CYCLOPEDIA

OF

LAW AND PROCEDURE

WILLIAM MACK

EDITOR-IN-CHIEF

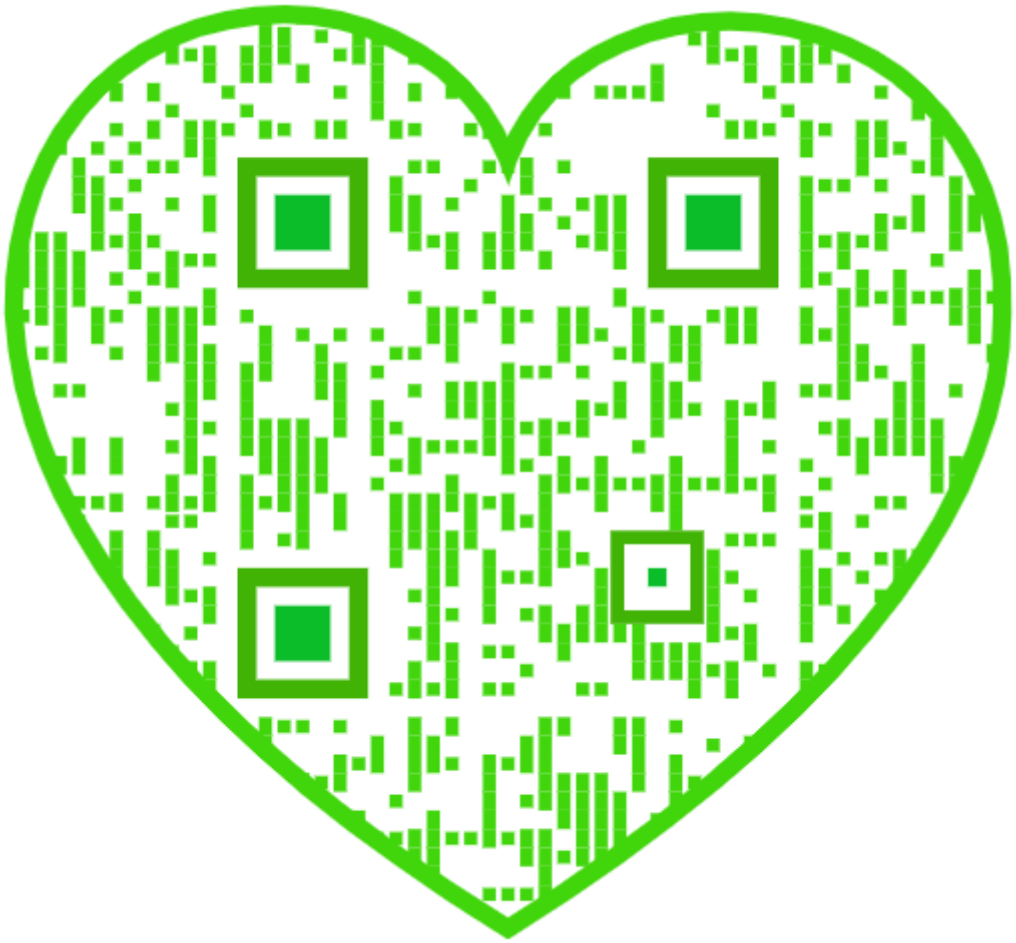
VOLUME XXV

NEW YORK

THE AMERICAN LAW BOOK COMPANY

LONDON: BUTTERWORTH & CO., 12 BELL YARD

1907



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PRINTERS AND BINDERS
ALBANY, N. Y.

To

CHARLES WALTER DUMONT

more than to any other man is due the existence of the Cyclopedia of Law and Procedure. His was the idea; his was the plan; and his has been the business ability and energetic management, as organizer and president of The American Law Book Company, which have made possible the successful publication of these volumes, which are therefore respectfully dedicated to him.

William Mack.

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By Joseph Henry Beale, Jr.
Bussey Professor of Law in Harvard University *

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* Author of "Innkeepers," 22 Cyc. 1068; also author of "Beale's Treatise on Hotels and Innkeepers," "Beale's Criminal Pleading and Practice," etc.; and joint author of "Beale and Wyman's Railroad Rate Regulation."

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I. TERMINOLOGY.

A. Larceny. Larceny is the taking and carrying away of the mere personal goods of another with intent to steal the goods.[1]

1. Reg. *v.* Holloway, 2 C. & K. 942, 3 Cox C. C. 241, 1 Den. C. C. 370, 13 Jur. 86, 18 L. J. M. C. 60, 3 New Sess. Cas. 410, T. & M. 40, 61 E. C. L. 942.

Other definitions are: "The felonious taking and carrying away of the personal goods of another." 4 Blackstone Comm. 229.

"The felonious stealing, taking and carrying, riding or driving away the personal property of another." Haywood *v.* State, 41 Ark. 479, 484.

"The felonious and fraudulent taking and carrying away by any person of the mere personal goods of another." U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537, 545.

"The fraudulent taking and carrying away of a thing without claim of right, with the intention of converting it to a use other than that of the owner." Wharton Cr. L. § 862.

"The taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the felonious intent to deprive him of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser." 2 Bishop Cr. L. § 758.

"Knowingly taking and carrying away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use." State *v.* South, 28 N. J. L. 28, 29, 74 Am. Dec. 250; Archbold Cr. L. 119 [*quoted* in State *v.* Chambers, 22 W. Va. 779, 785, 46 Am. Rep. 550].

Larceny has also been defined in the following cases:

Alabama.—Edmonds *v.* State, 70 Ala. 8, 45 Am. Rep. 67.

Arkansas.— State *v.* Parker, 34 Ark. 158, 36 Am. Rep. 5.

Delaware.— State *v.* Conlan, 3 Pennew. 218, 50 Atl. 95; State *v.* Pullen, 3 Pennew. 184, 50 Atl. 538; State *v.* Fitzpatrick, 9 Houst. 385, 32 Atl. 1072.

Indiana.— Barnhart *v.* State, 154 Ind. 177, 56 N. E. 212.

Louisiana.— State *v.* Parry, 48 La. Ann. 1483, 21 So. 30.

Massachusetts.— Com. *v.* James, 1 Pick. 375.

Nebraska.— Ladeaux *v.* State, (1905) 103 N. W. 1048; Philamalee *v.* State, 58 Nebr. 320, 78 N. W. 625; Mead *v.* State, 25 Nebr. 444, 41 N. W. 277.

New Jersey.— Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30.

New York.— People *v.* Nichols, 3 Park. Cr. 579.

Tennessee.— Hall *v.* State, 7 Lea 685.

Texas.— Bailey *v.* State, 18 Tex. App. 426.

Utah.— Matter of Gannett, 11 Utah 283, 39 Pac. 496.

Wisconsin.—Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294.

United States.— U. S. *v.* Otey, 31 Fed. 68, 12 Sawy. 416.

As defined by statute see the following cases:

California.— People *v.* Smith, 112 Cal. 333, 44 Pac. 663; People *v.* Lopez, 90 Cal. 569, 27 Pac. 427.

Dakota.— Territory *v.* Anderson, 6 Dak. 300, 50 N. W. 124.

Massachusetts.— Com. *v.* Kelley, 184 Mass. 320, 68 N. E. 346.

Minnesota.— State *v.* Southall, 77 Minn. 296, 79 N. W. 1007.

Missouri.— State *v.* Gray, 37 Mo. 463.

New York.— People *v.* Walker, 85 N. Y. App. Div. 556, 83 N. Y. Suppl. 372; People *v.* Smith, 86 Hun 485, 33 N. Y. Suppl. 989; People *v.* Bosworth, 64 Hun 72, 19 N. Y. Suppl. 114.

North Dakota.— State *v.* Tough, 12 N. D. 425, 96 N. W. 1025.

Utah.— State *v.* McKee, 17 Utah 370, 53 Pac. 733.

Derivation of term.— Larceny is derived from the Norman-French "larcyn" and signifies a felonious and wrongful taking and carrying away, by any person, of the personal goods of another, with felonious intent to convert them to his own use and make them his own property without the owner's consent. State *v.* Rechnitz, 20 Mont. 488, 52 Pac. 264. Larceny is an infamous crime. Hall *v.* Doyle, 35 Ark. 445; Williams *v.* U. S., 4 Indian Terr. 204, 69 S. W. 849.

Distinguished from false pretenses.— In most jurisdictions the two offenses (larceny and obtaining property by false pretenses) are distinct and neither is included in the other. Dominick *v.* State, 40 Ala. 680, 91 Am. Dec. 496; Hirshfield *v.* State, 11 Tex. App. 207; Witherspoon *v.* State, (Tex. Cr. App. 1896) 37 S. W. 433 [*overruling* Sims *v.* State, 21 Tex. App. 649, 1 S. W. 465]; State *v.* Reiff, 14 Wash. 664, 45 Pac. 318; Moyce *v.* Newington, 4 Q. B. D. 32, 14 Cox C. C. 182, 48 L. J. Q. B. 125, 39 L. T. Rep. N. S. 535, 27 Wkly. Rep. 319. But the distinction between larceny by trick and obtaining property by false pretense is a narrow one. In

B. "Simple" Larceny or "Mixed" Larceny— 1. In General. Larceny or

both the property is voluntarily relinquished by the owner and possession secured by the prisoner through a trick or false pretense, and in both the accused secures the property with intent to convert it to his own use. The distinction between the two crimes lies in the intention with which the owner parts with the property; if his intention is to invest the accused with the mere possession only of the property, and the latter with the requisite intent receives it and converts it to his own use, it is larceny. People *v.* Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102; Stinson *v.* People, 43 Ill. 397; March *v.* State, 117 Ind. 547, 20 N. E. 444; People *v.* Morse, 99 N. Y. 662, 2 N. E. 45 [*affirming* 3 N. Y. Cr. 104]; Loomis *v.* People, 67 N. Y. 322, 23 Am. Rep. 123; Kelly *v.* People, 6 Hun (N. Y.) 509; People *v.* Dean, 12 N. Y. Suppl. 749; Com. *v.* Yerkes, 29 Leg. Int. (Pa.) 60; Cline *v.* State, 43 Tex. 494; State *v.* Vickery, 19 Tex. 326; White *v.* State, 11 Tex. 769; Taylor *v.* State, 32 Tex. Cr. 110, 22 S. W. 148; Morrison *v.* State, 17 Tex. App. 34, 50 Am. Rep. 120. And see Smith *v.* People, 53 N. Y. 111, 13 Am. Rep. 474. But if the owner in parting with the property intends to invest the accused with the title also, the latter has committed the crime of obtaining the property by false pretense. State *v.* Styner, 154 Ind. 131, 56 N. E. 98; State *v.* Dickinson, 21 Mont. 595, 55 Pac. 539; Zink *v.* People, 77 N. Y. 114, 33 Am. Rep. 589 [*reversing* 16 Hun 396]; Thorne *v.* Turck, 10 Daly (N. Y.) 327 [*affirmed* in 94 N. Y. 90, 46 Am. Rep. 126]; Ross *v.* People, 5 Hill (N. Y.) 294; People *v.* French, 2 Wheel. Cr. (N. Y.) 259; Lewer *v.* Com., 15 Serg. & R. (Pa.) 93; Collins *v.* State, 15 Lea (Tenn.) 68; Williams *v.* State, 34 Tex. 558; Frank *v.* State, 30 Tex. App. 381, 17 S. W. 936; Pitts *v.* State, 5 Tex. App. 122; State *v.* Kube, 20 Wis. 217, 91 Am. Dec. 390; Reg. *v.* Solomons, 17 Cox C. C. 93, 62 L. T. Rep. N. S. 672; Coleman's Case, 2 East P. C. 672; Rex *v.* Adams, R. & R. 168. In Grunson *v.* State, 89 Ind. 533, 46 Am. Rep. 178, the court made the test between false pretense and larceny, not the intent of the owner to pass title, but whether he in fact passed title; holding that if the transaction does not result in law in passing title to the property, the obtaining of it by a trick is larceny. This however is erroneous and would make all cases of false pretense larceny, for in all such cases only a voidable title passes. So it has been decided that when the property is delivered to the accused by another than the owner, the question whether the obtaining constitutes larceny or false pretense depends not only on the intent with which such person delivers the property, but also on his authority over it. If he intends to pass the title, and he has authority so to do, the obtaining with intent to convert it is the crime of obtaining by false pretense. Com. *v.* Mulrey, 170 Mass. 103, 49 N. E. 91; Reg. *v.* Thompson, 9 Cox C. C. 222, 8 Jur. N. S. 1162, L. & C. 233, 32 L. J. M. C. 57, 7 L. T. Rep. N. S. 393, 11 Wkly. Rep. 41; Reg. *v.* Essex, 7 Cox C. C. 384, Dears. & B. 369, 371, 4 Jur. N. S. 15, 27 L. J. M. C. 20, 6 Wkly. Rep. 82; Reg. *v.* Barnes, 5 Cox C. C. 112, 2 Den. C. C. 59, 14 Jur. 1123, 20 L. J. M. C. 34, T. & M. 387; Witchell's Case, 2 East P. C. 830. It may be further observed that the distinction heretofore stated applies equally to the obtaining of money as of other kinds of property. If a loan of money is obtained by false pretenses, under an agreement for the return of the identical money, and the borrower feloniously converts it, he is guilty of larceny, as the owner did not intend to part with the title to the money lent. Porter *v.* State, 23 Tex. App. 295, 4 S. W. 889. But if the lender did not expect to receive back the identical money lent, but only an equal amount in other money, then the conversion would constitute the crime of obtaining by false pretense. Welsh *v.* People, 17 Ill. 339; Kelly *v.* People, 6 Hun (N. Y.) 509; Kellogg *v.* State, 26 Ohio St. 15. It is held to apply when the property is obtained by sham bets and gambling devices, as well as when other means are used. Nevertheless, the courts in their application of the rule, have not, owing to a different view taken of the same facts, always arrived at identical conclusions. Thus in Stinson *v.* People, 43 Ill. 397, where defendants made a pretended bet, one of them putting up the money and the other a mere package of waste paper, fraudulently marked as an express package containing money, and placed the same in a third person's hands with intent fraudulently to induce a party, really intending to bet, to part with his money, in a manner which seemed to him to involve a chance of winning something of value, when in fact nothing of value was staked against his money, a conviction for larceny was upheld, the court being of opinion that title to the money did not pass, it being delivered to be disposed of in a particular way only for his benefit, by staking it against an equal amount of money alleged to be, but which was not, in the package. See also Miller *v.* Com., 78 Ky. 15, 39 Am. Rep. 194; Com. *v.* Jenks, 138 Mass. 484; Loomis *v.* People, 67 N. Y. 322, 23 Am. Rep. 123; Defrese *v.* State, 3 Heisk. (Tenn.) 53, 8 Am. Rep. 1. But in Williams *v.* State, 34 Tex. 558, W inveigled prosecutor to bet ten dollars with him against a watch, on a gambling trick. Prosecutor, not having the money, staked a horse, and the horse and watch were delivered to an accomplice of W as stakeholder. On the development of the trick W claimed he had won and the horse was delivered to him with the consent of the prosecutor, although the prosecutor protested when W rode off with the horse. The court held it a case of false pretense, not larceny, saying that the prosecutor bet and lost either the horse or the ten dollars, that he placed the horse in the hands of the stakeholder, either as a thing bet or as a pledge. If the horse was bet and lost, then larceny

theft at common law is distinguished in two sorts, the one called "simple" or "plain" larceny, and the other "mixed" or "compound" larceny.[2]

2. "SIMPLE" OR "PLAIN" LARCENY. Simple or plain larceny is the felonious taking and carrying away of the personal goods of another;[3] it is larceny unaccompanied with any atrocious circumstances.[4]

3. "MIXED" OR "COMPOUND" LARCENY. Mixed or compound larceny has all the properties of simple or plain larceny, but is accompanied with either one or both of the aggravations of taking from one's house or person.[5]

C. "Single" Larceny. A single larceny consists in the stealing at one and the same time, or by one continuous operation, all the goods, no matter to whom belonging, which the thief had a preconceived intention of stealing.[6]

D. "Theft" or "Stealing." In some jurisdictions offenses usually styled as larcenies are denominated in the statutory definitions as thefts,[7] or as stealings.[8]

II. SUBJECTS OF LARCENY.

A. In General. At common law the only subjects of larceny were tangible, movable chattels; something which could be taken in possession and carried away, and which had some, although trifling, intrinsic value.[9] Any substance which has length, breadth, and thickness may be the subject of larceny, whether it is a solid, a liquid, or a gas, provided it is the subject of private ownership. Illuminating gas,[10] or water supplied by a water company and standing in

was not committed because prosecutor intended to part with property. The doctrine of asportation in larceny has no place in the offense of obtaining by false pretense. State *v.* Fraker, 148 Mo. 143, 49 S. W. 1017.

2. 4 Blackstone Comm. 229.

3. State *v.* Tofte, 59 Kan. 753, 54 Pac. 1062; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181; Com. *v.* Prewitt, 82 Ky. 240, 6 Ky. L. Rep. 195; State *v.* Berryman, 8 Nev. 262; 4 Blackstone Comm. 239.

Other definitions are: "A felonious and fraudulent taking and carrying away, by any Person, of the mere personal Goods of another, not from the Person, nor out of his House, above the Value of twelve Pence." Hawkins P. C. c. 33, § 1.

"The wrongful and fraudulent taking and carrying away by any person of the personal goods of another, with intent to steal the same." Ga. Code, § 4393; Brown *v.* State, 90 Ga. 454, 455, 16 S. E. 204; Roberts *v.* State, 83 Ga. 369, 370, 375, 9 S. E. 675.

4. State *v.* Chambers, 22 W. Va. 779, 46 Am. Rep. 550.

5. State *v.* Tofte, 59 Kan. 753, 54 Pac. 1062; Anderson *v.* Winfree, 85 Ky. 597, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181; State *v.* Chambers, 22 W. Va. 779, 46 Am. Rep. 550; 4 Blackstone Comm. 239.

6. U. S. *v.* Beerman, 24 Fed. Cas. No. 14,560, 5 Cranch C. C. 412.

7. Tex. Pen. Code, art. 858; Can. Cr. Code (1892), § 783.

The old word "larceny" has disappeared from our criminal terminology, as simplified by the code, and the word "theft" (i. e. stealing) has been substituted. Reg. *v.* Conlin, 1 Can. Cr. Cas. 41, 45.

"Theft" is a popular name for "larceny" (State *v.* Boyce, 65 Ark. 82, 83, 44 S. W. 1043; Bouvier L. Dict. [*quoted* in People *v.* Donohue, 84 N. Y. 438, 442]), and is often used as synonymous with the latter term (People *v.* Donohue, *supra*; Mathews *v.* State, 36 Tex. 675; 4 Blackstone Comm. 230).

8. Can. Rev. St. (1886) c. 164; Can. Cr. Code (1892), § 305. See also Reg. *v.* Lyon, 2 Can. Cr. Cas. 242, 250, 29 Ont. 497.

Theft or stealing is defined by the code to be the act of fraudulently, and without color of right, taking anything with intent to deprive the owner temporarily or absolutely of such thing. Rex *v.* George, 5 Can. Cr. Cas. 469, 470, 35 Nova Scotia 42.

The word "steal" or "stealing" imports the common-law offense of larceny; in fact "stealing" and "larceny" are often employed as synonymous in meaning. People *v.* Urquidas, 96 Cal. 239, 31 Pac. 52; Dunnell *v.* Fiske, 11 Metc. (Mass.) 551; Barnes *v.* State, 40 Nebr. 545, 59 N. W. 125; Coleman *v.* Playsted, 36 Barb. (N. Y.) 26; State *v.* Tough, 12 N. D. 425, 96 N. W. 1025; Mathews *v.* State, 4 Ohio St. 539; Sullivan *v.* Territory, 8 Okla. 499, 58 Pac. 650; Hughes *v.* Territory, 8 Okla. 28, 56 Pac. 708; Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779; Bouvier L. Dict. [*quoted* in Mathews *v.* State, 36 Tex. 675, 676]. See also Green *v.* Com., 111 Mass. 417; Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30. But see Barnhart *v.* State, 154 Ind. 177, 56 N. E. 212; U. S. *v.* Jolly, 37 Fed. 108.

9. U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356.

10. Com. *v.* Shaw, 4 Allen (Mass.) 308, 81 Am. Dec. 706; State *v.* Wellman, 34 Minn. 221, 25 N. W. 395; Reg. *v.* Firth, L. R. 1 C. C. 172, 11 Cox C. C. 234, 38 L. J. M. C. 54, 19 L. T. Rep. N. S. 746, 17 Wkly. Rep. 327; Reg. *v.* White, 3 C. & K. 363, 1 C. L. R. 489, 6 Cox C. C. 213, Dears. C. C. 203, 17

pipes,[11] or ice put away in an ice-house for domestic use are the subjects of larceny.[12] But nothing can be the subject of larceny in which there can be no ownership, such as a corpse.[13] The value may be less than the lowest coin.[14] That a lock has a key in it and is used to fasten a door is sufficient evidence of value.[15] But a thing like a letter or paper which has no intrinsic value cannot be the subject of larceny.[16] On this ground a passenger ticket stolen from the ticket office of a railroad company before it has been stamped and dated is not the subject of larceny.[17] And it has been held that a satisfaction piece of a mortgage fraudulently obtained from the mortgagee's agent, to whom it had been sent to be delivered on payment of the debt, could not be the subject of larceny, not yet being a valuable instrument.[18] But one who fraudulently secured a discharge paper of a soldier was convicted of larceny of paper.[19] The fact that property is illegally held or used is immaterial on the question of whether it is a subject of larceny.[20] If, however, the illegality prevents the property from having value the case is different. Indictment will not lie for larceny of "bills of credit of the United States Bank," of amounts less than such bank is authorized by its charter to issue, since such bills are void and of no value.[21]

B. Choses in Action or Other Documents — **1. At Common Law.** A chose in action being in its essence intangible could not be the subject of larceny at common law, and the paper evidence of the chose in action was considered merged with it.[22]

2. By Statute — **a. Introductory Statement.** By statute various kinds of choses in action are commonly made subjects of larceny.[23]

b. Bank-Note. Bank-notes are made the subject of larceny by statute, either expressly, or under a statute making "promissory notes" or "property" generally subjects of larceny.[24] The term "bank-note" in a statute includes national bank-

Jur. 536, 22 L. J. M. C. 123, 1 Wkly. Rep. 418.

11. Ferens *v.* O'Brien, 11 Q. B. D. 21, 15 Cox C. C. 332, 47 J. P. 472, 52 L. J. M. C. 70, 31 Wkly. Rep. 643.

12. Ward *v.* People, 6 Hill (N. Y.) 144 [*affirming* 3 Hill 395].

13. Rex *v.* Haynes, 2 East P. C. 652.

14. Reg. *v.* Morris, 9 C. & P. 349, 38 E. C. L. 209.

15. Wolverton *v.* Com., 75 Va. 909.

16. Payne *v.* People, 6 Johns. (N. Y.) 103.

17. State *v.* Hill, 1 Houst. Cr. Cas. (Del.) 420; State *v.* Musgang, 51 Minn. 556, 53 N. W. 874; McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152. *Contra*, in England. Reg. *v.* Beecham, 5 Cox C. C. 181.

18. People *v.* Stevens, 38 Hun (N. Y.) 62.

19. Com. *v.* Lawless, 103 Mass. 425.

20. See cases cited *infra*, this note.

Application of rule.— Thus the fact that an article contained in a letter in course of transmission by mail is not lawfully "mailable matter" is no defense to an indictment for stealing it. U. S. *v.* Randall, 27 Fed. Cas. No. 16,118, Deady 524. So it is no defense to an indictment for stealing intoxicating liquors that the liquors stolen were kept for sale in violation of law. State *v.* May, 20 Iowa 305; Com. *v.* Smith, 129 Mass. 104; Com. *v.* Coffee, 9 Gray (Mass.) 139. And money acquired by the illegal sale of intoxicating liquor may nevertheless be the subject of larceny from the possessor. Com. *v.* Rourke, 10 Cush. (Mass.) 397. And larceny of gaming checks can be committed, although gaming is illegal. State *v.* Wilmore, 9 Ohio Dec. (Reprint) 61, 10 Cinc. L. Bul. 321; Bales *v.* State, 3 W. Va. 685.

21. Culp *v.* State, 1 Port. (Ala.) 33, 26 Am. Dec. 357.

22. *Alabama.*— Culp *v.* State, 1 Port. 33, 26 Am. Dec. 357.

Mississippi.— Damewood *v.* State, 1 How. 262.

New York.— People *v.* Jackson, 8 Barb. 637; People *v.* Griffin, 38 How. Pr. 475; People *v.* Cook, 2 Park. Cr. 12.

North Carolina.— State *v.* Dill, 75 N. C. 257.

South Carolina.— State *v.* Casados, 1 Nott & M. 91.

United States.— U. S. *v.* Bowen, 24 Fed. Cas. No. 14,628, 2 Cranch C. C. 133; U. S. *v.* Carnot, 25 Fed. Cas. No. 14,726, 2 Cranch C. C. 469; U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356.

England.— Reg. *v.* Watts, 2 C. L. R. 604, 6 Cox C. C. 304, Dears. C. C. 326, 18 Jur. 192, 23 L. J. M. C. 56, 2 Wkly. Rep. 233; Reg. *v.* Powell, 5 Cox C. C. 396, 2 Den. C. C. 430, 16 Jur. 177, 21 L. J. M. C. 78.

See 32 Cent. Dig. tit. "Larceny," § 12 *et seq.*

23. See *infra*, cases cited in notes 24–58.

24. *Alabama.*— Corbett *v.* State, 31 Ala. 329 (but not under a statute making promissory notes subjects of larceny); Culp *v.* State, 1 Port. 33, 26 Am. Dec. 357.

Georgia.— Thomasson *v.* State, 22 Ga. 490; State *v.* Allen, R. M. Charlt. 518.

notes and treasury notes,[25] and the notes of banks of other states,[26] a note in the nature of a bank-note issued by an individual,[27] and redeemed bank-bills in the hands of the issuing bank's agents.[28] In short a "bank-note" embraces any available chose in action bearing that name.[29]

c. Commercial Paper. Promissory notes, bills of exchange, checks, and other commercial specialties are commonly made by statute subjects of larceny.[30] The following instruments have been held to fall within the statute: A silver certificate;[31] a county warrant;[32] a certificate of deposit in a bank;[33] a pension check of the United States government;[34] a due-bill if it has not been paid;[35] script certificates of a foreign railway company;[36] warehouse receipts;[37] and exchequer bills, although signed by a person not authorized to do so.[38] A document which is a complete bill of exchange in all respects except that of the signature of the drawer is, when in the hands of the intended drawer, a bill of exchange.[39] And a promissory note which, although not stamped as required by law, is enforceable in the hands of the holder, a *bona fide* purchaser, is a subject of larceny.[40] But a bill signed in blank by the accepter and so filled in by the drawer as not to be valid is neither a bill of exchange, an order for the payment of money, or a security for money.[41] Under a statute making the taking of bills obligatory punishable as larceny, the taking of one bill obligatory is larceny.[42]

d. Other Choses In Action or Documents. The following choses in action or written evidences of obligations are subjects of larceny by statute: Public records;[43] an obligation for the delivery of merchandise, which includes an order containing the owner's name and a measure of quantity, issued under an agreement

Iowa.— State *v.* Bond, 8 Iowa 540.
Massachusetts.— Com. *v.* Paulus, 11 Gray 305; Com. *v.* Stebbins, 8 Gray 492.
Mississippi.— Greeson *v.* State, 5 How. 33; Damewood *v.* State, 1 How. 262.
Missouri.— McDonald *v.* State, 8 Mo. 283.
South Carolina.— State *v.* Casados, 1 Nott & M. 91; State *v.* Tillery, 1 Nott & M. 9; State *v.* Wilson, 3 Brev. 196.
Tennessee.— Pyland *v.* State, 4 Sneed 357.
Virginia.— Adams *v.* Com., 23 Gratt. 949.
West Virginia.—Fredrick *v.* State, 3 W. Va. 695.
United States.— U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537; U. S. *v.* Murray, 15 Fed. Cas. No. 15,842, 1 Cranch C. C. 141.
See 32 Cent. Dig. tit. "Larceny," § 12.
In Ohio bank-bills cannot be regarded as "money or other goods" under the statute, because another section specifically provides for them. Johnson *v.* State, 11 Ohio St. 324.

25. *Alabama.*— Sallie *v.* State, 39 Ala. 691.
Florida.— *Ex p.* Prince, 27 Fla. 196, 9 So. 659, 26 Am. St. Rep. 67.
Illinois.— Collins *v.* People, 39 Ill. 233.
North Carolina.— State *v.* Thomason, 71 N. C. 146; State *v.* Banks, 61 N. C. 577.
Texas.— Sansbury *v.* State, 4 Tex. App. 99.
Virginia.— Boyd *v.* Com., 1 Rob. 691.
See 32 Cent. Dig. tit. "Larceny," § 12.

26. Com. *v.* Thomas, 10 Gray (Mass.) 483; Com. *v.* Woods, 10 Gray (Mass.) 477; Cummings *v.* Com., 2 Va. Cas. 128.

27. Sylvester *v.* Girard, 4 Rawle (Pa.) 185. But bank-notes of unincorporated banks are not within the statute making "bank-notes of incorporated banks" the subject of larceny. Spangler *v.* Com., 3 Binn. (Pa.) 533.

28. Com. *v.* Rand, 7 Metc. (Mass.) 475, 41 Am. Dec. 455; Rex *v.* Ranson, 2 Leach C. C. 1090, R. & R. 173. See also Rex *v.* Pooley, 2 Leach C. C. 887, R. & R. 23. But not an unstamped and unissued note. Scott *v.* Reg., 2 Can. Sup. Ct. 349.

29. Pomeroy *v.* Com., 2 Va. Cas. 342.

30. Greeson *v.* State, 5 How. (Miss.) 33; Damewood *v.* State, 1 How. (Miss.) 262; Boyd *v.* Com., 1 Rob. (Va.) 691.

31. Bromberger *v.* U. S., 128 Fed. 346, 63 C. C. A. 76.

32. State *v.* Morgan, 109 Tenn. 157, 69 S. W. 970.

33. State *v.* O'Connell, 144 Mo. 387, 46 S. W. 175.

34. State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

35. State *v.* Campbell, 103 N. C. 344, 9 S. E. 410.

36. Reg. *v.* Smith, 7 Cox C. C. 93, Dears. C. C. 561, 1 Jur. N. S. 1212, 25 L. J. M. C. 31, 4 Wkly. Rep. 196.

37. State *v.* Loomis, 27 Minn. 521, 8 N. W. 758.

38. Rex *v.* Aslett, 1 B. & P. N. R. 1, 2 Leach C. C. 958, R. & R. 67.

39. Rex *v.* Bowerman, [1891] 1 Q. B. 112, 17 Cox C. C. 151, 55 J. P. 373, 60 L. J. M. C. 13, 63 L. T. Rep. N. S. 532, 39 Wkly. Rep. 207.

40. Reg. *v.* Dewitt, 21 N. Brunsw. 17.

41. Rex *v.* Hart, 6 C. & P. 106, 25 E. C. L. 345.

42. Com. *v.* Messinger, 1 Binn. (Pa.) 273, 2 Am. Dec. 441.

43. Wilson *v.* State, 5 Ark. 513.
Indictments are "public records." People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131.

by him to redeem it by delivering berries of the quantity named;[44] a memorandum book of accounts;[45] a written instrument by which pecuniary obligations are created or discharged, which includes a receipted voucher;[46] an instrument of writing, which applies only to the writing of another than the person charged;[47] an evidence of debt, which does not include a written memorandum of an unenforceable agreement;[48] a security for money, which includes a mortgage deed and title deeds accompanying it;[49] and an original document which does not include an authentic copy.[50] "Personal property" or "personal goods" includes money, foreign or domestic;[51] it does not include choses in action[52] or common receipts.[53] But it has been held that an accountable receipt is covered by the phrase, and so is a note payable in chattels.[54] Postage stamps remaining in the possession of the government, unissued, are subjects of larceny as "personal property belonging to the United States."[55] From a chose in action should be distinguished a token, used for purpose of identification, as a pawnbroker's duplicate, which is a subject of larceny.[56] Upon this ground a railroad ticket has been held the subject of larceny in England.[57] And so in Tennessee, as being a "valuable instrument or writing" under the statute.[58]

3. Paper Not Containing an Obligation. A piece of paper upon which there is writing not constituting or evidencing a binding obligation may be the subject of larceny, provided it has any value.[59] But it has been held that where one by fraud induces another to sign a receipt and then takes it from him he cannot be indicted for larceny, as the receipt never having taken effect by delivery was worthless.[60] So invalid bonds, notes, etc., are not the subject of larceny.[61] Although the circulation of the bills of the banks of other states is prohibited, and they are declared by law to be worthless, yet in the hands of a *bona fide* holder they are property, and may be the subject of larceny.[62]

C. Realty — 1. At Common Law — a. In General. The common-law conception that for a thing to be the subject of larceny it must be capable of being possessed and asported, as such, rendered realty and whatever was attached thereto or savored thereof incapable of being stolen.[63] Growing crops severed and at

44. State *v.* Stewart, 1 Marv. (Del.) 542, 41 Atl. 188.

45. Com. *v.* Williams, 9 Metc. (Mass.) 273.

46. State *v.* Scanlan, 89 Minn. 244, 94 N. W. 686.

47. State *v.* Grisham, 90 Mo. 163, 2 S. W. 223.

48. People *v.* Hall, 74 Hun (N. Y.) 96, 26 N. Y. Suppl. 403.

49. Reg. *v.* Williams, 6 Cox C. C. 49.

50. Reg. *v.* McGinnis, 7 L. C. Jur. 311.

51. People *v.* Williams, 24 Mich. 156, 9 Am. Rep. 119; U. S. *v.* Moulton, 27 Fed. Cas. No. 15,827, 5 Mason 537. *Contra*, as to Portugal money, not current by proclamation. Rex *v.* Grimes, 2 East P. C. 647; Rex *v.* Leigh, 1 Leach C. C. 52.

52. U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356.

53. People *v.* Griffin, 38 How. Pr. (N. Y.) 475.

54. People *v.* Bradley, Sheld. (N. Y.) 576, 4 Park. Cr. 245.

55. Jolly *v.* U. S., 170 U. S. 402, 18 S. Ct. 624, 42 L. ed. 1085.

56. Reg. *v.* Morrison, Bell C. C. 158, 8 Cox C. C. 194, 5 Jur. N. S. 604, 28 L. J. M. C. 210, 7 Wkly. Rep. 554.

57. Reg. *v.* Boulton, 2 C. & K. 917, 3 Cox C. C. 576, 1 Den. C. C. 508, 13 Jur. 1034, 19 L. J. M. C. 67, 3 New Sess. Cas. 705, T. & M. 201, 61 E. C. L. 917.

58. Millner *v.* State, 15 Lea (Tenn.) 179.

59. State *v.* Wilson, 95 Iowa 341, 64 N. W. 266 (railroad tickets in the hands of a conductor after taking up); State *v.* James, 58 N. H. 67 (a printed list of names and dates); People *v.* Wiley, 3 Hill (N. Y.) 194 (bank-bills engraved but not yet issued); People *v.* McGrath, 5 Utah 525, 17 Pac. 116 (a phonographic report of testimony taken at a trial); Reg. *v.* Perry, 1 C. & K. 725, 1 Cox C. C. 222, 1 Den. C. C. 69, 47 E. C. L. 725 (void contract); Rex *v.* Mead, 3 C. & P. 535, 19 E. C. L. 637 (halves of country bank-notes sent in a letter, and valid when put together); Rex *v.* Clark, 2 Leach C. C. 1036, R. & R. 135; Rex *v.* Vyse, 1 Moody C. C. 218 (reissuable notes paid and not reissued).

60. People *v.* Loomis, 4 Den. (N. Y.) 380.

61. Wilson *v.* State, 1 Port. (Ala.) 118.

62. Starkey *v.* State, 6 Ohio St. 266.

63. *California.*—People *v.* Williams, 35 Cal. 671, quartz rock not severed.

Delaware.— State *v.* Hall, 5 Harr. 492, pipes attached to freehold.

Louisiana.— State *v.* Davis, 22 La. Ann. 77, copper pipe permanently affixed to an engine permanently attached to a sugar house.

New York.— Comfort *v.* Fulton, 39 Barb. 56, a growing crop.

North Carolina.— State *v.* Foy, 82 N. C. 679 (cabbage standing ungathered in field);

once taken away are not subject of larceny at common law.[64] But if the severance and taking be two transactions, the severed objects may be the subject of larceny.[65]

b. Fixtures. The rule that things annexed to the realty are not subjects of larceny does not apply to fixtures which can be removed without harm to the land and are only constructively part of the realty.[66] A key, although in the lock of a door in a house, is the subject of larceny.[67] But valves and other parts of machinery attached to a building are part of the freehold and not subjects of larceny.[68]

c. Documents of Title to Land. And documents of title to land are not subject of larceny, as they savor of the realty.[69]

2. By Statute. Under the provisions of statutes it is common to have a severance of anything fixed to the soil, if done *animo furandi*, constitute larceny; either by expressly naming such things as subjects of larceny,[70] or by

State *v.* Burt, 64 N. C. 619 (a nugget of gold, separated from the veins by natural causes).

Rhode Island.— Bartlett *v.* Brown, 6 R. I. 37, 75 Am. Dec. 675, cultivated fruit.

South Carolina.— State *v.* Stephenson, 2 Bailey 334, growing crops.

Tennessee.— Bell *v.* State, 4 Baxt. 426, potatoes or cabbages growing in the soil.

United States.— U. S. *v.* Smith, 27 Fed. Cas. No. 16,325, 1 Cranch C. C. 475 (logs in a fence); U. S. *v.* Wagner, 28 Fed. Cas. No. 16,630, 1 Cranch C. C. 314 (rails fixed into posts inserted in ground).

England.— Reg. *v.* Gooch, 8 C. & P. 293, 34 E. C. L. 742 (lead attached to building); Reg. *v.* Clinton, Ir. R. 4 C. L. 6 (drift seaweed cast on shore between high and low water mark); Rex *v.* Walker, 1 Moody C. C. 155; Rex *v.* Westbeer, 2 Str. 1133 (rolls of parchment concerning realty); Anonymous, Y. B. 11 & 12 Edw. III, 640, Beale's Cas. 488 (trees growing in the soil).

See 32 Cent. Dig. tit. "Larceny," §§ 14, 15.

64. Gregg *v.* State, 55 Ala. 116; Comfort *v.* Fulton, 39 Barb. (N. Y.) 56; Bell *v.* State, 4 Baxt. (Tenn.) 426; Emmerson *v.* Annison, 1 Mod. 89.

65. *Arkansas.*— State *v.* Parker, 34 Ark. 158, 36 Am. Rep. 5.

Georgia.— Beall *v.* State, 68 Ga. 820.

Louisiana.— State *v.* Prince, 42 La. Ann. 817, 8 So. 591.

Nevada.— State *v.* Berryman, 8 Nev. 262.

Tennessee.— Bradford *v.* State, 6 Lea 634.

England.— Reg. *v.* Foley, L. R. 26 Ir. 299, 17 Cox C. C. 142; Emmerson *v.* Annison, 1 Mod. 89.

See 32 Cent. Dig. tit. "Larceny," § 12.

Waste coal lying in the bottom of a stream was severed and taken by two transactions where the taker entered on the land in a boat; scooped up the coal lodged along the channel and bank of the stream; cleaned and sifted it; deposited the cleaned coal, little by little, on a flatboat; transported the boat load to bins; and shoveled the coal from the boat to the bins. Com. *v.* Steimling, 156 Pa. St. 400, 27 Atl. 297.

Turpentine which has flowed from trees into "boxes" cut in the trees to catch it, and ready to be dipped out, is the subject of larceny. Dickens *v.* State, 142 Ala. 49, 39 So. 14; State *v.* King, 98 N. C. 648, 4 S. E. 44; State *v.* Moore, 33 N. C. 70.

In Texas the common-law rule that there must be an asportation by a separate act subsequent to the severance does not prevail where the severance and immediate carrying away of chattels affixed to the realty constitutes larceny. *Ex p.* Willke, 34 Tex. 155; Farris *v.* State, (Cr. App. 1902) 69 S. W. 140; Alvia *v.* State, 42 Tex. Cr. 424, 60 S. W. 551; Harberger *v.* State, 4 Tex. App. 26, 30 Am. Rep. 157.

66. *Kentucky.*— Smith *v.* Com., 14 Bush 31, 29 Am. Rep. 402 (chandeliers); Clement *v.* Com., 47 S. W. 450, 20 Ky. L. Rep. 688 (copper boxes connected with a still).

Nebraska.— Junod *v.* State, (1905) 102 N. W. 462, wire fastened to fence-posts for temporary use as a summer pasture.

Ohio.— Jackson *v.* State, 11 Ohio St. 104, a leather belt connecting certain wheels in a sawmill.

Texas.— *Ex p.* Willke, 34 Tex. 155 (property attached to a house); Harberger *v.* State, 4 Tex. App. 26, 30 Am. Rep. 157 (rails in a fence).

England.— Rex *v.* Hedges, 2 East P. C. 590 note, 1 Leach C. C. 201, window sashes, fastened by laths nailed across the window frames and not fixed to the realty, and pictures fastened by laths nailed across the frames.

See 32 Cent. Dig. tit. "Larceny," § 14.

67. Hoskins *v.* Tarrence, 5 Blackf. (Ind.) 417, 35 Am. Dec. 129.

68. Langston *v.* State, 96 Ala. 44, 11 So. 334.

69. People *v.* Mackinley, 9 Cal. 250; Reg. *v.* Powell, 5 Cox C. C. 396, 2 Den. C. C. 403, 16 Jur. 177, 21 L. J. M. C. 78; Rex *v.* Wody, Y. B. 10 Edw. IV, pl. 9, 10 Beale's Cas. 489.

70. *Alabama.*— Carl *v.* State, 125 Ala. 89, 28 So. 505 (growing timber); Newsom *v.* State, 107 Ala. 133, 18 So. 206 (outstanding crops); Sullins *v.* State, 53 Ala. 474 (outstanding crop includes roasting ears of corn).

California.— People *v.* Opie, 123 Cal. 294, 55 Pac. 989, ore.

New Jersey.— State *v.* Stone, 30 N. J. L. 299, "lead or iron bar," which includes lead water pipe.

South Carolina.— State *v.* Washington, 26

holding that they are made subjects of larceny by general provisions of the statutes.[71]

D. Animals — **1. Animals Feræ Naturæ.** Since larceny connotes the taking of property of another, there could be no larceny at common law of animals *feræ naturæ* unless they were reclaimed, confined, or dead, since otherwise they were not property. Wild animals in a natural state are not the subject of larceny;[72] and the same is true of fish not caught or confined,[73] and of wild birds flying at large.[74] A wild animal caught in a trap seems to be sufficiently brought into possession to be the subject of larceny.[75]

2. Reclaimed Animals Fit For Food. Larceny may be committed by taking any creatures whatever which are *domitæ naturæ*, and fit for food, as ducks, hens, geese, turkeys, or their eggs or young ones,[76] or peafowls.[77] Pigeons coming home to roost every night in wooden boxes hung on the outside of a house[78] or kept in ordinary dovecotes are sufficiently reclaimed.[79] So are pheasants or partridges hatched by a hen and under the care of the hen in a coop.[80] The same thing is true of bees which have been reclaimed and are in the possession of the owner,[81] and of fish as soon as caught,[82] or when in an artificial pond[83] or in nets in the water.[84] So of oysters or clams planted under public water in a bed where

S. C. 604, 2 S. E. 623 (growing cotton); State *v.* Williams, 2 Strobh. 474 (grain includes peas); State *v.* Stephenson, 2 Bailey 334 (grain, which includes growing grain).

Texas.— Wilson *v.* State, 17 Tex. App. 393, timber, which does not include wood suitable only as fuel.

England.— Reg. *v.* Rice, Bell C. C. 87, 8 Cox C. C. 119, 5 Jur. N. S. 273, 28 L. J. M. C. 64, 7 Wkly. Rep. 232 (lead forming the gutters of two brick, timber, and tile built sheds erected upon the prosecutor's wharf is fixed to a building); Reg. *v.* Brumby, 3 C. & K. 315, 5 Cox C. C. 315 (cultivated fruit or plant used for the food of beasts); Rex *v.* Jones, 7 Cox C. C. 498, Dears. & B. 655, 4 Jur. N. S. 394, 27 L. J. M. C. 171, 6 Wkly. Rep. 470 (copper sun dial fixed upon a wooden post in a churchyard); Rex *v.* Worrall, 7 C. & P. 516, 32 E. C. L. 736 (building need not be completed); Rex *v.* Blick, 4 C. & P. 377, 19 E. C. L. 562 (brass fixed to tombstones); Rex *v.* Munday, 2 East P. C. 594, 2 Leach C. C. 950 (lead or other metal affixed to a house); Rex *v.* Davis, 2 East P. C. 593, 1 Leach C. C. 496 note; Rex *v.* Hodges, M. & M. 341, 22 E. C. L. 541 (plant or vegetable production does not include young fruit-trees); Rex *v.* Richards, R. & R. 20.

See 32 Cent. Dig. tit. "Larceny," §§ 14, 15.

71. State *v.* Hughes, 80 Miss. 609, 31 So. 963 (title deeds, as personal property); Ball *v.* White, 39 Ohio St. 650 (manure, as anything of value).

72. State *v.* Repp, 104 Iowa 305, 73 N. W. 829, 65 Am. St. Rep. 463, 40 L. R. A. 687 (wild bees); Warren *v.* State, 1 Greene (Iowa) 106 (raccoon); Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573 (marten); Wallis *v.* Mease, 3 Binn. (Pa.) 546 (wild bees); Reg. *v.* Read, 3 Q. B. D. 131, 14 Cox C. C. 17, 47 L. J. M. C. 50, 37 L. T. Rep. N. S. 722, 26 Wkly. Rep. 283 (rabbits).

Killing wild animals.— Where the killing and taking of animals *feræ naturæ* is one continuous act there is no larceny, for the dead animals, as such, have never come into the possession of the owner. Reg. *v.* Townley, L. R. 1 C. C. 315, 12 Cox C. C. 59, 40 L. J. M. C. 144, 24 L. T. Rep. N. S. 517, 19 Wkly. Rep. 725; Reg. *v.* Petch, 14 Cox C. C. 17, 38 L. T. Rep. N. S. 788.

Effect of special statutory provisions.— A tamed mocking-bird is a subject of larceny, as it is within the statute a "thing of value." Haywood *v.* State, 41 Ark. 479.

73. State *v.* Krider, 78 N. C. 481, fish.

74. Com. *v.* Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348 (doves); Hannam *v.* Mockett, 2 B. & C. 934, 4 D. & R. 518, 2 L. J. K. B. O. S. 183, 26 Rev. Rep. 591, 9 E. C. L. 401 (rooks); Rex *v.* Rough, 2 East P. C. 607 (pheasants); Y. B. 18 Edw. IV, 8, pl. 7 (doves).

75. State *v.* House, 65 N. C. 315, 6 Am. Rep. 744, otter. *Contra*, Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573, marten.

76. Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573.

77. Com. *v.* Beaman, 8 Gray (Mass.) 497.

78. Com. *v.* Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; Rex *v.* Brooks, 4 C. & P. 131, 19 E. C. L. 441.

79. Reg. *v.* Cheafor, 5 Cox C. C. 367, 2 Den. C. C. 361, 15 Jur. 1065, 21 L. J. M. C. 43, T. & M. 621.

80. Reg. *v.* Shickle, L. R. 1 C. C. 158, 11 Cox C. C. 189, 38 L. J. M. C. 21, 19 L. T. Rep. N. S. 327, 17 Wkly. Rep. 144; Reg. *v.* Cory, 10 Cox C. C. 23; Reg. *v.* Garnham, 8 Cox C. C. 451, 2 F. & F. 347; Reg. *v.* Head, 1 F. & F. 350.

81. State *v.* Murphy, 8 Blackf. (Ind.) 498; Harvey *v.* Com., 23 Gratt. (Va.) 941.

82. Rex *v.* Mallison, 20 Cox C. C. 204, 66 J. P. 503, 86 L. T. Rep. N. S. 600.

83. Rex *v.* Hundson, 2 East P. C. 611.

84. State *v.* Shaw, 67 Ohio St. 157, 65 N. E. 875, 60 L. R. A. 481.

they do not exist naturally, and the bed is set off or inclosed by stakes or otherwise sufficient to show private possession.[85]

3. Domestic Animals. Domestic animals useful to man, although running at large, are subjects of larceny.[86] Reclaimed animals which are neither farm-yard animals nor useful for food, such as dogs and cats, are not subjects of larceny at common law;[87] but one may steal the collar on a dog.[88] Ferrets, although tame and salable, were not the subject of larceny.[89] Animals of the kind under consideration are usually held to be subjects of larceny under general statutes making personal property or goods and chattels the subject of larceny,[90] although there are decisions to the contrary;[91] and they are sometimes made subjects of larceny by express provision of statute.[92]

4. Animal Products. Food products of animals, alive or dead, are subjects of larceny. Thus milk from a cow,[93] wool from the backs of sheep,[94] or a "ham," although of an animal *feræ naturæ*,[95] is a subject of larceny.

III. TAKING AND CARRYING AWAY.

A. The Act of Taking — 1. The Necessity of a Taking. The first requisite of larceny is taking possession of the goods by the thief.[96] Taking and carrying

85. State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347; People *v.* Wanzer, 43 Misc. (N. Y.) 136, 88 N. Y. Suppl. 281.

86. Burger *v.* State, 83 Ala. 36, 3 So. 319; Borer *v.* State, (Tex. Cr. App. 1894) 28 S. W. 951.

By statute in the Indian Territory cattle over a year old running at large and unbranded are not. Dansby *v.* U. S., 2 Indian Terr. 456, 51 S. W. 1083.

87. *Alabama.*—Ward *v.* State, 48 Ala. 161, 17 Am. Rep. 31.

Delaware.— State *v.* Butler, 2 Pennew. 127, 43 Atl. 480.

Indiana.— State *v.* Doe, 79 Ind. 9, 41 Am. Rep. 599.

Kentucky.— Com. *v.* Hazelwood, 84 Ky. 681, 2 S. W. 489, 8 Ky. L. Rep. 586.

New York.— People *v.* Campbell, 4 Park. Cr. 386; People *v.* Maloney, 1 Park. Cr. 593.

North Carolina.— State *v.* Holder, 81 N. C. 527, 31 Am. Rep. 517.

Ohio.— State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772.

Pennsylvania.— Com. *v.* Huggins, 4 Pa. Co. Ct. 671.

England.— Reg. *v.* Robinson, Bell C. C. 34, 8 Cox C. C. 115, 5 Jur. N. S. 203, 28 L. J. M. C. 58, 7 Wkly. Rep. 203.

See 32 Cent. Dig. tit. "Larceny," § 17.

88. State *v.* Butler, 2 Pennew. (Del.) 127, 43 Atl. 480.

89. Rex *v.* Searing, R. & R. 260.

90. *Arkansas.*— Haywood *v.* State, 41 Ark. 479.

Iowa.— Hamby *v.* Samson, 105 Iowa 112, 74 N. W. 918, 67 Am. St. Rep. 285, 40 L. R. A. 508.

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355.

Kentucky.— Com. *v.* Hazelwood, 84 Ky. 681, 2 S. W. 489, 8 Ky. L. Rep. 586.

Michigan.— Rockwell *v.* Oakland Cir. Judge, 133 Mich. 11, 94 N. W. 378.

New York.— Mullaly *v.* People, 86 N. Y. 365; People *v.* McMaster, 10 Abb. Pr. N. S. 132; People *v.* Campbell, 4 Park. Cr. 386; People *v.* Maloney, 1 Park. Cr. 593.

Ohio.— State *v.* Lymus, 26 Ohio St. 400, 20 Am. Rep. 772; State *v.* Yates, 10 Ohio Dec. (Reprint) 182, 19 Cinc. L. Bul. 150.

See 32 Cent. Dig. tit. "Larceny," § 17.

Contra, under an earlier statute. State *v.* Langford, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746; State *v.* Wheeler, 15 Rich. (S. C.) 362; State *v.* Brown, 9 Baxt. (Tenn.) 53, 40 Am. Rep. 81; Hurley *v.* State, 30 Tex. App. 333, 17 S. W. 455, 28 Am. St. Rep. 916.

91. *Alabama.*—Ward *v.* State, 48 Ala. 161, 17 Am. Rep. 31.

Indiana.— State *v.* Doe, 79 Ind. 9, 41 Am. Rep. 599.

North Carolina.— State *v.* Holder, 81 N. C. 527, 31 Am. Rep. 517.

Pennsylvania.— Findlay *v.* Bear, 8 Serg. & R. 571.

England.— Reg. *v.* Robinson, Bell C. C. 34, 8 Cox C. C. 115, 28 L. J. M. C. 58, 5 Jur. N. S. 203, 7 Wkly. Rep. 203.

92. In Alabama such a statute was held void for uncertainty. Johnson *v.* State, 100 Ala. 55, 14 So. 627.

93. Rex *v.* Martin, 2 East P. C. 618, 1 Leach C. C. 171.

94. Rex *v.* Martin, 2 East P. C. 618, 1 Leach C. C. 171.

95. Reg. *v.* Gallears, 2 C. & K. 981, 3 Cox C. C. 572, 1 Den. C. C. 501, 13 Jur. 1010, 19 L. J. M. C. 13, 3 New Sess. Cas. 704, T. & M. 196, 61 E. C. L. 981.

96. *Arkansas.*— Fulton *v.* State, 13 Ark. 168.

Florida.— Long *v.* State, 44 Fla. 134, 32 So. 870.

Georgia.— O'Bannon *v.* State, 76 Ga. 29.

Kansas.— State *v.* Kellerman, 14 Kan. 135.

Missouri.— State *v.* Boatright, 182 Mo. 33, 81 S. W. 450.

Pennsylvania.— Com. *v.* Campbell, Add. 232.

South Carolina.— State *v.* Hardy, Dudley 236.

away being essential elements of the crime of larceny, no subsequent connection with the property stolen can make one guilty of theft who was not connected with the original taking. One who trades for stolen property, having no complicity in the taking, is not guilty of larceny and his good faith is immaterial.[97] So one who after a theft is engaged by the thief to deliver the stolen property to another is not himself guilty of larceny, even though he knew the cattle to have been stolen.[98] And it was held error to refuse to instruct that no subsequent connection of defendant with the stolen property could make him guilty of larceny unless he were connected with the original taking.[99] So, there being no evidence of taking, it is error to instruct that the mere killing of a beef constitutes larceny.[1] If defendant did not participate in the original taking of the stolen property, the good or bad faith of a purchase subsequently made by him is immaterial.[2] But if possession is obtained directly from the owner defendant cannot rely on a purchase from a third person who had as he knew no right to sell.[3]

2. What Constitutes a Taking — a. In General. The act of taking possession involves the complete assumption of physical control over the chattel; which in turn requires both a complete severance of the chattel from the possession of the person from whom it was taken, and an assumption of actual control by the taker.

b. Momentary Possession Enough. If complete control is assumed and the goods are actually carried away, any, the least distance, it is enough, although the possession of the taker is immediately interrupted.[4] So where a thief being discovered in the very act of taking immediately abandoned or returned the thing, he had nevertheless completed the act of larceny.[5] Taking goods from a box or barrel and laying them on the floor beside it is enough to constitute a taking and carrying away.[6] Taking the goods and putting them into a receptacle for convenient removal is a sufficient taking and carrying away.[7]

c. Manual Touching Not Requisite. It is not necessary that the goods should actually be taken into the hands of the taker.[8]

Texas.— *Ex p.* Thrasher, (Cr. App. 1904) 80 S. W. 1142; Smith *v.* State, (Cr. App. 1898) 44 S. W. 520; Johnson *v.* State, 34 Tex. Cr. 254, 30 S. W. 228; Harris *v.* State, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717; Wright *v.* State, 18 Tex. App. 358.

Utah.— People *v.* Gillis, 6 Utah 84, 21 Pac. 404.

See 32 Cent. Dig. tit. "Larceny," § 22 *et seq.*

There must be an immediate taking of possession, not merely an intent to convert in the future. Quinn *v.* People, 32 Colo. 135, 75 Pac. 396.

97. People *v.* Ward, 105 Cal. 652, 39 Pac. 33.

98. Eastland *v.* State, (Tex. Cr. App. 1900) 59 S. W. 267; Green *v.* State, (Tex. App. 1892) 18 S. W. 651.

99. Davis *v.* State, (Tex. App. 1892) 19 S. W. 251; Willis *v.* State, 24 Tex. App. 584, 6 S. W. 856; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Curlin *v.* State, 23 Tex. App. 681, 5 S. W. 186; Tucker *v.* State, 21 Tex. App. 699, 2 S. W. 893.

1. Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318.

2. Phillips *v.* State, 19 Tex. App. 158; Trimble *v.* State, 18 Tex. App. 632; Prator *v.* State, 15 Tex. App. 363; Clayton *v.* State, 15 Tex. App. 348; McAfee *v.* State, 14 Tex. App. 668; McCampbell *v.* State, 9 Tex. App 124, 35 Am. Rep. 726.

3. Jameson *v.* State, 32 Tex. Cr. 385, 24 S. W. 508; Hart *v.* State, 22 Tex. App. 563, 3 S. W. 741.

4. Garris *v.* State, 35 Ga. 247; People *v.* Mills, 178 N. Y. 274, 70 N. E. 786; State *v.* Jackson, 65 N. C. 305.

Illustrations.— Thus where a thief snatched an ear-ring from a lady's ear but it caught in the curls of her hair, there was sufficient taking and carrying away to constitute larceny. Rex *v.* Lapier, 2 East P. C. 557, 708, 1 Leach C. C. 320. And where a thief went to an inn and, intending to steal a horse, directed the hostler to bring out his horse, pointing to the one he intended to steal, and the hostler accordingly led out the horse for the thief to mount, this was a sufficient taking to constitute larceny. Rex *v.* Pitman, 2 C. & P. 423, 12 E. C. L. 653.

5. Georgia *v.* Kepford, 45 Iowa 48; Eckels *v.* State, 20 Ohio St. 508; Harris *v.* State, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717.

6. State *v.* Higgins, 88 Mo. 354; State *v.* Wilson, 1 N. J. L. 439, 1 Am. Dec. 216; Tobias' Case, 1 City Hall Rec. (N. Y.) 30; Rex *v.* Simpson, 1 Leach C. C. 302 note.

7. State *v.* Hecox, 83 Mo. 531 (placing wheat in a sack); Reg. *v.* Wallis, 3 Cox C. C. 67 (drawing porter from a barrel into a can); Reg. *v.* Samways, Dears. C. C. 371, 2 Wkly. Rep. 498 (placing barley in a sack).

8. Conner *v.* State, 24 Tex. App. 245, 6 S. W. 138.

d. Taking in a Receptacle. And where goods are in a receptacle, the thief may take them, while they still remain in the receptacle and without removing them therefrom, by exercising complete power of control over them.[9]

e. Taking a Receptacle With Its Contents. One who takes a thing in which, as he knows or supposes, another thing is contained, takes them both, and if he takes wrongfully and with intent to steal is guilty of the larceny of both. Thus where a thief stole a trunk containing money he may be convicted of larceny of the money.[10] And where one stole a box containing a watch he was held guilty of larceny of the watch.[11] And one who, knowing that a coat worn by a person contained money, seized the coat in the effort to steal the money, and, the coat coming off in his hands, returned the coat but kept the money, was held guilty of larceny of the money.[12] Upon this principle one who has been convicted of stealing a pocket-book cannot be afterward indicted for stealing the contents.[13]

f. Taking an Animal. The question what acts are sufficient to constitute taking and carrying away an animal depends upon the completeness of control thereby secured and exercised over the animal. To catch an animal and have it in hand is a sufficient taking.[14] So is leading an animal, as a horse.[15] And it has been held that the catching of a sheep and cutting of hobbles from its feet was sufficient.[16] Possession is not taken and the offense of larceny is not complete where defendant entices a hog for twenty yards on the owner's premises by dropping corn and then abandons it.[17] So chasing a hog is not a sufficient taking.[18] Shooting or killing an animal, without more, is not a taking possession.[19] If an animal is shot and then is taken hold of for the purpose of cutting

Applications of rule.— Thus drawing porter from a barrel into a can is a sufficient asportation of the porter drawn, although the prisoner has not yet touched the can containing it. Reg. *v.* Wallis, 3 Cox C. C. 67. Diverting gas from passing through a meter placed by the company to measure the gas, by inserting a pipe for that purpose, is an asportation of the gas at such junction. Reg. *v.* White, 3 C. & K. 363, 1 C. L. R. 489, 6 Cox C. C. 213, Dears. C. C. 203, 17 Jur. 536, 22 L. J. M. C. 123, 1 Wkly. Rep. 418. And in the same way diverting water wrongfully from the pipe of a water company to the taker's pipe is a sufficient taking. Ferens *v.* O'Brien, 11 Q. B. D. 21, 15 Cox C. C. 332, 47 J. P. 472, 52 L. J. M. C. 70, 31 Wkly. Rep. 643. So a slave may be stolen by inducing him to escape from the master to the taker; but he is not taken until he is near enough to defendant to enable the latter to aid him against pursuit. State *v.* Wisdom, 8 Port. (Ala.) 511.

9. Goods in the owner's pocket are sufficiently taken and carried away when completely grasped in the taker's hand and lifted from the bottom of the pocket, although not yet removed from the pocket. Harrison *v.* People, 50 N. Y. 518, 10 Am. Rep. 517; Flynn *v.* State, 42 Tex. 301; Files *v.* State, 36 Tex. Cr. 206, 36 S. W. 93; State *v.* Chambers, 22 W. Va. 779, 46 Am. Rep. 550.

Where the hand is thrust into a money drawer and money actually taken into the hand there is a taking and carrying away of the money, although it is not removed from the drawer. State *v.* Green, 81 N. C. 560.

Taking in a wagon.—Where goods in a wagon are completely lifted from their former position and moved however slightly there is a sufficient taking and carrying away, although the goods are not removed from the wagon. Rex *v.* Cozlett, 2 East P. C. 556, 1 Leach C. C. 236; Rex *v.* Walsh, 1 Moody C. C. 14. But where a prisoner set up a long bale upon end in a wagon and cut the wrapper all the way down with intent to remove the contents, but had not yet touched the inside, there was no asportation. Rex *v.* Cherry, 2 East P. C. 556, 1 Leach C. C. 236 note.

10. Berry *v.* State, 10 Ga. 511.

11. State *v.* Derst, 10 Nev. 443.

Theft of coat containing watch.— Defendant stole a coat containing a watch of which he was unaware. He was properly charged with stealing the watch, for he had the intent to steal the coat and everything in it at the time he took it. Stevens *v.* State, 19 Nebr. 647, 28 N. W. 304.

12. Alexander *v.* Com., 20 S. W. 254, 14 Ky. L. Rep. 290.

13. U. S. *v.* Lee, 26 Fed. Cas. No. 15,586, 4 Cranch C. C. 446.

14. Georgia *v.* Kepford, 45 Iowa 48; State *v.* Carr, 13 Vt. 571.

15. State *v.* Gazell, 30 Mo. 92.

16. State *v.* Gray, 106 N. C. 734, 11 S. E. 422.

17. Edmonds *v.* State, 70 Ala. 8, 45 Am. Rep. 67.

18. Wolf *v.* State, 41 Ala. 412; State *v.* Seagler, 1 Rich. (S. C.) 30, 42 Am. Dec. 404.

19. Molton *v.* State, 105 Ala. 18, 16 So. 795, 53 Am. St. Rep. 97; People *v.* Murphy, 47 Cal. 103; Alexander *v.* State, 60 Miss. 953.

or skinning, and in the process is moved at all, there is according to some decisions a sufficient taking and carrying away to constitute larceny.[20] In other cases, however, a different conclusion has been reached.[21] In one jurisdiction, owing perhaps to the statute doing away with the need of asportation, there is some uncertainty as to what constitutes sufficient taking of an animal.[22]

g. Exercise of Complete Control. Possession is not taken until the thief exercises a complete and exclusive control over the thing taken. Merely striking the hand of a person and knocking money to the ground, where it is lost, is not a taking into possession so as to constitute larceny.[23] So to jostle another so that a watch and chain drops from him is not a sufficient taking of the watch to constitute larceny.[24] And where a woman put her hand into the pocket of another woman, and her hand being seized by an officer the pocket was torn and a pocket-book dropped to the ground, there is not sufficient evidence of larceny, it not being shown that the prisoner's hand touched the pocket-book.[25] On the same principle where the prisoner compelled by threats another to lay down on the ground a bed he was carrying, and was then apprehended before he himself took it up, there was no larceny.[26] But if the chattel while lying on the ground is picked up by the thief, it is a sufficient taking.[27] Selling the goods of another without actually taking possession of them is not sufficient taking to constitute larceny. Where one has neither actual nor constructive possession of the property of another, but points it out and purports to sell it, receiving payment therefor, he does not commit larceny in the absence of some act constituting an asportation.[28] So where a wrong-doer, without himself taking actual possession of it, sells a steer at large upon the range to one who never took possession he was not guilty of larceny.[29] And one who states to a pound-keeper that a certain animal in the pound is his, and sells it to the pound-keeper, who himself takes it out and turns it into his range, where it is afterward claimed by the rightful owner, is not thereby guilty of larceny.[30] But where in such a case the purchaser takes the property so sold into his own possession in good faith, the seller is guilty of larceny, since the purchaser takes as his innocent agent, and the act of the purchaser amounts to a taking by the seller.[31]

20. Thus where defendant after shooting a hog took hold of it and cut its throat it is sufficient (Kemp *v.* State, 89 Ala. 52, 7 So. 413; Croom *v.* State, 71 Ala. 14); and where the animal is wholly or partly skinned the larceny is complete (Lundy *v.* State, 60 Ga. 143; Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968; State *v.* Gilbert, 68 Vt. 188, 34 Atl. 697; Rex *v.* Rawlins, 2 East P. C. 617).

21. Thus it has been held that shooting a hog, turning it upon its back, and cutting its throat (Williams *v.* State, 63 Miss. 58), or shooting a hog and skinning one of its hams, leaving the skin attached to the animal (State *v.* Alexander, 74 N. C. 232), or the mere shooting of a cow and cutting off her ears, there being no value to ears (State *v.* Butler, 65 N. C. 309), is not a sufficient asportation.

22. Shooting and skinning an animal is certainly enough to constitute a taking. Musquez *v.* State, 41 Tex. 226; McPhail *v.* State, 9 Tex. App. 164. Merely killing an animal may or may not be a sufficient taking; but in case of an animal running at large it seems that killing the animal is enough. Coombes *v.* State, 17 Tex. App. 259 [*overruling* Martin *v.* State, 44 Tex. 172; Hall *v.* State, 41 Tex. 287]. But even in Texas evidence that defendant shot and wounded another's hog, and pursued it some distance, but did not kill or catch it, does not show a sufficient taking. Minter *v.* State, 26 Tex. App. 217, 9 S. W. 561. Branding a cow for the purpose of appropriating it is sufficient taking, since it cannot be accomplished without actual manual possession. Coward *v.* State, 24 Tex. App. 590, 7 S. W. 332.

23. Thompson *v.* State, 94 Ala. 535, 10 So. 520, 33 Am. St. Rep. 145.

24. People *v.* Rogers, 22 N. Y. App. Div. 147, 47 N. Y. Suppl. 893, 12 N. Y. Cr. 476.

25. Com. *v.* Luckis, 99 Mass. 431, 96 Am. Dec. 769.

26. Rex *v.* Farrell, 1 Leach C. C. 322 note.

27. State *v.* Pratt, 20 Iowa 267.

28. Long *v.* State, 44 Fla. 134, 32 So. 870; Johnson *v.* State, 34 Tex. Cr. 254, 30 S. W. 228.

29. Hardeman *v.* State, 12 Tex. App. 207.

30. People *v.* Gillis, 6 Utah 84, 21 Pac. 404.

31. Cummins *v.* Com., 5 Ky. L. Rep. 200; Lane *v.* State, 41 Tex. Cr. 558, 55 S. W. 831; Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946; Dale *v.* State, 32 Tex. Cr. 78, 22 S. W. 49; Doss *v.* State, 21 Tex. App. 505, 2 S. W. 814, 57 Am. Rep. 618 [*overruling* Lott *v.* State, 20 Tex. App. 230]; Madison *v.* State, 16 Tex. App. 435.

h. Severance From Former Possessor. Nor is possession obtained until the goods are completely severed from the possession and control of the owner.[32]

3. Taking Under Process. A constable or other officer who makes use of void process to get possession of property with intent to steal it, and not to take it for the satisfaction of a debt under process of law, is guilty of larceny.[33]

4. Asportation. Larceny requires not merely a taking possession, but also a carrying away or asportation, of the thing taken. Even though possession is taken there can be no larceny without asportation.[34] Nevertheless a bare removal from the place where the goods are found is a sufficient taking and carrying away.[35]

B. By Whom the Goods May Be Taken — 1. No Larceny by a Possessor — a. General Rule. To constitute larceny there must be a trespass in the original taking. One who has acquired possession *bona fide* cannot thereafter commit larceny of the thing so possessed.[36]

32. Where goods are tied by a string, the picking of them up and carrying as far as the string permits is not an asportation, for so long as the string is not broken the possession of the owner continues. Anonymous, 2 East P. C. 556, 1 Leach C. C. 321 note. And so the taking of an overcoat from a dummy which is still fastened to the dummy by a chain, the dummy itself being fastened to the building by a string, is not sufficient asportation to constitute larceny. People *v.* Meyer, 75 Cal. 383, 17 Pac. 431.

33. Luddy *v.* People, 219 Ill. 413, 76 N. E. 581, 3 L. R. A. N. S. 508, holding that where a constable, in conspiracy with a justice of the peace and a collection agent, seizes goods on a writ issued on a judgment for claims which had been paid, as shown by receipts filed with the justice but destroyed by him, takes the goods away, and afterward conceals himself so as to prevent the retaking of the goods, which were afterward found where they had been hidden by the justice and constable after a pretended sale, he is guilty of larceny.

34. *Alabama.*—Wolf *v.* State, 41 Ala. 412.

California.— People *v.* Murphy, 47 Cal. 103.

Georgia.— Lundy *v.* State, 60 Ga. 143.

Mississippi.— Williams *v.* State, 63 Miss. 58.

New York.— Harrison *v.* People, 50 N. Y. 518, 10 Am. Rep. 517.

North Carolina.— State *v.* Alexander, 74 N. C. 232; State *v.* Jones, 65 N. C. 395.

South Carolina.— State *v.* Hardy, Dudley 236.

See 32 Cent. Dig. tit. "Larceny," § 30.

Illustrations.—Where defendant was caught tampering with boxes but had not yet removed them from their places on a railway track there had not been sufficient asportation to constitute larceny. State *v.* Knolle, 90 Mo. App. 238. Nor is the mere upsetting of a barrel of turpentine such an asportation as will constitute larceny. State *v.* Jones, 65 N. C. 395.

Asportation unnecessary in Texas.— Under the Texas code it has been held that asportation is not necessary for larceny. Austin *v.* State, 42 Tex. 345; Hall *v.* State, 41 Tex. 287; Musquez *v.* State, 41 Tex. 226; Prim *v.* State, 32 Tex. 157; Newman *v.* State, (Cr. App. 1901) 64 S. W. 258; Harris *v.* State, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717; Dukes *v.* State, 22 Tex. App. 192, 2 S. W. 590; Walker *v.* State, 3 Tex. App. 70. So larceny may be committed in Texas by throwing a bale of cotton off a railroad train with intent to steal it; the bale is taken from the possession of the owner by this act. Price *v.* State, 41 Tex. 215.

35. *Alabama.*— State *v.* Wisdom, 8 Port. 511.

Missouri.— State *v.* Taylor, 136 Mo. 66, 37 S. W. 907 (removal of goods in a store from their accustomed places); State *v.* Higgins, 88 Mo. 354 (removal from one part of room to another); State *v.* Gazell, 30 Mo. 92 (leading horse for short distance).

Nebraska.— Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403.

North Carolina.— State *v.* Mitchener, 98 N. C. 689, 4 S. E. 26 (removal of goods from a store to the sidewalk); State *v.* Craige, 89 N. C. 475, 45 Am. Rep. 698 (removal of wheat from one garner to defendant's adjoining garner in the same mill).

Vermont.—State *v.* Carr, 13 Vt. 571, changing position of sheep for short distance.

England.— Rex *v.* Lapier, 2 East P. C. 557, 708, 1 Leach C. C. 320 (removal of ear-ring from lady's ear to her hair); Reg. *v.* Simpson, 3 C. L. R. 80, 6 Cox C. C. 422, Dears. C. C. 421, 18 Jur. 1030, 24 L. J. M. C. 7, 3 Wkly. Rep. 19 (taking watch from pocket and severing chain from buttonhole, although it caught on a button).

See 32 Cent. Dig. tit. "Larceny," § 30.

36. *Alabama.*—Wright *v.* Lindsay, 20 Ala. 428.

Arkansas.— Fulton *v.* State, 13 Ark. 168.

Florida.— Finlayson *v.* State, 46 Fla. 81, 35 So. 203.

Georgia.— Abrams *v.* State, 121 Ga. 170, 48 S. E. 965.

Illinois.— Johnson *v.* People, 113 Ill. 99.

Kentucky.— Snapp *v.* Com., 82 Ky. 173.

Michigan.— People *v.* Taugher, 102 Mich. 598, 61 N. W. 66.

Missouri.— State *v.* Stone, 68 Mo. 101.

New York.— People *v.* Cruger, 102 N. Y. 510, 7 N. E. 555, 55 Am. Rep. 830; Abrams *v.* People, 6 Hun 491.

b. Retention of Possession by Vendor. On the same principle, where an owner of property assigned it to another, but retained possession and afterward converted it to his own use, this was not larceny.[37]

c. Partners, Joint Owners, or Croppers. So a partner cannot commit larceny of partnership property.[38] This is equally true, although the partner has sold out all his interest in the property to his copartner, and is under obligation to hand over to him the specific property in question.[39] So in general a joint owner or tenant in common cannot be guilty of larceny, by taking and disposing of the whole property to his own use, unless he takes it out of the hands of a bailee, with whom it was left for safe custody, and the effect of such taking would be to charge the bailee.[40] And the same principle applies in the case of a "cropper,"

North Carolina.— State *v.* England, 53 N. C. 399, 80 Am. Dec. 334.

Ohio.— Anonymous, 1 Ohio Dec. (Reprint) 279, 6 West. L. J. 566.

Pennsylvania.— Krause *v.* Com., 93 Pa. St. 418, 39 Am. Rep. 762; Com. *v.* Boyer, 3 Pa. Co. Ct. 234; Com. *v.* Smith, 1 Pa. L. J. Rep. 400, 3 Pa. L. J. 34.

South Dakota.— State *v.* Lindley, 13 S. D. 248, 83 N. W. 257.

Tennessee.— Hite *v.* State, 9 Yerg. 198.

Texas.— Jones *v.* State, (Cr. App. 1899) 49 S. W. 387; Rumbo *v.* State, 28 Tex. App. 30, 11 S. W. 680; Lott *v.* State, 24 Tex. App. 723, 14 S. W. 277; Stokely *v.* State, 24 Tex. App. 509, 6 S. W. 538; Guest *v.* State, 24 Tex. App. 235, 5 S. W. 840; Herron *v.* State, 20 Tex. App. 296; Morrison *v.* State, 17 Tex. App. 34, 50 Am. Rep. 120.

Wisconsin.— Hill *v.* State, 57 Wis. 377, 15 N. W. 445.

England.— Reg. *v.* Flowers, 16 Q. B. D. 643, 16 Cox C. C. 33, 50 J. P. 648, 55 L. J. M. C. 179, 54 L. T. Rep. N. S. 547, 34 Wkly. Rep. 367; Reg. *v.* Hey, 2 C. & K. 983, 3 Cox C. C. 582, 1 Den. C. C. 602, 14 Jur. 154, T. & M. 209, 61 E. C. L. 983; Reg. *v.* Thristle, 2 C. & K. 842, 3 Cox C. C. 573, 1 Den. C. C. 502, 13 Jur. 1035, 19 L. J. M. C. 66, 3 New Sess. Cas. 702, T. & M. 204, 61 E. C. L. 842; Reg. *v.* Evans, C. & M. 632, 41 E. C. L. 343; Reg. *v.* Davis, 7 Cox C. C. 104, Dears. C. C. 640, 2 Jur. N. S. 478, 25 L. J. M. C. 91, 4 Wkly. Rep. 492; Reg. *v.* Cornish, 6 Cox C. C. 432, Dears. C. C. 425; Reg. *v.* Saward, 5 Cox C. C. 295; Reg. *v.* Mattheson, 5 Cox C. C. 276; Reg. *v.* Cole, 2 Cox C. C. 340; Reg. *v.* Goodbody, 8 C. & P. 665, 34 E. C. L. 951; Rex *v.* Savage, 5 C. & P. 143, 24 E. C. L. 495; Rex *v.* Fletcher, 4 C. & P. 544, 19 E. C. L. 642; Rex *v.* Charlewood, 2 East P. C. 689, 1 Leach C. C. 409, 3 Rev. Rep. 706; Rex *v.* Palmer, 2 East P. C. 586, 2 Leach C. C. 680; Rex *v.* Raven, Kel. C. C. 24; Rex *v.* Walsh, 2 Leach C. C. 1054, R. & R. 161, 4 Taunt. 258; Rex *v.* Smith, 1 Moody C. C. 473; Rex *v.* Mucklow, 1 Moody C. C. 160; Rex *v.* Banks, R. & R. 328; Rex *v.* Madox, R. & R. 68; Rex *v.* Meeres, 1 Show. 50.

See 32 Cent. Dig. tit. "Larceny," § 39 *et seq.*

Wrongful retention of property acquired bona fide.— The rule applies where possession of the chattels was taken *bona fide* and reasonably, although without the consent of the owner. As where the prisoner, assisting at a fire, took away goods from the burning house without the expressed desire of the owner, and afterward converted them, it was no larceny. Rex *v.* Leigh, 2 East P. C. 694, 1 Leach C. C. 411 note. So where one is intrusted with money to take away and get changed, if he takes it *bona fide* but later converts it to his own use he is not guilty of larceny. Mobley *v.* State, 114 Ga. 544, 40 S. E. 728; Reg. *v.* Reynolds, 2 Cox C. C. 170; Reg. *v.* Thomas, 9 C. & P. 741, 38 E. C. L. 429.

One who merely withholds possession of property which he ought to give up to another, although the withholding be felonious, is not guilty of larceny since there is no taking. Parr *v.* Loder, 97 N. Y. App. Div. 218, 89 N. Y. Suppl. 823.

Cattle joining herd of another.— If cattle joined defendant's herd and were noticed by him, and after vain efforts to drive them away he allowed them to remain, he took possession; and if he subsequently formed the intention to steal them his conversion was not larceny. Guest *v.* State, 24 Tex. App. 235, 5 S. W. 840.

Taking of goods by person in charge of store.—Where one had charge of a store with full authority to sell goods, etc., and carried the key, he was not a mere servant; hence an entry of the store by him and taking therefrom of goods could not amount to a theft, but was a mere breach of trust. Bismark *v.* State, 45 Tex. Cr. 54, 73 S. W. 965.

Conversion by steward of goods in his charge.— A steward taking ship's provisions for use on the vessel is not guilty of larceny if he subsequently converts them. U. S. *v.* Holland, 26 Fed. Cas. No. 15,378, 2 N. Y. Leg. Obs. 55.

37. Johnson *v.* State, (Tex. App. 1890) 13 S. W. 651; Reg. *v.* Pratt, 2 C. L. R. 774, 6 Cox C. C. 373, Dears. C. C. 360, 18 Jur. 539, 2 Wkly. Rep. 497. And see Love *v.* State, 78 Ga. 66, 3 S. E. 893, 6 Am. St. Rep. 234.

38. Jones *v.* State, 76 Ala. 8; Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Reg. *v.* Lowenbruck, 18 L. C. Jur. 212; Fawcett *v.* Thompson, 4 L. C. Jur. 234; Reg. *v.* St. Louis, 10 L. C. Rep. 34.

39. Phelps *v.* State, 109 Ga. 115, 34 S. E. 210.

40. Kirksey *v.* Fike, 29 Ala. 206.

or person who takes land to cultivate, sharing the crop with the owner of the land. The cropper is in possession of the crop, and does not commit larceny by withholding the owner's share.[41] If on the other hand an agricultural servant is employed to make a crop, and he is to receive a share of the crop by way of wages, he has neither title nor possession of the crop; and if he takes any part of it prior to the division with intent to steal it he is guilty of larceny.[42]

d. Other Instances. Other applications of the rule are given in the notes hereto.[43]

e. Determination of Bailment by Misuse. A theory once prevailed that where property was bailed for a certain limited purpose, its misuse for another purpose determined the bailment, constituted larcenous taking, and made the bailee guilty of larceny. It has been so held in the case of agistment of cattle,[44] and letting a horse to drive to a certain place.[45] But this notion was abandoned, and the general rule as heretofore stated applies to all kinds of bailments.[46]

f. Breaking Bulk. Where chattels are taken in good faith by a bailee, and he afterward breaks bulk and takes part of them with intent to steal, he commits larceny.[47] It is properly confined to a case where there is a package, such as a bale, composed of several chattels inclosed in an outer covering and there is an actual breaking of the outer covering. In such a case the taking of one or any portion of the inclosed chattels is universally held to be larceny.[48] The doctrine has, however, been extended in several jurisdictions to cover a case where several articles are bailed simultaneously and the bailee takes one of the articles, or a quantity of some substance is bailed and part only of it taken.[49] In England some

41. State *v.* Copeland, 86 N. C. 691; Bell *v.* State, 7 Tex. App. 25. Thus where a father and son rented land jointly, it being agreed by the landlord that they should have the first two bales of cotton, and the landlord demanded of the son the second bale, to which he agreed, the father who took the bale away could not be convicted of larceny. Scales *v.* State, 85 Ga. 540, 11 S. E. 860.

42. State *v.* Sanders, 52 S. C. 580, 30 S. E. 616.

43. One having assigned his goods to trustees for the benefit of creditors removed them before the trustees took possession, and hence did not commit larceny. Reg. *v.* Pratt, 2 C. L. R. 774, 6 Cox C. C. 373, Dears. C. C. 360, 18 Jur. 539, 2 Wkly. Rep. 497. A shopman gave a customer two shillings in change, whereupon the latter expressing a preference for four sixpences pretended to throw the two shillings back into the till, really returning only one, but receiving other change. This was not larceny of the shilling, it not having been returned to the possession of the shopman. Reg. *v.* Williams, 7 Cox C. C. 355. Where one has a creditor sign a receipt which the debtor lays down before him and the debtor immediately picks up the receipt and walks off without paying the debt, the receipt has never been in the possession of the creditor so as to make the taking larceny. Reg. *v.* Smith, 5 Cox C. C. 533, 2 Den. C. C. 449, 16 Jur. 414, 21 L. J. M. C. 111. And where one compelled another by threat of death to sign a promissory note which he immediately took away this was not larceny for the same reason. Rex *v.* Phipoe, 2 East P. C. 599, 2 Leach C. C. 673. So where defendant was in possession of a bank-bill belonging to him and prosecutor and laid it on the table desiring prosecutor to have it changed in order to divide the proceeds and prosecutor proceeded to pick it up when defendant apparently folded it in a paper which he delivered to him but it afterward appeared there was no bill in it, it was held that unless the prosecutor had possession of the bill defendant could not be guilty of larceny. Com. *v.* Campbell, Add. (Pa.) 232.

44. Reg. *v.* Stanbury, 2 Cox C. C. 272; Reg. *v.* Jackson, 2 Moody C. C. 32; Rex *v.* McNamee, 1 Moody C. C. 368; Rex *v.* Stock, 1 Moody C. C. 87.

45. Rex *v.* Tunnard, 2 East P. C. 687, 1 Leach C. C. 214. See also Johnson *v.* People, 113 Ill. 99; Anonymous, 1 Ohio Dec. (Reprint) 279, 6 West. L. J. 566.

46. Fulton *v.* State, 13 Ark. 168; Reg. *v.* Hey, 2 C. & K. 983, 3 Cox C. C. 582, 1 Den. C. C. 602, 14 Jur. 154, T. & M. 209, 61 E. C. L. 983; Rex *v.* Banks, R. & R. 328.

47. The doctrine of larceny by breaking bulk was supposed to have been established by the Southampton Carrier's Case. Y. B. 13 Edw. IV, 9, pl. 5.

48. State *v.* Fairclough, 29 Conn. 47, 76 Am. Dec. 590; Robinson *v.* State, 1 Coldw. (Tenn.) 120, 78 Am. Dec. 487; Reg. *v.* Vincent, 3 C. & K. 246, 5 Cox C. C. 537, 2 Den. C. C. 464, 16 Jur. 457, 21 L. J. M. C. 109; Reg. *v.* Poyser, 5 Cox C. C. 241, 2 Den. C. C. 233, 15 Jur. 386, 20 L. J. M. C. 191, T. & M. 559; Reg. *v.* Jenkins, 9 C. & P. 38, 38 E. C. L. 35; Rex *v.* Jones, 7 C. & P. 151, 32 E. C. L. 546; Rex *v.* Wynne, 2 East P. C. 664, 697, 1 Leach C. C. 413.

49. Com. *v.* James, 1 Pick. (Mass.) 375 (part of a quantity of ground barilla); Com. *v.* Brown, 4 Mass. 580 (one of several packages of goods bailed at the same time); Nich-

countenance has been given to this extension of the doctrine,[50] but the prevailing view seems to be otherwise.[51] If the outer covering is broken it is larceny to take the whole contents.[52] If the bailee has a right to open the package his opening it is not breaking bulk, and his opening it and converting all the goods is not larceny.[53]

2. Larceny by Custodian — a. Introductory Statement. Possession in one person is quite consistent with actual manual control in another. Where the possessor of goods places the goods in the hands of another, intending, however, himself to retain the actual or potential control, either by remaining present himself or by retaining the control through his servant, he remains in possession of the goods, and the actual holder of the goods is termed the custodian.

b. Giving Money to Change or Count. When one hands to another money to be changed for other money on the spot, the former does not part with the possession, but only the custody of the money until the transaction is completed; and if the other takes the money with felonious intent without returning the right change he is guilty of larceny.[54] Where the change is taken the possession both of the money and the change passes.[55] If on the other hand the owners of the bill intrust it to another to take away to get changed and to return with the change, the possession of the bill is intrusted to him; and if he afterward makes off with it, it is not larceny but breach of trust.[56] So where one permits another to take money to count in his presence and then hand back, the possession remains in the owner; and if the other, being a mere custodian, feloniously appropriates the money he is guilty of larceny.[57]

c. Cash Sales. Where parties are engaged in a cash sale the whole transaction is incomplete until the payment is completed; and the possession of the goods remains in the seller and that of the money in the buyer until they are simultaneously exchanged. If in such case the buyer gets control of the goods

ols *v.* People, 17 N. Y. 114 (one of several bars of pig iron).

50. Rex *v.* Howell, 7 C. & P. 325, 32 E. C. L. 637, one of a number of staves taken; larceny.

51. Rex *v.* Pratley, 5 C. & P. 533, 24 E. C. L. 693; Rex *v.* Madox, R. & R. 68.

52. Rex *v.* Brazier, R. & R. 251. But see Rex *v.* Mason, 8 Mod. 74.

53. Reg. *v.* Glasse, 2 Cox C. C. 236.

54. *Alabama.*— Levy *v.* State, 79 Ala. 259.

Georgia.— Finkelstein *v.* State, 105 Ga. 617, 31 S. E. 589.

Illinois.— Farrell *v.* People, 16 Ill. 506.

Indiana.— Huber *v.* State, 57 Ind. 341, 26 Am. Rep. 57.

Minnesota.— State *v.* Anderson, 25 Minn. 66, 33 Am. Rep. 455.

New Hampshire.— State *v.* Watson, 41 N. H. 533.

New York.— Hildebrand *v.* People, 56 N. Y. 394, 15 Am. Rep. 435.

Texas.— Flynn *v.* State, (Cr. App. 1904) 83 S. W. 206.

England.— Reg. *v.* McKale, L. R. 1 C. C. 125, 11 Cox C. C. 32, 37 L. J. M. C. 97, 18 L. T. Rep. N. S. 335, 16 Wkly. Rep. 800; Rex *v.* Oliver, 2 Russell Cr. 182 [*cited* in Rex *v.* Walsh, 4 Taunt. 258, 274].

Illustrations.— Thus where one hands another a sovereign expecting two half sovereigns in exchange, and the latter hands back only one half sovereign, giving the other to a third person, who refuses to deliver it, the one to whom the sovereign was first given is guilty of stealing it. Reg. *v.* Twist, 12 Cox C. C. 509, 29 L. T. Rep. N. S. 546. A person handed another a twenty-dollar bill to change, and the latter pretending he could not change it handed back a one-dollar bill instead of the original bill; this was held larceny of the twenty-dollar bill, as the possession remained in the owner until the appropriation. Walters *v.* State, 17 Tex. App. 226, 50 Am. Rep. 128. Where one is seeking to have a dollar changed and another takes it, saying he will go and get it changed, and the former demands the money back, and the latter runs away, it is a case of simple larceny. Fitzgerald *v.* State, 118 Ga. 855, 45 S. E. 666. Similarly where a person asking that his half-crown be changed picks up the change and retains the half-crown, he is guilty of larceny of the change so taken up by him. Rex *v.* Williams, 6 C. & P. 390, 25 E. C. L. 489.

55. Where a person entered a shop and asked to have a sovereign changed, laying it down on the counter, and the shopman, acquiescing, laid down the correct change which the other took up, but also took up the sovereign, it was held that the sovereign had passed into the possession of the shopman and that defendant was guilty of larceny of it. Reg. *v.* Jones, 5 Cox C. C. 226.

56. Mobley *v.* State, 114 Ga. 544, 40 S. E. 728; Reg. *v.* Reynolds, 2 Cox C. C. 170; Reg. *v.* Thomas, 9 C. & P. 741, 38 E. C. L. 429.

57. Hecox *v.* State, 105 Ga. 625, 31 S. E. 592; Com. *v.* O'Malley, 97 Mass. 584.

and makes off with them without paying for them he is guilty of larceny.[58] And conversely if the seller gets the money and refuses to give up the goods it is larceny.[59]

d. Other Instances. Other instances of the rule are set out in the notes.[60]

3. Larceny by a Servant — a. When Servant Has Custody and When Possession — (1) *Goods Intrusted to Servant by Master.* Where a servant is given goods by his master to use in the service, the possession of them remains in

58. Reg. *v.* Slowly, 12 Cox C. C. 269, 27 L. T. Rep. N. S. 803; Reg. *v.* Cohen, 2 Den. C. C. 249, T. & M. 576; Rex *v.* Gilbert, 1 Moody C. C. 185; Rex *v.* Campbell, 1 Moody C. C. 179.

59. Reg. *v.* Morgan, 6 Cox C. C. 408, Dears. C. C. 395, 18 Jur. 1085.

Applications of rule.— Thus where one surrenders up his watch with the understanding that he is immediately to receive fifty dollars for it, the keeping of the watch without payment of the money is larceny. Chamberlain *v.* State, 25 Tex. App. 398, 8 S. W. 474. And where a tradesman handed goods to a customer to examine and the latter ran away with them, he was held guilty of larceny. Rex *v.* Chissers, T. Raym. 275. Similarly, where one unloaded onions which he owned on the premises of a prospective purchaser, who thereupon refused to pay for the onions or to allow the seller to remove them, it was held larceny, as the owner never intended to part with the possession of the onions until he received his money therefor. Reg. *v.* Slowly, 12 Cox C. C. 269, 27 L. T. Rep. N. S. 803. And where a person, having ordered a tradesman to bring goods to his house, looks out a certain quantity, asks the price of them, separates them from the rest, and then, by sending the tradesman home on pretense of wanting other articles, takes the opportunity of running away with the goods so looked out with intent to steal them, it is larceny; for, as the sale was not completed, the possession of the property still remained in the tradesman. Rex *v.* Sharpless, 2 East P. C. 675, 1 Leach C. C. 92.

60. Where the holder of a promissory note having received a partial payment from the maker handed it to him to indorse the payment, and he took it away, and refused to give it up, it was held that the possession remained in the owner, and that his subsequent conversion being found to be felonious, was larceny. People *v.* Call, 1 Den. (N. Y.) 120, 43 Am. Dec. 655. Where a landlord gave a tenant a receipt expecting to receive immediately the rent which the receipt acknowledges, and the tenant kept the receipt but declined to pay the rent, he is guilty of larceny of the receipt. Reg. *v.* Rodway, 9 C. & P. 784, 38 E. C. L. 453. The obligor in a bond for title asked the obligee to let him see the bond that he might inspect it; she let him take it, and he threw it into the fire, where it was consumed. The obligor was guilty of larceny. Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670. Where one handed another a sum of money to be immediately handed over to a third party in the same or an adjoining room and the person so receiving the money in the first instance appropriates a part of it to his own use he is guilty of larceny for the handing of the money to him for a particular purpose in the presence of the owner put him in custody only, not the possession, of the money, and the appropriation was therefore a trespass. Com. *v.* Lannan, 153 Mass. 287, 26 N. E. 858, 25 Am. St. Rep. 629, 11 L. R. A. 450. One waiting in a crowd to purchase a railway ticket requests another nearer the pay-place to buy a ticket for her, handing him a sovereign to pay for it. He made off with the sovereign and was held guilty of larceny. Reg. *v.* Thompson, 9 Cox C. C. 244, 8 Jur. N. S. 1184, L. & C. 225, 32 L. J. M. C. 53, 7 L. T. Rep. N. S. 432, 11 Wkly. Rep. 40. Where one person accompanies another to a bank and requests the banker in paying a check to deliver the money to such other person, and they set out intending to return together to the former's shop, at which place the latter is to deliver an equivalent for the money so delivered by the banker, but on the way makes off with the money, he is guilty of larceny, as the owner never parted with his property and possession in the money but surrendered only the bare custody. Reg. *v.* Johnson, 5 Cox C. C. 372, 2 Den. C. C. 310, 15 Jur. 1113, 21 L. J. M. C. 32, T. & M. 612. Where a woman who had been riding with a bundle in a hackney coach got out and told the coachman to take out the parcel and put it in the house and instead of that he appropriated it to his own use, he was held guilty of larceny. Rex *v.* Sears, 1 Leach C. C. 415 note. A, the holder of a bond, met B, the maker, and presuming he meant to pay it, took it from his pocket and made no objection when B took it from his hand. B then chewed up the bond. This was held larceny. Vaughn *v.* Com., 10 Gratt. (Va.) 758. A person handed another a piece of money to be changed into a different form and put into a letter and deposited in the office. Everything was to be done in the presence of both parties. The one to whom the money was given refused to deposit the letter or return it to the giver, with intent to keep it himself. This was held larceny. State *v.* Walker, 65 Kan. 92, 68 Pac. 1095. Money was obtained by defendant on the pretense of cashing a check and he then made off with both money and check; it was held larceny. Grunson *v.* State, 89 Ind. 533, 46 Am. Rep. 178. This doctrine was carried to an unjustifiable extreme where a firm agreed to lay a quantity of steam pipes for a farmer and permitted the latter to haul to his farm

the master, and the servant has custody only.[61] This was probably otherwise originally.[62] The present rule was settled by an English statute which was thought in later times to be merely declaratory of the common law.[63] But the master may give his servant not merely the custody of money or other property, but also the title to it. In such a case if the servant appropriates the money or goods to his own use the act is not larceny. This is the case of a bailiff, who is an accountable party and not a mere custodian of the money he handles.[64] So where a servant receives money to expend about the master's business and render an account, an appropriation of the money is not larceny.[65]

(II) *Goods Given to Servant by a Third Person.* On the other hand a servant has "possession" as distinguished from "custody" of goods received from a third person for his master until he delivers them to his master, or has put his master into possession by depositing them in a receptacle provided by the master for that purpose.[66]

(III) *Goods Placed in the Master's Receptacle.* When a servant, having received goods from a third person, places them in a receptacle provided by the master to receive them, the possession vests at once in the master; and if the servant afterward takes out and converts the goods he is guilty of larceny. Thus when the servant is sent with the master's cart to receive goods from a third person for the master, the cart is the receeptacle provided by the master for the purpose, and when the servant places the goods in the cart as directed the possession vests in the master; if the servant afterward feloniously takes the goods from

quite a quantity of the pipe. Trouble arising the farmer removed and secreted the pipe and was held guilty of larceny, the possession never having been taken out of the owners until such removal. Currier *v.* State, 157 Ind. 114, 60 N. E. 1023.

61. Crook *v.* State, 39 Tex. Cr. 252, 45 S. W. 720; Phillips *v.* State, (Tex. Cr. App. 1897) 42 S. W. 557; Wright *v.* State, 35 Tex. Cr. 470, 34 S. W. 273.

62. See Y. B. 21 Hen. VII, 14, pl. 21; Y. B. 2 Hen. IV, 18, pl. 6; Rex *v.* Watson, 2 East P. C. 680, 2 Leach C. C. 640, where the test seems to have been whether or not the servant was under the master's eye, rather than whether or not the servant received from the master, as it is now.

63. St. 21 Hen. VIII, c. 7.

64. Reg. *v.* Green, 2 C. L. R. 303, 6 Cox C. C. 296, Dears. C. C. 323, 18 Jur. 158, 2 Wkly. Rep. 264.

65. Reg. *v.* Thompson, 9 Cox C. C. 222, 8 Jur. N. S. 1162, L. & C. 233, 32 L. J. M. C. 57, 7 L. T. Rep. N. S. 393, 11 Wkly. Rep. 41; Reg. *v.* Goodenough, 6 Cox C. C. 206, Dears. C. C. 210, 1 Wkly. Rep. 417; Reg. *v.* Dartnell, 20 L. T. Rep. N. S. 1020.

66. Warmoth *v.* Com., 81 Ky. 133; Reg. *v.* Lyon, 1 F. & F. 54.

Instances.— If a servant appropriates to his own use bank-bills obtained by him at a bank on a check drawn by his master it is an embezzlement and not a larceny. Com. *v.* King, 9 Cush. (Mass.) 284; Rex *v.* Walsh, 2 Leach C. C. 1054, R. & R. 161, 4 Taunt. 258. And where a servant is sent to get a note changed and makes off with the change it is not larceny, for the change never came into the possession of the master. Rex *v.* Sullens, 1 Moody C. C. 129. So where money is paid to a servant for his master, even though he is not authorized to receive it, and he feloniously appropriates the money, it is not larceny, since he received possession. State *v.* Johnson, 49 Iowa 141; Rex *v.* Hawtin, 7 C. & P. 281, 32 E. C. L. 613. Where a teller at a bank receives a deposit and does not put it into the proper place in the bank but appropriates it to his own use, it is not larceny, for the deposit came into possession of the teller and never reached the possession of the bank. Rex *v.* Bazley, 2 East P. C. 571, 2 Leach C. C. 835; Rex *v.* Waite, 2 East P. C. 570, 1 Leach C. C. 28. So it has been held that where a servant who was employed to sell goods sold some and immediately appropriated the money, this was not larceny. Reg. *v.* Betts, Bell C. C. 90, 8 Cox C. C. 140, 5 Jur. N. S. 274, 28 L. J. M. C. 69, 7 Wkly. Rep. 239.

Decisions having opposite tendency.— In one or two cases the rule seems to have been carried to an unjustifiable extreme. Where the servant of a bank received a bundle of canceled checks from the bank messenger of the company and abstracted and destroyed one of them, it being his duty to keep them for his employers, it was held that when given into his custody they had reached their ultimate destination and were in the constructive possession of the owners, and the abstraction of one with fraudulent intent was held larceny. Reg. *v.* Watts, 4 Cox C. C. 336, 2 Den. C. C. 14, 14 Jur. 870, 19 L. J. M. C. 192, T. & M. 342. And similarly in a Minnesota case. Under a statute making the offense of stealing railroad passenger tickets larceny it was held that a conductor might be indicted for appropriating tickets sold and issued by the company and taken up by the conductor, such tickets, after being thus taken up, coming into the possession of the

the cart he is guilty of larceny.[67] In the same way when the master sends the servant with a boat to get the goods, the possession at once vests in the master when the goods are placed in the boat.[68] And if a clerk or other servant receives money for his master in the course of business and places it in his master's safe or cash drawer the possession vests in the master, and if the servant afterward feloniously appropriates the money he is guilty of larceny.[69] A limitation of the rule is recognized where the servant places the goods in the receptacle provided by the master not in the course of the master's business but for his own convenience as a handy hiding-place, not intending to relinquish them to his master but appropriating them at the time to his own purposes; under these circumstances the possession does not vest in the master, and the servant afterward taking the goods away does not commit larceny.[70]

(IV) *Goods Deposited on Master's Premises.* Where a servant received hay from a third person for his master and unloaded it at the door of his master's stable preparatory to putting it in the hay-loft, and afterward carried it away for himself this was larceny, for the hay was put into the master's possession by being unloaded in front of his stable.[71]

(V) *Goods Given to a Servant by a Fellow-Servant.* When a servant receives goods from a fellow-servant for the purposes of the master, he gets possession or mere custody according as the servant who gave him the goods had possession or mere custody. So where a third party gives a servant money for his master, and the servant hands it to another servant who misappropriates it, this is not larceny, for the money had not yet been reduced to the possession of the master.[72] On the other hand, if the first servant had the property from the master to guard, the second servant commits larceny.[73]

(VI) *Existence of the Relation.* Whether or not the relation of master and servant subsists is a question of fact in each particular case, to be decided by the jury in a doubtful case.[74] A servant in the employment of two persons, as

company. State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

67. Washington *v.* State, 106 Ala. 58, 17 So. 546; Reg. *v.* Reed, 2 C. L. R. 607, 6 Cox C. C. 284, Dears. C. C. 257, 18 Jur. 284, 23 L. J. M. C. 25, 2 Wkly. Rep. 190; Reg. *v.* Norval, 1 Cox C. C. 95; Rex *v.* Harding, R. & R. 93. See, however, Cody *v.* State, 31 Tex. Cr. 183, 20 S. W. 398.

68. Rex *v.* Ahrabat, 2 East P. C. 569, 2 Leach C. C. 824; Rex *v.* Spears, 2 East P. C. 568, 2 Leach C. C. 825. When a master sends out a fishing smack in charge of a skipper, who occupies the position of a servant, fish taken at sea are in the possession of the owner of the smack by which they are taken as soon as they are taken and put in the smack, the skipper in charge thereof having only custody of the fish thereafter. Hence his appropriation of them with fraudulent intent is larceny. Rex *v.* Mallison, 20 Cox C. C. 204, 66 J. P. 503, 86 L. T. Rep. N. S. 600.

69. Warmoth *v.* Com., 81 Ky. 133; Com. *v.* Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, 15 L. R. A. 317; Reg. *v.* Wright, 7 Cox C. C. 413, Dears. & B. 431, 4 Jur. N. S. 313, 27 L. J. M. C. 65, 6 Wkly. Rep. 255.

70. Thus the appropriation of money received from a customer by a clerk, who momentarily dropped it in the cash drawer but with intent to retain control over it, is embezzlement and not larceny, as the coin never came into the possession of the master. Com. *v.* Ryan, 155 Mass. 523, 30 N. E. 364, 31 Am. St. Rep. 560, 15 L. R. A. 317. So where a servant employed to sell goods sold part and received the money, a portion of which he concealed in his chamber in his master's house, and afterward, having been discharged, broke into the house and took the money so secreted, this was held no burglary, for the money had never been in the possession of the master. Rex *v.* Dingley, 1 Show. 53.

71. Reg. *v.* Hayward, 1 C. & K. 518, 47 E. C. L. 518.

72. Reg. *v.* Masters, 2 C. & K. 930, 3 Cox C. C. 178, 1 Den. C. C. 332, 12 Jur. 942, 18 L. J. M. C. 2, 3 New Sess. Cas. 326, T. & M. 1, 61 E. C. L. 930.

73. Bonner *v.* State, 125 Ala. 49, 27 So. 783. But in U. S. *v.* Holland, 26 Fed. Cas. No. 15,378, 2 N. Y. Leg. Obs. 55, the steward of a vessel to whom provisions had been given for cooking seems to have been regarded as in possession of the provisions.

74. Phillips *v.* State, (Tex. Cr. App. 1897) 42 S. W. 557; Reg. *v.* Warren, 10 Cox C. C. 359.

Who are not servants.— One employed to do piece-work at home is not a servant; he is a bailee of the material given to him to work on at home, and if he converts it to his own use he is not guilty of larceny. Reg. *v.* Saward, 5 Cox C. C. 295; Reg. *v.* Harris, 5 Cox C. C. 151. Where an employee appropriates to his own use money intrusted to him for safe-keeping by his employer, it not being part of his regular duty to take charge

partners, must be considered as the servant of each.[75] A person may be a servant, although employed only for a single transaction.[76] Where a workman is sent by his fellows to their employer to get their pay and after receiving it he appropriated it to his own use, he is not the servant of the employer in this transaction, but that of his fellows, and he cannot be convicted of larceny from his employer.[77] A servant may deal with property of his master in a way that is entirely outside the scope of his service; and in that case the ordinary rules as between master and servant do not apply.[78]

b. Taking by a Servant — (I) *Taking Constitutes Larceny.* A servant who has merely custody of his master's goods may by feloniously taking them for himself be guilty of larceny.[79]

(II) *What Constitutes a Taking* — (A) *In General.* Where goods of the master are in the servant's custody, any act of the servant which is inconsistent with the master's retaining the possession of them is sufficient to constitute a taking of possession by the servant; and if the other elements of the crime are present it will be an act of larceny.[80] Where, however, the servant, although

of his employer's money, this is not larceny. The money was delivered to him not as a servant but as a friend. State *v.* Fann, 65 N. C. 317. A person who is employed to get orders for goods and to receive payment for them, but who is at liberty to get the orders and receive the money where and when he thinks proper, being paid by a commission on the goods sold, is not a servant. Reg. *v.* Bowers, L. R. 1 C. C. 41, 10 Cox C. C. 250, 12 Jur. N. S. 550, 35 L. J. M. C. 206, 14 L. T. Rep. N. S. 671, 14 Wkly. Rep. 803. Nor is an officer of a benefit club, in whose name the money of the club is deposited in a bank, while carrying the money to the bank to deposit it. Reg. *v.* Marsh, 3 F. & F. 523.

Who are servants.—A hall-keeper appointed by the justices is the servant of the inhabitants. Reg. *v.* Winbow, 5 Cox C. C. 346. A person employed as a distraining broker, if engaged in the service of the prosecutor only, and paid a salary by him, is a servant. Reg. *v.* Flanagan, 10 Cox C. C. 561. A was a cashier and collector to commission agents. He was paid partly by salary and partly by percentage on the profits, but was not to contribute to the losses, and had no control over the management of the business. He was a servant. Reg. *v.* McDonald, 9 Cox C. C. 10, 7 Jur. N. S. 1127, L. & C. 85, 31 L. J. M. C. 67, 5 L. T. Rep. N. S. 330, 10 Wkly. Rep. 21.

75. Rex *v.* Leach, 3 Stark. 70, 3 E. C. L. 598.

76. Rex *v.* Hughes, 1 Moody C. C. 370. But the driver of a glass-coach hired for the day is not the servant of the party hiring it. Rex *v.* Haydon, 7 C. & P. 445, 32 E. C. L. 699.

77. Reg. *v.* Barnes, L. R. 1 C. C. 45, 10 Cox C. C. 255, 12 Jur. N. S. 549, 35 L. J. M. C. 204, 14 L. T. Rep. N. S. 601, 14 Wkly. Rep. 805.

78. Reg. *v.* Jones, C. & M. 611, 41 E. C. L. 32. Thus a letter-carrier was intrusted with money with which to purchase money orders; this was not part of his duty, and he had no intention of stealing the money at the time he received it, but afterward appropriated it. This was held not a larceny as the notes were not in his custody as a post-office servant but in his actual possession. Reg. *v.* Glass, 2 C. & K. 395, 2 Cox C. C. 236, 1 Den. C. C. 215, 61 E. C. L. 395.

79. *Alabama.*— Oxford *v.* State, 33 Ala. 416; Case *v.* State, 26 Ala. 17.

Arkansas.— Powell *v.* State, 34 Ark. 693.

Connecticut.— State *v.* Cummings, 33 Conn. 260, 89 Am. Dec. 208.

Kentucky.— Gill *v.* Bright, 6 T. B. Mon. 130.

North Carolina.— State *v.* Jarvis, 63 N. C. 556.

Vermont.— State *v.* White, 2 Tyler 352.

Wisconsin.— State *v.* Schingen, 20 Wis. 74.

England.— Reg. *v.* Roberts, 3 Cox C. C. 74.

See 32 Cent. Dig. tit. "Larceny," § 42.

But see Ennis *v.* State, 3 Greene (Iowa) 67.

Breaking bulk unnecessary.— Therefore a servant of a bailee may commit larceny without breaking bulk, since he has no possession before the taking. Com. *v.* Brown, 4 Mass. 580.

80. State *v.* Schingen, 20 Wis. 74 (offer of sale sufficient, without actual sale); Reg. *v.* Hall, 2 C. & K. 947, 3 Cox C. C. 245, 1 Den. C. C. 381, 13 Jur. 87, 18 L. J. M. C. 62, 3 New Sess. Cas. 407, T. & M. 47, 61 E. C. L. 947 (placing master's goods on a pair of scales and fraudulently telling master they have been brought by a third party and left to be paid for); Reg. *v.* Richards, 1 C. & K. 532, 47 E. C. L. 532 (where a servant was supplied with a quantity of pig-iron by his employers which he was to melt and he was paid by the amount melted, and he put into the furnace an iron axle belonging to his employers in order to increase the amount of melted iron, this was a taking possession and an act of larceny); Reg. *v.* Manning, 6 Cox C. C. 86, Dears. C. C. 21, 17 Jur. 28, 22 L. J. M. C. 217, 1 Wkly. Rep. 40 (removal of master's goods from one part of the premises to another, for the purpose of enabling another person to offer them to the master for sale as the goods of that third person); Reg. *v.* Gruncell, 9 C. & P. 365, 38 E. C. L. 218 (in this case a wagoner took some hay from his

dealing wrongfully with the goods of his master which are in his custody, nevertheless does nothing inconsistent with the continued possession of the master, the act does not constitute a taking of possession.[81]

(B) *Servant Intrusted With Money to Use.* Where a servant is intrusted with money to spend for his master, he is guilty of larceny if he feloniously converts all or a part of the money to his own use.[82]

(C) *Servant Receiving Specific Goods For Specific Purpose.* Where goods are given to a servant by his master for a specific purpose and feloniously uses them for himself, he is guilty of larceny.[83] And so generally where the servant is intrusted with property by his master and feloniously appropriates it to his own use.[84]

master's stable and put it on a wagon, and then set off on a journey; the hay was not allowed by the master to be used on the journey. It was held that larceny was committed as soon as it was removed from the stable *animo furandi*).

A servant clandestinely taking his master's oats with intent to give them to his master's horses, against his master's orders, has been held guilty of larceny, as he thereby took possession of his master's property. Reg. *v.* Privett, 2 C. & K. 114, 2 Cox C. C. 40, 1 Den. C. C. 193; Reg. *v.* Handley, C. & M. 547, 41 E. C. L. 298; Rex *v.* Morfit, R. & R. 228, 41 E. C. L. 298. See 26 & 27 Vict. c. 103, § 1, by which it was provided that this should not be larceny. And see further Reg. *v.* Smith, 1 Cox C. C. 10, prosecutor declined to offer evidence, because he thought to consider this a felony was revolting to common sense; this course was commended by Rolfe, B.

81. Thus where miners are paid by the amount of ore they bring to the surface and in order to increase their own heaps they take ore from heaps belonging to other miners, there is no larceny, for the ore is in the possession of the owners all the time. Rex *v.* Webb, 1 Moody C. C. 431. And in a similar case where servants of a tanner were paid according to the number of skins they dressed, and a servant broke into the master's store-house and removed dressed skins which he placed on his own pile in order to receive more money than he had earned, since the skins remained and were intended to remain in the master's possession there was no taking by the servant. Reg. *v.* Holloway, 2 C. & K. 942, 3 Cox C. C. 241, 1 Den. C. C. 370, 13 Jur. 86, 18 L. J. M. C. 60, 3 New Sess. Cas. 410, T. & M. 40, 61 E. C. L. 942.

82. Reg. *v.* Cooke, L. R. 1 C. C. 295, 12 Cox C. C. 10, 40 L. J. M. C. 68, 24 L. T. Rep. N. S. 108, 19 Wkly. Rep. 389; Reg. *v.* Bea-Goode, C. & M. 582, 41 E. C. L. 317 (servant given money to buy coals appropriates a balance unexpended to his own use); Reg. *v.* Goode, C. & M. 582, 41 E. C. L. 317 (servant in charge of barge given money to pay tonnage dues, and appropriating a balance to his own use); Reg. *v.* Low, 10 Cox C. C. 168, 13 L. T. Rep. N. S. 642, 14 Wkly. Rep. 286 (servant whose duty it was to pay his master's workmen falsely representing to the cashier the amount required and appropriated the surplus to his own use).

Employee of treasury or bank.— One who is intrusted by the treasurer of the United States mint with a specific sum of money to be paid out on an order drawn by the director and indorsed by the treasurer is guilty of larceny if he appropriates the money to his own use, he being but a servant, and the possession of the money remaining in the treasurer. Com. *v.* Hutchinson, 2 Pars. Eq. Cas. (Pa.) 384. So a cashier in a state treasurer's office by converting instead of depositing a draft committed to his care commits larceny from the state in whose constructive possession such draft is. Phelps *v.* People, 72 N. Y. 334 [*affirming* 49 How. Pr. 437]. Upon the same principle a teller feloniously abstracting money from a safe commits larceny. Com. *v.* Barry, 116 Mass. 1; Rex *v.* Hammon, 2 Leach C. C. 1083, R. & R. 165, 4 Taunt. 304, 13 Rev. Rep. 596.

83. Rex *v.* Lavender, 2 East P. C. 566 (appropriation of money given by his master to deliver to another); Rex *v.* Bass, 2 East P. C. 566, 698, 1 Leach C. C. 258 (sale of goods to be delivered to another and appropriation of proceeds); Reg. *v.* Heath, 2 Moody C. C. 33; Rex *v.* Metcalf, 1 Moody C. C. 433. And see Kirk *v.* Garrett, 84 Md. 383, 35 Atl. 1089, taking without the consent of his employer manufactured silver, and leaving in its place old silver, equal in weight but not in value.

84. Crocheron *v.* State, 86 Ala. 64, 5 So. 649, 11 Am. St. Rep. 18 (field-hand given mule to plow, and converting the mule); Cam. *v.* Brown, 4 Mass. 580 (servant of common carrier given package to deliver feloniously appropriates it); U. S. *v.* Strong, 27 Fed. Cas. No. 16,411, 2 Cranch C. C. 251 (workman in navy yard given copper bolts to use in work, and appropriated them); Reg. *v.* Samways, Dears. C. C. 371, 2 Wkly. Rep. 498 (servant employed to winnow barley sacked up the grain and carried it away); Rex *v.* Paradice, 2 East P. C. 565 (bookkeeper given letter to post took for himself); Rex *v.* Atkinson, 1 Leach C. C. 302 note (servant received gold to change into silver and ran away with it).

Where a clerk is given goods to exhibit or sell, and he appropriates them feloniously, he is guilty of larceny. Reg. *v.* Hawkins, 4 Cox C. C. 224, 1 Den. C. C. 584, 14 Jur. 513, T. & M. 328; Reg. *v.* Harvey, 9 C. & P. 353, 38 E. C. L. 211.

(D) *Servant Employed to Take Care of Goods.* Where a servant is employed to guard or otherwise take care of goods, and he appropriates some of the goods, he is guilty of larceny; having custody merely of the goods and not possession. Thus a clerk in a store is guilty of larceny if he feloniously appropriates goods from the store[85] or money.[86] So a brakeman on a train who feloniously takes goods under transportation commits larceny,[87] and an agent of an express company who takes fraudulently money lying in the company's safe waiting to be delivered is guilty of larceny.[88] So a hostler who feloniously appropriates a horse in his charge is guilty of larceny.[89] And the custodian of a building who takes goods feloniously from the building is guilty of larceny.[90] And where a letter carrier feloniously appropriates a letter given him to deliver he is guilty of larceny.[91]

4. Larceny by a Guest. Like a servant a guest has custody only, not possession, of his host's property handed to him for use by the host; and if he takes the property with intent to steal, he is guilty of larceny.[92]

5. Larceny by Wife or Husband — a. At Common Law. At common law the relation of husband and wife was considered so identical that neither could steal from the other, and the delivery of goods to a third party by the wife negatived any trespass and hence could not be larceny. The stealing by a woman of her husband's goods did not amount to a felony at common law.[93] On this ground another woman who acts with the wife in fraudulently taking his goods is not guilty of larceny.[94] Even while eloping with an adulterer the wife herself cannot steal her husband's goods.[95] Under the law of community between husband and wife which prevails in California and other western states the wife has no control over her husband's possession; and one who knowing the facts takes with her consent is nevertheless guilty of larceny.[96]

b. Under Married Women's Property Acts. Under statutes giving a married woman separate title to her own personal property, it is held in some jurisdictions that the common-law rule is unchanged; and therefore that a husband cannot

The driver of a coal cart by selling for his own benefit part of a load given him to deliver commits larceny of the coal. Reg. *v.* Hooper, 1 F. & F. 85.

85. Atterberry *v.* State, 56 Ark. 515, 20 S. W. 411; Reg. *v.* Hornby, 1 C. & K. 305, 47 E. C. L. 305.

86. Walker *v.* Com., 8 Leigh (Va.) 743; Rex *v.* Chipchase, 2 East P. C. 567, 2 Leach C. C. 699.

87 Brown *v.* People, 20 Colo. 161, 36 Pac. 1040; Manson *v.* State, 24 Ohio St. 590.

88. Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

89. People *v.* Belden, 37 Cal. 51; People *v.* Wood, 2 Park. Cr. (N. Y.) 22; State *v.* Self, 1 Bay (S. C.) 242.

90. People *v.* Perini, 94 Cal. 573, 29 Pac. 1027; Wall *v.* State, 75 Ga. 474; Roeder *v.* State, 39 Tex. Cr. 199, 45 S. W. 570.

The fact that a clerk has access to a safe where his employer keeps his money does not divest the owner of his possession thereof, and the appropriation of its contents by the clerk is larceny. Turner *v.* State, 124 Ala. 59, 27 So. 272.

91. Reg. *v.* Bickerslaff, 2 C. & K. 761, 61 E. C. L. 761; Reg. *v.* Rathbone, C. & M. 220, 2 Moody C. C. 242, 41 E. C. L. 124; Reg. *v.* Poynton, 9 Cox C. C. 249, 8 Jur. N. S. 1218, L. & C. 247, 32 L. J. M. C. 29, 7 L. T. Rep. N. S. 434, 11 Wkly. Rep. 73.

92. Anonymous, Lib. Assis. 137, pl. 39, Beale's Cas. 272. The most extreme case of this sort to be found is Richards *v.* Com., 13 Gratt. (Va.) 803; in that case a guest at an inn borrowed a gun of the innkeeper to take out and shoot birds; he made off with the gun and disposed of it. This was held larceny.

93. Lamphier *v.* State, 70 Ind. 317; Reg. *v.* Streeter, [1900] 2 Q. B. 601, 19 Cox C. C. 570, 64 J. P. 537, 69 L. J. Q. B. 915, 83 L. T. Rep. N. S. 288, 48 Wkly. Rep. 702; Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397, 46 L. J. M. C. 156, 36 L. T. Rep. N. S. 36, 25 Wkly. Rep. 679; Reg. *v.* Glassie, 7 Cox C. C. 1.

The taking by the wife of society funds in the possession of her husband is not larceny. Rex *v.* Willis, 1 Moody C. C. 375.

94. Lamphier *v.* State, 70 Ind. 317.

95. Reg. *v.* Glassie, 7 Cox C. C. 1.

If a person merely assists a married woman who has not committed or intended to commit adultery in carrying away the goods of her husband without the knowledge and consent of the latter, although with intent to deprive the latter of his property, he cannot be convicted of stealing the goods. Reg. *v.* Avery, Bell C. C. 150, 8 Cox C. C. 184, 5 Jur. N. S. 577, 28 L. J. M. C. 185, 7 Wkly. Rep. 431; Rex *v.* Harrison, 2 East P. C. 559, 1 Leach C. C. 47.

96. People *v.* Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96.

commit larceny of his wife's separate property.[97] But the opposite view is taken in other jurisdictions.[98]

6. Larceny by Wife's Paramour. Receipt from the wife of the husband's goods by an adulterer or one intending to elope with her and live in adultery with her is larceny from the husband.[99] But the prisoner must have taken some active part either in carrying away or disposing of the goods taken.[1] Selling of goods by him is sufficient.[2] The fact that defendant was in the husband's service and acted under the wife's directions affords no defense.[3] A wife's clothes are her husband's property, and it is as much larceny for the adulterer to take them as any other property belonging to the husband.[4] One who assists a wife to carry away her husband's property and is afterward found living in adultery with her, using the property in common, may be convicted of larceny.[5] Since a wife cannot steal her husband's goods, the adulterer cannot be indicted for receiving stolen goods when he receives from her goods taken from her husband.[6] If, however, he receives them from someone other than the wife, he may well be guilty of receiving stolen property.[7]

7. Larceny by Owner. The owner of goods who has the right to possession cannot commit larceny of them by taking them from a possessor, even if he takes it by fraud or force.[8] He may, however, be guilty of larceny by taking the goods from the possession of a bailee in two cases: If the owner takes his goods from a bailee clandestinely with intent to charge the bailee with the value, he is guilty of larceny.[9] And if the bailee has a lien on the property, or an interest in it which he has a right to protect by retaining possession, it is larceny for the owner to take it away with intent to steal.[10] So it is larceny for a pledgor of

97. State *v.* Parker, 3 Ohio Dec. (Reprint) 551; Golden *v.* State, 22 Tex. App. 1, 2 S. W. 531.

98. So where a husband by fraud or threats secured personal property of his wife he was held guilty of larceny. Hunt *v.* State, 72 Ark. 241, 79 S. W. 769, 105 Am. St. Rep. 34, 65 L. R. A. 71; Beasley *v.* State, 138 Ind. 552, 38 N. E. 35, 46 Am. St. Rep. 418; Reg. *v.* Streeter, [1900] 2 Q. B. 601, 19 Cox C. C. 570, 64 J. P. 537, 69 L. J. Q. B. 915, 83 L. T. Rep. N. S. 288, 48 Wkly. Rep. 570.

99. People *v.* Schuyler, 6 Cow. (N. Y.) 572; Reg. *v.* Berry, Bell C. C. 95, 8 Cox C. C. 117, 5 Jur. N. S. 228, 28 L. J. M. C. 70; Reg. *v.* Tollett, C. & M. 112, 41 E. C. L. 67; Reg. *v.* Featherstone, 2 C. L. R. 774, 6 Cox C. C. 376, Dears. C. C. 369, 18 Jur. 538, 23 L. J. M. C. 127, 2 Wkly. Rep. 496; Reg. *v.* Flatman, 14 Cox C. C. 396, 44 J. P. 314, 42 L. T. Rep. N. S. 159; Reg. *v.* Thompson, 4 Cox C. C. 191, 1 Den. C. C. 549, 14 Jur. 488, T. & M. 294; Rex *v.* Tolfree, 1 Moody C. C. 243.

1. Reg. *v.* Taylor, 12 Cox C. C. 627.

Finding goods in adulterer's possession insufficient.— An adulterer cannot be convicted of stealing the goods of the husband brought by the wife alone to his lodgings, and placed by her in the room in which the adultery was afterward committed, merely upon evidence of their being found there; but it would be otherwise if the goods could be traced in any way to his personal possession. Reg. *v.* Rosenberg, 1 C. & K. 233, 1 Cox C. C. 21, 47 E. C. L. 233.

2. Reg. *v.* Harrison, 12 Cox C. C. 19.

3. Reg. *v.* Mutters, 10 Cox C. C. 50, 11 Jur. N. S. 144, L. & C. 511, 34 L. J. M. C. 54, 11 L. T. Rep. N. S. 642, 13 Wkly. Rep. 326.

4. Reg. *v.* Tollett, C. & M. 112, 41 E. C. L. 67. But see *contra*, Reg. *v.* Fitch, 7 Cox C. C. 269, Dears. & B. 87, 3 Jur. N. S. 524, 26 L. J. M. C. 169, 5 Wkly. Rep. 527.

Where a wife gave to one who was on terms of criminal intimacy with her personal ornaments bought on her husband's credit and never given to her as her own, he was guilty of larceny. People *v.* Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96.

5. Reg. *v.* Berry, Bell C. C. 95, 8 Cox C. C. 117, 5 Jur. N. S. 228, 28 L. J. M. C. 70, 7 Wkly. Rep. 240; Reg. *v.* Thompson, 4 Cox C. C. 191, 1 Den. C. C. 549, 14 Jur. 488, T. & M. 294.

6. Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397, 46 L. J. M. C. 156, 36 L. T. Rep. N. S. 36, 25 Wkly. Rep. 679.

7. Reg. *v.* Deer, 9 Cox C. C. 225, 8 Jur. N. S. 1216, L. & C. 240, 32 L. J. M. C. 33, 7 L. T. Rep. N. S. 366, 11 Wkly. Rep. 43.

8. State *v.* Dewitt, 32 Mo. 571; Adams *v.* State, 45 N. J. L. 448; Barnes *v.* State, 9 Tex. App. 128; Reg. *v.* Wadsworth, 10 Cox C. C. 557.

A part owner of property is not guilty of larceny in taking it from a mere possessor. Fairy *v.* State, 18 Tex. App. 314.

9. People *v.* Thompson, 34 Cal. 671; People *v.* Stone, 16 Cal. 369; State *v.* Fitzpatrick, 9 Houst. (Del.) 385, 32 Atl. 1072; Palmer *v.* People, 10 Wend. (N. Y.) 165, 25 Am. Dec. 551; 2 East P. C. 558; Y. B. 7 Hen. VI, 43. But see, under the Texas code, Taylor *v.* State, 7 Tex. App. 659.

10. *Michigan.*— People *v.* Long, 50 Mich. 249, 15 N. W. 105.

goods to take them from the pledgee,[11] or for the owner to take them from one who is rightfully holding them on a lien[12] with intent to deprive the possessor of his interest. If the *animus furandi* is lacking there is of course no larceny under these circumstances.[13] The fact that the taker has a claim on the goods will not make it any the less larceny if he takes them from the possession of the owner with intention to deprive him of his interest. Thus where a "cropper," paid by a share of the crop, takes the whole crop from the owner's possession with felonious intent he is guilty of larceny.[14]

C. Acquisition of Title — 1. In Absence of Special Statutory Provisions — a. Statement of Rule. If the owner or the possessor who has actual or apparent authority to deal with the title of goods intends to pass the title and not merely the possession of the goods to a person whose intent in taking them is felonious, the act of taking is not larceny.[15] It is not necessary that the intention should be to pass title to the person who obtains the property. If that person pretends to be a servant or agent and to be obtaining it for a master or principal and the giver intends the title to pass to the latter the transaction does not constitute larceny.[16] But in order to prevent larceny the title must be intended to pass

Missouri.— State *v.* Dewitt, 32 Mo. 571.

New Jersey.— Adams *v.* State, 45 N. J. L. 448.

New York.— Palmer *v.* People, 10 Wend. 165, 25 Am. Dec. 551.

Pennsylvania.— Com. *v.* Shertzer, 3 Lack. Leg. N. 8.

See 32 Cent. Dig. tit. "Larceny," § 20½.

Contra.— Clarke *v.* State, 41 Nebr. 370, 59 N. W. 785.

Where a sheriff levies on the goods, and the owner takes them away animo furandi, he is guilty of larceny. Whiteside *v.* Lowney, 171 Mass. 431, 50 N. E. 931; Com. *v.* Greene, 111 Mass. 392.

Where imported goods were in possession of a bailee who had given his bond for their reëxportation, and was therefore responsible for their disposition and entitled to hold the possession for his own security, the owner taking the goods with intent to steal, was held guilty of larceny. Rex *v.* Wilkinson, R. & R. 349.

Where a member of a benefit society took money belonging to the society from the custodian, who was responsible for it, with intent to steal it, he was held guilty of larceny, although he was a part owner of the money. Reg. *v.* Cain, C. & M. 309, 2 Moody C. C. 204, 41 E. C. L. 172; Reg. *v.* Webster, 9 Cox C. C. 13, 7 Jur. N. S. 1208, L. & C. 77, 31 L. J. M. C. 17, 5 L. T. Rep. N. S. 327, 10 Wkly. Rep. 20; Rex *v.* Bramley, R. & R. 355.

11. People *v.* Stone, 16 Cal. 369; Henry *v.* State, 110 Ga. 750, 36 S. E. 55, 78 Am. St. Rep. 137; Bruley *v.* Rose, 57 Iowa 651, 11 N. W. 629; State *v.* Braden, 2 Overt. (Tenn.) 68.

12. Tumalty *v.* Parker, 100 Ill. App. 382; People *v.* Long, 50 Mich. 249, 15 N. W. 105; Com. *v.* Dingman, 26 Pa. Super. Ct. 615; State *v.* Stephens, 32 Tex. 155. In Com. *v.* Tobin, 2 Brewst. (Pa.) 570, which seems to lay down a contrary view, the indictment was faulty in naming the bailor as owner.

13. Com. *v.* Greene, 111 Mass. 392.

14. State *v.* Webb, 87 N. C. 558; State *v.* Jones, 19 N. C. 544; State *v.* Gay, 1 Hill (S. C.) 364; Connell *v.* State, 2 Tex. App. 422. A party having some claim to grain raised on a farm, after surrendering the same to a receiver thereof, may be guilty of larceny in taking it and carrying it away. State *v.* Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

15. *Arkansas.*— Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

Connecticut.— State *v.* Kallaher, 70 Conn. 398, 39 Atl. 606, 66 Am. St. Rep. 107.

Georgia.— Pease *v.* State, 94 Ga. 615, 21 S. E. 588.

Illinois.—Welsh *v.* People, 17 Ill. 339.

Indiana.— Perkins *v.* State, 65 Ind. 317; Williams *v.* State, 49 Ind. 367.

Kentucky.— Elliott *v.* Com., 12 Bush 176.

Louisiana.— State *v.* Will, 49 La. Ann. 1337, 22 So. 378.

Missouri.— State *v.* Copeman, 186 Mo. 108, 84 S. W. 942.

New York.— Thorne *v.* Turck, 94 N. Y. 90, 46 Am. Rep. 126; Smith *v.* People, 53 N. Y. 111, 13 Am. Rep. 474; Ross *v.* People, 5 Hill 294.

Texas.— Pitts *v.* State, 5 Tex. App. 122.

England.— Reg. *v.* Hollis, 12 Q. B. D. 25, 15 Cox C. C. 345, 48 J. P. 120, 53 L. J. M. C. 38, 49 L. T. Rep. N. S. 572, 32 Wkly. Rep. 372; Reg. *v.* McKale, L. R. 1 C. C. 125, 11 Cox C. C. 32, 37 L. J. M. C. 97, 18 L. T. Rep. N. S. 335, 16 Wkly. Rep. 800; Reg. *v.* Twist, 12 Cox C. C. 509, 29 L. T. Rep. N. S. 546; Reg. *v.* Essex, 7 Cox C. C. 384, Dears. & B. 371, 4 Jur. N. S. 16, 27 L. J. M. C. 20, 6 Wkly. Rep. 82; Reg. *v.* Williams, 7 Cox C. C. 355; Reg. *v.* Goodenough, 6 Cox C. C. 206, Dears. C. C. 210, 1 Wkly. Rep. 417; Reg. *v.* Barnes, 2 Den. C. C. 59; Reg. *v.* Adams, 1 Den. C. C. 38.

16. It will be noticed in such a case that the title does not pass at all, since the person to whom it was intended to pass it is not really concerned in the transaction; the fact that the owner intends to deal with the title

at the time of the transaction; if possession alone is then passed, with permission that the taker should later assume title to the property, or part of it, the taking, if fraudulent and with intent to steal, is larceny.[17] And if upon a sale it is agreed that the title shall not pass until full payment is made the fraudulent purchaser is guilty of larceny.[18]

b. Extent and Limits of Rule. Where one has deposited a stake on a bet, and being fraudulently led to believe that he has lost the bet allows it to be paid over to his opponent, there is no larceny because he intends to pass the title.[19] And the same is the case where a sale of a chattel is intended, although induced by fraud, since the seller intends to pass the title the buyer is not guilty of larceny.[20] So where a loan of money is obtained by fraud, since the title is intended to pass in case of a loan of money the borrower is not guilty of larceny.[21] Other applications of the rule are set out in the notes.[22] On the other hand since a mere bailee in giving up the goods does not affect the title to them, one who obtains possession from a bailee by fraud may be guilty of larceny.[23]

is of itself enough to prevent the crime from being larceny. Reg. *v.* Thompson, 9 Cox C. C. 222, 8 Jur. N. S. 1162, L. & C. 233, 32 L. J. M. C. 57, 7 L. T. Rep. N. S. 393; Reg. *v.* Adams, 1 Den. C. C. 38; Rex *v.* Atkinson, 2 East P. C. 673; Rex *v.* Coleman, 2 East P. C. 672, 1 Leach C. C. 303 note; Rex *v.* Adams, R. & R. 168. See, however, Reg. *v.* Copeland, 5 Cox C. C. 299.

17. Thus where an agent was given money to take out ten dollars for himself and hand the remainder to a third person, and he took the whole, such having been his intention from the beginning, he was guilty of larceny by trick of the whole amount since he was not given title even to ten dollars, and must select his ten dollars from the mass before it would belong to him. Com. *v.* Lannan, 153 Mass. 287, 26 N. E. 858, 25 Am. St. Rep. 629, 11 L. R. A. 450. So where several articles were handed to a pretended servant to take to his master, that his master might select one and return the rest, title was not intended to pass to any article until the selection was made; and the pretended servant having obtained them with intent to steal was guilty of larceny of all the articles. Rex *v.* Davenport, 2 Russell Cr. 146.

18. People *v.* Raschke, 73 Cal. 378, 15 Pac. 13. See, however, Grunson *v.* State, 89 Ind. 533, 46 Am. Rep. 178.

19. Johnson *v.* State, (Ark. 1905) 88 S. W. 905; Hindman *v.* State, 72 Ark. 516, 81 S. W. 836; Williams *v.* State, 34 Tex. 558; Rex *v.* Nicholson, 2 East P. C. 669, 2 Leach C. C. 610.

20. Foster *v.* State, 117 Ga. 39, 43 S. E. 421; Zink *v.* People, 77 N. Y. 114, 33 Am. Rep. 589, 6 Abb. N. Cas. 413; Frank *v.* State, 30 Tex. App. 381, 17 S. W. 936; Reg. *v.* North, 8 Cox C. C. 433; Rex *v.* Parkes, 2 East P. C. 671, 2 Leach C. C. 614; Rex *v.* Harvey, 2 East P. C. 669, 1 Leach C. C. 467, 3 Rev. Rep. 714.

21. Kelly *v.* People, 6 Hun (N. Y.) 509; Kellogg *v.* State, 26 Ohio St. 15; Collins *v.* State, 15 Lea (Tenn.) 68; Rex *v.* Atkinson, 2 East P. C. 673; Rex *v.* Coleman, 2 East P. C. 672, 1 Leach C. C. 303 note.

22. Prosecuting witness drew a draft in favor of defendant in payment for medical services said by defendant to have been performed for prosecuting witness. This was held no larceny, although defendant's statement was false and fraudulent. Steward *v.* People, 173 Ill. 464, 50 N. E. 1056, 64 Am. St. Rep. 133. A pawnbroker was induced by fraud to deliver pledged goods to the owner; this was not larceny, since he meant to release his legal interest in the goods, not merely the possession. Rex *v.* Meilheim, Carrington Cr. L. 281; Rex *v.* Jackson, 1 Moody C. C. 119. The wife of a bank depositor obtained his money from the bank on a forged order, and some of the money was disposed of by the prisoner, her paramour. It was no larceny, since the bank-teller had absolute authority to deal with title. Reg. *v.* Prince, L. R. 1 C. C. 150, 11 Cox C. C. 193, 38 L. J. M. C. 8, 19 L. T. Rep. N. S. 364, 17 Wkly. Rep. 179. The prosecutor paid money for a purse into which the prisoner had pretended to drop a number of coins. On getting the purse he found no coins had been dropped into it. It was held no larceny. Reg. *v.* Solomons, 17 Cox C. C. 93, 62 L. T. Rep. N. S. 672. The prisoner by false records showed that a balance of £2 was due him from his master, which sum was paid. It was held no larceny. Reg. *v.* Green, 2 C. L. R. 303, 6 Cox C. C. 296, Dears. C. C. 323, 18 Jur. 158, 2 Wkly. Rep. 264. It was defendant's duty to ascertain the dock dues on prosecutor's goods and get the requisite amount from the prosecutor's clerk and pay the same. He misrepresented the amount of the dock dues and appropriated the difference between the actual dues and what he had represented. It was held no larceny. Reg. *v.* Thompson, 9 Cox C. C. 222, 8 Jur. N. S. 1162, L. & C. 233, 32 L. J. M. C. 57, 7 L. T. Rep. N. S. 393, 11 Wkly. Rep. 41. The prisoner dropped a ring and pretended to find it in the presence of his victim, stated the right of his victim to half the reward, and sold to the victim his own share of the reward for a sum of money. This was not larceny of the money. Reg. *v.* Wilson, 8 C. & P. 111, 34 E. C. L. 638.

23. Hughen *v.* State, (Ark. 1889) 11 S. W. 693; Com. *v.* Collins, 12 Allen (Mass.) 181; Reg. *v.* Little, 10 Cox C. C. 559.

2. Under Statutes Making Obtaining Property by False Pretenses Larceny. It is very common by statute to make the crime of obtaining goods by false pretenses larceny; and in that case of course larceny is committed, although the title passes.[24]

D. From Whom the Goods May Be Taken — 1. Taking Must Be From a Possessor. Since the thief is required to take possession, it follows that if larceny is committed the thief must take from some person who was previously in possession. All personal chattels which are not abandoned are supposed by the law to be in the possession of some person, and if such possession is not actual, a possessor must be found by construction of law. One having once taken possession of a chattel remains in possession, although it is out of his actual custody, until someone else takes possession.[25] Cattle running at large are in the possession of the owner.[26] So is an estray.[27] And if the estray joins a flock of animals belonging to another without his knowledge, the possession continues in the owner of the estray.[28] A shipper for whom a grain-car has been brought to a station, but who has not yet been notified of its arrival, has no possession of the car; and one who takes the car does not take from him or deprive him of it.[29] The fact that the possessor of a chattel has no right to it does not make it any the less a subject of larceny.[30] Since a servant has no possession, one who illegally or fraudulently induces a servant to give him the master's goods is guilty of larceny from the master.[31]

2. Larceny of Lost Goods — a. Possession of Lost Goods. The law places the possession of lost chattels in the loser until they are taken into the actual possession of a finder.[32] If property is left behind by its owner in a shop, or other place to which the owner is likely to return to find it, it is often said to be not lost but mislaid, and therefore to be in the owner's possession; but no difference between mislaid property and property actually lost seems to exist in this respect.[33]

24. *Minnesota.*— State *v.* Hulder, 78 Minn. 524, 81 N. W. 532; State *v.* Southall, 77 Minn. 296, 79 N. W. 1007.

New York.— People *v.* Rice, 128 N. Y. 649, 29 N. E. 146.

Oklahoma.— Martin *v.* Territory, 4 Okla. 105, 43 Pac. 1067.

Virginia.— Fay *v.* Com., 28 Gratt. 912.

Washington.— State *v.* White, 12 Wash. 417, 41 Pac. 182; State *v.* Smith, 9 Wash. 248, 37 Pac. 290.

West Virginia.— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429; State *v.* Halida, 28 W. Va. 499.

25. Webb *v.* State, (Tex. Cr. App. 1898) 44 S. W. 498. But it has been held that where stolen hogs, which were put in a pen, entirely escape from the control of their captors, a second taking constitutes a fresh larceny. Trimble *v.* State, 33 Tex. Cr. 397, 26 S. W. 727.

Taking skins from an Indian camp, in the absence of the Indians, is larceny, for they were in the possession of the Indians, although absent. Pennsylvania *v.* Becomo, Add. (Pa.) 386.

26. State *v.* White, 126 Mo. 591, 29 S. W. 591; Bennett *v.* State, 32 Tex. Cr. 216, 22 S. W. 684; McGrew *v.* State, 31 Tex. Cr. 336, 20 S. W. 740; Huffman *v.* State, 28 Tex. App. 174, 12 S. W. 588; Jones *v.* State, 3 Tex. App. 498; U. S. *v.* Smiley, 27 Fed. Cas. No. 16,317, 6 Sawy. 640.

27. Lamb *v.* State, 40 Nebr. 312, 58 N. W. 963.

Cattle which have wandered from the owner's pasture into an adjoining pasture are in the owner's possession. Taylor *v.* State, (Tex. Cr. App. 1903) 75 S. W. 35.

28. Palmer *v.* State, (Nebr. 1903) 97 N. W. 235; Reg. *v.* Riley, 6 Cox C. C. 88, Dears. C. C. 149, 17 Jur. 189, 22 L. J. M. C. 48; Reg. *v.* Finlayson, 3 N. S. Wales 301.

29. Rex *v.* McElroy, 11 Can. Cr. Cas. 34.

30. Thus one who steals from a thief is guilty of larceny. Ward *v.* People, 3 Hill (N. Y.) 395.

31. Com. *v.* White, 5 Gray (Mass.) 83, 66 Am. Dec. 350; People *v.* Griswold, 64 Mich. 722, 31 N. W. 809; Reg. *v.* Hollis, 12 Q. B. D. 25, 15 Cox C. C. 345, 48 J. P. 120, 53 L. J. M. C. 38, 49 L. T. Rep. N. S. 372, 32 Wkly. Rep. 372; Reg. *v.* Webb, 5 Cox C. C. 154; Rex *v.* Wilkins, 2 East P. C. 673, 1 Leach C. C. 520; Rex *v.* Clark, 5 Can. Cr. Cas. 235, 3 Ont. L. Rep. 176.

32. Coon *v.* State, 13 Sm. & M. (Miss.) 246, of a slave which absconded from his owner.

33. *Massachusetts.*— McAvoy *v.* Medina, 11 Allen 548, 87 Am. Dec. 733.

Missouri.— State *v.* McCann, 19 Mo. 249.

New York.— People *v.* McGarren, 17 Wend. 460; Loucks *v.* Gallogly, 1 Misc. 22, 23 N. Y. Suppl. 126.

Tennessee.— Pyland *v.* State, 4 Sneed 357; Pritchett *v.* State, 2 Sneed 285, 62 Am. Dec. 468; Lawrence *v.* State, 1 Humphr. 228, 34 Am. Dec. 644.

Wisconsin.— Clifton *v.* State, 52 Wis. 533, 9 N. W. 389.

England.— Reg. *v.* West, 3 C. L. R. 86, 6 Cox C. C. 415, Dears. C. C. 402, 18 Jur. 1030, 24 L. J. M. C. 4, 3 Wkly. Rep. 21; Reg. *v.*

Where property is placed in a receptacle, like a desk or box, and the receptacle is taken by one who is ignorant of the fact that the property is contained in it, the possession of the property does not pass with that of the receptacle, but remains in the person who placed it there.[34] Where the owner abandons property, that is, leaves it for any one who chooses to take it, he ceases to be in possession; and a taker is not infringing the possession of any one, and therefore does not commit larceny.[35] Animals running at large are in the possession of their owner, and so is an estray.[36]

b. Goods Found Without Clue to Ownership. If goods are found under such circumstances that there is absolutely no clue to the ownership, that is, no reasonable expectation that the owner will find the goods, the finder has a legal right to take the goods for his own use.[37] If therefore a finder of goods who has no clue to the ownership takes the goods for himself and converts them to his own use he is not guilty of larceny.[38]

Moore, 8 Cox C. C. 416, 7 Jur. N. S. 172, L. & C. 1, 30 L. J. M. C. 77, 3 L. T. Rep. N. S. 710, 9 Wkly. Rep. 276; Reg. *v.* Pierce, 6 Cox C. C. 117.

See 32 Cent. Dig. tit "Larceny," § 21.

34. Cartwright *v.* Green, 2 Leach C. C. 952, 8 Ves. Jr. 405, 7 Rev. Rep. 91, 32 Eng. Reprint 412; Merry *v.* Green, 10 L. J. M. C. 154, 7 M. & W. 623 (where a bureau is sold, and money is afterward discovered in a secret drawer and taken by the finder, he takes it from the possession of the person who placed it there); Robinson *v.* State, 11 Tex. App. 403, 40 Am. Rep. 790 (where a suit of clothes was sold in a shop and laid aside in an empty trunk, and the trunk was afterward sold and delivered to a purchaser, the latter did not thereby acquire possession of the clothes).

35. Reg. *v.* Peters, 1 C. & K. 245, 47 E. C. L. 245. Therefore one who takes a chattel apparently abandoned is not guilty of larceny since he has no intent to steal. Johnson *v.* State, 36 Tex. 375.

What is not abandoned property.— Property left beside the highway for several years by the owner is not necessarily abandoned (Sikes *v.* State, (Tex. Cr. App. 1894) 28 S. W. 688); nor is a coffin, in which are the remains of a human being (State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785); a winding sheet buried around a dead body (Haynes' Case, 12 Coke 113); nor pigs killed by the owner because bitten by a mad dog, and buried (Reg. *v.* Edwards, 13 Cox C. C. 384, 36 L. T. Rep. N. S. 30).

36. See *supra*, III, D, 1.

37. *Indiana.*— Bowen *v.* Sullivan, 62 Ind. 281, 30 Am. Rep. 172.

Iowa.— State *v.* Dean, 49 Iowa 73, 31 Am. Rep. 143.

Minnesota.— State *v.* Hoshaw, 89 Minn. 307, 94 N. W. 873.

Missouri.— Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

New Jersey.— Keron *v.* Cashman, (Ch. 1896) 33 Atl. 1055.

New York.— People *v.* Seaton, 15 N. Y. Suppl. 270.

Oregon.— Danielson *v.* Roberts, 44 Oreg. 108, 74 Pac. 913, 102 Am. St. Rep. 627.

Virginia.— Hunt *v.* Com., 13 Gratt. 757, 70 Am. Dec. 443.

England.— Reg. *v.* Thurborn, 2 C. & K. 831, 1 Den. C. C. 387, 13 Jur. 499, 18 L. J. M. C. 140, T. & M. 67, 61 E. C. L. 831; Reg. *v.* Mole, 1 C. & K. 417, 4 E. C. L. 417; Reg. *v.* Deaves, Ir. R. 3 C. L. 306, 11 Cox C. C. 227; Reg. *v.* Wood, 3 Cox C. C. 453, 3 New Sess. Cas. 581.

See 32 Cent. Dig. tit. "Larceny," § 45.

38. *Connecticut.*— State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46.

Delaware.— Kennedy *v.* Woodrow, 6 Houst. 46.

Illinois.— Lane *v.* People, 10 Ill. 305; Tyler *v.* People, 1 Ill. 293, 12 Am. Dec. 176.

Indiana.— Wolfington *v.* State, 53 Ind. 343; Bailey *v.* State, 52 Ind. 462, 21 Am. Rep. 182.

Iowa.— State *v.* Taylor, 25 Iowa 273.

Missouri.— State *v.* Conway, 18 Mo. 321.

New York.— People *v.* Cogdell, 1 Hill 94, 37 Am. Dec. 297; People *v.* Swan, 1 Park. Cr. 9.

Ohio.— Baker *v.* State, 29 Ohio St. 184, 23 Am. Rep. 731.

Texas.— Johnson *v.* State, 36 Tex. 375.

Virginia.— Tanner *v.* Com., 14 Gratt. 635.

England.— Reg. *v.* Glyde, L. R. 1 C. C. 139, 11 Cox C. C. 103, 37 L. J. M. C. 107, 18 L. T. Rep. N. S. 613, 16 Wkly. Rep. 1174; Reg. *v.* Christopher, Bell C. C. 27, 8 Cox C. C. 91, 5 Jur. N. S. 24, 28 L. J. M. C. 35, 32 L. T. Rep. N. S. 150, 7 Wkly. Rep. 60; Reg. *v.* Deaves, 11 Cox C. C. 227, Ir. R. 3 C. L. 306; Reg. *v.* Shea, 7 Cox C. C. 147; Reg. *v.* Dixon, 7 Cox C. C. 35, Dears. C. C. 580, 25 L. J. M. C. 39; Reg. *v.* Scully, 1 Cox C. C. 189.

See 32 Cent. Dig. tit. "Larceny," § 45.

Under special statutory provisions.— In Iowa the finding and conversion of property without the knowledge of the owner is not larceny. State *v.* Taylor, 25 Iowa 273. Under the Texas code, making it larceny for a finder of property "of which he knows the owner" to appropriate it, one who finds a cuff button without a clue to the owner and afterward, having learned the owner, refused to give it up to him, is not guilty. Mayes *v.* State, (Tenn. 1887) 4 S. W. 659. In Ver-

c. Goods Found With Clue to Ownership — (I) *Effect of Clue.* If there is any clue to the ownership of lost property the finder who takes for himself is guilty of larceny.[39]

(II) *What Amounts to Clue.* A clue to the ownership is any circumstance which will lead the finder to believe that the owner can find his goods again. This may consist of: (1) Some mark on the article itself which would tend to identify the owner. Thus where papers or the owner's card are found in a pocket-book, it affords a clue to the owner.[40] So of a name on a watch.[41] But natural marks on animals, although serving to identify them, do not indicate the ownership, so as to constitute a clue.[42] (2) The place in which the property is found. If the property is found in such a place that it might be inferred that the owner, discovering his loss, would return to look for it, this circumstance of itself constitutes a clue to the ownership. This is the case where money or other property is found in a shop, whether by the shop-keeper himself or by a customer.[43] So where it is found in a vehicle, like a coach,[44] a railway carriage,[45] or a cart;[46] in a dwelling-house;[47] or in a theater.[48] The same is true where a bale or sack is found in a highway, having evidently dropped from a passing vehicle,[49] or on a railroad track, having dropped from a train.[50] So where money is found hidden in the ground within a farm building.[51] Where one accidentally left his purse on an old saddle in a barn, there was held to be a clue to the ownership;[52] and so where he placed a box containing musical instruments near the door of his shop.[53] (3) The nature of the property itself. There may be something in the nature of the property itself, as its unusually great value, or some peculiarity about it, which will indicate to the finder that the owner can probably be found. Thus domestic animals found straying are almost always regarded as possessing a clue to the ownership,[54] and the same thing was true of runaway slaves.[55]

mont the finder of lost goods must advertise them; otherwise, if he converts them, he is guilty of larceny. State *v.* Jenkins, 2 Tyler (Vt.) 377.

39. *Iowa.*— State *v.* Bolander, 71 Iowa 706, 29 N. W. 602.

Massachusetts.— Com. *v.* Titus, 116 Mass. 42, 17 Am. Rep. 138.

Minnesota.— State *v.* Boyd, 36 Minn. 538, 32 N. W. 780.

Nevada.— State *v.* Clifford, 14 Nev. 72, 33 Am. Rep. 526.

Ohio.— Brooks *v.* State, 35 Ohio St. 46.

South Carolina.— State *v.* Ferguson, 2 McMull. 502.

Texas.— Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753.

United States.— U. S. *v.* Pearl, 27 Fed. Cas. No. 16,022, 5 Cranch C. C. 392.

England.— Reg. *v.* Moore, 8 Cox C. C. 416, 7 Jur. N. S. 172, L. & C. 1, 30 L. J. M. C. 77, 3 L. T. Rep. N. S. 710, 9 Wkly. Rep. 276; Rex *v.* Pope, 6 C. & P. 346, 25 E. C. L. 466.

See 32 Cent. Dig. tit. "Larceny," § 45.

40. Allen *v.* State, 91 Ala. 19, 8 So. 665, 24 Am. St. Rep. 856; State *v.* Hayes, 98 Iowa 619, 67 N. W. 673, 60 Am. St. Rep. 219, 37 L. R. A. 116; Randal *v.* State, 4 Sm. & M. (Miss.) 349; Rhodes *v.* State, 11 Tex. App. 563.

41. Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753.

42. State *v.* Swayze, 11 Oreg. 357, 3 Pac. 574.

43. *Delaware.*— State *v.* Stevens, 2 Pennew. 486, 49 Atl. 174.

Missouri.— State *v.* McCann, 19 Mo. 249.

New York.— People *v.* McGarren, 17 Wend. 460.

Tennessee.— Lawrence *v.* State, 1 Humphr. 228, 34 Am. Dec. 644.

England.— Reg. *v.* West, 3 C. L. R. 86, 6 Cox C. C. 415, Dears. C. C. 402, 18 Jur. 1030, 24 L. J. M. C. 4, 3 Wkly. Rep. 21; Reg. *v.* Moore, 8 Cox C. C. 416, 7 Jur. N. S. 172, L. & C. 1, 30 L. J. M. C. 77, 3 L. T. Rep. N. S. 710, 9 Wkly Rep. 276.

See 32 Cent. Dig. tit. "Larceny," § 45.

44. Rex *v.* Wynne, 2 East P. C. 664, 697, 1 Leach C. C. 413; Rex *v.* Sears, 1 Leach C. C. 415 note.

45. Reg. *v.* Pierce, 6 Cox C. C. 117.

46. State *v.* Farrow, 61 N. C. 161, 93 Am. Dec. 585.

47. Roberts *v.* State, 83 Ga. 369, 9 S. E. 675; Reg. *v.* Kerr, 8 C. & P. 176, 34 E. C. L. 675.

48. Reg. *v.* Coffin, 2 Cox C. C. 44.

49. Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762.

50. Rountree *v.* State, 58 Ala. 381.

51. Sovern *v.* Yoran, 16 Oreg. 269, 20 Pac. 100, 8 Am. St. Rep. 293.

52. Pyland *v.* State, 4 Sneed (Tenn.) 357.

53. Clifton *v.* State, 52 Wis. 533, 9 N. W. 389.

54. State *v.* Martin, 28 Mo. 530; Lamb *v.* State, 40 Nebr. 312, 58 N. W. 963; People *v.* Kaatz, 3 Park. Cr. (N. Y.) 129.

55. Murray *v.* State, 18 Ala. 727; State *v.* Davis, 4 N. C. 271; State *v.* Miles, 2 Nott & M. (S. C.) 1. *Contra*, Com. *v.* Hays, 1 Va. Cas. 122.

(III) *Belief of Finder as to Clue to Ownership.* The question whether a clue to the ownership exists does not depend upon the actual facts, but upon the reasonable belief of the finder at the time of finding.[56] If the finder, discovering the clue, takes the article in good faith for the owner he has possession; and if he afterward forms the intent to steal and appropriates the property to his own use he is not guilty of larceny, since he was already in possession at the time of forming the intent to steal.[57] So where one receives a letter apparently addressed to him, and upon opening it finds that it contains money intended for another, and converts the money to his own use, it is not larceny, since the original taking was innocent.[58]

d. Withholding For a Reward. When the finder of lost property, although he may know or have a clue to the owner, merely detains it temporarily in the hope of obtaining a reward, he is not guilty of larceny.[59] If on the other hand the intention of the finder is to return it only in case a reward is offered and given to him, he is guilty of larceny in the taking.[60]

e. Larceny From Finder. The finder of lost property is the possessor and also substantial owner thereof as against any one except the true owner, and where the finder delivers the property to defendant's wife on her representation that it was probably defendant's, but that if it was not it would be returned, and defendant falsely claimed and converted the property, he was guilty of larceny.[61]

IV CONSENT OF THE OWNER.

A. Necessity of Taking Against Will of Owner — 1. In General. Larceny cannot be committed generally speaking unless the taking is against the will

56. *Minnesota.*— State *v.* Boyd, 36 Minn. 538, 32 N. W. 780; State *v.* Levy, 23 Minn. 104, 23 Am. Rep. 678.

Ohio.— Baker *v.* State, 29 Ohio St. 184, 23 Am. Rep. 731.

Oregon.— State *v.* Swayze, 11 Oreg. 357, 3 Pac. 574.

Texas.— Reed *v.* State, 8 Tex. App. 40, 34 Am. Rep. 732.

England.— Reg. *v.* Glyde, L. R. 1 C. C. 139, 11 Cox C. C. 103, 37 L. J. M. C. 107, 18 L. T. Rep. N. S. 613, 16 Wkly. Rep. 1174; Reg. *v.* Thurborn, 2 C. & K. 831, 1 Den. C. C. 387, 13 Jur. 499, 18 L. J. M. C. 140, T. & M. 67, 61 E. C. L. 831; Reg. *v.* Scully, 1 Cox C. C. 189; Reg. *v.* Wood, 3 Cox C. C. 453, 3 New Sess. Cas. 581; Reg. *v.* Knight, 12 Cox C. C. 102, 25 L. T. Rep. N. S. 508, 20 Wkly. Rep. 1.

See 32 Cent. Dig. tit. "Larceny," § 45.

57. *Alabama.*—Smith *v.* State, 103 Ala. 40, 16 So. 12; Beckham *v.* State, 100 Ala. 15, 14 So. 859; Allen *v.* State, 91 Ala. 19, 8 So. 665, 24 Am. St. Rep. 856; Weaver *v.* State, 77 Ala. 26; Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762; Rountree *v.* State, 58 Ala. 381.

Connecticut.— Ransom *v.* State, 22 Conn. 153.

Indiana.— Starck *v.* State, 63 Ind. 285, 30 Am. Rep. 214.

Iowa.— State *v.* Wood, 46 Iowa 116.

Mississippi.— Beatty *v.* State, 61 Miss. 18.

New York.— People *v.* Hendrickson, 18 N. Y. App. Div. 404, 46 N. Y. Suppl. 402; People *v.* Anderson, 14 Johns. 294, 7 Am. Dec. 462.

North Carolina.— State *v.* England, 53 N. C. 399, 80 Am. Dec. 334; State *v.* Roper, 14 N. C. 473, 24 Am. Rep. 268.

Tennessee.— Porter *v.* State, 1 Mart. & Y. 226.

Texas.— McLaren *v.* State, 21 Tex. App. 513, 2 S. W. 858; Wilson *v.* State, 20 Tex. App. 662; Warren *v.* State, 17 Tex. App. 207; Martinez *v.* State, 16 Tex. App. 122; Pitts *v.* State, 3 Tex. App. 210.

England.— Reg. *v.* Christopher, Bell C. C. 27, 8 Cox C. C. 91, 5 Jur. N. S. 24, 28 L. J. M. C. 35, 32 L. T. Rep. N. S. 150, 7 Wkly. Rep. 60; Reg. *v.* Matthews, 12 Cox C. C. 489, 28 L. T. Rep. N. S. 645; Reg. *v.* Deaves, 11 Cox C. C. 227, Ir. R. 3 C. L. 306; Reg. *v.* Shea, 7 Cox C. C. 147; Reg. *v.* Preston, 5 Cox C. C. 390, 2 Den. C. C. 353, 16 Jur. 109, 21 L. J. M. C. 41, T. & M. 641; Reg. *v.* Hore, 3 F. & F. 315.

Canada.— Reg. *v.* Slavin, 35 N. Brunsw. 388; Reg. *v.* Martin, 3 Nova Scotia Dec. 124.

See 32 Cent. Dig. tit. "Larceny," §§ 4, 44.

58. Rex *v.* Mucklow, 1 Moody C. C. 160.

59. State *v.* Arkle, 116 N. C. 1017, 21 S. E. 408; Micheaux *v.* State, 30 Tex. App. 660, 18 S. W. 550; Reg. *v.* Yorke, 2 C. & K. 841, 3 Cox C. C. 181, 1 Den. C. C. 335, 12 Jur. 1078, 18 L. J. M. C. 38, T. & M. 20, 61 E. C. L. 841; Reg. *v.* Gardner, 9 Cox C. C. 253, 8 Jur. N. S. 1217, L. & C. 243, 32 L. J. M. C. 35, 7 L. T. Rep. N. S. 471, 11 Wkly. Rep. 96.

60. Com. *v.* Mason, 105 Mass. 163, 7 Am. Rep. 507; Berry *v.* State, 31 Ohio St. 219, 27 Am. Rep. 506; Reg. *v.* Peters, 1 C. & K. 245, 47 E. C. L. 245; Reg. *v.* Reed, C. & M. 306, 41 E. C. L. 170; Reg. *v.* O'Donnell, 7 Cox C. C. 337; Reg. *v.* Spurgeon, 2 Cox C. C. 102.

61. Williams *v.* State, 165 Ind. 472, 75 N. E. 875.

of the owner; and therefore a taking by consent of the owner or possessor, although the taker had a felonious intent at the time of taking, is not larceny.[62]

2. Joint Owners. So consent of any one of several joint owners prevents a taking of goods from being larceny.[63]

3. Consent of a Bailee. This consent to the taking by one who is in actual possession as a bailee is sufficient to prevent the taking being larceny, without regard to the consent of the bailor or owner.[64]

4. Consent of a Custodian. Where the taker has the consent of a servant or other custodian of the property to the taking the question whether the consent prevents the taking from being larceny depends upon the authority of the custodian to give such consent on behalf of the owner. The consent of a custodian who has authority from the possessor to pass the possession is sufficient to prevent a taking from being larceny.[65] Where the goods are in the mere custody of a servant or other person who is not actually or apparently authorized by the possessor to pass the possession, his consent to a taking will not prevent the taking from being larceny.[66] This is true if the custodian is defrauded into giving consent.[67] It is equally larceny if the custodian colludes with the taker.[68]

62. *California.*— People *v.* Proctor, 1 Cal. App. 521, 82 Pac. 551.

Florida.— Lowe *v.* State, 44 Fla. 449, 32 So. 956, 103 Am. St. Rep. 171.

Missouri.— State *v.* Waller, 174 Mo. 518, 74 S. W. 842; State *v.* Storts, 138 Mo. 127, 39 S. W. 483.

North Carolina.—Dodd *v.* Hamilton, 4 N. C. 471.

Tennessee.— Kemp *v.* State, 11 Humphr. 320; Dodge *v.* Brittain, Meigs 84; Hite *v.* State, 9 Yerg. 198.

Texas.— Garcia *v.* State, 26 Tex. 209, 82 Am. Dec. 605; Chalk *v.* State, (App. 1892) 18 S. W. 864.

England.— Reg. *v.* Reeves, 5 Jur. N. S. 716.

Illustration.— Defendant proposed marriage to prosecutrix, and was accepted. He represented that he had property which he was trading for a new house, and that he needed a specified sum in addition to what he had in bank to make the deal. The prosecutrix agreed to loan him money, for which he agreed to give a bill of sale as security. The loan was made, but his representations were false. It was held that he was not guilty of larceny; title to the money loaned being transferred to him. People *v.* Proctor, 1 Cal. App. 521, 82 Pac. 551.

63. Jones *v.* State, 28 Tex. App. 42, 11 S. W. 830; McIntosh *v.* State, 18 Tex. App. 284.

64. Wilson *v.* State, 37 Tex. Cr. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373; Erskine *v.* State, 1 Tex. App. 405.

65. Thus one who secures property from an ordinary clerk in a shop or bank with his consent, although he does so fraudulently and with intent to steal, is not guilty of larceny. Reg. *v.* Prince, L. R. 1 C. C. 150, 11 Cox C. C. 193, 38 L. J. M. C. 8, 19 L. T. Rep. N. S. 364, 17 Wkly. Rep. 179; Reg. *v.* Jackson, 1 Moody C. C. 119. But where one went into a shop and asked to buy the chattel, and was referred by the clerk to the shopkeeper, who refused to let him have it except upon his father's order; and he afterward, without having obtained such order, and in the absence of the shop-keeper, asked to see the chattel, and it was shown him by the clerk, and he took it from the counter, told the clerk that he had made it all right with the shop-keeper, and carried away the chattel, the act was larceny. Com. *v.* Wilde, 5 Gray (Mass.) 83, 66 Am. Dec. 350.

66. Oakley *v.* State, 40 Ala. 372; State *v.* McCartey, 17 Minn. 76; U. S. *v.* Walker, 27 Fed. Cas. No. 16,632, 1 Cranch C. C. 402.

67. See cases cited *infra*, this note.

Applications of rule.— Where a servant is sent to deliver goods to a purchaser, and is defrauded into giving them up to defendant on the way, the act is larceny. People *v.* Griswold, 64 Mich. 722, 31 N. W. 809; Rex *v.* Small, 8 C. & P. 46, 34 E. C. L. 600; Reg. *v.* Webb, 5 Cox C. C. 154; Reg. *v.* Simpson, 2 Cox C. C. 235; Reg. *v.* Stewart, 1 Cox C. C. 174; Rex *v.* Wilkin, 2 East P. C. 673, 1 Leach C. C. 520; Rex *v.* Longstreeth, 1 Moody C. C. 137. A servant in charge of a mare but without any authority to deal with her in any way rides to a fair and is swindled out of the mare by a fraudulent trade, the one obtaining the mare in this way is guilty of larceny of the mare from the owner. Reg. *v.* Sheppard, 9 C. & P. 121, 38 E. C. L. 82. So where a mare belonging to A was at a livery-stable, and A sent word to the stable-keeper not to let B have her, but B obtained the mare from the ostler at the livery-stable by a false statement, and never returned her, it was held that S was rightly convicted of larceny. Reg. *v.* Steer, 2 C. & K. 988, 3 Cox C. C. 187, 1 Den. C. C. 349, 13 Jur. 41, 18 L. J. M. C. 30, T. & M. 11, 61 E. C. L. 988. And where a servant obtained the key of his master's storehouse from a fellow-servant, who had charge of it, by fraudulent representations, and removed wheat, he was held guilty of larceny. Reg. *v.* Robins, 6 Cox C. C. 420, Dears. C. C. 418, 18 Jur. 1058.

68. State *v.* Koplan, 167 Mo. 298, 66 S. W. 967; Reg. *v.* James, 24 Q. B. D. 439, 17

B. Consent Obtained by Force or Fear. A pretended consent obtained by force or threat of force, and therefore extorted from the fears of the owner, is not a real consent, and does not prevent a taking from being larceny.[69] The threat of bringing a civil action is not such compulsion as will make the owner's consent void.[70] Nor will threat of exposure,[71] nor of prosecution.[72] The compulsion must involve physical fear; the compulsion of mere mental distress will not neutralize the consent of the owner.[73]

C. Consent Obtained by Fraud — 1. General Doctrine of Larceny by Trick — a. Statement of Rule. If the consent of the owner to the taking is obtained by fraud it will not prevent the taking from being larceny. If one obtains possession of goods from the owner or possessor by fraud with intent to steal the taking is larceny,[74] as is now held in every jurisdiction.[75]

Cox C. C. 24, 54 J. P. 615, 59 L. J. M. C. 96, 62 L. T. Rep. N. S. 578; Reg. *v.* Hornby, 1 C. & K. 305, 47 E. C. L. 305; Reg. *v.* Tuckwell, C. & M. 215, 41 E. C. L. 121; Rex *v.* Pearce, 2 East P. C. 603.

69. *Connecticut.*— State *v.* Kallaher, 70 Conn. 398, 39 Atl. 606, 66 Am. St. Rep. 116 (threat to burn house with family, who were sick in bed, immediately); State *v.* Fenn, 41 Conn. 590.

District of Columbia.— U. S. *v.* Murphy, 4 MacArthur 375, 48 Am. Rep. 754, obtaining money through fraud and fear.

Massachusetts.— Com. *v.* Low, Thach. Cr. Cas. 477, abuse of legal process.

North Carolina.— State *v.* Bryant, 74 N. C. 124, loan compelled through fear.

Pennsylvania.— Com. *v.* Cruikshank, 138 Pa. St. 194, 20 Atl. 937, obtaining goods by threatening boy in possession.

England.— Reg. *v.* Lovell, 8 Q. B. D. 185, 45 J. P. 407, 50 L. J. M. C. 91, 44 L. T. Rep. N. S. 319, 30 Wkly. Rep. 416 (payment of pretended debt compelled through fear); Reg. *v.* McGrath, L. R. 1 C. C. 205, 11 Cox C. C. 347, 39 L. J. M. C. 7, 21 L. T. Rep. N. S. 543, 18 Wkly. Rep. 119 (mock auction, with pretended sale to victim, and payment compelled through fear); Reg. *v.* Hazell, 11 Cox C. C. 597, 23 L. T. Rep. N. S. 562.

70. State *v.* Kallaher, 70 Conn. 398, 39 Atl. 606, 66 Am. St. Rep. 116.

71. Haley *v.* State, 49 Ark. 147, 4 S. W. 746.

72. Haley *v.* State, 49 Ark. 147, 4 S. W. 746; Rex *v.* Reane, 1 Leach C. C. 278 note.

73. Steward *v.* People, 173 Ill. 464, 50 N. E. 1056, 64 Am. St. Rep. 133.

74. The doctrine of larceny by trick was established by the case of Rex *v.* Pear, 2 East P. C. 685, 1 Leach C. C. 212.

75. *Alabama.*— Schafer *v.* State, (1890) 8 So. 670; Holbrook *v.* State, 107 Ala. 154, 18 So. 109, 54 Am. St. Rep. 65; Frazier *v.* State, 85 Ala. 17, 4 So. 691, 7 Am. St. Rep. 21; Wilson *v.* State, 1 Port. 118.

Arkansas.— Hindman *v.* State, 72 Ark. 516, 81 S. W. 836; Hunt *v.* State, 72 Ark. 241, 79 S. W. 769, 105 Am. St. Rep. 34, 65 L. R. A. 71.

California.— People *v.* Campbell, 127 Cal. 278, 59 Pac. 593; People *v.* Raischke, 83 Cal. 501, 23 Pac. 1083; People *v.* Smith, 23 Cal. 280.

Colorado.— Housh *v.* People, 24 Colo. 262, 50 Pac. 1036.

Connecticut.— State *v.* Fenn, 41 Conn. 590.

District of Columbia.— U. S. *v.* Rodgers, 1 Mackey 419.

Florida.— Finlayson *v.* State, 46 Fla. 81, 35 So. 203.

Georgia.— Martin *v.* State, 123 Ga. 478, 51 S. E. 334; Cunnegin *v.* State, 118 Ga. 125, 44 S. E. 846; Harris *v.* State, 81 Ga. 758, 7 S. E. 689, 12 Am. St. Rep. 355.

Illinois.— Doss *v.* People, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180.

Indiana.— Bradley *v.* State, 165 Ind. 397, 75 N. E. 873; Crum *v.* State, 148 Ind. 401, 47 N. E. 833.

Iowa.— Ennis *v.* State, 3 Greene 67.

Kansas.— State *v.* Woodruff, 47 Kan. 151, 27 Pac. 842, 27 Am. St. Rep. 285.

Kentucky.— Miller *v.* Com., 78 Ky. 15, 39 Am. Rep. 194; Elliott *v.* Com., 12 Bush 176; Blackburn *v.* Com., 89 S. W. 160, 28 Ky. L. Rep. 96.

Louisiana.— State *v.* Will, 49 La. Ann. 1337, 22 So. 378.

Massachusetts.— Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200.

Michigan.— People *v.* Shaw, 57 Mich. 403, 24 N. W. 121; People *v.* Camp, 56 Mich. 548, 23 N. W. 216.

Mississippi.— Watson *v.* State, 36 Miss. 593.

Missouri.— State *v.* Kosky, 191 Mo. 1, 90 S. W. 454; State *v.* Mintz, 180 Mo. 268, 88 S. W. 12; State *v.* Hall, 85 Mo. 669; State *v.* Murphy, 90 Mo. App. 548.

New Hampshire.— State *v.* Watson, 41 N. H. 533.

New York.— People *v.* Miller, 169 N. Y. 339, 62 N. E. 418; Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; Smith *v.* People, 53 N. Y. 111, 13 Am. Rep. 474; People *v.* Laurence, 70 Hun 80, 23 N. Y. Suppl. 1095; Weyman *v.* People, 4 Hun 511, 6 Thomps. & C. 696; St. Valerie *v.* People, 64 Barb. 426; People *v.* Jackson, 3 Park. Cr. 590. But see People *v.* Miller, 14 Johns. 371.

North Carolina.— State *v.* McRae, 111 N. C. 665, 16 S. E. 173.

Oklahoma.— Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092.

Oregon.— State *v.* Meldrum, 41 Oreg. 380,

b. Applications of Rule. Thus hiring a horse or other property with the intent to steal at the time of hiring is larceny.[76] So where under pretense of changing money one obtains money from its possessor and deceives him by giving in exchange a less amount or nothing the act is larceny by trick.[77] So where under color of a bet one is induced to deposit money or other goods with another, who makes off with it, the whole being a fraudulent scheme of the stakeholder, the taking of the property is larceny.[78] And so is obtaining money to keep on deposit for a certain purpose, with intent to steal it,[79] or obtaining money to use for the

70 Pac. 526; State *v.* Skinner, 29 Oreg. 599, 46 Pac. 368.

Pennsylvania.— Com. *v.* Eichelberger, 119 Pa. St. 254, 13 Atl. 422, 4 Am. St. Rep. 642; Com. *v.* Yerkes, 119 Pa. St. 266.

South Carolina.— State *v.* Lindenthall, 5 Rich. 237, 57 Am. Dec. 743; State *v.* Thurston, 2 McMull. 382.

Tennessee.— Mitchell *v.* State, 92 Tenn. 668, 23 S. W. 68; Hall *v.* State, 6 Baxt. 522; Coldwell *v.* State 3 Baxt. 429. *Contra*, at common law. See Felter *v.* State, 9 Yerg. 397.

Texas.— White *v.* State, 11 Tex. 769; Harris *v.* State, (Cr. App. 1901) 65 S. W. 921; Shell *v.* State, 32 Tex. Cr. 512, 24 S. W. 646; Porter *v.* State, 23 Tex. App. 295, 4 S. W. 889; Hernandez *v.* State, 20 Tex. App. 151; Atterberry *v.* State, 19 Tex. App. 401; Hornbeck *v.* State, 10 Tex. App. 408.

Utah.— People *v.* Berlin, 9 Utah 383, 35 Pac. 498.

Vermont.— State *v.* Cameron, 40 Vt. 555.

Virginia.— Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867; Starkie *v.* Com., 7 Leigh 752.

Washington.— State *v.* Skilbrick, 25 Wash. 555, 66 Pac. 53.

West Virginia.— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

England.— Reg. *v.* Twist, 12 Cox C. C. 509, 29 L. T. Rep. N. S. 546; Reg. *v.* Radcliffe, 12 Cox C. C. 474; Reg. *v.* Waller, 10 Cox C. C. 360; Reg. *v.* Box, 9 C. & P. 126, 38 E. C. L. 85; Reg. *v.* Robson, 9 Cox C. C. 29, 8 Jur. N. S. 64, L. & C. 93, 31 L. J. M. C. 22, 5 L. T. Rep. N. S. 402, 10 Wkly. Rep. 61; Reg. *v.* Kay, 7 Cox C. C. 289, Dears. & B. 231, 3 Jur. N. S. 546, 26 L. J. M. C. 119, 5 Wkly. Rep. 511; Reg. *v.* Sparrow, 2 Cox C. C. 287; Rex *v.* Aickles, 2 East P. C. 675, 1 Leach C. C. 294; Rex *v.* Sharpless, 2 East P. C. 675, 1 Leach C. C. 92; Rex *v.* Pearce, 2 East P. C. 603; Reg. *v.* Richardson, 1 F. & F. 488; Reg. *v.* Gillings, 1 F. & F. 36; Rex *v.* Pratt, 1 Moody C. C. 250.

Canada.— Reg. *v.* Ewing, 21 U. C. Q. B. 523.

See 32 Cent. Dig. tit. "Larceny," § 34 *et seq.*

76. *Kansas.*— State *v.* Woodruff, 47 Kan. 151, 27 Pac. 842, 27 Am. St. Rep. 285.

New York.— Brannan's Case, 1 City Hall Rec. 50.

Pennsylvania.— Com. *v.* Smith, 1 Pa. L. J. Rep. 400, 3 Pa. L. J. 34.

South Carolina.— State *v.* Gorman, 2 Nott & M. 90, 10 Am. Dec. 576.

Texas.— Smith *v.* State, 35 Tex. 738; Lewis *v.* State, (Cr. App. 1905) 87 S. W. 831; Weeks *v.* State, (Cr. App. 1894) 24 S. W. 905.

Vermont.— State *v.* Cameron, 40 Vt. 555; State *v.* Humphrey, 32 Vt. 569, 78 Am. Dec. 605.

England.— Reg. *v.* Cole, 2 Cox C. C. 340; Rex *v.* Semple, 2 East P. C. 691, 1 Leach C. C. 409; Rex *v.* Charlewood, 2 East P. C. 689 1 Leach C. C. 409, 3 Rev. Rep. 706; Rex *v.* Pear, 2 East P. C. 685, 1 Leach C. C. 212; Rex *v.* Stock, 1 Moody C. C. 87.

77. Verberg *v.* State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; Flynn *v.* State, (Tex. Cr. App. 1904) 83 S. W. 206; Reg. *v.* Hollis, 12 Q. B. D. 25, 15 Cox C. C. 345, 48 J. P. 120, 53 L. J. M. C. 38, 49 L. T. Rep. N. S. 572, 32 Wkly. Rep. 372.

78. *Arkansas.*— Hindman *v.* State, 72 Ark. 516, 81 S. W. 836.

California.— People *v.* Shaughnessy, 110 Cal. 598, 43 Pac. 2.

Kentucky.— Miller *v.* Com., 78 Ky. 15, 39 Am. Rep. 194.

Michigan.— People *v.* Shaw, 57 Mich. 403, 24 N. W. 121, 58 Am. Rep. 372.

Missouri.— State *v.* Copeman, 186 Mo. 108, 84 S. W. 942.

Oregon.— State *v.* Ryan, (1905) 82 Pac. 703, 1 L. R. A. N. S. 862.

Tennessee.— Defrese *v.* State, 3 Heisk. 53, 8 Am. Rep. 1.

Texas.—Williams *v.* State, 34 Tex. 558.

England.— Reg. *v.* Buckmaster, 20 Q. B. D. 182, 16 Cox C. C. 339, 52 J. P. 358, 57 L. J. M. C. 25, 57 L. T. Rep. N. S. 720, 36 Wkly. Rep. 701; Rex *v.* Robson, R. & R. 307; Rex *v.* Horner, 1 Leach C. C. 270.

See 32 Cent. Dig. tit. "Larceny," § 36.

Illustration.— The prosecutor was induced by defendant to bet money on a runner as against the runner of a club to which defendant belonged by representations that the club runner, although a favorite, would lose the race, thereby enabling defendant to win large sums from other club members, the understanding being that prosecutor's money was to be returned to him, and not really bet, prosecutor to get a share of the winnings as compensation for aiding the defendant and his confederates. On the club runner winning, defendant refused to return prosecutor's money. This was held to be larceny by trick. Johnson *v.* State, (Ark. 1905) 88 S. W. 905.

79. *California.*— People *v.* Montarial, 120 Cal. 691, 53 Pac. 355 (to keep in trunk); People *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506 (to secure faithfulness of employee).

owner in a certain way, with intent to steal it, as to buy property for the owner of the money,[80] or to take to a bank or shop and get changed,[81] or for other purposes of the owner.[82] Other applications of the rule are set out in the notes.[83]

2. Possession Obtained by Trick From Servant or Bailee. It is immaterial in this connection that possession is obtained from a servant or bailee instead of from the owner himself.[84]

Missouri.— State *v.* Buck, 186 Mo. 15, 84 S. W. 951, to secure faithfulness of employee.

New York.— People *v.* Sumner, 161 N. Y. 652, 57 N. E. 1120 (to await the result of examination of title of land purchased); People *v.* Gottschalk, 137 N. Y. 569, 33 N. E. 339 [*affirming* 66 Hun 64, 20 N. Y. Suppl. 777] (to secure faithfulness of employee).

Texas.— Johnson *v.* State, 46 Tex. Cr. 415, 80 S. W. 621, to keep safe over night.

England.— Reg. *v.* Russett, [1892] 2 Q. B. 312, 17 Cox C. C. 534, 56 J. P. 743, 67 L. T. Rep. N. S. 124, 40 Wkly. Rep. 592 (to secure performance of contract of sale); Reg. *v.* Bunce, 1 F. & F. 523 (to use in practising witchcraft).

Illustration.— On this principle where one pretends to find a ring and to expect a reward, which he is to share with the victim of the trick, and persuades the victim to deposit money as security for a division of the reward next day, receiving the ring himself, the obtaining of the money by this trick is larceny. Rex *v.* Watson, 2 East P. C. 680, 2 Leach C. C. 640; Rex *v.* Moore, 2 East P. C. 679, 1 Leach C. C. 314; Rex *v.* Patch, 2 East P. C. 678, 1 Leach C. C. 238; Rex *v.* Marsh, 1 Leach C. C. 345.

80. People *v.* Delbos, 146 Cal. 734, 81 Pac. 131; People *v.* Abbott, 53 Cal. 284, 31 Am. Rep. 59; Crum *v.* State, 148 Ind. 401, 47 N. E. 833; People *v.* Martin, 116 Mich. 446, 74 N. W. 653; People *v.* Hackett, 175 N. Y. 503, 67 N. E. 1087.

81. Murphy *v.* People, 104 Ill. 528; Com. *v.* Flynn, 167 Mass. 460, 45 N. E. 924, 57 Am. St. Rep. 472; Com. *v.* Barry, 124 Mass. 325, Special Sessions Justices *v.* People, 90 N. Y. 12, 43 Am. Rep. 135.

82. *California.*— People *v.* De Graaf, 127 Cal. 676, 60 Pac. 429 (to be used in obtaining an office for the owner); People *v.* Rae, 66 Cal. 423, 6 Pac. 1, 56 Am. Rep. 102 (to deposit with creditor until the swindler could get his own money from the baggage-car).

Illinois.— Doss *v.* People, 158 Ill. 660, 41 N. E. 1093, 49 Am. St. Rep. 180 (to bet for owner on a race); Cantwell *v.* People, 138 Ill. 602, 28 N. E. 964 (to secure restoration of stolen property).

New York.— Loomis *v.* People, 67 N. Y. 322, 23 Am. Rep. 123 (to bet); Smith *v.* People, 53 N. Y. 111, 13 Am. Rep. 474 (to secure husband's release from prison); People *v.* Hughes, 91 Hun 354, 36 N. Y. Suppl. 493 (to use as partnership contribution); Macino *v.* People, 12 Hun 127 (to carry to Italy); People *v.* Dean, 12 N. Y. Suppl. 749 (to use in prosecuting a claim).

Oregon.— State *v.* Skinner, 29 Oreg. 599, 46 Pac. 368, as deposit on application for loan.

England.— Reg. *v.* Smith, 1 C. & K. 423, 47 E. C. L. 423 (to pay a bill); Reg. *v.* Brown, Dears. C. C. 616, 2 Jur. N. S. 192, 4 Wkly. Rep. 250 (to carry to a certain place).

See 32 Cent. Dig. tit. "Larceny," § 34 *et seq.*

83. **Other applications of rule.**— The owner of goods sold them to defendant and two pretended partners on an agreement that title should remain in the owner until the goods were paid for. It was held larceny. People *v.* Raischke, 83 Cal. 501, 23 Pac. 1083. Defendants induced a servant to deliver his master's horse to them, under a fraudulent agreement that they should deliver it to their master, but they converted it to their own use, as they had from the beginning intended to do. It was held larceny. Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200. While defendant's confederates were trying to trick the owner of the horses into believing he had exchanged them for certain mules, defendant made off with the horses. He was held guilty of larceny, having taken the horses with intent to steal them. State *v.* Zumbunson, 86 Mo. 111. A pretended purchaser of goods got the carrier's receipt from the seller's clerk on the pretext of examining the goods, and having thus obtained possession, shipped them away in defendant's ship. This taking was held to constitute larceny by the supposed purchaser. Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101. A person who obtained permission from the owners to sample cotton and used such permission with intent to appropriate the samples was held guilty of larceny. State *v.* McRae, 111 N. C. 665, 16 S. E. 173. Possession was given merely as security for performance of a contract, The inducement was fraudulent, and was followed by appropriation. This was held larceny. Devore *v.* Territory, 2 Okla. 562, 37 Pac. 1092.

84. *Massachusetts.*— Com. *v.* Rubin, 165 Mass. 453, 43 N. E. 200; Com. *v.* Collins, 12 Allen 181; Com. *v.* Wilde, 5 Gray 83, 66 Am. Dec. 350.

Missouri.— State *v.* Mintz, 189 Mo. 268, 88 S. W. 12.

New York.— Soltau *v.* Gerdau, 119 N. Y. 380, 23 N. E. 864, 16 Am. St. Rep. 843; Bassett *v.* Spofford, 45 N. Y. 387, 6 Am. Rep. 101; People *v.* McDonald, 43 N. Y. 61; Collins *v.* Ralli, 20 Hun 246; People *v.* Jackson, 3 Park. Cr. 590.

Texas.— Madden *v.* State, 1 Tex. App. 204.

England.— Reg. *v.* Stear, 2 C. & K. 988, 3 Cox C. C. 187, 1 Den. C. C. 349, 13 Jur. 41, 18 L. J. M. C. 30, T. & M. 11, 61 E. C. L. 988; Reg. *v.* Kendall, 12 Cox C. C. 598, 30 L. T. Rep. N. S. 345; Reg. *v.* Little, 10 Cox C. C. 559; Reg. *v.* Robins, 6 Cox C. C. 420, Dears. C. C. 418, 18 Jur. 1058; Reg. *v.* Simp-

3. Fault of the Victim. The fact that the victim lost his property while himself engaged in an illegal transaction does not prevent the offense from being committed.[85]

D. Mistake. If a chattel has been delivered and received under a mutual mistake as to its character, a subsequent misappropriation by the recipient will not constitute larceny. Thus where one is given by mistake a larger sum of money than he is entitled to, and afterward, discovering the mistake, he keeps it for himself, his act is not larceny.[86] In some jurisdictions it has been held that if the wrong-doer is given goods under a mistake, which he knows at the time of taking, he is guilty of larceny, although he did nothing to induce the mistaken act, and therefore did not secure the goods by a trick. Thus if one is overpaid by mistake, and receives the money knowing of the mistake, he has been held guilty of larceny.[87] But since the consent of the owner is freely given, without any wrongful inducement used by defendant, some courts hold that no larceny is committed under such circumstances.[88]

E. Submission. If the owner tacitly permits the taking by knowing of it and failing to object, his consent prevents the act from being larceny.[89] And mere failure to resist because the act is so sudden as to give no time for resistance does not prevent the taking from being larceny.[90]

F. Entrapment — 1. Acquiescence For Detection. If the owner of property facilitates the taking of the property for the purpose of securing the detection and punishment of the taker his act does not amount to consent to the taking and larceny is committed by the taker. Thus the fact that the owner stands by and does not prevent the taking does not prevent the act from being larceny.[91] Nor does the further fact that the owner so places the property or takes such other steps as to facilitate the taking.[92] So it is larceny to steal the contents of a decoy

son, 2 Cox C. C. 235; Rex *v.* Longstreeth, 1 Moody C. C. 137; Rex *v.* Heneh, R. & R. 121.

See 32 Cent. Dig. tit. "Lareeny," § 34 *et seq.*

85. See cases cited *infra*, this note.

Applications of rule.— Thus where two confederates tricked a man out of his money on pretense of a bet in which he was led to believe that he was eheating the other party to the bet, the confederates were nevertheless guilty of larceny by triek. People *v.* Shaw, 57 Mieh. 403, 24 N. W. 121, 58 Am. Rep. 372; Defrese *v.* State, 3 Heisk. (Tenn.) 53, 8 Am. Rep. 1. So where defendants obtained money from their vietim on the fraudulent pretense that they could buy with it for him skilfully counterfeited money they were guilty of lareeny by triek. Crum *v.* State, 148 Ind. 401, 47 N. E. 833. And where the vietim was lending himself to a fraudulent scheme of defendant the larceny was none the less punishable. Reg. *v.* Ewing 21 U. C. Q. B. 523.

86. Bailey *v.* State, 58 Ala. 414; Cooper *v.* Com., 110 Ky. 123, 60 S. W. 938, 22 Ky. L. Rep. 1627, 96 Am. St. Rep. 426, 52 L. R. A. 136; State *v.* Ducker, 8 Oreg. 394, 34 Am. Rep. 590; Reg. *v.* Flowers, 16 Q. B. D. 643, 16 Cox C. C. 33, 50 J. P. 648, 55 L. J. M. C. 179, 54 L. T. Rep. N. S. 547, 34 Wkly. Rep. 367 [*explaining* Reg. *v.* Ashwell, 16 Q. B. D. 190, 55 L. J. M. C. 65, where the court were equally divided in opinion]; Reg. *v.* Hehir, [1895] 2 Ir. 709, 18 Cox C. C. 267; Reg. *v.* Jaeobs, 12 Cox C. C. 151.

87. *Alabama.*—Bailey *v.* State, 58 Ala. 414.

Delaware.—State *v.* Williamson, Houst. Cr. Cas. 155.

Kentucky.— Cooper *v.* Com., 110 Ky. 123, 60 S. W. 938, 22 Ky. L. Rep. 1627, 96 Am. St. Rep. 426, 52 L. R. A. 136.

New York.—Wolfstein *v.* People, 6 Hun 121.

England.— Reg. *v.* Middleton, L. R. 2 C. C. 38, 12 Cox C. C. 260, 417, 42 L. J. M. C. 73, 28 L. T. Rep. N. S. 777.

88. Jones *v.* State, 97 Ga. 430, 25 S. E. 319, 54 Am. St. Rep. 433; Com. *v.* Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662.

89. Chalk *v.* State, (Tex. App. 1892) 18 S. W. 864.

Taking from drunken man.— Where a drunken man permitted another to take his watch without remonstranee, under the belief that it was done *bona fide* to prevent theft of the wateh, there was no larceny. Reg. *v.* Reeves, 5 Jur. N. S. 716. But evidenee that the owner of the property was drunk at the time it was taken may explain his laek of resistance at the time, and is consistent with non-eonsent. Jones *v.* People, 33 Colo. 161, 79 Pac. 1013.

90. Com. *v.* Dimond, 3 Cush. (Mass.) 235; Nelson *v.* State, (Tex. Cr. App. 1905) 88 S. W. 807; Clemons *v.* State, 39 Tex. Cr. 279, 45 S. W. 911, 73 Am. St. Rep. 923.

91. People *v.* Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238; State *v.* Adams, 115 N. C. 775, 20 S. E. 722; Rex *v.* Eggington, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leaeh C. C. 913, 5 Rev. Rep. 689.

92. Lowe *v.* State, 44 Fla. 449, 32 So. 956, 103 Am. St. Rep. 171; Conner *v.* State, 24

letter, placed in the mail for the purpose of detecting a mail-clerk.[93] The fact that an agent of the owner acts as a supposed confederate of the thief is no defense to the latter, provided the original design was formed independently of such agent.[94] So where a detective employed by the owner acts with the thief, the taking is none the less larceny.[95] And so where a person approached by the thief as his confederate notifies the owner or the public authorities, and, being authorized by them to do so, assists the thief in carrying out the plan, the larceny is nevertheless committed.[96]

2. Solicitation of the Thief. If, however, the owner, personally or by his agent, solicits the accused to take the property, the taking is plainly by his own procurement and consent, and the taking is therefore not larceny.[97] And if the pretended accomplice himself takes the goods, the wrong-doer being present abetting and afterward receiving the goods, there is no criminal taking and therefore no larceny.[98] The pretended accomplice, not having a felonious intent, is not guilty of larceny.[99] But where a private detective, without concert with the owner, induced a thief to steal goods in order himself to get a reward which had been offered him by the owner, he has been held a guilty party.[1]

G. Conditional Consent. If the owner of goods authorizes another to take possession under certain conditions, or for a certain purpose, this is not a consent that the goods shall be taken otherwise; and if they are so taken with intent to steal the act is larceny.[2] Similarly it is a well settled doctrine that the consent

Tex. App. 245, 6 S. W. 138; Reg. *v.* Williams, 1 C. & K. 195, 47 E. C. L. 195.

93. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607; Montgomery *v.* U. S., 162 U. S. 410, 16 S. Ct. 797, 40 L. ed. 1020; U. S. *v.* Jones, 80 Fed. 513; U. S. *v.* Bethea, 44 Fed. 802; U. S. *v.* Dorsey, 40 Fed. 752; U. S. *v.* Wight, 38 Fed. 106; Reg. *v.* Gardner, 1 C. & K. 628, 47 E. C. L. 628.

94. *Florida.*— Lowe *v.* State, 44 Fla. 449, 32 So. 956, 103 Am. St. Rep. 171.

Louisiana.— State *v.* Duncan, 8 Rob. 562.

Tennessee.— McAdams *v.* State, 8 Lea 456.

Texas.—Alexander *v.* State, 12 Tex. 540.

England.— Rex *v.* Eggington, 2 B. & P. 508, 2 East P. C. 494, 666, 2 Leach C. C. 913, 5 Rev. Rep. 689.

See 32 Cent. Dig. tit. "Larceny," § 33.

95. Pigg *v.* State, 43 Tex. 108; Johnson *v.* State, 3 Tex. App. 590; Reg. *v.* Gill, 6 Cox C. C. 295, Dears. C. C. 289, 18 Jur. 70, 23 L. J. M. C. 50, 2 Wkly. Rep. 222.

96. Varner *v.* State, 72 Ga. 745; State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360; People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; McAdams *v.* State, 8 Lea (Tenn.) 456.

97. *Colorado.*— Connor *v.* People, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295, 25 L. R. A. 341.

Illinois.— Love *v.* People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139.

Missouri.— State *v.* Waghalter, 177 Mo. 676, 76 S. W. 1028.

North Carolina.—State *v.* Adams, 115 N. C. 775, 20 S. E. 722.

Oregon.— State *v.* Hull, 33 Oreg. 56, 54 Pac. 159, 72 Am. St. Rep. 694.

Tennessee.— McAdams *v.* State, 8 Lea 456.

England.— Reg. *v.* Lawrence, 4 Cox C. C. 438; McDaniel's Case, Fost. 121.

See 32 Cent. Dig. tit. "Larceny," § 33.

98. *Georgia.*— Williams *v.* State, 55 Ga. 391.

Michigan.— People *v.* McCord, 76 Mich. 200, 42 N. W. 1106.

Missouri.— State *v.* Hayes, 105 Mo. 76, 16 S. W. 514, 24 Am. St. Rep. 360.

North Carolina.—State *v.* Adams, 115 N. C. 775, 20 S. E. 722.

Texas.— McGee *v.* State, (Cr. App. 1902) 66 S. W. 562.

England.— Reg. *v.* Lawrence, 4 Cox C. C. 438.

See 32 Cent. Dig. tit. "Larceny," § 33.

99. People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386, 25 L. R. A. 349; Rex *v.* Dannelly, 2 Marsh. 471, R. & R. 310, 4 E. C. L. 498.

1. Slaughter *v.* State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242.

2. See cases cited *infra*, in this note.

Applications of rule. — Where a box of matches was placed on the counter of a shop for lighting cigars, and defendant took the whole box, he was guilty of larceny. Mitchum *v.* State, 45 Ala. 29. So where cigarettes were placed in an automatic box, and one could obtain a cigarette by dropping in a brass disk. Reg. *v.* Hands, 16 Cox C. C. 188, 52 J. P. 24, 56 L. T. Rep. N. S. 370. And where defendant, who had been given permission to take soft coal upon paying for it according to weight, took a load of coal, spread slack over the top, had it weighed, and paid for it as slack, he was held guilty of larceny. Reg. *v.* Bramley, 8 Cox C. C. 468, 7 Jur. N. S. 478, L. & C. 21, 4 L. T. Rep. N. S. 309, 9 Wkly. Rep. 555. So consent by the state that a physician shall receive antitoxin free for administering it to a poor patient is not consent that he shall take it for administering it to a patient who, as he knows, is able to pay and who is expected to pay him.

to the doing of one act will not justify the doing of a similar but different one.[3]

V. INTENT TO STEAL.[4]

A. Necessity of Intent. An essential element in the crime of larceny is that the thief should have the felonious intent, the intent to steal or *animus furandi*, that is, the intent to deprive the owner feloniously and permanently of his property, at the time of the taking of possession.[5] So a special verdict under

People *v.* Lavin, 41 Misc. (N. Y.) 53, 83 N. Y. Suppl. 630. This principle appears to offer the true explanation of the Southampton Carrier's Case, Y. B. 13 Edw. IV, p. 9, pl. 5. The carrier was directed to go and take a certain bale to carry to Southampton: he took it for himself and converted it to his own use, and his act was held to be larceny.

3. See cases cited *infra*, this note.

Applications of rule.— Consent that defendant should take one steer will not prevent the taking of a different steer from being larceny. Peck *v.* State, 9 Tex. App. 70. And one who has permission to take cattle of one person cannot escape punishment for larceny by using it as a mere subterfuge for taking cattle of another. High *v.* State, (Tex. Cr. App. 1893) 24 S. W. 284.

4. **Averments in indictment** see *infra*, XIII, B, 5.

Instructions see *infra*, XV, B, 1, g.

Evidence of intent see *infra*, XIV, B, 3, d; C, 2, h.

Intent at time of finding lost property see *supra*, III, D, 2, c.

Defined.— Larcenous intent is an intent which exists where a man knowingly takes and carries away the goods of another without any claim or pretense of right, with intent wholly to deprive the owner of them or convert them to his own use. 2 Archbold Cr. Pr. & Pl. (8th ed.) p. 1184 [*quoted* in Wilson *v.* State, 18 Tex. App. 270, 274, 51 Am. Rep. 309]. See also State *v.* Shermer, 55 Mo. 83.

5. *Alaska.*— *Ex p.* Dubuque, 1 Alaska 16.

Arkansas.— Ward *v.* State, 70 Ark. 204, 66 S. W. 926; Conley *v.* State, 69 Ark. 454, 64 S. W. 218.

California.— People *v.* Brown, 105 Cal. 66, 38 Pac. 518; People *v.* Raschke, 73 Cal. 378, 15 Pac. 13.

Delaware.— State *v.* York, 5 Harr. 493.

Georgia.— Johnson *v.* State, 119 Ga. 563, 46 S. E. 839; Jackson *v.* State, 116 Ga. 578, 42 S. E. 750.

Illinois.— Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33.

Indiana.— Best *v.* State, 155 Ind. 46, 57 N. E. 534.

Kentucky.— Com. *v.* Williamson, 96 Ky. 1, 27 S. W. 812, 16 Ky. L. Rep. 197, 49 Am. St. Rep. 285; Blackburn *v.* Com., 89 S. W. 160, 28 Ky. L. Rep. 96.

Mississippi.—Watkins *v.* State, 60 Miss. 323.

Missouri.— State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417; State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Gray, 37 Mo. 463; Witt *v.* State, 9 Mo. 671.

Montana.—State *v.* Rechnitz, 20 Mont. 488, 52 Pac. 264.

Nebraska.— Barnes *v.* State, 40 Nebr. 545, 59 N. W. 125.

Nevada.— State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802.

New Jersey.— State *v.* South, 28 N. J. L. 28, 74 Am. Dec. 250.

New York.— Parr *v.* Loder, 97 N. Y. App. Div. 218, 89 N. Y. Suppl. 823; People *v.* Pollock, 51 Hun 613, 4 N. Y. Suppl. 297.

North Carolina.— State *v.* Barrett, 123 N. C. 753, 31 S. E. 731; State *v.* Bray, 89 N. C. 480.

Oklahoma.— Steil *v.* Territory, 12 Okla. 377, 71 Pac. 653.

Pennsylvania.— Com. *v.* Wilson, 1 Phila. 80.

Rhode Island.— State *v.* McAndrews, 15 R. I. 30, 23 Atl. 304.

South Carolina.— State *v.* Watson, 7 S. C. 63.

Texas.— Marshall *v.* State, 31 Tex. 471; Isaacs *v.* State, 30 Tex. 450; Matura *v.* State, (Cr. App. 1905) 89 S. W. 648; Womack *v.* State, (Cr. App. 1905) 86 S. W. 1015; Beard *v.* State, 45 Tex. Cr. 522, 78 S. W. 348; Green *v.* State, (Cr. App. 1895) 33 S. W. 120; Brown *v.* State, (App. 1892) 19 S. W. 898; Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523; Ryan *v.* State, 22 Tex. App. 699, 3 S. W. 547; Lott *v.* State, 20 Tex. App. 230; Martindale *v.* State, 19 Tex. App. 333; Knutson *v.* State, 14 Tex. App. 570.

Virginia.— Blunt *v.* Com., 4 Leigh 689, 26 Am. Dec. 341; Barker *v.* Com., 2 Va. Cas. 122.

West Virginia.— State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

United States.— U. S. *v.* Wilson, 44 Fed. 593; U. S. *v.* Inabnet, 41 Fed. 130; Weston *v.* U. S., 29 Fed. Cas. No. 17,457, 5 Cranch C. C. 492.

England.— Reg. *v.* Halford, 11 Cox C. C. 88, 18 L. T. Rep. N. S. 334, 16 Wkly. Rep. 731; Reg. *v.* Godfrey, 8 C. & P. 563, 34 E. C. L. 893; Rex *v.* Crump, 1 C. & P. 658, 12 E. C. L. 373; Rex *v.* Philips, 2 East P. C. 662.

See 32 Cent. Dig. tit. "Larceny," § 3 *et seq.*

Applications of rule.—Where one kills a cow not intending to steal it, he is not guilty of "cattle stealing," although immediately afterward he steals and appropriates the carcass (Nightengale *v.* State, 94 Ga. 395, 21 S. E. 221); so snatching bills from hand of owner and retaining them against his consent is not larceny unless there existed a

an indictment for larceny must find the intent.[6] If such an intent does not exist at the time of the taking, neither its formation afterward nor any subsequent appropriation of the property can make the larceny complete.[7] The question whether the *animus furandi* existed at the time of taking is a question for the jury.[8] One can have the intent to deprive the owner of his property without knowing who he is.[9] An open taking has been held to raise a presumption of fact against the existence of felonious intent, to be rebutted by clear proof.[10] If

felonious intent at the time (Hart *v.* State, 57 Ind. 102); and a lawful taking possession of cattle and an intent formed afterward to convert them to the taker's use is not larceny (State *v.* Hayes, 111 N. C. 727, 16 S. E. 410).

6. State *v.* Bray, 89 N. C. 480.

7. *Arkansas.*—Fulton *v.* State, 13 Ark. 168.

California.— People *v.* Jackson, 138 Cal. 462, 71 Pac. 566; People *v.* Morino, 85 Cal. 515, 24 Pac. 892; People *v.* Jersey, 18 Cal. 337.

Georgia.—Nightengale *v.* State, 94 Ga. 395, 21 S. E. 221; Snell *v.* State, 50 Ga. 219.

Idaho.— State *v.* Riggs, 8 Ida. 630, 70 Pac. 947.

Illinois.— Smith *v.* Shultz, 2 Ill. 490, 32 Am. Dec. 33.

Indiana.— Hart *v.* State, 57 Ind. 102.

Iowa.— State *v.* Larson, 85 Iowa 659, 52 N. W. 539; State *v.* Wood, 46 Iowa 116.

Kentucky.— Smith *v.* Com., 96 Ky. 85, 27 S. W. 852, 16 Ky. L. Rep. 256, 49 Am. St. Rep. 287; Com. *v.* Williamson, 96 Ky. 1, 27 S. W. 812, 16 Ky. L. Rep. 197, 49 Am. St. Rep. 285.

Missouri.— State *v.* Campbell, 108 Mo. 611, 18 S. W. 1109; State *v.* Ware, 62 Mo. 597; State *v.* Conway, 18 Mo. 321.

Nebraska.— Crockford *v.* State, (1905) 102 N. W. 70; Dobson *v.* State, 61 Nebr. 584, 85 N. W. 843.

New York.— Wilson *v.* People, 39 N. Y 459.

North Carolina.— State *v.* Overby, 127 N. C. 514, 37 S. E. 148; State *v.* Roper, 14 N. C. 473, 24 Am. Dec. 268.

Oregon.— State *v.* Meldrum, 41 Oreg. 380, 70 Pac. 526.

Texas.— Veasly *v.* State, (Cr. App. 1905) 85 S. W. 274; Jameson *v.* State, (Cr. App. 1902) 68 S. W. 275; Gosler *v.* State, (Cr. App. 1900) 56 S. W. 51; Siemers *v.* State, (Cr. App. 1900) 55 S. W. 334; Phillips *v.* State, (Cr. App. 1897) 42 S. W. 557; Margum *v.* State, 38 Tex. Cr. 231, 42 S. W. 291; McCarty *v.* State, (Cr. App. 1896) 35 S. W. 994; Brownfield *v.* State, (Cr. App. 1894) 25 S. W. 1120; Dismuke *v.* State, (Cr. App. 1892) 20 S. W. 562; Cunningham *v.* State, 27 Tex. App. 479, 11 S. W. 485; Guest *v.* State, 24 Tex. App. 235, 5 S. W. 840; Roberts *v.* State, 21 Tex. App. 460, 1 S. W. 452; Wilson *v.* State, 20 Tex. App. 662; Hernandez *v.* State, 20 Tex. App. 151; Deering *v.* State, 14 Tex. App. 599; Wolf *v.* State, 14 Tex. App. 210; Dow *v.* State, 12 Tex. App. 343; Quitzow *v.* State, 1 Tex. App. 65.

Utah.— People *v.* Miller, 4 Utah 410, 11 Pac. 514.

Vermont.— State *v.* Smith, 2 Tyler 272.

United States.— U. S. *v.* Holland, 26 Fed. Cas. No. 15,378, 2 N. Y. Leg. Obs. 55.

England.— Reg. *v.* Hore, 3 F. & F. 315.

See 32 Cent. Dig. tit. "Larceny," § 4.

The rule in Alabama.— In Alabama it is held that if the taking is tortious the taker will be guilty of larceny, even though the felonious intent is subsequently conceived and executed. Dozier *v.* State, 140 Ala. 668, 37 So. 1021; Weaver *v.* State, 77 Ala. 26; Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762. On the other hand, if the taking is not tortious, as for instance where the property is found, the intent to steal must exist at the time of the finding. Beckham *v.* State, 100 Ala. 15, 14 So. 859; Griggs *v.* State, 58 Ala. 425, 29 Am. Rep. 762.

In Maine, Massachusetts, and South Carolina a wrongful taking without felonious intent, followed by a felonious appropriation, has been held larceny. State *v.* Coombs, 55 Me. 477, 92 Am. Dec. 610; Com. *v.* White, 11 Cush. (Mass.) 483; State *v.* Davenport, 38 S. C. 348, 17 S. E. 37.

8. *Alabama.*— Dickens *v.* State, 142 Ala. 49, 39 So. 14.

Indiana.— Robinson *v.* State, 113 Ind. 510, 16 N. E. 184.

Kentucky.— Smith *v.* Com., 96 Ky. 85, 27 S. W. 852, 16 Ky. L. Rep. 256, 49 Am. St. Rep. 287; Com. *v.* Williamson, 96 Ky. 1, 27 S. W. 812, 16 Ky. L. Rep. 197, 49 Am. St. Rep. 285.

Missouri.— State *v.* Warden, 94 Mo. 648, 8 S. W. 233.

New York.— People *v.* Pollock, 51 Hun 613, 4 N. Y. Suppl. 297.

North Carolina.— State *v.* Bray, 89 N. C. 480.

Oregon.— State *v.* Meldrum, 41 Oreg. 380, 70 Pac. 526.

Rhode Island.— State *v.* McAndrews, 15 R. I. 30, 23 Atl. 304.

South Carolina.— State *v.* Watson, 7 S. C. 63.

West Virginia.— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

United States.— U. S. *v.* Wilson, 44 Fed. 593.

England.— Reg. *v.* Box, 9 C. & P. 126, 38 E. C. L. 85; Reg. *v.* Leppard, 4 F. & F. 51; Reg. *v.* Guernsey, 1 F. & F. 394; Reg. *v.* Farnborough, [1895] 2 Q. B. 484, 18 Cox C. C. 191, 59 J. P. 505, 64 L. J. M. C. 270, 73 L. T. Rep. N. S. 351, 15 Reports 497, 44 Wkly. Rep. 48.

9. Tervin *v.* State, 37 Fla. 396, 20 So. 551; Lawrence *v.* State, 20 Tex. App. 536.

10. Jackson *v.* State, 137 Ala. 96, 34 So. 609; Talbert *v.* State, 121 Ala. 33, 25 So. 690 [*overruling dictum* in Johnson *v.* State, 73

a felonious intent exists at the time of the taking, larceny is committed, although at some period subsequent to the taking defendant came to the conclusion that it was his own property.[11]

B. Nature of Intent — 1. Definition of Animus Furandi. The intent to steal is the intention to take the goods of another as a thief takes, and thereby to deprive the owner permanently of the use of them. To take goods with a fraudulent purpose to take the property of another and a consciousness of no right to take them is a sufficient definition of felonious intent.[12] The elements of *animus furandi* have been thus stated: The thing must be taken without any fair claim of right, with the intent to appropriate so far as to deprive the owner of it permanently, knowingly, or with the *bona fide* belief that the taking is against the owner's consent and intended disposal of the thing.[13]

2. The Felonious Purpose — a. In General. The purpose of the taking must be felonious; that is, it must be such a purpose as actuates a thief. If the purpose of taking property is to exact payment of money from the owner, it is or is not larceny of the property so taken according as the property is to be withheld permanently unless the money is paid, or is to be returned at all events.[14] If on the other hand the taking is to be permanent unless the money is paid the taking is larceny.[15] The same doctrine applies where one takes goods with the intent that the owner shall have them again, but only by buying them back.[16]

b. Taking to Pledge or to Obtain Reward. Taking the property of another

Ala. 523]; Black *v.* State, 83 Ala. 81, 3 So. 814, 3 Am. St. Rep. 691; McMullen *v.* State, 53 Ala. 531; Long *v.* State, 44 Fla. 134, 32 So. 870 ("not a presumption of law, but of fact for jury"); Dean *v.* State, 41 Fla. 291, 26 So. 638, 79 Am. St. Rep. 186; Littlejohn *v.* State, 59 Miss. 273; McDaniel *v.* State, 8 Sm. & M. (Miss.) 401, 47 Am. Dec. 93; Billard *v.* State, 30 Tex. 367, 94 Am. Dec. 317 ("evidence of no *animus furandi*"); Williams *v.* State, 22 Tex. App. 332, 3 S. W. 226.

It was at one time held in North Carolina that if the taking was open there could under no conditions be larceny.— The taking, it was said, must be done fraudulently and secretly, so as not only to deprive the owner of his property, but also to attempt to leave him without knowledge of the taker. State *v.* Shoaf, 68 N. C. 375; State *v.* Ledford, 67 N. C. 60; State *v.* Deal, 64 N. C. 270. "Stealing implies stealth." See State *v.* Fisher, 70 N. C. 78. But this peculiarity appears to be abandoned. State *v.* Hill, 114 N. C. 780, 18 S. E. 971; State *v.* Powell, 103 N. C. 424, 9 S. E. 627, 14 Am. St. Rep. 821, 4 L. R. A. 291. And elsewhere it is well settled that an open taking may constitute larceny. Esline *v.* U. S., 8 Fed. Cas. No. 4,528, 1 Hayw. & H. 620.

11. Jackson *v.* State, 137 Ala. 96, 34 So. 609.

12. Bodee *v.* State, 57 N. J. L. 140, 30 Atl. 681. It is correctly defined in a charge that the party taking goods "must know at the time when he took the property that it did not belong to him, and that he took it at the time intending to deprive the owner of the value of the same, and to appropriate the same to his own use and benefit." Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342, 344.

13. State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

14. See cases cited *infra*, this note.

Illustration.—Where a workman is paid according to the amount of work he does, and his finished material is kept in one place to mark the amount of wages due but is at all times in possession of the master, the servant having no lien upon it, the servant who wrongfully takes from the master to place with the material he has worked on is not guilty of larceny, since the purpose of the taking is merely temporary. Reg. *v.* Holloway, 2 C. & K. 942, 3 Cox C. C. 241, 13 Jur. 86, 18 L. J. M. C. 60, 3 New Sess. Cas. 410, T. & M. 40, 61 E. C. L. 942; Reg. *v.* Poole, 7 Cox C. C. 373, Dears. & B. 345, 27 L. J. M. C. 53, 3 Jur. N. S. 1268, 6 Wkly. Rep. 65; Rex *v.* Webb, 1 Moody C. C. 431.

15. As for instance in a similar case to the one stated in the preceding note, if the workman has a lien on the product for his wages. Fort *v.* State, 82 Ala. 50, 2 So. 477. So where defendant, an employee in a foundry, was paid by the amount of iron which ran out of the furnace, and to increase this quantity he threw into the furnace an iron axle belonging to his employers, it was held to be larceny, the axle being thereby destroyed. Reg. *v.* Richards, 1 C. & K. 532, 47 E. C. L. 532.

16. Thus where a servant of a tallow-chandler took a quantity from his master's warehouse and placed it on the scales, saying it came from a butcher whose pretended servant at once appeared to be paid for it, this was held larceny, for there was the intent to deprive the master of his tallow if he should not pay for it. Reg. *v.* Hall, 3 Cox C. C. 245. So taking railway tickets with intent to use is not the less larceny because they are ultimately to be returned to the railway company, since they are returned only in consideration of a ride. Reg. *v.* Beecham, 5 Cox C. C. 181.

with intent to pledge the same amounts to taking *animo furandi*, if there be no reasonable likelihood of ability to redeem or if the intention to redeem be only a vague and indefinite one.[17] But one who pledges borrowed property with the intention of redeeming and restoring it to the owner, and having a fair and reasonable expectation of so doing, is not guilty of larceny.[18] To take property with intent to hold until a reward is offered and then to claim the reward is taking *animo furandi*, for there is the intent to deprive the owner of his property unless and until a reward is paid.[19] But to take property with the intention of returning it, merely hoping for a reward, is not a felonious taking and hence not larceny.[20]

c. Taking to Destroy Evidence. One who takes to destroy the property lest it be used as evidence against him takes *animo furandi*.[21]

d. Taking For Illegal Purpose Other Than Theft. But a taking, not to deprive the owner, but for some purpose which, although it may be illegal, is not that of theft, is not a felonious taking.[22]

e. Taking For True Owner. If one entirely without right takes property from one who is in possession of it in order to return it to the true owner, or one whom he believes to be such, he is not guilty of larceny.[23]

f. Taking From a Drunken Companion. Taking property from a drunken companion to keep for him is not larceny.[24]

g. Taking in Joke or by Mistake. Taking openly, as a mere joke, without criminal intent, is not larceny.[25] Any mistake, whether of law or of fact, which

17. Reg. *v.* Wynn, 16 Cox C. C. 231, 234, 52 J. P. 55, 56 L. T. Rep. N. S. 749 ("was the pledging a real *bona fide* pledging with the intention of merely obtaining money temporarily, or with the intention of taking the pledge out of the power of the owner"); Reg. *v.* Trebilcock, 7 Cox C. C. 408, Dears. & B. 453, 4 Jur. N. S. 123, 27 L. J. M. C. 103, 6 Wkly. Rep. 281 (verdict of guilty not disturbed, although jury recommended him to mercy, thinking defendant meant ultimately to return property if he were able); Reg. *v.* Medland, 5 Cox C. C. 292 ("must not only be the intent, but also the ability to redeem"); Reg. *v.* Phetheon, 9 C. & P. 552, 38 E. C. L. 324 ("if it clearly appear that the prisoner only intended to raise money upon the property for a temporary purpose, and at the time of pledging the article had a reasonable and fair expectation of being enabled shortly, by the receipt of money, to take it out and restore it, he ought to be acquitted; but otherwise, not").

18. Blackburn *v.* Com., 89 S. W. 160, 28 Ky. L. Rep. 96.

19. Com. *v.* Mason, 105 Mass. 163, 7 Am. Rep. 507; Berry *v.* State, 31 Ohio St. 219, 27 Am. Rep. 506; Dunn *v.* State, 34 Tex. Cr. 257, 30 S. W. 227, 53 Am. St. Rep. 714; Reg. *v.* O'Donnell, 7 Cox C. C. 337; Reg. *v.* Spurgeon, 2 Cox C. C. 102.

20. Micheaux *v.* State, 30 Tex. App. 660, 18 S. W. 550; Reg. *v.* Yorke, 2 C. & K. 841, 3 Cox C. C. 181, 1 Den. C. C. 335, 12 Jur. 1078, 18 L. J. M. C. 38, T. & M. 20, 61 E. C. L. 841; Reg. *v.* Gardner, 9 Cox C. C. 253, 8 Jur. N. S. 1217, L. & C. 243, 32 L. J. M. C. 35, 7 L. T. Rep. N. S. 471, 11 Wkly. Rep. 96.

21. Stegall *v.* State, 32 Tex. Cr. 100, 22 S. W. 146, 40 Am. St. Rep. 761; Rex *v.* Cabbage, R. & R. 217. So where a servant stole and destroyed a letter from her mistress to another giving her a bad character this was held larceny. Reg. *v.* Jones, 2 C. & K. 236, 1 Cox C. C. 6, 1 Den. C. C. 188, 61 E. C. L. 236. And it has also been held that where a person employed in the post-office committed a mistake in the sorting of two letters containing money, and he threw the letters unopened, and the money down a water-closet, in order to avoid a penalty, he was held guilty of larceny of the letters and money. Reg. *v.* Wynn, 2 C. & K. 859, 3 Cox C. C. 271, 1 Den. C. C. 365, 13 Jur. 107, 18 L. J. M. C. 51, 3 New Sess. Cas. 414, T. & M. 32, 61 E. C. L. 859.

22. Thus where a shopkeeper, having sold a pound of coffee and learning that his customer was an inspector and the coffee was for analysis, snatched it away from him, it was held that there was no evidence of felonious intent. Hewson *v.* Gamble, 56 J. P. 534.

23. Gooch *v.* State, 60 Ark. 5, 28 S. W. 510 (if one borrows a horse from its owner and trades it to another, the taking from the latter with intent to return to the true owner is not larceny); Reg. *v.* Gardner, 9 Cox C. C. 253, 8 Jur. N. S. 1217, L. & C. 243, 32 L. J. M. C. 35, 7 L. T. Rep. N. S. 471, 11 Wkly. Rep. 96 (one who wrongfully takes lost property from the finder in order to restore it to the loser is not guilty of larceny); Rex *v.* Van Muyen, R. & R. 87 (the master of a captured vessel who took part of the cargo in order to restore it to the owner is not guilty of larceny).

24. Kecly *v.* State, 14 Ind. 36; Wilson *v.* People, 39 N. Y. 459; State *v.* Gilmer, 97 N. C. 429, 1 S. E. 491; Brownfield *v.* State, (Tex. Cr. App. 1894) 25 S. W. 1120.

25. *Georgia.*— Jackson *v.* State, 116 Ga. 578, 42 S. E. 750.

causes the taking can be shown in disproof of the intent to steal. An unintentional taking is not larceny.[26] And where one takes property similar to his own, under the belief that it is his own, he is not guilty.[27] So where one takes public records under the belief that they are old paper he does not take with intent to steal records.[28]

h. Taking With Intention of Purchasing. If without the knowledge or consent of the owner, but with the belief that he will be willing to sell, one takes goods with the intention of regularly paying for them, there is no felonious intent and therefore no larceny.[29] The intended purchase, however, must be fair and *bona fide*. The taking of property with the intent of purchasing it from the owner at a price less than its value, and of concealing and retaining it until such purchase could be effected, is larceny.[30]

i. Borrowing Without Permission. Where one without permission borrows goods of another intending and having the power to restore or replace them, the taking, although wrongful, does not constitute larceny.[31]

j. Taking Under Bona Fide Belief in Ownership or Authority. Since one who takes what he believes to be his has not the intent of a thief, a *bona fide* claim of right to take is incompatible with an intent to steal; and one who takes under a *bona fide* claim of right to do so is not guilty of larceny.[32] So one who takes

Kansas.— State *v.* Shepherd, 63 Kan. 545, 66 Pac. 236.

New York.— Devine *v.* People, 20 Hun 98.

Texas.— Black *v.* State, 46 Tex. Cr. 107, 79 S. W. 311.

United States.— U. S. *v.* Wilson, 44 Fed. 593.

26. Case *v.* State, 12 Ohio Cir. Ct. 158, 5 Ohio Cir. Dec. 194.

27. Randle *v.* State, 49 Ala. 14; Bird *v.* State, (Fla. 1904) 37 So. 525; Chambers *v.* State, (Tex. Cr. App. 1900) 59 S. W. 261; Brooks *v.* State, (Tex. Cr. App. 1894) 27 S. W. 141; Taylor *v.* State, 12 Tex. App. 489.

28. U. S. *v.* De Groat, 30 Fed. 764.

29. Mason *v.* State, 32 Ark. 238 (where a bar-tender refused to get up and serve some late customers and they helped themselves, offering to pay for their refreshment the next day, a conviction for larceny was not sustained); Long *v.* State, 11 Fla. 295; McCourt *v.* People, 64 N. Y. 583; Beckham *v.* State, (Tex. Cr. App. 1893) 22 S. W. 411; Saltillo *v.* State, 16 Tex. App. 249 (where one takes another's saddle but leaves more than sufficient property to pay for it with a letter directing the owner to pay himself out of such property, the taker is not guilty of larceny); Winn *v.* State, 11 Tex. App. 304 (where one took a keg of syrup, previously having proposed and intending to pay for it in labor, it was not larceny); Landin *v.* State, 10 Tex. App. 63 (defendant needing meat openly killed another's ox, intending and being able to pay owner; it was not larceny).

Allowing value on settlement of accounts. —On this principle a person taking an article, without the consent of the owner, but with the intent of allowing him the value of the article on settlement of their accounts, is not guilty of larceny. Young *v.* State, 37 Tex. Cr. 457, 36 S. W. 272.

30. Com. *v.* Mason, 105 Mass. 163, 7 Am. Rep. 507.

31. See cases cited *infra*, this note.

Applications of rule. — Removing planks from a loose pile of lumber and voluntarily restoring lumber of substantially the same kind and value is not a felonious taking. Fletcher *v.* Com., 118 Ky. 351, 80 S. W. 1089, 26 Ky. L. Rep. 227. And where there is a custom among contractors of helping themselves to each others' material for small quantities, although such custom be unreasonable, a taking in reliance upon it cannot be larceny. Charles Kuhl Artificial Stone Co. *v.* Mack, 17 Ohio Cir. Ct. 663, 12 Ohio Cir. Dec. 177. On this principle where a director in a bank was illegally allowed to make large overdrafts on his account, but was entirely solvent, he could not be convicted of theft without special evidence of intention to defraud. Nelson *v.* Rex, 20 Cox C. C. 150.

32. *Alabama.*— Barnes *v.* State, 103 Ala. 44, 15 So. 901; Bonham *v.* State, 65 Ala. 456.

Arkansas.— Blair *v.* State, 71 Ark. 643, 71 S. W. 482; Brown *v.* State, 28 Ark. 126.

California.— People *v.* Devine, 95 Cal. 227, 30 Pac. 378.

Colorado.— Miller *v.* People, 4 Colo. 182.

Connecticut.— State *v.* Main, 75 Conn. 55, 52 Atl. 257.

Delaware.— State *v.* Pullen, 3 Pennew. 184, 50 Atl. 538.

Florida.— Dean *v.* State, 41 Fla. 291, 26 So. 638, 79 Am. St. Rep. 186.

Georgia.— Cleveland *v.* State, 114 Ga. 110, 39 S. E. 941; James *v.* State, 114 Ga. 96, 39 S. E. 946; Lee *v.* State, 102 Ga. 221, 29 S. E. 264.

Illinois.— Phelps *v.* People, 55 Ill. 334.

Iowa.— State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125; State *v.* Bond, 8 Iowa 540.

Massachusetts.— Com. *v.* Stebbins, 8 Gray 492; Com. *v.* Robinson, Thach. Cr. Cas. 230.

Mississippi.— Buchanan *v.* State, (1889) 5 So. 617; Chambers *v.* State, 62 Miss. 108; McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

goods under the authority of another, in the *bona fide* belief that he is authorized or that his principal is entitled, is not guilty of larceny, although the belief is mistaken.[33] In the notes hereto are set out decisions showing the application of the doctrine enunciated.[34] It is necessary, however, in all cases that the claim of

Missouri.— State *v.* Homes, 17 Mo. 379, 57 Am. Dec. 269.

Nebraska.— Mead *v.* State, 25 Nebr. 444, 41 N. W. 277.

New Hampshire.— Severance *v.* Carr, 43 N. H. 65.

New York.— People *v.* Ouley, 7 N. Y. St. 794.

North Carolina.— State *v.* Thompson, 95 N. C. 596.

Pennsylvania.— Com. *v.* Swayne, 1 Pa. Super. Ct. 547.

Texas.— Smith *v.* State, 42 Tex. 444; Johnson *v.* State, 41 Tex. 608; Varas *v.* State, 41 Tex. 527; Kay *v.* State, 40 Tex. 29; Mullins *v.* State, 37 Tex. 337; Gardiner *v.* State, 33 Tex. 692; Thurman *v.* State, 33 Tex. 684; Herber *v.* State, 7 Tex. 69; Young *v.* State, (Cr. App. 1904) 83 S. W. 808; Hull *v.* State, (Cr. App. 1904) 80 S. W. 380; Pollard *v.* State, (Cr. App. 1904) 79 S. W. 26; Black *v.* State, 38 Tex. Cr. 58, 41 S. W. 606; Ray *v.* State, 35 Tex. Cr. 354, 33 S. W. 869; Phillips *v.* State, (Cr. App. 1895) 31 S. W. 644; Lawrence *v.* State, (Cr. App. 1895) 30 S. W. 668; Smith *v.* State, (Cr. App. 1895) 29 S. W. 785; Woods *v.* State, (Cr. App. 1893) 24 S. W. 99; Parks *v.* State, 29 Tex. App. 597, 16 S. W. 532; Lewis *v.* State, 29 Tex. App. 105, 14 S. W. 1008; Bennett *v.* State, 28 Tex. App. 342, 13 S. W. 142; Green *v.* State, 27 Tex. App. 570, 11 S. W. 636; McGowan *v.* State, 27 Tex. App. 183, 11 S. W. 112; Buchanan *v.* State, 26 Tex. App. 52, 9 S. W. 57; Howard *v.* State, 25 Tex. App. 602, 8 S. W. 806; White *v.* State, 23 Tex. App. 643, 5 S. W. 164; Donahoe *v.* State, 23 Tex. App. 457, 11 S. W. 677, 5 S. W. 245; Willey *v.* State, 22 Tex. App. 408, 3 S. W. 570; Owens *v.* State, 21 Tex. App. 579, 2 S. W. 808; Wilkerson *v.* State, 21 Tex. App. 501, 2 S. W. 857; Britt *v.* State, 21 Tex. App. 215, 17 S. W. 255; Tarin *v.* State, 19 Tex. App. 359; Boyd *v.* State, 18 Tex. App. 339; Small *v.* State, 18 Tex. App. 336; Winn *v.* State, 17 Tex. App. 284; Harris *v.* State, 17 Tex. App. 177; Madison *v.* State, 16 Tex. App. 435; Evans *v.* State, 15 Tex. App. 31; Lawrence *v.* State, 11 Tex. App. 306; Neely *v.* State, 8 Tex. App. 64.

England.— Rex *v.* Jenner, 7 L. J. M. C. O. S. 79.

See 32 Cent. Dig. tit. "Larceny," § 5.

33. *Arkansas.*— Holmes *v.* State, 59 Ark. 641, 27 S. W. 225.

California.— People *v.* Hoagland, 138 Cal. 338, 71 Pac. 359.

Florida.— Baker *v.* State, 17 Fla. 406.

Idaho.— State *v.* Seymour, 10 Ida. 699, 79 Pac. 825.

Iowa.— State *v.* Barrackmore, 47 Iowa 684.

Michigan.— People *v.* Slayton, 123 Mich. 397, 82 N. W. 205, 81 Am. St. Rep. 211.

Texas.— Tyler *v.* State, (Cr. App. 1902) 70 S. W. 750; Grogan *v.* State, (Cr. App. 1901) 65 S. W. 376; Phillips *v.* State, (Cr. App. 1895) 31 S. W. 644; Lawrence *v.* State, (Cr. App. 1895) 30 S. W. 668; Castillo *v.* State, 27 Tex. App. 188, 11 S. W. 32; Anderson *v.* State, 25 Tex. App. 593, 9 S. W. 43; Heskew *v.* State, 18 Tex. App. 275.

England.— Reg. *v.* Leppard, 4 F. & F. 51.

See 32 Cent. Dig. tit. "Larceny," § 5.

34. Taking money to pay a debt.— Taking money with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken is unlawful; but if it is done under an honest belief of the legal right to do so, it does not constitute larceny. Johnson *v.* State, 73 Ala. 523; Com. *v.* Stebbins, 8 Gray (Mass.) 492; Young *v.* State, 34 Tex. Cr. 290, 30 S. W. 238; Wolf *v.* State, 14 Tex. App. 210. Thus where defendant had purchased a due-bill on the owner of the property alleged to be stolen, and was informed and honestly believed that the owner was willing that the property be taken on that debt, it was no larceny to take it under that belief. State *v.* Williams, 95 Mo. 247, 8 S. W. 217, 6 Am. St. Rep. 46. In the absence, however, of a *bona fide* belief in the right to do so, taking money to apply it to the payment of a debt is larceny. Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403; People *v.* Solomon, 12 N. Y. App. Div. 627, 42 N. Y. Suppl. 573; Butler *v.* State, 3 Tex. App. 403.

Taking from officer.— Taking under *bona fide* claim of right from an officer (Kirk *v.* Com., 14 S. W. 1089, 12 Ky. L. Rep. 707; Bullard *v.* State, 41 Tex. Cr. 225, 53 S. W. 637) or retaking property after execution sale honestly believing it exempt and such retaking rightful (People *v.* Schultz, 71 Mich. 315, 38 N. W. 868) is not larceny. So where the owner of goods attached by an officer took part of the goods, but intentionally left enough to satisfy the claim, this may be shown to disprove the intent to steal. Com. *v.* Greene, 111 Mass. 392.

Purchase from one believed to be owner.— Purchase from one *bona fide* believed to be owner is not larceny. Morningstar *v.* State, 59 Ala. 30; Ward *v.* State, 70 Ark. 204, 66 S. W. 926; Houston *v.* State, (Tex. Cr. App. 1898) 47 S. W. 468; Wilkerson *v.* State, 21 Tex. App. 501, 2 S. W. 857; Holley *v.* State, 21 Tex. App. 156, 17 S. W. 159.

Belief of right to retake on failure to carry out contract.—A woman who gave property to her father under an arrangement by which he was to support her children is not guilty of larceny by retaking it when the arrangement is abandoned. Ross *v.* Com., 20 S. W. 214, 14 Ky. L. Rep. 259. On a dispute arising between the vendee of an organ on credit and the assignee of the contract as to the balance due, the latter took

right be a *bona fide* one.[35] Whether the claim is honest is a question for the jury.[36] And if the jury are in doubt they must acquit.[37]

k. Miscellaneous. Taking a bird-cage as wanton mischief for the purpose of retaliation;[38] catching a chicken and making it squall for sport merely, to annoy the owner;[39] opening a letter from idle curiosity;[40] or taking warrants from the possession of a bailiff, with the intent of depriving him of his authority,[41] does not constitute larceny. So where a detective accompanied a thief, pretending to be his accomplice, and apparently has a part in the taking, he is not guilty of larceny because the felonious intent is lacking.[42] But where, without concert with the

the organ, stating where he was taking it and that vendee could come there and settle. A conviction of larceny was reversed. People *v.* Walburn, 132 Mich. 24, 92 N. W. 494. Although a vendor of real estate has permitted the vendee to file the deed for record with the register of deeds, he is not guilty of larceny if he secures from the register the deed and destroys it under the honest belief that he has a right to the paper, the transaction not being entirely completed. Com. *v.* Weld, Thach. Cr. Cas. (Mass.) 157. So a taking of lightning rods openly, and under a claim of right existing by virtue of the provisions of a written contract by which the rods were put up, does not constitute a theft. Brokaw *v.* State, (Tex. Cr. App. 1905) 85 S. W. 801. One who took a bell from a milk wagon openly, rang it loudly to call the driver, and finally left word with a bystander of his taking and claim of ownership was erroneously convicted of larceny. Causey *v.* State, 79 Ga. 564, 5 S. E. 121, 11 Am. St. Rep. 447. An umbrella mender after delivering an umbrella retook to claim a lien; if he acted *bona fide*, it was no larceny. Reg. *v.* Wade, 11 Cox C. C. 549.

Taking under authority of a statute which is subsequently declared unconstitutional is not felonious. Kueney *v.* Uhl, (Iowa 1904) 98 N. W. 602.

Other applications of rule.— Taking by a husband of property which he believes to be his wife's and which he believes therefore he has a right to take, is not larceny. Watkins *v.* State, 60 Miss. 323; Overton *v.* State, 43 Tex. 616. So an honest belief that a steer claimed to have been stolen was the property of defendant's father, for whom he took it, entitles him to an acquittal on a trial for larceny. Darnell *v.* State, (Tex. Cr. App. 1901) 63 S. W. 631. Cutting and taking grass from the land of another by one honestly claiming to be lessee is not larceny. State *v.* Ravenscraft, 62 Mo. App. 109. One who openly in the daytime drives to a neighbor's farm and in the presence of such neighbor's wife and of others carries off a trough claimed by him as his own, and which he had previously demanded, is not guilty of larceny. Seymore *v.* State, 12 Tex. App. 391. A lessee who repairs a pen with his own rails only for a temporary purpose and afterward removes the rails under a claim of right is not guilty of larceny. Meerschat *v.* State, (Tex. Cr. App. 1900) 57 S. W. 955; Wilson *v.* State, 27 Tex. App. 577, 11 S. W. 638. Taking rails from the land of the owner in the latter's presence and with the statement that the vendor of the owner had said the taker might have the rails fails to show a fraudulent intent. Demint *v.* State, 26 Tex. App. 370, 9 S. W. 738. One who *bona fide* believes that he has a lien on goods and that he can repledge the goods is not guilty of larceny if he so repledges. People *v.* Husband, 36 Mich. 306. One who labors under a belief that he has a right to kill any unbranded animal over one year old, and does so, is not guilty of larceny. Dehbs *v.* State, 43 Tex. 650. So of one who kills doves which are stealing his corn, under the belief in his right to do so. Taylor *v.* Newman, 4 B. & S. 89, 9 Cox C. C. 314, 32 L. J. M. C. 186, 8 L. T. Rep. N. S. 424, 11 Wkly. Rep. 752, 116 E. C. L. 89. So where money was given defendant, a servant, for the purpose of paying turnpike toll, and he went by another road, and spent the money on beer, but openly and without any felonious intent, a conviction of larceny was held wrong. Reg. *v.* Deering, 11 Cox C. C. 298, 20 L. T. Rep. N. S. 680, 17 Wkly. Rep. 807. Where one had bought cotton of a firm, and in removing it carried off more than he was entitled to, but openly, and under a claim of right as a part of the trade, it was held such a taking was not felony. Newton Mfg. Co. *v.* White, 63 Ga. 697.

35. *Alabama.*— Morrisette *v.* State, 77 Ala. 71.

Florida.— Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237.

Mississippi.— McDaniel *v.* State, 8 Sm. & M. 401, 47 Am. Dec. 93.

North Carolina.— State *v.* Thompson, 95 N. C. 596.

Washington.— State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

See 32 Cent. Dig. tit. "Larceny," § 5.

36. State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

37. Reese *v.* State, 43 Tex. Cr. 539, 67 S. W. 325; Camplin *v.* State, 1 Tex. App. 108.

38. Crocheron's Case, 1 City Hall Rec. (N. Y.) 177.

39. Colwell *v.* State, (Tex. Cr. App. 1896) 34 S. W. 615.

40. Reg. *v.* Godfrey, 8 C. & P. 563, 34 E. C. L. 893.

41. Reg. *v.* Bailey, L. R. 1 C. C. 347, 12 Cox C. C. 129, 41 L. J. M. C. 61, 25 L. T. Rep. N. S. 882, 20 Wkly. Rep. 301.

42. People *v.* Mills, 178 N. Y. 274, 70 N. E.

owner, he induces a thief to steal goods, in order himself to get a reward which had been offered by the owner, he has been held guilty.[43] On the other hand servants who took without authority a quantity of beans from their master to feed his horses were held guilty of larceny, for there was the intent to deprive the master of his property, although applied to feeding his horses.[44] This is a rather questionable decision.

3. Permanent Taking. There is no *animus furandi* without an intention of depriving the owner permanently in a fair sense. The wrongful taking of the personal property of another for a mere temporary purpose is not larceny.[45] Thus if one illegally takes another's horse to ride, with the intention of leaving it within a reasonable distance for the owner to take it, there is no intention to steal.[46] *A fortiori* taking with the intention of temporarily using the horse and then returning it is not larceny.[47] The temporary taking of a horse to facilitate escape, intending to turn it loose within a reasonable distance, is not larceny.[48] If, however, the horse is to be turned loose under such circumstances that the owner will not be likely to recover it, the taking is larceny.[49] Taking a skiff to evade arrest, and carrying along a friend to return it, is not larceny.[50] And similarly the taking of a guard's pistol by escaping convicts, which they directed to be returned to him, is not larceny.[51] Other instances of temporary taking are set out in the notes.[52]

4. Whether For Gain. According to the weight of authority the felonious

786; Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386, 25 L. R. A. 349; Rex *v.* Dannelly, 2 Marsh. 471, R. & R. 310, 4 E. C. L. 498.

43. Slaughter *v.* State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242.

44. Rex *v.* Morfit, R. & R. 228; Reg. *v.* Privett, 2 C. & K. 114, 2 Cox C. C. 40, 1 Den. C. C. 193, 61 E. C. L. 114.

45. *Kansas.*— State *v.* Shepherd, 63 Kan. 545, 66 Pac. 236.

Mississippi.— Leland *v.* State, 82 Miss. 132, 33 So. 842.

Missouri.— Witt *v.* State, 9 Mo. 671.

New Jersey.— State *v.* South, 28 N. J. L. 28, 74 Am. Dec. 250.

Oklahoma.— Steil *v.* Territory, 12 Okla. 377, 71 Pac. 653; Mitchell *v.* Territory, 7 Okla. 527, 54 Pac. 782.

Texas.— Smith *v.* State, (Cr. App. 1895) 29 S. W. 785; Knutson *v.* State, 14 Tex. App. 570.

See 32 Cent. Dig. tit. "Larceny," § 6.

46. *Indiana.*— Umphrey *v.* State, 63 Ind. 223.

Kansas.— *In re* Mutchler, 55 Kan. 164, 40 Pac. 283.

New York.— Jeffers' Case, 1 City Hall Rec. 83.

Texas.— McCracken *v.* State, 6 Tex. App. 507.

England.— Reg. *v.* Addis, 1 Cox C. C. 78; Reg. *v.* Philips, 2 East P. C. 662.

47. State *v.* Shermer, 55 Mo. 83; State *v.* Self, 1 Bay (S. C.) 242; McDaniel *v.* State, 33 Tex. 419; Schultz *v.* State, 30 Tex. App. 94, 16 S. W. 756.

48. *Arkansas.*— Dove *v.* State, 37 Ark. 261.

Delaware.— State *v.* York, 5 Harr. 493.

Pennsylvania.— Com. *v.* Wilson, 1 Phila. 80, to be turned loose after riding thirty miles.

Texas.— Lucas *v.* State, 33 Tex. Cr. 290, 26 S. W. 213.

Utah.— People *v.* Flynn, 7 Utah 378, 26 Pac. 1114.

England.— Rex *v.* Crump, 1 C. & P. 658, 12 E. C. L. 373.

See 32 Cent. Dig. tit. "Larceny," § 9.

49. State *v.* Davis, 38 N. J. L. 176, 20 Am. Rep. 367.

Question for jury.— It is for the jury to say whether reckless exposure to loss, abandonment at a distance from home, and other treatment of a horse taken by defendant constitute evidence of an intent to permanently deprive the owner of his property. State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

50. State *v.* Dillon, 48 La. Ann. 1365, 20 So. 913.

51. Mahoney *v.* State, 33 Tex. Cr. 388, 26 S. W. 622.

52. Taking papers in order to delay the taking of a deposition (Parr *v.* Loder, 97 N. Y. App. Div. 218, 89 N. Y. Suppl. 823), taking a steer to tie a hoard over its face in order to keep it out of the fields (Bryant *v.* State, 25 Tex. App. 751, 8 S. W. 937), taking a locket and necklace belonging to his mistress to prevent her going to a place of amusement (Cain *v.* State, 21 Tex. App. 662, 2 S. W. 888), taking muskets with the sole intent to prevent the use of them upon the taker and his associates (U. S. *v.* Durkee, 25 Fed. Cas. No. 15,009, McAllister 196), taking away articles in order to induce the owner (a girl) to fetch them and thereby give the taker an opportunity to solicit her to commit fornication with him (Rex *v.* Dickinson, R. & R. 312), or taking a bicycle, intending to return it the same day (People *v.* Brown, 105 Cal. 66, 38 Pac. 518). So taking a hand-car from the tool-house of a railroad company and riding on it twelve miles and leaving it at the side of a track. State *v.* Ryan, 12 Nev. 401, 28 Am. Rep.

intent required for larceny is not necessarily an intent to gain advantage for defendant; an intention to deprive the owner of his property is enough.[53] But in a few cases it is held necessary to show that defendant took for his own purpose or *lucri causa*; a phrase borrowed from the Roman law.[54]

c. Incapacity to Form Intent. If a person is incapable of forming an intent to steal he cannot be guilty of larceny. Thus a child too young to form an intent to steal cannot be guilty of larceny.[55] A person who is incapable by reason of intoxication of forming an intent to steal is not guilty of larceny.[56] Mere drunkenness, however, does not prevent the existence of the intent or the commission of the crime,[57] and the fact that on prior occasions of intoxication defendant was bereft of reason is immaterial.[58]

VI. DEFENSES.[59]

A. Personal Defenses.[60] An alien enemy is not punishable for taking property as an act of war.[61] A person who is so insane as not to be able to govern his acts cannot be convicted; therefore kleptomania, if proved, is a defense to a charge of theft.[62] A deaf and dumb person is not by reason of his infirmities

802. So one who takes a printed document from a government office to be printed in a newspaper is not guilty of larceny unless he had the object and intention of depriving the government permanently of the paper. Reg. *v.* Guernsey, 1 F. & F. 394.

53. *Alabama.*—Williams *v.* State, 52 Ala. 411 [*overruling* State *v.* Hawkins, 8 Port. 461, 33 Am. Dec. 294].

California.— People *v.* Juarez, 28 Cal. 380.

Indiana.— Best *v.* State, 155 Ind. 46, 57 N. E. 534. See Pence *v.* State, 110 Ind. 95, 10 N. E. 919; Keely *v.* State, 14 Ind. 36.

Minnesota.— State *v.* Wellman, 34 Minn. 221, 25 N. W. 395.

Mississippi.— Delk *v.* State, 64 Miss. 77, 1 So. 9, 60 Am. Rep. 46; Warden *v.* State, 60 Miss. 638; Hamilton *v.* State, 35 Miss. 214.

Nevada.— State *v.* Slingerland, 19 Nev. 135, 7 Pac. 280; State *v.* Ryan, 12 Nev. 401, 28 Am. Rep. 802.

New Jersey.— State *v.* Davis, 38 N. J. L. 176, 20 Am. Dec. 367.

South Carolina.— State *v.* Brown, 3 Strobh. 508.

Texas.— Lopez *v.* State, 46 Tex. Cr. 473, 80 S. W. 1016, 1197. See Corn *v.* State, 41 Tex. 301; State *v.* Sherlock, 26 Tex. 106; Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670; Alexander *v.* State, 12 Tex. 540.

West Virginia.—State *v.* Caddle, 35 W. Va. 73, 12 S. E. 1098.

England.— Reg. *v.* Jones, 2 C. & K. 236, 1 Cox C. C. 6, 1 Den. C. C. 188, 61 E. C. L. 236; Rex *v.* Cabbage, R. & R. 217.

See 32 Cent. Dig. tit. "Larceny," § 6.

If a servant takes his master's property, and hands it over to another as a gift, it is as much a felony as if he takes it to a pawnbroker and pledges it. Reg. *v.* White, 9 C. & P. 344, 38 E. C. L. 206.

54. State *v.* Palmer, 4 Pennew. (Del.) 126, 53 Atl. 359; State *v.* Littrell, 170 Mo. 13, 70 S. W. 143; People *v.* Woodward, 31 Hun (N. Y.) 57.

55. Allen *v.* State, (Tex. Cr. App. 1896) 37 S. W. 757.

If the child is old enough to form the intent, the fact that he acted under the control of a parent will not disprove the existence of the intent. People *v.* Richmond, 29 Cal. 414.

56. *Alabama.*— Chatham *v.* State, 92 Ala. 47, 9 So. 607.

Arkansas.— Wood *v.* State, 34 Ark. 341, 36 Am. Rep. 13.

Delaware.—State *v.* Kavanaugh, 4 Pennew. 131, 53 Atl. 335.

Georgia.— Jenkins *v.* State, 93 Ga. 1, 18 S. E. 992. But *compare* Bernhard *v.* State, 76 Ga. 613.

Indiana.— Robinson *v.* State, 113 Ind. 510, 16 N. E. 184.

Michigan.— People *v.* Cummins, 47 Mich. 334, 11 N. W. 184, 186; People *v.* Walker, 38 Mich. 156.

North Dakota.— State *v.* Koerner, 8 N. D. 292, 78 N. W. 981, 73 Am. St. Rep. 752, statutory.

Texas.— Cady *v.* State, 39 Tex. Cr. 236, 45 S. W. 568.

Virginia.— Hall *v.* Com., 78 Va. 678.

Wisconsin.— Collins *v.* State, 115 Wis. 596, 92 N. W. 266; State *v.* Schingen, 20 Wis. 74.

See 32 Cent. Dig. tit. "Larceny," § 3 *et seq.*

57. State *v.* McGonigal, 5 Harr. (Del.) 510; O'Herrin *v.* State, 14 Ind. 420; Wright *v.* State, 37 Tex. Cr. 627, 40 S. W. 491.

58. State *v.* Hart, 29 Iowa 268.

59. Entrapment as defense see *supra*, IV, F.

60. Coercion of husband as defense to prosecution of wife see HUSBAND AND WIFE, 21 Cyc. 1355.

Infancy as a defense see INFANTS, 22 Cyc. 623.

61. State *v.* Stanhope, Brayt. (Vt.) 20, the defense must be made by special plea.

62. State *v.* McCullough, 114 Iowa 532, 87 N. W. 503, 89 Am. St. Rep. 382, 55 L. R. A. 378; People *v.* Sprague, 2 Park. Cr. (N. Y.) 43; Lowe *v.* State, 44 Tex. Cr. 224, 70 S. W. 206; Harris *v.* State, 18 Tex. App. 287.

incapable of committing crime, but may be proved to be of sufficient capacity to be guilty of larceny.[63]

B. Disposition of the Property. What disposition the thief made of the property is immaterial, and no dealing with the property after the taking can destroy or in any way affect his guilt. Thus a return of the property is no defense.[64] Neither is an agreement to return it,[65] nor a condonation of the theft by the owner of the goods, upon an agreement to treat the thief as a debtor.[66] Nor need it be shown that the thief after the taking carried out his felonious intent by converting the goods to his own use.[67]

C. Custom. A custom to take another's property is of itself no defense to a prosecution for larceny.[68] But evidence of such a custom might be admissible as bearing on the *bona fides* of the taker, and thus disproving the *animus furandi*.[69]

D. Excuse. Where defendant took a horse with intent to deprive its owner of its value, or a portion thereof, it is immaterial that at the time of the taking the horse was trespassing on defendant's premises.[70]

E. Limitation. Prosecution may be barred by a statute of limitations.[71]

F. Change of Law. If after the commission of an act of larceny the law is so changed as to abolish the provisions making the act criminal, there can be no conviction, even though in place of the repealed law similar provisions were enacted.[72] The repeal should contain a saving clause keeping the old provisions alive for the purpose of punishing infractions of them; and the punishment may then be inflicted under the old provisions.[73] A mere amendment of the old law does not prevent punishment under unamended provisions of the old law.[74]

VII. RESTITUTION OF STOLEN PROPERTY.

A. Right of Owner to Restitution — 1. Under the English Practice. Under the English practice the owner of stolen goods has no action for their recovery until he has successfully prosecuted the thief; upon which, by statute, the court has power to issue an order of restitution directing the stolen goods to be returned to the owner, and it will not matter that the stolen property has found its way into the hands of *bona fide* purchasers. Property ordered restored must be that stolen.[75] The property must be identified at the time of the trial.[76] While

63. Com. *v.* Hill, 14 Mass. 207.

64. State *v.* Scott, 64 N. C. 586; Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565; Reg. *v.* Poynton, 9 Cox C. C. 249, 8 Jur. N. S. 1218, L. & C. 247, 32 L. J. M. C. 29, 7 L. T. Rep. N. S. 434, 11 Wkly. Rep. 73.

65. People *v.* Gottschalk, 66 Hun (N. Y.) 64, 20 N. Y. Suppl. 777 [*affirmed* in 137 N. Y. 569, 33 N. E. 339].

66. Young *v.* People, 193 Ill. 236, 61 N. E. 1104.

67. Davis *v.* State, 10 Lea (Tenn.) 707. But see State *v.* Hayes, 111 N. C. 727, 16 S. E. 410.

68. See cases cited *infra*, this note.

Applications of rule.— A custom of killing all unmarked hogs over twelve months old and taking the carcass is no defense to a prosecution for larceny for doing so. Lawrence *v.* State, 20 Tex. App. 536. And so of a custom to go into pastures and take wood from the owners; "there is no law authorizing thieving by custom." Vick *v.* State, (Tex. Cr. App. 1902) 69 S. W. 156. So of a "general belief" that property found with no marks belongs to the finder. State *v.* Welch, 73 Mo. 284, 39 Am. Rep. 515. And it is no defense to the theft of oysters from the oyster bed of T that prior to T's acquisition of title the public took oysters from the bed without objection; T's title papers being duly recorded, its acquisition of title being notoriously published, it having fenced the property and planted oyster beds thereon, and defendant, when informed that he was trespassing, having refused to desist. Com. *v.* Doane, 1 Cush. (Mass.) 5; Ragazine *v.* State, (Tex. Cr. App. 1905) 84 S. W. 832.

69. Hendry *v.* State, 39 Fla. 235, 22 So. 647.

70. Com. *v.* Mason, 105 Mass. 163, 7 Am. Rep. 507.

71. State *v.* Hoke, 84 Ind. 137.

72. Hirschburg *v.* People, 6 Colo. 145; Tuton *v.* State, 4 Tex. App. 472; Hubbard *v.* State, 2 Tex. App. 506; Sheppard *v.* State, 1 Tex. App. 522.

73. State *v.* Willis, 66 Mo. 131; Allen *v.* Com., 2 Leigh (Va.) 727.

74. State *v.* Miller, 58 Ind. 399.

75. Reg. *v.* Pierce, Bell C. C. 235, 8 Cox C. C. 344, E. B. & E. 509, 4 Jur. N. S. 1078, 27 L. J. M. C. 231, 96 E. C. L. 509; Rex *v.* Haverstock, 5 Can. Cr. Cas. 113.

76. Reg. *v.* Smith, 12 Cox C. C. 597; Josephs *v.* Adkins, 2 Stark. 76, 19 Rev. Rep. 677, 3 E. C. L. 324.

the earlier statutes limited the power to order restitution to cases of felonious taking,[77] later statutes extended the rule to cases of false pretenses.[78] A *bona fide* purchaser of goods obtained by false pretenses is subject to an order for restitution.[79] While it was held under earlier statutes that the power to order restitution could be invoked only when the goods could be returned in specie,[80] yet it has been held under a later statute that the proceeds of stolen property in the hands of the convict or his agent may be ordered restored to the original owner.[81] The jurisdiction of the court of queen's bench to issue a writ of restitution of stolen property was incidental to the judgment on appeals of felony, which were abolished by 59 Geo. III, c. 46, and it was abolished with them.[82] Mandamus will not lie to compel the court to issue an order for restitution,[83] although if an order be made, attachment will be issued for its disobedience.[84] The Forfeiture for Felony Act, 1870 (33 & 54 Vict. c. 23, § 4), which empowers the court to award any sum of money not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by reason of felony, such sum to be "deemed a judgment-debt to the person entitled to receive the same from the person so convicted," requires to be exercised with considerable caution, as being liable to abuse by arrangements in the nature of condonation of a felony.[85] It was an offense within 4 Geo. I, c. 11, § 4, to take money under pretense of helping a man to goods stolen from him, although the prisoner has no acquaintance with the felon, and did not pretend that he had, although he had no power to apprehend the felon, and although the goods were never restored, and the prisoner had not power to restore them.[86] Similarly under statute 7 & 8 Geo. IV, c. 29, § 58, it was held an offense to receive money with an intent to purchase stolen goods from thieves for the owner, not meaning to bring them to justice.[87] By statute also the property in a stolen chattel revests in the owner on the conviction of the thief, and the owner may maintain trover for it, although there has been no order for restitution.[88] The *bona fide* purchaser of stolen beasts sold in market overt cannot, in answer to a claim for them by the original owner after the conviction of the thief, counter-claim for the cost of their keep while the beasts were in the possession of the purchaser, for they were his own property until, on the conviction, the property revested in the original owner.[89]

2. IN THE UNITED STATES. In the United States generally the owner of stolen property is entitled to have it back irrespective of the conviction of the thief. Identified stolen goods may be recovered even from a *bona fide* purchaser,[90] but not stolen bank-notes or other money to which an innocent holder gets title.[91]

77. Rex *v.* De Veaux, 2 East P. C. 789, 839, 2 Leach C. C. 585.

78. Reg. *v.* Stancliffe, 11 Cox C. C. 318.

79. Reg. *v.* Goldsmith, 12 Cox C. C. 594; Bentley *v.* Vilmont, 12 App. Cas. 471, 52 J. P. 68, 57 L. J. Q. B. 18, 57 L. T. Rep. N. S. 854, 36 Wkly. Rep. 481. But the *bona fide* purchaser of a stolen negotiable instrument is protected by section 100 of the Larceny Act of 1861, from the operation of an order for restitution, and by interpretation of this statute is held not liable in an action in trover. Chicester *v.* Hill, 15 Cox C. C. 258, 47 J. P. 324, 52 L. J. Q. B. 160, 48 L. T. Rep. N. S. 364, 31 Wkly. Rep. 245.

80. Reg. *v.* Jones, 14 Cox C. C. 528; Rex *v.* Stanton, 7 C. & P. 431, 32 E. C. L. 692.

81. Reg. *v.* Justices Cent. Cr. Ct., 18 Q. B. D. 314, 16 Cox C. C. 196, 51 J. P. 229, 56 L. J. M. C. 25, 56 L. T. Rep. N. S. 352, 35 Wkly. Rep. 243.

82. Reg. *v.* London Corp., L. R. 4 Q. B. 371, 10 B. & S. 341, 11 Cox C. C. 280, 38 L. J. M. C. 107, 20 L. T. Rep. N. S. 604, 17 Wkly. Rep. 722.

83. Reg. *v.* Judges, etc., Cent. Cr. Ct., 11 Q. B. D. 479, 15 Cox C. C. 325, 52 L. J. M. C. 121.

84. Reg. *v.* Wollez, 8 Cox C. C. 337.

85. Reg. *v.* Lovett, 11 Cox C. C. 602.

86. Rex *v.* Ledbitter, 1 Moody C. C. 76.

87. Reg. *v.* Pascoe, 2 C. & K. 927, 3 Cox C. C. 462, 1 Den. C. C. 456, 13 Jur. 544, 18 L. J. M. C. 186, 4 New Sess. Cas. 66, T. & M. 141, 61 E. C. L. 927.

88. Scattergood *v.* Sylvester, 15 Q. B. 506, 14 Jur. 977, 19 L. J. Q. B. 447, 69 E. C. L. 506.

89. Walker *v.* Matthews, 8 Q. B. D. 109, 51 L. J. Q. B. 243, 46 L. T. Rep. N. S. 915, 30 Wkly. Rep. 338.

90. Lance *v.* Cowan, 1 Dana (Ky.) 195.

91. U. S. *v.* Read, 27 Fed. Cas. No. 16,125, 2 Cranch C. C. 159.

B. Voluntary Restitution Mitigating Punishment. Restitution has been given a totally different effect by statute in Michigan[92] and in Texas,[93] where complete voluntary restitution of the goods by the thief to the owner operates to reduce the offense from a felony to a misdemeanor. The prisoner cannot invoke the benefit of the statute where the offense includes a burglarious entry made in order to commit the larceny.[94] Restitution must be voluntary, and restitution under threat of prosecution is not voluntary.[95] Nor is return of stolen property after having been caught with it in possession "voluntary" within the statute.[96] The return must not be prompted solely by apprehensions of discovery.[97] If, however, the return is induced by repentance it is enough, although fear of punishment may also constitute a motive.[98] Restitution must be within a reasonable time. Returning property on the evening of the day on which it was stolen is a return within a reasonable time.[99] The identical property must be returned. The statute does not apply where the character of the property has been changed, as from live hogs to pork.[1] Nor will payment for stolen property enable the prisoner to invoke the statute.[2]

VIII. PARTIES.

A. Principal — 1. Principal in the First Degree. The person who with his own hand takes the goods is the principal in the first degree in the crime of larceny.[3] A party who takes no part in the actual larceny and is not present at the time and place of the taking cannot be guilty of the larceny as principal.[4]

2. Joint Principals. Where two or more persons act together in a larceny, each of them doing one part of the whole act, they are joint principals in the crime.[5]

Property changed into money.— The right of the owner of stolen property to a summary restitution thereof, under the Massachusetts statute, is limited to the articles stolen, and does not extend to money into which they have been changed by the thief. Com. *v.* Boudrie, 4 Gray (Mass.) 418. On a conviction of larceny of money, the court ought not to enter judgment against the prisoner for the amount, nor award an execution in favor of the person from whom it was stolen. *In re* Henley, 1 Va. Cas. 145. Where money was taken from defendant on a search warrant, but on trial she was found not guilty of larceny, as charged, by finding and appropriating the money, it should be returned to her, and the court cannot retain the case on its docket, and call a jury to determine the ownership of the money, under Code, § 4657, for that only applies where defendant has been found guilty. State *v.* Williams, 61 Iowa 517, 16 N. W. 586.

92. 2 Mich. Comp Laws, § 5765.

93. Paschal Dig. art. 2397.

94. Pitcher *v.* People, 16 Mich. 142.

95. Owen *v.* State, 44 Tex. 248; Ware *v.* State, (Cr. App. 1905) 84 S. W. 1065.

96. Elkins *v.* State, 35 Tex. Cr. 206, 32 S. W. 1046; Blount *v.* State, 34 Tex. Cr. 640, 31 S. W. 652; Powell *v.* State, (Tex. Cr. App. 1893) 24 S. W. 515; Brill *v.* State, 1 Tex. App. 572.

97. Allen *v.* State, 12 Tex. App. 190; Stephenson *v.* State, 4 Tex. App. 591.

98. Bird *v.* State, 16 Tex. App. 528. One who has stolen a watch, and denied knowledge of it when questioned, but who nevertheless has given it up of his own accord before prosecution commenced, is within the protection of the statute. Bennett *v.* State, 17 Tex. App. 143.

99. Ingle *v.* State, 1 Tex. App. 307.

1. Horsman *v.* State, 43 Tex. 353; Grant *v.* State, 2 Tex. App. 163.

2. Landreth *v.* State, 44 Tex. Cr. 239, 70 S. W. 758; Trafton *v.* State, 5 Tex. App. 480.

3. Reg. *v.* Tuckwell, C. & M. 215, 41 E. C. L. 121.

4. *Alabama.*— Hill *v.* State, 78 Ala. 1.

Florida.— Baldwin *v.* State, 46 Fla. 115, 35 So. 220.

Georgia.— Minor *v.* State, 58 Ga. 551.

Kansas.— State *v.* Lewallen, 55 Kan. 690, 41 Pac. 948.

Missouri.— State *v.* Jackson, 126 Mo. 521, 29 S. W. 601.

Texas.— Coltharp *v.* State, (Cr. App. 1901) 60 S. W. 879.

England.— Reg. *v.* Jeffries, 3 Cox C. C. 85; Rex *v.* Kelly, R. & R. 313; Rex *v.* King, R. & R. 246.

5. Newberry *v.* State, (Tex. Cr. App. 1903) 74 S. W. 774; Montgomery *v.* State, (Tex. Cr. App. 1893) 23 S. W. 693; Cook *v.* State, 14 Tex. App. 96.

Applications of rule.— Where one party brings the property stolen to a certain place, where his confederate takes it and makes off with it, since the whole constitutes one transaction in which both take a part, both are guilty of larceny as principals. Conner *v.* State, 25 Ga. 515, 71 Am. Dec. 184; People *v.* Wiley, 20 N. Y. Suppl. 445; McDowell's Case, 5 City Hall Rec. (N. Y.) 94; Reg. *v.* Kelly, 2 C. & K. 379, 61 E. C. L. 379. And similarly when one

3. Principal in the Second Degree. One who, while taking no part in the actual commission of the act, is present aiding and abetting the actual thief, is a principal in the second degree, and is dealt with in the same way as the actual principal.[6] For this reason one cannot be convicted as accessary to larceny where the evidence proves him to have been present aiding and abetting.[7] And where several persons are acting together at the time of taking, it is unnecessary to prove which of them actually took the property, as all are guilty.[8] If the person present at the theft was a party to the plan, and was in a position to give aid, he is a principal.[9] But it is not enough merely to show that defendant was present at the act of larceny; guilty complicity in the act must be shown to make him a principal.[10] And if the parties agreed to do a certain act, and one of them did a different act which amounted to larceny, whether the others present will be principals depends upon whether it naturally grew out of the act intended, so as to be foreseeable.[11] And if a person was party to a plan of theft, but withdrew before the commission of the act, stating to his confederates that he would have nothing to do with it, he is not a party to their subsequent theft.[12] So if one is apparently acting in concert with the participants, but is really acting as agent of the police for their detection, he is not a party.[13] But where a private detective, without concert with the owner, induces a thief to steal goods, in order himself to get

joins in carrying off property under the belief that it belongs to the other, but learns during the transaction that it was stolen by his companion and remains and completes the removal he is joint principal in the larceny. Green *v.* State, 114 Ga. 918, 41 S. E. 55. So if one helps the actual taker by bringing the victim to him or by holding the attention of the victim while the goods are taken he is a joint principal. St. Valerie *v.* People, 64 Barb. (N. Y.) 426, Wells *v.* State, 4 Tex. App. 20; Rex *v.* Standley, R. & R. 226; Rex *v.* County, 2 Russell Cr. 193, 285. One who builds a pen to catch hogs while others consummate the larceny by driving the hogs into the pen is guilty as principal. Trimble *v.* State, 33 Tex. Cr. 397, 26 S. W. 727. Where larceny is committed by means of a trick in which several parties are concerned, all such parties are principals. People *v.* Putnam, 90 N. Y. App. Div. 125, 85 N. Y. Suppl. 1056. And where one party helps his confederate into a building where the latter takes goods both are principals. State *v.* Peebles, 178 Mo. 475, 77 S. W. 518.

6. *Alabama.*— Browder *v.* State, 102 Ala. 164, 14 So. 895.

Arkansas.— Atterberry *v.* State, 56 Ark. 515, 20 S. W. 411; Lester *v.* State, 32 Ark. 727.

Delaware.— State *v.* Pullen, 3 Pennew. 184, 50 Atl. 538.

Florida.— Albritton *v.* State, 32 Fla. 358, 13 So. 955.

Mississippi.— Murray *v.* State, (1904) 36 So. 541; Hogsett *v.* State, 40 Miss. 522.

Texas.— Corn *v.* State, 41 Tex. 301; Brite *v.* State, (Cr. App. 1897) 43 S. W. 342; English *v.* State, 29 Tex. App. 174, 15 S. W. 649; Kegans *v.* State, 27 Tex. App. 703, 11 S. W. 644; Sutton *v.* State, 16 Tex. App. 490; Scales *v.* State, 7 Tex. App. 361; Taylor *v.* State, 5 Tex. App. 529; Bybee *v.* State, 4 Tex. App. 505; Berry *v.* State, 4 Tex. App. 492.

England.— Rex *v.* Moore, 2 East P. C. 679, 1 Leach C. C. 314.

See 32 Cent. Dig. tit. "Larceny," §§ 55, 56.

Applications of rule.— So a person standing outside the house or room in which the goods are being taken to keep watch and warn the thief, if necessary, is a principal. Com. *v.* Lucas, 2 Allen (Mass.) 170; Rex *v.* Gogerly, R. & R. 255. And where one induces a servant or bailee to take the master's goods and hand them over he is a principal in the theft. State *v.* McCartey, 17 Minn. 76; Reg. *v.* James, 24 Q. B. D. 439, 17 Cox C. C. 24, 54 J. P. 615, 59 L. J. M. C. 96, 62 L. T. Rep. N. S. 578; Reg. *v.* Coggins, 12 Cox C. C. 517, 29 L. T. Rep. N. S. 469.

7. Rex *v.* Gordon, 1 East P. C. 315, 352, 1 Leach C. C. 515.

8. Nevill *v.* State, 60 Ind. 308; Com. *v.* Fortune, 105 Mass. 592; Clay *v.* State, 40 Tex. 67; Thom *v.* State, (Tex. Cr. App. 1893) 22 S. W. 877; Wampler *v.* State, 28 Tex. App. 352, 13 S. W. 144.

9. State *v.* Stanley, 48 Iowa 221; Bynum *v.* State, (Tex. Cr. App. 1903) 72 S. W. 844.

10. State *v.* Norman, 101 Mo. 520, 14 S. W. 661, 20 Am. St. Rep. 623, 10 L. R. A. 35; Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176. A party is not a principal in another's theft because, having accidentally been present at the act, he approved it, and at once committed a similar theft himself. Tave *v.* State, (Tex. Cr. App. 1898) 44 S. W. 178.

11. Thus when soldiers were taken along to help serve a warrant in a house, and some of them stole goods, the others were not guilty of larceny. Rex *v.* Plumer, 1 Leach C. C. 7 note.

12. Sessions *v.* State, 37 Tex. Cr. 58, 38 S. W. 605.

13. People *v.* Mills, 178 N. Y. 274, 70 N. E. 786; Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386, 25 L. R. A. 349; Rex *v.* Dannelly, 2 Marsh. 471, R. & R. 310, 4 E. C. L. 498.

a reward which has been offered him by the owner, he has been held to be a party.[14]

4. Larceny Through an Innocent Agent. One who with felonious intent procures a taking of another's property by means of an innocent agent is himself guilty of the larceny as principal.[15]

5. Larceny Through Guilty Agent. But if he procures the taking through a guilty agent he is not a principal, but an accessary before the fact.[16] And the guilty agent is none the less a principal because he was acting merely as a hired servant.[17]

B. Accessary Before the Fact. One who encourages or procures the commission of a larceny before it is committed, but is not present at the act, is an accessary before the fact, and must be punished as such.[18] The accessary could not be convicted at common law until after the conviction of the principal, but this has very generally been changed by statute.[19] In the case of a misdemeanor an accessary before the fact is dealt with as a principal; and therefore where petit larceny is a misdemeanor, all parties to it, whether before or at the fact, are principals.[20] And so in North Carolina as to all larcenies, as a result of making them petit larcenies.[21] The same is true of attempts to commit larceny since that is a misdemeanor.[22] And it is common by statute to provide that all parties to a

14. Slaughter *v.* State, 113 Ga. 284, 68 S. E. 854, 84 Am. St. Rep. 242.

15. *Kentucky.*— Cummins *v.* Com., 5 Ky. L. Rep. 200.

Missouri.— State *v.* Mintz, 189 Mo. 268, 88 S. W. 12.

New York.— People *v.* McMurray, 4 Park. Cr. 234.

Texas.— Wampler *v.* State, 28 Tex. App. 352, 13 S. W. 144.

England.— Reg. *v.* Manley, 1 Cox C. C. 104.

Applications of rule.— If one procures an infant to enter a house and take personal property therefrom, he would be guilty of larceny from the house, or burglary, as the case might be. Rice *v.* State, 118 Ga. 48, 44 S. E. 805. Where one sells a steer knowing it is not his own and with intent to deprive the owner thereof, directing the innocent purchaser to go and take possession of it, and the purchaser does so, the seller is guilty of larceny, as he makes the purchaser's act his own. State *v.* Hunt, 45 Iowa 673. Where a person changed the check on a trunk belonging to another in a haggage-room of a railroad company so as to correspond to a duplicate he himself had, it was held the taking and asportation was complete, the prisoner having made the innocent railroad company his agent for that purpose. Com. *v.* Barry, 125 Mass. 390. If one having a right of action makes use of a process which he knows that he has no right to adopt to get the property of his debtor, and with intent to defraud him, it is larceny. Com. *v.* Low, Thach. Cr. Cas. (Mass.) 477. Where one had an innocent person remove some indictments from the files and then took them from him, either with or without his consent, he was guilty of a theft of the public records. People *v.* Mills, 178 N. Y. 274, 70 N. E. 786. One who sells a horse belonging to another to an innocent purchaser, the latter taking it from the possession of the owner, is guilty of larceny. Walls *v.* State, 43 Tex. Cr. 70, 63 S. W. 328; Lane *v.* State, 41 Tex. Cr. 558, 55 S. W. 831. So where one procures the agent of a railroad company to send him property of another, left on the company's right of way, he is guilty of larceny. Sikes *v.* State, (Tex. Cr. App. 1894) 28 S. W. 688. Where defendant stole a horse and took it to the house of another, who innocently borrowed it and rode into another county, defendant accompanying him, such act is the act of defendant, who is therefore guilty of a taking in the second county. Wampler *v.* State, 28 Tex. App. 352, 13 S. W. 144. Defendant induced a child nine years old to rob a till and give him the money. Defendant was held guilty of larceny if the child was unconscious of guilt. Reg. *v.* Bleasdale, 2 C. & K. 765, 61 E. C. L. 765; Reg. *v.* Manley, 1 Cox C. C. 104. One intending to steal a horse procures a hostler to bring out a horse which he says is his own; this is sufficient taking to be larceny. Rex *v.* Pitman, 2 C. & P. 423, 12 E. C. L. 653.

16. State *v.* Wyckoff, 31 N. J. L. 65.

17. Taylor *v.* State, 5 Tex. App. 529.

18. Groves *v.* State, 76 Ga. 808; Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050.

Illustration.—One who before a theft agrees to take care of the thief's family while the latter disposes of his property is an accessary before the fact. State *v.* Stanley, 48 Iowa 221.

19. Daughtrey *v.* State, 46 Fla. 109, 35 So. 397; U. S. *v.* Crane, 25 Fed. Cas. No. 14,888, 4 McLean 317; Reg. *v.* Hughes, Bell C. C. 242, 8 Cox C. C. 278, 6 Jur. N. S. 177, 29 L. J. M. C. 71, 1 L. T. Rep. N. S. 450, 8 Wkly. Rep. 195.

20. Slaughter *v.* State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242; State *v.* Henderson, 35 La. Ann. 45; Reed *v.* Greenville, 83 Miss. 192, 35 So. 178.

21. State *v.* Stroud, 95 N. C. 626; State *v.* Fox, 94 N. C. 928; State *v.* Gaston, 73 N. C. 93, 21 Am. Rep. 459.

22. Reg. *v.* Esmonde, 26 U. C. Q. B. 152.

felony, either before or at the fact, shall be principals; when such a statute exists, parties who at common law would be accessaries before the fact to larceny become principals in the theft, and may be convicted as joint participants in the crime.[23]

C. Accessary After the Fact. One who knowing of the theft assists the thief to escape or to make way with his booty is an accessary after the fact to the theft.[24] This, like the offense of being accessary before the fact, is a separate offense; at common law it could be punished only after the conviction of the principal, but under common statutes it may now be punished independently, provided the guilt of the principal is alleged and proved.[25] In some states the offense is merged with that of larceny, accessaries after as well as before the fact being made principals.[26] In other states the accessary after the fact is not made a principal, as the accessary before the fact is, but remains an accessary only as at common law.[27]

D. Receiver of Stolen Goods. Receiving stolen goods, knowing them to be stolen, is in its nature an accessorial act, giving aid and comfort to the thief; but it is everywhere by statute created a separate crime. In some jurisdictions it still remains an accessorial act, and may be punished as such notwithstanding the statute.[28] But it is usually held that it can no longer be punished in connection with the larceny,[29] or at least that he is not an "accomplice" in the crime.[30] One cannot be at the same time a thief and a receiver of the stolen property.[31] But the Texas penal code makes receiving stolen property a variety of theft.[32]

IX. DEGREES.

A. Grand Larceny — 1. At Common Law. At common law there were two degrees of larceny: Grand larceny, a capital offense; and petit larceny, which was

23. *California.*— People *v.* Feliz, (1902) 69 Pac. 220; People *v.* Bearss, 10 Cal. 68; People *v.* Davidson, 5 Cal. 133.

Minnesota.— State *v.* Beebe, 17 Minn. 241.

Montana.— State *v.* De Wolfe, 29 Mont. 415, 74 Pac. 1084.

Pennsylvania.—Com. *v.* Hollister, 157 Pa. St. 13, 27 Atl. 386, 25 L. R. A. 349; Com. *v.* Hughes, 11 Phila. 430.

Texas.— McDonald *v.* State, 34 Tex. Cr. 556, 35 S. W. 286; Blain *v.* State, 24 Tex. App. 626, 7 S. W. 239; Watson *v.* State, 21 Tex. App. 598, 1 S. W. 451, 17 S. W. 550; Smith *v.* State, 21 Tex. App. 107, 17 S. W. 552.

United States.— Pearce *v.* Oklahoma, 118 Fed. 425, 55 C. C. A. 550 [*affirming* 11 Okla. 438, 68 Pac. 504].

See 32 Cent. Dig. tit. "Larceny," § 55.

24. People *v.* Sanborn, 14 N. Y. St. 123; West *v.* State, 27 Tex. App. 472, 11 S. W. 482; House *v.* State, 16 Tex. App. 25; Rex *v.* Lee, 6 C. & P. 536, 25 E. C. L. 563; Reg. *v.* Campbell, 8 Quebec Q. B. 322.

In the absence of knowledge of the theft the aider is guilty of no crime. State *v.* Empey, 79 Iowa 460, 44 N. W. 707; Robbins *v.* State, 33 Tex. Cr. 573, 28 S. W. 473.

In Ohio harboring one guilty of petit larceny is not a crime. Hallett *v.* State, 29 Ohio St. 168.

25. Edwards *v.* State, 80 Ga. 127, 4 S. E. 268; Jordan *v.* State, 56 Ga. 92; State *v.* King, 88 Minn. 175, 92 N. W. 965.

26. People *v.* Sligh, 48 Mich. 54, 11 N. W. 782; People *v.* Sanborn, 14 N. Y. St. 123; Reg. *v.* Campbell, 8 Quebec Q. B. 322.

27. Jackson *v.* State, (Tex. Cr. App. 1904) 80 S. W. 631; Criner *v.* State, 41 Tex. Cr. 290, 53 S. W. 873; Guinn *v.* State, 39 Tex. Cr. 257, 45 S. W. 694; Yates *v.* State, (Tex. Cr. App. 1897) 42 S. W. 296; Wheeler *v.* State, 38 Tex. Cr. 71, 41 S. W. 615; Ray *v.* State, 35 Tex. Cr. 354, 33 S. W. 869; De los Santos *v.* State, (Tex. Cr. App. 1894) 26 S. W. 831; Moore *v.* State, 28 Tex. App. 377, 13 S. W. 152; Buchanan *v.* State, 26 Tex. App. 52, 9 S. W. 57; Willis *v.* State, 24 Tex. App. 584, 6 S. W. 856; Gentry *v.* State, 24 Tex. App. 478, 6 S. W. 321; Collins *v.* State, 24 Tex. App. 141, 5 S. W. 848; Cohea *v.* State, 9 Tex. App. 173; State *v.* Jones, 3 Wash. 175, 28 Pac. 254.

28. *Arkansas.*— Polk *v.* State, 36 Ark. 117.

Georgia.— Licette *v.* State, 75 Ga. 253; Roberts *v.* State, 55 Ga. 220.

Kentucky.— Able *v.* Com., 5 Bush 698.

South Carolina.— State *v.* Butler, 3 McCord 383.

England.— Rex *v.* Moores, 7 C. & P. 270, 32 E. C. L. 608.

See 32 Cent. Dig. tit. "Larceny," § 57.

29. People *v.* Stakem, 40 Cal. 599; People *v.* Maxwell, 24 Cal. 14; Street *v.* State, 39 Tex. Cr. 134, 45 S. W. 577. And see Crawford *v.* State, (Tex. Cr. App. 1896) 34 S. W. 927.

30. State *v.* Jones, 115 Iowa 113, 88 N. W. 196.

31. State *v.* Honig, 78 Mo. 249; State *v.* Larkin, 49 N. H. 39.

32. Gonzales *v.* State, 13 Tex. App. 48; Martin *v.* State, 9 Tex. App. 293. See Brown *v.* State, 15 Tex. App. 581.

not capitally punished. The word "larceny" is a general term, including both grand and petit larceny.[33] By the common law of England grand larceny was the stealing of goods above the value of twelve pence.[34] While the line is differently drawn in this country, the distinction between grand and petit larceny is usually based on the value of the property taken; and the value of the property is therefore a material ingredient in the crime of grand larceny.[35] In some states there is no legal distinction, the phrase "grand larceny" being merely a term in general use to designate a larceny of property over a certain value.[36] Value means market value.[37] The other elements of grand larceny are the same as those of larceny generally; thus, a felonious intent must exist.[38]

2. STATUTORY GRAND LARCENY. In several states aggravated forms of larceny have been designated as grand larceny, without regard to the value of the goods stolen. The legislature has power to designate such acts as grand larceny.[39] The stealing of some domestic animals is often made grand larceny.[40] This means the stealing of a live animal of the sort named, and does not cover stealing the carcass of a dead animal.[41] Larceny from the person is often made grand larceny,[42] and also larceny from a dwelling-house.[43] Larceny in the commission of burglary is grand larceny in Missouri.[44] Other varieties of grand larceny are set out in the notes.[45]

B. Petit Larceny. Petit larceny is often a statutory misdemeanor in this country,[46] but is sometimes a felony.[47] A second offense of petit larceny is, however, usually a felony.[48] In South Carolina at one time the larceny of an animal of less value than twenty dollars was petit larceny.[49]

C. Value of Goods the Criterion. The conviction must be for petit larceny if the prosecution does not affirmatively prove the goods to be above the

33. *Ex p.* Bell, 19 Fla. 608; State *v.* Keyser, 56 Vt. 622.

34. State *v.* Bean, 74 Vt. 111, 52 Atl. 269; State *v.* Young, 13 Wash. 584, 43 Pac. 881.

35. *California.*— People *v.* Garcia, (1899) 59 Pac. 576; People *v.* Price, 67 Cal. 350, 7 Pac. 745.

Louisiana.— State *v.* Pierre, 39 La. Ann. 915, 3 So. 60; State *v.* Carodine, 28 La. Ann. 24.

Mississippi.— Stokes *v.* State, 58 Miss. 677.

Missouri.— State *v.* Donovan, 121 Mo. 496, 26 S. W. 340; State *v.* Barker, 64 Mo. 282.

New York.— People *v.* Griffin, 38 How. Pr. 475.

Texas.— White *v.* State, (Cr. App. 1903) 72 S. W. 185; Donaho *v.* State, (Cr. App. 1898) 47 S. W. 469.

See 32 Cent. Dig. tit. "Larceny," § 50.

36. State *v.* Bean, 74 Vt. 111, 52 Atl. 269.

37. State *v.* Maggard, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 463; State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785; Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

38. Cox *v.* Com., 78 S. W. 423, 25 Ky. L. Rep. 1577; Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

39. People *v.* Townsley, 39 Cal. 405.

40. People *v.* Barnes, 65 Cal. 16, 2 Pac. 493; People *v.* Salorse, 62 Cal. 139; Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760; State *v.* Daniels, 32 Mo. 558; State *v.* Major, 14 Rich. (S. C.) 76.

41. Hunt *v.* State, 55 Ala. 138; People *v.* Smith, 112 Cal. 333, 44 Pac. 663.

42. People *v.* Holmes, 126 Cal. 462, 58 Pac. 917; People *v.* Sherman, (Cal. 1893) 32 Pac. 879; Fallon *v.* People, 2 Abb. Dec. (N. Y.) 83, 2 Keyes 145; Bennett *v.* State, 16 Tex. App. 236.

43. State *v.* Weber, 156 Mo. 257, 56 S. W. 893; State *v.* Scott, 109 Mo. 226, 19 S. W. 89; State *v.* Kennedy, 88 Mo. 341; State *v.* Brown, 75 Mo. 317; State *v.* Smith, 30 Mo. 114; State *v.* Ramelsburg, 30 Mo. 26.

44. State *v.* Butterfield, 75 Mo. 297.

45. Lucas *v.* State, 96 Ala. 51, 11 So. 216 (larceny from a railroad car); Gregg *v.* State, 55 Ala. 116 (larceny of outstanding crop); People *v.* Salvador, 71 Cal. 15, 11 Pac. 801 (larceny of gold dust from a mining claim); State *v.* Broderick, 61 Vt. 421, 17 Atl. 716 (larceny of blankets or robes from a vehicle).

46. People *v.* Finn, 87 N. Y. 533 [*affirming* 26 Hun 58]; People *v.* Rawson, 61 Barb. (N. Y.) 619; People *v.* Shay, 10 Abb. Pr. (N. Y.) 413; Carpenter *v.* Mills, 29 How. Pr. (N. Y.) 473. Otherwise at common law. Ward *v.* People, 6 Hill (N. Y.) 144 [*affirming* 3 Hill 395]); Shay *v.* People, 4 Park. Cr. (N. Y.) 353; Stevenson *v.* State, 5 Baxt. (Tenn.) 681.

47. Barnhart *v.* State, 154 Ind. 177, 56 N. E. 212; Pooler *v.* State, 97 Wis. 627, 73 N. W. 336. But see Ford *v.* State, 3 Pinn. (Wis.) 449, 4 Chandl. 148.

48. People *v.* Smith, 143 Cal. 597, 77 Pac. 449; State *v.* Lehr, 16 Mo. App. 491; People *v.* Rawson, 61 Barb. (N. Y.) 619.

49. State *v.* Hamblin, 4 S. C. 1; State *v.* Thomas, 14 Rich. (S. C.) 163; Burton *v.* Watkins, 2 Hill (S. C.) 674.

value required for grand larceny.[50] Some value must be proved, even for petit larceny.[51] The values of articles of property stolen from different owners or even from the same owner at different times cannot be combined to make out an offense of grand larceny.[52]

X. TAKING OF TWO ARTICLES AT ONE TIME.

A. From One Owner. Where several articles are taken from the same owner at or about the same time by the same thief, the better practice, in spite of the fact that there are technically several takings, is to regard the takings as a single offense, and to indict and punish but once. This is clearly the case when the goods are taken at the same time by one act of taking.[53] But it is equally true where the goods, although taken at substantially the same time, are taken independently.[54]

B. From Different Owners. Even if several articles taken at substantially one time are taken from different persons, the act, according to the prevailing view, constitutes but a single theft,[55] although in a few jurisdictions the taking at

50. *California.*—People *v.* Comyns, 114 Cal. 107, 45 Pac. 1034.

Iowa.— State *v.* Burton, 103 Iowa 28, 72 N. W. 413.

Missouri.— State *v.* Donovan, 121 Mo. 496, 26 S. W. 340.

New York.— People *v.* Griffin, 38 How. Pr. 475.

South Carolina.— State *v.* Bennet, 2 Treadw. 693, 3 Brev. 515.

Texas.— Clark *v.* State, 26 Tex. App. 486, 9 S. W. 767.

See 32 Cent. Dig. tit. "Larceny," § 50.

51. State *v.* Lambert, 21 Mo. App. 301.

52. *Alabama.*— Brown *v.* State, 105 Ala. 117, 16 So. 929.

Mississippi.— Scarver *v.* State, 53 Miss. 407.

Missouri.—State *v.* Maggard, 160 Mo. 469, 61 S. W. 184, 83 Am. St. Rep. 484.

Texas.— White *v.* State, (Cr. App. 1903) 72 S. W. 185; Lacey *v.* State, 22 Tex. App. 657, 3 S. W. 343.

England.—Rex *v.* Petrie, 1 Leach C. C. 294.

See 32 Cent. Dig. tit. "Larceny," § 50 *et seq.*

53. State *v.* Faulkner, 32 La. Ann. 725; State *v.* Stevens, 62 Me. 284.

Taking both partnership goods and goods of individual partner.— Where a statute provided that an indictment for stealing the property of a partnership might lay the ownership in one of the partners, an indictment laying the property in one partner would cover the taking of partnership goods and also individual goods of the partner named by the same act. Lasure *v.* State, 19 Ohio St. 43.

54. State *v.* McCormack, 8 Oreg. 236; Reg. *v.* Brettel, C. & M. 609, 41 E. C. L. 33.

Applications of rule.— This rule was applied to a theft of gas by means of a pipe which tapped a gas main; since the pipe remained full at all times the taking was held to be a continuous act, punishable but once. Reg. *v.* Firth, L. R. 1 C. C. 172, 11 Cox C. C. 234, 38 L. J. M. C. 54, 19 L. T. Rep. N. S. 746, 17 Wkly. Rep. 327. So, where accused took cyanides from a mine from time to time, in small quantities, to avoid detection, and then carried them away, it was a continuous transaction, and he was properly convicted for the final asportation. State *v.* Mandich, 24 Nev. 336, 54 Pac. 516. In the same way where it was proved that a servant took several pieces of lace away from his master's house, this is a single offense, although it is possible that he may have taken the pieces separately. Rex *v.* Jones, 4 C. & P. 217, 19 E. C. L. 483. And where one, with the intention of stealing timber, entered on the land of another to cut and carry away such timber, and pursued such intention for a number of days and by a series of acts, until it was effectuated, he can be convicted for the same as one offense, since such series of acts constitute a part of the same transaction. Carl *v.* State, 125 Ala. 89, 28 So. 505. And so where a defendant on two or three occasions within an hour and a half obtained from the prosecutor money with which to buy liquor, in all amounting to eighty dollars, without returning any change, this was such a continuous transaction as to constitute one theft. Flynn *v.* State, (Tex. Cr. App. 1904) 83 S. W. 206.

55. *District of Columbia.*— Hoiles *v.* U. S., 3 MacArthur 370, 36 Am. Rep. 106.

Georgia.— Lowe *v.* State, 57 Ga. 171.

Indiana.— Furnace *v.* State, 153 Ind. 93, 54 N. E. 441; Bell *v.* State, 42 Ind. 335.

Iowa.— State *v.* Congrove, 109 Iowa 66, 80 N. W. 227; State *v.* Larson, 85 Iowa 659, 52 N. W. 539.

Kentucky.— Nichols *v.* Com., 78 Ky. 180.

Michigan.— People *v.* Johnson, 81 Mich. 575, 45 N. W. 1119.

Missouri.— State *v.* Morphin, 37 Mo. 373; Lorton *v.* State, 7 Mo. 55, 37 Am. Dec. 179.

Nevada.— State *v.* Douglas, 26 Nev. 196, 65 Pac. 802, 99 Am. St. Rep. 688. *Compare* State *v.* Lambert, 9 Nev. 321.

North Carolina.— State *v.* Simons, 70 N. C. 336. *Compare* State *v.* Bynum, 117 N. C. 749, 23 S. E. 218.

Ohio.— State *v.* Hennessey, 23 Ohio St. 339, 13 Am. Rep. 253.

Pennsylvania.— Fulmer *v.* Com., 97 Pa. St. 503.

Tennessee.— Kelly *v.* State, 7 Baxt. 323. *Compare* Morton *v.* State, 1 Lea 498.

one time of several articles of different persons may be regarded either as one crime or as distinct crimes.[56]

C. Distinct Takings. If the takings were at substantially different times or places, they constitute distinct offenses, even if the goods belong to the same owner and *a fortiori* if they belong to different persons.[57]

XI. ATTEMPT TO COMMIT LARCENY.

A. What Constitutes an Attempt. An attempt to commit larceny is criminal at common law.[58] In order to constitute a criminal attempt there must be an intent to steal;[59] and an overt act intended and apparently adapted to carrying out the intent, which must have progressed measurably near to success. Putting a hand in the pocket of the intended victim is enough,[60] and so is opening a cash drawer[61] or ransacking a house.[62] Other instances of common-law attempts are given in the notes.[63] A common provision of penal codes defines criminal attempt as any overt act in pursuance of a criminal intent.[64] A statute punishing an attempt to commit a violent felony covers an attempt to commit larceny from the person, since that involves force.[65]

B. Successful Attempt. It has been held that if an attempted larceny is successful, and the complete crime committed, there can be no conviction for the attempt.[66]

C. Attempt Impossible of Success. An attempt is punishable notwithstanding it may be impossible of success. Thus an attempt to steal by picking a pocket is a crime, although there was in fact nothing in the pocket.[67] So opening and

Utah.— State *v.* Mickel, 23 Utah 507, 65 Pac. 484.

Vermont.— State *v.* Newton, 42 Vt. 537.

Virginia.— Alexander *v.* Com., 90 Va. 809, 20 S. E. 782.

Washington.— Territory *v.* Heywood, 2 Wash. 180, 2 Pac. 189.

Wyoming.—Ackerman *v.* State, 7 Wyo. 504, 54 Pac. 228.

56. Bushman *v.* Com., 138 Mass. 507; Com. *v.* Sullivan, 104 Mass. 552; State *v.* Thurston, 2 McMull. (S. C.) 382.

57. *Indiana.*— Joslyn *v.* State, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425.

Kentucky.— Nichols *v.* Com., 78 Ky. 180 (takings two hundred yards apart); Weaver *v.* Com., 86 S. W. 551, 27 Ky. L. Rep. 743.

Montana.— State *v.* English, 14 Mont. 399, 36 Pac. Rep. 815, takings one hour apart.

Tennessee.— Phillips *v.* State, 85 Tenn. 551, 3 S. W. 434, takings from different sides of the same room.

Vermont.— State *v.* Emery, 68 Vt. 109, 34 Atl. 432, 54 Am. St. Rep. 878; State *v.* Newton, 42 Vt. 537.

England.— Rex *v.* Smith, R. & M. 295, 21 E. C. L. 755.

58. Nicholson *v.* State, 9 Baxt. (Tenn.) 258.

59. State *v.* Hollingsworth, 1 Marv. (Del.) 528, 41 Atl. 143.

60. State *v.* Wilson, 30 Conn. 500.

61. Clark *v.* State, 86 Tenn. 511, 8 S. W. 145.

62. State *v.* Utley, 82 N. C. 556.

63. C was in the employ of a contractor for the supply of meat to a camp, and the course of business was for the meat to be sent down to the camp, there weighed out to the different messes, and the surplus, if any, returned to the contractor. C, while employed upon this duty by the contractor, during the weighing out, substituted a false weight for the true one, his intention being to carry away and steal the difference between the just surplus, for which he would have to account to his master, and the apparent surplus actually remaining after the first weighing. Nothing remained upon his part to complete his scheme except to carry away and dispose of the meat, which he would have done had the fraud not been detected. It was held that he was properly convicted of attempting to steal the meat. Reg. *v.* Cheeseman, 9 Cox C. C. 100, 8 Jur. N. S. 143, L. & C. 140, 31 L. J. M. C. 89, 5 L. T. Rep. N. S. 717, 10 Wkly. Rep. 255. Inducing a person, by a pretense that he had won a certain sum of money provided he could produce an equal amount of his own, to draw his money out of a bank and bring it to the lottery shop, and then directing him to enter the shop alone, constitutes a punishable attempt. People *v.* Mann, 113 Cal. 76, 45 Pac. 182.

64. Griffin *v.* State, 26 Ga. 493, holding that under such a provision of the code it was held that to take an impression of a warehouse key, for the purpose of having a false key made in order that either defendant himself or another for him might steal from the warehouse, was an attempt to commit larceny.

65. State *v.* Lewis, 113 Wis. 391, 89 N. W. 143.

66. Reg. *v.* Meal, 3 Cox C. C. 70. But see People *v.* Mills, 178 N. Y. 274, 70 N. E. 786.

67. *Connecticut.*—State *v.* Wilson, 30 Conn. 500.

attempting to steal from an empty cash drawer is a crime.[66] And also attempting to steal from an empty house.[69]

D. Solicitation. Soliciting to steal is a misdemeanor.[70]

XII. STATUTORY OFFENSES.

A. Statutory Aggravations of Larceny[71] — **1. INTRODUCTORY STATEMENT.** Statutes have been passed in most jurisdictions adding to the common-law offense of larceny new offenses of an aggravated sort, consisting of larceny with some additional element. The general requirements of larceny must exist in these statutory modifications of the offense. Thus the intent to steal must be proved in all statutory aggravations of larceny.[72]

2. LARCENY FROM THE PERSON.[73] Taking from the person is held to mean a taking from the presence[74] or protection,[75] and whether or not there has been such a taking is a question for the jury.[76] The presence of the owner must have been relied upon to guard the goods.[77] Hence property taken from a sleeping[78] or intoxicated[79] person has been held not to be larceny from the person unless the victim has been made drunk to facilitate the theft.[80] The statute defining larceny from the person as grand larceny does not make it necessary that the property should actually be removed from the presence of the person.[81] But one to be guilty of larceny from the person must have secured possession of the goods alleged to have been stolen.[82] The offense is committed only in the place in which

Massachusetts.— Com. *v.* McDonald, 5 Cush. 365.

Michigan.— People *v.* Jones, 46 Mich. 441, 9 N. W. 486.

New York.— People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, 20 Am. St. Rep. 732, 10 L. R. A. 109 [*reversing* 54 Hun 279, 7 N. Y. Suppl. 582, 7 N. Y. Cr. 329].

England.— Reg. *v.* Brown, 24 Q. B. D. 357, 16 Cox C. C. 715, 54 J. P. 408, 59 L. J. M. C. 47, 61 L. T. Rep. N. S. 594, 38 Wkly. Rep. 95 [*overruling* Reg. *v.* Collins, 9 Cox C. C. 497, 10 Jur. N. S. 686, L. & C. 471, 33 L. J. M. C. 177, 10 L. T. Rep. N. S. 581, 12 Wkly. Rep. 886]; Reg. *v.* Ring, 17 Cox C. C. 491, 56 J. P. 552, 61 L. J. M. C. 116, 66 L. T. Rep. N. S. 300.

See 32 Cent. Dig. tit. "Larceny," § 53.

68. Clark *v.* State, 86 Tenn. 511, 8 S. W. 145.

69. State *v.* Utley, 82 N. C. 556.

70. Reg. *v.* Gregory, L. R. 1 C. C. 77, 10 Cox C. C. 459, 36 L. J. M. C. 60, 16 L. T. Rep. N. S. 388, 15 Wkly. Rep. 774.

71. Assault with intent to commit robbery see ROBBERY.

72. *Alabama.* — Lyon *v.* State, 61 Ala. 224.

Arkansas.— Conley *v.* State, 69 Ark. 454, 64 S. W. 218.

Illinois.— McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058.

Minnesota.— State *v.* Johnson, 77 Minn. 267, 79 N. W. 968.

Texas.— Smith *v.* State, 43 Tex. Cr. 251, 76 S. W. 434.

England.— Rex *v.* John, 7 C. & P. 324, 32 E. C. L. 636.

Contra.— Hughes *v.* Territory, 8 Okla. 28, 56 Pac. 708.

73. In Louisiana this crime does not exist; there is no distinction between larceny from the person and other larceny. State *v.* Wilson, 107 La. 344, 31 So. 759.

74. Woodard *v.* State, 9 Tex. App. 412; U. S. *v.* Jones, 26 Fed. Cas. No. 15,494, 3 Wash. 209; Rex *v.* Francis, 2 East P. C. 708, 2 Str. 1015.

75. Reg. *v.* Selway, 8 Cox C. C. 235.

76. Reg. *v.* Selway, 8 Cox C. C. 235.

77. Where the owner of money held it out in his open hand and allowed defendant to take it, not supposing that he would keep it, but defendant ran off with it, there is no larceny from the person. Harris *v.* State, (Tex. Cr. App. 1901) 65 S. W. 921.

78. People *v.* McElroy, 116 Cal. 583, 48 Pac. 718; Rex *v.* Hamilton, 8 C. & P. 49, 34 E. C. L. 602; Rex *v.* Reading, 1 Leach C. C. 240 note. But see Rex *v.* Willan, 2 Leach C. C. 495; Rex *v.* Thompson, 1 Leach C. C. 443. *Contra*, Hall *v.* People, 39 Mich. 717.

79. Rex *v.* Gribble, 1 Leach C. C. 275.

80. Rex *v.* Branny, 2 East. P. C. 704.

81. People *v.* Lonnen, 139 Cal. 634, 73 Pac. 586; Clemmons *v.* State, 39 Tex. Cr. 279, 45 S. W. 911, 73 Am. St. Rep. 923; Dukes *v.* State, 22 Tex. App. 192, 2 S. W. 590.

82. Rodriguez *v.* State, (Tex. Cr. App. 1903) 71 S. W. 596 (as where defendant grasped a diamond stud in the shirt bosom of another and attempted to unscrew it but was captured before he accomplished his purpose he was held not guilty of theft from the person); Tarrango *v.* State, 44 Tex. Cr. 385, 71 S. W. 597 (inserting the hand in the pocket of another far enough to touch money contained therein, but not securing it, will not constitute a theft from the person). But where one by force drew a watch from another's pocket and the chain from the buttonhole, but the watch-key having been caught by a button the watch and

the taking occurs; the thief cannot be prosecuted for this offense in another county into which he takes the goods.[83] The amount of punishment does not depend upon the value of the property taken.[84] There can be no principals in the second degree to this crime, since persons present cannot aid and abet in so personal a matter.[85] Robbery is distinguished from larceny from the person by the elements of force or previously putting in fear. The mere snatching of a thing from the person is larceny,[86] but if force is used to secure the article,[87] or if there is a struggle,[88] the crime is robbery. The use of violence after the taking will not raise the crime to robbery,[89] and the force must be used to overcome resistance, not merely to seize the property.[90] If robbery has been committed, the element of force or fear may be neglected, and the wrong-doer may be indicted and punished for a larceny from the person,[91] or on an indictment for robbery he may be convicted of larceny from the person.[92] No particular kind of larceny is required; the offense may be committed by force, by stealth, or in any other way in which the taking from the personal protection of the possessor can be accomplished.[93]

3. Larceny From Dwelling-House or Other Buildings — a. "Dwelling-House." To constitute this crime the taking must be from a building or an appurtenance thereto.[94] In the following instances the larceny was held to be larceny from a dwelling-house. Larceny from a building within the curtilage of a dwelling,[95] from the office of a hotel,[96] or from a part of a building occupied as a dwelling-house in another part, although the two parts have no internal communication.[97] But a taking from part of a building neither communicating with any part occupied as a dwelling nor occupied by the same person is not larceny from a dwelling-house.[98] The mere fact that a person habitually sleeps in a building does not make it a dwelling-house; so of a warehouse,[99] or a stable.[1] Taking clothes from a railing on the outer edge of an open piazza in the front of a dwelling-house does not constitute the statutory offense of "larceny in a dwelling-house."[2] In the Texas statute a theft by a domestic servant is excepted from the act, and is simple larceny only.[3] In Massachusetts stealing property of less than one

chain remained suspended, it was held that there was a sufficient severance to convict for stealing from the person. Reg. *v.* Simpson, 3 C. L. R. 80, 6 Cox C. C. 422, Dears. C. C. 421, 18 Jur. 1030, 24 L. J. M. C. 7, 3 Wkly. Rep. 19.

83. Gage *v.* State, 22 Tex. App. 123, 2 S. W. 638.

84. Com. *v.* Nolan, 5 Cush. (Mass.) 288.

85. Rex *v.* Murphey, 1 Leach C. C. 266.

86. *Georgia.*—Fanning *v.* State, 66 Ga. 167. *Iowa.*— State *v.* Fisher, 106 Iowa 658, 77 N. W. 456. *Missouri.*— State *v.* Sommers, 12 Mo. App. 374. *Texas.*— Boyd *v.* State, (Cr. App. 1895) 29 S. W. 157. *Virginia.*— Johnson *v.* Com., 24 Gratt. 555. *England.*— Reg. *v.* Walls, 2 C. & K. 214, 61 E. C. L. 214; Rex *v.* Baker, 2 East P. C. 702, 1 Leach C. C. 290; Rex *v.* Macaulay, 1 Leach C. C. 287.

87. Smith *v.* State, 117 Ga. 320, 43 S. E. 736, 97 Am. St. Rep. 165; Rex *v.* Lapier, 2 East P. C. 557, 708, 1 Leach C. C. 220; Rex *v.* Moore, 1 Leach C. C. 335; Rex *v.* Mason, R. & R. 311.

88. Burke *v.* State, 74 Ga. 372; Rex *v.* Davies, 2 East P. C. 709.

89. Dawson *v.* Com., 74 S. W. 701, 25 Ky. L. Rep. 5; Harman's Case, 2 Rolle 154.

90. Rex *v.* Gnosil, 1 C. & P. 304, 12 E. C. L. 182.

91. Williams *v.* U. S., 3 App. Cas. (D. C.) 335; Bonsall *v.* State, 35 Ind. 460.

92. People *v.* Jones, 53 Cal. 58.

93. Higgs *v.* State, 113 Ala. 36, 21 So. 353; Com. *v.* Dimond, 3 Cush. (Mass.) 235.

94. Larceny from a building differs from burglarious stealing in that the latter, even if the theft is in the night-time, involves a breaking and entering of the building, while larceny from the building does not. Parks *v.* State, 66 Ga. 192.

95. State *v.* Bugg, 66 Kan. 668, 72 Pac. 236; Rex *v.* Hancock, R. & R. 127.

96. State *v.* Leedy, 95 Mo. 76, 8 S. W. 245.

97. People *v.* Horrigan, 68 Mich. 491, 36 N. W. 236; Rex *v.* Gibson, 2 East P. C. 508, 1 Leach C. C. 357; Rex *v.* Brown, 2 East C. P. 493; Rex *v.* Burrowes, 1 Moody C. C. 274.

98. State *v.* Clark, 89 Mo. 423, 1 S. W. 332.

99. Rex *v.* Smith, 2 East P. C. 497, 2 Leach C. C. 1018 note; Rex *v.* Flannagan, R. & R. 140.

1. Rex *v.* Turner, 6 C. & P. 407, 25 E. C. L. 498; Rex *v.* Brown, 2 East P. C. 501, 2 Leach C. C. 1018 note.

2. Henry *v.* State, 39 Ala. 679.

3. Taylor *v.* State, 42 Tex. 387.

hundred dollars value in a dwelling-house in the night was simple larceny, although in the daytime it is aggravated larceny by statute.[4] Entering a dwelling-house with intent to steal is sometimes made a statutory offense.[5]

b. "House" or "Outhouse." The statute sometimes creates the crime of larceny from a house. Under this form of statute the house need not be a dwelling, nor within the curtilage of a dwelling.[6] A chicken-coop is not a house,[7] nor is a tent.[8] But a railroad passenger station is a house.[9] An indictment for larceny from the house is sustained by proof that defendant took and carried away a watch from a post, on which it was hanging, covered by the roof of the building.[10] But an indictment for theft from a house cannot be sustained by proof that the stolen property was taken while hanging at and outside of the store door, on a piece of wood nailed to the door, facing and projecting toward the street.[11] A district school-house is not an outhouse.[12]

c. "Shop." A shop, properly so called, is a place where goods are sold by retail, and a store is a place of deposit; but in this country shops are frequently called stores, and a place called a millinery store may therefore be a shop.[13] A blacksmith shop is a shop.[14] So is a building where a workman pursues his business and keeps his tools, or the products of his labor, although no article is sold or offered for sale therein.[15]

d. "Warehouse," "Storehouse," or "Counting-House." To constitute the crime of larceny from a storehouse it is not sufficient that the building in which the crime was committed was built for a storehouse, but it must at the time of the offense have been used for that purpose.[16] A covered structure, used for storing cotton bales, one side and end of which are planked up, and the others left open so that wagons can drive under to load and unload, which, together with two acres of land connected with it, is inclosed by a plank fence nine feet high, the gates of which are kept locked, constitutes a "warehouse."[17] So does an opera house used for the storage of the stage properties between occasions when it is used for entertainments,[18] and a railroad station, part of which is used for storing freight,[19] and a meat house.[20] But a trunk near the door of a baggage-room on a platform, covered by the same roof, but not inclosed, which is used as a common passageway by all going about the depot, is not in a warehouse.[21] A building called a "machine house" on the premises of a person who had large chemical works, in which all goods sent out were weighed, and the men's time was taken and wages paid, although the books were kept in another building

Who are domestic servants.— A party hired for one day to butcher and cut up beef is not a domestic servant. Richardson *v.* State, 43 Tex. 456. Neither is a person hired for an hour to carry wood from the street to the back-yard, passing through the house. Williams *v.* State, 41 Tex. 649. Whether a person employed for a day to do ironing is a domestic servant is a question for the jury. Coleman *v.* State, 44 Tex. 109.

4. Tully *v.* Com., 4 Metc. (Mass.) 357; Hopkins *v.* Com., 3 Metc. (Mass.) 460; Haggett *v.* Com., 3 Metc. (Mass.) 457; Wilde *v.* Com., 2 Metc. (Mass.) 408.

5. State *v.* Chambers, 6 Ala. 855; Berry *v.* State, 10 Ga. 511. Entering a yard with such intent does not come within the act. Com. *v.* Taggert, 3 Brewst. (Pa.) 340.

6. Stanley *v.* State, 58 Ga. 430.

Railroad car.— Although larceny from a railroad car is a specific statutory offense, one may be punished for larceny from a house who takes from a railroad car standing in a house. Bone *v.* State, 121 Ga. 147, 48 S. E. 986.

7. Willis *v.* State, 102 Ga. 572, 28 S. E. 917.

8. Callahan *v.* State, 41 Tex. 43.

9. Bone *v.* State, 121 Ga. 147, 48 S. E. 986.

10. Burge *v.* State, 62 Ga. 170.

11. Martinez *v.* State, 41 Tex. 126.

12. State *v.* Bailey, 10 Conn. 144.

13. Com. *v.* Annis, 15 Gray (Mass.) 197.

14. Reg. *v.* Carter, 1 C. & K. 173, 47 E. C. L. 173.

15. State *v.* Hanlon, 32 Oreg. 95, 48 Pac. 353.

16. Jefferson *v.* State, 100 Ala. 59, 14 So. 627.

17. Hagan *v.* State, 52 Ala. 373; Bennett *v.* State, 52 Ala. 370.

18. Hunter *v.* Com., 48 S. W. 1077, 20 Ky. L. Rep. 1165.

19. Andrews *v.* State, 123 Ala. 42, 26 So. 522.

20. Benton *v.* Com., 91 Va. 782, 21 S. E. 495.

21. Lynch *v.* State, 89 Ala. 18, 7 So. 829, And see Middleton *v.* State, 53 Ga. 248.

which was called the "office," might be found by the jury to be a "counting-house." [22]

e. "Building." A church is a building.[23] So is a corn-crib;[24] and a stationary structure, eight feet tall, covered with shingles and inclosed with wire, erected for the purpose of the safe-keeping of birds and fowls.[25] But a "refreshment saloon" is not necessarily a building.[26]

f. "Place." A warehouse occupied for business purposes only, and not within the curtilage of or connected with any dwelling-house, is a place.[27]

g. Protection or Control of Property. In order to constitute larceny in a dwelling-house or other dwelling the property stolen must indeed be under the protection of the house, and not under the eye or personal care of someone who happens to be in the house.[28] The personal effects of a sleeping man left beside the bed are under the protection of the dwelling;[29] but property immediately under the eye or upon the person of one who is awake is under his protection, and not under that of the house.[30] Property left by mistake is under the protection of the house,[31] but not property casually left.[32] The property need not belong to or be under the control of the owner of the house.[33]

h. Who May Commit Offense. A taking by the owner of the house is not larceny from the dwelling, since the object of the statute was not to protect against him;[34] nor is a taking by the owner's wife.[35] But a taking by a guest,[36] a boarder, or a lodger,[37] is larceny from the dwelling. A taking by a tenant who has hired a furnished house is not larceny from the dwelling.[38] One standing outside the house aiding and abetting is a principal in the offense.[39] But where witness stole a sack of money from a drawer, went outside the building, and handed

22. Reg. *v.* Potter, 3 C. & K. 179, 5 Cox C. C. 187, 2 Den. C. C. 235, 15 Jur. 498, 20 L. J. M. C. 170, T. & M. 561.

23. Rex *v.* Hickman, 2 East P. C. 593, 1 Leach C. C. 318; Rex *v.* Parker, 2 East P. C. 592, 1 Leach C. C. 320 note.

"Taking out of a building anything of value belonging thereto" does not cover the taking from a building loose lumber which did not belong to and was not to be used in connection with the building itself. Fletcher *v.* Com., 80 S. W. 1089, 26 Ky. L. Rep. 227.

To convict of larceny from a building used for manufacturing the actual use of the building for the purpose must be shown. Rex *v.* Dixon, R. & R. 39.

Presence of police officer.— That a police officer is present in a shop in the night-time when an article which forms part of the stock in trade and is in its usual place therein is stolen therefrom, he having been stationed there for the purpose of detecting the thief, will not have the effect to change the character of the offense from that of larceny in a building. Com. *v.* Nott, 135 Mass. 269.

24. State *v.* Gibson, 97 Iowa 416, 66 N. W. 742.

25. Williams *v.* State, 105 Ga. 814, 32 S. E. 129, 70 Am. St. Rep. 82.

26. Com. *v.* Mahar, 8 Gray (Mass.) 469.

27. Reg. *v.* Edmundson, 8 Cox C. C. 212, 2 E. & E. 77, 5 Jur. N. S. 1351, 28 L. J. M. C. 213, 7 Wkly. Rep. 565, 10 E. C. L. 77.

28. Robinson *v.* Van Auken, 190 Mass. 161, 76 S. E. 601. And see cases cited in subsequent notes in this section.

29. Com. *v.* Smith, 111 Mass. 429; Rex *v.* Thomas, Carrington Cr. L. 295; Reg. *v.* Hamilton, 8 C. & P. 49, 34 E. C. L. 602; Rex *v.* Campbell, 2 Leach C. C. 564.

30. State *v.* Patterson, 98 Mo. 283, 11 S. W. 728; Rex *v.* Owen, 2 East P. C. 645, 2 Leach C. C. 572. See also Com. *v.* Lester, 129 Mass. 101.

Application of rule.— Therefore goods in an open shop placed by the shopkeeper in the hands of defendant are not under the protection of the building, and if he steals them it is not larceny from the building. Com. *v.* Lester, 129 Mass. 101. It has been held, however, that where a person having money of his own in a satchel went into the banking-house of another, and temporarily deposited it upon the counter, and while standing within about two feet of it another person called his attention away, and a third abstracted money from the satchel, it was larceny from the house. Simmons *v.* State, 73 Ga. 609, 54 Am. Rep. 885.

31. Rex *v.* Carroll, 1 Moody C. C. 89.

32. Anonymous, 8 Mod. 165.

33. Hill *v.* State, 41 Tex. 157.

34. Rex *v.* Gould, 2 East P. C. 644, 1 Leach C. C. 217. *Contra*, under a later form of statute. Reg. *v.* Bowden, 1 C. & K. 147, 47 E. C. L. 147.

35. Com. *v.* Hartnett, 3 Gray (Mass.) 450; Rex *v.* Gould, 2 East P. C. 644, 1 Leach C. C. 217.

36. Point *v.* State, 37 Ala. 148.

37. Ullman *v.* State, 1 Tex. App. 220, 28 Am. Rep. 405; Rex *v.* Taylor, R. & R. 310.

38. Rex *v.* Palmer, 2 East P. C. 586, 2 Leach C. C. 680.

39. Reg. *v.* Murphy, 6 Cox C. C. 340.

it to defendant, who did not know what was in the sack, or that it was stolen, a conviction of larceny from the house was not sustained.[40]

i. Value of Property Stolen. When the punishment depends on the value of the property stolen, the value is found by adding the value of all the goods taken.[41] When the crime is made grand larceny by statute, the value of the property is immaterial.[42]

4. Larceny of Goods Affixed to a Building. To constitute the offense the goods must be taken directly from the building by defendant; the crime is not committed by taking the goods after they have been severed.[43]

5. Larceny From Vessel. The crime of larceny from a vessel is complete when a box of shoes has been broken open, and the shoes taken out of it and concealed in the vessel, although not carried out of the vessel.[44] Taking the luggage of a passenger going by a steamboat is larceny from a vessel.[45] In Massachusetts the offense is of a different kind according as the theft is committed at night or in the daytime.[46]

B. Statutory Crimes Similar to Larceny — 1. Larceny by Bailee — a. Nature of the Offense. The offense of larceny by bailee or agent has been frequently created by statute, being another method of dealing with the offense more commonly called embezzlement.[47] In some states it is held that where one intrusted with property by another fraudulently converts it to his own use, he is guilty of larceny after trust, although he may have fraudulently induced the delegation of the trust with intent to so convert the property, and therefore be guilty of larceny by trick.[48] In some states, although the statute makes the offense larceny, it is interpreted as creating a separate crime, namely, embezzlement;[49] this sometimes results in making an act embezzlement which would have been held larceny at common law.[50] In Massachusetts, on the other hand, such acts are now made simple acts of larceny, and punished on an ordinary indictment for larceny.[51] Under the ordinary form of statute the misuse of property, the legal title of which was in defendant, is not covered.[52] In some cases

40. Davis *v.* State, 100 Ga. 69, 25 S. E. 921.

41. Rex *v.* Jones, 4 C. & P. 217, 19 E. C. L. 483.

42. State *v.* Riley, 100 Mo. 493, 13 S. W. 1063.

43. Reg. *v.* Gooch, 8 C. & P. 293, 34 E. C. L. 742.

44. Nutzel *v.* State, 60 Ga. 264.

45. Rex *v.* Wright, 7 C. & P. 159, 32 E. C. L. 551.

46. Com. *v.* McLaughlin, 11 Cush. (Mass.) 598.

47. *Alabama.*— Case *v.* State, 26 Ala. 17.
California.— People *v.* Smith, 23 Cal. 280.
Georgia. — Belt *v.* State, 103 Ga. 12, 29 S. E. 451.
Illinois.— Weimer *v.* People, 186 Ill. 503, 58 N. E. 378.
New York.— People *v.* Kellogg, 105 N. Y. App. Div. 505; 94 N. Y. Suppl. 617; Matter of Dempsey, 32 Misc. 178, 65 N. Y. Suppl. 722, 15 N. Y. Cr. 90.
Virginia.— Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867.
Wisconsin. — State *v.* Leicham, 41 Wis. 565.
Canada.— Reg. *v.* Cox, 16 Ont. 228; Livingston *v.* Massey, 23 U. C. Q. B. 156.
In Washington there are no degrees in the statutory offense. State *v.* Weydeman, 3 Wash. 399, 28 Pac. 749.

48. People *v.* Campbell, 127 Cal. 278, 59 Pac. 593; Walker *v.* State, 117 Ga. 260, 43 S. E. 701; State *v.* Shirer, 20 S. C. 392.

49. Fulton *v.* State, 13 Ark. 168; Com. *v.* Simpson, 9 Metc. (Mass.) 138; Com. *v.* Stearns, 2 Metc. (Mass.) 343.

50. Lowenthal *v.* State, 32 Ala. 589; State *v.* Wingo, 89 Ind. 204; Jones *v.* State, 59 Ind. 229. *Compare* Marcus *v.* State, 26 Ind. 101.

51. Com. *v.* Kelley, 184 Mass. 320, 68 N. E. 346.

52. *Illinois.*— Bergman *v.* People, 177 Ill. 244, 52 N. E. 363; Stoker *v.* People, 114 Ill. 320, 2 N. E. 55.
Massachusetts.— Com. *v.* Libbey, 11 Metc. 64, 45 Am. Dec. 185; Com. *v.* Stearns, 2 Metc. 343.
New York.— People *v.* Thomas, 83 N. Y. App. Div. 226, 82 N. Y. Suppl. 215.
Pennsylvania.— Young *v.* Glendenning, 8 Pa. Dist. 57.
Washington. — Brandenstein *v.* Way, 17 Wash. 293, 49 Pac. 511.
England.— Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302, 6 Jur. N. S. 513, 29 L. J. M. C. 132, 2 L. T. Rep. N. S. 254, 8 Wkly. Rep. 422; Reg. *v.* Hassall, 8 Cox C. C. 491, 7 Jur. N. S. 1064, L. & C. 58, 30 L. J. M. C. 175, 4 L. T. Rep. N. S. 561, 9 Wkly. Rep. 708; Reg. *v.* Garrett, 8 Cox C. C. 368, 2

special statutes applying to particular classes of persons limit the general application of the law.[53]

b. The Bailment. The bailment required by the statute involves the element of trust in the bailee,[54] and therefore if there is no intentional trust extended to the bailee that he will return the thing in specie the offense is not committed.[55] But there need not be a technical contract of bailment.[56] The goods may have been delivered to defendant by a third person for the owner as well as by the owner himself.[57] Under the statute there is a bailment where one holds money given him to invest,[58] to buy goods,[59] to get changed,[60] or to pay for goods;[61] or money that he has collected for another,[62] or received for the sale of another's goods.[63] So there is a bailment where one holds the goods of another for sale,[64] or to deliver the same,[65] or on deposit;[66] or where goods are borrowed,[67] or bought for another.[68]

c. The Conversion. To sustain a charge of larceny by a bailee it is necessary to prove some act of conversion inconsistent with the purposes of the bailment.[69] If there is a conversion after bailment, the act forbidden by the statute is complete.[70] The conversion must be actual; a mere unexecuted contract by the bailee to sell the property is not necessarily a conversion,[71] nor is a mere offer to sell.[72] Although a repudiation of the owner's claim, and the assertion of title in the bailee, without other act, might constitute sufficient conversion.[73]

d. The Intent. The intent to steal must exist at the time of the conversion.[74]

F. & F. 14; Reg. *v.* Marsh, 3 F. & F. 523; Reg. *v.* Wheeler, 14 Wkly. Rep. 848.

53. State *v.* Whitehouse, 95 Me. 179, 49 Atl. 869 (guardian); State *v.* Walton, 62 Me. 106 (town officer); Reg. *v.* Daynes, 12 Cox C. C. 514, 29 L. T. Rep. N. S. 468.

54. Cunnegin *v.* State, 118 Ga. 125, 44 S. E. 846.

55. Wylie *v.* State, 97 Ga. 207, 22 S. E. 954.

Illustration.— Where a bank-teller by mistake paid a depositor more than he asked for and more than was due, and the depositor converted the whole amount, he was not guilty under the statute because no trust was reposed in him. Com. *v.* Hays, 14 Gray (Mass.) 62, 74 Am. Dec. 662.

56. Thus a married woman (Reg. *v.* Robson, 9 Cox C. C. 29, 8 Jur. N. S. 64, L. & C. 93, 31 L. J. M. C. 22, 5 L. T. Rep. N. S. 402, 10 Wkly. Rep. 61), or an infant (Reg. *v.* Macdonald, 15 Cox C. C. 757), or a subbailee (Reg. *v.* Clegg, 11 Cox C. C. 212, Ir. R. 3 C. L. 166) may be held under a statute. And where a drunken man allowed defendant, a friend, to take his watch, believing that defendant was acting solely from friendly motives, there was a sufficient bailment under the act. Reg. *v.* Reeves, 5 Jur. N. S. 716.

57. Com. *v.* Mooney, 8 Phila. (Pa.) 610.

58. Reg. *v.* Fullagar, 14 Cox C. C. 370, 44 J. P. 57.

59. Reg. *v.* Aden, 12 Cox C. C. 512, 29 L. T. Rep. N. S. 467.

60. Mobley *v.* State, 114 Ga. 544, 40 S. E. 728.

61. Reg. *v.* Wells, 1 F. & F. 109.

62. Haupt *v.* State, 108 Ga. 64, 33 S. E. 831; People *v.* Civille, 44 Hun (N. Y.) 497. State *v.* Dale, 8 Oreg. 229.

63. State *v.* Maines, 26 Wash. 160, 66 Pac. 431; Reg. *v.* Banks, 13 Q. B. D. 29, 15 Cox C. C. 450, 48 J. P. 470, 53 L. J. M. C. 132, 50 L. T. Rep. N. S. 427, 32 Wkly. Rep. 722; Reg. *v.* Holloway Prison, 18 Cox C. C. 631, 66 L. J. Q. B. 830, 77 L. T. Rep. N. S. 247; Rex *v.* Hartley, R. & R. 104.

64. Com. *v.* Maher, 11 Phila. (Pa.) 425; Reg. *v.* Oxenham, 13 Cox C. C. 349, 46 L. J. M. C. 125, 35 L. T. Rep. N. S. 490; Reg. *v.* Richmond, 12 Cox C. C. 495, 29 L. T. Rep. N. S. 408.

65. Reg. *v.* Davies, 10 Cox C. C. 239, 14 L. T. Rep. N. S. 491, 14 Wkly. Rep. 679.

66. Cody *v.* State, 100 Ga. 105, 28 S. E. 106; People *v.* Sherman, 133 N. Y. 349, 31 N. E. 107; Reg. *v.* Cosser, 13 Cox C. C. 187.

67. Brooks *v.* State, 26 Tex. App. 184, 9 S. W. 562; Reg. *v.* Tomkinson, 14 Cox C. C. 603, 45 J. P. 814, 44 L. T. Rep. N. S. 821.

68. Reg. *v.* Aden, 12 Cox C. C. 512, 29 L. T. Rep. N. S. 467; Reg. *v.* Bunkall, 9 Cox C. C. 419, 10 Jur. N. S. 216, L. & C. 371, 33 L. J. M. C. 75, 9 L. T. Rep. N. S. 778, 12 Wkly. Rep. 414.

69. Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082; Reg. *v.* Jackson, 9 Cox C. C. 505.

70. *Missouri.*— Norton *v.* State, 4 Mo. 461.

New York.— People *v.* Evans, 69 Hun 222, 23 N. Y. Suppl. 717.

Oregon.— State *v.* Lucas, 24 Oreg. 168, 33 Pac. 538.

Texas.— Berg *v.* State, 2 Tex. App. 148.

England.— Reg. *v.* Henderson, 11 Cox C. C. 593, 23 L. T. Rep. N. S. 628.

Canada.— Reg. *v.* Barnett, 17 Ont. 649; Reg. *v.* Tweedy, 23 U. C. Q. B. 120.

71. Reg. *v.* Brooks, 8 C. & P. 295, 34 E. C. L. 743.

72. Anonymous, 1 Ohio Dec. (Reprint) 279, 6 West. L. J. 566.

73. Von Senden *v.* State, (Tex. Cr. App. 1898) 45 S. W. 725.

74. *Arkansas.*— Conley *v.* State, 69 Ark. 454, 64 S. W. 218.

Georgia.— Almand *v.* State, 110 Ga. 883, 36 S. E. 215, 78 Am. St. Rep. 140.

2. Larceny by False Pretenses. Although the crime of obtaining property by false pretenses is an entirely distinct offense from larceny, statutes sometimes make the same act larceny.[75] The felonious intent must exist at the time of taking.[76]

3. Stealing Animals[77] — a. In General. There are special statutes relating to cattle stealing in many states.[78] The offense requires an intent to steal.[79] The statute is usually interpreted as not altering the common law; the stealing is larceny at common law and a distinct crime under the statute.[80] Therefore the degrees of larceny that exist at common law do not apply to cattle stealing, which is punishable under the statute whatever the value of the cattle.[81] A statute punishing stealing "an animal of the cow kind" includes stealing a steer.[82] The offense of stealing a horse does not include the offense of taking and using an estray,[83] nor of unlawfully or maliciously riding a horse, the property of another, without his consent.[84] The statute refers to live animals only.[85]

b. Larceny of Branded Cattle. Purchase in good faith is no defense to this crime in Texas.[86] In Arkansas and the Indian Territory unbranded cattle are by statute not subjects of common-law larceny.[87] Driving stock from its accustomed range is a statutory offense in Texas similar to larceny.[88]

4. Other Offenses Against Animals. Killing an animal with intent to steal the carcass is a statutory offense in England. It is committed when the intent is to steal part of the carcass,[89] and when the animal is wounded with the intent charged so that it dies later.[90] Other English statutes deal with unlawfully taking rabbits.[91] In Rhode Island wrongfully taking oysters from a private bed is a

Illinois.— McElroy *v.* People, 202 Ill. 473, 66 N. E. 1058.

Michigan.— People *v.* Butts, 128 Mich. 208, 87 N. W. 224; People *v.* Stratton, 126 Mich. 100, 85 N. W. 248.

New York.— Moss *v.* Cohen, 158 N. Y. 240, 53 N. E. 8.

South Carolina.— State *v.* Butler, 21 S. C. 353.

Texas.— Smith *v.* State, 45 Tex. Cr. 251, 76 S. W. 434; Von Senden *v.* State, (Cr. App. 1898) 45 S. W. 725.

Virginia.— Shinn *v.* Com., 32 Gratt. 899.

75. *Minnesota.*— State *v.* Henn, 39 Minn. 464, 40 N. W. 564.

New York.— People *v.* Rothstein, 42 Misc. 123, 85 N. Y. Suppl. 1076.

Tennessee.— Mitchell *v.* State, 92 Tenn. 668, 23 S. W. 68.

Texas.— Maddox *v.* State, 41 Tex. 205; Porter *v.* State, 23 Tex. App. 295, 4 S. W. 889; Davison *v.* State, 12 Tex. App. 214.

West Virginia.— State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429.

76. State *v.* Lord, (Minn. 1899) 79 N. W. 968.

77. Definition of cattle.— The word "cattle" means a species of animals having an essential identity in qualities, to be taken and considered either collectively or individually. Hubotter *v.* State, 32 Tex. 479.

78. *Louisiana.*— State *v.* Gouvernale, 112 La. 956, 36 So. 817.

South Carolina.— State *v.* Major, 14 Rich. 76.

Utah.— Matter of Gannett, 11 Utah 283, 39 Pac. 496.

Virginia.— Lanthrop *v.* Com., 6 Gratt. 671.

Washington.— State *v.* Klein, 38 Wash. 475, 80 Pac. 770.

79. Young *v.* State, (Tex. Cr. App. 1904) 83 S. W. 808. *Contra,* Hughes *v.* Territory, 8 Okla. 28, 56 Pac. 708.

In Kentucky if there was no felonious intent the wrongful taker is guilty of a misdemeanor. Cox *v.* Com., 78 S. W. 423, 25 Ky. L. Rep. 1577.

80. Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101; Granger *v.* State, 52 Nebr. 352, 72 N. W. 474.

81. McVeigh *v.* Ripley, 77 Conn. 136, 58 Atl. 701; Hoge *v.* People, 117 Ill. 35, 6 N. E. 796; Woodring *v.* Terr., 14 Okla. 250, 78 Pac. 85; State *v.* Moore, 30 S. C. 69, 8 S. E. 437.

82. Watson *v.* State, 55 Ala. 150.

83. Wilkins *v.* State, (Tex. Cr. App. 1900) 55 S. W. 819.

84. State *v.* Gouvernale, 112 La. 956, 36 So. 817.

85. Golden *v.* State, 63 Miss. 466.

86. Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624.

87. Murray *v.* U. S., 1 Ind. Terr. 28, 35 S. W. 240.

88. Spoonemore *v.* State, 25 Tex. App. 358, 8 S. W. 280; Vaughn *v.* State, 21 Tex. App. 573, 2 S. W. 825; Yoakum *v.* State, 21 Tex. App. 260, 17 S. W. 254; Foster *v.* State, 21 Tex. App. 80, 17 S. W. 548; Powell *v.* State, 7 Tex. App. 467.

89. Rex *v.* Williams, 1 Moody C. C. 107.

90. Reg. *v.* Sutton, 8 C. & P. 291, 2 Lew. C. C. 272, 2 Moody C. C. 34, 34 E. C. L. 740.

Cutting off part of a sheep whilst it is alive with intent to steal such part will support an indictment for killing with intent to steal part of the carcass, if the cutting off must occasion its death. Rex *v.* Clay, R. & R. 287.

91. Rex *v.* Garratt, 6 C. & P. 369, 25 E. C. L. 479; Rex *v.* Glover, R. & R. 200.

statutory offense distinct from larceny.[92] Stealing a slave was a special statutory offense.[93] "Stealing a free negro" was made an offense by statute.[94] Stealing poultry is made misdemeanor by statute.[95] The statute making the wilful killing of an animal larceny has no application where the killing follows asportation, as in that case the offense of larceny is complete.[96]

5. SEVERING FROM THE SOIL. Severing and carrying away timber is often a crime by statute.[97] This need not be done in public.[98] It does not apply to cord-wood already cut and piled on the land.[99] Larceny of an outstanding crop requires a felonious intent,[1] or at least an intent to take wrongfully.[2] Entering land and carrying off wood or other property means property growing on the land, and not money or other chattel on the land.[3] In Canada a special statute deals with offenses which consist in taking wood within the Indian country.[4]

6. HAVING IN POSSESSION IMPLEMENT COMMONLY USED FOR COMMISSION OF LARCENY. A shoplifter's bag is not an "implement, adapted, designed, or commonly used for the commission of" larceny within a statute making it an offense to have such implement in one's possession.[5]

7. MISCELLANEOUS OFFENSES. A number of statutes have been enacted creating special offenses of the taking of certain articles not the subject of larceny at common law, such as fixtures[6] or writings relating to real estate;[7] or punishing particularly the taking of certain articles which were subjects of larceny at common law, such as public records,[8] goods in process of manufacture,[9] or otherwise extending the common law.[10] Concealment of a will with fraudulent purpose is a statutory offense in England.[11] "Stealing rides" may be made criminal by statute, although a ride cannot be the subject of larceny.[12] A stream of water running by the side of a piece of ground, which is inclosed on every side except that on which it is bounded by the water, was not a stream in inclosed ground, within the English statute, so as to subject a person fishing therein to the penalty inflicted by that act.[13]

92. State *v.* Tayler, 13 R. I. 541.
93. Spivey *v.* State, 26 Ala. 90.
94. Davenport *v.* Com., 1 Leigh (Va.) 588.
95. State *v.* Shutts, 69 N. J. L. 206, 54 Atl. 235.
96. State *v.* Crow, 107 Mo. 341, 17 S. W. 745.
97. Carl *v.* State, 125 Ala. 89, 28 So. 505; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189. This crime being by the statute made grand larceny the value of the crop taken is immaterial. Newsom *v.* State, 107 Ala. 133, 18 So. 206.
98. Carl *v.* State, 125 Ala. 89, 28 So. 505.
99. Reg. *v.* Caswell, 33 U. C. Q. B. 303.
1. Lyon *v.* State, 61 Ala. 224.
2. Newsom *v.* State, 107 Ala. 133, 18 So. 206.
3. State *v.* Vosburg, 111 N. C. 718, 16 S. E. 392.
4. Reg. *v.* Johnson, 8 Can. L. T. Occ. Notes 334; Reg. *v.* Fearman, 10 Ont. 660.
5. People *v.* Lyons, 18 Misc. (N. Y.) 339, 41 N. Y. Suppl. 646, 11 N. Y. Cr. 330.
6. Reg. *v.* Gooch, 8 C. & P. 293, 34 E. C. L. 742; Rex *v.* Munday, 2 East P. C. 594, 2 Leach C. C. 850.
7. Rex *v.* John, 7 C. & P. 324, 32 E. C. L. 636.
8. People *v.* Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131; Witte *v.* State, 21 Tex. App. 88, 17 S. W. 723.
9. Rex *v.* Woodhead, 1 M. & Rob. 549; Rex *v.* Hugill, 2 Russell Cr. 403.
10. Smith *v.* State, 84 Ala. 438, 4 So. 683 (removing property subject to lien); Jones *v.* Com., 1 Bush (Ky.) 34, 89 Am. Dec. 605 (taking unlawfully without intent to steal).
Stealing property of the United States.—Jolly *v.* U. S., 170 U. S. 402, 18 S. Ct. 624, 42 L. ed. 1085. The phrase "personal goods of another," in Act April 30, 1790 (U. S. Rev. St. (1878) § 5356 [U. S. Comp. St. (1901) p. 3638]), § 16, punishing the crime of larceny in any place under the sole and exclusive jurisdiction of the United States, embraces the personal goods of the United States. U. S. *v.* Maxon, 26 Fed. Cas. No. 15,748, 5 Blatchf. 360.
11. Reg. *v.* Morris, 9 C. & P. 89, 38 E. C. L. 64.
12. Pressley *v.* State, 118 Ga. 315, 45 S. E. 395.
13. Lisle *v.* Brown, 1 Marsh. 127, 5 Taunt. 440, 1 E. C. L. 229, under 5 Geo. III, c. 14, § 3.
Place where fish are bred, kept, and preserved.—On an indictment on 5 Geo. III, c. 14, § 1, for entering an inclosed park, and taking fish, bred, kept, and preserved there, in the river Kent, running through the park, it appeared that the park was walled round, except where the river entered and passed out, that there were fences to keep in the deer, that there was nothing to keep in the fish, that they were not known to breed there, and that nothing was done to stock the river, but that persons were never suffered

XIII. INDICTMENT AND INFORMATION.[14]

A. General Principles — 1. CAPTION. A mistake in the caption as to the term of court does not vitiate an indictment.[15]

2. INDUCEMENT. An indictment alleging facts which constitute larceny need not in the inducement name the offense as larceny,[16] nor need it explicitly allege that the grade of the offense is grand or petit larceny;[17] nor is the indictment bad if it names the offense wrongly in the inducement, as by calling it embezzlement or burglary.[18]

3. METHOD OF ALLEGING — a. Positive Charges. The indictment must charge facts, not evidence by which the facts are to be proved,[19] and must allege the

to angle in the park without leave. It was held that this was not a place where fish were to be considered as "bred, kept, or preserved" within the meaning of the act. Lisle *v.* Brown, 1 Marsh. 127, 5 Taunt. 440, 1 E. C. L. 229.

14. **Necessity of indictment** see, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 271 *et seq.*

Allegations as to former conviction see INDICTMENTS AND INFORMATIONS, 22 Cyc. 356 *et seq.*

Amendment see INDICTMENTS AND INFORMATIONS, 22 Cyc. 441 *et seq.*

Conclusion within statute see INDICTMENTS AND INFORMATIONS, 22 Cyc. 343 *et seq.*

Cure by verdict of insufficiency of accusation see INDICTMENTS AND INFORMATIONS, 22 Cyc. 485 *et seq.*

Demurrer see INDICTMENTS AND INFORMATIONS, 22 Cyc. 410 *et seq.*

Duplicity in general see INDICTMENTS AND INFORMATIONS, 22 Cyc. 376 *et seq.*

Duplicity in indictment charging burglary, with intent to commit larceny, and larceny see BURGLARY, 6 Cyc. 223.

Duplicity in indictment charging both larceny and embezzlement see INDICTMENTS AND INFORMATIONS, 22 Cyc. 399 *et seq.*

Election between acts and counts see INDICTMENTS AND INFORMATIONS, 22 Cyc. 404 *et seq.*

Joinder of counts in general see INDICTMENTS AND INFORMATIONS, 22 Cyc. 316 *et seq.*

Joinder of counts for burglary and larceny or for burglary and larceny and receiving stolen goods see BURGLARY, 6 Cyc. 224 note 25, 225 note 26.

Joinder of counts charging different offense in the same act see INDICTMENTS AND INFORMATIONS, 22 Cyc. 394 *et seq.*

Necessity of setting forth acts constituting offense see, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 301 *et seq.*

Sufficiency of allegations to found action for malicious prosecution see MALICIOUS PROSECUTION.

Sufficiency of indictment in language of statute see INDICTMENTS AND INFORMATIONS, 22 Cyc. 335 *et seq.*

Sufficiency of warrant of commitment or judgment in summary trial for larceny see CRIMINAL LAW, 12 Cyc. 299 *et seq.*

Forms of indictment or information will be found set out in full, in part, or in substance in Verberg *v.* State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; Allen *v.* State, 134 Ala. 159, 160, 32 So. 318; Carl *v.* State, 125 Ala. 89, 91, 28 So. 505; Turner *v.* State, 124 Ala. 59, 27 So. 272; Marshall *v.* State, 71 Ark. 415, 75 S. W. 584; State *v.* Sherman, 71 Ark. 349, 74 S. W. 293; People *v.* Lonnen, 139 Cal. 634, 73 Pac. 586; People *v.* Prather, 134 Cal. 386, 66 Pac. 483; State *v.* Spencer, 2 Pennew. (Del.) 225, 45 Atl. 399; Lang *v.* State, 42 Fla. 595, 28 So. 856; Bone *v.* State, 120 Ga. 866, 48 S. E. 356; Heard *v.* State, 120 Ga. 848, 48 S. E. 311; State *v.* Bellamy, 63 Kan. 144, 65 Pac. 274; Bailey *v.* Com., 58 S. W. 425, 22 Ky. L. Rep. 512; State *v.* King, 95 Md. 125, 51 Atl. 1102; State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429; People *v.* Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546; People *v.* Lammerts, 164 N. Y. 137, 58 N. E. 22, 15 N. Y. Cr. 158; State *v.* Moore, 129 N. C. 494, 38 S. E. 626, 55 L. R. A. 96; Steil *v.* Territory, 12 Okla. 377, 71 Pac. 656; State *v.* Humphreys, 43 Oreg. 44, 70 Pac. 824; State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716; State *v.* Halpin, 16 S. D. 170, 91 N. W. 605; State *v.* Hellekson, 13 S. D. 242, 83 N. W. 254; State *v.* Morgan, 109 Tenn. 157, 69 S. W. 970; Beard *v.* State, 45 Tex. Cr. 522, 78 S. W. 348; Bolton *v.* State, 41 Tex. Cr. 642, 57 S. W. 813; Young *v.* State, (Tex. Cr. App. 1903) 75 S. W. 798; Bell *v.* State, (Tex. Cr. App. 1901) 62 S. W. 567; Jasper *v.* State, (Tex. Cr. App. 1901) 61 S. W. 392; State *v.* Smith, 31 Wash. 245, 71 Pac. 767.

For forms of demurrer to indictment or information see Johnson *v.* State, 119 Ga. 257, 45 S. E. 960; Walthous *v.* State, 114 Ga. 75, 39 S. E. 872; State *v.* Rathbone, 9 Ida. 161, 67 Pac. 186.

15. George *v.* People, 167 Ill. 447, 47 N. E. 741.

16. State *v.* Hinckley, 4 Minn. 345.

17. State *v.* Dilworth, 34 La. Ann. 216; State *v.* Lartigue, 29 La. Ann. 642; State *v.* Powell, 28 La. Ann. 315.

18. State *v.* White, 129 Ind. 153, 28 N. E. 425; State *v.* Gillett, 92 Iowa 527, 61 N. W. 169; State *v.* Coon, 18 Minn. 518.

19. Smith *v.* State, 35 Tex. 738; State *v.* Reis, 9 Wash. 329, 37 Pac. 452.

necessary facts affirmatively, not by mere implication,[20] or by way of suspicion.[21] It is not necessary, however, to use language with the utmost precision and nicety; a charge that is sufficiently clear according to the ordinary use of language is enough.[22]

b. Disjunctive or Conjunctive Allegations. An allegation in the disjunctive is good if the words connected mean the same thing,[23] or things so similar that there is no prejudice to defendant in charging them both; as for instance an allegation that defendant did lead or drive away an animal.[24] And by statute a disjunctive allegation, even though it leaves the charge somewhat indefinite, is allowed.[25]

4. Erroneous Use of Language — a. Mistakes in Spelling and Grammar. Mere errors in spelling which leave the sense clear and certain do not vitiate an indictment;[26] nor do mere errors of grammar which do not confuse the sense, such as wrong use of the singular or the plural number,[27] or under the same circumstances misuse of a word, as using "said" in a manner technically inaccurate,[28] or confusing a thing with the value of the thing.[29]

b. Omission of a Word. The omission of a word is not fatal to an indictment if the indictment contains a sufficient allegation of the offense without it. The omission of the word "away" from the technical allegation of asportation, "did steal, take and carry away," is not fatal, since the word "steal" of itself imports an asportation.[30] Therefore so long as the word "steal" is used the omission of the word "carry," so that the allegation was that defendant "feloniously did steal, take and away," is not fatal.[31] Where the word "steal" is also omitted so that the allegation reads merely "feloniously took and carried," the omission is fatal.[32] So the omission of a connecting word, if it does not confuse the meaning, will not vitiate the indictment.[33]

c. Repetition of a Word. The improper repetition of a word, so long as the sense is clear, will not vitiate the indictment.[34]

5. Unnecessary Averments — a. Duplicity. Where a statute or the common law provides several ways in which the offense may be committed, and the indictment charges the commission of a single offense, but in several ways, the indict-

20. State v. Dooly, 64 Mo. 146.

21. Frisbie v. Butler, Kirby (Conn.) 213

22. State v. Rooke, 10 Ida. 388, 79 Pac. 82; State v. Derst, 10 Nev. 443; Irvin v. State, 37 Tex. 412, Sansbury v. State, 4 Tex. App. 99. Similarly in an indictment under a statute making it a misdemeanor to connect any pipe, tube, or other instrument with a water main for the purpose of fraudulently taking water therefrom, the complaint need not charge that the connection was made by means of a pipe, tube, or other instrument, since if made at all as alleged it must have been so made. *Ex p.* Helbing, 66 Cal. 215, 5 Pac. 103. And an information for grand larceny, charging defendant with having stolen "about $80 lawful money of the United States of America," was not demurrable for uncertainty as to the amount stolen, as it could not be said that the information failed to charge a larceny of more than fifty dollars. People v. Peltin, 1 Cal. App. 612, 82 Pac. 980.

23. State v. Humphreys, 43 Oreg. 44, 70 Pac. 824.

24. People v. Smith, 15 Cal. 408; State v. Brookhouse, 10 Wash. 87, 38 Pac. 862; Rex v. White, 34 Nova Scotia 436.

25. Russell v. State, 71 Ala. 348; Gabriel v. State, 40 Ala. 357.

26. Grant v. State, 55 Ala. 201 (gol for gold); Bernhard v. State, 76 Ga. 613 (initial J for I); State v. Lucas, 147 Mo. 70, 47 S. W. 1067 (guilts for gilts); State v. Williamson, 43 Tex. 500 (possion for possession); Allen v. State, (Tex. Cr. App. 1894) 28 S. W. 474 (tenty for twenty); Barner v. State, (Tex. Cr. App.) 1892) 20 S. W. 559 (on for one); Hutto v. State, 7 Tex. App. 44 (Janury for January); Thomas v. State, 2 Tex. App. 293 (gilding for gelding).

27. State v. Lee Ping Bow, 10 Oreg. 27; Snow v. State, 6 Tex. App. 284.

28. Brown v. State, 28 Tex. App. 379, 13 S. W. 150.

29. Goodson v. State, 32 Tex. 121; Pate v. State, (Tex. Cr. App. 1904) 83 S. W. 695.

30. State v. Chambers, 2 Greene (Iowa) 308; State v. Parry, 48 La. Ann. 1483, 21 So. 30; Com. v. Adams, 7 Gray (Mass.) 43; State v. Mann, 25 Ohio St. 668; State v. Witt, 35 Oreg. 230, 55 Pac. 1054.

31. Walker v. State, 50 Ark. 532, 8 S. W. 939.

32. Rountree v. State, 58 Ala. 381.

33. Bennett v. State, 73 Ark. 386, 84 S. W. 483 (of); State v. Bartlett, 55 Me. 200 (and); State v. Hellekson, 13 S. D. 242, 83 N. W. 254 (the). *Contra*, State v. Huston, 12 Tex. 245 (at); Riley v. State, 27 Tex. App. 606, 11 S. W. 642 (of).

34. Heath v. State, 101 Ind. 512.

ment is not bad for duplicity.[35] This, however, cannot be done where the offenses themselves are different.[36]

b. Surplusage. If the indictment contains a good charge of larceny, but contains additional useless allegations, these allegations will not harm the indictment if it is not thereby rendered so prolix as to prejudice defendant in making his defense.[37] Such needless allegations are rejected as surplusage.[38]

c. Repugnancy. Where, however, one allegation being enough, two contradictory allegations are inserted, neither can be rejected as surplusage, since it is uncertain which the grand jury accepted as the true one. The indictment is repugnant and void.[39]

B. Essential Parts of the Indictment — 1. The Taking. The indictment for larceny in its ordinary form charges that defendant "stole, took, and carried away" the goods.[40] An indictment is not bad which uses other terms, as "haul" for "carry,"[41] or omits steal,[42] or in the case of an animal charges that defendant did lead and drive away the animal.[43] Merely formal objections for immaterial errors are by statute not fatal to the indictment.[44] It is possible by statute to make an indictment which charges simply that defendant stole the property of a person named.[45]

2. Feloniously.[46] At common law, larceny being a felony, the indictment is bad if it does not allege that the act was felonious.[47] Under modern statutes other words may be used instead of the word of art "feloniously."[48] In the case of petit larceny, when not felonious, or sometimes of statutory larceny, it is not necessary to allege that the act was done feloniously.[49] But in such a case no harm is done by alleging that the act was feloniously done, the allegation being surplusage.[50] An

35. *Alabama.* — Mooney *v.* State, 8 Ala. 328.

Colorado.— Rowe *v.* People, 26 Colo. 542, 59 Pac. 57.

Kansas.— State *v.* Dunn, 66 Kan. 483, 71 Pac. 811.

Maine.— State *v.* Cates, 99 Me. 68, 58 Atl. 238.

Minnesota.— State *v.* Comings, 54 Minn. 359, 56 N. W. 50.

Texas.— Steele *v.* State, 46 Tex. Cr. 337, 81 S. W. 962.

36. Barber *v.* State, 34 Ala. 213.

37. People *v.* Laurence, 137 N. Y. 517, 33 N. E. 547.

38. State *v.* Johnson, 30 La. Ann. 305; Reg. *v.* Jennings, 7 Cox C. C. 397, Dears. & B. 447, 4 Jur. N. S. 146, 6 Wkly. Rep. 231; Rex *v.* Hundson, 2 East P. C. 611.

Applications of rule.—Thus where to a good and sufficient indictment for larceny are added allegations intended as charges of burglary or of larceny from a dwelling-house, but so imperfect that the indictment is insufficient for the greater offense, the imperfect allegations may be rejected as surplusage and the indictment will stand as a good indictment for larceny. State *v.* Richardson, 45 La. Ann. 692, 12 So. 749; Com. *v.* Hathaway, 14 Gray (Mass.) 392; State *v.* Hupp, 31 W. Va. 355, 6 S. E. 919.

39. Smitherman *v.* State, 63 Ala. 24.

40. People *v.* Strong, 46 Cal. 302; Gregg *v.* State, 64 Ind. 223; State *v.* Gomer, 6 La. Ann. 311; State *v.* Friend, 47 Minn. 449, 50 N. W. 692.

41. Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911.

42. State *v.* Lee Yan Yan, 10 Oreg. 365.

43. Webb *v.* State, 21 Ind. 236.

44. People *v.* Wheeler, 66 N. Y. App. Div. 187, 73 N. Y. Suppl. 130 [*reversed* in 169 N. Y. 487, 62 N. E. 572]; Bolton *v.* State, 41 Tex. Cr. 642, 57 S. W. 813; State *v.* Halida, 28 W. Va. 499.

45. State *v.* Chambers, 2 Greene (Iowa) 308; Com. *v.* Kelley, 184 Mass. 320, 68 N. E. 346.

In Texas it is otherwise. Insall *v.* State, 14 Tex. App. 145. See, however, Scott *v.* State, 40 Tex. 503; Alexander *v.* State, 12 Tex. 540; Carr *v.* State, 9 Tex. App. 463.

46. See, generally, Indictments and Informations, 22 Cyc. 311 *et seq.*

47. *Indiana.*— Sovine *v.* State, 85 Ind. 576; Scudder *v.* State, 62 Ind. 13.

Missouri.— State *v.* Weldon, 70 Mo. 572.

North Carolina.— State *v.* Williams, 31 N. C. 140.

Virginia. — Barker *v.* Com., 2 Va. Cas. 122.

Canada.— Reg. *v.* Inglis, 25 Nova Scotia 259.

48. Baldwin *v.* State, 46 Fla. 115, 35 So. 220; State *v.* Smith, 31 Wash. 245, 71 Pac. 767.

In Texas "fraudulently" takes the place of "feloniously." Austin *v.* State, 42 Tex. 345.

49. State *v.* Boyce, 65 Ark. 82, 44 S. W. 1043; State *v.* Sipult, 17 Iowa 575; Reg. *v.* Stokes, 8 C. & P. 151, 34 E. C. L. 660.

50. State *v.* Hogard, 12 Minn. 293; State *v.* Joiner, 19 Mo. 224; Wolverton *v.* Com., 75 Va. 909; Reg. *v.* Butterworth, 12 Cox C. C. 132, 25 L. T. Rep. N. S. 850.

allegation that the taking was against the law is not necessary,[51] nor that it was done without color of right.[52]

3. Fraudulently. In Texas and Virginia the statute recites the necessity of a fraudulent taking; and in those states, in addition to the allegation of intent to steal, the indictment must explicitly allege that the taking was fraudulent.[53]

4. Against the Will of the Owner.[54] The indictment must contain in some form the allegation that the taking was against the will of the owner. This was done at common law by an explicit statement that the taking was against the will or without the consent of the owner; and such an allegation was essential.[55] Where more than one owner is alleged, the consent of all the owners must be negatived.[56] Where goods are alleged to have been taken from a possessor, the ownership also being alleged, the consent of both the owner and the possessor must be negatived,[57] unless the possessor appears to have been a mere naked bailee without interest in the property.[58] In a few states, usually by statute, the consent of the owner need not be expressly alleged; the allegation that defendant feloniously stole, or some other allegation in the indictment, being regarded as sufficiently negativing the owner's consent.[59]

5. The Intent to Steal.[60] The intent to steal must be alleged in some form. This was explicitly done at common law, and the old form is, it seems, sufficient under the codes.[61] An immaterial variation of the form is not usually fatal to the indictment.[62] But in some form it is essential that the allegation should appear.[63] And in Texas the approved form is an allegation of the intent to deprive the owner of the value of the property taken.[64] It is usually held that the necessary intent is sufficiently implied by the allegation that defendant feloniously stole,[65]

51. State *v.* Jones, 7 Nev. 408.

52. Rex *r.* George, 5 Can. Cr. Cas. 469, 35 Nova Scotia 42.

53. Lawless *v.* State, (Tex. App. 1892) 19 S. W. 676; Doxey *v.* State, (Tex. App. 1889) 12 S. W. 412; Chance *v.* State, 27 Tex. App. 441, 11 S. W. 457; McPherson *r.* State, 20 Tex. App. 194; Spain *r.* State, 19 Tex. App. 469; Ware *v.* State, 19 Tex. App. 13; Ortis *r.* State, 18 Tex. App. 282; Sloan *v.* State, 18 Tex. App. 225; Muldrew *r.* State, 12 Tex. App. 617 [*overruling* Musquez *r.* State, 41 Tex. 226]; Duff *v.* Com., 92 Va. 769, 23 S. E. 643.

54. Admissibility of evidence see *infra*, XIV, B, 3, d.

Instructions see *infra*, XV, B, 6.

Necessity of proving non-consent see *infra*, XIV, B, 3, b.

Non-consent as element of offense see *supra*, IV, A.

Sufficiency of proof of non-consent see *infra*, XIV, C, 2, f.

55. People *r.* Dilcher, 38 Misc. (N. Y.) 89, 77 N. Y. Suppl. 108; Johnson *r.* State, 39 Tex. 393; Long *v.* State, (Tex. Cr. App. 1897) 39 S. W. 674; Frazier *r.* State, 18 Tex. App. 434; Bailey *v.* State, 18 Tex. App. 426; Bland *v.* State, 18 Tex. App. 12.

56. Scott *r.* State, (Tex. Cr. App. 1902) 68 S. W. 680; Williams *r.* State, 23 Tex. App. 619, 5 S. W. 129; Williams *r.* State, 19 Tex. App. 276; Bailey *r.* State, 18 Tex. App. 426; McIntosh *v.* State, 18 Tex. App. 284.

What allegation sufficient.— This may be done by averring that the taking was without the consent of A, B, and C, the alleged owners. Com. *v.* Smith, 116 Mass. 40; Wesley *r.* State, 45 Tex. Cr. 64, 73 S. W. 960. But see Taylor *r.* State, 18 Tex. App. 489.

57. Swink *v.* State, 32 Tex. Cr. 530, 24 S. W. 893; Bland *r.* State, 18 Tex. App. 12.

58. Burns *r.* State, 35 Tex. 724.

59. *California.*— People *r.* Davis, 97 Cal. 194, 31 Pac. 1109.

Kentucky.— Hall *r.* Com., 21 S. W. 353, 14 Ky. L. Rep. 731.

Louisiana.— State *r.* Jones, 41 La. Ann. 784, 6 So. 638; State *r.* De Serrant, 33 La. Ann. 979.

Pennsylvania.— Com. *r.* Butler, 144 Pa. St. 568, 24 Atl. 910.

Tennessee.— Wedge *r.* State, 7 Lea 687.

See 32 Cent. Dig. tit. "Larceny," § 61.

60. Admissibility of evidence see *infra*, XIV, B, 3, d.

Instructions see *infra*, XV, B, 7.

Weight and sufficiency of evidence see *infra*, XIV, C, 2, h.

61. Yates *r.* State, 67 Ga. 770; Martin *r.* State, 67 Nebr. 36, 93 N. W. 161.

62. State *v.* Southall, 77 Minn. 296, 79 N. W. 1007 (intent to deprive of the property); Hendricks *r.* State, (Tex. Cr. App. 1900) 56 S. W. 55 (intent to appropriate to defendant's use).

63. *Ex p.* Dubuque, 1 Alaska 16; Sullivan *r.* Territory, 8 Okla. 499, 58 Pac. 650.

64. Ridgeway *r.* State, 41 Tex. 231; Eaton *r.* State, (Tex. Cr. App. 1897) 41 S. W. 604; Robinson *r.* State, 17 Tex. App. 589; Peralto *r.* State, 17 Tex. App. 578; Thompson *r.* State, 16 Tex. App. 74; Tallant *r.* State, 14 Tex. App. 234.

65. *California.*— People *v.* Lopez, 90 Cal. 569, 27 Pac. 427; People *v.* Brown, 27 Cal. 500.

or even that he stole, this being sufficient to show the animus with which the act was done.[66]

C. Description of Goods[67] — **1. General Principles — a. Certainty of Description** — (I) *Introductory Statement.* The description must be sufficiently certain to enable the jury to identify the property described in the indictment with that referred to by the evidence, and to show the court that the property is a subject of larceny.[68]

(II) *Definiteness.* The description may be too general and indefinite to support a conviction.[69] An alternative description is bad, if it is impossible, as "one certain trunk or chest,"[70] or if it is uncertain, as "three head of neat stock or beeves," all neat stock not being beeves.[71] Even if the description is conceivably ambiguous, it is usually held sufficient if it is reasonably certain.[72]

(III) *Subject of Larceny.* The allegations must be sufficient to show that the property is subject of larceny. Where certain varieties of a general class of things are subject of larceny, while others are not, it is necessary to specify the facts which make the things described subjects of larceny.[73] But in the case of an animal habitually domesticated or confined and used for food, it is enough to give the name of the animal.[74] Otherwise, however, when the crime is different according as the animal is alive or dead, it should be alleged to be dead, if that is the fact.[75] Where the description shows the property to be personal there need be no allegation that it is personal, or that it is the subject of larceny.[76] In the case of goods, the larceny of which is made criminal by statute, it is generally

Indiana.—Hamilton *v.* State, 142 Ind. 276, 41 N. E. 588.

Maine.— State *v.* Leavitt, 66 Me. 440.

Minnesota.— State *v.* Hackett, 47 Minn. 425, 50 N. W. 472, 28 Am. St. Rep. 380.

Missouri.— State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429.

Nebraska.— Rema *v.* State, 52 Nebr. 375, 72 N. W. 474.

New Mexico.— Territory *v.* Garcia, (1904) 75 Pac. 34.

South Dakota.— State *v.* Halpin, 16 S. D. 170, 91 N. W. 605.

See 32 Cent. Dig. tit. "Larceny," § 63.

66. State *v.* Griffin, 79 Iowa 568, 44 N. W. 813; Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30; Halkem *v.* Com., 2 Va. Cas. 4.

67. In an indictment for burglary with intent to commit larceny see Burglary, 6 Cyc. 219.

Variance see *infra*, XIII, F.

68. See the cases cited *infra*, XIII, C, 1, a, (II), (III), b, c, d, 2.

69. McCowan *v.* State, 58 Ark. 17, 22 S. W. 955 (two ladies' walking jackets); Melvin *v.* State, 120 Ga. 490, 48 S. E. 198 (one shovel); State *v.* Patrick, 79 N. C. 655, 28 Am. Rep. 340 (one pound of meat); State *v.* Morey, 2 Wis. 494, 60 Am. Dec. 439 (one hundred pounds of meat); Reg. *v.* Bonner, 7 Cox C. C. 13 (a parcel); State *v.* McLeod, 50 N. C. 318 ("a certain writ of fieri facias belonging to the superior court" and "a certain record of the superior court"). On the other hand "an information taken in the police court" has been held sufficiently definite, at least after verdict. Reg. *v.* Mason, 22 U. C. C. P. 246.

70. Potter *v.* State, 39 Tex. 388.

71. Castello *v.* State, 36 Tex. 324.

72. See cases cited *infra*, this note.

Applications of rule.— Thus "one trunk," although it might possibly refer to a part of the body, is a sufficient description of stolen property. Churchwell *v.* State, 117 Ala. 124, 23 So. 72. So is a pair of shoes, which might mean shoes for a horse (Palmer *v.* State, 136 Ind. 393, 36 N. E. 130), one hide, which does not state what kind (State *v.* Dowell, 3 Gill & J. (Md.) 310), or a "bull tongue," which means a peculiarly shaped plowshare (State *v.* Clark, 30 N. C. 226).

73. See cases cited *infra*, this note.

Applications of rule.— Thus it is not sufficient to say that defendant stole "five fish" without stating the conditions which render them the subject of larceny (State *v.* Krider, 78 N. C. 481), or three eggs without stating the species of eggs (Reg. *v.* Cox, 1 C. & K. 487, 47 E. C. L. 494), or an animal *feræ naturæ* without stating that it was either dead, tame, or confined (Reg. *v.* Rough, 2 East P. C. 607).

74. Skelton *v.* State, 149 Ind. 641, 49 N. E. 901 (turkey); State *v.* Turner, 66 N. C. 618 (turkey); State *v.* Taylor, 27 N. J. L. 117, 72 Am. Dec. 347 (oysters).

75. State *v.* Shutts, 69 N. J. L. 206, 54 Atl. 235.

76. Mountjoy *v.* State, 78 Ind. 172; Jones *v.* State, 51 Miss. 718, 24 Am. Rep. 658.

Applications of rule.— It has been so held of a horse (Damron *v.* State, (Tex. Cr. App. 1894) 27 S. W. 7), cattle (Hendricks *v.* State, (Tex. Cr. App. 1900) 56 S. W. 55), cords of wood (State *v.* Parker, 34 Ark. 158, 36 Am. Rep. 5), ore or specimens of ore (People *v.* Freeman, 1 Ida. 322; State *v.* Berryman, 8 Nev. 262), and "one bolt of domestic, made of cotton" (State *v.* Odum, 11 Tex. 12).

enough to use the statutory description.[77] Where a statute excepts from among the subjects of larceny a hog over a year old running at large unmarked, it is not necessary in an indictment for larceny of a hog to negative the exception.[78] In some states the stealing of vegetable products cultivated for food or the market is made larceny by statute. In framing an indictment under such a statute it is necessary to allege that the fruit or product taken was cultivated for food or market.[79] It is not necessary to make the allegation where the product stolen is specifically named in the statute.[80] And where a statute punishes the stealing of an outstanding crop, it is necessary to show that the thief severed it from the soil.[81]

b. Name of Article[82] — (i) *Class Name.* It is sufficient description of chattels to enumerate giving the class name.[83]

(ii) *Raw Material or Product.*[84] When raw material has been changed to some extent by labor, it may nevertheless still be called by the name of the material provided it has not been wrought into a new substance with a specific name to designate it.[85] When, however, the product has a specific distinguishing name, that name must be used to describe it.[86] Substances mechanically mixed should not be described "as a certain mixture consisting of, etc.," but by the names applicable to them before such mixture; otherwise with regard to substances chemically mixed, since there is a change of nature.[87]

c. Number or Quantity. A statement of the number or quantity of the articles

77. State *v.* Brin, 30 Minn. 522, 16 N. W. 406 (railroad ticket); McGee *v.* State, 43 Tex. 662 (estray).

78. Matthews *v.* State, 24 Ark. 484.

79. State *v.* Thompson, 93 N. C. 537; State *v.* Liles, 78 N. C. 496.

80. State *v.* Ballard, 97 N. C. 443, 1 S. E. 685.

81. Schamberger *v.* State, 68 Ala. 543; Holly *v.* State, 54 Ala. 238; State *v.* Bragg, 86 N. C. 687.

What allegation sufficient.— "Attached to land" is equivalent to allegation that the ears were plucked from the standing plant. Wiswell *v.* State, 21 Ohio St. 658.

82. **Variance** see *infra*, XIII, F.

83. *Alabama.*— Pfister *v.* State, 84 Ala. 432, 4 So. 395.

District of Columbia.— Nordlinger *v.* U. S., 24 App. Cas. 406, 70 L. R. A. 227.

Louisiana.— State *v.* Curtis, 44 La. Ann. 320, 10 So. 784.

Nebraska.— Sharp *v.* State, 61 Nebr. 187, 85 N. W 38.

Texas.— Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670; Johnson *v.* State, 42 Tex. Cr. 103, 58 S. W. 69; Grissom *v.* State, 40 Tex. Cr. 146, 49 S. W. 93.

West Virginia.— Frederick *v.* State, 3 W. Va. 695.

Application of rule.— The following descriptions have been held sufficient: One watch (Williams *v.* State, 25 Ind. 150), one watch and chain (Powell *v.* State, 88 Ga. 32, 13 S. E. 829), "one gold-filled case watch and chain and one diamond ring" (People *v.* Burns, 121 Cal. 529, 53 Pac. 1096), one double case silver watch (Patterson *v.* State, 122 Ga. 587, 50 S. E. 489), one gold watch (Pfister *v.* State, 84 Ala. 432, 4 So. 395), one trunk (Churchwell *v.* State, 117 Ala. 124, 23 So. 72), an article of clothing, without giving the color (State *v.* Martin, 82 N. C. 672), one book (Turner *v.* State, 102 Ind. 425, 1 N. E. 869; State *v.* Logan, 1 Mo. 532), a mileage book (State *v.* Spencer, 2 Pennew. (Del.) 225, 45 Atl. 399), a piano (Nordlinger *v.* U. S., 24 App. Cas. (D. C.) 406, 70 L. R. A. 227), one hide (State *v.* Dowell, 3 Gill & J. (Md.) 310), two ears of corn (Harris *v.* State, 100 Ala. 129, 14 So. 538), one note (Young *v.* People, 193 Ill. 236, 61 N. E. 1104), fertilizer (State *v.* Elia, 108 La. 553, 32 So. 476), two bales of cotton (Peters *v.* State, 100 Ala. 10, 14 So. 896), a pair of shoes (Palmer *v.* State, 136 Ind. 393, 36 N. E. 130; Lamkin *v.* State, 42 Tex. 415), barilla (Com. *v.* James, 1 Pick. (Mass.) 375).

84. **Variance** see *infra*, XIII, F.

85. See cases cited *infra*, this note.

Illustrations.— Thus a bale of cotton may be described as cotton (Peters *v.* State, 100 Ala. 10, 14 So. 896), a cord of wood as wood (State *v.* Labauve, 46 La. Ann. 548, 15 So. 172), or lumps of tin or ingots as twenty-five pounds weight of tin (Reg. *v.* Mansfield, C. & M. 140, 5 Jur. 661, 41 E. C. L. 81); so "corn in the ear" may be described as three bushels of corn (State *v.* Nipper, 95 N. C. 653), or as Indian corn or maize (Com. *v.* Pine, 2 Pa. L. J. Rep. 154, 3 Pa. L. J. 411).

86. See cases cited *infra*, this note.

Illustrations.— Thus books of printed sheets after they are bound cannot be described as printed sheets (Com. *v.* Merrifield, 4 Mete. (Mass.) 468), or a coat as cloth (Com. *v.* Clair, 7 Allen (Mass.) 525), or a piece of cloth as so many pounds of wool (Reg. *v.* Mansfield, C. & M. 140, 5 Jur. 661, 41 E. C. L. 81). A set of handkerchiefs not yet separated may, however, be described as so many handkerchiefs. Rex *v.* Nibbs, 1 Moody C. C. 25.

87. Reg. *v.* Bond, 3 C. & K. 337, 4 Cox C. C. 231, 1 Den. C. C. 517, 14 Jur. 390, 19

taken is usually a necessary part of the description. Thus "a lot of cord wood" is not sufficiently definite.[88] Nor is "some bottled beer."[89] It is insufficient to allege that defendant stole "cattle."[90] But a "parcel of oats" was held good.[91]

d. Description Unknown. Where an offense is substantially set out in the indictment a matter of description may be omitted where a good excuse for such omission is given, as that a fuller description is unknown.[92] But if the description was not unknown as alleged it is a fatal variance.[93]

2. Particular Kinds of Goods — a. Written Instruments — (i) *General Principles.* A written instrument must be sufficiently described to enable the jury to identify the instrument, and the accused to understand the accusation; no greater particularity is required.[94] A description by the ordinary name by which it is designated, the amount secured by it, and the ownership is enough, as in case of a bank-check,[95] a pay-check,[96] a pension check,[97] or a county warrant.[98] A certain instrument in writing containing evidence of an existing contract for the conveyance of real estate, to wit, a lot in A, of the value, etc., was held sufficient on motion to arrest.[99] A post-office order may be described as a warrant or order for the payment of money.[1] And coupons of state bonds may be described without describing the bonds from which they were cut.[2] The description must be positive, not inferential; a description of "four pieces of paper commonly called 'United States five-twenty bonds'" does not sufficiently allege the crime of stealing government bonds.[3] Immaterial errors in the description are not fatal.[4] An indictment for stealing valuable security must particularize the kind of security stolen,[5] and if a check it need not state the drawees to be bankers.[6] But the charge must be laid within the words of the statute, as a "check of or on any bank."[7] It is not ordinarily necessary to include any averment as to the validity of the instrument, as that there is money due upon

L. J. M. C. 138, 4 New Sess. Cas. 143, T. & M. 242.

88. Walthour *v.* State, 114 Ga. 75, 39 S. E. 872.

89. State *v.* Hoyer, 40 La. Ann. 744, 4 So. 899; State *v.* Moore, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96.

90. Mathews *v.* State, 39 Tex. Cr. 553, 47 S. W. 647, 48 S. W. 189.

91. State *v.* Brown, 12 N. C. 137, 17 Am. Dec. 562.

92. *Alabama.*— Leonard *v.* State, 115 Ala. 80, 22 So. 564.

California.— People *v.* Bogart, 36 Cal. 245.

Delaware.— State *v.* Patton, 1 Marv. 552, 41 Atl. 193.

Indiana.— State *v.* Hoke, 84 Ind. 137.

Iowa.— State *v.* Williams, 118 Iowa 494, 92 N. W. 652.

Maine.— State *v.* Dawes, 75 Me. 51.

Massachusetts.— Com. *v.* Butts, 124 Mass. 449.

Minnesota.— State *v.* Brin, 30 Minn. 522, 16 N. W. 406.

Missouri.— State *v.* Burks, 159 Mo. 568, 60 S. W. 1100.

New York.— People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178; Haskins *v.* People, 16 N. Y. 344.

Oklahoma.— Woodring *v.* Territory, 14 Okla. 250, 78 Pac. 85.

Texas.— Berry *v.* State, 46 Tex. Cr. 420, 80 S. W. 630.

93. James *v.* State, 115 Ala. 83, 22 So. 565.

94. State *v.* Hall, 85 Mo. 669; State *v.* Kroeger, 47 Mo. 530.

95. State *v.* Pierson, 59 Iowa 271, 13 N. W. 291; People *v.* Lovejoy, 37 N. Y. App. Div. 52, 55 N. Y. Suppl. 543; Whalen *v.* Com., 90 Va. 544, 19 S. E. 182.

96. Gaines *v.* State, (Tex. Cr. App. 1903) 77 S. W. 10.

97. State *v.* Bishop, 98 N. C. 773, 4 S. E. 357.

98. State *v.* Morgan, 109 Tenn. 157, 69 S. W. 970.

99. Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670.

1. Reg. *v.* Gilchrist, C. & M. 224, 2 Moody C. C. 233, 41 E. C. L. 126.

2. State *v.* Wade, 7 Baxt. (Tenn.) 22.

3. Kearney *v.* State, 48 Md. 16.

4. Thus, it has been held that although the information alleges that the check stolen was drawn "in favor of one Pennington," and the evidence shows that it was drawn in favor of "A. G. Pennington or bearer," the variance is immaterial. People *v.* Arras, 89 Cal. 223, 26 Pac. 766. And it has also been held where a bill of exchange was described, and the name of two indorsers given, the fact that it bore also the name of a third indorser was immaterial. Rex *v.* Austin, 2 East P. C. 602.

5. Reg. *v.* Lowrie, L. R. 1 C. C. 61, 10 Cox C. C. 388, 36 L. J. M. C. 24, 15 L. T. Rep. N. S. 632, 15 Wkly. Rep 360.

6. Reg. *v.* Heath, 2 Moody C. C. 33.

7. Com. *v.* Shissler, 7 Pa. Dist. 341.

it,[8] or that it is valid and binding,[9] or that the maker is bound to pay it,[10] or in the case of bank-notes that the bank was legally incorporated[11] or was solvent,[12] nor in the case of a deed need it be alleged to be of value.[13] But if the instrument is so described as to be obviously invalid, the indictment is bad; as an indictment describing bills of credit of a denomination which could not be legally issued.[14] And it has been held that an indictment for stealing railroad tickets should allege that they had been stamped, dated, and signed, as otherwise they would not be in force.[15]

(II) *Promissory Notes.* It is sufficient to describe a promissory note as one promissory note for the payment of money,[16] or simply as a promissory note,[17] or even as a note.[18] Where the article stolen was described as a bank post bill the court could not take notice that it was a promissory note unless the bill were set out in the indictment.[19] Promissory notes being the subject of larceny only by statute, an indictment for stealing them must conclude *contra formam statuti.*[20]

b. Money — (I) *In General.* Money, whether in the form of coin, national paper currency, or bank-notes, need be described no more exactly than any other kind of chattel; that is, the description must be sufficiently definite reasonably to identify the subject of the larceny charged, and to inform defendant of the charge against him.[21] And where the jury does not know the specific description of money it may so aver.[22] Money is improperly described as goods and chattels, or as so many dollars, the goods and chattels of a person named.[23] But if the money is otherwise sufficiently described, an allegation that it is of the goods and chattels of the owner may be rejected as surplusage.[24] Since paper money is not subject of larceny at common law, but is universally made so by statutes, the statutes have also commonly provided for the description of money in indictments. In many jurisdictions it is made sufficient by statute to describe money as so much money, without specifying more particularly the kind of money.[25] A description

8. Phelps *v.* People, 6 Hun (N. Y.) 401. *Contra,* of bank-bills. State *v.* Thomas, 2 McCord (S. C.) 527.

9. State *v.* Hickman, 8 N. J. L. 299.

10. State *v.* Wade, 7 Baxt. (Tenn.) 22.

11. People *v.* Jackson, 8 Barb. (N. Y.) 637; McLaughlin *v.* Com., 4 Rawle (Pa.) 464.

12. Munson *v.* State, 4 Greene (Iowa) 483.

13. State *v.* Hall, 85 Mo. 669.

14. Culp *v.* State, 1 Port. (Ala.) 33, 26 Am. Dec. 357.

15. State *v.* Holmes, 9 Wash. 528, 37 Pac. 283; McCarty *v.* State, 1 Wash. 377, 25 Pac. 299, 22 Am. St. Rep. 152.

16. Rex *v.* Milnes, 2 East P. C. 602. But see *contra,* Stewart *v.* Com., 4 Serg. & R. (Pa.) 194.

17. Com. *v.* Gallagher, 126 Mass. 54; Com. *v.* Brettun, 100 Mass. 206, 97 Am. Dec. 95.

18. Du Bois *v.* State, 50 Ala. 139.

19. Rex *v.* Chard, R. & R. 362.

20. People *v.* Cook, 2 Park. Cr. (N. Y.) 12.

21. An indictment for grand larceny, charging the fraudulent taking of one bill of the lawful currency of the United States of America, of the denomination of fifty dollars, the personal property of a certain person, sufficiently describes the property. Knight *v.* State, (Ala. 1905) 39 So. 592.

22. Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253; Cook *v.* State, 4 Tex. App. 265.

23. *Delaware.*— State *v.* Parker, Houst. Cr. Cas. 9.

Indiana.— Whitson *v.* State, 160 Ind. 510, 67 N. E. 265. See Garfield *v.* State, 74 Ind. 60.

Maryland.— State *v.* King, 95 Md. 125, 51 Atl. 1102.

Michigan.— Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314.

England.— Reg. *v.* Radley, 2 C. & K. 974, 3 Cox C. C. 460, 1 Den. C. C. 450, 13 Jur. 544, 18 L. J. M. C. 184, 3 New Sess. Cas. 651, T. & M. 144, 61 E. C. L. 974.

24. Reg. *v.* Radley, 2 C. & K. 974, 3 Cox C. C. 460, 1 Den. C. C. 450, 13 Jur. 544, 18 L. J. M. C. 184, 3 New Sess. Cas. 651, T. & M. 144, 61 E. C. L. 974; Reg *v.* Saunders, 10 U. C. Q. B. 544.

25. *Arkansas.*— State *v.* Boyce, 65 Ark. 82, 44 S. W. 1043.

Indiana.— Rains *v.* State, 137 Ind. 83, 36 N. E. 532; Randall *v.* State, 132 Ind. 539, 32 N. E. 305; Hammond *v.* State, 121 Ind. 512, 23 N. E. 515.

Iowa.— State *v.* Alverson, 105 Iowa 152, 74 N. W. 770.

Kentucky.— Com. *v.* Mann, 14 S. W. 685, 12 Ky. L. Rep. 477.

Louisiana.— State *v.* Green, 27 La. Ann. 598; State *v.* Walker, 22 La. Ann. 425.

Michigan.— Brown *v.* People, 29 Mich. 232.

New York.— People *v.* Reavey, 38 Hun 418.

Texas.— Bell *v.* State, (Cr. App. 1901) 62 S. W. 567; Jasper *v.* State, (Cr. App. 1901)

of money as so many dollars, without adding that it is money, is sufficient.[26] Bank-notes are properly described in an indictment for larceny as money, although at the time they were stolen they were not in circulation, but were in the hands of the bankers themselves.[27] In some jurisdictions it has been held necessary to describe money by the denomination of the separate pieces,[28] and where the denomination is unknown an allegation to that effect is necessary to make the description sufficient.[29] And in some jurisdictions the courts go so far as to require an allegation of inability to obtain knowledge.[30] In other jurisdictions it is held that it is not necessary to state the kinds and denominations of the separate pieces of money.[31]

(II) *Currency.* The term "current money" includes all legal tender money,[32] national bank-notes,[33] treasury notes, and United States gold or silver certificates,[34] and coin,[35] but does not include checks for money.[36] Under an indictment for

61 S. W. 392; Wofford *v.* State, 29 Tex. App. 536, 16 S. W. 535.

Washington.— State *v.* Johnson, 19 Wash. 410, 53 Pac. 667.

See 32 Cent. Dig. tit. "Larceny," § 72.

26. Whitson *v.* State, 160 Ind. 510, 67 N. E. 265; Dukes *v.* State, 22 Tex. App. 192, 2 S. W. 590. *Contra,* People *v.* Lammerts, 164 N. Y. 137, 58 N. E. 22, 15 N. Y. Cr. 158.

Proof of taking three ten-dollar bills will support the charge of taking thirty dollars in money. State *v.* Freeman, 89 N. C. 469.

27. Reg. *v.* West, 7 Cox C. C. 183, Dears. & B. 109, 2 Jur. N. S. 1123, 26 L. J. M. C. 6, 5 Wkly. Rep. 50.

28. *Arkansas.*— State *v.* Oakley, 51 Ark. 112, 10 S. W. 17; Barton *v.* State, 29 Ark. 68. *Compare* Marshall *v.* State, 71 Ark. 415, 75 S. W. 584, holding it unnecessary to go further than to describe it as gold, silver, or paper.

California.— People *v.* Ball, 14 Cal. 101, 73 Am. Dec. 631.

Minnesota.— State *v.* Hinckley, 4 Minn. 345.

Mississippi.— Merrill *v.* State, 45 Miss. 651.

Montana.— Territory *v.* Shipley, 4 Mont. 468, 2 Pac. 313.

New Hampshire.— Lord *v.* State, 20 N. H. 404, 51 Am. Dec. 231.

New York.— Low *v.* People, 2 Park. Cr. 37.

Tennessee.— State *v.* Longbottoms, 11 Humphr. 39.

United States.— U. S. *v.* Barry, 24 Fed. Cas. No. 14,530, 4 Cranch C. C. 606.

England.— Rex *v.* Fry, R. & R. 482.

See 32 Cent. Dig. tit. "Larceny," § 72.

Description as "sundry bank-bills" defective. Hamblett *v.* State, 18 N. H. 384.

29. *Alabama.*— Verberg *v.* State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17; Grant *v.* State, 55 Ala. 201.

Dakota.— Territory *v.* Anderson, 6 Dak. 300, 50 N. W. 124.

Florida.— Lang *v.* State, 42 Fla. 595, 28 So. 856; Porter *v.* State, 26 Fla. 56, 7 So. 145.

Iowa.— State *v.* Hoppe, 39 Iowa 468.

Kentucky.— Travis *v.* Com., 96 Ky. 77, 27 S. W. 863, 16 Ky. L. Rep. 253.

Massachusetts.— Com. *v.* Sawtelle, 11 Cush. 142.

Michigan.— Merwin *v.* People, 26 Mich. 298, 12 Am. Rep. 314.

Minnesota.— State *v.* Taunt, 16 Minn. 109.

New York.— People *v.* Spencer, 27 Misc. 491, 58 N. Y. Suppl. 1127.

See 32 Cent. Dig. tit. "Larceny," § 72 *et seq.*

30. State *v.* Tilney, 38 Kan. 714, 17 Pac. 606.

31. *Indiana.*— Riggs *v.* State, 104 Ind. 261, 3 N. E. 886.

Kentucky.— Com. *v.* Mann, 14 S. W. 685, 12 Ky. L. Rep. 477.

Massachusetts.— Com. *v.* Stebbins, 8 Gray 492.

Ohio.— McDivit *v.* State, 20 Ohio St. 231.

Texas.— Bravo *v.* State, 20 Tex. App. 177. See Ridgeway *v.* State, 41 Tex. 231.

Washington.— State *v.* Palmer, 20 Wash. 207, 54 Pac. 1121; State *v.* Burns, 19 Wash. 52, 52 Pac. 316; State *v.* Blanchard, 11 Wash. 116, 39 Pac. 377.

See 32 Cent. Dig. tit. "Larceny," § 72.

32. Summers *v.* State, 45 Tex. Cr. 423, 76 S. W. 762.

33. State *v.* Finnegen, 127 Iowa 286, 103 N. W. 155; State *v.* Gasting, 23 La. Ann. 609; State *v.* Beebe, 17 Minn. 241. But a charge of lawful money of the United States was held not supported by the evidence of the larceny of bank-notes. Hamilton *v.* State, 60 Ind. 193, 28 Am. Rep. 653.

Circulation.— Bank-notes need not be in circulation to be described as money. Reg. *v.* West, 7 Cox C. C. 183, Dears. & B. 109, 2 Jur. N. S. 1123, 26 L. J. M. C. 6, 5 Wkly. Rep. 50.

34. Berry *v.* State, 46 Tex. Cr. 420, 80 S. W. 630; Dennis *v.* State, (Tex. Cr. App. 1903) 74 S. W. 559; Nubel *v.* State, (Tex. Cr. App. 1901) 65 S. W. 374.

35. Leonard *v.* State, 115 Ala. 80, 22 So. 564; Blount *v.* State, 76 Ga. 17; Menear *v.* State, 30 Tex. App. 475, 17 S. W. 1082. "Eighty-five cents, lawful current money of the United States" is sustained by proof of the theft of eighty-five cents in United States five-cent pieces. Black *v.* State, 46 Tex. Cr. 107, 79 S. W. 311.

36. Lancaster *v.* State, 9 Tex. App. 393.

larceny of "money," however, the stealing of a check or draft for the payment of money may be proved.[37]

(III) *Coin.* Coin is properly described as copper or silver coin of the United States of a certain value.[38] A charge of the theft of seven dollars in silver is supported by evidence of a theft of five silver dollars and two dollars in minor coin.[39] In Texas an indictment for stealing coin was held insufficient for not naming the government which issued the coin.[40] The coin need not be alleged to be current.[41] A coin may be described simply as money, under common statutes.[42]

(IV) *United States Paper Currency.* The allegation that the thing taken was lawful money has been held sufficient.[43] And so of the allegation that it was lawful money of the United States.[44] "Gold and silver coin and paper currency" is a good statutory description.[45] Even if the money is not required to be described as lawful money of the United States, such an allegation if made is descriptive, and must be proved; and it is a variance to prove the taking of Canadian money.[46] Some statutes permit promissory notes to be described simply as money. The constitutionality of such a provision has been doubted.[47] Current paper money of the United States is enough.[48] And so of "greenback currency of the United States,"[49] national bank currency and treasury notes;[50] current money of the United States,[51] national currency,[52] national bank currency,[53] lawful currency of the United States,[54] or United States currency.[55] But "one hundred and fifty dollars in United States currency" has been held defective.[56] "United States treasury note" is sufficient, without stating the kind.[57] Greenbacks are included

37. Hunt *v.* State, 72 Ark. 241, 79 S. W. 769, 105 Am. St. Rep. 34, 65 L. R. A. 71; People *v.* Lammerts, 164 N. Y. 137, 58 N. E. 22, 15 N. Y. Cr. 158.

38. *Alabama.*— Chisolm *v.* State, 45 Ala. 66.

Florida.— Porter *v.* State, 26 Fla. 56, 7 So. 145.

Georgia.— Berry *v.* State, 10 Ga. 511.

Indiana.— McKane *v.* State, 11 Ind. 195; Daily *v.* State, 10 Ind. 536.

Iowa.— Munson *v.* State, 4 Greene 483.

Massachusetts.— Com. *v.* Gallagher, 16 Gray 240.

New York.— Miller *v.* People, 21 Hun 443.

Texas.— Bryant *v.* State, 16 Tex. App. 144.

West Virginia.— State *v.* Jackson, 26 W. Va. 250.

United States.— U. S. *v.* Barry, 24 Fed. Cas. No. 14,530, 4 Cranch C. C. 606; U. S. *v.* Rigsby, 27 Fed. Cas. No. 16,163, 2 Cranch C. C. 364.

See 32 Cent. Dig. tit. "Larceny," § 73.

39. Edwards *v.* State, (Tex. Cr. App. 1902) 68 S. W. 795.

40. Boyle *v.* State, 37 Tex. 359; Williams *v.* State, 5 Tex. App. 116.

41. Com. *v.* Gallagher, 16 Gray (Mass.) 240; Crofton *v.* State, 79 Ga. 584, 4 S. E. 333.

42. Mcnear *v.* State, 30 Tex. App. 475, 17 S. W. 1082.

43. Rains *v.* State, 137 Ind. 83, 36 N. E. 532; People *v.* Reavey, 38 Hun (N. Y.) 418; State *v.* Palmer, 20 Wash. 207, 54 Pac. 1121; State *v.* Blanchard, 11 Wash. 116, 39 Pac. 377.

"Money" alone is enough in California (People *v.* Winkler, 9 Cal. 234), but not in Texas (Lavarre *v.* State, 1 Tex. App. 685).

44. Carden *v.* State, 89 Ala. 130, 7 So. 801; State *v.* Fisher, 106 Iowa 658, 77 N. W. 456; State *v.* Moore, 66 Mo. 372 [*overruling* State *v.* Kroeger, 47 Mo. 530].

45. State *v.* Boyce, 65 Ark. 82, 44 S. W. 1043.

46. State *v.* Phillips, 27 Wash. 364, 67 Pac. 608.

47. Brown *v.* People, 29 Mich. 232.

48. Thomas *v.* State, 117 Ala. 84, 23 So. 659; Cody *v.* State, 100 Ga. 105, 28 S. E. 106; State *v.* Ziord, 30 La. Ann. 867; State *v.* Evans, 15 Rich. (S. C.) 31.

49. Levy *v.* State, 79 Ala. 259.

50. State *v.* Henry, 24 Kan. 457. But a description of the stolen articles, as "one five and one two-dollar greenback bill, United States currency National Bank bills, and money," was held to be bad, and the indictment set aside, because the description was repugnant and uncertain. Lewis *v.* State, 3 Heisk. (Tenn.) 333.

51. *Iowa.*— State *v.* Williams, 118 Iowa 494, 92 N. W. 652; State *v.* Connor, 118 Iowa 490, 92 N. W. 654.

Kentucky.— Jones *v.* Com., 13 Bush 356.

Louisiana.— State *v.* Monroe, 30 La. Ann. 1241.

Maryland.— State *v.* King, 95 Md. 125, 51 Atl. 1102.

Virginia.— Dull *v.* Com., 25 Gratt. 965.

See 32 Cent. Dig. tit. "Larceny," § 74.

52. Du Bois *v.* State, 50 Ala. 139; Territory *v.* Anderson, 6 Dak. 300, 50 N. W. 124.

53. State *v.* Henry, 24 Kan. 457.

54. Blount *v.* State, 76 Ga. 17.

55. Bailey *v.* Com., 58 S. W. 425, 22 Ky. L. Rep. 512. *Contra*, as too vague. Leftwich *v.* Com., 20 Gratt. (Va.) 716.

56. Merrill *v.* State, 45 Miss. 651.

57. Randall *v.* State, 53 N. J. L. 485, 22 Atl. 45; Hummel *v.* State, 17 Ohio St. 628.

as treasury notes,[58] but "greenbacks" has been held a sufficient description of itself.[59] "Gold certificate" is good,[60] and "promissory notes of the United States" has been held sufficient.[61] On the other hand it has been held insufficient to describe money as "paper money of the United States,"[62] or as so many "bills."[63] But "bills" is a good description in the indictment and a new trial should be granted where the charge was for stealing bills and there was no proof that they were bank-bills.[64] Larceny of bills will not sustain indictment for the larceny of lawful money of the United States.[65] Where the indictment charges the theft of treasury notes, proof must be made that they were issued by the authority of the United States.[66] The decisions in Texas have not been uniform. The description "one ten-dollar bill of lawful currency of the United States" is good.[67] So is the description, "one five-dollar bill in money,"[68] "in United States currency,"[69] "in greenback currency of the United States,"[70] or "in United States paper currency";[71] but "twenty ten (10) dollar paper currency money of the United States of America of the denomination and value of twenty dollars each" was held unintelligible.[72] Under such a description, however, the courts have not always permitted proof of stealing certain kinds of paper currency. Thus it has been held that "lawful currency" or "current money" includes treasury notes, but not national bank-notes or coin certificates.[73] United States paper currency, however, was held to include national bank-notes and coin certificates.[74]

(v) *Bank-Notes.* The description of bank-notes in an indictment need be no more exact than that of other chattels or written instruments; a reasonable identification is all that is necessary.[75] A bank-bill may be described as a promissory note.[76] But a silver certificate cannot be so described.[77] It is enough to

58. Duvall *v.* State, 63 Ala. 12; Hickey *v.* State, 23 Ind. 21.

59. Turner *v.* State, 124 Ala. 59, 27 So. 272; Levy *v.* State, 79 Ala. 259; State *v.* Graham, 65 Iowa 617, 22 N. W. 897; State *v.* Hockenberry, 30 Iowa 504. But it has been held otherwise on the ground that another word is used in the statute. State *v.* Cason, 20 La. Ann. 48, the court saying "no such effects or notes as 'greenbacks' are known in law."

60. People *v.* Dunn, 53 Hun (N. Y.) 381, 6 N. Y. Suppl. 805, 7 N. Y. Cr. 173.

61. Hummel *v.* State, 17 Ohio St. 628.

62. State *v.* Hoke, 84 Ind. 137; Caskey *v.* State, (Tex. Cr. App. 1899) 50 S. W. 703.

63. State *v.* Oakley, 51 Ark. 112, 10 S. W. 17; Jackson *v.* State, 34 Tex. Cr. 90, 29 S. W. 265.

64. Johnson *v.* State, 119 Ga. 257, 45 S. E. 960.

65. Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081; State *v.* Phillips, 27 Wash. 364, 67 Pac. 608.

66. Sallie *v.* State, 39 Ala. 691.

67. Berry *v.* State, 46 Tex. Cr. 420, 80 S. W. 630; White *v.* State, (Tex. Cr. App. 1900) 57 S. W. 100; Spencer *v.* State, (Tex. Cr. App. 1899) 55 S. W. 58; Colter *v.* State, 37 Tex. Cr. 284, 39 S. W. 576; Thompson *v.* State, 35 Tex. Cr. 511, 34 S. W. 629; Goldstein *v.* State, (Tex. Cr. App. 1893) 23 S. W. 686; Lavarre *v.* State, 1 Tex. App. 685.

68. Green *v.* State, 28 Tex. App. 493, 13 S. W. 784.

69. Martinez *v.* State, 41 Tex. 164.

70. Morris *v.* State, (Tex. Cr. App. 1893) 20 S. W. 979.

71. Kimbrough *v.* State, 28 Tex. App. 367, 13 S. W. 218.

72. Jones *v.* State, 39 Tex. Cr. 387, 46 S. W. 250.

73. Block *v.* State, 44 Tex. 621; Summers *v.* State, 45 Tex. Cr. 423, 76 S. W. 762; Perry *v.* State, 42 Tex. Cr. 540, 61 S. W. 400; Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081; Lewis *v.* State, 28 Tex. App. 140, 12 S. W. 736.

74. Dennis *v.* State, (Tex. Cr. App. 1903) 74 S. W. 559; Rucker *v.* State, (Tex. Cr. App. 1894) 26 S. W. 65; Kimbrough *v.* State, 28 Tex. App. 367, 13 S. W. 218; Cook *v.* State, 4 Tex. App. 265. Finally in Berry *v.* State, 46 Tex. Cr. 420, 80 S. W. 630, the court held that all these kinds of paper currency were included in the general description of "lawful currency."

75. Wilson *v.* State, 66 Ga. 591; People *v.* Jackson, 8 Barb. (N. Y.) 637; Bravo *v.* State, 20 Tex. App. 177.

76. *Iowa.*— State *v.* Bond, 8 Iowa 540.

Massachusetts.— Com. *v.* Jenks, 138 Mass. 484; Com. *v.* Collins, 138 Mass. 483; Com. *v.* Butts, 124 Mass. 449.

Mississippi.— Damewood *v.* State, 1 How. 262.

North Carolina.— State *v.* Fulford, 61 N. C. 563.

Pennsylvania.— Com. *v.* Boyer, 1 Binn. 201; Com. *v.* Byerly, 2 Brewst. 568; Com. *v.* Henry, 2 Brewst. 566.

South Carolina.— State *v.* Wilson, 3 Brev. 196.

Vermont.— State *v.* Emery, Brayt. 131.

See 32 Cent. Dig. tit. "Larceny," § 75.

77. Stewart *v.* State, 62 Md. 412.

describe notes issued by banks and circulating as money as bank-bills,[78] or bank-notes,[79] which are equivalent terms.[80] It is not necessary to show that they were the notes of any particular bank,[81] although it was formerly customary to give the name of the bank or allege that it was unknown.[82] And it has sometimes been held necessary to state the name of the bank,[83] and the state of charter.[84] And the indictment should allege by what authority the note was issued.[85] The date of the note need not be set out.[86] Nor need the indictment state the tenor of the note.[87] It has been held, however, that "Kentucky bank note" was too indefinite.[88]

c. **Animals**[89]— (1) *In General.* An animal is usually sufficiently described by giving its ordinary name, without further particulars. The color of an animal need not be given,[90] but doing so does not vitiate the indictment.[91] The description of an animal by its common appellation usually means the live and not the dead animal,[92] even where the animal is of a kind ordinarily used for food,[93] unless the animal is equally well known by the name used, whether dead or alive.[94] The description of animals has in several states been simplified by statutes which make it sufficient to describe an animal by its generic name.[95]

78. *Iowa.*— Munson *v.* State, 4 Greene 483.
Michigan.— People *v.* Kent, 1 Dougl. 42.
New Hampshire.— State *v.* Mahanna, 48 N. H. 377.
New York.— Low *v.* People, 2 Park. Cr. 37.
Vermont.— State *v.* Emery, Brayt. 131.
See 32 Cent. Dig. tit. "Larceny," § 75.
Evidence of orders of a railroad company on its treasurer does not support an allegation of larceny of bank-bills. Grummond *v.* State, 10 Ohio 510.

79. *Georgia.*— Bell *v.* State, 41 Ga. 589.
Iowa.— State *v.* Graham, 65 Iowa 617, 22 N. W. 897; State *v.* Hockenberry, 30 Iowa 504.
Maryland.— State *v.* Cassel, 2 Harr. & G. 407.
Massachusetts.— Com. *v.* Richards, 1 Mass. 337.
Texas.— Simpson *v.* State, 10 Tex. App. 681.
Virginia.—Com. *v.* Moseley, 2 Va. Cas. 154.
West Virginia.— Fredrick *v.* State, 3 W. Va. 695.
See 32 Cent. Dig. tit. "Larceny," §§ 74, 75.
Compare Com. *v.* McDowell, 1 Browne (Pa.) 359, holding that where the statute did not mention bank-notes, but the stealing of bank-notes was punishable under the clause dealing with theft of promissory notes, the description "bank-note" was insufficient; the note must be described as a promissory note.
Payment of money.— It is not necessary to state that bank-notes are for the payment of money. U. S. *v.* McDaniel, 26 Fed. Cas. No. 15,666, 4 Cranch C. C. 721.

80. State *v.* Hays, 21 Ind. 176; Munson *v.* State, 4 Greene (Iowa) 483; Eastman *v.* Com., 4 Gray (Mass.) 416; Roth *v.* State, 10 Tex. App. 27.

81. Berry *v.* State, 10 Ga. 511; Foster *v.* State, 71 Md. 553, 18 Atl. 972; Com. *v.* Richards, 1 Mass. 337; Pyland *v.* State, 4 Sneed (Tenn.) 357. And see Baldwin *v.* State, 1 Sneed (Tenn.) 411.

82. *Connecticut.*— Salisbury *v.* State, 6 Conn. 101.
Indiana.— Crawford *v.* State, 2 Ind. 132.
Massachusetts.— Com. *v.* Grimes, 10 Gray 470, 71 Am. Dec. 666.
New York.— People *v.* Jackson, 8 Barb. 637.
North Carolina.— State *v.* Rout, 10 N. C. 618.
See 32 Cent. Dig. tit. "Larceny," § 75.

83. State *v.* Smart, 4 Rich. (S. C.) 356, 55 Am. Dec. 683.

84. State *v.* Brown, 53 N. C. 443; U. S. *v.* Porte, 27 Fed. Cas. No. 16,070, 1 Cranch C. C. 369.

85. State *v.* Brown, 53 N. C. 443.

86. Hummel *v.* State, 17 Ohio St. 628.

87. Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

88. Rhodus *v.* Com., 2 Duv. (Ky.) 159.

89. **Variance** see *infra*, XIII, F, 2.

90. Perry *v.* State, 37 Ark. 54; People *v.* Stanford, 64 Cal. 27, 28 Pac. 106; Mizell *v.* State, 38 Fla. 20, 20 So. 769.

91. Harvey *v.* State, 121 Ga. 590, 49 S. E. 674; Alderman *v.* State, 57 Ga. 367; State *v.* Charlot, 8 Rob. (La.) 529.

92. Grant *v.* State, 42 Tex. Cr. 273, 58 S. W. 1026; Rex *v.* Edwards, R. & R. 370.

93. Rex *v.* Halloway, 1 C. & P. 127, 12 E. C. L. 84.

94. Thus "shad" will be a good description, although the fish were dead (State *v.* Donovan, Houst. Cr. Cas. (Del.) 43); or "hog" may mean dead hog (Walker *v.* State, 3 Tex. App. 70. *Contra*, Com. *v.* Beaman, 8 Gray (Mass.) 497); or "one beef" may mean either the live or dead animal (State *v.* Baden, 42 La. Ann. 295, 7 So. 582; State *v.* Garrett, 34 Tex. 674; Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40; Moore *v.* State, 2 Tex. App. 350).

95. Under such a statute "horse" includes mare (People *v.* Pico, 62 Cal. 50; Davis *v.* State, 23 Tex. App. 210, 4 S. W. 590) and gelding (Wiley *v.* State, 3 Coldw. (Tenn.) 362); and cow includes any bovine (People *v.* Machado, (Cal. 1890) 63 Pac. 66), as heifer (People *v.* Soto, 49 Cal. 67).

(II) *Description of Particular Animals.* The generic word "horse" is sufficient to describe any animal of the species,[96] or a specific name may be given, as mare.[97] So horse includes gelding,[98] and mare includes filly.[99] Under special statutes concerning the stealing of horses, where certain species were separately enumerated by the names denoting age and sex, it is held in some cases that the specific name as given in the statute must be used.[1] This has been changed in Texas.[2] The generic name is a sufficient designation, as cattle,[3] beef cattle,[4] or neat cattle;[5] or a specific name may be given, as cow,[6] ox,[7] bull,[8] steer or beef steer,[9] heifer,[10] calf,[11] bull yearling,[12] or "two beeves, the same being cattle."[13] If a specific name is given, but one that in ordinary speech stands for several species, it will include such species. Thus cow includes heifer.[14] But a specific name will not cover any animal not included in the species. Thus steer does not include cow[15] or bull.[16] Other animals are also usually described sufficiently by the generic name. Thus "sheep" includes "rig" and "wether,"[17] or "lamb."[18] In England at one time it was held that in an indictment upon a statute which punished the larceny of several species of sheep, naming them, the specific name must be correctly given in the indictment.[19] But these English cases were finally overruled

In Georgia it was especially required that the age and sex should be alleged. Brown *v.* State, 86 Ga. 633, 13 S. E. 20.

96. *Arkansas.*— State *v.* Gooch, 60 Ark. 218, 29 S. W. 640.

Idaho.— State *v.* Collett, 9 Ida. 608, 75 Pac. 271.

Texas.— Smythe *v.* State, 17 Tex. App. 244.

Utah.— People *v.* Sensabaugh, 2 Utah 473.

England.— Reg. *v.* Aldridge, 4 Cox C. C. 143.

See 32 Cent. Dig. tit. "Larceny," § 68.

"One mule" is good. State *v.* King, 31 La. Ann. 179.

97. Teal *v.* State, 119 Ga. 102, 45 S. E. 964; State *v.* Rathbone, 8 Ida. 161, 67 Pac. 186; State *v.* Friend, 47 Minn. 449, 50 N. W. 692; State *v.* Shuck, 38 Wash. 270, 80 Pac. 444.

98. People *v.* Monteith, 73 Cal. 7, 14 Pac. 373; Baldwin *v.* People, 2 Ill. 304; State *v.* Donnegan, 34 Mo. 67.

99. Rex *v.* Welland, R. & R. 367.

1. See cases cited *infra*, this note.

Application of rule.— Thus "horse" was held to mean stallion (Taylor *v.* State, 44 Ga. 263; Lunsford *v.* State, 1 Tex. App. 448, 28 Am. Rep. 414; Keesee *v.* State, 1 Tex. App. 298), and would not cover a gelding (State *v.* Buckles, 26 Kan. 237; Turley *v.* State, 3 Humphr. (Tenn.) 323; Swindel *v.* State, 32 Tex. 102; Valesco *v.* State, 9 Tex. App. 76; Persons *v.* State, 3 Tex. App. 240) or a mare (Banks *v.* State, 28 Tex. 644); nor would "gelding" cover a horse, colt, or ridgeling (State *v.* McDonald, 10 Mont. 21, 24 Pac. 628, 24 Am. St. Rep. 25; Gibbs *v.* State, 34 Tex. 134; Johnson *v.* State, 16 Tex. App. 402; Brisco *v.* State, 4 Tex. App. 219, 30 Am. Rep. 162).

2. Davis *v.* State, 23 Tex. App. 210, 4 S. W. 590.

3. People *v.* Littlefield, 5 Cal. 355; Walton *v.* State, 41 Tex. Cr. 454, 55 S. W. 566; Mathews *v.* State, 41 Tex. Cr. 98, 51 S. W. 915; State *v.* Brookhouse, 10 Wash. 87, 38 Pac. 862.

4. Duval *v.* State, 8 Tex. App. 370.

5. State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138 (does not mean clean cattle); State *v.* Dewitt, 152 Mo. 76, 53 S. W. 429; Territory *v.* Christman, 9 N. M. 582, 58 Pac. 343.

6. Mizell *v.* State, 38 Fla. 20, 20 So. 769; Nightengale *v.* State, 94 Ga. 395, 21 S. E. 221; State *v.* Crow, 107 Mo. 341, 17 S. W. 745; Wilburn *v.* Territory, 10 N. M. 402, 62 Pac. 968.

7. Henry *v.* State, 45 Tex. 84; Parchman *v.* State, 44 Tex. 192; State *v.* Murphy, 39 Tex. 46; Hubotter *v.* State, 32 Tex. 479; Camplin *v.* State, 1 Tex. App. 108; State *v.* Barkuloo, 18 Wash. 141, 51 Pac. 350.

8. Peeples *v.* State, 46 Fla. 101, 35 So. 223.

9. State *v.* Mumford, 70 Kan. 858, 79 Pac. 669; Short *v.* State, 36 Tex. 644; Grant *v.* State, 2 Tex. App. 163; Robertson *v.* State, 1 Tex. App. 311.

10. Jones *v.* State, 92 Ga. 480, 17 S. E. 859.

11. People *v.* Warren, 130 Cal. 683, 63 Pac. 86; Oats *v.* U. S., 1 Indian Terr. 152, 38 S. W. 673.

12. Berryman *v.* State, 45 Tex. 1.

13. Hubotter *v.* State, 32 Tex. 479.

14. Washington *v.* State, 58 Ala. 355; Parker *v.* State, 39 Ala. 365; People *v.* Soto, 49 Cal. 67; Garvin *v.* State, 52 Miss. 207; State *v.* Crow, 107 Mo. 341, 17 S. W. 745. *Contra*, under a statute in England. Rex *v.* Cook, 2 East P. C. 616, 1 Leach C. C. 105.

15. Territory *v.* Marinez, (Ariz. 1896) 44 Pac. 1089.

16. State *v.* Royster, 65 N. C. 539.

17. Rex *v.* Stroud, 6 C. & P. 535, 25 E. C. L. 563.

18. State *v.* Tootle, 2 Harr. (Del.) 541.

19. Thus "sheep" meant wether (Rex *v.* Stroud, 6 C. & P. 535, 25 E. C. L. 563; Rex *v.* Birket, 4 C. & P. 216, 19 E. C. L. 482); and did not include ewe (Rex *v.* Birket, 4 C. & P. 216, 19 E. C. L. 482; Rex *v.* Puddifoot, 1 Moody C. C. 247. *Contra*, Reg. *v.* McCulley, 2 Lew. C. C. 272, 2 Moody C. C. 34); nor did ewe include ewe teg or lamb

and the generic name "sheep" was held sufficient under the statute to include a lamb.[20] "Hog" or "head of hogs" is enough to cover any variety of swine.[21] "Pig" is good without alleging the sex.[22] But "female hog" will not cover a boar.[23] It was held in an early case, under a statute punishing hog stealing, that the statutory word "hog" must be used, and an indictment for stealing a pig would not be good.[24] Hens may be described as chickens.[25]

D. Special Allegations — 1. Time.[26] The time of the offense must be stated in the indictment.[27] This must be done in such a way as to show that the offense was committed after the act was made criminal,[28] and that the statute of limitations has not run against the act alleged.[29] And the date alleged must not be impossible, as for instance after the finding of the indictment.[30] The time alleged in the indictment need not be proved, however; it is enough to prove the commission of the offense at any time before the finding of the indictment.[31] By statute the necessity for alleging a definite time is often dispensed with. Under such a statute it has been held that an indictment is good which leaves a blank for the time,[32] or alleges that the act "has been committed,"[33] or that the act was committed "on or about" a certain day,[34] or even alleges a future day.[35] When time is of the essence of an offense, as in the case of larceny from a dwelling in the night-time, it is essential to allege and prove the time.[36] The time of each part of the offense need not be separately averred.[37]

2. Place.[38] The place of every offense must be alleged in the indictment, in order to establish the venue; and the allegation must merely be sufficiently precise to make the venue of the act certain.[39] As is true of time, the exact place stated need not be proved; it is enough to prove any place within the jurisdiction of the court.[40] But if the place of the commission of an offense enters into and is material for the description of the offense, it must be exactly alleged and proved.[41] This is always true in the case of so-called "local" crimes. Thus in

(Reg. *v.* Jewett, 2 Cox C. C. 227; Rex *v.* Looms, 1 Moody C. C. 160).

20. Reg. *v.* Spicer, 1 C. & K. 697, 1 Den. C. C. 82, 47 E. C. L. 699.

21. Lavender *v.* State, 60 Ala. 60; State *v.* Stelly, 48 La. Ann. 1478, 21 So. 89; State *v.* Godet, 29 N. C. 210; State *v.* Mansfield, 33 Tex. 129; Guerrero *v.* State, 46 Tex. Cr. App. 445, 80 S. W. 1001; Moore *v.* State, 2 Tex. App. 350; Grant *v.* State, 2 Tex. App. 163.

22. Brown *v.* State, 44 Ga. 300.

23. Green *v.* State, 95 Ga. 463, 22 S. E. 289.

24. State *v.* McLain, 2 Brev. (S. C.) 443.

25. State *v.* Bassett, 34 La. Ann. 1108.

26. See, generally, Indictments and Informations, 22 Cyc. 307 *et seq.*

27. State *v.* Johnson, 32 Tex. 96.

28. Bolton *v.* State, 5 Coldw. (Tenn.) 650.

29. State *v.* Wren, 48 La. Ann. 803, 19 So. 745.

30. Thus an allegation that defendant stole goods outside the county in 1878 and brought the stolen goods into the county in 1876 is impossible and bad. Hutchinson *v.* State, 62 Ind. 556.

31. State *v.* Carr, 4 Pennew. (Del.) 523, 57 Atl. 370; State *v.* Clark, 8 Rob. (La.) 533; State *v.* Charlot, 8 Rob. (La.) 529; Com. *v.* Sego, 125 Mass. 210; Green *v.* State, (Tex. Cr. App. 1905) 86 S. W. 332.

32. Fleming *v.* State, 136 Ind. 149, 36 N. E. 154.

33. Bell *v.* State, 75 Ala. 25.

34. State *v.* Woolsey, 19 Utah 486, 57 Pac. 426.

35. Cole *v.* People, 37 Mich. 544.

36. Davis *v.* State, 3 Coldw. (Tenn.) 77.

37. Harris *v.* State, 2 Tex. App. 102.

38. See, generally, Indictments and Informations, 22 Cyc. 307 *et seq.*

39. *Georgia.*— Hall *v.* State, 120 Ga. 142, 47 S. E. 519.

Iowa.— State *v.* Lillard, 59 Iowa 479, 13 N. W. 637.

Louisiana.— State *v.* Capers, 6 La. Ann. 267.

Michigan.— People *v.* Turney, 124 Mich. 542, 83 N. W. 273.

New Hampshire.—State *v.* Cotton, 24 N. H. 143.

New York.— People *v.* Horton, 17 N. Y. Suppl. 1; Howell *v.* People, 2 Hill 281.

Texas.— State *v.* Johnson, 32 Tex. 96; Vick *v.* State, (Cr. App. 1902) 69 S. W. 156.

England.— Rex *v.* Perkins, 4 C. & P. 363, 19 E. C. L. 555.

Place situated in two counties.— Where a place is partly situate in the county of W, and partly in the county of S, it is sufficient, in an indictment for larceny, to state the offense to have been committed at the parish of H in the county of W. Rex *v.* Perkins, 4 C. & P. 363, 19 E. C. L. 555.

40. People *v.* Honeyman, 3 Den. (N. Y.) 121.

41. Thus to give the United States courts jurisdiction of an offense on the ground that it was committed in a place under the sole

an indictment for larceny from a building or for burglary the place of the building must be alleged and proved with exactness, as a necessary part of the description of the offense.[42] Where goods are stolen in one county or state and brought by the thief into a second county or state, an indictment for theft in the latter county may simply allege a theft in that county, without mentioning the original taking;[43] or it may allege the original taking and the bringing into the county where the indictment is found;[44] but it is of course defective if it neither alleges that the larceny was committed in the latter county or that the property was brought there.[45]

3. Value[46] — a. In General. The old distinction between grand and petit larceny depends upon the value of the goods taken; and an indictment for grand larceny must therefore state the value of the goods in order to show that the crime was of the higher degree.[47] And where on conviction damages are allowed to the owner, based upon the value of the goods stolen, the value must be alleged in order to justify granting such damages.[48] If no value is stated, the indictment might be sufficient as an indictment for petit larceny,[49] but there is authority to the contrary.[50] Where by statute an aggravated form of larceny is punished without reference to the value of the goods stolen, the value need not be stated in the indictment. It is so held in respect of larceny from the person,[51] larceny from a building,[52] or larceny of an animal.[53] The value alleged is the market

and exclusive jurisdiction of the United States, the fact that the crime was committed in such a place must be averred. U. S. *v.* Davis, 25 Fed. Cas. No. 14,930, 5 Mason 356.

42. Williams *v.* State, 33 Tex. 345; Reg. *v.* Brookes, C. & M. 543, 41 E. C. L. 296; Reg. *v.* Andrews, C. & M. 121, 41 E. C. L. 72.

43. *Alabama.*— Ham *v.* State, 17 Ala. 188.

California.— People *v.* Prather, 120 Cal. 660, 53 Pac. 259; People *v.* Staples, 91 Cal. 23, 27 Pac. 523; People *v.* Scott, 74 Cal. 94, 15 Pac. 384; People *v.* Mellon, 40 Cal. 648.

Montana.— State *v.* De Wolfe, 29 Mont. 415, 74 Pac. 1084.

Nebraska.— Hurlburt *v.* State, 52 Nebr. 428, 72 N. W. 471.

New York.— Haskins *v.* People, 16 N. Y. 344.

Oklahoma.— Keith *v.* Territory, 8 Okla. 307, 57 Pac. 834.

Texas.— Beard *v.* State, 45 Tex. Cr. 522, 78 S. W. 348; Hoffman *v.* State, (Cr. App. 1897) 42 S. W. 309.

Contra.— Norris *v.* State, 33 Miss. 373.

Change of form of property. — But this form of allegation will not be sufficient where the goods were taken in one form and brought into the jurisdiction in a different state, as where a turkey was taken alive in another place and brought dead into the county where the indictment is found. Com. *v.* Beaman, 8 Gray (Mass.) 497. So an indictment for stealing "a brass furnace" in the county of H is not supported by evidence of stealing a brass furnace in the county of R and breaking it there, and bringing the pieces into H. Rex *v.* Halloway, 1 C. & P. 127, 12 E. C. L. 84.

44. Bryant *v.* State, 116 Ala. 445, 23 So. 40; State *v.* Seay, 3 Stew. (Ala.) 123, 20 Am. Dec. 66; People *v.* Prather, 134 Cal. 386, 66 Pac. 483, 724; Jones *v.* State, 53 Ind. 235; Connell *v.* State, 2 Tex. App. 422.

45. Worthington *v.* State, 58 Md. 403, 42 Am. Rep. 338; State *v.* Brown, 8 Nev. 208.

46. Evidence see *infra*, XIV, B, 3, e; XIV, C, 2, *g*.

Finding in verdict see *infra*, XVI, C, 6.

Instructions see *infra*, XVI, B, 2, d.

Value as element of offense see *supra*, IX, E.

Variance see *infra*, XIII, F, 4.

47. *Alabama.*— Wilson *v.* State, 1 Port. 118.

Georgia.— Davis *v.* State, 40 Ga. 229.

Missouri.— State *v.* Pedigo, 71 Mo. 443.

New Hampshire.— State *v.* Goodrich, 46 N. H. 186.

New York.— People *v.* Willett, 102 N. Y. 251, 6 N. E. 301; Howell *v.* People, 2 Hill 281.

Oklahoma.— Sullivan *v.* Territory, 8 Okla. 499, 58 Pac. 650.

Texas.— Pittman *v.* State, 14 Tex. App. 576; Sheppard *v.* State, 1 Tex. App. 304, 28 Am. Rep. 422.

England.— Reg. *v.* Gamble, 16 L. J. M. C. 149, 16 M. & W. 384; Rex *v.* Peel, R. & R. 302.

See 32 Cent. Dig. tit. "Larceny," § 76.

48. Com. *v.* Smith, 1 Mass. 245.

49. Payne *v.* Barnes, 5 Barb. (N. Y.) 465.

50. Sheppard *v.* State, 42 Ala. 531.

51. Green *v.* State, 28 Tex. App. 493, 13 S. W. 784; Shaw *v.* State, 23 Tex. App. 493, 5 S. W. 317; Bennett *v.* State, 16 Tex. App. 236.

52. State *v.* Sharp, 106 Mo. 106, 17 S. W. 225; State *v.* Castor, 93 Mo. 242, 5 S. W. 906; State *v.* Beckworth, 68 Mo. 82.

53. *Alabama.*— Adams *v.* State, 60 Ala. 52.

Arkansas.— Walker *v.* State, 50 Ark. 532, 8 S. W. 939; Houston *v.* State, 13 Ark. 66.

value.[54] And the allegation must be sufficiently certain.[55] The value of current money need not be stated, since it is obviously the face value as alleged in the description.[56] A common statutory provision is that the money due on a promissory note, check, etc., shall be deemed the value of the instrument. Under this statute in an indictment for larceny of a bank-note, when the description of the note states its denomination, no other allegation of value need be made.[57] And in an indictment for larceny of a check, draft, or promissory note, the description of the instrument contains a sufficient allegation that the amount named is due and is therefore its value.[58]

b. Collective Value. Where in a single count several things are alleged to have been taken the value of each article should properly be stated separately. If a single value has been stated for all the goods a conviction is possible only if the taking of all the goods is proved, since if the jury finds a part only of the goods taken there is no value of such goods alleged. The indictment is, however, not invalid, and if the jury finds that all the goods named were stolen a conviction will be sustained.[59] If the better practice is followed, and the separate values are stated, it is not necessary to allege the aggregate value.[60]

California.— People *v.* Townsley, 39 Cal. 405.

Colorado.— Quinn *v.* People, 32 Colo. 135, 75 Pac. 396; Chesnut *v.* People, 21 Colo. 512, 42 Pac. 656.

Florida.— Mizell *v.* State, 38 Fla. 20, 20 So. 769.

Kansas.— State *v.* Small, 26 Kan. 209.

Louisiana.— State *v.* Hill, 46 La. Ann. 736, 15 So. 145; State *v.* Thomas, 28 La. Ann. 827; State *v.* Wells, 25 La. Ann. 372.

Missouri.— State *v.* Bowers, (1886) 1 S. W. 288; State *v.* Lawn, 80 Mo. 241; State *v.* Daniels, 32 Mo. 558.

Montana.— Territory *v.* Pendry, 9 Mont. 67, 22 Pac. 760.

Oklahoma.— Howard *v.* Territory, 15 Okla. 199, 79 Pac. 773; Woodring *v.* Territory, 14 Okla. 250, 78 Pac. 85.

Texas.— Johnson *v.* State, 29 Tex. 492; Lopez *v.* State, 20 Tex. 780; Beard *v.* State, 45 Tex. Cr. 522, 78 S. W. 348.

Washington.— State *v.* Kyle, 14 Wash. 550, 45 Pac. 147; State *v.* Young, 13 Wash. 584, 43 Pac. 881.

West Virginia.— State *v.* Sparks, 30 W. Va. 101, 3 S. E. 40.

See 32 Cent. Dig. tit. "Larceny," § 77.

54. State *v.* James, 58 N. H. 67; Smith *v.* State, (Tex. Cr. App. 1898) 44 S. W. 520. The measure of the value is the value of the property in the county of the forum at the time it was brought into that county, and not its value at the time of the taking in the county of the taking. Clark *v.* State, 23 Tex. App. 612, 5 S. W. 178.

55. *Alabama.*— Williams *v.* State, 44 Ala. 396, too uncertain.

California.— People *v.* Righetti, 66 Cal. 184, 4 Pac. 1063, 1185; People *v.* Poggi, 19 Cal. 600, sufficient.

Florida.— Baldwin *v.* State, 46 Fla. 115, 35 So. 220, sufficient.

Maryland.— Gardner *v.* State, 25 Md. 146, sufficient.

New York.— People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883, sufficient.

See 32 Cent. Dig. tit. "Larceny," § 76 *et seq.*

56. *Alabama.*— Turner *v.* State, 124 Ala. 59, 27 So. 272.

California.— People *v.* Green, 15 Cal. 512.

Louisiana.— State *v.* King, 37 La. Ann. 91.

New York.— People *v.* Evans, 143 N. Y. 638, 37 N. E. 823.

Texas.— Kelley *v.* State, 34 Tex. Cr. 412, 31 S. W. 174; Bagley *v.* State, 3 Tex. App. 163.

United States.— Beckley *v.* U. S., 3 Fed. Cas. No. 1,211, 1 Hayw. & H. 88.

See 32 Cent. Dig. tit. "Larceny," § 79.

57. State *v.* Cassel, 2 Harr. & G. (Md.) 407; Adams *v.* Com., 23 Gratt. (Va.) 949.

58. State *v.* Pierson, 59 Iowa 271, 13 N. W. 291; State *v.* O'Connell, 144 Mo. 387, 46 S. W. 175; Phelps *v.* People, 72 N. Y. 334.

59. *Alabama.*— Jackson *v.* State, 69 Ala. 249; Grant *v.* State, 55 Ala. 201.

California.— People *v.* Robles, 34 Cal. 591.

Georgia.— Bone *v.* State, 120 Ga. 866, 48 S. E. 356.

Indiana.— Edson *v.* State, 148 Ind. 283, 47 N. E. 625; Clifton *v.* State, 5 Blackf. 224.

Iowa.— State *v.* Hart, 29 Iowa 268.

Maine.— State *v.* Hood, 51 Me. 363; State *v.* Buck, 46 Me. 531.

Missouri.—State *v.* Koplan, 167 Mo. 298, 66 S. W. 967; State *v.* O'Connell, 144 Mo. 387, 46 S. W. 175; State *v.* Beatty, 90 Mo. 143, 2 S. W. 215, 216.

Ohio.— State *v.* Mook, 40 Ohio St. 588.

Tennessee.— State *v.* Shelton, 90 Tenn. 539, 18 S. W. 253.

Texas.— Thompson *v.* State, 43 Tex. 268; Doyle *v.* State, 4 Tex. App. 253; Meyer *v.* State, 4 Tex. App. 121; Ware *v.* State, 2 Tex. App. 547.

Washington.— State *v.* Brew, 4 Wash. 95, 29 Pac. 762, 31 Am. St. Rep. 904.

England.— Rex *v.* Forsyth, R. & R. 204.

See 32 Cent. Dig. tit. "Larceny," § 78.

60. State *v.* Kelliher, 32 Oreg. 240, 50 Pac. 532.

4. NAME.[61] A person's name is that by which he is commonly known; and if a person is commonly and habitually known by a certain name he may be called by that name in an indictment, even though his right name is different.[62] Where defendant is a woman who at the time of the larceny was unmarried, her name at that time should be stated, although she has since been married.[63] The name includes both the christian name and the surname; and, unless one or the other is unknown, both must be given.[64] But where a christian name and surname are given, an alias surname may be given without repeating the christian name.[65] And where that is the case the surname may be stated as unknown and the christian name stated.[66] Both christian and surname must be exactly stated; and any error in the names or in the order of the names is fatal.[67] By statute in many states an immaterial variance is not fatal.[68] And sometimes without the aid of a statute, where a name repeated in an indictment is wrongly given by an obvious slip of the pen, the error is not fatal.[69] Where there are father and son of the same name, the latter commonly distinguished by the addition "junior," this is not part of the name, and its omission is not error.[70] An addition of "esquire" is immaterial, and need not be proved.[71] In most states it is sufficient to designate the christian name or names by initials.[72] An error in spelling a name which nevertheless leaves the sound correct is not fatal; a form of a name which is *idem sonans* with the correct form is sufficient.[73] It is sufficient in naming a corporation against which a larceny is alleged to have been committed to give a form by which it is generally known,[74] and especially a form by which defendant knows and will recognize it.[75] The rule as to *idem sonans* applies to corporate names; "Chatam Bank" is not fatal where the true name is "Chatham Bank."[76] It is

61. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 322 *et seq.*

62. People *v.* Woods, 65 Cal. 121, 3 Pac. 466; People *v.* Leong Quong, 60 Cal. 107; State *v.* Pierre, 39 La. Ann. 915, 3 So. 60; State *v.* France, 1 Overt. (Tenn.) 434; Lott *v.* State, 24 Tex. App. 723, 14 S. W. 277.

63. State *v.* Labertew, 55 Kan. 674, 41 Pac. 945.

64. Crittenden *v.* State, 134 Ala. 145, 32 So. 273; Johnson *v.* State, 59 Ala. 37; Morningstar *v.* State, 52 Ala. 405; Willis *v.* People, 2 Ill. 399; Farmer *v.* State, (Tex. Cr. App. 1894) 28 S. W. 197.

65. Viberg *v.* State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22.

66. Shockley *v.* State, 38 Tex. Cr. 458, 42 S. W. 972.

67. State *v.* Taylor, 15 Kan. 420; Hensley *v.* Com., 1 Bush (Ky.) 11, 89 Am. Dec. 604; State *v.* English, 67 Mo. 136; Collins *v.* State, 43 Tex. 577; Perry *v.* State, 4 Tex. App. 566.

68. People *v.* Main, 114 Cal. 632, 46 Pac. 612; People *v.* Pline, 61 Mich. 247, 28 N. W. 83; State *v.* Riley, 100 Mo. 493, 13 S. W. 1063; Chessley *v.* State, (Tex. Cr. 1903) 74 S. W. 548; Olibare *v.* State, (Tex. Cr. 1898) 48 S. W. 69.

69. Creeson *v.* State, 5 How. (Miss.) 33.

70. State *v.* Grant, 22 Me. 171; Wesley *v.* State, 45 Tex. Cr. 64, 73 S. W. 960; Windom *v.* State, 44 Tex. Cr. 514, 72 S. W. 193.

71. Rex *v.* Ogilvie, 2 C. & P. 230, 12 E. C. L. 542; Reg. *v.* Keys, 2 Cox C. C. 225.

As to the name of peers see Reg. *v.* Pitts, 8 C. & P. 771, 34 E. C. L. 1013; Reg. *v.* Caley, 5 Jur. 709; Rex *v.* Sulls, 2 Leach C. C. 861.

72. *Alabama.*—Lyon *v.* State, 61 Ala. 224.

Kansas.— State *v.* Flack, 48 Kan. 146, 29 Pac. 571.

Louisiana.— State *v.* Prince, 42 La. Ann. 817, 8 So. 591.

Missouri.— State *v.* Sweeney, 56 Mo. App. 409.

North Carolina.—State *v.* Brite, 73 N. C. 26.

Texas.— State *v.* Black, 31 Tex. 560.

73. *Minnesota.*— State *v.* Blakeley, 83 Minn. 432, 86 N. W. 419, Barrom and Barone.

South Carolina.— State *v.* White, 34 S. C. 59, 12 S. E. 661, 27 Am. St. Rep. 783, Kenuedy and Canada.

Texas.— Cline *v.* State, 34 Tex. Cr. 415, 31 S. W. 175 (Hillmer and Helmer); Cerda *v.* State, 33 Tex. Cr. 458, 26 S. W. 992 (Felipe and Phillip); Spoonemore *v.* State, 25 Tex. App. 358, 8 S. W. 280 (Hix Nowels and Hicks Nowells); Hutto *v.* State, 7 Tex. App. 44 (Pittis and Pettis); Wells *v.* State, 4 Tex. App. 20 (Chan and Chang).

Virginia.— Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867, Bolden and Bolen.

England.— Reg. *v.* Davis, 15 Jur. 546, 20 L. J. M. C. 207, Darius and Trius.

74. State *v.* Rollo, 3 Pennew. (Del.) 421, 54 Atl. 683; Price *v.* State, 41 Tex. 215.

75. Jackson *v.* State, 93 Ga. 165, 18 S. E. 436.

Application of rule.— For instance, where there is but one railroad with a name at all similar, "Wabash Railroad" is sufficient, although the true name is "Wabash Western Railroad." State *v.* Sharp, 106 Mo. 106, 17 S. W. 225.

76. Roth *v.* State, 10 Tex. App. 27.

not enough, however, to give a common abbreviation for the name; "Mo. P. Ry. Company" is not a sufficient averment of the name "Missouri Pacific Railway Company."[77]

5. Ownership — a. In General. In an indictment for larceny the ownership of the property must be alleged.[78] It is not sufficient to allege that the goods were taken from the person of another.[79] And obviously an allegation that the goods were taken from the premises of a certain person is not a sufficient allegation of possession.[80] No special form of allegation is necessary. Thus it may be alleged that the goods were "the property of" the person named,[81] his "goods and chattels,"[82] his "personal goods and chattels,"[83] that they belonged to the person named,[84] or that the person named was the owner.[85] It is not necessary, in addition to alleging ownership, to state the person from whose possession the goods were taken.[86] The allegation that the goods were the property of the person named is a sufficient allegation that they were his goods at the time of the theft, without further identification of the time.[87] Ownership in a particular person is not an essential element in the crime; the allegation is merely part of the description and identification of the goods.[88] It is sufficient, it has been held,

77. White *v.* State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879.

78. *Alabama.*— Turner *v.* State, 124 Ala. 59, 27 So. 272.

California.— People *v.* Piggott, 126 Cal. 509, 59 Pac. 31.

Delaware.— State *v.* Fitzpatrick, 9 Houst. 385, 32 Atl. 1072.

Georgia.— Buffington *v.* State, 124 Ga. 24, 52 S. E. 19.

Iowa.— State *v.* Loomis, (1905) 105 N. W. 397; State *v.* Wasson, 126 Iowa 320, 101 N. W. 1125.

Kentucky.— McBride *v.* Com., 13 Bush 337; Reed *v.* Com., 7 Bush 641.

Maryland.— State *v.* Tracey, 73 Md. 447, 21 Atl. 366.

Michigan.— *In re* Leddy, 11 Mich. 197.

Missouri.— State *v.* Ellis, 119 Mo. 437, 24 S. W. 1017.

Montana.— State *v.* De Wolfe, 29 Mont. 415, 74 Pac. 1084.

South Carolina.— State *v.* Dwyre, 2 Hill 287.

Texas.— Gadson *v.* State, 36 Tex. 350; Williams *v.* State, 33 Tex. 345; Long *v.* State, (Cr. App. 1892) 20 S. W. 576; Culberson *v.* State, 2 Tex. App. 324.

Virginia.— Barker *v.* Com., 2 Va. Cas. 122.

England.—Reg. *v.* Ward, 7 Cox C. C. 421.

See 32 Cent. Dig. tit. "Larceny," § 81 *et seq.*

79. People *v.* Hanselman, 76 Cal. 460, 18 Pac. 425, 9 Am. St. Rep. 238; State *v.* Ellis, 119 Mo. 437, 24 S. W. 1017. *Contra*, Hugo *v.* State, 110 Ga. 768, 36 S. E. 60.

80. Hughes *v.* State, 74 Miss. 368, 20 So. 838. But it has been held that the allegation that defendant "took the money from the money drawers of said deponent's store" is equivalent to a statement that he took the money out of the possession of the deponent. People *v.* Smith, 86 Hun (N. Y.) 485, 33 N. Y. Suppl. 989.

81. *Alabama.*— Turner *v.* State, 124 Ala. 59, 27 So. 272.

Arkansas.— Hawkins *v.* State, 55 Ark. 353, 18 S. W. 240.

California.— People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; People *v.* Goggins, 80 Cal. 229, 22 Pac. 206.

Indiana.— Skelton *v.* State, 149 Ind. 641, 49 N. E. 901; Choen *v.* State, 85 Ind. 209.

Kentucky.— Hall *v.* Com., 21 S. W. 353, 14 Ky. L. Rep. 731.

Louisiana.— State *v.* Bayonne, 36 La. Ann. 761.

North Carolina.— State *v.* Beatty, 61 N. C. 52.

South Dakota.— State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716.

See 32 Cent. Dig. tit. "Larceny," § 81 *et seq.*

82. *Indiana.*— Garber *v.* State, 94 Ind. 219.

Louisiana.— State *v.* Vanderlip, 4 La. Ann. 444.

Maine.— State *v.* Bartlett, 55 Me. 200.

Massachusetts.— Com. *v.* Morse, 14 Mass. 217.

Michigan.— People *v.* Kent, 1 Dougl. 42.

Missouri.— State *v.* Ware, 62 Mo. 597.

New York.— People *v.* Holbrook, 13 Johns. 90.

Virginia.— Angel *v.* Com., 2 Va. Cas. 228.

United States.— Beckley *v.* U. S., 3 Fed. Cas. No. 1,211, 1 Hayw. & H. 88.

See 32 Cent. Dig. tit. "Larceny," § 81.

But see Rex *v.* Rough, 2 East P. C. 607.

83. Evans *v.* State, 150 Ind. 651, 50 N. E. 820; Barker *v.* State, 48 Ind. 163; King *v.* State, 44 Ind. 285.

84. Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141; State *v.* Griffin, 79 Iowa 568, 44 N. W. 813; State *v.* De Wolfe, 29 Mont. 415, 74 Pac. 1084.

85. Mathews *v.* State, 17 Tex. App. 472.

86. State *v.* Gallimore, 29 N. C. 147; Thompson *v.* Com., 2 Va. Cas. 135.

87. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; People *v.* Arras, 89 Cal. 223, 26 Pac. 766.

88. State *v.* Harris, 42 La. Ann. 980, 8 So. 536.

to charge the ownership in A or B, and to prove it in either;[89] but to charge that the accused fraudulently drove away cattle without the authority of the owner is not tantamount to an allegation that the cattle were not the property of the accused.[90] The allegation of ownership is material, and must be proved as alleged in order to secure conviction.[91] By statute the allegation of ownership may be made unnecessary or a variance immaterial.[92]

b. Who Should Be Laid as Owner[93] — (i) *Ownership in Possessor.* The actual condition of the legal title is immaterial to the thief; so far as he is concerned, one may be taken as the owner who was in peaceable possession of it, and whose possession was unlawfully disturbed by the taking. The possessor of the goods from whom the thief took them may therefore properly be described as owner in the indictment.[94] The possession must be actual; right of possession alone will not suffice.[95] Nor a general direction and control, not amounting to a legal possession.[96] The goods need not be in the actual manual possession of the person described as owner at the moment of taking; it is enough that he was legally the possessor.[97] Upon this principle the property of goods stolen may be laid in a bailee from whom they were taken,[98] as for instance in a common

89. State *v.* Ware, 44 La. Ann. 954, 11 So. 579.

90. Long *v.* State, 6 Tex. App. 642.

91. McBride *v.* Com., 13 Bush (Ky.) 337; Com. *v.* Williams, 1 Va. Cas. 14. Where the prisoner received money as the agent of his fellow workmen, not as servant of his employer, it was wrongly described as the property of his employer. Reg. *v.* Barnes, 10 Cox C. C. 255, L. R. 1 C. C. 45, 12 Jur. N. S. 549, 35 L. J. M. C. 204, 14 L. T. Rep. N. S. 601, 14 Wkly. Rep. 805.

92. *California.*— People *v.* Smith, 112 Cal. 333, 44 Pac. 663.

Iowa.— State *v.* Hall, 97 Iowa 400, 66 N. W. 725.

Kentucky.— Porter *v.* Com., 61 S. W. 16, 22 Ky. L. Rep. 1657.

New York.— People *v.* Kellogg, 105 N. Y. App. Div. 505, 94 N. Y. Suppl. 617.

Oklahoma.— Martin *v.* Territory, 4 Okla. 105, 43 Pac. 1067.

South Dakota.— State *v.* Vincent, 16 S. D. 62, 91 N. W. 347.

Illustration.— Under a statute, providing that an erroneous allegation of an indictment as to the person injured is immaterial, evidence of the larceny of money from an unnamed person is sufficient to support an indictment charging the larceny of the money from a certain individual and divers other persons to the grand jury unknown, although there is no evidence of a larceny from the individual named. People *v.* Kellogg, 105 N. Y. App. Div. 505, 94 N. Y. Suppl. 617.

93. See, generally, INDICTMENTS AND INFORMATIONS.

Variance see *infra*, XIII, F, 3.

94. *Alabama.*— Morningstar *v.* State, 52 Ala. 405.

California.— People *v.* Davis, 97 Cal. 194, 31 Pac. 1109.

Delaware.— State *v.* Patton, 1 Marv. 552, 41 Atl. 193.

Georgia.— Markham *v.* State, 25 Ga. 52.

North Carolina.— State *v.* Allen, 103 N. C. 433, 9 S. E. 626.

Texas.— Bagley *v.* State, 3 Tex. App. 163.

United States.— U. S. *v.* Barlow, 1 Fed. Cas. No. 14,521, 1 Cranch C. C. 94.

England.— Reg. *v.* Webster, 9 Cox C. C. 13, 7 Jur. N. S. 1208, L. & C. 77, 31 L. J. M. C. 17, 5 L. T. Rep. N. S. 327, 10 Wkly. Rep. 20; Rex *v.* Wallis, 1 Moody C. C. 344.

Canada.— Reg. *v.* Massey, 13 U. C. C. P. 484.

See 32 Cent. Dig. tit. "Larceny," § 81.

95. Merritt *v.* State, 73 Ark. 32, 83 S. W. 330; Rex *v.* Adams, R. & R. 168.

96. Murray *v.* U. S., 1 Ind. Terr. 28, 35 S. W. 240; State *v.* Washington, 15 Rich. (S. C.) 39; Ritcher *v.* State, 38 Tex. 643.

Application of rule.— Where a chattel is left upon land without the knowledge of the owner the latter is not in possession and cannot be described as owner. Pitts *v.* State, (Tex. Cr. App. 1893) 22 S. W. 410. But where a canal company were accustomed to return property found in their canal, to the owner, and iron was stolen from the canal while it was being cleaned, property was properly laid in the canal company. Reg. *v.* Rowe, Bel C. C. 93, 8 Cox C. C. 139, 5 Jur. N. S. 274, 28 L. J. M. C. 128, 7 Wkly. Rep. 236.

97. Com. *v.* Butts, 124 Mass. 449.

98. *Alabama.*— Jones *v.* State, 13 Ala. 153.

Delaware.— State *v.* Pullen, 3 Pennew. 184, 50 Atl. 538.

Florida.— Long *v.* State, 42 Fla. 509, 28 So. 775; Kennedy *v.* State, 31 Fla. 428, 12 So. 858.

Indiana.— Edson *v.* State, 148 Ind. 283, 47 N. E. 625.

Maine.— State *v.* Somerville, 21 Me. 14, 38 Am. Dec. 248.

Missouri.— State *v.* O'Connell, 144 Mo. 387, 46 S. W. 175.

New Hampshire.— State *v.* Ayer, 23 N. H. 301.

New York.— People *v.* Smith, 1 Park. Cr. 329.

North Carolina.— State *v.* McRae, 111 N. C. 665, 16 S. E. 173; State *v.* Allen, 103 N. C. 433, 9 S. E. 626; State *v.* Powell, 103

carrier,[99] an innkeeper,[1] a pledgee,[2] a receiver,[3] a hirer or borrower,[4] a *cestui que trust*,[5] one in possession under a contract for purchase,[6] a washerwoman who has the goods to wash,[7] or a coachmaker who has a coach to repair,[8] or a lienor,[9] a manufacturer who is performing work on the materials of another,[10] a cashier of a bank,[11] or a constable who has attached or taken the goods in execution.[12] But a deputy sheriff placed in the house to watch the property on the night of the burglary was held not to be such a special owner that ownership in him should be alleged.[13] A purchaser at a sheriff's sale,[14] or a finder,[15] may be described as owner. Where a horse which was hired for a week was returned to the owner every night, and was taken during the night, property should be laid in the owner.[16] An agister,[17] an agent for sale or for other purpose,[18] or a depositary[19] may be alleged to be owner. It is immaterial that the possession is wrongful. Thus a thief in possession may be described as owner when the goods have been stolen from him by a second thief.[20] So ownership may be laid in a receiver of stolen goods,[21] or one who has obtained them fraudulently or in some other way unlawfully.[22]

N. C. 424, 9 S. E. 627, 14 Am. St. Rep. 821, 4 L. R. A. 291; State *v.* Bishop, 98 N. C. 773, 4 S. E. 357; State *v.* Hardison, 75 N. C. 203.

Texas.— Moseley *v.* State, 42 Tex. 78; Bell *v.* State, (Cr. App. 1902) 71 S. W. 24; Ledbetter *v.* State, 35 Tex. Cr. 195, 32 S. W. 903; Duren *v.* State, 15 Tex. App. 624.

United States.— U. S. *v.* Burroughs, 25 Fed. Cas. No. 14,695, 3 McLean 405.

England.— Reg. *v.* Vincent, 3 C. & K. 246, 5 Cox C. C. 537, 2 Den. C. C. 464, 16 Jur. 457, 21 L. J. M. C. 109; Rex *v.* Scott, 2 East P. C. 655, R. & R. 10.

See 32 Cent. Dig. tit. "Larceny," § 85.

99. *Alabama.*—Allen *v.* State, 134 Ala. 159, 32 So. 318; Rountree *v.* State, 58 Ala. 381.

Kentucky.— Bryant *v.* Com., 68 S. W. 846, 24 Ky. L. Rep. 447.

Texas.— Radford *v.* State, 35 Tex. 15.

Vermont.— State *v.* Casavant, 64 Vt. 405, 23 Atl. 636.

England.— Rex *v.* Deakin, 2 East P. C. 653, 2 Leach C. C. 862; Rex *v.* Trollop, Kel. C. C. 39.

Canada.— Reg. *v.* Martin, 3 Nova Scotia Dec. 124.

See 32 Cent. Dig. tit. "Larceny," § 85.

1. Rex *v.* Wymer, 4 C. & P. 391, 19 E. C. L. 569; Rex *v.* Todd, 1 Leach C. C. 357 note.

2. Smith *v.* State, (Tex. Cr. App. 1895) 29 S. W. 785.

3. State *v.* Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

4. State *v.* Wisdom, 8 Port. (Ala.) 511; Yates *v.* State, 10 Yerg. (Tenn.) 549; Moseley *v.* State, 42 Tex. 78; Rex *v.* Brunswick, 1 Moody C. C. 26; Rex *v.* Belstead, R. & R. 304. But see Emmerson *v.* State, 33 Tex. Cr. 89, 25 S. W. 289.

5. State *v.* Addington, 1 Bailey (S. C.) 310.

6. Fowler *v.* State, 100 Ala. 96, 14 So. 860; State *v.* Pettis, 63 Me. 124.

7. Rex *v.* Parker, 1 Leach C. C. 357 note.

8. Rex *v.* Taylor, 2 East P. C. 653, 1 Leach C. C. 356.

9. Rex *v.* Todd, 1 Leach C. C. 357 note.

10. State *v.* Ayer, 23 N. H. 301; State *v.* Brown, (N. J. 1905) 60 Atl. 1117.

11. Com. *v.* Butts, 124 Mass. 449.

12. State *v.* Pullen, 3 Pennew. (Del.) 184, 50 Atl. 538; Hill *v.* State, 1 Head (Tenn.) 454.

13. Linhart *v.* State, 33 Tex. Cr. 504, 27 S. W. 260.

14. Robinson *v.* State, 1 Ga. 563.

15. Quinn *v.* People, 123 Ill. 333, 15 N. E. 46; Owen *v.* State, 6 Humphr. (Tenn.) 330; Blackburn *v.* State, 44 Tex. 457; Swink *v.* State, 32 Tex. Cr. 530, 24 S. W. 893; Massey *v.* State, 31 Tex. Cr. 91, 19 S. W. 908; Jinks *v.* State, 5 Tex. App. 68.

16. Reg. *v.* Kendall, 12 Cox C. C. 598, 30 L. T. Rep. N. S. 345.

17. People *v.* Buelna, 81 Cal. 135, 22 Pac. 396; Rex *v.* Woodward, 2 East P. C. 653, 1 Leach C. C. 357 note.

18. *Alabama.*— Viberg *v.* State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22.

Idaho.— State *v.* Farris, 5 Ida. 666, 51 Pac. 772.

New York.— People *v.* Smith, 1 Park. Cr. 329.

Texas.— Kersh *v.* State, 45 Tex. Cr. 451, 77 S. W. 790; Fore *v.* State, 5 Tex. App. 251.

England.— Reg. *v.* Jennings, 7 Cox C. C. 397, Dears. & B. 447, 4 Jur. N. S. 146, 6 Wkly. Rep. 231; Reg. *v.* Baird, 9 C. & P. 44, 38 E. C. L. 38.

The agent must be such legally; if he is in fact a mere servant, by whatever name called, he cannot be described as owner. State *v.* Jenkins, 78 N. C. 478.

19. Kennedy *v.* State, 31 Fla. 428, 12 So. 858; Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081; Skipworth *v.* State, 8 Tex. App. 135; Reg. *v.* Vincent, 3 C. & K. 246, 5 Cox C. C. 537, 2 Den. C. C. 464, 16 Jur. 457, 21 L. J. M. C. 109.

20. People *v.* Nelson, 56 Cal. 77; Ward *v.* People, 3 Hill (N. Y.) 395.

21. Com. *v.* Bowers, 3 Brewst. (Pa.) 350.

22. King *v.* State, 43 Tex. 351; Fay *v.* State, (Tex. Cr. App. 1902) 70 S. W. 744; Mathews *v.* State, 9 Tex. App. 138.

(II) *Ownership in Legal Owner.* Instead of naming the person from whose possession the goods were taken as owner, it is optional with the pleader to name the true owner as such, although the property was in the possession of another.[23] When the owner of property is indicted for larceny of it by taking it from a bailee, the property cannot be laid in defendant; it must be laid in the bailee alone.[24] Any legal interest in the goods, although less than the absolute title, will support an allegation of ownership.[25] But there must be an actual legal interest, not a mere claim or expectation of interest. Thus a seller who has delivered the goods cannot be described as owner merely because negotiations are pending between him and the buyer for canceling the sale.[26] So claiming ownership and attempting without success to do acts of ownership is not enough to justify a description as owner.[27] The ostensible ownership is, however, enough to justify the description. So far as the thief is concerned, he cannot question the title of the apparent owner.[28]

(III) *The Texas Doctrine.* In Texas both the ownership and the possession of the goods at the time of taking must be alleged.[29] And an allegation of possession is not an allegation of ownership.[30] The person must be named as possessor who actually had the legal possession of the goods.[31] And generally speaking

23. *Florida.*— Kennedy *v.* State, 31 Fla. 428, 12 So. 858.

Illinois.— Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699.

Iowa.— State *v.* Mullen, 30 Iowa 203.

Kentucky.— Bailey *v.* Com., 58 S. W. 425, 22 Ky. L. Rep. 512.

New Hampshire.— State *v.* Gorham, 55 N. H. 152.

Tennessee.— Lowry *v.* State, 113 Tenn. 220, 81 S. W. 373.

England.— Reg. *v.* King, 12 Cox C. C. 134, 25 L. T. Rep. N. S. 851; Rex *v.* Remnant, R. & R. 101.

Applications of rule.— Thus property in a growing crop may be laid in a tenant as against a third person, for the statute which provides that possession of a crop on land rented for agricultural purposes is deemed to be vested in the lessor is only for the lessor's protection (State *v.* Higgins, 126 N. C. 1112, 36 S. E. 113); so the title of goods taken from a carrier may be laid in the consignee (Com. *v.* Sullivan, 104 Mass. 552; Walker *v.* State, 9 Tex. App. 38); of goods stolen at an inn in the guest (Rex *v.* Todd, 1 Leach C. C. 357 note); of pledged goods in the pledgor (Com. *v.* O'Hara, 10 Gray (Mass.) 469); of mortgaged goods in the mortgagee who has the right of possession (State *v.* Quick, 10 Iowa 451); of goods stolen in the true owner (State *v.* Stanley, 48 Iowa 221); of a check in the payee (Com. *v.* Lawless, 103 Mass. 425; U. S. *v.* Jones, 31 Fed. 718, 725); or of property in the hands of a receiver in the owner (State *v.* Coss, 12 Wash. 673, 42 Pac. 127); and so of property held on a lien (Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699); of goods saved from a wreck (Reg. *v.* Clegg, 11 Cox C. C. 212, Ir. R. 3 C. L. 166); of crops on land farmed by a lessee on shares in the owner of the land (State *v.* Jacobs, 50 La. Ann. 447, 23 So. 608; State *v.* King, 98 N. C. 648, 4 S. E. 44), or of property of a minor in the guardian (Thomasson *v.* State, 22 Ga. 499); so goods which have been seized on execution may be described as the property of the execution creditor, since he is still the owner ((Rex *v.* Eastall, 2 Russell Cr. 320); and so the ownership of goods in a bonded warehouse of the government, which can be taken out by the general owner at any time on payment of the tax is rightly laid in the general owner (State *v.* Harmon, 104 N. C. 792, 10 S. E. 474; Lowry *v.* State, 113 Tenn. 220, 81 S. W. 373); and the property in a coffin in which a corpse is buried may be laid in the person who bought it and used it to bury the dead (State *v.* Doepke, 68 Mo. 208, 30 Am. Rep. 785).

24. Adams *v.* State, 45 N. J. L. 448; State *v.* McCoy, 89 N. C. 466. But see State *v.* Fitzpatrick, 9 Houst. (Del.) 385, 32 Atl. 1072.

25. Sharp *v.* State, 61 Nebr. 187, 85 N. W. 38.

Applications of rule.— So money collected by an agent for collection who had the right to use the money as his own is rightly described as the money of the agent. Fenner *v.* State, (Tex. Cr. App. 1892) 20 S. W. 355. And money which a sea-captain was to receive and divide between the shipowner and the crew might be described as the money of the captain. Com. *v.* McDonald, 187 Mass. 581, 73 N. E. 852, under a statute.

26. Phillips *v.* State, (Tex. Cr. App. 1897) 42 S. W. 557.

27. Carl *v.* State, 125 Ala. 89, 28 So. 505.

28. State *v.* Acebal, 110 La. 129, 34 So. 303; State *v.* Lewis, 49 La. Ann. 1207, 22 So. 327; State *v.* Everage, 33 La. Ann. 120.

29. Garner *v.* State, 36 Tex. 693; Castello *v.* State, 36 Tex. 324; Garcia *v.* State, 26 Tex. 209, 82 Am. Dec. 605; Hall *v.* State, 22 Tex. App. 632, 3 S. W. 338; Case *v.* State, 12 Tex. App. 228; Watts *v.* State, 6 Tex. App. 263.

30. Maddox *v.* State, 14 Tex. App. 447.

31. York *v.* State, 42 Tex. Cr. 528, 61 S. W. 128; Dawson *v.* State, (Tex. Cr. App.

possession must be proved as laid.[32] Possession may be established by showing that the person named had the management and control of the goods.[33] A guardian in control of his ward's property may be named as possessor.[34] But one who is not actually in physical control may be the possessor.[35] The absolute legal owner may be named as such; or any person may be named as owner who may be taken as an owner so far as the thief is concerned; which ordinarily includes any possessor who has an interest in the property or exercises any control or management.[36]

(IV) *JOINT OWNERSHIP.* Where goods are owned by several persons, allegation of ownership in one of them only is erroneous.[37] Every one of the joint owners must be named.[38] If, however, one of the joint owners is in possession and control of the goods, he may be named alone as the owner.[39] But temporary absence of one joint owner is not enough to give a separate possession to the other, so as to justify an allegation that he is owner.[40] Conversely an indictment is erroneous which alleges joint ownership when the property really belongs to one of the parties named individually.[41] It is provided by statute in several states that if property is owned by several it shall be sufficient to allege the ownership in one of the owners.[42] The statute will not, however, cure the error

1893) 24 S. W. 414; William *v.* State, 26 Tex. App. 131, 9 S. W. 357; Conner *v.* State, 24 Tex. App. 245, 6 S. W. 138; Littleton *v.* State, 20 Tex. App. 168; Briggs *v.* State, 20 Tex. App. 106. Consequently the finder of an estray who takes and feeds him must be named as the possessor not the owner. Williams *v.* State, (Tex. Cr. App. 1899) 51 S. W. 904; Tinney *v.* State, 24 Tex. App. 112, 5 S. W. 831. But where M left an animal on one farm while moving to another, intending to return for it soon and A found it on the highway and returned it to the farm where M had left it, possession was properly laid in M. Dawson *v.* State, (Tex. Cr. App. 1900) 59 S. W. 262.

32. Long *v.* State, 39 Tex. Cr. 461, 46 S. W. 821, 73 Am. St. Rep. 954; Owens *v.* State, 28 Tex. App. 122, 12 S. W. 506; Alexander *v.* State, 24 Tex. App. 126, 5 S. W. 840; Bailey *v.* State, 29 Tex. App. 68; Johnson *v.* State, 4 Tex. App. 594.

33. Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788; Littleton *v.* State, 20 Tex. App. 168; Garling *v.* State, 2 Tex. App. 44.

34. Frazier *v.* State, 18 Tex. App. 434.

35. Martin *v.* State, 44 Tex. Cr. 538, 72 S. W. 386; Willis *v.* State, (Tex. Cr. App. 1898) 44 S. W. 826; Moore *v.* State, 8 Tex. App. 496; Garling *v.* State, 2 Tex. App. 44.

36. Blackburn *v.* State, 44 Tex. 457; Cox *v.* State, 43 Tex. 101; Gatlin *v.* State, 39 Tex. 130; Dignowitty *v.* State, 17 Tex. 521, 67 Am. Dec. 670; Blackwell *v.* State, (Tex. Cr. App. 1903) 73 S. W. 960; McMullen *v.* State, (Tex. Cr. App. 1900) 59 S. W. 891; Ledbetter *v.* State, (Tex. Cr. App. 1895) 29 S. W. 1084; Duren *v.* State, 15 Tex. App. 624; Turner *v.* State, 7 Tex. App. 596; Jinks *v.* State, 5 Tex. App. 68; Gaines *v.* State, 4 Tex. App. 330; Samora *v.* State, 4 Tex. App. 508.

Applications of rule.—Where one has money belonging to his employer intermingled with his own money he has possession of the whole and may be described as owner (Fenner *v.* State, (Tex. Cr. App. 1892) 20 S. W. 355); so one may be named as owner who is a guardian (Trafton *v.* State, 5 Tex. App. 480), a bailor (Fore *v.* State, 5 Tex. App. 251), a borrower (Moseley *v.* State, 42 Tex. 78), an owner out of possession (Billard *v.* State, 30 Tex. 367, 94 Am. Dec. 317), or a hirer (Langford *v.* State, 8 Tex. 115).

37. *Idaho.*— People *v.* Frank, 1 Ida. 200.

Massachusetts.— Com. *v.* Trimmer, 1 Mass. 476.

Mississippi.— McDowell *v.* State, 68 Miss. 348, 8 So. 508.

New Hampshire.—State *v.* McCoy, 14 N. H. 364.

North Carolina.—State *v.* Burgess, 74 N. C. 272.

South Carolina.— State *v.* London, 3 S. C. 230; State *v.* Owens, 10 Rich. 169.

38. State *v.* Frame, 4 Harr. (Del.) 569; McNealy *v.* State, 17 Fla. 198; State *v.* Edwards, 86 N. C. 666; State *v.* Patterson, 68 N. C. 292; Dodd *v.* State, 10 Tex. App. 370; Hannahan *v.* State, 7 Tex. App. 664.

39. Merritt *v.* State, 73 Ark. 32, 83 S. W. 330; Scott *v.* State, 42 Ark. 73; Hogg *v.* State, 3 Blackf. (Ind.) 326; State *v.* Wilson, 6 Oreg. 428; Henry *v.* State, 45 Tex. 84; Samora *v.* State, 4 Tex. App. 508.

40. Merritt *v.* State, 73 Ark. 32, 83 S. W. 330.

41. *Indiana.*— Widner *v.* State, 25 Ind. 234.

New Hampshire.—State *v.* Ellison, 58 N. H. 325.

Ohio.— Lewis *v.* State, 4 Ohio 389.

South Carolina.— State *v.* Ryan, 4 McCord 16, 17 Am. Dec. 702.

Texas.— Brown *v.* State, 35 Tex. 691; Hernandez *v.* State, 43 Tex. Cr. 480, 63 S. W. 320.

England.— Rex *v.* Finch, 1 Moody C. C. 418.

See 32 Cent. Dig. tit. "Larceny" § 84.

42. *Alabama.*— Payne *v.* State, 140 Ala. 148, 37 So. 74; Smith *v.* State, 133 Ala.

where the property is laid in several persons and proved to be in part of them only.[43]

(v) *Unknown Owner.* But ownership may, if such is the case, be laid in a person unknown.[44] Where ownership was averred as unknown but possession was in A the indictment was held sufficient.[45] The indictment fails, however, if it is proved that the owner was in fact known, since there is a variance;[46] and this is true, even though the grand jury was in fact ignorant of the ownership, if by reasonable diligence they might have discovered the owner;[47] therefore evidence of the taking of goods belonging to a known person is inadmissible.[48] It is not necessary to aver that the unknown person is not defendant.[49]

c. Ownership in Certain Special Cases — (i) *Servant.* When a master puts a chattel in charge of a servant, the possession remains in the master, and he may therefore be described as owner, and the servant cannot be so described.[50]

145, 31 So. 806, 91 Am. St. Rep. 21; Harris *v.* State, 60 Ala. 50.

Idaho.— State *v.* Ireland, 9 Idaho 686, 75 Pac. 257.

Indiana.— Marcus *v.* State, 26 Ind. 101; Widner *v.* State, 25 Ind. 234.

Iowa.— State *v.* Cunningham, 21 Iowa 433.

Kentucky.— Porter *v.* Com., 61 S. W. 16, 22 Ky. L. Rep. 1657.

Massachusetts.— Com. *v.* O'Brien, 12 Allen 183; Com. *v.* Arrance, 5 Allen 517.

Missouri.— State *v.* Riley, 100 Mo. 493, 13 S. W. 1063.

Tennessee.— State *v.* Connor, 5 Coldw. 311.

Texas.— Pitts *v.* State, (App. 1890) 14 S. W. 1014; Clark *v.* State, 26 Tex. App. 486, 9 S. W. 767.

Extent and limits of rule.— So where property was laid in one firm which belonged to another firm composed of the same members and another. Lowry *v.* State, 113 Tenn. 220, 81 S. W. 373. Where, however, the person named has no legal interest in the property, but merely an interest in the profits, he should not be named as owner. People *v.* Romaine, 1 Wheel. Cr. (N. Y.) 369.

43. Parmer *v.* State, 41 Ala. 416. Thus where the property was alleged to belong to A and B and it proved to belong to A and C, the error was not cured by the statutes. Blankenship *v.* State, 55 Ark. 244, 18 S. W. 54.

44. *Connecticut.*—State *v.* Wilson, 30 Conn. 500.

Georgia.— Thomas *v.* State, 96 Ga. 311, 22 S. E. 956.

Maine.— State *v.* Polland, 53 Me. 124.

Missouri.— State *v.* Casteel, 53 Mo. 124.

North Carolina.— State *v.* Bell, 65 N. C. 313.

Pennsylvania.—Com. *v.* O'Brien, 2 Brewst. 566.

Texas.— Landreth *v.* State, 44 Tex. Cr. 239, 70 S. W. 758; Clements *v.* State, 43 Tex. Cr. 400, 66 S. W. 301; Melton *v.* State, (Cr. App. 1900) 56 S. W. 67; Baxter *v.* State, (Cr. App. 1897) 43 S. W. 87; Long *v.* State, (Cr. App. 1892) 20 S. W. 576, McVey *v.* State, 23 Tex. App. 659, 5 S. W. 174; Mackey *v.* State, 20 Tex. App. 603; Lowe *v.* State, 11 Tex. App. 253; Smith *v.* State, 7 Tex. App. 382; Jorasco *v.* State, 6 Tex. App. 238; Taylor *v.* State, 5 Tex. App. 1.

Virginia.— Barker *v.* Com., 2 Va. Cas. 122.

See 32 Cent. Dig. tit. "Larceny," § 91.

45. State *v.* Schatz, 71 Mo. 502; Ritcher *v.* State, 38 Tex. 643.

46. Oxier *v.* U. S., 1 Ind. Terr. 85, 38 S. W. 331; Williams *v.* State, (Tex. Cr. App. 1905) 84 S. W. 829; Dawson *v.* State, (Tex. Cr. App. 1901) 61 S. W. 489; Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463.

47. Hill *v.* State, 78 Ala. 1; State *v.* Thompson, 137 Mo. 620, 39 S. W. 83; Lamkin *v.* State, 42 Tex. 415; Lane *v.* State, (Tex. Cr. App. 1898) 45 S. W. 693; Shockley *v.* State, 38 Tex. Cr. 458, 42 S. W. 972; Grant *v.* State, (Tex. Cr. App. 1896) 36 S. W. 264; Swink *v.* State, 32 Tex. Cr. 530, 24 S. W. 893; Atkinson *v.* State, 19 Tex. App. 462; Brewer *v.* State, 18 Tex. App. 456; Jorasco *v.* State, 6 Tex. App. 238.

48. Dawson *v.* State, (Tex. Cr. App. 1901) 61 S. W. 489.

49. Reed *v.* State, 32 Tex. Cr. 139, 22 S. W. 403; Thompson *v.* State, 9 Tex. App. 301.

50. *Alabama.*— Heygood *v.* State, 59 Ala. 49; Jones *v.* State, 13 Ala. 153.

Iowa.— State *v.* Rivers, 60 Iowa 381, 13 N. W. 73, 14 N. W. 738.

Kansas.— State *v.* Rice, (1901) 63 Pac. 737; State *v.* Beaty, 62 Kan. 266, 62 Pac. 658.

North Carolina.— State *v.* Jenkins, 78 N. C. 478.

Tennessee.— Lowry *v.* State, 113 Tenn. 220, 81 S. W. 373; Hite *v.* State, 9 Yerg. 198, slave.

Texas.— Thomas *v.* State, 1 Tex. App. 289.

England.— Reg. *v.* Ashley, 1 C. & K. 198, 47 E. C. L. 198; Reg. *v.* King, 4 F. & F. 493; Rex *v.* Hutchinson, R. & R. 306.

Extent and limits of rule.— Where baggage in the hotel office is in control of the proprietor's son, it may be described as the property of the proprietor. Odell *v.* State, 44 Tex. Cr. App. 307, 70 S. W. 964. The keeper of the poor-farm is servant of the superintendent, and the title of chattels taken from the keeper should be laid in the superintendent. People *v.* Bennett, 37 N. Y.

(II) *Married Woman.* Since by the common law all a woman's choses in possession pass to her husband directly upon marriage, or upon their acquisition after marriage, and her possession is his, she has neither title to chattels nor possession of them; and the ownership of all chattels stolen from her must therefore be laid in the husband.[51] This is true not only of the property used in common,[52] but also of the money furnished to the wife by her husband for her own purposes,[53] and her clothes and paraphernalia,[54] and stock in trade in a shop conducted by her.[55] Even if the goods have just been acquired by the wife, and have never been in the husband's hands, they should be described as his.[56] Where goods are taken from the woman before her marriage, ownership should be laid in her in her maiden name.[57] Under modern statutes women are given title to their separate personal property, and may have separate possession of it. When a wife owns and possesses chattels and they are stolen from her, ownership may be laid in her.[58] When, however, the possession of the wife's separate property is actually in the husband he may be described as owner.[59] So where her chattel is used for household purposes with her assent the property may be laid either in her or in her husband.[60] Conversely, when the property of the husband is in the wife's possession she may be described as owner on account of her possession.[61] When under the statute a wife cannot acquire property from her husband, a chattel given her by her husband must be described as his, as at common law.[62] When a wife is separated from her husband, whether rightly or wrongly, the property in goods stolen from her possession may be laid in her.[63]

117, 93 Am. Dec. 551, 4 Abb. Pr. N. S. 89. The receiptor for chattels under attachment by the sheriff is the servant of the sheriff in whom the ownership should be laid, although the chattels were taken from the receiptor. Com. *v.* Morse, 14 Mass. 217; Norton *v.* People, 8 Cow. (N. Y.) 137. When, however, a servant receives a chattel from a third person and it is stolen before delivery to the master, the servant is in possession and may be described as owner. Reg. *v.* Rudick, 8 C. & P. 237, 34 E. C. L. 709. So where A is servant of an industrial corporation and has received money for goods sold and is accountable to the treasurer for the money received he has sufficient possession of the money to sustain a conviction for larceny against B, a member of the society, who has taken money from a till under A's charge. Reg. *v.* Burgess, 9 Cox C. C. 302, 9 Jur. N. S. 582, L. & C. 299, 32 L. J. M. C. 185, 8 L. T. Rep. N. S. 255, 11 Wkly. Rep. 602. Where a pretended servant collects money ostensibly for his pretended master, but really with intent to steal, property in the indictment cannot be laid in the pretended master since he had neither title nor possession. Reg. *v.* Tessier, 10 Quebec Q. B. 45.

51. Com. *v.* Williams, 7 Gray (Mass.) 337; Hill *v.* State, 1 Head (Tenn.) 454; Hughes *v.* Com., 17 Gratt. (Va.) 565, 94 Am. Dec. 498.

In Louisiana, where the rights of the wife are regulated by a code based on the civil law, goods belonging to the wife as her separate property may be described as hers. State *v.* Gaffery, 12 La. Ann. 265.

52. State *v.* Dredden, 1 Marv. (Del.) 522, 41 Atl. 925; Merriweather *v.* State, 33 Tex. 789; Wilson *v.* State, 3 Tex. App. 206.

53. People *v.* McCarty, 5 Utah 280, 17 Pac. 734.

54. State *v.* Hays, 21 Ind. 288.

55. U. S. *v.* Murphy, 27 Fed. Cas. No. 15,838, 4 Cranch C. C. 681.

56. As in the case of a married woman robbed of a purse which she had just found (Reg. *v.* Sallows, 2 Cox C. C. 63), or money she had just received (Rex *v.* Roberts, 7 C. & P. 485, 32 E. C. L. 720).

57. Rex *v.* Turner, 1 Leach C. C. 536.

58. *Alabama.*— Johnson *v.* State, 100 Ala. 55, 14 So. 627; Johnson *v.* State, (1893) 13 So. 377; Rollins *v.* State, 98 Ala. 79, 13 So. 280; Robinson *v.* State, 84 Ala. 434, 4 So. 774.

California.— People *v.* Watson, 72 Cal. 402, 14 Pac. 97.

Indiana.— Stevens *v.* State, 44 Ind. 469.

Ohio.— Pratt *v.* State, 35 Ohio St. 514, 35 Am. Rep. 617.

Pennsylvania.— Com. *v.* Martin, 5 Pa. L. J. Rep. 245, 5 Pa. L. J. 245.

South Carolina.— State *v.* Pitts, 12 S. C. 180, 32 Am. Rep. 508.

See 32 Cent. Dig. tit. "Larceny," § 83.

59. Ellis *v.* State, 76 Ala. 90; Lavender *v.* State, 60 Ala. 60; Davis *v.* State, 17 Ala. 415; State *v.* Jackson, Houst. Cr. Cas. (Del.) 561; Johnson *v.* State, 120 Ga. 509, 48 S. E. 199; Alexander *v.* State, 9 Tex. App. 48; Burt *v.* State, 7 Tex. App. 578.

60. State *v.* Petre, 35 N. J. L. 64.

61. Com. *v.* McLaughlin, 103 Mass. 435.

62. State *v.* Dredden, 1 Marv. (Del.) 522, 41 Atl. 925.

63. Le Cointe *v.* U. S., 7 App. Cas. (D. C.) 16 (after-acquired goods); Ware *v.* State, 2 Tex. App. 547; U. S. *v.* Parsons, 27 Fed. Cas. No. 16,001, 4 Cranch C. C. 726; Reg. *v.* Fitch, 7 Cox C. C. 269, Dears. & B. 187,

(III) *Parent and Child.* When a minor child living with his father is in possession of wearing apparel or other property which is stolen, it may be described in the indictment as the property of the child.[64] But it is not error, although not the better course, to lay the property in the father.[65] But if the goods were taken from the possession of the father he should be named as owner.[66]

(IV) *Property of a Deceased Person.* Since a dead man cannot own property, an indictment which describes stolen goods as the goods of A deceased is bad.[67] Nor at common law could the property be laid in an estate, since an estate is not a person in the law.[68] Where the owner dies intestate, the property taken before the appointment of the administrator should be laid in the ordinary.[69] Where the owner dies testate and the executor accepts, the ownership of goods stolen at any time after death should be laid in him, and the ownership of goods taken after the appointment of an administrator should be laid in him. In this country the appointment of administrator would probably be held to relate back to the death, and the ownership of goods taken at any time after the death might be laid in him.[70] Although doubtless an indictment laying the ownership of goods taken between death and the appointment of the administrator in the probate judge would be supported. An indictment laying the property in the administrator and the heirs is erroneous.[71] When, however, the heir is in actual possession and control of the goods, the property may be laid in him and not in the administrator,[72] as for instance in the widow and children in actual possession, no administrator having been appointed;[73] and so where one partner dies, and his widow or child continues the business on his behalf, the property may be laid in the widow or child and the surviving partner jointly.[74] It is sometimes provided by statute that the ownership of goods belonging to a deceased person may be laid in the estate.[75]

(V) *Corporation.*[76] When the ownership of goods is laid in a corporation, the corporate name must be given, but the fact of incorporation need not be alleged, at least if the name imports incorporation.[77] If the name does not of

3 Jur. N. S. 524, 26 L. J. M. C. 169, 5 Wkly. Rep. 527.

64. State *v.* Koch, 4 Harr. (Del.) 570; Jackson *v.* State, (Tex. Cr. App. 1904) 79 S. W. 521, 80 S. W. 631; Rex *v.* Forsgate, 1 Leach C. C. 463.

Son acting as servant.— Where the son was put in charge of the father's goods, not belonging to the son (in the case cited a stock of goods for sale), the son was acting as a servant; and if the goods were stolen they could only be described as the property of the father. Reg. *v.* Green, 7 Cox C. C. 186, Dears. & B. 113, 2 Jur. N. S. 1146, 26 L. J. M. C. 17, 5 Wkly. Rep. 52.

65. Wright *v.* State, 35 Tex. Cr. 470, 34 S. W. 273; Bazan *v.* State, (Tex. Cr. App. 1893) 24 S. W. 100; Reg. & Hughes, C. & M. 593, 41 E. C. L. 323.

66. Olibare *v.* State, (Tex. Cr. App. 1898) 48 S. W. 69.

67. U. S. *v.* Mason, 26 Fed. Cas. No. 15,738, 2 Cranch C. C. 410.

68. People *v.* Hall, 19 Cal. 425.

69. Reg. *v.* Tippin, C. & M. 545, 41 E. C. L. 297; Reg. *v.* Johnson, 7 Cox C. C. 379, Dears. & B. 340, 4 Jur. N. S. 55, 27 L. J. M. C. 52, 6 Wkly. Rep. 64; Rex *v.* Smith, 7 C. & P. 147, 32 E. C. L. 544.

70. State *v.* Woodley, 25 Ga. 235; State *v.* Lockhart, 24 Ga. 420.

71. Walker *v.* State, 111 Ala. 29, 20 So. 612.

72. Reg. *v.* Jackson, 19 U. C. C. P. 280.

73. Crockett *v.* State, 5 Tex. App. 526; State *v.* Heaton, 23 W. Va. 773, opinion of the court by Green, J.

74. Rex *v.* Scott, 2 East P. C. 655, R. & R. 10; Rex *v.* Gaby, R. & R. 178.

75. State *v.* Sherman, 71 Ark. 349, 74 S. W. 293; People *v.* Prather, 120 Cal. 660, 53 Pac. 259.

76. See, generally, Indictments and Informations, 22 Cyc. 351.

77. *Delaware.*— State *v.* Rollo, 3 Pennew. 421, 54 Atl. 683.

Georgia.— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

Iowa.— State *v.* Fogarty, 105 Iowa 32, 74 N. W. 754.

Kentucky.— Com. *v.* Vineyard, 82 S. W. 289, 26 Ky. L. Rep. 543.

Minnesota.— State *v.* Loomis, 27 Minn. 521, 8 N. W. 758.

Missouri.— State *v.* Shields, 89 Mo. 259, 1 S. W. 336.

New Mexico.— Territory *v.* Garcia, (1904) 75 Pac. 34.

See 32 Cent. Dig. tit. "Larceny," § 86.

Contra.— Thurmond *v.* State, 30 Tex. App. 539, 17 S. W. 1098; Martin *v.* State, (Tex. App. 1887) 5 S. W. 859; White *v.* State, 24

itself import incorporation, the association named must be alleged to be a corporation or else the names of the members must be given.[78] If the fact of incorporation is alleged, it is unnecessary to aver incorporation under the general laws or under a private statute.[79] The incorporation is sufficiently proved by establishing its existence *de facto*.[80] A copy of the general incorporation law and of the articles of association is competent evidence.[81]

(VI) *UNINCORPORATED ASSOCIATION*.[82] In the case of a partnership or other unincorporated association the names of all the individuals composing the association must be given.[83] In the case of certain English societies the property may be laid in one or more of the trustees or other officers.[84] And under the statute as to alleging joint ownership, it is enough to lay the property in one member of the association.[85]

(VII) *MISCELLANEOUS SPECIAL CASES*. In other special cases special forms of allegation must be used. Thus a bible, the property of an unincorporated religious society, is rightly alleged to be the property of A, one of the trustees, and others,[86] or of the trustees of the church.[87] Property of an established church in England, where the benefice is a vicarage, may be laid as the property of the vicar,[88] or of the vicar and churchwardens,[89] or of the churchwardens.[90] The property cannot be laid in "the parishioners;" some individual must be named.[91] Property purchased for the use of the poor and stolen may in England be described as goods of the overseers of the poor.[92] In this country they should not be so described,[93] but should be alleged to be the goods of the county.[94] Property owned for ordinary county purposes, or held by it in its corporate capacity, should be described as goods of the county.[95] When the property of the goods of one sentenced for felony vests in the queen, it is not error to describe as the property of the queen goods of an adjudged felon stolen from the possession of his wife.[96] Property belonging to the state in the hands of the treasurer may be described as the property of the state.[97]

Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879.

78. People *v.* Bogart, 36 Cal. 245.

79. State *v.* Loomis, 27 Minn. 521, 8 N. W. 758.

80. *California.*— People *v.* Oldham, 111 Cal. 648, 44 Pac. 312.

Indiana.— Smith *v.* State, 28 Ind. 321.

Louisiana.— State *v.* Collens, 37 La. Ann. 607.

Nebraska.— Braithwaite *v.* State, 28 Nebr. 832, 45 N. W. 247.

North Carolina.— State *v.* Grant, 104 N. C. 908, 10 S. E. 554.

England.—Reg. *v.* Langton, 2 Q. B. D. 296, 13 Cox C. C. 345, 46 L. J. M. C. 136, 35 L. T. Rep. N. S. 527.

See 32 Cent. Dig. tit. "Larceny," § 86.

81. Com. *v.* Whitman, 121 Mass. 361.

82. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 351.

83. *Arkansas.*— McCowan *v.* State, 58 Ark. 17, 22 S. W. 955.

California.— People *v.* Bogart, 36 Cal. 245.

Georgia.— Buffington *v.* State, 124 Ga. 24, 52 S. E. 19.

Illinois.— Wallace *v.* People, 63 Ill. 451.

Indiana.— Bingle *v.* State, 161 Ind. 369, 68 N. E. 645.

England.— Rex *v.* Sherrington, 1 Leach C. C. 513.

The name "Stewart & Reece" imports a partnership, and an indictment for larceny, where the ownership of the stolen goods was laid in "one Stewart & Reece," without more, was bad on special demurrer. Buffington *v.* State, 124 Ga. 24, 52 S. E. 19.

84. Reg. *v.* Atkinson, C. & M. 525, 2 Moody C. C. 278, 41 E. C. L. 287; Reg. *v.* Cain, C. & M. 399, 2 Moody C. C. 204, 41 E. C. L. 172; Reg. *v.* Bull, 1 Cox C. C. 137; Rex *v.* Boulton, 5 C. & P. 537, 24 E. C. L. 696. See Reg. *v.* Loose, Bell C. C. 259, 8 Cox C. C. 302, 6 Jur. N. S. 513, 29 L. J. M. C. 132, 2 L. T. Rep. N. S. 254, 8 Wkly. Rep. 222.

85. Reg. *v.* Pritchard, 8 Cox C. C. 461, L. & C. 34, 7 Jur. N. S. 557, 30 L. J. M. C. 169, 4 L. T. Rep. N. S. 340, 9 Wkly. Rep. 579.

86. Rex *v.* Boulton, 5 C. & P. 537, 24 E. C. L. 696.

87. State *v.* Livingston, Houst. Cr. Cas. (Del.) 71.

88. Reg. *v.* Miles, 1 Cox C. C. 351.

89. Reg. *v.* Wortley, 2 C. & K. 283, 2 Cox C. C. 32, 1 Den. C. C. 162, 61 E. C. L. 283.

90. Reg. *v.* Garlick, 1 Cox C. C. 52.

91. Reg. *v.* O'Brien, 13 U. C. Q. B. 436.

92. Rex *v.* Went, R. & R. 267.

93. State *v.* Rollins, 28 Ind. 390.

94. People *v.* Bennett, 37 N. Y. 117, 4 Abb. Pr. N. S. 89, 93 Am. Dec. 551.

95. State *v.* Cunningham, 51 Mo. 479; Reg. *v.* Winbow, 5 Cox C. C. 346.

96. Reg. *v.* Whitehead, 2 Moody C. C. 181.

97. People *v.* Phelps, 49 How. Pr. (N. Y.) 437.

E. Indictments For Allied Offenses — 1. Accessary.[98] In indicting an accessary before the fact, who had procured the principal to commit the offense for him, it is enough to allege the facts of the crime, and then allege that the principal acted for defendant, even though by statute defendant might have been charged directly with committing the crime.[99] And where defendant became an accessary by procuring or by giving aid to the principal, either before or after the fact, it is enough to allege generally that he procured or aided the principal, without alleging the circumstances of the procurement or aid.[1]

2. Attempt.[2] An indictment for attempt to commit larceny must at common law set out the acts which constituted the attempt.[3] By statute, however, an indictment which simply alleges in general terms that defendant attempted to steal may be good.[4] An indictment for an attempt to commit larceny from the person must allege an assault.[5] It is not necessary, in an indictment for attempt to steal, to specify or describe the goods intended to be stolen.[6] So of burglary with intent to commit larceny.[7]

3. Second Offense.[8] Where a second offense is punished more severely than a first offense, an indictment for a second offense should contain an exact description of the first conviction.[9] Where the increased punishment is provided for one who is convicted of three or more larcenies at the same term of court, it is obvious that the prior convictions cannot be stated in either indictment, and the punishment may be inflicted on an ordinary indictment for larceny.[10] Where an indictment charges in different counts the larceny of goods of different persons on the same day, and the record recites that he was convicted of three distinct larcenies as a basis for sentencing him as a common thief, it will not be presumed that the several larcenies charged were really one offense committed by stealing the property of several persons at one time, since, if such were the fact, one count would have been sufficient.[11]

4. Statutory Extensions of Larceny[12] **— a. General Principles.** When statutory offenses, such as embezzlement or obtaining by false pretenses, are made larceny by statute, and it is regarded as an actual extension of the offense, the statute may provide that the crime may be proved under an indictment for larceny,[13] or the facts may be stated in full.[14] And if there is no statutory permission for charging

98. See, generally, Indictments and Informations, 22 Cyc. 360 *et seq.*

99. People *v.* Peckens, 153 N. Y. 576, 47 N. E. 883.

1. Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050; Gann *v.* State, 42 Tex. Cr. 133, 57 S. W. 837.

2. See, generally, Indictments and Informations, 22 Cyc. 363.

3. State *v.* Wilson, 30 Conn. 500; State *v.* Brannan, 3 Nev. 238; Randolph *v.* Com., 6 Serg. & R. (Pa.) 398; Reg. *v.* Bullock, Dears. C. C. 653, 25 L. J. M. C. 92.

4. Jackson *v.* State, 91 Ala. 55, 8 So. 773, 24 Am. St. Rep. 860.

5. Randolph *v.* Com., 6 Serg. & R. (Pa.) 398.

6. *Indiana.*— Bloch *v.* State, 161 Ind. 276, 68 N. E. 287.

Missouri.— State *v.* Hughes, 76 Mo. 323.

North Carolina.— State *v.* Utley, 82 N. C. 556.

Tennessee.— Hayes *v.* State, 15 Lea 64.

England.— Reg. *v.* Johnson, 10 Cox C. C. 13, 10 Jur. N. S. 1160, L. & C. 489, 34 L. J. M. C. 24, 11 L. T. Rep. N. S. 389, 13 Wkly. Rep. 101.

Canada.— Reg. *v.* Taylor, 5 Can. Cr. Cas. 89.

7. State *v.* McClung, 35 W. Va. 280, 13 S. E. 654.

8. See, generally, Indictments and Informations, 22 Cyc. 356, 357.

9. State *v.* Loehr, 93 Mo. 103, 5 S. W. 696; Pryor *v.* Com., (Va. 1897) 26 S. E. 864; Reg. *v.* Clark, 3 C. & K. 367, 6 Cox C. C. 210, Dears. C. C. 198, 17 Jur. 582, 22 L. J. M. C. 135, 10 Wkly. Rep. 439; Rex *v.* Allen, R. & R. 382.

10. State *v.* Riley, 28 Iowa 547.

11. Bushman *v.* Com., 138 Mass. 507.

12. See also Embezzlement; False Pretenses.

13. Com. *v.* McDonald, 187 Mass. 581, 73 N. E. 852; Com. *v.* Kelley, 184 Mass. 320, 68 N. E. 346; People *v.* Dunn, 53 Hun (N. Y.) 381, 6 N. Y. Suppl. 805, 7 N. Y. Cr. 173; Duff *v.* Com., 92 Va. 769, 23 S. E. 643; Pitsnogle *v.* Com., 91 Va. 808, 22 S. E. 351, 50 Am. St. Rep. 867; Anable *v.* Com., 24 Gratt. (Va.) 563; Leftwich *v.* Com., 20 Gratt. (Va.) 716; Reg. *v.* Haigh, 7 Cox C. C. 403.

The provision of the Texas statute authorizing a conviction for embezzlement under an indictment for theft is not retroactive. Simco *v.* State, 8 Tex. App. 406.

14. State *v.* New, 22 Minn. 76.

it as larceny, the facts which constitute the offense charged must be set out in full.[15]

b. Larceny by Bailee.[16] The indictment for this offense must be so framed as to cover the acts forbidden by the statute, and is sufficient if it does so.[17] All the statutory elements must be alleged; thus, it must be alleged whose bailee defendant was,[18] and that he was a bailee for hire, if that is required by the statute,[19] and the facts showing the bailment must be alleged,[20] although not the details of the agreement which resulted in the bailment.[21] On the other hand, facts not material under the statute need not be alleged, such as the particulars of the conversion;[22] the consideration for the bailment, where none is required by the statute;[23] or an intent to appropriate.[24]

c. Larceny From the Person.[25] An indictment for larceny from the person is sufficient if it states all the elements of the offense, although it does not use the exact language of the statute.[26] All the statutory elements must be alleged,[27] including of course the fact that the taking was from the person.[28] The common-law elements of larceny must also be alleged.[29] If, however, the statute does not use the word it is not necessary to charge that the stealing was felonious.[30] An indictment for grand larceny in stealing money from the person need not aver that it was stolen in the night-time; and a conviction may be sustained, if property of any value is taken, the statute making any taking from the person grand larceny.[31]

d. Larceny From a Dwelling-House, or Other Building.[32] Only the actual requirements for the crime, as laid down in the statute, need be stated. It is not necessary to allege facts not essential for the offense.[33] On the other hand any fact made essential by the statute must be alleged.[34] A description which is clear according to the ordinary meaning of words is sufficient. Thus a dwelling-house

15. Johnson *v.* People, 113 Ill. 99; State *v.* Clements, 82 Minn. 448, 85 N. W. 234; State *v.* Henn, 39 Minn. 464, 40 N. W. 564; People *v.* Hart, 35 Misc. (N. Y.) 182, 71 N. Y. Suppl. 492.

16. See also EMBEZZLEMENT.

17. Matter of Dempsey, 32 Misc. (N. Y.) 178, 65 N. Y. Suppl. 722; Young *v.* State, 45 Tex. Cr. 247, 75 S. W. 798; Elton *v.* State, 40 Tex. Cr. 339, 50 S. W. 379, 51 S. W. 245.

18. State *v.* Holton, 88 Minn. 171, 92 N. W. 541; Reg. *v.* Bailey, 7 Cox C. C. 179, Dears. & B. 121, 2 Jur. N. S. 1171, 26 L. J. M. C. 4, 5 Wkly. Rep. 48.

19. Terry *v.* State, 1 Wash. 277, 24 Pac. 447.

20. People *v.* Poggi, 19 Cal. 600; McCarty *v.* State, 45 Tex. Cr. 510, 78 S. W. 506; Wilbur *v.* Territory, 3 Wyo. 268, 21 Pac. 698.

21. State *v.* Barry, 77 Minn. 128, 79 N. W. 656; Com. *v.* Baturin, 22 Pa. Co. Ct. 161; Elton *v.* State, 40 Tex. Cr. 339, 50 S. W. 379, 51 S. W. 245.

22. People *v.* Poggi, 19 Cal. 600.

23. Caskey *v.* State, (Tex. Cr. App. 1899) 50 S. W. 703.

24. Purcelly *v.* State, 29 Tex. App. 1, 13 S. W. 993.

25. See also ROBBERY.

26. Mukes *v.* Com., (Ky. 1893) 21 S. W. 529; Chitwood *v.* State, 44 Tex. Cr. 439, 71 S. W. 973; Brown *v.* State, (Tex. Cr. App. 1893) 22 S. W. 24; Schanz *v.* State, 17 Wis. 251.

Illustration.— Thus if the taking is shown to have been from the person of the owner, there need not be an explicit allegation that the taking was from the person. State *v.* Graham, 65 Iowa 617, 22 N. W. 897; Com. *v.* Sherman, 105 Mass. 169; Com. *v.* Bonner, 97 Mass. 587.

27. Kerry *v.* State, 17 Tex. App. 178, 50 Am. Rep. 122.

28. State *v.* Lawrence, 20 Oreg. 236, 25 Pac. 638.

29. Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056 (against the owner's will); Eaton *v.* State, (Tex. Cr. App. 1897) 41 S. W. 604 (intent to steal).

30. Randall *v.* State, 53 N. J. L. 485, 22 Atl. 45.

31. Fallon *v.* People, 2 Abb. Dec. (N. Y.) 83, 2 Keyes 145 [*affirming* 6 Park. Cr. 256].

32. See also BURGLARY.

33. Bolling *v.* State, 98 Ala. 80, 12 So. 782; Heard *v.* State, 120 Ga. 848, 48 S. E. 311; Kimbrough *v.* State, 101 Ga. 583, 29 S. E. 39; Moseley *v.* State, 74 Ga. 404; Smith *v.* State, 60 Ga. 430; Irvin *v.* State, 37 Tex. 412.

Time of day.— It is not necessary to state a circumstance, like the time of day, which, although mentioned in the statute, is material only on the amount of punishment. State *v.* Harris, 119 N. C. 811, 26 S. E. 148.

34. State *v.* Savage, 32 Me. 583 (use of building); Hutchinson *v.* Com., 4 Metc. (Mass.) 359; Hopkins *v.* Com., 3 Metc. (Mass.) 460; Haggett *v.* Com., 3 Metc. (Mass.) 457 (time of day); Rex *v.* Etherington, 2 East P. C. 635, 2 Leach C. C. 671 (putting in fear).

may be described as a residence[35] or as a dwelling,[36] and a shop may be called such, although it is spoken of in the evidence as a store;[37] although where a difference between shop and store is made in the statute the right word must be used in the indictment.[38] A warehouse may be described as a storehouse.[39] The ownership must be stated correctly,[40] although it has been held that where the building is otherwise sufficiently described, as by stating a specific name by which it is known, the owner's name need not be given.[41] A person who hires a room in a house may be described as owner of the house when goods were taken from the room.[42] But the owner of the building who has leased it to another, in whose exclusive possession it is, cannot be described as owner.[43] An allegation of stealing from a house sufficiently charges larceny in a house and *vice versa*.[44] It has been held unnecessary to state all the facts necessary to a common-law indictment for larceny.[45]

e. Miscellaneous Offenses Kindred to Larceny. The same principle covers all statutory offenses akin to larceny; the indictment must charge all the essential statutory elements. An indictment for cutting timber covering all the language of the statute is sufficient,[46] but an indictment failing to allege the intent is defective.[47] An indictment for stealing a portion of an outstanding crop is good, under a statute punishing stealing part of such crop.[48] "Fraudulently took," being equivalent to "steal" in the statute, is sufficient without adding "stole."[49] Under a statute punishing one who severs and steals corn, fruit, etc., or other annual product, it is enough to allege a taking of one of the enumerated products without averring it to be an annual product, but if the product is not among those specified, such an averment is necessary.[50] It must be alleged that defendant had no right in the thing taken.[51] It is not sufficient to allege a taking in the field; the taking must be alleged to have been from the field.[52] Indictments upon certain English statutes by which it is made a crime to take deer from parks or fish preserved in a stream or pond have been considered in many decisions.[53] An indictment for larceny from the mail need not allege that the letter was intended to be delivered.[54] The indictment may allege both that defendant stole and that he embezzled the letter, where the statute makes the two acts identical.[55] In an indictment for the taking temporary use of an animal, the consent of the person having control must be negatived.[56] The statutory word

35. People *v.* Klammer, 137 Mich. 399, 100 N. W. 600.
36. State *v.* O'Neil, 21 Oreg. 170, 27 Pac. 1038.
37. Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333.
38. State *v.* Canney, 19 N. H. 135.
39. Martin *v.* State, 95 Ga. 478, 20 S. E. 271; State *v.* Sprague, 149 Mo. 409, 50 S. W. 901. But it has been held that a buggy-shed house may not be described as a wagon-shed house. Thompson *v.* State, 92 Ga. 448, 17 S. E. 265.
40. Markham *v.* State, 25 Ga. 52.
41. State *v.* Minck, 94 Minn. 50, 102 N. W. 207.
42. Farlinger *v.* State, 110 Ga. 313, 35 S. E. 152.
43. Trice *v.* State, 116 Ga. 602, 42 S. E. 1008.
44. Bailey *v.* State, 99 Ala. 143, 13 So. 566 [*modifying* Moore *v.* State, 40 Ala. 49]; People *v.* Klammer, 137 Mich. 399, 100 N. W. 600; U. S. *v.* Gassaway, 25 Fed. Cas. No. 15,190 1 Hayw. & H. 174; Rex *v.* White, 34 Nova Scotia 436.
45. Jefferson *v.* State, 117 Ga. 710, 45 S. E. 61.
46. Carl *v.* State, 125 Ala. 89, 28 So. 505.
47. McCord *v.* State, 79 Ala. 269.
48. Holly *v.* State, 54 Ala. 238.
49. McKinney *v.* State, (Tex. Cr. App. 1894) 28 S. W. 816.
50. State *v.* Allisbach, 69 Ind. 50.
51. State *v.* Ravenscraft, 62 Mo. App. 109.
52. State *v.* Nelson, 28 S. C. 16, 4 S. E. 792; State *v.* Shuler, 19 S. C. 140.
53. Wickes *v.* Clutterbuck, 2 Bing. 483, 3 L. J. C. P. O. S. 67, 10 Moore P. C. 63, 9 E. C. L. 670; Rex *v.* Mallinson, 2 Burr. 679, 2 Ld. Ken. 384; Rex *v.* Sadler, 2 Chit. 519, 18 E. C. L. 766; Reg. *v.* King, 1 D. & L. 721, 8 Jur. 271, 13 L. J. M. C. 43; Rex *v.* Edwards, 1 East 278; Rex *v.* Amey, R. & R. 372; Rex *v.* Carradice, R. & R. 153.
54. Hall *v.* U. S., 168 U. S. 632, 18 S. Ct. 237, 42 L. ed. 607.
55. Beery *v.* U. S., 2 Colo. 186; U. S. *v.* Byrne, 44 Fed. 188.

For indictments on the English act see Reg. *v.* Wynn, 2 C. & K. 859, 3 Cox C. C. 271, 1 Den. C. C. 365, 13 Jur. 107, 18 L. J. M. C. 51, 3 New Sess. Cas. 414, T. & M. 32, 61 E. C. L. 859; Reg. *v.* Ellms, R. & R. 141.

56. Blackman *v.* State, 98 Ala. 77, 13 So. 316. An allegation that defendant took the

"wilfully" need not be used in an indictment for killing cattle with intent to steal, since the other allegations necessarily import that the act was wilful.[57] In an indictment for defacing ear-marks on cattle with intent to steal, the ear-marks need not be described, nor the method of defacing alleged.[58] An indictment for taking ore from a mine must show that the ore was in the mine when taken.[59] In an indictment for buying cotton in the seed, the name of the owner of the cotton and the person from whom it was bought must be alleged.[60] For the offense of "stealing bank-bills knowing them to be such" the indictment must aver the knowledge.[61]

F. Variance[62] — **1. General Principles.** Where the evidence does not support the indictment, in that while it shows a larceny it indicates also that the larceny has been misdescribed in some material particular, there is a variance, and defendant must be acquitted.[63] If, however, the description is sufficiently full and definite to identify the transaction and to inform defendant of the charge, a mere technical inaccuracy of description will not make the indictment erroneous.[64]

temporary use of a buggy is surplusage, and does not vitiate the indictment. State *v.* Darden, 117 N. C. 697, 23 S. E. 106.

57. State *v.* Lowe, 56 Kan. 594, 44 Pac. 20.

58. State *v.* Lee, 17 Oreg. 488, 21 Pac. 455.

59. Reg. *v.* Trevenner, 2 M. & Rob. 476.

60. Russell *v.* State, 71 Ala. 348; Grattan *v.* State, 71 Ala. 344.

61. Gatewood *v.* State, 4 Ohio 386.

62. See, generally, Indictments and Informations, 22 Cyc. 450 *et seq.*

63. Com. *v.* Barrett, 28 Pa. Super. Ct. 112. And see *infra*, cases cited in this note. An indictment for stealing nineteen shillings is not supported by evidence of stealing one sovereign. Reg. *v.* Bird, 12 Cox C. C. 257. To describe a treasury note as bearing one per cent interest instead of one mill per centum was bad. U. S. *v.* Hardyman, 13 Pet. 176, 10 L. ed. 113. A charge of larceny of bills is not supported by proof of the stealing of bills or notes payable in current bills but not in money. Linnenden Case, 1 City Hall Rec. (N. Y.) 30. An indictment for stealing a plow is not supported by evidence of the stealing of a plowshare. State *v.* Cockfield, 15 Rich. (S. C.) 316. The taking of a deer skin severed from the body of the deer is not properly described as the taking of a slain deer. State *v.* Hemphill, 20 N. C. 241. An indictment for stealing a "steel strap" will not support a conviction for stealing a "steel trap." Snoga *v.* State, 46 Tex. Cr. 419, 80 S. W. 625. An indictment for stealing three one-gallon crocks of preserved pears will not support a conviction for stealing one three-gallon crock. People *v.* Kehoe, 19 N. Y. Suppl. 763. If an animal is described as dead, proof that it was taken alive is a variance. Reg. *v.* Roe, 11 Cox C. C. 554, 22 L. T. Rep. N. S. 414. And conversely if it is described as alive proof that it was dead when taken will not support the indictment. Rex *v.* Halloway, 1 C. & P. 128, 12 E. C. L. 84; Rex *v.* Edwards, R. & R. 370. An indictment for stealing a writ issued from the office of the court is not sustained by evidence of taking such a writ not yet issued. State *v.* McLeod, 5 Jones (N. C.) 318. An indictment for stealing bank-notes, properly described, can be supported only by evidence of taking bank-notes exactly answering to the description. Pomeroy *v.* Com., 2 Va. Cas. 342. An indictment for stealing a bottle of whisky is not supported by evidence that defendant drew the liquor from a cask into his own bottle brought with him for the purpose. Com. *v.* Gavin, 121 Mass. 54, 23 Am. Rep. 255.

64. *Georgia.*— Harvey *v.* State, 121 Ga. 590, 49 S. E. 674; Bone *v.* State, 120 Ga. 866, 48 S. E. 356; Brown *v.* State, 90 Ga. 454, 16 S. E. 204; Rivers *v.* State, 57 Ga. 28.

Kansas.— State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Nebraska.— Barnes *v.* State, 40 Nebr. 545, 59 N. W. 125.

West Virginia.—Fredrick *v.* State, 3 W. Va. 695.

England.— Rex *v.* Rawlins, 2 East P. C. 617.

Thus on an indictment for stealing "a person's garment commonly called a waterproof coat" proof of stealing a gum coat is sufficient. State *v.* Heck, 1 Marv. (Del.) 524, 41 Atl. 142. So an indictment for stealing one double-case silver watch is supported by evidence of taking from a jeweler's bench the works and the case of the watch, which had been separated for purposes of repair. Patterson *v.* State, 122 Ga. 587, 50 S. E. 489. And an allegation of "notes of a bank" covers bank-notes. State *v.* Vanderlip, 4 La. Ann. 444. So an indictment charging theft of national bank-bills was supported by evidence that state bank-bills were taken, where it appeared that the witnesses did not know a national bank-bill, and evidently meant bills issued by the national banks located in different states. Keating *v.* People, 160 Ill. 480, 43 N. E. 724. An indictment charging theft of treasury notes was supported by evidence that a gold certificate and several silver certificates were among the bills taken, and evidence that they were genuine. Keating *v.* People, 160 Ill. 480, 43 N. E. 724. An indictment for larceny described the property as a "cast iron balance

By statute it is often provided that an immaterial variance shall not prevent a conviction.[65]

2. UNNECESSARY DESCRIPTIVE ALLEGATIONS. When an allegation necessary for the description of the property is made unnecessarily precise, the description given, although unnecessary, must be exactly proved.[66] If, however, the entire allegation is an unnecessary one, so that it may be rejected as surplusage, variance in a part of the description is not material.[67] So when the unnecessary minute description is in the alternative, since the indictment is good without it and defendant is not misled, it is enough to prove either branch of the description.[68] It is usually unnecessary to describe the color of an animal, but if described it must be proved as stated.[69] It is unnecessary to describe the brand on an animal, but if the brand or its position on the animal is described the proof must correspond.[70]

wheel." The evidence was that the wheel had been broken up and converted into "old iron" by defendants to facilitate removal. This was no variance, since they really took the whole wheel. Gettinger *v.* State, 13 Nebr. 308, 14 N. W. 403. So a shoulder wrap may be described as a cape. Waller *v.* People, 175 Ill. 221, 51 N. E. 900. Pay checks as money orders. Barnes *v.* State, 46 Fla. 96, 35 So. 227. A "filled case" watch as gold. Glover *v.* State, 22 Fla. 493. A pair of pantaloons as a pair of pants. State *v.* Johnson, 30 La. Ann. 904. So under the description "fertilizer" one may prove either "phosphate fertilizer" or "fertilizer of phosphate," each meaning the same. State Elia, 108 La. 553, 32 So. 476. "Strain cloth" supported by evidence of "strainer cloth" (State *v.* Underwood, 77 N. C. 502), and "calf skin" by "kip skin" (State *v.* Campbell, 76 N. C. 261). To describe a note as being for twenty-three hundred dollars when it was for twenty-three hundred dollars and interest and taxes is an immaterial variance. State *v.* Fenn, 41 Conn. 590. An indictment for stealing money is supported by evidence of taking a pocket-book or trunk containing the money. Berry *v.* State, 10 Ga. 511; U. S. *v.* Lee, 26 Fed. Cas. No. 15,586, 4 Cranch C. C. 446. But see Johnson *v.* State, 32 Ark. 181. An indictment for stealing and carrying away a horse is supported by evidence that he was ridden, driven, or led away. Baldwin *v.* People, 2 Ill. 304.

65. Porter *v.* Com., 61 S. W. 16, 22 Ky. L Rep. 1657; Goodall *v.* State, 22 Ohio St. 203.

66. Lynch *v.* State, 89 Ala. 18, 7 So. 829; McLendon *v.* State, 121 Ga. 158, 48 S. E. 902; Hall *v.* State, 120 Ga. 142, 47 S. E. 519; Warrington *v.* State, 1 Tex. App. 168.

Applications of rule.— A sheet unnecessarily described as composed of wool must be proved to be made of wool; it is a variance if the sheet is part cotton. Alkenbrack *v.* People, 1 Den. (N. Y.) 80. So the marks on a pine log, unnecessarily alleged, must be proved. State *v.* Noble, 15 Me. 476. A charge of the larceny of a "Smith & Weston" revolver is not supported by evidence of the larceny of a "Smith & Wesson" revolver. Morgan *v.* State, 61 Ind. 447. So the charge of stealing "a certain United States currency note, commonly called a greenback bill, of the value and denomination of five dollars" is not supported by proof of the stealing of a "five dollar bill." Statum *v.* State, 9 Tex. App. 273. So it is unnecessary to describe money as "of the United States" but it must be proved when so described. Marshall *v.* State, 71 Ark. 415, 75 S. W. 584. "Buckskin gloves" is not supported by proof of "sheepskin gloves." McGee *v.* State, 4 Tex. App. 625. In the description "beef steer," the word "beef" is unnecessary, but it must be proved. Cameron *v.* State, 9 Tex. App. 332.

67. Hall *v.* State, 120 Ga. 142, 47 S. E. 519.

68. Thus under the description "a black or brown mare" it is sufficient to prove the taking of either a black or a brown mare. People *v.* Smith, 15 Cal. 408.

69. Hardy *v.* State, 112 Ga. 18, 37 S. E. 95; Hill *v.* State, 41 Tex. 253.

What is not a variance.— A hog was described as "black spotted" and it was proved that it was "black spotted" but "sandy colored generally"; this is not a variance. Cross *v.* State, 64 Ga. 443. So where an alleged red milch cow was shown to have white spots it is not a variance so long as the prevailing color is red. Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172. "Gray" is supported by evidence of "dark iron-gray." State *v.* Hill, 65 Mo. 84.

70. Hill *v.* State, 41 Tex. 253; Allen *v.* State, 8 Tex. App. 360; Sweat *v.* State, 4 Tex. App. 617; Courtney *v.* State, 3 Tex. App. 257; Priesmuth *v.* State, 1 Tex. App. 480.

Extent and limits of rule.— Where a brand is described as "P. A. R.," proof of "P. R. A." was held a variance (Ranjel *v.* State, 1 Tex. App. 461), and where a brand was described as on the hips, proof that it was on the ribs was a variance (Priesmuth *v.* State, 1 Tex. App. 480). A slight variance in the connection of the letters in a brand is not fatal. Stoneham *v.* State, 3 Tex. App. 594. And where the brand was described as a script "e" and one witness said figure "9" and another a "q" there was no substantial variance. Sweat *v.* State, 4 Tex. App. 617.

So of the ear-marks on an animal; they need not be described, but if described they must be proved.[71] Where an indictment charged theft of an appearance bond by a surety to escape liability thereon, the surety was not guilty under the indictment, unless he took the bond for the purpose alleged.[72]

3. OWNERSHIP. A variance in the ownership of the property as alleged is fatal at common law.[73] Under statutes, however, an immaterial variance is not fatal.[74]

4. QUANTITY OR NUMBER. Quantity and number are not ordinarily essential to be proved as alleged; and a variance as to the number or quantity or goods stolen is not fatal to conviction. Thus where an indictment charges the taking of several articles of the kind named, the proof may show the taking of a less number.[75] So where the indictment alleges the taking of a certain quantity, it is established by proof of taking a smaller quantity;[76] or, since the greater includes the less, by proof of taking a larger quantity.[77] Where the indictment alleges the taking of several articles, it may be supported by proof of the taking of any one of them.[78] If, however, the punishment depends on the number of things stolen, proof of

71. Robertson *v.* State, 97 Ga. 206, 22 S. E. 974; Wiley *v.* State, 74 Ga. 840; Crenshaw *v.* State, 64 Ga. 449.

Extent and limits of rule.— The description "a crop and underbit in each ear" is not supported by evidence of "a crop in each ear" (Wiley *v.* State, 74 Ga. 840), and "a crop off the left ear, and a split in the right ear" was not supported by evidence of a crop off the right ear and a split in the left (Robertson *v.* State, 97 Ga. 206, 22 S. E. 974). But where a horse was described as blemished in the left eye, and the blemish was in the right, the variance was not held fatal. Boyd *v.* Com., 59 S. W. 518, 22 Ky. L. Rep. 1017.

72. Counts *v.* State, (Tex. Cr. App. 1905) 89 S. W. 972.

73. *Alabama.*— Harris *v.* State, 60 Ala. 50.

California.— People *v.* Prather, 120 Cal. 660, 53 Pac. 259.

Illinois.— Barnes *v.* People, 18 Ill. 52, 65 Am. Dec. 699.

Indiana.— Bell *v.* State, 46 Ind. 453; King *v.* State, 44 Ind. 285.

Kentucky.— McBride *v.* Com., 13 Bush 337.

Maine.— State *v.* Furlong, 19 Me. 225.

Texas.— Williams *v.* State, (Cr. App. 1905) 84 S. W. 829; Green *v.* State, (Cr. App. 1895) 30 S. W. 220; Woods *v.* State, (Cr. App. 1893) 24 S. W. 99; Ganoway *v.* State, (Cr. App. 1893) 21 S. W. 46; Clark *v.* State, 29 Tex. App. 437, 16 S. W. 171; Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176; Littleton *v.* State, 20 Tex. App. 168; Fletcher *v.* State, 16 Tex. App. 635; Robinson *v.* State, 5 Tex. App. 519.

Virginia.— Jones *v.* Com., 17 Gratt. 563. See Halkem *v.* Com., 2 Va. Cas. 4.

See 32 Cent. Dig. tit. "Larceny," § 104.

What is not a variance.—An indictment for the theft of an animal alleged possession in W. The proof showed that W had temporarily gone away, leaving the animal on the range, and that he had requested his father to look after it, which he did, but allowing it to remain on the range. It was held that the indictment properly alleged the possession in W; the father having no special ownership in the animal. Parks *v.* State, (Tex. Cr. App. 1905) 89 S. W. 1064.

74. People *v.* Smith, 112 Cal. 333, 44 Pac. 663; State *v.* Harris, 42 La. Ann. 980, 8 So. 530.

75. *Alabama.*— Martin *v.* State, 125 Ala. 64, 28 So. 92.

Florida.— Raines *v.* State, 42 Fla. 141, 28 So. 57.

Indiana.— Edson *v.* State, 148 Ind. 283, 47 N. E. 625.

Iowa.— State *v.* Hessian, 58 Iowa 68, 12 N. W. 77.

Mississippi.—Swinney *v.* State, 8 Sm. & M. 576.

Missouri.— State *v.* Thompson, 137 Mo. 620, 39 S. W. 83.

Texas.— Kersh *v.* State, 45 Tex. Cr. 451, 77 S. W. 790; Alderson *v.* State, 2 Tex. App. 10.

Applications of rule.— So on an indictment for larceny of three hogs of A, and the proof was that defendant took one each of A, B, and C, a conviction was justified, in spite of the variance as to the second and third hog. State *v.* Evans, 23 S. C. 209. *Contra*, in Massachusetts, where a collective value is stated; on the ground that the articles not found to be taken might be the only ones to which the grand jury attached value. Com. *v.* Lavery, 101 Mass. 207.

76. *Delaware.*— State *v.* Heck, 1 Marv. 524, 41 Atl. 142.

Georgia.— Green *v.* Hater, 114 Ga. 918, 41 S. E. 55.

North Carolina.— State *v.* Harris, 64 N. C. 127.

Pennsylvania.— Com. *v.* Dingman, 26 Pa. Super. Ct. 615.

Texas.— Green *v.* State, (Cr. App. 1905) 86 S. W. 332; Pones *v.* State, 43 Tex. Cr. 201, 63 S. W. 1021; Jones *v.* State, (Cr. App. 1898) 44 S. W. 162.

77. State *v.* Martin, 82 N. C. 672.

78. Grissom *v.* State, 40 Tex. Cr. 146, 49 S. W. 93; Davis *v.* State, 32 Tex. Cr. 377, 23 S. W. 794.

Application of rule.— So on a charge of stealing "national bank currency and United States treasury notes" the jury may find

stealing one of the articles described will not support a general verdict of guilty.[79] So where the indictment charges the stealing of several articles, and is defective as to some of the articles, it will nevertheless support a conviction for stealing those articles as to which the allegations are sufficient. This is true where some of the articles named are not subjects of larceny,[80] or are not properly or correctly described,[81] or where no value of them is alleged,[82] or the ownership is wrongly stated.[83] It is not necessary to prove the value alleged; but the goods may be proved of less value, provided the evidence shows the commission of the offense described.[84] The indictment need not describe all the articles taken by defendant at one time.[85] But it can only be supported by proof of taking one or more of the specific things described.[86] And where the indictment charged the taking of "one head of neat cattle" it could not be supported by evidence of the theft of two animals, neither of them identified with the one intended by the grand jury.[87]

5. Conviction on Indictment For Different Offense[88] — a. Conviction For Larceny on Indictment For Aggravated Offense. Under an indictment for aggravated larceny, such as larceny from the person or from the dwelling-house or for burglary or robbery, a conviction of larceny may be had if the aggravation is not proved,[89] or if it is insufficiently alleged in the indictment.[90] In the case of a statutory aggravation of larceny such a conviction cannot be had for petit larceny when under the statute no petit larceny could be committed under the circumstances charged,[91] and conversely under an indictment for larceny one cannot be convicted of a statutory offense which is petit larceny.[92] Nor can there be a con-

defendant guilty if he stole either. State *v.* Henry, 24 Kan. 457. *Contra*, State *v.* Collins, 72 N. C. 144.

79. State *v.* Bunten, 2 Nott & M. (S. C.) 441.

80. State *v.* Moore, 129 N. C. 494, 39 S. E. 626, 55 L. R. A. 96; Harvey *v.* Com., 23 Gratt. (Va.) 941; Reg. *v.* St. Denis, 8 Ont. Pr. 16.

81. Reed *v.* State, 88 Ala. 36, 6 So. 840; Com. *v.* Eastman, 2 Gray (Mass.) 76; State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716; Caskey *v.* State, (Tex. Cr. App. 1899) 50 S. W. 703.

82. State *v.* Vanderlip, 4 La. Ann. 444.

83. Bone *v.* State, 121 Ga. 147, 48 S. E. 986; State *v.* I. En, 10 Nev. 277.

84. McCorkle *v.* State, 14 Ind. 39; Com. *v.* Logan, 3 Brewst. (Pa.) 341; Moore *v.* State, (Tex. Cr. App. 1894) 24 S. W. 901; Moore *v.* State, (Tex. Cr. App. 1894) 24 S. W. 900. But an indictment for grand larceny, for stealing property of more than twenty-five dollars in value, is not sustained by proof of the theft of property of less than twenty-five dollars in value from the person, even though stealing from the person be grand larceny, regardless of the value of the stolen property, since grand larceny by stealing from the person is not described in the indictment. Rhodihan *v.* People, 5 Park. Cr. (N. Y.) 395. The number may, however, become a descriptive allegation, and necessary to be proved. This was held in case of an indictment for stealing five certificates of shares of stock of a certain number; the court regarded this as the description of a series of uniformly numbered certificates, not supported by proof that there was one certificate for five shares. People *v.* Coon, 45 Cal. 672.

85. Jackson *v.* State, 14 Ind. 327.

86. Reg. *v.* Bond, 3 C. & K. 337, 4 Cox C. C. 231, 1 Den. C. C. 517, 14 Jur. 390, 19 L. J. M. C. 138, 4 New Sess. Cas. 143, T. & M. 242.

87. Coward *v.* State, 24 Tex. App. 590, 7 S. W. 332.

88. See, generally, Indictments and Informations, 22 Cyc. 466 *et seq.*

89. *Alabama.*— Storrs *v.* State, 129 Ala. 101, 29 So. 778; Morris *v.* State, 97 Ala. 82, 12 So. 276; Borum *v.* State, 66 Ala. 468; Allen *v.* State, 58 Ala. 98.

Georgia.— Brown *v.* State, 90 Ga. 454, 16 S. E. 204; Polite *v.* State, 78 Ga. 347.

Indiana.— Wyatt *v.* State, 1 Blackf. 257.

Iowa.— State *v.* Nordman, 101 Iowa 446, 70 N. W. 621.

Massachusetts.— Com. *v.* Lowery, 149 Mass. 67, 20 N. E. 697; Jennings *v.* Com., 105 Mass. 586; Com. *v.* Hope, 22 Pick. 1.

Minnesota.— State *v.* Eno, 8 Minn. 220.

Missouri.— State *v.* Brannon, 55 Mo. 63, 17 Am. Rep. 643.

Nebraska.— Stevens *v.* State, 19 Nebr. 647, 28 N. W. 304.

New York.— People *v.* McGowan, 17 Wend. 386.

Oregon.— State *v.* Taylor, 3 Oreg. 10.

Tennessee.— Fanning *v.* State, 12 Lea 651; Williams *v.* State, 1 Tenn. Cas. 473.

Vermont.— State *v.* Brady, 14 Vt. 353.

Virginia.— Clarke *v.* Com., 25 Gratt. 908.

England.— Reg. *v.* Butterworth, R. & R. 387.

90. State *v.* Langford, 55 S. C. 322, 33 S. E. 370, 74 Am. St. Rep. 746; Davis *v.* State, 3 Coldw. (Tenn.) 77.

91. Pinckard *v.* State, 62 Ala. 167; Gregg *v.* State, 55 Ala. 116; State *v.* Davidson, 73 Mo. 428; Roberts *v.* State, 33 Tex. Cr. 83, 24 S. W. 895.

92. King *v.* State, 54 Ga. 184.

viction of grand larceny when the statutory offense charged is only a misdemeanor.[93] Upon this principle there can be no conviction of a crime not charged in the indictment, as of other property than that described.[94]

b. Conviction on Indictment For Larceny[95] — (I) *Conviction For Different Crime.* Under an indictment for larceny one cannot at common law be found guilty of a different offense, such as embezzlement,[96] obtaining by false pretenses,[97] receiving stolen goods,[98] or other new statutory offense kindred to larceny.[99]

(II) *Conviction Where Evidence Proves Aggravated Offense.* Under an indictment for larceny there may be a conviction, although the evidence proves the commission of a higher offense which includes larceny, as robbery or larceny from a dwelling-house.[1] And so where a specially severe punishment is provided by statute for larceny of an animal, one who steals an animal may be indicted and convicted of common-law larceny.[2]

XIV. EVIDENCE.[3]

A. Presumptions and Burden of Proof — 1. Proof Beyond Reasonable Doubt. As in all criminal cases, defendant cannot be convicted unless he has been proved beyond all reasonable doubt to have committed the offense.[4] The prosecution must establish each of the essential elements of the crime,[5] and that the goods in the possession of defendant were the identical goods alleged to have been stolen;[6] and where the evidence is consistent with defendant's innocence, he should be acquitted.[7]

2. Burden of Proof of the Offense. The burden of proof therefore does not shift to defendant no matter what presumptions may arise as to any element of the crime. So the prosecution must disprove beyond a reasonable doubt any

93. Allen *v.* State, 86 Ga. 399, 12 S. E. 651.

94. State *v.* McGraw, 74 Mo. 573.

95. See, generally, Indictments and Informations, 22 Cyc. 466 *et seq.*

96. Fulton *v.* State, 13 Ark. 168; State *v.* Stone, 68 Mo. 101; Taylor *v.* State, 25 Tex. App. 96, 7 S. W. 861.

97. People *v.* Dumar, 106 N. Y. 502, 13 N. E. 325; People *v.* Miller, 64 N. Y. App. Div. 450, 72 N. Y. Suppl. 253 [*reversed* on another point in 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546]; People *v.* Bough, 1 N. Y. Suppl. 298.

98. Ross *v.* State, 1 Blackf. (Ind.) 390; Logan *v.* State, 2 Tex. App. 408; Parchman *v.* State, 2 Tex. App. 228, 27 Am. Rep. 435.

99. *Alabama.*— Holcombe *v.* State, 69 Ala. 218.

Delaware.— State *v.* Palmer, 4 Pennew. 126, 53 Atl. 359.

Kansas.— State *v.* Bellamy, 63 Kan. 144, 65 Pac. 274.

Louisiana.— State *v.* Gouvernale, 112 La. 956, 36 So. 817; State *v.* Fruge, 106 La. 694, 31 So. 323.

Texas.—Wilkins *v.* State, (Cr. App. 1900) 55 S. W. 819; Long *v.* State, 39 Tex. Cr. 461, 46 S. W. 821, 73 Am. St. Rep. 954; Smith *v.* State, (Cr. App. 1895) 29 S. W. 785; Nichols *v.* State, 28 Tex. App. 105, 12 S. W. 500; Beavers *v.* State, 14 Tex. App. 541. But see Marshall *v.* State, 4 Tex. App. 549.

1. *Georgia.*— Green *v.* State, 119 Ga. 120, 45 S. E. 990; Mattox *v.* State, 115 Ga. 212, 41 S. E. 709; Gardner *v.* State, 105 Ga. 662, 31 S. E. 577; Willis *v.* State, 102 Ga. 572, 28 S. E. 917.

Kansas.— State *v.* Tofte, 59 Kan. 753, 54 Pac. 1062.

Missouri.— State *v.* Keeland, 90 Mo. 337, 2 S. W. 442.

New York.— People *v.* Smith, 57 Barb. 46.

Texas.— Skipworth *v.* State, 8 Tex. App. 135. *Contra*, as to the crime of larceny from the person, on the ground that it is made by the statute an entirely distinct offense. Harris *v.* State, 17 Tex. App. 132.

England.— Rex *v.* Pearce, 2 Leach C. C. 1046, R. & R. 130; Rex *v.* Robinson, R. & R. 238.

2. Waters *v.* People, 104 Ill. 544; Lue *v.* Com., (Ky. 1891) 15 S. W. 664; State *v.* Snyder, 50 N. H. 150.

3. See, generally, Criminal Law, 12 Cyc. 379 *et seq.*

4. State *v.* Conlan, 3 Pennew. (Del.) 218, 50 Atl. 95; Shelton *v.* State, 12 Tex. App. 513; Hardeman *v.* State, 12 Tex. App. 350.

5. State *v.* Carr, 4 Pennew. (Del.) 523, 57 Atl. 370.

Felonious taking.— The prosecution must show that the taking was felonious. McCary *v.* State, (Tex. Cr. App. 1904) 80 S. W. 373; Pollard *v.* State, (Tex. Cr. App. 1904) 79 S. W. 26; Smith *v.* State, 45 Tex. Cr. 251, 76 S. W. 434; Tanner *v.* State, (Tex. Cr. App. 1898) 44 S. W. 489.

6. Bishop *v.* People, 194 Ill. 365, 62 N. E. 785.

7. State *v.* Seymour, 10 Ida. 699, 79 Pac. 825.

asserted consent or authority of the owner for the taking.[8] So the prosecution must prove beyond a reasonable doubt in a prosecution for larceny by bailee that the person named in the indictment, and not another as asserted by the defendant, was the bailor.[9] The felonious intent to steal at the time of taking being one of the elements of the offense, the prosecution must prove the existence of the felonious intent beyond a reasonable doubt.[10] So where defendant admits the taking, but introduces evidence of intoxication, the burden of proving the felonious intent in spite of the intoxication is on the prosecution;[11] and the same thing is true where, admitting the taking, he alleges that the goods were taken under a claim of right.[12] In one case it was said that the burden of proving that because of insanity or intoxication defendant had no felonious intent was upon defendant.[13] In the very same case it had rightly been said that the burden of proving the intent is on the prosecution. The court probably meant that the burden of introducing evidence to raise a doubt was on defendant, because of the presumption, mentioned in the opinion, that a man intends to do what he does.

3. Burden of Proof of an Affirmative Defense. Where defendant sets up a real affirmative defense, the burden of proof should rest upon him.[14]

B. Admissibility of Evidence in General — 1. Relevancy of Evidence. Irrelevant evidence, according to the general rules, is excluded.[15]

2. Nature of Evidence — a. Real Evidence. Any article which is involved in

8. Smith *v.* State, 45 Tex. Cr. 251, 76 S. W. 434; Johnson *v.* State, 34 Tex. Cr. 254, 30 S. W. 228.

9. Crain *v.* State, (Tex. Cr. App. 1900) 56 S. W. 912.

10. *California.*— People *v.* Perini, 94 Cal. 573, 29 Pac. 1027.

Delaware.— State *v.* Kavanaugh, 4 Pennew. 131, 53 Atl. 335.

Georgia.— Johnson *v.* State, 119 Ga. 563, 46 N. E. 839.

Iowa.— State *v.* Wallace, 47 Iowa 660.

Nebraska.— Haskins *v.* State, 46 Nebr. 888, 65 N. W. 894.

South Dakota.— State *v.* Weckert, 17 S. D. 202, 95 N. W. 924.

See 32 Cent. Dig. tit. "Larceny," § 129.

11. Davis *v.* State, 54 Nebr. 177, 74 N. W. 599.

12. State *v.* Weckert, 17 S. D. 202, 95 N. W. 924.

13. State *v.* Kavanaugh, 4 Pennew. (Del.) 131, 53 Atl. 335.

14. Thus where a defendant set up the statute of limitations, the burden of bringing his case within the statute was upon him, although if the time named in the statute had expired the burden of bringing in evidence that defendant had been absent and thus within an exception to the statute was upon the prosecution. The evidence being introduced, it was for defendant to disprove it. Com. *v.* Bates, 1 Pa. Super. Ct. 223.

15. *Alabama.*— Smith *v.* State, 103 Ala. 40, 16 So. 12.

Georgia.— Long *v.* State, 22 Ga. 40.

Kansas.— State *v.* Romain, 44 Kan. 719, 25 Pac. 225.

Nevada.— State *v.* Ward, 19 Nev. 297, 10 Pac. 133.

Texas.— Counts *v.* State, (Cr. App. 1905) 89 S. W. 972; Grant *v.* State, 42 Tex. Cr. 273, 58 S. W. 1026; Byrd *v.* State, 26 Tex. App. 374, 9 S. W. 759; Williamson *v.* State, 13 Tex. App. 514.

See 32 Cent. Dig. tit. "Larceny," § 130.

Applications of rule.— Thus evidence that the prosecuting witness and others who had defendant in charge the night before the trial were drinking and playing cards was excluded; so were questions asked for the purpose of discrediting a witness by disputing his answers. Tabor *v.* State, 34 Tex. Cr. 631, 31 S. W. 662, 53 Am. St. Rep. 726. So on a prosecution for cattle theft committed in a particular county, evidence of the purpose of the accused in going to that county three years before the commission of the offense is irrelevant. People *v.* Green, 143 Cal. 8, 76 Pac. 649. So on a prosecution for stealing cattle from a certain range, the question whether the owner had cattle on another range was irrelevant unless it was claimed that the cattle alleged to have been stolen were there. People *v.* Green, 143 Cal. 8, 76 Pac. 649. So evidence that defendant's father owned hogs similar to those taken is immaterial. Ledbetter *v.* State, (Tex. Cr. App. 1895) 29 S. W. 479. So evidence that a third party, not in court, confessed to have committed the larceny is inadmissible. Daniel *v.* State, 65 Ga. 199. Evidence that defendant during the progress of the trial was indicted for receiving the property which he is on trial for stealing is inadmissible. Burns *v.* State, (Tex. Cr. App. 1901) 66 S. W. 303. So the following evidence has been held inadmissible, that a stolen mule was seen in the pasture of defendant's father, without evidence to connect defendant therewith (Moore *v.* State, (Tex. Cr. App. 1894) 25 S. W. 626); on trial for feloniously carrying away standing corn, the fact that the field was watched the night prior to the alleged crime (Newsom *v.* State, 107 Ala. 133, 18 So. 206); on a prosecution for cattle theft, evidence of the

the testimony, whether the stolen property or other thing, may be introduced in evidence and exhibited to the jury.[16] But it is not necessary to produce the stolen goods in court; they may be described by witnesses.[17] Although in some jurisdictions it appears to be necessary to account for the non-production of written instruments.[18]

b. Hearsay. The ordinary rules of hearsay apply in a trial for larceny. Mere hearsay cannot be shown,[19] even a declaration *in articulo mortis*.[20] Statements

disposition of the animal after defendant's arrest and in his absence (Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456); in a prosecution for horse theft, evidence as to what became of the horses after defendant's arrest (Clay *v.* State, 40 Tex. Cr. 556, 51 S. W. 212); in a prosecution for larceny of money from a sewing-machine, evidence that defendant's mother had a similar machine (Childress *v.* State, 122 Ala. 21, 26 So. 162); on a prosecution for cattle theft, evidence that the brand was cut out of the hide after butchering, defendant not being implicated (State *v.* Huffman, 16 Oreg. 15, 16 Pac. 640); on an information for stealing a pocket-book dropped in a saloon, testimony as to what the complaining witness had done, at another saloon, in dropping his pocket-book and charging theft (People *v.* Long, 44 Mich. 296, 6 N. W. 673).

Evidence held relevant.— On the other hand evidence has been admitted as relevant in the following cases: On trial of an indictment for larceny of a horse, proof that he was accustomed to graze by day and return to his stable by night, but on the night in question did not return. Johnson *v.* State, 47 Ala. 62. Evidence that, a day or two before the larceny was committed, the person from whom the money was alleged to have been taken had a large amount in his possession. Van Syoc *v.* State, 69 Nebr. 520, 96 N. W. 266. Where larceny from a vault was alleged to have been committed on the fourth, evidence of the condition of the vault on the morning of the sixth, when the larceny was discovered. People *v.* Parsons, 105 Mich. 177, 63 N. W. 69. On the trial upon a charge of hog stealing, testimony that the hog had been killed by the accused, and its carcass secreted, and that he subsequently sent another person to cut it in pieces and carry them to his house, is admissible, as showing a felonious asportation of the property after the theft had been first begun, by the taking of the living hog, and the concealment of its carcass after it had been killed. State *v.* Bazile, 50 La. Ann. 1184, 24 So. 178. On a trial of one who received a mattress filled with goose feathers, promising to clean and return it, but who returned it filled with chicken feathers, evidence that defendant was shipping large quantities of goose feathers and receiving chicken feathers. Com. *v.* Williamson, 96 Ky. 1, 27 S. W. 812, 16 Ky. L. Rep. 197, 49 Am. St. Rep. 285. On a prosecution for stealing certain cattle, evidence is admissible that defendant or his companion said they would like to get the cattle in question to take care of. Shackelford *v.* State, (Tex. Cr. App. 1899) 53 S. W. 884. In a prosecution for larceny, a question asked of defendant on cross-examination as to whether or not he was connected with a circus which was in town on the day of the larceny was admissible as showing defendant's occupation and residence. Viberg *v.* State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22. Where, in a prosecution for grand larceny of money from a cash register, a mutilated and alleged counterfeit coin was clearly identified as having been taken from the register at the time the crime was committed and was found on defendant's person when he was arrested a short time thereafter, it was properly admitted in evidence to connect defendant with the offense, although it was not "lawful money of the United States" which defendant was charged with taking. People *v.* Peltin, 1 Cal. App. 612, 82 Pac. 980.

16. State *v.* Coover, 69 Kan. 382, 76 Pac. 845; Com. *v.* Burke, 12 Allen (Mass.) 182; State *v.* Miller, 144 Mo. 26, 45 S. W. 1104; Lamb *v.* State, 69 Nebr. 212, 95 N. W. 1050. Thus on a trial for theft of a roll of money, the exhibition to the jury after identification by the prosecuting witness of a roll of paper, with a single bill wrapped around it, used by the thief to replace the roll taken, was properly allowed. Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

17. Thus parol evidence of the contents of stolen notes may be given without accounting for their non-production. People *v.* Holbrook, 13 Johns (N. Y.) 90; Moore *v.* Cone, 2 Leigh (Va.) 701.

18. U. S. *v.* Lodge, 26 Fed. Cas. No. 15,622, 4 Cranch C. C. 673; Rex *v.* Aickles, 2 East P. C. 675, 1 Leach C. C. 294.

19. Long *v.* State, 44 Fla. 134, 32 So. 870; Wiggins *v.* People, 4 Hun (N. Y.) 540. A witness cannot, on a trial for larceny, testify that the day after the theft the person from whom the property was stolen, in the absence of defendant, identified and claimed it. Anderson *v.* State, 14 Tex. App. 49. On trial for horse stealing, evidence that the alleged owner of the horse went to the livery stable where he was, and took him away in defendant's absence, claiming to own him, is inadmissible in the absence of any testimony by the alleged owner himself as to the ownership and identity of the horse, and its admission is reversible error. Cannada *v.* State, 29 Tex. App. 537, 16 S. W. 341.

20. Rex *v.* Lloyd, 4 C. & P. 233, 19 E. C. L. 491.

which are part of the *res gestæ* may be shown.[21] Evidence that a witness had given an account of the transaction on the day after the crime similar to that given at the trial cannot be introduced, where no evidence of a contradictory statement by the witness has been offered.[22]

c. Evidence of Other Crimes.[23] It is not permissible to show that defendant had committed other crimes as tending to show him guilty of the larceny for which he was indicted.[24] *A fortiori* evidence of an independent offense of some other person is immaterial.[25] In accordance with this general principle, evidence is inadmissible that defendant committed an independent theft, either before or after the one with which he is charged.[26] So the possession of other stolen goods cannot be shown.[27] The evidence offered is not objectionable on this ground if in fact it does not tend to raise suspicion of another crime.[28] In certain cases, however, where evidence of another crime is incidental to the proof of the crime in question it will be received. The evidence may be received as part of the *res gestæ*, when the two thefts were committed upon the same occasion,[29] or to prove the intent, when that is denied.[30] So resistance to arrest may be shown, although it involves the fact that in resisting defendant killed an officer,[31] and a former conviction may be shown to disprove good character.[32] Other instances in which evidence of other offenses was held admissible are set out in the notes.[33]

21. State *v.* Chrétien, 35 La. Ann. 1031; State *v.* Lemon, 92 N. C. 790. A witness testified to seeing defendant one evening near the scene of the larceny. Another witness was allowed, in order to fix the date, to testify to the time of a conversation he had with the first witness, a few days later. State *v.* Dunn, 109 Iowa 750, 80 N. W. 1068.

22. Reese *v.* State, 43 Tex. Cr. 539, 67 S. W. 325.

23. See, generally, CRIMINAL LAW, 12 Cyc. 405 *et seq.*

24. As for instance to break down his character, by showing that he had been arrested for passing counterfeit money (Smith *v.* State, 10 Ind. 106), or for a fraudulent mortgage (Gillespie *v.* People, 176 Ill. 238, 52 N. E. 250).

25. As that the person from whom defendant claimed to have bought the stolen horse had stolen other horses (People *v.* Cline, 83 Cal. 374, 23 Pac. 391), or that defendant's mother kept a house of ill fame (McClure *v.* Com., 81 Ky. 448).

26. *California.*— People *v.* Hartman, 62 Cal. 562.

Missouri.— State *v.* Reavis, 71 Mo. 419; State *v.* Daubert, 42 Mo. 242.

New York.— People *v.* Justices Ct. Spec. Sess., 10 Hun 158.

Oregon.— State *v.* O'Donnell, 36 Oreg. 222, 61 Pac. 892.

Texas.— Gilbraith *v.* State, 41 Tex. 567; Tijerina *v.* State, 45 Tex. Cr. 182, 74 S. W. 913; Grant *v.* State, 42 Tex. Cr. 273, 58 S. W. 1026; Wilson *v.* State, 41 Tex Cr. 115, 51 S. W. 916; Spillman *v.* State, (Cr. App. 1898) 44 S. W. 150; Isham *v.* State, (Cr. App. 1897) 41 S. W. 622; Kelley *v.* State, 18 Tex. App. 262.

Vermont.— State *v.* Kelley, 65 Vt. 531, 27 Atl. 203, 36 Am. St. Rep. 884.

See 32 Cent. Dig. tit. "Larceny," § 131.

Illustration.— Where a mule was stolen from the residence of the owner upon Saturday night, and upon the next night again from the residence of B, it was held that the fact that the accused had carried the mule to the house of B on Sunday morning, and that he assisted in stealing it on Sunday night, was no evidence that he had stolen it the night before. State *v.* Vinson, 63 N. C. 335.

27. Nixon *v.* State, 31 Tex. Cr. 205, 20 S. W. 364; Reg. *v.* Oddy, 5 Cox C. C. 210, 2 Den. C. C. 264, 15 Jur. 517, 20 L. J. M. C. 198, T. & M. 593.

28. Green *v.* Com., 24 S. W. 623, 15 Ky. L. Rep. 536.

29. *California.*— People *v.* Taylor, (1902) 69 Pac. 292.

Georgia.— Mattox *v.* State, 115 Ga. 212, 41 S. E. 709.

New York.— Haskins *v.* People, 16 N. Y. 344.

Texas.— Bonners *v.* State, (Cr. App. 1896) 35 S. W. 650; Holmes *v.* State, 20 Tex. App. 509.

England.— Rex *v.* Rooney, 7 C. & P. 517, 32 E. C. L. 736.

See 32 Cent. Dig. tit. "Larceny," § 131.

30. People *v.* Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846; People *v.* Hughes, 91 Hun (N. Y.) 354, 36 N. Y. Suppl. 493; State *v.* White, 89 N. C. 462; Robinson *v.* State, (Tex. Cr. App. 1898) 48 S. W. 176.

31. Willingham *v.* State, (Tex. Cr. App. 1894) 26 S. W. 834.

32. Reg. *v.* Shrimpton, 3 C. & K. 373, 5 Cox C. C. 387, 2 Den. C. C. 319, 15 Jur. 1089, 21 L. J. M. C. 37, T. & M. 627.

33. Under an indictment for larceny of tobacco, the property of R, it was competent for the prosecution to prove the loss of other tobacco in the neighborhood, to account for the fact that the quantity of tobacco found in the possession of defendants exceeded that lost by R, and it was not necessary to instruct the jury as to the purpose for which the testimony was admitted. Slaughter *v.*

d. Marks and Brands — (I) *Identifying Marks on Goods in General.* In establishing the identity of stolen goods, identifying marks may be proved. This may be done by actually introducing the goods as marked; and it has been held that testimony as to the marks cannot be introduced without producing the goods themselves or accounting for failure to do so.[34] But this application of the "best evidence rule" is not usually made in this country, and parol evidence of the marks may be freely introduced.[35]

(II) *Marks on Cattle.* Marks on cattle may be proved to identify the cattle and to prove the ownership.[36] Such marks do not need to be recorded in order to be admissible for any purpose for which they are competent.[37]

(III) *Brands on Cattle.* In several states brands may be duly recorded, and the recorded brand may be introduced to prove ownership; but by special provision of the statute an unrecorded brand cannot be admitted to prove ownership.[38] The recording of the brand can be proved only by the record itself;[39] but proof of any sort may be introduced to show that the animal in question bore the brand; as for instance pieces of hide which when placed together show the brand.[40] The statute requires that the part of the animal on which the brand is placed should be designated. It is not enough to designate two or more parts in the alternative,[41] but it has been held unnecessary to specify the side.[42] The brand may be assigned; and it is evidence of ownership of the owner of the brand, not of the one who originally recorded it.[43] A brand is not admissible to prove ownership which was not recorded until after the alleged taking.[44] So where two brands are recorded by the same person, neither can be admitted to prove owner-

Com., 58 S. W. 588, 22 Ky. L. Rep. 679. In a prosecution for cattle theft, testimony that defendant confessed to the witness that he had thrown poison into a yard on a certain date for the purpose of killing certain dogs which he was afraid would bark at him while going by with the cows in controversy, and so hinder the theft, is admissible as bearing on the offense charged, although it also shows a separate and distinct offense. Parker *v.* State, 43 Tex. Cr. 526, 67 S. W. 121. On indictment for larceny a witness for the prosecution who had feigned complicity in the crime was asked by the prosecuting attorney whether there had been a good deal of trouble from stealing in that vicinity. The answer tended to explain why the witness had feigned complicity. It was held that it could not have prejudiced the accused, as tending to prove him guilty of larcenies other than that with which he was charged. People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799.

34. Reg. *v.* Farr, 4 F. & F. 396.

35. State *v.* Moore, 52 La. Ann. 605, 26 So. 1001; State *v.* Kiger, 115 N. C. 746, 20 S. E. 456.

36. Howard *v.* State, 108 Ala. 571, 18 So. 813; State *v.* Crow, 107 Mo. 341, 17 S. W. 745.

Extent and limits of rule.— So evidence that the ear-mark on hog's ears found in defendant's possession was not defendant's mark is admissible. State *v.* Southern, 48 La. Ann. 628, 19 So. 668. In State *v.* Lee, 17 Oreg. 488, 21 Pac. 455, a question as to marks was ruled out because it was defective in form.

37. Lee *v.* State, (Tex. Cr. App. 1901) 65 S. W. 540; Gear *v.* State, (Tex. Cr. App. 1897) 42 S. W. 285; Wyers *v.* State, 22 Tex. App. 258, 2 S. W. 722; Kelly *v.* State, 1 Tex. App. 628.

38. Territory *v.* Smith, (N. M. 1904) 78 Pac. 42; Poag *v.* State, 40 Tex. 151; Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946; Lockwood *v.* State, (Tex. Cr. App. 1894) 26 S. W. 200.

As to what is sufficient record of a brand see Dickson *v.* Territory, 6 Ariz. 199, 56 Pac. 971; Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656; Lee *v.* State, (Tex. Cr. App. 1901) 65 S. W. 540; McGrew *v.* State, 31 Tex. Cr. 336, 20 S. W. 740; Thompson *v.* State, 26 Tex. App. 466, 9 S. W. 760; Byrd *v.* State, 26 Tex. App. 374, 9 S. W. 759.

39. Elsner *v.* State, 22 Tex. App. 687, 3 S. W. 474.

40. Hendricks *v.* State, (Tex. Cr. App. 1900) 56 S. W. 55.

41. Steed *v.* State, 43 Tex. Cr. 567, 67 S. W. 328 (jaw, shoulder, or side); Reese *v.* State, 43 Tex. Cr. 539, 67 S. W. 325 (shoulder or side); Massey *v.* State, 31 Tex. Cr. 91, 19 S. W. 908 (shoulder or thigh).

42. Hayes *v.* State, 30 Tex. App. 404, 17 S. W. 940 (left or right side); Thompson *v.* State, 25 Tex. App. 161, 7 S. W. 589.

43. Chavez *v.* Territory, 6 N. M. 455, 30 Pac. 903.

44. Unsell *v.* State, 39 Tex. Cr. 330, 45 S. W. 1022; Turner *v.* State, 39 Tex. Cr. 322, 45 S. W. 1020; Groom *v.* State, 23 Tex. App. 82, 3 S. W. 668. But see Harvey *v.* State, 21 Tex. App. 178, 17 S. W. 158.

Road-brand.— Similarly where the statute provides that a road-brand must be placed on cattle and recorded before they are driven beyond the limits of the state, the record of a brand made after the removal of the cattle is unauthorized by law, and is inad-

ship.[45] Evidence that two persons had recorded the same brand is admissible as tending to disprove ownership in one of them.[46] That the bill of sale of a stolen animal, executed by defendant, described the brand on the animal as different from the one used by the owner, does not render it inadmissible in a prosecution for the theft, but merely affects its weight.[47] Evidence of a brand on a cow claimed to be the mother of a stolen calf is not admissible in a prosecution for the theft of the calf.[48] Evidence of the state that a calf was branded with the owner's brand after its recovery from defendant, charged to have stolen it, is inadmissible in a prosecution for the theft.[49] Although an unrecorded brand cannot be admitted to prove ownership, it is admissible as evidence identifying the stolen property, the ownership being established by other testimony.[50] Therefore where an unrecorded brand is shown to have been used by the alleged owner defendant may show that it had also been used by another person, in order to raise a doubt as to the identity.[51]

e. Bill of Sale of Goods. A bill of sale of the stolen property may be admissible in evidence for several purposes. A bill of sale to the alleged owner may be introduced to prove ownership,[52] and a bill of sale to an independent third person may be introduced to disprove ownership in the alleged owner.[53] A bill of sale of the goods received by defendant at the time he took the goods is admissible in his behalf.[54] On the other hand, a bill of sale found in defendant's possession and shown to be a forgery is admissible against him.[55] A bill of sale of the goods given by defendant to a purchaser from him is admissible in his favor to prove *bona fides*.[56] On the other hand, a bill of sale given by defendant may be introduced in evidence against him.[57] The bill of sale is equally admissible in evidence, although not acknowledged and recorded.[58]

f. Acts of the Accused — (i) *Evidence on Behalf of the State.* The acts of defendant after the taking, so far as they have a bearing on the issue, are admissible in evidence. Thus evidence may be given of the flight of the accused after the theft.[59] So evidence is admissible that the accused surrendered the

missible to prove ownership. Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318.

45. Turner *v.* State, 39 Tex. Cr. 322, 45 S. W. 1020.

46. Massey *v.* State, 1 Tex. App. 563.

47. Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946.

48. Wallace *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1102. See, however, Black *v.* State, 38 Tex. Cr. 58, 41 S. W. 606; Thurmond *v.* State, 37 Tex. Cr. 422, 35 S. W. 965.

49. Wallace *v.* State, (Tex. Cr. App. 1902) 66 S. W. 1102.

50. Brooke *v.* People, 23 Colo. 375, 48 Pac. 502; Chestnut *v.* People, 21 Colo. 512, 42 Pac. 656; Johnson *v.* State, 73 Ga. 128; State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433; Poage *v.* State, 43 Tex. 454; Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456; Steed *v.* State, 43 Tex. Cr. App. 567, 67 S. W. 328; Lockwood *v.* State, 32 Tex. Cr. 137, 22 S. W. 413; Tittle *v.* State, 30 Tex. App. 597, 17 S. W. 1118; Coffelt *v.* State, 19 Tex. App. 436; Priesmuth *v.* State, 1 Tex. App. 480.

51. Myers *v.* State, 24 Tex. App. 334, 6 S. W. 194.

52. Wilson *v.* State, 32 Tex. Cr. 22, 22 S. W. 39.

When not evidence of ownership.— A bill of sale to a certain company is no evidence of ownership of another company, when the two are not identified. Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624. A bill of sale of a given number of cattle of a certain brand, which does not include all cattle so branded, does not constitute evidence of ownership of any particular beast so branded. Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624.

53. Wells *v.* State, 11 Nebr. 409, 9 N. W. 552.

54. Buchanan *v.* State, 26 Tex. App. 52, 9 S. W. 57.

55. Territory *v.* Doyle, 7 Mont. 245, 14 Pac. 671; Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481.

56. Farley *v.* State, 57 Ind. 331.

In Texas a statute requires that a bill of sale shall be taken by a butcher; in a prosecution for theft of cattle which were sold by defendant to a butcher, the bill of sale must be produced or accounted for. Edwards *v.* State, (App. 1891) 16 S. W. 418.

57. Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342; Williams *v.* State, 30 Tex. App. 153, 16 S. W. 760; Abrigo *v.* State, 29 Tex. App. 143, 15 S. W. 408.

58. Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946; Lockwood *v.* State, 32 Tex. Cr. 137, 22 S. W. 413; Wilson *v.* State, 32 Tex. Cr. 22, 22 S. W. 39; Morrow *v.* State, 22 Tex. App. 239, 2 S. W. 624.

59. *Alabama.*— Viberg *v.* State, 138 Ala. 100, 35 So. 53, 100 Am. St. Rep. 22.

stolen property,[60] voluntarily paid its value,[61] was found going to the place where it was concealed,[62] absconded with the proceeds,[63] or cashed the draft paid for the stolen goods, which were known to have been sold after the theft.[64] Possession of implements for the commission of crime may be shown.[65] Concealment of the stolen goods by defendant may be shown,[66] and also his disposal of the property.[67] Evidence that defendant attempted to borrow money, after the larceny, is admissible, but not that another, not shown to be authorized by him, did so.[68] Evidence of attempts by the accused to intimidate a witness for the prosecution is admissible.[69]

(II) *Evidence in Behalf of Defendant.* Conduct of defendant may sometimes be shown in defense; as that he assisted an officer in pursuit of the stolen property.[70] So on a prosecution for stealing a heifer, where defendant claimed that he had lost a heifer and took the one in question in the belief that it was his, evidence is admissible that defendant had hunted for his heifer, and of his declarations while doing so.[71]

g. Confessions[72] and Declarations[73] of the Accused — (I) *As Evidence Against Accused.* Confessions and incriminating declarations of the accused,

Georgia.— Sewell *v.* State, 76 Ga. 836.
Iowa.— State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639.
Oregon.— State *v.* Lee, 17 Oreg. 488, 21 Pac. 455.
Texas.— Gilleland *v.* State, 24 Tex. App. 524, 7 S. W. 241.
United States.— U. S. *v.* Jackson, 29 Fed. 503.
See 32 Cent. Dig. tit. "Larceny," § 140.

60. Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163; Brown *v.* State, 43 Tex. Cr. 524, 67 S. W. 112.

61. State *v.* Furr, 121 N. C. 606, 28 S. E. 552.

62. Nash *v.* State, (Tex. Cr. App. 1898) 47 S. W. 649.

63. Com. *v.* Hurd, 123 Mass. 438.

64. Hargrove *v.* State, (Tex. Cr. App. 1901) 65 S. W. 1070.

65. Thus possession of burglars' tools by defendant may be shown on a trial for larceny from a dwelling-house. State *v.* Davis, 80 Mo. 53 [*affirming* 14 Mo. App. 198]. So where in a trial for larceny of a diamond ring, the evidence shows that while defendants were in the store of the prosecuting witness the ring was stolen, and an imitation diamond ring substituted for it, jewelry containing similar imitation diamonds, afterward found in defendants' possession, is admissible in evidence for the purpose of showing that defendants had the means of committing the crime charged. Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085. So on a trial for the larceny of hogs carried by team from the place of the theft to another town, testimony that a team found on defendant's father's place, where defendant resided, made tracks found between the two towns the morning after the larceny, was properly admitted. State *v.* Wackernagel, 118 Iowa 12, 91 N. W. 761. So it has been held that evidence that a dray like defendant's carried off the goods at the time of the theft is admissible. Roberts *v.* State, 55 Ga. 220.

66. Bolling *v.* State, 98 Ala. 80, 12 So. 782; Reg. *v.* Mansfield, C. & M. 140, 5 Jur. 661, 41 E. C. L. 81.

67. See cases cited *infra*, this note.

Application of rule.— Where a stolen bill was not found on the person of defendant when arrested, evidence that he had spent the money was admissible. Fenner *v.* State, (Tex. Cr. App. 1892) 20 S. W. 355. Evidence that witnesses dug up bones on defendant's premises appearing to be those of a beef corresponding in size to that alleged to have been stolen by defendant was admissible as circumstantial evidence. Foster *v.* State, (Tex. Cr. App.) 1900) 56 S. W. 58. A telegram offering horses for sale, sent by defendant shortly after leaving the place where the larceny was committed, is admissible as tending to prove a desire to speedily dispose of property and flee. State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677. Where the proof of larceny is circumstantial, proof that defendant had an opportunity to put the stolen goods in the place where they were found is not rendered incompetent as incriminating evidence by proof that other persons also had such opportunity, since that circumstance merely weakens the probative force of the evidence. Padfield *v.* People, 146 Ill. 660, 35 N. E. 469. Evidence that a defendant charged with the theft of hogs shortly after the alleged theft sold dry salt pork, which was not identified as stolen property, did not tend to prove the commission of the offense, and hence its admission was error. Grant *v.* State, 42 Tex. Cr. 273, 58 S. W. 1026.

68. Childress *v.* State, 122 Ala. 21, 26 So. 162.

69. State *v.* Baden, 42 La. Ann. 295, 7 So. 582.

70. Pinkard *v.* State, 30 Ga. 757; Hinds *v.* State, 11 Tex. App. 238.

71. State *v.* Daley, 53 Vt. 442, 38 Am. Rep. 694.

72. See, generally, Criminal Law, 12 Cyc. 459 *et seq.*

73. See, generally, Criminal Law, 12 Cyc. 418 *et seq.*

if freely made, are admissible against him.[74] But a confession is not admissible if when it was made defendant was acting under duress, or under promise of some advantage held out to him.[75] Where no promise was made to him, the mere fact that he hoped by confession to escape punishment does not render the confession inadmissible.[76] Nor does the fact that he believed one of the surrounding crowd to be an officer about to arrest him prevent the introduction of his statement.[77] Where two persons are shown to be engaged in a common design, the declarations of one may be admitted against the other.[78] Declarations of defendant before the theft are also admissible against him.[79] No declarations are admissible unless they are in some way relevant to the issue.[80]

(II) *As Evidence in Favor of Accused.*[81] Under some circumstances declarations of defendant may be shown in defense. Thus his explanation of his possession of the stolen goods may be shown.[82] But not declarations not connected with the possession of the property.[83] And where defendant in a prosecution for larceny defends on the ground of title to the property, declarations by him, while in possession of the property, as to his source of title, are not admissible in his favor as *res gestæ*.[84]

h. Incriminating Circumstances. Any circumstances which tend to connect defendant with the offense, and are not in themselves inadmissible, may be proved. Thus the pecuniary need of defendant before the theft may be shown to establish a motive for the taking,[85] and possession of money immediately after the theft may be shown;[86] and particularly evidence of the possession of more property after the theft than before is admissible as tending to show that defendant secured the stolen property.[87] If the evidence applies to possession of money a considerable

74. *Georgia.*— Griffin *v.* State, 86 Ga. 257, 12 S. E. 409; Kimbrough *v.* State, 76 Ga. 786.

Massachusetts.— Com. *v.* Rowe, 105 Mass. 590.

Minnesota.— State *v.* Hogard, 12 Minn. 293.

Montana.— State *v.* Wells, (1905) 83 Pac. 476.

Nebraska.— Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056.

Texas.— Gibson *v.* State, (Cr. App. 1904) 83 S. W. 1119; McBroom *v.* State, (Cr. App. 1901) 61 S. W. 481; Richmond *v.* State, (Cr. App. 1898) 45 S. W. 495.

See 32 Cent. Dig. tit. "Larceny," § 141.

Applications of rule.— So on a prosecution for the larceny of money, evidence that defendant directed witnesses where the money was concealed, and that it was found where he directed them, is admissible. Rusher *v.* State, 94 Ga. 363, 21 S. E. 593, 47 Am. St. Rep. 175. So an anonymous letter, written by defendant to the prosecutor, advising the dropping of the prosecution, is admissible. Rumph *v.* State, 91 Ga. 20, 16 S. E. 104. A servant employed in a furniture store delivered certain carpets belonging to the store to a person to be carried away, it being in the line of the servant's employment to give out carpets for delivery; and on being confronted with the one to whom he delivered them, and in response to a recital to him by such person of the facts of the delivery, he denied the delivery, and claimed that he did not know such person. On a prosecution for larceny of the carpets, that the denial was competent evidence on behalf of the state as tending to show the delivery was not innocently made. People *v.* Cole, 141 Cal. 88, 74 Pac. 547.

75. Greer *v.* State, 31 Tex. 129.

76. Gentry *v.* State, 24 Tex. App. 80, 5 S. W. 660.

77. Lopez *v.* State, 37 Tex. Cr. 649, 40 S. W. 972.

78. Jackson *v.* State, 54 Ala. 234; Norsworthy *v.* State, 45 Tex. Cr. 339, 77 S. W. 803; Baker *v.* State, 80 Wis. 416, 50 N. W. 513.

79. Stephens *v.* State, (Tex. Cr. App. 1894) 26 S. W. 728.

80. Stevens *v.* State, (Tex. Cr. App. 1899) 49 S. W. 105; Barbee *v.* State, 30 Tex. App. 669, 18 S. W. 680.

81. See, generally, CRIMINAL LAW, 12 Cyc. 426 *et seq.*

82. Bryant *v.* State, 116 Ala. 445, 23 So. 40; State *v.* Young, 41 La. Ann. 94, 6 So. 468; People *v.* Shephard, 70 Mich. 132, 37 N. W. 925; Chambers *v.* State, 62 Miss. 108. And see State *v.* Strodemier, 40 Wash. 608, 82 Pac. 915.

83. Blount *v.* State, (Tex. Cr. App. 1894) 28 S. W. 950; Brooks *v.* State, 26 Tex. App. 184, 9 S. W. 562.

84. Allen *v.* State, 71 Ala. 5.

85. Sims *v.* State, (Tex. Cr. App. 1898) 45 S. W. 705. And see People *v.* Sullivan, 144 Cal. 471, 77 Pac. 1000; People *v.* Peltin, 1 Cal. App. 612, 82 Pac. 980.

86. State *v.* Thompson, 87 Iowa 670, 54 N. W. 1077; Summers *v.* State, 45 Tex. Cr. 423, 76 S. W. 762.

87. *Alabama.*— Martin *v.* State, 104 Ala. 71, 16 So. 82.

California.— People *v.* Sullivan, 144 Cal. 471, 77 Pac. 1000; People *v.* Kelly, 132 Cal. 430, 64 Pac. 563.

time after the theft it is irrelevant.[88] Where two persons are shown to have been connected together in an enterprise, the conduct of each is admissible against all.[89] Where, however, two are jointly indicted, the conduct of one cannot be put in evidence against the other unless their connection in the enterprise is first established.[90] But on the trial of an indictment for larceny, evidence that a co-defendant led a witness to the stolen property is admissible to prove when and how it was found, without proving a conspiracy between the prisoner on trial and such a defendant.[91] Evidence that defendant had opportunity to commit the offense is admissible.[92] Other incriminating circumstances may be shown.[93]

i. Other Evidence. Other evidence when offered in a prosecution for larceny is dealt with on general principles. Opinion evidence on a matter within the knowledge of the jury is inadmissible.[94] Where a statute makes it a felony to steal the notes of any particular incorporated bank, the act of incorporation becomes a public statute, and may be proved by the statute book.[95]

3. The Purpose of Evidence — a. Venue. The venue may be proved by inference; direct and positive proof is not required.[96]

Kansas.— State *v.* Grebe, 17 Kan. 458.

Massachusetts.— Com. *v.* Montgomery, 11 Metc. 534, 45 Am. Dec. 227.

Michigan.— People *v.* Herrick, 59 Mich. 563, 26 N. W. 767.

North Carolina.— State *v.* Bruce, 106 N. C. 792, 11 S. E. 475.

Wisconsin.— Perrin *v.* State, 81 Wis. 135, 50 N. W. 516.

See 32 Cent. Dig. tit. "Larceny," § 142.

88. Turner *v.* State, 124 Ala. 59, 27 So. 272.

89. People *v.* Garcia, (Cal. 1899) 59 Pac. 576; Lewis *v.* State, 4 Kan. 296.

90. O'Neil *v.* State, 42 Ind. 346.

91. State *v.* Bowers, 17 Iowa 46.

92. Smith *v.* State, 133 Ala. 145, 31 So. 806, 91 Am. St. Rep. 21; Roberts *v.* State, 55 Ga. 220. Thus where on a prosecution for larceny, prosecutor testified that, shortly before missing the money stolen, he heard a noise in the back room of his store, and defendant's brother came out and gave him ten cents, saying that he had broken a lamp chimney, which was on the staircase in the back room, and that thereafter, on searching the brother, he stated defendant had given him certain money found on him, and defendant stated that he had paid for the lamp chimney, the testimony was admissible as tending to show defendant had been secreted in the store and broken the chimney when coming down stairs to escape, and given his brother the money to pay for it. Barker *v.* State, 126 Ala. 69, 28 So. 685.

93. Conley *v.* State, 21 Tex. App. 495, 1 S. W. 454.

Illustration.— Thus on a trial for larceny committed in a railroad car evidence that the conduct of the accused and his traveling companion had excited attention and notice of the passengers in the same car was admissible. Martin *v.* State, 67 Nebr. 36, 93 N. W. 161. In a prosecution for theft, a certain handkerchief and big bale tobacco sack, to both of which defendant had access at the time of the theft, were admissible in evidence, after being identified as the handkerchief and sack in which the stolen property was found concealed on defendant's property. Flores *v.* State, (Tex. Cr. App. 1901) 63 S. W. 330. On trial for the theft of cattle, it was legitimate to show that certain witnesses, who testified that they assisted in carrying off the cattle at defendant's suggestion, were brought to or near a pasture in question by defendant, or by horses furnished by him. Wright *v.* State, (Tex. Cr. App. 1898) 44 S. W. 151. It may be shown that defendant knew the cattle of the prosecutor (Wright *v.* State, (Tex. Cr. App. 1898) 44 S. W. 151), that he stated that the key of his corn-crib, in which the stolen goods were eventually found, was mislaid (Hubbard *v.* State, 107 Ala. 33, 18 So. 225), and that stolen hides were found in a certain culvert (Kennon *v.* State, 46 Tex. Cr. 359, 82 S. W. 518). So the state may show that the prosecuting witness at the time of the larceny was in a drugged condition, and particularly the peculiar effects of the drug administered. State *v.* Buckley, 72 N. C. 358. On the other hand it was error to admit evidence of gambling by defendant (Martin *v.* State, 104 Ala. 71, 16 So. 82); evidence that defendant and the person from whom he claimed to have received the stolen goods during a journey had quarreled while on the trip (State *v.* Broderick, 61 Vt. 421, 17 Atl. 716); evidence on a trial for horse theft that defendant had traded for a horse more than a month before the theft (Hart *v.* State, (Tex. Cr. App. 1897) 40 S. W. 495). So where defendant, on a trial for theft of cattle, claimed that he had bought them, evidence that he had borrowed money, stating at the time that he wanted it to pay for cattle, was immaterial, in the absence of evidence that he used the proceeds of the loan to buy the cattle which it was claimed that he stole. Bratt *v.* State, (Tex. Cr. App. 1897) 41 S. W. 624.

94. Tyler *v.* State, 11 Tex. App. 388.

95. U. S. *v.* Porte, 27 Fed. Cas. No. 16,070, 1 Cranch C. C. 369.

96. Filson *v.* Territory, 11 Okla. 351, 67 Pac. 473.

b. Consent of the Owner. Circumstantial evidence is admissible to prove non-consent of the owner, at least if the owner cannot testify,[97] as when he is dead[98] or a convict in prison.[99] If, however, the owner testifies at the trial, it has been held that he must directly state that he did not consent.[1] Evidence offered by defendant to show consent must be relevant,[2] and must not be mere hearsay.[3]

c. Motive. Proper evidence to prove motive may be introduced, as that defendant was in need of money to pay his debts,[4] that he had no apparent means of livelihood,[5] or that he believed he had been overreached by the owner.[6] So where the defense of kleptomania was set up on the trial of an indictment for the larceny of pocket-knives, it was competent for the prosecution to show for the purpose of establishing a motive on the part of defendant that he had been in the habit of making presents of pocket-knives prior to the time of the theft charged.[7] And having shown that defendant knew that the prosecutor had a considerable sum of money, the amount of it may be proved.[8] Evidence that one charged with larceny was reputed at the time to be a person of property is inadmissible in his defense.[9]

d. Intent — (i) *Evidence in Behalf of State.* Evidence is admissible which tends to show that the intent of defendant was felonious. Thus evidence that he made inquiries or was informed as to the ownership of the property before he took it may be admitted to show that he knew he had no right to it.[10] So evidence of similar previous transactions may be admitted to show intent,[11] but not evidence of dissimilar dishonesty.[12] Evidence of the conduct of defendant before the taking may be admissible to show his intent, as that he was seen a day or two before, riding through the owner's pasture looking at his cattle,[13] or that he had declared it would be easy to steal the goods.[14] So evidence of defendant's

Extent and limits of rule.— Thus proof that the property was stolen in another county, and subsequently found in defendant's possession in the county in which he is tried, warrants a finding that it was brought into the latter county by defendant. Lyon *v.* State, (Tex. Cr. App. 1896) 34 S. W. 947. Where there is direct evidence of defendant's possession of the stolen horse in an adjoining county, and circumstantial evidence of his taking the same in the county of the trial, a verdict of guilty is warranted. State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677. But evidence that accused carried the goods stolen from a car into the county where the trial took place is insufficient to prove the venue in that county, where it did not appear that the larceny from the car occurred in that county. Williams *v.* State, 105 Ga. 743, 31 S. E. 749.

97. State *v.* Osborne, 28 Iowa 9; Van Syoc *v.* State, 69 Nebr. 520, 96 N. W. 266; Love *v.* State, 15 Tex. App. 563; Stewart *v.* State, 9 Tex. App. 321.

98. Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456.

99. Guin *v.* State, (Tex. Cr. App. 1899) 50 S. W. 350.

1. State *v.* Osborne, 28 Iowa 9 (*semble*); Rema *v.* State, 52 Nebr. 375, 72 N. W. 474; Spiars *v.* State, (Tex. Cr. App. 1902) 69 S. W. 533; Ridge *v.* State, (Tex. Cr. App. 1902) 66 S. W. 774; Wisdom *v.* State, 42 Tex. Cr. 579, 61 S. W. 926 [*overruling* Hoskins *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1003]; Good *v.* State, 30 Tex. App. 276, 17 S. W. 409; State *v.* Morey, 2 Wis. 494, 60 Am. Dec. 439.

2. Thus evidence that the owner of a mule had attempted to find a certain person for the purpose of having him take the mule to a named place is not admissible to show consent, on the prosecution of another, for the theft of the mule. Broomfield *v.* State, (Tex. Cr. App. 1903) 74 S. W. 915.

3. Evidence offered on behalf of one on trial for theft that the owner of the property was dead and had said that the accused had his consent to take it was properly excluded. Sneed *v.* State, 4 Tex. App. 514.

4. Fulmer *v.* Com., 97 Pa. St. 503; Perrin *v.* State, 81 Wis. 135, 50 N. W. 516; Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141. *Contra*, Snapp *v.* Com., 82 Ky. 173, 6 Ky. L. Rep. 34.

5. People *v.* Herrick, 59 Mich. 563, 26 N. W. 767.

6. Woods *v.* State, 76 Ala. 35, 52 Am. Rep. 315.

7. Com. *v.* Fritch, 9 Pa. Co. Ct. 164.

8. Churchwell *v.* State, 117 Ala. 124, 23 So. 72.

9. Com. *v.* Stebbins, 8 Gray (Mass.) 492.

10. State *v.* Loehr, 93 Mo. 103, 5 S. W. 696; Bodee *v.* State, 57 N. J. L. 140, 30 Atl. 681; Green *v.* State, (Tex. Cr. App. 1895) 30 S. W. 220.

11. People *v.* Fehrenbach, 102 Cal. 394, 36 Pac. 678; People *v.* Luke, 9 N. Y. St. 638. And see *supra*, XIV, B, 2, c.

12. Davis *v.* State, 54 Nebr. 177, 74 N. W. 599.

13. Spiars *v.* State, (Tex. Cr. App. 1902) 69 S. W. 533.

14. Com. *v.* Corkery, 175 Mass. 460, 56 N. E. 711.

conduct after the taking,[15] as concealing the goods taken,[16] denying them to the owner,[17] mortgaging them,[18] or taking a receipt in the name of his wife instead of the owner,[19] may tend to prove his intent; and so is advice of counsel to give the goods up to the prosecutor, but not reasons for such advice.[20] An accomplice of defendant may give direct evidence of the intent.[21] On a trial for theft of jewelry in the night from the owner's bed-chamber, evidence that a witness smelled chloroform in the chamber immediately after the theft was committed was admissible to prove intent.[22] On trial for theft of one animal, it was error to admit evidence that defendant had made no butcher's report to the county commissioners' court, as tending to prove too much, where it appears that he butchered over twenty head of cattle shortly previous to his arrest.[23]

(II) *Evidence in Behalf of Accused.* Evidence is admissible for defendant which tends to disprove the existence of the criminal intent.[24] Defendant himself may testify directly as to his intent,[25] and his declarations at the time of the taking, being part of the *res gestæ*, are admissible to prove an innocent intent.[26] Evidence is admissible that the owner owed defendant more than the value of the goods,[27] or that defendant made a mistake,[28] as that being a creditor of the owner he had been informed that the owner was willing to have him take the goods in payment.[29] So to disprove intent defendant may contradict the terms of a written agreement.[30] But the evidence must not be too remote.[31]

e. Value. The value of the property stolen may be shown by any competent evidence.[32] Opinion of value can be given only by an expert,[33] and the owner, not being an expert, cannot testify to the value of the goods to him.[34] But very slight knowledge will qualify a witness to testify to value.[35] The owner may state the price he recently paid for the goods.[36] Evidence of the market value of the goods at the place of taking is always admissible.[37] If a market value can be proved, evidence of any other sort bearing on the value is inadmissible.[38] If there is no market value at the place of taking, value in a neighboring market

15. Beatty *v.* State, 61 Miss. 18.
16. Bonner *v.* State, 125 Ala. 49, 27 So. 783.
17. Rex *v.* Semple, 2 East P. C. 691, 1 Leach C. C. 424, 3 Rev. Rep. 709.
18. Swanner *v.* State, (Tex. Cr. App. 1901) 65 S. W. 186.
19. Pierce *v.* State, 124 Ala. 66, 27 So. 269.
20. Tippie *v.* State, (Tex. App. 1890) 13 S. W. 777.
21. Brown *v.* State, (Tex. Cr. App. 1893) 20 S. W. 924.
22. Conner *v.* State, 6 Tex. App. 455.
23. Barker *v.* State, (Tex. Cr. App. 1894) 26 S. W. 400.
24. Defendant, who was an attorney, was charged with aiding and abetting other parties in committing larceny, by executing a deed conveying property which the grantor did not own; and the state claimed that defendant represented to the grantee that he examined the title, and found a good title in the grantor. Defendant testified that he represented that an abstract furnished by the grantor appeared to give him a good title. It was held that the abstract was admissible to show the absence of criminal intent. People *v.* Seldner, 62 N. Y. App. Div. 357, 71 N. Y. Suppl. 35.
25. State *v.* Lowe, 67 Kan. 183, 72 Pac. 524.
26. Maddox *v.* State, 41 Tex. 205; Rumbo *v.* State, 28 Tex. App. 30, 11 S. W. 680.
27. People *v.* Eastman, 77 Cal. 171, 19 Pac. 266.
28. Powell *v.* State, 44 Tex. Cr. 273, 70 S. W. 968.
29. State *v.* Williams, 95 Mo. 247, 8 S. W. 217, 6 Am. St. Rep. 46.
30. People *v.* Barringer, 76 Hun (N. Y.) 330, 27 N. Y. Suppl. 700.
31. Durrett *v.* State, 62 Ala. 434.
32. Dozier *v.* State, 130 Ala. 57, 30 So. 396; Houston *v.* State, 13 Ark. 66; Saddler *v.* State, 20 Tex. App. 195.
33. Engster *v.* State, 11 Nebr. 539, 10 N. W. 453.
34. Brooks *v.* State, 28 Nebr. 389, 44 N. W. 436. But see Cohen *v.* State, 50 Ala. 108.
35. Thus testimony as to the value of a sealskin-coat may be given by one who has priced such articles (Printz *v.* People, 42 Mich. 144, 3 N. W. 306, 36 Am. Rep. 437); or even by one who had never seen a sealskin overcoat bought or sold, and did not know anything about its worth, except what any man of ordinary intelligence might be presumed to know (State *v.* Finch, 70 Iowa 316, 30 N. W. 578, 59 Am. Rep. 443).
36. White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373; Odell *v.* State, 44 Tex. Cr. 307, 70 S. W. 964.
37. State *v.* McKeavitt, 106 Iowa 748, 77 N. W. 325; Cannon *v.* State, 18 Tex. App. 172; Martinez *v.* State, 16 Tex. App. 122.
38. Baden *v.* State, (Tex. Cr. App. 1903) 74 S. W. 769.

may be shown;[39] and if there is no market value, evidence of the actual value may be received.[40]

f. Ownership. The alleged owner may testify to his ownership.[41] Indeed it is sometimes asserted as an application of the best evidence rule that the alleged owner must testify or his absence be accounted for.[42] Declarations of ownership are excluded as hearsay, whether made by the alleged owner[43] or by the thief subsequent to the taking.[44] Long continued possession before the taking is *prima facie* evidence of ownership.[45] A judgment in a suit between defendant and the alleged owner is inadmissible, being *res inter alios acta*.[46] Evidence tending to show ownership in another person than the alleged owner is admissible.[47] Other cases in which evidence was held admissible on the question of ownership are set out in the notes.[48]

g. Identification of Property. An article cannot be introduced in evidence without identification.[49] The property alleged to have been stolen may be identified by ordinary evidence.[50] Goods alleged to be stolen may be produced in court and identified in the presence of the jury.[51] And the jury may examine the

39. State *v.* Brown, 55 Kan. 611, 40 Pac. 1001; Odell *v.* State, 44 Tex. Cr. 307, 70 S. W. 964.

40. State *v.* Walker, 119 Mo. 467, 24 S. W. 1011.

Illustrations.— Thus phonographic reports of witnesses' testimony having no market price, their value to the person who can use the testimony, may be shown. People *v.* McGrath, 5 Utah 525, 17 Pac. 116. So where the maker of a note stole it from the holder and destroyed it, any evidence from which the jury might infer value may be considered. State *v.* Fenn, 41 Conn. 590.

41. Bennett *v.* State, 73 Ark. 386, 84 S. W. 483; Shackelford *v.* State, (Tex. Cr. App. 1899) 53 S. W. 884; State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

42. Butler *v.* State, 3 Tex. App. 48; Taylor *v.* Com., 77 Va. 692. *Contra*, Lowrance *v.* State, 4 Yerg. (Tenn.) 145.

43. Anderson *v.* State, 39 Tex. Cr. 690, 24 S. W. 517; Cannada *v.* State, (Tex. Cr. App. 1893) 24 S. W. 513.

44. State *v.* Waters, 139 Mo. 539, 41 S. W. 221. In Virginia, however, on trial for the larceny of a horse, evidence that a purchaser of the horse from a vendee of the accused had received a letter from the owner so accurately describing the horse as to cause a delivery of the animal to such owner was held admissible. Taylor *v.* Com., 77 Va. 692.

45. Morris *v.* State, 84 Ala. 446, 4 So. 912; State *v.* Donovan, 121 Mo. 496, 26 S. W. 340; State *v.* Boone, 70 Mo. 649.

Illustration.— So in support of an indictment for stealing lead fixed to a dwelling-house, proof that the prosecutor received the rent is sufficient *prima facie* evidence of his ownership. Reg. *v.* Brummitt, L. & C. 9, 8 Cox C. C. 413, 3 L. T. Rep. N. S. 679, 9 Wkly. Rep. 257. Under Pen. Code, § 956, declaring that, when an offense involving a private injury is described so as to identify the act, an erroneous allegation as to the injured person is immaterial, evidence that one partner had possession, control, and management of a horse belonging to the firm at the time of its alleged larceny will sustain an allegation of ownership in such partner. People *v.* Nunley, 142 Cal. 105, 441, 75 Pac. 676, 76 Pac. 45.

46. Tinney *v.* State, 111 Ala. 74, 20 So. 597; Edwards *v.* State, 69 Ga. 737.

47. Renfro *v.* State, 6 Baxt. (Tenn.) 517; Territory *v.* Woolsey, 3 Utah 470, 24 Pac. 765.

48. In a prosecution for larceny of property belonging to a corporation, papers connected with the proceedings for incorporation, which were regular on their face, were properly permitted to be read to the jury, to establish the issue of the corporation's ownership. Smith *v.* State, 106 Ala. 679, 18 So. 694. Testimony that the owner of the property answered to the name alleged after the prosecution was instituted was competent. Young *v.* State, (Tex. Cr. App. 1893) 24 S. W. 287. Where a receipt was given by the thief for the stolen money, and the owner alleged in the indictment was not the person to whom the receipt ran, it was not improperly varying the receipt by parol to show that the owner alleged was the real owner. State *v.* Lucas, 24 Oreg. 168, 33 Pac. 538.

49. Ballow *v.* State, 42 Tex. Cr. 263, 58 S. W. 1023.

50. In a prosecution for hog theft, where the evidence showed that the hog stolen was a black sow, and defendant testified to the killing of a red hog by him, and stated that it was of the same litter as a black sow which he acknowledged killing, testimony of the state with reference to the weight of the red hog, which was much greater than that of the black sow killed by defendant, was admissible to show the improbability that the two hogs were of the same litter. Franks *v.* State, (Tex. Cr. App. 1905) 87 S. W. 148. Identification of the contents of a pocket-book on an indictment for stealing a pocket-book and its contents is inadmissible. Johnson *v.* State, 32 Ark. 181.

51. Bryant *v.* State, 116 Ala. 445, 23 So. 40.

article with a magnifying glass to find identifying marks.[52] If the property cannot be produced, it may be described by parol evidence.[53] Part of the stolen goods may be identified, although the whole cannot.[54] Identity may be proved by sufficiently strong evidence of similarity,[55] but not by mere similarity.[56] A witness who cannot positively identify the property may give his opinion of the identity, according to the best of his knowledge and belief.[57] Hearsay evidence cannot be introduced for identification.[58]

h. Identity and Presence of Accused.[59] Evidence to identify the accused with the thief and to show his presence at or near the scene of the theft is admissible.[60]

i. Discrediting Witness. Evidence may be introduced to discredit a witness.[61] So a witness may be asked questions on cross-examination tending to show that

52. Short *v.* State, 63 Ind. 376.

53. Spittorff *v.* State, 108 Ind. 171, 8 N. E. 911; Rex *v.* Aickles, 2 East P. C. 675, 1 Leach C. C. 294.

54. Fowler *v.* State, 100 Ala. 96, 14 So. 860 (as the horns of an ox); Lue *v.* Com., (Ky. 1891) 15 S. W. 664 (hide of a cow); Pones *v.* State, 43 Tex. Cr. 201, 63 S. W. 1021.

55. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; Roberts *v.* People, 11 Colo. 213, 17 Pac. 637; White *v.* Com., 80 Ky. 480, 4 Ky. L. Rep. 373; State *v.* Montgomery, 17 S. D. 500, 97 N. W. 716.

56. Buchanan *v.* State, 109 Ala. 7, 19 So. 410; State *v.* Due, 27 N. H. 256.

57. State *v.* Babb, 76 Mo. 501; State *v.* Murphy, 15 Wash. 98, 45 Pac. 729.

On the other hand on an indictment for stealing a cow, the refusal of the court to allow a witness to state that in identifying cattle it is difficult to distinguish one from the other, by reason of the similarity of the marks on them, is not prejudicial, being a mere opinion. Lue *v.* Com., (Ky. 1891) 15 S. W. 664.

58. Whizenant *v.* State, 71 Ala. 383; Sayres *v.* State, 30 Ala. 15; Gibson *v.* State, 114 Ga. 34, 39 S. E. 948; State *v.* Hargrave, 97 N. C. 457, 1 S. E. 774; Gann *v.* State, (Tex. Cr. App. 1900) 59 S. W. 896; Roberts *v.* State, (Tex. Cr. App. 1898) 47 S. W. 358; Howard *v.* State, 35 Tex. Cr. 136, 32 S. W. 544.

59. See, generally, CRIMINAL LAW, 12 Cyc. 392 *et seq.*

60. People *v.* Garcia, (Cal. 1899) 59 Pac. 576; Com. *v.* Griffin, 4 Allen (Mass.) 310; Owens *v.* State, 28 Tex. App. 122, 12 S. W. 506; State *v.* Young, 67 Vt. 450, 32 Atl. 251.

Extent and limits of rule.— On a prosecution of a Mexican for horse theft, testimony of the owner that the second evening before the theft three Mexicans passed through his lot, and that one of them looked like defendant, but that all Mexicans looked very much alike to him, is admissible for what it is worth. Trevenio *v.* State, (Tex. Cr. App. 1905) 87 S. W. 1162. So in a prosecution for theft of an overcoat, evidence by the wife of the prosecuting witness that when defendant disappeared from the residence the overcoat also disappeared, and that she was in an adjoining room, and did not notice defendant when he left, but the coat was hanging at the head of the bed in the room where defendant was immediately before leaving, and was not there after he left, and that she and defendant were the only persons in the house, was properly admitted, although elicited in answer to a question by defendant's counsel. Smith *v.* State, (Tex. Cr. App. 1903) 75 S. W. 298. And on a trial for the theft of a mule, the testimony of a witness that on the night of the theft defendant came to her house; that, on being refused admission, he went toward the road; that later she heard someone in the road say "Whoa!" and heard someone pass the road on horseback was admissible. Burch *v.* State, (Tex. Cr. App. 1905) 90 S. W. 168. But testimony that the description of the thief "tallied with the defendant" is inadmissible, as it was a mere conclusion which should be left for the jury. Chilton *v.* State, 105 Ala. 98, 16 So. 797. In a prosecution for larceny from the person, it was permissible to show in whose company defendant was seen on the day when the crime was committed, and prior to its commission. State *v.* Williams, 118 Ga. 494, 92 N. W. 652.

61. On a prosecution for stealing two calves, defendant having pleaded not guilty, although not claiming to own the two calves, may, as tending to weaken the state's case, show that other calves also found in defendant's possession, and likewise identified by the prosecuting witness as his, in fact belonged to defendant. Yates *v.* State, (Tex. Cr. App. 1897) 42 S. W. 296. In the trial of an indictment for larceny of two colts, evidence tending to show that the accused was informed that the sale of the colts to the prosecuting witness was a sham, and that they had been sold to a party with whom he had been jointly indicted, was admissible. State *v.* Waltz, 52 Iowa 227, 2 N. W. 1102. On trial for theft of cattle and for receiving stolen cattle, in separate counts, the testimony of certain witnesses that, on the first trial of defendant, they heard one C testify that he, C, and defendant stole the cattle, was properly admitted for the purpose of discrediting such witnesses by showing that defendant had them present at the former

he and not defendant committed the larceny.[62] But evidence that the prosecuting witness agreed to stop the prosecution if defendant would restore the stolen property is inadmissible.[63] A witness cannot be discredited by asking her on cross-examination whether she is a common prostitute.[64]

j. Corroboration. Evidence revelant to corroborate an account given by the defendant may be admitted.[65]

k. Rebuttal — (I) *Introductory Statement.* Evidence in contradiction and rebuttal of competent evidence previously introduced by the other party is admissible.[66]

(II) *Rebuttal by Defendant of Evidence in Chief.* Evidence of an incriminatory circumstance may be discredited by circumstances in the case.[67]

trial to prove an alibi as against the count for theft, where the effect of such testimony was so limited by instruction. Collins *v.* State, 39 Tex. Cr. 441, 46 S. W. 933.

62. State *v.* Wallace, 44 S. C. 357, 22 S. E. 411; Reg. *v.* Cracknell, 10 Cox C. C. 408.

63. Childress *v.* State, 122 Ala. 21, 26 So. 162.

64. Stayton *v.* State, 32 Tex. Cr. 33, 22 S. W. 38.

65. See cases cited *infra*, this note.

Extent and limits of rule.— So evidence is admissible that upon being first found in possession of the stolen property he gave the same account that he gave upon the trial. Shelton *v.* State, 11 Tex. App. 36. So where defendant claims to have bought the property, evidence that he actually had the money to pay for it is admissible. Jones *v.* State, 49 Ind. 549. So where defendant claimed that the property found in his possession and alleged to be stolen was his own, and used by him as a sample in selling, evidence that he had at about that time sold such property to various persons was admissible. People *v.* Crapo, 76 N. Y. 288, 32 Am. Rep. 302 [*affirming* 15 Hun 269]. On the other hand, where the defense is that defendant bought the horse in question, evidence that before the theft he applied to a person to purchase a horse is inadmissible. Foster *v.* People, 18 Mich. 266. On a prosecution for larceny of money, where defendant was shown to have been in possession of about the amount stolen, evidence that a year or more before the theft he had received money for the sale of horses is too remote. State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417. When on a trial for larceny of money, defendant testified that at some time not disclosed she had no money not honestly acquired, and that of the money she had she paid various sums to persons, from some of whom she took written receipts therefor, which she offered in evidence, it was held that they were immaterial evidence. Com. *v.* Cannon, 97 Mass. 337. Evidence may be introduced in corroboration of a confession of the accused. Churchwell *v.* State, 117 Ala. 124, 23 So. 72.

66. See *infra*, XIV, B, 2, k, (II), (III), (IV).

67. See cases cited *infra*, this note.

Applications of rule.— Evidence that footsteps led from defendant's house to the place of larceny may be rebutted by proof that defendant never had boots that would fit the footsteps. Stone *v.* State, 12 Tex. App. 219. Evidence that defendant placed the stolen goods under a certain table may be rebutted by testimony that a witness saw the table on the day mentioned and there were no such goods under it. State *v.* Concannon, 25 Wash. 327, 65 Pac. 534. Evidence that defendant offered to pay back the money alleged to be stolen may be explained by proving that defendant was a timid man and easily frightened. State *v.* Lewis, 136 N. C. 626, 48 S. E. 654. So where evidence was introduced to show that defendant took goods from an administrator, defendant might introduce the inventory and appraisement to show that no such goods had been inventoried. State *v.* King, 122 Iowa 1, 96 N. W. 712; Baker *v.* State, 11 Tex. App. 262. So upon a prosecution for stealing blacksmith's tools, defendant may introduce evidence that the prosecutor's shop had been burned, and in his written statement to the insurance company he stated that all his tools had been destroyed. Lewandowski *v.* State, 44 Tex. Cr. App. 511, 72 S. W. 594. Evidence that defendant slaughtered the calf in question in a secluded place may be explained by evidence that he did so at the request of a person to whom he had sold the carcass. Landers *v.* State, (Tex Cr. App. 1901) 63 S. W. 557. Evidence that defendant offered, soon after the theft with which he was charged, to loan a woman money, may be explained by showing that he was engaged to marry her. People *v.* Howes, 81 Mich. 396, 45 N. W. 961. On a trial for stealing money from prosecutor while drunk, the state having, as a basis for the argument that defendant was preparing to take it, shown that after taking it from prosecutor's pocket, at his request, to pay for the liquor, he, in putting it back, called the attention of the clerk to the fact, he, to explain this conduct, may show that prosecutor was in the habit of losing money while drunk, and wrongfully accusing people of stealing it, and that he knew of this habit. State *v.* Lewis, 133 N. C. 653, 45 S. E. 521. Defendant having been shown to have been present at the place of the larceny, he may introduce evidence that he went there for a legitimate purpose. State *v.* English, 67 Mo. 136. In an

Nevertheless evidence which is immaterial will of course not be admitted for this purpose.[68]

(III) *Rebuttal by Prosecution of Evidence For Defense.* When an explanation is given by defendant, it may be disproved by rebutting evidence,[69] and such rebutting evidence may be entirely circumstantial evidence;[70] but it must be otherwise admissible; and it has been held that stenographic notes of former testimony cannot be admitted for the purpose, since defendant could not meet the witness face to face.[71]

(IV) *Rebuttal by Defendant of Rebutting Evidence of Prosecution.* Where an explanation given by a defendant is rebutted by direct denial or otherwise defendant in sur-rebuttal may show circumstances tending to substantiate his own testimony.[72]

indictment for larceny, if a confession by defendant is introduced, tending to prove that soon after the larceny was committed he was in possession of a part of the stolen property, and gave the same to his mother, it is competent for him to prove in defense that his mother never had the property in question from him. Com. *v.* Howe, 2 Allen (Mass.) 153.

68. Allen *v.* State, 134 Ala. 159, 32 So. 318. Where, in a prosecution for grand larceny of money from a cash register, there was no evidence that defendant made any attempt to borrow money prior to the commission of the offense, evidence that defendant's credit was good and that he could have borrowed money was not admissible for the purpose of accounting for the money found on his person. People *v.* Peltin, 1 Cal. App. 612, 82 Pac. 980.

69. See cases cited *infra*, this note.

Applications of rule. — Where defendant claimed to have been acting in good faith for a third party, the prosecution may rebut by showing that the other party could not have had the goods (State *v.* Cameron, 40 Vt. 555), or would not have had dealings with defendant (Ellis *v.* People, 21 How. Pr. (N. Y.) 356), or that he could not have dealt with the other in good faith (Chambers *v.* State, (Tex. Cr. App. 1901) 65 S. W. 192), or by other circumstances (Com. *v.* Grose, 99 Mass. 423). Testimony of defendant that he always carried his money in his stockings might be met by evidence of a contrary habit. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31. Testimony of defendant that he went to the place of larceny to check up his pay-rolls might be rebutted by evidence of the length of time required for such work. Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141. Where the accused, as a witness in his own defense, testified that he purchased the harness described in the indictment, and placed it where it was found, with wire, for safekeeping, it is competent for the district attorney, on cross-examination, to ask him why he had placed wire, admitted by him to have been stolen, in the same place. State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639. Evidence that defendant was an idler, and did not work half the time, is admissible to rebut the inference from evidence that he got the money for improvements on his house by honest work. Martin *v.* State, 104 Ala. 71, 16 So. 82. And evidence that defendant was in jail at about the time of the theft may be explained in rebuttal by fixing the date of the theft at a time when defendant was out of jail, although it is a different time from that named by the first witnesses, the time not being material. Turpin *v.* Com., 74 S. W. 734, 25 Ky. L. Rep. 90.

70. Barfield *v.* State, 41 Tex. Cr. 19, 51 S. W. 908.

71. Pooler *v.* State, 97 Wis. 627, 73 N. W. 336.

72. Kimball *v.* State, 37 Tex. Cr. 230, 39 S. W. 297, 66 Am. St. Rep. 799. And see cases cited *infra*, this note.

Applications of rule.—Where to show a taking by mistake of a colt defendant testified that W had sold and delivered him a similar colt, and the prosecution denied such delivery, evidence is admissible that W said he was about to take the colt to defendant. Herndon *v.* State, (Tex. App. 1892) 18 S. W. 551. And so where defendant claimed to have taken the horse in question by mistake, and the prosecution, to disprove good faith, introduced testimony that defendant had never reimbursed the person to whom he had sold the horse, the animal having been taken from the purchaser by the owner, defendant was entitled to show that he had reimbursed the purchaser. Sigler *v.* State, 7 Tex. App. 283. On the trial of an indictment for larceny, where the evidence established that defendant had borrowed the chattel to take it to a certain place, but had himself gone to another place, and sold it, and used the proceeds, defendant was allowed to put in evidence to the effect that he had previously arranged with another to go to the first place, but did not go because that other person was prevented by the sickness of his child from going with him. Grimes *v.* State, 68 Ind. 193. The brand of the party from whom defendant claimed to have obtained the alleged stolen animal was proved to be a horizontal "11." The brand on the animal was proved to be a perpendicular "11." Evidence was admissible to show that mistakes in the manner of applying the brand were frequently made by stockmen. Boren *v.* State, 23 Tex. App. 28, 4 S. W. 463.

C. Sufficiency of Evidence[73]**— 1. General Principles as to Sufficiency — a. Circumstantial Evidence.**[74] While a conviction may be had on mere circumstantial evidence, such evidence must be strong enough to exclude any reasonable hypothesis of innocence, to create a moral certainty of guilt, and to enable the jury to find the crime proved beyond a reasonable doubt.[75] Mere suspicion of

73. See, generally, Criminal Law, 12 Cyc. 485 *et seq.*

Cases in which the evidence has been held sufficient to support a conviction.—*Arizona.*— Davis *v.* Territory, (1905) 80 Pac. 389.

Arkansas.— McGaha *v.* State, (1905) 88 S. W. 983; Martin *v.* State, (1905) 88 S. W. 962; Gill *v.* State, 73 Ark. 625, 83 S. W. 912; Cage *v.* State, 73 Ark. 484, 84 S. W. 631.

California.— People *v.* Taylor, (1902) 69 Pac. 292; People *v.* Wilder, 134 Cal. 182, 66 Pac. 228.

Florida.— McCray *v.* State, 45 Fla. 80, 34 So. 5.

Georgia.— Gaines *v.* State, 124 Ga. 5, 52 S. E. 78; Carroll *v.* State, 121 Ga. 197, 48 S. E. 909; Bone *v.* State, 121 Ga. 147, 48 S. E. 986; Wardlow *v.* State, 119 Ga. 132, 45 S. E. 971; Teal *v.* State, 119 Ga. 102, 45 S. E. 964; Jackson *v.* State, 118 Ga. 780, 45 S. E. 604; Porter *v.* State, 89 Ga. 422, 15 S. E. 495.

Idaho.— State *v.* Ireland, 9 Ida. 686, 75 Pac. 257.

Illinois.— Thompson *v.* People, 192 Ill. 79, 61 N. E. 474.

Iowa.— State *v.* Greenland, 125 Iowa 141, 100 N. W. 341.

Kansas.— State *v.* Mumford, 70 Kan. 858, 79 Pac. 669.

Minnesota.— State *v.* Minck, 94 Minn. 50, 102 N. W. 207; State *v.* Salverson, 87 Minn. 40, 91 N. W. 1; State *v.* Brooks, 84 Minn. 276, 87 N. W. 779.

Missouri.— State *v.* Smith, 190 Mo. 706, 90 S. W. 440; State *v.* Harrington, 111 Mo. App. 559, 86 S. W. 274.

Nebraska.— Junod *v.* State, (1905) 102 N. W. 462; O'Brien *v.* State, 69 Nebr. 691, 96 N. W. 649; Van Syoc *v.* State, 69 Nebr. 520, 96 N. W. 266; Van Buren *v.* State, 63 Nebr. 453, 88 N. W. 671.

New Mexico.— Territory *v.* Clark, (1905) 79 Pac. 708.

New York.— People *v.* Walker, 178 N. Y. 563, 70 N. E. 1105 [*affirming* 85 N. Y. App. Div. 556, 83 N. Y. Suppl. 372].

North Dakota.— State *v.* Foster, (1905) 105 N. W. 938.

Texas.— Davenport *v.* State, (Cr. App. 1905) 89 S. W. 1077, 1078; Bink *v.* State, (Cr. App. 1905) 89 S. W. 1075, 1077; Canaday *v.* State, (Cr. App. 1905) 87 S. W. 346; Williams *v.* State, (Cr. App. 1905) 85 S. W. 1142; Ware *v.* State, (Cr. App. 1905) 84 S. W. 1065; Gibson *v.* State, (Cr. App. 1904) 83 S. W. 1119; Pate *v.* State, (Cr. App. 1904) 83 S. W. 695; Lopez *v.* State, 46 Tex. Cr. 473, 80 S. W. 1016; Blanco *v.* State, (Cr. App. 1904) 80 S. W. 370; Jackson *v.* State, (Cr. App. 1904) 80 S. W. 83; Pollard *v.* State, (Cr. App. 1904) 79 S. W. 26; Conner *v.* State, (Cr. App. 1903) 76 S. W. 924; Thompson *v.* State, 45 Tex. Cr. 244, 76 S. W. 561; Turner *v.* State, (Cr. App. 1903) 74 S. W. 777; Chessley *v.* State, (Cr. App. 1903) 74 S. W. 548; Ezell *v.* State, (Cr. App. 1902) 71 S. W. 283; Allen *v.* State, (Cr. App. 1893) 24 S. W. 30.

Washington.— State *v.* Johnson, 36 Wash. 294, 78 Pac. 903; State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

Wyoming.— Younger *v.* State, 12 Wyo. 24, 73 Pac. 551.

United States.— Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141.

England.— Reg. *v.* Wright, 7 Cox C. C. 413, Dears. & B. 431, 4 Jur. N. S. 313, 27 L. J. M. C. 65, 6 Wkly. Rep. 255; Reg. *v.* Moah, 7 Cox C. C. 60, Dears. C. C. 626, 2 Jur. N. S. 213, 25 L. J. M. C. 66, 4 Wkly. Rep. 255; Reg. *v.* Simpson, 4 Cox C. C. 275; Rex *v.* Rees, 6 C. & P. 606, 25 E. C. L. 599.

Cases in which the evidence has been held insufficient to support a conviction.— *Illinois.* — Watts *v.* People, 204 Ill. 233, 68 N. E. 563.

Missouri.— State *v.* Lockhart, 188 Mo. 427, 87 S. W. 457; State *v.* McGee, 188 Mo. 401, 87 S. W. 452; State *v.* Scott, 177 Mo. 665, 76 S. W. 950.

Montana.— State *v.* Foster, 26 Mont. 71, 66 Pac. 565.

Nebraska.— Ladeaux *v.* State, (1905) 103 N. W. 1048.

Oklahoma.— Wells *v.* Territory, 15 Okla. 195, 81 Pac. 425.

Texas.— Whitsel *v.* State, (Cr. App. 1905) 90 S. W. 505; Womack *v.* State, (Cr. App. 1905) 86 S. W. 1015; Winchester *v.* State, (Cr. App. 1905) 85 S. W. 1073; Wesley *v.* State, (Cr. App. 1905) 85 S. W. 802; Flynn *v.* State, (Cr. App. 1904) 83 S. W. 206; Howell *v.* State, (Cr. App. 1904) 83 S. W. 185; Watters *v.* State, (Cr. App. 1904) 82 S. W. 654; Barnes *v.* State, 46 Tex. Cr. 513, 81 S. W. 735; Walker *v.* State, (Cr. App. 1904) 81 S. W. 716; Snoga *v.* State, 46 Tex. Cr. 419, 80 S. W. 625; Edwards *v.* State, (Cr. App. 1904) 79 S. W. 542; Black *v.* State, 46 Tex. Cr. 107, 79 S. W. 311; Gillam *v.* State, (Cr. App. 1903) 76 S. W. 923; Taylor *v.* State, (Cr. App. 1903) 75 S. W. 35.

Utah.— State *v.* Gordon, 28 Utah 15, 76 Pac. 882.

England.— Reg. *v.* Slingsby, 4 F. & F. 61.

74. For sufficiency of circumstantial evidence to sustain conviction of crime generally see Criminal Law, 12 Cyc. 487 *et seq.*

75. State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518; Kaiser *v.* State, 35 Nebr. 704, 53 N. W. 610; People *v.* Ouley, 7 N. Y. St. 794; Bennett *v.* State, 25 Tex. App. 695, 8 S. W. 933; Buntain *v.* State, 15 Tex. App. 490.

guilt or tendency of the evidence to show guilt, or even probability of guilt, is not enough.[76] But a conviction for larceny will not be set aside merely because the evidence would not sustain a conviction for another crime.[77]

b. Evidence of the Corpus Delicti.[78] The *corpus delicti*, that is, the fact that a theft has been committed, must be satisfactorily established before there can be a conviction. This involves proof of two things: (1) That goods have been taken from the prosecutor; (2) that they were feloniously taken by someone. The *corpus delicti* may be established by purely circumstantial evidence.[79] So it is not necessary to call witnesses whose testimony taken together would directly negative an innocent taking.[80] The *corpus delicti*, it is usually held, cannot be proved by the uncorroborated confession of defendant.[81] But it may certainly be proved by a corroborated confession.[82] It must be sufficiently established by the evidence that the prosecutor lost the goods alleged to have been stolen from him. If on the evidence it cannot be found that the prosecutor has lost the property described, the *corpus delicti* has not been proved, and defendant must be acquitted.[83] This need not, however, be established by direct evidence of loss. Although no portion of the prosecutor's goods has been missed, it is a question for the jury, under all the circumstances of the case, whether the goods, which are the

For evidence on which conviction might be sustained see Turner *v.* State, 111 Ga. 217, 36 S. E. 686; State *v.* Dunn, 109 Iowa 750, 80 N. W. 1068; Mullins *v.* Com., 12 S. W. 137, 11 Ky. L. Rep. 345; State *v.* Wellman, 34 Minn. 221, 25 N. W. 395; People *v.* Van Dusen, 165 N. Y. 33, 58 N. E. 755, 15 N. Y. Cr. 238; Tucker *v.* State, (Tex. Cr. App. 1893) 23 S. W. 682.

For evidence insufficient to sustain conviction see France *v.* State, 68 Ark. 529, 60 S. W. 236; Moore *v.* State, 100 Ga. 81, 25 S. E. 848; State *v.* Mitchener, 98 N. C. 689, 4 S. E. 26.

76. *Georgia.*—Monroe *v.* State, 111 Ga. 831, 35 S. E. 650.

Indiana.—Martin *v.* State, 148 Ind. 519, 47 N. E. 930.

Iowa.—State *v.* Clifford, 86 Iowa 550, 53 N. W. 299, 41 Am. St. Rep. 518.

Mississippi.—Booker *v.* State, (1891) 9 So. 355.

Nebraska.—Staman *v.* State, 14 Nebr. 68, 15 N. W. 227.

North Carolina.—State *v.* Eller, 104 N. C. 853, 10 S. E. 313.

Texas.—Adams *v.* State, (App. 1890) 13 S. W. 1009.

England.—Reg. *v.* Britton, 1 F. & F. 354.

Illustrations.—A conviction of larceny cannot be sustained on testimony merely that a person accused defendant of stealing his clothes, which charge defendant then and at the trial denied. State *v.* Pugh, 131 N. C. 807, 42 S. E. 936. And where, in a prosecution for theft of a mule, it is not shown that accused was ever in possession of the animal, but only that it was seen yoked to an animal belonging to him, and accused's statement after his arrest that he purchased it from a named person is not disproved, although such person was examined by the state, a conviction cannot be sustained. Trevino *v.* State, (Tex. Cr. App. 1902) 69 S. W. 72.

77. Smith *v.* State, 8 Tex. App. 141.

78. See, generally, CRIMINAL LAW, 12 Cyc. 488.

79. *Alabama.*—Martin *v.* State, 125 Ala. 64, 28 So. 92.

California.—People *v.* Davis, 97 Cal. 194, 31 Pac. 1109.

Iowa.—State *v.* Minor, 106 Iowa 642, 77 N. W. 330.

New York.—People *v.* Pinckney, 67 Hun 428, 22 N. Y. Suppl. 118.

Wyoming.—Dalzell *v.* State, 7 Wyo. 450, 53 Pac. 297.

See 32 Cent. Dig. tit. "Larceny," § 149. And see, generally, CRIMINAL LAW, 12 Cyc. 488.

80. Roberts *v.* State, 61 Ala. 401; People *v.* Davis, 97 Cal. 194, 31 Pac. 1109.

81. Johnson *v.* State, 86 Ga. 90, 13 S. E. 282; May *v.* People, 92 Ill. 343; Willard *v.* State, 27 Tex. App. 386, 11 S. W. 453, 11 Am. St. Rep. 197. And see, generally, CRIMINAL LAW, 12 Cyc. 433. See, however, Reg. *v.* Burton, 6 Cox C. C. 293, Dears. C. C. 282, 18 Jur. 157, 23 L. J. M. C. 52, 2 Wkly. Rep. 230; Rex *v.* Tuffs, 5 C. & P. 167, 24 E. C. L. 508.

82. Chezem *v.* State, 56 Nebr. 496, 76 N. W. 1056; Atkins *v.* State, 44 Tex. Cr. 291, 70 S. W. 744; Nicks *v.* State, 40 Tex. Cr. 1, 48 S. W. 186; Evans *v.* State, (Tex. Cr. App. 1897) 38 S. W. 616; Reg. *v.* Burton, 6 Cox C. C. 293, Dears. C. C. 282, 18 Jur. 157, 23 L. J. M. C. 52, 2 Wkly. Rep. 230.

83. *California.*—People *v.* Williams, 57 Cal. 108.

Georgia.—Hand *v.* State, 110 Ga. 257, 34 S. E. 286.

Illinois.—Vale *v.* People, 161 Ill. 309, 43 N. E. 1091.

New York.—People *v.* Cahill, 62 N. Y. App. Div. 612, 70 N. Y. Suppl. 849, 15 N. Y. Cr. 513.

Texas.—Lane *v.* State, (Cr. App. 1898) 45 S. W. 693; Reynolds *v.* State, 29 Tex. App. 368, 16 S. W. 192.

See 32 Cent. Dig. tit. "Larceny," § 149.

subject of the indictment, are his property.[84] If it appears that the prosecutor lost the goods described, there must be evidence that the loss was by a felonious taking in order that the jury may find the *corpus delicti*.[85] But evidence of felony, to justify conviction, need not be so strong as to prove conclusively that there was no possibility of a non-felonious taking.[86]

84. Reg. *v.* Hooper, 1 F. & F. 85. See also cases cited *infra*, this note. *Contra*, Reg. *v.* Dredge, 1 Cox C. C. 235.

Application of rule.—Thus where defendant was found under suspicious circumstances in possession of goods similar to a large amount or number in possession of the alleged owner, the jury may be justified in finding the *corpus delicti*, although the owner cannot prove that he lost any portion of his goods. Smith *v.* State, 133 Ala. 145, 31 So. 806, 91 Am. St. Rep. 21 (meat and lard from a storehouse); State *v.* Cardelli, 19 Nev. 319, 10 Pac. 433 (cattle from a herd of over one thousand); People *v.* Williams, 58 Hun (N. Y.) 278, 12 N. Y. Suppl. 249; State *v.* Wilson, 76 N. C. 120 (money); Reg. *v.* Mockford, 11 Cox C. C. 16, 17 L. T. Rep. N. S. 582, 16 Wkly. Rep. 375 (fowls from a fowl-house); Reg. *v.* Burton, 6 Cox C. C. 293, Dears. C. C. 282, 18 Jur. 157, 23 L. J. M. C. 52, 2 Wkly. Rep. 230 (pepper from a storehouse). And so generally it may be proved by circumstantial evidence that goods found in possession of the accused were taken from the alleged owner. Garza *v.* State, 43 Tex. Cr. 499, 66 S. W. 1098; Garcia *v.* State, (Tex. Cr. App. 1894) 26 S. W. 504.

85. *Georgia.*— Johnson *v.* State, 48 Ga. 326.

Indiana.— Hamilton *v.* State, 142 Ind. 276, 41 N. E. 588.

Louisiana.— State *v.* Johnson, 29 La. Ann. 717.

Tennessee.— Younkins *v.* State, 2 Coldw. 219.

Texas.— Landreth *v.* State, 44 Tex. Cr. 239, 70 S. W. 758.

See 32 Cent. Dig. tit. "Larceny," § 149.

Applications of rule.— Evidence that the stolen property was claimed and surrendered does not suffice to prove either the fact of the theft or the ownership represented, even though supplemented by proof that the accused had avoided arrest. Jorasco *v.* State, 8 Tex. App. 540. And where goods are discovered which once formed part of the stock of a retail tradesman, evidence must make it appear that they were not sold by him in the course of trade before a larceny from him can be established. Green *v.* State, 68 Ala. 539; Johnson *v.* State, 86 Ga. 90, 13 S. E. 282, 12 S. E. 471.

86. Thus in a prosecution for horse stealing, where the evidence showed that the horse was put in the stable at night, and next morning was gone, and no evidence was introduced by defendant to show that the horse had merely escaped, the existence of a *corpus delicti* was sufficiently shown. State *v.* Rodman, 62 Iowa 456, 17 N. W. 663. Defendant and a companion were seen standing near the prosecuting witness, who was in a drunken sleep on a doorstep about three o'clock in the morning. They moved away, and, after stopping for a few minutes by a fence, went down the street. Witness was aroused, and his trousers pocket was found turned inside out. Before going to sleep his purse was in that pocket. The purse was found near the fence where defendant and his companion stopped. This evidence was sufficient to support the finding of a taking from the person, although the purse might possibly have dropped from the pocket. People *v.* Appleton, 120 Cal. 250, 52 Pac. 582. So on a trial for larceny, proof that complainant owned and had in his vest a watch; that in the presence of defendant he hung the vest up, with the watch in it; and that later, after he had put on the vest, he missed the watch, is sufficient evidence to establish the *corpus delicti*. People *v.* Davis, 19 N. Y. Suppl. 781. On indictment for the larceny of hogs, there was evidence that the owner of the hogs, hearing two reports of a gun and the squeal of a hog, hurried in the direction of the noise, and on reaching the place heard someone running; that he found two of his hogs dead, one with its throat cut; that defendant was that morning in the neighborhood, with a gun, on the pretense of duck shooting; that he hastily left the vicinity; that in the evening defendant told the owner he would tell him on Monday who did the shooting; and that on Monday he fled the country. This was sufficient evidence of the *corpus delicti* to go to the jury. Kemp *v.* State, 89 Ala. 52, 7 So. 413. Defendant was accused of stealing a mule which was missing from a pasture. Defendant was near the pasture shortly after the mule was missed, and three days later he was in a town forty miles away, where the mule was found. Defendant's witness testified that defendant assisted in driving the mule from the pasture to said town as a hired hand. There was sufficient proof of the *corpus delicti*. Tidwell *v.* State, 40 Tex. Cr. 38, 47 S. W. 466, 48 S. W. 184. Defendant was indicted for the larceny of a hog, which with others was kept in a lot and disappeared during the absence of the owner, without breaking the inclosure. There was evidence that defendant and his wife had in their possession, about the time the hog disappeared, parts of the body of a hog which, in size and color of the hair, corresponded with what might have been obtained from such hog; that such meat, after being discovered, was put away and concealed by defendant's wife; and that they made false statements in regard to it. The question of *corpus delicti* was for the jury. Colquitt *v.* State, 61 Ala. 48.

c. Credibility of Witnesses.[87] The testimony of a witness may be successfully impeached by other facts and thus rendered insufficient to support a verdict.[88] On the other hand, where strong evidence for the defense was given by a brother of the accused, the weight of the evidence was affected by the relationship.[89]

d. Testimony of Accomplice.[90] At common law a conviction may be had on the uncorroborated testimony of an accomplice.[91] But in some jurisdictions because of statutory provisions no conviction can be had on the uncorroborated testimony of an accomplice; and this corroboration must extend to the connection of defendant with the act.[92] An accomplice may be confirmed by evidence not of itself sufficient for conviction.[93]

2. Proof of the Necessary Elements of the Offense — a. Time and Place. The time and place of the taking must be shown by evidence.[94]

b. Participation of Accused in the Act. No one can be convicted of larceny without sufficient evidence that he was himself connected with the taking.[95] And

87. See, generally, WITNESSES.

88. Thus where the sole witness for the prosecution had previous to the trial assured defendant that he knew nothing against defendant, a new trial was granted. Adams *v.* State, 10 Tex. App. 677. So a conviction of petit larceny, resting on the unsupported testimony of one witness, which is contradicted in several material matters, which contradiction cannot reasonably be attributed to mistake on the part of such witness, cannot be sustained. Day *v.* State, (Miss. 1890) 7 So. 326.

89. De los Santos *v.* State, (Tex. Cr. App. 1893) 22 S. W. 924.

90. See, generally, CRIMINAL LAW, 12 Cyc. 445 *et seq.*

91. See CRIMINAL LAW, 12 Cyc. 453.

92. Buck *v.* State, (Tex. Cr. App. 1904) 83 S. W. 387; Hankins *v.* State, (Tex. Cr. App. 1898) 47 S. W. 992; Thurmond *v.* State, (Tex. App. 1891) 17 S. W. 1110; Lockhart *v.* State, (Tex. App. 1890) 13 S. W. 993; Menges *v.* State, 25 Tex. App. 710, 9 S. W. 49; Buchanan *v.* State, 25 Tex. App. 546, 8 S. W. 665; Crowell *v.* State, 24 Tex. App. 404, 6 S. W. 318; Reg. *v.* Dyke, 8 C. & P. 261, 34 E. C. L. 723; Rex *v.* Wilkes, 7 C. & P. 272, 32 E. C. L. 609. And see CRIMINAL LAW, 12 Cyc. 454.

A corroboration by the wife of the accomplice was held insufficient. Rex *v.* Neal, 7 C. & P. 168, 32 E. C. L. 555. It is probably now otherwise, since a wife is competent to testify against her husband. See State *v.* Sprague, 149 Mo. 409, 50 S. W. 901.

It is a question of fact for the jury whether a person is an accomplice. Cooper *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1109; Riley *v.* State, 27 Tex. App. 606, 11 S. W. 642.

A person may be proved an accomplice by circumstantial evidence (Wynn *v.* State, 81 Ga. 743, 7 S. E. 737), but may not be found so without evidence (Com. *v.* Jones, 136 Mass. 173).

Proof that person was not an accomplice.— In a prosecution for horse theft, it was competent for the state to prove that witness was acting as a detective for the purpose of ferreting out the crime with which defendant was charged, or assisting in his detection and apprehension to show that he was not an accomplice and therefore would not require corroboration. Lightfoot *v.* State, (Tex. Cr. App. 1904) 78 S. W. 1075.

93. See cases cited *infra*, this note.

Extent and limits of rule.—As by evidence of admissions by the accused (Kent *v.* State, 64 Ark. 247, 41 S. W. 849), by evidence of suspicious conduct of the accused (State *v.* Van Winkle, 80 Iowa 15, 45 N. W. 388; Long *v.* State, 23 Tex. App. 692, 5 S. W. 188), or by evidence of possession of the stolen goods by the accused (People *v.* Cleveland, 49 Cal. 577; Parsley *v.* State, (Tex. Cr. App. 1901) 64 S. W. 257; Williams *v.* State, (Tex. Cr. App. 1898) 45 S. W. 494; Reg. *v.* Birkett, 8 C. & P. 732, 34 E. C. L. 989), not, however, by evidence of finding the goods in the house of defendant's father (Funderburg *v.* State, (Tex. Cr. App. 1896) 34 S. W. 613). Evidence confirming the accomplice in a matter connected with his own part only in the offense is not sufficient. Reg. *v.* Birkett, 8 C. & P. 732, 34 E. C. L. 989. But where the only corroboration was testimony of the wife of the accomplice and evidence of possession by the accomplice a conviction was affirmed. State *v.* Sprague, 149 Mo. 409, 50 S. W. 901.

94. Throckmorton *v.* Com., 29 S. W. 16, 16 Ky. L. Rep. 530; McCoy *v.* State, 3 Tex. App. 399.

Evidence held sufficient.— In a prosecution in K county for the theft of a horse, a deputy sheriff testified that he arrested defendant in K county, and that defendant then had the horse in his possession. The sheriff testified that he received defendant from the deputy's custody in K county. The prosecuting witness testified that the horse found in defendant's possession by the sheriff in K county was stolen from him in L county. The venue was sufficiently proved. Brown *v.* State, (Tex. Cr. App. 1900) 59 S. W. 1118.

Evidence insufficient to show theft committed before indictment found see McDaniel *v.* State, 90 S. W. 504.

95. Foster *v.* State, 19 Tex. App. 73; Vaughn *v.* State, 17 Tex. App. 562.

The mere presence of defendant in the place where the acknowledged thief was arrested, or his companionship with the thief before

in order to establish the guilt of an accused on the ground that he was an accomplice of another who was undoubtedly guilty, it is necessary to prove beyond reasonable doubt that he was a sharer in the crime.[96] The identity of the accused with the thief must be proved beyond reasonable doubt, like any other part of the case.[97]

c. Asportation — (I) *Taking and Carrying Away.* Evidence must be introduced sufficient to show a taking and asportation of the goods.[98] But direct evidence of the taking is not necessary.[99] The taking and asportation may be shown by circumstantial evidence.[1]

(II) *Conversion.* When larceny is committed by converting, secreting, withholding, or appropriating the property, such an act must be sufficiently established by evidence. An attempt to sell is sufficient evidence of appropriation.[2] So is evidence of pawning the goods.[3] But the mere fact that the property is not returned is not enough.[4]

d. Identity of the Property — (I) *In General.* A person may be convicted of larceny upon evidence connecting him with the theft, although the article stolen may not be identified, or even found.[5] But the evidence must refer to the

or after the offense, is not sufficient to prove him connected with the offense, but in connection with other evidence it may be sufficient for conviction. State *v.* Dishman, 74 N. C. 217; Com. *v.* Devine, 18 Pa. Super. Ct. 431.

For evidence sufficient to connect defendant with the taking see State *v.* Berndgen, 75 Minn. 38, 77 N. W. 408; Jackson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 749; Wright *v.* State, (Tex. Cr. App. 1898) 45 S. W. 723.

For evidence insufficient to connect defendant with the taking see Knowles *v.* State, 27 Tex. App. 503, 11 S. W. 522.

96. Com. *v.* Devine, 18 Pa. Super. Ct. 431.

Applications of rule.— The fact that they were associated in other immoral or criminal conduct is not sufficient. State *v.* Graham, 62 Iowa 108, 17 N. W. 192. So where it is claimed that a servant who was acting under his master's orders was guilty with the master in a theft, it is necessary to establish the fact that he knew of the illegality, and actually shared in the scheme. State *v.* Stewart, 6 Nev. 175; Ivey *v.* State, 43 Tex. 425; Tippie *v.* State, (Tex. Cr. App. 1890) 13 S. W. 777.

For evidence held sufficient to warrant a submission to the jury of the question whether defendant was an accomplice see State *v.* Goings, 101 N. C. 706, 7 S. E. 900.

For evidence held sufficient to warrant a finding that defendant was an accomplice see Moultry *v.* State, 89 Ga. 291, 15 S. E. 330; State *v.* Goings, 101 N. C. 706, 7 S. E. 900; Cheatham *v.* State, (Tex. Cr. App. 1898) 45 S. W. 565; Nelson *v.* State, 52 Wis. 534, 9 N. W. 388.

For evidence held insufficient to warrant a finding that defendant was an accomplice see Martin *v.* State, 148 Ind. 519, 47 N. E. 930; Gilmore *v.* State, (Tex. App. 1890) 13 S. W. 646; Menges *v.* State, 25 Tex. App. 710, 9 S. W. 49.

97. State *v.* McCracken, 66 Iowa 569, 24 N. W. 43.

For evidence held sufficient to show identity see Stalcup *v.* State, 129 Ind. 519, 26 N. E. 1116; State *v.* Rowland, 72 Iowa 327, 33 N. W. 137.

For evidence of identity held sufficient to go to jury see Com. *v.* Cronan, 155 Mass. 393, 29 N. E. 639.

98. Black *v.* State, 38 Tex. Cr. 58, 41 S. W. 606. Therefore evidence merely of receiving stolen goods will not support conviction for larceny. Watts *v.* People, 204 Ill. 233, 68 N. E. 563; Trimble *v.* State, 18 Tex. App. 632.

99. It is not necessary to show that the goods have been seen in defendant's possession. Dimmick *v.* U. S., 135 Fed. 257, 70 C. C. A. 141.

1. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; Cross *v.* State, 64 Ga. 443; Edwards *v.* State, (Tex. Cr. App. 1902) 68 S. W. 795; Hickey *v.* State, (Tex. Cr. App. 1901) 63 S. W. 641; Walker *v.* State, 3 Tex. App. 70.

For circumstantial evidence held insufficient to support a conviction see Mizell *v.* State, 38 Fla. 20, 20 So. 769; Hicks *v.* State, 101 Ga. 581, 28 S. E. 917; State *v.* Wilkerson, 72 N. C. 376; Randle *v.* State, (Tex. Cr. App. 1902) 70 S. W. 958; Hernandez *v.* State, 43 Tex. Cr. 80, 63 S. W. 320; Pye *v.* U. S., 20 Fed. Cas. No. 11,488, 1 Hayw. & H. 90.

For evidence held sufficient to show asportation see State *v.* Mitchener, 98 N. C. 689, 4 S. E. 26.

For facts on which asportation was held question for jury see State *v.* Perkins, 104 N. C. 710, 10 S. E. 175.

2. McManus *v.* State, 91 Ga. 7, 16 S. E. 98; Stepp *v.* State, 31 Tex. Cr. 349, 20 S. W. 753.

3. McManus *v.* State, 91 Ga. 7, 16 S. E. 98; People *v.* Hazard, 28 N. Y. App. Div. 304, 50 N. Y. Suppl. 1023 [*affirmed* in 158 N. Y. 727, 53 N. E. 1129].

4. Jones *v.* State, (Tex. Cr. App. 1899) 49 S. W. 387; Rex *v.* Yend, 6 C. & P. 176, 25 E. C. L. 381.

5. State *v.* Kent, 65 N. C. 311.

property described in the indictment, and in that sense there must be an identification of the property stolen with that charged.[6] And when the evidence refers to property found in defendant's possession, it must be identified with that which was stolen.[7] The identity may be established by direct identification by the owner,[8] or by testimony as to peculiar marks or brands.[9] The identity may be established by circumstantial evidence.[10] But the evidence of identity must be sufficient to justify a verdict.[11]

(II) *Animals.* Where an animal found in defendant's possession is to be identified by its marks, the identification necessarily fails if there is a material variance.[12] The identification must be proved with reasonable certainty.[13] The identification may be established by circumstantial evidence.[14] But such evidence must establish the identity with sufficient certainty, otherwise it will not justify a conviction.[15]

(III) *Identity of Money.* Identity of money as well as of other goods may be established by circumstances,[16] and evidence of identity cannot in the nature of things be as satisfactory as in the case of other property.[17] The mere fact that

6. Johnson *v.* State, 73 Ark. 101, 83 S. W. 651; Blandford *v.* State, 115 Ga. 824, 42 S. E. 207; Crockett *v.* State, 14 Tex. App. 226.

7. State *v.* Osborne, 45 Iowa 425; Watson *v.* State, (Tex. Cr. App. 1904) 82 S. W. 514; Roy *v.* State, 34 Tex. Cr. 301, 30 S. W. 666.

8. People *v.* Keane, 43 Cal. 638.

9. State *v.* Hill, 96 Mo. 357, 10 S. W. 28.

Illustrations.—Where stolen railway tickets were identified by their number it was sufficient. Com. *v.* Randall, 119 Mass. 107. A watch, and the chain on it, found in defendant's possession, are sufficiently identified as those stolen from witness by his testimony that the watch was exactly like his watch, and that the chain he would identify positively as his. Johnson *v.* State, 148 Ind. 522, 47 N. E. 926.

10. State *v.* Yates, 159 Mo. 525, 60 S. W. 1051; Taylor *v.* State, (Tex. Cr. App. 1897) 42 S. W. 285; Bagley *v.* State, 3 Tex. App. 163.

Applications of rule.— Thus where a bale of cotton was stolen, and defendant was seen near the place of theft driving a wagon with a bale of cotton in it, whereas he owned no cotton, there is sufficient identification; Piland *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1007. So where stolen cotton was loaded on a wagon under a pecan tree, the wagon was traced to defendant's house, cotton was found there with pecan leaves in it, and no pecan trees grew near defendant's house, there was sufficient identification. Simnacher *v.* State, (Tex. Cr. App. 1897) 43 S. W. 354. For other cases in which the facts were held sufficient to show identification see State *v.* Filmore, 92 Iowa 766, 61 N. W. 101; State *v.* Reynolds, 87 N. C. 544; State *v.* Patterson, 78 N. C. 470.

For circumstantial evidence of identity sufficient to go to jury see Smith *v.* State, 133 Ala. 145, 31 So. 806, 91 Am. St. Rep, 21.

11. Newton *v.* State, (Tex. Cr. App. 1898) 48 S. W. 507; Shelby *v.* State, (Tex. Cr. App. 1897) 42 S. W. 306. Thus where the evidence establishes similarity merely and there is no other evidence of identification, a conviction cannot be supported. Bishop *v.* People, 194 Ill. 365, 62 N. E. 785; Bishop *v.* State, (Tex. Cr. App. 1894) 25 S. W. 25; Beach *v.* State, (Tex. Cr. App. 1889) 11 S. W. 832.

12. State *v.* Ballard, 104 Mo. 634, 16 S. W. 525; Ligon *v.* State, (Tex. Cr. App. 1893) 22 S. W. 403; Lacy *v.* State, 31 Tex. Cr. 78, 19 S. W. 896; Whitlow *v.* State, (Tex. App. 1892) 18 S. W. 865; Stewart *v.* State, 24 Tex. App. 418, 6 S. W. 317.

13. Cranch *v.* State, (Tex. App. 1889) 12 S. W. 491.

Identification held to be proved with reasonable certainty see Jones *v.* State, (Tex. Cr. App. 1902) 68 S. W. 267; Pierce *v.* State, (Tex. Cr. App. 1896) 36 S. W. 95.

14. Randolph *v.* State, (Tex. Cr. App. 1899) 49 S. W. 591; Watson *v.* State, (Tex. Cr. App. 1898) 48 S. W. 185; Wolfe *v.* State, 25 Tex. App. 698, 9 S. W. 44.

15. **Instances.**— As where the evidence merely shows possession by defendant of the same number of cattle as was stolen (Hilligas *v.* State, 55 Nebr. 586, 75 N. W. 1110; Harris *v.* State, 13 Tex. App. 309), or of hogs with hair of the same color (Smith *v.* State, 44 Tex. Cr. 81, 68 S. W. 510), or with ear-marks like the prosecutor's, which are also similar to defendant's (Wellman *v.* State, 100 Ga. 576, 28 S. E. 605), or of a horse with the same brand as prosecutor's, of which many had been sold (Horn *v.* State, 30 Tex. App. 541, 17 S. W. 1094). Where an animal is stolen, meat found on defendant's premises cannot be identified with part of the stolen animal merely by showing that it was meat from the same kind of animal, and of a similar size and shape (Littlejohn *v.* State, (Tex. App. 1890) 13 S. W. 889); but even in such a case where there are other circumstances of suspicion the identification may be sufficient (Stevens *v.* State, 77 Ga. 310, 2 S. E. 684).

16. State *v.* Hoppe, 39 Iowa 468; Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

Question for jury.— Where money is found in the possession of the accused, its identification with stolen money is for the jury. State *v.* Griffin, 71 Iowa 372, 32 N. W. 447.

17. People *v.* Linn, 23 Cal. 150.

defendant soon after the theft of money was in possession of money is not sufficient for identification of the latter with the stolen money,[18] and mere evidence that money found in defendant's possession was of similar denominations with that stolen without more is not sufficient identification.[19] But where the amount, kind, and denominations correspond, and access is shown, the identity is sufficiently established.[20]

e. Ownership — (i) *Proof of Ownership.* Ownership must be proved by sufficient evidence or the conviction cannot be supported.[21] Where the owner is alleged in the indictment as unknown, there can be no conviction unless it is proved that the grand jury did not know his name and could not discover it by due diligence,[22] as by showing that the cattle stolen were estrays.[23] So evidence that a certain person lost cattle like those stolen will not justify a verdict for stealing the cattle of a person unknown.[24] In the case of unknown ownership alleged, it is necessary to prove that defendant is not owner.[25] Where the ownership is differently laid in different counts, a general verdict of guilty may be found on evidence that the goods belong to some one of the persons named, without establishing the ownership of the particular one.[26] Proof of ownership of a corporation in the name by which it is commonly called is sufficient.[27]

(ii) *Possession as Evidence of Ownership.* Long continued undisputed possession in the alleged owner is sufficient evidence of ownership.[28] But mere apparent paper title is not necessarily enough.[29] Proof that property belongs to A and is in the possession of B will support an allegation of ownership in A.[30] But it will also support an indictment naming the possessor as owner.[31]

(iii) *Marks and Brands.* In Texas and other cattle-raising states owner-

18. State *v.* Dawson, 90 Mo. 149, 1 S. W. 827; State *v.* Carter, 72 N. C. 99.

19. *Idaho.*— State *v.* Nesbit, 4 Ida. 548, 43 Pac. 66.

Nebraska.— Kaiser *v.* State, 35 Nebr. 704, 53 N. W. 610.

Texas.— Johnson *v.* State, 36 Tex. Cr. 394, 37 S. W. 424.

Washington.— State *v.* Johnson, 36 Wash. 294, 78 Pac. 903.

Canada.— Reg. *v.* Winslow, 12 Manitoba 649.

20. People *v.* Wong Chong Suey, 110 Cal. 117, 42 Pac. 420, especially where the bills were folded in the same way as the money stolen. Rucker *v.* State, (Tex. Cr. App. 1894) 26 S. W. 65. And where two one-hundred-dollar bills were stolen, and two one-hundred-dollar bills were later found in the possession of defendant who was destitute of money before the larceny, there was sufficient evidence of identity. Com. *v.* Montgomery, 11 Metc. (Mass.) 534, 45 Am. Dec. 227.

21. McNight *v.* State, (Tex. Cr. App. 1900) 58 S. W. 95; Kinney *v.* State, (Tex. App. 1892) 19 S. W. 681; Thompson *v.* State, 23 Tex. App. 356, 5 S. W. 114.

In consequence.—Where the only evidence of ownership should have been excluded as hearsay, a conviction cannot be supported (Hawkins *v.* State, 95 Ga. 458, 20 S. E. 217), and where the last name only of the owner is proved, but there is no evidence as to his christian name, a conviction must be set aside (Atkins *v.* State, 44 Tex. Cr. 291, 70 S. W. 744).

22. Sharp *v.* State, 29 Tex. App. 211, 15 S. W. 176.

23. Pecvehouse *v.* State, (Tex. Cr. App. 1894) 27 S. W. 142. And even in that case if the cattle had been taken by an "estrayer" who thereby acquired a legal right in them, the allegation that the owner was unknown is not proved. Thomason *v.* State, (Tex. Cr. App. 1896) 34 S. W. 121.

24. State *v.* Rawlston, 73 N. C. 180.

25. Benton *v.* State, 21 Tex. App. 554, 2 S. W. 885.

26. Butler *v.* State, 91 Ala. 87, 9 So. 191.

27. Jackson *v.* State, 93 Ga. 165, 18 S. E. 436; Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563.

28. State *v.* Donovan, 121 Mo. 496, 26 S. W. 340; Reg. *v.* Downing, 11 Cox C. C. 580, 23 L. T. Rep. N. S. 398.

For cases where the particular facts were held sufficient to show ownership see State *v.* Robinson, 35 La. Ann. 964; Wright *v.* State, 40 Tex. Cr. 45, 48 S. W. 191; Reg. *v.* King, 12 Cox C. C. 134.

For cases where the particular facts were held insufficient to show ownership see Hix *v.* People, 157 Ill. 382, 41 N. E. 862; State *v.* Furlong, 19 Me. 225; Overturf *v.* State, 31 Tex. Cr. 10, 23 S. W. 147; Reg. *v.* Bell, 13 Cox C. C. 623.

29. Deeds and a will which showed title in the complaining witness, but which did not trace it back to the government, are not sufficient proof of ownership to support a charge of larceny against defendant for stealing timber from the land, in the absence of evidence that such grantors or testator ever had possession of the property. Carl *v.* State, 125 Ala. 89, 28 So. 505.

30. Denton *v.* State, (Tex. Cr. App. 1902) 70 S. W. 217.

31. Griffiths *v.* State, 163 Ind. 555, 72 N. E. 563.

ship may be proved by a legally recorded brand. A duly recorded brand affords *prima facie* evidence of ownership.[32] But the brand must correspond to the record, both in form and in place on the animal; and if it does not exactly correspond, the evidence is not of itself sufficient to prove ownership.[33] When animals belonging to the owner of the brand have been sold, the mere fact that the animal is branded does not prove ownership in the owner of the brand.[34] And the brand of one person is not sufficient evidence of the ownership of another who claims an animal as purchaser from the former.[35] By express provision of the Texas statute, an unrecorded brand is not sufficient proof of ownership,[36] and the same thing is true of a brand recorded after the theft.[37] But if there is sufficient evidence of ownership, it need not be shown that the brand is recorded.[38] An ear-mark need not be recorded in order to furnish evidence of ownership.[39] On indictment for stealing an animal, evidence that the brand on the animal had been changed, so as to make it resemble a brand claimed by defendant, without any evidence to show that defendant was concerned in altering the brand, or that he was connected in any way withthe stolen animal, is insufficient to justify a conviction.[40]

(IV) *CLAIM OF OWNERSHIP BY DEFENDANT.* Where defendant sets up ownership in himself, the evidence must be sufficient to disprove the claim beyond a reasonable doubt in order to justify a conviction.[41]

f. Non-Consent of the Owner. A conviction of larceny cannot be sustained unless there was evidence of the non-consent of the owner to the taking.[42] Where more than one person is interested in property, it is enough to show the non-consent of the one from whose possession it was taken.[43] In one state, however, because of the peculiar doctrine that the owner and possessor must both be named in the indictment, the non-consent of both must be proved.[44] In some jurisdic-

32. Turner *v.* State, 39 Tex. Cr. 322, 45 S. W. 1020. But evidence of a recorded brand is not alone sufficient to prove ownership in the owner of the brand; since cattle bearing a man's brand do not necessarily belong to him at the time. State *v.* De Wolfe, 29 Mont. 415, 74 Pac. 1084.

33. Myers *v.* State, 24 Tex. App. 334, 6 S. W. 194; Harwell *v.* State, 22 Tex. App. 251, 2 S. W. 606.

Illustration.— So on a prosecution for horse theft, the main fact relied on being the brand, where the certificates of the record of the brand of the real owner and that of accused were almost identical, one being a mashed O, and the other a round O, their horses ran on the same range, and the branding by the means used was not always exact, and several witnesses testified that accused owned the horse, the evidence was insufficient to sustain a conviction for the theft. Fruger *v.* State, (Tex. Cr. App. 1901) 63 S. W. 130.

34. Clark *v.* State, (Tex. App. 1892) 20 S. W. 555.

35. Horn *v.* State, 30 Tex. App. 541, 17 S. W. 1094.

36. Burke *v.* State, 25 Tex. App. 172, 7 S. W. 873; Romero *v.* State, 24 Tex App. 130, 5 S. W. 663; Wyers *v.* State, 21 Tex. App. 448, 2 S. W. 816.

37. Unsell *v.* State, 39 Tex. Cr. 330, 45 S. W. 1022; Priesmuth *v.* State, 1 Tex. App. 480.

38. Hutto *v.* State, 7 Tex. App. 44; Wolf *v.* State, 4 Tex. App. 332; Fisher *v.* State, 4 Tex. App. 181.

39. People *v.* Bolanger, 71 Cal. 17, 11 Pac. 799.

40. Schnaubert *v.* State, 28 Tex. App. 222, 12 S. W. 732.

41. **For cases in which the evidence was held insufficient** see Schnaubert *v.* State, 28 Tex. App. 222, 12 S. W. 732; Stone *v.* State, 27 Tex. App. 576, 11 S. W. 637; Ellis *v.* State, 27 Tex. App. 190, 11 S. W. 111; Thompson *v.* State, 26 Tex. App. 466, 9 S. W. 760; Misseldine *v.* State, 21 Tex. App. 335, 17 S. W. 768; Hunter *v.* State, 13 Tex. App. 16.

For cases where the evidence was held sufficient see People *v.* Chrisman, 135 Cal. 282, 67 Pac. 136; Com. *v.* Carroll, 123 Mass. 411; People *v.* Dunn, 114 Mich. 355, 72 N. W. 172; Stewart *v.* State, (Tex. Cr. App. 1902) 67 S. W. 107; Areola *v.* State, (Tex. Cr. App. 1898) 48 S. W. 195.

42. Sutton *v.* State, 67 Ark. 155, 53 S. W. 890; Thockmorton *v.* Com., 29 S. W. 16, 16 Ky. L. Rep. 530; McMahon *v.* State, 1 Tex. App. 102; Rex *v.* Daman, 2 B. & Ald. 378, 1 Chit. 147, 18 E. C. L. 91; Rex *v.* Corden, 2 Burr. 2279; Rex *v.* Savage, 5 C. & P. 143, 24 E. C. L. 495.

43. Bryant *v.* Com., 68 S. W. 846, 24 Ky. L. Rep. 447 (railroad company); People *v.* Parsons, 105 Mich. 177, 63 N. W. 69 (surviving partner); State *v.* Bjelkstrom, (S. D. 1905) 104 N. W. 481 (agent); Holmes *v.* State, (Tex. Cr. App. 1897) 42 S. W. 979 (husband).

On a trial for larceny of the wife's wearing apparel, her testimony is the best evidence the case admits of to prove non-consent of the owner, although her husband legally owns it. People *v.* Williams, 1 Wheel. Cr. (N. Y.) 18.

44. Williamson *v.* State, 13 Tex. App. 514; Bowling *v.* State, 13 Tex. App. 338.

tions the non-consent of the owner must be proved by his own evidence, if that is obtainable.[45] Although where the owner's testimony cannot be had, his non-consent may in these states be inferred from circumstances.[46] And objection must be made to evidence when offered as circumstantial.[47] On the other hand, in other jurisdictions the non-consent of the owner may in all cases be proved by circumstantial evidence.[48]

g. Value — (I) *Necessity of Proof of Value.* It is usually held that no conviction can be had unless the property stolen is affirmatively proved to be of some value,[49] but in a few states value may be inferred without any direct evidence on the point;[50] and it is not necessary to prove any precise value; it is enough to show that it was of some value, at least to the owner.[51] In petit larceny and in several statutory forms of larceny value is not material; and on an indictment for one of these offenses it is not necessary to prove any particular value, only that the article is of intrinsic worth.[52] Where larceny of a check for a certain amount is charged, no proof of its actual value is required, the law presuming that the face value is its actual value.[53]

(II) *Evidence of Value.* Value may be proved by circumstantial evidence.[54]

45. Perry *v.* State, 44 Nebr. 414, 63 N. W. 26; Bubster *v.* State, 33 Nebr. 663, 50 N. W. 953; Good *v.* State, 30 Tex. App. 276, 17 S. W. 409; Bowling *v.* State, 13 Tex. App. 338; Wilson *v.* State, 12 Tex. App. 481; Jackson *v.* State, 7 Tex. App. 363; Porter *v.* State, 1 Tex. App. 394; State *v.* Moon, 41 Wis. 684; State *v.* Morey, 2 Wis. 494, 60 Am. Dec. 439.

46. Palmer *v.* State, (Nebr. 1903) 97 N. W. 235; Atkins *v.* State, 44 Tex. Cr. 291, 70 S. W. 744; Clayton *v.* State, 15 Tex. App. 348; Erskine *v.* State, 1 Tex. App. 405.

47. Schultz *v.* State, 20 Tex. App. 308.

48. People *v.* Jacks, 76 Mich. 218, 42 N. W. 1134; People *v.* Wiggins, 92 N. Y. 656 [*affirming* 28 Hun 308]; State *v.* Wong Quong, 27 Wash. 93, 67 Pac. 355.

For cases in which the evidence was held to show want of consent see Wiegrefe *v.* State, 66 Nebr. 23, 92 N. W. 161; Taylor *v.* State, (Tex. Cr. App. 1903) 75 S. W. 35; Hoskins *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1003; Dowell *v.* State, (Tex. Cr. App. 1896) 35 S. W. 651; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189; Fowle *v.* State, 47 Wis. 545, 2 N. W. 1133.

For cases in which the evidence was held insufficient to show non-consent of the owner see Robertson *v.* State, 32 Ga. 424; McLin *v.* State, 29 Tex. App. 171, 15 S. W. 600.

For evidence tending to show want of consent see Rains *v.* State, 7 Tex. App. 588.

49. *Alabama.*— Rose *v.* State, 117 Ala. 77, 23 So. 638; Parker *v.* State, 111 Ala. 72, 20 So. 641.

Florida.—Whitehead *v.* State, 20 Fla. 841.

Georgia.—White *v.* State, 120 Ga. 145, 47 S. E. 547; Lane *v.* State, 113 Ga. 1040, 39 S. E. 463; May *v.* State, 111 Ga. 840, 36 S. E. 222; Benjamin *v.* State, 105 Ga. 830, 31 S. E. 739.

Illinois.— Collins *v.* People, 39 Ill. 233.

Missouri.— State *v.* Murphy, 141 Mo. 267, 42 S. W. 936.

Nebraska.— Rooney *v.* State, 51 Nebr. 576, 71 N. W. 309.

Texas.— Ellison *v.* State, 25 Tex. App. 328, 8 S. W. 462; Moore *v.* State, 17 Tex. App. 176; Hall *v.* State, 15 Tex. App. 40.

In a prosecution for grand larceny, the evidence must show beyond all reasonable doubt that the property taken was of value sufficient to constitute the offense of grand larceny. In this case the evidence was held insufficient. Francis *v.* State, (Miss. 1906) 39 So. 897.

50. Com. *v.* Logan, 3 Brewst. (Pa.) 341.

51. Com. *v.* Lawless, 103 Mass. 425; Com. *v.* Burke, 12 Allen (Mass.) 182; Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333; Com. *v.* McKenney, 9 Gray (Mass.) 114.

52. **Petit larceny.**—State *v.* Slack, 1 Bailey (S. C.) 330; Thompson *v.* State, (Tex. Cr. App. 1904) 78 S. W. 941.

Larceny from the person.— Flannagan *v.* State, 32 Nebr. 114, 49 N. W. 220. Otherwise in Georgia. Powell *v.* State, 88 Ga. 32, 13 S. E. 829.

Larceny of cattle.— Houston *v.* State, 13 Ark 66; Woodring *v.* Territory, 14 Okla. 250, 78 Pac. 85; Davis *v.* State, 40 Tex. 134.

Larceny from building.— Hawkins *v.* State, 95 Ga. 458, 20 S. E. 217, some value must be proved.

As to proof of value for jurisdiction see Com. *v.* Byce, 8 Gray (Mass.) 461.

53. Whalen *v.* Com., 90 Va. 544, 19 S. E. 182.

54. Johnson *v.* State, 73 Ark. 101, 83 S. W. 651; Harris *v.* State, (Tex. Cr. App. 1892) 20 S. W. 754.

Illustrations.— The jury are warranted in finding that a horse is of some value, upon evidence that he was a dark sorrel horse, weighing about nine hundred pounds, had a long tail, and was driven a long distance (Com. *v.* McKenney, 9 Gray (Mass.) 114), or upon evidence that a witness went one hundred miles to hunt the horse, and that the horse traveled one hundred miles back again (Houston *v.* State, 13 Ark. 66). So the proof of value of the stolen property may be inferred from the fact that a sum of money was put to the credit of the accused by the firm to whom he sent the property

The value to be proved is that at the time and place of the larceny.[55] The value proved may exceed the amount alleged.[56] Permission to prove the value in United States currency is not error.[57] Evidence of value by mere opinion of a witness is not sufficient unless he is shown to possess knowledge on the subject.[58] Very vague estimates of value are, however, allowed to go to the jury.[59] Evidence of the price obtained for the goods either before or after the larceny is sufficient proof of value.[60]

(III) *Value of Money and Notes.* The value of United States coin need not be proved,[61] and the same thing is true of genuine United States treasury notes or greenbacks.[62] It is often so provided of other bank-notes by statute.[63] Other bank-notes are required to be proved genuine notes in order to establish their value.[64] This may be done by the testimony of a business man who knows the fact.[65] The value may be proved without evidence of genuineness.[66] The ordinary method of proving value of a bank-note is to prove its actual circulation as currency.[67] But the fact that a witness for the prosecution, who was a broker,

to be sold. State *v.* Collins, 49 La. Ann. 1198, 22 So. 357.

55. People *v.* Cole, 54 Mich. 238, 19 N. W. 968.

56. Com. *v.* Gallagher, 126 Mass. 54.

57. Hubotter *v.* State, 32 Tex. 479.

58. Edmonds *v.* State, 42 Nebr. 684, 60 N. W. 957.

For cases in which opinion evidence was held sufficient to show value see State *v.* Blain, 118 Iowa 466, 92 N. W. 650; Keith *v.* Territory, 8 Okla. 307, 57 Pac. 834; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189.

For cases in which opinion evidence was held insufficient to show value see McBroom *v.* State, (Tex. Cr. App. 1901) 61 S. W. 480; Sampson *v.* State, (Tex. Cr. App. 1892) 20 S. W. 711.

59. Where on the issue as to whether the bale of cotton stolen was worth more than twenty dollars, a witness testified "that he did not know exactly what the bale of cotton was worth; about thirty dollars — maybe a little more," there was sufficient evidence that it was worth more than twenty dollars to be submitted to the jury. State *v.* Davenport, 38 S. C. 348, 17 S. E. 37.

60. See Gatewood *v.* Com., 46 S. W. 1, 20 Ky. L. Rep. 348.

Value several months before theft.— Where the owner paid thirty dollars for the property stolen eighteen months before the theft, it is natural to infer a value under thirty dollars, although a jury might be permitted to find a value of thirty dollars. State *v.* Norman, 101 Mo. 520, 14 S. W. 661, 20 Am. St. Rep. 623, 10 L. R. A. 35.

What is sufficient proof of market value.— On a trial for stealing a saddle, where it was shown that the actual value of the saddle was twenty-two dollars, and that defendant had since refused that sum for it, there was sufficient proof of its "market value." Rollins *v.* State, 32 Tex. Cr. 566, 25 S. W. 125.

Evidence sufficient to go to jury.— On the trial of an indictment for the larceny of a cow, evidence that the owner of the cow, but a short time before she was stolen, paid fifty dollars for her, and that defendant instructed his employee, who was assisting him in selling the stolen cow, to ask thirty dollars or forty dollars for her, was sufficient to go to the jury on the point that she was worth more than twenty-five dollars when stolen. People *v.* Harris, 77 Mich. 568, 43 N. W. 1060.

61. Grant *v.* State, 55 Ala. 201; Ector *v.* State, 120 Ga. 543, 48 S. E. 315.

62. *Illinois.*— Collins *v.* People, 39 Ill. 233.

Missouri.— State *v.* Mosely, 38 Mo. 380.

South Carolina.— State *v.* Evans, 15 Rich. 31.

Wisconsin.— State *v.* Ford, 21 Wis. 610.

United States.— U. S. *v.* Byers, 25 Fed. Cas. No. 14,705, 4 Cranch C. C. 171.

See 32 Cent. Dig. tit. "Larceny," § 155.

Where a national bank-bill is produced and identified as part of the stolen money it is sufficient evidence that it is worth its full value. The value is fixed by law. Joiner *v.* State, 124 Ga. 102, 52 S. E. 151; Keating *v.* People, 160 Ill. 480, 43 N. E. 724.

63. McDowell *v.* State, 74 Miss. 373, 20 So. 864.

64. *Alabama.*— Corbett *v.* State, 31 Ala. 329.

Delaware.— State *v.* Dobson, 3 Harr. 563.

Georgia.— State *v.* Allen, R. M. Charlt. 518.

New York.— Johnson *v.* People, 4 Den. 364; People *v.* Caryl, 12 Wend. 547.

South Carolina.— State *v.* Smart, 4 Rich. 356, 55 Am. Dec. 683.

In New York it has been held that after sentence the bills will be presumed genuine, in the absence of evidence to the contrary. Higgins *v.* People, 7 Lans. 110.

65. Clark *v.* State, 14 Ind. 26.

66. State *v.* Allen, R. M. Charlt. (Ga.) 518; State *v.* Pratt, 20 Iowa 267. As for instance by showing that the prosecutor received them from a solvent bank, since he could hold the bank on them whether they were genuine or not. State *v.* Allen, *supra.*

67. *Alabama.*— Corbett *v.* State, 31 Ala. 329.

Illinois.— Hildreth *v.* People, 32 Ill. 36.

Indiana.— Crawford *v.* State, 2 Ind. 132.

had exchanged the bills alleged to have been stolen, giving other money for them, after the larceny, but who did not speak of any former knowledge of such bills, or express any belief as to their genuineness, is no evidence that the bills were genuine.[68]

h. Intent — (i) *Necessity of Proof of Intent.* The felonious intent must be proved to the satisfaction of the jury. The existence of the felonious intent is a question for the jury.[69] If upon the evidence the jury is not justified in finding the existence of the felonious intent, a conviction cannot be sustained.[70]

(ii) *Evidence of Intent in General.* Where defendant who claims to have taken the property innocently gave false accounts of the taking, it is evidence from which the jury may find the felonious intent.[71] Sufficient evidence to justify a finding of felonious intent also exists where defendant attempted to conceal the goods or to escape with them, and denied possession of them.[72] If the taking was open and notorious the presumption is against an intent to steal, and there must be an acquittal unless there is some positive evidence of such an intent.[73] But if such evidence is given the intent is proved.[74] But a secret and clandestine taking of another's property, without explanation, may be found felonious.[75]

(iii) *Lost or Mislaid Property.* Where lost property is found, and is converted by the finder to his own use, and the property is so marked as to be capable of identification, proof of the possession and of the immediate subsequent conversion is admissible to establish the felonious intent.[76] So where the evidence showed

New York.— Johnson *v.* People, 4 Den. 364.

Ohio.— Hummel *v.* State, 17 Ohio St. 628.

Tennessee.— Vincent *v.* State, 3 Heisk. 120; Pyland *v.* State, 4 Sneed 357; Baldwin *v.* State, 1 Sneed 411.

Virginia.— Cummings *v.* Com., 2 Va. Cas. 128.

See 32 Cent. Dig. tit. "Larceny," § 155.

68. Johnson *v.* People, 4 Den. (N. Y.) 364.

69. *Alabama.*—Verberg *v.* State, 137 Ala. 73, 34 So. 848, 97 Am. St. Rep. 17.

California.— People *v.* Grider, (1884) 3 Pac. 492; People *v.* Carabin, 14 Cal. 438.

Minnesota.— State *v.* Colwell, 43 Minn. 378, 45 N. W. 847.

New Jersey.— State *v.* South, 28 N. J. L. 28, 75 Am. Dec. 250.

New York.— Ellis *v.* People, 21 How. Pr. 356.

Pennsylvania.— Com. *v.* Cramer, 25 Pa. Super. Ct. 141.

Texas.— Banks *v.* State, 7 Tex. App. 591.

Vermont.— State *v.* Blay, 77 Vt. 56, 58 Atl. 794.

England.— Reg. *v.* Farnborough, [1895] 2 Q. B. 484, 18 Cox C. C. 191, 59 J. P. 505, 64 L. J. M. C. 270, 73 L. T. Rep. N. S. 351, 15 Reports 497, 44 Wkly. Rep. 48.

See 32 Cent. Dig. tit. "Larceny," § 180.

70. People *v.* Goldberg, 20 N. Y. App. Div. 444, 46 N. Y. Suppl. 913; State *v.* Foy, 131 N. C. 804, 42 S. E. 934; Hicks *v.* State, (Tex. Cr. App. 1898) 47 S. W. 1016; Reg. *v.* Carter, 47 J. P. 759.

71. Green *v.* Com., 24 S. W. 117, 15 Ky. L. Rep. 566; State *v.* Campbell, 108 Mo. 611, 18 S. W. 1109; May *v.* State, 38 Nebr. 211, 56 N. W. 804.

72. People *v.* Swalm, 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96; State *v.* Patton, 1 Marv. (Del.) 552, 41 Atl. 193; Elton *v.* State, 40 Tex. Cr. 339, 50 S. W. 379, 51 S. W. 245. But where defendant, who was under age, went with certain persons to kill a beef on the assurance that they had authority so to do and the only evidence of his felonious intent was that the killing occurred at night and that on the next morning he falsely denied having possession of any of the beef, it was insufficient to support a conviction of theft; the animal being one of a bunch of wild cattle whose owner was unknown. Smith *v.* State, 2 Tex. App. 477.

73. Black *v.* State, 83 Ala. 81, 3 So. 814, 3 Am. St. Rep. 691; McMullen *v.* State, 53 Ala. 531; Stuart *v.* People, 73 Ill. 20; People *v.* Hillhouse, 80 Mich. 580, 45 N. W. 484; Williams *v.* State, 22 Tex. App. 332, 3 S. W. 226.

Illustrations.—Where the evidence shows that defendant took the watch from its owner, who was drunk, and that he pawned it, and when accused of the theft by a detective, he admitted the taking and restored the watch, it is proper to refuse a charge that these facts raise a strong presumption that there was no felonious intent, which must be repelled by clear and convincing evidence. Schafer *v.* State, (Ala. 1890) 8 So. 670.

74. State *v.* Powell, 103 N. C. 424, 9 S. E. 627, 14 Am. St. Rep. 821, 4 L. R. A. 291. Where one took money from the pocket of a boy who was asleep, disguised himself, became intoxicated and ran away, there was sufficient evidence of a felonious intent. People *v.* Hansen, 84 Cal. 291, 24 Pac. 117.

75. Robinson *v.* State, 113 Ind. 510, 16 N. E. 184.

76. State *v.* Hayes, 98 Iowa 619, 67 N. W. 673, 60 Am. St. Rep. 219, 37 L. R. A. 116.

that accused found the property described as having been stolen, and knew it to be the property of the rightful owner, and retained it with the express purpose of converting it to his own use, his conviction of simple larceny was not to be set aside.[77]

(iv) *Claim of Right.* A claim of right which is sufficiently proved by the evidence is enough to prevent conviction.[78] But an alleged claim of right may be disproved by circumstances.[79]

(v) *Mistake.* If goods are taken under a mistake, defendant believing that they are his own, this if established as probable will prevent conviction.[80] And this is stronger if the taking was by a servant or employee of the supposed owner, who had no interest in the goods.[81]

(vi) *Subsequent Conduct.* The intent at the time of taking may be sufficiently proved by subsequent conduct of defendant.[82] On the other hand a sufficient explanation of the subsequent conduct leaves the intent without sufficient proof.[83]

(vii) *Previous Similar Frauds.* A taking which appears fraudulent, where it is shown that similar frauds have previously been perpetrated by defendant, may be found felonious.[84]

i. Nature or Degree of the Offense. The kind or degree of larceny charged must be proved by sufficient evidence.[85]

77. Flemister *v.* State, 121 Ga. 146, 48 S. E. 910.

78. Ross *v.* Com., 20 S. W. 214, 14 Ky. L. Rep. 259; Homer *v.* State, (Tex. Cr. App. 1902) 68 S. W. 999; Murrah *v.* State, (Tex. Cr. App. 1901) 63 S. W. 318; Sweeten *v.* State, (Tex. Cr. App. 1892) 20 S. W. 712; Wilson *v.* State, 27 Tex. App. 577, 11 S. W. 638.

79. Littlejohn *v.* State, (Tex. Cr. App. 1897) 38 S. W. 789.

80. Cook *v.* State, 29 Ga. 75; Mims *v.* State, (Tex. Cr. App. 1895) 32 S. W. 540; Pittman *v.* State, (Tex. Cr. App. 1891) 17 S. W. 623; Lunsford *v.* State, 29 Tex. App. 205, 15 S. W. 204; Phipps *v.* State, 22 Tex. App. 621, 3 S. W. 761; Thompson *v.* State, 21 Tex. App. 141, 17 S. W. 718.

For cases in which the evidence was held sufficient to show that defendant was not acting under a mistake see State *v.* Hunt, 45 Iowa 673; Lawrence *v.* State, 35 Tex. Cr. 114, 32 S. W. 530, 539; Johnson *v.* State, (Tex. Cr. App. 1894) 26 S. W. 504.

81. Cook *v.* State, 29 Ga. 75; Mims *v.* State, (Tex. Cr. App. 1895) 32 S. W. 540.

82. Quinn *v.* People, 32 Colo. 135, 75 Pac. 396; State *v.* McKee, 17 Utah 370, 53 Pac. 733; Johnson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 576; Gear *v.* State, (Tex. Cr. App. 1897) 42 S. W. 285.

Illustrations.—Where defendant borrowed a horse to go to a certain place, but in fact started off in a different direction, left the state with the horse, and never returned it, the felonious intent may be found at the time of taking. Weeks *v.* State, (Tex. Cr. App. 1894) 24 S. W. 905. So omission to use ordinary and well known means of discovering the owner of goods found will justify a finding of felonious intent at the time of the taking. State *v.* Briscoe, 3 Pennew. (Del.) 7, 50 Atl. 271. Where one has obtained possession of a deed by false representations, and has placed it on record, his intention in so doing may be inferred from his subsequent conduct and conversation relative thereto. State *v.* Hall, 85 Mo. 669. Killing a hog, secreting its carcass, and sending another to cut it up and carry it to the home of the one having killed it, sufficiently shows a felonious intent at the time of the killing. State *v.* Bazile, 50 La. Ann. 1184, 24 So. 178.

83. People *v.* Stewart, 80 Cal. 129, 22 Pac. 124; Perrin *v.* Com., 87 Va. 554, 13 S. E. 76.

Illustration.—Where one hired a horse to drive to a certain town, but instead drove to many towns, keeping the horse many days, but writing the owner regarding his movements, it was held there was insufficient evidence of a felonious intent to steal the horse at the time of the hiring. Stillwell *v.* State, 155 Ind. 552, 58 N. E. 709.

84. May *v.* State, 38 Nebr. 211, 56 N. W. 804; People *v.* Evans, 69 Hun (N. Y.) 222, 23 N. Y. Suppl. 717.

85. Grand larceny.—Where defendant is indicted for grand larceny in stealing several articles, but there is no sufficient evidence to show a taking of all the articles, there can be no conviction of the grand larceny unless the articles proved to be taken are shown to be worth more than the required amount. People *v.* Kehoe, 19 N. Y. Suppl. 763; Alexander *v.* Com., 90 Va. 809, 20 S. E. 782.

Attempt.— On indictment for an attempt to commit larceny, where the evidence shows an attempt to commit robbery, a conviction as for the former offense must be reversed. State *v.* Craft, 72 Mo. 456.

Larceny from the person.—Where the indictment charged the defendant with stealing money from the "person" of B, proof that the money was delivered by B. to defendant's wife in one city, to carry to another, did not sustain the charge of theft from the person, in the indictment. De Gaultie *v.*

3. Proof by Particular Kinds of Evidence — a. Opportunity. Evidence of sole opportunity to commit the crime is enough to justify conviction,[86] and evidence of access by defendant to the stolen goods, with other suspicious circumstances, may justify a conviction.[87] But mere opportunity, not exclusive without other circumstances pointing clearly to defendant as guilty, is not sufficient to justify conviction.[88]

b. Evidence of Tracks. Tracing the stolen goods by footsteps, tracks of animals, or other tracks to defendant's house, with other circumstances, is often enough to sustain a conviction.[89] But where such tracks are not necessarily connected either with the larceny or defendant they are not alone enough to justify a conviction.[90]

D. Evidence of Possession of Stolen Property — 1. Possession as Evidence of Guilt — a. General Principles. The authorities are in conflict as to whether mere recent possession of stolen property is evidence against the accused. In many jurisdictions the mere fact of recent possession is evidence against the possessor.[91] In other jurisdictions unexplained possession is evidence against the

State, 31 Tex. 32. Evidence that the owner of stolen money felt someone touch his pocket containing his purse, and that on looking around quickly he saw defendant's hand holding the purse pass from his to defendant's pocket, is sufficient to prove theft from the person. Green *v.* State, 28 Tex. App. 493, 13 S. W. 784.

86. Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138; Burns *v.* State, (Tex. Cr. App. 1903) 71 S. W. 965.

87. *Illinois.*— Carroll *v.* People, 136 Ill. 456, 27 N. E. 18.

Iowa.— State *v.* House, 108 Iowa 68, 78 N. W. 859.

Michigan.— People *v.* Howard, 50 Mich. 390, 15 N. W. 523.

Minnesota.—State *v.* Summers, 38 Minn. 324, 37 N. W. 451.

New York.— People *v.* Cassin, 16 N. Y. Suppl. 926 [*affirmed* in 136 N. Y. 633, 32 N. E. 1014]; People *v.* Huntington, 1 N. Y. Suppl. 526.

North Carolina.— State *v.* Bruce, 106 N. C. 792, 11 S. E. 475.

Texas.— Battle *v.* State, (Cr. App. 1894) 24 S. W. 642.

Illustration. — Where defendant jostled against the prosecuting witness, who at once found his pocket picked, a conviction may be sustained. State *v.* Hall, 79 Iowa 674, 44 N. W. 914; People *v.* Wilkinson, 60 Hun (N. Y.) 582, 14 N. Y. Suppl. 827; People *v.* Sands, 9 N. Y. St. 12.

88. *California.*— People *v.* Wong Ah You, 67 Cal. 31, 7 Pac. 8.

Georgia.— Mitchell *v.* State, 103 Ga. 578, 29 S. E. 435; Hines *v.* State, 51 Ga. 301.

Montana.— State *v.* Whorton, 25 Mont. 11, 63 Pac. 627.

New York.— People *v.* Gillette, 76 Hun 611, 28 N. Y. Suppl. 101; People *v.* Lesser, 76 Hun 371, 27 N. Y. Suppl. 750, 31 Abb. N. Cas. 227.

Texas.— Powers *v.* State, 16 Tex. 546; Jackson *v.* State, (Cr. App. 1901) 65 S. W. 520; Caldwell *v.* State, (Cr. App. 1897) 42 S. W. 304.

Washington.— State *v.* Payne, 6 Wash. 563, 34 Pac. 317.

England.— Reg. *v.* Walker, 6 Cox C. C. 310, Dears. C. C. 280.

89. Harris *v.* State, 62 Ga. 337; State *v.* McKinstry, 100 Iowa 82, 69 N. W. 267; Cole *v.* State, (Miss. 1888) 4 So. 577; State *v.* Graves, 95 Mo. 510, 8 S. W. 739.

90. McIver *v.* State, (Tex. Cr. App. 1900) 60 S. W. 50; Mote *v.* State, (Tex. Cr. App. 1900) 55 S. W. 173; Hankins *v.* State, (Tex. App. 1889) 12 S. W. 490.

91. *Alabama.*— Fisher *v.* State, 46 Ala. 717.

Georgia.— Williams *v.* State, 119 Ga. 564, 46 S. E. 837; McAfee *v.* State, 68 Ga. 823; Wilson *v.* State, 66 Ga. 591.

Illinois.— Smith *v.* People, 103 Ill. 82.

Indiana.— Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; Smathers *v.* State, 46 Ind. 447; Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494. See Bailey *v.* State, 52 Ind. 462, 21 Am. Rep. 182.

Iowa.— State *v.* Wilson, 95 Iowa 341, 64 N. W. 266; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; State *v.* Kelly, 57 Iowa 644, 11 N. W. 635. See State *v.* Jordan, 69 Iowa 506, 29 N. W. 430; State *v.* Walker, 41 Iowa 217.

Kansas.— State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138; State *v.* Cassady, 12 Kan. 550. See State *v.* Henry, 24 Kan. 457.

Massachusetts.— Com. *v.* Deegan, 138 Mass. 182; Com. *v.* Bell, 102 Mass. 163.

Michigan.— People *v.* La Munion, 64 Mich. 709, 31 N. W. 593; Gablick *v.* People, 40 Mich. 292.

Mississippi.— Murray *v.* State, (1904) 36 So. 541; Snowden *v.* State, 62 Miss. 100; Unger *v.* State, 42 Miss. 642.

Missouri.— State *v.* Jennings, 81 Mo. 185, 51 Am. Rep. 236. See State *v.* Lange, 59 Mo. 418.

Nevada.— State *v.* Mandich, 24 Nev. 336, 54 Pac. 516.

New Jersey.— State *v.* Lax, 71 N. J. L. 386, 59 Atl. 18.

New York.— Knickerbocker *v.* People, 43

possessor.[92] In California the authorities appear to be in conflict.[93] It is probable that the apparent conflict between these views is less important than it seems. Although in many states stress is laid on the point, most jurisdictions are probably really in accord in holding that evidence of recent possession may be received for what it is worth, but that it is worthless unless supported by other evidence; and failure to account for the possession is such evidence. The effect of recent possession is the same in a prosecution for larceny from the person as in one for simple larceny.[94] So of larceny from a building, where there was no doubt that the goods were taken from a building.[95] And so of burglary, where the theft proved was in connection with an act of burglary.[96]

b. Independent Evidence of Corpus Delicti Required.[97] Possession of another's property is not in any way evidence that the possessor stole it, where there is no independent evidence of any theft,[98] or identification of the property by independent evidence with that stolen.[99] The rule that the possession of stolen property, without explanation, is evidence of larceny does not apply where the circumstances under which the party acquired possession are proven.[1] Where defendant's possession was shown to have been obtained from a common carrier at a distance from the place of taking it raises no presumption against him.[2]

c. Possession of Part of the Stolen Property. Possession of part of the stolen property is under ordinary circumstances evidence of stealing the whole;[3] as of

N. Y. 177. See People *v.* Smith, 1 Wheel. Cr. Cas. 131.

North Carolina.— State *v.* Williams, 47 N. C. 194.

Vermont.— State *v.* Brewster, 7 Vt. 118.

Washington.— State *v.* Burns, 19 Wash. 52, 52 Pac. 316.

England.— Reg. *v.* Langmead, 9 Cox C. C. 464, L. & C. 427, 10 L. T. Rep. N. S. 350.

See 32 Cent. Dig. tit. "Larceny," § 170.

The sale of stolen property by the accused, at a grossly inadequate price may be considered in determining his guilt. State *v.* Herron, 64 Kan. 363, 67 Pac. 861.

92. *Arizona.*— Terr. *v.* Casio, 1 Ariz. 485, 2 Pac. 755.

Arkansas.— Boykin *v.* State, 34 Ark. 443.

Florida.— Bellamy *v.* State, 35 Fla. 242, 17 So. 560. See Tilly *v.* State, 21 Fla. 242.

Idaho.— State *v.* Sanford, 8 Ida. 187, 67 Pac. 492.

Nebraska.— Robb *v.* State, 35 Nebr. 285, 53 N. W. 134.

North Dakota.— State *v.* Rosencrans, 9 N. D. 163, 82 N. W. 422.

Oklahoma.— Douthitt *v.* Territory, 7 Okla. 55, 54 Pac. 312. And see Blain *v.* Territory, 15 Okla. 549, 82 Pac. 653.

Tennessee.— Cook *v.* State, 16 Lea 461, 1 S. W. 254. See Hughes *v.* State, 8 Humphr. 75.

Texas.— Selph *v.* State, (Cr. App. 1905) 90 S. W. 174; Unsell *v.* State, (Cr. App. 1898) 45 S. W. 902; Faulkner *v.* State, 15 Tex. App. 115; Lowe *v.* State, 11 Tex. App. 253.

Wisconsin.— Fowle *v.* State, 47 Wis. 545, 2 N. W. 1133.

Wyoming.— Younger *v.* State, 12 Wyo. 24, 73 Pac. 551.

See 32 Cent. Dig. tit. "Larceny," § 170 *et seq.*

93. People *v.* Luchetti, 119 Cal. 501, 51 Pac. 707 (that mere possession is evidence); People *v.* Nicolosi, (Cal. 1893) 34 Pac. 824; People *v.* Ah Ki, 20 Cal. 177; People *v.* Chambers, 18 Cal. 382; People *v.* Mahoney, 18 Cal. 180.

94. Roberts *v.* State, 33 Tex. Cr. 83, 24 S. W. 895.

95. State *v.* King, 122 Iowa 1, 96 N. W. 712.

96. Magee *v.* People, 139 Ill. 138, 28 N. E. 1077; Langford *v.* People, 134 Ill. 444, 25 N. E. 1009; State *v.* Frahm, 73 Iowa 355, 35 N. W. 451; State *v.* Conway, 56 Kan. 682, 44 Pac. 627; Knickerbocker *v.* People, 43 N. Y. 177.

97. See also CRIMINAL LAW, 12 Cyc. 488.

98. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; Thomas *v.* State, 109 Ala. 25, 19 So. 403.

Arkansas.— Shepherd *v.* State, 44 Ark. 39.

Indiana.— Bailey *v.* State, 52 Ind. 462, 21 Am. Rep. 182; Howard *v.* State, 50 Ind. 190.

Missouri.— State *v.* Sasseen, 75 Mo. App. 197.

Nebraska.— Smith *v.* State, 17 Nebr. 358, 22 N. W. 780.

New York.— People *v.* Caniff, 2 Park. Cr. 586.

Ohio.— McGuire *v.* State, 3 Ohio Cir. Ct. 551, 2 Ohio Cir. Dec. 318.

South Carolina.— State *v.* McGowan, 1 S. C. 14.

Texas.— Garcia *v.* State, 26 Tex. 209, 82 Am. Dec. 605.

England.— Reg. *v.* Hall, 1 Cox C. C. 231.

99. State *v.* Lackland, 136 Mo. 26, 37 S. W. 812; U. S. *v.* Candler, 65 Fed. 308.

1. State *v.* Spencer, 4 Pennew. (Del.) 92, 53 Atl. 337.

2. Heed *v.* State, 25 Wis. 421.

3. People *v.* Fagan, 66 Cal. 534, 6 Pac. 394; State *v.* Wilson, 95 Iowa 341, 64 N. W. 266;

the unexplained possession by defendant of box and wrapper in which the stolen goods had been packed.[4]

d. Proof of Possession. Whether defendant was in possession of goods which were found is a question for the jury.[5] Where defendant pastured cattle for prosecutor, and the cattle escaped and returned to him, together with two others which defendant sold as his own to him, these facts tended to show possession on defendant's part of the two cattle thus sold by him.[6] And where goods formerly stolen from one person were found by another, and while in the latter's possession were exactly described by defendant, who claimed to have lost them, there is evidence of possession by defendant.[7] On the other hand there is not sufficient evidence of defendant's possession where it is shown that the goods were carried away on his team;[8] that he was seen walking behind a wagon in which they were carried away;[9] that they were found in a room jointly occupied by him and another,[10] or in a room occupied by him, but not under his control;[11] or that they were in possession of his servant.[12]

2. Weight of the Evidence — a. Possession as Raising a Presumption of Guilt. When a person is found in possession of recently stolen property, it is usually held that the burden of accounting for such possession rests upon him,[13] or as it is commonly put, that the possession of itself raises a presumption against the accused, which will justify conviction if he does not meet it by a reasonable explanation.[14] The same presumption arises when defendant points out the place

State *v.* Henry, 24 Kan. 457; Hill *v.* State, 41 Tex. 253.

4. People *v.* Block, 15 N. Y. Suppl. 229.

5. See the cases cited in the notes following.

6. State *v.* Jackson, 86 Mo. 18.

7. State *v.* Jones, 20 N. C. 120.

8. Newman *v.* State, 26 Ga. 633.

9. Cruit *v.* State, 41 Tex. 476.

10. Turbeville *v.* State, 42 Ind. 490.

11. Casas *v.* State, 12 Tex. App. 59.

12. Olivarez *v.* State, (Tex. Cr. App. 1892) 20 S. W. 751.

13. *California.*— People *v.* Kelly, 28 Cal. 423.

Colorado.— Brooke *v.* People, 23 Colo. 375, 48 Pac. 502.

Delaware.— State *v.* Carr, 4 Pennew. 523, 57 Atl. 370.

Indiana.— Jones *v.* State, 49 Ind. 549.

Louisiana.— State *v.* Daly, 37 La. Ann. 576; State *v.* Kimble, 34 La. Ann. 392.

Nevada.— State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677.

Texas.— Mondragon *v.* State, 33 Tex. 480. *Contra,* Hernandez *v.* State, 9 Tex. App. 288.

Wisconsin.— Crilley *v.* State, 20 Wis. 231.

14. *Arizona.*— Territory *v.* Casio, 1 Ariz. 485, 2 Pac. 755.

Connecticut.— State *v.* Raymond, 46 Conn. 345; State *v.* Weston, 9 Conn. 527, 25 Am. Dec. 46.

Delaware.— State *v.* Briscoe, 3 Pennew. 7, 50 Atl. 271.

Florida.— Tilly *v.* State, 21 Fla. 242.

Georgia.— McAfee *v.* State, 68 Ga. 823; Tucker *v.* State, 57 Ga. 503.

Illinois.— Keating *v.* People, 160 Ill. 480, 43 N. E. 724; Magee *v.* People, 139 Ill. 138, 28 N. E. 1077; Langford *v.* People, 134 Ill. 444, 25 N. E. 1009. In an early case in Illinois it was held error to charge that recent possession of stolen property is of itself *prima facie* evidence against defendant, and throws the burden on him. Conkwright *v.* People, 35 Ill. 204. But in a later case it was held proper to instruct that recent possession will warrant conviction unless the other evidence so far overcomes the presumption thus raised as to create a reasonable doubt. Sahlinger *v.* People, 102 Ill. 241.

Indiana.— Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; Smathers *v.* State, 46 Ind. 447.

Iowa.— State *v.* Wilson, 95 Iowa 341, 64 N. W. 266; State *v.* Frahm, 73 Iowa 355, 35 N. W. 451; Johnson *v.* Miller, 63 Iowa 529, 17 N. W. 34, 50 Am. Rep. 758; State *v.* Kelly, 57 Iowa 644, 11 N. W. 635.

Kansas.— State *v.* Conway, 56 Kan. 682, 44 Pac. 627; State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138; State *v.* Cassady, 12 Kan. 550. Mere evidence of recent possession of stolen property does not create a presumption of guilt or even tend to prove guilt, without evidence of other circumstances; but the absence of reasonable explanation of such possession is such a circumstance, and recent unexplained possession does raise a presumption of guilt. State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742; State *v.* Hoffman, 53 Kan. 700, 37 Pac. 138; State *v.* Cassady, 12 Kan. 550. But unexplained possession is not conclusive of guilt. State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Louisiana.— State *v.* Kelly, 50 La. Ann. 597, 23 So. 543; State *v.* Daly, 37 La. Ann. 576.

Massachusetts.— Com. *v.* Deegan, 138 Mass. 182; Com. *v.* Bell, 102 Mass. 163.

Michigan.— People *v.* Wood, 99 Mich. 620, 58 N. W. 638.

Minnesota.— State *v.* Hogard, 12 Minn. 293.

of concealment of the property.[15] The force of the presumption is not affected by the fact that a state or county line intervenes between the place of theft and the place of finding.[16] The force of the presumption changes according to the nature of the property. Thus the possession of stolen money of a kind rarely found in circulation is much stronger evidence than that of ordinary money.[17] In several jurisdictions, however, evidence of the possession of recently stolen property is not enough by itself, without any other facts whatever, to support a conviction.[18] In a few states by statute one found in possession of stolen cattle has the burden cast upon him.[19] But this is really only the burden of giving an explanation, and whether the explanation is satisfactory is a question for the jury.[20]

b. Presumption Not Conclusive. Whatever be the law as to the presumption of guilt, it is everywhere agreed that the presumption is one of fact, not of law; the jury must pass on all the evidence.[21] And it is error to charge that there is a

Mississippi.— Foster *v.* State, 52 Miss. 695; Unger *v.* State, 42 Miss. 642.

Missouri.— State *v.* Good, 132 Mo. 114, 33 S. W. 790; State *v.* Crank, 75 Mo. 406; State *v.* Brown, 75 Mo. 317; State *v.* Robbins, 65 Mo. 443; State *v.* Creson, 38 Mo. 372; State *v.* Gray, 37 Mo. 463.

New York.— People *v.* Weldon, 111 N. Y. 569, 19 N. E. 279; Knickerbocker *v.* People, 43 N. Y. 177; People *v.* Weeks, 3 Wheel. Cr. 532. It has been held that possession of the stolen goods is evidence of guilt where good character is not shown. People *v.* Preston, 1 Wheel. Cr. 41. But where the case is doubtful and good character is shown, evidence of possession is not sufficient proof to sustain a conviction. People *v.* Turrell, 1 Wheel. Cr. 34.

North Carolina.— State *v.* Patterson, 78 N. C. 470.

Pennsylvania.— State *v.* Myers, Add. 320.

South Carolina.— State *v.* Garvin, 48 S. C. 258, 26 S. E. 570.

Tennessee.— Hughes *v.* State, 8 Humphr. 75; Hudson *v.* State, 9 Yerg. 408.

Vermont.— State *v.* Brewster, 7 Vt. 118; State *v.* Jenkins, 2 Tyler 377.

United States.— U. S. *v.* Jones, 31 Fed. 718.

See 32 Cent. Dig. tit. "Larceny," § 170 *et seq.*

15. Hudson *v.* State, 9 Yerg. (Tenn.) 408.

16. McGuire *v.* State, 6 Baxt. (Tenn.) 621; Graves *v.* State, 12 Wis. 591.

17. People *v.* Getty, 49 Cal. 581.

18. *Alabama.*— Stringer *v.* State, 135 Ala. 60, 33 So. 685.

California.— People *v.* Vidal, 121 Cal. 221, 53 Pac. 558; People *v.* Fagan, 66 Cal. 534, 6 Pac. 394; People *v.* Swinford, 57 Cal. 86; People *v.* Brown, 48 Cal. 253; People *v.* Antonio, 27 Cal. 404.

Nebraska.— Robb *v.* State, 35 Nebr. 285, 53 N. W. 134. The rule prevailing in Nebraska is that no presumption of guilt arises from the mere fact of possession of stolen property, but the inference to be drawn from such fact is for the jury alone, when weighed in connection with all the evidence adduced on the trial. Williams *v.* State, 60 Nebr. 526, 83 N. W. 681; Metz *v.* State, 46 Nebr. 547, 65 N. W. 190; Dobson *v.* State, 46 Nebr. 250, 64 N. W. 956; Robb *v.* State, 35 Nebr. 285, 53 N. W. 134.

Ohio.— Blaney *v.* State, 17 Ohio Cir. Ct. 486, 9 Ohio Cir. Dec. 616.

Texas.— Pace *v.* State, (Cr. App. 1895) 31 S. W. 173; Tomerlin *v.* State, (Cr. App. 1894) 26 S. W. 214; McGuire *v.* State, 19 Tex. App. 467; Truax *v.* State, 12 Tex. App. 230; Pettigrew *v.* State, 12 Tex. App. 225; Dreyer *v.* State, 11 Tex. App. 503; Williams *v.* State, 11 Tex. App. 275; Williams *v.* State, 4 Tex. App. 178. See, however, the earlier cases of Thompson *v.* State, 43 Tex. 268; Perry *v.* State, 41 Tex. 483; Mondragon *v.* State, 33 Tex. 480; People *v.* Chadwick, 7 Utah 134, 25 Pac. 737.

Virginia.— Hunt *v.* Com., 13 Gratt. 757, 70 Am. Dec. 443.

West Virginia.— State *v.* Reece, 27 W. Va. 375.

See 32 Cent. Dig. tit. "Larceny," § 170 *et seq.*

19. Flores *v.* State, 13 Tex. App. 665; State *v.* Enbank, 33 Wash. 293, 74 Pac. 378.

20. White *v.* State, 21 Tex. App. 339, 17 S. W. 727; Schindler *v.* State, 15 Tex. App. 394; Gomez *v.* State, 15 Tex. App. 64; Flores *v.* State, 13 Tex. App. 665.

Statute not retroactive see Espy *v.* State, 32 Tex. 375.

21. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; Orr *v.* State, 107 Ala. 35, 18 So. 142.

Arkansas.— Blankenship *v.* State, 55 Ark. 244, 18 S. W. 54.

Florida.— Bellamy *v.* State, 35 Fla. 242, 17 So. 560. See Atzroth *v.* State, 10 Fla. 207.

Mississippi.—Harper *v.* State, 71 Miss. 202, 13 So. 882; Matthews *v.* State, 61 Miss. 155; Stokes *v.* State, 58 Miss. 677; Davis *v.* State, 50 Miss. 86. See Snowden *v.* State, 62 Miss. 100.

Missouri.— State *v.* Kelly, 73 Mo. 608.

Nevada.— State *v.* En, 10 Nev. 277.

New Hampshire.—State *v.* Hodge, 50 N. H. 510.

New York.—Stover *v.* People, 56 N. Y. 315.

North Carolina.— State *v.* Graves, 72 N. C. 482.

Ohio.— Methard *v.* State, 19 Ohio St. 363.

Oregon.— State *v.* Pomeroy, 30 Oreg. 16, 46 Pac. 797; State *v.* Hale, 12 Oreg. 352, 7 Pac. 523.

legal presumption of guilt, or that the law presumes guilt.[22] And the weight to be given to such evidence is for the jury alone; under no circumstances is the presumption conclusive.[23] It is error in some states to charge that it is presumptive evidence, or creates a *prima facie* case. Such instruction is illegal as an instruction on the weight of evidence.[24] So it is error to charge that possession is a strong criminating circumstance, in jurisdictions where a charge on the weight of evidence is forbidden.[25] It is error in such jurisdictions even to charge that it is a criminating circumstance tending to show guilt.[26] But it has been held that a charge that "the law presumes," while technically wrong, is not cause for reversal if the whole charge makes it clear that the presumption is not conclusive, and the jury is to consider all the evidence.[27] For the same reason defendant cannot have a charge that mere evidence of possession without more will not justify conviction; it is a charge on the facts.[28] The jury should be instructed as to presumption.[29]

Texas.— Thomas *v.* State, 43 Tex. 658; Barnes *v.* State, 43 Tex. 98; Tomerlin *v.* State, (Cr. App. 1894) 26 S. W. 214; Stockman *v.* State, 24 Tex. App. 387, 6 S. W. 298, 5 Am. St. Rep. 894.

Washington.— State *v.* Walters, 7 Wash. 246, 34 Pac. 938, 1098.

Wisconsin.— Ingalls *v.* State, 48 Wis. 647, 4 N. W. 785; Graves *v.* State, 12 Wis. 591.

See 32 Cent. Dig. tit. "Larceny," § 171.

22. *Florida.*— Young *v.* State, 24 Fla. 147, 3 So. 881.

Georgia.— Griffin *v.* State, 86 Ga. 257, 12 S. E. 409.

Indiana.— Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077; Smith *v.* State, 58 Ind. 340.

New Hampshire.— State *v.* Hodge, 50 N. H. 510.

North Carolina.—State *v.* McRae, 120 N. C. 608, 27 S. E. 78, 58 Am. St. Rep. 808.

Texas.— McCoy *v.* State, 44 Tex. 616; Lee *v.* State, 27 Tex. App. 475, 11 S. W. 483; Watkins *v.* State, 2 Tex. App. 73; Hannah *v.* State, 1 Tex. App. 578; Foster *v.* State, 1 Tex. App. 363.

Washington.— State *v.* Harras, 25 Wash. 416, 65 Pac. 774.

See 32 Cent. Dig. tit. "Larceny," § 181.

23. *Alabama.*—Underwood *v.* State, 72 Ala. 220; Fisher *v.* State, 46 Ala. 717.

Arkansas.— Boykin *v.* State, 34 Ark. 443.

Florida.— Bellamy *v.* State, 35 Fla. 242, 17 So. 560.

Georgia.— Tucker *v.* State, 57 Ga. 503.

Idaho.— State *v.* Ireland, 9 Ida. 686, 75 Pac. 257.

Indiana.— Engleman *v.* State, 2 Ind. 91, 52 Am. Dec. 494.

Indian Territory.— Oxier *v.* U. S., 1 Indian Terr. 85, 38 S. W. 331.

Kansas.— State *v.* Deuel, 63 Kan. 811, 66 Pac. 1037.

Michigan.— Gablick *v.* People, 40 Mich. 292.

Minnesota.— State *v.* Hoshaw, 89 Minn. 307, 94 N. W. 873.

Mississippi.— Stokes *v.* State, 58 Miss. 677; Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175.

Nevada.— State *v.* Mandich, 24 Nev. 336, 54 Pac. 516.

New York.— People *v.* Sheahan, 1 Wheel. Cr. 188.

North Carolina.— State *v.* Rights, 82 N. C. 675.

Tennessee.— Wilcox *v.* State, 3 Heisk. 110; Curtis *v.* State, 6 Coldw. 9.

Texas.— Thompson *v.* State, 43 Tex. 268; Williamson *v.* State, 30 Tex. App. 330, 17 S. W. 722; Taylor *v.* State, 27 Tex. App. 463, 11 S. W. 462.

Vermont.— State *v.* Brewster, 7 Vt. 118.

Wisconsin.— State *v.* Snell, 46 Wis. 524, 1 N. W. 225.

See 32 Cent. Dig. tit. "Larceny," § 181.

Rebutting presumption.— The presumption arising out of possession need not be rebutted by direct evidence; evidence of high character has a bearing. State *v.* Hessians, 50 Iowa 135; State *v.* Hogard, 12 Minn. 293; State *v.* Crank, 75 Mo. 406; State *v.* Sasseen, 75 Mo. App. 197; Price *v.* Com., 21 Gratt. (Va.) 846.

A charge that the possession affords sufficient ground for a presumption of fact that the possessor was the thief is erroneous as invading the province of the jury. State *v.* Heaton, 23 W. Va. 773.

24. People *v.* Cline, 74 Cal. 575, 16 Pac. 391; People *v.* Gutierrez, 74 Cal. 81, 15 Pac. 444; People *v.* Titherington, 59 Cal. 598; State *v.* Jordan, 69 Iowa 506, 29 N. W. 430; Williams *v.* State, 60 Nebr. 526, 83 N. W. 681; Dobson *v.* State, 46 Nebr. 250, 64 N. W. 956; Martinez *v.* State, 41 Tex. 164; Lockhart *v.* State, 29 Tex. App. 35, 13 S. W. 1012; Gonzales *v.* State, 18 Tex. App. 449; Tucker *v.* State, 16 Tex. App. 471; Bryant *v.* State, 16 Tex. App. 144; Williams *v.* State, 4 Tex. App. 178.

25. Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905; State *v.* Bliss, 27 Wash. 463, 68 Pac. 87; Roberts *v.* State, 11 Wyo. 66, 70 Pac. 803.

26. State *v.* Walters, 7 Wash. 246, 34 Pac. 938, 1098.

27. Campbell *v.* State, 150 Ind. 74, 49 N. E. 905; State *v.* Kelly, 57 Iowa 644, 11 N. W. 635; State *v.* Richart, 57 Iowa 245, 10 N. W. 657; State *v.* Hessians, 50 Iowa 135.

28. Underwood *v.* State, 72 Ala. 220; State *v.* Hogard, 12 Minn. 293.

29. Gablick *v.* People, 40 Mich. 292.

c. Effect of Unexplained Possession. In almost all jurisdictions unexplained possession justifies a conviction.[30] In a few jurisdictions recent possession, unexplained either by direct or by circumstantial evidence, including evidence of character, is conclusive of guilt.[31] There is no presumption when there is no opportunity to explain the possession. Where under the circumstances of the case the possession, while tending to prove some other crime, like receiving stolen goods, does not indicate a taking by defendant, it cannot be relied upon to support a conviction.[32]

d. Effect of Possession in Connection With Other Evidence. Evidence of possession accompanied by evidence of other suspicious circumstances justifies a conviction.[33]

3. Explanation of Possession — a. General Principles. When one is found in possession of recently stolen property, but gives an explanation of his possession which seems reasonable to the jury, the possession ceases to have any evidentiary value and raises, either alone or in connection with other circumstances, no presumption of guilt; if the crime is proved, it must be done by other evidence altogether.[34] If, however, the explanation of his possession given by defendant

30. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; Shepperd *v.* State, 94 Ala. 102, 10 So. 663; Adams *v.* State, 52 Ala. 379.

Colorado.— Bergdahl *v.* People, 27 Colo. 302, 61 Pac. 228.

Georgia.— Stafford *v.* State, 121 Ga. 169, 48 S. E. 903; Scott *v.* State, 119 Ga. 425, 46 S. E. 637; Smiley *v.* State, 66 Ga. 754; Brown *v.* State, 59 Ga. 456.

Indiana.— Madden *v.* State, 148 Ind. 183, 47 N. E. 220.

Iowa.— State *v.* Griffin, 71 Iowa 372, 32 N. W. 447; State *v.* Hallett, 63 Iowa 259, 19 N. W. 206.

Kansas.— State *v.* Herron, 64 Kan. 363, 67 Pac. 861.

Kentucky.— Branson *v.* Com., 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. Rep. 614.

Mississippi.— Snowden *v.* State, 62 Miss. 100; Matthews *v.* State, 61 Miss. 155.

Missouri.— State *v.* De Mosse, 98 Mo. 340, 11 S. W. 731; State *v.* Nolle, 96 Mo. App. 524, 70 S. W. 504; State *v.* Krieger, 4 Mo. App. 584.

Nebraska.— Palmer *v.* State, (1903) 97 N. W. 235; Tatum *v.* State, 61 Nebr. 229, 85 N. W. 40; Robb *v.* State, 35 Nebr. 285, 53 N. W. 134; Hair *v.* State, 16 Nebr. 601, 21 N. W. 464.

New York.— Knickerbocker *v.* People, 43 N. Y. 177.

Pennsylvania.— Com. *v.* Devine, 18 Pa. Super. Ct. 431; Com. *v.* Laird, 14 York Leg. Rec. 128.

Texas.— Phillips *v.* State, (Cr. App. 1896) 34 S. W. 119; Baldwin *v.* State, 31 Tex. Cr. 589, 21 S. W. 679; Gentry *v.* State, 25 Tex. App. 614, 8 S. W. 925; Roberts *v.* State, 17 Tex. App. 82; Hunnicutt *v.* State, (App. 1887) 4 S. W. 882.

See 32 Cent. Dig. tit. "Larceny," § 170 *et seq.*

Contra, in California. People *v.* Cline, 83 Cal. 374, 23 Pac. 391; People *v.* Gassaway, 23 Cal. 51; People *v.* Ah Ki, 20 Cal. 177. See People *v.* Mahoney, 18 Cal. 180.

31. State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Kennedy, 88 Mo. 341; State *v.* Kelly, 73 Mo. 608; State *v.* Bruin, 34 Mo. 537; State *v.* Turner, 65 N. C. 592. See, however, State *v.* Kelly, 9 Mo. App. 512; Moore *v.* State, (Tex. Cr. App. 1896) 33 S. W. 980; Moreno *v.* State, 24 Tex. App. 401, 6 S. W. 299.

32. Alexander *v.* State, 60 Miss. 953; Ball's Case, 4 City Hall Rec. (N. Y.) 113; Lopez *v.* State, 28 Tex. App. 343, 13 S. W. 219.

33. *California.*— People *v.* St. Clair, (1896) 44 Pac. 234.

Georgia.— Carreker *v.* State, 92 Ga. 471, 17 S. E. 671; Moss *v.* State, 88 Ga. 241, 14 S. E. 572.

Michigan.— People *v.* Walker, 38 Mich. 156.

Minnesota.— State *v.* Johnson, 33 Minn. 34, 21 N. W. 843.

Mississippi.— Heard *v.* State, 59 Miss. 545.

Montana.— Territory *v.* Doyle, 7 Mont. 245, 14 Pac. 671.

Nebraska.— McLain *v.* State, 18 Nebr. 154, 24 N. W. 720.

Texas.— Roberson *v.* State, (Cr. App. 1901) 65 S. W. 910; Martinez *v.* State, (Cr. App. 1900) 57 S. W. 829; Evans *v.* State, (Cr. App. 1897) 38 S. W. 616; Lyon *v.* State, (Cr. App. 1896) 34 S. W. 947; Emmerson *v.* State, 33 Tex. Cr. 89, 25 S. W. 289; Freese *v.* State, (Cr. App. 1893) 21 S. W. 189; Von Emons *v.* State, (Cr. App. 1893) 20 S. W. 1106.

Utah.— People *v.* Wright, 11 Utah 41, 39 Pac. 477.

Washington.— State *v.* Wong Quong, 27 Wash. 93, 67 Pac. 355.

See 32 Cent. Dig. tit. "Larceny," § 177.

34. *Florida.*— Williams *v.* State, 40 Fla. 480, 25 So. 143, 74 Am. St. Rep. 154; Bellamy *v.* State, 35 Fla. 242, 17 So. 560.

Idaho.— State *v.* Collett, 9 Ida. 608, 75 Pac. 271; State *v.* Marquardsen, 7 Ida. 352, 62 Pac. 1034; State *v.* Seymour, 7 Ida. 257, 61 Pac. 1033.

Illinois.— Watts *v.* People, 204 Ill. 233,

was in itself or in connection with the circumstances improbable, the prosecution need not disprove it; if the explanation is to be made effective this must be done by defendant introducing further evidence to support it.[35]

b. Explanation Raising Reasonable Doubt. Defendant is not bound to prove the truth of his explanation; the presumption arising from recent possession is removed if the explanation leaves the matter in doubt.[36] In other words, when such a reasonable explanation of the possession is given, the prosecution must

68 N. E. 563; Jones *v.* People, 12 Ill. 259.

Iowa.— State *v.* Deyoe, 97 Iowa 744, 66 N. W. 733; State *v.* Jordan, 69 Iowa 506, 29 N. W. 430.

Mississippi.— Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175.

North Carolina.— State *v.* Bridges, 114 N. C. 868, 19 S. E. 607.

Oregon.— State *v.* Sally, 41 Oreg. 366, 70 Pac. 396.

South Carolina.— State *v.* Dilley, Riley 302.

Texas.— Selph *v.* State, (Cr. App. 1905) 90 S. W. 174; Lacy *v.* State, 31 Tex. Cr. 78, 19 S. W. 896; Adams *v.* State, (App. 1890) 13 S. W. 1009; Clark *v.* State, 27 Tex. App. 405, 11 S. W. 374; Arispe *v.* State, 26 Tex. App. 581, 10 S. W. 111; Guest *v.* State, 24 Tex. App. 530, 7 S. W. 242; Bean *v.* State, 24 Tex. App. 11, 5 S. W. 525; Clark *v.* State, 22 Tex. App. 599, 3 S. W. 744; Brothers *v.* State, 22 Tex. App. 447, 3 S. W. 737; Shultz *v.* State, 22 Tex. App. 16, 2 S. W. 599; Vaughn *v.* State, 21 Tex. App. 573, 2 S. W. 825; Schultz *v.* State, 20 Tex. App. 315; Norwood *v.* State, 20 Tex. App. 306; York *v.* State, 17 Tex. App. 441; Ross *v.* State, 16 Tex. App. 554; Sitterlee *v.* State, 13 Tex. App. 587; Irvine *v.* State, 13 Tex. App. 499; Johnson *v.* State, 12 Tex. App. 385.

Utah.— State *v.* Gordon, 28 Utah 15, 76 Pac. 882.

England.— Reg. *v.* Exall, 4 F. & F. 922.

See 32 Cent. Dig. tit. "Larceny," § 175.

Explanations held sufficient on the facts.— People *v.* Fagan, 98 Cal. 230, 33 Pac. 60; McMahon *v.* People, 120 Ill. 581, 11 N. E. 883; State *v.* Miller, 10 Minn. 313; Foresythe *v.* State, (Tex. App. 1892) 20 S. W. 371; Harsdorf *v.* State, (Tex. App. 1892) 18 S. W. 415; Reveal *v.* State, 27 Tex. App. 57, 10 S. W. 759; Cudd *v.* State, 25 Tex. App. 666, 8 S. W. 814; Powell *v.* State, 11 Tex. App. 401.

Explanation by third person at defendant's request.— Where one, called on to explain his possession of stolen property, asks a person present to speak for him, the explanation is entitled to the same weight as though made by himself. Windham *v.* State, 19 Tex. App. 413.

35. *Georgia.*— Hudson *v.* State, 121 Ga. 147, 48 S. E. 903.

Iowa.— State *v.* Arnold, 12 Iowa 479.

Louisiana.— State *v.* Kimble, 34 La. Ann. 392.

Mississippi.—Jones *v.* State, 30 Miss. 653, 64 Am. Dec. 175.

Texas.— Brown *v.* State, 41 Tex. Cr. 232, 53 S. W. 866; Ray *v.* State, (Cr. App. 1897) 43 S. W. 77; Conners *v.* State, 31 Tex. Cr. 453, 20 S. W. 981; Holley *v.* State, 21 Tex. App. 156, 17 S. W. 159.

England.— Reg. *v.* Dibley, 2 C. & K. 818, 61 E. C. L. 818; Reg. *v.* Crowhurst, 1 C. & K. 370, 47 E. C. L. 370; Reg. *v.* Harmer, 2 Cox C. C. 487; Reg. *v.* Hughes, 1 Cox C. C. 176.

See 32 Cent. Dig. tit. "Larceny," § 175.

Explanations held insufficient on the facts.— Roberts *v.* People, 11 Colo. 213, 17 Pac. 637; Ford *v.* State, 92 Ga. 459, 17 S. E. 667; Holsey *v.* State, 89 Ga. 433, 15 S. E. 588; Duckett *v.* State, 65 Ga. 369; State *v.* Whitmer, 77 Iowa 557, 42 N. W. 442; Moore *v.* Com., (Ky. 1890) 14 S. W. 278; People *v.* Hawksley, 82 Mich. 71, 45 N. W. 1123; Washington *v.* State, (Miss. 1901) 29 So. 77; State *v.* Campbell 108 Mo. 611, 18 S. W. 1109; State *v.* Guest, 101 Mo. 234, 13 S. W. 957; State *v.* Mandich, 24 Nev. 336, 54 Pac. 516; Blankenship *v.* State, 5 Tex. App. 218.

36. *Colorado.*— Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905.

Florida.— Bellamy *v.* State, 35 Fla. 242, 17 So. 560.

Illinois.— Conkwright *v.* People, 35 Ill. 204.

Indiana.— Hall *v.* State, 8 Ind. 439.

Iowa.— State *v.* Bartlett, 128 Iowa 518, 105 N. W. 59; State *v.* Miner, 107 Iowa 656, 78 N. W. 679; State *v.* Manley, 74 Iowa 561, 38 N. W. 415; State *v.* Kirkpatrick, 72 Iowa 500, 34 N. W. 301; State *v.* Peterson, 67 Iowa 564, 25 N. W. 780; State *v.* Hopkins, 65 Iowa 240, 21 N. W. 585; State *v.* Richart, 57 Iowa 245, 10 N. W. 657; State *v.* Emerson, 48 Iowa 172.

Maine.— State *v.* Merrick, 19 Me. 398.

Michigan.— People *v.* Walters, 76 Mich. 195, 42 N. W. 1105.

Nebraska.— Grentzinger *v.* State, 31 Nebr. 460, 48 N. W. 148.

New Jersey.— State *v.* Lax, 71 N. J. L. 386, 59 Atl. 18.

South Carolina.— State *v.* Bennet, 3 Brev. 514.

Texas.— Eastland *v.* State, (Cr. App. 1900) 59 S. W. 267; Russell *v.* State, (Cr. App. 1897) 43 S. W. 81; Ray *v.* State, (Cr. App. 1897) 43 S. W. 77; Teague *v.* State, (Cr. App. 1895) 31 S. W. 401; Taylor *v.* State, 15 Tex. App. 356.

Application of rule.— Therefore an instruction that a defendant must "satisfactorily" explain his recent possession is erroneous. Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905; Hoge *v.* People, 117 Ill. 35, 6 N. E. 796.

establish the falsity of it beyond a reasonable doubt.[37] The prosecution is not required to do this, as a matter of law, in any particular way, as by calling the person from whom the prisoner claims to have obtained the goods.[38] A common explanation of possession given by the thief upon discovery is that he bought the goods from an unknown person. This explanation is entitled to little weight with the jury, or with the court which is passing on the facts.[39] The explanation may be so improbable that even if not contradicted by evidence the jury will misbelieve it; the reasonableness of it is for the jury.[40]

c. **Reasonableness For the Jury.** Whether the explanation is reasonable is for the jury.[41] And a reasonable explanation will not necessarily lead to acquittal.[42] Even if a reasonable account is given, the question of guilt is still entirely for the jury, and defendant is not entitled to an instruction that the prosecution must show the account to be false.[43] And if the explanation is false, the presumption is against the accused,[44] although his guilt cannot be found on that fact alone, in a state where unexplained possession alone will not justify conviction.[45]

d. **Proof of Explanation** — (i) *By Declarations of Defendant.* A statement made at the time defendant is discovered in possession of the goods, in explanation of his possession, is admissible in evidence a part of the *res gestæ*.[46] Such

37. *Delaware.*— State *v.* Carr, 4 Pennew. 523, 57 Atl. 370.

Florida.— Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Iowa.— State *v.* Brown, 25 Iowa 561.

Texas.— Ward *v.* State, 41 Tex. 611; Hilscher *v.* State, (Cr. App. 1905) 88 S. W. 227; Brown *v.* State, 34 Tex. Cr. 150, 29 S. W. 772; Hyatt *v.* State, 32 Tex. Cr. 580, 25 S. W. 291; Coleman *v.* State, (Cr. App. 1893) 22 S. W. 41; White *v.* State, 28 Tex. App. 71, 12 S. W. 406; Lee *v.* State, 27 Tex. App. 475, 11 S. W. 483; Tarin *v.* State, 25 Tex. App. 360, 8 S. W. 473; Harris *v.* State, 15 Tex. App. 411.

England.— Reg. *v.* Smith, 2 C. & K. 207, 61 E. C. L. 207; Reg. *v.* Crowhurst, 1 C. & K. 370, 47 E. C. L. 370; Reg. *v.* Hughes, 1 Cox C. C. 176.

See 32 Cent. Dig. tit. "Larceny," § 175.

But see State *v.* Smith, 4 Ida. 733, 44 Pac. 554.

38. Reg. *v.* Wilson, 7 Cox C. C. 310, Dears. & B. 157, 3 Jur. N. S. 167, 26 L. J. M. C. 45, 5 Wkly. Rep. 251.

39. State *v.* King, 122 Iowa 1, 96 N. W. 712; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763. In Thomason *v.* State, (Tex. Cr. App. 1897) 41 S. W. 638, Henderson, J., said: "This is the same ubiquitous stranger who so often figures in the records of this court in theft of cattle cases. Like the Wandering Jew, he is always on the go, but, when the time of trial comes, is always inaccessible, and cannot be found."

40. State *v.* King, 122 Iowa 1, 96 N. W. 712; State *v.* Marshall, 105 Iowa 38, 74 N. W. 763.

41. *California.*— People *v.* Elster, (1884) 3 Pac. 884.

Florida.— Leslie *v.* State, 35 Fla. 171, 17 So. 555.

Kentucky.— Cosby *v.* Com., 16 S. W. 88, 12 Ky. L. Rep. 982.

Nevada.— State *v.* Mandich, 24 Nev. 336, 54 Pac. 516.

Texas.— Williams *v.* State, 37 Tex. 474; Franklin *v.* State, 37 Tex. Cr. 312, 39 S. W. 680.

42. Crawford *v.* State, 113 Ala. 661, 21 So. 64; State *v.* Moore, 101 Mo. 316, 14 S. W. 182.

43. Dillon *v.* People, 1 Hun (N. Y.) 670, 4 Thomps. & C. 205; Wilson *v.* State, (Tex. Cr. App. 1896) 34 S. W. 284; Wheeler *v.* State, 34 Tex. Cr. 350, 30 S. W. 913; Pollard *v.* State, 33 Tex. Cr. 197, 26 S. W. 70.

44. Allen *v.* State, (Tex. Cr. App. 1893) 24 S. W. 30.

45. Smith *v.* State, (Tex. Cr. App. 1900) 56 S. W. 54; McCarty *v.* State, 36 Tex. Cr. 135, 35 S. W. 994; Arispe *v.* State, 26 Tex. App. 581, 10 S. W. 111.

46. *Alabama.*— Bryant *v.* State, 116 Ala. 445, 23 So. 40; Smith *v.* State, 103 Ala. 40, 16 So. 12.

Georgia.— Walker *v.* State, 28 Ga. 254.

Illinois.— Bennett *v.* People, 96 Ill. 602.

Kansas.— State *v.* Gillespie, 62 Kan. 469, 63 Pac. 742.

Mississippi.— Payne *v.* State, 57 Miss. 348.

Texas.— Darnell *v.* State, 43 Tex. 147; Shackelford *v.* State, 43 Tex. 138; Ward *v.* State, 41 Tex. 611; Perry *v.* State, 41 Tex. 483; Goens *v.* State, 35 Tex. Cr. 73, 31 S. W. 656; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788; Lopez *v.* State, 28 Tex. App. 343, 13 S. W. 219; Heskew *v.* State, 17 Tex. App. 161; Lewis *v.* State, 17 Tex. App. 140; Howell *v.* State, 16 Tex. App. 93; Castellow *v.* State, 15 Tex. App. 551; Shackleford *v.* State, 2 Tex. App. 385.

England.— Reg. *v.* Abraham, 2 C. & K. 550, 3 Cox C. C. 430, 61 E. C. L. 550.

See 32 Cent. Dig. tit. "Larceny," § 145.

Illustration.—Where defendant was charged with the theft of three head of cattle, in his possession, and the first notice he had that the cattle were claimed by another was by the service of a writ of sequestration, a statement by him, made to the officer serving the writ, to the effect that defendant claimed

a statement is admissible as well against as for defendant.[47] If defendant's possession has ceased before discovery, his declarations when first charged with the offense are admissible.[48] Corroboration of defendant's statement is admissible if the truth of his explanation is controverted,[49] but not if it is uncontradicted.[50]

(II) *By Other Evidence.* It is open to defendant to explain his recent possession by any evidence bearing upon the question, even though he gave no explanation at the time he was found in possession.[51] Testimony of a witness who was present at the time defendant claimed to have paid for the property is admissible to prove the fact of payment, and also defendant's declarations made at that time as to the account upon which the payment was made.[52] And a refusal to allow the prisoner to testify as to the conversation that took place between himself and another, from whom he claims to have received the property stolen, tending to show that he did not know that it was stolen property, is error.[53] Where defendant has given a reasonable explanation of his possession of the property which he is charged with stealing, the state does not disprove his explanation merely by showing that a witness who gave additional testimony in support of it had previously made inconsistent statements.[54] On the other hand, where on the trial of an indictment for entering a house and stealing therefrom a coat, it was shown on the part of the government that the coat had been stolen at a particular time, and soon afterward was seen on the back of defendant, evidence showing that it was common for workmen in the vicinity to buy second-hand coats had too slight bearing on the issue to be admissible.[55] And a defendant will not be allowed to show that several days after the theft he told persons who proposed to buy the property that he would not sell it because it was not his, and that he intended to give it to the owner when called for.[56]

4. Personal and Exclusive Possession. Possession of defendant must be personal and exclusive, for the reason that such possession alone indicates that the goods have come to the possessor by his own act, or with his consent.[57] So also there is no presumption where the goods are found on the premises of the prisoner, but in an open building to which many others had access,[58] or in the open

only two of the cattle, and that he had driven the other away several times, but that it had returned, is admissible. Hodge *v.* State, 41 Tex. Cr. 229, 53 S. W. 862.

47. State *v.* Rodman, 62 Iowa 456, 17 N. W. 663.

48. Taylor *v.* State, 15 Tex. App. 356; Anderson *v.* State, 11 Tex. App. 576 [*overruling* Cameron *v.* State, 44 Tex. 652; Childress *v.* State, 10 Tex. App. 698; Hampton *v.* State, 5 Tex. App. 463; Robinson *v.* State, 3 Tex. App. 487].

49. Nelson *v.* People, 22 Colo. 330, 44 Pac. 594; Andrews *v.* State, 25 Tex. App. 339, 8 S. W. 328.

50. May *v.* State, (Tex. Cr. App. 1899) 51 S. W. 242.

51. Jones *v.* State, 49 Ind. 549; Way *v.* State, 35 Ind. 409.

52. People *v.* Cline, 74 Cal. 575, 16 Pac. 391.

53. State *v.* Kelley, 57 Iowa 644, 11 N. W. 635.

54. Loving *v.* State, 18 Tex. App. 459.

55. State *v.* Staples, 47 N. H. 113, 90 Am. Dec. 565.

56. Dixon *v.* State, 2 Tex. App. 530.

57. People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862 [*affirming* 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107]; State *v.* Smith, 24 N. C. 402. Evidence that the goods of a husband were found in a room where the wife and an adulterer had stayed did not sufficiently show personal possession of the adulterer. Reg. *v.* Rosenberg, 1 C. & K. 233, 1 Cox C. C. 21, 47 E. C. L. 233.

58. *California.*— People *v.* Curran, (1892) 31 Pac. 1116; People *v.* Hurley, 60 Cal. 74, 44 Am. Rep. 55.

Colorado.— Van Straaten *v.* People, 26 Colo. 184, 56 Pac. 905.

Iowa.— State *v.* Griffin, 71 Iowa 372, 32 N. W. 447.

Michigan.— Gablick *v.* People, 40 Mich. 292.

North Carolina.— State *v.* Rice, 83 N. C. 661; State *v.* Smith, 24 N. C. 402.

England.— Reg. *v.* Hughes, 14 Cox C. C. 223, 39 L. T. Rep. N. S. 292; Reg. *v.* Coots, 2 Cox C. C. 188.

See 32 Cent. Dig. tit. "Larceny," § 173.

Use of part of stolen property.—In a prosecution for theft, part of the stolen property, consisting of barbed wire, was found in a building on defendant's place, over which he exercised a personal supervision, although it was occupied partly by others also. Defendant, when arrested, was building a fence with some of the wire, and told the officer who seized it that he bet he would bring it back. The evidence showed sufficient possession of the property by defendant to war-

field,[59] or in a room in a hotel to which servants had access,[60] or in a trunk to which other persons had been.[61] It may be a joint possession,[62] and evidence of possession in one is evidence against both.[63] But possession of a companion, although the two were together before the theft, is not enough.[64] Property found in a house occupied exclusively by defendant and his wife is sufficiently traced to defendant's possession.[65] Similarly possession in defendant's wife may be shown.[66] But it cannot be shown that the goods were found in a house occupied by his wife and daughter; the possession in that case is merely constructive.[67] Possession in defendant's son is not evidence against defendant, unless it is proved that the son obtained the goods from defendant.[68] And so possession in defendant's father is not admissible against defendant.[69] If, however, a connection is shown between the son and the father, or even if the son lives in the father's house, the evidence is admissible and the weight of it is for the jury;[70] and so where goods were found in the house of defendant's sister.[71] Evidence that stolen goods were found in defendant's bedroom, in the drawer of a bureau, containing only men's clothing, in a purse under a paper covering the bottom of the drawer, is sufficient to show a conscious, exclusive possession by defendant, a man, although the room was also occupied by two women, especially where defendant, when arrested, was in the company of another man, charged to be his confederate, on whom a portion of the stolen goods were found.[72]

5. Recent Possession. In order to warrant a presumption of guilt the possession must be recent.[73] Whether possession is recent is generally speaking for

rant a conviction. Pitts *v.* State, (Tex. Cr. App. 1895) 30 S. W. 359.

59. Watts *v.* People, 204 Ill. 233, 68 N. E. 563; State *v.* Scott, 109 Mo. 226, 19 S. W. 89; Bryant *v.* State, 25 Tex. App. 751, 8 S. W. 937; Lacey *v.* State, 25 Tex. App. 618, 8 S. W. 803. But evidence that prosecutor lost certain marked hogs; that he found them in a pen near defendant's house; that they had been re-marked and an attempt made to obliterate the former marks, which, however, partly remained; and that they also had the flesh marks of prosecutor's hogs, is sufficient to sustain a conviction of defendant of the theft. Johnson *v.* State, 77 Ga. 68.

60. State *v.* Wilks, 58 Mo. App. 159.

61. State *v.* Tilton, 63 Iowa 117, 18 N. W. 716; State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

62. People *v.* Nicolosi, (Cal. 1893) 34 Pac. 824; State *v.* Raymond, 46 Conn. 345.

Instances.— As where it is clear that several jointly possessed had been acting in concert. Porter *v.* People, 31 Colo. 508, 74 Pac. 879. And where the evidence showed that two persons were together on the night of the theft, it was proper to show that part of the stolen property was found on each of them. Branson *v.* Com., 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. Rep. 614; Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735.

63. State *v.* Phelps, 91 Mo. 478, 4 S. W. 119; State *v.* Wohlman, 34 Mo. 482, 86 Am. Dec. 117.

64. State *v.* Pennyman, 68 Iowa 216, 26 N. W. 82.

65. State *v.* Johnson, 60 N. C. 235, 86 Am. Dec. 434. *Contra,* Perkins *v.* State, 32 Tex. 109.

66. Buckine *v.* State, 121 Ga. 337, 49 S. E. 257; State *v.* Phelps, 91 Mo. 478, 4 S. W. 119.

67. State *v.* Drew, 179 Mo. 315, 78 S. W. 594, 101 Am. St. Rep. 474.

68. Brown *v.* State, 34 Tex. Cr. 150, 29 S. W. 772.

69. Moore *v.* State, (Tex. Cr. App. 1894) 25 S. W. 626.

70. Jackson *v.* State, 118 Ga. 780, 45 S. E. 604; State *v.* Van Winkle, 80 Iowa 15, 45 N. W. 388; Gilford *v.* State, (Tex. Cr. App. 1903) 78 S. W. 692.

71. Bone *v.* State, 121 Ga. 147, 48 S. E. 986.

72. People *v.* Wilson, 151 N. Y. 403, 45 N. E. 862 [*affirming* 7 N. Y. App. Div. 326, 40 N. Y. Suppl. 107].

73. *Arkansas.*— Shepherd *v.* State, 44 Ark. 39.

Florida.— Williams *v.* State, 40 Fla. 480, 25 So. 143, 74 Am. St. Rep. 154.

Michigan.— Gablick *v.* People, 40 Mich. 292.

Missouri.— State *v.* Floyd, 15 Mo. 349; State *v.* Wolff, 15 Mo. 168.

North Carolina.— State *v.* Williams, 31 N. C. 140; State *v.* Jones, 20 N. C. 120.

Pennsylvania.— Com. *v.* Berney, 28 Pa. Super. Ct. 61.

Texas.— Moreno *v.* State, 24 Tex. App. 129, 3 S. W. 736; Lehman *v.* State, 18 Tex. App. 174, 51 Am. Rep. 298.

See 32 Cent. Dig. tit. "Larceny," § 172.

Possession for the time stated was held not sufficiently recent to raise a presumption of guilt in the following cases: Warren *v.* State, 1 Greene (Iowa) 106 (eighteen months); State *v.* Jennett, 88 N. C. 665 (eighteen months); State *v.* Rights, 82 N. C. 675 (two or three weeks); Com. *v.* Berney, 28 Pa. Super. Ct. 61 (two months); Beck *v.* State, 44 Tex.

the jury, and depends on the circumstances of each case.[74] Possession not recent enough to raise a presumption may nevertheless be shown in evidence, to be considered for what it is worth, along with other evidence.[75] Possession will raise a presumption of guilt in the case of property which does not readily pass from hand to hand at a time more remote from the theft than in the case of property readily transferred.[76] Where there is no other evidence against defendant, remote possession will not justify sending a case to the jury.[77]

6. Possession of Other Stolen Goods. Possession may be shown of other goods stolen at the same time as those which defendant is accused of stealing.[78] This is true even if the goods belonged to another owner, if they were all taken at the same time.[79] Such evidence is not admissible without evidence that the other goods were stolen, and that they were taken at the same time.[80] Such evidence may be relevant to prove the identity of the accused, to identify part of the property with that described in the indictment,[81] to establish the intent,[82] to show exclusive possession,[83] or as one of the circumstances of finding the prop-

430 (two years); Yates *v.* State, 37 Tex. 202 (five months); Alderman *v.* State, (Tex. Cr. App. 1893) 23 S. W. 685 ("some months"); Bragg *v.* State, 17 Tex. App. 219 (five or six months). Possession within two months was held sufficiently recent in Mondragon *v.* State, 33 Tex. 480.

74. *Alabama.*—White *v.* State, 72 Ala. 195 [*overruling* Maynard *v.* State, 46 Ala. 85].

Indiana.— Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

Mississippi.— Jones *v.* State, 26 Miss. 247.

Nevada.— State *v.* Mandich, 24 Nev. 336, 54 Pac. 516.

Texas.— Willis *v.* State, 24 Tex. App. 584, 6 S. W. 856; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Curlin *v.* State, 23 Tex. App. 681, 5 S. W. 186.

Virginia.— Price *v.* Com., 21 Gratt. 846.

Washington.— State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

England.— Reg. *v.* Knight, 9 Cox C. C. 437, L. & C. 373, 9 L. T. Rep. N. S. 808. See 32 Cent. Dig. tit. "Larceny," § 181.

75. *Arkansas.*— Reed *v.* State, 54 Ark. 621, 16 S. W. 819.

Georgia.— Turner *v.* State, 114 Ga. 45, 39 S. E. 863; Jones *v.* State, 105 Ga. 649, 31 S. E. 574; McAfee *v.* State, 68 Ga. 823.

Indiana.— Blaker *v.* State, 130 Ind. 203, 29 N. E. 1077.

Kansas.— State *v.* Foulk, (1898) 52 Pac. 864.

Michigan.— Gablick *v.* People, 40 Mich. 292.

Minnesota.— State *v.* Miller, 45 Minn. 521, 48 N. W. 401.

North Carolina.— Gregory *v.* Richards, 53 N. C. 410; State *v.* Shaw, 49 N. C. 440.

Texas.— Strickland *v.* State, (Cr. App. 1896) 35 S. W. 169; Florez *v.* State, 26 Tex. App. 477, 9 S. W. 772.

Wisconsin.— Jenkins *v.* State, 62 Wis. 49, 21 N. W. 232.

England.— Reg. *v.* Evans, 2 Cox C. C. 270.

Canada.— Reg. *v.* Starr, 40 U. C. Q. B. 268.

76. Territory *v.* Casio, 1 Ariz. 485, 2 Pac. 755 (an ass); Rex *v.* Partridge, 7 C. & P. 551, 32 E. C. L. 754 (remnants of woolen cloth; two months not too remote). *Compare* State *v.* McRae, 120 N. C. 608, 27 S. E. 78, 58 Am. St. Rep. 808, (current money, two or three days too remote).

77. Calloway *v.* State, 111 Ga. 832, 36 S. E. 63 (several months); Porter *v.* State, 45 Tex. Cr. 66, 73 S. W. 1053 (two years); Matlock *v.* State, 25 Tex. App. 654, 8 S. W. 818, 8 Am. St. Rep. 451 (two years); Romero *v.* State, 25 Tex. App. 394, 8 S. W. 641 (three years); Reg. *v.* Cooper, 3 C. & K. 318, 16 Jur. 750; Reg. *v.* Harris, 8 Cox C. C. 333 (six months); Rex *v.* Adams, 3 C. & P. 600, 14 E. C. L. 736 (three months); Reg. *v.* Smith, 3 F. & F. 123 (seventeen months); Reg. *v.* Cruttenden, 6 Jur. 267.

78. *Alabama.*—Grant *v.* State, 55 Ala. 201.

California.— People *v.* Nunley, 142 Cal. 441, 76 Pac. 45; People *v.* Ross, 65 Cal. 104, 3 Pac. 491.

Florida.— Barnes *v.* State, 46 Fla. 96, 35 So. 227.

Missouri.— State *v.* Flynn, 124 Mo. 480, 27 S. W. 1105.

North Carolina.— State *v.* Weaver, 104 N. C. 758, 10 S. E. 486.

Oklahoma.— Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565.

Texas.— Speights *v.* State, 1 Tex. App. 551.

79. People *v.* Robles, 34 Cal. 591; State *v.* Ditton, 48 Iowa 677.

80. *Alabama.*— Tinney *v.* State, 111 Ala. 74, 20 So. 597.

Indian Territory.— Oxier *v.* U. S., 1 Indian Terr. 85, 38 S. W. 331.

Missouri.— State *v.* Castor, 93 Mo. 242, 5 S. W. 906.

New York.— Boland *v.* People, 19 Hun 80.

Texas.— Neeley *v.* State, 27 Tex. App. 315, 11 S. W. 376; Webb *v.* State, 8 Tex. App. 115.

81. Yarborough *v.* State, 41 Ala. 405; Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; Parker *v.* U. S., 1 Indian Terr. 592, 43 S. W. 858; Tyler *v.* State, 13 Tex. App. 205.

82. Johnson *v.* State, 148 Ind. 522, 47 N. E. 926; State *v.* Moore, 101 Mo. 316, 14 S. W. 182; State *v.* Wolff, 15 Mo. 168; Passagoli *v.* State, (Tex. Cr. App. 1896) 38 S. W. 200.

83. People *v.* Wright, 11 Utah 41, 39 Pac. 477.

erty.[84] Evidence is also admissible of the finding of goods stolen at a different time, where the two felonies were connected together and form part of a series of transactions.[85] And it has been held that evidence of finding a number of things recently bought by defendant is slight evidence of possession of stolen money which it is claimed was used to buy them.[86]

XV. TRIAL.[87]

A. Province of Court and Jury.[88] The jury are judges of the facts and the inferences from them, and the court should not interfere with their action.[89] All controverted questions of fact must be left to the jury.[90] They should be left to consider whether defendant was present at the taking;[91] whether he had a motive for the taking;[92] whether he took with felonious intent,[93] or under a *bona fide* claim of right;[94] whether the property has been properly identified;[95] and in general any question as to the weight of evidence.[96] But the jury should not be left to decide the law, or to determine any question which is for the court to determine.[97]

B. Instructions[98] — **1. Instructions in General — a. Applicability to Issues and Evidence.** The court is not bound to give instructions stating a mere abstract proposition of law.[99] But the charge of the court must respond to every issue raised by the evidence.[1] A refusal to charge on elements not raised in the evidence is

84. People *v.* Nicolosi, (Cal. 1893) 34 Pac. 824; State *v.* Brown, 100 Iowa 50, 69 N. W. 277; State *v.* Schaffer, 70 Iowa 371, 30 N. W. 639.

85. Com. *v.* Riggs, 14 Gray (Mass.) 376, 77 Am. Dec. 333.

86. Carr *v.* State, 84 Ga. 250, 10 S. E. 626.

87. See, generally, Criminal Law, 12 Cyc. 504 *et seq.*

88. See, generally, Criminal Law, 12 Cyc. 587 *et seq.*

89. *Alabama.*— Carter *v.* State, (1906) 40 So. 82; Childress *v.* State, 122 Ala. 21, 26 So. 162; Herges *v.* State, 30 Ala. 45.

Indiana.— Huber *v.* State, 57 Ind. 341, 26 Am. Rep. 57.

Iowa.— State *v.* Newhouse, 115 Iowa 173, 88 N. W. 353.

Nebraska.—Jameson *v.* State, 25 Nebr. 185, 41 N. W. 138.

Nevada.— State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677.

Texas.— Nash *v.* State, (Cr. App. 1898) 47 S. W. 649; Lopez *v.* State, 28 Tex. App. 343, 13 S. W. 219; White *v.* State, 17 Tex. App. 188.

See 32 Cent. Dig. tit. "Larceny," § 184.

For evidence held sufficient to present a question for the jury whether or not defendant was connected with it as an aider or abetter see State *v.* Wells, (Mont. 1905) 83 Pac. 476.

90. *Georgia.*— Horton *v.* State, 66 Ga. 690.

Nebraska.— Wiegrefe *v.* State, 66 Nebr. 23, 92 N. W. 161.

New York.— People *v.* McCallam, 103 N. Y. 587, 9 N. E. 502.

Texas.— Huddleston *v.* State, 11 Tex. App. 22.

England.— Reg. *v.* Deering, 11 Cox C. C. 298, 20 L. T. Rep. N. S. 680, 17 Wkly. Rep. 807; Reg. *v.* Wilkins, 10 Cox C. C. 363; Reg. *v.* Hooper, 1 F. & F. 85.

See 32 Cent. Dig. tit. "Larceny," § 180.

91. Clifford *v.* Com., 49 S. W. 339, 20 Ky. L. Rep. 1336.

92. People *v.* Kelly, 132 Cal. 430, 64 Pac. 563.

93. Jackson *v.* State, 137 Ala. 96, 34 So. 609; State *v.* Hines, 5 Ida. 789, 51 Pac. 984; State *v.* Coy, 119 N. C. 901, 26 S. E. 120; State *v.* Gaither, 72 N. C. 458.

94. Barnes *v.* State, 103 Ala. 44, 15 So. 901; Smith *v.* State, 24 Tex. App. 290, 6 S. W. 40.

95. People *v.* Kiley, 107 Mich. 345, 65 N. W. 233; State *v.* Sansom, 3 Brev. (S. C.) 5; Melton *v.* State, (Tex. Cr. App. 1900) 56 S. W. 67; Hill *v.* State, 17 Wis. 675, 86 Am. Dec. 736.

96. People *v.* Cline, 83 Cal. 374, 23 Pac. 391; People *v.* Carabin, 14 Cal. 438.

97. Bishop *v.* State, 43 Tex. 390.

98. See, generally, Criminal Law, 12 Cyc. 611 *et seq.*

99. Kirby *v.* State, 139 Ala. 87, 36 So. 721; Byrd *v.* State, (Tex. Cr. App. 1898) 45 S. W. 804. See also Selph *v.* State, (Tex. Cr. App. 1905) 90 S. W. 174.

Illustration.— Thus a failure to charge the law applicable to a voluntary return is not error where the facts do not show a voluntary return. Lane *v.* State, 41 Tex. Cr. 558, 55 S. W. 831; Johnson *v.* State, (Tex. Cr. App. 1900) 55 S. W. 576.

Good character.— The court should not refuse to instruct that good character is evidence that may be used in defense against any evidence. State *v.* Birkey, 122 Iowa 102, 97 N. W. 980; State *v.* Rodman, 62 Iowa 456, 17 N. W. 663.

1. People *v.* Eckert, 19 Cal. 603; Graff *v.* People, 134 Ill. 380, 25 N. E. 563; People *v.* Harrison, 93 Mich. 594, 53 N. W. 725; Johnson *v.* State, (Tex. Cr. App. 1905) 90 S. W. 633; Powell *v.* State, 44 Tex. Cr. 273, 70 S. W.

proper,[2] and it is error to charge on elements not raised in evidence, if such charge is prejudicial to defendant.[3] The charge must not go outside the indictment,[4] and where there is more than one count the court must state separately the law applicable to each.[5] It is error to limit the jury to the consideration of a question not embraced within the indictment,[6] or to direct the attention of the jury away from the real issue.[7] Provisions of law which incidentally affect the issue must be explained to the jury.[8]

b. General and Specific Instructions. Where the general instructions contain all the elements of theft defendant is not entitled to specific instructions;[9] but where the proof shows larceny from the person, it is proper to instruct specifically;[10] and in such case it is not error to fail to define theft generally,[11] or to add to the specific instructions that it is not necessary for the state to prove that no force was used.[12] Where a defense is adequately presented by the instructions, it

968; Vance *v.* State, 34 Tex. Cr. 395, 30 S. W. 792; Mathews *v.* State, 32 Tex. Cr. 355, 23 S. W. 690; McDaniel *v.* State, 24 Tex. App. 552, 7 S. W. 249; Bond *v.* State, 23 Tex. App. 180, 4 S. W. 580; Ryan *v.* State, 22 Tex. App. 699, 3 S. W. 547.

Illustrations.—On a prosecution for theft of cattle, an instruction that, if the jury believed accused won the animal at a game of cards, they must acquit, is proper where the evidence raised such an issue, and the court, in a subsequent portion of the charge, instructed on reasonable doubt. Pace *v.* State, 41 Tex. Cr. 203, 51 S. W. 953, 53 S. W. 689. Where accused, when arrested, had on his person the exact number of five-dollar and twenty-dollar pieces taken from a cash register, and the total amount found in his pockets was within a few cents of the amount stolen therefrom, an instruction touching the recent possession of stolen property was justified. People *v.* Peltin, 1 Cal. App. 612, 82 Pac. 980.

Although defendant has not raised the issue, it is not error to charge on evidence. Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342.

2. *Alabama.*— Martin *v.* State, 125 Ala. 64, 28 So. 92; Skelton *v.* State, 78 Ala. 35; Durrett *v.* State, 62 Ala. 434.

Georgia.— Tucker *v.* State, 114 Ga. 61, 39 S. E. 926; Parks *v.* State, 66 Ga. 192.

Missouri.— State *v.* Boatright, 182 Mo. 33, 81 S. W. 450.

Nevada.— State *v.* Espinozei, 20 Nev. 209, 19 Pac. 677.

North Carolina.— State *v.* Nicholson, 124 N. C. 820, 32 S. E. 813.

Oregon.— State *v.* Hill, 39 Oreg. 90, 65 Pac. 518.

Texas.— Hull *v.* State, (Cr. App. 1904) 80 S. W. 380; Mathis *v.* State, (Cr. App. 1901) 65 S. W. 523; Pones *v.* State, 43 Tex. Cr. 201, 63 S. W. 1021; Chesson *v.* State, (Cr. App. 1897) 42 S. W. 293; Taylor *v.* State, (Cr. App. 1897) 42 S. W. 285; McVey *v.* State, 23 Tex. App. 659, 5 S. W. 174; Banks *v.* State, 7 Tex. App. 591.

See 32 Cent. Dig. tit. "Larceny," § 185.

3. People *v.* Roberts, 1 Cal. App. 447, 82 Pac. 624; Harrison *v.* State, 42 Tex. Cr. 509, 60 S. W. 963; Williams *v.* State, (Tex. Cr. App. 1899) 51 S. W. 904; James *v.* State, 40 Tex. Cr. 190, 49 S. W. 401; Sanders *v.* State, 38 Tex. Cr. 343, 42 S. W. 983; Phillips *v.* State, (Tex. Cr. App. 1897) 42 S. W. 557; Prewitt *v.* State, (Tex. Cr. App. 1895) 29 S. W. 792. To charge the jury that if they can account for loss of property by supposing facts they may acquit is erroneous as leading the jury to believe that they may suppose facts to explain defendant's innocence that are not brought out in evidence. Du Bois *v.* State, 50 Ala. 139.

4. State *v.* Weber, 156 Mo. 249, 56 S. W. 729; State *v.* Phillips, 27 Wash. 364, 67 Pac. 608. Indictment charged common-law larceny; instruction authorizing conviction under statute was erroneous. State *v.* Arter, 65 Mo. 653. Indictment charged larceny of particular goods in store; an instruction directing conviction if any goods were stolen was held erroneous. State *v.* Babb, 76 Mo. 501.

5. Mixon *v.* State, 28 Tex. App. 347, 13 S. W. 143.

6. Harrison *v.* State, 42 Tex. Cr. 509, 60 S. W. 963.

7. People *v.* Van Deusen, 165 N. Y. 33, 58 N. E. 755, 15 N. Y. Cr. 238.

8. Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172.

9. Hall *v.* Com., 106 Ky. 894, 51 S. W. 814, 21 Ky. L. Rep. 520; Tyler *v.* Onzts, 93 Ky. 331, 20 S. W. 256, 14 Ky. L. Rep. 321; Hester *v.* Com., 29 S. W. 875, 16 Ky. L. Rep. 783; Chitwood *v.* State, 44 Tex. Cr. 439, 71 S. W. 973; Reed *v.* State, (Tex. Cr. App. 1898) 46 S. W. 931; Morrow *v.* State, (Tex. Cr. App. 1894) 26 S. W. 395. Thus a specific instruction as to what it takes to constitute the identification of money is not necessary. Pones *v.* State, 43 Tex. Cr. 201, 63 S. W. 1021.

10. Crook *v.* State, 39 Tex. Cr. 252, 45 S. W. 720; Dalton *v.* State, (Tex. Cr. App. 1894) 27 S. W. 259.

11. Chitwood *v.* State, 44 Tex. Cr. 439, 71 S. W. 973. *Contra*, Still *v.* State, (Tex. Cr. App. 1899) 50 S. W. 355.

12. State *v.* Chavis, 34 S. C. 132, 13 S. E. 317.

is not error to refuse a more specific charge.[13] But the defense of kleptomania calls for a specific instruction.[14]

c. Misleading and Prejudicial Instructions. Instructions which mislead the jury are erroneous,[15] and so are instructions which prejudice the jury against defendant.[16] If, however, the charge is favorable to the accused, there is no error in it of which he can complain.[17]

2. Instructions as to Particular Elements of the Offense — a. General Definition of the Offense. Instructions defining the crime of larceny should state that defendant feloniously stole the property of another without his consent.[18] An instruction defining larceny in the language of the statute is sufficient.[19]

13. State *v.* Hill, 39 Oreg. 90, 65 Pac. 518; Brigham *v.* State, (Tex. Cr. App. 1899) 49 S. W. 381; Glass *v.* State, 34 Tex. Cr. 299, 30 S. W. 556.

14. Looney *v.* State, 10 Tex. App. 520, 38 Am. Rep. 646.

15. *Alabama.*— Crittenden *v.* State, 134 Ala. 145, 32 So. 273.

Illinois.— Quinn *v.* People, 123 Ill. 333, 15 N. E. 46.

Indiana.— Owen *v.* State, 52 Ind. 379.

Missouri.— State *v.* Sprague, 149 Mo. 409, 50 S. W. 901.

North Carolina.— State *v.* Childers, 74 N. C. 180.

Texas.— Jasper *v.* State, (Cr. App. 1901) 61 S. W. 392; Cunningham *v.* State, (Cr. App. 1898) 43 S. W. 988; Pierce *v.* State, (Cr. App. 1894) 24 S. W. 899; Lynch *v.* State, 32 Tex. Cr. 45, 22 S. W. 47, 26 S. W. 409; Conners *v.* State, 31 Tex. Cr. 453, 20 S. W. 981; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788.

Applications of rule.— On one's trial for theft of sheep, an instruction to acquit if he in good faith bought them, but that a fraudulent sale would be no defense, was fatally misleading; since the jury might have understood the meaning to be that a sale fraudulent on the part of the seller merely would be no defense. Dreyer *v.* State, 11 Tex. App. 631. So where, on a prosecution for cattle theft, defendant claimed that he purchased the cattle, an instruction that if the proof merely connected defendant with the property subsequent to the taking, and the jury so believed beyond a reasonable doubt, they should find him not guilty, is misleading and confusing. Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456.

Instructions not objectionable under rule.— An instruction that if the horse was running at large, and was regarded as an estray in the neighborhood, and if the jury believed "from the evidence" that defendant took possession of him, "or exercised such ownership over him as owners of live stock usually exercise over the same," with intent to steal the horse, defendant was guilty, was not subject to the objection that, as there was no evidence of how ownership was exercised over stock in the community, the jury might believe a claim of ownership over the horse while it was on the range would constitute theft; since the instruction referred to the evidence, and the only evidence of ownership was of the bridling and leading the horse from the range to defendant's premises, and there using and claiming him. Bennett *v.* State, 70 Ark. 43, 66 S. W. 198, 914. In a prosecution for larceny the court instructed that recent possession of stolen goods was a circumstance tending to prove guilt, in weighing which the jury should consider "the lapse of time since the property was taken, the character and nature of the property taken . . . and the demeanor and character of the accused. All of these circumstances . . . are proper to be taken into account." The instruction was held not open to criticism as intending the demeanor of the defendant at the time of trial. People *v.* Farrington, 140 Cal. 656, 74 Pac. 288. And see Turner *v.* State, 111 Ga. 217, 36 S. E. 686.

16. State *v.* Thompson, 87 Iowa 670, 54 N. W. 1077; State *v.* Tucker, 76 Iowa 232, 40 N. W. 725; People *v.* Harris, 77 Mich. 568, 43 N. W. 1060; Massey *v.* State, 29 Tex. App. 159, 15 S. W. 601. "A man may steal in daylight as well as at night" was held to be prejudicial. Stuckey *v.* State, 7 Tex. App. 174.

17. Jackson *v.* State, (Tex. Cr. App. 1902) 70 S. W. 749.

18. *California.*— People *v.* Christensen, 85 Cal. 568, 24 Pac. 888.

Indiana.— Howard *v.* State, 50 Ind. 190.

Michigan.— People *v.* Harris, 77 Mich. 568, 43 N. W. 1060.

South Carolina.— State *v.* Garvin, 48 S. C. 258, 26 S. E. 570.

Texas.— Ellison *v.* State, (Cr. App. 1903) 72 S. W. 188; Elton *v.* State, 40 Tex. Cr. 339, 50 S. W. 379, 51 S. W. 245; Harrell *v.* State, 37 Tex. Cr. 612, 40 S. W. 799; Beabout *v.* State, 37 Tex. Cr. 515, 40 S. W. 405; Williams *v.* State, 27 Tex. App. 466, 11 S. W. 481.

Where evidence warrants an instruction that property was stolen, it is not necessary to instruct on the essential elements of larceny. People *v.* Carey, 125 Mich. 535, 84 N. W. 1087.

19. People *v.* Rinz, 144 Cal. 251, 77 Pac. 907; Hix *v.* People, 157 Ill. 382, 41 N. E. 862; State *v.* Garvin, 48 S. C. 258, 26 S. E. 570; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189.

Defining larceny generally.— In a prosecution under Code, § 3907, providing that if any person finds personal property of which he knows the owner, and unlawfully appropriates the same, he is guilty of larceny,

b. Time and Place of the Offense. The jury should be charged that in absence of proof of time or place of stealing they cannot convict.[20] An instruction that the state is not required to prove the exact time laid in the indictment is good.[21] When it is applicable to the evidence, an instruction that where defendant stole property in one county and brought it with felonious intent to steal into another county, he is guilty of larceny in the latter county is not prejudicial to defendant;[1] but where the jury had reasonable doubt as to the ownership of the animal in the county of first taking, an instruction to acquit was improperly refused.[2] Where the evidence was that horses were herded in a ranch in Coahuila, it was sufficient to support an instruction as to theft in Coahuila.[3]

c. Taking and Asportation of the Property. Defendant is entitled to a charge on the necessity of taking and carrying away the property if the evidence raises the question.[4] Where there is evidence of delivery, defendant is entitled to a charge thereon.[5] And so where there is evidence of two separate takings,[6] or where there is some doubt as to defendant's presence at the original taking.[7] An instruction that if property was not taken by defendant but received by him the jury

it is not error to give the definition of larceny generally as contained in section 3902, as the legislature did not intend by the enactment of section 3907 to create a distinct crime, but to declare a rule of evidence, which, being fulfilled, constitutes the crime as defined in the latter section, and particularly as there was evidence from which the jury might have found defendant guilty of larceny independent of said section 3907. State *v.* Hayes, 98 Iowa 619, 67 N. W. 673, 60 Am. St. Rep. 219, 37 L. R. A. 116.

Curing error by subsequent instructions.—Although, on a trial for grand larceny committed in the execution of a bunco game, the court read to the jury section 332 of the Penal Code, which has reference to fraudulently obtaining money by device, trick, etc., the error was cured by the following charges to the effect that the person obtaining money from another by fraud or artifice, with the intention of stealing it — the owner not intending to part with his title — is guilty of larceny. People *v.* Shaughnessy, 110 Cal. 598, 43 Pac. 2.

Miscellaneous instructions on statutory larceny.—Where the statute defines theft from the person as a theft committed without knowledge of the person from whom the property is taken or so suddenly as not to allow time to make resistance, an instruction that to convict the proof must show that the property was taken so suddenly as not to allow time for resistance did not include an instruction of taking without knowledge. Mathis *v.* State, (Tex. Cr. App. 1901) 65 S. W. 523. An instruction making felonious intent an ingredient of an offense is error where the statute does not require it. Carl *v.* State, 125 Ala. 89, 28 So. 505. Where the indictment alleges property was taken so suddenly, etc., an instruction to find defendant guilty if he took so suddenly, etc., or without knowledge, is ground for reversal, although no exception is taken. Swartz *v.* State, (Tex. Cr. App. 1894) 27 S. W. 136. Where the indictment for larceny is under the statute defining the crime of grand larceny, as taking property by stealth or fraud, an instruction that the jury must be satisfied beyond a reasonable doubt that the property was taken by fraud or stealth is proper. Flohr *v.* Territory, 14 Okla. 477, 78 Pac. 565. If the evidence shows a larceny by trick, defendant is entitled to instructions thereon. People *v.* Miller, 169 N. Y. 339, 62 N. E. 418, 88 Am. St. Rep. 546.

20. State *v.* Donnelly, 72 Mo. App. 543.

Inference that property was stolen and was thereafter brought by the thief to a certain place will not justify conviction. Davis *v.* U. S., 18 App. Cas. (D. C.) 468.

21. State *v.* Anderson, 59 S. C. 229, 37 S. E. 820. The language "at about the time charged" is good. Green *v.* State, (Tex. Cr. App. 1905) 86 S. W. 332. "If the horse was stolen prior to the indictment" it is not error where the evidence shows the horse was stolen shortly before. Barner *v.* State, (Tex. App. 1892) 20 S. W. 559.

1. State *v.* Ware, 69 Mo. 332.

2. Steed *v.* State, 43 Tex. Cr. 567, 67 S. W. 328.

3. Granado *v.* State, 37 Tex. Cr. 426, 35 S. W. 1069.

4. In a prosecution for larceny, an instruction offered by defendant that "the possession must be personal and exclusive, and must be such as to preclude the inference that the stolen property was in the possession of any other person than the defendant," was properly modified by striking out the part following the word "exclusive," and adding in lieu thereof, "or it must be the possession of some person or persons by the consent and will of the accused, and in either case the possession must involve a distinct and conscious assertion of possession by the accused." People *v.* Warren, 130 Cal. 683, 63 Pac. 86.

5. Clark *v.* State, 34 Tex. Cr. 120, 29 S. W. 382.

6. Barnes *v.* State, 43 Tex. Cr. 355, 65 S. W. 922; Poteet *v.* State, (Tex. Cr. App. 1897) 43 S. W. 339.

7. Beard *v.* State, (Tex. Cr. App. 1904) 83 S. W. 824.

must acquit is a sufficient instruction as to the necessity of his presence at the taking.[8] Where there is sufficient evidence to sustain a conviction of defendant, defendant is not entitled to an instruction that there was no evidence that defendant and not another took the property.[9]

d. Value of the Property. Where the value of the property alleged to have been stolen is immaterial, it is not necessary to charge on the question of value,[10] or where the value of the property is proved beyond a reasonable doubt it is not error to assume the value of the property in an instruction.[11] In the larceny of a bank-check the question of value is for the jury and it is error to instruct them that the check is presumptively of some value where the maker has funds in the bank to meet it.[12] In an indictment for larceny of United States notes the refusal to instruct the jury that they must be satisfied of the genuineness of the notes is ground for a new trial.[13] Where the owner cannot testify as to the value of the stolen article it is error to instruct the jury that the value of the property is to be estimated by its value to the owner.[14] It is not error to instruct the jury that in finding value they are not confined to the price second-hand dealers would pay for the property or sell it for.[15]

e. Ownership—(i) *In General.* Where the evidence raises the issue the accused is entitled to a charge that unless the jury are satisfied beyond a reasonable doubt that the ownership is proved as laid in the indictment they should acquit.[16] Failure to instruct on ownership is not error where the evidence does not raise the issue.[17] It is error for the court to assume ownership,[18] or that defendant was not owner,[19] but assumption consistent with the defense is not error.[20] It is sufficient instruction on ownership for the court to state that the jury must believe

8. Williams *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1142.

Where defendant claims that he was intrusted with the possession it is error to instruct the jury in a prosecution for a theft of cattle that, if defendant drove the stock from its accustomed range with intent to defraud the owner, he should be found guilty; since if he had done so while in possession the offense would not have been larceny. Chambers *v.* State, (Tex. Cr. App. 1900) 59 S. W. 261; Long *v.* State, 39 Tex. Cr. 461, 46 S. W. 821, 73 Am. St. Rep. 954.

9. People *v.* Piggott, 126 Cal. 509, 59 Pac. 31; People *v.* Luchetti, 119 Cal. 501, 51 Pac. 707.

10. Chitwood *v.* State, 44 Tex. Cr. 439, 71 S. W. 973.

11. Nelson *v.* State, 35 Tex. Cr. 205, 32 S. W. 900.

Instruction that bill is money.—Where an indictment for theft charges the taking of a "twenty-dollar bill in money, of the value of twenty dollars," it is proper to charge the jury that the twenty-dollar bill was money. Still *v.* State, (Tex. Cr. App. 1899) 50 S. W. 355.

12. Burrows *v.* State, 137 Ind. 474, 37 N. E. 271, 45 Am. St. Rep. 210.

13. Collins *v.* People, 39 Ill. 233.

14. Brooks *v.* State, 28 Nebr. 389, 44 N. W. 436.

15. State *v.* Hathaway, 100 Iowa 225, 69 N. W. 449.

16. State *v.* Garvin, 48 S. C. 258, 26 S. E. 570; Kay *v.* State, 40 Tex. 29; Armstead *v.* State, (Tex. Cr. App. 1905) 87 S. W. 824; Hull *v.* State, (Tex. Cr. App. 1904) 80 S. W. 380; Landers *v.* State, (Tex. Cr. App. 1905) 63 S. W. 557; Melton *v.* State, (Tex. Cr. App. 1900) 56 S. W. 67; Wright *v.* State, 40 Tex. Cr. 45, 48 S. W. 191; Conners *v.* State, 31 Tex. Cr. App. 453, 20 S. W. 981.

An instruction to acquit if there was any question, no matter how slight, is error. Robinson *v.* State, 24 Fla. 358, 5 So. 6.

A requested instruction that defendant should be given the benefit of the doubt whether property belonged to husband or wife is properly refused. Kirby *v.* State, 139 Ala. 87, 36 So. 721.

17. People *v.* Buelna, 81 Cal. 135, 22 Pac. 396; Cunningham *v.* State, 27 Tex. App. 479, 11 S. W. 485. Where defendant, accused of stealing a mule alleged to be the property of S, set up in defense that G was the owner, and had given defendant authority to take and sell the mule, but S had the actual control of the mule, and G denied giving such authority to defendant, and these issues were properly submitted to the jury, it was not error to refuse to instruct that, if S was not the owner, defendant should be acquitted. Homer *v.* State, (Tex. Cr. App. 1902) 68 S. W. 999.

18. Hix *v.* People, 157 Ill. 382, 41 N. E. 862; Territory *v.* Jaggers, 9 Mont. 5, 22 Pac. 121.

Failure to direct the jury that they must find property in another is error, under a statute defining larceny as taking the property of another. State *v.* Crow, 54 Mo. App. 208.

19. State *v.* Loveless, 17 Nev. 424, 30 Pac. 1080.

20. Quinn *v.* People, 123 Ill. 333, 15 N. E. 46.

the property in question was the property of the alleged owner.[21] An instruction that it is not necessary for the alleged owner to testify as to ownership is proper where ownership is otherwise established.[22] But an instruction that where the owner would not swear positively to the property being his there should be an acquittal was properly refused.[23]

(II) *Possession.* The jury should be instructed that possession should be proved as laid in the indictment.[24] It is not error to refuse to charge on possession where the servant's custody is the master's possession.[25] Control exercised by a son under the father's direction did not require an instruction on the theory that the son was a special owner.[26] It is sufficient instruction on possession to state that the jury must find that the owner, or other person alleged in the indictment to have had possession, had possession or had control and management.[27] The word "actual" possession or control need not be used.[28]

(III) *Brands.* Where the statute provides that no unrecorded brands shall be recognized as evidence of ownership the jury should be so instructed.[29] It is the duty of the court to limit the effect of an unrecorded brand to the question of identity.[30] A charge to that effect is, however, unnecessary where the ownership is undisputed.[31] An instruction as to the effect of a recorded brand as evidence is error as being on the weight of evidence.[32]

f. Consent of Owner. When a taking by consent of the owner is asserted, the jury should be instructed that defendant must be acquitted if he took with the owner's consent.[33] But when theft has been properly defined in the general charge, a failure to include the want of consent of the owner, if no issue as to the

21. Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342. Property in one who claimed the horse as an estray (Quinn *v.* People, 123 Ill. 333, 15 N. E. 46), or in one who held as an agister (People *v.* Buelna, 81 Cal. 135, 22 Pac. 396), has been held sufficient.

22. State *v.* Primeaux, 39 La. Ann. 673, 2 So. 423.

23. State *v.* Eubank, 33 Wash. 293, 74 Pac. 378.

24. White *v.* State, 33 Tex. Cr. 94, 25 S. W. 290; Cannon *v.* State, (Tex. Cr. App. 1893) 24 S. W. 517. Where possession of an animal was laid in D, and D employed P to feed the animal, a refusal to submit the question of possession by P was not error. Strickland *v.* State, (Tex. Cr. App. 1896) 35 S. W. 169.

25. Livingston *v.* State, 38 Tex. Cr. 535, 43 S. W. 1008; Strickland *v.* State, (Tex. Cr. App. 1896) 35 S. W. 169.

26. Gentry *v.* State, 41 Tex. Cr. 497, 56 S. W. 68.

27. Cannon *v.* State, (Tex. Cr. App. 1893) 24 S. W. 517.

28. Kennon *v.* State, (Tex. Cr. App. 1904) 82 S. W. 518.

29. Chowning *v.* State, 41 Tex. Cr. 81, 51 S. W. 946; Tittle *v.* State, 30 Tex. App. 597, 17 S. W. 1118; Wyers *v.* State, 21 Tex. App. 448, 2 S. W. 816. But where it appeared that a certain company was owner of the brand for several years and had actual possession of the cattle so marked, claiming them as its own, an instruction that a cow so branded was its property was not erroneous. Brooks *v.* State, 38 Tex. Cr. 167, 31 S. W. 410.

30. Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456; Welch *v.* State, 42 Tex. Cr. 338, 60 S. W. 46.

31. Hays *v.* State, (Tex. Cr. App. 1903) 72 S. W. 598.

32. Alexander *v.* State, 24 Tex. App. 126, 5 S. W. 840.

33. Otero *v.* State, 30 Tex. App. 450, 17 S. W. 1081.

Even where the owner is unknown the jury should be instructed that the want of consent of the unknown owner must be proved. Spruill *v.* State, 10 Tex. App. 695.

Where the property taken was owned or possessed by several the court should charge for acquittal if the accused took with the consent of either. Towls *v.* State, (Tex. Cr. App. 1894) 26 S. W. 990. Without the consent of "A B or C or either of them" was held error as authorizing conviction if any one of the three failed to consent. Woods *v.* State, 26 Tex. App. 490, 10 S. W. 108. A charge without consent of either not error when neither consulted. Key *v.* State, 37 Tex. Cr. 511, 40 S. W. 296.

Where non-consent is otherwise established an instruction that the owner need not testify as to his consent is proper. Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294.

Sufficient instruction as to consent.—Where, in a prosecution for burglary and larceny, the court charged that if defendant unlawfully and forcibly did break and enter into the building of G "with the intent to steal therein," and the succeeding instruction declared that if the jury believed and found that defendant unlawfully and forcibly both broke and entered the building of G, as defined in the first instruction, and there took the property alleged, and did so with the intent to fraudulently convert the same to his own use, etc., the second instruction was not objectionable for failure to require the

consent of the owner has been raised, will not be error.[34] Where there was no evidence of consent a charge on the theory that there was consent was properly refused.[35] An instruction to acquit if defendant took with the prosecutor's consent, etc., was sufficient as bearing on defendant's claim that he had prosecutor's consent.[36] If it is admitted that defendant obtained the property with the consent of the owner, an instruction authorizing conviction if property was obtained without consent is erroneous.[37]

g. Intent — (I) *In General.* Instructions defining the crime of larceny must contain the elements of felonious intent or fraud.[38] If this element of felonious intent is sufficiently expressed otherwise the word feloniously or fraudulently need not be used,[39] but if the charge is made that larceny is complete on the act of fraudulent or felonious taking, the charge is erroneous for there may be fraudulent takings that are not larceny.[40] The meaning of the word "felonious" need not be explained when used in an instruction.[41] Fraudulent or felonious intent is sufficiently defined as a taking without consent of the owner, and with intent to deprive him of the property.[42] When the evidence tends to exonerate the accused he is entitled to instructions directing the attention of the jury to the question of intent,[43] or where there is evidence from which the jury might infer that the taking was not fraudulent defendant has a right to have the jury instructed as to the distinction between trespass and larceny.[44]

(II) *Existence at the Time of Taking.* Defendant is entitled to an instruction that the felonious intent must be proved to exist in the original

"taking," apart from the conversion, to have been without the consent of the owner of the property. State *v.* Speritus, 191 Mo. 24, 90 S. W. 459.

34. Simnacher *v.* State, (Tex. Cr. App. 1897) 43 S. W. 512.

Where defendant claimed he obtained with consent, the court held that the general charge was sufficient. State *v.* Fisher, 106 Iowa 658, 77 N. W. 456.

35. Stokes *v.* State, (Tex. Cr. App. 1902) 70 S. W. 95.

36. O'Toole *v.* State, 40 Tex. Cr. 578, 51 S. W. 244.

37. Sanders *v.* State, 38 Tex. Cr. 343, 42 S. W. 983.

38. *Alabama.*— Lunsford *v.* Dietrich, 93 Ala. 565, 90 So. 308, 30 Am. St. Rep. 79.

Arkansas.— Denmark *v.* State, 58 Ark. 576, 25 S. W. 867.

California.— People *v.* Cheong Foon Ark, 61 Cal. 527.

Florida.— Long *v.* State, 44 Fla. 134, 32 So. 870.

Georgia.— Lee *v.* State, 102 Ga. 221, 29 S. E. 264.

Missouri.— State *v.* Lackland, 136 Mo. 26, 37 S. W. 812.

Nebraska.— Barnes *v.* State, 40 Nebr. 545, 59 N. W. 125.

North Carolina.— State *v.* Barrett, 123 N. C. 753, 31 S. E. 731.

Texas.— Holsey *v.* State, 24 Tex. App. 35, 5 S. W. 523; Riojas *v.* State, 8 Tex. App. 49.

Wisconsin.—Fetkenhauer *v.* State, 112 Wis. 491, 88 N. W. 294.

See 32 Cent. Dig. tit. "Larceny," § 191.

"Felonious taking with intent to steal" not prejudicial to defendant. People *v.* Gordon, 133 Cal. 328, 65 Pac. 746.

"Intent to convert animal to his own use, knowing it was not his," not prejudicial to defendant. State *v.* Sally, 41 Oreg. 366, 70 Pac. 396.

39. People *v.* Tomlinson, 102 Cal. 19, 36 Pac. 506; Philamalee *v.* State, 58 Nebr. 320, 78 N. W. 625; Gardner *v.* State, 55 N. J. L. 17, 26 Atl. 30; Ashlock *v.* State, 16 Tex. App. 13. And see State *v.* Speritus, 191 Mo. 24, 90 S. W. 459.

40. Purtell *v.* State, 43 Tex. 483.

41. Hamlet *v.* Com., 5 S. W. 366, 9 Ky. L. Rep. 418.

Other instructions as to felonious or fraudulent intent.— Possession of property and a failure to return it or correct the mistake was held a sufficient definition of fraudulent intent. Shaw *v.* State, 23 Tex. App. 493, 5 S. W. 317. And a consciousness that he had no right to take the goods was added in Bodee *v.* State, 57 N. J. L. 140, 30 Atl. 681. But an instruction to convict if defendant appropriated the property to his own use was held erroneous as omitting felonious intent in State *v.* Rutherford, 152 Mo. 124, 53 S. W. 417. But to make knowledge of defendant requisite that bonds had been paid where he falsely represented that they were not paid is error. Woodruff *v.* State, 61 Ark. 157, 32 S. W. 102.

42. Busby *v.* State, 116 Ala. 453, 32 So. 896; State *v.* Minor, 106 Iowa 642, 77 N. W. 330; State *v.* Bond, 8 Iowa 540; State *v.* Yates, 159 Mo. 525, 60 S. W. 1051; State *v.* Sasseen, 75 Mo. App. 197; Johnson *v.* State, (Tex. Cr. App. 1893) 24 S. W. 285.

43. Hamilton *v.* State, 2 Tex. App. 494.

44. Cox *v.* Com., 78 S. W. 423, 25 Ky. L. Rep. 1577; Bray *v.* State, 41 Tex. 203; Guest *v.* State, 24 Tex. App. 235, 5 S. W. 840; Ainsworth *v.* State, 11 Tex. App. 339.

taking;[45] but the jury may infer from all the facts and circumstances of the case that the felonious intent existed in the first taking.[46] Where the evidence raises only the issue as to what intent defendant had when he received the property, it is not an erroneous instruction to limit the jury to the belief of the accused.[47] It is error to instruct, where defendant received the property innocently, that if he received the property fraudulently he should be convicted.[48]

(III) *Intent to Take For a Temporary Use or Purpose.* The jury should be instructed that if the accused took the property with intent not to deprive the owner of it, but to use it temporarily, he has not the felonious intent necessary to constitute larceny, whenever it may be inferred from the evidence that defendant intended only a temporary use.[49] But where there is no evidence that defendant intended a temporary use such instruction is not necessary,[50] and a request for a special instruction may be refused where the subject-matter is covered by the general charge.[51]

(IV) *Taking Under a Claim of Right.* Where there is evidence which has a tendency to show that defendant took the property under a claim of right, the jury should be instructed that if they find that the accused took the property believing he had a right to it,[52] if he took it believing it to be his own,[53] or if he

45. *California.*— People *v.* Carabin, 14 Cal. 438.

Georgia.— O'Bannon *v.* State, 76 Ga. 29.

Idaho.— State *v.* Hines, 5 Ida. 789, 51 Pac. 984.

Indiana.— Dean *v.* State, 130 Ind. 237, 29 N. E. 911.

North Carolina.— State *v.* Hayes, 111 N. C. 727, 16 S. E. 410.

Oregon.— State *v.* Howard, 41 Oreg. 49, 69 Pac. 50.

Texas.— Veasly *v.* State, (Cr. App. 1905) 85 S. W. 274; Thompson *v.* State, (Cr. App. 1900) 55 S. W. 330; Tanner *v.* State, (Cr. App. 1898) 44 S. W. 489; Willis *v.* State, 24 Tex. App. 584, 6 S. W. 856.

See 32 Cent. Dig. tit. "Larceny," § 192.

46. State *v.* Hayes, 98 Iowa 619, 67 N. W. 673, 60 Am. St. Rep. 219, 37 L. R. A. 116; Booth *v.* Com., 4 Gratt. (Va.) 525. Where, on a prosecution for theft, there was no evidence that accused at the time of the theft was so intoxicated as to be unable to form a criminal intent, the mere fact that it appeared that he might have been drinking did not require an instruction that, if accused was too drunk to form a fraudulent intent, he should be acquitted. Berry *v.* State, 46 Tex. Cr. 420, 80 S. W. 630.

47. Windom *v.* State, 44 Tex. Cr. 514, 72 S. W. 193.

48. State *v.* Lindley, 13 S. D. 248, 83 N. W. 257.

49. Conly *v.* State, 69 Ark. 454, 64 S. W. 218; Davis *v.* State, 45 Tex. Cr. 132, 74 S. W. 544; Windom *v.* State, 44 Tex. Cr. 514, 72 S. W. 193.

50. Hartley *v.* State, (Tex. Cr. App. 1903) 71 S. W. 603; Hyatt *v.* State, 32 Tex. Cr. 580, 25 S. W. 291.

51. Cerda *v.* State, 33 Tex. Cr. 458, 26 S. W. 992.

52. Hull *v.* State, (Tex. Cr. App. 1904) 80 S. W. 380; Tyler *v.* State, (Tex. Cr. App. 1902) 70 S. W. 750; Reese *v.* State, 44 Tex. Cr. 34, 68 S. W. 283; Meerchat *v.* State, (Tex. Cr. App. 1900) 57 S. W. 955; Parker *v.* State, (Tex. Cr. App. 1900) 57 S. W. 668; Young *v.* State, 34 Tex. Cr. 290, 30 S. W. 238; Criswell *v.* State, 24 Tex. App. 606, 7 S. W. 337.

Where the evidence raised a reasonable doubt as to defendant's belief, instructions of the character mentioned as the tax are proper. Jackson *v.* State, (Tex. Cr. App. 1904) 79 S. W. 521, 80 S. W. 631; Sissell *v.* State, (Tex. Cr. App. 1892) 20 S. W. 368.

Evidence authorizing charge.— Where defendant claimed that prosecutor had loaned him the overcoat, it was held sufficient to charge that if jury believed that the prosecutor loaned defendant the overcoat they should acquit. Smith *v.* State, (Tex. Cr. App. 1903) 75 S. W. 298. It is not error for the court to submit to the jury the question of the good faith of accused in taking a horse by bill of sale from another not in possession, where the accused is charged with theft of the horse as an estray. Baxter *v.* State, (Tex. Cr. App. 1897) 43 S. W. 87. Where there was some evidence that accused bought the cotton he was entitled to instructions to acquit if he bought the cotton. Hall *v.* State, 120 Ga. 142, 47 S. E. 519. But on a prosecution for theft, where defendant claimed that he traded for the property, and the state contended that defendant stole it, it was proper not to charge as to defendant's good faith in making the trade. Glass *v.* State, 34 Tex. Cr. 299, 30 S. W. 556.

A request for a special instruction covered by the general charge may be refused. Lee *v.* State, 103 Ga. 587, 30 S. E. 553; Sigler *v.* State, 9 Tex. App. 427.

It is error to refuse to submit intention to the jury when defense was a *bona fide* claim of right. Lee *v.* State, 102 Ga. 221, 29 S. E. 264.

53. Wilson *v.* State, (Tex. Cr. App. 1903) 76 S. W. 434; Steed *v.* State, 43 Tex. Cr. 567, 67 S. W. 328; Black *v.* State, (Tex. Cr. App. 1897) 41 S. W. 606; Hunter *v.* State,

took it under a *bona fide* mistake as to his authority it is their duty to acquit the accused.[54]

3. Instructions as to Evidence — a. Circumstantial Evidence.[55] Where the evidence is entirely circumstantial the court should instruct that in order to convict the circumstances must be so strong as to exclude every reasonable hypothesis except defendant's guilt.[56] Defendant is entitled to an instruction on circumstantial evidence where the state relies solely on recent unexplained possession,[57] where the place of finding the property is relied on as a circumstance of guilt,[58] or where the case rests merely upon circumstances.[59] So the court may charge that flight and attempted concealment are circumstances to be considered against defendant;[60] but where there is direct evidence of the commission of the offense, a charge on circumstantial evidence is not required.[61]

b. Assumption of Facts.[62] An instruction which assumes any fact or inference which is matter for the jury is erroneous. It has been so held in respect of an assumption that defendant took the property,[63] or had possession of other stolen

(Tex. Cr. App. 1896) 37 S. W. 323; Miles *v.* State, 1 Tex. App. 510.

What instruction sufficient.— On a trial for theft, a charge that by "fraudulent taking" is meant that the person taking knew at the time that the property was not his own, and that to warrant a conviction the jury must believe, beyond a reasonable doubt, that the goods taken were the property of the prosecuting witness, sufficiently informs the jury that, if they had a reasonable doubt of the fact that defendant raised or owned the goods taken, they should acquit. Spencer *v.* State, 34 Tex. Cr. 65, 29 S. W. 159. A charge that, before there could be a conviction for theft of a calf, the jury must believe that it was the property of Y, renders unnecessary an affirmative charge to acquit if they believed that it was the property of defendant, as testified by him. Thurmond *v.* State, 37 Tex. Cr. 422, 35 S. W. 965.

Disproving claim of right.— It is not error to instruct that the state is not required to disprove defendant's claim of right by direct evidence, but by any evidence sufficient to satisfy the jury of its falsity. Blanton *v.* State, (Tex. Cr. App. 1894) 26 S. W. 624.

54. Yarbrough *v.* State, 115 Ala. 92, 22 So. 534; Roberts *v.* State, 44 Tex. Cr. 267, 70 S. W. 423; Melton *v.* State, (Tex. Cr. App. 1900) 56 S. W. 67; Phillips *v.* State, (Tex. Cr. App. 1895) 31 S. W. 644; Myers *v.* State, 24 Tex. App. 334, 6 S. W. 194.

What instructions proper or sufficient.— The court having charged that, if defendant took the steer mistakenly believing it to belong to a brand purchased by him, he was innocent, it was error to add that the transfer must have been a *bona fide* transfer of the animal he was charged with stealing, since there may have been a mistake which should lead to acquittal, although there was no actual transfer of a particular animal. Lockwood *v.* State, (Tex. Cr. App. 1894) 26 S. W. 200. When defendant and others were caught in the act of killing a hog belonging to the prosecutor, defendant's brother explained that they thought the hog was their father's. In the trial of defendant for stealing the hog he adopted that as his theory of defense. A charge that might be construed so as to restrict the explanations made at the time to what was said by defendant was not error, where the jury were also told that, if the defendant believed he was killing his father's hog, he should be acquitted. Poteet *v.* State, (Tex. Cr. App. 1897) 43 S. W. 339. Where defendant on trial for theft of cattle claimed that he believed the person for whom he worked, and under whose orders he took the cattle, was the owner of them, an instruction that the jury should acquit him if the person for whom he worked believed that he had authority to take the cattle is sufficiently favorable for him. Ray *v.* State, 35 Tex. Cr. 354, 33 S. W. 869.

55. See, generally, Criminal Law, 12 Cyc. 633 *et seq.*

56. Wantland *v.* State, 145 Ind. 38, 43 N. E. 931; State *v.* Davenport, 38 S. C. 348, 17 S. E. 37; Roebuck *v.* State, 40 Tex. Cr. 689, 51 S. W. 914.

57. Sullivan *v.* State, 18 Tex. App. 623.

58. State *v.* Austin, 129 N. C. 534, 40 S. E. 4; Green *v.* State, (Tex. Cr. App. 1896) 34 S. W. 283.

59. York *v.* State, 42 Tex. Cr. 528, 61 S. W. 128; Gentry *v.* State, 41 Tex. Cr. 497, 56 S. W. 68; Pace *v.* State, 41 Tex. Cr. 203, 51 S. W. 953, 53 S. W. 689; Roebuck *v.* State, 40 Tex. Cr. 689, 51 S. W. 914; Montgomery *v.* State, (Tex. Cr. App. 1893) 20 S. W. 926; Smith *v.* State, (Tex. App. 1889) 12 S. W. 869.

60. State *v.* Connor, 118 Iowa 490, 92 N. W. 654.

61. People *v.* Lonnen, 139 Cal. 634, 73 Pac. 586; Aladin *v.* State, (Tex. Cr. App. 1905) 86 S. W. 327; Landreth *v.* State, 44 Tex. Cr. 239, 70 S. W. 758; Doucette *v.* State, (Tex. Cr. App. 1898) 45 S. W. 800; Williams *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1103; Monk *v.* State, (Tex. Cr. App. 1898) 44 S. W. 1101; Holmes *v.* State, (Tex. Cr. App. 1897) 42 S. W. 979.

62. See, generally, Criminal Law, 12 Cyc. 601, 602.

63. State *v.* Taylor, 111 Mo. 538, 20 S. W. 239; State *v.* Castor, 93 Mo. 242, 5 S. W.

property,[64] or in respect of inference of asportation,[65] unless the matter assumed was favorable to defendant,[66] or unless the jury might find defendant guilty on the evidence independent of the assumed fact.[67]

c. Evidence of Alibi.[68] Where evidence tending to establish an alibi has been given, a charge on that defense must be given.[69] The charge must not relieve the prosecution of the burden of proof.[70]

d. Evidence of Possession — (i) *Form and Requisites in General.* It is sufficient to instruct the jury that the unexplained possession of property recently stolen is presumptive evidence that the possessor stole it,[71] and that if the jury have a reasonable doubt as to the truth of the explanation they should acquit.[72] It is not necessary to instruct "if defendant gave an honest account," as honest implies true;[73] but to instruct that the jury must be satisfied beyond a reasonable doubt that defendant had in his possession the identical money stolen before they can convict is error.[74] In instructing on the rule of recent possession it is not necessary to make a direct application of the rule to the facts;[75] or, where the charge is full on the circumstantial evidence, it is not necessary to give a special charge on the recent possession;[76] or if the charge uses the word "lost" instead of "stolen," it is not erroneous.[77]

(ii) *Instructions on Weight of Evidence.*[78] An instruction on the weight of the possession of the stolen property by defendant as evidence is erroneous.[79]

(iii) *Issues and Evidence Requiring Instructions.* Where there is evi-

906; Owens *v.* State, 28 Tex. App. 122, 12 S. W. 506.

The assumption is harmless where defendant admitted he took the property to take care of it. Tanner *v.* State, (Tex. Cr. App. 1898) 44 S. W. 489.

64. Homer *v.* State, (Tex. Cr. App. 1901) 65 S. W. 371.

65. State *v.* Perkins, 104 N. C. 710, 10 S. E. 175.

66. Lopez *v.* State, (Tex. Cr. App. 1892) 20 S. W. 395.

67. Barker *v.* State, 126 Ala. 69, 28 So. 685.

68. See, generally, CRIMINAL LAW, 12 Cyc. 619.

69. Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456; Ballow *v.* State, (Tex. Cr. App. 1902) 69 S. W. 513; Arismendis *v.* State, (Tex. Cr. App. 1900) 60 S. W. 47.

A charge on alibi was held sufficient in Reid *v.* State, (Tex. Cr. App. 1900) 57 S. W. 662.

Where possession of stolen goods is shown. — Where defendant pleaded an alibi, and possession of the stolen property by him was shown, the jury were instructed as to the defense of alibi, and as to the presumption arising from the possession of stolen goods. It was held that it was not error to fail to qualify the instruction on possession as to the rebuttal of the presumption of guilt by proof of alibi. State *v.* Riney, 137 Mo. 102, 38 S. W. 718.

70. State *v.* Van Winkle, 80 Iowa 15, 45 N. W. 388.

71. Webb *v.* State, 106 Ala. 52, 18 So. 491; People *v.* Rodundo, 44 Cal. 538; People *v.* Wilson, 30 Mich. 486; Jones *v.* State, 51 Miss. 718, 24 Am. Rep. 658.

An instruction of the character leaves open to the jury to consider whether the length of time of possession after the loss is long enough to rebut the presumption. Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163.

72. Gilmore *v.* State, (Tex. Cr. App. 1895) 33 S. W. 120; Bazan *v.* State, (Tex. Cr. App. 1893) 24 S. W. 100.

73. People *v.* Buelna, 81 Cal. 135, 22 Pac. 396.

74. Barker *v.* State, 126 Ala. 69, 28 So. 685; Grant *v.* State, 55 Ala. 201; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788.

75. Hart *v.* State, 22 Tex. App. 563, 3 S. W. 741.

Instruction held sufficient to cover explanation of recent possession. — An instruction to the effect that "if defendant assisted in driving hogs to town and disposing of them, not knowing tney were stolen, he is not guilty of larceny" is sufficient to cover the explanation of recent possession. State *v.* Cross, 95 Iowa 629, 64 N. W. 614.

76. Bonners *v.* State, (Tex. Cr. App. 1896) 35 S. W. 650.

77. Belote *v.* State, 36 Miss. 96, 72 Am. Dec. 163.

78. See, generally, CRIMINAL LAW, 12 Cyc. 596 *et seq.*

79. State *v.* Maloney, 27 Oreg. 53, 39 Pac. 398; Wheeler *v.* State, 38 Tex. Cr. 71, 41 S. W. 615; Tomerlin *v.* State, (Tex. Cr. App. 1894) 26 S. W. 214.

Applications of rule. — The following instructions are erroneous: That possession without bill of sale is presumption of guilt (Willey *v.* State, 22 Tex. App. 408, 3 S. W. 570); that possession is a "strong presumption" against defendant (Baker *v.* State, 80 Wis. 416, 50 N. W. 518); that such possession raises a presumption of guilt (People *v.* Mitchell, 55 Cal. 236. See also Blankenship *v.* State, 55 Ark. 244, 18 S. W. 54; White *v.* State, 17 Tex. App. 188); or in-

dence of recent possession it is error to refuse to charge on the effect of such possession.[80] Where there is other evidence an instruction that recent possession was the only inculpatory evidence was properly refused;[81] but where there is no evidence of recent possession no charge need be made.[82] Nor need a charge be made where there is no evidence accounting for the possession,[83] or where the failure to charge does not harm defendant[84] or mislead the jury.[85]

(iv) *Applicability to Issues and Evidence.*[86] In instructing on recent possession it is error to ignore the defense; the instruction must be made applicable to the facts of the case;[87] although an instruction that the jury should consider the character of the accused when there was no evidence as to his character was held not erroneous.[88] It is error to instruct that recent possession may be considered in establishing the guilt or innocence of defendant, for the jury do not pass on innocence.[89] An instruction on recent possession is not rendered bad by omission to charge that such possession must be exclusive.[90]

(v) *Explanation of Possession.* Where there is evidence that the accused made an explanation of his possession the jury should be instructed on the explanation of recently stolen property.[91] Where there is no evidence of an explanation no charge need be given,[92] nor need one be given where the court

structing for correction where the explanation given was proved false (McCarty *v.* State, 36 Tex. Cr. 135, 35 S. W. 994).

For other instructions held erroneous as being on the weight of the evidence see Reed *v.* State, 54 Ark. 621, 16 S. W. 819; Spillman *v.* State, 38 Tex. Cr. 607, 44 S. W. 149; Sisk *v.* State, (Tex. Cr. App. 1897) 42 S. W. 985; Pace *v.* State, (Tex. Cr. App. 1895) 31 S. W. 173; McWhorter *v.* State, 11 Tex. App. 584.

For instructions held not erroneous as being on the weight of the evidence see Wheeler *v.* State, 38 Tex. Cr. 71, 41 S. W. 615.

80. Owens *v.* State, 119 Ga. 304, 46 S. E. 433; State *v.* Collett, 9 Ida. 608, 75 Pac. 271; State *v.* White, 126 Mo. 591, 29 S. W. 591; Armstead *v.* State, (Tex. Cr. App.) 87 S. W. 824; Hodge *v.* State, 41 Tex. Cr. 229, 53 S. W. 862; Robertson *v.* State, 33 Tex. Cr. 366, 26 S. W. 508; Rucker *v.* State, (Tex. Cr. App. 1894) 26 S. W. 65; Clark *v.* State, 30 Tex. App. 402, 17 S. W. 942; Coward *v.* State, 24 Tex. App. 590, 7 S. W. 332; Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Long *v.* State, 11 Tex. App. 381.

81. Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342.

82. People *v.* Carey, 125 Mich. 535, 84 N. W. 1087; Wilson *v.* State, (Tex. Cr. App. 1896) 34 S. W. 284.

83. Baldwin *v.* State, 31 Tex. Cr. 589, 21 S. W. 679.

When charge on explanation proper.—Where, on a trial for cattle theft, a witness stated that he saw defendant drive the animal along the road on the day that the theft was alleged to have been committed that defendant stated that he traded some cows for cattle, and that the animal in question was one he traded for, the court properly charged on the explanation given by defendant of the possession of recently stolen property. Parks *v.* State, (Tex. Cr. App. 1905) 89 S. W. 1064.

84. Joseph *v.* State, 110 Ga. 774, 36 S. E. 61.

85. State *v.* Howard, 41 Oreg. 49, 69 Pac. 50.

86. See, generally, Criminal Law, 12 Cyc. 651.

87. Hix *v.* People, 157 Ill. 382, 41 N. E. 862; State *v.* Tucker, 76 Iowa 232, 40 N. W. 725; Newman *v.* State, 43 Tex. 525; State *v.* Humason, 5 Wash. 499, 32 Pac. 111.

88. People *v.* Farrington, 140 Cal. 656, 74 Pac. 288.

89. Smith *v.* State, 13 Tex. App. 507.

90. Galvin *v.* State, 93 Ind. 550; Ellison *v.* State, (Tex. Cr. App. 1903) 72 S. W. 188; Brookin *v.* State, 26 Tex. App. 121, 9 S. W. 735.

91. State *v.* Jones, 115 Iowa 113, 88 N. W. 196; Grentzinger *v.* State, 31 Nebr. 460, 48 N. W. 148; State *v.* Sally, 41 Oreg. 366, 70 Pac. 396; Wingo *v.* State, (Tex. Cr. App. 1903) 75 S. W. 29; Olibare *v.* State, (Tex. Cr. App. 1898) 48 S. W. 69; Farias *v.* State, (Tex. Cr. App. 1898) 45 S. W. 721; Wheeler *v.* State, 34 Tex. Cr. 350, 30 S. W. 913; Young *v.* State, 34 Tex. Cr. 290, 30 S. W. 238; James *v.* State, 32 Tex. Cr. 509, 24 S. W. 642; Conners *v.* State, 31 Tex. Cr. 453, 20 S. W. 981; Gentry *v.* State, (Tex. Cr. App. 1892) 20 S. W. 551; Navarrow *v.* State, (Tex. App. 1891) 17 S. W. 545; Fleming *v.* State, (Tex. App. 1890) 15 S. W. 173; Carter *v.* State, (Tex. App. 1889) 12 S. W. 740; Fernandez *v.* State, 25 Tex. App. 538, 8 S. W. 667; Willis *v.* State, 24 Tex. App. 586, 6 S. W. 857; Shuler *v.* State, 23 Tex. App. 182, 4 S. W. 581; Miller *v.* State, 18 Tex. App. 34; Ray *v.* State, 13 Tex. App. 51; Ruston *v.* State, 10 Tex. App. 644; Vincent *v.* State, 9 Tex. App. 303; Heath *v.* State, 7 Tex. App. 464.

92. State *v.* Spencer, 4 Pennew. (Del.) 92, 53 Atl. 337; State *v.* Teller, 45 Oreg. 571, 78 Pac. 980; Pace *v.* State, (Tex. Cr. App. 1895) 31 S. W. 173; Baldwin *v.* State, 31 Tex. Cr. 589, 21 S. W. 679.

consider the testimony given as no explanation,[93] where no explanation is given until the next day,[94] or where the explanation is inculpatory.[95] It is error to instruct on the explanation of recent possession where the identical property stolen is not found in defendant's possession.[96] Where defendant's explanation is that he purchased the property it is sufficient to charge on the purchase, without charging in regard to the explanation made by defendant.[97] It is a sufficient charge on the explanation of recent possession to charge that if the jury believe that defendant came honestly into possession they should acquit.[98] To authorize conviction if defendant's explanation is false is error,[99] or to charge that his possession is a circumstance against him when his explanation is reasonable is error,[1] unless his explanation of his receiving possession does not exclude the idea of his having had a previous felonious connection with the taking.[2] The court should not suggest what particular explanation was referred to.[3]

(VI) *Recent Possession.* The jury should be explicitly instructed that unless they find that the possession was recent they should not presume defendant guilty.[4] The fact that defendant was not in possession at the time he made his explanation to the officers does not render an instruction inapplicable.[5] It is error to charge on recent possession before charging on the question of actual larceny.[6]

e. Conduct of Defendant. When the facts warrant it, an instruction that defendant's conduct after the disappearance of the property may be considered as a circumstance of guilt is not erroneous.[7]

4. Other Instructions — a. Grade or Degree of Offense. If there is evidence tending to prove theft, but on the evidence it is doubtful whether the value of the goods was greater or less than the amount required for grand larceny, the

93. Brown *v.* State, 41 Tex. Cr. 232, 53 S. W. 866.

94. Smotherman *v.* State, (Tex. Cr. App. 1904) 83 S. W. 838.

95. Holt *v.* State, 39 Tex. Cr. 282, 45 S. W. 1016, 46 S. W. 829; Ewing *v.* State, 29 Tex. App. 434, 16 S. W. 185.

96. Smith *v.* State, 44 Tex. Cr. 81, 68 S. W. 510; Doss *v.* State, 28 Tex. App. 506, 13 S. W. 788. *Contra,* Leonard *v.* State, 115 Ala. 80, 22 So. 564.

97. Thomason *v.* State, (Tex. Cr. App. 1897) 41 S. W. 638. No objection to the use of the word "bought" instead of "traded." May *v.* State, (Tex. Cr. App. 1899) 51 S. W. 242; Reed *v.* State, (Tex. Cr. App. 1898) 46 S. W. 931; Hays *v.* State, 36 Tex. Cr. 533, 38 S. W. 171.

98. State *v.* Sally, 41 Oreg. 366, 70 Pac. 396. Where, in a prosecution for hog theft, it appeared that, when defendant's possession of the hogs was first questioned, he gave an explanation thereof, it was proper to charge that if the hogs were found in defendant's possession recently after they were stolen, and when his possession was first questioned he made an explanation as to how he came by them, and the jury believed that such explanation was probably true, they should acquit. Green *v.* State, (Tex. Cr. App. 1905) 90 S. W. 1114.

99. Thompson *v.* State, (Tex. Cr. App. 1904) 78 S. W. 941; Armstrong *v.* State, (Tex. Cr. App. 1899) 50 S. W. 346; Hopperwood *v.* State, 39 Tex. Cr. 15, 44 S. W. 841. But a charge that if defendant's explanation when such possession was first questioned was unreasonable or inconsistent with innocence, or, if consistent with innocence, the state proved it to have been false, the jury should consider such possession and explanation in determining defendant's guilt was unobjectionable. Isham *v.* State, (Tex. Cr. App. 1899) 49 S. W. 581.

1. Coleman *v.* State, (Tex. Cr. App. 1900) 55 S. W. 836.

2. Waters *v.* State, 117 Ala. 108, 22 So. 490.

3. Garrett *v.* State, 42 Tex. Cr. 521, 61 S. W. 129; Clayton *v.* State, (Tex. Cr. App. 1898) 44 S. W. 165.

4. Boyd *v.* State, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908; Curlin *v.* State, 23 Tex. App. 681, 5 S. W. 186.

Failure to use word "recent" is not ground for a new trial where the possession was in fact recent. Young *v.* State, 95 Ga. 456, 20 S. E. 270.

Charge on weight of evidence.— Where the evidence as to accused's good character was based largely on personal acquaintance and knowledge rather than on reputation, and other circumstances, such as masquerading under an assumed name, tended to neutralize its effect, it was not error for the court to refuse to charge that "the presumption arising from the possession alone of stolen property is removed by evidence of defendant's good character." People *v.* Peltin, 1 Cal. App. 612, 82 Pac. 980.

5. Taylor *v.* State, (Tex. Cr. App. 1903) 75 S. W. 35.

6. State *v.* McGowan, 1 S. C. 14.

7. People *v.* Farrington, 140 Cal. 656, 74

court should explain both degrees of the offense and submit the issue to the jury,[8] or leave it to the jury to find the value.[9] There is no need of an instruction as to a grade of the offense when there is no evidence that such a grade was committed.[10] Where there is no proof of value above the amount required for grand larceny there is no need of an instruction except as to petit larceny.[11] On the other hand, where the undisputed testimony places the value above that required for grand larceny, an instruction on petit larceny is not required.[12] Where an aggravated larceny is the same offense whatever the value of the property stolen, no instruction on value need be given.[13] But where the grade of the offense or the sentence depends upon the value of the goods, the jury should be instructed to find the value.[14] Where the jury are instructed to find the value it is not necessary to charge as to grades of the offense.[15] The jury should be instructed to find the market value, not the value to the owner;[16] but in the absence of exception by defendant a charge is sufficient which speaks merely of the value of the property.[17]

b. Parties. On the trial of one indicted as principal in a theft, if the evidence shows that another person was concerned in it, a charge upon the legal position of parties to a crime is necessary. Thus where there is evidence that defendant acted through an innocent agent, the position of one who acts through an innocent agent must be explained to the jury.[18] Where defendant was an accomplice, the jury must be instructed that he can be convicted as principal only if he was present aiding and abetting the taking.[19] When testimony is given by an accom-

Pac. 288; State *v.* Williams, 118 Iowa 494, 92 N. W. 652; Kennon *v.* Territory, 5 Okla. 685, 50 Pac. 172.

8. Bishop *v.* People, 194 Ill. 365, 62 N. E. 785; State *v.* McCarty, 73 Iowa 51, 34 N. W. 606; Wilhelm *v.* Com., 12 S. W. 271, 11 Ky. L. Rep. 431; Lee *v.* State, 14 Tex. App. 266.

An instruction, in a prosecution for burglary and larceny, that if, in connection with the burglary, property of any value was stolen, accused may be convicted of larceny, and, if no burglary was committed, but property of the value of thirty dollars or more was stolen, accused may be convicted of grand larceny, is correct, since the value of the property is material only where no burglary was committed in connection with the larceny. State *v.* Sprague, 149 Mo. 409, 50 S. W. 901.

9. Mason *v.* People, 2 Colo. 373; Williams *v.* People, 24 N. Y. 405. Thus where goods were taken on separate occasions, but the evidence does not show that goods over the value of twenty dollars were taken on any one occasion, it is error to instruct the jury that they may convict of grand larceny if they find that defendant took goods worth twenty dollars in any one day. Cody *v.* State, 31 Tex. Cr. 183, 20 S. W. 398.

10. People *v.* Clark, 145 Cal. 727, 79 Pac. 434; State *v.* Patterson, 98 Mo. 283, 11 S. W. 728.

11. Weaver *v.* Com., 86 S. W. 551, 27 Ky. L. Rep. 743; State *v.* Sharp, 106 Mo. 106, 17 S. W. 225.

12. Jones *v.* State, 49 Ind. 549; People *v.* Harris, 77 Mich. 568, 43 N. W. 1060; State *v.* Sprague, 149 Mo. 409, 50 S. W. 901; Williams *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1142; Ellis *v.* State, (Tex. Cr. App. 1896) 38 S. W. 205; Young *v.* State, 34 Tex. Cr. 290, 30 S. W. 238; White *v.* State, 33 Tex. Cr. 94, 25 S. W. 290; Cannon *v.* State, (Tex. Cr. App. 1893) 24 S. W. 517; Haskins *v.* State, (Tex. Cr. App. 1892) 20 S. W. 832; Fenner *v.* State, (Tex. Cr. App. 1892) 20 S. W. 355; White *v.* State, 28 Tex. App. 71, 12 S. W. 406; Cunningham *v.* State, 27 Tex. App. 479, 11 S. W. 485.

13. State *v.* Scott, 109 Mo. 226, 19 S. W. 89; State *v.* Bates, 25 Utah 1, 69 Pac. 70; State *v.* Washing, 36 Wash. 485, 78 Pac. 1019.

14. Locke *v.* State, 32 N. H. 106; Rhodihan *v.* People, 5 Park. Cr. (N. Y.) 395. But see *contra*, Riley's Case, 12 Abb. Pr. (N. Y.) 479, 21 How. Pr. 451.

15. State *v.* Hessian, 58 Iowa 68, 12 N. W. 77.

16. State *v.* Smith, 48 Iowa 595.

17. Osborne *v.* State, (Tex. Cr. App. 1900) 56 S. W. 53.

18. Knowles *v.* State, 27 Tex. App. 503, 11 S. W. 522.

19. People *v.* Ruiz, 144 Cal. 251, 77 Pac. 907; Trevenio *v.* State, (Tex. Cr. App. 1905) 87 S. W. 1162; McAlister *v.* State, 45 Tex. Cr. 258, 76 S. W. 760, 108 Am. St. Rep. 958; Hodge *v.* State, 41 Tex. Cr. 229, 53 S. W. 862; Wright *v.* State, 40 Tex. Cr. 45, 48 S. W. 191; Bell *v.* State, 39 Tex. Cr. 677, 47 S. W. 1010; Hankins *v.* State, (Tex. Cr. App. 1898) 47 S. W. 992; Brite *v.* State, (Tex. Cr. App. 1897) 43 S. W. 342; State *v.* Brookhouse, 10 Wash. 87, 38 Pac. 862. Therefore an instruction that, to convict, the evidence must show beyond a reasonable doubt that defendant was an original taker of the animal in the county in which the prosecution took place, and not an accomplice or a receiver of stolen property, was

plice, an instruction should be given on the law relating to accomplice testimony.[20] And if there is anything in the evidence tending to show the witness an accomplice, the jury should be instructed that if they find him to have been an accomplice they shall convict on his uncorroborated testimony.[21]

e. Burden of Proof. The burden of proof is on the prosecution to prove that the taking was felonious,[22] and that the goods in the possession of defendant were the identical goods alleged to have been stolen,[23] and the jury should be instructed that this must be proved beyond a reasonable doubt.[24] It is a sufficient charge on reasonable doubt to state that it must be a doubt growing out of all the circumstances in the case.[25] It is error to instruct the jury that they must believe defendants beyond a reasonable doubt.[26] Where the evidence is circumstantial it is not sufficient to instruct that the jury should be satisfied beyond a reasonable doubt.[27] An instruction which has the effect of invoking against defendant the commission of another offense or that instructs for conviction when the facts are such that defendant may have been guilty of another crime is erroneous.[28]

d. Punishment. If the punishment is not to be fixed by the jury, the court should not inform them as to the amount of punishment imposed.[29] In a state where the jury fixes the penalty, the law as to the permissible punishment should be stated to the jury. A charge stating the penalty for a different offense is erroneous, although the amount is less than that for the offense for which defendant is on trial.[30] If the minimum penalty is rightly stated, but the maximum is stated too large, it is not reversible error where the jury inflict the minimum penalty only.[31] But if the whole penalty is wrongly stated it is erroneous, although the punishment actually imposed comes within the legal maximum.[32] Where the charge states the penalty twice, once correctly, and the other, "not less than two nor more than two nor more than five years," it is not such a misstatement of the penalty as requires a reversal of the judgment.[33] Where the amount of punishment is affected by a voluntary return of the goods an instruction on the effect of a return must be given when the evidence shows that a return has been made.[34] But an instruction is not necessary when the return made does not satisfy the law.[35]

improperly refused. Steed *v.* State, 43 Tex. Cr. 567, 67 S. W. 328. On a trial under an indictment for larceny of a cow, where there is evidence tending to show a conspiracy between defendant and another person to steal and dispose of the cow, a charge which ignores this tendency of the evidence and predicates defendant's right of acquittal upon the fact that the cow was taken and disposed of by such other person is erroneous and properly refused. Huskey *v.* State, 129 Ala. 94, 29 So. 838.

20. Sapp *v.* State, (Tex. Cr. App. 1903) 77 S. W. 456.

21. Kelly *v.* State, 1 Tex. App. 628.

22. See *supra*, XIV, A.

23. See *supra*, XIV, A.

24. Simms *v.* State, (Tex. Cr. App. 1894) 25 S. W. 771.

Overthrowing presumption created by state's evidence.— It is error to instruct the jury that after the state has introduced its evidence, it becomes necessary for defendant to overthrow the presumption which has been created, or that where defendant sets up a defense it is necessary for him to prove it. State *v.* Huffman, 16 Oreg. 15, 16 Pac. 640; Chambers *v.* State, 44 Tex. Cr. 61, 68 S. W. 286; Baker *v.* State, 80 Wis. 416, 50 N. W. 518.

25. Chavez *v.* Territory, 6 N. M. 455, 30 Pac. 903. But "such a doubt as you are able to find reason for in the evidence" was held error in Childs *v.* State, 34 Nebr. 236, 51 N. W. 837.

26. Lewis *v.* State, 29 Tex. App. 105, 14 S. W. 1008.

27. Roebuck *v.* State, 40 Tex. Cr. 689, 51 S. W. 914.

28. People *v.* Tipton, 73 Cal. 405, 14 Pac. 894; Gilbert *v.* Com., 106 Ky. 919, 51 S. W. 804, 21 Ky. L. Rep. 544.

29. Lawhead *v.* State, 46 Nebr. 607, 65 N. W. 779; Ford *v.* State, 46 Nebr. 390, 64 N. W. 1082.

30. Spradling *v.* State, 30 Tex. App. 595, 17 S. W. 1117.

31. Ramirez *v.* State, 43 Tex. Cr. 455, 66 S. W. 1101.

32. Livingston *v.* State, 141 Ind. 131, 40 N. E. 684.

33. Adam *v.* State, (Tex. Cr. App. 1892) 20 S. W. 548.

34. Bennett *v.* State, 28 Tex. App. 342, 13 S. W. 142; Anderson *v.* State, 25 Tex. App. 593, 9 S. W. 43.

35. Hyatt *v.* State, 32 Tex. Cr. 580, 25 S. W. 291; Boze *v.* State, 31 Tex. Cr. 347, 20 S. W. 752; Wheeler *v.* State, 15 Tex. App. 607.

C. Verdict[36] — **1. Conformity to Indictment.** The verdict must be conformable to the indictment.[37]

2. Certainty of Verdict. The verdict of the jury must be reasonably certain in order to support a judgment.[38] Bad spelling and grammar do not vitiate a verdict, so long as the meaning is clear.[39] The charge of the court, defining the grades of the offense and stating to them limits of the punishment, may be used in construing the verdict.[40]

3. General Verdict on Two Counts. If a general verdict of guilty is rendered on an indictment containing two counts, and one count is bad, the verdict may be supported by the good count.[41] But where one is a felony and the other a misdemeanor, and the punishments are different, a general verdict cannot be supported.[42] Under an indictment containing two counts, one for grand larceny and the other for receiving stolen goods, a verdict assessing the value of the property at a sum which reduces the grand larceny to petit larceny, and finding defendant guilty generally on both counts, is inconsistent and void.[43]

4. Indictment For Taking Several Articles. On an indictment for taking several things a general verdict is usually sufficient.[44] It, however, amounts to an

36. See, generally, Criminal Law, 12 Cyc. 686 *et seq.*

37. State *v.* McGee, 181 Mo. 312, 80 S. W. 899.

Verdicts held insufficient.— Thus a verdict "guilty of theft of property of the value of twelve dollars" is not a good verdict on an indictment for hog stealing. Collins *v.* State, 6 Tex. App. 647. And on an indictment for larceny of property worth ten dollars in the commission of burglary a verdict not guilty of burglary but guilty of larceny is not good, although larceny in the commission of burglary is grand larceny. State *v.* Brown, 73 Mo. 631.

Verdicts held sufficient.— But where, under an indictment for larceny, in which defendant was charged among other things with taking certain promissory notes for the payment of money, commonly called bank-notes, the jury returned a verdict as follows: "We, the jury, find the defendant guilty of larceny, in taking the money in the indictment mentioned, and fix the amount and value of the same at $127.80," the verdict was sufficiently formal. State *v.* Bond, 8 Iowa 540. Where, on a trial for the larceny of a bank-note, the ownership of which is laid in C, "agent of the Farmers' Exchange," there is no exception that the evidence fails to show a special property in C, a verdict of guilty establishes C's ownership, and on appeal the words, "agent of the Farmers' Exchange," will be treated as surplusage. State *v.* Carter, 113 N. C. 639, 18 S. E. 517. On a prosecution under Rev. St. (1899) § 1900, for larceny from the person in the nighttime, a verdict that the jury "find defendant guilty of larceny from the person in the night-time, as charged in the information, and assess the punishment at imprisonment in the penitentiary for five years," is in proper form. State *v.* Smith, 190 Mo. 706, 90 S. W. 440.

38. Verdicts held sufficient.— Where an information charged larceny from the person of S in the night-time, a verdict, "We, the jury . . find the defendant guilty of larceny from the person in the nighttime as charged," etc., was sufficient. State *v.* McGee, 188 Mo. 401, 87 S. W. 452. And on an indictment for stealing from the person, a verdict of guilty, as charged, of grand larceny, in stealing from the person, was sufficient. Fallon *v.* People, 2 Abb. Dec. (N. Y.) 83, 2 Keyes 145 [*affirming* 6 Park Cr. 256]. In a prosecution for stealing hogs, under a statute, provided that if any person shall steal any sheep, hog, or goat, where the value of the property is under twenty dollars, he shall be punished, a verdict that "the jury find the defendant guilty of theft of property of value of less than $20" is sufficiently definite and certain. Lawrence *v.* State, 20 Tex. App. 536.

Verdicts held insufficient.— A verdict finding defendant guilty of "fraudulently taking the coal described in the indictment," having found some but not all the elements of larceny, is insufficient. Johnston *v.* State, 25 Tex. App. 731, 9 S. W. 48. So, a verdict of "guilty of larceny," finding the value of the property "taken from the person of Peter Coleman," sustains a judgment for simple larceny, but not for stealing from the person. McEntee *v.* State, 24 Wis. 43.

39. Higginbotham *v.* State, 42 Fla. 573, 29 So. 410, 89 Am. St. Rep. 237 ("guilty"); State *v.* Smart, 4 Rich. (S. C.) 356, 55 Am. Dec. 683 ("larceny").

40. Vincent *v.* State, 10 Tex. App. 330.

41. People *v.* Dimick, 107 N. Y. 13, 14 N. E. 178. Where one count is for larceny and the other for receiving stolen goods, a general verdict is good if the grade of the offenses and the punishment are the same. State *v.* Baker, 70 N. C. 530.

42. State *v.* Major, 14 Rich. (S. C.) 76; Campbell *v.* Reg., 11 Q. B. 799, 2 Cox C. C. 463, 12 Jur. 117, 17 L. J. M. C. 89, 2 New Sess. Cas. 297, 63 E. C. L. 799.

43. Jenkins *v.* State, 41 Miss. 582.

44. Kollenberger *v.* People, 9 Colo. 233, 11 Pac. 101.

indictment for taking each of the articles specified.[45] And therefore where the number of articles taken is important, on account of a separate penalty imposed, the verdict should specify the articles stolen unless all were proved to have been taken;[46] and their value, separately or collectively, should also be specified.[47] Upon an indictment for stealing bank-bills and a gold coin, the jury returned this verdict: "Guilty, but not of taking the gold piece." The court might, against the objection of defendant, record this verdict as a verdict of not guilty as to so much of the indictment as related to the stealing of the gold coin and guilty as to the residue.[48]

5. Grade or Degree of Crime. The verdict must find the grade or degree of the offense. Where a jury on an indictment for grand larceny finds a verdict "guilty as charged" it is a good conviction of grand larceny.[49] And so on an indictment for larceny in a dwelling-house of a verdict "guilty as charged."[50] An imperfect verdict is good if the meaning is clear.[51] The jury may find a defendant guilty of petit larceny, although the goods exceed the value of twelve pence.[52] But where two were indicted for grand larceny, and the proof against both was the same, the jury could not convict one of grand larceny and the other of petit larceny.[53]

6. Value. While the value of the goods taken determines the grade of the offense, and the value must be alleged in an indictment for grand larceny and proved in order to convict, it is usually held unnecessary for the jury in its verdict to find the value; a general verdict of guilty being a finding that the goods taken were of the value alleged.[54] But in Nebraska, where it is specially required by statute that the value should be found, a verdict is held bad which does not find the value;[55] and in New Hampshire the value must be found, as a basis for a

Judgment will not be arrested on an indictment for larceny of "sundry bank bills, of the aggregate value of $367," merely because the verdict was "guilty of stealing sundry bank bills, of the value of $317," and "not guilty as to the residue." Com. *v.* Duffy, 11 Cush. (Mass.) 145.

45. State *v.* Somerville, 21 Me. 14, 38 Am. Dec. 248.

46. State *v.* Somerville, 21 Me. 14, 38 Am. Dec. 248; Hope *v.* Com., 9 Metc. (Mass.) 134; State *v.* Kersh, 1 Strobh. (S. C.) 352.

47. State *v.* Buck, 46 Me. 531.

48. Com. *v.* Stebbins, 8 Gray (Mass.) 492.

49. People *v.* Perez, 87 Cal. 122, 25 Pac. 262; People *v.* Manners, 70 Cal. 428, 11 Pac. 643; People *v.* Price, 67 Cal. 350, 7 Pac. 745; People *v.* Whitely, 64 Cal. 211, 27 Pac. 1104.

50. State *v.* Treadwell, 54 Kan. 513, 38 Pac. 813.

51. Thus where larceny is divided into grand larceny and petit larceny, a verdict of "guilty of larceny in the second degree" is justified, as standing for petit larceny. People *v.* Righetti, 66 Cal. 184, 4 Pac. 1063, 1185. And where an information charges petit larceny, but charges no prior conviction, the verdict of "guilty of grand larceny, as charged in the information" will be construed in connection with the information, and taken to mean guilty of petit larceny, and an error of the court in instructing for grand larceny is harmless. Evans *v.* State, 150 Ind. 651, 50 N. E. 820. But where one is indicted for horse stealing, a verdict of "guilty of petit larceny" may not be rendered, since such a verdict is foreign to the offense charged. State *v.* Spurgin, 1 McCord (S. C.) 252.

52. State *v.* Bennet, 2 Treadw. (S. C.) 693, 3 Brev. 515.

53. State *v.* Larumbo, Harp. (S. C.) 183; State *v.* Wilson, 3 McCord (S. C.) 187.

54. *Alabama.*— Du Bois *v.* State, 50 Ala. 139; Jones *v.* State, 13 Ala. 153.

Colorado.— Mason *v.* People, 2 Colo. 373.

Indiana.— State *v.* Murphy, 8 Blackf. 498.

Minnesota.— State *v.* Colwell, 43 Minn. 378, 45 N. W. 847. See State *v.* Coon, 18 Minn. 518.

Mississippi.— Cole *v.* State, (1888) 4 So. 577; Cook *v.* State, 49 Miss. 8; Wilborn *v.* State, 8 Sm. & M. 345.

Ohio.— Schoonover *v.* State, 17 Ohio St. 294.

Oregon.— State *v.* Kelliher, 32 Oreg. 240, 50 Pac. 532; Howell *v.* State, 1 Oreg. 241.

Pennsylvania.— Com. *v.* Butler, 144 Pa. St. 568, 24 Atl. 910; Com. *v.* Dingman, 26 Pa. Super. Ct. 615.

Utah.— People *v.* Gough, 2 Utah 70.

Virginia.— Poindexter *v.* Com., 6 Rand. 667.

Wisconsin.— State *v.* White, 25 Wis. 359.

England.— Reg. *v.* Wright, 7 Cox C. C. 413, Dears. & B. 431, 4 Jur. N. S. 313, 27 L. J. M. C. 65, 6 Wkly. Rep. 255.

See 32 Cent. Dig. tit. "Larceny," § 208.

55. Holmes *v.* State, 58 Nebr. 297, 78 N. W. 641; Fisher *v.* State, 52 Nebr. 531, 72 N. W. 954; McCormick *v.* State, 42 Nebr. 866, 61 N. W. 99; McCoy *v.* State, 22 Nebr. 418, 35 N. W. 202.

judgment for forfeiture of the value.[56] In a few other states it is held that a verdict not finding the value is bad.[57] On an indictment for aggravated larceny where the grade and punishment do not depend on the value of the property taken, the verdict need not assess the value.[58] When the value must be found it is enough to find the aggregate value.[59]

7. Assessment of Punishment. In some jurisdictions the jury may or must assess the punishment. If they may or not as they choose, failure to assess punishment will not invalidate the verdict.[60] An informality in the form of verdict will not be fatal to it.[61] But a verdict assessing a punishment not warranted by law is bad.[62]

D. Sentence.[63] The sentence is sufficient, if it is reasonably certain, although it is in some degree informal. Thus a sentence of imprisonment for a certain term and enough longer to pay the costs at forty cents per day is good, although the costs are to be taxed later by the clerk.[64] So a sentence may omit any provision for restoration of the goods or payment of value to the owner, which is not properly part of the sentence.[65] If hard labor is not part of the punishment, a sentence is not void because the court orders imprisonment at hard labor, since the words may be stricken out.[66] But a sentence of imprisonment for a term longer than legally permitted is void.[67] A sentence is not void, although given on a verdict which might have been set aside on appeal.[68]

XVI. PUNISHMENT.[69]

A. Punishment Must Be on the Indictment and Verdict. The punishment must be for the crime charged in the indictment.[70] In a few cases, where a special punishment is provided, not for a distinct crime but for the general crime committed under special circumstances, the circumstances may be shown after verdict, and need not be charged in the indictment.[71] This is sometimes the case with special punishments for habitual thieves.[72] Punishments for a second offense

56. Locke *v.* State, 32 N. H. 106.

57. Long *v.* State, 42 Fla. 509, 28 So. 775; Meadowcroft *v.* People, 163 Ill. 56, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Thompson *v.* People, 125 Ill. 256, 17 N. E. 749; Tohin *v.* People, 104 Ill. 565; Williams *v.* People, 44 Ill. 478; Collins *v.* People, 39 Ill. 233; Hildreth *v.* People, 32 Ill. 36; Sawyer *v.* People, 8 Ill. 53; Highland *v.* People, 2 Ill. 392; State *v.* Redman, 17 Iowa 329; Ray *v.* State, 1 Greene (Iowa) 316, 48 Am. Dec. 379; Miles *v.* State, 3 Tex. App. 58.

58. McDowell *v.* State, 61 Ala. 172; Yarborough *v.* State, 41 Ala. 405; Smith *v.* State, 60 Ga. 430; Harris *v.* State, 57 Ohio St. 92, 48 N. E. 284; Com. *v.* Lore, 21 Pa. Co. Ct. 205. And see Armstrong *v.* State, 21 Ohio St. 357; Barton *v.* State, 18 Ohio 221.

59. Case *v.* State, 26 Ala. 17; Warren *v.* State, 1 Greene (Iowa) 106.

Findings held sufficient.— A finding that an article was worth a certain sum is a sufficient finding of value. State *v.* Finch, 70 Iowa 316, 30 N. W. 578, 59 Am. Rep. 443. So is a finding that defendant took property to the amount of thirteen dollars. Timmons *v.* State, 56 Miss. 786. Where the property taken is money a finding that defendant took so many dollars is a sufficient finding of value. Hildreth *v.* People, 32 Ill. 36; Reed *v.* State, 66 Nebr. 184, 92 N. W. 321. In 1864 in Alabama it was held that under an indictment for grand larceny, the jury must assess the value of the property alleged to have been stolen in the specie currency of the country. Parker *v.* State, 39 Ala. 365. It is enough if the verdict simply find the value, without finding the market value. The statute does not require a finding of market value. State *v.* Williams, 118 Iowa 494, 92 N. W. 652.

60. People *v.* Littlefield, 5 Cal. 355; Shafer *v.* State, 74 Ind. 90.

61. Doty *v.* State, 6 Blackf. (Ind.) 529; Tarry *v.* Newman, 15 L. J. M. C. 160, 15 M. & W. 645, 2 New Sess. Cas. 449.

62. Fowler *v.* State, 9 Tex. App. 149.

63. See, generally, Criminal Law, 12 Cyc. 769 *et seq.*

64. McIntosh *v.* State, 52 Ala. 355.

65. Isaacs *v.* State, 23 Md. 410.

66. State *v.* Maher, 25 Nev. 465, 62 Pac. 236.

67. Tully *v.* Com., 4 Metc. (Mass.) 357.

68. Kellar *v.* Davis, 69 Nebr. 494, 95 N. W. 1028.

69. See, generally, Criminal Law, 12 Cyc. 953 *et seq.*

70. People *v.* Martin, 91 Mich. 650, 52 N. W. 68; People *v.* Jones, 49 Mich. 591, 14 N. W. 573; State *v.* Davidson, 124 N. C. 839, 32 S. E. 957.

71. State *v.* Bynum, 117 N. C. 749, 23 S. E. 218.

72. State *v.* Riley, 28 Iowa 547; Stevens *v.* Com., 4 Metc. (Mass.) 360. But see World *v.* State, 50 Md. 49.

require an allegation of the former conviction in the indictment.[73] The punishment must also be based on the verdict or plea.[74]

B. The Nature and Amount of Punishment. At common law the amount of punishment is determined by the court, if it is not absolutely fixed by the law;[75] but under statutes it is sometimes fixed by the jury.[76] The amount of punishment may be fixed without regard to the punishment which has been inflicted upon an accomplice in the same offense.[77] Punishment cannot be less than the minimum fixed by law.[78] Matters in mitigation of punishment should be shown by defendant.[79] The punishment must not be excessive,[80] and the law must be complied with as regards the nature of the punishment.[81]

LARD. In its ordinary meaning, the fat of swine which is melted and separated from the flesh.[1] (See, generally, ADULTERATION; FOOD.)

LAREM. Either the tutelary deity of the hearth, or the only home of the family;[2] the household, meaning by that term the united body, consisting of a man and his wife and children and domestics dwelling together in one abode.[3]

73. *Ex p.* Young Ah Gow, 73 Cal. 438, 15 Pac. 76; Evans *v.* State, 150 Ind. 651, 50 N. E. 820; People *v.* Ellsworth, 68 Mich. 496, 36 N. W. 236.

74. *In re* Tutt, 55 Kan. 705, 41 Pac. 957; State *v.* Coston, 113 La. 717, 37 So. 619.

75. Swinney *v.* State, 8 Sm. & M. (Miss.) 576.

76. Martin *v.* State, 125 Ala. 64, 28 So. 92. See Moss *v.* State, 42 Ala. 546.

77. State *v.* Walthall, 115 Iowa 126, 88 N. W. 195; Klein *v.* People, 31 N. Y. 229.

78. State *v.* Daniels, 32 Mo. 558. The question what statute applied to the case, and what its proper interpretation is, was considered in the following cases:

Alabama.— *Ex p.* Thomas, 113 Ala. 1, 21 So. 369; Cohen *v.* State, 50 Ala. 108.

Indiana.— Colip *v.* State, 153 Ind. 584, 55 N. E. 739, 74 Am. St. Rep. 322.

Louisiana.— State *v.* Williams, 114 La. 940, 38 So. 686; State *v.* Eubanks, 114 La. 428, 38 So. 407; State *v.* Henderson, 47 La. Ann. 642, 17 So. 200.

Massachusetts.— Com. *v.* O'Neil, 188 Mass. 330, 74 N. E. 592; Com. *v.* McKenney, 9 Gray 114.

Michigan.— People *v.* Jones, 49 Mich. 591, 14 N. W. 573.

Missouri.— State *v.* Copeman, 186 Mo. 108, 84 S. W. 942; State *v.* Buchardt, 144 Mo. 83, 46 S. W. 150.

New York.— People *v.* McTameney, 30 Hun 505, 13 Abb. N. Cas. 55, 66 How. Pr. 70.

North Carolina.— State *v.* Putney, 61 N. C. 543.

Ohio.— Calkins *v.* State, 14 Ohio St. 222.

Tennessee.— Wilcox *v.* State, 3 Heisk. 110.

Texas.— Kelly *v.* State, 1 Tex. App. 628.

United States.— U. S. *v.* Black, 24 Fed. Cas. No. 14,601, 2 Cranch C. C. 195.

Canada.— Reg. *v.* Randolph, 32 Ont. 212.

79. Broms *v.* Com., 2 Duv. (Ky.) 351; State *v.* Harris, 119 N. C. 811, 26 S. E. 148. As to the extent of punishment allowed by the statute see Sanders *v.* State, 55 Ark. 365, 18 S. W. 376; State *v.* Robertson, 111 La. 809, 35 So. 916; Williams *v.* People, 24 N. Y. 405.

80. The following punishments have been held excessive: Seven years for larceny of steer worth twenty dollars (Palmer *v.* State, (Nebr. 1903) 97 N. W. 235); five years for larceny of property worth forty dollars (Junod *v.* State, (Nebr. 1905) 102 N. W. 462); or ten years in the penitentiary for the stealing of a horse worth forty dollars (George *v.* U. S., (Indian Terr. 1905) 89 S. W. 1121). The following have been held not excessive: Ten years for a pickpocket (State *v.* Williams, 118 Iowa 494, 92 N. W. 652; State *v.* Connor, 118 Iowa 490, 92 N. W. 654); two years for stealing heifer worth thirty dollars (State *v.* Ritchie, 69 Iowa 123, 28 N. W. 474); three years for stealing ox worth thirty-four dollars (State *v.* Upson, 64 Iowa 248, 20 N. W. 173); or seven years for grand larceny (State *v.* Bliss, 27 Wash. 463, 68 Pac. 87).

81. The nature of punishment permitted is discussed in the following cases:

Florida.— Dean *v.* State, 41 Fla. 291, 26 So. 638, 79 Am. St. Rep. 186, imprisonment in jail for non-payment of fine.

Iowa.— State *v.* Williams, 118 Iowa 494, 92 N. W. 652, imprisonment at hard labor.

Tennessee.— Foster *v.* State, 9 Baxt. 353, infamy.

Utah.— *Ex p.* Lewis, 10 Utah 47, 41 Pac. 1077, imprisonment for non-payment of fine.

Virginia.— Aldridge *v.* Com., 2 Va. Cas. 447, free negro sold as slave or banished.

United States.— U. S. *v.* Nelson, 27 Fed. Cas. No. 15,863, 4 Cranch C. C. 579 (whipping a slave); U. S. *v.* Nathan, 27 Fed. Cas. No. 15,857, 4 Cranch C. C. 470 (branding a slave).

1. State *v.* Snow, 81 Iowa 642, 646, 47 N. W. 777, 11 L. R. A. 355.

2. Chaine *v.* Wilson, 16 How. Pr. (N. Y.) 552, 562, as used in the Latin sentence "*Ubi quis larem ac fortunarum suarum summam constituit.*"

3. Lord *v.* Colvin, 4 Drew. 366, 374, 5 Jur. N. S. 351, 28 L. J. Ch. 361, 7 Wkly. Rep. 250, 62 Eng. Reprint 141, where it is said: "'Larem,' which even to a Roman was a

LARGE. Absolutely or relatively great or ample as regards quantity, number, extent.[4] (Large: Running at, see Animals. See also At Large.)

LASCIVIOUS. That which tends to excite lust;[5] loose; wanton, lewd, lustful;[6] tending to produce voluptuous or lewd emotions.[7] (See Lasciviously; Licentiously. See also, generally, Lewdness.)

LASCIVIOUS COHABITATION. See Lewdness.

LASCIVIOUS CONDUCT. See Lewdness.

LASCIVIOUSLY. In a lascivious manner, loosely, wantonly, lewdly.[8] (See Lascivious.)

LAST.[9] As an adjective, that which comes or remains after all the others;

figurative expression, . . . does not signify the place of abode. The words are '*in eodem loco ubi quis larem constituit*,' i. e. a man has his domicile in that place where he has established his 'larem.' The word must mean, not the place of residence, but the body which resides there; or perhaps more correctly, the act of co-residence as members of the same family."

4. Standard Dict. See also Lavelle *v.* State, 136 Ind. 233, 236, 36 N. E. 135 ("large parts"); Bement *v.* Claybrook, 5 Ind. App. 193, 31 N. E. 556, 557 ("large cotton wood and sycamore trees"); Woolley *v.* Louisville Southern R. Co., 93 Ky. 223, 230, 19 S. W. 595, 15 Ky. L. Rep. 13 ("large number"); Adams *v.* Foster, 5 Cush. (Mass.) 156, 157 ("largest sum"); Nichols *v.* Bertram, 3 Pick. (Mass.) 342, 344 ("large or capital letters"); Ailman *v.* Griswold, 12 R. I. 339, 342 (larger portion"); Griffiths *v.* Hatchard, 8 Jur. 649, 650, 1 Kay & J. 17, 23 L. J. Ch. 957, 2 Wkly. Rep. 672, 69 Eng. Reprint 350 ("largest lot").

"Off large" applied to a vessel see Ward *v.* The Fashion, 29 Fed. Cas. No. 17,154, 6 McLean 152, Newb. Adm. 8. See also, generally, Collision.

5. U. S. *v.* Britton, 17 Fed. 731, 733. See also *Ex p.* Doran, 32 Fed. 76, 77; U. S. *v.* Wightman, 29 Fed. 636.

6. Webster Dict. [*quoted* in State *v.* Lawrence, 19 Nebr. 307, 313, 27 N. W. 126].

"Lascivious, lewd, obscene, or of an indecent character" see U. S. *v.* Hanover, 17 Fed. 444.

"Gross lewdness and lascivious behavior" see State *v.* Millard, 18 Vt. 574, 578, 46 Am. Dec. 170.

7. U. S. *v.* Bebout, 28 Fed. 522, 524.

"Lascivious book" see U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338, 342.

"Lascivious carriage" see Fowler *v.* State, 5 Day (Conn.) 81, 84.

"Lascivious publication" see U. S. *v.* Clarke, 38 Fed. 732, 733. See also Dunlop *v.* U. S., 165 U. S. 486, 500, 17 S. Ct. 375, 41 L. ed. 799; Swearingen *v.* U. S., 161 U. S. 446, 451, 16 S. Ct. 562, 40 L. ed. 765; U. S. *v.* Males, 51 Fed. 41, 42; U. S. *v.* Clarke, 38 Fed. 500, 501.

8. Webster Dict. [*quoted* in State *v.* Lawrence, 19 Nebr. 307, 313, 27 N. W. 126].

"Lasciviously associate" see State *v.* Stubbs, 108 N. C. 774, 776, 13 S. E. 90 [*citing* State *v.* Lashley, 84 N. C. 754].

9. As used in connection with other words see the following phrases: "Last and usual place of abode" (Tilden *v.* Johnson, 6 Cush. (Mass.) 354, 359; Healey *v.* Butler, 66 Wis. 9, 12, 27 N. W. 822); "last annual account" (Hunter *v.* Dowling, [1893] 1 Ch. 391, 396); "last antecedent" (Wood *v.* Baldwin, 10 N. Y. Suppl. 195, 196); "last assessment" (People *v.* Hamill, 134 Ill. 666, 672, 17 N. E. 799, 29 N. E. 280); "last . . . assessment roll" (Nowlen *v.* Benton Harbor, 134 Mich. 401, 406, 96 N. W. 450; Duanesburgh *v.* Jenkins, 40 Barb. (N. Y.) 574, 580; Phelps *v.* Lewiston, 19 Fed. Cas. No. 11,076, 15 Blatchf. 131, 135); "last clear chance" (McLamb *v.* Wilmington, etc., R. Co., 122 N. C. 862, 873, 29 S. E. 894; Styles *v.* Richmond, etc., R. Co., 118 N. C. 1084, 1092, 24 S. E. 740 [*citing* Gunter *v.* Wicker, 85 N. C. 310]; Davies *v.* Mann, 6 Jur. 954, 12 L. J. Exch. 10, 10 M. & W. 546); "last day of the term" (see Parsons *v.* Hathaway, 40 Me. 132, 133; Jones *v.* Williams, 62 Miss. 183, 184); "last entering" (U. S. *v.* Mullan, 123 U. S. 186, 188, 8 S. Ct. 79, 31 L. ed. 140); "last equalized valuation" (State *v.* Pierce County, 71 Wis. 327, 328, 37 N. W. 233); "last general election" (State *v.* Woodbury, 17 Nev. 337, 344, 30 Pac. 1006); "last hereinbefore described" (Cartwright *v.* Korman, 45 Kan. 515, 519, 26 Pac. 48; Spicer *v.* Howe, 38 Kan. 465, 469, 16 Pac. 825); "last known place of abode" (Hanrott *v.* Evans, 4 T. L. R. 128); "last legal settlement" (Canajoharie *v.* Johnstown, 17 Johns. (N. Y.) 41, 44); "last mentioned" (Brancker *v.* Molyneux, 1 M. & G. 710, 726, 39 E. C. L. 986); "'last mentioned' check" (State *v.* Malim, 14 Nev. 288, 290); "last-mentioned goods and chattels" (Ashton *v.* Brevitt, 14 L. J. Exch. 297, 298); "last or most usual place of abode" (Reg. *v.* Smith, L. R. 10 Q. B. 604, 607); "last or only child" (Holder *v.* Harrell, 6 Ga. 125, 127); "last past" (Burhans *v.* Vanness, 10 N. J. L. 102, 107; Brown *v.* Hankerson, 3 Cow. (N. Y.) 70, 72; Steele *v.* Mart, 4 B. & C. 272, 6 D. & R. 392, 28 Rev. Rep. 256, 10 E. C. L. 576; Reg. *v.* Crisp, 7 East 389, 392, 3 Smith K. B. 377); "last place of abode" (Reg. *v.* Webb, [1896] 1 Q. B. 487, 489, 18 Cox C. C. 312, 60 J. P. 280, 65 L. J. M. C. 98, 74 L. T. Rep. N. S. 428, 44 Wkly. Rep. 527; Reg. *v.* Farmer, [1892] 1 Q. B. 637, 640, 17 Cox C. C. 413, 56 J. P. 341, 61 L. J. M. C. 65, 65 L. T. Rep. N. S. 736, 40 Wkly. Rep. 228; Reg. *v.* Damarell, L. R. 3 Q. B. 50, 53, 8 B. & S. 659, 37 L. J. M. C. 21; Reg. *v.* Davis, 22 L. J. M. C. 143, 144; Reg. v. Evans, 19 L. J. M. C. 151, 154, 1 L. M. & P.

latest; hindmost; closing; final; ultimate. As an adverb, in conclusion; finally; lastly.[10] (See LATE.)

LAST SICKNESS.[11] The sickness which is terminated by death;[12] the sickness which results in death;[13] that of which a person died;[14] *in extremis*;[15] the immediate illness resulting in the decedent's death.[16] (See IN EXTREMIS.)

LATA CULPA. See CULPA.[17]

LATA CULPA DOLO ÆQUIPARATUR. A maxim meaning "A concealed fault is equal to a deceit."[18]

LATE. Defunct; existing recently, but now dead;[19] formerly; recently;[20] lately.[21] (See LAST.)

LATENT. Not manifest, hidden, concealed, not visible or apparent.[22] (Latent: Ambiguity, see AMBIGUITY.[23] Defect[24]—In Appliance or Machinery, see MASTER AND SERVANT; NEGLIGENCE; RAILROADS; In Article Sold, see NEGLIGENCE; SALES; In Vessel, see SHIPPING. See also PATENT.)

357, 4 New Sess. Cas. 191; *Ex p.* Jones, 1 L. M. & P. 357, 363); "last port of discharge" (Brown *v.* Vigne, 12 East 283, 285, 11 Rev. Rep. 375); "last publication" (Harrison *v.* Wallis, 44 Misc. (N. Y.) 492, 497, 90 N. Y. Suppl. 44; Pinkerton *v.* J. L. Gates Land Co., 118 Wis. 514, 523, 95 N. W. 1089; Chippewa River Land Co. *v.* J. L. Gates Land Co., 118 Wis. 345, 348, 94 N. W. 37, 95 N. W. 954); "last session" (Tuohy *v.* Chase, 30 Cal. 524, 527); "last three days of the session" (John V. Farwell Co. *v.* Matheis, 48 Fed. 363, 364); "last will" (see WILLS).

"Lastly" in a will see Cogbill *v.* Cogbill, 2 Hen. & M. (Va.) 467, 507.

10. Century Dict.

11. **"Last sickness" expenses** see McVoy *v.* Percival, 1 Dudley (S. C.) 337, 339.

12. Huse *v.* Brown, 8 Me. 167, 169.

13. U. S. *v.* Frisbie, 28 Fed. 808, 810.

14. La. Civ. Code (1900), art. 3199.

15. Sykes *v.* Sykes, 2 Stew. (Ala.) 364, 369, 20 Am. Dec. 40; Carroll *v.* Bonham, 42 N. J. Eq. 625, 628, 9 Atl. 371; Prince *v.* Hazleton, 20 Johns. (N. Y.) 502, 513, 11 Am. Dec. 307.

16. Matter of Reese, 2 Pearson (Pa.) 482.

It includes any sickness for which a physician is called, which continues until death. Wasson's Estate, 8 Pa. Dist. 480, 481.

It does not include the illness of one caused by a serious injury from which he so far recovers that he is able to attend to business, but has a subsequent relapse from which he dies; it relates not to remote but proximate cause of death. Matter of Reese, 2 Pearson (Pa.) 482. Nor can it be construed to include a lingering illness that has stretched across many months or many years. Duckett's Estate, 1 Kulp (Pa.) 227, 228. See also Rouse *v.* Morris, 17 Serg. & R. (Pa.) 328, 331.

17. See also 12 Cyc. 989 note 84; 11 Cyc. 1187 note 54; and, generally, NEGLIGENCE.

18. Tayler L. Gloss.

19. Black L. Dict.

"Late constable" see Bordine *v.* Service, 16 N. J. L. 47, 48.

"Late king" see Rex *v.* Huggins, 3 C. & P. 414, 415 note, 14 E. C. L. 638.

"Late the husband" see Guier's Case, Dyer 46*b*.

20. Hoffman *v.* Fleming, 66 Ohio St. 143, 157, 64 N. E. 63 [*distinguishing* Beckett *v.* Selover, 7 Cal. 215, 68 Am. Dec. 237], where the court said that this case "seems to have been construed in the sense of 'last,' while in Holmes *v.* Custance, 12 Ves. Jr. 279, 33 Eng. Reprint 106, where the description was 'Robert Holmes, late of Norwich,' Sir William Grant, Master of the Rolls, said: 'Everyone knows that the sense of "late" is not recently, but formerly, of Norwich.'"

According to the context, it may mean existing not long ago. Pleasant *v.* State, 17 Ala. 190, 191, construing the term "the late W. C."

"Late in the Compter prison" see Sedley *v.* White, 11 East 528.

21. Black L. Dict.

Expiration implied see State *v.* Griscom, 8 N. J. L. 136, 137.

Removal implied see Beckett *v.* Selover, 7 Cal. 215, 233, 68 Am. Dec. 237.

"Late in May" means a date later than the 17th. Erskine *v.* Erskine, 13 N. H. 436, 443.

"Lately carried on" see Quidort *v.* Pergeaux, 18 N. J. Eq. 472, 479.

"Lately intruded" see Rex *v.* Chistleton, 2 Show. 290, 294.

"Lately purchased" see Cave *v.* Harris, 57 L. J. Ch. 62, 63, 57 L. T. Rep. N. S. 768, 36 Wkly. Rep. 182.

22. Celluloid Mfg. Co. *v.* Cellonite Mfg. Co., 42 Fed. 900, 906. See also Newell *v.* Turner, 9 Port (Ala.) 420, 422.

"Latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth ambiguity." Carter *v.* Holman, 60 Mo. 498, 504 [*citing* Bacon]; Pringle *v.* Rogers, 193 Pa. St. 94, 97, 44 Atl. 275 [*citing* Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108].

23. See also 16 Cyc. 535 note 16.

24. **The term "latent defects,"** in a bill of lading exempting the owner from liability for loss occurring by latent defects in hull, even existing before shipment or sailing, does not include an open port, though unknown to the master on sailing. Putnam *v.* The Manitoba, 104 Fed. 145, 151. See also The

LATENT DANGERS. Dangers not seen, or perceptible to the senses by their presence.[25] (See LATENT.)

LATENT DEED. A deed kept for twenty years or more in a man's scrutoire or strong box.[26] (See, generally, DEEDS.)

LATERAL. Proceeding from the side.[27] (Lateral: Railroad, see RAILROADS. Support, see ADJOINING LANDOWNERS; DAMAGES; EMINENT DOMAIN. See also LATERALLY.)

LATERALLY. By the side.[28] (See LATERAL.)

LATERAL RAILROAD. See RAILROADS.

LATERAL SUPPORT. See ADJOINING LANDOWNERS.

LATH. A thin strip of wood, nailed to studs and furring to support the plastering.[29] (See LATHING.)

LATHING. In architecture, nailing the laths to the joists, quarters, or battens of a building.[30] (See LATH.)

LATIN. The language of the ancient Romans.[31] (See ENGLISH; FRENCH; GREEK; LANGUAGE.)

LATITAT. Name of an ancient writ calling a defendant to answer a personal action in the king's bench.[32]

LATITUDINARIANS. Persons who had no great liking for the liturgy or ceremonies, or indeed the government of the church.[33] (See, generally, RELIGIOUS SOCIETIES.)

LATROCINIUM. Robbery or piracy.[34] (See FURTUM. See also, generally, PIRACY; ROBBERY.)

LATTER. Later; more recent; coming or happening after something else.[35] (See FORMER; LATE.)

LAUDANUM. An alcoholic preparation of opium, known in medical science as the tincture of opium, but properly known as laudanum.[36]

LAUNCH. To cause to move or slide from the land into the water.[37] (See, generally, SHIPPING.)

Phœnicia, 90 Fed. 116, 118; The Carib Prince, 63 Fed. 266, 268; 9 Cyc. 759 note 5.

25. Williams *v.* Walton, etc., Co., 9 Houst. (Del.) 322, 331, 32 Atl. 726.

26. Wright *v.* Wright, 7 N. J. L. 175, 177, 11 Am. Dec. 546.

27. Webster Dict. [*quoted* in Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 620, 10 S. E. 925].

"**Lateral motion**" see Brooks *v.* Jenkins, 4 Fed. Cas. No. 1,953, 3 McLean 432, 454.

"**Lateral deviation**" see Herron *v.* Rathmines, etc., Imp. Com'rs., [1892] A. C. 498, 541, 67 L. T. Rep. N. S. 658.

28. Hardin *v.* Shedd, 190 U. S. 508, 515, 23 S. Ct. 685, 47 L. ed. 1156 [*citing* Moore *v.* Willamette Transp., etc., Co., 7 Oreg. 355; Webster Dict.].

29. Worcester Dict. [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 642].

"**Lath**" **is lumber, not timber.** Babka *v.* Eldred, 47 Wis. 189, 191, 2 N. W. 102, 559.

30. Gerilt Encycl. Arch. p. 587 [*quoted* in Mellen *v.* Ford, 28 Fed. 639, 643].

31. Bouvier L. Dict.

Latin is an important language in the law; being the language not only of the civil and canon law, but of the early European codes, of much of the ancient common law of England and Scotland, and of a large proportion of the public, civil and maritime law of later times. Burrill L. Dict.

Law Latin is a technical law language made up of Latin and latinized English and French. English L. Dict.

There are three sorts of law Latin: (1) Good Latin, allowed by the grammarians and lawyers; (2) false or incongruous Latin, which in times past would abate original writs, though it would not make void any judicial writ, declaration, or plea, etc.; (3) words of art, known only to the sages of the law, and not to grammarians, called "Lawyers' Latin." Wharton L. Lex.

32. Bouvier L. Dict. See also Lowry *v.* Lawrence, 1 Cai. (N. Y.) 69, 70; Johnson *v.* Smith, 2 Burr. 950, 962.

33. Atty.-Gen. *v.* Glasgow College, 2 Coll. 665, 706, 33 Eng. Ch. 665, 63 Eng. Reprint 908.

34. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 78, 79, 36 Am. Rep. 579 [*citing* American Ins. Co. *v.* Bryan, 1 Hill (N. Y.) 25; Atlantic Ins. Co. *v.* Storrow, 5 Paige (N. Y.) 285].

35. Century Dict.

"**Latter part of January**" see Bailey *v.* Ricketts, 4 Ind. 488, 491.

36. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462, 472.

37. Homer *v.* The Lady of the Ocean, 70 Me. 350, 352, where it is said: "The launching is a definite period, one well understood as applied in shipbuilding."

LAUNDRY. A place where clothes are washed.[38] (Laundry[39]: Regulation and License of, see LICENSES. See also LAUNDRYMAN.)

LAUNDRYMAN. One whose business it is to wash clothes.[40] (See LAUNDRY.)

LAW. A word of illimitable use in both its popular and its technical sense.[41] A rule or method according to which phenomena or actions[42] coexist or follow each other;[43] a rule of conduct;[44] a rule of conduct and of right;[45] a rule of action prescribed by a superior, which an inferior is bound to obey.[46] In jurisprudence, a rule prescribed by human society for the government of human conduct;[47] a rule of action or of civil conduct prescribed by competent authority,[48] by the law-making power of the state,[49] by the proper lawmaking authority,[50] by the supreme authority for the government of human action,[51] by the sovereign power,[52] or by the supreme power in a state;[53] an established or permanent rule,[54] established by the supreme power, or the power having the legislative control of the particular subject;[55] an expression of the public will;[56] an act,[57] enactment,[58] ordinance,[59] or

38. Webster Dict. [*quoted* in Com. *v.* Pearl Laundry Co., 105 Ky. 259, 265, 49 S. W. 26, 20 Ky. L. Rep. 1172].

Laundry work is not commerce.—See 7 Cyc. 415 note 18.

39. See also 8 Cyc. 1060 note 14; 8 Cyc. 874 note 21.

40. Com. *v.* Pearl Laundry Co., 105 Ky. 259, 265, 266, 49 S. W. 26, 20 Ky. L. Rep. 1172, holding that this term, however, does not include persons who merely receive and collect soiled clothes to be washed, acting as agents of those engaged in the laundry business, and receiving by way of compensation a discount from the price charged the general public.

41. **There is no word in the language which** in its popular and technical application takes a wider or more diversified signification than the word "law." Its use in both regards is illimitable. Miller *v.* Dunn, 72 Cal. 462, 466, 14 Pac. 27, 1 Am. St. Rep. 67.

As an adjective.—"Neither Webster nor Worcester give 'law' as an adjective; it is, however, used with very much the force of an adjective in several combinations, some of which often, though not always, appear as compound words, while others cannot, consistently with usage in books of jurisprudence, be so explained." Abbott L. Dict.

42. **In its most general and comprehensive sense** it applies indiscriminately to all kinds of action. Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563, 576.

43. Black L. Dict.

44. Johnson *v.* Detrick, 152 Mo. 243, 251, 53 S. W. 891.

45. O'Donoghue *v.* Akin, 2 Duv. (Ky.) 478, 480.

46. People *v.* Quant, 12 How. Pr. (N. Y.) 83, 89.

47. Abbott L. Dict. See also State *v.* Fry, 4 Mo. 120, 189; State *v.* Ludington, 33 Wis. 107, 116.

48. Davis *v.* Ballard, 1 J. J. Marsh. (Ky.) 563, 576.

49. Pope *v.* Phifer, 3 Heisk. (Tenn.) 682, 701; 1 Kent Comm. 447 [*quoted* in People *v.* Martin, 38 Misc. (N. Y.) 67, 76 N. Y. Suppl. 953].

50. Chamberlain *v.* Evansville, 77 Ind. 542, 550.

51. State *v.* Hockett, 70 Iowa 442, 454, 30 N. W. 742.

52. Forepaugh *v.* Delaware, etc., R. Co., 128 Pa. St. 217, 18 Atl. 503, 15 Am. St. Rep. 672, 5 L. R. A. 508. See also People *v.* Bay City, 36 Mich. 186, 190.

53. *Kansas.*— Leavenworth County Com'rs *v.* Miller, 7 Kan. 479, 501, 12 Am. Rep. 425.

Missouri.— State *v.* Fry, 4 Mo. 120, 189 [*quoting* Kent Comm.].

New York.— Thorne *v.* Cramer, 15 Barb. 112, 114.

Pennsylvania.— Baldwin *v.* Philadelphia, 99 Pa. St. 164, 170; Locke's Appeal, 72 Pa. St. 491, 508, 13 Am. Rep. 716.

Tennessee.— State *v.* McCann, 4 Lea 1, 9; Budd *v.* State, 3 Humphr. 483, 490, 39 Am. Dec. 189 [*quoting* Blackstone Comm.].

Blackstone's definition is: "A rule of civil conduct, prescribed by the supreme power in the state, commanding what is right, and prohibiting what is wrong." 1 Blackstone Comm. [*quoted* in Baldwin *v.* Philadelphia, 99 Pa. St. 164, 170; State *v.* McCann, 4 Lea (Tenn.) 1, 6].

In the United States.— The definitions of the term "law," as found in our older text-books and in the English writers, failed to express the American idea of that term. The proper definition in the sense in which it is used in America is a rule of conduct prescribed to the state or people thereof in accord with the Constitution of the United States and of the states, when enacted by a state legislature State *v.* McCann, 4 Lea (Tenn.) 1, 9.

54. **"Law is a rule, not a transient,** sudden order from a superior to or concerning a particular person, but something permanent, uniform, and universal." Opinion of Justices, 66 N. H. 629, 632, 33 Atl. 1076.

55. Dubuque Dist. Tp. *v.* Dubuque, 7 Iowa 262, 281.

56. Ware *v.* Hylton, 3 Dall. (U. S.) 199, 212, 1 L. ed. 568.

57. Sedgwick County Com'rs *v.* Bailey, 13 Kan. 600, 608; Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261, 266.

58. Allen *v.* Wyckoff, 48 N. J. L. 90, 94, 2 Atl. 659, 57 Am. Rep. 548; People *v.* Martin, 38 Misc. (N. Y.) 67, 76 N. Y. Suppl. 953 [*citing In re* Burchard, 27 Hun (N. Y.) 429].

59. Pimental *v.* San Francisco, 21 Cal. 351, 361.

statute,[60] prescribed by the legislative power,[61] as opposed to rules of civil conduct deduced from the customs of the people or judicial precedents;[62] the declared will of the legislature;[63] a rule ordained and made known by the legislature, for the government of the people in the state, which they are bound to obey.[64] In a popular sense the term is frequently employed as referring to a science[65] of principles;[66] a lucrative science, a professional science;[67] a science or system of principles or rules of human conduct;[68] a system of rules and principles, in which the rights of parties are protected and enforced;[69] a system of rules conformable to the standards of justice and on an enlarged view of the relations of persons and things as they practically exist; a mass of principles classified, reduced to order and put in the shape of rules, agreed on by ascertaining the common consent of mankind;[70] the whole body or system of rules of conduct, including the decisions of courts, as well as legislative acts.[71] The term also includes "substantive law" which creates duties, rights and obligations,[72] and "adjective law," or the law of procedure, which provides a method of enforcing and protecting such duties, rights and obligations;[73] the enforcement of justice among men.[74] The term is sometimes used in contradistinction to the words "admiralty,"[75] "constitution,"[76] "contract,"[77] "equity,"[78] and "fact."[79] A law may be either human or divine.[80] Again law may be classified as *lex scripta* or

60. Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 148, 90 N. W. 378; Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261, 266.

"Bill," "law," and "act" as used in the Constitution of New York see People *v.* Lawrence, 36 Barb. (N. Y.) 177, 187.

61. Clayton *v.* Berry, 27 Ark. 129, 131.

62. Black L. Dict. See also Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 190, 1 N. E. 663; Lycoming F. Ins. Co. *v.* Wright, 60 Vt. 515, 523, 12 Atl. 103; State *v.* Tingey, 24 Utah 225, 230, 67 Pac. 33; Phelps *v.* Panama, 1 Wash. Terr. 518, 524; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 18, 10 L. ed. 865. But see *infra*, text and note 71.

"The decisions of courts are not the law; they are only evidence of the law." Paul *v.* Davis, 100 Ind. 422, 426; Yates *v.* Lansing, 9 Johns. (N. Y.) 395, 415, 6 Am. Dec. 290; Falconer *v.* Simmons, 51 W. Va. 172, 174, 41 S. E. 193; Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 378, 13 S. Ct. 914, 37 L. ed. 772; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 18, 10 L. ed. 865; U. S. Saving, etc., Co. *v.* Harris, 113 Fed. 27, 35; Phipps *v.* Harding, 70 Fed. 468, 473, 17 C. C. A. 203, 30 L. R. A. 513. *Contra*, Miller *v.* Dunn, 72 Cal. 462, 465, 14 Pac. 27, 1 Am. St. Rep. 67; Nelson *v.* Kerr, 2 Thomps. & C. (N. Y.) 299, 301.

63. People *v.* Collins, 3 Mich. 343, 406. See also La. Civ. Code [*quoted* in Hollingsworth *v.* Tensas Parish, 17 Fed. 109, 117, 4 Woods 280].

64. State *v.* Fry, 4 Mo. 120, 189 [*citing* 1 Blackstone Comm. 44].

65. "Law is not an exact science."—*In re* Delaware County *v.* Turnpike Road, 4 Pa. Co. Ct. 101, 103; Hill *v.* Mynatt, (Tenn. Ch. App. 1900) 59 S. W. 163, 167, 52 L. R. A. 883 [*citing* Citizens' Loan Fund, etc., Assoc. Co. *v.* Friedley, 123 Ind. 143, 23 N. E. 1075, 18 Am. St. Rep. 320, 7 L. R. A. 669].

66. Paul *v.* Davis, 100 Ind. 422, 427 [*citing* Ram Leg. Judg. 201].

67. Century Dict. [*quoted* in U. S. *v.* Massachusetts Gen. Hospital, 100 Fed. 932, 938, 41 C. C. A. 114].

68. Black L. Dict.; Burrill L. Dict. See also Wynehamer *v.* People, 13 N. Y. 378, 392, 395, 445].

69. Cortelyou *v.* Maben, 22 Nebr. 697, 700, 36 N. W. 159, 3 Am. St. Rep. 284.

70. Duncan *v.* Magette, 25 Tex. 245, 253.

71. Miller *v.* Dunn, 72 Cal. 462, 466, 14 Pac. 27, 1 Am. St. Rep. 67. But see *supra*, text and note 62.

In the phrase, "due process of law," it embraces all legal and equitable rules defining human rights and duties and providing for their enforcement, not only as between man and man, but also between the state and its citizens. Jenkins *v.* Ballantyne, 8 Utah 245, 247, 30 Pac. 760, 16 L. R. A. 689.

72. Black L. Dict. [*citing* Holland Jur. 61, 238]; Burrill L. Dict.

73. Black L. Dict. [*citing* Holland Jur. 61, 238]; Burrill L. Dict. See also Clark *v.* Eddy, 10 Ohio Dec. (Reprint) 539, 542, 22 Cinc. L. Bul. 63.

74. McAllister *v.* Marshall, 6 Binn. (Pa.) 338, 350, 6 Am. Dec. 458.

75. Anderson L. Dict. [*citing* Austin *v.* Rutland R. Co., 17 Fed. 466, 469, 21 Blatchf. 358].

76. Black L. Dict.

77. Blackstone Comm. [*quoted* in Landon *v.* Litchfield, 11 Conn. 251, 266].

78. "As, in the expressions, a court of law, a remedy at law, an action at law, at law." Anderson L. Dict. [*citing* Austin *v.* Rutland R. Co., 17 Fed. 466, 469, 21 Blatchf. 358]. See also Hooker *v.* Nichols, 116 N. C. 157, 21 S. E. 207; Fleming *v.* Burgin, 37 N. C. 584, 589; Com. *v.* Meeser, 44 Pa. St. 341, 346; Ellis *v.* Davis, 109 U. S. 485, 497, 3 S. Ct. 327, 27 L. ed. 1006.

79. Black L. Dict.

80. Borden *v.* State, 11 Ark. 519, 527, 44 Am. Dec. 217, where it is said: "We understand all laws to be either human or divine, according as they have man or God for their

written law[81] and as *lex non scripta* or unwritten law.[82] In old English jurisprudence the word "law" was used to signify an oath, or the privilege of being sworn.[83] (Law: Bankrupt, see BANKRUPTCY. Books — As Evidence, see EVIDENCE; Copyright of, see COPYRIGHT; Use of by Jury, see CRIMINAL LAW; TRIAL. Civil Damage, see INTOXICATING LIQUORS. Common, see COMMON LAW. Constitutional, see CONSTITUTIONAL LAW. Criminal, see CRIMINAL LAW. Ex Post Facto, see CONSTITUTIONAL LAW; CRIMINAL LAW; STATUTES. Customary, see COMMON LAW; CUSTOMS AND USAGES. Day, see LAW DAY. Distinguished From Equity, see ACTIONS; EQUITY. Due Process of, see CONSTITUTIONAL LAW. General, see STATUTES. Insolvent, see INSOLVENCY. International, see INTERNATIONAL LAW; TREATIES. Local, see STATUTES. Maritime, see ADMIRALTY, and the Admiralty Titles. Martial, see ARMY AND NAVY; WAR. Merchant, see COMMERCIAL PAPER; COMMON LAW; EVIDENCE. Military, see ARMY AND NAVY; MILITIA. Of Nations, see INTERNATIONAL LAW; TREATIES. Of Necessity, see ACTIONS. Of the Case, see APPEAL AND ERROR; COURTS; CRIMINAL LAW; JUDGMENTS. Of the Land, see CONSTITUTIONAL LAW. Of the Road, see STREETS AND HIGHWAYS. Organic, see CONSTITUTIONAL LAW. Parliamentary, see PARLIAMENTARY LAW. Penal, see CRIMINAL LAW; STATUTES. Positive, see CONSTITUTIONAL LAW; STATUTES. Private, see STATUTES. Public, see STATUTES. Questions of, see CRIMINAL LAW; TRIAL. Reports — In General, see REPORTS; As Evidence, see EVIDENCE; Copyright of, see COPYRIGHT; Use of by Jury, see CRIMINAL LAW; TRIAL. Retrospective, see CONSTITUTIONAL LAW; STATUTES. Revenue, see CUSTOMS DUTIES; INTERNAL REVENUE. Special, see STATUTES. Statutory, see STATUTES. Unwritten, see COMMON LAW; CUSTOMS AND USAGES; Written, see CONSTITUTIONAL LAW; STATUTES.)

LAW AND FACT. See TRIAL.

LAW CHARGES. Such charges as are occasioned by the prosecution of a suit before the courts.[84]

LAW DAY. The appointed day for the payment of money to secure which a mortgage was given;[85] the exact time specified for paying money due under a mortgage.[86] (See, generally, MORTGAGES.)

author, and divine laws are of two kinds, that is to say, 1st, Natural laws; 2d, Positive or revealed laws."

Natural law or the law of nature is "the rule of human action prescribed by the Creator, and discoverable by the light of reason." Anderson L. Dict. [*citing* 1 Blackstone Comm. 24, 39, 43]; "a natural law is defined by BURLAMQUI to be 'A rule which so necessarily agrees with the nature and state of man, that, with out observing its maxims, the peace and happiness of society can never be preserved.'" Borden *v.* State, 11 Ark. 519, 527, 44 Am. Dec. 217. See also LAW OF NATURE, *post*, p. 168.

Positive or revealed law is "the law of nature, imparted by God himself." Anderson L. Dict. [*citing* 1 Blackstone Comm. 24, 39, 43].

"Austin's division.— Divine law — the revealed law of God; positive human law — municipal law; positive morality — morality; laws metaphorically so called — the laws of animate and inanimate nature." Anderson L. Dict. [*citing* Austin Jurisp. Lect. 1, § 8].

"Locke's division of law.—Divine law — the law of God, natural or revealed; civil law — the municipal law; law of reputation — morality." Anderson L. Dict.

81. Written law is the statute law. Black L. Dict. See also Persse, etc., Paper Works *v.* Willett, 19 Abb. Pr. (N. Y.) 416; Phelps *v.* Panama, 1 Wash. Terr. 518, 523, 524; Boehtlinck *v.* Schneider, 3 Esp. 58, 59. And, generally, STATUTES.

82. Unwritten law is the common law. Black L. Dict. See also Fitzpatrick *v.* Simonson Bros. Mfg. Co., 86 Minn. 140, 148, 90 N. W. 378; Lycoming F. Ins. Co. *v.* Wright, 60 Vt. 515, 523, 12 Atl. 103; Phelps *v.* Panama, 1 Wash. Terr. 518, 523; Swift *v.* Tyson, 16 Pet. (U. S.) 1, 18, 10 L. ed. 865; Smith *v.* U. S., 22 Fed. Cas. No. 13,122, 1 Gall. 261, 266; Boehtlinck *v.* Schneider, 3 Esp. 58, 59. And, generally, COMMON LAW; CUSTOMS AND USAGES.

83. "As in the phrases 'to wage one's law,' 'to lose one's law.'" Black L. Dict.

84. But this name applies more particularly to the costs, which the party cast has to pay to the party gaining the cause. It is in favor of these only that the law grants the privilege. La. Civ. Code, art. 3164 [*quoted* in Barkley *v.* His Creditors, 11 Rob. (La.) 28, 31; Rousseau *v.* His Creditors, 17 La. 206, 207]. See, generally, COSTS.

85. Kortright *v.* Cady, 21 N. Y. 343, 345, 78 Am. Dec. 145. See also Lanier *v.* Driver, 24 Ala. 149, 158; Ward *v.* Lord, 100 Ga. 407, 409, 28 S. E. 446.

86. Moore *v.* Norman, 43 Minn. 428, 430, 45 N. W. 857, 19 Am. St. Rep. 247, 9 L. R. A. 55.

LAWFUL.[87] That which in its substance is sanctioned or justified by the law;[88] peaceable.[89] (Lawful: Age, see INFANTS. Fence, see ANIMALS; FENCES; RAILROADS. Heir, see DESCENT AND DISTRIBUTION; HEIR. Issue — Affecting Estate Tail, see ESTATES; Birth of as Requisite to Curtesy, see CURTESY; Birth of as Revocation of Will, see WILLS; Dying Without, see WILLS; Right of

87. Compared with and distinguished from "legal."— "'Legal' looks more to the letter and 'lawful' to the spirit, of the law. 'Legal' is more appropriate for conformity to positive rules of law; 'lawful,' for accord with ethical principle. 'Legal' imports, rather, that the forms of law are observed and the proceeding is correct in method,— that rules prescribed have been obeyed; 'lawful,' that the act is rightful in substance, — that moral quality is secured." Anderson L. Dict. [*quoted* in State *v.* Whealey, 5 S. D. 427, 431, 59 N. W. 211].

88. Anderson L. Dict. [*quoted* in State *v.* Dorsey, 118 Ind. 167, 169, 20 N. E. 777, 10 Am. St. Rep. 111], where the words "unlawful" and "illegal" are defined in like manner.

89. Boyd *v.* Shaw, 14 Me. 58, 62.

As used in connection with other words see the following phrases: "Lawful age" (McKim *v.* Handy, 4 Md. Ch. 228, 237); "lawful authorities" (Mitchel *v.* U. S., 9 Pet. (U. S.) 711, 734, 9 L. ed. 283; U. S. *v.* Clarke, 8 Pet. (U. S.) 436, 449, 8 L. ed. 1001); "lawful authority" (May *v.* Forbes, 2 Penew. (Del. 194, 196, 43 Atl. 839; State *v.* Keen, 34 Me. 500, 505; Straus *v.* Imperial F. Ins. Co., 94 Mo. 182, 188, 6 S. W. 698, 4 Am. St. Rep. 368; Bell *v.* Clapp, 10 Johns. (N. Y.) 263, 265, 6 Am. Dec. 339); "lawful business" (Evans *v.* Reading Chemical Fertilizing Co., 160 Pa. St. 209, 220, 28 Atl. 702); "lawful cause" (Jenkins *v.* Cook, 1 P. D. 80, 100, 45 L. J. P. C. 1, 34 L. T. Rep. N. S. 1, 24 Wkly. Rep. 439); "lawful charges" (Anniston First Nat. Bank *v.* Elliott, 125 Ala. 646, 651, 652, 661, 663, 82 Am. St. Rep. 268; Richardson *v.* Dunn, 79 Ala. 167, 171; Posey *v.* Pressley, 60 Ala. 243, 250); "lawful citizen" (Pierce *v.* Butler, 16 Vt. 101, 105); "lawful claim" (Lux *v.* Haggin, 69 Cal. 255, 346, 10 Pac. 674; Cemansky *v.* Fitch, 121 Iowa 186, 190, 96 N. W. 754); "lawful claim or demand" (Kramer *v.* Carter, 136 Mass. 504, 507); "lawful debt" (Holdsworth *v.* Clifton Dartmouth Hardness, 11 A. & E. 490, 501, 39 E. C. L. 270); "lawful defense" (People *v.* Downs, 56 Hun (N. Y.) 5, 11, 8 N. Y. Suppl. 521); "lawful discharge" (Mason *v.* Haile, 12 Wheat. (U. S.) 370, 377, 6 L. ed. 660); "lawful entry" (Boyd *v.* Shaw, 14 Me. 58, 62); "lawful excuse" (Dickins *v.* Gill, [1896] 2 Q. B. 310, 313, 18 Cox C. C. 384, 60 J. P. 488, 65 L. J. M. C. 187, 75 L. T. Rep. N. S. 32, 44 Wkly. Rep. 686); "lawful for the court" (Davison *v.* Davison, 17 N. J. L. 169, 171); "lawful freeholders" (Day *v.* Roberts, 8 Vt. 413, 417); "lawful funds" (Ogden *v.* Slade, 1 Tex. 13, 14); "lawful impediment" (Ware *v.* Hylton, 3 Dall. (U. S.) 199, 251, 278, 1 L. ed. 568); "lawful interest" (Daniel *v.* Gibson, 72 Ga. 367, 369, 53 Am. Rep. 845); "lawful manner" (Elsner *v.* Shrigley, 80 Iowa 30, 34, 45 N. W. 393; *In re* McDonald, 4 Wyo. 150, 163, 33 Pac. 18); "lawful meeting" (Leonard *v.* Lent, 43 Wis. 83, 88); "lawful men" (State *v.* Alderson, 10 Yerg. (Tenn.) 523, 524); "lawful merchandise" (Boyd *v.* Moses, 7 Wall. (U. S.) 316, 318, 19 L. ed. 192; Southampton Steam Colliery Co. *v.* Clarke, L. R. 6 Exch. 53, 54, 40 L. J. Exch. 8, 19 Wkly. Rep. 214); "lawful municipal ordinance" (Fielders *v.* North Jersey St. R. Co., 68 N. J. L. 343, 348, 53 Atl. 404, 54 Atl. 822, 96 Am. St. Rep. 552, 59 L. R. A. 455); "lawful order" (*Ex p.* Cohen, 5 Cal. 494, 495; Bearns *v.* Gould, 77 N. Y. 455, 458; U. S. *v.* Terry, 41 Fed. 771, 772); "lawful partition fences" (Taylor *v.* Young, 61 Wis. 314, 319, 21 N. W. 408); "lawful possession" (Collins *v.* Pease, 146 Mo. 135, 139, 47 S. W. 925; Michau *v.* Walsh, 6 Mo. 346, 350; Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. (N. Y.) 55, 57, 68 N. Y. Suppl. 744); "lawful process" (Healey *v.* Geo. F. Blake Mfg. Co., 180 Mass. 270, 273, 62 N. E. 270); "lawful provocation" (State *v.* Bulling, 105 Mo. 204, 225, 15 S. W. 367, 16 S. W. 830); "lawful purpose" (State *v.* Robison, 61 S. C. 106, 108, 39 S. E. 247; *In re* Waterloo Organ Co., 134 Fed. 341, 343, 67 C. C. A. 255); "lawful representatives" (Clark *v.* Cammann, 14 N. Y. App. Div. 127, 131, 43 N. Y. Suppl. 575); "lawful size" (Osborn *v.* Charlevoix Cir. Judge, 114 Mich. 655, 659, 72 N. W. 982); "lawful structure" (Gray *v.* Chicago, etc., R. Co., 10 Wall. (U. S.) 454, 462, 19 L. ed. 969); "lawful sum in money" (Martin *v.* Bott, 17 Ind. App. 444, 46 N. E. 151, 153); "lawful trade" (Cory *v.* Burr, 9 Q. B. D. 463, 471; Havelock *v.* Hancill, 3 T. R. 277, 278, 1 Rev. Rep. 703 [*quoted* in American Ins. Co. *v.* Dunham, 15 Wend. (N. Y.) 9, 18]); "lawful trade-mark" (Smith *v.* Reynolds, 22 Fed. Cas. No. 13,098, 10 Blatchf. 100, 106); "shall be lawful" (*Ex p.* Simonton, 9 Port. (Ala.) 390, 392, 33 Am. Dec. 320; Julius *v.* Oxford, 5 App. Cas. 214, 216, 44 J. P. 600, 49 L. J. Q. B. 577, 42 L. T. Rep. N. S. 546, 28 Wkly. Rep. 726; Reg. *v.* Oxford, 4 Q. B. D. 525, 554, 48 L. J. Q. B. 609, 41 L. T. Rep. N. S. 122; *Re* Newport Bridge, 2 Q. B. 377, 382, 105 E. C. L. 376; Parnaby *v.* Lancaster Canal Co., 11 A. & E. 223, 230, 9 L. J. Exch. 338, 3 P. & D. 162, 39 E. C. L. 139 [*citing* Allnutt *v.* Inglis, 12 East 527, 11 Rev. Rep. 482]; Rex *v.* Eye, 4 B. & Ald. 271, 272, 6 E. C. L. 480, 1 B. & C. 85, 8 E. C. L. 37, 2 D. & R. 172; Rex *v.* Broderip, 5 B. & C. 239, 7 D. & R. 861, 29 Rev. Rep. 229, 11 E. C. L. 445; Hands *v.* Upper Canada Law Soc., 17 Ont. 300, 309).

"Lawfully," etc., see *post*, p. 167, note 94.

Inheritance, see DESCENT AND DISTRIBUTION; WILLS. Money, see PAYMENT. See also LAWFULLY; LEGAL.)

LAWFUL AGE. See INFANTS.

LAWFUL CAPTURE. A capture made by a declared enemy lawfully commissioned and according to the laws of war.[90] (See, generally, WAR.)

LAWFUL DEED. A deed conveying a good or lawful title.[91] (See GOOD TITLE; and, generally, DEEDS.)

LAWFUL FUNDS. As used in a promissory note payable in lawful funds of the United States or its equivalent, a term which means gold or silver, which is the only lawful tender of the United States.[92]

LAWFUL GOODS. As used in a marine insurance policy, a term which means goods not prohibited by the laws of the country to which the vessel belongs.[93] (See, generally, MARINE INSURANCE.)

LAWFUL HEIR. See DESCENT AND DISTRIBUTION; HEIR.

LAWFUL INTEREST. See INTEREST.

LAWFUL ISSUE. See DEEDS; DESCENT AND DISTRIBUTION; ISSUE; WILLS.

LAWFULLY.[94] In pursuance of or according to law.[95] (See LAWFUL.)

LAWFUL MONEY.[96] Any currency usually and lawfully employed in buying and selling;[97] such currency as shall be lawful at the time payment is to be made;[98] coin or treasury notes made a legal tender by act of congress,[99] including

90. Mauran *v.* Alliance Ins. Co., 6 Wall. (U. S.) 1, 10, 18 L. ed. 836.

91. Dearth *v.* Williamson, 2 Serg. & R. (Pa.) 498, 499, 7 Am. Dec. 652.

92. Ogden *v.* Slade, 1 Tex. 13, 14.

93. Seton *v.* Low, 1 Johns. Cas. (N. Y.) 1, 12. See also Juhel *v.* Rhinelander, 2 Johns. Cas. (N. Y.) 120; Skidmore *v.* Desdoity, 2 Johns. Cas. (N. Y.) 77.

94. **As used in connection with other words** see the following phrases: "Lawfully administered" oath (State *v.* McCarthy, 41 Minn. 59, 60, 42 N. W. 599); "lawfully and peaceably" (Keller *v.* Henry, 24 Ark. 575, 580); "lawfully assessed" (Oberich *v.* Gilman, 31 Wis. 495, 498); "lawfully assume" (*In re* Croxon, [1904] 1 Ch. 252, 255, 73 L. J. Ch. 170, 89 L. T. Rep. N. S. 733, 52 Wkly. Rep. 343); "lawfully begotten" (Keys *v.* Goldsborough, 2 Harr. & J. (Md.) 369, 372; Den *v.* Cox, 9 N. J. L. 10, 14; Edward's Appeal, 108 Pa. St. 283, 289; Minnig *v.* Batdorff, 5 Pa. St. 503, 506; Browne *v.* Groombridge, 4 Madd. 495, 20 Rev. Rep. 326, 56 Eng. Reprint 788); "lawfully begotten children" (Edward's Appeal, 108 Pa. St. 283, 289); "lawfully begotten heirs" (Watson *v.* Williamson, 129 Ala. 362, 368, 30 So. 281; Den *v.* Cox, 9 N. J. L. 10 [*cited* in Weart *v.* Cruser, 49 N. J. L. 475, 476, 13 Atl. 36]; Loving *v.* Hunter, 8 Yerg. (Tenn.) 4, 29); "lawfully convey" (Martin *v.* Brown, 4 Minn. 282); "lawfully demanded" (People *v.* Roberts, 157 N. Y. 70, 75, 51 N. E. 437; Manser *v.* Dix, 8 De G. M. & G. 703, 712, 3 Jur. N. S. 252, 57 Eng. Ch. 543, 44 Eng. Reprint 561; Doe *v.* Alexander, 2 M. & S. 525, 529, 14 Rev. Rep. 830, 15 Rev. Rep. 338); "lawfully discharged" (Mason *v.* Haile, 12 Wheat. (U. S.) 370, 376, 6 L. ed. 660; Ammidon *v.* Smith, 1 Wheat. (U. S.) 447, 459, 4 L. ed. 132; "lawfully divided" (Miller *v.* Miller, 1 Duv. (Ky.) 8, 10); "lawfully imprisoned" (Com. *v.* Barker, 133 Mass. 399, 400); "lawfully made" (Rex *v.* Theed, 2 Ld. Raym. 1375, 1376); "lawfully occupied by a building or structure" (Scott *v.* Carritt, 81 L. T. Rep. N. S. 454, 456); "lawfully opened" (State *v.* Wertzel, 62 Wis. 184, 190, 22 N. W. 150); "lawfully passing" (Fawcett *v.* York, etc., R. Co., 16 Q. B. 610, 618, 15 Jur. 173, 20 L. J. Q. B. 222, 71 E. C. L. 610); "lawfully seized" (Bell *v.* Huggins, 1 Bay (S. C.) 326, 327; Pringle *v.* Witten, 1 Bay (S. C.) 256, 258, 1 Am. Dec. 612); "lawfully summoned" (Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 510, 17 L. ed. 851).

95. People *v.* Martin, 38 Misc. (N. Y.) 67, 71, 76 N. Y. Suppl. 953.

As used in a pleading, without a statement of the special facts on which it is predicated, "lawfully" has, in general, no effect, for the term is not only indefinite, but affirms matters of law instead of fact. Hanson *v.* Langan, 9 N. Y. Suppl. 625.

"Lawfully possessed" is a term equivalent to "peaceably possessed." McCartney *v.* Alderson, 45 Mo. 35, 38 [*citing* Michau *v.* Walsh, 6 Mo. 346]. See also Beeler *v.* Cardwell, 29 Mo. 72, 77 Am. Dec. 550; Wade *v.* McMillen, 29 Mo. 18, 20; Krevet *v.* Meyer, 24 Mo. 107, 110.

96. **"Lawful money of the state of Connecticut"** see Dorrance *v.* Stewart, 1 Yeates (Pa.) 349.

"Lawful money of the United States" see Cocke *v.* Kendall, 5 Fed. Cas. No. 2,929*b*, Hempst. 236.

"Lawful current money" see Black *v.* State, 46 Tex. Cr. 107, 79 S. W. 311.

"In lawful current money of Pennsylvania" see Wharton *v.* Morris, 1 Dall. (Pa.) 125, 1 L. ed. 65.

97. State *v.* Boomer, 103 Iowa 106, 113, 72 N. W. 424. See also State *v.* Neilon, 43 Oreg. 168, 171, 73 Pac. 321.

Does not include bank-notes see Garner *v.* State, 5 Yerg. (Tenn.) 160, 162.

98. O'Neil *v.* McKewn, 1 S. C. 147, 148.

99. Perry *v.* State, 42 Tex. Cr. 540, 541, 61 S. W. 400, holding that silver certificates

the silver coin of the United States, as it is recognized by the constitution of the United States,[1] gold or silver coin or United States treasury notes and fractional currency.[2] (See Coin; Currency; Current Money; and, generally, Payment.)

LAWFUL TITLE. A perfect title with a general covenant of warranty.[3] (See Good Title; and, generally, Deeds.)

LAWLESS. Not subject or submissive to law; uncontrolled by law, whether natural, human, or divine.[4] (See Disorderly.)

LAW MERCHANT. See Commercial Paper; Common Law; Evidence.

LAW OF NATIONS. See International Law.

LAW OF NATURE. Those fit and just rules of conduct which the Creator has prescribed to man as a dependent and social being, and which are to be ascertained from the deductions of right reason, though they may be more precisely known and more explicitly declared by divine revelation.[5]

LAW OF THE FLAG. A term used to designate the right under which a shipowner who sends his vessel into a foreign port gives notice by his flag to all who enter into contracts with the shipmaster that he intends the law of that flag to regulate those contracts, and that they must either submit to its operation or not contract with him or his agent at all.[6] (See, generally, Shipping.)

LAW OF THE LAND. See Constitutional Law.

LAW OF THE ROAD. See Streets and Highways.

LAW OF THE STAPLE. The law-merchant.[7] (See Commercial Paper; Common Law.)

LAW REPORTS. A general term, in English and American jurisprudence, for the published volumes narrating the decisions of the courts.[8] (Law Reports: In General, see Reports. Copyright of, see Copyright. Use of by Jury, see Criminal Law; Trial.)

LAWS IN FORCE. See Statutes.

LAWSUIT. An action at law, or litigation.[9] (See, generally, Actions.)

LAWYER. See Attorney and Client.

LAY. As an adjective, relating to persons or things not clerical or ecclesiastical;[10] not connected with a profession.[11] As a noun, a share of the proceeds or profits of a voyage.[12] As a verb, to put or place in a position or situation;[13] to construct;[14] to deliver;[15] to offer;[16] to risk;[17] to state or allege in pleading.[1]

or national bank-notes are not included in the phrase.

1. Blount *v.* State, 76 Ga. 17, 18.

"Lawful silver money" see Parrish *v.* Kohler, 11 Phila. (Pa.) 346, 347 [*distinguishing* Morris *v.* Bancroft, 1 Wkly. Notes Cas. (Pa.) 223].

2. Hamilton *v.* State, 60 Ind. 193, 194, 28 Am. Rep. 653, holding that the term cannot be construed to include the notes of national banks.

It includes only gold and silver coin, or that which by law is made its equivalent, so as to be exchangeable therefor at par and on demand, and does not include a currency note which, though nominally exchangeable for coin at its face value, is not redeemable on demand. Bronson *v.* Rodes, 7 Wall. (U. S.) 229, 247, 19 L. ed. 141.

3. Clark *v.* Redmen, 1 Blackf. (Ind.) 379, 380. See also Browning *v.* Wright, 2 B. & P. 13, 15 note, 5 Rev. Rep. 521.

4. Century Dict. [*quoted* in Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353, 362].

5. Wightman *v.* Wightman, 4 Johns. Ch. (N. Y.) 343, 349. See also *ante*, p. 165, note 80.

6. Ruhstrat *v.* People, 185 Ill. 133, 144, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181 [*citing* Bouvier L. Dict.].

7. Burrill L. Dict. [*citing* Blount].

8. Abbott L. Dict.

9. Bouvier L. Dict. See also Hill *v.* Packard, 5 Wend. (N. Y.) 375, 386 [*affirming* 7 Cow. 434, 441].

10. Black L. Dict.

For example as used in phrases "lay and ecclesiastical clerk" (7 Cyc. 190 note 44): "lay corporation" (Burrill L. Dict.); "lay fee" (Wharton L. Lex.); "lay investiture" (Black L. Dict.); and the like.

11. English L. Dict.

12. Thomas *v.* Osborn, 19 How. (U. S.) 22, 25, 15 L. ed. 534; Coffin *v.* Jenkins, 5 Fed. Cas. No. 2,948, 3 Story 108, 112.

13. Century Dict.

14. Central R. Co. *v.* Collins, 40 Ga. 582, 624. See also Boyden *v.* Brattleboro, 65 Vt. 504, 508, 27 Atl. 164.

15. Ullman *v.* Babcock, 63 Tex. 68, 70.

16. Peck *v.* Pierce, 63 Conn. 310, 318, 28 Atl. 524, "laid the same in evidence."

17. Koster *v.* Seney, 99 Iowa 584, 587, 68 N. W. 824, in gambling parlance. See Gaming.

18. Black L. Dict.

For example as used in the phrases "[to] lay damages" (Black L. Dict.); to lay the action with a scienter (English L.

The meaning of the word often depends upon its use in connection with other words,[19] as for example as employed in the phrases "lay down" or "laid down,"[20] "lay off" or "laid off,"[21] "lay open" or "laid open,"[22] "lay out" or "laid out,"[23] "lay up" or "laid up."[24] (Lay: Corporation, see CORPORATIONS. Day, see LAY DAYS; SHIPPING. Out, see STREETS AND HIGHWAYS.)

LAY CORPORATION. See CORPORATIONS.

LAY DAYS or **LAYING DAYS.** Days sometimes given in a favor of the charterer, which are called "demurrage days."[25] (See SHIPPING.)

LAYING OUT. See STREETS AND HIGHWAYS.

LAY SHARE. See SEAMEN.

LEAD. One of the useful metals, remarkable for its softness and durability.[26] (See, generally, MINES AND MINERALS.)

LEAD. To guide; to show the method of attaining;[27] to draw;[28] to go first and show the way.[29] (To Lead: A Witness, see WITNESSES.)

Dict.); "to lay the venue" (Black L. Dict.); and the like.

19. **"Laying at wharf"** see Dewees *v.* Adger, 2 McCord (S. C.) 105.

"Laying stock" see Dunwell *v.* Bidwell, 8 Minn. 34 [*citing* Farmers' Bank *v.* Winslow, 3 Minn. 86, 74 Am. Dec. 740].

20. White Lick Quarterly Meeting of Friends *v.* White Lick Quarterly Meeting of Friends, 89 Ind. 136, 142, where it is said: "In the peculiar phraseology of the Society of Friends, a meeting is said to have been 'set up' when it has been organized according to the usages of the society, and to have been 'laid down' when it has formally dissolved."

21. See Howe *v.* Robinson, 13 Misc. (N. Y.) 256, 259, 34 N. Y. Suppl. 85; Meehan *v.* Jones, 70 Fed. 453, 455.

22. Myers *v.* Pownal, 16 Vt. 415, 416.

23. *Connecticut.*— Cone *v.* Hartford, 28 Conn. 363, 365; Wolcott *v.* Pond, 19 Conn. 597, 601.

Georgia.— Central R. Co. *v.* Collins, 40 Ga. 582, 624.

Illinois.— Chicago Anderson Pressed Brick Co. *v.* Chicago, 138 Ill. 628, 633, 28 N. E. 756; Matthiessen, etc., Zinc Co. *v.* La Salle, 117 Ill. 411, 417, 2 N. E. 406, 8 N. E. 81.

Indiana.—Decker *v.* Washburn, 8 Ind. App. 673, 35 N. E. 1111, 1112.

Maine.— Wright *v.* Woodcock, 86 Me. 113, 116, 29 Atl. 953, 25 L. R. A. 499; Mansur *v.* Aroostock County, 83 Me. 514, 521, 22 Atl. 358.

Maryland.— Valentine *v.* Hagerstown, 86 Md. 486, 489, 38 Atl. 931 [*cited* in Sindall *v.* Baltimore, 93 Md. 526, 530, 49 Atl. 645].

Massachusetts.— Peabody *v.* Boston, etc., R. Co., 181 Mass. 76, 81, 62 N. E. 1047; Foster *v.* Boston Park Com'rs, 133 Mass. 321, 329; Fuller *v.* Springfield, 123 Mass. 289, 291; Hitchcock *v.* Springfield, 121 Mass. 382, 385; Bowman *v.* Boston, 5 Cush. (Mass.) 1, 8; Charlestown Branch R. Co. *v.* Middlesex County, 7 Metc. (Mass.) 78, 83.

Minnesota.— *In re* Smith, 51 Minn. 316, 319, 53 N. W. 711.

New Jersey.— Gaines *v.* Hudson County Ave. Com'rs, 37 N. J. L. 12, 14.

New York.— *In re* Department of Public Parks, 86 N. Y. 437, 439; *In re* Department of Public Works, 24 Hun 378, 379; Matter of One Hundred and Thirty-Eighth St., 60 How. Pr. 293; People *v.* Judges Cortland County, 24 Wend. 491, 493.

North Carolina.— Smith *v.* Eason, 33 N. C. 94, 97.

Pennsylvania.— *In re* Magnolia Ave., 117 Pa. St. 56, 61, 11 Atl. 405; *In re* Opening of Twenty-Eighth St., 102 Pa. St. 140, 146; City Sewage Utilization Co. *v.* Davis, 8 Phila. 625, 627.

Vermont.— Winooski Lumber, etc., Co. *v.* Colchester, 57 Vt. 538, 541.

Washington.— Flint *v.* Long, 12 Wash. 342, 346, 41 Pac. 49.

Wisconsin.—State *v.* Babcock, 42 Wis. 138, 148; State *v.* Huck, 29 Wis. 202, 207.

Distinguished from "improve" see Foster *v.* Boston Park Com'rs, 133 Mass. 321, 332.

24. Kemp *v.* Knickerbocker Ice Co., 69 N. Y. 45, 46 (ice); Clarkson *v.* Western Assur. Co., 92 Hun (N. Y.) 527, 532, 37 N. Y. Suppl. 53 (ship); The Ceres, 61 Fed. 701, 704 (ship); Hunter *v.* Wright, 10 B. & C. 714, 716, 8 L. J. K. B. O. S. 259, 21 E. C. L. 302 (ship).

25. Nielsen *v.* Wait, 16 Q. B. D. 67, 70, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33. See also Little *v.* Stevenson, [1896] A. C. 108, 8 Aspin. 162, 65 L. J. P. C. 69, 74 L. T. Rep. N. S. 529; Pyman *v.* Dreyfus, 24 Q. B. D. 152, 153, 6 Aspin. 444, 59 L. J. Q. B. 13, 61 L. T. Rep. N. S. 724; Nielsen *v.* Wait, 16 Q. B. D. 67, 70, 5 Aspin. 553, 55 L. J. Q. B. 87, 54 L. T. Rep. N. S. 344, 34 Wkly. Rep. 33.

26. Century Dict. See also State *v.* Stone, 30 N. J. L. 299, 300; Pollen *v.* Le Roy, 30 N. Y. 549, 550.

"Lead mine" see U. S. *v.* Gratiot, 26 Fed. Cas. No. 15,249, 1 McLean 454.

27. Johnson Dict. [*quoted* in Tarner *v.* Walker, 6 B. & S. 871, 877, 118 E. C. L. 871]. See also Shevlin *v.* Shevlin, 96 Minn. 398, 406, 105 N. W. 257.

28. Brunton *v.* Hall, 1 Q. B. 792, 795, 1 G. & D. 207, 6 Jur. 340, 10 L. J. Q. B. 258, 41 E. C. L. 779, as to lead manure.

29. Tarner *v.* Walker, 6 B. & S. 871, 877, 118 E. C. L. 871. See also Smith *v.* Moore, 1 C. B. 438, 9 Jur. 352, 50 E. C. L. 438.

LEADING. Drawing;[30] having the management of;[31] settling or determining.[32] (Leading: Question, see WITNESSES.)

LEADING QUESTION. See WITNESSES.

LEAF TOBACCO. A term applied to any tobacco that is on the stem, or in its original form with the stem taken out.[33]

LEAGUE. Four thousand four hundred twenty-eight acres.[34] (See, generally, PUBLIC LANDS.)

LEAKAGE. In the law of carriers, in the ordinary signification of the word, a loss of a part, but not of the whole of a liquid commodity.[35] (Leakage: Effect on Liability of — Carrier, see CARRIERS; SHIPPING; Insurer, see INSURANCE.)

LEAP. To make a spring or bound.[36]

LEAP-YEAR. See TIME.[37]

LEARNED. Possessing learning; crudite; versed in the law;[38] to be in receipt of creditable information.[39] (See LEARNING.)

LEARNING. A word sometimes used as equivalent to "teaching." It may signify either the act of acquiring knowledge or the knowledge itself.[40] (See EDUCATION; LEARNED.)

LEASE. See LANDLORD AND TENANT.

LEASE AND RELEASE. See DEEDS.

LEASEHOLD. See LANDLORD AND TENANT.

LEASING COMPANY. The company which has let, farmed out, or rented its property to another.[41] (See, generally, RAILROADS.)

LEAST. See AT LEAST.

LEATHER. The hides and skins of certain animals, prepared by chemical and

30. Brunton *v.* Hall, 1 Q. B. 792, 795, 1 G. & D. 207, 6 Jur. 340, 10 L. J. Q. B. 258, 41 E. C. L. 779.

31. English L. Dict.

As the "leading counsel."— Black L. Dict.

32. Burrill L. Dict.

As a "leading case."— Black L. Dict.

33. U. S. *v.* Schroeder, 93 Fed. 448, 450, 35 C. C. A. 376.

34. Hunter *v.* Morse, 49 Tex. 219, 220.

A "marine league" is equivalent to three geographical miles, or three sea miles. Rockland, etc., Steamship Co. *v.* Fessenden, 79 Me. 140, 148, 8 Atl. 550.

Mexican league.— The term "leagues," as used in a grant of four leagues of land in the province of Texas, Dec. 27, 1795, means Spanish leagues, and not American or English leagues. The old legal league, by the laws of Spain, and which was adopted in Mexico, consisted of five thousand varas; and a vara, in Texas, is equivalent to thirty-three and one-third inches; making the league equal to a little more than two and sixty-three one-hundredths miles, and the square league equal to four thousand four hundred and twenty-eight and four-tenths acres. U. S. *v.* Perot, 98 U. S. 428, 429, 25 L. ed. 251.

A "square league" is five thousand varas square and its area is twenty-five million varas. U. S. *v.* De Rodriquez, 25 Fed. Cas. No. 14,950, 7 Sawy. 617, 618.

35. Thomas *v.* The Morning Glory, 13 La. Ann. 269, 271, 71 Am. Dec. 509.

36. Century Dict.

"Leap at a running train" see Johnson *v.* West Chester, etc., R. Co., 70 Pa. St. 357, 365.

37. See also Cal. Pol. Code (1899), § 3256; Mont. Codes (1895), § 3141; 3 Cyc. 41 note 87.

38. Black L. Dict.

"Learned education" see Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 167, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 11 Eng. Reprint 50, 6 Wkly. Rep. 813.

"Learned in the law" see O'Neal *v.* McKinna, 116 Ala. 606, 620, 22 So. 905 (applied to an attorney); Jamieson *v.* Wiggin, 12 S. D. 16, 20, 80 N. W. 137, 76 Am. St. Rep. 585, 46 L. R. A. 317 [*cited* in Howard *v.* Burns, 14 S. D. 383, 388, 85 N. W. 920] (applied to eligibility of candidate for judge); State *v.* Ward, 9 Heisk. (Tenn.) 100, 110 (in arbitration agreement); Nance *v.* Thompson, 1 Sneed (Tenn.) 321, 326 (in arbitration agreement).

"Learned languages" are the languages that are learned by people of high education. Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 11 Eng. Reprint 50, 6 Wkly. Rep. 813.

The "learned professions" see Com. *v.* Fitler, 147 Pa. St. 288, 292, 23 Atl. 568, 15 L. R. A. 205; *In re* Ellis, 124 Fed. 637, 638.

39. Seibert Cylinder Oil-Cup Co. *v.* Manning, 34 Fed. 538, 540. See also Shepard *v.* Pratt, 16 Kan. 209, 211.

40. Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 166, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 11 Eng. Reprint 50, 6 Wkly. Rep. 813.

"Godly learning" see Baker *v.* Lee, 8 H. L. Cas. 495, 505, 7 Jur. N. S. 1, 30 L. J. Ch. 625, 11 Eng. Reprint 522; Whicker *v.* Hume, 7 H. L. Cas. 124, 162, 4 Jur. N. S. 933, 28 L. J. Ch. 396, 11 Eng. Reprint 50.

41. Atlanta, etc., Air-Line R. Co. *v.* Harrison, 76 Ga. 757, 759.

mechanical means in such a manner as to resist influences to which in their natural condition they are subject, and also to give them certain entirely new properties and qualities.[42] (See, generally, CUSTOMS DUTIES.)

LEAVE. As a noun, permission.[43] As a verb, according to the context or the intent with which it is employed[44] the word may mean to abscond;[45] to confine, to commit, or to revert;[46] to deliver;[47] to depart;[48] to get off;[49] to give;[50] to go away from;[51] to have;[52] to own;[53] to quit;[54] to remove from;[55] to resign;[56] to submit;[57] to suffer to remain;[58] to withdraw from.[59] (Leave: And License, see TRESPASS. Of Court, see LEAVE OF COURT.)

LEAVE AND LICENSE. See TRESPASS.

LEAVEN. As a noun, any substance that sets up or is intended to set up fermentation;[60] any substance that sets up fermentation in, or raises and makes light.[61] As a verb, to excite fermentation in; to raise and make light.[62]

LEAVE OF COURT. Permission granted by the court to do something which, without such permission, would not be allowable.[63] (Leave of Court: As Condition Precedent to Action — Affecting Running of Statute of Limitations, see LIMITATIONS OF ACTIONS; Affecting Equitable Relief Against Judgment, see JUDGMENTS; Against Insane Person, see INSANE PERSONS; By or Against Assignee, see ASSIGNMENTS FOR BENEFIT OF CREDITORS; By or Against Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; By or Against Receiver, see RECEIVERS; For Deficiency on Foreclosure, see MORTGAGES; In Garnishment Proceeding, see GARNISHMENT; On Bond of Executor or Administrator, see EXECUTORS AND ADMINISTRATORS; On Bond of Guardian, see GUARDIAN AND WARD; On Bond of Trustee, see TRUSTS; On Injunction Bond, see INJUNCTIONS; On Judgment, see JUDGMENTS; JUSTICES OF THE PEACE. To Amend, see EQUITY; INJUNCTIONS; PLEADING. To File Application to Open or Vacate Judgment, see JUDGMENTS. To File Pleading, see PLEADING. To Find and File Indictment, see INDICTMENTS AND INFORMATIONS. To Issue Execution, see EXECUTIONS. To Make Motion, see MOTIONS. To Plead and Defend, see PLEADING. To Revive Action, see ABATEMENT AND REVIVAL.)

42. Encycl. Brit. (1894) [*quoted* in Tannage Patent Co. *v.* Donallan, 93 Fed. 811, 817].

"Leather gouffre" see U. S. *v.* Naday, 98 Fed. 421, 422, 39 C. C. A. 124.

Note payable in leather see Elkins *v.* Parkhurst, 17 Vt. 105, 106.

"Patent-leather" is a term used to designate glazed calfskin. Keutgen *v.* Lawrence, 14 Fed. Cas. No. 7,745, 1 Blatchf. 615.

43. *Ex p.* Williams, 116 Cal. 512, 513, 48 Pac. 499. See Jackson *v.* State, 52 Kan. 249, 253, 34 Pac. 744. See also LEAVE OF COURT.

44. Weedon *v.* Woodbridge, 13 Q. B. 462, 467, 66 E. C. L. 461.

45. McLeran *v.* Shearer, 33 Vt. 230, 232.

46. Century Dict. [*quoted* in Brown *v.* Just, 118 Mich. 678, 680, 77 N. W. 263].

47. Buck *v.* Buck, 60 Ill. 105, 106; Weedon *v.* Woodbridge, 13 Q. B. 462, 467, 13 Jur. 627, 66 E. C. L. 462.

48. McQuinn *v.* McQuinn, 110 Ky. 321, 327, 61 S. W. 358, 22 Ky. L. Rep. 1770.

49. Sawtelle *v.* Railway Pass. Assur. Co., 21 Fed. Cas. No. 12,392, 15 Blatchf. 216, 217.

50. Campbell *v.* Beaumont, 91 N. Y. 464, 467; Carr *v.* Effinger, 78 Va. 197, 203.

51. Monroe *v.* Hartford St. R. Co., 76 Conn. 201, 205, 56 Atl. 498.

52. Sayre *v.* Sayre, 32 N. J. Eq. 61, 64 [*citing* Treharne *v.* Layton, L. R. 10 Q. B. 459]; Du Bois *v.* Ray, 35 N. Y. 162, 165; Kennedy *v.* Sedgwick, 3 Kay & J. 540, 541, 69 Eng. Reprint 1223 [*cited* in White *v.* Hill, L. R. 4 Eq. 265, 270, 16 L. T. Rep. N. S. 821]; Bythesea *v.* Bythesea, 27 Eng. L. & Eq. 402, 405.

53. McNitt *v.* Turner, 16 Wall. (U. S.) 352, 363, 21 L. ed. 341.

54. Douglass *v.* Anderson, 32 Kan. 350, 351, 4 Pac. 257; Price *v.* Minot, 107 Mass. 49, 60; Van Baggen *v.* Baines, 9 Exch. 523, 530, 23 L. J. Exch. 213, 25 Eng. L. & Eq. 530.

55. Florance *v.* Camp, 5 La. 280, 281; McLeran *v.* Shearer, 33 Vt. 230, 232.

56. See Price *v.* Minot, 107 Mass. 49, 60.

57. The Leipsic, 5 Fed. 108, 112.

58. Jackson *v.* Bulloch, 12 Conn. 38, 45; Sonneborn *v.* Manufacturers' Ins. Co., 44 N. J. L. 220, 224, 43 Am. Rep. 365.

59. See Crocker *v.* Old South Soc., 103 Mass. 489, 497; French *v.* Old South Soc., 106 Mass. 479, 487.

60. Standard Dict. [*quoted* in Leggett *v.* U. S., 131 Fed. 817, 818].

61. Leggett *v.* U. S., 131 Fed. 817, 818.

62. Leggett *v.* U. S., 131 Fed. 817, 818 [*quoting* Century Dict.; Webster Dict.].

"In order to produce a leaven, it is only necessary that an agent to set up fermentation he employed; and baking powder or bicarbonate of soda are such agents." Leggett *v.* U. S., 131 Fed. 817, 818 [*quoting* Board of General Appraisers].

63. Bouvier L. Dict.

LECTURE. A discourse on any subject.[64] (Lecture: Copyright of, see COPYRIGHT. Literary Property in, see LITERARY PROPERTY.)

LEDGE. See MINES AND MINERALS.

LEDGER. See EVIDENCE.

LEFT.[65] See LEAVE.

LEGACY. A gift or bequest by testament;[66] a gift or bequest of personal property;[67] a gift of personal estate by will;[68] a bequest of goods and chattels by will or testament;[69] a testamentary disposition of personal property.[70] (Legacy: Generally, see WILLS. Charitable, see CHARITIES. Distribution of, see EXECUTORS AND ADMINISTRATORS. Enforcement of Payment of, see EXECUTORS AND ADMINISTRATORS. Payment of, see EXECUTORS AND ADMINISTRATORS. Subject to — Execution, see EXECUTIONS; Mortgage, see CHATTEL MORTGAGES; Garnishment, see GARNISHMENT; Taxation, see TAXATION. Tax, see INTERNAL REVENUE; TAXATION. To Husband and Wife, see HUSBAND AND WIFE. Violating Rule Against Perpetuities, see PERPETUITIES. See also BEQUEST; DEVISE.)

LEGACY TAX. See TAXATION.

LEGAL. LAWFUL,[71] *q. v.*, that is, something effectual and proper and which the courts of judicature of the country will recognize and enforce;[72] opposed to that which is illegal or unlawful;[73] allowed or authorized by law; implied or imputed in law; opposed to actual; sufficient to meet the requirements of law;[74] a term which refers to common law as distinguished from equity.[75] (Legal: Assets, see EXECUTORS AND ADMINISTRATORS. Blank Subject to Copyright, see COPYRIGHT.

64. Webster Int. Dict.

65. **"What is left"** see Bramell *v.* Adams, 146 Mo. 70, 74, 47 S. W. 931.

"Left . . . open" see French *v.* Halt, 53 Vt. 364, 367, a gate.

"Left outside" of levee see Duncan *v.* Mississippi Levee Com'rs, 74 Miss. 125, 128, 20 So. 838. See also LEVEES.

66. Matter of Karr, 2 How. Pr. N. S. (N. Y.) 405, 409; Matter of Thompson, 5 Dem. Surr. (N. Y.) 393, 396.

67. Orton *v.* Orton, 3 Abb. Dec. (N. Y.) 411, 414, 3 Keyes 486, 3 Transcr. App. 18.

68. Evans *v.* Price, 118 Ill. 593, 599, 8 N. E. 854.

69. Probate Ct. *v.* Matthews, 6 Vt. 269, 274.

70. Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429, 436.

Kinds of legacy.— A legacy may be absolute, additional, alternate, conditional, contingent, cumulative, demonstrative, general, indefinite, lapsed, modal, pecuniary, residuary, specific, substitutionary, universal, vested, or a trust legacy. Black L. Dict.; 5 Words & Phrases, tit. "Legacy." See, generally, WILLS.

71. **Compared with and distinguished from "lawful"** see State *v.* Bulling, 105 Mo. 204, 225, 15 S. W. 367, 16 S. W. 830; Curtis *v.* Alleghany County, 1 Phila. (Pa.) 237, 238. See also Green *v.* Equitable Mort. Co., 107 Ga. 536, 539, 33 S. E. 869.

72. Dufaur *v.* Professional L. Assur. Co., 25 Beav. 599, 603, 4 Jur. N. S. 841, 27 L. J. Ch. 817, 53 Eng. Reprint 766, where it is said: "In this Court, however, a technical meaning is attached to the word 'legal,' it marks the distinction between a legal and an equitable estate and between a legal and equitable right, and these words 'legal' and 'equitable' are used as opposed to each other. But in ordinary parlance, the meaning of the word 'legal' is not so confined."

"When legal proceedings of any sort are spoken of, the descriptive word legal is not usually understood to affirm their validity; for it is used indiscriminately, whether the proceedings be valid or void." Jones *v.* McLain, 16 Tex. Civ. App. 305, 306, 41 S. W. 714

73. Sweet L. Dict.

74. Anderson L. Dict. [*cited* in Jones *v.* McLain, 16 Tex. Civ. App. 305, 306, 41 S. W. 714].

75. Inland Revenue Com'rs *v.* Angus, 23 Q. B. D. 579, 590, 61 L. T. Rep. N. S. 832, 38 Wkly. Rep. 3.

As used in connection with other words see the following phrases: "Legal and fair." Wood *v.* Strother, 76 Cal. 545, 546, 18 Pac. 766, 9 Am. St. Rep. 249. "Legal or just." Reed *v.* Duluth, etc., R. Co., 100 Mich. 507, 510, 59 N. W. 144. "Legal attainments." State *v.* McGinley, 4 Ind. 7, 11. "Legal capacity." Pence *v.* Aughe, 101 Ind. 317, 319; Dewey *v.* State, 91 Ind. 173, 182. "Legal cause." Gill *v.* State, 61 Ala. 169, 172. "Legal chose in action." Torkington *v.* Magee, [1902] 2 K. B. 427, 433. Legal commitment. People *v.* Beach, 122 Cal. 37, 38, 54 Pac. 369 [*citing Ex p.* Baker, 88 Cal. 84, 25 Pac. 966]; People *v.* Nevins, 1 Hill (N. Y.) 154, 171. "Legal costs." Davis *v.* Norman, 101 Ky. 599, 601, 42 S. W. 108; Childs *v.* New Haven, etc., Co., 135 Mass. 570, 572; James *v.* Bligh, 11 Allen (Mass.) 4, 5; Crocker *v.* Baker, 18 Pick. (Mass.) 407, 414. "Legal county road." Schroeder *v.* Multnomah County, 45 Oreg. 92, 97, 76 Pac. 772. "Legal debts." Guild *v.* Walter, 182 Mass. 225, 226, 65 N. E. 68; Rogers *v.* Daniell, 8 Allen (Mass.) 343, 348. "Legal demand." Foss *v.* Norris, 70 Me. 117, 119; Palmetto

Consideration, see CONTRACTS. Cruelty, see DIVORCE. Estate, see ESTATES. Estoppel, see ESTOPPEL. Fraud, see FRAUD. Heir, see DESCENT AND DISTRIBUTION; HEIR. Holiday, see HOLIDAYS. Incapacity, see ALIENS; DRUNKARDS; HUSBAND AND WIFE; INFANTS; INSANE PERSONS; SPENDTHRIFTS. Interest, see INTEREST. Malice, see CRIMINAL LAW; FALSE IMPRISONMENT; HOMICIDE; LIBEL AND SLANDER; MALICIOUS MISCHIEF; MALICIOUS PROSECUTION. Mortgage, see GUARDIAN AND WARD; HUSBAND AND WIFE; INSANE PERSONS. Negligence, see NEGLIGENCE. Notice, see NOTICE; PROCESS. Process, see PROCESS. Representations, see EXECUTORS AND ADMINISTRATORS. Residence, see DOMICILE. Settlement, see PAUPERS. Tender, see PAYMENT. See also LAWFUL; LEGALLY.)

LEGAL AGE. See INFANTS.

LEGAL ARREST. See ARREST.

LEGAL ASSETS. See EXECUTORS AND ADMINISTRATORS.

LEGAL BLANKS. See COPYRIGHT.

LEGAL CLAIM. One which the party asserting it may enforce by action or by some proceeding at law or in equity.[76] (See CLAIM.)

LEGAL CONSIDERATION. See CONTRACTS.

Lodge No. 5, I. O. O. F. *v.* Hubbell, 2 Strobh. (S. C.) 457, 462, 49 Am. Dec. 604. "Legal depositary." Yarnell *v.* Los Angeles, 87 Cal. 603, 608, 25 Pac. 767. "Legal disability." Bouvier L. Dict. [*quoted* in Meeks *v.* Vassault, 16 Fed. Cas. No. 9,393, 3 Sawy. 206, 213]. See also State *v.* Calhoun, 50 Kan. 523, 533, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838; Makepeace *v.* Bronnenberg, 146 Ind. 243, 246, 45 N. E. 336; Rosa *v.* Prather, 103 Ind. 191, 195, 2 N. E. 575; Bauman *v.* Grubbs, 26 Ind. 419, 421; Wiesner *v.* Zaun, 39 Wis. 188, 206. "Legal discharge." Johnson *v.* Maxon, 23 Mich. 129, 142. "Legal disbursements." *In re* Clement, 160 Pa. St. 391, 397, 28 Atl. 932. "Legal disqualifications." State *v.* Blair, 53 Vt. 24, 29. "Legal exaction of duty." People *v.* Durfee, 62 Mich. 487, 494, 29 N. W. 109. "Legal excuse." State *v.* Washoe County Bd. of Equalization, 7 Nev. 83, 97. "Legal fees." Montana Ore Purchasing Co. *v.* Boston, etc., Copper, etc., Min. Co., 27 Mont. 288, 323, 70 Pac. 1114. "Legal impediment." Bonker *v.* People, 37 Mich. 4, 7. "Legal incapacity." Chorlton *v.* Lings, L. R. 4 C. P. 374, 395, 1 Hopw. & C. 1, 38 L. J. C. P. 25, 19 L. T. Rep. N. S. 534, 17 Wkly. Rep. 284. "Legal irregularity." Hay's Case, 14 Abb. Pr. (N. Y.) 53, 56. "Legal losing." Loucks *v.* Gallogly, 1 Misc. (N. Y.) 22, 24, 23 N. Y. Suppl. 126. "Legal means." McCandless *v.* Allegheny Bessemer Steel Co., 152 Pa. St. 139, 149, 25 Atl. 579. "Legal measures." Reg. *v.* Southampton, 1 Q. B. 4, 26, 101 E. C. L. 4. "Legal merchandise." Cockburn *v.* Alexander, 6 C. B. 791, 798, 18 L. J. C. B. 74, 60 E. C. L. 791. "Legal offenses." People *v.* New York Bd. of Police Com'rs, 20 Hun (N. Y.) 333, 337. "Legal or equitable." Montgomery *v.* McEwen, 7 Minn. 351. "Legal owner." Glover *v.* U. S., 164 U. S. 294, 296, 17 S. Ct. 95, 41 L. ed. 440. "Legal personal representatives." King *v.* Cleaveland, 26 Beav. 166, 168, 53 Eng. Reprint 860; Cotton *v.* Cotton, 2 Beav. 67, 70, 3 Jur. 886, 8 L. J. Ch. 349, 17 Eng. Ch. 67, 48 Eng. Reprint 1104 [*quoted* in Surman *v.* Wharton, [1891] 1 Q. B. 491, 495, 60 L. J. Q. B. 233, 64 L. T. Rep. N. S. 866, 39 Wkly. Rep. 416]. "Legal plaintiff." U. S. *v.* Henderlong, 102 Fed. 2, 4. "Legal post." Clark *v.* Haney, 8 Brit. Col. 130, 132. "Legal proceeding." Fehling *v.* Goings, 67 N. J. Eq. 375, 386, 58 Atl. 642; Morrill *v.* Hoyt, 83 Tex. 59, 60, 18 S. W. 424, 29 Am. St. Rep. 630; Mack *v.* Campeau, 69 Vt. 558, 561, 38 Atl. 149, 69 Am. St. Rep. 948; Griem *v.* Fidelity, etc., Co., 99 Wis. 530, 531, 75 N. W. 67; *In re* Rome Planing-Mill Co., 96 Fed. 812, 815; Atty.-Gen. *v.* Tynemouth, [1898] 1 Q. B. 604, 606, 62 J. P. 292, 67 L. J. Q. B. 489, 78 L. T. Rep. N. S. 372, 46 Wkly. Rep. 518; Smith *v.* Manchester, 24 Ch. D. 611, 613, 53 L. J. Ch. 96, 49 L. T. Rep. N. S. 96, 32 Wkly. Rep. 83; Reg. *v.* Southampton, 1 B. & S. 5, 26, 7 Jur. N. S. 990, 30 L. J. Q. B. 244, 9 Wkly. Rep. 630, 101 E. C. L. 5. "Legal process." Cooley *v.* Davis, 34 Iowa 128, 130; Wolf *v.* McKinley, 65 Minn. 156, 158, 68 N. W. 2; Loy *v.* Home Ins. Co., 24 Minn. 315, 319, 31 Am. Rep. 346; Perry *v.* Lorillard F. Ins. Co., 6 Lans. (N. Y.) 201, 204; Burton *v* Wheeler, 42 N. C. 217, 220; Runkle *v.* Citizens' Ins. Co., 6 Fed. 143, 146; *In re* Bininger, 3 Fed. Cas. No. 1,420, 7 Blatchf. 262, 267. See also 9 Cyc. 20; 7 Cyc. 280 note 24. "Legal punishments." *Ex p.* State, 87 Ala. 46, 49, 6 So. 328. "Legal reason." Aaron *v.* State, 40 Ala. 307, 312. "Legal school age." Needham *v.* Wellesley, 139 Mass. 372, 374, 31 N. E. 732. "Legal service." Smith *v.* Colloty, 69 N. J. L. 365, 367, 55 Atl. 805. "Legal strike." Toledo, etc., R. Co. *v.* Pennsylvania Co., 54 Fed. 730, 733, 19 L. R. A. 387. "Legal subdivisions." Robinson *v.* Forrest, 29 Cal. 317, 324. "Legal tax." McPhelomy *v.* Solomon, 15 Ind. 189, 190. "Legal title." Nottingham *v.* Calvert, 1 Ind. 527, 528; Lombard *v.* Ruggles, 9 Me. 62, 65. "Legal transfer." Cadwallader *v.* Durham, 46 N. J. L. 53, 56. "Legal warrant." White *v.* State, 28 Nebr. 341, 346, 44 N. W. 443. "Legal wrong." White *v.* Rio Grande Western R. Co., 25 Utah 346, 361, 71 Pac. 593.

"**Legally,**" etc., see *post*, p. 174, note 86.

76. Cowan *v.* New York, 3 Hun (N. Y.) 632, 633; People *v.* Woodruff, 57 N. Y. App. Div. 342, 68 N. Y. Suppl. 100.

LEGAL CRUELTY. See DIVORCE.

LEGAL DAMAGES. Such losses or detriments as the law compensates in consequence of a wrong committed.[77] (See, generally, DAMAGES.)

LEGAL DAY. A day in which legal and judicial business can be transacted, as distinguished from "*dies non.*"[78] (See DAY; DIES NON.)

LEGAL DEMAND. A demand properly made as to form, time and place.[79] (See DEMAND.)

LEGAL DISCRETION. A discretion to be exercised within the limits which the law fixes;[80] a discretion to be exercised according to the rules of law.[81] (See DISCRETION; JUDICIAL DISCRETION.)

LEGAL DUTY. An obligation arising from contract of the parties or the operation of law;[82] that which the law requires to be done or forborne to a determinate person or to the public at large, and is correlative to a right vested in such determinate person or the public.[83] (See DUTY.)

LEGAL ESTATE. See ESTATES.

LEGAL ESTOPPEL. See ESTOPPEL.

LEGAL EVIDENCE. Admissible evidence.[84] (See, generally, EVIDENCE.)

LEGAL FENCE. See ANIMALS; FENCES; RAILROADS.

LEGAL FRAUD. See FRAUD.

LEGAL HEIR. See DESCENT AND DISTRIBUTION; HEIRS.

LEGAL HOLIDAY. See HOLIDAYS.

LEGAL IMPEDIMENT. See MARRIAGE.

LEGAL IMPOSSIBILITY. See CONTRACTS.

LEGAL INCAPACITY. See INCAPACITY.

LEGAL INSANITY. See INSANE PERSONS.

LEGAL INSOLVENCY. See INSOLVENCY.

LEGAL INTEREST. See INTEREST.

LEGAL ISSUE. See ISSUE.

LEGAL JEOPARDY. See CRIMINAL LAW.

LEGAL JURY. See GRAND JURIES; JURIES.

LEGALLY.[85] The state or character of being legal; lawfulness; conformity to law.[86] (See LAWFULLY; LEGAL.)

LEGAL MALICE. See MALICE.

77. Stuhr *v.* Curran, 44 N. J. L. 181, 201; 43 Am. Rep. 353.

78. Heffner *v.* Heffner, 48 La. Ann. 1088, 1090, 20 So. 281, distinguishing a "judicial day."

79. Foss *v.* Norris, 70 Me. 117, 118.

80. Norton *v.* Kearney, 10 Wis. 443, 450.

81. State *v.* Valliant, 123 Mo. 524, 543, 27 S. W. 379, 28 S. W. 586; Osborn *v.* U. S. Bank, 9 Wheat. (U. S.) 738, 866, 6 L. ed. 204. See also Hanthorn *v.* Oliver, 32 Oreg. 57, 62, 51 Pac. 440, 67 Am. St. Rep. 518; Thompson *v.* Connell, 31 Oreg. 231, 235, 48 Pac. 467, 65 Am. St. Rep. 818.

82. Md. Civ. Code, §§ 1920, 1921 [*cited* in Riddell *v.* Peck-Williamson Heating, etc., Co., 27 Mont. 44, 59, 69 Pac. 241]. See also Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 450, 35 Atl. 90 [*citing* Kahl *v.* Love, 37 N. J. L. 5; Heaven *v.* Pender, 11 Q. B. D. 503, 47 J. P. 709, 52 L. J. Q. B. 702, 49 L. T. Rep. N. S. 357].

83. Wharton Leg. Max. § 24 [*quoted* in Smith *v.* Clarke Hardware Co., 100 Ga. 163, 165, 28 S. E. 73, 39 L. R. A. 607; Western Maryland R. Co. *v.* Kehoe, 83 Md. 434, 450, 35 Atl. 90; Emry *v.* Roanoke Nav., etc., Co., 111 N. C. 94, 95, 16 S. E. 18, 17 L. R. A. 699; Bragdon *v.* Perkins-Campbell Co., 87 Fed. 109, 110, 30 C. C. A. 567, 66 L. R. A. 924; Cleveland, etc., R. Co. *v.* Ballentine, 84 Fed. 935, 937, 28 C. C. A. 572; Goodlander Mill Co. *v.* Standard Oil Co., 63 Fed. 400, 402, 11 C. C. A. 253, 27 L. R. A. 583].

84. West *v.* Hayes, 51 Conn. 533, 543.

85. Distinguished from "duly."—"Legally" is not synonymous with the word "duly" and the one is not the equivalent for the other. Where a statute required one to be "legally" summoned, an allegation that he had been "duly" summoned did not show a compliance. State *v.* Clancy, 56 Vt. 698, 700.

Distinguished from "practically."—See Richmond Waterworks Co. *v.* Richmond, 3 Ch. D. 82, 96, 45 L. J. Ch. 441, 34 L. T. Rep. N. S. 480.

86. Century Dict. See also Inland Revenue Com'rs *v.* Angus, 23 Q. B. D. 579, 594, 61 L. T. Rep. N. S. 832, 38 Wkly. Rep. 3.

As used in connection with other words see the following phrases: "Legally appointed." Com. *v.* Chase, 127 Mass. 7, 13. "Legally appropriated." Inland Revenue Com'rs *v.* Forrest, 15 App. Cas. 334, 352, 54 J. P. 772, 60 L. J. Q. B. 281, 63 L. T. Rep. N. S. 36, 39 Wkly. Rep. 33. "Legally assigned." Dufaur *v.* Professional L. Assur.

LEGAL MEMORY. Time out of mind.[87]

LEGAL MORTGAGE. A mortgage which is created by operation of law;[88] a first mortgage;[89] a conveyance of lands by a debtor to his creditor as a pledge or security, etc., with a proviso.[90] (Legal Mortgage: Of Interdict on Property of Intermeddler, see INSANE PERSONS. Of Ward Against Tutor or Guardian, see GUARDIAN AND WARD. Of Wife Against Husband, see HUSBAND AND WIFE.)

LEGAL NEGLIGENCE. See NEGLIGENCE.

LEGAL NOTICE. See NOTICE; PROCESS.

LEGAL OFFICER. See OFFICERS.

LEGAL PRESUMPTION. See EVIDENCE.

LEGAL PROCEEDINGS. See ACTIONS.

LEGAL PROCESS. See PROCESS.

LEGAL PROVOCATION. A word which is synonymous with "lawful, adequate, and reasonable provocation," and means an assault or personal violence.[91] (See, generally, ASSAULT AND BATTERY; CRIMINAL LAW; HOMICIDE.)

LEGAL RATE OF INTEREST. See INTEREST.

LEGAL RELEVANCY. A term distinguishable in meaning from "relevancy" and "logical relevancy."[92]

LEGAL REMEDY. A remedy at law, as distinguished from a remedy in equity;[93] a suit or proceeding in a court of justice.[94] (See, generally, ACTIONS.)

LEGAL REPRESENTATIVE. In the broadest sense one who lawfully represents another in any matter whatever;[95] one who legally and lawfully represents another in any matter or thing of whatever nature or character it may be;[96] any person, natural or artificial, who by operation of law stands in the place of and represents the interests of another;[97] any person or corporation taking the beneficial interest

Co., 25 Beav. 599, 603, 4 Jur. N. S. 841, 27 L. J. Ch. 817, 53 Eng. Reprint 766. "Legally authorized." Farris *v.* Martin, 10 Humphr. (Tenn.) 495, 498. "Legally authorized and assigned." Hall *v.* Gittings, 2 Harr. & J. (Md.) 380, 395; 1 Cyc. 616 note 99. "Legally authenticated." *In re* Fowler, 4 Fed. 303, 310, 18 Blatchf. 430. "Legally constituted." Benjamins *v.* Andrews, 5 C. B. N. S. 299, 304, 94 E. C. L. 299. "Legally determined." Ulmer *v.* Paine, 1 Me. 84, 87. "Legally dispossessed." Mattoon *v.* Munroe, 21 Hun (N. Y.) 74, 82. "Legally due." Barke *v.* Early, 72 Iowa 273, 278, 33 N. W. 677. "Legally established." Hartford *v.* New York, etc., R. Co., 59 Conn. 250, 252, 22 Atl. 37; *In re* Mason's Orphanage, [1869] 1 Ch. 596, 598, 65 L. J. Ch. 439, 74 L. T. Rep. N. S. 161, 44 Wkly. Rep. 339. "Legally irresponsible." Greer Mach. Co. *v.* Stains, (Tenn. Ch. App. 1900) 59 S. W. 692, 699. "Legally issuable." Weiss *v.* Chambers, 50 Mich. 158, 161, 15 N. W. 63. "Legally laid out." State *v.* Siegel, 54 Wis. 86, 89, 11 N. W. 435. "Legally made." People *v.* Peoria, etc., R. Co., 116 Ill. 410, 411, 6 N. E. 459. "Legally placed." Rep *v.* Mullen, 1 B. & Ad. 211, 218, 20 E. C. L. 458. "Legally required." Stocker *v.* Dech, 167 Pa. St. 212, 214, 31 Atl. 555. "Legally satisfied." Montgomery County *v.* Cochran, 116 Fed. 985, 990. "Legally transferred." Inland Revenue Com'rs *v.* Angus, 23 Q. B. D. 579, 590, 61 L. T. Rep. N. S. 832, 38 Wkly. Rep. 3.

87. Miller *v.* Garlock, 8 Barb. (N. Y.) 153, 154.

"Legal memory" was in England, under the statute of limitation of 32 Hen. VIII, sixty years. In Massachusetts the time of legal memory is analogous to the time prescribed for bringing a writ of right. In New York previous to 1830 it was twenty-five years, and subsequent to that time it was twenty years. Miller *v.* Garlock, 8 Barb. (N. Y.) 153, 154.

88. La. Civ. Code (1900), art. 3287.

89. Thompson *v.* Clerk, 7 L. T. Rep. N. S. 269, 270, 11 Wkly. Rep. 23.

90. Bouvier L. Dict. [*quoted* in Bingham *v.* Frost, 3 Fed. Cas. No. 1,413].

91. State *v.* Bulling, 105 Mo. 204, 225, 15 S. W. 367, 16 S. W. 830. See also State *v.* Smith, 10 Rich. (S. C.) 341, 346.

92. Chamberlayne Best Ev. (Am. Notes) 251 [*quoted* in Hoag *v.* Wright, 34 N. Y. App. Div. 260, 266, 54 N. Y. Suppl. 658]. See also Mr. Chamberlayne's discussion of the meaning of this term in 16 Cyc. 1112.

93. State *v.* Sneed, 105 Tenn. 711, 722, 58 S. W. 1070.

94. Swann *v.* Buck, 40 Miss. 268, 299.

95. Anderson L. Dict. [*quoted* in *In re* Conrad, 89 Iowa 396, 398, 56 N. W. 535, 48 Am. St. Rep. 396; Griffin *v.* Brower, 21 Pa. Co. Ct. 188, 190].

96. Wear *v.* Bryant, 5 Mo. 147, 164.

97. Alford *v.* Consolidated F. & M. Ins. Co., 88 Minn. 478, 480, 93 N. W. 517. See also Olney *v.* Lovering, 167 Mass. 446, 448, 45 N. E. 766 [*citing* Eager *v.* Whitney, 163 Mass. 463, 40 N. E. 1046]; Lasater *v.* Jacksboro First Nat. Bank, (Tex. Civ. App. 1902) 72 S. W. 1054, 1055; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 597, 6 S. Ct. 877, 29 L. ed. 997.

n property, real or personal.[98] In the common use of the words and in its ordinary signification,[99] a term equivalent to "executor" or "administrator."[1] However, the meaning to be attached to these words in any particular case is often controlled by the context and the intent with which they are used, as well as by the existing state of things and the relative situation of the parties to be affected;[2]

98. Allen *v.* Alliance Trust Co., 84 Miss. 319, 326, 36 So. 285.

99. Although not of uniform interpretation (Thompson *v.* U. S., 20 Ct. Cl. 276, 278), and not always necessarily having the same signification (Delaunay *v.* Burnett, 9 Ill. 454, 494), these words have a well recognized meaning in the law (Robinson *v.* Hurst, 78 Md. 59, 70, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761).

1. *Alabama.*— Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 79, 30 So. 528.

California.— Davis *v.* Davis, 26 Cal. 23, 39, 85 Am. Dec. 157.

Connecticut.— Staples *v.* Lewis, 71 Conn. 288, 290, 41 Atl. 815; Johnson *v.* Edmond, 65 Conn. 492, 497, 33 Atl. 503; Tarrant *v.* Backus, 63 Conn. 277, 283, 28 Atl. 46. See also Greene *v.* Huntington, 73 Conn. 106, 114, 46 Atl. 883.

Georgia.— Firemen's Fund Ins. Co. *v.* Sims, 115 Ga. 939, 942, 42 S. E. 269.

Illinois.— Stevens *v.* Shannahan, 160 Ill. 330, 344, 43 N. E. 350; Johnson *v.* Van Epps, 110 Ill. 551, 560; Bowman *v.* Long, 89 Ill. 19, 21; People *v.* Phelps, 78 Ill. 147, 149 [*cited* in People *v.* Petrie, 191 Ill. 497, 509, 61 N. E. 499, 85 Am. St. Rep. 268]; Warnecke *v.* Lembca, 71 Ill. 91, 95, 12 Am. Rep. 85; Delaunay *v.* Burnett, 9 Ill. 454, 494.

Iowa.— Pardoe *v.* Iowa State Nat. Bank, 106 Iowa 345, 351, 76 N. W. 800.

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 70, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761 [*quoted* in Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, 112, 51 Atl. 838].

Massachusetts.— Thayer *v.* Pressey, 175 Mass. 225, 236, 56 N. E. 5; Lodge *v.* Weld, 139 Mass. 499, 504, 2 N. E. 95; Cox *v.* Curwen, 118 Mass. 198, 200; Wason *v.* Colburn, 99 Mass. 342, 343, 344; Johnson *v.* Ames, 11 Pick. 173, 178.

Mississippi.— Allen *v.* Alliance Trust Co., 84 Miss. 319, 332, 36 So. 285; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. 234, 275.

Missouri.— Loos *v.* John Hancock Mut. L. Ins. Co., 41 Mo. 538; Hogan *v.* Welcker, 14 Mo. 177, 183; Stewart *v.* Gibson, 71 Mo. App. 232, 235; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211, 220.

Nebraska.— Wamsley *v.* Crook, 3 Nebr. 344, 350.

New Jersey.— Golden Star Fraternity *v.* Martin, 59 N. J. L. 207, 212, 35 Atl. 908; Halsey *v.* Paterson, 37 N. J. Eq. 445, 448.

New York.— Matthews *v.* American Cent. Ins. Co., 154 N. Y. 449, 456, 48 N E. 751, 61 Am. St. Rep. 627, 39 L. R. A. 433; Griswold *v.* Sawyer, 125 N. Y. 411, 414, 26 N. E. 464; Leonard *v.* Harney, 63 N. Y. App. Div. 294, 299, 71 N. Y. Suppl. 546; Geoffroy *v.* Gilbert, 5 N. Y. App. Div. 98, 102, 38 N. Y. Suppl. 643; Lawrence *v.* Niagara F. Ins. Co., 2 N. Y. App. Div. 267, 268, 37 N. Y. Suppl. 811; Geoffroy *v.* Gilbert, 15 Misc. 60, 62, 36 N. Y. Suppl. 884.

Ohio.— Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 431.

Oregon.— Kelsay *v.* Eaton, 45 Oreg. 70, 76, 76 Pac. 770, 106 Am. St. Rep. 662.

Pennsylvania.— Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858; Weaver *v.* Roth, 105 Pa. St. 408, 412; Ralston *v.* Waln, 44 Pa. St. 279, 287; Duncan *v.* Walker, 1 Yeates 213, 220; Griffin *v.* Brower, 21 Pa. Co. Ct. 188, 190.

South Dakota.— Reilly *v.* Phillips, 4 S. D. 604, 608, 57 N. W. 780.

Tennessee.— Pillow *v.* Hardman, 3 Humphr. 538, 540, 541, 39 Am. Rep. 195.

Virginia.— Brent *v.* Washington, 18 Gratt. 526, 529.

United States.— Mutual L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 597, 6 S. Ct. 877, 29 L. ed. 997; Hammond *v.* Mason, etc., Organ Co., 92 U. S. 724, 726, 23 L. ed. 767; Pittel *v.* Fidelity Mut. L. Assoc., 86 Fed. 255, 257, 30 C. C. A. 21; Armstrong *v.* Mutual L. Ins. Co., 11 Fed. 573, 575, 20 Blatchf. 493; Thompson *v.* U. S., 20 Ct. Cl. 276, 278; Chaplin *v.* U. S., 19 Ct. Cl. 424, 425.

England.— Price *v.* Strange, 6 Madd. 159, 161, 22 Rev. Rep. 266, 56 Eng. Reprint 1052.

In other words, the executor in case of a will, or the administrator in case of intestacy. Tarrant *v.* Backus, 63 Conn. 283, 288, 28 Atl. 46.

2. *Alabama.*— Sullivan *v.* Louisville, etc., R. Co., 128 Ala. 77, 79, 30 So. 528.

Illinois.— Johnson *v.* Van Epps, 110 Ill. 551, 559, 560; Bowman *v.* Long, 89 Ill. 19, 21, 22; Warnecke *v.* Lembca, 71 Ill. 91, 12 Am. Rep. 85; Phelps *v.* Smith, 15 Ill. 572; Delaunay *v.* Burnett, 9 Ill. 454, 494.

Iowa.— Pardoe *v.* Iowa State Nat. Bank, 106 Iowa 345, 351, 76 N. W. 800; *In re* Conrad, 89 Iowa 396, 398, 56 N. W. 535, 48 Am. St. Rep. 396 [*citing* Anderson L. Dict.].

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 71, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761; Albert *v.* Albert, 68 Md. 352, 370, 12 Atl. 11.

Massachusetts.— Lodge *v.* Weld, 139 Mass. 499, 504, 2 N. E. 95; Cox *v.* Curwen, 118 Mass. 198, 200.

Mississippi.— Allen *v.* Alliance Trust Co., 84 Miss. 319, 322, 36 So. 285; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. 234, 275.

Missouri.— Loos *v.* John Hancock Mut. L. Ins. Co., 41 Mo. 538, 539; Hogan *v.* Welcker, 14 Mo. 177, 183; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211, 220.

New Jersey.— Golden Star Fraternity *v.* Martin, 59 N. J. L. 207, 212, 35 Atl. 908.

New York.— Matthews *v.* American Cent.

for example, they may be and indeed have very frequently been employed as meaning ALIENEE,[3] *q. v.*; assignee;[4] assignee for benefit of creditors;[5] assignee in bankruptcy;[6] brother or sister;[7] child;[8] DESCENDANT,[9] *q. v.*; lineal descendant;[10] DEVISEE,[11] *q. v.*; distributee;[12] grantee;[13] guardian;[14] HEIR,[15] *q. v.*; lawful

Ins. Co., 154 N. Y. 449, 456, 48 N. E. 751, 61 Am. St. Rep. 627, 39 L. R. A. 433; Griswold *v.* Sawyer, 125 N. Y. 411, 414, 26 N. E. 464; Leonard *v.* Harney, 63 N. Y. App. Div. 294, 299, 71 N. Y. Suppl. 546; Geoffroy *v.* Gilbert, 5 N. Y. App. Div. 98, 102, 38 N. Y. Suppl. 643.

Pennsylvania.— Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858; Weaver *v.* Roth, 105 Pa. St. 408, 412; Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327, 330; Com. *v.* Bryan, 6 Serg. & R. 81, 83; Duncan *v.* Walker, 1 Yeates 213, 220; Griffin *v.* Brower, 21 Pa. Co. Ct. 188, 190.

South Dakota.— Reilly *v.* Phillips, 4 S. D. 604, 608, 57 N. W. 780.

Tennessee.—Pillow *v.* Hardeman, 3 Humphr. 538, 540, 541, 39 Am. Rep. 195.

Virginia.— Brent *v.* Washington, 18 Gratt. 526, 533.

United States.— Mutual L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 597, 6 S. W. 877, 29 L. ed. 997; Ralston *v.* Sharon, 51 Fed. 702, 715.

3. Delaunay *v.* Burnett, 9 Ill. 454, 494; Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858.

4. Plummer *v.* Brown, 64 Cal. 429, 430, 1 Pac. 703; Warnecke *v.* Lembca, 71 Ill. 91, 95, 12 Am. Rep. 85; Thayer *v.* Pressey, 175 Mass. 225, 236, 56 N. E. 5; Allen *v.* Alliance Trust Co., 84 Miss. 319, 322, 36 So. 285; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234, 276; Merchants' Nat. Bank *v.* Abernathy, 32 Mo. App. 211, 220; Wamsley *v.* Crook, 3 Nebr. 344, 350; Hogan *v.* Page, 2 Wall. (U. S.) 605, 607, 17 L. ed. 854; Pittel *v.* Fidelity Mut. L. Assoc., 86 Fed. 255, 257, 30 C. C. A. 21. But see Fuller *v.* Davis, 63 Miss. 78, 80.

5. Henderson Nat. Bank *v.* Alves, 91 Ky. 142, 145, 15 S. W. 132, 12 Ky. L. Rep. 722; Louisville Trust Co. *v.* Kentucky Nat. Bank, 87 S. W. 143, 147.

6. National Bank *v.* Trimble, 40 Ohio St. 629; Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327, 329; Wright *v.* Greensburg Bank, 30 Fed. Cas. No. 18,078, 8 Biss. 243; Markson *v.* Kansas City First Nat. Bank, 16 Fed. Cas. No. 9,097; Crocker *v.* Chetopa First Nat. Bank, 6 Fed. Cas. No. 3,397, 4 Dill. 358, 361. But see Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858 [*distinguishing* Monongahela Nat. Bank *v.* Overholt, 96 Pa. St. 327, 330]; Barnett *v.* Muncie Nat. Bank, 2 Fed. Cas. No. 1,026 [*affirmed* in 98 U. S. 555, 25 L. ed. 212].

Trustee in bankruptcy not included see Firemen's Fund Ins. Co. *v.* Sims, 115 Ga. 939, 942, 42 S. E. 269.

7. Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 431, 4 Ohio N. P. 393.

8. Miller *v.* Metcalf, 77 Conn. 176, 181, 58 Atl. 743; Albert *v.* Albert, 68 Md. 352, 370, 12 Atl. 11; Greenwood *v.* Holbrook, 111 N. Y. 465, 471, 18 N. E. 711; Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 431, 4 Ohio N. P. 393; Stook's Appeal, 20 Pa. St. 349, 351.

9. Warnecke *v.* Lembca, 71 Ill. 91, 92, 12 Am. Rep. 85; Ewing *v.* Jones, 130 Ind. 247, 252, 29 N. E. 1057, 15 L. R. A. 75; Cox *v.* Curwen, 118 Mass. 198, 200; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234, 276; Greenwood *v.* Holbrook, 111 N. Y. 465, 471, 18 N. E. 711; Kelsay *v.* Eaton, 45 Oreg. 70, 76, 76 Pac. 770, 106 Am. St. Rep. 662.

10. Miller *v.* Metcalf, 77 Conn. 176, 181, 58 Atl. 743 [*citing* Staples *v.* Lewis, 71 Conn. 288, 41 Atl. 815]. *In re* Hess, 20 Ohio Cir. Ct. 703, 10 Ohio Cir. Dec. 823.

11. Allen *v.* Alliance Trust Co., 84 Miss. 319, 322, 36 So. 285; Wamsley *v.* Crook, 3 Nebr. 344, 350; Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 431, 4 Ohio N. P. 393; Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858; Stook's Appeal, 20 Pa. St. 349, 353. See also Stevenson *v.* Sullivant, 5 Wheat. (U. S.) 207, 257, 5 L. ed. 70. But see Newton *v.* Newton, 77 Tex. 508, 511, 14 S. W. 157.

12. Johnson *v.* Ames, 11 Pick. (Mass.) 173, 178.

13. "This formula, 'or his legal representatives,' embraces representatives of the original grantee in the land, by contract, such as assignees or grantees, as well as by operation of law." Malone *v.* Big Flat Gravel Min. Co., 93 Cal. 384, 390, 28 Pac. 1063; Warnecke *v.* Lembca, 71 Ill. 91, 95, 12 Am. Rep. 85; Delaunay *v.* Burnett, 9 Ill. 454, 494; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. (Miss.) 234, 276; Wamsley *v.* Crook, 3 Nebr. 344, 350; Hogan *v.* Page, 2 Wall. (U. S.) 605, 607, 17 L. ed. 854.

14. McLain *v.* Bedgood, 89 Ga. 793, 799, 15 S. E. 670; Johnson *v.* Ames, 11 Pick. (Mass.) 173, 178.

15. *Connecticut.*— Blakeman *v.* Sears, 74 Conn. 516, 520, 51 Atl. 517.

District of Columbia.— Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey 70, 80.

Illinois.— Stevens *v.* Shannahan, 160 Ill. 330, 343, 344, 43 N. E. 350; Warnecker *v.* Lembca, 71 Ill. 91, 93, 12 Am. Rep. 85; Delaunay *v.* Burnett, 9 Ill. 454, 494.

Indiana.— Ewing *v.* Jones, 130 Ind. 247, 251, 15 L. R. A. 75, 29 N. E. 1057.

Massachusetts.— Thayer *v.* Pressey, 175 Mass. 225, 236, 56 N. E. 5; Johnson *v.* Ames, 11 Pick. 173, 178.

Michigan.— Rivenett *v.* Bourquin, 53 Mich. 10, 13, 18 N. W. 537.

Minnesota.— Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 309, 61 N. W. 331; Ewing *v.* Warner, 47 Minn. 446, 447, 50 N. W. 603.

Mississippi.— Allen *v.* Alliance Trust Co., 84 Miss. 319, 322, 36 So. 285; Grand Gulf R., etc., Co. *v.* Bryan, 8 Sm. & M. 234, 275.

heir;[16] Issue,[17] *q. v.*; Legatee,[18] *q. v.*; next of kin;[19] one claiming by purchase or descent;[20] orphan;[21] purchaser;[22] purchaser at a sale of mortgaged property under decree of court;[23] receiver of an insolvent corporation;[24] successor;[25] widow;[26] a party in interest who has succeeded to the right of a deceased party;[27] a person in whom an estate legally vests;[28] one who represents rights by succession to a conveyance;[29] one who succeeds a grantee in the title of land;[30] one who succeeds to the inheritance of an estate;[31] one who succeeds to the legal rights of the insured by reason of his death or the transfer of the property, and not a mere agent of the insured;[32] one who would take under the statutes of distribution.[33] Sometimes the term is used as synonymous with "representative,"[34] "lawful representative,"[35] or "personal representative."[36] (See, generally, Executors and Administrators.)

Missouri.— Ewing *v.* Shannahan, 113 Mo. 188, 195, 20 S. W. 1065; Hogan *v.* Welcker, 14 Mo. 177, 183; Stewart *v.* Gibson, 71 Mo. App. 232, 235.

Nebraska.— Wamsley *v.* Crook, 3 Nebr. 344, 350.

New Jersey.— Chasy *v.* Gowdy, 43 N. J. Eq. 95, 96, 9 Atl. 580.

New York.— Griswold *v.* Sawyer, 125 N. Y. 411, 413, 26 N. E. 464; Greenwood *v.* Holbrook, 111 N. Y. 465, 469, 18 N. E. 711; Tillman *v.* Davis, 95 N. Y. 17, 25, 47 Am. Rep. 1; Geoffroy *v.* Gilbert, 15 Misc. 60, 62, 36 N. Y. Suppl. 884.

Ohio.— Rice *v.* White, 8 Ohio 216.

Pennsylvania.— Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858; Stooks' Appeal, 20 Pa. St. 349, 353; Com. *v.* Bryan, 6 Serg. & R. 81, 83; Duncan *v* Walker, 1 Yeates 213, 220, 2 Dall. 205, 1 L. ed. 350.

Texas.— Allen *v.* Stovall, 94 Tex. 618, 628, 63 S. W. 863, 64 S. W. 777.

16. Rivenett *v.* Bourquin, 53 Mich. 10, 13, 18 N. W. 537.

17. *In re* Hess, 20 Ohio Cir. Ct. 703, 10 Ohio Cir. Dec. 823.

18. Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey (D. C.) 70, 80; Allen *v.* Alliance Trust Co., 84 Miss. 319, 322, 36 So. 285; Thomas *v.* Lett, 6 Ohio S. & C. Pl. Dec. 429, 431, 4 Ohio N. P. 393. But see Newton *v.* Newton, 77 Tex. 508, 511, 14 S. W. 157.

19. *Illinois.*—Warnecke *v.* Lembca, 71 Ill. 91, 95, 12 Am. Rep. 85; Delaunay *v.* Burnett, 9 Ill. 454, 496.

Minnesota.— Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 309, 61 N. W. 331.

New Jersey.— Howell *v.* Gifford, 64 N. J. Eq. 180, 187, 53 Atl. 1074.

New York.— Griswold *v.* Sawyer, 125 N. Y. 411, 413, 26 N. E. 464; Greenwood *v.* Holbrook, 111 N. Y. 465, 471, 18 N. E. 711; Geoffroy *v.* Gilbert, 15 Misc. 60, 62, 36 N. Y. Suppl. 884; Drake *v.* Pell, 3 Edw. 251, 270; Phyfe *v.* Phyfe, 3 Bradf. Surr. 45, 52.

Oregon.— Kelsay *v.* Eaton, 45 Oreg. 70, 76, 76 Pac. 770, 106 Am. St. Rep. 662.

Pennsylvania.— Osborn *v.* Athens First Nat. Bank, 175 Pa. St. 494, 498, 34 Atl. 858 [*citing* Ralston *v.* Waln, 44 Pa. St. 279].

Tennessee.— Rose *v.* Wortham, 95 Tenn. 505, 511, 32 S. W. 458, 30 L. R. A. 609; Pillow *v.* Hardeman, 3 Humphr. 538, 540, 541, 39 Am. Rep. 195.

United States.— Pittel *v.* Fidelity Mut. L. Assoc., 86 Fed. 255, 257, 30 C. C. A. 21.

20. Wear *v.* Bryant, 5 Mo. 147, 164.

21. Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey (D. C.) 70, 80.

22. Warnecke *v.* Lembca, 71 Ill. 91, 95, 12 Am. Rep. 85; Phelps *v.* Smith, 15 Ill. 572, 575; Delaunay *v.* Burnett, 9 Ill. 454, 494. But see Hamilton *v.* Homer, 46 Miss. 378, 395 [*citing* 1 Stephen Comm. 353; 2 Blackstone Comm. 201; Coke Litt. 237*b*].

23. Oneale *v.* Caldwell, 18 Fed. Cas. No. 10,515, 3 Cranch C. C. 312.

24. Barbour *v.* National Exch. Bank, 45 Ohio St. 133, 137, 12 N. E. 5.

25. Pittel *v.* Fidelity Mut. L. Assoc., 86 Fed. 255, 257, 30 C. C. A. 21.

26. Masonic Mut. Relief Assoc. *v.* McAuley, 2 Mackey (D. C.) 70, 80; Griswold *v.* Sawyer, 125 N. Y. 411, 414, 26 N. E. 464 [*cited* in Lyons *v.* Yerex, 100 Mich. 214, 216, 58 N. W. 1112, 43 Am. St. Rep. 452].

27. Morehouse *v.* Phelps, 18 Ill. 472, 481.

28. Bridge *v.* Abbot, 3 Bro. Ch. 224, 227, 29 Eng. Reprint 502.

29. Thayer *v.* Pressey, 175 Mass. 225, 236, 56 N. E. 5 [*citing* Lodge *v.* Weld, 139 Mass. 499, 504, 2 N. E. 95].

30. Woodruff *v.* Woodruff, 44 N. J. Eq. 349, 352, 16 Atl. 4, 1 L. R. A. 380.

31. Thompson *v.* U. S., 20 Ct. Cl. 276, 278 [*citing* 2 Jarman Wills 120].

32. Metzger *v.* Manchester F. Assur. Co., 102 Mich. 334, 337, 63 N. W. 650.

33. Farnam *v.* Farnam, 53 Conn. 261, 290, 2 Atl. 325, 5 Atl. 682; Delaunay *v.* Burnett, 9 Ill. 454, 496; Ewing *v.* Warner, 47 Minn. 446, 447, 50 N. W. 603.

34. Brent *v.* Washington, 18 Gratt. (Va.) 526, 529; Staples *v.* Lewis, 71 Conn. 288, 290, 41 Atl. 815; Armstrong *v.* Mutual L. Ins. Co., 11 Fed. 573, 575, 20 Blatchf. 493 [*citing* Wason *v.* Colburn, 99 Mass. 342].

35. Lansdale *v.* Cox, 7 T. B. Mon. (Ky.) 401, 405.

36. Staples *v.* Lewis, 71 Conn. 288, 290, 41 Atl. 815.

Does not include: A husband see Saltmarsh *v.* Candia, 51 N. H. 71, 76; *In re* Lesieur, 205 Pa. St. 119, 122, 54 Atl. 579. Indorser of commercial paper see Barnett *v.* Muncie Nat. Bank, 2 Fed. Cas. No. 1,026 [*affirmed* in 98 U. S. 555, 25 L. ed. 212]. Judgment creditor see Barrett *v.* Shelbyville Nat. Bank, 85 Tenn. 426, 429, 3 S. W. 117.

LEGAL RESIDENCE. See Domicile.

LEGAL RIGHT. A capacity residing in one man of controlling with the assistance of the state, the action of others;[37] a right that may be enforced in a civil action.[38] (See, generally, Actions.)

LEGAL SERVICE. See Process.

LEGAL SETTLEMENT. See Paupers.

LEGAL STRIKE. See Labor Unions.

LEGAL SUBROGATION. See Subrogation.

LEGAL SUCCESSION. That succession which the law has established in favor of the nearest relation of the deceased.[39] (See, generally, Descent and Distribution.)

LEGAL TENDER. See Payment.

LEGAL TENDER NOTE. A genuine and current treasury note.[40] (See, generally, Payment.)

LEGAL VOTER. See Elections.

LEGATEE. The person to whom a legacy is given.[41] (Legatee: In General, see Wills. Alien, see Aliens. Concluded by Judgment, see Judgments. Revival of Action by, see Abatement and Revival.)

LEGATOS VIOLARE CONTRA JUS GENTIUM EST. A maxim meaning "It is contrary to the law of nations to injure ambassadors."[42]

LEGATUM MORTE TESTATORIS TANTUM CONFIRMATUR, SICUT DONATIO INTER VIVOS TRADITIONE SOLA. A maxim meaning "A legacy is confirmed by the death of a testator, in the same manner as a gift from a living person is by delivery alone."[43]

LEGATUS REGIS VICE FUNGITUR A QUO DESTINATUR ET HONORANDUS EST SICUT ILLE CUJUS VICEM GERIT. A maxim meaning "An ambassador fills the place of the king by whom he is sent, and is to be honored as he is whose place he fills."[44]

LEGEM ENIM CONTRACTUS DAT. A maxim meaning "The contract makes the law."[45]

LEGEM TERRÆ AMITTENTES, PERPETUAM INFAMIÆ NOTAM INDE MERITO INCURRUNT. A maxim meaning "Those who lose the law of the land, then justly incur the ineffaceable brand of infamy."[46]

LEGE RHODIA. Literally, "by the Rhodian law;" but more particularly, by that fragment of such law which treats of and relates to the subject of jettison, (*de jactu*) preserved in the Pandects.[47] (See, generally, Marine Insurance.)

LEGES ANGLIÆ SUNT TRIPARTITÆ,—JUS COMMUNE, CONSUETUDINES AC DECRETA COMITIORUM. A maxim meaning "The laws of England are threefold,—common law, customs, and decrees of parliament."[48]

LEGES COMMUNES SI NESCIT FŒMINA, MILES. A maxim meaning "If a woman is ignorant of the laws, her husband is presumed to know them, and to instruct her."[49]

Surviving partner see Sullivan *v.* Louisville, etc., R., Co., 128 Ala. 77, 79, 30 So. 528.

37. Holland El. Jur. (4th ed.) 70 [*quoted* in Winnipeg *v.* Barrett, 5 Cartwr. Cas. (Can.) 32, 131].

38. Colson *v.* Com., 110 Ky. 233, 255, 61 S. W. 46, 22 Ky. L. Rep. 1674. See also U. S. *v.* Fah Chung, 132 Fed. 109, 110. See also 6 Cyc. 705.

39. La. Civ. Code (1900), art. 877.

40. State *v.* Beebe, 17 Minn. 241, 249.

It is a contract on the part of the government to pay its nominal value in coin. O'Neil *v.* McKewn, 1 S. C. 147, 149.

41. Burrill L. Dict. [*citing* 2 Blackstone Comm. 512]. See also Pitman *v.* Stevens, 15 East 505, 510.

42. Black L. Dict.

43. Black L. Dict.

44. Black L. Dict.

45. Bouvier L. Dict.

Applied in Pearsall *v.* Hirsh, 59 N. Y. Super. Ct. 410, 412, 14 N. Y. Suppl. 305; Allen *v.* Merchants' Nat. Bank, 22 Wend. (N. Y.) 215, 233, 34 Am. Dec. 289; Reeves *v.* State Bank, 8 Ohio St. 465, 479; Brasell *v.* La Compagnie du Grand Troue, 11 Quebec Super. Ct. 150, 159.

46. Black L. Dict. [*citing* 3 Inst. 221].

47. Meech *v.* Robinson, 4 Whart. (Pa.) 360, 363, 34 Am. Dec. 514 [*citing* Dig. lib. 14, tit. 2, 1].

48. Black L. Dict.

49. Morgan Leg. Max.

LEGES FIGENDI ET REFIGENDI CONSUETUDO EST PERICULOSISSIMA. A maxim meaning "The practice of fixing and refixing [making and remaking] the laws is a most dangerous one."[50]

LEGES HUMANÆ NASCUNTUR, VIVUNT, ET MORIUNTUR. A maxim meaning "Human laws are born, live, and die."[51]

LEGES NATURÆ PERFECTISSIMÆ SUNT ET IMMUTABILES. A maxim meaning "The laws of nature are most perfect and immutable."[52]

LEGES NON SCRIPTÆ. Unwritten laws.[53] (See, generally, COMMON LAW; CUSTOMS AND USAGES. See also LAW.)

LEGES NON VERBIS SED REBUS SUNT IMPOSITÆ. A maxim meaning "Laws are imposed not on words but things."[54]

LEGES POSTERIORES PRIORES CONTRARIAS ABROGANT. A maxim meaning "Later laws repeal earlier laws inconsistent therewith."[55]

LEGES QUÆ RETROSPICIUNT RARO, ET MAGNA CUM CAUTIONE SUNT ADHIBENDÆ; NEQUE ENIM JANUS LOCARETUR IN LEGIBUS. A maxim meaning "Laws which are retrospective are rare, and to be received with great caution, for Janus should have no situation among the laws."[56]

LEGES SCRIPTÆ. Written laws.[57] (See, generally, STATUTES. See also LAW.)

LEGES SUUM LIGENT LATOREM. A maxim meaning "Laws should bind their own maker."[58]

LEGES VIGILANTIBUS, NON DORMIENTIBUS SUBVENIUNT. A maxim meaning "The laws aid the vigilant, not the negligent."[59]

LEGE TOTUM, SI VOS SCIRE TOTUM. A maxim meaning "Read all, if you would know all."[60]

LEGHORN CITRON. Citron preserved by being cut in halves, boiled and soaked in salt water, freshened, and covered with syrup and boiled down, and fresh sugar placed thereon.[61] (See CITRON; and, generally, CUSTOMS DUTIES.)

LEGIBUS SUMPTIS DESINENTIBUS, LEGE NATURÆ UTENDUM EST. A maxim meaning "When laws imposed by the state fail, we must act by the law of nature."[62]

LEGIS CONSTRUCTIO NON FACIT INJURIAM. A maxim meaning "The con-

50. Black L. Dict.
51. Black L. Dict.
52. Black L. Dict.
Applied in Calvin's Case, 7 Coke 1, 25*a*.
53. Burrill L. Dict.
54. Burrill L. Dict. [*citing* Branch Princ.].
55. Broom Leg. Max.
Applied or quoted in Prince George's County *v.* Laurel, 51 Md. 457, 465; Cumberland *v.* Magruder, 34 Md. 381, 387; Flaherty *v.* Thomas, 12 Allen (Mass.) 428, 434; State *v.* Vernon County Ct., 53 Mo. 128, 131; State *v.* Donnelly, 20 Nev. 214, 218, 19 Pac. 580; State *v.* Kelly, 34 N. J. L. 75, 76; State *v.* Shoemaker, 20 N. J. L. 153, 164; State *v.* Plunkett, 18 N. J. L. 5, 7; McNeely *v.* Woodruff, 13 N. J. L. 352, 356; Buckallew *v.* Ackerman, 8 N. J. L. 48; Astor *r.* New York, 37 N. Y. Super. Ct. 539, 569; Woodruff *v.* Dickie, 5 Rob. (N. Y.) 619, 629; Davidson *v.* New York, 2 Rob. (N. Y.) 230, 270; Raudebaugh *v.* Shelley, 6 Ohio St. 307, 316; Riley *v.* Willis, 5 Whart. (Pa.) 145, 148; Sowers *v.* Leibey, 4 Pa. Co. Ct. 223, 229; Lynd *v.* Biggs, 1 Pa. L. J. 47, 48; Fox *r.* Com., 16 Gratt. (Va.) 1, 8; Allen *r.* Com., 2 Leigh (Va.) 727, 731; Mackey *v.* Bell, 3 Hen. & M. (Va.) 199, 210; Livingston *v.* Story, 11 Pet. (U. S.) 351, 397, 9 L. ed. 746; Magill *v.* Brown, 16 Fed. Cas. No. 8,952, Brightly N. P. 346; Garnett *v.* Bradley, 3 App. Cas. 944, 966, 48 L. J. Exch. 186, 39 L. T. Rep. N. S. 261, 26 Wkly. Rep. 698; Middleton *v.* Crofts, 2 Atk. 650, 675, 2 Barn. 351, Cas. t. Hardw. 57, 2 Kel. C. C. 148, 2 Str. 1056, 26 Eng. Reprint 788; Harris *r.* Robinson, 2 C. B. 908, 910, 52 E. C. L. 908; Foster's Case, 11 Coke 56*b*, 62*b*; Porter's Case, 1 Coke 22*a*, 25*b*; Wynn *r.* Davies, 1 Curt. Eccl. 69, 79; Rex *v.* Abell, 1 L. J. K. B. O. S. 250, 251; Shadford *r.* Houstoun, 1 Str. 317, 360; *Ex p.* McCleave, 21 N. Brunsw. 315, 338; Reg. *r.* Sherman, 17 W. C. C. P. 166, 170.
56. Tayler L. Gloss.
57. Burrill L. Dict.
58. Burrill L. Dict. [*citing* Fleta lib. 1, c. 17, § 14].
59. Black L. Dict.
Applied in Griswold *v.* Butler, 3 Conn. 227, 233; Hanna *r.* His Creditors, 12 Mart. (La.) 32, 69; Toole *r.* Cook, 16 How. Pr. (N. Y.) 142, 145; Fanning *r.* Dunham, 5 Johns. Ch. (N. Y.) 122, 146, 9 Am. Dec. 283; Hoge *r.* Hoge, 1 Watts (Pa.) 163, 198, 26 Am. Dec. 52; Peebles *r.* Reading, 8 Serg. & R. (Pa.) 484, 494.
60. Morgan Leg. Max.
61. U. S. *r.* Nordlinger, 121 Fed. 690, 691, 58 C. C. A. 438.
62. Black L. Dict. [*citing* 2 Rolle 298].

struction of the law does no wrong; a construction made by the law works no injury."[63]

LEGIS INTERPRETATIO LEGIS VIM OBTINET. A maxim meaning "The interpretation of law obtains the force of law."[64]

LEGISLATE. To make laws.[65] (See CONSTITUTIONAL LAW.)

LEGISLATION. The exercise of sovereign power;[66] the act of giving or enacting laws.[67] (Legislation: In General, see CONSTITUTIONAL LAW; STATUTES. Contract to Influence, see CONTRACTS; Validity of, see CONSTITUTIONAL LAW; STATES.)

LEGISLATIVE.[68] That makes or enacts laws; law making;[69] giving laws and law giving;[70] making, giving, or enacting laws, relating or pertaining to the passing of laws;[71] of, or pertaining to legislation or to a legislature.[72] (Legislative: Divorce, see DIVORCE. Journal — In General, see STATUTES; Judicial Notice of, see EVIDENCE; Parol Evidence as to, see EVIDENCE. Power, see CONSTITUTIONAL LAW; EXECUTIVE; JUDICIAL; MINISTERIAL.)

LEGISLATIVE ACT.[73] An act which prescribes what the law shall be in future cases arising under it;[74] an act of the legislative department of the government, by which the law, to be applied in future cases under particular states of fact, is established in the form of a statute, ordinance, resolution, or other written form.[75] (See LEGISLATIVE.)

LEGISLATIVE DEPARTMENT. That department of the government which makes the laws;[76] the organ or organs of the government which make the law.[77] (See EXECUTIVE; JUDICIAL; LEGISLATURE.)

LEGISLATIVE OFFICE. An office which is understood as relating to the enactment of laws.[78] (See LEGISLATURE.)

LEGISLATIVE OFFICER. One whose duties relate mainly to the enactment of laws.[79] (See LEGISLATURE.)

63. Burrill L. Dict.

64. Black L. Dict.

65. Abbott L. Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93].

66. Rison *v.* Farr, 24 Ark. 161, 166, 87 Am. Dec. 52.

67. Wharton L. Lex. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93].

"Rightful subject of legislation" see Rankin *v.* Jauman, 4 Ida. 53, 64, 36 Pac. 502.

68. "Legislative intent" see People *v.* Sturges, 27 N. Y. App. Div. 387, 390, 50 N. Y. Suppl. 5.

"Legislative intention" see Lee Bros. Furniture Co. *v.* Cram, 63 Conn. 433, 438, 28 Atl. 540.

69. Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644].

70. State *v.* Fry, 4 Mo. 120, 189.

71. Zell Encycl. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93]. See also Webster Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93.

72. Worcester Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93].

73. Distinguished from "judicial act" see People *v.* Oakland Bd. of Education, 54 Cal. 375, 376; Philomath College *v.* Wyatt, 27 Oreg. 390, 468, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68; Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 761, 25 L. ed. 496. See also 23 Cyc. 1614 note 20.

"Legislative action" see Straub *v.* Pittsburgh, 138 Pa. St. 356, 360, 22 Atl. 93.

74. Union Pac. R. Co. *v.* U. S., 99 U. S. 700, 761, 25 L. ed. 496 [*quoted* in Tanner *v.* Nelson, 25 Utah 226, 233, 70 Pac. 984]. See also Smith *v.* Strother, 68 Cal. 194, 196, 197, 8 Pac. 852.

75. Smith *v.* Strother, 68 Cal. 194, 196, 197, 8 Pac. 852. See also People *v.* Sturtevant, 9 N. Y. 263, 273, 59 Am. Dec. 536; Seitzinger *v.* Tamaqua, 187 Pa. St. 539, 542, 41 Atl. 454; Wilkinson *v.* Leland, 2 Pet. (U. S.) 627, 660, 7 L. ed. 542.

"Legislative grant" see Citizens' St. R. Co. *v.* City R. Co., 56 Fed. 746, 750.

"Legislative permission" see Sammons *v.* Gloversville, 175 N. Y. 346, 352, 67 N. E. 622.

76. *In re* Davies, 168 N. Y. 89, 101, 61 N. E. 118, 56 L. R. A. 855.

77. Webster Dict. [*quoted* in *In re* Railroad Com'rs, 15 Nebr. 679, 682, 50 N. W. 276].

"Legislative body" see Buckstaff *v.* Hicks, 94 Wis. 34, 39, 68 N. W. 403, 59 Am. St. Rep. 853.

78. State *v.* Womack, 4 Wash. 19, 27, 29 Pac. 939.

79. Bouvier L. Dict. [*quoted* in State *v.* Kelly, 103 Mo. App. 711, 714, 77 S. W. 996; Braithwaite *v.* Cameron, 3 Okla. 630, 638, 38 Pac. 1084]. See also People *v.* Swift, 59 Mich. 529, 544, 26 N. W. 694.

LEGISLATIVE POWER.[80] The lawmaking power;[81] the power to make laws;[82] that power in a state which gives and makes laws for the people;[83] a power to enact laws or to declare what the law shall be;[84] the power to enact new rules for the regulation of future conduct, rights, and controversies.[85] (See CONSTITUTIONAL LAW.)

LEGISLATORUM EST VIVA VOX, REBUS ET NON VERBIS LEGEM IMPONERE. A maxim meaning "The voice of legislators is a living voice, to impose laws on things, and not on words."[86]

LEGISLATURE. A term used as synonymous with "general assembly";[87] the body of persons in the state clothed with authority to make laws.[88] (Legislature: Acts of, see STATUTES. Congress, see UNITED STATES. Contempt of, see STATES. Contract to Influence Act of, see CONTRACTS. Members—Apportionment of, see STATES; Election of, see ELECTIONS; STATES; Exemption From Arrest, see ARREST; Privilege of, see ARREST; EXECUTIONS; PROCESS; STATES. Powers of, see CONSTITUTIONAL LAW; STATUTES.)

LEGIS MINISTER NON TENETUR IN EXECUTIONE OFFICII, SUI, FUGERE AUT RETROCEDERE. A maxim meaning "The minister of the law is bound, in the execution of his office, not to fly nor to retreat."[89]

LEGIS VIRTUS HÆC EST; IMPERARE, VETARE, PERMITTERE, PUNIRE. A maxim meaning "The virtue of the law is this; to command, forbid, permit, and punish."[90]

LEGITIMACY. A status or social condition, and capacity to inherit is only one of its incidents.[91] (See, generally, BASTARDS.)

LEGITIMATE. As an adjective, LAWFUL,[92] *q. v.* As a noun, a person born in lawful wedlock.[93] As a verb, to make lawful, to legalize, and, in the case of an illegitimate, the plain and unambignous meaning is to render legitimate; to communicate the rights of a legitimate child to one who is illegitimate is to invest with the rights of a lawful heir.[94] (See, generally, BASTARDS.)

LEGITIMATE CAUSE. A debt.[95]

80. **Distinguished** from "judicial power" see 23 Cyc. 1620 note 64. See also CONSTITUTIONAL LAW.

81. State Treasurer *v.* Weeks, 4 Vt. 215, 222.

82. Wharton L. Lex. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 442, 21 N. E. 267, 4 L. R. A. 93].

83. State *v.* Fry, 4 Mo. 120, 189.

84. Anderson L. Dict. [*quoted* in Waters *v.* Townsend, 65 Ark. 613, 615, 47 S. W. 1054]. See also O'Neil *v.* American F. Ins. Co., 166 Pa. St. 72, 78, 30 Atl. 943, 45 Am. St. Rep. 650, 26 L. R. A. 715.

85. Cooley Const. Lim. 110–112 [*cited* in Waters *v.* Townsend, 65 Ark. 613, 615, 47 S. W. 1054].

Legislative power is "that one of the three great departments into which the powers of government are distributed — legislative, executive and judicial — which is concerned with enacting or establishing, and incidentally with repealing laws. Abbott L. Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93]. See also People *v.* Freeman, 80 Cal. 233, 234, 22 Pac. 173, 13 Am. St. Rep. 122. Forsyth *v.* Hammond, 71 Fed. 443, 451, 18 C. C. A. 175.

86. Black L. Dict.

87. State *v.* Gear, 5 Ohio S. & C. Pl. Dec. 569, 7 Ohio N. P. 551.

88. Abbott L. Dict. [*quoted* in State *v.* Hyde, 121 Ind. 20, 26, 22 N. E. 644; Evansville *v.* State, 118 Ind. 426, 441, 21 N. E. 267, 4 L. R. A. 93].

Legislature does not include the governor.— See Brooks *v.* Fischer, 79 Cal. 173, 176, 21 Pac. 652, 4 L. R. A. 429.

89. Burrill L. Dict. [*citing* Branch Princ.].

90. Peloubet Leg. Max. [*citing* Calvini Lex.].

91. Pratt *v.* Pratt, 5 Mo. App. 539, 541. See also Davenport *v.* Caldwell, 10 S. C. 317, 337; State *v.* Shumpert, 1 S. C. 85, 87.

92. Estes *v.* Fry, 22 Mo. App. 80, 88, as a "legitimate purpose."

"Legitimate purpose," as applied to the acts of a municipal corporation, is a term meaning such a purpose as is authorized by the municipal charter. Vaughn *v.* Greencastle, 104 Mo. App. 206, 209, 78 S. W. 50.

93. Swinney *v.* Klippert, 50 S. W. 841, 842, 20 Ky. L. Rep. 2014; Gates *v.* Seibert, 157 Mo. 254, 272, 57 S. W. 1065, 80 Am. St. Rep. 625; Killam *v.* Killam, 39 Pa. St. 120, 123; Wilson *v.* Babb, 18 S. C. 59, 69; Webster Dict. [*quoted* in Leonard *v.* Braswell, 99 Ky. 528, 538, 36 S. W. 684, 18 Ky. L. Rep. 395, 36 L. R. A. 707].

94. Webster Dict. [*quoted* in Leonard *v.* Braswell, 99 Ky. 528, 538, 36 S. W. 684, 18 Ky. L. Rep. 395, 36 L. R. A. 707; McKamie *v.* Baskerville, 86 Tenn. 459, 460, 7 S. W. 104]. See also Rockingham *v.* Mt. Holly, 26 Vt. 653, 657.

95. Miller *v.* Manhattan L. Ins. Co., 110

LEGITIMATE HEIR. See HEIR.

LEGITIMATE TAXATION. See TAXATION.[96]

LEGITIMATION. See ADOPTION OF CHILDREN; BASTARDS.

LEGITIME. In the civil law, the amount which the forced heir is entitled to collect for the succession;[97] that portion of his property which the testator cannot dispose of to the prejudice of his children, and which consequently accrues to them at his death.[98] (See, generally, DESCENT AND DISTRIBUTION.)

LEGITIME IMPERANTI PARERE NECESSE EST. A maxim meaning "One lawfully commanding must be obeyed."[99]

LEGIT VEL NON. Literally, "Does he read or not?" In old English practice, the question asked of the ordinary, on the trial, whether a prisoner claiming his clergy could read.[1] (See, generally, CRIMINAL LAW.)

LEGUMEN. In the English laws or customs relating to tithes, a word generally applicable to pulse, and may include tares.[2]

LEGUM OMNES SERVI SUMUS, UT LIBERI ESSE POSSUMUS. A maxim meaning "We are slaves to the law, in order that we may become free."[3]

LEMON PEEL PRESERVED. Lemons cut in two, and thrown into casks of brine, the pulp of which, when it has reached this country, has left half the lemon, and the fruit has been destroyed.[4] (See, generally, CUSTOMS DUTIES.)

LEND. To deliver to another for use, on condition that the thing loaned, or an equivalent of the kind, shall be returned;[5] the parting with a thing of value to another for a time fixed or indefinite, yet to have some time in ending, to be used or enjoyed by that other, the thing itself, or the equivalent of it, to be given back at the time fixed, or when lawfully asked for, with or without compensation for the use, as may be agreed on.[6] In the law of the wills, to give;[7] to give, bequeath or devise.[8] (See BORROW; DELIVER; LOAN; and, generally, BAILMENTS.)

LENGTH. The property of being long or extended in a single direction.[9]

LEPROSY. An infectious or contagious disease tending to cause one afflicted with it to be shunned or excluded from society.[10]

La. 652, 658, 34 So. 723, as used in Louisiana code.

96. See also Newby *v.* Platte County, 25 Mo. 258, 268.

97. Miller *v.* Miller, 105 La. 257, 261, 29 So. 802.

98. Cox *v.* Von Ahlepeldt, 50 La. Ann. 1266, 1269, 23 So. 959.

99. Black L. Dict. [*citing* Jenkins Cent. 120].

1. State *v.* Bilansky, 3 Minn. 246. See also Burrill L. Dict; Armstrong *v.* Lisle, 1 Salk. 60, 61, where it is said: "And then Sir Samuel Astry asked the ordinary, *Legit vel. non?* who answered, *legit*".

2. Daws *v.* Benn, 1 B. & C. 751, 764, 8 E. C. L. 316. See also 20 Cyc. 1288 note 62.

3. Morgan Leg. Max.

4. Hills Bros. Co. *v.* U. S., 113 Fed. 857, as used in the Tariff Act of 1897.

5. Kelley *v.* Lewis, 4 W. Va. 456, 461. See also Coleman *v.* State, 32 Ala. 581, 582; Osborne *v.* Carey, 5 Manitoba 237, 239 [*citing* Dufresne *v.* Dufresne, 10 Ont. 773; Hopkins *v.* Hopkins, 7 Ont. 224].

6. Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 177.

Lend an acceptance see Reynolds *v.* Doyle, 1 M. & G. 753, 756, 2 Scott N. R. 45, 39 E. C. L. 1009.

7. Britt *v.* Rawlings, 87 Ga. 146, 147, 13 S. E. 336; Hudgens *v.* Wilkins, 77 Ga. 555, 558; Pournell *v.* Harris, 29 Ga. 736, 742 [*citing* Deane *v.* Hansford, 9 Leigh (Va.) 253, 256]; Burch *v.* Burch, 19 Ga. 174, 185; Bryan *v.* Duncan, 11 Ga. 67, 75 [*cited* in Booth *v.* Terrell, 16 Ga. 20, 23]; Ga. Civ. Code (1895), § 3322, unless the context requires its restricted meaning. *Compare* Hinson *v.* Pickett, 1 Hill Eq. (S. C.) 35, 38; Loving *v.* Hunter, 8 Yerg. (Tenn.) 4, 29; Chapman *v.* Chapman, 90 Va. 409, 410.

Distinction between "lend" and "give" in ascertaining intention see Hudgens *v.* Wilkins, 77 Ga. 555, 558.

8. Holt *v.* Pickett, 111 Ala. 362, 367, 20 So. 432 [*citing* Lloyd *v.* Rambo, 35 Ala. 709; Ewing *v.* Standefer, 18 Ala. 400; Woodley *v.* Findley, 9 Ala. 716].

9. Century Dict. See also Miller *v.* Androscoggin Pulp Co., 17 Fed. Cas. No. 9,559, Holmes 142, 146.

Applied to a railroad see Herbert *v.* Baltimore, etc., R. Co., 8 Houst. (Del.) 120, 130, 13 Atl. 902; People *v.* Chapin, 106 N. Y. 265, 267, 12 N. E. 595.

10. Simpson *v.* Press Pub. Co., 33 Misc. (N. Y.) 228, 229, 67 N. Y. Suppl. 401 [*citing* Odgers L. & Sl. 53].

"The form of leprosy known by the name of elephantiasis is an African disease, which was common in Louisiana before the suppression of the slave trade, as it is at this day in the island of Cuba, where the trade is still carried on." Walker *v.* Ferriere, 6 La. Ann. 278.

LES EXCES. In the civil law, a term applied to acts of violence which exceed all measure and may put the life of the spouse in danger.[11] (See LES SEVICES.)

LESION. In the civil law the injury suffered by one who does not receive a full equivalent for what he gives in a commutative contract.[12] (Lesion: In Contract of Sale — Of Personalty, see SALES; Of Realty, see VENDOR AND PURCHASER.)

LESS. Literally, taking from — taking a smaller number, quantity or interest from a larger; the process of subtracting or withdrawing;[13] a term denoting quantity.[14] (See EXCEPT; MORE.)

LESSEE. A person to whom a lease is made;[15] an owner *pro tanto* of the estate which is leased to him.[16] (See, generally, LANDLORD AND TENANT.)

LESSEN. To make less; to reduce; to diminish; to abate; to decrease.[17]

LES SEVICES. In the civil law, acts of cruelty which do not put the life of the spouse in danger.[18] (See LES EXCES.)

LESSOR. A person who makes a conveyance by lease;[19] a person who grants a lease.[20] (See, generally, LANDLORD AND TENANT.)

LET. As a noun, in old conveyancing, hindrance; interruption.[21] As a verb, to allow; to permit;[22] to award;[23] to exchange;[24] to give;[25] to hire;[26] to DEMISE,[27] *q. v.*; to lease or grant the use and possession of a thing for compensation.[28] The

11. 2 Poullier Le Droit Civ. Français 41 [*quoted* in Butler *v.* Butler, 1 Pars. Eq. Cas. (Pa.) 329, 343].

12. La. Civ. Code (1900), art. 1860 [*cited* in Smart *v.* Bibbins, 109 La. 986, 987, 34 So. 49; Linkswiler *v.* Hoffman, 109 La. 948, 955, 34 So. 34].

13. Austin *v.* Willis, 90 Ala. 421, 424, 8 So. 94, where it is said: "A hundred less one, is the equivalent, or synonym of ninety and nine."

14. Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 375, 31 Am. Rep. 732.

"Less estate therein" see Swift *v.* Vermont Mut. F. Ins. Co., 18 Vt. 305, 313.

"Less expense account" see Sager *v.* Tupper, 38 Mich. 258, 264.

"Less than" see Mullen *v.* State, 96 Ind. 304; Wooddy *v.* Old Dominion Ins. Co., 31 Gratt. (Va.) 362, 375, 31 Am. Rep. 732; Millington *v.* Harwood, [1892] 2 Q. B. 166, 169, 61 L. J. Q. B. 582, 66 L. T. Rep. N. S. 576, 40 Wkly. Rep. 481; Garby *v.* Harris, 7 Exch. 591, 593, 16 Jur. 456, 21 L. J. Exch. 160; Jervis *v.* Tomkinson, 1 H. & N. 195, 203, 26 L. J. Exch. 41, 4 Wkly. Rep. 683.

"Less the credits" see Roberts *v.* Roberts, 122 N. C. 782, 783, 30 S. E. 347.

"Less the discount."— Frankfort Bank *v.* Johnson, 24 Me. 490, 497.

15. La. Civ. Code, art. 2677 [*quoted* in Viterbo *v.* Friedlander, 120 U. S. 707, 716, 7 S. Ct. 962, 30 L. ed. 776].

16. Gilligan *v.* Providence, 11 R. I. 258.

17. Webster Int. Dict.

"Lessen and reduce" as the opposite of "raise and advance" see Rex *v.* Bury, 4 B. C. 361, 362, 10 E. C. L. 615.

"Lessen or abridge" as words of similar import to "change or limit" see Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 6, 28 N. W. 685.

18. 2 Poullier Le Droit Civ. Français 41 [*quoted* in Butler *v.* Butler, 1 Pars. Eq. Cas. (Pa.) 329, 343].

19. Clark *v.* Hyatt, 55 N. Y. Super. Ct. 98, 105, 8 N. Y. St. 134, [*citing* Wharton L. Lex.].

20. La. Civ. Code, art. 2677 [*quoted* in Viterbo *v.* Friedlander, 120 U. S. 707, 716, 7 S. Ct. 962, 30 L. ed. 776].

21. Burrill L. Dict. See also Pearson *v.* Iles, Dougl. (3d ed.) 556.

22. Eberts *v.* Thompson, 113 Pa. St. 19, 23, 4 Atl. 194.

23. Black L. Dict., as "to let a contract." See LETTING.

24. King *v.* Fuller, 3 Cai. (N. Y.) 152, 153.

25. Grant *v.* Dabney, 19 Kan. 388, 389, 27 Am. Rep. 125.

26. Cartlidge *v.* Sloan, 124 Ala. 596, 599, 26 So. 918 [*citing* Bouvier L. Dict.]; Kinney *v.* Hynds, 7 Wyo. 22, 32, 49 Pac. 403, 52 Pac. 1081. See also Bramble *v.* Culmer, 78 Fed. 497, 501, 24 C. C. A. 182, as to the "demise" or "letting" of a vessel.

"Hired or let to hire" see The Volunteer, 28 Fed. Cas. No. 16,991, 1 Sumn. 551, 558.

"Let and hired" see Palmer *v.* Gracie, 18 Fed. Cas. No. 10,692, 4 Wash. C. C. 110.

"Let for hire" see Swetman *v.* Covington, 82 S. W. 386, 26 Ky. L. Rep. 701.

27. Jackson *v.* Silvernail, 15 Johns. (N. Y.) 278, 280; Mostyn *v.* West Mostyn Coal, etc., Co., 1 C. P. D. 145, 152, 45 L. J. C. P. 401, 34 L. T. Rep. N. S. 325, 24 Wkly. Rep. 401 [*cited* in Hart *v.* Windsor, 13 L. J. Exch. 129, 135, 12 M. & W. 68, 85]. See also Baxter *v.* Browne, 2 W. Bl. 973, 974; Doe *v.* Hogg, 1 C. & P. 160, 12 E. C. L. 102, 4 D. & R. 226, 16 E. C. L. 196. And *compare* Messent *v.* Reynolds, 3 C. B. 194, 203, 10 Jur. 550, 15 L. J. C. P. 226, 54 E. C. L. 194.

Distinguished from "demise" see Mershon *v.* Williams, 63 N. J. L. 398, 403, 404, 44 Atl. 211.

"Demise or let" see Wilkinson *v.* Clauson, 29 Minn. 91, 93, 12 N. W. 147.

"Let and underlet" see Lynde *v.* Hough, 27 Barb. (N. Y.) 415, 420.

28. Cartlidge *v.* Sloan, 124 Ala. 596, 599,

term is sometimes employed as equivalent to the expression "it is hereby ordered that."[29] (See, generally, BAILMENTS; LANDLORD AND TENANT. See also LETTING.)

LETHAL WEAPON. A deadly weapon.[30] (See DANGEROUS WEAPON; and, generally, ASSAULT AND BATTERY; HOMICIDE; WEAPONS.)

LETTER. One of the arbitrary marks or characters constituting the alphabet.[31] In correspondence, a writing;[32] a message in writing;[33] a written or printed message;[34] correspondence wholly or partly in writing;[35] a writing inclosed in an envelope and transmitted by mail.[36] In a technical sense, a superior word; a word to represent a class of mail matter that is in every business sense of so high a grade that all else becomes inferior in classification and in enumeration to it.[37] Metaphorically, the verbal expression; the strict literal meaning.[38] (Letter or Letters: As Evidence, see CRIMINAL LAW; DEPOSITIONS; EVIDENCE. Containing Threats, see THREATS. Contract by, see CONTRACTS. Decoy, see DECOY LETTERS. Evidence of Contents or Meaning of, see EVIDENCE. Forgery of, see FORGERY. Injunction Against Publication, see INJUNCTIONS. Inspection of, see DISCOVERY. Of Administration, see EXECUTORS AND ADMINISTRATORS. Of Attorney, see ATTORNEY AND CLIENT. Of Credit, see BANKS AND BANKING. Of Exchange, see COMMERCIAL PAPER. Of Guardianship, see GUARDIAN AND WARD. Of Marque and Reprisal, see WAR. Of Recommendation, see GUARANTY. Patent, see PATENTS. Rogatory, see DEPOSITIONS. Testamentary, see EXECUTORS AND ADMINISTRATORS.)

26 So. 918 [*citing* Bouvier L. Dict.]. See also Hunt *v.* Comstock, 15 Wend. (N. Y.) 665, 667.

As implying a concession or grant the word is the proper equivalent of *concessi* or *demisi*. Johnson Dict. [*cited* in Hemphill *v.* Eckfeldt, 5 Whart. (Pa.) 274, 277]. See also Abeel *v.* Radcliff, 13 Johns. (N. Y.) 297, 299, 7 Am. Dec. 377.

As employed in a lease, the word may be considered a translation of "*tradidi*," which is from "*trado*," signifying "to deliver, give, or yield up; surrender." Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 315, 316.

Employed in a deed, the word is used merely for the purpose of passing title to an estate described by other words introduced for that purpose. Krider *v.* Lafferty, 1 Whart. (Pa.) 303, 315, 316, 317.

29. As in the clauses: "Let an inventory be taken," "Let a family meeting be held as prayed for," "Let a writ of seizure and sale issue," etc. Ingram *v.* Laroussini, 50 La. Ann. 69, 76, 23 So. 498. See also *In re* Atwell, 140 Fed. 368, 370, quoting St. Paul who said: "Let all things be done decently and in order."

30. State *v.* Godfrey, 17 Oreg. 300, 306, 20 Pac. 625, 11 Am. St. Rep. 830, where it is said: "Of this class are guns, swords, knives, pistols, and the like, when used within striking distance from the victim; all others are lethal or not according to their capability to produce death or great bodily harm in the manner in which they are used."

31. Black L. Dict.

32. U. S. *v.* Gaylord, 17 Fed. 434, 441; U. S. *v.* Huggett, 40 Fed. 636, 640 [*citing* Bouvier L. Dict.; Webster Dict.].

Distinguished from "writing" see U. S. *v.* Ling, 61 Fed. 1001, 1002; U. S. *v.* Andrews, 58 Fed. 861, 863 [*affirmed* in 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023]. See also U. S. *v.* Warner, 59 Fed. 355, 356; U. S. *v.* Wilson, 58 Fed. 768, 769.

Type-written matter is included. U. S. *v.* Gaylord, 17 Fed. 438, 441.

A literary composition.— "Every letter is, in the general and proper sense of the term, a literary composition." Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 396.

33. Dwight *v.* Brewster, 1 Pick. (Mass.) 50, 56, 11 Am. Dec. 133.

34. U. S. *v.* Denicke, 35 Fed. 407, 409; U. S. *v.* Britton, 17 Fed. 731, 732.

35. Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531.

36. Larison *v.* State, 49 N. J. L. 256, 259, 9 Atl. 700, 60 Am. Rep. 606.

The term may include: A circular. U. S. *v.* Mason, 22 Fed. 707. *Compare* Dewees' Case, 7 Fed. Cas. No. 3,848, Chase 531. A sealed circular. U. S. *v.* Dauphin, 20 Fed. 625, 629. See also U. S. *v.* Noelke, 1 Fed. 426, 429. Marked words in a magazine sent to a person. State *v.* Wetherell, 70 Vt. 274, 275, 40 Atl. 728.

Contents of sealed matter only may be meant. Middleby *v.* Effler, 118 Fed. 261, 263, 55 C. C. A. 355.

Post-letter defined see 1 Vict. c. 36 [*quoted* in U. S. *v.* Rapp, 30 Fed. 818, 821].

A decoy letter is embraced within the term "letter." Goode *v.* U. S., 159 U. S. 663, 670, 16 S. Ct. 136, 40 L. ed. 297; U. S. *v.* Bethea, 44 Fed. 802; U. S. *v.* Dorsey, 40 Fed. 752, 753; U. S. *v.* Wight, 38 Fed. 106, 109; U. S. *v.* Cottingham, 25 Fed. Cas. No. 14,872, 2 Blatchf. 470; U. S. *v.* Foye, 25 Fed. Cas. No. 15,157, 1 Curt. 364, 367.

"Printed lottery ticket" not included. See U. S. *v.* Clark, 22 Fed. 708, 709.

37. U. S. *v.* Huggett, 40 Fed. 636, 640 [*citing* Henshaw *v.* Foster, 9 Pick. (Mass.) 312; Bouvier L. Dict.; Webster Dict.; Lawson Conc.].

38. As the letter of a statute, distinguished from its spirit. Black L. Dict. [*citing* Story Bailm. § 369]. See STATUTES.

LETTER BOOK. See Evidence.

LETTER BOX. A receptacle for receiving the deposit of letters.[39]

LETTER CARRIER. See Post-Office.

LETTER OF ADVICE. See Advice.

LETTER OF ATTORNEY. See Principal and Agent.

LETTER OF CREDENCE. See Ambassadors and Consuls.

LETTER OF CREDIT. A written instrument, addressed by one person to another, requesting the latter to give credit to the person in whose favor it is drawn.[40] (See, generally, Banks and Banking; Commercial Paper; Guaranty.)

LETTER OF EXCHANGE. A bill of exchange.[41] (See, generally, Commercial Paper.)

LETTER OF RECOMMENDATION. See Guaranty.

LETTERPRESS COPY. A well-known process, by which, after a letter has been written on ordinary paper, it is placed between the leaves of a book filled with tissue paper, the pages upon which the copy is desired being usually dampened somewhat for that purpose, after which such book is subject to great pressure by means of a hand or other press.[42]

LETTERS OF ADMINISTRATION. See Executors and Administrators.

LETTERS OF GUARDIANSHIP. See Guardian and Ward.

LETTERS OF MARQUE AND REPRISAL. See War.

LETTERS PATENT. See Patents.

LETTERS ROGATORY. See Depositions.

LETTERS TESTAMENTARY. See Executors and Administrators.

LETTING. An Americanism used to signify the act of putting out portions of work to be performed by contract.[43] (Letting: Contract—In General, see Contracts; By City, see Municipal Corporations; By County, see Counties; By State, see States; By Town, see Towns; By United States, see United States. See also Let.)

LEVANT. In old English law, rising up.[44]

LEVANT ET COUCHANT. Rising up and lying down.[45]

LEVARI FACIAS. Literally, "You cause to be levied."[46] A writ of execution directed to the sheriff for levying a sum of money upon a man's lands, tenements, goods and chattels;[47] a writ which commands the sheriff that, of the lands, goods, and chattels, of the debtor, he cause to be levied the sum recovered, so that he have it in court, to be delivered to the creditor.[48] The appropriate writ

39. See Duval *v.* Busch, 21 Abb. N. Cas. (N. Y.) 214, 216. See also 7 Cyc. 1101.

40. Cal. Civ. Code (1899), § 2858; Mont. Civ. Code (1895), § 3710; N. D. Rev. Codes (1899), § 4664; S. D. Civ. Code, (1903), § 2008.

Other definitions see 7 Cyc. 539; 20 Cyc. 1399.

41. English L. Dict.

42. Lawrence *v.* Merritt, 127 U. S. 113, 114, 8 S. Ct. 1099, 32 L. ed. 91, where it is said: "One or more impressions may thus be made of the written matter upon the leaves of this tissue paper."

43. Webster Dict. [*quoted* in Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33, 55].

44. Burrill L. Dict.

45. Burrill L. Dict.

"The term levant and couchant is a very old legal phrase, and in its primary sense means, "when the beasts or cattle of a stranger are come into another man's ground, and there having remained a certain good space of time." Carr *v.* Lambert, 3 H. & C. 499, 506.

Levancy and couchancy are a mode of admeasuring the common. Scholes *v.* Hargreaves, 5 T. R. 46, 48, 2 Rev. Rep. 532.

46. Burrill L. Dict.

47. Pentland *v.* Kelly, 6 Watts & S. (Pa.) 483, 484 [*citing* Jacob L. Dict.], where it is said: "It cannot be doubted that the levari facias, which is substituted for the fieri facias, inquisition and venditioni in the case of the mechanics' lien, is an execution."

A common-law writ.—"It is a great mistake to say that a levari facias is not a common-law writ. It was in common use before the writ of fieri facias was adopted. Under the feudal system the land of a feudatory could not be sold for the payment of debts; it could only be seized by the sheriff, and held to enforce payment; even goods could not be sold on that form of writ, which was in the nature of a distress, but the fieri facias was resorted to as a means of selling the goods, not the land. At an after-time the writ of elegit was devised as a means of selling one-half of the land. In Hart *v.* Homiller, 23 Pa. St. 39, see p. 43, it is said to be a common mode of enforcing the payment of specific liens in the Orphans' Court." Stewart *v.* Miller, 2 Pearson (Pa.) 358, 359.

48. Davis *v.* Richmond, 14 Mass. 473, 474, comparing and distinguishing other writs.

by which to sell land;[49] the ordinary writ for collecting charges upon land, as in the cases of mortgages, mechanics' liens, and municipal charges.[50] (See CAPIAS AD SATISFACIENDUM; FIERI FACIAS; and, generally, EXECUTIONS.)

LEVARI FACIAS DAMNA DE DISSEISITORIBUS. A writ formerly directed to the sheriff for the levying of damages, which a disseisor had been condemned to pay to the disseisee.[51]

LEVARI FACIAS QUANDO VICECOMES RETURNAVIT QUOD NON HABUIT EMPTORES. An old writ commanding the sheriff to sell the goods of a debtor which he had already taken, and had returned that he could not sell them; and as much more of the debtor's goods as would satisfy the whole debt.[52]

LEVARI FACIAS RESIDUUM DEBITI. An old writ directed to the sheriff for levying the remnant of a partly satisfied debt upon the lands and tenements or chattels of the debtor.[53]

LEVEE DISTRICT. See LEVEES.

"**In England,** the taking out of a capias ad satisfaciendum is considered to be an election to have the body, instead of the goods or lands; but his election is made by the creditor himself. Our writ of execution comprehending the capias fieri facias, and levari facias, the taking it out is in no degree indicative of the manner in which it is to be served." Lyman *v.* Lyman, 11 Mass. 317, 320. "By our statute, we have but one form of an execution, which includes a capias ad satisfaciendum, a levari facias as to the money of the debtor, and an extendi facias as to his lands." Ladd *v.* Blunt, 4 Mass. 402, 403.

49. McClelland *v.* Devilbiss, 1 Pa. Co. Ct. 613, 614.

50. "It is the proper process in equity. . . It is a well known form of writ, which even inexperienced clerks can issue without blundering; it requires no special order of the Court to obtain it, and it therefore accords best with the decree, for that gives the plaintiff a right to his money. *Ubi est eadem ratio, ibi debet esse idem jus.*" Hart *v.* Homiller, 23 Pa. St. 39, 43.

In Pennsylvania it "is the only execution proper on a judgment on a mechanic's lien." The court observed, "that by the statute of the state a mechanic's lien could only be enforced by levari facias,—a writ peculiar to the state of Pennsylvania,—and such a writ could not by law issue against a public body." National Foundry, etc., Works *v.* Oconto Water Co., 52 Fed. 43, 55 [*citing* Williams *v.* First School Dist., 18 Pa. St. 275].

51. Abbott L. Dict. [*citing* Cowell Int.].

52. Black L. Dict. [*citing* Cowell Int.].

53. Black L. Dict. [*citing* Cowell Int.].

LEVEES

By Archibald H. Throckmorton
Dean of College of Law, Central University of Kentucky

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CROSS-REFERENCES

For Matters Relating to:
Drains and Drainage, see DRAINS.
Eminent Domain, see EMINENT DOMAIN.
Rights and Liabilities With Respect to:
Navigable Waters, see NAVIGABLE WATERS.
Non-Navigable Waters, see WATERS.

I. DEFINITION.

A levee is an embankment on the margin of a river or other body of water to prevent inundation.[1]

II. CONSTRUCTION AND MAINTENANCE.

A. In General. Prior to 1879 the work of constructing and maintaining levees in the United States, and particularly along the Mississippi river, was wholly under the care of the several states. At first this duty was imposed

1. Royse *v.* Evansville, etc., R. Co., 160 Ind. 592, 67 N. E. 446; McAlpine *v.* Chicago Great Western R. Co., 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85; Coffin *v.* Portland, 27 Fed. 412.

Another definition is: "An artificial mound of earth intended exclusively as a protection from overflow." State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 142, 7 So. 226.

A secondary meaning, growing out of the purposes for which levees are commonly used, is "a landing place or quay" (Coffin *v.* Portland, 27 Fed. 412), "a place . . . for lading and unlading goods" (St. Paul *v.* Chicago, etc., R. Co., 63 Minn. 330, 351, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; McAlpine *v.* Chicago Great Western R. Co., 68 Kan. 207, 75 Pac. 73, 64 L. R. A. 85).

Distinguished from: "Embankment" see Dehon *v.* Lafourché Basin Levee Bd., 110 La. 767, 34 So. 770; State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 7 So. 226. "Street." see St. Paul *v.* Chicago, etc., R. Co., 63 Minn.

almost exclusively upon riparian landowners, each being required to construct and maintain the levees on his own land; but after the Civil war, because of the great changes wrought in the lower Mississippi valley by the devastation of the country and the emancipation of the slave labor, the landowners were relieved of this burdensome duty and it was imposed upon the state and its local political divisions.[2] Since 1879 the Federal government, under its authority over foreign and interstate commerce, has coöperated with the states in the construction and maintenance of these important public works.[3]

B. Constitutional and Statutory Provisions. The right of the state to construct and maintain levees, whether by direct action or through subordinate political divisions, is comprehended under the police power.[4]

C. Proceedings For Establishment. In some jurisdictions the construction of levees is undertaken by the state or local authorities on their own initiative;[5] in others, their establishment can only be undertaken upon the initiative of the persons to be affected, usually by petition.[6] Since, however, the construction of

330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184.

2. Surgi *v.* Matthews, 24 La. Ann. 613; Kennard *v.* Lafargue, 23 La. Ann. 168; Jefferson Parish Police Jury *v.* Tardos, 22 La. Ann. 58.

3. 21 U. S. St. at L. 37 [U. S. Comp. St. (1901) p. 3528]; 23 U. S. St. at L. 144 [U. S. Comp. St. (1901) p. 3530]; Dehon *v.* Lafourché Basin Levee Bd., 110 La. 767, 34 So. 770.

4. *California.*— Dean *v.* Davis, 51 Cal. 406.

Kansas.— Missouri, etc., R. Co. *v.* Cambern, 66 Kan. 365, 71 Pac. 809.

Louisiana.— Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244; Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Bass *v.* State, 34 La. Ann. 494; State *v.* Maginnis, 26 La. Ann. 558; State *v.* Clinton, 25 La. Ann. 401.

Mississippi.— Daily *v.* Swope, 47 Miss. 367; Alcorn *v.* Hamer, 38 Miss. 652; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

Missouri.— Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

New Jersey.— Tide-Water Co. *v.* Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634 [*affirming* 18 N. J. Eq. 54].

Tennessee.— Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

Washington.— Hansen *v.* Hammer, 15 Wash. 315, 46 Pac. 332.

See 32 Cent. Dig. tit. "Levees," §§ 2, 22.

The power and its limitations.— "The building of levees in Louisiana is a public enterprise or work which concerns directly at least half the people of the State, and incidentally the whole State. Of the propriety of constructing levees, the General Assembly is the exclusive judge, because we find in the constitution no limitation upon the right of the people, through the General Assembly, to exercise the power." State *v.* Maginnis, 26 La. Ann. 558, 559. But the state has no such power where the constitution forbids it to "contract any debt for works of internal improvement, or be a party in carrying on such works." State *v.* Froelich, 115 Wis. 32, 95 Am. St. Rep. 894, 58 L. R. A. 757. A constitutional and statutory provision "permitting the owners or occupants of lands to construct drains and ditches for agricultural and sanitary purposes across the lands of others" does not authorize the construction of a levee along a river, as an independent work, not connected with a system of drainage of lands for agricultural or sanitary purposes. Updike *v.* Wright, 81 Ill. 49. But the constitution of Illinois has been amended since the decision in Updike *v.* Wright, so as to allow the construction of a levee such as was therein declared unconstitutional. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600; O'Brien *v.* Wheelock, 95 Fed. 883, 37 C. C. A. 309 [*affirmed* in 184 U. S. 450, 22 S. Ct. 354, 46 L. ed. 636]. Under a constitutional provision forbidding any appropriation of money for a longer term than two years, money appropriated for the construction of a levee cannot be applied after the expiration of two years. Robertson *v.* Caldwell, 14 La. Ann. 864.

Validity of statutes.— An act entitled "An act to provide for the construction, reparation and protection of drains, ditches and levees across the lands of others, for agricultural, sanitary and mining purposes, and to provide for the organization of drainage districts" is not unconstitutional because embracing more than one subject, since the subject of the act is the protection of the land against surplus water. Blake *v.* People, 109 Ill. 504. And see Dehon *v.* Lafourché Basin Levee Bd., 110 La. 767, 34 So. 770. A statute requiring owners of an embankment along a river to repair the same upon notice to do so, and allowing repairs to be made at their expense upon their failure to make them is unconstitutional because providing no judicial method of determining the necessity of the repairs. Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738.

5. Lamb *v.* Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244; State *v.* Maginnis, 26 La. Ann. 558; Jefferson Parish Police Jury *v.* Tardos, 22 La. Ann. 58.

6. Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

such public works involves the taking of private property, the expenditure of large sums of money, and frequently the levying of levee taxes and assessments, all statutes must be strictly complied with or the proceedings will be void.[7]

D. Land on Which Levee May Be Constructed — 1. Nature of Authority to Take. Land taken by the state for the purpose of the construction of a levee is usually taken under the power of eminent domain;[8] but in at least one jurisdiction it is taken under the exercise, by the state, of its police power.[9]

2. Compensation. When taken under the power of eminent domain, under the constitutional provisions requiring compensation for private property taken for public purposes, the owner is entitled to compensation,[10] but when taken under the exercise of the police power, no compensation is made to the owner.[11]

3. Doctrine of Servitude in Louisiana.[12] By a doctrine of the civil law in force in Louisiana before its purchase by the United States, and still the law of Louisiana, lands abutting on navigable rivers and bayous are held by their owners subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation, the injury to the property being *damnum absque injuria*. Laws and regulations providing for the taking of such lands are not unconstitutional because in violation of the state constitution providing that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid,"[13] nor of the section of the fourteenth amendment of the constitution of the United States which provides "nor shall any state deprive any person of life, liberty, or property without due process of law."[14]

4. Power Strictly Construed.[15] A statute authorizing the taking of land in

7. Royse *v.* Evansville, etc., R. Co., 160 Ind. 592, 67 N. E. 446; Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

The authorization of a levee also authorizes such work as is "strictly needful" for its proper construction. Dehon *v.* Lafourché Basin Levee Bd., 110 La. 767, 34 So. 770.

Under the Illinois statute, which authorizes drainage commissioners to use district funds for the construction or repair of ditches and levees within or without the district, it is not essential that the petition asking for an assessment to repair a levee should specify where the desired work is to be done in order to authorize the expenditure of the assessment in repairing the levee at a point outside the district. Hosmer *v.* Hunt Drainage Dist., 134 Ill. 300, 26 N. E. 584.

8. *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321; Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738; Chicot County Levee Inspectors *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418. See Eminent Domain, 15 Cyc. 594.

9. Bass *v.* State, 34 La. Ann. 494; La. Civ. Code, art. 665 (661).

10. *Ex p.* Martin, 13 Ark. 198, 58 Am. Dec. 321; Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738. See also *infra*, II, G.

11. Eldridge *v.* Trezevant, 160 U. S. 452, 16 S. Ct. 345, 40 L. ed. 490.

12. **The state of Arkansas has never claimed such a servitude,** whether it existed upon all the lands bordering on the Mississippi river within all the original Louisiana territory or not. Chicot County Levee Inspectors, etc. *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418.

13. Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244; Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Ruch *v.* New Orleans, 43 La. Ann. 275, 9 So. 473; Dubose *v.* Carroll Parish Levee Com'rs, 11 La. Ann. 165; Remy *v.* Municipality No. 2, 11 La. Ann. 148; Zenor *v.* Concordia Parish, 7 La. Ann. 150; Eldridge *v.* Trezevant, 160 U. S. 452, 16 S. Ct. 345, 40 L. ed. 490; Hart *v.* Orleans Parish Levee Com'rs, 54 Fed. 559; La. Civ. Code, art. 665 (661).

Even though the destruction of buildings is required.— Hanson *v.* Lafayette, 18 La. 295.

A landowner does not cease to be a riparian proprietor, nor escape from the servitude, by the condemnation of a strip of his land along the river for a public road or street. Ruch *v.* New Orleans, 43 La. Ann. 275, 9 So. 473.

More land may be taken from time to time as the river encroaches on the bank. Ruch *v.* New Orleans, 43 La. Ann. 275, 9 So. 473; Bass *v.* State, 34 La. Ann. 494.

But property away from the Mississippi river, owing no servitude for levees, must be paid for when expropriated for a levee. Koerber *v.* New Orleans Levee Bd., 51 La. Ann. 523, 25 So. 415; Pontchartrain R. Co. *v.* Orleans Levee Dist. Com'rs, 49 La. Ann. 570, 21 So. 765.

A non-navigable bayou lying wholly within the state may be closed in the construction of the public levee system of the state. Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244.

14. Eldridge *v.* Trezevant, 160 U. S. 452, 16 S. Ct. 345, 40 L. ed. 490.

15. **No abandonment of a public levee can**

one county for a levee does not authorize the taking of any land in an adjoining county,[16] although necessary for protection of the district.

E. Contracts For Construction.[17] The conveyance of land in consideration of the construction of a levee constitutes a contract, for the violation of which an action will lie against the parish for damages,[18] but where no time is stipulated for the letting of the contract or erection of the levee a reasonable time is allowed.[19] The fact that private parties have bound themselves to pay additional funds to a contractor to whom the work of construction of a public levee has been awarded does not impair the public character of the work or affect its control by the state.[20]

F. Liability and Lien For Cost of Construction and Maintenance — 1. LIABILITY FOR. There can be no recovery against either a state or its local subdivisions or boards or against individuals for the cost of construction and maintenance of levees, unless the statutes and police regulations have been strictly complied with.[21] Since the riparian proprietors on the Mississippi are not now bound to maintain the levees on their lands, they are not liable to third persons for expenses voluntarily incurred in closing a crevasse on their lands.[22]

2. LIEN FOR — a. When Existing. In Louisiana,[23] prior to their repeal by the statute of Feb. 27, 1866, the statutes imposed the duty of constructing and maintaining levees upon riparian landowners, and upon their failure to execute such work, when notified, it might be done under the direction of the police juries of the parish, and the cost recovered from the delinquent landowners, whose land was subject to a privilege or lien for the amount and might be sold to satisfy it. These statutes were strictly construed, and no lien existed nor was any sale valid, unless their provisions were strictly complied with.[24]

be claimed, when, ever since its construction, it had, in times of high water, been taken possession of by the public and repaired. Driver *v.* St. Francis Levee Dist., 70 Ark. 358, 68 S. W. 26. For dedication of property for levee see DEDICATION, 13 Cyc. 449 note 16.

16. Louisiana, etc., R. Co. *v.* Tensas Basin Levee Dist. Com'rs, 87 Fed. 594, 31 C. C. A. 121.

17. **Building contracts** generally see BUILDERS AND ARCHITECTS, 1 Cyc. 1 *et seq.* See also Yazoo, etc., Delta Levee Com'rs *v.* Short, (Miss. 1905) 38 So. 330.

Rescission or cancellation.— A contract by which a railroad company agreed with a Louisiana levee district to build a portion of its railroad in Arkansas, in the form of a levee embankment, in violation of Arkansas statutes, and in opposition to Arkansas levee authorities, is impossible of performance, and should be rescinded. Louisiana, etc., R. Co. *v.* Tensas Basin Levee Dist. Com'rs, 87 Fed. 594, 31 C. C. A. 121. For cancellation of contracts for levees under Louisiana statutes see Louisiana, etc., R. Co. *v.* Tensas Basin Levee Dist. Com'rs, *supra.*

18. Lindsey *v.* Point Coupee Parish Police Jury, 16 La. Ann. 389.

19. Lindsey *v.* Point Coupee Parish Police Jury, 16 La. Ann. 389. See CONTRACTS, 9 Cyc. 611.

20. Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244.

21. Young *v.* Concordia Police Jury, 32 La. Ann. 392; Neely *v.* Tensas Parish Police Jury, 4 La. Ann. 181. Under a statute providing that a town should be liable for expenses incurred in the erection of a dike or levee after the collection of certain local assessments, the town was not liable until the assessments were collected. Hendrick *v.* West Springfield, 107 Mass. 541.

If a police jury orders a person to build a levee, and accepts it when built, they are liable for the reasonable price therefor. Cavalier *v.* Jefferson Parish Police Jury, 24 La. Ann. 272.

Under La. Acts (1874), No. 4, creating the Louisiana levee company, and providing for the levy of a tax for the creation of a levee construction fund, plaintiff's claim for construction and maintaining levees is a debt against and payable out of the fund thereby created, and is not a charge against the state. Louisiana Levee Co. *v.* State, 31 La. Ann. 250; State *v.* Maginnis, 26 La. Ann. 558; State *v.* Clinton, 25 La. Ann. 401.

22. New Orleans, etc., R. Co. *v.* Turcan, 46 La. Ann. 155, 15 So. 187.

In Pennsylvania no duty lies on the owner of flat or cripple lands between high and low water mark, on the bank of a river, to shut out the stream by the construction of a bank or levee; but where the state, under her police power, at her own expense, has banked out the water and left the owner in possession of the land thus protected, the duty to repair the bank falls on him. Philadelphia *v.* Scott, 81 Pa. St. 80, 22 Am. Rep. 738.

23. **In Mississippi** see Skipwith *v.* Dodd, 24 Miss. 487.

For early New Jersey statute see Jones *v.* Lore, 3 N. J. L. 1048.

24. For cases under these statutes see

b. Registration. A privilege or lien on land acquired by repairs to a levee under contract with the owner of the land,[25] or by direction of the police jury,[26] is not superior to the lien of a mortgage on the land, unless registered as provided by law.

G. Injuries From Construction or Maintenance[27] — **1. In General.** Under a constitution providing for compensation to the landowner for so much of his property as is "taken, appropriated, or damaged," the landowner is entitled to compensation not only for damages by the original construction of a levee,[28] but also for damages inflicted in its repair.[29] Under such provisions damages may be recovered by a landowner whose land is flooded by a stream dammed up by the levee, although none of his land is actually taken.[30]

2. Defects. Where it is the duty of a riparian proprietor to maintain a levee on his land, he is liable to third parties for damages resulting to them from his failure or neglect to do so.[31] A corporation, however, employed by the state to

Foley *v.* Hagan, 23 La. Ann. 286; O'Connor *v.* Stewart, 19 La. Ann. 127; White *v.* Winn, 15 La. Ann. 552; Semel *v.* Gould, 12 La. Ann. 225; East Baton Rouge Police Jury *v.* McDonough, 10 La. Ann. 395; Morancy *v.* Madison Police Jury, 10 La. Ann. 222; Lepretre *v.* General Council, 8 La. Ann. 22; Armstrong *v.* Madison Police Jury, 6 La. Ann. 177; Smith *v.* Hereford, 6 La. Ann. 100; Williams *v.* Le Blanc, 5 La. Ann. 125; Hereford *v.* West Baton Rouge Police Jury, 4 La. Ann. 172; Knox *v.* West Baton Rouge Police Jury, 4 La. Ann. 62; O'Reilly *v.* Oakey, 4 La. Ann. 21; Crowley *v.* Concordia Parish, 3 La. Ann. 224; Jeannin *v.* Millaudon, 5 Rob. (La.) 76; Newcomb *v.* East Baton Rouge Police Jury, 4 Rob. (La.) 233; Pointe Coupee Police Jury *v.* Gardiner, 2 Rob. (La.) 139; Winchester *v.* Cain, 1 Rob. (La.) 421; De Verbois *v.* Navy, 12 La. 247; Weinprender *v.* His Creditors, 5 La. 349; Hiriart *v.* Morgan, 5 La. 43; McDonough *v.* Duplantier, 1 La. 223; Croizet *v.* Point Coupee Police Jury, 1 La. 103; New Orleans Police Jury *v.* Hampton, 5 Mart. N. S. (La.) 389; Bouligny *v.* Dormenon, 2 Mart. N. S. (La.) 455; New Orleans Police Jury *v.* McDonogh, 7 Mart. (La.) 8; Fortier *v.* McDonogh, 4 Mart. (La.) 718; Syndics *v.* Mayhew, 4 Mart. (La.) 175.

25. Foley *v.* Hagan, 23 La. Ann. 285.

26. Wheelwright *v.* St. Louis, etc., Ocean Canal, etc., Co., 48 La. Ann. 606, 19 So. 591.

27. **Liability of United States** for injury caused by construction see United States.

28. Duncan *v.* Mississippi Levee Com'rs, 74 Miss. 125, 20 So. 838; Richardson *v.* Levee Com'rs, 68 Miss. 539, 9 So. 351; Yazoo-Mississippi Delta Levee Com'rs *v.* Harkleroads, 62 Miss. 807. See Eminent Domain, 15 Cyc. 652 *et seq.* See also *supra*, II, D, 2.

29. Chicot County Levee Com'rs *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418.

Under Miss. Const. § 238, no compensation can be recovered for damages to land "because of its being left outside a levee." Thus he cannot recover damages because such land is left without protection or for the expense of removing buildings from such land, but may recover damages for the obstruction of the drainage of such land by the levee. Ham *v.* Yazoo-Mississippi Delta Levee Com'rs, 83 Miss. 534, 35 So. 943; Duncan *v.* Mississippi Levee Com'rs, 74 Miss. 125, 20 So. 838; Richardson *v.* Levee Com'rs, 68 Miss. 539, 9 So. 351; Yazoo-Mississippi Delta Levee Com'rs *v.* Harkleroads, 62 Miss. 807. "Damages produced by independent causes, other than being left outside the levee, if in their nature allowable within the rules of law, are still recoverable." Duncan *v.* Mississippi Levee Com'rs, 74 Miss. 125, 128, 20 So. 838. That all other damage which is not remote, and arises directly from the taking of part for levee purposes, resulting to the owner's adjacent land immediately from the construction of the levee, is to be compensated for, seems as clear as the denial of damage by the river. Richardson *v.* Levee Com'rs, 68 Miss. 539, 9 So. 351.

In proceedings on appeal, the auditor cannot be heard to deny that plaintiff was the owner of the land on which the levee was located, since it will be presumed that this fact was properly found by the jury in assessing the damages. Auditor *v.* Crise, 20 Ark. 540; Crise *v.* Auditor, 17 Ark. 572.

30. Hughes *v.* Mississippi Levee Com'rs, (Miss. 1900) 27 So. 744.

31. Savannah, etc., R. Co. *v.* Lawton, 75 Ga. 192 (where a railroad company purchased low land near a river, having on it a wall constituting part of a system adopted by adjoining proprietors to prevent flooding); Le Blanc *v.* Pittman, 16 La. Ann. 430.

It is no defense to an action for damages for improper construction of a levee that the obstruction to drainage complained of occurred many years before, limitations not having been pleaded, nor that plaintiff would have sustained equal damage if the levee had not been constructed at all. Bader *v.* St. Francis Levee Dist., 110 Mo. App. 599, 85 S. W. 654.

When a municipality, acting under authority of a statute (Spellman *v.* Caledonia, 117 Wis. 254, 97 N. W. 271), or upon a license given it by the owners of lands along a natural watercourse (Hamilton *v.* Ashbrook, 62 Ohio St. 511, 57 N. E. 239), constructs levees for the purpose of confining its waters, it does not thereby undertake that the levees are sufficient to protect such lands from over-

build levees as directed by a commissioner of engineers and according to a standard fixed by the engineers is not liable for injuries by inundation by crevasses before the appointment of engineers,[32] or where it has not been directed by the engineers to build the levee or had not failed to do the work according to the standard fixed by the engineers.[33]

3. Consequential Damages. Levee or drainage districts are not liable for damages resulting from the erection along a stream of a levee which, by reason of keeping the stream within its banks at the point where erected, causes the stream to overflow other lands situated upon the river.[34] Nor may an action be maintained by a landowner to subject the public funds of such district to the payment of damages resulting to his land from the carelessness, negligence, recklessness, or unscientific work in the construction of a levee by the agents and employees of said board.[35]

4. Damages When Payable. Except in cases of urgent public necessity, land cannot be lawfully taken or damaged in the construction or repair of a levee before condemnation or the payment of damages therefor.[36]

H. Injuries to Levees. The unlawful destruction, cutting, or injury of levees is not only punishable criminally,[37] but also subjects the perpetrator to an action for damages by persons sustaining special injuries.[38]

III. Levee Districts, Boards, Companies, and Officers.

A. Districts — 1. Nature and Creation in General — a. Definition. A levee district is a quasi-public corporation, created by the state, under its police power, for the performance of certain prescribed governmental functions in the district, such as the prevention of the overflowing or inundation of lands.[39] It is simply a

flow, nor does it engage to maintain them. Otherwise, where injury results from defective construction. Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210.

32. Louque *v.* Louisiana Levee Co., 27 La. Ann. 134.

33. Choppin *v.* Louisiana Levee Co., 30 La. Ann. 345.

34. Lamb *v.* Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; Elmore *v.* Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; Russell, etc., Drainage Dist. *v.* Pinkstaff, 41 Ill. App. 504.

Nor for injury resulting to a fishery.—Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85, 35 Am. Rep. 632.

Damnum absque injuria.— Losses resulting from such erections are said to be too remote or consequential and hence *damnum absque injuria.* Lamb *v.* Reclamation Dist. No. 108, 73 Cal. 125, 14 Pac. 625, 2 Am. St. Rep. 775; Tinicum Fishing Co. *v.* Carter, 90 Pa. St. 85, 35 Am. Rep. 632. See also 1 Cyc. 645 *et seq.*

35. Elmore *v.* Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; Nugent *v.* Mississippi Levee Com'rs, 58 Miss. 197, 214, in which the court said: "This fund the commissioners may bind by acts done in pursuance of law, and to the extent allowed by law. Any other disposition of it would be a violation of law, and therefore void. Their inability to divert the fund is total. It cannot be removed or lessened by the commission of a wrong to another. Whoever has been injured by their wrongful act must look alone to the wrong-doer for redress, not to innocent tax-payers whose funds have been committed to the charge of the commissioners."

36. Hughes *v.* Mississippi Levee Com'rs, (Miss. 1900) 27 So. 744. See also 15 Cyc. 775 *et seq.*

Under early Arkansas statutes, upon an application for mandamus to compel the auditor to issue his warrant for damages from the construction of a levee on petitioner's land, he must allege and prove that the levee has been placed under contract, or is in process of construction. Auditor *v.* Crise, 20 Ark. 540; Crise *v.* Auditor, 17 Ark. 572; *Ex p.* Crise, 16 Ark. 193.

37. State *v.* Casimere, 43 La. Ann. 442, 9 So. 438; Booksh *v.* Dardenne, 36 La. Ann. 342; Jefferson Police Jury *v.* Eastman, 9 Rob. (La.) 297. See also the statutes of the several states.

38. Newcomb *v.* Tisdale, 62 Cal. 575, holding, however, that justification on the ground of urgent necessity to save life and property may be interposed.

39. *California.*— Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 1038; Quint *v.* Hoffman, 103 Cal. 506, 37 Pac. 514; Reclamation Dist. No. 124 *v.* Gray, 95 Cal. 601, 30 Pac. 779; Hoke *v.* Perdue, 62 Cal. 545; People *v.* Williams, 56 Cal. 647; People *v.* Reclamation Dist. No. 108, 53 Cal. 346; Dean *v.* Davis, 51 Cal. 406.

Illinois.— Elmore *v.* Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363;

governmental agency, of the same nature as a county taxing district, or school-district, for the performance of certain governmental functions.[40]

b. How Created. Such a district can be created not only by the means and in the manner provided by the general law, but also by special act,[41] or by implication of law, as by legislative recognition subsequent to its organization,[42] and it is not necessary that the statute expressly declare it a corporation.[43]

c. How Validity Attacked. When organized under the forms of law, it becomes at least a corporation *de facto* and the validity of the proceedings leading up to its creation and organization is not subject to collateral attack,[44] and may be questioned only by a proceeding in the name of the state,[45] such as a writ

Mason, etc., Spec. Drainage Dist. Com'rs *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Blake *v.* People, 109 Ill. 504.

Mississippi.— Nugent *v.* Mississippi Levee Com'rs, 58 Miss. 197.

Missouri.— State *v.* Wall, 153 Mo. 216, 54 S. W. 465; Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

Wisconsin.— State *v.* Stewart, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394.

Nature of such districts.— The term "quasi-corporation" applies to a body which exercises certain functions of a corporate character, but has not been created a corporation by any statute. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590. "Such corporations are sometimes denominated quasi corporations, for the reason that they have not all the powers which belong to corporations by the common law, or all those which are usually possessed by municipal corporations; but as they possess all the powers, either by express grant or necessary implication, which are requisite for the performance of the duties enjoined upon them by law, they are to be regarded as public corporations for municipal purposes." People *v.* Reclamation Dist. No. 108, 53 Cal. 346, 348. "If these districts can be said to be corporations at all, I think they are properly called public corporations for municipal purposes. That phrase means no more than that they are state organizations for state purposes." People *v.* Reclamation Dist. No. 551, 117 Cal. 114, 120, 48 Pac. 1016, per Temple, J. See also People *v.* Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676 [*modifying* 63 Pac. 342]; People *v.* Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016. "There can be no question that levee boards, under the Constitution, are bodies politic entirely separate and distinct from municipal corporations for the purpose of taxation." United R., etc., Co. *v.* Meyers, 112 La. 897, 905, 36 So. 797. "It is a public political subdivision of the State, which the State has the power to create, under its police powers, and as such subdivision it exercises the prescribed functions of government in the district." Morrison *v.* Morey, 146 Mo. 543, 561, 48 S. W. 629. Levee district is not a political corporation within the meaning of a statute which forbids the pledging of the credit "of the State, or of any political corporation thereof." Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882.

40. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; People *v.* Levee Dist. No. 6, 131 Cal. 30, 63 Pac. 676 [*modifying* 63 Pac. 342]; People *v.* Reclamation Dist. No. 551, 117 Cal. 114, 48 Pac. 1016; Koerber *v.* Orleans Levee Dist. Bd., 51 La. Ann. 523, 25 So. 415; Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

"A levee district is a mere functionary of the State . . . one of the instrumentalities which the General Assembly may use in performing its duty of maintaining a levee system in the State." Hughes *v.* Caddo Levee Dist. Com'rs, 108 La. 146, 151, 32 So. 218.

Duties the legislature itself is not authorized to perform may be devolved by it upon such district. Hughes *v.* Caddo Levee Dist. Com'rs, 108 La. 146, 32 So. 218.

41. St. Louis, etc., R. Co. *v.* Grayson, (Ark. 1904) 78 S. W. 777.

Although the constitution forbids the creation except by general law of either a private corporation or a corporation for municipal purposes, a levee district may be created by special act of the legislature. People *v.* Reclamation Dist., 117 Cal. 114, 48 Pac. 1016 [*approved* in People *v.* Levee Dist., 131 Cal. 30, 63 Pac. 676 (*modifying* 63 Pac. 342)]; Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725. "These districts, in my opinion, belong to neither of these classes. They are special organizations, formed to perform certain work, which the policy of the state requires or permits to be done." People *v.* Reclamation Dist., 117 Cal. 114, 121, 48 Pac. 1016, per Temple, J.

A special act establishing a drainage district for the purpose of maintaining a particular levee does not suspend the general law on the subject of levees, nor is it repealed by the subsequent passage of a general law. St. Louis Southwestern R. Co. *v.* Grayson, 72 Ark. 119, 78 S. W. 777.

42. Reclamation Dist. *v.* Gray, 95 Cal. 601, 30 Pac. 779; People *v.* Reclamation Dist., 53 Cal. 346.

43. Dean *v.* Davis, 51 Cal. 406.

44. See cases cited *infra*, note 45.

45. Reclamation Dist. *v.* Turner, 104 Cal. 334, 37 Pac. 1038; Quirt *v.* Hoffman, 103 Cal. 506, 37 Pac. 514; Hoke *v.* Perdue, 62 Cal. 545; Dean *v.* Davis, 51 Cal. 406; Mason, etc., Com'rs *v.* Griffin, 134 Ill. 330, 25 N. E. 995; Blake *v.* People, 109 Ill. 504.

of quo warranto,[46] scire facias,[47] or certiorari.[48] But a levee district organized under an unconstitutional law is not even a corporation *de facto*, and its existence may be questioned in a collateral proceeding.[49]

2. Proceedings For Organization. In some jurisdictions levee districts are created directly by the legislature;[50] but more frequently authority is conferred upon the county courts,[51] boards of supervisors,[52] or other local authorities to organize such districts upon petition of landowners within the proposed district.[53]

3. Territory Included.[54] The same territory cannot legally be made part of two levee districts.[55] Under a statute authorizing the construction of a levee in one county,[56] no power is granted to extend a portion of the levee into an adjoining county.[57]

B. Boards, Commissioners, Etc. — 1. In General. The governing power of levee districts is usually vested in boards of commissioners.[58] Since the levee district is a political subdivision of the state, the levee commissioners are public officers endowed with a corporate being only for the purpose of the public trust confided to them.[59]

2. Powers. Such boards, from the very nature of their duties in protecting

46. People *v.* Reclamation Dist., 117 Cal. 114, 48 Pac. 1016; Blake *v.* People, 109 Ill. 504.

47. Mason, etc., Com'rs *v.* Griffin, 134 Ill. 330, 25 N. E. 995.

48. Mason, etc., Com'rs *v.* Griffin, 134 Ill. 330, 25 N. E. 995.

49. Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562.

Arkansas statutes construed see Pratt *v.* Dudley, 73 Ark. 536, 84 S. W. 781.

50. Wilkinson *v.* Langridge, 51 La. Ann. 189, 24 So. 790.

51. State *v.* Wall, 153 Mo. 216, 54 S. W. 465; Johnston *v.* Galveston Co., (Tex. Civ. App. 1905) 85 S. W. 511.

52. De Baker *v.* Batcheller, 97 Cal. 472, 32 Pac. 512.

53. See the statutes of the several states.

In California, by St. (1891) p. 30, petition must be signed by a majority of the landowners within the proposed district. De Baker *v.* Batcheller, 97 Cal. 472, 32 Pac. 512. When organization is based on a petition, it must conform strictly to the statutory requirements. Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562. A statute which directs that on the presentation of a petition, the board of supervisors "shall at once proceed" to erect a levee district, without giving them any discretion to reject the petition, change the boundaries of the district, or otherwise exercise any discretion, is unconstitutional as an improper delegation of legislative powers to interested individuals. Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562; Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613.

Illinois act of May 29, 1879, requiring a petition for the formation of a drainage district to be presented to the county court, and the finding of certain facts as a prerequisite to its creation as a corporation, is not invalid as authorizing the county court to create the corporation, since it is the statute itself, and not the court, which brings into existence the corporation. Blake *v.* People, 109 Ill. 504.

The territory to be included within the district should be carefully described in the statute or petition upon which the organization of the district is based. De Baker *v.* Batcheller, 97 Cal. 472, 32 Pac. 512. But where the petition is required to be published, it is not necessary that a plot referred to in the petition be also published. De Baker *v.* Batcheller, 97 Cal. 472, 32 Pac. 512. What territory included see *infra*, III, A, 3.

54. Islands bounded on one side by the Gulf of Mexico proper, and surrounded by its waters, must be held to lie "in" the gulf, and not included in the levee district described as "between the Bayou La Fourche, the Mississippi river and the Gulf of Mexico," although an island surrounded by inland waters is not necessarily outside a levee district. Wilkinson *v.* Langridge, 51 La. Ann. 189, 24 So. 790.

Description of territory to be included see *supra*, note 53.

55. Abascal *v.* Bouny, 37 La. Ann. 538.

56. City in a county.— A statute authorizing counties to construct sea walls authorizes a county to construct a sea wall in a city in the county. Johnston *v.* Galveston County, (Tex. Civ. App. 1905) 85 S. W. 511.

57. Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613.

58. See the statutes of the several states.

59. Nugent *v.* Mississippi Levee Com'rs, 58 Miss. 197.

A levee board when superseded in its functions by a law dividing the district and creating a new corporation for one portion, and placing the other under charge of the local authorities, ceases to exist, except so far as its existence is expressly continued for special objects, such as settling up its indebtedness, etc. Barkley *v.* Levee Com'rs, 93 U. S. 258, 23 L. ed. 893.

A trustee of a reclamation district is disqualified from acting with respect to the acquisition by the district of a levee owned by himself. Reclamation Dist. *v.* Turner, 104 Cal. 334, 37 Pac. 1038.

their respective districts against sudden inundations,[60] are vested with plenary power and large discretion in the location, erection, and repair of levees.[61] They may accordingly determine the amount of land needful in constructing or repairing levees,[62] may abandon a levee and build one in another place, or otherwise change the line of the levee.[63]

3. Control by Courts. The courts will not control the action of such boards on the ground alone that they have acted hastily or unwisely.[64] But in cases of gross or arbitrary abuse of their powers they may be restrained by the courts.[65]

4. Contracts. A contract by a levee board of one state for the construction of a levee in another state without the coöperation of the authorities of the latter is *ultra vires* and void.[66] Nor has a levee board any power to donate to a private corporation land granted to it for the purpose of enabling it to establish a levee system.[67]

5. Personal Liability. In case of wanton or gross abuse of their powers by levee commissioners resulting in damage to individuals, they are personally liable for such damages upon suit by the parties injured.[68]

C. Police Juries. The legislature may constitutionally delegate to police juries or other local authorities power to pass such ordinances as they may deem necessary in regard to levees,[69] as for their protection and preservation.[70]

D. Companies. It is within the power of the legislature to create a levee company and to invest it with the necessary authority to construct levees.[71]

E. Funds—1. How Obtained. Statutes creating levee districts also provide

60. "The very nature of the ever shifting yet ever present danger of ruin by flood, against which the levees are designed to guard, renders it imperative that the board should have the fullest latitude in dealing with each situation as it may arise and confront them." Ham *v.* Yazoo-Mississippi Delta Com'rs, 83 Miss. 534, 553, 35 So. 943.

In emergency cases the commissioners, without waiting until there is an actual break in the levee, or a certainty there will be one, may enter on private property and take earth for the repair of a levee (Koerber *v.* New Orleans Levee Bd., 51 La. Ann. 523, 25 So. 415), but it must restore his property as it was before or compensate him fully (Koerber *v.* Orleans Levee Bd., 52 La. Ann. 2110, 28 So. 318).

61. Myers *v.* Rolfe, 71 Ark. 215, 72 S. W. 52; Missouri, etc., R. Co. *v.* Camberu, 66 Kan. 365, 71 Pac. 809; Glass *v.* Concordia Parish, 113 La. 544, 37 So. 189; Orleans Dist. Levee Com'rs *v.* Jackson, 113 La. 124, 36 So. 912; Sauter *v.* Vidalia, 110 La. 377, 34 So. 558; Egan *v.* Hart, 45 La. Ann. 1358, 14 So. 244; Dubose *v.* Levee Com'rs, 11 La. Ann. 165; Gillespie *v.* Concordia Police Jury, 5 La. Ann. 403; Hanson *v.* Lafayette, 18 La. 295; Hemingway *v.* Stansell, 106 U. S. 399, 1 S. Ct. 473, 27 L. ed. 245.

62. Chicot County Levee Inspectors *v.* Crittenden, 94 Fed. 613, 36 C. C. A. 418. See also Orleans Dist. Levee Com'rs *v.* Jackson, 113 La. 124, 36 So. 912.

63. Ham *v.* Yazoo-Mississippi Delta Levee Com'rs, 83 Miss. 534, 35 So. 943.

64. Ham *v.* Yazoo-Mississippi Delta Levee Com'rs, 83 Miss. 534, 35 So. 943.

65. Orleans Levee Dist. Com'rs *v.* Jackson, 113 La. 124, 36 So. 912.

66. Louisiana, etc., R. Co. *v.* Tensas Basin Levee Dist. Com'rs, 87 Fed. 594, 31 C. C. A. 121.

67. State *v.* Smith, 104 La. 370, 29 So. 40.

But it may contract with a railroad company to build a portion of its road over the land in the form of a levee embankment, since to the extent it would protect the district it was a "public improvement," contemplated by the statute, although owned at its completion by a private corporation. Louisiana, etc., R. Co. *v.* Tensas Basin Levee Dist. Com'rs, 87 Fed. 594, 31 C. C. A. 121.

68. Elmore *v.* Mason City Drainage Com'rs, 135 Ill. 269, 25 N. E. 1010, 25 Am. St. Rep. 363; Russell, etc., Drainage Dist. *v.* Pinkstaff, 41 Ill. App. 504; Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Dubose *v.* Carroll Parish Levee Com'rs, 11 La. Ann. 165; Nugent *v.* Mississippi Levee Com'rs, 58 Miss. 197.

Who not liable.—Where a statute authorizes the levee commissioners to erect only such levees as are approved by the state board of engineers, the exclusive authority to locate levees is devolved upon the engineers and neither the commissioners nor the district is liable in damages by reason of such location. Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490. See also *supra*, II, G.

69. St. John the Baptist Parish *v.* Shexnaydre, 34 La. Ann. 850; Hunsicker *v.* Briscoe, 12 La. Ann. 169.

70. A statute prohibiting police juries and city authorities from contracting debts without providing in the same ordinance for their payment does not extend to levee districts. Hughes *v.* Caddo Levee Dist. Com'rs, 108 La. 146, 32 So. 218.

71. Choppin *v.* Louisiana Levee Co., 30 La. Ann. 345; Columbia Bottom Levee Co. *v.*

for the creation of funds to pay their obligations, either by the levying of taxes or assessments,[72] or by the sale of bonds.[73]

2. When Bonds Void.[74] If the statute is unconstitutional,[75] or if the bonds or other certificates of indebtedness are not issued strictly in accordance therewith,[76] they are void.

3. How Funds Applied. The funds thus created are held by the commissioner or other officers in trust,[77] for the purposes expressed in the statute. Taxes received and lands forfeited may not be diverted by subsequent act of the legislature,[78] nor to the payment of damages caused by the negligent or other wrongful conduct of the commissioners.[79]

4. Warrants. Obligations are usually paid by the issuance of warrants against the custodian of the levee funds.[80] These warrants do not bear interest, unless expressly or by necessary implication so authorized by statute.[81]

Meier, 39 Mo. 53; Egyptian Levee Co. *v.* Harlin, 27 Mo. 495, 72 Am. Dec. 276.

72. Anderson *v.* Issaquema County, 75 Miss. 873, 23 So. 310.

Taxes and assessments see *infra*, IV.

A law appropriating certain taxes, when collected, to levee purposes is not unconstitutional as violating the obligation of contracts as against one holding a prior warrant against the general fund of the state. Fisher *v.* Steele, 39 La. Ann. 447, 1 So. 882.

Under La. acts (1892), No. 46, § 20, suit against sheriff for default in paying over levee taxes collected should be brought by the state. Pearce *v.* State, 49 La. Ann. 643, 21 So. 737.

Payable out of district funds.— Although the obligations of a levee district are made payable by the levee treasurer of the county, they are payable only out of the funds of the district in which the work was done, and the county is not liable thereon. Boro *v.* Phillips County, 3 Fed. Cas. No. 1,663, 4 Dill. 216.

73. Ellis *v.* Pontchartrain Levee Dist. Com'rs, 43 La. Ann. 33, 8 So. 914; Munson *v.* Atchafalaya Basin Levee Dist. Com'rs, 43 La. Ann. 15, 8 So. 906; Ham *v.* Yazoo-Mississippi Delta Levee Com'rs, 83 Miss. 534, 35 So. 943.

Bonds of levee district are not void since neither the district nor the board of directors thereof is a "municipality" under a provision of the constitution prohibiting a county, city, town, or municipality from issuing any interest-bearing evidences of debt, except to pay an existing indebtedness. Memphis Trust Co. *v.* St. Francis Levee Dist., 69 Ark. 284, 62 S. W. 902.

Where bonds are issued under a statute providing that certain taxes shall constitute a fund for their payment, a subsequent statute relieving a portion of the land from the taxes is unconstitutional as violating the obligation of a contract. Woodruff *v.* State, 77 Miss. 68, 25 So. 483. Bonds for construction of levees authorized by statute, expressly payable out of the assessments on lands of the district benefited, are not an increase of municipal indebtedness, within Mo. Const. art. 10, § 12, limiting the same. Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

74. Validity of entire issue of bonds is determined by final decree of supreme court affirming validity of one of the issue. State *v.* Board of Liquidators, 29 La. Ann. 690.

75. Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

Even though the district retained the proceeds arising from their sale, and paid interest on them for several years, the rule still holds good. Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562.

76. Boro *v.* Phillips County, 3 Fed. Cas. No. 1,663, 4 Dill. 216.

77. Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

Repeal of law creating district.— Where taxes are collected for the benefit of a levee district, and the laws creating the district are repealed, without the taxes having been expended, they constitute a trust fund in the hands of a board of levee and drainage commissioners subsequently created for the same district for the purposes for which the district was recreated. And the county court has no jurisdiction to require the collector of taxes to refund taxes paid for the benefit of a levee district created by a valid statute, although the act creating the district has been repealed. Collier *v.* Campbell Lumber Co., (Ark. 1905) 86 S. W. 295.

78. Gibbs *v.* Green, 54 Miss. 592; Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590.

79. Peart *v.* Meeker, 45 La. Ann. 421, 12 So. 490; Lowe *v.* Yazoo-Mississippi Delta Levee Com'rs, (Miss. 1896) 19 So. 346.

80. See the statutes of the several states.

Orders drawn against funds not at the time in the hands of the treasurer were valid under Miss. Laws (1850), p. 214, § 9, as amended by Laws (1857), p. 87. Anderson *v.* Issaquena County, 75 Miss. 873, 23 So. 310.

There is no consideration for warrants of a diking district issued to purchase warrants of a prior diking district, the latter having been issued under a statute which had been declared unconstitutional, and no method of payment thereof having been provided by the legislature. Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

Such warrants may, by statute, be made receivable for taxes.— Prescott *v.* McNamara, 73 Cal. 236, 14 Pac. 877.

81. Anderson *v.* Issaquena County, 75 Miss. 873, 23 So. 310.

F. Actions — **1. Right to Sue or Be Sued.** The capacity of levee boards, commissioners, and companies to sue and be sued is governed by statute.[82]

2. Parties.[83] Who are proper parties in such actions is dependent on the statutes.[84]

3. Jurisdiction. Jurisdiction to administer the trust funds of levee districts for the benefit of the bondholders is vested in the courts of equity.[85] A levee district board engaged only in the exercise of public duties and functions, although authorized to sue and to be sued, has a local *situs*, and cannot be sued outside the state of its domicile.[86]

4. Form of Action — **a. Ejectment.**[87] Under a statute providing that the remedy of a landowner by ad quod damnum proceedings "shall be exclusive of all other remedies," ejectment will not lie against a levee board to recover land taken for levee purposes.[88]

b. Injunction.[89] Injunction is the proper remedy to prevent the payment of warrants alleged to be illegal.[90]

c. Mandamus.[91] Where the duty is imposed by statute on a county court to levy a tax for levee purposes, it may be compelled by mandamus to perform its duty.[92] Wherever discretion is conferred, however, mandamus does not lie.[93]

5. Pleading.[94] In a suit against a levee company for damages caused by a crevasse the petition in order to set forth a *prima facie* cause of action must allege facts sufficient to constitute a failure or violation on the part of the company of duties imposed by statute.[95]

6. Evidence.[96] In an action for damages, caused by defective construction of a levee, evidence of the amount required to put the levee in proper condition is admissible as to the amount of damages.[97]

82. Louisiana Levee Co. *v.* State, 31 La. Ann. 250.

For actions under former Lonisiana statutes see Gastel *v.* McGenty, 20 La. Ann. 431; Levee Com'rs *v.* Harris, 20 La. Ann. 201; Brown *v.* Madison Police Jury, 4 La. Ann. 180; Croizet *v.* Point Coupee Police Jury, 1 La. 103; New Orleans Police Jury *v.* McDonogh, 7 Mart. 8.

83. Parties generally see Parties.

84. See the statutes of the several states.

Under a statute giving a board of levee commissioners the capacity to sue and be sued and granting them perpetual succession, and under a subsequent statute substituting the auditor and treasurer of the state for the commissioners, the auditor and treasurer can be sued, and the state is a proper party, but in the absence of direct authority to sue the land commissioner, he cannot be sued. State *v.* Woodruff, 83 Miss. 111, 36 So. 79, 37 So. 706.

A diking district is not a necessary party defendant to a suit by taxpayers to enjoin payment of its warrants, the question at issue being their validity, which depends on the construction of a statute; and the collection and disbursement of the dike taxes being in the hands of the county treasurer, free from control of the district. Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

In Iowa, under Code, § 2545, which provides that "all persons having an interest . . in obtaining the relief demanded, may be joined as plaintiffs," different owners of land, assessed for the construction of a levee, may join in an action to quash the proceedings. Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

85. Gibbs *v.* Green, 54 Miss. 592. See also Pratt *v.* Dudley, 73 Ark. 536, 84 S. W. 781, holding that a proceeding in chancery is the proper mode for the levee commissioners created by Ark. Acts (1901), p. 27, to recover from the county treasurer funds collected by him for levee purposes pursuant to Ark. Acts (1883), p. 157.

86. St. Francis Levee Dist. *v.* Bodkin, 108 Tenn. 700, 69 S. W. 270.

87. **Ejectment** generally see Ejectment.

88. Owens *v.* Yazoo-Mississippi Delta Levee Com'rs, 74 Miss. 269, 21 So. 12.

89. **Injunction** generally see Injunctions.

90. Abbott *v.* Gaches, 20 Wash. 517, 56 Pac. 28.

91. **Mandamus** generally see Mandamus.

92. Boro *v.* Phillips County, 3 Fed. Cas. No. 1,663, 4 Dill. 216.

A statute which purports to provide a summary remedy by mandamus to enforce the obligations of certain corporations to repair levees cannot be construed as extending to an obligation to construct a new levee. State *v.* New Orleans, etc., R. Co., 42 La. Ann. 138, 7 So. 226.

93. State *v.* Board of Liquidators, 29 La. Ann. 690.

94. **Matters relating to pleading** generally see Pleading.

95. Choppin *v.* Louisiana Levee Co., 30 La. Ann. 345.

96. **Evidence** generally see Evidence.

97. Barden *v.* Portage, 79 Wis. 126, 48 N. W. 210.

IV. TAXES AND ASSESSMENTS.

A. Taxes — 1. Power of Legislature to Levy. Subject to the provisions of the state and federal constitutions, the legislatures of the several states have full power to levy taxes for the erection and maintenance of levees [98] as public works within the sphere of the police power.[99] This power may be exercised directly by the legislature, by the levy of a tax upon the whole state,[1] or may be delegated by it to local authorities for the levy of taxes within their respective jurisdiction.[2] Under many of the more recent state constitutions, however, the power of the legislature to levy taxes for such purposes is greatly circumscribed,[3] and where the legislature exceeds its constitutional powers the statute is void.[4]

2. Nature of the Tax. A special tax for levee purposes, as distinguished from an assessment,[5] is a charge imposed upon all the subjects within the district included, on which the state imposes a tax for general purposes.[6]

B. Assessments — 1. Their Nature. Local assessments for levee purposes, while levied under the taxing power, in its broadest sense,[7] are not strictly speaking taxes, but are charges upon particular property specially benefited by the levee and are imposed, not as a burden, but in return for the benefits conferred.[8]

For proceedings on appeal to the court as to the amount of the assessment see Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600.

98. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; McGehee *v.* Mathis, 21 Ark. 40; Wallace *v.* Shelton, 14 La. Ann. 498. A statute which authorizes the levee commissioners to levy a tax on the "assessed valuation" of the property does not contemplate a new valuation and assessment. Hollingsworth *v.* Thompson, 45 La. Ann. 222, 12 So. 1, 40 Am. St. Rep. 220.

Levees are not "an internal improvement and local concern," within the meaning of Ark. Const. art. 6, § 9, providing that the county court shall have jurisdiction in all matters relating to the internal improvements and local concerns of the respective counties, and hence a statute granting to a board of levee inspectors power to adjust the levying and assessment of taxes for levees is not unconstitutional. McGehee *v.* Mathis, 21 Ark. 40.

99. State *v.* Clinton, 25 La. Ann. 401; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

"The building of levees in Louisiana is a public enterprise or work which concerns directly at least half the people of the State, and incidentally the whole State. Of the propriety of constructing levees, the General Assembly is the exclusive judge, because we find in the constitution no limitation upon the right of the people, through the General Assembly, to exercise the power. They have the right to assess a tax and to expend the money arising therefrom, if they choose, in the construction of levees, or in the erection of such public works as they may deem beneficial." State *v.* Maginnis, 26 La. Ann. 558.

1. State *v.* Maginnis, 26 La. Ann. 558.

2. McGehee *v.* Mathis, 21 Ark. 40; State *v.* Cage, 34 La. Ann. 506; Gillespie *v.* Concordia Parish Police Jury, 5 La. Ann. 403.

3. See the constitutions of the several states.

4. *In re* Bonds of Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 65 Am. St. Rep. 106, 14 L. R. A. 755; Brandenstein *v.* Hoke, 101 Cal. 131, 35 Pac. 562; Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613; Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

5. See *infra*, IV, B, 1.

6. It is essential to its nature as a tax that it be uniform throughout the district, and be levied in proportion to the value of the property upon which it falls, without any attention being paid to the benefits to be conferred. People *v.* Whyler, 41 Cal. 351; Munson *v.* Atchafalaya Basin Levee Com'rs, 43 La. Ann. 15, 8 So. 906; Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

7. Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873; Charnock *v.* Levee Dist. Co., 38 La. Ann. 323, 325, where it is said: "The exaction of such contributions is an exercise of the taxing power, in its broadest sense. There is nothing in this case to support the assessment as an exercise of the police power or of the power of eminent domain, and unless we are to attribute it to some 'vagrant power,' there is no other source from which it can spring except the power of taxation."

Assessments according to the value of the land, and not according to the amount of benefits received by each parcel, to pay for public improvements in an irrigation district, are not unconstitutional, unless by force of an express constitutional provision, as such assessments are included in the inherent power of taxation, which is not limited to the benefits received. *In re* Bonds of Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 65 Am. St. Rep. 106, 14 L. R. A. 755.

8. Munson *v.* Atchafalaya Basin Levee Com'rs, 43 La. Ann. 15, 8 So. 906; Charnock *v.* Levee Dist. Co., 38 La. Ann. 323, construing Louisiana constitution.

Especially are such assessments not considered taxes within the constitutional restrictions on the power of taxation, such as that it must be equal and uniform, or according to the value of property.[9]

2. How Levied. They are levied only on property benefited, and not in proportion to the value of the property, but in proportion to the amount of benefit.[10] The validity of assessments, upon these principles, for levee purposes, has been repeatedly sustained.[11]

3. How District Determined. The assessment district must be determined by the legislature or other public authority, whose discretion in defining the area to be benefited by the proposed levee is not subject to control by the courts.[12]

C. Property Liable — 1. Extent and Nature. The legislature is vested with large discretionary powers as to the nature and extent of the property upon which taxes and assessments may be imposed for levee purposes,[13] and is held to delegate such discretion to local bodies, officers, etc., that are authorized by statute to levy

9. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; McGehee *v.* Mathis, 21 Ark. 40; Munson *v.* Atchafalaya Basin Levee Dist. Com'rs, 43 La. Ann. 15, 8 So. 906; Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873; Charnock *v.* Levee Dist. Co., 38 La. Ann. 323; Levee Com'rs *v.* Lorio, 33 La. Ann. 276; Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629; Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590. "That provision of our state constitution, which requires taxation to be proportioned to the value of the property on which it is laid, is only applicable to taxation in its usual, ordinary and received sense, and is, therefore, limited to taxation for general purposes alone, where the money raised by the tax goes into the State treasury, or the county treasury, or the general fund of some city or town, and is applicable to any purpose to which the legislative body of such state, county or town may choose to apply it; and it is not intended to apply to local assessments, where the money raised is to be expended on the property taxed." Egyptian Levee Co. *v.* Hardin, 27 Mo. 495, 496, 72 Am. Dec. 276. *Contra*, in Tennessee see Reelfoot Lake Levee Dist. *v.* Dawson, 97 Tenn. 151, 36 S. W. 1041, 34 L. R. A. 725.

10. Charnock *v.* Fordoche, etc., Spec. Levee Dist. Co., 38 La. Ann. 323; Morrison *v.* Morey, 146 Mo. 543, 48 S. W. 629.

The distinctive feature of an assessment, as distinguished from a tax, is not the purpose for which it is levied, but the method of levying, whether on all property alike or in proportion to benefit. People *v.* Whyler, 41 Cal. 351.

11. Carson *v.* St. Francis Levee Dist., 59 Ark. 513, 27 S. W. 590; Bishop *v.* Marks, 15 La. Ann. 147; Gillespie *v.* Concordia Police Jury, 5 La. Ann. 403; Columbia Bottom Levee Co. *v.* Meier, 39 Mo. 53; Rouse *v.* Hampton, 20 Fed. Cas. No. 12,088 [*reversed* on other grounds in 22 Wall. 263, 22 L. ed. 755].

12. Moulton *v.* Parks, 64 Cal. 166, 30 Pac. 613; Smith *v.* Willis, 78 Miss. 243, 28 So. 878; Alcorn *v.* Hamer, 38 Miss. 652; Rouse *v.* Hampton, 20 Fed. Cas. No. 12,088 [*reversed* on other grounds in 22 Wall. 263, 22 L. ed. 755]. And see Ward *v.* Frank, etc., Creek Co., 14 N. J. L. 301; McCarty *v.* Brick, 11 N. J. L. 27.

Right of appeal.— A statutory provision that the decision of the board of levee inspectors on all questions relating to the improper assessment of land "shall be final" does not deprive the landowners of the right of appeal to the courts. McGehee *v.* Mathis, 21 Ark. 40.

13. George *v.* Young, 45 La. Ann. 1232, 14 So. 137; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

Three elements must concur for validity of such assessments: (1) The work must be public and of a character to confer special local benefits on the district within which the assessment is levied; (2) the assessment must be supported by benefits actually or presumptively received by the persons or property subjected to it; and (3) the contribution must not manifestly exceed the benefit conferred. Where these elements, or any of them, are clearly wanting in contributions exacted under the name of a local or special assessment, the legislative action cannot be sustained. But the province of determining for what objects, in what districts, and on what persons or property such assessments may be levied, is wisely and indeed necessarily confided to the legislative department, and it is only where the assessment is so manifestly unjust, oppressive, and violative of the foregoing requirements as to give demonstration that they have been disregarded that a court will be justified in overruling the legislative judgment. Minor *v.* Sheriff, 43 La. Ann. 337, 338, 2 So. 49.

All lands in the district must be assessed under a statute providing for an assessment "upon the lands situated within the district." Sacramento County Levee Dist. *v.* Huber, 57 Cal. 41.

Land injured.— A tax is valid, although the levee injures some land in the district rather than benefits it, and although both the land benefited and that injured are assessed at their original value. People *v.* Whyler, 41 Cal. 351.

Subsequent inclusion of land in district.— Where land situated in a county where there

such taxes and assessments.[14] Taxes may be levied generally on all persons and property subject to taxation for state purposes,[15] or may be levied only on lands within the district.[16] Assessments are usually levied directly and exclusively on the real estate benefited,[17] but may be imposed upon the produce of the land.[18]

2. EXEMPTIONS. Within the discretionary power just mentioned[19] the legislature or the local authorities under authority delegated to them may exempt property from taxation or assessment for levee purposes.[20]

D. Assessment and Collection — 1. HOW METHOD DETERMINED. The method of assessment[21] and collection,[22] including such matters of detail as the officer or officers upon whom such duty is imposed,[23] the time of assessment and collection,[24]

was no tax for levees was subsequently included by act of the legislature within the boundaries of another county comprised within a levee district wherein there was a levee tax, such land is subject to tax. Holder *v.* Bond, (Miss. 1901) 29 So. 769; Smith *v.* Willis, 78 Miss. 243, 28 So. 878.

14. McDermott *v.* Mathis, 21 Ark. 60.

This discretion will not be controlled unless it be demonstrated that the contribution exacted is unsupported by any possible benefit, or out of all proportion to such possible benefit. Hill *v.* Fontenot, 46 La. Ann. 1563, 16 So. 475; Minor *v.* Sheriff, 43 La. Ann. 337, 9 So. 49.

That the lands are not subject to overflow from the Mississippi river nor protected by levees is not sufficient to justify judicial interference, for, although not themselves subject to overflow, they may receive benefit from improved means of access and transportation, and from the general improvement of the community, by the protection of adjacent lands subject to overflow (Memphis Land, etc., Co. *v.* St. Francis Levee Dist., 64 Ark. 258, 24 S. W. 763; McDermott *v.* Mathis, 21 Ark. 60; Chambliss *v.* Johnson, 77 Iowa 611, 42 N. W. 427; Minor *v.* Sheriff, 43 La. Ann. 337, 9 So. 49), nor that the land will not be enhanced in value by the levee for the purpose for which the owner is using it or intends to use it (Memphis Land, etc., Co. *v.* St. Francis Levee Dist., 64 Ark. 258, 42 S. W. 763).

15. Munson *v.* Atchafalaya Basin Levee Com'rs, 43 La. Ann. 15, 8 So. 906.

16. Mason *v.* Tensas Parish Police Jury, 9 La. Ann. 368.

Urban and rural property and buildings as well as lands included under a statute authorizing a tax on "all taxable lands" in the parish. Mason *v.* Tensas Parish Police Jury, 9 La. Ann. 368.

17. Minor *v.* Sheriff, 43 La. Ann. 337, 9 So. 49.

18. Landry *v.* Henderson, 109 La. 143, 33 So. 115.

Assessment on bales of cotton raised on land benefited was upheld. Excelsior Planting, etc., Co. *v.* Green, 39 La. Ann. 455, 1 So. 873.

Assessment on oysters raised in public waters.— Buras Levee Dist. *v.* Mialegvich, 52 La. Ann. 1292, 27 So. 790.

19. **The courts will seldom interfere with this discretion** of the legislature and local authorities. Hill *v.* Fontenot, 46 La. Ann. 1563, 16 So. 475; Selby *v.* Levee Com'rs, 14 La. Ann. 434. See also George *v.* Young, 45 La. Ann. 1232, 14 So. 137.

20. See cases cited *infra*, this note.

Exemption of land acquired under one statute does not exempt land acquired under a subsequent statute. Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590.

Exemption of land from taxation does not exempt it from assessment for levee purposes. Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590.

Exemption from "parochial and municipal" taxes by a constitutional provision does not constitute an exemption from a levee tax. United R., etc., Co. *v.* Mevers, 112 La. 897, 36 So. 797.

Lands left outside a levee may be exempted by statute, but in the absence of an express exemption are subject to taxes and assessments for levee purposes as lands within the levee district. Owens *v.* Yazoo, etc., R. Co., 74 Miss. 821, 21 So. 244; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

No exemption from tax for levee purposes on business of selling liquor under constitutional provision exempting "property" between the river and the levee from taxation for such purposes. Yazoo, etc., Delta Levee Com'rs *v.* Houston, 81 Miss. 619, 33 So. 491.

Lands acquired and used by a municipality as a public park are exempt. Robb *v.* Philadelphia, 25 Pa. Super. Ct. 343.

Repeal of tax for general purposes does not necessarily repeal the tax for levee purposes. Tate *v.* Yazoo-Mississippi Delta Levee Com'rs, 84 Miss. 388, 36 So. 395.

21. Mullins *v.* Shaw, 77 Miss. 900, 27 So. 602, 28 So. 958.

22. Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

23. Davis *v.* Gaines, 48 Ark. 370, 3 S. W. 184; Missouri, etc., R. Co. *v.* Cambern, (Kan. App. 1901) 63 Pac. 605; Zeigler *v.* Thompson, 43 La. Ann. 1013, 10 So. 197; Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

Void assessment.— Where a trustee of a reclamation district acts with others in fixing the price of an existing levee owned by himself, the assessment to pay such price is void. Reclamation Dist. No. 542 *v.* Turner, 104 Cal. 334, 37 Pac. 1038.

24. Memphis Land, etc., Co. *v.* St. Francis

the amount,[25] submission to popular vote, and method of voting[26] of levee taxes is wholly determined by statute.[27] It is essential to the validity of the taxes and assessments that the statutes authorizing them be valid,[28] and be complied with.[29] But it will be presumed that all the requirements of the statute have been met,[30] and upon their assessment being shown, the burden of proof is on the party assailing them to prove their illegality.[31]

2. OBJECTIONS. Where objections to proceedings for assessment and collection are not made at the proper time they are considered waived.[32]

3. AMOUNT. The value of property or benefits fixed by the assessor or assessors will not be changed by the courts, unless clearly arbitrary and made without regard to those things which regulate value.[33]

4. PAYMENT. Payment may be made in such currency or other media as is authorized by statute,[34] and may be enforced without set-off for a private levee taken for public use, or other claim for compensation against the district, or damages suffered by crevasses.[35]

Levee Dist., 64 Ark. 258, 42 S. W. 763; Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

25. State *v.* Winkleman, 96 Mo. App. 223, 69 S. W. 1063.

26. Memphis Land, etc., Co. *v.* St. Francis Levee Dist., 64 Ark. 258, 42 S. W. 763; Stotts *v.* Wall, 153 Mo. 216, 54 S. W. 465.

27. Ward *v.* Frank, etc., Creek Co., 14 N. J. L. 301.

Taxes against a railroad company may be charged directly against the owner, instead of against the real estate only. "This difference results from the necessities of the case, as of course land used by a railroad company for the operation of its road could not be sold to pay the assessment made against it." Missouri, etc., R. Co. *v.* Cambern, 66 Kan. 365, 367, 71 Pac. 809.

28. Wright *v.* Thomas, 26 Ohio St. 346.

29. Richman *v.* Muscatine County, 70 Iowa 627, 26 N. W. 24.

An invalid assessment of property in a county is not impliedly validated by a subsequent statute imposing a tax for levee purposes. "It is necessary not only to have a proper levy of taxes, but it is essential to have a legal assessment of the lands upon which the levy is to operate. The assessment roll is the warrant of the tax collector for collecting the taxes; if that is void, his action in the sale of land under it is void." Mullins *v.* Shaw, 77 Miss. 900, 910, 27 So. 602. 28 So. 958.

Under a statute requiring three inspectors to examine and designate land to be assessed, such examination and designation by two of them is not sufficient, although their report is afterward signed by the third. Ballard *v.* Davis, 31 Miss. 525.

There can be no valid reassessment, in the absence of special legislative authority, where the original assessment is invalid. Franklin Sav. Bank *v.* Moran, 19 Wash. 200, 52 Pac. 858.

30. See cases cited *infra*, note 31.

The minutes of the proceedings of the board of commissioners of a levee district, where a district levee tax appears to have been levied, are to be taken as of unquestionable verity, and are not to be attacked in a collateral proceeding to which said commissioners are not parties. Gaither *v.* Green, 40 La. Ann. 362, 4 So. 210.

31. Memphis Land, etc., Co. *v.* St. Francis Levee Dist., 64 Ark. 258, 42 S. W. 763; Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600; Mason *v.* Tensas Parish Police Jury, 9 La. Ann. 368.

32. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600; Blake *v.* People, 109 Ill. 504; Missouri, etc., R. Co. *v.* Cambern, (Kan. App. 1901) 63 Pac. 605; Mason *v.* Tensas Parish Police Jury, 9 La. Ann. 368.

33. Clayton *v.* Lafargue, 23 Ark. 137; People *v.* Whyler, 41 Cal. 351.

Relief against the levy of an excessive assessment will not be granted by a court of equity until plaintiff has paid so much of the assessment as he recognizes as legal. Quint *v.* Hoffman, 103 Cal. 506, 37 Pac. 514.

"To invoke the intervention of a court to set aside such an assessment would be to invoke the judicial authority to give its judgment controlling effect when the law intends that that of the assessor should prevail." Memphis Land, etc., Co. *v.* St. Francis Levee Dist., 64 Ark. 258, 265, 42 S. W. 763.

Opinions of witnesses who profess to be familiar with the subject of inquiry, and who have had opportunities of acquiring information on such subject, are competent as to how much land will be benefited or damaged by a levee, even though they do not live in the immediate neighborhood of such land, Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600.

That lands are made healthier by construction of the levee may be considered. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600.

Amount of prior assessments may be considered in making an assessment for levee purposes. Lovell *v.* Sny Island Levee Drainage Dist., 159 Ill. 188, 42 N. E. 600.

34. As in warrants on the levee fund see Prescott *v.* McNamara, 73 Cal. 236, 14 Pac. 877.

35. Fitzhugh *v.* Cotton Belt Levee Dist., 54

E. Sale of Land For Non-Payment — 1. In General. In event of non-payment of taxes for levee purposes the lands upon which they are assessed may be sold,[36] and, if no bid is received for the amount of the taxes, may be purchased by the public authorities[37] in whom the title vests to the same extent as if bought by a private individual.[38]

2. Compliance With Statutory Provisions. It is necessary to the validity of such sale that the statutes under which it is made be constitutional,[39] and that they be strictly complied with in the assessment of lands, levy of taxes, and proceedings for the sale.[40] But slight irregularities will not avoid the sale.[41]

3. Where More Than One Sale. Land once sold to the state or other public authority for delinquent taxes cannot be the subject of a second valid sale[42] until purchased or redeemed, and the purchaser at such a subsequent sale acquires no title.[43]

4. Method of Sale. The legislature possesses large discretion in determining the general method of sale[44] and the details of procedure.[45] It may accordingly authorize such sale to be made either summarily by the tax officials[46] or to be made by the courts at the suit of the levee commissioners.[47]

Ark. 224, 15 S. W. 455; Templeton *v.* Morgan, 16 La. Ann. 438.

36. Woodruff *v.* State, 77 Miss. 68, 25 So. 483; Williams *v.* Cammack, 27 Miss. 209, 61 Am. Dec. 508.

A statute in regard to lands "sold for taxes" applies to lands sold for levee taxes. Metcalfe *v.* Perry, 66 Miss. 68, 5 So. 232; Beirne *v.* Burdett, 52 Miss. 795.

The deputy of the sheriff making the sale and the clerk of the court in which the tax deed must be filed are not disqualified from purchasing. O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

37. Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

38. Woodruff *v.* State, 77 Miss. 68, 25 So. 483; Paxton *v.* Valley Land Co., 68 Miss. 739, 10 So. 77; Rouse *v.* Hampton, 20 Fed. Cas. No. 12,088 [*reversed* on other grounds in 22 Wall. 263, 22 L. ed. 755].

Such lands remain liable for further taxes accruing, unless exempted by special statute. Woodruff *v.* State, 77 Miss. 68, 25 So. 483; Shotwell *v.* Louisville, etc., R. Co., 69 Miss. 541, 11 So. 455. Mississippi statutes providing that lands purchased by the liquidating levee board at tax-sales, and not redeemed, should not be subject to state taxation for levee purposes or otherwise, such lands, while owned by the liquidating levee board, were exempt from state taxation for levee purposes. Woodruff *v.* State, *supra*.

39. Shotwell *v.* Louisville, etc., R. Co., 69 Miss. 541, 11 So. 455.

40. Owens *v.* Yazoo, etc., Valley R. Co., 74 Miss. 821, 21 So. 244.

Where the taxes have been paid, the land is not delinquent and a sale of such land is void. Metcalfe *v.* Perry, 66 Miss. 68, 5 So. 232.

41. Such as that the sale was not on the proper day, that bonds were not duly executed by the tax-collectors before making sale, or that deeds as required by law were not executed. Woodruff *v.* State, 77 Miss. 68, 25 So. 483.

Recital of payment in full.— The auditor's deed reciting the payment of a certain sum "in full of all state and county taxes" is not evidence of the payment of levee taxes. Ford *v.* Delta, etc., Land Co., 164 U. S. 662, 17 S. Ct. 230, 41 L. ed. 590.

Under a statute providing for a quitclaim deed by the state on the payment of all levee taxes up to date, the lands remain liable for any taxes legally due, but whose collection was omitted at the time of making the deed. Woodruff *v.* State, 77 Miss. 68, 25 So. 483. And such conveyance without the full payment of such taxes, "neither defeats the title of the State nor confers title upon the grantee." Murdock *v.* Chaffe, 67 Miss. 740, 7 So. 519; McCulloch *v.* Stone, 64 Miss. 378, 8 So. 236.

42. Louisville, etc., R. Co. *v.* Buford, 73 Miss. 494, 19 So. 584; Shotwell *v.* Louisville, etc., R. Co., 69 Miss. 541, 11 So. 455; Ricks *v.* Baskett, 68 Miss. 250, 8 So. 514; Murdock *v.* Chaffe, 67 Miss. 740, 7 So. 519.

43. See cases cited *supra*, note 42.

44. Recourse must be had to other laws in pari materia in the absence of any special provision of law as to the manner in which the levee tax-collector shall make the sales of property of a delinquent taxpayer. Templeton *v.* Morgan, 16 La. Ann. 438.

45. Jeaunin *v.* Millaudon, 9 La. Ann. 223; Powers *v.* Penny, 59 Miss. 5; Belcher *v.* Mhoon, 47 Miss. 613; Johnson *v.* Hunter, 127 Fed. 219. It may provide that the incorrect statement of the ownership of lands shall be immaterial, and may dispense with a warning order. Ballard *v.* Hunter, (Ark. 1905) 85 S. W. 252.

46. Belcher *v.* Mhoon, 47 Miss. 613; O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

47. A decree of court ordering a sale is not subject to collateral attack on ground that the sale was for illegal penalties and costs (Ballard *v.* Hunter, (Ark. 1905) 85 S. W. 252), nor on the ground that the court

5. Effect of Deed. A deed from the proper officer to land sold for delinquent taxes is *prima facie* evidence of title,[48] and it is within the power of the legislature to make such deed conclusive evidence of the fulfilment of all requirements imposed by statute,[49] although it cannot make such deed conclusive evidence of compliance with the fundamental requirements derived from the constitution.[50]

F. Redemption. Provision is usually made by statute that the owner of lands sold for delinquent taxes,[51] whether sold to the state or to a private individual,[52] shall have a certain length of time in which to redeem,[53] upon payment of the purchase-price or taxes due, together with costs of sale and an additional penalty;[54] but in the absence of such a statute no right of redemption exists after the sale.[55] The purchaser is entitled to allowance for improvements on the property made before suit brought to redeem, but not for improvements made after the institution of the suit nor for their rental value.[56]

LEVEL. A horizontal line or plane.[1]

LEVER. To lift, heave, hold, or raise up.[2]

LEVIS CULPA. In the civil law, ordinary fault or neglect.[3] (See Culpa; Levissima Culpa; and, generally, Negligence.)

LEVIS EXCEPTIO EXCUSAT A SPOLIO. A maxim meaning "A slight defense excuses from the consequences of spuilzie."[4]

LEVISSIMA CULPA. In the civil law, slight fault or neglect.[5] (See Culpa; Levis Culpa; and, generally, Negligence.)

LEVITICAL DEGREES. Degrees of kindred within which persons are prohibited to marry.[6] (See, generally, Incest; Marriage.)

allowed the commissioner making sale greater fees than were allowed by law, nor for alleged defects in matters of procedure (Johnson *v.* Hunter, 127 Fed. 219).

48. Paxton *v.* Valley Land Co., 67 Miss. 96, 6 So. 628; Beirne *v.* Burdett, 52 Miss. 795.

49. Powers *v.* Penny, 59 Miss. 5. See also Means *v.* Haley, 84 Miss. 550, 552, 36 So. 257 [*approving* Paxton *v.* Valley Land Co., 68 Miss. 739, 10 So. 77], where it is said: "The intent of the legislature in enacting the several laws germane to this matter was to validate the title and make secure the possession of that large class of property owners in the delta of our state who hold under various sales for taxes made in years past. It certainly should not be the policy of the courts to disturb titles so quieted on account of any difference of opinion merely as to the correctness of past adjudications."

50. Powers *v.* Penny, 59 Miss. 5.

51. Owner who has become bankrupt may still redeem until an assignee has been appointed and conveyance made to him of the bankrupt's estate. Hampton *v.* Rouse, 22 Wall. (U. S.) 263, 22 L. ed. 755 [*reversing* 20 Fed. Cas. No. 12,088].

52. Baird *v.* McNamara, 78 Miss. 455, 30 So. 69; Heard *v.* Walton, 39 Miss. 388.

A statute allowing owners to redeem lands to which title was then in the state did not affect the state's title to such lands as were not redeemed in accordance with the act. Paxton *v.* Valley Land Co., 68 Miss. 739, 10 So. 77.

53. Under the Mississippi statute two years for persons not under disabilities, and for infants and insane persons three years after removal of their disabilities. Baird *v.* McNamara, 78 Miss. 455, 30 So. 69.

54. See the statutes of the several states.

55. Banks *v.* St. Francis Levee Dist., 66 Ark. 490, 51 S. W. 830; O'Reilly *v.* Holt, 18 Fed. Cas. No. 10,563, 4 Woods 645.

56. Baird *v.* McNamara, 78 Miss. 455, 30 So. 69.

For matters relating to improvements generally see Improvements.

1. Webster Int. Dict. But see Clayton *v.* Gregson, 5 A. & E. 302, 307, 31 E. C. L. 623, 1 Harr. & W. 159, 6 N. & M. 694, 4 N. & M. 602, 30 E. C. L. 600, where it is said that in ordinary language the word does not invariably mean horizontally.

As applied to land the word "level" may denote not an artificial division of the land but the peculiar character and situation of it. Rex *v.* Tower Hamlets Levees Com'rs, 9 B. & C. 517, 523, 7 L. J. K. B. O. S. 131, 4 M. & R. 365, 17 E. C. L. 235 [*citing* Rooke's Case, 5 Coke 99b].

2. Boyer Dict. [*quoted* in U. S. *v.* Burr, 25 Fed. Cas. No. 14,693].

Properly translated lever signifies a levying or setting up "of wears." Williams *v.* Wilcox, 8 A. & E. 314, 334, 7 L. J. Q. B. 229, 3 N. & P. 606, 1 W. W. & H. 477, 35 E. C. L. 609.

3. Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368, 378. See also 12 Cyc. 989 note 84.

4. Trayner Leg. Max.

5. Brand *v.* Schenectady, etc., R. Co., 8 Barb. (N. Y.) 368, 378. See also 12 Cyc. 989 note 84.

6. Burrill L. Dict. [*citing* 3 Blackstone Comm. 435]. See also Brook *v.* Brook, 9

LEVY.[7] A term frequently used in more than one sense, its meaning in a particular instance being determined by resort to the context,[8] and bearing different significations according to its object.[9] With respect to writs, as a noun, in its original sense, an actual making the money out of the property;[10] in its secondary sense, seizing the property preliminary to making the money out of it;[11] a seizure;[12] actual seizure;[13] the seizure actual or constructive of the property;[14] seizure under attachment;[15] taking possession;[16] taking possession of property by an officer;[17] the taking and seizure of property on execution;[18] an appropriation[19] of property by an officer indicated by some act;[20] a substantial taking for the satisfaction of the debt, that is, by the removal of the goods;[21] a specific declaration by the sheriff that the land is liable to a specific lien;[22] any act on the part of the officer showing an intent to sell the specific land and subject it to the satisfaction of the judgment, followed by a sale;[23] also a statutory conveyance;[24] as a verb, to COLLECT,[25] *q. v.*; to collect by execution;[26] to collect or exact money;[27] to GATHER (*q. v.*) or EXACT,[28] *q. v.*; to raise;[29] to have the property within the power and control of the officer;[30] to seize, sell, and have in hands;[31] to seize or take by virtue of a judicial writ thereunto commanding;[32] to

H. L. Cas. 193, 243, 7 Jur. N. S. 422, 4 L. T. Rep. N. S. 93, 9 Wkly. Rep. 461, 11 Eng. Reprint 703; Hill *v.* Good, Vaugh. 302, 305.

7. Derived from the Latin *levo* or the French *lever*, both signifying to raise. Burrill L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 352].

8. Morton *v.* Comptroller-Gen., 4 S. C. 430 [*quoted* in Southern R. Co. *v.* Kay, 62 S. C. 28, 33, 39 S. E. 785].

9. State *v.* Lakeside Land Co., 71 Minn. 283, 291, 73 N. W. 970; Lloyd *v.* Wyckoff, 11 N. J. L. 218, 227.

10. Nelson *v.* Van Gazelle Mfg. Co., 45 N. J. Eq. 594, 17 Atl. 943.

In legal contemplation it is the satisfaction of a fieri facias, that is, it is presumptive evidence that satisfaction may result or has resulted from it. Peay *v.* Fleming, 2 Hill Eq. (S. C.) 97.

Where goods are seized and money obtained by compulsion, there has been a levy. Reid *v.* Gowans, 13 Ont. App. 501, 521.

11. Nelson *v.* Van Gazelle Mfg. Co., 45 N. J. Eq. 594, 17 Atl. 943.

12. Bouvier L. Dict. [*quoted* in Union Nat. Bank *v.* Byram, 131 Ill. 92, 102, 22 N. E. 842; Valle *v.* Fargo, 1 Mo. App. 344, 352].

13. Lehnhardt *v.* Jennings, 119 Cal. 192, 194, 48 Pac. 56, 51 Pac. 195; Baldwin *v.* Conger, 9 Sm. & M. (Miss.) 516, 520; Douglas *v.* Orr, 58 Mo. 573, 574; Duncan *v.* Matney, 29 Mo. 368, 375, 77 Am. Dec. 575; Wagner *v.* J. H. North Furniture, etc., Co., 63 Mo. App. 206, 210; Elliott *v.* Bowman, 17 Mo. App. 693, 697; Birbeck Inv., etc., Co. *v.* Gardner, 55 N. J. Eq. 632, 635, 37 Atl. 767; 1 Wagner St. Mo. (1872) p. 606, § 18; Rev. Code (1845), p. 489, § 67 [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 352]; Webster Int. Dict. [*quoted* in Textor *v.* Shipley, 86 Md. 424, 440, 38 Atl. 932].

14. Dover Glass Works Co. *v.* American F. Ins. Co., 1 Marv. (Del.) 32, 50, 29 Atl. 1039, 65 Am. St. Rep. 264; Bond *v.* Willett, 31 N. Y. 102, 102*d*, 1 Abb. Dec. 165, 1 Keyes 377, 29 How. Pr. 47; Tefft *v.* Providence Washington Ins. Co., 19 R. I. 185, 187, 32 Atl. 914, 61 Am. St. Rep. 761; *In re* Weinger, 126 Fed. 875, 877; Smith *v.* Packard, 98 Fed. 793, 798, 39 C. C. A. 294.

15. Bouvier L. Dict. [*quoted* in Union Nat. Bank *v.* Byram, 131 Ill. 92, 102, 22 N. E. 842].

16. Burchell *v.* Green, 6 Misc. (N. Y.) 236, 238, 27 N. Y. Suppl. 82.

17. Pracht *v.* Pister, 30 Kan. 568, 573, 1 Pac. 638.

18. Webster Dict. [*quoted* in Rhoads *v.* Given, 5 Houst. (Del.) 183, 186].

19. Appropriation defined see 3 Cyc. 565.

20. Evans *v.* Wilder, 7 Mo. 359, 364; Burkett *v.* Clark, 46 Nebr. 466, 472, 64 N. W. 1113; Bland *v.* Whitfield, 46 N. C. 122, 125; McMillan *v.* Gaylor, (Tenn. Ch. App. 1895) 35 S. W. 453, 454; Carey *v.* German American Ins. Co., 84 Wis. 80, 86, 54 N. W. 18, 20, 36 Am. St. Rep. 907, 20 L. R. A. 267.

21. Cocker *v.* Musgrove, 9 Q. B. 223, 232, 10 Jur. 922, 15 L. J. Q. B. 365, 58 E. C. L. 223 [*cited* in Locke *v.* McConkey, 26 N. C. Q. B. 475, 481].

22. Gassaway *v.* Hall, 3 Hill (S. C.) 289.

23. Bouvier L. Dict. [*quoted* in Blood *v.* Light, 38 Cal. 649, 658, 99 Am. Dec. 441].

24. Jones *v.* Buck, 54 Me. 301, 305; Jewett *v.* Whitney, 43 Me. 242, 251.

25. Bouvier L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 347].

26. Burrill L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 352].

27. Lloyd *v.* Wyckoff, 11 N. J. L. 218, 222; Tomlin L. Dict. [*quoted* in Collins *v.* Ferrall, 2 Sm. & M. (Miss.) 383, 386]. See also Rhoads *v.* Given, 5 Houst. (Del.) 183, 186.

28. Webster Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 353 (as to levy money, etc.)].

29. U. S. *v.* Burr, 25 Fed. Cas. No. 14,693; Bouvier L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 347, 353]; Johnson Quarto Dict. [*quoted* in Valle *v.* Fargo, *supra*].

30. Bouvier L. Dict. [*quoted* in Carey *v.* German American Ins. Co., 84 Wis. 80, 86, 54 N. W. 18, 36 Am. St. Rep. 907, 20 L. R. A. 267.

31. Drewe *v.* Lainson, 11 A. & E. 529, 538, 39 E. C. L. 289.

32. Standard Dict. [*quoted* in State *v.*

take into custody or seize specific property in satisfaction of a writ;[33] to do the acts by which a sheriff sets apart and appropriates, for the purpose of satisfying the command of a writ of execution, a part or the whole of a defendant's property.[34] As applied to fines, to ACKNOWLEDGE,[35] *q. v.* As applied to taxation, as a noun, assessment;[36] computation, extension according to the assessment;[37] formal approval;[38] the taking and seizure of property on a warrant;[39] as a verb,[40] to ASSESS,[41] *q. v.*; to COLLECT (*q. v.*) or EXACT,[42] *q. v.*; to IMPOSE,[43] *q. v.*; to impose or assess;[44] to impose, assess, and collect under authority of law;[45] to lay;[46] to raise;[47] to raise or collect;[48] to raise or collect by assessment;[49] to charge a sum of money, already ascertained, against the person or property subject to the charge;[50] to determine by vote amount of tax to be raised;[51] to fix the rate at which property is to be taxed.[52] As applied to war, as a noun, a general assemblage of persons in force to overthrow the government or to coerce its conduct;[53] as a verb, to inaugurate;[54] to make.[55] As applied to men or troops, to bring together;[56] to raise or collect.[57] As applied to ditches, to raise; cast up.[58] As applied to a nuisance, to raise or set up.[59] (Levy: Equitable, see EQUITABLE LEVY. Failure to Make, see SHERIFFS AND CONSTABLES. Of Assessment — For Insurance Purposes, see INSURANCE, and the Insurance Titles; For Public Improvements, see DRAINS; LEVEES; MUNICIPAL CORPORATIONS; STREETS AND

Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

33. Carr *v.* Huffman, 1 Kan. App. 713, 41 Pac. 982, 984.

34. Anderson L. Dict. [*quoted* in Burkett *v.* Clark, 46 Nebr. 466, 472, 64 N. W. 1113].

35. Black L. Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

36. Kinney *v.* Zimpleman, 36 Tex. 554, 582.

37. Wis. Rev. St. §§ 1210*a*, 1210*b* [*cited* in Bradley *v.* Lincoln County, 60 Wis. 71, 73, 18 N. W. 732].

38. Ferry *v.* Deneen, (Iowa 1900) 82 N. W. 424, 425.

39. Webster Dict. [*quoted* in Rhoads *v.* Given, 5 Houst. (Del.) 183, 186].

40. Implying only a ministerial duty see Dickson *v.* Burckmyer, 67 S. C. 526, 534, 46 S. E. 343.

It includes the doing of whatever things are required to be done in order to authorize the collector to procure the taxes. Hohenstatt *v.* Bridgeton, 62 N. J. L. 169, 171, 40 Atl. 649. See also Moore *v.* Foote, 32 Miss. 469, 479.

41. Valle *v.* Fargo, 1 Mo. App. 344, 350.

Compared with or distinguished from "assess" see Perry County *v.* Selma, etc., R. Co., 58 Ala. 546, 559; Rhoads *v.* Given, 5 Houst. (Del.) 183, 186; Valle *v.* Fargo, 1 Mo. App. 344, 347; State *v.* Jersey City, 42 N. J. L. 97, 99; Scudder *v.* State, 33 N. J. L. 424, 427; Kelly *v.* Herrall, 20 Fed. 364, 369.

42. Jacob L. Dict.; Tomlin L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 351, 352].

Distinguished from "collect" see Parsons *v.* People, 32 Colo. 221, 229, 76 Pac. 666.

43. Parsons *v.* People, 32 Colo. 221, 229, 76 Pac. 666; Clifton *v.* Hobgood, 106 La. 535, 541, 31 So. 46.

44. Standard Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

45. State *v.* Lakeside Land Co., 71 Minn. 283, 291, 73 N. W. 970; Standard Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635]; Webster Dict. [*quoted* in Southern R. Co. *v.* Kay, 62 S. C. 28, 32, 39 S. E. 785].

46. U. S. *v.* Mobile, 12 Fed. 768, 770, 4 Woods 536.

47. Parsons *v.* People, 32 Colo. 221, 229, 76 Pac. 666.

48. Black L. Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

49. Webster Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 352; Southern R. Co. *v.* Kay, 62 S. C. 28, 32, 39 S. E. 785].

50. Westport *v.* Mastin, 62 Mo. App. 647, 655.

51. State *v.* Lakeside Land Co., 71 Minn. 283, 291, 73 N. W. 970.

52. Emeric *v.* Alvarado, 64 Cal. 529, 606, 2 Pac. 418.

53. U. S. *v.* Greathorse, 26 Fed. Cas. No. 15,254, 2 Abb. 364, 372, 4 Sawy. 457; U. S. *v.* Hanway, 26 Fed. Cas. No. 15,299, 2 Wall. Jr. 139; U. S. *v.* Hoxie, 26 Fed. Cas. No. 15,407, 1 Paine 265, 272.

54. Black L. Dict. [*quoted* in State *v.* Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

55. Lloyd *v.* Wyckoff, 11 N. J. L. 218, 222; U. S. *v.* Burr, 25 Fed. Cas. Nos. 14,692*a*, 14,693, 4 Cranch C. C. 455. See U. S. *v.* Mitchell, 2 Dall. (U. S.) 348, 351, 1 L. ed. 410, 26 Fed. Cas. No. 15,788. See also Druecker *v.* Salomon, 21 Wis. 621, 626, 94 Am. Dec. 571 (conspiracy to forcibly resist an execution of a draft for soldiers); *Ex p.* Bollman, 4 Cranch (U. S.) 75, 126, 2 L. ed. 554 (does not include mere enlistment of men to serve against the government).

56. Johnson Quarto Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 353].

57. Webster Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 352].

58. Jacob L. Dict. [*quoted* in Valle *v.* Fargo, 1 Mo. App. 344, 351].

59. Black L. Dict. [*quoted* in State *v.*

HIGHWAYS; On Corporate Stock, see CORPORATIONS. Of Attachment, see ATTACHMENT; JUSTICES OF THE PEACE. Of Execution, see EXECUTIONS; JUSTICES OF THE PEACE. Officer's Liability With Respect to, see SHERIFFS AND CONSTABLES. Of Garnishment, see GARNISHMENT. Of License-Tax — Generally, see LICENSES; On Liquor Traffic, see INTOXICATING LIQUORS. Of Tax — Generally, see TAXATION; For Local Purposes, see COUNTIES; DRAINS; LEVEES; MUNICIPAL CORPORATIONS; SCHOOLS AND LOCAL SCHOOL-DISTRICTS; STREETS AND HIGHWAYS; TOWNS. Of War, see INSURRECTION. Under Admiralty Process, see ADMIRALTY. Under Internal Revenue Laws, see INTERNAL REVENUE. Wrongful, see ATTACHMENT; EXECUTIONS; SHERIFFS AND CONSTABLES.)

LEVY COURT. A court formerly existing in the District of Columbia, charged with the administration of the ministerial and financial duties of Washington county.[60]

LEVYING WAR. See INSURRECTION; TREASON.

LEWD. See LEWDNESS.

LEWD HOUSE. See LEWDNESS.

LEWDLY. See LEWDNESS.

Camp Sing, 18 Mont. 128, 145, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635].

60. Levy Ct. *v.* Woodward, 2 Wall. (U. S.) 501, 507, 17 L. ed. 851.

LEWDNESS

By Edward C. Ellsbree *

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CROSS-REFERENCES

For Matters Relating to:

Abduction, see Abduction.

Adultery or Fornication, see Adultery; Fornication.

Bastardy, see Bastards.

* Author of "Inspection," 22 Cyc. 1363.

For Matters Relating to — (*continued*)
Bigamy or Polygamy, see BIGAMY.
Criminal Law In General, see CRIMINAL LAW; INDICTMENTS AND INFORMATIONS.
Disorderly Conduct, see DISORDERLY CONDUCT.
Disorderly House, see DISORDERLY HOUSES.
Incest, see INCEST.
Marriage or Cohabitation Between Races, see MISCEGENATION.
Obscenity, see OBSCENITY.
Prostitution, see PROSTITUTION.
Rape, see RAPE.
Seduction, see SEDUCTION.
Sending Lewd Matter Through Mails, see POST-OFFICE.
Sodomy, see SODOMY.

I. DEFINITION.

Lewd is defined as given to the unlawful indulgence of lust, dissolute, lustful, filthy.[1] Lewdness is an offense against morality by frequenting houses of ill fame, or by some grossly scandalous and public indecency;[2] licentiousness.[3]

II. NATURE AND ELEMENTS OF OFFENSE.

A. At Common Law. The offense of lewdness at common law was confined to open and public indecency,[4] and was a misdemeanor, punishable by fine and imprisonment.[5]

B. By Statute — 1. In General. In many jurisdictions the scope of the offense at common law has been enlarged by statute, so as to include illicit sexual intercourse, and the irregular indulgence of lust, whether public or private.[6]

2. Unlawful Cohabitation or Living Together in Adultery or Fornication — a. The Living Together. To convict of the offense of lewdly and lasciviously associating and cohabiting together, there must be a dwelling or living together by the parties as if the conjugal relation existed,[7] and their illicit intercourse

1. Webster Dict. [*quoted* in State *v.* Lawrence, 19 Nebr. 307, 313, 27 N. W. 126]. See also U. S. *v.* Bebout, 28 Fed. 522, 524; U. S. *v.* Bennett, 24 Fed. Cas. No. 14,571, 16 Blatchf. 338.

2. Anderson L. Dict.; Black L. Dict. And see Com. *v.* Wardell, 128 Mass. 52, 54, 35 Am. Rep. 357.

The term "public indecency" has no fixed legal meaning, is vague and indefinite, and cannot in itself imply a definite offense. State *v.* Huey, 16 Ind. 338; Jennings *v.* State, 16 Ind. 335; McJunkins *v.* State, 10 Ind. 140.

3. Black L. Dict. And see Holton *v.* State, 28 Fla. 303, 309, 9 So. 716.

Other definitions are that form of immorality which has relation to sexual impurity (U. S. *v.* Males, 51 Fed. 41, 42; Bouvier L Dict.); unlawful indulgence of the animal desires (State *v.* Toombs, 79 Iowa 741, 744, 45 N. W. 300); the living and cohabiting together as man and wife openly, publicly, and notoriously, without being lawfully married (State *v.* Moore, 1 Swan (Tenn.) 136, 137); designedly open and indecent or obscene exposure of the person (State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508, 509. And see OBSCENITY); lustfulness and lascivious behavior; a synonym of unchastity, sensuality, and debauchery (State *v.* Wilson, 124 Iowa 264, 99 N. W. 1060, 1061; Century Dict.); all those wanton acts between persons of different sexes, flowing from the exercise of lustful passions, which are grossly indecent and unchaste, and which are not otherwise punished as crimes against chastity and public decency (Fowler *v.* State, 5 Day (Conn.) 81, 84).

4. 4 Blackstone Comm. 64; Com. *v.* Wardell, 128 Mass. 52, 35 Am. Rep. 357; Com. *v.* Lambert, 12 Allen (Mass.) 177; Delany *v.* People, 10 Mich. 241; State *v.* Moore, 1 Swan (Tenn.) 136; Grisham *v.* State, 2 Yerg. (Tenn.) 589; Brooks *v.* State, 2 Yerg. (Tenn.) 482. But see State *v.* Cagle, 2 Humphr. (Tenn.) 414.

5. Grisham *v.* State, 2 Yerg. (Tenn.) 589; Rex *v.* Crunden, 2 Campb. 89, 11 Rev. Rep. 671; Le Roy *v.* Sidley, 1 Keb. 620, Sid. 168.

6. Com. *v.* Wardell, 128 Mass. 52, 35 Am. Rep. 357; Com. *v.* Lambert, 12 Allen (Mass.) 177.

The various acts which constituted lewdness at common law are now generally covered by a variety of statutory offenses, as lascivious cohabitation, indecent exposure, etc. Cyclopedic L. Dict.

7. *Arkansas.*— Turney *v.* State, 60 Ark. 259, 29 S. W. 893; Bush *v.* State, 37 Ark.

must be habitual and not merely occasional.[8] But proof of the parties living together in adultery or fornication for a single day with the intention to continue

215; Taylor *v.* State, 36 Ark. 84; Lyerly *v.* State, 36 Ark. 39; Sullivan *v.* State, 32 Ark. 187.

Florida.— Whitehead *v.* State, (1904) 37 So. 302; Penton *v.* State, 42 Fla. 560, 28 So. 774; Thomas *v.* State, 39 Fla. 437, 22 So. 725; Pinson *v.* State, 28 Fla. 735, 9 So. 706; Luster *v.* State, 23 Fla. 339, 2 So. 690.

Illinois.— Searls *v.* People, 13 Ill. 597.

Indiana.— Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; State *v.* Gartrell, 14 Ind. 280; Wright *v.* State, 5 Blackf. 358, 35 Am. Dec. 126.

Iowa.— State *v.* Marvin, 12 Iowa 499.

Kansas.— State *v.* Cassida, 67 Kan. 171, 72 Pac. 522.

Mississippi.— Kinard *v.* State, 57 Miss. 132; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Missouri.— State *v.* Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am St. Rep. 483; State *v.* Crowner, 56 Mo. 147.

Virginia.— Pruner *v.* Com., 82 Va. 115; Jones *v.* Com., 80 Va. 18.

West Virginia.— State *v.* Miller, 42 W. Va. 215, 24 S. E. 882.

See 32 Cent. Dig. tit. "Lewdness," § 3.

Holding out as man and wife.— In Kinard *v.* State, 57 Miss. 132, 134, it is said: "When the court announces . . . that, in order to constitute the offence of unlawful cohabitation, 'the parties must dwell together, openly and notoriously . . . as if the conjugal relation existed between them,' it is not meant that they should pass themselves off upon the community as husband and wife . . . that is to say, as husbands and wives usually live." See also Lyerly *v.* State, 36 Ark. 39; Sullivan *v.* State, 32 Ark. 187; Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440; State *v.* Osborne, 39 Mo. App. 372; State *v.* Berry, 24 Mo. App. 466.

In Mississippi, under Code (1880), § 2700, it is not necessary to constitute the offense that the parties dwell together publicly as husband and wife, but it may be proved by circumstances which show habitual sexual intercourse. Schwall *v.* State, (1897) 21 So. 660; Brown *v.* State, (1890) 8 So. 257; Granberry *v.* State, 61 Miss. 440. Under the code of 1857, the law was as stated in the text. Kinard *v.* State, 57 Miss. 132; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

8. *Alabama.*— Wright *v.* State, 108 Ala. 60, 18 So. 941 (holding, however, that occasional acts of illicit intercourse may constitute the offense, unless the parties had no intention of continuing the adulterous intercourse as desire and opportunity might arise); Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Hall *v.* State, 53 Ala. 463; Quartemas *v.* State, 48 Ala. 269; Smith *v.* State, 39 Ala. 554; Collins *v.* State, 14 Ala. 608.

Arkansas.— Turney *v.* State, 60 Ark. 259, 29 S. W. 893; Taylor *v.* State, 36 Ark. 84; Lyerly *v.* State, 36 Ark. 39; Sullivan *v.* State, 32 Ark. 187.

Florida.— Whitehead *v.* State, (1904) 37 So. 302; Penton *v.* State, 42 Fla. 560, 28 So. 774; Thomas *v.* State, 39 Fla. 437, 22 So. 725; Pinson *v.* State, 28 Fla. 735, 9 So. 706; Luster *v.* State, 23 Fla. 339, 2 So. 690.

Georgia.— Laswon *v.* State, 116 Ga. 571, 42 S. E. 752.

Illinois.— Searls *v.* People, 13 Ill. 597.

Indiana.— Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; Clouser *v.* Clapper, 59 Ind. 548; Wright *v.* State, 5 Blackf. 358, 35 Am. Dec. 126.

Iowa.— State *v.* Marvin, 12 Iowa 499.

Kansas.— State *v.* Cassida, 67 Kan. 171, 72 Pac. 522.

Massachusetts.— Com. *v.* Calef, 10 Mass. 153.

Minnesota.— State *v.* Williams, 94 Minn. 319, 102 N. W. 722.

Mississippi.— Schwall *v.* State, (1897) 21 So. 660; Brown *v.* State, (1890) 8 So. 257; Granberry *v.* State, 61 Miss. 440; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Missouri.— State *v.* Crowner, 56 Mo. 147; Hinson *v.* State, 7 Mo. 244; State *v.* Osborne, 39 Mo. App. 372.

Texas.— Richardson *v.* State, 37 Tex. 346; Parks *v.* State, 4 Tex. App. 134; Swancoat *v.* State, 4 Tex. App. 105.

Virginia.— Pruner *v.* Com., 82 Va. 115; Jones *v.* Com., 80 Va. 18.

West Virginia.— State *v.* Miller, 42 W. Va. 215, 24 S. E. 882.

See 32 Cent. Dig. tit. "Lewdness," § 3.

Previous arrangement and understanding.— A single act of criminal intimacy is not sufficient to constitute the offense of living in fornication or adultery, although that act was the result of previous arrangement and understanding between the parties. Smith *v.* State, 39 Ala. 554.

Same habitation.— "Cohabiting" or "living together" means that the parties must dwell or reside together in the same habitation as a common or joint residing place. Bush *v.* State, 37 Ark. 215; Lyerly *v.* State, 36 Ark. 39; Sullivan *v.* State, 32 Ark. 187; Richardson *v.* State, 37 Tex. 346; Massey *v.* State, (Tex. Cr. App. 1901) 65 S. W. 911; Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098; Bird *v.* State, 27 Tex. App. 635, 11 S. W. 641, 11 Am. St. Rep. 214; Mitten *v.* State, 24 Tex. App. 346, 6 S. W. 196. But see Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Parks *v.* State, 4 Tex. App. 134; Swancoat *v.* State, 4 Tex. App. 105, where it is held that repeated adulterous meetings at any given place, or even at different places, may be such a cohabiting as will constitute the offense.

Master and servant.— Where parties live together in the same family and under the same roof, in the relation of master and servant, occasional sexual intercourse will

the relation is sufficient, and it is not necessary to establish any agreement or understanding between them that sexual intercourse should continue.[9]

b. Notoriety. Under the statutes of most of the states it is an essential element of the offense of unlawful cohabitation or living in adultery that such relation should be open and notorious.[10] In some states, however, this is not necessary.[11]

3. Lewd and Lascivious Behavior or Carriage. At common law lascivious behavior in the presence of only one person, although in a place of public resort, was not an indictable offense.[12] Under the statutes, however, it has been generally held that this offense may as well be committed in the presence of one person as of many,[13] even where such behavior is required to be "open."[14]

not constitute the offense of living together in unlawful cohabitation. State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 600; State *v.* Marvin, 12 Iowa 499; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465; State *v.* Osborne, 39 Mo. App. 372. However, the mere relationship of master and servant, or mistress and hired man, between the parties, will not necessarily exclude the other relationship of lewd and lascivious cohabitation. State *v.* Cassida, 67 Kan. 171, 72 Pac. 522.

Cohabitation under belief of marriage.— Cohabitation under an honest, although mistaken, belief that the parties cohabiting are lawfully married, will not support an indictment for lewd and lascivious cohabitation, if not such as to create a common scandal or tend to corrupt the public morals. Com. *v.* Munson, 127 Mass. 459, 34 Am. Rep. 411. See also Delany *v.* People, 10 Mich. 241; Schoudel *v.* State, 57 N. J. L. 209, 30 Atl. 598.

The object of the statute prohibiting the offense of lewdly and lasciviously associating and cohabiting together is to prohibit the public scandal and disgrace of such living together by persons of opposite sexes who are not married to each other. People *v.* Salmon, (Cal. 1905) 83 Pac. 42; Penton *v.* State, 42 Fla. 560, 28 So. 774; Luster *v.* State, 23 Fla. 339, 2 So. 690; Searls *v.* State, 13 Ill. 597; State *v.* Marvin, 12 Iowa 499; Com. *v.* Calef, 10 Mass. 153; Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465; Pruner *v.* State, 82 Va. 115.

9. Linton *v.* State, 88 Ala. 216, 7 So. 261; Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Hall *v.* State, 53 Ala. 463.

10. *Alabama.*— Quartemas *v.* State, 48 Ala. 269.

California.— People *v.* Salmon, (1905) 83 Pac. 42; *Ex p.* Thomas, 103 Cal. 497, 37 Pac. 514; People *v.* Gates, 46 Cal. 52.

Indiana.— State *v.* Johnson, 69 Ind. 85; State *v.* Gartrell, 14 Ind. 280; Lumpkins *v.* Justice, 1 Ind. 557; Wright *v.* State, 5 Blackf. 358, 35 Am. Dec. 126.

Mississippi.—Carotti *v.* State, 42 Miss. 334, 97 Am. Dec. 465.

Missouri.— State *v.* Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483; State *v.* Crowner, 56 Mo. 147; State *v.* Phillips, 49 Mo. App. 325.

See 32 Cent. Dig. tit. "Lewdness," § 3 *et seq.*

11. Musfelt *v.* State, 64 Nebr. 445, 90 N. W. 237.

In Missouri lewd and lascivious cohabitations between persons, one or both of whom are married, and not to each other, is a criminal offense whether open and notorious or not. State *v.* West, 84 Mo. 440; State *v.* Coffee, 39 Mo. App. 56.

12. Reg. *v.* Webb, 2 C. & K. 933, 3 Cox C. C. 183, 1 Den. C. C. 338, 13 Jur. 42, 18 L. J. M. C. 39, T. & M. 23, 61 E. C. L. 933; Reg. *v.* Watson, 2 Cox C. C. 376.

13. Fowler *v.* State, 5 Day (Conn.) 81; Com. *v.* Wardell, 128 Mass. 52, 35 Am. Rep. 357; State *v.* Millard, 18 Vt. 574, 46 Am. Dec. 170.

14. Com. *v.* Wardell, 128 Mass. 52, 34 Am. Rep. 357 [*distinguishing* Com. *v.* Catlin, 1 Mass. 8, where the acts were participated in by both parties, without objection, and were intended to be private and concealed]; State *v.* Millard, 18 Vt. 574, 46 Am. Dec. 170. "The word 'open' qualifies the intention of the perpetrator of the act; it does not fairly imply that it must be public, in the sense of being in a public place, or in the presence of many people. The offence created does not depend on the number present. It is enough if it be an intentional act of lewd exposure, offensive to one or more persons present. To hold otherwise would be to hold that one might commit with impunity any act of indecency, however gross, before any number of individuals successively." Com. *v.* Wardell, 128 Mass. 52, 54, 35 Am. Rep. 357; Grisham *v.* State, 2 Yerg. (Tenn.) 589. See also State *v.* Millard, 18 Vt. 574, 46 Am. Dec. 170; State *v.* Juneau, 88 Wis. 180, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

Lewdness is deemed to be open only when it is committed in the presence of another, or in a place open to the public view. Williams *v.* People, 67 Ill. App. 344.

"In any public place."— Under a statute providing for the punishment of any person who should be "guilty of notorious lewdness . . . in any public place," a public highway was held not to be such a public place as the statute contemplated (Williams *v.* State, 64 Ind. 553, 31 Am. Rep. 135); and under some statutes punishing the offense of indecent exposure, it is not necessary that such exposure be made to any person (State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508).

III. DEFENSES.

A. Marriage or Divorce. The marriage of the parties at the time of the alleged offense is a defense to a prosecution for unlawful cohabitation;[15] but a subsequent marriage is no defense.[16] A void divorce obtained prior to defendant's second marriage is no defense to a prosecution for living in open and notorious fornication.[17]

B. Innocence of Co-Defendant. The absence of a guilty intent may be shown in the defense of either of the parties, but it cannot inure to the benefit of the other who was guilty.[18]

IV. INDICTMENT OR INFORMATION.

A. In General. An indictment or information for illicit cohabitation or other lewdness must charge with certainty every element necessary to constitute the offense.[19] Lewdness as a statutory offense may be charged either in the language of the statute,[20] where the statute sets out all the elements of the offense with sufficient certainty,[21] or in language of like import and equivalent meaning.[22]

B. Particular Averments — 1. SEX OF DEFENDANTS. An indictment for illegal cohabitation should charge the parties to be of different sexes, and that they cohabitated as husband and wife.[23]

2. MARRIAGE. The existence of the marriage relation between the parties should be either expressly or impliedly negatived.[24] The indictment must also allege, expressly or impliedly, that the parties were or were not married to another, where the statute makes this an element of the offense, but not otherwise.[25]

15. State *v.* Adams, 65 N. C. 537; State *v.* Schlachter, 61 N. C. 520. See also People *v.* Colton, 2 Utah 457.

16. Owens *v.* State, 94 Ala. 97, 10 So. 669.

17. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

18. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599.

19. State *v.* Clinch, 8 Iowa 401; Newman *v.* State, 69 Miss. 393, 10 So. 580. See, generally, INDICTMENTS AND INFORMATIONS.

20. *Illinois.*— Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492]; Williams *v.* People, 67 Ill. App. 344.

Indiana.— State *v.* Chandler, 96 Ind. 591.

Iowa.— State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508.

Massachusetts.— Com. *v.* Parker, 4 Allen 313.

Missouri.— State *v.* Osborne, 69 Mo. 143; State *v.* Bess, 20 Mo. 419; State *v.* Byron, 20 Mo. 210; State *v.* Hopson, 76 Mo. App. 482; State *v.* Morrison, 64 Mo. App. 507.

North Carolina.— State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90.

Virginia.— Scott *v.* Com., 77 Va. 344.

See 32 Cent. Dig. tit. "Lewdness," § 7 *et seq.* And see INDICTMENTS AND INFORMATIONS, 22 Cyc. 339 *et seq.*

Forms of indictments or informations held sufficient see Crane *v.* People, 168 Ill. 395, 48 N. E. 54; State *v.* Chandler, 96 Ind. 591; State *v.* Bauguess, 106 Iowa 107, 76 N. W. 508; State *v.* Osborne, 69 Mo. 143; State *v.* Bess, 20 Mo. 419; People *v.* Colton, 2 Utah 457.

21. When the statute both names and describes the offense, an indictment in the language of the statute is sufficient; but when the statute does not describe the acts constituting the offense, the indictment must specifically set them forth. Williams *v.* People, 67 Ill. App. 344; Damerson *v.* State, 8 Mo. 494; State *v.* Morrison, 64 Mo. App. 507; State *v.* Brunson, 2 Bailey (S. C.) 149. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 339 *et seq.*

22. *Colorado.*—King *v.* People, 7 Colo. 224, 3 Pac. 223.

Indiana.— State *v.* Chandler, 96 Ind. 591.

Massachusetts.— Com. *v.* Dill, 159 Mass. 61, 34 N. E. 84.

North Carolina.— State *v.* Stubbs, 108 N. C. 774, 13 S. E. 90; State *v.* Lyerly, 52 N. C. 158.

Utah.— People *v.* Colton, 2 Utah 457.

See 32 Cent. Dig. tit. "Lewdness," § 7. And see INDICTMENTS AND INFORMATIONS, 22 Cyc. 336 *et seq.*

23. State *v.* Dunn, 26 Ark. 34; State *v.* Fore, 23 N. C. 378, holding, however, that an indictment sufficiently alleges the sex of defendants, where the court must intend from the allegations thereof that the parties were of different sexes. See also State *v.* Lashley, 84 N. C. 754.

Cohabitation as husband and wife see *infra*, IV, B, 3.

24. Crouse *v.* State, 16 Ark. 566; State *v.* Clinch, 8 Iowa 401; State *v.* Lashley, 84 N. C. 754; State *v.* Aldridge, 14 N. C. 331; People *v.* Colton, 2 Utah 457.

25. State *v.* Gooch, 7 Blackf. (Ind.) 468 (holding that an indictment against an un-

3. COHABITATION. An indictment for lewd and lascivious cohabitation or living in adultery or fornication must allege that the parties cohabited or lived together or with each other, and that they did so as husband and wife, where this is an essential element under the statute.[26]

4. NOTORIETY. An indictment for lewdness should charge that the acts constituting the offense were openly and notoriously committed, where this is an essential element of the offense.[27]

5. TIME OF OFFENSE. Unlawful cohabitation being a continued offense may properly be charged as having been committed between certain days, and proof of cohabitation at any time between such days is sufficient.[28] However, it has been held sufficient to charge the offense as having been committed on a certain day, without a *continuando*.[29]

6. MISCELLANEOUS AVERMENTS. Where such facts are essential elements of the offense charged, it should be alleged that there was habitual sexual intercourse,[30] or that a "notorious act of public indecency" was committed.[31] It need not be alleged that the offense was committed to the common nuisance of the people of the commonwealth.[32] And an indictment for unlawful cohabitation against a negro and a certain woman, spinster, is good, without stating the descent of the woman.[33]

C. Joinder of Parties. While the weight of authority seems to be that, although unlawful cohabitation is a joint offense,[34] the participants may be indicted either jointly or severally,[35] it has been held that they must be joined in the same information or indictment, unless one of them be unknown or since dead.[36] If jointly indicted it is within the discretion of the court whether they shall be tried jointly or separately.[37]

V. EVIDENCE.

A. Competency of Witnesses. The general rules governing the competency of witnesses in criminal cases are applicable to this offense.[38] The husband of the

married man for living in open and notorious fornication with a certain woman need not aver that she was unmarried); State *v.* Bess, 20 Mo. 419.

26. *Arkansas.*— State *v.* Dunn, 26 Ark. 34.
Indiana.— State *v.* Gartrell, 14 Ind. 280.
Massachusetts.— Com. *v.* Dill, 159 Mass. 61, 34 N. E. 84, holding that an indictment charging that defendants "did lewdly and lasciviously abide and cohabit" together was sufficient after verdict, although the statute used the word "associate" instead of "abide."
Missouri.— State *v.* Byron, 20 Mo. 210.
West Virginia.— State *v.* Foster, 21 W. Va. 767, 26 W. Va. 272.
See 32 Cent. Dig. tit. "Lewdness," § 7 *et seq.*

27. State *v.* Johnson, 69 Ind. 85; Delany *v.* People, 10 Mich. 241 (indictment at common law); State *v.* Moore, 1 Swan (Tenn.) 136; State *v.* Cagle, 2 Humphr. (Tenn.) 414 (holding that an allegation of notoriety, if necessary, is sufficiently made by the terms "openly and publicly").

28. Bailey *v.* State, 36 Nebr. 808, 55 N. W. 241; State *v.* Way, 5 Nebr. 283. See also INDICTMENTS AND INFORMATIONS, 22 Cyc. 319.

29. Hinson *v.* State, 7 Mo. 244.
"Certain day and divers other days."— An indictment charging illicit cohabitation on a certain day and on divers other days is supported by proof of the commission of the offense at a time prior to the day certain, provided such time is within the statute of limitations. State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

30. Newman *v.* State, 69 Miss. 393, 10 So. 580.

31. Williams *v.* People, 67 Ill. App. 344.

32. Com. *v.* Parker, 4 Allen (Mass.) 313.

33. Ashworth *v.* State, 9 Tex. 490.

34. State *v.* Hook, 4 Kan. App. 451, 46 Pac. 44; Delany *v.* People, 10 Mich. 241; State *v.* Foster, 21 W. Va. 767.

35. Wasden *v.* State, 18 Ga. 264; Scott *v.* Com., 77 Va. 344; State *v.* Foster, 21 W. Va. 767.

36. King *v.* People, 7 Colo. 224, 3 Pac. 223; State *v.* Hook, 4 Kan. App. 451, 46 Pac. 44; Delany *v.* People, 10 Mich. 241. See also State *v.* Byron, 20 Mo. 210.
Indictment held bad as not charging joint offense.— An information that "A" did lewdly and lasciviously cohabit with "B," etc., "they not being then and there married to each other" was held bad, as not charging a joint offense against "B" also. Delany *v.* People, 10 Mich. 241. See also State *v.* Hook, 4 Kan. App. 451, 46 Pac. 44.

37. Delany *v.* People, 10 Mich. 241; Stewart *v.* State, 64 Miss. 626, 2 So. 73. See also State *v.* Foster, 21 W. Va. 767. And see CRIMINAL LAW, 12 Cyc. 505.

38. See, generally, WITNESSES.

feme defendant may testify as to her marriage to him,[39] but a divorced husband is incompetent to testify as to the adulterous intercourse, or any other fact which occurred while the marriage subsisted.[40]

B. Presumptions and Burden of Proof — 1. Marriage. The single state being presumed until the contrary is shown, the burden is upon defendants to prove marriage.[41]

2. Criminal Intent. Habitual sexual intercourse being shown, a criminal intent will be presumed, and need not be proved by the state.[42]

C. Admissibility — 1. In General. The general rules governing the admissibility of evidence in criminal cases apply in prosecutions for this offense.[43] Confessions or admissions of one defendant are admissible against himself or herself,[44] but the jury should be cautioned that they are to operate only against the party making them.[45]

2. As to Intercourse. The fact of illicit intercourse, from its very nature, can rarely be directly proved, and therefore circumstantial evidence is of necessity admissible to prove it.[46] Hearsay evidence, including rumor, is inadmissible.[47]

3. As to Chastity. Evidence of the bad reputation of the woman for chastity is admissible against her co-defendant.[48]

The competency of a child five years of age to testify upon a prosecution for an indecent assault is within the discretion of the trial court. State *v.* Juneau, 88 Wis. 180, 59 N. W. 580, 43 Am. St. Rep. 877, 24 L. R. A. 857.

39. State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83.

40. State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656.

41. State *v.* McDuffie, 107 N. C. 885, 12 S. E. 83; People *v.* Colton, 2 Utah 457. See also State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. *Contra,* Hopper *v.* State, 19 Ark. 143.

42. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599. See also Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

43. See, generally, Criminal Law; Evidence.

A decree in a divorce suit between one of defendants and her husband is inadmissible. Crane *v.* People, 65 Ill. App. 492.

On an indictment for open gross lewdness evidence of secret lewdness is irrelevant. Com. *v.* Catlin, 1 Mass. 8.

44. Alsabrooks *v.* State, 52 Ala. 24; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182 (holding that the admission of the woman that the co-defendant was the father of a bastard child, of which she was delivered more than twelve months after the finding of the indictment, was admissible against her); State *v.* Berry, 24 Mo. App. 466.

45. Alsabrooks *v.* State, 52 Ala. 24; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182; State *v.* Berry, 24 Mo. App. 466.

The proper remedy is to request an instruction to the jury limiting the operation and effect of such evidence. Owens *v.* State, 94 Ala. 97, 10 So. 669; Alsabrooks *v.* State, 52 Ala. 24; State *v.* Berry, 24 Mo. App. 466.

46. *Alabama.*— Hill *v.* State, 137 Ala. 66, 34 So. 406; Brown *v.* State, 108 Ala. 18, 18 So. 811; Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Illinois.— Searls *v.* People, 13 Ill. 597; Crane *v.* People, 65 Ill. App. 492.

Indiana.— Jackson *v.* State, 116 Ind. 464, 19 N. E. 330.

Iowa.— See State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

Nebraska.— State *v.* Way, 5 Nebr. 283.

See 32 Cent. Dig. tit. "Lewdness," § 14.

Evidence tending to show the relation.— While occasional acts of illicit intercourse do not establish guilt, they are admissible in connection with other facts, such as the birth of a child, defendant's occupying the same room with the woman, etc. State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 660. Evidence that when defendant and his paramour were arrested, she was living in the same house with him, and was cooking his breakfast, that there was but one bed in the house, and that when she and defendant were leaving they took their clothes from the same box under the bed, is admissible. Brown *v.* State, 108 Ala. 18, 18 So. 811. And it is competent to show that defendant furnished his paramour with groceries and provisions. Hill *v.* State, 137 Ala. 66, 34 So. 406. *Compare* State *v.* Coffey, 44 Mo. App. 455. Where the state had introduced evidence that defendant supported his alleged paramour at his house, it was held competent for defendant to show that the woman was staying at the place under a contract to work for his father. Hill *v.* State, 137 Ala. 66, 34 So. 406.

47. Evidence that it was the general rumor of the neighborhood that the parties were living in adultery is not admissible to prove that fact. Overstreet *v.* State, 3 How. (Miss.) 328; Buttram *v.* State, 4 Coldw. (Tenn.) 171; Belcher *v.* State, 8 Humphr. (Tenn.) 63.

48. State *v.* Berry, 24 Mo. App. 466, holding also that the woman is to be protected against its effect by instructions limiting it.

4. Prior or Subsequent Acts of Familiarity. Prior acts of familiarity between the parties may be proved to illustrate and characterize the acts and conduct of the parties complained of as constituting the particular offense charged,[49] if not too remote in point of time to afford a reasonable inference of guilt.[50] Such evidence is only admissible, however, when offered in connection with, or subsequently to, the introduction of evidence tending to prove the offense charged.[51] Evidence of subsequent intimacy tending to show a continued illicit relation between the parties is admissible.[52]

D. Weight and Sufficiency — 1. In General. The evidence to sustain a conviction must, as in other cases, be sufficient to establish the guilt of the parties beyond all reasonable doubt.[53] Evidence wholly circumstantial may be sufficient to support a conviction.[54] The weight and sufficiency of the evidence is for the jury to determine, in view of all the circumstances of the case.[55]

2. As to Marriage. The fact of marriage must be proved by direct evidence,[56]

49. *Alabama.*— Hill *v.* State, 137 Ala. 66, 34 So. 406; Wright *v.* State, 108 Ala. 60, 18 So. 941; Alsabrooks *v.* State, 52 Ala. 24; Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Florida.— Brevaldo *v.* State, 21 Fla. 789.

Illinois.— Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492].

Mississippi.— Stewart *v.* State, 64 Miss. 626, 2 So. 73.

Nebraska.— State *v.* Way, 5 Nebr. 283.

Tennessee.— Mynatt *v.* State, 8 Lea 47; Cole *v.* State, 6 Baxt. 239.

See 32 Cent. Dig. tit. "Lewdness," § 14.

50. Stewart *v.* State, 64 Miss. 626, 2 So. 73.

51. Alsabrooks *v.* State, 52 Ala. 24; Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492]; State *v.* Way, 5 Nebr. 283.

52. *Alabama.*— Hill *v.* State, 137 Ala. 66, 34 So. 406; Brown *v.* State, 108 Ala. 18, 18 So. 811; Alsabrooks *v.* State, 52 Ala. 24. See also Lawson *v.* State, 20 Ala. 65, 56 Am. Dec. 182.

Illinois.— Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492].

Mississippi.— Stewart *v.* State, 64 Miss. 626, 2 So. 73.

Nebraska.— State *v.* Way, 5 Nebr. 283.

Tennessee.— Mynatt *v.* State, 8 Lea 47; Cole *v.* State, 6 Baxt. 239.

See 32 Cent. Dig. tit. "Lewdness," § 14.

53. Pinson *v.* State, 28 Fla. 735, 9 So. 706; Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492]; Van Dolsen *v.* State, 1 Ind. App. 108, 27 N. E. 440.

An indictment for open and notorious fornication is sustained by proof that defendant during the lifetime of his wife, she being undivorced, married and openly cohabited with another woman. Hood *v.* State, 56 Ind. 263, 26 Am. Rep. 21.

An allegation of "bedding and cohabiting together" is sustained by proof of the habitual surrender of the person of the woman to the gratification of the man. State *v.* Jolly, 20 N. C. 108, 32 Am. Dec. 656.

Open and gross lewdness is not proven by evidence of acts of secret adultery. State *v.* Chandler, 132 Mo. 155, 33 S. W. 797, 53 Am. St. Rep. 483; State *v.* Phillips, 49 Mo. App. 325; State *v.* Brunson, 2 Bailey (S. C.) 149.

An indictment for "living together" in fornication is not supported by proof of habitual carnal intercourse without living together. McCabe *v.* State, 34 Tex. Cr. 418, 30 S. W. 1063; Thomas *v.* State, 28 Tex. App. 300, 12 S. W. 1098; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427.

54. Peak *v.* State, 10 Humphr. (Tenn.) 99.

55. *Alabama.*— Bodiford *v.* State, 86 Ala. 67, 5 So. 559, 11 Am. St. Rep. 20; Hall *v.* State, 53 Ala. 463.

Florida.— Pinson *v.* State, 28 Fla. 755, 9 So. 706.

Nebraska.— Musfelt *v.* State, 64 Nebr. 445, 90 N. W. 237.

South Carolina.— State *v.* Sauls, 70 S. C. 393, 50 S. E. 17.

Tennessee.— Mynatt *v.* State, 8 Lea 47.

The birth of a child while the parties are living together is a fact to be considered by the jury. State *v.* Kirkpatrick, 63 Iowa 554, 19 N. W. 660.

56. State *v.* Coffee, 39 Mo. App. 56. On an indictment against two persons for lascivious cohabitation, one of the parties being married, the testimony of the alleged husband's sister that he and the woman left witness' house for the declared purpose of going to the house of a clergyman, about two miles distant, in order to be married by him, and that after an absence sufficient for that purpose they returned, declared that they were married, and lived together as man and wife, having several children, is not sufficient to prove the marriage. Com. *v.* Littlejohn, 15 Mass. 163.

Common-law marriage.—In Alabama, where common-law marriages by consent followed by cohabitation, without ceremony or solemnization, are valid, it was held that where, on trial of a divorced husband for living in adultery with another woman, there was evidence that, after the decree of divorce, he and his former wife, in the presence of witnesses, agreed to "let the past be the past, and from that time on they would again live together as man and wife," and that from then to the time of the trial they had lived together as husband and wife, whether they were remar-

and cannot be established by reputation alone.[57] Direct evidence consists of the record of the clergyman or other person who performed the ceremony,[58] and the testimony of witnesses who were present.[59] Defendant's confession or admission of marriage may also be sufficient evidence to prove that fact.[60]

3. As to Carnal Intercourse. The fact of intercourse must usually be inferred from circumstances,[61] which should be sufficient to produce a belief or conviction of the judgment that the parties have been cohabiting.[62]

VI. Trial and Judgment.[63]

A. Instructions. Defendants are entitled to an instruction that the evidence must establish guilt beyond a reasonable doubt.[64] Instructions should not be misleading,[65] on the weight of evidence,[66] or based on facts which there is no evidence to support.[67]

B. Verdict and Judgment. Although jointly indicted, defendants may be tried separately,[68] and one may be convicted and sentenced before the trial of the other.[69] Indeed it seems that one of the parties may be convicted and the other acquitted,[70] although there are decisions to the contrary.[71]

VII. Sentence and Punishment.

The punishment for the offense is governed by statute.[72]

LEX. Literally "Law; a law; the law."[73] (See Law; see also Jus.)

LEX ÆQUITATE GAUDET; APPETIT; PERFECTUM EST NORMA RECTI. A maxim meaning "The law delights in equity: it covets perfection; it is a rule of right."[1]

ried was a question for the jury. Mickle *v.* State, (Ala. 1896) 21 So. 66. And see, generally, Marriage.

57. Com. *v.* Littlejohn, 15 Mass. 163; State *v.* Coffee, 39 Mo. App. 56.

58. Com. *v.* Dill, 156 Mass. 226, 30 N. E. 1016; Com. *v.* Littlejohn, 15 Mass. 163.

59. Com. *v.* Dill, 156 Mass. 226, 30 N. E. 1016; Com. *v.* Littlejohn, 15 Mass. 163.

60. Cayford's Case, 7 Me. 57. See also Adultery, 1 Cyc. 963 *et seq.*; and, generally, Marriage.

61. See *supra*, V, C, 2.

62. Crane *v.* People, 168 Ill. 395, 48 N. E. 54 [*affirming* 65 Ill. App. 492]; Searls *v.* People, 13 Ill. App. 597; Jackson *v.* State, 116 Ind. 464, 19 N. E. 330; State *v.* Way, 5 Nebr. 283; State *v.* Poteet, 30 N. C. 23.

63. See, generally, Criminal Law.

64. Searls *v.* People, 13 Ill. 597; Tomlinson *v.* People, 102 Ill. App. 542, holding that an instruction requiring, as a condition of acquittal, the jury to find that defendants did not cohabit together and have illicit intercourse, is not equivalent to such an instruction.

65. Bush *v.* State, 37 Ark. 215. See Criminal Law, 12 Cyc. 647.

66. Pinson *v.* State, 28 Fla. 735, 9 So. 706, holding it to be error for the court to assume that the circumstances shown constituted a cohabitation as man and wife. See also Hall *v.* State, 53 Ala. 463; State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374; Hill *v.* State, 11 Tex. App. 379, holding that an instruction that "if the proof . . . shows that the defendants did live and sleep together in the same room, and had for a series of months, it is strong evidence against the accused," was flagrantly on the weight of evidence, and ground for reversal. See also Criminal Law, 12 Cyc. 596 *et seq.*

67. State *v.* St. John, 94 Mo. App. 229, 68 S. W. 374. See also Criminal Law, 12 Cyc. 651 *et seq.*

68. See *supra*, IV, C.

69. Delany *v.* People, 10 Mich. 241; State *v.* Lyerly, 52 N. C. 158.

70. State *v.* Cutshall, 109 N. C. 764, 14 S. E. 107, 26 Am. St. Rep. 599 [*overruling* State *v.* Mainor, 28 N. C. 340]; State *v.* Caldwell, 8 Baxt. (Tenn.) 576; Ledbetter *v.* State, 21 Tex. App. 344, 17 S. W. 427; Alonzo *v.* State, 15 Tex. App. 378, 49 Am. Rep. 207.

71. The offense of lewd and lascivious cohabitation is a joint offense of which both parties must be guilty, or neither. State *v.* Hook, 4 Kan. App. 451, 46 Pac. 44; Delany *v.* People, 10 Mich. 241.

72. Under Vt. St. §§ 5066, 5170, a man over sixteen years of age, convicted of gross lewdness, should be sentenced to imprisonment in the house of correction, and not in the state prison. *In re* Harris, 68 Vt. 243, 35 Atl. 55.

73. Black L. Dict.

1. Bouvier L. Dict.

LEX ALIQUANDO SEQUITUR ÆQUITATEM. A maxim meaning "The law sometimes follows equity."[2]

LEX ANGLIÆ EST LEX MISERICORDIÆ. A maxim meaning "The law of England is a law of mercy."[3]

LEX ANGLIÆ NON PATITUR ABSURDUM. A maxim meaning "The law of England does not suffer an absurdity."[4]

LEX ANGLIÆ NUNQUAM MATRIS SED SEMPER PATRIS CONDITIONEM IMITARI PARTUM JUDICAT. A maxim meaning "The law of England rules that the offspring shall always follow the condition of the father, never that of the mother."[5]

LEX ANGLIÆ NUNQUAM SINE PARLIAMENTO MUTARI POTEST. A maxim meaning "The law of England cannot be changed but by parliament."[6]

LEX A REGE NON EST VIOLENDA. A maxim meaning "The king cannot violate the law."[7]

LEX BENEFICIALIS REI CONSIMILI REMEDIUM PRÆSTAT. A maxim meaning "A beneficial law affords a remedy for a similar case."[8]

LEX CERTO ESTO; PŒNA CERTA, ET CRIMINI IDEONEA, ET LEGIBUS PRÆFINITA. A maxim meaning "Let the law be certain; and let the punishment be certain, adequate to the crime, and previously determined by the laws."[9]

LEX CITIUS TOLERARA VULT PRIVATUM DAMNUM QUAM PUBLICUM MALUM. A maxim meaning "The law will more readily tolerate a private loss than a public evil."[10]

LEX CONTRA ID QUOD PRÆSUMIT, PROBATIONEM NON RECIPIT. A maxim meaning "The law admits no proof against that which it presumes."[11]

LEX DEFICERE NON POTEST IN JUSTITIA EXHIBENDA. A maxim meaning 'The law cannot be defective in dispensing justice."[12]

LEX DE FUTURO, JUDEX DE PRÆTERITO. A maxim meaning "The law provides for the future, the judge for the past."[13]

LEX DILATIONES SEMPER EXHORRET. A maxim meaning "The law always abhors delays."[14]

LEX DOMICILII. Literally "The law of the domicile."[15] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX EST AB ÆTERNO. A maxim meaning "Law is from everlasting."[16]

LEX EST ANIMA REGIS, ET REX EST ANIMA LEGIS. A maxim meaning "The law is the soul of the king, and the king is the soul of the law."[17]

LEX EST DICTAMEN RATIONIS. A maxim meaning "Law is the dictate of reason. The common law will judge according to the law of nature and the public good."[18]

LEX EST EXERCITUS JUDICUM TUTISSIMUS DUCTOR. A maxim meaning "The law is the safest leader of the army of judges."[19]

LEX EST LINMA RECTI. A maxim meaning "Law is a straight line."[20]

LEX EST NORMA RECTI. A maxim meaning "Law is a rule of right."[21]

LEX EST RATIO SUMMA, QUÆ JUBET QUÆ SUNT UTILIA ET NECESSARIA, ET CONTRARIA PROHIBET. A maxim meaning "Law is the perfection of reason, which commands what is useful and necessary, and forbids the contrary."[22]

2. Bouvier L. Dict.
3. Black L. Dict.
4. Black L. Dict.
Applied in Avowry's Case, 9 Coke 19*b*, 22*a*.
5. Black L. Dict.
6. Black L. Dict.
7. Morgan Leg. Max.
8. Black L. Dict. [*citing* 2 Inst. 680].
9. Morgan Leg. Max.
10. Black L. Dict. [*citing* Coke Litt. 152].
Applied in Waddill *v.* Chamberlayne, Jeff. (Va.) 10, 13; Forsyth *v.* Hall, Drapers (U. C.) 291, 312.
11. Black L. Dict. [*citing* Lofft Max. 573].
12. Black L. Dict. [*citing* Coke Litt. 197].
13. Black L. Dict.
14. Black L. Dict. [*citing* Inst. 240].
15. Black L. Dict.
16. Black L. Dict. [*citing* Jenkins Cent. p. 34, case 66].
17. Peloubet Leg. Max. [*citing* Branch Princ.].
18. Peloubet Leg. Max. [*citing* Jenkins Cent. 117, case 33].
"The common law will judge according to the law of nature and the public good." Black L. Dict.
19. Morgan Leg. Max. [*citing* 2 Inst. 526].
20. Morgan Leg. Max. [*citing* Jenkins Cent. 132].
21. Black L. Dict. [*citing* Branch Princ.].
22. Burrill L. Dict. [*citing* Coke Litt. 319*b*].

LEX EST SANCTIO SANCTA, JUBENS HONESTA ET PROHIBENS CONTRARIA. A maxim meaning "Law is a sacred sanction, commanding what is right and prohibiting the contrary." [23]

LEX EST TUTISSIMA CASSIS; SUB CLYPEO LEGIS NEMO DECIPITUR. A maxim meaning "Law is the safest helmet; under the shield of the law no one is deceived." [24]

LEX FACIT REGEM. A maxim meaning "Law makes the king." [25]

LEX FAVET DOTI. A maxim meaning "The law favors dower." [26]

LEX FINGIT UBI SUBSISTIT ÆQUITAS. A maxim meaning "The law feigns where equity exists." [27]

LEX FORI. Literally "The law of the forum or court." [28]

LEX HÆREDITATES LIBERAS ESSE VULT NON IN PERPETUUM ASTRICTIS. A maxim meaning "The law wishes inheritance to be free to those who are not strictly bound in all time coming." [29]

LEXICON. See DICTIONARY.

LEX INJUSTA NON EST LEX. A maxim meaning "An unjust law is not a law." [30]

LEX INTENDIT VICINUM VICINI FACTA SCIRE. A maxim meaning "The law intends [or presumes] that one neighbor knows what another neighbor does." [31]

LEX JUDICAT DE REBUS NECESSARIO FACIENDIS, QUASI RE IPSA FACTIS. A maxim meaning "The law judges of things that must necessarily be done, as if they were in fact done." [32]

LEX LOCI. Literally "The law of the place." [33] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX LOCI CONTRACTUS. Literally "The law of the place of the contract." [34] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX LOCI DELICTUS. Literally "The law of the place where the crime took place." [35]

LEX LOCI DOMICILII. Literally "The law of the place of domicile." [36] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX LOCI REI SITÆ. Literally "The law of the place where a thing is situated." [37] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX LOCI SOLUTIONIS. Literally "The law of the place of solution." [38] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX MERCATORIA EST LEX TERRÆ. A maxim meaning "The mercantile law is the law of the land." [39]

LEX NECESSITATIS EST LEX TEMPORIS, I. E., INSTANTIS. A maxim meaning "The law of necessity is the law of the time, that is, of the instant, or present moment." [40]

LEX NEMINEM COGIT AD VANA SEU INUTILIA. An old and salutary [41]

23. Burrill L. Dict. [*citing* 2 Inst. 587].
Applied in Gibson *v.* Minet, 1 H. Bl. 569, 597, 3 T. R. 481, 1 Rev. Rep. 754.
24. Burrill L. Dict. [*citing* 2 Inst. 56].
25. Peloubet Leg. Max. [*citing* Lofft Max. 8].
26. Burrill L. Dict.
27. Burrill L. Dict. [*citing* Branch Princ.].
28. Burrill L. Dict. [*citing* Story Bills, § 160; Story Confl. L. § 330].
29. Morgan Leg. Max.
30. Peloubet Leg. Max. [*citing* Lofft Max. 98].
31. Burrill L. Dict. [*citing* Coke Litt. 78b].
32. Burrill L. Dict. [*citing* Branch Princ.].
33. Black L. Dict.
34. Black L. Dict.
The phrase is used, in a double sense, to mean sometimes the law of the place where a contract is entered into; sometimes, that of the place of its performance. Gibson *v.* Connecticut F. Ins. Co., 77 Fed. 561, 565.
Lex loci contractus aut actus see Graham *v.* Norfolk First Nat. Bank, 20 Hun (N. Y.) 326, 332.
35. Black L. Dict.
36. Black L. Dict.
37. Black L. Dict.
38. Black L. Dict.
39. Tayler L. Gloss.
40. Burrill L. Dict.
41. Referred to as "the old and salutary maxim" (Olmstead's Appeal, 43 Conn. 110, 118); "the old maxim" (Moseley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142, 152); "a maxim of the common law" (Conger *v.* Weaver, 6 Cal. 548, 559, 65 Am. Dec. 528; Luthy *v.* Woods, 1 Mo. App. 167, 169; Huntington *v.* Nicoll, 3 Johns. (N. Y.) 566, 598

maxim of the common law, meaning "The law will not force any one to do a thing vain and fruitless." [42]

LEX NEMINEM COGIT OSTENDERE QUOD NESCIRE PRÆSUMITUR. A maxim meaning "The law compels no one to show that which he is presumed not to know." [43]

LEX NEMINI FACIT INJURIAM. A maxim meaning "The law does injury to no one." [44]

LEX NEMINI OPERATUR INIQUUM. A maxim meaning "The law works injustice to no one." [45]

LEX NIL FACIT FRUSTRA. A maxim meaning "The law does nothing in vain." [46]

LEX NIL FRUSTRA JUBET. A maxim meaning "The law commands nothing vainly." [47]

LEX NON A REGE EST VIOLANDA. A maxim meaning "The law is not to be violated by the king." [48]

[*quoted* in State Sav. Assoc. *v.* Kellogg, 52 Mo. 583, 591]); "and of common sense" (Luthy *v.* Woods, *supra*); "a maxim of the common law as appropriate to our day as in the days of Hobart" (State *v.* Van Wye, 136 Mo. 227, 241, 37 S. W. 938, 58 Am. St. Rep. 627).

42. Broom Leg. Max. [*citing* Coke Litt. 127*b*; Wingfield Max. p. 600].

Applied or quoted in the following cases:

California.— Conger *v.* Weaver, 6 Cal. 548, 559, 65 Am. Dec. 528.

Connecticut.— Olmstead's Appeal, 43 Conn. 110, 118; Giddings *v.* Canfield, 4 Conn. 482, 490.

Georgia.— Robinson *v.* Lane, 19 Ga. 337, 378.

Kentucky.— U. S. Bank *v.* Huth, 4 B. Mon. 423, 438.

Louisiana.— Jones *v.* Read, 1 La. Ann. 200, 203; Barbarin *v.* Armstrong, 2 La. 208.

Maine.— Browne *v.* Bowdoinham, 71 Me. 144, 148; Wing *v.* Merchant, 57 Me. 383, 386.

Maryland.— Norris *v.* Despard, 38 Md. 487, 491.

Massachusetts.— Com. *v.* Temple, 14 Gray 69, 78; Ward *v.* Fuller, 15 Pick. 185, 190; Tolman *v.* Emerson, 4 Pick. 160, 163; Gordon *v.* Massachusetts F. & M. Ins. Co., 2 Pick. 249, 259.

Michigan.— Giddings *v.* State, 93 Mich. 1, 52 N. W. 944, 16 L. R. A. 402; Gristock *v.* Royal Ins. Co., 87 Mich. 428, 431, 49 N. W. 634; Grand Lodge A. O. U. W. *v.* Child, 70 Mich. 163, 172, 38 N. W. 1.

Missouri.— State *v.* Van Wye, 136 Mo. 227, 241, 37 S. W. 938, 58 Am. St. Rep. 627; Bouldin *v.* Ewart, 63 Mo. 330, 334; State Sav. Assoc. *v.* Kellogg, 52 Mo. 583, 591; State *v.* St. Louis, etc., R. Co., 3 Mo. App. 180, 192; Dryden *v.* Kellogg, 2 Mo. App. 87, 96; Luthy *v.* Woods, 1 Mo. App. 167, 169.

Montana.— Mont. Codes, (1895) § 4623.

New Hampshire.— Cahoon *v.* Coe, 57 N. H. 556, 579; Copp *v.* Henniker, 55 N. H. 179, 211, 20 Am. Rep. 194; Russell *v.* Dyer, 43 N. H. 396, 399; Wells *v.* Burbank, 17 N. H. 393, 411.

New Jersey.— Parker *v.* Pettit, 43 N. J. L. 512, 516; American Print Works *v.* Lawrence, 21 N. J. L. 248, 262.

New York.— *In re* Thirty-fourth St. R. Co., 102 N. Y. 343, 347, 7 N. E. 172; Piercy *v.* Averill, 37 Hun 360, 366; Loomis *v.* Tifft, 16 Barb. 541, 544; Drake *v.* Thayer, 5 Rob. 694, 700; Schroeder *v.* Hudson River R. Co., 5 Duer 55, 62; Ammidon *v.* Century Rubber Co., 14 N. Y. Suppl. 769, 772; Columbia College *v.* Dracher, 10 Abb. N. Cas. 235, 241; Huntington *v.* Nicoll, 3 Johns. 566, 598.

Pennsylvania.— Watmough *v.* Francis, 7 Pa. St. 206, 214; Bellas *v.* McCarty, 10 Watts 13, 28; Jaques *v.* Weeks, 7 Watts 261, 278; Fitch *v.* Ross, 4 Serg. & R. 557, 559; Heller's Estate, 5 Pa. Dist. 205, 17 Pa. Co. Ct. 603; *In re* Mercantile Appraisers' Lists, 1 Pa. Dist. 439, 443; Barlet's Estate, 2 Chest. Co. Rep. 457, 458, 3 Kulp 241; Williams *v.* De Haven, 9 Phila. 173, 174 [*affirmed* in 2 Wkly. Notes Cas. 294, 295].

Vermont.— Mosley *v.* Vermont Mut. F. Ins. Co., 55 Vt. 142, 152.

United States.— *In re* Leong Yick Dew, 19 Fed. 490, 495.

England.— Hick *v.* Rodocanachi, [1891] 2 Q. B. 626, 638, 7 Aspin. 97, 56 J. P. 54, 61 L. J. Q. B. 42, 40 Wkly. Rep. 161; Bell *v.* Midland R. Co., 10 C. B. N. S. 287, 306, 7 Jur. N. S. 1200, 30 L. J. C. P. 273, 4 L. T. Rep. N. S. 293, 9 Wkly. Rep. 612, 100 E. C. L. 287; Main's Case, 5 Coke 20*b*, 21*a*.

Canada.—Oliver *v.* Smith, 2 Can. L. T. Acc. Notes 152, 156; Fortier *v.* Wilson, 11 U. C. C. P. 495, 499.

43. Black L. Dict. [*citing* Lofft Max. 569].

44. Burrill L. Dict. [*citing* Branch Princ.].

Applied in Bucknor's Estate, 7 Wkly. Notes Cas. (Pa.) 470, 472.

45. Burrill L. Dict.

46. Burrill L. Dict. [*citing* Jenkins Cent. 12, case 19].

Applied in: Gloucester City *v.* Greene, 45 N. J. Eq. 747, 754, 18 Atl. 81 [*citing* Huntington *v.* Nicoll, 3 Johns. (N. Y.) 566, 598]; Jenkins *v.* Smith, 21 Misc. (N. Y.) 750, 753, 48 N. Y. Suppl. 126, 127 [*citing* Jackson *v.* Adams, 7 Wend. (N. Y.) 367, 368]; Hussey *v.* Moore, 3 Bulstr. 275, 280. See also Collingwood *v.* Pace, 1 Ventr. 413, 417.

47. Burrill L. Dict.

Applied in Hussey *v.* Moore, 3 Bulstr. 275, 280.

48. Cyclopedic L. Dict. [*citing* Jenkins Cent.]

LEX NON CONSILIA NUDA, SED ACTUS APERTOS RESPICIT. A maxim meaning "The law regards not mere intentions, but open acts." [49]

LEX NON CURAT DE MINIMIS. A maxim meaning "The law does not regard small matters." [50] (See De Minimis Non Curat Lex.)

LEX NON DEBIT DEFICERE CONQUERENTIBUS IN JUSTITIA EXHIBENDA. A maxim meaning "The law wills that, in every case where a man is wronged and endamaged, he shall have remedy." [51]

LEX NON DEFICIT IN JUSTITIA EXHIBENDA. A maxim meaning "The law does not fail in showing justice." [52]

LEX NON EXACTE DEFINIT, SED ARBITRIO BONI VIRI PERMITTIT. A maxim meaning "The law does not define exactly, but trusts in the judgment of a good man." [53]

LEX NON FAVET DELICATORUM VOTIS. A maxim meaning "The law favors not the wishes of the dainty." [54]

LEX NON INTENDIT ALIQUID IMPOSSIBILE. A maxim meaning "The law does not intend anything impossible." [55]

LEX NON PATITUR FRACTIONES ET DIVISIONES STATUUM. A maxim meaning "The law does not suffer fractions and divisions of estates." [56]

LEX NON PRÆCIPIT INUTILIA, QUIA INUTILIS LABOR STULTUS. A maxim meaning "The law does not command useless things; for useless labor is folly." [57]

LEX NON REQUIRIT VERIFICARI QUOD APPARET CURIÆ. A maxim meaning "The law does not require that to be verified [or proved] which is apparent to the court." [58]

LEX NON SCRIPTA. Literally "The unwritten or common law." [59] (See, generally, Common Law; Customs and Usages. See also Law.)

LEX NOSTRA NEMINEM ABSENTEM DAMNAT. A maxim meaning "Our law condemns no one in his absence." [60]

LEX ORBIS, INSANIS, ET PAUPERIBUS PRO TUTORE ATQUE PARENTE EST. A maxim meaning "The law is the guardian and father of orphans, the insane, and the poor." [61]

LEX PLUS LAUDATUR QUANDO RATIONE PROBATUR. A maxim meaning "The law is the more praised when it is approved by reason." [62]

LEX POSTERIOR DEROGAT PRIORI. A maxim meaning "A later statute takes away the effect of a prior one." [63]

LEX PROSPICIT, NON RESPICIT. A maxim meaning "The law prescribes a rule for the future, not for the past." [64]

49. Peloubet Leg. Max. [*citing* Lofft Max. 123].

50. Bouvier L. Dict.

51. Broom Leg. Max. [*citing* Coke Litt. 197*b*].

52. Burrill L. Dict. [*citing* Jenkins Cent. p. 41, case 78; 31, case 61; 27, case 50].

53. Black L. Dict.

Applied in Bissell *v.* Briggs, 9 Mass. 462, 475, 6 Am. Dec. 88.

54. Black L. Dict. [*citing* Broom Leg. Max. 379].

55. Burrill L. Dict.

Applied in: St. Louis, etc., R. Co. *v.* Evans, etc., Fire Brick Co., 85 Mo. 307, 329; *In re* Leong Yick Dew, 19 Fed. 490, 495 [*quoting* Bouvier L. Dict.]; *In re* Thames River, 12 Coke 89*a*.

56. Burrill L. Dict. [*citing* Branch Princ.]

57. Burrill L. Dict. [*citing* Coke Litt. 197*b*].

Applied in *In re* Moury, 112 Mass. 394, 400; Frost's Case, 5 Coke 88*b*.

58. Burrill L. Dict.

Applied in Baten's Case, 9 Coke 53*b*, 54*b*.

59. Wharton L. Lex. [*citing* 1 Stephen Comm. (7th ed.) 40–68].

Statutes made before the beginning of the reign of Richard I are accounted part of the *lex non scripta*. Burrill L. Dict. [*citing* Hale Hist. Com. L. 1, 2, 21].

60. Morgan Leg. Max.

61. Peloubet Leg. Max. [*citing* Lofft Max. 352].

62. Burrill L. Dict.

Applied in: Doe *v.* Ewart, 7 A. & E. 634, 657, 34 E. C. C. 337; Dalmer *v.* Barnard, 7 T. R. 248, 252; Porter *v.* Bradley, 3 T. R. 143, 146.

63. Black L. Dict. [*citing* Broom Leg. Max. 29; Mackeldey Rom. L. § 71].

Applied in: *In re* Statutes, etc., 22 Can. Sup. Ct. 577, 679; Brophy *v.* Atty.-Gen., 5 Cartwr. Cas. (Can.) 156, 211.

64. U. S. *v.* Iselin, 87 Fed. 194, 197 [*citing In re* Richardson, 20 Fed. Cas. No. 11,777, 2 Story 571].

LEX PUNIT MENDACIUM. A maxim meaning "The law punishes falsehood." [65]

LEX PURE PŒNALIS, OBLIGAT TANTUM AD PŒNAM, NON ITEM AD CULPAM; LEX PŒNALIS MIXTA, ET AD CULPAM OBLIGAT, ET AD PŒNAM. A maxim meaning "The law, merely penal, binds only as to penalty, not as to fault; the mixed penal law binds both to fault and penalty." [66]

LEX REI SITÆ. Literally "The law of the place of situation of the thing." [67] (See CONFLICT OF LAWS, and Cross-References Thereunder.)

LEX REJICIT SUPERFLUA [PUGNANTIA]. A maxim meaning "The law rejects superfluous [and contradictory] things." [68]

LEX REPROBAT MORAM. A maxim meaning "The law reprobates delay." [69]

LEX RESPICIT ÆQUITATEM. A maxim meaning "The law pays regard to equity." [70]

LEX SCRIPTA. Literally "Written law." [71] (See, generally, CONSTITUTIONAL LAW; STATUTES. See also LAW.)

LEX SCRIPTA SI CESSET, ID CUSTODIRI OPORTET QUOD MORIBUS ET CONSUETUDINE INDUCTUM EST; ET, SI QUA IN RE HOC DEFECERIT, TUNC ID QUOD PROXIMUM ET CONSEQUENS EI EST; ET, SI ID NON APPAREAT, TUNC JUS QUO URBS ROMANA UTITUR SERVARI OPORTET. A maxim meaning "If the written law be silent, that which is drawn from manners and custom ought to be observed; and, if that is in any manner defective, then that which is next and analogons to it; and, if that does not appear, then the law which Rome uses should be followed." [72]

LEX SEMPER DABIT REMEDIUM. A maxim meaning "The law will always give a remedy." [73]

LEX SEMPER INTENDIT QUOD CONVENIT RATIONI. A maxim meaning "The law always intends what is agreeable to reason." [74]

LEX SPECTAT AD PROXIMAM NON AD REMOTAM CAUSAM. A maxim meaning "The law looks to the proximate not to the remote cause." [75]

LEX SPECTAT NATURÆ ORDINEM. A maxim meaning "The law regards the order and course of nature." [76]

LEX SUCCURRIT IGNORANTI. A maxim meaning "The law assists the ignorant." [77]

LEX SUCCURRIT MINORIBUS. A maxim meaning "The law aids minors." [78]

LEX TERRÆ. Literally "The law of the land." [79] (See, generally, CONSTITUTIONAL LAW.)

LEX UNO ORE OMNES ALLOQUITUR. A maxim meaning "The law addresses all with one [the same] mouth or voice." [80]

LEX VIGILANTIBUS, NON DORMIENTIBUS, SUBVENIT. A maxim meaning "Law assists the wakeful, not the sleeping." [81]

LIABILITY. A broad term; [82] thus it may be employed as meaning the state of

65. Burrill L. Dict. [*citing* Jenkins Cent. p. 15, case 26].
66. Tayler L. Gloss.
67. Black L. Dict.
68. Burrill L. Dict. [*citing* Jenkins Cent. 133, case 72].
69. Burrill L. Dict. [*citing* Jenkins Cent. 36, case 68].
70. Black L. Dict. [*citing* Coke Litt. 24*b*].
71. Burrill L. Dict. [*citing* 1 Blackstone Comm. 6285; Hale Hist. Com. L. 1, 2].
72. Black L. Dict.
73. Black L. Dict. [*citing* Broom Leg. Max. 192; Branch Princ.].
Applied in: Peters *v.* Van Lear, 4 Gill (Md.) 249, 255; Smith *v.* Bonsall, 5 Rawle (Pa.) 80, 89.
74. Burrill L. Dict. [*citing* Coke Litt. 78*b*].
75. Jeffries *v.* Alexander, 8 H. L. Cas. 594. 638, 7 Jur. N. S. 221, 31 L. J. Ch. 9, 11 Eng. Reprint 562.
76. Broom Leg. Max. [*citing* Coke Litt. 197*b*].
77. Burrill L. Dict. [*citing* Jenkins Cent. 15, case 26].
78. Burrill L. Dict. [*citing* Jenkins Cent. p. 51, case 97].
79. Black L. Dict.
80. Burrill L. Dict. [*citing* 2 Inst.].
81. Black L. Dict. [*citing* 1 Story Const. § 529].
82. "The word . . . is a very broad one."—Hyatt *v.* Anderson, 74 S. W. 1094, 1096, 25 Ky. L. Rep. 132.
"A liability created by a statute" means a liability which would not exist but for the statute. Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507, 515 [*quoted* in Nimick *v.* Mingo Iron Works Co., 25 W. Va. 184, 194].

being LIABLE,[83] *q. v.*; that for which one is responsible or liable;[84] obligation;[85] that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action;[86] responsibility;[87] legal responsibility;[88] amenability or responsibility to law; the condition of one who is subject to a charge or duty which may be judicially enforced;[89] the condition of being actually or potentially subject to an obligation;[90] the condition of being responsible for a possible or actual loss, penalty, evil, expense or burden;[91] the state of being bound or obliged in law or justice[92] to do, pay, or make good something,[93] or of one who is bound in law and justice to do something which may be enforced by action;[94] the state or condition of one who is under obligation to do at once or at some future time something which may be enforced by action.[95] In criminal law, a term covering every form of punishment to which a man subjects himself,

"Liability to cease" see Kish *v.* Cory, L. R. 10 Q. B. 553, 561, 2 Aspin. 593, 44 L. J. Q. B. 205, 32 L. T. Rep. N. S. 670, 23 Wkly. Rep. 880; Francesco *v.* Massey, L. R. 8 Exch. 101, 104, 42 L. J. Exch. 75, 21 Wkly. Rep. 440.

"All liabilities" see *In re* Yorkshire Permanent Ben. Bldg. Soc., 43 Ch. D. 407, 416, 59 L. J. Ch. 197, 62 L. T. Rep. N. S. 486, 38 Wkly. Rep. 376.

"Different relative liabilities" see Reg. *v.* Capel, 12 A. & E. 382, 411, 4 Jur. 886, 9 L. J. M. C. 65, 4 P. & D. 87, 40 E. C. L. 194.

"Outstanding liabilities" see Perret *v.* King, 30 La. Ann. 1368, 1370, 31 Am. Rep. 240.

Distinguished from "duties" or "rights" see Sydney Municipal Council *v.* Bourke, [1895] A. C. 433, 438, 59 J. P. 659, 64 L. J. P. C. 140, 72 L. T. Rep. N. S. 605, 11 Reports 482.

The antithesis of assets see Lovejoy *v.* Foxcroft, 91 Me. 367, 382, 40 Atl. 141.

83. Berry *v.* Kansas City, etc., R. Co., 52 Kan. 759, 771, 34 Pac. 805, 39 Am. St. Rep. 371.

84. Standard Dict. [*quoted* in White *v.* Green, (Iowa 1897) 70 N. W. 182, 184].

85. Adams *v.* Fragiacomo, 71 Miss. 417, 424, 15 So. 798.

Double sense of term.—It is used either generally, as including every kind of obligation, or in the more special sense to denote inchoate, future, unascertained, or imperfect obligations, as opposed to "debts," the essence of which is that they are ascertained and certain. Rapalje & L. L. Dict. [*quoted* in State *v.* Sheets, 26 Utah 105, 108, 72 Pac. 334].

Bond not included see Los Angeles *v.* Teed, 112 Cal. 319, 327, 44 Pac. 580. To the same effect see Reynolds *v.* Lyon County, 121 Iowa 733, 738, 96 N. W. 1096.

Debts included see *In re* Hevenor, 144 N. Y. 271, 274, 39 N. E. 393; Witz *v.* Mullin, 90 Va. 805, 806, 20 S. E. 783.

Debts not included see White *v.* Green, (Iowa 1897) 70 N. W. 182, 184; McElfresh *v.* Kirkendall, 36 Iowa 224, 226; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, 152; Choate *v.* Quinichett, 12 Heisk. (Tenn.) 427, 432.

Judgments included see *In re* United Button Co., 140 Fed. 495, 505.

86. Haywood *v.* Shreve, 44 N. J. L. 94, 104 [*quoted* in *In re* Van Orden, 96 Fed. 86, 88].

87. Bouvier L. Dict. [*quoted* in Lattin *v.* Gillette, 95 Cal. 317, 319, 30 Pac. 545, 29 Am. St. Rep. 115; Piller *v.* Southern Pac. R. Co., 52 Cal. 42, 44; Smart *v.* Morrison, 15 Ill. App. 226, 229; McElfresh *v.* Kirkendall, 36 Iowa 224, 226].

88. Black L. Dict. [*quoted* in Benge *v.* Bowling, 106 Ky. 575, 576, 51 S. W. 151, 21 Ky. L. Rep. 165].

It embraces a responsibility arising from or growing out of some express or implied consent of parties (Thomas *v.* Union Pac. R. Co., 1 Utah 232, 236); and it may arise, from contracts expressed or implied, or in consequence of torts (Bouvier L. Dict. [*cited* in Lattin *v.* Gillette, 95 Cal. 317, 319, 30 Pac. 545, 29 Am. St. Rep. 115; Wood *v.* Currey, 57 Cal. 208, 209; Piller *v.* Southern Pac. R. Co., 52 Cal. 42, 44; McElfresh *v.* Kirkendall, 36 Iowa 224, 226; Choate *v.* Quinchett, 12 Heisk. (Tenn.) 427, 432]. See also Miller *v.* Kern County Land Co., 134 Cal. 586, 588, 66 Pac. 856.

89. Abbott L. Dict. [*quoted* in Wood *v.* Currey, 57 Cal. 208, 209].

90. Rapalje & L. L. Dict. [*quoted* in State *v.* Sheets, 26 Utah 105, 108, 72 Pac. 334].

The term is not restricted to the absolute, but may include a contingency. Cochran *v.* U. S., 157 U. S. 286, 296, 15 S. Ct. 628, 39 L. ed. 704 [*quoted* in State *v.* Sheets, 26 Utah 105, 108, 72 Pac. 334].

91. Standard Dict. [*quoted* in White *v.* Greene, (Iowa 1897) 70 N. W. 182, 184; Reynolds *v.* Waterville, 92 Me. 292, 319, 42 Atl. 553].

92. Joslin *v.* New Jersey Car Spring Co., 36 N. J. L. 141, 145 [*quoted* in *In re* Van Orden, 96 Fed. 86, 88]; Black L. Dict. [*quoted* in Benge *v.* Bowling, 106 Ky. 575, 576, 51 S. W. 151, 21 Ky. L. Rep. 165].

93. Black L. Dict. [*quoted* in Benge *v.* Bowling, 106 Ky. 575, 576, 51 S. W. 151, 21 Ky. L. Rep. 165].

94. Bouvier L. Dict. [*quoted* in Lattin *v.* Gillette, 95 Cal. 317, 319, 30 Pac. 545, 29 Am. St. Rep. 115; Piller *v.* Southern Pac. R. Co., 52 Cal. 42, 44; Smart *v.* Morrison, 15 Ill. App. 226, 229; McElfresh *v.* Kirkendall, 36 Iowa 224, 226; Benge *v.* Bowling, 106 Ky. 575, 576, 51 S. W. 151, 21 Ky. L. Rep. 165; Choate *v.* Quinichett, 12 Heisk. (Tenn.) 427, 432].

95. White *v.* Green, 105 Iowa 176, 181, 74 N. W. 928; Hyatt *v.* Anderson, 74 S. W. 1094, 1096, 25 Ky. L. Rep. 132, 134.

by violating the common laws of the county.[96] (See CHARGES; CLAIM; CONTINGENCY; CONTINGENT; DEBT; DEMAND; INDEBTEDNESS; LIABLE.)

LIABILITY INSURANCE. A contract by which the insurer agrees to indemnify the insured against loss by reason of the liability imposed by law for damages on account of bodily injuries, including death, suffered by a person or persons through accident or casualty occurring within a specified term.[97] (See EMPLOYER'S LIABILITY INSURANCE. See also, generally, INSURANCE.)

LIABLE.[98] Exposed to a certain contingency or casualty more or less probable;[99] financially responsible, to be obliged to pay, at least, upon a contingency;[1] bound, in the present, to pay, in the future, certainly, or upon contingency;[2] According to the context the word may mean bound or obliged;[3] likely or probable;[4] qualified;[5] subject.[6] (See CHARGES; CLAIM; CONTINGENCY; CONTINGENT; DEBT; DEMAND; INDEBTEDNESS; LIABILITY.)

LIBEL. A species of pleading.[7] (Libel: Generally, see LIBEL AND SLANDER. For Divorce, see DIVORCE. For Forfeiture, see FORFEITURES; NEUTRALITY LAWS; WAR. In Admiralty, see ADMIRALTY.)

96. U. S. *v.* Ulrici, 28 Fed. Cas. No. 16,594, 3 Dill. 532, 534. See also U. S. *v.* Reisinger, 128 U. S. 398, 402, 9 S. Ct. 99, 32 L. ed. 480; U. S. *v.* Mathews, 23 Fed. 74, 75.

97. See 8 Encyclopedia Americana (article by Edwin W. De Leon on "Casualty Insurance"), where the author classifies "Liability Insurance" as one of "the four great headings" into which "Casualty Insurance" is usually divided. See CASUALTY INSURANCE, 6 Cyc. 701.

98. As used in connection with other words see the following phrases: "Liable, by reason of any contract or promise." Johnson *v.* Skafte, L. R. 4 Q. B. 700, 704, 10 B. & S. 727, 38 L. J. Q. B. 318, 20 L. T. Rep. N. S. 909, 17 Wkly. Rep. 1098. "Liable for the consequences." State *v.* Lindsey, 19 Nev. 47, 53, 5 Pac. 822, 3 Am. St. Rep. 776. "Liable to be deprived." *In re* Loftus-Otway, [1895] 2 Ch. 235, 238, 64 L. J. Ch. 529, 72 L. T. Rep. N. S. 656, 13 Reports 536, 43 Wkly. Rep. 501. "Liable to be laid out in the purchase of land." *In re* Hill, [1896] 1 Ch. 962, 966, 65 L. J. Ch. 511, 74 L. T. Rep. N. S. 460, 44 Wkly. Rep. 573. "Liable to contribute." Reg. *v.* Monck, 2 Q. B. D. 544, 547, 46 L. J. M. C. 251, 36 L. T. Rep. N. S. 720. "Liable to entry." Manuel *v.* Fabyanski, 44 Minn. 71, 75, 46 N. W. 208. "Liable to execution." Lambert *v.* Powers, 36 Iowa 18, 20. "Liable to deteriorate from keeping." Jolley *v.* Hardeman, 111 Ga. 749, 751, 36 S. E. 952. "Liable to draft." Gregg Tp. *v.* Jamison, 55 Pa. St. 468, 473. "Liable to forfeiture." The Mary Celeste, 16 Fed. Cas. No. 9,202, 2 Lowell 354, 357; The Kate Heron, 14 Fed. Cas. No. 7,619, 6 Sawy. 106, 111. "Liable to pay." *In re* Barber, 14 M. & W. 720, 722. "Liable to repair." Rural District Council *v.* Parker, [1900] 1 Q. B. 1, 4, 63 J. P. 708, 69 L. J. Q. B. 105, 81 L. T. Rep. N. S. 403, 48 Wkly. Rep. 68; Cuckfield Rural Dist. Council *v.* Goring, [1898] 1 Q. B. 865, 867, 62 J. P. 358, 67 L. J. Q. B. 539, 28 L. T. Rep. N. S. 530, 46 Wkly. Rep. 541. "Liable to the distress of the landlord." *In re* Mitchell, 116 Fed. 87, 98. "Shall not be 'liable.'" Yerby *v.* Matthews, 26 Ga. 549, 550. "Stock liable to be converted or exchanged." Northumberland *v.* Percy, [1893] 1 Ch. 298, 303, 62 L. J. Ch. 331, 68 L. T. Rep. N. S. 45, 3 Reports 156, 41 Wkly. Rep. 597.

99. Webster Dict. [*quoted* in Home Ins. Co. *v.* Peoria, etc., R. Co., 178 Ill. 64, 70, 52 N. E. 862].

It may denote "something external which may befall us." Webster Dict. [*quoted* in Albert *v.* Gibson, 141 Mich. 698, 703, 105 N. W. 19; Beasley *v.* Linehan Transfer Co., 148 Mo. 413, 421, 50 S. W. 87].

So it may refer to a future possible or probable happening which may not actually occur. Webster Dict. [*quoted* in Home Ins. Co. *v.* Peoria, etc., R. Co., 178 Ill. 64, 70, 52 N. E. 862; State *v.* Sheets, 26 Utah 105, 108, 72 Pac. 334; Cochran *v.* U. S., 157 U. S. 286, 296, 15 S. Ct. 628, 39 L. ed. 704].

1. Reynolds *v.* Waterville, 92 Me. 292, 319, 42 Atl. 553.

2. Reynolds *v.* Waterville, 92 Me. 292, 319, 42 Atl. 553.

3. Booth *v.* Com., 16 Gratt. (Va.) 519, 525. See also *In re* Hill, [1896] 1 Ch. 962, 966, 65 L. J. Ch. 511, 74 L. T. Rep. N. S. 460, 44 Wkly. Rep. 573.

4. Hallum *v.* Omro, 122 Wis. 337, 344, 99 N. W. 1051.

5. State *v.* Davis, 12 R. I. 492, 493, 34 Am. Rep. 704. *Contra*, Booth *v.* Com., 16 Gratt. (Va.) 519, 525.

6. Beasley *v.* Linehan Transfer Co., 148 Mo. 413, 50 S. W. 87.

7. Burrill L. Dict. See also Phœnix Ins. Co. *v.* The Atlas, 93 U. S. 302, 316, 23 L. ed. 863. See also 1 Cyc. 853.

Embraces an "information."—The term "information" is not exclusively applied to a proceeding at common law. A libel on a seizure is in its terms and essence an information. The Samuel, 1 Wheat. (U. S.) 9, 14, 4 L. ed. 23. See INFORMATIONS IN CIVIL CASES.

LIBEL AND SLANDER

By Edgar B. Kinkead *
Professor of Law, Ohio State University, Columbus, Ohio

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* Author of "Kinkead's Code Pleading," "Kinkead on Torts," "Kinkead's Ohio Practice," "Probate Law and Practice," and "Jurisprudence, Law and Ethics."

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CROSS-REFERENCES

For Matters Relating to;
Abatement or Revival, see ABATEMENT AND REVIVAL.
Arrest, see ARREST.
Bail, see ARREST; BAIL.
Blasphemous Libel, see BLASPHEMY.
Conspiracy to Defame, see CONSPIRACY.
Constitutional Law, see CONSTITUTIONAL LAW.
Copyright of Libelous Work, see COPYRIGHT.
Criminal Law Generally, see CRIMINAL LAW.
Indictment or Information Generally, see INDICTMENTS AND INFORMATIONS.
Injunction to Restrain:
Libel or Slander, see INJUNCTIONS.
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Liability of:
Corporation, see CORPORATIONS.
Husband or Wife, See HUSBAND AND WIFE.
Insane Person, see INSANE PERSONS.
Obscene Libel, see OBSCENITY.
Provoking Homicide by Defamation, see HOMICIDE.
Right of Action by Husband or Wife, see HUSBAND AND WIFE.

I. DEFINITIONS.

A. Libel. A definition of libel which has frequently met with judicial approval is as follows: A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred,

contempt, or ridicule.[1] It has been said, however, by Chief Justice Sherwood, in

1. Com. *v.* Clap, 4 Mass. 163, 168, 3 Am. Dec. 212 [*quoted* in Rice *v.* Simmons, 2 Harr. (Del.) 417, 31 Am. Dec. 766; Clark *v.* Binney, 2 Pick. (Mass.) 113, 115; Mitchell *v.* Bradstreet Co., 116 Mo. 226, 241, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; McGinnis *v.* Knapp, 109 Mo. 131, 138, 18 S. W. 1134; Legg *v.* Dunleavy, 80 Mo. 558, 562, 50 Am. Rep. 512; Price *v.* Whitely, 50 Mo. 439, 440; Keemle *v.* Sass, 12 Mo. 499, 504; Nelson *v.* Musgrave, 10 Mo. 648, 649; O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 370, 76 N. Y. Suppl. 498; Ryckman *v.* Delavan, 25 Wend. (N. Y.) 186, 198; Cole *v.* Neustadter, 22 Oreg. 191, 199, 29 Pac. 550; Cramer *v.* Noonan, 4 Wis. 231, 238]; 2 Kent Comm. 17 [*quoted* in Simmons *v.* Morse, 51 N. C. 6, 7].

Other definitions are: "A censorious or ridiculing writing, picture or sign, made with a mischievous and malicious intent towards government, magistrates or individuals." Alexander Hamilton *arguendo* in People *v.* Croswell, 3 Johns. Cas. (N. Y.) 337, 354 [*quoted* in McGinnis *v.* Knapp, 109 Mo. 131, 139, 18 S. W. 1134; Price *v.* Whitely, 50 Mo. 439, 441; Hermann *v.* Bradstreet Co., 19 Mo. App. 227, 231; Moore *v.* Francis, 121 N. Y. 199, 204, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214 (where, however, the definition was criticized as giving to the word "censorious" a much broader signification than strictly belongs to it); O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 369, 76 N. Y. Suppl. 498; Cooper *v.* Greeley, 1 Den. (N. Y.) 347, 354; Steele *v.* Southwick, 9 Johns. (N. Y.) 214, 215; Cole *v.* Neustadter, 22 Oreg. 191, 198, 29 Pac. 550; Smith *v.* Bradstreet Co., 63 S. C. 525, 530, 41 S. E. 763; McBride *v.* Ellis, 9 Rich. (S. C.) 313, 315; State *v.* Farley, 4 McCord (S. C.) 317, 321; Cramer *v.* Noonan, 4 Wis. 231, 238, and *explained* in Cady *v.* Brooklyn Union Pub. Co., 51 N. Y. Suppl. 198, 23 Misc. (N. Y.) 409, 413]; Tappan *v.* Wilson, 7 Ohio 190, 193.

"Any false and malicious publication, when expressed in printing or writing, or by signs or pictures . . . which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt or ridicule, or charges an act odious and disgraceful in society." Iron Age Pub. Co. *v.* Crudup, 85 Ala. 519, 520, 5 So. 332 [*quoted* in Wofford *v.* Meeks, 129 Ala. 349, 355, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214; Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 357, 21 So. 531].

"Any writing, picture or other sign tending, without lawful excuse, to injure the character of an individual, by subjecting him to ridicule, contempt or disgrace." Henderson *v.* Hale, 19 Ala. 154, 161 [*citing* Cook Defam. 2; 1 Stark. Sl. 169].

"A false and unprivileged publication which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his business." Taylor *v.* Hearst, 107 Cal. 262, 269, 40 Pac. 392.

"A . . . publication . . . which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him the subject of hatred, odium, contempt, or ridicule." Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485, 488.

"A false and malicious publication of a person which exposes him to public ridicule, hatred or contempt, or hinders virtuous men from associating with him." Donaghue *v.* Gaffy, 54 Conn. 257, 268, 7 Atl. 552.

"A false and malicious writing, published of another, which renders him contemptible or ridiculous in public estimation, or exposes him to public hatred or contempt, or hinders virtuous men from associating with him." Lindley *v.* Horton, 27 Conn. 58, 61.

"A malicious defamation of any person, made public by printing, writing, signs or pictures, tending to blacken the memory of the dead, with intent to provoke the living, or injure the reputation of the living, provoke him to wrath, and expose him to hatred, contempt or ridicule." State *v.* Avery, 7 Conn. 266, 268, 18 Am. Dec. 105 [*citing* 4 Blackstone Comm. 150; 1 Hawkins P. C. c. 73, § 1; Holt L. 73].

"A malicious defamation, expressed in print or writing, or by signs or pictures, tending to blacken the memory of the dead, with an intent to provoke the living, or to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt, or ridicule." Hillhouse *v.* Dunning, 6 Conn. 391, 407.

"A malicious publication in printing, writing, signs or pictures, imputing to another something which has a tendency to injure his reputation; to disgrace or degrade him in society, lower him in the esteem and opinion of the world, or bring him into public hatred, contempt or ridicule." Layton *v.* Harris, 3 Harr. (Del.) 406, 407 [*quoted* in State *v.* Jeandell, 5 Harr. (Del.) 475, 481].

"Any malicious defamation, expressed either in printing, writing, pictures or effigies." Rice *v.* Simmons, 2 Harr. (Del.) 309, 424, 31 Am. Dec. 766.

"Anything written, or printed, or expressed by signs, caricatures, or pictures, against a natural person, or artificial body as a corporation, imputing to him or it something which has a tendency to injure his or its reputation, disgrace or degrade him or it in society, lower him or it in the opinion of the world, or bring him or it into public hatred, contempt or ridicule — if done maliciously." Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. (Del.) 181, 190 [*citing* Layton *v.* Harris, 3 Harr. (Del.) 406].

"Any published writing that imputes criminal or dishonest conduct to another, or that tends to disgrace him and bring him into hatred, contempt or ridicule." Bailey *v.* Hol-

a well considered opinion, that the attempts to define a libel, although practically

land, 7 App. Cas. (D. C.) 184, 189 [*citing* Hagan *v.* Hendry, 18 Md. 177, 191; White *v.* Nicholls, 3 How. (U. S.) 266, 11 L. ed. 591; Townshend Sl. & L. § 176 *et seq.*].

"Any written or printed publication which holds a person up to scorn or ridicule, or to a stronger feeling of contempt or execration, or which imputes or implies his commission of a crime not directly charged." Crocker *v.* Hadley, 102 Ind. 416, 417, 1 N. E. 734.

"Any false and defamatory printing, writing, sign, picture, representation or effigy, tending to expose any person to public hatred or ridicule, deprive him of the benefits of public confidence, or social intercourse, or designed to blacken and vilify the memory of a deceased person, and tending to scandalize and disgrace his relations and friends." Hartford *v.* State, 96 Ind. 461, 463, 49 Am. Rep. 185.

"Any such publication as holds a person up to scorn or ridicule, or to a stronger feeling of contempt or execration, or impairs his enjoyment of general society, or imputes or implies his commission of a crime not directly charged." Bain *v.* Myrick, 88 Ind. 137, 138.

"Any publication that tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule." Johnson *v.* Stebbins, 5 Ind. 364, 367 [*quoted* in Prosser *v.* Callis, 117 Ind. 105, 109, 19 N. E. 735].

"The malicious defamation of a person, made public by any printing, writing, effigy, or pictorial representation." Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 525, 90 N. W. 349.

"Any publication whether in writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Staub *v.* Van Benthuysen, 36 La. Ann. 467, 468 [*citing* Odgers L. & Sl. 7, 10].

"A defamatory publication, written and printed." State *v.* Barnes, 32 Me. 530, 533.

"A malicious publication, tending to expose a person to contempt, ridicule, hatred, or degradation of character." Brown *v.* Boynton, 122 Mich. 251, 253, 80 N. W. 1099 [*citing* Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367].

"A malicious defamation, expressed either in printing or writing, and tending to blacken the memory of one who is dead, or the reputation of one that is alive, and expose him to public hatred, contempt or ridicule." People *v.* Jerome, 1 Mich. 142, 143.

"A malicious publication, expressed in print, writing, or by signs, tending to injure the reputation of another, and expose him to public hatred, contempt, or ridicule." Smith *v.* Coe, 22 Minn. 276, 277.

"Written slander." Menter *v.* Stewart, 2 How. (Miss.) 698, 699.

"The malicious defamation of a person made public by any printing or writing which tends to provoke him to wrath or expose him to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse." Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 222, 87 S. W. 565.

"A false and malicious publication expressed either in print or in writing, or by pictures, effigies, or other signs, tending to injure the reputation of one alive and expose him to public hatred, contempt, or ridicule." Raker *v.* State, 50 Nebr. 202, 206, 69 N. W. 749.

"A malicious publication, expressed either in printing or writing, or by signs or pictures, tending either to injure the memory of one dead, or the reputation of one alive, and expose him to public hatred, contempt, or ridicule." Finch *v.* Vifquain, 11 Nebr. 280, 281, 9 N. W. 43.

"Any malicious publication against a person, 'tending to blacken his reputation, or expose him to public hatred, contempt, or ridicule.'" Geisler *v.* Brown, 6 Nebr. 254, 259 [*citing* Cooper *v.* Stone, 24 Wend. (N. Y.) 434].

"A published writing which holds a person up to the public as an object of hatred, ridicule, or contempt." Hand *v.* Winton, 38 N. J. L. 122, 123.

"The printed or written declarations of one person against another." Woodruff *v.* Woodruff, 36 Misc. (N. Y.) 15, 16, 72 N. Y. Suppl. 39 [*citing* Odgers L. & Sl. 1; Townshend Sl. & L. §§ 3, 4].

"A malicious publication, tending to injure the reputation of the person libelled, and expose him to public hatred, contempt, or ridicule." Palmer *v.* Concord, 48 N. H. 211, 215, 97 Am. Dec. 605 [*quoted* in Giles *v.* John B. Clarke Co., 69 N. H. 92, 93, 36 Atl. 876].

"Any publication . . . which tends to degrade, injure, or bring a person into contempt and ridicule; or accuses him of crime or other act odious or disgraceful." Smart *v.* Blanchard, 42 N. H. 137, 151.

"A malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech, which exposes any living person, or the memory of any person deceased, to hatred, contempt, ridicule or obloquy, or which causes, or tends to cause, any person to be shunned or avoided, or which has a tendency to injure any person, corporation or association of persons, in his or their business or occupation." Miller *v.* Donovan, 16 Misc. (N. Y.) 453, 454, 39 N. Y. Suppl. 820.

"Any unprivileged publication of which the necessary tendency is to expose a man to hatred, contempt or ridicule." Miller *v.* Donovan, 16 Misc. (N. Y.) 453, 454, 39 N. Y. Suppl. 820.

"A malicious publication, in writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation,

innumerable, have never been so comprehensive and accurate as to comprehend

to disgrace or degrade him in society, and to lower him in the esteem and opinion of the world, or to bring him into public hatred, contempt, or ridicule." Cole *v.* Neustadter, 22 Oreg. 191, 198, 29 Pac. 550.

"A false and malicious publication against an individual, either in print, or writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt, or ridicule." State *v.* Smily, 37 Ohio St. 30, 32, 41 Am. Rep. 487; Kahn *v.* Cincinnati Times-Star, 10 Ohio S. & C. Pl. Dec. 599, 603, 8 Ohio N. P. 616.

"Every publication by writing, printing, or painting which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous." Cole *v.* Neustadter, 22 Oreg. 191, 198, 29 Pac. 550.

"Any malicious publication, written, printed or painted, which, by word or signs, tends to expose a man to ridicule, contempt, hatred or degradation of character." Pittock *v.* O'Niell, 63 Pa. St. 253, 258, 3 Am. Rep. 544 [*quoted* in Collins *v.* Dispatch Pub. Co., 152 Pa. St. 187, 189, 25 Atl. 546, 34 Am. St. Rep. 636; Barr *v.* Moore, 87 Pa. St. 385, 391, 30 Am. Rep. 367].

"Any malicious printed slander, which tends to expose a man to ridicule, contempt, hatred or degradation of character." McCorkle *v.* Binns, 5 Binn. (Pa.) 340, 349, 352 [*quoted* in Keemle *v.* Sass, 12 Mo. 499, 504; Nelson *v.* Musgrave, 10 Mo. 648, 649; Hermann *v.* Bradstreet Co., 19 Mo. App. 227, 231; Com. *v.* McClure, 3 Kulp (Pa.) 464, 465; Cramer *v.* Noonan, 4 Wis. 231, 238].

"Any publication which tends to bring a man into disrepute, ridicule or contempt." Mitchell *v.* Bradstreet Co., 116 Mo. 226, 241, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; McCorkle *v.* Binns, 5 Binn. (Pa.) 340, 352 [*quoted* in Keemle *v.* Sass, 12 Mo. 499, 504; Hermann *v.* Bradstreet Co., 19 Mo. App. 227, 231].

"Any malicious publication, injurious to the reputation of another." Com. *v.* McClure, 3 Kulp (Pa.) 464, 465.

"Any publication, either by signs, printing or otherwise, that is calculated to bring upon any body public odium or contempt, or which is likely to injure them in their standing in society." Oles *v.* Pittsburg Times, 2 Pa. Super. Ct. 130, 132.

"The injurious detraction of any one by writing or equivalent symbols." Williams *v.* Karnes, 4 Humphr. (Tenn.) 811 [*quoted* in State *v.* Atchison, 3 Lea (Tenn.) 729, 730, 31 Am. St. Rep. 663].

"Any malicious publication, expressed in printing or writing, or by pictures or signs, tending to injure the character of an individual or diminish his reputation." Dunn *v.* Winters, 2 Humphr. (Tenn.) 512, 513 [*quoted* in Riley *v.* Lee, 88 Ky. 603, 609, 11 S. W. 713, 21 Am. St. Rep. 358, 11 Ky. L. Rep. 586].

"A false and malicious defamation of any person, made public by either writing or printing, signs or pictures, in order to provoke him to wrath, or to expose him to public hatred, contempt, or ridicule." Harris *v.* Huntington, 2 Tyler (Vt.) 129, 135, 4 Am. Dec. 728.

"A publication which renders the person ridiculous merely, and exposes him to contempt, which tends to render his situation in society uncomfortable and irksome, which reflects a moral turpitude on the party and holds him up as a dishonest and mischievous member of society, and describes him in a scurrilous and ignominious point of view — which tends to impair his standing in society, as a man of rectitude and principle, or unfit for the society and intercourse of honorable and honest men." Colby *v.* Reynolds, 6 Vt. 489, 494, 27 Am. Dec. 574 [*quoted* in Riley *v.* Lee, 88 Ky. 603, 609, 11 S. W. 713, 11 Ky. L. Rep. 586, 21 Am. St. Rep. 358].

"A publication without justification, or lawful excuse, which is calculated to injure the reputation of another." Johnson *v.* Brown, 13 W. Va. 71, 147.

"Every publication, either by writing, printing, or pictures, which charges upon or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous." White *v.* Nicholls, 3 How. (U. S.) 266, 290, 11 L. ed. 591.

"Any publication . . . the tendency of which is to degrade and injure another person, or to bring him into contempt, hatred or ridicule; or which accuses him of a crime punishable by law, or of an act odious and disgraceful in society." Giles *v.* State, 6 Ga. 276, 283 [*quoted* in Stewart *v.* Swift Specific Co., 76 Ga. 280, 283, 2 Am. St. Rep. 40]; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115, 116 [*quoted* in Riley *v.* Lee, 88 Ky. 603, 609, 11 S. W. 713, 11 Ky. L. Rep. 586, 21 Am. St. Rep. 358; State *v.* Smily, 37 Ohio St. 30, 33, 41 Am. Rep. 487; Com. *v.* McClure, 3 Kulp (Pa.) 464, 465].

"A publication without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred or contempt." Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330, 331.

"Everything printed or written, which reflects on the character of another, and is published without lawful justification or excuse . . . whatever the intention may have been." Kahn *v.* Cincinnati Times-Star, 10 Ohio S. & C. Pl. Dec. 599, 603, 8 Ohio N. P. 616; O'Brien *v.* Clement, 15 M. & W. 435, 437 [*quoted* in Stewart *v.* Swift Specific Co., 76 Ga. 280, 283, 2 Am. St. Rep. 40]; Odgers L. & Sl. 20 [*quoted* in Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 586, 41 S. W. 381].

"Any written communication, which bears on the face of it any charge, or which tends

all cases that may arise, and that such attempts in this regard in some degree resemble similar attempted definitions of fraud.[2]

to vilify another." Shipley *v.* Todhunter, 7 C. & P. 680, 689, 32 E. C. L. 819 [*quoted* in State *v.* Smily, 37 Ohio St. 30, 33, 41 Am. Rep. 487].

"Everything written of another, which holds him up to scorn and ridicule, that might reasonably be considered as provoking him to a breach of the peace." Holt L. 223 [*quoted* in Stone *v.* Cooper, 2 Den. (N. Y.) 293, 303].

"A malicious defamation of a person expressed otherwise than by words, as by writing, print, figures, signs, or any other symbols." Brown L. Dict. [*quoted* in Finch *v.* Vifquain, 11 Nebr. 280, 281, 9 N. W. 43].

"'Any representation in writing,' etc., 'calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.'" 2 Bishop Cr. L. § 907 [*quoted* in State *v.* Hoskins, 60 Minn. 168, 169, 62 N. W. 270, 27 L. R. A. 412].

"Any writing, picture, or other like representation of a nature to blacken his reputation, or to hold him up to contempt or ridicule." 2 Bishop Cr. L. § 929 [*quoted* in *In re* McDonald, 4 Wyo. 150, 157, 33 Pac. 18].

"Everything written of another which holds him up to that scorn and ridicule which might reasonably (i. e., according to our natural passions), be considered as provoking him to a breach of the peace." Starkie Sl. & L. § 156 [*quoted* in Prosser *v.* Callis, 117 Ind. 105, 108, 19 N. E. 735].

"A malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of the dead, or the reputation of one who is alive, and to expose him to public hatred, contempt or ridicule." Hawkins P. C. c. 73, § 1 [*quoted* in Stow *v.* Converse, 3 Conn. 325, 341, 8 Am. Dec. 189; Root *v.* King, 7 Cow. (N. Y.) 613, 620].

"Every publication, by writing, printing, or painting, which charges or imputes to any person that which renders him liable to punishment, or which is calculated to make him infamous, odious, or ridiculous." 1 Hill Torts 237 [*quoted* in Hetherington *v.* Sterry, 28 Kan. 426, 429, 42 Am. Rep. 169].

"A malicious defamation, expressed in printing or writing, or by signs, pictures, &c., tending to injure the reputation of another, and thereby exposing such person to public hatred, contempt, or ridicule." 2 Selwyn N. P. 1045 [*quoted* in Rice *v.* Simmons, 2 Harr. (Del.) 417, 425, 31 Am. Dec. 766; Armentrout *v.* Moranda, 8 Blackf. (Ind.) 426, 427].

"A wrong done by writing or effigy." Townshend Sl. & L. § 22 [*quoted* in Weiss *v.* Whittemore, 28 Mich. 366, 375; Mitchell *v.* Bradstreet Co., 116 Mo. 226, 241, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138]; Kahn *v.* Cincinnati Times-Star, 10 Ohio S. & C. Pl. Dec. 599, 603, 8 Ohio N. P. 616.

"A malicious defamation of any person, and especially a magistrate, made public by either printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt and ridicule." 4 Blackstone Comm. 150 [*quoted* in Root *v.* King, 7 Cow. (N. Y.) 613, 620].

"False defamatory words, if written and published." Odgers L. & Sl. 1 [*quoted* in Gambrill *v.* Schooley, 93 Md. 48, 59, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87].

"A malicious defamation, expressed either in printing or writing, or by signs, pictures, etc., tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt or ridicule." 6 Bacon Abr. 337 [*quoted* in Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 407, 24 Pac. 1051].

As defined by statute see People *v.* Seeley, 139 Cal. 118, 119, 72 Pac. 834; Schomberg *v.* Walker, 132 Cal. 224, 227, 64 Pac. 290; Tonini *v.* Cevasco, 114 Cal. 266, 271, 46 Pac. 103; *In re* Kowalsky, 73 Cal. 120, 122, 14 Pac. 399; Colvard *v.* Black, 110 Ga. 642, 645, 36 S. E. 80; Behre *v.* National Cash Register Co., 100 Ga. 213, 216, 27 S. E. 986, 62 Am. St. Rep. 320; Stewart *v.* Swift Specific Co., 76 Ga. 280, 282, 2 Am. St. Rep. 40; Prussing *v.* Jackson, 85 Ill. App. 324, 330; Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443, 448; Foster *v.* Boue, 38 Ill. App. 613, 615; Huse *v.* Inter-Ocean Pub. Co., 12 Ill. App. 627, 630; State *v.* Keenan, 111 Iowa 286, 291, 82 N. W. 792; Stewart *v.* Pierce, 93 Iowa 136, 137, 61 N. W. 388; Call *v.* Larabee, 60 Iowa 212, 214, 14 N. W. 237; Kinyon *v.* Palmer, 18 Iowa 377, 381; Eckert *v.* Van Pelt, 69 Kan. 357, 360, 76 Pac. 909, 66 L. R. A. 266; State *v.* Clyne, 53 Kan. 8, 19, 35 Pac. 789; State *v.* Morrison, 46 Kan. 679, 680, 27 Pac. 133; Dever *v.* Clark, 44 Kan. 745, 752, 25 Pac. 205; State *v.* Brady, 44 Kan. 435, 437, 24 Pac. 948, 21 Am. St. Rep. 296, 9 L. R. A. 606; State *v.* Wait, 44 Kan. 310, 314, 24 Pac. 354; Castle *v.* Houston, 19 Kan. 417, 27 Am. Rep. 127; State *v.* Shippman, 83 Minn. 441, 444, 86 N. W. 431; McCloskey *v.* Pulitzer Pub. Co., 152 Mo. 339, 349, 53 S. W. 1087; McGinnis *v.* Knapp, 109 Mo. 131, 138, 18 S. W. 1134; State *v.* Armstrong, 106 Mo. 395, 415, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; People *v.* Sherlock, 56 N. Y. App. Div. 422, 423, 68 N. Y. Suppl. 74; McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 515, 51 N. Y. Suppl. 275; People *v.* Stark, 59 Hun (N. Y.) 51, 58, 12 N. Y. Suppl. 688; Lauder *v.* Jones, (N. D. 1904) 101 N. W. 907, 911; State *v.* Hollon, 12 Lea (Tenn.) 482, 483; Walker *v.* San Antonio Light Pub. Co., 30 Tex. Civ. App. 165, 169, 70 S. W. 555; *In re* McDonald, 4 Wyo. 150, 157, 38 Pac. 18; Reg. *v.* Cameron, 2 Can. Cr. Cas. 173, 176.

2. McGinnis *v.* Knapp, 109 Mo. 131, 18 S. W. 1134 [*citing* Townshend Sl. & L. § 20].

[I, A]

B. Slander. The word "slander" is the general and original word for all kinds of defamation,[3] and at an early day in the history of the common law the term applied both to oral and written defamations of character.[4] In this sense it has been defined to be the defaming of a man in his reputation by speaking or writing words from whence any injury in character or property arises, or may arise to him of whom the words are used.[5] But in modern usage it has been limited to defamation by words spoken,[6] and in this sense may be defined as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another.[7]

C. Slander of Title. Although the term "slander" is more appropriate to the defamation of the character of an individual, yet the term "slander of title" has by common use become a well known and recognized phrase of the law, and an action therefor is permitted to be maintained against one person who falsely and maliciously disparages the title of another person to property, whether such

3. Johnson *v.* Haldeman, 102 Ky. 163, 43 S. W. 226, 19 Ky. L. Rep. 1164.

4. Belo *v.* Smith, 91 Tex. 221, 42 S. W. 850 [*citing* Starkie Sl. & L. 3].

5. Espinasse N. P. 496 [*quoted* in Johnson *v.* Haldeman, 102 Ky. 163, 164, 43 S. W. 226, 19 Ky. L. Rep. 1164].

Other definitions are: "Any false, malicious and personal imputation effected by writings, pictures or signs, and tending to alter the party's situation in society for the worst." Starkie Sl. 140, c. 5 [*quoted* in Rice *v.* Simmons, 2 Harr. (Del.) 417, 424, 31 Am. Dec. 766].

"The publishing of words in writing or by speaking, by reason of which the person to whom they relate becomes liable to suffer some corporal punishment." 9 Bacon Abr. 28 [*quoted* in Johnson *v.* Haldeman, 102 Ky. 163, 164, 43 S. W. 226, 19 Ky. L. Rep. 1164].

Defamation defined see 13 Cyc. 756.

Defamatory words.—"Words which produce any perceptible injury to the reputation of another [are called defamatory]." Odgers L. & Sl. 26 [*quoted* in Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356; Hollenbeck *v.* Hall, 103 Iowa 214, 216, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734]. "Any words, if false and malicious, imputing conduct which injuriously affects a man's reputation or which tends to degrade him in society or bring him into public hatred and contempt, are in their nature defamatory." Reid *v.* Providence Journal Co., 20 R. I. 120, 125, 37 Atl. 637. "Defamatory words, in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken." Moore *v.* Francis, 121 N. Y. 199, 203, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214 [*quoted* in Gallagher *v.* Bryant, 44 N. Y. App. Div. 527, 529, 60 N. Y. Suppl. 844; Gideon *v.* Dwyer, 87 Hun (N. Y.) 246, 249, 33 N. Y. Suppl. 754]. "Any written words are defamatory which impute to plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such conduct. . . . And so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which thus by engendering an evil opinion of him in the minds of right-thinking men tend to deprive him of friendly intercourse and society." Odgers Sl. & L. 20 [*quoted* in Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 586, 41 S. W. 381].

"A defamatory publication is one which is false, and calculated to bring the person defamed into disrepute." Marks *v.* Baker, 28 Minn. 162, 166, 9 N. W. 678 [*citing* Cooley Torts 193], where it is said: "But it is not necessarily malicious."

6. Johnson *v.* Haldeman, 102 Ky. 163, 164, 43 S. W. 226, 19 Ky. L. Rep. 1164 [*citing* Webster Dict.]; Belo *v.* Smith, 91 Tex. 221, 224, 42 S. W. 850.

7. J. M. James Co. *v.* Continental Nat. Bank, 105 Tenn. 1, 8, 58 S. W. 261, 80 Am. St. Rep. 857, 51 L. R. A. 255 [*citing* Harrison *v.* Burem, 1 Tenn. Cas. 94, Thomps. Cas. 152; Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308; 3 Blackstone Comm. 183; Cooley Torts 229, 235; Newell Sl. & L. 40; Rapalje & L. L. Dict. 1198; Townshend Sl. & L. § 3; Webster Int. Dict.].

Other definitions are: "False defamatory words . . . if spoken." Odgers L. & Sl. 1 [*quoted* in Gamhrill *v.* Schooley, 93 Md. 48, 59, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87].

"Defamation without legal excuse published orally, by words spoken, being the object of the sense of hearing." Newell Defam. 33 [*quoted* in Fredrickson *v.* Johnson, 60 Minn. 337, 341, 62 N. W. 388].

"Verbal defamation of character." Menter *v.* Stewart, 2 How. (Miss.) 698, 699.

"Oral or spoken defamatory words used by one person against another." Woodruff *v.* Woodruff, 36 Misc. (N. Y.) 15, 16, 72 N. Y. Suppl. 39 [*citing* Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Odgers L. & Sl. 1; Townshend Sl. & L. (4th ed.) pp. 4, 5, §§ 3, 4].

As defined by statute see Rea *v.* Wood, 105 Cal. 314, 320, 38 Pac. 899; Nidever *v.* Hall, 67 Cal. 79, 80, 7 Pac. 136; Ross *v.* Ward, 14 S. D. 240, 242, 85 S. W. 182, 86 Am. St. Rep. 746.

property be real or personal, in consequence of which such other person is caused to suffer some special pecuniary loss or damage.[8]

D. Scandalum Magnatum. Under ancient statutes in England words spoken in derogation of a peer, a judge, or other great officer of the realm, which were called *scandalum magnatum*, were at one time held to be more heinous than slanders spoken of ordinary private persons and would give rise either to a civil or criminal action, although the words were such as would not be actionable in the case of a common person.[9] But the statutes of *scandalum magnatum*,[10] which had long been practically obsolete, were repealed by the Statute Law Revision Act of 1887;[11] and it is said that *scandalum magnatum* is unknown in the United States.[12]

II. GENERAL PRINCIPLES.

A. The Right Invaded by Actionable Defamation. The enjoyment of private reputation, unassailed, is as much a constitutional right as the possession of life, liberty, or property.[13] The foundation of an action for defamation, whether libel or slander, is the injury done to reputation;[14] injury to the feelings is not sufficient to justify a recovery.[15] Nor can such injury arise if there is no publication.[16] Words which are not in their nature defamatory, while perhaps if false and malicious, and if used by a person who knows or ought to know that special damage will follow and such damage does in fact follow, an action, as for instance an action on the case, may be maintained,[17] yet cannot be made the basis of an action for libel or slander.[18]

B. Damage as a Prerequisite to Recovery. The law recognized two classes of damages in suits for defamation — general and special.[19] Special damages are such as are computable in money.[20] General damages are those which the law presumes must actually, proximately, and necessarily result from the pub-

8. Burkett *v.* Griffith, 90 Cal. 532, 536, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707. See also Carbondale Inv. Co. *v.* Burdick, 67 Kan. 329, 335, 72 Pac. 781.

9. 3 Blackstone Comm. 123.

10. St. 3 Edw. I, c. 34; 2 Rich. II, St. 1, c. 5; and 12 Rich. II, c. 11.

11. Odgers L. & Sl. (4th ed.) 430.

12. Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680 [*citing* Townshend Sl. & L. (4th ed.) § 138]. See also Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St Rep. 287.

13. McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21; Park *v.* Detroit Free Press Co., 72 Mich. 560, 566, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599 (where it is said: "There is no room for holding in a constitutional system that private reputation is any more subject to be removed by statute from full legal protection than life, liberty, or property. It is one of those rights, necessary to human society that underlie the whole social scheme of civilization"); Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532 (holding, however, that a statute barring recovery after a retraction as widely published as the libel, is constitutional); Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648 (holding, however, that a statute limiting recovery to compensatory (as opposed to punitive) damages is constitutional). See also Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

14. Broderick *v.* James, 3 Daly (N. Y.) 481. See also Lyle *v.* Clason, 1 Cai. (N. Y.) 581, 583, where it is said: "The basis of the action is damages for the injury to character in the opinions of others."

15. Samuels *v.* Evening Mail Assoc., 6 Hun (N. Y.) 5.

16. Broderick *v.* James, 3 Daly (N. Y.) 481; Lyle *v.* Clason, 1 Cai. (N. Y.) 581. See also *infra*, IV, A.

17. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524; Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637. See also Lynch *v.* Knight, 9 H. L. Cas. 577, 11 Eng. Reprint 854.

18. Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637; Fanning *v.* Chace, 17 R. I. 388, 22 Atl. 275, 33 Am. St. Rep. 878, 13 L. R. A. 134; Mayrant *v.* Richardson, 1 Nott & M. (S. C.) 347, 9 Am. Dec. 707. See also Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Kelly *v.* Partington, 4 B. & Ad. 700, 3 L. J. Q. B. 104, 2 N. & M. 460, 24 E. C. L. 307.

19. Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

Damages recoverable in actions for libel or slander see *infra*, VIII, G.

20. Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

lication of the defamatory matter.[21] The latter arise by inference of law and are not required to be proved by evidence and are allowable whenever the immediate tendency of the words is to impair plaintiff's reputation, although no actual pecuniary loss has in fact resulted;[22] the words from which the law presumes injury in such case being deemed actionable *per se*.[23] All other defamation is actionable *per quod*, that is, special damages must be alleged and proven.[24]

III. DEFAMATORY WORDS AND ACTS.

A. Libelous Words and Acts — 1. In General. The courts have long recognized a distinction between written and oral defamation. While whatever charge will sustain a suit for slander when the words are merely spoken will sustain a suit for libel if they are written or printed and published, yet many charges which if merely spoken of another would not be actionable without proof of special damages will be libelous *per se* when written or printed and published.[25] Accordingly it may be stated as a general proposition that words written or printed may be libelous and actionable *per se*, that is, actionable without any allegations of special damages, if they tend to expose plaintiff to public hatred, contempt, ridicule, aversion, or disgrace and to induce an evil opinion of him in the minds of right-thinking persons and to deprive him of their friendly intercourse and society, even though the same words if spoken would not have been actionable.[26] Some of the courts, however, while recognizing the rule as

21. Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790. See also Turner *v.* Hearst, 115 Cal. 394.

22. Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790. See also Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345; Walker *v.* San Antonio Light Pub. Co., 30 Tex. Civ. App. 165, 70 S. W. 555.

23. Stewart *v.* Minnesota Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St. Rep. 696; Pratt *v.* Pioneer Press Co., 35 Minn. 251, 254, 28 N. W. 708 (where it is said: "When language is used concerning a person or his affairs which, from its nature, necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication *prima facie* constitutes a cause of action, and *prima facie* constitutes a wrong, without any allegation or evidence of damage other than that which is implied or presumed from the fact of publication; and this is all that is meant by the term 'actionable *per se*'"); Bergmann *v.* Jones, 94 N. Y. 51; Dial *v.* Holter, 6 Ohio St. 228; Lansing *v.* Carpenter, 9 Wis. 540, 76 Am. Dec. 281. See also *infra*, III.

24. Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Melvin *v.* Weiant, 36 Ohio St. 184, 38 Am. Rep. 572; Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Press Co. *v.* Stewart, 119 Pa. St. 584, 14 Atl. 51. See Hartley *v.* Herring, 8 T. R. 130, 4 Rev. Rep. 614. And see *infra*, III.

25. Watson *v.* Trask, 6 Ohio 531, 27 Am. Dec. 271.

26. *Arkansas.*— Obaugh *v.* Finn, 4 Ark. 110, 121, 37 Am. Dec. 773.

California.— Leonard *v.* McPherson, 146 Cal. 616, 80 Pac. 1084; Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290; Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103; Wilson *v.* Fitch, 41 Cal. 363, holding that it is libelous *per se* to impute dishonest practices to a person.

Colorado.— Republican Pub Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051, charging a husband with inhuman and cruel treatment of his wife.

Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Hillhouse *v.* Dunning, 6 Conn. 391; Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189.

Delaware.— Rice *v.* Simmons, 2 Harr. 417, 31 Am. Dec. 766.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Georgia.— Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80; White *v.* Parks, 93 Ga. 633, 20 S. E. 78; Augusta Evening News *v.* Radford, 91 Ga. 494, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533; Stewart *v.* Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40.

Illinois.— Cerveny *v.* Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864 [*reversing* 35 Ill. App. 560]; Herrick *v.* Tribune Co., 108 Ill. App. 244; Huse *v.* Inter-Ocean Pub. Co., 12 Ill. App. 627.

Indiana.— Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735; Crocker *v.* Hadley, 102 Ind. 416, 1 N. E. 734; Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Over *v.* Hildebrand, 92 Ind. 19; Gabe *v.* McGinnis, 68 Ind. 538; Johnson *v.* Stebbins, 5 Ind. 364 (a publication charging that plaintiff, a postmaster, kept the post-office in a house of such low character that a decent lady dare not enter); Patchell *v.* Jaqua, 6 Ind. App. 70, 33 N. E. 132.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Stewart *v.* Pierce, 93 Iowa 136, 61 N. W. 388 (holding that it is libelous to charge a person with availing himself of the confidence of his partner for his personal advantage); Call *v.* Larabee, 60 Iowa 212, 14 N. W. 237; Kinyon *v.* Palmer, 18 Iowa 377.

established by the authorities, have expressed a doubt whether this distinction

Kansas.— Kirkpatrick *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316.

Kentucky.—Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73; Riley *v.* Lee, 88 Ky. 603, 608, 11 S. W. 713, 21 Am. St. Rep. 358; Duncan *v.* Brown, 15 B. Mon. 186.

Maine.—Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50.

Maryland.— Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Massachusetts.— Loker *v.* Campbell, 163 Mass. 242, 39 N. E. 1038; Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768; Clark *v.* Binney, 2 Pick. 113.

Michigan.— Field *v.* Magee, 122 Mich. 556, 81 N. W. 354; Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952, 94 Mich. 119, 54 N. W. 766; Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52 (holding that a publication charging a wife with deserting her husband during his sickness is libelous *per se*); Foster *v.* Scripps, 39 Mich. 376, 379, 33 Am. Rep. 403.

Minnesota.—Alwin *v.* Liesch, 86 Minn. 281, 90 N. W. 404; State *v.* Shippman, 83 Minn. 441, 86 N. W. 431 (holding that it is libelous *per se* to charge one with using false weights); Richmond *v.* Post, 69 Minn. 457, 72 N. W. 704; Byram *v.* Aiken, 65 Minn. 87, 67 N. W. 807; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; Nelson *v.* Musgrave, 10 Mo. 648 [*approved* in Keemle *v.* Sass, 12 Mo. 499]; Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 565 (holding that a publication charging that plaintiff was a strike breaker; that he assisted to move street cars, for the convenience of the public, against the opposition of striking crews; that he was a foe of organized labor, and had accepted money from a labor organization in a certain city on an agreement to leave the city during a strike, but, after going outside the corporate limits, had immediately returned — tended to blacken plaintiff's reputation and excite ridicule or wrath against him, and was libelous *per se*).

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

Nebraska.—Williams *v.* Fuller, 68 Nebr. 354, 94 N. W. 118, (1903) 97 N. W. 246, holding that it is libelous *per se* to charge that one is "a bright specimen of degenerated humanity," that he "lives off his wife and the misdeeds of other men," that he is a "pot-bellied, beer-guzzling old specimen of a degenerated race," and that he "would not hesitate to steal the coppers off a dead man's eyes."

New Jersey.— Feder *v.* Herrick, 43 N. J. L. 24.

New York.— Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc 314, 22 N. Y. Suppl. 766]; Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 1 N. Y. Suppl. 475]; Moore *v.* Francis, 121 N. Y. 199, 204, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Bergmann *v.* Jones, 94 N. Y. 51; Gallagher *v.* Bryant, 44 N. Y. App. Div. 527, 60 N. Y. Suppl. 844; Stokes *v.* Stokes, 76 Hun 314, 28 N. Y. Suppl. 165; Rider *v.* Rulison, 74 Hun 239, 26 N. Y. Suppl. 234; Winchell *v.* Argus Co., 69 Hun 354, 23 N. Y. Suppl. 650; Moffatt *v.* Cauldwell, 3 Hun 26, 5 Thomps. & C. 256 (holding that a sensational newspaper article stating that plaintiff was living in extreme poverty and destitution, and written in a style calculated to injure plaintiff's reputation, is libelous *per se*, although a mere charge of poverty is ordinarily not so); Perkins *v.* Mitchell, 31 Barb. 461; Bennett *v.* Williamson, 4 Sandf. 60; Lehmann *v.* Tribune Assoc., 37 Misc. 506, 75 N. Y. Suppl. 1034; Cady *v.* Brooklyn Union Pub. Co., 23 Misc. 409, 51 N. Y. Suppl. 198; Witcher *v.* Jones, 17 N. Y. Suppl. 491; Cooper *v.* Greeley, 1 Den. 347; Cramer *v.* Riggs, 17 Wend. 209; Steele *v.* Southwick, 9 Johns. 214.

North Carolina.— Simmons *v.* Morse, 51 N. C. 6.

North Dakota.— Lander *v.* Jones, (1904) 101 N. W. 907.

Oregon.— State *v.* Mason, 26 Oreg. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779.

Pennsylvania.— Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420.

South Carolina.— Fonville *v.* McNeare, Dudley 303, 31 Am. Dec. 556; Mayrant *v.* Richardson, 1 Nott & M. 347, 9 Am. Dec. 707.

Tennessee.— Haws *v.* Stanford, 4 Sneed 520.

Texas.—Walker *v.* San Antonio Light Pub. Co., 30 Tex. Civ. App. 165, 70 S. W. 555; Burton *v.* O'Niell, 6 Tex. Civ. App. 513, 25 S. W. 1013.

Vermont.— Colby *v.* Reynolds, 6 Vt. 489, 27 Am. Dec. 574.

Virginia.— Moss *v.* Harwood, 102 Va. 386, 46 S. E. 385 (holding that, where it is the duty of the chief of police to collect fines, a charge that he has collected them but does not seem to have recorded them imputes conduct tending to impeach his reputation and bring him into disgrace and is actionable); Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455 (holding that the words, "As you will make considerable by being summoned to court, I would advise you to go and pay George Bowman the balance you owe him . . . for his . . . wild hogs you killed," are libelous *per se*).

Wisconsin.— Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111 (a publication referring to plaintiff as "his majesty Bucksniff," "the legislative god," "beautiful senatorial god," "dearly-beloved Bucksniff"); Allen *v.* News Pub. Co., 81 Wis. 120, 50 N. W. 1093; Moley *v.* Barager, 77 Wis. 43, 45 N. W. 1082; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; Solverson *v.* Peterson, 64 Wis. 198, 25 N. W.

between verbal and written or printed slander is well founded in principle.[27] The reasons usually assigned for this distinction between written and spoken slander is that the former is in more permanent form and may be circulated more extensively than the latter and therefore is calculated to do much greater injury than slander merely spoken;[28] and further that a written slander requires deliberation

14, 54 Am. Rep. 607; Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511 (a newspaper publication charging that the suicide of a man was due to the exactions of his wife and to her fraudulent conduct in taking wages which her son had not earned); Cottrill *v.* Cramer, 43 Wis. 242; Cary *v.* Allen, 39 Wis. 481; Lansing *v.* Carpenter, 9 Wis. 540, 76 Am. Dec. 281; Cramer *v.* Noonan, 4 Wis. 231.

United States.—White *v.* Nicholls, 3 How. 266, 11 L. ed. 591; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41 (a charge of inducing publication of a libel in order to found suits upon it for extortion); Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302; Merchants' Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19; Pfitzinger *v.* Dubs, 64 Fed. 696, 12 C. C. A. 399 (holding that it is libelous *per se* to write of one "you can't spoil a rotten egg"); Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456] (a publication charging a candidate for office with having sold out to a rival); Shattuc *v.* McArthur, 25 Fed. 133 (a statement that a general passenger agent had grown rich by making his agents divide commissions with him); Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

England.— Bell *v.* Stone, 1 B. & P. 331, 4 Rev. Rep. 820; Cropp *v.* Tilney, 3 Salk. 226; Austin *v.* Culpepper, 2 Show. 313, Skin. 123; Thorley *v.* Kerry, 4 Taunt. 355, 13 Rev. Rep. 626; Villars *v.* Monsley, 2 Wils. C. P. 403. See also Leicester *v.* Walter, 3 Campb. 214 note, 2 Campb. 251.

See 32 Cent. Dig. tit. "Libel and Slander," § 1.

This rule has been applied to the following written or printed epithets or imputations: "Anarchist" (Cerveny *v.* Chicago Daily News Co., 139 Ill. 345, 28 N. E. 692, 13 L. R. A. 864 [*reversing* 35 Ill. App. 560]. See also Lewis *v.* Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59, where it was charged that one would be an anarchist if he thought it would pay); "frozen snake" (Hoare *v.* Silverlock, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624); "itchy old toad" (Villers *v.* Monsley, 2 Wils. C. P. 403); "black sheep" (McGregor *v.* Gregory, 2 Dowl. P. C. N. S. 769, 12 L. J. Exch. 204, 11 M. & W. 287); "skunk" (Pledger *v.* State, 77 Ga. 242, 3 S. E. 320, where the words were: "Leave the old 'skunk' to himself;" Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349); "egotistical and over-estimated, self-conceited jackass" (Moley *v.* Barager, 77 Wis. 43, 45 N. W. 1082); "enormous swine, which lives on lame horses" (Solverson *v.* Peterson, 64 Wis. 198, 25 N. W. 14, 54 Am. Rep. 607); "dangerous, able and seditious agitator" (Wilkes *v.* Shields, 62 Minn. 426, 64 N. W. 921). But a complaint charging that defendant by whom plaintiff had been previously employed had in writing accused the latter with being a "labor agitator" was held not to be sufficient to render defendant liable in the absence of averments that the words bore an actionable meaning. Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003. So the word "hogs" applied to plaintiffs in a newspaper is not libelous where as explained by other portions of the published article it merely accused plaintiffs of being deficient in some quality which the law did not require them as good citizens to possess. Urban *v.* Helmick, 15 Wash. 155, 45 Pac. 747.

Allegorical or figurative allusions.— Allegorical or figurative allusions which tend to bring a person into contempt are libelous *per se.* Hoare *v.* Silverlocks, 12 Q. B. 624, 12 Jur. 695, 17 L. J. Q. B. 306, 64 E. C. L. 624, holding that in an action for writing and publishing of plaintiff, that his warmest friends "in giving up the advocacy of her claims, stated that they had realized the fable of the Frozen Snake," if not guilty be pleaded and a verdict of guilty found, plaintiff is entitled to judgment, since the jury may have understood that the words "Frozen Snake" were meant to charge plaintiff with ingratitude to friends. But it is not actionable to refer to a person as a "Man Friday" where there is no averment to show a derogatory meaning. Forbes *v.* King, 1 Dowl. P. C. 672.

27. Colby *v.* Reynolds, 6 Vt. 489, 493, 27 Am. Dec. 574, where it is said: "Perhaps it is to be regretted that a distinction was ever made between oral and written slander, and if it was a new question no distinction would now be made"); Thorley *v.* Kerry, 4 Taunt. 365, 13 Rev. Rep. 626. See also Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50.

28. *California.*— Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103.

Colorado.— Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut.— Stow *v.* Converse, 3 Conn. 325, 342, 8 Am. Dec. 189.

Georgia.— Augusta Evening News *v.* Radford, 91 Ga. 494, 495, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533.

Kentucky.— Riley *v.* Lee, 88 Ky. 603, 11 S. W. 713, 11 Ky. L. Rep. 586, 21 Am. St. Rep. 358.

Minnesota.— Byram *v.* Aiken, 65 Minn. 87, 67 N. W. 807, where it is said: "In this respect, libel differs from slander, where the law, in respect to our natural passions, gives

and is therefore more injurious, since a person reducing an accusation to writing is presumed to have satisfied himself of its truth.[29] In order to be libelous *per se* it is not essential that the words should involve an imputation of crime.[30] Nor is scandalous matter necessary to make a libel.[31] But defamatory words to be libelous *per se* must be of such a nature that the court can presume as matter of law that they will tend to disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule or cause him to be shunned and avoided.[32] The impu-

no action for mere defamatory words, which it considers as transitory abuse, and not having substance and body enough to constitute an injury by affecting the reputation."

Pennsylvania.— McClurg *v.* Ross, 5 Binn. 218.

England.— Clement *v.* Chivis, 9 B. & C. 172, 27 L. J. K. B. O. S. 189, 4 M. & R. 127, 17 E. C. L. 85.

29. *California.*—Tonini *v.* Cevasco, 114 Cal. 266, 270, 46 Pac. 103.

Colorado.— Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 406, 24 Pac. 1051.

Georgia.— Augusta Evening News *v.* Radford, 91 Ga. 494, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533.

Indiana.— Prosser *v.* Callis, 117 Ind. 105, 109, 19 N. E. 735.

Kentucky.— Riley *v.* Lee, 88 Ky. 603, 608, 11 S. W. 713, 11 Ky. L. Rep. 586, 21 Am. St. Rep. 358.

Pennsylvania.— McClurg *v.* Ross, 5 Binn. 218.

England.— Clement *v.* Chives, 9 B. & C. 172, 27 L. J. K. B. O. S. 189, 4 M. & R. 127, 17 E. C. L. 85.

30. *Colorado.* — Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Indiana.— Crocker *v.* Hadley, 102 Ind. 416, 1 N. E. 734; Gabe *v.* McGinnis, 68 Ind. 538; Johnson *v.* Stebbins, 5 Ind. 364.

Iowa.— Call *v.* Larabee, 60 Iowa 212, 14 N. W. 237.

Maine.— Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50.

Massachusetts.— Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768.

Minnesota.— State *v.* Shippman, 83 Minn. 441, 86 N. W. 431; Byram *v.* Aiken, 65 Minn. 87, 67 N. W. 807; Wilkes *v.* Shields, 62 Minn. 426, 64 N. W. 921; Holston *v.* Boyle, 46 Minn. 432, 49 N. W. 203.

Missouri.— McGinnis *v.* Knapp, 109 Mo. 131, 18 S. W. 1134.

Ohio.— State *v.* Smily, 37 Ohio St. 30, 41 Am. Rep. 487; Watson *v.* Trask, 6 Ohio 534, 27 Am. Dec. 271.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768.

New York.— Gallagher *v.* Bryant, 44 N. Y. App. Div. 527, 60 N. Y. Suppl. 844; Stokes *v.* Stokes, 76 Hun 314, 28 N. Y. Suppl. 165; Winchell *v.* Argus Co., 69 Hun 354, 23 N. Y. Suppl. 650; Lehmann *v.* Tribune Assoc., 37 Misc. 506, 75 N. Y. Suppl. 1034.

South Carolina.—Fonville *v.* McNease, Dudley 303, 31 Am. Dec. 556.

Vermont.— Colby *v.* Reynolds, 6 Vt. 489, 27 Am. Dec. 574.

Virginia.— Moss *v.* Harwood, 102 Va. 386, 46 S. E. 385; Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455.

Wisconsin.— Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511; Lansing *v.* Carpenter, 9 Wis. 540, 76 Am. Dec. 281.

See 32 Cent. Dig. tit. "Libel and Slander," § 1.

31. Cropp *v.* Tilney, 3 Salk. 225, 226, where it is said that "it is enough if the defendant induces an ill opinion to be had of the plaintiff, or to make him contemptible and ridiculous." See also Watson *v.* Trask, 6 Ohio 531, 533, 27 Am. Dec. 271 (where it is said: "Words of ridicule only, or of contempt, which merely tend to lessen a man in public esteem, or to wound his feelings, will support a suit for libel, because of their being embodied in a more permanent and enduring form; of the increased deliberation and malignity of their publication, and of their tendency to provoke breaches of the public peace"); Forbes *v.* King, 1 Dowl. P. C. 672; Woodard *v.* Dowsing, 2 M. & R. 74, 17 E. C. L. 701; Villers *v.* Monsley, 2 Wils. P. C. 403.

32. *California.*— Clarke *v.* Fitch, 41 Cal. 472.

Illinois.— Ulery *v.* Chicago Live Stock Exch., 54 Ill. App. 233; Foster *v.* Boue, 38 Ill. App. 613, holding that in order to render written words libelous, the court ought to be able to see that a party's reputation was liable to be injured in some serious and material manner.

Indiana.— Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003.

Iowa.—Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835; Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349; Acborn *v.* Piper, 66 Iowa 694, 24 N. W. 513.

Maine.— Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50.

Minnesota.—Herringer *v.* Ingberg, 91 Minn. 71, 97 N. W. 460.

Mississippi.— Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873, holding that a clearance paper given to a discharged railway employee, reciting, "Cause for leaving service, unsatisfactory service, conduct good," is not libelous *per se*.

New York.— Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 [*affirming* 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711] (holding that to impute sordid interest to the "crowd" associated with plaintiff is not libelous as to plaintiff, since to attach his

tation must be one tending to affect a party in a society whose standard of opinion the court can recognize.[33] In many cases, moreover, words charging plaintiff with the commission of acts permissible in law, although they may lack public approval, have been held not to expose plaintiff to hatred, contempt, ridicule, or disgrace in the sense or to the degree required by the law of libel,[34] as for instance charging one with setting up the statute of limitations,[35] or the illegality of a con-

name to the coterie which surrounded him was not to impute to him their personal defects or moral turpitude); Brown *v.* Tribune Assoc., 74 N. Y. App. Div. 359, 77 N. Y. Suppl. 461 (holding that it is not libelous to charge a wife with being the cause of her husband's suicide); Bell *v.* Sun Printing, etc., Co., 42 N. Y. Super. Ct. 567, 3 Abb. N. Cas. 157; Rade *v.* Press Pub. Co., 37 Misc. 254, 75 N. Y. Suppl. 298 (charge that one has consumption or once had it); Zinserling *v.* Journal Co., 26 Misc. 591, 57 N. Y. Suppl. 905; Gallup *v.* Belmont, 16 N. Y. Suppl. 483 [*affirmed* in 135 N. Y. 647, 32 N. E. 647] (a publication that officers of a kennel club had failed to pay prizes awarded and were consequently disqualified to exercise certain privileges); Ramscar *v.* Gerry, 1 N. Y. Suppl. 635; Stone *v.* Cooper, 2 Den. 293, 299 (where it is said: "But to sustain a private action for the recovery of a compensation in damages for a false and unauthorized publication, the plaintiff in such action must either aver and prove that he has sustained some special damage from the publication of the matter charged against him; or the nature of the charge itself must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss either in his property, character, or business, or in his domestic or social relations, in consequence of the publication of such charge").

Ohio.— Settlage *v.* Kampf, 10 Ohio Dec. (Reprint) 822, 19 Cinc. L. Bul. 321.

Rhode Island.— De Fronsac *v.* News Co., (1896) 35 Atl. 1046.

South Carolina.— Mayrant *v.* Richardson, 1 Nott & M. 347, 9 Am. Dec. 707.

Tennessee.— Payne *v.* Western, etc., R. Co., 13 Lea 507, 49 Am. Rep. 666, holding that a notice published by a railroad company to the effect that it would discharge all employees trading with plaintiff is not libelous.

Washington.— Urban *v.* Helmick, 15 Wash. 155, 45 Pac. 747.

Wisconsin.— Gillan *v.* State Journal Printing Co., 96 Wis. 460, 71 N. W. 892, holding that a charge that plaintiff had repeatedly written to high school teachers, asking them to launch attacks upon the state university, is not libelous *per se*.

United States.— Goldberger *v.* Philadelphia Grocer Pub. Co., 42 Fed. 42.

England.— Forbes *v.* King, 1 Dowl. P. C. 672 (holding that it is not libelous to charge a person with being a "man Friday" to another); Mawe *v.* Pigott, Ir. R. 4 C. L. 54 (holding that a statement in writing "that men who gave up their all . . . for the cause of Old Ireland were guilty of infamous conduct" is not libelous *per se*).

See 32 Cent. Dig. tit. "Libel and Slander," § 1.

Illustrations.— It has been held not to be libelous *per se* to publish of a person that he "figured quite prominently in some of the squatter riots" (Clarke *v.* Fitch, 41 Cal. 472); that he is "a little insignificant puppy" (Foster *v.* Boue 38 Ill. App. 613); that he had been "black-listed" (Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003); "The Mississippi bard foameth" (Kinyon *v.* Palmer, 18 Iowa 377); that he is "an Englishman, of more or less indifferent repute" (Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 [*affirming* 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711]); that he "forged sentiments and words for Silas Wright which he never uttered" (Cramer *v.* Noonan, 4 Wis. 231); that he is a "crank" (Walker *v.* Tribune Co., 29 Fed. 827); "like many others [he] left our service during the strike" (Kansas City, etc., R. Co. *v.* Delaney, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600); "make the S. B. pay it" (Major *v.* McGregor, 5 Ont. L. Rep. 81).

33. Mawe *v.* Pigott, Ir. R. 4 C. L. 54.

34. *Connecticut.*— Donaghue *v.* Gaffy, 54 Conn. 257, 7 Atl. 552, holding that it is not libelous *per se* to charge one with obtaining a lease of premises of which another was a tenant at will and ordering the tenant to vacate.

Iowa.— Achorn *v.* Piper, 66 Iowa 694, 24 N. W. 513, holding that it is not libelous *per se* to charge a grain dealer with entering into a combination to reduce the price of grain.

Michigan.— People *v.* Jerome, 1 Mich. 142.

New York.— Foot *v.* Pitt, 83 N. Y. App. Div. 76, 82 N. Y. Suppl. 464; Zinserling *v.* Journal Co., 26 Misc. 591, 57 N. Y. Suppl. 905 (holding that it is not libelous to charge that a hotel-keeper refused to furnish board to a variety troupe without pay and that he obtained their baggage for their bills); Stone *v.* Cooper, 2 Den. 293 (holding that it is not libelous *per se* to charge one with using money for "shaving purposes" as such a business may be neither improper nor illegal).

Wisconsin.— Platto *v.* Geilfuss, 47 Wis. 491, 2 N. W. 1135, holding that the words: "We return unpaid draft of J. V. V. Platto for $11. He pays no attention to notices," are not libelous *per se*, as the debtor, plaintiff, was under no obligation in law or morals to regard the notices.

35. Hollenbeck *v.* Hall, 103 Iowa 214, 72

tract,[36] as a defense. To accuse one of being deficient in some quality which the law does not require him as a good citizen to possess is not libelous *per se*.[37] Mere general abuse and scurrility, however ill-natured and vexatious, is no more actionable when written than when spoken, if it does not convey a degrading charge or imputation.[38] It is generally held that notices to the public announcing the cessation of business relations between the writer and another are not libelous *per se*, unless statements are published which are unnecessary for the purposes of the notice.[39] Words in disparagement of goods, relating to the quality of articles made, produced, or sold, but containing no imputations in themselves affecting personal character or reputation, are not held to be libelous *per se*.[40]

2. Particular Imputations — a. Imputations of Falsehood. Written charges imputing falsehood in direct form, or words implying want of veracity, are libelous *per se*.[41] But a written or printed publication which does not attack the personal

N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734; Bennett *v.* Williamson, 4 Sandf. (N. Y.) 60.

36. Homer *v.* Engelhardt, 117 Mass. 539, holding that to publish of a saloon-keeper that he set up as a defense to a just claim in court the existing prohibitory liquor law is not libelous *per se*.

37. Urban *v.* Helmick, 15 Wash. 155, 45 Pac. 747.

38. Rice *v.* Simmons, 2 Harr. (Del.) 417, 31 Am. Dec. 766; Tappan *v.* Wilson, 7 Ohio 190.

39. Behre *v.* National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320, a notice by a principal that his agent is no longer connected with him and that any contracts made by such agent will be void. Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835 (where an editor announced that he had withdrawn from a paper because of a disagreement with the manager as to the policy of the paper, and asked for support for a rival paper of which he was editor); Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349 (a notice that plaintiff, an insurance agent, was no longer employed by defendant and that policy-holders should not pay him any premiums); Ratzel *v.* New York News Pub. Co., 67 N. Y. App. Div. 598, 73 N. Y. 849 [*reversing* 35 Misc. 487, 71 N. Y. Suppl. 1074]; Ertheiler *v.* Bernheim, 37 N. Y. App. Div. 472, 56 N. Y. Suppl. 26 (a letter to a person with whom the writer had transacted business that the writer had ceased to employ certain brokers); Gutkes *v.* New York Produce Exch., 46 Misc. (N. Y.) 133, 93 N. Y. Suppl. 254 (holding that a complaint alleging that defendant produce exchange posted a notice denying plaintiff representation on the floor of the exchange, and stating that any member of the exchange who should transact business for plaintiff would be deemed guilty of violation of the by-laws, etc., but not alleging that the notice conveyed any meaning not apparent on its face, did not state a cause of action for libel; the notice not being defamatory *per se*); Nevill *v.* Fine Arts, etc., Ins. Co., [1897] A. C. 68, 61 J. P. 500, 66 L. J. Q. B. 195, 75 L. T. Rep. N. S. 606; Capital, etc., Bank *v.* Henty, 7 App. Cas. 741, 47 J. P. 214, 52 L. J. Q. B. 232, 47 L. T. Rep. N. S. 662, 31 Wkly. Rep. 157; Mulligan *v.* Cole, L. R. 10 Q. B. 549, 44 L. J. Q. B. 153, 33 L. T. Rep. N. S. 12 (where the words were "the public are respectfully informed that Mr. Mulligan's connection with the institute has ceased and that he is not authorized to receive subscriptions"); O'Hea *v.* Cork Union, L. R. 32 Ir. 629; Maloney *v.* Bartley, 3 Campb. 210; Delany *v.* Jones, 4 Esp. 191.

40. Boynton *v.* Shaw Stocking Co., 146 Mass. 219, 15 N. E. 507; Dooling *v.* Budget Pub. Co., 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83. *Compare* Lawyers' Co-Operative Pub. Co. *v.* West Pub. Co., 32 N. Y. App. Div. 585, 52 N. Y. Suppl. 1120.

41. *Connecticut.*— Lindley *v.* Horton, 27 Conn. 58.

Georgia.— Pavesich *v.* New England L. Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101 (holding that a publication in a newspaper of an advertisement of an insurance company containing a person's picture and a statement that the person has policies of insurance with the company and is pleased with his investment, when in fact he has no such policies, is libelous as having the tendency to create the impression among those who knew the facts that the person whose picture is reproduced has told a wilful falsehood, either gratuitously or for a consideration); Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80; Beazley *v.* Reid, 68 Ga. 380.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91 (holding that it is libelous *per se* to charge one with obtaining property by lying); Gabe *v.* McGinniss, 68 Ind. 538 (holding that the words, "He is chiefest among ten thousand, and the one altogether lovely — on the swear. . . . If Beecher is really desirous of laying out Theodore Tilton, in his suit now in progress in New York City, let him send for our friend McGinnis," are libelous *per se*).

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Jensen *v.* Damm, 127 Iowa 555, 103 N. W. 798, holding that a written publication stating that the subscribers were well acquainted with plaintiff and would not believe him under oath is libelous *per se*.

veracity of the party against whom it is made, but merely charges a mistake in judgment, is not libelous *per se*, as such a charge does not affect the reputation of the party.[42] So it has been held that a writing not charging actual falsehood, but simply expressing the opinion of the writer that in a certain event plaintiff would lie, is not actionable *per se*.[43]

b. Imputation of Dishonesty or Fraud. Written words which charge dishonesty or fraud, although not imputing the commission of a crime, will of themselves support an action for libel.[44] Thus it is libelous *per se* to charge one with

Kentucky.— Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73, 11 Ky. L. Rep. 697; Riley *v.* Lee, 88 Ky. 603, 11 S. W. 713, 11 Ky. L. Rep. 586, 21 Am. St. Rep. 358 (holding that to write of one, "I regard this conduct in him as uncalled for, ungentlemanly and detestable as his statement was fallacious," is libelous *per se*); Duncan *v.* Brown, 15 B. Mon. 186 (holding that a written charge that B would put his name to anything that T would request him to sign is libelous *per se*).

Michigan.— Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869; Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952, 94 Mich. 119, 54 N. W. 766 (holding that a newspaper story that plaintiff was engaged to be married to a lady who eloped with his cousin and that he denied the engagement and the alleged relationship imputes falsehood and is actionable *per se*); Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119 (holding that a written charge that plaintiff would not hesitate to lie in order to defend himself is libelous *per se*); Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640.

Minnesota.— Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128; Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330, holding that a publication of a resolution of a city council denouncing a private citizen for publishing an alleged false report as to the result and effect of a suit brought by him against the city is libelous *per se*.

New Hampshire.— Giles *v.* John B. Clarke Co., 69 N. H. 92, 36 Atl. 876.

New York.— Rider *v.* Rulison, 74 Hun 239, 26 N. Y. Suppl. 234 (holding that it is libelous *per se* to write of one that "he can't tell the truth"); Cooper *v.* Stone, 24 Wend. 434; Steele *v.* Southwick, 9 Johns. 214 (holding that to write of a person that he "is no slouch at swearing to an old story" is actionable *per se*); Brooks *v.* Bemiss, 8 Johns. 455 (holding that the written words, "This is not the first time that the idea of falsehood and Micah Brooks have been associated together, in the minds of many honest men," are libelous *per se*).

North Carolina.— Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

Pennsylvania.— McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420.

South Carolina.— Woodburn *v.* Miller, Cheves 194.

Virginia.— Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455, holding that the words, "I hope you will stop swearing lies," and "quit lying or preaching, one," are libelous *per se*.

Washington.— Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772, holding that it is libelous *per se* to publish of plaintiff that if the writer could not convince plaintiff before his friends of "being a liar and a poltroon" the writer would forfeit fifty dollars.

Wisconsin.— Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004 (holding that it is libelous *per se* to refer to a person as being "eloquent in calumnies" and as "lying and quarreling with acquaintances and neighbors"); Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

United States.—Snowdon *v.* Lindo, 22 Fed. Cas. No. 13,152, 1 Cranch C. C. 569, holding that it is libelous *per se* to call one a "lying, slanderous rascal."

See 32 Cent. Dig. tit. "Libel and Slander," § 3.

Charging one with being a liar is libelous. Lindley *v.* Horton, 27 Conn. 58; Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80; Hake *v.* Brames, 95 Ind. 161; Davis *v.* Griffith, 4 Gill & J. (Md.) 342; Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Nelson *v.* Musgrave, 10 Mo. 648; Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416; Giles *v.* John B. Clarke Co., 69 N. H. 92, 36 Atl. 876; Johnston *v.* Lance, 29 N. C. 448; Fisher *v.* Patterson, 14 Ohio 418; Johnson *v.* Com., (Pa. 1888) 14 Atl. 425 (holding that an effigy bearing the words, "By George, the old liar," is libelous *per se*); Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803; Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772; Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

Charging one with being a political liar is not libelous *per se*. Settlage *v.* Kampf, 10 Ohio Dec. (Reprint) 822, 19 Cinc. L. Bul. 321.

Imputations of perjury see *infra*, III, D, 11, a, (XIV),

42. Walker *v.* Hawley, 56 Conn. 559, 16 Atl. 674.

43. Foster *v.* Boue, 38 Ill. App. 613.

44. *Alabama.*—Wofford *v.* Meeks, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214 (insinuation of "corruption and dishonesty" on the part of county commissioners); Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531 (charging one with knowingly attempting to collect for services an amount greatly in excess of the reasonable value).

knowingly making false representations with intent to deceive another,[45] or to write or publish of one that he is engaged in fraudulent transactions or that he is conducting a fraudulent enterprise.[46] But the conduct charged must be of such

California.— Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672, publishing fact of discharge of person "for good and sufficient reasons."

Delaware.— Rice *v.* Simmons, 2 Harr. 417, 31 Am. Dec. 766 (holding that a publication in these words, "The public are hereby cautioned against receiving from Washington Rice, or John Agness, a black man, any papers relative to my business, as sundry papers have been purloined from my store and fell into the hands of said W. Rice, who hath endeavored to put some of them in claim against me, viz.: bill and receipts for grain," is libelous *per se*); Butterworth *v.* Conrow, 1 Marv. 361, 41 Atl. 84.

Florida.— Jones *v.* Greeley, 25 Fla. 629, 6 So. 448, holding that to call one a "dishonest man" is libelous *per se*.

Georgia.—Behre *v.* National Cash Register Co., 100 Ga. 213, 27 S. E. 986, 62 Am. St. Rep. 320.

Illinois.— Huse *v.* Inter-Ocean Pub. Co., 12 Ill. App. 627.

Iowa.— Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356.

Kentucky.— Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Minnesota.— State *v.* Shippman, 83 Minn. 441, 86 N. W. 431 (charging use of false weights); Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330 (charging one with knowingly publishing a false report tending to injure the credit of a city).

Missouri.—Midland Pub. Co. *v.* Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298, the word "fake" applied to a trade journal.

Nebraska.— Farley *v.* McBride, (1905) 103 N. W. 1036.

New Hampshire.—Giles *v.* John B. Clarke Co., 69 N. H. 92, 36 Atl. 876.

New York.— Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Shanks *v.* Stumpf, 34 N. Y. App. Div. 623, 54 N. Y. Suppl. 1115 [*affirming* 23 Misc. 264, 51 N. Y. Suppl. 154], a publication charging the editor of a financial newspaper with using it to threaten and persecute dealers in bonds who refused to subscribe for or advertise in the paper.

North Carolina.— Simmons *v.* Morse, 51 N. C. 6, a written statement that "you have been trying to defraud me a long time, and has done it all you had power to do for the last ten or twelve years."

Pennsylvania.—Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747, a publication stating, "We dare say that his scheme to steal a pipe line from the poor producers in order to give it to the opulent refiners . . . will fail."

Texas.— Sanders *v.* Hall, 22 Tex. Civ. App. 282, 55 S. W. 594, a letter to plaintiff's creditor stating that plaintiff is about to move and intimating that he is doing so for the purpose of evading payment.

Wisconsin.— Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511, a statement charging a woman with fraudulent conduct in taking wages for her son which he had not earned is libelous *per se*.

United States.— Merchants Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19.

England.— Green *v.* Chapman, 4 Bing. N. Cas. 92, 5 Scott 340, 33 E. C. L. 613; Cheese *v.* Scales, 6 Jur. 955, 12 L. J. Exch. 13, 10 M. & W. 488, publishing of plaintiff that "he was a person in whose hands defendant would not intrust £5 of his private property."

See 32 Cent. Dig. tit. "Libel and Slander," § 4.

45. Patchell *v.* Jaqua, 6 Ind. App. 70, 33 N. E. 132 (charging another with obtaining a right of way for a railroad by making "misrepresentations"); Stewart *v.* Pierce, 93 Iowa 136, 61 N. W. 388; Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302 (a publication charging a person with making fraudulent representations in the sale of patent rights); Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8 (charging one with fraudulently deceiving another as to a fact so as to induce him to indorse a note for a larger sum than he intended).

46. *California.*—Wilson *v.* Fitch, 41 Cal. 363.

Iowa.— Morse *v.* Times Republican Printing Co., 124 Iowa 707, 100 N. W. 867, charging a person with posing as an insurance agent and with issuing bogus policies.

Massachusetts.— Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (a publication charging one with being a party to an alleged custom-house fraud); Hurley *v.* Fall River Daily Herald Pub. Co., 138 Mass. 334 (holding that a publication that plaintiff held an insurance policy on the life of a person recently deceased, that such policy was obtained by a fraudulent physical examination, and that the death of the party was due to malpractice is libelous *per se*). See also Call *v.* Hayes, 169 Mass. 586, 48 N. E. 777.

Minnesota.— Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302, telegram addressed, "Slippery Sam."

United States.— Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352.

England.—Brown *v.* Cromme, 2 Stark. 264, 19 Rev. Rep. 727, 3 E. C. L. 417, charging a bankrupt with fraudulent practices.

See 32 Cent. Dig. tit. "Libel and Slander," § 4.

a nature as to reflect upon the character and integrity of plaintiff and tend to subject him to a loss of public confidence and respect; and a writing, although charging wrongful conduct or dereliction of duty, is not libelous *per se*, within the meaning of the rule, unless it imputes a dishonest or fraudulent motive or intent.[47]

c. Imputations of Indebtedness or Delinquency in Paying Debts. A publication which imputes an unwillingness or refusal to pay just debts is libelous *per se*, as tending to destroy the party's reputation for integrity and fair dealing.[48] So it is generally held libelous *per se* to publish or cause to be published one's name as a delinquent debtor or as one unworthy of financial credit.[49] But when the charge does not affect a person in his business or profession, it is not libelous *per se* to publish of him that he owes money,[50] or to charge him with mere inability

47. *Colorado.*— Bush *v.* McMann, 12 Colo. App. 504, 55 Pac. 956, holding that a letter from a landlord to a mortgagee of his tenant's chattels that the tenant has made no arrangements for the rent and that he will thereafter look to the mortgagee for the rent is not libelous *per se*.

Iowa.— O'Connell *v.* Scontz, 126 Iowa 709, 102 N. W. 807, holding that a notice from a county officer to a taxpayer that the officer had been apprised that the taxpayer had moneys not listed for taxation is not libelous as containing a charge of defrauding the state.

Kentucky.— Keyer *v.* Rives, 56 S. W. 4, 21 Ky. L. Rep. 1706.

Michigan.— Brown *v.* Boynton, 122 Mich. 251, 80 N. W. 1099; Hanaw *v.* Jackson Patriot Co., 98 Mich. 506, 57 N. W. 734, holding that a publication describing an assault committed by plaintiff and stating that it arose out of plaintiff's deducting one dollar and twenty-five cents from a bill which he owed is not libelous *per se*.

New York.— Crashley *v.* Press Pub. Co., 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711; Gallup *v.* Belmont, 16 N. Y. Suppl. 483. See also Labouisse *v.* Evening Post Pub. Co., 10 N. Y. App. Div. 30, 41 N. Y. Suppl. 688; Hatfield *v.* Sisson, 28 Misc. 255, 59 N. Y. Suppl. 73.

South Carolina.— Harman *v.* Harman, 54 S. C. 100, 31 S. E. 881.

Texas.— Youngblood *v.* Godair, (Civ. App. 1898) 46 S. W. 913, holding that a notice from a mortgagee to the purchaser of the mortgaged property demanding payment from the purchase-price is not libelous *per se*.

United States.— McLoughlin *v.* American Circular Loom Co., 125 Fed. 203, 60 C. C. A. 87, holding that a letter charging that a person in installing electric light wires violated the rules of an insurance company is not libelous *per se*.

Canada.— Hanna *v.* De Blaquiere, 11 U. C. Q. B. 310.

See 32 Cent. Dig. tit. "Libel and Slander," § 4.

48. *Michigan.*— Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869, a letter referring to a party as a "dead beat of the first order."

Minnesota.— Davis *v.* Hamilton, 85 Minn. 209, 88 N. W. 744, holding that to write of one that he is an applicant in the bankruptcy courts for release from his just debts is libelous *per se*.

Nebraska.— Mertens *v.* Bee Pub. Co., (1904) 99 N. W. 847.

Texas.— Sanders *v.* Hall, 22 Tex. Civ. App. 282, 55 S. W. 594, holding that a charge that one is about to leave the country for the purpose of evading payment of his debts is libelous *per se*.

Wisconsin.— Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86, holding that it is libelous *per se* to send an envelope on which is printed the business card of an association the purpose of which was stated to be "for collecting bad debts."

See 32 Cent. Dig. tit. "Libel and Slander," § 5.

49. *California.*— Ingraham *v.* Lyon, 105 Cal. 254, 38 Pac. 892.

Georgia.—White *v.* Parks, 93 Ga. 633, 20 S. E. 78.

Kansas.—Werner *v.* Vogeli, 10 Kan. App. 536, 63 Pac. 607.

Nebraska.— See Masters *v.* Lee, 39 Nebr. 574, 58 N. W. 222.

Ohio.— Cleveland Retail Grocers' Assoc. *v.* Exton, 18 Ohio Cir. Ct. 321, 10 Ohio Cir. Dec. 145.

Texas.— Nettles *v.* Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658; Burton *v.* O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013, holding that letters sent to plaintiff in open envelopes stamped "Bad Debt Collecting Agency" and stating that plaintiff must pay her debts or be published as a delinquent debtor are libelous *per se*.

Wisconsin.— Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

See 32 Cent. Dig. tit. "Libel and Slander," § 5.

Privileged communications see *infra*, VI.

50. Hollenbeck *v.* Hall, 103 Iowa 214, 72 N. W. 518, 64 Am. St. Rep. 175, 39 L. R. A. 734; Windisch-Muhlhauser Brewing Co. *v.* Bacon, 53 S. W. 520, 21 Ky. L. Rep. 928; Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568; McCann *v.* Edinburgh Roperie Co., L. R. 28 Ir. 24 (holding that the words, "If you do not remit, the matter will be reported to our Dublin solicitors," are not libelous

to pay his debts,[51] or failure to pay a debt.[52] So it has been held that a written or printed statement that plaintiff is "slow" in the payment of his bills, but not to the extent that his promises are not kept, or that it is unnecessary to place a claim in the hands of a collector, or to put it into judgment in order to secure payment, or that he ever disputes his bills, is not actionable *per se*.[53]

d. Imputations of Libelous or Slanderous Acts. A written or printed publication charging a person with uttering or publishing slanderous or libelous matter is actionable *per se*, as such an imputation is calculated to degrade and disgrace the party and bring him into ill-repute.[54]

e. Imputations of Mental Disease. A charge imputing insanity is libelous *per se* because it tends to expose one to public contempt and ridicule.[55] On the same theory publications asserting that a person is afflicted with mania for the destruction of persons or animals,[56] or a disease similar to hydrophobia,[57] are libelous *per se*. So publications imputing mere impairment of mental faculties or intellectual weakness not amounting to insanity are libelous *per se*.[58]

f. Imputations of Cruelty. Written or printed charges of cruelty or heart-

per se); Reg. *v.* Coghlan, 4 F. & F. 316 (holding that an offer to sell a debt is not libelous *per se*).

Imputations injurious to business or profession see *infra*, III, G.

51. Sanders *v.* Edmonson, (Tex. Civ. App. 1900) 56 S. W. 611.

52. Windisch-Muhlhauser Brewing Co. *v.* Bacon, 53 S. W. 520, 21 Ky. L. Rep. 928.

53. McDermott *v.* Union Credit Co., 76 Minn. 84, 78 N. W. 967, 79 N. W. 673.

54. *Arkansas.*— Patton *v.* Cruce, 72 Ark. 421, 81 S. W. 380, 105 Am. St. Rep. 46, charge of being "a secret slandered and scandel-monger."

Kentucky.—Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73, 11 Ky. L. Rep. 697, holding that it is libelous *per se* to charge a person with uttering "foul lies" and with possessing a "vile slanderous tongue."

Massachusetts.— Clark *v.* Binney, 2 Pick. 113.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

South Carolina.— Woodburn *v.* Miller, Cheves 194.

Vermont.— Gregory *v.* Atkins, 42 Vt. 237; Colby *v.* Reynolds, 6 Vt. 489, 27 Am. Dec. 574.

Wisconsin.— Cramer *v.* Noonan, 4 Wis. 231.

United States.—Snowdon *v.* Lindo, 22 Fed. Cas. No. 13,152, 1 Cranch C. C. 569. See also Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41, holding that it is actionable *per se* to charge a person with inducing the publication of a libel in order to found suits upon it to extort money. *Compare* Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 81.

See 32 Cent. Dig. tit. "Libel and Slander," § 7.

Compare Loughead *v.* Bartholomew, Wright (Ohio) 90, holding that where a plaintiff who, charged by defendant with slander, relies upon the truth of the words published by him to show that he is not guilty of slander, as charged by defendant, cannot maintain his action, when proof of the truth injuriously affects a third person not a party to the case.

55. Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461; Southwick *v.* Stevens, 10 Johns. (N. Y.) 443; Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032; Urben *v.* Pittsburgh Times, 1 Mona. (Pa.) 135; Morgan *v.* Lingen, 8 L. T. Rep. N. S. 800.

56. Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485.

57. See Stewart *v.* Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40, a publication charging that the bite of a cat had caused a person to purr, mew, and endeavor to catch rats, and to otherwise act like a cat.

58. Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867 (holding that an article calculated to exhibit plaintiff as a shallow and ridiculous person is libelous *per se*); Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72 (holding that the words, "I don't propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain't built that way," printed and published in a coarse and blotted imitation of the handwriting of plaintiff, who was a candidate for office, and with an imitation of the genuine signature of plaintiff attached are libelous as tending to show him to be ignorant, illiterate, and incapable of intelligently performing his duties as a member of congress); Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747 (holding that to publish of a person that he is "without brains" is libelous *per se*); Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004 (holding that to charge one in a letter with being incapable of thinking, and with being a "stupid blockhead," an "idiot" and a "fool" is libelous *per se*). *Compare* Mayrant *v.* Richardson, 1 Nott & M. (S. C.) 347, 9 Am. Dec. 707, holding that written words imputing mere weakness of understanding to a candidate for office are not actionable *per se*; since such words, while they may be

less and inhuman conduct are actionable *per se*, since they excite the hatred of the community.[59]

g. Imputations of Roguery, Rascality, and General Depravity. A written or printed publication imputing roguery, rascality, or general depravity, which carries with it a charge of moral turpitude and degradation of character, the natural tendency of which is to hold the party up to contempt and expose him to the reprobation of the virtuous and honorable is libelous *per se*.[60] Thus it is libelous

calculated to excite compassion, do not excite hatred, ridicule, or contempt.

59. Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051 (charging a husband with abusing his wife by taking away her young child and with not providing sufficient fuel to keep her warm); O'Rourke *v.* Lewiston Daily Sun Pub. Co., 89 Me. 310, 36 Atl. 398; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993 (holding that published statements that an owner of injured cattle had hitched a team to them and dragged them some distance, "breaking bones that had not already been broken," and had left them in a dying condition for some time, until they were killed by an officer of the society for the prevention of cruelty to animals, were libelous *per se*); Churchill *v.* Hunt, 2 B. & Ald. 685, 1 Chit. 480, 22 Rex. Rep. 807, 18 E. C. L. 263 (a charge of attending a public ball after having killed a pedestrian by negligent driving).

Cruelty to children.— In Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611, 12 Utah 439, it was held that a written publication charging one with cruel treatment of a child is actionable *per se*. See also Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528. *Compare* Geisler *v.* Brown, 6 Nebr. 254 [*disapproved* in World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737], holding that words charging a woman with being an inhuman stepmother and with beating her child over the head unmercifully with a club was not libelous *per se*.

Cruelty to animals.— See Loker *v.* Campbell, 163 Mass. 242, 39 N. E. 1038, a charge of unnecessarily failing to provide cattle with proper shelter and protection from the weather.

60. *California.*—Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290.

Delaware.— Croasdale *v.* Bright, 6 Houst. 52, holding that publishing of one that he is a "miserable specimen of humanity, who . . . attacks private character, business interests, the sanctity of home and desecrates the memory of the dead" is libelous *per se*.

Georgia.— Stewart *v.* Swift Specific Co., 76 Ga. 280, 2 Am. St. Rep. 40, holding that a printed publication charging that a daughter voluntarily furnished for publication matter holding her mother up to ridicule by representing her mother as afflicted with a disease similar to hydrophobia, due to the bite of a cat and ascribing to her conduct consisting of acts like a cat is libelous *per se*, since it imputes to the daughter ungrateful and unfilial conduct.

Indiana.— Crocker *v.* Hadley, 102 Ind. 416, 1 N. E. 734 (holding that to publish of a party, "He has sold himself, Judas-like, for a few pieces of silver, to sell his neighbors out," is libelous *per se*); Johnson *v.* Stebbins, 5 Ind. 364.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231; Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177, where the charge was that "he had been in more rows than any other one man in this county."

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314, holding that to publish that one has been "in collusion with ruffians" is libelous.

Massachusetts.—Atwill *v.* Mackintosh, 120 Mass. 177; Clark *v.* Binney, 2 Pick. 113.

Michigan.— Eikhoff *v.* Gilbert, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451; Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52; Wheaton *v.* Beecher, 66 Mich. 307, 33 N. W. 503.

Minnesota.—Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330, holding that to charge one with being "disreputable" is libelous.

Missouri.— McGinnis *v.* Knapp, 109 Mo. 131, 18 S. W. 1134; Price *v.* Whitley, 50 Mo. 439 (where plaintiff was charged with being "an imp of the devil . . . sitting upon the mayor's seat"); Manget *v.* O'Neill, 51 Mo. App. 35 (a charge that one was "a specimen too contemptible for any decent person to associate with").

New Jersey.— Hand *v.* Winton, 38 N. J. L. 122, holding it libelous *per se* to charge that a citizen in exercising his political privileges was influenced by pecuniary motives.

New York.— Gates *v.* New York Recorder Co., 155 N. Y. 228, 49 N. E. 769; Byrnes *v.* Mathews, 12 N. Y. St. 74 [*affirmed* in 109 N. Y. 662, 17 N. E. 868] (holding that to charge that one is accustomed to do things in the line of "spying and sneaking" that others would not do is libelous *per se*); Carpenter *v.* Hammond, 1 N. Y. St. 551 (holding that to write of one that he is "the most treacherous wretch that ever struck the hand that fed him," and with having a "shallow head and unprincipled heart" is libelous *per se*); Cooper *v.* Greeley, 1 Den. 347 (holding that to charge that a party will not bring a suit for libel in a certain county "for he is known there" is libelous *per se*).

Wisconsin.— Kay *v.* Jansen, 87 Wis. 118, 58 N. W. 245; Cottrill *v.* Cramer, 43 Wis. 242 (holding that it is libelous *per se* to publish of a person "that he has attempted a lower depth of degradation than any lead-

per se to publish of one that he is a hypocrite,[61] a rascal,[62] a scoundrel,[63] a confidence man,[64] a blackguard,[65] a villain,[66] a rogue,[67] or a swindler.[68] So the same rule has been applied to written words charging plaintiff with being a drunkard.[69]

ing politician ever before attempted," and "that no patriot can speak of him without contempt and indignation"); Cary *v.* Allen, 39 Wis. 481; Brown *v.* Remington, 7 Wis. 462 (holding that to write of one that it "would be impossible for a newspaper article to injure him to the extent of six cents" is libelous *per se*).

United States.— Pfitzinger *v.* Dubs, 64 Fed. 696, 12 C. C. A. 399 (holding that the charge that "you cannot get P. down any lower than he is" is libelous *per se*); Post Pub. Co. *v.* Hallam, 59 Fed. 530 [*affirming* 55 Fed. 456] (holding that a publication charging a candidate for office with having sold out to a rival is libelous *per se*).

England.— Cox *v.* Lee, L. R. 4 Exch. 284, 38 L. J. Exch. 219, 21 L. T. Rep. N. S. 173 (a charge of ingratitude); Tuan *v.* Robeson, 5 Bing. 17, L. J. C. P. O. S. 199, 2 M. & P. 32, 30 Rev. Rep. 530 (holding that it is libelous to charge a protestant archbishop with attempting to convert Roman catholic priests by offers of money and preferment); Teacy *v.* McKenna, Ir. R. 4 C. L. 374 (holding that a letter stating that a presbyterian job coach proprietor had refused the use of his hearse for the funeral of his deceased servant because the body was to be interred in a catholic burying-ground is libelous *per se*); Woodard *v.* Dowsing, 2 M. & R. 74, 17 E. C. L. 701 (charging a person with oppressive conduct toward paupers).

See 32 Cent. Dig. tit. "Libel and Slander," § 6.

61. *Florida.*—Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

Kansas.— State *v.* Mayberry, 33 Kan. 441, 6 Pac. 553, where plaintiff was charged with being a "hypocritical puppy."

Minnesota.— Knox *v.* Meehan, 64 Minn. 280, 66 N. W. 1149, where plaintiff was charged with being a "religious hypocrite." See also Byram *v.* Aiken, 65 Minn. 87, 67 N. W. 807.

Nebraska.— Finch *v.* Vifguain, 11 Nebr. 280, 9 N. W. 43, where plaintiff was charged with being an "arch hypocrite."

England.— Thorley *v.* Kerry, 4 Taunt. 355, 13 Rev. Rep. 626.

See 32 Cent. Dig. tit. "Libel and Slander," § 6.

62. Cassidy *v.* Brooklyn Daily Eagle, 18 N. Y. Suppl. 930 [*reversed* on another point in 138 N. Y. 239, 33 N. E. 1038]; Williams *v.* Karnes, 4 Humphr. (Tenn.) 9; Snowdon *v.* Lindo, 22 Fed. Cas. No. 13,152, 1 Cranch C. C. 569, where the words were "lying, slanderous rascal."

63. *Maryland.*— Davis *v.* Griffith, 4 Gill & J. 342.

Nebraska.— Finch *v.* Vifguain, 11 Nebr. 280, 9 N. W. 43.

New York.— Loveland *v.* Hosmer, 8 How. Pr. 215, where the words were, "This scoundrel was indicted for fraud."

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493, accusing one of being an "infamous scoundrel."

Virginia.— Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803, where, however, the charge was held to be privileged.

Wisconsin.— Van Slyke *v.* Carpenter, 7 Wis. 173.

United States.— Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352.

See 32 Cent. Dig. tit. "Libel and Slander," § 6.

64. Manget *v.* O'Neill, 51 Mo. App. 35.

65. Croasdale *v.* Bright, 6 Houst. (Del.) 52; Davis *v.* Griffith, 4 Gill & J. (Md.) 342.

66. Hillhouse *v.* Dunning, 6 Conn. 391; Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Bell *v.* Stone, 1 B. & P. 331, 4 Rev. Rep. 820.

67. See Hubbard *v.* Rutledge, 57 Miss. 7; Villers *v.* Monsley, 2 Wils. C. P. 403.

68. *Massachusetts.*— Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583.

New York.— Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360; Cameron *v.* Tribune Assoc., 3 Silv. Sup. 575, 7 N. Y. Suppl. 739; Williams *v.* Godkin, 5 Daly 499, a publication charging plaintiff with "plastering" a mine for the purpose of swindling the public.

Texas.— St. Louis Southwestern R. Co. *v.* McArthur, 31 Tex. Civ. App. 205, 72 S. W. 76, holding that a published notice stating that a party was representing himself to be an agent of defendant when in fact he was not and that he was soliciting advertisements for them without authority is libelous *per se*.

Wisconsin.— Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004 (accusing one of being a "smooth swindler"); Van Slyke *v.* Carpenter 7 Wis. 173 (accusing one of being a "swindling scoundrel").

England.— J'Anson *v.* Stuart, 1 T. R. 748, 1 Rev. Rep. 392. See also Goldstein *v.* Foss, 6 B. & C. 154, 13 E. C. L. 81, 4 Bing. 489, 13 E. C. L. 601, 2 C. & P. 252, 12 E. C. L. 556, 9 D. & R. 197, 1 M. & P. 402, 2 Y. & J. 146, 29 Rev. Rep. 610.

See 32 Cent. Dig. tit. "Libel and Slander," § 6.

69. *Georgia.*— Giles *v.* State, 6 Ga. 276, a criminal prosecution.

Kansas.— State *v.* Mayberry, 33 Kan. 441, 6 Pac. 553, holding that it is criminally libelous to state that a person has been intoxicated on several occasions.

Massachusetts.— See Atwill *v.* Mackintosh, 120 Mass. 177.

Michigan.— Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507.

Missouri.— Hawkins *v.* Globe Printing Co.,

And likewise applying the same rule written words charging one with being a whelp,[70] a seducer,[71] or a filcher have been held to be libelous *per se*.[72]

h. Betrayal of Confidence or Trust. A publication which charges a breach of trust[73] or a betrayal of confidence[74] is libelous *per se*.

i. Imputations as to Church Standing or Religious Beliefs. A written publication which imports that a party has been expelled from membership in a church or is unworthy of being a church member is libelous *per se*, when the imputation is based on the character or conduct of the party and not on his religious belief.[75] Moreover it has been held that a written or printed statement charging plaintiff with infidelity, with being actively engaged in propagating infidel principles, and with giving expressions to sentiments of irreverence toward the Creator is libelous *per se*.[76]

j. Charges of Political Corruption Against Others Than Public Officers. A publication which imputes political corruption, or the use of political influence or privileges for pecuniary gain, is libelous *per se*, even though the party against whom the charge is made is not a public officer or candidate for office.[77]

10 Mo. App. 174, charge of habitual drunkenness.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137, holding that an article charging a woman with getting up a donation party for a saloon-keeper and with drinking liquor at the party is libelous *per se*.

New York.— Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. 409, 49 Am. St. Rep. 646; Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Tobin *v.* Sykes, 71 Hun 469, 24 N. Y. Suppl. 943; Root *v.* King, 6 Cow. 613 [*affirmed* in 4 Wend. 113], holding that to publish of a lieutenant-governor that he addressed the senate while drunk is libelous *per se*.

Wisconsin.— Adamson *v.* Reymer, 94 Wis. 243, 68 N. W. 1000.

England.— Ritchie *v.* Sexton, 55 J. P. 389, 64 L. T. Rep. N. S. 210.

70. Manget *v.* O'Neill, 51 Mo. App. 35.

71. Atwill *v.* Mackintosh, 120 Mass. 177; Finch *v.* Vifquain, 11 Nebr. 280, 9 N. W. 43; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128.

72. Crocker *v.* Hadley, 102 Ind. 416, 1 N. E. 734.

73. Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356 (imputing that an attorney had acted in an outrageously dishonest manner in taking money from an estate); McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673 (holding that it is libelous *per se* to charge a son who was trustee of his father's estate with having "got away with the property"); Carpenter *v.* Hammond, 1 N. Y. St. 551 (holding that a printed circular charging plaintiff with spending defendant's money intrusted to him in a fiduciary capacity without his consent is libelous *per se*).

74. Stewart *v.* Pierce, 93 Iowa 136, 61 N. W. 388 (a charge of violating the confidence of a partner); Manget *v.* O'Neill, 51 Mo. App. 35; Tryon *v.* Evening News Assoc., 39 Mich. 636; Lauder *v.* Jones, (N. D. 1904) 101 N. W. 907 (a charge that plaintiff had betrayed confidential communications, to an alleged criminal with the corrupt purpose of shielding him from the legal consequences of his offenses).

75. Over *v.* Hildebrand, 92 Ind. 19; Call *v.* Larabee, 60 Iowa 212, 14 N. W. 237 (holding that a publication by a church committee that plaintiff had been expelled from church, that they believed him to be unworthy of their confidence, and that they considered him a man of immoral character and not worthy of a place in any church is libelous *per se*); McCorkle *v.* Binns, 5 Binn. (Pa.) 340, 6 Am. Dec. 420 (holding that to publish of a person "that he has been deprived of a participation of the chief ordinance of the church to which he belongs and that too by reason of his infamous, groundless assertions" is actionable *per se*).

Imputations against members of W. C. T. U. see Street *v.* Johnson, 80 Wis. 455, 50 N. W. 395, 27 Am. St. Rep. 42, 14 L. R. A. 203.

Imputation of mormonism.— In Witcher *v.* Jones, 17 N. Y. Suppl. 491, it was held that a charge in a newspaper that plaintiff "joined the Mormons, and at one time had a good deal of influence in church matters at Salt Lake" was capable of a defamatory construction, and that it was not error to submit to the jury the question whether such charge was libelous, and it was intimated moreover that the charge was libelous *per se*.

76. Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189, 4 Conn. 17.

77. Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50; Field *v.* Magee, 122 Mich. 556, 81 N. W. 354 (holding that a publication charging that plaintiff had said that there was not one of a certain class of voters who could not be bought for a two-dollar bill and stating that such remarks indicated how he intended to carry the fall election is libelous *per se*); Hand *v.* Winton, 38 N. J. L. 122; Weed *v.* Foster, 11 Barb. (N. Y.) 203 (holding that a publication charging that plaintiff, an influential politician, had received large sums of money for appointments to lucrative offices is libelous *per se*).

k. Imputations of Poverty. The imputation of poverty, squalor, and misery may be so made as to excite ridicule and so amount to libel *per se*.[78]

l. Imputations Charging Infringement of Patent Rights. A publication charging infringement of a regularly granted patent right has been held to be libelous *per se*;[79] the rule, however, being generally based on the ground that the imputation is injurious to plaintiff in his business.[80]

m. Imputations Upon Men as to Their Relations with Women Other Than Charges of Want of Chastity. Various publications concerning relations of men with women, which, although not imputing a want of chastity, yet tend to disgrace the party charged or to render him ludicrous or ridiculous, are libelous *per se*.[81]

n. Imputations Upon Women Other Than Charges of Unchastity. So various publications concerning women, not amounting to imputations of want of chastity, have been held to be libelous *per se*.[82]

Charges against person in official capacity see *infra*, III, H.

78. Martin *v.* Press Pub. Co., 93 N. Y. App. Div. 531, 87 N. Y. Suppl. 859; Battersby *v.* Collier, 24 N. Y. App. Div. 89, 48 N. Y. Suppl. 976; Moffatt *v.* Cauldwell, 3 Hun (N. Y.) 26, 5 Thomps. & C. 256.

79. Bowsky *v.* Cimiotti Unhairing Co., 72 N. Y. App. Div. 172, 76 N. Y. Suppl. 465 (where, however, the publication was held to be privileged); Watson *v.* Trask, 6 Ohio 531, 27 Am. Dec. 271; Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302; Cousins *v.* Merrill, 16 U. C. C. P. 114 (holding that the words, "Beware of the fraud," referring to the infringement of a patent are libelous).

Imputing infringement of patent as constituting slander of title see Meyrose *v.* Adams, 12 Mo. App. 329; Cousins *v.* Merrill, 16 U. C. C. P. 114. See also *infra*, IX, B.

80. Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073; Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329. See also Watson *v.* Trask, 6 Ohio 531, 27 Am. Dec. 271 (where the charge was held to be libelous as tending to blacken plaintiff's reputation, injure his business, and expose him to hatred and contempt); Cousins *v.* Merrill, 16 U. C. C. P. 144.

Libel touching person in his business see *infra*, III, G.

81. *Colorado.*—Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051, holding that it is libelous to charge a husband with abusing his wife, and taking away her child and declaring that she would never see it again.

Michigan.— Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952, 94 Mich. 119, 54 N. W. 766, holding that a publication stating that plaintiff was engaged to be married, that he had ordered his wedding supper and hired a minister, and that a few hours before the marriage the lady had eloped with his cousin is libelous *per se*.

Minnesota.— Holston *v.* Boyle, 46 Minn. 432, 49 N. W. 203, a statement that plaintiff has been chastised for improper conduct toward women.

New York.— Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 1 N. Y. Suppl. 475] (a charge that a breach of promise suit had been brought against a married man); Woolworth *v.* Star Co., 97 N. Y. App. Div. 525, 90 N. Y. Suppl. 147 (an article stating that plaintiff's wife had announced that her life had been made unhappy because plaintiff neglected her in his absorbing pursuit of millions and that he sacrificed everything to his one passion in consequence of which he and she were separated); D'Andrea *v.* New York Press Co., 61 N. Y. App. Div. 605, 70 N. Y. Suppl. 759 (holding that it is libelous *per se* to charge that plaintiff was walking with a married woman, that the husband confronted them and was shot by the wife, and that plaintiff was tried for complicity in the crime but was acquitted).

Texas.— Walker *v.* San Antonio Light Pub. Co., 30 Tex. Civ. App. 165, 70 S. W. 555, a statement that a person has been publicly caned by an actress on Broadway.

England.— Clement *v.* Chivis, 9 B. & C. 172, 7 L. J. K. B. O. S. 189, 4 M. & R. 127, 17 E. C. L. 85, a charge that a person has been guilty of gross misconduct toward women.

Imputations of unchastity see *infra*, III, E.

82. *Illinois.*— Herrick *v.* Tribune Co., 108 Ill. App. 244, holding that it is libelous *per se* to charge a woman with speculating in the grain market and with having frequent quarrels with one who had recently died under suspicious circumstances.

Michigan.— Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52, charging a wife with deserting her husband in his sickness.

Missouri.— McMurry *v.* Martin, 26 Mo. App. 437 (writing of a woman "that she is like an old sheep and has twins at every litter" and "that she stinks like old cheese," etc.); Hawkins *v.* Globe Printing Co., 10 Mo. App. 174 (holding that it is libelous *per se* to publish of a wife that she permitted her husband to sleep with another woman).

New York.— Gates *v.* New York Recorder Co., 155 N. Y. 228, 49 N. E. 769 (charging a woman with having been a concert-hall singer and dancer at Coney Island); Kirman

o. Imputation of Illegitimacy. It is libelous *per se* to charge one in print or writing with being illegitimate.[83]

p. Imputation of Negro Blood in White Persons. To publish of a white man that he is a negro[84] or that he is colored[85] is libelous *per se*.

q. Imputations of Cowardice. Publications imputing cowardice are libelous *per se*.[86]

r. Imputations of Profanity. A charge of profanity is libelous *per se*.[87]

s. Imputing Want of Sexual Powers. An imputation that a man is a eunuch is libelous *per se*.[88]

3. Caricatures, Pictures, Signs, or Effigies. An actionable libel may be published by means of pictures, caricatures,[89] signs,[90] or effigies.[91]

B. Oral Communications — 1. In General. Oral defamation as a cause of action has been divided into five classes, as follows: (1) Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude for which the party, if the charge be true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. (3) Defamatory words falsely spoken of

v. Sun Printing, etc., Assoc., 99 N. Y. App. Div. 367, 91 N. Y. Suppl. 193 (holding that an article stating that plaintiff was about to be married, that the guests had assembled but the bridegroom failed to appear, that plaintiff fell to the floor with a scream and the guests made a rush for the tables is libelous); McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 51 N. Y. Suppl. 275 (holding that a newspaper story describing a boat-race between plaintiff and another young lady as "a race for a beau with a handsome face" with other similar matter is libelous *per se*); Tobin *v.* Sykes, 71 Hun 469, 24 N. Y. Suppl. 943 (holding that it is libelous *per se* to refer to a woman as a "miserable drunken brute" and to state that "she sends her children for beer daily, and cruelly beats them").

Pennsylvania.— Oles *v.* Pittsburg Times, 2 Pa. Super. Ct. 130, 38 Wkly. Notes Cas. 461 (charging a woman old and poor with being a witch and with having bewitched a little boy, where it appeared that the paper in which the article was published circulated among people who believed in witchcraft); Mix *v.* North American Co., 12 Pa. Dist. 446, 17 York Leg. Rec. 49.

Wisconsin.— Kay *v.* Jansen, 87 Wis. 118, 58 N. W. 245 (publishing of a woman whose son was in the state industrial school "we know the tree by the fruit"); Allen *v.* News Pub. Co., 81 Wis. 120, 50 N. W. 1093 (charging a widow with making remarks regarding the sex and masculine powers of her deceased husband); Cary *v.* Allen, 39 Wis. 481 (charging that a certain person had absconded and that plaintiff, a woman, had gone to meet him).

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Butler *v.* Carter, etc., Pub. Co., 135 Fed. 69, 67 C. C. A. 543; Butler *v.* Evening Leader Co., 134 Fed. 994; Butler *v.* Barret, 130 Fed. 944.

83. Shelby *v.* Sun Printing, etc., Assoc., 38 Hun (N. Y.) 474; Mix *v.* North American Co., 12 Pa. Dist. 446, 17 York Leg. Rec. 49.

84. Upton *v.* Times-Democrat Pub. Co., 104 La. 141, 28 So. 970.

85. Flood *v.* Evening Post Pub. Co., 71 S. C. 122, 50 S. E. 641; Flood *v.* News, etc., Co., 71 S. C. 112, 50 S. E. 637.

86. Price *v.* Whitley, 50 Mo. 439 (charging plaintiff with being "a cowardly snail, that shrinks back into his shell at the sight of the slightest shadow"); Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772 (where the words were, "You are a liar and a poltroon").

87. Com. *v.* Batchelder, Thach. Cr. Cas. (Mass.) 191. See also Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189; Com. *v.* Wardwell, 136 Mass. 164.

88. Eckert *v.* Van Pelt, 69 Kan. 357, 76 Pac. 909, 66 L. R. A. 266.

89. Ellis *v.* Kimball, 16 Pick. (Mass.) 132; Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309 (holding that a picture, the only meaning of which it was capable being that the monument of plaintiff should show that liquor and money were the source of his Napoleon-like means in passing a bill, was libelous); Moley *v.* Barager, 77 Wis. 43, 45 N. W. 1082 (holding that a publication of a cut representing plaintiff as a jackass is libelous). *Compare* Kennedy *v.* Press Pub. Co., 41 Hun (N. Y.) 422, holding that the publication of a cut representing the interior of plaintiff's saloon is not libelous, where there is nothing charging plaintiff with improperly conducting his saloon or showing that he was responsible for the character of his guests.

90. Jefferies *v.* Duncombe, 2 Campb. 3, 11 East 226 (suspending a lamp before one's house; thus denoting the keeping of a brothel); Case de Libellis Famosis, 5 Coke 125*a* (fixing a gallows against one's door).

91. Johnson *v.* Com., 22 Wkly. Notes Cas. (Pa.) 68, holding that a libel may be published by hanging in effigy, even though no defamatory words appear upon such effigy.

a person which impute to the party unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person which, although not in themselves actionable, occasion the party special damage.[92] In a few jurisdictions this classification has, apart from statute, been enlarged to some extent, as for instance, by permitting recovery without proof of special damages for imputations of unchastity in a female, although no crime is charged;[93] or generally for words spoken of a female, having a tendency to wound her feelings, bring her into contempt, and prevent her from occupying the position in society, to which she is entitled, as a woman.[94] So it has been suggested that still another class of oral words be added as being actionable *per se*, viz., charges which are deemed exceptionably disgraceful in particular localities,[95] as for instance in South Carolina, charging a white person with being a mulatto.[96] The classification of defamation into that which is actionable *per se* and that which is actionable *per quod* has never been adopted in Louisiana, but there the rule of civil law obtains that all oral defamations producing any perceptible injury to the reputation of another are actionable.[97]

2. Oral Defamation Not Actionable Per Se — a. In General. Oral words not included within the first four classes of words actionable *per se* as enumerated above[98] are not as a general rule actionable *per se*, and without proof of special damage, although tending to expose to public hatred, contempt, and ridicule.[99]

92. Pollard *v.* Lyon, 91 U. S. 225, 226, 23 L. ed. 308. See also Moore *v.* Francis, 121 N. Y. 199, 203, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214 [*citing* Onslaw *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177], where it is said: "Slanderous words are those which (1) import a charge of some punishable crime; or (2) impute some offensive disease which would tend to deprive a person of society; or (3) which tend to injure a party in his trade, occupation, or business; or (4) which have produced some special damage."

93. Haynes *v.* Ritchey, 30 Iowa 76, 6 Am. Rep. 642; Cleveland *v.* Detweiler, 18 Iowa 299; Bearsley *v.* Bridgman, 17 Iowa 290; Wilson *v.* Beighler, 4 Iowa 427; Truman *v.* Taylor, 4 Iowa 424; Smith *v.* Silence, 4 Iowa 321, 66 Am. Dec. 137; Dailey *v.* Reynolds, 4 Greene (Iowa) 354; Cox *v.* Bunker, Morr. (Iowa) 269; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Sexton *v.* Todd, Wright (Ohio) 316.

94. Malone *v.* Stewart, 15 Ohio 319, 45 Am. Dec. 577, holding that to call a woman a "hermaphrodite" is actionable *per se*.

95. See 12 Am. Dec. 41 note.

96. See *infra*, page 268 note 22.

97. Harris *v.* Minvielle, 48 La. Ann. 908, 19 So. 925; Fellman *v.* Dreyfous, 47 La. Ann. 907, 17 So. 422; Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502; Spotorno *v.* Fourichon, 40 La. Ann. 423, 4 So. 71; Feray *v.* Foote, 12 La. Ann. 894; Miller *v.* Holstein, 16 La. 389.

98. See *supra*, III, B, 1.

99. *District of Columbia.*—Knight *v.* Blackford, 3 Mackey 177, 51 Am. Rep. 772, holding that it is not slanderous *per se* to charge one with speaking disrespectfully of another.

Indiana.— Wyant *v.* Smith, 5 Blackf. 293, holding that the words, "I have lost my hogs, and I believe he and his nearest neighbors got them," are not actionable *per se*.

Maine.— Barnes *v.* Trundy, 31 Me. 321.

Massachusetts.—Fitzgerald *v.* Robinson, 112 Mass. 371; Bloss *v.* Tobey, 2 Pick. 320 (holding that to charge a person with burning his own store is not actionable); Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137.

Michigan.— Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495.

Missouri.— Birch *v.* Benton, 26 Mo. 153 (holding that it is not actionable *per se* to charge a man with whipping his wife); Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609 (holding that the words, "He forged my name to one of his rent receipts," are not actionable).

Montana.— Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

New Jersey.— Jaeger *v.* Beberdick, 70 N. J. L. 372, 57 Atl. 157.

New York.— Anonymous, 60 N. Y. 262, 19 Am. Rep. 174 (holding that words charging a female with self-pollution are not actionable *per se*); Flatow *v.* Von Bremsen, 19 N. Y. Civ. Proc. 125, 131, 11 N. Y. Suppl. 680 (holding that to say of one that he "don't understand his business" and that "his wife is not virtuous" is not slanderous *per se*).

Oregon.— Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

Pennsylvania.— McClurg *v.* Ross, 5 Binn. 218.

South Carolina.— O'Hanlon *v.* Myers, 10 Rich. 128 (holding that to charge one with having burnt and destroyed a will is not slanderous); Gage *v.* Shelton, 3 Rich. 242 (holding that it is not actionable *per se* to say of one that he docked the tail of his

b. Particular Oral Imputations Considered — (I) *Imputations of Indebtedness.* Oral words imputing to a person not in business a state of indebtedness or inability to pay his debts are not actionable *per se*.[1]

(II) *Imputations of Intoxication.* An oral charge of drunkenness is not actionable *per se*,[2] unless it charges a crime,[3] or unless it is coupled with some business in which drunkenness is a disqualification.[4]

(III) *Imputations of Falsehood.* Oral imputations of falsehood are not actionable *per se*,[5] unless they charge a crime,[6] or affect one in his business or profession.[7]

(IV) *Imputations of Dishonesty, Rascality, or General Depravity.* An oral charge of dishonesty or rascality is not actionable *per se*,[8] unless such

horse); Sturgenegger *v.* Taylor, 2 Brev. 480 (holding that the words, "Those two rascals killed my hogs, and converted them to their own use," are not actionable in themselves).

Texas.— King *v.* Sassaman, (Tex. Civ. App. 1899) 54 S. W. 304, holding that a statement that another uses morphine is not slanderous *per se*.

Vermont.— Hoar *v.* Ward, 47 Vt. 657, holding that words charging one with being a bastard are not actionable *per se*.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308; Johnson *v.* Brown, 13 Fed. Cas. No. 7,375, 4 Cranch C. C. 235.

England.— Simmons *v.* Mitchell, 6 App. Cas. 156, 45 J. P. 237, 50 L. J. P. C. 11, 43 L. T. Rep. N. S. 710, 29 Wkly. Rep. 401 (holding that words merely conveying suspicion as to the commission of a crime are not actionable); Holt *v.* Scholefield, 6 T. R. 691, 3 Rev. Rep. 318.

Canada.— Palmer *v.* Solmes, 30 U. C. C. P. 481; Fellowes *v.* Hunter, 20 U. C. Q. B. 382.

See 32 Cent. Dig. tit. "Libel and Slander," § 10.

1. Windsor *v.* Oliver, 41 Ga. 538 (holding that the words, "They are not worth fifty cents on the dollar," are not actionable); Barnes *v.* Trundy, 31 Me. 321; Redway *v.* Gray, 31 Vt. 292; Speake *v.* Hughes, [1904] 1 K. B. 138, 73 L. J. K. B. 172, 89 L. T. Rep. N. S. 576 (holding that where in an action for slander the words complained of were alleged to have been spoken to plaintiff's employers, and were as follows: "You have a barman in your employ (meaning the plaintiff) who has removed from his landlord's house, leaving £2 owing for a month's rent, and I cannot get the money from him," and plaintiff alleged, as special damage, that in consequence of the slander he was dismissed from his employment, the words were not actionable, in the absence of special damage resulting from them, and that the special damage alleged was too remote); Storey *v.* Challands, 8 C. & P. 234, 34 E. C. L. 708 (holding that to say of one that he borrowed money without repaying it is not slanderous).

2. *Indiana.*— Rock *v.* McClarnon, 95 Ind. 415.

Kentucky.— Elliott *v.* Ailsberry, 2 Bibb 473, 5 Am. Dec. 631.

Maine.— Buck *v.* Hersey, 31 Me. 558.

Mississippi.— Warren *v.* Norman, Walk. 387, holding that the words, "He got drunk on Christmas," are not actionable.

New York.— Baxter *v.* Mohr, 37 Misc. 833, 76 N. Y. Suppl. 982, holding that the words, "You dirty drunken cur . . . you are drunk now," are not actionable.

Ohio.— Coffee *v.* Cowley, 4 Ohio Dec. (Reprint) 112, 1 Clev. L. Rep. 35.

Rhode Island.— Lodge *v.* O'Toole, 20 R. I. 405, 39 Atl. 752 (holding that charging a woman with drunkenness amounting to a violation of decency is not actionable *per se*); Seery *v.* Viall, 16 R. I. 517, 17 Atl. 552.

South Carolina.— O'Hanlon *v.* Myers, 10 Rich. 128.

United States.— Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

England.— Alexander *v.* Jenkins, [1892] 1 Q. B. 797, 56 J. P. 452, 61 L. J. Q. B. 634, 66 L. T. N. S. 391, 40 Wkly. Rep. 546.

Canada.— Tighe *v.* Wicks, 33 U. C. Q. B. 479.

See 32 Cent. Dig. tit. "Libel and Slander," § 11.

3. See *infra*, III, D.

4. See *infra*, III, G, H.

5. *Arkansas.*— Studdard *v.* Trucks, 31 Ark. 726, holding that to say of one that he is of bad character for truth and veracity and that the speaker would not believe him under oath is not actionable *per se*.

Kentucky.— Smalley *v.* Anderson, 4 T. B. Mon. 367.

Maine.— Barnes *v.* Trundy, 31 Me. 321.

Massachusetts.— Harding *v.* Brooks, 5 Pick. 244. See also Cook *v.* Cook, 100 Mass. 194.

New York.— Havemeyer *v.* Fuller, 10 Abb. N. Cas. 9, 60 How. Pr. 316, holding that it is not slanderous *per se* to say of one that "he cheated the government, and swore he did not do so."

Pennsylvania.— Harvey *v.* Boies, 1 Penr. & W. 12.

Vermont.— Kimmis *v.* Stiles, 44 Vt. 351.

United States.— Johnson *v.* Brown, 13 Fed. Cas. No. 7,375, 4 Cranch C. C. 235.

See 32 Cent. Dig. tit. "Libel and Slander," § 12.

6. See *infra*, III, D.

7. See *infra*, III, G, H.

8. *District of Columbia.*— Knight *v.* Blackford, 3 Mackey 177, 51 Am. Rep. 772.

Indiana.— Porter *v.* Choen, 60 Ind. 338, holding that the words, "He has always

charge is uttered or spoken of a person in his business or employment,[9] or unless there is an imputation of the commission of a crime.[10] Thus it is not actionable *per se* to say of a person that he is a rogue,[11] a rascal,[12] a scoundrel,[13] or a villain.[14] And the same rule is applicable to words describing plaintiff as a cheat,[15] a swindler,[16]

kept a set of liars about him to swear for him," are not actionable *per se*.

Iowa.—Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785; Lucas *v.* Flinn, 35 Iowa 9, holding that the charge, "You defrauded me," is not actionable *per se*.

Maryland.— Winter *v.* Sumvalt, 3 Harr. & J. 38, holding that the words, "You are a rogue, and I can prove that you cheated Mathias Sitler out of one hundred dollars," are not actionable *per se*.

Minnesota.— Richmond *v.* Post 69 Minn. 457, 72 N. W. 704, holding that the words, "If they can make money dishonestly, I have the same right," are not actionable *per se*.

Missouri.— Rammell *v.* Otis, 60 Mo. 365, holding that to say of one that he does not keep honest books is not slanderous *per se* unless it is made in connection with the business of the person charged.

New York.— Pike *v.* Van Wormer, 5 How. Pr. 171, 6 How. Pr. 99 (holding that the charge, "You are a bogus peddler," is not actionable *per se*); Rathbun *v.* Emigh, 6 Wend. 407 (holding that it is not actionable to charge the keeping of false books of account unless the keeping of the books is incident to a business).

Pennsylvania.— Colbert *v.* Caldwell, 3 Grant 181; McClurg *v.* Ross, 5 Binn. 218; Brown *v.* Street, 1 Phila. 85.

England.— Doyley *v.* Roberts, 3 Bing. N. Cas. 835, 3 Hodges 154, 6 L. J. C. P. 279, 5 Scott 40, 32 E. C. L. 384 (holding that the words, "He had defrauded his creditors, and had been horsewhipped off the course at Doncaster," are not actionable *per se*); Feise *v.* Linder, 3 B. & P. 372 (holding that the words, "He has brought a forged bill of lading for half the cargo already," do not charge a crime and are not actionable); Richardson *v.* Allen, 2 Chit. 657, 18 E. C. L. 834 (holding that the words, "He has defrauded a meal-man of a roan horse," are not actionable *per se*); Storey *v.* Challands, 8 C. & P. 234, 34 E. C. L. 708.

See 32 Cent. Dig. tit. "Libel and Slander," § 13.

The word "knave" imports dishonesty, unless explained by some words showing that it was used in some other sense. Harding *v.* Brooks, 5 Pick. (Mass.) 244.

9. See *infra*, III, G, H.

10. See *infra*, III, D.

11. *Georgia.*— Ford *v.* Johnson, 21 Ga. 399.

Kentucky.— Mills *v.* Taylor, 3 Bibb 469; Caldwell *v.* Abbey, Hard. 529.

Louisiana.— Artieta *v.* Artieta, 15 La. Ann. 48.

Maryland.— Winter *v.* Sumvalt, 3 Harr. & J. 38. *Compare* Marshall *v.* Addison, 4 Harr. & M. 537.

New York.— Quinn *v.* O'Gara, 2 E. D. Smith 388; Oakley *v.* Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107, holding that the words, "Squire Oakley is a damned rogue," were not actionable *per se*, although spoken of a magistrate where they were not spoken of him in his official capacity.

North Carolina.— Idol *v.* Jones, 13 N. C. 162.

Pennsylvania.— Herst *v.* Borbidge, 57 Pa. St. 62.

England.—Standhope *v.* Blith, 4 Coke 15*a*; Lancaster *v.* French, 2 Str. 797; Bellamy *v.* Barker, 1 Str. 304.

See 32 Cent. Dig. tit. "Libel and Slander," § 13.

12. Knight *v.* Blackford, 3 Mackey (D. C.) 177, 51 Am. Rep. 772; Gosling *v.* Morgan, 32 Pa. St. 273; Stanhope *v.* Blith, 4 Coke 15*a*. See also Jones *v.* Edwards, 57 Miss. 28.

13. Quinn *v.* O'Gara, 2 E. D. Smith (N. Y.) 388; Harrison *v.* Stratton, 4 Esp. 218.

14. Nelson *v.* Borchenius, 52 Ill. 236; Johnson *v.* Brown, 13 Fed. Cas. No. 7,375, 4 Cranch C. C. 235; Stanhope *v.* Blith, 4 Coke 15*a*; Fellowes *v.* Hunter, 20 U. C. Q. B. 382.

15. *Illinois.*— Nelson *v.* Borchenius, 52 Ill. 236.

Indiana.— Pollock *v.* Hastings, 88 Ind. 248.

Iowa.— Lucas *v.* Flinn, 35 Iowa 9.

Massachusetts.— Odiorne *v.* Bacon, 6 Cush. 185.

New York.— Havemeyer *v.* Fuller, 60 How. Pr. 316, holding that it is not actionable to say of another that he cheated the government.

Pennsylvania.—Weierbach *v.* Trone, 2 Watts & S. 408, holding that no action lies for words imputing that one person had attempted to cheat another, where the act charged does not affect the public.

England.— Savage *v.* Robury, 5 Mod. 398, 2 Salk. 694; Davis *v.* Miller, 2 Str. 1169.

Canada.— Fellowes *v.* Hunter, 20 U. C. Q. B. 382.

See 32 Cent. Dig. tit. "Libel and Slander," § 13.

16. *Illinois.*— Nelson *v.* Borchenius, 52 Ill. 236.

Indiana.— Pollock *v.* Hastings, 88 Ind. 248.

Iowa.— Lucas *v.* Flinn, 35 Iowa 9.

Kentucky.— Mills *v.* Taylor, 3 Bibb 469, holding that the words, "You came from Canada to swindle the people of Kentucky out of their property," are not actionable *per se*.

Massachusetts.— Odiorne *v.* Bacon, 6 Cush. 185; Stevenson *v.* Hayden, 2 Mass. 406.

New York.— Eislie *v.* Walther, 4 N. Y. Suppl. 385; Chase *v.* Whitlock, 3 Hill 139.

Wisconsin.—Weil *v.* Altenhofen, 26 Wis. 708, holding that the words, "Swindled a man

a blackleg,[17] a pimp,[18] or a loafer.[19] So a charge of writing anonymous, scurrilous letters is not actionable *per se*.[20]

(v) *Imputations of Mental Weakness and Incapacity.* Oral imputations of insanity, mental weakness, and incapacity are not actionable *per se* unless spoken of a person in his business or professional capacity.[21]

(vi) *Imputations of Negro Blood in White Persons.* The general rule is that to call a white person a negro or mulatto is not actionable *per se*.[22]

(vii) *Charge of Harboring Runaway Slaves.* It has been held that a charge of harboring runaway slaves is not slanderous *per se*.[23]

(viii) *Words of Abuse.* Mere words of common abuse are not actionable *per se*.[24] But if an actionable wrong is otherwise committed, it may be shown that it was accompanied with words of common abuse, to enhance the damages.[25]

(ix) *Words Imputing Illegitimacy.* Oral words charging a person with being a bastard are not actionable *per se*.[26]

C. Words Made Actionable Per Se by Statute. By statute in some jurisdictions it is provided that all words which from their usual construction and common acceptation are considered as insults and tend to violence and breach of the peace are actionable.[27] Under statutes containing such provisions, it has been held that such words are held to be actionable under statute whether they be spoken[28] or

out of five hundred dollars," are not actionable *per se*.

England.— Black *v.* Hunt, L. R. 2 Ir. 10; Ward *v.* Weeks, 7 Bing. 211, 4 M. & P. 796, 9 L. J. C. P. O. S. 6, 20 E. C. L. 101; Savile *v.* Jardine, 2 H. Bl. 531, 3 Rev. Rep. 502.

Canada.—Fellowes *v.* Hunter, 20 U. C. Q. B. 382.

17. Van Tassel *v.* Capron, 1 Den. (N. Y.) 250, 43 Am. Dec. 667 (holding that the words, A, B & C "are a set of damned blacklegs," are not actionable *per se*); Chase *v.* Whitlock, 3 Hill (N. Y.) 139.

18. Flatow *v.* Von Bremsen, 11 N. Y. Suppl. 680, 19 N. Y. Civ. Proc. 125, 131.

19. Flatow *v.* Von Bremsen, 11 N. Y. Suppl. 680, 19 N. Y. Civ. Proc. 125, 131.

20. Middleby *v.* Effler, 118 Fed. 261, 55 C. C. A. 355.

21. Abrams *v.* Smith, 8 Blackf. (Ind.) 95 (holding that it is not actionable *per se* to say that one had committed a crime but was insane when he committed it); Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625; Goldrick *v.* Levy, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20 (holding that it is not actionable *per se* to say of one that he is crazy and has a soft spot in his head); Mayrant *v.* Richardson, 1 Nott & M. (S. C.) 347, 9 Am. Dec. 707 (holding that a charge of weak-mindness is not actionable). See also Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Morgan *v.* Lingen, 8 L. T. Rep. N. S. 800.

22. McDowell *v.* Bowles, 53 N. C. 184 (holding that it is not actionable to call a white minister a free negro where there is no allegation that the words were spoken in reference to plaintiff's profession); Barret *v.* Jarvis, 1 Ohio 83 note, Tapp. 244 (holding that charging one with being akin to a negro is not actionable); Johnson *v.* Brown, 13 Fed. Cas. No. 7,375, 4 Cranch C. C. 235 (holding that it is not actionable *per se* to call a white man a "yellow negro").

In Louisiana, where the courts are not bound by the technical distinctions of the common law as to words actionable *per se*, and words not actionable *per se*, it has been held that charging a white person with being a negro is calculated to inflict injury and damage and hence may support an action for slander. Spotorno *v.* Fourichon, 40 La. Ann. 423, 4 So. 71.

In South Carolina in some early cases it was held to be actionable to call a white person a mulatto on the ground that under the laws of that state a mulatto was deprived of all his civil rights and liable to be tried in all cases without a jury. Eden *v.* Legare, 1 Bay (S. C.) 171; Wood *v.* King, 1 Nott & M. (S. C.) 184; Atkinson *v.* Hartley, 1 McCord (S. C.) 203.

23. Skinner *v.* White, 18 N. C. 471; Croskeys *v.* O'Driscoll, 1 Bay (S. C.) 481.

24. Davis *v.* Tacoma R., etc., Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802; Robertson *v.* Edelstein, 104 Wis. 440, 441, 80 N. W. 724, where it is said: "The law is well settled, and based on the experience and wisdom of centuries, that an action of slander ought not to be maintained for mere abuse and vilification, in the absence of actual special damage." See also Ritchie *v.* Stenius, 73 Mich. 563.

25. Davis *v.* Tacoma R., etc., Co., 35 Wash. 203, 77 Pac. 209, 66 L. R. A. 802.

Damages recoverable generally see *infra*, VIII, C

26. Maxwell *v.* Allison, 11 Serg. & R. (Pa.) 343; Hoar *v.* Ward, 47 Vt. 657.

27. See cases cited *infra*, notes 28–30.

28. McLean *v.* Warring, (Miss. 1893) 13 So. 236; Verner *v.* Verner, 64 Miss. 321, 1 So. 479; Lewis *v.* Black, 27 Miss. 425; Crawford *v.* Mellton, 12 Sm. & M. (Miss.) 328 (holding that the words, "C. swore a lie, and I can prove it," are actionable under statute); Scott *v.* Peebles, 2 Sm. & M. (Miss.) 546; Davis *v.* Farrington, Walk. (Miss.) 304;

written.[29] Other statutory provisions exist in some jurisdictions making specified oral charges actionable *per se*, although they do not impute a criminal offense.[30]

D. Imputation of Crime — 1. Libelous Imputations. Any written or printed statement which falsely and maliciously charges another with the commission of a crime is libelous *per se*.[31] Indeed to charge a person with that which, although

Payne *v.* Tancil, 98 Va. 262, 35 S. E. 725; Hogan *v.* Wilmoth, 16 Gratt. (Va.) 80; Moseley *v.* Moss, 6 Gratt. (Va.) 534; Brooks *v.* Calloway, 12 Leigh (Va.) 466.

29. Torrance *v.* Hurst, Walk. (Miss.) 403 (a publication charging a party with making under oath a false inventory of the estate of a deceased person); Rolland *v.* Batchelder, 84 Va. 664, 5 S. E. 695 (a letter written to a woman intimating falsely that she had invited the writer to meet her and proposing a private interview); Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803 (holding that a publication charging plaintiff with being a liar, with acts of misrepresentation, and that the writer could not recognize him as a gentleman is libelous *per se*).

30. See *supra*, III, A, 1.

31. *Alabama.*— Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531; Iron Age Pub. Co. *v.* Crudup, 85 Ala. 519, 5 So. 332.

California.— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Connecticut.— Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920; Hillhouse *v.* Dunning, 6 Conn. 391.

District of Columbia.— Viedt *v.* Evening Star Newspaper Co., 19 D. C. 534; Wills *v.* Jones, 13 App. Cas. 482; Washington Gas Light Co. *v.* Lansden, 9 App. Cas. 508.

Florida.—Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Georgia.— Tillman *v.* Willis, 61 Ga. 433, opinion by Bleckley, J.

Illinois.— Kenney *v.* Illinois State Journal Co., 64 Ill. App. 39.

Indiana.— Doan *v.* Kelley, 121 Ind. 413, 23 N. E. 266; Young *v.* Clegg, 93 Ind. 371; Bain *v.* Myrick, 88 Ind. 137; Heilman *v.* Shanklin, 60 Ind. 424; Tracy *v.* Hacket, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398.

Kentucky.— Lenrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292, 18 Ky. L. Rep. 551.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Worthington *v.* Houghton, 109 Mass. 481.

Michigan.— Boehmer *v.* Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Bacon *v.* Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324, 54 Am. St. Rep. 372.

Minnesota.— Davis *v.* Hamilton, 85 Minn. 209, 88 N. W. 744 (a publication charging plaintiff with having expended his means in defending himself from prosecutions brought for his open and persistent violation of the laws of the state); Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Simmons *v.* Holster, 13 Minn. 249.

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981; Boogher *v.* Knapp, 76 Mo. 457 [*affirming* 8 Mo. App. 591]; Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293 [*affirming* 2 Mo. App. 565]; Nelson *v.* Musgrave, 10 Mo. 648; Ferguson *v.* Evening Chronicle Pub. Co., 72 Mo. App. 462; Houston *v.* Woolley, 37 Mo. App. 15; State *v.* Kountz, 12 Mo. App. 511.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737; Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857.

New Hampshire.— Barnes *v.* Campbell, 59 N. H. 128, 47 Am. Rep. 183; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605.

New Jersey.— Hartkorn *v.* Paterson, etc., Gas, etc., Co., 67 N. J. L. 42, 50 Atl. 354.

New York.— Van Ingen *v.* Star Co., 157 N. Y. 695, 51 N. E. 1094 [*affirming* 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114]; Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Hartman *v.* Morning Journal Assoc., 138 N. Y. 638, 34 N. E. 512 [*affirming* 19 N. Y. Suppl. 398]; Bergmann *v.* Jones, 94 N. Y. 51; Brooks *v.* Harison, 91 N. Y. 83; Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. Y. Suppl. 263 (holding that it is libelous *per se* to call one a "Rogues' Gallery man"); Weston *v.* Weston, 83 N. Y. App. Div. 520, 82 N. Y. Suppl. 351; Crashley *v.* Press Pub. Co., 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711 (holding, however, that it is not libelous *per se*, as charging a crime, to publish of one that he had participated in a rebellion in Brazil); Westbrook *v.* New York Sun Assoc., 58 N. Y. App. Div. 562, 69 N. Y. Suppl. 266; Hatch *v.* Matthews, 83 Hun 349, 31 N. Y. Suppl. 926; Weber *v.* Butler, 81 Hun 244, 30 N. Y. Suppl. 713; Arrow Steamship Co. *v.* Bennett, 73 Hun 81, 25 N. Y. Suppl. 1029; Manner *v.* Simpson, 13 Daly 156; Dwyer *v.* Fireman's Journal Co., 11 Daly 248; Williams *v.* Godkin, 5 Daly 499; McClean *v.* New York Press Co., 19 N. Y. Suppl. 262; Witcher *v.* Jones, 17 N. Y. Suppl. 491; Hotchkiss *v.* Oliphant, 2 Hill 510; Nash *v.* Benedict, 25 Wend. 645; Stilwell *v.* Barter, 19 Wend. 487.

North Carolina.— Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768; Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania.— Davis *v.* Carey, 141 Pa. St. 314, 21 Atl. 633; Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep.

not criminal, yet degrades him in the eyes of the public or exposes him to contempt or ridicule is libelous *per se*.[32]

2. SLANDEROUS IMPUTATIONS — a. General Rule. The general rule in regard to oral words imputing the commission of a crime has been announced to be that "in case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable."[33] This rule has been adopted in substance at least in most of the jurisdictions in this country.[34] But the English rule has been broadly laid down to be that spoken words which impute that plain-

188, 11 L. R. A. 725; Godshalk *v.* Metzgar, (1889) 17 Atl. 215; Deford *v.* Miller, 3 Penr. & W. 103; Struthers *v.* Peacock, 11 Phila. 287.

Rhode Island.— Morrison-Jewell Filtration Co. *v.* Lingane, 19 R. I. 316, 33 Atl. 452; Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345; Perry *v.* Man, 1 R. I. 263.

Tennessee.— Haws *v.* Stanford, 4 Sneed 520.

Texas.— Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. Rep. 75; Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Boone *v.* Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313; Belo *v.* Smith, (Civ. App. 1897) 40 S. W. 856 [*affirmed* in 91 Tex. 221, 42 S. W. 850]; Young *v.* Sheppard, (Civ. App. 1897) 40 S. W. 62.

Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin.— Kraus *v.* Sentinel Co., 60 Wis. 425, 19 N. W. 384; Cochran *v.* Melendy, 59 Wis. 207, 18 N. W. 24; Bowe *v.* Rogers, 50 Wis. 598, 7 N. W. 547; Frank *v.* Dunning, 38 Wis. 270; Noonan *v.* Orton, 32 Wis. 106.

Wyoming.— *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53; Morgan *v.* Halberstadt, 60 Fed. 592, 9 C. C. A. 147; O'Shaughnessy *v.* New York Recorder Co., 58 Fed. 653; McDonald *v.* Press Pub. Co., 55 Fed. 264; Mallory *v.* Bennett, 15 Fed. 371.

Canada.— Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

See 32 Cent. Dig. tit. "Libel and Slander," § 17.

32. See *supra*, III, A, 1.

33. Brooker *v.* Coffin, 5 Johns. (N. Y.) 188, 191, 4 Am. Dec. 337.

34. *Alabama.*— Berdeaux *v.* Davis, 58 Ala. 611; Heath *v.* Devaughn, 37 Ala. 677; Hillhouse *v.* Peck, 2 Stew. & P. 395; Perdue *v.* Burnett, Minor 138; Coburn *v.* Harwood, Minor 93, 12 Am. Dec. 37.

Arkansas.— See Stallings *v.* Whittaker, 55 Ark. 494, 499, 18 S. W. 829, where it is said, "Words which charge the plaintiff with a felony are actionable *per se*."

Connecticut.— Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675; Hoag *v.* Hatch, 23 Conn. 585; Frisbie *v.* Fowler, 2 Conn. 707.

Delaware.— Kinney *v.* Hosea, 3 Harr. 77.

District of Columbia.— Pollard *v.* Lyon, 1 MacArthur 296 [*affirmed* in 91 U. S. 225, 23 L. ed. 308].

Georgia.— Giddens *v.* Mirk, 4 Ga. 364.

Indiana.— Seller *v.* Jenkins, 97 Ind. 430; Dukes *v.* Clark, 2 Blackf. 20.

Iowa.— Halley *v.* Gregg, 74 Iowa 563, 38 N. W. 416; Burton *v.* Burton, 3 Greene 316.

Kentucky.— Mudd *v.* Rogers, 102 Ky. 280, 43 S. W. 255, 19 Ky. L. Rep. 1329; Lemons *v.* Wells, 78 Ky. 117; McNamara *v.* Shannon, 8 Bush 557.

Maine.— Shepherd *v.* Piper, 98 Me. 384, 57 Atl. 84.

Massachusetts.— Miller *v.* Parish, 8 Pick. 384, 385 [*approved* in Brown *v.* Nickerson, 5 Gray 1], where it is said: "Whenever an offense is charged, which, if proved, may subject the party to a punishment, though not ignominious, but which brings disgrace upon the party falsely accused, such an accusation is actionable."

Michigan.— Taylor *v.* Kneeland, 1 Dougl. 67.

Nebraska.— Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448.

New Hampshire.— See Tenney *v.* Clement, 10 N. H. 52, 57, where it is said: "Words imputing to another a crime punishable by law, are of themselves actionable."

New Jersey.— Johnson *v.* Shields, 25 N. J. L. 116; Joralemon *v.* Pomeroy, 22 N. J. L. 271; Ludlum *v.* McCuen, 17 N. J. L. 12.

New York.— Wright *v.* Paige, 36 Barb. 438 [*affirmed* in 3 Keyes 581, 3 Transcr. App. 134]; Young *v.* Miller, 3 Hill 21; Bissell *v.* Cornell, 24 Wend. 354; Case *v.* Buckley, 15 Wend. 327; Martin *v.* Stillwell, 13 Johns. 275, 7 Am. Dec. 374; Widrig *v.* Oyer, 13 Johns. 124; Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337.

Ohio.— Hollingsworth *v.* Shaw, 19 Ohio St. 430, 2 Am. Rep. 411; Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Dial *v.* Holter, 6 Ohio St. 228; Landis *v.* Taylor, 7 Ohio S. & C. Pl. Dec. 280, 5 Ohio N. P. 216.

Oregon.— Shartle *v.* Hutchinson, 3 Oreg. 337.

Pennsylvania.— Davis *v.* Carey, 141 Pa. St. 314, 21 Atl. 633; Stitzell *v.* Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396; Gosling *v.* Morgan, 32 Pa. St. 273; Colbert *v.* Caldwell, 3 Grant 181; Andres *v.* Koppenheafer, 3 Serg. & R. 255, 8 Am. Dec. 647; Miles *v.* Oldfield, 4 Yeates 423, 2 Am. Dec. 412; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276, 18 Lanc. L. Rev. 217; Struthers *v.* Peacock, 11 Phila. 287.

tiff has been guilty of a crime punishable with imprisonment are actionable without proof of special damage.[35]

b. Crime Charged May Be a Felony or Misdemeanor. An oral charge of the commission of a felony is actionable *per se*.[36] So an oral charge of the commission of a misdemeanor may be slanderous *per se* as well as the charge of a felony.[37] A misdemeanor, however, is ordinarily not punishable by an infamous punishment; hence, in order that a charge of such offense may be actionable *per se*, it is necessary that it be indictable and involve moral turpitude.[38]

c. Crime Charged Must Be an Offense at Common Law or by Statute. As a

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995; Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

South Carolina.— Gage *v.* Shelton, 3 Rich. 242.

Tennessee.— Rodgers *v.* Rodgers, 11 Heisk. 757; Smith *v.* Smith, 2 Sneed 473.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458, 466, where it is said: "Any accusation is actionable whenever an offense is charged which, if proved, would subject the accused person to a punishment, though not such as is known in the books, technically, as an ignominious punishment, if the accusation be such as to bring disgrace on the person of whom the words are spoken."

Vermont.— Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162; Murray *v.* McAllister, 38 Vt. 167; Redway *v.* Gray, 31 Vt. 292 [*distinguishing* and *explaining* Billings *v.* Wing, 7 Vt. 439] (holding that the charge must not only impute an offense punishable corporally but must impute moral turpitude); Holton *v.* Muzzy, 30 Vt. 365.

Virginia.— Payne *v.* Tancil, 98 Va. 262, 35 S. E. 725.

Wisconsin.— Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398; Gibson *v.* Gibson, 43 Wis. 23, 28 Am. Rep. 527; Mayer *v.* Schleichter, 29 Wis. 646; Ranger *v.* Goodrich, 17 Wis. 78; Eaton *v.* White, 2 Pinn. 42.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308 [*affirming* 1 MacArthur (D. C.) 296].

See 32 Cent. Dig. tit. "Libel and Slander," §§ 17–19.

In Missouri the rule of the text has been criticized on the ground that it "lacks certainty; for the terms 'moral turpitude' and 'infamous' are of indefinite import, and men differ as to the quality of an act according to their own standard of morality;" and it has been said that the "rule that is safest and most certain in this application is, that words are in themselves actionable which impute an indictable offense for which corporal punishment may be inflicted as the immediate punishment, and not as the consequence of a failure to satisfy a pecuniary penalty." Birch *v.* Benton, 26 Mo. 153.

In North Carolina the charge must impute a crime to which is annexed an infamous punishment. Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386; McKee *v.* Wilson, 87 N. C. 300; Wilson *v.* Tatum, 53 N. C. 300; Wall *v.* Hoskins, 27 N. C. 177; Skinner *v.* White, 18 N. C. 471; Brady *v.* Wilson, 11 N. C. 93.

35. Odgers L. & Sl. 37. See also Webb *v.* Bevan, 11 Q. B. D. 609, 47 J. P. 488, 52 L. J. Q. B. 544, 49 L. T. Rep. N. S. 201; Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177 [*criticizing* Turner *v.* Ogden, 2 Salk. 696].

Rule in Canada see Routley *v.* Harris, 18 Ont. 405; Decow *v.* Tait, 25 U. C. Q. B. 188; Smith *v.* Collins, 3 U. C. Q. B. 1.

36. *Arkansas.*— Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

California.— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Kentucky.— Wiley *v.* Campbell, 5 T. B. Mon. 396.

Tennessee.— Smith *v.* Smith, 2 Sneed 473.

England.— Curtis *v.* Curtis, 10 Bing. 477, 25 E. C. L. 229, 3 L. J. C. P. 158, 4 Moore & S. 337 (holding that to say of one, "You have committed an act for which I can transport you," is actionable *per se*, as imputing an offense for which plaintiff is liable to be transported); Francis *v.* Roose, 1 H. & H. 36, 7 L. J. Exch. 66, 3 M. & W. 191 (holding that the words, "You have done things with the company for which you ought to be hanged, and I will have you hanged before the first of August," are actionable *per se* as imputing a felony).

37. *Delaware.*— Kinney *v.* Hosea, 3 Harr. 77.

Kentucky.— Lemons *v.* Wells, 78 Ky. 117; McNamara *v.* Shannon, 8 Bush 557; Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122.

Minnesota.— Earle *v.* Johnson, 81 Minn. 472, 84 N. W. 332.

New York.— Crawford *v.* Wilson, 4 Barb. 504; Alexander *v.* Alexander, 9 Wend. 141; Damarest *v.* Haring, 6 Cow. 76.

Tennessee.— Smith *v.* Smith, 2 Sneed 473.

England.— Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 18, 19.

Compare McKee *v.* Wilson, 87 N. C. 300.

38. Crawford *v.* Wilson, 4 Barb. (N. Y.) 504; Baxter *v.* Mohr, 37 Misc. (N. Y.) 833, 76 N. Y. Suppl. 982; Young *v.* Miller, 3 Hill (N. Y.) 21; Stitzell *v.* Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276, 18 Lanc. L. Rev. 217; Smith *v.* Smith, 2 Sneed (Tenn.) 473; Redway *v.* Gray, 31 Vt. 292.

general rule the offense charged must be one which is indictable and punishable either at common law or under statute.[39] Hence it is not actionable *per se* to charge "desertion," since such offense is of a purely military character,[40] or to charge the commission of a crime punishable by a town ordinance only.[41] It has been held, however, that the form of criminal procedure under which the offense is punished is immaterial and that it is not essential that the offense be indictable, it being sufficient that it is punishable summarily, as upon complaint and warrant.[42]

d. What Constitutes Moral Turpitude. Moral turpitude in this connection has been defined to be an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[43]

39. *Alabama.*—Johnston *v.* Morrow, 9 Port. 525.

Delaware.— Kinney *v.* Hosea, 3 Harr. 77.

Indiana.— Dukes *v.* Clark, 2 Blackf. 20.

Iowa.— Burton *v.* Burton, 3 Greene 316.

Kentucky.— Mudd *v.* Rogers, 102 Ky. 280, 43 S. W. 255, 19 Ky. L. Rep. 1329; Lemons *v.* Wells, 78 Ky. 117; Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122; Mills *v.* Taylor, 3 Bibb 469.

Maine.— Shepherd *v.* Piper, 98 Me. 384, 57 Atl. 84.

Maryland.— Griffin *v.* Moore, 43 Md. 246; Dorsey *v.* Whipps, 8 Gill 457.

Missouri.— Rammell *v.* Otis, 60 Mo. 365; Birch *v.* Benton, 26 Mo. 153; Houston *v.* Woolley, 37 Mo. App. 15.

Nebraska.— Herzog *v.* Campbell, 47 Nebr. 370, 66 N. W. 424; Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448.

New Jersey.— Johnson *v.* Shields, 25 N. J. L. 116.

New York.— Wright *v.* Paige, 36 Barb. 438 [*affirmed* in 3 Keyes 581, 3 Transcr. App. 134]; Quinn *v.* O'Gara, 2 E. D. Smith 388; Young *v.* Miller, 3 Hill 21; Damarest *v.* Haring, 6 Cow. 76.

North Carolina.— Eure *v.* Odom, 9 N. C. 52, 53, where it is said: "The crime charged, too, must be such as is punishable by the common or statute law; for, if it be only a matter of spiritual cognizance, it is not, according to the authorities, actionable to charge it."

Oregon.— Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

Pennsylvania.— Davis *v.* Carey, 141 Pa. St. 314, 21 Atl. 633; Lukehart *v.* Byerly, 53 Pa. St. 418; Deford *v.* Miller, 3 Penr. & W. 103; McClurg *v.* Ross, 5 Binn. 218.

Tennessee.—Williams *v.* Karnes, 4 Humphr. 9.

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

Canada.— Palmer *v.* Solmes, 30 U. C. C. P. 481.

See 32 Cent. Dig. tit. "Libel and Slander," § 18.

40. Hollingsworth *v.* Shaw, 19 Ohio St. 430, 2 Am. Rep. 411.

41. Seery *v.* Viall, 16 R. I. 517, 17 Atl. 552.

42. Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739; Webb *v.* Beavan, 11 Q. B. D. 609, 47 J. P. 488, 52 L. J. Q. B. 544, 49 L. T. Rep. N. S. 201.

43. Newell Defam. (2d ed.) § 12 [*quoted* in Baxter *v.* Mohr, 37 Misc. (N. Y.) 833, 76 N. Y. Suppl. 982]. See also Smith *v.* Smith, 2 Sneed (Tenn.) 473, 479 [*quoting* Webster Dict.], where it is said: "Moral turpitude is said to imply 'inherent baseness or vileness of principles in the human heart; extreme depravity.'"

Offenses involving moral turpitude.— The following are examples of offenses held to involve moral turpitude: Poisoning a neighbor's cow (Burton *v.* Burton, 3 Greene (Iowa) 316), altering the ear-marks of another's hogs (Perdue *v.* Burnett, Minor (Ala.) 138), making a false declaration of a right to vote (Crawford *v.* Wilson, 4 Barb. (N. Y.) 504), destroying fruit trees of another (Murray *v.* McAllister, 38 Vt. 167), furnishing watered milk to a creamery (Geary *v.* Bennett, 53 Wis. 444, 10 N. W. 602), having knowledge of a murder and concealing the fact until forced to confess (Gallagher *v.* Bryant, 162 N. Y. 662, 57 N. E. 1110 [*affirming* 44 N. Y. App. Div. 527, 60 N. Y. Suppl. 844]), removing landmarks (Young *v.* Miller, 3 Hill (N. Y.) 21); Dial *v.* Holter, 6 Ohio St. 228; Todd *v.* Rough, 10 Serg. & R. (Pa.) 18), fornication (Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675), attempting to corrupt a jury (Gibbs *v.* Dewey, (5 Cow. (N. Y.) 503), attempting to commit larceny (Berdeaux *v.* Davis, 58 Ala. 611), giving medicine to produce an abortion (Filber *v.* Dautermann, 26 Wis. 518), keeping a bawdy-house (Lipprant *v.* Lipprant, 52 Ind. 273; Wright *v.* Paige, 36 Barb. (N. Y.) 438; Martin *v.* Stillwell, 13 Johns. (N. Y.) 275, 7 Am. Dec. 374), selling liquor to slaves (Smith *v.* Smith, 2 Sneed (Tenn.) 473), publishing an obscene paper (Viele *v.* Gray, 10 Abb. Pr. (N. Y.) 1), forging a petition to the legislature (Alexander *v.* Alexander, 9 Wend. (N. Y.) 141), selling diseased meat (Lietz *v.* Hohman, 16 Pa. Super. Ct. 276), drunkenness (Morgan *v.* Kennedy, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521. *Compare* Baxter *v.* Mohr, 37 Misc. (N. Y.) 833, 76 N. Y. Suppl. 982), drunkenness on part of woman (Brown *v.* Nickerson, 5 Gray (Mass.) 1).

e. Character of Punishment — (I) *What Constitutes an Infamous Punishment.* "Infamous punishment" is generally used as synonymous with "corporal punishment."[44] In some jurisdictions moreover imprisonment in the penitentiary as opposed to a common jail is essential.[45]

(II) *Punishment by Fine.* There is a divergence of authority as to the character of punishment necessary to render actionable an imputation of an offense involving moral turpitude but not subjecting to infamous punishment. In some states corporal punishment is essential,[46] and that as the immediate punishment and not merely as a consequence of failure to pay fine.[47] In other states punishment by pecuniary fine alone may be sufficient.[48] An oral charge of an offense

Offenses not involving moral turpitude.— The following are examples of offenses held not to involve moral turpitude: Breaking open and reading a letter sent by mail (Hillhouse *v.* Peck, 2 Stew. & P. (Ala.) 395; Ludlum *v.* McCuen, 17 N. J. L. 12), trading with negroes (Heath *v.* Devaughn, 37 Ala. 677), assault and battery (Dudley *v.* Horn, 21 Ala. 379), taking away standing corn (Stitzell *v.* Reynolds, 59 Pa. St. 488), or selling personal property by wife of joint owner (Rodgers *v.* Rodgers, 11 Heisk. (Tenn. 757).

44. *Alabama.*— Perdue *v.* Burnett, Minor 138.

Indiana.— Wilcox *v.* Edwards, 5 Blackf. 183.

Kentucky.— Elliott *v.* Ailsberry, 2 Bibb 473, 5 Am. Dec. 631.

Maine.— Buck *v.* Hersey, 31 Me. 558, holding that punishment by fine only is not infamous.

New Jersey.— Ludlum *v.* McCuen, 17 N. J. L. 12, holding that mutilation, whipping, branding, pillory, and hard labor in the house of correction and the stocks are infamous punishments.

North Carolina.— Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73, holding that imprisonment in the state prison is infamous punishment.

Pennsylvania.— Miles *v.* Oldfield, 4 Yeates 423, 2 Am. Dec. 412.

England.— Curtis *v.* Curtis, 10 Bing. 477, 3 L. J. C. P. 158, 4 Moore & S. 337, 25 E. C. L. 229.

See 32 Cent. Dig. tit. "Libel and Slander," §19.

An infamous offense is an offense the conviction and punishment whereof involves moral turpitude and social degradation. McKee *v.* Wilson, 87 N. C. 300. "Capital offences of all grades are infamous, by reason of their atrocity. So are all grades of the *crimen falsi*; because fraud is an essential ingredient. For the same reason, larceny is infamous, independent of its punishment." Perdue *v.* Burnett, Minor (Ala.) 138, 140.

45. *Alabama.*—Heath *v.* Devaughn, 37 Ala. 677.

New Jersey.— Ludlum *v.* McCuen, 17 N. J. L. 12.

New York.— Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337.

North Carolina.— McKee *v.* Wilson, 87 N. C. 300; Skinner *v.* White, 18 N. C. 471.

Pennsylvania.— Stitzell *v.* Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396.

See 32 Cent. Dig. tit. "Libel and Slander," § 19.

46. *Kentucky.*— Elliott *v.* Ailsberry, 2 Bibb 473, 5 Am. Dec. 631. See also Lemons *v.* Wells, 78 Ky. 117.

Maine.— Buck *v.* Hersey, 31 Me. 558.

Maryland.— Shafer *v.* Ahalt, 48 Md. 171, 30 Am. Rep. 456; Griffin *v.* Moore, 43 Md. 246; Wagaman *v.* Byers, 17 Md. 183.

Missouri.— Rammell *v.* Otis, 60 Mo. 365; Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525; Curry *v.* Collins, 37 Mo. 324; Birch *v.* Benton, 26 Mo. 153; Houston *v.* Woolley, 37 Mo. App. 15.

New York.— Damarest *v.* Haring, 6 Cow. 76; Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337, holding it not to be sufficient that the offense is punishable by commitment to the house of correction.

North Carolina.— McKee *v.* Wilson, 87 N. C. 300; Wall *v.* Hoskins, 27 N. C. 177; Skinner *v.* White, 18 N. C. 471.

Tennessee.—Williams *v.* Karnes, 4 Humphr. 9.

Vermont.— Billings *v.* Wing, 7 Vt. 439 [*distinguished* in Redway *v.* Gray, 31 Vt. 292].

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495.

England.— Webb *v.* Beavan, 11 Q. B. D. 609, 610, 47 J. P. 488, 52 L. J. Q. B. 544, 49 L. T. Rep. N. S. 201, where it is said: "The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally."

Canada.— Routley *v.* Harris, 18 Ont. 405. See also Smith *v.* Collins, 3 U. C. Q. B. 1.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 18, 19.

47. Griffin *v.* Moore, 43 Md. 246; Wagaman *v.* Byers, 17 Md. 183; Rammell *v.* Otis, 60 Mo. 365; Birch *v.* Benton, 26 Mo. 153; Billings *v.* Wing, 7 Vt. 439 [*distinguished* in Redway *v.* Gray, 31 Vt. 292].

48. *Alabama.*— Perdue *v.* Burnett, Minor 138.

Connecticut.— See Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675.

Massachusetts.— Brown *v.* Nickerson, 5 Gray 1; Miller *v.* Parish, 8 Pick. 384.

involving moral turpitude, but punishable by corporal punishment, is slanderous *per se*, although the offense is also subject to alternative punishment by fine.[49]

3. Crime For Which Party Is Not Liable to Punishment — a. In General. It is not necessary that the language used, in order to be slanderous, should be so spoken as if true to expose the person concerning whom it is uttered to a criminal prosecution.[50] That is one of the tests by which to determine whether it constitutes a good cause of action, but it is not the only one. The other is that it imputes to a person a species of misconduct to which the law attaches a criminal punishment, and that thereby he is subjected to obloquy, social degradation and disrepute.[51] The imputation of crime is essential as a test whether the words used do amount to legal slander,[52] but it does not take away their actionable qualities that they are so spoken as to indicate that the party has suffered the penalty of the law or is no longer exposed to danger of punishment.[53]

b. Offense Barred by Statute of Limitations. The fact that prosecution for the crime charged is barred by the statute of limitations is no defense.[54]

c. Repeal of Statute Creating Offense. Words published since the repeal of a criminal statute, charging a violation thereof prior to the repeal are actionable, although no criminal prosecution would now lie.[55]

d. Effect of Pardon. So the fact that the liability to punishment is discharged by a pardon prior to the publication of the words imputing a crime will not deprive plaintiff of his right of action.[56]

e. Sentence Already Served. Words charging the commission of a criminal offense may be actionable, although they are so spoken as to indicate that the party has suffered the penalty of the law.[57]

Pennsylvania.— Todd *v.* Rough, 10 Serg. & R. 18.

Rhode Island.— Seery *v.* Viall, 16 R. I. 517, 17 Atl. 552; Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

See 32 Cent. Dig. tit. "Libel and Slander," § 18.

49. Lemons *v.* Wells, 78 Ky. 117; Redway *v.* Gray, 31 Vt. 292; Geary *v.* Bennett, 53 Wis. 444, 10 N. W. 602. *Compare* McKee *v.* Wilson, 87 N. C. 300.

50. *Connecticut.*— Webb *v.* Fitch, 1 Root 544.

Massachusetts.— Krebs *v.* Oliver, 12 Gray 239.

New York.— Van Ankin *v.* Westfall, 14 Johns. 233.

Pennsylvania.— Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355; Smith *v.* Stewart, 5 Pa. St. 372.

Tennessee.— Poe *v.* Grever, 3 Sneed 664.

Canada.— Smith *v.* Collins, 3 U. C. Q. B. 1.

See 32 Cent. Dig. tit. "Libel and Slander," § 20.

51. Krebs *v.* Oliver, 12 Gray (Mass.) 239; Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233, 234 (where the court said: "The right of the plaintiff to sustain the action does not obtain upon the question, whether he was liable to be prosecuted and punished for the crime charged against him"); Shipp *v.* McCraw, 7 N. C. 463, 9 Am. Dec. 611 (where it is said: "The *gravamen* in an action of slander, is social degradation"); Poe *v.* Grever, 3 Sneed (Tenn.) 664, 667 (where it is said: "It is the imputation of the commission of a crime, falsely and maliciously, that works the injury, and forms the true ground of redress in law").

52. Abrams *v.* Smith, 8 Blackf. (Ind.) 95 (holding that it is not actionable to charge that one had committed a penitentiary offense but that he was insane when he committed it); Krebs *v.* Oliver, 12 Gray (Mass.) 239; Bash *v.* Sommer, 20 Pa. St. 159 (holding that to say, "and his wife stole a thousand dollars in gold," will not support an action in favor of the wife as the words import a charge of stealing in the presence of the husband).

53. Krebs *v.* Oliver, 12 Gray (Mass.) 239.

54. Webb *v.* Fitch, 1 Root (Conn.) 544; Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233.

55. French *v.* Creath, 1 Ill. 31. *Compare* Pegram *v.* Stoltz, 76 N. C. 349.

56. Shipp *v.* McCraw, 7 N. C. 463, 9 Am. Dec. 611; Boston *v.* Tatam, Cro. Jac. 623; Cuddington *v.* Wilkins, Hob. 92.

57. *California.*— Burke *v.* Mascarich, 81 Cal. 302, 22 Pac. 673, where the words were, "He is a state's prison convict."

Illinois.— Herhold *v.* White, 114 Ill. App. 186.

Massachusetts.— Krebs *v.* Oliver, 12 Gray 239, words charging that the plaintiff "was imprisoned many years in a penitentiary in Germany for larceny."

Missouri.— Michael *v.* Matheis, 77 Mo. App. 556, where the words were: "She . . . has been in the penitentiary here."

Pennsylvania.— Smith *v.* Stewart, 5 Pa. St. 372, words charging one with having been a convict in a sister state.

England.— Gainford *v.* Tuke, Cro. Jac. 536;

4. Imputation of Crime Never Actually Perpetrated. To charge a person with the commission of a crime, the *corpus* of which never existed, is notwithstanding actionable,[58] unless by reason of qualifying or explanatory statements at the time or otherwise the fact that no crime had in fact been committed was known or ought to have been known to the person addressed.[59]

5. Crime Incapable of Commission by Party Defamed. It is actionable *per se* to charge one with the commission of a crime impossible of commission by the person defamed because of physical incapacity, minority, or other reason,[60] unless such impossibility was known or communicated to the hearers.[61]

6. Imputation of Arrest, Incarceration, Indictment, or Conviction of Crime. Similarly and upon a parity of reasoning, it is well established that an imputation of arrest,[62]

Fowler *v.* Dowdney, 2 M. & Rob. 119 (where the words were, "He is a returned convict"); Beaver *v.* Hides, 2 Wils. C. P. 300.

58. *Connecticut.*— Williams *v.* Miner, 18 Conn. 464.

Indiana.— Durrah *v.* Stillwell, 59 Ind. 139, holding that it is actionable to charge one with stealing a watch, although the watch had never been stolen.

Massachusetts.— Stone *v.* Clark, 21 Pick. 51.

Minnesota.— West *v.* Hanrahan, 28 Minn. 385, 10 N. W. 415.

New York.— Harmon *v.* Carrington, 8 Wend. 488.

Pennsylvania.— Colbert *v.* Caldwell, 3 Grant 181; Eckart *v.* Wilson, 10 Serg. & R. 44.

Vermont.— Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561, holding that words imputing a possible crime are actionable *per se*, although the charge could not be true.

See 32 Cent. Dig. tit. "Libel and Slander," § 21.

Compare Snag *v.* Gee, 4 Coke 16.

59. Williams *v.* Miner, 18 Conn. 464; Colbert *v.* Caldwell, 3 Grant (Pa.) 181; Rea *v.* Harrington, 58 Vt. 181, 187, 2 Atl. 475, 56 Am. Rep. 561, where it was said: "If they [the hearers] had no right to believe or understand there was an imputation of crime, either by reason of the expressions in the same connection, as, he is a murderer, he killed my dog, or by reason of facts supposed to be in the minds of the hearers which would render the imputation of crime impossible, as a charge of stealing timber, the speaker having reference to growing timber which is not the subject of theft, and supposing the hearers understood to what he referred, in either case the charge is not actionable *per se*."

60. *Connecticut.*— Williams *v.* Miner, 18 Conn. 464, holding that it is actionable to charge a joint tenant with theft of joint property.

Illinois.— Stewart *v.* Howe, 17 Ill. 71, holding that slander will lie for charging an infant under ten with theft, although he is conclusively presumed incapable of commission of the crime.

Massachusetts.— Stone *v.* Clark, 21 Pick. 51 (holding that on a charge of perjury defendant cannot show that the false swearing was on an immaterial issue); Carter *v.* Andrews, 16 Pick. 1 (holding that it is actionable to charge a tenant in common with stealing joint property).

North Carolina.— Chambers *v.* White, 47 N. C. 383, holding that it is actionable to charge a boy under fourteen with bestiality.

Vermont.— Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

See 32 Cent. Dig. tit. "Libel and Slander," § 21.

Compare Adams *v.* Hannon, 3 Mo. 222, holding that it is not actionable *per se* to charge an unmarried woman with adultery, as she is incapable of committing the offense.

61. Becket *v.* Sterrett, 4 Blackf. (Ind.) 499 (holding that it is not actionable for one partner to charge another with stealing out of the store when the hearers understand the charge to refer to partnership property); Kennedy *v.* Gifford, 19 Wend. (N. Y.) 296; Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615.

62. *California.*— Gilman *v.* McClatchy, 111 Cal. 606, 44 Pac. 241.

Kansas.— Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

Kentucky.— Wiley *v.* Campbell, 5 T. B. Mon. 396, where the words were: "You have been croped for felony."

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Davis *v.* Marxhausen, 86 Mich. 281, 49 N. W. 50; Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768.

Pennsylvania.— Godshalk *v.* Metzgar, (1889) 17 Atl. 215; Collins *v.* Morning News Co., 41 Wkly. Notes Cas. 425.

Texas.— Belo *v.* Smith, 91 Tex. 221, 42 S. W. 850 [*affirming* (Civ. App. 1897) 40 S. W. 856]; Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Butler *v.* Carter, etc., Pub. Co., 135 Fed. 69, 67 C. C. A. 543; Butler *v.* Evening Leader Co., 134 Fed. 994; Butler *v.* Barret, 130 Fed. 944.

England.— See Beaver *v.* Hides, 2 Wils. C. P. 300.

See 32 Cent. Dig. tit. "Libel and Slander," § 22.

indictment,[63] conviction,[64] or imprisonment[65] for crime is equivalent to an imputation of the commission of such crime and is actionable.

7. Crime Committed in Another State or Jurisdiction. It is not essential that the offense charged should be cognizable and punishable within the jurisdiction where the slander was published and to whose tribunals resort is had for redress.[66] But an action will not lie for words spoken in another state imputing the commission of a crime in that state when the offense charged is not indictable in that state, although it may be indictable in the state where redress is sought.[67] Whether words are slanderous *per se* as charging the commission of a criminal offense where they were spoken in a state other than that in which the alleged crime was committed has been held not to depend upon the laws of the state where they were spoken but upon the laws of the state in which the act is charged to have taken place.[68] Accordingly it is held that where the offense is charged to have been committed in another jurisdiction it must be alleged and shown to be an infamous offense or one involving moral turpitude in the jurisdiction in which the act is alleged to have been committed.[69] Where, however, the act charged as

Compare Stacy *v.* Portland Pub. Co., 68 Me. 279.

63. *Florida.*— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Dec. 676.

Michigan.— Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Brace *v.* Brink, 33 Mich. 91.

New York.— Pelton *v.* Ward, 3 Cai. 73, 2 Am. Dec. 251.

North Carolina.— Chandler *v.* Robison, 29 N. C. 480.

Texas.— Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

See 32 Cent. Dig. tit. "Libel and Slander," § 22.

Accusation of crime.— To publish of one that he had been accused of stealing a horse and that he sued his accusers, and the jury found for defendants, imputes the crime of grand larceny and is actionable. Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293.

64. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Boogher *v.* Knapp, 76 Mo. 457 [*affirming* 8 Mo. App. 591]; Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247; Leyman *v.* Latimer, 3 Ex. D. 352, 14 Cox C. C. 51, 47 L. J. Exch. 470, 37 L. T. Rep. N. S. 819, 26 Wkly. Rep. 305. See also Perry *v.* Man, 1 R. I. 263.

65. *Illinois.*— Herhold *v.* White, 114 Ill. App. 186, holding that the words, "He (meaning the plaintiff) is and has been behind bars," are slanderous and actionable of themselves without any innuendo.

Massachusetts.— Krebs *v.* Oliver, 12 Gray 239.

Missouri.— Michael *v.* Matheis, 77 Mo. App. 556.

New York.— Wuest *v.* Brooklyn Citizen, 102 N. Y. App. Div. 480, 92 N. Y. Suppl. 852 [*reversing* 38 Misc. 1, 76 N. Y. Suppl. 706] (holding that where an alleged libel, published of and concerning plaintiff, recited: "She went to a prison for an operation. She sank so low. She said it cost $5, and that her screams were heard all over the block," the word "prison" being substituted by mistake for "person," the obvious meaning of the charge was that plaintiff had submitted to a criminal operation, on account of which she had been sent to prison, and was libelous *per se*); Smith *v.* Ottendorfer, 3 N. Y. St. 187 (a charge that plaintiff had made acquaintance with the criminal courts and penitentiaries in a number of states).

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921.

Pennsylvania.— Smith *v.* Stewart, 5 Pa. St. 372.

Rhode Island.— Morrissey *v.* Providence Tel. Pub. Co., 19 R. I. 124, 32 Atl. 19, where plaintiff was charged with being an "ex-convict."

England.— Fowler *v.* Dowdney, 2 M. & Rob. 119 (where the words were "A returned convict"); Beaver *v.* Hides, 2 Wils. C. P. 300.

See 32 Cent. Dig. tit. "Libel and Slander," § 22.

66. Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233; Shipp *v.* McCraw, 7 N. C. 463, 9 Am. Dec. 611; Poe *v.* Grever, 3 Sneed (Tenn.) 664. See also Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386; Brewer *v.* Weakley, 2 Overt. (Tenn.) 99, 5 Am. Dec. 656.

Charge of confinement in penitentiary of another state or country.— Krebs *v.* Oliver, 12 Gray (Mass.) 239; Smith *v.* Stewart, 5 Pa. St. 372.

67. Barclay *v.* Thompson, 2 Penr. & W. (Pa.) 148. See also Stout *v.* Wood, 1 Blackf. (Ind.) 71.

Law governing actionable quality of words generally see *infra*, VIII, B.

68. Dufresne *v.* Weise, 46 Wis. 290, 1 N. W. 59. But see Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355.

69. Kinney *v.* Hosea, 3 Harr. (Del.) 77; Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525; Sparrow *v.* Maynard, 53 N. C. 195, 196 (where it was said, however, "We do not wish to be understood as saying, that the inference of social loss will be drawn in this State from every charge of an offense committed in another State, which, by the laws of that State, is punished infamously. That

having been committed in another state is according to common law[70] and the municipal law of every civilized country[71] an offense of the character required, to render the charge actionable *per se*, it will not be necessary to allege and prove affirmatively the law of the state in which the alleged offense was committed. So words charging an offense committed in a foreign jurisdiction other than a sister state are actionable *per se* if the act charged is of such a nature that the court can presume it is a crime in such jurisdiction.[72] The state courts take judicial notice of the criminal laws of the United States and the imputation of an act which is in violation of such laws may sustain an action for slander in the state courts without averment and affirmative proof of the criminality of the act in question under the federal laws.[73]

8. Charging Intention or Disposition to Commit Crime. Spoken words charging merely an intention or disposition to commit crime in the future are not actionable, since such intent constitutes no crime.[74] But where an intent to commit a crime is coupled with an overt act so as to constitute a distinct offense in itself, words charging such offense may be actionable *per se*.[75] Written words imputing a criminal disposition to another are libelous *per se*.[76]

9. Imputations of Attempts to Commit Crime. A charge of an attempt to commit a crime is, when such attempt constitutes a criminal offense, actionable *per se* in the same way and under the same conditions as charges of other crimes.[77]

will depend upon the light in which it is regarded here"); Wall *v.* Hoskins, 27 N. C. 177. *Compare* Shipp *v.* McCraw, 7 N. C. 463, 9 Am. Dec. 611, where the question of pleadings was not noticed in the opinion of the majority.

70. *Illinois.*— Upham *v.* Dickinson, 50 Ill. 97, imputation of larceny.

Indiana.— Linville *v.* Earlywine, 4 Blackf. 469 (imputation of larceny); Offutt *v.* Earlywine, 4 Blackf. 460, 32 Am. Dec. 40 (imputation of larceny); Cefret *v.* Burch, 1 Blackf. 400 (imputation of larceny).

Iowa.— Hicks *v.* Walker, 2 Greene 440, imputation of larceny.

Maryland.— Haines *v.* Campbell, 74 Md. 158, 21 Atl. 702, 28 Am. St. Rep. 240.

Missouri.— Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525; Johnson *v.* Dicken, 25 Mo. 580, imputation of larceny.

Pennsylvania.— Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116; Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355; Smith *v.* Stewart, 5 Pa. St. 372.

Tennessee.— Poe *v.* Grever, 3 Sneed 664; Howell *v.* Cheatham, Cooke 247.

See 32 Cent. Dig. tit. "Libel and Slander," § 23.

Libelous imputation of crime committed in another state.— Cameron *v.* Tribune Assoc., 3 Silv. Sup. (N. Y.) 575, 7 N. Y. Suppl. 739, holding that to publish of one that he swindled in another state by procuring payment of fraudulent bills is libelous *per se*.

71. Poe *v.* Grever, 3 Sneed (Tenn.) 664.

72. Lister *v.* Wright, 2 Hill (N. Y. 320; Smith *v.* Collins, 3 U. C. Q. B. 1. See also Cook *v.* Tardos, 6 La. Ann. 779; Langdon *v.* Young, 33 Vt. 136, holding, however, that in the absence of all proof, words alleged in the declaration to have been spoken by defendant in a foreign country, charging plaintiff with having there given poison with the intent to injure the person to whom it was administered, are not actionable as charging an offense indictable in such foreign country.

Libelous imputations of crime committed in foreign country.— Smith *v.* Ottendorfer, 3 N. Y. St. 187, holding that it is libelous *per se* to charge one with having suffered punishment for a crime in a prison in Prussia.

73. Harris *v.* Terry, 98 N. C. 131, 3 S. E. 745.

74. *Illinois.*— McKee *v.* Ingalls, 5 Ill. 30.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

New York.— Weed *v.* Bibbins, 32 Barb. 315.

Ohio.— Seaton *v.* Cordray, Wright 101.

Pennsylvania.— Stees *v.* Kemble, 27 Pa. St. 112, where the words were, "A man that would do that would steal."

Rhode Island.— Fanning *v.* Chace, 17 R. I. 388, 22 Atl. 275, 33 Am. St. Rep. 878, 13 L. R. A. 134, a charge that plaintiff "is going to start a house of ill fame."

Vermont.— Dickey *v.* Andros, 32 Vt. 55, holding that it is not actionable to express a belief that one went to a place for the purpose of persuading another to commit a crime.

United States.—Mitchell *v.* Sharon, 51 Fed. 424, 59 Fed. 980, 8 C. C. A. 429.

England.—See Harrison *v.* Stratton, 4 Esp. 218. *Compare* Prinn *v.* Howe, 1 Bro. P. C. 64, 1 Eng. Reprint 419.

See 32 Cent. Dig. tit. "Libel and Slander," § 24.

75. Burton *v.* Beasley, 88 Ind. 401, holding that it is slanderous *per se* to charge one with administering poison with intent to murder.

76. Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

77. Berdeaux *v.* Davis, 58 Ala. 611. See also Fanning *v.* Chace, 17 R. I. 388, 22 Atl.

But an oral charge of an attempt to commit a crime will not be actionable *per se* where such attempt does not of itself constitute a distinct substantive offense.[78] So all the elements necessary to constitute a criminal attempt must be contained in the charge.[79]

10. Imputations Charging Solicitations to Commit Crime. Under the general rule making imputations of the commission of crimes of a specified character actionable *per se*, a charge of solicitation to commit crime may be actionable *per se*.[80]

11. Particular Crimes — a. Imputations in Libelous Form — (i) *Arson and Burning Buildings.* It is libelous *per se* to charge one with having committed the crime of arson.[81] So it is libelous *per se* to charge a person with having burned his own property for the purpose of defrauding an insurance company, and this whether a burning of this character is a statutory offense[82] or not.[83]

(ii) *Assault and Battery.* Written words charging assault and battery are actionable *per se*.[84]

(iii) *Bigamy and Polygamy.* It is libelous *per se* to charge one with having been guilty of the crime of bigamy[85] or polygamy.[86]

(iv) *Blackmailing or Extortion.* It is libelous *per se* to charge one with

275, 33 Am. St. Rep. 878, 13 L. R. A. 134. *Compare* Wilson *v.* Tatum, 53 N. C. 300, holding that words charging an attempt to commit a felony were not actionable *per se* as they charged a misdemeanor, the punishment of which was not deemed infamous.

This rule has been applied to an attempt to commit murder (Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345; Cristman *v.* Cristman, 36 Ill. App. 567; Mills *v.* Wimp, 10 B. Mon. (Ky.) 417; Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456), or larceny (Berdeaux *v.* Davis, 58 Ala. 611), to procure an abortion (Filber *v.* Dautermann, 26 Wis. 518), or to bribe (Heilman *v.* Shanklin, 60 Ind. 424; Bidwell *v.* Rademacher, 11 Ind. App. 218, 38 N. E. 879; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8).

78. Hotchkiss *v.* Olmstead, 37 Ind. 74, attempt to procure money under false pretenses.

79. Rock *v.* McClarnon, 95 Ind. 415 (holding that it is not actionable to charge one while drunk with attempting to get his wife to take powders containing arsenic, as there is no charge of "administering the poison" which is necessary to the offense); Russell *v.* Wilson, 7 B. Mon. (Ky.) 261 (holding that it is not actionable *per se* to charge one with having attempted to commit a robbery unless it is charged to have been by assault with an offensive weapon or by a demand accompanied with threats and menaces).

80. Damarest *v.* Haring, 6 Cow. (N. Y.) 76; Womack *v.* Circle, 29 Gratt. (Va.) 192. See also Mills *v.* Wimp, 10 B. Mon. (Ky.) 417, where it is said: "Charging another with solicitation to commit a felony is actionable as imputing a misdemeanor."

81. Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; Forshee *v.* Abrams, 2 Iowa 571; Malloy *v.* Bennett, 15 Fed. 371.

Words held too indefinite to charge arson.— In Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637, it was held that the words, "Every fire in this building has started on the upper floor and twice in Reid's printing establishment," were not definite enough to charge arson.

82. Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691; World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737; Frank *v.* Dunning, 38 Wis. 270. *Compare* Reader *v.* Platt, 4 Ohio Dec. (Reprint) 540, 2 Clev. L. Rep. 338.

83. Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211. See also Huhhard *v.* Rutledge, 57 Miss. 7, where, however, the charge was held privileged.

84. *Colorado.*—Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

Kansas.—Hanson *v.* Krehbiel, 68 Kan. 670, 75 Pac. 1041, 104 Am. St. Rep. 422, 64 L. R. A. 790.

Michigan.—Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397 (holding that a charge that one has been arrested for assault and battery is libelous); McGuire *v.* Vaughan, 106 Mich. 280, 64 N. W. 44; Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624.

Nebraska.— See World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737 [*overruling* Geistler *v.* Brown, 6 Nebr. 254].

Pennsylvania.— Urben *v.* Pittsburgh Times, 1 Mona. 135.

Wisconsin.— Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000.

See 32 Cent. Dig. tit. "Libel and Slander," § 31.

85. Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556 (holding that to publish of a married man that "he has a wife living in the west" is libelous *per se*); Weber *v.* Butler, 81 Hun (N. Y.) 244, 30 N. Y. Suppl. 713; Parker *v.* Meader, 32 Vt. 300.

86. See Witcher *v.* Jones, 17 N. Y. Suppl. 491 [*affirmed* in 137 N. Y. 599, 33 N. E. 743], where the charge was, "He went to Utah, where he joined the Mormons, and at

extortion [87] or with blackmailing, and this, although the charge of blackmailing may not impute a crime.[88]

(v) *Bribery and Corruption.* A written or printed publication charging that one is guilty of the crime of bribery is libelous *per se* whether the words so written or printed charge the giving of a bribe [89] or the receiving [90] of a bribe. So words charging gross corruption for the purpose of influencing voters,[91] or charging gross fraud in the conduct of a public official,[92] are actionable *per se*, and

one time had a great deal of influence in church matters at Salt Lake."

87. Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041 (a criminal libel); Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41. See also Stanley *v.* Webb, 4 Sandf. (N. Y.) 21.

88. Weston *v.* Weston, 83 N. Y. App. Div. 520, 82 N. Y. Suppl. 351; Robertson *v.* Bennett, 44 N. Y. Super. Ct. 66; Macdonald *v.* Mail Printing Co., 2 Ont. L. Rep. 278. See also Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41. *Compare* Edsall *v.* Brooks, 3 Rob. (N. Y.) 284 [*modifying* 2 Rob. 29, 17 Abb. Pr. 221, 26 How. Pr. 426].

89. *California.*— Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Delaware.— Layton *v.* Harris, 3 Harr. 406.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424.

Michigan.— Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309.

Missouri.— McGinnis *v.* Knapp, 109 Mo. 131, 18 S. W. 1134.

New York.— Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838.

Rhode Island.— Morrison-Jewell Filtration Co. *v.* Lingane, 19 R. I. 316, 33 Atl. 452.

South Dakota.— Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

See 32 Cent. Dig. tit. "Libel and Slander," § 35.

90. *Delaware.*— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337 [*affirmed* in (1904) 58 Atl. 513, 65 L. R. A. 980].

Indiana.— Young *v.* Clegg, 93 Ind. 371, holding that a letter stating that the person addressed had bribed the prosecuting attorney to release his son is a libel on the prosecuting attorney.

Maine.— McNally *v.* Burleigh, 91 Me. 22, 39 Atl. 285.

Michigan.— Boehmer *v.* Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318, holding that a charge that a franchise had been procured by the use of "boodle" imputes that the officials granting the franchise were bribed and is libelous *per se*.

New Jersey.— Hand *v.* Winton, 38 N. J. L. 122, holding that it is libelous to charge a member of a political party with offering a resolution at a nominating convention under the influence of a bribe.

North Dakota.— Lauder *v.* Jones, (1904) 101 N. W. 907, holding that it is libelous to charge that a judge for a money consideration extended protection to a person who is described as a notorious law-breaker.

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

Vermont.— Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395; Royce *v.* Maloney, 57 Vt. 325.

Wisconsin.— Kimball *v.* Fernandez, 41 Wis. 329.

See 32 Cent. Dig. tit. "Libel and Slander," § 35.

91. *California.*— Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Delaware.— Layton *v.* Harris, 3 Harr. 406, holding that a letter informing the recipient that money had been deposited for him with plaintiff to enable him to vote a certain ticket is a libel upon plaintiff.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424, holding that in an action for charging bribery of voters it is immaterial that the person alleged to have been bribed was not a legal voter.

Michigan.— Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309, holding that a caricature of a member of the legislature representing him as using liquor and money to secure the passage of a bill is libelous *per se*.

Missouri.— McGinnis *v.* Knapp, 109 Mo. 131, 18 S. W. 1134, holding that a newspaper article headed, "The McGinnis Cohorts," and, "They Rally 'Round the Brewers' Flag in the Senate," and stating that the "distribution of the $50,000 slush fund, sent here by the liquor interests, may enable Senator McGinnis to make good his boast" that he could defeat a bill is libelous *per se*.

New York.— Van Ingen *v.* Star Co., 157 N. Y. 695, 51 N. E. 1094 [*affirming* 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114]; Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838.

See 32 Cent. Dig. tit. "Libel and Slander," § 35.

"Treating voters" not being unlawful, a publication charging such act has been held not to be libelous *per se*. Heilman *v.* Shanklin, 60 Ind. 424.

Imputation of fraud in registry of voters. — In Kraus *v.* Sentinel Co., 60 Wis. 425, 19 N. W. 384, it was held that a publication connecting plaintiff's name with alleged gross frauds in the registry of voters is actionable *per se*.

92. *Michigan.*—Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320.

Minnesota.— Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128.

New York.— Hamilton *v.* Eno, 81 N. Y. 116.

this rule holds good, although the publication does not amount to an imputation of a charge of crime.[93]

(VI) *Burglary.* A written publication imputing that a person has committed burglary is libelous *per se*.[94]

(VII) *Counterfeiting.* An imputation of counterfeiting in libelous form is actionable *per se*.[95]

(VIII) *Disorderly or Gambling Houses.* A written publication charging that a certain house is disorderly,[96] or charging one with keeping a disorderly house,[97] is actionable *per se*. So a charge of keeping a gambling house[98] or of keeping a house of ill fame[99] is libelous *per se*.

(IX) *Embezzlement.* Written words imputing the crime of embezzlement are libelous *per se*.[1] A positive and express charge of embezzlement is not requisite to constitute a publication libelous *per se*; it is sufficient if the language used

North Carolina.— Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

See 32 Cent. Dig. tit. "Libel and Slander," § 35.

93. Tillson *v.* Robbins, 68 Me. 295, 28 Am. Rep. 50 (holding that it is libelous *per se* to charge one with being responsible for "atrocious corruption, intimidation and fraud" in an election); Van Ness *v.* Hamilton, 19 Johns. (N. Y.) 349 (holding that a charge that plaintiff, a member of the council of revision, received money for services rendered in procuring an act of incorporation to be passed is actionable *per se*).

94. Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Long *v.* Tribune Printing Co., 107 Mich. 207, 65 N. W. 108; French *v.* Detroit Free Press Co., 95 Mich. 168, 54 N. W. 711; McAllister *v.* Detroit Free Press Co., 95 Mich. 164, 54 N. W. 710; McAllister *v.* Detroit Free Press Co., 85 Mich. 453, 48 N. W. 612; McAllister *v.* Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; Blair *v.* Burroughs, 23 Cinc. L. Bul. 180; McClure *v.* Review Pub. Co., 38 Wash. 160, 80 Pac. 303, where, however, the charge was privileged.

95. Nelson *v.* Musgrave, 10 Mo. 648 (holding that a charge that one is "thought no more of than a counterfeiter" is libelous *per se*); Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99 (holding that it is libelous to charge that one was recently released from prison, having served a term for counterfeiting).

96. McClean *v.* New York Press Co., 19 N. Y. Suppl. 262, holding that a publication charging that a house is disorderly or disreputable is equivalent to charging that the inmates are disorderly and is a libel upon the lessee and occupants.

97. Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725.

98. Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

A charge of gambling is libelous *per se*. Ferguson *v.* Evening Chronicle Pub. Co., 72 Mo. App. 462 (holding that to charge one in writing with being one of a "quartet of gamblers" and with engaging in a game of "craps" at "$200 a throw" is libelous *per se*); Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757 (holding that a charge that one is a professional gambler is libelous *per se*); Digby *v.* Thompson, 4 B. & Ad. 821, 2 L. J. K. B. 140, 1 N. & M. 485, 2 E. C. L. 358. But see Forbes *v.* King, 1 Dowl. P. C. 672, where it was held not libelous to write of a man that he had been engaged in a gambling fracas arising out of a dispute at play without an averment that illegal gambling and play were intended.

99. See *infra*, III, E, 1, c.

1. *Alabama.*— Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788; Iron Age Pub. Co. *v.* Crudup, 85 Ala. 519, 5 So. 332.

Illinois.— Thomas *v.* Dunaway, 30 Ill. 373.

Indiana.— See Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275.

Michigan.—Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575; 80 Am. St. Rep. 527, 46 L. R. A. 397; Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501; Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249.

Minnesota.— Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128 (holding that a charge that plaintiff, a county auditor, had drawn funds from the county treasury for clerk hire and had appropriated part to his own use is actionable *per se*); Glatz *v.* Thein, 47 Minn. 278, 50 N. W. 127; Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678. See also Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856, where the charge was justified.

Missouri.— State *v.* Kountz, 12 Mo. App. 511.

Nebraska.— Farley *v.* McBride, (1905) 103 N. W. 1036 (holding that it is libelous *per se* to charge a sheriff with having obtained from the county of which he was an officer, a certain sum of money upon a false account for expenses which he had never incurred); Pokrok Zapadu Pub. Co. *v.* Zirkovsky, 42 Nebr. 64, 60 N. W. 358.

naturally imports the commission of such an offense,[2] as for instance a charge that one is a "defaulter."[3] Indeed imputations in libelous form charging misappropriation, although not amounting to crime, are yet actionable as tending to bring plaintiff into disgrace or disrepute.[4]

New York.— Dailey *v.* Engineering, etc., Journal, 94 N. Y. App. Div. 314, 88 N. Y. Suppl. 6; Ginsberg *v.* Union Surety, etc., Co., 68 N. Y. App. Div. 141, 74 N. Y. Suppl. 561; Hart *v.* Sun Printing, etc., Assoc., 79 Hun 358, 29 N. Y. Suppl. 434; Johns *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 19 N. Y. Suppl. 3 (where, however, the charge was privileged); Manner *v.* Simpson, 13 Daly 156; Carpenter *v.* Hammond, 1 N. Y. St. 551.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Pennsylvania.— Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568.

Rhode Island.— Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

Wisconsin.— Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000; Cochran *v.* Melendy, 59 Wis. 207, 18 N. W. 24; Bowe *v.* Rogers, 50 Wis. 598, 7 N. W. 547.

United States.— Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53 [*reversing* 55 Fed. 264]; Morgan *v.* Halberstadt, 60 Fed. 592, 9 C. C. A. 147; Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352.

England.— Finden *v.* Westlake, M. & M. 461, 31 Rev. Rep. 748, 22 E. C. L. 563.

See 32 Cent. Dig. tit. "Libel and Slander," § 41.

2. Iron Age Pub. Co. *v.* Crudup, 85 Ala. 519, 5 So. 332; Mallory *v.* Pioneer-Press Co., 34 Minn. 521, 26 N. W. 904 (holding that a publication stating that plaintiff "has disappeared with some of his employer's funds, and the police have been notified" charges embezzlement and is libelous *per se*); Hart *v.* Sun Printing, etc., Assoc., 79 Hun (N. Y.) 358, 29 N. Y. Suppl. 434 (holding that it is libelous to publish of an administrator that he was having trouble with the creditors of an estate, that he "set himself to clear the estate" and that in the clearing process "about $9,000 disappeared"); Manner *v.* Simpson, 13 Daly (N. Y.) 156 (holding that to publish of a discharged superintendent as a reason for his discharge that constant reports were in circulation to the effect that all the materials sent to the factory were not used in the construction of the company's pianos is libelous *per se* as charging embezzlement); Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53 [*reversing* 55 Fed. 264] (holding that to publish that plaintiff, the "Southern Ohio manager of the Standard Oil Co. until six months ago, when he strangely disappeared, has been located, living in luxury" in Canada, is libelous *per se*); Morgan *v.* Halberstadt, 60 Fed. 592, 9 C. C. A. 147 (holding that to publish of one that "he boasted of the manner in which he was helping himself to the company's funds" is libelous *per se*).

Publications held not to charge embezzlement: It is not libelous *per se* to publish of a discharged railway employee that he "had been discharged for failing to ring up all fares collected" (Pittsburgh, etc., Pass. R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363); to publish of one having charge of printing for an organization that he had received the money from it to pay therefor but put off payment by various excuses until compelled to pay by suit (Hackett *v.* Providence Tel. Pub. Co., 18 R. I. 589, 29 Atl. 143); to charge the manager of a corporation with having used and employed the goods, means, and credit of the corporation for his own benefit (Johnson *v.* Brown, 13 W. Va. 71); to charge a manager of a corporation with causing the failure of the corporation by "extravagant management" (Dailey *v.* Engineering, etc., Journal, 94 N. Y. App. Div. 314, 88 N. Y. Suppl. 6); to charge that a manager of a farmers' alliance exchange was discharged because of heavy losses in the business and that the showing of a branch office simply proved that the manager was "a man of small business capacity" (Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788); or to charge that "there was a deficit in the accounts" of plaintiff, an ex-county treasurer, where the publication also stated that it was claimed for plaintiff that the shortage was "for fees collected which belonged to the office and not to the county," and that "the matter was settled by the bondsmen before the meeting of the board" of supervisors (Hofflund *v.* Journal Co., 88 Wis. 369, 60 N. W. 263. See also Brown *v.* Boynton, 122 Mich. 251, 80 N. W. 1099). So the words, "It is wondered at how he can live in more than ordinary style . . . while having merely the honorable receipts of his agency to live upon," do not necessarily impute the crime of embezzlement and that the construction of the language was for the jury. Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249.

3. Roberts *v.* Miller, 2 Greene (Iowa) 122; State *v.* Kountz, 12 Mo. App. 511 (where it is said: "When the term defaulter is employed to explain a disqualification for holding a public office, but one meaning can attach to it in the minds of all persons of ordinary intelligence"); Ginsberg *v.* Union Surety, etc., Co., 68 N. Y. App. Div. 141, 74 N. Y. Suppl. 561 (where, however, the charge was held privileged); Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

4. Viedt *v.* Evening Star Newspaper Co., 19 D. C. 534, holding that a newspaper article

(x) *False Pretenses and Kindred Crimes.* A written publication imputing that one is guilty of the crime of false pretenses, or a crime of a kindred nature, is actionable *per se*.[5] Indeed, even though no crime is charged, words imputing swindling or cheating may be actionable as tending to disgrace or degrade the person of whom they were written.[6]

(xi) *Forgery.* To charge one in writing with the crime of forgery is actionable *per se*.[7] But it is not libelous *per se* to accuse a person of forgery where the expression is not used in such a manner as to import a crime,[8] to blacken the character of plaintiff, or to expose him to public hatred, contempt, or ridicule.[9]

(xii) *Homicide.* It is libelous *per se* to charge one with unlawfully causing

charging a bailee of goods with converting them to his own use does not charge embezzlement but is libelous as tending to bring him into disgrace and disrepute. See also Easton *v.* Buck, 23 N. Y. App. Div. 463, 48 N. Y. Suppl. 158; Wartenbe *v.* Sternberger, 23 Cinc. L. Bul. (Ohio) 113; Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

5. Kenney *v.* Illinois State Journal Co., 64 Ill. App. 39; Williams *v.* Chicago Herald Co., 46 Ill. App. 655 (holding, however, that a publication warning the public against a swindling scheme is privileged); Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360 (where, however, the communication was privileged); Cameron *v.* Tribune Assoc., 3 Silv. Sup. (N. Y.) 575, 7 N. Y. Suppl. 739; Loveland *v.* Hosmer, 8 How. Pr. (N. Y.) 215; Belo *v.* Smith, 91 Tex. 221, 42 S. W. 850 [*affirming* (Civ. App. 1897) 40 S. W. 856]; Young *v.* Sheppard, (Tex. Civ. App. 1897) 40 S. W. 62. See also Johnson *v.* Brown, 13 W. Va. 71.

6. *Georgia.*— Ransone *v.* Christian, 49 Ga. 491.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91, holding that it is libelous to charge one with obtaining property by lying and with refusing to pay for the same.

New York.— Hartman *v.* Morning Journal Assoc., 138 N. Y. 638, 34 N. E. 512 [*affirming* 19 N. Y. Suppl. 398]; Wachter *v.* Quenzer, 29 N. Y. 547 (holding that a charge of borrowing property and then absconding without returning or paying for the same is libelous *per se*); Hatch *v.* Matthews, 83 Hun 349, 31 N. Y. Suppl. 926; Arrow Steamship Co. *v.* Bennett, 73 Hun 81, 25 N. Y. Suppl. 1029; Williams *v.* Godkin, 5 Daly 499.

Ohio.— Cincinnati St. R. Co. *v.* Cincinnati Daily Tribune Co., 31 Cinc. L. Bul. 111, holding that where a street railroad is required by its charter to report to the city auditor the amount of its gross income and to pay to the city treasurer a percentage thereof, it is libelous *per se* to charge that the company kept one set of books for the stock-holder and another for the city auditor.

Vermont.— Gregory *v.* Atkins, 42 Vt. 237.

Canada.— See Gfroerer *v.* Hoffman, 15 U. C. Q. B. 441.

See 32 Cent. Dig. tit. "Libel and Slander," § 68. See also *infra*, III, A, 2, g.

Imputations held not libelous.— In Trimble *v.* Anderson, 79 Ala. 514, a notice warning all persons against trading for two notes, alleging that plaintiff had obtained them without consideration from a person whose mental condition at the time incapacitated him for business, was held not libelous *per se*, as there was no charge of fraud or dishonesty in obtaining the notes. In Greville *v.* Chapman, 5 Q. B. 731, Dav. & M. 553, 8 Jur. 189, 13 L. J. Q. B. 172, 48 E. C. L. 731, it was held not to be libelous *per se* to charge one with withdrawing a horse from a race in order to obtain an unfair advantage over those with whom he had heavy wagers on the result of the race.

7. *Iowa.*— Nihols *v.* Eaton, 110 Iowa 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483, holding that a communication by a life insurance company charging an examining physician with forging an application for insurance is libelous *per se*, although under the circumstances of the case it was held to be privileged. See also Anderson *v.* Hart, 68 Iowa 400, 27 N. W. 289.

Kentucky.— Caldwell *v.* Story, 107 Ky. 10, 52 S. W. 850, 21 Ky. L. Rep. 599, 45 L. R. A. 725, where, however, the communication was held privileged.

Michigan.—Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

New York.— Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. Y. Suppl. 263; Hotchkiss *v.* Oliphant, 2 Hill 510, holding that a publication, "Is Miles Hotchkiss, Esq. . . . the individual who broke jail . . . while confined . . . on a charge of forgery?" is libelous *per se* as imputing forgery.

Canada.— Fellowes *v.* Hunter, 20 U. C. Q. B. 382, where, however, the charge of forgery was qualified by the context.

See 32 Cent. Dig. tit. "Libel and Slander," § 42.

8. Downing *v.* Brown, 3 Colo. 571 (holding that an officer's memorandum book not required by law to be kept but in which entries are made by the officer for his own convenience cannot be the subject of forgery); Cramer *v.* Noonan, 4 Wis. 231 (holding that it is not libelous *per se* to write of one "that . . . he forged sentiments and words for Silas Wright which he never uttered" as it does not charge the crime of forgery). See also Stockley *v.* Clement, 4 Bing. 162, 5 L. J. C. P. O. S. 139, 12 Moore C. P. 376, 13 E. C. L. 449.

9. Cramer *v.* Noonan, 4 Wis. 231.

the death of another.[10] So any words containing a direct charge of murder,[11] or imputing that one is suspected of the crime,[12] or stating facts sufficient to show a felonious killing,[13] are actionable *per se.*

(XIII) *LARCENY.* A publication imputing that a person is guilty of the crime of larceny is libelous *per se.*[14] Any language which in its ordinary and usual sig-

10. *Indiana.*— Doan *v.* Kelley, 121 Ind. 413, 23 N. E. 266.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; McLaughlin *v.* Cowley, 127 Mass. 316.

Michigan.— Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691; Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403, holding that a newspaper publication that a physician had caused the death of a patient by reckless treatment is libelous.

Minnesota.— Palmer *v.* Smith, 21 Minn. 419, holding that a charge against a husband that by desertion and neglect he had caused the death of the wife and that "it was not only a case of criminal neglect, but also of criminal intent" is actionable *per se.*

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981.

New Hampshire.— Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605, holding that a publication charging an army with the murder of non-combatants is *prima facie* libelous, although an individual soldier may not maintain an action therefor.

New York.— Bergmann *v.* Jones, 94 N. Y. 51.

North Carolina.— Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

Washington.— Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

United States.— Morning Journal Assoc. *v.* Duke, 128 Fed. 657, 63 C. C. A. 459; O'Shaughnessy *v.* New York Recorder Co., 58 Fed. 653; Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773, holding that it is libelous *per se* to charge one with being an accessary to a murder.

See 32 Cent. Dig. tit. "Libel and Slander," § 43.

11. Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981 (holding that a newspaper article referring to plaintiff as "robber number three who killed the farmer" is libelous *per se*); Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775 (to charge one with the murder of two Union soldiers, since the war, is libelous *per se*).

12. Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275.

Imputations by expressing mere suspicion generally see *infra*, III, K, 3.

13. Doan *v.* Kelley, 121 Ind. 413, 23 N. E. 266 (holding that a false publication headed "A School Child Killed . . . by a Teacher," and stating that the teacher had just finished punishing the child when it coughed and dropped to the floor and died, and that the teacher had been arrested and lodged in jail and that threats of lynching her were freely made, is libelous *per se*); Bergmann *v.* Jones, 94 N. Y. 51; O'Shaughnessy *v.* New York Recorder Co., 58 Fed. 653 (holding that a publication charging an officer with treating a prisoner trying to escape in a merciless manner and causing his death is actionable *per se*).

14. *Alabama.*— Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531.

California.— De Witt *v.* Wright, 57 Cal. 576.

Georgia.— Tillman *v.* Willis, 61 Ga. 433.

Indiana.— Bain *v.* Myrick, 88 Ind. 137.

Iowa.— Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

Maine.— Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

Michigan.— Randall *v.* Evening News Assoc., 101 Mich. 561, 60 N. W. 301; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Davis *v.* Marxhausen, 86 Mich. 281, 49 N. W. 50; Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Minnesota.— Glatz *v.* Thein, 47 Minn. 278, 50 N. W. 127; Simmons *v.* Holster, 13 Minn. 249.

Missouri.— Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293 [*affirming* 2 Mo. App. 565]; Nelson *v.* Musgrave, 10 Mo. 648; Salvatelli *v.* Ghio, 9 Mo. App. 155.

Nebraska.— Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857.

New Jersey.— Hartkorn *v.* Paterson, etc., Gas, etc., Co., 67 N. J. L. 42, 50 Atl. 354.

New York.— Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Ryer *v.* Fireman's Journal Co., 11 Daly 251; Dwyer *v.* Fireman's Journal Co., 11 Daly 248; Washburn *v.* Cooke, 3 Den. 110, where, however, the charge was privileged.

Ohio.— Fisher *v.* Patterson, 14 Ohio 418; Wahle *v.* Cincinnati Gazette Co., 6 Ohio Dec. (Reprint) 709, 7 Am. L. Rec. 541, 4 Cinc. L. Bul. 61.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768; Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania.— Struthers *v.* Peacock, 11 Phila. 287.

Texas.— Belo *v.* Fuller, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75.

Virginia.— Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin.— Cochran *v.* Melendy, 59 Wis. 207, 18 N. W. 24; Bowe *v.* Rogers, 50 Wis. 598, 7 N. W. 547.

nification and as understood by men of ordinary intelligence, knowing all the circumstances imputes the offense, will support an action for libel.[15] To call one a thief[16] or to charge him with "stealing"[17] is actionable *per se*, as charging the crime of larceny unless the words are so qualified as to show that they were used in a sense not importing that offense.[18] Moreover it is unnecessary that the technical offense of larceny should be charged to render the publication libelous; it is sufficient if the tendency of the charge is to bring plaintiff into public hatred, ridicule, or scorn.[19]

(XIV) *PERJURY AND SUBORNATION OF PERJURY* — (A) *Perjury.* A written or printed charge of perjury is libelous *per se*.[20] Thus to call one in writing a

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Butler *v.* Carter, etc., Pub. Co., 135 Fed. 69, 67 C. C. A. 543; Butler *v.* Evening Leader Co., 134 Fed. 994; Butler *v.* Barret, 130 Fed. 944.

England.— Williams *v.* Gardiner, 5 L. J. Exch. 280, 1 M. & W. 245, 1 Tyrw. & G. 578.

Canada.— Gfroerer *v.* Hoffman, 15 U. C. Q. B. 441.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 45–52.

15. Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Ryer *v.* Fireman's Journal Co., 11 Daly (N. Y.) 251; Dwyer *v.* Fireman's Journal Co., 11 Daly (N. Y.) 248; Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768 (holding that a publication charging one with having been arrested for larceny, commenting upon her kleptomaniac qualities, and stating that stolen property was found in her apartment is libelous *per se*); Cochran *v.* Melendy, 59 Wis. 207, 18 N. W. 24.

Imputations held not to charge larceny.— Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531; Armentrout *v.* Moranda, 8 Blackf. (Ind.) 426; Salvatelli *v.* Ghio, 9 Mo. App. 155 (holding that words charging a pastor with carrying away banners belonging to a church and stripping it of many valuable articles were not libelous without proof of special damage); Steele *v.* Edwards, 15 Ohio Cir. Ct. 52, 8 Ohio Cir. Dec. 161 (holding that the words, "I want you to call and settle for the fodder you were kind enough to take Saturday without permission," were not libelous *per se*); Gohen *v.* Cincinnati Volksblatt Co., 31 Cinc. L. Bul. 111 (holding that it is not libelous *per se* as imputing a crime to publish of a newspaper reporter that he went through a dead man's pockets in the hope of stumbling on a sensation, and that the coroner, being responsible for property found on the persons of those dead, examined him under oath).

16. *Georgia.*— Tillman *v.* Willis, 61 Ga. 433.

Michigan.— Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

Minnesota.— Simmons *v.* Holster, 13 Minn. 249, holding that an advertisement that certain property was stolen and that the thief was believed to be a person named is libelous *per se*.

Missouri.— Nelson *v.* Musgrave, 10 Mo. 648, holding that the words, "He is thought no more of than a horse-thief," are libelous *per se*.

New Jersey.— Hartkorn *v.* Paterson, etc., Gas, etc., Co., 67 N. J. L. 42, 50 Atl. 354.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

See 32 Cent. Dig. tit. "Libel and Slander," § 46.

17. Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181, 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293 [*affirming* 2 Mo. App. 565]; Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857; Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768, holding that it is libelous *per se* to publish of a person that stolen property was found in her apartments.

Horse stealing.— It is libelous *per se* to charge another with the crime of horse stealing. Lehrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292, 18 Ky. L. Rep. 551 (holding that to publish of a person that he had hired a horse at a livery stable and had not returned it and that the owner of the horse believed that it had been stolen is libelous *per se*); Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293 [*affirming* 2 Mo. App. 565] (holding that to publish of one that he was once accused of stealing a horse and had sued his accuser and a verdict had been rendered for defendant is libelous as imputing grand larceny); Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652; Mountney *v.* Watton, 2 B. & Ad. 673, 9 L. J. K. B. O. S. 298, 22 E. C. L. 282.

18. Randall *v.* Evening News Assoc., 101 Mich. 561, 60 N. W. 301, holding that a publication charging that a city board had issued bonds to construct a boulevard in order to enhance the value of land of which plaintiff was an owner and calling the transaction a "steal" is not libelous as imputing larceny.

19. Bain *v.* Myrick, 88 Ind. 137 (holding that a publication charging that plaintiff "seems to have coveted his late partner's cattle" and that he "started for the city with the cattle" and "an officer was put upon his trail" is libelous *per se*); Randall *v.* Evening News Assoc., 101 Mich. 561, 60 N. W. 301.

20. *Connecticut.*— Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920; Hillhouse *v.* Dunning, 6 Conn. 391.

"perjurer,"[21] a perjured scoundrel,[22] or an affidavit man,[23] has been held to be libelous without proof of special damage. Moreover, an imputation of wilful falsehood, although not amounting to a charge of perjury, may yet be actionable, under the general rule as to libel,[24] provided such imputation of falsehood tends to injure the reputation of plaintiff.[25]

(B) *Subornation of Perjury.* A written or printed accusation of subornation of perjury is actionable *per se*.[26]

(XV) *Rape.* An imputation in libelous form of the commission of rape is actionable *per se*.[27]

District of Columbia.— Washington Gas Light Co. *v.* Lansden, 9 App. Cas. 508.

Florida.— Wilson *v.* Marks, 18 Fla. 322.

Georgia.— Ransone *v.* Christian, 49 Ga. 491.

Illinois.— Gaines *v.* Gaines, 109 Ill. App. 226.

Indiana.— Downey *v.* Dillon, 52 Ind. 442; Coombs *v.* Rose, 8 Blackf. 155.

Iowa.— Jensen *v.* Damm, 127 Iowa 555, 103 N. W. 798, holding that a publication charging that plaintiff had had a certain person arrested on a criminal charge and afterward on the trial had retracted everything that had been said at a preliminary trial, and had given a false answer to a certain question, is sufficient to go to the jury on the question whether the words impute perjury.

Kansas.— Kirkpatrick *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316, where, however, the words were privileged.

Louisiana.— See Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134.

Michigan.— Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119 (holding that it is libelous to publish of another that he would not hesitate to lie in court or anywhere else to defend himself); Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233 (holding that to charge that a jury have perjured themselves in rendering a certain verdict is libelous).

Minnesota.— See Stewart *v.* Wilson, 23 Minn. 449.

New York.— Marsh *v.* Ellsworth, 50 N. Y. 309 [*affirming* 32 N. Y. Super. Ct. 589] (where, however, the charge was privileged); Rosenberg *v.* Nesbitt, 14 N. Y. St. 248. See also Steele *v.* Southwick, 9 Johns. 214.

North Carolina.— Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

Ohio.— Commercial Gazette Co. *v.* Dean, 11 Ohio Dec. (Reprint) 207, 25 Cinc. L. Bul. 250.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania.— Godshalk *v.* Metzgar, (1889) 17 Atl. 215 (holding that a publication concerning a witness that he was arrested "on account of his criminal evidence" is libelous *per se*); Deford *v.* Miller, 3 Penr. & W. 103 (holding that to publish of a person that in law the offense of which he is guilty would be called perjury is actionable *per se*): Regensperger *v.* Kiefer, 4 Pa. Cas. 541, 7 Atl. 724.

Texas.— See Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

Vermont.— Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247.

Wisconsin.— Noonan *v.* Orton, 32 Wis. 106.

See 32 Cent. Dig. tit. "Libel and Slander," § 54 *et seq.*

Imputations held not to charge perjury.— A notice from county officials that they had been apprised that moneys of plaintiff had been omitted from taxation is not libelous as containing a charge of having committed perjury in swearing to a false assessment. O'Connell *v.* Shontz, 126 Iowa 709, 102 N. W. 807. So a writing containing the words "I have heard Olsen testify on the stand time and again and I know his ability in that line," is not libelous as charging perjury. Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128. In Stewart *v.* Wilson, 23 Minn. 449, 452, the following words, "as Mr. Wilson has sworn to this answer, there is a good chance for the 'deacon' to bring a complaint against him for perjury. We have not the slightest doubt but there is a great deal of perjury in these numerous cases, and it ought to be shown up. We have no idea, however, that Mr. Wilson is tainted with it in the slightest," were held not to be libelous.

21. Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128.

22. Haws *v.* Stanford, 4 Sneed (Tenn.) 520.

23. St. James' Evening Post Case, 2 Atk. 469, 26 Eng. Reprint 683.

24. See *supra*, III, A, 1.

25. Washington Gas Light Co. *v.* Lansden, 9 App. Cas. (D. C.) 508 (holding that a charge that one swore falsely before a committee of congress is actionable *per se*); Jensen *v.* Damm, (Nebr. 1905) 103 N. W. 798; Haws *v.* Stanford, 4 Sneed (Tenn.) 520; Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455 (holding that to charge one with false swearing before the grand jury is libelous *per se*). *Compare* Casselman *v.* Winship, 3 Dak. 292, 19 N. W. 412, holding that a statement that plaintiff "made false affidavits in order to commence his case" was not libelous *per se*.

26. Perry *v.* Man, 1 R. I. 263; Dawson *v.* Holt, 11 Lea (Tenn.) 583, 47 Am. Rep. 312.

27. Gilman *v.* McClatchy, 111 Cal. 606, 44 Pac. 241 (holding that a charge that one has been arrested for rape is libelous *per se*);

(xvi) *Receiving Stolen Property.* A publication charging one with receiving stolen goods is libelous *per se*.[28]

(xvii) *Robbery.* A charge of robbery is libelous *per se*.[29] But it has been intimated that a charge of an "attempt to rob," when construed in connection with the context, may not be actionable *per se* as charging the commission of a crime.[30]

(xviii) *Selling Impure Food.* It is libelous *per se* to charge one with selling diseased meats[31] or impure milk[32] in violation of a criminal statute. But, as in the case of all imputations of crime, to render a publication libelous *per se* as charging a violation of the health laws, the offense must be charged in language fairly and reasonably bearing that interpretation.[33]

(xix) *Smuggling.* To charge one with smuggling is libelous *per se*.[34] So a written charge of an attempt to evade and defraud the revenue laws of the United States by making out fraudulent invoices of books imported from a foreign country is libelous *per se*.[35]

(xx) *Treason.* It is libelous *per se* to publish a charge imputing that one is guilty of the crime of treason.[36] But a publication charging a person with taking part in a revolt or rebellion, within a foreign government other than England, is insufficient to charge a crime, in the absence of proof of the existence of some statute or law making such an act a treasonable offense.[37]

(xxi) *Miscellaneous Crimes.* It is libelous *per se* to charge one with kidnapping,[38] breaking jail,[39] suffering[40] or assisting prisoners to escape from jail,[41] selling liquors illegally,[42] illegal voting,[43] poisoning cattle,[44] making an indecent assault,[45] public decency,[46] false imprisonment,[47] unlawful interference with mail matter,[48] or with falsely impersonating a constable.[49] Similarly, to publish that plaintiff is under indictment for not canceling stamps on an empty liquor cask, the contents of which he had sold;[50] or that he has been convicted of libel;[51]

Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991 (holding that to publish of one that he has committed adultery and that the case seems one of rape is libelous *per se*).

28. Peoples *v.* Detroit Post, etc., Co., 54 Mich. 457, 20 N. W. 528; *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

29. Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360.

30. Walford *v.* Herald Printing, etc., Co., 133 Ind. 372, 32 N. E. 929.

31. See Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

32. Brooks *v.* Harison, 91 N. Y. 83, opinion by Finch, J.

33. Hartmann *v.* Sun Printing, etc., Assoc., 74 N. Y. App. Div. 282, 77 N. Y. Suppl. 538, holding that a charge that "in each store tainted poultry was found" does not charge a crime.

34. Stilwell *v.* Barter, 19 Wend. (N. Y.) 487.

35. Worthington *v.* Houghton, 109 Mass. 481.

36. Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253. See also Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 [*affirming* 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711]; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128, where the word "traitor" was applied to plaintiff.

37. Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 [*affirming* 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711, where plaintiff was charged with taking part in a revolution in Brazil.

38. Palmer *v.* Adams, 137 Ind. 72, 36 N. E. 695; Nash *v.* Benedict, 25 Wend. (N. Y.) 645.

39. Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510.

40. McNally *v.* Burleigh, 91 Me. 22, 39 Atl. 285.

41. *In re* McDonald, 4 Wyo. 150, 33 Pac. 18.

42. Ingram *v.* Reed, 5 Pa. Super. Ct. 550, 41 Wkly. Notes Cas. 123; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580, holding that it is libelous *per se* to charge one with running a "blind tiger" where liquor is sold in violation of the law.

43. Walker *v.* Winn, 8 Mass. 248.

44. Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405.

45. Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

46. McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

47. Boone *v.* Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313.

48. Wills *v.* Jones, 13 App. Cas. (D. C.) 482; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

49. McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606.

50. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

51. Boogher *v.* Knapp, 76 Mo. 457 [*affirming* 8 Mo. App. 591].

or to charge a justice of the peace with packing a jury[52] has been held to be libelous *per se.*

b. Imputations in Slanderous Form — (I) *ABORTION.* It is actionable *per se* orally to charge a person with the act of causing or procuring an abortion, under circumstances not allowed by law.[53] But since the common-law offense of abortion is restricted to cases in which the woman was quick with child, words charging a woman with procuring an abortion upon herself, without imputing that she was quick with child, are not actionable in the absence of statute making the act charged a punishable offense.[54]

(II) *ADULTERATING FOOD PRODUCTS.* Words charging a person with selling or offering for sale impure or watered milk or other adulterated food products in contravention of criminal statutes are actionable *per se.*[55]

(III) *ALTERING BRANDS.* Where the alteration or defacing of the mark or brand of any animal is an indictable offense by statute, an oral imputation or charge of such offense is actionable *per se.*[56] But the rule is otherwise where no such offense is recognized by statute;[57] and where such statutory offense exists, the act charged to give rise to an action without proof of special damage must be such as clearly falls within the prohibition of the statute.[58]

(IV) *ARSON AND BURNING BUILDINGS.* Spoken words charging a person with the burning of another's property such as constitutes arson at common law or under statute are slanderous *per se.*[59] But independently of statute a charge

52. Mix *v.* Woodward, 12 Conn. 262.

53. *Indiana.*— De Pew *v.* Robinson, 95 Ind. 109, holding that charging one with being an "abortionist" is actionable *per se.*

New York.— Bissell *v.* Cornell, 24 Wend. 354; Widrig *v.* Oyer, 13 Johns. 124.

Texas.— Hitzfelder *v.* Koppelmann, 30 Tex. Civ. App. 162, 70 S. W. 353, holding that to say of a husband and wife "they have used something that they get no children," intending to charge abortion, is actionable *per se.*

Wisconsin.— Filber *v.* Dautermann, 26 Wis. 518, holding that words charging one with administering to her daughter pills "to drive off a child" are actionable *per se.*

Canada.— Miller *v.* Houghton, 10 U. C. Q. B. 348.

54. Smith *v.* Gaffard, 31 Ala. 45 (holding that the words, "I suppose Caroline was with child, and took something to make her lose it," is not actionable *per se*); Hatfield *v.* Gano, 15 Iowa 177; Abrams *v.* Foshee, 3 Iowa 274, 66 Am. Dec. 77.

55. Brooks *v.* Harison, 91 N. Y. 83; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276 (holding that it is actionable as imputing a crime involving moral turpitude to charge a butcher with knowingly selling diseased meat); Geary *v.* Bennett, 53 Wis. 444, 10 N. W. 602 (holding that it is actionable *per se* to charge one with furnishing watered milk to a creamery). See also Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266; Stevens *v.* Hartwell, 11 Metc. (Mass.) 542. *Compare* Havemeyer *v.* Fuller, 10 Abb. N. Cas. (N. Y.) 9, 60 How. Pr. 316.

56. Perdue *v.* Burnett, Minor (Ala.) 138, where the words, "You have altered the marks of four of my hogs," were held actionable *per se.*

57. Williams *v.* Karnes, 4 Humphr. (Tenn.) 9.

58. Johnston *v.* Morrow, 9 Port. (Ala.) 525 (holding that to charge plaintiff with having marked the hogs of a third person is not actionable *per se*, since the branding of an unmarked hog is not an "alteration" within the meaning of the statute); Gage *v.* Shelton, 3 Rich. (S. C.) 242 (holding that words merely charging plaintiff with having cut off the tail of defendant's horse are not actionable in themselves, since such act is not a crime unless it was done for the purpose of preventing identification); Williams *v.* Karnes, 4 Humphr. (Tenn.) 9 (holding that the words, "Joseph Williams altered the earmark of my hog from my mark to his, or procured it to be done," do not of themselves impute a crime, and that it must be shown by the colloquium or otherwise that the word "altered" imported that plaintiff had the fraudulent purpose of depriving defendant of his property and appropriating it to himself).

59. *Alabama.*— Waters *v.* Jones, 3 Port. 442, 29 Am. Dec. 261, words charging the burning of a gin-house.

California.— Clugston *v.* Garretson, 103 Cal. 441, 37 Pac. 469, words charging the burning of a woodyard appurtenant to or connected with a warehouse.

Connecticut.— Tuttle *v.* Bishop, 30 Conn. 80, words charging the burning of a factory.

Delaware.— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88 (words charging the burning of a school-house); Kinney *v.* Hosea, 3 Harr. 77 (words charging the burning of a public hall).

Georgia.— Giddens *v.* Mirk, 4 Ga. 364, words charging the burning of a camp ground.

Illinois.— Barnes *v.* Hamon, 71 Ill. 609.

Indiana.— McNeal *v.* Woods, 3 Blackf. 485.

Iowa.—Crawford *v.* Bergen, 91 Iowa 675,

of burning an uninhabited dwelling-house,[60] or a barn not connected with a dwelling-house or filled with corn,[61] is not actionable *per se*. It is not as a general rule actionable *per se* to charge one with burning his own property.[62] But a contrary rule has been applied to words charging plaintiff with burning his property with the intent to defraud insurance companies, the statutes in many jurisdictions expressly providing that a burning of this character shall constitute arson.[63] Words fairly imputing the commission of the crime are actionable.[64] Accordingly it has

60 N. W. 205, where, however, the charge of burning a granary was held to be justified.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205 (where the charge was held to be privileged); Wallace *v.* Young, 5 T. B. Mon. 155 (charge of burning a school-house); Logan *v.* Steele, 1 Bibb 593, 4 Am. Dec. 659 (charge of burning a barn).

Louisiana.— Covington *v.* Roberson, 111 La. Ann. 326, 35 So. 586; Taylor *v.* Ellington, 46 La. Ann. 371, 15 So. 499, charge of burning a stable and dwelling-house.

Maine.— See Estes *v.* Estes, 75 Me. 478.

Maryland.— Haines *v.* Campbell, 74 Md. 158, 21 Atl. 702, 28 Am. St. Rep. 240 (charge of burning a barn); Jones *v.* Hungerford, 4 Gill & J. 402 (charge of burning a school-house); House *v.* House, 5 Harr. & J. 125 (charge of burning a barn).

Massachusetts.— Lawler *v.* Earle, 5 Allen 22 (where the charge was held to be privileged); Tebbetts *v.* Goding, 9 Gray 254; Bloss *v.* Tobey, 2 Pick. 320.

Michigan.— Moyer *v.* Pine, 4 Mich. 409, charge of burning a mill. See also Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

New York.— Fulkerson *v.* George, 3 Abb. Pr. 75.

North Carolina.— Reeves *v.* Bowden, 97 N. C. 29, 1 S. E. 549.

Oregon.— Hurd *v.* Moore, 2 Oreg. 85.

Pennsylvania.— Davis *v.* Carey, 141 Pa. St. 314, 21 Atl. 633.

South Carolina.— Gage *v.* Shelton, 3 Rich. 242, charge of burning a barn.

Vermont.— Nichols *v.* Packard, 16 Vt. 83, charge of burning a store building.

Wisconsin.— Frank *v.* Dunning, 38 Wis. 270 (charge of burning a hop house); Noonan *v.* Orton, 32 Wis. 106 (charge of burning a paper mill).

Canada.— See Manly *v.* Corry, 3 U. C. Q. B. 380; McNab *v.* McGrath, 5 U. C. Q. B. O. S 516, holding, however, that a building which had been occupied as a shop, but which for a year or more had not been so used, was not a shop within the meaning of 3 Wm. IV, c. 3.

See 32 Cent. Dig. tit. "Libel and Slander," § 29.

60. Brady *v.* Wilson, 11 N. C. 93.

61. Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525.

62. *Indiana.*— McNeal *v.* Woods, 3 Blackf. 485.

Massachusetts.—Tebbetts *v.* Goding, 9 Gray 254; Bloss *v.* Tobey, 2 Pick. 320, holding that it is not a crime to burn one's own property, unless there is an injury inflicted upon some other person.

Pennsylvania.— Kennelly *v.* Bricker, 31 Pittsb. Leg. J. N. S. 286.

Vermont.— Redway *v.* Gray, 31 Vt. 292, holding that it is not actionable *per se* to charge one with burning the house of his wife which was occupied by him.

Wisconsin.— Frank *v.* Dunning, 38 Wis. 270.

See 32 Cent. Dig. tit. "Libel and Slander," § 30.

63. *California.*— Cahill *v.* Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88.

Maine.— Estes *v.* Estes, 75 Me. 478.

Massachusetts.— Chace *v.* Sherman, 119 Mass. 387; Tebbetts *v.* Goding, 9 Gray 254.

Michigan.— Fowler *v.* Gilbert, 38 Mich. 292, holding that it is not necessary, in order to render the words actionable, that the property be actually insured.

Minnesota.— West *v.* Hanrahan, 28 Minn. 385, 10 N. W. 415.

New York.— Case *v.* Buckley, 15 Wend. 327.

Ohio.— Hilbrant *v.* Simmons, 18 Ohio Cir. Ct. 123, 9 Ohio Cir. Dec. 566.

See 32 Cent. Dig. tit. "Libel and Slander," § 30.

Compare Redway *v.* Gray, 31 Vt. 292, holding that words charging one with burning his property in order to defraud an insurance company do not impute a crime either at common law or under statute.

64. *Georgia.*— Giddens *v.* Mirk, 4 Ga. 364, holding that to charge burning the "camp ground" is to charge arson, although the ownership of the property be not indicated, unless the circumstances give another meaning to the words.

Louisiana.— Covington *v.* Roberson, 111 La. Ann. 326, 35 So. 586.

Maryland.—Haines *v.* Campbell, 74 Md. 158, 21 Atl. 702, 28 Am. St. Rep. 240, holding that the following charge, "I threw the burning of William Witman's barn into Campbell's face," "While I did not tell Campbell that he burnt Witman's barn, I gave him to understand that his nearest neighbors believed that he did," was actionable *per se*.

Massachusetts.— Chace *v.* Sherman, 119 Mass. 387, holding that it is slanderous *per se* to say of plaintiff in reference to property of plaintiff which had previously burned, "He burned it because he was poor and wanted the money."

Ohio.— Hilbrant *v.* Simmons, 18 Ohio Cir. Ct. 123, 9 Ohio Cir. Dec. 566, holding that the statement, "In place of trying to track

been held that the plain and natural import of words charging plaintiff with setting on fire or burning a building is that he has wilfully committed the act so as to be guilty of arson.[65] But it will not be presumed, in a charge of burning one's own property, that the imputation was intended that the burning was with the purpose of defrauding insurance companies.[66]

(v) *Assault and Battery.* An oral charge of assault and battery is held not to be actionable *per se*.[67]

(vi) *Bigamy.* Bigamy is an offense involving moral turpitude and an oral charge thereof is actionable *per se*.[68]

(vii) *Blackmailing or Extortion.* Charging a person with being a blackmailer is equivalent to charging such person with being guilty of the crime of extortion,[69] and is slanderous *per se* in jurisdictions where extortion or blackmailing is recognized as a crime.[70] But a charge of concocting a blackmailing or extortion scheme has been held not to be actionable *per se* as charging a criminal offense.[71]

(viii) *Bribery and Embracery.* Oral words charging bribery,[72] or the solicitation of a bribe,[73] or embracery,[74] are actionable *per se*, since such offenses involve moral turpitude.[75] But to render the words actionable *per se* under this rule the act charged must constitute a criminal offense.[76]

(ix) *Burglary.* Words charging a person with the crime of burglary are

around here you had better been to home tracking the man that burned your house and you would track him in your own door. You know you burned it. You took the money and built a barn with it," is slanderous *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 30.

Compare Waters *v.* Jones, 3 Port. (Ala.) 442, 29 Am. Dec. 261, holding that the words, "He has been at different times, close about where C's gin house was burnt, in disguise, with a sheep skin or bear skin," do not charge arson.

65. Tuttle *v.* Bishop, 30 Conn. 80. *Compare* Jones *v.* Hungerford, 4 Gill & J. (Md.) 402, holding that the charge, "He burnt the school house," did not of itself import a wilful burning.

66. Brettun *v.* Anthony, 103 Mass. 37; Tebbetts *v.* Goding, 9 Gray (Mass.) 254; Frank *v.* Dunning, 38 Wis. 270.

67. Dudley *v.* Horn, 21 Ala. 379; Speaker *v.* McKenzie, 26 Mo. 255 (a statement that plaintiff had whipped his mother); Birch *v.* Benton, 26 Mo. 153 (charging wife beating); Billings *v.* Wings, 7 Vt. 439 (a charge that "he snaked his mother out of doors by the hair of her head"). See also Poe *v.* Grever, 3 Sneed (Tenn.) 664.

68. Heming *v.* Power, 6 Jur. 858, 10 M. & W. 564.

69. Hess *v.* Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Mitchell *v.* Sharon, 51 Fed. 424.

70. Hess *v.* Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Mitchell *v.* Sharon, 51 Fed. 424; Marks *v.* Samuel, [1904] 2 K. B. 287, 73 L. J. K. B. 587, 90 L. T. Rep. N. S. 590, 20 T. L. R. 430, 53 Wkly. Rep. 88, where the accusation was that plaintiff had brought a "blackmailing" action.

In Ohio it was at one time held that words charging a person with being a blackmailer were not actionable *per se*, since they did not impute an actionable offense. Byers *v.* Forest, 4 Ohio Dec. (Reprint) 458, 2 Clev. L. Rep. 194. But a different rule was subsequently laid down under a statute making blackmailing a crime. English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133.

71. Mitchell *v.* Sharon, 51 Fed. 424.

72. Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216; Hoag *v.* Hatch, 23 Conn. 585 (holding that it is actionable *per se* to charge one with giving rum to electors in order to secure his election); Earle *v.* Johnson, 81 Minn. 472, 84 N. W. 332.

73. Quist *v.* Kiichli, 92 Minn. 160, 99 N. W. 642.

74. Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503 (holding that charging one with handing papers to a jury in order to influence the jury is slanderous *per se*); Gibbons *v.* Tarter, 5 Sneed (Tenn.) 644.

75. Hoag *v.* Hatch, 23 Conn. 585.

76. Field *v.* Colson, 93 Ky. 347, 20 S. W. 264, 14 Ky. L. Rep. 315 (holding that words charging that a candidate for office was bribed in a former contest with another person to give up the contest are not actionable *per se*); Tharp *v.* Nolan, 84 S. W. 1168, 27 Ky. L. Rep. 326 (holding that under statute making it an offense for an officer to take any bribe to do or omit to do any act in official capacity, words charging that defendant furnished money to elect plaintiff justice of peace in consideration of his agreeing to vote in a certain way were not actionable *per se*, as the words charge the bribery of a private citizen); Goodrich *v.* Hooper, 97 Mass. 1, 93 Am. Dec. 49; Greenwood *v.* Cobbey, 26 Nebr. 449, 42 N. W. 413 (holding that to say of a city attorney that his opinion is too easily warped for a money consideration is not actionable *per se*).

slanderous *per se*.[77] But to charge another with entering a house and carrying away goods owned by him and another as copartners is not slanderous *per se*.[78]

(x) *Conspiracy.* An oral charge of criminal conspiracy is actionable *per se*.[79] But it has been held not to be slanderous *per se* to charge a husband with entering into conspiracy with his wife to extort money from another, since a man cannot enter into a criminal conspiracy with his wife alone.[80]

(xi) *Counterfeiting.* It is slanderous *per se* to charge one with being a counterfeiter.[81] But it is held not to be actionable *per se* to charge one with passing counterfeit money, unless it is averred that the party knew the money to be counterfeit.[82]

(xii) *Disorderly or Gambling Houses.* Oral words charging one with keeping a disorderly[83] or gambling house[84] are slanderous *per se*.

(xiii) *Embezzlement.* Embezzlement is a purely statutory offense,[85] and any words imputing the commission of the crime as defined by statute are slanderous *per se*.[86] But the act charged must include all of the elements of the crime of

77. Wozelka *v.* Hettrick, 93 N. C. 10; Newskey *v.* Mundt, 4 Leg. Gaz. (Pa.) 230 (where the slanderous charge was held privileged); Burckhalter *v.* Coward, 16 S. C. 435. See also Galloway *v.* Courtney, 10 Rich. (S. C.) 414, where the words, "It was Robert Galloway who broke into his sister's house, and took the money," were held actionable as imputing larceny.

78. Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615.

79. Gay *v.* Homer, 13 Pick. (Mass.) 535 (holding that the words, "Gay and Brown are together in cheating the company," with a proper colloquium, charge conspiracy); Beehler *v.* Steever, 2 Whart. (Pa.) 313.

80. Hornburger *v.* Seiler, 24 Pa. Co. Ct. 476.

81. Thirman *v.* Matthews, 1 Stew. (Ala.) 384; Ormsby *v.* Douglass, 2 Abb. Pr. (N. Y.) 407; Black *v.* Brown, 9 Johns. (N. Y.) 264; Brittain *v.* Allen, 14 N. C. 167; Howard *v.* Stephenson, 2 Hill (S. C.) 408.

82. Church *v.* Bridgman, 6 Mo. 190; Pike *v.* Van Wormer, 5 How. Pr. (N. Y.) 171, 6 How. Pr. 99. See also Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885.

83. *Indiana.*— See Dodge *v.* Lacey, 2 Ind. 212, holding, however, that a charge of keeping a "house of ill fame" in the connection in which it was stated did not support an innuendo that a "house of prostitution" was meant and hence that the words were not actionable.

Massachusetts.— Fitzgerald *v.* Robinson, 112 Mass. 371, holding that the words, "He keeps a bad house and not a proper place of resort: he keeps bad girls there," are actionable as imputing the keeping of a house of ill fame.

Michigan.— Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228, holding that the words, "You are not a decent woman; you do not keep a respectable house," spoken to a woman, are slanderous *per se*.

New Jersey.— Moore *v.* Beck, 71 N. J. L. 7, 58 Atl. 166.

New York.— Bush *v.* Prosser, 11 N. Y. 347; Wright *v.* Paige, 36 Barb. 438 [*affirmed* in 3 Keyes 581, 3 Transcr. App. 134]; Cook *v.* Rief, 52 N. Y. Super. Ct. 302; Martin *v.* Stillwell, 13 Johns. 275, 7 Am. Dec. 374.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757, holding that it is slanderous *per se* to impute that another is a whoremaster.

See 32 Cent. Dig. tit. "Libel and Slander," § 40. And see *supra*, III, E, 2, e.

Letting house for purpose of prostitution. — It is slanderous *per se* to charge one with letting a house for the purpose of prostitution. Halley *v.* Gregg, 74 Iowa 563, 38 N. W. 416.

Words held not actionable per se.— Where defendant said he was going to build a house and paint it red and run it in opposition to plaintiff, and if plaintiff could make money dishonestly, he had the same right, with an innuendo that defendant meant that plaintiff was keeping a place of prostitution, it was held that the words without additional averments did not charge a crime. Richmond *v.* Post, 69 Minn. 457, 72 N. W. 704. To say of another, "He is going to start a house of ill fame," is not actionable *per se*. Fanning *v.* Chace, 17 R. I. 388, 22 Atl. 275, 33 Am. St. Rep. 878, 13 L. R. A. 134.

84. Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466, holding that the charge, "He keeps a gambling place," or "gambling hell" is actionable *per se*. *Compare* McGuire *v.* Blair, 4 N. C. 328.

85. See Embezzlement, 15 Cyc. 489 *et seq.*

86. *Georgia.*— Elsas *v.* Browne, 68 Ga. 117; Franklin *v.* Browne, 67 Ga. 272.

Illinois.— Bihler *v.* Gockley, 18 Ill. App. 496, words charging one with larceny as bailee.

Indiana.— Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53; Taylor *v.* Short, 40 Ind. 506; Becket *v.* Sterrett, 4 Blackf. 499 (holding that words by a partner charging his copartner with "pilfering" out of the store are actionable *per se*); Hays *v.* Allen, 3 Blackf. 408 (words charging a postmaster with keeping and embezzling letters).

Kentucky.— Gill *v.* Bright, 6 T. B. Mon. 130, holding that to charge one who has the

embezzlement.[87] Thus if the words in their plain and natural import do not charge the crime of embezzlement but impute no more than a breach of trust, they are not actionable *per se*.[88]

(XIV) *False Pretenses and Kindred Crimes.* An oral imputation of the commission of the crime of false pretenses or of a kindred offense is actionable *per se*.[89] It is not necessary that the words should be such as to describe the

care of goods with stealing them is slander. See also Hume *v.* Arrasmith, 1 Bibb 165, 4 Am. Dec. 626.

Louisiana.— Muse *v.* Acey, 37 La. Ann. 383, holding that it is slanderous to say of an attorney that if money were paid into his hands the party entitled thereto would not get a dollar of it.

Maryland.— Schulze *v.* Fox, 53 Md. 37; Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Goodrich *v.* Hooper, 97 Mass. 1, 93 Am. Dec. 49; Clay *v.* Brigham, 8 Gray 161.

Michigan.— Mains *v.* Whiting, 87 Mich. 172, 49 N. W. 559 (holding that the words, "You are the dirty sewer through which all the slums of this embezzlement have flowed," and "If that twenty dollars had been turned over to you or to Van Wagner, the company would never have seen twenty cents of it," are slanderous *per se*); Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855 (holding that a charge that plaintiff "went to Lansing, and collected $1,400 of our money, and went west with it," is actionable as charging embezzlement); Taylor *v.* Kneeland, 1 Dougl. 67 (words charging a postmaster with embezzling letters are actionable *per se*).

Nebraska.— Chaplin *v.* Lee, 18 Nebr. 440, 25 N. W. 609.

New Hampshire.—Harris *v.* Burley, 8 N. H. 256, words charging a partner in a business with taking things which did not belong to him are actionable *per se*.

New York.— Dodge *v.* Bradstreet Co., 59 How. Pr. 104, holding that to call one a defaulter under circumstances imputing a crime is actionable.

Pennsylvania.— Beck *v.* Stitzel, 21 Pa. St. 522, holding that to say of an administrator that he had "smuggled away" property belonging to the estate is slanderous *per se*.

South Carolina.— Stokes *v.* Stuckey, 1 McCord 562, holding that it is actionable *per se* to charge one with stealing cotton which he had taken to gin for another.

Vermont.— See Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

Virginia.— Hoyle *v.* Young, 1 Wash. 150, 1 Am. Dec. 446, holding that it is actionable *per se* to charge a partner with having received more tobacco than he had accounted for to his partners.

See 32 Cent. Dig. tit. "Libel and Slander," § 41.

87. Jaeger *v.* Beberdick, 70 N. J. L. 372, 57 Atl. 157 (holding that where plaintiff had contracted to build houses for defendant and it was the duty of plaintiff to use money paid him by defendant to pay for labor and materials, and defendant had stopped payment on a check made to plaintiff for the reason that "he (meaning the plaintiff) misappropriated the money," the words will not bear an innuendo of embezzlement as there was no duty on part of plaintiff to use any specific fund to pay for the materials and labor); Goodrich *v.* Hooper, 97 Mass. 1, 93 Am. Dec. 49 (holding that words charging that an officer of the government had failed to pay over a part of certain money he had collected for the government, but not charging that he had failed to pay on demand, are not actionable as charging embezzlement).

88. *Indiana.*— Burke *v.* Miller, 6 Blackf. 155.

Kentucky.— Hawn *v.* Smith, 4 B. Mon. 385; Caldwell *v.* Abbey, Hard. 529, holding that a charge of embezzling goods is not actionable as it imports merely a breach of trust.

Massachusetts.— Allen *v.* Hillman, 12 Pick. 101, holding that to say of a treasurer of a Masonic lodge, "He has robbed the treasury," imputes only a breach of trust and is not actionable *per se*.

Michigan.— See Taylor *v.* Kneeland, 1 Dougl. 67.

Pennsylvania.— McClurg *v.* Ross, 5 Binn. 218.

England.— See Williams *v.* Stott, 2 L. J. Exch. 303, 3 L. J. Exch. 110, 3 Tyr. 688.

See 32 Cent. Dig. tit. "Libel and Slander," § 41.

89. *Illinois.*—Lafollett *v.* McCarthy, 18 Ill. App. 87; Murphy *v.* Daugherty, 10 Ill. App. 214, holding that it is actionable to orally charge another with swindling by making false entries in partnership books.

Indiana.— Graeter *v.* Hogan, 2 Ind. App. 193, 28 N. E. 209.

Iowa.— Wilkin *v.* Tharp, 55 Iowa 609, 8 N. W. 467 (holding, however, that a person cannot commit the crime of cheating by false pretenses in connection with weighing scales, unless he has charge of the weighing, and hence that to charge a purchaser with lifting up on the scales when goods he is purchasing are weighed does not charge him with the crime unless he was doing the weighing); Mott *v.* Dawson, 46 Iowa 533 (holding that where the words charged that plaintiff watered a lot of cattle sold by him that were not to be watered within twelve hours before weighing, the charge is actionable as imputing an intent on plaintiff's part to cheat by false pretenses).

Kentucky.—See Winsette *v.* Hunt, 53 S. W. 522, 21 Ky. L. Rep. 922, holding, however, that to say of another, "He (meaning plain-

offense with technical accuracy.[90] It is sufficient if they impute the crime, when taken in their plain and natural import,[91] as for instance when there is a general description of the offense by name.[92] A charge merely of attempting to obtain money under false pretenses is not actionable.[93]

(xv) *FORGERY.* It is slanderous *per se* to charge one with the crime of forgery.[94] Any words which when taken in connection with the circumstances under which they are alleged to have been spoken are calculated to induce the hearers to suspect or believe that plaintiff was guilty of the crime are actionable *per se*.[95] But the words must in their plain and obvious sense import a charge of forgery.[96] The imputation may be as effectually made by way of interrogation as by an

tiff) made false statements about, and misrepresented the lot he (Winsette) had traded to me," does not charge a crime.

Massachusetts.— Chapman *v.* Ordway, 5 Allen 593.

Michigan.— See Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855.

Pennsylvania. — Weierbach *v.* Trone, 2 Watts & S. 408, holding, however, that a charge of cheating which does not affect the public and may be guarded against by common prudence is not actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 68.

90. Lafollett *v.* McCarthy, 18 Ill. App. 87; Graeter *v.* Hogan, 2 Ind. App. 193, 28 N. E. 209.

91. Graeter *v.* Hogan, 2 Ind. App. 193, 28 N. E. 209.

92. Lafollett *v.* McCarthy, 18 Ill. App. 87.

93. Hotchkiss *v.* Olmstead, 37 Ind. 74.

94. *Arkansas.*—Edwards *v.* Havener, (1896) 38 S. W. 342.

Connecticut.— Nichols *v.* Hayes, 13 Conn. 155.

Illinois.— Zuckerman *v.* Sonnenschein, 62 Ill. 115; Ingalls *v.* Allen, 1 Ill. 300.

Indiana.— Hotchkiss *v.* Olmstead, 37 Ind. 74; Creelman *v.* Marks, 7 Blackf. 281; Drummond *v.* Leslie, 5 Blackf. 453; Atkinson *v.* Reding, 5 Blackf. 39 (words charging a person with having forged a deposition); Kent *v.* David, 3 Blackf. 301; Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041.

Kentucky.— McGeever *v.* Kennedy, 42 S. W. 114, 19 Ky. L. Rep. 845.

Maryland.— Arnold *v.* Cost, 3 Gill & J. 219, 22 Am. Dec. 302, words charging that plaintiff had forged an instrument purporting to be a certificate that a certain person who had at one time been a slave had been freed by his master.

Massachusetts.— Clarke *v.* Zettick, 153 Mass. 1, 26 N. E. 234; Waters *v.* Gilbert, 2 Cush. 27; Gay *v.* Homer, 13 Pick. 535, charging one with forging way-bills and books in order to screen a defalcation by a third party.

Michigan.— Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863.

Missouri.— Crecelius *v.* Bierman, 59 Mo. App. 513.

New York.— Stiles *v.* Comstock, 9 How. Pr. 48; Thorn *v.* Moser, 1 Den. 488; Lister *v.* Wright, 2 Hill 320; Andrews *v.* Woodmansee, 15 Wend. 232; Alexander *v.* Alexander, 9 Wend. 141 (charging one with forging a name to a petition to the legislature to procure lands); Harmon *v.* Carrington, 8 Wend. 488; Gorham *v.* Ives, 2 Wend. 534; Jarvis *v.* Hatheway, 3 Johns. 180, 3 Am. Dec. 473.

North Carolina.— Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386; Ricks *v.* Cooper, 10 N. C. 587.

Ohio.— Seely *v.* Blair, Wright 683.

Tennessee.— Pursell *v.* Archer, Peck 317, holding that to orally charge one with forging a pass for a negro is slanderous *per se*.

England.— Jones *v.* Herne, 2 Wils. C. P. 87, holding that the words, "You . . . are a rogue, and I . . . will prove you a rogue, for you forged my name," are actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 42.

95. Drummond *v.* Leslie, 5 Blackf. (Ind.) 453 (holding that the words, "Some one forged that receipt, but I do not say who forged it, . . . but Leslie (meaning the plaintiff) can say who did it," are actionable as charging forgery); Gorham *v.* Ives, 2 Wend. (N. Y.) 534.

96. Mills *v.* Taylor, 3 Bibb (Ky.) 469.

Words held not to impute forgery.— It has been held not to be slanderous *per se* as imputing forgery to charge plaintiff with having sued defendant in a note that he had never signed (Creelman *v.* Marks, 7 Blackf. (Ind.) 281); to say of one, "I will take him to Bow-street upon a charge of forgery" (Harrison *v.* King, 4 Price 46, 7 Taunt. 431, 18 Rev. Rep. 524, 2 E. C. L. 432); to charge one with adding the words "or common" after the word "special" and before the word "fund" on a county warrant, as the legal effect of the instrument was not changed (Edwards *v.* Havener, (Ark. 1896) 38 S. W. 342). So to say of plaintiff that "he, or somebody, had altered the credit, or indorsement on a note, from a larger to a less sum, and that the note would speak for itself" has been held not to charge a crime against plaintiff. Ingalls *v.* Allen, 1 Ill. 300. So where defendant in speaking of plaintiff and of a note given by defendant to plaintiff said, "I never put my name on the back of the note, but she must have done it," the words are not actionable in the absence of an averment explaining the meaning of the words. Atkinson *v.* Scammon, 22 N. H. 40. Where a person's name is signed to a note by an assumed agent, his denial of the signature and the authority of such agent to sign is

affirmative charge.[97] As a general rule it is actionable *per se* to call one a "forger,"[98] but a mere charge of forgery does not necessarily mean felonious forgery, for which alone an action lies;[99] and words stating that a person is a "forger" are not actionable *per se*, where such words are coupled with a charge of some act which does not of itself constitute forgery.[1] The charge must be made concerning an instrument capable of being forged.[2] Where there is a charge of forging a name to a note, the natural meaning conveyed is that the note was susceptible of forgery and the words are actionable *per se*.[3]

(xvi) *Homicide.* It is slanderous *per se* to charge a person with the commission of the crime of murder or manslaughter;[4] and it is immaterial that no such murder has been committed by any one, provided such fact is not known to the persons who heard the charge.[5] Thus to call one a "murderer" is slanderous *per se*.[6] Moreover any words which are calculated to induce the hearers to believe that the party charged is guilty of the crime are actionable *per se*.[7] Since every

not actionable *per se*. Andrews *v.* Woodmansee, 15 Wend. (N. Y.) 232.

97. Gorham *v.* Ives, 2 Wend. (N. Y.) 534, holding that where defendant stated that a certain portion of a note had been forged and asked witness if he did not think the part forged was in plaintiff's handwriting, and also stated that he showed the note to another who said the part forged was in plaintiff's handwriting, the words were actionable *per se*.

98. Zuckerman *v.* Sonnenschein, 62 Ill. 115; Hotchkiss *v.* Olmstead, 37 Ind. 74.

99. Alexander *v.* Alexander, 9 Wend. (N. Y.) 141.

1. Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386.

2. *Kentucky.*— Jackson *v.* Weisiger, 2 B. Mon. 214, holding that to charge a person with forging and publishing a letter representing that the publisher and the individual whose act it purports to be are partners is not actionable *per se*.

Missouri.— Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609, holding that the charge, "He forged my name to one of his rent receipts," without additional averments, is not actionable *per se*.

New York.— Cumming *v.* Arrowsmith, 5 City Hall Rec. 52.

Ohio.—Peairs *v.* Harrah, Tapp. 254, holding that it is not actionable to say that plaintiff had forged a name to a paper which he had given to a session of the church.

Pennsylvania.— Miller *v.* Rittinger, 2 Pearson 351, holding that to charge that one forged a name to a recommendation for a certain medicine is not actionable *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 42.

3. Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863.

4. *Alabama.*—Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Taylor *v.* Casey, Minor 258.

Indiana.— McFadin *v.* David, 78 Ind. 445, 41 Am. Rep. 587; O'Conner *v.* O'Conner, 24 Ind. 218; Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456; Jones *v.* Diver, 22 Ind. 184.

Massachusetts.— Thomas *v.* Blasdale, 147 Mass. 438, 18 N. E. 214; Young *v.* Cook, 144 Mass. 38, 10 N. E. 719.

Missouri.— Noeninger *v.* Vogt, 88 Mo. 589; Curry *v.* Collins, 37 Mo. 324.

New Hampshire.— Tenney *v.* Clement, 10 N. H. 52.

New York.— Titus *v.* Sumner, 44 N. Y. 266; Carroll *v.* White, 33 Barb. 615; Secor *v.* Harris, 18 Barb. 425; Lister *v.* Wright, 2 Hill 320.

North Carolina.— Dudley *v.* Robinson, 24 N. C. 141; Sugart *v.* Carter, 18 N. C. 8.

Ohio.— Liles *v.* Gaster, 42 Ohio St. 631.

Pennsylvania.— Eckart *v.* Wilson, 10 Serg. & R. 44.

Tennessee.— Hays *v.* Hays, 1 Humphr. 402; Howell *v.* Cheatham, Cooke 247.

Texas.— Smith *v.* State, 32 Tex. 594.

Wisconsin.— Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456 (holding that to say of one, "She is slow poisoning her husband," is actionable as charging the giving of poison with intent to kill); Langton *v.* Hagerty, 35 Wis. 150; Montgomery *v.* Deeley, 3 Wis. 709.

England.— Peake *v.* Oldham, Cowp. 275, 2 W. Bl. 960; Ford *v.* Primrose, 5 D. & R. 287, 3 L. J. K. B. O. S. 40, 16 E. C. L. 234.

See 32 Cent. Dig. tit. "Libel and Slander," § 43.

5. Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Tenney *v.* Clement, 10 N. H. 52; Sugart *v.* Carter, 18 N. C. 8.

6. Noeninger *v.* Vogt, 88 Mo. 589. See also Titus *v.* Sumner, 44 N. Y. 266.

7. *Indiana.*— O'Conner *v.* O'Conner, 24 Ind. 218 (holding that the words, "In room of her trying to help him, she seemed to do all she could to burry him out of the world," are actionable *per se*); Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456 (holding that the words, "They have hurried more than one traveler out of the way for his money," and, "They fixed up a bottle of whisky and gave it to Luddick and Wheedon, who took it . . . and drank it, and it killed them both," are actionable *per se*.

New Hampshire.— Tenney *v.* Clement, 10 N. H. 52, holding that it is actionable *per se* to charge that a murder took place and that plaintiff "had a hand in it."

New York.— Secor *v.* Harris, 18 Barb. 425,

killing is presumably felonious,[8] a charge that one has killed another is actionable *per se* unless explained.[9]

(XVII) *INTOXICATING LIQUORS.* Words imputing the sale of spirituous or intoxicating liquors in violation of law are slanderous *per se*.[10] But words charging a person with soliciting and obtaining liquor from one who sells it in violation of law have been held not to impute the commission of a public offense, and hence not to be actionable *per se*.[11]

(XVIII) *LARCENY*—(A) *In General.* As a general rule to charge one orally with the crime of larceny is actionable *per se*.[12] In order to be actionable *per se*,

holding that to say of a physician that he gave the speaker's children medicine and it killed them, that they did not live long after they took it and died right off the same day, is actionable *per se*.

Ohio.— Liles *v.* Gaster, 42 Ohio St. 631, holding that words charging that a person ran away because he had poisoned a decedent named are actionable *per se*.

Wisconsin.— Langton *v.* Hagerty, 35 Wis. 150, holding that the words, "He . . . murdered the man," are actionable *per se*, although the person alleged to have been murdered is not named.

England.— Peake *v.* Oldham, Cowp. 275, 2 W. Bl. 960, holding that the words, "You are guilty," and, "You are guilty . . . rather than you should go without a hangman I will hang you," with proper innuendo, are actionable *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 43.

Imputations held not to impute murder.— It has been held not to be slanderous *per se* to charge one with being a "bushwhacker" (Curry *v.* Collins, 37 Mo. 324); to say of a physician, "In my opinion the bitters that Diver fixed for Smith were the cause of his death" (Jones *v.* Diver, 22 Ind. 184); to say of a person, "That child belonged to Aunt Jerusha, and Eliza Higgins was her aid." "Eliza Higgins buried it." "Eliza Higgins had the young one in her cellar two or three days" (Young *v.* Cook, 144 Mass. 38, 10 N. E. 719); or to say that A tried to get his wife to take powders containing poison and arsenic and that if she had taken them they would have killed, as there was no administering of the poison (Rock *v.* McClarnon, 95 Ind. 415). So to charge that plaintiff administered morphine to another on the day he made his will does not charge that death ensued from the administration of the morphine and is not actionable *per se*. McFadin *v.* David, 78 Ind. 445, 41 Am. Rep. 587.

8. Carroll *v.* White, 33 Barb. (N. Y.) 615.

9. *Alabama.*— Taylor *v.* Casey, Minor 258, holding that words charging homicide generally without a charge that it was felonious are actionable in themselves.

Indiana.— O'Conner *v.* O'Conner, 24 Ind. 218, holding that the words, "They have killed my son," are actionable as imputing murder.

Massachusetts.— Thomas *v.* Blasdale, 147 Mass. 438, 18 N. E. 214, holding that the words, "He knows how she came to her death. He killed her. He is to blame for her death. There was foul play there," are actionable *per se*.

New York.— Carroll *v.* White, 33 Barb. 615, holding that to say of a physician, "He has killed six children," is actionable as charging a crime.

Pennsylvania.— Eckart *v.* Wilson, 10 Serg. & R. 44, holding that the words, "You have killed Bob Waters; you have poisoned him, and I can prove it," are actionable *per se*.

Tennessee.— Hays *v.* Hays, 1 Humphr. 402, holding that the charge, "You have killed one negro and nearly killed another," was capable of a felonious meaning and that it was proper to submit to the jury the question whether the words imported a crime.

See 32 Cent. Dig. tit. "Libel and Slander," § 43.

10. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516 (holding that to say of one that he is the greatest rumseller in town, taking the words in their natural and ordinary signification, either imports a criminal charge *ex vi termini*, or is susceptible of that construction, and as imputing a criminal charge is actionable *per se*); Smith *v.* Smith, 2 Sneed (Tenn.) 473; Holton *v.* Muzzy, 30 Vt. 365. *Compare* Redway *v.* Gray, 31 Vt. 292.

11. Sterling *v.* Jugenheimer, 69 Iowa 210, 28 N. W. 559.

12. *Alabama.*— Berdeaux *v.* Davis, 58 Ala. 611; Gandy *v.* Humphries, 35 Ala. 617; Holley *v.* Burgess, 9 Ala. 728; Bradley *v.* Gibson, 9 Ala. 406; Adams *v.* Ward, 1 Stew. 42. See also Long *v.* Musgrove, 75 Ala. 158; Kirksey *v.* Fike, 29 Ala. 206; Robertson *v.* Lea, 1 Stew. 141.

Arkansas.— Gaines *v.* Belding, 56 Ark. 100, 19 S. W. 236.

California.— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Smullen *v.* Phillips, 92 Cal. 408, 28 Pac. 442; Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1; Frolich *v.* McKiernan, 84 Cal. 177, 24 Pac. 114; Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863; Pink *v.* Catanich, 51 Cal. 420; Scott *v.* Harbor, 18 Cal. 704.

Connecticut.— Woodruff *v.* Richardson, 20 Conn. 238; Williams *v.* Miner, 18 Conn. 464; Bailey *v.* Hyde, 3 Conn. 463, 8 Am. Dec. 202; Watson *v.* Churchill, 5 Day 256.

Delaware.— Kennedy *v.* Woodrow, 6 Houst. 46.

Georgia.— Roberts *v.* Ramsey, 86 Ga. 432, 12 S. E. 644; Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219; Stancell *v.* Pryor, 25 Ga. 40.

Illinois.— Hintz *v.* Graupner, 138 Ill. 158,

however, it is not necessary that the words spoken should by themselves constitute a technical charge of crime or that there should be a directly affirmative

27 N. E. 935 [*affirming* 37 Ill. App. 510]; Stumer *v.* Pitchman, 124 Ill. 250, 15 N. E. 757 [*affirming* 22 Ill. App. 399]; Miller *v.* Johnson, 79 Ill. 58; Zuckerman *v.* Sonnenschein, 62 Ill. 115; Upham *v.* Dickinson, 50 Ill. 97; Crotty *v.* Morrissey, 40 Ill. 447; Wilborn *v.* Odell, 29 Ill. 456; Stewart *v.* Howe, 17 Ill. 71; Ayres *v.* Grider, 15 Ill. 37; Gilmer *v.* Eubank, 13 Ill. 271; McKee *v.* Ingalls, 5 Ill. 30; McGilvray *v.* Springett, 68 Ill. App. 275; Balcom *v.* Michaels, 49 Ill. App. 379; Halsey *v.* Stillman, 48 Ill. App. 413; Peters *v.* Bourneau, 22 Ill. App. 177; Welker *v.* Butler, 15 Ill. App. 209; Murphy *v.* Daugherty, 10 Ill. App. 214; McGregor *v.* Eakin, 3 Ill. App. 340.

Indiana.— Wilson *v.* McCrory, 86 Ind. 170; Marks *v.* Jacobs, 76 Ind. 216; Porter *v.* Choen, 60 Ind. 338; Durrah *v.* Stillwell, 59 Ind. 139; Hutts *v.* Hutts, 51 Ind. 581; Reynolds *v.* Ross, 42 Ind. 387; Keesling *v.* McCall, 36 Ind. 321; Carmichael *v.* Shiel, 21 Ind. 66; Justice *v.* Kirlin, 17 Ind. 588; Gaul *v.* Fleming, 10 Ind. 253; Thomason *v.* Grimes, 5 Ind. 385; Hickley *v.* Grosjean, 6 Blackf. 351; Nelson *v.* Robe, 6 Blackf. 204; Burke *v.* Miller, 6 Blackf. 155; Hoskins *v.* Tarrence, 5 Blackf. 417, 35 Am. Dec. 129; Alley *v.* Neely, 5 Blackf. 200; Becket *v.* Sterrett, 4 Blackf. 499; Swann *v.* Rary, 3 Blackf. 298; Cefret *v.* Burch, 1 Blackf. 400; Whittam *v.* Young, 1 Blackf. 299; Short *v.* Acton, 33 Ind. App. 361, 71 N. E. 505; Hinesley *v.* Sheets, 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. Rep. 356. See also McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Harrison *v.* Manship, 120 Ind. 43, 22 N. E. 87; Casey *v.* Hulgan, 118 Ind. 590, 21 N. E. 322; McCoy *v.* McCoy, 106 Ind. 492, 7 N. E. 188; Tucker *v.* Call, 45 Ind. 31; Meyer *v.* Bohlfing, 44 Ind. 238; Hart *v.* Coy, 40 Ind. 553; Taylor *v.* Short, 40 Ind. 506; Kerschbaugher *v.* Slusser, 12 Ind. 453; Gates *v.* Meredith, 7 Ind. 440; Thompson *v.* Grimes, 5 Ind. 385; Prichard *v.* Lloyd, 2 Ind. 154; Stucker *v.* Davis, 8 Blackf. 414; Hays *v.* Mitchell, 7 Blackf. 117; Wyant *v.* Smith, 5 Blackf. 293; Linville *v.* Earlywine, 4 Blackf. 469; Offutt *v.* Earlywine, 4 Blackf. 460, 32 Am. Dec. 40; Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479.

Iowa.—O'Donnell *v.* Hastings, 68 Iowa 271, 26 N. W. 433; Prime *v.* Eastwood, 45 Iowa 640; Hess *v.* Fockler, 25 Iowa 9; Fisher *v.* Tice, 20 Iowa 479; Barton *v.* Holmes, 16 Iowa 252; De Moss *v.* Haycock, 15 Iowa 149; Karney *v.* Paisley, 13 Iowa 89; Hicks *v.* Walker, 2 Greene 440; Parker *v.* Lewis, 2 Greene 311; Pierson *v.* Steortz, Morr. 136. See also Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279; Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785; Long *v.* Peters, 47 Iowa 239 (where, however, the charge was privileged); Georgia *v.* Kepford, 45 Iowa 48; McCaleb *v.* Smith, 22 Iowa 242.

Kansas.— Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181; Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585; Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; McNamara *v.* Shannon, 8 Bush 557; Barr *v.* Gaines, 3 Dana 258; Gill *v.* Bright, 6 T. B. Mon. 130; Samuel *v.* Bond, Litt. Sel. Cas. 158; Jones *v.* McDowell, 4 Bibb 188; Eastland *v.* Caldwell, 2 Bibb 21, 4 Am. Dec. 668; Hume *v.* Arrasmith, 1 Bibb 165, 4 Am. Dec. 626; Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291. See also Brown *v.* Piner, 6 Bush 518; Grimes *v.* Coyle, 6 B. Mon. 301 (where, however, the words were privileged); Faris *v.* Starke, 9 Dana 128, 33 Am. Dec. 536 (where, however, the charge was held privileged); Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122; Porter *v.* Hughey, 2 Bibb 232; Clay *v.* Barkley, Ky. Dec. 67; Blackburn *v.* Clark, 41 S. W. 430, 19 Ky. L. Rep. 659; Nixon *v.* Wright, 11 S. W. 8, 10 Ky. L. Rep. 863 (where, however, the truth was proved).

Louisiana.— Caspar *v.* Prosdame, 46 La. Ann. 36, 14 So. 317; Sibley *v.* Lay, 44 La. Ann. 936, 11 So. 581; Savoie *v.* Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Doullut *v.* McManus, 37 La. Ann. 800; Lobe *v.* Cary, 33 La. Ann. 914; Dufort *v.* Abadie, 23 La. Ann. 280; Mallerich *v.* Mertz, 19 La. Ann. 194; Mohrman *v.* Ohse, 17 La. Ann. 64; Cook *v.* Tardos, 6 La. Ann. 779.

Maine.— Sanborn *v.* Fickett, 91 Me. 364, 40 Atl. 66; Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147; Wing *v.* Wing, 66 Me. 62, 22 Am. Rep. 548; Burbank *v.* Horn, 39 Me. 233. See also Brown *v.* Brown, 14 Me. 317.

Maryland.— Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583; Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Beeler *v.* Jackson, 64 Md. 589, 2 Atl. 916 (where, however, the communication was privileged); Fawsett *v.* Clark, 48 Md. 494, 30 Am. Rep. 481; Robinett *v.* Ruby, 13 Md. 95; Long *v.* Eakle, 4 Md. 454; Bonner *v.* Boyd, 3 Harr. & J. 278; Wheatley *v.* Wallis, 3 Harr. & J. 1.

Massachusetts.— Billings *v.* Fairbanks, 136 Mass. 177 (where, however, the communication was privileged); Walker *v.* Flynn, 130 Mass. 151; Dale *v.* Harris, 109 Mass. 193 (where the charge was held privileged); Krebs *v.* Oliver, 12 Gray 239; Clay *v.* Brigham, 8 Gray 161; Watson *v.* Moore, 2 Cush. 133; Dunnell *v.* Fiske, 11 Metc. 551; Allen *v.* Perkins, 17 Pick. 369; Pond *v.* Hartwell, 17 Pick. 269; Carter *v.* Andrews, 16 Pick. 1; Wonson *v.* Sayward, 13 Pick. 402, 23 Am. Dec. 691; Hix *v.* Drury, 5 Pick. 296; Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79.

Michigan.— Blount *v.* Mason, 140 Mich. 1, 103 N. W. 525; Line *v.* Spies, 139 Mich. 484, 102 N. W. 993; Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135 (where the charge was privileged); Youngs *v.* Adams, 113 Mich. 199, 71 N. W. 585; Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245; McNaughton *v.*

charge; it is sufficient if the words would naturally and presumably be understood

Quay, 102 Mich. 142, 60 N. W. 474; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910. See also Schuyler *v.* Anderson, 91 Mich. 635, 52 N. W. 64; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687.

Minnesota.— Metcalf *v.* Collinson, 95 Minn. 238, 103 N. W. 1022; Laury *v.* Evans, 87 Minn. 396, 92 N. W. 224; Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Warner *v.* Lockerby, 28 Minn. 28, 8 N. W. 879, 31 Minn. 421, 18 N. W. 145, 821; Quinn *v.* Scott, 22 Minn. 456; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Mississippi.— Alabama, etc., R. Co. *v.* Brooks, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528, where, however, the charge was privileged. See also Jones *v.* Edwards, 57 Miss. 28; Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Hancock *v.* Blackwell, 139 Mo. 440, 41 S. W. 205; Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Lewis *v.* McDaniel, 82 Mo. 577; Rammell *v.* Otis, 60 Mo. 365; Hall *v.* Adkins, 59 Mo. 144; Pennington *v.* Meeks, 46 Mo. 217; Houston *v.* Lane, 39 Mo. 495; Weaver *v.* Hendrick, 30 Mo. 502; Johnson *v.* Dicken, 25 Mo. 580; Pasley *v.* Kemp, 22 Mo. 409; Gardner *v.* Self, 15 Mo. 480; Estes *v.* Antrobus, 1 Mo. 197, 13 Am. Dec. 496; Grimes *v.* Thorp, 113 Mo. App. 652, 88 S. W. 638; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609; Bridgman *v.* Armer, 57 Mo. App. 528; Baldwin *v.* Fries, 46 Mo. App. 288; Morgan *v.* Rice, 35 Mo. App. 591; Boyce *v.* Aubuchon, 34 Mo. App. 315; Casey *v.* Aubuchon, 25 Mo. App. 91; Wood *v.* Hilbish, 23 Mo. App. 389. See also Christal *v.* Craig, 80 Mo. 367; Elder *v.* Oliver, 30 Mo. App. 575; Steinecke *v.* Marx, 10 Mo. App. 581.

Nebraska.— Chaplin *v.* Lee, 18 Nebr. 440, 25 N. W. 609.

New Hampshire.— Moore *v.* Butler, 48 N. H. 161; Robinson *v.* Keyser, 22 N. H. 323. See also Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573; Blanchard *v.* Fisk, 2 N. H. 398.

New Jersey.— Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261. See also Bartow *v.* Brands, 15 N. J. L. 248; Ogden *v.* Riley, 14 N. J. L. 186, 25 Am. Dec. 513.

New York.— Hayes *v.* Ball, 72 N. Y. 418; Titus *v.* Sumner, 44 N. Y. 266; Bisbey *v.* Shaw, 12 N. Y. 67; Slayton *v.* Hemken, 91 Hun 582, 36 N. Y. Suppl. 249; Sherman *v.* Rogers, 70 Hun 425, 24 N. Y. Suppl. 390; Collyer *v.* Collyer, 50 Hun 422, 3 N. Y. Suppl. 310; Van Akin *v.* Caler, 48 Barb. 58; Maybee *v.* Fisk, 42 Barb. 326; Coleman *v.* Playsted, 36 Barb. 26; Gomez *v.* Joyce, 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 337; Dolevin *v.* Wilder, 7 Rob. 319; Palmer *v.* Lang, 7 Daly 33; Maeske *v.* Smith, 35 N. Y. St. 541, 12 N. Y. Suppl. 423; Deyo *v.* Brundage, 13 How. Pr. 221; Jaycocks *v.* Ayres, 7 How. Pr. 215; Anonymous, 3 How. Pr. 406; Lister *v.* Wright, 2 Hill 320; Beach *v.* Ranney, 2 Hill 309; Cornelius *v.* Van Slyck, 21 Wend. 70; Phillips *v.* Barber, 7 Wend. 439; Van Ankin *v.* Westfall, 14 Johns. 233; Dexter *v.* Taber, 12 Johns. 239; Gidney *v.* Blake, 11 Johns. 54; Miller *v.* Miller, 8 Johns. 74, 77. See also Hill *v.* Durham House Drainage Co., 79 Hun 335, 29 N. Y. Suppl. 427 (where, however, the words were privileged); Ayres *v.* Covill, 18 Barb. 260; Quinn *v.* O'Gara, 2 E. D. Smith 388; Snell *v.* Snell, 3 Abb. Pr. 426; Smith *v.* Kerr, 1 Edm. Sel. Cas. 190 (where the words were privileged); Baum *v.* Clause, 5 Hill 196; Shepard *v.* Merrill, 13 Johns. 475.

North Carolina.— Burton *v.* March, 51 N. C. 409; Holmes *v.* Johnson, 33 N. C. 55; Wall *v.* Hoskins, 27 N. C. 177; Dudley *v.* Robinson, 24 N. C. 141; James *v.* Clarke, 23 N. C. 397; Shipp *v.* McCraw, 7 N. C. 463, 9 Am. Dec. 611. See also McCurry *v.* McCurry, 82 N. C. 296; Stokes *v.* Arey, 53 N. C. 66; Idol *v.* Jones, 13 N. C. 162.

North Dakota.— Wrege *v.* Jones, (1904) 100 N. W. 705.

Ohio.— Bell *v.* McGinness, 40 Ohio St. 204, 48 Am. Rep. 673; Cheadle *v.* Buell, 6 Ohio 67; Wilson *v.* Apple, 3 Ohio 270; Kolb *v.* Wolf, 1 Disn. 136; Zehring *v.* Zehring, 1 Disn. 25; Phillips *v.* Le June, 25 Ohio Cir. Ct. 107; Reinhardt *v.* Faschnacht, 4 Ohio Cir. Ct. 321, 2 Ohio Cir. Dec. 571; Tedtman *v.* Hancock, 1 Ohio Cir. Ct. 238, 1 Ohio Cir. Dec. 129. See also Brown *v.* Myers, 40 Ohio St. 99; Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Seaton *v.* Cordray, Wright 101.

Oregon.— Quigley *v.* McKee, 12 Oreg. 22, 5 Pac. 347, 53 Am. Rep. 320.

Pennsylvania.— Rowand *v.* De Camp, 96 Pa. St. 493; Drown *v.* Allen, 91 Pa. St. 393; Stitzell *v.* Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396; Herst *v.* Borbidge, 57 Pa. St. 62 [*affirming* 6 Phila. 391]; Thompson *v.* Barkley, 27 Pa. St. 263; Dottarer *v.* Bushey, 16 Pa. St. 204; Sbultz *v.* Chambers, 8 Watts 300; McKennon *v.* Greer, 2 Watts 352; Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380; Walter *v.* Erdman, 4 Pa. Super. Ct. 348; Kerr *v.* Atticks, 20 Pa. Co. Ct. 233; Newskey *v.* Mundt, 4 Leg. Gaz. 230, where the charge was privileged. See also Stitzell *v.* Reynolds, 59 Pa. St. 488; Lukehart *v.* Byerly, 53 Pa. St. 418; Stees *v.* Kemble, 27 Pa. St. 112; Bash *v.* Sommer, 20 Pa. St. 159; Findley *v.* Bear, 8 Serg. & R. 571; McClurg *v.* Ross, 5 Binn. 218.

South Carolina.— Mayson *v.* Sheppard, 12 Rich. 254; Galloway *v.* Courtney, 10 Rich. 414; Marshall *v.* Gunter, 6 Rich. 419; Morgan *v.* Livingston, 2 Rich. 573; Poppenheim *v.* Wilkes, 1 Strobh. 275; Hugley *v.* Hugley, 2 Bailey 592; Davis *v.* Johnston, 2 Bailey 579; Rotereau *v.* Fisher, 2 McCord 189; Stokes *v.* Stuckey, 1 McCord 562; Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633; Wilson *v.* Hogg, 1 Nott & M. 216; Jones *v.* Rivers, 3 Brev. 95. See also Sturgenegger *v.* Taylor, 2 Brev. 480.

by the hearers as charging the crime of larceny.[13] But the words must import a felonious taking,[14] although it is held that there is no distinction between grand

South Dakota.— Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746.

Tennessee.—Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730; Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Poe *v.* Grever, 3 Sneed 664; Blair *v.* Snodgrass, 1 Sneed 1; Hancock *v.* Stephens, 11 Humphr. 507; Watson *v.* Nicholas, 6 Humphr. 174; Nall *v.* Hill, Peck 325.

Texas.— Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

Vermont.— Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320; Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779; Currier *v.* Richardson, 63 Vt. 617, 22 Atl. 625; Sabin *v.* Angell, 46 Vt. 740; Hoyt *v.* Smith, 32 Vt. 304; Redway *v.* Gray, 31 Vt. 292; Kirkaldie *v.* Paige, 17 Vt. 256.

Virginia.— Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644; Harman *v.* Cundiff, 82 Va. 239; Hansbrough *v.* Stinnett, 25 Gratt. 495; Dillard *v.* Collins, 25 Gratt. 343; Bourland *v.* Eidson, 8 Gratt. 27; McAlexander *v.* Harris, 6 Munf. 465; Hook *v.* Hancock, 5 Munf. 546.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin.— Schild *v.* Legler, 82 Wis. 73, 51 N. W. 1099; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Stern *v.* Katz, 38 Wis. 136; Langton *v.* Hagerty, 35 Wis. 150; Rogers *v.* Henry, 32 Wis. 327; Filber *v.* Dautermann, 28 Wis. 134; Talmadge *v.* Baker, 22 Wis. 625; Kennedy *v.* Holborn, 16 Wis. 457. See also Egan *v.* Semrad, 113 Wis. 84, 88 N. W. 906.

United States.— Rutherford *v.* Moore, 21 Fed. Cas. No. 12,173, 1 Cranch C. C. 388.

England.—Kelly *v.* Partington, 4 B. & Ad. 700, 3 L. J. K. B. 104, 2 N. & M. 460, 24 E. C. L. 699; Tomlinson *v.* Brittlebank, 4 B. & Ad. 630, 2 L. J. K. B. 105, 1 N. & M. 455, 24 E. C. L. 277; Sloman *v.* Dutton, 10 Bing. 402, 3 L. J. C. P. 109, 4 Moore & S. 174, 25 E. C. L. 192; Penfold *v.* Westcote, 2 B. & P. N. R. 335; Hankinson *v.* Bilby, 2 C. & K. 440, 61 E. C. L. 440; Rowcliffe *v.* Edmonds, 4 Jur. 684, 9 L. J. Exch. 278, 7 M. & W. 12; Bryant *v.* Loxton, 11 Moore C. P. 344, 22 E. C. L. 608; Atkinson *v.* Newton, 3 Wkly. Rep. 14; Beavor *v.* Hides, 2 Wils. C. P. 300. See also Jackson *v.* Adams, 2 Bing. N. Cas. 402, 1 Hodges 339, 5 L. J. C. P. 79, 2 Scott 599, 29 E. C. L. 591; Lemon *v.* Simmons, 57 L. J. Q. B. 260, 36 Wkly. Rep. 351.

Canada.— Gildner *v.* Busse, 3 Ont. L. Rep. 561, where the charge was privileged.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 45–52.

13. *Alabama.*— Holley *v.* Burgess, 9 Ala. 728, holding that an accusation that one has been "whipped for stealing hogs" charges larceny.

Delaware.— Kennedy *v.* Woodrow, 6 Houst. 46, holding that it is actionable *per se* to charge one with finding money and having knowledge of the owner, and with concealing it for the purpose of applying it to his own use.

Georgia.— Stancell *v.* Pryor, 25 Ga. 40.

Indiana.— Keesling *v.* McCall, 36 Ind. 321, holding that to say of one in reference to some wheat which had been stolen, "Now I don't want anything to go out from me, that I said that Tom McCall stole the wheat, for I don't know who stole it, but it looks suspicious," is actionable as charging larceny.

Iowa.— Hess *v.* Fockler, 25 Iowa 9 (holding that the words, "My table cloths are gone, and you know where they are. . . . You have got them. My husband has gone down town to get a warrant against you, to search your house for the table cloths and imprison you," are actionable as charging larceny); De Moss *v.* Haycock, 15 Iowa 149.

Kentucky.— Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291, holding that the words, "I discharged Elrod for stealing," are slanderous *per se.*

Maryland.— Robinett *v.* Ruby, 13 Md. 95, holding that where defendant in speaking of property which had been stolen said that he no longer suspected a certain person but that "the girl that hired with us has got it" the words are actionable *per se.*

Minnesota.— Laury *v.* Evans, 87 Minn. 396, 92 N. W. 224, holding that the words, "You get out of here. You came in here to see what you could find to steal," are actionable *per se.*

Missouri.—Casey *v.* Aubuchon, 25 Mo. App. 91, holding that to say of another, "Casey has done me a dirty trick; I left him in my store, and when I came back the drawer was short five dollars," is actionable as imputing larceny.

Ohio.— Cheadle *v.* Buell, 6 Ohio 67, holding that words charging that one received a letter, giving himself a false name at the time and promising to deliver it but instead broke it open and used the money contained therein, are actionable as charging larceny.

South Carolina.— Mayson *v.* Sheppard, 12 Rich. 254 (holding that where defendant in speaking of a certain transaction said, "If that be not stealing, what do you call it?" the words are actionable *per se*); Davis *v.* Johnston, 2 Bailey 579 (holding that to say of another person, "Tell him he is riding a stolen horse, and has a stolen watch in his pocket," is actionable *per se*).

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507.

England.— Beavor *v.* Hides, 2 Wils. C. P. 300, holding that the words, "He was put in the roundhouse for stealing ducks at Crowland," are actionable *per se.*

See 32 Cent. Dig. tit. "Libel and Slander," §§ 45–52.

14. *Alabama.*— Robertson *v.* Lea, 1 Stew. 141.

and petit larceny in this respect.[15] Although the words spoken amount of themselves to a charge of larceny, yet if accompanied with a specification of acts upon which the charge is based, which show that no such crime was committed, the person of whom the words were spoken has no cause of action.[16] Thus if the words relate to the taking of property not a subject of larceny, they will not be actionable.[17] A charge of the commission of an act equivalent to larceny is not slanderous *per se*, as by implication the idea of the precise offense of larceny is excluded.[18] Where the words are capable of two constructions, the one innocent and the other importing the commission of a crime, it is necessary that extrinsic facts be averred to show that the words were intended to impute a crime and were so understood by the hearers, in order that such words may be actionable.[19]

Indiana.— Harrison *v.* Manship, 120 Ind. 43, 22 N. E. 87; Wilson *v.* McCrory, 86 Ind. 170; Hart *v.* Coy, 40 Ind. 553 (holding that where there is no averment of extrinsic facts, the words, "I have seen women steal yarn before," are not slanderous *per se*); Keesling *v.* McCall, 36 Ind. 321; Prichard *v.* Lloyd, 2 Ind. 154; Stucker *v.* Davis, 8 Blackf. 414 (holding that the words, "He has my horse," are not actionable *per se*); Wyant *v.* Smith, 5 Blackf. 293 (holding that the words, "I lost my hogs, and I believe he and his nearest neighbors got them," does not charge a crime).

Kentucky.— Brown *v.* Piner, 6 Bush 518 (holding that to say of one that he sheared another's sheep and kept the wool is not actionable *per se*); Jones *v.* McDowell, 4 Bibb 188; Porter *v.* Hughey, 2 Bibb 232 (holding that to say that certain persons were accustomed to "kill cattle no more theirs than mine" does not charge larceny); Clay *v.* Barkley, Ky. Dec. 67 (holding that the words, "He killed and salted one of my hogs," are not actionable *per se*).

Maine.— Brown *v.* Brown, 14 Me. 317, holding that the words, "Uncle Daniel must settle for some of my logs he has made away with," are not actionable *per se*.

Missouri.— Christal *v.* Craig, 80 Mo. 367; Boyce *v.* Anbuchon, 34 Mo. App. 315, holding that to say of another that he has gotten or hidden the speaker's money is not actionable *per se*.

New Jersey.—Bartow *v.* Brands, 15 N. J. L. 248.

New York.— Coleman *v.* Playsted, 36 Barb. 26.

North Carolina.— McCurry *v.* McCurry, 82 N. C. 296, holding that the words, "You, McCurry, are a rogue and your mother has upheld you in stealing from your cradle up," do not impute a crime to the mother (plaintiff) and are not actionable *per se*.

Pennsylvania.— Stitzell *v.* Reynolds, 59 Pa. St. 488, holding that to say of plaintiff that she "had her hogs in your corn and carried corn away" does not charge larceny); Lukehart *v.* Byerly, 53 Pa. St. 418; Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

South Carolina.— Sturgenegger *v.* Taylor, 2 Brev. 480, holding that the words, "Those two rascals killed my hogs, and converted them to their own use," are not actionable *per se*.

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507.

Texas.— McCarthy *v.* Miller, (Civ. App. 1900) 57 S. W. 973, holding that where defendant entered plaintiff's house in her absence and made a search, and holding up a piece of coal which he had found in plaintiff's house said, "Here is your stolen coal," the words are not actionable *per se*, since there is no charge that plaintiff stole the coal.

England.— Kelly *v.* Partington, 4 B. & Ad. 700, 3 L. J. K. B. 104, 2 N. & M. 460, 24 E. C. L. 699.

See 32 Cent. Dig. tit. "Libel and Slander," § 45.

Words imputing a mere intention to steal are not actionable *per se*. Seaton *v.* Cordray, Wright (Ohio) 101.

15. Redway *v.* Gray, 31 Vt. 292, holding that words charging one with stealing property of less value than seven dollars are actionable.

16. Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440. See also Williams *v.* Miner, 18 Conn. 464.

17. See *infra*, III, D, 11, b, (XVIII), (C).

18. Thompson *v.* Grimes, 5 Ind. 385 (holding that the words, "He used up my stuff, made tight work of it, and appropriated the money to his own use, and I don't consider that any better than stealing," are not slanderous *per se*); Stokes *v.* Arey, 53 N. C. 66 (holding that the words, "You as good as stole old John Henly's canoe," are not actionable *per se*); Stees *v.* Kemble, 27 Pa. St. 112 (holding that the words, "A man that would do that would steal," do not charge larceny).

19. Long *v.* Musgrove, 75 Ala. 158; Prichard *v.* Lloyd, 2 Ind. 154; Wood *v.* Hilbish, 23 Mo. App. 389 (holding that the words, "I will not keep him all summer, for I have to watch my pocket book too close," without any prefatory averments in the petition stating extrinsic facts, do not charge a crime); Hansbrough *v.* Stinnett, 25 Gratt. (Va.) 495 (holding that the words, "Dick Stinnett killed my beef," are not returnable without additional averments). See also Wilson *v.* McCrory, 86 Ind. 170.

(B) *Larceny From Dead Men.* It is actionable *per se* to charge one with larceny of the property of a deceased person.[20]

(C) *Subject of the Larceny Charged.* Words actionable *per se* as charging larceny, if spoken in relation to a subject of which no larceny was capable of being committed, are not actionable *per se*.[21] If, however, the property charged to have been stolen is the subject of larceny, either at common law or under statute, the charge is actionable *per se*.[22]

20. Wonson *v.* Sayward, 13 Pick. (Mass.) 402, 23 Am. Dec. 691 (holding that to take the boots *animo furandi* from the body of a man found drowned and driven ashore is a felony and that the imputation of such an act is actionable *per se*); Bash *v.* Sommer, 20 Pa. St. 159.

21. *Alabama.*— Kirksey *v.* Fike, 29 Ala. 206.

Connecticut.— Williams *v.* Miner, 18 Conn. 464.

Iowa.— McCaleb *v.* Smith, 22 Iowa 242, holding that it is not actionable to impute acts constituting a trespass only, even though the acts were characterized by the use of the word "stole."

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355, holding that a charge of stealing a dog is not actionable at common law.

Kentucky.— Blackburn *v.* Clark, 41 S. W. 430, 19 Ky. L. Rep. 659, holding that it is not actionable *per se* to charge one with "stealing" the door of a house.

Maine.— Wing *v.* Wing, 66 Me. 62, 22 Am. Rep. 548, holding that the words, "Almon Wing stole windows from Benjamin Jordan's house," are not actionable, as they charge only a trespass upon realty; but that to say Wing "stole Benjamin Jordan's windows" is actionable, as it charges larceny.

Massachusetts.— Carter *v.* Andrews, 16 Pick. 1.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333, holding that it is not actionable to charge one with stealing a "bee tree" as neither wild animals nor standing trees are subject to larceny.

Missouri.—Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440, holding that a charge of stealing fixtures is not actionable *per se*.

New Hampshire.— Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573 (holding that a charge of taking a sable out of a trap in the woods is not actionable *per se*); Blanchard *v.* Fisk, 2 N. H. 398 (holding that to say of a person that he had stolen a "file of bills" is not actionable where the bills were "unsatisfied accounts."

New Jersey.— Ogden *v.* Riley, 14 N. J. L. 186, 25 Am. Dec. 513, holding that marl is not a subject of larceny and that to charge one with stealing it is not actionable *per se*.

New York.— Ayres *v.* Covill, 18 Barb. 260, holding under a statute making any record paper or proceeding in a court subject to larceny, a charge of stealing a written examination from a magistrate's court is not actionable, unless it appears that the examination was had in a proceeding of which the justice had jurisdiction.

North Carolina.— Idol *v.* Jones, 13 N. C. 162, holding that the words, "He has stolen my bee tree," are not actionable if a standing tree is meant.

Ohio.— Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615; Phillips *v.* Le June, 25 Ohio Cir. Ct. 107.

Pennsylvania.— Stitzell *v.* Reynolds, 67 Pa. St. 54, 5 Am. Rep. 396 (holding that to charge one with the larceny of standing corn is not actionable *per se*); Lukehart *v.* Byerly, 53 Pa. St. 418 (holding that a charge that one has "stolen apples" is not actionable *per se* without a colloquium, for the words may charge only a trespass); Findlay *v.* Bear, 8 Serg. & R. 571 (holding that it is not actionable *per se* to charge one with stealing a dog).

Tennessee.— Rodgers *v.* Rodgers, 11 Heisk. 757.

England.— Lemon *v.* Simmons, 57 L. J. Q. B. 260, 36 Wkly. Rep. 351.

See 32 Cent. Dig. tit. "Libel and Slander," § 52.

22. *Illinois.*— Halsey *v.* Stillman, 48 Ill. App. 413, holding that, under a statute making anything which is parcel of the realty subject to larceny, it is actionable *per se* to accuse another of stealing screen doors off a house.

Indiana.— Hoskins *v.* Tarrence, 5 Blackf. 417, 35 Am. Dec. 129, holding that it is actionable *per se* to charge one with stealing a key, although in a lock of a door in a house, as it is "personal goods."

Kansas.— Harrington *v.* Miles, 11 Kan. 480, 15 Am. Rep. 355, holding that it is actionable *per se* to charge one with stealing a dog, as under statute such act is larceny.

Maryland.— Fawsett *v.* Clark, 48 Md. 494, 30 Am. Rep. 481.

Massachusetts.— Dunnell *v.* Fiske, 11 Metc. 551, holding that it is actionable *per se* to charge one with stealing "patterns," if by the charge is meant material forms used for moldings; but that it is not actionable, if the theft of an invention or mere knowledge of the patterns is meant.

New York.— Collyer *v.* Collyer, 50 Hun 422, 3 N. Y. Suppl. 310; Phillips *v.* Barber, 7 Wend. 439 (holding that the words, "You have stolen my wood," are actionable *per se* when unqualified); Dexter *v.* Taber, 12 Johns. 239 (a charge of stealing standing timber is not actionable *per se*, but that it is otherwise as to a charge of stealing timber already cut).

(D) *Charge of Larceny Against Joint Owner.* It is not actionable *per se* to charge a joint owner[23] or a partner[24] with taking property held under joint ownership. But if, when the words imputing theft of the property of which plaintiff was a joint owner are spoken, no allusion was made to any joint ownership of the property and it did not appear that the persons addressed knew or believed such to be its condition, the charge is slanderous *per se*.[25]

(E) *Particular Epithets* — (1) "THIEF" AND DERIVATIVES. The word "thief," if not explained, will be presumed to impute crime,[26] and hence it may be laid down as a general rule that to call one a thief is *prima facie* actionable *per se*,[27] even though the term is used with reference to no particular transaction,

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779 (holding that it is actionable *per se* to charge one with stealing lumber, although the words were so used as to show that by lumber was meant wood taken from defendant's land); Redway *v.* Gray, 31 Vt. 292 (holding that a charge of stealing hay is actionable *per se*).

See 32 Cent. Dig. tit. "Libel and Slander," § 52.

Horse stealing.— It is slanderous *per se* to charge one with horse stealing. Smith *v.* Burrus, 1066 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59; Bell *v.* McGinness, 40 Ohio St. 204, 48 Am. Rep. 673 (holding that to say of one, "He stole the horse without a doubt; there is so much evidence against him that it will convict him," is actionable *per se*); Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Dillard *v.* Collins, 25 Gratt. (Va.) 343. So to charge one with belonging to a gang of horse thieves is actionable *per se*. Quinn *v.* Scott, 22 Minn. 456.

23. *Alabama.*— Kirksey *v.* Fike, 29 Ala. 206, holding that it is not actionable *per se* to say of a joint owner of property, "He is mighty smart after night," and, "Put him in the dark, and he would get it all."

Massachusetts.— Carter *v.* Andrews, 16 Pick. 1.

Ohio.— Phillips *v.* Le June, 25 Ohio Cir. Ct. 107, holding that it is not actionable *per se* to charge a joint tenant with taking away undivided crops.

Tennessee.— Rodgers *v.* Rodgers, 11 Heisk. 757, holding that words charging a wife of a joint owner of personal property with selling a portion thereof in her possession are not actionable *per se*, as a joint tenant cannot be guilty of larceny.

England.— Lemon *v.* Simmons, 57 L. J. Q. B. 260, 30 Wkly. Rep. 351, holding that it is not actionable *per se* to charge a husband with robbing his wife while they are living together, *sed aliter* if they were living apart.

24. Alfele *v.* Wright, 17 Ohio St. 238, 93 Am. Dec. 615, holding that it is not actionable *per se* for one partner to charge another partner with the taking of some of the partnership goods.

25. Williams *v.* Miner, 18 Conn. 464; Carter *v.* Andrews, 16 Pick. (Mass.) 1, holding that where a charge of larceny is made against a tenant in common, but the hearers are unaware of the fact that the charge was made in reference to goods held in common, it is slanderous *per se*.

26. McKee *v.* Ingalls, 5 Ill. 30. See also Rowland *v.* De Camp, 96 Pa. St. 493.

27. *Arkansas.*— Gaines *v.* Belding, 56 Ark. 100, 19 S. W. 236.

California.— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Smullen *v.* Phillips, 92 Cal. 408, 28 Pac. 442; Frolich *v.* McKiernan, 84 Cal. 177, 24 Pac. 114; Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863; Pink *v.* Catanich, 51 Cal. 420.

Connecticut.— Woodruff *v.* Richardson, 20 Conn. 238; Williams *v.* Miner, 18 Conn. 464.

Illinois.— Stumer *v.* Pitchman, 124 Ill. 250, 15 N. E. 757 [*affirming* 22 Ill. App. 399]; Zuckerman *v.* Sonnenschein, 62 Ill. 115; McKee *v.* Ingalls, 5 Ill. 30; Peters *v.* Bourneau, 22 Ill. App. 177; Murphy *v.* Daugherty, 10 Ill. App. 214; McGregor *v.* Eakin, 3 Ill. App. 340.

Indiana.— Marks *v.* Jacobs, 76 Ind. 216; Porter *v.* Choen, 60 Ind. 338; Meyer *v.* Bohlfing, 44 Ind. 238; Hickley *v.* Grosjean. 6 Blackf. 351; Swann *v.* Rary, 3 Blackf. 298.

Iowa.— Fisher *v.* Tice, 20 Iowa 479; Parker *v.* Lewis, 2 Greene 311, holding that to say of one, "He is a thief, he stole my wheat and ground it and sold the flour to the Indians," is actionable *per se*.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; McNamara *v.* Shannon, 8 Bush 557; Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122; Samuel *v.* Bond, Litt. Sel. Cas. 158.

Louisiana.— Caspar *v.* Prosdame, 46 La. Ann. 36, 14 So. 317; Doullut *v.* McManus, 37 La. Ann. 800; Lobe *v.* Cary, 33 La. Ann. 914; Dufort *v.* Abadie, 23 La. Ann. 280; Mallerich *v.* Mertz, 19 La. Ann. 194; Mohrman *v.* Ohse, 17 La. Ann. 664. See also Solet *v.* Solet, 1 Roh. 339.

Michigan.— Blount *v.* Mason, 140 Mich. 1, 103 N. W. 525 (holding that the words, "Uncle Billy, don't you want to go and help catch a thief?" are actionable *per se*); Line *v.* Spies, 139 Mich. 484, 102 N. W. 993; Youngs *v.* Adams, 113 Mich. 199, 71 N. W. 585; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

Minnesota.— Metcalf *v.* Collinson, 95 Minn. 238, 103 N. W. 1022; Frederickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Quinn *v.* Scott, 22 Minn. 456, holding that the words, "There is no use in bringing any horse thieves to this town, for the justice is in the ring

and does not charge any special crime.[28] But the word "thief" is not necessarily actionable. When it is apparent from the circumstances under which the word is spoken that it is not intended or understood as charging a felony or crime, it is not actionable,[29] as for instance where it appears that the word was used as a mere

just as bad as any of them. I believe Quinn belongs to the gang of thieves," are actionable *per se* as charging a crime.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Lewis *v.* McDaniel, 82 Mo. 577; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609; Bridgman *v.* Armer, 57 Mo. App. 528 (holding that the words, "You are a thief," constitute a *prima facie* case); Baldwin *v.* Fries, 46 Mo. App. 288; Morgan *v.* Rice, 35 Mo. App. 591; Boyce *v.* Aubuchon, 34 Mo. App. 315.

New Hampshire.— Robinson *v.* Keyser, 22 N. H. 323.

New York.—Titus *v.* Sumner, 44 N. Y. 266; Bisbey *v.* Shaw, 12 N. Y. 67; Van Akin *v.* Caler, 48 Barb. 58; Gomez *v.* Joyce, 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 337; Dolevin *v.* Wilder, 7 Rob. 319; Deyo *v.* Brundage, 13 How. Pr. 221; Jayeocks *v.* Ayres, 7 How. Pr. 215; Anonymous, 3 How. Pr. 406; Lister *v.* Wright, 2 Hill 320; Beach *v.* Ranney, 2 Hill 309; Gidney *v.* Blake, 11 Johns. 54, holding that the words, "Your children are thieves, and I can prove it," will support an action in favor of one of the children.

North Carolina.— Dudley *v.* Robinson, 24 N. C. 141.

Ohio.— Tedtman *v.* Hancock, 1 Ohio Cir. Ct. 238, 1 Ohio Cir. Dec. 129.

Oregon.— Quigley *v.* McKee, 12 Oreg. 22, 5 Pac. 347, 53 Am. Rep. 320.

Pennsylvania.— Rowand *v.* De Camp, 96 Pa. St. 493; Walter *v.* Erdman, 4 Pa. Super. Ct. 348; Kerr *v.* Atticks, 20 Pa. Co. Ct. 233 (holding that the words, "Anybody that would do a trick like that is a liar and a thief, and there is not an honest drop of blood in you," is actionable *per se*); Newskey *v.* Mundt, 4 Leg. Gaz. 230 (where the charge was privileged).

South Carolina.— Poppenheim *v.* Wilkes, 1 Strobh. 275; Rotereau *v.* Fisher, 2 McCord 189; Wilson *v.* Hogg, 1 Nott & M. 216.

South Dakota.— Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746.

Tennessee.— Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

Vermont.— Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320 (holding that it is actionable *per se* to call one a thief where the person charged was an employee of a creamery and bailee of the butter when made, and the word was spoken to impute that plaintiff dishonestly tested the cream, for if defendant converted part of the butter by a false test he was guilty of larceny); Sabin *v.* Angell, 46 Vt. 740.

Virginia.— Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin.—Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Stern *v.* Katz, 38 Wis. 136 (holding that the charge, "He is a swindler and a thief, and stole eight thousand dollars from me," is actionable *per se*); Rogers *v.* Henry, 32 Wis. 327.

England.— Slowman *v.* Dutton, 10 Bing. 402, 3 L. J. C. P. 109, 4 Moore & S. 174, 25 E. C. L. 192; Penfold *v.* Westcote, 2 B. & P. N. R. 335; Hankinson *v.* Bilby, 2 C. & K. 440, 61 E. C. L. 446; Cristie *v.* Cowell, 1 Peake N. R. 4, 3 Rev. Rep. 642; Atkinson *v.* Newton, 3 Wkly. Rep. 14.

Canada.— See Edgar *v.* Newell, 24 U. C. Q. B. 215.

See 32 Cent. Dig. tit. "Libel and Slander," § 46.

28. Roberts *v.* Ramsey, 86 Ga. 432, 12 S. E. 644.

29. *Illinois.*— McKee *v.* Ingalls, 5 Ill. 30.

Iowa.— Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

Louisiana.— Solet *v.* Solet, 1 Rob. 339.

Maryland.— Fawsett *v.* Clark, 48 Md. 494, 30 Am. Rep. 481, holding that to call one "a thief" is not actionable *per se* when the hearers understood that a charge of falsifying accounts was meant.

Michigan.— Youngs *v.* Adams, 113 Mich. 199, 71 N. W. 585; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687. See also Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

Missouri.— Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Bridgman *v.* Armer, 57 Mo. App. 528, holding that if the words were intended as terms of abuse and not as imputing a crime and were so understood by the hearers they are not actionable *per se*.

New Jersey.— Ogden *v.* Riley, 14 N. J. L. 186, 25 Am. Dec. 513.

New York.— Hayes *v.* Ball, 72 N. Y. 418; Quinn *v.* O'Gara, 2 E. D. Smith 388.

Ohio.— Brown *v.* Myers, 40 Ohio St. 99 (holding that charging a person with being a thief is not actionable where the words must have been understood to refer to the person's having obtained money by fraud); Phillips *v.* Le June, 25 Ohio Cir. Ct. 107.

Pennsylvania.— Rowand *v.* De Camp, 96 Pa. St. 493.

Wisconsin.— Egan *v.* Semrad, 113 Wis. 84, 88 N. W. 906, holding that the words, "You are a thief and a rogue, you cheated me out of more than one hundred pounds of oats," are not actionable *per se* when spoken in reference to a transaction where plaintiff in selling oats to defendant had put rocks in the wagon before the oats were weighed and had removed them before the empty wagon was weighed.

England.— Penfold *v.* Westcote, 2 B. & P. N. R. 335; Thompson *v.* Bernard, 1 Campb. 48 (holding that the words, "Thompson is a

term of abuse,[30] or had relation to a transaction that was fraudulent but not criminal.[31] To charge one with being a thieving person is actionable *per se*.[32]

(2) "STEAL" AND DERIVATIVES. As a general rule, to say of a person that he "stole," "is stealing," "has stolen," or otherwise charging him with stealing property belonging to the speaker or to a third person, without any accompanying language to qualify the offensive import of the charge, is actionable *per se*;[33] and it is

damned thief." "Thompson received the earnings of the ship, and ought to pay the wages," are not actionable); Hankinson *v.* Bilby, 2 C. & K. 440, 61 E. C. L. 440; Cristie *v.* Cowell, 1 Peake N. P. 4, 3 Rev. Rep. 642.

Canada.— Fellowes *v.* Hunter, 20 U. C. Q. B. 382.

See 32 Cent. Dig. tit. "Libel and Slander," § 46.

30. Bridgman *v.* Armer, 57 Mo. App. 528. See also Roberts *v.* Ramsey, 86 Ga. 432, 12 S. E. 644.

31. Brown *v.* Myers, 40 Ohio St. 99.

32. Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219; Reynolds *v.* Ross, 42 Ind. 387 (holding that the words, "Yon are a G—d d—d, lying thieving son of a bitch," are actionable); Alley *v.* Neely, 5 Blackf. (Ind.) 200; Pierson *v.* Steortz, Morr. (Iowa) 136, 187 (where it was said: "It is contended that the words 'thieving' and 'thievish' are nearly synonymous. We think otherwise. The former implies action, the latter mere propensity. The mere ungratified inclination to steal renders one thievish, but he cannot be properly denominated a 'thieving puppy,' unless practical exercise has been given to that inclination") Rutherford *v.* Moore, 21 Fed. Cas. No. 12,173, 1 Cranch C. C. 388 (holding that the charge, "He gets his living by thieving," is actionable *per se*).

33. *Alabama.* — Gandy *v.* Humphries, 35 Ala. 617; Holley *v.* Burgess, 9 Ala. 728; Adams *v.* Ward, 1 Stew. 42.

Connecticut.— Williams *v.* Miner, 18 Conn. 464; Watson *v.* Churchill, 5 Day 256.

Illinois.— Upham *v.* Dickinson, 50 Ill. 97 (holding that where the words were, "He stole two or three thousand dollars from defendant's brother, in the state of Ohio," the mere statement in connection therewith that plaintiff was in business with defendant's brother or was a clerk for him when he stole the money would be no explanation of the offensive words and would not reduce the crime charged from larceny to the common-law offense of embezzlement); Crotty *v.* Morrissey, 40 Ill. 477 (holding that qualifying the words, "He stole two hundred dollars from me," by the words, "when I was drunk," does not free them from their slanderous quality); Gilmer *v.* Eubank, 13 Ill. 271.

Indiana.— Wilson *v.* McCrory, 86 Ind. 170; Marks *v.* Jacobs, 76 Ind. 216; Keesling *v.* McCall, 36 Ind. 321; Carmichael *v.* Shiel, 21 Ind. 66; Thompson *v.* Grimes, 5 Ind. 385; Hickley *v.* Grosjean, 6 Blackf. 351; Linville *v.* Earlywine, 4 Blackf. 469; Swann *v.* Rary, 3 Blackf. 298; Whittam *v.* Young, 1 Blackf. 299; Short *v.* Acton, 33 Ind. App. 361, 71 N. E. 505.

Iowa.— McMinemee *v.* Smith, (1903) 93 N. W. 75; O'Donnell *v.* Hastings, 68 Iowa 271, 26 N. W. 433; Long *v.* Peters, 47 Iowa 239 (where, however, the charge was held privileged); Barton *v.* Holmes, 16 Iowa 252; De Moss *v.* Haycock, 15 Iowa 149; Karney *v.* Paisley, 13 Iowa 89.

Kansas.— Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181; Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; Faris *v.* Starke, 9 Dana 128, 33 Am. Dec. 536 (where, however, the charge was held privileged); Barr *v.* Gaines, 3 Dana 258; Gill *v.* Bright, 6 T. B. Mon. 130; Eastland *v.* Caldwell, 2 Bibb 21, 4 Am. Dec. 668; Hume *v.* Arrasmith, 1 Bibb 165, 4 Am. Dec. 626; Macanley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291.

Louisiana.— Cook *v.* Tardos, 6 La. Ann. 779.

Maine.— Burbank *v.* Horn, 39 Me. 233.

Maryland.— Long *v.* Eakle, 4 Md. 454; Bonner *v.* Boyd, 3 Harr. & J. 278.

Massachusetts.— Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79.

Michigan.— Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910.

Minnesota.— Laury *v.* Evans, 87 Minn. 396, 92 N. W. 224; Warner *v.* Lockerby, 28 Minn. 28, 8 N. W. 879; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri.— Hall *v.* Adkins, 59 Mo. 144; Pennington *v.* Meeks, 46 Mo. 217; Weaver *v.* Hendrick, 30 Mo. 502; Pasley *v.* Kemp, 22 Mo. 409; Grimes *v.* Thorp, 113 Mo. App. 652, 88 S. W. 638 (holding that the words, "I know I never got all my rent corn off the ground that Joe Grimes had rented; the corn that Joe Grimes sold to Teidgen was my corn, and I am satisfied that Grimes stole my corn," are actionable *per se* as charging larceny); Morgan *v.* Rice, 35 Mo. App. 591; Boyce *v.* Aubuchon, 34 Mo. App. 315; Wood *v.* Hilbish, 23 Mo. App. 389.

New Hampshire.—Moore *v.* Butler, 48 N. H. 161.

New York.— Hayes *v.* Ball, 72 N. Y. 418; Collyer *v.* Collyer, 50 Hun 422, 3 N. Y. Suppl. 310; Maybee *v.* Fisk, 42 Barb. 326; Coleman *v.* Playsted, 36 Barb. 26; Maeske *v.* Smith, 35 N. Y. St. 541, 12 N. Y. Suppl. 423; Jaycocks *v.* Ayres, 7 How. Pr. 215; Phillips *v.* Barber, 7 Wend. 439.

North Carolina.—James *v.* Clarke, 23 N. C. 397.

North Dakota.—Wrege *v.* Jones, (1904) 100 N. W. 705.

Ohio.— Bell *v.* McGinness, 40 Ohio St. 204, 48 Am. Rep. 673.

not necessary that the charge should specify precisely what property was stolen,[34] or to name the victim of the larceny.[35] But such words are not actionable *per se* if, as understood by the hearers, or as qualified by other words, or by the transaction concerning which the parties were speaking, they were not intended to charge a crime.[36] A charge of an attempt to steal[37] is not actionable unless such attempt in itself constitutes a crime.[38] So a charge of mere intent to steal is not actionable *per se*.[39] The words, "You will steal," or, "I believe you will steal," do not, when standing alone and without qualification, imply a charge that the person of whom they are spoken did steal or has stolen and are not actionable *per se*.[40] But when taken in connection with other words spoken at the time, or with the surrounding circumstances known to the speaker and hearers, such words may import a charge of crime committed in the past and therefore may be actionable without proof of special damages.[41]

(3) "TAKE" AND DERIVATIVES. Words charging a taking of property do not

Pennsylvania.— Dottarer *v.* Bushey, 16 Pa. St. 204.

South Carolina.— Mayson *v.* Sheppard, 12 Rich. 254; Hugley *v.* Hugley, 2 Bailey 592; Davis *v.* Johnston, 2 Bailey 579; Stokes *v.* Stuckey, 1 McCord 562; Jones *v.* Rivers, 3 Brev. 95.

Tennessee.— Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730; Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821; Blair *v.* Snodgrass, 1 Sneed 1.

Texas.— Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779; Redway *v.* Gray, 31 Vt. 292.

Virginia.— Harman *v.* Cundiff, 82 Va. 239 (holding that the words, "John Cundiff is the best hand to steal sheep I ever saw," "He stole sheep," are actionable *per se*); Bourland *v.* Eidson, 8 Gratt. 27; McAlexander *v.* Harris, 6 Munf. 465.

Wisconsin.— Hamlin *v.* Fantl, 118 Wis. 594, 95 N. W. 955; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Langton *v.* Hagerty, 35 Wis. 150; Talmadge *v.* Baker, 22 Wis. 625.

England.— Beavor *v.* Hides, 2 Wils. C. P. 300.

See 32 Cent. Dig. tit. "Libel and Slander," § 47.

34. Collyer *v.* Collyer, 50 Hun (N. Y.) 422, 3 N. Y. Suppl. 310.

35. Langton *v.* Hagerty, 35 Wis. 150.

36. *Illinois.*— Ayres *v.* Grider, 15 Ill. 37 (holding that where a constable arrests a person and takes from him certain property and the one arrested accuses the constable of stealing, the words are not actionable *per se* if the hearers understand the words to refer to the arrest); McGilvray *v.* Springett, 68 Ill. App. 275 (holding that one who accuses another of stealing town money is not guilty of slander when the stealing referred to was the presentation of a bill against the city for a greater amount than was due and the bystanders who heard the accusation so understood it).

Indiana.— Taylor *v.* Short, 40 Ind. 506; Carmichael *v.* Shiel, 21 Ind. 66.

Iowa.— McCaleb *v.* Smith, 22 Iowa 242, holding that it is not actionable to charge one with committing a trespass, even though the words were characterized by the use of the word "stole."

Kentucky.— Blackburn *v.* Clark, 41 S. W. 430, 19 Ky. L. Rep. 659.

Maine.— Wing *v.* Wing, 66 Me. 62, 22 Am. Rep. 548.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Hall *v.* Adkins, 59 Mo. 144.

New Hampshire.— Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573; Blanchard *v.* Fisk, 2 N. H. 398.

New Jersey.— Ogden *v.* Riley, 14 N. J. L. 186, 25 Am. Dec. 513.

Pennsylvania.— Lukehart *v.* Byerly, 53 Pa. St. 418; Bash *v.* Sommer, 20 Pa. St. 159, holding that the words, "Sommer and his wife stole a thousand dollars in gold," will not support an action of slander by the wife with her husband as they import a charge of stealing in his presence.

England.— Jackson *v.* Adams, 2 Bing. N. Cas. 402, 1 Hodges 339, 5 L. J. C. P. 79, 2 Scott 599, 29 E. C. L. 591 (holding that no action will lie in favor of a churchwarden on a charge of stealing the parish bell-ropes as he had the possession of the bell-ropes and could not be guilty of stealing them); Cristie *v.* Cowell, 1 Peake N. P. 4, 3 Rev. Rep. 642.

See 32 Cent. Dig. tit. "Libel and Slander," § 47.

37. Steinecke *v.* Marx, 10 Mo. App. 581, holding that the words, "You are one of the men who tried to steal my wagon," do not impute larceny.

38. Berdeaux *v.* Davis, 58 Ala. 611. See also *supra*, III, D, 9.

39. Seaton *v.* Cordray, Wright (Ohio) 101. See also *supra*, III, D, 8.

40. Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785.

41. Prime *v.* Eastwood, 45 Iowa 640 (holding that to charge one with having the speaker's hogs in his possession and to say of him that "I know that he will [steal]" is actionable *per se*); Hicks *v.* Walker, 2 Greene (Iowa) 440 (where the charge was that plaintiff "will steal, and did steal in Pennsylvania, and had to leave the state for stealing"); Cornelius *v.* Van Slyck, 21 Wend. (N. Y.) 70 (where the words were, "You

of themselves convey an imputation of larceny,[42] since the property might reasonably have been taken under a claim of right, or through mistake, or in sport.[43] But if it appears from the connection in which the charge was made or the circumstances attending its utterance that it was intended and understood to impute the crime of larceny it will be regarded as actionable *per se*.[44]

(4) "Rob" and Derivatives. The word "rob" or its derivatives is sometimes used not in its technical sense, but according to its general meaning, as imputing a charge of larceny; and when used in this sense is actionable *per se*.[45]

(5) "Pilfer," "Plunder," and "Hook." An accusation of "pilfering" has

will steal and I can prove it"); Dottarer *v.* Bushey, 16 Pa. St. 204 (where the words were, "I believe he will steal and I believe he did steal").

42. *Alabama.*— Robertson *v.* Lea, 1 Stew. 141.

Indiana.— Harrison *v.* Manship, 120 Ind. 43, 22 N. E. 87, holding that the words, "He took and drove off my ducks and sold them," are not actionable *per se*.

Missouri.— Christal *v.* Craig, 80 Mo. 367, holding that the words, "You have took my pocket-book and money, and have got it," do not impute larceny.

New Jersey.— Bartow *v.* Brands, 15 N. J. L. 248, holding that the words "took my pocket book from my vest pocket" standing alone do not charge a crime.

New York.— Coleman *v.* Playsted, 36 Barb. 26.

Pennsylvania.— Lukehart *v.* Byerly, 53 Pa. St. 418.

See 32 Cent. Dig. tit. "Libel and Slander," § 48.

43. Christal *v.* Craig, 80 Mo. 367.

44. *Indiana.*— Wilson *v.* McCrory, 86 Ind. 170; Justice *v.* Kirlin, 17 Ind. 588; Short *v.* Acton, 33 Ind. App. 361, 71 N. E. 505 (holding that the words, "He tore the roof off of J. S. Patterson's coal shed and took out some coal. You can call that stealing, or what you please," are actionable when properly averred); Hinesley *v.* Sheets, 18 Ind. App. 612, 48 N. E. 802, 63 Am. St. Rep. 356 (holding that the words, "I know he took wheat that did not belong to him," may be made actionable by proper colloquium and innuendo).

Iowa.— De Moss *v.* Haycock, 15 Iowa 149, holding that to charge one with "taking without leave" property belonging to defendant is actionable *per se* if understood by the hearers to charge a crime.

Kentucky.— Jones *v.* McDowell, 4 Bibb 188, holding that where defendant said of plaintiff that he "saw the appellee take corn from Aaron Rainy's crib twice, and look around to see if any person saw him measuring," the description of the actions of plaintiff clearly showed that defendant meant to charge a felonious taking.

Michigan.— Blount *v.* Mason, 140 Mich. 1, 103 N. W. 525 (holding that the words, "I saw Fred Blount take wood from off my wood pile, and he has it now on his wagon, and I want you to go with me to the mill, and see it unloaded," are actionable with an averment that they imputed a crime); Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245.

Missouri.— Estes *v.* Antrobus, 1 Mo. 197, 13 Am. Dec. 496.

New York.— Miller *v.* Miller, 8 Johns. 74, 77, holding that the words, "My watch has been stolen in Polly Miller's bar room, and I have reason to believe that Tina Miller took it, and that her mother concealed it," are actionable *per se*.

Ohio.— Reinhardt *v.* Faschnacht, 4 Ohio Cir. Ct. 321, 2 Ohio Cir. Dec. 571, holding that to say of one, "Your cousin Faschnacht took my ring; she had better bring it back." "I can have her put in the county jail," is actionable.

Pennsylvania.— Dottarer *v.* Bushey, 16 Pa. St. 204 (where the words were, "He took my wood and is guilty of any and every thing that is dishonest"); Shultz *v.* Chambers, 8 Watts 300; Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380 (holding that the following words: "I have lost a calfskin out of my cellar the day that you and Bornman got the leather." "I do not blame you nor Gray, but Bornman must have taken it," were words actionable *per se*).

South Carolina.— Galloway *v.* Courtney, 10 Rich. 414 (holding that the words, "It was Robert Galloway who broke into his sister's house, and took the money," are actionable as charging larceny); Jones *v.* Rivers, 3 Brev. 95 (to charge that one on pretense of being a preacher inveigled negroes and took them off is actionable *per se*).

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507; Watson *v.* Nicholas, 6 Humphr. 174, holding that where plaintiff said to defendant, "Did you not say it was not the first pig I had taken that was not my own," and defendant answered, "I did say it, and say it yet," the words were actionable *per se*.

Virginia.— Hook *v.* Hancock, 5 Munf. 546, holding that it is actionable to say of another, "Hancock has taken my slave, and I will have him sent to the penitentiary for it."

See 32 Cent. Dig. tit. "Libel and Slander," § 48.

45. Slayton *v.* Hemken, 91 Hun (N. Y.) 582, 36 N. Y. Suppl. 249; Shultz *v.* Chambers, 8 Watts (Pa.) 300; Jones *v.* Rivers, 3 Brev. (S. C.) 95, holding that to charge one with robbing another's medicine chest is actionable *per se*.

Imputations of robbery see *infra*, III, D, 11, b. (XXII).

been held to import a charge of larceny and to be actionable *per se*.[46] But it has been held that the common and ordinary meaning of the word "hook" is not to "steal," and that the term is not of itself actionable *per se*.[47] So it has been held that saying that a library has been "plundered" is not equivalent to saying that books had been stolen from it, and is not actionable *per se*.[48]

(6) "ROGUE" OR "RASCAL." Although calling one a "rogue" or a "rascal" is not in itself slanderous,[49] yet such terms may be so used in connection with other defamatory words as to render them actionable.[50]

(XIX) *LIBEL.* Oral words charging another with publishing a libel have been held to be slanderous *per se* as imputing a criminal offense.[51]

(XX) *PERJURY OR FALSE SWEARING AND SUBORNATION OF PERJURY*— (A) *In General.* The rule is well supported by numerous well considered authorities that a charge of perjury is actionable *per se*,[52] perjury being under-

46. Becket *v.* Sterrett, 4 Blackf. (Ind.) 499; De Moss *v.* Haycock, 15 Iowa 149.

47. Hays *v.* Mitchell, 7 Blackf. (Ind.) 117.

48. Carter *v.* Andrews, 16 Pick. (Mass.) 1.

49. See III, B, 2, b, (IV).

50. Savoie *v.* Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200 (holding that to say of one that he is a damned rascal or a rogue, and that he had stolen all the property he possessed is slander *per se*); Herst *v.* Borbridge, 57 Pa. St. 62 [*affirming* 6 Phila. 391] (holding that to charge one with the larceny of certain hats, followed by the remark, "You are a rogue," is sufficient after verdict to sustain the action); Morgan *v.* Livingston, 2 Rich. (S. C.) 573 (holding that the words, "You get your living by sneaking about when other people are asleep," "Where did you get the little wild shoats you have in your pen? You are an infernal roguish rascal," impute larceny and are actionable *per se*.

51. Viele *v.* Gray, 10 Abb. Pr. (N. Y.) 1, 18 How. Pr. 550; Proper *v.* Luce, 3 Penr. & W. (Pa.) 65 (holding that an unqualified charge that one is a "common libeler" is actionable *per se*); Andres *v.* Koppenheafer, 3 Serg. & R. (Pa.) 255, 8 Am. Dec. 647 (holding that the words, "What is a woman that makes a libel? She is a dirty creature and that is you. You have made a libel," are actionable *per se*).

52. *Alabama.*—Williams *v.* Spears, 11 Ala. 138; Kennedy *v.* Dear, 6 Port. 90; Commons *v.* Walters, 1 Port. 377, 27 Am. Dec. 635; Canterbury *v.* Hill, 4 Stew. & P. 224; Harris *v.* Purdy, 1 Stew. 231; Lea *v.* Robertson, 1 Stew. 138. See also Spruil *v.* Cooper, 16 Ala. 791; Hall *v.* Montgomery, 8 Ala. 510; Robertson *v.* Lea, 1 Stew. 141.

Arkansas.— Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829; Carlock *v.* Spencer, 7 Ark. 12. See also Knight *v.* Sharp, 24 Ark. 602; Horn *v.* Foster, 19 Ark. 346.

Connecticut.— Lyman *v.* Wetmore, 2 Conn. 42 note; Chapman *v.* Gillet, 2 Conn. 40.

Delaware.— Eccles *v.* Shannon, 4 Harr. 193. See also Stewart *v.* Cleaver, 1 Harr. 337.

Georgia.— Smith *v.* Wright, 55 Ga. 218; Brown *v.* Hanson, 53 Ga. 632. See also Dalton *v.* Higgins, 34 Ga. 433.

Illinois.— Harbison *v.* Shook, 41 Ill. 141; Wolbrecht *v.* Baumgarten, 26 Ill. 291; Hicks *v.* Rising, 24 Ill. 566; Norton *v.* Gordon, 16 Ill. 38; Owen *v.* McKean, 14 Ill. 459; Sanford *v.* Gaddis, 13 Ill. 329; Becherer *v.* Stock, 49 Ill. App. 270. See also Crandall *v.* Dawson, 6 Ill. 556; Blair *v.* Sharp, 1 Ill. 30.

Indiana.— Mull *v.* McKnight, 67 Ind. 535; Dean *v.* Miller, 66 Ind. 440; Hutts *v.* Hutts, 62 Ind. 214; Downey *v.* Dillon, 52 Ind. 442; Weston *v.* Lumley, 33 Ind. 486; Tull *v.* David, 27 Ind. 377; Whitsel *v.* Lennen, 13 Ind. 535; Shellenbarger *v.* Norris, 2 Ind. 285; Lanter *v.* McEwen, 8 Blackf. 495; Henry *v.* Hamilton, 7 Blackf. 506; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564; McClemery *v.* Keller, 3 Blackf. 488; Wilson *v.* Harding, 2 Blackf. 241. See also Dorsett *v.* Adams, 50 Ind. 129; Shinloub *v.* Ammerman, 7 Ind. 347; Snyder *v.* Degant, 4 Ind. 578; Starr *v.* Harrington, 1 Ind. 515; Gants *v.* Vinard, 1 Ind. 476; Roella *v.* Follow, 7 Blackf. 377; Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212 (where, however, defendant justified the charge); Cummins *v.* Butler, 3 Blackf. 190; Henson *v.* Veatch, 1 Blackf. 369.

Iowa.— Bradley *v.* Kennedy, 2 Greene 231.

Kansas.— Miles *v.* Harrigton, 8 Kan. 425.

Kentucky.— Holt *v.* Turpin, 78 Ky. 433; Sloan *v.* Gilbert, 12 Bush 51, 23 Am. Rep. 708; Dedway *v.* Powell, 4 Bush 77, 96 Am. Dec. 283; Ramey *v.* Thornberry, 7 B. Mon. 475; Eastburn *v.* Stephens, Litt. Sel. Cas. 82; Gibbs *v.* Tucker, 2 A. K. Marsh. 219. See also Burkett *v.* McCarty, 10 Bush 758; Beswick *v.* Chappel, 8 B. Mon. 486; Martin *v.* Melton, 4 Bibb 99; Watson *v.* Hampton, 2 Bibb 319.

Louisiana.—Mallerich *v.* Mertz, 19 La. Ann. 194; Mohrman *v.* Ohse, 17 La. Ann. 64; Miller *v.* Holstein, 16 La. 389.

Maine.— Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706; McAllister *v.* Sibley, 25 Me. 474. See also Small *v.* Clewley, 60 Me. 262.

Maryland.— Huffer *v.* Miller, 74 Md. 454, 22 Atl. 205; Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887. See also Sheely *v.* Biggs, 2 Harr. & J. 363, 3 Am. Dec. 552.

Massachusetts.— Wood *v.* Southwick, 97 Mass. 354; Gardner *v.* Dyer, 5 Gray 22; Stone *v.* Clark, 21 Pick. 51; Fowle *v.* Robbins, 12 Mass. 498. See also Sibley *v.* Marsh, 7 Pick. 38; Ross *v.* Lapham, 14 Mass. 275.

stood as meaning and embracing that crime which consists of and is defined to be

Michigan.—McNaughton *v.* Quay, 102 Mich. 142, 60 N. W. 474; Brace *v.* Brink, 33 Mich. 91; Crone *v.* Angell, 14 Mich. 340; Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59. See also Thompson *v.* Bowers, 1 Dougl. 321.

Minnesota.— See Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227; Lewis *v.* Black, 27 Miss. 425.

Missouri.— Perselly *v.* Bacon, 20 Mo. 330; Palmer *v.* Hunter, 8 Mo. 512; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609. See also McManus *v.* Jackson, 28 Mo. 56; Dowd *v.* Winters, 20 Mo. 361; Harris *v.* Woody, 9 Mo. 113; Berry *v.* Dryden, 7 Mo. 324; Hibler *v.* Servoss, 6 Mo. 24; Alderson *v.* Auerswald, 80 Mo. App. 370.

New Hampshire.— Butterfield *v.* Buffum, 9 N. H. 156.

New Jersey.— Cole *v.* Grant, 18 N. J. L. 327; Haight *v.* Morris, 7 N. J. L. 289; Badgley *v.* Hedges, 2 N. J. L. 233, where, however, the charge was privileged.

New York.— Spooner *v.* Keeler, 51 N. Y. 527; Howard *v.* Sexton, 4 N. Y. 157; Gorton *v.* Keller, 51 Barb. 475; Kern *v.* Towsley, 51 Barb. 385; Tilson *v.* Clark, 45 Barb. 178; Phincle *v.* Vaughan, 12 Barb. 215; Rundell *v.* Butler, 7 Barb. 260 (holding that where defendant, in speaking of an oath taken by plaintiff, in a suit before a justice of the peace, and of defendant's having made a complaint against plaintiff before the grand jury for perjury, said he "went to the grand jury and asked them if they wanted more witnesses, and that they said they had witnesses enough to satisfy them," such words are actionable *per se*); Coons *v.* Robinson, 3 Barb. 625; Hopkins *v.* Smith, 3 Barb. 599; Palmer *v.* Haight, 2 Barb. 210; Walrath *v.* Nellis, 17 How. Pr. 72; Jacobs *v.* Fyler, 3 Hill 572; Hutchins *v.* Blood, 25 Wend. 413; Clark *v.* Dibble, 16 Wend. 601; Roberts *v.* Champlin, 14 Wend. 120; Power *v.* Price, 12 Wend. 500; Cook *v.* Bostwick, 12 Wend. 48; Dayton *v.* Rockwell, 11 Wend. 140; Sherwood *v.* Chace, 11 Wend. 38; Gilman *v.* Lowell, 8 Wend. 573, 24 Am. Dec. 96; Ring *v.* Wheeler, 7 Cow. 725; Woodbeck *v.* Keller, 6 Cow. 118; Fox *v.* Vanderbeck, 5 Cow. 513; McKinly *v.* Rob, 20 Johns. 351; Crookshank *v.* Gray, 20 Johns. 344; Chapman *v.* Smith, 13 Johns. 78; Niven *v.* Munn, 13 Johns. 48; Van Steenbergh *v.* Kortz, 10 Johns. 167; Vaughan *v.* Havens, 8 Johns. 109; McClaughry *v.* Wetmore, 6 Johns. 82, 5 Am. Dec. 194; Pelton *v.* Ward, 3 Cai. 73, 2 Am. Dec. 251; Green *v.* Long, 2 Cai. 91; Hopkins *v.* Beedle, 1 Cai. 347, 2 Am. Dec. 191. See also Bonner *v.* McPhail, 31 Barb. 106; Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. 275; Emery *v.* Miller, 1 Den. 208; Muchler *v.* Mulhollen, Lalor 263; Aldrich *v.* Brown, 11 Wend. 596; Mitchell *v.* Borden, 8 Wend. 570; Bullock *v.* Koon, 4 Wend. 531; Rouse *v.* Ross, 1 Wend. 475; Allen *v.* Crofoot, 7 Cow. 46; Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337; Ward *v.* Clark, 2 Johns. 10, 3 Am. Dec. 383; Stafford *v.* Green, 1 Johns. 505.

North Carolina.— Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780; Pugh *v.* Neal, 49 N. C. 367; Howell *v.* Howell, 32 N. C. 82; Chandler *v.* Robison, 29 N. C. 480; Rineheardt *v.* Potts, 29 N. C. 403; Whitaker *v.* Carter, 26 N. C. 461; Jenkins *v.* Cockerham, 23 N. C. 309; McDonald *v.* Murchison, 12 N. C. 7; Studdard *v.* Linville, 10 N. C. 474; Hamilton *v.* Dent, 2 N. C. 116, 1 Am. Dec. 552. See also Pegram *v.* Stoltz, 76 N. C. 349; Sparrow *v.* Maynard, 53 N. C. 195; Mebane *v.* Sellars, 48 N. C. 199; Sluder *v.* Wilson, 32 N. C. 92; Smith *v.* Smith, 30 N. C. 29; Kincade *v.* Bradshaw, 10 N. C. 63; Boling *v.* Luther, 4 N. C. 635.

Ohio.— Rayner *v.* Kinney, 14 Ohio St. 283; Wilson *v.* Oliphant, Wright 153; Brown *v.* Kincaid, Wright 37; Price *v.* Eckles, Tapp. 242; Stickels *v.* Hall, 3 Ohio Cir. Ct. 398, 2 Ohio Cir. Dec. 224. See also Hamm *v.* Wickline, 26 Ohio St. 81; Waggoner *v.* Richmond, Wright 173; Willis *v.* Patterson, Tapp. 324.

Pennsylvania.— Gorman *v.* Sutton, 32 Pa. St. 247; Bricker *v.* Potts, 12 Pa. St. 200; Steinman *v.* McWilliams, 6 Pa. St. 170; Kean *v.* McLaughlin, 2 Serg. & R. 469; Rue *v.* Mitchell, 2 Dall. 58, 1 L. ed. 288, 1 Am. Dec. 258; McCulloch *v.* Craig, 1 Phila. 74. See also Barger *v.* Barger, 18 Pa. St. 489; Tipton *v.* Kahle, 3 Watts 90; Harvey *v.* Boies, 1 Penr. & W. 12; Packer *v.* Spangler, 2 Binn. 60; Shaffer *v.* Kintzer, 1 Binn. 537, 2 Am. Dec. 488.

South Carolina.— Zimmerman *v.* McMakin, 22 S. C. 372, 53 Am. Rep. 720; Morgan *v.* Livingston, 2 Rich. 573; Gale *v.* Hays, 3 Strobh. 452; Patrick *v.* Smoke, 3 Strobh. 147; Simpson *v.* Vaughan, 2 Strobh. 32; Palmer *v.* Bogan, 2 McMull. 122; Dalrymple *v.* Lofton, 2 McMull. 112; Hamilton *v.* Langley, 1 McMull. 498; Randall *v.* Holsenbake, 3 Hill 175; Power *v.* Miller, 2 McCord 220; McMeans *v.* Calhoun, 1 Nott & M. 422. See also Dalrymple *v.* Lofton, 2 Speers 588; Wilson *v.* Cloud, 2 Speers 1; Pegram *v.* Styron, 1 Bailey 595; Peareson *v.* Picket, 1 McCord 472.

Tennessee.—Bell *v.* Farnsworth, 11 Humphr. 608; Steele *v.* Phillips, 10 Humphr. 461; Sharp *v.* Wilhite, 2 Humphr. 434; Magee *v.* Stark, 1 Humphr. 506; Wilson *v.* Nations, 5 Yerg. 211. See also Davis *v.* Davis, 87 Tenn. 200, 10 S. W. 363; McAnally *v.* Williams, 3 Sneed 26; Cannon *v.* Phillips, 2 Sneed 185; Jones *v.* Marrs, 11 Humphr. 214; Davis *v.* McNees, 8 Humphr. 40 (where, however, the charge was privileged); Coulter *v.* Stuart, 2 Yerg. 225.

Vermont.— Bates *v.* Harrington, 51 Vt. 1; Cass *v.* Anderson, 33 Vt. 182; Sanderson *v.* Hubbard, 14 Vt. 462; Wood *v.* Scott, 13 Vt. 42; Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704. See also Kimmis *v.* Stiles, 44 Vt.

the wilful giving under an oath or affirmation, legally imposed, of false testimony material to the issue or point of inquiry.[53]

(B) *Form of Imputation* — (1) DIRECT CHARGE OF PERJURY. If the charge of perjury is direct and unqualified, it is in itself actionable.[54]

(2) CHARGE OF FALSE SWEARING. Swearing to that which is false does not necessarily imply that the party has in judgment of law perjured himself. It may mean that he has sworn to a falsehood without being conscious at the time that it was a falsehood.[55] Hence words charging that one "swore falsely," "swore to a falsehood," "swore to a lie," or any similar words, are not actionable,[56] unless they are coupled with other words calculated to convey to the mind of the hearer the idea that the falsehood was of the grade which the law punishes as a

351; Dwinells *v.* Aikin, 2 Tyler 75; Bowdish *v.* Peckham, 1 D. Chipm. 144.

Virginia.— Bourland *v.* Eidson, 8 Gratt. 27; Hinchman *v.* Lawson, 5 Leigh 695, 27 Am. Dec. 622; Grant *v.* Hover, 6 Munf. 13. See also Hogan *v.* Wilmoth, 16 Gratt. 80; Lincoln *v.* Chrisman, 10 Leigh 338.

West Virginia.— McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415; Shroyer *v.* Miller, 3 W. Va. 158.

Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.

England.— See Hall *v.* Weeden, 8 D. & R. 140, 4 L. J. K. B. O. S. 204, 16 E. C. L. 340; Roberts *v.* Camden, 9 East 93, 9 Rev. Rep. 513; Holt *v.* Scholefield, 6 T. R. 691, 3 Rev. Rep. 318.

Canada.— See Swan *v.* Clelland, 13 U. C. Q. B. 335.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 54–60.

53. Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448. See also PERJURY.

54. *Alabama.*— Commons *v.* Walters, 1 Port. 377, 27 Am. Dec. 635 (holding that the words, "You are perjured," are actionable without a colloquium); Robertson *v.* Lea, 1 Stew. 141; Lea *v.* Robertson, 1 Stew. 138 (holding that the words, "He is perjured." "He has committed perjury," are actionable *per se*).

Delaware.— Eccles *v.* Shannon, 4 Harr. 193, holding that to say of one, "He had perjured himself," is actionable *per se*.

Georgia.— Brown *v.* Hanson, 53 Ga. 632, holding that it is actionable *per se* to say of one that "he had perjured himself."

Kansas.— Miles *v.* Harrington, 8 Kan. 425, holding that the charge, "You are a perjured scoundrel," is actionable *per se*.

Louisiana.— Mohrman *v.* Ohse, 17 La. Ann. 64.

Maine.— Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706, holding that to say of one, "[He] swore to an absolute lie, and so was guilty of perjury," is actionable *per se*.

New York.— Ring *v.* Wheeler, 7 Cow. 725 (holding that the words, "You are a perjured scoundrel," are actionable *per se*); Green *v.* Long, 2 Cai. 91; Hopkins *v.* Beedle, 1 Cai. 347, 2 Am. Dec. 191.

Ohio.— Waggoner *v.* Richmond, Wright 173; Stickels *v.* Hall, 3 Ohio Cir. Ct. 398, 2 Ohio Cir. Dec. 224, holding that the words, "He is a perjurer," are actionable *per se*.

Pennsylvania.—McCulloch *v.* Craig, 1 Phila. 74.

Tennessee.—Bell *v.* Farnsworth, 11 Humphr. 608.

Vermont.— Bates *v.* Harrington, 51 Vt. 1; Kimmis *v.* Stiles, 44 Vt. 351.

England.— Roberts *v.* Camden, 9 East 93, 9 Rev. Rep. 513; Holt *v.* Scholefield, 6 T. R. 691, 3 Rev. Rep. 318.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 54, 55.

55. Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448; Hopkins *v.* Beedle, 1 Cai. (N. Y.) 347, 2 Am. Dec. 191.

56. *Alabama.*— Robertson *v.* Lea, 1 Stew. 141.

Arkansas.— Knight *v.* Sharp, 24 Ark. 602, holding that to say of one that he had "sworn a lie" is not actionable *per se*.

Illinois.— Blair *v.* Sharp, 1 Ill. 30.

Indiana.— Shinloub *v.* Ammerman, 7 Ind. 347 (holding that the words, "He (meaning the plaintiff) swore a lie before Belmont," are not actionable *per se*); Rocila *v.* Follow, 7 Blackf. 377 (holding that the words, "He took a false oath," are not actionable *per se*); Cummins *v.* Butler, 3 Blackf. 190.

Kentucky.— Beswick *v.* Chappel, 8 B. Mon. 486, holding that the words, "If I had sworn to what you did, I would have sworn to a lie," do not in themselves constitute a charge of perjury.

Maine.— Small *v.* Clewley, 60 Me. 262.

Maryland.— Sheely *v.* Biggs, 2 Harr. & J. 363, 3 Am. Dec. 552.

Massachusetts.— Sibley *v.* Marsh, 7 Pick. 38.

Minnesota.— Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448.

Missouri.— Harris *v.* Woody, 9 Mo. 113.

New York.— Phincle *v.* Vaughan, 12 Barb. 215; Muchler *v.* Mulhollen, Lalor 263; Roberts *v.* Champlin, 14 Wend. 120; Crookshank *v.* Gray, 20 Johns. 344; Ward *v.* Clark, 2 Johns. 10, 3 Am. Dec. 383; Stafford *v.* Green, 1 Johns. 505; Hopkins *v.* Beedle, 1 Cai. 347, 2 Am. Dec. 191.

North Carolina.— Mebane *v.* Sellars, 48 N. C. 199; Browne *v.* Dula, 7 N. C. 574.

Pennsylvania.— Barger *v.* Barger, 18 Pa. St. 489; Tipton *v.* Kahle, 3 Watts 90; Packer *v.* Spangler, 2 Binn. 60; Shaffer *v.* Kintzer, 1 Binn. 537, 2 Am. Dec. 488; McCulloch *v.* Craig, 1 Phila. 74.

crime,[57] or unless the circumstances under which the charge is made show that the false swearing referred to took place at a judicial proceeding before a tribunal legally constituted and having jurisdiction.[58] Under statute, however,

South Carolina.— Dalrymple *v.* Lofton, 2 Speers 588.

Tennessee.— Jones *v.* Marrs, 11 Humphr. 214.

Vermont.— Kimmis *v.* Stiles, 44 Vt. 351; Bowdish *v.* Peckham, 1 D. Chipm. 144.

Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.

England.— Hall *v.* Weedon, 8 D. & R. 140, 4 L. J. K. B. O. S. 204, 16 E. C. L. 340 (holding that it is not actionable *per se* to say of one that "[his] oath ought not to be taken for he has been a forsworn man, and I can bring people to prove it; and they that know him will not sit in the jury box with him"); Holt *v.* Scholefield, 6 T. R. 691, 3 Rev. Rep. 318.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 54–58.

In Louisiana a charge against plaintiff of having sworn falsely is actionable, since in that state the common-law rule as to spoken words not being actionable *per se* unless charging a crime does not obtain. Miller *v.* Holstein, 16 La. 389; Mallerich *v.* Mertz, 10 La. Ann. 194.

57. *Illinois.*— Owen *v.* McKean, 14 Ill. 459.

Kentucky.—Ramey *v.* Thornberry, 7 B. Mon. 475, holding that the charge, "Ramey swore a lie in the Pike Circuit Court, on the trial of the Commonwealth against Davidson Mays" is actionable.

Maryland.— Huffer *v.* Miller, 74 Md. 454, 22 Atl. 205 (holding that the words, "He (the plaintiff) swore to damn lies before Justice Bitner, and that was the reason he (the plaintiff) was acquitted," are actionable *per se*); Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887 (holding that to say of another, "You got on the stand and swore false oaths against me," is actionable *per se*, if the "stand" mentioned was the witness' stand in a court of justice in a judicial proceeding).

Massachusetts.— Wood *v.* Southwick, 97 Mass. 354 (holding that the words, "You swore to a lie last spring in that case of Obes about the poor-farm-house, and I can prove it," is actionable *per se*); Fowle *v.* Robbins, 12 Mass. 498 (holding that to say of one, "You swore false at the trial of your brother John," is actionable *per se*).

Michigan.— Brace *v.* Brink, 33 Mich. 91 (holding that to charge another with having sworn falsely and with having been indicted before the grand jury for false swearing is actionable *per se*); Crone *v.* Angell, 14 Mich. 340 (holding that to say of one, "He has sworn to a damned lie, and I will put him through for it if it costs me all I am worth," is actionable *per se*).

Missouri.— Perselly *v.* Bacon, 20 Mo. 330 (holding that the words, "You swore a lie before the grand jury," are actionable *per se*); Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

New York.— Spooner *v.* Keeler, 51 N. Y. 527 (holding that to say of one, "You swore to a lie . . . in that suit we had at Liberty," is actionable *per se*); Kern *v.* Towsley, 51 Barb. 385; Phincle *v.* Vaughan, 12 Barb. 215; Coons *v.* Robinson, 3 Barb. 625 (where the words were, "He [the plaintiff] has sworn to a lie and done it meaningly to cut my throat"); Walrath *v.* Nellis, 17 How. Pr. 72 (where the words were, "I would not swear to what Charles Walrath has, for the town of Palatine or the county of Montgomery. Peter J. Wagner is honestly mistaken, but Charles Walrath is wilful"); Jacobs *v.* Fyler, 3 Hill 572 (where the words were, "He has sworn false to my injury six or seven hundred dollars"); Sherwood *v.* Chace, 11 Wend. 38; Gilman *v.* Lowell, 8 Wend. 573, 24 Am. Dec. 96 (holding that it is actionable to say of another, "He has sworn falsely and I will attend to the grand jury respecting it"); Pelton *v.* Ward, 3 Cai. 73, 2 Am. Dec. 251 (holding that the words, "You swore to a lie, for which you now stand indicted," are actionable *per se*).

North Carolina.— Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; McDonald *v.* Murchison, 12 N. C. 7, holding that the words, "You swore to a lie to-day, in a case tried before Josiah Tyson, Esquire, against Daniel McDonald for killing a dog, and you offered to swear to a lie before," are actionable *per se*.

Pennsylvania.— Bricker *v.* Potts, 12 Pa. St. 200, holding that the words, "You . . . swore a lie, and it is in black and white, in Westmoreland county; you . . . swore a lie, and it is on record in Greenburgh," are actionable *per se*.

South Carolina.— McMeans *v.* Calhoun, 1 Nott & M. 422.

Tennessee.—Bell *v.* Farnsworth, 11 Humphr. 608 (holding that it is actionable *per se* to say of another, "You took out a peace warrant against me and some of my family, and swore falsely"); Magee *v.* Stark, 1 Humphr. 506 (holding that it is actionable *per se* as charging perjury to say of one, "I had a lawsuit with Thomas G. Denning, and Thomas Stark swore falsely against me, and I have advertised him as such," as the word "lawsuit" necessarily implies a judicial proceeding."

Vermont.— Cass *v.* Anderson, 33 Vt. 182.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 54–56.

58. *Arkansas.*— Knight *v.* Sharp, 24 Ark. 602.

Delaware.— Stewart *v.* Cleaver, 1 Harr. 337.

Indiana.— Dean *v.* Miller, 66 Ind. 440; Henry *v.* Hamilton, 7 Blackf. 506.

in some jurisdictions, either making false swearing, in any matter or thing other than a judicial proceeding, a criminal offense,[59] or prescribing the circumstances under which false swearing shall be deemed slanderous,[60] words charging another with having sworn falsely have been held actionable *per se*, although not spoken in reference to a judicial proceeding.

(c) *In Proceedings Before Justices of the Peace.* Words charging a person with swearing to falsehoods in a legal proceeding before a justice of the peace are actionable in themselves.[61] On the other hand, however, it has been held that it is not actionable *per se* to charge one with swearing falsely before a person referred to as a "squire,"[62] unless in addition thereto it is alleged and shown

Kansas.— Miles *v.* Harrington, 8 Kan. 425.
Kentucky.— Martin *v.* Melton, 4 Bibb 99; Watson *v.* Hampton, 2 Bibb 319.
Maine.— Small *v.* Clewley, 60 Me. 262.
Maryland.— Sheely *v.* Biggs, 2 Harr. & J. 363, 3 Am. Dec. 552.
Massachusetts.— Gardner *v.* Dyer, 5 Gray 22; Stone *v.* Clark, 21 Pick. 51.
Michigan.— McNaughton *v.* Quay, 102 Mich. 142, 60 N. W. 474.
Minnesota.— Schmidt *v.* Witherick, 29 Minn. 156, 12 N. W. 448.
Mississippi.— Lewis *v.* Black, 27 Miss. 425.
Missouri.—McManus *v.* Jackson, 28 Mo. 56; Palmer *v.* Hunter, 8 Mo. 512.
New Jersey.— Cole *v.* Grant, 18 N. J. L. 327.
New York.— Gorton *v.* Keeler, 51 Barb. 475; Bonner *v.* McPhail, 31 Barb. 106; Crookshank *v.* Gray, 20 Johns. 344; Chapman *v.* Smith, 13 Johns. 78; Niven *v.* Munn, 13 Johns. 48; Vaughan *v.* Havens, 8 Johns. 109.
North Carolina.— Mebane *v.* Sellars, 48 N. C. 199; Rineheardt *v.* Potts, 29 N. C. 403.
Ohio.— Wilson *v.* Oliphant, Wright 153; Brown *v.* Kincaid, Wright 37.
Pennsylvania.— Barger *v.* Barger, 18 Pa. St. 489.
South Carolina.— Morgan *v.* Livingston, 2 Rich. 573; Gale *v.* Hays, 3 Strobh. 452.
Vermont.— Sanderson *v.* Hubbard, 14 Vt. 462; Wood *v.* Scott, 13 Vt. 42.
Virginia.— Hogan *v.* Wilmoth, 16 Gratt. 80.
Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.
England.— Holt *v.* Scholefield, 6 T. R. 691, 3 Rev. Rep. 318.
Canada.— See McDonald *v.* Moore, 26 U. C. C. P. 52.
See 32 Cent. Dig. tit. "Libel and Slander," §§ 54–56.

59. Smith *v.* Wright, 55 Ga. 218, holding that a charge that "Peter Smith had told lies, and sworn to them" was actionable *per se*. See also Holt *v.* Turpin, 78 Ky. 433.

60. Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829 [*distinguishing* Knight *v.* Sharp, 24 Ark. 602]; Harbison *v.* Shook, 41 Ill. 141 (holding under statute that it is unnecessary to aver or prove that the evidence or oath charged to be false was material or that the oath was in a judicial proceeding); Sanford *v.* Gaddis, 13 Ill. 329 (holding that it is not necessary that words spoken in a conversation concerning a judicial proceeding should have been uttered under such circumstances as to impute the crime of perjury). See also Darling *v.* Banks, 14 Ill. 46. *Compare* McGough *v.* Rhodes, 12 Ark. 625 [*overruling* Carlock *v.* Spencer, 7 Ark. 12], holding that a charge of false swearing is not actionable unless connected with some proceeding or matter in which perjury could be committed.

61. *Alabama.*— Harris *v.* Purdy, 1 Stew. 231 (holding that the words, "He swore a lie," with a colloquium of plaintiff's testimony before a justice of the peace, is actionable *per se*); Robertson *v.* Lea, 1 Stew. 141.
Illinois.— Sanford *v.* Gaddis, 13 Ill. 329.
Indiana.— Dorsett *v.* Adams, 50 Ind. 129; Shellenbarger *v.* Norris, 2 Ind. 285; Henry *v.* Hamilton, 7 Blackf. 506.
Kentucky.— Dedway *v.* Powell, 4 Bush 77, 96 Am. Dec. 283.
New Jersey.— Cole *v.* Grant, 18 N. J. L. 327.
New York.— Dayton *v.* Rockwell, 11 Wend. 140; Fox *v.* Vanderbeck, 5 Cow. 513 (holding that where defendant said that plaintiff had sworn falsely in his testimony before a justice of the peace, and requested the justice to keep minutes of the testimony so that he might prosecute him for perjury, and subsequently said that he thought he should prosecute him for perjury, the words were actionable); Van Steenbergh *v.* Kortz, 10 Johns. 167.
North Carolina.— Pugh *v.* Neal, 49 N. C. 367. See also Sluder *v.* Wilson, 32 N. C. 92, holding, however, that to make words charging false swearing before a justice of the peace amount to a charge of perjury, it is necessary that the declaration should state and the proof show a proceeding in which an oath could be judicially administered.
Pennsylvania.— Kean *v.* McLaughlin, 2 Serg. & R. 469, holding that it is actionable to say of a witness who has just given his testimony in a justice's court, "You have sworn a manifest lie."
South Carolina.— Zimmerman *v.* McMakin, 22 S. C. 372, 53 Am. Rep. 720.
Tennessee.— Sharp *v.* Wilhite, 2 Humphr. 434.
See 32 Cent. Dig. tit. "Libel and Slander," § 56.

62. Ward *v.* Clark, 2 Johns. (N. Y.) 10, 3 Am. Dec. 383; Stafford *v.* Green, 1 Johns. (N. Y.) 505; Dalrymple *v.* Lofton, 2 Speers (S. C.) 588. *Compare* Rue *v.* Mitchell, 2 Dall. (Pa.) 58, 1 L. ed. 288, 1 Am. Dec. 258.

that such person so called had authority to hold a court known in law or to act judicially and administer an oath.[63]

(D) *In Grand Jury Proceedings.* A grand jury is a tribunal competent to administer an oath and words imputing false swearing before a grand jury are actionable *per se*.[64] And where a charge of this character has been made, defendant cannot be relieved from responsibility on the ground that no such judicial proceeding was had or, if had, that the person charged with false swearing was not examined as a witness.[65]

(E) *Special Proceedings.* Since at common law perjury cannot be assigned on an extrajudicial oath, words charging perjury or false swearing in a special proceeding are not, in the absence of statute,[66] actionable, where the proceeding is not judicial or quasi-judicial,[67] and one in which the administration of oaths is authorized by law.[68]

(F) *Jurisdiction of Court.* Since an accusation of perjury implies within itself everything necessary to constitute the offense,[69] where the words contain a direct charge of perjury or are such as of themselves necessarily import a charge of perjury, it is not necessary to aver and show that the charge related to testimony in an action before a court of competent jurisdiction,[70] as it will be pre-

63. Canterbury *v.* Hill, 4 Stew. & P. (Ala.) 224, where the words were held actionable, there being an inducement to show that the "squire" was a justice of the peace.

64. Holt *v.* Turpin, 78 Ky. 433; Perselly *v.* Bacon, 20 Mo. 330.

Words charging a grand juror with having "foresworn himself by neglecting or refusing to prevent an offense within his knowledge" are not actionable, since such neglect or refusal do not constitute perjury or any other indictable offense. McAnally *v.* Williams, 3 Sneed (Tenn.) 26.

65. Holt *v.* Turpin, 78 Ky. 433. *Compare* Emery *v.* Miller, 1 Den. (N. Y.) 208, holding that where a declaration in slander stated a complaint before a grand jury and that plaintiff was sworn and gave evidence upon such complaint, and contained a colloqium concerning the evidence so given, and charged defendant with having spoken words in themselves imputing perjury to plaintiff, in giving such testimony, the action would not be sustained without proof of such proceedings before the grand jury.

66. See Avery *v.* Ward, 150 Mass. 160, 22 N. E. 707, where words relating to an oath taken by an assured to the truth of a statement in writing, setting forth the particulars of a loss as required by his policy, were held actionable under a statute enlarging the offense of perjury.

67. *Alabama.*— Hall *v.* Montgomery, 8 Ala. 510, proceeding before register of land-office.

Kentucky.— Beswick *v.* Chappel, 8 B. Mon. 486, holding that a charge that one swore a lie in the oath he took as viewer of a proposed alteration of a road is not actionable *per se*, such an oath not being taken in the course of a judicial proceeding.

Ohio.— Willis *v.* Patterson, Tapp. 275.

Pennsylvania.— Harvey *v.* Boies, 1 Penr. & W. 12.

South Carolina.— Pegram *v.* Styron, 1 Bailey 595, holding that words charging perjury in swearing to an account before a notary public with a view to its being presented to an administrator are not actionable *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 57.

Proceedings held to be judicial.— The following proceedings have been held to be judicial within the meaning of the text: A proceeding to test the sanity of a person alleged to be insane (Hutts *v.* Hutts, 62 Ind. 214); an affidavit verifying a petition to the board of county commissioners in regard to a road (Weston *v.* Lumley, 33 Ind. 486); arbitration proceedings (Moore *v.* Horner, 4 Sneed (Tenn.) 491. See also Bullock *v.* Koon, 4 Wend. (N. Y.) 531, holding, however, that slander will not lie for charging a witness with perjury whilst testifying before arbitrators, if after the oath is administered to him, new parties are added to the arbitration, and new matters in controversy are submitted to be passed upon, and the charge be made in reference to what is said by the witness after such addition of parties and matters in controversy. *Compare* Willis *v.* Patterson, Tapp. (Ohio) 275); and an ecclesiastical tribunal before which a justice of the peace was authorized by law to administer oaths (Chapman *v.* Gillet, 2 Conn. 40. *Compare* Harvey *v.* Boies, 1 Penr. & W. (Pa.) 12, where the words were, "He swore a lie before the church sessions").

68. Dalton *v.* Higgins, 34 Ga. 433 (holding that it is not actionable *per se* to charge one with false swearing before processioners of land," as they have no authority to administer an oath); Willis *v.* Patterson, Tapp. (Ohio) 275 (holding that if a judicial officer administers an oath in a proceeding in which such oath is not authorized by law, he acts not as an officer but merely in the capacity of a private person, and that to charge one with perjury in relation to such an oath so administered to him is charging him with a crime he could not commit); Harvey *v.* Boies, 1 Penr. & W. (Pa.) 12.

69. Hall *v.* Montgomery, 8 Ala. 510.

70. *Kentucky.*— Gibbs *v.* Tucker, 2 A. K. Marsh. 219.

sumed until the contrary appears that the court had jurisdiction of the cause[71] and had power lawfully to administer an oath.[72] When, however, the words charged are not actionable in themselves but are rendered so by reference to extrinsic matters, it is incumbent on plaintiff to allege and show that they were spoken in reference to a proceeding before a court or officer of competent jurisdiction.[73] It is always a defense to show that the words were uttered in reference to testimony given under an oath administered extrajudicially or in a proceeding in which the court or officer was without jurisdiction.[74] The same rule applies to words referring to testimony given under an oath prescribed by an unconstitutional act of the legislature,[75] or to testimony given while not under the obligation of an oath.[76] If, however, the charge relates to a judicial proceeding before a tribunal having jurisdiction over the subject under investigation, it will be no defense that the pleadings in the cause may have been so defective that no reversible judgment could be rendered.[77] So it has been held that it will be no defense to a charge of false swearing in an affidavit or complaint made before a tribunal of competent jurisdiction, for the purpose of procuring a warrant, that the affidavit was insufficient to justify the issuance of a warrant,[78] or that the warrant actually taken out was void for want of a seal.[79] It has also

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

New York.— Spooner *v.* Keeler, 51 N. Y. 527; Kern *v.* Towsley, 51 Barb. 385; Green *v.* Long, 2 Cai. 91.

North Carolina.— Pugh *v.* Neal, 49 N. C. 367 (holding that where the words charge one with false swearing in a trial before a justice of the peace, it was not necessary to show that the justice before whom the trial was had was duly commissioned); Hamilton *v.* Dent, 2 N. C. 116, 1 Am. Dec. 552.

Pennsylvania.— Bricker *v.* Potts, 12 Pa. St. 200, holding that it is immaterial that in fact no judicial proceeding existed.

South Carolina.— Dalrymple *v.* Lofton, 2 McMull. 112.

See 32 Cent. Dig. tit. "Libel and Slander," § 59.

71. Green *v.* Long, 2 Cai. (N. Y.) 91; Dalrymple *v.* Lofton, 2 McMull. (S. C.) 112. *Compare* Dorsett *v.* Adams, 50 Ind. 129.

72. Green *v.* Long, 2 Cai. (N. Y.) 91; Hamilton *v.* Dent, 2 N. C. 116, 1 Am. Dec. 552.

73. Dorsett *v.* Adams, 50 Ind. 129; Shellenbarger *v.* Norris, 2 Ind. 285; Cummins *v.* Butler, 3 Blackf. (Ind.) 190; Bonner *v.* McPhail, 31 Barb. (N. Y.) 106; Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. (N. Y.) 275 (where it is said: "It is not actionable to say of a person that he swore falsely, or swore to a lie, unless it be said in reference to his testimony given on the trial of a cause, or in some proceeding where an oath is by law authorized to be administered"); Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

74. *Alabama.*— Hall *v.* Montgomery, 8 Ala. 510.

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

New York.— Green *v.* Long, 2 Cai. 91.

North Carolina.— Boling *v.* Luther, 4 N. C. 635, holding that it is not actionable to charge one with false swearing in obtaining a warrant when the justice had no authority to issue such warrant.

Ohio.— Hamm *v.* Wickline, 26 Ohio St. 81 (holding that where the words charge that plaintiff had sworn to a lie in an examination before a justice of the peace, the charge is not actionable, if the justice did not have jurisdiction, even though plaintiff intended to charge perjury and the hearers so understood); Waggoner *v.* Richmond, Wright 173 (holding that it is not actionable to charge one with perjury in reference to an affidavit not authorized by law where the hearers understood the charge to relate to the affidavit).

Pennsylvania.— Shaffer *v.* Kintzer, 1 Binn. 537, 2 Am. Dec. 488, holding that to say of one, "He has sworn false," is not actionable where the colloquium shows that the words referred to an extrajudicial affidavit.

South Carolina.— Dalrymple *v.* Lofton, 2 McMull. 112; Pegram *v.* Styron, 1 Bailey 595, holding that it is not actionable to charge one with swearing to an account before a magistrate, where such oath was extrajudicial.

See 32 Cent. Dig. tit. "Libel and Slander," § 59.

75. Burkett *v.* McCarty, 10 Bush (Ky.) 758.

76. Snyder *v.* Degant, 4 Ind. 578 (holding that where the words are spoken in reference to a trial described in the declaration, it is a good defense to show that plaintiff could not have committed legal perjury at that trial as he was not sworn); Bullock *v.* Koon, 4 Wend. (N. Y.) 531.

77. Weston *v.* Lumley, 33 Ind. 486; Wood *v.* Southwick 97 Mass. 354.

78. Dayton *v.* Rockwell, 11 Wend. (N. Y.) 140.

Insufficient affidavit not objected to.— In Henry *v.* Hamilton, 7 Blackf. (Ind.) 506, it was held that if a justice of the peace issues a state warrant on an insufficient affidavit, and the party accused, on being arrested, proceeds to trial before the justice without objection, the insufficiency of the affidavit will not render the proceedings *coram non judice*, and to charge a witness with swearing falsely on such trial is actionable.

79. Bell *v.* Farnsworth, 11 Humphr. (Tenn.) 608.

been held that a charge of perjury may be predicated upon testimony given in a proceeding which was not void and *coram non judice*, although it was erroneous in consequence of an error of judgment on the part of the judicial officer in taking such testimony and acting upon it.[80]

(G) *Materiality of Evidence.* Since to constitute the offense of perjury a person must swear falsely respecting a fact material to the issue,[81] it may be stated as a general rule that to charge one with false swearing in testifying as a witness on the trial of a cause is not actionable if the evidence charged to be false was not material to the issue involved in the suit in which it was given.[82] It is not necessary, however, to show to what particular degree the point in respect to which the person is charged with false swearing was material to the issue; it is sufficient if it be circumstantially material.[83] Nor is it necessary that the testimony should be so material as to establish the action or defense. It is sufficient if it goes to prove a material circumstance or link in the chain of evidence making out the cause of action or defense.[84] Where the language is in itself actionable as amounting to an accusation of the crime of perjury, without the aid of any colloquia or averments of extrinsic facts, in explanation of the circumstances under which the words were spoken, the materiality of the false testimony will be presumed,[85] at least in the absence of anything to show that it was known or understood to relate to an immaterial matter at the time by those in whose presence the defamatory accusation was made.[86] Indeed there are several decisions to the effect that, although the words are not actionable in themselves, it will be presumed that the testimony of a witness sworn and examined in a judicial proceeding was material and pertinent to the issue;[87] and this, although the charge was not general but was confined to a particular part of the testimony, unless the hearers must necessarily have understood that the testimony charged to have been

80. Van Steenbergh *v.* Kortz, 10 Johns. (N. Y.) 167.

81. Darling *v.* Banks, 14 Ill. 46.

82. *Arkansas.*— Horn *v.* Foster, 19 Ark. 346, where the rule is stated in the language of the text.

Illinois.— See Darling *v.* Banks, 14 Ill. 46. *Compare* Harbison *v.* Shook, 41 Ill. 141.

Indiana.— McGlemery *v.* Keller, 3 Blackf. 488.

Massachusetts.— Sibley *v.* Marsh, 7 Pick. 38, holding that where plaintiff is charged with false swearing only which does not necessarily imply perjury, it was proper that the jury should consider whether the words spoken had relation to facts immaterial to the inquiry.

Missouri.— Harris *v.* Woody, 9 Mo. 113; Alderson *v.* Auerswald, 80 Mo. App. 370.

New York.— Howard *v.* Sexton, 4 N. Y. 157 (holding that an action of slander will lie for imputing perjury in respect to evidence which is material, although if objected to it would have been incompetent as in violation of the statute of frauds); Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. 275; Hutchins *v.* Blood, 25 Wend. 413; Power *v.* Price, 16 Wend. 450 [*reversing* 12 Wend. 500]; Roberts *v.* Champlin, 14 Wend. 120; Bullock *v.* Koon, 4 Wend. 531; Rouse *v.* Ross, 1 Wend. 475.

North Carolina.— Smith *v.* Smith, 30 N. C. 29; Studdard *v.* Linville, 10 N. C. 474.

Ohio.— Wilson *v.* Oliphant, Wright 153, holding, however, that it is sufficient if the testimony is material to an issue in the cause, although the issue itself was immaterial and upon application should have been stricken out.

South Carolina.— Wilson *v.* Cloud, 2 Speers 1.

Tennessee.— See Sharp *v.* Wilhite, 2 Humphr. 434.

Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.

See 32 Cent. Dig. tit. "Libel and Slander," § 60.

Materiality held a question of law.— In an action of slander for charging plaintiff with false swearing in giving his testimony in a cause, where there is no dispute as to the facts sworn to, the question whether the evidence was material to the point in issue is a question of law to be decided by the court, and not of fact to be passed upon by the jury. Horn *v.* Foster, 19 Ark. 346; Power *v.* Price, 16 Wend. (N. Y.) 450.

83. Hutchins *v.* Blood, 25 Wend. (N. Y.) 413.

84. Hutchins *v.* Blood, 25 Wend. (N. Y.) 413.

85. Downey *v.* Dillon, 52 Ind. 442; Dorsett *v.* Adams, 50 Ind. 129; Whitsel *v.* Lennen, 13 Ind. 535; Wilson *v.* Harding, 2 Blackf. (Ind.) 241; Dalrymple *v.* Lofton, 2 McMull. (S. C.) 112. See also Wolbrecht *v.* Baumgarten, 26 Ill. 291, where the words were actionable *per se* by statute.

86. Wood *v.* Southwick, 97 Mass. 354.

87. Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. (N. Y.) 275; Power *v.* Price, 16 Wend. (N. Y.) 450; Chapman *v.* Smith, 13 Johns. (N. Y.) 78; Niven *v.* Munn, 13 Johns.

false was immaterial,[88] it being, however, competent for defendant to rebut this legal presumption.[89] Moreover the broad rule has been laid down that where false testimony is charged against a witness as to any particular matter, and nothing appears at the time to show but that it may have been material to the issue in which it was given; or is otherwise known to the hearer, but is so received and understood by him, in such case defendant will be regarded as designedly imputing perjury; and having once giving the imputation to the world, he cannot subsequently avoid slander by showing that the testimony was immaterial.[90]

(H) *Subornation of Perjury.* A charge that one is guilty of subornation of perjury is slanderous *per se*.[91] But words are not actionable as charging subornation of perjury, unless it appears from the colloquium or the words themselves that they had reference to an oath taken in the course of a judicial proceeding.[92]

(XXI) *Poisoning.* It is slanderous *per se* to charge one with poisoning,[93] or with attempting to poison another.[94]

(XXII) *Poisoning or Killing Domestic Animals.* Where the killing or poisoning of a domestic animal is an indictable crime, a charge of such offense is actionable *per se*.[95] But the act charged must constitute a criminal offense to come within the rule.[96]

(XXIII) *Rape.* Oral words imputing that a person is guilty of the crime of rape are actionable *per se*.[97]

(N. Y.) 48; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

88. Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. (N. Y.) 275; Power *v.* Price, 16 Wend. (N. Y.) 450 [*reversing* 12 Wend. 500]. See also Coleman *v.* Goodwin, 2 B. & C. 285 note, 9 E. C. L. 131; 3 Dougl. 91, 26 E. C. L. 69. *Compare* Crookshank *v.* Gray, 20 Johns. (N. Y.) 344; Smith *v.* Smith, 30 N. C. 29, holding that where the words do not directly import a charge of perjury but only that plaintiff was foresworn and defendant had, in speaking the words, gone on to specify the matters testified by plaintiff and the point in which he had sworn falsely, then it would be incumbent on plaintiff to set forth the whole truth in his declaration, and if upon the whole thus stated and proved the matter to which the alleged false oath related appeared to be immaterial, action could not be maintained.

89. Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. (N. Y.) 275.

90. Butterfield *v.* Buffum, 9 N. H. 156.

91. Beers *v.* Strong, Kirby (Conn.) 12; Shimer *v.* Bronnenburg, 18 Ind. 363 (holding that the words, "Pete Farnot swore to a lie, and you (the plaintiff meaning) hired him," are actionable as imputing subornation of perjury when properly averred); Avery *v.* Ward, 150 Mass. 160, 22 N. E. 707.

92. Power *v.* Miller, 2 McCord (S. C.) 220.

93. Furr *v.* Speed, 74 Miss. 423, 21 So. 562 (holding that the words, "Mrs. Furr poisoned me," are actionable *per se*); Liles *v.* Gaster, 42 Ohio St. 631; Eckart *v.* Wilson, 10 Serg. & R. (Pa.) 44 (holding that the words, "You have poisoned him, and I can prove it," are actionable); Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456 (where the charge was that plaintiff was "slow poisoning her husband").

94. Mills *v.* Wimp, 10 B. Mon. (Ky.) 417, "holding that the charge, "She put poison in a barrel of drinking water to poison me," is actionable *per se*. *Compare* Rock *v.* McClarnon, 95 Ind. 415.

95. *Illinois.*— Tottleben *v.* Blankenship, 58 Ill. App. 47.

Iowa.— Burton *v.* Burton, 3 Greene 316, a charge of poisoning defendant's cow.

Kentucky.— Lemons *v.* Wells, 78 Ky. 117, holding that to say of another, "He knew that Lemons poisoned his mare Alice and that he would have him arrested, on suspicion, for poisoning his mare," is actionable *per se*.

Maryland.— Yearly *v.* Ashley, 4 Harr. & J. 314, holding that the words, "Isaiah Ashley cut my horses' throats," are actionable.

Michigan.— Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495, holding that it is actionable to charge a person with poisoning the cattle of another, the poisoning resulting in the death of the cattle.

New York.— See Baxter *v.* Mohr, 37 Misc. 833, 76 N. Y. Suppl. 982.

South Carolina.— Gage *v.* Shelton, 3 Rich. 242, holding that it is actionable *per se* to charge one with killing a horse.

Vermont.— Hutchinson *v.* Wheeler, 35 Vt. 330, a charge of poisoning a cow.

See 32 Cent. Dig. tit. "Libel and Slander," § 62.

96. Chaplin *v.* Cruikshanks, 2 Harr. & J. (Md.) 247 (holding that it is not actionable to charge one with poisoning the horse of another, as it does not charge an indictable offense in the absence of evidence to show that the horse died); Glines *v.* Smith, 48 N. H. 259 (holding that to charge another "with wilfully and maliciously poisoning a horse" does not charge a crime under statute); Sturgenegger *v.* Taylor, 2 Brev. (S. C.) 480 (holding that the words, "Those two rascals killed my hogs," are not slanderous *per se*).

97. Dudley *v.* Nowill, 11 N. Y. App. Div.

(XXIV) *RECEIVING STOLEN PROPERTY.* An oral charge of criminally receiving stolen property is actionable *per se*.[98] But the words must impute criminal intention.[99]

(XXV) *REMOVING LANDMARKS.* Where the removing of landmarks is recognized as an indictable crime, oral words charging such removal are actionable *per se*.[1]

(XXVI) *ROBBERY.* It is slanderous *per se* to charge one with robbery.[2] The word "robber" is not actionable unless defendant intended to impute crime, which, however, the law will presume if not explained.[3] Words charging a person with being a "robber" or with having "robbed" may be so qualified as not to be actionable *per se*.[4] Thus a charge of "robbing a town" is not actionable, since the crime cannot be committed against a town.[5] A charge of a mere attempt to rob is not actionable *per se*,[6] unless such attempt in itself constitutes a crime.[7]

(XXVII) *VIOLATION OF ELECTION LAWS.* A charge of fraudulently destroying a vote,[8] or wilfully making a false declaration of one's right to vote,[9] or of fraudulently miscounting votes,[10] has been held to be actionable *per se*.

203, 42 N. Y. Suppl. 681 (holding that it is actionable *per se* as charging rape to say of one that "he is the father of a child by a young girl not yet fifteen years old"); Lally *v.* Emery, 59 Hun (N. Y.) 237, 12 N. Y. Suppl. 785; Pallet *v.* Sargent, 36 N. H. 496; Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

98. Mayo *v.* Sample, 18 Iowa 306 (where the communication complained of was held privileged); Alfred *v.* Farlow, 8 Q. B. 854, 10 Jur. 714, 15 L. J. Q. B. 258, 55 E. C. L. 854; Symmons *v.* Blake, 1 M. & Rob. 477.

99. Dorsey *v.* Whipps, 8 Gill (Md.) 457, holding that the words, "I have been informed that some gentleman in the neighborhood of plaintiff had missed some clevises off his plows, and went to plaintiff's to have others made, and on arriving there, found his clevises in the possession of plaintiff; that he claimed the clevises, and plaintiff pretended not to know how they came into his shop, but afterward acknowledged that he had purchased them from one of claimant's negroes, and begged him to say nothing about it as it would ruin him," are not slanderous *per se*. See also Paterson *v.* Collins, 11 U. C. Q. B. 63.

1. Beswick *v.* Chappel, 8 B. Mon. (Ky.) 486; Young *v.* Miller, 3 Hill (N. Y.) 21; Dial *v.* Holter, 6 Ohio St. 228; Tood *v.* Rough, 10 Serg. & R. (Pa.) 18.

2. *Illinois.*—Zuckerman *v.* Sonnenschein, 62 Ill. 115.

Indiana.— Hutts *v.* Hutts, 51 Ind. 581; Craig *v.* Brown, 5 Blackf. 44, holding that it is actionable to say of a postmaster, "He would rob the mail for 100 dollars."

Maine.— See Kent *v.* Bonzey, 38 Me. 435, where defendant said of plaintiff and another, "One of them held him and the other put his hand in his pocket and took the money out."

Minnesota.— Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388.

New York.— Titus *v.* Sumner, 44 N. Y. 266; Lister *v.* Wright, 2 Hill 320. See also Miller *v.* Holmes, 61 N. Y. Super. Ct. 245, 19 N. Y. Suppl. 701.

Pennsylvania.— Newskey *v.* Mundt, 4 Leg. Gaz. 230, where the charge was privileged.

Tennessee.— Coulter *v.* Stuart, 2 Yerg. 225.

England.— Tomlinson *v.* Brittlebank, 4 B. & Ad. 630, 2 L. J. K. B. 105, 1 N. & M. 455, 24 E. C. L. 277; Slowman *v.* Dutton, 10 Bing. 402, 3 L. J. C. P. 109, 4 Moore & S. 174, 25 E. C. L. 193; Tozer *v.* Mashford, 6 Exch. 539, 20 L. J. Exch. 225; Rowcliffe *v.* Edmonds, 4 Jur. 684, 9 L. J. Exch. 278, 7 M. & W. 12; Hankinson *v.* Bilby, 16 M. & W. 442.

See 32 Cent. Dig. tit. "Libel and Slander," § 66.

3. Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687.

4. Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291 (holding that a charge that plaintiff "beat Boulier out of one thousand dollars when he worked for Boulier . . . He robbed you, Boulier, of a thousand dollars when he worked for you" does not charge a crime); Allen *v.* Hillman, 12 Pick. (Mass.) 101; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687; Filber *v.* Dautermann, 28 Wis. 134 (holding that the words, "You have cheated and robbed orphan children," shown by the complaint to have been used to charge that plaintiff had secured the assignment of some mortgages by fraud, are not actionable *per se*).

To call one a "bushwhacker" does not impute robbery. Curry *v.* Collins, 37 Mo. 324.

5. McCarty *v.* Barrett, 12 Minn. 494.

6. Russell *v.* Wilson, 7 B. Mon. (Ky.) 261.

7. See Bartow *v.* Brands, 15 N. J. L. 248.

8. Dodds *v.* Henry, 9 Mass. 262.

9. Crawford *v.* Wilson, 4 Barb. (N. Y.) 504.

A charge of double voting at a town meeting on a question of opinion merely and one which the meeting had no power to determine has been held not to be actionable *per se*. Shepherd *v.* Piper, 98 Me. 384, 57 Atl. 84.

10. Ellsworth *v.* Hayes, 71 Wis. 427, 37 N. W. 249.

(XXVIII) *CRIMES RELATING TO UNITED STATES MAIL.* To charge one orally with robbing the United States mail,[11] or with sending obscene matter through the mails,[12] or to charge a postmaster with embezzling letters,[13] is slanderous *per se*. But it is not slanderous *per se* to charge one with breaking open and reading a letter, as that is not an offense involving moral turpitude or subjecting one to infamous punishment.[14]

(XXIV) *MISCELLANEOUS CRIMES.* Words charging a person with being an anarchist,[15] or imputing malicious trespass or destruction of property,[16] public indecency,[17] vagrancy,[18] drunkenness,[19] seduction,[20] or charging one with disturbing a religious meeting,[21] disposing of mortgaged property,[22] or with producing a false and pretended heir for the purpose of intercepting the inheritance of property,[23] have been held to be actionable *per se* as charging the commission of a criminal offense. But a charge of burning, destroying, and suppressing a will,[24] or of being a "white capper,"[25] is not actionable as imputing crime.

E. Imputations of Unchastity or Immorality — 1. IN LIBELOUS FORM — a. In General. A written or printed charge of unchastity or immorality is actionable *per se*, since it tends to blacken the reputation and to expose one to public contempt.[26] It is not necessary that the charge of unchastity be direct, but

11. Jones *v.* Chapman, 5 Blackf. (Ind.) 88; Craig *v.* Brown, 5 Blackf. (Ind.) 44.

12. Halstead *v.* Nelson, 36 Hun (N. Y.) 149, a charge of mailing a circular advertising articles for preventing conception and procuring abortion. *Compare* Middleby *v.* Effler, 118 Fed. 261, 55 C. C. A. 355, holding that to orally charge one with having "written anonymous letters" which were "scurrilous" and that it was a "state prison offense" is not actionable as it does not charge a crime.

13. Hays *v.* Allen, 3 Blackf. (Ind.) 408; Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67.

14. Hillhouse *v.* Peck, 2 Stew. & P. (Ala.) 395; Greene *v.* Murdock, (Cal. App. 1905) 81 Pac. 993; Ludlum *v.* McCuen, 17 N. J. L. 12.

Larceny of contents of letter. — Words charging a person with having received a letter containing money to deliver to another, giving himself a false name at the time, and that instead of delivering the letter he broke it open and used the money, are slanderous as charging larceny. Cheadle *v.* Buell, 6 Ohio 67.

15. Von Gerichten *v.* Seitz, 94 N. Y. App. Div. 130, 87 N. Y. Suppl. 968, holding that to charge another with being an anarchist is actionable as charging the crime of being an advocate of the doctrine that organized government should be overthrown by force or violence.

16. Wilcox *v.* Edwards, 5 Blackf. (Ind.) 183 (holding that a charge of malicious trespass is actionable *per se*); Murray *v.* McAllister, 38 Vt. 167 (holding that a charge that plaintiff had destroyed defendant's apple trees is a charge of an indictable offense involving moral turpitude).

17. Seller *v.* Jenkins, 97 Ind. 430.

18. Miles *v.* Oldfield, 4 Yeates (Pa.) 423, 2 Am. Dec. 412, holding that the words, "You are a vagrant," are slanderous *per se*.

19. Brown *v* Nickerson, 5 Gray (Mass.) 1 (holding that to charge a woman with drunkenness is actionable *per se* as charging a crime); Morgan *v.* Kennedy, 62 Minn. 348, 64 N. W. 912, 54 Am. St. Rep. 647, 30 L. R. A. 521.

20. Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

Pretense by married man of being unmarried actionable. — Gray *v.* Wood, 5 Ohio S. & C. Pl. Dec. 580, 7 Ohio N. P. 606.

21. Thomas *v.* Smith, 75 Hun (N. Y.) 573, 27 N. Y. Suppl. 589, holding that it is actionable *per se* to charge one with disturbing a "camp meeting."

22. Vaus *v.* Middlebrook, 3 N. Y. St. 277, holding that the words, "Vaus is a rascal and is not to be trusted. . . He gave me a chattel mortgage on some of his property, and disposed of the property before paying the mortgage," are actionable *per se*.

23. Weed *v.* Bibbins, 32 Barb. (N. Y.) 315.

24. O'Hanlon *v.* Myers, 10 Rich. (S. C.) 128.

25. Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143, holding that it is not slanderous to call a person a "white capper" or to charge him with posting a white cap notice.

26. *Alabama.* — Weir *v.* Hoss, 6 Ala. 881.

Illinois. — Spolek Denni Hlasatel *v.* Hoffman, 204 Ill. 532, 68 N. E. 400; Strader *v.* Snyder, 67 Ill. 404; Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443.

Indiana. — Funk *v.* Beverly, 112 Ind. 190, 13 N. E. 573; Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Kentucky. — McGee *v.* Wilson, Litt. Sel. Cas. 187.

Massachusetts. — Goodrich *v.* Davis, 11 Metc. 473; Farnsworth *v.* Storrs, 5 Cush. 412, where, however, the charge was justified.

Michigan. — Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624; Peoples *v.* Detroit, etc., Co., 54 Mich. 457, 20 N. W. 528; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Missouri. — Barber *v.* St. Louis Dispatch Co., 3 Mo. App. 377.

any written charge fairly imputing immorality or unchaste conduct, even though not amounting to illegal sexual intercourse, is actionable.[27]

New York.— Johnson *v.* Synett, 157 N. Y. 684, 51 N. E. 1091 [*affirming* 89 Hun 192, 35 N. Y. Suppl. 79]; Gates *v.* New York Recorder Co., 155 N. Y. 228, 49 N. E. 769 [*affirming* 31 N. Y. Suppl. 1127]; Stafford *v.* Morning Journal Assoc., 142 N. Y. 598, 37 N. E. 625 [*affirming* 68 Hun 467, 22 N. Y. Suppl. 1008]; More *v.* Bennett, 48 N. Y. 472; O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 76 N. Y. Suppl. 498; Mooney *v.* New York News Pub. Co., 48 N. Y. App. Div. 271, 62 N. Y. Suppl. 781; Mooney *v.* Bennett, 44 N. Y. App. Div. 423, 60 N. Y. Suppl. 1103; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. 634; Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12; Gray *v.* Baker, 19 N. Y. Suppl. 940.

Ohio.— Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235.

Pennsylvania.— Collins *v.* Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636 [*reversing* 1 Pa. Dist. 773]; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544.

Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

Vermont.— Wilcox *v.* Moon, 63 Vt. 481, 22 Atl. 80; Wilcox *v.* Moon, 61 Vt. 484, 17 Atl. 742.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Broad *v.* Deuster, 4 Fed. Cas. No. 1,908, 8 Biss. 265; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115.

England.— Clement *v.* Chivis, 9 B. & C. 172, 7 L. J. K. B. O. S. 189, 4 M. & R. 127, 17 E C. L. 85 (holding that it is libelous to charge that a man had assaulted females in a barefaced manner and that he had been guilty of gross misconduct); Tuam *v.* Robeson, 5 Bing. 17, 6 L. J. C. P. O. S. 199, 2 M. & P. 32, 30 Rev. Rep. 530, 15 E. C. L. 449; Richards *v.* Cohen, 1 L. J. K. B. 210.

Canada.— Anderson *v.* Stewart, 8 U. C. Q. B. 243.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 71–78.

27. *Illinois.*— Spolek Denni Hlasatel *v.* Hoffman, 204 Ill. 532, 68 N. E. 400 [*affirming* 105 Ill. App. 170] (a publication charging that a woman sought elsewhere a substitute for her husband); Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443 (a publication concerning a married woman, stating that she had "run off with another fellow").

Indiana.— Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991, holding that it is libelous to charge a woman with having traveled with a man, not her husband, with having been turned out of a hotel, and that the transaction had caused a sensation in the community where it transpired.

Massachusetts.— Goodrich *v.* Davis, 11 Metc. 473, a publication charging plaintiff with a violation of the seventh commandment.

Michigan.— Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624 (an article entitled, "Teachers Guilty of Horrible Crimes," and imputing that they had taken criminal liberties with some of their pupils); Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251 (holding that the words, "There was that Iowa Beecher business of his, which beat him out of a station at Grass Lake," will support an innuendo charging adultery).

New York.— Stafford *v.* Morning Journal Assoc., 142 N. Y. 598, 37 N. E. 625 [*affirming* 68 Hun 467, 22 N. Y. Suppl. 1008] (holding that the words, "Le Huray Sisters, Blanche, Stella and Allien, just from Paris; massage, French style; Love secrets; how to get a husband; Inclose stamp; valuable information for ladies by aid of cards," published in the advertising columns of a newspaper under the heading, "Astrology," are libelous); O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 76 N. Y. Suppl. 498 (a publication charging in a spectacular manner that plaintiff had been arrested at a public resort with a married woman); Mooney *v.* New York News Pub. Co., 48 N. Y. App. Div. 271, 62 N. Y. Suppl. 781 (holding that to charge a woman with living with a man as his wife, although not married to him, is libelous *per se*); Mooney *v.* Bennett, 44 N. Y. App. Div. 423, 60 N. Y. Suppl. 1103 (holding that a publication that M had lived with plaintiff who called herself Mrs. M, and that her relatives denied her claim to the title, and alluding to her as the alleged Mrs. M, is libelous).

Ohio.— Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235, holding that a letter to a young woman's father stating, "I will write Concerning Laurie. I wish you would Come out here and take her home as she has caused me a great deal of trouble so much so that She has separated Me and my husband and she is still Staying with him Alone. Please come at once. My husband has treated me shamefully through her And driven me and my Children away from home For her sake," is libelous *per se*.

United States.— Broad *v.* Deuster, 4 Fed. Cas. No. 1,908, 8 Biss. 265, holding that to publish of a man that "there are suits pending against him to the effect that he has put himself in unlawful relations with the wives of other men" is libelous *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

Words not libelous per se.— Stockman *v.* Western Union Tel. Co., (Kan. App. 1900) 63 Pac. 658 (holding that a telegraph message sent by a husband to his wife who was suing him for a divorce, requesting her not to study "ology" (meaning the female sexual organs) too hard. "No witnesses will appear," was not libelous *per se*, and that the telegraph company was not liable, since it had no right to assume that the words meant something not apparent on their face); Fields *v.* Curd, (Ky. 1891) 16 S. W. 453 (holding the words, "I like you and want to tell you so. If you like me, I want to know it. Let us be friends, and good friends. Answer this," written by a man to a married woman,

b. Incest. A publication in writing, imputing incest, is actionable *per se*.[28]

c. Keeping House of Ill Fame. A written charge of keeping a house of ill fame is actionable *per se*.[29]

2. In Slanderous Form — a. In General. As a general rule at common law spoken words are not actionable as in themselves imputing unchastity or immorality, or by reason of the existence of extraneous facts and circumstances tending to prove that they were spoken for the purpose of imputing a want of chastity, because unchastity as a subject of ecclesiastical cognizance was not punishable in common-law courts.[30] In some jurisdictions, however, apart from statute, an oral charge of unchastity in a woman is actionable *per se*.[31] Moreover, in most jurisdictions in this country oral language charging unchastity may now be actionable *per se*, either as the direct result of statutes expressly to this effect,[32] or

are not libelous as they contain no imputations upon the character of the recipient of the letter); Sickles *v.* Kling, 60 N. Y. App. Div. 515, 69 N. Y. Suppl. 944 (holding that to write of a woman that "she became Allen's agent while they were related together in the city of New York, since which time she has formed a new relationship with one Sickles," is not libelous). See also Robinson *v.* Jermyn, 1 Price 11.

28. Edwards *v.* Kansas City Times, 32 Fed. 813.

29. Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Keeping disorderly house generally see *supra*, III, D, 11, a, (VIII).

30. *Alabama.*— Berry *v.* Carter, 4 Stew. & P. 387, 24 Am. Dec. 762.

California.— Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136.

District of Columbia.— Pollard *v.* Lyon, 1 MacArthur 296.

Georgia.— Castleberry *v.* Kelly, 26 Ga. 606, holding that it is not a crime for a white woman to have intercourse with a negro and hence such a charge is not actionable.

Idaho.—Douglas *v.* Douglas, 4 Ida. 293, 38 Pac. 934.

Indiana.— Lupkins *v.* Justice, 1 Ind. 557; Dukes *v.* Clark, 2 Blackf. 20.

Kentucky.— McGee *v.* Wilson, Litt. Sel. Cas. 187; Elliott *v.* Ailsberry, 2 Bibb 473, 5 Am. Dec. 631.

Maryland.— Hemming *v.* Elliott, 66 Md. 197, 7 Atl. 110; Shafer *v.* Ahalt, 48 Md. 171, 30 Am. Rep. 456; Griffin *v.* Moore, 43 Md. 246; Wagaman *v.* Byers, 17 Md. 183; Stanfield *v.* Boyer, 6 Harr. & J. 248.

Montana.— Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

New Hampshire.— Woodbury *v.* Thompson, 3 N. H. 194.

New York.— Bassell *v.* Elmore, 48 N. Y. 561; Wilson *v.* Goit, 17 N. Y. 442; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Erwin *v.* Dezell, 64 Hun 391, 19 N. Y. Suppl. 784; Pettibone *v.* Simpson, 66 Barb. 492; Beach *v.* Ranney, 2 Hill 309; Bradt *v.* Towsley, 13 Wend. 253; Moody *v.* Baker, 5 Cow. 351; Brooker *v.* Coffin, 5 Johns. 188, 4 Am. Dec. 337; Buys *v.* Gillespie, 2 Johns. 115, 3 Am. Dec. 404.

South Carolina.— W. & L., 2 Nott & M. 204; Boyd *v.* Brent, 3 Brev. 241.

Texas.— Ross *v.* Fitch, 58 Tex. 148; McQueen *v.* Fulgham, 27 Tex. 463; Linney *v.* Maton, 13 Tex. 449. See also Hatcher *v.* Range, 98 Tex. 85, 81 S. W. 289. *Compare* Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077; King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

Vermont.— Hoar *v.* Ward, 47 Vt. 657; Underhill *v.* Welton, 32 Vt. 40.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308; Keiler *v.* Lessford, 14 Fed. Cas. No. 7,649, 2 Cranch C. C. 190.

England.— Roberts *v.* Roberts, 5 B. & S. 584, 10 Jur. N. S. 1027, 33 L. J. Q. B. 249, 10 L. T. Rep. N. S. 602, 12 Wkly. Rep. 909, 117 E. C. L. 384; Wilby *v.* Elston, 8 C. B. 142, 7 D. & L. 143, 13 Jur. 706, 18 L. J. C. P. 320, 65 E. C. L. 142; Parkins *v.* Scott, 1 H. & C. 153, 8 Jur. N. S. 593, 31 L. J. Exch. 331, 6 L. T. Rep. N. S. 394, 10 Wkly. Rep. 562; Gascoigne *v.* Ambler, 2 Ld. Raym. 1004; Brayne *v.* Cooper, 9 L. J. Exch. 80, 5 M. & W. 249; Byron *v.* Emes, 12 Mod. 106; Robertson *v.* Powell, 2 Selw. 1259 note.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

31. Cushing *v.* Hederman, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320; Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079; Haynes *v.* Ritchey, 30 Iowa 76, 6 Am. Rep. 642; Snediker *v.* Poorbaugh, 29 Iowa 488; Cleveland *v.* Detweiler, 18 Iowa 299; Bearsley *v.* Bridgman, 17 Iowa 290; Truman *v.* Taylor, 4 Iowa 424; Smith *v.* Silence, 4 Iowa 321, 66 Am. Dec. 137; Dailey *v.* Reynolds, 4 Greene (Iowa) 354; Cox *v.* Bunker, Morr. (Iowa) 269; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Wilson *v.* Runyon, Wright (Ohio) 651; Stevens *v.* Handly, Wright (Ohio) 121; Wilson *v.* Robbins, Wright (Ohio) 40; Murray *v.* Murray, 1 Cinc. Super. Ct. (Ohio) 290.

32. *Arkansas.*— Roe *v.* Chitwood, 36 Ark. 210.

California.—Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533; Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48; Kedrolivansky *v.* Niebaum, 70 Cal. 216, 11 Pac. 641; McKinney *v.* Roberts, 68 Cal. 192, 8 Pac. 857; Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136; Pink *v.* Catanich, 51 Cal. 420.

Illinois.— Iles *v.* Swank, 202 Ill. 453, 66 N. E. 1042 [*affirming* 105 Ill. App. 9]; Ran-

indirectly as the result of statutes making the act charged an indictable crime,[82]

som *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323]; Schmisseur *v.* Kreilich, 92 Ill. 347; Stowell *v.* Beagle, 57 Ill. 97; Elam *v.* Badger, 23 Ill. 498; Spencer *v.* McMasters, 16 Ill. 405; Patterson *v.* Edwards, 7 Ill. 720; Burke *v.* Stewart, 81 Ill. App. 506; Hammond *v.* Stewart, 72 Ill. App. 512; Claypool *v.* Claypool, 56 Ill. App. 17; Colby *v.* McGee, 48 Ill. App. 294; Koch *v.* Heideman, 16 Ill. App. 478.

Missouri.— Christal *v.* Craig, 80 Mo. 367; Elfrank *v.* Seiler, 54 Mo. 134; Birch *v.* Benton, 26 Mo. 153; Hudson *v.* Garner, 22 Mo. 423; Stieber *v.* Wensel, 19 Mo. 513; Moberly *v.* Preston, 8 Mo. 462; Brown *v.* Wintsch, 110 Mo. App. 264, 84 S. W. 196; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453; Kersting *v.* White, 107 Mo. App. 265, 80 S. W. 730; Nelson *v.* Wallace, 48 Mo. App. 193.

Montana.— See Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

Statutes making charge of unchastity in women actionable.— In several of the states where the statute makes words imputing want of chastity actionable *per se*, the statute operates only in favor of women, and a man has no right of action, unless the words impute a crime. Downing *v.* Wilson, 36 Ala. 717; Lewis *v.* Hudson, 44 Ga. 568; Campbell *v.* Irwin, 146 Ind. 681, 45 N. E. 810; Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Buscher *v.* Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; Belck *v.* Belck, 97 Ind. 73; Hallowell *v.* Guntle, 82 Ind. 554; Branstetter *v.* Dorrough, 81 Ind. 527; Logan *v.* Logan, 77 Ind. 558; Hutchinson *v.* Lewis, 75 Ind. 55; Huddleson *v.* Swope, 71 Ind. 430; Emmerson *v.* Marvel, 55 Ind. 265; Sunman *v.* Brewin, 52 Ind. 140; Acker *v.* McCullough, 50 Ind. 447; Waugh *v.* Waugh, 47 Ind. 580; Wilson *v.* Barnett, 45 Ind. 163; Ward *v.* Colyhan, 30 Ind. 395; Blickenstaff *v.* Perrin, 27 Ind. 527; Linck *v.* Kelley, 25 Ind. 278, 87 Am. Dec. 362; Rodgers *v.* Lacey, 23 Ind. 507; Proctor *v.* Owens, 18 Ind. 21, 81 Am. Dec. 341; Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Guard *v.* Risk, 11 Ind. 156; Rodebaugh *v.* Hollingsworth, 6 Ind. 339 (holding that any single act of sexual intercourse between a married female and a male person not her husband, or between an unmarried female and a male person, is whoredom within the meaning of a statute making it actionable to charge a female with whoredom); Kelley *v.* Dillon, 5 Ind. 426; Abshire *v.* Cline, 3 Ind. 115; Lumpkins *v.* Justice, 1 Ind. 557; Worth *v.* Butler, 7 Blackf. (Ind.) 251; Ricket *v.* Stanley, 6 Blackf. (Ind.) 169; Dukes *v.* Clark, 2 Blackf. (Ind.) 20; Shields *v.* Cunningham, 1 Blackf. (Ind.) 86; Hibner *v.* Fleetwood, 19 Ind. App. 421, 49 N. E. 607; Peterson *v.* Murray, 13 Ind. App. 430, 41 N. E. 836; Cosand *v.* Lee, 11 Ind. App. 511, 38 N. E. 1099; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400; Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914; Lyons *v.* Stratton, 102 Ky. 317, 43 S. W. 446, 19 Ky. L. Rep. 1343; Adams *v.* Rankin, 1 Duv. (Ky.) 58; Williams *v.* Greenwade, 3 Dana (Ky.) 432; Smalley *v.* Anderson, 4 T. B. Mon. (Ky.) 367; Smalley *v.* Anderson, 2 T. B. Mon. (Ky.) 56, 15 Am. Dec. 121; McGee *v.* Wilson, Litt. Sel. Cas. (Ky.) 187; Matthews *v.* Davis, 4 Bibb (Ky.) 173; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645; Morris *v.* Curtis, 45 S. W. 86, 20 Ky. L. Rep. 56; Hemming *v.* Elliott, 66 Md. 197, 7 Atl. 110; Terry *v.* Bright, 4 Md. 430 (the statute under which this case was decided applied only to unmarried women); Derham *v.* Derham, 123 Mich. 451, 82 N. W. 218; Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228; Proctor *v.* Houghtaling, 37 Mich. 41; Burt *v.* McBain, 29 Mich. 260; Jacobs *v.* Cater, 87 Minn. 448, 92 N. W. 397; Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Distin *v.* Rose, 69 N. Y. 122; Brown *v.* Moore, 90 Hun (N. Y.) 169, 35 N. Y. Suppl. 736; Doe *v.* Roe, 32 Hun (N. Y.) 628; Wilkens *v.* Hammann, 43 Misc. (N. Y.) 21, 86 N. Y. Suppl. 744; Courtney *v.* Mannheim, 14 N. Y. Suppl. 929; Ronnie *v.* Ryder, 8 N. Y. Suppl. 5; Bowden *v.* Bailes, 101 N. C. 612, 8 S. E. 342; Sowers *v.* Sowers, 87 N. C. 303; Lucas *v.* Nichols, 52 N. C. 32; Sharpe *v.* Stephenson, 34 N. C. 348; Snow *v.* Witcher, 31 N. C. 346; McBrayer *v.* Hill, 26 N. C. 136; Hampton *v.* Wilson, 15 N. C. 468; Watts *v.* Greenlee, 13 N. C. 115; Watts *v.* Greenlee, 12 N. C. 210; Smith *v.* Hamilton, 10 Rich. (S. C.) 44; Anonymous, 1 Hill (S. C.) 251; Freeman *v.* Price, 2 Bailey (S. C.) 115; Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503. See also Radke *v.* Kolbe, 79 Minn. 440, 82 N. W. 977. *Compare* Philips *v.* Wiley, 2 Litt. (Ky.) 153; Morris *v.* Barkley, 1 Litt. (Ky.) 64.

In Texas under a statute providing that "if any person shall, orally or otherwise, falsely and maliciously, or falsely and wantonly, impute to any female in this State, married or unmarried, a want of chastity, he shall be deemed guilty of slander, and, upon conviction, shall be fined," etc., it has been held that words spoken orally, which falsely and maliciously or falsely and wantonly impute to a female a want of chastity are actionable without showing special damage arising therefrom. Hatcher *v.* Range, 98 Tex. 85, 81 S. W. 289.

33. *Connecticut.*— Kennenberg *v.* Neff, 74 Conn. 62, 49 Atl. 853; Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675 (fornication); Frisbie *v.* Fowler, 2 Conn. 707 (adultery and fornication).

the imputation in the latter case falling within the general rule as to slanderous charges of the commission of crimes.[34]

b. Wording of Imputation — (i) *In General.* It is not necessary in order to constitute actionable slander that the words should amount to a directly affirmative charge of fornication, adultery, or unchastity; it is sufficient if the words were calculated to induce the hearers to suppose and understand that the person against whom they were uttered was guilty of unchastity,[35] charges of unchastity against men[36] being within the application of the rule as well as imputations

Georgia.— Michelson *v.* Lavin, 95 Ga. 565, 20 S. E. 292; Lewis *v.* Hudson, 44 Ga. 568; Beggarly *v.* Craft, 31 Ga. 309, 76 Am. Dec. 687; Richardson *v.* Roberts, 23 Ga. 215; Pledger *v.* Hathcock, 1 Ga. 550.

Iowa.— Georgia *v.* Kepford, 45 Iowa 48, charging a man with adultery.

Kansas.— Henicke *v.* Griffith, 29 Kan. 516, adultery.

Maine.— Patterson *v.* Wilkinson, 55 Me. 42, 92 Am. Dec. 568 (fornication); True *v.* Plumley, 36 Me. 466 (fornication).

Massachusetts.— Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322; Adams *v.* Stone, 131 Mass. 433; Riddell *v.* Thayer, 127 Mass. 487; York *v.* Johnson, 116 Mass. 482; Robbins *v.* Fletcher, 101 Mass. 115; Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639; Kenney *v.* McLaughlin, 5 Gray 3, 66 Am. Dec. 345; Snell *v.* Snow, 13 Metc. 278, 46 Am. Dec. 730; Miller *v.* Parish, 8 Pick. 384.

Minnesota.— Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291 (fornication); Stroebel *v.* Whitney, 31 Minn. 384, 18 N. W. 98 (fornication).

Nebraska.— Barr *v.* Birkner, 44 Nebr. 197, 62 N. W. 494; Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New Hampshire.— Noyes *v.* Hall, 62 N. H. 594 (charge of being a "whore"); Symonds *v.* Carter, 32 N. H. 458 (fornication followed as a consequence by a bastard child); Sturtevant *v.* Root, 27 N. H. 69 (adultery).

New Jersey.— Joralemon *v.* Pomeroy, 22 N. J. L. 271 (fornication); Smith *v.* Minor, 1 N. J. L. 16 (fornication followed as a consequence by a bastard child).

Oregon.— Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140, adultery.

Pennsylvania.—Hartranft *v.* Hesser, 34 Pa. St. 117; Vanderlip *v.* Roe, 23 Pa. St. 82; Evans *v.* Tibbins, 2 Grant 451 (fornication); Harker *v.* Ore, 10 Watts 245 (adultery); Beirer *v.* Bushfield, 1 Watts 23 (adultery); Walton *v.* Singleton, 7 Serg. & R. 449, 10 Am. Dec. 472 (fornication); Brown *v.* Lamberton, 2 Binn. 34 (adultery); Rhoads *v.* Anderson, 10 Pa. Cas. 247, 13 Atl. 823; Stoke *v.* Miller, 8 Pa. Cas. 100, 5 Atl. 621 (fornication); Long *v.* Fleming, 2 Miles 104 (fornication).

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995; Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458 (living together in a state of cohabitation); Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077.

Vermont.— Sheridan *v.* Sheridan, 58 Vt. 504, 5 Atl. 494; Dickey *v.* Andros, 32 Vt. 55; Holton *v.* Muzzy, 30 Vt. 365 (adultery); Ryan *v.* Madden, 12 Vt. 51.

Wisconsin.— Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398 (adultery); Gibson *v.* Gibson, 43 Wis. 23, 28 Am. Rep. 527; Mayer *v.* Schleichter, 29 Wis. 646 (prostitution); Ranger *v.* Goodrich, 17 Wis. 78 (prostitution); Benaway *v.* Conyne, 3 Pinn. 196, 3 Chandl. 214.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

34. See *supra*, III, D, 2, a.

35. Abshire *v.* Cline, 3 Ind. 115; Patterson *v.* Frazer, (Tex. Civ. App. 1904) 79 S. W. 1077.

A charge that plaintiff had "intercourse" with a person of the opposite sex is not actionable (Huddleson *v.* Swope, 71 Ind. 430; Merritt *v.* Dearth, 48 Vt. 65), unless the word "intercourse" is so used as to show that criminal or sexual intercourse is meant (Elam *v.* Badger, 23 Ill. 498; Adams *v.* Rankin, 1 Duv. (Ky.) 58).

36. Page *v.* Merwin, 54 Conn. 426, 8 Atl. 675 (holding that where defendant in speaking of an unmarried woman who had recently given birth to a child said, "Page (meaning the plaintiff) is the father of the child," the words are actionable as charging a crime); Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322 (holding that where the words alleged were, "What a pity we have got such a man for a director. His moral character is not good. You must have heard about his being caught with the house girl. I have got proof enough. I have been looking around and I know it's so. He is vile," while the word "caught" did not necessarily imply the commission of an offense, yet with the accompanying expressions it implies adultery); Birch *v.* Benton, 26 Mo. 153 (holding that it is actionable to charge a man "with keeping his own negro wench"); Beirer *v.* Bushfield, 1 Watts (Pa.) 23 (holding that the words, "He was guilty with a woman, for he went to bed with Mrs. Kislar, and stroked her," are actionable); Walton *v.* Singleton, 7 Serg. & R. (Pa.) 449, 10 Am. Dec. 472 (charging a married man with "fornication"); Brown *v.* Lamberton, 2 Binn. (Pa.) 34 (charging that a married man played in a fodder room with a married woman, not his wife, and that children of hers belonged to him).

Words held not actionable. — Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136 (holding that

upon women.[37] The fact that the charge of unchastity is expressed in words too

words charging that another virtually acknowledged he had sexual intercourse with a woman named not his wife do not charge that he was actually guilty but that he acknowledged himself guilty and hence are not actionable); Dickey *v.* Andros, 32 Vt. 55 (holding that where defendant in a conversation about plaintiff said, "I saw Dickey here on Friday night. I saw him and heard him and can swear to it. He was not here for any good design. I will break up the haunt if I can possibly do it," the words do not charge adultery and are not actionable).

37. *California.*—Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48 (holding that where defendant said that a certain man "was cohabiting with plaintiff as his mistress;" that "he was keeping the girl for immoral purposes," and that he "was using Ida as his mistress," the words are actionable *per se*); Kedrolivansky *v.* Niebaum, 70 Cal. 216, 11 Pac. 641 (holding that where defendant said "that said plaintiff was a bad woman, and that you had better have nothing to do with her case, as it is a very bad one; that she . . . had not lived with her husband for two years previous to his death, and that she . . . was the cause of her husband's death; that she had driven him . . . to drinking, and that her husband fell while drunk, and was killed," the words are actionable as charging adultery); McKinney *v.* Roberts, 68 Cal. 192, 8 Pac. 857 (holding that to say of a married woman that she is a paramour of a man not her husband is actionable *per se*).

Illinois.— Iles *v.* Swank, 202 Ill. 453, 66 N. E. 1042, 105 Ill. App. 9, holding that the words, "She keeps a public house; I could do business with her if I wanted to; have seen lots of that going on there," when properly averred, are actionable as charging adultery.

Indiana.— Waugh *v.* Waugh, 47 Ind. 580 (holding that it is actionable to say to a married woman, "You have taken men into your bedroom"); Rodgers *v.* Lacey, 23 Ind. 507 (holding that the words, "It was no doubt but that George Howk was as intimate with Mrs. Lacey . . . as with his own wife. That he . . . could prove by three witnesses that George Howk came out of the bed-room, where Mrs. Lacey . . . was, with his trowsers down," are actionable); Proctor *v.* Owens, 18 Ind. 21, 81 Am. Dec. 341 (holding that where defendant said of plaintiff that "Baden saw or told him that . . . he either scared or drove Jane Owens and a man supposed to be Jo. Dearmond up from behind a log; . . . that they broke and run, and that he (Baden) got her parasol and handkerchief, and if any body did not believe him he could come and see them," the words are actionable as charging adultery); Guard *v.* Risk, 11 Ind. 156 (holding that to say that an unmarried woman slept with a man two nights imputes fornication and is actionable); Shields *v.* Cunningham, 1 Blackf. 86 (holding that the words, "Dr. Eddy made an appointment with Elizabeth Cunningham, (meaning the plaintiff) scaled the walls and went to bed to her," are actionable as charging fornication).

Kentucky.— Lyons *v.* Stratton, 102 Ky. 317, 43 S. W. 446, 19 Ky. L. Rep. 1343 (holdthat the words, "She is set up for the winter," when properly averred, are actionable); Morris *v.* Curtis, 45 S. W. 86, 20 Ky. L. Rep. 56 (holding that it is actionable for defendant to say that when he passed plaintiff and another he saw the latter get off plaintiff, who put her clothes down).

Maine.— True *v.* Plumley, 36 Me. 466, holding that to say of a woman that "she is a damned whore, or she would not ride with J. B." is sufficient to charge her with adultery.

Michigan.— Derham *v.* Derham, 123 Mich. 451, 82 N. W. 218, holding that to say that plaintiff's grandfather was a woman's man and that plaintiff was just like him, that her mother was like the grandfather and that plaintiff was no better is actionable *per se*.

Missouri.—Kersting *v.* White, 107 Mo. App. 265, 80 S. W. 730, holding that where plaintiff was keeping house for Elms and defendant said Elms and his housekeeper were "living in sin together," the words are actionable as imputing unchastity to plaintiff.

New Hampshire.— Sturtevant *v.* Root, 27 N. H. 69, holding that to say that a married woman went into a bedroom with a man not her husband is actionable as imputing adultery.

New York.— Ronnie *v.* Ryder, 8 N. Y. Suppl. 5 (holding that the court will not disturb a verdict for plaintiff where the words charged were, "She is a dangerous woman, and inclined for men"); Mason *v.* Stratton, 1 N. Y. Suppl. 511.

North Carolina.— Sowers *v.* Sowers, 87 N. C. 303 (holding that to say of an unmarried woman that if she "did not give birth to a child, she missed a good chance," is actionable as charging fornication); Watts *v.* Greenlee, 13 N. C. 115 (holding that to charge a woman with being incontinent is actionable).

Ohio.— Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561, words charging a woman with sleeping with a man not her husband.

Pennsylvania.— Evans *v.* Tibbins, 2 Grant 451 (holding that the words that plaintiff and another were "caught together in the packing-room" are actionable when coupled with an innuendo that fornication was meant); Harker *v.* Orr, 10 Watts 245 (holding that to say of a married woman that she went gadding about with young men to night meetings and that they were watching by the way for her is actionable).

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304, holding that a statement by a man concerning his divorced wife that if she has a venereal disease she caught it from someone else besides himself is slanderous where she is afflicted with such a discase.

vulgar and indecent to find a place in the dictionaries will not prevent it from

Vermont.— Sheridan *v.* Sheridan, 58 Vt. 504, 5 Atl. 494, holding that the words, "Ask your mother . . . when she had the double-shotted children . . . what strange bull . . . came along," when spoken of a married woman who had given birth to twins, are actionable as imputing the crime of adultery.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 71–78.

Words not actionable per se.— *Illinois.*— Koch *v.* Heideman, 16 Ill. App. 478, holding that to say of a married woman, "She has been laying on the lounge with a male boarder," does not charge adultery.

Indiana.— Funk *v.* Beverly, 112 Ind. 190, 13 N. E. 573 (holding that the words, "I know all about that case; while she was out there claiming to be the wife of George H. Funk, she was back here claiming to be my wife," is not actionable as imputing want of chastity); Ward *v.* Colyhan, 30 Ind. 395 (holding that the words, "He went to see her for that purpose," without further averments, are not actionable).

Massachusetts.— Adams *v.* Stone, 131 Mass. 433 (holding that the words, "Mr. Harvey Adams was intimate with his brother's wife for a number of years," do not charge adultery and are not actionable); York *v.* Johnson, 116 Mass. 482 (holding that where defendant said of plaintiff, "I was speaking to a certain lady about . . . Mrs. Yorks case . . . and I said, what should you think of a lady who belongs to the . . . church . . . if she should give the pox to a married man and he should give it to his wife," and plaintiff alleged that defendant meant that she had a loathsome disease and had given it to a married man, the words are not actionable as they do not support the innuendo).

Minnesota.— Radke *v.* Kolbe, 79 Minn. 440, 82 N. W. 977, holding that the words, "Mr. Radke had to work awful hard on the section every day, and his woman went some nights with other men folks. She is a dirty sow," are not actionable as imputing want of chastity to the wife.

Missouri.— Adams *v.* Hannon, 3 Mo. 222 (holding that to say of a woman, "I stroked her," is not actionable *per se*); Walker *v.* Hoeffner, 54 Mo. App. 554 (holding that where plaintiff said that defendant had put her husband in a hospital and made ten dollars a week out of her boarders in a dishonest way, the words do not charge unchastity, without proof of the sense in which the language was understood.

New York.— Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440 (holding that to say of a woman "that she was in the habit of entertaining gentlemen callers at all hours of the night" is not actionable as charging unchastity); Anonymous, 60 N. Y. 262, 19 Am. Rep. 174 (holding that words charging a female with self-pollution are not actionable); McMahon *v.* Hallock, 1 N. Y. Suppl. 312 (holding that the words, "Go over to my office. My wife and her mother are particular what company they keep. They do not wish to be annoyed by such characters as you," are not slanderous as they do not impute want of chastity).

North Carolina.— Lucas *v.* Nichols, 52 N. C. 32, holding that words imputing to a woman a wanton and lascivious disposition only are not actionable. See also Snow *v.* Witcher, 31 N. C. 346.

Texas.— Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133, holding that the words, "Are you . . . acquainted with Mrs. W——, who was formerly connected with the Sunny South? If so, where is she now, and do you not think she is a charming lady?" with an allegation that Mrs. Wright was of bad repute, do not impute a want of chastity.

Vermont.— Ryan *v.* Madden, 12 Vt. 51, holding that where defendant said of a married woman that what he had done to her would send them both to state's prison, the words do not impute to her the crime of adultery.

Wisconsin.— Clute *v.* Clute, 101 Wis. 137, 76 N. W. 1114 (holding that the words, "You matched him in the berry patch," are not actionable *per se*); Benz *v.* Wiedehoeft, 83 Wis. 397, 53 N. W. 686 (holding that the words, "The whip was used in the barn. There was some monkey work going on there. I will tell you who it was some other time," followed in another discourse by the words, "It was Lizzie Benz and Willie Drott that was caught in the barn in the crib," are not actionable); K. *v.* H., 20 Wis. 239, 91 Am. Dec. 397 (holding that words charging a married woman with having seated herself upon the lap of a man other than her husband and desiring him to have carnal intercourse with her do not charge adultery and are not actionable *per se*).

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

"Keep" or "kept."— While the words "keep" and "kept" have several meanings, depending on the context of which they form a part, or the circumstances under which they are used (Downing *v.* Wilson, 36 Ala. 717; McBrayer *v.* Hill, 26 N. C. 136), yet when it is said in reference to a female that a certain man keeps her, the ordinary and popular interpretation of the expression is that the relation between the parties is one which involves illicit intercourse (Downing *v.* Wilson, *supra*; McBrayer *v.* Hill, *supra*), and the words are actionable as involving a charge of want of chastity (Downing *v.* Wilson, *supra;* McBrayer *v.* Hill, *supra*), especially where spoken in connection with other language or under circumstances indicating that this meaning was intended (Huddleson *v.* Swope, 71 Ind. 430; Kenney *v.* McLaughlin, 5 Gray (Mass.) 3, 66 Am. Dec. 345; Zeliff *v.* Jennings, 61 Tex. 458; Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503). But words charging that a married woman keeps some man

being actionable *per se*, if the words are well understood and commonly used to convey such imputation.[38]

(II) *Particular Epithets.* It is not actionable merely to call a woman a "bitch" or a "slut," such words not of themselves imputing a breach of chastity,[39] although if they are used under such circumstances or in such connection as to show that they were intended and understood to mean an imputation of whoredom they may be actionable.[40] Where words imputing to a woman want of chastity are actionable *per se* as charging slander, a charge that a woman is a "whore," is actionable,[41] unless the word was uttered with such explanatory statements, or

other than her husband are of doubtful import; and whether they were spoken by the speaker, and understood by the hearers, as charging the crime of adultery, or a mere ordinary employment of help, is a question of fact to be settled by a jury. Henicke *v.* Griffith, 29 Kan. 516.

38. Linck *v.* Kelley, 25 Ind. 278, 87 Am. Dec. 362; Abshire *v.* Cline, 3 Ind. 115; Edgar *v.* McCutchen, 9 Mo. 768; Benaway *v.* Conyne, 3 Pinn. (Wis.) 196, 3 Chandl. 214.

The word "screwed" while in its ordinary sense not imputing sexual intercourse may when spoken in certain localities involve a charge of whoredom. Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477. See also Elam *v.* Badger, 23 Ill. 498; Hatch *v.* Potter, 7 Ill. 725, 43 Am. Dec. 88; Linck *v.* Kelley, 25 Ind. 278, 87 Am. Dec. 362.

39. *Illinois.*— Claypool *v.* Claypool, 56 Ill. App. 17; Roby *v.* Murphy, 27 Ill. App. 394.

Indiana.— Schurick *v.* Kollman, 50 Ind. 336.

Kentucky.— Peters *v.* Garth, 50 S. W. 682, 20 Ky. L. Rep. 1934 (holding that the words, "She is a damned slut, she is a damned bitch, she is a damned sow and those who know her know she is no account," are not actionable); Craig *v.* Pyles, 39 S. W. 33, 18 Ky. L. Rep. 1043.

Minnesota.— Jacobs *v.* Cater, 87 Minn. 448, 92 N. W. 397.

New York.— Nealon *v.* Frisbie, 11 Misc. 12, 31 N. Y. Suppl. 856.

Ohio.— Wilson *v.* Runyon, Wright 651.

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

Wisconsin.— Robertson *v.* Edelstein, 104 Wis. 440, 80 N. W. 724; K. *v.* H., 20 Wis. 239, 91 Am. Dec. 397.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

40. Kennenberg *v.* Neff, 74 Conn. 62, 49 Atl. 853 (holding that to call a woman a certain man's "old slut" is actionable as imputing a want of chastity); Logan *v.* Logan, 77 Ind. 558; Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448 (holding that the words, "I guess the old bitch can pay her rent now after having so many men running up here nights," are actionable as imputing adultery).

41. *California.*— Pink *v.* Catanich, 51 Cal. 420.

Georgia.— Michelson *v.* Lavin, 95 Ga. 565, 20 S. E. 292; Beggarly *v.* Craft, 31 Ga. 309, 76 Am. Dec. 687; Pledger *v.* Hathcock, 1 Ga. 550, where the court held that the words, "Have you heard of Matilda Rheedy and Micajah C. Martin' whoring of it?" were words actionable *per se*.

Illinois.— Schmisseur *v.* Kreilich, 92 Ill. 347 (holding that the words, "She has acted the whore," are actionable); Burke *v.* Stewart, 81 Ill. App. 506; Claypool *v.* Claypool, 56 Ill. App. 17.

Indiana.— Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239 (holding that it is actionable *per se* to call a woman a "whoring slut"); Belck *v.* Belck, 97 Ind. 73; Hutchinson *v.* Lewis, 75 Ind. 55; Sunman *v.* Brewin, 52 Ind. 140; Ward *v.* Colyhan, 30 Ind. 395; Rodgers *v.* Lacey, 23 Ind. 507 (holding that the charge, "Mrs. Lacey is as hard a whore as ever was in Logansport," is actionable *per se*); Rodebaugh *v.* Hollingsworth, 6 Ind. 339; Kelley *v.* Dillon, 5 Ind. 426.

Iowa.— Sheehey *v.* Cokley, 43 Iowa 183, 22 Am. Rep. 236; Snediker *v.* Poorbaugh, 29 Iowa 488; Smith *v.* Silence, 4 Iowa 321, 66 Am. Dec. 137; Cox *v.* Bunker, Morr. 269.

Kentucky.—Williams *v.* Greenwade, 3 Dana 432.

Maine.— True *v.* Plumley, 36 Me. 466.

Missouri.— Elfrank *v.* Seiler, 54 Mo. 134 (where plaintiffs were charged as being "whoring folks"); Hudson *v.* Garner, 22 Mo. 423; Brown *v.* Wintsch, 110 Mo. App. 264, 84 S. W. 196; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

Nebraska.— Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New Hampshire.— Noyes *v.* Hall, 62 N. H. 594.

New York.— Courtney *v.* Mannheim, 14 N. Y. Suppl. 929.

Ohio.— Stevens *v.* Handly, Wright 121.

Pennsylvania.— Hartranft *v.* Hesser, 34 Pa. St. 117; Rhoads *v.* Anderson, 10 Pa. Cas. 247, 13 Atl. 823.

Rhode Island.— Kelley *v.* Flaherty, 16 R. I. 234, 14 Atl. 876, 27 Am. St. Rep. 739.

Texas.— Hatcher *v.* Range, 98 Tex. 85, 81 S. W. 289.

Vermont.— Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

Washington.— Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503.

Wisconsin.— Mayer *v.* Schleichter, 29 Wis. 646; Ranger *v.* Goodrich, 17 Wis. 78.

England.— Brand *v.* Roberts, 4 Burr. 2418; Theijer *v.* Eastwick, 4 Burr. 2032.

Canada.— Martindale *v.* Murphy, 2 N. Brunsw. 161.

See 32 Cent. Dig. tit. "Libel and Slander," § 78.

in connection with such facts as make it clear that it was neither used by the speaker nor taken by the listeners in its actionable sense.[42] The same rule applies to the use of the terms "prostitute,"[43] and "strumpet."[44] The word "bawd" applied to a woman is not actionable *per se* as imputing unchastity, since a bawd is one who procures opportunities for persons of opposite sexes to cohabit in an unlawful manner.[45] Nor is it actionable *per se* to charge a woman with being "base" and "lewd,"[46] or "ornery";[47] or to say of her that she is a "bad woman," a woman of "ill repute," or not a "decent woman," or to use other words of similar import,[48] unless the words are spoken in such connection with other words or under such circumstances as will impute want of chastity.[49]

(III) *Charge of Pregnancy or Birth of Illegitimate Child.* It has been held that a charge that an unmarried woman is pregnant or that such a woman[50]

Charge of being inmate of whore-house.— The words, "Eliza Perrin was one week in Lafayette in a whore-house," are actionable as charging whoredom. Blickenstaff *v.* Perrin, 27 Ind. 527. But to say of a woman, "She has gone down the river with two whores to the 'Goose Horn' at St. Louis and is now there with them," is not actionable without a colloquium as to the kind of place alluded to. Dyer *v.* Morris, 4 Mo. 214.

42. Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

43. *Nebraska.*— Barr *v.* Birkner, 44 Nebr. 197, 62 N. W. 494, holding that to say of a woman that "she is an old cat" (meaning prostitute) is actionable.

New York.— Distin *v.* Rose, 69 N. Y. 122.

Oregon.— Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

Vermont.— Sheridan *v.* Sheridan, 59 Vt. 504, 5 Atl. 494.

Wisconsin.— Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398; Gibson *v.* Gibson, 43 Wis. 23, 28 Am. Rep. 527.

See 32 Cent. Dig. tit. "Libel and Slander," § 72 *et seq.*

44. Freeman *v.* Price, 2 Bailey (S. C.) 115; Power *v.* Shaw, 1 Wils. C. P. 62 (holding that to call a woman a strumpet in the city of Bristol is actionable, as the word "strumpet" means "whore," and to call a woman a whore is actionable by the custom of the place); Martindale *v.* Murphy, 2 N. Brunsw. 161.

45. Dyer *v.* Morris, 4 Mo. 214.

46. Snow *v.* Witcher, 31 N. C. 346.

47. Wimer *v.* Albaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422.

48. *Illinois.*— Burke *v.* Stewart, 81 Ill. App. 506, holding that it is not actionable to charge a woman with being a "woman of ill repute."

Indiana.— Dodge *v.* Lacey, 2 Ind. 212.

Kentucky.— Feast *v.* Auer, (1906) 90 S. W. 564, holding that the words "dirty, vile woman," do not charge unchastity.

Massachusetts.— Riddell *v.* Thayer, 127 Mass. 487; Snell *v.* Snow, 13 Metc. 278, 46 Am. Dec. 730, holding that the words, "She is a bad girl, and unworthy to be employed," are not actionable as charging want of chastity.

New York.— Brown *v.* Moore, 90 Hun 169, 35 N. Y. Suppl. 736 (holding that the words, "You worked as a cook in Martin Burns' low hotel. Anyone that worked there aint much. . . . You are not a lady," do not impute unchastity); Kenworthy *v.* Brown, 45 Misc. 292, 92 N. Y. Suppl. 34 (holding that the words, "Low woman," "half negress," does not impute want of chastity.

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

See 32 Cent. Dig. tit. "Libel and Slander," § 71 *et seq.*

49. Riddell *v.* Thayer, 127 Mass. 487; Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228 (the words, "You are not a decent woman; you do not keep a respectable house," are actionable as imputing want of chastity); Vanderlip *v.* Roe, 23 Pa. St. 82.

50. *Illinois.*— Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323].

Indiana.— Kern *v.* Bridwell, 119 Ind. 226, 21 N. E. 664, 12 Am. St. Rep. 409; Emmerson *v.* Marvel, 55 Ind. 265 (holding that the words spoken of an unmarried woman, "She was getting fat, some one had slipped up on the blind side of her," while not ordinarily actionable *per se*, may be made so by proper averments that the words were understood to import pregnancy); Acker *v.* McCullough, 50 Ind. 447; Wilson *v.* Barnett, 45 Ind. 163 (holding that where defendant said, "Irvin Barnard was going to run away on account of Josephine (plaintiff meaning) being in a bad fix, and that a certain woman had got medicine of a doctor and that she had . . . become all right," and the words were alleged to mean that plaintiff, an unmarried female, had been pregnant, the charge is actionable *per se*); Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477 (holding that the words, "She is in the family way, and I . . . can prove by Bob Thompson that she . . . has been taking camphor and opium pills to produce an abortion," when spoken of an unmarried woman are actionable); Hibner *v.* Fleetwood, 19 Ind. App. 421, 49 N. E. 607; Cosand *v.* Lee, 11 Ind. App. 511, 38 N. E. 1099 (holding that to say of an unmarried woman, "You want to come home, and have another young one, like you did last summer," is actionable as charging fornication).

has given birth to a child[51] is actionable *per se* as amounting to a charge of fornication. So a charge that a married woman has given birth to a bastard child is actionable as charging adultery.[52] To say of a married woman that she is pregnant[53] or has a child[54] is not actionable *per se*.

c. Bestiality or Sodomy. Whether words charging sodomy or bestiality are actionable *per se*[55] or not[56] depends as a general rule on the question whether the jurisdiction is one in which the act charged is recognized as a common-law, or statutory offense. In one jurisdiction, however, where sodomy or bestiality was not criminally punishable, a charge imputing to a woman an act of this character was held actionable on the ground that it was an imputation of unchastity.[57]

Maine.— Patterson *v.* Wilkinson, 55 Me. 42. 92 Am. Dec. 568, holding that the words, "Malvina (meaning the plaintiff) has been to swear a young one," are actionable.

New Jersey.— Smith *v.* Minor, 1 N. J. L. 16.

Pennsylvania.— Long *v.* Fleming, 2 Miles 104.

See 32 Cent. Dig. tit. "Libel and Slander," § 73.

51. *Georgia.*—Richardson *v.* Roberts, 23 Ga. 215, holding that to say of an unmarried woman, "Her child . . . was Nathaniel Griggs'," is actionable.

Indiana.— Kelley *v.* Dillon, 5 Ind. 426; Worth *v.* Butler, 7 Blackf. 251; Hibner *v.* Fleetwood, 19 Ind. App. 421, 49 N. E. 607.

Iowa.— Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079; Bearsley *v.* Bridgman, 17 Iowa 290 (holding that to say of an unmarried woman, "She has had a baby," is actionable *per se*); Truman *v.* Taylor, 4 Iowa 424.

Kentucky.— Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914; Nicholson *v.* Dunn, 52 S. W. 935, 21 Ky. L. Rep. 643; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645, holding that the words, "One of Mrs. Nicholson's twins had twins, so I heard," are actionable as imputing want of chastity.

Missouri.— Moberly *v.* Preston, 8 Mo. 462.

New Hampshire.— Symonds *v.* Carter, 32 N. H. 458.

Ohio.— Murray *v.* Murray, 1 Cinc. Super. Ct. 290.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 72, 73, 75.

Charging man with bastardy.— In Erwin *v.* Dezell, 64 Hun (N. Y.) 391, 19 N. Y. Suppl. 784, it was held that bastardy is not a crime in New York and that words charging that a man had been arrested for bastardy are not actionable *per se*.

52. Hammond *v.* Stewart, 72 Ill. App. 512; Maxwell *v.* Allison, 11 Serg. & R. (Pa.) 343; Hoar *v.* Ward, 47 Vt. 657. *Compare* Patterson *v.* Edwards, 7 Ill. 720, holding that the words, "Mrs. Edwards has raised a family of children by a negro," are not sufficient in themselves to charge adultery and are not actionable.

Necessity of averment or colloquium.— The mother of a person charged with being a bastard cannot maintain an action of slander for the words as imputing want of chastity to the mother in the absence of an averment or colloquium connecting the charge with plaintiff (Maxwell *v.* Allison, 11 Serg. & R. (Pa.) 343), and stating definitely the crime intended to be imputed (Hoar *v.* Ward, 47 Vt. 657).

53. Acker *v.* McCullough, 50 Ind. 447.

54. Wilson *v.* Beighler, 4 Iowa 427, holding that the words, "She had a child," without any averment that the party about whom the words were spoken was unmarried or that the hearers understood the words to impute want of chastity, are not actionable.

55. *Indiana.*—Ausman *v.* Veal, 10 Ind. 355, 71 Am. Dec. 331 (holding that the words, "She had two pups," with an innuendo of bestiality are actionable *per se*, and it is no defense that it is impossible for a woman to have connection with a dog or to have pups by him, as it is popularly believed to be possible, and injury results to plaintiff from the degree of credit given the words and not from the actual scientific facts); Harper *v.* Delp, 3 Ind. 225 (holding that to say of a man that he "ravished a cow" is actionable *per se*, but to say that "he had been caught foul of a cow" is not actionable without additional averments).

Missouri.— Edgar *v.* McCutchen, 9 Mo. 768.

New York.— Woolcott *v.* Goodrich, 5 Cow. 714 (holding that it is actionable to say of one, "He has been with a sow"); Goodrich *v.* Woolcott, 3 Cow. 231.

England.— Coleman *v.* Goodwin, 2 B. & C. 285 note, 9 E. C. L. 131, 3 Dougl. 90, 26 E. C. L. 69; Woolnoth *v.* Meadows, 5 East 463, 2 Smith K. B. 28, 7 Rev. Rep. 742; Collier *v.* Burrel, Sid. 373; Poturite *v.* Barrel, Sid. 220.

Canada.— Anonymous, 29 U. C. Q. B. 456, where plaintiff was charged with being a "sodomite."

See 32 Cent. Dig. tit. "Libel and Slander," § 74.

56. Coburn *v.* Harwood, Minor (Ala.) 93, 12 Am. Dec. 37; Estes *v.* Carter, 10 Iowa 400; Melvin *v.* Weiant, 36 Ohio St. 184, 38 Am. Rep. 572; Davis *v.* Brown, 27 Ohio St. 326; McKean *v.* Folden, 2 Ohio Dec. (Reprint) 248, 2 West. L. Month. 146.

57. Haynes *v.* Ritchey, 30 Iowa 76, 6 Am. Rep. 642; Cleveland *v.* Detweiler, 18 Iowa 299, holding that the words, "When you see Mary Cleveland, you bark, say dog, whistle or howl and that will make her drop her

d. Incest. Incest is not a common-law crime, and hence spoken words charging such act, although imputing unchastity in its most detestable form, are not actionable *per se*,[58] except in jurisdictions where incest is made a statutory offense.[59]

e. Keeping House of Ill Fame. An oral charge of keeping a house of prostitution is actionable *per se*.[60] The term "bad house" does not necessarily imply a bawdy house, and charging a person with keeping a "bad house" is not in itself actionable.[61] But the term when construed in connection with other words may impute the crime of keeping a bawdy house and thus be actionable *per se*.[62] So other words, innocent in themselves, may be used to charge the keeping of a house of ill fame.[63]

feathers," and, "There was a tale started to the effect that Mary Cleveland had been too intimate with a dog, and it killed the dog," are actionable *per se*.

58. Eure *v.* Odom, 9 N. C. 52; Palmer *v.* Solmes, 45 U. C. Q. B. 15.

59. Griggs *v.* Vickroy, 12 Ind. 549; Abshire *v.* Cline, 3 Ind. 115; Millison *v.* Sutton, 1 Ind. 508 (holding, however, that the words, "All the bravery you ever showed was in sleeping with your sisters," do not charge that plaintiff, a sister of the person addressed, had had intercourse with her brother); Mason *v.* Mason, 4 N. H. 110; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; Guth *v.* Lubach, 73 Wis. 131, 40 N. W. 681 (holding that to say of a man that he "used" his daughter is capable of sustaining an innuendo that a charge of incest was meant). See also Lumpkins *v.* Justice, 1 Ind. 557.

60. *Indiana.* — Lipprant *v.* Lipprant, 52 Ind. 273.

Maryland.— Griffin *v.* Moore, 43 Md. 246, a charge of keeping a house of ill fame.

Massachusetts.— Fitzgerald *v.* Robinson, 112 Mass. 371.

Michigan.— Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228.

Nebraska. — Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448.

New York.—Wright *v.* Paige, 3 Keyes 581, 3 Transcr. App. 134 [*affirming* 36 Barb. 438]. (a charge of keeping a whorehouse); Cook *v.* Rief, 52 N. Y. Super. Ct. 302, 8 N. Y. Civ. Proc. 133 (a charge of keeping a whorehouse); Wilkens *v.* Hammann, 43 Misc. 21, 86 N. Y. Suppl. 744 (charge of keeping a house of prostitution); Martin *v.* Stillwell, 13 Johns. 275, 7 Am. Dec. 374 (a charge of keeping a bawdy house).

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

Vermont.— Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162, a charge of keeping a house of ill fame.

Wisconsin.— Eaton *v.* White, 2 Pinn. 42, a charge of keeping a whore house.

England. — Huckle *v.* Reynolds, 7 C. B. N. S. 114, 1 L. T. Rep. N. S. 9, 97 E. C. L. 114 (a charge of keeping a bawdy house); Brayne *v.* Cooper, 9 L. J. Exch. 80, 5 M. & W. 249; Spall *v.* Massey, 2 Stark. 559, 3 E. C. L. 529.

See 32 Cent. Dig. tit. "Libel and Slander," § 77.

Letting house for purposes of prostitution. — It is actionable *per se* to charge one with the statutory offense of letting a house for purposes of prostitution or lewdness. Halley *v.* Gregg, 74 Iowa 563, 38 N. W. 416.

"Drummer for a whore house."— It is not actionable *per se* to charge a man that he is a "drummer for a whore house." Mudd *v.* Rogers, 102 Ky. 280, 43 S. W. 255, 19 Ky. L. Rep. 1329.

61. Peterson *v.* Sentman, 37 Md. 140, 11 Am. Rep. 534.

62. Fitzgerald *v.* Robinson, 112 Mass. 371 (holding that the words, "He keeps a bad house, and not a proper place of resort; he keeps bad girls there," are actionable); Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995 (holding that the words, "She is a woman of bad character; she keeps a bad house where men go at all times," are actionable as charging the keeping of a house of ill fame); Spall *v.* Massey, 2 Stark. 559, 3 E. C. L. 529.

63. Lipprant *v.* Lipprant, 52 Ind. 273 (holding that words charging a woman with keeping an "accommodation house" are actionable when the meaning of the charge in the locality where it is made is the keeping of a house of ill fame); Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228 (holding that the charge, "You are not a decent woman; you do not keep a respectable house," is slanderous and actionable); Hendrickson *v.* Sullivan, 28 Nebr. 329, 44 N. W. 448 (holding that the words, "I guess the old bitch can pay her rent now, after having so many men running up here nights," are slanderous as imputing the keeping of a house of ill fame); Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162 (holding that the words, "She keeps a common open house; she is nothing but a whore anyway," are actionable).

Words held not to charge keeping of bawdy house.— It is not slanderous to charge one with keeping a "public house." Dodge *v.* Lacey, 2 Ind. 212. Words charging that plaintiff's house was a "stinking place" and that "she has men enough there most of the time" are not actionable. Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162. Words charging plaintiff with having a venereal disease do not amount to a charge of keeping a house of ill fame. Posnett *v.* Marble, *supra*. A publication charging that a woman had been arrested for keeping a disorderly house and that she had

F. Imputation of Venereal or Contagious Disease — 1. Libelous Words. To falsely charge one in writing with having any repulsive disease or condition which would necessarily cause him to be shunned or avoided is libelous *per se*.[64]

2. Slanderous Words. So the general rule is laid down that to charge one orally with a disease which would wholly or partially exclude him from society is actionable *per se*,[65] this being an exception to the rule that the words must contain an imputation of some criminal offense for which corporal punishment may be inflicted.[66] This principle has been applied to venereal disorders,[67] leprosy,[68] and the plague.[69] But an action for oral slander in charging plaintiff with disease has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society; and it has been asserted that the foregoing are the only examples which the adjudged cases furnish.[70] Charging another with having had a disease is not actionable unless the words impute a continuance of the disorder at the time of speaking them.[71]

G. Imputations Affecting One in His Profession or Business — 1. In General. It may be stated as a general rule that published words, whether written or oral, are actionable if they directly tend to the prejudice or injury of any one in his profession, trade, or business.[72] The actionable character of the

been in trouble with the police before does not charge that on the previous occasion she had been charged with keeping a disorderly house. Hilder *v.* Brooklyn Daily Eagle, 45 Misc. (N. Y.) 165, 91 N. Y. Suppl. 983.

64. Simpson *v.* Press Pub. Co., 33 Misc. (N. Y.) 228, 67 N. Y. Suppl. 401 (leprosy); Villers *v.* Monsley, 2 Wils. C. P. 403 (holding that to charge a man in writing with having the itch is actionable *per se*). See also Meteye *v.* Times-Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314, leprosy.

65. Watson *v.* McCarthy, 2 Ga. 57, 46 Am. Dec. 380; Nichols *v.* Guy, 2 Ind. 82.

66. Williams *v.* Holdredge, 22 Barb. (N. Y.) 396.

67. *Georgia.*—Watson *v.* McCarthy, 2 Ga. 57, 46 Am. Dec. 280, gonorrhea. See also Gilbert *v.* Crystal Fountain Lodge, 80 Ga. 284, 4 S. E. 905, 12 Am. St. Rep. 255.

Indiana.— Nichols *v.* Guy, 2 Ind. 82.

Iowa.— McDonald *v.* Nugent, 122 Iowa 651, 98 N. W. 506.

Massachusetts.— Golderman *v.* Stearns, 7 Gray 181.

New York.— Upton *v.* Upton, 51 Hun 184, 4 N. Y. Suppl. 936; Williams *v.* Holdredge, 22 Barb. 396 (holding that to say of a married woman that she has the venereal disease, the clap, and the pox is actionable); Hewit *v.* Mason, 24 How. Pr. 366 (holding that it is actionable to charge a person with having the "lues venerea").

Ohio.— Kaucher *v.* Blinn, 29 Ohio St. 62, 23 Am. Rep. 727.

Rhode Island.— Irons *v.* Field, 9 R. I. 216, holding that the words, "I will tell you what the matter with her is. She has had the pox," are actionable as the charge imports that the party was suffering from the disease at the time the words were uttered.

Vermont.— See Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

England.— Clifton *v.* Wells, 1 Ld. Raym. 710 (pox); Bloodworth *v.* Gray, 7 M. & G. 334, 8 Scott N. R. 9, 49 E. C. L. 334 (pox).

See 32 Cent. Dig. tit. "Libel and Slander," § 79.

68. Taylor *v.* Perkins, Cro. Jac. 144. See also Simpson *v.* Press Pub. Co., 33 Misc. (N. Y.) 228, 67 N. Y. Suppl. 401; Williams *v.* Holdredge, 22 Barb. (N. Y.) 396.

69. See Nichols *v.* Guy, 2 Ind. 82; Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625.

70. Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625, holding that an action cannot be maintained for orally imputing insanity without the averment of special damage. See also Villers *v.* Monsley, 2 Wils. C. P. 403, where it is said: "If one man should say of another that he has the itch, without more, an action would not lie."

71. *Indiana.*— Nichols *v.* Guy, 2 Ind. 82.

Maine.— Bruce *v.* Soule, 69 Me. 562, holding that the words, "He was about dead with the bad disorder," do not charge plaintiff with having the "bad disorder" at the time of speaking and are not actionable."

Massachusetts.— Golderman *v.* Stearns, 7 Gray 181.

New York.— Williams *v.* Holdredge, 22 Barb. 396; Pike *v.* Van Wormer, 5 How. Pr. 171.

Rhode Island.— Irons *v.* Field, 9 R. I. 216.

England.— Bloodworth *v.* Gray, 7 M. & G. 334, 8 Scott N. R. 9, 49 E. C. L. 334; Carslake *v.* Mapledoram, 2 T. R. 473.

See 32 Cent. Dig. tit. "Libel and Slander," § 79.

72. *Alabama.*— Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788; Ware *v.* Clowney, 24 Ala. 707; Johnson *v.* Robertson, 8 Port. 486.

Arkansas.— Obaugh *v.* Finn, 4 Ark. 110, 37 Am. Dec. 773.

California.— Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

charge lies in the fact that it injures the party in his business or profession, and hence it is not necessary that the words should contain an imputation upon plaintiff as an individual which would be actionable apart from the question of his business or profession.[73] Indeed it has been held that an imputation, when false and when made for the express purpose of injuring plaintiff in his profession, and when such injury actually follows as the probable and natural result of the speaking of the words, will support an action, even though the words have no meaning which strictly speaking could be called defamatory, although it may not be technically an action for slander, if the words are not defamatory.[74] Words not actionable in themselves are not actionable when spoken of one in a profession or trade unless they touch him in his profession or business;[75] that is, they must

Georgia.—Hardy *v.* Williamson, 86 Ga. 551, 12 S. E. 874, 22 Am. St. Rep. 479.

Illinois.— Gerald *v.* Inter Ocean Pub. Co., 90 Ill. App. 205.

Kentucky.— Fred *v.* Traylor, 115 Ky. 94, 72 S. W. 768, 24 Ky. L. Rep. 1906; Hargan *v.* Purdy, 93 Ky. 424, 20 S. W. 432, 14 Ky. L. Rep. 383; Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291.

Maine.— Orr *v.* Skofield, 56 Me. 483.

Massachusetts.— Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524, where it is said: "Words are held to be actionable *per se*, which convey an imputation upon one in the way of his profession or occupation."

Michigan.—Henkel *v.* Schaub, 94 Mich. 542, 54 N. W. 293.

Minnesota.— Lotto *v.* Davenport, 42 Minn. 395, 44 N. W. 311; Williams *v.* Davenport, 42 Minn. 393, 44 N. W. 311, 18 Am. St. Rep. 519; Pratt *v.* Pioneer Press Co., 35 Minn. 251, 28 N. W. 708.

Missouri.— St. James Military Academy *v.* Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L. R. A. 667; Rammell *v.* Otis, 60 Mo. 365; Lally *v.* Cantwell, 30 Mo. App. 524; Hermann *v.* Bradstreet Co., 19 Mo. App. 227.

New Jersey.— Johnson *v.* Shields, 25 N. J. L. 116.

New York.— Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457 [*affirming* 48 Hun 308, 9 N. Y. Suppl. 443]; White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Fowles *v.* Bowen, 30 N. Y. 20; Fry *v.* Bennett, 28 N. Y. 324; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Easton *v.* Buck, 23 N. Y. App. Div. 463, 48 N. Y. Suppl. 158; Burtch *v.* Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Ostrom *v.* Calkins, 5 Wend. 263, where it is said: "The general rule is, that words are actionable which directly tend to the prejudice of any one in his office, profession, trade or business, in any lawful employment by which he may gain his livelihood."

Pennsylvania.— Price *v.* Conway, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R. A. 193.

South Carolina.— Davis *v.* Davis, 1 Nott & M. 290.

Tennessee.— Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

Wisconsin.— Gillan *v.* State Journal Printing Co., 96 Wis. 460, 71 N. W. 892; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; Gauvreau *v.* Superior Pub. Co., 62 Wis. 403, 22 N. W. 726; Gottbehuet *v.* Hubachek, 36 Wis. 515.

United States.— Daily *v.* De Young, 127 Fed. 491; Ohio, etc., R. Co. *v.* Press Pub. Co., 48 Fed. 206.

England.—Whittington *v.* Gladwin, 5 B. & C. 180, 11 E. C. L. 420, 2 C. & P. 146, 12 E. C. L. 497, 7 D. & R. 649, 16 E. C. L. 310, where it is said: "Whatever words have a tendency to hurt, or are calculated to prejudice a man who seeks his livelihood by any trade or business are actionable."

See 32 Cent. Dig. tit. "Libel and Slander," §§ 80–90.

Application of rule to libel and slander respectively.—In Harman *v.* Delany, 2 Str. 898, 899 [*quoted* in Hermann *v.* Bradstreet Co., 19 Mo. App. 227], it is said: "The law has always been very tender of the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action, that will not be actionable in case of another person; and if bare words are so, it will be stronger in the case of a libel in a public newspaper, which is so diffusive."

Words imputing insanity when spoken or written of one in his trade or occupation are actionable *per se*. Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214.

73. Orr *v.* Skofield, 56 Me. 483; Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188, 1 Blatchf. 588; Kelly *v.* Buffington, 14 Fed. Cas. No. 7,671, 3 Cranch C. C. 81.

If the words are actionable per se under all circumstances, it is immaterial whether they touch plaintiff in his business. See Zier *v.* Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9; Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387.

74. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

75. *Georgia.*—Van Epps *v.* Jones, 50 Ga. 238.

have such a close reference to such profession or trade that it can be said that they are defamatory by means of an imputation upon one in that character, as for example, an imputation upon him as a clergyman, a physician, or a tradesman, distinctly from and independently of being an imputation upon him as an individual.[76] To be actionable it is not sufficient that the words merely be injurious to one whatever his pursuit, but they must prejudice him in the special profession or business in which he is actually engaged.[77] When the words spoken have such a relation to the profession or occupation of plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or

Indiana.—Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143.

Maine.— Buck *v.* Hersey, 31 Me. 558.

Massachusetts.— Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

Minnesota.— Newell *v.* How, 31 Minn. 235, 17 N. W. 383.

Missouri.— Spurlock *v.* Lombard Inv. Co., 59 Mo. App. 225 (holding that an advertisement of a sale under a trust deed alleged to have been previously made by plaintiff, who was a lawyer, farmer, real estate dealer and hotel-keeper, is not actionable *per se*, as the publication does not impute to plaintiff in any of his capacities, fraud, dishonesty, or any mean or dishonorable trickery in his conduct, insolvency, or want of credit, or integrity, or any pecuniary inability to carry on his business with success); Baldwin *v.* Walser, 41 Mo. App. 243.

New York.— Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Purdy *v.* Rochester Printing Co., 96 N. Y. 372, 48 Am. Rep. 632 [*reversing* 26 Hun 206] (holding that a newspaper article to the effect that the body of a man apparently frozen to death had been found in the highway, and that plaintiff as coroner was proceeding to hold an inquest when a physician pronounced the man alive, is not libelous, although plaintiff was also a physician, as the article does not refer to him as a physician); Kinney *v.* Nash, 3 N. Y. 177 (holding that where plaintiff brought an action for slander for words imputing to him misconduct as a constable, the action is not sustained by proof of words imputing to him misconduct while acting as agent of the executive of the state for the arrest in another state of a fugitive from justice); Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Goll *v.* Delesderniers, 26 Misc. 549, 57 N. Y. Suppl. 475 (holding that it is not libelous *per se* to publish of a business man that he has had one or more unsatisfactory fires, as such words do not of themselves import any fact derogatory to his character and standing as a business man); Gunning *v.* Appleton, 58 How. Pr. 471; Van Tassel *v.* Capron, 1 Den. 250, 43 Am. Dec. 667.

North Carolina.— McDowell *v.* Bowles, 53 N. C. 184.

Pennsylvania.— Rush *v.* Cavenaugh, 2 Pa. St. 187; Foster *v.* Small, 3 Whart. 138; Brown *v.* Street, 1 Phila. 85.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

Wisconsin.— Gillan *v.* State Journal Printing Co., 96 Wis. 460, 71 N. W. 892.

England.— Miller *v.* David, L. R. 9 C. P. 118, 43 L. J. C. P. 84, 30 L. T. Rep. N. S. 58, 22 Wkly. Rep. 332 (holding that when the words charged a stone mason with being the ringleader of the nine-hour system, and with having ruined the town by bringing about such system and with having stopped several good jobs from being carried out by being the ringleader of the nine-hour system, the charge is not actionable *per se*, as it does not touch him in his occupation); Hopwood *v.* Thorn, 8 C. B. 293, 14 Jur. 87, 19 L. J. C. P. 94, 65 E. C. L. 293; Figgins *v.* Cogswell, 3 M. & S. 369.

See 32 Cent. Dig. tit. "Libel and Slander," § 80.

76. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

77. *Indiana.*— Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143.

Missouri.— Spurlock *v.* Lombard Inv. Co., 59 Mo. App. 225; Baldwin *v.* Walser, 41 Mo. App. 243, 251, where it is said: "The rule is that in order to render language concerning one in a special character or relation actionable 'it must touch him' in that special character or relation; for, unless it does, it must be judged in regard to its actionable quality by the rules which apply to language concerning an individual as such. It is not sufficient that the language disparages him generally, or that his general reputation is thereby affected, it must be such as, if true, would disqualify him or render him less fit properly to fulfill the duties incident to the special character assumed."

New York.— Purdy *v.* Rochester Printing Co., 96 N. Y. 372, 48 Am. Rep. 632 [*reversing* 26 Hun 206]; Le Massena *v.* Storm, 62 N. Y. App. Div. 150, 70 N. Y. Suppl. 882 (holding that where plaintiff was engaged in soliciting and publishing legal notices in a certain paper and defendant told certain of plaintiff's customers that such paper was "not a daily newspaper within the meaning of the code provisions concerning the publication of legal notices," such statement did not relate to the personal character or professional conduct of plaintiff or necessarily tend to injure him in his business and hence was not actionable *per se*); Fitzgerald *v.* Redfield, 51 Barb. 484, 491 (where it is said:

ability, when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, although not applied by the speaker to the profession or occupation of plaintiff; but when they convey only a general imputation upon his character, equally injurious to any one of whom they might be spoken, they are not actionable, unless such application be made.[78]

2. Necessity of Pursuit of Business at Time of Publication. Slanderous imputations, to be actionable within the foregoing rule, must be published while the party is still engaged in such business or profession.[79] But a libel, although published even after the party has ceased to engage in such business or profession, may still be actionable as tending to disgrace and degrade.[80]

3. Character of Business or Profession — a. In General. The foregoing rule is applicable to any lawful occupation or employment by which a person may gain his livelihood.[81]

b. Unlawful Profession or Business. An action for libel or slander in respect to plaintiff's profession or business cannot be maintained when such business or profession is unlawful;[82] yet, if a cause of action can be stated without reference to such illegal business or profession, as for instance where the words charge a

"The question is not whether the plaintiff has suffered in his general reputation; it is whether he has been prejudiced in his employment"); Ireland *v.* McGarvish, 1 Sandf. 155 (holding that to maintain an action for words spoken on the ground that they were injurious to plaintiff in his business or occupation, the words must relate to his business character and must impute to him misconduct in that character and it is not sufficient that the words are imputations on his morality, temper, or conduct generally, which would be injurious to him whatever were his pursuits, and that hence a charge against a proprietor of a public house that he was a dangerous man, that he was a desperate man, and that the declarant was afraid to go to such house alone is not actionable); Van Tassel *v.* Capron, 1 Den. 250, 43 Am. Dec. 667.

Pennsylvania.— Wright *v.* Ewing, 1 Am. L. J. 428, holding that where defendant in objecting to plaintiff being chosen as an arbitrator said that he was "not an honest man," the words were not actionable as they were not spoken of him in a trade or as an arbitrator, he not being chosen as such.

England.— Doyley *v.* Roberts, 3 Bing. N. Cas. 835, 3 Hodges 154, 6 L. J. C. P. 279, 5 Scott 40, 32 E. C. L. 384.

See 32 Cent. Dig. tit. "Libel and Slander," § 80 *et seq.*

78. Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105.

79. *Maryland.*— Dicken *v.* Shepherd, 22 Md. 399. *Compare* Marshall *v.* Addison, 4 Harr. & M. 537.

New Hampshire.—Harris *v.* Burley, 8 N. H. 216.

New York.— Ramscar *v.* Gerry, 1 N. Y. Suppl. 635, holding that a libel on a person with reference to a particular business is not actionable, if he has never been engaged in such business.

North Carolina.— Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

England.— Wadsworth *v.* Bentley, 2 Wkly. Rep. 376.

Abandonment of intention to enter business.— The mere fact that plaintiff abandoned his intention of entering and pursuing a certain line of business in consequence of the misrepresentations of defendant to the public is not sufficient to make the misrepresentations actionable within the rule. Dudley *v.* Briggs, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494.

80. *Kansas.*— Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

Minnesota.— Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New York.— Cramer *v.* Riggs, 17 Wend. 209.

Pennsylvania.— Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568.

See 32 Cent. Dig. tit. "Libel and Slander," § 80.

81. Craig *v.* Brown, 5 Blackf. (Ind.) 44; Johnson *v.* Shields, 25 N. J. L. 116, 120 (where it is said: "Any lawful employment, or situation of trust, lucrative or confidential, is within the rule"); Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484; Carpenter *v.* Dennis, 3 Sandf. (N. Y.) 305; Ohio, etc., R. Co. *v.* Press Pub. Co., 48 Fed. 206 (where it is said: "It is elementary law that every legal occupation from which pecuniary benefit may be derived creates such special susceptibility to injury by language charging unfitness or improper conduct of such occupation that such language is actionable, without proof of special damage").

82. *California.*— Johnson *v.* Simonton, 43 Cal. 242.

Kentucky.— Hargan *v.* Purdy, 93 Ky. 424, 20 S. W. 432, 14 Ky. L. Rep. 383, holding that where a physician has no authority to practise his profession in the state, he cannot maintain an action for words spoken or written of him in that profession, as he cannot

crime, recovery may be had.[83] So a person does not necessarily forfeit all legal claim to protection against defamatory matter affecting his character because he has been guilty of a single illegal act, and hence unless the matters set forth in a declaration are of a nature which indicates that plaintiff's acts and conduct in connection therewith necessarily involve moral turpitude or might fairly be held to affect his general character in any particular, a publication which held plaintiff up to contempt and reproach, as wanting in integrity or otherwise culpable in his general conduct or character, would be actionable, although it might also relate to plaintiff's participation in an illegal transaction.[84] Accordingly it has been held that, although plaintiff, acting on certain facts and in conformity to what he supposed to be the law and usage in similar cases, may have committed a violation of law or participated in the illegal act of another, it does not follow that his general character for commercial integrity and fair dealing was thereby forfeited or so far affected that he could not maintain an action for a publication which held him up to the public as wanting in the qualities and characteristics of a merchant of integrity and honor.[85]

4. Particular Occupations and Professions Considered — a. Physicians and Dentists. It may be laid down as a general rule that words imputing to a physician a want of professional skill or knowledge, or negligence or misconduct in his professional capacity, are actionable in themselves on the ground of presumed damage, oral words[86] coming within the application of the rule as well as

be heard to complain that the words have the effect to deter him from violating a penal law.

New York.— Marsh *v.* Davison, 9 Paige 580, holding that it is not slanderous to charge a person not legally authorized to practise medicine as a profession with having destroyed the life of a patient by mistaken but legal and well meant efforts to save his life. *Compare* Fry *v.* Bennett, 28 N. Y. 324 [*affirming* 3 Bosw. 200].

United States.—Dauphin *v.* Times Pub. Co., 7 Fed. Cas. No. 3,584*a*.

England.— Collins *v.* Carnegie, 1 A. & E. 695, 3 L. J. K. B. 196, 3 N. & M. 703, 28 E. C. L. 326; Manning *v.* Clement, 7 Bing. 362, 9 L. J. C. P. O. S. 60, 5 M. & P. 211, 20 E. C. L. 166; Yrisari *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 4 L. J. C. P. O. S. 128, 11 Moore C. P. 308; Hunt *v.* Bell, 1 Bing. 1, 7 Moore C. P. 212, 25 Rev. Rep. 563, 8 E. C. L. 373.

See 32 Cent. Dig. tit. "Libel and Slander," § 80.

Compare Crane *v.* Darling, 71 Vt. 295, 44 Atl. 459, holding that a physician whose license has been duly recorded before the speaking of the slanderous words may have his action therefrom, although his license was not recorded at the time to which the slanderous words referred, and although the statute prescribes a penalty for practising before the license is recorded, if, as in this case, the words used charge plaintiff with general professional ignorance and incompetency.

Burden of proof as to obtaining requisite license.— In an action for a libel on the manager of an opera, it has been held that he need not aver or prove that he was licensed; he will be presumed not to have violated the law until the contrary is shown. Fry *v.* Bennett, 28 N. Y. 324 [*affirming* 3 Bosw. 200].

83. Marsh *v.* Davison, 9 Paige (N. Y.) 580; Yrisarri *v.* Clement, 3 Bing. 432, 11 E. C. L. 213, 2 C. & P. 223, 12 E. C. L. 538, 4 L. J. C. P. O. S. 128, 11 Moore C. P. 308.

84. Chenery *v.* Goodrich, 98 Mass. 224.

85. Chenery *v.* Goodrich, 98 Mass. 224. See also Greville *v.* Chapman, 5 Q. B. 731, Dav. & M. 553, 8 Jur. 189, 13 L. J. Q. B. 172, 48 E. C. L. 731.

86. *Alabama.*— Johnson *v.* Robertson, 4 Port. 486.

Connecticut.—Swift *v.* Dickerman, 31 Conn. 285.

Indiana.— De Pew *v.* Robinson, 95 Ind. 109; Jones *v.* Diver, 22 Ind. 184.

Louisiana.— Tarleton *v.* Lagarde, 46 La. Ann. 1368, 16 So. 180, 49 Am. St. Rep. 353, 26 L. R. A. 325.

Massachusetts.— Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

New York.— Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457 [*affirming* 48 Hun 308, 1 N. Y. Suppl. 443]; White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503; Carroll *v.* White, 33 Barb. 615; Secor *v.* Harris, 18 Barb. 425, 426 (where it is said: "The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage"); Bergold *v.* Puchta, 2 Thomps. & C. 532 (where the words were, "He is no doctor; he bought his diploma for $50").

Rhode Island.— Rice *v.* Cottrel, 5 R. I. 340.

South Carolina.— Brown *v.* Mims, 2 Mill 235, holding that it is slanderous to refer to a physician as a "damned rascal" where the

written publications.[87] Thus to refer to a physician in his professional capacity as a "quack," whether orally or in writing, is defamatory as a matter of law.[88] But to charge a physician merely with mismanagement of a particular case is not of itself actionable; a charge of want of skill, ignorance, neglect, or misconduct in a particular case is not actionable *per se*,[89] unless the charge is of such gross professional incapacity or misconduct as amounts to an imputation of general unfitness or incompetency.[90] A charge that a physician has caused the

conversation is in regard to plaintiff's professional skill.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359; Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836, a charge that a physician had fabricated and collected charges for professional visits against the speaker.

England.— Southee *v.* Denny, 1 Exch. 196, 17 L. J. Exch. 151; Edsall *v.* Russell, 2 Dowl. P. C. N. S. 641, 6 Jur. 996, 12 L. J. C. P. 4, 4 M. & G. 1090, 5 Scott N. R. 801, 43 E. C. L. 560.

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

87. *Massachusetts.*— Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

Michigan.— Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403.

Minnesota.— Pratt *v.* Pioneer Press Co., 35 Minn. 251, 28 N. W. 708 (holding that words imputing negligence to plaintiff in his profession as a physician are actionable *per se*); Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Pratt *v.* Pioneer Press Co., 30 Minn. 41, 14 N. W. 62.

New York.— Bornmann *v.* Star Co., 174 N. Y. 212, 66 N. E. 723 [*affirming* 76 N. Y. Suppl. 1009] (holding that it is libelous to publish of plaintiff that he is a "jackass disguised as a doctor, a brute graduated to care for the sick, a ghoul graduated to mutilate the dead, a degenerate graduate deserving arrest and punishment, a savage unworthy to retain his diploma"); Krug *v.* Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317 [*reversing* 16 N. Y. App. Div. 480, 44 N. Y. Suppl. 864] (holding that it is actionable *per se* to publish an article referring to plaintiff, a physician, as a "fool" or a "duncehead," and stating "can we trust ourselves and our families under the care of such a man when Dr. Krug so hates the Poles that he could drown each one in a spoon of water?"); Patch *v.* Tribune Assoc., 38 Hun 368.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

Pennsylvania.— Bryant *v.* Pittsburg Times, 192 Pa. St. 585, 44 Atl. 251.

Wisconsin.— Elmergreen *v.* Horn, 115 Wis. 385, 91 N. W. 973; Gauvreau *v.* Superior Pub. Co., 62 Wis. 403, 22 N. W. 726.

England.— Ramadge *v.* Ryan, 9 Bing. 333, 2 L. J. C. P. 7, 2 Moore & S. 421, 23 E. C. L. 604; Wakley *v.* Healey, 7 C. B. 591, 18 L. J. C. P. 241, 62 E. C. L. 591; Long *v.* Chubb, 5 C. & P. 55, 24 E. C. L. 451.

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

Rule applied to dentists.—Cady *v.* Brooklyn Union Pub. Co., 23 Misc. (N. Y.) 409, 51 N. Y. Suppl. 198; Gunning *v.* Appleton, 58 How. Pr. (N. Y.) 471.

88. White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503 (holding that to call a physician, whether homeopathic or allopathic, a quack is in effect charging him with a want of the necessary knowledge and training to practise the system of medicine which he undertakes to practise); Elmergreen *v.* Horn, 115 Wis. 385, 91 N. W. 973; Long *v.* Chubb, 5 C. & P. 55, 24 E. C. L. 451. See also Ramadge *v.* Ryan, 9 Bing. 333, 2 L. J. C. P. 7, 2 Moore & S. 421, 23 E. C. L. 604.

89. *Connecticut.*— Camp *v.* Martin, 23 Conn. 86, holding that to say of a physician in reference to a particular patient, "His treatment of her was rascally," is not actionable *per se*, as it does not impute general incompetency.

Indiana.— Jones *v.* Diver, 22 Ind. 184.

Kentucky.— Manire *v.* Hubbard, 110 Ky. 311, 61 S. W. 466, 22 Ky. L. Rep. 1753, holding that it is not actionable to say of a physician that "the negroes who were said to have the small-pox had no breaking out or eruption" until plaintiff, the attending physician, "applied a salve to their faces, and caused it to break out," as the words charge only a want of skill in a particular transaction.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389, holding that a charge of malpractice made against a physician is not necessarily libelous.

New York.— Lynde *v.* Johnson, 39 Hun 12 (holding that it is not actionable to say of a physician that he acted hastily in amputating an arm and did not make the amputation on his own judgment or that he took the word of a physician whom he consulted and did not himself sufficiently examine the arm or that he had better have cut off the left arm than the right); Secor *v.* Harris, 18 Barb. 425.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

90. *Alabama.*— Johnson *v.* Robertson, 8 Port. 486.

Connecticut.— Camp *v.* Martin, 23 Conn. 86; Sumner *v.* Utley, 7 Conn. 257.

Indiana.— Jones *v.* Diver, 22 Ind. 184.

Minnesota.— Pratt *v.* Pioneer Press Co., 35 Minn. 251, 28 N. W. 708, holding that a publication stating that plaintiff, a physician, allowed the decomposing body of a dead in-

death of a patient, in one of several instances, is actionable.[91] To be actionable as injuring a physician in his profession it is necessary that the words actually touch him in his profession as a physician.[92] Accordingly the rule has been laid down that to render words spoken or written of and concerning a physician actionable, they must be published of him in his professional character, and that it is not enough that the language disparages him generally, that his general reputation is thereby

fant to remain several days in the same room with the sick mother is actionable *per se*, although relating to but a single case.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

New York.— Lynde *v.* Johnson, 39 Hun 12; Secor *v.* Harris, 18 Barb. 425.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

Wisconsin.— Gauvreau *v.* Superior Pub. Co., 62 Wis. 403, 409, 22 N. W. 726, where it is said: "So long, therefore, as the words employed in stating the conduct of the physician in a particular case, only impute to him such ignorance or want of skill as is compatible with the ordinary or general knowledge and skill in the same profession, they are not actionable *per se*. But where the words so employed in detailing the action of the physician in a particular case, taken together, are such as fairly impute to him gross ignorance and unskilfulness in such matters as men of ordinary knowledge and skill in the profession should know and do, then they necessarily tend to bring such physician into public hatred, contempt, ridicule, or professional disrepute, and hence are actionable *per se*."

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

Compare Poe *v.* Mondford, Cro. Eliz. 620 [*disapproved* in 9 Bacon Abr. 49, 50].

91. *Alabama.*— Johnson *v.* Robertson, 8 Port. 486, holding that the words, "He has killed the child by giving it too much calomel," when spoken of a physician, are actionable.

Connecticut.—Swift *v.* Dickerman, 31 Conn. 285, holding that the words, "Dr. Swift loses almost all his patients. Anybody might as well die as to have him," are actionable *per se*.

Indiana.— De Pew *v.* Robinson, 95 Ind. 109; Jones *v.* Diver, 22 Ind. 184, holding that it is actionable to say of a physician that the medicine he gave a patient was poisonous and caused the death of the patient.

Michigan.—Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403.

New York.— Cruikshank *v.* Gordon, 48 Hun 308, 1 N. Y. Suppl. 443; Patch *v.* Tribune Assoc., 38 Hun 368; Carroll *v.* White, 33 Barb. 615 (holding that to say of a physician, "He has killed six children in one year," is actionable *per se*); Secor *v.* Harris, 18 Barb. 425 (holding that the words, "Dr. Secor killed my children. He gave them tea-spoonful doses of calomel, and it killed them," are actionable *per se*).

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477, holding that a publication by a village board of health in a preamble to an order regulating physicians and surgeons that the board had become satisfied that in the village a number of deaths had occurred from the carelessness of physicians attending the patients soon after attending others affected by infectious diseases was libelous *per se* upon plaintiff, a physician of that village.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

Wisconsin.— Gauvreau *v.* Superior Pub. Co., 62 Wis. 403, 22 N. W. 726, holding that a newspaper article charging that a physician had treated a child for teething when it had diphtheria and that the child died from the disease is libelous *per se*.

England.— Edsall *v.* Russell, 2 Dowl. P. C. N. S. 641, 6 Jur. 996, 12 L. J. C. P. 4, 4 M. & G. 1090, 5 Scott N. R. 801, 43 E. C. L. 560; Southee *v.* Denny, 1 Exch. 196, 17 L. J. Exch. 151. *Compare* Poe *v.* Mondford, Cro. Eliz. 620 [*disapproved* in 9 Bacon Abr. 49, 50].

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

92. *Indiana.*— Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143, holding that it is not actionable to charge a physician with being a "whitecapper."

Kentucky.— Manire *v.* Hubbard, 110 Ky. 311, 61 S. W. 466, 22 Ky. L. Rep. 1753, holding that a publication that there are and have been no cases of smallpox in a certain town as published by plaintiff, a physician, is not actionable *per se*.

Minnesota.— Zier *v.* Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, holding that the words, "Wanted E. B. Zier, M. D., to pay a drug bill," are not libelous on their face.

New York.— See Purdy *v.* Rochester Printing Co., 96 N. Y. 372, 48 Am. Rep. 632.

Ohio.— Anonymous, 1 Ohio 83 note, holding that it is not actionable to charge a physician with being "so steady drunk that he cannot do business any more," as they do not touch his professional skill or capacity.

Pennsylvania.— Foster *v.* Small, 3 Whart. 138, holding that it is not actionable to charge a physician with want of a diploma or of collegiate training, nor to say of him that he is a "two-penny-bleeder," as the words do not impute want of professional skill but want of professional dignity manifested by a petty attention to the humble employments of the art.

England.— Ayre *v.* Craven, 2 A. & E. 2, 4 L. J. K. B. 35, 4 N. & M. 220, 29 E. C. L. 23 (holding that words imputing adultery to a physician were not actionable *per se* and without special damage, where there was

affected, or that the words used tend to injure him in his profession.[93] On the other hand it has been held that in order for words charging a physician with misconduct to be actionable as touching him in his profession, it is not necessary that the misconduct should be charged as having been committed by plaintiff while acting as a physician or in connection with his practice.[94]

b. Attorneys at Law. A defamatory charge oral or written touching an attorney in his profession is actionable *per se*.[95] A charge of dishonesty or breach of trust made against an attorney in regard to property of clients under his control,[96] or an imputation of unfaithfulness generally to clients[97] imports a lack of qualities essential to a lawyer in his professional character and are actionable. A

nothing to show that the adultery was committed by him while acting as a physician, or in connection with his medical practice); Clay *v.* Roberts, 9 Jur. N. S. 580, 8 L. T. Rep. N. S. 397, 11 Wkly. Rep. 649 (holding that it is not actionable to charge a physician with a breach of professional etiquette); Dockrell *v.* Dougall, 80 L. T. Rep. N. S. 556 (holding that a doctor whose name has been used without his authority in an advertisement to puff the sale of medicine has no cause of action unless he is injured in his property or profession).

See 32 Cent. Dig. tit. "Libel and Slander," § 81.

93. Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143.

94. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

95. See cases cited *infra*, this note.

Written words. — *California.* — Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Connecticut.— Wynne *v.* Parsons, 57 Conn. 73, 17 Atl. 362.

Florida.— Hoey *v.* Fletcher, 39 Fla. 325, 22 So. 716.

Indiana.— Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425.

Iowa.— Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356.

Kansas.— Hetherington *v.* Sterry, 28 Kan. 426, 42 Am. Rep. 169.

Michigan.— Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63; Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501.

Minnesota.— Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554; Stewart *v.* Minnesota Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St. Rep. 696; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

New Hampshire.— Giles *v.* John B. Clarke Co., 69 N. H. 92, 36 Atl. 876.

New Jersey.— McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Henderson *v.* Commercial Advertiser Assoc., 111 N. Y. 685, 19 N. E. 286 [*affirming* 46 Hun 504]; Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105; Gibson *v.* Sun Printing, etc., Assoc., 71 N. Y. App. Div. 556, 76 N. Y. Suppl. 197; Garr *v.* Selden, 6 Barb. 416; Clark *v.* Anderson, 11 N. Y. Suppl. 729; Riggs *v.* Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145.

Pennsylvania.— Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142; Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367.

Wisconsin.— Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81.

England.— Godson *v.* Home, 1 B. & B. 7, 3 Moore C. P. 223, 5 E. C. L. 472; May *v.* Brown, 3 B. & C. 113, 4 D. & R. 670, 2 L. J. K. B. O. S. 212, 10 E. C. L. 60; Boydell *v.* Jones, 7 Dowl. P. C. 210, 1 H. & H. 408, 4 M. & W. 446; Bishop *v.* Latimer, 4 L. T. Rep. N. S. 775; Jones *v.* Stevens, 11 Price 235, 25 Rev. Rep. 714.

See 32 Cent. Dig. tit. "Libel and Slander," § 82.

Oral words.— *Michigan.*— Mains *v.* Whiting, 87 Mich. 172, 49 N. W. 559.

Ohio.— Goodenow *v.* Tappan, 1 Ohio 60; Goldrick *v.* Levy, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20.

Pennsylvania.— Rush *v.* Cavenaugh, 2 Pa. St. 187.

Vermont.— Chipman *v.* Cook, 2 Tyler 456.

England.— Doyley *v.* Roberts, 3 Bing. N. Cas. 835, 3 Hodges 154, 6 L. J. C. P. 273, 5 Scott 40, 32 E. C. L. 384; Phillips *v.* Jansen, 2 Esp. 624; Bishop *v.* Latimer, 4 L. T. Rep. N. S. 775; Day *v.* Buller, 3 Wils. C. P. 59.

See 32 Cent. Dig. tit. "Libel and Slander," § 82.

96. Wynne *v.* Parsons, 57 Conn. 73, 17 Atl. 362 (holding that a publication charging that plaintiff, a lawyer, got himself appointed administrator of an estate and spent the money of the estate for his personal use and was unable to pay the allowance of the court and was debarred from the profession on that account is libelous); Mains *v.* Whiting, 87 Mich. 172, 49 N. W. 559; Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501; May *v.* Brown, 3 B. & C. 113, 4 D. & R. 670, 2 L. J. K. B. O. S. 212, 10 E. C. L. 60.

97. *Iowa.*— Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356.

Kansas.— Hetherington *v.* Sterry, 28 Kan. 426, 42 Am. Rep. 169, holding that a charge against an attorney that he abandoned his client's cause by resigning his office in the midst of litigation brought on by his advice is libelous *per se*.

Michigan.—Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501.

New York.— Garr *v.* Selden, 6 Barb. 416 (holding that it is actionable to charge an attorney with revealing and disclosing confidential communications made to him by his

charge against an attorney of cheating or swindling,[98] sharp practice,[99] or ignorance of the law [1] is actionable. A charge of ignorance or want of skill in a particular transaction is not actionable,[2] unless at least the charge be such as imports gross ignorance or unskilfulness.[3] But words charging an attorney with want of integrity, whether used generally of his profession or particularly as to some one transaction, are actionable *per se*.[4] As in the case of imputations affecting persons in their professional capacities generally, it is essential that the charge should actually touch the attorney in his profession.[5] But it has been held that in order that words may touch an attorney in his profession it is not essential that they should be expressly applied by the speaker to his profession, provided they directly tend to injure him in respect to it, although when they convey only a general imputation upon his character, equally injurious to any one of whom they might be

client for the purpose of aiding and abetting another person with whom he had combined and colluded, and of injuring his client); Riggs *v.* Denniston, 3 Johns. Cas. 198, 2 Am. Dec. 145 (holding that a charge against a lawyer of offering himself as a witness in order to divulge the secrets of his client is libelous).

Vermont.— Chipman *v.* Cook, 2 Tyler 456, holding that to say of a lawyer, "He is not a man of integrity, and is not to be trusted; he will take fees on both sides of a cause," is actionable.

Wisconsin.— Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81, holding that a publication charging an attorney with "betraying and selling innocence in a court of justice" is actionable *per se*.

See 32 Cent. Dig. tit. "Libel and Slander," § 82.

98. *California.*—Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Iowa.— Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356, holding that a charge against an attorney that he was trying to get as much out of an estate as possible and that he charged two fees for the same transaction is libelous *per se*.

Michigan.— Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63, holding that where plaintiff, an attorney, presented a bill to a municipality and it was allowed by the council as a result of the mayor's casting the deciding vote, a charge that the mayor received part of the money allowed to pay the bill is a libel upon plaintiff.

New York.— Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105 (holding that to publish of an attorney that he did a "good thing, in his sober moments, in the way of collecting soldiers' claims against the government, for a fearful percentage," and that "the blood-money he got from the 'boys in blue' in this way, is supposed to be a big thing" is actionable *per se*); Clark *v.* Anderson, 11 N. Y. Suppl. 729.

Ohio.— Goodenow *v.* Tappan, 1 Ohio 60, holding that to say of a lawyer, "He is a d——d rascal, and an immoral and base man, and unless ignorance of the law makes a lawyer he is no lawyer," is actionable *per se*.

Pennsylvania.— Rush *v.* Cavenaugh, 2 Pa. St. 187, holding that it is slanderous to call an attorney a "cheat."

See 32 Cent. Dig. tit. "Libel and Slander," § 82.

99. Boydell *v.* Jones, 7 Dowl. P. C. 210, 1 H. & H. 408, 4 M. & W. 446, holding that it is libelous to impute to an attorney "sharp practice" in his profession.

To call a lawyer a "shyster" is actionable *per se*. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

1. Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425; Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270 [*affirming* 71 Hun 485, 24 N. Y. Suppl. 1060]; Mattice *v.* Wilcox, 129 N. Y. 633, 29 N. E. 1030 [*affirming* 13 N. Y. Suppl. 330] (holding that it is libelous to publish of an attorney these words, "Make Burr Mattice attorney for the village, so that every person that gets spanked on the ice will be able to obtain a judgment from $1000 to $10,000 against the village"); Gibson *v.* Sun Printing, etc., Assoc., 71 N. Y. App. Div. 566, 76 N. Y. Suppl. 197; Goodenow *v.* Tappan, 1 Ohio 60 (holding that it is slanderous to say of a lawyer, "unless ignorance of the law makes a lawyer he is no lawyer"); Goldrick *v.* Levy, 8 Ohio Dec. (Reprint) 146, 6 Cinc. L. Bul. 20 (holding that it is actionable to say of a practising lawyer that he had never been admitted to the bar and had no right to practise); Day *v.* Buller, 3 Wils. C. P. 59 (holding that to say of an attorney, "He is no more a lawyer than the devil," is actionable *per se*). See also Phillips *v.* Jansen, 2 Esp. 624.

2. Garr *v.* Selden, 6 Barb. (N. Y.) 416; Foot *v.* Brown, 8 Johns. (N. Y.) 64, holding that to say of an attorney, "Foot knows nothing about the suit . . . and he will lead you . . . on until he has undone you," when the words refer to a particular suit, is not actionable.

3. See Secor *v.* Harris, 18 Barb. (N. Y.) 425 [*disapproving* Foot *v.* Brown, 8 Johns. 64], where, however, the charge was against a physician.

4. Garr *v.* Selden, 6 Barb. (N. Y.) 416.

5. *Georgia.*—Van Epps *v.* Jones, 50 Ga. 238.

Minnesota.— Stewart *v.* Minnesota Tribune Co., 40 Minn. 101, 41 N. W. 457, 12 Am. St.

spoken, they are not actionable, unless such application be made.[6] To write of a lawyer that he pays no attention to a notice which he is under no obligation in law or morals to regard cannot have any injurious tendency *prima facie*, and therefore is not libelous.[7]

c. Clergymen. Imputations touching a clergyman or a minister of the gospel in his religious calling or profession are actionable.[8] For example, a charge of

Rep. 696, holding that it is not libelous to publish of a lawyer that he has removed his office to his house to save expense.

Missouri.— Spurlock *v.* Lombard Inv. Co., 59 Mo. App. 225.

New York.— Keene *v.* Tribune Assoc., 76 Hun 488, 27 N. Y. Suppl. 1045; Wellman *v.* Sun Printing, etc., Co., 66 Hun 331, 21 N. Y. Suppl. 577, holding that the charge that a lawyer's wife produced a miscarriage upon herself is not a libel upon the lawyer.

South Dakota.—Kirby *v.* Martindale, (1905) 103 N. W. 648, holding that publishing the name of an attorney in a directory without a rating is not actionable without additional averments.

England.— Dauncey *v.* Holloway, [1901] 2 K. B. 441, 70 L. J. K. B. 695, 84 L. T. Rep. N. S. 649, 49 Wkly. Rep. 546 (holding that a charge against a solicitor that "he has lost thousands" or that "he has gone for thousands instead of hundreds this time" is not slanderous *per se*); Doyley *v.* Roberts, 3 Bing. N. Cas. 835, 3 Hodges 154, 6 L. J. C. P. 279, 5 Scott 40, 32 E. C. L. 384 (holding that the words, "He has defrauded his creditors, and has been horsewhipped off the course at Doncaster," spoken of an attorney, are not actionable unless applicable to his conduct in his profession); Reeves *v.* Templar, 2 Jur. 137 (holding that it is not libelous to write of an attorney that he did not present his bill for fifteen years and having made his client's will, presented it after his death to his representatives).

See 32 Cent. Dig. tit. "Libel and Slander," § 82.

6. Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105.

7. Platto *v.* Geilfuss, 47 Wis. 491, 2 N. W. 1135.

8. See cases *infra*, this note.

Libelous words.— *Indiana.*— Bidwell *v.* Rademacher, 11 Ind. App. 218, 38 N. E. 879.

Iowa.— Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235.

Michigan.— Dailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Minnesota.— Knox *v.* Meehan, 64 Minn. 280, 66 N. W. 1149.

Nebraska.— Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588.

New York.— Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728 [*affirming* 24 Misc. 238, 52 N. Y. Suppl. 515]; Johnson *v.* Synett, 89 Hun 192, 35 N. Y. Suppl. 79.

Rhode Island.— See Porter *v.* Post Pub. Co., 20 R. I. 88, 37 Atl. 535.

Texas.— Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573]; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805; Coles *v.* Thompson, 7 Tex. Civ. App. 666, 27 S. W. 46.

Vermont.— Jones *v.* Roberts, 73 Vt. 201, 50 Atl. 1071.

Wisconsin.— Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

United States.— Pfitzinger *v.* Dubs, 64 Fed. 696, 12 C. C. A. 399, it is libelous *per se* to publish of plaintiff, a clergyman, "You cannot get P down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg."

England.— Tuam *v.* Robeson, 5 Bing. 17, 6 L. J. C. P. O. S. 199, 2 M. & P. 32, 30 Rev. Rep. 530, 15 E. C. L. 449 (holding that it is libelous to publish of a protestant archbishop that he attempts to convert catholic priests by offers of money and preferment), Walker *v.* Brogden, 19 C. B. N. S. 65, 11 Jur. N. S. 671, 12 L. T. Rep. N. S. 495, 13 Wkly. Rep. 809, 115 E. C. L. 65 (holding that to say of a clergyman that he came to the performance of divine service in a towering passion and thus his conduct was calculated to make infidels of his congregation is libelous); Edwards *v.* Bell, 8 Moore C. P. 467. *Compare* Hearne *v.* Stowell, 12 A. & E. 719, 6 Jur. 458, 11 L. J. Q. B. 25, 4 P. & D. 696, 40 E. C. L. 357, holding that an article charging a Roman catholic priest with requiring a parishioner to perform a penance of a degrading kind is not actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 83.

Slanderous words.— *Georgia.*— Elsas *v.* Browne, 68 Ga. 117 (holding that to say of a minister that he collected money for a particular purpose and embezzled it and that he is unfit to be a minister is actionable); Franklin *v.* Browne, 67 Ga. 272.

Illinois.— Mitchell *v.* Milholland, 106 Ill. 175.

Massachusetts.—Harding *v.* Brooks, 5 Pick. 244 (holding that it is actionable *per se* to call a minister a "knave" as the charge imports dishonesty); Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137.

New Jersey.— Ritchie *v.* Widdemer, 59 N. J. L. 290, 35 Atl. 825.

New York.— Damarest *v.* Haring, 6 Cow. 76.

Ohio.— Hayner *v.* Cowden, 27 Ohio St. 292, 22 Am. Rep. 303.

Pennsylvania.— McMillan *v.* Birch, 1 Binn. 178, 2 Am. Dec. 426.

Vermont.— Skinner *v.* Grant, 12 Vt. 456.

Wisconsin.— Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429.

drunkenness,[9] want of veracity,[10] immorality,[11] or a violation of the third commandment,[12] disobedience to the laws of the church,[13] or insanity [14] has been held to be actionable within the rule. While the words, whether spoken or written, to be actionable in themselves under this rule must touch the clergyman in his profession,[15] yet there is authority to the effect that it is not to be implied from this rule that defamatory words charging a clergyman with vice or immorality are not actionable *per se*, unless such charges are made in connection with some act or utterance made by him while in the performance of his professional or ministerial functions.[16] It is held not to be necessary to a right of action that a minister of the gospel should be receiving compensation for his services at the time the words were spoken.[17]

d. Teachers. Oral or written publications charging a person with incompetency or want of ability as a teacher, or charging him with such acts or conduct as to show that he is unfit to be a teacher, are actionable.[18] But to have

England.—Pemberton *v.* Colls, 10 Q. B. 461, 11 Jur. 1011, 16 L. J. Q. B. 403, 59 E. C. L. 461; Dod *v.* Robinson, Aleyn K. B. 63; Cranden *v.* Walden, 3 Lev. 17.

Canada.— Starr *v.* Gardner, 6 U. C. Q. B. O. S. 512.

See 32 Cent. Dig. tit. "Libel and Slander," § 83.

Any one who is licensed to preach the gospel is one practising a profession. Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327, holding that a local preacher of the methodist church is a minister of the gospel, having a profession within the meaning of the rule.

9. Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137; Hayner *v.* Cowden, 27 Ohio St. 292, 22 Am. Rep. 303; McMillan *v.* Birch, 1 Binn. (Pa.) 178, 2 Am. Dec. 426. *Contra*, Tighe *v.* Wicks, 33 U. C. Q. B. 479.

10. Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588; Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

11. Ritchie *v.* Widdemer, 59 N. J. L. 290, 35 Atl. 825 (holding that it is slanderous to say of a minister that wherever he had been he had trouble with women and that in one instance the trouble was such that his wife threatened to leave him); Johnson *v.* Synett, 89 Hun (N. Y.) 192, 35 N. Y. Suppl. 79 (holding that it is libelous to publish of a minister that he was arrested because he was too much of a family man); Damarest *v.* Haring, 6 Cow. (N. Y.) 76 (holding that a charge of incontinency against a minister is slanderous); Coles *v.* Thompson, 7 Tex. Civ. App. 666, 27 S. W. 46; Jones *v.* Roberts, 73 Vt. 201, 50 Atl. 1071 (holding that a letter stating that the conduct of plaintiff was unbecoming a married man and a minister of the gospel is libelous *per se*). *Compare* Gallwey *v.* Marshall, 2 C. L. R. 399, 9 Exch. 295, 23 L. J. Exch. 78, 2 Wkly. Rep. 106 (holding that no action will lie for an oral charge of incontinency in a clergyman, unless he is beneficed or holds some clerical office or employment of temporal profit); Breeze *v.* Sails, 23 U. C. Q. B. 94.

12. Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317.

13. Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429. See also Skinner *v.* Grant, 12 Vt. 456.

14. Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429, words spoken of a priest stating that he was irresponsible and insane.

15. Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; McDowell *v.* Bowles, 53 N. C. 184, holding that it is not actionable *per se* to charge a white minister with being a free negro.

16. Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137 [*explained* in Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524]; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317. *Compare* Hopwood *v.* Thorn, 8 C. B. 293, 14 Jur. 87, 19 L. J. C. P. 94, 65 E. C. L. 293 (holding that words charging a minister who was in partnership with having cheated his partner in settling up their accounts are not actionable); Pemberton *v.* Colls, 10 Q. B. 461, 11 Jur. 1011, 16 L. J. Q. B. 403, 59 E. C. L. 461 (holding that a charge against a minister that he fraudulently obtained defendant's signature to a security for payment of money is not actionable *per se*)..

17. Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

18. See cases cited *infra*, this note.

Libelous words. — *California.* — Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179, holding that a publication stating that a school-teacher "was almost entirely destitute of those womanly and honorable characteristics that should be the first requisites in a teacher" is actionable *per se*.

Connecticut.— Lindley *v.* Horton, 27 Conn. 58, holding that charging a school-teacher with general untruthfulness is an actionable libel.

Illinois.— Danville Democrat Pub. Co. *v.* McClure, 86 Ill. App. 432, holding that it is libelous to charge a president of an institution of learning with "shameless skulduggery."

Indiana.— Doan *v.* Kelley, 121 Ind. 413, 23 N. E. 266 (holding that a publication headed, "A school child killed by a teacher," and intimating that the death of the child was due

this effect the publication must impute to plaintiff the lack of some one of the qualities or qualifications which are the prerequisites to the due fulfilment of his duties as a school-teacher.[19]

e. Merchants, Tradesmen, and Manufacturers — (I) *In General.* Every wilful and unauthorized imputation, spoken, written, or printed, which imputes to a merchant, manufacturer, or other business man, conduct which is injurious to his character and standing as a merchant, manufacturer, or business man, is libelous or slanderous as the case may be.[20] But to be actionable without proof of special damages the words must contain an imputation such as is necessarily hurtful in its effect upon plaintiff's business and must touch him in his special

to punishment given him by the teacher is libelous *per se*); Henry *v.* Moberly, 6 Ind. App. 490, 33 N. E. 981 (holding that a publication concerning a school-teacher stating that her character and conduct were not such as would give her a right influence over her pupils and that she knowingly claimed wages not due her is actionable *per se*).

Louisiana.— Mielly *v.* Soule, 49 La. Ann. 800, 21 So. 593.

Missouri.— St. James Military Academy *v.* Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L. R. A. 667, holding that a publication charging that an institution of learning teaches and permits dancing and that hence its administration is harmful to the moral and religious interests of the community is actionable *per se*.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New York.— Triggs *v.* Sun Printing, etc., Assoc., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612 [*reversing* 91 N. Y. App. Div. 259, 86 N. Y. Suppl. 486] (holding that an article representing a college professor as a presumptuous literary freak and ridiculing his private life is libelous); People *v.* Judah, 2 Wheel. Cr. 26 (holding that a publication ridiculing a college professor, accusing him of wanting ability and resembling an orang-outang in dress and appearance is libelous).

Pennsylvania.— Price *v.* Conway, 134 Pa. St. 340, 19 Atl. 687, 19 Am. St. Rep. 704, 8 L. R. A. 193, holding that a publication charging that a teacher of shorthand was incompetent and could not be recommended by the author of the system which he taught is libelous.

Wisconsin.— Gillan *v.* State Journal Printing Co., 96 Wis. 460, 71 N. W. 892.

United States.— Totten *v.* Sun Printing, etc., Assoc., 109 Fed. 289, holding that a publication charging that plaintiff was of unsound mind and in consequence was removed from a position as professor in a scientific school is actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 84.

Slanderous words.— *Illinois.*— See Elam *v.* Badger, 23 Ill. 498.

Missouri.— Bray *v.* Callihan, 155 Mo. 43, 55 S. W. 865 (holding that to say of a school-teacher that he is "a villainous reptile" and that he "is not fit to go with decent girls and I advise mothers to look after their daughters" is slanderous *per se*); McAtee *v.* Valandingham, 75 Mo. App. 45.

North Carolina.— Wakefield *v.* Smithwick, 49 N. C. 327.

Ohio.— Stevens *v.* Handly, Wright 121, holding that it is slanderous to call a school mistress a nasty dirty slut.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779, holding that where plaintiff is engaged in the business of keeping and teaching boys, it is slanderous *per se* to charge him with intemperance or that he failed to prevent boys in his care from committing larceny, but that words imputing want of solvency are not actionable as they do not imply the want of any quality which a teacher should possess.

See 32 Cent. Dig. tit. "Libel and Slander," § 84.

19. Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416, holding that to say of a school-teacher that he is "noted" and "has done more damage and less good than any other teacher," and, referring to his application for a position as teacher, "this district knows when it has had enough, so it turned the gentleman down," does not impeach him or any of those qualities which are essential to an accomplished school-teacher and is not libelous *per se*.

Accusing a dancing master of drunkenness, idleness, vagrancy, and worthlessness of character are not actionable *per se*, where the words are not alleged to have been spoken in reference to plaintiff's employment. Buck *v.* Hersey, 31 Me. 558.

20. *Florida.*—Jones *v.* Greeley, 25 Fla. 629, 6 So. 448 (holding that a charge against a banker and money lender that he was pretending to be a philanthropist and benefactor of the poor when in fact he was a grasping and penurious gradgrind whose greed had inflicted untold sorrow on the widow and orphan is actionable *per se*); Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676 (holding that to publish of a liquor dealer that he was under indictment for not canceling stamps on empty liquor casks is actionable *per se*).

Massachusetts.— Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138. See also Noeninger *v.* Vogt, 88 Mo. 589.

New York.— John W. Lovell Co. *v.* Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A.

trade or occupation.[21] Words charging one with being engaged in a perfectly lawful transaction or merely doing that which he has a legal right to do are not

363 (holding that it is libelous to charge that plaintiff had published a certain book on which the copyright had expired and that the publication was an infringement on a later edition of the books of which defendants were publishers under a contract with author); Fry *v.* Bennett, 28 N. Y. 324; Hollingsworth *v.* Spectator Co., 49 N. Y. App. Div. 16, 63 N. Y. Suppl. 2; Prince *v.* Socialistic Co-operative Pub. Assoc., 31 Misc. 234, 64 N. Y. Suppl. 285 [*affirming* 61 N. Y. Suppl. 1145]; Sawyer *v.* Bennett, 20 N. Y. Suppl. 835 (holding that a statement that the failure of a firm was caused by reckless speculation of their agent is a libel upon the agent).

Ohio.— Watson *v.* Trask, 6 Ohio 531, 27 Am. Dec. 271, holding that it is libelous to charge one with the infringement of a regularly granted patent.

Wisconsin.— Gross Coal Co. *v.* Rose, 126 Wis. 24, 105 N. W. 225, 2 L. R. A. N. S. 741 (holding that charging a dealer in coal not only with charging extortionate prices in times of famine, but also with refusing to sell coal at these prices to people in sickness, is actionable as touching plaintiff in his business); Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349 (holding that a publication calling another a skunk and stating that he was repulsive and low in his business practices is libelous *per se*).

United States.— Daily *v.* De Young, 127 Fed. 491 (holding that a statement that plaintiff conducted a mining company with reckless extravagance is actionable *per se*); Willard *v.* Sun Printing, etc., Co., 106 Fed. 636 (holding that to publish of plaintiff that thirty years before he was "the center of the most gigantic conspiracy ever known in Wall street, and resulted in the events culminating in Black Friday" is actionable as injuring plaintiff in his business as a stockbroker); American Book Co. *v.* Gates, 85 Fed. 729 (holding that a charge that plaintiff puts out-of-date school books in frontier and backwood states and that "books that are referred to now a days as a laughingstock by intelligent teachers are foisted upon whole states for a series of years" is libelous); Locke *v.* Bradstreet Co., 22 Fed. 771 (where it is said that "every wilful and unauthorized publication, written or printed, which imputes to a merchant or other business man, conduct which is injurious to his character and standing as a merchant or business man is a libel and implies malice"); Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188, 1 Blatchf. 589.

England.— Riding *v.* Smith, 1 Ex. D. 91, 45 L. J. Exch. 281, 34 L. T. Rep. N. S. 500, 24 Wkly. Rep. 487, holding that an action brought by a trader for words spoken of his wife who assisted him in his business accusing her of having committed adultery on the premises where the business of the trader was conducted is maintainable on the grounds that the words would tend to injure his business. See also Brayne *v.* Cooper, 9 L. J. Exch. 80, 5 M. & W. 249.

See 32 Cent. Dig. tit. "Libel and Slander," § 86.

Charge of keeping place of bad resort.—The words, "He keeps a bad place of resort; keep away from it," spoken of a tradesman in relation to his trade, are actionable. Fitzgerald *v.* Robinson, 112 Mass. 371. But in Kennedy *v.* Press Pub. Co., 41 Hun (N. Y.) 422, it was held that the publication of an article and picture showing that the saloon of plaintiff was the resort of degraded characters is not libelous, in the absence of anything in the article charging that plaintiff conducted his saloon improperly or that he was responsible for the character of his guests.

The mere posting of a notice by an employer to employees, maliciously forbidding them to trade with a certain person named, does not constitute libel or slander. Payne *v.* Western, etc., R. Co., 13 Lea (Tenn.) 507, 49 Am. Rep. 666. See also Ulery *v.* Chicago Live Stock Exch., 54 Ill. App. 233. *Compare* Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681].

21. *Kentucky.*—Winsette *v.* Hunt, 53 S. W. 522, 21 Ky. L. Rep. 922, holding that to say of a merchant who is not a trader in real estate that he made false statements and misrepresented a lot he had traded to defendant is not actionable, as it is not defamatory of him in respect to his trade or employment.

Maryland.— Dicken *v.* Shepherd, 22 Md. 399.

Massachusetts.— Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369, holding that it is not libelous to charge the manager of an opera house with discriminating against the Irish, although quite a large proportion of the readers of the papers are Irish and plaintiff's audiences are partly Irish.

Michigan.— McGraw *v.* Detroit Free Press Co., 85 Mich. 203, 48 N. W. 500, holding that where plaintiff was the keeper of a stall in a certain market, it is not libelous upon him to publish "the Princess market is not a howling success. At no time were there more than a dozen people in the market on Saturday night."

New York.— Ireland *v.* McGarvish, 1 Sandf. 155; Verbeck *v.* Duryea, 36 Misc. 242, 73 N. Y. Suppl. 346; Goll *v.* Delesderniers, 26 Misc. 549, 57 N. Y. Suppl. 475 (holding that it is not libelous to say of a business man that he has had one or more unsatisfactory fires); Knickerbocker L. Ins. Co. *v.* Ecclesine, 6 Abb. Pr. N. S. 9 [*affirmed* in 34 N. Y. Super. Ct. 76, 11 Abb. Pr. N. S. 385, 42 How. Pr. 201] (holding that a publication stating that the stock-holders of an insurance company are entitled to twenty per cent of the profits besides an interest divided on the capital is not libelous).

actionable *per se*.[22] So where two or more persons have been engaged in business together or have had business relations with each other, a notice by one of such parties announcing the dissolution or cessation of such business relations is not actionable where the publication contains nothing more than is necessary to accomplish its purpose.[23] But if the notice goes farther and impugns the character or reputation of the party or reflects upon him in such a manner as to injuriously affect him in his business the notice then becomes actionable *per se*.[24]

(II) *Insolvency, Bankruptcy, or Want of Credit.* The law carefully guards the credit of merchants, traders and business men, and oral or written words imputing to them insolvency, bankruptcy, or want of credit are actionable *per se*,[25] the rule applying to any one to whom credit is important in the prosecu-

Rhode Island.— Barr *v.* Providence Tel. Pub. Co., 27 R. I. 101, 60 Atl. 835, holding that a complaint for libel, charging that plaintiff was a horseshoer and carriage manufacturer, and that defendant published of plaintiff and certain others, who were members of the democratic committee of P, a statement derogatory to them as politicians, and containing an interrogatory asking what respectable citizen would select these men, who tell them who they must vote for, to represent them in a business transaction, etc., but containing nothing intimating that plaintiff was not skilled or competent in his business, was not libelous, within the act of 1647 (1 R. I. Col. Rec. p. 184), defining libel as a disparagement of a man in his trade or business.

Wisconsin.— Canton Surgical, etc., Chair Co. *v.* McLain, 82 Wis. 93, 51 N. W. 1098.

United States.— Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

See 32 Cent. Dig. tit. "Libel and Slander," § 86.

22. Donaghue *v.* Gaffy, 54 Conn. 257, 7 Atl. 552; Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397 (holding that where defendant, a retail liquor dealer, charged plaintiffs with overbidding him in a matter of a lease and turning him out of his place of business because he had ceased to buy from them, the charge is not actionable, as plaintiffs had a legal right to do that which was imputed to them); Hahnemannian L. Ins. Co. *v.* Beebe, 48 Ill. 87, 95 Am. Dec. 519 (holding that it is not libelous for a newspaper to assume that an insurance company proposes to do that which its charter authorizes it to do); Achorn *v.* Piper, 66 Iowa 694, 24 N. W. 513; Willis *v.* Eclipse Mfg. Co., 81 N. Y. App. Div. 591, 81 N. Y. Suppl. 359 (holding that a letter charging a merchant with "cutting prices" is not actionable, where there is no charge that he was bound not to cut the price); Smid *v.* Bernard, 31 Misc. (N. Y.) 35, 63 N. Y. Suppl. 278 (holding that it is not libelous *per se* to publish of a retail baker that he had started a fight against a bakers' labor union and had refused to employ its members because they would not work for fifty cents a day); Stone *v.* Cooper, 2 Den. (N. Y.) 293 (holding that a charge that plaintiff used money for "shaving purposes" is not actionable).

23. Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349; Baldwin *v.* Walser, 41 Mo. App. 243; Mulligan *v.* Cole, L. R. 10 Q. B. 549, 44 L. J. Q. B. 153, 33 L. T. Rep. N. S. 12.

24. Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103; Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502; Miller *v.* Green, 33 Nova Scotia 517.

25. *Colorado.*— McKenzie *v.* Denver Times Pub. Co., 3 Colo. App. 554, 34 Pac. 577, holding that the words, "Business Changes. McKenzie Lumber Co. Denver, attached," published in a newspaper, are libelous *per se*.

Connecticut.— Lewis *v.* Hawley, 2 Day 495, 2 Am. Dec. 121, holding that it is actionable to charge a drover with being a bankrupt.

Georgia.— Brown *v.* Holton, 109 Ga. 431, 34 S. E. 717 (holding that a letter stating that a merchant has failed and refuses to pay his debts is actionable *per se*); May *v.* Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, 15 L. R. A. 637 (holding that it is libelous for a notary to falsely and maliciously protest a draft and the fact that the protest is invalid will not render the libel harmless).

Illinois.— Hays *v.* Mather, 15 Ill. App. 30.

Michigan.— Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476, holding that a false statement that a merchant in the habit of purchasing goods was heavily indebted and had conveyed property to his wife at half its value is actionable *per se*.

Minnesota.— Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915; Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387; Newell *v.* How, 31 Minn. 235, 17 N. W. 383, holding that words which on their face necessarily and clearly impute to a merchant, if not actual insolvency, at least financial embarrassment and doubtful credit, are actionable *per se*.

Missouri.—Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Hermann *v.* Bradstreet Co., 19 Mo. App. 227, holding that to say of a tradesman that he is in the hands of the sheriff is libelous.

Nebraska.— Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28, holding that a newspaper publication stating that a business corporation is maintaining a precarious existence, that it is not able to meet its financial obligations and is tottering, bankrupt, and about to pass out of existence is libelous *per se*.

tion of his business.[26] And it is held that where the words are such as to affect a man's credit, then it is neither necessary to aver nor to prove that they were spoken in reference to the particular trade or business which plaintiff was

New York.— Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701 [*reversing* 50 Hun 345, 3 N. Y. Suppl. 156]; Fry *v.* Bennett, 28 N. Y. 324; Lewis *v.* Chapman, 16 N. Y. 369 [*reversing* 19 Barb. 252]; Carpenter *v.* Dennis, 3 Sandf. 305; Ryan *v.* Burger, etc., Brewing Co., 13 N. Y. Suppl. 660; Calkins *v.* Wheaton, 1 Edm. Sel. Cas. 226; Titus *v.* Follet, 2 Hill 318; Ostrom *v.* Calkins, 5 Wend. 263; Sewall *v.* Catlin, 3 Wend. 291 (holding that to say of plaintiff in connection with failures, "I understand that there is trouble with the Messrs. Sewalls," is actionable *per se*); Mott *v.* Comstock, 7 Cow. 654 (holding that to say of a merchant that a debt will be lost because he is unable to pay it, is actionable); Else *v.* Ferris, Anth. N. P. 36 (holding that the words, "He will be a bankrupt in six months," spoken of a merchant, are actionable *per se*).

Pennsylvania.— Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643 (holding that a written imputation of financial embarrassment is libelous); Phillips *v.* Hoefer, 1 Pa. St. 62, 44 Am. Dec. 111.

South Carolina.— Reynolds *v.* Bentley, 1 McMull. 16, 36 Am. Dec. 251 (holding that to charge a merchant with conveying all his property to another and with making provisions for removing out of the state without paying his debt is actionable); Davis *v.* Ruff, Cheves 17, 34 Am. Dec. 584 (holding that to say of a merchant that he is "broke" and cannot pay more than fifty cents on the dollar is actionable, but that it was no slander of a firm to say that one of the partners was "broke"); Davis *v.* Davis, 1 Nott & M. 290.

Tennessee.— Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131.

Texas.— Hirshfield *v.* Ft. Worth Nat. Bank. 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779, holding that words imputing insolvency to a stock dealer who buys and sells farm produce are actionable *per se*.

Wisconsin.— Robinson *v.* Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983; Brown *v.* Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860 (holding that a letter written by one of two rival milk sellers advising a shipper to sell no more milk to the other unless he had surety for his goods as such seller paid nothing to his shippers is libelous); Platto *v.* Geilfuss, 47 Wis. 491, 2 N. W. 1135. *Compare* Canton Surgical, etc., Chair Co. *v.* McLain, 82 Wis. 93, 51 N. W. 1098.

United States.— Salomon *v.* Armour, 123 Fed. 342 (holding that the refusal of a debtor to pay his creditor an item in dispute between them, which the debtor claims he does not owe, does not justify the creditor in publishing of the debtor that he does not pay his debts, and such a publication will render the creditor liable to the debtor for libel); Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

England.— Williams *v.* Smith, 22 Q. B. D. 134, 52 J. P. 823, 58 L. J. Q. B. 21, 59 L. T. Rep. N. S. 757, 37 Wkly. Rep. 93; Capital, etc., Bank *v.* Henty, 5 C. P. D. 514, 45 J. P. 188, 49 L. J. C. P. 830, 43 L. T. Rep. N. S. 651, 28 Wkly. Rep. 851 [*affirmed* in 7 App. Cas. 741, 47 J. P. 214, 52 L. J. Q. B. 232, 47 L. T. Rep. N. S. 662, 31 Wkly. Rep. 157]; Whittington *v.* Gladwin, 5 B. & C. 180, 11 E. C. L. 420, 2 C. & P. 146, 12 E. C. L. 497, 7 D. & R. 649, 16 E. C. L. 310, 4 L. J. K. B. O. S. 125, 29 Rev. Rep. 212 (holding that to say of an innkeeper that he is a bankrupt is actionable, although he was not liable to the bankrupt laws); Rolin *v.* Steward, 14 C. B. 595, 2 C. L. R. 759, 18 Jur. 536, 23 L. J. C. P. 148, 2 Wkly. Rep. 467, 78 E. C. L. 595 (holding that it is actionable to say of a trader that his checks are dishonored); Brown *v.* Smith, 13 C. B. 596, 1 C. L. R. 4, 17 Jur. 807, 22 L. J. C. P. 151, 1 Wkly. Rep. 288, 76 E. C. L. 596 (holding that the words, "If he does not come and make terms with me, I will make a bankrupt of him, and ruin him," when spoken of a tradesman, are actionable); Eaton *v.* Johns, 1 Dowl. P. C. N. S. 602 (holding that to write of a party that he was a "mere man of straw" is libelous as imputing insolvency); Fleming *v.* Newton, 1 H. L. Cas. 363, 9 Eng. Reprint 797; Dobson *v.* Thornistone, 3 Mod. 112; Hall *v.* Smith, 1 M. & S. 287 (holding that it is actionable to say of a brewer that he had been a bankrupt); Jones *v.* Littler, 7 M. & W. 423 (holding that where defendant stated that plaintiff, a brewer, had been "in a sponging-house within this last fortnight for debt," the words were actionable *per se*). See also Chapman *v.* Lamphire, 3 Mod. 155.

See 32 Cent. Dig. tit. "Libel and Slander," § 87.

26. *New York.*— Carpenter *v.* Dennis, 3 Sandf. 305; Ostrom *v.* Calkins, 5 Wend. 263.

Pennsylvania.— Phillips *v.* Hoefer, 1 Pa. St. 62, 44 Am. Dec. 111, holding that it is actionable to say of a farmer, "The sheriff will sell him out one of these days, and claims against him not sued will be lost."

Tennessee.— Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

England.— Whittington *v.* Gladwin, 5 B. & C. 180, 11 E. C. L. 420, 2 C. & P. 146, 12 E. C. L. 497, 7 D. & R. 649, 16 E. C. L. 310, 4 L. J. K. B. O. S. 125, 29 Rev. Rep. 212.

See 32 Cent. Dig. tit. "Libel and Slander," § 87.

pursuing.[27] Under this rule erroneous statements or reports issued by mercantile agencies or associations among business men for mutual protection or for the collection of bad debts have been held to be actionable,[28] provided the communication is not privileged.[29] The words to be actionable *per se* must in their common and ordinary meaning necessarily impute insolvency or want of credit.[30] Thus it is not actionable to say of a merchant that he has been sued,[31] that judgment has been recovered against him,[32] that he has sold[33] or mortgaged[34] his property, or that he has refused to pay a certain promissory note.[35]

(III) *Fraud or Dishonesty*—(A) *In General.* Language which imputes to one fraud or want of integrity in his business is actionable *per se*;[36] or, as the

27. Davis *v.* Ruff, Cheves (S. C.) 17, 20, 34 Am. Dec. 584; Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779. *Compare* Canton Surgical, etc., Chair Co. *v.* McLain, 82 Wis. 93, 51 N. W. 1098. See also *infra*, XIII, C; VIII, E, l, g, (VII).

28. *Georgia.*— Dun *v.* Weintraub, 111 Ga. 416, 36 S. E. 808, 50 L. R. A. 670 (holding that to publish of a trader that "he is looked upon locally as an itinerant trader of small financial responsibility, and uncertain prospects" is libelous *per se*); Johnson *v.* Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77 (holding that it is libelous *per se* for a mercantile agency to send out a notice that a merchant was drinking and failing in business and that it would be well to watch him and trust him slowly).

Minnesota.— Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915, holding that where defendant is a member of a merchants' protection association and causes plaintiff's name to be entered in a published list known as a "Black List" or "Dead-Beat-List," thereby imputing insolvency and dishonesty to plaintiff in his business, such a publication is libelous *per se*.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138 (holding that a false publication that a business firm has assigned is libelous *per se*); Hermann *v.* Bradstreet Co., 19 Mo. App. 227.

New York.— Kingsbury *v.* Bradstreet Co., 116 N. Y. 211, 22 N. E. 365 [*affirming* 35 Hun 212].

Pennsylvania.— McIntyre *v.* Weinert, 195 Pa. St. 52, 45 Atl. 666, where plaintiff, a retail dealer, was blacklisted by a nassociation of wholesale produce dealers and such action was held libelous.

Wisconsin.—Muetze *v.* Tuteur, 77 Wis. 236, 46 N.W. 123, 20 Am. St. Rep. 115, 9 L.R.A. 86.

See 32 Cent. Dig. tit. "Libel and Slander," § 87.

29. See *infra*, VI, C, 11, e.

30. *Florida.*— Wittich *v.* Pensacola First Nat. Bank, 20 Fla. 843, 51 Am. Rep. 631.

Maryland.— Dicken *v.* Shepherd, 22 Md. 399, holding that a statement of plaintiff that defendant would never be able to pay for a mill, purchased by him for his own use as a miller, and that the creditors had better get their money as soon as possible for defendant was going to shut down upon him and they would never get it, does not amount to a charge of insolvency against him in his business.

Michigan.— Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855, holding that the statement that plaintiff had "left town" does not, without additional averments, charging that plaintiff had absconded and was insolvent, charge insolvency.

Minnesota.— Newell *v.* How, 31 Minn. 235, 17 N. W. 383, holding that letters inquiring as to the indebtedness of a merchant and in reference to his financial standing, but containing no assertion on their face derogatory to him, are not actionable *per se* and are not made so by the fact that confidence is exacted and promised.

New York.— Kingsbury *v.* Bradstreet Co., 116 N. Y. 211, 22 N. E. 365.

Wisconsin.— Canton Surgical, etc., Chair Co. *v.* McLain, 82 Wis. 93, 51 N. W. 1098.

England.— Angle *v.* Alexander, 7 Bing. 119, 4 M. & P. 870, 20 E. C. L. 61, holding that the words, "You . . . are a regular prover under bankruptcy," are not actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 87.

31. Giacona *v.* Bradstreet Co., 48 La. Ann. 1191, 20 So. 706.

32. Woodruff *v.* Bradstreet Co., 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555 [*affirming* 35 Hun 16]. See also Dun *v.* Weintraub, 111 Ga. 416, 36 S. E. 808, 50 L. R. A. 670.

33. Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60 (holding that a charge that a merchant had sold his stock in trade for one dollar does not impute insolvency and is not libelous); Dun *v.* Maier, 82 Fed. 169, 27 C. C. A. 100.

34. Dun *v.* Weintraub, 111 Ga. 416, 36 S. E. 808, 50 L. R. A. 670; Newbold *v.* Bradstreet, 57 Md. 38, 40 Am. Rep. 426.

35. Hirshfield *v.* Ft. Worth Nat. Bank, 83 Tex. 452, 18 S. W. 743, 29 Am. St. Rep. 660, 15 L. R. A. 639.

36. *Alabama.*— See Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531.

Illinois.— Gunton *v.* Hughes, 79 Ill. App. 661; Kenney *v.* Illinois State Journal Co., 64 Ill. App. 39 (holding that a charge against plaintiff, a canvasser of books, that she fraudulently represented that the federation of labor had recommended her book is actionable *per se*); Hays *v.* Mather, 15 Ill. App. 30 (holding that where defendant sold out his business to A, a minor, and wrote to customers, "A. M. Hays, my successor in busi-

rule has been otherwise well expressed, any charge of dishonesty against an individual, in connection with his business, whereby his character in such business may be injuriously affected, is actionable.[37] So a charge of adulteration of goods,[38] of selling a substitute for the genuine article,[39] or of selling diseased

ness, is not legally responsible for his contracts, as he is yet a minor. A word to the wise is sufficient," the words are slanderous *per se*).

Kentucky.— Fred *v.* Traylor, 115 Ky. 94, 72 S. W. 768, 24 Ky. L. Rep. 1906.

Maryland.— Marshall *v.* Addison, 4 Harr. & M. 537.

Massachusetts.—Worthington *v.* Houghton, 109 Mass. 481, holding that it is actionable to charge an exporter with swearing to false invoices in order to evade the tariff duties.

Minnesota.— Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915.

Missouri.—Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Noeninger *v.* Vogt, 88 Mo. 589 (holding that it is slanderous *per se* to call a business man a "defrauder"); Rammell *v.* Otis, 60 Mo. 365.

New Hampshire.—Harris *v.* Burley, 8 N. H. 216.

New Jersey.— Feder *v.* Herrick, 43 N. J. L. 24.

New York.— Fowles *v.* Bowen, 30 N. Y. 20 (holding that to say of a clerk that he had become such a notorious liar that little confidence could be placed in him is actionable *per se*); Fry *v.* Bennett, 28 N. Y. 324; Loftus *v.* Bennett, 68 N. Y. App. Div. 128, 74 N. Y. Suppl. 290; Crandall *v.* Jacob, 22 N. Y. App. Div. 400, 48 N. Y. Suppl. 279; Gideon *v.* Dwyer, 87 Hun 246, 33 N. Y. Suppl. 754; Arrow Steamship Co. *v.* Bennett, 73 Hun 81, 25 N. Y. Suppl. 1029 (holding that the words, "When the Arrow Steamship Company went fishing for stray twenty-dollar bills, we looked through the little scheme, and told what we saw. The Arrow Steamship Company was not pleased. They even accused us of misstating facts; but they packed up their gripsack all the same, and started for a healthier clime," are libelous *per se*); Rosenwald *v.* Hammerstein, 12 Daly 377 (holding that the words, "The people . . . who, under the guise of assumed respectability, resort to low commercial jugglery to foist a valueless, not to say dangerous, article upon unsuspecting manufacturers and jobbers, and thereby probably cause their ruin, are no better than the 'stool pigeons' in a low Chatham Street dive," are libelous *per se*); Taylor *v.* Church, 1 E. D. Smith 279; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 398.

Pennsylvania.— Meas *v.* Johnson, 185 Pa. St. 12, 39 Atl. 562, holding that the words, "You are a first class fraud, and of the first water," are libelous when used in reference to a business man.

South Carolina.— Davis *v.* Davis, 1 Nott & M. 290.

Virginia.— Hoyle *v.* Young, 1 Wash. 150, 1 Am. Dec. 446, holding that a charge that a merchant had received more tobacco than he had accounted for to the house of which he was a partner is actionable *per se*.

Wisconsin.— Dr. Shoop Family Medicine Co. *v.* Wernich, 95 Wis. 164, 70 N. W. 160, holding that it is libelous *per se* for a newspaper to publish the following statement addressed to a proprietor of medicine, "Your advertisements will not be received in the columns of the 'Landwith,' although you offer us big pay. We have repeatedly advised our readers that by the manufacture and sale of such medicines the public are swindled."

United States.— Merchants' Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19.

England.— Prior *v.* Wilson, 1 C. B. N. S. 95, 87 E. C. L. 95.

See 32 Cent. Dig. tit. "Libel and Slander," § 86½.

Words to be construed in connection with context.— Where the words used charged plaintiff with "base treachery" and "foul and unfair dealings," yet if when taken in connection with the entire article only charged him with having done that which he had a right to do, they are not actionable. Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397.

Charge of overestimating one's wealth.— If plaintiff makes an estimate of his wealth and defendant in answer to a question from a third person expresses the opinion that plaintiff has overestimated his wealth, the words are not actionable. Gunton *v.* Hughes, 79 Ill. App. 661.

A charge that a merchant's clerk is dishonest will not support an action in favor of the merchant. Smith *v.* Hollister, 32 Vt. 695.

37. Noeninger *v.* Vogt, 88 Mo. 589; Fowles *v.* Bowen, 30 N. Y. 20.

38. Havemeyer *v.* Fuller, 60 How. Pr. (N. Y.) 316, 10 Abb. N. Cas. 9; White *v.* Delavan, 17 Wend. (N. Y.) 49 (holding that a publication charging a maltster with using filthy and disgusting water in the malting of grain for brewing is libelous *per se*); Morrison-Jewell Filtration Co. *v.* Lingane, 19 R. I. 316, 33 Atl. 452 (holding that a statement that plaintiff, a manufacturer of a system of filtration, employed alum in the process and there was doubt as to the healthfulness of the water, is actionable *per se*); Dabold *v.* Chronicle Pub. Co., 107 Wis. 357, 83 N. W. 639 (holding that a charge against plaintiff that he sold butter as pure creamery make when it was only forty per cent butter and the balance grease, and that persons dealing with plaintiff had been misled, is libelous *per se*).

39. Holmes *v.* Clisby, 118 Ga. 820, 45 S. E. 684 (selling damaged shoes as shoes of first quality); Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177 (holding that a charge that plaintiff, a druggist, was making and selling

meats[40] is actionable. A statement merely in disparagement of the property or goods of a merchant or other man of business is not actionable without proof of special damages,[41] although if defendant goes beyond this and in his statement touches the character or reputation of plaintiff in his business, the charge is actionable.[42]

(B) *False Weights and Measures.* It is actionable to charge a storekeeper with using false weights and measures in his business.[43]

(C) *False Books.* An oral charge of keeping false books spoken of one whose business necessitates the keeping of books is held to be actionable.[44] But it has been held that it is not actionable to charge a man with keeping false books, unless his business necessarily leads to dealing on credit and the keeping of books is incidental to his business.[45]

counterfeit Harlem oil and putting it in counterfeit wrappers is libelous); Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615 (holding that words charging another with imitating a liniment of defendant and with base and dishonest efforts to palm it off on the public are libelous *per se*).

40. *California.*— Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Massachusetts.— Stevens *v.* Hartwell, 11 Metc. 542, holding that where there is no averment that the words were spoken of plaintiff in relation to his trade, an oral charge of having sold a diseased animal is not actionable, and that to make it so it must appear that he knowingly sold such animal.

Texas.— Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

Wisconsin.— Singer *v.* Bender, 64 Wis. 169, 24 N. W. 903.

41. Boynton *v.* Shaw Stocking Co., 146 Mass. 219, 15 N. E. 507; Le Massena *v.* Storm, 62 N. Y. App. Div. 150, 154, 70 N. Y. Suppl. 882 (where it is said: "When the slander is of a property right or title, or of a thing, falsity of utterance, malice and special damages flowing or resulting necessarily or naturally as the proximate consequence must be alleged and shown by the plaintiff, except in those cases where the slanderous words also impute to the owner dishonesty, fraud, deception or other misconduct in his trade or business in connection with the property"); Tobias *v.* Harland, 4 Wend. (N. Y.) 537; Nonpareil Cork Mfg. Co. *v.* Keasbey, etc., Co., 108 Fed. 721; Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86, 68 L. J. Q. B. 34, 79 L. T. Rep. N. S. 429; Evans *v.* Harlow, 5 Q. B. 624, Dav. & M. 507, 8 Jur. 571, 13 L. J. Q. B. 120, 48 E. C. L. 624; Linotype Co. *v.* British Type-setting Mach. Co., 81 L. T. Rep. N. S. 331; Empire Typesetting Mach. Co. *v.* Linotype Co., 79 L. T. Rep. N. S. 8; Young *v.* Macrae, 3 B. & S. 264, 9 Jur. N. S. 538, 32 L. J. Q. B. 6, 7 L. T. Rep. N. S. 354, 11 Wkly. Rep. 63; Harman *v.* Delany, 2 Str. 898.

Slander of title or property see *infra*, IX.

42. *Georgia.*— Holmes *v.* Clisby, 118 Ga. 820, 45 S. E. 684.

Illinois.— Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8, holding that a publication charging that the wares of a manufacturer are a humbug, worthless, and unfitted for practical use is a libel.

Michigan.— Burr's Damascus Tool Works *v.* Peninsular Tool Mfg. Co., 142 Mich. 417, 105 N. W. 858; Weiss *v.* Whittemore, 28 Mich. 366 (holding that a statement in substance that plaintiff, who was then agent for the sale of the Steinway piano alone, but had formerly been the agent for both that and the Knabe, had in every instance while holding such double agency recommended the latter piano as the best and advised his customers to buy it as being superior in every respect to the others, when made by the agents for the sale of the Knabe, after plaintiff had given it up, with the design of placing plaintiff before customers in a false, ridiculous, and discreditable attitude is libelous).

Missouri.— Midland Pub. Co. *v.* Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298, holding that the words, "Hints to advertisers. This is from the fake trade journal published at St. Louis," is libelous *per se*.

New York.— Davey *v.* Davey, 22 Misc. 668, 50 N. Y. Suppl. 161 [*affirmed* in 36 N. Y. App. Div. 640, 56 N. Y. Suppl. 1106], holding that a publication by one brother concerning the business methods of another "that an unscrupulous grocer of the same name in the immediate vicinity or neighborhood advertises 'Davey's teas and coffees' with a view to deceive the public, and may sell an inferior article" is libelous.

England.—Western Counties Manure Co. *v.* Lawes Chemical Manure Co., L. R. 9 Exch. 218, 43 L. J. Exch. 171, 23 Wkly. Rep. 5.

See 32 Cent. Dig. tit. "Libel and Slander," § 86½.

43. Joralemon *v.* Pomery, 22 N. J. L. 271. See also Griffiths *v.* Lewis, 7 Q. B. 61, 9 Jur. 370, 14 L. J. Q. B. 197, 53 E. C. L. 61.

44. Burtch *v.* Nuckerson, 17 Johns. (N. Y.) 217, 8 Am. Dec. 390 (holding that it is slanderous to charge a blacksmith with keeping false books); Backus *v.* Richardson, 5 Johns. (N. Y.) 476. *Compare* Rammell *v.* Otis, 60 Mo. 365.

45. Rathbun *v.* Emigh, 6 Wend. (N. Y.) 407, where the court held that it is not actionable to say of a farmer or of a sawyer of lumber and dealer therein that he keeps false books.

(D) *Particular Epithets.* To say of one with reference to his trade or business that he is a rogue,[46] a swindler,[47] a cheat,[48] a villain,[49] a rascal,[50] or a scoundrel [51] is actionable.

(IV) *Lack of Knowledge or Skill.* Words whether spoken or written imputing to a person want of knowledge, skill, or capacity to conduct his business are actionable *per se*.[52]

(V) *Intoxication.* Charging intoxication in connection with one's business tends to challenge his business qualifications and capacity, and is actionable.[53]

f. Architects and Contractors. Imputations affecting an architect [54] or contractor [55] in his business are actionable.

g. Mechanics. Words imputing to a mechanic want of skill or knowledge in his craft are actionable *per se*, if they are clearly shown to have been spoken with reference to plaintiff's occupation, and the employment is one requiring peculiar knowledge and skill.[56]

h. Author and Editors of Newspapers. Although the public at large is privileged to comment on and criticize fairly a publication of an author or editor,[57] yet the character and reputation of an author or editor is entitled to the same protection as that of any other individual, and any false charge in writing touching him in his business or profession is actionable *per se*.[58]

46. Mills *v.* Taylor, 3 Bibb (Ky.) 469; Marshall *v.* Addison, 4 Harr. & M. (Md.) 537; Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140; Sloman *v.* Chisholm, 22 U. C. Q. B. 20.

47. Mills *v.* Taylor, 3 Bibb (Ky.) 469 (holding that where defendant referred to plaintiff as a rogue and swindler, and stated that he came "from Canada to swindle the people of Kentucky out of their property," the charge was actionable); Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

48. Nelson *v.* Borchenius, 52 Ill. 236; Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

49. Nelson *v.* Borchenius, 52 Ill. 236; Marshall *v.* Addison, 4 Harr. & M. (Md.) 537.

50. Nelson *v.* Borchenius, 52 Ill. 236; Hesler *v.* Degant, 3 Ind. 501, holding that to say of a tanner and currier that he was a good-for-nothing rascal and all the leather he made was good for nothing is actionable.

51. Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

52. Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788; Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. (D. C.) 306; Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484 (mechanic); Botterill *v.* Whytehead, 41 L. T. Rep. N. S. 588.

Imputation of discharge for carelessness.— In Ratzel *v.* New York News Pub. Co., 67 N. Y. App. Div. 598, 73 N. Y. Suppl. 849 [*reversing* 35 Misc. 487, 71 N. Y. Suppl. 1074], it was held that to state that a party has been discharged for general carelessness and that his place will be filled by a competent man does not charge that he was unskilled, unfitted, or incompetent, and is not actionable.

53. Johnson *v.* Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77; Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406; Kelly *v.* Huffington, 14 Fed. Cas. No. 7,671, 3 Cranch C. C. 81.

Charging an undertaker with intoxication is actionable *per se*. Holmes *v.* Jones, 13 N. Y. Civ. Proc. 260.

54. Clifford *v.* Cochrane, 10 Ill. App. 570 (where the words were, "His appointment as architect of a public building can be regarded in no other light than as a public calamity"); Dennis *v.* Johnson, 42 Minn. 301, 44 N. W. 68; Legg *v.* Dunleavy, 80 Mo. 558, 50 Am. Rep. 512 [*affirming* 10 Mo. App. 461].

55. Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Struthers *v.* Peacock, 11 Phila. (Pa.) 287 (a charge of fraudulent evasion of contract); Moore *v.* Rolin, 89 Va. 107, 15 S. E. 520, 16 L. R. A. 625; Lapham *v.* Noble, 54 Fed. 108.

56. Fitzgerald *v.* Redfield, 51 Barb. (N. Y.) 484. See also Manner *v.* Simpson, 13 Daly (N. Y.) 156; Chapman *v.* Lamphire, 3 Mod. 155; Redman *v.* Pyne, 1 Mod. 19.

57. Dowling *v.* Livingstone, 108 Mich. 321, 66 N. W. 225, 62 Am. St. Rep. 702, 32 L. R. A. 104; Triggs *v.* Sun Printing, etc., Assoc., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612 [*reversing* 91 N. Y. App. Div. 259, 86 N. Y. Suppl. 486]; Cooper *v.* Stone, 24 Wend. (N. Y.) 434; Naulty *v.* Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Heriot *v.* Stuart, 1 Esp. 437, holding that it is not actionable for one newspaper to charge another with being vulgar or scurrilous. See also *infra*, VI, D, 4.

58. *California.*—Fitch *v.* De Young, 66 Cal. 339, 5 Pac. 364, holding that it is libelous for one newspaper to charge another with having secretly sold the support and advocacy of his paper to a certain corporation.

Delaware.— Croasdale *v.* Tantum, 6 Houst. 60 (holding that to allude to an editor as a "miserable specimen of humanity" and to state that the writers were obliged to break silence and appeal to the public because of an attempt on the part of this blackguard to blast our characters and win our business" is libelous); Croasdale *v.* Bright, 6 Houst. 52.

New York.— Triggs *v.* Sun Printing, etc.,

i. Real Estate and Advertising Agents. Any oral or written publication containing an imputation upon a real estate[59] or advertising agent[60] touching him in his business is actionable *per se*.

j. Hotel and Boarding-House Keepers. Oral or written language regarding hotel or boarding-house keepers is actionable *per se* if it reflects on the character of the accommodations furnished by them to the public or otherwise tends to prejudice them in their business.[61]

k. Miscellaneous Occupations. Imputations affecting an actor,[62] an auctioneer,[63] a horse-breeder,[64] a gamekeeper,[65] an insurance examiner,[66] a master of a ship,[67]

Assoc., 179 N. Y. 144, 71 N. E. 739, 103 Am. St. Rep. 841, 66 L. R. A. 612 [*reversing* 91 N. Y. App. Div. 259, 86 N. Y. Suppl. 486] (holding that an article ridiculing the private life of an author and representing him as a presumptuous literary freak is an attack upon his reputation and libelous); Hart *v.* Townsend, 67 How. Pr. 88 (holding that to publish that a certain newspaper was started for purposes of plunder is actionable); Cooper *v.* Stone, 24 Wend. 434.

United States.— Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*, holding that where the author of a work of art is referred to as a swindler, a humbug, and a fraud the words are libelous.

England.— Heriot *v.* Stuart, 1 Esp. 437, holding that it is libelous for one newspaper to charge another with being low in circulation.

See 32 Cent. Dig. tit. "Libel and Slander," § 88.

Libeling newspaper reporter.— In Tryon *v.* Evening News Assoc., 39 Mich. 636, it was held that it is libelous to publish to the injury of a newspaper reporter an untrue statement showing that he had violated a private confidence by talebearing.

An oral imputation of insanity against plaintiff, an author, is not actionable *per se*. Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625, where, however, it did not appear that the words were spoken of plaintiff in connection with his authorship.

The word "crank" written of an author has been held not to be actionable *per se* as tending to injure the author in his profession. Walker *v.* Tribune Co., 29 Fed. 827.

59. Pledger *v.* State, 77 Ga. 242, 3 S. E. 320, holding that a newspaper article charging a real estate agent with objecting to colored tenants and advising colored people not to patronize him, but to leave "the old skunk to himself," is libelous.

60. MacDonald *v.* Lord, 27 Ill. App. 111, holding that it is libelous to charge an advertising agent with not being responsible.

61. Stokes *v.* Stokes, 76 Hun (N. Y.) 314, 28 N. Y. Suppl. 165 (holding that a publication affecting the credit of a president and manager of a hotel company is actionable *per se*); Trimmer *v.* Hiscock, 27 Hun (N. Y.) 364 (holding that to say of a hotel-keeper, "He kept no accommodations, and a person could not get a decent bed or decent meal if he tried," is actionable); Robertson *v.* Bennett, 44 N. Y. Super. Ct. 66 (holding that it is actionable to publish of a boarding-house keeper that he is a blackmailer); Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643 (holding that a publication headed "Hotel Keepers Embarrassed" is libelous).

It is not actionable to say of an innkeeper that he is a dangerous man and that the speaker is afraid to go to the inn (Ireland *v.* McGarvish, 1 Sandf. (N. Y.) 155), or to advise applicants for board at a certain place "to inform themselves before locating there, as to table, attention and characteristics of the proprietors" (Wallace *v.* Bennett, 1 Abb. N. Cas. (N. Y.) 478).

62. Gerald *v.* Inter Ocean Pub. Co., 90 Ill. App. 205; Lotto *v.* Davenport, 42 Minn. 395, 44 N. W. 311; Williams *v.* Davenport, 42 Minn. 393, 44 N. W. 311, 18 Am. St. Rep. 519, holding that it is actionable to charge an actor with ungentlemanly and discourteous conduct.

63. Easton *v.* Buck, 23 N. Y. App. Div. 463, 48 N. Y. Suppl. 158; Bryant *v.* Loxton, 11 Moore C. P. 344, 22 E. C. L. 608, holding that a statement concerning an auctioneer that "he is a damned rascal; he has cheated me out of £109 on the valuation" is actionable *per se*.

64. Henkel *v.* Schaub, 94 Mich. 542, 54 N. W. 293 (holding that where plaintiffs claimed to be the owner of a full-blooded Percheron stallion which they had imported, a charge made by defendant that the stallion was neither imported nor full-blooded is actionable without an allegation of special damage); Gideon *v.* Dwyer, 87 Hun (N. Y.) 246, 33 N. Y. Suppl. 754 (holding that to say of a person who is engaged in breeding horses for the purpose of selling them, "You are no sportsman. You had to leave Nashville on account of a turf fraud you committed there," is slanderous).

65. Foulger *v.* Newcomb, L. R. 2 Exch. 327, 36 L. J. Exch. 169, 16 L. T. Rep. N. S. 595, 15 Wkly. Rep. 1181, holding that where it is the duty of a gamekeeper not to kill foxes, a charge made against a gamekeeper that he killed foxes is slanderous.

66. Hollingsworth *v.* Spectator Co., 49 N. Y. App. Div. 16, 63 N. Y. Suppl. 2.

67. Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878 (holding that a statement imputing drunkenness to a master mariner while in the command of a vessel in the discharge of his duties at sea is actionable *per se*); Orr *v.* Skofield, 56 Me. 483 (holding that to say

a stock-broker,[68] or a ticket agent[69] in his business or profession are actionable *per se*. So language which charges a railroad with such incapacity or neglect in the conduct of its business that belief in the truth of the charges would as a natural and proximate consequence induce shippers of goods and passengers to refrain from employing it as a common carrier is actionable without proof of special damage.[70]

H. Imputations Affecting a Person in His Office or Employment — 1. In General. Imputations upon officers and employees are governed by the same general principles as those regulating charges made against a person in his business or profession.[71] There are two ways by which words not actionable in themselves may become so by being published of a person in respect to his office: (1) Where the act charged would be punished by indictment which would not be so if done by a person not in office;[72] (2) where the libel or slander tends to disgrace and disparage one in an office of profit or honor and to deprive him of it,[73] it not being necessary that the words should import a charge of crime.[74] Any language, whether spoken or written, imputing want of integrity, a lack of due qualification, or a dereliction of duty to an officer or employee is actionable *per se*.[75] The reason for the rule is that words which reflect upon the integrity or capacity of an officer tend to render his tenure precarious and to exclude him from office, and

that plaintiff sold the consignment of a ship of which he was the master and "pocketed the money" is actionable); Kelly *v.* Huffington, 14 Fed. Cas. No. 7,671, 3 Cranch C. C. 81; Ingram *v.* Lawson, 6 Bing. N. Cas. 212, 4 Jur. 151, 9 L. J. C. P. 145, 8 Scott 471, 37 E. C. L. 587 (holding that it is libelous to publish of a ship which plaintiff had advertised for a voyage to the East Indies that the Jews had bought her to take out convicts); Irwin *v.* Brandwood, 2 H. & C. 960, 10 Jur. N. S. 370, 33 L. J. Exch. 257, 9 L. T. Rep. N. S. 772, 12 Wkly. Rep. 438.

68. Morris *v.* Langdale, 2 B. & P. 284; Capel *v.* Jones, 4 C. B. 259, 11 Jur. 396, 56 E. C. L. 259.

69. Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103.

70. Ohio, etc., R. Co. *v.* Press Pub. Co., 48 Fed. 206, where the language complained of was that "over one-half of the ties in the road-bed [of the plaintiff] are rotten, and it is dangerous to run trains very fast."

71. See *supra*, III, G, 1.

72. Com. *v.* Snelling, 15 Pick. (Mass.) 321 (where the language imputed high crimes and misdemeanors); Allen *v.* Hillman, 12 Pick. (Mass.) 101; Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67; Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380; Harris *v.* Terry, 98 N. C. 131, 3 S. E. 745.

73. Allen *v.* Hillman, 12 Pick. (Mass.) 101.

74. Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380.

75. *Alabama.*— Wofford *v.* Meeks, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214 (where it is said: "So, too, it is libelous to impute to any one holding an office that he has been guilty of improper conduct in office or has been actuated by wicked, corrupt or selfish motives"); Henderson *v.* Hale, 19 Ala. 154.

California.— Rea *v.* Wood, 105 Cal. 314, 38 Pac. 899.

Colorado.— Byers *v.* Martin, 2 Colo. 605, 25 Am. Rep. 755.

Illinois.— Prussing *v.* Jackson, 85 Ill. App. 324.

Indiana.— Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735; Johnson *v.* Stebbins, 5 Ind. 364; Craig *v.* Brown, 5 Blackf. 44.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Robbins *v.* Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152; Truth Pub. Co. *v.* Reed, 13 Ky. L. Rep. 323.

Maryland.— Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716.

Massachusetts.— Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; Dodds *v.* Henry, 9 Mass. 262.

Michigan.— Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320.

Minnesota.— Martin *v.* Paine, 69 Minn. 482, 72 N. W. 450; Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380, where it is said: "Without entering upon a consideration of the distinctions which may exist between persons holding offices of emolument, and those in mere honorary official positions, it may be laid down as the settled rule, that slanderous words spoken of a person in an office of profit, and relating to him in such office, importing a charge of unfitness, either in respect of morals or capacity, for the duties of such office, or a want of integrity, or corruption therein, are actionable *per se*."

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New Jersey.— Heller *v.* Duff, 62 N. J. L. 101, 40 Atl. 691; Ludlum *v.* McCuen, 17 N. J. L. 12.

New York.— Kinney *v.* Nash, 3 N. Y. 177; O'Leary *v.* New York News Pub. Co., 51 N. Y. App. Div. 2, 64 N. Y. Suppl. 327; Woods *v.* Gleason, 18 N. Y. App. Div. 401,

when the office is lucrative work a detriment from a pecuniary point of view.[76] Indeed it has been intimated that to make words actionable on the principle under discussion the charge must be of such a nature that if true it would be the cause for removal of the incumbent from office.[77] Where an action is brought for words alleged to have been spoken of a person in a particular office or employment, it must appear that he was holding the office or following the employment at the time the words were spoken.[78] However, to be libelous, it is sufficient that the words tend to expose the character of plaintiff to ridicule or contempt and to degrade him in the estimation of the community, although his term of office or employment had expired at the time of publication.[79]

46 N. Y. Suppl. 200; O'Shaughnessy *v.* Morning Journal Assoc., 71 Hun 47, 24 N. Y. Suppl. 609; Van Tassel *v.* Capron, 1 Den. 250, 43 Am. Dec. 667; Oakley *v.* Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107.

North Carolina.— Dawson *v.* Baxter, 131 N. C. 65, 42 S. E. 456; Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775; Edwards *v.* Howell, 32 N. C. 211.

Pennsylvania.— Hook *v.* Hackney, 16 Serg. & R. 385.

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

Virginia.— Moss *v.* Harwood, 102 Va. 386, 46 S. E. 385.

Wisconsin.— Smith *v.* Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620; Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111; Ellsworth *v.* Hayes, 71 Wis. 427, 37 N. W. 249; Spiering *v.* Andræ, 45 Wis. 330, 30 Am. Rep. 744; Gotthehuet *v.* Hubachek, 36 Wis. 515; Wilson *v.* Noonan, 23 Wis. 105; Lansing *v.* Carpenter, 9 Wis. 540, 76 Am. Dec. 281.

United States.—O'Shaughnessy *v.* New York Recorder Co., 58 Fed. 653.

England.— Booth *v.* Arnold, [1895] 1 Q. B. 571, 59 J. P. 215, 64 L. J. Q. B. 443, 72 L. T. Rep. N. S. 310, 14 Reports 326, 43 Wkly. Rep. 360 (holding that words imputing want of integrity, dishonesty, or malversation to any one holding a public office of confidence or trust whether an office of profit or not are actionable without proof of special damage); Lumby *v.* Allday, 1 Cromp. & J. 301, 9 L. J. Exch. O. S. 62, 1 Tyrw. 217; Parmiter *v.* Coupland, 4 Jur. 701, 9 L. J. Exch. 202, 6 M. & W. 105. See also Alexander *v.* Jenkins, [1892] 1 Q. B. 797, 802, 56 J. P. 452, 6 L. J. Q. B. 634, 66 L. T. Rep. N. S. 391, 40 Wkly. Rep. 546, where, however, is laid down the following rule: "Where the imputation is an imputation not of misconduct in an office, but of unfitness for an office, and the office for which a person is said to be unfit is not an office of profit, but one merely of what has been called honour credit, the action will not lie, unless the conduct charged be such as would enable him to be removed from or deprived of that office."

See 32 Cent. Dig. tit. "Libel and Slander," §§ 91–96.

A charge of violation of an official oath is actionable. Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380.

76. Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380. See also Craig *v.* Brown, 5 Blackf. (Ind.) 44.

Mere opprobrious words, which subject to no punishment or temporal loss, are, it has been said, not actionable when spoken of men in office. Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177.

77. Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 542, 19 Am. Dec. 152 (where it is said: "To charge a judge with improprieties, which would not be cause of impeachment or address, would be no more actionable than would be the same charge, made against a private citizen"); Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819. *Compare* Sillars *v.* Collier, 151 Mass. 50, 53, 23 N. E. 723, 6 L. R. A. 680 (where, in commenting upon the defamation of a legislator, it is said: "This being so, no averment of special damages was necessary, provided the words are defamatory, and to make them defamatory it is not necessary that they should import a charge of crime. It would be sufficient if they imported such misconduct as would expose him to expulsion, or even to censure, from the House, and we are inclined to think also that it would be sufficient if they imported such conduct as would, by the general sense of the community, be deemed immoral, or discreditable in such a way as clearly to impair his influence and lessen his position and standing as a public man, and thus to affect him injuriously as a member of the Legislature").

78. *California.*— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216.

Massachusetts.— Allen *v.* Hillman, 12 Pick. 101.

New York.— Forward *v.* Adams, 7 Wend. 204.

North Carolina.—McKee *v.* Wilson, 87 N. C. 300; Edwards *v.* Howell, 32 N. C. 211, opinion of the court by Pearson, J.

England.— Bellamy *v.* Burch, 16 M. & W. 590.

See 32 Cent. Dig. tit. "Libel and Slander," § 91.

79. *California.*— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216.

Kansas.— Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

Minnesota.— Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

2. CHARGE MUST TOUCH PLAINTIFF IN HIS OFFICE OR EMPLOYMENT. To be actionable the charge must not only tend to injure plaintiff in his office or employment but must touch him in his official or business character by imputing to him the want of some necessary qualification in the exercise thereof.[80]

3. OPINION AS TO DISPOSITION OF OFFICER OR EMPLOYMENT. Where the words amount simply to an opinion of the speaker or writer as to the disposition of a public officer they are not actionable.[81]

4. PARTICULAR CLASSES OF OFFICERS CONSIDERED — a. Members of Legislative Bodies. An oral or written publication charging a member of congress or of a state legislature with ignorance or incapacity to perform his duties,[82] or with bribery or corruption,[83] or with such other acts or conduct as would tend to bring

New York.— Cramer *v.* Riggs, 17 Wend. 209.

Wisconsin.— Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392.

80. *Alabama.*— Henderson *v.* Hale, 19 Ala. 154; Hogg *v.* Dorrah, 2 Port. 212.

California.— Rea *v.* Wood, 105 Cal. 314, 38 Pac. 899, holding that an oral statement that a state railroad commissioner had robbed his father and mother is not actionable under a statute defining slander of one in office as an imputation of "general disqualification in those respects which the office or other occupation peculiarly requires," since charging a person with a single act of dishonesty does not amount to an imputation that he has a general reputation for dishonesty.

Indiana.— Oram *v.* Franklin, 5 Blackf. 42.

Kentucky.— Robbins *v.* Treadway, 2 J. J. Marsh. 540, 19 Am. Dec. 152.

Maryland.— Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716.

Massachusetts.— Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; Shattuck *v.* Allen, 4 Gray 540.

Michigan.— Murphy *v.* Nelson, 94 Mich. 554, 54 N. W. 282.

Nebraska.— Greenwood *v.* Cobbey, 26 Nebr. 449, 42 N. W. 413.

New Jersey.—Ludlum *v.* McCuen, 17 N. J. L. 12.

New York.— Kinney *v.* Nash, 3 N. Y. 177; Van Tassel *v.* Capron, 1 Den. 250, 43 Am. Dec. 667; Oakley *v.* Farrington, 1 Johns. Cas. 129, 1 Am. Dec. 107.

North Carolina.— Dawson *v.* Baxter, 131 N. C. 65, 42 S. E. 456 (holding that to publish of a mayor and chief of police that they had been asked to coöperate with a citizens' committee, but had refused to do so and had worked against the committee, does not charge a breach of official duty as to the public and is not libelous); Crawford *v.* Barnes, 118 N. C. 912, 24 S. E. 670; McGuire *v.* Blair, 4 N. C. 328.

Ohio.— Tappan *v.* Wilson, 7 Ohio 190.

Vermont.— Hosford *v.* Allen, 1 Vt. 50, holding that since a deputy sheriff having private charge of a jury at a justice's court acts therein under his special appointment and oath for that particular service and not in virtue of his general office, an action will not lie for charging him with misconduct on such occasion if the words are declared on as slander of him in his capacity and office as deputy.

Wisconsin.— Hoffiund *v.* Journal Co., 88 Wis. 369, 60 N. W. 263.

England.— James *v.* Brook, 9 Q. B. 7, 10 Jur. 541, 16 L. J. Q. B. 17, 58 E. C. L. 7; Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177.

See 32 Cent. Dig. tit. "Libel and Slander," § 91.

Coarse and abusive language spoken of one in office or under employment is not actionable unless they are spoken of and touch him in his office or employment. Van Tassel *v.* Capron, 1 Den. (N. Y.) 250, 43 Am. Dec. 667.

81. Sillars *v.* Collier, 151 Mass. 50, 53, 23 N. E. 723, 6 L. R. A. 680, where it is said: "In order to be defamatory of one in respect to his public office, the spoken words must go at least so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it, or the holding of principles which are hostile to the maintenance of the government." *Compare* Craig *v.* Brown, 5 Blackf. (Ind.) 44, holding that to say of a postmaster, "He would rob the mail for 100 dollars, yes, he would rob the mail for five dollars," is actionable as it imputes want of integrity to plaintiff in his official capacity. See also *infra*, III, H, 4, a.

82. Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72, holding that to publish of a candidate for congress in a coarse and blotted imitation of his handwriting over an imitation of his signature, as follows, "I don't propose to go into debate on the tariff differences on wool, quinine, and all the things, because I ain't built that way," is libelous, as imputing ignorance and illiteracy. *Compare* Mayrant *v.* Richardson, 1 Nott & M. (S. C.) 347, 9 Am. Dec. 707; Alexander *v.* Jenkins, [1892] 1 Q. B. 797, 56 J. P. 452, 61 L. J. Q. B. 634, 66 L. T. Rep. N. S. 391, 40 Wkly. Rep. 546, where it appeared that the office of town councilor was not an office of profit.

83. Negley *v.* Farrow, 60 Md. 158, 45 Am. St. Rep. 715 (holding that a newspaper publication is libelous *per se* which charges that a state senator voted against his party and received from the other party in consideration of his vote a profitable contract); Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309; Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 41; Cramer *v.* Riggs,

him into shame, disgrace, and contempt as an officer,[84] is actionable *per se*. But no action lies for imputing probable future misconduct to a legislative officer, even though in his official capacity.[85] Nor is a charge of commission of acts which are not related to his office and do not constitute a dereliction of his official duties actionable.[86]

b. Executive Offices and Employees. And in like manner, the rule making defamatory words touching a person in his office has been applied to various executive officers and employees, such as a member of a board of equalization,[87] a census enumerator,[88] an employee in the federal treasury department,[89] a city engineer,[90] chief engineer of a fire department,[91] county auditor,[92] county commissioner,[93] county treasurer,[94] custodian of a city museum,[95] dock-master,[96] election inspector,[97]

17 Wend. (N. Y.) 209; Wilson *v.* Noonan, 23 Wis. 105.

Rule applied to members of city council.— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216; Petsch *v.* Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034 (holding that a publication charging an alderman with being a member of a "city hall ring" and with directing a plan for plundering the city treasury is actionable); Booth *v.* Arnold, [1895] 1 Q. B. 571, 59 J. P. 215, 64 L. J. Q. B. 443, 72 L. T. Rep. N. S. 310, 14 Reports 326, 43 Wkly. Rep. 360.

84. Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680; Spencer *v.* Southwick, 11 Johns. (N. Y.) 573 [*reversing* 10 Johns. 259] (charging a senator with fraudulently procuring the passage of a bill in which he was financially interested); Thomas *v.* Croswell, 7 Johns. (N. Y.) 264, 5 Am. Dec. 269 (holding that to publish of a member of congress, "He is a fawning sycophant, a misrepresentative in Congress and a grovelling office-seeker, he has abandoned his post in Congress, in pursuit of an office," is libelous); Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111. See also Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189.

85. Hogg *v.* Dorrah, 2 Port. (Ala.) 212 (holding that to say of a member of the legislature in reference to the future discharge of his functions that "he is a corrupt old tory" is not slanderous *per se*); Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680 (holding that the words, "Sometimes a change of heart comes from the pocket," spoken of the change of opinion of a legislator, import only the speaker's opinion that the legislator would change his conduct on account of the expectation of a future pecuniary benefit and are not actionable); Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177, holding that to say of a member of parliament that he would break his word is not actionable. See also *supra*, III, H, 1.

86. Thompson *v.* Powning, 15 Nev. 195 (holding that to publish of an ex-state senator that he, for a consideration, voted against his own resolution on fares and weights four years since is not actionable, as it might be construed to mean that he cast such vote in a caucus or otherwise); Crawford *v.* Barnes, 118 N. C. 912, 24 S. E. 670 (holding that an oral statement that a member of congress "had signed the Alliance demands . . . And then went to Washington as a Member of Congress and repudiated those demands" is not actionable).

87. Truth Pub. Co. *v.* Reed, 13 Ky. L. Rep. 323, holding that to publish in a newspaper that plaintiff, a member of the board of equalization, would reduce the taxes of any one who would promise to vote for his brother for mayor is libelous.

88. Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

89. See Viedt *v.* Evening Star Newspaper Co., 19 D. C. 534; Bailey *v.* Holland, 7 App. Cas. (D. C.) 184.

90. Prussing *v.* Jackson, 85 Ill. App. 324, holding that a newspaper article which charges a conspiracy to secure the passage of an ordinance which would be a fraud on the municipality and jeopardize the health of the entire city and characterizes the passage of the ordinance as a crime to which the slaughter of the innocents will seem as mild as mother's milk, and then charges the city engineer with being one of the conspirators by saying that the ordinance will be recommended by him and that he will be taken care of liberally is actionable *per se*.

91. Gottbehuet *v.* Hubachek, 36 Wis. 515, holding that it is slanderous to charge the chief engineer of a fire department with being drunk while at a fire.

92. Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735 (holding that a publication that a financial statement made by a county auditor was false and that an officer who would swear to one lie would swear to another is libelous); Martin *v.* Paine, 69 Minn. 482, 72 N. W. 450.

93. Wofford *v.* Meeks, 129 Ala. 349, 30 So. 625, 55 L. R. A. 214, 87 Am. St. Rep. 66; Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819, holding that it is libelous to charge a county commissioner with being corruptly influenced by pecuniary considerations, and with voting as his private interests dictated.

94. Henderson *v.* Hale, 19 Ala. 154; Hoffland *v.* Journal Co., 88 Wis. 369, 60 N. W. 263.

95. Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614.

96. Fleming *v.* Brauer, 96 N. Y. Suppl. 594, charging that a dock-master was guilty of oppression and extortion.

97. Ellsworth *v.* Hayes, 71 Wis. 427, 37

mayor,[98] notary public,[99] state or county prosecuting attorney,[1] superintendent of police board,[2] state commissioner of insurance,[3] state sealer of weights and measures,[4] superintendent of penitentiary,[5] superintendent of streets,[6] or supervisor of the poor.[7] So the rule applies to sheriffs,[8] constables,[9] policemen,[10] or detectives.[11] Thus it is actionable *per se* to charge a police officer with neglecting or ill-treating prisoners placed under his control,[12] with intentional or habitual

N. W. 249, charge that an election inspector wilfully miscounted votes.

A charge of fraudulently destroying a vote made against an election inspector is slanderous *per se*. Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Vance *v.* Louisville Courier-Journal Co., 95 Ky. 41, 23 S. W. 591, 15 Ky. L. Rep. 412; Dodds *v.* Henry, 9 Mass. 262.

98. Price *v.* Whitely, 50 Mo. 439; Dawson *v.* Baxter, 131 N. C. 65, 42 S. E. 456; Parmiter *v.* Coupland, 4 Jur. 701, 9 L. J. Exch. 202, 6 M. & W. 105.

99. Henderson *v.* Commercial Advertiser Assoc., 111 N. Y. 685, 19 N. E. 286 [*affirming* 46 Hun 504].

1. Young *v.* Clegg, 93 Ind. 371; Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716; Sharpe *v.* Larson, 70 Minn. 209, 72 N. W. 961; Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554; Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462. *Compare* Greenwood *v.* Cobbey, 26 Nebr. 449, 42 N. W. 413, holding that it is not libelous to say of a city attorney, "His opinion is too easily warped for a money consideration."

United States district attorney.— Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595.

2. Dow *v.* Long, 190 Mass. 138, 76 N. E. 667.

3. Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

4. Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392.

5. McIntyre *v.* Journal Co., 5 N. Y. App. Div. 609, 40 N. Y. Suppl. 1005, holding that an article stating that plaintiff, a superintendent of the penitentiary, was now a rich man, although he was not so when he went into office and that "the whole prison system is rotten to the core" is libelous. *Compare* Steyskal *v.* Detroit Journal Co., 119 Mich. 246, 77 N. W. 939.

6. Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

7. Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640, holding that where one supervisor of the poor in a meeting of the supervisors stated that plaintiff, a supervisor, "was a liar, a thief, and a perjurer," such words were actionable *per se*.

8. Wintrode *v.* Renbarger, 150 Ind. 556, 50 N. E. 570; Heller *v.* Duff, 62 N. J. L. 101, 40 Atl. 691; Dole *v.* Van Rensselaer, 1 Johns. Cas. (N. Y.) 330.

9. Augusta Evening News *v.* Radford, 91 Ga. 494, 17 S. E. 612, 44 Am. St. Rep. 53, 20 L. R. A. 533 (holding that to charge a constable with inducing people to sue out unnecessary warrants in order to increase his fees is actionable); Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320 (holding that a newspaper article charging a constable with arresting peaceable and innocent men as tramps merely to get the fees allowed by law for such services charges gross misconduct in office and is actionable *per se*). *Compare* Stone *v.* Bevins, (Ky. 1894) 24 S. W. 869, holding that it is not actionable to say to a constable who had levied an execution on defendant's property, "This execution is unjust, except one dollar and fifty cents; and that is the way you make your living," as the words do not in themselves import a want of integrity or charge corruption.

10. Edsall *v.* Brooks, 2 Rob. (N. Y.) 29, 17 Abb. Pr. 221 (holding that a newspaper report charging a policeman with blackmailing and stating that he had been dismissed therefor is actionable); Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921 (holding that to print and publish of a policeman that "he is said to have been in the workhouse and to have had a criminal record" is libelous *per se*); O'Brien *v.* Times Pub. Co., 21 R. I. 256, 43 Atl. 101 (holding that to charge a policeman with being drunk at roll-call is libelous).

11. Byrnes *v.* Mathews, 12 N. Y. St. 74 (holding that where plaintiff was a private detective employed by the municipal health ward and defendant published concerning his employment, "There may be one explanation. The only decent one we can ourselves imagine . . . is that the respected gentlemen of the board of health wanted something done in the line of spying and sneaking, meaner and dirtier than they had the face to ask the police department to do — and so they went to Col. Byrne," the words were libelous *per se*); Holland *v.* Flick, 212 Pa. St. 201, 61 Atl. 828 (holding that charging a detective with cowardice is libelous *per se*).

12. Wintrode *v.* Renbarger, 150 Ind. 556, 50 N. E. 570 (holding that a charge that a sheriff neglected, ill-treated, and starved prisoners in his custody is actionable *per se*); Woods *v.* Gleason, 18 N. Y. App. Div. 401, 46 N. Y. Suppl. 200; O'Shaughnessy *v.* Morning Journal Assoc., 71 Hun (N. Y.) 47, 24 N. Y. Suppl. 609; Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381; O'Shaughnessy *v.* New York Recorder Co., 58 Fed. 653 (holding that a publication charging a police officer with treating a prisoner attempting to escape in a merciless manner by striking him a crushing blow on the neck, felling him to the ground, and shortly causing his death is actionable).

neglect of duty,[13] or with prostituting his office for his own pecuniary profit.[14] So a charge that a postmaster had unlawfully interfered with the mail matter which was under his control is actionable.[15]

c. Judicial Officers — (I) *In General.* Any words, oral or written, imputing want of integrity or incapacity to a judge are actionable *per se*.[16] So it is actionable to publish that a judge has done that which would warrant removing him or depriving him of his office.[17]

(II) *Justices of the Peace.* Words imputing to a justice of the peace dishonesty or corruption or misconduct touching him in his office[18] or ignorance or

13. Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507 (holding that a written statement concerning a village marshal that he had been thoroughly corrupt in his discharge of his duty as marshal and that there was no possible palliation for his many offenses is actionable); Smith *v.* Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620.

14. *Massachusetts.* — Dow *v.* Long, 190 Mass. 138, 76 N. E. 667.

Michigan. — Weston *v.* Grand Rapids Pub. Co., 128 Mich. 375, 87 N. W. 258.

Nebraska. — Farley *v.* McBride, (1905) 103 N. W. 1036.

New Jersey. — Heller *v.* Duff, 62 N. J. L. 101, 40 Atl. 691, holding that a false charge that a sheriff used his official position to protect a certain disorderly house in his bailiwick is actionable.

New York. — Woods *v.* Gleason, 18 N. Y. App. Div. 401, 46 N. Y. Suppl. 200; Dole *v.* Van Rensselaer, 1 Johns. Cas. 330, holding that an oral charge against a sheriff that "moneys which he had collected on execution had been taken and converted to his own use" is slanderous *per se*.

Rhode Island. — Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031, holding that a charge that an officer accepted money from pool-room men, roulette keepers, and liquor dealers, in return for his protection of them against violations of the law is libelous.

Virginia. — Moss *v.* Harwood, 102 Va. 386, 46 S. E. 385, holding that a statement that fines had been collected by a chief of police which do not seem to have been recorded, reflects upon him as an officer and is actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 93.

15. Hays *v.* Allen, 3 Blackf. (Ind.) 408; Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67 (holding that an oral charge of embezzling matter from United States mails is actionable); Harris *v.* Terry, 98 N. C. 131, 3 S. E. 745 (holding that it is slanderous to charge a postmaster with breaking open mail matter). See also Craig *v.* Brown, 5 Blackf. (Ind.) 44. *Compare* Ludlum *v.* McCuen, 17 N. J. L. 12, holding that the words, "He . . . has broken open my letters in the Post Office," spoken of a postmaster, do not import that he unlawfully and in violation of his official duty broke open the letters and are not actionable.

Keeping disorderly office. — A publication stating that a shooting affray occurred at a certain post-office, that the house in which the post-office was kept was of such a low character that a decent lady dare not enter, and that it is high time the post-office was in the hands of others is a libel upon the postmaster and is actionable. Johnson *v.* Stebbins, 5 Ind. 364.

16. Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 19 Am. Dec. 152 (holding that the words, "He lacks capacity as a judge," and, "He has abandoned the common principles of truth," are actionable); Dolloway *v.* Turrill, 26 Wend. (N. Y.) 383 [*reversing* 17 Wend. 426]; Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907 (charging refusal to perform a legal duty, and that the refusal was from corrupt motives, and that plaintiff was privy to an agreement to extend protection to violators of the law). See also Burdett *v.* Com., 103 Va. 838, 48 S. E. 878, 106 Am. St. Rep. 916, 68 L. R. A. 251, criminal libel.

In the absence of an allegation that the words were published of plaintiff as a judge, it is not libelous to refer to him as a "purse proud aristocrat," anxious to put down the United States bank so that his stock in state banks might become more profitable, and as an editor of a "mud machine" devoted to libelous and abusive political publications. Tappan *v.* Wilson, 7 Ohio 191.

17. Hook *v.* Hackney, 16 Serg. & R. (Pa.) 385 (holding that to say of a judge, "He is a damned old rascal, and has done that which will remove him from his seat," is slanderous); Lansing *v.* Carpenter, 9 Wis. 540, 76 Am. Dec. 281 (holding that to write of a court commissioner that "the past would warrant the depriving him of his office" is libelous).

18. Mix *v.* Woodward, 12 Conn. 262 (holding that the statement that plaintiff was deprived of his justiceship "for malpractice in packing a jury" is actionable); Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380 (holding that the words, "It is the G—d d—dest erroneous decision I ever saw any justice give, and it was a d—d outrage, and it was done for spite," are slanderous); O'Leary *v.* New York News Pub. Co., 51 N. Y. App. Div. 2, 64 N. Y. Suppl. 327 (holding that for a newspaper to publish of a justice that, angered at a prisoner's disrespect, he left the bench and committed a violent assault on the prisoner is actionable); How. *v.* Prinn, 2 Salk. 694. See also Adams *v.* Meredew, 3 Y. & J. 219.

want of capacity generally to perform the duties of his office[19] are actionable. It is necessary, however, that the words touch the justice in his office, and the use of the word "squire" alone is not sufficient to show that the charge was made against him as a justice.[20] So it has been held that words charging a justice of the peace with corrupt conduct in trying a cause over which he had no jurisdiction are not actionable on the theory that where a person under color of an office does an act beyond its authority and jurisdiction, he cannot be considered as an officer in committing that act, and the law will not protect him as such against the consequences of his unauthorized conduct.[21]

(III) *Jurors.* Words, oral or written, which tend to impeach the honesty or integrity of jurors in their office are actionable *per se*.[22]

d. Officers and Agents of Corporations and Associations. Words, written or spoken, concerning an officer or agent of a corporation or an association come within the general rule relating to imputations upon a person in his business or profession, and hence words imputing to such officer or agent lack of ability to perform the duties of his office,[23] want of integrity,[24] misappropriation of corporate funds,[25] or such other conduct as would render him unfit to hold his office,[26] are actionable. But an action will not lie on this principle for words spoken after the office has been abolished.[27]

e. Private Employees. Any words, written or oral, tending to disparage a

Charge not imputing fraud.—Allegations by a litigant in pleadings and papers necessary to obtain a review of a judgment that the judgment was a fraud upon his rights are not actionable *per se* as imputing fraud or corruption upon the judge. Murphy *v.* Nelson, 94 Mich. 554, 54 N. W. 282.

19. Spiering *v.* Andræ, 45 Wis. 330, 30 Am. Rep. 744, where a juror said of plaintiff: "The reason I did not take out my second papers was that I did not want to sit as a juror before such a damned fool of a justice." *Compare* How *v.* Prinn, 2 Salk. 694, where it is said, "In offices of profit, words that impute either defect of understanding, of ability, or integrity, are actionable; but in those of credit, words that impute want only of ability, are not actionable, as of a justice of the peace," etc.

20. Van Tassel *v.* Capron, 1 Den. (N. Y.) 250, 43 Am. Dec. 667; Oakley *v.* Farrington, 1 Johns. Cas. (N. Y.) 129, 1 Am. Dec. 107 (holding that the words, "Squire Oakley is a d—d rogue," are not actionable); McGuire *v.* Blair, 4 N. C. 328.

21. Oram *v.* Franklin, 5 Blackf. (Ind.) 42.

22. Byers *v.* Martin, 2 Colo. 605, 25 Am. Rep. 755, holding that a publication denouncing a verdict as infamous and declaring that the jurors have violated their oaths is libelous.

Charge against foreman of grand jury of soliciting a bribe see Quist *v.* Kiichli, 92 Minn. 160, 99 N. W. 642.

23. Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788; Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214 [*reversing* 3 N. Y. Suppl. 162], holding that to publish of a bank teller that he is suffering from overwork, that his mental condition is not good, and that there has been trouble in the affairs of the bank occasioned by his mental derangement is libelous *per se*.

24. *California.*— Frolich *v.* McKiernan, 84 Cal. 177, 24 Pac. 114.

Georgia.— Hardy *v.* Williamson, 86 Ga. 551, 12 S. E. 874, 22 Am. St. Rep. 479.

Illinois.— See McLaughlin *v.* Fisher, 136 Ill. 111, 24 N. E. 60 [*affirming* 32 Ill. App. 54].

New Jersey.—Johnson *v.* Shields, 25 N. J. L. 116, holding that the words, "He had sold the property of the company and pocketed the money," spoken of a director and superintendent of the company, are slanderous.

South Dakota.— Nichols *v.* Smith, (1905) 102 N. W. 1135; Whitford *v.* Smith, (1905) 102 N. W. 1135; Barron *v.* Smith, (1904) 101 N. W. 1105.

United States.— Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53 [*affirming* 55 Fed. 264]; Shattuc *v.* McArthur, 25 Fed. 133, 29 Fed. 136 (holding that a statement that a general passenger agent had grown rich by making his local ticket agents or some of them divide their commissions with him is libelous *per se*); Forrest *v.* Hanson, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63 (holding that it is actionable to say of a bank director that he is a swindler).

England.— Robertson *v.* Wylde, 7 L. J. C. P. 196.

See 32 Cent. Dig. tit. "Libel and Slander," § 95.

25. Johnson *v.* Shields, 25 N. J. L. 116; Press. Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53 [*affirming* 55 Fed. 264]; Currigan *v.* Ryan, 15 Wkly Rep. 61.

26. Finch *v.* Vifquain, 11 Nebr. 280, 9 N. W. 43, when it appeared that plaintiff was grand worthy chief templar in a temperance organization and a written publication referred to him as a "seducer of innocent girls" and as "an arch hypocrite and scoundrel."

27. Allen *v.* Hillman, 12 Pick. (Mass.) 101.

person in his employment or imputing to him such acts or conduct as to injuriously affect him therein are actionable.[28] Thus words imputing want of veracity,[29] dishonesty, and lack of integrity,[30] or unreliability and unworthiness of trust,[31] are actionable *per se*. So words imputing insanity are actionable *per se*, when spoken or written of one occupying a position of trust and confidence, in relation to his position.[32] But as in other cases the words must touch plaintiff in his particular employment.[33] Thus the rule has been stated that the actionable character of words published of a clerk must be tested by the question whether they impute to plaintiff the want of any qualification such as a clerk ought to have or any misconduct which would make him unfit to discharge faithfully and correctly all the duties of a clerk.[34]

5. Candidates For Office. A person by proclaiming himself as a candidate for office does not become entitled to any exclusive privileges not possessed by private individuals, and the rule making defamatory words touching a person in his office actionable is not applicable to candidates for office.[35]

I. Words Actionable Upon Proof of Special Damage. All defamatory words whether oral or written are actionable upon proof of special damage.[36] In some jurisdictions it is held that the charge must be defamatory in its nature in

28. *Alabama.*—Ware *v.* Clowney, 24 Ala. 707.

Arkansas.— Obaugh *v.* Finn, 4 Ark. 110, 37 Am. Dec., 773.

California.— Butler *v.* Howes, 7 Cal. 87.

Kentucky.— Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291.

Missouri.— Rammell *v.* Otis, 60 Mo. 365; Keemle *v.* Sass, 12 Mo. 499; Lally *v.* Cantwell, 30 Mo. App. 524.

New York.— Fowles *v.* Bowen, 30 N. Y. 20.

See 32 Cent. Dig. tit. "Libel and Slander," § 96.

Charging unchastity against domestic servant.— It is slanderous to charge an unmarried female domestic servant with having had a miscarriage, as chastity is an essential requisite to one in such a position. Connors *v.* Justice, 13 Ir. C. L. 451.

Words not actionable per se.— It has been held not to be actionable *per se* to give a discharged railway employee a clearance card reading: "Cause for leaving service, unsatisfactory service, conduct good" (Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873), or to write to plaintiff's employer these words: "The insulting remarks offered to our representative . . . by your adjuster . . . warrant us to withhold any new business from your local agent here" (Cole *v.* Neustadter, 22 Oreg. 191, 29 Pac. 550).

29. Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Hake *v.* Brames, 95 Ind. 161; Fowles *v.* Bowen, 30 N. Y. 20.

30. *Arkansas.*— Obaugh *v.* Finn, 4 Ark. 110, 37 Am. Dec. 773, holding that it is actionable for defendant to charge plaintiff with having swindled him out of money paid him in advance by defendant for work to be performed.

California.— Butler *v.* Howes, 7 Cal. 87.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91, holding that it is libelous to write to plaintiff's employer that plaintiff had obtained property from the writer by corrupt means.

Kentucky.— Macauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291.

Missouri.— Rammell *v.* Otis, 60 Mo. 365.

New York.— Fowles *v.* Bowen, 30 N. Y. 20; Manner *v.* Simpson, 13 Daly 156 (words charging embezzlement, unfitness, and extravagance); Carpenter *v.* Hammond, 1 N. Y. St. 551; Brown *v.* Orvis, 6 How. Pr. 376.

See 32 Cent. Dig. tit. "Libel and Slander," § 96.

31. Howe Mach. Co. *v.* Sonder, 58 Ga. 64 (holding that it is libelous to publish of a former employee that he is a "diminutively insignificant and contemptuously unreliable, indolent and dishonest fellow"); Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826; Tryon *v.* Evening News Assoc., 39 Mich. 636 (holding it libelous to publish of a newspaper reporter that he had violated confidence by talebearing); Flaherty *v.* New York Times Co., 109 N. Y. App. Div. 489, 96 N. Y. Suppl. 381 (charging a janitress with disregard of employer's interests and with using his property without his consent); Brown *v.* Orvis, 6 How. Pr. (N. Y.) 376.

32. Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214.

33. Brown *v.* Street, 1 Phila. (Pa.) 85.

34. Wilson *v.* Cottman, 65 Md. 190, 3 Atl. 890; Lumby *v.* Allday, 1 Cromp. & J. 301, 9 L. J. Exch. O. S. 62, 1 Tyrw. 217, holding that it is not actionable to say of a clerk, "You are a fellow, a disgrace to the town, unfit to hold your situation, for your conduct with whores."

35. Mayrant *v.* Richardson, 1 Nott & M. (S. C.) 347, 9 Am. Dec. 707.

36. *Delaware.*— Cameron *v.* Cockran, 2 Marv. 166, 42 Atl. 454; Prettyman *v.* Shockley, 4 Harr. 112, holding that a charge that plaintiff was about to run away and defraud his creditors is actionable with an allegation of special damage.

Indiana.— Jones *v.* Diver, 22 Ind. 184, holding that words imputing want of skill

order to support the action.[37] In other jurisdictions the rule is that any words occasioning actual damage are actionable whether defamatory or not,[38] although the action may not be technically an action for libel or slander if the words are

to a professional man in a particular case are actionable when they cause special damage.

Kentucky.— Mudd *v.* Rogers, 102 Ky. 280, 43 S. W. 255, 19 Ky. L. Rep. 1329 (holding that a charge that a man is a "drummer for a whore house" is actionable upon proof of special damages); Hardin *v.* Harschfield, 12 S. W. 779, 11 Ky. L. Rep. 638.

Maine.— Barnes *v.* Trundy, 31 Me. 321.

Maryland.— Wilson *v.* Cottman, 65 Md. 190, 3 Atl. 890, where it is said: "When some specific damage is caused by words falsely and maliciously spoken, they may become actionable, when otherwise the law would give no redress against the person speaking them."

Massachusetts.— Doyle *v.* Kirby, 184 Mass. 409, 68 N. E. 843.

Missouri.— Birch *v.* Benton, 26 Mo. 153.

New Jersey.— Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 67 Am. Dec. 400.

New York.— Brooks *v.* Harison, 91 N. Y. 83 (holding that an oral charge of selling impure milk is actionable if special damage is shown); Bassell *v.* Elmore, 48 N. Y. 561; Bell *v.* Sun Printing, etc., Co., 42 N. Y. Super. Ct. 567, 2 Abb. N. Cas. 157 (holding that a charge against a party that he had made a contract under an assumed name will support an action on proof of special damages). See also Anonymous, 60 N. Y. 262, 19 Am. Rep. 174.

Vermont.— Kimmis *v.* Stiles, 44 Vt. 351, holding that an oral charge of falsehood is actionable on proof of special damages.

Wisconsin.— Servatius *v.* Pichel, 34 Wis. 292, holding that where defendant, a priest of the Roman catholic church, said, "This Peter Servatius is excommunicated, because he has laid hands on the priest to put him out of the church . . . I will not pray for him, and consider him a lost sheep, and withdraw all my pastoral blessings from him. If he shall die, the burial rites of the church will be denied him," the words are defamatory of plaintiff and actionable upon proof of special damages.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308. See also Walker *v.* Tribune Co., 29 Fed. 827.

See 32 Cent. Dig. tit. "Libel and Slander," § 97.

Words charging want of chastity are actionable on proof of special damages.

Maryland.— Shafer *v.* Ahalt, 48 Md. 171, 30 Am. Rep. 456.

New Hampshire.— Woodbury *v.* Thompson, 3 N. H. 194.

New York.— Wilson *v.* Goit, 17 N. Y. 442; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Pettibone *v.* Simpson, 66 Barb. 492; Fuller *v.* Fenner, 16 Barb. 333; Beach *v.* Ranney, 2 Hill 309; Williams *v.* Hill, 19 Wend. 305; Bradt *v.* Towsley, 13 Wend. 253 (holding that calling a woman a prostitute is actionable if special damage is shown); Moody *v.* Baker, 5 Cow. 351.

Texas.— Ross *v.* Fitch, 58 Tex. 148; McQueen *v.* Fulgham, 27 Tex. 463; Linney *v.* Maton, 13 Tex. 449; Sanders *v.* Edmonson, (Civ. App. 1900) 56 S. W. 611.

Vermont.— Underhill *v.* Welton, 32 Vt. 40.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

See 32 Cent. Dig. tit. "Libel and Slander," § 97.

In Louisiana no distinction is made between words actionable *per se* and words actionable only with reference to special damage. Fellman *v.* Dreyfous, 47 La. Ann. 907, 17 So. 422; Tarleton *v.* Lagarde, 46 La. Ann. 1368, 16 So. 180, 49 Am. St. Rep. 353, 26 L. R. A. 325; Spotorno *v.* Fourichon, 40 La. Ann. 423, 4 So. 71; Feray *v.* Foote, 12 La. Ann. 894; Miller *v.* Holstein, 16 La. 389.

37. *District of Columbia.*—Knight *v.* Blackford, 3 Mackey 177, 51 Am. Rep. 772.

Maryland.—Wilson *v.* Cottman, 65 Md. 190, 3 Atl. 890.

Missouri.— Legg *v.* Dunlevy, 10 Mo. App. 461.

New York.—Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Hallock *v.* Miller, 2 Barb. 630.

Rhode Island.— Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

England.— Kelly *v.* Partington, 5 B. & Ad. 645, 3 L. J. K. B. 104, 3 N. & M. 117, 27 E. C. L. 273; Sheahan *v.* Ahearne, Ir. R. 9 C. L. 412. *Compare* Moore *v.* Meagher, 3 Smith K. B. 135, 1 Taunt. 39, 9 Rev. Rep. 702.

See 32 Cent. Dig. tit. "Libel and Slander," § 97.

38. *Illinois.*—American Ins. Co. *v.* France, 111 Ill. App. 382.

Iowa.—Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Massachusetts.— Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Morasse *v.* Brochu, 151 Mass. 567, 574, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524, where it is said: "If there was a sufficient averment of special damages, then the question is, whether an imputation of the kind made by the defendant upon the plaintiff, when false, and when made for the express purpose of injuring the plaintiff in his profession, and when such injury is the probable and natural result of the speaking of the words, and when such injury actually follows, just as was intended by the defendant, will support an action by the plaintiff against the defendant. It is sometimes said that it will not, unless the words are defamatory. But the better rule is, that such an imputation, whether defamatory of the plaintiff or not, will support an action under the circum-

not defamatory.[39] It is generally agreed, however, that the special damage must be the natural and proximate consequence of the words used.[40] The test by which to determine whether special damage must be alleged and proved in order to make out a cause of action for defamation is whether the language is such as necessarily must or naturally and presumably will occasion pecuniary damage to the person of whom it is spoken.[41]

J. Construction of Language Used — 1. General Rule. At one time defamatory words were construed *in mitiori sensu* the object being to discourage litigation,[42] but this doctrine has long since been exploded.[43] And the rule now is that the words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used and the ideas they are adapted to convey to those who heard or read them.[44] Where words,

stances above mentioned. There are all the elements of a wrongful act deliberately done for the purpose of working an injury, and actually working one, even though the words have no meaning which, strictly speaking, could be called defamatory. . . . It may not be technically an action for slander, if the words are not defamatory; but the name of the action is of no consequence."

New Hampshire.— Hammond *v.* Hussey, 51 N. H. 40, 12 Am. Rep. 41, holding that where a party sustains an injury by the wilful wrong-doing of another, the sufferer may have an action against the wrong-doer.

South Carolina.— Reynolds *v.* Bentley, 1 McMull. 16, 36 Am. Dec. 251.

See 32 Cent. Dig. tit. "Libel and Slander," § 97.

39. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

40. *District of Columbia.*—Knight *v.* Blackford, 3 Mackey 177, 51 Am. Rep. 772.

Iowa.— Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Kentucky.— Field *v.* Colson, 93 Ky. 347, 20 S. W. 264, 14 Ky. L. Rep. 315; Hardin *v.* Harshfield, 12 S. W. 779, 11 Ky. L. Rep. 638.

Massachusetts.— Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524.

New York.—Anonymous, 60 N. Y. 262, 19 Am. Rep. 174; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420.

South Carolina.— Reynolds *v.* Bentley, 1 McMull. 16, 36 Am. Dec. 251.

Virginia.— Moore *v.* Rolin, 89 Va. 107, 15 S. E. 520, 16 L. R. A. 625.

Wisconsin.— Gough *v.* Goldsmith, 44 Wis. 262, 28 Am. Rep. 579; Servatius *v.* Pichel, 34 Wis. 292.

England.— Haddan *v.* Lott, 15 C. B. 411, 3 C. L. R. 144, 24 L. J. C. P. 49, 80 E. C. L. 411; Riding *v.* Smith, 1 Ex. D. 91, 45 L. J. Exch. 281, 34 L. T. Rep. N. S. 500, 24 Wkly. Rep. 487; Lynch *v.* Knight, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854; Allsop *v.* Allsop, 5 H. & N. 534, 6 Jur. N. S. 433, 29 L. J. Exch. 315, 2 L. T. Rep. N. S. 290, 8 Wkly. Rep. 449.

See 32 Cent. Dig. tit. "Libel and Slander," § 97.

41. Pratt *v.* Pioneer Press Pub. Co., 35 Minn. 251, 28 N. W. 708.

Necessity of alleging special damages see *infra*, VIII, E, 1, n, (II), (B).

42. Anonymous, 11 Jac. 1; Cox *v.* Humphrey, Cro. Eliz. 889; Peake *v.* Pollard, Cro. Eliz. 214; Holland *v.* Stoner, Cro. Jac. 315; Mitchell *v.* Brown, 1 Rolle Abr. 70. See also Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

43. *Alabama.*— Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

Georgia.— Giddens *v.* Mirk, 4 Ga. 364.

Indiana.— Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456.

Massachusetts.— Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737.

New York.— Damarest *v.* Haring, 6 Cow. 76.

Vermont.— Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

See 32 Cent. Dig. tit. "Libel and Slander," § 98.

44. *Alabama.*— Sternau *v.* Marx, 58 Ala. 608; Downing *v.* Wilson, 36 Ala. 717; Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Robinson *v.* Drummond, 24 Ala. 174; Hogg *v.* Dorrah, 2 Port. 212; Thirman *v.* Matthews, 1 Stew. 384.

California.— Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70 (construing the word "sack" in a statement accusing one of having charge of the "sack" for an election); Clarke *v.* Fitch, 41 Cal. 472.

Connecticut.— Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; Tuttle *v.* Bishop, 30 Conn. 80.

Georgia.—Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. E. 216; Giddens *v.* Mirk, 4 Ga. 364; Cooper *v.* Perry, Dudley 247.

Illinois.— Miller *v.* Johnson, 79 Ill. 58; Barnes *v.* Hamon, 71 Ill. 609; Ayers *v.* Grider, 15 Ill. 37; McKee *v.* Ingalls, 5 Ill. 30; Harkness *v.* Chicago Daily News Co., 102 Ill. App. 162; Gunton *v.* Hughes, 79 Ill. App. 661; Jacksonville Journal Co. *v.* Beymer, 42 Ill. App. 443.

from their general import, appear to have been spoken to defame a party, the

Indiana.— Seller *v.* Jenkins, 97 Ind. 430; Logan *v.* Logan, 77 Ind. 558; Lipprant *v.* Lipprant, 52 Ind. 273; Blickenstaff *v.* Perrin, 27 Ind. 527; O'Conner *v.* O'Conner, 24 Ind. 218; Rodgers *v.* Lacey, 23 Ind. 507; Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456; Dodge *v.* Lacey, 2 Ind. 212; Becket *v.* Sterrett, 4 Blackf. 499.

Iowa.— Prime *v.* Eastwood, 45 Iowa 640; Dixon *v.* Stewart, 33 Iowa 125; Barton *v.* Holmes, 16 Iowa 252; Wilson *v.* Beighler, 4 Iowa 427; Truman *v.* Taylor, 4 Iowa 424 (where it is said: "These words are to be taken in their plain and natural import, and are to be understood by us according to the sense in which they appear to have been used, and the ideas which they were adapted to convey to those to whom they were addressed"); Kiene *v.* Ruff, 1 Iowa 482.

Kentucky.— Duncan *v.* Brown, 15 B. Mon. 186; McGowan *v.* Manifee, 7 T. B. Mon. 314, 18 Am. Dec. 178; Logan *v.* Steele, 1 Bibb 593, 4 Am. Dec. 659; Hume *v.* Arrasmith, 1 Bibb 165, 4 Am. Dec. 626; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Louisiana.— Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406; Trimble *v.* Moore, 2 La. 577.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556.

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Buckley *v.* O'Niel, 113 Mass. 193, 18 Am. Rep. 466; Goodrich *v.* Hooper, 97 Mass. 1, 93 Am. Dec. 49; Bloss *v.* Tobey, 2 Pick. 320; Chaddock *v.* Briggs, 13 Mass. 248, 7 Am. Dec. 137.

Michigan.— Line *v.* Spies, 139 Mich. 484, 102 N. W. 993; Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476.

Minnesota.—Harringer *v.* Ingberg, 91 Minn. 71, 97 N. W. 460; Johnson *v.* Force, 80 Minn. 315, 83 N. W. 182; Nord *v.* Gray, 80 Minn. 143, 82 N. W. 1082; Radke *v.* Kolbe, 79 Minn. 440, 82 N. W. 977; Stroebel *v.* Whitney, 31 Minn. 384, 18 N. W. 98; Stewart *v.* Wilson, 23 Minn. 449.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389. *Compare* Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Rep. 293; Fallenstein *v.* Booth, 13 Mo. 427; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737.

New Hampshire.— Butterfield *v.* Buffum, 9 N. H. 156.

New Jersey.— Ogden *v.* Riley, 14 N. J. L. 186, 25 Am. Dec. 513.

New York.— Hayes *v.* Ball, 72 N. Y. 418; More *v.* Bennett, 48 N. Y. 472; Moffatt *v.* Cauldwell, 3 Hun 26, 5 Thomps. & C. 256; Wright *v.* Paige, 36 Barb. 438; Carroll *v.* White, 33 Barb. 615; Dorland *v.* Patterson, 23 Wend. 422; Kennedy *v.* Gifford, 19 Wend. 296; Gilman *v.* Lowell, 8 Wend. 573, 24 Am. Dec. 96; Gibson *v.* Williams, 4 Wend. 320; Gorham *v.* Ives, 2 Wend. 534; Damarest *v.* Haring, 6 Cow. 76; Goodrich *v.* Woolcott, 3 Cow. 231.

North Carolina.— Hamilton *v.* Smith, 19 N. C. 274; Hamilton *v.* Dent, 2 N. C. 116, 1 Am. Dec. 552.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 542, 101 N. W. 907, where it is said: "In other words, it is the duty of the court to see what the rest of mankind sees, and to understand the meaning of the writing as the rest of mankind understands it, and to place itself in the position of an unbiased reader of ordinary intelligence, and thus determine the meaning which the language, considered in its natural and popular sense, was intended and calculated to convey."

Ohio.—Van Ingen *v.* Newton, 1 Disn. 482, 12 Ohio Dec. (Reprint) 746; English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133.

Pennsylvania.— Lukehart *v.* Byerly, 53 Pa. St. 418; Parsley *v.* Wilhelm, 17 Pa. Super. Ct. 444; Goebeler *v.* Wilhelm, 17 Pa. Super Ct. 432.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573; Hugley *v.* Hugley, 2 Bailey 592; Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633; Davis *v.* Davis, 1 Nott & M. 290; Wilson *v.* Hogg, 1 Nott & M. 216.

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507; Watson *v.* Nicholas, 6 Humphr. 174.

Texas.—King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304; Gulf, etc., R. Co. *v.* Floore, (Civ. App. 1897) 42 S. W. 607; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210; Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359; Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779 [*citing* 1 Am. Lead. Cas. (4th ed.) 131]; Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247.

Virginia.—Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455; Hoyle *v.* Young, 1 Wash. 150, 1 Am. Dec. 446.

Wisconsin.—Hamlin *v.* Fantl, 118 Wis. 594, 95 N. W. 955; Pandow *v.* Eichsted, 90 Wis. 298, 63 N. W. 284; Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511; Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456; Filber *v.* Dautermann, 26 Wis. 518; Montgomery *v.* Deeley, 3 Wis. 709.

United States.—Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681]; Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

England.— Rex *v.* Lambert, 2 Campb. 398, 11 Rev. Rep. 748; Chalmers *v.* Payne, 2 C. M. & R. 156, 1 Gale 69, 4 L. J. Exch. 151, 5 Tyrw. 766; Woolnoth *v.* Meadows, 5 East 463, 2 Smith K. B. 28, 7 Rev. Rep. 742; Daines *v.* Hartley, 3 Exch. 200, 12 Jur. 1093,

court ought not to be industrious in putting a construction upon them different from what they bear in their common acceptation and meaning.[45]

2. Defamatory Matter to Be Construed in Its Entirety. The language alleged to be defamatory must be construed as a whole, that is, the words must be construed in connection with other parts of the conversation or published matter, written or printed.[46] Thus in determining whether a publication is libelous the headlines of the article cannot be disregarded.[47]

3. Construction According to Explanations or Surrounding Circumstances. Defamatory language must be interpreted as it would be understood by the reader or hearers, taking into consideration accompanying explanations and the surround-

18 L. J. Exch. 81; Homer *v.* Taunton, 5 H. & N. 661, 29 L. J. Exch. 318, 2 L. T. Rep. N. S. 512, 18 Wkly. Rep. 449 (holding that although the word "truckmaster" is not found in any English dictionary yet it is composed of two well known English words, and that plaintiff was not bound to give evidence of its meaning); Churchill *v.* Gedney, 53 J. P. 471; Hankinson *v.* Bilby, 16 M. & W. 442.

Canada.— Johnson *v.* Hedge, 6 U. C. Q. B. 337.

See 32 Cent. Dig. tit. "Libel and Slander," § 98.

Provincial and colloquial terms.— The courts will understand provincial and colloquial expressions in the sense in which they are used and understood. See Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Cooper *v.* Perry, Dudley (Ga.) 247; Logan *v.* Logan, 77 Ind. 558; Lipprant *v.* Lipprant, 52 Ind. 273; Nonpareil Cork Mfg. Co. *v.* Keasbey, etc., Co, 108 Fed. 721.

45. Peake *v.* Oldham, 1 Cowp. 272, 2 W. Bl. 960 [*cited* in Goodrich *v.* Woolcott, 3 Cow. (N. Y.) 231; Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907].

46. *Alabama.*— Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788.

California.—Van Vactor *v.* Walkup, 46 Cal. 124; Bradley *v.* Gardner, 10 Cal. 371.

Connecticut.— Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397.

Illinois.—Winchell *v.* Strong, 17 Ill. 597; McKee *v.* Ingalls, 5 Ill. 30; Scarcy *v.* Sudhoff, 84 Ill. App. 148; Tottleben *v.* Blankenship, 58 Ill. App. 47.

Iowa.— Mosnat *v.* Snyder, 105 Iowa 500, 75 N. W. 356; Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

Kentucky.— Morehead *v.* Jones, 2 B. Mon. 210, 36 Am. Dec. 600; Trabue *v.* Mays, 3 Dana 138, 28 Am. Dec. 61.

Louisiana.— Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556; Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Wing *v.* Wing, 66 Me. 62, 22 Am. Rep. 548.

Massachusetts.—Goodrich *v.* Davis, 11 Metc. 473.

Michigan.— O'Connor *v.* Sill, 60 Mich. 175, 27 N. W. 13.

Minnesota.— Johnson *v.* Force, 80 Minn. 315, 83 N. W. 182.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

Missouri.— St. James Military Academy *v.* Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L. R. A. 667, Burgess, J., delivering the opinion of the court.

New York.—More *v.* Bennett, 48 N. Y. 472; Dickson *v.* Phillips, 51 N. Y. Super. Ct. 162.

Ohio.— Brown *v.* Myers, 40 Ohio St. 99.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Texas.— Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

Washington.— Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866.

Wisconsin.— Robertson *v.* Edelstein, 104 Wis. 440, 80 N. W. 724.

England.— Chalmers *v.* Payne, 2 C. M. & R 156, 1 Gale 69, 4 L. J. Exch. 151, 5 Tyrw. 766.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 98, 99.

47. *California.*— Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Colorado.— Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485.

Michigan.—McAllister *v.* Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; Bourrescau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501.

Minnesota.— Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615, where it was said that "the headlines are an important part of the publication, and cannot be disregarded, for they often render a publication libelous on its face, which without them might not necessarily be so."

New Jersey.— Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041.

Pennsylvania.— Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643.

United States.— Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128.

England.—Lewis *v.* Clement, 3 B. & Ald. 702, 5 E. C. L. 403, 3 B. & B. 297, 7 E. C. L. 740, 7 Moore C. P. 200, 10 Price 181, 22 Rev. Rep. 533; Harvey *v.* French, 1 Cromp. & M. 11, 1 L. J. Exch. 231, 2 Moore & S. 591, 2 Tyrw. 585, 28 E. C. L. 514.

See 32 Cent. Dig. tit. "Libel and Slander," § 99.

ing circumstances which were known to the hearer or reader.[48] Words used in a publication, even if not actionable in and of themselves, may become so if they convey a hidden and covert meaning and are understood in their concealed sense by the person or persons addressed.[49]

4. EFFECT OF SECRET INTENTION OF PUBLISHER. The words are to be construed according to their common understanding and not according to defendant's secret intention.[50]

48. *Alabama.*—Parmer *v.* Anderson, 33 Ala. 78; Wright *v.* Lindsay, 20 Ala. 428; Williams *v.* Cawley, 18 Ala. 206.

California.— Bettner *v.* Holt, 70 Cal. 270, 11 Pac. 713; Van Vactor *v.* Walkup, 46 Cal. 124.

Colorado.—Downing *v.* Brown, 3 Colo. 571.

Connecticut.—Williams *v.* Miner, 18 Conn. 464.

Georgia.— Pavesich *v.* New England L. Ins. Co., 122 Ga. 190, 50 S. E. 68, 106 Am. St. Rep. 104, 69 L. R. A. 101.

Illinois.— Miller *v.* Johnson, 79 Ill. 58; Winchell *v.* Strong, 17 Ill. 597; Merrill *v.* Marshall, 113 Ill. App. 447; Tottlehen *v.* Blankenship, 58 Ill. App. 47; Bihler *v.* Gockley, 18 Ill. App. 496; Welker *v.* Butler, 15 Ill. App. 209.

Indiana.— McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Pollock *v.* Hastings, 88 Ind. 248; Blickenstaff *v.* Perrin, 27 Ind. 527; Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456; Carmichael *v.* Shiel, 21 Ind. 66; Hayes *v.* Mitchell, 7 Blackf. 117; Burke *v.* Miller, 6 Blackf. 155.

Iowa.—Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785; Prime *v.* Eastwood, 45 Iowa 640; Myers *v.* Dresden, 40 Iowa 660; Dixon *v.* Stewart, 33 Iowa 125; McCaleb *v.* Smith, 22 Iowa 242; De Moss *v.* Haycock, 15 Iowa 149.

Kentucky.— Parker *v.* McQueen, 8 B. Mon. 16; Hawn *v.* Smith, 4 B. Mon. 385; Morehead *v.* Jones, 2 B. Mon. 210, 36 Am. Dec. 600; Trabue *v.* Mays, 3 Dana 138, 28 Am. Dec. 61; Gill *v.* Bright, 6 T. B. Mon. 130; Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122.

Louisiana.— Trimble *v.* Moore, 2 La. 577.

Maryland.— Fawsett *v.* Clark, 48 Md. 494, 30 Am. Rep. 481.

Massachusetts.— Riddell *v.* Thayer, 127 Mass. 487; Stone *v.* Clark, 21 Pick. 51.

Michigan.— Line *v.* Spies, 139 Mich. 484, 102 N. W. 993; O'Connor *v.* Sill, 60 Mich. 175, 27 N. W. 13; Crone *v.* Angell, 14 Mich. 340.

Minnesota.— Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615; McCarty *v.* Barrett, 12 Minn. 494.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Hall *v.* Adkins, 59 Mo. 144; Bridgman *v.* Armer, 57 Mo. App. 528; Morgan *v.* Rice, 35 Mo. App. 591.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New Hampshire.— Norton *v.* Ladd, 5 N. H. 203, 20 Am. Dec. 573.

New York.— Hayes *v.* Ball, 72 N. Y. 418; Van Akin *v.* Caler, 48 Barb. 58; Dickson *v.* Phillips, 51 N. Y. Super. Ct. 162; Dempsey *v.* Paige, 4 E. D. Smith 218; Quinn *v.* O'Gara, 2 E. D. Smith 388; Bannon *v.* Cleary, 6 N. Y. St. 36; Dorland *v* Patterson, 23 Wend. 422; Phillips *v.* Barber, 7 Wend. 439; Van Rensselaer *v.* Dole, 1 Johns. Cas. 279.

North Carolina.— Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386.

South Carolina.— Pegram *v.* Styron, 1 Bailey 595; Shecut *v.* McDowel, 1 Treadw. 35, 3 Brev. 38, 5 Am. Dec. 536.

Tennessee.—Watson *v.* Nicholas, 6 Humphr. 174.

Texas.— Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359; Smith *v.* Miles, 15 Vt. 245.

Washington.— Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866.

Wisconsin.— Robertson *v.* Edelstein, 104 Wis. 440, 80 N. W. 724; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Eaton *v.* White, 2 Pinn. 42. See also Hamlin *v.* Fantl, 118 Wis. 594, 95 N. W. 955.

United States.— Chiatovich *v.* Hanchett, 96 Fed. 681, 41 C. C. A. 648 [*affirmed* in 101 Fed. 742]; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

England.—Thompson *v.* Bernard, 1 Campb. 48; Daines *v.* Hartley, 3 Exch. 200, 12 Jur. 1093, 18 L. J. Exch. 81; Hankinson *v.* Bilby, 16 M. & W. 442; Cristie *v.* Cowell, Peake N. P. 4, 3 Rev. Rep. 642.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 98, 99.

49. Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648.

50. *Alabama.*— Sternau *v.* Marx, 58 Ala. 608.

Connecticut.— Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69, opinion of the court by Pardee, J.

Georgia.— Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. E. 216.

Illinois.— McKee *v.* Ingalls, 5 Ill. 30; Jacksonville Journal Co., *v.* Beymer, 42 Ill. App. 443.

Indiana.— Branstetter *v.* Dorrough, 81 Ind. 527.

Kentucky.— Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Ohio.— Van Ingen *v.* Newton, 1 Disn. 482, 12 Ohio Dec. (Reprint) 746.

Pennsylvania.— Goebeler *v.* Wilhelm, 17 Pa. Super. Ct. 432; Parsley *v.* Wilhelm, 17 Pa. Super. Ct. 444.

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304; Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

5. Understanding of Particular Reader no Criterion. Nor, it has been said, is it the understanding of any particular reader that is to determine the question.[51] Thus the fact that supersensitive persons with morbid imaginations may be able by reading between the lines of an article to discover some defamatory meaning therein is not sufficient to make it libelous.[52]

6. Charge of Crime. In order to be actionable as charging a crime it is not necessary that the words should impute the offense with the technical accuracy required in an indictment or that they should make the charge in express terms.[53] If the defamatory words, taken in their natural and ordinary signification, fairly import a criminal charge, it is sufficient.[54] So words not actionable in themselves may express a criminal charge by reason of their allusion to some extrinsic fact, or in consequence of being used and understood in a particular sense different

Wisconsin.— Hamlin *v.* Fantl, 118 Wis. 594, 95 N. W. 955.

United States.— Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201, holding that on the question as to the meaning of a publication the jury ought to determine not what defendant intended to charge but what in fact he did charge and what the reading public might reasonably suppose he intended to charge.

England.— Read *v.* Ambridge, 6 C. & P. 308, 25 E. C. L. 447; Hankinson *v.* Bilby, 16 M. & W. 442.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 98, 99.

51. Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556. See also Snell *v.* Snow, 13 Metc. (Mass.) 278, 46 Am. Dec. 730; Gribble *v.* Pioneer Press Co., 37 Minn. 277.

Admissibility of evidence as to understanding of witnesses see *infra*, VIII, F, 2, d, (III).

52. Reid *v.* Providence Journal Co., 20 R. I. 120, 37 Atl. 637.

53. *Delaware.*— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Georgia.— Hooper *v.* Martin, 54 Ga. 648, holding that where defendant charged A with attempting a crime and stated that he drove him off and added, "When I drove him off, I saw . . . standing at the road holding a torch for him," the latter words impute a crime to B.

Illinois.— Bihler *v.* Gockley, 18 Ill. App. 496.

Indiana.—Wilson *v.* McCrory, 86 Ind. 170.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556, where it is said: "It is not necessary, in order to render words actionable, that there should be the same precision and certainty in the language employed to make the charge as in the allegations of an indictment for the same offense."

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Michigan.— Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855, holding that the words, "If Ayres hadn't gone away we should issue warrants for him," will bear the meaning that A "had absconded, and had been guilty of some offense for which he was liable to arrest" and with that meaning is actionable.

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737, holding that a publication to be libelous *per se* because charging another with the commission of a crime does not need to contain the technical statutory language and phrases essential to a good indictment for the crime charged.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652; Zeliff *v.* Jennings, 61 Tex. 458; Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077; Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381; Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264; Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

England.— Coleman *v.* Goodwin, 2 B. & C. 285 note, 9 E. C. L. 131, 3 Dougl. 90, 26 E. C. L. 69; Holt *v.* Scholefield, 3 Rev. Rep. 318, 6 T. R. 691.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 17, 98, 99.

54. *Georgia.*—Cooper *v.* Perry, Dudley 247.

Illinois.— Bihler *v.* Gockley, 18 Ill. App. 496; Halsey *v.* Stillman, 48 Ill. App. 413.

Indiana.— Wilson *v.* McCrory, 86 Ind. 170.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556.

Michigan.— Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

Minnesota.— Quist *v.* Kiichli, 92 Minn. 160, 99 N. W. 642 (where it is said: "It is not necessary that the words make a charge in express terms, for they are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime"); Nord *v.* Gray, 80 Minn. 143, 82 N. W. 1082; Richmond *v.* Post, 69 Minn. 457, 72 N. W. 704.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737.

New Hampshire.— Robinson *v.* Keyser, 22 N. H. 323.

New York.— Cook *v.* Bostwick, 12 Wend. 48.

North Carolina.—Webster *v.* Sharpe, 116 N. C. 466, 21 S. E. 912.

Pennsylvania.— Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Texas.— Gulf, etc., R. Co. *v.* Floore, (Civ. App. 1897) 42 S. W. 607.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 98, 99.

from their natural meaning and thus become actionable.[55] But words are not actionable, although ordinarily importing a crime if they are spoken or written in a different sense and understood in that sense by the person addressed.[56] If, however, words charging a crime are spoken with reference to some transaction not amounting to the crime charged, the hearers must understand the reference in order to render the words harmless and not actionable.[57]

K. Certainty and Positiveness of Charge — 1. In General. To maintain an action for libel or slander it is not necessary that the charge should be direct and positive — the imputation may be inferred from an indirect communication,[58] as where defendant "expresses a suspicion, or institutes a comparison, or delivers the words as matter of hear-say . . . or answer, or exclamation, or uses disjunctive or adjective words, or speaks ironically."[59] Insinuations may be as defamatory as direct assertions, since the effect and tendency of the language used and not its form is the criterion.[60]

2. Imputation by Expressing Belief or Opinion. A defamatory charge published as an expression of belief or opinion is as effectual as if made in positive language, for the publisher must be understood to assert that there is in his mind evidence sufficient to convince him that the charge is true;[61] and the fact that the reasons

55. Hays *v.* Mitchell, 7 Blackf. 117; Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

56. *Alabama.*—Williams *v.* Cawley, 18 Ala. 206.

Connecticut.— Williams *v.* Miner, 18 Conn. 464.

Illinois.— Miller *v.* Johnson, 79 Ill. 58.

Indiana.— McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Carmichael *v.* Shiel, 21 Ind. 66; Burke *v.* Miller, 6 Blackf. 155.

Iowa.— Myers *v.* Dresden, 40 Iowa 660.

Kentucky.— Trahue *v.* Mays, 3 Dana 138, 28 Am. Dec. 61; Gill *v.* Bright, 6 T. B. Mon. 130; Brite *v.* Gill, 2 T. B. Mon. 65, 15 Am. Dec. 122.

Minnesota.— McCarty *v.* Barrett, 12 Minn. 494.

Missouri.— Bridgman *v.* Armer, 57 Mo. App. 528.

New York.— Hayes *v.* Ball, 72 N. Y. 418; Dempsey *v.* Paige, 4 E. D. Smith 218; Quinn *v.* O'Gara, 2 E. D. Smith 388; Phillips *v.* Barber, 7 Wend. 439.

North Carolina.— Barnes *v.* Crawford, 115 N. C. 76, 20 S. E. 386.

Ohio.— Brown *v.* Myers, 40 Ohio St. 99.

South Carolina.— Sheeut *v.* McDowel, 1 Treadw. 35.

Wisconsin.— Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559.

See 32 Cent. Dig. tit. "Libel and Slander," § 99.

57. *Illinois.*—Welker *v.* Butler, 15 Ill. App. 209.

Indiana.— Carmichael *v.* Shiel, 21 Ind. 66.

Massachusetts.—Stone *v.* Clark, 21 Pick. 51.

Michigan.— Crone *v.* Angell, 14 Mich. 340.

New York.— Bannon *v.* Cleary, 6 N. Y. St. 36; Van Rensselaer *v.* Dole, 1 Johns. Cas. 239.

Tennessee.—Watson *v.* Nicholas, 6 Humphr. 174.

Vermont.— Smith *v.* Miles, 15 Vt. 245.

See 32 Cent. Dig. tit. "Libel and Slander," § 99.

58. *Alabama.*— Waters *v.* Jones, 3 Port. 442, 29 Am. Dec. 261.

Massachusetts.— Com. *v.* Child, 13 Pick. 198.

Minnesota.— Johnson *v.* Force, 80 Minn. 315, 83 N. W. 182.

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

Missouri.— Nelson *v.* Musgrave, 10 Mo. 648, holding that the words, "He is thought no more of than a horse thief and a counterfeiter," are actionable as charging that plaintiff is a horse thief and counterfeiter.

Wisconsin.— Cramer *v.* Noonan, 4 Wis. 231, holding that to publish of plaintiff that he was as "versatile in circumventing the law of right as the famous Monroe Edwards," a notorious forger, is actionable.

See 32 Cent. Dig. tit. "Libel and Slander," § 100.

Compare Atkinson *v.* Hartley, 1 McCord (S. C.) 203.

59. Waters *v.* Jones, 3 Port. (Ala.) 442, 29 Am. Dec. 261.

60. State *v.* Norton, 89 Me. 290, 36 Atl. 394; Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652. See also Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455.

61. *Alabama.*—Waters *v.* Jones, 3 Port. 442, 29 Am. Dec. 261.

Georgia.— Giddens *v.* Mirk, 4 Ga. 364.

Iowa.—Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

Kentucky.— Logan *v.* Steele, 1 Bibb 593, 4 Am. Dec. 659.

Louisiana.— Covington *v.* Roberson, 111 La. 326, 35 So. 586.

Massachusetts.— Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79, holding that the words, "He would venture any thing Nye had stolen the book," are equivalent to a charge of theft and actionable.

Minnesota.— Simmons *v.* Holster, 13 Minn. 249.

Missouri.— Johnson *v.* St. Louis Dispatch Co., 2 Mo. App. 565.

New York.— Miller *v.* Miller, 8 Johns. 74,

for the belief are also given will not affect the question, unless these reasons explain away the charge.[62]

3. Imputations by Expressing Mere Suspicion. In some jurisdictions the rule has been laid down that words conveying a mere suspicion that a person has committed a crime are not actionable *per se*.[63] But in other jurisdictions the rule is that where the obvious tendency of a publication is to fasten suspicion of the commission of a crime on plaintiff, it is actionable.[64]

4. Imputations in Interrogative Form. An actionable imputation may be as effectually made by way of interrogation as by an affirmative allegation.[65]

5. Imputations in Conditional Form. Where the charge is conditional in its form, the actionable quality of the imputation depends upon the fact assumed in the conditional clause. If defendant makes the charge to depend upon a fact which he has stated conditionally but which is known to be true, it is equivalent to a direct charge and actionable.[66]

6. Imputations in Alternative Form. An imputation in alternative form is actionable only when both alternatives are defamatory and if either alternative statement is harmless, the charge is not actionable.[67]

7. Ironical Words. Words may be ironical and yet be actionable as much as if expressed in the most positive and direct form of averment.[68]

holding that the allegation that a crime has been committed with an assertion of belief that a particular person committed it is equivalent to a positive charge against that person.

Ohio.—Stickels *v.* Hall, 3 Ohio Cir. Ct. 398, 2 Ohio Cir. Dec. 224.

Pennsylvania.— Dottarer *v.* Bushey, 16 Pa. St. 204; Beehler *v.* Steever, 2 Whart. 313.

South Carolina.— Gage *v.* Shelton, 3 Rich. 242.

See 32 Cent. Dig. tit. "Libel and Slander," § 101.

62. Johnson *v.* St. Louis Dispatch Co., 2 Mo. App. 565. See also Morgan *v.* Rice, 35 Mo. App. 591.

63. Burns *v.* Williams, 88 N. C. 159, 162 (where it is said: "A suspicion lurking in the heart and manifested in one's conduct, is not the same thing as a charge of a committed criminal act, unless perhaps, when a suspicion is expressed in a form to impute, and understood to impute, the offence to which it points"); Simmons *v.* Mitchell, 6 App. Cas. 156, 45 J. P. 237, 50 L. J. P. C. 11, 43 L. T. Rep. N. S. 710, 29 Wkly. Rep. 401; Tozer *v.* Mashford, 6 Exch. 539. See also Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395, holding, however, that where the declaration explained the meaning of the word "suspicion" to involve a direct charge of crime and the language was susceptible of involving such a charge, it was for the jury to say what was meant.

64. Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485; Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Bain *v.* Myrick, 88 Ind. 137; Harrison *v.* Findley, 23 Ind. 265, 85 Am. Dec. 456; Drummond *v.* Leslie, 5 Blackf. (Ind.) 453 (where it is said: "If the words were calculated to induce the hearers to suspect that the plaintiff was guilty of the crime, they were actionable"); Pond *v.* Hartwell, 17 Pick. (Mass.) 269. See also World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737. *Compare* Sillars *v.* Collier, 151 Mass. 50, 23 N. E. 723, 6 L. R. A. 680.

65. *Kentucky.*— Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281.

Maine.— State *v.* Norton, 89 Me. 290, 36 Atl. 394.

Massachusetts.—Goodrich *v.* Davis, 11 Metc. 473.

New York.— Hotchkiss *v.* Oliphant, 2 Hill 510; Gorham *v.* Ives, 2 Wend. 534.

Pennsylvania.— See Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

Rhode Island.— Barr *v.* Providence Telegram Pub. Co., 27 R. I. 101, 60 Atl. 835.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573; Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633.

Vermont.— Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395.

England.— Northampton's Case, 12 Coke 134; Hunt *v.* Thimblethorp, 1 Vine Abr. 429.

See 32 Cent. Dig. tit. "Libel and Slander," § 102.

66. Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041; Clarke *v.* Zettick, 153 Mass. 1, 26 N. E. 234. See also Mills *v.* Taylor, 3 Bibb (Ky.) 469; Rahauser *v.* Schwerger Barth, 3 Watts (Pa.) 28; Bornman *v.* Boyer, 3 Binn. (Pa.) 515, 5 Am. Dec. 380.

67. Blackwell *v.* Smith, 8 Mo. App. 43 (holding that the words, "You are a thief, or you got the book from a thief," are not actionable as they do not constitute an unqualified charge of theft); Lukehart *v.* Byerly, 53 Pa. St. 418 (holding that when the slander charged is an alternative between trespass and larceny an indictable offense is not necessarily imputed); Atkinson *v.* Hartley, 1 McCord (S. C.) 203; Pandow *v.* Eichsted, 90 Wis. 298, 63 N. W. 284.

68. Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111; Boydell *v.* Jones, 7 Dowl. P. C.

8. ACKNOWLEDGMENT OF PREVIOUS CHARGE. An acknowledgment merely of having published defamatory words cannot be the foundation of an action, and is material only as evidence of the former charge.[69]

9. INDEFINITENESS OR ERROR AS TO PERSON DEFAMED — a. In General. Defamatory words to be actionable must refer to some ascertained or ascertainable person and that person must be plaintiff.[70] Plaintiff need not be named in the slanderous or libelous publication if matters of description or other references therein or the extrinsic facts and circumstances are sufficient to show that he was intended as the object of it and was so understood by others.[71] It is not necessary that all the world should understand that the charge referred to plaintiff; it is sufficient that those who know plaintiff can make out that he is the person meant.[72] Where a publication is libelous or slanderous *per se* the fact that it is made to apply to plaintiff, although a mistake as to the initials of the person intended, will be no excuse.[73] On the other hand it has been held that the names used in a publication is not conclusive, and that if the publication viewed in connection with the publicly known circumstances is such that it could refer to one personally, no other person would have a right of action, even if, by reason of identity of name with that used in the publication, he might sustain injury thereby.[74]

210, 1 H. & H. 408, 4 M. & W. 446, ironically calling one "an honest lawyer." See also Cass *v.* Anderson, 33 Vt. 182.

69. Spaits *v.* Poundstone, 87 Ind. 522, 44 Am. Rep. 773 (where the words were: "I did say to Rebecca McClure that you stole my watch"); Fonville *v.* McNease, Dudley (S. C.) 303, 31 Am. Dec. 556; Griffiths *v.* Lewis, 7 Q. B. 61, 9 Jur. 370, 14 L. J. Q. B. 197, 53 E. C. L. 60.

70. *Alabama.*— Robinson *v.* Drummond, 24 Ala. 174.

Illinois.— Ingalls *v.* Allen, 1 Ill. 300, holding that a charge that "plaintiff, or somebody, had altered the credit or indorsement on a note" was not actionable.

Indiana.— Harper *v.* Delp, 3 Ind. 225; Harvey *v.* Coffin, 5 Blackf. 566.

Massachusetts.— Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856, where it is said: "In a suit for libel or slander, it is always necessary for the plaintiff to allege, and prove that the words were spoken or written of and concerning the plaintiff."

Michigan.— McGraw *v.* Detroit Free Press Co., 85 Mich. 203, 48 N. W. 500; Lewis *v.* Soule, 3 Mich. 514; Taylor *v.* Kneeland, 1 Dougl. 67.

New York.— Mooney *v.* New York News Pub. Co., 48 N. Y. App. Div. 271, 62 N. Y. Suppl. 781, where an article referred to plaintiff by two different names and was held actionable.

Ohio.— Joseph *v.* Christy, 8 Ohio Dec. (Reprint) 476, 8 Cinc. L. Bul. 190.

Pennsylvania.— O'Donnell *v.* Wilkes-Barre Times, 13 Luz. Leg. Reg. 89.

See 32 Cent. Dig. tit. "Libel and Slander," § 103.

Connecting defamatory matter with plaintiff in pleading see *infra*, VIII, E, 1, g, (III).

Evidence to show reference to plaintiff see *infra*, VIII, F, 2, b, (III).

71. *Alabama.*— Weir *v.* Hoss, 6 Ala. 881, where plaintiff's name was Hoss and the term "filly horse" used in the libel was explained by innuendo to mean plaintiff's wife.

Georgia.— Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80.

Kentucky.— Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Maryland.— Bonner *v.* Boyd, 3 Harr. & J. 278, holding that to say of a person while pointing at him in a crowd of people, "There is the man who stole my horse," is slander.

Minnesota.— Dressel *v.* Shipman, 57 Minn. 23, 58 N. W. 684.

New York.— Palmer *v.* Bennett, 83 Hun 220, 31 N. Y. Suppl. 567, 1 N. Y. Annot. Cas. 208; Ryer *v.* Fireman's Journal Co., 11 Daly 251; Parker *v.* Raymond, 3 Abb. Pr. N. S. 343; Croswell *v.* Weed, 25 Wend. 621; Gibson *v.* Williams, 4 Wend. 320.

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237.

South Carolina.— Clark *v.* Creitzburgh, 4 McCord 491, holding that where the libel is on "John Thornton and his friend" plaintiff may show that he is the party meant by the word "friend."

South Dakota.—Whitford *v.* Smith, (1905) 102 N. W. 1135; Nichols *v.* Smith, (1905) 102 N. W. 1135; Barron *v.* Smith, (1904) 101 N. W. 1105.

See 32 Cent. Dig. tit. "Libel and Slander," § 103.

Where asterisks are used instead of the name of the party libeled, this is sufficient if those who know plaintiff understand that he is the party meant. Bourke *v.* Warren, 2 C. & P. 307, 12 E. C. L. 587.

Printing initial letters of names only will not protect a libeler. Roach *v.* Garvan, 2 Atk. 469, 26 Eng. Reprint 683.

72. Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80; Lewis *v.* Soule, 3 Mich. 514; Bourke *v.* Warren, 2 C. & P. 307, 12 E. C. L. 587.

73. Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

74. Hansom *v.* Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856.

b. Imputations Affecting a Class. Where the defamatory matter has no specific personal application and is so general that no individual damages can be presumed, and the class referred to is so numerous that great vexation and oppression might grow out of a multiplicity of suits, no private suit can be maintained.[75] But although the defamatory publication is directed against a particular class of persons or a group, yet any one of that class or group may maintain an action upon showing that the words apply especially to him.[76]

10. Repetition — a. Repetition With Authorship Credited to Others — (i) *Libel.* It is no justification in an action for libel that the libelous matter was previously published by a third person and that defendant at the time of his publication disclosed the name of the author.[77]

75. *Illinois.*— Story *v.* Jones, 52 Ill. App. 112, holding that to say of a man that he belonged to the Missouri home guards, and that it is a band of robbers, is not actionable, as there is no charge that any particular member was a robber but merely that he might be a robber.

Michigan.— McGraw *v.* Detroit Free Press Co., 85 Mich. 203, 48 N. W. 500, holding that where plaintiff had a stall and sold goods in a building called "Princess Market" and defendant published the words, "The Princess market is not a howling success. At no time were there more than a dozen people in the market on Saturday night," it was not a libel upon plaintiff.

New York.— Hauptner *v.* White, 81 N. Y. App. Div. 153, 80 N. Y. Suppl. 895; Sumner *v.* Buel, 12 Johns. 475 (holding that an officer of a regiment cannot maintain an action for a publication reflecting on the officers of the regiment generally); White *v.* Delavan, 17 Wend. 49.

Rhode Island.—Barr *v.* Providence Tel. Pub. Co., 27 R. I. 101, 60 Atl. 835, where however, it is said that "by proper innuendoes, that which is averred generally of a class of men may be shown to apply to a given individual of that class."

Utah.— Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

See 32 Cent. Dig. tit. "Libel and Slander," § 103. See also *infra*, VIII, A, 4, e.

A joint action cannot be brought by members of a hose company for an article charging that members of the company without specifying individuals had committed theft. Giraud *v.* Beach, 3 E. D. Smith (N. Y.) 337.

76. *Alabama.*—Wofford *v.* Meeks, 129 Ala. 349, 30 So. 625, 87 Am. St. Rep. 66, 55 L. R. A. 214 [*citing* Jones *v.* State, 38 Tex. Cr. 364, 43 S. W. 78, 70 Am. St. Rep. 751, 756, note of Mr. Freeman].

Kentucky.— Forbes *v.* Johnson, 11 B. Mon. 48.

Massachusetts.— Ellis *v.* Kimball, 16 Pick. 132.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137.

New York.— Bornmann *v.* Star Co., 174 N. Y. 212, 66 N. E. 723 [*affirming* 76 N. Y. Suppl. 1009]; Maybee *v.* Fisk, 42 Barb. 326 (holding that the words, "Your boys have stolen my corn," spoken to a father, were held actionable in a suit by the oldest of three boys even though the two other sons did steal the corn); Ryer *v.* Fireman's Journal Co., 11 Daly 251 (holding that a publication that "the entire staff of harness makers . . . have been dismissed for alleged thefts" will sustain an action in favor of one of the harness makers); Gidney *v.* Blake, 11 Johns. 54 (holding that the words, "His children are thieves," are actionable in favor of one of the children).

Utah.— Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 42 Pac. 112, 35 L. R. A. 611.

England.— Foxcroft *v.* Lacy, Hob. 122.

See 32 Cent. Dig. tit. "Libel and Slander," § 193. See also *infra*, VIII, A, 4, e.

77. *Indiana.*— Johnson *v.* Stebbins, 5 Ind. 364; Clarkson *v.* McCarty, 5 Blackf. 574.

Iowa.— Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867.

Louisiana.— Perret *v.* New Orleans Times Newspaper, 25 La. Ann. 170.

Michigan.— Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501.

New York.— Hotchkiss *v.* Oliphant, 2 Hill 510; Dole *v.* Lyon, 10 Johns. 447, 6 Am. Dec. 346.

North Carolina.— Johnston *v.* Lance, 29 N. C. 448; Hampton *v.* Wilson, 15 N. C. 468.

Pennsylvania.— Runkle *v.* Meyer, 3 Yeates 518, 2 Am. Dec. 393. *Compare* Binns *v.* McCorkle, 2 Browne 79.

Wisconsin.— Sans *v.* Joerris, 14 Wis. 663.

United States.— Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244.

England.— De Crespigny *v.* Wellesley, 5 Bing. 392, 7 L. J. C. P. O. S. 100, 2 M. & P. 695, 30 Rev. Rep. 665, 15 E. C. L. 636; Delegal *v.* Highley, 3 Bing. N. Cas. 950, 32 E. C. L. 435, 8 C. & P. 444, 34 E. C. L. 827, 3 Hodges 158, 6 L. J. C. P. 337, 5 Scott 154; Tidman *v.* Ainslie, 10 Exch. 63.

Canada.— Macdonald *v.* Mail Printing Co., 32 Ont. 163.

See 32 Cent. Dig. tit. "Libel and Slander," § 104.

Compare Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. St. Rep. 293.

Repetition as a mitigating circumstance see *infra*, VII, B, 8.

Mere fact of repetition as defense see *infra*, VII, A, 1, d.

(II) *Slander.* In several of the earlier cases in England and in this country the rule has been stated that in an action for slander it is a good defense to show that the words were spoken on the authority of another, whose name was given at the time the repetition was made.[78] But the modern rule is that a person is not justified in repeating a slanderous charge, although he at the time names the author,[79] unless at least it appears that he acted without any malicious intent, the *quo animo* with which the charge was repeated being the controlling consideration in some jurisdictions.[80]

b. Repetition Credited to Rumor or Report. A man may slander or libel another as effectually by circulating rumors or reports, or by putting his communications, spoken or written, in the shape of hearsays, as by making distinct assertions of defamatory matter; and hence the fact that the slanderous or libelous words are published with the qualification "if reports are true," "report says," or other similar qualification, will not alter the actionable character of the words.[81]

Written publication of story previously told by plaintiff.— It has been held libelous to publish in a newspaper a story calculated to render plaintiff ludicrous, even where it appears that plaintiff had told the story of himself, it not appearing that he had authorized the publication in the newspaper. Cook *v.* Ward, 6 Bing. 409, 8 L. J. C. P. O. S. 126, 4 M. & P. 99, 31 Rev. Rep. 456, 19 E. C. L. 189.

78. Tatlow *v.* Jaquett, 1 Harr. (Del.) 333, 26 Am. Dec. 399; Trabue *v.* Mays, 3 Dana (Ky.) 138, 28 Am. Dec. 61; Northampton's Case, 12 Coke 134; Maitland *v.* Goldney, 2 East 426; Davis *v.* Lewis, 7 T. R. 17, 4 Rev. Rep. 373. See also Kelley *v.* Dillon, 5 Ind. 426; Skinner *v.* Grant, 12 Vt. 456.

79. *Indiana.*— Funk *v.* Beverly, 112 Ind. 190, 13 N. E. 573; Cates *v.* Kellogg, 9 Ind. 506; Jones *v.* Chapman, 5 Blackf. 88; Whittam *v.* Young, 1 Blackf. 299.

Kentucky.— Evans *v.* Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Louisiana.— Harris *v.* Minvielle, 48 La. Ann. 908, 19 So. 925.

Michigan.— Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Burt *v.* McBain, 29 Mich. 260, holding that a repetition of slander which shows that it is merely a repetition of the words of another, and which is accompanied by an expression of disbelief in its truth is actionable.

Ohio.— Fowler *v.* Chichester, 26 Ohio St. 9; Haines *v.* Welling, 7 Ohio 253. *Compare* Sexton *v.* Todd, Wright 317.

Pennsylvania.— Smith *v.* Stewart, 5 Pa. St. 372.

Tennessee.— Larkins *v.* Tarter, 3 Sneed 681.

England.— Lewis *v.* Walter, 4 B. & Ald. 605, 23 Rev. Rep. 415, 6 E. C. L. 620; McPherson *v.* Daniels, 10 B. & C. 263, 8 L. J. K. B. O. S. 14, 5 M. & R. 251, 21 E. C. L. 117 (holding that to be a defense it must be shown that defendant repeated the story on a justifiable occasion and in the *bona fide* belief in its truth); Bennett *v.* Bennett, 6 C. & P. 588, 25 E. C. L. 589.

See 32 Cent. Dig. tit. "Libel and Slander," § 104.

Repetition accompanied by expression of disbelief in its truth.— This rule has been applied, although the repetition was accompanied by an expression of disbelief in its truth. Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645; Burt *v.* McBain, 29 Mich. 260.

Repetition as a mitigating circumstance see *infra*, VII, B, 8.

Mere fact of repetition as defense see *infra*, VII, A, 1, d.

80. *Illinois.*— Cummerford *v.* McAvoy, 15 Ill. 311.

Louisiana.— Harry *v.* Constantin, 14 La. Ann. 782.

Maine.— Haynes *v.* Leland, 29 Me. 233.

Mississippi.— Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514. See also Scott *v.* Peebles, 2 Sm. & M. 546.

Missouri.— Church *v.* Bridgman, 6 Mo. 190.

New York.— Dole *v.* Lyon, 10 Johns. 447, 6 Am. Dec. 346.

North Carolina.— Johnston *v.* Lance, 29 N. C. 448; Hampton *v.* Wilson, 15 N. C. 468.

South Carolina.— Miller *v.* Kerr, 2 McCord 285, 13 Am. Dec. 722.

See 32 Cent. Dig. tit. "Libel and Slander," § 104.

81. *Colorado.*— Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485.

Illinois.— Wheeler *v.* Shields, 3 Ill. 348.

Indiana.— Kelley *v.* Dillon, 5 Ind. 426.

Kentucky.— Smalley *v.* Anderson, 4 T. B. Mon. 367.

Massachusetts.— Kenney *v.* McLaughlin, 5 Gray 3, 66 Am. Dec. 345.

Missouri.— Johnson *v.* St. Louis Dispatch Co., 65 Mo. 539, 27 Am. Dec. 293.

Nebraska.— World Pub. Co. *v.* Mullen, 43 Nebr. 126, 61 N. W. 108, 47 Am. St. Rep. 737; Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857.

New Jersey.— Schenck *v.* Schenck, 20 N. J. L. 208.

New York.— Johnson *v.* Brown, 57 Barb. 118; Gorham *v.* Ives, 2 Wend. 534; Powers *v.* Skinner, 1 Wend. 451.

North Carolina.— Hudnell *v.* Eureka Lum-

IV. PUBLICATION.

A. In General. Since the basis of an action for defamation is damages for the injury to character in the opinion of other men, proof of the publication of the defamatory words is essential to the maintenance of an action for libel or slander.[82]

B. To Whom Publication May Be Made — 1. In General. There must be a communication to some person other than plaintiff and defendant.[83] But it is no

ber Co., 133 N. C. 169, 45 S. E. 532; Hampton *v.* Wilson, 15 N. C. 468.

Pennsylvania.— Smith *v.* Stewart, 5 Pa. St. 372. See also Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

South Carolina.— Finch *v.* Finch, 21 S. C. 342, holding that one may be liable for repeating a slander, although he says at the time that he does not believe it.

Wisconsin.— Sans *v.* Joerris, 14 Wis. 663.

England.— Watkin *v.* Hall, L. R. 3 Q. B. 396, 9 B. & S. 279, 37 L. J. Q. B. 125, 18 L. T. Rep. N. S. 561, 16 Wkly. Rep. 857.

See 32 Cent. Dig. tit. "Libel and Slander," § 105.

Mere existence of rumor as defense see *infra*, VII, A, 1, e.

82. *Alabama.*—Weir *v.* Hoss, 6 Ala. 881.

Kentucky.— McGeever *v.* Kennedy, 42 S. W. 114, 19 Ky. L. Rep. 845.

Massachusetts.— Sheffill *v.* Van Deusen, 13 Gray 304, 74 Am. Dec. 632.

New York.— Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265; Owen *v.* J. S. Ogilvie Pub. Co., 32 N. Y. App. Div. 465, 53 N. Y. Suppl. 1033, 6 N. Y. Annot. Cas. 76; Broderick *v.* James, 3 Daly 481; Lyle *v.* Clason, 1 Cai. 581.

Virginia.— Sun Life Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 106–108.

Delivering sealed letter.— The delivery to the addressee of a sealed letter at the request of a postmaster, without knowledge of its contents, does not constitute a publication of the libel as against the person so delivering it; but it is otherwise, if he knew its contents before delivery. Layton *v.* Harris, 3 Harr. (Del.) 406.

Pleading publication see *infra*, VIII, E, 1, i.

Burden of proof as to publication see *infra*, VIII, F, 1, b.

Evidence admissible to show publication see *infra*, VIII, F, 2, e.

Sufficiency of evidence of publication see *infra*, VIII, F, 3, b.

Publication of criminal libel or slander see *infra*, X, B.

83. *California.*— Sester *v.* Montgomery, 78 Cal. 486, 21 Pac. 185, 12 Am. St. Rep. 76, 3 L. R. A. 653.

Colorado.— Willard *v.* Mellor, 19 Colo. 534, 36 Pac. 148.

Illinois.— Frank *v.* Kaminsky, 109 Ill. 26; Heller *v.* Howard, 11 Ill. App. 554.

Indiana.— Spaits *v.* Poundstone, 87 Ind. 522, 44 Am. Rep. 773; Luick *v.* Driscoll, 13 Ind. App. 279, 41 N. E. 463, 55 Am. St. Rep. 224.

Iowa.— Yousling *v.* Dare, 122 Iowa 539, 98 N. W. 371; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; Desmond *v.* Brown, 33 Iowa 13.

Kentucky.— McIntosh *v.* Matherly, 9 B. Mon. 119.

Maryland.— Gambrill *v.* Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

Massachusetts.— Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316; Comerford *v.* West End St. R. Co., 164 Mass. 13, 41 N. E. 59; Sheffill *v.* Van Deusen, 13 Gray 304, 74 Am. Dec. 632.

Nebraska.— Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158.

New York.— Broderick *v.* James, 3 Daly 481; Galligan *v.* Kelly, 31 N. Y. Suppl. 561; Lyle *v.* Clason, 1 Cai. 581.

Ohio.— Steele *v.* Edwards, 15 Ohio Cir. Ct. 52, 8 Ohio Cir. Dec. 161.

South Carolina.— Fonville *v.* McNease, Dudley 303, 31 Am. Dec. 556.

Tennessee.— Sylvis *v.* Miller, 96 Tenn. 94, 33 S. W. 921; Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568.

Vermont.— Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

Virginia.— Sun Life Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

United States.— O'Donnell *v.* Nee, 86 Fed. 96; Warnock *v.* Mitchell, 43 Fed. 428.

England.— Robinson *v.* Jones, L. R. 4 Ir. 391; Delacroix *v.* Thevenot, 2 Stark. 63, 3 E. C. L. 317; Clutterbuck *v.* Chaffers, 1 Stark. 471, 2 E. C. L. 181. See also Phillips *v.* Jansen, 2 Esp. 624.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 106–108.

Publication defined.— Publication is the communication of defamatory matter to a third person. Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263 [*quoted* in Gambrill *v.* Schooley, 93 Md. 48, 59, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87].

Publication of writing defined.—Publication of a defamatory writing is the making it known, after it has been written, to some person other than him of whom it is written. Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263 [*quoted* in Gambrill *v.* Schooley, 93 Md. 48, 60, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87].

defense to an action for slander that the words were spoken to and not of plaintiff, when others were present and heard the words spoken.[84]

2. PUBLICATION TO PLAINTIFF'S FAMILY. Defendant's liability is not qualified by the fact that the defamatory words were communicated to members of plaintiff's family only, since as much protection is due a man's reputation in the presence of his family as in the presence of strangers.[85] Thus a publication to the husband or wife of plaintiff is a publication within the contemplation of law.[86]

3. PUBLICATION TO WIFE OF DEFENDANT. On the principle that husband and wife are one person in law the rule has been stated that a communication of defamatory matter by defendant to his wife in confidence is not a publication.[87]

4. OFFICIAL COMMUNICATIONS. The delivery of a libel by one officer of the government to another for no public or official purpose is a publication.[88] But it has been held that neither the sending of an official communication relating to public business nor retaining a copy thereof amounts to a publication within the meaning of that term as used in the law of libel.[89]

C. Extent of Publication. To constitute a publication it is not necessary that the contents of the written or spoken communication should be made known to the public generally. It is enough if they are made known to a single person.[90]

D. Defamatory Matter Not Understood by Hearers or Readers. It must be shown that the libelous or slanderous matter was communicated to some third person who understood it since otherwise there is no publication.[91] Thus if words were spoken in a foreign language, which no one present understood, no

The word "published" imports the communication of the defamatory writing to some third person or persons. McLaughlin *v.* Schnellbacher, 65 Ill. App. 50, 55 [*citing* Burton *v.* Burton, 3 Greene (Iowa) 316; Watts *v.* Greenlee, 13 N. C. 115; Duel *v.* Agan, 1 Code Rep. (N. Y.) 134].

Publication to neighbors in defendant's home.— It is no defense to an action of slander that the slanderous words were spoken at defendant's fireside in the presence of but two other neighbors. Shaw *v.* Sweeney, 2 Greene (Iowa) 587.

84. Pavlovski *v.* Thornton, 89 Ga. 829, 15 S. E. 822; Hammond *v.* Stewart, 72 Ill. App. 512.

Publication under statute making insulting words actionable.— Under a statute making actionable words which are "in common acceptation considered as insults and lead to violence and breach of the peace" it is not necessary that the words should be spoken in the presence of plaintiff. Scott *v.* Peebles, 2 Sm. & M. (Miss.) 546.

85. Miller *v.* Johnson, 79 Ill. 58; Hammond *v.* Stewart, 72 Ill. App. 512. See also Sullivan *v.* Sullivan, 48 Ill. App. 435.

86. Luick *v.* Driscoll, 13 Ind. App. 279, 41 N. E. 463, 55 Am. St. Rep. 224; Schenck *v.* Schenck, 20 N. J. L. 208; Wenman *v.* Ash, 13 C. B. 836, 1 C. L. R. 592, 17 Jur. 579, 22 L. J. C. P. 190, 1 Wkly. Rep. 452, 76 E. C. L. 835. See also Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

87. Sesler *v.* Montgomery, 78 Cal. 486, 21 Pac. 185, 12 Am. St. Rep. 76, 3 L. R. A. 653 [*reversing* (1888) 19 Pac. 686]; Wennhak *v.* Morgan, 20 Q. B. D. 635, 52 J. P. 470, 57 L. J. Q. B. 241, 59 L. T. Rep. N. S. 28, 36 Wkly. Rep. 697. *Compare* Trumbull *v.* Gibbons, 3 City Hall Rec. (N. Y.) 97.

In North Carolina it has been held that in an indictment under the code for slandering an innocent woman, words spoken by the husband in the presence of the wife were published where it appeared that they were not of a gentle and confidential character, but were spoken in a loud tone which could have been heard a long way off, and besides it appeared from the testimony that a negro woman was near, and one of the witnesses was in hearing, although he testified that the language used by defendant was different from that charged by the prosecutrix. State *v.* Shoemaker, 101 N. C. 690, 8 S. E. 332.

88. Wyatt *v.* Gore, Holt N. P. 299, 3 E. C. L. 124.

89. Gardner *v.* Anderson, 9 Fed. Cas. No. 5,220.

Privileged communications between public officials see *infra*, VI, C, 2.

90. Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455. See also McLaughlin *v.* Schnellbacher, 65 Ill. App. 50; Luick *v.* Driscoll, 13 Ind. App. 279, 41 N. E. 463, 55 Am. St. Rep. 224; Shaw *v.* Sweeney, 2 Greene (Iowa) 587; Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544 (holding that a circulation in any county of a periodical in which there is a libelous publication is sufficient to sustain an action for libel in such county); Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

91. Sullivan *v.* Sullivan, 48 Ill. App. 435 (where the words spoken in the presence of the three young children of plaintiff were held not to be sufficiently published to sustain an action therefor); Desmond *v.* Brown, 33 Iowa 13; Sheffill *v.* Van Dusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632; Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12. *Compare* Hammond *v.* Stewart, 72 Ill. App. 512.

action will lie therefor.[92] So in order to prove the publication of a letter written in a foreign language, it must be shown that it was read by some one other than plaintiff, who understood that language.[93] On the other hand it has been held that the presumption is that an article in the Dutch language printed in a local Dutch newspaper of large circulation in this country is understood by its readers without an English translation.[94]

E. Modes of Publishing Libel — 1. In General. Merely to compose or write a libel is not a publication.[95] If a libel was not intended for publication and copies were taken without the consent of defendant, there is no publication by defendant.[96] So it has been intimated that if the person who writes a libel shuts it up in his desk and a thief steals it, that cannot be said to be a publication of it.[97] But an actionable publication may be made as well by composing or writing a libel, that it may be published, if publication follow, as by circulating it afterward, and if a person having written libelous matter publishes it or causes it to be published by another, an action for libel will lie against him.[98]

2. By Letter — a. In General. The writing of a libelous letter against one person and placing it in the post-office directed to another person who receives and reads it is a publication of the libel;[99] but the publication is not complete

92. Sheffill *v.* Van Deusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632 [*citing* Edwards *v.* Wooten, 12 Coke 35; Phillips *v.* Jansen, 2 Esp. 624; Wheeler *v.* Appleton, Godb. 339; Hickes's Case, Poph. 139]; Broderick *v.* James, 3 Daly (N. Y.) 481; Wormouth *v.* Cramer, 3 Wend. (N. Y.) 394; Zeig *v.* Ort, 3 Pinn. (Wis.) 30. See also Hurtert *v.* Weines, 27 Iowa 134; Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751.

The presumption in an action for slander is that the words were spoken in the English language. Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262. See also Bechtell *v.* Shatler, Wright (Ohio) 107, holding that after verdict it will be intended that words spoken in a discourse with divers peoples, concerning another, with a malicious intent, were uttered in a language understood by those addressed.

Pleading words spoken in foreign language see *infra*, VIII, E, 1, j (III).

93. Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; Kiene *v.* Ruff, 1 Iowa 482.

94. Steketee *v.* Kimm, 48 Mich. 322, 12 N. W. 177. See also Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235. *Compare* Simonsen *v.* Herold Co., 61 Wis. 626, 21 N. W. 799.

95. Weir *v.* Hoss, 6 Ala. 881; Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265; Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12.

Libelous matter not kept within exclusive possession of defendant. — In Beardsley *v.* Tappen, 2 Fed. Cas. No. 1,188*a*, it was held that in an action against the manager of a mercantile agency for libel in making a false report of plaintiff's business standing, publication of the libel is sufficiently shown by proof that the books in which it is contained were not in defendant's exclusive possession, but that others in his office had access thereto and that they and a merchant in the city heard or read the alleged slander.

96. Weir *v.* Hoss, 6 Ala. 881.

97. Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263.

98. Hazy *v.* Woitke, 23 Colo. 556, 48 Pac. 1048 (holding that it is not necessary that defendant's communication be inserted verbatim so long as the substance of it appears in print); Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. (Del.) 181; Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502 [*reversing* 25 N. Y. App. Div. 438, 49 N. Y. Suppl. 627] (holding that where one furnishes facts for publication, knowing or having reasonable cause to believe that they are to be used for the purpose, he is just as liable as the actual publisher); Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819 (holding that signing a libelous paper when it is being carried around to procure signatures and delivering it when signed to the carrier or another person, without knowing that it would afterward be printed, is itself a publication of the libelous matter by the party signing it).

Where publisher rewrites libelous article. — In Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235, it was held that where defendant wrote an article to a newspaper which rewrote and changed it before it was published it was not sufficient to show that defendant participated in the publication of the article but that it must be shown that he participated in the publication of the libelous matter. But where a libel is sent to a newspaper and the editor strikes out the most libelous part and publishes the remainder, the writer is liable for the part published. Darby *v.* Ousley, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227, 4 Wkly. Rep. 463.

Persons liable for publication see *infra*, VIII, A, 5.

99. Young *v.* Clegg, 93 Ind. 371. See also Owen *v.* J. S. Ogilvie Pub. Co., 32 N. Y. App. Div. 465, 53 N. Y. Suppl. 1033.

Letter addressed jointly to plaintiff and plaintiff's employer. — In Schmuck *v.* Hill, 2

until it is received and read by some third person.[1] Sending a sealed libelous letter through the mail to the person libeled,[2] with no reason to suppose that it will be opened and read by any one else before he has received and read it is not a publication which will support a civil action for libel.[3] But the rule is to the contrary where defendant believed or had good reason to believe that the letter might be read by a third person.[4] Thus sending an unsealed letter by a messenger who reads it,[5] or sending a letter to a person, who because of inability to read is obliged to procure another to read it,[6] constitutes a publication. So too sending a letter to one whose clerk is in the known habit of opening his letters,

Nebr. (Unoff.) 79, 96 N. W. 158, it was held that where a libelous letter concerning plaintiff was sent by mail addressed to plaintiff's employer and plaintiff jointly, and delivered at the employer's shop where it was found by plaintiff and turned over unopened to her employer who read it, this was a sufficient publication.

Letter sent to third person by mistake.— In Fox *v.* Broderick, 14 Ir. C. L. 453, it was held that a letter sent by mistake to the employer of plaintiff instead of to plaintiff is actionable and it is no defense that the publication was by mistake.

If any third person read or heard a libelous letter read there would be a publication of it, and this whether such third person obtained knowledge of its contents by design or through inadvertence. McLaughlin *v.* Schnellbacher, 65 Ill. App. 50. The depositing of a letter in the post-office would be a publication of it, although it never came into the hands of him for whom it was intended, if it came to those of any one else, because a wrong-doer is answerable for all the consequences of his act. Callan *v.* Gaylord, 3 Watts (Pa.) 321.

Joint publication.— Where one of defendants proposed to the other to write the libel, and one wrote the letter with the other assisting in its composition, this was considered a sufficient publication by both. Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768.

1. McCarlie *v.* Atkinson, 77 Miss. 594, 27 So. 641, 78 Am. St. Rep. 540; Alabama, etc., R. Co. *v.* Brooks, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528. See also Shipley *v.* Todhunter, 7 C. & P. 680, 32 E. C. L. 819; Warren *v.* Warren, 1 C. M. & R. 250, 3 L. J. Exch. 294, 4 Tyrw. 850.

2. *Indiana.*— Spaits *v.* Poundstone, 87 Ind. 522, 44 Am. Rep. 773.

Kentucky.— McIntosh *v.* Matherly, 9 B. Mon. 119.

Massachusetts.— Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316.

New York.— Lyle *v.* Clason, 1 Cai. 581.

Tennessee.— Sylvis *v.* Miller, 96 Tenn. 94, 33 S. W. 921.

Vermont.— Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

United States.— Warnock *v.* Mitchell, 43 Fed. 428.

England.— Barrow *v.* Sewellin, Hob. 86.

See 32 Cent. Dig. tit. "Libel and Slander," § 108.

Compare Houston *v.* Woolley, 37 Mo. App. 15 (holding that the writing and sending a libelous writing to the libeled is a publication under statute); Peters *v.* Tardivel, 15 Quebec Super. Ct. 401 (a letter sent to the person defamed). See also *supra*, IV, B, 1, text and note 83.

Sealed letter delivered to plaintiff by third person. — Throwing a sealed letter, unaddressed to plaintiff or a third person, into the inclosure of another, who delivers it to plaintiff himself, is not a publication. Fonville *v.* McNease, Dudley (S. C.) 303, 31 Am. Dec. 556.

If a man writes and delivers in person a libelous letter to the party defamed, it is no publication. Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

Rule in criminal prosecutions see Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316. And see *infra*, X, B.

3. Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316; Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

4. Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316.

Libelous matter printed on envelope.— Where an envelope sent through the mails had the clause "for collecting bad debts" printed on it, it was held that this was a sufficient publication. Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

5. See Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760; Rolland *v.* Batchelder, 84 Va. 664, 5 S. E. 695.

Unsealed letter not shown to be read by third person.—A writing in an unsealed envelope to the person who was defamed thereby is not a publication of the writing in the absence of a showing that its contents were communicated to some third person or persons. Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568; Clutterbuck *v.* Chaffers, 1 Stark. 471, 2 E. C. L. 181.

6. Allen *v.* Wortham, 89 Ky. 485, 487, 13 S. W. 73, 11 Ky. L. Rep. 697, where it is said that "such exposure of the subject-matter of it was the proximate, and, under the existing condition, inevitable consequence of his act of writing and sending." See also Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760, where, however, it was intimated that the illiteracy of plaintiff must be known to defendant.

and who actually reads the letter in question,[7] has been held to constitute a publication within the rule.

b. Sending Letter to Agent. If a person composes a libel and sends it to his agent, to be read by him, and it reaches its destination and is read by such agent, it is a sufficient publication to support an action.[8]

3. By Postal Card. It has been held that the transmission through the mails of an uncovered postal card containing matter libelous of the person to whom it is addressed is an actionable publication.[9]

4. By Telegram. The writing of a message and the delivery of it to the telegraph company for transmission to plaintiff is a publication by the writer.[10] So where a libelous message is delivered in writing to one operator of a telegraph company and is by him forwarded over the company's wires to the receiving operator to be by him reduced to writing and delivered to plaintiff, such forwarding constitutes a publication by the company,[11] and the fact that the message was transmitted over the wires by sound does not render the publication oral instead of written.[12]

5. By Dictation to Stenographer. The dictation of libelous matter by defendant to his stenographer by whom a typewritten copy is made and transmitted to plaintiff after being signed by defendant is in law a publication of the libel,

7. Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316; Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032 (where, however, it did not appear that the authority of the clerk to open plaintiff's letters was known to defendant); Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263 (where a letter addressed to a firm was read by its clerks); Delacroix v. Thevenot, 2 Stark. 63, 3 E. C. L. 317. See also Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760.

8. Bacon *v.* Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; Ward *v.* Smith, 6 Bing. 749, 19 E. C. L. 335, 4 C. & P. 302, 19 E. C. L. 525, 8 L. J. C. P. O. S. 294, 4 M. & P. 595.

9. Spence *v.* Burt, 18 Lanc. L. Rev. (Pa.) 251; Sadgrove *v.* Hole, [1901] 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. Rep. N. S. 647, 49 Wkly. Rep. 473 (holding that where libelous matter on a postal card does not on its face refer to plaintiff so as to raise an implication that any person reading it would understand it to refer to plaintiff, it will not be presumed that it was read by someone who did understand the libelous matter to refer to him, but that if the matter on its face clearly applied to plaintiff the mailing of the card would constitute a publication); Robinson *v.* Jones, L. R. 4 Ir. 391. *Compare* Steele *v.* Edwards, 15 Ohio Cir. Ct. 52, 8 Ohio Cir. Dec. 161 (holding that the mailing of a postal card is not *ipso facto* a publication to the postal authorities or to any other person without proof that the defamatory matter was actually read by some third person); McCann *v.* Edinburgh Roperie Co., L. R. 28 Ir. 24.

10. Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54. See also Williamson *v.* Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. Rep. N. S. 332, 22 Wkly. Rep. 878.

11. Peterson *v.* Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302. See also Whitfield *v.* South Eastern R. Co., E. B. & E. 115, 4 Jur. N. S. 688, 27 L. J. Q. B. 229, 6 Wkly. Rep. 545, 96 E. C. L. 115.

12. Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 44, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661, where it is said: "When the means of reproducing the contents of a writing are by repeating its contents orally to another, to enable him to put it into writing, and the person to whom it is repeated reduces it to writing, the writing thus produced does not depend for its identification on the oral utterances of the person who reads or repeats, but on the writing itself, which is thus communicated to the person who reduces it to writing; and it can make no difference whether the contents of the writing are communicated by sound over telegraph wires by one operator to another or by a person in audible words to an amanuensis at his side. See McCoombs *v.* Tuttle, 5 Blackf. (Ind.) 431; Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455; Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263. As long ago as Lamb's Case, 9 Coke 59*b*, it was held that where one knowing a writing to be a libel 'reads it to others that is an unlawful publication of it;' and in 'The Case De Libellis Famosis,' 5 Coke 124*b*, it was held that a 'libel may be published (1) *verbis aut cantilenis*, as where it is maliciously repeated or sung in the presence of others.' It is not necessary to go as far as this in order to hold that the facts in the present case constituted the publication of a libel." See also Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646.

although there is no communication of the letter by defendant to any other person.[13] On the other hand it has been held that where a manager of a corporation in connection with its business dictated a libelous letter to a stenographer in the corporation's employment, the dictation, copying, and mailing constituted but a single act of the corporation and did not amount to a publication as the acts of both servants were necessary to make the letter complete.[14]

6. Printing. An action to recover damages for libel cannot be maintained upon proof simply that the libelous words were composed and were in existence as printed matter, without being known to any one except the author and the victim.[15] But printing a libel is regarded as a publication when possession of the printed matter is delivered with the expectation that it will be read by some third person, provided that result actually follows.[16]

7. Reading Libel to Third Person. It is a sufficient publication of a libel if defendant reads it in the presence of others.[17] So the repetition to third persons of the contents of a letter to plaintiff is a sufficient publication.[18]

8. Giving Writing to Third Person to Copy. The giving of a libel as writing by defendant to a third person to copy for defendant is a publication.[19]

F. Repetition or Republication. A substantial reiteration of a prior defamatory publication by defendant amounts to a republication for which he will be responsible and this, although a verdict for damages for the prior publication has already been recovered.[20] It has been held, however, that words repeated to persons who have previously heard them from defendant under circumstances making them privileged are not actionable.[21] So the repetition of words in the presence of the slandered only is not actionable.[22]

G. Publication Authorized or Induced by Plaintiff. If plaintiff con-

13. Gambrill *v.* Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87, holding that such publication will support an action for libel or slander at the election of plaintiff. See also Owen *v.* J. S. Ogilvie Pub. Co., 32 N. Y. App. Div. 465, 53 N. Y. Suppl. 1033; Boxisus *v.* Frères, [1894] 1 Q. B. 842, 58 J. P. 670, 63 L. J. Q. B. 401, 70 L. T. Rep. N. S. 368, 9 Reports 224, 42 Wkly. Rep. 392; Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263; Harper *v.* Hamilton Retail Grocers' Assoc., 32 Ont. 295.

14. Owen *v.* J. S. Ogilvie Pub. Co., 32 N. Y. App. Div. 465, 466, 53 N. Y. Suppl. 1033, 6 N. Y. Annot. Cas. 76, where the court said: "They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation." See also Puterbaugh *v.* Gold Medal Co., 5 Ont. L. Rep. 680. *Compare* Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263.

15. Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265; Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12, holding that a proprietor of a newspaper cannot be found to have published a libel unless it is proved to have been read as well as printed and sold.

16. Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265 [*citing* Trumbull *v.* Gibbons, 3 City Hall Rec. (N. Y.) 97; Rex *v.* Burdett, 4 B. & Ald. 95, 6 E. C. L. 404; Rex *v.* Clerk, 1 Barn. 304; Baldwin *v.* Elphinston, 2 W. Bl. 1037].

17. McCoombs *v.* Tuttle, 5 Blackf. (Ind.) 431; Snyder *v.* Andrews, 6 Barb. (N. Y.) 43; Miller *v.* Donovan, 16 Misc. (N. Y.) 453, 39 N. Y. Suppl. 820; Van Cleef *v.* Lawrence, 2 City Hall Rec. (N. Y.) 41; Forrester *v.* Tyrrell, 57 J. P. 532.

Publication by singing see Johnson *v.* Hudson, 7 A. & E. 233 note, 1 Harr. & W. 680, 5 L. J. K. B. 95, 34 E. C. L. 139.

18. Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455.

19. Kiene *v.* Ruff, 1 Iowa 482. See also Adams *v.* Lawson, 17 Gratt. (Va.) 250, 94 Am. Dec. 455, where defendant adopted and signed what a third person wrote at his request and kept a copy.

20. Sharpe *v.* Larson, 70 Minn. 209, 72 N. W. 961.

Every sale of a copy of a libel is a fresh publication for which a civil action lies against the seller. Staub *v.* Van Benthuysen, 36 La. Ann. 467. See also Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144, opinion of the court by Holmes, J.

Liability for repetition by others see *infra*, VIII, A, 5, f.

21. Broughton *v.* McGraw, 39 Fed. 672, 5 L. R. A. 406. But see Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 141.

22. Irish-American Bank *v.* Bader, 59 Minn. 329, 61 N. W. 328, where slanderous words spoken of a bank were repeated in the presence of its cashier.

sented to or authorized the publication complained of, he cannot recover for any injury sustained by reason of the publication;[23] and the same rule applies to a publication solicited or induced by inquiry on the part of plaintiff or his agent,[24] at least if it was procured by the fraudulent contrivance of plaintiff himself, with a view to an action.[25] So the repetition in the presence of a third person and at the special request or instance of plaintiff or his agent of words originally spoken by defendant in the presence of plaintiff only is not an actionable publication.[26] So the repetition by defendant of slanderous words, spoken by another at the request of plaintiff, will not sustain an action.[27] But it has been held that while a mere acknowledgment to plaintiff in the presence of a third person of having spoken slanderous words to other third persons is not the foundation of an action,[28] yet where a person originates a slander and afterward repeats it in answer to a question by the person slandered in the presence of a third person brought by him for the purpose of hearing the answer, the repetition is actionable.[29]

V. INTENT AND MALICE.

A. Intent in General. The publication of defamatory matter actionable *per se* entitles the party defamed to compensation for the actual injury done him without regard to the motive with which the publication was made; want of actual intent to injure furnishes no legal excuse.[30] Thus it is held to be no defense that the words were spoken in jest or merriment,[31] that defendant was drunk when he

23. Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502 [*reversing* 25 N. Y. App. Div. 433, 49 N. Y. Suppl. 627].

24. Kansas City, etc., R. Co. *v.* Delaney, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600.

Privileged character of communication see *infra*, VI, C. 10.

25. Sutton *v.* Smith, 13 Mo. 120; White *v.* Newcomb, 25 N. Y. App. Div. 397, 49 N. Y. Suppl. 704; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633. See also Jones *v.* Chapman, 5 Blackf. (Ind.) 88; Smith *v.* Wood, 3 Camph. 323, 14 Rev. Rep. 752; King *v.* Waring, 5 Esp. 13. *Compare* Brunswick *v.* Harmer, 14 Q. B. 185, 14 Jur. 110, 19 L. J. Q. B. 20, 68 E. C. L. 185.

26. Heller *v.* Howard, 11 Ill. App. 554; Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; O'Donnell *v.* Nee, 86 Fed. 96.

27. Haynes *v.* Leland, 29 Me. 233.

28. Griffiths *v.* Lewis, 7 Q. B. 61, 9 Jur. 370, 14 L. J. Q. B. 197, 53 E. C. L. 60.

29. Griffiths *v.* Lewis, 7 Q. B. 61, 9 Jur. 370, 14 L. J. Q. B. 197, 53 E. C. L. 60. Where plaintiff inquired of defendant if he had accused her of using false weights in her trade, and defendant, in the presence of a third person, answered, "To be sure I did. You have done it for years." See also Watson *v.* Nicholas, 6 Humphr. (Tenn.) 174; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633. *Compare* Irish-American Bank *v.* Bader, 59 Minn. 329, 61 N. W. 328; Patterson *v.* Frazer, (Tex. Civ. App. 1904) 79 S. W. 1077.

30. *Connecticut.*— Hotchkiss *v.* Porter, 30 Conn. 414.

Illinois.— Hatch *v.* Potter, 7 Ill. 725, 43 Am. Dec. 88. *Compare* McKee *v.* Ingalls, 5 Ill. 30.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Short *v.* Acton, 33 Ind. App. 361, 71 N. E. 505.

Kentucky.— Nicholson *v.* Merritt, 67 S. W. 51, 23 Ky. L. Rep. 2281.

Massachusetts.— Curtis *v.* Mussey, 6 Gray 261.

Minnesota.— Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512; Shull *v.* Raymond, 23 Minn. 66.

Mississippi.— Furr *v.* Speed, 74 Miss. 423, 21 So. 562; Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389, holding that the injury is the same whether the article is the result of malice, or of carelessness and negligence.

Nebraska.— Whiting *v.* Carpenter, 4 Nebr. (Unoff.) 342, 93 N. W. 926.

New York.— Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. 409, 49 Am. St. Rep. 646; Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214 (where it is said that "it is not a legal excuse that defamatory matter was published accidentally or inadvertently, or with good motives, and in an honest belief in its truth"); Littlejohn *v.* Greeley, 13 Abb. Pr. 41.

Tennessee.— Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

Texas.— Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

Wisconsin.— Hamlin *v.* Fantl, 118 Wis. 594, 95 N. W. 955.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 109, 110. See also *infra*, VII, A, 1, b, text and note 28 *et seq.*

Compare Studdard *v.* Linville, 10 N. C. 474.

31. Hatch *v.* Potter, 7 Ill. 725, 43 Am. Dec. 88; Long *v.* Eakle, 4 Md. 454; Triggs *v.* Sun Printing, etc., Assoc., 179 N. Y. 144, 71 N. E.

uttered the slander,[32] or that the publication was the result of an honest mistake,[33] as for instance the publisher's ignorance that the publication contained libelous matter.[34]

B. Malice. There has been much confusion regarding the use and meaning of the word "malice" in the law of libel and slander. The different views, while the cause of much controversy and misunderstanding, do not in fact create divergence in the substantive law of defamation, as their ultimate effect is identical.[35] The rule as stated in some of the authorities is that malice is not a necessary ingredient of a cause of action for libel or slander, and that if the publication is defamatory, and is not privileged or justifiable, actual or compensatory damages are recoverable irrespective of the question of malice.[36] On the other hand malice has been divided into two distinct classes, to wit, malice in law and malice in fact.[37] In the decisions in which these two classes of malice are recognized the rule is laid down that while malice is an essential ingredient of libel or slander or,

739, 103 Am. St. Rep. 841, 66 L. R. A. 612 [*reversing* 91 N. Y. App. Div. 259, 86 N. Y. Suppl. 486]. *Compare* McKee *v.* Ingalls, 5 Ill. 30.

32. McKee *v.* Ingalls, 5 Ill. 30; Reed *v.* Harper, 25 Iowa 87, 95 Am. Dec. 774; Williams *v.* McManus, 38 La. Ann. 161, 58 Am. Rep. 171.

33. Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 565; Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165; McClean *v.* New York Press Co., 19 N. Y. Suppl. 262; Littlejohn *v.* Greeley, 13 Abb. Pr. (N. Y.) 41.

A printer's mistake without wrongful intent in printing an article written by plaintiff as a gratuitous puff of himself, and published at his request, cannot be made the basis of an action for libel. Sullings *v.* Shakespeare, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166.

34. Curtis *v.* Mussey, 6 Gray (Mass.) 261. *Compare* Smith *v.* Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216.

35. See Prince *v.* Brooklyn Daily Eagle, 16 Misc. (N. Y.) 186, 37 N. Y. Suppl. 250.

36. *Indiana.*— Wabash Printing, etc., Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904.

Michigan.— Smurthwaite *v.* News Pub. Co., 124 Mich. 377, 83 N. W. 116; Austin *v.* Hyndman, 119 Mich. 615, 78 N. W. 663.

Minnesota.— Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New York.— Cady *v.* Brooklyn Union Pub. Co., 23 Misc. 409, 51 N. Y. Suppl. 198; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788; Prince *v.* Brooklyn Daily Eagle, 16 Misc. 186, 37 N. Y. Suppl. 250.

Texas.— Brown *v.* Durham, (Civ. App. 1897) 42 S. W. 331.

Wisconsin.— Wilson *v.* Noonan, 35 Wis. 321.

England.— See Abrath *v.* North Eastern R. Co., 11 App. Cas. 247, 253, 50 J. P. 659, 55 L. J. Q. B. 457, 55 L. T. Rep. N. S. 63, where it is said: "That unfortunate word 'malice' has got into cases . . . for libel. We all know that a man may be the publisher of a libel without a particle of malice or improper motive. Therefore the case is not the same as where actual and real malice is necessary. Take the case where a person may make an untrue statement of a man in writing, not privileged on account of the occasion of its publication; he would be liable although he had not a particle of malice against the man."

See 32 Cent. Dig. tit. "Libel and Slander," § 111.

37. Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Jellison *v.* Goodwin, 43 Me. 287, 69 Am. Dec. 62; Liles *v.* Gaster, 42 Ohio St. 631.

Malice in law is implied malice and arises by operation of law when a publication is made without lawful excuse.

California.— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Iowa.— Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867.

Louisiana.— Staub *v.* Van Benthuysen, 36 La. Ann. 467.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Michigan.— Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910.

New Jersey.— King *v.* Patterson, 49 N. J. L. 417, 419, 9 Atl. 705, 60 Am. Rep. 622 [*citing* Cooley Torts 209]; where it is said: "In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally, without just cause or excuse."

United States.— Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.

See 32 Cent. Dig. tit. "Libel and Slander," § 111.

Actual malice or malice in fact has been said to mean "personal hatred or ill will towards the plaintiff, or wanton disregard of the civil obligations of the defendants toward the plaintiff." Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576. See also Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Lick *v.* Owen, 47 Cal. 252; Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Gray *v.* Henry County, (Tex. Civ. App. 1897) 42 S. W. 333;

as it is sometimes expressed, is the gist of the action therefor,[38] yet the law presumes or implies malice from the publication of words actionable *per se*, whether written or oral, and no actual malice is essential to recovery.[39] Indeed if the publication is not justified by proof of its truth or by the privileged occasion of publication

Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115.

The distinction between malice in fact in actions for slander and malice in law is that the first implies a desire and intention to injure while the second may exist in connection with an honest and laudable purpose. Jellison *v.* Goodwin, 43 Me. 287, 69 Am. Dec. 62.

Evidence to show actual malice see *infra*, VII, F, 2, c.

38. *California.*— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Georgia.— State Mut. L., etc., Assoc. *v.* Baldwin, 116 Ga. 855, 43 S. E. 262.

Illinois.— McKee *v.* Ingalls, 5 Ill. 30, 33, where it is said: "Malice is the gist of this action."

Kentucky.— Williams *v.* Gordon, 11 Bush 693.

Missouri.— Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

New Jersey.— King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

Virginia.— Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803, holding that in actions for slander under a statute making actionable insulting words, malice is as essential as at common law.

See 32 Cent. Dig. tit. "Libel and Slander," § 111.

39. *Alabama.*— Shelton *v.* Simmons, 12 Ala. 466.

California.— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Lick *v.* Owen, 47 Cal. 252.

Colorado.— Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

Delaware.— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337; Cameron *v.* Cockran, 2 Marv. 166, 42 Atl. 454; Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88; Croasdale *v.* Bright, 6 Houst. 52; Layton *v.* Harris, 3 Harr. 406; Kinney *v.* Hosea, 3 Harr. 397; Parke *v.* Blackiston, 3 Harr. 373.

Georgia.— Holmes *v.* Clishy, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103; Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; Shipp *v.* Story, 68 Ga. 47; Ransone *v.* Christian, 56 Ga. 351.

Illinois.— Mitchell *v.* Milholland, 103 Ill. 175; Zuckerman *v.* Sonnenschein, 62 Ill. 115; Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252; Gilmer *v.* Eubank, 13 Ill. 271; McKee *v.* Ingalls, 5 Ill. 30; Gaines *v.* Gaines, 109 Ill. App. 226; Schofield *v.* Baldwin, 102 Ill. App. 560; Tottleben *v.* Blankenship, 58 Ill. App. 47; Colby *v.* McGee, 48 Ill. App. 294.

Indiana.— Hauger *v.* Benua, 153 Ind. 642, 53 N. E. 942; Gaul *v.* Fleming, 10 Ind. 253; Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Yeates *v.* Reed, 4 Blackf. 463, 32 Am. Dec. 43; Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928; Parker *v.* Lewis, 2 Greene 311.

Kansas.— Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914; Williams *v.* Gordon, 11 Bush 693; Trabue *v.* Mays, 3 Dana 138, 28 Am. Dec. 61; John Brenner Brewing Co. *v.* McGill, 62 S. W. 722, 23 Ky. L. Rep. 212; Nicholson *v.* Dunn, 52 S. W. 935, 21 Ky. L. Rep. 643; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645; Jones *v.* Todd, 51 S. W. 452, 21 Ky. L. Rep. 382.

Louisiana.— Covington *v.* Roberson, 111 La. 326, 35 So. 586; McClure *v.* McMartin, 104 La. 496, 29 So. 227; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885; Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173; Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Savoie *v.* Scanlan, 43 La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Williams *v.* McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Staub *v.* Van Benthuysen, 36 La. Ann. 467; Kernan *v.* Chamberlin, 5 Rob. 116; Boullemet *v.* Philips, 2 Rob. 365; Chauchoix *v.* Dupuy, 3 La. 206. See also Gilbert *v.* Palmer, 8 La. Ann. 130.

Maine.— Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; Jellison *v.* Goodwin, 43 Me. 287, 69 Am. Dec. 62; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

Maryland.— Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715; Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.— Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359; Curtis *v.* Mussey, 6 Gray 261.

Michigan.— Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504; Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910; Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Whittemore *v.* Weiss, 33 Mich. 348; Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

Minnesota.— Simmons *v.* Holster, 13 Minn. 249.

Mississippi.— Furr *v.* Speed, 74 Miss. 423, 21 So. 562; Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514; Binns *v.* Stokes, 27 Miss. 239.

Missouri.— Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863; Browning *v.* Powers, (1897) 38 S. W. 943; Barbee *v.* Hereford, 48 Mo. 323; Buckley *v.* Knapp, 48 Mo. 152;

the law conclusively presumes malice such as is essential to the action.[40] Malice in fact is, as a general rule, material only as establishing a right to recover exemplary damages,[41] or to defeat defendant's plea that the publication is privileged.[42] So it has been intimated that where a publication which is actionable only on averment and proof of special damages, if it is not justified by proof of its truth only by the privileged occasion of justification, the law conclusively presumes malice such as is essential to the action.[43] On the other hand the rule has been

Pennington *v.* Meeks, 46 Mo. 217; Weaver *v.* Hendrick, 30 Mo. 502; Hudson *v.* Garner, 22 Mo. 423; Estes *v.* Antrobus, 1 Mo. 197, 13 Am. Dec. 496; Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 565; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453; Fish *v.* St. Louis County Printing, etc., Co., 102 Mo. App. 6, 74 S. W. 641.

Nebraska.— Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Nebr. 64, 60 N. W. 358; Mertens *v.* Bee Pub. Co., 5 Nebr. (Unoff.) 592, 99 N. W. 847.

New Hampshire.—Mason *v.* Mason, 4 N. H. 110.

New Jersey.—King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129 [*reversing* 39 Hun 204]; Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360; Howard *v.* Sexton, 4 N. Y. 157; O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 76 N. Y. Suppl. 498; Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Suppl. 50; Schuyler *v.* Busbey, 68 Hun 474, 23 N. Y. Suppl. 102 [*affirmed* in 142 N. Y. 680, 37 N. E. 825]; Harwood *v.* Keech, 4 Hun 389, 6 Thomps. & C. 665; Fry *v.* Bennett, 5 Sandf. 54; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; Fulkerson *v.* George, 3 Abb. Pr. 75; Washburn *v.* Cooke, 3 Den. 110; Root *v.* King, 4 Wend. 113, 7 Cow. 613, 21 Am. Dec. 102.

North Carolina.— Erwin *v.* Sumrow, 8 N. C. 472.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907; Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768.

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Farley *v.* Ranck, 3 Watts & S. 554; Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525; Moore *v.* Leader Pub. Co., 8 Pa. Super. Ct. 152, 42 Wkly. Notes Cas. 570; Stewart *v.* Press Co., 1 Pa. Co. Ct. 247; Stoner *v.* Hoffer, 5 Lanc. L. Rev. 325.

Tennessee.— Mattson *v.* Albert, 97 Tenn. 232, 36 S. W. 1090.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210; Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

Virginia.—Dillard *v.* Collins, 25 Gratt. 343.

Washington.— Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503. See also Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772.

Wisconsin.— Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; Brueshaber *v.* Hertling, 78 Wis. 498, 47 N. W. 725.

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591; Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475; Union Mut. L. Ins. Co. *v.* Thomas, 83 Fed. 803, 28 C. C. A. 96; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

England.— Hooper *v.* Truscott, 2 Bing. N. Cas. 457, 5 L. J. C. P. 177, 2 Scott 672, 29 E. C. L. 616; Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly Rep. 913, 111 E. C. L. 829.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 111, 278.

Express malice, it has been held, is never implied nor presumed but it may be proved either directly or indirectly. Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88. *Compare* Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

40. *California.*— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Georgia.— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655, where it is said: "No amount of evidence going to negative malice will wholly defeat the action under a plea of justification, the words being actionable *per se* and not privileged. Nothing short of proving the truth of the plea will suffice."

Illinois.— Gilmer *v.* Eubank, 13 Ill. 271; Tottleben *v.* Blankenship, 58 Ill. App. 47.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Michigan.— Whitemore *v.* Weiss, 33 Mich. 348.

New Jersey.— King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Fry *v.* Bennett, 5 Sandf. 54.

United States.— Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115.

England.— See Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly Rep. 913, 111 E. C. L. 829.

See 32 Cent. Dig. tit. "Libel and Slander," § 278.

Compare Williams *v.* Gordon, 11 Bush (Ky.) 693.

41. Childres *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. See also *infra*, VIII, G, 3, b.

42. Childres *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40. See also *infra*, VI, F.

43. King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622. *Compare* Cam-

laid down that the cases of constructive malice are exclusively such as involve words capable of bearing in themselves a defamatory meaning, and that when a hidden defamatory meaning is sought to be attributed to words in themselves innocent and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown by averment and proof to have existed in the mind of defendant at the time of publication.[44]

VI. PRIVILEGED COMMUNICATIONS.

A. In General. From motives of public policy the law recognizes certain communications or publications as privileged;[45] that is, communications which under ordinary circumstances would be slanderous or libelous are held to be privileged when spoken or written on or in connection with a lawful occasion.[46] Privileged communications are of two kinds, those absolutely privileged and those qualifiedly privileged. An absolutely privileged communication is one for which an action will not lie, even though the words are published maliciously and with knowledge of their falsity, whereas a qualifiedly privileged communication is one which is *prima facie* privileged only and in which the privilege may be lost by proof of malice in the publication of the libel or slander.[47] The occasion of making a communication qualifiedly privileged rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of

eron *v.* Corkran, 2 Marv. (Del.) 166, 42 Atl. 454.

44. Caldwell *v.* Raymond, 2 Abb. Pr. (N. Y.) 193. See also Smith *v.* Ashley, 11 Metc. (Mass.) 367, 45 Am. Dec. 216; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115.

45. Atlanta News Pub. Co. *v.* Wedlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139.

46. *Georgia.*— Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

Illinois.— Elam *v.* Badger, 23 Ill. 498.

Kentucky.— Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Massachusetts.—Smith *v.* Higgins, 16 Gray 251; Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418.

Minnesota.— Quinn *v.* Scott, 22 Minn. 456.

New York.— Hosmer *v.* Loveland, 19 Barb. 111; Kelly *v.* Taintor, 48 How. Pr. 270.

Texas.—Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Gulf, etc., R. Co. *v.* Floore, (Civ. App. 1897) 42 S. W. 607.

Virginia.—Dillard *v.* Collins, 25 Gratt. 343.

United States.— White *v.* Nichols, 3 How. 266, 11 L. ed. 591.

England.— Munster *v.* Lamb, 11 Q. B. D. 588, 600, 47 J. P. 805, 52 L. J. Q. B. 726, 49 L. T. Rep. N. S. 252, 32 Wkly. Rep. 248, where it is said: "Defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions."

See 32 Cent. Dig. tit. "Libel and Slander," § 113.

Application of doctrine to statutory action for insults.— The ordinary rules to privileged communications apply to actions instituted under statute for insults leading to breaches of peace. Verner *v.* Verner, 64 Miss. 321, 1 So. 479; Strode *v.* Clement, 90 Va. 553, 19 S. E. 177; Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474.

Jurisdiction to entertain communications.— The general rule, however, is subject to this qualification: that in all cases where the object or occasion of the words or writing is redress for an alleged wrong, or a proceeding in a tribunal, or before some individual or associated body of men, such tribunal, individual, or body must be vested with authority to render judgment or make a decision in the case, or to entertain the proceeding, in order to give them the protection of privileged communications. Hosmer *v.* Loveland, 19 Barb. (N. Y.) 111.

47. *Alabama.*— Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49.

Connecticut.—Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

Florida.— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Georgia.—Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139.

Illinois.—Young *v.* Richardson, 4 Ill. App. 364.

Kansas.— Kirkpatrick *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384.

New York.— Hill *v.* Durham House Drainage Co., 79 Hun 335, 29 N. Y. Suppl. 427.

North Carolina.— Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

See 32 Cent. Dig. tit. "Libel and Slander," § 113.

Privileged "occasion" and "communication" distinguished.— "Confusion sometimes arises between an 'occasion' of privilege, and a 'privileged communication.' There may be an occasion of privilege without a privileged communication, but not the latter without the former. This confusion may be

plaintiff and throws upon him the onus of proving malice in fact.[48] Hence the characteristic feature of "absolute" as distinguished from "conditional" privilege is that in the former the question of malice is not open and all inquiry into good faith is closed.[49]

B. Communications Absolutely Privileged[50] — **1. In General.** The doctrine of absolute privilege is founded on the principle that in certain cases it is advantageous for the public interest that persons should not be in any way fettered in their statements and is confined to cases where the public service or the due administration of justice requires that a person shall speak his mind freely.[51]

2. Particular Classes — a. Legislative Proceedings — (I) *Utterances by Members of Legislature.* A member of the legislature is not liable in an action of libel or slander for words published in the discharge of his official duties, even though made maliciously.[52] But this privilege does not extend to words spoken unofficially, although in the legislative hall and while the legislature is in session.[53]

(II) *Memorials and Petitions.* Memorials and petitions to the legislature for the redress of grievances are held to be absolutely privileged when pertinent to the proceedings to which the communications relate.[54] On the other hand it has been held that a communication made by a citizen voluntarily appearing before a legislative committee is not absolutely privileged, although it is qualifiedly privileged if made in good faith and without malice.[55]

b. Judicial Proceedings — (I) *In General.* As a general rule libelous or slanderous matter published in the due course of a judicial proceeding is absolutely privileged and will not support an action for defamation, although made maliciously and with knowledge of its falsity.[56]

avoided by remembering that these phrases are technical terms used in respect to the evidence by which malice in defendant — the real issue of fact — is determined. Where the evidence establishes circumstances which the law says support a duty to make a statement of facts honestly believed to be true, or an honest comment on facts, such circumstances are called an occasion of privilege; and when the evidence goes further, and shows that on such occasion defendant made the communication complained of in good faith with honest intent to perform that duty, it is said the evidence has established a privileged communication. But in all cases the simple question in issue is, Was the damage suffered by plaintiff caused by the malice of defendant?" Atwater *v.* Morning New Co., 67 Conn. 504, 516, 34 Atl. 865.

48. Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; Rothholz *v.* Dunkle, 53 N. J. L. 438, 22 Atl. 193, 26 Am. St. Rep. 432, 13 L. R. A. 655; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622; Lewis *v.* Chapman, 16 N. Y. 369; White *v.* Nicholls, 3 How. (U. S.) 266, 11 L. ed. 591; Wright *v.* Woodgate, 2 C. M. & R. 573, 1 Gale 329, 1 Tyrw. & G. 12.

49. Atlanta News Pub. Co. *v.* Wedlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139; Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274.

50. Communications absolutely privileged defined see *supra*, VI, A, text and note 47.

51. *Connecticut.*— Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

Illinois.— Young *v.* Lindstrom, 115 Ill. App. 239.

New York.— Hastings *v.* Lusk, 22 Wend. 410, 34 Am. Dec. 330.

Tennessee.— Ruohs *v.* Backer, 6 Heisk, 395. 19 Am. Rep. 598.

United States.— Vogel *v.* Gruaz, 110 U. S. 311, 4 S. Ct. 12, 28 L. ed. 158.

52. Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189; McGaw *v* Hamilton, 184 Pa. St. 108, 39 Atl. 4, 63 Am. St. Rep. 786; Dillon *v.* Balfour, L. R. 20 Ir. 600.

53. Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189; McGaw *v.* Hamilton, 184 Pa. St. 108, 39 Atl. 4, 63 Am. St. Rep. 786.

54. Cook *v.* Hill, 3 Sandf. (N. Y.) 341; Harris *v.* Huntington, 2 Tyler (Vt.) 129, 4 Am. Dec. 728 Lake *v.* King, 1 Saund. 131*a*.

Information given to the governor for the purpose of influencing his action on a bill which had passed the legislature is *prima facie* privileged only. Woods *v.* Wiman, 122 N. Y. 445, 25 N. E. 919 [*reversing* 47 Hun 362].

55. Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963. See also Reid *v.* Delorme, 2 Brev. (S. C.) 76.

56. *Alabama.*— Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49.

California.— Hollis *v.* Meux, 69 Cal. 625, 11 Pac. 248, 58 Am. Dec. 574.

Delaware.— Goslin *v.* Cannon, 1 Harr. 3.

Georgia.— Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81.

Illinois.— Burdette *v.* Argile, 94 Ill. App. 171, holding that it is immaterial that the

(II) *Materiality of Communication to Issue.* The authorities in this country, however, have qualified this rule to this extent, that as to parties, counsel, and witnesses the privilege attaches only to such matter as is applicable and pertinent to the subject of the inquiry or relevant to the issue.[57] If the publica-

matter is expressed in words unnecessarily harsh and offensive.

Louisiana. — Wamack *v.* Kemp, 6 Mart. N. S. 477.

Maryland.— Gore *v.* Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382.

Massachusetts.— Hoar *v.* Wood, 3 Metc. 193, 197, where it is said: "Then we take the rule to be well settled by the authorities, that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore if spoken elsewhere, would import malice and be actionable in themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry." See also McLaughlin *v.* Cowley, 127 Mass. 316; Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

Mississippi.—See Sands *v.* Robinson, 12 Sm. & M. 704, 51 Am. Dec. 132.

New York.— Marsh *v.* Ellsworth, 50 N. Y. 309 [*affirming* 2 Sweeny 589]; Garr *v.* Selden, 4 N. Y. 91; Woodman *v.* Kidd, 25 N. Y. App. Div. 254, 49 N. Y. Suppl. 301; Aylesworth *v.* St. John, 25 Hun 156; Cook *v.* Hill, 3 Sandf. 341; Warner *v.* Paine, 2 Sandf. 195; Suydam *v.* Moffat, 1 Sandf. 459; Gilbert *v.* People, 1 Den. 41, 43 Am. Dec. 646.

North Carolina.— Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780.

Ohio.— Wilson *v.* Whitacre, 4 Ohio Cir. Ct. 15, 2 Ohio Cir. Dec. 392 (holding that a communication to the supreme court preferring charges against the character of a person applying for admission to the bar is privileged, for the courts act in a judicial capacity in passing upon an application for admission to the bar); Childs *v.* Voris, 6 Ohio S. & C. Pl. Dec. 75, 4 Ohio N. P. 67.

Tennessee.— Lea *v.* White, 4 Sneed 111.

Vermont.— Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin.— Jennings *v.* Paine, 4 Wis. 358.

England.—Dawkins *v.* Rokeby, L. R. 8 Q. B. 255 [*affirmed* in L. R. 7 H. L. 744, 45 L. J. Q. B. 8, 33 L. T. Rep. N. S. 196, 23 Wkly. Rep. 931]; Seaman *v.* Netherclift, 1 C. P. D. 540; Astley *v.* Younge, 2 Burr. 807, 2 Ld. Ken. 536; Revis *v.* Smith, 18 C. B. 126, 2 Jur. N. S. 614, 25 L. J. C. P. 195, 4 Wkly. Rep. 506, 86 E. C. L. 126; Henderson *v.* Broomhead, 4 H. & N. 569, 579, 5 Jur. N. S. 1175, 28 L. J. Exch. 360, 7 Wkly. Rep. 492 (where it is said: "No action will lie for words spoken or written in the course of any judicial proceeding"); Lilley *v.* Roney, 61 L. J. Q. B. 727 (a letter of complaint against a solicitor forwarded to the registrar of the incorporated law society).

See 32 Cent. Dig. tit. "Libel and Slander," §§ 117–123.

This privilege extends to the protection of the judge, parties, counsel, and witnesses, and arises immediately upon the doing of any act required or permitted by law in the course of a judicial proceeding or as preliminary thereto. McLaughlin *v.* Cowley, 127 Mass. 316; Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

A letter written to the chief commissioner of an insolvent debtor's court by an opposing creditor, previously to the hearing of an insolvent's case, is not a privileged communication, since the proceeding is irregular and improper. Gould *v.* Hulme, 3 C. & P. 625, 14 E. C. L. 750.

57. *Delaware.*— Eccles *v.* Shannon, 4 Harr. 193.

Georgia.— Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81.

Illinois.— Burdette *v.* Argile, 94 Ill. App. 171.

Louisiana.— Grant *v.* Haynes, 105 La. 304, 29 So. 708, 54 L. R. A. 930.

Massachusetts.—McLaughlin *v.* Cowley, 127 Mass. 316, 319 (where it is said: "It was stated in the opinion of this court in the recent case of Rice *v.* Coolidge, *infra*, that it seems to be settled by the English authorities that judges, counsel, parties and witnesses are absolutely exempted from liability to an action for defamatory words published in the course of judicial proceedings; and that the same doctrine is generally held in the American courts, with the disqualification, as to parties, counsel and witnesses, that their statements made in the course of an action must be pertinent and material to the case); Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279; Hoar *v.* Wood, 3 Metc. 193.

Minnesota.— Sherwood *v.* Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L. R. A. 153.

New Jersey.— Cole *v.* Grant, 18 N. J. L. 327.

New York.— Marsh *v.* Ellsworth, 50 N. Y. 309 [*affirming* 2 Sweeny 589]; Garr *v.* Selden, 4 N. Y. 91; Woodman *v.* Kidd, 25 N. Y. App. Div. 254, 49 N. Y. Suppl. 301; Aylesworth *v.* St. John, 25 Hun 156; Warner *v.* Paine, 2 Sandf. 195; Suydam *v.* Moffat, 1 Sandf. 459; Sickles *v.* Kling, 30 Misc. 37, 61 N. Y. Suppl. 647.

North Carolina.— Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780.

Vermont.— Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin.— Jennings *v.* Paine, 4 Wis. 358.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 117–123.

tion is not in fact pertinent, it will nevertheless be privileged if defendant in good faith believed it pertinent and had reasonable or probable cause for so believing,[58] and this, although the publication was not believed to be true and was made with a malicious motive.[59]

(III) *Jurisdiction of Court.* It is necessary that the court have jurisdiction of the subject-matter in issue, for a void judicial proceeding furnishes no protection to the defamatory matter published therein.[60]

(IV) *Pleadings, Complaints, Affidavits, or Motions*—(A) *In Civil Cases*—(1) Motions or Affidavits. Motions or affidavits filed in a civil case before a court having jurisdiction in the premises are absolutely privileged, provided the matter contained therein is either relevant and pertinent to the issue or is believed upon reasonable grounds to be so by the affiant or person making the motion;[61] and it has been held that the fact that a person makes an affidavit voluntarily, without requiring the party requesting it to take proceedings to have his deposition taken, does not affect the question of privilege.[62] But if an irrelevant

Reason for this qualification.—This qualification of the rule is adopted in order that the privilege given to individuals in the interest of an efficient administration of justice may not be abused as a cloak beneath which to gratify private malice. McLaughlin *v.* Cowley, 127 Mass. 316.

58. *Alabama.*—Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49.

Illinois.—Burdette *v.* Argile, 94 Ill. App. 171.

Massachusetts.—Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963.

Missouri.—Hyde *v.* McCabe, 100 Mo. 412, 13 S. W. 875.

New York.—Aylesworth *v.* St. John, 25 Hun 156; Warner *v.* Paine, 2 Sandf. 195, holding that where it is fairly debatable whether matter alleged to be libelous is pertinent or not, the party or counsel using the words is entitled to the benefit of the doubt. See also Moore *v.* Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; Beggs *v.* McCrea, 62 N. Y. App. Div. 39, 70 N. Y. Suppl. 864.

Tennessee.—Lea *v.* White, 4 Sneed 111.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 117–123.

59. Hyde *v.* McCabe, 100 Mo. 412, 13 S. W. 875; Suydam *v.* Moffat, 1 Sandf. (N. Y.) 459; Johnson *v.* Brown, 13 W. Va. 71.

60. *Georgia.*—Francis *v.* Wood, 75 Ga. 648.

Iowa.—Rainbow *v.* Benson, 71 Iowa 301, 32 N. W. 352.

New York.—Perkins *v.* Mitchell, 31 Barb. 461.

South Carolina.—Milam *v.* Burnsides, 1 Brev. 295.

West Virginia.—Johnson *v.* Brown, 13 W. Va. 71.

England.—See Buckley *v.* Wood, 4 Coke 14. *Compare* Gwinne *v.* Poole, 1 Hawk. P. C. 194, 2 Lutw. 1560.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 117–123.

Compare Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L. R. A. 417.

61. *Illinois.*—Rall *v.* Donnelly, 56 Ill. App. 425; Hibbard, etc., Co. *v.* Ryan, 46 Ill. App. 313.

Iowa.—Hawk *v.* Evans, 76 Iowa 593, 41 N. W. 368, 14 Am. St. Rep. 247, where, however, the court said that there was nothing in the case tending to show bad faith.

Michigan.—Hart *v.* Baxter, 47 Mich. 198, 10 N. W. 198, holding that it is immaterial that the affidavit was wilfully and maliciously false.

Missouri.—See Hyde *v.* McCabe, 100 Mo. 412, 418, 13 S. W. 875, where it is said: "The general rule is that an affidavit filed in the course of judicial proceedings is not actionable as libelous if fairly relevant to the issue, or responsive to some fact apparently bearing on the issue to which it is directed, assuming, of course, that the court has jurisdiction in the premises."

New York.—Garr *v.* Selden, 4 N. Y. 91; Beggs *v.* McCrea, 62 N. Y. App. Div. 39, 70 N. Y. Suppl. 864; Warner *v.* Paine, 2 Sandf. 195.

Ohio.—Harris *v.* Reams, 2 Ohio Dec. (Reprint) 281, 2 West. L. Month. 302.

See 32 Cent. Dig. tit. "Libel and Slander," § 119.

Compare Kelly *v.* Lafitte, 28 La. Ann. 435, holding that matters alleged in affidavits in judicial proceedings are not absolutely privileged and that defendant is liable when they are made maliciously and without probable cause.

In England it has been held that an affidavit is absolutely privileged, although the defamatory matter charged therein is not material. Astley *v.* Younge, 2 Burr. 807, 2 Ld. Ken. 536; Revis *v.* Smith, 18 C. B. 126, 2 Jur. N. S. 614, 25 L. J. C. P. 195, 4 Wkly. Rep. 506, 86 E. C. L. 126; Doyle *v.* O'Doherty, C. & M. 418, 41 E. C. L. 230; Henderson *v.* Broomhead, 4 H. & N. 569, 5 Jur. N. S. 1175, 28 L. J. Exch. 360, 7 Wkly. Rep. 492; Kennedy *v.* Hilliard, 10 Ir. C. L. 195, 1 L. T. Rep. N. S. 578; Gompas *v.* White, 54 J. P. 22.

62. Beggs *v.* McCrea, 62 N. Y. App. Div. 39, 70 N. Y. Suppl. 864. *Compare* Rosenberg *v.* Nesbitt, 14 N. Y. St. 248.

charge otherwise libelous is contained in an affidavit, it may be the basis of an action for libel, if shown to have been maliciously made without an honest belief based upon reasonable ground that it was relevant to the issue.[63]

(2) PLEADINGS. Defamatory matter contained in pleadings filed according to law in a court having jurisdiction, if relevant and pertinent to the issues in the case, is absolutely privileged;[64] and it is immaterial that the allegations are false

63. Hyde *v.* McCabe, 100 Mo. 412, 13 S. W. 875, holding that where an affidavit in support of a motion alleges insolvency in plaintiff and plaintiff files a counter affidavit denying insolvency and alleging that the affidavit in support of the motion was "a corrupt, voluntary and wilful case of false swearing," the averment in the counter affidavit is not sufficiently relevant to the issue to be privileged.

64. *District of Columbia.*— Harlow *v.* Carroll, 6 App. Cas. 128.

Georgia.— Conley *v.* Key, 98 Ga. 115, 25 S. E. 914; Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274.

Illinois.— Ash *v.* Zwietusch, 159 Ill. 455, 42 N. E. 854 [*affirming* 57 Ill. App. 157]; Strauss *v.* Meyer, 48 Ill. 385.

Indiana.— Wilkins *v.* Hyde, 142 Ind. 260, 41 N. E. 536.

Kentucky.— Monroe *v.* Davis, 118 Ky. 806, 82 S. W. 450, 26 Ky. L. Rep. 728; Gaines *v.* Ætna Ins. Co., 104 Ky. 695, 47 S. W. 884, 20 Ky. L. Rep. 886; Forbes *v.* Johnson, 11 B. Mon. 48; Hardin *v.* Cumstock, 2 A. K. Marsh. 480, 12 Am. Dec. 427.

Louisiana.— Monroe *v.* H. Weston Lumber Co., 49 La. Ann. 594, 21 So. 742; Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Youree *v.* Hamilton, 45 La. Ann. 1191, 14 So. 77; Randall *v.* Hamilton, 45 La. Ann. 1184, 14 So. 73, 22 L. R. A. 649; Gardemal *v.* McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195; Weil *v.* Israel, 42 La. Ann. 955, 8 So. 826; Vinas *v.* Merchants' Mut. Ins. Co., 33 La. Ann. 1265; Wallis *v.* New Orleans, etc., R. Co., 29 La. Ann. 66.

Maryland.— Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518.

Massachusetts.— McLaughlin *v.* Cowley, 127 Mass. 316; McLaughlin *v.* Cowley, 131 Mass. 70.

Minnesota.— Sherwood *v.* Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L. R. A. 153.

Missouri.— Jones *v.* Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445.

New York.— Sickles *v.* Kling, 60 N. Y. App. Div. 515, 69 N. Y. Suppl. 944 [*affirming* 31 Misc. 287, 64 N. Y. Suppl. 252]; Link *v.* Moore, 84 Hun 118, 32 N. Y. Suppl. 461, 1 N. Y. Annot. Cas. 330; Dada *v.* Piper, 41 Hun 254; Prescott *v.* Tousey, 53 N. Y. Super. Ct. 56 (holding that where plaintiff in an action demands a bill of particulars, he cannot base an action for libel on the statements therein made); Hawley *v.* Wolverton, 5 Paige 522.

Ohio.— Lanning *v.* Christy, 30 Ohio St. 115, 27 Am. Rep. 431.

Tennessee.— Crockett *v.* McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

Texas.— Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L. R. A. 417.

Washington.— Abbott *v.* National Bank of Commerce, 20 Wash. 552, 56 Pac. 376.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

United States.— King *v.* McKissick, 126 Fed. 215; McGehee *v.* Insurance Co. of North America, 112 Fed. 853, 50 C. C. A. 551; Union Mut. L. Ins. Co. *v.* Thomas, 83 Fed. 803, 28 C. C. A. 96; Duncan *v.* Atchison, etc., R. Co., 72 Fed. 808, 19 C. C. A. 202.

Canada.— Wilkins *v.* Major, 22 Quebec Super. Ct. 264.

See 32 Cent. Dig. tit. "Libel and Slander," § 120.

Compare Comfort *v.* Young, 100 Iowa 627, 69 N. W. 1032.

In California under statute allegations in pleadings are absolutely privileged. Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174; Hollis *v.* Meux, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574 [*distinguishing* Wyatt *v.* Buell, 47 Cal. 624]; Duncan *v.* Atchison, etc., R. Co., 72 Fed. 808, 19 C. C. A. 202, where the libelous matter was contained in an answer filed in proceedings before an interstate commerce commission.

In England the rule is broadly stated that no action can be brought for any statements by the parties in the pleadings. Seaman *v.* Netherclift, 1 C. P. D. 540 [*affirmed* in 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. Rep. N. S. 784, 25 Wkly. Rep. 159]. See also Dawkins *v.* Rokeby, L. R. 7 H. L. 774, 45 L. J. Q. B. 8, 33 L. T. Rep. N. S. 196, 23 Wkly. Rep. 931 [*affirming* L. R. 8 Q. B. 255]; Munster *v.* Lamb, 11 Q. B. D. 588, 47 J. P. 805, 52 L. J. Q. B. 726, 49 L. T. Rep. N. S. 252, 32 Wkly. Rep. 248; Astley *v.* Younge, 2 Burr. 807, 2 Ld. Ken. 536; Revis *v.* Smith, 18 C. B. 126, 2 Jur. N. S. 614, 25 L. J. C. P. 195, 4 Wkly. Rep. 506, 86 E. C. L. 126; Henderson *v.* Broomhead, 4 H. & N. 569, 5 Jur. N. S. 1175, 28 L. J. Exch. 360, 7 Wkly. Rep. 492.

Charges made against person not party to action.— The rule of the text has been applied to a petition making charges against a person who is not a party to the suit. Gardemal *v.* McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195. But in Ruohs *v.* Backer, 6 Heisk. (Tenn.) 395, 19 Am. Rep. 598, it was held that statements made in the course of judicial proceedings with regard to third persons were conditionally privileged only, and not actionable when made without malice and with probable cause

and malicious[65] and are made under cover and pretense of a wrongful or groundless suit.[66] The matter to which the privilege does not extend must be so palpably wanting in relation to the subject-matter that no reasonable man can doubt its irrelevancy.[67] But where it is apparent that the allegations are wholly gratuitous, irrelevant, and immaterial they are not privileged,[68] and in such case it will be no justification merely to show that they were believed to be true.[69]

(B) *In Criminal Cases.* Many of the authorities lay down the rule that a criminal complaint or affidavit made before a justice of the peace, a grand jury, or a court of competent jurisdiction in the regular course of justice and containing no impertinent allegations is not to be deemed an actionable libel.[70] On the

for belief that they were true. See also Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139.

65. *Georgia.*— Conley *v.* Key, 98 Ga. 115, 25 S. E. 914; Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274.

Illinois.— Strauss *v.* Meyer, 48 Ill. 385.

Indiana.— Wilkins *v.* Hyde, 142 Ind. 260, 41 N. E. 536.

Kentucky.— Gaines *v.* Ætna Ins. Co., 104 Ky. 695, 47 S. W. 884, 20 Ky. L. Rep. 886.

Louisiana.— Gardemal *v.* McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195.

Maryland.— Bartlett *v.* Christhilf, 69 Md. 219, 14 Atl. 518.

New York.— Link *v.* Moore, 84 Hun 118, 32 N. Y. Suppl. 461, 1 N. Y. Annot. Cas. 330.

Vermont.— Torrey *v.* Field, 10 Vt. 353.

Washington.— Abbott *v.* National Bank of Commerce, 20 Wash. 552, 56 Pac. 376.

Canada.— Wilkins *v.* Major, 22 Quebec Super. Ct. 264.

See 32 Cent. Dig. tit. "Libel and Slander," § 120.

66. Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274; Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L. R. A. 417. *Compare* Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856.

67. Harlow *v.* Carroll, 6 App. Cas. (D. C.) 128; Hawks *v.* Bright, 51 La. Ann. 79, 24 So. 615; Crockett *v.* McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914, holding that by the question whether alleged defamatory matter included in a pleading was pertinent to the issue in the case is meant whether there was probable cause for including the matter in the pleading. See also Moore *v.* Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753 [*reversing* 51 Hun 472, 4 N. Y. Suppl. 378]; Union Mut. L. Ins. Co. *v.* Thomas, 83 Fed. 803, 28 C. C. A. 96.

68. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Sherwood *v.* Powell, 61 Minn. 479, 63 N. W. 1103, 52 Am. St. Rep. 614, 29 L. R. A. 153; Dada *v.* Piper, 41 Hun (N. Y.) 254. See also Forbes *v.* Johnson, 11 B. Mon. (Ky.) 48.

69. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; McLaughlin *v.* Cowley, 131 Mass. 70; McLaughlin *v.* Cowley, 127 Mass. 316. *Compare* Gardemal *v.* McWilliams, 43 La. Ann. 454, 9 So. 106, 26 Am. St. Rep. 195.

Counsel cannot justify an irrelevant averment by showing his belief that it was true,

the sources of his information, or his instruction from his client. McLaughlin *v.* Cowley, 131 Mass. 70; McLaughlin *v.* Cowley, 127 Mass. 316. See also Wimbish *v.* Hamilton, 47 La. Ann. 246, 10 So. 856.

70. *California.*— Ball *v.* Rawles, 93 Cal. 222, 28 Pac. 937, 27 Am. St. Rep. 174.

Georgia.— Francis *v.* Wood, 75 Ga. 648.

Illinois.—McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317 [*reversing* 67 Ill. App. 452]; Burdette *v.* Argile, 94 Ill. App. 171.

Indiana.— Hartsock *v.* Reddick, 6 Blackf. 255, 38 Am. Dec. 141.

Kansas.— Bailey *v.* Dodge, 28 Kan. 72.

Louisiana.— Burke *v.* Ryan, 36 La. Ann. 951, affidavit in support of motion for new trial.

Massachusetts.— Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128; Morrow *v.* Wheeler, etc., Mfg. Co., 165 Mass. 349, 43 N. E. 105; Kidder *v.* Parkhurst, 3 Allen 393, where before the presentation to the grand jury the complaint was presented to several persons by whom it was signed.

Michigan.— Graham *v.* Cass Cir. Judge, 108 Mich. 425, 66 N. W. 348.

New York.— Bailey *v.* Dean, 5 Barb. 297; Allen *v.* Crofoot, 2 Wend. 515, 20 Am. Dec. 647.

South Carolina.— Sanders *v.* Rollinson, 2 Strobh. 447; Vausse *v.* Lee, 1 Hill 197, 26 Am. Dec. 168.

England.— See Fowler *v.* Homer, 3 Campb. 294, 13 Rev. Rep. 807; Johnson *v.* Evans, 3 Esp. 32, 6 Rev. Rep. 809.

See 32 Cent. Dig. tit. "Libel and Slander," § 118.

Rule applied to communication to prosecuting attorney.— Vogel *v.* Gruaz, 110 U. S. 311, 4 S. Ct. 12, 28 L. ed. 158.

Private communication to officer.— Communications addressed to a justice of the peace as an individual and not for the purpose of seeking his aid or advice in an official capacity are not privileged. Liske *v.* Stevenson, 58 Mo. App. 220. See also Bigner *v.* Hodges, 82 Miss. 215, 33 So. 980.

Affidavit or statement to non-judicial officer.— In Reid *v.* McLendon, 44 Ga. 156, defendant made an affidavit before United States officers which caused plaintiff's cotton to be confiscated and sold. The affidavit was not considered as made in a judicial proceeding but as furnishing information to the government and was privileged if made in good faith and on demand of the United

other hand there are decisions making the privileged character of complaints preferred against offenders before a judicial officer depend upon the question whether the person acted *bona fide* in making the complaint, and this rule has been applied where the alleged defamatory imputation was followed up by criminal proceedings actually instituted,[71] or where it was embodied in a formal affidavit or complaint,[72] as well as where it consisted merely of a verbal charge not followed up by an affidavit on the institution of proceedings.[73]

(v) *TESTIMONY.* Statements made by a witness in the regular course of a judicial proceeding are absolutely privileged where they are fairly responsive to questions propounded by counsel or where, although volunteered, they are relevant and pertinent to the subject of inquiry.[74] If the evidence is pertinent or respon-

States officers. Where defendant desired to prosecute plaintiff for felony and before prosecuting stated the crime to a constable and informed him that he wished him to serve the process, it was held that there was no privilege attaching to the communication to the constable. Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 141.

Subsequent repetition of charge.— If A prefers a criminal charge against B, on oath, and B is acquitted and afterward A reiterates the charge, he has no privilege beyond that of any other person who utters a slander. Burlingame *v.* Burlingame, 8 Cow. (N. Y.) 141.

71. McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317 [*reversing* 67 Ill. App. 452]; Hill *v.* Miles, 9 N. H. 9, holding that where one institutes criminal proceedings without intending to prosecute them in the regular course, but as a pretense to promulgate slander or to serve any other improper purpose, an action may be maintained for any libelous matter contained in them.

72. See Rainbow *v.* Benson, 71 Iowa 301, 32 N. W. 352 (where, however, it appeared that the affidavit was made in good faith and the matters there alleged were pertinent); Warden *v.* Whalen, 8 Pa. Co. Ct. 660.

Statement in affidavit and verbal charge distinguished.— In Nissen *v.* Cramer, 104 N. C. 574, 576, 10 S. E. 676, 6 L. R. A. 780, it is said: "In Briggs *v.* Byrd, 34 N. C. 377, this Court held, that there was a presumption of good faith in favor of one who made a verbal charge of larceny to a Justice of the Peace against another, with the expressed purpose, not afterwards carried out, of filing a formal affidavit embodying the charge, and that in an action for slander, founded upon the statement to the Justice, the plaintiff must prove the existence of malice when the words were uttered. On the other hand, it is a well established rule that when one actually lodges information before a judicial officer that he is informed that another has committed a felony, or infamous offence, the informer is absolutely protected against an action for slander based upon his affidavit, and a person claiming to have sustained injury has no remedy, unless the facts will enable him to maintain an action for malicious prosecution." See also Hastings *v.* Lusk, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330; Holmes *v.* Johnson, 44 N. C. 44.

73. Bunton *v.* Worley, 4 Bibb (Ky.) 38, 7 Am. Dec. 735; Briggs *v.* Byrd, 34 N. C. 377 (holding that *prima facie* every application is to be deemed honest, and to have been preferred upon good motives); Marshall *v.* Gunter, 6 Rich. (S. C.) 419. See also Bigner *v.* Hodges, 82 Miss. 215, 33 So. 980.

Necessity for probable cause in making complaint.— In Pierce *v.* Oard, 23 Nebr. 828, 37 N. W. 677, a communication to a magistrate made without reasonable or probable ground for believing that a crime had been committed was held not to be privileged.

74. *Alabama.*—Chambliss *v.* Blau, 127 Ala. 86, 28 So. 602.

Illinois.— McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317; Burdette *v.* Argile, 94 Ill. App. 171; McNabb *v.* Neal, 88 Ill. App. 571; Fagan *v.* Fries, 30 Ill. App. 236.

Indiana.— Hutchinson *v.* Lewis, 75 Ind. 55; Baldwin *v.* Hutchison, 8 Ind. App. 454, 35 N. E. 711.

Iowa.— Smith *v.* Howard, 28 Iowa 51.

Louisiana.— Terry *v.* Fellows, 21 La. Ann. 375.

Maine.— Barnes *v.* McCrate, 32 Me. 442.

Massachusetts.—Laing *v.* Mitten, 185 Mass. 233, 70 N. E. 128; Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963.

Michigan.— Acre *v.* Starkweather, 118 Mich. 214, 76 N. W. 379.

Mississippi.— Verner *v.* Verner, 64 Miss. 321, 1 So. 479, holding that the immunity of a witness is not affected by the statute making insulting words actionable.

Missouri.—Lamberson *v.* Long, 66 Mo. App. 253; Crecelius *v.* Bierman, 59 Mo. App. 513, 523 (where it is said: "Where the words spoken by him are clearly pertinent or material to the inquiry, or where the answers given by him are in direct response to questions propounded to him by the court or counsel the privilege is absolute"); Steinecke *v.* Marx, 10 Mo. App. 581.

New Jersey.— Badgley *v.* Hedges, 2 N. J. L. 233.

New York.— Marsh *v.* Ellsworth, 50 N. Y. 309; White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503; McLaughlin *v.* Charles, 60 Hun 239, 14 N. Y. Suppl. 608; Perkins *v.* Mitchell, 31 Barb. 461; Newfield *v.* Copperman, 42 N. Y. Super. Ct. 302.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Ohio.— Liles *v.* Gaster, 42 Ohio St. 631; Lanning *v.* Christy, 30 Ohio St. 115, 27 Am.

sive to the questions propounded, it is immaterial that it is false and given maliciously,[75] or that neither plaintiff nor defendant were parties to the actions in which the alleged defamatory testimony was given.[76] So it is sufficient if the words are uttered under an honest belief that they are relevant and pertinent, whether they are so in fact or not.[77] But a witness will not be permitted with impunity to volunteer defamatory statements which are irrelevant to the matter of inquiry and which he does not reasonably believe to be relevant.[78]

Rep. 431; Harris *v.* Reams, 2 Ohio Dec. (Reprint) 281, 2 West. L. Month. 302; Emerman *v.* Bruder, 7 Ohio S. & C. Pl. Dec. 311, 5 Ohio N. P. 31.

Oregon.— Cooper *v.* Phipps, 24 Oreg. 357, 33 Pac. 985, 22 L. R. A. 836.

Pennsylvania.— Thompson *v.* McCready, 194 Pa. St. 32, 45 Atl. 78.

Tennessee.— Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 60 L. R. A. 139; Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821.

Wisconsin.— Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

See 32 Cent. Dig. tit. "Libel and Slander," § 121.

In England the rule goes somewhat farther than the rule of the text, or at least the rule is applied liberally for the protection of the witness, and it is held that the testimony of a witness having reference to the inquiry is absolutely privileged, notwithstanding it may be malicious. Seaman *v.* Netherclift, 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. Rep. N. S. 784, 25 Wkly. Rep. 159 [*affirming* 1 C. P. D. 540]. See also Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963. This rule has been extended to a military man who is called before a court of inquiry for the purpose of testifying upon a matter of military discipline (Dawkins *v.* Rokeby, L. R. 7 H. L. 744, 45 L. J. Q. B. 8, 33 L. T. Rep. N. S. 196, 23 Wkly. Rep. 931 [*affirming* L. R. 8 Q. B. 255]) as well as to testimony given by a person in the character of a witness before a select committee of the house of commons (Goffin *v.* Donnelly, 6 Q. B. D. 307, 45 J. P. 439, 50 L. J. Q. B. 303, 44 L. T. Rep. N. S. 141, 29 Wkly. Rep. 440). But what a witness says before he enters or after he has left the witness' box is not privileged. Trotman *v.* Dunn, 4 Camph. 211. So it has been intimated that if a man when in the witness' box, were to take advantage of his position to utter something having no reference to the cause as matter of inquiry, in order to assail the character of another, his statement would not be within the privilege. Seaman *v.* Netherclift, 2 C. P. D. 53, 46 L. J. C. P. 128, 35 L. T. Rep. N. S. 784, 25 Wkly. Rep. 159.

In Maryland a departure has been made from the rule supported by the authorities generally and it has been held that a witness is not liable in a civil action for a slanderous reflection cast upon a party to the controversy in answer to a question which could have been answered without making such reflection. Hunckel *v.* Voneiff, 69 Md. 179, 14 Atl. 500, 17 Atl. 1056, 9 Am. St. Rep. 413.

Court must have jurisdiction.— The statements must be made before a court having jurisdiction in order to entitle the witness to be protected. Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461.

Witness before committee of legislature.— The privilege of a witness appearing before a committee of the legislature, in a matter within the jurisdiction of the committee, is the same as that of a witness in proceedings before a court of justice. Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963.

A **committee of aldermen** investigating charges against the board of public works, in order to report to the board of aldermen, having power by its president to subpœna and swear witnesses, but not to issue capias for them, nor to commit them for refusal to testify, has no judicial character nor function, and the privilege of its witnesses is conditional, not absolute, and when one summoned before an investigating committee of aldermen speaks words pertinent to the investigation which is actually being held, and is apparently within the committee's power, such words are not debarred of privilege because not in response to question. Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

Action against person procuring witness to testify.— It does not follow from the rule of the text that the person defamed may not maintain an action against one who with malice and intent to injure procures and suborns a witness to testify falsely. Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279.

75. McLaughlin *v.* Charles, 60 Hun (N. Y.) 239, 14 N. Y. Suppl. 608; Newfield *v.* Copperman, 42 N. Y. Super. Ct. 302; Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139; Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

76. Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139. See also Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907; Gaffin *v.* Donnelly, L. R. 6 Q. B. 309; Seaman *v.* Netherclift, 2 C. P. D. 53, 46 L. J. C. P. 128, 25 Wkly. Rep. 159.

77. *Indiana.*—Hutchinson *v.* Lewis, 75 Ind. 55.

Massachusetts.— Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963.

Michigan.—Acre *v.* Starkweather, 118 Mich. 214, 76 N. W. 379.

Missouri.—Lamberson *v.* Long, 66 Mo. App. 253; Crecelius *v.* Bierman, 59 Mo. App. 513; Steinecke *v.* Marx, 10 Mo. App. 581.

New York.— White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503.

See 32 Cent. Dig. tit. "Libel and Slander," § 121.

78. *Indiana.*—Hutchinson *v.* Lewis, 75 Ind. 55.

(VI) *Briefs, Arguments, and Statements of Counsel.* In England no action will lie against an advocate for defamatory words spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered maliciously and without any justification or excuse, and are irrelevant to every issue of fact which is contested before the tribunal.[79] But the rule generally prevailing in this country is that whatever is said or written by counsel in a legal proceeding, pertinent and material to the matter in controversy, is absolutely privileged and no action can be maintained upon it.[80] But in applying this principle the courts are said to be liberal even to the extent of declaring that where matter is put forth by counsel in the course of a judicial proceeding that may possibly be pertinent they will not so regard it as to deprive its author of his privilege.[81] The same privilege is extended to a party who acts as his own counsel and accordingly, when in the absence of the prosecutor, a complainant is acting as party or counsel in the management of a criminal prosecution before a magistrate, either as a matter of right, or by permission of the magistrate, he is entitled to the same privileges as a party or counsel in other judicial proceedings.[82] But a party or counsel cannot avail himself of his situation to gratify private malice by

Iowa.— Smith *v.* Howard, 28 Iowa 51.

Kentucky.— Nix *v.* Caldwell, 81 Ky. 293, 50 Am. Rep. 163, holding that irrelevant and impertinent statements made in bad faith and with knowledge of their irrelevancy are not privileged, although the witness may have been compelled to testify.

Massachusetts.— Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963.

Missouri.—Lamberson *v.* Long, 66 Mo. App. 253.

New York.—White *v.* Carroll, 42 N. Y. 161, 1 Am. Rep. 503.

Oregon.— Cooper *v.* Phipps, 24 Oreg. 357, 33 Pac. 985, 22 L. R. A. 836, holding that if the witness abuses his privilege by false statements which he knows to be impertinent and immaterial and not responsive to questions propounded by him, for the purpose of malicious defamation, he may upon an affirmative showing to the effect be held in damage for slander.

Tennessee.— Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 6 Am. St. Rep. 821.

See 32 Cent. Dig. tit. "Libel and Slander," § 121.

79. Munster *v.* Lamb, 11 Q. B. D. 588, 47 J. P. 805, 52 L. J. Q. B. 726, 49 L. T. Rep. N. S. 252, 32 Wkly. Rep. 248. See also Hodgson *v.* Scarlett, 1 B. & Ald. 232, 19 Rev. Rep. 301; Astley *v.* Younge, 2 Burr. 807, 2 Ld. Ken. 536; Mackay *v.* Ford, 5 H. & N. 792, 6 Jur. N. S. 587, 29 L. J. Exch. 404, 2 L. T. Rep. N. S. 514, 8 Wkly. Rep. 586; Needham *v.* Dowling, 15 L. J. C. P. 9; Pedley *v.* Morris, 61 L. J. Q. B. 21, 65 L. T. Rep. N. S. 526, 40 Wkly. Rep. 42.

Subsequent publication by counsel.— The privilege of counsel does not protect him if he subsequently publishes the defamatory matter to the public. Flint *v.* Pike, 4 B. & C. 473, 6 D. & R. 528, 3 L. J. K. B. O. S. 272, 28 Rev. Rep. 335, 10 E. C. L. 665.

In Canada it has been held that an advocate is not responsible in damages for making in a case injurious statements concerning a witness under examination, unless the words complained of are foreign to the case in which he is at the time engaged. Gauthier *v.* St. Pierre, 28 L. C. Jur. 16, 7 Montreal Leg. N. 44.

80 *California.*—Carpenter *v.* Ashley, (1906) 83 Pac. 444.

Illinois.— McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317 [*reversing* 67 Ill. App. 452]; Burdette *v.* Argile, 94 Ill. App. 171.

Kentucky.— Stewart *v.* Hall, 83 Ky. 375, holding moreover that if counsel incorporates in his brief a statement of a part of the testimony in a case which he reasonably and in good faith believed to be material to his case, he will not be liable for defamatory matter contained in the statement, although upon final hearing this testimony is excluded as being incompetent.

Louisiana.— Stackpole *v.* Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187.

Maryland.— Maulsby *v.* Reifsnider, 69 Md. 143, 14 Atl. 505.

New York.— Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265; Sickles *v.* Kling, 60 N. Y. App. Div. 515, 69 N. Y. Suppl. 944 [*affirming* 31 Misc. 287, 64 N. Y. Suppl. 252]; Hastings *v.* Lusk, 22 Wend. 410, 34 Am. Dec. 330; Ring *v.* Wheeler, 7 Cow. 725.

North Carolina.— Shelfer *v.* Gooding, 47 N. C. 175.

Pennsylvania.— Vigours *v.* Palmer, 1 Browne 40.

Tennessee.— Davis *v.* McNees, 8 Humphr. 40.

See 32 Cent. Dig. tit. "Libel and Slander," § 122.

In Georgia an attorney has a conditional privilege to make during the trial such comments on the case and parties as in his judgment seems proper and such privilege is lost if he acts maliciously. Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139; Lester *v.* Thurmond, 51 Ga. 118.

81. Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265.

82. McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317; Hoar *v.* Wood, 3 Metc. (Mass.) 193.

uttering slanderous expressions, either against a party, a witness, or a third person, which have no relation to the cause or subject-matter of the inquiry.[83]

(VII) *ORAL COMMENTS OF PARTIES.* A party to a suit in a court of justice, although not acting as his own counsel, or testifying as a witness, is not liable to be sued for slander for any statement he may make in relation to the subject-matter then pending, at least if the statement is made in good faith.[84]

(VIII) *DELIBERATIONS OF JURY.* Any words uttered by a juror in the deliberations of the jury after they have retired to consider a verdict are absolutely privileged and such privilege is not limited to words which are shown to be pertinent to the questions arising for decision.[85]

(IX) *COMMUNICATIONS BY JUDGE.* In England the broad rule has been announced that no action will lie against a judge for words spoken in his judicial capacity in a court of justice,[86] and this doctrine has been applied to the court of a coroner[87] and to a court-martial,[88] as well as to the superior courts. There is also support by authorities in this country for this absolute exemption from liability on the part of judges.[89] On the other hand the rule has been stated that communications of this character are privileged if they are material and pertinent or at least if they are in good faith believed to be pertinent and material.[90]

(X) *JUDGMENT AND EXECUTION.* An action will not lie for the disgrace and disrepute occasioned by the advertisement and sale of property in judicial proceedings instituted to foreclose a mortgage,[91] or for recording a judgment which was afterward set aside.[92]

c. Executive Proceedings.[93] The English rule is that a communication

83. *California.*—Carpenter *v.* Ashley, (1906) 83 Pac. 444, holding that an attorney is not privileged to charge opposing counsel with perjury or subornation of perjury.

Delaware.— Eccles *v.* Shannon, 4 Harr. 193.

Louisiana.— Stackpole *v.* Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187.

Maryland.— Maulshy *v.* Reifsnider, 69 Md. 143, 14 Atl. 505.

Massachusetts.— Hoar *v.* Wood, 3 Metc. 193.

New Jersey.— Cole *v.* Grant, 18 N. J. L. 327.

New York.— Hastings *v.* Lusk, 22 Wend. 410, 34 Am. Dec. 330; Ring *v.* Wheeler, 7 Cow. 725.

Pennsylvania.— Vigours *v.* Palmer, 1 Browne 40.

Vermont.— Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704.

Wisconsin.— Jennings *v.* Paine, 4 Wis. 358.

See 32 Cent. Dig. tit. "Libel and Slander," § 122.

84. McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317; Badgley *v.* Hedges, 2 N. J. L. 233; Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780. See also Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836.

As for instance where a party, although represented by counsel, says of the testimony of an opposing witness during the progress of a trial that "it is a lie." Badgley *v.* Hedges, 2 N. J. L. 233; Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780. See also Mower *v.* Watson, 11 Vt. 536, 34 Am. Dec. 704.

85. Dunham *v.* Powers, 42 Vt. 1. See also O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26; Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836.

Privilege of grand jurors see GRAND JURY, 20 Cyc. 1356 note 69.

86. Scott *v.* Stansfield, L. R. 3 Exch. 220, 37 L. J. Exch. 155, 18 L. T. Rep. N. S. 572, 16 Wkly. Rep. 911, holding that no action is maintainable against a judge for words spoken by him in his judicial character and in the exercise of his judicial functions, although they are spoken maliciously and without probable cause and irrelevantly to the matter at issue.

87. Thomas *v.* Churton, 2 B. & S. 475, 8 Jur. N. S. 795, 31 L. J. Q. B. 139, 6 L. T. Rep. N. S. 320, 110 E. C. L. 475, holding that a coroner is not liable for false and malicious language used by him in addressing a jury impaneled before him.

88. Home *v.* Bentinck, 2 B. & B. 130, 4 Moore C. P. 563, 8 Price 225, 22 Rev. Rep. 748, 6 E. C. L. 68; Jekyll *v.* Moore, 2 B. & P. N. R. 341, 6 Esp. 63.

89. See McLaughlin *v.* Cowley, 127 Mass. 316 [*citing* Rice *v.* Coolidge, 121 Mass. 393, 23 Am. Rep. 279]; Childs *v.* Voris, 6 Ohio S. & C. Pl. Dec. 75, 4 Ohio N. P. 67 (words spoken by a judge in the discharge of a judicial duty in a matter over which he has jurisdiction are absolutely privileged); Dunham *v.* Powers, 42 Vt. 1; Spalding *v.* Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. ed. 780.

90. Aylesworth *v.* St. John, 25 Hun (N. Y.) 156. *Compare* O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26.

91. Gore *v.* Condon, 87 Md. 368, 39 Atl. 1042, 67 Am. St. Rep. 352, 40 L. R. A. 382.

92. McLaughlin *v.* Doey, L. R. 32 Ir. 518.

93. Communications of this character held conditionally privileged see *infra*, VI, D, 2.

relating to state matters by one officer of state to another in the course of his official duty is absolutely privileged and cannot be made the subject of an action for libel.[94] So in this country it has been held that the head of an executive department of government cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to a legislative act and in respect to matters within his authority, by reason of any personal motive that might be alleged to have prompted his action.[95] Likewise it has been held that a petition to a governor for the removal of an officer,[96] or to a fire marshal to institute an inquiry as to the cause of a fire,[97] or a resolution offered in a city council by a member,[98] or a message by a mayor to a council announcing his veto of a bill passed by council and his reasons therefor,[99] is absolutely privileged provided the communication is pertinent and material.

C. Communications Qualifiedly Privileged[1] — **1. In General — a. General Rule Stated.** Where a party makes a communication and such communication is prompted by a duty owed either to the public or to a third party, or the communication is one in which the party has an interest and it is made to another having a corresponding interest, the communication is privileged if made in good faith and without actual malice.[2]

b. Nature of Duty Underlying Privilege. The duty under which the party is

94. Chatterton *v.* Secretary of State, [1895] 2 Q. B. 189, 59 J. P. 596, 64 L. J. Q. B. 676, 72 L. T. Rep. N. S. 858, 14 Reports 504.

Report made by military officer.— In Dawkins *v.* Paulet, L. R. 5 Q. B. 94, 9 B. & S. 768, 39 L. J. Q. B. 53, 21 L. T. Rep. N. S. 584, 18 Wkly. Rep. 336, it was held that a report made to the adjutant-general of the army for the information of the commander-in-chief, by defendant as the superior military officer of plaintiff in the discharge of military duty, touching the competence of plaintiff as an officer, is absolutely privileged.

95. Spalding *v.* Vilas, 161 U. S. 483, 16 S. Ct. 631, 40 L. ed. 780. See also Gardner *v.* Anderson, 9 Fed. Cas. No. 5,220.

Report by officer to superior.— In De Arnaud *v.* Ainsworth, 24 App. Cas. (D. C.) 167, it is held that public policy affords absolute protection and immunity for what may be said or written by an officer in his official report or communication to a superior when such report or communication is made in the course and discharge of official duty.

96. Larkin *v.* Noonan, 19 Wis. 82.

97. Newfield *v.* Copperman, 15 Abb. Pr. N. S. (N. Y.) 360.

98. Wachsmuth *v.* Merchants' Nat. Bank, 96 Mich. 426, 56 N. W. 9, 21 L. R. A. 278.

99. Trebilcock *v.* Anderson, 117 Mich. 39, 75 N. W. 129.

1. Communications qualified by privileged defined see *supra*, VI. A, text and note 47.

2. *Florido.*— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Louisiana.— Baysset *v.* Hire, 49 La. Ann. 904, 22 So. 44, 62 Am. St. Rep. 675.

Maine.—Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446

Maryland.— Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Massachusetts.— Joannes *v.* Bennett, 5 Allen 169, 81 Am. Dec. 738; Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418.

Michigan.—Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

Minnesota.— Trebby *v.* Transcript Pub. Co, 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330; Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678.

Missouri.— Finley *v.* Steele, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852; Sullivan *v.* Stratban-Hutton-Evans Commission Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859.

New Hampshire.—Moore *v.* Butler, 48 N. H. 161.

New Jersey.— Rothholz *v.* Dunkle, 53 N. J. L. 438, 22 Atl. 193, 26 Am. St. Rep. 432, 13 L. R. A. 655.

New York.— Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129; Sunderlin *v.* Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Ormsby *v.* Douglass, 37 N. Y. 477; Van Wyck *v.* Aspinwall, 17 N. Y. 190 [*affirming* 4 Duer 268]; Bowsky *v.* Cimiott Unhairing Co., 72 N. Y. App. Div. 172, 76 N. Y. Suppl. 465; McCarty *v.* Lambley, 20 N. Y. App. Div. 264, 46 N. Y. Suppl. 792; Halstead *v.* Nelson, 24 Hun 395; Thorn *v.* Moser, 1 Den. 488.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

South Dakota.—Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746.

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

Virginia.— Strode *v.* Clement, 90 Va. 553, 19 S. E. 177 (decided under statute making actionable insulting words); Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474.

West Virginia.—Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

Wisconsin.— Rude *v.* Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717; Noonan *v.* Orton, 32 Wis. 106.

privileged to make the communication need not be one having the force of a legal obligation, but it is sufficient if it is social or moral in its nature and defendant in good faith believes he is acting in pursuance thereof, although in fact he is mistaken.[3]

c. Exceeding Privilege — (1) *In General.* In some of the authorities the rule is stated that where the party exceeds his privilege and the communication complained of goes beyond what the occasion demands that he should publish, and is unnecessarily defamatory of plaintiff, he will not be protected and the fact that a duty, a common interest, or a confidential relation existed to a limited degree is not a defense, even though he acted in good faith.[4] On the other hand it has

United States.—White *v.* Nicholls, 3 How. 266, 11 L. ed. 591; Locke *v.* Bradstreet Co., 22 Fed. 771.

England.— Laughton *v.* Sodor & Man, L. R. 4 P. C. 495, 42 L. J. P. C. 11, 28 L. T. Rep. N. S. 377, 9 Moore P. C. N. S. 318, 21 Wkly. Rep. 204, 17 Eng. Reprint 318; Somerville *v.* Hawkins, 10 C. B. 583, 15 Jur. 450, 20 L. J. C. P. 131, 70 E. C. L. 583; Whiteley *v.* Adams, 15 C. B. N. S. 392, 10 Jur. N. S. 470, 33 L. J. C. P. 89, 9 L. T. Rep. N. S. 483, 12 Wkly. Rep. 153; Wright *v.* Woodgate, 2 C. M. & R. 573, 1 Gale 329, 1 Tyrw. & G. 12; Toogood *v.* Spyring, 1 C. M. & R. 181, 3 L. J. Exch. 347, 4 Tyrw. 582; Shipley *v.* Todhunter, 7 C. & P. 680, 32 E. C. L. 819; Cockayne *v.* Hodgkisson, 5 C. & P. 543, 24 E. C. L. 699; Harrison *v.* Bush, 5 E. & B. 344, 348, 1 Jur. N. S. 846, 25 L. J. Q. B. 25, 3 Wkly. Rep. 474, 85 E. C. L. 344 (where the rule was thus stated: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contained criminatory matter which, without this privilege, would be slanderous and actionable"); Simmonds *v.* Dunne, Ir. R. 5 C. L. 358.

An application filed with a board of pardons, by a father asking for a pardon for his son is privileged. Keenan *v.* McMurray, 34 Pittsb. Leg. J. N. S. (Pa.) 223.

3. *Florida.*— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Georgia.— Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

Louisiana.— Baysset *v.* Hire, 49 La. Ann. 904, 22 So. 44, 62 Am. St. Rep. 675.

Maryland.— Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Michigan.—Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

Minnesota.— Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678.

New York.— Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Pennsylvania.— Echard *v.* Morton, 26 Pa. Super. Ct. 579.

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

Wisconsin.— Rude *v.* Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717.

England.— Waller *v.* Loch, 7 Q. B. D. 619, 46 J. P. 484, 51 L. J. Q. B. 274, 45 L. T. Rep. N. S. 242, 30 Wkly. Rep. 18; Whiteley *v.* Adams, 15 C. B. N. S. 392, 10 Jur. N. S. 470, 33 L. J. C. P. 89, 9 L. T. Rep. N. S. 483, 12 Wkly. Rep. 153; Harrison *v.* Bush, 5 E. & B. 344, 1 Jur. N. S. 846, 25 L. J. Q. B. 25, 3 Wkly. Rep. 474. *Compare* Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54, 58 J. P. 620, 63 L. J. Q. B. 587, 70 L. T. Rep. N. S. 828, 9 Reports 452, 42 Wkly. Rep. 422 [*overruling* Tompson *v.* Dashwood, 11 Q. B. D. 43, 52 L. J. Q. B. 425, 48 L. T. Rep. N. S. 943] (holding that it is immaterial that defendant reasonably or unreasonably believed that the person to whom he made the communication had some duty or interest with regard to its subject-matter, if such person had in fact no such duty or interest); Stuart *v.* Bell, [1891] 2 Q. B. 341, 60 L. J. Q. B. 577, 64 L. T. Rep. N. S. 633, 39 Wkly. Rep. 612 (holding that the fact that defendant honestly believed that he was discharging a moral or social duty is immaterial, if the court holds that the surrounding circumstances as they then appeared to defendant at the time of publication did not make it the duty of defendant to act as he did).

4. *Illinois.*— Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8.

Indiana.—Wilson *v.* Barnett, 45 Ind. 163.

Kentucky.— Cole *v.* Wilson, 18 B. Mon. 212.

Minnesota.— Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615.

Missouri.— Sullivan *v.* Strahan-Hutton-Evans Commission Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859; Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New York.—Payne *v.* Rouss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705; Sarasohn *v.* Workingmen's Pub. Assoc., 44 N. Y. App. Div. 302, 60 N. Y. Suppl. 640.

Pennsylvania.—Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142.

South Carolina.— Woodburn *v.* Miller, Cheves 194.

Virginia.— Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474, 83 Va. 106, 1 S. E. 803.

Washington.— Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772.

been held that expressions in excess of what the occasion warrants do not *per se* take away the privilege, although such excess may be evidence of malice for the consideration of the jury.[5]

(II) *Excessive Publication.* A qualified privilege is not lost by the mere fact that the communication, whether oral or written, is incidentally brought to the attention of others than those for whom it was intended.[6] Thus the mere fact that an oral communication is made in the hearing of others than the parties immediately interested will not of itself defeat the defense of privilege.[7] But it has been held that the privilege is lost if strangers to the privileged occasion were present by the invitation or design of defendant.[8] So it is held that malice may be established by the unnecessary publicity of the communication.[9]

(III) *Sending Privileged Matter by Telegram.* So it has been held that a communication which would be privileged if sent by letter becomes unprivileged if sent through the telegraph office.[10]

2. Official Communications — a. In General. The rule making communications made in discharge of a public duty qualifiedly privileged applies to reports or other communications made by public officials in the course of their duties.[11]

b. Reports of Committees. The report of a committee lawfully appointed by the public authorities to make an investigation is privileged so far as it deals with

Canada.— Benner *v.* Edwards, 30 Ont. 676.

In Michigan it is held that a charge irrelevant to the privileged occasion is not privileged (Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397); but that the words in a publication which are relevant though excessive are privileged though they are evidence of malice for the jury (Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52).

5. Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Atwill *v.* Mackintosh, 120 Mass. 177, 182 (where it is said: "This privilege is not defeated by the mere fact that the communication is made in terms that were intemperate or excessive from over excitement"); Brow *v.* Hathaway, 13 Allen (Mass.) 239 (where, however, it was intimated that charges if not only excessive, but foreign to the legitimate objects of the occasion, were not privileged); Joannes *v.* Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738; Nevill *v.* Fine Arts, etc., Ins. Co., [1895] 2 Q. B. 156, 59 J. P. 371, 64 L. J. Q. B. 681, 72 L. T. Rep. N. S. 525, 14 Reports 587 (holding that a finding by the jury that the statement exceeded the privileged occasion is not equivalent to a finding of actual malice and is immaterial); Cooke *v.* Wildes, 3 C. L. R. 1090, 5 E. & B. 328, 1 Jur. N. S. 610, 24 L. J. Q. B. 367, 3 Wkly. Rep. 458, 85 E. C. L. 328. *Compare* Robinett *v.* Ruby, 13 Md. 95; Tuson *v.* Evans, 12 A. & E. 733, 40 E. C. L. 364; Huntley *v.* Ward, 6 C. B. N. S. 514, 6 Jur. N. S. 18, 95 E. C. L. 514; Toogood *v.* Spyring, 1 C. M. & R. 181, 3 L. J. Exch. 347, 4 Tyrw. 582; Oddy *v.* Paulet, 4 F. & F. 1009.

6. Sheftall *v.* Georgia Cent. R. Co., 123 Ga. 589, 51 S. E. 646; Redgate *v.* Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; Hatch *v.* Lane, 105 Mass. 394; Mertens *v.* Bee Pub. Co., 5 Nebr. (Unoff.) 592, 99 N. W. 847. *Compare* Webber *v.* Vincent, 9 N. Y. Suppl. 101; Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803.

7. Hatch *v.* Lane, 105 Mass. 394; Brow *v.* Hathaway, 13 Allen (Mass.) 239; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261 (where the presence of bystanders was a mere casual incident); Pittard *v.* Oliver, [1891] 1 Q. B. 474, 55 J. P. 100, 60 L. J. Q. B. 219, 64 L. T. Rep. N. S. 758, 39 Wkly. Rep. 311; Taylor *v.* Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. 313, 71 E. C. L. 308; Toogood *v.* Spyring, 1 C. M. & R. 181, 3 L. J. Exch. 347, 4 Tyrw. 582; Jones *v.* Thomas, 50 J. P. 149, 53 L. T. Rep. N. S. 678, 34 Wkly. Rep. 104.

8. Sheftall *v.* Georgia Cent. R. Co., 123 Ga. 589, 51 S. E. 646; Parsons *v.* Surgey, 4 F. & F. 247. See also Simpson *v.* Downs, 16 L. T. Rep. N. S. 391.

9. Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67; Dale *v.* Harris, 109 Mass. 193; Brow *v.* Hathaway, 13 Allen (Mass.) 239; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261 (holding that the existence of express malice may be legitimately gathered from the circumstances under which the communication is made, as if an opportunity is sought to make it before third persons not legally interested in hearing it); Somerville *v.* Hawkins, 10 C. B. 583, 15 Jur. 450, 20 L. J. C. P. 131, 70 E. C. L. 583.

10. Williamson *v.* Freer, L. R. 9 C. P. 393, 43 L. J. C. P. 161, 30 L. T. Rep. N. S. 332, 22 Wkly. Rep. 878.

11. *Connecticut.*— Haight *v.* Cornell, 15 Conn. 74.

Georgia.— Pearce *v.* Brower, 72 Ga. 243.

Illinois.— Rausch *v.* Anderson, 75 Ill. App. 526.

Iowa.— Mayo *v.* Sample, 18 Iowa 306, a charge of receiving stolen goods made by a mayor, in the capacity of *ex officio* chief of police. See also Rector *v.* Smith, 11 Iowa 302.

matter which is the subject of inquiry by the committee in the discharge of its duty.[12]

3. Communications Relative to Appointment of Public Officers. The selection of suitable persons for the performance of official service is essential to the interests of both the government and the citizen, and hence communications to the appointing power,[13] or, it has been held, to an officer who defendant might naturally suppose could prevent the appointment,[14] with reference to the character and qualifications of candidates for public office, are generally regarded as illustrations of qualifiedly or conditionally privileged publications, and in such cases no action will lie for false statements in the publication unless they are also malicious and the burden of proof in this respect rests upon plaintiff.

4. Communications Regarding School-Teachers. A communication made by a private citizen to the authorities having the power of appointment or removal of public school-teachers, charging improper conduct, bad character, or other disqualification on the part of a public school-teacher[15] or on the part of a

Louisiana.— Fisk *v.* Soniat, 33 La. Ann. 1400.

Maine.— Bradford *v.* Clark, 90 Me. 298, 38 Atl. 229.

Maryland.— Maurice *v.* Worden, 54 Md. 233, 39 Am. Rep. 384.

Massachusetts.— Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482; Smith *v.* Higgins, 16 Gray 251; Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583, holding, however, that statements made by a member of a city council in the presence of that body, when not pertinent to any inquiry or investigation pending, are not privileged.

Nebraska.— Greenwood *v.* Cobbey, 26 Nebr. 449, 42 N. W. 413.

New York.— Stevenson *v.* Ward, 48 N. Y. App. Div. 291, 62 N. Y. Suppl. 717.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

Rhode Island.— *In re* Investigating Commission, 16 R. I. 751, 11 Atl. 429.

England.— Andrews *v.* Nott Bower, [1895] 1 Q. B. 888, 59 J. P. 420, 64 L. J. Q. B. 536, 72 L. T. Rep. N. S. 530, 14 Reports 404, 43 Wkly. Rep. 582; Royal Aquarium, etc., Soc. *v.* Parkinson, [1892] 1 Q. B. 431, 56 J. P. 404, 61 L. J. Q. B. 409, 66 L. T. Rep. N. S. 513, 40 Wkly. Rep. 450; Hart *v.* Gumpach, L. R. 4 P. C. 439, 42 L. J. P. C. 25, 9 Moore P. C. N. S. 241, 21 Wkly. Rep. 365, 17 Eng. Reprint 505; Humphreys *v.* Stilwell, 2 F. & F. 590; Little *v.* Pomeroy, Ir. R. 7 C. L. 50; Pittard *v.* Oliver, 63 L. T. Rep. N. S. 247; Sutton *v.* Plumridge, 16 L. T. Rep. N. S. 741. See also Hopley *v.* Williams, 53 J. P. 822; Simpson *v.* Downs, 16 L. T. Rep. N. S. 391.

Canada.— See Campeau *v.* Monette, 19 Quebec Super. Ct. C. S. 429.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 115, 124.

Official communications held absolutely privileged see *supra*, VI, B, 2, 3.

12. *Connecticut.*— Haight *v.* Cornell, 15 Conn. 74.

Massachusetts.— Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482.

Missouri.— Weber *v.* Lane, 99 Mo. App. 69, 71 S. W. 1099.

New York.— Lent *v.* Underhill, 54 N. Y. App. Div. 609, 66 N. Y. Suppl. 1086.

Rhode Island.— *In re* Investigating Commission, 16 R. I. 751, 11 Atl. 429.

See 32 Cent. Dig. tit. "Libel and Slander," § 115.

13. Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Law *v.* Scott, 5 Harr. & J. (Md.) 438; Clark *v.* Ford, 5 Fed. Cas. No. 2,820, 1 Hayw. & H. 6. *Compare* Harris *v.* Huntington, 2 Tyler (Vt.) 129, 4 Am. Dec. 728, where a petition to the legislature in regard to a candidate for office was held to be absolutely privileged.

Words spoken by a presiding judge concerning a candidate for office appointed by the court are privileged if made without malice. Goodenow *v.* Tappan, 1 Ohio 60. See also Brockerman *v.* Keyser, 1 Phila. (Pa.) 243, 269.

Public comment and criticism of candidates for election see *infra*, VI, D, 3.

14. Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

15. *Illinois.*— Rausch *v.* Anderson, 75 Ill. App. 526.

Indiana.— Henry *v.* Moberly, 23 Ind. App. 305, 51 N. E. 497.

Massachusetts.— Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228.

Missouri.— Finley *v.* Steele, 159 Mo. 299, 60 S. W. 108, 52 L. R. A. 852.

New York.— Decker *v.* Gaylord, 35 Hun 584.

See 32 Cent. Dig. tit. "Libel and Slander," § 125.

A county superintendent of schools and a township trustee are not liable for falsely charging a teacher with cruelty, incompetency, and neglect in the exercise of his duties if they act in good faith. Branaman *v.* Hinkle, 137 Ind. 496, 37 N. E. 546. See also Galligan *v.* Kelly, 31 N. Y. Suppl. 561. So a county superintendent of schools has the right to communicate in good faith to a school-board his reasons for revoking the certificate of a teacher employed by them, and such communication is conditionally

person who has made application to the proper authorities for license to teach [16] is privileged if made in good faith.

5. Communications Regarding Liquor Licenses. Defamatory statements published for the purpose of preventing the grant of a liquor license or of obtaining the revocation of one already granted are conditionally privileged when made to a body having the power to grant or revoke licenses.[17] Where the matter is in the form of a memorial, the circulation of the memorial for the purpose of obtaining signatures thereto is within the privilege.[18]

6. Communications Regarding Conduct of Public Officers. No action for libel or slander lies for a petition or remonstrance imputing want of integrity or other cause of unfitness to a public officer or employee subject to removal by or under the supervision of the officer or board to whom the communication is addressed, provided such communication is made in good faith and without malice.[19] But to come within this rule the officer or board addressed must have some interest or duty in the matter.[20]

privileged. Rausch *v.* Anderson, 75 Ill. App. 526.

16. Wieman *v.* Mabee, 45 Mich. 484, 8 N. W. 71, 40 Am. Rep. 477; Harwood *v.* Keech, 4 Hun (N. Y.) 389, 6 Thomps. & C. 665; Nolan *v.* Kane, 13 Ohio Cir. Ct. 485, 7 Ohio Cir. Dec. 520.

17. Coloney *v.* Farrow, 5 N. Y. App. Div. 607, 39 N. Y. Suppl. 460; Vanderzee *v.* McGregor, 12 Wend. (N. Y.) 545, 27 Am. Dec. 156; Metzler *v.* Romine, 9 Pa. Co. Ct. 171; Werner *v.* Ascher, 86 Wis. 340, 56 N. W. 869.

18. Vanderzee *v.* McGregor, 12 Wend. (N. Y.) 545, 27 Am. Dec. 156.

19. *Illinois.*— Young *v.* Richardson, 4 Ill. App. 364.

Kentucky.— Shields *v.* Com., 55 S. W. 881, 21 Ky. L. Rep. 158.

Maryland.— See Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

Nebraska.— Greenwood *v.* Cobbey, 26 Nebr. 449, 42 N. W. 413.

New Jersey.— Frank *v.* Dessena, 5 N. J. L. J. 185.

New York.— Cook *v.* Hill, 3 Sandf. 341; Howard *v.* Thompson, 21 Wend. 319, 34 Am. Dec. 238; Thorn *v.* Blanchard, 5 Johns. 508. See also Van Wyck *v.* Aspinwall, 17 N. Y. 190 [*affirming* 4 Duer 268].

North Carolina.— Bradsher *v.* Cheek, 109 N. C. 278, 13 S. E. 777; Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775.

Pennsylvania.— Gray *v.* Pentland, 4 Serg. & R. 420; Gray *v.* Pentland, 2 Serg. & R. 23.

Rhode Island.— Kent *v.* Bongartz, 15 R. I. 72, 22 Atl. 1023, 2 Am. St. Rep. 870.

South Carolina.— Reid *v.* Delorme, 2 Brev. 76.

Virginia.— Tyree *v.* Harrison, 100 Va. 540, 42 S. E. 295.

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591.

England.— Blagg *v.* Sturt, 10 Q. B. 899, 1 Jur. 1011, 16 L. J. Q. B. 39, 59 E. C. L. 899; Fairman *v.* Ives, 5 B. & Ald. 642, 7 E. C. L. 351, 1 Chit. 85, 18 E. C. L. 60, 1 D. & R. 252, 24 Rev. Rep. 514; Woodward *v.* Lander, 6 C. & P. 548, 25 E. C. L. 569; Harrison *v.* Bush, 5 E. & B. 344, 1 Jur. N. S. 846, 25 L. J. Q. B. 25, 3 Wkly. Rep. 474 (holding that where defendant was subject to removal by the sovereign, a communication to the secretary of state was privileged); Cooke *v.* Wildes, 3 C. L. R. 1090, 5 E. & B. 328, 1 Jur. N. S. 610, 24 L. J. Q. B. 367, 3 Wkly. Rep. 458, 85 E. C. L. 328; Kershaw *v.* Bailey, 1 Exch. 743, 17 L. J. Exch. 129; Dickson *v.* Wilton, 1 F. & F. 419; Bannister *v.* Kelty, 59 J. P. 793; Blake *v.* Pilfold, 1 M. & Rob. 198.

See 32 Cent. Dig. tit. "Libel and Slander," § 124.

Disclosures by witness before investigating committee.— Disclosures made to an investigating committee with reference to persons employed by a city to perform public work, by one who has been summoned as a witness, are conditionally privileged when pertinent to the investigation. Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106.

Malicious charges.— Charges preferred against a policeman before the board of police commissioners, made falsely and with express malice and with the deliberate purpose of injuring said policeman and causing his dismissal, are actionable. Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920.

A petition asking a county commissioner to resign, although signed without intent that it should be printed or further published than by circulating it for signatures, is not a privileged communication. Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

20. Bailey *v.* Holland, 7 App. Cas. (D. C.) 184 (holding that a letter written to a United States senator accusing one for whom he had secured an appointment of dishonorable conduct toward others is not a privileged communication); Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732; Hebditch *v.* McIlwaine, [1894] 2 Q. B. 54, 58 J. P. 620, 63 L. J. Q. B. 587, 70 L. T. Rep. N. S. 828, 9 Reports 452, 42 Wkly. Rep. 422 (holding moreover that it is not sufficient that the maker of the statement honestly and reasonably believes that the person to whom it is made has an interest or duty in the matter).

7. Proceedings For Church, Lodge, or Society Discipline. Persons who join churches, secret societies, benevolent, or temperance organizations submit to the jurisdiction of those bodies in matters of faith and individual conduct affecting their relations as members and subject themselves to tribunals established by those bodies to pass upon such questions. Accusations made by one member against another, to a body competent to try the offense, or words spoken or written in the course of an investigation or trial, either by the prosecutor, defendant, or witnesses are privileged when made without malice, in the regular course of discipline prescribed by the rules and regulations of the society.[21]

A publication to an inhabitant of a parish concerning an officer thereof is not privileged. Currigan *v.* Ryan, 15 Wkly. Rep. 61. See also Dickeson *v.* Hilliard, L. R. 9 Exch. 79, 43 L. J. Exch. 37, 30 L. T. Rep. N. S. 196, 22 Wkly. Rep. 372.

Criticism of conduct of public men see *infra*, VI, D, 2.

21. *Alabama.*— Grant *v.* State, 141 Ala. 96, 37 So. 420.

Georgia.— Etchison *v.* Pergerson, 88 Ga. 620, 15 S. E. 680. See also Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

Indiana.— Kleizer *v.* Symmes, 40 Ind. 562; Coombs *v.* Rose, 8 Blackf. 155.

Kentucky.— Lucas *v.* Case, 9 Bush 297.

Louisiana.— Miller *v.* Roy, 10 La. Ann. 231.

Massachusetts.— York *v.* Pease, 2 Gray 282; Remington *v.* Congdon, 2 Pick. 310, 13 Am. Dec. 431.

Missouri.— Landis *v.* Campbell, 79 Mo. 433, 49 Am. Rep. 239.

Nebraska.— Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588.

New York.— Streety *v.* Wood, 15 Barb. 105 (holding that to present written charges against a member of a society to another for his signature is privileged); Ostheimer *v.* Blumert, 1 N. Y. City Ct. Suppl. 17; O'Donaghue *v.* McGovern, 23 Wend. 26; Jarvis *v.* Hatheway, 3 Johns. 180, 3 Am. Dec. 473.

North Carolina.— Whitaker *v.* Carter, 26 N. C. 461.

Ohio.— Dial *v.* Holter, 6 Ohio St. 228.

South Carolina.— Smith *v.* Youmans, 3 Hill 85.

Tennessee.— Dunn *v.* Winters, 2 Humphr. 512.

Wisconsin.— Servatius *v.* Pichel, 34 Wis. 292.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 114, 115.

Judicial statement of rule.— In Farnsworth *v.* Storrs, 5 Cush. (Mass.) 412, 415, it is said: "Amongst these powers and privileges, established by long and immemorial usage, churches have authority to deal with their members, for immoral and scandalous conduct; and for that purpose, to hear complaints, to take evidence and to decide; and upon conviction, to administer proper punishment by way of rebuke, censure, suspension and excommunication. To this jurisdiction, every member, by entering into the church covenant, submits, and is bound by his consent. Remington *v.* Congdon, 2 Pick. (Mass.) 310, 13 Am. Dec. 431. The proceedings of the church are quasi-judicial, and therefore those who complain, or give testimony, or act and vote, or pronounce the result, orally or in writing, acting in good faith, and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably, making such proceedings a pretence for covering an intended scandal, are protected by law."

Communications relating to non-members. In Etchison *v.* Pergerson, 88 Ga. 620, 15 S. E. 680, it was held that when one church member is a witness on the trial of another before a proper church tribunal, *a bona fide* disclosure of all relevant facts is incumbent upon him as a private moral duty, and if those facts necessarily involve misconduct or even a crime on the part of a person not a member of the church, the naming of such person as a part of the relevant testimony of the witness is within the protection of the privileged occasion. But in Coombs *v.* Rose, 8 Blackf. (Ind.) 155, it was held that if in making accusations against a member of the church, in the regular course of church discipline, the character of one not a member is attacked, the communication is not as to the latter privileged. In Nix *v.* Caldwell, 81 Ky. 293, 50 Am. Rep. 163, A was on trial before a masonic lodge. B testified and C made an affidavit that B could not be believed under oath. Neither B nor C were masons. It was held that there was no duty resting upon C to make the affidavit and that it was not privileged.

Probable cause for making charge.— It has been held that where libelous charges are privileged because preferred to a lodge tribunal, the fact that the party making the charge had probable cause for speaking the words is a justification, although he was actuated by malice and acted in bad faith. Streety *v.* Wood, 15 Barb. (N. Y.) 105. But in Dial *v.* Holter, 6 Ohio St. 228, it was held that defamatory words, used in a complaint to a church to bring plaintiff to trial before a church committee, although privileged are actionable, if made wilfully and maliciously, even though made on probable cause.

Where charges made against the president of a college affecting his personal character and competency were investigated by a board of trustees, the speech of the president in his defense containing matter pertinent and relevant to the issue, and published by the com-

8. COMMUNICATIONS IN FURTHERANCE OF CRIMINAL PROSECUTIONS. Upon grounds of public policy communications which would otherwise be slanderous are protected as privileged, if they are made in good faith in the prosecution of an inquiry regarding a crime which has been committed, and for the purpose of detecting and bringing to punishment the criminal.[22] It is not enough that defendant should have made the communication to an officer, but he must have made it for the purpose of protecting himself and preventing a crime, or of detecting and bringing a criminal to punishment.[23] So a person who in the presence of a public officer wantonly and maliciously, in entire disregard of the right of another, charges the latter with crime, cannot rely on the protection of the privilege.[24]

9. COMMUNICATIONS IN COURSE OF MUTUAL CONTROVERSY. The law justifies a man in repelling a defamatory charge by a denial or by an explanation. He has a qualified privilege to answer the charge, and if he does so in good faith, and what he publishes is fairly an answer, and is published for the purpose of repelling the charge and not with malice, it is privileged, although it be false.[25] But the

mittee in connection with the other proceedings, was held to be privileged. Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

The entry of the resolution of excommunication from membership in a church on the minute-book of the session and the exhibition of it to the members for their signatures does not constitute a publication. Landis *v.* Campbell, 79 Mo. 433, 49 Am. Rep. 239. *Compare* Shelton *v.* Nance, 7 B. Mon. (Ky.) 128.

Proceedings without jurisdiction. — Where the laws governing a medical society do not justify the action taken by the society in expelling a member, no privilege attaches to the proceedings. Fawcett *v.* Charles, 13 Wend. (N. Y.) 473.

A circular issued by one member of a society to others for the purpose of obtaining a statutory investigation is not privileged. Hill *v.* Hart-Davies, 21 Ch. D. 798, 51 L. J. Ch. 845, 47 L. T. Rep. N. S. 82, 31 Wkly. Rep. 22.

Publishing in church paper result of investigation. — In Redgate *v.* Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236, it was held that where the officers of a church upon inquiry find that their pastor is unfit for his office and in the performance of what they honestly believe to be their duty toward other members and churches of the same denomination publish in good faith in the church papers the result of their inquiry, and there is reasonable occasion for such publication, it will be deemed to be privileged. See also Kirkpatrick *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316 (a publication of result of an inquiry in a lodge journal); Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

22. *Delaware.* — Craig *v.* Burris, 4 Pennew. 156, 55 Atl. 353.

Georgia. — Chapman *v.* Battle, 124 Ga. 574, 52 S. E. 812, holding that statements made in the prosecution of efforts to recover property which has been stolen are protected as *prima facie* privileged communications.

Illinois. — Cristman *v.* Cristman, 36 Ill. App. 567.

Iowa. — Mayo *v.* Sample, 18 Iowa 306.

Kentucky. — Grimes *v.* Coyle, 6 B. Mon. 301.

Massachusetts. — Eames *v.* Whittaker, 123 Mass. 342; Dale *v.* Harris, 109 Mass. 193.

Minnesota. — Quinn *v.* Scott, 22 Minn. 456.

New York. — Smith *v.* Kerr, 1 Edm. Sel. Cas. 190.

Washington. — Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503.

England. — Padmore *v.* Lawrence, 11 A. & E. 380, 381, 39 E. C. L. 217, 3 P. & D. 209, 4 Jur. 458, 9 L. J. Q. B. 137 (where it is said: "For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if *bona fide* made in the prosecution of an inquiry into a suspected crime"); Hooper *v.* Truscott, 2 Bing. N. Cas. 457, 5 L. J. C. P. 177, 2 Scott 672, 29 E. C. L. 616 (holding, however, that where defendant's object is to compromise the felony, the publication is not privileged); Force *v.* Warren, 15 C. B. N. S. 806, 109 E. C. L. 806; Dancaster *v.* Hewson, 6 L. J. K. B. O. S. 311, 2 M. & R. 176, 17 E. C. L. 706; Shufflebottom *v.* Allday, 5 Wkly. Rep. 315. See also Harrison *v.* Fraser, 29 Wkly. Rep. 652.

See 32 Cent. Dig. tit. "Libel and Slander," § 130.

Communication by person ignorant of facts. —Where money was stolen from a house at which plaintiff was a guest, and defendant met the marshal on the street and volunteered the statement that plaintiff had taken the money, it was held that the statement was not privileged as defendant knew nothing of the facts and was not acting in discharge of any public or private duty. Hancock *v.* Blackwell, 139 Mo. 440, 41 S. W. 205.

23. Stewart *v.* Major, 17 Wash. 238, 49 Pac. 503.

24. Robinson *v.* Van Auken, 190 Mass. 161, 76 N. E. 601. See also Quinn *v.* Scott, 22 Minn. 456.

25. *Louisiana.* — Bloom *v.* Crescioni, 109 La. 667, 33 So. 724, 94 Am. St. Rep. 456; Goldberg *v.* Dobberton, 46 La. Ann. 1303, 16 So. 192, 28 L. R. A. 721; Johnston *v.* Barrett, 36 La. Ann. 320; Fulda *v.* Caldwell, 9 La. Ann. 358.

privilege under this rule is limited to retorts or answers which are necessary to the defense or fairly arise out of the charges made, and hence if the defamatory matter published by defendant is not a proper reply to the matter published by plaintiff which provoked its publication, it will be actionable irrespective of the question of malice.[26]

10. Communications at Request of Person Defamed. As a general proposition where defamatory matter is published in the form of an answer made to inquiries by plaintiff or his agent, the answer is privileged,[27] if the answer of defendant does not go beyond plaintiff's question.[28] So if plaintiff either personally or through his agents invites and procures the publication of defamatory matter for the purpose of making it the foundation of an action, the communication will be privileged,[29] unless there has been a previous publication of the same defamatory matter by defendant.[30] Where a person originates a slander, and afterward repeats it in

Maryland.— Shepherd *v.* Baer, 96 Md. 152, 53 Atl. 790.

Michigan.— Smurthwaite *v.* News Pub. Co., 124 Mich. 377, 83 N. W. 116; Myers *v.* Kaichen, 75 Mich. 272, 42 N. W. 820; O'Connor *v.* Sill, 60 Mich. 175, 27 N. W. 13.

Missouri.— Fish *v.* St. Louis County Printing, etc., Co., 102 Mo. App. 6, 74 S. W. 641.

North Carolina.—Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

Pennsylvania.— Com. *v.* Pavitt, 2 Del. Co. 16.

Virginia.— Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803.

England.— Laughton *v.* Sodor & Man, L. R 4 P. C. 495, 42 L. J. P. C. 11, 9 Moore C. P. N. S. 318, 28 L. T. Rep. N. S. 377, 21 Wkly. Rep. 204, 17 Eng. Reprint 318; Hobbs *v.* Bryers, L. R. 2 Ir. 496; Dwyer *v.* Esmonde, L. R. 2 Ir. 243; O'Donoghue *v.* Hussey, Ir. R. 5 C. L. 124; Reg. *v.* Veley, 16 L. T. Rep. N. S. 122, letters written by attorney in defense of a client.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 131, 143.

Compare Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787.

26. *California.*— Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533.

Michigan.— Smurthwaite *v.* News Pub. Co., 124 Mich. 377, 83 N. W. 116; Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397.

Missouri.— Fish *v.* St. Louis County Printing, etc., Co., 102 Mo. App. 6, 74 S. W. 641.

New York.— Cassidy *v.* Brooklyn Daily Eagle, 18 N. Y. Suppl. 930 [*reversed* on other grounds in 138 N. Y. 239, 33 N. E. 1038]; Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

Virginia.— Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803.

England.— Huntley *v.* Ward, 6 C. B. N. S. 514, 6 Jur. N. S. 18, 95 E. C. L. 514.

Canada.— Benner *v.* Edmonds, 30 Ont. 676.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 131, 143.

Compare Goldberg *v.* Dobberton, 46 La. Ann. 1303, 16 So. 192, 28 L. R. A. 721.

27. Beeler *v.* Jackson, 64 Md. 589, 2 Atl. 916; Billings *v.* Fairbanks, 136 Mass. 177, 139 Mass. 66, 29 N. E. 544; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633; Warr *v.* Jolly, 6 C. & P. 497, 25 E. C. L. 543. See also Hebner *v.* Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Neusky *v.* Mundt, 4 Leg. Gaz. (Pa.) 230; Kerr *v.* Shedden, 4 C. & P. 528, 19 E. C. L. 633.

Words used by a husband in answer to a question addressed to his wife by plaintiff, if they do not go beyond the occasion, are privileged. Middleby *v.* Effler, 118 Fed. 261, 55 C. C. A. 355.

Interview at solicitation of plaintiff.— In Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129, it was intimated that if a person obtains an interview with defendant at the solicitation of plaintiff, and as his friend, slanderous words of defendant, uttered at such interview, were not privileged.

Answers to unauthorized questions in plaintiff's behalf.— In Force *v.* Warren, 15 C. B. N. S. 806, 109 E. C. L. 806, it was held that when a charge was made originally to plaintiff alone and is subsequently repeated to an acquaintance of plaintiff, to whom the latter had communicated the fact of the charge, the repetition is not a privileged communication.

Whether communications induced by plaintiff amount to a publication see *supra*, IV, G.

28. Middleby *v.* Effler, 118 Fed. 261, 55 C. C. A. 355.

29. Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656 (holding that if defendant gave a copy of a libel published in a newspaper to one who in procuring it acted as plaintiff's agent and at their request, such publication if procured with a view of bringing the action is privileged); Miller *v.* Donovan, 16 Misc. (N. Y.) 453, 39 N. Y. Suppl. 820. See also Rogers *v.* Clifton, 3 B. & P. 587; Smith *v.* Wood, 3 Campb. 323, 14 Rev. Rep. 752; King *v.* Waring, 5 Esp. 13.

30. Howland *v.* Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Miller *v.* Donovan, 16 Misc. (N. Y.) 453, 39 N. Y. Suppl. 820. *Compare* Stevenson *v.* Ward, 48 N. Y. App. Div. 291, 62 N. Y. Suppl. 717, where the prior publication was privileged.

answer to a question by the person slandered, in the presence of a third person brought by him for the purpose of hearing the answer, it has been held that the repetition is not a privileged communication.[31] Where, however, a person does not originate a slander, and being applied to by the person whose character is affected thereby makes, in the presence of a third person, a communication in answer to questions put to him, such communication is privileged.[32]

11. COMMUNICATIONS IN DISCHARGE OF DUTY TO OTHERS — a. In General. A communication is privileged when made in good faith in answer to one having an interest in the information sought,[33] or if volunteered, when the party to whom the communication is made has an interest in it and the writer or speaker stands in such relation to him as to make it a reasonable duty or at least proper that he should give the information.[34] A communication, however, is not privileged

31. Griffiths *v.* Lewis, 7 Q. B. 61, 9 Jur. 370, 14 L. J. Q. B. 197, 53 E. C. L. 61. See also Thorn *v.* Moser, 1 Den. (N. Y.) 488, where the charges were repeated to a person falsely representing himself as the agent of plaintiff. *Compare* Sanborn *v.* Gerald, 91 Me. 366, 40 Atl. 67; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633, where the doctrine of qualified privilege is applied to a case where the inquiry was made in good faith on the part of plaintiff merely to ascertain whether defendant had made such a charge.

32. Warr *v.* Jolly, 6 C. & P. 497, 25 E. C. L. 543. See also Haynes *v.* Leland, 29 Me. 233.

33. *Iowa.*— Long *v.* Peters, 47 Iowa 239.

New Jersey.— Van Horn *v.* Van Horn, 56 N. J. L. 318, 28 Atl. 669; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Sunderlin *v.* Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Liddle *v.* Hodges, 2 Bosw. 537 (holding that words spoken to a landlord in answer to inquiries by him as to the character of a tenant are qualifiedly privileged); Webber *v.* Vincent, 9 N. Y. Suppl. 101.

Wisconsin.— Rude *v.* Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717, holding that where plaintiff had been arrested on the complaint of a father for the seduction of his daughter and a third person on behalf of the father made inquiries of defendant as to plaintiff's character, the letter of defendant in answer to such inquiries was privileged.

United States.— Locke *v.* Bradstreet Co., 22 Fed. 771; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

See 32 Cent. Dig. tit. "Libel and Slander," § 133.

Communications at solicitation of friend.— Defamatory words do not become privileged merely because uttered in the strictest confidence by one friend to another, nor because uttered upon the most urgent solicitation. Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129.

34. *District of Columbia.*— Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Kentucky.— Nix *v.* Caldwell, 81 Ky. 293, 50 Am. Rep. 163; Harper *v.* Harper, 10 Bush 447; Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Louisiana.— Solet *v.* Solet, 1 Rob. 339.

Minnesota.— Nord *v.* Gray, 80 Minn. 143, 82 N. W. 1082; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

New York.— Lewis *v.* Chapman, 16 N. Y. 369.

Ohio.— Alpin *v.* Morton, 21 Ohio St. 536.

West Virginia.— Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873.

United States.— Locke *v.* Bradstreet Co., 22 Fed. 771; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

England.— Derry *v.* Handley, 16 L. T. Rep. N. S. 263.

See 32 Cent. Dig. tit. "Libel and Slander," § 133.

This rule has been applied to communications between attorney and client (Browne *v.* Dunn, 6 Reports 67. See also O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26; Washburn *v.* Cooke, 3 Den. (N. Y.) 110; Burton *v.* Downes, 1 F. & F. 668), attorney and stenographer or clerk (Boxsius *v.* Goblet, [1894] 1 Q. B. 842, 58 J. P. 670, 63 L. J. Q. B. 401, 70 L. T. Rep. N. S. 368, 9 Reports 224, 42 Wkly. Rep. 392), bishop and clergy (Laughton *v.* Sodor & Man, L. R. 4 P. C. 495, 42 L. J. P. C. 11, 28 L. T. Rep. N. S. 377, 9 Moore P. C. N. S. 318, 21 Wkly. Rep. 204, 17 Eng. Reprint 318), clergyman and parishioner (Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495; Davies *v.* Snead, L. R. 5 Q. B. 608, 39 L. J. Q. B. 202, 23 L. T. Rep. N. S. 126; James *v.* Boston, 2 C. & K. 4, 61 E. C. L. 4), clergyman and curate (Clark *v.* Molyneux, 3 Q. B. D. 237, 14 Cox C. C. 10, 47 L. J. Q. B. 230, 37 L. T. Rep. N. S. 694, 26 Wkly. Rep. 104), physician and patient (Cameron *v.* Cockran, 2 Marv. (Del.) 166, 42 Atl. 454), principal and agent (Nichols *v.* Eaton, 110 Iowa 509, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483; Ormsby *v.* Douglass, 37 N. Y. 477; Washburn *v.* Cooke, 3 Den. (N. Y.) 110; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580), employer and employee (Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594. See also Scarll *v.* Dixon, 4 F. & F. 250), creditor and surety (Dunman *v.* Bigg, 1 Campb. 269 note, 10 Rev. Rep. 680 note), directors and shareholders of a corporation (Lawless *v.* Anglo-Egyptian Cotton, etc., Co., L. R. 4 Q. B. 262, 10 B. & S. 226, 38 L. J. Q. B. 129,

merely because published in strict confidence and between friends.[35] The authorities are conflicting as to the responsibility of a stranger voluntarily making a communication to another where there is no common interest in the subject-matter, and the interest is confined solely to the party receiving the communication.[36] In some of the decisions the rule is broadly stated that everyone who believes himself to be possessed of knowledge which, if true, does or may affect the rights and interests of another, has the right, in good faith, to communicate such, his belief, to that other.[37] On the other hand the doctrine has been limited in the case of volunteered communications to cases where the parties by reason of their relation to each other are interested in the subject-matter of inquiry, or to cases where the well being of society requires that a party in possession of what he supposes to be facts should disclose them.[38] So the information must be given to one who is reasonably and properly entitled to it.[39]

b. Communication to Relative of Plaintiff. A communication to the relatives of a party defamed, when made on request or in the discharge of a duty, social, moral, or legal, are qualifiedly privileged.[40] So a comunication by an employer of

17 Wkly. Rep. 498), ex-partners (Wilson *v.* Robinson, 7 Q. B. 68, 9 Jur. 726, 14 L. J. Q. B. 196, 53 E. C. L. 68), and landlord and tenant (Knight *v.* Gibbs, 1 A. & E. 43, 3 L. J. K. B. 135, 3 N. & M. 467, 28 E. C. L. 45; Toogood *v.* Spyring, 1 C. M. & R. 181, 3 L. J. Exch. 347, 4 Tyrw. 582. See also Gillis *v.* McDonnell, Ir. R. 4 C. L. 342, 18 Wkly. Rep. 346. *Compare* Dillard *v.* Collins, 25 Gratt. (Va.) 343).

35. Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129 [*reversing* 39 Hun 204]. See also Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. (D. C.) 306; Joannes *v.* Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738; Krebs *v.* Oliver, 12 Gray (Mass.) 239.

36. Nix *v.* Caldwell, 81 Ky. 293, 50 Am. Rep. 163.

37. *Iowa.*— Mott *v.* Dawson, 46 Iowa 533 [*quoting* Townshend Sl. & L. § 241], holding that one having knowledge that the seller of a lot of cattle which were not to be watered within twelve hours before weighing watered them within that time for the purpose of increasing their weight is not liable for slander because of his having informed the purchaser of that fact.

Maryland.— Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Mississippi.— Hubbard *v.* Rutledge, 57 Miss. 7.

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280. *Compare* Davis *v.* Wells, 25 Tex. Civ. App. 155, 60 S. W. 566.

Wisconsin.— Noonan *v.* Orton, 32 Wis. 106. *Compare* Brown *v.* Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860.

See 32 Cent. Dig. tit. "Libel and Slander," § 133.

38. Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425; Nix *v.* Caldwell, 81 Ky. 293, 50 Am. Rep. 163 (holding that where one honestly believes his neighbor is dishonest he is not justified in publishing that fact to the world unless a proper occasion exists); Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461. See also Stuart *v.* Bell, [1891] 2 Q. B. 341, 60 L. J. Q. B. 577, 64 L. T. Rep. N. S. 633, 39 Wkly. Rep. 612. *Compare* Coxhead *v.* Richards, 2 C. B. 569, 10 Jur. 984, 15 L. J. C. P. 278, 52 E. C. L. 569.

39. Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461; Alpin *v.* Morton, 21 Ohio St. 536; Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54, 58 J. P. 620, 63 L. J. Q. B. 587, 70 L. T. Rep. N. S. 828, 9 Reports 452, 42 Wkly. Rep. 422. See also Scarll *v.* Dixon, 4 F. & F. 250; Brett *v.* Watson, 20 Wkly. Rep. 723.

Rule applied to statement by physician.— Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461; Alpin *v.* Morton, 21 Ohio St. 536.

40. *Iowa.*— Long *v.* Peters, 47 Iowa 239.

Kentucky.— Faris *v.* Starke, 9 Dana 128, 33 Am. Dec. 536.

Massachusetts.— Atwill *v.* Mackintosh, 120 Mass. 177, holding that in an action by a husband against one who at the request of the wife's father had written to the father a letter concerning the husband's general standing in society, such a communication was privileged.

Michigan.— Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135.

New Hampshire.— Moore *v.* Butler, 48 N. H. 161.

England.— Taylor *v.* Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. 313, 71 E. C. L. 308 (a communication made in answer to an inquiry by plaintiff's brother); Hooper *v.* Truscott, 2 Bing. N. Cas. 457, 5 L. J. C. P. 177, 2 Scott 672, 29 E. C. L. 616.

See 32 Cent. Dig. tit. "Libel and Slander," § 134.

Communication to husband in regard to wife.— In Beals *v.* Thompson, 149 Mass. 405, 21 N. E. 959, it was held that the fact that plaintiff owed money to defendant before her marriage, which she refused to pay, does not render a defamatory letter concerning her conduct before marriage, written by defendant to her husband, a privileged communication, since the husband was under no obligation to pay the debts of the wife contracted before her marriage.

an infant, charging the latter with a crime committed in connection with his employment, is *prima facie* privileged when made to the parent of the employee.[41]

c. Communication as to Character of Suitor or Lover. Statements regarding the character of a suitor or lover made in answer to inquiries by one interested, or when volunteered by one who is under a duty to make it on account of his relationship, are privileged if made in good faith.[42] But such communications if volunteered will not be protected merely on the ground that the parties making them hold friendly relations with those to whom the communications are made.[43] Thus a letter written to a woman containing libelous matter concerning her suitor is not justified by the fact that the writer was her friend and former pastor and that the letter was written at the request of her parents who assented to all its contents.[44]

d. Communication as to Character of Employee. A communication derogatory of the character of an employee, made to the employer or to one about to employ such person and for the employer's benefit, is privileged, when made in good faith, and this whether the information was voluntarily given or was in answer to an inquiry.[45] But where the communication is made solely for the benefit of the informant, as for instance to compel the employee to pay a debt due the informant, it is not privileged.[46] Where one has given a recommendation to an employee and facts subsequently coming to his knowledge cause him to change his opinion, he is privileged to communicate such facts to a party with whom employment has been obtained on the strength of the recommendation.[47]

41. Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135; Moore *v.* Butler, 48 N. H. 161, holding that a statement to the mother of a servant, not in the hearing of another person, that her daughter has stolen a certain article is privileged. *Compare* Rose *v.* Imperial Engine Co., 110 N. Y. App. Div. 437, 96 N. Y. Suppl. 808, holding that where defendant wrote to plaintiff's mother charging him with a crime when an investigation would have shown plaintiff's innocence is not privileged.

42. McBride *v.* Ledoux, 111 La. 398, 35 So. 615, 100 Am. St. Rep. 491 (holding that in order that the communication of a report against a suitor shall be privileged it is not necessary that the informant shall have had such information on the subject as to make him believe the report true); Buisson *v.* Huard, 106 La. 768, 31 So. 293, 56 L. R. A. 296; Baysset *v.* Hire, 49 La. Ann. 904, 22 So. 44, 62 Am. St. Rep. 675; Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992; Fenton *v.* Macdonald, 1 Ont. L. Rep. 422.

A letter from a son-in-law to a mother-in-law about to marry is privileged. Todd *v.* Hawkins, 8 C. & P. 88, 2 M. & Rob. 20, 34 E. C. L. 624.

43. Krebs *v.* Oliver, 12 Gray (Mass.) 239, 243 (where it is said: "A mere friendly acquaintance or regard does not impose a duty of communicating charges of a defamatory character concerning a third person, although they may be told to one who has a strong interest in knowing them"); Byam *v.* Collins, 111 N. Y. 143, 19 N. E. 75, 7 Am. St. Rep. 726, 2 L. R. A. 129 [*reversing* 39 Hun 204].

44. Joannes *v.* Bennett, 5 Allen (Mass.) 169, 81 Am. Dec. 738.

45. *Indiana.*—Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. N. S. 1091.

Iowa.—Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Kentucky.—Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Maryland.—Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Massachusetts.—Dale *v.* Harris, 109 Mass. 193.

New York.—Halstead *v.* Nelson, 36 Hun 149, 24 Hun 395, 1 N. Y. Suppl. 280.

England.—Stuart *v.* Bell, [1891] 2 Q. B. 341, 60 L. J. Q. B. 577, 64 L. T. Rep. N. S. 633, 39 Wkly. Rep. 612; Fountain *v.* Boodle, 3 Q. B. 5, 2 G. & D. 455, 43 E. C. L. 605; Kelly *v.* Partington, 4 B. & Ad. 700, 3 L. J. K. B. 104, 2 N. & M. 460, 24 E. C. L. 307; Child *v.* Affleck, 9 B. & C. 403, 7 L. J. K. B. O. S. 272, 4 M. & R. 338, 17 E. C. L. 185; Rogers *v.* Clifton, 3 B. & P. 587; Amann *v.* Damm, 8 C. B. N. S. 597, 29 L. J. C. P. 313, 7 Jur. N. S. 47, 2 L. T. Rep. N. S. 322, 8 Wkly. Rep. 470, 98 E. C. L. 597; Weatherston *v.* Hawkins, 1 T. R. 110. See also Fryer *v.* Kinnersley, 15 C. B. N. S. 422, 10 Jur. N. S. 441, 33 L. J. C. P. 96, 9 L. T. Rep. N. S. 415, 12 Wkly. Rep. 155, 109 E. C. L. 422. *Compare* Pattison *v.* Jones, 8 B. & C. 578, 7 L. J. K. B. O. S. 26, 3 M. & R. 101, 15 E. C. L. 287, a communication voluntarily given.

See 32 Cent. Dig. tit. "Libel and Slander," § 136.

46. Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Hollenbeck *v.* Ristine, 114 Iowa 358, 86 N. W. 377.

47. Butterworth *v.* Conrow, 1 Marv. (Del.) 361, 41 Atl. 84; Fowles *v.* Bowen, 30 N. Y.

But it has been held that the fact that the person to whom a letter alleged to be libelous is sent had taken a special interest in the party concerning whom it is written and had recommended him for employment is insufficient to create a duty on the part of the writer so as to bring the letter within the rule of privileged communications.[48]

e. Reports of Mercantile Standing — (i) *By Mercantile Agencies.* The principle that a communication which would otherwise be actionable is privileged if made in good faith upon a matter involving an interest or duty of the party making it to a person having a corresponding interest or duty applies to an agent or agency employed to procure information as to the solvency, credit, and standing of another, where the information is communicated confidentially and in good faith to a principal having an interest in the subject-matter.[49] But a communication from a mercantile agency is privileged only when made to one having an interest in the particular matter and not when it is published in a report for general circulation among subscribers.[50]

(ii) *By Mutual Protective Associations.* The doctrine of qualified privilege has been applied to information furnished to members or subscribers by mutual protective associations.[51] On the other hand it is held that where such an association is formed not for the purpose of keeping its subscribers informed as to the credit and standing of the parties with whom they deal, but of blacklisting

20; Gardner *v.* Slade, 13 Q. B. 796, 13 Jur. 826, 18 L. J. Q. B. 334, 66 E. C. L. 796.

48. Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. (D. C.) 306; Payne *v.* Ronss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705. *Compare* Dixon *v.* Parsons, 1 F. & F. 24.

49. *Michigan.*— Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138.

New Jersey.— King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Sunderlin *v.* Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322; Ormsby *v.* Douglass, 37 N. Y. 477.

Ohio.— Crist *v.* Bradstreet Co., 9 Ohio Dec. (Reprint) 751, 17 Cinc. L. Bul. 138.

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

Wisconsin.— State *v.* Lonsdale, 48 Wis. 348, 4 N. W. 390.

United States.— Douglass *v.* Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; Locke *v.* Bradstreet Co., 22 Fed. 771 (holding that where a mercantile agency without exercising ordinary care and caution published a statement, unfairly and without reason to believe its truth, and imparted the information to others recklessly, it was liable); Trussell *v.* Scarlett, 18 Fed. 214; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

Canada.— Robinson *v.* Dun, 24 Ont. App. 287 [*reversing* 28 Ont. 21].

See 32 Cent. Dig. tit. "Libel and Slander," § 137.

50. *Georgia.*—Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423; Johnson *v.* Bradstreet Co., 77 Ga. 172, 4 Am. St. Rep. 77.

Michigan.— Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 38 Am. St. Rep. 592, 20 L. R. A. 138.

New Jersey.— King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Sunderlin *v.* Bradstreet, 46 N. Y. 188, 7 Am. Rep. 322 (holding that the fact that the report was in cipher and understood by the subscribers alone is immaterial); Taylor *v.* Church, 8 N. Y. 452 [*reversing* on other grounds 1 E. D. Smith 279].

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

United States.— Douglass *v.* Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; Locke *v.* Bradstreet Co., 22 Fed. 771; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

Canada.— Todd *v.* Dun, 15 Ont. App. 85.

See 32 Cent. Dig. tit. "Libel and Slander," § 137.

Access of agency clerks to books.— In Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*, it was held that the placing of defamatory matter upon the books of the agency within reach of the clerks employed therein was such a publication as to take away the privilege accorded the manager of the agency. *Compare* Trussell *v.* Scarlett, 18 Fed. 214; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

Malicious report to commercial agency.—A false and malicious report to a commercial agency is not privileged. Lowry *v.* Vedder, 40 Minn. 475, 42 N. W. 542.

51. Reynolds *v.* Plumbers' Material Protective Assoc., 30 Misc. (N. Y.) 709, 63 N. Y. Suppl. 303; McIntyre *v.* Weinert, 195 Pa. St. 52, 45 Atl. 666; Getting *v.* Foss, 3 C. & P. 160, 14 E. C. L. 502. See also Ulery *v.* Chicago Live Stock Exch., 54 Ill. App. 233.

delinquent debtors in order to compel the payment of debts already due, publications made in furtherance of such a purpose are not privileged.[52]

(III) *By Private Persons.* Information furnished upon request to a creditor or to one applied to for credit concerning the financial standing of a debtor or applicant for credit,[53] or a communication between two parties concerning the credit of a third person when both parties have an interest in subject-matter of the communication, are *prima facie* privileged.[54]

12. Communications in Furtherance of Common Interest — a. Between Relatives. Communications made between relatives for the protection of or in furtherance of their common interests are conditionally privileged.[55]

b. Common Business Interest. Defamatory matter is privileged when published without malice to parties who have a common business interest in the subject-matter of the publication, even though it may be false and injurious.[56]

52. Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. E. 216; Weston *v.* Barnicoat, 175 Mass. 454, 458, 56 N. E. 619, 49 L. R. A. 612 (where, however, it is said: "Of course we do not mean to say that the statement might not have been privileged if believed to be true, and if the purpose of the association and publication was and was understood to be merely to give information to the members concerning the credit of people with whom they might deal"); Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915; Lowry *v.* Vedder, 40 Minn. 475, 42 N. W. 542; Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

53. Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Van Horn *v.* Van Horn, 56 N. J. L. 318, 28 Atl. 669; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261; Storey *v.* Challands, 8 C. & P. 234, 34 E. C. L. 708; Robshaw *v.* Smith, 38 L. T. Rep. N. S. 423.

54. Ritchie *v.* Arnold, 79 Ill. App. 406; Lewis *v.* Chapman, 16 N. Y. 369 [*reversing* 19 Barb. 252]. See also Ormsby *v.* Douglass, 37 N. Y. 477; Blackham *v.* Pugh, 2 C. B. 611, 15 L. J. C. P. 290, 52 E. C. L. 611.

A letter voluntarily written by one of two rival milk sellers, advising a shipper to sell no more milk to the other unless he had surety for his goods, is not a privileged communication. Brown *v.* Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860. See also King *v.* Watts, 8 C. & P. 614, 34 E. C. L. 921.

55. Campbell *v.* Bannister, 79 Ky. 205 (holding that one whose house has been set on fire may communicate to his family, under proper precautions and without malice, his suspicions as to who the incendiary is); Faris *v.* Starke, 9 Dana (Ky.) 128, 33 Am. Dec. 536; Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866 (a letter written by a son to a mother for the purpose of informing her as to her rights in certain property); Fenton *v.* Macdonald, 1 Ont. L. Rep. 422. See also *supra*, VI, C. 11, b.

56. *Colorado.*— Denver Public Warehouse Co. *v.* Holloway, (1905) 83 Pac. 131.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Georgia.— Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103.

Iowa.— Nichols *v.* Eaton, 110 Iowa 569, 81 N. W. 792, 80 Am. St. Rep. 319, 47 L. R. A. 483.

Kentucky.— Caldwell *v.* Story, 107 Ky. 10, 52 S. W. 850, 21 Ky. L. Rep. 599, 45 L. R. A. 735.

Louisiana.— Dunsee *v.* Norden, 36 La. Ann. 78; Haney *v.* Trost, 34 La. Ann. 1146, 44 Am. Rep. 461.

Massachusetts.— Squires *v.* Wason Mfg. Co., 182 Mass. 137, 65 N. E. 32.

Missouri.— See Sullivan *v.* Strathan-Hutton-Evans Commission Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859, opinion of the court delivered by Marshall, J.

New Jersey.—Rothholz *v.* Dunkle, 53 N. J. L. 438, 22 Atl. 193, 26 Am. St. Rep. 432, 13 L. R. A. 655.

New York.—Ginsberg *v.* Union Surety, etc., Co., 68 N. Y. App. Div. 141, 74 N. Y. Suppl. 561.

North Carolina.— Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594.

Rhode Island.— Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Texas.— Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580; Gulf, etc., R. Co. *v.* Floore, (Civ. App. 1897) 42 S. W. 607; Campbell *v.* Bostwick, (Civ. App. 1893) 22 S. W. 828.

United States.— Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

England.— Hamon *v.* Falle, 4 App. Cas. 247; Sadgrove *v.* Hole, [1901] 2 K. B. 1, 70 L. J. K. B. 455, 84 L. T. Rep. N. S. 647, 49 Wkly. Rep. 473; Lawless *v.* Anglo-Egyptian Cotton, etc., Co., L. R. 4 Q. B. 262, 10 B. & S. 226, 38 L. J. Q. B. 129, 17 Wkly. Rep. 498; McDougall *v.* Claridge, 1 Campb. 267, 10 Rev. Rep. 679; Warren *v.* Warren, 1 C. M. & R. 250, 3 L. J. Exch. 294, 4 Tyrw. 850; Shipley *v.* Todhunter, 7 C. & P. 680, 32 E. C. L. 819; Brooks *v.* Blanchard, 1 Cromp. & M. 779, 2 L. J. Exch. 275, 3 Tyrw. 844.

Canada.— Tobin *v.* Gannon, 34 Nova Scotia 9.

See 32 Cent. Dig. tit. "Libel and Slander," § 139.

On the other hand, however, a publication made to others than those interested is not privileged.[57]

c. Common Membership in Church, Lodge, or Society. Representations made by a member of a church, lodge, or society regarding the character or conduct of another member are privileged when made in good faith to one having authority under the laws of the organization to receive charges for the purpose of discipline or removal.[58] But common membership will not protect the publication of defamatory matter concerning another member, where the member addressed had no duty to perform or interest to serve which made it necessary or proper for the information to be given to him.[59]

13. Communications in Protection of Defendant's Interest — a. In General. A communication made by a person immediately concerned in interest in the subject-matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is privileged,[60] where the communication is made to one occupying a confidential

Communication by bank director to co-director in individual capacity.— If the one making the communication is privileged to do so when acting in a special capacity, he will not be protected if he makes such a communication in his individual capacity. Thus a bank director is not justified in making a communication to a co-director in the public streets affecting the credit of a merchant, where there is no evidence of such a communication being confidential, although he might make such a communication to the board of directors in relation to one of the customers of the bank. Sewell *v.* Catlin, 3 Wend. (N. Y.) 291.

Exceeding privilege.—Where defendant in writing a letter on a matter of business in which he was interested in reply to a communication from the person to whom it is addressed states matters derogatory to the character of a third person, which was not necessary to a statement of defendant's position in regard to the subject-matter of the correspondence, such defamatory matter is not privileged. Merchants Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19.

57. Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

58. Pendleton *v.* Hawkins, 11 N. Y. App. Div. 602, 42 N. Y. Suppl. 626 (holding that the publication was privileged where a church trustee made inquiries concerning the pastor and received in reply a letter containing defamatory matter which he showed to the other trustees and to another member of the church in good faith, believing it to be true); O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26; McKnight *v.* Hasbrouck, 17 R. I. 70, 20 Atl. 95; Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429; Maitland *v.* Bramwell, 2 F. & F. 623. See also Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322; Lally *v.* Emery, 79 Hun (N. Y.) 560, 29 N. Y. Suppl. 888; Lally *v.* Emery, 59 Hun (N. Y.) 237, 12 N. Y. Suppl. 785.

Communication with reference to plaintiff's fitness for church office.—In Howard *v.* Dickie, 120 Mich. 238, 79 N. W. 191, it was held that a statement by an official member at a quarterly conference of church trustees, called to elect trustees for the ensuing year, in response to a question as to why he objected to a certain candidate, if made without malice and in good faith, is privileged.

A letter written to elders about to employ a pastor, informing them of his character and conduct, is privileged when not malicious. Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Blackburn *v.* Blackburn, 4 Bing. 395; 13 E. C. L. 557, 3 C. & P. 146, 14 E. C. L. 495, 6 L. J. C. P. O. S. 13, 1 M. & P. 33, 63, 29 Rev. Rep. 583. The writer of such letter is not responsible for any damages resulting from plaintiff's publication of such letter by reading it from the pulpit of his church before the congregation. Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850.

59. *Massachusetts.*— Lovejoy *v.* Whitcomb, 174 Mass. 586, 55 N. E. 322; Shurtleff *v.* Parker, 130 Mass. 293, 39 Am. Rep. 454; York *v.* Johnson, 116 Mass. 482.

New Jersey.— Ritchie *v.* Widdemer, 59 N. J. L. 290, 35 Atl. 825.

North Carolina.— Holmes *v.* Johnson, 33 N. C. 55.

Texas.— Coles *v.* Thompson, 7 Tex. Civ. App. 666, 27 S. W. 46.

Wisconsin.— Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 123.

England.— Martin *v.* Strong, 5 A. & E. 535, 2 Harr. & W. 336, 6 L. J. K. B. 48, 1 N. & P. 29, 31 E. C. L. 721; Magrath *v.* Finn, Ir. R. 11 C. L. 152.

See 32 Cent. Dig. tit. "Libel and Slander," § 140.

Statements made to a minister of the gospel in his ministerial office have been held to be privileged. Vickers *v.* Stoneman, 73 Mich. 419, 41 S. W. 495. But the fact that a slander was spoken by defendant to one who had formerly been pastor of the church to which plaintiff and defendant belonged and in response to inquiries by such former pastor did not make the speaking a privileged communication. Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488.

60. *Delaware.*—Craig *v.* Burris, 4 Pennew. 156, 55 Atl. 353.

relationship to the communicant or having a corresponding interest or duty,[61] or to the public generally, provided such publication is necessary and proper in the protection of defendant's interest.[62] Thus it has been held that where publication in a newspaper is a reasonable mode of giving notice to third persons for the purpose of protecting defendants against the acts or representations of plaintiff, the fact that thereby the communication came to the notice of third persons having no corresponding interest in the matter would not of itself defeat the defense of privilege.[63] But the privilege may be lost if the publication is made maliciously or contains matter unnecessary for the protection of defendant's interest.[64]

b. Communications Against Present or Former Employee. Where an employer publishes matter derogatory to a present or former employee in order to protect himself against the acts or statements of such employee, the communication is privileged if made in good faith and confined to the occasion which justified its publication.[65] Thus it has been held privileged for an employer to distribute to

Georgia.— Sheftall *v.* Georgia Cent. R. Co., 123 Ga. 589, 51 S. E. 646.

Massachusetts.— Brow *v.* Hathaway, 13 Allen 239, holding that the privilege is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested.

Michigan.— Smith *v.* Smith, 73 Mich. 445, 446, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52, where it is said: "A qualified privilege exists in cases where some communication is necessary and proper in the protection of a person's interest."

England.— Blackham *v.* Pugh, 2 C. B. 611, 15 L. J. C. P. 290, 52 E. C. L. 611; Delany *v.* Jones, 4 Esp. 191.

See 32 Cent. Dig. tit. "Libel and Slander," § 141.

61. *Alabama.*— Easley *v.* Moss, 9 Ala. 266.

Louisiana.— Lynch *v.* Febiger, 39 La. Ann. 336, 1 So. 690.

Massachusetts.— Lawler *v.* Earle, 5 Allen 22.

Mississippi.— Alabama, etc., Co. *v.* Brooks, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528.

New York.— Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360; Hill *v.* Durham House Drainage Co., 79 Hun 335, 29 N. Y. Suppl. 427; Clapp *v.* Devlin, 35 N. Y. Super. Ct. 170.

North Carolina.— Allen *v.* Cape Fear, etc., R. Co., 100 N. C. 397, 6 S. E. 105.

Virginia.— Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358.

England.— Croft *v.* Stevens, 7 H. & N. 570, 31 L. J. Exch. 143, 5 L. T. Rep. N. S. 683, 10 Wkly. Rep. 272; Crisp *v.* Gill, 5 Wkly. Rep. 494.

See 32 Cent. Dig. tit. "Libel and Slander," § 141.

Rule applied to statements made to plaintiff's attorney.— Jacob *v.* Lawrence, 14 Cox C. C. 321. See also Huntley *v.* Ward, 6 C. B. N. S. 514, 6 Jur. N. S. 18, 95 E. C. L. 514, where, however, the privilege was exceeded.

62. Rice *v.* Simmons, 2 Harr. (Del.) 309; Hatch *v.* Lane, 105 Mass. 394; Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52.

63. Hatch *v.* Lane, 105 Mass. 394. See also Rice *v.* Simmons, 2 Harr. (Del.) 309. *Compare* Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502 (holding that a circular letter sent out by a firm stating that a certain person is no longer in their employ, and advising their "friends and customers" to give him no recognition on their account, is not privileged); Daniel *v.* New York News Pub. Co., 21 N. Y. Suppl. 862 [*affirmed* in 142 N. Y. 660, 37 N. E. 569]; Brown *v.* Croome, 2 Stark. 297, 19 Rev. Rep. 727, 3 E. C. L. 417.

64. *Indiana.*—Wilson *v.* Barnett, 45 Ind. 163.

Kentucky.— Cole *v.* Wilson, 18 B. Mon. 212.

Michigan.— Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52.

New York.— Hill *v.* Durham House Drainage Co., 79 Hun 335, 29 N. Y. Suppl. 427.

South Carolina.— Woodburn *v.* Miller, Cheves 194.

Washington.— Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772.

Canada.— Benner *v.* Edmonds, 30 Ont. 676.

See 32 Cent. Dig. tit. "Libel and Slander," § 141.

65. *Georgia.*— Sheftall *v.* Georgia Cent. R. Co., 123 Ga. 589, 51 S. E. 646.

Louisiana.— Levy *v.* McCan, 44 La. Ann. 528, 10 So. 794. *Compare* Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502.

Massachusetts.— Hatch *v.* Lane, 105 Mass. 394 (publication in newspaper by baker that an employee had "left my employ, and taken upon himself the privilege of collecting my bills"); Gassett *v.* Gilbert, 6 Gray 94.

Michigan.— Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181.

New York.— See Ratzel *v.* New York News Pub. Co., 67 N. Y. App. Div. 598, 73 N. Y. Suppl. 849 [*reversing* 35 Misc. 487, 71 N. Y. Suppl. 1074]. *Compare* Daniel *v.* New York News Pub. Co., 21 N. Y. Suppl. 862 [*affirmed* in 142 N. Y. 660, 37 N. E. 569].

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384.

Virginia.— Brown *v.* Norfolk, etc., R. Co., 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472.

subordinate agents a list of discharged employees with reasons for their discharge, when the purpose is to prevent unsuitable men from being reëmployed.[66] So where defendant, a trader, has been accused of charging for goods never delivered, he may vindicate himself by imputing the dishonesty to his servant.[67]

14. Communications of Public Interest to Members of Community Generally. In some of the decisions the rule has been stated that the fact that the subject-matter of the communication is one of public interest in the community of which the parties to the communication are members is sufficient as respects interest to confer the privilege, and that in regard to the matters of public interest all that is necessary to render the words spoken to be privileged is that they should be communicated in good faith without malice to those who have an interest in the subject-matter to which they refer, and in a fixed belief that the communications were true, such belief being founded on reasonable and probable grounds.[68] This rule has been applied to communications warning the public against frauds.[69]

15. Dictation to Stenographer or Clerk. As a general rule the dictation of a libelous letter by defendant to his private and confidential stenographer or clerk is not a privileged communication and this whether the letter is to be transmitted to plaintiff[70] or to a third person.[71] On the other hand it has been held that a solicitor intrusted to write defamatory matter on a privileged occasion on behalf of a client may, without losing the privilege, discharge his duty to his client in the ordinary and reasonable way of continuing his business, that is, by having the communication taken down and copied by a clerk.[72]

England.— Taylor *v.* Hawkins, 16 Q. B. 308, 15 Jur. 746, 20 L. J. Q. B. 313, 71 E. C. L. 308; Fountain *v.* Boodle, 3 Q. B. 5, 2 G. & D. 455, 43 E. C. L. 605; Manby *v.* Witt, 18 C. B. 544, 2 Jur. N. S. 1004, 25 L. J. C. P. 294, 4 Wkly. Rep. 613, 86 E. C. L. 544; Harris *v.* Thompson, 13 C. B. 333, 76 E. C. L. 333.

Canada.— Miller *v.* Green, 33 Nova Scotia 517; Puterbaugh *v.* Gold Medal Co., 5 Ont. L. Rep. 680.

See 32 Cent. Dig. tit. "Libel and Slander," § 142.

Accusing employee of theft in presence of third person.— Where a manager of a store having been told by two subordinates that a third employee had not only stolen certain property but had admitted his guilt charged the alleged offender with theft in the presence of third persons and dismissed him from service, it was held that the words were *prima facie* privileged. McCarty *v.* Lambley, 20 N. Y. App. Div. 264, 46 N. Y. Suppl. 1792. See also Brow *v.* Hathaway, 13 Allen (Mass.) 239; Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135; Gildner *v.* Busse, 3 Ont. L. Rep. 561.

66. Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181; Hebner *v.* Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384; Brown *v.* Norfolk, etc., R. Co., 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472. See also Hunt *v.* Great Northern R. Co., [1891] 2 Q. B. 189, 55 J. P. 648, 60 L. J. Q. B. 498.

67. Coward *v.* Wellington, 7 C. & P. 531, 32 E. C. L. 743.

68. Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446; Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678; Briggs *v.* Garrett, 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274.

Statements made at a town meeting by a taxpayer regarding matters that could lawfully come before such meeting are qualifiedly privileged. Bradford *v.* Clark, 90 Me. 298, 38 Atl. 229; Smith *v.* Higgins, 16 Gray (Mass.) 251; George *v.* Goddard, 2 F. & F. 689; Spencer *v.* Amerton, 1 M. & Rob. 470.

Comment and criticism of matters of public interest see *infra*, VI, D.

69. Price *v.* Simmons, 2 Harr. (Del.) 309; Williams *v.* Chicago Herald Co., 46 Ill. App. 655 (holding that a publication in a newspaper warning the public against a swindling scheme was not libelous); St. Louis Clothing Co. *v.* J. D. Hail Dry-Goods Co., 156 Mo. 393, 56 S. W. 1112 (holding that where plaintiff published an advertisement calculated to mislead and deceive the public a counter advertisement by defendant, attacking this as being a deception and a fake, was justifiable and privileged); St. Louis Southwestern R. Co. *v.* McArthur, 31 Tex. Civ. App. 205, 72 S. W. 76. See also Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8; Bowsky *v.* Cimiotti Unhairing Co., 72 N. Y. App. Div. 172, 76 N. Y. Suppl. 465.

70. Gambrill *v.* Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87.

71. Pullman *v.* Hill, [1891] 1 Q. B. 524, 60 L. J. Q. B. 299, 64 L. T. Rep. N. S. 691, 39 Wkly. Rep. 263.

72. Boxsius *v.* Goblet Frères, [1894] 1 Q. B. 842, 58 J. P. 670, 63 L. J. Q. B. 401, 70 L. T. Rep. N. S. 368, 9 Reports 224,

16. Communications by Attorney or Agent. If a communication by an agent or attorney to a third person is reasonably necessary and usual in the discharge of his duties to his principal or client, it is *prima facie* privileged.[73]

17. Repetitions or Insinuations. On the question whether words are privileged the same rule applies to repetitions of defamatory words originally published by others or insinuations of what is false that applies to false statements directly made.[74] The repetition of a defamation for the purpose of obtaining advice as to whether the person defamed should be notified of the report is not privileged.[75]

D. Public Criticism and News — 1. In General. It is sometimes said that fair and honest criticism in matters of public concern is privileged.[76] But in other cases a distinction is drawn between an ordinary privileged communication and the so-called privilege of fair criticism.[77] The interests of society require that immunity should be granted to the discussion of public affairs and that all acts and matters of a public nature may be freely published with fitting comments or strictures.[78] But the privilege is limited strictly to comment and criticism and

42 Wkly. Rep. 392, 58 J. P. 670. See also Harper *v.* Hamilton Retail Grocers' Assoc., 32 Ont. 295.

73. Boxsius *v.* Goblet Frères, [1894] 1 Q. B. 842, 58 J. P. 670, 63 L. J. Q. B. 401, 70 L. T. Rep. N. S. 368, 9 Reports 224, 42 Wkly. Rep. 392; Baker *v.* Carrick, [1894] 1 Q. B. 838, 58 J. P. 669, 63 L. J. Q. B. 398, 70 L. T. Rep. N. S. 366, 9 Reports 283, 42 Wkly. Rep. 338; Hopwood *v.* Thorn, 8 C. B. 293, 14 Jur. 87, 19 L. J. C. P. 94, 65 E. C. L. 293.

74. Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275.

75. Branstetter *v.* Dorrough, 81 Ind. 527. See also Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425; Davis *v.* Wells, 25 Tex. Civ. App. 155, 60 S. W. 566.

76. See Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111 [*citing* Stark Sl. & L. (ed. 1877) 332].

Privileged communications to public generally see *supra*, VI, C, 14.

77. Bearce *v.* Bass, 88 Me. 521, 541, 34 Atl. 411, 51 Am. St. Rep. 446 (where it is said: "The distinction between fair and reasonable comment and criticism, and privileged communications, is this. That in the latter case, the words may be defamatory but the defamation is excused or justified by reason of the occasion; while in the former case, the words are not defamatory of the plaintiff, and hence not libelous,— the stricture or criticism is not upon the person himself, but upon his work"); Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 242, 28 N. E. 1, 13 L. R. A. 97 (where it is said: "There is an important distinction to be noticed between the so called privilege of fair criticism upon matters of public interest, and the privilege existing in the case, for instance, of answers to inquiries about the character of a servant. In the latter case a *bona fide* statement not in excess of the occasion is privileged, although it turns out to be false. In the former, what is privileged, if that is the proper term, is criticism, not statement, and . . . if he takes upon himself in his own person to allege facts otherwise libelous, he will not be privileged if those facts are not true. The reason for the distinction lies in the different nature and degree of the exigency and of the damage in the two cases. . . . When private inquiries are made about a private person, a servant, for example, it is often impossible to answer them properly without stating facts. . . . But what the interest of private citizens in public matters require is freedom of discussion rather than of statement"). See also Sheckell *v.* Jackson, 10 Cush. (Mass.) 25; Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216; Davis *v.* Shepstone, 11 App. Cas. 187, 50 J. P. 709, 55 L. J. P. C. 51, 55 L. T. Rep. N. S. 1, 34 Wkly. Rep. 722; Henwood *v.* Harrison, L. R. 7 C. P. 606, 41 L. J. C. P. 206, 26 L. T. Rep. N. S. 938, 20 Wkly. Rep. 1000; Campbell *v.* Spottiswoode, 3 B. & S. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. Rep. N. S. 201, 11 Wkly. Rep. 569, 113 E. C. L. 769.

78. *Iowa.*— Cherry *v.* Des Moines Leader, 114 Iowa 298, 86 N. W. 323, 89 Am. St. Rep. 365, 54 L. R. A. 855; Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235.

Louisiana.— Cooke *v.* O'Malley, 109 La. 382, 33 So. 377.

Maine.— Bearce *v.* Bass, 88 Me. 521, 539, 34 Atl. 411, 51 Am. St. Rep. 446, where it is said: "Every one has a right to comment on matters of public interest and concern, provided he does so fairly and with an honest purpose."

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314.

Massachusetts.—Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

New York.— Fry *v.* Bennett, 3 Bosw. 200; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788.

Pennsylvania.— Press Co. *v.* Stewart, 119 Pa. St. 584, 14 Atl. 51.

United States.— Crane *v.* Waters, 10 Fed. 619.

England.— McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100, 72 L. J. K. B. 612, 88 L. T. Rep. N. S. 757, 51 Wkly. Rep.

does not extend to protect false statements, unjust inferences, imputations of evil motives, or criminal conduct, and attacks upon private character, the publisher being responsible for the truth of what he alleges to be facts.[79]

2. **Conduct of Public Men.** Comment on and criticism of the acts and conduct of public men are privileged if fair and reasonable and made in good faith.[80] But

689; Merivale *v.* Carson, 20 Q. B. D. 275, 52 J. P. 261, 58 L. T. Rep. N. S. 331, 36 Wkly. Rep. 231; Kelly *v.* Tinling, L. R. 1 Q. B. 699, 12 Jur. N. S. 940, 35 L. J. Q. B. 231, 13 L. T. Rep. N. S. 255, 14 Wkly. Rep. 51; Davis *v.* Duncan, L. R. 9 C. P. 396, 43 L. J. C. P. 185, 30 L. T. Rep. N. S. 464, 22 Wkly. Rep. 575; Henwood *v.* Harrison, L. R. 7 C. P. 606, 41 L. J. C. P. 206, 26 L. T. Rep. N. S. 938, 2 Wkly. Rep. 1000; Hunter *v.* Sharpe, 4 F. & F. 983, 15 L. T. Rep. N. S. 421; Gathercole *v.* Miall, 10 Jur. 337, 15 L. J. Exch. 179, 15 M. & W. 319; Risk Allah Bey *v.* Whitehurst, 18 L. T. Rep. N. S. 615.

See 32 Cent. Dig. tit. "Libel and Slander," § 144.

Mistaken inferences.— Defendant need not prove the exact truth and soundness of his deductions, and he is not liable if in acting honestly he makes, through mistaken inferences on the matters of fact involved, defamatory statements, the truth of which statements he cannot substantiate. Crane *v.* Waters, 10 Fed. 619; Hunter *v.* Sharpe, 4 F. & F. 983, 15 L. T. Rep. N. S. 421; Risk Allah Bey *v.* Whitehurst, 18 L. T. Rep. N. S. 615.

Matters of public interest.—Matters of public interest, justifying criticism and comment thereon, have been held to include a business college (Press Co. *v.* Stewart, 119 Pa. St. 584, 14 Atl. 51), character of homes provided by employers for their laborers (South Hetton Coal Co. *v.* North-Eastern News Assoc., [1894] 1 Q. B. 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. Rep. N. S. 844, 9 Reports 240, 42 Wkly. Rep. 322. *Compare* Hogan *v.* Sutton, 16 Wkly. Rep. 127), church services (Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235; Kelly *v.* Tinling, L. R. 1 Q. B. 699, 12 Jur. N. S. 940, 35 L. J. Q. B. 231, 13 L. T. Rep. N. S. 255, 14 Wkly. Rep. 51. See also Gathercole *v.* Miall, 10 Jur. 337, 15 L. J. Exch. 179, 15 M. & W. 319), evidence given in court (Hedley *v.* Barlow, 4 F. & F. 224; Woodgate *v.* Ridout, 4 F. & F. 202; Kane *v.* Mulvains, Ir. R. 2 C. L. 402), a judicial proceeding acquitting a criminal (Risk Allah Bey *v.* Whitehurst, 18 L. T. Rep. N. S. 615), place of public entertainment (Dibdin *v.* Swan, 1 Esp. 28, 5 Rev. Rep. 717), a theatrical performance (Cherry *v.* Des Moines Leader, 114 Iowa 298, 86 N. W. 323, 89 Am. St. Rep. 365, 54 L. R. A. 855), character of construction of public buildings (Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446), and the character of construction of public bridge (Crane *v.* Waters, 10 Fed. 619).

The circulation and position of a newspaper are not matters of general public interest and a discussion on the subject is not protected if it be libelous. Latimers *v.* Western Morning News Co., 25 L. T. Rep. N. S. 44.

79. *California.*— Wilson *v.* Fitch, 41 Cal. 363.

Delaware.— Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. 181.

Iowa.— Clifton *v.* Lange, 108 Iowa 472, 79 N. W. 276.

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 515, 48 N. E. 275 (where it is said that "the privilege of comment and criticism on matters of public interest . . . does not extend to false statements"); Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

Michigan.— Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

New York.— Fry *v.* Bennett, 3 Bosw. 200; Fry *v.* Bennett, 5 Sandf. 54, holding that privilege can be claimed on the ground that the statements were criticisms of matters of public interest, unless the truth of the facts published is admitted or established.

Pennsylvania.— Oles *v.* Pittsburg Times, 2 Pa. Super. Ct. 130, 38 Wkly. Notes Cas. 461.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

Washington.— Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772.

England.— Green *v.* Chapman, 4 Bing. N. Cas. 92, 5 Scott 340, 33 E. C. L. 613; Campbell *v.* Spottiswoode, 3 B. & S. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. Rep. N. S. 201, 11 Wkly. Rep. 569, 11 E. C. L. 769; Dibdin *v.* Swan, 1 Esp. 28, 5 Rev. Rep. 717; Hedley *v.* Barlow, 4 F. & F. 224; Woodgate *v.* Ridout, 4 F. & F. 202; Stuart *v.* Lovell, 2 Stark 93, 19 Rev. Rep. 688, 3 E. C. L. 331.

See 32 Cent. Dig. tit. "Libel and Slander," § 144.

80. *Connecticut.*—Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Iowa.— Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235, comment on conduct of clergyman.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Vance *v.* Louisville Courier-Journal Co., 95 Ky. 41, 23 S. W. 591, 15 Ky. L. Rep. 412.

Louisiana.— Wallis *v.* Bazet, 34 La. Ann. 131.

Michigan.— Miner *v.* Detroit Post, etc., Co., 49 Mich. 358, 13 N. W. 773.

Minnesota.—Herringer *v.* Ingberg, 91 Minn. 71, 97 N. W. 460.

Nebraska.— Farley *v.* McBride, (1905) 103 N. W. 1036; Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

the right to criticize does not embrace the right to make false statements of fact, to attack the private character of a public officer, or to falsely impute to him malfeasance or misconduct in office.[81] In some jurisdictions, however, it is held that even though the statements are not strictly true, defendant is not liable if there was probable cause for the statements and there is no proof of express malice.[82]

New York.— Hamilton *v.* Eno, 81 N. Y. 116; Duffy *v.* New York Evening Post Co., 109 N. Y. App. Div. 471, 474, 96 N. Y. Suppl. 629, where in the case of an alleged libel against a person in his character of a politician it is said: "To comment upon the acts or conduct of a public man is the right of every citizen."

Pennsylvania.— Rowand *v.* De Camp, 96 Pa. St. 493.

United States.— Hallam *v.* Post Pub. Co., 55 Fed. 456 [*affirmed* in 59 Fed. 530, 8 C. C. A. 201]; Crane *v.* Waters, 10 Fed. 619; Crane *v.* Boston Advertiser, 6 Fed. Cas. No. 3,352*a*.

England.— Wason *v.* Walter, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34, 19 L. T. Rep. N. S. 409, 17 Wkly. Rep. 169; Dunne *v.* Anderson, 3 Bing. 88, 11 E. C. L. 51, 10 Moore C. P. 407, R. & M. 287, 28 Rev. Rep. 591, 21 E. C. L. 753; Hibbins *v.* Lee, 4 F. & F. 243, 11 L. T. Rep. N. S. 541; Cox *v.* Feeney, 4 F. & F. 13; Seymour *v.* Butterworth, 3 F. & F. 372; Turnbull *v.* Bird, 2 F. & F. 508; Kane *v.* Mulvains, Ir. R. 2 C. L. 402; Odger *v.* Mortimer, 28 L. T. Rep. N. S. 472; Harle *v.* Catherall, 14 L. T. Rep. N. S. 801.

See 32 Cent. Dig. tit. "Libel and Slander," § 145.

Conduct of private person as affecting public matters.— In Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97, it was held that comment on the conduct of private individuals as affecting public matters is privileged, as for instance comments upon the conduct of a private individual in connection with alleged customhouse frauds.

Persons not public men within meaning of rule.— An insurance agent (Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867), a landlord (Hogan *v.* Sutton, 16 Wkly. Rep. 127), a secretary of a cemetery association (Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Nebr. 64, 60 N. W. 358), and a trustee of a mining corporation (Wilson *v.* Fitch, 41 Cal. 363), have been held not to be public men so as to render them amenable to public criticism.

Privileged communications regarding public officers see *supra*, V, C, 6.

81. *Iowa.*— Clifton *v.* Lange, 108 Iowa 472, 79 N. W. 276.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Maryland.— Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Massachusetts — Com. *v.* Wardwell, 136 Mass. 164; Dodds *v.* Henry, 9 Mass. 262.

Michigan.— Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403.

Minnesota.—Martin *v.* Paine, 69 Minn. 482, 72 N. W. 450.

Nebraska.— Farley *v.* McBride, (1905) 103 N. W. 1036; Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

New York.— Hamilton *v.* Eno, 81 N. Y. 116; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; Hart *v.* Townsend, 67 How. Pr. 88; Powers *v.* Skinner, 1 Wend. 451.

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921; Cincinnati Gazette Co. *v.* Bishop, 6 Ohio Dec. (Reprint) 1113, 10 Am. L. Rec. 488 [*affirming* 7 Ohio Dec. (Reprint) 711, 4 Cinc. L. Bul. 1082]; Wahle *v.* Cincinnati Gazette Co., 6 Ohio Dec. (Reprint) 709, 7 Am. L. Rec. 541, 4 Cinc. L. Bul. 61.

Pennsylvania.— Wood *v.* Boyle, 177 Pa. St. 620, 35 Atl. 853, 55 Am. St. Rep. 747; Rowand *v.* De Camp, 96 Pa. St. 493.

Texas — Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

Washington.— Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772.

Wisconsin.— Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111. See also Ellsworth *v.* Hayes, 71 Wis. 427, 37 N. W. 249.

United States.—Hallam *v.* Post Pub. Co., 55 Fed. 456 [*affirmed* in 59 Fed. 530, 8 C. C. A. 201]; Smith *v.* Tribune Co., 22 Fed. Cas. No. 13,118, 4 Biss. 477. *Compare* Crane *v.* Waters, 10 Fed. 619; Crane *v.* Boston Advertiser, 6 Fed. Cas. No. 3,352*a*.

England.— Davis *v.* Shepstone, 11 App. Cas. 187, 50 J. P. 709, 55 L. J. P. C. 51, 55 L. T. Rep. N. S. 1, 34 Wkly. Rep. 722; Joynt *v.* Cycle Trade Pub. Co., [1904] 2 K. B. 292, 73 L. J. K. B. 752, 91 L. T. Rep. N. S. 155; Proctor *v.* Webster, 16 Q. B. D. 112, 55 L. J. Q. B. 150, 53 L. T. Rep. N. S. 765; Henwood *v.* Harrison, L. R. 7 C. P. 606, 41 L. J. C. P. 206, 26 L. T. Rep. N. S. 938, 20 Wkly. Rep. 1000; Ryan *v.* Wood, 4 F. & F. 735; Wilson *v.* Reed, 2 F. & F. 149; Odger *v.* Mortimer, 28 L. T. Rep. N. S. 472; Simpson *v.* Downs, 16 L. T. Rep. N. S. 391.

See 32 Cent. Dig. tit. "Libel and Slander," § 145.

Where an officer was not elected by the public but appointed by a city council, and is subject to removal only by the council, no libel against him is privileged except a representation made without malice to the proper authorities. Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403.

82. O'Rourk *v.* Lewiston Daily Sun Pub. Co., 89 Me. 310, 36 Atl. 398; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec 605; Jackson *v.* Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367; Coates *v.* Wal-

3. Candidates For Election. When a man becomes a candidate for an office his character for honesty and integrity and his qualifications and fitness for the position are put before the public and are thereby made proper subjects for comment.[83] But as a general rule false allegations of fact charging criminal or disgraceful conduct, or otherwise aspersive of character, are not privileged.[84] On the other hand it is held in some jurisdictions that matters having a bearing on the character and fitness for office of a candidate may be published if they are in good

lace, 4 Pa. Super. Ct. 253, 40 Wkly. Notes Cas. 235.

83. *California.*— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Iowa.— See Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

Maryland.— Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

Massachusetts.— Curtis *v.* Mussey, 6 Gray 261.

Michigan.— Eikhoff *v.* Gilbert, 124 Mich. 353, 359, 83 N. W. 110, 51 L. R. A. 451 (where it is said: "The defendants had a right to discuss the fitness of the plaintiff for the office to which he aspired, and might lawfully communicate to the electors any facts within their knowledge concerning his character or conduct, and express their opinions upon them, and their inferences deduced from them, so long as they stated as facts only the truth, and as opinions and inferences therefrom only honest belief"); Wheaton *v.* Beecher, 66 Mich. 307, 33 N. W. 503; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

Missouri.— Smith *v.* Burris, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

Nebraska.— Farley *v.* McBride, (1905) 103 N. W. 1036.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270 [*affirming* 71 Hun 485, 24 N. Y. Suppl. 1060]; Lewis *v.* Few, Anth. N. P. 102, 5 Johns. 1.

Ohio.— Seely *v.* Blair, Wright 358, 683.

Oregon.— Upton *v.* Hume, 24 Oreg. 430, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

South Dakota.— Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746; Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233; Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

See 32 Cent. Dig. tit. "Libel and Slander," § 146.

84. *California.*— Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216; Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Burke *v.* Mascarich, 81 Cal. 302, 22 Pac. 673.

Delaware.— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Maryland.— Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

Massachusetts.— Curtis *v.* Mussey, 6 Gray 261; Com. *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212, a criminal prosecution. *Compare* Com. *v.* Wardwell, 136 Mass. 164.

Michigan.— Eikhoff *v.* Gilbert, 124 Mich. 353, 361, 83 N. W. 110, 51 L. R. A. 451 (where it is said that "a candidate for office has a right of action for aspersions upon his character, and cannot be subjected to unwarranted and untruthful charges"); Austin *v.* Hyndman, 119 Mich. 615, 78 N. W. 663; Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; Wheaton *v.* Beecher, 66 Mich. 307, 33 N. W. 503; Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

Missouri.— Smith *v.* Burris, 106 Mo. 94, 16 S. W. 881, 27 Am. St. Rep. 329, 13 L. R. A. 59.

Nebraska.—Mertens *v.* Bee Pub. Co., (1904) 5 Nebr. (Unoff.) 592, 99 N. W. 847.

New Jersey.— State *v.* Schmitt, 49 N. J. L. 579, 9 Atl. 774.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270 [*affirming* 71 Hun 485, 24 N. Y. Suppl. 1060]; Lewis *v.* Few, Anth. N. P. 102, 5 Johns. 1; Root *v.* King, 7 Cow. 613.

Ohio.—Seely *v.* Blair, Wright 358, 683.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

South Dakota.— Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746, Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233; Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757, holding, however, that an editor of a newspaper or any other person has a right to publish in a newspaper any allegations true or false, with good motives, or maliciously, in reference to the physical or mental qualifications of a candidate for an office in the gift of the people.

United States.— Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456].

England.— Duncombe *v.* Daniell, 8 C. & P. 222, 2 Jur. 32, 1 W. W. & H. 101, 34 E. C. L. 701.

See 32 Cent. Dig. tit. "Libel and Slander," § 146.

Defamation of appointee of candidates for office.— In order to inform the public of the conduct and character of an officer who is a candidate for reëlection, an elector cannot with impunity publish defamatory statements

faith and on probable cause believed to be facts.[85] The publication of an attack upon a person who is not a candidate for the votes of the people, but who is seeking an appointive office, is not privileged.[86]

4. Books and Works of Art. Books, paintings, and other works of art are legitimate subjects of comment, and criticism, fairly and honestly made, is not actionable, however strong the terms of censure may be, without the averment and proof of special damage, unless it goes further and attacks the individual.[87] But the privilege of criticism cannot warrantably be perverted to the purposes of wilfully and falsely assailing the moral character of an author.[88]

5. Publication of News — a. In General. Newspapers as such have no peculiar privilege.[89] Defamatory matter published in good faith in the honest belief in its truth if false is not privileged because published as a mere matter of news.[90]

concerning an appointee of such candidate. Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

85. Briggs *v.* Garrett, 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274; Express Printing Co. *v.* Copeland, 64 Tex. 354. See also Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678; Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84. *Compare* Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

In Iowa it is held that where a person honestly believing that a candidate for public office is guilty of conduct affecting his fitness for the position to which he aspires communicates that belief to the electors whose support the candidate seeks, acting in good faith in discharge of his duty to the public, the communication is privileged. Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Bays *v.* Hunt, 60 Iowa 251, 14 N. W. 785 [*distinguishing* Mott *v.* Dawson, 46 Iowa 533].

86. Hunt *v.* Bennett, 19 N. Y. 173; Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765.

87. *Maine.*— Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

Massachusetts.— Dooling *v.* Budget Pub. Co., 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83; Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

Michigan.— Dowling *v.* Livingstone, 108 Mich. 321, 66 N. W. 225, 62 Am. St. Rep. 702, 32 L. R. A. 104.

United States.— Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

England.— Merivale *v.* Carson, 20 Q. B. D. 275, 52 J. P. 261, 58 L. T. Rep. N. S. 331, 36 Wkly. Rep. 231; Carr *v.* Hood, 1 Campb. 355 note, 10 Rev. Rep. 701 note; Tabart *v.* Tipper, 1 Campb. 350, 10 Rev. Rep. 698; Paris *v.* Levy, 9 C. B. N. S. 342, 7 Jur. N. S. 289, 30 L. J. C. P. 11, 3 L. T. Rep. N. S. 323, 9 Wkly. Rep. 71, 99 E. C. L. 342 [*affirming* 2 F. & F. 71]; Fraser *v.* Berkeley, 7 C. & P. 621, 32 E. C. L. 789; Macleod *v.* Wakley, 3 C. & P. 311, 14 E. C. L. 584; Strauss *v.* Francis, 4 F. & F. 1107, 15 L. T. Rep. N. S. 674; Morrison *v.* Belcher, 3 F. & F. 614; Eastwood *v.* Holmes, 1 F. & F. 347; Thompson *v.* Shackell, M. & M. 187, 31 Rev. Rep. 728, 22 E. C. L. 503; Soane *v.* Knight, M. & M. 74, 31 Rev. Rep. 714, 22 E. C. L. 477.

See 32 Cent. Dig. tit. "Libel and Slander," § 147.

88. Cooper *v.* Stone, 24 Wend. (N. Y.) 434. See also Croasdale *v.* Bright, 6 Houst. (Del.) 52; Hart *v.* Townsend, 67 How. Pr. (N. Y.) 88.

Imputations affecting authors or editors in their profession or business see *supra*, III, G, 4, h.

89. *California.*— Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Georgia.— Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 N. E. 756, 3 L. R. A. N. S. 1139; Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

Iowa.— Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867.

Kentucky.— Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226, 20 Ky. L. Rep. 634.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Sheckell *v.* Jackson, 10 Cush. 25.

Michigan.— Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Foster *v.* Scripps, 39 Mich. 376, 33 Am. Rep. 403.

Minnesota.— Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84.

New Hampshire.— Barnes *v.* Campbell, 59 N. H. 128, 4 Am. Rep. 183; Smart *v.* Blanchard, 42 N. H. 137.

Ohio.— Cincinnati Gazette Co. *v.* Bishop, 6 Ohio Dec. (Reprint) 1113, 10 Am. L. Rec. 488.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

Tennessee.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

See 32 Cent. Dig. tit. "Libel and Slander," § 148.

90. *California.*— Gilman *v.* McClatchy, 111 Cal. 606, 44 Pac. 241.

Colorado.— Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

Georgia.— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655, holding that it is no justifica-

b. Freedom of the Press. The constitution of the United States and the state constitutions guarantee the right of freedom of speech and liberty of the press.[91] The term "freedom of the press" consists in a right, in the conductor of a newspaper, to print what he chooses, without any previous license but subject to be held responsible therefor to the same extent that any one else would be responsible for the publication.[92]

E. Reports of Official Proceedings — 1. Judicial Proceedings — a. In General. A full, fair, and impartial report of a judicial proceeding is qualifiedly privileged,[93] unless the court has itself prohibited the publication or the subject-matter

tion that the defamation was inserted as an advertisement.

Indiana.— Johnson *v.* Stebbins, 5 Ind. 364.

Kentucky.— Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226, 20 Ky. L. Rep. 634.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Maine.— Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275; Sheckell *v.* Jackson, 10 Cush. 25.

Michigan.— Long *v.* Tribune Printing Co., 107 Mich. 207, 65 N. W. 108; Peoples *v.* Detroit Post, etc., Co., 54 Mich. 457, 20 N. W. 528; Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209.

Minnesota.—Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330; Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532; Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904.

Missouri.— Arnold *v.* Savings Co., 76 Mo. App. 159.

New Hampshire.— Barnes *v.* Campbell, 59 N. H. 128, 47 Am. Rep. 183; Smart *v.* Blanchard, 42 N. H. 137.

New York.— Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Heyler *v.* New York News Pub. Co., 71 Hun 4, 24 N. Y. Suppl. 499 [*affirmed* in 148 N. Y. 734, 42 N. E. 723]; Schuyler *v.* Busbey, 68 Hun 474, 23 N. Y. Suppl. 102 [*affirmed* in 142 N. Y. 680, 37 N. E. 825]; McClean *v.* New York Press Co., 19 N. Y. Suppl. 262; Edsall *v.* Brooks, 17 Abb. Pr. 221.

Pennsylvania.—Ingram *v.* Reed, 5 Pa. Super. Ct. 550, 41 Wkly. Notes Cas. 123; Shelly *v.* Dampman, 1 Lack. Leg. N. 77; Collins *v.* Morning News Co., 41 Wkly. Notes Cas. 425.

South Carolina.— McBride *v.* Ellis, 9 Rich. 313.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 536, 45 Pac. 1097, 35 L. R. A. 611, where it is said: "The publication in a newspaper of false and defamatory matter is not privileged because made in good faith as a matter of news."

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

Canada.— Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

See 32 Cent. Dig. tit. "Libel and Slander," § 148.

91. See Constitutional Law, 8 Cyc. 892 note 24.

92. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676; Giddens *v.* Mirk, 4 Ga. 364; Arnold *v.* Sayings Co., 76 Mo. App. 159; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757. See also Constitutional Law, 8 Cyc. 892 notes 25, 26.

93. *Georgia.*— Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139.

Illinois.— Storey *v.* Wallace, 60 Ill. 51.

Louisiana.— Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 760, 32 So. 17, 58 L. R. A. 62, where it is said: "Where a proceeding, in the nature of a criminal prosecution, or in a civil suit, has actually been filed, in a properly constituted tribunal, and there has been a judicial hearing of some kind, the publication, without malice, of a fair and accurate report of what has taken place before such tribunal is privileged."

Maryland.— McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

Massachusetts.— Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New Jersey.— McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606.

New York.— Willmann *v.* Press Pub. Co., 49 N. Y. App. Div. 35, 63 N. Y. Suppl. 515; Lawyers' Co-operative Pub. Co. *v.* West Pub. Co., 32 N. Y. App. Div. 585, 52 N. Y. Suppl. 1120; Bissell *v.* Press Pub. Co., 62 Hun 551, 17 N. Y. Suppl. 393; Salisbury *v.* Union, etc., Co., 45 Hun 120; Johns *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 19 N. Y. Suppl. 3; Ackerman *v.* Jones, 37 N. Y. Super. Ct. 42; Stanley *v.* Webb, 4 Sandf. 21, 2 Code Rep. 153; D'Auxy *v.* Star Co., 31 Misc. 388, 64 N. Y. Suppl. 283.

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921; Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285; Parks *v.* Inquirer Co., 16 Ohio Cir. Ct. 409, 8 Ohio Cir. Dec. 621 [*affirming* 4 Ohio S. & C. Pl. Dec. 184]; Coleman *v.* Ohio State Journal, 5 Ohio S. & C. Pl. Dec. 579, 7 Ohio N. P. 564.

Pennsylvania.—Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643; Moore *v.* Leader Pub. Co., 8 Pa. Super. Ct. 152, 42 Wkly. Notes Cas. 570;

of the trial or proceeding be unfit for publication.[94] And no action will lie therefor except on proof of malice in making it.[95] This privilege has been extended to writers of law books referring to reported cases faithfully and fairly, although failure to use reasonable care and diligence in order to be correct destroys the privilege.[96]

b. Preliminary Proceedings — (i) *Pleadings in Civil Cases.* A distinction has been drawn between reports of what takes place in open court and that which is done out of court by one party alone, and it is held that the publication of the contents of a petition or of other pleadings or papers filed in civil proceedings before trials or before any action has taken place on such pleadings or papers by the court is not privileged.[97] But the privilege covers pro-

McLaughlin *v.* McMakin, Brightly 132; Shelly *v.* Dampman, 1 Lack. Leg. N. 77.

Rhode Island.— Brown *v.* Providence Telegram Pub. Co., 25 R. I. 117, 54 Atl. 1061; Metcalf *v.* Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

Tennessee.— Saunders *v.* Baxter, 6 Heisk. 369.

England.—Macdougall *v.* Knight, 25 Q. B. D. 1, 54 J. P. 788, 59 L. J. Q. B. 517, 63 L. T. Rep. N. S. 43, 38 Wkly. Rep. 553; Macdougall *v.* Knight, 17 Q. B. D. 636, 51 J. P. 38, 55 L. J. Q. B. 464, 55 L. T. Rep. N. S. 274, 34 Wkly. Rep. 727 [*affirmed* in 14 App. Cas. 194, 53 J. P. 691, 58 L. J. Q. B. 537, 60 L. T. Rep. N. S. 762, 38 Wkly. Rep. 44]; Usill *v.* Hales, 3 C. P. D. 319, 14 Cox. C. C. 61, 47 L. J. C. P. 323, 38 L. T. Rep. N. S. 65, 26 Wkly. Rep. 371; Myers *v.* Defries, 5 Ex. D. 180, 49 L. J. Exch. 266, 42 L. T. Rep. N. S. 137, 28 Wkly. Rep. 406, 4 Ex. D. 176, 48 L. J. Exch. 446, 40 L. T. 795, 41 L. T. Rep. N. S. 659; Stevens *v.* Sampson, 5 Ex. D. 53, 49 L. J. Q. B. 120, 41 L. T. Rep. N. S. 728, 28 Wkly. Rep. 87; Hoare *v.* Silverlock, 9 C. B. 20, 19 L. J. C. P. 215, 67 E. C. L. 20; Andrews *v.* Chapman, 3 C. & K. 286; Smith *v.* Scott, 2 C. & K. 580, 61 E. C. L. 580; Milissich *v.* Lloyds, 13 Cox C. C. 575, 46 L. J. C. P. 404, 36 L. T. Rep. N. S. 423, 25 Wkly. Rep. 353; Lewis *v.* Levy, E. B. & E. 537, 4 Jur. N. S. 970, 27 L. J. Q. B. 282, 6 Wkly. Rep. 629, 96 E. C. L. 537.

See 32 Cent. Dig. tit. "Libel and Slander," § 127.

The reason for the rule has been thus stated: "The chief advantage to the country which we can discern, and that which we understand to be intended by the foregoing passage, is the security which the publicity gives for the proper administration of justice. It used to be said sometimes that the privilege was founded on the fact of the court being open to the public. Stockdale *v.* Hansard, 9 A. & E. 1, 3 Jur. 905, 8 L. J. Q. B. 294, 2 P. & D. 1, 36 E. C. L. 27, per Patteson, J. This no doubt is too narrow, as suggested by Lord Chief Justice Cockburn, in Wason *v.* Walter, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34, 19 L. T. Rep. N. S. 409, 17 Wkly. Rep. 169; but the privilege and the access of the public to the courts stand in reason upon common ground. Lewis *v.* Levy, E. B. & E. 537, 4 Jur. N. S. 970, 27 L. J. Q. B. 282, 6 Wkly. Rep. 629, 96 E. C. L. 537. It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." Cowley *v.* Pulsifer, 137 Mass. 392, 394, 50 Am. Rep. 318. See also Rex *v.* Wright, 8 T. R. 293, 4 Rev. Rep. 649.

A committee of the house of lords when conducting an inquiry upon a matter referred to them constitutes a public court of justice within the above rule. Kane *v.* Mulvains, Ir. R. 2 C. L. 402.

Rule applied to proceedings before registrar in bankruptcy.— Ryalls *v.* Leader, L. R. 1 Exch. 296, 12 Jur. N. S. 503, 35 L. J. Exch. 185, 14 L. T. Rep. N. S. 563, 14 Wkly. Rep. 838.

The publication of libelous matter uttered at a public execution or by the public officers, the ministers of religion, the convict himself or the bystanders, is not privileged. Sanford *v.* Bennett, 24 N. Y. 20.

A statement made by a newspaper on its own authority and not purporting to be a report of proceedings of a court is not privileged, and it is immaterial that the libel was in fact a matter of evidence. Storey *v.* Wallace, 60 Ill. 51.

Matter alleged to be defamatory of strangers to proceedings.— It is immaterial that he who claims to be libeled by the report was not a party to the judicial proceeding. Ackerman *v.* Jones, 37 N. Y. Super. Ct. 42.

94. See American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005; Steele *v.* Brannan, L. R. 7 C. P. 261, 41 L. J. M. C. 85, 26 L. T. Rep. N. S. 509, 20 Wkly. Rep. 607.

Obscene libels see OBSCENITY.

95. Ackerman *v.* Jones, 37 N. Y. Super. Ct. 42; Stevens *v.* Sampson, 5 Ex. D. 53, 49 L. J. Q. B. 120, 41 L. T. Rep. N. S. 782, 28 Wkly. Rep. 87, holding that a true report of the proceedings in a court of justice is not absolutely privileged, and if it be published from a malicious motive an action will lie.

96. Blake *v.* Stevens, 4 F. & F. 232, 11 L. T. Rep. N. S. 543.

97. *Massachusetts.*— Cowley *v.* Pulsifer, 137 Mass. 392, 50 Am. Rep. 318.

ceedings which are in their nature only preliminary if any judicial action has been had thereon.[98]

(II) *Ex Parte Criminal Proceedings.* The general rule seems to be that the publication of *ex parte* criminal proceedings before a public magistrate is privileged.[99]

(III) *Grand Jury Proceedings, Reports to Officers, Etc.* Proceedings before a grand jury,[1] reports made to police officers charging persons with crime,[2] reports made by police and detective officers to their superiors and subscribed in books kept for that purpose,[3] and proceedings before an insurance adjuster[4] have been held not to be judicial proceedings within the meaning of the rule and the publication thereof is not privileged.

c. **Report Must Be Accurate, Full, and Impartial.** The report must present fully and fairly an impartial account of the proceedings.[5] It is not necessary,

Michigan.— Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599.

Missouri.— Barber *v.* St. Louis Dispatch Co., 3 Mo. App. 377.

New York.— Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 467, 82 N. Y. Suppl. 401 (holding that until proceedings are brought to the attention of courts, judges, or magistrates, or have so far advanced that the parties have lost absolute control over them, there is no privilege either at common law or under the statute); Gray *v.* Sampers, 35 N. Y. App. Div. 270, 55 N. Y. Suppl. 3.

Tennessee.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

Texas.— Sutton *v.* Belo, (Civ. App. 1901) 64 S. W. 686.

See 32 Cent. Dig. tit. "Libel and Slander," § 127.

Compare Thompson *v.* Powning, 15 Nev. 195.

98. American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

Proceedings in ex parte application for injunction.— Proceedings had in chambers on an *ex parte* application for an injunction *pendente lite* are court proceedings and the publication thereof is privileged. Metcalf *v.* Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900; Smith *v.* Scott, 2 C. & K. 580, 61 E. C. L. 580.

99. *Kentucky.*— Beiser *v.* Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457, 24 Ky. L. Rep. 259.

Maryland.— McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

Missouri.— See Barber *v.* St. Louis Dispatch, 3 Mo. App. 377.

New York.— Bissell *v.* Press Pub. Co., 62 Hun 551, 17 N. Y. Suppl. 393; Ackerman *v.* Jones, 37 N. Y. Super. Ct. 42. *Compare* Johns *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 19 N. Y. Suppl. 3; Stanley *v.* Webb, 4 Sandf. 21, 2 Code Rep. 153.

Rhode Island.— Metcalf *v.* Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

England.— Kimber *v.* Press Assoc., [1893] 1 Q. B. 65, 57 J. P. 247, 62 L. J. Q. B. 152, 67 L. T. Rep. N. S. 515, 4 Reports 95, 41 Wkly. Rep. 17; Wason *v.* Walter, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34, 19 L. T. Rep. N. S. 409, 17 Wkly. Rep. 169; Usill *v.* Hales, 3 C. P. D. 319, 14 Cox C. C. 61, 47 L. J. C. P. 323, 38 L. T. Rep. N. S. 65, 26 Wkly. Rep. 371; Lewis *v.* Levy, E. B. & E. 537, 4 Jur. N. S. 970, 27 L. J. Q. B. 282, 6 Wkly. Rep. 629, 96 E. C. L. 537; Pinero *v.* Goodlake, 15 L. T. Rep. N. S. 676. See also Reg. *v.* Gray, 10 Cox C. C. 184.

See 32 Cent. Dig. tit. "Libel and Slander," § 127.

Compare Cincinnati Gazette Co. *v.* Timberlake, 10 Ohio St. 548, 78 Am. Dec. 285.

1. McCabe *v.* Cauldwell, 18 Abb. Pr. (N. Y.) 377.

Coroner's inquest.— In Storey *v.* Wallace, 60 Ill. 51, the question whether or not a privilege attaches to a report of proceeedings before a coroner was referred to but not decided by the court.

2. Jastrzembski *v.* Marxhausen, 120 Mich. 677, 79 N. W. 935, holding that where a newspaper reporter at the suggestion of an officer at police headquarters obtains from a wife who came there to make complaint against her husband a repetition of the statements made to the officer, and the reporter publishes them as facts without further investigation, the publisher cannot defend an action by the husband for libel, on the ground that the article was a report of a judicial proceeding. See also Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62.

3. Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62; Fullerton *v.* Berthiaume, 6 Quebec Super. Ct. 342.

Newspaper article purporting to state acts and theories of officers.— Where an alleged libelous newspaper article contained no statement that plaintiff was guilty of burglary, and only purported to state the acts, theories, and representations of the officers of the law in relation to plaintiff's pursuit, arrest, trial, and acquittal of such offense, and that she had associated with burglars and was connected with certain burglaries, it was held that the matter was quasi-privileged. McClure *v.* Review Pub. Co., 38 Wash. 160, 80 Pac. 303.

4. Cooke *v.* O'Malley, 109 La. 382, 33 So. 377.

5. *Iowa.*— Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928.

however, that the report be verbatim,[6] and where the proceedings last more than one day a publication every morning of the proceedings of the previous day is privileged if fair and accurate.[7] Reporting a speech of counsel[8] or the result of the evidence[9] is not a fair and impartial report.

d. Exceeding the Privilege. The publication must contain only that which happened in the due course of the judicial proceedings, and any matter added thereto by the publisher defamatory of plaintiff is not privileged.[10] Thus the privilege does not extend to protect comments which are unwarranted by the facts

Maryland.— McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

Massachusetts.— Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596.

New York.— Willmann *v.* Press Pub. Co., 49 N. Y. App. Div. 35, 63 N. Y. Suppl. 515; Salisbury *v.* Union, etc., Co., 45 Hun 120.

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 88, 33 N. E. 921, where it is said that "to be within the protection of the rule, it is necessary that the publication contain an accurate and impartial report of what actually occurred, without change or addition."

Rhode Island.— Brown *v.* Providence Telegram Pub. Co., 25 R. I. 117, 54 Atl. 1061; Metcalf *v.* Times Pub. Co., 20 R. I. 674, 40 Atl. 864, 78 Am. St. Rep. 900.

Tennessee.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

Wisconsin— Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81.

England.— Macdougall *v.* Knight, 17 Q. B. D. 636, 51 J. P. 38, 55 L. J. Q. B. 464, 55 L. T. Rep. N. S. 274, 34 Wkly. Rep. 727; Hayward *v.* Hayward, 34 Ch. D. 198, 56 L. J. Ch. 287, 55 L. T. Rep. N. S. 729, 35 Wkly. Rep. 392; Flint *v.* Pike, 4 B. & C. 473, 6 D. & R. 528, 3 L. J. K. B. O. S. 272, 28 Rev. Rep. 335, 10 E. C. L. 665; Kane *v.* Mulvains, Ir. R. 2 C. L. 402; Pinero *v.* Goodlake, 15 L. T. Rep. N S. 676.

See 32 Cent. Dig. tit. "Libel and Slander," § 127.

Publication affecting stranger to action.— If the publication is fair and accurate, it is immaterial that it affects third persons. Ryalls *v.* Leader, L. R. 1 Exch. 296, 12 Jur. N. S. 503, 35 L. J. Exch. 185, 14 L. T. Rep. N. S. 563, 14 Wkly. Rep. 838.

6. Salisbury *v.* Union, etc., Co., 45 Hun (N. Y.) 120; American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005; Hoare *v.* Silverlock, 9 C. B. 20, 19 L. J. C. P. 215, 67 E. C. L. 20; Andrews *v.* Chapman, 3 C. & K. 286; Milissich *v.* Lloyds, 13 Cox C. C. 575, 46 L. J. C. P. 404, 36 L. T. Rep. N. S. 423, 25 Wkly. Rep. 353; Stile *v.* Nokes, 7 East 493; Blake *v.* Stevens, 4 F. & F. 232, 11 L. T. Rep. N. S. 543; Risk Allah Bey *v.* Whitehurst, 18 L. T. Rep. N. S. 615.

A substantially accurate report is privileged (D'Auxy *v.* Star Co., 31 Misc. (N. Y.) 388, 64 N. Y. Suppl. 283; Andrews *v.* Chapman, 3 C. & K. 286), although of a part only of the proceedings (Macdougall *v.* Knight, 25 Q. B. D. 1, 54 J. P. 788, 59 L. J. Q. B. 517, 63 L. T. Rep. N. S. 43, 38 Wkly. Rep. 553). Thus it has been held that a fair and accurate report of the judgment in an action published *bona fide* and without malice is privileged, although not accompanied by any report of the evidence given at the trial. Macdougall *v.* Knight, 25 Q. B. D. 1, 54 J. P. 788, 59 L. J. Q. B. 517, 63 L. T. Rep. N. S. 43, 38 Wkly. Rep. 553. *Compare* Macdougall *v.* Knight, 14 App. Cas. 194, 53 J. P. 691, 58 L. J. Q. B. 537, 60 L. T. Rep. N. S. 762, 38 Wkly. Rep. 44 [*affirming* 17 Q. B. 636, 51 J. P. 38, 55 L. J. Q. B. 464, 55 L. T. Rep. N. S. 274, 34 Wkly Rep. 727]; Milissich *v.* Lloyds, 13 Cox C. C. 575, 46 L. J. C. P. 404, 36 L. T. Rep. N. S. 423, 25 Wkly. Rep. 353.

7. Lewis *v.* Levy, E. B. & E. 537, 4 Jur. 464, 55 L. T. Rep. N. S. 274, 34 Wkly. Rep. 629, 96 E. C. L. 537.

8. Saunders *v.* Mills, 6 Bing. 213, 8 L. J. C. P. O. S. 24, 3 M. & P. 520, 31 Rev. Rep. 394, 19 E. C. L. 103; Kane *v.* Mulvains, Ir. R. 2 C. L. 402.

9. Lewis *v.* Walter, 4 B. & Ald. 605, 23 Rev. Rep. 415, 6 E. C. L. 620.

10. *Michigan.*— Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Scripps *v.* Reilly, 38 Mich. 10.

New York.— Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 467, 82 N. Y. Suppl. 401; Stanley *v.* Webb, 4 Sandf. 21, 2 Code Rep. 153; D'Auxy *v.* Star Co., 31 Misc. 388, 64 N. Y. Suppl. 283.

Rhode Island.— Brown *v.* Providence Telegram Pub. Co., 25 R. I. 117, 54 Atl. 1061.

Tennessee.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

England.— McGregor *v.* Thwaites, 3 B. & C. 24, 14 D. & R. 695, 2 L. J. K. B. O. S. 217, 27 Rev. Rep. 274, 10 E. C. L. 21; Andrews *v.* Chapman, 3 C. & K. 286; Delegal *v.* Highley, 3 Bing. N. Cas. 950, 960, 32 E. C. L. 435, 8 C. & P. 444, 34 E. C. L. 827, 3 Hodges 158, 6 L. J. C. P. 337, 5 Scott 154, where it is said: "It is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest that such report must be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal proceedings."

See 32 Cent. Dig. tit. "Libel and Slander," § 127.

If statements reported to have been made by counsel were not in fact made, the publisher is liable. Atlanta News Pub. Co. *v.* Medlock, 123 Ga 714, 51 S. E. 756, 3 L. R. A. N. S. 1139.

shown at the trial or proceeding,[11] or statements by an attorney outside of court and in a private conversation,[12] or statements made by a justice of what had been said by persons in his office, not under oath previously to the issuance of a warrant, and not a part of the proceedings.[13]

2. Executive and Legislative Proceedings and Investigations. An accurate and impartial account of executive and legislative proceedings and investigations is privileged when made in good faith.[14]

11. Moore *v.* Dispatch Printing Co., 87 Minn. 450, 92 N. W. 396; Hart *v.* Sun Printing, etc., Assoc., 79 Hun (N. Y.) 358, 29 N. Y. Suppl. 434; Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 413, 14 Am. St. Rep. 874, 5 L. R. A. 643; Godshalk *v.* Metzgar, (Pa. 1889) 17 Atl. 215; Moore *v.* Leader Pub. Co., 8 Pa. Super. Ct. 152, 42 Wkly. Notes Cas. 570; Stile *v.* Nokes, 7 East 493. See also Johns *v.* Press Pub. Co., 61 N. Y. Super. Ct. 207, 19 N. Y. Suppl. 3; Collins *v.* Morning News Co., 41 Wkly. Notes Cas. (Pa.) 425.

Headlines prefixed to a report of a judicial proceeding are privileged, when they are a fair index of the matter contained in the report (Lawyers' Co-operative Pub. Co. *v.* West Pub. Co., 32 N. Y. App. Div. 585, 52 N. Y. Suppl. 1120. See also Lewis *v.* Clement, 3 B. & Ald. 702, 22 Rev. Rep. 530, 5 E. C. L. 403 [*reversed* on other grounds in 3 B. & B. 297, 7 Moore C. P. 200, 10 Price 181, 22 Rev. Rep. 533, 7 E. C. L. 740]), otherwise they are not privileged (Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643; Dorr *v.* U. S., 195 U. S. 138, 24 S. Ct. 808, 49 L. ed. 128).

Report of arrest.— It has been held that a newspaper may report the fact that a person has been arrested and held for examination on a particular charge, but that it has no right to go beyond this and assume the guilt of the person charged. Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62; Cass *v.* New Orleans Times, 27 La. Ann. 214; Tresca *v.* Maddox, 11 La. Ann. 206, 60 Am. Dec. 198; Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33; Duncan *v.* Thwaites, 3 B. & C. 556, 5 D. & R. 447, 3 L. J. K. B. O. S. 3, 10 E. C. L. 255.

A publication which charges attorneys at law, in their conduct touching the defense of a client against a criminal prosecution, with "betraying and selling innocence in a court of justice," and with doing acts in their profession which should cause them "to be held up to the world as derelict in their sense of honor and obligation" and "unworthy of trust and confidence," is not in the nature of a report of a proceeding in a court of justice, and is not privileged. Ludwig *v.* Cramer, 53 Wis. 193, 80 N. W. 81.

12. Desjardins *v.* Berthiaume, 16 Quebec Super. Ct. 506.

13. McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606, where the matter reported did not appear in the affidavit or warrant. See also Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62.

14. Meteye *v.* Times-Democrat Pub. Co., 47 La. Ann. 824, 17 So. 314 (holding that if the headlines are pertinent to the report, they are privileged); Terry *v.* Fellows, 21 La. Ann. 375; Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Howland *v.* Maynard, 159 Mass. 434, 34 N. E. 515, 38 Am. St. Rep. 445, 21 L. R. A. 500; Wason *v.* Walter, L. R. 4 Q. B. 73, 8 B. & S. 671, 38 L. J. Q. B. 34, 19 L. T. Rep. N. S. 409, 17 Wkly. Rep. 169; Curry *v.* Walter, 1 B. & P. 525, 1 Esp. 457, 8 T. R. 298, 5 Rev. Rep. 743, 4 Rev. Rep. 717; Rex *v.* Wright, 8 T. R. 293, 4 Rev. Rep. 649. See also Pfister *v.* Sentinel Co., 108 Wis. 572, 84 N. W. 887. *Compare* Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853 (holding that a city council is not a legislative body and that a publication of statements made at a council meeting is not the publication of the proceedings of a legislative body so as to be privileged); Stockdale *v.* Hansard, 7 C. & P. 731, 2 M. & Rob. 9, 32 E. C. L. 844 [*affirmed* in 9 A. & E. 1, 3 Jur. 905, 8 L. J. Q. B. 294, 2 P. & D. 1, 36 E. C. L. 27] (holding a printer of the house of commons liable for publishing a report made to the house of commons, although published by order of the house).

Report of unauthorized proceeding.— A resolution of a city council attacking the character of a private citizen is not within the scope of the authority of the city council and hence its publication is not privileged. Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330.

Publication of conclusions of writer.— A publication that plaintiffs and another by means of their wealth and political power had obtained absolute control of the mayor and a majority of the city council in the matter of obtaining a franchise for the street railway and that plaintiff by such buying had in no wise lost caste but continued to be a leader in society was not privileged as the report of a public official proceeding, since the substance of the publication consisted of the conclusions and deductions of the writer. Pfister *v.* Sentinel Co., 108 Wis. 572, 84 N. W. 887.

Report of evidence taken ex parte.— The publication of proceedings before a joint committee appointed by the legislature to sit after its adjournment to obtain evidence consisting in part of statements by witnesses not under oath, to guide the state's counsel in instituting criminal prosecutions against the perpetrators of land frauds and forgeries, is not privileged when the evidence was taken *ex parte* and behind closed doors and the purpose of the committee was in no way in aid of legislation. Belo *v.* Wren, 63 Tex. 686. See also Purcell *v.* Sowler, 2 C. P. D. 215,

3. Church and Society Proceedings. A publication of a report of church or society proceedings containing defamatory matter may be privileged when made without malice and in the performance of some public or private duty.[15] But the publication must be a fair and accurate report of the proceedings, made *bona fide* and without malice.[16]

4. Public Records and Documents. The publication of public records to which everyone has a right of access is privileged.[17]

F. Good Faith, Falsity, and Malice[18] — **1. General.** Where the communication is absolutely privileged the question of a malice is immaterial.[19] But a qualifiedly privileged communication is inconsistent with the existence of express malice and requires both an occasion of privilege and the use of that occasion in good faith and is actionable if actuated by express malice.[20]

46 L. J. C. P. 308, 36 L. T. Rep. N. S. 416, 25 Wkly. Rep. 362.

15. *Kansas.*— Redgate *v.* Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; Kirkpatrick *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316.

Massachusetts.— Barrows *v.* Bell, 7 Gray 301, 66 Am. Dec. 479, a publication to public generally of report of proceedings of medical corporation.

North Carolina.— Gattis *v.* Kilgo, 140 N. C. 106, 52 S. E. 249.

Pennsylvania.— Miller *v.* Knabb, 5 Pa. Co. Ct. 636.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

Vermont.— Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

See 32 Cent. Dig. tit. "Libel and Slander," § 129.

Compare Sarasohn *v.* Workingmen's Pub. Assoc., 44 N. Y. App. Div. 302, 60 N. Y. Suppl. 640.

Publication brought to attention of non-members.— In Redgate *v.* Loush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236, it was held that where the publication of a report of church proceedings appears to have been made in good faith and for the members of the denomination alone, the fact that it incidentally may have been brought to the attention of others than members of the church will not take away its privileged character.

16. Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528. See also Sarasohn *v.* Workingmen's Pub. Assoc., 44 N. Y. App. Div. 302, 60 N. Y. Suppl. 640; Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

17. Searles *v.* Scarlett, [1892] 2 Q. B. 56, 56 J. P. 789, 61 L. J. Q. B. 573, 66 L. T. Rep. N. S. 837, 40 Wkly. Rep. 696 (record of judgment); Annaly *v.* Trade Auxiliary Co., L. R. 26 Ir. 394; Fleming *v.* Newton, 1 H. L. Cas. 363, 9 Eng. Reprint 797 (register of protests of commercial paper); McNally *v.* Oldham, 16 Ir. C. L. 298, 8 L. T. Rep. N. S. 604 (record of a judgment); Cosgrave *v.* Trade Auxiliary Co., Ir. R. 8 C. L. 349. *Compare* Reis *v.* Perry, 64 L. J. Q. B. 566, 15 Reports 427, 43 Wkly. Rep. 648.

A report of a bureau officer of an executive department of the government, when incorporated in a printed senate document as part of a committee report, becomes a public document, which every person is entitled to receive, inspect, and circulate; and, if such bureau officer gives or loans to another person such a senate document, he does not incur liability as for a publication of a libel. De Arnaud *v.* Ainsworth, 24 App. Cas. (D. C.) 167.

An untrue statement of the effect of a judgment in a former action is not privileged. Hayward *v.* Hayward, 34 Ch. D. 198, 56 L. J. Ch. 287, 55 L. T. Rep. N. S. 729, 35 Wkly. Rep. 392.

18. Malice as ingredient of action for defamation see *supra*, V, B.

19. Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907. See also *supra*, VI, A, text and note 47 *et seq.*

20. *California.*—Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290; Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533.

Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920.

District of Columbia.— Wills *v.* Jones, 13 App. Cas. 482.

Florida.— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Georgia.— Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103; Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687.

Illinois.— Elam *v.* Badger, 23 Ill. 498; Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8; Wharton *v.* Wright, 30 Ill. App. 343.

Iowa.— Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306, opinion of the court by Deemer, C. J.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Massachusetts.— Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963; Coffin *v.* Coffin, 4 Mass. 1, 3 Am. Dec. 189.

Minnesota.—Hebner *v.* Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Martin *v.* Paine, 69 Minn. 482, 72 N. W. 450; Lowry *v.* Vedder, 40 Minn. 475, 42 N. W. 542.

Mississippi.— Alabama, etc., R. Co. *v.* Brooks, 69 Miss. 168, 13 So. 847, 30 Am. St. Rep. 528.

2. **Burden of Proof.** When, however, defendant shows that the publication complained of was made under circumstances rendering it conditionally privileged, plaintiff has the burden of proving express malice.[21] But it has been held

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New Jersey.— Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261.

New York.— Hamilton *v.* Eno, 81 N. Y. 116; Lewis *v.* Chapman, 16 N. Y. 369; Ginsberg *v.* Union Surety, etc., Co., 68 N. Y. App. Div. 141, 74 N. Y. Suppl. 561; Haft *v.* New Castle First Nat. Bank, 19 N. Y. App. Div. 423, 46 N. Y. Suppl. 481; Remsen *v.* Bryant, 24 Misc. 238, 52 N. Y. Suppl. 515; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788; Green *v.* Meyer, 44 N. Y. Suppl. 81; Lathrop *v.* Hyde, 25 Wend. 448; Vanderzee *v.* McGregor, 12 Wend. 545, 27 Am. Dec. 156.

Ohio.— Nolan *v.* Kane, 5 Ohio S. & C. Pl. Dec. 105, 7 Ohio N. P. 331.

Pennsylvania.— McIntyre *v.* Weinert, 195 Pa. St. 52, 45 Atl. 666; Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725.

Rhode Island.— Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Tennessee.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Cranfill *v.* Hayden, (Civ. App. 1903) 75 S. W. 573; Davis *v.* Wells, 25 Tex. Civ. App. 155, 60 S. W. 566.

Virginia.— Tyree *v.* Harrison, 100 Va. 540, 42 S. E. 295; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803.

Washington.— McClure *v.* Review Pub. Co., 38 Wash. 160, 80 Pac. 303; Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866.

Wisconsin.— Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429.

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591; Warner *v.* Missouri Pac. R. Co., 112 Fed. 114; Locke *v.* Bradstreet Co., 22 Fed. 771; Erber *v.* Dun, 12 Fed. 526, 530, 4 McCrary 160, where it is said: "But a communication which would otherwise be privileged is not so if made with malice in fact — that is, through hatred, ill-will, and a malicious desire to injure; and a statement privileged in the first instance may lose its privileged character by being repeated and persisted in after knowledge of the fact that it is false or erroneous has been brought home to its author."

England.— Nevill *v.* Fine Arts, etc., Ins. Co., [1895] 2 Q. B. 156, 59 J. P. 371, 64 L. J. Q. B. 681, 72 L. T. Rep. N. S. 525, 14 Reports 587; Stevens *v.* Sampson, 5 Ex. D. 53, 49 L. J. Q. B. 120, 41 L. T. Rep. N. S. 782, 28 Wkly. Rep. 87; Dickson *v.* Wilton, 1 F. & F. 419; Browne *v.* Dunn, 6 Reports 67.

See 32 Cent. Dig. tit. "Libel and Slander," § 149.

Probable cause for belief in truth of charge. — In some jurisdictions the rule is laid down that to be privileged the words must have been published without actual malice, in an honest belief of their truth, and with that belief based upon reasonable or probable cause after a reasonably careful inquiry. Toothaker *v.* Conant, 91 Me. 438, 40 Atl. 331; McNally *v.* Burleigh, 91 Me. 22, 39 Atl. 285. See also Harwood *v.* Keech, 6 Thomps. & C. (N. Y.) 665; Briggs *v.* Garrett, 111 Pa. St. 404, 2 Atl. 513, 56 Am. Rep. 274. *Compare* Fowles *v.* Bowen, 30 N. Y. 20; Clark *v.* Molyneux, 3 Q. B. D. 237, 14 Cox C. C. 10, 47 L. J. Q. B. 230, 37 L. T. Rep. N. S. 694, 26 Wkly. Rep. 104; Harris *v.* Thompson, 13 C. B. 333, 76 E. C. L. 333.

Ill-will or malice against plaintiff personally.— It has been held not to be necessary that the ill-will or malice of defendant should have been against plaintiff personally, and that a publication not made in good faith but from an indirect, wrongful, or ulterior motive is malicious. Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931; Royal Aquarium, etc., Soc. *v.* Parkinson, [1892] 1 Q. B. 431, 56 J. P. 404, 61 L. J. Q. B. 409, 66 L. T. Rep. N. S. 513, 40 Wkly. Rep. 450. See also Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

21. *Colorado.*— Denver Public Warehouse Co. *v.* Holloway, (1905) 83 Pac. 131.

Delaware.— Cameron *v.* Cockran, 2 Marv. 166, 42 Atl. 454.

Florida.— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

Illinois.— McDavitt *v.* Boyer, 169 Ill. 475, 48 N. E. 317 [*reversing* 67 Ill. App. 452]; Ritchie *v.* Arnold, 79 Ill. App. 406; Rausch *v.* Anderson, 75 Ill. App. 526; Wharton *v.* Wright, 30 Ill. App. 343.

Indiana.— Henry *v.* Moberly, 23 Ind. App. 305, 51 N. E. 497.

Iowa.— Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Kansas.— Redgate *v.* Roush, 61 Kan. 480, 59 Pac. 1050, 48 L. R. A. 236; Kirkpatriek *v.* Eagle Lodge No. 32, 26 Kan. 384, 40 Am. Rep. 316.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456.

Maine.— Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Massachusetts. — Brow *v.* Hathaway, 13 Allen 239.

Michigan.— Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Howard *v.* Dickie, 120 Mich. 238, 79 N. W. 191.

Minnesota.—Hebner *v.* Great Northern R. Co., 78 Minn. 289, 80 N. W. 1128, 79 Am. St. Rep. 387; Simmons *v.* Holster, 13 Minn. 249.

Nebraska.— Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28; Mertens *v.* Bee Pub. Co., 5 Nebr. (Unoff.) 592, 99 N. W. 847.

that when plaintiff proves malice, he need not go further and show the falsity of the defamatory charge.[22]

VII. JUSTIFICATION AND MITIGATION.

A. Justification[23] — **1. Grounds of Justification — a. Truth** — (I) *General Rule.* In the absence of statutory or constitutional provision to the contrary, the general rule is that in all civil actions of libel or slander, defendant is justified in law and exempt from all civil responsibility, where he alleges and establishes the truth of the matter charged as defamatory; the truth of the words is a complete defense, whether the words on their face appear to be actionable or are made actionable by reason of special damages;[24] and it is immaterial that the matter

New Jersey.— Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261; King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Ormsby *v.* Douglass, 37 N. Y. 477; Coloney *v.* Farrow, 5 N. Y. App. Div. 607, 39 N. Y. Suppl. 460; Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Suppl. 50; Liddle *v.* Hodges, 2 Bosw. 537; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788; Ostheimer *v.* Blumert, 1 N. Y. City Ct. Suppl. 17.

North Carolina.— Gattis *v.* Kilgo, 140 N. C. 106, 52 S. E. 249; Gattis *v.* Kilgo, 128 N. C. 402, 38 N. E. 931; Wakfield *v.* Smithwick, 49 N. C. 327.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Ohio.— Liles *v.* Gaster, 42 Ohio St. 631; Crist *v.* Bradstreet Co., 9 Ohio Dec. (Reprint) 618, 15 Cinc. L. Bul. 334.

Pennsylvania.— Echard *v.* Morton, 26 Pa. Super. Ct. 579; McGaw *v.* Hamilton, 15 Pa. Super. Ct. 181; Brockerman *v.* Keyser, 1 Phila. 243. *Compare* Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725 holding that if the alleged libel charges an indictable offense and the libel is privileged, defendant cannot rest, but must introduce some evidence of good faith, as the *prima facie* presumption is that plaintiff is innocent and the publication malicious.

South Dakota.— Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233.

Virginia.— Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644; Strode *v.* Clement, 90 Va. 553, 19 S. E. 177.

Washington.—Kimble *v.* Kimble, 14 Wash. 369, 44 Pac. 866.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin.— Calkins *v.* Sumner, 13 Wis. 193, 80 Am. Dec. 738.

United States.— White *v.* Nichols, 3 How. 266, 11 L. ed. 591; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

England.— Nevill *v.* Fine Arts, etc., Ins. Co., [1897] A. C. 68, 61 J. P. 500, 66 L. J. Q. B. 195, 75 L. T. Rep. N. S. 606; Jenoure *v.* Delmege, [1891] A. C. 73, 55 J. P. 500, 60 L. J. P. C. 11, 63 L. T. Rep. N. S. 814, 39 Wkly. Rep. 388; Hooper *v.* Truscott, 2 Bing. N. Cas. 457, 5 L. J. C. P. 177, 2 Scott 672, 29 E. C. L. 616; Somerville *v.* Hawkins, 10 C. B. 583, 15 Jur. 450, 20 L. J. C. P. 131, 70 E. C. L. 583; Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly. Rep. 913, 111 E. C. L. 829; Caulfield *v.* Whitworth, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 936.

See 32 Cent. Dig. tit. "Libel and Slander," § 150.

Slight evidence of actual malice will, it has been held, throw the burden of proof back on defendant, if the communication is conditionally privileged. Cook *v.* Hill, 3 Sandf. (N. Y.) 341. On the other hand it has been held that defendant cannot be called upon to prove that he was not actuated by malice toward plaintiff when no more than a mere scintilla has been adduced by plaintiff. Bearce *v.* Bass, 88 Me. 521, 34 Atl. 411, 51 Am. St. Rep. 446.

22. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* on other grounds (Civ. App. 1903) 75 S. W. 573]. *Compare* Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249; Fowles *v.* Bowen, 30 N. Y. 20; Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

Burden of proof as to truth generally see *infra*, VIII, F, 1, e.

Falsity as evidence of malice see *infra*, VIII, F, 2, c, (III).

23. Burden of proof as to justification see *infra*, VIII, F, 1, e.

Admissibility of evidence of justification *infra*, VIII, F, 2, h.

Sufficiency of evidence of justification see *infra*, VIII, F, 3, g.

Pleading justification see *infra*, VIII, E, 2, b, (XII).

Justification in criminal prosecutions see *infra*, X, E.

Defenses in general see *infra*, VIII, A, 6.

24. *Georgia.*— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424.

Kansas.— Boldon *v.* Thompson, (1899) 56 Pac. 131; Mundy *v.* Wight, 26 Kan. 173; Castle *v.* Houston, 19 Kan. 417, 27 Am. Rep. 127.

Kentucky.— Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177, 18 Ky. L. Rep. 291.

Louisiana.— Staub *v.* Van Benthuysen, 36 La. Ann. 467; Rayne *v.* Taylor, 14 La. Ann. 406.

was published maliciously and without reason on the part of defendant to believe it true.[25]

(II) *Statutory or Constitutional Provisions.* In several of the states, however, as the result either of constitutional or statutory provision, the rule is that in actions for libel the truth is a complete defense only when published with good motives and for justifiable ends.[26] Under a statute making actionable words which from their usual construction and common acceptation are considered insults, the truth of the words spoken has been held to constitute no defense.[27]

b. Belief. The mere fact that defendant in a suit for libel or slander believed the charges to be true is no justification,[28] even though such belief may have been induced by misconduct on the part of defendant, if such misconduct falls short of

Massachusetts.— Rice *v.* Albee, 164 Mass. 88, 41 N. E. 122; Foss *v.* Hildreth, 10 Allen 76.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Sullings *v.* Shakespeare, 46 Mich. 408, 9 N. W. 451, 41 Am. Rep. 166.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; McAtee *v.* Valandingham, 75 Mo. App. 45.

Nebraska.— Larson *v.* Cox, 68 Nebr. 44, 93 N. W. 1011.

New York.— Beecher *v.* Press Pub. Co., 60 N. Y. App. Div. 536, 69 N. Y. Suppl. 895; Fulkerson *v.* George, 3 Abb. Pr. 75; Kelly *v.* Taintor, 48 How. Pr. 270.

Oregon.— Shartle *v.* Hutchinson, 3 Oreg. 337.

Pennsylvania.— Press Co. *v.* Stewart, 119 Pa. St. 584, 14 Atl. 51.

Rhode Island.— Perry *v.* Man, 1 R. I. 263.

Texas.— Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134.

Washington.— Leghorn *v.* Review Pub. Co., 31 Wash. 627, 72 Pac. 485; Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049; Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

United States.— Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

Canada.— Macdonald *v.* Mail Printing Co., 32 Ont. 163.

See 32 Cent. Dig. tit. "Libel and Slander," § 152.

25. McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465; Foss *v.* Hildreth, 10 Allen (Mass.) 76; George *v.* Jennings, 4 Hun (N. Y.) 66, 6 Thomps. & C. 138; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Huff *v.* Bennett, 4 Sandf. (N. Y.) 120.

26. *Delaware.*— Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. 181.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Louisiana.— Perret *v.* New Orleans Times Newspaper, 25 La. Ann. 170. *Compare* Staub *v.* Van Benthuysen, 36 La. Ann. 467.

Maine.— Pease *v.* Bamford, 96 Me. 23, 51 Atl. 234; Pierce *v.* Rodliff, 95 Me. 346, 50 Atl. 32.

Massachusetts.— Perry *v.* Porter, 124 Mass. 338.

Nebraska.— Larson *v.* Cox, 68 Nebr. 44, 93 N. W. 1011; Neilson *v.* Jensen, 56 Nebr. 430, 76 N. W. 866. See also Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Nebr. 64, 60 N. W. 358.

See 32 Cent. Dig. tit. "Libel and Slander," § 152.

27. McLean *v.* Warring, (Miss. 1893) 13 So. 236. See also Brooks *v.* Calloway, 12 Leigh (Va.) 466. But see Chaffin *v.* Lynch, 84 Va. 884, 6 S. E. 474.

28. *California.*— Wilson *v.* Fitch, 41 Cal. 363.

Connecticut.— Hotchkiss *v.* Porter, 30 Conn. 414; Woodruff *v.* Richardson, 20 Conn. 238.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231; Grimes *v.* Coyle, 6 B. Mon. 301.

Maine.— Powers *v.* Cary, 64 Me. 9.

Massachusetts.— Clark *v.* Brown, 116 Mass. 504; Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639; Watson *v.* Moore, 2 Cush. 133.

Missouri.— Morgan *v.* Rice, 35 Mo. App. 591.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137.

New York.— Fry *v.* Bennett, 3 Bosw. 200.

North Carolina.— Wozelka *v.* Hettrick, 93 N. C. 10.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

England.— Campbell *v.* Spottiswoode, 3 B. & S. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. Rep. N. S. 201, 11 Wkly. Rep. 569, 113 E. C. L. 769.

See 32 Cent. Dig. tit. "Libel and Slander," § 153. See also *supra*, V, A, text and note 30.

Accompanying charge with statement of facts inducing belief.— It is immaterial that defendant accompanied his charge with a statement of facts which reasonably induced him to believe the charge true and that he was honest in such belief. Morgan *v.* Rice, 35 Mo. App. 591.

In Louisiana in an action for slander absence of malice, combined with probable cause for belief of defendant that his words were true, may constitute a defense. Lester *v.* Corley, 45 La. Ann. 1006, 13 So. 467.

what defendant has charged.[29] So it has been held to be no defense that the person to whom the words were published did not believe them to be true.[30] On the other hand it is held that an action will not lie for words which, although actionable in themselves, were spoken under such circumstances as would not lead persons present to believe they were spoken as truth.[31]

c. Anger and Passion. Anger and sudden passion are no justification for the publication of libel or slander.[32]

d. Prior Publication by Third Person. It is no justification that defendant received his information from a third person.[33]

e. Reports and Rumors Previously Existing. Nor is it a defense that at the time of publication the defamatory matter was the subject of general rumor or report.[34]

29. Gillis *v.* Peck, 20 Conn. 228; Clark *v.* Brown, 116 Mass. 504 (where plaintiff having taken property in jest had caused defendant to believe him guilty of larceny); Parkhurst *v.* Ketchum, 6 Allen (Mass.) 406, 83 Am. Dec. 639; Watson *v.* Moore, 2 Cush. (Mass.) 133. *Compare* Hewett *v.* New Orleans, etc., R. Co., 28 La. Ann. 685.

In an action by a married woman it is no defense that defendant was led by plaintiff's husband to believe the truth of the words uttered. McMichael *v.* Greenhaw, 6 Pa. Co. Ct. 561 [*distinguishing* Tibbs *v.* Brown, 2 Grant (Pa.) 39].

30. Marble *v.* Chapin, 132 Mass. 225 (holding that it is no defense that the words were spoken when no one else was present to one who knew them to be false and who did not repeat them until after action brought); Burt *v.* McBain, 29 Mich. 260.

31. Haynes *v.* Haynes, 29 Me. 247; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687. See also Harry *v.* Constantin, 14 La. Ann. 782. But see Burt *v.* McBain, 29 Mich. 260, holding that an instruction that if the jury believed the words were spoken "without any intention to injure the plaintiff, and under such circumstances as would not lead the person who heard them to believe they were spoken as true, the plaintiff could not recover," was erroneous.

32. *Illinois.*— Miller *v.* Johnson, 79 Ill. 58; Flagg *v.* Roberts, 67 Ill. 485; Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252; Danville Press Co. *v.* Harrison, 99 Ill. App. 244. *Compare* McKee *v.* Ingalls, 5 Ill. 30.

Indiana.— Mousler *v.* Harding, 33 Ind. 176, 5 Am. Rep. 195.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Kansas.—Miles *v.* Harrington, 8 Kan. 425.

Louisiana.— Simpson *v.* Robinson, 104 La. 180, 28 So. 908; Poissenot *v.* Reuther, 51 La. Ann. 965, 25 So. 937.

Michigan.— Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

New York.— Xavier *v.* Oliver, 80 N. Y. App. Div. 292, 80 N. Y. Suppl. 225; Courtney *v.* Mannheim, 14 N. Y. Suppl. 929; Else *v.* Ferris, Anth. N. P. 36.

South Carolina.— Finch *v.* Finch, 21 S. C. 342.

United States.— Shattuc *v.* McArthur, 25 Fed. 133.

See 32 Cent. Dig. tit. "Libel and Slander," § 154.

Words not inducing belief on part of strangers.— It has been held that where words are spoken under such circumstances of excitement or anger as would not lead the persons present to believe they were spoken as truth, they will not sustain an action for damages. Haynes *v.* Haynes, 29 Me. 247. Thus it is held that where defendant's language was a mere outburst of passion, induced by plaintiff's conduct toward his wife and himself, and was neither intended nor understood by the bystanders to charge plaintiff with the commission of a crime, defendant is not liable. Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687. See also Mihojevich *v.* Bodechtel, 48 La. Ann. 618, 19 So. 672.

33. *Florida.*— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Kentucky.— Parker *v.* McQueen, 8 B. Mon. 16.

Massachusetts.— Clark *v.* Munsell, 6 Metc. 373.

Missouri.— Moberly *v.* Preston, 8 Mo. 462.

New Jersey.— Stuart *v.* News Pub. Co., 67 N. J. L. 317, 51 Atl. 709, holding that it is no defense that a petition for divorce had contained the defamatory matter.

New York.— Robinson *v.* Evening Post Pub. Co., 25 Misc. 243, 55 N. Y. Suppl. 62, 28 N. Y. Civ. Proc. 239 (holding that it is no defense that the publisher received the libel in the usual course of business from the Associated Press, a reputable news agency); Van Benschoten *v.* Yaple, 13 How. Pr. 97.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Davis *v.* Sladden, 17 Oreg. 259, 21 Pac. 140.

Pennsylvania.— McMichael *v.* Greenhaw, 6 Pa. Co. Ct. 561.

United States.— Atkinson *v.* Patton, 2 Fed. Cas. No. 614, 1 Cranch C. C. 46.

See 32 Cent. Dig. tit. "Libel and Slander," § 155.

Repetition with authorship credited to others see *supra*, III, K, 10, a.

34. *Connecticut.*— Lewis *v.* Niles, 1 Root 346.

Georgia.— Richardson *v.* Roberts, 23 Ga. 215.

Kentucky.—Calloway *v.* Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 406.

Louisiana.— Cade *v.* Redditt, 15 La. Ann. 492.

Michigan.— Fowler *v.* Gilbert, 38 Mich. 292.

f. Prior Defamation by Plaintiff. One libel or slander cannot be set off against another independent libel or slander, and hence it is no defense that plaintiff has previously libeled or slandered defendant[35] or a third person.[36]

g. Bad Character of Plaintiff. Nor is the bad character of plaintiff a complete defense.[37]

2. Unsuccessful Justification — a. Failure to Sustain Plea. Where the truth is pleaded in justification failure to sustain the plea by proof may be considered by the jury as an aggravating circumstance in estimating damages.[38] But the jury should be guided by the motive with which the plea is made; hence if it is interposed in good faith, under an honest belief in the truth of the matter published and with reasonable grounds for such belief, it cannot be regarded as an aggravation beyond the real injury sustained by plaintiff.[39] Indeed it has been held that

Missouri.— Moberly *v.* Preston, 8 Mo. 462.
New Jersey.— Stuart *v.* News Pub. Co., 67 N. J. L. 317, 51 Atl. 709.
New York.— Mapes *v.* Weeks, 4 Wend. 659.
North Carolina.— Johnston *v.* Lance, 29 N. C. 448; Nelson *v.* Evans, 12 N. C. 9.
United States.— Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.
England.— Watkin *v.* Hall, L. R. 3 Q. B. 396, 9 B. & S. 279, 37 L. J. Q. B. 125, 18 L. T. Rep. N. S. 561, 16 Wkly. Rep. 857.
See 32 Cent. Dig. tit. "Libel and Slander," § 155.

Repetition credited to rumor see *supra*, III, K, 10, b.

35. Patton *v.* Cruce, 72 Ark. 421, 81 S. W. 380, 105 Am. St. Rep. 46, 65 L. R. A. 937; Bourland *v.* Edson, 8 Gratt. (Va.) 27; Battell *v.* Wallace, 30 Fed. 229, 230, where it is said that "a libel upon the plaintiff cannot be justified by a previous wholly independent libel upon the defendant."

Communications in course of mutual controversy see *supra*, VI, C, 9.

36. Hotchkiss *v.* Lothrop, 1 Johns. (N. Y.) 286.

37. Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235.

Bad character of plaintiff as mitigating circumstances see *infra*, VII, B, 3.

38. *California.*— Chamberlin *v.* Vance, 51 Cal. 75.
Colorado.— Downing *v.* Brown, 3 Colo. 571.
Connecticut.— Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75.
Georgia.— Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839; Ransone *v.* Christian, 49 Ga. 491.
Illinois.— Hawver *v.* Hawver, 78 Ill. 412; Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Dec. 98; Freeman *v.* Tinsley, 50 Ill. 497; Thomas *v.* Dunaway, 30 Ill. 373; Sloan *v.* Petrie, 15 Ill. 425.
Maine.— Smith *v.* Wyman, 16 Me. 14.
Massachusetts.— Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114; Jackson *v.* Stetson, 15 Mass. 48.
Michigan.— Proctor *v.* Houghtaling, 37 Mich. 41.
Mississippi.— Doss *v.* Jones, 5 How. 158.
Missouri.— Browning *v.* Powers, (1897) 38 S. W. 943.
New York.— Marx *v.* Press Pub. Co., 134 N. Y. 561, 31 N. E. 918 [*affirming* 12 N. Y. Suppl. 162]; Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701 [*reversing* 50 Hun 345, 3 N. Y. Suppl. 156]; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457 [*affirming* 48 Hun 308, 1 N. Y. Suppl. 443]; Distin *v.* Rose, 69 N. Y. 122; Willard *v.* Press Pub. Co., 52 N. Y. App. Div. 448, 65 N. Y. Suppl. 73; Tobin *v.* Sykes, 71 Hun 469, 24 N. Y. Suppl. 943; Root *v.* King, 7 Cow. 613 [*affirmed* in 4 Wend. 113, 21 Am. Dec. 102].
Ohio.— Wilkinson *v.* Palmer, Tapp. 34.
Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.
Pennsylvania.— Updegrove *v.* Zimmerman, 13 Pa. St. 619.
South Carolina.— Finch *v.* Finch, 21 S. C. 342; Burckhalter *v.* Coward, 16 S. C. 435.
Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.
Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.
United States.— Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384; Sun Printing, etc., Co. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163.
England.— Caulfield *v.* Whitworth, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 936.
See 32 Cent. Dig. tit. "Libel and Slander," § 157.
Compare Swails *v.* Butcher, 2 Ind. 84; Shoulty *v.* Miller, 1 Ind. 544; Murphy *v.* Stout, 1 Ind. 372; Shank *v.* Case, 1 Ind. 170; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

39. *Georgia.*— Ransone *v.* Christian, 49 Ga. 491. *Compare* Richardson *v.* Roberts, 23 Ga. 215.
Illinois.— Hawver *v.* Hawver, 78 Ill. 412; Freeman *v.* Tinsley, 50 Ill. 497; Thomas *v.* Dunaway, 30 Ill. 373; Sloan *v.* Petrie, 15 Ill. 425.
Indiana.— Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212.
Iowa.— Kinyon *v.* Palmer, 18 Iowa 377.
Michigan.— Proctor *v.* Houghtaling, 37 Mich. 41.
Missouri.— Browning *v.* Powers, (1897) 38 S. W. 943.
New Hampshire.— Pallet *v.* Sargent, 36 N. H. 496.
New York.— Klinck *v.* Colby, 46 N. Y. 427, 7 Am. Rep. 360; Willard *v.* Press Pub. Co., 52 N. Y. App. Div. 448, 65 N. Y. Suppl. 73; Aird *v.* Fireman's Journal Co., 10 Daly 254;

if a plea of justification is made in good faith, and evidence is introduced honestly, for the purpose of supporting it, such evidence should be considered by the party in mitigation of damages, although it is insufficient to prove the truth of the plea.[40]

b. Withdrawn or Insufficient Plea.[41] Where defendant files a plea of justification a subsequent withdrawal of it will not, it has been held, render it inadmissible to show malice and aggravate the damages.[42] But it has been held that an invalid or insufficient plea of justification, upon which no judgment could have been rendered, is entitled to no weight in aggravation of damages under the plea of not guilty.[43]

B. Mitigation[44] — **1. Grounds in General.** The rule has been stated that in an action for defamation two classes of facts are pleadable and provable in mitigation of damages: (1) Such as impeach the character of plaintiff; (2) such as tend to negative the malicious motive of plaintiff.[45] Code provisions

Fulkerson *v.* George, 3 Abb. Pr. 75. *Compare* Fero *v.* Ruscoe, 4 N. Y. 162.

Ohio.— Rayner *v.* Kinney, 14 Ohio St. 283.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Shartle *v.* Hutchinson, 3 Oreg. 337.

Texas.— Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860; Express Printing Co. *v.* Copeland, 64 Tex. 354.

Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

United States.— Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384.

See 32 Cent. Dig. tit. "Libel and Slander," § 157.

Compare Pool *v.* Devers, 30 Ala. 672; Robinson *v.* Drummond, 24 Ala. 174; Gorman *v.* Sutton, 32 Pa. St. 247; Wilson *v.* Nations, 5 Yerg. (Tenn.) 211.

40. Ransone *v.* Christian, 49 Ga. 491; Thomas *v.* Dunaway, 30 Ill. 373; Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212. See also Burckhalter *v.* Coward, 16 S. C. 435. And see *infra*, VIII, E, 7, f, (v), (A).

41. **Right to withdraw plea of justification** see *infra*, VIII, E, 7, m, (II), (A).

42. Spencer *v.* McMasters, 16 Ill. 405; Beasley *v.* Meigs, 16 Ill. 139; Alliance Review Pub. Co. *v.* Valentine, 9 Ohio Cir. Ct. 387, 6 Ohio Cir. Dec. 323. See also Wilson *v.* Robinson, 7 Q. B. 68, 9 Jur. 726, 14 L. J. Q. B. 196, 53 E. C. L. 68. *Compare* Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799; Gilmore *v.* Borders, 2 How. (Miss.) 824.

43. Shirley *v.* Keath, 4 Coldw. (Tenn.) 29; Braden *v.* Walker, 8 Humphr. (Tenn.) 34.

44. **Measure of damages recoverable** generally see *infra*, VIII, G.

Evidence admissible in mitigation see *infra*, VIII, F, 2, i.

Burden of proof as to mitigating circumstances see *infra*, VIII, F, 1, g.

Pleading matters in mitigation see *infra*, VIII, E, 2, b, (XIII).

45. Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. (N. Y.) 74, 85 N. Y. Suppl. 570; Witcher *v.* Jones, 17 N. Y. Suppl. 491 [*affirmed* in 137 N. Y. 599, 33 N. E. 743].

Insanity of defendant in mitigation of damages. see INSANE PERSONS, 22 Cyc. 1212, text and note 46.

Haste incident to newspaper business.—The mere fact that the haste necessary to prepare the defamatory matter for press prevented an investigation as to the truth has been held not to be a mitigating circumstance. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6. On the other hand it has been held to be admissible in mitigation of damages that defendants were engaged in the business of receiving newspapers from the publishers and distributing them to dealers, and that the volume of its business and the necessity of haste prevented the examination of the contents of the papers. Hawk *v.* American News Co., 33 N. Y. Suppl. 848, 24 N. Y. Civ. Proc. 255.

Other less offensive communications.— In Bradford *v.* Edwards, 32 Ala. 628, it was held that in a suit for slander, defendant cannot prove, in mitigation of damages, that in other conversations than those alleged he spoke of plaintiff less offensively.

Public interest in subject-matter of publication.— The importance to the public of a report made by a board of health cannot be taken into consideration as mitigating a charge that the report was induced by a reward offered to the person making it. Hamilton *v.* Eno, 81 N. Y. 116. So it is not a mitigating circumstance that the libel was published for the purpose of defeating plaintiff's election to a public office. Rearick *v.* Wilcox, 81 Ill. 77; Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270.

Prior recovery by plaintiff.— It is not a mitigating circumstance that a recovery had been had against a defendant by the same plaintiff in another action for a libel which formed a series of numbers published in the same gazette and containing the libelous words charged in the second suit. Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459.

Husband's efforts to prevent spread of slander by wife.— It has been held that in a suit against husband and wife for words spoken by the wife, the husband's efforts to prevent the circulation of the slander do not consti-

allowing both justification and mitigation to be set up in actions of libel and slander have not changed the rules as to what circumstances are mitigating.[46] Mitigating circumstances set up to negative malicious motives must have been known to defendant at the time of the publication and induced a belief of its truth.[47]

2. Truth of Charge. The truth of the defamatory words may be taken advantage of by way of mitigating damages if it is properly pleaded.[48]

3. Bad Character or Reputation of Person Defamed. The general bad character or reputation of plaintiff is a mitigating circumstance in libel or slander. Plaintiff in an action for defamation complains that defendant has injured his character or reputation; and therefore defendant may prove that plaintiff's general reputation was already bad, with a view of showing that no serious injury was inflicted upon him by the publication.[49] Evidence is admissible as to plaintiff's general reputation with reference to the matter charged in the defamation or his general reputation as a man of moral worth, without restriction to the particu-

tute a mitigating circumstance. Yeates *v.* Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43.

Absurdity of charge.— In Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114, it was held that the right to recover exemplary damages where the publication was malicious is not affected by the fact that the charge was so ridiculous upon its face that no friends of plaintiff could believe it to be true.

Mitigating circumstances inadmissible to defeat action see Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440.

46. Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38; Hatfield *v.* Lasher, 81 N. Y. 246 [*affirming* 17 Hun 23, 57 How. Pr. 258]; Hager *v.* Tibbits, 2 Abb. Pr. N. S. (N. Y.) 97; Graham *v.* Stone, 6 How. Pr. (N. Y.) 15, 1 Code Rep. N. S. 181.

47. *California.*— Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Swift *v.* Dickerman, 31 Conn. 285.

Iowa.— Forshee *v.* Abrams, 2 Iowa 571.

Maryland.— Huffer *v.* Miller, 74 Md. 454, 22 Atl. 205.

Massachusetts.— Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476.

Minnesota.—Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; Quinn *v.* Scott, 22 Minn. 456.

New York.— Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 1 N. Y. Suppl. 475]; Hatfield *v.* Lasher, 81 N. Y. 246 [*affirming* 17 Hun 23, 57 How. Pr. 258]; Willover *v.* Hill, 72 N. Y. 36; Bush *v.* Prosser, 11 N. Y. 347; Kinney *v.* Roberts, 26 Hun 166; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131; Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. Suppl. 570; Witcher *v.* Jones, 17 N. Y. Suppl. 491.

Pennsylvania.— Petrie *v.* Rose, 5 Watts & S. 364.

Vermont.— Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247.

Wisconsin.— Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349.

United States.— Butler *v.* Barret, 130 Fed. 944; Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

See 32 Cent. Dig. tit. "Libel and Slander," § 159.

48. See *infra*, VIII, E, 7, f, (v).

49. *Alabama.*— Waters *v.* Jones, 3 Port. 442, 29 Am. Dec. 261.

California.— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

Illinois.— Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271.

Massachusetts.— Clark *v.* Brown, 116 Mass. 504.

New York.— Calkins *v.* Colburn, 10 N. Y. St. 778; Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595; Root *v.* King, 7 Cow. 613; Paddock *v.* Salisbury, 2 Cow. 811; Foot *v.* Tracy, 1 Johns. 46.

North Carolina.— Smith *v.* Smith, 30 N. C. 29.

Pennsylvania.— Henry *v.* Norwood, 4 Watts 347.

South Carolina.— Eifert *v.* Sawyer, 2 Nott. & M. 511, 10 Am. Dec. 633; McLuny *v.* Buford, 1 Nott. & M. 268.

Wisconsin.— Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657, holding that in an action for slander the bad character of plaintiff at and before the time of the alleged slander may be shown in mitigation of exemplary as well as compensatory damages.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Wright *v.* Schroeder, 30 Fed. Cas. No. 18,091, 2 Curt. 548.

England.— Scott *v.* Sampson, 8 Q. B. D. 491, 46 J. P. 408, 51 L. J. Q. B. 380, 46 L. T. Rep. N. S. 412, 30 Wkly. Rep. 541.

See 32 Cent. Dig. tit. "Libel and Slander," § 161.

Evidence admissible to show bad character see *infra*, VIII, F, 2, i, (II).

lar feature in respect to which his character had been assailed.[50] But the evidence must relate to the character or reputation of plaintiff as fixed before the publication of the words complained of.[51]

50. *Alabama.*— Fuller *v.* Dean, 31 Ala. 654; Pope *v.* Welsh, 18 Ala. 631; Scott *v.* McKinnish, 15 Ala. 662; Waters *v.* Jones, 3 Port. 442, 29 Am. Dec. 261; Commons *v.* Walters, 1 Port. 323.

Connecticut.— Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156; Austin *v.* Hanchet, 2 Root 148; Seymour *v.* Merrills, 1 Root 459; Brunson *v.* Lynde, 1 Root 354.

Georgia.— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

Illinois.— Adams *v.* Smith, 58 Ill. 417; Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Young *v.* Bennett, 5 Ill. 43; Welker *v.* Butler, 15 Ill. App. 209.

Indiana.— Burke *v.* Miller, 6 Blackf. 155.

Iowa.— Fletcher *v.* Burroughs, 10 Iowa 557.

Kansas.— Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Kentucky.— Eastland *v.* Caldwell, 2 Bibb 21, 4 Am. Dec. 668.

Maine.— Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

Massachusetts.— Mahoney *v.* Belford, 132 Mass. 393; Clark *v.* Brown, 116 Mass. 504; Peterson *v.* Morgan, 116 Mass. 350; Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639; Stone *v.* Varney, 7 Metc. 86, 39 Am. Dec. 762; Wolcott *v.* Hall, 6 Mass. 514, 4 Am. Dec. 173.

Michigan.— Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232.

Minnesota.— Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512; Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.—Anthony *v.* Stephens, 1 Mo. 254, 13 Am. Dec. 497.

New Hampshire.—Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244; Lamos *v.* Snell, 6 N. H. 413, 25 Am. Dec. 468.

New Jersey.— Sayre *v.* Sayre, 25 N. J. L. 235.

North Carolina.— Sowers *v.* Sowers, 87 N. C. 303; Smith *v.* Smith, 30 N. C. 29; Goodbread *v.* Ledbetter, 18 N. C. 12; Vick *v.* Whitfield, 3 N. C. 222.

Ohio.— Duval *v.* Davey, 32 Ohio St. 604; Dewitt *v.* Greenfield, 5 Ohio 225; Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235. *Compare* Dewitt *v.* Greenfield, 5 Ohio 225.

Pennsylvania.— Moyer *v.* Moyer, 49 Pa. St. 210; Henry *v.* Norwood, 4 Watts 347. *Compare* Steinman *v.* McWilliams, 6 Pa. St. 170.

Rhode Island.— Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina.— Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633; McLuny *v.* Buford, 1 Nott & M. 268.

Texas.— Knapp *v.* Campbell, 14 Tex. Civ. App. 199, 36 S. W. 765

Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

Vermont.— Bridgman *v.* Hopkins, 34 Vt. 532; Bowen *v.* Hall, 20 Vt. 232. *Compare* Smith *v.* Shumway, 2 Tyler 74.

Virginia.— McNutt *v.* Young, 8 Leigh 542. *Compare* Dillard *v.* Collins, 25 Gratt. 343.

Wisconsin.— Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004; Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. 911; Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657; Wilson *v.* Noonan, 35 Wis. 321; Wilson *v.* Noonan, 27 Wis. 598.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330; Wright *v.* Schroeder, 30 Fed. Cas. No. 18,091, 2 Curt. 548.

England.— Leicester *v.* Walter, 3 Campb. 214 note, 2 Campb. 251; Waithman *v.* Weaver, D. & R. N. P. 10, 11 Price 257 note, 25 Rev. Rep. 770, 16 E. C. L. 412; Rodriguez *v.* Tadmire, 2 Esp. 721; Mills *v.* Spencer, Holt N. P. 533, 3 E. C. L. 211.

See 32 Cent. Dig. tit. "Libel and Slander," § 161.

Compare Lambert *v.* Pharis, 3 Head (Tenn.) 622; Bell *v.* Farnsworth, 11 Humphr. (Tenn.) 608.

Reputation as to particular transactions held inadmissible.— Mahoney *v.* Belford, 132 Mass. 393; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

Evidence of specific offenses other than those charged.— It is no defense to a libel that plaintiff has been guilty of offenses other than those imputed to him, although of a similar character, as this would only show that plaintiff's reputation ought to be bad, not that it is bad. Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163.

Speaking opprobriously of plaintiff by members of community.— It cannot be shown in mitigation of damages that for some time before the suit the people of the parish were in the habit of speaking opprobriously of plaintiff, for this is not evidence of general reputation. Kendrick *v.* Kemp, 6 Mart. N. S. (La.) 500.

51. *Alabama.*— Scott *v.* McKinnish, 15 Ala. 662; Commons *v.* Walters, 1 Port. 323.

Kansas.— Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Michigan.— Georgia *v.* Bond, 114 Mich 196, 72 N. W. 232.

Minnesota.— Simmons *v.* Holster, 13 Minn. 249.

Missouri.— Hess *v.* Gansz, 90 Mo. App. 439.

New York.— Calkins *v.* Colburn, 10 N. Y. St. 778; Donglass *v.* Tousey, 2 Wend. 352, 20 Am. Dec. 616.

Wisconsin.— Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657; B. *v.* I., 22 Wis. 372, 94 Am. Dec. 604.

See 32 Cent. Dig. tit. "Libel and Slander," § 161.

4. Character of Defendant. Defendant cannot rely on his own bad character in mitigation of damages.[52]

5. Belief and Absence of Malice on Part of Defendant. Defendant may show in mitigation of damages that the libel or slander was published under an honest conviction of its truth arising from probable grounds of suspicion known to him at the time of publication,[53] or that he otherwise acted in good faith and without malice.[54] But it has been held that absence of malice mitigates exemplary and not compensatory damages,[55] and hence in a jurisdiction where compensatory damages alone can be recovered, absence of malice is immaterial and cannot be shown.[56]

6. Intoxication. It has been held that drunkenness may be shown in mitigation of damages.[57] But it has also been held that if the slander is often repeated

52. Hastings *v.* Stetson, 130 Mass. 76. See also *infra*, VIII, F, 2, f, (I), (H), text and note 87.

53. *California.*— Morris *v.* Lachman, 68 Cal. 109, 8 Pac. 799.

Connecticut.— Williams *v.* Miner, 18 Conn. 464.

Florida.— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Illinois.— Moore *v.* Mauk, 3 Ill. App. 114.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405.

Louisiana.— Clement *v.* His Creditors, 37 La. Ann. 692.

Maryland.— Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Massachusetts.— Larned *v.* Buffington, 3 Mass. 546, 3 Am. Dec. 185.

Michigan.— Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Evening News Assoc. *v.* Tryon, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450.

Missouri.— Lewis *v.* Humphries, 64 Mo. App. 466.

New York.— Robinson *v.* Evening Post Pub. Co., 39 N. Y. App. Div. 525, 57 N. Y. Suppl. 303 [*modifying* 25 Misc. 243, 55 N. Y. Suppl. 62]; Littlejohn *v.* Greeley, 13 Abb. Pr. 41, 311, 22 How. Pr. 345.

Ohio.— Alpin *v.* Morton, 21 Ohio St. 536.

Pennsylvania.—Beehler *v.* Steever, 2 Whart. 313.

Rhode Island.—Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

Wisconsin.— Adamson *v.* Raymer, 94 Wis. 243, 68 N. W. 1000.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Shattuc *v.* McArthur, 25 Fed. 133.

See 32 Cent. Dig. tit. "Libel and Slander," § 162.

Compare Sickra *v.* Small, 87 Me. 493, 33 Atl. 9, 47 Am. St. Rep. 344.

News item furnished from reliable source. — It may be shown in mitigation of damages that a statement in a newspaper was made on information furnished by the police and published as a matter of news in the belief that it was true. Evening Post Co. *v.* Hunter, 38 S. W. 487, 18 Ky. L. Rep. 726. So. where matter published in newspapers came from a source which had been found by experience to be reliable, this fact may be shown in mitigation of damages, although there was no attempt made to investigate the truth of the publication. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6. See also Robinson *v.* Evening Post Pub. Co., 25 Misc. (N. Y.) 243, 55 N. Y. Suppl. 62, 28 N. Y. Civ. Proc. 239.

54. *Alabama.*— Shelton *v.* Simmons, 12 Ala. 466.

Connecticut.— Haight *v.* Cornell, 15 Conn. 74.

Georgia.— Shipp *v.* Story, 68 Ga. 47.

Indiana.— Heilman *v.* Shanklin, 60 Ind. 424.

Iowa.— Morse *v.* Times Republican Printing Co., 124 Iowa 707, 100 N. W. 867.

Michigan.— Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. 1165; Lewis *v.* Humphries, 64 Mo. App. 466.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

Texas.— Belo *v.* Wren, 63 Tex. 686.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Shattuc *v.* McArthur, 29 Fed. 136.

See 32 Cent. Dig. tit. "Libel and Slander," § 162.

Mistake in honest effort to enlighten the public.— Damages for a libel are reduced to a minimum if the libel results from an honest mistake made in an honest effort to enlighten the public. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251. See also Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307; Evening News Assoc. *v.* Tryon, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450.

Evidence of existing good-will between the parties prior to the speaking of the words is not admissible in mitigation of damages. Barr *v.* Hack, 46 Iowa 308.

55. Thompson *v.* Powning, 15 Nev. 195. *Compare* Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611, 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

56. Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051; Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345.

57. Gates *v.* Meredith, 7 Ind. 440 (holding that it is admissible in mitigation that when the words were spoken the mind of plaintiff was so besotted by a long course of dissipation and his character so depraved that no

both when the slanderer is sober and when he is drunk, the fact of intoxication is no mitigation.[58]

7. Provocation, Passion, and Enmity. It may be stated as a general rule that the fact that plaintiff provoked such anger or passion as resulted in the defamatory publication may be shown and considered in mitigation of damages.[59] It is not sufficient, however, that the words were published in anger and passion alone, it must also appear that there was provocation operating as the immediate cause,[60]

one who knew him would pay any attention to what he might utter, or give any credence to any slanderous charge he might make); Howell *v.* Howell, 32 N. C. 84. *Compare* Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453; Mix *v.* McCoy, 22 Mo. App. 488.

58. Howell *v.* Howell, 32 N. C. 84.

59. *Alabama.*— Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Arkansas.— Patton *v.* Cruce, 72 Ark. 421, 81 S. W. 386, 105 Am. St. Rep. 46, 65 L. R. A. 937.

Illinois.— Flagg *v.* Roberts, 67 Ill. 485; Freeman *v.* Tinsley, 50 Ill. 497; Thomas *v.* Dunaway, 30 Ill. 373.

Indiana.— Mousler *v.* Harding, 33 Ind. 176, 5 Am. Rep. 195; Brown *v.* Brooks, 3 Ind. 518.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Kansas.— Miles *v.* Harrington, 8 Kan. 425.

Kentucky.— Craig *v.* Catlet, 5 Dana 323; Duncan *v.* Brown, 15 B. Mon. 186.

Louisiana.— Germann *v.* Crescioni, 105 La. 496, 29 So. 968; Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406; Young *v.* Bridges, 34 La. Ann. 333.

Maryland.— Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583; Botelar *v.* Bell, 1 Md. 173; Davis *v.* Griffith, 4 Gill & J. 342.

Massachusetts.— Child *v.* Homer, 13 Pick. 503; Larned *v.* Buffinton, 3 Mass. 546, 3 Am. Dec. 185.

Michigan.— Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687.

Minnesota.— Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.— Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453; Fish *v.* St. Louis County Printing, etc., Co., 102 Mo. App. 62, 74 S. W. 641.

New York.— Xavier *v.* Oliver, 80 N. Y. App. Div. 292, 80 N. Y. Suppl. 225; Courtney *v.* Mannheim, 14 N. Y. Suppl. 929; Else *v.* Ferris, Anth. N. P. 36; Dolevin *v.* Wilder, 34 How. Pr. 488; Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

North Carolina.— Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588; McDougald *v.* Coward, 95 N. C. 368.

Pennsylvania.— Steever *v.* Beehler, 1 Miles 146.

Wisconsin.— Ranger *v.* Goodrich, 17 Wis. 78.

United States.— Shattuc *v.* McArthur, 29 Fed. 136; Shattuc *v.* McArthur, 25 Fed. 133.

England.— Wakley *v.* Johnson, R. & M. 422, 27 Rev. Rep. 767, 21 E. C. L. 787.

See 32 Cent. Dig. tit. "Libel and Slander," § 164.

Words spoken in altercation ending in assault and battery.— In Young *v.* Bridges, 34 La. Ann. 333, it was held that it is a mitigating circumstance that the words were uttered during a heated altercation, and that plaintiff, aged thirty-five, committed a severe assault on defendant, aged sixty, immediately after the latter spoke the words.

60. *Alabama.*— Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Maryland.— Botelar *v.* Bell, 1 Md. 173.

Massachusetts.— Child *v.* Homer, 13 Pick. 503.

New York.— Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595.

Virginia.— Bourland *v.* Eidson, 8 Gratt. 27.

See 32 Cent. Dig. tit. "Libel and Slander," § 164.

The provocation must be so recent as to induce a fair presumption that the injury done was inflicted during the continuance of the feelings and passions excited by the provocation.

Maryland.— Davis *v.* Griffith, 4 Gill & J. 342.

Massachusetts.— Child *v.* Homer, 13 Pick. 503.

Michigan.— Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687.

Minnesota.— Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787; Quinby *v.* Minnesota Tribune Co., 38 Minn. 528, 38 N. W. 623, 8 Am. St. Rep. 693, holding that the fact that the publication was induced by passion caused by a previous provoking publication by plaintiff (irrelevant to the subject of the libel) will not be considered in mitigation of damages where there has been time for hot blood to cool.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.— Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

New York.— Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595 [*affirming* 4 Wend. 336].

North Carolina.— Goodbread *v.* Ledbetter, 18 N. C. 12.

Virginia.— Bourland *v.* Eidson, 8 Gratt. 27.

Wisconsin.— Ranger *v.* Goodrich, 17 Wis. 78.

United States.— Battell *v.* Wallace, 30 Fed. 229, holding that a prior libel or slander by plaintiff cannot be given in evidence in mitigation of damages where any considerable interval has elapsed.

See 32 Cent. Dig. tit. "Libel and Slander," § 164.

on the part of the person concerning whom the defamatory statement or publication was made.[61]

8. Previous Publication by Others. As a general rule defendant may show in mitigation of damages that he did not originate the calumnious charge, evidence of prior publications by others being admissible on the theory that they tend to show that defendant reasonably believed them to be true.[62] There are authorities, however, holding that where the slander or libel does not on its face purport to be derived from another but is stated as of defendant's own knowledge, he cannot show in mitigation that it was in fact communicated to him by another.[63] Defendant must have known of the previous publication at the time he made

Long-standing enmity.— The fact that plaintiff had for a long time been the enemy of defendant is not admissible in mitigation of damages. Craig *v.* Catlet, 5 Dana (Ky.) 323; Andrews *v.* Bartholomew, 2 Metc. (Mass.) 509.

Plaintiff's habit of vilifying defendant.— Defendant cannot show in mitigation of damages that plaintiff was in the habit of vilifying, insulting, and provoking him and his family. Goodbread *v.* Ledbetter, 18 N. C. 12; McAlexander *v.* Harris, 6 Munf. (Va.) 465; Wakley *v.* Johnson, R. & M. 422, 27 Rev. Rep. 767, 21 E. C. L. 787. *Compare* Botelar *v.* Bell, 1 Md. 173.

Quarrelsomeness of plaintiff.— It is no mitigation to show that the person slandered was quarrelsome. Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

Former controversies between plaintiff and defendant cannot be given in evidence in mitigation. Lister *v.* Wright, 2 Hill (N. Y.) 320.

61. *Illinois.*— Flagg *v.* Roberts, 67 Ill. 485; Freeman *v.* Tinsley, 50 Ill. 497.

Indiana.— Jauch *v.* Jauch, 50 Ind. 135, 19 Am. Dec. 699.

Kansas.— Miles *v.* Harrington, 8 Kan. 425.

Maryland.— Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583; Botelar *v.* Bell, 1 Md. 173.

Michigan.—Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447.

Nebraska.— Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New York.— Dolevin *v.* Wilder, 34 How. Pr. 488.

See 32 Cent. Dig. tit. "Libel and Slander," § 164.

62. *Illinois.*— Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935. *Compare* Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271.

Iowa.— Hinkle *v.* Davenport, 38 Iowa 355, where it was stated at the time of speaking the words complained of that defendant had heard the report from others.

Kentucky.— Williams *v.* Greenwade, 3 Dana 432; Evans *v.* Smith, 5 T. B. Mon. 363, 17 Am. Dec. 74.

Michigan.— Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507. *Compare* Bronson *v.* Bruce, 59 Mich. 467, 26 N. W. 671, 60 Am. Rep. 307.

Minnesota.— Hewitt *v.* Pioneer-Press Co., 23 Minn. 178, 23 Am. Rep. 680.

Missouri.— Baldwin *v.* Boulware, 79 Mo. App. 5; Lewis *v.* Humphries, 64 Mo. App. 466.

New Jersey.— Hoboken Printing, etc., Co. *v.* Kahn, 58 N. J. L. 359, 33 Atl. 382, 1060, 55 Am. St. Rep. 609.

New York.— Hatfield *v.* Lasher, 81 N. Y. 246; Bush *v.* Prosser, 11 N. Y. 347. *Compare* Hager *v.* Tibbits, 2 Abb. Pr. N. S. 97; Mapes *v.* Weeks, 4 Wend. 659.

Pennsylvania.— Kennedy *v.* Gregory, 1 Binn. 85; Stepp *v.* Croft, 18 Pa. Super. Ct. 101.

South Carolina.— Galloway *v.* Courtney, 10 Rich. 414; Easterwood *v.* Quin, 2 Brev. 64, 3 Am. Dec. 700.

United States.— McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244; Romanyne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. C. C. 246. *Compare* Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163.

See 32 Cent. Dig. tit. "Libel and Slander," § 165.

A former distinct libel on plaintiff by another person is not admissible in extenuation of a second libel. Wilson *v.* Fitche, 41 Cal. 363.

Prior publication merely directing attention to subject-matter of libel.— Defendant cannot show, in mitigation of damages, a previous publication of a libel in a newspaper, when the effect of the libel was merely to direct his attention to the subject and to stimulate an investigation upon his part and the investigation resulted in the publication of the libel. Wilson *v.* Fitch, 41 Cal. 363.

63. Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156 [*overruling* Leister *v.* Smith, 2 Root (Conn.) 24]; Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38; Elliott *v.* Boyles, 31 Pa. St. 65.

Source of information need not be stated in defamatory article.—A newspaper article which upon its face purports to be derived from sources other than the writer's own knowledge need not necessarily state the sources of information, in order to permit a publisher, when sued thereon, to allege and prove mitigating circumstances showing that he acted in good faith upon apparently reliable information. Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611, 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611. *Compare* Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514, a case of slander.

the charge and must have been influenced by it in making his defamatory statement.[64]

9. Rumor and General Belief. It has been held that evidence of a general rumor, belief, or suspicion that plaintiff was guilty of the defamatory charge is admissible in mitigation of damages.[65] But this view has been controverted by other authorities holding that such evidence is inadmissible.[66]

64. Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. 501 [*reversing* 29 N. Y. App. Div. 149, 51 N. Y. Suppl. 839]; Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. Y. Suppl. 263; Gray *v.* Brooklyn Union Pub. Co., 35 N. Y. App. Div. 286, 52 N. Y. Suppl. 35; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131; Belo *v.* Smith, (Tex. Civ. App. 1897) 40 S. W. 856; Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628.

65. *Colorado.*— Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut.— Case *v.* Marks, 20 Conn. 248.

Delaware.— Morris *v.* Barker, 4 Harr. 520.

Iowa.— See Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38; Beardsley *v.* Bridgman, 17 Iowa 290.

Kentucky.—Calloway *v.* Middleton, 2 A. K. Marsh. 372, 12 Am. Dec. 406; McIntyre *v.* Bransford, 17 S. W. 359, 13 Ky. L. Rep. 454.

Maryland.—Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

Michigan.— Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; Farr *v.* Rasco, 9 Mich. 353, 80 Am. Dec. 88.

Mississippi.— Binns *v.* Stokes, 27 Miss. 239.

New Jersey.— Stuart *v.* News Pub. Co., 67 N. J. L. 317, 51 Atl. 709; Hoboken Printing, etc., Co. *v.* Kahn, 58 N. J. L. 359, 33 Atl. 382, 1060, 55 Am. St. Rep. 609; Cook *v.* Barkley, 2 N. J. L. 169, 2 Am. Dec. 343.

North Carolina.—Nelson *v.* Evans, 12 N. C. 9.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293. *Compare* McCoy *v.* Crawford, Tapp. 238.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

United States.— Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

England.— Leicester *v.* Walter, 3 Campb. 214 note, 2 Campb. 251; —— *v.* Moor, 1 M. & S. 284.

See 32 Cent. Dig. tit. "Libel and Slander," § 166.

In Alabama it is held that evidence that a party was generally suspected is admissible (Fuller *v.* Dean, 31 Ala. 654), but that evidence of a common or general report is an entirely different thing and inadmissible (Scott *v.* McKinnish, 15 Ala. 662). So a report that plaintiff had been suspected is inadmissible. Bradley *v.* Gibson, 9 Ala. 406.

In Indiana it is held that general reports and suspicions are admissible, but that a mere report not shown to be general is inadmissible. Blickenstaff *v.* Perrin, 27 Ind. 527; Kelley *v.* Dillon, 5 Ind. 426; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564; Henson *v.* Veatch, 1 Blackf. 369; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400. Evidence that it "was currently reported and circulated in the neighborhood" is not a general report or suspicion and is inadmissible. Blickenstaff *v.* Perrin, 27 Ind. 527; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400.

Necessity of giving rumor as authority.— In some of the authorities it is held that the fact that rumor existed is a mitigating circumstance only if defendant gave the rumor as his authority. Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835; Marker *v.* Dunn, 68 Iowa 720, 28 N. W. 38; Young *v.* Slemons, Wright (Ohio) 124; Haskins *v.* Lumsden, 10 Wis. 359; Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

Knowledge of rumor at time of publication.— It is essential that defendant knew of the rumor or report at the time the publication was made. Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389; Willover *v.* Hill, 72 N. Y. 36; Kellogg *v.* Cary, 3 Penr. & W. (Pa.) 102.

Belief in rumor.— The existence of slanderous reports which defendant did not believe and admits to be untrue is not a matter of mitigation. Graham *v.* Stone, 6 How. Pr. (N. Y.) 15, Code Rep. N. S. 181.

Subsequent rumors.— It is no excuse for defendant that others had heard the same rumor after he himself had set it going. Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791. See also Hancock *v.* Stephens, 11 Humphr. (Tenn.) 507.

66. *California.*— Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533; Wilson *v.* Fitch, 41 Cal. 363.

Georgia.— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

Illinois.— Strader *v.* Snyder, 67 Ill. 404; Lehning *v.* Hewett, 45 Ill. 23; Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Young *v.* Bennett, 5 Ill. 43.

Massachusetts.— Mahoney *v.* Belford, 132 Mass. 393; Wolcott *v.* Hall, 6 Mass. 514, 4 Am. Dec. 173.

Missouri.— Anthony *v.* Stephens, 1 Mo. 254, 13 Am. Dec. 497. *Compare* Nelson *v.* Wallace, 48 Mo. App. 193, holding that defendant may show that the slander complained of was only a repetition of a current report of long standing by which plaintiff's general reputation had become impaired.

New Hampshire.— Knight *v.* Foster, 39 N. H. 576; Dame *v.* Kenney, 25 N. H. 318. *Compare* Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244.

New York.— Kennedy *v.* Gifford, 19 Wend. 296; Inman *v.* Foster, 8 Wend. 602 (holding that general rumors are not admissible in mitigation unless they affect the general character); Mapes *v.* Weeks, 4 Wend. 659; Cole *v.* Perry, 8 Cow. 214; Root *v.* King,

10. Retraction or Apology. A subsequent retraction of a libel or slander by defendant may be introduced in evidence to mitigate the damages.[67] In some jurisdictions, however, either under statute[68] or apart from statute,[69] it is held that an apology or retraction made after the commencement of the action cannot be proved in mitigation of the damages. On the other hand it has been held that where the retraction is fully, fairly, and promptly made and is such as an impartial person would consider reasonable and satisfactory it is admissible in mitigation, although made after the commencement of the action.[70] A mere offer on the part of defendant to publish a retraction is not admissible in mitigation of damages,[71] unless it is made in good faith and before suit is brought.[72]

VIII. ACTIONS.

A. Right of Action and Defenses[73] — **1. Nature of Action.** The right to an

7 Cow. 613; Matson *v.* Buck, 5 Cow. 499. *Compare* Springstein *v.* Field, Anth. N. P. 252; Powers *v.* Skinner, 1 Wend. 451.

Pennsylvania.— Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116; Fitzgerald *v.* Stewart, 53 Pa. St. 343.

Tennessee.— Hancock *v.* Stephens, 11 Humpr. 507.

See 32 Cent. Dig. tit. "Libel and Slander," § 166.

Admission of falsity of charge.— Reports and rumors, it has been held, cannot be given in evidence unless there is an admission of the falsity of the charge. Mapes *v.* Weeks, 4 Wend. (N. Y.) 659.

67. *California.*— Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Indiana.— White *v.* Sun Pub. Co., 164 Ind. 426, 73 N. E. 890.

Kentucky.— Lehrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292.

Louisiana.— Cass *v.* New Orleans Times, 27 La. Ann. 214.

Maine.— Kent *v.* Bonzey, 38 Me. 435.

Minnesota.— Gray *v.* Times Newspaper Co., 74 Minn. 452, 77 N. W. 204, 73 Am. St. Rep. 363.

New York.— Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. Suppl. 570; Hotchkiss *v.* Oliphant, 2 Hill 510.

Canada.— Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

See 32 Cent. Dig. tit. "Libel and Slander," § 168.

A retraction in the presence of defendant's family merely is not sufficient. Kent *v.* Bonzey, 38 Me. 435.

Publication of denial by plaintiff.— A publication of the statement that the victim of the libelous charge denies it is not a retraction of it. Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

Subsequently attempting to place new construction on libel.— A subsequent article not containing a disavowal or a retraction but attempting to put a new construction upon the libel is not admissible as a mitigating circumstance. Hotchkiss *v.* Oliphant, 2 Hill (N. Y.) 510. See also Gray *v.* Times Newspaper Co., 74 Minn. 452, 77 N. W. 204, 73 Am. St. Rep. 363.

Significance of correction a question for jury.— A second publication in the nature of a correction may be considered in mitigation of damages, but its signification is entirely a question for the jury to determine. Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309.

Ohio Rev. St. § 5094, declares that, if a libel shall be published in good faith through a mistake of fact, with reasonable ground to believe that the statements were true, and the publisher on demand, and within a reasonable time, publishes a full and complete retraction, etc., the presumption of malice should be thereby rebutted. It was held that under Ohio Const. art. 1, § 16, declaring that all the courts shall be open, and every person, for an injury done him in his person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay, section 5094 should be construed so as to become operative only upon a demand being made for a retraction; and it is optional with the person libeled to stand upon his rights under the old law, or to waive a part by demanding and accepting a retraction under the law as amended. Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309.

68. Bradford *v.* Edwards, 32 Ala. 628.

69. Evening News Assoc. *v.* Tryon, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450. See also Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139.

70. Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129. See also Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766]; Smith *v.* Harrison, 1 F. & F. 565.

71. Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139 (holding that an offer by the publisher of a libel to open the columns of his paper to plaintiff for any statement or explanation he may wish to make is immaterial); Turton *v.* New York Recorder Co., 144 N. Y. 144, 38 N. E. 1009 [*affirming* 3 Misc. 314, 22 N. Y. Suppl. 766].

72. Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. (N. Y.) 74, 85 N. Y. Suppl. 570; Blohm *v.* Bamber, 10 N. Y. Suppl. 98.

73. Actions generally see Actions, 1 Cyc. 634.

action of libel or slander, where special damages are not sought, depends upon a publication of matter affecting the reputation of plaintiff, of that character which is defined by law as necessarily causing actionable damage, made by defendant in violation of a legal duty. The two main elements are injury to plaintiff and a wrongful act, that is an act in violation of a legal duty by defendant.[74]

2. Notice to Retract as Condition Precedent to Suit. Under statutes requiring a notice to retract to be served against the publisher of a newspaper before commencing an action for libel, it has been held that the service of notice is not a condition precedent to the recovery of actual damages, but only for the recovery of punitive damages.[75]

3. Defamation Subsequent to Commencement of Action. To support an action for defamation it must appear that the words alleged to be defamatory were published prior to the commencement of the action.[76] Defamatory words published subsequent to the commencement of the action constitute a separate and distinct cause of action and cannot be brought into the original action by means of a supplemental complaint, nor can any damages be awarded on their account.[77]

4. Persons Entitled to Sue — a. In General. An action for defamation must be brought by the person injuriously affected thereby; a third person cannot sue either alone[78] or jointly with the interested party.[79]

b. Corporations. A corporation, although an artificial person, may maintain an action for defamatory words published of it, concerning the trade or business in which it may be engaged.[80] It has been held, however, that a municipal

74. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865. See also *supra*, II, B, text and note 19 *et seq.*

An action for tort see Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; McDonald *v.* Green, 176 Mass. 113, 57 N. E. 211.

75. Holston *v.* Boyle, 46 Minn. 432, 49 N. W. 203; Clementson *v.* Minnesota Tribune Co., 45 Minn. 303, 47 N. W. 781; Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648. *Compare* Williams *v.* Smith, 134 N. C. 249, 46 S. E. 502; Foye *v.* Guardian Printing, etc., Co., 109 Fed. 368, construing New Jersey statute.

Anonymous publications.— Where there is a provision in such a statute that it shall not apply to anonymous publications, a newspaper article signed "Smith" is not an anonymous publication within the meaning of the statute. Williams *v.* Smith, 134 N. C. 249, 46 S. E. 502.

76. Skinner *v.* Robeson, 4 Yeates (Pa.) 375; Taylor *v.* Sturgingger, 2 Mill (S. C.) 267; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. (U. S.) 202, 16 L. ed. 73. *Compare* Dewit *v.* Greenfield, 5 Ohio 225.

New trial will be granted if the record does not show affirmatively that the words were spoken before action was commenced. Taylor *v.* Sturgingger, 2 Mill (S. C.) 367. *Compare* Skinner *v.* Robeson, 4 Yeates (Pa.) 375, holding that the verdict will not be arrested although the words were spoken after issuance of writ.

77. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4.

Subsequent publications as evidencing malice on the part of the publisher see *infra*, VIII, F, 2, c, (XII), (C).

78. Londhead *v.* Bartholomew, Wright (Ohio) 91.

Suits by husband and wife see Husband and Wife, 21 Cyc. 1529, text and note 37 *et seq.*

Action by wife against husband see Husband and Wife, 21 Cyc. 1519, text and note 66.

Suit by infant see Infants, 22 Cyc. 629, note 19.

Action by foreigner see Aliens, 2 Cyc. 108, text and notes 92, 93.

79. Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292.

80. *Illinois.*— Hahnemannian L. Ins. Co. *v.* Beebe, 48 Ill. 87, 95 Am. Dec. 519.

New Jersey.— Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 67 Am. Dec. 400.

New York.— Union Associated Press *v.* Heath, 49 N. Y. App. Div. 247, 63 N. Y. Suppl. 96; Mutual Reserve Fund L. Assoc. *v.* Spectator Co., 50 N. Y. Super. Ct. 460; Knickerbocker L. Ins. Co. *v.* Ecclesine, 34 N. Y. Super. Ct. 76, 11 Abb. Pr. N. S. 385, 42 How. Pr. 201 (holding that if the language is not actionable *per se*, an action may be sustained upon proof of special damage to the business, trade, or property of the corporation); Shoe, etc., Bank *v.* Thompson, 18 Abb. Pr. 413, 23 How. Pr. 253.

Ohio.— See Brayton *v.* Cleveland Special Police Co., 63 Ohio St. 83, 57 N. E. 1085, 52 L. R. A. 525.

Pennsylvania.— Temperance Mut. Ben. Assoc. *v.* Schweinhard, 3 Pa. Co. Ct. 353.

Rhode Island.— Morrison-Jewell Filtration Co. *v.* Lingane, 19 R. I. 316, 33 Atl. 452.

Wisconsin.— Gross Coal Co. *v.* Rose, 126 Wis. 24, 105 N. W. 225, 110 Am. St. Rep. 894, 2 L. R. A. N. S. 741; Canton Surgical, etc., Chair Co. *v.* McLain, 52 Wis. 93, 51 N. W. 1098.

corporation cannot maintain an action for a letter charging the corporation with corruption.[81]

c. Partners. For words spoken of partners in the way of their trade, business, or profession, they may sue jointly.[82] But where plaintiffs sue as a partnership, for injuries to their business by reason of slander, no damages can be allowed for words published of a partner as an individual,[83] unless the jury find that the injury to individual character affected the business of the firm.[84] Where the language spoken or written concerning partners in their partnership business is actionable *per se*, either partner may sue separately for the injury sustained by him.[85]

d. Assignees. At common law a right of action for slander is not assignable, and hence no recovery can be had by an assignee.[86]

e. Publication Affecting a Class. It has been held that where a publication affects a class of persons without any special personal application, no individual of that class can sustain an action for the publication.[87] On the other hand it has been held that one who publishes matter about a family in its collective capacity assumes the risk of its being libelous as to any member thereof.[88] So it has been held that a publication which denounces a verdict as infamous and charges the "twelve men" composing the jury with having done injustice to their oaths is directed against the jurors individually and an individual juror may maintain an action therefor.[89]

f. Surviving Relatives For Defamation of a Deceased Person. The maligning of the memory of a deceased person is not a cause of action for damages in favor of his relatives where it does not affect their reputation.[90]

United States.— Ohio, etc., R. Co. *v.* Press Pub. Co., 48 Fed. 206.

England.— South Helton Coal Co. *v.* Northeastern News Assoc., [1894] 1 Q. B. 133, 58 J. P. 196, 63 L. J. Q. B. 293, 69 L. T. Rep. N. S. 844, 9 Roberts 240, 42 Wkly. Rep. 322; Metropolitan Saloon Omnibus Co. *v.* Hawkins, 4 H. & N. 87, 28 L. J. Exch. 201, 5 Jur. N. S. 226, 7 Wkly. Rep. 265. See also Williams *v.* Beaumont, 10 Bing. 260, 3 L. J. C. P. 31, 3 Moore & S. 705, 25 E. C. L. 127.

See 32 Cent. Dig. tit. "Libel and Slander," § 174.

Compare St. Louis Church *v.* Blanc, 8 Rob. (La.) 51.

See also CORPORATIONS, 10 Cyc. 1336, note 79.

Slander of stock-holder.— In Brayton *v.* Cleveland Special Police Co., 63 Ohio St. 83, 57 N. E. 1085, 52 L. R. A. 525 [*reversing* 19 Ohio Cir. Ct. 47, 9 Ohio Cir. Dec. 748], it was held that a corporation cannot maintain an action for slander for words spoken solely of and concerning an individual who is a stock-holder and officer of the corporation, unless the slander be in direct relation to the trade or business of the corporation.

81. Manchester *v.* Williams, [1891] 1 Q. B. 94, 54 J. P. 512, 60 L. J. Q. B. 23, 63 L. T. Rep. N. S. 805, 39 Wkly. Rep. 302. See also Giraud *v.* Bead, 3 E. D. Smith (N. Y.) 337.

82. Taylor *v.* Church, 1 E. D. Smith (N. Y.) 279; Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*; Forster *v.* Lawson, 3 Bing. 452, 4 L. J. C. P. O. S. 148, 11 Moore C. P. 360, 11 E. C. L. 224; Cooke *v.* Batchelor, 3 B. & P. 150; Le Fanu *v.* Malcomson, 1 H. L. Cas. 637; 9 Eng. Reprint 910; Russell *v.* Webster, 23 Wkly. Rep. 59. See also Gazynski *v.* Colburn, 11 Cush. (Mass.) 10; Titus *v.* Follet, 2 Hill (N. Y.) 318.

Joinder of husband of owner of business.— An action for slander in relation to a business cannot be maintained by the husband of the owner, jointly with his wife, although he is entitled to a proportion of the profits, but has no interest in the *corpus* of the business. Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292.

83. Davis *v.* Ruff, Cheves (S. C.) 17, 34 Am. Dec. 584 (holding that it is no slander of a firm to impute want of solvency to a partner); Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

84. Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

85. Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139 (holding that where a publication libels two persons, so that each would have a right of action irrespective of any partnership relation, the fact that the libel attributes to them a firm-name will not prevent the maintenance of separate actions); Rosenwald *v.* Hammerstein, 12 Daly (N. Y.) 377; Noonan *v.* Orton, 32 Wis. 106; Robinson *v.* Marchant, 7 Q. B. 918, 10 Jur. 156, 15 L. J. Q. B. 135, 53 E. C. L. 918; Harrison *v.* Bevington, 8 C. & P. 708, 34 E. C. L. 975.

86. See ASSIGNMENTS, 4 Cyc. 24, text and note 46.

87. White *v.* Delavan, 17 Wend. (N. Y.) 49. See also *supra*, III, K, 9, a, text and note 75.

88. Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

89. Byers *v.* Martin, 2 Colo. 605, 25 Am. Rep. 755.

90. Bradt *v.* New Nonpareil Co., 108 Iowa

5. Persons Liable — a. In General. All persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication,[91] each being liable in full without apportionment as to his particular share.[92] Thus he who furnishes the means of convenient circulation, knowing or having reasonable cause to believe that it is to be used for that purpose, if it is in fact so used, is guilty of aiding the publication and thereby becomes liable.[93] But it must be shown that the publication or participation of the person sought to be held liable related to the defamatory matter published, and not simply to the general communication of which the defamatory matter was a part.[94] So the innocent delivery of a sealed letter by a postman, or by another at his request, would not be an actionable publication of a libel contained in the letter.[95] A person will be liable for what is published by his authority;[96] and although the publication of

449, 79 N. W. 122, 45 L. R. A. 681; Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654, 4 N. Y. Annot. Cas. 7; Wellman *v.* Sun Printing, etc., Co., 66 Hun (N. Y.) 331, 21 N. Y. Suppl. 577. *Compare* Huot *v.* Noiseax, 2 Quebec Q. B. 521.

Suit by representative of deceased. — In Bradt *v.* New Nonpareil Co., 108 Iowa 449, 79 N. W. 122, 45 L. R. A. 681, it was intimated that the personal representative of a person of whom a libel was published after his decease could not recover in a suit therefor.

91. *Delaware.*— Layton *v.* Harris, 3 Harr. 406.

Illinois.— Prussing *v.* Jackson, 85 Ill. App. 324.

Iowa.— Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Louisiana.— Staub *v.* Van Benthuysen, 36 La. Ann. 467.

Massachusetts.— Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768.

Michigan.— Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52.

New York.— Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429; Roberts *v.* Breckon, 31 N. Y. App. Div. 431, 52 N. Y. Suppl. 638.

Pennsylvania.— Collins *v.* Morning News Co., 41 Wkly. Notes Cas. 425.

See 32 Cent. Dig. tit. "Libel and Slander," § 175.

Where a conspiracy to publish a libel is shown, all the conspirators are responsible for all the publications, although no one of them was concerned in all. Cranfill *v.* Hayden, (Tex. Civ. App. 1903) 75 S. W. 573.

Facts held not to constitute a participation. — Where defendants as members of a society secured the expulsion of plaintiff on the grounds of gross immorality, and the vote was published among the transactions of the society by the committee of publication of which defendants were not members, defendants were not liable. Barrows *v.* Carpenter, 11 Cush. (Mass.) 456. See also Russo *v.* Maresca, 72 Conn. 51, 43 Atl. 552.

Action against married woman see Husband and Wife, 21 Cyc. 1545, text and note 48 *et seq.*

Liability of infants see Infants, 22 Cyc. 620, text and notes 50, 51.

Liability of insane persons see Insane Persons, 22 Cyc. 1212, text and notes 44 *et seq.*

Action against informant of person libeled. — No claim can be maintained by the publishers of a libelous work against a person informing the individuals libeled of the publication, who brings action against the publishers, resulting in the recovery of damages. Saunders *v.* Seyd, etc., Credit Index Co., 75 L. T. Rep. N. S. 193.

92. Klos *v.* Zahorick, 113 Iowa 161, 80 N. W. 1046, 53 L. R. A. 235.

93. Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. 265.

One who negligently signs a libelous article without knowing its contents, and delivers it to the person who wrote it without any direction restricting the use to be made of it, is responsible for the publication thereof by the person to whom it is so delivered, where the article shows on its face that it is intended for publication. Loibe *v.* Breidenbach, 78 Wis. 49, 47 N. W. 15. See also Bacon *v.* Michigan Cent. R. Co., 55 Mich. 224, 21 N. W. 324, 54 Am. Rep. 372; Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

94. Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235. See also Russo *v.* Maresca, 72 Conn. 51, 43 Atl. 552.

The mere furnishing of some of the materials used by another in the preparation of an alleged libelous article does not constitute a publication by the person furnishing the materials, if when printed the article as a whole is something very different from the materials so furnished by him. Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656. If one communicates partly in writing and partly in conversation, the material from which another composes a libel, that is insufficient to prove the liability of the former for the publication. Cochran *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363.

95. Layton *v.* Harris, 3 Harr. (Del.) 406.

96. Wilson *v.* Noonan, 27 Wis. 598; Parkes *v.* Prescott, L. R. 4 Exch. 169, 38 L. J. Exch. 105, 20 L. T. Rep. N. S. 537, 17 Wkly. Rep. 773. See Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543 [*reversing* 9 App. Cas. (D. C.) 508]. See also Master and Servant.

a libelous or defamatory statement may be without one's knowledge, if made by his authority he will be liable for the same.[97]

b. Corporations. A corporation is liable in damages for the publication of a libel as it is for its other torts.[98]

c. Partners. So a partnership may be liable for the publication of a libel.[99]

d. Defamation by Party's Attorney. A client is not responsible for an unauthorized defamatory communication made by his attorney.[1] It has been held, however, that when the facts furnished by a client to his attorney are misleading and defamatory in character, and their incorporation into a petition is foreign to the object and purposes of the suit, the client is liable.[2]

e. Newspaper Publications — (i) *Owner or Proprietor.* The owner or proprietor of a newspaper is liable for a libel published therein, although the publication may have been made in his absence and without his knowledge.[3]

One who adopts or recognizes the publication of a libelous article purporting to emanate from him may be liable therefor. Croasdale *v.* Bright, 6 Houst. (Del.) 52; Dawson *v.* Holt, 11 Lea (Tenn.) 583, 47 Am. Rep. 312. But mere silence on the part of one in whose name a libel is unauthorizedly published will not render him liable. Simmons *v.* Holster, 13 Minn. 249; Dawson *v.* Holt, *supra*. So when a person in publishing a defamatory article professed to act for a third person, defendant cannot ratify the publication so as to render himself liable. Russo *v.* Maresca, 72 Conn. 51, 43 Atl. 552.

Where a notary public who is an agent and employee of a bank falsely and maliciously makes a protest for non-payment, the bank is not liable, as in such cases the notary acts as a public officer and not as agent of the bank. May *v.* Jones, 88 Ga. 308, 14 S. E. 552, 30 Am. St. Rep. 154, 15 L. R. A. 637.

97. Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722 [*affirming* 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66].

98. Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Fogg *v.* Boston, etc., R. Corp., 148 Mass. 513, 20 N. E. 109, 12 Am. St. Rep. 583; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84; Samuels *v.* Evening Mail Assoc., 75 N. Y. 604; Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54. See Washington Gas Light Co. *v.* Lansden, 9 App. Cas. (D. C.) 508. See also Corporations, 10 Cyc. 1215, 1216.

A corporation may defend a suit for libel brought against a servant of the corporation. Breay *v.* Royal British Nurses' Assoc., [1897] 2 Ch. 272, 66 L. J. Ch. 587, 76 L. T. Rep. N. S. 735, 46 Wkly. Rep. 86.

Liability of corporation for slander see Corporations, 10 Cyc. 1215, 1216.

Action against municipal corporation. — An action of libel cannot be maintained against a city or town. Howland *v.* Maynard, 159 Mass. 434, 34 N. E. 515, 38 Am. St. Rep. 445, 21 L. R. A. 500. *Compare* McLay *v.* Bruce County Corp., 14 Ont. 398.

99. Atlantic Glass Co. *v.* Paulk, 83 Ala. 404, 3 So. 800 (holding that it is permissible to maintain an action for the publishing of a libel against a partnership where the publication is made by the authority or acquiescence of all the partners); Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528 (holding that where a newspaper is conducted by a partnership one partner may be the implied agent of another to publish a libel so as to render the partnership liable as such). *Compare* Woodling *v.* Knickerbocker Co., 31 Minn. 268, 17 N. W. 387, holding that one partner in a firm engaged in dealing in furniture and draperies is not, merely because of being a partner, liable for a libel published by another partner, or a servant of the firm, by placing a placard on a piece of furniture, the property of the firm, offering it for sale.

1. Hardin *v.* Cumstock, 2 A. K. Marsh. (Ky.) 480, 12 Am. Dec. 427; Bayly *v.* Fourchy, 32 La. Ann. 136; Galveston, etc., R. Co. *v.* Smith, 81 Tex. 479, 17 S. W. 133.

2. Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856.

3. *California.* — Dunn *v.* Hearst, 139 Cal. 239, 73 Pac. 138.

Indiana. — Dunn *v.* Hall, 1 Ind. 344, Smith 228.

Louisiana. — Perret *v.* New Orleans Times Newspaper, 25 La. Ann. 170.

Massachusetts. — Curtis *v.* Mussey, 6 Gray 261.

Missouri. — Buckley *v.* Knapp, 48 Mo. 152; Hess *v.* Gansz, 90 Mo. App. 439; Arnold *v.* Sayings Co., 76 Mo. App. 159.

Nebraska. — Williams *v.* Fuller, 68 Nebr. 354, 94 N. W. 118, (1903) 97 N. W. 246.

New Jersey. — Gebhardt *v.* England, 8 N. J. L. 146.

New York. — Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722 [*affirming* 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66]; O'Brien *v.* Bennett, 59 N. Y. App. Div. 623, 69 N. Y. Suppl. 298; McMahon *v.* Bennett, 31 N. Y. App. Div. 16, 52 N. Y. Suppl. 390; Huff *v.* Bennett, 4 Sandf. 120; Andres *v.* Wells, 7 Johns. 260, 5 Am. Dec. 267.

Pennsylvania. — Bruce *v.* Reed, 104 Pa. St. 408, 49 Am. Rep. 586.

Wisconsin. — Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81, holding that the pro-

And this rule has been held to apply equally as well where the paper is published by a corporation.[4]

(II) *Managing Editor.* The managing editor of a newspaper is equally liable with the proprietor for the publication of a libelous article, and this whether he knows of the publication or not, as it is his duty to know the contents of all articles published.[5]

(III) *Assistant Editor.* But an assistant editor of a newspaper is not bound to know all that goes into the paper and can be held liable only for what he himself does or knowingly permits to be done.[6]

(IV) *Other Officers.* The same rule applies to other officers or agents of a corporation or association engaged in the publication of a newspaper, where such officers or agents have no powers as general managers.[7]

(V) *Vendors and Distributors.* It is a good defense for a vendor or distributor of a newspaper or periodical to show that he had no knowledge of the libelous matter and that there were no extraneous facts which should have put him on his guard.[8]

(VI) *Author or Instigator.* The author of an article published in a newspaper is responsible for the defamatory matter contained therein, and it is no defense that immaterial variations not affecting the sense are made from the original manuscript.[9] So one who causes or procures the libel to be published is liable for all the damages consequent upon the publication,[10] although it is held that

prietor of a newspaper in which a libel is published may be sued therefor without joining the writer of the article as defendant.

United States.— Dexter *v.* Spear, 7 Fed. Cas. No. 3,867, 4 Mason 115; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

England.— Rex *v.* Topham, 4 T. R. 126, 2 Rev. Rep. 343.

See 32 Cent. Dig. tit. "Libel and Slander," § 178.

Punitive damages.— When a general manager in the absence of a proprietor publishes a libel, refuses to retract when informed of the groundlessness of the charge and republishes the libel, the proprietor is liable in punitive damages. Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274 [*affirming* 101 Am. St. Rep. 722, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66].

Liability for acts of employees.— A newspaper proprietor is liable for the mistakes, malice, or recklessness of his employees. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599; Scripps *v.* Reilly, 38 Mich. 10; Collins *v.* Morning News Co., 6 Pa. Super. Ct. 330, 41 Wkly. Notes Cas. 425.

Liability of assignee of newspaper plant.— Where a printing press and newspaper establishment were assigned merely as security for a debt, and the press remained in the sole possession and management of the assignor, the ownership of the assignee is not such as to render him liable to an action as proprietor for a libelous publication. Andres *v.* Wells, 7 Johns. (N. Y.) 260, 5 Am. Dec. 267.

Liability for act of co-proprietor.— One proprietor of a newspaper is liable for the act of his co-proprietor in publishing a libelous article. Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244.

4. Aldrich *v.* Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84; Pfister *v.* Sentinel Co., 108 Wis. 572, 84 N. W. 887, holding that an action will lie against the directors of a corporation for causing the publication of libelous articles.

Liability of corporation for libel generally see *supra*. VIII, A, 5, b.

5. Danville Press Co. *v.* Harrison, 99 Ill. App. 244; Nevin *v.* Spieckemann, 1 Pa. Cas. 400, 4 Atl. 497; Smith *v.* Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

6. Weil *v.* Nevin, 1 Mona. (Pa.) 65; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

7. Danville Press Co. *v.* Harrison, 99 Ill. App. 244; Mecabe *v.* Jones, 10 Daly (N. Y.) 222; Nevin *v.* Spieckemann, 1 Pa. Cas. 400, 4 Atl. 497.

8. Staub *v.* Van Benthuysen, 36 La. Ann. 467; Street *v.* Johnson, 80 Wis. 455, 50 N. W. 395, 27 Am. St. Rep. 42, 14 L. R. A. 203; Emmens *v.* Pottle, 16 Q. B. D. 354, 50 J. P. 228, 55 L. J. Q. B. 51, 53 L. T. Rep. N. S. 808, 34 Wkly. Rep. 116; Rex *v.* Wiatt, 8 Mod. 123; Day *v.* Bream, 2 M. & Rob. 54.

9. Strader *v.* Snyder, 67 Ill. 404; Prussing *v.* Jackson, 85 Ill. App. 324; Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525; Dawson *v.* Holt, 11 Lea (Tenn.) 583, 47 Am. Rep. 312; Loibl *v.* Breidenbach, 78 Wis. 49, 47 N. W. 15.

10. *Colorado.*— Hazy *v.* Woetke, 23 Colo. 556, 563, 48 Pac. 1048 [*quoting* Odgers 155], where in a well considered opinion of the court delivered by Hayt, C. J., it is said: "Every one who requests, procures or commands another to publish a libel is answerable as though he published it himself."

the mere answering of questions of newspaper reporters is not sufficient to charge a person with responsibility for the publication of the answers.[11]

f. Repetition and Republication by Others. Where defamatory matter is republished by another than the original author, the author is not liable therefor unless the republication is the natural and probable consequence of his own act, or unless he has actually or presumptively authorized or ordered its repetition.[12] But the rule has been stated that if the slander be repeated under such circumstances as to be justifiable and innocent, and not to give a cause of action against the one repeating the same, then the first publisher thereof is generally responsible for the damage caused by such repetition.[13] Defendant is not liable for a republication by plaintiff or for the publication by plaintiff of a letter or other communication containing defamatory matter received by him from defendant.[14]

Maryland.— International Fraternal Alliance *v.* Mallalieu, 87 Md. 97, 39 Atl. 93.

Minnesota.— Zier *v.* Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9.

New York.— Thomas *v.* Smith, 75 Hun 573, 27 N. Y. Suppl. 589.

Pennsylvania.— Wills *v.* Hardcastle, 19 Pa. Super. Ct. 525.

United States.— Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543.

See 32 Cent. Dig. tit. "Libel and Slander," § 178.

11. Henry *v.* Pittsburgh, etc., R. Co., 139 Pa. St. 289, 21 Atl. 157.

12. *Illinois.*— Clifford *v.* Cochrane, 10 Ill. App. 570.

Indiana.— Cates *v.* Kellogg, 9 Ind. 506.

Iowa.— Prime *v.* Eastwood, 45 Iowa 640.

Kentucky.— Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73, 11 Ky. L. Rep. 697.

Massachusetts.— Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612 (holding that where plaintiff's name is placed upon a black-list, by defendant, defendant is liable for the acts of the officers of the association which were the natural and probable consequences of his act); Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Shurtleff *v.* Parker, 130 Mass. 293, 39 Am. Rep. 454; Hastings *v.* Stetson, 126 Mass. 329, 331, 30 Am. Rep. 683 (where it is said: "It is too well settled, to be now questioned, that one who utters a slander is not responsible . . . for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control and who thereby make themselves liable to the person slandered; and that such repetition cannot be considered in law a necessary, natural or probable consequence of the original slander"); Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768; Stevens *v.* Hartwell, 11 Metc. 542.

Minnesota.— Zier *v.* Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9.

Nebraska.— Schmuck *v.* Hill, 2 Nebr. (Unoff.) 79, 96 N. W. 158.

New York.— Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502 [*reversing* 25 N. Y. App. Div. 438, 49 N. Y. Suppl. 627] (holding that the mere speaking of words in the presence of third persons that are not actionable *per se* would at most amount to a mere slander, even if special damages were alleged, and their repetition or the printing and publication of them by the independent act of a third party would not render the person speaking them responsible thereon); Pettibone *v.* Simpson, 66 Barb. 492; Olmstead *v.* Brown, 12 Barb. 657; Gutkes *v.* New York Produce Exch., 46 Misc. 133, 92 N. Y. Suppl. 934.

Ohio.— Wartenbe *v.* Sternberger, 23 Cinc. L. Bul. 113, holding that where defendant wrote a letter to confirm rumors against the character of plaintiff a candidate for office (so that the natural and probable use of the letter would be to circulate it) defendant is liable for the unauthorized publication of the letter and copies of it.

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

Wisconsin.— Gough *v.* Goldsmith, 44 Wis. 262, 28 Am. Rep. 579.

United States.— Merchants' Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19.

England.— Parkins *v.* Scott, 1 H. & C. 153, 8 Jur. N. S. 593, 31 L. J. Exch. 331, 6 L. T. Rep. N. S. 394, 10 Wkly. Rep. 562; Speight *v.* Gosnay, 55 J. P. 501, 60 L. J. Q. B. 231.

See 32 Cent. Dig. tit. "Libel and Slander," § 177.

Repetition held to be natural and probable consequence of original publication see Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; Zier *v.* Hofflin, 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9.

Repetition by defendant see *supra*, IV, F.

13. Bassell *v.* Elmore, 48 N. Y. 561 [*citing* Fowles *v.* Bowen, 30 N. Y. 20; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Ward *v.* Weeks, 7 Bing. 211, 9 L. J. C. P. O. S. 6, 4 M. & P. 796, 20 E. C. L. 101]. *Compare* Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724.

14. *Michigan.*—Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850, holding that where an alleged libelous letter was written concerning plaintiff's character as a clergyman, defendants were not responsible for any damages resulting from plaintiff's publication of such letter by reading it from the pulpit before the congregation.

6. Defenses — a. Res Adjudicata[15] — (i) *In General.* A judgment on one portion of a libelous article is a bar to an action on another portion of the same article.[16] Nor will a separate action lie on a republication by the same party of a libel, where the republication was made prior to the action on the original article.[17] It is no objection that the utterance of the same slanderous words has been proved against defendant for a special purpose in a previous action for slander between the same parties, founded on the speaking of words other than those so given in evidence.[18] So the fact that a judgment had been recovered against defendant's wife for making independently of him the same slanderous charge is no bar to an action against him.[19]

(ii) *Prior Suit For Malicious Prosecution.* A judgment for defendant in an action for malicious prosecution is a bar to a subsequent suit against him for slander for the same accusation as the one on which plaintiff was arrested, although said slanderous words were uttered on a different occasion, provided they were uttered before the suit for malicious prosecution was commenced.[20]

b. Failure to Prosecute For Previous Libel. It is no defense that the party libeled has failed to prosecute for a previous publication.[21]

c. Bankruptcy of Plaintiff. It is no defense that since the commencement of the action plaintiff has been declared a bankrupt.[22]

d. Negligence of Plaintiff. Where the injury to plaintiff has been aggravated by his own negligence, such negligence will not bar his recovery of damages for so much of the injury as was sustained prior to his negligence.[23]

e. Agreement to Waive Right of Action. An agreement to waive a right of action for defamation in consideration of the destruction of certain documents by defendant is, when performed by defendant, a bar to the action.[24]

f. Release of Others Liable. That plaintiff has released from liability the owners and publishers of a newspaper containing the libel which defendant is charged with having circulated is not a defense.[25] On the other hand it has been held that a sealed release of the proprietor of a newspaper by plaintiff is a bar to an action against a person for communicating the defamatory matter to the newspaper for publication.[26]

g. Retraction or Apology. In the absence of an express agreement[27] the

New York.— Galligan *v.* Kelly, 31 N. Y. Suppl. 561.

South Carolina. — Fonville *v.* McNease, Dudley 303, 31 Am. Dec. 556, holding that the throwing of a letter addressed to plaintiff containing libelous matter into an inclosure does not constitute a publication thereof where a stranger picks it up and delivers it to plaintiff without reading it, although plaintiff thereafter repeats the contents publicly and defendant avows himself author.

Tennessee.— Sylvis *v.* Miller, 96 Tenn. 94, 33 S. W. 921.

Vermont.— Wilcox *v.* Moon, 64 Vt. 450, 24 Atl. 244, 33 Am. St. Rep. 936, 15 L. R. A. 760, holding that where a letter defamatory of a wife is sent to her and she shows it to her husband defendant is not liable therefor.

See 32 Cent. Dig. tit. "Libel and Slander," §§106–108.

15. Res adjudicata generally see Judgments, 23 Cyc. 1215 *et seq.*

16. Galligan *v.* Sun Printing, etc., Assoc., 25 Misc. (N. Y.) 355, 54 N. Y. Suppl. 471, 28 N. Y. Civ. Proc. 349.

17. Galligan *v.* Sun Printing, etc., Assoc., 25 Misc. (N. Y.) 355, 54 N. Y. Suppl. 471, 28 N. Y. Civ. Proc. 349.

18. Swift *v.* Dickerman, 31 Conn. 285; Campbell *v.* Butts, 3 N. Y. 173.

19. Cushing *v.* Hederman, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320.

20. Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Dec. 665; Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301.

21. Curtis *v.* Mussey, 6 Gray (Mass.) 261.

22. Dillard *v.* Collins, 25 Gratt. (Va.) 343.

23. Giacona *v.* Bradstreet Co., 48 La. Ann. 1191, 20 So. 706.

24. Lane *v.* Applegate, 1 Stark. 97, 18 Rev. Rep. 750, 2 E. C. L. 46.

25. Potter *v.* Morning Journal Assoc., 49 N. Y. App. Div. 242, 63 N. Y. Suppl. 223.

26. Rogers *v.* Cox, 66 N. J. L. 432, 50 Atl 143.

27. The publication of a retraction or an apology upon an agreement with the injured party that the publication shall constitute a complete accord and satisfaction will bar the right of plaintiff to an action for damages. Storey *v.* Wallace, 60 Ill. 51; Boosey *v.* Wood, 3 H. & C. 484, 11 Jur. N. S. 181, 34 L. J. Exch. 65, 11 L. T. Rep. N. S. 639, 13 Wkly. Rep. 317.

publication of a retraction or an apology is not a justification and will not bar an action by the person defamed.[28]

h. Absence of Injury. It is not a justification in an action for words actionable *per se* that plaintiff has suffered no injury.[29]

i. Illegality of Business of Person Libeled in Business Capacity. Where plaintiff complains that he has been defamed in his business or occupation the illegality of the business is a defense to the action.[30]

j. Suppression of Part of Libel. That a part of a libelous story defamatory of plaintiff was suppressed is no excuse for defendant when sued for publishing the rest of it.[31]

k. Limitations[32] — (i) *In General.* In an action for libel and slander the statute of limitations begins to run from the date of publication of the slander or libel declared on, however long it may be before the person defamed knows of the publication,[33] and this it has been intimated even though plaintiff's ignorance may be due to fraud on the part of defendant.[34] A slander once barred cannot be revived by an admission that it had formerly been made.[35]

(ii) *Communications Published in Judicial Proceedings.* A cause of action for libel or slander founded on publications made in the course of judicial proceedings does not accrue until the final determination of the proceedings in which the publication is made.[36]

l. Truth or Justification. The truth of the defamatory matter complained of may constitute a justification.[37]

28. *California.*— Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Illinois.— Storey *v.* Wallace, 60 Ill. 51.

Louisiana.— Williams *v.* McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Cass *v.* New Orleans Times, 27 La. Ann. 214; Perret *v.* New Orleans Times Newspaper, 25 La. Ann. 170.

Michigan.— Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504.

Minnesota.— Gray *v.* Minnesota Tribune Co., 81 Minn. 333, 84 N. W. 113.

Canada.—Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

See 32 Cent. Dig. tit. "Libel and Slander," § 156.

Words retracted in same conversation.— But if slanderous words are immediately retracted in the same conversation, and in the hearing of all who heard them spoken, so as to show that the speaker meant no imputation, no action can be maintained. Trahue *v.* Mays, 3 Dana (Ky.) 138, 28 Am. Dec. 61; Linney *v.* Maton, 13 Tex. 449.

29. McMeans *v.* Calhoun, 1 Nott & M. (S. C.) 422.

30. Fry *v.* Bennett, 3 Bosw. (N. Y.) 200 [*affirmed* in 28 N. Y. 324], holding, however, that opening a building for the exhibition of an opera, and the exhibition of the same without a license, is not illegal in any such sense that an article published of the manager as such cannot be made the basis of an action for libel on the mere ground of illegality of such business. See also *supra*, III, G, 3, b.

31. Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

32. Limitation of actions generally see Limitations of Actions.

33. *Colorado.*— Evans *v.* Republican Pub. Co., 20 Colo. App. 281, 78 Pac. 311; Bush *v.* McMann, 12 Colo. App. 504, 55 Pac. 956.

Iowa.— Jean *v.* Hennessy, 69 Iowa 373, 28 N. W. 645.

Mississippi.— McCarlie *v.* Atkinson, 77 Miss. 594, 27 So. 641, holding that libelous matter contained in a letter, written and mailed in one state to an addressee in another state, is not published until the letter is received and read.

Missouri.—Barnard *v.* Boulware, 5 Mo. 454.

Ohio.— Pearl *v.* Koch, 5 Ohio S. & C. Pl. Dec. 5.

Tennessee.— Brownlow *v.* Jones, 1 Sneed 170.

England.— Brunswick *v.* Harmer, 14 Q. B. 185, 14 Jur. 110, 19 L. J. Q. B. 20, 68 E. C. L. 185.

See 32 Cent. Dig. tit. "Libel and Slander," § 181.

Particular statutory periods see Evans *v.* Republican Pub. Co., 20 Colo. App. 281, 78 Pac. 311; Hazell *v.* Shelby, 11 Ill. 9; Jean *v.* Hennessy, 69 Iowa 373, 28 N. W. 645; Menter *v.* Stewart, 2 How. (Miss.) 698.

Statute limiting actions for words spoken extended to libels.— A statute limiting the right to bring case for words to "one year next after the words spoken" has been held to include actions for libel. Menter *v.* Stewart, 2 How. (Miss.) 698. *Compare* Hazell *v.* Shelby, 11 Ill. 9.

34. McCarlie *v.* Atkinson, 77 Miss. 594, 27 So. 641.

35. Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495; Fox *v.* Wilson, 48 N. C. 485.

36. Moody *v.* Libbey, 1 Abb. N. Cas. (N. Y.) 154; Masterson *v.* Brown, 72 Fed. 136, 18 C. C. A. 481.

37. See *supra*, VII, A, 1, a.

B. Jurisdiction and Venue.[38] The cause of action for slander is transitory, and action may be brought in any county[39] or jurisdiction[40] in which defendant may be found. In the case of libel it is held that it is not the jurisdiction in which the article is printed but the jurisdiction in which it is published and circulated that determines whether the words used are actionable.[41] So the general rule is that an action for libel may be brought and tried in any county in which the libel was published or circulated.[42]

C. Process.[43] Under a statute in South Carolina it has been held that an action for slander cannot be instituted by attachment.[44]

D. Parties[45]**—1. Parties Plaintiff.**[46] Where several persons are injured by the publication of the same libel or slander each must sue alone,[47] unless they are in partnership or otherwise jointly interested.[48]

38. Jurisdiction generally see COURTS.
Venue generally see VENUE.

39. Owen *v.* McKean, 14 Ill. 459; Teagle *v.* Deboy, 8 Blackf. (Ind.) 134; Offutt *v.* Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40. *Compare* Caldwell *v.* Story, 107 Ky. 10, 52 S. W. 850, 21 Ky. L. Rep. 599, 45 L. R. A. 735, holding that the venue of the action is in the county in which the words were spoken.

40. Offutt *v.* Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; Hull *v.* Vreeland, 42 Barb. (N. Y.) 543; Lister *v.* Wright, 2 Hill (N. Y.) 320, holding that the courts of one state or jurisdiction have jurisdiction over an action of slander by one citizen of the state against another, although the slanderous words were spoken in another jurisdiction.

Actionable quality of words published in another jurisdiction.— An action lies in one state for words published in another state, provided they are actionable by the laws of such other state. Linville *v.* Earlywine, 4 Blackf. (Ind.) 469; Offutt *v.* Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; Stout *v.* Wood, 1 Blackf. (Ind.) 71; Hull *v.* Vreeland, 42 Barb. (N. Y.) 543, 18 Abb. Pr. 182; Langdon *v.* Young, 33 Vt. 136. See also *supra*, III, D, 7.

41. Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273 (holding that where a newspaper published in Ohio and containing a libel on a citizen of New York is sold and circulated in the latter state, a cause of action for such libel arises in New York); Haskell *v.* Bailey, 63 Fed. 873, 11 C. C. A. 476.

42. Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231; Cincinnati Times-Star Co. *v.* France, 61 S. W. 18, 22 Ky. L. Rep. 1666; MacCormac *v.* Tobey, 109 N. Y. App. Div. 581, 96 N. Y. Suppl. 302 (holding that where there is no allegation that the libel was published outside of a certain county, the action must be brought in the county where published and circulated); Rogers *v.* Butler, 71 N. Y. App. Div. 613, 75 N. Y. Suppl. 536; Vitolo *v.* Bee Pub. Co., 66 N. Y. App. Div. 582, 73 N. Y. Suppl. 273; Belo *v.* Wren, 63 Tex. 686. See also Tingley *v.* Times-Mirror Co., 144 Cal. 205, 77 Pac. 918.

In Iowa the action must be brought in the county in which defendants reside. Hall *v.* Royce, 54 Iowa 136, 6 N. W. 177.

43. Process generally see PROCESS.

44. Sargeant *v.* Helmbold, Harp. (S. C.) 219. See also ATTACHMENT, 4 Cyc. 448, note 69.

45. Parties generally see PARTIES.

46. Persons entitled to sue see *supra*, VIII, A, 4.

47. *Alabama.* — Chandler *v.* Halloway, 4 Port. 17.
California.— Robinett *v.* McDonald, 65 Cal. 611, 4 Pac. 651.
Georgia.— Constitution Pub. Co. *v.* Way, 94 Ga. 120, 21 S. E. 139.
Indiana.— Hart *v.* Crow, 7 Blackf. 351.
Indian Territory. — Brooks *v.* Collins, 3 Indian Terr. 468, 58 S. W. 559.
Iowa.— Hinkle *v.* Davenport, 38 Iowa 355.
Kentucky.— Forbes *v.* Johnson, 11 B. Mon. 48.
Massachusetts.— Gaznski *v.* Colburn, 11 Cush. 10.
Michigan. — Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292.
New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137.
Pennsylvania.— Ebersoll *v.* Krug, 3 Binn. 555.
England.— Sandes *v.* Wildsmith, [1893] 1 Q. B. 771, 62 L. J. Q. B. 404, 69 L. T. Rep. N. S. 387 [*distinguishing* Booth *v.* Briscoe, 2 Q. B. D. 496, 25 Wkly. Rep. 838]; Smith *v.* Cooker, Cro. Car. 512.
See 32 Cent. Dig. tit. "Libel and Slander," § 171.

The case of husband and wife who are jointly slandered is no exception to the rule (Gazynski *v.* Colburn, 11 Cush. (Mass.) 10), although at common law the wife cannot sue alone for defamatory words spoken of herself alone (Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292; Anderson *v.* Pock, 4 Ohio Dec. (Reprint) 495, 2 Clev. L. Rep. 260; Long *v.* Long, 4 Pa. St. 29). See also HUSBAND AND WIFE, 21 Cyc. 1529, text and note 37 *et seq.*

48. See *supra*, VIII, A, 4, c, text and note 82.

Rule applied to slander of title of joint owners of lands see Gazynski *v.* Colburn, 11

2. PARTIES DEFENDANT[49] — a. Slander. As a general rule an action cannot be maintained against two persons jointly for uttering and publishing slanderous words because the words of one are not the words of another.[50] But where the words are uttered in furtherance of a conspiracy against plaintiff, a demurrer will not lie for misjoinder, because the conspirators are joint tort feasors.[51]

b. Libel. Where the publication of a libel is the joint act of two or more persons they may be sued jointly[52] or separately[53] at the election of plaintiff. If one only is sued the liability of the others will not be a defense to mitigate the damages recoverable.[54] On the other hand if separate suits be brought against each, plaintiff can have but one satisfaction.[55] But for two distinct publications of the same libel by different persons, two actions must be brought, one for each publication.[56]

E. Pleading[57] — 1. DECLARATION, COMPLAINT, OR PETITION[58] — a. In General. A complaint which alleges two or more sets of words is good if either of such sets be actionable,[59] and plaintiff may indicate his intention to rely exclusively on one

Cush. (Mass.) 10; Child *v.* Emerson, 102 Mich. 38, 60 N. W. 292.

49. Persons liable for libel or slander see *supra*, VIII, A, 5.

50. *Kentucky.*— Webb *v.* Cecil, 9 B. Mon. 198, 48 Am. Dec. 423.

New York.— Forsyth *v.* Edmiston, 5 Duer 653.

North Carolina.— Gattis *v.* Kilgo, 125 N. C. 133, 34 S. E. 246.

Ohio.— Anderson *v.* Pack, 4 Cinc. L. Bul. 596, 4 Ohio Dec. (Reprint) 495, 2 Clev. L. Rep. 260; Campbell *v.* Burns, 10 Ohio S. & C. Pl. Dec. 204, 7 Ohio N. P. 201.

Pennsylvania.— Glass *v.* Stewart, 10 Serg. & R. 222; Nash *v.* Bloom, 10 Pa. Co. Ct. 358; Stieh *v.* Todd, 11 Montg. Co. Rep. 70; Carvill *v.* Cochran, 1 Phila. 399.

Rhode Island.— Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

See 32 Cent. Dig. tit. "Libel and Slander," § 171.

Where similar words are uttered by both husband and wife each must be sued separately. Carvill *v.* Cochran, 1 Phila. (Pa.) 399; Blake *v.* Smith, 19 R. I. 476, 34 Atl. 995.

51. Green *v.* Davies, 83 N. Y. App. Div. 216, 82 N. Y. Suppl. 54. See also Forsyth *v.* Edmiston, 5 Duer (N. Y.) 653.

52. Webb *v.* Cecil, 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423; Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; Forsyth *v.* Edmiston, 5 Duer (N. Y.) 653; Thomas *v.* Rumsey, 6 Johns. (N. Y.) 26; Harris *v.* Huntington, 2 Tyler (Vt.) 129, 4 Am. Dec. 728.

Joinder of person furnishing information.— An action against a corporation for posting a notice concerning plaintiff and an action against the persons who furnished the information to the corporation which was contained in the notice are improperly joined. Gutkes *v.* New York Produce Exch., 46 Misc. (N. Y.) 133, 93 N. Y. Suppl. 254.

Consolidation of actions against editor and publisher of same libel see CONSOLIDATION AND SEVERANCE OF ACTIONS, 8 Cyc. 594 note 18.

53. Munson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54; Ludwig *v.* Cramer, 53 Wis. 193, 10 N. W. 81.

54. Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

55. Union Associated Press *v.* Press Pub. Co., 24 Misc. (N. Y.) 610, 54 N. Y. Suppl. 183; Thomas *v.* Rumsey, 6 Johns (N. Y.) 26, where, however, it was intimated that if plaintiff does not accept the damages recovered in one suit, he may proceed to judgment against defendant in the other suit and elect *de melioribus damnis*.

56. Monson *v.* Lathrop, 96 Wis. 386, 71 N. W. 596, 65 Am. St. Rep. 54.

Damages recoverable.— The victim of a libel by merely filing a declaration in an action against a party originating the libel does not mitigate the damages recoverable by himself against a newspaper independently publishing substantially the same libel. Parker *v.* Republican Co., 181 Mass. 392, 63 N. E. 931.

57. Pleading generally see PLEADING.

58. Forms of declarations, complaints, or petitions will be found set out in full, in part, or in substance in Leonard *v.* McPherson, 146 Cal. 616, 80 Pac. 1084; Covington *v.* Roberson, 111 La. 326, 35 So. 586; Blount *v.* Mason, 140 Mich. 1, 103 N. W. 525; Gendron *v.* St. Pierre, 73 N. H. 419, 62 Atl. 966; Lamberti *v.* Sun Printing, etc., Assoc., 111 N. Y. App. Div. 437, 97 N. Y. Suppl. 694; Cerro de Pasco Tunnel, etc., Co. *v.* Haggin, 106 N. Y. App. Div. 401, 94 N. Y. Suppl. 593; Daily *v.* Engineering, etc., Journal, 94 N. Y. App. Div. 314, 88 N. Y. Suppl. 6; Cassavoy *v.* Pattison, 93 N. Y. App. Div. 370, 87 N. Y. Suppl. 658; Hilder *v.* Brooklyn Daily Eagle, 45 Misc. (N. Y.) 165, 91 N. Y. Suppl. 983; Naulty *v.* Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Kirby *v.* Martindale, (S. D. 1905) 103 N. W. 648; Butler *v.* Carter, etc., Pub. Co., 135 Fed. 69, 67 C. C. A. 543; Butler *v.* Evening Leader Co., 134 Fed. 994.

59. Buscher *v.* Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37; Hutchinson *v.* Lewis, 75 Ind. 55; Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355; Bloom *v.* Bloom, 5 Serg. & R. (Pa.) 391; Edds *v.* Waters, 8 Fed. Cas. No. 4,275, 4 Cranch C. C. 170.

portion, and in such case recovery must be limited to damages resulting from the portion so selected and relied on.[60]

b. Form Prescribed by Statute. Where a statute prescribes a form for actions for defamation, it is sufficient to declare according to the statute and everything else may be supplied by proof.[61] But a declaration failing to set forth the cause of action in substantial conformity with the requirements of statute is demurrable.[62]

c. Counts — (I) *In General.* The same slanderous words may be set forth in one count in various forms so as to meet the proof under the various shapes in which it may come.[63] If a count sets out words not actionable and words spoken at the same time which are actionable, the count is good,[64] and the non-actionable words may be charged in aggravation of damages.[65]

(II) *Incorporation of Matter by Reference.* Matters of inducement and allegations in one count may be incorporated in subsequent counts by reference.[66] So a general allegation of falsity and damage made as a conclusion to the petition is sufficient, and it is not necessary that a separate allegation should be appended to each count.[67] However, it has been held that where a declaration for slander contains several counts each setting forth a separate and distinct slander, each count must be perfect in itself, and that the omission of a material statement in one count cannot be supplied by a reference therein to another.[68]

d. Anticipating Defenses. The complaint need not negative matters of defense.[69] It is held, however, that plaintiff may allege in the petition the non-existence of such matters as would exempt defendant from liability.[70]

e. Alleging Irrelevant Matters. The declaration should not contain superfluous, impertinent, or scandalous matter.[71] But allegations of plaintiff's good character are not detrimental to defendant, since the law presumes good character and hence are improperly stricken out as being irrelevant.[72]

f. Joinder of Causes of Action.[73] Where in one conversation or one article various expressions are used, all imputing the same defamatory charge, each

60. Davis *v.* Hamilton, 85 Minn. 209, 88 N. W. 744.

61. Holcombe *v.* Roberts, 19 Ga. 588.

62. Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625.

63. Pennington *v.* Meeks, 46 Mo. 217; Eaton *v.* White, 2 Pinn. (Wis.) 42.

Common-law slander and the statutory action for insulting words cannot be united in the same count of a declaration but words actionable at common law may be declared on under the statute. Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692; Payne *v.* Tancil, 98 Va. 262, 35 S. E. 725; Chaffin *v.* Lynch, 83 Va. 106, 1 S. E. 803; Hogan *v.* Wilmoth, 16 Gratt. (Va.) 80; Haskell *v.* Bailey, 63 Fed. 873, 11 C. C. A. 476.

64. Cummins *v.* Butler, 3 Blackf. (Ind.) 190; Davis *v.* Hamilton, 85 Minn. 209, 88 N. W. 744; Bash *v.* Sommer, 20 Pa. St. 159.

65. Dioyt *v.* Tanner, 20 Wend. (N. Y.) 190.

66. *Alabama.*— Canterbury *v.* Hill, 4 Stew. & P. 224.

Michigan.— Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855.

New York.— Ronnie *v.* Ryder, 8 N. Y. Suppl. 5; Rathbun *v.* Emigh, 6 Wend. 407; Loomis *v.* Swick, 3 Wend. 205.

Texas.— See Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L. R. A. 417.

Wisconsin.— Abendroth *v.* Boardley, 27 Wis. 555.

See 32 Cent. Dig. tit. "Libel and Slander," § 185.

67. Newell *v.* How, 31 Minn. 235, 17 N. W. 383; Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73. See also Holton *v.* Muzzy, 30 Vt. 365.

68. Holton *v.* Muzzy, 30 Vt. 365.

69. *California.*— Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179.

New York.— Fry *v.* Bennett, 28 N. Y. 324 [*affirming* 3 Bosw. 200].

North Carolina.— Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. Rep. 73.

Virginia.— Moore *v.* Rolin, 89 Va. 107, 15 S. E. 520, 16 L. R. A. 625.

Wisconsin.— Street *v.* Johnson, 80 Wis. 455, 50 N. W. 395, 27 Am. St. Rep. 42, 14 L. R. A. 203.

United States.— Walker *v.* Tribune Co., 29 Fed. 827.

See 32 Cent. Dig. tit. "Libel and Slander," § 186.

70. Youree *v.* Hamilton, 45 La. Ann. 1191, 4 So. 77; Randall *v.* Hamilton, 45 La. Ann. 1184, 14 So. 73, 22 L. R. A. 649.

71. Joannes *v.* Burt, 6 Allen (Mass.) 236, 83 Am. Dec. 625.

72. Morgan *v.* Bennett, 40 N. Y. App. Div. 619, 57 N. Y. Suppl. 1088.

73. Joinder of actions generally see JOINDER AND SPLITTING OF ACTIONS, 23 Cyc. 376.

separate expression is not cause for a separate action,[74] and need not be declared on in a separate count.[75] Every distinct publication of libelous or slanderous matter gives rise to a separate cause of action, although several causes of action for different libels or slanders may be united in the same action.[76] But it has been held that slanderous words spoken at one time constitute one cause of action and the same or other slanderous words spoken at other times constitute other causes of action, and if relied upon they should be separately pleaded in separate counts or paragraphs.[77] On the other hand it has been held that words spoken at different times and to different persons may be included in one count if the charges are in reference to the same subject.[78] However, it has been held that words spoken under such circumstances need not be embraced in the same count, and if they are alleged in different counts plaintiff cannot be forced to elect.[79]

g. Inducement and Colloquium — (I) *In General.* The inducement is the statement of facts out of which the charge arises or which are necessary or useful to make the charge intelligible.[80] The colloquium is a direct allegation that the

74. Cracraft *v.* Cochran, 16 Iowa 301; Coleman *v.* Playsted, 36 Barb. (N. Y.) 26; Galligan *v.* Sun Printing, etc., Assoc., 25 Misc. (N. Y.) 355, 54 N. Y. Suppl. 471, 28 N. Y. Civ. Proc. 349; Rathbun *v.* Emigh, 6 Wend. (N. Y.) 407; Griffiths *v.* Lewis, 8 Q. B. 841, 10 Jur. 711, 15 L. J. Q. B. 249, 55 E. C. L. 841. See also Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004.

Libel affecting plaintiff in different capacities.— Although a libel may affect plaintiff as an individual, as a professional man, and as an officer, it only constitutes one libel consisting of different items and such items cannot be made distinct causes of action by declaring on each in separate counts. Hess *v.* Gansz, 90 Mo. App. 439.

75. Cracraft *v.* Cochran, 16 Iowa 301; Rathbun *v.* Emigh, 6 Wend. (N. Y.) 407.

76. *Georgia.*— Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687.

Kentucky.— Fred *v.* Traylor, 115 Ky. 94, 72 S. W. 768, 24 Ky. L. Rep. 1906.

Michigan.— Randall *v.* Gartner, 96 Mich. 284, 55 N. W. 843.

Missouri.— Christal *v.* Craig, 80 Mo. 367.

England.— Griffiths *v.* Lewis, 8 Q. B. 841, 10 Jur. 711, 15 L. J. Q. B. 249, 55 E. C. L. 841; Hughes *v.* Rees, 1 H. & H. 197, 2 Jur. 809, 4 M. & W. 204.

See 32 Cent. Dig. tit. "Libel and Slander," § 171.

Joinder with cause of action for malicious prosecution.— A cause of action for slander and for an injury to character by a false and malicious charge under oath before a grand jury may be united in one complaint. Hull *v.* Vreeland, 42 Barb. (N. Y.) 543.

77. Swinney *v.* Nave, 22 Ind. 178; Jean *v.* Hennessy, 69 Iowa 373, 28 N. W. 645; Patterson *v.* Wilkinson, 55 Me. 42, 92 Am. Dec. 568. See also Hughes *v.* Rees, 1 H. & H. 197, 2 Jur. 809, 4 M. & W. 204. *Compare* Charlter *v.* Barret, Peake N. P. 32.

Rule applied to libel.— Fleischman *v.* Bennett, 87 N. Y. 231; Cerro de Pasco Tunnel, etc., Co. *v.* Haggin, 106 N. Y. App. Div. 401, 94 N. Y. Suppl. 593.

A libel and slander cannot be joined in one count, but when the written accusation is a matter of inducement and preliminary to the verbal one, it may be set forth as such in the declaration. Hoyt *v.* Smith, 32 Vt. 304.

Count held not to include two causes of action.— Where the complaint, after setting forth the actionable words, alleged that defendant spoke "other words of like falsity and defamation," it is not demurrable as uniting two causes of action, for only one set of words is set forth. Gray *v.* Nellis, 6 How. Pr. (N. Y.) 290.

78. Lewis *v.* McDaniel, 82 Mo. 577; Hoyt *v.* Smith, 32 Vt. 304.

A count is bad for duplicity when it declares upon three sets of words concerning plaintiff's intemperance, insolvency, and his failure to prevent boys under his control from committing larceny, although spoken to the same persons at different times on the same day. Darling *v.* Clement, 69 Vt. 292, 37 Atl. 779.

79. Watter *v.* Hoeffner, 51 Mo. App. 46.

80. Taverner *v.* Little, 5 Bing. N. Cas. 678, 35 E. C. L. 363 [*quoted* in Grand *v.* Dreyfus, 122 Cal. 58, 54 Pac. 389].

It is the office of the inducement "to narrate the extrinsic circumstances which, coupled with the language published, affects its construction, and renders it actionable, where, standing alone and not thus explained, the language would appear either not to concern the plaintiff, or if concerning him, not to affect him injuriously." Townshend Sl. & L. § 308 [*quoted* in Squires *v.* State, 39 Tex. Cr. 96, 105, 45 S. W. 147, 73 Am. St. Rep. 904]. See also Grand *v.* Dreyfus, 122 Cal. 58, 54 Pac. 389. "It is said that the proper office of an inducement, or introductory averment, is to state facts by reference to which the libel is rendered intelligible, and is shown to contain an injurious imputation." McGregor *v.* Gregory, 11 M. & W. 287, 295, 2 Dowl. P. C. N. S. 769, 12 L. J. Exch. 204. Whenever words have the slanderous meaning alleged, not by their own extrinsic force, but by reason of the existence of some erroneous fact, this fact must be averred in a traversable form, which averment is called the "in-

language published was concerning plaintiff or concerning plaintiff and his affairs, or concerning plaintiff and facts alleged as inducement.[81] No inducement or averment of extrinsic facts is necessary when the defamatory matter is actionable *per se*.[82] But when the words are not actionable *per se* it is necessary to plead in the inducement such extrinsic facts as will render the words actionable,[83] and to connect such extrinsic facts by proper colloquium with the particular words.[84]

ducement." State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976 [*citing* Carter *v.* Andrews, 16 Pick. (Mass.) 1]; State *v.* Elliot, 10 Kan. App. 69, 61 Pac. 981.

81. Townshend Sl. & L. § 323 [*quoted* in Squires *v.* State, 39 Tex. Cr. 96, 105, 45 S. W. 147, 73 Am. St. Rep. 904].

Other definitions see State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976; State *v.* Elliot, 10 Kan. App. 69, 61 Pac. 981; Barnes *v.* State, 88 Md. 347, 41 Atl. 781; Carter *v.* Andrews, 16 Pick. (Mass.) 1; Cooper *v.* Greeley, 1 Den. (N. Y.) 347; Andrews *v.* Woodmansee, 15 Wend. (N. Y.) 232; Cheetham *v.* Tillotson, 5 Johns. (N. Y.) 430; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; Lukehart *v.* Byerly, 53 Pa. St. 418; Vanderlip *v.* Roe, 23 Pa. St. 82; Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111; Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. St. Rep. 511.

82. *Arkansas.*— McGough *v.* Rhodes, 12 Ark. 625.

California.— Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863.

Illinois.— Elam *v.* Badger, 23 Ill. 498.

Indiana.— Worth *v.* Butler, 7 Blackf. 251.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

New York.— Malone *v.* Stillwell, 15 Abb. Pr. 421; Croswell *v.* Weed, 25 Wend. 621.

Pennsylvania.— Bricker *v.* Potts, 12 Pa. St. 200.

Rhode Island.— Morrissey *v.* Providence Telegram Pub. Co., 19 R. I. 124, 32 Atl. 19.

Vermont.— Cass *v.* Anderson, 33 Vt. 182.

Wisconsin.— Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511.

See 32 Cent. Dig. tit. "Libel and Slander," § 187.

Where a slanderous charge assumes the existence of a fact, an averment of the charge is a sufficient averment of the fact. Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

83. *Arkansas.*— McGough *v.* Rhodes, 12 Ark. 625.

Georgia.— Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219.

Hawaii.—Provisional Government *v.* Smith, 9 Hawaii 257.

Indiana.— Garrett *v.* Bissell Chilled Plow Works, 154 Ind. 319, 56 N. E. 667; Works *v.* Stevens, 76 Ind. 181; Emmerson *v.* Marvel, 55 Ind. 265; Ward *v.* Colyham, 30 Ind. 395; Stutsman *v.* Stutsman, 32 Ind. App. 73, 66 N. E. 773, (1903) 67 N. E. 950; Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024.

Iowa.— Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349.

Louisiana.— Southern Chemical, etc., Co. *v.* Wolf, 48 La. Ann. 631, 19 So. 558.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556.

Massachusetts.— Brettun *v.* Anthony, 103 Mass. 37; Chenery *v.* Goodrich, 98 Mass. 224; Tebbetts *v.* Goding, 9 Gray 254.

Michigan.— Taylor *v.* Kneeland, 1 Dougl. 67.

Minnesota.— Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915; Smith *v.* Coe, 22 Minn. 276.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60.

New Hampshire.— Harris *v.* Burley, 8 N. H. 256.

New York.— Kinney *v.* Nash, 3 N. Y. 177; Fry *v.* Bennett, 5 Sandf. 54.

Ohio.— Henney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

Pennsylvania.— Gosling *v.* Morgan, 32 Pa. St. 273.

Washington.— Wright *v.* Daniel, 40 Wash. 6, 82 Pac. 139.

Wisconsin.— Benz *v.* Wiedenhoeft, 83 Wis. 397, 53 N. W. 686.

United States.— McGlean *v.* Fowle, 15 Fed. Cas. No. 8,691, 2 Cranch C. C. 118.

See 32 Cent. Dig. tit. "Libel and Slander," § 187.

Necessity of showing meaning of slang, irony, and metaphor.— If language is used ironically, enough must be alleged to make it so appear. Brown *v.* Bennett, 100 Ill. App. 279. But it has been held that the meaning of slang words and metaphors may be sufficiently averred in the innuendo without a colloquium. Vanderlip *v.* Roe, 23 Pa. St. 82.

Words used in other than natural sense.— Where plaintiff relies on the fact that particular words have acquired a meaning different from their natural sense a distinct averment of such acquired meaning has been held to be necessary and an innuendo without such averment is sufficient. McGregor *v.* Gregory, 2 Dowl. P. C. N. S. 769, 12 L. J. Exch. 204, 11 M. & W. 287 [*following* Angle *v.* Alexander, 7 Bing. 119, 4 M. & P. 870, 20 E. C. L. 61], the words "black sheep."

84. Linville *v.* Earlywine, 4 Blackf. (Ind.) 469; Brettun *v.* Anthony, 103 Mass. 37; Carter *v.* Andrews, 16 Pick. (Mass.) 1; Bloss *v.* Tobey, 2 Pick. (Mass.) 320; Fowle *v.* Robbins, 12 Mass. 498.

It is not necessary that the colloquium precede the statement of the words or innuendo. Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024; Brittain *v.* Allen, 13 N. C. 120; Stanley *v.* Brit, Mart. & Y. (Tenn.) 222.

The want of a proper inducement or colloquium cannot be supplied by the innuendo.[85]

(II) *Effect of Statutory Provisions.* Statutes providing that it shall not be necessary to state any extrinsic facts to show the application of the defamatory matter to plaintiff do not obviate the necessity of pleading the extrinsic facts necessary to render the words actionable.[86]

(III) *Connecting Matter With Person Defamed.* When the defamatory words are unequivocal and point out with certainty the person to whom they are intended to apply, no colloquium is necessary.[87] If, however, from a perusal of the defamatory words the person intended to be defamed cannot be ascertained, the words must be substantially averred to have been published of and concerning plaintiff.[88] When the communication is clear and unambiguous, except that it does not refer in express terms to plaintiff, it is sufficient to allege in general terms that it was published of and concerning plaintiff.[89] Where matter averred

85. *Kentucky.*— Beswick *v.* Chappel, 8 B. Mon. 486.

Maryland.— Dorsey *v.* Whipps, 8 Gill 457.

Missouri.— Salvatelli *v.* Ghio, 9 Mo. App. 155.

New York.— Caldwell *v.* Raymond, 2 Abb. Pr. 193; McClaughry *v.* Wetmore, 6 Johns. 82, 5 Am. Dec. 194.

Vermont.— Holton *v.* Muzzy, 30 Vt. 365; Ryan *v.* Madden, 12 Vt. 51.

See 32 Cent. Dig. tit. "Libel and Slander," § 187.

In England the rule of the text formerly prevailed. Day *v.* Robinson, 1 A. & E. 554, 28 E. C. L. 265, 3 L. J. Exch. 381, 4 N. & M. 884, 30 E. C. L. 619. But under statute no colloquium is necessary, it is sufficient to set out the words and put any construction upon them by innuendo. Hemmings *v.* Gasson, E. B. & E. 346, 4 Jur. N. S. 834, 27 L. J. Q. B. 252, 6 Wkly. Rep. 601, 96 E. C. L. 346.

Innuendo see *infra*, VIII, E, 1, k.

86. *California.*—Grand *v.* Dreyfus, 122 Cal. 58, 54 Pac. 389.

Indiana.— Ward *v.* Colyhan, 30 Ind. 395; Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54; Stutsman *v.* Stutsman, 32 Ind. App. 73, 66 N. E. 773, (App. 1903) 67 N. E. 950; Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024.

Iowa.— See Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349. *Compare* Clarke *v.* Jones, 49 Iowa 474.

Massachusetts.— Tebbetts *v.* Goding, 9 Gray 254.

Missouri.— Christal *v.* Craig, 80 Mo. 367; Boyce *v.* Aubuchon, 34 Mo. App. 315.

New York.— Wachter *v.* Quenzer, 29 N. Y. 547; Fry *v.* Bennett, 5 Sandf. 54.

Wisconsin.— Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511.

See 32 Cent. Dig. tit. "Libel and Slander," § 187.

In New Jersey under a statute providing that plaintiff may aver that the words were used in a defamatory sense, specifying such defamatory sense, without any prefatory averments, the pleader may aver that the words were used in any defamatory sense he may see fit to attribute to them. Curley *v.* Feeney, 62 N. J. L. 70, 40 Atl. 678.

87. Thirman *v.* Matthews, 1 Stew. (Ala.) 384; Hutchinson *v.* Lewis, 75 Ind. 55; Cave *v.* Shelor, 2 Munf. (Va.) 193. See also Blount *v.* Mason, 140 Mich. 1, 103 N. W. 525.

Identifying plaintiff by descriptions in libel.— It is not necessary that a declaration in libel should identify plaintiff with every description in the libel, since such rule would enable one to publish libels with impunity by inserting misdescriptions in some respects not essential to a general understanding of the person meant. Butler *v.* Carter, etc., Pub. Co., 135 Fed. 69, 67 C. C. A. 543. A declaration in an action for libel by the publication of an article set out, and which related to a woman described therein as widely known as "Annie Oakley," and as having been a famous rifle shot who had given public exhibitions, etc., which, in addition to an allegation that the libel was published of and concerning plaintiff, further alleges that plaintiff had acquired great skill in shooting with a rifle, and had given public exhibitions, and was widely known by the name of "Annie Oakley," sufficiently shows on its face that the article related to plaintiff. Butler *v.* Carter, etc., Pub. Co., *supra*.

88. *Massachusetts.*— McCallum *v.* Lambie, 145 Mass. 234, 13 N. E. 899; Baldwin *v.* Hildreth, 14 Gray 221.

Minnesota.— Carlson *v.* Minnesota Tribune Co., 47 Minn. 337, 50 N. W. 229.

North Carolina.— Brittain *v.* Allen, 14 N. C. 167.

South Carolina.— Wilson *v.* Hamilton, 9 Rich. 382.

Virginia.— Cave *v.* Shelor, 2 Munf. 193.

See 32 Cent. Dig. tit. "Libel and Slander," § 188.

Compare Cross *v.* Flood, 77 Vt. 285, 59 Atl. 1018.

Substantial averment of fact sufficient.— Brashear *v.* Shepherd, Ky. Dec. 249; Brown *v.* Lamberton, 2 Binn. (Pa.) 34.

89. *Colorado.*— Craig *v.* Pueblo Press Pub. Co., 5 Colo. App. 208, 37 Pac. 945.

Indiana.— Harper *v.* Delp, 3 Ind. 225.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Maine.— Hanna *v.* Singer, 97 Me. 128, 53 Atl. 991.

as defamatory requires a resort to extrinsic facts to make it applicable to plaintiff, such facts must be averred,[90] unless such averments are rendered unnecessary by provision of statute.[91]

(IV) *IMPUTATIONS OF CRIME* — (A) *In General.* Where defamatory matter imputing a crime is published in terms *prima facie* actionable and unequivocally expressive of the essential ingredients of the crime alleged to be charged, no prefatory averment of extraneous facts is required.[92] But where the imputation does not *per se* import criminality and depends on extrinsic facts to explain it

Massachusetts.—Hurley *v.* Fall River Daily Herald Pub. Co., 138 Mass. 334; Chenery *v.* Goodrich, 98 Mass. 224; Miller *v.* Parish, 8 Pick. 384.

New Hampshire.— Sturtevant *v.* Root, 27 N. H. 69.

New York.— Van Alstyne *v.* Lewis, 41 Misc. 355, 84 N. Y. Suppl. 764; Titus *v.* Follet, 2 Hill 318; Milligan *v.* Thorn, 6 Wend. 412; Gidney *v.* Blake, 11 Johns. 54; New York City Dist. Water-Supply Co. *v.* Morning Journal Assoc., 1 N. Y. L. Rec. 127.

North Carolina.— Carson *v.* Mills, 69 N. C. 122; Brittain *v.* Allen, 14 N. C. 167.

Pennsylvania.— Maxwell *v.* Allison, 11 Serg. & R. 343.

Texas.— Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

Vermont.— Smith *v.* Hollister, 32 Vt. 695.

Wisconsin.— Dabold *v.* Chronicle Pub. Co., 107 Wis. 357, 83 N. W. 639.

United States.— Warner *v.* Missouri Pac. R. Co., 112 Fed. 114; Duvivier *v.* French, 104 Fed. 278, 43 C. C. A. 529.

See 32 Cent. Dig. tit. "Libel and Slander," § 188.

90. Stewart *v.* Wilson, 23 Minn. 449; Smith *v.* Coe, 22 Minn. 276; Tyler *v.* Tillotson, 2 Hill (N. Y.) 507; Miller *v.* Maxwell, 16 Wend. (N. Y.) 9; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; Briggs *v.* Byrd, 33 N. C. 353.

91. *California.*— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845 [*disapproving* De Witt *v.* Wright, 57 Cal. 576]; Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Indiana.— Doan *v.* Kelley, 121 Ind. 413, 23 N. E. 266; Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735; Stutsman *v.* Stutsman, 32 Ind. App. 73, 66 N. E. 773, (App. 1903) 67 N. E. 950.

Iowa.— Swearingen *v.* Stanley, 23 Iowa 115.

Minnesota.—Prendergast *v.* Dispatch Printing Co., 40 Minn. 295, 41 N. W. 1036; Petsch *v.* Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034.

Missouri.— Stieber *v.* Wensel, 19 Mo. 513.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New York.— Townes *v.* New York Evening Journal Pub. Co., 109 N. Y. App. Div. 852, 96 N. Y. Suppl. 822; Stromberg *v.* Tribune Assoc., 88 N. Y. App. Div. 589, 85 N. Y. Suppl. 259; Peters *v.* Morning Journal Assoc., 74 N. Y. App. Div. 305, 77 N. Y. Suppl. 597; Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429; Hussey *v.* New York Recorder Co., 89 Hun 609, 35 N. Y. Suppl. 49; Bianchi *v.* Star Co., 46 Misc. 486, 95 N. Y. Suppl. 28; Lehmann *v.* Tribune Assoc., 37 Misc. 506, 75 N. Y. Suppl. 1034; Mattice *v.* Wilcox, 13 N. Y. Suppl. 330; Crane *v.* O'Reilly, 13 N. Y. Civ. Proc. 71; Cook *v.* Rief, 8 N. Y. Civ. Proc. 133.

North Carolina.— Wozelka *v.* Hettrick, 93 N. C. 10.

Ohio.— Powers *v.* Seaton, 2 Ohio Dec. (Reprint) 365, 2 West. L. Month. 532.

Wisconsin.— Van Slyke *v.* Carpenter, 7 Wis. 173.

See 32 Cent. Dig. tit. "Libel and Slander," § 188.

Defamatory words clearly not relating to plaintiff.— It has been held that where, on the face of the complaint, it is clearly apparent that the defamatory words do not relate to and have no connection with plaintiff, the general averment to that effect being contradicted and rendered nugatory by other allegations, the New York statute does not apply and the complaint is demurrable. Corr *v.* Sun Printing, etc., Assoc., 177 N. Y. 131, 69 N. E. 288; Fleischmann *v.* Bennett, 87 N. Y. 231 [*affirming* 23 Hun 200]; Hauptner *v.* White, 81 N. Y. App. Div. 153, 80 N. Y. Suppl. 895.

Allegations held not to negative averments applying libel to plaintiff.—Where an article alleged to be libelous charged that plaintiff went in business at C and there killed a certain person, it was held that the allegation that the article referred to plaintiff is not negatived by the further allegation that plaintiff never went to C and did not kill such person. Cady *v.* Minneapolis Times Co., 58 Minn. 329, 59 N. W. 1040.

92. *Maryland.*— Dorsey *v.* Whipps, 8 Gill 457.

New Hampshire.— Edgerley *v.* Swain, 32 N. H. 478; Robinson *v.* Keyser, 22 N. H. 323.

Pennsylvania.—Colbert *v.* Caldwell, 3 Grant 181.

South Carolina.— Power *v.* Miller, 2 McCord 220. See also Marshall *v.* Gunter, 6 Rich. 419.

Wisconsin.—Filber *v.* Dautermann, 26 Wis. 518.

See 32 Cent. Dig. tit. "Libel and Slander," § 189.

Averment that charge imputes indictable offense.— It is not necessary to allege that the charge imputes an indictable offense. Webb *v.* Beavan, 11 Q. B. D. 609, 47 J. P. 488, 52 L. J. Q. B. 544, 49 L. T. Rep. N. S. 201.

these facts must be set forth, and connected with the defamatory words by a colloquium so as to show that a crime was charged.[93] If the words may be understood in a sense not criminal and there is no colloquium to show that they were spoken in a criminal sense, they are not actionable.[94] It is not necessary, however, that the petition should state the crime with the certainty required in an indictment.[95]

(B) *Necessity For Pleading Law of Foreign State.* Where the words complained of charge an offense which is a crime at common law and of such an infamous nature that the court can presume it to be actionable in any other jurisdiction, it is not necessary to plead the laws of the state where the offense is charged to have been committed.[96] But where the offense is not a crime at common law or is not one involving moral turpitude, it is necessary to make an averment that under the law of the state where the crime is alleged to have been committed the offense charged is a crime.[97]

(C) *Particular Crimes* — (1) ARSON. A complaint for a defamatory charge of arson may with the proper inducement and colloquium be sufficient, although the words alleged as charged do not of themselves import a charge of arson.[98] Where the defamatory words charge plaintiff with burning his own building, there must be set forth such circumstances as would render the burning unlawful.[99]

(2) EMBEZZLEMENT. Words not actionable in themselves may be shown by extrinsic facts to impute embezzlement and when averred with the proper induce-

93. *Kentucky.*— Beswick *v.* Chappel, 8 B. Mon. 486.

Maryland.— Dorsey *v.* Whipps, 8 Gill 457.

Massachusetts.— Gay *v.* Homer, 13 Pick. 535.

Michigan.— Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855.

Missouri.— Curry *v.* Collins, 37 Mo. 324; McManus *v.* Jackson, 28 Mo. 56; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

New Jersey.— Miller *v.* Beebe, 2 N. J. L. J. 56.

New York.— Morgan *v.* Bennett, 40 N. Y. App. Div. 619, 57 N. Y. Suppl. 1088; Stone *v.* Cooper, 2 Den. 293.

Pennsylvania.— Lukehart *v.* Byerly, 53 Pa. St. 418; Thompson *v.* Lusk, 2 Watts 17, 26 Am. Dec. 91.

South Carolina.— Power *v.* Miller, 2 McCord 220.

United States.— Johnson *v.* Brown, 3 Fed. Cas. No. 7,375, 4 Cranch C. C. 235.

See 32 Cent. Dig. tit. "Libel and Slander," § 189.

A statement that plaintiff passed counterfeit money is not actionable, without a colloquium showing that the intention was to impute the offense of passing counterfeit money, knowing it to be counterfeit. Church *v.* Bridgman, 61 Mo. 190; Pike *v.* Van Wormer, 6 How. Pr. (N. Y.) 99; Pike *v.* Van Wormer, 5 How. Pr. (N. Y.) 171.

Alleging death of person charged as murdered. — In an action for words charging plaintiff with having murdered a certain person it is not necessary to aver the death of the person said to have been murdered. Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Tenney *v.* Clement, 10 N. H. 52. *Contra*, Chandler *v.* Holloway, 4 Port. (Ala.) 17.

Place of giving forged check.— In an action for slander in charging the forging of a check, it is not necessary to allege the place where the check was given. Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041.

94. Dorsey *v.* Whipps, 8 Gill (Md.) 457.

95. Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556; Gibbs *v.* Dewey, 5 Cow. (N. Y.) 503; Miller *v.* Miller, 8 Johns. (N. Y.) 74; Thompson *v.* Barkley, 27 Pa. St. 263.

96. Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525; Langdon *v.* Young, 33 Vt. 136; Montgomery *v.* Deeley, 3 Wis. 709.

97. *Delaware.*— Kinney *v.* Hosea, 3 Harr. 77.

Missouri.— Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525.

New York.— Stuart *v.* New York Herald Co., 73 N. Y. App. Div. 459, 77 N. Y. Suppl. 216.

North Carolina.— Sparrow *v.* Maynard, 53 N. C. 195; Wall *v.* Hoskins, 27 N. C. 177; Shipp *v.* McGraw, 7 N. C. 463, 9 Am. Dec. 611.

Vermont.— Langdon *v.* Young, 33 Vt. 136.

See 32 Cent. Dig. tit. "Libel and Slander," § 190.

98. Barnes *v.* Hamon, 71 Ill. 609 (where the words were, "He burned the house"); Reeves *v.* Bowden, 97 N. C. 29, 1 S. E. 549 (where the words alleged were, "That damned scoundrel knows all about it").

99. Emig *v.* Daum, 1 Ind. App. 146, 27 N. E. 322; Bloss *v.* Tobey, 2 Pick. (Mass.) 320; Canning *v.* Owen, 24 R. I. 233, 52 Atl. 1027; Weil *v.* Schmidt, 28 Wis. 137.

Averment held to be unnecessary.—Where plaintiff is charged with burning his own barn to defraud the insurance company, the declaration need not aver that the barn was insured. Case *v.* Buckley, 15 Wend. (N. Y.) 327.

ment and colloquium the complaint is not demurrable because the words are not actionable *per se*.[1]

(3) LARCENY. Language harmless on its face may be shown by proper averment to have been used and understood as charging larceny.[2] But words not necessarily imputing larceny will not sustain a cause of action where there is no averment or colloquium to show that the words were used to denote a felonious taking.[3] But words imputing larceny *per se* do not require the averment of extrinsic facts to render them actionable.[4] So where words actionable in themselves as charging larceny were spoken in a connection which did not import a criminal charge, the declaration is not demurrable, unless it shows on its face that the words were spoken under such circumstances.[5]

(4) PERJURY AND FALSE SWEARING. An imputation of perjury or false swearing actionable *per se* needs no inducement or averment of facts as to the judicial proceeding in which it was committed,[6] or as to the materiality of the testimony charged to have been falsely given.[7] In an action of slander for charging false

1. Wagner *v.* Saline County Progress Printing Co., 45 Mo. App. 6; Richmond *v.* Loeb, 19 R. I. 120, 32 Atl. 167; Karger *v.* Rich, 81 Wis. 177, 51 N. W. 424.

2. Glatz *v.* Thein, 47 Minn. 278, 50 N. W. 127.

3. *Indiana.*— Harrison *v.* Manship, 120 Ind. 43, 22 N. E. 87; Hart *v.* Coy, 40 Ind. 553.

Massachusetts.— Carter *v.* Andrews, 16 Pick. 1.

Missouri.— Powell *v.* Crawford, 107 Mo. 595, 17 S. W. 1007; Christal *v.* Craig, 80 Mo. 367.

Pennsylvania.— See Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

Rhode Island.— Walton *v.* Frost, 22 R. I. 157, 46 Atl. 680.

Virginia.— Hansborough *v.* Stinnett, 25 Gratt. 495.

See 32 Cent. Dig. tit. "Libel and Slander," § 192.

Averring charge of statutory larceny.— Where the article charged to have been stolen is subject to larceny only by virtue of a statute, plaintiff must show affirmatively that the article is embraced within the provisions of the statute. Ayres *v.* Covill, 18 Barb. (N. Y.) 260.

Describing articles charged to have been stolen.— In McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883, it was held that a declaration for slander alleging that defendant said, "McLeod stole it," followed by a recital of circumstances showing the statement to have related to "certain personal property" of a named corporation is sufficient, where not demurred to, although it does not specifically describe the articles charged to have been taken.

Want of inducement not supplied by innuendo.— The words, "Thereby accusing the plaintiff of stealing," in a declaration, immediately following the words alleged to have been spoken, will not supply the place of an inducement or colloquium. Brown *v.* Brown, 14 Me. 317.

4. Cornelius *v.* Van Slyck, 21 Wend. (N. Y.) 70, the words, "You will steal and I can prove it."

Averment of commission of larceny.— Where the complaint alleges that defendant had reported that plaintiff had been guilty of the larceny of certain goods belonging to defendant, it is not necessary to aver that a larceny had been committed. Durrah *v.* Stillwell, 59 Ind. 139.

Charge of larceny before magistrate.— Where defendant charged plaintiff with larceny before a magistrate, it is necessary to aver that the charge was made before the magistrate in his official capacity. Hill *v.* Miles, 9 N. H. 9.

5. Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219.

6. *Alabama.*— Hall *v.* Montgomery, 8 Ala. 510; Commons *v.* Walters, 1 Port. 377, 27 Am. Dec. 635.

Missouri.—Perselly *v.* Bacon, 20 Mo. 330.

New York.— Coons *v.* Robinson, 3 Barb. 625; Jacobs *v.* Flyer, 3 Hill 572.

Ohio.— Stickels *v.* Hall, 3 Ohio Cir. Ct. 398, 2 Ohio Cir. Dec. 224.

Pennsylvania.— Call *v.* Foresman, 5 Watts 331.

See 32 Cent. Dig. tit. "Libel and Slander," § 193.

7. *Alabama.*— Hall *v.* Montgomery, 8 Ala. 510.

Illinois.— Wolbrecht *v.* Baumgarten, 26 Ill. 291.

Indiana.— Whitsel *v.* Lennen, 13 Ind. 535.

Missouri.— Palmer *v.* Hunter, 8 Mo. 512.

West Virginia.— Shroyer *v.* Miller, 3 W. Va. 158.

See 32 Cent. Dig. tit. "Libel and Slander," § 193.

In an action for a general charge of false swearing, if the charge be general, as that "he swore to a lie," it is not necessary that there be an express averment that the testimony was material to the issue. Dorsett *v.* Adams, 50 Ind. 129; Chapman *v.* Smith, 13 Johns. (N. Y.) 78; Niven *v.* Munn, 13 Johns. (N. Y.) 48; Dalrymple *v.* Lofton, 2 McMull. (S. C.) 112; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

Averring language or substance of testimony.— It is not necessary that plaintiff

swearing, if the charge is not actionable *per se*, the petition must contain an inducement and colloquium showing that the offensive words had reference to plaintiff's testimony in a judicial proceeding.[8] It is generally sufficient, however, to render a charge of false swearing actionable to aver that plaintiff was examined as a witness in the trial of a cause before a court, and that the charge of defendant was in reference thereto,[9] and it is held not to be necessary to aver that the court had jurisdiction of the cause.[10]

(v) *Imputations of Unchastity and Immorality* — (a) *In General.* Where in actions for imputations of unchastity or immorality the words charged are actionable only by reason of extraneous facts, these facts must be averred so as to show that an actionable charge was imputed.[11]

should set forth the language or substance of the testimony delivered by him and referred to by defendant as constituting the false swearing unless defendant when speaking the words charging false swearing went on to specify what plaintiff did swear or in what particulars his testimony was false. Gudger *v.* Penland, 108 N. C. 593, 13 S. E. 168, 23 Am. St. Rep. 73; Smith *v.* Smith, 30 N. C. 29.

8. *Arkansas.*— Knight *v.* Sharp, 24 Ark. 602.

Illinois.— Blair *v.* Sharp, 1 Ill. 30.

Indiana.— Dorsett *v.* Adams, 50 Ind. 129; Cummins *v.* Butler, 3 Blackf. 190.

Kentucky.— Martin *v.* Melton, 4 Bibb 99.

Missouri.— McManus *v.* Jackson, 28 Mo. 56; Harris *v.* Woody, 9 Mo. 113.

New York.— Gilman *v.* Lowell, 8 Wend. 573, 24 Am. Dec. 96; Vaughan *v.* Havens, 8 Johns. 109.

North Carolina.— Browne *v.* Dula, 7 N. C. 574.

South Carolina.— Power *v.* Miller, 2 McCord 220.

Tennessee.— Jones *v.* Marrs, 11 Humphr. 214.

Virginia.—Hogan *v.* Wilmoth, 16 Gratt. 80.

See 32 Cent. Dig. tit. "Libel and Slander," § 193.

9. *Connecticut.*— Lyman *v.* Wetmore, 2 Conn. 42 note.

Indiana.— Dean *v.* Miller, 66 Ind. 440; Shellenbarger *v.* Norris, 2 Ind. 285.

Massachusetts.— Gardner *v.* Dyer, 5 Gray 22; Stone *v.* Clark, 21 Pick. 51.

Mississippi.— Lewis *v.* Black, 27 Miss. 425.

New York.— Niven *v.* Munn, 13 Johns. 48.

South Carolina.— Dalrymple *v.* Lofton, 2 McMull. 112. See also Simpson *v.* Vaughan, 2 Strobh. 32.

Tennessee.— Sharp *v.* Wilhite, 2 Humphr. 434.

Vermont.— Kimmis *v.* Stiles, 44 Vt. 351; Sanderson *v.* Hubbard, 14 Vt. 462; Wood *v.* Scott, 13 Vt. 42.

See 32 Cent. Dig. tit. "Libel and Slander," § 193.

Averment as to particular proceeding. — Where the complaint alleged a charge of false swearing to have been made with reference to a suit tried on a particular day, it is not necessary to specify which of several suits between the same parties tried on the same day. Harris *v.* Purdy, 1 Stew. (Ala.) 231.

Averment as to swearing of plaintiff.— In an action for slander for a charge of false swearing in relation to testimony given before arbitrators, the want of an averment that plaintiff was legally sworn is fatal if properly objected to. Sanderson *v.* Hubbard, 14 Vt. 462. See also Lyman *v.* Wetmore, 2 Conn. 42 note. And the same has been held of testimony before a justice of the peace. Dorsett *v.* Adams, 50 Ind. 129.

10. Sanford *v.* Gaddis, 13 Ill. 329 (holding moreover that it is not necessary to aver that the justice had authority to administer the oath to plaintiff); Chapman *v.* Smith, 13 Johns. (N. Y.) 78; Niven *v.* Munn, 13 Johns. (N. Y.) 48; Dalrymple *v.* Lofton, 2 McMull. (S. C.) 112. *Compare* Dorsett *v.* Adams, 50 Ind. 129; Shellenbarger *v.* Norris, 2 Ind. 285; Cannon *v.* Phillips, 2 Sneed (Tenn.) 185.

11. *Alabama.*— Smith *v.* Gaffard, 31 Ala. 45.

Kentucky.— Peters *v.* Garth, 50 S. W. 682, 20 Ky. L. Rep. 1934.

Massachusetts.— Snell *v.* Snow, 13 Metc. 278, 46 Am. Dec. 730.

Vermont.— Cross *v.* Flood, 77 Vt. 285, 59 Atl. 1018; Merritt *v.* Dearth, 48 Vt. 65; Hoar *v.* Ward, 47 Vt. 657. See also Wilcox *v.* Moon, 63 Vt. 481, 22 Atl. 80.

Washington.—Wright *v.* Daniel, 40 Wash. 6, 82 Pac. 139.

See 32 Cent. Dig. tit. "Libel and Slander," § 194.

Charge of "keeping" woman.— No averment is necessary to explain a charge that plaintiff is "keeping" a certain woman. Payne *v.* Tancil, 98 Va. 262, 35 S. E. 725.

In declaring on a charge of keeping a house of ill fame, it is not necessary to aver that plaintiff had a house, if the words charged directly denote possession of a house. Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162. In Dodge *v.* Lacey, 2 Ind. 212, it was held that to speak of a house as a house of ill fame may mean that it is a bawdy house, but allegations are necessary in the complaint that the person speaking the words was accustomed to use them in that meaning.

Where defendant called plaintiff a "whore" and the petition based thereon does not allege that plaintiff is married, the expression will be construed as imputing fornication. Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

(B) *Words Having Provincial Meaning.* Where charges of unchastity and immorality are made by words having a provincial meaning, not actionable *per se*, the petition must affirmatively allege the import and meaning of the charge at the time and place of use.[12]

(C) *Particular Imputations* — (1) PREGNANCY OR MATERNITY. A false charge of present or past pregnancy or maternity in order to be actionable *per se* must be connected with an averment that plaintiff was unmarried at the time referred to in the charge.[13]

(2) ADULTERY. In order to render words imputing immorality or unchastity but not of themselves imputing adultery actionable as charging that offense, marriage at the time the crime was said to have been committed must be averred.[14]

(3) INCEST. A petition declaring upon a charge of incest must contain averments bringing the case within the statutory definition of incest where the defamatory words do not of themselves import that offense.[15]

(VI) *IMPUTATIONS OF CONTAGIOUS DISEASE.* In declaring on a charge of leprosy, it is not necessary to allege that leprosy is contagious.[16]

(VII) *IMPUTATIONS INJURIOUS TO PROFESSION, BUSINESS, OR EMPLOYMENT* — (A) *In General.* Where the defamation complained of shows upon its face that it was published of plaintiff in reference to his profession, business, or employment and contains matter injurious to him in such capacity, no averment that the words were so published is necessary.[17] If, however, such facts do not appear in the charge it is necessary to allege that plaintiff was engaged in such profession, business or employment at the time of publication and that the charge was published of plaintiff in reference thereto.[18] Where the communication is not

Charge of communicating loathsome disease.— A petition alleging that defendant falsely stated of plaintiff that she communicated to her husband through her marital relations a loathsome disease imports unchastity. Woodruff *v.* Woodruff, 36 Misc. (N. Y.) 15, 72 N. Y. Suppl. 39.

12. Emmerson *v.* Marvel, 55 Ind. 265; Shigley *v.* Snyder, 45 Ind. 541; Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Harper *v.* Delp, 3 Ind. 225; Dodge *v.* Lacey, 2 Ind. 212; Dyer *v.* Morris, 4 Mo. 214; Ryan *v.* Madden, 12 Vt. 51.

13. Smith *v.* Gaffard, 31 Ala. 45 (holding that a mere allegation that plaintiff is an infant and unmarried is insufficient); Wilson *v.* Beighler, 4 Iowa 427; Young *v.* Cook, 144 Mass. 38, 10 N. E. 719.

A charge that plaintiff is the mother of a mulatto child requires no averments. Smith *v.* Hamilton, 10 Rich. (S. C.) 44.

14. Christal *v.* Craig, 80 Mo. 367; Merritt *v.* Dearth, 48 Vt. 65; Ryan *v.* Madden, 12 Vt. 51.

Averring charge of fornication.— In a suit by husband and wife for words imputing unchastity to the wife, marriage need not be averred where the statute punishes both adultery and fornication. Benaway *v.* Conyne, 3 Pinn. (Wis.) 196, 3 Chandl. 214.

15. Griggs *v.* Vickroy, 12 Ind. 549; Lumpkins *v.* Justice, 1 Ind. 557.

16. Simpson *v.* Press Pub. Co., 33 Misc. (N. Y.) 228, 67 N. Y. Suppl. 401.

17. Harkness *v.* Chicago Daily News Co., 102 Ill. App. 162. See also Hays *v.* Mather, 15 Ill. App. 30; Dicken *v.* Shepherd, 22 Md. 399.

Averment as to taking out license by plaintiff.— It has been held that in an action for libel by the manager of an opera, against the proprietor of a newspaper, it was held wholly unnecessary for plaintiff to aver and prove that he had taken out a license under certain statutes to give operatic representations. Fry *v.* Bennett, 28 N. Y. 324.

18. *Georgia.*— Van Epps *v.* Jones, 50 Ga. 238.

Illinois.— Harkness *v.* Chicago Daily News Co., 102 Ill. App. 162.

Indiana.— Pollock *v.* Hastings, 88 Ind. 248; Honk *v.* Hicks, 11 Ind. App. 190, 38 N. E. 864.

Kansas.— Eckert *v.* Van Pelt, 69 Kan. 357, 76 Pac. 909, 66 L. R. A. 266.

Kentucky.— Mills *v.* Taylor, 3 Bibb 469.

Maine.— Buck *v.* Hersey, 31 Me. 558; Barnes *v.* Trundy, 31 Me. 321, 323, where it is said: "To maintain an action on the ground that words spoken of a person with reference to his profession or occupation, are in themselves actionable, the declaration must contain a distinct averment, that the words were spoken of and concerning the plaintiff, and of and concerning his profession or occupation."

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266; Dicken *v.* Shepherd, 22 Md. 399.

Michigan.— Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63.

New York.— Cassavoy *v.* Pattison, 93 N. Y. App. Div. 370, 87 N. Y. Suppl. 658; Carroll *v.* White, 33 Barb. 615; Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Suppl. 109; Havemeyer *v.* Fuller, 10 Abb. N. Cas. 9, 60 How. Pr. 316;

defamatory *per se*, mere averments that defendant intended to make certain charges against plaintiff in his business or professional character are not sufficient; the complaint must show how the words affect plaintiff in his business or profession.[19]

(B) *Imputation of Insolvency.* A charge of insolvency against one in a business requiring credit has been held to be actionable without a colloquium that the words were used in reference to the occupation or business of plaintiff.[20]

(VIII) *Imputations of Official Misconduct or Unfitness For Office.* Words imputing misconduct or unfitness for office must show on their face that they were used of and concerning plaintiff in his official character, or such fact must be averred in the petition.[21]

(IX) *Allegations as to Special Statutes Involved.* It has been held that an act declaring what words are actionable is a public law of which the court is bound to take notice and need not be pleaded.[22] So in an action for imputing an offense criminal by statute only, the statute need not be averred.[23]

h. Malice and Want of Probable Cause — (I) *In General.* The rule is laid down that the complaint must allege that the defamatory matter was published maliciously.[24] While, however, the word "maliciously" is ordinarily used, the

Burtch *v.* Nickerson, 17 Johns. 217, 8 Am. Dec. 390; Gilbert *v.* Field, 3 Cai. 329.

South Carolina.— Davis *v.* Davis, 1 Nott & M. 290.

Texas.—Brown *v.* Durham, (Civ. App. 1897) 42 S. W. 331.

Vermont.— Redway *v.* Gray, 31 Vt. 292.

Wisconsin.— Geary *v.* Bennett, 65 Wis. 554, 27 N. W. 335.

United States.— Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324.

See 32 Cent. Dig. tit. "Libel and Slander," § 195.

Characterizing suit for libel.— A suit for a false publication of plaintiff's business standing need not be characterized as for libel, by averment in the complaint. Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

Where the publication complained of is libelous in itself, an averment in the declaration of plaintiff's official or professional character will not be ground of demurrer, although the libelous matter cannot apply to that official or professional character. Gage *v.* Robinson, 12 Ohio 250.

19. Divens *v.* Meredith, 147 Ind. 693, 47 N. E. 143; Rice *v.* Albee, 164 Mass. 88, 41 N. E. 122; Newell *v.* How, 31 Minn. 235, 17 N. W. 383.

20. Carpenter *v.* Dennis, 3 Sandf. (N. Y.) 305; Smith *v.* Bradstreet Co., 63 S. C. 525, 41 S. E. 763; Davis *v.* Ruff, Cheves (S. C.) 17, 34 Am. Dec. 584. See also Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324. *Compare* Redway *v.* Gray, 31 Vt. 292, holding that an action of slander cannot be maintained for imputing insolvency to plaintiff, unless it be averred in the declaration, in addition to stating his business, that this imputation was made of him concerning his trade or business.

21. *Georgia.*— Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

Illinois.— McLaughlin *v.* Fisher, 136 Ill. 111, 24 N. E. 60 [*affirming* 32 Ill. App. 54].

Maine.— Hanna *v.* Singer, 97 Me. 128, 53 Atl. 991.

Michigan.— Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309.

Minnesota.— Stoll *v.* Houde, 34 Minn. 193, 25 N. W. 63; Gove *v.* Blethen, 21 Minn. 80, 18 Am. Rep. 380.

New York.— Lindsey *v.* Smith, 7 Johns. 359.

Vermont.— Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395.

See 32 Cent. Dig. tit. "Libel and Slander," § 196.

22. Sanford *v.* Gaddis, 13 Ill. 329. See also Terry *v.* Bright, 4 Md. 430.

Action under statute for insulting words.— Where an action is brought for slander, for words actionable under special statute as being insults tending to violence and breach of the peace, it has been held that the declaration must allege that the action is under statute, or else the actionability of the words will be judged by the common-law rules as to what constitutes slander. Hogan *v.* Wilmoth, 16 Gratt. (Va.) 80; Moseley *v.* Moss, 6 Gratt. (Va.) 534. See also Scott *v.* Peebles, 2 Sm. & M. (Miss.) 546.

23. Elam *v.* Badger, 23 Ill. 498.

24. *Alabama.*— Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531.

Kentucky.— Hanning *v.* Bassett, 12 Bush 361; Williams *v.* Gordon, 11 Bush 693.

Louisiana.— See St. Louis Church *v.* Blane, 8 Rob. 51. *Compare* Covington *v.* Roberson, 111 La. 326, 35 So. 586, holding that it is sufficient if plaintiff allege a condition of things such as would show a fault on the part of defendant accompanied by a claim of resulting damage and the fact of malice is immaterial.

New Jersey.— Webster *v.* Holmes, 62 N. J. L. 55, 40 Atl. 778.

Virginia.— Dillard *v.* Collins, 25 Gratt. 343.

absence of the epithet does not obviate the pleading, where the facts pleaded are such as to imply malice.[25] An allegation that the words contained in the publication are false[26] or are a libel[27] has been held to imply malice on the part of defendant and to be a sufficient allegation thereof. It is held not to be necessary to aver a want of probable cause[28] or to lay a scienter.[29]

(II) *Privileged Publications.* If the defamatory matter is conditionally privileged it is sufficient to aver generally that the publication was made maliciously[30] without setting forth in the complaint the facts and circumstances which show the existence of malice.[31] Moreover it is held that an allegation that the words published were false is a sufficient allegation of malice, even though defendant subsequently pleads a privileged occasion.[32] But it has been held that where facts disclosing a privilege are averred in the complaint, it is incumbent on plaintiff to allege that the publication was made maliciously and a mere averment that the words were malicious is not sufficient.[33] It has been held, however, that, although the statement of the circumstances in the declaration indicate that the communication was privileged, an averment that the publication was false and malicious without an averment of knowledge on the part of defendant of the falsity of the charge or of want of probable cause is sufficient.[34]

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591.

See 32 Cent. Dig. tit. "Libel and Slander," § 198.

In New York it has been intimated that where the publication is unambiguous and not capable of being understood in any other sense than as defamatory to an extent that must necessarily expose plaintiff to contempt and ridicule it is by implication of law malicious, and that an allegation that the publication was malicious, although common and proper in such case, was mere matter of form the lack of which since the adoption of the code formed no legal objection to a pleading. Hunt *v.* Bennett, 19 N. Y. 173. *Compare* Battersby *v.* Collier, 34 N. Y. App. Div. 347, 54 N. Y. Suppl. 363.

Averring wantonness.— A statute in North Carolina making it a misdemeanor to attempt "in a wanton and malicious manner to destroy the reputation of an innocent woman" has been held not to affect the civil action for slander for a charge of incontinency, and it is unnecessary to allege that the words were spoken "wantonly" as well as maliciously. Bowden *v.* Bailes, 101 N. C. 612, 8 S. E. 324.

Averring malice as affecting question of damages.— Defendant's intent may be stated as affecting the question of exemplary damages. Baldwin *v.* Genung, 70 N. Y. App. Div. 271, 74 N. Y. Suppl. 835.

25. Burton *v.* Beasley, 88 Ind. 401; Keesling *v.* McCall, 36 Ind. 321; Younger *v.* Duffie, 26 Hun (N. Y.) 442; Opdyke *v.* Weed, 18 Abb. Pr. (N. Y.) 223 note; Purdy *v.* Carpenter, 6 How. Pr. (N. Y.) 361; Dillard *v.* Collins, 25 Gratt. (Va.) 343; White *v.* Nicholls, 3 How. (U. S.) 266, 11 L. ed. 591, where it is said that "in describing the act complained of the word maliciously is not indispensable to characterize it; . . . the law is satisfied with words of equivalent power and import."

26. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Burton *v.* Beasley, 88 Ind. 401; White *v.* Nicholls, 3 How. (U. S.) 266, 284, 11 L. ed. 591, where it is said: "Thus for instance, the word falsely has been held to be sufficiently expressive of a malicious intent."

27. Hunt *v.* Bennett, 19 N. Y. 173.

28. Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531; Andrew *v.* Deshler, 43 N. J. L. 16.

29. Andrew *v.* Deshler, 43 N. J. L. 16. *Compare* Caldwell *v.* Raymond, 2 Abb. Pr. (N. Y.) 193, holding that when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts by defendant must be averred.

30. Viele *v.* Gray, 10 Abb. Pr. (N. Y.) 1, 18 How. Pr. 550; Purdy *v.* Carpenter, 6 How. Pr. (N. Y.) 361; Campbell *v.* Bostick, (Tex. Civ. App. 1893) 22 S. W. 828; Servatius *v.* Pichel, 34 Wis. 292; Mower-Hobart Co. *v.* Dun, 131 Fed. 812.

Where the action is against a corporation and the petition shows on its face that the communication is privileged, there must be a substantive averment that defendant either authorized or ratified the act of the agent. Warner *v.* Missouri Pac. R. Co., 112 Fed. 114.

31. Viele *v.* Gray, 10 Abb. Pr. (N. Y.) 1, 18 How. Pr. 550.

32. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

33. Henry *v.* Moberly, 6 Ind. App. 490, 33 N. E. 981. *Compare* Purdy *v.* Carpenter, 6 How. Pr. (N. Y.) 361, holding that it is not necessary to aver express malice or want of probable cause.

34. Andrew *v.* Deshler, 43 N. J. L. 16; Purdy *v.* Carpenter, 6 How. Pr. (N. Y.) 361.

An action for words spoken in the course of judicial proceedings must contain an allegation of want of reasonable or probable cause; an averment of the want of "jus-

i. Publication — (I) *In General* — (A) *Libel.* An allegation in a complaint for libel that defendant published the defamatory matter or caused it to be published is sufficient to show that it was communicated to others and that defendant was responsible therefor,[35] and plaintiff cannot be required to aver under what particular circumstances the alleged libel was published.[36]

(B) *Slander.* It is generally held sufficient in an action for slander to allege that the words were spoken or uttered by defendant in the presence of some third person or persons and the names of such person or persons need not be given.[37] So it has been held that an averment that defendant "published" the defamatory matter is good, as the word "published" imports that the words were spoken in the presence of some third person.[38]

(II) *Time and Place.* The petition should allege with exactness the time when[39] and the place where the publication was made,[40] and it has been held that

tifiable cause or excuse" is not sufficient. Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49. In such case the relevancy and materiality of the testimony must be negatived. Hartung *v.* Shaw, 130 Mich. 177, 89 N. W. 701.

35. *Illinois.*— McLaughlin *v.* Schnellbacher, 65 Ill. App. 50.

Indiana.— Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54.

Maine.— Sproul *v.* Pillsbury, 72 Me. 20.

New York.— Waistel *v.* Holman, 2 Hall 172.

Vermont.— Wilcox *v.* Moon, 63 Vt. 481, 22 Atl. 80.

Wisconsin.— Dabold *v.* Chronicle Pub. Co., 107 Wis. 357, 83 N. W. 639; Benedict *v.* Westover, 44 Wis. 404.

England.— See Baldwin *v.* Elphinston, 2 W. Bl. 1037.

See 32 Cent. Dig. tit. "Libel and Slander," § 199.

Illustrations.— An averment that defendant is the proprietor of a paper and that the libelous matter was published in his paper is a sufficient averment of a publication by him. Hunt *v.* Bennett, 4 E. D. Smith (N. Y.) 647 [*affirmed* in 19 N. Y. 173]. *Compare* Simonsen *v.* Herold Co., 61 Wis. 626, 21 N. W. 799. A complaint showing the composition of a libelous article by one defendant and its publication by the other is sufficient to charge both as publishers. Baker *v.* McClellan, 3 N. Y. Suppl. 315. But a complaint alleging that defendant made slanderous statements in the presence of reporters "and thereby defendant caused" such statement to be published is insufficient as it states only a legal conclusion. Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N E. 502 [*reversing* 25 N. Y. App. Div. 438, 49 N. Y. Suppl. 627].

36. McLaughlin *v.* Schnellbacher, 65 Ill. App. 50; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527; Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54; Sickles *v.* Kling, 30 Misc. (N. Y.) 37, 61 N. Y. Suppl. 647; Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

37. *Alabama.*— Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Georgia.— Bradshaw *v.* Perdue, 12 Ga. 510.

Indiana.— Marks *v.* Jacobs, 76 Ind. 216; Watts *v.* Morgan, 50 Ind. 318.

Kansas.— See Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585.

Maine.— Burbank *v.* Horn, 39 Me. 233.

New York.— Anonymous, 3 How. Pr. 406; Wood *v.* Gilchrist, 1 Code Rep. 117.

Oregon.— Hurd *v.* Moore, 2 Oreg. 85.

Pennsylvania.— Brown *v.* Brashier, 2 Penr. & W. 114.

South Carolina.— Kyzer *v.* Grubbs, 2 McCord 305.

See 32 Cent. Dig. tit. "Libel and Slander," § 199.

Amended petition.—A petition alleging that defendant said of plaintiff certain words in themselves slanderous is amendable by adding thereto an allegation that such words were spoken in the presence of a third person. Wolfe *v.* Israel, 102 Ga. 772, 29 S. E. 935.

Averment of mere speaking of defamatory words.— It has been held that the complaint in an action of slander must allege that the words were spoken in the presence and hearing of some third person. Anonymous, 3 How. Pr. (N. Y.) 406; Wood *v.* Gilchrist, 1 Code Rep. (N. Y.) 117. On the other hand it has been held under statute that it is not necessary to allege that the words were spoken in the presence and hearing of any person. Hutts *v.* Hutts, 51 Ind. 581; Mann *v.* Hauts, 40 Ind. 122; Guard *v.* Risk, 11 Ind. 156; Atwinger *v.* Fellner, 46 Mo. 276.

Averment held insufficient.— An averment that the words were spoken in the presence of certain persons "as the plaintiffs are informed and believe" is insufficient. McKinney *v.* Roberts, (Cal. 1885) 8 Pac. 3.

38. Burton *v.* Burton, 3 Greene (Iowa) 316; Duel *v.* Agan, 1 Code Rep. (N. Y.) 134. *Contra*, Watts *v.* Greenlee, 13 N. C. 115.

39. Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585; Cole *v.* Babcock, 78 Me. 41, 2 Atl. 545; Gray *v.* Sidelinger, 72 Me. 114; Young *v.* Cook, 144 Mass. 38, 10 N. E. 719; Gardinier *v.* Knoz, 27 Hun (N. Y.) 500.

The time may be stated with a continuando.— Burbank *v.* Horn, 39 Me. 233.

Variance as to time see *infra*, VIII, E, 9, d.

40. Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585. See also Young *v.* Cook, 144 Mass. 38, 10 N. E. 719.

any indefiniteness in these respects will render the petition insufficient as against a demurrer.[41]

(III) *Person Making Publication.* There must be an allegation in the pleading that the publication was made by defendant.[42] A complaint for slander which does not allege that the slanderous words were spoken, uttered, or published by defendant is bad on demurrer,[43] and the failure to make such allegation cannot be supplied by colloquium or innuendo.[44]

j. Setting Out Defamatory Matter — (I) *In General.* The general rule is that the complaint must set out the particular defamatory words as published, and a statement of their substance and effect is insufficient.[45] But in a few jurisdictions a contrary rule is announced.[46] So it has been intimated that a modification

The place may be stated with a videlicet.— Burbank *v.* Horn, 39 Me. 233.

Variance as to place see *infra*, VIII, E, 9, d.

41. Cole *v.* Babcock, 78 Me. 41, 2 Atl. 545. See also Young *v.* Cook, 144 Mass. 38, 10 N. E. 719. *Compare* Haag *v.* Cooley, 33 Kan. 387, 6 Pac. 585; Gardinier *v.* Knox, 27 Hun (N. Y.) 500.

Aider by verdict.—A declaration in an action of slander which fails to state the time when the slanderous words charged were spoken, so as to show affirmatively that the action is brought within the period authorized by the statute, is good after verdict. Dubois *v.* Robbins, 115 Ill. App. 372.

42. Gutkes *v.* New York Produce Exch., 46 Misc. (N. Y.) 133, 93 N. Y. Suppl. 254.

43. Watts *v.* Morgan, 50 Ind. 318; Roberts *v.* Lovell, 38 Wis. 211.

44. Watts *v.* Morgan, 50 Ind. 318; Roberts *v.* Lovell, 38 Wis. 211.

45. *Indiana.* — Branaman *v.* Hinkle, 137 Ind. 496, 37 N. E. 546; Rock *v.* McClarnon, 95 Ind. 415; Smail *v.* Fisher, 2 Ind. App. 426, 28 N. E. 714. *Compare* Butler *v.* Gutheny, 1 Blackf. 496.

Kentucky.— Taylor *v.* Moran, 4 Metc. 127.

Minnesota.— American Book Co. *v.* Kingdom Pub. Co., 71 Minn. 363, 73 N. W. 1089.

Missouri.— Watson *v.* Musick, 2 Mo. 29.

New Hampshire.— Gendron *v.* St. Pierre, 72 N. H. 400, 56 Atl. 915; Bassett *v.* Spofford, 11 N. H. 127.

New Jersey.—Webster *v.* Holmes, 62 N. J. L. 55, 40 Atl. 778.

New York.— Drohan *v.* O'Brien, 76 N. Y. App. Div. 265, 78 N. Y. Suppl. 430 (holding that where the words are specially set out in the petition, and followed by the words "or words of like purport, meaning and effect" the petition is demurrable); Battersby *v.* Collier, 34 N. Y. App. Div. 347, 54 N. Y. Suppl. 363; Battershy *v.* Collier, 24 N. Y. App. Div. 89, 48 N. Y. Suppl. 976; Germ Proof Filter Co. *v.* Pasteur Chamberland Filter Co., 81 Hun 49, 30 N. Y. Suppl. 584; Forsyth *v.* Edmiston, 5 Duer 653; Van Alstyne *v.* Lewis, 41 Misc. 355, 84 N. Y. Suppl. 764; McDonald *v.* Edwards, 20 Misc. 523, 46 N. Y. Suppl. 672; Blessing *v.* Davis, 24 Wend. 100.

North Carolina.— Burns *v.* Williams, 88 N. C. 159.

Rhode Island.— Kenyon *v.* Cameron, 17 R. I. 122, 20 Atl. 233.

South Carolina.— Bagley *v.* Johnston, 4 Rich. 22. *Compare* Kyzer *v.* Grubbs, 2 McCord 305.

South Dakota.— Kirby *v.* Martindale, (1905) 103 N. W. 648.

Texas.— Runge *v.* Franklin, 72 Tex. 585, 10 S. W. 721, 13 Am. St. Rep. 833, 3 L. R. A. 417; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

Vermont.— Merritt *v.* Dearth, 48 Vt. 65.

Wisconsin.— Schubert *v.* Richter, 92 Wis. 199, 66 N. W. 107.

United States.— O'Donnell *v.* Nee, 86 Fed. 96; Whitaker *v.* Freeman, 29 Fed. Cas. No. 17,527*a*, 12 N. C. 271.

England.— Wright *v.* Clements, 3 B. & Ald. 503, 22 Rev. Rep. 465, 5 E. C. L. 292; Gutsole *v.* Mathers, 5 Dowl. P. C. 69, 2 Gale 64, 5 L. J. Exch. 274, 1 M. & W. 495, 1 Tyrw. & G. 694; West *v.* Smith, 4 Dowl. P. C. 703. See also Harris *v.* Warre, 4 C. P. D. 125, 48 L. J. C. P. 310, 40 L. T. Rep. N. S. 429, 27 Wkly. Rep. 461; Rigby *v.* Heron, 1 Jur. 558; Cook *v.* Cox, 3 M. & S. 110.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 201, 202.

Words spoken affirmatively in answer to question.— If the slanderous words were spoken affirmatively in answer to a question, they should be laid as having been spoken affirmatively. Yeates *v.* Reed, 4 Blackf. (Ind.) 463, 32 Am. Dec. 43.

The use of quotation marks is sufficient to identify the words included between them as being the defamation complained of. Hemphill *v.* Holley, 4 Minn. 233.

A slanderous charge alleged as showing express malice need not be specifically pleaded. Phelan *v.* Rycroft, 27 Misc. (N. Y.) 48, 57 N. Y. Suppl. 251; Stevens *v.* Handly, Wright (Ohio) 121.

Words unusual in conversation.—Where the complaint states that the words therein contained are those which defendant spoke concerning plaintiff, it is immaterial that the style of such words is unusual for a conversation. Hull *v.* Vreeland, 42 Barb. (N. Y.) 543.

46. Kimball *v.* Page, 96 Me. 487, 52 Atl. 1010; True *v.* Plumley, 36 Me. 466; May *v.* Wood, 172 Mass. 11, 51 N. E. 191; Rice *v.* Albee, 164 Mass. 88, 41 N. E. 122; Robbins *v.* Fletcher, 101 Mass. 115; Lee *v.* Kane, 6 Gray (Mass.) 495; Allen *v.* Perkins, 17 Pick.

must be imposed on the general rule where the pleader must from the nature of the case resort to a verbal description of the defamatory matter, as where movements, postures, or pictures are used.[47] If the complaint charges defendant with having adopted certain slanderous words used by another, the words spoken in the first instance must be set forth.[48] A count which sets forth no words as having been spoken either according to their tenor or their substance, cannot, it has been held, be maintained as one for slander.[49]

(II) *Whole Publication or Material Part.* The article or conversation need not be set out in full and it is sufficient if the petition contains the material part or only so much as is necessary to show an actionable imputation.[50]

(III) *Foreign Language and Translations.* Where the defamation is published in a foreign language, plaintiff must set forth the communication as originally made, and an accurate translation of the same into English,[51] and if the

(Mass.) 369; Pond *v.* Hartwell, 17 Pick. (Mass.) 269; Whiting *v.* Smith, 13 Pick. (Mass.) 364; Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79; Lukehart *v.* Byerly, 53 Pa. St. 418; Tipton *v.* Kahle, 3 Watts (Pa.) 90; Kennedy *v.* Lowry, 1 Binn. (Pa.) 393; Middlehy *v.* Effler, 118 Fed. 261, 55 C. C. A. 355, construing Massachusetts statute. See also Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; White *v.* Parks, 93 Ga. 633, 20 S. E. 78. *Compare* Yundt *v.* Yundt, 12 Serg. & R. (Pa.) 427; Wittmaier *v.* Krieg, 13 Pa. Co. Ct. 64; Carvill *v.* Cochran, 1 Phila. (Pa.) 399.

47. Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405. See also Ellis *v.* Kimball, 16 Pick. (Mass.) 132.

48. Blessing *v.* Davis, 24 Wend. (N. Y.) 100; Solomon *v.* Lawson, 8 Q. B. 823, 10 Jur. 796, 15 L. J. Q. B. 253, 55 E. C. L. 823. See also Gauvreau *v.* Superior Pub. Co., 62 Wis. 403, 22 N. W. 726.

49. Rice *v.* Albee, 164 Mass. 88, 41 N. E. 122; Comerford *v.* West End St. R. Co., 164 Mass. 13, 41 N. E. 59. *Compare* Kimball *v.* Page, 96 Me. 487, 52 Atl. 1010.

A count in slander setting forth words as written is demurrable. Ayres *v.* Toulmin, 74 Mich. 44, 41 N. W. 855.

50. *Alabama.*— Weir *v.* Hoss, 6 Ala. 881.

Illinois.— Spencer *v.* McMasters, 16 Ill. 405.

Minnesota.— Blethen *v.* Stewart, 41 Minn. 205, 42 N. W. 932.

New York.— Culver *v.* Van Anden, 4 Abb. Pr. 375.

Pennsylvania.— Hersh *v.* Ringwalt, 3 Yeates 508, 2 Am. Dec. 392.

Texas.— Wallis *v.* Walker, 73 Tex. 8, 11 S. W. 123.

Vermont.— See Cross *v.* Flood, 77 Vt. 285, 59 Atl. 1018.

England.— Rutherford *v.* Evans, 6 Bing. 451, 19 E. C. L. 207, 4 C. & P. 74, 19 E. C. L. 414, 8 L. J. C. P. O. S. 86, 4 M. & P. 163, 31 Rev. Rep. 465.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 202, 203.

Compare McClure *v.* Review Pub. Co., 38 Wash. 160, 80 Pac. 303, holding that where, in an action against a newspaper for libel, the complaint set out mere excerpts from the publication, it was not error for the court to compel plaintiff to make the complaint more definite and certain by incorporating copies of the entire articles in which the alleged libelous matter appeared.

If the petition contains words additional to those constituting the cause of action, they will not vitiate the pleading. Sanford *v.* Gaudis, 15 Ill. 228. But it has been held that they may be stricken out on motion. Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456. In Deyo *v.* Brundage, 13 How. Pr. (N. Y.) 221, it was held that it was proper, although not necessary, for the petition to contain so much as must be proved by plaintiff at trial. So it has been held that a complaint setting forth the whole of the objectionable article and averring that the whole is false and defamatory is sufficiently definite and certain. Singer *v.* New York Times Co., 74 N. Y. App. Div. 380, 77 N. Y. Suppl. 531.

If separate passages of a libel are set out in one count they should be described as separate and distinct parts. Tabart *v.* Tipper, 1 Campb. 350, 10 Rev. Rep. 698.

Setting out libelous index of review.— In an action for libel in a review it is sufficient to set out the contents of the index (referring to an article in the body of the review) which is of itself a libel. Buckingham *v.* Murray, 2 C. & P. 46, 3 Rev. Rep. 653, 12 E. C. L. 442.

Pointing out libelous portion of article.— Where an entire newspaper article, containing an alleged letter written by plaintiff, was charged to be false, and, if the letter were fabricated, the article, taken as a whole, was libelous *per se*, and was not a privileged publication specified by Civ. Code, §§ 45, 47, 48 (Code Civ. Proc. § 460), it was error to sustain a demurrer to the complaint for its failure to point out the portion of the publication charged to be libelous. Leonard *v.* McPherson, 146 Cal. 616, 80 Pac. 1084.

51. *Indiana.*—Kerschbaugher *v.* Slusser, 12 Ind. 453; Hickley *v.* Grosjean, 6 Blackf. 351.

New York.—Lettman *v.* Ritz, 3 Sandf. 734; Wormouth *v.* Cramer, 3 Wend. 394.

Ohio.— Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

translation does not set forth a cause of action, it is immaterial that the foreign words are actionable.[52]

k. Innuendo[53] — (I) *Office and Functions* — (A) *In General.* The office of the innuendo is to connect the defamatory matter with other facts and circumstances sufficiently expressed before, for the purpose of showing the meaning and application of the charge.[54]

(B) *Changing Meaning of Words.* The innuendo is only explanatory of the words to which it is attached and it cannot enlarge or restrict the natural meaning of words, introduce new matter, or make certain that which was uncertain, except in so far as it connects the words published with the extrinsic or explanatory cir-

Pennsylvania. — Rahauser *v.* Schwerger Barth, 3 Watts 28.

Wisconsin.— Dr. Shoop Family Medicine Co. *v.* Wernich, 95 Wis. 164, 70 N. W. 160 (holding that an averment that the article being translated into English "reads as follows" is a sufficient allegation that the translation was correct); Pelzer *v.* Benish, 67 Wis. 291, 30 N. W. 366; Zeig *v.* Ort, 3 Pinn. 30.

England.— Jenkins *v.* Phillips, 9 C. & P. 766, 5 Jur. 252, 38 E. C. L. 766; Zenobio *v.* Axtell, 6 T. R. 162, 3 Rev. Rep. 142.

See 32 Cent. Dig. tit. "Libel and Slander," § 204.

In Missouri it is held under a statute that it is not necessary to set out the foreign language. Elfrank *v.* Seiler, 54 Mo. 134; Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754. See also Stieber *v.* Wensel, 19 Mo. 513.

Averring understanding of foreign language by hearers see *infra*, VIII, E, 1, i, (II).

52. K. *v.* H., 20 Wis. 239, 91 Am. Dec. 397.

53. Innuendo defined.—An innuendo is "an explanation of the meaning of the words published or spoken by a reference to facts, previously ascertained by averment or otherwise." 1 Starkie Sl. 418, 431 [*quoted* in Fry *v.* Bennett, 5 Sandf. (N. Y.) 54, 65]. "An innuendo is not an averment, but only matter of explanation." Wallace *v.* Homestead Co., 117 Iowa 348, 363, 90 N. W. 835. "An innuendo means nothing more than the words '*id est*,' '*scilicet*,' or 'meaning,' or 'aforesaid,' as explanatory of a subject matter sufficiently expressed before; as such a one, meaning the defendant, or such a subject, meaning the subject in question." Wallace *v.* Homestead Co., 117 Iowa 348, 363, 90 N. W. 835; Rex *v.* Horne, 2 Cowp. 672 [*quoted* in Cheetham *v.* Tillotson, 5 Johns. (N. Y.) 430, 438; Adams *v.* Meredew, 2 Y. & J. 417].

54. *Alabama.*—Whitsett *v.* Womack, 8 Ala. 466; Coburn *v.* Harwood, Minor 93, 12 Am. Dec. 37.

Connecticut.— Stow *v.* Converse, 4 Conn. 17.

Illinois.— Patterson *v.* Edwards, 7 Ill. 720; Gerald *v.* Inter Ocean Pub. Co., 90 Ill. App. 205.

Iowa.— Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835; Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349.

Kansas.— Hess *v.* Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; Henicke *v.* Griffith, 29 Kan. 516.

Maine.— Emery *v.* Prescott, 54 Me. 389.

Maryland.—Barnes *v.* State, 88 Md. 347, 41 Atl. 781; Dorsey *v.* Whipps, 8 Gill 457.

Massachusetts. — Carter *v.* Andrews, 16 Pick. 1.

Michigan.— Taylor *v.* Kneeland, 1 Dougl. 67.

New Hampshire.— Mason *v.* Mason, 4 N. H. 110.

New Jersey.— Freisinger *v.* Moore, 65 N. J. L. 286, 47 Atl. 432; Joralemon *v.* Pomeroy, 22 N. J. L. 271; Ludlum *v.* McCuen, 17 N. J. L. 12.

New York.— Fry *v.* Bennett, 5 Sandf. 54; Verbeck *v.* Duryea, 36 Misc. 242, 73 N. Y. Suppl. 346; Blaisdell *v.* Raymond, 4 Abb. Pr. 446, 14 How. Pr. 265; Caldwell *v.* Raymond, 2 Abb. Pr. 193; Cooper *v.* Greeley, 1 Den. 347; Andrews *v.* Woodmansee, 15 Wend. 232; Cheetham *v.* Tillotson, 5 Johns. 430; Van Vechten *v.* Hopkins, 5 Johns. 211, 4 Am. Dec. 339.

Pennsylvania.— Naulty *v.* Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Collins *v.* Dispatch Pub. Co., 152 Pa. St. 187, 25 Atl. 546, 34 Am. St. Rep. 636; Herst *v.* Borbidge, 57 Pa. St. 62; Evans *v.* Tibbins, 2 Grant 451.

Texas.— Squires *v.* State, (Cr. App. 1898) 45 S. W. 147.

Vermont.— Sheridan *v.* Sheridan, 58 Vt. 504, 5 Atl. 494; Taft *v.* Howard, 1 D. Chipm. 275.

Virginia.— Hogan *v.* Wilmoth, 16 Gratt. 80.

West Virginia.—Argabright *v.* Jones, 46 W. Va. 144, 32 S. E. 995.

Wisconsin.— Buckstaff *v.* Viall, 84 Wis. 129, 54 N. W. 111; Weil *v.* Altenhofen, 26 Wis. 708; Cramer *v.* Noonan, 4 Wis. 231.

United States.— Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*, 1 Blatchf. 588.

England.— Rex *v.* Horne, 2 Cowp. 672.

See 32 Cent. Dig. tit. "Libel and Slander," § 205.

A statement that defendants "meant and intended to convey" certain ideas is a sufficient innuendo, although it would be better pleading to aver in direct terms that the language was so understood by the persons reading it. Chiatovich *v.* Hanchett, 88 Fed. 873. See also Hoyt *v.* Smith, 32 Vt. 304.

An amendment will be allowed plaintiff for the purpose of inserting proper innuendos in his complaint. Hawks *v.* Patton, 18 Ga. 52, 63 Am. Dec. 266.

cumstances alleged in the inducement.[55] If the publication is not actionable *per se*, it cannot be made so by an innuendo.[56] But if the words are equivocal or

55. *Alabama.*— Gaither *v.* Advertiser Co., 102 Ala. 458, 14 So. 788; Henderson *v.* Hale, 19 Ala. 154; Weir *v.* Hoss, 6 Ala. 881.

California.— Grand *v.* Dreyfus, 122 Cal. 58, 54 Pac. 389.

Dakota.— Casselman *v.* Winship, 3 Dak. 292, 19 N. W. 412.

District of Columbia.— Viedt *v.* Evening Star Newspaper Co., 19 D. C. 534.

Georgia.— Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687.

Illinois.— Herhold *v.* White, 114 Ill. App. 186; Herrick *v.* Tribune Co., 108 Ill. App. 244; Brown *v.* Burnett, 10 Ill. App. 279; Gault *v.* Babbitt, 1 Ill. App. 130.

Indiana.— Rock *v.* McClarnon, 95 Ind. 415; Pollock *v.* Hastings, 88 Ind. 248; Schurick *v.* Kollman, 50 Ind. 336; Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477; Hays *v.* Mitchell, 7 Blackf. 117.

Iowa.—Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835.

Kentucky.— Brown *v.* Piner, 6 Bush 518; Beswick *v.* Chappel, 8 B. Mon. 486; Martin *v.* Melton, 4 Bibb 99; Watson *v.* Hampton, 2 Bibb 319; Caldwell *v.* Abbey, Hard. 529; Feast *v.* Auer, 90 S. W. 564, 28 Ky. L. Rep. 794, 4 L. R. A. N. S. 560; Winsette *v.* Hunt, 53 S. W. 522, 21 Ky. L. Rep. 922.

Maine.—Patterson *v.* Wilkinson, 55 Me. 42, 92 Am. Dec. 568; Emery *v.* Prescott, 54 Me. 389; Brown *v.* Brown, 14 Me. 317.

Maryland.—Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716; Sheely *v.* Biggs, 2 Harr. & J. 363, 3 Am. Dec. 552.

Massachusetts.— Dow *v.* Long, 190 Mass. 138, 76 N. E. 667; Adams *v.* Stone, 131 Mass. 433.

Michigan.— Taylor *v.* Kneeland, 1 Dougl. 67.

Missouri.—Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Church *v.* Bridgman, 6 Mo. 190; Midland Pub. Co. *v.* Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298; Boyce *v.* Aubuchon, 34 Mo. App. 315.

New Hampshire.—Harris *v.* Burley, 8 N. H. 256.

New Jersey.— Joralemon *v.* Pomeroy, 22 N. J. L. 271.

New York.— Morrison *v.* Smith, 83 N. Y. App. Div. 206, 82 N. Y. Suppl. 166; Parker *v.* Bennett, 68 N. Y. App. Div. 148, 74 N. Y. Suppl. 214; Miller *v.* Maxwell, 16 Wend. 9.

North Carolina.—Watts *v.* Greenlee, 13 N. C. 115.

Ohio.— Cleveland Retail Grocers' Assoc. *v.* Exton, 18 Ohio Cir. Ct. 321, 10 Ohio Cir. Dec. 145.

Pennsylvania.— Naulty *v.* Bulletin Co., 206 Pa. St. 128, 55 Atl. 862; Lukehart *v.* Byerly, 53 Pa. St. 418; Gosling *v.* Morgan, 32 Pa. St. 273; Dottarer *v.* Bushey, 16 Pa. St. 204; Packer *v.* Spangler, 2 Binn. 60.

Rhode Island.— Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031.

South Carolina.—Wilson *v.* Hamilton, 9 Rich. 382.

Vermont.— Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162; Sheridan *v.* Sheridan, 58 Vt. 504, 5 Atl. 494; Nichols *v.* Packard, 16 Vt. 83; Ryan *v.* Madden, 12 Vt. 51; Fitzsimmons *v.* Cutler, 1 Aik. 33.

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495; Moseley *v.* Moss, 6 Gratt. 534.

West Virginia.— Argabright *v.* Jones, 46 W. Va. 144, 32 S. E. 995; Johnson *v.* Brown, 13 W. Va. 71.

Wisconsin.— Hofflund *v.* Journal Co., 88 Wis. 369, 60 N. W. 263; Benaway *v.* Conyne, 3 Pinn. 196, 3 Chandl. 214.

United States.— Duvivier *v.* French, 104 Fed. 278, 43 C. C. A. 529; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188, 1 Blatchf. 588.

England.— Capital, etc., Counties Bank *v.* Henty, 7 App. Cas. 741, 47 J. P. 214, 52 L. J. Q. B. 232, 47 L. T. Rep. N. S. 662, 31 Wkly. Rep. 157; Goldstein *v.* Foss, 6 B. & C. 154, 13 E. C. L. 81, 4 Bing. 489, 13 E. C. L. 601, 2 C. & P. 252, 12 E. C. L. 556, 9 D. & R. 197, 1 M. & P. 402, 2 Y. & J. 146, 29 Rev. Rep. 610; Angle *v.* Alexander, 7 Bing. 119, 4 M. & P. 870, 20 E. C. L. 61 [*reversing* 1 Tyrw. 9, 1 C. & J. 143]; Hunt *v.* Goodlake, 43 L. J. C. P. 54, 29 L. T. Rep. N. S. 472; Jacobs *v.* Schmaltz, 62 L. T. Rep. N. S. 121.

Canada.— Macdonald *v.* Mail Printing Co., 32 Ont. 163.

See 32 Cent. Dig. tit. "Libel and Slander," § 205.

56. *Georgia.*—Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687.

Iowa.—Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835.

Maryland.— Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716; Jones *v.* Hungerford, 4 Gill & J. 402.

New Hampshire.—Harris *v.* Burley, 8 N. H. 256.

New Jersey.— Joralemon *v.* Pomeroy, 22 N. J. L. 271.

New York.—Verbeck *v.* Duryea, 36 Misc. 242, 73 N. Y. Suppl. 346.

Vermont.— Jones *v.* Roberts, 73 Vt. 201, 50 Atl. 1071; Fitzsimmons *v.* Cutler, 1 Aik. 33.

Virginia.— Moss *v.* Harwood, 102 Va. 386, 46 S. E. 385.

England.—Wheeler *v.* Haynes, 9 A. & E. 286 note, 8 L. J. Q. B. 3, 1 P. & D. 55, 1 W. W. & H. 645, 36 E. C. L. 166.

See 32 Cent. Dig. tit. "Libel and Slander," § 205.

Words not necessarily imputing crime.— An innuendo cannot enlarge ambiguous words not necessarily of themselves importing crime, beyond the averment of the speaker's intention. Weed *v.* Bibbins, 32 Barb. (N. Y.) 315. Where the meaning is ambiguous it is only necessary to aver that defendants by means of the words insinuated and meant to be understood by the hearers as charging plain-

ambiguous and admit of several meanings, it is proper to attribute to them in the innuendo the fixed and definite meaning which plaintiff thinks they ought to bear.[57]

(II) *Necessity and Propriety.* Where the publication is libelous or slanderous upon its face,[58] or the meaning of the publication is plain and unambiguous,[59] no innuendo is required. If, however, the words are not *per se* actionable there must be an innuendo showing, by reference to facts stated in the inducement, the injurious sense imported by the charge.[60]

tiff with the crime which the words are capable of imputing. Rundell *v.* Butler, 7 Barb. (N. Y.) 260.

Connecting plaintiff with defamatory matter.— If the libelous article does not show on its face that it refers to plaintiff, extrinsic facts necessary to identify plaintiff as the person referred to cannot be embodied in the innuendo. Duvivier *v.* French, 104 Fed. 278, 43 C. C. A. 529. If plaintiff is designated by another name in the libel, the real name may be designated by an innuendo. Hays *v.* Brierly, 4 Watts (Pa.) 392.

57. *New York.*—Gutkes *v.* New York Produce Exch., 46 Misc. 133, 93 N. Y. Suppl. 254; Kenworthy *v.* Brown, 45 Misc. 292, 92 N. Y. Suppl. 34; Barnard *v.* Press Pub. Co., 17 N. Y. Suppl. 573. See also Smid *v.* Bernard, 31 Misc. 35, 63 N. Y. Suppl. 278.

Ohio.— Powers *v.* Seaton, 2 Ohio Dec. (Reprint) 365, 2 West. L. Month. 532.

Pennsylvania.— Stoner *v.* Erisman, 206 Pa. St. 600, 56 Atl. 77; Gosling *v.* Morgan, 32 Pa. St. 273; Dottarer *v.* Bushey, 16 Pa. St. 204.

Wisconsin.—Van Slyke *v.* Carpenter, 7 Wis. 173.

United States.—Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188, 1 Blatchf. 588.

England.— Babonneau *v.* Farrell, 15 C. B. 360, 3 C. L. R. 42, 1 Jur. N. S. 114, 24 L. J. C. P. 9, 3 Wkly. Rep. 11, 80 E. C. L. 360; Barrett *v.* Long, 3 H. L. Cas. 395, 10 Eng. Reprint 154; Williams *v.* Gardiner, 5 L. J. Exch. 280, 1 M. & W. 245, 1 Tyrw. 578.

See 32 Cent. Dig. tit. "Libel and Slander," § 205.

Words in common use and well understood. — It is not necessary to allege the meaning of any word which is in common use and well understood, although such word, on account of its obscenity, is not inserted in any dictionary. Edgar *v.* McCutchen, 9 Mo. 768; Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121.

58. *Alabama.*—Williams *v.* Spears, 11 Ala. 138.

Delaware.— Donahoe *v.* Star Pub. Co., (1902) 53 Atl. 567.

Georgia.— Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687.

Indiana.— Dean *v.* Miller, 66 Ind. 440; Roella *v.* Follow, 7 Blackf. 377.

Maryland.— Lewis *v.* Daily News Co., 81 Md. 466, 32 Atl. 246, 29 L. R. A. 59.

Minnesota.— Sharpe *v.* Larson, 70 Minn. 209, 72 N. W. 961; Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388.

Missouri.— Edgar *v.* McCutchen, 9 Mo. 768.

Nebraska.— Williams *v.* Fuller, 68 Nebr. 354, 94 N. W. 118, (1903) 97 N. W. 246.

New Hampshire.— Robinson *v.* Keyser, 22 N. H. 323.

New Jersey.— Curley *v.* Feeney, 62 N. J. L. 70, 40 Atl. 678.

New York.— More *v.* Bennett, 48 N. Y. 472 [*reversing* 48 Barb. 229]; Collis *v.* Press Pub. Co., 68 N. Y. App. Div. 38, 74 N. Y. Suppl. 78; Keller *v.* Dean, 57 N. Y. App. Div. 7, 67 N. Y. Suppl. 842; Garby *v.* Bennett, 40 N. Y. App. Div. 163, 57 N. Y. Suppl. 853.

North Carolina.— Brittain *v.* Allen, 14 N. C. 167.

South Carolina.— Galloway *v.* Courtney, 10 Rich. 414.

United States.— Walker *v.* Tribune Co., 29 Fed. 827; Broad *v.* Deuster, 4 Fed. Cas. No. 1,908, 8 Biss. 265; Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121.

England.— Clegg *v.* Laffer, 10 Bing. 250, 3 L. J. C. P. 56, 3 Moore & S. 727, 25 E. C. L. 123; Harvey *v.* French, 1 Cromp. & M. 11, 1 L. J. Exch. 231, 2 Moore & S. 591, 2 Tyrw. 585, 28 E. C. L. 514; Kinahan *v.* McCullagh, Ir. R. 11 C. L. 1.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 206, 207.

59. Randall *v.* Evening News Assoc., 79 Mich. 266, 44 N. W. 783, 7 L. R. A. 309; Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320; Midland Pub. Co. *v.* Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298.

60. *Indiana.*— Roella *v.* Follow, 7 Blackf. 377.

Iowa.— Kinyon *v.* Palmer, 18 Iowa 377.

Maryland.— Jones *v.* Hungerford, 4 Gill & J. 402.

Michigan.— Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609 (holding that the Missouri statute prescribing a short form of innuendo does not dispense with the necessity of stating extrinsic facts in the inducement when required to render the charge actionable *per se*); Unterberger *v.* Scharff, 51 Mo. App. 102.

New York.— Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Suppl. 50.

South Dakota.—Kirby *v.* Martindale, (1905) 103 N. W. 648.

Texas.— Schulze *v.* Jalonick, (Civ. App. 1895) 29 S. W. 193.

Vermont.— Sanderson *v.* Hubbard, 14 Vt. 462; Wood *v.* Scott, 13 Vt. 42.

Wisconsin.— Kay *v.* Jansen, 87 Wis. 118, 58 N. W. 245.

(III) *Effect of Unnecessary Innuendo.* The innuendo may be treated as surplusage where it is used in connection with words which are unequivocal and actionable *per se*,[61] and it is held that where plaintiff in an action has, by innuendo, put a meaning upon the alleged defamatory publication which is not supported by its language or by proof, the court may nevertheless submit the case to the jury, if the publication is defamatory *per se*.[62] But where the communication is not actionable *per se* and the innuendo is used to impute a defamatory meaning, plaintiff is bound by the construction which he has given to the words in the innuendo.[63]

1. Understanding of Hearers — (I) *Ambiguous Statements.* Where the words declared are capable of conveying the defamatory meaning claimed for

England.— Rawlings *v.* Norbury, 1 F. & F. 341; Cox *v.* Cooper, 9 L. T. Rep. N. S. 329, 12 Wkly. Rep. 75.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 206, 207.

In Massachusetts, under statute, it has been held that innuendos are unnecessary and that a clear and concise statement of such things as are necessary to make the words intelligible in the same sense in which they were spoken is sufficient. Clarke *v.* Zettick, 153 Mass. 1, 26 N. E. 234. See also Young *v.* Cook, 144 Mass. 38, 10 N. E. 719.

61. *Colorado.* — Republican Pub. Co. *v.* Miner, 3 Colo. App. 568, 34 Pac. 485.

Illinois.— Schmisseur *v.* Kreilich, 92 Ill. 347. *Compare* Sanford *v.* Gaddis, 13 Ill. 329.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

Massachusetts.— Haynes *v.* Clinton Printing Co., 169 Mass. 512, 48 N. E. 275.

Michigan.— Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

Minnesota.— State *v.* Shippman, 83 Minn. 441, 86 N. W. 431.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Hudson *v.* Garner, 22 Mo. 423.

New Jersey.— Curley *v.* Feeney, 62 N. J. L. 70, 40 Atl. 678.

New York.— Martin *v.* Press Pub. Co., 93 N. Y. App. Div. 531, 87 N. Y. Suppl. 859 [*reversing* 40 Misc. 524, 83 N. Y. Suppl. 119]; Carroll *v.* White, 33 Barb. 615; Croswell *v.* Weed, 25 Wend. 621.

Rhode Island.— Brown *v.* Providence Telegram Pub. Co., 25 R. I. 117, 54 Atl. 1061.

South Carolina.— Gage *v.* Shelton, 3 Rich. 242.

Tennessee.— Haws *v.* Stanford, 4 Sneed 520.

Virginia.— Payne *v.* Tancil, 98 Va. 262, 35 S. E. 725.

Wisconsin.— Schofield *v.* Milwaukee Free Press Co., 126 Wis. 81, 105 N. W. 227, 2 L. R. A. N. S. 691; Kraus *v.* Sentinel Co., 60 Wis. 425, 19 N. W. 384.

England.— Harvey *v.* French, 1 Cromp. & M. 11, 1 L. J. Exch. 231, 2 Moore & S. 591, 2 Tyrw. 585, 58 E. C. L. 514; Barrett *v.* Long, 3 H. L. Cas. 395, 10 Eng. Reprint 154.

See 32 Cent. Dig. tit. "Libel and Slander," § 208.

Where an innuendo is necessary it forms a material part of the pleading and cannot be rejected as surplusage. Rodebaugh *v.* Hollingsworth, 6 Ind. 339.

62. Morrison *v.* Smith, 177 N. Y. 366, 69 N. E. 725 [*reversing* 83 N. Y. App. Div. 206, 82 N. Y. Suppl. 166]; Wuest *v.* Brooklyn Citizen, 102 N. Y. App. Div. 480, 92 N. Y. Suppl. 852 [*reversing* 38 Misc. 1, 76 N. Y. Suppl. 706]; Hilder *v.* Brooklyn Daily Eagle, 45 Misc. (N. Y.) 165, 91 N. Y. Suppl. 983 (holding that where plaintiff wishes to fall back on the natural meaning of the words used he should set forth in different counts the article with and without the innuendo); Watkin *v.* Hall, L. R. 3 Q. B. 396, 9 B. & S. 279, 37 L. J. Q. B. 125, 18 L. T. Rep. N. S. 561, 16 Wkly. Rep. 857 (holding under statute that words set out with an innuendo may be read as two counts, one with the innuendo and the other without it, and proof of either is sufficient). See also Martin *v.* Press Pub. Co., 40 Misc. (N. Y.) 524, 83 N. Y. Suppl. 119; Westbrook *v.* New York Sun Assoc., 32 Misc. (N. Y.) 37, 65 N. Y. Suppl. 399; Smid *v.* Bernard, 31 Misc. (N. Y.) 35, 63 N. Y. Suppl. 278. *Compare* Sanford *v.* Gaddis, 13 Ill. 329; Butler *v.* Wood, 10 How. Pr. (N. Y.) 222; Williams *v.* Stott, 1 Cromp. & M. 675, 3 L. J. Exch. 110, 2 L. J. Exch. 303, 3 Tyrw. 688; Maguire *v.* Knox, Ir. R. 5 C. L. 408.

63. *Arizona.*—Johnston *v.* Morrison, 3 Ariz. 109, 21 Pac. 465.

Connecticut.— Mix *v.* Woodward, 12 Conn. 262.

Illinois.— Merrill *v.* Marshall, 113 Ill. App. 447; Herrick *v.* Tribune Co., 108 Ill. App. 244.

Indiana.— Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New York.— Brown *v.* Tribune Assoc., 74 N. Y. App. Div. 359, 77 N. Y. Suppl. 461; Beecher *v.* Press Pub. Co., 60 N. Y. App. Div. 536, 69 N. Y. Suppl. 895.

Texas.— Patterson *v.* Frazer, (Civ. App. 1904) 79 S. W. 1077, 1082, where it is said: "It is a settled rule of law that, whenever a specific meaning is given to the terms of a libel or oral slander by connecting it with previous matter, the whole must be proved, as being essential to the nature and identity of the charge."

Vermont.— Kimmis *v.* Stiles, 44 Vt. 351.

them, and also equally capable of conveying some other and innocent meaning, there must be an averment and innuendo showing not only that the words were intended by plaintiff in a defamatory sense but that the hearers understood the language as conveying the alleged defamatory meaning.[64]

(II) *Foreign Language.* So as a general rule where defamatory words are published in a foreign language, the complaint should contain an averment that the hearers or persons addressed understood them.[65] But where the defamatory words, although published in a foreign language, are in the vernacular of the place of publication and unambiguous, an allegation that they were understood by the persons who heard them is unnecessary.[66]

m. Falsity. A petition for libel or slander which fails to allege that the words complained of are false is held to be demurrable.[67] But an allegation that the words contained in the publication are a libel has been held to be a sufficient allegation of falsity.[68] So where the publication charges an indictable offense the presumption of innocence has been held to be *prima facie* evidence of falsity and an allegation of falsity is unnecessary.[69]

n. Damages — (I) *General Damages* — (A) *In General.* If the words declared upon are actionable *per se* the law presumes damages,[70] and it is not necessary that special damages should be alleged; a general allegation that plaintiff has suffered damage by reason of the publication is sufficient.[71]

England.— Ruel *v.* Tatnell, 43 L. T. Rep. N. S. 507, 29 Wkly. Rep. 172.

64. *Alabama.*— Smith *v.* Gaffard, 33 Ala. 168.

California.— Maynard *v.* Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

Indiana.— Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54; Cosand *v.* Lee, 11 Ind. App. 511, 38 N. E. 1099.

Iowa.— Wilson *v.* Beighler, 4 Iowa 427.

England.— Woolnoth *v.* Meadows, 5 East 463, 2 Smith K. B. 28, 7 Rev. Rep. 742.

See 32 Cent. Dig. tit. "Libel and Slander," § 209.

If the charge is unambiguous, such an averment is unnecessary. Dudley *v.* Nowill, 11 N. Y. App. Div. 203, 42 N. Y. Suppl. 681.

If the publication in no way refers to plaintiff, it is necessary to aver that it was understood by some third person to refer to plaintiff. De Witt *v.* Wright, 57 Cal. 576.

65. Rich *v.* Scalio, 115 Ill. App. 166; Wormouth *v.* Cramer, 3 Wend. (N. Y.) 395, 20 Am. Dec. 706; Simonsen *v.* Herold Co., 61 Wis. 626, 21 N. W. 799; K. *v.* H., 20 Wis. 239, 91 Am. Dec. 397; Zeig *v.* Ort, 3 Pinn. (Wis.) 30; Amann *v.* Damm, 8 C. B. N. S. 597, 7 Jur. N. S. 47, 29 L. J. C. P. 313, 2 L. T. Rep. N. S. 322, 8 Wkly. Rep. 470, 98 E. C. L. 597; Fleetwood *v.* Curle, Cro. Jac. 557. *Compare* Atwinger *v.* Fellner, 46 Mo. 276 (decided under statute); Peters *v.* Morning Journal Assoc., 74 N. Y. App. Div. 305, 77 N. Y. Suppl. 597.

Setting out matter in foreign language see *supra*, VIII, E, 1, j, (III).

66. Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863; Bechtell *v.* Shatler, Wright (Ohio) 107. See also Heeney *v.* Kilbane, 59 Ohio St. 499, 53 N. E. 262.

67. Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531; Wabash R. Co. *v.* Young, 162 Ind. 102, 69 N. E. 1003, 4 L. R. A. N. S. 1091; Bottomly *v.* Bottomly, 80 Md. 159, 30 Atl. 706; Rice *v.* Albee, 164 Mass. 88, 41 N. E. 122. *Compare* Gutkes *v.* New York Produce Exch., 46 Misc. (N. Y.) 133, 93 N. Y. Suppl. 254; Schofield *v.* Milwaukee Free Press Co., 126 Wis. 81, 105 N. W. 227, 2 L. R. A. N. S. 691; Rowe *v.* Rooch, 1 M. & S. 304.

Sufficient averment of falsity.—An averment in a complaint for slander that defendant spoke "the false and scandalous words" sufficiently charges them to be false where the objection is by general demurrer. Haskins *v.* Jordan, 123 Cal. 157, 55 Pac. 786.

68. Hunt *v.* Bennett, 19 N. Y. 173.

69. Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768.

70. See *infra*, VIII, F, 1, d.

71. *Alabama.*— Johnson *v.* Robertson, 8 Port. 486.

District of Columbia.— Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Indiana.— De Pew *v.* Robinson, 95 Ind. 109.

Iowa.— Hicks *v.* Walker, 2 Greene 440.

Michigan.— Savlan *v.* Ayer, 129 Mich. 545, 89 N. W. 359.

Missouri.— Rammell *v.* Otis, 60 Mo. 365.

New Jersey.— See Marsh *v.* Edge, 68 N. J. L. 661, 54 Atl. 834.

New York.— Slayton *v.* Hemken, 91 Hun 582, 36 N. Y. Suppl. 249; Perkins *v.* Mitchell, 31 Barb. 461; Smid *v.* Bernard, 31 Misc. 35, 63 N. Y. Suppl. 278.

Ohio.— Cincinnati St. R. Co. *v.* Cincinnati Daily Tribune, 31 Cinc. L. Bul. 111.

Pennsylvania.— McIntyre *v.* Weinert, 195 Pa. St. 52, 45 Atl. 666.

Rhode Island.— O'Brien *v.* Times Pub. Co., 21 R. I. 256, 43 Atl. 101.

Texas.— Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805; Young *v.* Sheppard,

(B) *Injury to Business or Profession.* For published words which are actionable *per se* as tending to injure a man in his trade, business, or occupation, plaintiff is entitled to recover without any allegation of special damages.[72] But this rule does not dispense with the necessity of alleging special damages which are not such as the law can infer from the publication itself.[73]

(II) *Special Damages* — (A) *Words Actionable Per Se.* Where the imputation is actionable *per se* and damages sought to be recovered are not such as the law can infer from the nature of the defamation but depend upon the peculiar circumstances of the particular case, such damages must be specifically alleged in the complaint.[74]

(B) *Words Not Actionable Per Se* — (1) In General. When words in themselves not actionable become so by reason of some special damage, occasioned by them, such special damage must be particularly averred in the declaration.[75] In

(Civ. App. 1897) 40 S. W. 62; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

Wisconsin.— Scofield *v.* Milwaukee Free Press Co., 122 Wis. 88, 105 N. W. 227, 2 L. R. A. N. S. 691.

See 32 Cent. Dig. tit. "Libel and Slander," § 212.

Omission of prayer for relief.—A statement that defendant in uttering the words intended to injure and did injure plaintiff is sufficient under the North Carolina code, although there is no prayer for relief. Gattis *v.* Kilgo, 125 N. C. 133, 34 S. E. 246.

Alleging punitive or exemplary damages.— Under a statute requiring that the petition state separately the amount of punitive damages sought to be recovered, a prayer that plaintiff had been actually damaged in the sum of one thousand dollars, for which sum, together with the sum of nine thousand dollars as punitive damages, he prays judgment, is good. Midland Pub. Co. *v.* Implement Trade Journal Co., 108 Mo. App. 223, 83 S. W. 298. Where the complaint alleges damages to plaintiff's business and does not ask vindictive damages, it is not necessary to aver whether suit is for actual or exemplary damages. Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

72. *Maine.*— Barnes *v.* Trundy, 31 Me. 321.

Michigan.—Weiss *v.* Whittemore, 28 Mich. 366.

Minnesota.— Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615.

New York.— Moore *v.* Francis, 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214; Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Suppl. 109; Smid *v.* Bernard, 31 Misc. 35, 63 N. Y. Suppl. 278.

South Carolina.— Smith *v.* Bradstreet Co., 63 S. C. 525, 41 S. E. 763.

United States.— Chiatovich *v.* Hanchett, 88 Fed. 873.

England.— Whittington *v.* Gladwin, 5 B. & C. 180, 11 E. C. L. 420, 2 C. & P. 146, 12 E. C. L. 497, 7 D. & R. 649, 16 E. C. L. 310, 47 L. J. K. B. O. S. 125, 29 Rev. Rep. 212; Evans *v.* Harries, 1 H. & N. 251, 26 L. J. Exch. 31; Hartley *v.* Herring, 8 T. R. 130, 4 Rev. Rep. 614.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 212, 214.

General allegation of loss of trade held sufficient.— Weiss *v.* Whittemore, 28 Mich. 366; Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615. See also Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 23 Am. St. Rep. 474, 8 L. R. A. 524; Chiatovich *v.* Hanchett, 88 Fed. 873.

73. *District of Columbia.*— Cramer *v.* Cullinane, 2 MacArthur 197.

Georgia.— Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423.

New York.— Rembt *v.* Roehr Pub. Co., 71 N. Y. App. Div. 459, 75 N. Y. Suppl. 861.

United States.— Brinkmann *v.* Taylor, 103 Fed. 773.

England.— Delegal *v.* Highley, 3 Bing. N. Cas. 950, 32 E. C. L. 435, 8 C. & P. 444, 34 E. C. L. 827, 3 Hodges 158, 6 L. J. C. P. 337, 5 Scott 154.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 212, 214.

74. Couch *v.* Mining Journal Co., 130 Mich. 294, 89 N. W. 936; Hatt *v.* Evening News Assoc., 94 Mich. 119, 54 N. W. 766; Roberts *v.* Breckon, 31 N. Y. App. Div. 431, 52 N. Y. Suppl. 638; Brinkmann *v.* Taylor, 103 Fed. 773. See Broad *v.* Deuster, 4 Fed. Cas. No. 1,908, 8 Biss. 265, holding that while the omission of the pleading in this respect may render it obnoxious to a motion to make it more definite and certain, the pleading is not for such omission demurrable.

75. *Alabama.*— Ivey *v.* Pioneer Sav., etc., Co., 113 Ala. 349, 21 So. 531.

Arkansas.— Studdard *v.* Trucks, 31 Ark. 726.

Georgia.— Ford *v.* Lamb, 116 Ga. 655, 42 S. E. 998; Van Epps *v.* Jones, 50 Ga. 238.

Illinois.— Strauss *v.* Meyer, 48 Ill. 385.

Kentucky.— Manire *v.* Hubbard, 110 Ky. 311, 61 S. W. 466, 22 Ky. L. Rep. 1753; Windisch-Mulhauser Brewing Co. *v.* Bacon, 53 S. W. 520, 21 Ky. L. Rep. 928.

Maine.— Barnes *v.* Trundy, 31 Me. 321.

Minnesota.— Metcalf *v.* Collinson, 95 Minn. 238, 103 N. W. 1022.

New York.— Maglio *v.* New York Herald Co., 83 N. Y. App. Div. 44, 82 N. Y. Suppl. 509; Willis *v.* Eclipse Mfg. Co., 81 N. Y. App. Div. 591, 81 N. Y. Suppl. 359; Langdon

such case it is necessary that the declaration should set forth precisely in what way the special damage resulted from the publication of the words. It is not sufficient to allege generally that plaintiff has suffered special damages.[76] The special damages thus alleged must be the natural and probable consequences of the publication.[77]

(2) Injury to Business or Profession. A petition declaring on a publication which, although not actionable *per se*, causes loss to plaintiff in his business or profession must allege the particular contracts, sales, employments, customers, patients, or clients, as the case may be, lost by reason of the publication.[78] But it has been held that the rule is relaxed where the individuals may be supposed

v. Shearer, 43 N. Y. App. Div. 607, 60 N. Y. Suppl. 193; Bassil *v.* Elmore, 65 Barb. 627; Rade *v.* Press Pub. Co., 37 Misc. 254, 75 N. Y. Suppl. 298; Smid *v.* Bernard, 31 Misc. 35, 63 N. Y. Suppl. 278; Havemeyer *v.* Fuller, 10 Abb. N. Cas. 9, 60 How. Pr. 316; Bell *v.* Sun Printing, etc., Assoc., 3 Abb. N. Cas. 157; Caldwell *v.* Raymond, 2 Abb. Pr. 193.

South Carolina.— Boyd *v.* Brent, 1 Treadw. 101.

Wisconsin.— Geary *v.* Bennett, 65 Wis. 554, 27 N. W. 335.

United States.— Dun *v.* Maier, 82 Fed. 169, 27 C. C. A. 100.

England.— Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 217, 6 L. J. C. P. 32, 3 Scott 723, 32 E. C. L. 176.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 213, 213½.

See also *infra*, VIII, E, 7, c.

76. *Colorado.*— Bush *v.* McMann, 12 Colo. App. 504, 55 Pac. 956.

Massachusetts.— Doyle *v.* Kirby, 184 Mass. 409, 68 N. E. 843; Cook *v.* Cook, 100 Mass. 194.

Montana.— Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

New Hampshire.— Woodbury *v.* Thompson, 3 N. H. 194.

New York.— King *v.* Sun Printing, etc., Co., 179 N. Y. 600, 72 N. E. 1144 [*affirming* 84 N. Y. App. Div. 310, 82 N. Y. Suppl. 787]; Robertson *v.* New York Press Co., 2 N. Y. App. Div. 49, 37 N. Y. Suppl. 187; Woodruff *v.* Bradstreet Co., 35 Hun 16 [*affirmed* in 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555]; Stiebeling *v.* Lockbaus, 21 Hun 457; Bassil *v.* Elmore, 65 Barb. 627; Martin *v.* Press Pub. Co., 40 Misc. 524, 83 N. Y. Suppl. 119; Smid *v.* Bernard, 31 Misc. 35, 63 N. Y. Suppl. 278. See also Ratzel *v.* New York News Pub. Co., 67 N. Y. App. Div. 598, 73 N. Y. Suppl. 849, holding that an allegation of a statement to plaintiff by defendant that the latter would make it uncomfortable and hot for plaintiff adds nothing to the strength of a complaint not actionable.

Rhode Island.— Canning *v.* Owen, 24 R. I. 233, 52 Atl. 1027.

Tennessee.— Kansas City, etc., R. Co. *v.* Delaney, 102 Tenn. 289, 52 S. W. 151, 45 L. R. A. 600; Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568.

Texas.— Hitzfelder *v.* Koppelmann, 30 Tex. Civ. App. 162, 70 S. W. 353.

Vermont.— Hoar *v.* Ward, 47 Vt. 657.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

England.— Dwyer *v.* Meehan, L. R. 18 Ir. 138; Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 217, 6 L. J. C. P. 32, 3 Scott 723, 32 E. C. L. 176.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 213, 213½.

77. *District of Columbia.*— Cramer *v.* Cullinane, 2 MacArthur 197.

Georgia.— Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423.

New York.— Raines *v.* New York Press Co., 92 Hun 515, 37 N. Y. Suppl. 45.

Rhode Island.— Canning *v.* Owen, 24 R. I. 233, 52 Atl. 1027.

United States.— Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

England.— Chamberlain *v.* Boyd, 11 Q. B. D. 407, 47 J. P. 372, 52 L. J. Q. B. 277, 48 L. T. Rep. N. S. 328, 31 Wkly. Rep. 572; Société Francaise des Asphaltes *v.* Farrell, Cab. & E. 563; Rustell *v.* Macquister, 1 Camph. 49 note; Vicars *v.* Wilcocks, 8 East 1, 9 Rev. Rep. 361; Ashley *v.* Harrison, 1 Esp. 48, 1 Peake N. P. 194, 3 Rev. Rep. 686; Dixon *v.* Smith, 5 H. & N. 450, 29 L. J. Exch. 125.

78. *Georgia.*— Watters *v.* Retail Clerks Union No. 479, 120 Ga. 424, 47 S. E. 911. See also Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423.

Illinois.— See American Ins. Co. *v.* France, 111 Ill. App. 382.

Massachusetts.— See Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524; Dudley *v.* Briggs, 141 Mass. 582, 6 N. E. 717, 55 Am. Rep. 494.

Missouri.— Rammell *v.* Otis, 60 Mo. 365.

Montana.— Ledlie *v.* Wallen, 17 Mont. 150, 42 Pac. 289.

New Jersey.— See Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 67 Am. Dec. 400.

New York.— King *v.* Sun Printing, etc., Assoc., 84 N. Y. App. Div. 310, 82 N. Y. Suppl. 787; Bosi *v.* New York Herald Co., 58 N. Y. App. Div. 619, 68 N. Y. Suppl. 1134 [*affirming* 33 Misc. 622, 68 N. Y. Suppl. 898]; Langdon *v.* Shearer, 43 N. Y. App. Div. 607, 60 N. Y. Suppl. 193; Erwin *v.* Dezell, 64 Hun 391, 19 N. Y. Suppl. 784; Verbeck *v.* Duryea, 36 Misc. 242, 73 N. Y. Suppl. 346; Smid *v.* Bernard, 31 Misc. 35,

to be unknown to defendant, where it is impossible to specify them, or where they are so numerous as to excuse a specific description on the ground of inconvenience.[79]

o. Verification. A statute providing that all pleadings shall be verified applies to an action for libel.[80]

2. Plea, Answer, or Counter-Claim[81] — **a. In General** — (i) *Necessity For Answering Entire Declaration.* It is essential that the plea in order to constitute a complete defense should answer the whole ground of action relied on in the petition.[82] But where there are separate and distinct charges in the same libel or slander it is sufficient if the whole is answered by different pleas.[83] Where the petition alleges two distinct defamatory charges, defendant may deny one and plead the truth in justification of the other.[84]

(ii) *Scandalous Matter in Defense.* Allegations in a plea necessary to show the truth of the defamation complained of should not be stricken out, although they are in their nature scandalous.[85]

(iii) *Setting Forth Entire Publication.* Where the complaint sets forth only a portion of a libelous article, the answer cannot set forth the remainder of the article if it in no way affects the meaning of what is set forth in the complaint.[86] But it has been held that defendant may allege and admit the publication by him of an article, a copy of which is annexed to his answer, and deny that he published the alleged libelous article as set forth in the complaint.[87] It has been held that in a suit for libel in a newspaper, the publication being founded upon, but partially different from, an article written by defendant for the newspaper, defendant cannot be required to set out in the answer the original communication sent to the paper.[88]

b. Specific Defenses Considered — (i) *Plaintiff Not Real Party in Interest.* An allegation that plaintiff is not the real party in interest, but that the action is prosecuted by some one else in plaintiff's name, is not irrelevant.[89]

63 N. Y. Suppl. 278; Flatow *v.* Von Bremsen, 11 N. Y. Suppl. 680, 19 N. Y. Civ. Proc. 125.

Texas.— Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

Virginia.— Reusch *v.* Roanoke Cold Storage Co., 91 Va. 534, 22 S. E. 358. See also Moore *v.* Rolin, 89 Va. 107, 15 S. E. 520, 16 L. R. A. 625.

United States.— Walker *v.* Tribune Co., 29 Fed. 827.

See 32 Cent. Dig. tit. "Libel and Slander," § 214.

Under the Massachusetts Practice Act it has been held that an objection that damages have not been alleged with sufficient particularity cannot prevail where it is not specifically stated in the causes of demurrer. Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524; McLoughlin *v.* American Circular Loom Co., 125 Fed. 203, 60 C. C. A. 87, construing Mass. Rev. Laws, c. 173, § 15.

79. Trenton Mut. L., etc., Ins. Co. *v.* Perrine, 23 N. J. L. 402, 67 Am. Dec. 400. See also Weiss *v.* Whittemore, 28 Mich. 366.

80. Berea College *v.* Powell, 77 S. W. 382, 25 Ky. L. Rep. 1220.

81. Forms of pleas or answers will be found set out in full, in part, or in substance in Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Jansen *v.* Fischer, 45 Misc. (N. Y.) 361, 90 N. Y. Suppl. 346.

82. McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Plea held sufficient.—A complaint alleging that plaintiff was an attorney and that defendant had charged him with being a "shyster" is properly met by a denial that plaintiff was an attorney. Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

83. Van Derveer *v.* Sutphin, 5 Ohio St. 293; Smith *v.* Tribune Co., 22 Fed. Cas. No. 13,118, 4 Biss. 477.

84. Waltenberg *v.* Bernhard, 26 Misc. (N. Y.) 659, 56 N. Y. Suppl. 396.

85. Wuensch *v.* Morning Journal Assoc., 4 N. Y. App. Div. 110, 38 N. Y. Suppl. 605.

86. Oleson *v.* Journal Printing Co., 47 Minn. 300, 50 N. W. 80; Burnham *v.* Franklin, 44 Misc. (N. Y.) 299, 89 N. Y. Suppl. 917; Bremridge *v.* Latimer, 10 L. T. Rep. N. S. 816, 12 Wkly. Rep. 878.

87. Burnham *v.* Franklin, 44 Misc. (N. Y.) 299, 89 N. Y. Suppl. 917.

88. Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235. *Compare* Rolker *v.* Gonzalez, 32 N. Y. App. Div. 224, 52 N. Y. Suppl. 1000.

89. Moody *v.* Libbey, 1 Abb. N. Cas. (N. Y.) 154.

(II) *Insanity or Mental Derangement.* In order that insanity or monomania on the subject-matter of the charge may be a defense, it must be directly alleged in the plea or answer.[90]

(III) *Denial of Publication.* It is competent for defendant to deny that he published or was responsible for the publication of the libelous or slanderous matter.[91]

(IV) *Denial of Malice or Intent.* It has been held that where the alleged publication is actionable *per se* and not privileged, the allegation in the complaint of the malicious intent of defendant in making the publication is immaterial and it is not necessary for defendant to admit or controvert the same.[92] But defendant may in his answer show either by the entire publication or by extrinsic facts and circumstances that there was no design or intent to impute the actionable charge laid in the petition,[93] it being intimated that if the allegations of the complaint in this regard are not denied they will be admitted.[94]

(V) *Publication Made on the Authority of Another.* In jurisdictions where it is a good defense to show that the words were repeated on the authority of another, it has been held that such defense must be specially pleaded, and it must be averred that the charge was made known to defendant by some third person named in the plea, and that such person had in fact made the statement.[95]

(VI) *Denial of Meaning Attributed in Innuendo.* If the words are ambiguous a denial of the meaning attached to them by the innuendo in the complaint is good.[96]

(VII) *Denial of Marital Relation Between Plaintiffs.* In an action

90. Fisher *v.* Tice, 20 Iowa 479, holding that an allegation that plaintiff "resorted to every means to vex and injure the defendant, knowing him to be insane on the subject of his lost claim," and that the alleged libelous words were used in regard to his loss of such claim, does not set up insanity or monomania so as to constitute a defense.

91. Samuels *v.* Evening Mail Assoc., 52 N. Y. 625.

Denials held insufficient.— A denial that plaintiff uttered the precise words at the precise time as stated in the complaint is bad. Salinger *v.* Lusk, 7 How. Pr. (N. Y.) 430. So an allegation that defendant had no recollection of speaking the slanderous words and that therefore he denied that he ever spoke them is not a denial of the charge. McCauley *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291.

Identity of person libeled.—Where defendant at the trial first objects that the complaint does not allege that the libel was published of and concerning plaintiff, the averments in the answer may be considered in determining plaintiff's identity with the person libeled. Jacquelin *v.* Morning Journal Assoc., 39 N. Y. App. Div. 515, 57 N. Y. Suppl. 299.

92. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54. See also Belt *v.* Lawes, 51 L. J. Q. B. 359.

Effect of denial of malice.— Defendant by denying that he wilfully, wantonly, and maliciously spoke the slanderous words in the presence of the persons named in the petition does not deny the speaking of the words, but only the malice and attendant circumstances. Lamberson *v.* Long, 66 Mo. App. 253.

93. Sollitt *v.* Moore, 107 Ill. App. 479; McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Carmichael *v.* Shiel, 21 Ind. 66; Wilkin *v.* Tharp, 55 Iowa 609, 8 N. W. 467.

Matter set up by special plea.— Parker *v.* McQueen, 8 B. Mon. (Ky.) 16; Brite *v.* Gill, 2 T. B. Mon. (Ky.) 65, 15 Am. Dec. 122.

94. Wilkin *v.* Tharp, 55 Iowa 609, 8 N. W. 467. But see Fry *v.* Bennett, 5 Sandf. (N. Y.) 54.

95. Parker *v.* McQueen, 8 B. Mon. (Ky.) 16; Robinson *v.* Harvey, 5 T. B. Mon. (Ky.) 519. See also Shaw *v.* Grant, Tapp. (Ohio) 157. *Compare* Hogan *v.* Brown, 12 Fed. Cas. No. 6,581, 1 Cranch C. C. 75 (holding that where the fact appears from plaintiff's testimony defendant may take advantage of it, although he does not specially plead it); Lewis *v.* Walter, 4 B. & Ald. 605, 23 Rev. Rep. 415, 6 E. C. L. 620.

When plea demurrable.— Such defense is demurrable where the libelous statement purports on its fact to be made on the personal knowledge of the writer. Clifton *v.* Lange, 108 Iowa 472, 79 N. W. 276.

96. Hollingsworth *v.* Spectator Co., 53 N. Y. App. Div. 291, 65 N. Y. Suppl. 812; McGregor *v.* Gregory, 2 Dowl. P. C. N. S. 769, 12 L. J. Exch. 204, 11 M. & W. 287.

Denial held insufficient.— In Barr *v.* Birkner, 44 Nebr. 197, 62 N. W. 494, it was held that an averment that the publication "was not in the sense of nor with the intent to convey the idea" claimed in the petition was not a denial that the words had the signification alleged in the innuendo.

at common law by plaintiff and his wife for slander of the wife, a denial that the parties were husband and wife is a good plea in bar.[97]

(VIII) *DENIAL OF ALLEGATION OF GOOD CHARACTER.* Defendant may deny plaintiff's allegation of good character,[98] although failure to do so is not an admission that the publication was false.[99]

(IX) *GENERAL DENIAL.* A general denial has been held to be a good plea in an action for libel.[1]

(X) *STATUTE OF LIMITATIONS.*[2] Defendant must plead the statute of limitations in order to avail himself of it as a defense.[3]

(XI) *PRIVILEGE*—(A) *Necessity For Pleading.* Defendant may at common law under the plea of general issue set up the defense that the words were published upon a privileged occasion.[4] But under statutes in several jurisdictions it is required that the defense should be specially pleaded.[5]

(B) *Matters Essential to Proper Plea.* It is necessary that a special plea shall contain facts sufficient to show that the publication was made on a privileged occasion.[6] Defendant must also allege that he acted without malice,[7] except where the words are absolutely privileged.[8] It has been held, however, that he need not allege in addition to the averment of want of malice that he believed the statements complained of to be true.[9] The plea of privilege is in

97. Chantler *v.* Lindsey, 4 D. & L. 339, 16 L. J. Exch. 16, 16 M. & W. 82.

Actions by husband and wife for libel or slander generally see HUSBAND AND WIFE, 21 Cyc. 1529.

98. Smith *v.* Ottendorfer, 3 N. Y. St. 187.

99. Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

1. Johnson *v.* Stehhins, 5 Ind. 364; Batterman *v.* Journal Co., 28 Misc. (N. Y.) 375, 59 N. Y. Suppl. 965, holding that an answer that defendant "has no knowledge or information as to any of the matters therein contained sufficient to form a belief" is good. *Compare* Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. (N. Y.) 74, 85 N. Y. Suppl. 570 [*affirmed* in 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375].

2. Limitations of actions generally see LIMITATIONS OF ACTIONS.

3. Norris *v.* Elliott, 39 Cal. 72; Dubois *v.* Robbins, 115 Ill. App. 372; Brickett *v.* Davis, 21 Pick. (Mass.) 404.

4. See *infra*, VIII, E, 7, h, text and note 85.

5. See *infra*, VIII, E, 7, h, text and note 86.

6. *Iowa.*— Cherry *v.* Des Moines Leader, 114 Iowa 298, 86 N. W. 323, 89 Am. St. Rep. 365, 54 L. R. A. 855.

Kentucky.— Morgan *v.* Booth, 13 Bush 480.

Maryland.— Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Missouri.— Jones *v.* Brownlee, 161 Mo. 258, 61 S. W. 795, 53 L. R. A. 445.

New York.— Jeffras *v.* McKillop, etc., Co., 4 Thomps. & C. 578; Suydam *v.* Moffat, 1 Sandf. 459; Zilver *v.* Cooper, 37 Misc. 158, 74 N. Y. Suppl. 850.

England.— Smith *v.* Thomas, 2 Bing. N. Cas. 372, 4 Dowl. P. C. N. S. 333, 1 Hodges 353, 5 L. J. C. P. 52, 2 Scott 546, 29 E. C. L. 578.

Canada.— Crow's Nest Pass Coal Co. *v.* Bell, 4 Ont. L. Rep. 660.

See 32 Cent. Dig. tit. "Libel and Slander," § 218.

A defense that the words were spoken before the session of a church need not allege that the rules of the church constituted the elders a session and the pastor (defendant) the moderator thereof. Kleizer *v.* Symmes, 40 Ind. 562.

Under the code permitting a partial defense in mitigation, defendant may set up that the publication was in part a fair and correct account of a judicial proceeding. Bissell *v.* Press Pub. Co., 62 Hun (N. Y.) 551, 17 N. Y. Suppl. 393.

Joinder of plea of privilege to plea of justification.— A plea alleging that the words were privileged and also that they were true is merely a plea of justification. Etchison *v.* Pergerson, 88 Ga. 620, 15 S. E. 680.

7. Buddington *v.* Davis, 6 How. Pr. (N. Y.) 401; O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26; How *v.* Bodman, 1 Handy (Ohio) 528, 12 Ohio Dec. (Reprint) 272; McKnight *v.* Hasbrouck, 17 R. I. 70, 20 Atl. 95; Smith *v.* Thomas, 2 Bing. N. Cas. 372, 4 Dowl. P. C. N. S. 333, 1 Hodges 353, 5 L. J. C. P. 52, 2 Scott 546, 29 E. C. L. 578. *Compare* Robinson *v.* Hatch, 55 How. Pr. (N. Y.) 55.

Declarations of an attorney outside of court and in a private conversation may be pleaded to show good faith of defendant in making a report of judicial proceedings. Desjardins *v.* Berthiaume, 16 Quebec Super. Ct. 506.

8. Garr *v.* Seldon, 4 N. Y. 91; Torrey *v.* Field, 10 Vt. 353; Johnson *v.* Brown, 13 W. Va. 71.

9. McKnight *v.* Hasbrouck, 17 R. I. 70, 20 Atl. 95. *Compare* O'Donaghue *v.* McGovern, 23 Wend. (N. Y.) 26.

Rule applied to publication absolutely privileged.— Torrey *v.* Field, 10 Vt. 353; Johnson *v.* Brown, 13 W. Va. 71.

the nature of a confession and avoidance, and the admission, to be of any avail in such defense, must be as broad as the charge.[10]

(c) *Hypothetical Plea.* A hypothetical defense that the words, if spoken, were spoken under certain specific circumstances rendering them privileged has been held to be good.[11]

(XII) *JUSTIFICATION*—(A) *In General.* The truth must be specially pleaded in order to be available as a defense,[12] unless the petition shows upon its face that the charge is true, in which case a demurrer will lie.[13] The answer should contain a distinct averment that the defamatory matter charged is true.[14]

(B) *Justification of Charged as Laid in the Petition*—(1) IN GENERAL. The plea of justification in an action for damages for libel or slander must as a general rule justify the same words alleged in the declaration, complaint, or petition, or so much of them as are actionable, and it is no defense to aver and justify similar words spoken or written by defendant.[15] On the other hand, however, it has been intimated that an answer in justification is sufficient if the substance of the defamatory matter be justified.[16] Defendant is bound to more than a mere

Belief in pertinency of matter claimed to be absolutely privileged.—It has been held not to be necessary in setting up an absolute privilege to aver that defendant believed the matter to be pertinent and material to the subject-matter of the privileged occasion. Torrey *v.* Field, 10 Vt. 353. *Compare* Johnson *v.* Brown, 13 W. Va. 71.

10. Thus a charge of libel in a given writing is not answered by an admission of another writing which is privileged, although the latter is set out by way of inducement in the complaint. Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

11. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81; Kleizer *v.* Symmes, 40 Ind. 562. *Compare* Buddington *v.* Davis, 6 How. Pr. (N. Y.) 401.

12. See *infra*, VIII, E, 7, e, (II), text and notes 64, 65.

Plea construed against pleader.—It has been stated that pleas of justification are to be construed most strongly against the pleader. Gage *v.* Robinson, 12 Ohio 250; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

Demurrer to justification.—Where an answer practically amounts to a justification it should be so treated unless demurred to. Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

One general plea of justification cannot be filed to a declaration containing three counts for three distinct libels. Honess *v.* Stubbs, 7 C. B. N. S. 555, 6 Jur. N. S. 682, 29 L. J. C. P. 220, 8 Wkly. Rep. 188, 97 E. C. L. 555.

Justification dependent upon facts in litigation.—Where defendant justifies the charge that plaintiff is the infringer of his patent, the issue cannot be determined until a suit pending in relation to the patent has been determined in the United States courts. C. S. Burt Co. *v.* Casey, etc., Mfg. Co., 107 La. 231, 31 So. 667.

Time of making plea.—It has been held that justification is an issuable plea within the rule of court and may be pleaded on setting aside an order for judgment. Woodward *v.* Andrews, 1 Brev. (S. C.) 310 [*citing* Lowfield *v.* Jackson, 2 Wils. C. P. 117].

A plea of justification to a complaint declaring on words as insults leading to a breach of the peace must traverse the allegation "that the words were spoken in a manner to insult." An ordinary plea of justification is not sufficient. Crawford *v.* Mellton, 12 Sm. & M. (Miss.) 328.

13. Rollins *v.* Louisville Times Co., 90 S. W. 1081, 28 Ky. L. Rep. 1054.

14. Thrall *v.* Smiley, 9 Cal. 529; Kelly *v.* Taintor, 48 How. Pr. (N. Y.) 270.

Plea of reasonable belief insufficient.—The plea must allege the truth and not that defendant has good reason to believe it to be true. Smith *v.* Johnson, 69 Vt. 231, 39 Atl. 198. *Compare* Moore *v.* Edmiston, 70 N. C. 510.

Averment of good faith unnecessary.—It is not necessary to aver that the words were spoken with good motives and for justifiable ends. Larson *v.* Cox, 68 Nebr. 44, 93 N. W. 1011; McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415.

15. *Iowa.*—Halley *v.* Gregg, 82 Iowa 622, 8 N. W. 974.

Michigan.—Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

New York.—Daly *v.* Byrne, 1 Abb. N. Cas. 150.

Pennsylvania.—Frederitze *v.* Odenwalder, 2 Yeates 243.

Vermont.—Skinner *v.* Grant, 12 Vt. 456.

Wisconsin.—Dufresne *v.* Weise, 46 Wis. 290, 1 N. W. 59.

United States.—Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352.

England.—Rassam *v.* Budge, [1893] 1 Q. B. 571, 57 J. P. 361, 62 L. J. Q. B. 312, 68 L. T. Rep. N. S. 717, 5 Reports 336, 41 Wkly. Rep. 377.

See 32 Cent. Dig. tit. "Libel and Slander," § 219.

16. Walford *v.* Herald Printing, etc., Co., 133 Ind. 372, 32 N. E. 927. See also Coe *v.* Griggs, 76 Mo. 619.

literal justification; he must justify the substance of the publication, its character, and imputations.[17]

(2) Justifying Innuendos. A plea of justification admits the truth of innuendos which are proper inferences from the defamatory matter,[18] and hence where defendant sets up the truth he must justify the words in the sense in which the innuendo explains them,[19] unless the innuendo enlarges the natural and ordinary sense of the language of the publication or otherwise places a forced construction thereon.[20]

(3) Justification Coextensive With Charge. The plea of justification must be as broad as the defamatory charge made in the publication, and a statement of facts showing the truth of a part only cannot operate as a complete defense.[21] But so much of the publication as adds nothing to its defamatory

17. *Minnesota.*— Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787.

Missouri.— Nelson *v.* Musgrave, 10 Mo. 648.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New York.— Fidler *v.* Delavan, 20 Wend. 57.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652.

England.— Morrison *v.* Harmer, 3 Bing. N. Cas. 759, 3 Hodges 108, 4 Scott 524, 32 E. C. L. 349; Alexander *v.* North Eastern R. Co., 6 B. & S. 240, 11 Jur. N. S. 619, 34 L. J. Q. B. 152, 13 Wkly. Rep. 651, 11 E. C. L. 340; Gwynn *v.* South Eastern R. Co., 18 L. T. Rep. N. S. 738.

See 32 Cent. Dig. tit. "Libel and Slander," § 219.

18. Downey *v.* Dillon, 52 Ind. 442; Fidler *v.* Delavan, 20 Wend. (N. Y.) 57.

19. *Indiana.*— Downey *v.* Dillon, 52 Ind. 442; Ricket *v.* Stanley, 6 Blackf. 169; Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867.

Kansas.— Grubb *v.* Elder, 67 Kan. 316, 72 Pac. 790.

Michigan.— Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501.

New York.— Westervelt *v.* New York Times Co., 91 N. Y. App. Div. 72, 86 N. Y. Suppl. 454; Hilder *v.* Brooklyn Daily Eagle, 45 Misc. 165, 91 N. Y. Suppl. 983; Fidler *v.* Delavan, 20 Wend. 57.

North Carolina.— Snow *v.* Witcher, 31 N. C. 346.

Ohio.— Gage *v.* Robinson, 12 Ohio 250.

Rhode Island.— Ames *v.* Hazard, 8 R. I. 143.

Vermont.— Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247; Royce *v.* Maloney, 57 Vt. 325.

United States.— Cunningham *v.* Underwood, 116 Fed. 803, 53 C. C. A. 99.

See 32 Cent. Dig. tit. "Libel and Slander," § 219.

In Tennessee it has been held that defendant may plead the truth of the language used by him without regard to any innuendo that may have been employed in the declaration. Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 733, 23 S. W. 131, where the court said: "It would violate every canon of common sense and good pleading to hold that a defendant cannot justify the speaking of the words or the publication of the libel without at the same time admitting the truth of some far-fetched and extravagant meaning started in the imagination of the pleader or evolved from the morbid brain of his client, and introduced into the declaration in the form of an innuendo."

20. Walford *v.* Herald Printing, etc., Co., 133 Ind. 372, 32 N. E. 929; Ames *v.* Hazard, 8 R. I. 143. See also Biggs *v.* Great Eastern R. Co., 18 L. T. Rep. N. S. 482, 16 Wkly. Rep. 908.

21. *Florida.*— Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Illinois.— Rice *v.* Aleshire, 72 Ill. App. 455; Gault *v.* Babbitt, 1 Ill. App. 130.

Indiana.— Palmer *v.* Adams, 137 Ind. 72, 36 N. E. 695; Johnson *v.* Stebbins, 5 Ind. 364.

Iowa.— Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Wallace *v.* Homestead Co., 117 Iowa 348, 90 N. W. 835; Clifton *v.* Lange, 108 Iowa 472, 79 N. W. 276.

Kansas.— Grubb *v.* Elder, 67 Kan. 316, 72 Pac. 790.

Maryland.— Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732.

Michigan.— McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

Minnesota.— Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787; Palmer *v.* Smith, 21 Minn. 419.

New York.— Wachter *v.* Quenzer, 29 N. Y. 547; Stock *v.* Keele, 86 N. Y. App. Div. 136, 83 N. Y. Suppl. 133; Baldwin *v.* Genung, 70 N. Y. App. Div. 271, 74 N. Y. Suppl. 835; Morse *v.* Press Pub. Co., 49 N. Y. App. Div. 375, 63 N. Y. Suppl. 423; Kingsley *v.* Kingsley, 79 Hun 569, 29 N. Y. Suppl. 921; Feely *v.* Jones, 79 Hun 18, 29 N. Y. Suppl. 440; Burnham *v.* Franklin, 44 Misc. 299, 89 N. Y. Suppl. 917; Christianson *v.* O'Neil, 39 Misc. 11, 78 N. Y. Suppl. 757; Zilver *v.* Cooper, 37 Misc. 158, 74 N. Y. Suppl. 850; Lowe *v.* Bennett, 27 Misc. 356, 58 N. Y. Suppl. 88; Mattice *v.* Wilcox, 13 N. Y. Suppl. 330

character need not be justified, such as unmeaning adjectives and epithets which do not qualify, color, or intensify the tone or sentiment of the publication.[22]

(c) *Admitting the Publication.* A plea of justification in an action for slander or libel must admit that defendant uttered or published the defamatory matter.[23] Thus a plea of justification in a hypothetical or conditional form is bad.[24]

(d) *Setting Forth the Facts* — (1) In General. Where the defamatory charge is general in its nature, the plea must state specifically the acts or offenses of which plaintiff is guilty or the other facts showing the truth of the charge. A mere assertion that the charge is true is not sufficient.[25] It has been held,

[*affirmed* in 129 N. Y. 633, 29 N. E. 1030]; Daly *v.* Byrne, 1 Abb. N. Cas. 150; Loveland *v.* Hosmer, 8 How. Pr. 215; Fidler *v.* Delavan, 20 Wend. 57; Powers *v.* Skinner, 1 Wend. 451.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Rhode Island.— Ames *v.* Hazard, 8 R. I. 143, 147, where it is said: "The substance of the libel,— its main charges,— may be stated in connection with circumstances of time, place, parties, or position of the most aggravating character. These intensify the main charge, and are in themselves libelous, and therefore it is, that not the main charge alone, but all distinct collateral libelous imputations must be justified. . . . The defendant must justify everything which was injurious to the plaintiff. If the libel charges the commission of an offence in a particular manner, the plea must not only justify the fact, but the manner. If the offence be charged with circumstances of aggravation, these must be justified as well as the crime."

Vermont.— Holton *v.* Muzzy, 30 Vt. 365.

United States.— Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384; Cook *v.* Tribune Assoc., 6 Fed. Cas. No. 3,165, 5 Blatchf. 352; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8; Smith *v.* Tribune Co., 22 Fed. Cas. No. 13,118, 4 Biss. 477.

England.— Cooper *v.* Lawson, 8 A. & E. 746, 2 Jur. 919, 8 L. J. Q. B. 9, 1 P. & D. 15, 1 W. W. & H. 601, 35 E. C. L. 823; Ingram *v.* Lawson, 1 Arn. 387, 5 Bing. N. Cas. 66, 7 Dowl. P. C. 125, 3 Jur. 73, 8 L. J. C. P. 1, 6 Scott 775, 35 E. C. L. 45, Roberts *v.* Brown, 10 Bing. 519, 3 L. J. C. P. 168, 4 Moore & S. 407, 25 E. C. L. 248; Clarkson *v.* Lawson, 6 Bing. 266, 8 L. J. C. P. O. S. 36, 3 M. & P. 605, 19 E. C. L. 127; Edwards *v.* Bell, 1 Bing. 403, 8 E. C. L. 568; Morrison *v.* Harmer, 3 Bing. N. Cas. 759, 3 Hodges 108, 4 Scott 524, 32 E. C. L. 349; Smith *v.* Parker, 2 D. & L. 394, 14 L. J. Exch. 52, 13 M. & W. 459; Edsall *v.* Russell, 2 Dowl. P. C. N. S. 641, 6 Jur. 996, 12 L. J. C. P. 4, 4 M. & G. 1090, 5 Scott N. R. 801, 43 E. C. L. 560.

See 32 Cent. Dig. tit. "Libel and Slander," § 219.

22. Ames *v.* Hazard, 8 R. I. 143.

23. *Delaware.*— Donahoe *v.* Star Pub. Co., 3 Pennew. 545, 53 Atl. 1028.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Kentucky.— Samuel *v.* Bond, Litt. Sel. Cas. 158.

Missouri.— Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579.

Ohio.— Davis *v.* Mathews, 2 Ohio 257.

See 32 Cent. Dig. tit. "Libel and Slander," § 220.

24. Buddington *v.* Davis, 6 How. Pr. (N. Y.) 401; Sayles *v.* Wooden, 6 How. Pr. (N. Y.) 84, Code Rep. N. S. 409; Porter *v.* McCreedy, Code Rep. N. S. (N. Y.) 88 (holding that defendant must admit or deny or set up new matter in avoidance, but that he cannot deny that he uttered the words, and then suggest hypothetically that if he did, he uttered them in reference to a certain contract); Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730. *Compare* Buhler *v.* Wentworth, 17 Barb. (N. Y.) 649, 9 How. Pr. 282.

An allegation that if plaintiff should prove certain facts defendant will prove in justification certain matters, stating them, is bad. Lewis *v.* Kendall, 6 How. Pr. (N. Y.) 59, Code Rep. N. S. 402.

25. *Delaware.*— Donahoe *v.* Star Pub. Co., 3 Pennew. 545, 53 Atl. 1028.

Illinois.— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243.

Indiana.— Campbell *v.* Irwin, 146 Ind. 681, 45 N. E. 810; De Armond *v.* Armstrong, 37 Ind. 35; Johnson *v.* Stebbins, 5 Ind. 364.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Maryland.— Orme *v.* Lodge, 3 Harr. & J. 83.

Michigan.— McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

Missouri.— Stark *v.* Knapp, 160 Mo. 529, 61 S. W. 669; Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579.

New York.— Wachter *v.* Quenzer, 29 N. Y. 547; Shanks *v.* Stumpf, 34 N. Y. App. Div. 623, 54 N. Y. Suppl. 1115 [*affirming* 23 Misc. 264, 51 N. Y. Suppl. 154]; Brush *v.* Blot, 16 N. Y. App. Div. 80, 44 N. Y. Suppl. 1073; Kingsley *v.* Kingsley, 79 Hun 569, 29 N. Y. Suppl. 921; McKane *v.* Brooklyn Citizen, 53 Hun 132, 6 N. Y. Suppl. 171 [*affirmed* in 117 N. Y. 634, 22 N. E. 1129]; Knox *v.* Commercial Agency, 40 Hun 508; Tilson *v.* Clark, 45 Barb. 178; Fry *v.* Bennett, 5 Sandf. 54; Robinson *v.* Hatch, 55 How. Pr. 55; Billings *v.* Waller, 28 How. Pr. 97; Sayles *v.* Wooden, 6 How. Pr. 84, Code Rep. N. S. 409; Cooper *v.* Greeley, 1 Den. 347.

South Carolina.— Lawton *v.* Hunt, 4 Rich. 258.

however, that a plea in justification does not require the same degree of certainty and precision as are requisite in an indictment for a crime imputed, but that it is sufficient if the plea contains a clear and distinct statement of the facts constituting the ground of defense.[26] Where, however, the complaint is made up of specific charges, a general averment that the charges are true is sufficient.[27] Where defendant in an attempt to give the substantial facts sets forth unnecessary facts, the plea is not thereby rendered bad.[28]

(2) JUSTIFYING PARTICULAR IMPUTATIONS — (a) FORGERY. It is a good plea, in justification to a general charge of forging, to aver that plaintiff falsely, fraudulently, and unlawfully altered a note so as to materially change its terms.[29] So it has been held that where the complaint charged plaintiff with having signed defendant's name to a promissory note without his permission, a plea that plaintiff did sign defendant's name to said note without his permission is good.[30] But

Tennessee.— Steele *v.* Phillips, 10 Humphr. 461; Nall *v.* Hill, Peck 325.

Texas.— Nettles *v.* Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658.

Vermont.— Torrey *v.* Field, 10 Vt. 353.

West Virginia.— Amos *v.* Stockert, 47 W. Va. 109, 34 S. E. 821; Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

United States.— Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384; Barrows *v.* Carpenter, 2 Fed. Cas. No. 1,058, 1 Cliff. 204.

England.— Zierenberg *v.* Labouchere, [1893] 2 Q. B. 183, 57 J. P. 711, 63 L. J. Q. B. 89, 69 L. T. Rep. N. S. 172, 4 Reports 464, 41 Wkly. Rep. 675; Hickinbotham *v.* Leach, 2 Dowl. P. C. N. S. 270, 11 L. J. Exch. 341, 10 M. & W. 361; Bruton *v.* Downes, 1 F. & F. 668; Early *v.* Smith, 12 Ir. C. L. appendix xxxv; Behrens *v.* Allen, 8 Jur. N. S. 118; Holmes *v.* Catesby, 1 Taunt 543; J'Anson *v.* Stuart, 1 T. R. 748, 1 Rev. Rep. 392. *Compare* Devereux *v.* Clarke, [1891] 2 Q. B. 582, 60 L. J. Q. B. 773; Gourley *v.* Plimsoll, L. R. 8 C. P. 362, 42 L. J. C. P. 121, 244, 28 L. T. Rep. N. S. 598, 29 L. T. Rep. N. S. 138, 21 Wkly. Rep. 683 (holding that the better practice is to allow pleas in general form with a liberal allowance of particulars); Jones *v.* Bewicke, L. R. 5 C. P. 32.

See 32 Cent. Dig. tit. "Libel and Slander," § 221.

Compare Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

Statement of facts held sufficient.— In an action for libel for stating that plaintiff's operatic performances were disgraced by the attendance of pickpockets, kept mistresses, etc., an answer averring the truth and stating that the names of the persons frequenting the exhibitions are unknown is sufficiently definite and certain. Maretzek *v.* Cauldwell, 2 Rob. (N. Y.) 715.

An averment stating the defense to be in justification may be stricken out on motion. Kelly *v.* Waterbury, 87 N. Y. 179.

Pleading by single word "justification."— It is improper to plead justification by the single word "justification." Kirtley *v.* Deck, 3 Hen. & M. (Va.) 388.

Imputations not inferences from facts.— It is only where the imputation complained of is a conclusion or inference from certain facts that the plea of justification must aver the existence of a state of facts which will warrant the inference of the charge. Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

A plea setting forth the evidence of the facts instead of the facts themselves is bad. Fidler *v.* Delavan, 20 Wend. (N. Y.) 57. Facts merely evidentiary may be stricken out on motion. Kelly *v.* Waterbury, 87 N. Y. 179.

26. Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8. See also Niven *v.* Munn, 13 Johns. (N. Y.) 48. *Compare* Snyder *v.* Andrews, 6 Barb. (N. Y.) 43; Steele *v.* Phillips, 10 Humphr. (Tenn.) 461.

27. *Illinois.*— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243.

Indiana.— Hauger *v.* Benua, 153 Ind. 642, 53 N. E. 942.

Kansas.— Dever *v.* Clark, 44 Kan. 745, 25 Pac. 205.

Massachusetts.— McLaughlin *v.* Cowley, 127 Mass. 316.

Missouri.— Stark *v.* Knapp, 160 Mo. 529, 61 S. W. 669.

New York.— Kingsley *v.* Kingsley, 79 Hun 569, 29 N. Y. Suppl. 921; Vanwyck *v.* Guthrie, 4 Duer 268; Shanks *v.* Stumpf, 23 Misc. 264, 51 N. Y. Suppl. 154 [*affirmed* in 34 N. Y. App. Div. 624, 54 N. Y. Suppl. 1115]; Steinman *v.* Clark, 10 Abb. Pr. 132.

South Dakota.— See Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233.

Texas.— Kuhn *v.* Young, 78 Tex. 344, 14 S. W. 796.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

West Virginia.— See Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

United States.— Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

England.— Carr *v.* Duckett, 5 H. & N. 783, 29 L. J. Exch. 468.

See 32 Cent. Dig. tit. "Libel and Slander," § 221.

28. Barrows *v.* Carpenter, 2 Fed. Cas. No. 1,058, 1 Cliff. 204.

29. Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

30. Creelman *v.* Marks, 7 Blackf. (Ind.) 281.

a charge that plaintiff forged an order is not justified by the allegation that he uttered a forged order.[31]

(b) Homicide. An answer to a charge of being an accessary to a murder, alleging that plaintiff encouraged, countenanced, and supported the person who did the killing, is good.[32]

(c) Larceny. Where the complaint alleged that defendant accused plaintiff of being a thief, defendant can justify only by alleging and proving specific acts of larceny on the part of plaintiff.[33] But if the charge imputes a larceny of specific articles, it is not a justification to allege a larceny of other and different pieces of property.[34]

(d) Perjury and False Swearing. An answer justifying a charge of perjury or false swearing in a judicial proceeding should set forth the testimony which was sworn to by plaintiff,[35] and should allege that such testimony was material to the issue[36] and known to plaintiff to be false.[37] If the charge imputes perjury or false swearing in any particular case or in reference to a specific statement in any particular case, then defendant can justify only by showing that in the particular case or in reference to the specific statement in the particular case plaintiff committed perjury.[38]

(e) Unchastity and Immorality. A plea of justification for a charge of unchastity or immorality must answer the exact charge imputed.[39] The justification must state facts sufficient to show that the charge is true, both as to the act alleged, and as to the attendant circumstances which are descriptive of and identify the offense.[40]

31. Kent *v.* David, 3 Blackf. (Ind.) 301.

32. Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773.

Where murder is charged with circumstances of aggravation, the circumstances, if libelous in themselves, must be justified. Helsham *v.* Blackwood, 11 C. B. 111, 15 Jur. 861, 20 L. J. C. P. 187, 73 E. C. L. 111.

33. Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Jaycocks *v.* Ayres, 7 How. Pr. (N.Y.) 215; Anonymous, 3 How. Pr. (N. Y.) 406.

Justifying act and intent.—Where plaintiff is charged with having done an act not necessarily criminal, with comments showing that it was intended to charge plaintiff with larceny, the answer must justify both the act and the felonious intent. Wahle *v.* Cincinnati Gazette Co., 7 Ohio Dec. (Reprint) 581, 4 Cinc. L. Bul. 61.

Justifying by showing embezzlement.—A charge of stealing property is justified by showing embezzlement of the property. McLeod *v.* Crosby, 128 Mich. 641, 87 N. W. 883.

34. Eastland *v.* Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668; Houston *v.* Lane, 39 Mo. 495; Christianson *v.* O'Neil, 39 Misc. (N. Y.) 11, 78 N. Y. Suppl. 757 [*affirmed* in 82 N. Y. App. Div. 636, 81 N. Y. Suppl. 1120].

35. Downey *v.* Dillon, 52 Ind. 442; Tilson *v.* Clark, 45 Barb. (N. Y.) 178. See also Steele *v.* Phillips, 10 Humphr. (Tenn.) 461.

A charge of false swearing under statute where the imputation does not refer to a judicial proceeding may be justified by alleging the truth, and the time, place, and occasion of the false swearing. Sanford *v.* Gaddis, 13 Ill. 329. A justification to a charge of certifying a lie should set out the particular facts of the case. Jones *v.* Cecil, 10 Ark. 592.

Answer bad for uncertainty.—An answer to a charge of perjury that plaintiff's testimony in two different lawsuits was contradictory as to a fact material in each, and that he committed perjury in one or the other, is bad for uncertainty in failing to elect upon which case to base the charge of perjury. Mull *v.* McKnight, 67 Ind. 535.

36. McGough *v.* Rhodes, 12 Ark. 625; Boyd *v.* Sell, Tapp. (Ohio) 43.

37. Downey *v.* Dillon, 52 Ind. 442. See also Lewis *v.* Black, 27 Miss. 425.

38. Sanford *v.* Gaddis, 13 Ill. 329; Starr *v.* Harrington, 1 Ind. 515.

39. Holton *v.* Muzzy, 30 Vt. 365.

Rule illustrated.—A charge of having begotten a bastard child is not justified by a plea of criminal intercourse with the mother of the bastard. Holton *v.* Muzzy, 30 Vt. 365. So it is not a justification of a charge of adultery with one person to allege adultery with another. Buckner *v.* Spaulding, 127 Ind. 229, 26 N. E. 792; Ricket *v.* Stanley, 6 Blackf. (Ind.) 169. So for a charge of whoredom it is no justification to allege the keeping of a house of ill fame (Swartzel *v.* Dey, 3 Kan. 244), or that plaintiff is of notoriously bad character for chastity (Sunman *v.* Brewin, 52 Ind. 140). But a justification that plaintiff had intercourse with her brother is sufficient to cover a charge that she had such intercourse and was pregnant thereby. Edwards *v.* Knapp, 97 Mo. 432, 10 S. W. 54.

40. Abshire *v.* Cline, 3 Ind. 115 (holding that it is not a sufficient justification that plaintiff said she had committed the crime charged); Rutherford *v.* Paddock, 180 Mass.

(E) *Partial Justification.* Where the defamatory matter is divisible and contains several distinct libelous or slanderous charges, defendant may justify one or more of the separate charges.[41] But the plea must be as broad as the particular charge which defendant attempts to justify.[42] A justification of part only of the matter declared on entitles plaintiff to recover upon the remainder.[43]

(F) *Notice of Justification.* Statutes authorizing a notice of justification as a substitute for a special plea dispense with the form but not with the substance of the plea. A notice of special matter in justification to be given in evidence under the general issue must contain as distinct an allegation of the grounds of the defense as would be stated in a special plea, although it need not have the technicality of a special plea; it must contain all the substantial averments of a special plea.[44] Where a libel is long, general averments to avoid prolixity of pleading are not admissible.[45]

(XIII) *Mitigating Circumstances.* In specially pleading mitigating circumstances[46] the answer should state the facts on which mitigation is predicated.[47]

289, 62 N. E. 381, 91 Am. St. Rep. 282 (holding that proof of adultery is not a justification for calling plaintiff a "dirty old whore"); Sharpe *v.* Stephenson, 34 N. C. 348; Eaton *v.* White, 2 Pinn. (Wis.) 42.

Truth of words at time of speaking.—A plea of justification for calling a woman a "whore" must show that she was one at the time the words were spoken. Peterson *v.* Murray, 13 Ind. App. 420, 41 N. E. 836.

41. *Florida.*—Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

Illinois.— Cloidt *v.* Wallace, 56 Ill. App. 389.

Maine.— Stacy *v.* Portland Pub. Co., 68 Me. 279.

New York.— Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182 [*reversing* 77 Hun 506, 29 N. Y. Suppl. 107]; Stock *v.* Keele, 86 N. Y. App. Div. 136, 83 N. Y. Suppl. 133; Hollingsworth *v.* Spectator Co., 53 N. Y. App. Div. 291, 65 N. Y. Suppl. 812.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Vermont.— Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

United States.— Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

England.— Clarkson *v.* Lawson, 6 Bing. 587, 8 L. J. C. P. O. S. 193, 4 M. & P. 356, 31 Rev. Rep. 425, 19 E. C. L. 266; Clarke *v.* Taylor, 2 Bing. N. Cas. 654, 2 Hodges 65, 5 L. J. C. P. 235, 3 Scott 95, 29 E. C. L. 703.

See 32 Cent. Dig. tit. "Libel and Slander," § 225.

Restriction of plea to certain parts of declaration.—A plea of justification goes to the entire declaration unless it is restricted in its terms to certain parts or certain counts. Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839; Sawyer *v.* Bennett, 20 N. Y. Suppl. 45, 22 N. Y. Civ. Proc. 343, 28 Abb. N. Cas. 393 [*affirmed* in 20 N. Y. Suppl. 835].

Variance as to part justified.— If defendant attempts to justify a part of the charge and designates the portion by setting it forth *in hæc verba*, the omission or substitution of a single word will be fatal variance. Torrey *v.* Field, 10 Vt. 353.

42. Jones *v.* Greeley, 25 Fla. 629, 6 So. 448; Ames *v.* Hazard, 6 R. I. 335; Torrey *v.* Field, 10 Vt. 353.

43. Knapp *v.* Camphell, 14 Tex. Civ. App. 199, 36 S. W. 765; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8; Clarke *v.* Taylor, 2 Bing. N. Cas. 654, 2 Hodges 65, 5 L. J. C. P. 235, 3 Scott 95, 29 E. C. L. 703.

44. *Massachusetts.*— Brickett *v.* Davis, 21 Pick. 404.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

New Hampshire.— Folsom *v.* Brown, 25 N. H. 114.

New York.— Bissell *v.* Cornell, 24 Wend. 354; Mitchell *v.* Borden, 8 Wend. 570; Shepard *v.* Merill, 13 Johns. 475.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Vermont.— Bowdish *v.* Peckham, 1 D. Chipm. 144.

Wisconsin.— Fowler *v.* Colton, 1 Pinn. 331.

See 32 Cent. Dig. tit. "Libel and Slander," § 226.

In Michigan it has been held under statute that a notice that "defendant will prove the truth of the allegations in said declaration contained" was not too general. Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251 [*following* Cresinger *v.* Reed, 25 Mich. 450]. But under a prior system, specific averments were necessary and the precise acts claimed to have justified the charge were required to appear. Thompson *v.* Bowers, 1 Dougl. 321. See also Bailey *v.* Kalamazoo Pub. Co., *supra*.

45. Van Derveer *v.* Sutphin, 5 Ohio St. 293. See also Van Ness *v.* Hamilton, 19 Johns. (N. Y.) 349, where the same rule was held to apply to a special plea.

46. Necessity of specially pleading mitigating circumstances see *infra*, VIII, E, 7, f, (I).

47. McKane *v.* Brooklyn Citizen, 53 Hun (N. Y.) 132, 6 N. Y. Suppl. 171 [*affirmed* in 117 N. Y. 634, 22 N. E. 1129]; Knox *v.* Commercial Agency, 40 Hun (N. Y.) 508; Burnham *v.* Franklin, 44 Misc. (N. Y.) 299, 89 N. Y. Suppl. 917. See also Moore *v.* Francis, 3 N. Y. Suppl. 162 [*reversed* on

So where facts in mitigation are relied upon as showing defendant's good faith the answer must allege that defendant knew the facts at the time he made the charge.[48] So the facts must be averred as being in mitigation, otherwise plaintiff may treat them as pleaded in bar.[49] It has been held that defendant may in all cases set up in his answer, with or without a defense, mitigating circumstances.[50]

(XIV) *COUNTER-CLAIM.*[51] In an action for libel or slander it has been held that defendant can set up as a counter-claim only such acts or declarations on the part of plaintiff as form a part of the *res gestæ*,[52] and where the answer is by way of a general denial a counter-claim for slander alleged to have been uttered by plaintiff shortly before the day mentioned in the complaint cannot be set up, as the denial shows that there is no connection between the two.[53]

(XV) *VERIFICATION.* Under a statute allowing defendant to omit the verification of his answer as respects all its allegations wherever he would be excused from testifying as a witness to the truth of any matter denied by such answer, it has been held that in an action for libel if defendant denies the publication charged he is entitled to omit the verification of his answer as to all the answers set up.[54]

(XVI) *JOINDER OF DEFENSES*—(A) *In General.* Under statute in several jurisdictions it has been held permissible to join the defenses of privilege and justification,[55] justification and mitigation,[56] statute of limitations and justification,[57] and general denial and mitigation.[58] Where under statute defendant is permitted to file contradictory defenses, a plea of privilege may be joined with a plea of the general issue, although defendant may be required to elect at the trial.[59] But such joinder is improper in the absence of statute.[60] Where the answer contains two inconsistent defenses, it has been held that the court may strike out the first on the theory that the second was intended to supersede the first.[61]

(B) *General Issue and Justification.* Where there are separate and distinct charges in the same libel or slander, it is allowable in the same plea to plead the general issue as to a part and justify as to the other charges.[62] Indeed it is the general rule that a plea of justification may be joined with a plea of the general

other grounds in 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214].

In pleading heat and passion in mitigation defendant should set forth the acts and language of plaintiff which caused the heat and passion. Dolevin *v.* Wilder, 7 Rob. (N. Y.) 319.

Where the facts are single and indivisible, defendant is not required to separately state and number each mitigating circumstance. Kinyon *v.* Palmer, 20 Iowa 138.

48. Brown *v.* McArthur, 106 N. Y. App. Div. 366, 94 N. Y. Suppl. 537; Dolevin *v.* Wilder, 7 Rob. (N. Y.) 319.

49. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54; Robinson *v.* Evening Post Pub. Co., 25 Misc. (N. Y.) 243, 55 N. Y. Suppl. 62, 28 N. Y. Civ. Proc. 239; Shanks *v.* Stumpf, 23 Misc. (N. Y.) 264, 51 N. Y. Suppl. 154 [*affirmed* in 34 N. Y. App. Div. 623, 54 N. Y. Suppl. 1115].

50. Van Benschoten *v.* Yaple, 13 How. Pr. (N. Y.) 97 [*citing* Bush *v.* Prosser, 11 N. Y. 347].

51. **Counter-claim** generally see RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.

52. Thomssen *v.* Ertz, 93 Minn. 280, 101 N. W. 304; Richardson *v.* Northrup, 56 Barb. (N. Y.) 105.

53. Fellerman *v.* Dolan, 7 Abb. Pr. (N. Y.) 395 note.

54. Blaisdell *v.* Raymond, 5 Abb. Pr. (N. Y.) 144 [*affirmed* in 6 Abb. Pr. 148].

55. Wilson *v.* Sullivan, 81 Ga. 238, 7 S. E. 274; Halstead *v.* Nelson, 24 Hun (N. Y.) 395; Fink *v.* Justh, 14 Abb. Pr. N. S. (N. Y.) 107.

56. Ayres *v.* Covill, 18 Barb. (N. Y.) 260; Fink *v.* Justh, 14 Abb. Pr. N. S. (N. Y.) 107; Howard *v.* Raymond, 11 Abb. Pr. (N. Y.) 155; Jeffries *v.* McKillop, 48 How. Pr. (N. Y.) 122; Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705; Van Ingen *v.* Newton, 1 Disn. (Ohio) 458, 12 Ohio Dec. (Reprint) 732; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004.

57. Kelly *v.* Craig, 9 Humphr. (Tenn.) 215.

58. Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821 (holding that such defenses are not inconsistent); Doyle *v.* Fritz, 86 N. Y. App. Div. 515, 83 N. Y. Suppl. 762; Stiles *v.* Comstock, 9 How. Pr. (N. Y.) 48. *Compare* Matthews *v.* Beach, 5 Sandf. (N. Y.) 256; Meyer *v.* Schultz, 4 Sandf. (N. Y.) 664.

59. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81.

60. Lucan *v.* Smith, 1 H. & N. 481, 2 Jur. N. S. 1170, 26 L. J. Exch. 94, 5 Wkly. Rep. 138.

61. Skillman *v.* Downs, 10 La. 103.

62. Cloidt *v.* Wallace, 56 Ill. App. 389; Van Derveer *v.* Sutphin, 5 Ohio St. 293.

issue or general denial as to the same charge,[63] and where such pleas are joined plaintiff cannot be required to elect on which plea he will go to trial.[64]

3. Replication, New Assignment, and Bill of Particulars — a. Replication or Reply. The replication must answer the new matter alleged in the plea.[65] If plaintiff fails to reply to a plea of justification, defendant is entitled to judgment on the pleading.[66] But facts pleaded in mitigation are sufficiently in issue without any reply.[67] Where a plea consists merely of matter of excuse or justification, the general replication *de injuria sua propria* is the proper answer and puts the whole plea in issue.[68] A replication alleging actual malice is a good reply to a plea of qualified privilege,[69] or a plea setting up the defense that defendant uttered the words on the authority of some third person.[70]

b. New Assignment. Where defendant in his plea sets up that the defamatory matter was published in the due course of a judicial proceeding, it is held that plaintiff, if he desires to show a publication upon another and different occasion from that named in the plea,[71] or that defendant exceeded his privilege in making the publication,[72] must reply by way of new assignment and a replication *de injuria* is insufficient.

c. Bill of Particulars. In actions for libel or slander, an order may be granted in favor of either plaintiff or defendant requiring of the opposite party a bill of particulars whenever the pleading of such party does not sufficiently state the facts which he relies upon as a claim or defense.[73] However, if the party is in a position

63. *Alabama.*— Wright *v.* Lindsay, 20 Ala. 428.

Indiana.— Weston *v.* Lumley, 33 Ind. 486; Johnson *v.* Stebbins, 5 Ind. 364.

Kansas.— Cole *v.* Woodson, 32 Kan. 272, 4 Pac. 321.

Kentucky.— Harper *v.* Harper, 10 Bush 447; Horton *v.* Banner, 6 Bush 596. *Compare* Rooney *v.* Tierney, 82 Ky. 253.

Massachusetts.— Payson *v.* Macomber, 3 Allen 69.

Missouri.— Nelson *v.* Wallace, 48 Mo. App. 193; Wood *v.* Hilbish, 23 Mo. App. 389. *Compare* Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579.

New York.— Kingsley *v.* Kingsley, 79 Hun 569, 29 N. Y. Suppl. 921; Buhler *v.* Wentworth, 17 Barb. 649, 9 How. Pr. 282 (holding that the defense that defendant has no recollection of making the alleged charge, but that if he did it was true, is in effect a joinder of the pleas of general issue and justification and is good); Ormsby *v.* Douglas, 5 Duer 665. *Compare* Ormsby *v.* Douglass, 2 Abb. Pr. 407.

Pennsylvania.— Ferber *v.* Gazette, etc., Assoc., 212 Pa. St. 367, 61 Atl. 939; Peters *v.* Ulmer, 74 Pa. St. 402.

South Carolina.— Miller *v.* Graham, 1 Brev. 283.

Utah.— Murphy *v.* Carter, 1 Utah 17.

United States.— Clark *v.* Ford, 5 Fed. Cas. No. 2,820, 1 Hayw. & H. 6; Whitaker *v.* Freeman, 29 Fed. Cas. No. 17,527*a*, 12 N. C. 271.

See 32 Cent. Dig. tit. "Libel and Slander," § 230.

Compare Williams *v.* McManus, 38 La. Ann. 161, 58 Am. Rep. 171; Miller *v.* Roy, 10 La. Ann. 231; Skillman *v.* Downs, 10 La. 103.

Joinder of plea denying correctness of innuendo.—A plea of justification and one denying the correctness of the innuendo may be joined. Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131. But a plea of general issue and one denying the correctness of the innuendo cannot be joined as every defense available under the second plea is available under the first. Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

Denial of publication and justification of other words. — Defendant cannot deny the words charged and then allege and justify the speaking of other words charging the same offense. Dufresne *v.* Weise, 46 Wis. 270, 1 N. W. 59.

64. Horton *v.* Banner, 6 Bush (Ky.) 596; Ormsby *v.* Douglas, 5 Duer (N. Y.) 665. *Compare* Clark *v.* Ford, 5 Fed. Cas. No. 2,820, 1 Hayw. & H. 6.

65. Alcorn *v.* Hooker, 7 Blackf. (Ind.) 58; Spencer *v.* Southwick, 10 Johns. (N. Y.) 259.

Replication held sufficient see Eastland *v.* Caldwell, 2 Bibb (Ky.) 21, 4 Am. Dec. 668.

66. Nelson *v.* Wallace, 48 Mo. App. 193.

67. Newman *v.* Otto, 4 Sandf. (N. Y.) 668.

68. Crane *v.* Douglass, 2 Blackf. (Ind.) 195; Allen *v.* Crofoot, 7 Cow. (N. Y.) 46.

69. Dial *v.* Holter, 6 Ohio St. 228.

70. Crane *v.* Douglass, 2 Blackf. (Ind.) 195.

71. Nelson *v.* Robe, 6 Blackf. (Ind.) 204.

72. Torrey *v.* Field, 10 Vt. 353.

73. Clark *v.* Munsell, 6 Metc. (Mass.) 373; Newell *v.* Butler, 38 Hun (N. Y.) 104; Ball *v.* Evening Post Pub. Co., 38 Hun (N. Y.) 11; Tallmadge *v.* Press Pub. Co., 7 N. Y. Suppl. 895; Wren *v.* Wield, L. R. 4 Q. B. 213, 38 L. J. Q. B. 88, 20 L. T. Rep. N. S. 277; Hennessy *v.* Wright, 57 L. J. Q. B. 594, 59 L. T. Rep. N. S. 795, 36 Wkly. Rep. 878. See also Orvis *v.* Dana, 1 Abb. N. Cas. (N. Y.) 268; Thacher *v.* Schaeffer, 19 Wkly. Notes Cas. (Pa.) 566.

to know the facts or to ascertain them as readily and easily as the opposite party, a bill of particulars will not be granted.[74] So where the bill of particulars is not necessary to enable defendant to answer upon the merits or to justify the publication,[75] or where the nature of the facts required to be specified is such that on account of their indefiniteness or uncertainty they cannot be adequately expressed,[76] a bill of particulars will not be ordered. The bill should contain a statement of all the necessary facts which the party intends to prove at the trial, but not matters of evidence.[77] It is generally held that defendant is entitled to know definitely the time and place of the publication of the alleged slander or libel and the name of a party to whom publication was made, and if the complaint fails to show these particulars, a bill will be ordered.[78] Where the defamatory matter is actionable *per se*, plaintiff cannot be required to furnish a bill of particulars showing the elements of his general damages,[79] or to state specifically his special damages when special damages are not alleged.[80] But where special damages are claimed, plaintiff may be required to state the particulars relating thereto.[81]

4. DEMURRER[82] — a. In General. Where the allegations of the parties terminate in a demurrer, the sufficiency of each of the pleadings is drawn in question and

74. Holmes *v.* Jones, 13 N. Y. Civ. Proc. 260; Weil *v.* Dun, 2 Pa. Co. Ct. 72.

75. Kuster *v.* New York Times Co., 79 N. Y. App. Div. 39, 79 N. Y. Suppl. 978; Singer *v.* New York Times Co., 74 N. Y. App. Div. 380, 77 N. Y. Suppl. 531; National Gramophone Corp. *v.* American Talking-Mach. Co., 50 N. Y. App. Div. 162, 63 N. Y. Suppl. 600; Orvis *v.* Jennings, 6 Daly (N. Y.) 434.

76. Hatch *v.* Matthews, 85 Hun (N. Y.) 522, 33 N. Y. Suppl. 332 [*affirming* 9 Misc. 307, 30 N. Y. Suppl. 309].

77. Newell *v.* Butler, 38 Hun (N. Y.) 104; Ball *v.* Evening Post Pub. Co., 38 Hun (N. Y.) 11; Tallmadge *v.* Press Pub. Co., 7 N. Y. Suppl. 895, 10 N. Y. Suppl. 713.

Stating names of witnesses.— It is no part of the office of a bill of particulars to state the names of witnesses. Knipe *v.* Brooklyn Daily Eagle, 101 N. Y. App. Div. 83, 91 N. Y. Suppl. 872; Dent *v.* Ryan, 5 Silv. Sup. (N. Y.) 513, 8 N. Y. Suppl. 806.

Facts relied on in justification.— A bill of particulars may be required of defendant justifying in an action for libel. A statement of all necessary facts may be demanded, but not a statement of evidence. Newell *v.* Butler, 38 Hun (N. Y.) 104; Ball *v.* Evening Post Pub. Co., 38 Hun (N. Y.) 11.

78. McLean *v.* Warring, (Miss. 1893) 13 So. 236; Mason *v.* Clark, 75 N. Y. App. Div. 460, 78 N. Y. Suppl. 327; Rowe *v.* Washburne, 62 N. Y. App. Div. 131, 70 N. Y. Suppl. 868; Dent *v.* Ryan, 5 Silv. Sup. (N. Y.) 513, 8 N. Y. Suppl. 806; Stiebeling *v.* Lockhaus, 21 Hun (N. Y.) 457; Dempewolf *v.* Hills, 53 N. Y. Super. Ct. 105, 11 N. Y. Civ. Proc. 14 (holding it sufficient if the bill of particulars names one person in whose presence the words were spoken); Turner *v.* Beavan, 10 N. Y. Suppl. 128, 23 Abb. N. Cas. 432; McCarron *v.* Sire, 3 N. Y. Suppl. 650, 14 N. Y. Civ. Proc. 252 (holding, however, that the exact time need not be named); Jones *v.* Platt, 60 How. Pr. (N. Y.) 277; Weil *v.* Dun, 2 Pa. Co. Ct. 72; Doan *v.* Sellers, 2 Chest. Co. Rep. (Pa.) 172; Roselle *v.* Buchanan, 16 Q. B. D. 656, 55 L. J. Q. B. 376, 34 Wkly. Rep. 488; Bradbury *v.* Cooper, 12 Q. B. D. 94, 48 J. P. 198, 53 L. J. Q. B. 558, 32 Wkly. Rep. 32. *Compare* Thacher *v.* Schaeffer, 19 Wkly. Notes Cas. (Pa.) 566; Gouraud *v.* Fitzgerald, 37 Wkly. Rep. 265.

Stating false and true parts of publication. — Plaintiff cannot be required to furnish a bill of particulars stating what part of the publication he deems false and what part true. Singer *v.* New York Times Co., 74 N. Y. App. Div. 380, 77 N. Y. Suppl. 531.

Clause improperly inserted in bill.— The order granting a motion for a bill of particulars should not contain a provision that in default of service of the bill of particulars plaintiff be precluded from giving evidence upon the trial in support of his complaint. Mason *v.* Clark, 75 N. Y. App. Div. 460, 78 N. Y. Suppl. 327.

Effect of naming numerous persons in bill. — It is no objection to a bill of particulars that it is inconceivable that plaintiff intended to prove publication to and by so many people as are named in the bill. Smith *v.* Will, etc., Co., 27 Misc. (N. Y.) 600, 59 N. Y. Suppl. 482 [*affirmed* in 47 N. Y. App. Div. 625, 62 N. Y. Suppl. 1147].

79. Stokes *v.* Stokes, 72 Hun (N. Y.) 372, 25 N. Y. Suppl. 405; American Multiple Fabric Co. *v.* Eureka Fire Hose Co., 18 Abb. N. Cas. (N. Y.) 70.

80. Cruikshank *v.* Bennett, 30 Misc. (N. Y.) 232, 62 N. Y. Suppl. 118.

81. Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423; Jacobs *v.* Overflow Preventive Co., 72 Hun (N. Y.) 637, 25 N. Y. Suppl. 346; New York Infant Asylum *v.* Roosevelt, 35 Hun (N. Y.) 501, 7 N. Y. Civ. Proc. 307; American Multiple Fabric Co. *v.* Eureka Fire Hose Co., 18 Abb. N. Cas. (N. Y.) 70; Weil *v.* Dun, 2 Pa. Co. Ct. 72; Fritchey *v.* York Pub. Co., 17 York Leg. Rec. (Pa.) 80.

82. Forms of demurrer will be found set out in full, in part, or in substance in Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327; Dow *v.* Long, 190 Mass. 138, 76 N. E. 667.

the cause will be determined against the party whose pleadings contain the first defects.[83]

b. To Plaintiff's Pleadings — (I) *In General.* A general demurrer to a petition or a count thereof will be overruled if any of the words laid therein are actionable.[84] But a demurrer will lie to a part of the words laid.[85] The demurrer tests the actionable character of the charge and it will only be sustained where the court can affirmatively say that the publication is incapable of any reasonable construction which will render the words defamatory.[86]

(II) *For Failure to Allege Publication of and Concerning Plaintiff.* Defendant may demur where the complaint does not allege that the defamatory matter was published of and concerning plaintiff.[87]

(III) *For Failure to Allege Publication by Defendant.* The question whether defendant published the charge cannot be determined on demurrer.[88]

(IV) *For Failure to Allege Falsity.* It has been intimated that a demurrer will lie for failure of plaintiff to allege that the words charged were false and defamatory.[89]

(V) *For Failure to Allege Service of Notice to Retract.* It is held to be a ground for demurrer that the complaint does not allege that the statutory notice to retract was given to defendant.[90]

(VI) *Raising Defense of Privilege by Demurrer.* The defense that the defamatory matter is privileged cannot be raised on demurrer,[91] unless it appears

83. Spencer *v.* Southwick, 11 Johns. (N. Y.) 573.

84. Cummins *v.* Butler, 3 Blackf. (Ind.) 190; Porter *v.* Post Pub. Co., 20 R. I. 188, 37 Atl. 535; Edds *v.* Waters, 8 Fed. Cas. No. 4,275, 4 Cranch C. C. 170; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

85. Abrams *v.* Smith, 8 Blackf. (Ind.) 95. See also Cummins *v.* Butler, 3 Blackf. (Ind.) 190; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

86. *Alabama.* — Trimble *v.* Anderson, 79 Ala. 514.

Maine.— Thompson *v.* Lewiston Daily Sun Pub. Co., 91 Me. 203, 39 Atl. 556.

New York.— Goldsmith *v.* Glatz, 43 Hun 640; Wesley *v.* Bennett, 6 Duer 688, 5 Abb. Pr. 498; Dexter *v.* Press Pub. Co., 36 Misc. 388, 73 N. Y. Suppl. 706; Gunning *v.* Appleton, 58 How. Pr. 471.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652.

United States.— Daily *v.* De Young, 127 Fed. 491; Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302.

See 32 Cent. Dig. tit. "Libel and Slander," § 234.

Necessity for demurrer.— If the words are not actionable *per se* defendant must demur or move in arrest of judgment. He cannot object at the trial (Blunt *v.* Zuntz, Anth. N. P. (N. Y.) 246), unless the action is for words slanderous *per se* and others not so, thus preventing a demurrer (Beach *v.* Ranney, 2 Hill (N. Y.) 309).

Demurrer to words published in foreign language.— In determining on demurrer the actionable quality of words published in a foreign language, the court can only be expected to examine the English translation. Hickley *v.* Grosjean, 6 Blackf. (Ind.) 351.

Effect of overruling demurrer.— Overruling a demurrer to a count in libel may mean that the words are libelous as matter of law; but it does not necessarily mean more than that the judge cannot say as matter of law that they are not libelous, in which case also he would overrule the demurrer, but would leave the question to the jury. Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369.

87. New York, etc., Water Co. *v.* Morning Journal Assoc., 40 N. Y. Suppl. 272.

88. Chiatovich *v.* Hanchett, 88 Fed. 873.

Stating time of publication.— Where a declaration stating that on a certain day and "at divers other days and times" defendant, etc., it was held that the words "and at divers other days and times" were surplusage and not ground for special demurrer. Cummins *v.* Butler, 3 Blackf. (Ind.) 190.

89. Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1089.

90. Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

91. *Illinois.*— Harkness *v.* Chicago Daily News Co., 102 Ill. App. 162.

Louisiana.— Fellman *v.* Dreyfous, 47 La. Ann. 907, 17 So. 422.

Michigan.— Boehmer *v.* Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318.

New Jersey.— Heller *v.* Duff, 62 N. J. L. 101, 40 Atl. 691.

New York.— Kelly *v.* Taintor, 48 How. Pr. 270; Marsh *v.* Elsworth, 36 How. Pr. 532.

Rhode Island.— Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031.

Wisconsin.— Hellstern *v.* Katzer, 103 Wis. 391, 79 N. W. 429; Cottrill *v.* Cramer, 43 Wis. 242.

See 32 Cent. Dig. tit. "Libel and Slander," § 236.

Allegations of malice in complaint.— Where the complaint contains an averment that

from the statement of facts shown in the complaint that it was published upon a privileged occasion,[92] and in such case the complaint must show all the facts defendant would be obliged to show under a plea of privilege.[93]

(VII) *Admission and Presumptions on Demurrer.* The demurrer admits the allegations in the complaint only to the extent that it tests the actionable quality of the words.[94] Hence it admits allegations of falsity, and publication,[95] and malice,[96] and the correctness of the innuendos as averred in the petition,[97] unless the innuendo attributes a meaning to the words which is not justified by the words themselves or by the extrinsic facts with which they are connected.[98]

c. To Defendant's Pleadings. The sufficiency of an answer raising the defense of privilege may be questioned on demurrer.[99] So a plea of justification may be attacked by demurrer.[1] Where facts in mitigation of damages are alleged as a partial defense, a demurrer will lie to question their sufficiency for that purpose,[2] but where any fact alleged in a separate defense is competent in mitigation of damages, a demurrer to such defense is not well taken, although some of the facts are inadmissible for that purpose.[3] Where an answer to a complaint sets up in defense circumstances which could only be admitted in evidence in mitigation of damages, a demurrer is proper.[4]

plaintiff acted maliciously the demurrer admits this allegation and thus prohibits the raising of the question of privilege as privilege is inconsistent with express malice. Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392. See also Marsh *v.* Elsworth, 36 How. Pr. (N. Y.) 532; Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031.

92. Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139; Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461; Marsh *v.* Elsworth, 36 How. Pr. (N. Y.) 532. See also Heller *v.* Duff, 62 N. J. L. 101, 40 Atl. 691.

93. Perkins *v.* Mitchell, 31 Barb. (N. Y.) 461.

94. Crone *v.* Angell, 14 Mich. 340; Wellman *v.* Sun Printing, etc., Co., 66 Hun (N. Y.) 331, 21 N. Y. Suppl. 577; Gunning *v.* Appleton, 58 How. Pr. (N. Y.) 471. See also Jones *v.* Stevens, 11 Price 235, 25 Rev. Rep. 714.

Words published in foreign language.—A demurrer to a petition declaring on words uttered in a foreign language admits the correctness of the translation contained therein. Hickley *v.* Grosjean, 6 Blackf. (Ind.) 351.

95. Shepard *v.* Baer, 96 Md. 152, 53 Atl. 790; Bosi *v.* New York Herald Co., 33 Misc. (N. Y.) 622, 68 N. Y. Suppl. 898 [*affirmed* in 58 N. Y. App. Div. 619, 68 N. Y. Suppl. 1134]; Marsh *v.* Elsworth, 36 How. Pr. (N. Y.) 532; Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031; Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392.

96. Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72; Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031; Eviston *v.* Cramer, 47 Wis. 659, 3 N. W. 392.

Allegation as to want of probable cause.—It has been held that an allegation of want of probable cause in a declaration for a libel published in a judicial proceeding is not admitted by a demurrer, since the question of want of probable cause was one of law for the court. Crockett *v.* McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

97. *Illinois.*—Herrick *v.* Tribune Co., 108 Ill. App. 244.

Michigan.—Belknap *v.* Ball, 83 Mich. 583, 47 N. W. 674, 21 Am. St. Rep. 622, 11 L. R. A. 72.

New Jersey.—Feder *v.* Herrick, 43 N. J. L. 24.

United States.—Mitchell *v.* Sharon, 51 Fed. 424; Smith *v.* Tribune Co., 22 Fed. Cas. No. 13,118, 4 Biss. 477.

England.—Wheeler *v.* Haynes, 9 A. & E. 286 note, 9 L. J. Q. B. 3, 1 P. & D. 55, 1 W. W. & H. 645, 36 E. C. L. 166.

See 32 Cent. Dig. tit. "Libel and Slander," § 235.

98. Zinserling *v.* Journal Co., 26 Misc. (N. Y.) 591, 57 N. Y. Suppl. 905; Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302.

99. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54.

1. Sawyer *v.* Bennett, 2 N. Y. Suppl. 45, 22 N. Y. Civ. Proc. 343, 28 Abb. N. Cas. 393 [*affirmed* in 20 N. Y. Suppl. 835]; Sterling *v.* Sherwood, 20 Johns. (N. Y.) 204; George *v.* Lemon, 19 Tex. 150.

Rule applied to plea joined with partial defense in mitigation.—Jansen *v.* Fischer, 45 Misc. (N. Y.) 361, 90 N. Y. Suppl. 346.

2. Morse *v.* Press Pub. Co., 63 N. Y. App. Div. 61, 71 N. Y. Suppl. 348; Fry *v.* Bennett, 5 Sandf. (N. Y.) 54. But see Newman *v.* Otto, 4 Sandf. (N. Y.) 668.

3. Morse *v.* Press Pub. Co., 63 N. Y. App. Div. 61, 71 N. Y. Suppl. 348.

Demurrer to interrogatives attached to answer.—Where the petition sets out the entire publication, and a part thereof, although not forming the basis of the charge, is admissible in mitigation of damages, interrogatives attached to the answer relating to such part are not demurrable. Grant *v.* Times Star Co., 9 Ohio S. & C. Pl. Dec. 619.

4. Matthews *v.* Beach, 5 Sandf. (N. Y.) 256; Robinson *v.* Evening Post Pub. Co., 25 Misc. (N. Y.) 243, 55 N. Y. Suppl. 62, 28

5. Amendment — a. Of Petition or Complaint — (i) *In General.* Plaintiff may amend his petition by leave of court at any time before or during trial or after verdict, provided the amendment does not introduce a new cause of action.[5]

(ii) *What May Be Brought in by Amendment* — (A) *In General.* A petition may be amended so as to show that the defamation was published of plaintiff in his business, office, or profession,[6] or for the purpose of setting up special damages,[7] setting forth the defamatory words as originally published in a foreign language,[8] changing the venue,[9] alleging publication,[10] or inserting an innuendo.[11] So where a statute requires that notice shall be given defendant before bringing suit, plaintiff is entitled to amend his petition to show that such notice had been given.[12] So a declaration to which exceptions have been sustained as showing upon its face that the charge was privileged may be amended by striking out the allegations showing privilege.[13]

(B) *Alleging Further Publication.* An amendment will not be allowed for

N. Y. Civ. Proc. 239. *Compare* Roeber *v.* New Yorker Staats Zeitung, 1 N. Y. App. Div. 427, 37 N. Y. Suppl. 255.

5. *Indiana.*— Lister *v.* McNeal, 12 Ind. 302.

Massachusetts.— Baldwin *v.* Soule, 6 Gray 321; Gay *v.* Homer, 13 Pick. 535.

Mississippi.— Bigner *v.* Hodges, 82 Miss. 215, 33 So. 980.

Missouri.— Street *v.* Bushnell, 24 Mo. 328.

New York.— Collyer *v.* Collyer, 50 Hun 422, 3 N. Y. Suppl. 310; Miller *v.* Holmes, 61 N. Y. Super. Ct. 245, 19 N. Y. Suppl. 701; Wood *v.* Gilchrist, 1 Code Rep. 117; Weston *v.* Worden, 19 Wend. 648.

Ohio.— Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437.

Pennsylvania.— Conroe *v.* Conroe, 47 Pa. St. 198 (holding that in an action for slander a new count may be added to the declaration when it can be regarded as an amendment at common law); Proper *v.* Luce, 3 Penr. & W. 65; Shock *v.* McChesney, 4 Yeates 507, 2 Am. Dec. 415; Watres *v.* Lloyd, Wilcox 116.

South Carolina.— Phillips *v.* McMasters, 2 Mill 261.

Tennessee.— Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568.

Texas.— Nettles *v.* Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658.

Vermont.— Bates *v.* Harrington, 51 Vt. 1; Harris *v.* Lawrence, 1 Tyler 156.

Virginia.— Harman *v.* Cundiff, 82 Va. 239.

Canada.— Tobin *v.* Gannon, 34 Nova Scotia 9.

See 32 Cent. Dig. tit. "Libel and Slander," § 237.

Where there is a variance between the declaration and proof the proper time to amend is at the conclusion of plaintiff's case. Rainy *v.* Bravo, L. R. 4 P. C. 287, 27 L. T. Rep. N. S. 249, 20 Wkly. Rep. 873.

Insertion of immaterial matter.—Where the defamatory matter is absolutely privileged, an amendment inserting in petition an averment of express malice and want of probable cause will not be permitted as it would not help the cause of action. Larkin *v.* Noonan, 19 Wis. 82.

Charge deemed by court non-actionable.— The court will not amend if it is of the opinion that defendant did not mean to imply a slanderous charge. Camfield *v.* Bird, 3 C. & K. 56.

6. Powers *v.* Cary, 64 Me. 9; Fitzgerald *v.* Geils, 84 Hun (N. Y.) 295, 32 N. Y. Suppl. 306; Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437; Nettles *v.* Somervell, 6 Tex. Civ. App. 627, 25 S. W. 658. *Compare* Thackara *v.* Curren, 2 Browne (Pa.) 246, where an amendment altering the trade laid in the declaration was refused after the jury had been sworn.

7. Hoyt *v.* Donovan, 117 Mich. 172, 75 N. W. 295; Fitzgerald *v.* Geils, 84 Hun (N. Y.) 295, 32 N. Y. Suppl. 306.

Where truth of charge is shown.— Such an amendment will not be allowed where the evidence proves the truth of the charge. Nixon *v.* Wright, 11 S. W. 8, 10 Ky. L. Rep. 863.

Increasing amount of damages alleged.— In Curtiss *v.* Lawrence, 17 Johns. (N. Y.) 111, the court refused to allow the declaration to be amended by increasing the amount of damages alleged where the *ad damnum* was one thousand dollars and the verdict four thousand two hundred and fifty dollars.

8. Lettman *v.* Ritz, 3 Sandf. (N. Y.) 734; Debaix *v.* Lehind, Code Rep. N. S. (N. Y.) 235; Jenkins *v.* Phillips, 9 C. & P. 766, 5 Jur. 252, 38 E. C. L. 444.

Correcting translation.— It is erroneous to refuse leave to amend by correcting an erroneous translation of slanderous words uttered in a foreign language. Rahauser *v.* Schwerger Barth, 3 Watts (Pa.) 28.

9. Pain *v.* Parker, 13 Johns. (N. Y.) 329.

10. Wood *v.* Gilchrist, 1 Code Rep. (N. Y.) 117; Wolfe *v.* Israel, 102 Ga. 772, 29 S. E. 935.

11. Hoyt *v.* Wayne Cir. Judge, 117 Mich. 172, 75 N. W. 295.

12. Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648; Williams *v.* Smith, 134 N. C. 249, 46 S. E. 502.

13. Sinclair *v.* Dalien, 73 Tex. 73, 11 S. W. 147.

the purpose of inserting in a petition a new and essentially different set of words of themselves sufficient to constitute a new cause of action.[14] But where the additional words are of the same general character as the original charge alleged an amendment may be granted.[15] Plaintiff may, it has been held, amend in order to set up an additional publication of the original libel.[16]

(III) *Nullifying Statute of Limitations.* It has been held that an amendment will not be allowed to a declaration in an action for libel or slander, where its effect would be to deprive defendant of the right to plead the statute of limitations.[17]

b. Of Plea or Answer. Defendant may amend his answer by setting up the truth of the alleged defamatory words,[18] provided the amendment is offered before the case goes to the jury.[19] So it has been held that defendant may be allowed to amend his answer by denying statements in the complaint as to the manner in which plaintiff was damaged, and as to the amount of damages sustained.[20] But it has been held that defendant cannot in his amendment deny that he uttered the alleged slanderous words and set up other words published by him concerning plaintiff,[21] or deny that he published the newspaper in which the alleged libel was printed.[22] Nor can the statute of limitations, it has been held, be set up by way of amendment of the answer.[23]

6. Waiver of Defects and Aider by Verdict — a. Waiver by Further Pleadings. The failure of the petition to allege a publication has been held not to be

14. *Georgia.*— Colvard *v.* Black, 110 Ga. 642, 36 S. E. 80.

Indiana.— Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477.

Maryland.— Schulze *v.* Fox, 53 Md. 37.

New York.— Williams *v.* Cooper, 1 Hill 637, holding that a charge of stealing apples cannot be amended by inserting a charge of stealing boards also.

Wisconsin.— Geary *v.* Bennett, 65 Wis. 554, 27 N. W. 335; K. *v.* H., 20 Wis. 239, 91 Am. Dec. 397.

See 32 Cent. Dig. tit. "Libel and Slander," § 238.

Compare Mohr *v.* Lemle, 69 Ala. 180; Dougherty *v.* Bentley, 7 Fed. Cas. No. 4,024, 1 Cranch C. C. 219.

Changing from charge of larceny to charge of embezzlement.— Where the declaration charged words imputing larceny and at trial was amended to charge words imputing embezzlement, it was held that the counts of the amended declaration made a new case. Schulze *v.* Fox, 53 Md. 37.

15. *Connecticut.*— Barber *v.* Barber, 33 Conn. 335.

Iowa.— Snediker *v.* Poorbaugh, 29 Iowa 488.

New York.— Weston *v.* Worden, 19 Wend. 648.

Vermont.— Bates *v.* Harrington, 51 Vt. 1.

Wisconsin.— See Geary *v.* Bennett, 65 Wis. 554, 27 N. W. 335.

England.— Saunders *v.* Bate, 1 H. & N. 402.

16. Corbin *v.* Knapp, 5 Hun (N. Y.) 197. *Compare* Georgia Cent. R. Co. *v.* Sheftall, 118 Ga. 865, 45 S. E. 687, holding that where plaintiff brings suit for publication to designated persons he cannot thereafter by an amendment show a publication to other persons at a different time and place, since it would set up a new and distinct cause of action and therefore infringe the rule of pleading prohibiting such amendments.

17. Miller *v.* Johnson, 10 N. Y. Civ. Proc. 205; Weston *v.* Worden, 19 Wend. (N. Y.) 648; Hester *v.* Mullen, 107 N. C. 724, 12 S. E. 447; Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437; Smith *v.* Smith, 45 Pa. St. 403. See also Shock *v.* McChesney, 4 Yeates (Pa.) 507, 2 Am. Dec. 415. *Compare* Williams *v.* Cooper, 1 Hill (N. Y.) 637; Tobias *v.* Harland, 1 Wend. (N. Y.) 93.

18. Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62; Wimbish *v.* Hamilton, 47 La. Ann. 246, 16 So. 856; Canale *v.* Press Pub. Co., 61 N. Y. App. Div. 143, 70 N. Y. Suppl. 450; Williams *v.* Cooper, 1 Hill (N. Y.) 637.

Amendment of answer allowed at time of withdrawal of replication see McGill *v.* Sheehee, 16 Fed. Cas. No. 8,796, 1 Cranch C. C. 49.

19. Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62; Waters *v.* Guthrie, 2 Bailey (S. C.) 106.

Filing new plea of justification.— Where a plea in justification is adjudged bad on demurrer, it is within the discretion of the court to grant or refuse leave to file a new plea in justification. Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114.

20. Goodyear Dental Vulcanite Co. *v.* White, 10 Fed. Cas. No. 5,601, 4 Ban. & A. 437, 17 Blatchf. 5.

21. Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974.

22. Canale *v.* Press Pub. Co., 61 N. Y. App. Div. 143, 70 N. Y. Suppl. 450.

23. Allensworth *v.* Coleman, 5 Dana (Ky.) 315. *Compare* Brickett *v.* Davis, 21 Pick. (Mass.) 404.

cured by answering over,[24] but formal defects in a pleading will be deemed waived when the opposite party fails to demur and answer over.[25] Where an omitted material allegation in one pleading is supplied or admitted in a subsequent pleading by the opposite party, the defect in the former pleading will be remedied.[26] Thus allegations in a plea of justification to a petition declaring on words charging perjury or false swearing may cure the defects in the petition caused by the absence of such allegations.[27] But it has been held that where plaintiff demurs to one plea or answer, and the admission or averment is found in another, such admission or averment will not avail plaintiff as supplying the deficiencies in his complaint; the plea or answer containing the admission not being before the court, on the demurrer.[28]

b. Waiver by Trial. Where the inducements, colloquiums, or innuendos necessary to render the petition good are insufficient in form and defendant proceeds to trial without attacking them by motion or demurrer, he cannot complain of the insufficiency at trial.[29] So a plea of justification cannot be objected to at trial because it does not state the facts upon which plaintiff relies to prove the truth of the charge.[30] An objection that there is a material variance between the words alleged and the words proved cannot be raised for the first time on appeal or error.[31]

c. Aider by Verdict — (1) *In General.* Under the well known and general rule relating to aider by verdict a pleading in an action for libel or slander defective in form may be cured by verdict.[32] But a verdict will not aid a petition declaring on words which are not actionable,[33] or failing to set forth the words spoken.[34]

24. Anonymous, 3 How. Pr. (N. Y.) 406; Wood *v.* Gilchrist, 1 Code Rep. (N. Y.) 117. See also Donaghe *v.* Rankin, 4 Munf. (Va.) 261.

25. Fowler *v.* Gilbert, 38 Mich. 292; Elfrank *v.* Seiler, 54 Mo. 134 (holding that where the slanderous words were spoken in Dutch and the petition alleges only the English translation, defendant, after answering over, cannot object that the petition does not state a cause of action); Allen *v.* Crofoot, 7 Cow. (N. Y.) 46.

26. Linck *v.* Kelley, 25 Ind. 278, 87 Am. Dec. 362; Whittemore *v.* Ware, 101 Mass. 352; Witcher *v.* Richmond, 8 Humphr. (Tenn.) 473; Hoyt *v.* Smith, 32 Vt. 304, holding that a failure to aver that the words were spoken of and concerning plaintiff is aided by a plea of justification which admits that they were so spoken.

27. Atteberry *v.* Powell, 29 Mo. 429, 77 Am. Dec. 579; Vaughan *v.* Havens, 8 Johns. (N. Y.) 109; Witcher *v.* Richmond, 8 Humphr. (Tenn.) 473; Sanderson *v.* Hubbard, 14 Vt. 462; Wood *v.* Scott, 13 Vt. 42.

28. Ayres *v.* Covill, 18 Barb. (N. Y.) 260.

29. Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422; Chace *v.* Sherman, 119 Mass. 387; Clay *v.* Brigham, 8 Gray (Mass.) 161; Gale *v.* Hays, 3 Strobh. (S. C.) 452.

30. Bryan *v.* Gurr, 27 Ga. 378; Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Evans *v.* Franklin, 26 Mo. 252; Kirtley *v.* Dec, 3 Hen. & M. (Va.) 388. *Compare* Wachter *v.* Quenzer, 29 N. Y. 547.

Charge as to defectiveness of plea.— Where, during trial, a plea is understood by counsel on both sides and the court as a plea of justification, it is error for the court to charge on its own motion that the plea is defective and not available to defendant. Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839; Bryan *v.* Gurr, 27 Ga. 378.

Waiving failure to reply.— Defendant waives his right to a judgment on the pleadings, when, after failure of plaintiff to reply to the plea of justification, he makes an ineffectual motion for judgment and then goes to trial. Nelson *v.* Wallace, 48 Mo. App. 193; Long *v.* Long, 4 Pa. St. 29.

31. Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323].

32. *Connecticut.*— Tuttle *v.* Bishop, 30 Conn. 80.

Georgia.— Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

Indiana.— Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Wilcox *v.* Webb, 1 Blackf. 258.

Iowa.— Kiene *v.* Ruff, 1 Iowa 482.

Pennsylvania.— Wills *v.* Church, 5 Serg. & R. 190.

See 32 Cent. Dig. tit. "Libel and Slander," § 243.

A failure of plaintiff to allege malice is cured by verdict. Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67.

Declaration failing to specify kind of felony charged.— An allegation that defendant made a charge of felony against plaintiff before a magistrate, without stating what kind of felony charged, is good after verdict. Hill *v.* Miles, 9 N. H. 9.

33. Dorsey *v.* Whipps, 8 Gill (Md.) 457.

34. Parsons *v.* Bellows, 6 N. H. 289, 25 Am. Dec. 461; Haselton *v.* Weare, 8 Vt. 480. See also Bell *v.* Bugg, 4 Munf. (Va.) 260.

So a declaration containing no direct charge that the words were spoken by defendant is bad after verdict.[35]

(II) *Aiding Inducement and Colloquium*—(A) *In General.* The rule is laid down that if the words laid in the declaration must have been used in a peculiar sense or with reference to some particular subject in order to render them actionable, and there is no averment or colloquium, a motion in arrest of judgment will lie.[36] On the other hand it is held that where the words are of doubtful signification, but capable of a defamatory meaning, a defective averment or colloquium in the petition will be cured by verdict, if the court is able to see from the record that plaintiff has a good cause of action.[37]

(B) *Charge of Perjury.* A petition charging that defendant imputed perjury or false swearing to plaintiff cannot be objected to after verdict, because it fails to aver that plaintiff was legally sworn at the trial,[38] that the testimony alleged to be false was material,[39] that plaintiff testified on such trial,[40] or that the court had jurisdiction.[41]

(C) *Failure to Allege Publication of and Concerning Plaintiff.* It has been held that the omission to aver that the words were written or spoken of and concerning plaintiff is fatal even after verdict.[42] On the other hand it is held that the petition will be good after verdict when it appears therefrom with reasonable certainty that the words were published of plaintiff, although there is no formal and direct averment.[43]

(III) *Aiding Innuendos.* It has been held that where the alleged defamatory

35. Donaghe *v.* Rankin, 4 Munf. (Va.) 261.

36. Dodge *v.* Lacey, 2 Ind. 212; Carter *v.* Andrews, 16 Pick. (Mass.) 1; Edgerley *v.* Swaim, 32 N. H. 478; Atkinson *v.* Scammon, 22 N. H. 40.

A complaint for charging a wife with adultery that does not allege the marriage of either the wife or the other party has been held to be bad on motion in arrest. Merritt *v.* Dearth, 48 Vt. 65. *Compare* McLenahan *v.* Andrews, 135 Pa. St. 383, 19 Atl. 1039; Beirer *v.* Bushfield, 1 Watts (Pa.) 23.

37. *Connecticut.*— Mix *v.* Woodward, 12 Conn. 262.

Indiana.— Taylor *v.* Short, 40 Ind. 506; Shimer *v.* Bronnenburg, 18 Ind. 363, holding that after verdict the court will support the declaration by every legal intendment if there is nothing material on the record to prevent it, and that where a fact must necessarily have been proved at a trial to justify the verdict and the declaration omits to state it, the defect is cured by the verdict, if the general terms of the declaration are otherwise sufficient to comprehend the proof.

Massachusetts.— Goodrich *v.* Davis, 11 Metc. 473; Carter *v.* Andrews, 16 Pick. 1.

Missouri.— See Palmer *v.* Hunter, 8 Mo. 512, holding that where the issue joined is such as necessarily requires proof of facts defectively stated or omitted in the declaration, and without which proof it is not to be presumed either that the judge could direct the jury to give, or the jury could have given, the verdict, such defect, imperfection, or omission is cured by verdict.

New York.— Kennedy *v.* Gifford, 19 Wend. 296.

Pennsylvania.— Bornman *v.* Boyer, 3 Binn. 515, 5 Am. Dec. 380.

Vermont.— Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561; Cass *v.* Anderson, 33 Vt. 182 (holding that when the statement of material facts in the colloquium of a declaration for slander is defective in form, the defect cannot be taken advantage of by motion in arrest of judgment, and that after verdict the court will supply by intendment all such averments as may fairly and reasonably be presumed to have been proved and which the general, although defective, allegations of the declaration embrace); Nichols *v.* Packard, 16 Vt. 83.

See 32 Cent. Dig. tit. "Libel and Slander," § 244.

Omission of name of victim of crime.— The omission to give the christian name of the person whose house is alleged to have been robbed (Galloway *v.* Courtney, 10 Rich. (S. C.) 414), or of the name of the owner of the alleged stolen property (Thompson *v.* Barkley, 27 Pa. St. 263), is no ground for arrest of judgment.

38. Cass *v.* Anderson, 33 Vt. 182; Sanderson *v.* Hubbard, 14 Vt. 462.

39. Wilson *v.* Harding, 2 Blackf. (Ind.) 241; Palmer *v.* Hunter, 8 Mo. 512; Sherwood *v.* Chace, 11 Wend. (N. Y.) 38; Chapman *v.* Smith, 13 Johns. (N. Y.) 78; Niven *v.* Munn, 13 Johns. (N. Y.) 48; Magee *v.* Stark, 1 Humphr. (Tenn.) 506.

40. Whitaker *v.* Carter, 26 N. C. 461.

41. Palmer *v.* Hunter, 8 Mo. 512; Sherwood *v.* Chace, 11 Wend. (N. Y.) 38; Niven *v.* Munn, 13 Johns. (N. Y.) 48.

42. Sayre *v.* Jewett, 12 Wend. (N. Y.) 135.

43. Ellis *v.* Kimball, 16 Pick. (Mass.) 132; Nestle *v.* Van Slyck, 2 Hill (N. Y.) 282; Hanbest *v.* Cox, 10 Leg. Int. (Pa.) 106; Hoyle *v.* Young, 1 Wash. (Va.) 150, 1 Am. Dec. 446.

words do not in themselves or in connection with the precedent matter in the declaration necessarily imply an actionable charge, the absence of the necessary innuendo is not cured by verdict.[44] It has, however, been held that it is no objection after verdict that the innuendo enlarges the natural meaning of the words to which it is attached.[45]

7. ISSUES AND EVIDENCE ADMISSIBLE UNDER PLEADINGS — a. Publication. Under a denial to a complaint alleging a publication at a specified time and "at other times" proof of the speaking of the words at any time prior to the commencement of the action may be shown.[46] So under the general issue at common law defendant may give in evidence any matter tending to deny or disprove the publication of the alleged defamatory words.[47] Where defendant answers by a general denial, and plaintiff testifies to the conversation in which the slanderous words were used, defendant can state fully what was said by the parties in such conversation.[48]

b. Inducement, Colloquium, and Innuendo, and Meaning of Words. The extraneous facts which must necessarily be set out to make the alleged defamatory words actionable and the colloquium are traversable and must be proved.[49] But this rule does not apply to mere introductory averments not material to the action.[50] It has been held that an innuendo is not an averment of facts upon which an issue can be taken,[51] and cannot be the subject of proof by witnesses.[52] Under a plea of justification, the meaning ascribed to the words by plaintiff is not in issue.[53] Defendant may under the general issue,[54] or it is held under a

44. Wood *v.* Scott, 13 Vt. 42. *Compare* Dias *v.* Short, 16 How. Pr. (N. Y.) 322.

Uncertainty in the innuendo may be removed by verdict (Nestle *v.* Van Slyck, 2 Hill (N. Y.) 282), but not, it is held, when the words are so alleged as to be incapable of the innuendo attached to them (Bowdish *v.* Peckham, 1 D. Chipm. (Vt.) 144).

45. Dottarer *v.* Bushey, 16 Pa. St. 204; Shultz *v.* Chambers, 8 Watts (Pa.) 300.

46. Norris *v.* Elliott, 39 Cal. 72; Wilby *v.* Elston, 8 C. B. 142, 7 D. & L. 143, 13 Jur. 706, 18 L. J. C. P. 320, 65 E. C. L. 143; O'Brien *v.* Clement, 3 D. & L. 676, 10 Jur. 395, 15 L. J. Exch. 285, 15 M. & W. 435. See also Clarke *v.* Fox, 10 N. Y. App. Div. 514, 41 N. Y. Suppl. 1091.

47. See Hagan *v.* Hendry, 18 Md. 177.

48. Judge *v.* Judge, 14 N. Y. Civ. Proc. 138. See also Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63.

49. *Arizona.*— Johnston *v.* Morrison, 3 Ariz. 109, 21 Pac. 465.

Connecticut.— Mix *v.* Woodward, 12 Conn. 262.

Georgia.— Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219.

Illinois.— Strader *v.* Snyder, 67 Ill. 404; Brown *v.* Burnett, 10 Ill. App. 279.

Indiana.— Hickley *v.* Grosjean, 6 Blackf. 351.

Missouri.— Unterberger *v.* Scharff, 51 Mo. App. 102.

New York.— Kinney *v.* Nash, 3 N. Y. 177; Wuest *v.* Brooklyn Citizen, 38 Misc. 1, 76 N. Y. Suppl. 706; Emery *v.* Miller, 1 Den. 208; Van Vechten *v.* Hopkins, 5 Johns. 211, 4 Am. Dec. 339.

Pennsylvania.— Barger *v.* Barger, 18 Pa. St. 489.

South Carolina.— Ashbell *v.* Witt, 2 Nott & M. 364.

United States.— Smith *v.* Tribune Co., 22 Fed. Cas. No. 13,118, 4 Biss. 477.

See 32 Cent. Dig. tit. "Libel and Slander," § 247.

In Massachusetts where it is permissible to allege the substance of the charge, the necessary extrinsic facts may be proved at the trial, although not alleged (Allen *v.* Perkins, 17 Pick. 369; Pond *v.* Hartwell, 17 Pick. 269); but not if the charge is not set out either in full or in substance (Stevens *v.* Hartwell, 11 Metc. 542).

When plaintiff desires to aggravate the meaning of a publication, he must allege and prove the necessary extrinsic facts. Cassidy *v.* Brooklyn Daily Eagle, 138 N. Y. 239, 33 N. E. 1038 [*reversing* 18 N. Y. Suppl. 930].

50. Sidgreaves *v.* Myatt, 22 Ala. 617 (an averment of good reputation); Coleman *v.* Southwick, 9 Johns. (N. Y.) 45, 6 Am. Dec. 253.

51. Mix *v.* Woodward, 12 Conn. 262; Fry *v.* Bennett, 5 Sandf. (N. Y.) 54; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339. *Compare* Wilkin *v.* Tharp, 55 Iowa 609, 8 N. W. 467.

52. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; Rangler *v.* Hummel, 37 Pa. St. 130. *Compare* Unterberger *v.* Scharff, 51 Mo. App. 102; Barger *v.* Barger, 18 Pa. St. 489.

Testimony of witnesses as to understanding of words see *infra*, VIII, F, 2, d, (III).

53. Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

54. Parker *v.* McQueen, 8 B. Mon. (Ky.) 16; Brite *v.* Gill, 2 T. B. Mon. (Ky.) 65, 15 Am. Dec. 122; Smith *v.* Tribune Co., 22 Fed.

special plea,[55] introduce explanations or facts and circumstances tending to show the innocent sense of the alleged defamatory words. Indeed, if the words were used in such a relation or connection, as to render them not actionable, but it does not so appear in the declaration, defendant must avail himself of this fact by plea in defense, unless it appears in plaintiff's evidence on the trial, and a demurrer is not available for this purpose.[56]

c. Special Damages. Special damages cannot be proved unless they are alleged in the petition,[57] even though the words are actionable *per se*.[58] So when special damages are alleged plaintiff cannot introduce evidence of other special damages not alleged.[59] The plea of not guilty has been held to put in issue the special damages alleged.[60]

d. Matters in Aggravation of Damages. For the purpose of showing in aggravation of damages that defendant was prompted by malice in publishing the defamatory words complained of other similar words published at other times and places have been held admissible without being specially pleaded.[61] On the other hand it is held that plaintiff is not entitled to introduce in aggravation of damages facts not specially pleaded which in effect go to enlarge the scope of the libel or slander itself, although the publication is defamatory on its face.[62]

e. Justification — (I) *In General.* A plea attempting to justify a declaration in which there is no proper averment of a libel presents an immaterial issue.[63]

(II) *Under Plea of General Issue or Denial.* As a general rule the truth as a justification is not in issue under a plea of general issue or denial,[64] and

Cas. No. 13,118, 4 Biss. 477. See also Hagan *v.* Hendry, 18 Md. 177.

55. Parker *v.* McQueen, 8 B. Mon. (Ky.) 16; Brite *v.* Gill, 2 T. B. Mon. (Ky.). 65, 15 Am. Dec. 122.

56. Little *v.* Barlow, 26 Ga. 423, 71 Am. Dec. 219.

Demurrer to plaintiff's pleading see *supra*, VIII, E, 4, b.

57. *Alabama.*— Gandy *v.* Humphries, 35 Ala. 617.

Connecticut.— Bostwick *v.* Hawley, Kirby 290; Bostwick *v.* Nickelson, Kirby 65.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

Michigan.— Couch *v.* Mining Journal Co., 130 Mich. 294, 89 N. W. 936; Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952; Burt *v.* McBain, 29 Mich. 260.

Minnesota.— Holston *v.* Boyle, 46 Minn. 432, 49 N. W. 203.

Missouri.— Nicholson *v.* Rogers, 129 Mo. 136, 31 S. W. 260; Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340.

New York.— Loftus *v.* Bennett, 68 N. Y. App. Div. 128, 74 N. Y. Suppl. 290; Harcourt *v.* Harrison, 1 Hall 474; Shipman *v.* Burrows, 1 Hall 399; Bell *v.* Sun Printing, etc., Assoc., 3 Abb. N. Cas. 157; Herrick *v.* Lapham, 10 Johns. 281.

Pennsylvania.— Haldeman *v.* Martin, 10 Pa. St. 369.

United States.— Kelly *v.* Huffington, 14 Fed. Cas. No. 7,671, 3 Cranch C. C. 81.

See 32 Cent. Dig. tit. "Libel and Slander," § 248.

Necessity of alleging special damages generally see *supra*, VIII, E, 1, n, (II).

Allegation of injury by boycott.— Under a complaint alleging that plaintiff had been injured in his business by persons boycotting his store on account of the slander, it was held that the word "boycott" does not necessarily imply a combination to injure and that plaintiff could show a refusal to trade on the part of old customers. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516.

58. *Alabama.*— Johnson *v.* Robertson, 8 Port. 486.

Maryland.— Dicken *v.* Shepherd, 22 Md. 399.

Massachusetts.— Chesley *v.* Tompson, 137 Mass. 136.

Michigan.— McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

Nebraska.— See Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New York.— Hallock *v.* Miller, 2 Barb. 630.

Ohio.— Wilson *v.* Runyon, Wright 651.

Vermont.— Kidder *v.* Bacon, (1902) 52 Atl. 322.

See 32 Cent. Dig. tit. "Libel and Slander," § 248. See also *supra*, VIII, E, 1, n, (II), (A).

59. Johnson *v.* Robertson, 8 Port. (Ala.) 486; Hallock *v.* Miller, 2 Barb. (N. Y.) 630.

60. Wilby *v.* Elston, 8 C. B. 142, 7 D. & L. 143, 13 Jur. 706, 18 L. J. C. P. 320, 65 E. C. L. 143; O'Brien *v.* Clement, 3 D. & L. 676, 10 Jur. 395, 15 L. J. Exch. 285, 15 M. & W. 435.

61. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Howell *v.* Cheatham, Cooke (Tenn.) 247. See also *infra*, VIII, F, 2, c, (XII), text and note 8 *et seq.*

62. Cassidy *v.* Brooklyn Daily Eagle, 138 N. Y. 239, 33 N. E. 1038.

63. Brown *v.* Burnett, 10 Ill. App. 279.

64. *Alabama.*— Douge *v.* Pearce, 13 Ala. 127; Arrington *v.* Jones, 9 Port. 139.

can only be shown under a plea of justification.[65] But in some jurisdictions either under or apart from statute a justification instead of being specially pleaded may be offered in evidence under the general issue on the requisite notice given to the opposite party.[66]

(III) *Pleas of General Issue and Justification.* Where the general issue and justification are both pleaded, the jury are not to consider the latter if they find the former to be true.[67]

f. Mitigation — (I) *In General.* In the absence of statute, any defense which does not amount to a justification may be given in evidence under the general issue in mitigation of damages.[68] But under statute in several jurisdictions where

Connecticut.— Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397.

Delaware.— Kinney *v.* Hosea, 3 Harr. 397; Waggstaff *v.* Ashton, 1 Harr. 503.

Indiana.— Kelley *v.* Dillon, 5 Ind. 426; Burke *v.* Miller, 6 Blackf. 155; Henson *v.* Veatch, 1 Blackf. 369.

Iowa.— Bearsley *v.* Bridgman, 17 Iowa 290.

Kentucky.— Samuel *v.* Bond, Litt. Sel. Cas. 158.

Louisiana.— McClure *v.* McMartin, 104 La. 496, 29 So. 227; Miller *v.* Roy, 10 La. Ann. 231.

Maine.— Taylor *v.* Robinson, 29 Me. 323.

Maryland.— Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887; Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.—Brickett *v.* Davis, 21 Pick. 404; Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114.

Michigan.— Moyer *v.* Pine, 4 Mich. 409.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137; Knight *v.* Foster, 39 N. H. 576.

New York.— Fero *v.* Ruscoe, 4 N. Y. 162; Snyder *v.* Andrews, 6 Barb. 43; Shepard *v.* Merrill, 13 Johns. 475.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157.

Ohio.— Brooks *v.* Bryan, Wright 760.

Pennsylvania.— Kay *v.* Fredrigal, 3 Pa. St. 221; Spence *v.* Burt, 18 Lanc. L. Rev. 251.

South Carolina.— Eagan *v.* Gantt, 1 McMull. 468; Easterwood *v.* Quin, 2 Brev. 64, 3 Am. Dec. 700.

Tennessee.— McCampbell *v.* Thornburgh, 3 Head 109.

Vermont.— Barns *v.* Webb, 1 Tyler 17.

Virginia.— Grant *v.* Hover, 6 Munf. 13.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin.— Eaton *v.* White, 2 Pinn. 42.

England.— Rumsey *v.* Webb, C. & M. 104, 11 L. J. C. P. 129, 41 E. C. L. 63; Underwood *v.* Parks, 2 Str. 1200.

See 32 Cent. Dig. tit. "Libel and Slander," § 249½.

65. *Connecticut.*—Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Delaware.— See Donahoe *v.* Star Pub. Co., 3 Pennew. 545, 53 Atl. 1028.

Illinois.— Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271.

Michigan.— McNaughton *v.* Quay, 102 Mich. 142, 60 N. W. 474.

New York.— Sawyer *v.* Bennett, 20 N. Y. Suppl. 835.

North Carolina.— Sowers *v.* Sowers, 87 N. C. 303.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Washington.— Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

Wisconsin.— Langton *v.* Hagerty, 35 Wis. 150.

United States.— Barrows *v.* Carpenter, 2 Fed. Cas. No. 1,058, 1 Cliff. 204.

See 32 Cent. Dig. tit. "Libel and Slander," § 249½.

The reason why matters in justification must be pleaded specially is that plaintiff may not be surprised, but the reason does not apply where plaintiff himself produces the evidence on which the justification rests. Watson *v.* Hamilton, 6 Rich. (S. C.) 75.

Question of malice not in issue under plea of justification.— Where in an action of slander issue is joined by plaintiff upon a plea that the words declared on were true, without objecting to the sufficiency of such plea, the question whether the words were spoken maliciously cannot be left to the jury, after a finding for defendant on such plea. Dicken *v.* Shepherd, 22 Md. 399.

Character and requisites of plea of justification see *supra*, VIII, E, 2, b, (XII).

66. Beehler *v.* Steever, 2 Whart. (Pa.) 313; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

In Washington under statute it has been held that the truth may be shown as a complete defense, although pleaded in mitigation of damages only. Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

In Hawaii, under statute, the truth can be shown under the general issue. Gomez *v.* Hawaiian Gazette Co., 10 Hawaii 108.

67. Sumner *v.* Shipman, 65 N. C. 623.

Separate trial of issues.— Where justification is pleaded to a part and "not guilty" to the balance, the two issues will be tried separately. Flagg *v.* Hobart, Quincy (Mass.) 332.

68. *Alabama.*—Scott *v.* McKinnish, 15 Ala. 662; Arrington *v.* Jones, 9 Port. 139; Kennedy *v.* Dear, 6 Port. 90.

Connecticut.— Williams *v.* Miner, 18 Conn. 464.

Delaware.— Donahoe *v.* Star Pub. Co., 3 Pennew. 545, 53 Atl. 1028; Morris *v.* Barker, 4 Harr. 520. See also Croasdale *v.* Bright, 6 Houst. 52.

Florida.— Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170.

defendant intends to give circumstances in evidence in mitigation of damages, they must be specially pleaded.[69] But it has been held that a statute permitting the pleading of mitigating circumstances in connection with a plea of justification does not change the common-law rule allowing mitigating circumstances to be offered in evidence under the general issue.[70]

(II) *Under Pleas of General Issue and Justification.* In those states

Illinois.— Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119; Storey *v.* Early, 86 Ill. 461; Thomas *v.* Dunaway, 30 Ill. 373; Tottleben *v.* Blankenship, 58 Ill. App. 47.

Indiana.— Burke *v.* Miller, 6 Blackf. 155.

Iowa.— McClintock *v.* Crick, 4 Iowa 453.

Louisiana.— Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.— Larned *v.* Buffington, 3 Mass. 546, 3 Am. Dec. 185; Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639.

Mississippi.— Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

New Jersey.— Cook *v.* Barkley, 2 N. J. L. 169, 2 Am. Dec. 343.

New York.— Snyder *v.* Andrews, 6 Barb. 43; Meyer *v.* Schultz, 4 Sandf. 664; Calkins *v.* Colburn, 10 N. Y. St. 778; Anonymous, 8 How. Pr. 434; Paddock *v.* Salisbury, 2 Cow. 811.

Ohio.— Blue *v.* Hoke, 2 Ohio Dec. (Reprint) 440, 3 West. L. Month. 100; Shields *v.* Moore, 2 Ohio Dec. (Reprint) 331, 2 West. L. Month. 437.

Pennsylvania.— Conroe *v.* Conroe, 47 Pa. St. 198; Updegrove *v.* Zimmerman, 13 Pa. St. 619; Beehler *v.* Steever, 2 Whart. 313.

Virginia.— Grant *v.* Hover, 6 Munf. 13.

England.— Keyzor *v.* Newcomb, 1 F. & F. 559; Richards *v.* Richards, 2 M. & Rob. 557.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 250, 251.

Particular matters admissible in mitigation see *infra*, VIII, F, 2, i.

69. *Georgia.*— Howe Mach. Co. *v.* Souder, 58 Ga. 64.

Iowa.— Craver *v.* Norton, 114 Iowa 46, 86 N. W. 54, 89 Am. St. Rep. 346; Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

Minnesota.— Hewitt *v.* Pioneer-Press Co., 23 Minn. 178, 23 Am. Rep. 680.

Missouri.— Baldwin *v.* Frics, 46 Mo. App. 288.

New York.— Willover *v.* Hill, 72 N. Y. 36; Morse *v.* Press Pub. Co., 63 N. Y. App. Div. 61, 71 N. Y. Suppl. 348; Gray *v.* Brooklyn Union Pub. Co., 35 N. Y. App. Div. 286, 55 N. Y. Suppl. 35; Palmer *v.* Palladium Printing Co., 16 N. Y. App. Div. 270, 44 N. Y. Suppl. 675; Clarke *v.* Fox, 10 N. Y. App. Div. 514, 41 N. Y. Suppl. 1091; Hatch *v.* Matthews, 85 Hun 522, 33 N. Y. Suppl. 332 [*affirming* 9 Misc. 307, 30 N. Y. Suppl. 309]; Kingsley *v.* Kingsley, 79 Hun 569, 29 N. Y. Suppl. 921; McKane *v.* Brooklyn Citizen, 53 Hun 132, 6 N. Y. Suppl. 171 [*affirmed* in 117 N. Y. 634, 22 N. E. 1129]; Knox *v.* Commercial Agency, 40 Hun 508; Bennett *v.* Matthews, 64 Barb. 410; Jeffras *v.* McKillop, 4 Thomps. & C. 578; Dolevin *v.* Wilder, 7 Rob. 319; Maretzek *v.* Cauldwell, 2 Rob. 715, 19 Abb. Pr. 35; Steffen *v.* Schaefer, 15 N. Y. Suppl. 493; Ward *v.* Deane, 10 N. Y. Suppl. 421; Moore *v.* Francis, 3 N. Y. Suppl. 162 [*reversed* on other grounds in 121 N. Y. 199, 23 N. E. 1127, 18 Am. St. Rep. 810, 8 L. R. A. 214]; Heaton *v.* Wright, 10 How. Pr. 79; Anonymous, 6 How. Pr. 160. See also Herr *v.* Bamberg, 10 How. Pr. 128.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157; Knott *v.* Burwell, 96 N. C. 272, 2 S. E. 588.

South Dakota.— Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611, 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Langton *v.* Hagerty, 35 Wis. 150.

United States.— Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475 (decided under Missouri statute); Battell *v.* Wallace, 30 Fed. 229 (decided under New York statute).

See 32 Cent. Dig. tit. "Libel and Slander," § 227.

Pleading other and different charges.— The right to plead matters in mitigation does not permit an assault upon plaintiff's character by making other and different charges. Hess *v.* New York Press Co., 26 N. Y. App. Div. 73, 49 N. Y. Suppl. 894.

Irrelevant matters alleged in mitigation.— Where the facts alleged in mitigation are irrelevant and not admissible in mitigation they may be stricken from the answer by motion. Hilton *v.* Carr, 40 N. Y. App. Div. 490, 58 N. Y. Suppl. 134.

If the court has any doubt as to the admissibility of matters in mitigation they should not be stricken from the answer. Burnham *v.* Franklin, 44 Misc. (N. Y.) 299, 89 N. Y. Suppl. 917.

Where the mitigating circumstances are shown by plaintiff, they may be considered by the jury, although defendant has failed to plead them. Croasdale *v.* Bright, 6 Houst. (Del.) 52; Moore *v.* Manufacturers' Nat. Bank, 51 Hun (N. Y.) 472, 4 N. Y. Suppl. 378 [*reversed* on other grounds in 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753].

70. McCoy *v.* McCoy, 106 Ind. 492, 7 N. E. 188; O'Conner *v.* O'Conner, 27 Ind. 69; Swinney *v.* Nave, 22 Ind. 178; Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479; Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914; Thurman *v.* Virgin, 18 B. Mon. (Ky.) 785.

where, under a plea of the general issue, evidence is admissible in mitigation of damages, the rule is not changed, although justification is also pleaded.[71]

(III) *Under Pleas of Justification and Mitigation.* Where statutes permit the joining of pleas in justification and mitigation, mitigating circumstances are admissible, although the plea of justification should fail.[72] Under statutes of this character the same matter may be pleaded both in justification and mitigation.[73]

(IV) *Under Plea of Justification.* The rule has been laid down both under and apart from statute that, although defendant relies solely on a plea of justification, averring the truth of the words, he is not precluded from giving evidence in mitigation of damages.[74]

(V) *Facts Establishing or Tending to Establish Truth* — (A) *Evidence Already Offered in Justification.* Evidence offered in support of a plea of justification may be considered in mitigation of damages, when such evidence is insufficient to sustain the plea.[75] In some of these jurisdictions, however, it is required that the general issue and justification shall both be pleaded,[76] and in other jurisdictions under statute it is necessary that the facts should also be specially pleaded in mitigation.[77]

71. *Alabama.*— Fuller *v.* Dean, 31 Ala. 654 [*overruling* Shelton *v.* Simmons, 12 Ala. 466]; Pope *v.* Welsh, 18 Ala. 631.

Illinois.— Young *v.* Bennett, 5 Ill. 43.

Missouri.— Hawkins *v.* Globe Printing Co., 10 Mo. App. 174.

New Hampshire.— Pallet *v.* Sargent, 36 N. H. 496.

New York.— Hamer *v.* McFarlin, 4 Den. 509.

Virginia.— McNutt *v.* Young, 8 Leigh 542.

Wisconsin.— Vliet *v.* Rowe, 1 Pinn. 413.

See 32 Cent. Dig. tit. "Libel and Slander," § 252.

72. *Kentucky.*— Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914.

Minnesota.— Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678.

New York.— Russ *v.* Brooks, 4 E. D. Smith 644.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Oregon.— Shartle *v.* Hutchinson, 3 Oreg. 337.

Washington.— Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

Wisconsin.— Eviston *v.* Cramer, 54 Wis. 220, 11 N. W. 556.

See 32 Cent. Dig. tit. "Libel and Slander," § 253.

73. Fink *v.* Justh, 14 Abb. Pr. N. S. (N. Y.) 107; Kelly *v.* Taintor, 48 How. Pr. (N. Y.) 270; Eviston *v.* Cramer, 54 Wis. 220, 11 N. W. 556. See also Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

74. *Indiana.*—Heilman *v.* Shanklin, 60 Ind. 424; O'Conner *v.* O'Conner, 27 Ind. 69; Swinney *v.* Nave, 22 Ind. 178; Shoulty *v.* Miller, 1 Ind. 544; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564.

Kentucky.— Morehead *v.* Jones, 2 B. Mon. 210, 36 Am. Dec. 600.

Maine.— Sawyer *v.* Hopkins, 22 Me. 268.

New Jersey.— Vanch *v.* Hull, 3 N. J. L. 578, 4 Am. Dec. 389.

New York.— See Doyle *v.* Fritz, 86 N. Y. App. Div. 515, 83 N. Y. Suppl. 762.

Ohio.— Blue *v.* Hoke, 2 Ohio Dec. (Reprint) 440, 3 West. L. Month. 100.

See 32 Cent. Dig. tit. "Libel and Slander," § 254.

Compare Hix *v.* Drury, 5 Pick. (Mass.) 296; Buckley *v.* Knapp, 48 Mo. 152; Fenstermaker *v.* Tribune Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611; Mayo *v.* Blair, 16 Fed. Cas. No. 9,354, 1 Hayw. & H. 96.

Evidence already offered in justification see *infra*, VIII, F, 7, b, (V), (A).

Effect of unsuccessful plea of justification see *supra*, VII, A, 2.

75. *Connecticut.*— Swift *v.* Dickerman, 31 Conn. 285.

Georgia.— Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

Illinois.— Thomas *v.* Dunaway, 30 Ill. 373.

Indiana.— Shoulty *v.* Miller, 1 Ind. 544; Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212; Landis *v.* Shanklin, Smith 78.

Maine.— McAllister *v.* Sibley, 25 Me. 474.

Maryland.— Rigden *v.* Wolcott, 6 Gill & J. 413.

Massachusetts.— Sibley *v.* Marsh, 7 Pick. 38.

Missouri.— See McCloskey *v.* Pulitzer, 152 Mo. 339, 53 S. W. 1087.

New York.— Bisbey *v.* Shaw, 12 N. Y. 67. *Compare* Fero *v.* Ruscoe, 4 N. Y. 126, decided prior to the code.

Ohio.— Wilson *v.* Apple, 3 Ohio 270.

South Carolina.— McLuny *v.* Buford, 1 Nott & M. 268.

Tennessee.— West *v.* Walker, 2 Swan 32.

Wisconsin.— Kennedy *v.* Holborn, 16 Wis. 457.

See 32 Cent. Dig. tit. "Libel and Slander," § 321.

76. West *v.* Walker, 2 Swan (Tenn.) 32. See also Sibley *v.* Marsh, 7 Pick. (Mass.) 38.

77. Bisbey *v.* Shaw, 12 N. Y. 67; Kelly *v.* Taintor, 48 How. Pr. (N. Y.) 270. See also

(B) *Under General Issue or General Denial*—(1) EVIDENCE ESTABLISHING TRUTH. Evidence that the charge is true is inadmissible under the general issue or general denial, although offered only in mitigation of damages.[78]

(2) EVIDENCE TENDING TO ESTABLISH JUSTIFICATION. Moreover there are authorities to the effect that under the plea of the general issue defendant cannot give in evidence any mitigating circumstances which tend to prove the truth of the imputation.[79] But the rule sustained by other authorities is that under the

Eviston *v.* Cramer, 54 Wis. 220, 11 N. W. 556.

Facts set up in special plea alone.— Facts amounting to a justification when specially pleaded are admissible, although pleaded only in mitigation of damages. Baker *v.* Wilkins, 3 Barb. (N. Y.) 220.

78. *Alabama.*— Kennedy *v.* Dear, 6 Port. 90.

Connecticut.— Donaghue *v.* Gaffey, 53 Conn. 43, 2 Atl. 397; Swift *v.* Dickerman, 31 Conn. 285; Williams *v.* Miner, 18 Conn. 464; Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156.

Delaware.— Waggstaff *v.* Ashton, 1 Harr. 503.

Illinois.— Regnier *v.* Cabot, 7 Ill. 34.

Indiana.— Blickenstaff *v.* Perrin, 27 Ind. 527; Burke *v.* Miller, 6 Blackf. 155; Henson *v.* Veatch, 1 Blackf. 369.

Maine.— Taylor *v.* Robinson, 29 Me. 323; Ridley *v.* Perry, 16 Me. 21.

Maryland.— Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887.

Massachusetts.— Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114.

Mississippi.— Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

New Hampshire.— Knight *v.* Foster, 39 N. H. 576; Pallet *v.* Sargent, 36 N. H. 496.

New York.— Fero *v.* Ruscoe, 4 N. Y. 162; Else *v.* Ferris, Anth. N. P. 36; Purple *v.* Horton, 13 Wend. 9, 27 Am. Dec. 167; Shepard *v.* Merrill, 13 Johns. 475.

North Carolina.—Smith *v.* Smith, 30 N. C. 29.

Pennsylvania.— Porter *v.* Botkins, 59 Pa. St. 484; Updegrove *v.* Zimmerman, 13 Pa. St. 619.

South Carolina.— Eagan *v.* Gantt, 1 McMull. 468.

Tennessee.— Haws *v.* Stanford, 4 Sneed 520.

Vermont.— Hutchinson *v.* Wheeler, 35 Vt. 330.

Virginia.— See Moseley *v.* Moss, 6 Gratt. 534.

United States.— Barrows *v.* Carpenter, 2 Fed. Cas. No. 1,058, 1 Cliff. 204; Mayo *v.* Blair, 16 Fed. Cas. No. 9,354, 1 Hayw. & H. 96. *Compare* Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

England.— Vessey *v.* Pike, 3 C. & P. 512, 14 E. C. L. 689.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 160, 250, 322.

In Ohio a contrary doctrine has been announced. Van Derveer *v.* Sutphin, 5 Ohio St. 293; Commercial Gazette Co. *v.* Healy, 10 Ohio Dec. (Reprint) 415, 21 Cinc. L. Bul. 93; Halstead *v.* Schempp, 8 Ohio Dec. (Reprint) 204, 6 Cinc. L. Bul. 271; Mack *v.* McGary, 6 Ohio Dec. (Reprint) 1062, 10 Am. L. Rec. 49. *Compare* Duval *v.* Davey, 32 Ohio St. 604; Haywood *v.* Foster, 16 Ohio 88.

A publication not declared on or offered in proof by plaintiff cannot be found true by the jury to mitigate damages. Fisher *v.* Patterson, 14 Ohio 418. But it has been held that if plaintiff prove the speaking of words not laid in the declaration tending to show malice defendant may under the general issue prove those words to be true. Burke *v.* Miller, 6 Blackf. (Ind.) 155. See also *infra*, VIII, E, 7, g, text and note 84.

79. *Alabama.*— Scott *v.* McKinnish, 15 Ala. 662; Arrington *v.* Jones, 9 Port. 139; Kennedy *v.* Dear, 6 Port. 90.

Illinois.— Storey *v.* Early, 86 Ill. 461; Thomas *v.* Dunaway, 30 Ill. 373; Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Owen *v.* McKean, 14 Ill. 459; Young *v.* Bennett, 5 Ill. 43.

Indiana.— Kelley *v.* Dillon, 5 Ind. 426; Abshire *v.* Cline, 3 Ind. 115; Teagle *v.* Deboy, 8 Blackf. 134; Burke *v.* Miller, 6 Blackf. 155.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137.

Pennsylvania.— Porter *v.* Botkins, 59 Pa. St. 484; Smith *v.* Smith, 39 Pa. St. 441; Barger *v.* Barger, 18 Pa. St. 489; Updegrove *v.* Zimmerman, 13 Pa. St. 619; Minesinger *v.* Kerr, 9 Pa. St. 312; Petrie *v.* Rose, 5 Watts & S. 364. *Compare* Stees *v.* Kemble, 27 Pa. St. 112.

Tennessee.— Shirley *v.* Keathy, 4 Coldw. 29.

Virginia.— McAlexander *v.* Harris, 6 Munf. 465; Grant *v.* Hover, 6 Munf. 13.

England.— Underwood *v.* Parks, 2 Str. 1200; Smith *v.* Richardson, Willes 20. *Compare* Knobell *v.* Fuller, Peake Add. Cas. 139, 4 Rev. Rep. 896.

See 32 Cent. Dig. tit. "Libel and Slander," § 323.

In Massachusetts the general rule as stated in the text obtains. Watson *v.* Moore, 2 Cush. 133; Bodwell *v.* Swan, 3 Pick. 376; Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114. *Compare* Stone *v.* Varney, 7 Metc. 86, 39 Am. Dec. 762. But where the occasion of the speaking of the words furnishes a case of *prima facie* excuse or privilege it is held that evidence is admissible under the general issue to show good faith and probable cause, although it has a tendency to establish the truth of the charge. Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418; Rem-

general issue the jury may consider in mitigation of damages facts and circumstances calculated to mislead defendant into the belief of the charge and thereby having a tendency to prove the charge true, provided they fall short of establishing a justification.[80]

g. Matters in Rebuttal of Malice. Where plaintiff has put in evidence a fact not pleaded by him tending to show express malice, defendant may without a special plea rebut by showing evidence explanatory of the fact.[81] If plaintiff, in proof of malice, relies upon the falsity of the charge, defendant may rebut the inference by evidence of the truth of the charge, even under the general issue.[82] *A fortiori* if plaintiff undertakes to show that matters asserted by defendant as the grounds for his belief of the truth of the charge are false, defendant will be permitted to show the truth of his assertions.[83] So where plaintiff proves the publication of words not laid in the petition in order to show malice, defendant may prove the truth of these words under the general issue.[84]

h. Privilege. At common law the defense of privilege can be made either under the general issue or by a special plea setting forth the facts constituting

ington *v.* Congdon, 2 Pick. 310, 13 Am. Dec. 431.

Evidence that defendant repeated a current report is not evidence tending to establish the truth of the charge. Henson *v.* Veatch, 1 Blackf. (Ind.) 369; Cook *v.* Barkley, 2 N. J. L. 169, 2 Am. Dec. 343; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244.

Information derived from third person.— It has been held that evidence that defendant had been told by a third person that plaintiff was guilty of the crime charged is inadmissible as tending to establish the truth. Austin *v.* Hanchett, 2 Root (Conn.) 148; Inman *v.* Foster, 8 Wend. (N. Y.) 602; Mapes *v.* Weeks, 4 Wend. (N. Y.) 659.

80. *Connecticut.*— Williams *v.* Miner, 18 Conn. 464.

Delaware.— Donohoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337.

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676.

Kentucky.— See Hart *v.* Reed, 1 B. Mon. 166, 35 Am. Dec. 179.

Maryland.— Wagner *v.* Holbrunner, 7 Gill 296.

Michigan.— Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Huson *v.* Dale, 19 Mich. 17, 2 Am. Rep. 66. *Compare* Thompson *v.* Bowers, 1 Dougl. 321.

Ohio.— Reynolds *v.* Tucker, 6 Ohio St. 516, 67 Am. Dec. 353; Van Derveer *v.* Sutphin, 5 Ohio St. 293; Hilbrant *v.* Simmons, 18 Ohio Cir. Ct. 123, 9 Ohio Cir. Dec. 566.

South Carolina.— McLuny *v.* Buford, 1 Nott & M. 268.

United States.— Cooke *v.* O'Brien, 6 Fed. Cas. No. 3,177, 2 Cranch C. C. 17.

See 32 Cent. Dig. tit. "Libel and Slander," § 323.

In New York prior to the code defendant in an action of libel or slander could not give evidence in mitigation of damages which tended to prove the truth of the charge complained of. Bisbey *v.* Shaw, 12 N. Y. 67; Bush *v.* Prosser, 11 N. Y. 347; Bennett *v.* Matthews, 64 Barb. 410; Stanley *v.* Webb, 21 Barb. 148; Snyder *v.* Andrews, 6 Barb. 43; Gilman *v.* Lowell, 8 Wend. 573, 24 Am. Dec. 96; Andrews *v.* Vanduzer, 11 Johns. 38. See also Moore *v.* Francis, 3 N. Y. Suppl. 162. But since the enactment of the code defendant may allege in his answer the truth of the charge in justification and also facts tending to prove its truth in mitigation of damages, and although the evidence fails to prove the justification, he is entitled to have it submitted to the jury in mitigation of damages. Bisbey *v.* Shaw, *supra*. Indeed it is held not to be necessary that the answer should allege the truth of the charge complained of to entitle defendant to aver and prove such facts and circumstances to reduce the amount of damages. Bush *v.* Prosser, *supra*. See also Dolevin *v.* Wilder, 7 Rob. 319; Heaton *v.* Wright, 10 How. Pr. 79.

In Nevada, since the adoption of the code practice and procedure, the courts have generally held that defendant may prove in mitigation of damages facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge, without any allegation in the answer that the charge is true. Thompson *v.* Powning, 15 Nev. 195.

81. Reiley *v.* Timme, 53 Wis. 63, 10 N. W. 5.

82. Cameron *v.* Corkran, 2 Marv. (Del.) 166, 42 Atl. 454; Brown *v.* Wright, 6 La. Ann. 253.

83. Brown *v.* Wright, 6 La. Ann. 253.

84. *Delaware.*— Tatlow *v.* Jaquett, 1 Harr. (Del.) 333, 26 Am. Dec. 399.

Indiana.— Burke *v.* Miller, 6 Blackf. 155. *Compare* Teagle *v.* Deboy, 8 Blackf. 134.

Maryland.— Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715; Wagner *v.* Holbrunner, 7 Gill 296.

Pennsylvania.—Henry *v.* Norwood, 4 Watts 347.

England.— Warne *v.* Chadwell, 2 Stark. 457, 20 Rev. Rep. 716, 3 E. C. L. 487.

See 32 Cent. Dig. tit. "Libel and Slander," § 291.

Compare Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Daly *v.* Byrne, 77 N. Y. 182.

the privilege.[85] But in some states under statute it is now required that the defense of privilege shall be specially pleaded where the fact of privilege does not appear on the face of the petition.[86] Where the defamatory matter is privileged, it is held that defendant may prove under the general issue the truth,[87] or the conduct of plaintiff justifying defendant in believing the matter to be true,[88] in order to show probable cause and absence of malice.

i. Character of Person Defamed — (i) *Evidence of Bad Character Offered by Defendant.* Apart from statute to the contrary the general bad character of plaintiff may be shown in mitigation of damages, although the general issue or general denial alone be pleaded,[89] or although defendant has filed

85. *Delaware.*— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337; Donahoe *v.* Star Pub. Co., 3 Pennew. 545, 53 Atl. 1028; Butterworth *v.* Conrow, 1 Marv. 361, 41 Atl. 84.

Indiana.— Abrams *v.* Smith, 8 Blackf. 95.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.— Bradley *v.* Heath, 12 Pick. 163, 22 Am. Dec. 418.

New York.— Fero *v.* Ruscoe, 4 N. Y. 162; Hastings *v.* Lusk, 22 Wend. 410, 34 Am. Dec. 330.

Tennessee.— Cooley *v.* Galyon, 109 Tenn. 1, 70 S. W. 607, 97 Am. St. Rep. 823, 60 L. R. A. 139; Dunn *v.* Winters, 2 Humphr. 512.

Vermont.— Torrey *v.* Field, 10 Vt. 353.

West Virginia.— Johnson *v.* Brown, 13 W. Va. 71.

England.— Lillie *v.* Price, 5 A. & E. 645, 5 Dowl. P. C. N. S. 432, 2 Harr. & W. 381, 6 L. J. K. B. 7, 1 N. & P. 16, 31 E. C. L. 766; Fairman *v.* Ives, 5 B. & Ald. 645, 7 E. C. L. 351, 1 Chit. 85, 18 E. C. L. 60, 1 D. & R. 252, 24 Rev. Rep. 514; O'Brien *v.* Clement, 3 D. & L. 676, 10 Jur. 395, 15 L. J. Exch. 285, 15 M. & W. 435; Lewis *v.* Levy, E. B. & E. 537, 4 Jur. N. S. 970, 27 L. J. Q. B. 282, 6 Wkly. Rep. 629, 96 E. C. L. 537.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 218, 255.

In Connecticut it is held that the question whether the publication was privileged is within the general issue, although it is better practice to give notice thereof. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865. See also Anderson *v.* Cowles, 72 Conn. 335, 44 Atl. 477, 77 Am. St. Rep. 310.

Evidence of procurement of publication by plaintiff.— Under the plea of not guilty it may be shown that the publication was by procurement of plaintiff with a view to an action thereon. Sutton *v.* Smith, 13 Mo. 120.

Where defendant denies that he made the statements there is no question of privilege for the jury. Bennett *v.* Brice, (Md. 1891) 21 Atl. 552; Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Setting up defense in demurrer.—Where the declaration avers that the publication was false and malicious, a demurrer admits it to be so, and the defense of privilege cannot be made on demurrer. Tiepke *v.* Times Pub. Co., 20 R. I. 200, 37 Atl. 1031. See also *supra*, VIII, E, 4, b, (VI).

86. *California.*— Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878; Gilman *v.* McClatchy, 111 Cal. 606, 44 Pac. 241.

Georgia.— Flanders *v.* Daley, 120 Ga. 885, 48 S. E. 327.

Kansas.— Hess *v.* Sparks, 44 Kan. 470, 25 Pac. 580.

Maryland.— Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Massachusetts.— Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528; Goodwin *v.* Daniels, 7 Allen 61.

New York.— Stevenson *v.* Ward, 48 N. Y. App. Div. 291, 62 N. Y. Suppl. 717; Steffen *v.* Schaefer, 15 N. Y. Suppl. 493.

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921; Steen *v.* Friend, 20 Ohio Cir. Ct. 459, 11 Ohio Cir. Dec. 235.

Wisconsin.— See Langton *v.* Hagerty, 35 Wis. 150.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 218, 255.

Evidence of malice upon plea of privilege. — Plaintiff is entitled under the issue raised by the plea of privilege to introduce any competent evidence of express malice. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

87. Remington *v.* Congdon, 2 Pick. (Mass.) 310, 13 Am. Dec. 431; Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249; Fountain *v.* Boodle, 3 Q. B. 5, 2 G. & D. 455, 43 E. C. L. 605; Fairman *v.* Ives, 5 B. & Ald. 642, 7 E. C. L. 351, 1 Chit. 85, 18 E. C. L. 60, 1 D. & R. 252, 24 Rev. Rep. 514.

Under special plea of privilege.— Evidence of the truth of the words is admissible under plea of privilege, to rebut evidence of malice but not to show justification. Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

Where the petition declares upon two publications, one of which is the report of the evidence given on plaintiff's trial, evidence that the second publication is a fair and true report is not competent to prove the truth of the first publication. Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860.

88. Bradley *v.* Heath, 12 Pick. (Mass.) 163, 22 Am. Dec. 418.

89. *Indiana.*— Tracy *v.* Hacket, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398.

New York.— Paddock *v.* Salisbury, 2 Cow. 811; Foot *v.* Tracy, 1 Johns. 46.

Ohio.— Duval *v.* Davey, 32 Ohio St. 604.

Pennsylvania.— Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116; Conroe *v.* Conroe, 47 Pa. St. 198.

Vermont.— Bowen *v.* Hall, 20 Vt. 232.

Wisconsin.— Wilson *v.* Noonan, 35 Wis.

a plea in justification in addition to the general issue.[90] Indeed it has been intimated that such evidence is admissible in mitigation of damages under the plea of justification alone.[91]

(11) *Evidence of Good Character Offered by Plaintiff.* In many jurisdictions the rule is stated that since the general character of plaintiff is presumed to be good he cannot introduce evidence of his good reputation until it has been attacked by defendant.[92] But in some jurisdictions, on the theory that plaintiff's character is put in issue in an action of libel or slander, evidence of his good reputation is admissible in chief.[93] Thus it has been held that if justification is pleaded, plaintiff may show his good reputation in aggravation of damages.[94]

321; Wilson *v.* Noonan, 27 Wis. 598; B. *v.* I., 22 Wis. 372, 94 Am. Dec. 604.

United States.— Cunningham *v.* Underwood, 116 Fed. 803, 53 C. C. A. 99.

England.— See Bracegirdle *v.* Bailey, 1 F. & F. 536.

Character required to be specially pleaded. — In some jurisdictions it is held that in the absence of a plea of justification or other plea assailing the character of plaintiff, evidence of plaintiff's character should be excluded. Howe Mach. Co. *v.* Souder, 58 Ga. 64; Halley *v.* Gregg, 82 Iowa 622, 84 N. W. 974. In New York under statute it is held that evidence of the bad character of plaintiff is available only by way of mitigating damages and hence should be specially pleaded in mitigation. Blanchard *v.* Tulip, 32 Hun 638; Ward *v.* Deane, 32 N. Y. St. 270.

90. Pope *v.* Welsh, 18 Ala. 631; Stone *v.* Varney, 7 Metc. (Mass.) 86, 39 Am. Dec. 762; Bowen *v.* Hall, 20 Vt. 232.

Evidence of bad character in justification see *infra*, VII, F, 2, h, (III).

91. See Sanders *v.* Johnson, 6 Blackf. (Ind.) 50, 36 Am. Dec. 564.

92. *Alabama.*— Rhodes *v.* Ijames, 7 Ala. 574, 43 Am. Dec. 604.

Delaware.— Parke *v.* Blackiston, 3 Harr. 373.

Illinois.— Harbison *v.* Shook, 41 Ill. 141.

Indiana.— Haun *v.* Wilson, 28 Ind. 296; McCabe *v.* Platter, 6 Blackf. 405.

Iowa.— Mayo *v.* Sample, 18 Iowa 306.

Massachusetts.— See Harding *v.* Brooks, 5 Pick. 244.

Michigan.— Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

New Hampshire.— Dame *v.* Kenney, 25 N. H. 318.

New York.— Shipman *v.* Burrows, 1 Hall 399; Inman *v.* Foster, 8 Wend. 602.

Ohio.— Blakeslee *v.* Hughes, 50 Ohio St. 490, 34 N. E. 793.

Oregon.— Cooper *v.* Phipps, 24 Oreg. 357, 33 Pac. 985, 22 L. R. A. 836.

Pennsylvania.— Chubb *v.* Gsell, 34 Pa. St. 114; Tibbs *v.* Brown, 2 Grant 39.

Tennessee.— Martin *v.* Hooker, 7 Coldw. 130.

Texas.—See Young *v.* Sheppard, (Civ. App. 1897) 40 S. W. 62. *Compare* King *v.* Sassaman, (Civ. App. 1901) 64 S. W. 937.

United States.— Smith *v.* Sun Pub. Co., 50 Fed. 399; Wright *v.* Schroeder, 30 Fed. Cas. No. 18,091, 2 Curt. 548. *Compare* Romayne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. 246.

England.— Guy *v.* Gregory, 9 C. & P. 584, 38 E. C. L. 342; King *v.* Waring, 5 Esp. 13; Cornwall *v.* Richardson, R. & M. 305, 27 Rev. Rep. 753, 21 E. C. L. 758.

See 32 Cent. Dig. tit. "Libel and Slander," § 256.

It is not ground for reversal that plaintiff was permitted to introduce evidence of good reputation, as a judgment will not be disturbed for admitting evidence in support of a fact which the law presumes. Stafford *v.* Morning Journal Assoc., 142 N. Y. 598, 37 N. E. 625 [*affirming* 68 Hun 467, 22 N. Y. Suppl. 1008].

Cross-examination of plaintiff's witnesses as to his character.— It is improper to cross-examine plaintiff's witnesses in regard to her reputation for chastity, they not having testified thereto on direct examination, even though defendant had pleaded plaintiff's bad character in mitigation of damages. Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389.

Evidence of character in rebuttal of evidence in justification see *infra*, VIII, F, 2, h, (VIII), (B).

93. *Connecticut.*— Bennett *v.* Hyde, 6 Conn. 24.

Kentucky.— Williams *v.* Greenwade, 3 Dana 432.

North Carolina.— Sample *v.* Wynn, 44 N. C. 319.

South Carolina.— Williams *v.* Haig, 3 Rich. 362, 45 Am. Dec. 774.

Virginia.— Adams *v.* Lawson, 17 Gratt. 250, 94 Am. Dec. 455.

West Virginia.— Shroyer *v.* Miller, 3 W. Va. 158.

See 32 Cent. Dig. tit. "Libel and Slander," § 256.

In Missouri it is held that the good character of plaintiff is admissible in chief as bearing on the question of damages but not to show that he is not guilty of the matters charged. Stark *v.* Knapp, 160 Mo. 529, 61 S. W. 669.

94. Smith *v.* Lovelace, 1 Duv. (Ky.) 215; Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Harding *v.* Brooks, 5 Pick. (Mass.) 244; Scott *v.* Peebles, 2 Sm. & M. (Miss.) 546; Sample *v.* Wynn, 44 N. C. 319. See also on this point Byrket *v.* Monohon, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; Authier *v.* Bennett Bros. Co., 16 Mont. 110, 40 Pac. 182.

j. Res Judicata. In an action for defamation the general issue puts in issue the matter of *res judicata*, and a former recovery as to a whole or a part of the actionable words contained in the petition may be shown under that plea.[95]

k. Statute of Limitations. If plaintiff replies to a plea of the statute of limitations that the words were spoken within the prescribed time, he must prove the speaking of some of the actionable words within that time.[96]

l. Denial of Malice. It has been held that unless a denial of malice in an action forms a part of the defense of privilege, the issue which it forms is immaterial.[97]

m. Abandoning and Withdrawing Issues — (I) *By Plaintiff.* Plaintiff may abandon at the trial any portion of the defamatory matter alleged in the declaration and proceed upon the residue.[98] So it has been held that plaintiff may have leave to withdraw a general replication in order to file a general demurrer.[99]

(II) *By Defendant* — (A) *Plea of Justification.* Defendant may have leave to withdraw his plea of justification before trial,[1] the making of an affidavit by defendant of the falsity of the matter contained in the plea being a prerequisite to such withdrawal, however, in one jurisdiction.[2] But the withdrawal of a plea of justification will be refused after the evidence is all in.[3]

(B) *General Issue.* Where a general denial is withdrawn the facts alleged in the complaint are to be taken as true.[4] It has been held that defendant will not be permitted to withdraw a plea of general issue in order to plead justification.[5]

8. Admissions in Pleadings — a. By Plaintiff. An amendment of a petition to which a demurrer had been sustained on the ground that the publication was not actionable *per se* is an admission that it was not actionable *per se*.[6]

b. By Defendant — (I) *Inducement, Colloquiums, and Innuendos.* The inducement, colloquium, and innuendo in the petition are admitted when defendant answers over without denying or objecting to them.[7]

(II) *Publication.* The plea of justification admits the publication as alleged in the petition;[8] but where the pleas of justification and general issue are properly joined the rule supported by the weight of authority is that plaintiff cannot avail himself of the admission of publication in the plea of justification, so as to render it unnecessary for him to prove publication under the general issue,[9] although

Compare Blakeslee *v.* Hughes, 50 Ohio St. 490, 34 N. E. 793.

Good reputation in rebuttal of facts set up in plea of justification see *infra*, VIII, F, 2, h, (VIII), (B).

95. Campbell *v.* Butts, 3 N. Y. 173.

96. Huston *v.* McPherson, 8 Blackf. (Ind.) 562; Pond *v.* Gibson, 5 Allen (Mass.) 19, 81 Am. Dec. 724.

Necessity of special plea of statute see *supra*, VIII, E, 2, b, (X).

97. Fry *v.* Bennett, 5 Sandf. (N. Y.) 54.

98. Stow *v.* Converse, 4 Conn. 17; Hesler v. Degant, 3 Ind. 501; Genet *v.* Mitchell, 7 Johns. (N. Y.) 120; Kirkaldie *v.* Paige, 17 Vt. 256.

99. McGill *v.* Skeehee, 16 Fed. Cas. No. 8,796, 1 Cranch C. C. 49.

1. Fitzgerrell *v.* Furgeson, 25 Ill. 138; Vanpelt *v.* Whitlock, 5 N. J. L. 810.

Withdrawn pleas of justification as evidence in aggravation of damages see *supra*, VII, A, 2, b, text and note 42.

2. Lent *v.* Butler, 3 Cow. (N. Y.) 370; Clinton *v.* Mitchell, 3 Johns. (N. Y.) 144.

3. Lea *v.* Robertson, 1 Stew. (Ala.) 138; Spencer *v.* McMasters, 16 Ill. 405.

4. George *v.* Nelson, 23 Ind. 392.

5. Anonymous, 1 Hill (S. C.) 251.

6. Scholl *v.* Bradstreet Co., 85 Iowa 551, 52 N. W. 500.

7. Ricket *v.* Stanley, 6 Blackf. (Ind.) 169 (holding that where defendant in a suit for slander brought by husband and wife pleads the general issue and justification, the marriage of plaintiffs is admitted); Youmans *v.* Paine, 86 Hun (N. Y.) 479, 35 N. Y. Suppl. 50 (holding that a plea of privilege admits that publication referred to plaintiff); Fidler *v.* Delavan, 20 Wend. (N. Y.) 57 (holding that a plea of justification in an action for a publication concerning the business of a firm admits that plaintiff is a member of the firm); Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

Admission of innuendos by plea of justification see *supra*, VIII, E, 2, b, (XII), (B), (2).

8. Hemphill *v.* Holley, 4 Minn. 233; Wilkinson *v.* Palmer, Tapp. (Ohio) 66.

Necessity of admission to constitute valid plea see *supra*, VIII, E, 2, b, (XII), (C).

9. *Illinois.*— Welker *v.* Butler, 15 Ill. App. 209.

Indiana.—Ricket *v.* Stanley, 6 Blackf. 169; Wheeler *v.* Robb, 1 Blackf. 330, 12 Am. Dec. 245.

there are authorities supporting a contrary view and holding that under such circumstances plaintiff need not show publication under the general issue.[10]

(III) *FALSITY.* A plea of the general issue[11] or a failure to plead in justification[12] is an admission that the charge was not in fact true.

(IV) *MATTERS STATED IN NOTICE ACCOMPANYING GENERAL PLEA.* It has been held that matters stated in a notice accompanying a general plea are not to be taken as admissions.[13]

9. VARIANCE[14] — a. Defamatory Words Used — (I) *IN GENERAL.* As a general rule a failure on the part of plaintiff to prove the words strictly as alleged in the petition constitutes a variance and apart from a statute to the contrary is fatal to his cause of action.[15] In some states, however, the code provides that the variance shall not be deemed material unless it has actually misled the adverse party.[16] Moreover, it is very generally held that a failure to prove all the words alleged does not constitute a fatal variance, provided sufficient of the precise words alleged are proved so as to constitute a cause of action.[17] It is a general rule that

Mississippi.— Doss *v.* Jones, 5 How. 158.

New York.— Matthews *v.* Beach, 8 N. Y. 173; Hamer *v.* McFarlin, 4 Den. 509.

Utah.— Murphy *v.* Carter, 1 Utah 17.

United States.— Whitaker *v.* Freeman, 29 Fed. Cas. No. 17,527*a*, 12 N. C. 271.

See 32 Cent. Dig. tit. "Libel and Slander," § 260.

10. Richardson *v.* Roberts, 23 Ga. 215; McAllister *v.* Sibley, 25 Me. 474; Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114; Jackson *v.* Stetson, 15 Mass. 48.

11. Jones *v.* Townsend, 21 Fla. 431, 58 Am. Rep. 676; Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323]; Thomas *v.* Dunaway, 30 Ill. 373; Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271; Hartranft *v.* Hesser, 34 Pa. St. 117; Continental Nat. Bank *v.* Bowdre, 92 Tenn. 723, 23 S. W. 131.

A plea of general issue to a charge of incontinency admits the falsity of the particular charge but not the good character of plaintiff. Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323].

12. Burke *v.* Mascarich, 81 Cal. 302, 22 Pac. 673; Pokrok Zapadu Pub. Co. *v.* Zizkovsky, 42 Nebr. 64, 60 N. W. 358; Alliance Review Pub. Co. *v.* Valentine, 9 Ohio Cir. Ct. 387, 6 Ohio Cir. Dec. 323.

Necessity of specially pleading justification see *supra*, VIII, E, 7, e, (II).

Plaintiff may prove the charge false, although no justification is pleaded. Alliance Review Pub. Co. *v.* Valentine, 8 Ohio Cir. Ct. 387, 6 Ohio Cir. Dec. 323. But it has been held that since a plea of not guilty admits the falsity of the charge, if proved to have been made, evidence of defendant's knowledge of its falsity is admissible under such plea only in rebuttal of a defense that it was made in good faith. Hartranft *v.* Hesser, 34 Pa. St. 117.

13. Smith *v.* Shumway, 2 Tyler (Vt.) 74.

14. Variance between pleading and proof of justification see *infra*, VIII, F, 3, g, (I), (B), (1), note 30.

15. *Alabama.*— Phillips *v.* Beene, 16 Ala. 720.

Illinois.— Searcy *v.* Sudhoff, 84 Ill. App. 148.

Maine.— Estes *v.* Estes, 75 Me. 478.

Maryland.— Winter *v.* Donovan, 8 Gill 370; Stanfield *v.* Boyer, 6 Harr. & J. 248.

Massachusetts.—Comerford *v.* West End St. R. Co., 164 Mass. 13, 41 N. E. 59.

Minnesota.—Irish-American Bank *v.* Bader, 59 Minn. 329, 61 N. W. 328.

Mississippi.— Furr *v.* Speed, 74 Miss. 423, 21 So. 562.

Missouri.— Birch *v.* Benton, 26 Mo. 153.

Ohio.— Scott *v.* Renforth, Wright 55, holding that an allegation that defendant said plaintiff put tobacco in beer is not supported by proof that defendant said plaintiff ordered tobacco put in beer.

Pennsylvania.— Johnston *v.* Tait, 6 Binn. 121, holding that an allegation that defendant said, "There was a collusion between A, B, and C," is not supported by proof of the words, "There was a collusion between A and B."

Vermont.— Harris *v.* Lawrence, 1 Tyler 156.

See 32 Cent. Dig. tit. "Libel and Slander," § 262.

16. Pegram *v.* Stoltz, 67 N. C. 144; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561. See also Coleman *v.* Playsted, 36 Barb. (N. Y.) 26.

17. *Alabama.*—Scott *v.* McKinnish, 15 Ala. 662; Chandler *v.* Holloway, 4 Port. 17.

California.— Haub *v.* Friermuth, 1 Cal. App. 556, 82 Pac. 571.

Connecticut.— Nichols *v.* Hayes, 13 Conn. 155.

Illinois.— Harbison *v.* Shook, 41 Ill. 141; Wilhorn *v.* Odell, 29 Ill. 456; Sanford *v.* Gaddis, 15 Ill. 228; Schofield *v.* Baldwin, 102 Ill. App. 509; Jack *v.* Kness, 96 Ill. App. 336; Searcy *v.* Sudhoff, 84 Ill. App. 148; Story *v.* Jones, 52 Ill. App. 112; Keefe *v.* Voight, 45 Ill. App. 620; Albin *v.* Parks, 2 Ill. App. 576.

Indiana.— McCallister *v.* Mount, 73 Ind. 559; Iseley *v.* Lovejoy, 8 Blackf. 462; Wheeler *v.* Robb, 1 Blackf. 330, 12 Am. Dec. 245; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400.

proof of similar or equivalent words is insufficient.[18] On the other hand it is generally held that the proof need not correspond in every minute particular with the words as laid, provided the identity of the charge is substantially made out.[19]

Kentucky.— Metcalfe *v.* Williams, 3 Litt. 387; Nicholson *v.* Dunn, 52 S. W. 935, 21 Ky. L. Rep. 643.

Maryland.— Robinett *v.* Ruby, 13 Md. 95.

Massachusetts.— Robinson *v.* Van Auken, 190 Mass. 161, 76 N. E. 601; Clark *v.* Munsell, 6 Metc. 373; Whiting *v.* Smith, 13 Pick. 364.

Missouri.— Noeninger *v.* Vogt, 88 Mo. 589; Lewis *v.* McDaniel, 82 Mo. 577; Coe *v.* Griggs, 76 Mo. 619; Pennington *v.* Meeks, 46 Mo. 217; Coghill *v.* Chandler, 33 Mo. 115; Unterberger *v.* Scharff, 51 Mo. App. 102; Casey *v.* Aubuchon, 25 Mo. App. 91; Mix *v.* McCoy, 22 Mo. App. 488.

New Hampshire.— Merrill *v.* Peaslee, 17 N. H. 540.

New York.— Nestle *v.* Van Slyck, 2 Hill 282; Purple *v.* Horton, 13 Wend. 9, 27 Am. Dec. 167; Loomis *v.* Swick, 3 Wend. 205; Miller *v.* Miller, 8 Johns. 74; Lewis *v.* Few, 5 Johns. 1, holding that where a libel is set forth as containing the words "U. States," and the evidence shows the words to be "United States," the variance is immaterial.

Ohio.— Cheadle *v.* Buell, 6 Ohio 67.

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507.

Vermont.— Smith *v.* Hollister, 32 Vt. 695.

Washington.— Leghorn *v.* Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

Wisconsin.— Dufresne *v.* Weise, 46 Wis. 290, 1 N. W. 59.

England.— Orpwood *v.* Barkes, 4 Bing. 261, 5 L. J. C. P. O. S. 167, 12 Moore C. P. 492, 29 Rev. Rep. 559, 13 E. C. L. 495; Flower *v.* Pedley, 2 Esp. 491; Compagnon *v.* Martin, 2 W. Bl. 790.

See 32 Cent. Dig. tit. "Libel and Slander," § 263.

18. *Alabama.*— Mohr *v.* Lemle, 69 Ala. 180; Scott *v.* McKinnish, 15 Ala. 662.

California.— Haub *v.* Friermuth, 1 Cal. App. 556, 82 Pac. 571.

Illinois.— Wallace *v.* Dixon, 82 Ill. 202; Wilborn *v.* Odell, 29 Ill. 456; Sanford *v.* Gaddis, 15 Ill. 228; Story *v.* Jones, 52 Ill. App. 112; Albin *v.* Parks, 2 Ill. App. 576.

Indiana.— Tucker *v.* Call, 45 Ind. 31; Gray *v.* Elzroth, 10 Ind. App. 587, 37 N. E. 551, 53 Am. St. Rep. 400.

Kentucky.— Taylor *v.* Moran, 4 Metc. 127; Tharp *v.* Nolan, 84 S. W. 1168, 27 Ky. L. Rep. 326.

Minnesota.— Irish-American Bank *v.* Bader, 59 Minn. 329, 61 N. W. 328, holding that where the words alleged were, "There is a run on the Irish-American Bank," "The Irish-American Bank closed its doors at two o'clock to-day," and the words proved were, "Have you got any money in the Irish-American Bank? If you have any there, you had better be getting it out," there was a material variance.

Missouri.— Coe *v.* Griggs, 76 Mo. 619; Bundy *v.* Hart, 46 Mo. 460, 2 Am. Rep. 525; Birch *v.* Benton, 26 Mo. 153; Wood *v.* Halbish, 23 Mo. App. 389.

New York.— Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123.

Tennessee.— Roberts *v.* Lamb, 93 Tenn. 343, 27 S. W. 668.

Vermont.— Smith *v.* Hollister, 32 Vt. 695.

United States.— Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

England.— Armitage *v.* Dunster, 4 Dougl. 291, 26 E. C. L. 482; McConnell *v.* McKenna, 10 Ir. C. L. 511.

See 32 Cent. Dig. tit. "Libel and Slander," § 263.

Compare Williams *v.* Miner, 18 Conn. 464; Desmond *v.* Brown, 29 Iowa 53, 4 Am. Rep. 194; Bigner *v.* Hodges, 82 Miss. 215, 33 So. 980; Furr *v.* Speed, 74 Miss. 423, 21 So. 562; Fritz *v.* Williams, (Miss. 1894) 16 So. 359; Bassett *v.* Spofford, 11 N. H. 127.

An alleged charge of misconduct as a constable is not sustained by proof of words imputing misconduct as agent of the executive of the state for the arrest in another state of a fugitive from justice. Kinney *v.* Nash, 3 N. Y. 177.

19. *California.*— Haub *v.* Friermuth, 1 Cal. App. 556, 82 Pac. 571.

Delaware.— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Illinois.— Thomas *v.* Fischer, 71 Ill. 576. *Compare* Norton *v.* Gordon, 16 Ill. 38; Patterson *v.* Edwards, 7 Ill. 720; Slocumb *v.* Kuykendall, 2 Ill. 187, 27 Am. Dec. 764.

Iowa.— Emerson *v.* Miller, 115 Iowa 315, 88 N. W. 803; Bower *v.* Deideker, 38 Iowa 418; McClintock *v.* Crick, 4 Iowa 453.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 28, 45 S. W. 90, 19 Ky. L. Rep. 2018; Nicholson *v.* Dunn, 52 S. W. 935, 21 Ky. L. Rep. 643; Lovejoy *v.* Cooksey, 39 S. W. 514, 19 Ky. L. Rep. 87.

Louisiana.— Trimble *v.* Moore, 2 La. 577; Freeland *v.* Lanfear, 2 Mart. N. S. 257.

Maine.— Kimball *v.* Page, 96 Me. 487, 489, 52 Atl. 1010, where it is said: "It is the general rule in actions for slander, where the words spoken are set out in the declaration, that they must be proved strictly as alleged. In the early cases in this country and in England, the slightest variation in the words proved from those alleged, was held to be fatal. But this rule has been somewhat modified, and it is now held that 'material words, those which are essential to the charge made, must be proved as alleged, and cannot be supplied by equivalent words, as words in one language by a translation into another. But in relation to unimportant, connecting or descriptive words, some latitude is allowed.' But even now the form of expression cannot be varied so far as to substitute the second person for the third, as you for he, or the reverse. Whiting *v.*

(II) *Excessive Proof.* If the words charged to have been published are proved, but with the addition of others, not varying the sense, the variance is immaterial.[20] If, however, other words not laid are proved which destroy the actionable quality or limit or change the meaning of those counted on, the action will not be sustained.[21]

(III) *Particular Variations* — (A) *Variation in Pronouns or Tense* — (1) Pronouns. In an action for slander, proof of words spoken in the second person will not sustain an allegation of words spoken in the third person.[22] So proof of words spoken in the third person will not sustain an allegation of words spoken in the second person.[23]

(2) Tense. So it has been held that a difference in the tense of the verb laid and that proved constitutes such a variance as to defeat a recovery.[24]

(B) *Positiveness.* A count charging that words were spoken affirmatively is not supported by proof of the same words spoken interrogatively.[25] So proof of slanderous words uttered hypothetically will not sustain an averment of slanderous words uttered absolutely.[26] It has been held that if the declaration alleges that

Smith, 13 Pick. 364. In Chapin *v.* White, 102 Mass. 139, it is said that 'if the pleader adds any allegation which narrows and limits that which is essential, it becomes descriptive, and must be proved as alleged. It identifies the slander.'"

Massachusetts.— Robinson *v.* Van Auken, 190 Mass. 161, 76 N. E. 601; Robbins *v.* Fletcher, 101 Mass. 115; Baldwin *v.* Soule, 6 Gray 321.

Michigan.— Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Missouri.— Cooper *v.* Marlow, 3 Mo. 188. *Compare* Watson *v.* Musick, 2 Mo. 29.

New Hampshire.— Bassett *v.* Spofford, 11 N. H. 127.

Ohio.— Stevens *v.* Handly, Wright 123.

South Carolina.— Finch *v.* Finch, 21 S. C. 342. *Compare* Morgan *v.* Livingston, 2 Rich. 573.

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Hazleton *v.* Weare, 8 Vt. 480. *Compare* Harris *v.* Lawrence, 1 Tyler 156.

See 32 Cent. Dig. tit. "Libel and Slander," § 263.

Compare Easley *v.* Moss, 9 Ala. 266; Creelman *v.* Marks, 7 Blackf. (Ind.) 281; Moore *v.* Bond, 4 Blackf. (Ind.) 458; Winter *v.* Donovan, 8 Gill (Md.) 370; Olmstead *v.* Miller, 1 Wend. (N. Y.) 506; Fox *v.* Vanderbeck, 5 Cow. (N. Y.) 513.

20. *Georgia.*— Brown *v.* Hanson, 53 Ga. 632.

Illinois.— Wilborn *v.* Odell, 29 Ill. 456; Keefe *v.* Voight, 45 Ill. App. 620.

Indiana.— McCoombs *v.* Tuttle, 5 Blackf. 431.

Missouri.— Noeninger *v.* Vogt, 88 Mo. 589; Cooper *v.* Marlow, 3 Mo. 188; Schmidt *v.* Bauer, 60 Mo. App. 212.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137; Merrill *v.* Peaslee, 17 N. H. 540.

England.— Bourke *v.* Warren, 2 C. & P. 307, 12 E. C. L. 587.

See 32 Cent. Dig. tit. "Libel and Slander," § 263.

21. Keefe *v.* Voight, 45 Ill. App. 620; Edgerley *v.* Swain, 32 N. H. 478; Rainy *v.* Bravo, L. R. 4 P. C. 287, 27 L. T. Rep. N. S. 249, 20 Wkly. Rep. 873.

22. *Illinois.*— Sanford *v.* Gaddis, 15 Ill. 228; Becker *v.* Schiller, 49 Ill. App. 606.

Maryland.— Wolf *v.* Rodifer, 1 Harr. & J. 409.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Williams *v.* Harrison, 3 Mo. 411; Schmidt *v.* Bauer, 60 Mo. App. 212.

New York.— Miller *v.* Miller, 8 Johns. 74, where the rule was based on the difference between words spoken in a passion to a man's face and deliberately behind his back.

Pennsylvania.— McConnell *v.* McCoy, 7 Serg. & R. 223.

United States.— Birch *v.* Simms, 3 Fed. Cas. No. 1,427, 1 Cranch C. C. 550; Rutherford *v.* Moore, 21 Fed. Cas. No. 12,173, 1 Cranch C. C. 388.

See 32 Cent. Dig. tit. "Libel and Slander," § 264.

23. *Indiana.*— Culbertson *v.* Stanley, 6 Blackf. 67.

Minnesota.— McCarty *v.* Barrett, 12 Minn. 494.

Mississippi.— Cock *v.* Weatherby, 5 Sm. & M. 333.

Missouri.— Williams *v.* Harrison, 3 Mo. 411; Schmidt *v.* Bauer, 60 Mo. App. 212.

England.— Stannard *v.* Harper, 5 M. & R. 295.

See 32 Cent. Dig. tit. "Libel and Slander," § 264.

24. Wilborn *v.* Odell, 29 Ill. 456; Sanford *v.* Gaddis, 15 Ill. 228. *Contra*, Buscher *v.* Scully, 107 Ind. 246, 5 N. E. 738, 8 N. E. 37.

25. Sanford *v.* Gaddis, 15 Ill. 228; Walker *v.* Boyd, 101 Ind. 396; King *v.* Whitley, 52 N. C. 529; Barnes *v.* Holloway, 8 T. R. 150.

Words spoken in answer to question.— It is not a variance where words are alleged affirmatively, that they were spoken in answer to a question. Jones *v.* Chapman, 5 Blackf. (Ind.) 88.

26. Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Evarts *v.* Smith, 19 Mich. 55;

defendant charged plaintiff with a crime, and the proof discloses merely that he said that he supposed plaintiff to be guilty of such crime, the variance is fatal.[27] But it has been held that where the slanderous words alleged are shown to have been preceded by the words, "If reports be true," or words of similar import, the proof does not create a variance.[28]

(c) *Language or Tongue Employed.* It constitutes a material variance to prove words published in a foreign language under an averment of words published in the English language.[29] But where the original language and the translation are both alleged, the question of variance is to be tested by the translation in the absence of any evidence of its incorrectness.[30]

(d) *Specific Imputations* — (1) IMPUTATION OF ARSON. A declaration averring a charge that plaintiff burned his own buildings is not supported by proof of a charge of burning buildings belonging to another.[31]

(2) IMPUTATION OF PERJURY. The ordinary rules as to variance are applicable to charges of perjury or false swearing.[32] Thus where words charging perjury are laid to have been spoken in reference to the testimony of plaintiff upon a particular occasion, it cannot be sustained by proof of a general charge.[33]

(3) IMPUTATION OF LARCENY OR EMBEZZLEMENT. In like manner illustrations of material and immaterial variances are frequently to be found in cases involving charges of larceny and also in those involving charges of embezzlement.[34] A

Stees *v.* Kemble, 27 Pa. St. 112; Foster *v.* Small, 3 Whart. (Pa.) 138.

In North Carolina under the code a variance of this character is not material if the conditional words proved convey the same idea to the jury as the positive charge laid. Pegram *v.* Stoltz, 67 N. C. 144.

27. Dickey *v.* Andros, 32 Vt. 55; Cook *v.* Stokes, 1 M. & Rob. 237.

28. Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156; Smith *v.* Stewart, 5 Pa. St. 372. *Compare* Horton *v.* Reavis, 6 N. C. 380, holding that where the allegation is that defendant charged unchastity, and the proof is that he said there was a rumor to that effect, but that he did not believe it, the variance is fatal.

29. Kerschbaugher *v.* Slusser, 12 Ind. 453; Grotius *v.* Ross, 24 Ind. App. 543, 57 N. E. 46; Zeig *v.* Ort, 3 Pinn. (Wis.) 30.

30. Schild *v.* Legler, 82 Wis. 73, 51 N. W. 1099.

31. Estes *v.* Estes, 75 Me. 478.

Variance held immaterial.— In Chace *v.* Sherman, 119 Mass. 387, it was held that an allegation of the words, "He . . . burned it . . . because he was poor and wanted the money," is supported by proof of a charge of burning by plaintiff "to get his insurance."

32. See cases cited *infra*, this note.

The variance is immaterial where the words alleged are, "Are you not afraid as you have perjured yourself?" and the words proved are, "You are perjured" (Commons *v.* Walters, 1 Port. (Ala.) 377, 27 Am. Dec. 635); where the words alleged are, "He had perjured himself — he swore lies before the court at Madison," and the words proved are the same as the words alleged with the addition "according to the church book" (Brown *v.* Hanson, 53 Ga. 632); or where the words alleged are, "False swearing," and the words proved are, "Fauls swearing" (Gaines *v.* Gaines, 109 Ill. App. 226).

The variance is material where the charge alleged that plaintiff "had sworn a lie . . . and that it was in him, for he had sworn what he could prove to be a point blank lie," and the charge proved is that plaintiff "had sworn off a just account . . . and that he would, or could prove it" (Berry *v.* Dryden, 7 Mo. 324); where the words alleged are, "He is perjured," and the words proved are, "He swore me out of a sum of money" (Tipton *v.* Kahle, 3 Watts (Pa.) 90).

33. Aldrich *v.* Brown, 11 Wend. (N. Y.) 596.

34. See cases cited *infra*, this note.

The variance is immaterial where the words alleged are, "Liar and a thief," and the proof is, "Scoundrel and a thief" (McGregor *v.* Eakin, 3 Ill. App. 340); where it is alleged, "You stole my peas," and the proof is, "You stole my peas and I can prove it" (James *v.* Clarke, 23 N. C. 397); where it is alleged, "John Hume . . . stole corn, and I . . . can prove it; he . . . is a rogue and not fit to keep a mill," and the proof is, "He had stolen corn, and he (the defendant) could prove it; and that he had sent his corn to the plaintiff's mill, and weighed it before he sent it and weighed it on its return, and that it was lacking" (Hume *v.* Arrowsmith, 1 Bibb (Ky.) 165, 4 Am. Dec. 626); where it is alleged, "You stole my staves and nails," and the proof is that defendant said: "Samuel Pasley was a damned rogue for he stole his staves and nails and that he could prove it" (Pasley *v.* Kemp, 22 Mo. 409); where it is alleged, "Poppenheim was a very bad man; he was a calf thief, and the records of the Court would prove it," and the proofs, "Poppenheim was a very bad man; he was a calf thief." "He has been indicted for calf stealing, and the records of the Court would prove

charge of larceny is not supported by proof of words imputing deception and fraud.[35]

(4) Imputation of Unchastity or Immorality. So the ordinary rules as to variance are applicable to charges of immorality or unchastity.[36]

b. Colloquiums and Extrinsic Matters Alleged — (I) *In General.* A variance in proof as to facts contained in the colloquium and inducement which are matters of mere allegation introductory to a description of the subject-matter of

it" (Poppenheim *v.* Wilkes, 1 Strobh. (S. C.) 275. See also Williams *v.* Miner, 18 Conn. 464); where it is alleged, "Stole hogs," and the proof is, "Stole a hog" (Barr *v.* Gaines, 3 Dana (Ky.) 258); where it is alleged, "Mima stole the pin," and the proof is, "Mima stole" (Kimball *v.* Page, 96 Me. 487, 52 Atl. 1010); where it is alleged, "He stole," and the proof is "Pennington stole" (Pennington *v.* Meeks, 46 Mo. 217. See also Hume *v.* Arrasmith, 1 Bibb (Ky.) 165, 4 Am. Dec. 626); where it is alleged, "He stole two hundred dollars from me when I was drunk," and the proof is "Morrissey stole two hundred dollars" (Crotty *v.* Morrissey, 40 Ill. 477); where it is alleged, "John Thompson killed my hogs and I can prove it, and he . . . is the biggest thief on this creek and I can prove it by Val. Mitchell and his boys that he . . . has stolen my hogs," and the proof is "John Thompson killed my hogs, and I can prove it, and he is the biggest thief on this creek" (Lewis *v.* McDaniel, 82 Mo. 577); where it is alleged "He is a thief." "He has been stealing from me all summer," and the proof is "He is a thief" (Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320. See also Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245).

The variance is material where it is alleged, "He steals a part of the money that he collects at the Catholic church in Seneca," and the words "in Seneca" are omitted in the proof (Crotty *v.* Morrissey, 40 Ill. 477); where it is alleged, "Mima stole the pin," and the proof is "Mima stole the buckle" (Kimball *v.* Page, 96 Me. 487, 52 Atl. 1010); where the charge alleged is that plaintiff who was postmaster at Farmington "embezzled certain papers," and the charge proved is "I have no doubt but that the papers were embezzled at Farmington" (Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67); where it is alleged, "He has been stealing from me all summer," and the proof is, "He is stealing from us every day" (Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320); where it is alleged, "Hancock's wife is a great thief, and ought to have been transported seven years ago," and the proof is "Hancock's wife is a damned bad one and ought," etc. (Hancock *v.* Winters, 2 Marsh. 502, 7 Taunt. 205, 2 E. C. L. 327. See also Jones *v.* Edwards, 57 Miss. 28).

35. Perry *v.* Porter, 124 Mass. 338. See also Stern *v.* Loewenthal, 77 Cal. 340, 19 Pac. 579; Nixon *v.* Wright, 11 S. W. 8, 10 Ky. L. Rep. 863; Freeland *v.* Lanfear, 2 Mart. N. S. (La.) 257.

36. See cases cited *infra*, this note.

The variance is immaterial where the charge alleged is "whore," and the proof is "whorish bitch" (Scott *v.* McKinnish, 15 Ala. 662); where the charge alleged is "whore," and the proof is, "Damned whore" (Thomas *v.* Fischer, 71 Ill. 576); where it is alleged, "They are strumpets, and the youngest is no better than her mother and the older one, and they are kept there for that purpose," and the proof is "They are strumpets, and the youngest is no better, and they are kept there for that purpose" (Richards *v.* Baumgart, 56 Ill. App. 422); where it is alleged, "She . . . slept with John Fox," and the proof is "He was in bed with her" (Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561); where the charge alleged is "public whore," and the proof is "whorish hitch" (Zimmerman *v.* McMakin, 22 S. C. 372, 53 Am. Rep. 720. See also Schmisseur *v.* Kreilich, 92 Ill. 347; Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280; Zeliff *v.* Jennings, 61 Tex. 458).

The variance is material where the charge alleged is "whore," and the proof is "strumpet" (Williams *v.* Bryant, 4 Ala. 44); where it is alleged "John Binning knocked up Charles Martin's daughter . . . she . . . has gone down below to her grandmother's to have a young one," and the proof is, "Johnnie Binning knocked up Charles Martin's girl." "She had gone down to her grandmother's, he supposed, to get rid of it," and, "Have you heard that Charles Martin's daughter was knocked up? I told him I had not heard it. He said it was so" (Sword *v.* Martin, 23 Ill. App. 304); where it is alleged, "As I drove past them, . . . I saw him . . . get up off of her . . . and she . . put her clothes down," and the words proved omitted the words, "Get up off of her" (Morris *v.* Curtis, 45 S. W. 86, 20 Ky. L. Rep. 56); where it is alleged, "Guilty of buggery with a mare," and the proof is, "Guilty of acting with a mare" (Cooper *v.* Bruce, 2 Watts (Pa.) 109); where it is alleged, "Elizabeth Long is pregnant and gone with child seven months," and the proof is, "Have you heard anything in respect to Miss Long being pregnant by Dr. P.?" (Long *v.* Fleming, 2 Miles (Pa.) 104; Payson *v.* Macomber, 3 Allen (Mass.) 69). See also in this connection Olmstead *v.* Miller, 1 Wend. (N. Y.) 506.

An allegation of "whore and common prostitute" is not proved by a general charge of unchastity. Doherty *v.* Brown, 10 Gray (Mass.) 250.

the action is immaterial, although if the facts are matters of description necessary to identify the subject-matter of the action variance is fatal.[37] Thus, in an action for imputing perjury, an incorrect allegation as to the names of the parties to the suit in which the perjury was alleged to have been committed,[38] or as to the character of the cause of action,[39] or the manner in which the oath was taken,[40] has been held to be immaterial.

(II) *PERSON DEFAMED.* Words spoken of one of two plaintiffs will not support an averment of words spoken of both plaintiffs.[41] But an averment of words spoken of plaintiff is sustained by proof of words spoken of plaintiff and another.[42]

c. Person Making Publication. Words spoken by defendants separately not in the presence of each other will not support an averment of words spoken jointly.[43] So an allegation that defendant spoke the words is not supported by proof that he procured another to speak them.[44]

d. Time and Place of Publication.[45] A variance between the date of the publication of the libel or slander as set forth in the declaration and the date as shown in evidence is immaterial and harmless.[46] The same rule applies as to a variation in proof as to the place of publication.[47]

e. Form of Publication — Whether Oral or Written. A count in slander is not sustained by evidence of a charge made in writing.[48]

F. Evidence[49] **— 1. PRESUMPTIONS AND BURDEN OF PROOF — a. In General.** The burden of proof is on plaintiff to prove the material facts in his petition not admitted by defendant.[50]

37. Southwick *v.* Stevens, 10 Johns. (N. Y.) 443 (holding that the prefix of the word "the" to the name of the newspaper printing the libel is an immaterial variance); Gates *v.* Bowker, 18 Vt. 23.

Contract referred to by way of inducement. — In Clements *v.* Maloney, 55 Mo. 352, it was held that where the petition in an action of slander refers to a contract merely by way of preliminary inducement, a technical variance between the allegations and the instrument will not render it inadmissible in evidence, unless the variance would tend to mislead the jury.

38. Teague *v.* Williams, 7 Ala. 844; Wiley *v.* Campbell, 5 T. B. Mon. (Ky.) 560; Dowd *v.* Winters, 20 Mo. 361. *Compare* Hibler *v.* Servoss, 6 Mo. 24.

39. Hamilton *v.* Langley, 1 McMull. (S. C.) 498.

40. Patrick *v.* Smoke, 3 Strobh. (S. C.) 147. *Compare* Phillips *v.* Beene, 16 Ala. 720, holding that words imputing perjury in reference to an oath taken before the register of a land-office is not supported by proof of an oath taken before a notary.

41. Davis *v.* Sherron, 7 Fed. Cas. No. 3,652, 1 Cranch C. C. 287.

42. Robinett *v.* McDonald, 65 Cal. 611, 4 Pac. 651.

43. Davis *v.* Sherron, 7 Fed. Cas. No. 3,652, 1 Cranch C. C. 287.

44. Watts *v.* Greenlee, 12 N. C. 210.

45. Necessity of alleging time and place of publication see *supra*, VIII, E, 1, i, (II).

46. *California.*— Norris *v.* Elliott, 39 Cal. 72; Thrall *v.* Smiley, 9 Cal. 529.

Illinois.— Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

Indiana.— Smith *v.* Smith, 76 Ind. 356. See also Hallowell *v.* Guntle, 82 Ind. 554.

New York.— Lanpher *v.* Clark, 77 Hun 506, 29 N. Y. Suppl. 107; Potter *v.* Thompson, 22 Barb. 87; McKinly *v.* Rob, 20 Johns. 351.

North Carolina.— Pegram *v.* Stoltz, 67 N. C. 144.

Oregon.— Quigley *v.* McKee, 12 Oreg. 22, 5 Pac. 347, 53 Am. Rep. 320.

Rhode Island.— Rice *v.* Cottrel, 5 R. I. 340.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Gates *v.* Bowker, 18 Vt. 23.

Wisconsin.— Brueshaber *v.* Hertling, 78 Wis. 498, 47 N. W. 725.

See 32 Cent. Dig. tit. "Libel and Slander," § 272.

47. *California.*— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Connecticut.— Goodrich *v.* Warner, 21 Conn. 432.

Illinois.— Cassem *v.* Galvin, 158 Ill. 30, 41 N. E. 1087 [*affirming* 53 Ill. App. 419]; Herhold *v.* White, 114 Ill. App. 186.

New York.— Lister *v.* Wright, 2 Hill 320.

Wisconsin.— Brueshaber *v.* Hertling, 78 Wis. 498, 47 N. W. 725.

See 32 Cent. Dig. tit. "Libel and Slander," § 272.

48. Hill *v.* Miles, 9 N. H. 9.

49. Evidence generally see EVIDENCE, 16 Cyc. 821.

50. Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281 (holding that where plaintiff alleged that she was unmarried she must prove it); Weltmer *v.* Bishop, 171 Mo. 110, 71 S. W. 167, 65 L. R. A. 584 (holding that where plaintiffs alleged that their business of magnetic healing was legitimate and a benefit to the public, the burden of proof

b. Publication and Responsibility Therefor — (i) *In General.* The burden is on plaintiff to prove that the words were published as averred in the complaint,[51] and that defendant was the author or publisher of the alleged libel or slander.[52] The editor and proprietor of a newspaper is presumed to have knowledge of its contents.[53] But it has been held that the burden of proving the negligence of a newspaper proprietor in retaining employees through whose recklessness or malice a libel has been published is on plaintiff.[54] The burden is on one selling a copy of a paper to show that he was ignorant of its contents.[55]

(ii) *Place of Publication.* In the absence of evidence to the contrary it will be presumed that the slanderous words were spoken in the state where the action is brought.[56]

c. Defamatory Words and Extrinsic Facts — (i) *In General.* If the words have the defamatory meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the burden is on plaintiff to prove that fact.[57] But if the words are actionable in themselves, all plaintiff is bound to prove is the speaking of the words.[58]

(ii) *Language or Tongue Employed.* Slanderous words are presumed to have been spoken in the English language, until the contrary is made to appear.[59]

(iii) *Reference to Plaintiff.* The burden is on plaintiff to prove that the defamatory words referred to him.[60]

(iv) *Meaning of Words.* The burden is on defendant to show that the words were used in a sense different from their ordinary and natural import.[61]

d. Damages. The law presumes damages when the words are actionable *per se*.[62] Plaintiff has a right to rely on such implied damage and need not

was on them); Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

51. Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

Variance between words alleged and words published see *supra*, VIII, E, 9, a.

52. See Bent *v.* Mink, 46 Iowa 576; Simmons *v.* Holster, 13 Minn. 249.

Evidence held not to raise presumption of authorship.— In a suit for libel, a charge that if the language used imputed dishonesty to plaintiff, and was untrue, it would be presumed that it was published by defendant in malice, is erroneous, as such facts cannot raise a presumption of defendant's authorship of the libel. Sands *v.* Marquardt, 113 Mo. App. 490, 87 S. W. 1011.

53. Fry *v.* Bennett, 28 N. Y. 324.

54. Scripps *v.* Reilly, 38 Mich. 10.

55. Staub *v.* Van Benthuysen, 36 La. Ann. 467; Vizetelly *v.* Mudie's Select Library, [1900] 2 Q. B. 170, 69 L. J. Q. B. 645.

56. Worth *v.* Butler, 7 Blackf. (Ind.) 251.

57. Johnston *v.* Morrison, (Ariz. 1889) 21 Pac. 465; Carter *v.* Andrews, 16 Pick. (Mass.) 1.

58. Bullock *v.* Koon, 9 Cow. (N. Y.) 30; Green *v.* Long, 2 Cai. (N. Y.) 91, holding that the burden of proof is on defendant in an action for an imputation of perjury to prove that the court before whom the alleged perjury was committed could not administer an oath. See also Dean *v.* Miller, 66 Ind. 440; Coons *v.* Robinson, 3 Barb. (N. Y.) 625.

Presumption as to actionable quality of words charging commission of crime in another jurisdiction see *supra*, III, D, 7, text and note 70 *et seq.*

59. Heeney *v.* Kilbana, 59 Ohio St. 499, 53 N. E. 262.

60. Boone *v.* Herald News Co., 27 Tex. Civ. App. 546, 66 S. W. 313.

61. Emerson *v.* Miller, 115 Iowa 315, 88 N. W. 803; Shockey *v.* McCauley, 101 Md. 461, 61 Atl. 583 (holding that words charging a tenant with having stolen pulleys and rope from his landlord must be deemed to refer to goods and chattels, and not to fixtures, and to be consequently actionable as imputing larceny, in the absence of evidence that the pulleys and rope were affixed to the freehold, and consequently not the subject of larceny); Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453. See also *supra*, III, J, 1.

62. *California.*— Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Colorado.— Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

Illinois.— Nolte *v.* Herter, 65 Ill. App. 430.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Dean *v.* Miller, 66 Ind. 440; Yeates *v.* Reed, 4 Blackf. 463, 32 Am. Dec. 43; Tracy *v.* Hackett, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Jensen *v.* Damm, 127 Iowa 555, 103 N. W. 798; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928; Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; Swearingen *v.* Stanley, 23 Iowa 115; Dailey *v.* Reynolds, 4 Greene 354.

Louisiana.— McClure *v.* McMartin, 104 La. 496, 29 So. 227; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885; Savoie *v.* Scanlon, 43

prove special damages.[63] And this rule applies as well where the words become actionable *per se*, when taken in connection with surrounding facts and circumstances, as when they are actionable *per se* without any inducement.[64] But the rule is otherwise where the words are not actionable *per se*.[65] Even though the words sued upon are actionable *per se*, special damages must be proved in order to be recovered.[66]

e. Justification. As a general rule the falsity of defamatory words is presumed, and it is not necessary that the complainant shall in the first instance offer any proof that the words were false.[67] Accordingly when defendant pleads justification the burden of proof is on him to prove that the charge is true.[68]

La. Ann. 967, 9 So. 916, 26 Am. St. Rep. 200; Lobe *v.* Cary, 33 La. Ann. 914; Mallerich *v.* Mertz, 19 La. Ann. 194; Daly *v.* Van Benthuysen, 3 La. Ann. 69; Guice *v.* Harvey, 14 La. 198.

Maine.— Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706.

Missouri.— Rammell *v.* Otis, 60 Mo. 365; Price *v.* Whitely, 50 Mo. 439; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

Montana.—Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New York.— Mason *v.* Stratton, 1 N. Y. Suppl. 511; Vaus *v.* Middlebrook, 3 N. Y. St. 277; Smith *v.* Ottendorfer, 3 N. Y. St. 187.

Texas.— Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381; Belo *v.* Smith, (Civ. App. 1897) 40 S. W. 856; Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544; Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Pfitzinger *v.* Dubs, 64 Fed. 696, 12 C. C. A. 399; Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

England.— Blackburn *v.* Blackburn, 4 Bing. 395, 13 E. C. L. 557, 3 C. & P. 146, 14 E. C. L. 495, 6 L. J. C. P. O. S. 13, 1 M. & P. 33, 63, 29 Rev. Rep. 583.

See 32 Cent. Dig. tit. "Libel and Slander," § 277. And see *supra*, II, B.

63. *California.*— Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Illinois.— Nolte *v.* Herter, 65 Ill. App. 430.

Indiana.— Tracy *v.* Hacket, 19 Ind. App. 133, 49 N. E. 185, 65 Am. St. Rep. 398.

Iowa.— Trimble *v.* Tantlinger, 104 Iowa 665, 69 N. W. 1045, 74 N. W. 25; Swearingen *v.* Stanley, 23 Iowa 115.

Missouri.— Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

Texas.— Belo *v.* Smith, (Civ. App. 1897) 40 S. W. 856.

See 32 Cent. Dig. tit. "Libel and Slander," § 277.

64. Dean *v.* Miller, 66 Ind. 440.

65. See *supra*, II, B, text and note 24; III, I.

66. Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188, 1 Blatchf. 588.

Necessity of alleging special damages see *supra*, VIII, E, 1, n, (II).

67. *Iowa.*— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

Kentucky.— McIntyre *v.* Bransford, (1891) 17 S. W. 359.

New York.— Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Suppl. 109; Fulkerson *v.* George, 3 Abb. Pr. 75.

Oregon.— Thomas *v.* Bowen, 29 Oreg. 258, 45 Pac. 768.

Texas.— Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

See 32 Cent. Dig. tit. "Libel and Slander," § 280.

Falsity of words published on privileged occasion see *supra*, VI, F, 2, text and note 22.

68. *Alabama.*—Hereford *v.* Combs, 126 Ala. 369, 28 So. 582.

Arkansas.— Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

Delaware.— Parke *v.* Blackiston, 3 Harr. 373.

Illinois.— Thomas *v.* Dunaway, 30 Ill. 373.

Indiana.—Hallowell *v.* Guntle, 82 Ind. 554; Gaul *v.* Fleming, 10 Ind. 253.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365.

Kansas.— Russell *v.* Anthony, 21 Kan. 450, 30 Am. Rep. 436.

Kentucky.— McIntyre *v.* Bransford, 17 S. W. 359, 13 Ky. L. Rep. 454.

Maine.— Haynes *v.* Leland, 29 Me. 233.

Maryland.— Hagan *v.* Hendry, 18 Md. 177.

Massachusetts.— Sperry *v.* Wilcox, 1 Metc. 267.

Michigan.— Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433.

Minnesota.— Wilcox *v.* Moore, 69 Minn. 49, 71 N. W. 917.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; State *v.* Hosmer, 85 Mo. 553; Nelson *v.* Wallace, 48 Mo. App. 193.

New York.— Knipe *v.* Brooklyn Daily Eagle, 101 N. Y. App. Div. 43, 91 N. Y. Suppl. 872, 34 N. Y. Civ. Proc. 44; Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Suppl. 109; Fulkerson *v.* George, 3 Abb. Pr. 75.

North Carolina.— Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

Virginia.— Hinchman *v.* Lawson, 5 Leigh 695, 27 Am. Dec. 622.

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591.

Canada.— Macdonald *v.* Mail Printing Co., 2 Ont. L. Rep. 278.

See 32 Cent. Dig. tit. "Libel and Slander," § 280.

f. Privilege. The burden is on defendant to prove that the alleged defamatory matter is privileged;[69] but it has been held that where the words are published in the course of a judicial proceeding, it is presumed that they were material to the issue, and the burden is on plaintiff to prove the contrary.[70]

g. Mitigation. Defendant must prove all facts relied on in mitigation of damages.[71] Thus the character of plaintiff is presumed to be good until attacked, and until assailed he will not be required to call witnesses to support it.[72]

h. Malice. As a general rule malice on the part of the person publishing words defamatory *per se* will be presumed.[73] But where defendant adduces in proof circumstances showing a qualifiedly privileged occasion, plaintiff then assumes the burden of proving malice in rebuttal.[74]

2. Admissibility of Evidence — a. In General. The rules governing the admissibility of evidence generally are applicable to actions for libel or slander.[75] Thus the evidence must be relevant,[76] and must not come within the prohibitions of the hearsay rule.[77] Evidence of the record of the recovery in a suit for malicious prosecution is admissible to show *res judicata*.[78]

69. *Kentucky.*— Beiser *v.* Scripps-McRae Pub. Co., 113 Ky. 383, 68 S. W. 457, 24 Ky. L. Rep. 259.

Michigan.— Day *v.* Backus, 31 Mich. 241.

Minnesota.— State *v.* Shippman, 83 Minn. 441, 86 N. W. 431.

New Jersey.—King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. Rep. 622.

New York.— Moore *v.* Manufacturers' Nat. Bank, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; Stuart *v.* Press Pub. Co., 83 N. Y. App. Div. 467, 82 N. Y. Suppl. 401; Marsh *v.* Ellsworth, 2 Sweeny 589; Marsh *v.* Elsworth, 36 How. Pr. 532.

Pennsylvania.—Conroy *v.* Pittsburgh Times, 139 Pa. St. 334, 21 Atl. 154, 23 Am. St. Rep. 188, 11 L. R. A. 725.

Texas.— Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49.

See 32 Cent. Dig. tit. "Libel and Slander," § 279.

70. Marsh *v.* Ellsworth, 2 Sweeny (N. Y.) 589; Liles *v.* Gaster, 42 Ohio St. 631; Cooper *v.* Phipps, 24 Oreg. 357, 33 Pac. 985, 22 L. R. A. 836.

71. *Indiana.*— Gaul *v.* Fleming, 10 Ind. 253.

Louisiana.— C. S. Burt Co. *v.* Casey, etc., Mfg. Co., 107 La. 231, 31 So. 667.

Minnesota.— Gray *v.* Times Newspaper Co., 74 Minn. 452, 77 N. W. 204, 73 Am. St. Rep. 363.

New York.— Fulkerson *v.* George, 3 Abb. Pr. 75.

North Carolina.— Oshorn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648.

Rhode Island.— Rice *v.* Cottrel, 5 R. I. 340.

United States.— White *v.* Nicholls, 3 How. 266, 11 L. ed. 591.

See 32 Cent. Dig. tit. "Libel and Slander, § 280.

72. Stowell *v.* Beagle, 79 Ill. 525; Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887; Lotto *v.* Davenport, 50 Minn. 99, 52 N. W. 130; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

Admissibility of evidence of good character in chief see *supra*, VIII, E, 7, i, (II).

73. See *supra*, V, B, text and note 39.

74. See *supra*, VI, F, 2.

75. See cases cited *infra*, notes 76, 77.

76. *California.*— Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067 (holding irrelevant the facts that plaintiff had never made complaint to defendant and did not commence suit until the day before the action would be outlawed); Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845 (holding irrelevant the fact that plaintiff besought certain persons to secure testimony in her behalf).

Iowa.— Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679.

New York.— Cudlip *v.* New York Evening Journal Pub. Co., 174 N. Y. 158, 66 N. E. 662; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Emery *v.* Miller, 1 Den. 208 (holding that on a charge of larceny of certain money a rumor that the money had actually been stolen is irrelevant); Moody *v.* Baker, 5 Cow. 351.

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237, holding irrelevant the fact that the police were attempting to find and arrest plaintiff's brother.

Wisconsin.— Robinson *v.* Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983.

United States.— Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526 (holding irrelevant the fact that plaintiff had never demanded a retraction); Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91 (holding irrelevant the fact that plaintiff had commenced suits against other newspapers for the publication of similar libels).

See 32 Cent. Dig. tit. "Libel and Slander," § 281.

77. Spolek Denni Hlasatel *v.* Hoffman, 105 Ill. App. 170 [*affirmed* in 204 Ill. 532, 68 N. E. 400]; Throckmorton *v.* Evening Post Pub. Co., 27 N. Y. App. Div. 125, 50 N. Y. Suppl. 153; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276; Dr. Shoop Family Medicine Co. *v.* Wernich, 95 Wis. 164, 70 N. W. 160.

78. Sheldon *v.* Carpenter, 4 N. Y. 579, 55 Am. Dec. 301. See also Moody *v.* Baker, 5 Cow. (N. Y.) 351.

b. To Show Person Defamed — (i) *In General.* Plaintiff may show by extrinsic evidence that the publication referred to him, although it does not name him.[79]

(ii) *Other Publications.* Thus to show that a publication referred to plaintiff evidence of other publications by defendant is admissible.[80] So it has been held that contemporaneous publications by other newspapers is admissible for this purpose.[81]

(iii) *Understanding of Hearers or Readers.*[82] As a general rule testimony of witnesses who read or heard the defamatory charge that they understood it to refer to plaintiff is admissible.[83] But in other jurisdictions it is held that, while whatever relevant facts outside of the publication could have enabled a witness to form an intelligent opinion or understanding that an offensive term was intended to be applied to plaintiff may be placed before the jury,[84] the opinion of a witness as to the intended application of the defamatory words to plaintiff is inadmissible,[85] unless at least peculiar circumstances are shown, either

79. *Connecticut.*— Mix *v.* Woodward, 12 Conn. 262.

Michigan.— Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447, holding that the entire conversation is admissible for this purpose.

Minnesota.— Martin County Bank *v.* Day, 73 Minn. 195, 75 N. W. 1115.

New York.— Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838 [*affirmed* in 156 N. Y. 376, 50 N. E. 979].

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237.

England.— Cook *v.* Ward, 6 Bing. 409, 8 L. J. C. P. O. S. 126, 4 M. & P. 99, 31 Rev. Rep. 456, 19 E. C. L. 189.

See 32 Cent. Dig. tit. "Libel and Slander," § 282.

80. Russell *v.* Kelly, 44 Cal. 641, 13 Am. Rep. 169; Mix *v.* Woodward, 12 Conn. 262; White *v.* Sayward, 33 Me. 322.

Inadmissibility of evidence of similar words spoken of third person in rebuttal.— Where plaintiff proves that defendant spoke certain words of plaintiff by the name of Mrs. Edwards, defendant cannot show that in other conversations he spoke similar words respecting another Mrs. Edwards. Patterson *v.* Edwards, 7 Ill. 720.

81. Van Ingen *v.* Mail, etc., Pub. Co., 156 N. Y. 376, 50 N. E. 979 [*affirming* 14 Misc. 326, 35 N. Y. Suppl. 838].

82. **Understanding of hearers or readers as to meaning of words** see *infra*, VIII, F, 2, d, (III).

83. *California.*— Russell *v.* Kelly, 44 Cal. 641, 13 Am. Rep. 169.

Indiana.— De Armond *v.* Armstrong, 37 Ind. 35; Smawley *v.* Stark, 9 Ind. 386.

Massachusetts.— Leonard *v.* Allen, 11 Cush. 241 (where, however, the evidence was introduced merely in explanation of the application of "certain expressions, gestures, and intonations"); Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768; Goodrich *v.* Davis, 11 Metc. 473.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

New Hampshire.— See Smart *v.* Blanchard, 42 N. H. 137, holding that the opinion of a witness is admissible when the application of the words to plaintiff is doubtful.

North Carolina.— Briggs *v.* Byrd, 33 N. C. 353.

Ohio.— McLaughlin *v.* Russell, 17 Ohio 475.

Tennessee.— Tompkins *v.* Wisener, 1 Sneed 458.

Texas.— Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

Vermont.— Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 618.

United States.— Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628. *Compare* Smith *v.* Sun Pub. Co., 50 Fed. 399.

See 32 Cent. Dig. tit. "Libel and Slander," § 282.

84. Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. 30.

85. White *v.* Sayward, 33 Me. 322; Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. 30 [*distinguishing* Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103]; O'Brien *v.* Bennett, 72 N. Y. App. Div. 367, 76 N. Y. Suppl. 498; Stokes *v.* Morning Journal Assoc., 66 N. Y. App. Div. 569, 73 N. Y. Suppl. 245; Maynard *v.* Beardsley, 7 Wend. (N. Y.) 560, 22 Am. Dec. 595; Gibson *v.* Williams, 4 Wend. (N. Y.) 320; Van Vechten *v.* Hopkins, 5 Johns. (N. Y.) 211, 4 Am. Dec. 339; Rangler *v.* Hummel, 37 Pa. St. 130; O'Donnell *v.* Wilkes-Barre Times, 13 Luz. Leg. Reg. (Pa.) 89. See also Anderson *v.* Hart, 68 Iowa 400, 27 N. W. 289, intimating, however, that when a libelous communication on its face directly or by way of innuendo or otherwise refers to any person a witness may possibly be asked who or what person was meant.

Testimony of defendant as to his understanding.— In Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915, it was held that in libel for black-listing a debtor whose name was sent a merchants' protective association, defendant may be cross-examined as to whether the list referred to plaintiff or not, in his understanding, as bearing on the question of defendant's knowledge and motive.

Understanding based on rumor.— The testimony of hearers as to whom they thought the charge referred, judging by current rumor

as respects the language employed, or the manner of its utterance or publication, as for instance, where the charge is made by equivocal expressions, insinuations, gestures, or intonations of voice.[86]

c. **Malice** — (I) *In General.* Evidence of malice on the part of defendant is inadmissible until some of the actionable words laid have been proved.[87] Plaintiff is not precluded from showing actual malice, because of the presumption of malice when the charge is actionable *per se*.[88] Nor is the admission of evidence to show malice error, although that issue is afterward taken from the jury.[89] Malice may be shown either by direct evidence or surrounding circumstances.[90]

(II) *Character of Publication.* So the character of the publication itself or the terms in which the communication is made may be evidence of malice.[91]

(III) *Falsity.* Evidence of the falsity of the publication is held to be admissible to show actual malice,[92] and this for the purpose of rebutting the presumption arising from a privileged occasion,[93] as well as for the purpose of enhancing dam-

or conversations of others, is inadmissible. Allenworth *v.* Coleman, 5 Dana (Ky.) 315.

86. Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103. See also Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. 30.

87. *Connecticut.*— Williams *v.* Miner, 18 Conn. 464.

Indiana.— Abrams *v.* Smith, 8 Blackf. 95.

Maryland.— Winter *v.* Donovan, 8 Gill 370; Duvall *v.* Griffith, 2 Harr. & G. 30.

Michigan.— Thompson *v.* Bowers, 1 Dougl. 321.

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495.

See 32 Cent. Dig. tit. "Libel and Slander," § 284.

88. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516 [*following* True *v.* Plumley, 36 Me. 466]; Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

89. Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66.

90. *Delaware.*— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Illinois.— Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935 [*affirming* 37 Ill. App. 510].

Iowa.— Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41.

Louisiana.— Simons *v.* Lewis, 51 La. Ann. 327, 25 So. 406.

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228, defendants' procuring evidence to prove truth of charge and declining to plead in justification.

Michigan.— Scripps *v.* Reilly, 35 Mich. 371, 24 Am. Rep. 575.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New Jersey.—See Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261.

New York.— Fry *v.* Bennett, 28 N. Y. 324; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Throckmorton *v.* Evening Post Pub. Co., 27 N. Y. App. Div. 125, 50 N. Y. Suppl. 153; Stafford *v.* Morning Journal Assoc., 68 Hun 467, 22 N. Y. Suppl. 1008 [*affirmed* in 142 N. Y. 598, 37 N. E. 625]; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. 9 note.

North Carolina.— Briggs *v.* Byrd, 34 N. C. 377.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Wisconsin.— Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 334.

England.— See Rustell *v.* Macquister, 1 Camp. 49 note.

See 32 Cent. Dig. tit. "Libel and Slander," § 284.

Evidence held to be inadmissible to show malice see Sibley *v.* Lay, 44 La. Ann. 936, 11 So. 581; Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061; Krug *v.* Pitass, 162 N. Y. 154, 56 N. E. 526, 76 Am. St. Rep. 317 [*reversing* 16 N. Y. App. Div. 480, 44 N. Y. Suppl. 864]; O'Brien *v.* Bennett, 59 N. Y. App. Div. 623, 69 N. Y. Suppl. 298; Brine *v.* Bazalgette, 3 Exch. 692, 18 L. J. Exch. 348.

Unsuccessful justification as evidence of malice see *supra*, VII, A, 2, a, text and note 38.

91. *Connecticut.*— Hotchkiss *v.* Porter, 30 Conn. 414.

Delaware.— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Massachusetts.— Atwill *v.* Mackintosh, 120 Mass. 177.

Missouri.— Sullivan *v.* Strathan-Hutton-Evans Commission Co., 152 Mo. 268, 53 S. W. 912, 47 L. R. A. 859.

New York.— Shanks *v.* Stumpf, 23 Misc. 264, 51 N. Y. Suppl. 154 [*affirmed* in 54 N. Y. Suppl. 1115].

North Carolina.— Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

See 32 Cent. Dig. tit. "Libel and Slander," § 284.

92. Brandt *v.* Morning Journal Assoc., 177 N. Y. 544, 69 N. E. 1120 [*affirming* 81 N. Y. App. Div. 183, 80 N. Y. Suppl. 1002]; Bergmann *v.* Jones, 94 N. Y. 51; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66 [*affirmed* in 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722]; McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 51 N. Y. Suppl. 275; Samuels *v.* Evening Mail Assoc., 9 Hun (N. Y.) 288 [*affirmed* in 75 N. Y. 604].

93. Laing *v.* Nelson, 40 Nebr. 252, 58 N. W. 846; Holt *v.* Parsons, 23 Tex. 9, 76 Am. Dec. 49; Blagg *v.* Sturt, 10 Q. B. 899,

ages or upholding exemplary damages.[94] But the mere circumstance of the statement being false will not suffice to show malice so as to rebut the presumption arising from a privileged occasion unless there is some evidence to show that defendant knew it to be false.[95]

(iv) *Other Parts of Conversation or Article.* Other parts of the conversation or article in which the alleged defamatory words were published may properly be given in evidence to show and explain the animus of the charge.[96]

(v) *Contemporaneous Acts of Defendant.* The conduct and actions, as well as the language of defendant at the time of the slander, is admissible in evidence on the question of express malice.[97]

(vi) *State of Feelings Between Plaintiff and Defendant.* Evidence of prior dealings between the parties, their acts and statements in regard to each other, and evidence generally showing the state of feelings between the parties is admissible as tending to show the motive of the defamatory publication.[98] It is held essential, however, that the evidence should tend to show malice at the time of publication.[99]

11 Jur. 1011, 16 L. J. Q. B. 39, 59 E. C. L. 897.

94. Brandt *v.* Morning Journal Assoc., 177 N. Y. 544, 69 N. E. 1120 [*affirming* 81 N. Y. App. Div. 183, 80 N. Y. Suppl. 1002]; Bergmann *v.* Jones, 94 N. Y. 51; Fry *v.* Bennett, 28 N. Y. 324; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516; Malloy *v.* Bennett, 15 Fed. 371. *Compare* Hume *v.* Kusche, 42 Misc. (N. Y.) 414, 87 N. Y. Suppl. 109; Prince *v.* Brooklyn Daily Eagle, 16 Misc. (N. Y.) 186, 37 N. Y. Suppl. 250.

95. Laing *v.* Nelson, 40 Nebr. 252, 58 N. W. 846; Hume *v.* Husche, 42 Misc. (N. Y.) 414, 87 N. Y. Suppl. 109; Harris *v.* Thompson, 24 Eng. L. & Eq. 370. See also *infra*, VIII, F, 3, e, (IV), (B), text and note 1.

96. *California.*—Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

New York.— Grant *v.* Herald Co., 42 N. Y. App. Div. 354, 59 N. Y. Suppl. 84.

Ohio.— Cincinnati Gazette Co. *v.* Bishop, 6 Ohio Dec. (Reprint) 1113, 10 Am. L. Rec. 488.

Pennsylvania.— Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355.

Texas.— Byrd *v.* State, 38 Tex. Cr. 630, 44 S. W. 521.

Vermont.— Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

See 32 Cent. Dig. tit. "Libel and Slander," § 286.

97. Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Parke *v.* Blackiston, 3 Harr. (Del.) 373 (evidence of defendant's manner and language in uttering slander); Rice *v.* Simmons, 2 Harr. (Del.) 309; Faxon *v.* Jones, 176, Mass. 206, 57 N. E. 359.

Evidence of an assault by defendant on plaintiff half an hour after the uttering of the slanderous statement is admissible in an action of slander to show malice. Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

98. *California.*— Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157.

Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

District of Columbia.— Wills *v.* Jones, 13 App. Cas. 482.

Illinois.— Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323].

Michigan.— Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Fowler *v.* Gilbert, 38 Mich. 292.

Mississippi.— Hubbard *v.* Rutledge, 57 Miss. 7.

New York.— Trapp *v.* Du Bois, 76 N. Y. App. Div. 314, 78 N. Y. Suppl. 505.

North Carolina.— Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209.

England.— Jackson *v.* Adams, 1 Hodges 78, 4 L. J. C. P. 194.

See 32 Cent. Dig. tit. "Libel and Slander," § 285.

Defendant cannot show the circumstances of a difficulty he had had with plaintiff. Brown *v.* Autrey, 78 Ga. 753, 3 S. E. 669.

99. *Indiana.*— Peterson *v.* Hutchinson, 30 Ind. 38 (statement by defendant in moving for a change of venue that he wanted to make plaintiff trouble held inadmissible); Justice *v.* Kirlin, 17 Ind. 558.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

Michigan.— Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061.

North Carolina.— Nissen *v.* Cramer, 104 N. C. 574, 10 S. E. 676, 6 L. R. A. 780.

Vermont.— Kirkaldie *v.* Paige, 17 Vt. 256, holding that an attempt by defendant to induce witnesses of plaintiff, by solicitation, money, and threats, not to attend court is inadmissible to show malice.

England.— See Hemmings *v.* Gasson, E. B. & E. 346, 4 Jur. N. S. 834, 27 L. J. Q. B. 252, 6 Wkly. Rep. 601, 96 E. C. L. 346.

See 32 Cent. Dig. tit. "Libel and Slander," § 285.

Evidence in mitigation held too remote.— In Downey *v.* Dillon, 52 Ind. 442, it was held that on a trial of an action of libel based on a charge of perjury, evidence for defendant that he had always before the publication directed his son to treat plaintiff kindly was held to be inadmissible, as not being confined to a period near the publication.

(VII) *Threats on Part of Defendant.* Threats made by defendant against plaintiff are evidence of malice, whether made before [1] or after [2] the publication of the charge. But a threat made during the trial has been held to be inadmissible.[3]

(VIII) *Efforts to Secure Indictment of Plaintiff by Defendant.* Evidence of efforts of defendant to secure the indictment of plaintiff by the grand jury is admissible to show malice on the part of defendant.[4]

(IX) *State of Feelings Between Defendant and Relative of Person Defamed.* It has been held that evidence of quarrels between defendant and a relation of plaintiff is inadmissible to show malice in defendant toward plaintiff.[5]

(X) *State of Feelings Between Plaintiff and Third Person.* Evidence of a misunderstanding between plaintiff and a third person of which defendant had no knowledge is not admissible to show malice on the part of defendant.[6]

(XI) *Evidence Showing Reckless or Careless Publication.* Evidence tending to show that publication was made with recklessness and indifference to the rights of plaintiff is admissible to show malice.[7]

(XII) *Other Publications* — (A) *In General.* As a general rule defamatory publications by defendant against plaintiff other than those sued on may be admitted in evidence to show malice on the part of defendant, and this, whether such publications were made prior or subsequent to the defamatory words complained of.[8] But there are numerous authorities to the effect that the language

1. Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Fry *v.* Bennett, 28 N. Y. 324; Davey *v.* Davey, 22 Misc. (N. Y.) 668, 50 N. Y. Suppl. 161 [*affirmed* in 36 N. Y. App. Div. 640, 56 N. Y. Suppl. 1106]. *Compare* Illinois Cent. R. Co. *v.* Ely, 83 Miss. 519, 35 So. 873, holding that in an action by a discharged railway employee for a libel in a clearance paper furnished him, testimony that an officer of the road had said that he was going to have plaintiff discharged because he had testified against the company in a lawsuit is inadmissible to show malice.

2. Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416; Wright *v.* Gregory, 9 N. Y. App. Div. 85, 41 N. Y. Suppl. 139.

3. Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061. *Compare* Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

4. Tolleson *v.* Posey, 32 Ga. 372; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935 [*affirming* 37 Ill. App. 510] (efforts to procure indictment of plaintiff subsequent to suit); Harbison *v.* Shook, 41 Ill. 141; Tate *v.* Humphrey, 2 Campb. 73 note.

5. Stowell *v.* Beagle, 57 Ill. 97; York *v.* Pease, 2 Gray (Mass.) 282. *Compare* Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935 [*affirming* 37 Ill. App. 510], holding that a statement by defendant that he had a grudge against the father of plaintiff was admissible.

6. Moore *v.* Thompson, 92 Mich. 498, 52 N. W. 1000; Robertson *v.* Wylde, 2 M. & Rob. 101.

7. Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Scripps *v.* Reilly, 38 Mich. 10; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131 [*affirmed* in 133 N. Y. 538, 30 N. E. 1148]; Shanks *v.* Stumpf, 23 Misc. (N. Y.) 264, 51 N. Y. Suppl. 154 [*affirmed* in 34 N. Y. App. Div. 624, 54 N. Y. Suppl. 1115].

Sufficiency of evidence of recklessness see *infra*, VIII, F, 3, e, text and note 91.

8. *California.*— Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533.

Connecticut.— Williams *v.* Miner, 18 Conn. 464.

Delaware.— State *v.* Jeandell, 5 Harr. 475.

Georgia.— Adkins *v.* Williams, 23 Ga. 222.

Illinois.— Rausch *v.* Anderson, 75 Ill. App. 526.

Indiana.— Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Casey *v.* Hulgan, 118 Ind. 590, 21 N. E. 322; Logan *v.* Logan, 77 Ind. 558; Roberts *v.* Ward, 8 Blackf. 333.

Iowa.— Prime *v.* Eastwood, 45 Iowa 640.

Kentucky.— Smith *v.* Lovelace, 1 Duv. 215; Letton *v.* Young, 2 Metc. 558.

Louisiana.— Kendrick *v.* Kemp, 6 Mart. N. S. 500.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427; Duvall *v.* Griffith, 2 Harr. & G. 30.

Massachusetts.— Borley *v.* Allison, 181 Mass. 246, 63 N. E. 260; Harriott *v.* Plimpton, 166 Mass. 585, 44 N. E. 992; Clark *v.* Brown, 116 Mass. 504; Markham *v.* Russell, 12 Allen 573, 90 Am. Dec. 169; Baldwin *v.* Soule, 6 Gray 321.

Michigan.— Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Whittemore *v.* Weiss, 33 Mich. 348.

Minnesota.— Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Reitan *v.* Goebel, 33 Minn. 151, 22 N. W. 291.

Missouri.— Hall *v.* Jennings, 87 Mo. App.

sought to be introduced in evidence must be of similar import to, or have some connection with, the charge declared on.[9]

(B) *Repetitions or Similar Publications.* It is well settled, however, that

627; Lanius *v.* Druggist Pub. Co., 20 Mo. App. 12.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

New Hampshire.— Symonds *v.* Carter, 32 N. H. 458; Severance *v.* Hilton, 32 N. H. 289; Merrill *v.* Peaslee, 17 N. H. 540.

New Jersey.— McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606; Bartow *v.* Brands, 15 N. J. L. 248.

North Carolina.— Brittain *v.* Allen, 14 N. C. 167; Brittain *v.* Allen, 13 N. C. 120.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293; Stearns *v.* Cox, 17 Ohio 590; Cincinnati Gazette Co. *v.* Bishop, 6 Ohio Dec. (Reprint) 1113, 10 Am. L. Rec. 488.

Pennsylvania.— Seip *v.* Deshler, 170 Pa. St. 334, 32 Atl. 1032.

South Carolina.— Miller *v.* Kerr, 2 McCord 285, 13 Am. Dec. 722.

Texas.— Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 618.

Wisconsin.— Hocks *v.* Sprangers, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

United States.— Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456].

England.— Finnerty *v.* Tipper, 2 Campb. 72; Rustell *v.* Macquinster, 1 Campb. 49 note; Camfield *v.* Bird, 3 C. & K. 56; Defries *v.* Davis, 7 C. & P. 112, 32 E. C. L. 526; Macleod *v.* Wakley, 3 C. & P. 311, 14 E. C. L. 584; Hemmings *v.* Gasson, E. B. & E. 346, 4 Jur. N. S. 834, 27 L. J. Q. B. 252, 6 Wkly. Rep. 601, 96 E. C. L. 346; Plunkett *v.* Cobbett, 5 Esp. 136, 2 Selw. 1042; Barrett *v.* Long, 3 H. L. Cas. 395, 10 Eng. Reprint 154; Pearson *v.* Le Maitre, 7 Jur. 748, 12 L. J. C. P. 253, 5 M. & G. 700, 6 Scott N. R. 607, 44 E. C. L. 366; Symmons *v.* Blake, 1 M. & Rob. 477; Mead *v.* Daubigny, Peake N. P. 125.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 286–289.

Prior publication upon which suit is pending.— Evidence of defamatory words published prior to the publication in controversy is held to be admissible to show malice, although an action is pending for the former publication. Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710; Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456]. *Compare* Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

Admissibility of other publication pleaded in separate count.— It has been held that where the declaration in an action of slander charges in separate counts two distinct publications of similar words, evidence of the words charged in one count are admissible for the purpose of showing malice in publishing the words set out in the other count, where the latter words are shown to have been uttered on a privileged occasion. Clark *v.* Brown, 116 Mass. 504.

Caution to jury that damages be allowed only for publication sued on see *infra*, VIII, F, 2, c, (XII), (D), note 12.

9. *Alabama.*— Parmer *v.* Anderson, 33 Ala. 78.

Connecticut.— Mix *v.* Woodward, 12 Conn. 262.

Indiana.— See McIntire *v.* Young, 6 Blackf. 496, 39 Am. Dec. 443.

Iowa.— Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389.

Maine.— Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; Conant *v.* Leslie, 85 Me. 257, 27 Atl. 147.

Massachusetts.— Clark *v.* Brown, 116 Mass. 504; Baldwin *v.* Soule, 6 Gray 321; Watson *v.* Moore, 2 Cush. 133.

Michigan.— Taylor *v.* Kneeland, 1 Dougl. 67.

Minnesota.— Jacobs *v.* Cater, 87 Minn. 448, 92 N. W. 397.

Missouri.— Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New Hampshire.— Symonds *v.* Carter, 32 N. H. 458; Severance *v.* Hilton, 32 N. H. 289.

New Jersey.— Schenck *v.* Schenck, 20 N. J. L. 208.

New York.— Frazier *v.* McCloskey, 60 N. Y. 337, 19 Am. Rep. 193; Howard *v.* Sexton, 4 N. Y. 157; Root *v.* Lowndes, 6 Hill 518, 41 Am. Dec. 762.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Pennsylvania.— Shock *v.* McChesney, 2 Yeates 473.

Tennessee.— Russell *v.* Farrell, 102 Tenn. 248, 52 S. W. 146; Saunders *v.* Baxter, 6 Heisk. 369.

England.— Finnerty *v.* Tipper, 2 Campb. 72.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 286–289.

Subsequent publication containing repetition and new matter.— If the publication, made after suit is brought, contains new libelous matter, the court will not separate it from the old, but the whole may be read in evidence. Schenck *v.* Schenck, 20 N. J. L. 208.

Evidence of another defamation charging a different crime to prove malice is inadmissible on the grounds of public policy. Medaugh *v.* Wright, 27 Ind. 137; Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493; Eckart *v.* Wilson, 10 Serg. & R. (Pa.) 44. See also Shock *v.* McChesney, 2 Yeates (Pa.) 473.

repetitions of the alleged defamatory matter or other defamatory publications of similar import are admissible to show actual or express malice on the part of defendant.[10]

(c) *Republications After Commencement of Action.* Moreover the weight of authority is in favor of the rule that a repetition of the defamatory words or a publication of similar import, although made *post litem motam*, is admissible to show malice.[11]

(d) *Publications Not Actionable.* Other publications may be admitted for

10. *California.*—Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958; Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Connecticut.— Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75; Austin *v.* Remington, 46 Conn. 116.

Illinois.— Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119; Schmisseur *v.* Kreilich, 92 Ill. 347; Stowell *v.* Beagle, 79 Ill. 525; Gaines *v.* Gaines, 109 Ill. App. 226.

Indiana.— Meyer *v.* Bohlfing, 44 Ind. 238; Burson *v.* Edwards, 1 Ind. 164, Smith 7; Lanter *v.* McEwen, 8 Blackf. 495.

Iowa.— Cushing *v.* Hederman, 117 Iowa 637, 91 N. W. 940, 94 Am. St. Rep. 320; Bailey *v.* Bailey, 94 Iowa 598, 63 N. W. 341; Halley *v.* Gregg, 74 Iowa 563, 38 N. W. 416.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; Campbell *v.* Bannister, 79 Ky. 205.

Maine.— Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; True *v.* Plumley, 36 Me. 466.

Massachusetts.— Hastings *v.* Stetson, 130 Mass. 76.

Michigan.— Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Beneway *v.* Thorp, 77 Mich. 181, 43 N. W. 863; Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375; Thompson *v.* Bowers, 1 Dougl. 321.

Minnesota.— Frederickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388.

Missouri.— Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

Nebraska.— McCleneghan *v.* Reid, 34 Nebr. 472, 51 N. W. 1037.

New Hampshire.— Symonds *v.* Carter, 32 N. H. 458; Severance *v.* Hilton, 32 N. H. 289.

New York.— Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457 [*affirming* 48 Hun 308, 1 N. Y. Suppl. 443]; Distin *v.* Rose, 69 N. Y. 122; Bassell *v.* Elmore, 48 N. Y. 561; Fowles *v.* Bowen, 30 N. Y. 20 (a letter written by defendant's partner with his assent); Ward *v.* Deans, 10 N. Y. Suppl. 421.

Vermont.— Cavanaugh *v.* Austin, 42 Vt. 576.

Virginia.— Hansbrough *v.* Stinnett, 25 Gratt. 495.

West Virginia.— Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117.

England.— Delegal *v.* Highley, 3 Bing. N. Cas. 950, 32 E. C. L. 435, 8 C. & P. 444, 34 E. C. L. 827, 3 Hodges 158, 6 L. J. C. P. 337; Pearson *v.* Le Maitre, 7 Jur. 748, 12 L. J. C. P. 253, 5 M. & G. 700, 6 Scott N. R. 607, 44 E. C. L. 366; Barwell *v.* Adkins, 1 M. & G. 807, 2 Scott N. R. 11, 39 E. C. L. 1038.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 286–289.

11. *Alabama.*— Sonneborn *v.* Bernstein, 49 Ala. 168; Parmer *v.* Anderson, 33 Ala. 78; Scott *v.* McKinnish, 15 Ala. 662.

California.— Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499; Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958; Chamberlin *v.* Vance, 51 Cal. 75; Norris *v.* Elliott, 39 Cal. 72.

Georgia.— Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152.

Illinois.— Halsey *v.* Stillman, 48 Ill. App. 413.

Indiana.— Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Hesler *v.* Degant, 3 Ind. 501; McIntire *v.* Young, 6 Blackf. 496, 39 Am. Dec. 443; Scott *v.* Mortsinger, 2 Blackf. 454.

Iowa.— Ellis *v.* Lindley, 38 Iowa 461; Hinkle *v.* Davenport, 38 Iowa 355; Schrimper *v.* Heilman, 24 Iowa 505; Bearsley *v.* Bridgman, 17 Iowa 290.

Kentucky.— Taylor *v.* Moran, 4 Metc. 127.

Maine.— Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; Smith *v.* Wyman, 16 Me. 13.

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Morasse *v.* Brochu, 151 Mass. 567, 25 N. E. 74, 21 Am. St. Rep. 474, 8 L. R. A. 524; Robbins *v.* Fletcher, 101 Mass. 115; Goodrich *v.* Stone, 11 Metc. 486; Bodwell *v.* Swan, 3 Pick. 376.

Michigan.— Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233; Taylor *v.* Kneeland, 1 Dougl. 67.

Minnesota.— Larrabee *v.* Minnesota Tribune Co., 36 Minn. 141, 30 N. W. 462; Gribble *v.* Pioneer Press Co., 34 Minn. 342, 25 N. W. 710.

Missouri.— Noeninger *v.* Vogt, 88 Mo. 589; Hall *v.* Jennings, 87 Mo. App. 627.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

Pennsylvania.— McAlmont *v.* McClelland, 14 Serg. & R. 359.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458.

Vermont.— Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

England.— Macleod *v.* Wakley, 3 C. & P. 311, 14 E. C. L. 584; Pearson *v.* Le Maitre, 7 Jur. 748, 12 L. J. C. P. 253, 5 M. & G. 700, 6 Scott N. R. 607, 44 E. C. L. 366.

See 32 Cent. Dig. tit. "Libel and Slander," § 288.

But see Holmes *v.* Brown, Kirby (Conn.) 151; Daly *v.* Byrne, 77 N. Y. 182; Distin-

the purpose of showing malice, whether they may themselves be made the basis of recovery in separate suits or not,[12] as for instance where they are not actionable *per se*,[13] or the right of action thereon has been barred by the statute of limitations,[14] or by a former recovery.[15] So evidence of a prior publication is admissible to show malice, although such publication has been adjudged to be true.[16]

(E) *Privileged Communications.* Repetitions or republications of the same or similar matter, although claimed to be privileged, have been held to be admissible to show actual malice.[17] But this ruling has been said to ignore the presumption of good faith with which the law clothes all statements made upon privileged occasions,[18] and the general rule is that a statement made on a privileged occasion is no evidence that another statement declared upon was made with actual malice and this whether the statements are of similar import or not.[19]

(F) *Publications Against Third Persons.* The general rule has been laid down that in an action for libel, evidence that defendant has libeled other persons, or that he has threatened to do so, is not admissible.[20] But in an action for libel against a newspaper, the publication of similar libels upon other persons may be admitted as showing a reckless indifference to the rights and reputations of others, and as furnishing a basis for an inference by the jury that the publication in controversy was malicious.[21]

v. Rose, 69 N. Y. 122 [*affirming* 7 Hun 83]; Frazier *v.* McCloskey, 60 N. Y. 337, 19 Am. Rep. 193 [*reversing* 2 Thomps. & C. 266]; Titus *v.* Sumner, 44 N. Y. 266; Stuart *v.* New York Herald Co., 73 N. Y. App. Div. 459, 77 N. Y. Suppl. 216; Eccles *v.* Radam, 75 Hun (N .Y.) 535, 27 N. Y. Suppl. 486; Kennedy *v.* Gifford, 19 Wend. (N. Y.) 296; Howell *v.* Cheatham, Cooke (Tenn.) 247; Swindell *v.* Harper, 51 W. Va. 381, 41 S. E. 117.

12. Post Pub. Co. *v.* Hallam, 59 Fed. 530 [*affirming* 55 Fed. 456].

Caution to jury accompanying admission of actionable words.— When the words introduced in evidence are actionable in themselves, the court should caution the jury not to consider them as giving any additional or independent right of recovery. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. 4; Letton *v.* Young, 2 Metc. (Ky.) 558; Post Pub. Co. *v.* Hallam, 59 Fed. 530 [*affirming* 55 Fed. 456]. See also *infra*, VIII, H, 1, c, (IV), text and note 66.

13. *Alabama.*— Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Massachusetts.— Beals *v.* Thompson, 149 Mass. 405, 21 N. E. 959.

New Jersey.— McDermott *v.* Evening Journal Assoc., 43 N. J. L. 488, 39 Am. Rep. 606.

North Carolina.— Brittain *v.* Allen, 14 N. C. 167; Brittain *v.* Allen, 13 N. C. 120.

Pennsylvania.— Elliott *v.* Boyles, 31 Pa. St. 65.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 286–289.

14. *Indiana.*— Throgmorton *v.* Davis, 4 Blackf. 174.

Maine.— Harmon *v.* Harmon, 61 Me. 233.

Maryland.— Botelar *v.* Bell, 1 Md. 173.

New Jersey.— Evening Journal Assoc. *v.* McDermott, 44 N. J. L. 430, 43 Am. Rep. 392.

New York.— Distin *v.* Rose, 69 N. Y. 122; Titus *v.* Sumner, 44 N. Y. 266; Inman *v.* Foster, 8 Wend. 602.

Ohio.— Flamingham *v.* Boucher, Wright 746.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573; Randall *v.* Holsenbake, 3 Hill 175.

Wisconsin.— Born *v.* Rosenow, 84 Wis. 620, 54 N. W. 1089.

See 32 Cent. Dig. tit. "Libel and Slander," § 289.

Compare Lincoln *v.* Chrisman, 10 Leigh (Va.) 338.

15. Swift *v.* Dickerman, 31 Conn. 285. See also Flanders *v.* Groff, 25 Hun (N. Y.) 553, where suit had been begun on the prior publications and had been discontinued upon settlement.

16. Throckmorton *v.* Evening Post Pub. Co., 35 N. Y. App. Div. 396, 54 N. Y. Suppl. 887.

17. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 916.

18. See Douglas *v.* Fargo, 13 N. D. 467, 101 N. W. 919.

19. *Massachusetts.*— Watson *v.* Moore, 2 Cush. 133.

Michigan.— Shinglemeyer *v.* Wright, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New York.— McLaughlin *v.* Charles, 60 Hun 239, 14 N. Y. Suppl. 608.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Pennsylvania.— Thompson *v.* McCready, 194 Pa. St. 32, 45 Atl. 78.

See 32 Cent. Dig. tit. "Libel and Slander," § 289.

20. Cochram *v.* Butterfield, 18 N. H. 115, 45 Am. Dec. 363; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580.

21. Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201; Gibson *v.*

(XIII) *Refusal to Retract.* The refusal of defendant, when requested, to publish a retraction of the defamatory charge is admissible as evidence of malice.[22] Evidence of an application to a responsible editor of a newspaper to retract and his refusal to do so is admissible to show malice on the part of the publisher.[23] But it is held that the refusal of a subordinate editor to publish a retraction of a libel published in a newspaper is not admissible against the proprietor.[24]

(XIV) *Interference With Publication of Vindication by Plaintiff.* Acts or conduct on the part of the proprietor of a newspaper publishing a libel, tending to prohibit plaintiff from vindicating his reputation, are admissible to show malice.[25] So an agreement by the editors of the newspaper in which the alleged libel was published with other newspapers to suppress the knowledge that plaintiff was seeking redress in the courts has been held to be evidence of malice.[26]

(XV) *Rebuttal of Evidence of Malice.*[27] Where plaintiff has introduced evidence of express malice, defendant may offer in rebuttal facts and circumstances or other evidence tending to show good faith on his part,[28] or want of hostility toward plaintiff,[29] as for instance by showing the entire article or conversation in which the defamatory matter was published,[30] or the sources of defendant's information.[31] So where for the purpose of showing malice plaintiff introduces evidence of another conversation or publication, it is competent for defendant in

Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp. 121.

22. Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624 (holding that in an action against a newspaper for libel, an article published after the article counted upon, which contained plaintiff's letter requesting a retraction and a refusal to retract, is admissible); Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429; Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237; Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398. See also Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233; Hoboken Printing, etc., Co. *v.* Kahn, 59 N. J. L. 218, 35 Atl. 1053, 59 Am. St. Rep. 585; Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539. *Compare* Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372.

23. Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429.

24. Edsall *v.* Brooks, 2 Rob. (N. Y.) 414, 33 How. Pr. 191.

25. Wallace *v.* Jameson, 179 Pa. St. 98, 36 Atl. 142; Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456].

A refusal to publish gratuitously a card of third person showing charge to be unfounded is admissible. Barnes *v.* Campbell, 60 N. H. 27.

26. Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456].

27. Pleadings under which evidence in rebuttal of malice admissible see *supra*, VIII, E, 7, g.

28. *Delaware.*— Cameron *v.* Cochran, 2 Marv. 166, 42 Atl. 454.

Illinois.— Burdett *v.* Argile, 94 Ill. App. 171.

Indiana.— Short *v.* Acton, 33 Ind. App. 361, 71 N. E. 505.

Massachusetts.— Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359.

Michigan.— Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New York.— Lally *v.* Emery, 54 Hun 517, 8 N. Y. Suppl. 135.

North Dakota.— Wrege *v.* Jones, 13 N. D. 267, 100 N. W. 705.

Ohio.— Henn *v.* Horn, 56 Ohio St. 442, 47 N. E. 248.

Canada.— Miller *v.* Green, 32 Nova Scotia 129.

See 32 Cent. Dig. tit. "Libel and Slander," § 291.

29. Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359 (holding that where plaintiff introduced evidence tending to show that defendant was actuated by express malice, it is competent for defendant to testify that he had no hostile feelings against plaintiff, since whenever one's actual feelings or intentions are in issue as distinguished from his manifestation of them, he may testify directly on that point); Brown *v.* Radebaugh, 84 Minn. 347, 87 N. W. 937; Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340; Henn *v.* Horn, 56 Ohio St. 442, 47 N. E. 248. See also Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

30. Smith *v.* Gaffard, 33 Ala. 168; Georgia *v.* Bond, 114 Mich. 196, 72 N. W. 232; Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216; Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169.

31. *California.*— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878.

Florida.— Hoey *v.* Fletcher, 39 Fla. 325, 22 So. 716.

Massachusetts.— Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596.

Ohio.— Hilbrant *v.* Simmons, 18 Ohio Cir. Ct. 123, 9 Ohio Cir. Dec. 566.

rebuttal to offer evidence of the conversation or publication in its entirety,[32] and to show the circumstances attendant upon the conversation or publication.[33]

d. Meaning of Words — (I) *In General.* Evidence is admissible to show the ordinary sense in which the alleged defamatory words are used and understood, such evidence having been admitted in the case of English words [34] as well as in the case of foreign words.[35] So evidence is admissible to show that the words were used in a sense different from the ordinary and natural sense,[36] but not, it has been held, unless accompanied by evidence showing that the explanations or surrounding circumstances at the time of publication were such as to convey that meaning.[37]

(II) *Other Statements or Publications.* Since the alleged defamatory matter must be construed in its entirety and in the light of accompanying explanations,[38] it follows that the whole conversation, article, or publication of which the alleged slanderous or libelous matter is a part is admissible to show the intention of the person publishing them and how they were understood by those addressed.[39] So too in the construction of an alleged libel the papers referred to

Texas.— Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580.

England.— Blackburn *v.* Blackburn, 4 Bing. 395, 13 E. C. L. 557, 3 C. & P. 146, 14 E. C. L. 495, 6 L. J. C. P. O. S. 13, 1 M. & P. 33, 63, 29 Rev. Rep. 583.

Evidence of a public rumor is not admissible unless defendant can show that at the time of publication he had knowledge of the rumor and acted on it. Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594.

32. Perry *v.* Breed, 117 Mass. 155. See also Smith *v.* Gaffard, 33 Ala. 168.

33. Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

34. Johnston *v.* Morrison, 3 Ariz. 109, 21 Pac. 465, holding that defendant may testify as to the ordinary meaning of the words. *Compare* Evidence, 17 Cyc. 213 note 38.

Understanding of words in vicinity.— In Craig *v.* Burris, 4 Pennew. (Del.) 156, 55 Atl. 353, it was held proper in an action for slander in stating that plaintiff had committed a certain offense, and would have to settle or "go up the road" to exclude testimony as to what people in and about the vicinity understood by the phrase "go up the road" and that the generally accepted meaning should be shown.

35. Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103 (holding that when slanderous words contain a word or phrase in a foreign language, which has, in common parlance among the people who speak that language, a meaning somewhat different from its definition by lexicographers, and is thus understood by them in common speech, it is competent to prove that fact); Wachter *v.* Quenzer, 29 N. Y. 547.

36. Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Rep. 665; Fawsett *v.* Clark, 48 Md. 494, 30 Am. Rep. 481; Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103; Sherman *v.* Rogers, 70 Hun (N. Y.) 425, 24 N. Y. Suppl. 390; Stafford *v.* Morning Journal Assoc., 68 Hun (N. Y.) 467, 22 N. Y. Suppl. 1008 [*affirmed* in 142 N. Y. 598, 37 N. E. 625]. *Compare* Laine *v.* Wells, 7 Wend. (N. Y.) 175.

37. Keyer *v.* Rives, 56 S. W. 4, 21 Ky. L. Rep. 1706; Coons *v.* Robinson, 3 Barb. (N. Y.) 625; Dempsey *v.* Paige, 4 E. D. Smith (N. Y.) 218; Sabin *v.* Angell, 46 Vt. 740; Major *v.* McGregor, 5 Ont. L. Rep. 81.

An explanation made on a subsequent day by defendant is not competent evidence for defendant. Lathan *v.* Berry, 1 Port. (Ala.) 110.

38. See *supra*, III, J, 2, text and note 46 *et seq.*

39. *California.*— Bradley *v.* Gardner, 10 Cal. 371.

Illinois.— Searcy *v.* Sudhoff, 84 Ill. App. 148; Foval *v.* Hallett, 10 Ill. App. 265.

Iowa.— Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

Massachusetts.— Goodrich *v.* Davis, 11 Metc. 473.

Michigan.— Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

New York.— Stafford *v.* Morning Journal Assoc., 68 Hun 467, 22 N. Y. Suppl. 1008 [*affirmed* in 142 N. Y. 598, 37 N. E. 625]; Dalton *v.* Gill, 25 Hun 120; Coleman *v.* Playsted, 36 Barb. 26; Webber *v.* Vincent, 9 N. Y. Suppl. 101; Keenholts *v.* Becker, 3 Den. 346, holding that foreign words spoken at the same time with the English words are admissible. See also Moore *v.* Manufacturers' Nat. Bank, 51 Hun 472, 4 N. Y. Suppl. 378 [*reversed* on other grounds in 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 752]. *Compare* Tillotson *v.* Cheetham, 3 Johns. 56, 3 Am. Dec. 459.

Texas.— Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

England.— Cooke *v.* Hughes, R. & M. 112, 27 Rev. Rep. 733, 21 E. C. L. 713.

See 32 Cent. Dig. tit. "Libel and Slander," § 293.

To determine whether an advertisement published in a newspaper is libelous, it is proper to read in evidence the entire column of the paper wherein it was published, and thus show its situation and surroundings. Stafford *v.* Morning Journal Assoc., 68 Hun (N. Y.) 467, 22 N. Y. Suppl. 1008 [*affirmed* in 142 N. Y. 598, 37 N. E. 625]. See also

therein,[40] or other writings to which the libel is a reply,[41] or previous publications by plaintiff which explain the libelous matter or soften its character,[42] are admissible. But it has been held that words published since the suit was commenced are inadmissible to show the sense in which the words declared on were used.[43]

(III) *Understanding of Hearers, Readers, or Witnesses.*[44] In some jurisdictions the rule is broadly stated that witnesses may state their understanding of the alleged defamatory words.[45] But the weight of authority is in favor of the rule that the testimony of readers or hearers as to what they understood the alleged defamatory words to mean is inadmissible, at least where the words are unambiguous and plain and in the absence of peculiar circumstances, either as respects to the language employed, or the manner of its utterance or publication.[46] This rule is in accordance with the principle of the law of evi-

Kingsbury *v.* Bradstreet Co., 116 N. Y. 211, 22 N. E. 365.

Declarations of the author of a printed libel made to the printer at the time the paper containing the libelous charge was handed to the latter are inadmissible to explain the sense of the alleged defamatory words, since such declaration could not have been known to all the readers of the libel and throw no light upon the publication. Hagan *v.* Hendry, 18 Md. 177.

Publication containing language of another. — Where the publication in a newspaper contains not only matter furnished by defendant but also statements originating with the newspaper reporter, it is not error to exclude the entire article. Hazy *v.* Woitke, 23 Colo. 556, 48 Pac. 1048.

Words not published are inadmissible to determine the actionable quality of the words declared on. Fry *v.* McCord, 95 Tenn. 678, 33 S. W. 568.

Words barred by statute of limitations. — Words not actionable cannot be made so by other words spoken at a different time and place, which are barred by the statute of limitations. Jones *v.* Jones, 46 N. C. 495.

40. Nash *v.* Benedict, 25 Wend. (N. Y.) 645.

41. Young *v.* Gilbert, 93 Ill. 595; Haws *v.* Stanford, 4 Sneed (Tenn.) 520.

42. Gould *v.* Weed, 12 Wend. (N. Y.) 12; Hotchkiss *v.* Lothrop, 1 Johns. (N. Y.) 286.

43. Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33; Keenholts *v.* Becker, 3 Den. (N. Y.) 346; Lucas *v.* Nichols, 52 N. C. 32. *Compare* Carter *v.* McDowell, Wright (Ohio) 100; Witcher *v.* Richmond, 8 Humphr. (Tenn.) 473.

44. Testimony of witnesses as to understanding of words generally see Evidence, 17 Cyc. 213 *et seq.*

Testimony of witnesses as to person referred to by defamatory words see *supra*, VIII, F, 2, b, (III).

45. Sheftall *v.* Georgia Cent. R. Co., 123 Ga. 589, 51 S. E. 646; Hawks *v.* Patton, 18 Ga. 52, 63 Am. Dec. 266; Nelson *v.* Borchenius, 52 Ill. 236; Tottleben *v.* Blankenship, 58 Ill. App. 47; Freeman *v.* Sanderson, 123 Ind. 264, 24 N. E. 239; Binford *v.* Young, 115 Ind. 174, 16 N. E. 142; Burton *v.* Beasley, 88 Ind. 401; De Armond *v.* Armstrong, 37 Ind. 35.

46. *Alabama.* — Smith *v.* Gaffard, 33 Ala. 168.

California. — Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499.

Colorado. — Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345.

Delaware. — See Craig *v.* Burris, 4 Pennew. 156, 55 Atl. 353.

Iowa. — Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349; Anderson *v.* Hart, 68 Iowa 400, 27 N. W. 289; Herzman *v.* Oberfelder, 54 Iowa 83, 6 N. W. 81.

Kentucky. — Allensworth *v.* Coleman, 5 Dana 315, holding that a witness cannot be permitted to state what he was induced by current rumor or the conversations of others to think defendant meant by the words.

Massachusetts. — Snell *v.* Snow, 13 Metc. 278, 46 Am. Dec. 730.

Minnesota. — Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. 30.

Mississippi. — Jarnigan *v.* Fleming, 43 Miss. 710, 5 Am. Rep. 514.

Missouri. — Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New Hampshire. — Smart *v.* Blanchard, 42 N. H. 137.

New York. — Wright *v.* Paige, 36 Barb. 438; Weed *v.* Bibbons, 32 Barb. 315; Beardsley *v.* Maynard, 4 Wend. 336.

North Carolina. — Pitts *v.* Pace, 52 N. C. 558; Sasser *v.* Rouse, 35 N. C. 142.

Pennsylvania. — Pittsburgh, etc., Pass. R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363.

Wisconsin. — Kidd *v.* Fleek, 47 Wis. 443, 2 N. W. 1121.

See 32 Cent. Dig. tit. "Libel and Slander," § 294.

Inferences and impressions of witnesses. — It is not competent for a witness to state his inferences and impressions as to the slanderous words used, but he must state as nearly as possible the exact words used. Teague *v.* Williams, 7 Ala. 844; Herzman *v.* Oberfelder, 54 Iowa 83, 6 N. W. 81; Rainy *v.* Bravo, L. R. 4 C. P. 287, 27 L. T. Rep. N. S. 249, 20 Wkly. Rep. 873; Harrison *v.* Bevington, 8 C. & P. 708, 34 E. C. L. 975. *Compare* McKee *v.* Ingalls, 5 Ill. 30; Tottleben *v.* Blankenship, 58 Ill. App. 47.

Where witness did not hear words spoken. — It is incompetent to ask a witness if he understood any language used by defendant to

dence, which in general limits the testimony of witnesses to a statement of the facts and circumstances within their knowledge, to the exclusion of their opinions and mental conclusions concerning the matter in issue.[47] However, such evidence is held to be admissible where the meaning of the words is doubtful or ambiguous;[48] where the words are actionable only by reason of extraneous facts, and such facts are known to the witness;[49] or where the imputation is conveyed by means of equivocal expressions, insinuations, gestures, and intonations of voice,[50] or by the use of cant or provincial expressions.[51] Where other publications are introduced to show malice, evidence of the understanding of witnesses as to such publications is inadmissible.[52]

(IV) *Extrinsic Facts and Circumstances.*[53] The surrounding facts and circumstances are admissible in evidence where they constitute part of the *res gestæ* of the publication,[54] or are relevant either to prove matters of inducement alleged in the pleadings,[55] or to show that the words were not used in an actionable sense.[56] Where the words charged are actionable *per se* only by reason of special circumstances, these circumstances must be proved by the best evidence, parol evidence being inadmissible under this rule to prove the contents of a writing or record.[57] But this strict rule is not applied where defendant has by his actions or words avowed the fact that is to be proved,[58] or where the facts are introduced as collateral matter and not as matter in issue.[59]

e. Publication and Responsibility Therefor — (I) *In General.* The publication of a libel or slander by defendant may, like any other fact, be proved by any competent and relevant evidence.[60] Thus publication may be shown by the testi-

have the meaning attributed to it by plaintiff, where it appears that the witness did not hear defendant speak the words complained of. Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422.

47. Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. 30.

48. *Illinois.*— Foval *v.* Hallett, 10 Ill. App. 265.

Iowa.— Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422; Barton *v.* Holmes, 16 Iowa 252.

Maryland.— Newbold *v.* Bradstreet, 57 Md. 38, 40 Am. Rep. 426.

New Hampshire.— Shaw *v.* Shaw, 49 N. H. 533; Smart *v.* Blanchard, 42 N. H. 137.

North Carolina.— Sasser *v.* Rouse, 35 N. C. 142; Briggs *v.* Byrd, 34 N. C. 377, holding that the evidence must be of the sense in which the words were understood at the time they were uttered.

Ohio.—McLaughlin *v.* Russell, 17 Ohio 475.

South Carolina.— Morgan *v.* Livingston, 2 Rich. 573.

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264.

Vermont.— Knapp *v.* Fuller, 55 Vt. 311, 45 Am. Rep. 618.

See 32 Cent. Dig. tit. "Libel and Slander," § 294.

49. Jarman *v.* Rea, 137 Cal. 339, 70 Pac. 216; Lewis *v.* Humphries, 64 Mo. App. 466; Wagner *v.* Saline County Progress Printing Co., 45 Mo. App. 6; Smith *v.* Miles, 15 Vt. 245.

50. Leonard *v.* Alleh, 11 Cush. (Mass.) 241; Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103.

51. Wimer *v.* Allbaugh, 78 Iowa 79, 42 N. W. 587, 16 Am. St. Rep. 422; Sasser *v.* Rouse, 35 N. C. 142.

52. Bullard *v.* Lambert, 40 Ala. 204; Cresinger *v.* Reed, 25 Mich. 450; Shaw *v.* Shaw, 49 N. H. 533.

53. Construction according to surrounding facts see *supra*, III, J, 3.

54. Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279; Young *v.* Bridges, 34 La. Ann. 333; Dalton *v.* Gill, 25 Hun (N. Y.) 120.

Facts held not to be part of the res gestæ see Lathan *v.* Berry, 1 Port. (Ala.) 110; Hagan *v.* Hendry, 18 Md. 177.

55. Ruble *v.* Bunting, 31 Ind. App. 654, 68 N. E. 1041; Traynor *v.* Sielaff, 62 Minn. 420, 64 N. W. 915; Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

Evidence held inadmissible see Parke *v.* Blackiston, 3 Harr. (Del.) 373; Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369.

56. McCormack *v.* Sweeney, 140 Ind. 680, 40 N. E. 114; Berry *v.* Massey, 104 Ind. 486, 3 N. E. 942; Line *v.* Spies, 139 Mich. 484, 102 N. W. 993.

57. Bullock *v.* Koon, 9 Cow. (N. Y.) 30.

Secondary evidence generally see Evidence, 17 Cyc. 465 *et seq.*

58. Cummin *v.* Smith, 2 Serg. & R. (Pa.) 440; Berryman *v.* Wise, 4 T. R. 366.

59. Southwick *v.* Stevens, 10 Johns. (N. Y.) 443. See also Hamilton *v.* Langley, 1 McMull. (S. C.) 498.

60. Howe Mach. Co. *v.* Souder, 58 Ga. 64; Cooke *v.* O'Malley, 109 La. 382, 33 So. 377; Wheaton *v.* Beecher, 79 Mich. 443, 44 N. W. 927; Schenck *v.* Schenck, 20 N. J. L. 208, holding that payment by defendant to the printer or publisher of a newspaper, for the insertion of libelous matter, is evidence to go

mony of those who read or heard it.[61] So defendant's authorship of a libel may be shown by comparison of handwriting.[62] And the fact that defendant threatened to write the libel is evidence of a subsequent publication by him.[63]

(II) *Admissions by Defendant.* An admission by defendant that he made the publication complained of is evidence to show publication by him,[64] unless the admission was made under such circumstances as to render it a privileged communication.[65]

(III) *Other Publications by Defendant.* The fact that defendant is connected by evidence with a publication in one newspaper does not connect him with a publication in another paper so as to justify the admission of the latter in evidence at least where publications in the respective papers are materially different.[66] But a repetition by defendant of the alleged defamatory matter has been held to be admissible in connection with other evidence as tending to show a prior publication.[67] Evidence that defendant had slandered others is inadmissible.[68]

(IV) *Copies and Secondary Evidence of Libel.*[69] In an action for libel, the original writing must be produced unless it is lost, destroyed, or otherwise unavailable.[70] Thus parol evidence is not admissible to show the contents of a libelous deposition sent to a governor containing charges against an officer, although a subpœna *duces tecum* has been refused by the court.[71] But to prove the publication of a newspaper containing a libel, it is not necessary to produce a

to the jury of his authorship or adoption of the libel.

The occupation of defendant is not pertinent to the issue raised by plea whether plaintiff had really spoken the words charged. Lehning *v.* Hewett, 45 Ill. 23.

Evidence of slanderous report.— In an action of slander, a letter stating that the writer had heard of a slanderous report with regard to plaintiff is good evidence to prove the circulation of the report but not to prove that defendant circulated the report. Schwartz *v.* Thomas, 2 Wash. (Va.) 167, 1 Am. Dec. 479.

61. Bradshaw *v.* Perdue, 12 Ga. 510; Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974; McGowan *v.* Manifee, 7 T. B. Mon. (Ky.) 314, 18 Am. Dec. 178 (holding that a witness may testify as to communications of a slanderous character made to him by defendant, although a relation of confidence and friendship existed between the parties and the communications were made in confidence); Benner *v.* Edmonds, 30 Ont. 676.

62. Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49; Brooke *v.* Peyton, 4 Fed. Cas. No. 1,933, 1 Cranch C. C. 96.

Testimony for defendant excluded.— It has been held that defendant cannot call witnesses to give their opinion that the libel is not in his handwriting, since if he caused it to be written he is equally liable, as if he wrote it. Cheritree *v.* Roggen, 67 Barb. (N. Y.) 124.

63. Bent *v.* Mink, 46 Iowa 576.

64. Wischstadt *v.* Wischstadt, 47 Minn. 358, 50 N. W. 225; Witcher *v.* Richmond, 8 Humphr. (Tenn.) 473; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488.

Plea of guilty to criminal charge.— In Wischstadt *v.* Wischstadt, 47 Minn. 358, 50 N. W. 225, it was held that in an action for slander defendant's plea of guilty to a criminal charge based on substantially, although not literally, the same language as that set forth in the complaint, is admissible to prove the uttering of the words by defendant.

65. Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495 (statement made to clergyman); Osborn *v.* Forshee, 22 Mich. 209.

Admission in former testimony.— In Osborn *v.* Forshee, 22 Mich. 209, it was held that testimony given by a witness at the trial in which he acknowledged the uttering of certain words alleged to be slanderous cannot be proved as an admission in a subsequent action for slander brought against him.

66. Bent *v.* Mink, 46 Iowa 576; Simmons *v.* Holster, 13 Minn. 249. See also McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

67. Gordon *v.* Spencer, 2 Blackf. (Ind.) 286 (holding that words spoken by defendant in answer to interrogatories of plaintiff may be given in evidence to support the words laid in the declaration, where the words laid in the declaration have been previously proved by other witnesses); Haskell *v.* Bailey, 63 Fed. 873, 11 C. C. A. 476.

68. Forshee *v.* Abrams, 2 Iowa 571; Sullivan *v.* O'Leary, 146 Mass. 322, 15 N. E. 775; Walter *v.* Hoeffner, 51 Mo. App. 46.

69. Secondary evidence generally see Evidence, 17 Cyc. 465 *et seq.*

70. *Alabama.*— Simpson *v.* Wiley, 4 Port. 215.

Connecticut.— Aspenwall *v.* Whitemore, 1 Root 408.

Illinois.— Prussing *v.* Jackson, 208 Ill. 85, 69 N. E. 771 [*reversing* 85 Ill. App. 324].

Vermont.— Gates *v.* Bowker, 18 Vt. 23.

England.— Rainy *v.* Bravo, L. R. 4 P. C. 287, 27 L. T. Rep. N. S. 249, 20 Wkly. Rep. 873.

See 32 Cent. Dig. tit. "Libel and Slander," § 295.

71. Gray *v.* Pentland, 2 Serg. & R. (Pa.) 23, 4 Serg. & R. 420.

copy which has been actually published; but upon the production of a copy not actually published a witness may swear that papers of the same kind were actually published.[72]

f. Damages[73] — (I) *General Damages* — (A) *Opinion of Witnesses.* The amount of general damages suffered by plaintiff is to be determined by the jury from the facts proved, and the opinions of witnesses on this question are inadmissible.[74]

(B) *Effect Upon Hearers or Readers.* It is competent for plaintiff to prove by persons who read or heard of the libel, the effect thereby produced upon them for the purpose of showing the substantive fact of damage sustained.[75]

(C) *Nature of Plaintiff's Business and Business Losses.* Evidence of the nature of plaintiff's business or occupation is admissible as bearing on the hurtful tendency of the defamatory words and the general damage to which he is exposed.[76] So where the defamation complained of is one affecting plaintiff's business, from which the law presumes general damage, evidence of general diminution or loss of business is admissible in proof of general damages.[77]

(D) *Social Ostracism.* Evidence that in consequence of the slander plaintiff had been excluded from the society in which he formerly moved is admissible on the question of the amount of general damages.[78]

72. Simmons *v.* Holster, 13 Minn. 249; McLaughlin *v.* Russell, 17 Ohio 475; Woodburn *v.* Miller, Cheves (S. C.) 194; Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

73. Weight and sufficiency of evidence of damage see *infra*, VIII, F, 3, f.

Measure of damage see *infra*, VIII, G.

Mitigation of damage see *infra*, VIII, F, 2, i.

Burden of proof as to damage see *supra*, VIII, F, 1, d.

Pleading damage see *supra*, VIII, E, 1, n.

74. Fleming *v.* Albeck, 67 Cal. 226, 7 Pac. 659; Alley *v.* Neely, 5 Blackf. (Ind.) 200. See also Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Opinion evidence as to amount of damages generally see Evidence, 17 Cyc. 49 *et seq.*

75. Warner *v.* Clark, 45 La. Ann. 863, 13 So. 203, 21 L. R. A. 502. See also Dr. Shoop Family Medicine Co. *v.* Wernich, 95 Wis. 164, 70 N. W. 160.

Hearsay evidence.— In McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673, it was held that testimony to the effect that a third person had said that her mother, who was a friend of plaintiff, had read the libelous publication and had shed tears over it was inadmissible as being hearsay.

76. Halley *v.* Gregg, 82 Iowa 622, 48 N. W. 974; Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679; Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 1 N. Y. Suppl. 475]; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993; Parrish *v.* Sun Printing, etc., Assoc., 6 N. Y. App. Div. 585, 39 N. Y. Suppl. 540. See also Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459.

77. *California.*— Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Kentucky.— Louisville Press Co. *v.* Tennell, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Minnesota.— Landon *v.* Watkins, 61 Minn. 137, 63 N. W. 615.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138.

Nebraska.— Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

New York.— Bergmann *v.* Jones, 94 N. Y. 51.

Texas.— Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

Vermont.— See Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

England.— Evans *v.* Harries, 38 Eng. L. & Eq. 347.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 299, 304.

Effect of abandonment of profession by plaintiff.— Where plaintiff was an ordained minister, but had not been engaged in clerical work for twelve years, it was held that evidence of damages sustained as a minister was incompetent. Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

Business losses as element of damages see *infra*, VIII, G, 2, e, (III).

Pleading damages to business or profession see *supra*, VIII, E, 1, n, (I), (B).

78. Burt *v.* McBain, 29 Mich. 260. See also Kersting *v.* White, 107 Mo. App. 265, 80 S. W. 730, holding, however, that in order that such evidence may be admissible, there must be proof that the exclusion was due to the alleged slander.

Special instances of slight, avoidance, or loss of hospitality on the part of friends and acquaintances are not admissible unless specially alleged, although the defamatory words are actionable *per se.* McDuff *v.* De-

(E) *Manner of Publication.* It has been held that plaintiff may show the manner of the publication as bearing on the question of the amount of damages.[79]

(F) *Extent of Circulation.* The extent of the circulation of the defamation is admissible as evidence of the injury done to the person defamed.[80]

(G) *Publications by Third Persons.* Every one is responsible for the natural and necessary consequences of his act, and the repetition of a slander may be the natural consequence of defendant's original publication and hence may be considered in aggravation of his damages.[81] But as a general rule one who publishes a libel is not responsible, either as on a distinct cause of action or by way of aggravation of damages for the original publication, for its voluntary and unjustifiable repetition, without his authority or request, by others over whom he has no control.[82] On the other hand it is held that defendant cannot offer in evidence publications of the same or similar defamatory matter by third persons, or recovery or the pendency of suit therefor, as tending to show that whatever injury plaintiff has sustained to his reputation was not caused by defendant alone, or that it had received from others an amount which would go to compensate him for his injury.[83]

troit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. Rep. 673.

79. Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49; Vines *v.* Serrell, 7 C. & P. 163, 32 E. C. L. 552.

80. *Iowa.*— Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49.

Massachusetts.— Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628; Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822.

New York.— Fry *v.* Bennett, 28 N. Y. 324 [*affirming* 3 Bosw. 200]; Cruikshank *v.* Gordon, 48 Hun 308, 1 N. Y. Suppl. 443; Fry *v.* Bennett, 4 Duer 247; Rice *v.* Withers, 9 Wend. 138.

Rhode Island.— See Rice *v.* Cottrel, 5 R. I. 340.

South Dakota.— Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

Texas.— See Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322. See also Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

England.— Plunkett *v.* Cobbett, 5 Esp. 136, 2 Selw. 1042; Gathercole *v.* Miall, 10 Jur. 337, 15 L. J. Exch. 179, 15 M. & W. 319.

See 32 Cent. Dig. tit. "Libel and Slander," § 300.

In actions for libel by publications in a newspaper, it is always competent for plaintiff to prove the extent to which, and the locality in which, the paper containing the publications circulated. Locke *v.* Chicago Chronicle Co., 107 Iowa 390, 78 N. W. 49; Bigelow *v.* Sprague, 140 Mass. 425, 5 N. E. 144; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41. The statement on the editorial page of a newspaper as to its circulation is admissible. Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99.

Testimony of a neighbor that he never heard the slander is inadmissible. Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375.

Opinion as to influence of newspaper.— Opinion in evidence to the effect that defendants' newspaper "has a greater power of moulding public opinion throughout the state than any other paper in it" is inadmissible, although coupled with an offer of proper evidence as to the circulation of the paper. Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

81. Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516; Rice *v.* Cottrel, 5 R. I. 340.

That it had become a current report that defendant had made the defamatory charge is held to be admissible as bearing upon the question of damages. Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633, holding that a report abroad in the community that defendant had made the defamatory charge against plaintiff was admissible the repetition not being made under such circumstances as to render the persons making it liable to action.

82. *Alabama.*—Hereford *v.* Combs, 126 Ala. 360, 28 So. 582.

California.—Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Iowa.— Zurawski *v.* Reichmann, 116 Iowa 338, 90 N. W. 69.

Massachusetts.— Hastings *v.* Stetson, 126 Mass. 329, 30 Am. Rep. 683. See also Leonard *v.* Allen, 11 Cush. 241.

Michigan.— McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

Minnesota.— Simmons *v.* Holster, 13 Minn. 249.

New Jersey.— See Butler *v.* Hoboken Printing, etc., Co., (Sup. 1905) 62 Atl. 272.

New York.— Austin *v.* Bacon, 49 Hun 386, 3 N. Y. Suppl. 587.

Virginia.— Sun L. Assur. Co. *v.* Bailey, 101 Va. 443, 44 S. E. 692.

See 32 Cent. Dig. tit. "Libel and Slander," § 300. See also *supra*, VIII, A, 5, f.

83. *Missouri.*— Arnold *v.* Sayings Co., 76 Mo. App. 159.

(H) *Character of Parties.* Evidence of plaintiff's reputation is admissible on the question of the extent of damage or injury sustained, since the measure of damages depends essentially on its grade.[84] So it has been held that the character of defendant and his standing in the community is a matter for the jury to consider in determining the amount of damages.[85] It is held, however, that defendant may not be permitted to show that plaintiff's character was so high and pure that it could not be injured by the defamation,[86] or that defendant was of such bad character or so unworthy of credit that no damage to plaintiff's reputation was sustained.[87]

(I) *Character of Hearer.* Evidence of the moral or intellectual character of the person in whose hearing the words were spoken is immaterial and inadmissible on the question of damages.[88]

(J) *Absence of Injury.* Testimony of witnesses to the effect that plaintiff's reputation and standing in the community was not affected by a publication actionable *per se* is inadmissible.[89] Evidence of statements by plaintiff that he was not injured by the defamation has been both admitted[90] and excluded.[91]

(K) *Family Relationship of Plaintiff.* Defendant may, as bearing on the question of damages, introduce evidence as to his family and family connections, his marriage, the size of his family, and the ages of his children.[92] But it is held that evidence that plaintiff's children are dependent upon him for support is inadmissible.[93]

New Jersey.— Butler *v.* Hoboken Printing, etc., Co., (Sup. 1905) 62 Atl. 272.

New York.— Gray *v.* Brooklyn Union Pub. Co., 35 N. Y. App. Div. 286, 55 N. Y. Suppl. 35; Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539; Palmer *v.* Matthews, 29 N. Y. App. Div. 149, 51 N. Y. Suppl. 839. *Compare* Van Ingen *v.* Mail, etc., Pub. Co., 156 N. Y. 376, 50 N. E. 979.

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237; Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643.

Rhode Island.— Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

United States.— Bennett *v.* Salisbury, 78 Fed. 769, 24 C. C. A. 329. See also Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628.

England.— Saunders *v.* Mills, 6 Bing. 213, 8 L. J. C. P. O. S. 24, 3 M. & P. 520, 31 Rev. Rep. 394; Creevy *v.* Carr, 7 C. & P. 64, 32 E. C. L. 501; Harrison *v.* Pearce, 1 F. & F. 567. See also Fresco *v.* May, 2 F. & F. 123.

84. Smith *v.* Lovelace, 1 Duv. (Ky.) 215; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

Evidence of bad character in mitigation see *infra*, VIII, F, 2, i, (II).

Whether plaintiff may offer evidence in chief see *supra*, VIII, E, 7, i, (II).

85. Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406. See also Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

86. Sayre *v.* Sayre, 25 N. J. L. 235. *Compare* Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

87. Hastings *v.* Stetson, 130 Mass. 76; Howe *v.* Perry, 15 Pick. (Mass.) 506; Sayre *v.* Sayre, 25 N. J. L. 235. *Compare* Gates *v.* Meredith, 7 Ind. 440.

88. Sheffill *v.* Van Deusen, 15 Gray (Mass.) 485, 77 Am. Dec. 377.

89. Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290; Titus *v.* Sumner, 44 N. Y. 266. See also Herrick *v.* Lapham, 10 Johns. (N. Y.) 281.

The same rule has been applied to evidence that the witnesses who heard the words did not believe them (Richardson *v.* Barker, 7 Ind. 567. See also Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114 [*affirmed* in 157 N. Y. 695, 51 N. E. 1094]); that plaintiff's damages were due to charges made by persons other than defendant (Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131; Carpenter *v.* Willey, 65 Vt. 168, 26 Atl. 488); or that the character of defendant was such that his remarks were not considered worthy of notice (Howe *v.* Perry, 15 Pick. (Mass.) 506).

Opinion evidence as to amount of damages sustained see *supra*, VIII, F, 2, f, (I), (A).

90. Richardson *v.* Barker, 7 Ind. 567; Samuels *v.* Evening Mail Assoc., 6 Hun (N. Y.) 5.

91. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59.

92. *California.*— Cahill *v.* Murphy, 94 Cal. 29, 30 Pac. 195, 28 Am. St. Rep. 88; Dixon *v.* Allen, 69 Cal. 527, 11 Pac. 179; Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863.

New Hampshire.— Barnes *v.* Campbell, 60 N. H. 27.

New York.— Enos *v.* Enos, 135 N. Y. 609, 32 N. E. 123; Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 49 Hun 606, 1 N. Y. Suppl. 475].

Pennsylvania.— Klumph *v.* Dunn, 66 Pa. St. 141, 5 Am. Rep. 355.

United States.— Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628.

See 32 Cent. Dig. tit. "Libel and Slander," § 301.

93. Cahill *v.* Murphy, 94 Cal. 29, 30 Pac.

(L) *Worldly Position and Social Standing of Parties* — (1) OF PLAINTIFF. The rank, condition in life, and social standing of plaintiff are as a general rule held to be admissible in evidence either in mitigation or aggravation of damages.[94]

(2) OF DEFENDANT. Defendant's worldly position and social standing is admissible on the question of the damaging effect of the defamatory words.[95]

(M) *Wealth or Poverty of Parties* — (1) OF PLAINTIFF.[96] In several cases it has been held that the amount of recovery in an action for libel or slander cannot be measured by the pecuniary condition of plaintiff, and hence that plaintiff's poverty is not a legitimate matter for the consideration of the jury for the purpose of enhancing damages.[97] But in other jurisdictions the pecuniary circumstances of plaintiff is held to be admissible for the purpose of estimating actual damages.[98]

(2) OF DEFENDANT. The weight of authority is in favor of the rule that the pecuniary circumstances of defendant are admissible in favor of plaintiff as tending to show the influence his words would have and the consequent extent of the injury,[99] although the authorities on this question are not harmonious and the evi-

195, 28 Am. St. Rep. 88. See also Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679, holding that the fact that plaintiff was engaged in aiding a sister in want was inadmissible.

94. *Delaware.*— Croasdale *v.* Bright, 6 Houst. 52; Parke *v.* Blackiston, 3 Harr. 373.

Illinois.— Peltier *v.* Mict, 50 Ill. 511; Harbison *v.* Shook, 41 Ill. 141.

Iowa.— Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679, where it was intimated that evidence of the occupation of plaintiff is admissible.

Kentucky.— Smith *v.* Lovelace, 1 Duv. 215.

Massachusetts.— Larned *v.* Buffinton, 3 Mass. 546, 3 Am. Dec. 185. See also Shute *v.* Barrett, 7 Pick. 82.

New York.— Saunders *v.* Post-Standard Pub. Co., 94 N. Y. Suppl. 993; Littlejohn *v.* Greeley, 13 Abb. Pr. 311, 22 How. Pr. 345; Tillotson *v.* Cheetham, 3 Johns. 56, 3 Am. Dec. 459, holding that the public position of plaintiff as an officer of the government is admissible. *Compare* Prescott *v.* Tousey, 50 N. Y. Super. Ct. 12.

Ohio.— Alliance Review Pub. Co. *v.* Valentine, 9 Ohio Cir. Ct. 387, 6 Ohio Cir. Dec. 323.

Texas.— Schulze *v.* Jalonick, 14 Tex. Civ. App. 656, 38 S. W. 264.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

United States.— Best *v.* Kessler, 130 Fed. 24, 64 C. C. A. 392; Morning Journal Assoc. *v.* Duke, 128 Fed. 657, 63 C. C. A. 459 [*affirming* 120 Fed. 860]; Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53.

See 32 Cent. Dig. tit. "Libel and Slander," § 302.

Compare Gandy *v.* Humphries, 35 Ala. 617.

95. *Delaware.*— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88; Parke *v.* Blackiston, 3 Harr. 373.

Indiana.— Justice *v.* Kirlin, 17 Ind. 588.

Iowa.— Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679.

Michigan.— Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752.

New York.— Littlejohn *v.* Greeley, 13 Abb. Pr. 311, 22 How. Pr. 345; Littlejohn *v.* Greeley, 13 Abb. Pr. 41.

Vermont.— Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320, holding that the fact that defendant held certain town offices was admissible.

See 32 Cent. Dig. tit. "Libel and Slander," § 303.

96. Poverty of plaintiff as affecting vindictive damages see *infra*, VIII, F, 2, f, (III), (B), text and note 14.

97. Pool *v.* Devers, 30 Ala. 672; Perrine *v.* Winter, 73 Iowa 645, 35 N. W. 679.

98. Peltier *v.* Mict, 50 Ill. 511; Clements *v.* Maloney, 55 Mo. 352. See also Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St. Rep. 287.

99. *California.*— Barkly *v.* Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413.

Connecticut.— Barber *v.* Barber, 33 Conn. 335; Case *v.* Marks, 20 Conn. 248; Bennett *v.* Hyde, 6 Conn. 24.

Illinois.— Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Storey *v.* Early, 86 Ill. 461; Harbison *v.* Shook, 41 Ill. 141.

Indiana.— Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53; Miller *v.* Cook, 124 Ind. 101, 24 N. E. 577.

Iowa.— Herzman *v.* Oberfelder, 54 Iowa 83, 6 N. W. 81; Karney *v.* Paisley, 13 Iowa 89.

Maine.— Standwood *v.* Whitmore, 63 Me. 209; Humphries *v.* Parker, 52 Me. 502.

Massachusetts.— Shute *v.* Barrett, 7 Pick. 82.

Michigan.— Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228; Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Brown *v.* Barnes, 39 Mich. 211, 33 Am. Rep. 375.

Missouri.— Taylor *v.* Pullen, 152 Mo. 434, 53 S. W. 1086; Thimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440; Buckley *v.* Knapp, 48 Mo. 152.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Virginia.— Harman *v.* Cundiff, 82 Va. 239.

See 32 Cent. Dig. tit. "Libel and Slander," § 303.

dence is excluded in some jurisdictions.[1] It has been intimated that defendant may show his poverty in mitigation,[2] but this rule has also been denied.[3]

(N) *Mental Suffering.*[4] Plaintiff is competent to testify as to the amount of his mental suffering.[5] So evidence of the appearance, exclamations, and conduct of plaintiff upon first reading or hearing the words published are admissible on this question.[6]

(II) *Special Damages*— (A) *In General.* Where plaintiff introduces no evidence of special damages, defendant cannot show that there were in fact no such special damages.[7]

(B) *To Business or Profession.* Where special damages by reason of injury to plaintiff in his business or profession are properly pleaded, any evidence competent to show a special loss of or diminution in the business or profession is admissible.[8]

Where a corporation is defendant, evidence of its wealth is not admissible. Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Robinson *v.* Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983.

Financial condition as showing ability to pay inadmissible.— The wealth of defendant is to be considered to show the rank and influence of defendant and not his ability to pay. Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Harman *v.* Cundiff, 82 Va. 239. See also Holmes *v.* Holmes, 64 Ill. 294.

It is not competent to enter into the details of the finances of a defendant in a libel or slander suit, but the inquiry should be directed to his financial standing in the community. Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

Financial circumstances of defendant in determining exemplary damages see *infra*, VIII, F, 2, f, (III), (B).

1. *Alabama.*— Ware *v.* Cartledge, 24 Ala. 622, 60 Am. Dec. 489.

Delaware.— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88; Morris *v.* Barker, 4 Harr. 520.

Nebraska.— Rosewater *v.* Hoffman, 24 Nebr. 222, 38 N. W. 857.

New York.— Enos *v.* Enos, 58 Hun 45, 11 N. Y. Suppl. 415; Palmer *v.* Haskins, 28 Barb. 90. *Compare* Lewis *v.* Chapman, 19 Barb. 252.

Texas.— Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860; King *v.* Sassaman, (Civ. App. 1901) 64 S. W. 937.

See 32 Cent. Dig. tit. "Libel and Slander," § 303.

2. Karney *v.* Paisley, 13 Iowa 89.

3. Case *v.* Marks, 20 Conn. 248.

4. Mental suffering as an element of damages see *infra*, VIII, G, 2, e, (IV).

5. Laing *v.* Nelson, 40 Nebr. 252, 58 N. W. 846; Phillips *v.* Le June, 25 Ohio Cir. Ct. 107; Commercial Gazette Co. *v.* Grooms, 10 Ohio Dec. (Reprint) 489, 21 Cinc. L. Bul. 292; Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

6. Finger *v.* Pollack, 188 Mass. 208, 74 N. E. 317 (holding that evidence that plaintiff cried, "looked bad," and did not sleep as well as before was admissible on the issue of mental suffering); Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

7. Fish *v.* St. Louis County Printing, etc., Co., 102 Mo. App. 6, 74 S. W. 641; Bennett *v.* Salisbury, 78 Fed. 769, 24 C. C. A. 329.

8. See cases cited *infra*, this note.

Evidence admissible to show special damage in business see Moore *v.* Stevenson, 27 Conn. 14; Western Union Tel. Co. *v.* Pritchett, 108 Ga. 411, 34 S. E. 216; Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Dicken *v.* Shepherd, 22 Md. 399 (holding that the testimony only of persons to whom the slanderous words were spoken is competent to prove special damages); Law *v.* Scott, 5 Harr. & J. (Md.) 438; Parker *v.* Republican Co., 181 Mass. 392, 63 N. E. 931; Western *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612; Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Whittemore *v.* Weiss, 33 Mich. 348; Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; Noeninger *v.* Vogt, 88 Mo. 589; Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28; Bergmann *v.* Jones, 94 N. Y. 51; Fowles *v.* Bowen, 30 N. Y. 20; Stafford *v.* Morning Journal Assoc., 68 Hun (N. Y.) 467, 22 N. Y. Suppl. 1008 [*affirmed* in 142 N. Y. 598, 37 N. E. 625]; Daniel *v.* New York News Pub. Co., 21 N. Y. Suppl. 862 [*affirmed* in 142 N. Y. 660, 37 N. E. 569]; O'Toole *v.* Post Printing, etc., Co., 179 Pa. St. 271, 36 Atl. 288; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. Rep. 115, 9 L. R. A. 86; Munster *v.* Lamb, 11 Q. B. D. 588, 4 J. P. 805, 52 L. J. Q. B. 726, 49 L. T. Rep. N. S. 252, 32 Wkly. Rep. 248; Riding *v.* Smith, 1 Ex. D. 91, 45 L. J. Exch. 281, 34 L. T. Rep. N. S. 500, 24 Wkly. Rep. 487; Bateman *v.* Lyall, 7 C. B. N. S. 638, 1 L. T. Rep. N. S. 296, 97 E. C. L. 638; Kendillon *v.* Maltby, C. & M. 402, 2 M. & Rob. 438, 41 E. C. L. 221; Barnett *v.* Allen, 1 F. & F. 125, 3 H. & M. 376, 4 Jur. N. S. 488, 27 L. J. Exch. 412. See also Knight *v.* Gibbs, 1 A. & E. 43, 3 L. J. K. B. 135, 3 N. & M. 467, 28 E. C. L. 45. See 32 Cent. Dig. tit. "Libel and Slander," § 304.

(III) *Exemplary or Vindictive Damages*—(A) *Malice.* Evidence of express malice is admissible as bearing on the question of the amount of punitive damages to be awarded plaintiff,[9] except in those jurisdictions where punitive damages are not allowed,[10] or except in cases where the defamation is also punishable by indictment.[11]

(B) *Financial Circumstances of Parties.* Plaintiff may show, for the purpose of estimating exemplary damages, the pecuniary circumstances of defendant,[12] and defendant may show for the same purpose that he has no property.[13] But it is held that evidence of the pecuniary condition of plaintiff is inadmissible for the purpose of increasing vindictive damages.[14]

(C) *Reputation of Plaintiff.* Evidence of reputation of plaintiff is important only as affecting the measure of compensation to which plaintiff is entitled and is not material on the question of punitive damages.[15]

(D) *Conduct of Defendant.* The fact that defendant obtruded himself into plaintiff's house and offered undue familiarities to his wife at the time the words were spoken is admissible in estimating punitive damages.[16]

g. Privilege.[17] Where privilege is relied upon as a defense, any evidence is admissible which tends to throw light upon the true character of the occasion,[18] or

Evidence inadmissible to show special damage in business see Newbold *v.* Bradstreet, 57 Md. 38, 40 Am. Rep. 426; Elmer *v.* Fessenden, 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; Brown *v.* Durham, 3 Tex. Civ. App. 244, 22 S. W. 868; Ward *v.* Weeks, 7 Bing. 211, 9 L. J. C. P. O. S. 6, 4 M. & P. 796, 20 E. C. L. 101; Rutherford *v.* Evans, 6 Bing. 451, 19 E. C. L. 207, 4 C. & P. 74, 19 E. C. L. 414, 8 L. J. C. P. O. S. 86, 4 M. & P. 3 Rev. Rep. 465; Tunnicliffe *v.* Moss, 3 C. & K. 83; Dixon *v.* Smith, 5 H. & N. 450, 29 L. J. Exch. 125; Clarke *v.* Morgan, 38 L. T. Rep. N. S. 354. See also Le Massena *v.* Storm, 62 N. Y. App. Div. 150, 70 N. Y. Suppl. 882; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405.

Evidence in rebuttal of special damages see Botsford *v.* Chase, 108 Mich. 432, 66 N. W. 325; Whittemore *v.* Weiss, 33 Mich. 348; Wier *v.* Allen, 51 N. H. 177; King *v.* Watts, 8 C. & P. 614, 34 E. C. L. 921.

9. *Florida.*— Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

Indiana.— Binford *v.* Young, 115 Ind. 174, 16 N. E. 142.

Michigan.— Huson *v.* Dale, 19 Mich. 17, 2 Am. Rep. 66.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New York.— Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. 457; Fry *v.* Bennett, 3 Bosw. 200.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458; King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

Malice as element of exemplary or punitive damages see *infra*, VIII, G, 3, b.

Evidence admissible to show malice see *supra*, VIII, F, 2, c.

10. Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

11. Wabash Printing, etc., Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904; Austin *v.* Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766.

12. *Florida.*— Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

Illinois.— Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

Missouri.— Buckley *v.* Knapp, 48 Mo. 152.

North Carolina.—Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St. Rep. 287; Adcock *v.* Marsh, 30 N. C. 360.

South Carolina.— Burckhalter *v.* Coward, 16 S. C. 435.

See 32 Cent. Dig. tit. "Libel and Slander," § 305.

Compare Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Young *v.* Kuhn, 71 Tex. 645, 9 S. W. 860; Harman *v.* Cundiff, 82 Va. 239.

Wealth of one of several defendants.— No recovery of punitive damages can be had in an action against several defendants where such damages are based upon evidence of the wealth and ability to pay such damages on the part of one of defendants only. Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543.

Pecuniary circumstances of defendant in determining actual damages see *supra*, VIII, F, 2, f, (I), (M), (2).

13. Rea *v.* Harrington, 58 Vt. 181, 2 Atl. 475, 56 Am. Rep. 561.

14. Reeves *v.* Winn, 97 N. C. 246, 1 S. E. 448, 2 Am. St. Rep. 287.

Poverty of plaintiff as affecting actual damages see *supra*, VIII, F, 2, f, (I), (M), (1).

15. Chubb *v.* Gsell, 34 Pa. St. 114.

16. Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252.

17. **Privilege** generally see *supra*, VI.

Pleading privilege see *supra*, VIII, E, 2, b, (XI).

Sufficiency of evidence of privilege see *infra*, VIII, F, 3, g.

18. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81.

Evidence admissible on part of defendant see Blakeslee *v.* Carroll, 64 Conn. 223, 29 Atl. 473, 25 L. R. A. 106; Jones *v.* Forehand,

the good faith of defendant in making the communication if the privileged occasion is one in which the question of good faith is material.[19] It is error, however, to allow defendant to testify that the communication is privileged, since a witness cannot be thus permitted to give his opinion as to the law of the case.[20]

h. Justification[21]— (i) *In General.* Any legal evidence tending to establish the truth of the defamatory charge is admissible to support a plea of justification.[22]

89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81; Mayo *v.* Sample, 18 Iowa 306; Warner *v.* Press Pub. Co., 15 Daly (N. Y.) 545, 8 N. Y. Suppl. 341; O'Connell *v.* Boston Herald Co., 129 Fed. 839 (holding that defendant may show that a report of a judicial proceeding was made from the written opinion of the appellate court, although such opinion was not a part of the record in the cause); Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169.

Evidence inadmissible on part of defendant see Bond *v.* Kendall, 36 Vt. 741; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349.

Evidence admissible on part of plaintiff see Over *v.* Hildebrand, 92 Ind. 19.

Confining evidence to issue.— Where privilege is set up as a defense, the evidence should be confined to the question of privilege *vel non*, save in so far as it may be admissible in mitigation of damages. Billet *v.* Times-Democrat Pub. Co., 107 La. 751, 32 So. 17, 58 L. R. A. 62.

19. See cases cited *infra*, this note.

Evidence admissible on part of defendant see Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723; Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Mayo *v.* Sample, 18 Iowa 306; Howland *v.* Flood, 160 Mass. 509, 36 N. E. 482; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Marks *v.* Baker, 28 Minn. 162, 9 N. W. 678; Hinman *v.* Hare, 104 N. Y. 641, 10 N. E. 41; Lally *v.* Emery, 79 Hun (N. Y.) 560, 29 N. Y. Suppl. 888; Chapman *v.* Calder, 14 Pa. St. 365; Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037; Browne *v.* Brick, (Tex. Civ. App. 1900) 56 S. W. 995; Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247; O'Connell *v.* Boston Herald Co., 129 Fed. 839; Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169.

See 32 Cent. Dig. tit. "Libel and Slander," § 306.

Evidence of malice offered by plaintiff see Rausch *v.* Anderson, 75 Ill. App. 526; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; Mulderig *v.* Wilkes-Barre Times, 215 Pa. St. 470, 64 Atl. 636 (holding that the evidence may be intrinsic from the style and tone of libelous article); Brockerman *v.* Keyser, 1 Phila. (Pa.) 269 (holding that when a public officer makes a privileged statement his refusal to give the source of his information is not evidence of malice); Brown *v.* Norfolk, etc., R. Co., 100 Va. 619, 42 S. E. 664, 60 L. R. A. 472; Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247.

20. Jones *v.* Forehand, 89 Ga. 520, 16 S. E. 262, 32 Am. St. Rep. 81. See also Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

21. **Justification as defense** see *supra*, VII, A.

Sufficiency of evidence in justification see *infra*, VIII, F, 3, h.

Pleading justification see *supra*, VIII, E, 2, h, (XII).

22. Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134.

Evidence admissible to show justification see Hereford *v.* Combs, 126 Ala. 369, 28 So. 582; Bullard *v.* Lambert, 40 Ala. 204; Becherer *v.* Stock, 49 Ill. App. 270; Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752; Roberts *v.* Miller, 2 Greene (Iowa) 122; Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177, 18 Ky. L. Rep. 291; Cooke *v.* O'Malley, 109 La. 382, 33 So. 377; Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706; McAllister *v.* Silbey, 25 Me. 474; Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266; Odiorne *v.* Bacon, 6 Cush. (Mass.) 185; McGuire *v.* Vaughan, 106 Mich. 280, 64 N. W. 44; Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233; Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691; Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Powers *v.* Presgroves, 38 Miss. 227; McCloskey *v.* Pulitzer Pub. Co., 152 Mo. 339, 53 S. W. 1087; Marsh *v.* Ellsworth, 50 N. Y. 309; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Lawson *v.* Morning Journal Assoc., 32 N. Y. App. Div. 71, 52 N. Y. Suppl. 484; Moore *v.* Francis, 3 N. Y. Suppl. 162; McDougald *v.* Coward, 95 N. C. 368; Commercial Gazette Co. *v.* Dean, 11 Ohio Dec. (Reprint) 207, 25 Cinc. L. Bul. 250; Jackson *v.* Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659; Hessel *v.* Bradstreet Co., 141 Pa. St. 501, 21 Atl. 659; Davis *v.* Davis, 87 Tenn. 200, 10 S. W. 363; Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037; Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991; Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614; Kimball *v.* Fernandez, 41 Wis. 329; Langton *v.* Hagerty, 35 Wis. 150. See 32 Cent. Dig. tit. "Libel and Slander," §§ 307–313

Evidence not admissible to show justification see Hereford *v.* Combs, 126 Ala. 369, 28 So. 582; Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920; Gillis *v.* Peck, 20 Conn. 228; Claypool *v.* Claypool, 65 Ill. App. 446; Hutts *v.* Hutts, 62 Ind. 214; Downey *v.* Dillon, 52 Ind. 442; Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 19 Am. Dec. 152; Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Peoples *v.* Detroit Post, etc., Co., 54 Mich. 457, 20 N. W. 528 (the affidavit of a convict); Maclean *v.*

But it is very generally held that evidence in justification must be confined to the matter in issue.[23]

(II) *Opinion of Witnesses.* The opinion of witnesses as to the truth of the charge is inadmissible.[24]

(III) *Bad Reputation of Plaintiff.* The general bad reputation of plaintiff is not as a general rule admissible under a plea of justification.[25] But where the general reputation of plaintiff in a particular respect is specifically assailed in the defamatory charge, evidence of bad character in the respect charged is admissible in justification.[26]

Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. Rep. 63; Atkinson *v.* Detroit Free Press, 46 Mich. 341, 9 N. W. 501; Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512; Tobin *v.* Sykes, 71 Hun (N. Y.) 469, 24 N. Y. Suppl. 943; Gorton *v.* Keeler, 51 Barb. (N. Y.) 475; Hessel *v.* Bradstreet Co., 141 Pa. St. 501, 21 Atl. 659; Anonymous, 1 Hill (S. C.) 251; Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544; Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611; Gregory *v.* Atkins, 42 Vt. 237; Skinner *v.* Grant, 12 Vt. 456; Kimball *v.* Fernandez, 41 Wis. 329; R. *v.* M., 21 Wis. 50; Newton *v.* Rowe, 1 C. & K. 616, 47 E. C. L. 616; Cleveland *v.* Sherman, 19 Quebec Super Ct. 270. See 32 Cent. Dig. tit. "Libel and Slander," §§ 307–313.

In proving the truth of a charge of perjury, defendant may show any acts or statements of plaintiff inconsistent with that to which he has sworn. Ransone *v.* Christian, 49 Ga. 491. See also Eastburn *v.* Stephens, Litt. Sel. Cas. (Ky.) 82. But in an action for charging a jury with perjury in rendering a verdict defendant cannot ask a juror (plaintiff) whether the verdict rendered was the verdict that he agreed to in the jury room. Welch *v.* Tribune Pub. Co., 83 Mich. 661, 47 N. W. 562, 21 Am. St. Rep. 629, 11 L. R. A. 233.

Weak and inconclusive evidence.—The jury may consider evidence of the truth, although it is weak and inconclusive. Boldon *v.* Thompson, 60 Kan. 856, 56 Pac. 131.

Evidence of crime barred by statute of limitations.—Defendant making a charge of crime may show the truth of the charge, although a criminal prosecution for the crime has been barred. Van Ankin *v.* Westfall, 14 Johns. (N. Y.) 233.

23. *Connecticut.*—Dennehy *v.* O'Connell, 66 Conn. 175, 33 Atl. 920, holding that where defendant charged perjury as to a part of testimony given by plaintiff, defendant cannot show other parts of the testimony to be false.

Delaware.—Kinney *v.* Hosea, 3 Harr. 397.

Louisiana.—See Cooke *v.* O'Malley, 109 La. 382, 33 So. 377.

Michigan.—Bourreseau *v.* Detroit Evening Journal Co., 63 Mich. 425, 30 N. W. 376, 6 Am. St. Rep. 320.

New York.—Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. Y. Suppl. 263 (holding that under a plea justifying a charge that plaintiff was "a Rogue's Gallery man" a record of plaintiff at police headquarters in another room was inadmissible); Palmer *v.* Haight, 2 Barb. 210.

Texas.—Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

Vermont.—Gregory *v.* Atkins, 42 Vt. 237.

Wisconsin.—Kimball *v.* Fernandez, 41 Wis. 329.

See 32 Cent. Dig. tit. "Libel and Slander," § 307.

Evidence of plaintiff's motives in bringing the suit is irrelevant to an issue of justification. Bradley *v.* Kennedy, 2 Greene (Iowa) 231.

Where words imputing larceny are shown by plaintiff to have been used to charge a breach of trust, evidence of the truth of the latter charge is irrelevant, as to charge a breach of trust is not actionable. Burke *v.* Miller, 6 Blackf. (Ind.) 155.

Limitation of proof to period of time covered by pleadings.—In an action for charging drunkenness, evidence of plaintiff's drunkenness during a period not covered by the plea of justification is inadmissible. Swan *v.* Thompson, 124 Cal. 193, 56 Pac. 878. But in an action for charging plaintiff with having committed fornication it was held that where the plea of justification averred that plaintiff had been guilty of fornication without averring any time, it was error for the court to restrict the proof of her having committed fornication to two years before the defamatory words were spoken. Stowell *v.* Beagle, 57 Ill. 97.

24. McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Bailey *v.* Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544. See also Robbins *v.* Treadway, 2 J. J. Marsh. (Ky.) 540, 19 Am. Dec. 152.

25. Hallowell *v.* Guntle, 82 Ind. 554; Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134. See also Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656.

General reputation of members of plaintiff's family is inadmissible. Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

26. Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119. See also Stowell *v.* Beagle, 79 Ill. 525; Proctor *v.* Houghtaling, 37 Mich. 41.

(iv) *Current Rumors and Publications by Third Persons.* Current reports and suspicions are not admissible to prove the truth.[27] So the fact that particular third persons had previously made the same charge is not admissible to prove the truth.[28]

(v) *Proof of Truth by Specific Instances* — (a) *Charge in General Terms.* Particular instances of crime or other misconduct have been held to be admissible in justification of charges made in general terms,[29] as for instance where the words impute habitual acts of misconduct or crime on the part of plaintiff.[30] On the other hand it has been held that a charge assailing the character of plaintiff for unchastity may be justified by showing the general reputation of plaintiff for unchastity, but not by showing specific acts of unchastity.[31]

(b) *Charge of Specific Act.* A charge of a specific act of misconduct cannot be supported by proof of other acts of misconduct of a similar character.[32] Thus evidence of offenses not charged in the libel or slander is inadmissible.[33]

(vi) *Evidence in Support of Part of Charge.* Where several separate and distinct charges are made, defendant may justify as to one, although he fails

27. *Alabama.*— Commons *v.* Walters, 1 Port. 323.

California.— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Connecticut.— Treat *v.* Browning, 4 Conn. 408, 10 Am. Dec. 156.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Wolff *v.* Smith, 112 Mich. 359, 70 N. W. 1010; Fowler *v.* Gilbert, 38 Mich. 292.

New York.— Hatfield *v.* Lasher, 81 N. Y. 246; Maesk *v.* Smith, 12 N. Y. Suppl. 423.

Pennsylvania.— Smith *v.* Buckecker, 4 Rawle 295.

Vermont.— See Smith *v.* Moore, 74 Vt. 81, 52 Atl. 320.

See 32 Cent. Dig. tit. "Libel and Slander," § 308 *et seq.* And see *supra*, VII, A, 1, e.

28. *Alabama.*— Fuller *v.* Dean, 31 Ala. 654.

California.— Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499.

Illinois.— Spolek Denni Hlasatel *v.* Hoffman, 204 Ill. 532, 68 N. E. 400 [*affirming* 105 Ill. App. 170].

Michigan.— Wolff *v.* Smith, 112 Mich. 359, 70 N. W. 1010; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8.

New York.— See Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. W. Suppl. 263.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

See also *supra*, VII, A, 1, d.

29. *Alabama.*— Adams *v.* Ward, 1 Stew. 42.

Kentucky.— Ratcliffe *v.* Louisville Courier-Journal Co., 99 Ky. 416, 36 S. W. 177, 18 Ky. L. Rep. 291.

Louisiana.— Cooke *v.* O'Malley, 109 La. 382, 33 So. 377.

New York.— Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. 182; Brown *v.* Orvis, 6 How. Pr. 376.

North Carolina.— Davis *v.* Lyon, 91 N. C. 444.

Texas.— Quaid *v.* Tipton, 21 Tex. Civ. App. 131, 51 S. W. 264.

Wisconsin.— Kimball *v.* Fernandez, 41 Wis. 329; Talmadge *v.* Baker, 22 Wis. 625.

See 32 Cent. Dig. tit. "Libel and Slander," § 309.

30. Davis *v.* Lyon, 91 N. C. 444; Kimball *v.* Fernandez, 41 Wis. 329; Talmadge *v.* Baker, 22 Wis. 625.

31. Stowell *v.* Beagle, 79 Ill. 525; Robertson *v.* Hamilton, 16 Ind. App. 328, 45 N. E. 46, 59 Am. St. Rep. 319; Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991; Proctor *v.* Houghtaling, 37 Mich. 41. See also Senter *v.* Carr, 15 N. H. 351.

Acts committed subsequent to making of charge.— Acts of prostitution committed two months after the charge was made are not admissible to justify a charge of whoredom. Beggarly *v.* Craft, 31 Ga. 309, 76 Am. Dec. 687. But where evidence has been shown tending to establish the truth of a charge of want of chastity, subsequent acts of improper intimacy are admissible, even though occurring after suit was brought. Claypool *v.* Claypool, 65 Ill. App. 446; Matthews *v.* Detroit Journal Co., 123 Mich. 608, 82 N. W. 243.

Admissibility of specific acts to prove reputation generally see Evidence, 16 Cyc. 1278, note 41 *et seq.*

32. Hallowell *v.* Guntle, 82 Ind. 554; Fry *v.* Bennett, 3 Bosw. (N. Y.) 200; Powers *v.* Skinner, 1 Wend. (N. Y.) 451.

33. *Iowa.*— Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Fisher *v.* Tice, 20 Iowa 479.

Michigan.— Youngs *v.* Adams, 113 Mich. 199, 71 N. W. 585; Fowler *v.* Gilbert, 38 Mich. 292.

New Hampshire.— Pallet *v.* Sargent, 36 N. H. 496.

New York.— Haddock *v.* Naughton, 74 Hun 390, 26 N. Y. Suppl. 455.

North Carolina.— Whitaker *v.* Carter, 26 N. C. 461.

Pennsylvania.— See Smith *v.* Buckecker, 4 Rawle 295.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 307, 308.

as to the others,[34] and any evidence tending to show the truth of the specific charge sought to be justified is admissible.[35] Thus where defendant denies responsibility for a part of the defamatory matter, he may prove the truth of the remainder.[36]

(VII) *Decisions of Church Tribunal.* The decision of a church tribunal is not competent evidence to show the truth of the charge.[37]

(VIII) *Rebuttal of Evidence in Justification*—(A) *In General.* Plaintiff is entitled to introduce evidence to rebut the evidence of truth offered by defendant.[38]

(B) *Good Character of Plaintiff.* There are several authorities to the effect that evidence of good reputation is not competent to show that plaintiff is not guilty of misconduct or an unlawful act which is not punishable as a crime.[39] If the words charge a crime it is generally held that plaintiff may show his good character in rebuttal of evidence in justification.[40] But it is held that where the proof is confined to the plea of justification, under which defendant assumes the burden of proving plaintiff guilty of the imputed offense and the latter seeks to repel defendant's proof on that subject and show his innocence by evidence of

34. See *infra*, VIII, F, 3, g, (I), (B), (2).

35. Lampher *v.* Clark, 149 N. Y. 472, 44 N. E. 182.

Where plaintiff has waived a part of the libel evidence in justification of that part is inadmissible. Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

36. Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; Cloidt *v.* Wallace, 56 Ill. App. 389.

37. Piper *v.* Woolman, 43 Nebr. 280, 61 N. W. 588; Whitaker *v.* Carter, 26 N. C. 461.

38. Murphy *v.* Daugherty, 10 Ill. App. 214.

Evidence admissible in rebuttal see Gandy *v.* Humphries, 35 Ala. 617; Hitchcock *v.* Caruthers, 82 Cal. 523, 23 Pac. 48; Stow *v.* Converse, 4 Conn. 17; Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189; Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935; Knight *v.* Lee, 80 Ind. 201; Justice *v.* Kirlin, 17 Ind. 588; Loker *v.* Campbell, 163 Mass. 242, 39 N. E. 1038; Randall *v.* Evening News Assoc., 101 Mich. 561, 60 N. W. 301; French *v.* Detroit Free Press Co., 95 Mich. 168, 54 N. W. 711; McAllister *v.* Detroit Free Press Co., 95 Mich. 164, 54 N. W. 710; Ellis *v.* Whitehead, 95 Mich. 105, 54 N. W. 752; Whittemore *v.* Weiss, 33 Mich. 348; Archibald *v.* Press Pub. Co., 82 N. Y. App. Div. 513, 81 N. Y. Suppl. 889; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Byrd *v.* Hudson, 113 N. C. 203, 18 S. E. 209; Woodburn *v.* Miller, Cheves (S. C.) 194; McLarin *v.* State, 4 Humphr. (Tenn.) 381; Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573]; Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Kansas City Star Co. *v.* Carlisle, 108 Fed. 344, 47 C. C. A. 384. See 32 Cent. Dig. tit. "Libel and Slander," § 314.

Evidence not admissible in rebuttal see Barkly *v.* Copeland, 86 Cal. 483, 25 Pac. 1; Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189; Roberts *v.* Miller, 2 Greene (Iowa) 122; Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361; Beers *v.* Payment, 95 Mich. 261, 54 N. W. 886; Weltmer *v.* Bishop, 171 Mo. 110, 71 S. W. 167, 65 L. R. A. 584; Hinman *v.* Hare, 104 N. Y. 641, 10 N. E. 41. See 32 Cent. Dig. tit. "Libel and Slander," § 314.

Friendly relations of parties after time of theft as charged.—Where plaintiff is charged with theft from defendant and some evidence is introduced by defendant in support of the charge, plaintiff may show continued friendly relations with defendant after the theft. Burton *v.* March, 51 N. C. 409; Currier *v.* Richardson, 63 Vt. 617, 22 Atl. 625.

39. *Connecticut.*—Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189.

Indiana.—Miles *v.* Vanhorn, 17 Ind. 245, 79 Am. Dec. 477 [*distinguished* in Downey *v.* Dillon, 52 Ind. 442].

Massachusetts.—Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656. See also Harding *v.* Brooks, 5 Pick. 244.

Montana.—Authier *v.* Bennett Bros. Co., 16 Mont. 110, 40 Pac. 182.

Ohio.—See Blakeslee *v.* Hughes, 50 Ohio St. 490, 34 N. E. 793.

Washington.—Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

United States.—Wright *v.* Schroeder, 30 Fed. Cas. No. 18,091, 2 Curt. 548.

See 32 Cent. Dig. tit. "Libel and Slander," § 314.

Compare Sheehey *v.* Cokley, 43 Iowa 183, 22 Am. Rep. 236; Scott *v.* Peebles, 2 Sm. & M. (Miss.) 546.

Admissibility of good reputation in aggravation of damages see *supra*, VIII, F, 2, f, (I), (II).

40. *Georgia.*—Bryan *v.* Gurr, 27 Ga. 378.

Illinois.—Harbison *v.* Shook, 41 Ill. 141; Balcom *v.* Michels, 49 Ill. App. 379; Peters *v.* Bourneau, 22 Ill. App. 177.

Indiana.—Downey *v.* Dillon, 52 Ind. 442; Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212.

Iowa.—Sheehey *v.* Cokley, 43 Iowa 183, 22 Am. Rep. 236.

Kentucky.—Smith *v.* Lovelace, 1 Duv. 215.

good character, his evidence on that point and for that purpose must be confined to those traits of character which the imputed offense involves.[41]

(c) *Record of Trial and Acquittal of Plaintiff.* The record of the trial and acquittal of a person upon indictment for a crime is not competent evidence of his innocence to meet a plea of justification interposed in an action by him for defamation, in charging him with the same crime.[42]

i. Mitigation[43]—(i) *In General.* The ordinary rules governing the admissibility of evidence generally are applicable to the introduction of facts and circumstances in mitigation of damages.[44] Where facts and circumstances are offered in mitigation on the ground of their tendency to show want of malice and good faith it must appear that such circumstances were known to defendant at the time he made the publication.[45]

Massachusetts.— Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Harding *v.* Brooks, 5 Pick. 244.

North Carolina.— Burton *v.* March, 51 N. C. 409.

See 32 Cent. Dig. tit. "Libel and Slander," § 314.

But see Severance *v.* Hilton, 24 N. H. 147; Matthews *v.* Huntley, 9 N. H. 146; Houghtaling *v.* Kilderhouse, 1 N. Y. 530 [*affirming* 2 Barb. 149].

41. McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

42. Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98; McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465; England *v.* Bourke, 3 Esp. 80. See also Stewart *v.* Minnesota Tribune Co., 41 Minn. 71, 42 N. W. 787.

43. Matters to be considered in mitigation see *supra*, VII, B.

Evidence of damages generally see *supra*, VIII, F, 2, f.

Measure of damages see *infra*, VIII, G.

Evidence of malice see *supra*, VIII, F, 2, c.

44. See cases cited *infra*, this note.

Evidence admissible in mitigation of damages see Kennedy *v.* Dear, 6 Port. (Ala.) 90; Coogler *v.* Rhodes, 38 Fla. 240, 21 So. 109, 56 Am. St. Rep. 170; Bower *v.* Deideker, 38 Iowa 418; Douglass *v.* Craig, 3 La. Ann. 639; McDougald *v.* Coward, 95 N. C. 368 (holding that defendant, having charged plaintiff with want of chastity, may show his mental suffering, caused by the belief that plaintiff had seduced defendant's son); Romayne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. 246 (the journals of congress containing the original libel are admissible to show in mitigation that plaintiff was not the author). See 32 Cent. Dig. tit. "Libel and Slander," § 315.

Evidence not admissible in mitigation of damages see Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Hutts *v.* Hutts, 51 Ind. 581; Forshee *v.* Abrams, 2 Iowa 571; McLaughlin *v.* Cowley, 127 Mass. 316 (holding that evidence that plaintiff told defendant after suit was brought that he thought defendant was justified in doing what he did); Collins *v.* Stephenson, 8 Gray (Mass.) 438; Ross *v.* Lapham, 14 Mass. 275 (holding that upon a charge of perjury, evidence that plaintiff is an atheist is inadmissible); Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Harman *v.* Cundiff, 82 Va. 239 (evidence of a fight between plaintiff and defendant having no connection with the slander); Bennett *v.* Salisbury, 78 Fed. 769, 24 C. C. A. 329 (holding that the belief of the editor is immaterial in a suit against the proprietor of a newspaper, on the issue of failure to prescribe sufficient rules for the investigation of the truth of reports). See 32 Cent. Dig. tit. "Libel and Slander," § 315.

Failure to contradict part of publication not in proof.— Where the part of publication not in proof contained a charge of crime, the fact that plaintiff did not attempt to prove the same is not an admission of its truth and should not be considered by the jury in mitigation of damages. Fisher *v.* Patterson, 14 Ohio 418.

45. *California.*— Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Connecticut.— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Swift *v.* Dickerman, 31 Conn. 285; Bailey *v.* Hyde, 3 Conn. 463, 8 Am. Dec. 202.

Iowa.— Hulbert *v.* New Nonpariel Co., 111 Iowa 490, 82 N. W. 928.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

Massachusetts.— Borley *v.* Allison, 181 Mass. 246, 63 N. E. 260; Lothrop *v.* Adams, 133 Mass. 471, 43 Am. Rep. 528.

New York.— Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621 [*affirming* 1 N. Y. Suppl. 475]; Grant *v.* Herald Co., 42 N. Y. App. Div. 354, 59 N. Y. Suppl. 84; Reade *v.* Sweetzer, 6 Abb. Pr. N. S. 9 note.

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Morning Journal Assoc. *v.* Duke, 128 Fed. 657, 63 C. C. A. 459 [*affirming* 120 Fed. 860]; Palmer *v.* Mahin, 120 Fed. 737, 747, 57 C. C. A. 41 (where it is said: "It is not competent to show the good intent or good faith of a libeler, in mitigation of damage, by proof of facts of which he had no knowledge when he made the publication"); Edwards *v.* Kansas City Times Co., 32 Fed. 813.

England.— Thompson *v.* Nye, 16 Q. B. 175, 15 Jur. 285, 20 L. J. Q. B. 85, 71 E. C. L. 175; Watts *v.* Fraser, 7 A. & E. 223, 1 Jur. 671, 6 L. J. K. B. 226, 2 N. & P. 157, W. W. & D. 451, 34 E. C. L. 135.

See 32 Cent. Dig. tit. "Libel and Slander," § 315.

(II) *Bad Character of Person Defamed.* The general bad character of plaintiff may be shown in mitigation of damages,[46] although the general issue or general denial alone be pleaded,[47] and may be established in actions of libel or slander in the same manner as in other civil actions.[48] Particular instances of misconduct are inadmissible to prove plaintiff's general bad character.[49] So it cannot be shown that plaintiff has committed a specific crime whether it be of the same nature as the one charged or not.[50] Nor can rumors or reports be admitted

Where the words were spoken by a wife, facts in mitigation known only to the husband are not admissible, although husband and wife are sued jointly. Petrie *v.* Rose, 5 Watts & S. (Pa.) 364.

46. See *supra*, VII, B, 3.

Character at time of publication.— Defendant cannot show the character of plaintiff subsequent to the time of publication of the libel or slander. Tolleson *v.* Posey, 32 Ga. 372. But he may cross-examine plaintiff as to his reputation and character before the time of the alleged slander. Bernstein *v.* Singer, 1 N. Y. App. Div. 63, 36 N. Y. Suppl. 1093.

47. See *supra*, VIII, E, 7, i, (I).

48. *Illinois.*— Regnier *v.* Cabot, 7 Ill. 34.

Indiana.— Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205.

Massachusetts.— Leonard *v.* Allen, 11 Cush. 241.

Michigan.— Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

Missouri.— Adams *v.* Hannon, 3 Mo. 222.

New York.— Remsen *v.* Bryant, 47 N. Y. App. Div. 503, 62 N. Y. Suppl. 434; Rensen *v.* Bryant, 24 Misc. 238, 52 N. Y. Suppl. 515 [*affirmed* in 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728]; Graves *v.* Gilchrist, 9 N. Y. Suppl. 88.

Pennsylvania.— Drown *v.* Allen, 91 Pa. St. 393.

Virginia.— Lincoln *v.* Chrisman, 10 Leigh 338.

See 32 Cent. Dig. tit. "Libel and Slander," § 316.

In an action for charging criminal abortion, defendant can prove plaintiff's reputation as an abortionist by those to whom the reputation was known before the publication. Bathrick *v.* Detroit Post, etc., Co., 50 Mich. 629, 16 N. W. 172, 45 Am. St. Rep. 63.

Proof of character generally see Evidence, 16 Cyc. 1273 *et seq.*

49. *Connecticut.*— Swift *v.* Dickerman, 31 Conn. 285.

Georgia.— Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655.

Illinois.— Sheahan *v.* Collins, 20 Ill. 325, 71 Am. Dec. 271.

Iowa.— Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389.

Kentucky.— Campbell *v.* Bannister, 79 Ky. 205.

Maine.— Ridley *v.* Perry, 16 Me. 21.

Maryland.— Law *v.* Scott, 5 Harr. & J. 438.

Massachusetts.— Mahoney *v.* Belford, 132 Mass. 393; McLaughlin *v.* Cowley, 131 Mass. 70; Peterson *v.* Morgan, 116 Mass. 350; Parkhurst *v.* Ketchum, 6 Allen 406, 83 Am. Dec. 639.

Michigan.— Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624; Randall *v.* Evening News Assoc., 97 Mich. 136, 56 N. W. 361.

Minnesota.— Davis *v.* Hamilton, 88 Minn. 64, 92 N. W. 512.

New Hampshire.— Pallet *v.* Sargent, 36 N. H. 496; Lamos *v.* Snell, 6 N. H. 413, 25 Am. Dec. 468.

New York.— Remsen *v.* Bryant, 47 N. Y. App. Div. 503, 62 N. Y. Suppl. 434; Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728 [*affirming* 24 Misc. 238, 52 N. Y. Suppl. 515; Wuensch *v.* Morning Jonrnal Assoc., 4 N. Y. App. Div. 110, 38 N. Y. Suppl. 605; Dinkelspiel *v.* New York Evening Journal Pub. Co., 42 Misc. 74, 85 N. Y. Suppl. 570 [*modified* in 91 N. Y. App. Div. 96, 86 N. Y. Suppl. 375]; Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595. See also Smith *v.* Matthews, 21 Misc. 150, 47 N. Y. Suppl. 96.

North Carolina.— Luther *v.* Skeen, 53 N. C. 356; Vick *v.* Whitfield, 3 N. C. 222.

Ohio.— Fisher *v.* Patterson, 14 Ohio 418; Dewit *v.* Greenfield, 5 Ohio 225.

Pennsylvania.— Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116; Stewart *v.* Press Co., 1 Pa. Co. Ct. 247.

Rhode Island.— Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

South Carolina.— Randall *v.* Holsenbake, 3 Hill 175; Freeman *v.* Price, 2 Bailey 115.

Tennessee.— Hackett *v.* Brown, 2 Heisk. 264; Lambert *v.* Pharis, 3 Head 622.

Vermont.— Bowen *v.* Hall, 20 Vt. 232.

United States.— Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. 925, 40 C. C. A. 163; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

England.— Bell *v.* Parke, 11 Ir. C. L. 413.

See 32 Cent. Dig. tit. "Libel and Slander," § 316.

Specific acts not pleaded.— Where plaintiff was charged with dishonesty in his business, specific acts of dishonesty not pleaded are not admissible in evidence as proof of plaintiff's general reputation for dishonesty. Dennis *v.* Johnson, 47 Minn. 56, 49 N. W. 383.

Proof of character generally by specific acts see Evidence, 16 Cyc. 1278 note 41 *et seq.*

50. *Iowa.*— Fisher *v.* Tice, 20 Iowa 479.

Kentucky.— Matthews *v.* Davis, 4 Bibb 173.

for this purpose,[51] unless at least they are so common and prevalent that they have affected the general character.[52]

(III) *BELIEF AND ABSENCE OF MALICE.* Defendant may show in mitigation of damages the absence of actual malice.[53] For this purpose the acts and statements of defendant at the time of publication,[54] or any facts or circumstances tending to induce a *bona fide* belief in the truth of the charge[55] as that the author

Massachusetts.— Watson *v.* Moore, 2 Cush. 133, holding that defendant, having charged a wife with larceny, cannot prove in mitigation that her husband keeps a disorderly house.

Pennsylvania.— Long *v.* Brougher, 5 Watts 439.

South Carolina.— Randall *v.* Holsenbake, 3 Hill 175; Eifert *v.* Sawyer, 2 Nott & M. 511, 10 Am. Dec. 633.

Wisconsin.— Wilson *v.* Noonan, 27 Wis. 598.

United States.— Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526.

See 32 Cent. Dig. tit. "Libel and Slander," § 316.

51. *Alabama.*— Bradley *v.* Gibson, 9 Ala. 406.

California.— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

Massachusetts.— Peterson *v.* Morgan, 116 Mass. 350.

Ohio.— Van Derveer *v.* Sutphin, 5 Obio St. 293.

Rhode Island.— Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 316, 319.

Public reports of specific crimes or vices inadmissible.— *California.*— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Wilson *v.* Fitch, 41 Cal. 363.

Massachusetts.— Wolcott *v.* Hall, 6 Mass. 514, 4 Am. Dec. 173.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

New York.— Root *v.* King, 7 Cow. 613.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Pennsylvania.— Pease *v.* Shippen, 80 Pa. St. 513, 21 Am. Rep. 116. See also Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237; Hayes *v.* Press Co., 127 Pa. St. 642, 18 Atl. 331, 14 Am. St. Rep. 874, 5 L. R. A. 643.

Tennessee.— Lambert *v.* Pharis, 3 Head 622.

See 32 Cent. Dig. tit. "Libel and Slander," § 316.

Rumors subsequent to defamatory publication excluded.— Thompson *v.* Nye, 16 Q. B. 175, 15 Jur. 285, 20 L. J. Q. B. 85, 71 E. C. L. 175.

Testimony as to charge made by third person.— In Poppenheim *v.* Wilkes, 1 Strobh. (S. C.) 275, it was held to be incompetent for defendant to prove by a witness that another person had imputed to plaintiff the offense alleged in the defamatory charge in question.

52. Folwell *v.* Providence Journal Co., 19 R. I. 551, 37 Atl. 6 [*citing* 4 Sutherland Dam. § 1226].

53. See *supra*, VII, B, 5.

54. *Alabama.*— Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

California.— Lick *v.* Owen, 47 Cal. 252.

Illinois.— Schofield *v.* Baldwin, 102 Ill. App. 560.

Kentucky.— Nicholson *v.* Merritt, 109 Ky. 369, 59 S. W. 25, 22 Ky. L. Rep. 914; Campbell *v.* Bannister, 79 Ky. 205; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645.

Missouri.— Baldwin *v.* Boulware, 79 Mo. App. 5.

New York.— Taylor *v.* Church, 8 N. Y. 452.

Pennsylvania.— Leitz *v.* Hohman, 16 Pa. Super. Ct. 276, 18 Lanc. L. Rev. 217.

England.— Creevy *v.* Carr, 7 C. & P. 64, 32 E. C. L. 501.

See 32 Cent. Dig. tit. "Libel and Slander," § 317.

The apparent good humor of defendant when making the charge does not tend to disprove malice. Weaver *v.* Hendrick, 30 Mo. 502.

Where the alleged libelous article is one of a series relating to a matter of public concern defendant may introduce the entire series to show his good faith. Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216.

55. *Connecticut.*— Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69.

Indiana.— Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Massachusetts.— Lawler *v.* Earle, 5 Allen 22.

Michigan.— Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981 (holding that the fact that defendant acted in good faith affects the question of exemplary, but not of actual, damages); Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New York.— Sarasohn *v.* Workingmen's Pub. Assoc., 44 N. Y. App. Div. 302, 60 N. Y. Suppl. 640; Lally *v.* Emery, 54 Hun 517, 8 N. Y. Suppl. 135; Doe *v.* Roe, 32 Hun 628; Weed *v.* Bibbins, 32 Barb. 315; Cameron *v.* Tribune Assoc., 3 Silv. Sup. 575, 7 N. Y. Suppl. 739; Hotchkiss *v.* Lothrop, 1 Johns. 286.

Pennsylvania.— Minesinger *v.* Kerr, 9 Pa. St. 312; Stoner *v.* Hoffer, 5 Lanc. L. Rev. 325; Donnelly *v.* Swain, 2 Phila. 93.

Vermont.— Hutchinson *v.* Wheeler, 35 Vt. 330.

Wisconsin.— Wilson *v.* Noonan, 35 Wis. 321.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41, holding that the good

of a libel received his information from another,[56] or even relied upon general rumors and reports,[57] is admissible in mitigation of damages. So acts of plaintiff tending to induce a belief in the truth of the defamatory matter is admissible.[58]

(IV) *Provocation and Passion.* Acts or statements of plaintiff tending to

faith or good intent of defendant is admissible in mitigation of exemplary damages, but is immaterial on the question of compensatory damages.

See 32 Cent. Dig. tit. "Libel and Slander," § 317.

Admissibility under general issue of facts establishing or tending to establish truth see *supra*, VIII, E, 7, f, (v).

Testimony of defendant.— It has been held competent for defendant to testify that he believed that the charges published were true and that he had no ill-will against plaintiff. Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41. *Compare* Dillard *v.* Collins, 25 Gratt. (Va.) 343. Defendant cannot testify that he believed that he was justified in making the publication and that he made it for the public good. Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41. Defendant cannot be asked, "Did you have any malice against the plaintiff?" as the jury might think the reply referred to the legal malice which the law presumes. Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157. A written statement by plaintiff made at the trial disclaiming evil intentions toward plaintiff is inadmissible. Hamilton *v.* Glenn, 1 Pa. St. 340.

Absence of malice on part of correspondent of newspaper.— The fact that the correspondent who sent the articles to defendant newspaper had no malice against plaintiff is immaterial. Van Alstyne *v.* Rochester Printing Co., 25 N. Y. App. Div. 282, 49 N. Y. Suppl. 523.

Facts known to newspaper reporters.— The jury should consider all facts within the knowledge of the reporters tending to prove the truth of the charge. Collis *v.* Press Pub. Co., 68 N. Y. App. Div. 38, 74 N. Y. Suppl. 78.

Circumstances held inadmissible to show belief in truth of charge see Stow *v.* Converse, 4 Conn. 17; Taylor *v.* Robinson, 29 Me. 323; Mankleton *v.* Lilly, 3 N. Y. St. 421; Anonymous, 1 Hill (S. C.) 251; Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559. See 32 Cent. Dig. tit. "Libel and Slander," § 317.

56. *Connecticut.*—Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865; Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69.

Michigan.— Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8.

Missouri.— Hawkins *v.* Globe Printing Co., 10 Mo. App. 174.

New York.— Robinson *v.* Evening Post Pub. Co., 25 Misc. 243, 55 N. Y. Suppl. 62, 28 N. Y. Civ. Proc. 239.

England.— Saunders *v.* Mills, 6 Bing. 213, 8 L. J. C. P. O. S. 24, 3 M. & P. 520, 31 Rev. Rep. 394, 19 E. C. L. 103; Duncombe *v.* Daniell, 8 C. & P. 222, 2 Jur. 32, 1 W. W. & H. 101, 34 E. C. L. 701; Creevy *v.* Carr, 7 C. & P. 64, 32 E. C. L. 501; Mullett *v.* Hulton, 4 Esp. 248; Davis *v.* Cutbush, 1 F. & F. 487. *Compare* Talbutt *v.* Clark, 2 M. & Rob. 312.

See 32 Cent. Dig. tit. "Libel and Slander," § 317. See also *supra*, VII, B, 8.

Compare Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 245, 28 N. E. 1, 13 L. R. A. 97, where, however, it was said that "probably a different rule would apply if defendant's publication professes on its face to be based upon other publications which are referred to, and the fact is so."

57. *Alabama.*— Bradley *v.* Gibson, 9 Ala. 406.

Maryland.— Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

New Hampshire.— Wetherbee *v.* Marsh, 20 N. H. 561, 51 Am. Dec. 244.

North Carolina.— Nelson *v.* Evans, 12 N. C. 9.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

Vermont.— Bridgman *v.* Hopkins, 34 Vt. 532.

See 32 Cent. Dig. tit. "Libel and Slander," § 319.

Compare Edwards *v.* San Jose Printing, etc., Soc., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70; Sheckell *v.* Jackson, 10 Cush. (Mass.) 25; Bodwell *v.* Swan, 3 Pick. (Mass.) 376; Alderman *v.* French, 1 Pick. (Mass.) 1, 11 Am. Dec. 114; Baldwin *v.* Boulware, 79 Mo. App. 5. See also *supra*, VII, B, 9.

Evidence admissible to show rumor see Bradley *v.* Gibson, 9 Ala. 406; Nailor *v.* Ponder, 1 Marv. (Del.) 408, 41 Atl. 88; Barr *v.* Hack, 46 Iowa 308; Evans *v.* Smith, 5 T. B. Mon. (Ky.) 363, 17 Am. Dec. 74; Nicholson *v.* Rust, 52 S. W. 933, 21 Ky. L. Rep. 645; Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632; Hess *v.* Gansz, 90 Mo. App. 439; Harrison *v.* Garrett, 132 N. C. 172, 43 S. E. 594; Van Derveer *v.* Sutphin, 5 Ohio St. 293; Ledgerwood *v.* Elliott, (Tex. Civ. App. 1899) 51 S. W. 872; Schulze *v.* Jalonick, 18 Tex. Civ. App. 296, 44 S. W. 580. See 32 Cent. Dig. tit. "Libel and Slander," § 319.

58. *Massachusetts.*— Alderman *v.* French, 1 Pick. 1, 11 Am. Dec. 114; Larned *v.* Buffinton, 3 Mass. 546, 3 Am. Dec. 185.

Michigan.— Scripps *v.* Foster, 41 Mich. 742, 3 N. W. 216.

Missouri.— Arnold *v.* Jewett, 125 Mo. 241, 28 S. W. 614.

New York.— Bennett *v.* Smith, 23 Hun 50.

Tennessee.— Shirley *v.* Keathy, 4 Coldw. 29.

See 32 Cent. Dig. tit. "Libel and Slander," § 317.

Compare Knight *v.* Foster, 39 N. H. 576.

excite anger or passion in defendant are admissible to show provocation and to mitigate damages;[59] and the rule is the same where the defamatory words are published by defendant under the excitement produced by the communication to him by a third person of the statements of plaintiff, as where plaintiff's statements are made directly to defendant.[60] But to render such act or declaration admissible in evidence it must be shown to have been the immediate and proximate cause or provocation of the defamatory words; it is not sufficient to show that the acts or statements occurred and were communicated to defendant before the publication of the words.[61] Thus defendant cannot show a prior and wholly distinct and independent libel or slander upon himself by plaintiff,[62] at least where any considerable interval of time has elapsed between the publications.[63]

(v) *Rebuttal of Evidence in Mitigation*—(a) *Good Character.* Any evidence competent to prove the good character of plaintiff is admissible to rebut evidence of bad character introduced by defendant in order to mitigate damages.[64]

59. *Alabama.*— Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Illinois.— Miller *v.* Johnson, 79 Ill. 58.

Indiana.— Jauch *v.* Jauch, 50 Ind. 135, 19 Am. Rep. 699.

Iowa.— Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

Maryland.— Davis *v.* Griffith, 4 Gill & J. 342.

Massachusetts.— Walker *v.* Flynn, 130 Mass. 151; Child *v.* Homer, 13 Pick. 503.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397.

Minnesota.— Warner *v.* Lockerby, 31 Minn. 421, 18 N. W. 145, 821.

Mississippi.— Powers *v.* Presgroves, 38 Miss. 227.

New York.— Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. 409, 49 Am. St. Rep. 646; Dolevin *v.* Wilder, 7 Rob. 319; Palmer *v.* Lang, 7 Daly 33; Hotchkiss *v.* Lothrop, 1 Johns. 286.

Ohio.— Phillips *v.* Le June, 25 Ohio Cir. Ct. 107.

South Carolina.— Thompson *v.* Boyd, 1 Mill 80.

Tennessee.— Haws *v.* Stanford, 4 Sneed 520.

Texas.— Ledgerwood *v.* Elliott, (Civ. App. 1899) 51 S. W. 872.

Virginia.— Bourland *v.* Eidson, 8 Gratt. 27.

Wisconsin.— Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349; Ranger *v.* Goodrich, 17 Wis. 78.

England.— Watts *v.* Fraser, 7 A. & E. 223, 1 Jur. 671, 6 L. J. K. B. 226, 2 N. & P. 157, W. W. & D. 451, 34 E. C. L. 135; Tarpley *v.* Blaby, 7 C. & P. 395, 32 E. C. L. 674.

See 32 Cent. Dig. tit. "Libel and Slander," § 318. And see *supra*, VII, B, 7.

Provocation by plaintiff essential.— It must appear that the passion was provoked by plaintiff. Miller *v.* Johnson, 79 Ill. 58. Thus provocation by the father of plaintiff is not admissible in mitigation in a suit for slander of plaintiff. Underhill *v.* Taylor, 2 Barb. (N. Y.) 348.

Knowledge of passion by hearers immaterial.— It is not necessary that the hearers should understand that the words were spoken in passion. Zurawski *v.* Reichmann, 116 Iowa 388, 90 N. W. 69.

60. Walker *v.* Flynn, 130 Mass. 151.

61. *Alabama.*— Moore *v.* Clay, 24 Ala. 235, 60 Am. Dec. 461.

Connecticut.— Watson *v.* Churchill, 5 Day 256.

Massachusetts.— Sheffill *v.* Van Deusen, 15 Gray 485, 77 Am. Dec. 377.

Michigan.— Whittemore *v.* Weiss, 33 Mich. 348; Moyer *v.* Pine, 4 Mich. 409.

New York.— Beardsley *v.* Maynard, 4 Wend. 336.

England.— Watts *v.* Fraser, 7 A. & E. 223, 1 Jur. 671, 6 L. J. K. B. 226, 2 N. & P. 157, W. W. & D. 451, 34 E. C. L. 135.

See 32 Cent. Dig. tit. "Libel and Slander," § 318. And see *supra*, VII, B, 7, text and note 60.

Continued hostile feelings between plaintiff and defendant are alone not sufficient to show provocation or passion. Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59; Sabin *v.* Angell, 46 Vt. 740. See also Harman *v.* Cundiff, 82 Va. 239.

62. *Indiana.*— De Pew *v.* Robinson, 95 Ind. 109.

Massachusetts.— Child *v.* Homer, 13 Pick. 503; Walker *v.* Winn, 8 Mass. 248.

Michigan.— Weston *v.* Grand Rapids Pub. Co., 128 Mich. 375, 87 N. W. 258; Porter *v.* Henderson, 11 Mich. 20, 82 Am. Dec. 59.

Minnesota.— See Dressel *v.* Shipman, 57 Minn. 23, 58 N. W. 684.

New York.— Beardsley *v.* Maynard, 4 Wend. 336.

England.— May *v.* Brown, 3 B. & C. 113, 4 D. & R. 670, 2 L. J. K. B. O. S. 212, 10 E. C. L. 60; Wakley *v.* Johnson, R. & M. 422, 27 Rev. Rep. 767, 21 E. C. L. 787. *Compare* Finnerty *v.* Tipper, 2 Camph. 72.

See 32 Cent. Dig. tit. "Libel and Slander," § 318.

63. Battell *v.* Wallace, 30 Fed. 229.

64. *Alabama.*— Holley *v.* Burgess, 9 Ala. 728.

Illinois.— Balcom *v.* Michels, 49 Ill. App. 379.

Iowa.— Hanners *v.* McClelland, 74 Iowa 318, 37 N. W. 389.

Moreover it has been held that, although no direct evidence of general bad character be offered by defendant, if proof offered in justification, although insufficient to sustain the charge, still has a legitimate tendency to prove the general character of plaintiff bad, and so reduce the damages, plaintiff may encounter it by proof of general good character.[65]

(B) *Malice.* To rebut evidence negativing malice, plaintiff may show that defendant knew,[66] or should have known,[67] that the charge was false, or any acts on the part of defendant indicating express malice.[68]

(C) *Rumors.* If defendant, for the purpose of showing good faith, is allowed to prove the circulation of rumors interpreting plaintiff's conduct in the same way as stated in the publication, there is no error in permitting plaintiff to show in rebuttal the existence of a widespread, general understanding which placed an entirely innocent interpretation on his acts.[69]

3. Weight and Sufficiency of Evidence — a. In General. The rules governing the weight and sufficiency of evidence generally[70] are applicable in actions for defamation.[71]

b. Publication and Responsibility Therefor.[72] It is not necessary that there should be direct proof of publication by defendant; any fact established to the satisfaction of a jury from which it may be inferred will be sufficient.[73] It is held

Kentucky.— McGee *v.* Sodusky, 5 J. J. Marsh. 185, 20 Am. Dec. 251.

Maryland.— Shilling *v.* Carson, 27 Md. 175, 92 Am. Dec. 632.

Massachusetts.— Leonard *v.* Allen, 11 Cush. 241.

New Hampshire.— Dame *v.* Kenney, 25 N. H. 318.

New York.— See Bernstein *v.* Singer, 1 N. Y. App. Div. 63, 36 N. Y. Suppl. 1093.

South Carolina.— Jeter *v.* Askew, 2 Speers 633.

Texas.— Cooper 4. Francis, 37 Tex. 445, holding that plaintiff is not called upon to prove his good character until it is attacked, and hence it is error to refuse to permit such rebuttal because he had closed his case.

See 32 Cent. Dig. tit. "Libel and Slander," § 324.

A petition for appointment to office is not competent to show good character and reputation for truth and veracity. Sanford *v.* Rowley, 93 Mich. 119, 52 N. W. 1119.

Rebuttal of evidence of bad character in particular direction.— Plaintiff's general good character is admissible in rebuttal of an imputation of bad character in a particular direction. Petrie *v.* Rose, 5 Watts & S. (Pa.) 364; Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 454]. See also Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

Rebuttal of evidence of want of malice.— Evidence by defendant of circumstances that may have awakened in the mind of defendant a suspicion of plaintiff's guilt and therefore tend to show want of malice does not open the door for testimony by plaintiff in support of his good character. Chubb *v.* Gsell, 34 Pa. St. 114.

Admissibility of evidence of good character in chief see *supra*, VIII, E, 7, i, (II).

65. Wright *v.* Schroeder, 30 Fed. Cas. No. 18,091, 2 Curt. 548.

66. Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226, 20 Ky. L. Rep. 634; Bullock *v.* Cloyes, 4 Vt. 304.

67. Butler *v.* Barret, 130 Fed. 944; Press Pub. Co. *v.* McDonald, 73 Fed. 440, 19 C. C. A. 516.

68. Wabash Print., etc., Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904; Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981. See also Evening Post Co. *v.* Voight, 72 Fed. 885, 19 C. C. A. 224.

69. Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201 [*affirming* 55 Fed. 456].

70. See Evidence, 17 Cyc. 753 *et seq.*

71. See cases cited *infra*, this note.

Evidence authorizing direction of verdict for plaintiff see Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138.

Evidence not authorizing direction of verdict for defendant see McAllister *v.* Detroit Free Press Co., 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318; Wheaton *v.* Beecher, 66 Mich. 307, 33 N. W. 503. See also Walker *v.* Smith, (Miss. 1895) 19 So. 102.

Evidence authorizing award of nonsuit see Colbert *v.* Caldwell, 3 Grant (Pa.) 181.

72. Admissibility of evidence to show publication see *supra*, VIII, F, 2, e.

What constitutes publication see *supra*, IV.

73. McCoombs *v.* Tuttle, 5 Blackf. (Ind.) 431. To the same effect see Bent *v.* Mink, 46 Iowa 576.

Evidence sufficient to show publication of libel see McCoombs *v.* Tuttle, 5 Blackf. (Ind.) 431; Bent *v.* Mink, 46 Iowa 576; Kiene *v.* Ruff, 1 Iowa 482; Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102; Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073; Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Lewis *v.* Few, 5 Johns. (N. Y.) 1; Callan *v.* Gaylord, 3 Watts (Pa.) 321; Burton

to be sufficient for plaintiff to establish by a preponderance of evidence that the words alleged were published by defendant; it is not necessary to prove such publication beyond a reasonable doubt.[74]

c. Inducement, Colloquium, and Meaning of Language[75] — (I) *IN GENERAL.* To sustain a defense that words which in their ordinary meaning are actionable were used in a non-actionable sense, there must be evidence of surrounding circumstances or explanations accompanying the words such as to induce the hearers or readers to understand that an innocent meaning was intended.[76] On the other hand, if the words are not actionable on their face, it must be shown by plaintiff that they were used and understood in an actionable sense.[77] Where the charge

v. O'Niell, 6 Tex. Civ. App. 613, 25 S. W. 1013.

See 32 Cent. Dig. tit. "Libel and Slander," § 328.

Evidence sufficient to show publication of slander see Richardson *v.* Hopkins, 7 Blackf. (Ind.) 116; Hess *v.* Fockler, 25 Iowa 9; Boldon *v.* Thompson, 60 Kan. 856, 56 Pac. 131; McGeever *v.* Kennedy, 42 S. W. 114, 19 Ky. L. Rep. 845; Loranger *v.* Loranger, 115 Mich. 681, 74 N. W. 228; Kelso *v.* Knehl, 116 Wis. 495, 93 N. W. 455.

See 32 Cent. Dig. tit. "Libel and Slander," § 328.

Evidence insufficient to show publication of libel see Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Hemmens *v.* Nelson, 13 N. Y. Suppl. 175 [*affirmed* in 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440].

Evidence insufficient to show publication of slander.— Pauley *v.* Drain, 6 S. W. 329, 9 Ky. L. Rep. 693; Young *v.* Jackson, 37 La. Ann. 810; Schuyler *v.* Anderson, 91 Mich. 635, 52 N. W. 64; Sanders *v.* Rollinson, 2 Strobh. (S. C.) 447.

Evidence sufficient to show publication by newspaper see Johnson *v.* Synett, 157 N. Y. 684, 51 N. E. 1091 [*affirming* 89 Hun 192, 35 N. Y. Suppl. 79]; Huff *v.* Bennett, 4 Sandf. (N. Y.) 120; Witcher *v.* Jones, 17 N. Y. Suppl. 491; Marx *v.* Press Pub. Co., 12 N. Y. Suppl. 162 [*affirmed* in 134 N. Y. 561, 31 N. E. 918]; Southwick *v.* Stevens, 10 Johns. (N. Y.) 443; Respublica *v.* Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

In an action against one not the publisher of the newspaper containing the alleged libel the mere production of the papers containing the libelous matter is not sufficient to connect defendant with the publication. Simmons *v.* Holster, 13 Minn. 249. Hence copies of the paper are not admissible until defendant's connection with the publication is proved. Bent *v.* Mink, 46 Iowa 576; Simmons *v.* Holster, *supra*. So the mere fact that defendant is connected with a somewhat similar, although distinct, publication against plaintiff is not sufficient. Bent *v.* Mink, *supra*; Simmons *v.* Holster, *supra*.

74. Zimmerman *v.* McMakin, 22 S. C. 372, 53 Am. Rep. 720.

Mere scintilla of evidence held insufficient to establish communication for purpose of publication.—A mere conjecture or suspicion that defendant in an action for libel communicated slanderous statements to another, for the purpose of their publication, is not enough to authorize the submission of the question as one of fact to a jury, since a mere scintilla of evidence is not sufficient. Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. 502. Where the evidence in an action for libel at most only establishes that a person whom defendant knew to be a reporter asked him as to a report which was in circulation concerning the matters alleged in the complaint, stating that he understood that defendant had asserted the facts which were subsequently published, and the latter admitted having done so, there being no proof that the latter's statement was made for publication, nothing having been said on the subject, and there being other evidence tending to show that defendant did not intend that it should be published and had no design to procure its publication, the refusal of the trial court to grant a nonsuit or to direct a verdict for defendant is reversible error, upon the ground that the proof was insufficient to establish a cause of action against him for libel. Schoepflin *v.* Coffey, *supra*.

75. **Inducement, colloquium, innuendo, and meaning of words** as matters in issue see *supra*, VIII, E, 7, b.

Construction of defamatory words see *supra*, III, J.

Province of court and jury in construing words see *infra*, VIII, H, 1, b, (II).

Admissibility of evidence as to meaning of words see *supra*, VIII, F, 2, d.

Burden of proof as to meaning of words see *supra*, VIII, F, 1, c, (IV).

76. *California.*— Motts *v.* Borba, (1894) 37 Pac. 159.

Illinois.— Upham *v.* Dickinson, 50 Ill. 97.

Iowa.— Kidd *v.* Ward, 91 Iowa 371, 59 N. W. 279.

Kentucky.— Faris *v.* Starke, 9 Dana 128, 33 Am. Dec. 536.

Missouri.— Trimble *v.* Foster, 87 Mo. 49, 56 Am. Rep. 440.

New York.— Maybee *v.* Fisk, 42 Barb. 326; Phillips *v.* Barber, 7 Wend. 439.

Wisconsin.— Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Eaton *v.* White, 2 Pinn. 42.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 326, 327.

77. Nidever *v.* Hall, 67 Cal. 79, 7 Pac. 136; Bond *v.* Brewster, 16 Daly (N. Y.) 82, 9 N. Y. Suppl. 516. See also Snell *v.* Snell, 3 Abb. Pr. (N. Y.) 426.

itself assumes the existence of a fact, proof of the charge is sufficient proof of the assumed fact.[78] Direct proof of an allegation in the petition is not essential, but a fact alleged may be inferred from other facts in evidence.[79]

(II) *Charge of Perjury.* Where a charge of perjury is actionable *per se*, plaintiff need not show that the evidence charged to be false was material to the issue;[80] but if the charge is not actionable *per se* as where it is a charge of false swearing merely, such fact must be proved.[81] The fact that plaintiff was sworn as a witness may, it is held, be inferred from proof that he testified.[82]

d. Application of Publication to Plaintiff.[83] Where the charge does not expressly refer to plaintiff he must show that the words were understood by others to refer to him, or that the facts and circumstances attending the publication were such as to induce that understanding.[84] It is held that the identity of the name of plaintiff and of the person defamed is not of itself sufficient to show the identity of the person.[85] On the other hand it is held that if an article on its face clearly refers to plaintiff it is immaterial that the intent was to libel another[86] of the same name,[87] or that the article was in fact true when applied to such other.[88]

78. Rodebaugh *v.* Hollingsworth, 6 Ind. 339; Hesler *v.* Degant, 3 Ind. 501; Davis *v.* Ruff, Cheves (S. C.) 17, 34 Am. Dec. 584.

79. Peltier *v.* Mict, 50 Ill. 511; Barnett *v.* Ward, 36 Ohio St. 107, 38 Am. Rep. 561; Skinner *v.* Grant, 12 Vt. 456.

80. Harbison *v.* Shook, 41 Ill. 141; Spooner *v.* Keeler, 51 N. Y. 527.

Testimony as to exact words showing reference to a trial unnecessary.— Where it is important to show that the charge had reference to a trial it has been held that it is not indispensable for the witness to give the exact words of defendant showing such reference, but if desired they should be elicited on cross-examination. Douge *v.* Pearce, 13 Ala. 127.

81. Harris *v.* Woody, 9 Mo. 113; Roberts *v.* Champlin, 14 Wend. (N. Y.) 120; Power *v.* Price, 12 Wend. (N. Y.) 500; Rouse *v.* Ross, 1 Wend. (N. Y.) 475.

82. Cass *v.* Anderson, 33 Vt. 182.

83. **Indefiniteness or error as to person defamed** see *supra*, III, K, 9.

Admissibility of evidence to show person defamed see *supra*, VIII, F, 2, b.

Province of court and jury as to applicability of defamation to plaintiff see *infra*, VIII, H, 1, b, (III).

84. *California.*— De Witt *v.* Wright, 57 Cal. 576.

Illinois.— Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. 46 [*affirming* 46 Ill. App. 550].

Indiana.— Grotius *v.* Ross, 24 Ind. App. 543, 57 N. E. 46.

Maryland.— International Fraternal Alliance *v.* Mallalieu, 87 Md. 97, 39 Atl. 93.

Missouri.— Crecelius *v.* Bierman, 59 Mo. App. 513.

New York.— Bianchi *v.* Star Co., 46 Misc. 486, 95 N. Y. Suppl. 28.

See 32 Cent. Dig. tit. "Libel and Slander," § 326.

Testimony of hearer as to understanding of application of words held sufficient.— Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. 46 [*affirming* 46 Ill. App. 550].

A party need not be named, if pointed to by description or circumstances tending to identify him. Burkhart *v.* North American Co., 214 Pa. St. 39, 63 Atl. 410.

85. Harlow *v.* Carroll, 6 App. Cas. (D. C.) 128 (holding that the identity of the name of plaintiff in the action for defamation and of the complainant in an equity suit in which libelous matter against the complainant was uttered is insufficient *prima facie* evidence to go to the jury to show the identity of the person); Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856; Finnegan *v.* Detroit Free Press Co., 78 Mich. 659, 44 N. W. 585.

86. *California.*— Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Massachusetts.— Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 34 N. E. 462, 20 L. R. A. 856.

New York.— De Sando *v.* New York Herald Co., 88 N. Y. App. Div. 492, 85 N. Y. Suppl. 111 (holding that there was not sufficient proof of a libel on plaintiff where a photograph of plaintiff was published in connection with a libelous article but another's name was printed beneath the photograph and the article stated facts tending to show that he is not the person referred to); Morrison *v.* Smith, 83 N. Y. App. Div. 206, 82 N. Y. Suppl. 166; McLean *v.* New York Press Co., 19 N. Y. Suppl. 262 (holding that where a newspaper referred to a certain house as a disorderly house it is no defense that such imputation was intended for another house). See also Clary-Squire *v.* Press Pub. Co., 58 N. Y. App. Div. 362, 68 N. Y. Suppl. 1028.

Pennsylvania.— Clark *v.* North American Co., 203 Pa. St. 346, 53 Atl. 237. See also Newskey *v.* Mundt, 4 Leg. Gaz. 230.

England.— Shepheard *v.* Whitaker, L. R. 10 C. P. 502, 32 L. T. Rep. N. S. 402.

See 32 Cent. Dig. tit. "Libel and Slander," § 326.

87. Davis *v.* Marxhausen, 86 Mich. 281, 49 N. W. 50. See also Griebel *v.* Rochester Printing Co., 8 N. Y. App. Div. 450, 40 N. Y. Suppl. 759.

88. Butler *v.* Barret, 130 Fed. 944.

e. Malice — (I) *In General.* The weight and sufficiency of evidence of actual malice is governed by the ordinary rules applicable to the weight and sufficiency of evidence in civil cases generally.[89] Actual knowledge that the charge is false,[90] or a reckless indifference to its truth or falsity[91] on the part of defendant, is sufficient to show actual malice.

(II) *Falsity.* The doctrine has been announced that the falsity of the defamatory matter may of itself be sufficient evidence of malice to support a verdict for punitive damages.[92]

(III) *Inference From Fact of Publication Actionable Per Se.* Moreover in some cases the rule is broadly stated that where the publication is actionable *per se*, malice is an inference of fact which the jury may draw from the defamatory publication alone, so as to justify the assessment of exemplary damages.[93]

(IV) *Malice in Rebuttal of Defense of Privilege*[94] — (A) *In General.* If the evidence shows that defendant had reason to believe and did believe a qualifiedly privileged charge to be true and published it in good faith, the defense of privilege is complete.[95] On the other hand, where it appears that the defama-

89. See cases cited *infra*, this note.

Evidence sufficient to show malice see Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Sesler *v.* Montgomery, (Cal. 1888) 19 Pac. 686; Wynne *v.* Parsons, 57 Conn. 73, 17 Atl. 362; Mohrman *v.* Ohse, 17 La. Ann. 64; King *v.* Ballard, 10 La. Ann. 557; McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21; Pollasky *v.* Minchener, 81 Mich. 280, 46 N. W. 5, 21 Am. St. Rep. 516, 9 L. R. A. 102; Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 33 N. W. 181; Weber *v.* Butler, 81 Hun (N. Y.) 244, 30 N. Y. Suppl. 713; Alliger *v.* Brooklyn Daily Eagle, 2 Silv. Sup. (N. Y.) 5, 6 N. Y. Suppl. 110 [*affirmed* in 127 N. Y. 651, 27 N. E. 856]; Turton *v.* New York Recorder, 3 Misc. (N. Y.) 314, 22 N. Y. Suppl. 766 [*affirmed* in 144 N. Y. 144, 38 N. E. 1009]; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 398 [*affirmed* in 158 N. Y. 638, 34 N. E. 512]; Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

See 32 Cent. Dig. tit. "Libel and Slander," § 329.

Evidence not sufficient to show malice see Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211; Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266; Livingston *v.* Bradford, 115 Mich. 140, 73 N. W. 135; Sands *v.* Robison, 12 Sm. & M. (Miss.) 704, 51 Am. Dec. 132; Hill *v.* Miles, 9 N. H. 9; Mason *v.* Mason, 4 N. H. 110; Ormsby *v.* Douglass, 37 N. Y. 477; Fowles *v.* Bowen, 30 N. Y. 20; Samuels *v.* Evening Mail Assoc., 9 Hun (N. Y.) 288. See also Edsall *v.* Brooks, 33 How. Pr. (N. Y.) 191; Crist *v.* Bradstreet Co., 9 Ohio Dec. (Reprint) 751, 17 Cinc. L. Bul. 138 (holding that negligence is not malice); Missouri Pac. R. Co. *v.* Richmond, 73 Tex. 568, 11 S. W. 555, 15 Am. St. Rep. 794, 4 L. R. A. 280.

See 32 Cent. Dig. tit. "Libel and Slander," § 329.

90. Bodwell *v.* Osgood, 3 Pick. (Mass.) 379, 15 Am. Dec. 228 (holding actual knowledge of falsity conclusive evidence of malice); Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 398 [*affirmed* in 138 N. Y. 638, 34 N. E. 512]; Behee *v.* Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384. See also McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 51 N. Y. Suppl. 275.

91. Moore *v.* Stevenson, 27 Conn. 14; Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63; McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Shanks *v.* Stumpf, 34 N. Y. App. Div. 623, 54 N. Y. Suppl. 1115 [*affirming* 23 Misc. 264, 51 N. Y. Suppl. 154]; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Weber *v.* Butler, 81 Hun (N. Y.) 244, 30 N. Y. Suppl. 713.

92. Warner *v.* Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Bergmann *v.* Jones, 94 N. Y. 51; Hamilton *v.* Eno, 81 N. Y. 116; Samuel *v.* Evening Mail Assoc., 75 N. Y. 604; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131 [*affirmed* in 133 N. Y. 538, 30 N. E. 1148]; Hume *v.* Kusche, 42 Misc. (N. Y.) 414, 87 N. Y. Suppl. 109; Farley *v.* Ranck, 3 Watts & S. (Pa.) 554; Rogers *v.* Clifton, 3 B. & P. 587; Palmer *v.* Hummerston, 1 Cab. & E. 36.

Malice as element of exemplary damages see *infra*, VIII, G, 3, b.

93. Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Schmisseur *v.* Kreilich, 92 Ill. 347; Evening News Assoc. *v.* Tryon, 42 Mich. 549, 4 N. W. 267, 36 Am. Rep. 450; Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416. *Compare* Hotchkiss *v.* Porter, 30 Conn. 414.

Malice as an element of exemplary or punitive damages see *infra*, VIII, G, 3, b.

94. Qualified privilege generally see *supra*, VI, C.

95. Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456;

tory statements were made by one who knew them to be false or did not believe them to be true or had not probable grounds for believing them to be true, this is sufficient evidence of malice to destroy a qualified privilege.[96] Where the communication is privileged, slight evidence of malice entitles plaintiff to have his case go to the jury.[97] But it is held that malice cannot be implied from the mere fact of publication alone so as to defeat the privilege.[98]

(B) *Falsity.*[99] The falsity of the charge alone will not establish malice so as to authorize a recovery, if the charge be privileged, and only becomes sufficient when coupled with evidence tending to show that plaintiff made the charges knowing them to be false, or with other evidence tending to show malice.[1] *A fortiori* when defendant's evidence tends to prove that the alleged defamatory matter was a privileged communication, plaintiff cannot break the force of that evidence and establish actual malice by relying on the presumption of falsity.[2]

(C) *Intemperate Language.* Mere intemperance of language is not such evidence of malice as necessarily to destroy a qualified privilege.[3]

(V) *Rebuttal of Malice.* The legal presumption of malice arising from the publication is not rebutted by proof that defendant had reason to and did believe the charge true;[4] but evidence of knowledge by defendant of facts sufficient to reasonably induce a fair-minded man to believe that plaintiff was guilty of the charge is sufficient to disprove express malice.[5]

Squires *v.* Wason Mfg. Co., 182 Mass. 137, 65 N. E. 32; Fahr *v.* Hayes, 50 N. J. L. 275, 13 Atl. 261; Boucher *v.* Clark Pub. Co., 14 S. D. 72, 84 N. W. 237.

96. Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63; Quinn *v.* Scott, 22 Minn. 456; Carpenter *v.* Bailey, 53 N. H. 590; Harwood *v.* Keeck, 6 Thomps. & C. (N. Y.) 665.

If the publication is the result of carelessness the privilege is lost. Douglass *v.* Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475.

97. Wright *v.* Wright, 30 Ill. App. 349; Fowles *v.* Bowen, 30 N. Y. 20; Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Tex. Civ. App. 1903) 75 S. W. 573], holding that it is sufficient to justify a recovery if there is any degree of actual malice in the motives inspiring the publication, although there may also be lawful motives. *Compare* Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440, holding that a scintilla of evidence is insufficient to carry the question to the jury.

98. Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 2 L. R. A. N. S. 1139; Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850; Mulderg *v.* Wilkes-Barre Times, 215 Pa. St. 470, 64 Atl. 636, holding, however, that the evidence of malice may be intrinsic from the style and tone of the article as published and complained of.

99. Admissibility of evidence of falsity to show malice in rebuttal of privilege see *supra*, VI, F.

Burden of proof as to falsity see *supra*, VIII, F, 1, e.

1. *Georgia.*— Atlanta News Pub. Co. *v.* Medlock, 123 Ga. 714, 51 S. E. 756, 3 L. R. A. N. S. 1139.

Illinois.— Ritchie *v.* Arnold, 79 Ill. App. 406.

Massachusetts.— Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228.

Michigan.— Konkle *v.* Haven, 140 Mich. 472, 103 N. W. 850.

Nebraska.— Laing *v.* Nelson, 40 Nebr. 252, 58 N. W. 846.

New York.— Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440; Harwood *v.* Keech, 4 Hun 389; Hume *v.* Kusche, 42 Misc. 414, 87 N. Y. Suppl. 109. See also Gray *v.* Sampers, 35 N. Y. App. Div. 270, 55 N. Y. Suppl. 3.

Texas.— Cranfill *v.* Hayden, (Civ. App. 1903) 75 S. W. 573.

United States.—Locke *v.* Bradstreet Co., 22 Fed. 771.

England.— Hancock *v.* Case, 2 F. & F. 711; Caulfield *v.* Whitworth, 18 L. T. Rep. N. S. 527, 16 Wkly. Rep. 936.

See 32 Cent. Dig. tit. "Libel and Slander," § 329.

2. See Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

3. Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644; Shipley *v.* Todhunter, 7 C. & P. 680, 32 E. C. L. 819; Cowles *v.* Potts, 11 Jur. N. S. 949, 34 L. J. Q. B. 247, 13 Wkly. Rep. 858. See also Spill *v.* Maule, L. R. 4 Exch. 232, 38 L. J. Exch. 138, 20 L. T. Rep. N. S. 675, 17 Wkly. Rep. 805.

Effect of exceeding privilege see *supra*, VI, C, 1, c.

4. Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33; Mertens *v.* Bee Pub. Co., 5 Nebr. (Unoff.) 592, 99 N. W. 847. *Compare* Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103, holding that evidence insufficient to establish good faith so as to sustain a plea of privilege may yet be sufficient to rebut the presumption of malice and mitigate damages.

5. Donahoe *v.* Star Pub. Co., 4 Pennew. (Del.) 166, 55 Atl. 337.

Evidence insufficient to rebut malice see Westerfield *v.* Scripps, 119 Cal. 607, 51 Pac. 958 (holding that positive testimony, uncontradicted, that a newspaper article was pub-

f. Damages[6]—(I) *General Damages.* Proof of general damages is not required, it being proper for the jury to make the award without proof.[7] Where a publication is false, unprivileged, and actionable *per se*, the cause of action for general actual damages is conclusively established, and the amount and measure of damages are the only questions left for litigation.[8] Under a general allegation of damages for loss of business, it is sufficient to show an immediate diminution of business; it is not necessary to connect the loss with the publication, by evidence of particular instances.[9]

(II) *Special Damages*—(A) *Natural and Probable Consequences of Publication.* In an action for defamatory words not actionable *per se* plaintiff cannot recover, unless the proof shows that the special damage alleged is the natural, immediate, and legal consequence of the charge,[10] and due exclusively to the publication by defendant.[11]

(B) *Character of Loss.* The special damage must flow from impaired reputation.[12] It must be a loss of a pecuniary character,[13] or the loss of some substantial or material advantage.[14] Thus loss of fuel and clothing previously gratuitously furnished,[15] the refusal of civil entertainment at a public house,[16] loss of a marriage,[17] loss of substantial hospitality of friends or third persons,[18] loss of a customer,[19] or a general falling off in business,[20] a refusal of credit,[21] or loss of profitable employment[22] is sufficient evidence of special damages. But evidence of the loss of *consortium vicinorum*,[23] or evidence that plaintiff's relatives slighted and

lished without the knowledge of defendant and with no actual malice is not conclusive on the question of malice in fact); Davis *v.* Marxhausen, 103 Mich. 315, 61 N. W. 504; Prince *v.* Brooklyn Eagle, 16 Misc. (N. Y.) 186, 37 N. Y. Suppl. 250.

6. Measure of damages see *infra*, VIII, G.
Admissibility of evidence of damages see *supra*, VIII, F, 2, f.
Burden of proof as to damages see *supra*, VIII, F, 1, d.
Necessity of pleading damages see *supra*, VIII, E, 1, n.

7. Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423; Jones *v.* Edwards, 57 Miss. 28; Hubbard *v.* Rutledge, 52 Miss. 581; Alliger *v.* Mail Printing Assoc., 20 N. Y. Suppl. 763; Tripp *v.* Thomas, 3 B. & C. 427, 10 E. C. L. 198. See also *infra*, VIII, G, 2, b.

8. Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

9. Douglass *v.* Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475.

10. Hollenbeck *v.* Ristine, 114 Iowa 358, 86 N. W. 377; Field *v.* Colson, 93 Ky. 347, 20 S. W. 264, 14 Ky. L. Rep. 315; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Anonymous, 60 N. Y. 262, 19 Am. Rep. 174 (holding that the fact that the father of plaintiff, although he entirely disbelieved the charge, refused to furnish her with promised clothing and education was insufficient); Fisk *v.* New York Press Co., 91 Hun (N. Y.) 547, 36 N. Y. Suppl. 184; Pettibone *v.* Simpson, 66 Barb. (N. Y.) 492; Wallace *v.* Bennett, 1 Abb. N. Cas. (N. Y.) 478; Beach *v.* Ranney, 2 Hill (N. Y.) 309.

11. Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420; Hallock *v.* Miller, 2 Barb. (N. Y.) 630; Wallace *v.* Bennett, 1 Abb. N. Cas. (N. Y.) 478; Keenholts *v.* Becker, 3 Den. (N. Y.) 346; Wallace *v.* Rodgers, 156 Pa. St. 395, 27 Atl. 163.

12. Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420.

13. Pettibone *v.* Simpson, 66 Barb. (N. Y.) 492; Beach *v.* Ranney, 2 Hill (N. Y.) 309; Pollard *v.* Lynn, 91 U. S. 225, 23 L. ed. 308.

14. Roberts *v.* Roberts, 5 B. & S. 384, 10 Jur. N. S. 1027, 33 L. J. Q. B. 249, 10 L. T. Rep. N. S. 602, 12 Wkly. Rep. 909, 117 E. C. L. 384; Moore *v.* Meagher, 3 Smith K. B. 135, 1 Taunt. 39, 9 Rev. Rep. 702. See also American Ins. Co. *v.* France, 111 Ill. App. 382; Crashley *v.* Press Pub. Co., 179 N. Y. 27, 71 N. E. 258 [*affirming* 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711].

15. Beach *v.* Ranney, 2 Hill (N. Y.) 309.

16. Olmstead *v.* Miller, 1 Wend. (N. Y.) 506. See also Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420.

17. Moody *v.* Baker, 5 Cow. (N. Y.) 351. See also Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

18. Pettibone *v.* Simpson, 66 Barb. (N. Y.) 492 (proof of being requested to leave the house of a third person); Davies *v.* Solomon, L. R. 7 Q. B. 112, 41 L. J. Q. B. 10, 25 L. T. Rep. N. S. 799, 20 Wkly. Rep. 167; Moore *v.* Meagher, 3 Smith K. B. 135, 1 Taunt. 39, 9 Rev. Rep. 702. See also Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

19. Brooks *v.* Harison, 91 N. Y. 83; Bradstreet Co. *v.* Gill, 72 Tex. 115, 9 S. W. 753, 13 Am. St. Rep. 768, 2 L. R. A. 405; Storey *v.* Challands, 8 C. & P. 234, 34 E. C. L. 708.

20. Riding *v.* Smith, 1 Ex. D. 91, 45 L. J. Exch. 281, 34 L. T. Rep. N. S. 500, 24 Wkly. Rep. 487.

21. Muetze *v.* Tuteur, 77 Wis. 236, 46 N. W. 123, 20 Am. St. Rep. 115, 9 L. R. A. 86.

22. See Pollard *v.* Lyon, 91 U. S. 225, 23 L. ed. 308.

23. Roberts *v.* Roberts, 5 B. & S. 384, 10

shunned him,[24] is not sufficient to show special damages. Neither mental suffering nor physical sickness will alone be sufficient to show special damages to support an action for words not actionable *per se*.[25]

g. Justification[26] — (1) *Truth* — (A) *In General.* Evidence merely showing that the imputation is literally true is not sufficient to constitute a justification;[27] the justification must be substantially proved.[28] But proof of the substance of the defamatory charge is a justification and it is not necessary that every immaterial portion of the charge be proven true.[29]

(B) *Coextensiveness of Charge and Justification* — (1) In General. The justification in order to be a complete defense must be coextensive with the charge.[30] So defendant, who would justify a charge, must justify as to the

Jur. N. S. 1027, 33 L. J. Q. B. 249, 10 L. T. Rep. N. S. 602, 12 Wkly. Rep. 909, 117 E. C. L. 384, holding that the loss of membership in a religious society comes within the principle that loss of *consortium vicinorum* is not sufficient special damage.

24. Bassil *v.* Elmore, 65 Barb. (N. Y.) 627; Dwyer *v.* Meehan, L. R. 18 Ir. 138.

25. Windisch-Muhlhauser Brewing Co. *v.* Bacon, 53 S. W. 520, 21 Ky. L. Rep. 928; Shafer *v.* Ahalt, 48 Md. 171, 30 Am. Rep. 456; Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420 [*overruling* Fuller *v.* Fenner, 16 Barb. (N. Y.) 333; Bradt *v.* Towsley, 13 Wend. (N. Y.) 253]; Beach *v.* Ranney, 2 Hill (N. Y.) 309; Guy *v.* Gregory, 9 C. & P. 584, 38 E. C. L. 342; Lynch *v.* Knight, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854; Allsop *v.* Allsop, 5 H. & N. 534, 6 Jur. N. S. 433, 29 L. J. Exch. 315, 2 L. T. Rep. N. S. 290, 8 Wkly. Rep. 449. See also Butler *v.* Hoboken Printing, etc., Co., (N. J. Sup. 1905) 62 Atl. 272.

Sickness or mental suffering as element of damage in case of words actionable per se see *infra*, VIII, G, 2, e, (IV).

In an action for words imputing want of chastity it has been held that any special damage, however slight, will suffice to sustain the action. Ross *v.* Fitch, 58 Tex. 148; Underhill *v.* Welton, 32 Vt. 40. Accordingly it has been held that dejection of mind, loss of health, and the consequent incapacity to attend to business has been held sufficient evidence of special damage to sustain an action of this character. McQueen *v.* Fulgham, 27 Tex. 463; Underhill *v.* Welton, 32 Vt. 40. But see Terwilliger *v.* Wands, 17 N. Y. 54, 72 Am. Dec. 420 [*overruling* Fuller *v.* Fenner, 16 Barb. (N. Y.) 333; Bradt *v.* Towsley, 13 Wend. (N. Y.) 253].

26. Justification as a defense see *supra*, VIII, A.

Pleading justification see *supra*, VIII, E, 2, b, (XII).

Admissibility of evidence in justification see *supra*, VIII, F, 2, h.

27. *California.*— Wilson *v.* Fitch, 41 Cal. 363.

Iowa.— Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397.

New York.— Wachter *v.* Quenzer, 29 N. Y. 547.

Texas.— Dement *v.* Houston Printing Co., 14 Tex. Civ. App. 391, 37 S. W. 985.

United States.— Romayne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. 246.

See 32 Cent. Dig. tit. "Libel and Slander," § 332.

28. Stow *v.* Converse, 4 Conn. 17; Forrest *v.* Hanson, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63.

29. *Connecticut.*— Stow *v.* Converse, 4 Conn. 17.

Iowa.— Mott *v.* Dawson, 46 Iowa 533 [*citing* Fountain *v.* West, 23 Iowa 10].

Kentucky.— Rollins *v.* Louisville Times Co., 90 S. W. 1081, 28 Ky. L. Rep. 1054; Windisch-Muhlhauser Brewing Co. *v.* Bacon, 53 S. W. 520, 21 Ky. L. Rep. 928.

Louisiana.— Coffee *v.* Smith, 109 La. 440, 33 So. 554; Bigney *v.* Van Benthuysen, 36 La. Ann. 38.

Massachusetts.— Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596; Golderman *v.* Stearns, 7 Gray 181.

Michigan.— Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

New Hampshire.— Carpenter *v.* Bailey, 56 N. H. 283.

New York.— Beecher *v.* Press Pub. Co., 60 N. Y. App. Div. 536, 69 N. Y. Suppl. 895; Doyle *v.* Levy, 89 Hun 350, 35 N. Y. Suppl. 434; Ropke *v.* Brooklyn Daily Eagle, 9 N. Y. St. 709; Brooks *v.* Bemiss, 8 Johns. 455 (holding that where in a notice of justification defendant stated that he would produce records of a trial during the term of June, 1810, and the record produced was of June, 1809, the variance was immaterial); Genet *v.* Mitchell, 7 Johns. 120.

North Carolina.—Snow *v.* Witcher, 31 N. C. 346.

Tennessee.— Wilson *v.* Nations, 5 Yerg. 211.

Texas.— Quaid *v.* Tipton, 21 Tex. Civ. App. 131, 51 S. W. 264.

Washington.— Leghorn *v.* Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

United States.— Forrest *v.* Hanson, 9 Fed. Cas. No. 4,943, 1 Cranch C. C. 63.

See 32 Cent. Dig. tit. "Libel and Slander," § 332.

Proof of matter in addition to charge.— A charge that A committed forgery is justified by proof that A and B committed it. Nichols *v.* Hayes, 13 Conn. 155.

30. *California.*— Schomberg *v.* Walker, 132

specific charge laid, and cannot set up a charge of the same thing, but distinct as to the subject-matter.[31]

(2) JUSTIFICATION OF DISTINCT PART OF DEFAMATORY WORDS. While proof of the truth of only a part of the imputation is as a general rule insufficient,[32] yet if the declaration, complaint, or petition contains more than one charge it has

Cal. 224, 64 Pac. 290; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157.

Connecticut.— Stow *v.* Converse, 4 Conn. 17.

Illinois.— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Sanford *v.* Gaddis, 13 Ill. 329.

Indiana.— Miller *v.* McDonald, 139 Ind. 465, 39 N. E. 159; Hake *v.* Brames, 95 Ind. 161; Swann *v.* Rary, 3 Blackf. 298.

Iowa.—Hollenbeck *v.* Ristine, 105 Iowa 488, 75 N. W. 355, 67 Am. St. Rep. 306.

Maine.— Pease *v.* Bamford, 96 Me. 23, 51 Atl. 234; Kent *v.* Bonzey, 38 Me. 435.

Michigan.— Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691; Whittemore *v.* Weiss, 33 Mich. 348.

Minnesota.— State *v.* Shippman, 83 Minn. 441, 86 N. W. 431; Trebby *v.* Transcript Pub. Co., 74 Minn. 84, 76 N. W. 961, 73 Am. St. Rep. 330; Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856; Quinn *v.* Scott, 22 Minn. 456.

Missouri.— Boogher *v.* Knapp, 97 Mo. 122, 11 S. W. 45; Hall *v.* Adkins, 59 Mo. 144.

New York.— Wachter *v.* Quenzer, 29 N. Y. 547; Fero *v.* Ruscoe, 4 N. Y. 162; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993; Carpenter *v.* New York Evening Journal Pub. Co., 96 N. Y. App. Div. 376, 89 N. Y. Suppl. 263 (holding that evidence that plaintiff's record was in a pigeon-hole at police headquarters in another room from the rogues' gallery does not justify the charge of being a rogues' gallery man); Collis *v.* Press Pub. Co., 68 N. Y. App. Div. 38, 74 N. Y. Suppl. 78; Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728 [*affirming* 24 Misc. 238, 52 N. Y. Suppl. 515]; Clemons *v.* Mellon, 27 N. Y. App. Div. 349, 49 N. Y. Suppl. 1129; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Christianson *v.* O'Neil, 39 Misc. 11, 78 N. Y. Suppl. 757; Stern *v.* Barrett Chemical Co., 28 Misc. 429, 58 N. Y. Suppl. 1129; Miller *v.* Donovan, 16 Misc. 453, 39 N. Y. Suppl. 820; Baum *v.* Clause, 5 Hill 196; Stilwell *v.* Barter, 19 Wend. 487; Turrill *v.* Dolloway, 17 Wend. 426; Powers *v.* Skinner, 1 Wend. 451.

North Carolina.— Davis *v.* Lyon, 91 N. C. 444.

Pennsylvania.— Burford *v.* Wible, 32 Pa. St. 95.

Texas.— Dement *v.* Houston Printing Co., 14 Tex. Civ. App. 391, 37 S. W. 985.

United States.— Edwards *v.* Kansas City Times Co., 32 Fed. 813; Kerr *v.* Force, 14 Fed. Cas. 7,730, 3 Cranch C. C. 8; Mayo *v.* Blair, 16 Fed. Cas. No. 9,354, 1 Hayw. & H. 96; Romayne *v.* Duane, 20 Fed. Cas. No. 12,028, 3 Wash. 246; Whitney *v.* Janesville Gazette, 29 Fed. Cas. No. 17,590, 5 Biss. 330.

England.— Weaver *v.* Lloyd, 2 B. & C. 678, 9 E. C. L. 295, 1 C. & P. 295, 12 E. C. L. 177, 4 D. & R. 230, 2 L. J. K. B. O. S. 122, 26 Rev. Rep. 515.

See 32 Cent. Dig. tit. "Libel and Slander," § 333.

Evidence of character in justification.— It has been held that general reputation is sufficient to justify a charge that a lawyer is a "pettifogging shyster." Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251. See also Duncan *v.* Brown, 15 B. Mon. (Ky.) 186. To prove the truth of a charge of unchastity defendant need not prove the bad reputation of plaintiff. Wilson *v.* Barnett, 45 Ind. 163. Nor is the good reputation of plaintiff sufficient when justification is pleaded to sustain a verdict in his favor. Authier *v.* Bennett Bros. Co., 16 Mont. 110, 40 Pac. 182.

Where the petition contains two counts for the same words spoken at different times, and defendant justifies as to the words last spoken, the words in the other count will not support the action. Wright *v.* Britton, Morr. (Iowa) 286.

The imputation as laid with innuendos in the petition must be justified (Mayo *v.* Blair, 16 Fed. Cas. No. 9,354, 1 Hayw. & H. 96) if the innuendos explain it fairly (Ames *v.* Hazard, 8 R. I. 143).

Correspondence of proof with plea.— Although defendant undertakes more in his plea than is required to prove the truth of the charge, it is held that he is bound to sustain his plea by proof of its allegations. Harbison *v.* Shook, 41 Ill. 141; Hicks *v.* Rising, 24 Ill. 566.

31. *Connecticut.*— Stow *v.* Converse, 4 Conn. 17. See also Mix *v.* Woodward, 12 Conn. 262.

Georgia.— Richardson *v.* Roberts, 23 Ga. 215.

Indiana.— Swann *v.* Rary, 3 Blackf. 298.

Massachusetts.— Downs *v.* Hawley, 112 Mass. 237.

Missouri.— Gardner *v.* Self, 15 Mo. 480.

New York.— Daly *v.* Byrne, 43 N. Y. Super. Ct. 261; Stiles *v.* Comstock, 9 How. Pr. 48; Andrews *v.* Vanduzer, 11 Johns. 38.

North Carolina.— Watters *v.* Smoot, 33 N. C. 315.

Pennsylvania.— Burford *v.* Wible, 32 Pa. St. 95.

Vermont.— Torrey *v.* Field, 10 Vt. 353.

Virginia.— Dillard *v.* Collins, 25 Gratt. 343.

England.— Weaver *v.* Lloyd, 2 B. & C. 678, 9 E. C. L. 295, 1 C. & P. 295, 12 E. C. L. 177, 4 D. & R. 230, 2 L. J. K. B. O. S. 122, 26 Rev. Rep. 515.

See 32 Cent. Dig. tit. "Libel and Slander," § 333.

32. See cases cited *supra*, note 30.

been held that defendant may justify one or more, and the recovery may be had for the part not justified.[33]

(c) *Imputations of Crime*—(1) Degree of Proof. As a general rule a justification of a charge of crime need not establish the crime beyond a reasonable doubt, and a preponderance of evidence is sufficient to bar recovery.[34] In some jurisdictions, however, the truth must be proved beyond a reasonable doubt.[35]

(2) Establishment of Constituent Elements of Crime. Defendant in order to sustain his plea of justification must show that plaintiff is guilty of the crime charged, and such defense can be established only by proving every element of

33. Tull *v.* David, 27 Ind. 377; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507; Lanpher *v.* Clark, 149 N. Y. 472, 475, 44 N. E. 182 (where it is said: "When several separate and distinct things are charged, the defendant may justify as to one, though he fail as to the others"); Fero *v.* Ruscoe, 4 N. Y. 162; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993; Powers *v.* Skinner, 1 Wend. (N. Y.) 451.

34. *Alabama.*— Spruil *v.* Cooper, 16 Ala. 791.

California.— Hearne *v.* De Young, 119 Cal. 670, 52 Pac. 150, 499 [*overruling* Merk *v.* Gelzhaeuser, 50 Cal. 631].

Colorado.— Downing *v.* Brown, 3 Colo. 571.

Georgia.— Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216; Atlanta Journal *v.* Mayson, 92 Ga. 640, 18 S. E. 1010, 44 Am. St. Rep. 104 [*distinguishing* Williams *v.* Gunnels, 66 Ga. 521; Ransone *v.* Christian, 56 Ga. 351].

Illinois.— Scott *v.* Fleming, 17 Ill. App. 561; Tunnell *v.* Ferguson, 17 Ill. App. 76, both decided under statute. *Compare* Corbley *v.* Wilson, 71 Ill. 209, 22 Am. Rep. 98; Crotty *v.* Morrissey, 40 Ill. 477, both decided prior to statute.

Iowa.— Riley *v.* Norton, 65 Iowa 306, 21 N. W. 649 [*overruling* Ellis *v.* Lindley, 38 Iowa 461; Fountain *v.* West, 23 Iowa 9, 92 Am. Dec. 405; Forshee *v.* Abrams, 2 Iowa 571; Bradley *v.* Kennedy, 2 Greene 231].

Kentucky.— Sloan *v.* Gilbert, 12 Bush 51, 23 Am. Rep. 708.

Maine.— Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204.

Maryland.— McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465.

Michigan.— Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433; Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8; Peoples *v.* Evening News, 51 Mich. 11, 16 N. W. 185, 691.

Missouri.— Edwards *v.* Knapp, 97 Mo. 432, 10 S. W. 54 [*overruling* Polston *v.* See, 54 Mo. 291]; Elder *v.* Oliver, 30 Mo. App. 575.

New Hampshire.— Folsom *v.* Brawn, 25 N. H. 114.

New York.— Lewis *v.* Shull, 67 Hun 543, 22 N. Y. Suppl. 484. *Compare* Fulkerson *v.* George, 3 Abb. Pr. 75; Clark *v.* Dibble, 16 Wend. 601.

North Carolina.— Barfield *v.* Britt, 47 N. C. 41, 62 Am. Dec. 190; Kincade *v.* Bradshaw, 10 N. C. 63.

Ohio.— Bell *v.* McGinness, 40 Ohio St. 204, 48 Am. Rep. 673.

Pennsylvania.—Maier *v.* Krause, 30 Pittsb. Leg. J. N. S. 56.

Vermont.— See Currier *v.* Richardson, 63 Vt. 617, 22 Atl. 625. *Compare* Dwinells *v.* Aikin, 2 Tyler 75.

Wisconsin.— Kidd *v.* Fleek, 47 Wis. 443, 2 N. W. 1121.

See 32 Cent. Dig. tit. "Libel and Slander," § 334.

Evidence produced by plaintiff.— It is not nccessary that the evidence be produced by defendant. It may as well be produced by plaintiff. Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216; Leghorn *v.* Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

A plea justifying a charge of perjury must be sustained by two witnesses, or by one witness and corroborating circumstances.

Georgia.—Ransone *v.* Christian, 56 Ga. 351.

Illinois.— See Crandall *v.* Dawson, 6 Ill. 556.

Indiana.— Byrket *v.* Monohon, 7 Blackf. 83, 41 Am. Dec. 212.

Iowa.— Bradley *v.* Kennedy, 2 Greene 231.

New York.— Hopkins *v.* Smith, 3 Barb. 599; Woodbeck *v.* Keller, 6 Cow. 118.

Pennsylvania.— Gorman *v.* Sutton, 32 Pa. St. 247; Steinman *v.* McWilliams, 6 Pa. St. 170.

Tennessee.— Coulter *v.* Stuart, 2 Yerg. 225.

See 32 Cent. Dig. tit. "Libel and Slander," § 335.

Contra.— Kincade *v.* Bradshaw, 10 N. C. 63.

A confession standing alone is not enough to warrant a conviction of crime, and so it is not enough to sustain a plea of justification. Georgia *v.* Kepford, 45 Iowa 48. But a charge that defendant admitted appropriating money is justified by proof of the admission alone. Hall *v.* Elgin Dairy Co., 15 Wash. 542, 46 Pac. 1049.

35. Wintrode *v.* Renbarger, 150 Ind. 556, 50 N. E. 570; Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53; Hutts *v.* Hutts, 62 Ind. 214; Tucker *v.* Call, 45 Ind. 31; Tull *v.* David, 27 Ind. 377; Swails *v.* Butcher, 2 Ind. 84; Shoulty *v.* Miller, 1 Ind. 544; Gants *v.* Vinard, 1 Ind. 476; Landis *v.* Shanklin, 1 Ind. 92; Wonderly *v.* Nokes, 8 Blackf. (Ind.) 589; Lanter *v.* McEwen, 8 Blackf. (Ind.) 495; Offutt *v.* Earlywine, 4 Blackf. (Ind.) 460, 32 Am. Dec. 40; Burckhalter *v.* Coward, 16 S. C. 435; Baker *v.* Kansas City Times Co., 2 Fed. Cas. No. 773. See also Wilson *v.* Barnett, 45 Ind. 163.

the crime necessary to a criminal conviction for the same offense.[36] This rule has been applied to a charge of arson,[37] bestiality,[38] bigamy,[39] blackmailing,[40] embezzlement,[41] forgery,[42] or larceny.[43] So the rule has been applied to a charge of homicide[44] or perjury.[45]

(D) *Other Imputations.* Justification of charges of dishonesty and fraud,[46] of charges of unchastity,[47] of charges of official misconduct,[48] or of being afflicted

36. Welker *v.* Butler, 15 Ill. App. 209; Ellis *v.* Buzzell, 60 Me. 209, 11 Am. Rep. 204; McBee *v.* Fulton, 47 Md. 403, 28 Am. Rep. 465 (holding that defendant must prove every element of the crime both in act and in intent); Quaid *v.* Tipton, 21 Tex. Civ. App. 131, 51 S. W. 264.

37. Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; Crawford *v.* Bergen, 91 Iowa 675, 60 N. W. 205.

38. Moore *v.* Colly, 34 Ga. 375.

39. Willmett *v.* Harmer, 8 C. & P. 695, 34 E. C. L. 968.

40. Macdonald *v.* Mail Printing Co., 32 Ont. 163.

41. Park *v.* Piedmont, etc., L. Ins. Co., 51 Ga. 510; Fowler *v.* Wallace, 131 Ind. 347, 31 N. E. 53; Thompson *v.* Pioneer Press Co., 37 Minn. 285, 33 N. W. 856; Mallory *v.* Pioneer Press Co., 34 Minn. 521, 26 N. W. 904; Ginsberg *v.* Union Surety, etc., Co., 68 N. Y. App. Div. 141, 74 N. Y. Suppl. 561. See also Leghorn *v.* Review Pub. Co., 31 Wash. 627, 72 Pac. 485.

42. Seely *v.* Blair, Wright (Ohio) 683; Chalmers *v.* Shackell, 6 C. & P. 475, 25 E. C. L. 532. See also Waters *v.* Gilbert, 2 Cush. (Mass.) 27.

43. *California.*— Scott *v.* Harbor, 18 Cal. 704.

Iowa.—Murphy *v.* Olberding, 107 Iowa 547, 78 N. W. 205; Mielenz *v.* Quasdorf, 68 Iowa 726, 28 N. W. 41; Georgia *v.* Kepford, 45 Iowa 48.

Maine.— Kent *v.* Bonzey, 38 Me. 435.

Missouri.— Hall *v.* Adkins, 59 Mo. 144; Morgan *v.* Rice, 35 Mo. App. 591.

North Carolina.— Burton *v.* March, 51 N. C. 409.

Texas.— Quaid *v.* Tipton, 21 Tex. Civ. App. 131, 51 S. W. 264.

Virginia.— Hook *v.* Hancock, 5 Munf. 546.

England.— Roberts *v.* Richards, 3 F. & F. 507.

See 32 Cent. Dig. tit. "Libel and Slander," § 336.

44. Peoples *v.* Detroit Post, etc., Co., 54 Mich. 457, 20 N. W. 528.

45. *Illinois.*— Becherer *v.* Stock, 49 Ill. App. 270.

Indiana.— Tull *v.* David, 27 Ind. 377; McGlemery *v.* Keller, 3 Blackf. 488.

Kentucky.— Sloan *v.* Gilbert, 12 Bush 51, 23 Am. Rep. 708.

Maine.— Newbit *v.* Statuck, 35 Me. 315, 58 Am. Dec. 706.

Massachusetts.— Wood *v.* Southwick, 97 Mass. 354.

New York.—Hopkins *v.* Smith, 3 Barb. 599; McKinly *v.* Rob, 20 Johns. 351.

North Carolina.— Chandler *v.* Robison, 29 N. C. 480; Jenkins *v.* Cockerham, 23 N. C. 309.

Ohio.— Price *v.* Eckles, Tapp. 242.

West Virginia.— McClaugherty *v.* Cooper, 39 W. Va. 313, 19 S. E. 415.

See 32 Cent. Dig. tit. "Libel and Slander," § 335.

46. *Illinois.*— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91.

Iowa.— Mott *v.* Dawson, 46 Iowa 533.

Massachusetts.— Chapman *v.* Ordway, 5 Allen 593; Odiorne *v.* Bacon, 6 Cush. 185.

New York.— Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. 701 [*reversing* 50 Hun 345, 3 N. Y. Suppl. 156]; Collis *v.* Press Pub. Co., 68 N. Y. App. Div. 38, 74 N. Y. Suppl. 78; Herr *v.* Bamberg, 10 How. Pr. 128.

Texas.—Patten *v.* Belo, 79 Tex. 41, 14 S. W. 1037.

Canada.—Tobin *v.* Gannon, 34 Nova Scotia 9.

See 32 Cent. Dig. tit. "Libel and Slander," § 338.

A charge that one is a "skin" is not justified by the fact that he is in arrears for rent. Christianson *v.* O'Neil, 39 Misc. (N. Y.) 11, 78 N. Y. Suppl. 757.

47. See cases cited *infra*, this note.

Evidence sufficient in justification see Ropke *v.* Brooklyn Daily Eagle, 9 N. Y. St. 709; Snow *v.* Witcher, 31 N. C. 346.

Evidence insufficient in justification see Richardson *v.* Roberts, 23 Ga. 215; Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Miller *v.* McDonald, 139 Ind. 465, 39 N. E. 159; Peterson *v.* Murray, 13 Ind. App. 420, 41 N. E. 836; Sheehey *v.* Cokley, 43 Iowa 183, 22 Am. Rep. 236; Smith *v.* Wyman, 16 Me. 14; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251; Watters *v.* Smoot, 33 N. C. 315; Burford *v.* Wible, 32 Pa. St. 95; Edwards *v.* Kansas City Times Co., 32 Fed. 813.

See 32 Cent. Dig. tit. "Libel and Slander," § 339.

Proof of one act of unchastity does not necessarily justify an imputation that a woman is a whore. Peterson *v.* Murray, 13 Ind. App. 420, 41 N. E. 836; Sheehey *v.* Cokley, 43 Iowa 183, 22 Am. Rep. 236; Smith *v.* Wyman, 16 Me. 14.

48. *Connecticut.*— Mix *v.* Woodward, 12 Conn. 262.

Michigan.— Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507.

Minnesota.— Quinn *v.* Scott, 22 Minn. 456.

New York.— Fleming *v.* Brauer, 96 N. Y. App. Div. 876, 96 N. Y. Suppl. 594; Turrill *v.* Dolloway, 17 Wend. 426.

England.—Moore *v.* Terrell, 4 B. & Ad. 871, 1 N. & M. 559, 24 E. C. L. 378.

with a venereal disease[49] are subject to the general rules applicable to the justification of defamatory imputations generally.[50]

(II) *Repetition With Authorship Credited to Others.*[51] A defense that the words were spoken on the authority and information of another is sustained only by proving that the words were actually spoken by such other.[52]

(III) *Absence of Malice.* Proof of absence of malice or a *bona fide* belief in the truth based on just and convincing grounds is not a justification.[53]

h. Privilege. The ordinary rules governing the weight and sufficiency of evidence in civil cases are applicable to evidence offered to show a privileged occasion.[54]

G. Measure of Damages[55] — **1. In General — a. Amount to Be Determined by Jury.** The amount of damages to be awarded rests in the sound discretion of the jury,[56] and is to be determined by taking into consideration all circumstances in mitigation or aggravation.[57]

b. Effect of Laying Amount in Complaint. The jury cannot award damages greater than the amount laid in the petition.[58]

2. Compensatory Damages — a. Proximate and Remote Damages. Plaintiff if the verdict is in his favor is entitled to recover such actual damages as the jury may find to be the direct and proximate result of the publication but not speculative or remote damages,[59] the rule applying to special as well as general dam-

See 32 Cent. Dig. tit. "Libel and Slander," § 340.

49. Golderman *v.* Stearns, 7 Gray (Mass.) 181.

50. See *supra*, VIII, F, 3, g, text and note 27 *et seq.*

51. Repetition with authorship credited to others as a defense see *supra*, III, K, 10, a.

52. Church *v.* Bridgman, 6 Mo. 190.

53. Woodruff *v.* Richardson, 20 Conn. 238; Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839; Grant *v.* Haynes, 105 La. 304, 29 So. 708, 54 L. R. A. 930; Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8. See also *supra*, VII, A, 1, b.

54. See cases cited *infra*, this note.

Evidence held insufficient to establish defense of privilege see Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49 (holding that in an action for libel, contained in cross interrogatories, the mere fact that the cross interrogatories were submitted to the jury is not conclusive as to their relevancy to the issue); Hotchkiss *v.* Porter, 30 Conn. 414; Allen *v.* Wortham, 89 Ky. 485, 13 S. W. 73, 11 Ky. L. Rep. 697; Perry *v.* Porter, 124 Mass. 338; Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

55. Damages generally see Damages, 13 Cyc. 1.

Admissibility of evidence of damages see *supra*, VIII, F, 2, f.

Sufficiency of evidence of damages see *supra*, VIII, F, 3, f.

Pleading damages see *supra*, VIII, E, 1, n.

56. *Alabama.*— Pool *v.* Devers, 30 Ala. 672.

California.— Lick *v.* Owen, 47 Cal. 252.

Delaware.— Kennedy *v.* Woodrow, 6 Houst. 46.

Kentucky.— Trabue *v.* Mays, 3 Dana 138, 28 Am. Dec. 61; John Brenner Brewing Co. *v.* McGill, 62 S. W. 722, 23 Ky. L. Rep. 212.

Louisiana.— Carlin *v.* Stewart, 2 La. 73.

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314.

Michigan.— Burt *v.* McBain, 29 Mich. 260.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Arnold *v.* Sayings Co., 76 Mo. App. 159.

Nebraska.—Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Davey *v.* Davey, 22 Misc. 668, 50 N. Y. Suppl. 161; Miller *v.* Donovan, 16 Misc. 453, 39 N. Y. Suppl. 820.

South Carolina.—Davis *v.* Davis, 2 Nott & M. 81.

United States.— Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160; Mayo *v.* Blair, 16 Fed. Cas. No. 9,354, 1 Hayw. & H. 96.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 342, 364.

57. Holmes *v.* Holmes, 64 Ill. 294; Trabue *v.* Mays, 3 Dana (Ky.) 138, 28 Am. Dec. 61; Arnold *v.* Sayings Co., 76 Mo. App. 159; Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160.

Evidence of malice in aggravation see *supra*, VIII, F, 2, c.

Matters to be considered in mitigation see *supra*, VII, B.

58. Pool *v.* Devers, 30 Ala. 672; Smith *v.* Times Co., 4 Pa. Dist. 399.

59. *California.*— Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

Iowa.— Georgia *v.* Kepford, 45 Iowa 48.

Louisiana.— McBride *v.* Ledoux, 111 La. 398, 35 So. 615, 100 Am. St. Rep. 491.

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314.

Massachusetts.— Hastings *v.* Stetson, 130 Mass. 76.

Nevada.— Thompson *v.* Powning, 15 Nev. 195, 209, where it is said: "The damages to be considered must be the necessary, natural,

ages.[60] Thus the fact of the desertion of a husband by his wife and an action by her for divorce as a result of the publication of a charge against him of adultery,[61] or the trouble and expense caused plaintiff, a state senator, by reason of the investigation by the senate of the charge made against him,[62] or the loss of half-fare privileges on a railroad by a minister[63] has been held to be too remote to be considered in estimating compensatory damages.

b. Substantial Recovery Not Dependent Upon Proof of Actual Damages. If the publication is actionable *per se*, plaintiff is not required to introduce evidence of actual damage to entitle him to substantial damages,[64] since in the absence of any evidence of damage the law presumes damage.[65]

c. Actual Malice Not a Prerequisite to Recovery. Actual malice on the part of defendant is not required to be proved to entitle the injured party to recover the actual damages he has sustained from the unprivileged publication of a charge defamatory *per se*.[66]

and proximate consequence of the act complained of."

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

United States.— Merchants Ins. Co. *v.* Buckner, 98 Fed. 222, 39 C. C. A. 19.

England.— Goslin *v.* Corry, 7 M. & G. 342, 8 Scott N. R. 21, 49 E. C. L. 342.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 342, 343.

60. See *supra*, VIII, F, 3, f, (II), (A).

61. Georgia *v.* Kepford, 45 Iowa 48. See also Ludlow *v.* Batson, 5 Ont. L. Rep. 309 (holding that a publication concerning one who received an allowance for the maintenance of his wife's niece that he put in a fictitious account of trifling matters, such as for candies, oranges, and Sunday collections, does not render the publisher liable for damages resulting from his wife and niece leaving him); Weldon *v.* De Bathe, 54 L. J. Q. B. 113, 33 Wkly. Rep. 328; Lynch *v.* Knight, 9 H. L. Cas. 577, 8 Jur. N. S. 724, 5 L. T. Rep. N. S. 291, 11 Eng. Reprint 854.

The alienation of the affections of plaintiff's husband and the loss of home and support have been considered an element of damages. Case *v.* Case, 45 Nebr. 493, 63 N. W. 867.

62. Raines *v.* New York Press Co., 92 Hun (N. Y.) 515, 37 N. Y. Suppl. 45.

63. Shurtleff *v.* Stevens, 51 Vt. 501, 31 Am. Rep. 698.

64. *California.*— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576; Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Hawaii.— See Gomez *v.* Hawaiian Gazette Co., 10 Hawaii 108.

Illinois.— Schofield *v.* Baldwin, 102 Ill. App. 560.

Mississippi.— See Furr *v.* Speed, 74 Miss. 423, 21 So. 562.

Nebraska.—Williams *v.* Fuller, 68 Nebr. 354, 94 N. W. 118, 97 N. W. 246.

South Dakota.— Bedtkey *v.* Bedtkey, 15 S. D. 310, 89 N. W. 479.

Wisconsin.— Bradley *v.* Cramer, 66 Wis. 297, 304, 28 N. W. 372, where it is said: "The plaintiff was entitled to substantial damages, without any proof of actual damages."

Loss of time for which employer makes no deduction.— Where plaintiff claims damages for time lost in consequence of defendant's wrongful act, the fact that plaintiff's employer made no deduction from his wages for such lost time will not relieve defendant from liability therefor. Elmer *v.* Fessenden, 154 Mass. 427, 28 N. E. 299.

65. See *supra*, VIII, F, 1, d.

66. *Massachusetts.*— Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

Nebraska.— Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New York.— Fry *v.* Bennett, 4 Duer 247.

Texas.— Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

United States.— Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.

See also *supra*, V, B, text and note 39 *et seq.*

Want of malice as not mitigating actual damages see *infra*, VIII, G, 1, d, note 68.

Statutes making actual malice a prerequisite to recovery of general damages.— In Connecticut it is provided by statute (Gen. St. § 1116) that in an action for libel defendant may prove intention, and unless plaintiff shall prove either malice in fact, or that defendant, after having been requested to retract, failed to do so, he shall only recover the actual damage he may have specially alleged and proved. Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157. See also Hotchkiss *v.* Porter, 30 Conn. 414; Moore *v.* Stevenson, 27 Conn. 14. Under this statute it has been held that if plaintiff proves malice in fact, he is entitled to recover general damages, notwithstanding the fact that defendant gives proof of intention or the fact that no retraction has been demanded, or that special damages have neither been alleged nor proved. Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157. In Minnesota a statute (similar to the Connecticut statute, but confined in its operation to newspaper libels) which in effect permits evidence of intention or good faith, coupled with a

d. Effect of Mitigating Circumstances on Recovery of Actual Damages. In all cases where the charge is false and not privileged plaintiff is entitled to his actual damages,[67] and defendant cannot reduce compensatory damages by proving mitigating circumstances,[68] except such as in their nature bear upon the question of the extent of the injury actually sustained.[69]

e. Elements of Compensatory Damages — (i) *In General.* In estimating compensatory damages the jury should consider all matters relevant to show the extent of the injury done by the words.[70]

full retraction, not only to mitigate damages, but to prevent the recovery of general damages, as distinguished from special damages, has been held not to be unconstitutional as depriving plaintiff of his remedy for injury to reputation. Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532. But a contrary view has been reached in Michigan in reference to a similar statute. Park *v.* Detroit Free Press Co., 72 Mich. 560, 40 N. W. 731, 16 Am. St. Rep. 544, 1 L. R. A. 599.

67. *California.*— Turner *v.* Hearst, 137 Cal. 232, 70 Pac. 18; Taylor *v.* Hearst, 118 Cal. 366, 50 Pac. 541.

Connecticut.— See Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157; Hotchkiss *v.* Porter, 30 Conn. 414; Moore *v.* Stevenson, 27 Conn. 14.

Delaware.— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337.

Illinois.— American Ins. Co. *v.* France, 111 Ill. App. 382.

Kentucky.— Blackwell *v.* Jobnston, 56 S. W. 12, 21 Ky. L. Rep. 1720.

Louisiana.— Covington *v.* Roberson, 111 La. 326, 35 So. 586.

Massachusetts.— Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

Michigan.— Austin *v.* Hyndman, 119 Mich. 615, 78 N. W. 663; Simons *v.* Burnbam, 102 Mich. 189, 60 N. W. 476.

Missouri.— Farley *v.* Evening Chronicle Pub. Co., 113 Mo. App. 216, 87 S. W. 565.

New Jersey.—King *v.* Patterson, 49 N. J. L. 417, 9 Atl. 705, 60 Am. St. Rep. 622.

New York.— Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131 [*affirmed* in 133 N. Y. 538, 30 N. E. 1148].

North Carolina.— Bowden *v.* Bailes, 101 N. C. 612, 8 S. E. 342.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

Pennsylvania.— Leitz *v.* Hohman, 16 Pa. Super. Ct. 276, 18 Lanc. L. Rev. 217.

Texas.— Brown *v.* Durham, (Civ. App. 1897) 42 S. W. 331.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

United States.— Shattuc *v.* McArthur, 29 Fed. 136.

See 32 Cent. Dig. tit. "Libel and Slander," § 342.

68. *California.*— Turner *v.* Hearst, 137 Cal. 232, 70 Pac. 18; Taylor *v.* Hearst, 118 Cal. 366, 50 Pac. 541.

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981; Israel *v.* Israel, 109 Mo. App. 366, 84 S. W. 453.

Nebraska.— Mertens *v.* Bee Pub. Co., 5 Nebr. (Unoff.) 592, 99 N. W. 847.

New York.— Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Remsen *v.* Bryant, 24 Misc. 238, 52 N. Y. Suppl. 515.

Pennsylvania.— Goebler *v.* Wilhelm, 30 Pittsb. Leg. J. N. S. 432.

Wisconsin.— Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99; Candrian *v.* Miller, 98 Wis. 164, 73 N. W. 1004. *Compare* Maxwell *v.* Kennedy, 50 Wis. 645, 7 N. W. 657.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41.

Evidence of plaintiff's intent and motive in publishing the defamatory matter will go in mitigation of the exemplary but not of the actual damages sustained. Rearick *v.* Wilcox, 81 Ill. 77; Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981; Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Lewis *v.* Humphries, 64 Mo. App. 466; Thompson *v.* Powning, 15 Nev. 195; Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853. See also *supra*, VIII, F, 2, i, (II) text and note 55.

69. Chubb *v.* Gsell, 34 Pa. St. 114.

In Washington where punitive damages are not recoverable it is held under statute that defendant may give in evidence mitigating circumstances and the court cannot hold that such evidence should be rejected on the theory that only damages which can be mitigated are punitive. Ott *v.* Press Pub. Co., 40 Wash. 308, 82 Pac. 403.

Bad character of plaintiff in mitigation of compensatory damages see *supra*, VII, B, 1, c.

70. *California.*— Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067; Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

District of Columbia.—Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306; Washington Gas Light Co. *v.* Lansden, 9 App. Cas. 508.

Kentucky.— Lehrer *v.* Elmore, 100 Ky. 56, 37 S. W. 292, 18 Ky. L. Rep. 551.

Louisiana.— Fitzpatrick *v.* Daily States Pub. Co., 48 La. Ann. 1116, 20 So. 173.

Missouri.— Arnold *v.* Sayings Co., 76 Mo. App. 159.

New York.— Fry *v.* Bennett, 3 Bosw. 200; Fulkerson *v.* George, 3 Abb. Pr. 75.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 13 Utah 532, 45 Pac. 1097, 35 L. R. A. 611.

United States.— Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

England.— Praed *v.* Graham, 24 Q. B. D. 53, 59 L. J. Q. B. 230, 38 Wkly. Rep. 103.

(II) *Injury to Reputation.* The material element of damage in an action for words defamatory *per se* is the injury done to character,[71] plaintiff being entitled to recover for such injury as general damages in the absence of statutory provision to the contrary.[72] Damages cannot be awarded for a general loss of reputation where the charge is not actionable *per se* and the damages are not pleaded.[73]

(III) *Business Losses.* Under a general allegation of loss of business it is competent for plaintiff to prove a general loss or decline of patronage.[74] Moreover where the words are actionable *per se* as affecting plaintiff in his business the jury may award such substantial damages as will compensate for the general injury to business, although no evidence whatever as to damages is offered by plaintiff.[75] Indeed it has been held that where words are actionable *per se*, without reference to the business or professional character of plaintiff, plaintiff may, by extrinsic evidence, connect the defamatory words with his business or professional character and recover the natural and proximate damages resulting to him in his business or profession and this without specific proof in respect to them.[76] But as a general rule, where the alleged defamatory words do not "touch" plaintiff in his business or profession, no recovery can be had for injury to such business or profession, unless the loss or damage is specially alleged and proved.[77] The defamatory matter must be the proximate cause of the business losses.[78]

(IV) *Mental Suffering.* Where the words uttered or the words published are in themselves actually libelous or slanderous *per se*,[79] the mental suffering occasioned by the publication of the defamatory words may be taken into consideration[80] by

See 32 Cent. Dig. tit. "Libel and Slander," § 343.

Evidence admissible on question of general damages see *supra*, VIII, F, 2, f.

71. Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Markham *v.* Russell, 12 Allen (Mass.) 573, 90 Am. Dec. 169. See also Hemmenway *v.* Woods, 1 Pick. (Mass.) 524.

In Michigan under a statute providing that damages shall be given only for injury to property, business, trade, profession, occupation, or feelings, it has been held that damages cannot be given for injury to reputation or good name. Derham *v.* Derham, 123 Mich. 451, 82 N. W. 218. *Compare* McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21, where it was intimated that if the act prohibited recovery for damages to plaintiff's reputation it was unconstitutional.

72. McDuff *v.* Detroit Evening Journal Co., 84 Mich. 1, 47 N. W. 671, 22 Am. St. Rep. 673.

73. Herrick *v.* Lapham, 10 Johns. (N. Y.) 281.

74. See *supra*, VIII, F, 2, f, (I), (C), text and note 77.

75. Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. (D. C.) 306; Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28. *Compare* Brame *v.* Diller, 23 Lanc. L. Rev. (Pa.) 350.

Damages not limited to business losses.— Although defendant intended to injure plaintiff only in his business yet plaintiff is not confined in his recovery to damage done to his business. Brown *v.* Durham, (Tex. Civ. App. 1897) 42 S. W. 331.

76. Sanderson *v.* Caldwell, 45 N. Y. 398, 6 Am. Rep. 105.

77. Line *v.* Spies, 139 Mich. 484, 102 N. W. 993; Smedley *v.* Soule, 125 Mich. 192, 84 N. W. 63. See also *supra*, VIII, E, 1, n, (II), (B), (2).

78. Daisley *v.* Dun, 107 Fed. 218.

Damages held too remote see Bradstreet *v.* Oswald, 96 Ga. 396, 23 S. E. 423 (holding that profits alleged to have been lost by reason of plaintiff's inability to buy goods to be in turn sold to his customers are too remote and conjectural to be recovered); Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652.

79. See cases cited *infra*, note 80 *et seq.*

Sufficiency of mental suffering to constitute special damages see *supra*, VIII, F, 3, f, (II), (B), text and note 25.

80. *California.*— Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129; Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Colorado.— Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Connecticut.—Swift *v.* Dickerman, 31 Conn. 285.

Illinois.— Welker *v.* Butler, 15 Ill. App. 209.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Massachusetts.— Finger *v.* Pollack, 188 Mass. 208, 74 N. E. 317; Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119; Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Chesley *v.* Thompson, 137 Mass. 136; Mahoney *v.* Belford, 132 Mass. 393; Hastings *v.* Stetson, 130 Mass. 76.

Michigan.— Derham *v.* Derham, 123 Mich. 451, 82 N. W. 218; Cribbs *v.* Yore, 119 Mich. 237, 77 N. W. 927; Farrand *v.* Aldrich, 85

the jury for the purpose of estimating general[81] and compensatory[82] damages. Moreover it has been held that because a libel or a slander involves an injury to the feelings of plaintiff, as well as to his reputation, his injury may be greater if the defamatory words are uttered with express malice than if there is only the malice which the law implies from intentionally doing, without justification, that which in its natural tendency is injurious.[83]

(v) *Injury to Health.* Injury to health has been held not to be a legitimate element of damages in actions for defamation of character, although the defamatory words are actionable *per se*.[84]

(vi) *Costs of Litigation.*[85] In some jurisdictions it is held that the expense of maintaining a suit for libel or slander is not a proper element of compensatory

Mich. 593, 48 N. W. 628; Scripps *v.* Reilly, 38 Mich. 10; Burt *v.* McBain, 29 Mich. 260.

Missouri.— Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863; Baldwin *v.* Boulware, 79 Mo. App. 5; Michael *v.* Matheis, 77 Mo. App. 556.

Nebraska.— Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

New Jersey.— Knowlden *v.* Guardian Printing, etc., Co., 69 N. J. L. 670, 55 Atl. 287; Deyo *v.* Clough, (Sup. 1899) 43 Atl. 653.

New York.— Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539; Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114 [*affirmed* in 157 N. Y. 695, 51 N. E. 1094]; Raines *v.* New York Press Co., 92 Hun 515, 37 N. Y. Suppl. 45; Ward *v.* Deane, 57 Hun 585, 10 N. Y. Suppl. 421; Hamilton *v.* Eno, 16 Hun 599; Gomez *v.* Joyce, 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 337; Fry *v.* Bennett, 4 Duer 247; Littlejohn *v.* Greeley, 13 Abb. Pr. 311, 22 How. Pr. 345; Littlejohn *v.* Greeley, 13 Abb. Pr. 41.

Ohio.— Commercial Gazette Co. *v.* Grooms, 10 Ohio Dec. (Reprint) 489, 21 Cinc. L. Bul. 292.

South Dakota.— Bedtkey *v.* Bedtkey, 15 S. D. 310, 89 N. W. 479.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458; McCarthy *v.* Miller, (Civ. App. 1900) 57 S. W. 973; Houston Printing Co. *v.* Dement, 18 Tex. Civ. App. 30, 44 S. W. 558; Young *v.* Sheppard, (Civ. App. 1897) 40 S. W. 62; Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

Washington.— Ott *v.* Press Pub. Co., 40 Wash. 308, 82 Pac. 403.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

United States.— Malloy *v.* Bennett, 15 Fed. 371.

See 32 Cent. Dig. tit. "Libel and Slander," § 347.

Compare Prime *v.* Eastweed, 45 Iowa 640.

Must be proximate consequence of defamation.— The mental suffering must be such as plaintiff experiences as the direct, immediate, and proximate effect of the libel. Turner *v.* Hearst, 115 Cal. 394, 47 Pac. 129.

In an action by two or more partners damages cannot be recovered for injury to their feelings. Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. 397; Haythorn *v.* Lawson, 3 C. & P. 196, 14 E. C. L. 523.

Mental suffering arising from libel on deceased relative.— Mental suffering and injury to feelings of plaintiff are not sufficient damages to sustain an action for a libel or slander upon a deceased relative of plaintiff. Bradt *v.* New Nonpareil Co., 108 Iowa 449, 79 N. W. 122, 45 L. R. A. 681; Sorensen *v.* Balaban, 11 N. Y. App. Div. 164, 42 N. Y. Suppl. 654.

81. *California.*— Taylor *v.* Hearst, 107 Cal. 262, 40 Pac. 392.

Colorado.—Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051.

Massachusetts.— Lombard *v.* Lennox, 155 Mass. 70, 28 N. E. 1125, 31 Am. St. Rep. 528; Chesley *v.* Thompson, 137 Mass. 136.

Michigan.— Cribbs *v.* Yore, 119 Mich. 237, 77 N. W. 927.

Missouri.— Nicholson *v.* Rogers, 129 Mo. 136, 31 S. W. 260.

New York.— Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539.

Texas.— Forke *v.* Homann, 14 Tex. Civ. App. 670, 39 S. W. 210.

See 32 Cent. Dig. tit. "Libel and Slander," § 347.

82. Republican Pub. Co. *v.* Mosman, 15 Colo. 399, 24 Pac. 1051; Swift *v.* Dickerman, 31 Conn. 285; Commercial Gazette Co. *v.* Grooms, 10 Ohio Dec. (Reprint) 489, 21 Cinc. L. Bul. 292.

In New York the rule of the text has been announced in some of the cases. Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539; Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114 [*affirmed* in 157 N. Y. 695, 51 N. E. 1094]. But in other cases such damages seem to be regarded as punitive and assessable only in cases where there is proof of actual malice. Warner *v.* Press Pub. Co., 132 N. Y. 181, 30 N. E. 393; Brooks *v.* Harison, 91 N. Y. 83.

83. Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359; Markham *v.* Russell, 12 Allen (Mass.) 573, 90 Am. Dec. 169. See also Burt *v.* Advertiser Newpaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

84. Butler *v.* Hoboken Printing, etc., Co., (N. J. Sup. 1905) 62 Atl. 272. *Compare* Burt *v.* McBain, 29 Mich. 260.

85. **Statutory regulation of costs** see *infra*, VIII, H, 2, c.

damages;[86] but nevertheless a contrary view has been asserted and maintained in other jurisdictions.[87]

(VII) *Future Damages.* In estimating damages the jury may consider the probable future injury resulting to plaintiff's reputation caused by the publication.[88] But the rule does not apply if the future injury be speculative or remote.[89]

(VIII) *Repetitions and Further Publications.* Repetitions or republications of a libel or slander by defendant,[90] or libels and slanders other than the one sued on,[91] cannot as a general rule be made an extra element of actual damages for which compensation may be awarded. Repetitions and other publications by defendant may, however, be considered by the jury on the question of malice and in aggravation of damages.[92] In Massachusetts, moreover, it has been held that because a libel or slander involves an injury to the feelings of plaintiff, as well as to his reputation, his injury may be greater if the defamatory words are published with express malice and hence that other publications made by defendant

86. Halstead *v.* Nelson, 24 Hun (N. Y.) 395; Hicks *v.* Foster, 13 Barb. (N. Y.) 663. See also Thompson *v.* Powning, 15 Nev. 195, 210, where it is said that "the plaintiff, in actions of this kind, is not always entitled to recover the expenses and costs that may have been incurred by the prosecution of his suit from the simple fact that he is entitled to a verdict in his favor."

Attorney's fees are held not to be recoverable. Grotius *v.* Ross, 24 Ind. App. 543, 57 N. E. 46; Irlbeck *v.* Bierle, 84 Iowa 47, 50 N. W. 36.

87. Guice *v.* Harvey, 14 La. 198; Finney *v.* Smith, 31 Ohio St. 529, 27 Am. Rep. 524.

88. *District of Columbia.*— Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Maine.— True *v.* Plumley, 36 Me. 466.

Massachusetts.—Weston *v.* Barnicoat, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628.

Nebraska.—Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28; Boldt *v.* Budwig, 19 Nebr. 739, 28 N. W. 280.

Texas.— Clark *v.* Bohms, (Civ. App. 1896) 37 S. W. 347.

England.— Gregory *v.* Williams, 1 C. & K. 568, 47 E. C. L. 568; Harrison *v.* Pearce, 1 F. & F. 567.

See 32 Cent. Dig. tit. "Libel and Slander," § 349.

Compare Halstead *v.* Nelson, 24 Hun (N. Y.) 395, holding that in legal theory the reputation is vindicated and made whole by the verdict and therefore no further injury can result.

Damages for prospective suffering where suit is brought four years after the publication cannot, it has been held, be recovered. Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372.

Damages occurring after suit for words not actionable per se.— Damages occurring after the commencement of the action are not sufficient to support an action for words not actionable *per se.* Crawford *v.* Barnes, 118 N. C. 912, 24 S. E. 670.

89. Hume *v.* Kusche, 42 Misc. (N. Y.) 414, 87 N. Y. Suppl. 109 (speculative profits from a contemplated partnership held too remote); Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

90. *California.*— Chamberlin *v.* Vance, 51 Cal. 75.

Connecticut.—Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75.

Illinois.— Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119.

Indiana.— Meyer *v.* Bohlfing, 44 Ind. 238; Burson *v.* Edwards, 1 Ind. 164; Lanter *v.* McEwen, 8 Blackf. 495; Forbes *v.* Myers, 8 Blackf. 74; McGlemery *v.* Keller, 3 Blackf. 488; Shortley *v.* Miller, Smith 395.

Iowa.— Ellis *v.* Lindley, 38 Iowa 461; Hinkle *v.* Davenport, 38 Iowa 355; Bearsley *v.* Bridgman, 17 Iowa 290.

Massachusetts.— See Bodwell *v.* Osgood, 3 Pick. 379, 15 Am. Dec. 228.

New York.— See McLaughlin *v.* Charles, 60 Hun 239, 14 N. Y. Suppl. 608.

England.— See Darby *v.* Ouseley, 1 H. & N. 1, 2 Jur. N. S. 497, 25 L. J. Exch. 227, 4 Wkly. Rep. 463.

See 32 Cent. Dig. tit. "Libel and Slander," § 348.

91. *Connecticut.*— Ward *v.* Dick, 47 Conn. 300, 36 Am. Rep. 75; Mix *v.* Woodward, 12 Conn. 262.

Indiana.— Vincent *v.* Dixon, 5 Ind. 270; Throgmorton *v.* Davis, 4 Blackf. 174.

Kentucky.— Letton *v.* Young, 2 Metc. 558.

Massachusetts.— Markham *v.* Russell, 12 Allen 573, 90 Am. Dec. 169.

New Jersey.— Schenck *v.* Schenck, 20 N. J. L. 208.

New York.— Coleman *v.* Playsted, 36 Barb. 26; Root *v.* Lowndes, 6 Hill 518, 41 Am. Dec. 762.

Ohio.— Van Derveer *v.* Sutphin, 5 Ohio St. 293.

England.— See Brunswick *v.* Harmer, 14 Q. B. 185, 14 Jur. 110, 19 L. J. Q. B. 20, 68 E. C. L. 185.

See 32 Cent. Dig. tit. "Libel and Slander," § 348.

A mere denial of plaintiff's allegation of good reputation is not to be considered in aggravation of damages. Pink *v.* Catanich, 51 Cal. 420.

92. Stowell *v.* Beagle, 79 Ill. 525; Harbison *v.* Shook, 41 Ill. 141; Hatch *v.* Potter, 7

concerning plaintiff are admissible as showing that the words charged were published maliciously and thus tended to aggravate the injury for which compensation is sought.[93]

3. Exemplary, Punitive, or Vindictive Damages[94] — a. In General. In most jurisdictions, exemplary, punitive, or vindictive damages are recoverable in actions for defamation of character.[95] In some jurisdictions, however, recovery is limited to actual or compensatory damages, and no punitive or exemplary damages are recoverable.[96] In no case are such damages allowed as a matter of right,[97] but their recovery rests in the sound discretion of the jury.[98]

b. Malice or Recklessness as Element of Exemplary Damages[99] — (i) *In General.* If express malice on the part of defendant is shown, exemplary or punitive damages are proper.[1] So if the defamation was recklessly or carelessly

Ill. 725, 43 Am. Dec. 88; Fowler *v.* Gilbert, 38 Mich. 292; Leonard *v.* Pope, 27 Mich. 145; Williams *v.* Harrison, 3 Mo. 411; Kean *v.* McLaughlin, 2 Serg. & R. (Pa.) 469. See also *supra*, VIII, F, 2, c, (XII).

Charges of fraud made by counsel for the defense may be considered in estimating damages. Struthers *v.* Peacock, 11 Phila. (Pa.) 287.

93. Faxon *v.* Jones, 176 Mass. 206, 57 N. E. 359; Markham *v.* Russell, 12 Allen (Mass.) 573, 90 Am. Dec. 169.

94. Admissibility of evidence as to exemplary damages see *supra*, VIII, F, 2, f, (III).

95. *California.*— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Illinois.— Harbison *v.* Shook, 41 Ill. 141; Hosley *v.* Brooks, 20 Ill. 115, 71 Am. Dec. 252; Schofield *v.* Baldwin, 102 Ill. App. 560.

Indiana.— Guard *v.* Risk, 11 Ind. 156.

New York.— Hunt *v.* Bennett, 19 N. Y. 173 [*affirming* 4 E. D. Smith 647]; Gomez *v.* Joyce, 56 N. Y. Super. Ct. 607, 1 N. Y. Suppl. 337; Tillotson *v.* Cheetham, 3 Johns. 56, 3 Am. Dec. 459.

North Carolina.— Sowers *v.* Sowers, 87 N. C. 303.

Ohio.— Fowler *v.* Chichester, 26 Ohio St. 9.

South Carolina.— Burckhalter *v.* Coward, 16 S. C. 435.

Wisconsin.—Cramer *v.* Noonan, 4 Wis. 231.

See 32 Cent. Dig. tit. "Libel and Slander," § 350.

If the charge subjects plaintiff to a criminal prosecution, no exemplary damages, it has been held, can be assessed. White *v.* Sun Pub. Co., 164 Ind. 426, 73 N. E. 890; Wabash Printing, etc., Co. *v.* Crumrine, 123 Ind. 89, 21 N. E. 904. See also Meyer *v.* Bohlfing, 44 Ind. 238. But the prevailing rule is to the contrary. Ransone *v.* Christian, 56 Ga. 351; Baldwin *v.* Fries, 46 Mo. App. 288; Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367.

96. Burt *v.* Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; Williams *v.* Fuller, 68 Nebr. 354, 94 N. W. 118, 97 N. W. 246; Ott *v.* Press Pub. Co., 40 Wash. 308, 82 Pac. 403; Spokane Truck, etc., Co. *v.* Hoefer, 2 Wash. 45, 25 Pac. 1072, 26 Am. St. Rep. 842, 11 L. R. A. 689.

In Pennsylvania the allowance of punitive damages is prohibited by statute. Parsley *v.* Wilhelm, 17 Pa. Super. Ct. 444; Goebeler *v.* Wilhelm, 17 Pa. Super. Ct. 432. But a different rule obtained prior to the statute. Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367.

97. Nicholson *v.* Rogers, 129 Mo. 136, 31 S. W. 260; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609; Kenyon *v.* Cameron, 17 R. I. 122, 20 Atl. 233.

98. *Indiana.*— Guard *v.* Risk, 11 Ind. 156.

Iowa.— Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928.

Kansas.— Miles *v.* Harrington, 8 Kan. 425.

Kentucky.— Blackwell *v.* Johnson, 56 S. W. 12, 21 Ky. L. Rep. 1720.

Maryland.— Gambrill *v.* Schooley, 93 Md. 48, 48 Atl. 730, 86 Am. St. Rep. 414, 52 L. R. A. 87; Nolan *v.* Traber, 49 Md. 460, 33 Am. Rep. 277.

Missouri.— Nicholson *v.* Rogers, 129 Mo. 136, 31 S. W. 260; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

New York.— Bergmann *v.* Jones, 94 N. Y. 51; Hunt *v.* Bennett, 19 N. Y. 173 [*affirming* 4 E. D. Smith 647]; Gray *v.* Sampers, 35 N. Y. App. Div. 270, 35 N. Y. Suppl. 3.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157.

Pennsylvania.— Barr *v.* Moore, 87 Pa. St. 385, 30 Am. Rep. 367.

Rhode Island.— Kenyon *v.* Cameron, 17 R. I. 122, 20 Atl. 233.

Wisconsin.—Cramer *v.* Noonan, 4 Wis. 231.

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475.

See 32 Cent. Dig. tit. "Libel and Slander," § 350.

Amount of damages generally as question for jury see *supra*, VIII, G, 1, a.

99. Evidence of malice see *supra*, VIII, F, 2, c.

Admissibility of malice on question of exemplary damages see *supra*, VIII, F, 2, f, (III), (A).

1. *California.*— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40; Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845.

Delaware.— Donahoe *v.* Star Pub. Co., 4 Pennew. 166, 55 Atl. 337; Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88; Kennedy *v.* Woodrow, 6 Houst. 46; Kinney *v.* Hosea, 3 Harr. 397.

published, punitive damages may properly be awarded as well as where the defamation was induced by the personal ill-will of defendant.[2] On the other hand there are many authorities to the effect that if express malice or recklessness

Florida.— Montgomery *v.* Knox, 23 Fla. 595, 3 So. 211.

Indiana.— De Pew *v.* Robinson, 95 Ind. 109.

Kansas.— Hess *v.* Sparks, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231.

Louisiana.— Bonnin *v.* Elliott, 19 La. Ann. 322.

Maine.— Jellison *v.* Goodwin, 43 Me. 287, 69 Am. Dec. 62.

Maryland.— Snyder *v.* Fulton, 34 Md. 128, 6 Am. Rep. 314.

Michigan.— Hatt *v.* Evening News Assoc., 94 Mich. 119, 54 N. W. 766; Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952; Newman *v.* Stein, 75 Mich. 402, 42 N. W. 956, 13 Am. St. Rep. 447; Evening News Assoc. *v.* Tryon, 42 Mich. 549, 4 N. W. 267, 36 Am. St. Rep. 450; Fowler *v.* Gilbert, 38 Mich. 292.

Montana.— Paxton *v.* Woodward, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416.

New Hampshire.— Knight *v.* Foster, 39 N. H. 576; Symonds *v.* Carter, 32 N. H. 458.

New York.— Brandt *v.* Morning Journal Assoc., 177 N. Y. 544, 69 N. E. 1120 [*affirming* 81 N. Y. App. Div. 183, 80 N. Y. Suppl. 1002]; Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Fry *v.* Bennett, 28 N. Y. 324 [*affirming* 3 Bosw. 200]; Taylor *v.* Church, 8 N. Y. 452; McMahon *v.* New York News Pub. Co., 51 N. Y. App. Div. 488, 64 N. Y. Suppl. 713; Fry *v.* Bennett, 4 Duer 247; Prince *v.* Socialistic Co-operative Pub. Assoc., 31 Misc. 234, 64 N. Y. Suppl. 285 [*affirming* 61 N. Y. Suppl. 1145]; Waltenberg *v.* Bernhard, 26 Misc. 659, 56 N. Y. Suppl. 396; Shanks *v.* Stumpf, 23 Misc. 264, 51 N. Y. Suppl. 154 [*affirmed* in 54 N. Y. Suppl. 1115]; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788; Prince *v.* Brooklyn Daily Eagle, 16 Misc. 186, 37 N. Y. Suppl. 250; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; Littlejohn *v.* Greeley, 22 How. Pr. 345.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157; Bowden *v.* Bailes, 101 N. C. 612, 8 S. E. 342; Gilreath *v.* Allen, 32 N. C. 67.

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819.

Virginia.— Harman *v.* Cundiff, 82 Va. 239.

Wisconsin.— Klewin *v.* Bauman, 53 Wis. 244, 10 N. W. 398.

United States.— Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475. See also Spooner *v.* Daniels, 22 Fed. Cas. No. 13,244*a*.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 350, 351.

Where some of defendants were actuated by malice and others were not, it is proper to find a verdict against all for compensatory damages and an additional amount as exemplary damages against those guilty of express malice. Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477.

2. *California.*— Turner *v.* Hearst, 137 Cal. 232, 70 Pac. 18.

Illinois.— Danville Press Co. *v.* Harrison, 99 Ill. App. 244.

Iowa.— Hulbert *v.* New Nonpareil Co., 111 Iowa 490, 82 N. W. 928.

Kentucky.— Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 49 S. W. 15, 20 Ky. L. Rep. 1231; Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226, 20 Ky. L. Rep. 634.

Michigan.— Long *v.* Tribune Printing Co., 107 Mich. 207, 65 N. W. 108.

Missouri.— Lanius *v.* Druggist Pub. Co., 20 Mo. App. 12.

New York.— Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; McMahon *v.* New York News Pub. Co., 51 N. Y. App. Div. 488, 64 N. Y. Suppl. 713; Payne *v.* Rouss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705; Grant *v.* Herald Co., 42 N. Y. App. Div. 354, 59 N. Y. Suppl. 84; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Karwowski *v.* Pitass, 20 N. Y. App. Div. 118, 46 N. Y. Suppl. 691; Van Ingen *v.* Star Co., 1 N. Y. App. Div. 429, 37 N. Y. Suppl. 114; Morrison *v.* Press Pub. Co., 59 N. Y. Super. Ct. 216, 14 N. Y. Suppl. 131; Prince *v.* Socialistic Co-operative Pub. Assoc., 31 Misc. 234, 64 N. Y. Suppl. 285 [*affirming* 61 N. Y. Suppl. 1145]; Waltenberg *v.* Bernhard, 26 Misc. 659, 56 N. Y. Suppl. 396; Ullrich *v.* New York Press Co., 23 Misc. 168, 50 N. Y. Suppl. 788; Smith *v.* Matthews, 9 Misc. 427, 29 N. Y. Suppl. 1058 [*affirmed* in 152 N. Y. 152, 46 N. E. 164]; Smith *v.* Matthews, 6 Misc. 162, 27 N. Y. Suppl. 120; Alliger *v.* Mail Printing Assoc., 20 N. Y. Suppl. 763.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157.

United States.— Post Pub. Co. *v.* Butler, 137 Fed. 723, 71 C. C. A. 309; Duke *v.* Morning Journal Assoc., 120 Fed. 860; Palmer *v.* Mahin, 120 Fed. 737, 57 C. C. A. 41; Times Pub. Co. *v.* Carlisle, 94 Fed. 762, 36 C. C. A. 475; Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53; Morning Journal Assoc. *v.* Rutherford, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803 [*affirming* 47 Fed. 487]; Malloy *v.* Bennett, 15 Fed. 371. See also Bennett *v.* Salisbury, 78 Fed. 769, 24 C. C. A. 329.

Canada.— Auburn *v.* Berthiaume, 23 Quebec Super. Ct. 476.

See 32 Cent. Dig. tit. "Libel and Slander," § 351.

equivalent thereto is not shown on the part of defendant, exemplary damages cannot be awarded.[3] But in other jurisdictions it is held that where malice exists exemplary damages may be given, and that it is immaterial whether the malice is actual or implied in law.[4]

(II) *Malice on Part of Agent of Defendant.* The general rule has been announced that express malice on the part of an agent or employee who has published a libel will not be imputed to the principal or employer so as to sustain a verdict for punitive damages unless the act was authorized or ratified by the latter.[5] On the other hand it has been held that where the charge and

Admissibility of evidence of recklessness see *supra*, VIII, F, 2, c, (XI).

3. *California.*— Hearne *v.* De Young, 132 Cal. 357, 64 Pac. 576.

Colorado.— Republican Pub. Co. *v.* Conroy, 5 Colo. App. 262, 38 Pac. 423.

Connecticut.—Hotchkiss *v.* Porter, 30 Conn. 414.

Delaware.— Nailor *v.* Ponder, 1 Marv. 408, 41 Atl. 88.

Georgia.— Bradstreet Co. *v.* Oswald, 96 Ga. 396, 23 S. E. 423.

Kansas.— Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993; Samuels *v.* Evening Mail Assoc., 9 Hun 288; Prince *v.* Socialistic Co-opperative Pub. Assoc., 31 Misc. 234, 64 N. Y. Suppl. 285; Miller *v.* Donovan, 16 Misc. 453, 39 N. Y. Suppl. 820. See also Fulkerson *v.* George, 3 Abb. Pr. 75; Littlejohn *v.* Greeley, 13 Abb. Pr. 41; Littlejohn *v.* Greeley, 22 How. Pr. 345.

Ohio.— Rollins *v.* Pennock, 2 Ohio Dec. (Reprint) 735, 5 West. L. Month. 184.

Wisconsin.— Reed *v.* Keith, 99 Wis. 672, 75 N. W. 392; Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760; Rogers *v.* Henry, 32 Wis. 327, holding that where the words were spoken in anger under provocation and without any deliberate purpose, punitive damages should not be allowed.

United States.— Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. ed. 73; Broughton *v.* McGrew, 39 Fed. 672, 5 L. R. A. 406.

See 32 Cent. Dig. tit. "Libel and Slander," § 351.

Falsity of charge.— In some jurisdictions it is held that proof of the falsity of the publication is sufficient evidence to require the submission of the question of malice to the jury and to warrant the allowance of exemplary damages. Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. 274, 101 Am. St. Rep. 722; Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Suppl. 993. See also *supra*, VIII, F, 3, e, (II).

Proof of publication establishes *prima facie* malice in fact sufficient to sustain a recovery of punitive damages. Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Malice in law held immaterial on question of exemplary damages.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270.

4. *Illinois.*— Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935 [*affirming* 37 Ill. App. 510]; Spolek Denni Hlasatel *v.* Hoffman, 105 Ill. App. 170 [*affirmed* in 204 Ill. 532, 68 N. E. 400]; Prussing *v.* Jackson, 85 Ill. App. 324.

Kentucky.— Courier-Journal Co. *v.* Sallee, 104 Ky. 335, 47 S. W. 226; Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281.

Maryland.— Shockey *v.* McCauley, (Md. 1905) 61 Atl. 583; Coffin *v.* Brown, 94 Md. 190, 50 Atl. 567, 89 Am. St. Rep. 422, 55 L. R. A. 732. See also Fresh *v.* Cutter, 73 Md. 87, 20 Atl. 774, 25 Am. St. Rep. 575, 10 L. R. A. 67.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583; Clements *v.* Maloney, 55 Mo. 352; Arnold *v.* Sayings Co., 76 Mo. App. 159; Baldwin *v.* Fries, 46 Mo. App. 288; Wood *v.* Hilbish, 23 Mo. App. 389. *Compare* Fulkerson *v.* Murdock, 53 Mo. App. 151; Nelson *v.* Wallace, 48 Mo. App. 193.

Pennsylvania.— See Regensperger *v.* Kiefer, 4 Pa. Cas. 541, 7 Atl. 724. *Compare* Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Becker *v.* Public Ledger, 6 Pa. Dist. 89.

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

See 32 Cent. Dig. tit. "Libel and Slander," § 351.

5. *Massachusetts.*— Goodrich *v.* Stone, 11 Metc. 486.

Michigan.— Detroit Daily Post Co. *v.* McArthur, 16 Mich. 447.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

New Jersey.—Haines *v.* Schultz, 50 N. J. L. 481, 14 Atl. 488.

New York.— See Craven *v.* Bloomingdale, 171 N. Y. 439, 64 N. E. 169. *Compare* Clifford *v.* Press Pub. Co., 78 N. Y. App. Div. 79, 79 N. Y. Suppl. 767.

Wisconsin.— Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760.

See 32 Cent. Dig. tit. "Libel and Slander," § 351.

Compare Commercial Gazette Co. *v.* Grooms, 10 Ohio Dec. (Reprint) 489, 21 Cinc. L. Bul. 292; St. Louis Southwestern R. Co. *v.* McArthur, 31 Tex. Civ. App. 205, 72 S. W. 76.

If relation of master and servant does not exist, defendant is not responsible for malice of the party supplying him with the defamatory matter. Bradley *v.* Cramer, 66 Wis. 297, 28 N. W. 372.

management of a newspaper,[6] or of a particular column of a newspaper,[7] in which a libelous article is published, is confided to an agent or employee, without the reservation of any supervision, express malice on the part of such agent or employee may be invoked against the owner or proprietor. So it has been held that the fact that defendant, the owner of a newspaper, had left the country, leaving the control of the paper in the hands of agents, and had given positive orders that no article reflecting upon the reputation of any person should be published without a strict investigation as to its truth, this cannot be shown to prevent an award of vindictive damages.[8]

c. Concurrent Award of Nominal and Punitive Damages. It has been held that if the jury decide that the actual damages sustained are merely nominal, punitive damages are not recoverable.[9] But a different rule has been declared by other authorities.[10]

4. Excessive and Insufficient Damages. Although there is no fixed measure of damages applicable to suits for libel or slander, since they must vary according to the circumstances of each case, yet the damages awarded ought to be reasonably proportionate to the injury done and hence a verdict is open to inspection and revision by the court for the purpose of determining whether the jury were guided by a sound discretion in fixing damages.[11]

5. Nominal Damages. If the defamatory charge is actionable *per se*, plaintiff is

6. Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66. See also Malloy *v.* Bennett, 15 Fed. 371.

7. Bruce *v.* Reed, 104 Pa. St. 408, 49 Am. Rep. 586.

8. Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; O'Brien *v.* Bennett, 59 N. Y. App. Div. 623, 69 N. Y. Suppl. 298; Morgan *v.* Bennett, 44 N. Y. App. Div. 323, 60 N. Y. Suppl. 619; McMahon *v.* Bennett, 31 N. Y. App. Div. 16, 52 N. Y. Suppl. 390.

9. Stacy *v.* Portland Pub. Co., 68 Me. 279.

10. Hubbard *v.* Rutledge, 52 Miss. 581; Ferguson *v.* Evening Chronicle Pub. Co., 72 Mo. App. 462; Prince *v.* Brooklyn Daily Eagle, 16 Misc. (N. Y.) 186, 37 N. Y. Suppl. 250. See also Gaines *v.* Gaines, 109 Ill. App. 226; Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157.

11. Davey *v.* Davey, 36 N. Y. App. Div. 640, 56 N. Y. Suppl. 1106 [*affirming* 22 Misc. 668, 50 N. Y. Suppl. 161].

Damages for libel held not excessive.—*California.*— Gilman *v.* McClatchy, 111 Cal. 606, 44 Pac. 241; Mowry *v.* Raabe, 89 Cal. 606, 27 Pac. 157.

Georgia.— Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

Illinois.— Danville Press Co. *v.* Harrison, 99 Ill. App. 244.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Indianapolis Sun Co. *v.* Horrell, 53 Ind. 527.

Kentucky.— Hedge *v.* Lehrer, 37 S. W. 261, 18 Ky. L. Rep. 558.

Louisiana.— Upton *v.* Times-Democrat Pub. Co., 104 La. 141, 28 So. 970.

Maine.— McNally *v.* Burleigh, 91 Me. 22, 39 Atl. 285.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Buckley *v.* Knapp, 48 Mo. 152; Keemle *v.* Sass, 12 Mo. 499.

Nebraska.— Bee Pub. Co., *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822; Bee Pub. Co. *v.* World Pub. Co., 59 Nebr. 713, 82 N. W. 28.

New Jersey.— Ogden *v.* Gibbons, 5 N. J. L. 518.

New York.—Payne *v.* Rouss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705; Jacquelin *v.* Morning Journal Assoc., 39 N. Y. App. Div. 515, 57 N. Y. Suppl. 299; Palmer *v.* New York News Pub. Co., 31 N. Y. App. Div. 210, 52 N. Y. Suppl. 539; Young *v.* Fox, 26 N. Y. App. Div. 261, 49 N. Y. Suppl. 634; Wright *v.* Gregory, 9 N. Y. App. Div. 85, 41 N. Y. Suppl. 139; Holmes *v.* Jones, 69 Hun 346, 23 N. Y. Suppl. 631; Stafford *v.* Morning Journal Assoc., 68 Hun 467, 22 N. Y. Suppl. 1008; Alliger *v.* Brooklyn Daily Eagle, 2 Silv. Sup. 5, 6 N. Y. Suppl. 110 [*affirmed* in 127 N. Y. 651, 27 N. E. 856]; Meyer *v.* Press Pub. Co., 46 N. Y. Super. Ct. 127; Hartman *v.* Morning Journal Assoc., 19 N. Y. Suppl. 398 [*affirmed* in 138 N. Y. 638, 34 N. E. 512].

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Rhode Island.— Brown *v.* Providence Telegram Pub. Co., 25 R. I. 117, 54 Atl. 1061; Luft *v.* Linganie, 17 R. I. 420, 22 Atl. 942; Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Texas.— Houston Printing Co. *v.* Dement, 18 Tex. Civ. App. 30, 44 S. W. 558; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 21 S. W. 384.

Utah.— Turner *v.* Stevens, 8 Utah 75, 30 Pac. 24.

West Virginia.— Sweeney *v.* Baker, 13 W. Va. 158, 31 Am. Rep. 757.

Wisconsin.— Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518; Bowe *v.* Rogers, 50 Wis. 598, 7 N. W. 547.

United States.— Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681]; Cooper *v.* Sun Printing, etc.,

entitled to at least nominal damages.[12] It is only when a mere technical invasion of legal right is shown, unaccompanied by any actual injury to person or property, that the court is authorized to instruct the jury to return a verdict for nominal damages only.[13] An award of nominal damages is not, however, necessarily

Assoc., 57 Fed. 566; Gibson *v.* Cincinnati Enquirer, 10 Fed. Cas. No. 5,392, 2 Flipp, 121.

See 32 Cent. Dig. tit. "Libel and Slander," § 353.

Damages for libel held excessive.— *Kentucky.*— Evening Post Co. *v.* Rhea, 81 S. W. 273, 26 Ky. L. Rep. 375.

Louisiana.— Upton *v.* Times-Democrat Pub. Co., 104 La. 141, 28 So. 970.

Minnesota.— Gray *v.* Times Newspaper Co., 78 Minn. 323, 81 N. W. 7; Peterson *v.* Western Union Tel. Co., 75 Minn. 368, 77 N. W. 985, 74 Am. St. Rep. 502, 43 L. R. A. 581; Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302.

New York.— Riker *v.* Clopton, 83 N. Y. App. Div. 310, 82 N. Y. Suppl. 65; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Holmes *v.* Jones, 50 Hun 345, 3 N. Y. Suppl. 156 [*affirmed* in 121 N. Y. 461, 24 N. E. 701]; Turton *v.* New York Recorder, 3 Misc. 314, 22 N. Y. Suppl. 766.

Pennsylvania.— Smith *v.* Times Pub. Co., 178 Pa. St. 481, 36 Atl. 296, 35 L. R. A. 819; Smith *v.* Times Co., 4 Pa. Dist. 399.

United States.— Duke *v.* Morning Journal Assoc., 120 Fed. 860; Daisley *v.* Douglass, 119 Fed. 485.

See 32 Cent. Dig. tit. "Libel and Slander," § 353.

Damages for slander held not excessive.— *Connecticut.*— Woodruff *v.* Richardson, 20 Conn. 238.

Georgia.— Pavlovski *v.* Thornton, 89 Ga. 829, 15 S. E. 822.

Illinois.— Shoaff *v.* Funk, 182 Ill. 224, 54 N. E. 969 [*affirming* 73 Ill. App. 550]; Schmisseur *v.* Kreilich, 92 Ill. 347; Miller *v.* Johnson, 79 Ill. 58; Flagg *v.* Roberts, 67 Ill. 485.

Indiana.— Knight *v.* Lee, 80 Ind. 201; Teagle *v.* Deboy, 8 Blackf. 134; Sanders *v.* Johnson, 6 Blackf. 50, 36 Am. Dec. 564.

Iowa.— McMinemee *v.* Smith, (1903) 93 N. W. 75; Emerson *v.* Miller, 115 Iowa 315, 88 N. W. 803.

Kentucky.— Ross *v.* Ross, 5 B. Mon. 20; Bell *v.* Howard, 4 Litt. 117; Faulkner *v.* Wilcox, 2 Litt. 369.

Louisiana.— Fatjo *v.* Seidel, 109 La. 699, 33 So. 737; Miller *v.* Holstein, 16 La. 389.

Maine.— Sanborn *v.* Fickett, 91 Me. 364, 40 Atl. 66; Humphries *v.* Parker, 52 Me. 502.

Minnesota.— Blume *v.* Scheer, 83 Minn. 409, 86 N. W. 446; Earle *v.* Johnson, 81 Minn. 472, 84 N. W. 332; Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Missouri.— Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863; Unterberger *v.* Scharff, 51 Mo. App. 102.

Nebraska.— Herzog *v.* Campbell, 47 Nebr. 370, 66 N. W. 424.

New York.— Cruikshank *v.* Gordon, 48 Hun 308, 1 N. Y. Suppl. 443 [*affirmed* in 119 N. Y. 178, 23 N. E. 457]; Wendt *v.* Craig, 17 N. Y. Suppl. 748; Maesk *v.* Smith, 12 N. Y. Suppl. 423; Webber *v.* Vincent, 9 N. Y. Suppl. 101; Southcombe *v.* Armstrong, 8 N. Y. Suppl. 361.

Pennsylvania.— Rhoads *v.* Anderson, 10 Pa. Cas. 247, 13 Atl. 823; McGee *v.* Kinsey, 1 Phila. 326.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 354; Templeton *v.* Graves, 59 Wis. 95, 17 N. W. 672.

England.— Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly. Rep. 913, 111 E. C. L. 829.

See 32 Cent. Dig. tit. "Libel and Slander," § 354.

Damages for slander held excessive.— *California.*— Sherwood *v.* Kyle, 125 Cal. 652, 58 Pac. 270; Rhodes *v.* Naglee, 66 Cal. 677, 6 Pac. 863.

Connecticut.— Haight *v.* Hoyt, 50 Conn. 583.

Georgia.— Beggarly *v.* Craft, 31 Ga. 309, 76 Am. Dec. 687.

Kansas.— Swartzel *v.* Dey, 3 Kan. 244.

Louisiana.— Boullemet *v.* Philips, 2 Rob. 365.

Maine.— Davis *v.* Starrett, 97 Me. 568, 55 Atl. 516, Libby *v.* Towle, 90 Me. 262, 38 Atl. 171.

Nebraska.— Brooks *v.* Dutcher, 22 Nebr. 644, 35 N. W. 128.

New Jersey.— Vanch *v.* Hull, 3 N. J. L. 578, 4 Am. Dec. 389.

New York.— White *v.* Newcomb, 25 N. Y. App. Div. 397, 49 N. Y. Suppl. 704; Cummings *v.* Line, 18 N. Y. Suppl. 469 [*affirmed* in 138 N. Y. 675, 34 N. E. 515].

Pennsylvania.— Mahler *v.* Dunn, 15 Pa. Dist. 273; Liebfried *v.* Wotring, 1 Lehigh Val. L. Rep. 349.

South Carolina.— Nettles *v.* Harrison, 2 McCord 230.

Texas.— Nunnally *v.* Taliaferro, 82 Tex. 286, 18 S. W. 149.

See 32 Cent. Dig. tit. "Libel and Slander," § 354.

Insufficient damages.— Simpson *v.* Robinson, 104 La. 180, 28 So. 908; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885; Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728.

12. Donahoe *v.* Star Pub. Co., 4 Pennew. (Del.) 166, 55 Atl. 337; Miles *v.* Harrington, 8 Kan. 425; Jones *v.* Edwards, 57 Miss. 28.

13. Markham *v.* Russell, 12 Allen (Mass.) 573, 90 Am. Dec. 169. See also Blohm *v.* Bamber, 10 N. Y. Suppl. 98.

The court cannot presume that plaintiff is entitled to only nominal damages. Lick *v.* Owen, 47 Cal. 252.

erroneous.[14] Thus it is held that where there is no ill-will or malice on the part of defendant, and no special damages, actual injury or pecuniary loss, alleged, or proven, the jury may find a verdict for only nominal damages.[15] So it has been held that the award of nominal damages may be justified where the alleged defamatory charge was published in response to defamatory charges on the part of plaintiff in the course of a controversy between the parties.[16] But the good faith or good intent of defendant alone is insufficient to deprive plaintiff of the right to substantial damages.[17]

H. Trial, Judgment, and Review — 1. Trial[18] — a. In General. The general principles governing the conduct of trials of civil cases generally are applicable to actions for libel or slander.[19]

b. Province of Court and Jury — (i) *In General.* The general rule making it the province of the court to pass upon questions of law and of the jury to pass upon questions of fact is applicable as a general proposition to actions for libel or slander.[20] In the federal courts, it is held, the judge in submitting a case to the jury may express his opinion of the facts.[21] In some states it is provided by statute or the constitution that the jury shall be the judge both of law and fact in suits for libel.[22] Provisions of this character in several jurisdictions have, how-

14. Palmer *v.* Leader Pub. Co., 7 Pa. Super. Ct. 594, 42 Wkly. Notes Cas. 556.

15. *Connecticut.*— Flint *v.* Clark, 13 Conn. 361.

Indiana.— Henry *v.* Moberly, 23 Ind. App. 305, 51 N. E. 497.

Louisiana.— Clement *v.* His Creditors, 37 La. Ann. 692; Dobard *v.* Nunez, 6 La. Ann. 294.

Maine.— Estes *v.* Estes, 75 Me. 478.

Michigan.— Scougale *v.* Sweet, 124 Mich. 311, 82 N. W. 1061; Bailey *v.* Kalamazoo Pub. Co., 40 Mich. 251.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New York.— Rundell *v.* Butler, 10 Wend. 119. See also Wavle *v.* Wavle, 9 Hun 125, where the evidence was such as would have justified a plea of justification.

Texas.— Irwin *v.* Cook, 24 Tex. 244.

England.— Wakelin *v.* Morris, 2 F. & F. 26.

See 32 Cent. Dig. tit. "Libel and Slander," § 352.

If the prior reputation of plaintiff was such that he sustained no injury from the charge, the jury may give nominal damages. Flint *v.* Clark, 13 Conn. 361. See also Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Substantial damages not dependent upon proof of actual damages see *supra*, VIII, G, 2, b.

16. Pugh *v.* McCarty, 40 Ga. 444; Kelly *v.* Sherlock, L. R. 1 Q. B. 686, 12 Jur. N. S. 937, 35 L. J. Q. B. 209.

17. *California.*— Edwards *v.* San Jose Printing, etc., Co., 99 Cal. 431, 34 Pac. 128, 37 Am. St. Rep. 70.

Iowa.— Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079.

Massachusetts.— See Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

Michigan.— Whittemore *v.* Weiss, 33 Mich. 348.

New York.— Griebel *v.* Rochester Printing Co., 60 Hun 319, 14 N. Y. Suppl. 848.

Texas.—Sanders *v.* Hall, 22 Tex. Civ. App. 282, 52 S. W. 594.

Virginia.— Blackwell *v.* Landreth, 90 Va. 748, 19 S. E. 791.

See 32 Cent. Dig. tit. "Libel and Slander," § 352. See also *supra*, VIII, G, 2, d, note 68.

Proof of actual malice not a prerequisite to recovery of actual damages see *supra*, VIII, G, 2, c.

18. Trial generally see Trial.

19. See cases cited *infra*, this note.

Argument of counsel see Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687; Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474; Mitchell *v.* Borden, 8 Wend. (N. Y.) 570.

Right to open and close see Cox *v.* Strickland, 101 Ga. 482, 28 S. E. 655; Teagle *v.* Deboy, 8 Blackf. (Ind.) 134; Samples *v.* Carnahan, 21 Ind. App. 55, 51 N. E. 425.

Necessity for impaneling jury to assess damages see Schewer *v.* Klein, 15 La. Ann. 303.

Necessity of election by plaintiff as to defamatory matter relied on see Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Downs *v.* Hawley, 112 Mass. 237; Clark *v.* Munsell, 6 Metc. (Mass.) 373.

Admission or rejection of evidence see Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687; Maclean *v.* Scripps, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; Gould *v.* Weed, 12 Wend. (N. Y.) 12 (holding that where publications other than those sued on are offered in evidence, the judge may require them to be first submitted to him); Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

20. Smith *v.* Stewart, 41 Minn. 7, 42 N. W. 595; Hunt *v.* Bennett, 19 N. Y. 173.

21. Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

22. McCloskey *v.* Pulitzer Pub. Co., 152 Mo. 339, 53 S. W. 1087; Arnold *v.* Jewett, 125 Mo. 241, 28 S. W. 614; Sands *v.* Marquardt, 113 Mo. App. 490, 87 S. W. 1011.

ever, been held to be applicable to criminal prosecutions for libel only;[23] but in England the statute commonly known as Fox's Act,[24] although confined in its terms to trials of indictments or informations for libel, has been construed as extending to civil cases,[25] and the English rule has been adopted to some extent in this country.[26]

(II) *Construction of Defamatory Language.*[27] It is the province of the court to determine what constitutes libel or slander abstractly. Hence if the language is plain and unambiguous it is a question of law whether or not it is libelous or slanderous.[28] But if the language is ambiguous and susceptible of two

See also Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624.

Provision held inapplicable to slander.— Grimes *v.* Thorp, 113 Mo. App. 652, 88 S. W. 638.

The court is held not to be deprived of power by such provisions to pass on the pleadings (St. James Military Academy *v.* Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L. R. A. 667], on the admissibility of evidence (Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. 624), or to award a nonsuit (Hazy *v.* Woitke, 23 Colo. 556, 48 Pac. 1048; Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60). On the other hand it is held that the court cannot direct a verdict for plaintiff (Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Heller *v.* Pulitzer Pub. Co., 153 Mo. 205, 54 S. W. 457; Duncan *v.* Williams, 107 Mo. App. 539, 81 S. W. 1175), or decide that a communication is not privileged (Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746).

Duty of court to instruct jury as to its functions.— The court is not obliged, in the absence of a request, to instruct the jury that they are the judges of the law as well as the fact. Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138.

Assessment of damages according to rules of law.— Under the Missouri statute it has been held that the jury must assess damages according to the settled principles of law. Sands *v.* Marquardt, 113 Mo. App. 490, 87 S. W. 1011.

23. Forshee *v.* Abrams, 2 Iowa 571; Hunt *v.* Bennett, 19 N. Y. 173; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544.

24. St. 32 Geo. III, c. 60.

25. Cox *v.* Lee, L. R. 4 Exch. 284, 38 L. J. Exch. 219, 21 L. T. Rep. N. S. 178; Baylis *v.* Lawrence, 11 A. & E. 920, 4 Jur. 652, 9 L. J. Q. B. 196, 3 P. & D. 526, 39 E. C. L. 485; Campbell *v.* Spottiswoode, 3 B. & S. 769, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. Rep. N. S. 201, 11 Wkly. Rep. 569, 113 E. C. L. 769; Parmiter *v.* Coupland, 4 Jur. 701, 9 L. J. Exch. 202, 6 M. & W. 105.

26. Shattuck *v.* Allen, 4 Gray (Mass.) 540.

27. Construction of defamatory language in general see *supra*, III, J.

28. *California.*— Tontini *v.* Cevaseo, 114 Cal. 266, 46 Pac. 103.

Colorado.— Downing *v.* Brown, 3 Colo. 571.

Connecticut.— Donaghue *v.* Gaffy, 54 Conn. 257, 7 Atl. 552.

Delaware.— Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. 181; Croasdale *v.* Tantum, 6 Houst. 60; Croasdale *v.* Bright, 6 Houst. 52.

Illinois.— Dowie *v.* Priddle, 216 Ill. 553, 75 N. E. 243; Gerald *v.* Inter Ocean Pub. Co., 90 Ill. App. 205.

Indiana.— Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91; Young *v.* Clegg, 93 Ind. 371; Gabe *v.* McGinnis, 68 Ind. 538; Thompson *v.* Grimes, 5 Ind. 385.

Kentucky.— Estham *v.* Curd, 15 B. Mon. 102; Morris *v.* Curtis, 45 S. W. 86, 20 Ky. L. Rep. 56.

Maryland.— Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716; Negley *v.* Farrow, 60 Md. 158, 45 Am. Rep. 715.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507.

Minnesota.— Smith *v.* Stewart, 41 Minn. 7, 42 N. W. 595; McCarty *v.* Barrett, 12 Minn. 494.

New York.— Hunt *v.* Bennett, 19 N. Y. 173; Crashly *v.* Press Pub. Co., 74 N. Y. App. Div. 118, 77 N. Y. Suppl. 711; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317; Snyder *v.* Andrews, 6 Barb. 43; Matthews *v.* Beach, 5 Sandf. 256; Woodruff *v.* Woodruff, 36 Misc. 15, 72 N. Y. Suppl. 39; Zinserling *v.* Journal Co., 26 Misc. 591, 57 N. Y. Suppl. 905; Shanks *v.* Stumpf, 23 Misc. 264, 51 N. Y. Suppl. 154 [*affirming* 34 N. Y. App. Div. 623, 624, 54 N. Y. Suppl. 1115]; Calkins *v.* Wheaton, 1 Edm. Sel. Cas. 226; Laine *v.* Wells, 7 Wend. 175.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477; Van Ingen *v.* Newton, 1 Disn. 482, 12 Ohio Dec. (Reprint) 746.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544; Flitcraft *v.* Jenks, 3 Whart. 158; Parsley *v.* Wilhelm, 17 Pa. Super. Ct. 444; Goebeler *v.* Wilhelm, 17 Pa. Super. Ct. 432.

Tennessee.— Williams *v.* McKee, 98 Tenn. 139, 38 S. W. 730.

Texas.— Mitchell *v.* Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134.

Vermont.— Norton *v.* Livingston, 64 Vt. 473, 24 Atl. 247.

Washington.— Urban *v.* Helmick, 15 Wash. 155, 45 Pac. 747.

United States.— Morning Journal Assoc.

meanings, one defamatory and the other not, it is for the jury to decide in what sense it was used.[29] However, it is for the court to determine whether or not the

v. Duke, 128 Fed. 657, 63 C. C. A. 459 [*affirming* 120 Fed. 860]; Scullin *v.* Harper, 78 Fed. 460, 24 C. C. A. 169; Morgan *v.* Halberstadt, 60 Fed. 592, 9 C. C. A. 147.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 357, 358.

Compare Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60.

If the declaration is demurred to, the court must determine whether it sets out a good cause of action. Twombly *v.* Monroe, 136 Mass. 464; Shattuck *v.* Allen, 4 Gray (Mass.) 540; Goodrich *v.* Davis, 11 Metc. (Mass.) 473; Hemmens *v.* Nelson, 138 N. Y. 517, 34 N. E. 342, 20 L. R. A. 440.

Submission of question to jury held not to be prejudicial to defendant.— It has been held that the fact that the meaning of words actionable on their face was submitted to the jury was harmless when a verdict was returned for plaintiff and that defendant could not complain. Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103; Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381. See also Olson *v.* Aubolee, 92 Minn. 312, 99 N. W. 1128.

Where the words charge a crime, it is error to submit to the jury as a question of fact what constitutes such crime. Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609. In the case of a charge of perjury, where there is no dispute as to the facts sworn to, the question whether the evidence was material to the issue is for the court. Power *v.* Price, 16 Wend. (N. Y.) 450; Steinman *v.* McWilliams, 6 Pa. St. 170.

Rule in libel cases.— In England the rule at one time obtained that the quality of the alleged libel as it stands on the record either simply or as explained by averments and innuendos is purely a question of law for the consideration of the court. Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544 [*citing* 2 Starkie Sl. & L. 281]. That this was the law in England both in civil and criminal proceedings up to 1792 was maintained so rigidly that nothing was submitted to the jury in such cases but the fact of publication and the truth of the innuendos. Rex *v.* Woodfall, 5 Burr. 2667; Rex *v.* Withers, 3 T. R. 428; Rex *v.* St. Asaph, 3 T. R. 428 note. But the statute of 33 Geo. III, c. 60, commonly known as Mr. Fox's Act, although confined in its terms to trials of indictments or informations for libel, has been extended by the English courts to civil cases, and it has been the approved practice for the judge in civil actions after explaining to the jury the legal definition of a libel to leave to them the question whether the publication upon which the action is founded falls within that definition. Cox *v.* Lee, L. R. 4 Exch. 284, 38 L. J. Exch. 219, 21 L. T. Rep. N. S. 178; Baylis *v.* Lawrence, 11 A. & E. 920, 4 Jur. 652, 9 L. J. Q. B. 196, 3 P. & D. 526, 39 E. C. L. 485; Campbell *v.* Spottiswoode, 3 B. & S. 781, 9 Jur. N. S. 1069, 32 L. J. Q. B. 185, 8 L. T. Rep. N. S. 201, 11 Wkly. Rep. 569, 113 E. C. L. 769; Parmiter *v.* Coupland, 4 Jur. 701, 9 L. J. Exch. 202, 6 M. & W. 105. See also Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544. In Massachusetts the English rule has been followed. Shattuck *v.* Allen, 4 Gray (Mass.) 540. But the English and Massachusetts decisions do not support the rule that the question of libel or no must always and necessarily be left to the jury. Capital, etc., Bank *v.* Henty, 7 App. Cas. 741, 47 J. P. 214, 52 L. J. Q. B. 232, 47 L. T. Rep. N. S. 662, 31 Wkly. Rep. 157; Mulligan *v.* Cole, L. R. 10 Q. B. 549, 44 L. J. Q. B. 153, 33 L. T. Rep. N. S. 12; Harris *v.* Wilson, 9 B. & C. 643, 7 L. J. K. B. O. S. 302, 4 M. & R. 605, 17 E. C. L. 289; Hunt *v.* Goodlake, 43 L. J. C. P. 54, 29 L. T. Rep. N. S. 472; Twombly *v.* Monroe, 136 Mass. 464, 469, where it is said, however, "We are satisfied with the rule, that, at the trial of civil actions for a libel, it is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in a defamatory sense, that the court can rule, as matter of law, that the publication is not libelous, and withdraw the case from the jury, or order a verdict for defendant." In most jurisdictions in this country it is held that, where the words are unambiguous and clearly libelous on their face, incapable of an innocent meaning, and the case free from any evidence tending to change their natural meaning, it is both the right and duty of the court in civil actions to instruct the jury, as a matter of law, that they are defamatory. Pugh *v.* McCarty, 44 Ga. 383; Gabe *v.* McGinnis, 68 Ind. 538; Smith *v.* Stewart, 41 Minn. 7, 42 N. W. 595; Hunt *v.* Bennett, 19 N. Y. 173; Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544; Gregory *v.* Atkins, 42 Vt. 237; Gottbehuet *v.* Hubachek, 36 Wis. 515.

29. *California.* — Tonini *v.* Cevasco, 114 Cal. 266, 46 Pac. 103.

Colorado.— Downing *v.* Brown, 3 Colo. 571.

Georgia.— Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103. See also Beazley *v.* Reid, 68 Ga. 380.

Illinois.— Merrill *v.* Marshall, 113 Ill. App. 447.

Indiana.— Gabe *v.* McGinnis, 68 Ind. 538; Justice *v.* Kirlin, 17 Ind. 588; Thompson *v.* Grimes, 5 Ind. 385; Alcorn *v.* Bass, 17 Ind. App. 500, 46 N. E. 1024.

Iowa.— Jensen *v.* Damm, 127 Iowa 555, 103 N. W. 798; Morse *v.* Times-Republican Printing Co., 124 Iowa 707, 100 N. W. 867; Quinn *v.* Prudential Ins. Co., 116 Iowa 522, 90 N. W. 349.

Kansas.— Henicke *v.* Griffith, 29 Kan. 516.

Kentucky.—Welsh *v.* Eakle, 7 J. J. Marsh. 424.

Maine.— Usher *v.* Severance, 20 Me. 9, 37 Am. Dec. 33.

Massachusetts.— Twombly *v.* Monroe, 136

language on its face is capable of a double meaning and should be submitted to

Mass. 464; Downs *v.* Hawley, 112 Mass. 237; Nye *v.* Otis, 8 Mass. 122, 5 Am. Dec. 79.

Michigan.—Hinchman *v.* Knight, 132 Mich. 532, 94 N. W. 1; Smurthwaite *v.* News Pub. Co., 124 Mich. 377, 83 N. W. 116; Eikhoff *v.* Gilbert, 124 Mich. 353, 83 N. W. 110, 51 L. R. A. 451; Simons *v.* Burnham, 102 Mich. 189, 60 N. W. 476; Ewing *v.* Ainger, 96 Mich. 587, 55 N. W. 996; French *v.* Detroit Free Press Co., 95 Mich. 168, 54 N. W. 711; McAllister *v.* Detroit Free Press Co., 95 Mich. 164, 54 N. W. 710.

Minnesota.— Sharpe *v.* Larson, 67 Minn. 428, 70 N. W. 1, 554; Prendergast *v.* Dispatch Printing Co., 40 Minn. 295, 41 N. W. 1036; Petsch *v.* Dispatch Printing Co., 40 Minn. 291, 41 N. W. 1034; Woodling *v.* Knickerbocker, 31 Minn. 268, 17 N. W. 387; McCarty *v.* Barrett, 12 Minn. 494; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494.

Mississippi.— Rodgers *v.* Kline, 56 Miss. 808, 31 Am. Rep. 389.

Missouri.— Ukman *v.* Daily Record Co., 189 Mo. 378, 88 S. W. 60; Birch *v.* Benton, 26 Mo. 153; Bridgman *v.* Armer, 57 Mo. App. 528.

Nevada.— Thompson *v.* Powning, 15 Nev. 195.

New Jersey.— Hand *v.* Winton, 38 N. J. L. 122.

New York.— Bergmann *v.* Jones, 94 N. Y. 51; Cornish *v.* Bennett, 82 N. Y. App. Div. 636, 81 N. Y. Suppl. 1121 [*affirming* 38 Misc. 688, 78 N. Y. Suppl. 244]; D'Andrea *v.* New York Press Co., 61 N. Y. App. Div. 605, 70 N. Y. Suppl. 759; Payne *v.* Rouss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705; Garby *v.* Bennett, 40 N. Y. App. Div. 163, 37 N. Y. Suppl. 853; Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728 [*affirming* 24 Misc. 238, 52 N. Y. Suppl. 515]; Lally *v.* Emery, 59 Hun 237, 12 N. Y. Suppl. 785; Patch *v.* Tribune Assoc., 38 Hun 368; Rundell *v.* Butler, 7 Barb. 260; Snyder *v.* Andrews, 6 Barb. 43; Clark *v.* Anderson, 11 N. Y. Suppl. 729; Byrnes *v.* Mathews, 12 N. Y. St. 74; Calkins *v.* Wheaton, 1 Edm. Sel. Cas. 226; Dolloway *v.* Turrill, 26 Wend. 383; Maynard *v.* Beardsley, 7 Wend. 560, 22 Am. Dec. 595 [*affirming* 4 Wend. 336]; Gibson *v.* Williams, 4 Wend. 320.

North Carolina.— Lucas *v.* Nichols, 52 N. C. 32; Simmons *v.* Morse, 51 N. C. 6.

North Dakota.— Lauder *v.* Jones, 13 N. D. 525, 101 N. W. 907.

Ohio.— Phillips *v.* Le June, 25 Ohio Cir. Ct. 107; Getchell *v.* Merchant Tailors' Exch., 11 Ohio Dec. (Reprint) 390, 26 Cinc. L. Bul. 233; English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133; Union Cent. L. Ins. Co. *v.* Mutual Ben. L. Ins. Co., 2 Cinc. L. Bul. 269, 5 Ohio Dec. (Reprint) 521, 6 Cinc. L. Bul. 382.

Pennsylvania.— Pittsburgh, etc., Pass. R. Co. *v.* McCurdy, 114 Pa. St. 554, 8 Atl. 230, 60 Am. Rep. 363; Vanderlip *v.* Roe, 23 Pa. St. 82; Dottarer *v.* Bushey, 16 Pa. St. 204; Hays *v.* Brierly, 4 Watts 392; Young *v.* Geiske, 21 Lanc. L. Rev. 33.

South Carolina.— Cregier *v.* Bunton, 2 Rich. 395; Jones *v.* Rivers, 3 Brev. 95; Davis *v.* Johnston, 2 Bailey 579.

Tennessee.— Hancock *v.* Stephens, 11 Humphr. 507; Watson *v.* Nicholas, 6 Humphr. 174; Hays *v.* Hays, 1 Humphr. 402.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359; Royce *v.* Maloney, 58 Vt. 437, 5 Atl. 395; Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633; Smith *v.* Miles, 15 Vt. 245.

United States.— Hanchett *v.* Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681]; Culmer *v.* Canby, 101 Fed. 195, 41 C. C. A. 302; Press Pub. Co. *v.* McDonald, 63 Fed. 238, 11 C. C. A. 155, 26 L. R. A. 53 [*affirming* 55 Fed. 264]; Erber *v.* Dun, 12 Fed. 526, 4 McCrary 160. See also Locke *v.* Bradstreet Co., 22 Fed. 771.

England.— Simmons *v.* Mitchell, 6 App. Cas. 156, 45 J. P. 237, 50 L. J. P. C. 11, 43 L. T. Rep. N. S. 710, 29 Wkly. Rep. 401; Jenner *v.* A'Beckett, L. R. 7 Q. B. 11, 41 L. J. Q. B. 14, 25 L. T. Rep. N. S. 464, 20 Wkly. Rep. 181; Hart *v.* Wall, 2 C. P. D. 146, 46 L. J. C. P. 227, 25 Wkly. Rep. 373; Stockdale *v.* Tarte, 4 A. & E. 1016, 31 E. C. L. 441; Fisher *v.* Clement, 10 B. & C. 472, 8 L. J. K. B. O. S. 176, 21 E. C. L. 203; Shipley *v.* Todhunter, 7 C. & P. 680, 32 E. C. L. 819; O'Brien *v.* Salisbury, 54 J. P. 215; Churchill *v.* Gedney, 53 J. P. 471; Linotype Co. *v.* British Empire Type-Setting Mach. Co., 81 L. T. Rep. N. S. 331; Street *v.* Licensed Victuallers Soc., 22 Wkly. Rep. 553. See also Fray *v.* Fray, 17 C. B. N. S. 603, 10 Jur. N. S. 1153, 34 L. J. C. P. 45, 112 E. C. L. 603; O'Donoghue *v.* Hussey, Ir. R. 5 C. L. 124.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 357, 358, 359.

This rule has been applied to alleged charges of abortion (Hitzfelder *v.* Koppelmann, 30 Tex. Civ. App. 162, 70 S. W. 353), arson (Warner *v.* Southall, 165 N. Y. 496, 59 N. E. 269 [*affirming* 31 N. Y. App. Div. 375, 52 N. Y. Suppl. 320], blackmailing (Edsall *v.* Brooks, 3 Rob. (N. Y.) 284), burglary (Long *v.* Tribune Printing Co., 107 Mich. 207, 65 N. W. 108), embezzlement (Friedburg *v.* Nudd, 9 Kan. App. 743, 60 Pac. 476. See also Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752; Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249), forgery (McLaughlin *v.* Bascom, 38 Iowa 660), larceny (Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. 361, 3 L. R. A. 69; Dunnell *v.* Fiske, 11 Metc. (Mass.) 551; Edwards *v.* Chandler, 14 Mich. 471, 90 Am. Dec. 249; Hayes *v.* Ball, 72 N. Y. 418; Dexter *v.* Taber, 12 Johns. (N. Y.) 239; Eifert *v.* Sawyer, 2 Nott & M. (S. C.) 511, 10 Am. Dec. 633), misconduct in office (Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Ellsworth *v.* Hayes, 71 Wis. 427, 37 N. W. 249), perjury (Dedway *v.* Powell, 4 Bush

the jury for construction.[30] It is the duty of the court to say whether a publication is capable of the meaning ascribed to it by the innuendo.[31] But when the court is satisfied of that, it must be left to the jury to say whether the publication has the meaning so ascribed to it.[32]

(III) *PERSONS DEFAMED.*[33] Whether plaintiff was the person intended, where the defamatory matter does not show on its face that it refers to him, is a question for the jury.[34] But in the absence of any innuendo, colloquium, or

(Ky.) 77, 96 Am. Dec. 283; Hawkins *v.* New Orleans Printing, etc., Co., 29 La. Ann. 134; Dell *v.* McBride, 133 Mich. 649, 95 N. W. 717), poisoning (Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456), unchastity or immorality (Roe *v.* Chitwood, 36 Ark. 210; Craver *v.* Norton, 114 Iowa 46, 86 N. W. 54, 89 Am. St. Rep. 346; Riddell *v.* Thayer, 127 Mass. 487; Matthews *v.* Detroit Journal Co., 123 Mich. 608, 82 N. W. 243; Derham *v.* Derham, 123 Mich. 451, 82 N. W. 218; Upton *v.* Upton, 51 Hun (N. Y.) 184, 4 N. Y. Suppl. 936; Shea *v.* Sun Printing, etc., Assoc., 14 Misc. (N. Y.) 415, 35 N. Y. Suppl. 703; Ronnie *v.* Ryder, 8 N. Y. Suppl. 5), or of having a venereal disease (Upton *v.* Upton, 51 Hun (N. Y.) 184, 4 N. Y. Suppl. 936).

The proper question for the jury is whether the tendency of the matter is injurious to plaintiff, not whether the intention of the publisher is to injure plaintiff. Fisher *v.* Clement, 10 B. & C. 472, 8 L. J. K. B. O. S. 176, 21 E. C. L. 203; O'Brien *v.* Salisbury, 54 J. P. 215. See also Haire *v.* Wilson, 9 B. & C. 643, 7 L. J. K. B. O. S. 302, 4 M. & R. 605, 17 E. C. L. 289.

Where words are spoken in a foreign language, the meaning is a question of fact for the jury. Noeninger *v.* Vogt, 88 Mo. 589; Schild *v.* Legler, 82 Wis. 73, 51 N. W. 1099.

Whether words were spoken of a man in a certain capacity is for the jury (Dicken *v.* Shepherd, 22 Md. 399; Skinner *v.* Grant, 12 Vt. 456), unless the publication itself plainly refers to the acts of one in an official or other special capacity (Hay *v.* Reid, 85 Mich. 296, 48 N. W. 507).

30. *California.*—Van Vactor *v.* Walkup, 46 Cal. 124.

Massachusetts.— Shattuck *v.* Allen, 4 Gray 540.

Ohio.— Reinhardt *v.* Faschnacht, 4 Ohio Cir. Ct. 321, 2 Ohio Cir. Dec. 571; English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133.

Wisconsin.— Bradley *v.* Cramer, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511.

United States.— Kerr *v.* Force, 14 Fed. Cas. No. 7,730, 3 Cranch C. C. 8.

See 32 Cent. Dig. tit. "Libel and Slander," § 357.

31. *Hawaii.* — Provisional Government *v.* Smith, 9 Hawaii 257.

Illinois.— Herrick *v.* Tribune Co., 108 Ill. App. 244.

Indiana.— Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54.

Maryland.— Kilgour *v.* Evening Star Newspaper Co., 96 Md. 16, 53 Atl. 716.

New York.— Morrison *v.* Smith, 177 N. Y. 366, 69 N. E. 725; Fry *v.* Bennett, 5 Sandf. 54.

Ohio.— English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133.

Pennsylvania.—Parsley *v.* Wilhelms, 17 Pa. Super. Ct. 444; Goebeler *v.* Wilhelm, 17 Pa. Super. Ct. 432; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276.

England.— Blagg *v.* Sturt, 10 Q. B. 899, 11 Jur. 1011, 16 L. J. Q. B. 39, 59 E. C. L. 899; Hunt *v.* Godlake, 43 L. J. C. P. 54, 29 L. T. Rep. N. S. 472.

32. *Hawaii.*— Provisional Government *v.* Smith, 9 Hawaii 257.

Indiana.— Hamilton *v.* Lowery, 33 Ind. App. 184, 71 N. E. 54.

Ohio.— Getchell *v.* Merchant Tailors' Exch., 11 Ohio Dec. (Reprint) 390, 26 Cinc. L. Bul. 233; English *v.* English, 9 Ohio Dec. (Reprint) 167, 11 Cinc. L. Bul. 133.

Pennsylvania.— Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544; McCorkle *v.* Binns, 5 Binn. 340, 6 Am. Dec. 420; Parsley *v.* Wilhelm, 17 Pa. Super. Ct. 444; Goebeler *v.* Wilhelm, 17 Pa. Super. Ct. 432; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276.

England.— Blagg *v.* Sturt, 10 Q. B. 899, 11 Jur. 1011, 16 L. Q. B. 39, 59 E. C. L. 899.

33. **Indefiniteness or error as to person defamed** see *supra*, III, K, 9.

34. *Connecticut.* — Mix *v.* Woodward, 12 Conn. 262.

Illinois.— McLaughlin *v.* Schnellbacher, 65 Ill. App. 50.

Indiana.— Prosser *v.* Callis, 117 Ind. 105, 19 N. E. 735; De Armond *v.* Armstrong, 37 Ind. 35.

Massachusetts.— Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 294, 34 N. E. 462, 20 L. R. A. 856 (where it is said: "It has often been held that it is a question of fact for the jury whether the words were or were not spoken or written 'of and concerning the plaintiff'"); Goodrich *v.* Davis, 11 Metc. 473; Miller *v.* Butler, 6 Cush. 71, 52 Am. Dec. 768.

Michigan.— Boehmer *v.* Detroit Free Press Co., 94 Mich. 7, 53 N. W. 822, 34 Am. St. Rep. 318; Lewis *v.* Soule, 3 Mich. 514.

Minnesota.— Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. 103.

New Hampshire.— Smart *v.* Blanchard, 42 N. H. 137.

New York.— Stokes *v.* Morning Journal Assoc., 66 N. Y. App. Div. 569, 73 N. Y. Suppl. 245; Green *v.* Telfair, 20 Barb. 11; Lyons *v.* Townsend, 2 Edm. Sel. Cas. 452; Gibson *v.* Williams, 4 Wend. 320; Van Vechten *v.* Hopkins, 5 Johns. 211, 4 Am. Dec. 339.

special averments of fact in the declaration connecting the defamatory language with plaintiff, it is for the court to say whether it was published of and concerning plaintiff.[35]

(IV) *PUBLICATION.*[36] It is usually a question of fact to be determined by the jury whether there was any publication of the libel or slander,[37] or whether such publication was made by defendant.[38]

(V) *JUSTIFICATION.*[39] Whether the allegations in pleadings setting up the defense of justification show a justification is a question of law for the court.[40] But it is for the jury to decide whether the truth of the defamatory matter is established by the evidence.[41]

(VI) *MITIGATION AND AGGRAVATION OF DAMAGES*[42] — (A) *In General.* It is usually for the jury to determine whether matters relied upon in mitigation or aggravation of damages are established by the evidence.[43]

(B) *Retraction.*[44] The question whether a retraction of a libel is full and complete within the meaning of the statute is ordinarily a question of law for the

South Dakota.— Nichols *v.* Smith, (1905) 102 N. W. 1135; Barron *v.* Smith, (1904) 101 N. W. 1105.

United States.— Butler *v.* Barret, 130 Fed. 944.

England.— Australian Newspaper Co. *v.* Bennett, [1894] A. C. 284, 58 J. P. 604, 63 L. J. P. C. 105, 70 L. T. Rep. N. S. 597, 6 Reports 484; Lawrence *v.* Newberry, 64 L. T. Rep. N. S. 797, 39 Wkly. Rep. 605.

See 32 Cent. Dig. tit. "Libel and Slander," § 359.

35. Barrows *v.* Bell, 7 Gray (Mass.) 301, 66 Am. Dec. 479.

36. What constitutes publication see *supra*, IV.

37. Taylor *v.* Moran, 4 Metc. (Ky.) 127; McGeever *v.* Kennedy, 42 S. W. 114, 19 Ky. L. Rep. 845, holding that whether a third person present at the speaking did or did not hear the language is a question of fact for the jury.

Time of publication.— The question as to when the slanderous words were spoken is, under conflicting testimony, for the jury. Schulze *v.* Fox, 53 Md. 37.

Whether allegation in complaint is descriptive.— In Downs *v.* Hawley, 112 Mass. 237 [*distinguishing* Chapin *v.* White, 102 Mass. 139], it was held that whether an allegation in a count for slander that the words were spoken in the hearing of divers citizens of the commonwealth is a descriptive allegation, and consequently not capable of being rejected as surplusage, is a question of construction for the judge.

38. *Delaware.*— Delaware State F. & M. Ins. Co. *v.* Croasdale, 6 Houst. 181.

Indiana.— McCoombs *v.* Tuttle, 5 Blackf. 431.

Massachusetts.— Rumney *v.* Worthley, 186 Mass. 144, 71 N. E. 316.

Minnesota.— Laury *v.* Evans, 87 Minn. 396, 92 N. W. 224.

New York.— Weston *v.* Weston, 83 N. Y. App. Div. 520, 82 N. Y. Suppl. 351; Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429; Stokes *v.* Morning Journal Assoc., 66 N. Y. App. Div. 569, 73 N. Y. Suppl. 245.

See 32 Cent. Dig. tit. "Libel and Slander," § 356.

Compare Robinson *v.* Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983.

39. Justification in general see *supra*, VII, A.

40. Van Ingen *v.* Newton, 1 Disn. (Ohio) 482, 12 Ohio Dec. (Reprint) 746.

41. *Illinois.*— Inland Printer Co. *v.* Economical Half Tone Supply Co., 99 Ill. App. 8.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; St. James Military Academy *v.* Gaiser, 125 Mo. 517, 28 S. W. 851, 46 Am. St. Rep. 502, 28 L. R. A. 667.

New York.— Remsen *v.* Bryant, 47 N. Y. App. Div. 503, 62 N. Y. Suppl. 434; Cameron *v.* Tribune Assoc., 3 Silv. Sup. 575, 7 N. Y. Suppl. 739; Stern *v.* Barrett Chemical Co., 29 Misc. 609, 61 N. Y. Suppl. 221 [*reversing* 28 Misc. 429, 58 N. Y. Suppl. 1129]; Thomas *v.* Croswell, 7 Johns. 264, 5 Am. Dec. 269.

Ohio.— Van Ingen *v.* Newton, 1 Disn. 482, 12 Ohio Dec. (Reprint) 746.

Pennsylvania.— See Bryant *v.* Pittsburg Times, 192 Pa. St. 585, 44 Atl. 251.

England.— Alexander *v.* North Eastern R. Co., 6 B. & S. 340, 11 Jur. N. S. 619, 34 L. J. Q. B. 152, 13 Wkly. Rep. 651, 118 E. C. L. 340.

See 32 Cent. Dig. tit. "Libel and Slander," § 361.

Submission of question to jury as harmless error.— Where there is no evidence in justification, defendant cannot complain because the question of the truth of the words was submitted to the jury. Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668. See also Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

42. Amount of damages generally a question of fact for jury see *supra*, VIII, G, 1, a.

Award of exemplary damages a question for jury see *supra*, VIII, G, 3, a, text and note 98.

43. Macaulev *v.* Elrod, 27 S. W. 867, 16 Ky. L. Rep. 291; Botelar *v.* Bell, 1 Md. 173; Youmans *v.* Paine, 86 Hun (N. Y.) 479, 35 N. Y. Suppl. 50.

44. Retraction as mitigating circumstance see *supra*, VII, B, 10.

court, since it involves the comparison and construction of two written instruments;[45] and whether it is published in a reasonable time, although not always a question of law, is a question of law where the court can see from the nature of the case that the time elapsed exceeds any possible time required by convenience or necessity.[46]

(c) *Unsuccessful Plea of Justification.*[47] Whether an unsuccessful plea of justification enhances damages depends on the good faith in which it was tendered and hence is a question for the jury.[48]

(VII) *PRIVILEGE.*[49] Where there is no dispute as to the circumstances under which a publication was made, it is a legal question for the court to determine whether the occasion is such as to bring the alleged defamatory publication within the protection afforded to privileged communications.[50] But whether the facts which give the publication the privileged character claimed for it are established by the evidence is a question for the jury.[51] Accordingly where the evidence is uncertain and conflicting it is proper for the court to instruct the

45. Couch *v.* Mining Journal Co., 130 Mich. 294, 89 N. W. 936; Gray *v.* Times Newspaper Co., 74 Minn. 452, 77 N. W. 204, 73 Am. St. Rep. 363.

46. Couch *v.* Mining Journal Co., 130 Mich. 294, 89 N. W. 936.

47. Unsuccessful plea of justification as aggravating circumstance see *supra*, VII, A, 2.

48. *Illinois.*— Thomas *v.* Dunaway, 30 Ill. 373; Sloan *v.* Petrie, 15 Ill. 425.

New Hampshire.— Pallet *v.* Sargent, 36 N. H. 496.

New Jersey.— Moore *v.* Beck, 71 N. J. L. 7, 58 Atl. 166.

New York.— Youmans *v.* Paine, 86 Hun 479, 35 N. Y. Suppl. 50.

Oregon.— Upton *v.* Hume, 24 Oreg. 420, 33 Pac. 810, 41 Am. St. Rep. 863, 21 L. R. A. 493.

See 32 Cent. Dig. tit. "Libel and Slander," § 364.

49. Privilege generally see *supra*, VI.

50. *Colorado.*— Denver Public Warehouse Co. *v.* Holloway, (1905) 83 Pac. 131.

District of Columbia.—Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Illinois.— Young *v.* Lindstrom, 115 Ill. App. 239; Wharton *v.* Wright, 30 Ill. App. 343.

Kentucky.— See Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018.

Louisiana.— Stackpole *v.* Hennen, 6 Mart. N. S. 481, 17 Am. Dec. 187.

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Brow *v.* Hathaway, 13 Allen 239.

Michigan.— Trebilcock *v.* Anderson, 117 Mich. 39, 75 N. W. 129.

Missouri.— Wagner *v.* Scott, 164 Mo. 289, 63 S. W. 1107; Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New York.— John W. Lovell Co. *v.* Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363; Sickles *v.* Kling, 60 N. Y. App. Div. 515, 69 N. Y. Suppl. 944; Halstead *v.* Nelson, 13 N. Y. St. 211.

North Carolina.—Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

Ohio.— Mauk *v.* Brundage, 68 Ohio St. 89, 67 N. E. 152, 62 L. R. A. 477; Crist *v.* Bradstreet Co., 9 Ohio Dec. (Reprint) 618, 15 Cinc. L. Bul. 334.

Pennsylvania.— Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Echard *v.* Morton, 26 Pa. Super. Ct. 579; McGraw *v.* Hamilton, 15 Pa. Super. Ct. 181; Ingram *v.* Reed, 5 Pa. Super. Ct. 550; Shelly *v.* Dampman, 1 Lack. Leg. N. 77.

Tennessee.— Crockett *v.* McLanahan, 109 Tenn. 517, 72 S. W. 950, 61 L. R. A. 914.

Texas.— Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805; Gulf, etc., R. Co. *v.* Floore, (Civ. App. 1897) 42 S. W. 607.

Vermont.— Kidder *v.* Bacon, 74 Vt. 263, 52 Atl. 322.

Virginia.— Farley *v.* Thalheimer, 103 Va. 504, 49 S. E. 644; Strode *v.* Clement, 90 Va. 553, 19 S. E. 177.

West Virginia.— Ward *v.* Ward, 47 W. Va. 766, 35 S. E. 873; Johnson *v.* Brown, 13 W. Va. 71.

United States.— Locke *v.* Bradstreet Co., 22 Fed. 771.

England.— Kimber *v.* Press Assoc., [1893] 1 Q. B. 65, 57 J. P. 247, 62 L. J. Q. B. 152, 67 L. T. Rep. N. S. 515, 41 Wkly. Rep. 17; Stace *v.* Griffith, L. R. 2 P. C. 420, 20 L. T. Rep. N. S. 197, 6 Moore P. C. N. S. 18, 16 Eng. Reprint 633; Cooke *v.* Wildes, 3 C. L. R. 1090, 5 E. & B. 329, 1 Jur. N. S. 610, 24 L. J. Q. B. 367, 3 Wkly. Rep. 458, 85 E. C. L. 329.

See 32 Cent. Dig. tit. "Libel and Slander," § 362.

Exceeding privilege is matter of law see Stewart *v.* Press Co., 1 Pa. Co. Ct. 247; Byrne *v.* Funk, 38 Wash. 506, 80 Pac. 772, holding that where a writing as a matter of law exceeded the privilege of fair comment it was not erroneous to refuse to submit the question of privilege to the jury.

51. *District of Columbia.*— Norfolk, etc., Steamboat Co. *v.* Davis, 12 App. Cas. 306.

Massachusetts.— Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656.

Michigan.— Owen *v.* Dewey, 107 Mich. 67, 65 N. W. 8.

New York.— White *v.* Carroll, 42 N. Y.

jury as to what facts constitute a privilege and leave them to say whether those facts are proved.[52] If the occasion of the communication is privileged and, in the opinion of the court, there is evidence of actual malice to go to the jury, the question whether or not the communication was made in good faith and without malice is one of fact for the jury.[53] But the court must determine whether there is sufficient evidence of malice to send the case to the jury and, if there is not, must direct a nonsuit or verdict for defendant.[54]

161, 1 Am. Rep. 503; Neil *v.* Fords, 72 Hun 12, 25 N. Y. Suppl. 406; Huff *v.* Bennett, 4 Sandf. 120.

Ohio.— Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921.

Texas.— Davis *v.* Wells, 25 Tex. Civ. App. 155, 60 S. W. 566.

Vermont.— Torrey *v.* Field, 10 Vt. 353.

England.— Stace *v.* Griffith, L. R. 2 P. C. 420, 20 L. T. Rep. N. S. 197, 6 Moore P. C. N. S. 18, 16 Eng. Reprint 633; Padmore *v.* Lawrence, 11 A. & E. 380, 4 Jur. 458, 9 L. J. Q. B. 137, 3 P. & D. 209, 39 E. C. L. 217.

See 32 Cent. Dig. tit. "Libel and Slander," § 362.

Applications of rule.— It may be left to the jury to decide whether a report of a judicial proceeding is a fair and true report (Parker *v.* Republican Co., 181 Mass. 392, 63 N. E. 931; Willmann *v.* Press Pub. Co., 49 N. Y. App. Div. 35, 63 N. Y. Suppl. 515; Garby *v.* Bennett, 40 N. Y. App. Div. 163, 57 N. Y. Suppl. 853; D'Auxy *v.* Star Co., 31 Misc. (N. Y.) 388, 64 N. Y. Suppl. 283; American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005), or whether comments on matters of public interest are fair (Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369; Wilcox *v.* Moore, 69 Minn. 49, 71 N. W. 917).

52. Howland *v.* George F. Blake Mfg. Co., 156 Mass. 543, 31 N. E. 656; Post Pub. Co. *v.* Moloney, 50 Ohio St. 71, 33 N. E. 921; Jackson *v.* Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659.

53. *Connecticut.*— Haight *v.* Cornell, 15 Conn. 74.

Delaware.— See Cameron *v.* Corkran, 2 Marv. 166, 42 Atl. 454.

Georgia.— Holmes *v.* Clisby, 118 Ga. 820, 45 S. E. 684; Pearce *v.* Brower, 72 Ga. 243.

Illinois.— Whitney *v.* Allen, 62 Ill. 472; Zuckerman *v.* Sonnenschein, 62 Ill. 115; Young *v.* Lindstrom, 115 Ill. App. 239.

Iowa.— Prewitt *v.* Wilson, 128 Iowa 198, 103 N. W. 365; Nichols *v.* Eaton, 110 Iowa 509, 81 N. W. 792, 80 Am. St. Rep. 317, 47 L. R. A. 483.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Morgan *v.* Booth, 13 Bush 480; Bunton *v.* Worley, 4 Bibb 38, 7 Am. Dec. 735. See also Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018.

Maryland.— Garrett *v.* Dickerson, 19 Md. 418.

Massachusetts.— Hupfer *v.* Rosenfeld, 162 Mass. 131, 38 N. E. 197; Wright *v.* Lothrop, 149 Mass. 385, 21 N. E. 963; Brow *v.* Hathaway, 13 Allen 239; Gassett *v.* Gilbert, 6 Gray 94.

Michigan.— Hewitt *v.* Morley, 111 Mich. 187, 69 N. W. 245; Garn *v.* Lockard, 108 Mich. 196, 65 N. W. 764; Bell *v.* Fernald, 71 Mich. 267, 38 N. W. 910.

Minnesota.— Brown *v.* Radebaugh, 84 Minn. 347, 87 N. W. 937; Allen *v.* Pioneer Press Co., 40 Minn. 117, 41 N. W. 936, 12 Am. St. Rep. 707, 3 L. R. A. 532.

Missouri.— Wagner *v.* Scott, 164 Mo. 289, 63 S. W. 1107.

New Hampshire.— Carpenter *v.* Bailey, 53 N. H. 283; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605; Moore *v.* Butler, 48 N. H. 161.

New York.— Payne *v.* Rouss, 46 N. Y. App. Div. 315, 61 N. Y. Suppl. 705; Lally *v.* Emery, 59 Hun 237, 12 N. Y. Suppl. 785; Liddle *v.* Hodges, 2 Bosw. 537; Lathrop *v.* Hyde, 25 Wend. 448; Cooper *v.* Stone, 24 Wend. 434; Jarvis *v.* Hatheway, 3 Johns. 180, 3 Am. Dec. 473.

North Carolina.— Osborn *v.* Leach, 135 N. C. 628, 47 S. E. 811, 66 L. R. A. 648; Bradsher *v.* Cheek, 109 N. C. 278, 13 S. E. 777; Ramsey *v.* Cheek, 109 N. C. 270, 13 S. E. 775; Adcock *v.* Marsh, 30 N. C. 360.

Ohio.— Goodenow *v.* Tappan, 1 Ohio 60.

Pennsylvania.— Echard *v.* Morton, 26 Pa. Super. Ct. 579.

South Carolina.— Smith *v.* Youmans, 3 Hill 85.

Tennessee.— Shadden *v.* McElwee, 86 Tenn. 146, 5 S. W. 602, 61 Am. St. Rep. 821.

Texas.— Davis *v.* Wells, 25 Tex. Civ. App. 155, 60 S. W. 566.

Vermont.— Nott *v.* Stoddard, 38 Vt. 25, 88 Am. Dec. 633.

Virginia.— Farley *v.* Thalhimer, 103 Va. 504, 49 S. E. 644; Tyree *v.* Harrison, 100 Va. 540, 42 S. E. 295.

United States.— White *v.* Nicholls, 3 How. 226, 11 L. ed. 591 [*reversing* 29 Fed. Cas. No. 17,554, 1 Hayw. & H. 123]; Douglass *v.* Daisley, 114 Fed. 628, 52 C. C. A. 324, 57 L. R. A. 475; Locke *v.* Bradstreet Co., 22 Fed. 771.

England.— Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly. Rep. 913, 111 E. C. L. 829; Cook *v.* Wildes, 3 C. L. R. 1090, 5 E. & B. 329, 1 Jur. N. S. 610, 24 L. J. Q. B. 367, 3 Wkly. Rep. 458; Hunt *v.* Algar, 6 C. & P. 245, 25 E. C. L. 415; Gilpin *v.* Fowler, 9 Exch. 615, 18 Jur. 292, 23 L. J. Exch. 152, 2 Wkly. Rep. 272; Kine *v.* Sewell, 7 L. J. Exch. 92, 3 M. & W. 297.

Canada.— English *v.* Lamb, 32 Ont. 73.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 362, 363.

54. Kersting *v.* White, 107 Mo. App. 265, 80 S. W. 730; Gattis *v.* Kilgo, 128 N. C. 402,

(VIII) *MALICE.*[55] The question of the existence or non-existence of malice on the part of defendant is one for the determination of the jury.[56]

(IX) *VARIANCE.*[57] Whether or not there is a variance between the words alleged and those proved is for the jury.[58]

c. Instructions — (I) *IN GENERAL.* The rules governing instructions in civil cases generally are applicable to instructions in civil actions for libel or slander.[59]

38 S. E. 931; Neeb *v.* Hope, 111 Pa. St. 145, 2 Atl. 568; Jackson *v.* Hopperton, 16 C. B. N. S. 829, 10 L. T. Rep. N. S. 529, 12 Wkly. Rep. 913, 111 E. C. L. 829; Cook *v.* Wildes, 3 C. L. R. 1090, 5 E. & B. 329, 1 Jur. N. S. 610, 24 L. J. Q. B. 367, 3 Wkly. Rep. 458, 85 E. C. L. 329; Gilpin *v.* Fowler, 9 Exch. 615, 18 Jur. 292, 23 L. J. Exch. 152, 2 Wkly. Rep. 272. See also Wagner *v.* Scott, 164 Mo. 289, 63 S. W. 1107.

Sufficiency of evidence of malice for submission to jury see *supra*, VIII, F, 3, e, (IV), text and note 97.

55. Evidence of malice see *supra*, VIII, F, 2, c.

56. *California.*— Childers *v.* San Jose Mercury Printing, etc., Co., 105 Cal. 284, 38 Pac. 903, 45 Am. St. Rep. 40.

Illinois.— McKee *v.* Ingalls, 5 Ill. 30.

Indiana.— Abrams *v.* Smith, 8 Blackf. 95.

Maine.— Lancey *v.* Bryant, 30 Me. 466.

Massachusetts.— Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369.

New York.— Weston *v.* Weston, 83 N. Y. App. Div. 520, 82 N. Y. Suppl. 351; Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Alliger *v.* Mail Printing Assoc., 20 N. Y. Suppl. 763.

See 32 Cent. Dig. tit. "Libel and Slander," § 363.

Compare Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Malice in rebuttal of defense of privilege a question for jury see *supra*, VIII, H, 1, b, (VII), text and note 53.

57. Variance generally see *supra*, VIII, E, 9.

58. Downs *v.* Hawley, 112 Mass. 237; Beardsley *v.* Tappan, 2 Fed. Cas. No. 1,188*a*.

59. See cases cited *infra*, this note.

Instructions relating to publication and responsibility therefor.— Heller *v.* Howard, 11 Ill. App. 554; Klos *v.* Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235; Irvine *v.* Gibson, 117 Ky. 306, 77 S. W. 1106, 25 Ky. L. Rep. 1418 (instruction as to liability of insane person); Wheaton *v.* Beecher, 79 Mich. 443, 44 N. W. 927; Schoepflin *v.* Coffey, 25 N. Y. App. Div. 438, 49 N. Y. Suppl. 627.

Instructions relating to person defamed.— Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Suppl. 429; Burkhart *v.* North American Co., 214 Pa. St. 39, 63 Atl. 410; Butler *v.* News-Leader Co., 104 Va. 1, 51 S. E. 213; Pellardis *v.* Journal Printing Co., 99 Wis. 156, 74 N. W. 99.

Instructions relating to defense of privilege in general see the following cases:

Alabama.— Stallings *v.* Newman, 26 Ala. 300, 62 Am. Dec. 723.

Connecticut.— McGarry *v.* Healey, 78 Conn. 365, 62 Atl. 671, holding that where there is no claim that the charge is privileged, it is proper to refuse to instruct on that subject.

Indiana.— Abrams *v.* Smith, 8 Blackf. 95.

Kentucky.— Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018; Grimes *v.* Coyle, 6 B. Mon. 301.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Boogher *v.* Knapp, 97 Mo. 122, 11 S. W. 45.

Nebraska.— Bee Pub. Co. *v.* Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822, instruction as to burden of proof.

New York.— Garby *v.* Bennett, 166 N. Y. 392, 59 N. E. 1117 [*affirming* 40 N. Y. App. Div. 163, 57 N. Y. Suppl. 853]; McCarty *v.* Lambley, 20 N. Y. App. Div. 264, 46 N. Y. Suppl. 792; Hart *v.* Sun Printing, etc., Assoc., 79 Hun 358, 29 N. Y. Suppl. 434.

North Carolina.— Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. 931.

South Dakota.— Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 808.

Texas.— Cranfill *v.* Hayden, 22 Tex. Civ. App. 656, 55 S. W. 805.

United States.— Cunningham *v.* Underwood, 116 Fed. 803, 53 C. C. A. 99.

England.— Hartwell *v.* Vesey, 3 L. T. Rep. N. S. 275.

See 32 Cent. Dig. tit. "Libel and Slander," § 367.

Instructions as to malice necessary to destroy privilege.— American Pub. Co. *v.* Gamble, 115 Tenn. 663, 90 S. W. 1005; Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573]; English *v.* Lamb, 32 Ont. 73.

Instructions as to justification in general see the following cases:

Georgia.— Craven *v.* Walker, 101 Ga. 845, 29 S. E. 152; Anderson *v.* Savannah Press Pub. Co., 100 Ga. 454, 28 S. E. 216.

Indiana.— Berry *v.* Massey, 104 Ind. 486, 3 N. E. 942; Over *v.* Schiffling, 102 Ind. 191, 26 N. E. 91, imputation of larceny.

Kentucky.— Duncan *v.* Brown, 15 B. Mon. 186.

Maine.— Smith *v.* Wyman, 16 Me. 14, imputation of whoredom.

Michigan.— Brewer *v.* Chase, 121 Mich. 526, 80 N. W. 575, 80 Am. St. Rep. 527, 46 L. R. A. 397; Hanaw *v.* Jackson Patriot Co., 98 Mich. 506, 57 N. W. 734, holding that the court need not call the jury's attention to the various facts introduced to prove justification.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

Texas.— Democrat Pub. Co. *v.* Jones, 83 Tex. 302, 18 S. W. 652; Cranfill *v.* Hayden, (Civ. App. 1903) 75 S. W. 573 [*reversed* on

Thus, subject to the rules defining the respective provinces of the court and jury in determining the actionable quality of words, the general principles governing instructions in civil cases are applicable to instructions as to the meaning and construction of words.[60] In like manner the same principles control in the case of

other grounds in 97 Tex. 544, 80 S. W. 609]; St. Louis Southwestern v. McArthur, 31 Tex. Civ. App. 205, 72 S. W. 76; Quaid v. Tipton, 21 Tex. Civ. App. 131, 51 S. W. 264; Bailey v. Chapman, 15 Tex. Civ. App. 240, 38 S. W. 544. See also Brown v. Durham, 3 Tex. Civ. App. 244, 22 S. W. 868.

Vermont.— Currier v. Richardson, 63 Vt. 617, 22 Atl. 625, sufficiency of evidence of justification.

Wisconsin.— Robinson v. Eau Claire Book, etc., Co., 110 Wis. 369, 85 N. W. 983; Candrian v. Miller, 98 Wis. 164, 73 N. W. 1004.

United States.— Morning Journal Assoc. v. Duke, 128 Fed. 657, 63 C. C. A. 459 [*affirming* 120 Fed. 860].

England.— Wakley v. Cooke, 4 Exch. 511, 19 L. J. Exch. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 367.

Instruction as to burden of proof of justification.— Wintrode v. Renbarger, 150 Ind. 556, 50 N. E. 570; Klos v. Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235; Sanborn v. Gerald, 91 Me. 366, 40 Atl. 67.

Instructions as to what constitutes express malice.— *Connecticut.*— Wynne v. Parsons, 57 Conn. 73, 17 Atl. 362.

Illinois.— Holmes v. Holmes, 64 Ill. 294.

Missouri.— Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

New York.— Smith v. Matthews, 152 N. Y. 152, 46 N. E. 164 [*reversing* 9 Misc. 427, 29 N. Y. Suppl. 1058].

North Carolina.— Gattis v. Kilgo, 128 N. C. 402, 38 S. E. 931.

Texas.— Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573].

Wisconsin.— Eviston v. Cramer, 57 Wis. 570, 15 N. W. 760.

United States.— Tribune Assoc. v. Follwell, 107 Fed. 646, 46 C. C. A. 526.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Instructions as to malice necessary to sustain an action.—*California.*—Taylor v. Hearst, 118 Cal. 366, 50 Pac. 541.

Massachusetts.— Kenney v. McLaughlin, 5 Gray 3, 66 Am. Dec. 345.

Texas.— Behee v. Missouri Pac. R. Co., 71 Tex. 424, 9 S. W. 449; Brown v. Durham, (Civ. App. 1897) 42 S. W. 331.

Wisconsin.— Plummer v. Johnsen, 70 Wis. 131, 35 N. W. 334; Wilson v. Noonan, 27 Wis. 598.

United States.— Smith v. Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Instructions as to burden of proof of malice see Hauger v. Benua, 153 Ind. 642, 53 N. E. 942.

Instructions as to variance see the following cases:

Connecticut.— Nichols v. Hayes, 13 Conn. 155.

Illinois.— Ransom v. McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323], holding that a charge that the substance of the alleged slanderous words are all that plaintiff must prove is erroneous.

Indiana.— Durrah v. Stillwell, 59 Ind. 139.

Iowa.— Klos v. Zahorik, 113 Iowa 161, 84 N. W. 1046, 53 L. R. A. 235, libel published in foreign language.

Missouri.— Atteberry v. Powell, 29 Mo. 429, 77 Am. Dec. 579; Baldwin v. Fries, 46 Mo. App. 288.

Vermont.— Posnett v. Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162.

See 32 Cent. Dig. tit. "Libel and Slander," § 368.

60. See cases cited *infra*, this note.

Instructions held to be proper.— *Connecticut.*— Graves v. Waller, 19 Conn. 90.

Florida.— Jones v. Greeley, 25 Fla. 629, 6 So. 448.

Illinois.— Dowie v. Priddle, 216 Ill. 553, 75 N. E. 243; Stumer v. Pitchman, 124 Ill. 250, 15 N. E. 757; Baker v. Young, 44 Ill. 42, 92 Am. Dec. 149.

Maryland.— Wagaman v. Byers, 17 Md. 183.

Massachusetts.— Fay v. Harrington, 176 Mass. 270, 57 N. E. 369.

Michigan.—Hinchman v. Knight, 132 Mich. 532, 94 N. W. 1.

Missouri.— Stark v. Knapp, 160 Mo. 529, 61 S. W. 669; St. Louis Clothing Co. v. J. D. Hail Dry Goods Co., 156 Mo. 393, 56 S. W. 1112; McCloskey v. Pulitzer Pub. Co., 152 Mo. 339, 53 S. W. 1087.

Nebraska.— Bee Pub. Co. v. Shields, 68 Nebr. 750, 94 N. W. 1029, 99 N. W. 822; Whiting v. Carpenter, 4 Nebr. (Unoff.) 342, 93 N. W. 926.

New York.— Turton v. New York Recorder, 3 Misc. 314, 22 N. Y. Suppl. 766 [*affirmed* in 144 N. Y. 144, 38 N. E. 1009].

Pennsylvania.— Stoner v. Hoffer, 5 Lanc. L. Rev. 325.

Texas.— Brown v. Durham, (Civ. App. 1897) 42 S. W. 331; Houston Printing Co. v. Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

Vermont.— Kidder v. Bacon, 74 Vt. 263, 52 Atl. 322.

Wisconsin.— Rude v. Nass, 79 Wis. 321, 48 N. W. 555, 24 Am. St. Rep. 717.

United States.— Middleby v. Effler, 118 Fed. 261, 55 C. C. A. 355; Hanchett v. Chiatovich, 101 Fed. 742, 41 C. C. A. 648 [*affirming* 96 Fed. 681].

See 32 Cent. Dig. tit. "Libel and Slander," § 366.

instructions relating to damages in actions for libel or slander including the rules governing instructions as to measure of damages, mitigation of damages, etc.[61]

Instructions held not to be proper.— *Illinois.*— Ketchum *v.* Gilmer, 115 Ill. App. 347; Roby *v.* Murphy, 27 Ill. App. 394.

Indiana.— Berry *v.* Massey, 104 Ind. 486, 3 N. E. 942.

Kentucky.— Letton *v.* Young, 2 Metc. 558; Estham *v.* Curd, 15 B. Mon. 102.

Maryland.— Chaplin *v.* Cruikshanks, 2 Harr. & J. 247.

Michigan.— Randall *v.* Evening News Assoc., 101 Mich. 561, 60 N. W. 301.

New York.— Kuster *v.* Press Pub. Co., 80 N. Y. App. Div. 615, 80 N. Y. Suppl. 1050.

Texas.— Cranfill *v.* Hayden, 97 Tex. 544, 80 S. W. 609 [*reversing* (Civ. App. 1903) 75 S. W. 573]; Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

See 32 Cent. Dig. tit. "Libel and Slander," § 366.

Instruction not requiring jury to find existence of extrinsic facts.— An instruction not requiring the jury to find the existence of certain extrinsic facts necessary to render the charge actionable is erroneous. Heller *v.* Howard, 11 Ill. App. 554; Krup *v.* Corley, 95 Mo. App. 640, 69 S. W. 609.

In an action for charging false swearing before a justice it is error to refuse defendant's request to instruct as to whether the testimony given by plaintiff in such case was material. Dalrymple *v.* Lofton, 2 McMull. (S. C.) 112.

Province of court and jury as to construction of defamatory language see *supra*, VIII, H, 1, b, (II).

61. See cases cited *infra*, this note.

Measure of damages.— *Arkansas.*— Stallings *v.* Whittaker, 55 Ark. 494, 18 S. W. 829.

California.— Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067.

Illinois.— Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Gaines *v.* Gaines, 109 Ill. App. 226 (holding that the court ought not to instruct that the damages must not be assessed in excess of the amount claimed in the declaration); Searcy *v.* Sudhoff, 84 Ill. App. 148 (holding that an instruction is erroneous which allows the jury to assess damages at "such sum as they may think fit" without confining them to the evidence of damages submitted to them); Mason *v.* Paul, 46 Ill. App. 592.

Indiana.— Grotius *v.* Ross, 24 Ind. App. 543, 57 N. E. 46; Indianapolis Journal Newspaper Co. *v.* Pugh, 6 Ind. App. 510, 33 N. E. 991.

Iowa.— Armstrong *v.* Pierson, 8 Iowa 29.

Kentucky.— Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281; Duncan *v.* Brown, 15 B. Mon. 186.

Michigan.—Hinchman *v.* Knight, 132 Mich. 532, 94 N. W. 1; French *v.* Detroit Free Press Co., 85 Mich. 463, 48 N. W. 615; McAllister *v.* Detroit Free Press Co., 85 Mich. 453, 48 N. W. 612.

Missouri.— Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668.

New York.— Warner *v.* Press Pub. Co., 132 N. Y. 181, 30 N. E. 393 [*affirming* 15 Daly 545, 8 N. Y. Suppl. 341].

Pennsylvania.— Smith *v.* Times Co., 4 Pa. Dist. 399.

Texas.— Sonka *v.* Sonka, (Civ. App. 1903) 75 S. W. 325.

Vermont.— Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Buckstaff *v.* Hicks, 94 Wis. 34, 68 N. W. 403, 59 Am. St. Rep. 853; Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. 911.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

England.— See Jones *v.* Mackie, L. R. 3 Exch. 17, 37 L. J. Exch. 1, 17 L. T. Rep. N. S. 151, 16 Wkly. Rep. 109.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Measure of damages for charge of unchastity.— Knowlden *v.* Guardian Printing, etc., Co., 69 N. J. L. 670, 55 Atl. 287; Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249; Bennett *v.* Salisbury, 78 Fed. 769, 24 C. C. A. 329; Enquirer Co. *v.* Johnston, 72 Fed. 443, 18 C. C. A. 628.

Mitigation of damages.— *California.*—Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067; Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Iowa.— Emerson *v.* Miller, 115 Iowa 315, 88 N. W. 803; Blocker *v.* Schoff, 83 Iowa 265, 48 N. W. 1079.

Kentucky.— Evening Post Co. *v.* Richardson, 113 Ky. 641, 68 S. W. 665, 24 Ky. L. Rep. 456; Nicholson *v.* Merritt, 59 S. W. 25, 22 Ky. L. Rep. 914.

Michigan.— Fowler *v.* Fowler, 113 Mich. 575, 71 N. W. 1084; Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

Minnesota.— Sharpe *v.* Larson, 74 Minn. 323, 77 N. W. 233.

Missouri.— Jones *v.* Murray, 167 Mo. 25, 66 S. W. 981; Grimes *v.* Thorp, 113 Mo. App. 652, 88 S. W. 638.

New York.— Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Suppl. 838; Daniel *v.* New York News Pub. Co., 21 N. Y. Suppl. 862 [*affirmed* in 142 N. Y. 660, 37 N. E. 569]. See also Alliger *v.* Mail Printing Assoc., 20 N. Y. Suppl. 763.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Right of plaintiff to damages when publication is actionable per se.— *California.*—Bohan *v.* Record Pub. Co., 1 Cal. App. 429, 82 Pac. 634.

Connecticut.— Wynne *v.* Parsons, 57 Conn. 73, 17 Atl. 362.

Georgia.— Flanders *v.* Daley, 124 Ga. 714, 52 S. E. 687.

(II) *Assuming Matters in Issue.* An instruction assuming as established by evidence a fact which is in controversy is erroneous.[62]

(III) *Weight of Evidence.* In some jurisdictions it is a general rule that it is the sole province of the jury to determine the weight that evidence should receive, without any assistance from the court;[63] in other jurisdictions it is held that the court in submitting a case to the jury may express his opinion on the facts.[64]

Kentucky.— Blackwell *v.* Johnston, 56 S. W. 12, 21 Ky. L. Rep. 1720.

Massachusetts.— Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119.

Pennsylvania.— Stepp *v.* Croft, 18 Pa. Super. Ct. 101.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Character and reputation of plaintiff as affecting damages.— *Illinois.*—Gaines *v.* Gaines, 109 Ill. App. 226; Balcom *v.* Michels, 49 Ill. App. 379.

Indiana.— Hibner *v.* Fleetwood, 19 Ind. App. 421, 49 N. E. 607.

New York.— Crandall *v.* Barron, 57 Hun 259, 11 N. Y. Suppl. 164 [*affirmed* in 127 N. Y. 690, 29 N. E. 150].

Pennsylvania.— Jackson *v.* Pittsburgh Times, 152 Pa. St. 406, 25 Atl. 613, 34 Am. St. Rep. 659.

Texas.— Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

Wisconsin.— Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. 911; Plummer *v.* Johnsen, 70 Wis. 131, 35 N. W. 334.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Nominal damages.— *Georgia.*— Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. 934, 104 Am. St. Rep. 103.

Kentucky.— Nicholson *v.* Merritt, 67 S. W. 5, 23 Ky. L. Rep. 2281.

Massachusetts.— Bishop *v.* Journal Newspaper Co., 168 Mass. 327, 47 N. E. 119; Markham *v.* Russell, 12 Allen 573, 90 Am. Dec. 169.

Michigan.— Austin *v.* Hyndman, 119 Mich. 615, 78 N. W. 663.

Nebraska.— Brooks *v.* Dutcher, 24 Nebr. 300, 38 N. W. 780.

Texas.— King *v.* Sassaman, (Civ. App. 1899) 54 S. W. 304.

Utah.— Fenstermaker *v.* Tribune Pub. Co., 12 Utah 439, 43 Pac. 112, 35 L. R. A. 611.

United States.— New York News Pub. Co. *v.* De Freitas, 84 Fed. 758, 28 C. C. A. 522.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Punitive damages.—*California.*—Graybill *v.* De Young, 140 Cal. 323, 73 Pac. 1067; Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. 290.

Florida.— Hayes *v.* Todd, 34 Fla. 233, 15 So. 752.

Maine.— True *v.* Plumley, 36 Me. 466.

Maryland.— Gambrill *v.* Schooley, 95 Md. 260, 52 Atl. 500, 63 L. R. A. 427.

Minnesota.— Peterson *v.* Western Union Tel. Co., 72 Minn. 41, 74 N. W. 1022, 71 Am. St. Rep. 461, 40 L. R. A. 661.

Missouri.— Callahan *v.* Ingram, 122 Mo. 355, 26 S. W. 1020, 43 Am. St. Rep. 583.

New York.— Crane *v.* Bennett, 77 N. Y. App. Div. 102, 79 N. Y. Suppl. 66; Potter *v.* New York Evening Journal Pub. Co., 68 N. Y. App. Div. 95, 74 N. Y. Suppl. 317.

Wisconsin.— Delaney *v.* Kaetel, 81 Wis. 353, 51 N. W. 559; Grace *v.* McArthur, 76 Wis. 641, 45 N. W. 518.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

Exemplary damages where husband and wife are defendants.— Upton *v.* Upton, 51 Hun (N. Y.) 184, 4 N. Y. Suppl. 936; Webber *v.* Vincent, 9 N. Y. Suppl. 101.

Republication by others as enhancing damages see Burt *v.* Advertiser Newpaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97.

Cautioning jury as to non-allowance of damages for publications not sued on see *infra*, VIII, H, 1, c, (IV), text and note 66.

62. See cases cited *infra*, this note.

This rule has been applied to an instruction assuming the guilt of defendant (Farnan *v.* Childs, 66 Ill. 544), the fact of repetition by defendant (Farnan *v.* Childs, *supra*. See also Hinkle *v.* Davenport, 38 Iowa 355), the truth or falsity of the charge (Remsen *v.* Bryant, 47 N. Y. App. Div. 503, 62 N. Y. Suppl. 434; Leitz *v.* Hohman, 16 Pa. Super. Ct. 276, 18 Lanc. L. Rev. 217; Ross *v.* Ward, 14 S. D. 240, 85 N. W. 182, 86 Am. St. Rep. 746; Tribune Assoc. *v.* Follwell, 107 Fed. 646, 46 C. C. A. 526. See also Chaplin *v.* Lee, 18 Nebr. 440, 25 N. W. 609), or assuming that there was no controversy as to the nature of the charge published (Mosier *v.* Stoll, 119 Ind. 244, 20 N. E. 752).

Instructions held not objectionable as assuming facts in issue.— Baker *v.* Young, 44 Ill. 42, 92 Am. Dec. 149; Tucker *v.* Call, 45 Ind. 31; Burt *v.* McBain, 29 Mich. 260; Aspell *v.* Smith, 134 Pa. St. 59, 19 Atl. 484; Clemmons *v.* Danforth, 67 Vt. 617, 32 Atl. 626, 48 Am. St. Rep. 836; Massuere *v.* Dickens, 70 Wis. 83, 35 N. W. 349.

63. Frizell *v.* Cole, 42 Ill. 362, where, however, it was intimated that it was not error to instruct the jury that affirmative evidence is entitled to more weight than negative evidence.

64. Crawford *v.* Ryan, 5 Pa. Cas. 212, 7 Atl. 738 (holding that it is not error for the court to refer to the testimony of some of the witnesses more than to that of others); Smith *v.* Sun Printing, etc., Co., 55 Fed. 240, 5 C. C. A. 91.

(iv) *Limiting Effect of Evidence to Purposes of Admission.* It is not only the right but the duty of the court to accompany the admission of evidence with cautionary words limiting its effect to the legitimate purposes of its admission.[65] Thus where publications other than those sued on are admitted in evidence solely to prove malice the judge should caution the jury not to allow damages for such publications.[66]

(v) *Inapplicable or Irrelevant Instructions.* Instructions given upon matters not placed in issue by the pleadings or not in evidence are very generally held to be erroneous.[67] This rule has been applied to instructions regarding justification[68] or privilege,[69] when such defenses have not been pleaded or put in issue. But the party requesting the instruction cannot complain because it was not warranted by the evidence.[70]

(vi) *Repeating Instructions.* It is not error to refuse to give an instruction to the jury, although it be correct, where the jury have already been instructed upon the same point.[71]

(vii) *Necessity of Request For Instructions.* It has been held not to be the duty of the court to give instructions in civil actions for libel or slander unless requested to do so.[72]

65. Letton *v.* Young, 2 Metc. (Ky.) 558; Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628; Hitchcock *v.* Moore, 70 Mich. 112, 37 N. W. 914, 14 Am. St. Rep. 474.

Charging as to effect of withdrawal of plea of justification.— In Peters *v.* Ulmer, 32 Leg. Int. (Pa.) 441, it was held that where in an action for slander, a plea of justification is withdrawn, plaintiff is entitled to a positive instruction to the jury to disregard the plea as evidence.

66. *Alabama.*—Scott *v.* McKinnish, 15 Ala. 662.

Kentucky.— Taylor *v.* Moran, 4 Metc. 127; Letton *v.* Young, 2 Metc. 558. *Compare* Sharp *v.* Bowlar, 103 Ky. 282, 45 S. W. 90, 19 Ky. L. Rep. 2018.

Massachusetts.— See Fay *v.* Harrington, 176 Mass. 270, 57 N. E. 369.

Missouri.— Grimes *v.* Thorp, 113 Mo. App. 652, 88 S. W. 638.

Texas.— Zeliff *v.* Jennings, 61 Tex. 458.

United States.— Post Pub. Co. *v.* Hallam, 59 Fed. 530, 8 C. C. A. 201.

See 32 Cent. Dig. tit. "Libel and Slander," § 369.

67. *Georgia.*— Pugh *v.* McCarty, 40 Ga. 444.

Maryland.— Padgett *v.* Sweeting, 65 Md. 404, 4 Atl. 887 (holding that it is erroneous for the court to instruct the jury that they may take into consideration the actual standing and character of plaintiff where there is nothing to impeach her good standing); Long *v.* Eakle, 4 Md. 454; Chaplin *v.* Cruikshanks, 2 Harr. & J. 247.

Michigan.— Farrand *v.* Aldrich, 85 Mich. 593, 48 N. W. 628; Wheaton *v.* Beecher, 79 Mich. 443, 44 N. W. 927.

Missouri.— Friedman *v.* Pulitzer Pub. Co., 102 Mo. App. 683, 77 S. W. 340; Boyce *v.* Aubuchon, 34 Mo. App. 315.

New York.— Clarke *v.* Fox, 91 Hun 298, 36 N. Y. Suppl. 674.

North Carolina.— Wakefield *v.* Smithwick, 49 N. C. 327.

Pennsylvania.— Woddrop *v.* Thacher, 117 Pa. St. 340, 11 Atl. 621.

Texas.— Cotulla *v.* Kerr, 74 Tex. 89, 11 S. W. 1058, 15 Am. St. Rep. 819. See also Houston Printing Co. *v.* Moulden, 15 Tex. Civ. App. 574, 41 S. W. 381.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 372.

Instructions held to be relevant or applicable.— Casey *v.* Hulgan, 118 Ind. 590, 21 N. E. 322; Taylor *v.* Robinson, 29 Me. 323; Ritchie *v.* Stenius, 73 Mich. 563, 41 N. W. 687; Masseure *v.* Dickens, 70 Wis. 83, 35 N. W. 349.

68. *California.*— Burke *v.* Mascarich, 81 Cal. 302, 22 Pac. 673.

Colorado.— Republican Pub. Co. *v.* Miner, 12 Colo. 77, 20 Pac. 345.

Massachusetts.— See Rutherford *v.* Paddock, 180 Mass. 289, 62 N. E. 381.

North Carolina.— Upchurch *v.* Robertson, 127 N. C. 127, 37 S. E. 157.

Tennessee.— Russell *v.* Farrell, 102 Tenn. 248, 52 S. W. 146.

See 32 Cent. Dig. tit. "Libel and Slander," § 372.

69. Etchison *v.* Pergerson, 88 Ga. 620, 15 S. E. 680.

70. Crane *v.* Darling, 71 Vt. 295, 44 Atl. 359.

71. *Illinois.*— Mitchell *v.* Milholland, 106 Ill. 175.

Iowa.— Irlbeck *v.* Bierle, 84 Iowa 47, 50 N. W. 36.

New York.— Southcombe *v.* Armstrong, 8 N. Y. Suppl. 361.

Wisconsin.—Campbell *v.* Campbell, 54 Wis. 90, 11 N. W. 456.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 373.

72. Minter *v.* Bradstreet Co., 174 Mo. 444, 73 S. W. 668, holding that where defendant

(VIII) *DIRECTING SPECIAL VERDICT.* It has been held not to be the duty of the court to instruct the jury that they may bring in a special verdict, although both justification and set-offs be pleaded.[73]

d. Verdict and Findings. The rules governing verdicts in civil cases generally are applicable to verdicts in civil actions for libel or slander.[74] A general verdict of guilty establishes the fact that the words were published as laid in the declaration maliciously and with intent to defame.[75] But if a jury render a special verdict, they should not omit to pass upon the material question of malice.[76] Where a count contains words which are actionable, coupled with others not actionable, but spoken at the same time, the latter will be considered as merely in aggravation, and a verdict finding entire damages on the whole count will be good.[77] But it is held that a general verdict upon a declaration containing counts, some of which are good and others not, is bad.[78]

2. NEW TRIAL, JUDGMENT, AND COSTS — a. New Trial.[79] A new trial will not be

gives evidence in mitigation it is not the duty of the trial court to instruct on the same in the absence of a request by defendant.

Instruction as to separate specification of damages for injured feelings.— Under statute providing that the jury in libel cases specify the amount of damages, for injured feelings separately from other damages, the court is not bound to so instruct in the absence of a request so to do. Field *v.* Magee, 122 Mich. 556, 81 N. W. 354; McGee *v.* Baumgartner, 121 Mich. 287, 80 N. W. 21.

73. Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839.

74. See cases cited *infra*, this note.

Forms of verdict held sufficient see Chandler *v.* Holloway, 4 Port. (Ala.) 17; Carlock *v.* Spencer, 7 Ark. 12; Wilborn *v.* Odell, 29 Ill. 456 (an oral verdict); Benaway *v.* Conyne, 3 Pinn. (Wis.) 196, 3 Chandl. 214.

Verdict held insufficient.— Cattell *v.* Dispatch Pub. Co., 88 Mo. 356, a verdict, "We find no cause of action.

Finding held sufficient finding of malice in fact.— Osborne *v.* Troup, 60 Conn. 485, 23 Atl. 157.

Verdict passing on question of privilege see Etchison *v.* Pergerson, 88 Ga. 620, 15 S. E. 680; Smith *v.* Smith, 73 Mich. 445, 41 N. W. 499, 16 Am. St. Rep. 594, 3 L. R. A. 52; Karger *v.* Rich, 81 Wis. 177, 51 N. W. 424.

Assessment of damages see Flagg *v.* Hobart, Quincy (Mass.) 332; Fox *v.* Boyd, 104 Tenn. 357, 58 S. W. 221; Eviston *v.* Cramer, 57 Wis. 570, 15 N. W. 760.

Verdict passing upon question of justification see Holmes *v.* Jones, 50 Hun (N. Y.) 345, 3 N. Y. Suppl. 156; Nehrling *v.* Herold Co., 112 Wis. 558, 88 N. W. 614; Cory *v.* Bond, 2 F. & F. 241.

Verdict against joint defendants see McAdams *v.* Reney, 4 Hayw. (Tenn.) 252; Cunningham *v.* Underwood, 116 Fed. 803, 53 C. C. A. 99.

Inconsistent verdicts or findings see the following cases:

Indiana.— Cook *v.* Howe, 77 Ind. 442.

Iowa.— O'Donnell *v.* Hastings, 68 Iowa 271, 26 N. W. 433.

Kentucky.— Scott *v.* Cook, 1 Duv. 314.

Ohio.— Fisher *v.* Patterson, 14 Ohio 418.

Rhode Island.— Tillinghast *v.* McLeod, 17 R. I. 208, 21 Atl. 345.

Wisconsin.— Karger *v.* Rich, 81 Wis. 177, 51 N. W. 424; Cottrill *v.* Cramer, 59 Wis. 231, 18 N. W. 12.

See 32 Cent. Dig. tit. "Libel and Slander," § 374.

75. McAdams *v.* Reney, 4 Hayw. (Tenn.) 252. See also Carlock *v.* Spencer, 7 Ark. 12.

76. McAdams *v.* Reney, 4 Hayw. (Tenn.) 252.

77. Lewis *v.* Niles, 1 Root (Conn.) 346; Bloom *v.* Bloom, 5 Serg. & R. (Pa.) 391; Chipman *v.* Cook, 2 Tyler (Vt.) 456; Griffiths *v.* Lewis, 8 Q. B. 841, 10 Jur. 711, 15 L. J. Q. B. 249, 55 E. C. L. 841.

78. Gosling *v.* Morgan, 32 Pa. St. 273 (holding that a judgment on such a verdict is erroneous unless some of the words declared on in each count are actionable); Harker *v.* Orr, 10 Watts (Pa.) 245; Ruth *v.* Kutz, 1 Watts (Pa.) 489; Posnett *v.* Marble, 62 Vt. 481, 20 Atl. 813, 22 Am. St. Rep. 126, 11 L. R. A. 162 (holding that in such case a new trial would be granted, as being the better course of procedure than arresting judgment); Turner *v.* Foxall, 24 Fed. Cas. No. 14,255, 2 Cranch C. C. 324; Pemberton *v.* Colls, 10 Q. B. 461, 11 Jur. 1011, 16 L. J. Q. B. 403, 59 E. C. L. 461 (where a *venire de novo* was awarded); Day *v.* Robinson, 1 A. & E. 554, 28 E. C. L. 265, 3 L. J. Exch. 381, 4 N. & M. 884, 30 E. C. L. 619; Onslow *v.* Horne, 2 W. Bl. 750, 3 Wils. C. P. 177. See also Chipman *v.* Cook, 2 Tyler (Vt.) 456. But see Graves *v.* Waller, 19 Conn. 90; Marshall *v.* Gunter, 6 Rich. (S. C.) 419; Wilson *v.* Hogg, 1 Nott & M. (S. C.) 216; Neilson *v.* Emerson, 2 Bay (S. C.) 439; Neal *v.* Lewis, 2 Bay (S. C.) 204, 1 Am. Dec. 640.

General verdict on counts charging speaking of same words.— In Bradley *v.* Kennedy, 2 Greene (Iowa) 231, it was held that where a declaration in slander contains several counts and two of them charge the speaking of the words at different times, and there is a general verdict for plaintiff, the judgment will not on this account be reversed.

79. New trial generally see NEW TRIAL.

New trial for excessive or insufficient damages see NEW TRIAL.

granted if the verdict can be sustained.[80] It has been held, moreover, that an action for libel or slander is in the nature of a penal action, and that as a general rule, a new trial will not be granted when the verdict is for defendant, and no rule of law has been violated in the admission or rejection of evidence, or in the exposition of the law to the jury, and there is no other ground for the motion than that the jury have misunderstood or disregarded the evidence.[81] So it has been held that a new trial will not be granted on account of the admission of incompetent evidence to rebut other incompetent evidence,[82] or on account of newly discovered evidence which goes to support a plea of justification, although it is intimated that the rule is otherwise if the evidence goes to support the plea of not guilty.[83]

b. Judgment[84]—(I) *IN GENERAL.* The general rules governing judgments in civil cases generally are applicable to civil actions for libel or slander.[85]

(II) *ARREST OF JUDGMENT.*[86] After a verdict, on a motion in arrest of judgment, on the ground that the words are not actionable the charge will be presumed to have been proved as laid in the petition, and with the intention imputed.[87] But if the record shows on its face that the charge is not actionable judgment for plaintiff will be arrested.[88] Where, however, the first count in a petition is dismissed and the second, although inartificially drawn, charges the publication of words actionable *per se*, a motion in arrest of judgment is properly overruled.[89]

80. Beecher *v.* Press Pub. Co., 35 Misc. (N. Y.) 418, 71 N. Y. Suppl. 957; Dougherty *v.* Miller, Wright (Ohio) 36; Napier *v.* Daniel, 3 Bing. N. Cas. 77, 2 Hodges 187, 6 L. J. C. P. 62, 3 Scott 417, 32 E. C. L. 45, where the court refused to allow the verdict because of an observation made by the jury in the course of the judge's summing up and before the rendition of the verdict.

81. Sheen *v.* Peoria Journal Co., 53 Ill. App. 267; Paddock *v.* Salisbury, 2 Cow. (N. Y.) 811; *Ex p.* Baily, 2 Cow. (N. Y.) 479; Hurtin *v.* Hopkins, 9 Johns. (N. Y.) 36; Jarvis *v.* Hatheway, 3 Johns. (N. Y.) 180, 3 Am. Dec. 473. See also Engel *v.* New York Evening Post Co., 38 Misc. (N. Y.) 377, 77 N. Y. Suppl. 884. *Compare* Johnson *v.* Scribner, 6 Conn. 185; Cheadle *v.* Buell, 6 Ohio 67; Hakewell *v.* Ingram, 2 C. L. R. 1397.

New trial in case of verdict for plaintiff.— Where defendant charged that plaintiff entered a house and stole property, a verdict for plaintiff will be set aside as against public policy where the real purpose of the entry was to commit a statutory rape on the infant daughter of the owner. O'Connor *v.* Press Pub. Co., 34 Misc. (N. Y.) 564, 70 N. Y. Suppl. 367.

Effect of agreement of counsel.— Where, during trial, counsel agreed that the only question was the amount of damages, defendant cannot object after verdict as a ground for new trial that the libel had not been proved to refer to plaintiff. Child *v.* Homer, 13 Pick. (Mass.) 503.

82. Stow *v.* Converse, 3 Conn. 325, 8 Am. Dec. 189.

83. Beers *v.* Root, 9 Johns. (N. Y.) 264. See also Symons *v.* Blake, 2 C. M. & R. 416, 4 Dowl. P. C. N. S. 263, 1 Gale 182.

84. Judgment generally see JUDGMENTS, 23 Cyc. 623.

85. See cases cited *infra*, this note.

Entry of judgment as in debt.— If the verdict and judgment are correct as to the sum recovered it is not error that judgment is entered as in debt, when it should be for damages. Perdue *v.* Burnett, Minor (Ala.) 138.

Satisfaction of judgment against one of two libelers.— Where a publication of a libel is the joint act of two or more persons, plaintiff, if he brings separate suit against each, can have but one satisfaction. Thomas *v.* Rumsey, 6 Johns. (N. Y.) 26. See also Union Associated Press *v.* Press Pub. Co., 24 Misc. (N. Y.) 610, 54 N. Y. Suppl. 183.

When joint recovery not permissible.— In an action against two or more for circulating libelous hand-bills separate acts not committed with a common purpose will not authorize a joint recovery. Leidig *v.* Bucher, 74 Pa. St. 65.

Default and interlocutory judgment as admission.— A default and interlocutory judgment admits the fact of publication and the truth of the innuendos. Tillotson *v.* Cheetham, 3 Johns. (N. Y.) 56, 3 Am. Dec. 459.

Effect of default judgment under New York statute when service obtained by publication see Davis *v.* Fox, 1 N. Y. App. Div. 403, 37 N. Y. Suppl. 163.

86. Arrest of judgment generally see JUDGMENTS, 23 Cyc. 824 *et seq.*

87. Beers *v.* Strong, Kirby (Conn.) 12; Mott *v.* Comstock, 7 Cow. (N. Y.) 654; Damarest *v.* Haring, 6 Cow. (N. Y.) 76. See also Hastings *v.* Lusk, 22 Wend. (N. Y.) 410, 34 Am. Dec. 330.

88. Hearne *v.* Stowell, 12 A. & E. 719, 6 Jur. 458, 11 L. J. Q. B. 25, 4 P. & D. 696, 40 E. C. L. 357; Purdy *v.* Stacey, 5 Burr. 2698. See also Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863.

89. Carpenter *v.* Hamilton, 185 Mo. 603, 84 S. W. 863.

c. Costs.[90] In several jurisdictions the recovery of costs in actions of libel or slander is expressly regulated by statute.[91]

3. Appeal and Error[92]— **a. Jurisdiction to Grant Writ of Error.** The Texas statute providing that the judgment of the court of civil appeals shall be final in all cases of slander has been held to apply to actions for libel, and hence the supreme court has jurisdiction to grant a writ of error in a libel suit.[93]

b. Presumptions.[94] The proceedings in the lower court will be presumed to be correct in the absence of anything to the contrary in the record.[95]

c. Harmless or Non-Prejudicial Error[96]—(i) *Rulings of Court.* An error made at the trial by the court is not ground for reversal when it appears from the record that no injury resulted to plaintiff in error. Thus a harmless error in a ruling upon a pleading,[97] or upon the admission or rejection of evidence,[98] is not

90. Costs generally see Costs, 11 Cyc. 1.

91. *Michigan.*— Dinger *v.* Miller, 39 Mich. 332.

New York.— Goodrich *v.* Stewart, 3 Wend. 439.

Ohio.— Dougherty *v.* Miller, Wright 36.

Pennsylvania.— Moon *v.* Long, 12 Pa. St. 207; Gower *v.* Clayton, 6 Serg. & R. 85; Wolfe *v.* Walls, 11 Pa. Dist. 646; McCarrigher *v.* Wilcox, 21 Pittsb. Leg. J. 69.

Rhode Island.— Brown *v.* James, 20 R. I. 700, 41 Atl. 893.

Vermont.— Parsons *v.* Young, 2 Vt. 434; Dwinells *v.* Aikin, 2 Tyler 75; Smith *v.* Shumway, 2 Tyler 74.

England.— Marshall *v.* Martin, L. R. 5 Q. B. 239, 39 L. J. Q. B. 85, 21 L. T. Rep. N. S. 788, 18 Wkly. Rep. 378; Forsdike *v.* Stone, L. R. 3 C. P. 607, 37 L. J. C. P. 301, 18 L. T. Rep. N. S. 722, 16 Wkly. Rep. 976; Lafone *v* Smith, 4 H. & N. 158, 5 Jur. N. S. 127; Hume *v.* Marshall, 37 L. T. Rep. N. S. 711; Magee *v.* Moyers, 18 Wkly. Rep. 842. See also Garnett *v.* Bradley, 3 App. Cas. 944, 48 L. J. Exch. 186, 39 L. T. Rep. N. S. 261, 26 Wkly. Rep. 698; Brown *v.* Houston, [1901] 2 K. B. 855, 70 L. J. K. B. 902, 85 L. T. Rep. N. S. 160; Biddulph *v.* Chamberlayne, 17 Q. B. 351, 79 E. C. L. 351; Harrison *v.* Bush, 5 E. & B. 344, 2 Jur. N. S. 90, 25 L. J. Q. B. 99, 4 Wkly. Rep. 199, 85 E. C. L. 344; Hopley *v.* Williams, 53 J. P. 822.

See 32 Cent. Dig. tit. "Libel and Slander," § 379.

Costs as element of damages see *supra*, VIII, G, 2, e, (VI).

92. Appeal and error generally see Appeal and Error, 2 Cyc. 474 *et seq.*

93. Belo *v.* Smith, 91 Tex. 221, 42 S. W. 850.

94. Presumptions in support of judgment in appeal and error generally see Apeal and Error, 3 Cyc. 275 *et seq.*

95. Myers *v.* Longstaff, 14 S. D. 98, 84 N. W. 233.

Applications of rule.— The court will presume that an instruction was properly refused (Abrams *v.* Smith, 8 Blackf. (Ind.) 95), or if given that it was applicable (Belck *v.* Belck, 97 Ind. 73); that an amendment was made (Proctor *v.* Owens, 18 Ind. 21, 81 Am. Dec. 341); that extrinsic facts were proven (Keck *v.* Derickson, 7 Ind. 563); or that evidence was properly admitted (Roberts *v.* Ward, 8 Blackf. (Ind.) 333) or rejected (Ranger *v.* Goodrich, 17 Wis. 78).

96. Harmless error generally see Appeal and Error, 3 Cyc. 383 *et seq.*

97. Barkly *v.* Copeland, 74 Cal. 1, 15 Pac. 307, 5 Am. St. Rep. 413; Johnson *v.* Brown, 130 Ind. 534, 28 N. E. 698; Porter *v.* Choen, 60 Ind. 338.

98. *California.*— Preston *v.* Frey, 91 Cal. 107, 27 Pac. 533.

Illinois.— Hintz *v.* Graupner, 138 Ill. 158, 27 N. E. 935.

Indiana.— Justice *v.* Kirlin, 17 Ind. 588.

Kentucky.— McIntyre *v.* Bransford, 17 S. W. 359, 13 Ky. L. Rep. 454.

Maryland.— Blumhardt *v.* Rohr, 70 Md. 328, 17 Atl. 266.

Massachusetts.— Lawler *v.* Earle, 5 Allen 22.

Michigan.— Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114.

Missouri.— Mitchell *v.* Bradstreet Co., 116 Mo. 226, 22 S. W. 358, 724, 38 Am. St. Rep. 592, 20 L. R. A. 138; Coe *v.* Griggs, 76 Mo. 619.

Pennsylvania.— Smith *v.* Smith, 39 Pa. St. 441.

Tennessee.— Robinson *v.* Baker, 10 Lea 402.

Wisconsin.— Hacker *v.* Heiney, 111 Wis. 313, 87 N. W. 249.

United States.— Smith *v.* Sun Printing, etc., Assoc., 55 Fed. 240, 5 C. C. A. 91.

See 32 Cent. Dig. tit. "Libel and Slander," § 381.

Permitting plaintiff to prove the falsity of the publication, although there was no plea of justification, is not prejudicial error, where defendant denied each and every allegation in the petition except the one charging the publication of the article. Moffitt *v.* Chicago Chronicle Co., 107 Iowa 407, 78 N. W. 45.

Admission of evidence held prejudicial.— In an action for false statements made in the report of an arrest, admission in evidence of the rough treatment which plaintiff received was error and it was not cured by an instruction to the jury that they should not consider the arrest at all. French *v.* Detroit Free Press Co., 85 Mich. 463, 48 N. W. 615; McAllister *v.* Detroit Free Press Co., 85 Mich. 453, 48 N. W. 612.

Exclusion of evidence held prejudicial.— A special verdict that the publication was false but not published "with intent to injure

ground for reversal. So when a charge is actionable *per se*, defendant cannot complain that the question of its actionable quality is submitted to the jury.[99]

(II) *Instructions.* The same rule applies to instructions given by the court to the jury.[1]

d. Review of Questions of Fact — (I) *In General.* The finding of the jury on a question of fact will not be disturbed by the reviewing court when there is some evidence upon which a verdict could be predicated,[2] but if there is no evidence whatever to support the verdict it will be reversed.[3]

(II) *Excessive Verdicts.*[4] A reviewing court will not set aside a verdict on the ground that the damages are excessive unless it is satisfied that the verdict is the result of gross error, passion, bias, corruption, or prejudice.[5]

plaintiff's feelings and degrade him in the estimation of the public" does not negative all malice and does not cure an error of the court in excluding evidence in mitigation of damages. Eviston *v.* Cramer, 54 Wis. 220, 11 N. W. 556.

99. Witcher *v.* Jones, 17 N. Y. Suppl. 491.

1. *Indiana.*— Brown *v.* Brooks, 3 Ind. 518.

Iowa.— Clear *v.* Reasor, 29 Iowa 327.

Maine.— Sawyer *v.* Hopkins, 22 Me. 268.

New York.— Mattice *v.* Wilcox, 147 N. Y. 624, 42 N. E. 270; Warner *v.* Press Pub. Co., 15 Daly 545, 8 N. Y. Suppl. 341.

Utah.— Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

Washington.— Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

See 32 Cent. Dig. tit. "Libel and Slander," § 382.

An instruction that slander suits are not favored in law is not reversible error where the evidence for plaintiff is insufficient to justify a verdict in her favor. McClurkin *v.* Ewing, 42 Ill. 282.

Instructions as to malice see Walker *v.* Wickens, 49 Kan. 42, 30 Pac. 181; Remington *v.* Congdon, 2 Pick. (Mass.) 310, 13 Am. Dec. 431; Hatt *v.* Evening News Assoc., 94 Mich. 114, 53 N. W. 952, 94 Mich. 119, 54 N. W. 766; Orth *v.* Featherly, 87 Mich. 315, 49 N. W. 640; Smith *v.* Matthews, 152 N. Y. 152, 46 N. E. 164 [*reversing* 9 Misc. 427, 29 N. Y. Suppl. 1058].

Instructions as to publication see Pavlovski *v.* Thornton, 89 Ga. 829, 15 S. E. 822; Frank *v.* Kaminsky, 109 Ill. 26.

Instructions as to reputation or character see Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323]; Wilcox *v.* Moon, 61 Vt. 484, 17 Atl. 742.

Instructions as to variance see Ransom *v.* McCurley, 140 Ill. 626, 31 N. E. 119 [*affirming* 38 Ill. App. 323]; Nicholson *v.* Rogers, 129 Mo. 136, 31 S. W. 260. See also McNaughton *v.* Quay, 102 Mich. 142, 60 N. W. 474.

Instructions as to damages see White *v.* Sun Pub. Co., 164 Ind. 426, 73 N. E. 890; Ott *v.* Press Pub. Co., 40 Wash. 308, 82 Pac. 403.

2. *Connecticut.*— Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. 865.

Illinois.— Peters *v.* Bourneau, 22 Ill. App. 177.

Louisiana.— Toye *v.* McMahon, 21 La. Ann. 308.

Michigan.— Lachman *v.* Fuller, 125 Mich. 473, 84 N. W. 721.

New York.— Engel *v.* New York Evening Post Co., 38 Misc. 377, 77 N. Y. Suppl. 884; Fleming *v.* Brauer, 96 N. Y. Suppl. 594, holding that a verdict for defendant will not be set aside unless it indicates passion or prejudice.

Washington.— Haynes *v.* Spokane Chronicle Pub. Co., 11 Wash. 503, 39 Pac. 969.

England.— Broome *v.* Gosden, 1 C. B. 728, 50 E. C. L. 728.

See 32 Cent. Dig. tit. "Libel and Slander," § 383.

Construction of alleged defamatory language.— On appeal the court will if possible construe the language in a sense that will support the verdict. Berea College *v.* Powell, 77 S. W. 381, 25 Ky. L. Rep. 1235.

3. Yarborough *v.* Tate, 14 Tex. 483.

Reversal as to one or more coparties.— The damages being so largely within the discretion of the jury, where a judgment against three defendants, one of whom is a wealthy corporation and the others individuals, is reversed as against the corporation and one other of defendants for insufficiency of evidence, it should be reversed *in toto*, and a new trial awarded as to the remaining defendant, although for compensatory damages only, as it cannot be fairly assumed as a matter of fact that the jury would have awarded the same amount of damages against the remaining defendant alone. Washington Gaslight Co. *v.* Lansden, 172 U. S. 534, 19 S. Ct. 296, 43 L. ed. 543.

4. **What verdicts are or are not excessive** see *supra*, VIII, G, 4.

Excessive verdict as ground for new trial see New Trial.

5. *California.*— Harris *v.* Zanone, 93 Cal. 59, 28 Pac. 845; Wilson *v.* Fitch, 41 Cal. 363.

Florida.— Jones *v.* Greeley, 25 Fla. 629, 6 So. 448.

Georgia.— Henderson *v.* Fox, 83 Ga. 233, 9 S. E. 839; Brown *v.* Autrey, 78 Ga. 753, 3 S. E. 669; Broach *v.* King, 23 Ga. 500.

Illinois.— Spencer *v.* McMasters, 16 Ill. 405.

Indiana.—Crocker *v.* Hadley, 102 Ind. 416, 1 N. E. 734; Marks *v.* Jacobs, 76 Ind. 216; Alexander *v.* Thomas, 25 Ind. 268.

(III) *Insufficient Verdicts.* A verdict will not be interfered with on appeal on the ground of the insufficiency of the damages awarded,[6] unless they are grossly inadequate.[7]

e. Matters First Urged on Appeal.[8] On appeal it is too late to object to the sufficiency of the declaration as to venue,[9] or to claim that the words are privileged.[10] So it is held that a question which should have been raised by innuendo cannot, in the absence of an innuendo, be raised for the first time on appeal.[11] So under statute in Vermont it is held that the motion for a certificate in an action for slander that the cause of action arose from the wilful and malicious act of defendants cannot be first made in the supreme court.[12] So an objection that the court erred in submitting to the jury the question whether the publication was a fair report of a legal proceeding is not available, where the court was not requested to pass on the question as a matter of law and no exception was taken to its submission to the jury.[13]

IX. Slander of Property or Title.[14]

A. General Statement as to Right of Action. False and malicious statements, disparaging property or the title thereto when followed, as a natural, reasonable, and proximate result, by special damage to the owner, are actionable.[15] Slander of title of property may be published orally or by writing, printing, or otherwise.[16] An action for slander of title is an action of tort,[17] and is not properly for words spoken, or for a libel written or published, but an action in

Kentucky.— Letton *v.* Young, 2 Metc. 558.

Minnesota.— Peterson *v.* Western Union Tel. Co., 65 Minn. 18, 67 N. W. 646, 33 L. R. A. 302; Pratt *v.* Pioneer Press Co., 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; St. Martin *v.* Desnoyer, 1 Minn. 156, 61 Am. Dec. 494. See also Fredrickson *v.* Johnson, 60 Minn. 337, 62 N. W. 388; Dennis *v.* Johnson, 42 Minn. 301, 44 N. W. 68.

Missouri.— Manget *v.* O'Neill, 51 Mo. App. 35; Hawkins *v.* Globe Printing Co., 10 Mo. App. 174.

New York.— Crate *v.* Decora, 15 N. Y. Suppl. 607; Maesk *v.* Smith, 12 N. Y. Suppl. 423; Tillotson *v.* Cheetham, 2 Johns. 63.

South Carolina.— Mayson *v.* Sheppard, 12 Rich. 254. See also Morgan *v.* Livingston, 2 Rich. 573.

Utah.— Turner *v.* Stevens, 8 Utah 75, 30 Pac. 24; Lowe *v.* Herald Co., 6 Utah 175, 21 Pac. 991.

Wisconsin.— Brown *v.* Vannaman, 85 Wis. 451, 55 N. W. 183, 39 Am. St. Rep. 860.

United States.— Smith *v.* Sun Pub. Co., 50 Fed. 399; Gibson *v.* Cincinnati Enquirer, 11 Fed. Cas. No. 5,392, 2 Flipp. 121.

England.— Praed *v.* Graham, 4 Q. B. D. 53, 59 L. J. Q. B. 230, 38 Wkly. Rep. 103. See also Harris *v.* Arnott, L. R. 26 Ir. 55.

See 32 Cent. Dig. tit. "Libel and Slander," § 384.

6. Remsen *v.* Bryant, 36 N. Y. App. Div. 240, 56 N. Y. Suppl. 728.

7. Simpson *v.* Robinson, 104 La. Ann. 180, 28 So. 908; Mequet *v.* Silverman, 52 La. Ann. 1369, 27 So. 885.

8. Waiver of defects in pleading and aider by verdict see *supra*, VIII, E, 6.

9. Wickham *v.* Baker, 4 Blackf. (Ind.) 517.

10. Hess *v.* Fockler, 25 Iowa 9; Brooks *v.* Harison, 91 N. Y. 83.

11. Conner *v.* Standard Pub. Co., 183 Mass. 474, 67 N. E. 596, holding that in an action for publishing that insurance companies considered plaintiff's property "peculiarly susceptible to fire," the charge cannot be treated as imputing that plaintiff intentionally burned his property for the purpose of defrauding insurance companies and requiring defendant to justify to that extent, where no innuendo was laid in the declaration and no question raised at the trial.

12. Nichols *v.* Packard, 16 Vt. 147.

13. Warner *v.* Press Pub. Co., 15 Daly (N. Y.) 545, 8 N. Y. Suppl. 341.

14. Slander of title defined see *supra*, I, C.

15. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Wilson *v.* Dubois, 35 Minn. 471, 28 N. W. 68, 59 Am. Rep. 335.

16. Meyrose *v.* Adams, 12 Mo. App. 329, 332 (where it is said that "the fact that the publication is written or printed, and not oral, makes no difference in the ground of the action, and goes only to the question of dissemination and consequent damages"); Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109. See also Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 217, 6 L. J. C. P. 32, 3 Scott 725, 32 E. C. L. 176.

17. McDonald *v.* Green, 176 Mass. 113 57 N. E. 211 (holding that an action for slander of title is within the contemplation of a statute forbidding actions of tort for slander to be commenced by trustee process); Stevenson *v.* Love, 106 Fed. 466 (holding that an action for false statements by defendant whereby "plaintiff was prevented from making a certain sale" was improperly

the nature of an action of trespass on the case for special damages sustained by reason of the speaking or publication of the slander of plaintiff's title.[18] The cause of action is denominated slander of title, by a sort of figure of speech, in which the title is personified, and made subject to many of the rules applicable to personal slander when the words themselves are not actionable.[19]

B. Nature of Property Affected. Slander of title or property may be predicated of either real[20] or personal[21] property. An action will lie for slander of title to letters patent,[22] copyrights,[23] or trade-marks.[24]

C. Prerequisites to Right of Action — 1. In General. In order for plaintiff to recover in the action he must prove: (1) The uttering and publishing of the slanderous words; (2) that they were false; (3) that they were malicious; (4) that he sustained special damage thereby;[25] and (5) that he possessed an estate or interest in the property slandered.[26]

2. Falsity. In order to maintain the action it is necessary to establish that the words published were false.[27] If the alleged defect or infirmity in title or prop-

laid in contract, the right of action being for slander of title).

18. Meyrose *v.* Adams, 12 Mo. App. 329. See also Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335; Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 217, 6 L. J. C. P. 32, 3 Scott 725, 32 E. C. L. 176.

19. Kendall *v.* Stone, 5 N. Y. 14.

20. *Indiana.*— May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946, a claim by defendant that he had a lien on land for money used in purchasing it.

Kansas.— Stark *v.* Chitwood, 5 Kan. 141, slander of title by means of a wrongful levy on land.

Maryland.— Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558, charge that plaintiff had only a dower interest in the land and that it belonged to defendant.

Michigan.— Harrison *v.* Howe, 109 Mich. 476, 67 N. W. 527, a false statement that certain premises could not be used for saloon purposes.

New York.— Dodge *v.* Colby, 108 N. Y. 445, 15 N. E. 703 [*affirming* 37 Hun 515]; Like *v.* McKinstry, 3 Abb. Dec. 62 [*affirming* 41 Barb. 186]; Snow *v.* Judson, 38 Barb. 210.

Rhode Island.— Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567, statement by a lessor that a year's lease given by him was only for a month.

England.— Wren *v.* Weild, L. R. 4 Q. B. 731, 10 B. & S. 51, 38 L. J. Q. B. 327, 20 L. T. Rep. N. S. 1007.

See 32 Cent. Dig. tit. "Libel and Slander," § 386.

An attorney employed to examine a title and agreed upon by both parties may be guilty of slandering the title, if he falsely and maliciously declares it bad when he knows it to be good, or could have ascertained the fact by the use of ordinary skill and diligence. Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. 818.

21. *Alabama.*— Hill *v.* Ward, 13 Ala. 310, claiming title to slaves.

Minnesota.— Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335, statement that a horse twelve years old was twenty-one years old.

New York.— Like *v.* McKinstry, 3 Abb. Dec. 62 [*affirming* 41 Barb. 186].

Virginia.— Ross *v.* Pines, Wythe 69, slander of title to slave.

England.— Wren *v.* Weild, L. R. 4 Q. B. 721, 10 B. & S. 51, 38 L. J. Q. B. 327, 20 L. T. Rep. N. S. 1007.

See 32 Cent. Dig. tit. "Libel and Slander," § 386.

22. Flint *v.* Hutchinson Smoke Burner Co., 110 Mo. 492, 19 S. W. 804, 33 Am. St. Rep. 476, 16 L. R. A. 243; Meyrose *v.* Adams, 12 Mo. App. 329; Germ Proof Filter Co. *v.* Pasteur Chamberland Filter Co., 81 Hun (N. Y.) 49, 30 N. Y. Suppl. 584; Wren *v.* Weild, L. R. 4 Q. B. 731, 10 B. & S. 51, 38 L. J. Q. B. 327, 20 L. T. Rep. N. S. 1007.

23. Swan *v.* Tappan, 5 Cush. (Mass.) 104.

24. McElwee *v.* Blackwell, 94 N. C. 261.

25. *California.*—Edwards *v.* Burris, 60 Cal. 157.

Indiana.— May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946.

Minnesota.— Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

Missouri.— Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

New York.— Le Massena *v.* Storm, 62 N. Y. App. Div. 150, 70 N. Y. Suppl. 882; Snow *v.* Judson, 38 Barb. 210.

Rhode Island.— Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 387–390.

26. See *infra*, IX, E, text and note 61.

27. *California.*—Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

Minnesota.— Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

New York.— Hastings *v.* Giles Lith. Co., 51 Hun 364, 4 N. Y. Suppl. 319; Like *v.* McKinstry, 41 Barb. 186 [*affirmed* in 3 Abb. Dec. 62].

North Carolina.— Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

Pennsylvania.— Young *v.* Geiske, 209 Pa. St. 515, 58 Atl. 887.

Rhode Island.— Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

erty exists, the action will not lie, however malicious the intent to injure may have been, because no one can be punished in damages for speaking the truth.[28] Indeed it is held that in order to constitute malice there must be a false statement.[29]

3. Malice — a. In General. Malice is a necessary ingredient to entitle plaintiff to recover.[30] Indeed it is said that malice is the gist of the action.[31]

b. Evidence — (i) *Burden of Proof.* It has been held that if plaintiff can show that the publication was false in any material respect, and can also show special damage due to himself by means of it, malice will be presumed and a *prima facie* case will be made for plaintiff.[32] On the other hand it is held that the burden of proving malice rests upon plaintiff,[33] and that malice is not presumed where a person injuriously slanders the title of another.[34]

(ii) *Admissibility.* Other statements made by defendant respecting the same title are admissible in the question of malice.[35]

(iii) *Weight and Sufficiency.* It is sufficient to prove facts and circumstances showing that the statements were made with knowledge of their falsity,[36] or in reckless disregard of the rights of plaintiff.[37] While malice must be shown as a substantive fact,[38] it is not necessary to prove it as an independent fact,[39] and

England.— Burnett *v.* Tak, 45 L. T. Rep. N. S. 743.

See 32 Cent. Dig. tit. "Libel and Slander," § 388.

Libelous statements made upon information received from another.— It has been held that if the publication is false, it is no justification that the publication charged as libelous sets forth that the statement was made upon information received from a third person. Meyrose *v.* Adams, 12 Mo. App. 329.

Sale of plaintiff's property under execution against him.—An action for slander of title will not lie because of defendant selling plaintiff's property under execution against plaintiff, since such sale is predicated on the validity of plaintiff's title. Denike *v.* Towns, 167 N. Y. 586, 60 N. E. 1110 [*affirming* 41 N. Y. App. Div. 625, 58 N. Y. Suppl. 931].

28. Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

29. Hastings *v.* Giles Lith. Co., 51 Hun (N. Y.) 364, 4 N. Y. Suppl. 319; Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

30. *Alabama.*— Hill *v.* Ward, 13 Ala. 310.

California.— Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

Colorado.— Graham *v.* Reno, 5 Colo. App. 330, 38 Pac. 835.

Kansas.— Stark *v.* Chitwood, 5 Kan. 141.

Louisiana.— Walden *v.* Peters, 2 Rob. 331, 38 Am. Dec. 213; Terrill *v.* Chambers, 12 La. 582.

Michigan.— Harrison *v.* Howe, 109 Mich. 476, 67 N. W. 527; Walkley *v.* Bostwick, 49 Mich. 374, 13 N. W. 780.

Missouri.— Butts *v.* Long, 106 Mo. App. 313, 80 S. W. 312.

New Jersey.— Andrew *v.* Deshler, 45 N. J. L. 167.

New York.— Hovey *v.* Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; Kendall *v.* Stone, 5 N. Y. 14 [*reversing* on other grounds 2 Sandf. 269]; Like *v.* McKinstry, 3 Abb. Dec. 62, 4 Keyes 397 [*affirming* 41 Barb. 186]; Dodge *v.* Colby, 37 Hun 515.

North Carolina.— Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

Pennsylvania.— Young *v.* Geiske, 209 Pa. St. 515, 58 Atl. 887.

Rhode Island.— Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

England.— Hargrave *v.* Le Breton, 4 Burr. 2422.

See 32 Cent. Dig. tit. "Libel and Slander," § 390.

31. Andrew *v.* Deshler, 45 N. J. L. 167; Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

32. Swan *v.* Tappan, 5 Cush. (Mass.) 104; John W. Lovell Co. *v.* Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363 [*affirming* 54 N. Y. Super. Ct. 60]. See also Ontario Industrial Loan, etc., Co. *v.* Lindsey, 4 Ont. 473, 484 [*reversed* on other grounds in 3 Ont. 66], where it is said: "If the allegations are made by a stranger who has no right to interfere, malice is presumed."

33. Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109. See also Hill *v.* Ward, 13 Ala. 310; Pater *v.* Baker, 3 C. B. 831, 11 Jur. 370, 16 L. J. C. P. 124, 54 E. C. L. 831.

34. McDaniel *v.* Baca, 2 Cal. 326, 56 Am. Dec. 339.

35. Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290; Kendall *v.* Stone, 2 Sandf. (N. Y.) 269.

36. Paull *v.* Halferty, 63 Pa. St. 46, 3 Am. Rep. 518; Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567; Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. 818. See also Linville *v.* Rhoades, 73 Mo. App. 217.

37. Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. 818. See also Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

38. Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109; Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

39. Hopkins *v.* Browne, 21 R. I. 20, 23, 41 Atl. 567, where it is said: "Malice is a purpose existing only in the mind, and is not ordinarily susceptible of proof as an independent fact. . . . In other words, it naturally and legitimately springs out of and is to be inferred from such language or conduct

hence it may be legitimately inferred from the character of the language and conduct of defendant,[40] as well as from other facts and circumstances.[41]

4. Injury or Damage — a. In General. Special damages are the gist of an action for slander of title or property and without them the action cannot be maintained; the utterance of a mere falsehood, however malicious, will not alone be sufficient.[42] It must be established that plaintiff sustained pecuniary loss[43] as the direct and natural result of the publication of the words.[44] Where loss of sale of a thing disparaged is claimed and relied on as special damages occasioned by the disparagement, it is indispensable to allege and show a loss of sale to some particular person, for the loss of a sale to some particular person is the special damage and of the gist and substance of the action.[45]

b. Interference With Contractual Relations. It has been held, that where there is a valid and subsisting contract concerning certain property, and a third person by a malicious slander of a title or interest in the property induces a breach of the contract, the remedy of the party injured thereby is in contract against the person refusing to perform and not against the third party for slander of title.[46] However, if the effect of the slander is not to create a breach of contract but to prevent an owner from making a contract concerning the property, an action for slander of title will lie against the intermeddler.[47]

D. Privilege — 1. In General. If defendant can show that the publication was honestly made by him, believing it to be true, and that there was a reasonable occasion or exigency in the conduct of his own affairs in matters where his interest

as naturally tends to deceive, injure, and damage another, and for which there is no legal excuse. . . . And where it is made to appear that the language used was knowingly false and uttered with intent to injure, it is clearly competent for the jury to find that it was malicious."

40. Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567.

41. Hill *v.* Ward, 13 Ala. 310; Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

42. *California.*—Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

Massachusetts.— Swan *v.* Tappan, 5 Cush. 104.

Michigan.— Haney Mfg. Co. *v.* Perkins, 78 Mich. 1, 43 N. W. 1073.

Minnesota.— Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

New York.— Kendall *v.* Stone, 5 N. Y. 14; Like *v.* McKinstry, 41 Barb. 186 [*affirmed* in 3 Abb. Dec. 62, 4 Keyes 397]; Linden *v.* Graham, 1 Duer 670; Tobias *v.* Harland, 4 Wend. 537.

North Carolina.— Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

Rhode Island.—Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567.

United States.— Collins *v.* Whitehead, 34 Fed. 121.

England.— Evans *v.* Harlow, 5 Q. B. 624, D. & M. 507, 8 Jur. 571, 13 L. J. Q. B. 120, 48 E. C. L. 624; Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 271, 6 L. J. C. P. 32, 3 Scott 725, 32 E. C. L. 176; Tasburgh *v.* Day, Cro. Jac. 484; Manning *v.* Avery, 3 Keb. 153.

Canada.— Ashford *v.* Choate, 20 U. C. C. P. 471.

See 32 Cent. Dig. tit. "Libel and Slander," § 389.

A question for jury.—The question whether the language charged had a tendency to deter customers from buying and whether they were in fact so deterred is for the jury. Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329.

43. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946 (holding that where plaintiff was prevented from selling his land for two hundred dollars more than it was worth, he might recover the two hundred dollars thus lost); Kendall *v.* Stone, 5 N. Y. 14; Young *v.* Geiske, 209 Pa. St. 515, 58 Atl. 887.

44. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946.

45. Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

46. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Brentman *v.* Note, 3 N. Y. Suppl. 420; Paull *v.* Halferty, 63 Pa. St. 46, 3 Am. Rep. 518; Morris *v.* Langdale, 2 B. & P. 284. *Compare* Ashford *v.* Choate, 20 U. C. C. P. 471.

Voluntary cancellation of contract by plaintiff.— Where the purchaser in a contract for the sale of land by reason of the slander became dissatisfied and procured a cancellation of the contract by plaintiff, there can be no recovery from the defendant, the cancellation being voluntary. Kendall *v.* Stone, 5 N. Y. 14 [*reversing* 2 Sandf. 269]. To same effect see Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

47. Brentman *v.* Note, 3 N. Y. Suppl. 420; Paull *v.* Halferty, 63 Pa. St. 46, 3 Am. Rep. 518; Stevenson *v.* Love, 106 Fed. 466. See also Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

was concerned, which fairly warranted the publication, such proof will bring the publication within the class of privileged publications and form a good defense to the action unless plaintiff can show express malice or malice in fact.[48] A person who utters words in the *bona fide* assertion and maintenance of his own title is regarded as standing in a more favorable position than he who attacks the title of another, without such cause.[49] And accordingly whenever a man claims a right or title in himself, it is not enough for plaintiff to prove that he has no such right; he must also show that defendant could not honestly have believed in the existence of the right he claimed, or at least that he had no reasonable or probable cause for so believing.[50] Thus if defendant, believing himself to have an exclusive patent, issues a notice of an alleged infringement by plaintiff in good faith as a warning to dealers against an invasion of his rights, a mistake on his part as to the validity of his claim will not render him liable to an action.[51] So the discontinuance or loss of a suit in regard to property will not render the person bringing it liable for slander of title where he had reasonable grounds for believing that he had a good cause of action.[52]

2. Malice — a. Burden of Proof. Assuming that the occasion of the publication brings it within the limits of a privileged communication, the burden of proving malice in fact is thrown upon plaintiff.[53] The mere fact that defendant asserts a claim to property of plaintiff which is unfounded does not warrant a presumption of malice.[54]

48. Swan *v.* Tappan, 5 Cush. (Mass.) 104.

Whether occasion privileged a question for the court.— John W. Lovell Co. *v.* Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363.

49. See Kendall *v.* Stone, 2 Sandf. (N. Y.) 269.

50. *Alabama.*— Hill *v.* Ward, 13 Ala. 310.

California.— Thompson *v.* White, 70 Cal. 135, 11 Pac. 564; McDaniel *v.* Baca, 2 Cal. 326, 56 Am. Dec. 339.

Illinois.— Everett Piano Co. *v.* Bent, 60 Ill. App. 372.

Kansas.— Stark *v.* Chitwood, 5 Kan. 141.

Kentucky.— Duncan *v.* Griswold, 92 Ky. 546, 18 S. W. 354, 13 Ky. L. Rep. 765.

Louisiana.— Henry *v.* Dufilho, 14 La. 48.

Maryland.— Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558.

New Jersey.— Brady *v.* Carteret Realty Co., 67 N. J. Eq. 641, 60 Atl. 938, 110 Am. St. Rep. 502, claiming an interest in land being sold at judicial sale.

New York.—Like *v.* McKinstry, 3 Abb. Dec. 62, 4 Keyes 397 [*affirming* 41 Barb. 186]; Cornwell *v.* Parke, 52 Hun 59, 5 N. Y. Suppl. 905; Bailey *v.* Dean, 5 Barb. 297.

North Carolina.— Cardon *v.* McConnell, 120 N. C. 461, 27 S. E. 109.

Pennsylvania.— Stieb *v.* Todd, 11 Montg. Co. Rep. 70.

Rhode Island.—Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

England.— Steward *v.* Young, L. R. 5 C. P. 122, 39 L. J. C. P. 85, 22 L. T. Rep. N. S. 168, 18 Wkly. Rep. 492; Brook *v.* Rawl, 4 Exch. 521, 19 L. J. Exch. 114; Smith *v.* Spooner, 3 Taunt. 246, 12 Rev. Rep. 645.

See 32 Cent. Dig. tit. "Libel and Slander," § 391.

Compare Ontario Industrial Loan, etc., Co., *v.* Lindsey, 3 Ont. 66 [*reversing* in part 4 Ont. 473].

Instruction omitting element of good faith. — An instruction that defendant in stating that plaintiff had no title was asserting title in himself and merely stating the difference between the parties is erroneous as omitting any hypothesis of good faith on the part of defendant in making his claim. Linville *v.* Rhoades, 73 Mo. App. 217.

51. Everett Piano Co. *v.* Bent, 60 Ill. App. 372; Hovey *v.* Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; Wren *v.* Weild, L. R. 4 Q. B. 731, 10 B. & S. 51, 38 L. J. Q. B. 327, 20 L. T. Rep. N. S. 1007. See Andrew *v.* Deshler, 45 N. J. L. 167; Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329. And see cases cited *supra*, note 50.

52. Walden *v.* Peters, 2 Rob. (La.) 331, 38 Am. Dec. 213; Henry *v.* Dufilho, 14 La. 48; Tewill *v.* Chambers, 12 La. 582 (proceedings before registrar and receiver); Bailey *v.* Dean, 5 Barb. (N. Y.) 297 (issuance of distress warrant).

Wrongful levy on land as belonging to another than owner.— Stark *v.* Chitwood, 5 Kan. 141.

Where a lawyer was employed to examine a title as shown in an abstract, and he did this with such care and skill as ordinarily skilful and prudent attorneys would use, he would not be liable for slander of title if the abstract was at fault, but he is liable in slander of title if he falsely and maliciously declares it bad when he knows it to be good. Hines *v.* Lumpkins, 19 Tex. Civ. App. 556, 47 S. W. 818.

53. Andrew *v.* Deshler, 45 N. J. L. 167; John W. Lovell Co. *v.* Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363.

54. Hill *v.* Ward, 13 Ala. 310; Cardon *v.* McConnell, 120 N. C. 461, 27 N. E. 109; Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

b. Rebuttal of Malice. To rebut evidence of malice defendant may show that he was advised by counsel, upon a fair representation of his claim, as to the course to be pursued in the protection of his rights.[55] It must appear, however, that defendant truthfully disclosed to his counsel all the material facts within his knowledge.[56]

c. Sufficiency of Evidence to Establish Malice. Actual malice in uttering the false statements may consist either in a direct intention to injure defendant or in a reckless disregard of his rights and the consequences that may result to him.[57] And it may be made out either by extrinsic evidence or from the language of the communication itself, as if its terms be disproportioned to the exigencies of the occasion, or if the language used be unnecessarily excessive.[58] If it be shown that plaintiff, in asserting title to property belonging to defendant, had no reasonable or probable cause for believing he had the title asserted, malice may be inferred, that is, the jury is at liberty to infer malice from want of probable cause, but will not be compelled to so find.[59] If there is any evidence of malice, the question of malice should be submitted to the jury.[60]

E. Persons Entitled to Sue. An action for slander of title is maintainable only by one who possesses an estate or interest in the property slandered.[61]

F. Persons Liable. While it is true that two or more persons cannot as a general rule be held jointly liable for verbal slander of title,[62] yet it is held that, under circumstances where all are jointly concerned and interested, and participate in the general purpose, the concert and coöperation may be shown, although the false and malicious statements may have been made by one alone.[63]

G. Pleading[64] — **1. By Plaintiff.** It is necessary for plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements have been made,[65] as well as to aver his title thereto,[66] so that it may be

55. Hill *v.* Ward, 13 Ala. 310; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558. See also Everett Piano Co. *v.* Bent, 60 Ill. App. 372; Stark *v.* Chitwood, 5 Kan. 141; Like *v.* McKinstry, 3 Abb. Dec. (N. Y.) 62, 4 Keyes 397 [*affirming* 41 Barb. 186].

56. Like *v.* McKinstry, 3 Abb. Dec. (N. Y.) 62, 4 Keyes 397 [*affirming* 41 Barb. 186].

57. Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

58. Andrew *v.* Deshler, 45 N. J. L. 167; Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567; Robertson *v.* McDougall, 4 Bing. 670, 13 E. C. L. 686, 3 C. & P. 259, 14 E. C. L. 556, 6 L. J. C. P. O. S. 171, 1 M. & P. 692. See also Walden *v.* Peters, 2 Rob. (La.) 331, 38 Am. Dec. 213; Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322.

59. Linville *v.* Rhoades, 73 Mo. App. 217; Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567.

60. Hill *v.* Ward, 13 Ala. 310; Gent *v.* Lynch, 23 Md. 58, 87 Am. Dec. 558; Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290; Hopkins *v.* Drowne, 21 R. I. 20, 41 Atl. 567. See also Andrew *v.* Deshler, 45 N. J. L. 167.

61. Edwards *v.* Burris, 60 Cal. 157; Germ Proof Filter Co. *v.* Pasteur Chamberland Filter Co., 81 Hun (N. Y.) 49, 30 N. Y. Suppl. 584.

Equity to compel reconveyance.— Although equity will compel a reconveyance on proof that an absolute deed was given as security for a loan and that the money secured had been paid to the grantee, the grantor has no such interest in the land as will enable him to maintain an action of slander of title against the grantee for saying that the grantor has no title to the property. Hurley *v.* Donovan, 182 Mass. 64, 64 N. E. 685.

As against defendant's claim of ownership or right plaintiff must succeed on the strength of his own asserted title and not on any infirmity of defendant's. Hastings *v.* Giles Lith. Co., 51 Hun (N. Y.) 364, 4 N. Y. Suppl. 319.

Suit by one corporation against another for slander of goods see Corporations, 10 Cyc. 1339, note 7.

62. Webb *v.* Cecil, 9 B. Mon. (Ky.) 198, 48 Am. Dec. 423; Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290. *Compare* Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754, slander of title by partners.

63. Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290.

Liability of solicitor aiding client.— In Ontario Industrial Loan, etc., Co. *v.* Lindsey, 3 Ont. 66 [*reversing* in part 4 Ont. 473], a solicitor was held liable in an action for slander of title by reason of the fact that he had, in behalf of his client, prepared and registered an instrument claiming lands belonging to plaintiff.

64. Pleading generally see Pleading.

65. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

66. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Edwards *v.* Burris, 60 Cal. 157; Stark *v.* Chitwood, 5 Kan. 141; Butts *v.* Long, 106 Mo. App. 313, 80 S. W. 312; Germ Proof Filter

shown wherein defendant had done him an injury. So it has been held to be necessary that the language complained of must be distinctly averred as published,[67] and that it is not sufficient to give merely its general purport and effect.[68] And it has been held that the complaint must set forth the falsehood of the statements made,[69] express malice, and want of probable cause.[70] So a complaint failing to allege special damages fails to allege a cause of action.[71] So the petition must show that the damages are the natural and probable consequence of the slander.[72] In order to show that the words uttered have caused injury to plaintiff, it is generally necessary to aver and show that they were uttered pending some treaty or public auction for the sale of the property, and that thereby an intending purchaser was prevented from bidding or competing;[73] and in such case the names of the particular customers or purchasers lost by reason of the slander must be alleged.[74]

Co. *v.* Pasteur Chamberland Filter Co., 81 Hun (N. Y.) 49, 30 N. Y. Suppl. 584.

Plaintiff may prove title by adverse possession, under a Texas statute, without specially pleading it. Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. 818.

67. Hill *v.* Ward, 13 Ala. 310; Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

Where the injury has been done by acts and threats more than by words, the complaint may be good, although it does not set out the words. McElwee *v.* Blackwell, 94 N. C. 261.

68. Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

Variance.— The slander proved must substantially correspond with that charged. Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

69. Meyrose *v.* Adams, 12 Mo. App. 329; Moore *v.* Rowbotham, 44 Leg. Int. (Pa.) 264.

70. Stark *v.* Chitwood, 5 Kan. 141; Meyrose *v.* Adams, 12 Mo. App. 329; Moore *v.* Rowbotham, 44 Leg. Int. (Pa.) 264. See also Walton *v.* Perkins, 28 Minn. 413, 10 N. W. 424. *Compare* Andrew *v.* Deshler, 43 N. J. L. 16 (holding that if there is an averment that the statements are false and malicious, an averment that they are false to the knowledge of defendant or an averment of want of probable cause is unnecessary even in the case of privileged communications); Young *v.* Geiske, 21 Lanc. L. Rev. (Pa.) 33.

Sufficient averment of malice.— A charge that defendant "wrongfully, intentionally and without just cause" made statements which were not true amounts to an allegation of malice. Linville *v.* Rhoades, 73 Mo. App. 217.

71. *California.*— Burkett *v.* Griffith, 90 Cal. 532, 537, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707, where it is said that "as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint."

Massachusetts.— Swan *v.* Tappan, 5 Cush. 104.

Minnesota.— Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

New York.— Maglio *v.* New York Herald Co., 93 N. Y. App. Div. 546, 87 N. Y. Suppl. 927; Maglio *v.* New York Herald Co., 83 N. Y. App. Div. 44, 82 N. Y. Suppl. 509; Childs *v.* Tuttle, 48 Hun 228, 15 N. Y. Civ. Proc. 182; Linden *v.* Graham, 1 Duer 670; Tobias *v.* Harland, 4 Wend. 537.

England.— Ingram *v.* Lawson, 6 Bing. N. Cas. 212, 4 Jur. 151, 9 L. J. C. P. 145, 8 Scott 471, 37 E. C. L. 587; Malachy *v.* Soper, 3 Bing. N. Cas. 371, 2 Hodges 217, 6 L. J. C. P. 32, 3 Scott 725, 32 E. C. L. 176.

Canada.— Ashford *v.* Choate, 20 U. C. C. P. 471. See also Davis *v.* Barnett, 26 U. C. Q. B. 109.

See 32 Cent. Dig. tit. "Libel and Slander," § 394.

An allegation of a loss in general terms is insufficient. Stark *v.* Chitwood, 5 Kan. 141; Stevenson *v.* Love, 106 Fed. 466.

Proof of special damages other than those alleged.— Evidence to recover special damages other than those alleged in the petition is inadmissible. Gott *v.* Pulsifer, 122 Mass. 235, 23 Am. Rep. 322, holding that where the special damage alleged was the loss of the sale of a statue, evidence of the value of the statue as a scientific curiosity or for purposes of exhibition is inadmissible. *Compare* Ingram *v.* Lawson, 9 C. & P. 326, 38 E. C. L. 197.

Failure to allege substantial damages.— It has been held that if the charges of slander of title are sustained, plaintiff will be entitled to a judgment for at least nominal damages in vindication of his right, although no substantial damages are alleged. Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

72. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

Averment that words were heard by prospective purchaser.— Where the slander consists in claiming title to property offered at auction, the petition must show the title which defendant set up, and that the words were spoken in the hearing of the bidders. Hill *v.* Ward, 13 Ala. 310.

73. Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

74. Wilson *v.* Dubois, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335; Childs *v.* Tuttle, 48 Hun (N. Y.) 228, 15 N. Y. Civ. Proc. 182; Linden *v.* Graham, 1 Duer (N. Y.) 670; Stevenson *v.* Love, 106 Fed. 466.

Where plaintiff was obliged to make a sale at a less price, the complaint should show

Evidence to support the allegations in the complaint or petition should not be set forth in such complaint or petition.[75]

2. By Defendant. The plea of the general issue will not only deny the fact of publication, but also that such publication was malicious.[76] So the truth of the words may be given in evidence under the general issue.[77]

H. Limitation of Actions.[78] Where the slander complained of consists of a continued claim of rights in plaintiff's property by defendant the statute of limitations does not commence to run until defendant ceases to set up his adverse claims.[79]

I. Damages Recoverable.[80] In addition to the actual damages sustained by plaintiff[81] it is discretionary with the jury to also award punitive or exemplary damages.[82]

J. Judgment.[83] In an action for slander upon plaintiff's title to real estate, plaintiff's title is only incidentally involved, and upon his failure to offer any evidence, an adjudication of title in defendant's favor is erroneous.[84]

K. Action of Jactitation — 1. In General. In an action known to the jurisprudence of Louisiana as a jactitation suit, a judgment is authorized requiring and compelling a person who speaks against the title of a *bona fide* possessor of real estate by asserting a right in himself either to desist from such assertions or bring suit in support of his alleged claim for the purpose of opposing his title to that of the possessor in order that the respective claims, rights, and titles of the parties may be finally settled according to law and justice.[85]

2. Parties. The action of jactitation cannot be maintained by a party not in possession.[86] Where defendant sets up title in himself he assumes the position of a plaintiff and the last warrantor of the original plaintiff's title is the real defendant.[87]

3. Pleading[88] — a. By Plaintiff. Without a charge of slander of title, plaintiff cannot maintain a jactitation suit.[89]

the names of the customers lost and the one to whom the sale was made, and the price he could have obtained and that actually obtained. Stevenson *v.* Love, 106 Fed. 466.

75. Butts *v.* Long, 94 Mo. App. 687, 68 S. W. 754.

76. Andrew *v.* Deshler, 43 N. J. L. 16.

77. Kendall *v.* Stone, 2 Sandf. (N. Y.) 269.

78. Statutes of limitations generally see Limitations of Actions.

79. Chesebro *v.* Powers, 78 Mich. 472, 44 N. W. 290.

80. Damages generally see Damages.

81. Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567.

Special damage as prerequisite to right of action see *supra*, IX, C, 4.

82. Kendall *v.* Stone, 2 Sandf. (N. Y.) 269; Stroud *v.* Smith, 194 Pa. St. 502, 45 Atl. 329 (holding that punitive damages may be awarded if the jury find that there was not only legal malice, but an actual malicious intent to injure); Hopkins *v.* Browne, 21 R. I. 20, 41 Atl. 567 (five thousand dollars held not excessive).

83. Judgment generally see Judgments.

84. Hellings *v.* Duvall, 131 Cal. 618, 63 Pac. 1017.

85. Bossier *v.* Jackson, 114 La. 707, 38 So. 525; Dalton *v.* Wickliffe, 35 La. Ann. 355; Van Wych *v.* Gaines, 13 La. Ann. 235; Walden *v.* Peters, 2 Rob. (La.) 331, 38 Am. Dec. 213 (where it is said: "The principal object of such a suit according to the Spanish law from which we derive it is to quiet title or compel the defendant either to waive or to institute a suit and thereby enable the plaintiff to make good his title"); Livingston *v.* Heerman, 9 Mart. (La.) 656, 714 (where it is said: "The object of this law was intended to protect possession; to give it the same advantages when disturbed by slander, as by actual intrusion. To force the defamer to bring suit, and throw the burthen on him of proving what he asserted"). See also 23 Cyc. 372.

86. Arrowsmith *v.* Durell, 14 La. Ann. 849. See also Bossier *v.* Jackson, 114 La. 707, 38 So. 525. *Compare* De Pontalba *v.* Blanc, 12 La. Ann. 8.

Mere possession is sufficient as against one disclaiming title and another having a void tax title. Posey *v.* Ducros, 115 La. 359, 39 So. 26.

Possession sufficient to establish prescriptive title not essential.— Where defendant relies on the two defenses, denial of plaintiff's possession, and a superior title in himself, it is not necessary for plaintiff to establish a possession of thirty years sufficient by itself to create prescriptive title, since his title is not at issue except so far as it may be destroyed by the establishment of a better title in defendant. Dalton *v.* Wickliffe, 35 La. Ann. 355.

87. Millaudon *v.* McDonough, 18 La. 102.

88. Pleading generally see Pleading.

89. Bossier *v.* Jackson, 114 La. 707, 38 So. 525.

b. By Defendant. The action admits of three responses: (1) A denial of plaintiff's possession;[90] (2) a denial of the slander; and (3) an admission of the slander.[91] If defendant denies the slander the court will proceed to try the fact whether he had defamed the title or not and give damages accordingly.[92] In the last case if he simply admits the slander without setting up specific title in himself, the appropriate judgment is one ordering him to bring suit and establish his pretenses.[93] But if defendant, after admitting the slander, avers a better title in himself the court need not order a new suit but may investigate and pass upon his title.[94] Defendant must either deny the slander or admit the allegation, but he cannot do both, for the pleas are inconsistent.[95]

4. Burden of Proof. In an action of slander of title, defendant by setting up title in himself converts it into a petitory action in which he must be considered as plaintiff with the burden of clearly establishing his claim.[96] But this rule applies only to the case where defendant is out of possession.[97]

5. Res Adjudicata. A petitory action in a federal court brought by the person who is alleged to have slandered the title is a bar to an action of jactitation.[98]

6. Judgment. The judgment in an action of jactitation may order defendant to establish his pretensions by suit within a certain period and his failure to do so will stand against him as a perpetual default in favor of plaintiff; but the court

90. Dalton *v.* Wickliffe, 35 La. Ann. 355.

Dismissal of exception on ground that plaintiff was not in possession.— Where an exception to the petition on the ground that plaintiff was not in possession, filed *in limine litis*, has been dismissed by the court previously to the impaneling of the jury, the question of possession was not before the jury. Arrowsmith *v.* Durrell, 14 La. Ann. 849.

Possession by plaintiff as prerequisite to maintenance of action see *supra*, IX, K, 2, text and note 86.

91. Dalton *v.* Wickliffe, 35 La. Ann. 355; Livingston *v.* Heerman, 9 Mart. (La.) 656.

Plea disclaiming title and possession.— The action is not to be dismissed because defendant pleads he is not in possession and disclaims title. Plaintiff may prove the slander and his damages. Hewitt *v.* Seaton, 14 La. 159.

92. Livingston *v.* Heerman, 9 Mart. (La.) 656.

93. Dalton *v.* Wickliffe, 35 La. Ann. 355; Packwood *v.* Dorsey, 4 La. Ann. 90; Proctor *v.* Richardson, 11 La. 188; Livingston *v.* Heerman, 9 Mart. (La.) 656.

94. Dalton *v.* Wickliffe, 35 La. Ann. 355; Gay *v.* Ellis, 33 La. Ann. 249; Clarkston *v.* Vincent, 32 La. Ann. 613; Short *v.* Methodist Episcopal Church, South, 11 La. Ann. 174; Proctor *v.* Richardson, 11 La. 188; Livingston *v.* Heerman, 9 Mart. (La.) 656, 714.

95. Proctor *v.* Richardson, 11 La. 186; Livingston *v.* Heerman, 9 Mart. (La.) 656.

96. McConnell *v.* Ory, 46 La. Ann. 564, 15 So. 424; Sully *v.* Spearing, 40 La. Ann. 558, 4 So. 489; Dalton *v.* Wickliffe, 35 La. Ann. 355, 357 (where it is said that defendant "assumes the position of actor, with the onus on himself, and dependent for success on the strength of his own title, and not on the weakness of his adversary's"); Gay *v.* Ellis, 33 La. Ann. 249; Clarkson *v.* Vincent, 32 La. Ann. 613; Livingston *v.* Heerman, 9 Mart. (La.) 656; Indianapolis Land Trust *v.* Hoffman, 57 Fed. 333, 6 C. C. A. 358. See also Remick *v.* Lang, 47 La. Ann. 914, 17 So. 461; Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715.

Shifting burden of proof.— In an action for slander to certain batture property where defendant claims title in himself on the ground that at the time he purchased the adjoining land the batture did not exist, the initial burden of proving its non-existence lies on defendant, but as this involves the proof of a negative, that burden is discharged when he produces evidence raising a strong presumption of the truth of the negative, and the burden is then shifted to the party holding the affirmative to destroy this by countervailing testimony. Delachaise *v.* Maginnis, 44 La. Ann. 1043, 11 So. 715.

Necessity of pleading facts showing invalidity of defendant's title.— Where defendant sets up title under a tax deed, plaintiff is entitled to prove without specially pleading the same, that the taxes for which the same was made were in fact paid prior to the tax-sale. Indianapolis Land Trust *v.* Hoffman, 57 Fed. 333, 6 C. C. A. 358.

Invalidity of title of defendant in possession.— If the title relied on by defendant in possession is not a valid one he cannot be permitted to controvert a confirmation of plaintiff's title by the government, nor to require that plaintiff's title should be traced from the original complainant to the confirmee. De Pontalba *v.* Blanc, 12 La. Ann. 8; Moore *v.* Blanc, 12 La. Ann. 7; Griffon *v.* Blanc, 12 La. Ann. 5.

97. De Pontalba *v.* Blanc, 12 La. Ann. 8; Moore *v.* Blanc, 12 La. Ann. 7; Griffon *v.* Blanc, 12 La. Ann. 5.

98. Van Wych *v.* Gaines, 13 La. Ann. 235.

cannot fix a term within which defendant must set forth his title or sue under penalty of barring his claim forever afterward.[99] If defendant is ordered to commence suit against plaintiff for the recovery of the land, he should not, prior to the determination of the issue of title, be mulcted in damages for having acquired a title and registered it.[1]

X. CRIMINAL RESPONSIBILITY.[2]

A. Words or Acts Constituting Criminal Defamation[3] — 1. LIBEL — a. In General. Libel is an indictable offense at common law;[4] and it is held that where a civil action will lie, an indictment will also lie, but not *vice versa*.[5] Moreover statutes have been passed in many jurisdictions making libels punishable as crimes.[6] It is usually stated that libelous publications are considered as offenses against the state because of their tendency to provoke breaches of the public peace.[7] Hence it is not necessary that the words charge an indictable offense,[8] or that they refer to a specific person; they may be defamatory of a class of individuals.[9]

b. Particular Imputations — (i) *IMPUTATIONS TENDING TO EXPOSE TO PUBLIC HATRED, CONTEMPT, OR RIDICULE.* An indictment or information, as the case may be, for libel will lie for words charging want of veracity,[10] intoxication,[11]

99. Packwood *v.* Dorsey, 4 La. Ann. 90.

Where plaintiff fails to disclose a color of title to the property with reference to which the suit is brought, he is not entitled to a judgment recognizing his possession as legal and quieting him therein, even though defendant, setting up title in himself, fails to establish it; and especially is this true where plaintiff does not pray such judgment. Posey *v.* Ducros, 115 La. 359, 39 So. 26. Nor should the judgment go beyond the prayer of the petition with reference to other property, where the possible effect will be to lay a foundation for, build up, or strengthen a title as against the public. Posey *v.* Ducros, *supra*.

1. Handlin *v.* Dodt, 110 La. 936, 34 So. 881.

2. **Criminal law** generally see CRIMINAL LAW, 12 Cyc. 70 *et seq.*

Jurisdiction of criminal libel see CRIMINAL LAW, 12 Cyc. 213.

Venue of criminal libel see CRIMINAL LAW, 12 Cyc. 236.

Conspiracy to charge person with commission of crime see CONSPIRACY, 8 Cyc. 636 note 17 *et seq.*

Conspiracy to injure person's character see CONSPIRACY, 8 Cyc. 636 note 24.

3. **Defamatory words and acts in civil cases** see *supra*, III.

4. Browning *v.* Com., 116 Ky. 282, 76 S. W. 19, 25 Ky. L. Rep. 482; Com. *v.* Chapman, 13 Metc. (Mass.) 68; Com. *v.* Whitmarsh, Thach. Cr. Cas. (Mass.) 441; Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 787; State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217.

5. Miller *v.* Butler, 6 Cush. (Mass.) 71, 52 Am. Dec. 768; Com. *v.* Child, 13 Pick. (Mass.) 198; Clark *v.* Binney, 2 Pick. (Mass.) 113. See also Browning *v.* Com., 116 Ky. 282, 76 S. W. 19, 25 Ky. L. Rep. 482.

6. Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185 (holding that a statute punishing libel is valid, although it does not define the offense, as it will be understood in its common-law sense); Glassmire *v.* Judkins, 84 Mich. 447, 47 N. W. 965 (holding that the act No. 192 of 1879 (Howell Annot St. Mich. § 9315) enumerating criminal libels is exclusive and that a libel that was criminal at common law but not enumerated in the statute is not a crime).

7. People *v.* Crespi, 115 Cal. 50, 46 Pac. 863; Provident Sav. L. Assur. Soc. *v.* Johnson, 115 Ky. 84, 72 S. W. 754, 24 Ky. L. Rep. 1902 (holding that a criminal libel is committed by any writing calculated to create disturbance of the peace, corrupt public morals, or lead to any act which when done is indictable); Com. *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212; Reg. *v.* Holbrook, 4 Q. B. D. 42, 14 Cox C. C. 185, 48 L. J. Q. B. 113, 39 L. T. Rep. N. S. 536, 27 Wkly. Rep. 313. See also Sheffill *v.* Van Deusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632; Lyle *v.* Clason, 1 Cai. (N. Y.) 581.

8. State *v.* Norton, 89 Me. 290, 36 Atl. 394; State *v.* Spear, 13 R. I. 324; State *v.* Henderson, 1 Rich. (S. C.) 179.

9. State *v.* Brady, 44 Kan. 435, 24 Pac. 948, 21 Am. St. Rep. 296, 9 L. R. A. 606; Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605; Jones *v.* State, 38 Tex. Cr. 364, 43 S. W. 78, 70 Am. St. Rep. 751.

If the publication refers to a specific person, such person must be ascertainable. Com. *v.* Harris, 5 Pa. Dist. 671; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

A corporation may, it has been held, be the subject of a criminal libel. State *v.* Boogher, 3 Mo. App. 442; Brennan *v.* Tracy, 2 Mo. App. 540. But see Com. *v.* Cochran, 23 Lanc. L. Rev. (Pa.) 267.

10. Com *v.* Wardwell, 136 Mass. 164 (a charge of being an "untruthful man"); Johnson *v.* Com., (Pa. 1888) 14 Atl. 425 (an effigy bearing the words, "By George, the old liar").

11. Giles *v.* State, 6 Ga. 276 (drunkard); State *v.* Mayberry, 33 Kan. 441, 6 Pac. 553 (holding that the words, "The editor of the Chronicle has been intoxicated on several

cowardice,[12] dishonesty,[13] infidelity,[14] insanity,[15] and moral depravity.[16] A publication by one person in the name of another is a libel upon such other, if it contains language which would subject him, had he written it, to public hatred and contempt.[17]

(II) *Imputations of Crime.* A written charge imputing bribery,[18] homicide,[19] larceny,[20] receiving stolen goods,[21] seduction,[22] or subornation of perjury[23] is sufficient to support an indictment for criminal libel.

(III) *Imputations of Unchastity and Immorality.* Words imputing unchastity and immorality are libelous.[24]

(IV) *Imputations Charging Public Officers With Misconduct or Unfitness For Office.* An indictment or information, as the case may be, will lie for publishing words charging corruption[25] or misconduct on the part of a

occasions, and that, too, after he was elected to the legislature as the champion of prohibition," is libelous).

12. See Palmer *v.* Concord, 48 N. H. 211, 97 Am. Dec. 605.

13. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792; State *v.* Powell, 66 Mo. App. 598 (a charge of procuring false affidavits); Lockhard *v.* State, 43 Tex. Cr. 61, 63 S. W. 566; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209 (charging one with being guilty of maladministration of the affairs of a corporation and in order to conceal the same with resorting to fraudulent practices).

14. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

15. State *v.* Roberts, 2 Marv. (Del.) 450, 43 Atl. 252, holding that a publication that a certain person had become insane in the persecution of a political opponent; that he had brought suits to deprive the latter of his property and personal liberty, which was robbery; and that there was imminent danger that his insane political prejudice and hatred would become contagious and result in the murder of his opponent is indictable.

16. Crowe *v.* People, 92 Ill. 231 (where the words were, "Now, my worthies . . . a beautiful trio you are, — three as mild-a-mannered and smooth-tongued scoundrels as ever scuttled ship or cut a throat"); State *v.* Powell, 66 Mo. App. 598 (a publication referring to complainant as a "Jo-Jo," a being having the head, face, features, and instincts of a dog and body and limbs like a man); Jones *v.* State, 38 Tex. Cr. 364, 43 S. W. 78, 70 Am. St. Rep. 751 (imputing disgracefnl acts to conductors of a street railway and charging them with being foul characters).

17. Com. *v.* Snyder, 1 Lanc. L. Rev. (Pa.) 20 (holding that an agent of an insurance company who printed a public circular containing a false statement of the standing of another company was liable to prosecution for libel); State *v.* Hollon, 12 Lea (Tenn.) 482; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

18. Baker *v.* State, 97 Ga. 452, 25 S. E. 341; Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185; Com. *v.* Rudy, 5 Pa. Dist. 270.

19. Smith *v.* State, 32 Tex. 594, where the charge was "hireling murderer."

20. Browning *v.* Com., 116 Ky. 282, 76 S. W. 19, 25 Ky. L. Rep. 482 (a charge that a person would purloin a printing outfit if he had a chance); Woody *v.* State, 16 Tex. App. 252 (charge of being a "thief").

21. State *v.* Smily, 37 Ohio St. 30, 41 Am. Rep. 487, holding that a charge that one's house was searched under legal process for the purpose of discovering stolen goods is libelous *per se.*

22. Com. *v.* Wardwell, 136 Mass. 164.

23. State *v.* Norton, 89 Me. 290, 36 Atl. 394.

24. *Connecticut.*— State *v.* Avery, 7 Conn. 266, 18 Am. Dec. 105.

Georgia.— Giles *v.* State, 6 Ga. 276, charge of being a "cuckhold."

Iowa.— State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Massachusetts.— Com. *v.* Wardwell, 136 Mass. 164, charging one with being a "libertine" and with ruining a young and innocent lady.

Michigan.— People *v.* Jackman, 96 Mich. 269, 55 N. W. 809, a charge that complainant's arm was broken while being ejected from a house of ill fame.

Texas.— Kubricht *v.* State, 44 Tex. Cr. 94, 69 S. W. 157, 100 Am. St. Rep. 842, 58 L. R. A. 959, holding that, where a minister, knowing that plaintiff has been acquitted of seduction, makes an entry on his church records imputing paternity of the child to plaintiff, the entry is a libel.

West Virginia.— State *v.* Clifford, 58 W. Va. 681, 52 S. E. 864, holding that a charge that "Newman went into his house and found a man, by the name of Baum and his wife . . . playing the dog" is libelous.

See 32 Cent. Dig. tit. "Libel and Slander," § 404.

Imputations held not libelous as charging unchastity.— A charge that a man met another man's wife and "committed an abomination in the sight of the Lord" is not libelous *per se.* People *v.* Isaacs, 14 N. Y. Cr. 148. A writing stating prosecutrix does not pay for anything she gets but pretends to pay by handing the money to the seller, who returns it to her, is not libelous as charging unchastity or prostitution. Kelly *v.* State, 24 Ind. App. 639, 57 N. E. 257.

25. *Indiana.*— Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185, a statement that a county superintendent of schools had for a

public officer,[26] as well as for publishing words imputing that such officer is unfit to hold office.[27]

(v) *Imputations of Insolvency.* It is an indictable offense to publish of another a charge imputing that he is insolvent.[28]

(vi) *Imputation Charging Performance of Lawful Act.* An indictment will not lie for publishing words charging a person with doing what he has a legal right to do.[29]

2. Slander. Slander is not a crime at common law,[30] but in some of the states statutes have been passed making certain slanderous charges criminal offenses;[31] the most common provisions relating to charges imputing to a female want of chastity.[32]

money consideration induced the board of education to change the school-books.

Kansas.— State *v.* Osborn, 54 Kan. 473, 38 Pac. 572.

Maryland.— See Avirett *v.* State, 76 Md. 510, 25 Atl. 676, 987.

Massachusetts.— Com. *v.* Damon, 136 Mass. 441, an article stating that the writer had been driven from his stand on the sidewalk while others were allowed to remain, and asking, "Does it require the presentation of a turkey, potatoes, . . . or other perquisites, quietly delivered, to close the eye of this vigilant official . . . in every particular case?"

New Jersey.— See State *v.* Schmitt, 49 N. J. L. 579, 9 Atl. 774.

Pennsylvania.— Com. *v.* Swallow, 8 Pa. Super. Ct. 539.

See 32 Cent. Dig. tit. "Libel and Slander," § 404.

26. *Indiana.*— State *v.* De Long, 88 Ind. 312, where the words were, "The rascally conduct of Pat Boyle mayor of the city of Huntington, and his pimps, in arresting and fining men on the most frivolous pretexts, would not be tolerated in any other town in Northern Indiana. There will be some lynch law put in force some of these days."

Maine.— State *v.* Norton, 89 Me. 290, 36 Atl. 394.

Massachusetts.— Com. *v.* Wright, 1 Cush. 46 (holding that it is libelous to publish of a juror that he agreed with another juror to stake the decision of the amount of damages to be awarded by them upon a game of draughts); Com. *v.* Snelling, 15 Pick. 321.

North Carolina.— State *v.* Lyon, 89 N. C. 568, a statement that a certain person had been arrested for rape and brought before Squire Davis and that "Squire Davis, after his style of dispensing justice, converts the case into an assault and battery and discharges the offender. . . . We presume that Mr. Davis had an eye to the costs . . . and accordingly rendered his decision to suit his own convenience."

Virginia.— Burdett *v.* Com., 103 Va. 838, 48 S. E. 878, 106 Am. St. Rep. 916, 68 L. R. A. 251, holding that it is libelous to charge that indictments had been found under the influence of a judge, that defendant had been forced to compromise, and that the judge was prompted by vicious motives.

See 32 Cent. Dig. tit. "Libel and Slander," § 404.

27. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792 (a statement that a county superintendent of schools was dishonest, an infidel, and an unbeliever and had written an article that was a disgrace to any decent man); Richardson *v.* State, 66 Md. 205, 7 Atl. 43 (a publication that a judge "has violated the State Constitution, and is disqualified; he is liable to impeachment and to indictment"); Com. *v.* Snelling, 15 Pick. (Mass.) 321; Com. *v.* Swallow, 8 Pa. Super. Ct. 539.

A statement purporting to be signed by a nominee for office where he is represented as abnegating the principles of the party he is openly espousing and disclaiming his belief in the principles of the opposing party, is libelous as tending to bring him into public hatred and contempt but not as representing him as a person unworthy of holding public office. Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

28. State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419, sending through the mails an envelope indorsed, "Bad Debt Collecting Agency."

29. People *v.* Jerome, 1 Mich. 142.

30. State *v.* Wakefield, 8 Mo. App. 11. See also State *v.* McArthur, 5 Wash. 558, 32 Pac. 367.

31. *Alabama.*— Booker *v.* State, 100 Ala. 30, 14 So. 561, holding under statute that a statement by a person that he is "satisfied" that another had hired witnesses to testify against him is slander as charging bribery. See also Riley *v.* State, 132 Ala. 13, 31 So. 731.

Arkansas.— McArthur *v.* State, 59 Ark. 431, 27 S. W. 628.

Michigan.— Schultz *v.* Huebner, 108 Mich. 274, 60 N. W. 57, holding under statute that the words, "You are a swindler; you beat the poor people out of their money, and are a cheat and a fraud," will subject the publisher to an indictment under above act.

Missouri.— State *v.* Buck, 43 Mo. App. 443.

Vermont.— State *v.* Sutton, 74 Vt. 12, 52 Atl. 116.

See 32 Cent. Dig. tit. "Libel and Slander," § 403.

32. See cases cited *infra*, this note.

In Missouri under a statute making it a crime to impute want of chastity to a female, the words must on their face charge the prose-

B. Publication.[33] Giving a letter containing defamatory matter to a clerk to copy,[34] or sending it to an attorney for the prosecution,[35] is a publication. So a communication of the defamatory matter to the person defamed alone is a sufficient publication;[36] the basis of the rule being the tendency of a criminal libel to produce a breach of the peace.[37] So the rule has been laid down that, if the accused, with intent to scandalize, affords, or causes to be afforded, to another an opportunity of learning the contents of the libelous instrument, he is guilty of a publication, although in fact the contents do not thereby become known.[38] Evidence that a newspaper came from defendant's office and was a copy of an edition of the same date is proof of publication.[39] The fact that one copy of a newspaper was sent to a given county is sufficient evidence of publication therein.[40]

cuting witness as with unchastity. State *v.* Bonine, 85 Mo. App. 462. Charging a female with keeping a bawdy house is not equivalent to a charge of fornication or whoredom and is not a criminal slander. State *v.* Boos, 66 Mo. App. 537.

In Texas, under statute, it is held that a statement that a woman will consent to sexual intercourse is criminal slander. Wallace *v.* State, (Cr. App. 1899) 49 So. 395. In Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10, it was held that a statement by accused that he had seen prosecutrix and L "getting there" does not impute want of chastity, but is susceptible of that meaning by innuendo. Obscene language referring only to the fact that a man and woman were in the habit of riding together in a sulky and not intended to charge that they were guilty of criminal intimacy is not criminal slander. Hix *v.* State, (Cr. App. 1892) 20 S. W. 550.

In North Carolina.— Under a statute making it a criminal offense to attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken which amount to a charge of incontinency, it has been held that the offense consists, not in charging a woman with incontinency, but in attempting to destroy her reputation. State *v.* Davis, 92 N. C. 764. It has been held under the statute that to say that a woman "had promised" to allow accused to have criminal intercourse with her and not that she actually did allow it does not charge incontinency. State *v.* Moody, 98 N. C. 671, 4 S. E. 119. But a statement that a woman had intercourse with a male dog charges "incontinency." State *v.* Hewlin, 128 N. C. 571, 37 S. E. 952. To say that a chaste woman "looked like a woman who had miscarried" does not charge incontinency. State *v.* Benton, 117 N. C. 788, 23 S. E. 432. The phrase "innocent woman" within the meaning of such statute has been stated broadly to be one who has never had sexual intercourse with any man. State *v.* Malloy, 115 N. C. 737, 20 S. E. 461; State *v.* Brown, 100 N. C. 519, 6 S. E. 568; State *v.* Davis, 92 N. C. 764. A woman who has had illicit intercourse but has repented and become virtuous is an "innocent woman" within the statute. State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852; State *v.* Grigg, 104 N. C. 882, 10 S. E. 684. So a woman is "innocent," although she was in the embrace of a man and they were about to commit the act but were interrupted before its consummation. State *v.* Hinson, 103 N. C. 374, 9 S. E. 552.

33. Publication in civil cases see *supra*, IV.

34. State *v.* McIntire, 115 N. C. 769, 20 S. E. 721.

35. Com. *v.* Pavitt, 2 Del. Co. (Pa.) 16.

36. State *v.* Avery, 7 Conn. 266, 18 Am. Dec. 105; State *v.* Shaffner, 2 Pennew. (Del.) 171, 44 Atl. 620; Giles *v.* State, 6 Ga. 276; Smith *v.* State, 32 Tex. 594; Mankins *v.* State, 41 Tex. Cr. 662, 57 S. W. 950. See also Hodges *v.* State, 5 Humphr. (Tenn.) 112. *Contra*, State *v.* Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616.

37. Sheffill *v.* Van Dusen, 13 Gray (Mass.) 304, 74 Am. Dec. 632; Lyle *v.* Clasm, 1 Cai. (N. Y.) 581.

Intent to provoke breach of peace essential. —When the libel is communicated only to the party defamed it must be with intent to provoke a breach of the peace. State *v.* Shaffner, 2 Pennew. (Del.) 171, 44 Atl. 620; Hodges *v.* State, 5 Humphr. (Tenn.) 112.

38. Giles *v.* State, 6 Ga. 276; Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751 [*citing* Wharton Cr. L. § 1618] (where the libel was written in a foreign language); State *v.* Shoemaker, 101 N. C. 690, 8 S. E. 332. See also People *v.* Miller, 122 Cal. 84, 54 Pac. 523, holding that under statute making it sufficient to sustain a charge to show that the accused knowingly parted with the libel under circumstances which exposed it to be seen and read by others, it is not necessary to show that defendant wrote or printed the article or personally or by personal direction circulated it.

39. State *v.* Jeandell, 5 Harr. (Del.) 475.

40. Baker *v.* State, 97 Ga. 452, 25 S. E. 341; State *v.* Kountz, 12 Mo. App. 511. See also Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214; Rex *v.* Burdett, 4 B. & Ald. 95, 6 E. C. L. 404.

Publication in newspaper of "general circulation."— Under a statute providing for punishment, for publication of a libel in a newspaper of "general circulation," it is necessary that it circulate beyond the county in which it is published, but not in every county of the state. Koen *v.* State, 35 Nebr.

C. Malice.[41] Malice is the essence or gist of the offense of libel.[42] Malice as used in this connection does not imply personal ill-will against the person libeled,[43] but merely the wilful doing of an unlawful act resulting in injury to another.[44]

D. Privileged Communications[45] — **1. In General.** The fact that the communication complained of was published on a privileged occasion may be set up as a defense to a criminal prosecution,[46] yet defendant may be criminally liable if the publication goes beyond what the exigencies of the privileged occasion require.[47]

2. Particular Communications Considered — a. Statements Authorized by Prosecuting Witness. It has been held that a prosecution for libel cannot be sustained when the publication was authorized by the prosecuting witness.[48]

b. Statements in Self-Defense or in Discharge of Duty. Statements made in self-defense,[49] or in the discharge of a duty to others,[50] are privileged, unless the publication contains expressions which exceed the limits of privilege,[51] or is made to others than those to whom the duty is owing.[52]

c. Statements Made in Judicial Proceedings. A person is not criminally liable for words published in the course of a judicial proceeding which are pertinent and relevant to the issues;[53] but this privilege does not protect a malicious publication not relevant to the inquiry, although made in the course of judicial proceedings.[54]

676, 53 N. W. 595, 17 L. R. A. 821. See also Razee *v.* State, (Nebr. 1905) 103 N. W. 438.

41. Malice in civil cases see *supra*, V, B.

42. State *v.* Shaffner, 2 Pennew. (Del.) 171, 44 Atl. 620; Com. *v.* Snelling, 15 Pick. (Mass.) 337; Com. *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212; Com. *v.* Scott, 3 Lanc. L. Rev. (Pa.) 290 (holding that defendant is not liable for words uttered without malice, although they were libelous and injured the prosecutor); Com. *v.* Sanderson, 3 Pa. L. J. 269; U. S. *v.* Cooper, 25 Fed. Cas. No. 14,865 (holding that in a prosecution under the sedition act of July 14, 1798, for publishing a libel against the president an intent to defame must clearly appear). See also Cady *v.* Brooklyn Union Pub. Co., 23 Misc. (N. Y.) 409, 51 N. Y. Suppl. 198.

Presumption of malice see *infra*, X, J, 1, e, text and note 53.

43. Com. *v.* Bonner, 9 Metc. (Mass.) 410; Com. *v.* Snelling, 15 Pick. (Mass.) 337. See also Riley *v.* State, 132 Ala. 13, 31 So. 731, holding that it is not essential that the publication be intentionally wrong or reckless.

44. Com. *v.* Snelling, 15 Pick. (Mass.) 337; Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; Rainwater *v.* State, 46 Tex. Cr. 496, 81 S. W. 38.

45. Privileged communications in civil cases see *supra*, VI.

46. Com. *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212; Com. *v.* Batchelder, Thach. Cr. Cas. (Mass.) 191; State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217; Com. *v.* Swallow, 8 Pa. Super. Ct. 539 (holding that the communication must be made on a proper occasion from a proper motive in a proper manner and upon probable cause); Com. *v.* Featherston, 9 Phila. (Pa.) 594; Davis *v.* State, (Tex. Cr. App. 1893) 22 S. W. 979; Hix *v.* State, (Tex. Cr. App. 1892) 20 S. W. 550.

47. Shields *v.* Com., 55 S. W. 881, 21 Ky. L. Rep. 1588; State *v.* Bienvenu, 36 La. Ann. 378; Com. *v.* Little, 12 Pa. Super. Ct. 636 See also People *v.* Sherlock, 166 N. Y. 180, 59 N. E. 830 [*affirming* 56 N. Y. App. Div. 422, 68 N. Y. Suppl. 74].

48. Com. *v.* Murphy, 8 Pa. Co. Ct. 399. See also Davis *v.* State, (Tex. Cr. App. 1893) 22 S. W. 979; Hix *v.* State, (Tex. Cr. App. 1892) 20 S. W. 550. *Compare* Valley *v.* State, 42 Nebr. 123, 60 N. W. 347.

49. Com. *v.* Pavitt, 2 Del. Co. R. (Pa.) 16; Com. *v.* Featherston, 9 Phila. (Pa.) 594, an advertisement warning the public against the negotiation of notes alleged to have been stolen.

50. Com. *v.* Batchelder, Thach. Cr. Cas. (Mass.) 191 (holding that where an editor publishes an obituary notice stating that the deceased never used profane language, the intention being to promote certain religious views, the editor of another sectarian paper may state that the deceased was a profane swearer if he believes the prior notice to be injurious); Kubricht *v.* State, 44 Tex. Cr. 94, 69 S. W. 157; Davis *v.* State, (Tex. Cr. App. 1893) 22 S. W. 979; Hix *v.* State, (Tex. Cr. App. 1892) 20 S. W. 550, 552 (where it is said: "A communication, which would otherwise be slanderous and actionable, is privileged, if made in good faith upon a matter involving an interest or duty to the party making it, though such duty be not strictly legal, but of doubtful obligation, to a person having the corresponding interest or duty").

51. Browning *v.* Com., 116 Ky. 282, 76 S. W. 19, 25 Ky. L. Rep. 482.

52. Shields *v.* Com., 55 S. W. 881, 21 Ky. L. Rep. 1588; Com. *v.* Sanderson, 2 Pa. L. J. Rep. 54, 3 Pa. L. J. 269; Com. *v.* Stacey, 1 Leg. Gaz. (Pa.) 114; Stayton *v.* State, 46 Tex. Cr. 205, 78 S. W. 1071, 108 Am. St. Rep. 988. See also People *v.* Sherlock, 166 N. Y. 180, 59 N. E. 830 [*affirming* 56 N. Y. App. Div. 422, 68 N. Y. Suppl. 74].

53. Lecroy *v.* State, 89 Ga. 335, 15 S. E. 463; Com. *v.* Culver, 1 Pa. L. J. Rep. 361; Lindsey *v.* State, 18 Tex. App. 280; Hix *v.* State, (Tex. Cr. App. 1892) 20 S. W. 832.

54. Lecroy *v.* State, 89 Ga. 335, 15 S. E.

d. Reports of Judicial Proceedings. The publication of a report of a judicial proceeding may be conditionally privileged.[55] But the publication must be fair and impartial and unaccompanied by defamatory comments and insinuations.[56] The publication of judicial proceedings must be only of matter fit for publication.[57]

e. Criticism of Public Matters and Publication of News. Where one becomes a candidate for a public office, he must be considered as putting his character in issue so far as it may affect his fitness and qualifications for office and the publication of the truth on this subject for the purpose of advising electors is not a libel.[58] So criticism of a public officer's official acts are privileged when made in a proper manner,[59] but the privilege does not extend to protect attacks upon the character and motive of an officer, although made without malice and upon probable cause.[60]

f. Confidential Communications. So the mere fact that a communication is confidential does not render it privileged.[61]

3. Malice and Good Faith. Malice on the part of defendant destroys his privilege.[62] Such malice may be shown by the style and tone of the libelous article,[63]

463; Gilbert *v.* People, 1 Den. (N. Y.) 41, 43 Am. Dec. 646; Com. *v.* Culver, 2 Pa. L. J. 362.

55. See Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

56. Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

A defamatory article concerning an attorney at law is not rendered privileged by the fact that it had some connection with judicial proceedings, although not a report of any portion thereof. State *v.* Wait, 44 Kan. 310, 24 Pac. 354.

57. Com. *v.* Costello, 1 Pa. Dist. 745; Com. *v.* Godshalk, 13 Phila. (Pa.) 575; Rex *v.* Carlisle, 3 B. & Ald. 161, 5 E. C. L. 101, 1 Chit. 451, 18 E. C. L. 248; Rex *v.* Creevey, 1 M. & S. 273, 14 Rev. Rep. 427.

Obscene libels see Obscenity.

58. State *v.* Keenan, 111 Iowa 286, 82 N. W. 792; State *v.* Haskins, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. Rep. 560, 47 L. R. A. 223; State *v.* Balch, 31 Kan. 465, 2 Pac. 609; Com. *v.* McClure, 3 Kulp (Pa.) 464 (holding that the publication of a falsehood, if in good faith, may be privileged); Com. *v.* Odell, 3 Pittsb. (Pa.) 449.

Excessive circulation.— Where a libel concerning a candidate for judge is circulated outside the judicial district it is not privileged, and in a criminal prosecution accused's belief in its truth affords him no protection. State *v.* Haskins, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. Rep. 560, 47 L. R. A. 223.

59. Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; *In re* Charge to Grand Jury, 1 N. J. L. J. 24; Banner Pub. Co. *v.* State, 16 Lea (Tenn.) 176, 57 Am. Rep. 216.

Criticism of a foreman of a newspaper office does not come within the rule. People *v.* Sherlock, 166 N. Y. 180, 59 N. E. 830 [*affirming* 68 N. Y. Suppl. 74].

In Pennsylvania, by the constitution of 1874, art. 1, § 7, it was provided that "no conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made, shall be established to the satisfaction of the jury." See Com. *v.* Swallow, 8 Pa. Super. Ct. 539; Com. *v.* Di Silvestro, 15 Pa. Dist. 21, 32 Pa. Co. Ct. 193; Com. *v.* Disbrow, 5 Pa. Dist. 276; Com. *v.* Rudy, 5 Pa. Dist. 270; Com. *v.* Murphy, 8 Pa. Co. Ct. 399; Com. *v.* Coon, 4 Pa. Co. Ct. 422; Com. *v.* McClure, 3 Kulp 464; Com. *v.* Warfel, 5 Lanc. L. Rev. 113; Com. *v.* Reed, 30 Leg. Int. 424; Com. *v.* Mellon, 29 Wkly. Notes Cas. 433.

60. Com. *v.* Wardwell, 136 Mass. 164; Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; *In re* Charge to Grand Jury, 1 N. J. L. J. 24. See also Com. *v.* Little, 12 Pa. Super. Ct. 636.

61. Smith *v.* State, 32 Tex. 594.

62. *Alabama.*— Grant *v.* State, 141 Ala. 96, 37 So. 420.

Iowa.— State *v.* Haskins, 109 Iowa 656, 80 N. W. 1063, 77 Am. St. Rep. 560, 47 L. R. A. 223.

Missouri.— State *v.* Derry, 20 Mo. App. 552.

Nebraska.— Vallery *v.* State, 42 Nebr. 123, 60 N. W. 347.

New Hampshire.— State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217.

Pennsylvania.— Com. *v.* Swallow, 8 Pa. Super. Ct. 539; Com. *v.* Odell, 3 Pittsb. 449.

Texas.— Kubricht *v.* State, 44 Tex. Cr. 94, 69 S. W. 157, 100 Am. St. Rep. 842, 58 L. R. A. 959.

See 32 Cent. Dig. tit. "Libel and Slander," § 411.

It cannot be determined on demurrer to an indictment whether or not the libel set out therein was published in good faith. People *v.* Stokes, 24 N. Y. Suppl. 727, 30 Abb. N. Cas. 200.

63. Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

Admissibility of other libelous articles.— Malice may be shown by proof of other articles reflecting on plaintiff in other editions of the same paper by defendant. Com. *v.* Cochran, 23 Lanc. L. Rev. (Pa.) 267.

or by the fact that publication was made without exercising care and diligence to ascertain its truth.[64]

E. Justification[65] — **1. In General.** Defendant cannot show in defense current rumors or suspicions,[66] the bad character of the person libeled,[67] probable grounds for his belief,[68] an honest mistake in the facts,[69] or an innocent intention.[70]

2. Truth.[71] At common law the truth of a libel cannot be shown as a defense in a criminal prosecution,[72] and this on the theory that however true the charge may be the publication of a libel against private individuals incites and provokes the mischief designed to be repressed by the public prosecution of libels.[73] In many authorities, however, the rule has been laid down either at common law or under constitutional or statutory provisions that the truth when published with good motives and for justifiable ends constitutes a complete defense.[74]

F. Persons Liable[75] — **1. In General.** The author of a libel and all persons concerned in making the publication are liable upon an indictment for libel.[76]

2. Authors. The author of a libel is criminally liable therefor, although the publication was made by another.[77]

3. Owner and Editor of Newspaper. The editor and owner of a newspaper is criminally liable for a libel published therein,[78] unless the publication was with-

64. Com. *v.* Mellon, 29 Wkly. Notes Cas. (Pa.) 433; Com. *v.* McClure, 3 Wkly. Notes Cas. (Pa.) 58.

65. Justification in civil cases see *supra*, VII, A.

66. State *v.* Ford, 82 Minn. 452, 85 N. W. 217; Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620.

67. People *v.* Stokes, 24 N. Y. Suppl. 727, 30 Abb. N. Cas. 200.

68. Riley *v.* State, 132 Ala. 13, 31 So. 731.

69. Richardson *v.* State, 66 Md. 205, 7 Atl. 43.

70. McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847. See also Com. *v.* Snelling, 15 Pick. (Mass.) 337, holding that it is not competent to show that the object of defendant was to attack vicious persons and establishments injurious to public morals.

Want of actual intent to vilify is no excuse for a libel, and if a man deems that to be right which the law pronounces wrong the mistake does not free him from guilt. State *v.* Brady, 44 Kan. 435, 24 Pac. 948, 21 Am. St. Rep. 296, 9 L. R. A. 606.

71. Burden of proof as to truth of communication see *infra*, X, J, 1, d.

72. Territory *v.* Nugent, 1 Mart. (La.) 108; State *v.* Lehre, 2 Brev. (S. C.) 446, 4 Am. Dec. 596; Smith *v.* State, 32 Tex. 594; Com. *v.* Morris, 1 Va. Cas. 176, 5 Am. Dec. 515.

73. State *v.* Lehr, 2 Brev. (S. C.) 446, 4 Am. Dec. 596; Smith *v.* State, 32 Tex. 594.

74. *Kansas.*— Castle *v.* Houston, 19 Kan. 417, 27 Am. Rep. 127.

Louisiana.— State *v.* Bienvenu, 36 La. Ann. 378.

Massachusetts.— Com. *v.* Damon, 136 Mass. 441; Com. *v.* Blanding, 3 Pick. 304, 15 Am. Dec. 214; Com. *v.* Clap, 4 Mass. 163, 3 Am. Dec. 212.

Minnesota.— State *v.* Ford, 82 Minn. 452, 85 N. W. 217.

New Hampshire.— See State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217.

New York.— Barthelemy *v.* People, 2 Hill 248; People *v.* Simons, 1 Wheel. Cr. 339.

Pennsylvania.— Respublica *v.* Dennie, 4 Yeates 267, 2 Am. Dec. 402.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 412, 413.

In Indiana defendant is not bound to prove that the publication was made in good faith. State *v.* Bush, 122 Ind. 42, 23 N. E. 677.

In Nebraska it is held that in a criminal prosecution under Cr. Code, § 47 (Cobbey Annot. St. (1903) § 1203), for publishing an alleged libelous article, the truth of the article when established is a perfect defense. Razee *v.* State, (1905) 103 N. W. 438.

In Texas the statute provides certain cases in which the truth is a complete defense whether malicious or not, as for instance in the case of a charge of unchastity (Wood *v.* State, 32 Tex. Cr. 476, 24 S. W. 284; Lasky *v.* State, (App. 1892) 18 S. W. 465), or a charge of a crime when the time, place, and nature of the offense are specified in the publication (Johnson *v.* State, 31 Tex. Cr. 464, 20 S. W. 980).

In admitting evidence of the truth the court is guided by the libelous publication and not by allegations in the indictment. Com. *v.* Guild, Thach. Cr. Cas. (Mass.) 329.

Publications made on a lawful occasion may be justified by the truth, although made maliciously. State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217; Com. *v.* Reed, 30 Leg. Int. (Pa.) 424; Com. *v.* Sanderson, 2 Pa. L. J. Rep. 54. See also Com. *v.* Morris, 1 Va. Cas. 176, 5 Am. Dec. 515.

75. Persons liable to civil action see *supra*, VIII, A, 5.

76. Com. *v.* Murphy, 8 Pa. Co. Ct. 399.

77. Com. *v.* Murphy, 8 Pa. Co. Ct. 399; Noble *v.* State, 38 Tex. Cr. 368, 43 S. W. 80.

78. Com. *v.* Kneeland, Thach. Cr. Cas. (Mass.) 346; Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Cir. Dec. 442; State *v.* Cass, 8 Ohio S. & C. Pl. Dec. 214, 5 Ohio N. P. 381; State *v.* Mason, 26 Oreg. 273, 38 Pac. 130, 46

out his consent or knowledge and did not occur through any negligence or want of ordinary care on his part.[79]

4. Corporations. A corporation may be indicted for a libel.[80]

5. Joint Publishers. Where slanderous words are uttered in concert by several and concurred in by each, criminal proceedings may be instituted against them jointly.[81] An individual and a corporation may be joined in the same indictment for libel, in different counts, the subject-matter being of the same nature, and the fact that the same measure of punishment cannot be inflicted on both defendants, the individual being subject to imprisonment, while the corporation can only be punished by fine, does not vitiate the indictment.[82]

6. Slander of Wife by Husband. Under statute in Texas, a husband may be prosecuted for slandering his wife.[83] But a different conclusion has been reached in North Carolina.[84]

7. Person Requesting or Procuring Publication. One who requests or procures another to publish a libel is answerable as though he published it himself.[85] So one furnishing libelous matter to a newspaper,[86] with the understanding that it will be published,[87] may be convicted of criminal libel for its publication, although there is no proof that he expressly requested its publication.[88]

8. Person Repeating Defamation. One who merely repeats or gives currency to defamatory matter originated by another is criminally liable.[89]

G. Indictment or Information[90] — **1. In General.** The indictment must be sufficiently complete to apprise defendant of every fact necessary to constitute the offense of which he stands charged.[91]

Am. St. Rep. 629, 26 L. R. A. 779. See also Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

Effect of assumption of responsibility by joint proprietor.— It is no defense that defendant, a part owner of the newspaper, protested against the publication, and only agreed to it on his partner agreeing to assume the responsibility therefor, where defendant then set the type for the article. Baldwin *v.* State, 39 Tex. Cr. 245, 45 S. W. 714.

79. Com. *v.* Kneeland, Thach. Cr. Cas. (Mass.) 346; Ickes *v.* State, 16 Ohio Cir. Ct. 31, 8 Ohio Dec. 442; State *v.* Mason, 26 Oreg. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779; Com. *v.* Rovnianek, 12 Pa. Super. Ct. 86.

In England prior to Lord Campbell's Act (6 & 7 Vict. c. 96) the proprietor of a newspaper was conclusively liable criminally for any libelous article appearing therein. Reg. *v.* Holbrook, 4 Q. B. D. 42, 14 Cox C. C. 185, 48 L. J. Q. B. 113, 39 L. T. Rep. N. S. 536, 27 Wkly. Rep. 313; Reg. *v.* Holbrook, 3 Q. B. D. 60, 13 Cox C. C. 650, 47 L. J. Q. B. 35, 37 L. T. Rep. N. S. 530, 26 Wkly. Rep. 144. See also Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397.

80. State *v.* Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663. See also Boogher *v.* Life Assoc. of America, 75 Mo. 319; State *v.* Passaic County Agricultural Soc., 54 N. J. L. 260, 23 Atl. 680.

81. State *v.* Marlier, 46 Mo. App. 233.

82. State *v.* Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

83. Stayton *v.* State, 46 Tex. Cr. 205, 78 S. W. 1071, 108 Am. St. Rep. 988.

84. State *v.* Edens, 95 N. C. 693, 59 Am. Rep. 294.

85. Noyes *v.* Thorpe, 73 N. H. 481, 62 Atl. 787; State *v.* Patterson, 2 N. J. L. J. 219.

A person employing a bad debt collecting agency and who after having reason to believe it was sending libelous envelopes refuses to stop its proceedings is criminally liable for the acts of the agency. State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

In New York under statute it has been intimated that whoever wilfully makes a statement to a representative of a newspaper concerning any person which if published would amount to a libel commits a crime, and this independent of the fact whether such statement was made for publication or whether its publication was secured by the person making it. Schoepflin *v.* Coffey, 25 N. Y. App. Div. 438, 49 N. Y. Suppl. 627.

86. Clay *v.* People, 86 Ill. 147.

87. State *v.* Osborn, 54 Kan. 473, 38 Pac. 572.

88. Com. *v.* Wolfinger, 16 Pa. Co. Ct. 257, 7 Kulp 537.

89. State *v.* Butman, 15 La. Ann. 166; Mack *v.* Sharp, 138 Mich. 448, 101 N. W. 631; State *v.* Derry, 20 Mo. App. 552.

90. Indictment and information generally see Indictments and Informations, 22 Cyc. 157 *et seq.*

91. *Alabama.*— Reid *v.* State, 53 Ala. 402, 25 Am. Rep. 627.

Kentucky.— Tracy *v.* Com., 87 Ky. 578, 9 S. W. 822, 10 Ky. L. Rep. 611.

Maryland.— Richardson *v.* State, 66 Md. 205, 7 Atl. 43.

Michigan.— People *v.* Jones, 67 Mich. 544, 35 N. W. 419.

Missouri.—State *v.* Buck, 43 Mo. App. 443.

2. Conformity to Statute Defining Offense. Under a statute providing that an indictment will lie for the publication of words having a specified tendency, the general rule is if the charge is actionable *per se* and its meaning plain and unmistakable it is not necessary to allege that the words possess the tendency prescribed in the statute;[92] but if the charge is not actionable *per se* it must be averred that the publication possessed such tendency.[93] An information which fails to state in the terms of the statute that the words were "falsely spoken" but does so state in substance is sufficient.[94] Under a statute requiring the consent of the person slandered to the finding of the indictment, an allegation in the indictment that it was found with the consent of the person slandered is no part of the statement of the offense, and an objection that the allegation is untrue must be raised by motion to set aside the indictment and is waived by going to trial.[95]

3. Counts. A count charging defendant with publishing two or more libels,[96] or with making two publications of the same libel,[97] is bad for duplicity. A libel on two or more persons contained in one writing and published by a single act constitutes but one offense.[98]

4. Colloquium and Inducement.[99] A publication libelous upon its face needs no colloquium or averment of extraneous matters;[1] but if the charge is not defamatory *per se*, there must be an inducement setting forth extrinsic facts giving the language a defamatory meaning and a colloquium showing this meaning or appli-

New York.—People *v.* McLaughlin, 33 Misc. 691, 68 N. Y. Suppl. 1108.

Oklahoma.— Lawton *v.* Territory, 9 Okla. 456, 60 Pac. 93.

South Carolina.— State *v.* Henderson, 1 Rich. 179.

See 32 Cent. Dig. tit. "Libel and Slander," § 417.

An allegation that a corporation was pecuniarily injured is not necessary to a criminal prosecution for a libel upon a private corporation. State *v.* Boogher, 3 Mo. App. 442.

Indictment for libel on information charging slander.— An indictment for libel cannot be sustained when the transcript shows that the information charged only a word spoken. Com. *v.* Fleer, 8 Del. Co. (Pa.) 25.

92. *California.*— People *v.* Seeley, 139 Cal. 118, 72 Pac. 834.

Kansas.— State *v.* Grinstead, (1901) 64 Pac. 55 [*reversing* 10 Kan. App. 90, 61 Pac. 980].

New York.— People *v.* McLaughlin, 33 Misc. 691, 68 N. Y. Suppl. 1108, 15 N. Y. Cr. 302.

Texas.— Mankins *v.* State, 41 Tex. Cr. 662, 57 S. W. 950 [*overruling* Byrd *v.* State, 38 Tex. Cr. 630, 44 S. W. 521]; Jones *v.* State, 38 Tex. Cr. 364, 43 S. W. 78, 70 Am. St. Rep. 751; Nordhaus *v.* State, (Cr. App. 1897) 40 S. W. 804.

Washington.— State *v.* Nichols, 15 Wash. 1, 45 Pac. 647.

See 32 Cent. Dig. tit. "Libel and Slander," § 417.

Contra.— Moody *v.* State, 94 Ala. 42, 10 So. 670; Lawton *v.* Territory, 9 Okla. 456, 60 Pac. 93.

Under the North Carolina statute providing for punishment for attempting to destroy the reputation of an innocent woman by charges of incontinency the indictment must allege that the woman is innocent (State *v.* Aldridge, 86 N. C. 680); that the words were spoken "wilfully and wantonly" (State *v.* Harwell, 129 N. C. 550, 40 S. E. 48, "unlawfully, wilfully, and feloniously" is insufficient), and in an attempt to destroy her reputation (State *v.* Mitchell, 132 N. C. 1033, 43 S. E. 938).

93. State *v.* Clark, 67 Kan. 870, 74 Pac. 232; State *v.* Elliott, (Kan. 1901) 64 Pac. 1116 [*affirming* 10 Kan. App. 69, 61 Pac. 981]; State *v.* Grinstead, 62 Kan. 593, 64 Pac. 49 [*affirming* 10 Kan. App. 78, 61 Pac. 976]. See also People *v.* Seeley, 139 Cal. 118, 72 Pac. 834; State *v.* Nichols, 15 Wash. 1, 45 Pac. 647.

94. State *v.* Matheis, 44 Mo. App. 294.

95. Conrand *v.* State, 65 Ark. 559, 47 S. W. 628.

96. People *v.* Jackman, 96 Mich. 269, 15 N. W. 809.

97. State *v.* Healy, 50 Mo. App. 243.

Charging publication and procuring publication.—An indictment that defendant "did compose and publish, and cause and procure to be composed and published," etc., is not bad for duplicity. State *v.* Robbins, 66 Me. 324.

98. State *v.* Hoskins, 60 Minn. 168, 62 N. W. 270, 27 L. R. A. 412.

99. The inducement is defined as "that part of an information for a libel not defamatory *per se* which alleges those extrinsic facts which are necessary to explain the meaning of the words used, and to show them to be injurious in effect." State *v.* Grinstead, 62 Kan. 593, 605, 64 Pac. 49 [*citing* Newell Sl. & L. 603].

Colloquium and inducement in civil actions see *supra*, VIII, E, 1, g.

1. Com. *v.* Root, 15 Pa. Dist. 441; State *v.* Henderson, 1 Rich. (S. C.) 179; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

cation,[2] otherwise the indictment is demurrable.[3] Such facts cannot be supplied by way of innuendo.[4]

5. Averments as to Person Defamed. The indictment should aver that the words were published "of and concerning" the prosecutor.[5] Where the persons defamed are alluded to in ambiguous terms, there must be a full and explicit averment showing the application,[6] unless, as in some states, the statute provides that it shall be sufficient to state generally that the publication was of and concerning the prosecution.[7] The indictment need not set out the profession, the occupation, or residence of the person libeled.[8]

6. Averment of Intent and Malice. The indictment must allege that the publication was made maliciously.[9] Where there is no publication except to the

2. *Indiana.*— Kelly *v.* State, 24 Ind. App. 639, 57 N. E. 257.

Kansas.— State *v.* Grinstead, 62 Kan. 593, 64 Pac. 49 [*reversing* on other grounds 10 Kan. App. 78, 61 Pac. 976]; State *v.* Elliot, 10 Kan. App. 69, 61 Pac. 981.

Maryland.— Barnes *v.* State, 88 Md. 347, 41 Atl. 781.

Michigan.— People *v.* Jackman, 96 Mich. 269, 55 N. W. 809.

Missouri.—State *v.* Pulitzer, 12 Mo. App. 6.

North Carolina.— State *v.* Neese, 4 N. C. 691. *Compare* State *v.* McIntosh, 92 N. C. 794, holding that an indictment for attempting to destroy the reputation of an innocent woman need not state the circumstances under which the words were spoken.

Pennsylvania.— Com. *v.* Swallow, 8 Pa. Super. Ct. 539.

Rhode Island.— State *v.* Spear, 13 R. I. 324; State *v.* Corbett, 12 R. I. 288.

South Carolina.— State *v.* Henderson, 1 Rich. 179.

Texas.— Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904; Clark *v.* State, 32 Tex. Cr. 412, 24 S. W. 29.

Vermont.— State *v.* Atkins, 42 Vt. 252.

See 32 Cent. Dig. tit. "Libel and Slander," § 419.

Sufficiency of averments.— The colloquia and innuendos are sufficient, if the inference they seek to raise is at all admissible. State *v.* Powell, 66 Mo. App. 598. The extrinsic facts must be independently and explicitly averred as traversable facts. State *v.* Atkins, 42 Vt. 252. In State *v.* Grinstead, 62 Kan. 593, 64 Pac. 49 [*reversing* on other grounds 10 Kan. App. 78, 61 Pac. 976], it was held that matters of inducement and innuendo need not be separated from each other but may be alleged together in the same part of the information or indictment and together may be allowed to help out each other's averments.

3. Peoples *v.* Collins, 102 Cal. 345, 36 Pac. 669; Barnes *v.* State, 88 Md. 347, 41 Atl. 781.

4. State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976 [*reversed* on other grounds in 62 Kan. 593, 64 Pac. 49]; State *v.* Elliot, 10 Kan. App. 69, 61 Pac. 981; Barnes *v.* State, 88 Md. 347, 41 Atl. 781; State *v.* Boos, 66 Mo. App. 537; State *v.* Pulitzer, 12 Mo. App. 6; State *v.* Atkins, 42 Vt. 252.

5. *Georgia.*— Taylor *v.* State, 4 Ga. 14.

Indiana.— Kelly *v.* State, 24 Ind. App. 639, 57 N. E. 257.

Pennsylvania.— Com. *v.* Meeser, 1 Brewst. 492.

South Carolina.— State *v.* Henderson, 1 Rich. 179.

Tennessee.— State *v.* Brownlow, 7 Humphr. 63.

Texas.— Neeley *v.* State, 32 Tex. Cr. 370, 23 S. W. 798.

See 32 Cent. Dig. tit. "Libel and Slander," § 420.

6. State *v.* Pulitzer, 12 Mo. App. 6; State *v.* Schmitt, 49 N. J. L. 579, 9 Atl. 774; State *v.* Henderson, 1 Rich. (S. C.) 179. See also Com. *v.* Swallow, 8 Pa. Super. Ct. 539; Com. *v.* Meeser, 1 Brewst. (Pa.) 492.

Curing defect by verdict see Johnson *v.* Com., (Pa. 1888) 14 Atl. 425.

7. People *v.* Stokes, 24 N. Y. Suppl. 727, 30 Abb. N. Cas. 200; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209.

8. State *v.* Barnes, 32 Me. 530; Com. *v.* Varney, 10 Cush. (Mass.) 402.

Indictment alleging office of person defamed.— An indictment charging defendant with libeling one A, intending to injure said A, the said A "being then and there sheriff of our said county of Worcester," alleges a libel on A in his private capacity. Com. *v.* Wardwell, 136 Mass. 164.

Marriage of person defamed.— The prefix of "Miss" to a woman's name, in an information for criminal slander by charging her with pregnancy, sufficiently shows that she is unmarried. State *v.* Buck, 43 Mo. App. 443.

9. State *v.* Roberts, 2 Marv. (Del.) 450, 43 Atl. 252; State *v.* Conable, 81 Iowa 60, 46 N. W. 759; State *v.* Robins, 66 Me. 324; State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

Unnecessary allegations.— It is not necessary to allege that defendant knew the charge was false (State *v.* Roberts, 2 Marv. (Del.) 450, 43 Atl. 252), that he did not believe the charge to be true, or that he had no reasonable grounds for believing it, since if the publication was a privileged one, that is a matter of defense (State *v.* Conable, 81 Iowa 60, 46 N. W. 759).

Admission of malice on demurrer.— On an indictment charging an attorney with filing a "certain false, scandalous and malicious writing and affidavit" charging the prosecutor with an offense, a demurrer to the in-

party libeled, there must be an allegation that it was sent with intent to provoke a breach of the peace.[10]

7. Averment of Publication — a. In General. An averment that defendant published a certain libel,[11] or an allegation of facts showing that he parted with it under circumstances which exposed it to be seen and read by others without averring that it was so seen or read[12] is sufficient. An indictment for slander must charge that the words were published in the presence of a certain person.[13] So if the slander be spoken in a foreign tongue, it is not enough to charge an utterance within the hearing of others, unless it also be alleged that the hearers were acquainted with the foreign language.[14]

b. Mode of Publication. An indictment or information is not fatally defective in failing to state the mode of publication,[15] or in describing the mode in the disjunctive.[16]

c. Time of Publication. Under statute in Arkansas it has been held that an indictment for slander is not insufficient because it charges that defendant on a future date did use, utter, and publish the words complained of, the allegation of a future and therefore an impossible date being a clerical error.[17]

8. Setting Out Defamatory Matter — a. In General. An indictment must set out the defamatory matter verbatim; to give the substance is not sufficient.[18]

dictment admits that the publication was malicious. Com. *v.* Culver, 1 Pa. L. J. Rep. 361.

10. State *v.* Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616; Hodges *v.* State, 5 Humphr. (Tenn.) 112.

11. Taylor *v.* State, 4 Ga. 14 (holding that an indictment charging that defendant did publish, etc., a certain libel, appearing as an advertisement in a newspaper, and setting forth the libel *in haec verba*, signed by a third person, is sufficiently certain without alleging that such libel was written by the third person named); State *v.* Barnes, 32 Me. 530 (holding that an allegation that defendant sent the libel to several persons and "thereby published" the same is not objectionable as stating a mere conclusion of law); Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751 (holding that an allegation that defendant "published," or "caused to be published," the libel, is sufficient, even though the libel be in a foreign language, the word "published" being the proper and technical term to denote an illegal publication); Barnum *v.* State, 92 Wis. 586, 66 N. W. 617. *Compare* Kelly *v.* State, 24 Ind. App. 639, 57 N. E. 257; People *v.* Stark, 136 N. Y. 538, 32 N. E. 1046 [*affirming* 59 Hun 51, 12 N. Y. Suppl. 688], holding under statute that an indictment must aver a publication and state the persons to whom and the manner in which it was published or that such facts are unknown to the grand jury.

12. Giles *v.* State, 6 Ga. 276; Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751; Mankins *v.* State, 41 Tex. Cr. 662, 57 S. W. 950. See also People *v.* Miller, 122 Cal. 84, 54 Pac. 523; State *v.* Barnes, 32 Me. 530.

13. Burnham *v.* State, 37 Fla. 327, 20 So. 548; State *v.* Matheis, 44 Mo. App. 294; Lefever *v.* State, (Tex. Cr. App. 1899) 49 S. W. 383; England *v.* State, (Tex. Cr. App. 1899) 49 S. W. 379; Wiseman *v.* State, 14 Tex. App. 74; McMahan *v.* State, 13 Tex. App. 220. See also Tippens *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1000.

Surplusage.— An averment that the publication was in the presence of A "and divers others" may be considered as surplusage. Lefever *v.* State, (Tex. Cr. App. 1899) 49 S. W. 383; England *v.* State, (Tex. Cr. App. 1899) 49 S. W. 379.

14. State *v.* Matheis, 44 Mo. App. 294; Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751.

15. State *v.* Dowd, 39 Kan. 412, 18 Pac. 483; Rattray *v.* State, 61 Miss. 377; Baldwin *v.* State, 39 Tex. Cr. 245, 45 S. W. 714. *Compare* People *v.* Stark, 136 N. Y. 538, 32 N. E. 1046 [*affirming* 59 Hun 51, 12 N. Y. Suppl. 688].

16. State *v.* Barnes, 32 Me. 530, where the libel was alleged to have been sent "in an envelope in the form of a letter, or printed circular, or pamphlet." See also Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751. *Compare* Rex *v.* Brereton, 8 Mod. 328.

17. Conrand *v.* State, 65 Ark. 559, 47 S. W. 628.

Variance as to time of publication see *infra*, X, G, 11, c, (II).

18. *Idaho.*— Bonney *v.* State, 3 Ida. 288, 29 Pac. 185.

Massachusetts.— Com. *v.* Wright, 1 Cush. 46.

Missouri.— State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419; State *v.* Marlier, 46 Mo. App. 233.

North Carolina.— State *v.* Townsend, 86 N. C. 676. *Compare* State *v.* Haddock, 109 N. C. 873, 13 S. E. 714, where the indictment was in the words of the statute containing the offense.

Pennsylvania.— Com. *v.* Sweney, 10 Serg. & R. 173; Com. *v.* Emenheiser, 18 York Leg. Rec. 111.

South Carolina.— See State *v.* Walsh, 2 McCord 248.

Moreover, the indictment must profess on its face to give the very words complained of.[19] It is not requisite that the whole publication of which the defamatory matter is a part should be set out in the indictment.[20]

b. Publication in Foreign Language. Words spoken in a foreign language should be set out in such language and followed by a proper translation.[21]

9. INNUENDOS.[22] If the plain, natural meaning of the words is actionable *per se* no innuendo is required,[23] and an innuendo in such case may be rejected as surplusage.[24] But if the words do not import defamation on their face, the defamatory meaning must be averred by innuendo.[25] The office of the innuendo is to point out and refer to matter already expressed; to explain the meaning of the publication when it is obscure, and to designate the persons alleged to have been libeled, when they are alluded to in covert and ambiguous terms.[26] Hence it cannot add to the natural meaning or sense of the language used,[27] except in

Tennessee.— State *v.* Brownlow, 7 Humphr. 63.

Texas.— Rogers *v.* State, 30 Tex. App. 462, 17 S. W. 548; Coulson *v.* State, 16 Tex. App. 189; Conlee *v.* State, 14 Tex. App. 222; Wiseman *v.* State, 14 Tex. App. 74; Hammers *v.* State, 13 Tex. App. 344.

See 32 Cent. Dig. tit. "Libel and Slander," § 423.

Recital of libelous publication sufficient.— Melton *v.* State, 3 Humphr. (Tenn.) 389.

Failure of second count to set out publication.— It is no ground for quashing indictment that the second count does not set forth the libel *in haec verbis.* Com. *v.* Emenheiser, 18 York Leg. Rec. (Pa.) 111.

An information not setting out the publication is sufficient to justify the issuing of a warrant. Com. *v.* Emenheiser, 18 York Leg. Rec. (Pa.) 111.

Singling out defamatory matter complained of.— Where an article is lengthy and contains matter that is libelous with much that is not, and the entire article is set out in full, the indictment is insufficient unless the libelous matter is singled out and the prosecution based thereon. Jackson *v.* State, (Tex. Cr. App. 1903) 77 S. W. 223. See also U. S. *v.* Callender, 29 Fed. Cas. No. 14,709.

Setting out obscene matter see OBSCENITY.

Supplying defects.— Where the matter set forth is not a libel, the defect cannot be supplied by other parts of the libelous publication. Com. *v.* Snelling, Thach. Cr. Cas. (Mass.) 318.

19. Com. *v.* Wright, 1 Cush. (Mass.) 46; State *v.* Goodman, 6 Rich. (S. C.) 387, 60 Am. Dec. 132; State *v.* Brownlow, 7 Humphr. (Tenn.) 63.

Modes of indicating exactness of copy.— The exactness of a copy may be indicated by the words "tenor" (Com. *v.* Wright, 1 Cush. (Mass.) 46), "of the tenor and effect following" (U. S. *v.* Callender, 25 Fed. Cas. No. 14,709), "in substance as follows, to wit": (State *v.* Smith, 7 Lea (Tenn.) 249), "that is to say" (Bonney *v.* State, 3 Ida. 288, 29 Pac. 185), pasting a clipping from a newspaper containing the libel (State *v.* Bildstein, 44 La. Ann. 778, 11 So. 37), or an envelope with the libelous indorsements thereon (State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419). But quotation marks (Com. *v.* Wright, 1 Cush. (Mass.) 46; State *v.* Goodman, 6 Rich. (S. C.) 387, 60 Am. Dec. 132; Coulson *v.* State, 16 Tex. App. 189), or the words "according to the purport and effect and in substance" (Com. *v.* Wright, *supra*), or the words "in substance, the following false, malicious, scandalous, libelous, and defamatory matters, and things according to the tenor and effect following — that is to say" (State *v.* Brownlow, 7 Humphr. (Tenn.) 63) are insufficient for this purpose.

20. State *v.* Barnes, 32 Me. 530.

21. State *v.* Marlier, 46 Mo. App. 233. See also Stichtd *v.* State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444. *Compare* State *v.* Willers, 27 La. Ann. 246, laying down a different rule in the case of libel.

22. Innuendo in civil actions see *supra*, VIII, E, 1, k.

23. Giles *v.* State, 6 Ga. 276; State *v.* Kountz, 12 Mo. App. 511 (holding that no innuendo is necessary to explain the meaning of "defaulter"); Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904; Jones *v.* State, 38 Tex. Cr. 364, 43 S. W. 78. See also Neely *v.* State, 32 Tex. Cr. 370, 23 S. W. 798.

Word not in dictionary.— A word in common use with a well understood meaning, although not in the dictionary, does not require an innuendo. Knight *v.* State, (Tex. Cr. App. 1899) 49 S. W. 383.

24. Com. *v.* Snelling, 15 Pick. (Mass.) 321; State *v.* Clifford, 58 W. Va. 681, 52 S. E. 864.

25. People *v.* Collins, 102 Cal. 345, 36 Pac. 669; McKie *v.* State, 37 Tex. Cr. 544, 40 S. W. 305; State *v.* Clifford, 58 W. Va. 681, 52 S. E. 864.

26. Giles *v.* State, 6 Ga. 276. To the same effect see Com. *v.* Snelling, 15 Pick. (Mass.) 321; State *v.* Buck, 43 Mo. App. 443; State *v.* Henderson, 1 Rich. (S. C.) 179; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904; Dickson *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

27. State *v.* Cass, 8 Ohio S. & C. Pl. Dec. 214, 5 Ohio N. P. 381; Squires *v.* State, 39

so far as the innuendo connects the words or language employed and used with the extrinsic facts averred.[28]

10. Amendments. An information may be amended where the amendment is based on the original publication and has reference solely to the innuendos and colloquia.[29]

11. Variance[30] — a. In General. Whatever allegation is descriptive of the offense must be proved.[31]

b. Defamatory Words. To authorize a conviction for defamation, it is necessary to prove the exact language alleged to have been used or published by defendant, or enough thereof to constitute the charge, and it is not sufficient that the words proved are equivalent to the words charged, if they are not substantially the same words.[32] On the other hand it is held sufficient to prove substantially the words charged,[33] and that proof of additional words not altering the meaning of those alleged will not constitute a variance.[34]

c. Publication — (i) *In General.* An allegation of a publication to one person is not supported by proof of a publication to another.[35] Where an informa-

Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904; Dickson *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

28. State *v.* Schmitt, 49 N. J. L. 579, 9 Atl. 774; State *v.* Mott, 45 N. J. L. 494; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904; Dickson *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

29. State *v.* Powell, 66 Mo. App. 598, holding that there is no limit to the number of such amendments.

30. Variance in civil actions for defamation see *supra*, VIII, E, 9.

31. State *v.* Barnes, 32 Me. 530.

Immaterial variance.— Under an indictment that the libel was "of and concerning the only daughter of Jane Roach" it need not be shown that the prosecutrix was an only daughter, since such allegation is not material to the criminal charge. State *v.* Perrin, 3 Brev. (S. C.) 152.

32. State *v.* Fenn, 112 Mo. App. 531, 86 S. W. 1098; Barnett *v.* State, 35 Tex. Cr. 280, 33 S. W. 340. But see U. S. *v.* Callender, 25 Fed. Cas. No. 14,709.

Immaterial variances.—Booker *v.* State, 100 Ala. 30, 14 So. 561 (where it was alleged that defendant had said that "M had hired witnesses . . . to swear to lies" and it was proved that defendant had said that "he was satisfied M had," etc.); Collins *v.* People, 115 Ill. App. 280 (holding that where the article offered in evidence and that set up in the indictment for libel differ with respect to a single word, which in no wise changed the meaning of such libel, the variance will not reverse); State *v.* Fitzgerald, 20 Mo. App. 408 (where there was an alleged charge of "fraud" and the proof was of the publication of the word "frod"); Gipson *v.* State, (Tex. Cr. App. 1903) 77 S. W. 216 (where it was alleged that defendant stated that he had intercourse with prosecutrix and it was proved that defendant stated that he and another had intercourse with her); McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847 (where the indictment used word "bubbledupes" while the original publication showed "bubbledupe").

Material variances.— Com. *v.* Buckingham, Thach. Cr. Cas. (Mass.) 29 (omission in the indictment of the word "evening" after the word "Tuesday" which occurred in the original publication); State *v.* Fenn, 112 Mo. App. 531, 86 S. W. 1098 (where the charge alleged was "he forged that deed," and the charge proved was that the prosecutor "had changed the consideration in a deed"); State *v.* Powers, 34 N. C. 5 (where it was alleged that defendant set up in public a board on which was a painting or a picture of a human head with a nail driven through the ear and a pair of shears hung on a nail, and it was proved that a human head showing a side face with an ear, a nail driven through the ear and a pair of shears hung on the nail, was inscribed or cut in the board by means of some instrument, but not painted).

Material variances in imputations of unchastity see West *v.* State, 44 Tex. Cr. 417, 71 S. W. 967; Riddle *v.* State, 30 Tex. App. 425, 17 S. W. 1073; Berry *v.* State, 27 Tex. App. 483, 11 S. W. 521; Frisby *v.* State, 26 Tex. App. 180, 9 S. W. 463.

33. McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847; Conlee *v.* State, 14 Tex. App. 222.

34. Com. *v.* Harmon, 2 Gray (Mass.) 289 (the omission in an indictment of date and signature of a libel); McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847; Lefever *v.* State, (Tex. Cr. App. 1899) 49 S. W. 383.

35. Tippens *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1000, holding that an instruction that the jury can convict if they find publication to other persons than those named in the indictment is erroneous.

There is a fatal variance between a complaint and an information for slander where the former alleges that the words were spoken in the presence of G and others, and the latter that they were spoken in the presence of P and others. Davis *v.* State, (Tex. Cr. App. 1893) 22 S. W. 979.

Under Ga. Code, § 4372, making it an offense to use to or of another opprobrious words, the accused may be convicted on an

tion for slander recites that it was published in the presence of two persons proof that it was uttered in the presence of both but not in the presence of both at the same time is insufficient.[36] But it is held that an allegation of publication to several persons is sufficiently sustained by evidence showing publication to one of the persons specified.[37]

(II) *Time of Publication.* It is not necessary to prove that the libel was published on the day alleged; proof that it was published at any time within the statute of limitations is sufficient to sustain the indictment.[38]

(III) *Tongue or Language Employed.* There is a fatal variance between an allegation that the words were spoken in one language and proof that they were spoken in another.[39]

H. Issues and Evidence Admissible Under Pleadings — 1. Inducement and Innuendo. The facts averred in the inducement to render the charge actionable must be proved as alleged,[40] but an averment in the form of an innuendo does not state a traversable fact[41] and is not susceptible of proof.[42]

2. Truth of Publication.[43] It has been held not to be necessary to plead the truth in order to put it in issue.[44]

I. Bill of Particulars. The general rule that where in the course of a suit from any cause a party is placed is such a situation that justice cannot be done in the trial without the aid of the information to be obtained by means of a specification or bill of particulars, the court in virtue of the general authority to regulate the conduct of the trials has power to direct such information to be seasonably furnished and in an authentic form, and that such an order may be effectual and accomplish the purpose intended by it the party required to furnish the bill of particulars must be confined to the particulars specified, has been applied in a prosecution for libel.[45]

J. Evidence[46] **— 1. Presumptions and Burden of Proof — a. Innocence of Accused.** In a prosecution for charging unchastity, it is error to charge that the presumption is in favor of the chastity of prosecutrix as it conflicts with the presumption of innocence of defendant.[47]

b. Defamatory Character of Publication. Where a libel is not actionable

indictment charging that the words were used to and of another, although the evidence shows that they were used of, but not to, him. Lecroy *v.* State, 89 Ga. 335, 15 S. E. 463.

36. Knight *v.* State, (Tex. Cr. App. 1899) 49 S. W. 383; Neely *v.* State, 32 Tex. Cr. 370, 23 S. W. 798.

37. State *v.* Barnes, 32 Me. 530. See also Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846.

38. Com. *v.* Varney, 10 Cush. (Mass.) 402.

Failure to offer any proof of the time of the offense is fatal. Stichtd *v.* State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

39. State *v.* Marlier, 46 Mo. App. 233; Stichtd *v.* State, 25 Tex. App. 420, 8 S. W. 477, 8 Am. St. Rep. 444.

40. State *v.* Perrin, 2 Brev. (S. C.) 474.

In a prosecution for slandering an innocent woman under statute in North Carolina by charging her with having had sexual intercourse with defendant it is held that where it is admitted that the charge was made, the only issue is whether the prosecutrix was an "innocent woman." State *v.* Malloy, 115 N. C. 737, 20 S. E. 461.

41. Com. *v.* Snelling, 15 Pick. (Mass.) 321.

42. State *v.* Henderson, 1 Rich. (S. C.) 179; Dickson *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694.

43. Truth as justification in prosecution for defamation see *supra*, X, E, 2.

44. Com. *v.* Morris, 1 Va. Cas. 176, 5 Am. Dec. 515.

45. Com. *v.* Snelling, 15 Pick. (Mass.) 321, holding that where a person is indicted for a libel containing general charges of official misconduct against a magistrate the court is authorized to require him, previously to the trial, in case he intends to give the truth in evidence in pursuance of statute, to file a bill of particulars specifying the instances of misconduct which he proposes to prove, and he will not be permitted to give in evidence any other instance of misconduct other than those definitely specified in the bill of particulars.

46. Evidence in criminal cases generally see Criminal Law, 12 Cyc. 379 *et seq.*

47. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628; State *v.* McDaniel, 84 N. C. 803. *Compare* Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846, holding that it was not error to charge in the language of the statute that the law presumes the chastity of every woman.

per se, the state must prove that it tended to injure one's reputation and expose him to public hatred, contempt, and ridicule.[48]

e. Privilege. The burden is on defendant to show that the libel is privileged.[49]

d. Justification. Under a defense of justification the burden is on defendant to establish the truth of the charge.[50] It has been held, however, that after the truth is established the burden is on the state to show that the publication was not with good motives and with justifiable ends.[51]

e. Malice.[52] The publication of a charge which is actionable *per se* is presumed to have been malicious, although no actual malice is shown,[53] unless it appears that the communication was made on a privileged occasion.[54]

f. Person Liable. If a libel appears under a man's handwriting and no other author is known he is presumed by law to be the author until the contrary is proved.[55] The publisher of a newspaper is *prima facie* presumed to be the publisher of a libel appearing therein.[56]

2. Admissibility — a. In General. The general rules governing the admissibility of evidence are applicable to prosecutions for libel or slander.[57]

b. Meaning of Language Used. Where the alleged defamatory matter is ambiguous, witnesses may, it has been held, testify as to what they understood defendant to mean in his use and employment of the same.[58] But if the charge is unambiguous, such evidence is not admissible.[59] So too it is held that the

48. Raker *v.* State, 50 Nebr. 202, 69 N. W. 749.

49. Smith *v.* State, 32 Tex. 594.

50. Com. *v.* Bonner, 9 Metc. (Mass.) 410.

51. State *v.* Verry, 36 Kan. 416, 13 Pac. 838; Com. *v.* Damon, 136 Mass. 441. *Compare* Com. *v.* Bonner, 9 Metc. (Mass.) 410.

52. Malice as gist of action see *supra*, X, C.

53. *Alabama.*— Haley *v.* State, 63 Ala. 83.

Georgia.— Fledger *v.* State, 77 Ga. 242, 3 S. E. 320.

Kansas.— State *v.* Clyne, 53 Kan. 8, 35 Pac. 789; State *v.* Brady, 44 Kan. 435, 24 Pac. 948, 21 Am. St. Rep. 296, 9 L. R. A. 606.

Massachusetts.— Com. *v.* Blanding, 3 Pick. 304, 15 Am. Dec. 214.

New Jersey.— State *v.* Patterson, 2 N. J. L. J. 218.

Pennsylvania.— Com. *v.* Swallow, 8 Pa. Super. Ct. 539; Com. *v.* Warfel, 5 Lanc. L. Rev. 113; Com. *v.* Odell, 3 Pittsb. 449.

Texas.— Smith *v.* State, 32 Tex. 594.

See 32 Cent. Dig. tit. "Libel and Slander," §§ 427, 428.

Where the words charge a crime malice is implied. State *v.* Shaffner, 2 Pennew. (Del.) 171, 44 Atl. 620.

Slanderous charge.—Under statute in North Carolina making it a criminal offense to charge a woman with incontinency, it has been held that when the slanderous charge is made the law *prima facie* implies malice from the publication except in case of a privileged communication. State *v.* Malloy, 115 N. C. 737, 20 S. E. 461; State *v.* Hinson, 103 N. C. 374, 9 S. E. 552.

54. Com. *v.* Cochran, 23 Lanc. L. Rev. (Pa.) 267.

55. Giles *v.* State, 6 Ga. 276.

56. Com. *v.* Morgan, 107 Mass. 199, holding that such presumption is not rebutted by evidence that he never saw the libelous matter and was not aware of its publication until it was pointed out to him in print and that an apology and retraction were afterward published in the same newspaper.

57. See cases cited *infra*, this note.

Evidence excluded as hearsay see People *v.* Thornton, 74 Cal. 482, 16 Pac. 244; State *v.* Morris, 109 N. C. 820, 13 S. E. 877.

Evidence excluded as irrelevant see Ridgely *v.* State, 75 Md. 510, 23 Atl. 1099.

The extrajudicial declarations of the person defamed are not admissible in evidence as the admission of a party, he being merely a witness in the prosecution. State *v.* Butman, 15 La. Ann. 166.

Papers seized under illegal warrant.—Upon a prosecution for seditious libel, papers found in the possession of a defendant may be given in evidence, although they had been seized under an illegal warrant. U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683.

Evidence as to family of prosecuting witness.— It has been held no error for a prosecuting witness to testify that he was married and had a family, as such evidence might affect his credibility, although tending neither to prove nor disprove the criminal charge. People *v.* Crespi, 115 Cal. 50, 46 Pac. 863. See also State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

58. State *v.* Bonine, 85 Mo. App. 462; State *v.* Fitzgerald, 20 Mo. App. 408. *Compare* Com. *v.* Scott, 3 Lanc. L. Rev. (Pa.) 290.

When a cant phrase or low expression not having an ordinary acceptation is used, a witness who knows may testify as to its meaning. Haley *v.* State, 63 Ala. 89.

59. Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10; Dickson *v.* State, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694. See also Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846.

testimony of defendant as to what he meant by the charge is properly excluded where the language is not ambiguous.[60]

c. Person Defamed. Where a libelous publication does not definitely designate the person libeled, testimony of witnesses that on reading the publication they understood it to refer to the prosecuting witness has been held to be admissible.[61]

d. Publication and Responsibility Therefor. Publication by defendant may be shown by any evidence legitimately tending to establish that fact.[62] Admissions of defendant are competent to show his authorship or publication of the defamation.[63] Evidence of other libelous publications by defendant is inadmissible to show that defendant was guilty of the publication charged.[64]

e. Truth of Charge[65] — (i) *In General.* Defendant may show in justification any fact tending to establish the truth of the charge.[66]

60. State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

61. Com. *v.* Buckingham, Thach. Cr. Cas. (Mass.) 29; State *v.* Mason, 26 Oreg. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779; People *v.* Ritchie, 12 Utah 180, 42 Pac. 209. But see People *v.* McDowell, 71 Cal. 194, 11 Pac. 868.

62. Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397 (holding that tax returns, hotel registers, and receipts signed by defendant as president of the paper publishing the libel, and dated prior and subsequent to the date of publication, are admissible to show his connection with the newspaper); People *v.* Ritchie, 12 Utah 180, 42 Pac. 209 (holding that hostile feelings between defendant and prosecuting witness may be shown); U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683 (holding that evidence may be given that other copies of the same libel were found in the possession of defendant).

Evidence held inadmissible.— Where prosecutrix testifies that she first heard the statement from her aunt, refusal to allow her to state if her aunt told her from whom she heard the report is not error. State *v.* Hinson, 103 N. C. 374, 9 S. E. 552. Where defendant was charged with having published a libelous pamphlet evidence that certain witnesses had seen the pamphlet was not admissible because what they had seen was not the identical copy of the publication which was charged in the information. Lockhard *v.* State, 43 Tex. Cr. 61, 63 S. W. 566.

Admission of evidence held harmless error. — A statement by a witness who testified to the slander that he engaged in a conversation with defendant for the purpose of compromise is harmless error. Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10.

The pasting of the original libel on the information does not destroy its character as evidence. State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419.

63. Com. *v.* Guild, Thach. Cr. Cas. (Mass.) 329; Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397.

An admission by the editor of a newspaper as to the authorship of a publication made in the absence of defendant is not admissible until a proper foundation by proof had been laid that defendant was the author. Com. *v.* Guild, Thach. Cr. Cas. (Mass.) 329.

Admission of proprietorship of newspaper not confession of guilt.— The *corpus delicti* of the crime of libel is the malicious publication and not the editorship or proprietorship of the paper in which the libel was published, and the acts and admissions of one charged with criminal libel tending to show his proprietorship of the paper in which the libel was published are not confessions, in legal contemplation. People *v.* Miller, 122 Cal. 84, 54 Pac. 523.

64. State *v.* Riggs, 39 Conn. 498.

Publication in one state no evidence of publication in another.— Publication in New York is not evidence of publication in Washington, District of Columbia. U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683.

65. Truth of charge as defense see *supra*, X, E, 2.

66. See cases cited *infra*, this note.

Evidence admissible to show truth of charge.— In the following cases the evidence was held admissible as tending to show the truth of the charge:

California.—People *v.* Seeley, 139 Cal. 118, 72 Pac. 834.

Iowa.— State *v.* Keenan, 111 Iowa 286, 82 N. W. 792; State *v.* Conable, 81 Iowa 60, 46 N. W. 759.

Kansas.— State *v.* Wait, 44 Kan. 310, 24 Pac. 354; State *v.* Mayberry, 33 Kan. 441, 6 Pac. 553.

Massachusetts.— Com. *v.* Snelling, Thach. Cr. Cas. 318.

Ohio.— Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397.

Pennsylvania.— Com. *v.* Swallow, 8 Pa. Super. Ct. 539; Com. *v.* Warfel, 5 Lanc. L. Rev. 113.

Texas.— Johnson *v.* State, 31 Tex. Cr. 569, 21 S. W. 541.

See 32 Cent. Dig. tit. "Libel and Slander," § 433.

Evidence inadmissible to show truth of charge.— In the following cases the evidence was held inadmissible to show the truth of the charge:

(II) *Current Reports and Suspicions.* Current reports and suspicions are not admissible to prove the truth of the charge.[67]

(III) *Bad Character of Person Defamed.* Evidence of the general bad character of the person defamed is not admissible to show the truth of the charge,[68] although such evidence may be admissible as bearing upon his credibility as a witness,[69] or in mitigation of defendant's punishment.[70]

(IV) *Imputations of Unchastity in Women.* On a prosecution for charging a woman with unchastity or unchaste conduct, evidence that she had committed prior acts of sexual intercourse,[71] or that her general reputation for chastity

Alabama.— Graves *v.* State, 9 Ala. 447, holding that affidavits used before an ecclesiastical tribunal upon a charge preferred by defendant against the prosecutor was inadmissible, where the decision of the tribunal differed from the statements made in the affidavits.

Iowa.— State *v.* Keenan, 111 Iowa 286, 82 N. W. 792.

Massachusetts.— Com. *v.* Snelling, Thach. Cr. Cas. 318, holding that evidence of private misconduct is not admissible to show official misconduct.

Missouri.— State *v.* Armstrong, 106 Mo. 395, 16 S. W. 604, 27 Am. St. Rep. 361, 13 L. R. A. 419, holding that in a prosecution for sending a letter indorsed, "Bad Debt Collecting Agency," evidence that the prosecuting witness owed a few small bills is not competent.

New Jersey.— Haase *v.* State, 53 N. J. L. 34, 29 Atl. 751, holding that in a prosecution for charging a physician with practising without a diploma, he cannot be compelled to show under what authority he practised at a time when no authority was required by law.

New York.— Barthelemy *v.* People, 2 Hill 248, holding that a libel charging "hardness towards the poor," "dissoluteness of morals," etc., being conclusions from instances of bad conduct before related in the libel, cannot be supported by other instances not specified by the writer.

Pennsylvania.— Com. *v.* Warfel, 5 Lanc. L. Rev. 113, holding that the conviction of the prosecutor for the offense charged when conviction occurs after suit brought is not admissible.

Tennessee.— Banner Pub. Co. *v.* State, 16 Lea 176, 57 Am. Rep. 216, holding that upon an indictment for charging state officers with abuses, evidence of abuses prior to the appointment of such officers is incompetent.

Texas.— Tippens *v.* State, (Cr. App. 1898) 43 S. W. 1000.

United States.— U. S. *v.* Callender, 25 Fed. Cas. No. 14,709, holding that it is not competent to prove one part of a specific charge by one witness and other parts by different witnesses.

See 32 Cent. Dig. tit. "Libel and Slander," § 433.

Evidence of falsity.— A conversation between the prosecuting witness and a third person in the absence of defendant, relating to the transaction out of which the publication grew and tending to show the falsity of the charge, is admissible, where the conversation took place prior to the connection of defendant with the transaction. Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

67. *Louisiana.*— State *v.* Butman, 15 La. Ann. 166.

Massachusetts.— Com. *v.* Snelling, 15 Pick. 337.

Michigan.— People *v.* Jackman, 96 Mich. 269, 35 N. W. 809.

Minnesota.— State *v.* Ford, 82 Minn. 452, 85 N. W. 217.

North Carolina.— State *v.* White, 29 N. C. 180.

Pennsylvania.— See Com. *v.* Swallow, 8 Pa. Super. Ct. 539.

See 32 Cent. Dig. tit. "Libel and Slander," § 433.

68. State *v.* Bush, 122 Ind. 42, 23 N. E. 677; Com. *v.* Snelling, 15 Pick. (Mass.) 337; State *v.* Lyon, 89 N. C. 568; McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847.

Imputation of bad character.— Where defendant charged prosecutor with being of notoriously bad and infamous character, defendant may show bad character of prosecuting witness in justification. Leader *v.* State, 4 Tex. App. 162.

69. State *v.* Bush, 122 Ind. 42, 23 N. E. 677.

70. See *infra*, X, J, 2, h.

71. Baxter *v.* State, 34 Tex. Cr. 516, 31 S. W. 394, 53 Am. St. Rep. 720; Van Dusen *v.* State, 34 Tex. Cr. 456, 30 S. W. 1073; Wood *v.* State, 32 Tex. Cr. 476, 24 S. W. 284; Duke *v.* State, 19 Tex. App. 14; Wagner *v.* State, 17 Tex. App. 554. See also Bowen *v.* State, (Tex. App. 1892) 18 S. W. 464.

Where defendant charged prosecutrix with being a whore, evidence that she had consulted with a witness as to the advisability of her entering such a house is admissible. McMahan *v.* State, 13 Tex. App. 220.

Imputation of specific act of unchastity.— In Patterson *v.* State, 12 Tex. App. 458, it was held that where the imputation complained of charges a specific act of unchastity defendant cannot prove any other acts or conduct showing a want of chastity except those specifically embraced in the imputation made by him.

Physical examination of prosecuting witness.— Defendant cannot compel the prosecuting witness to submit to a physical examination to ascertain whether she has had sexual intercourse with any person. Mc-

at the time of the alleged slander was bad,[72] has been held to be admissible in justification.

f. Privilege.[73] Evidence of the mode, time, and occasion of the publication is competent on the question whether or not it was privileged.[74]

g. Malice and Intent — (I) *In General.* Actual malice may like any other fact be shown by competent testimony.[75]

(II) *Other Publications.* Evidence of other defamatory publications by defendant against the prosecuting witnesses are admissible to show malice,[76] although published subsequent to defamation complained of.[77]

(III) *Absence of Malice* — (A) *In General.* Where absence of malice on the part of defendant becomes material to the issue, any competent evidence legitimately tending to show that he made the publication in good faith under belief in its truth is admissible.[78] So the fact that an alleged newspaper libel was

Arthur *v.* State, 59 Ark. 431, 27 S. W. 628; Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10.

On an indictment for slandering an "innocent woman" found under statute in North Carolina it has been held that, although the conduct of the woman at the time the words were used may have been exemplary, prior illicit intercourse on her part is admissible as tending to rebut testimony as to her subsequent good character. State *v.* Grigg, 104 N. C. 882, 10 S. E. 684.

72. Crane *v.* State, 30 Tex. App. 464, 17 S. W. 939; Patterson *v.* State, 12 Tex. App. 458. See also Collins *v.* State, 39 Tex. Cr. 30, 44 S. W. 846.

Bad reputation subsequent to the slander is not admissible, Jackson *v.* State, 42 Tex. Cr. 497, 6 S. W. 963.

Bad reputation at former place of residence. — Where prosecuting witness has recently moved from one place to another, defendant is entitled to the benefit of her bad reputation in the neighborhood from which she came as well as in that in which she is living. Ballew *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1063.

Good reputation of the prosecutrix at the time of the trial is inadmissible in behalf of the state. Gipson *v.* State, (Tex. Cr. App. 1903) 77 S. W. 216; Bowers *v.* State, 45 Tex. Cr. 185, 75 S. W. 299. Thus evidence on a trial for accusing a female of unchastity that prosecutrix was at that time received on terms of social equality by her neighbors is inadmissible. Gipson *v.* State, *supra*; Bowers *v.* State, *supra*.

73. Privilege as a defense see *supra*, X, D.

74. Com. *v.* Moore, 2 Chest. Co. Rep. (Pa.) 358.

Evidence inadmissible see Com. *v.* Buckingham, Thach. Cr. Cas. (Mass.) 29.

Evidence to show fairness of report. — Where a publication referred to a record in a criminal case to support certain defamatory statements, such record is admissible to show that publication was a fair report. People *v.* Glassman, 12 Utah 238, 42 Pac. 956.

75. State *v.* Conable, 81 Iowa 60, 46 N. W. 759 (holding that it is competent to allow the state to prove that defendant had asked the prosecuting witness to secure a certain office for him, in order to show that his failure to obtain the office influenced him in publishing the libel); Com. *v.* Damon, 136 Mass. 441 (holding that defendant may be asked whether his paper "pursued an unfriendly tone" toward the person libeled); Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620; Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10.

76. *Alabama.* — Grant *v.* State, 141 Ala. 96, 37 So. 420; Riley *v.* State, 132 Ala. 13, 31 So. 731.

Connecticut. — State *v.* Riggs, 39 Conn. 498.

Florida. — Eldridge *v.* State, 27 Fla. 162, 9 So. 448.

Iowa. — State *v.* Heacock, 106 Iowa 191, 76 N. W. 654; State *v.* Conable, 81 Iowa 60, 46 N. W. 759.

Massachusetts. — Com. *v.* Damon, 136 Mass. 441.

North Carolina. — State *v.* Mills, 116 N. C. 1051, 21 S. E. 563.

Texas. — Stayton *v.* State, 46 Tex. Cr. 205, 78 S. W. 1071, 108 Am. St. Rep. 988; Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10; Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118.

United States. — *In re* Crandell, 6 Fed. Cas. No. 3,350.

See 32 Cent. Dig. tit. "Libel and Slander," § 435.

77. *Alabama.* — Riley *v.* State, 132 Ala. 13, 31 So. 731.

Florida. — Eldridge *v.* State, 27 Fla. 162, 9 So. 448.

Iowa. — State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

Massachusetts. — Com. *v.* Damon, 136 Mass. 441.

Texas. — Stayton *v.* State, 46 Tex. Cr. 205, 78 S. W. 1071, 108 Am. St. Rep. 988; Whitehead *v.* State, 39 Tex. Cr. 89, 45 S. W. 10.

United States. — *In re* Crandell, 6 Fed. Cas. No. 3,350. *Contra*, U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683.

See 32 Cent. Dig. tit. "Libel and Slander," § 435.

Sensational dodgers calling the attention of the public to a publication in a newspaper and advertising the paper as containing it are admissible in evidence to prove malice, although no reference is made to them in the indictment. Com. *v.* Place, 153 Pa. St. 314, 26 Atl. 620.

78. See cases cited *infra*, this note.

Defendant may testify that he made the

published in the absence of the owner and against his orders is held admissible on the question of intent.[79]

(B) *Truth.*[80] Defendant may give in evidence the truth of the publication as an item to show the intent of the publication,[81] where it also appears that the publication was for a justifiable end.[82]

(C) *Information Upon Which Publication Was Made.* Rumors or other sources of information relied upon by defendant in making the publication are held to be admissible to show the absence of malice.[83]

h. Mitigation of Punishment. The bad character of the person defamed,[84] the fact that publication was made under provocation by the prosecuting witness,[85] and the fact that the publication contained some charges that were sustained by proof,[86] are competent to be considered in mitigation of punishment.

3. Weight and Sufficiency — a. In General. The rules governing the weight and sufficiency of evidence in criminal cases generally are applicable in prosecutions for defamation.[87] The accused is entitled to the benefit of any reasonable doubt as to his guilt.[88]

b. Person Defamed. It is not necessary to prove that the libel was published of a person in his professional character when that fact appears on the face of the libel.[89]

c. Truth or Falsity of Charge. Where defendant justifies, it is only necessary for him to raise a reasonable doubt in the minds of the jury as to the truth of the charge; in other words the falsity of the charge must be proved by the state beyond a reasonable doubt.[90] The justification in order to be complete must be

publication in good faith. State *v.* Clyne, 53 Kan. 8, 35 Pac. 789; People *v.* Stark, 59 Hun (N. Y.) 51, 12 N. Y. Suppl. 688 [*affirmed* in 136 N. Y. 538, 32 N. E. 1046]; Com. *v.* Scouten, 25 Pa. Co. Ct. 138. But it has been held that when the person responsible for the publication is sought to be punished in a criminal proceeding, he cannot excuse himself by testifying that he believed the publication was true, until he has given facts and circumstances from which a legal inference can be drawn that there was at least some ground for the belief. People *v.* Sherlock, 56 N. Y. App. Div. 422, 68 N. Y. Suppl. 74, 15 N. Y. Cr. 297 [*affirmed* in 166 N. Y. 180, 59 N. E. 830].

79. Com. *v.* Buckingham, Thach. Cr. Cas. (Mass.) 29.

80. Truth as a defense see *supra*, X, E, 2.

81. People *v.* Tracy, 2 Wheel. Cr. (N. Y.) 358; Com. *v.* Sanderson, 2 Pa. L. J. Rep. 269.

82. Com. *v.* Buckingham, Thach. Cr. Cas. (Mass.) 29.

83. Humbard *v.* State, 21 Tex. App. 200, 17 S. W. 126; Duke *v.* State, 19 Tex. App. 14; People *v.* Glassman, 12 Utah 238, 42 Pac. 956, holding that in a prosecution for libel on a candidate for public office, the evidence upon which the publication was made is admissible to rebut malice. *Compare* State *v.* Hinson, 103 N. C. 374, 9 S. E. 552 (holding that a prevalent report is inadmissible where the defamatory utterance is not privileged); Shaw *v.* State, 28 Tex. App. 236, 12 S. W. 741 (holding that evidence that defendant's friend had said that defendant and the prosecuting witness had been criminally intimate and defendant uttered the slander in corroboration of his friend's statement to save him from threatened violence is admissible to rebut malice on the inference that he made the charge wantonly).

84. State *v.* Bush, 122 Ind. 42, 23 N. E. 677; Melton *v.* State, 3 Humphr. (Tenn.) 389.

Character of defendant.— It is not competent for defendant to show that he was "a peaceable and orderly man." Com. *v.* Irwin, 2 Pa. L. J. 329.

85. Hartford *v.* State, 96 Ind. 461, 49 Am. Rep. 185. See also Graves *v.* State, 9 Ala. 447.

86. Melton *v.* State, 3 Humphr. (Tenn.) 389.

87. See cases cited *infra*, this note.

Evidence sufficient to sustain conviction see State *v.* Bonine, 85 Mo. App. 462; People *v.* Goslin, 171 N. Y. 627, 63 N. E. 1120 [*affirming* 67 N. Y. App. Div. 16, 73 N. Y. Suppl. 520].

Evidence insufficient to sustain conviction see State *v.* Shoemaker, 101 N. C. 690, 8 S. E. 332; Riddle *v.* State, 30 Tex. App. 425, 17 S. W. 1073.

88. State *v.* Shaffner, 2 Pennew. (Del.) 171, 44 Atl. 620; State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976; State *v.* Elliot, 10 Kan. App. 69, 61 Pac. 981.

89. Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751.

90. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628; State *v.* Bush, 122 Ind. 42, 23 N. E. 677; State *v.* Wait, 44 Kan. 310, 24 Pac. 354; State *v.* Grinstead, 10 Kan. App. 90, 61 Pac. 980; Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118.

Where defendant justifies a libel charging a crime it has been held that he must produce such evidence as would justify the jury in convicting prosecutor of the offense

as broad as the charge; it cannot be a sufficient justification to show that part of the matter is true.[91]

d. Malice or Negligence. It has been held that where the communication is privileged, malice or negligence on the part of defendant must be proved affirmatively beyond a reasonable doubt by evidence extrinsic,[92] or by intrinsic evidence from the style and tone of the publication;[93] it cannot be inferred from the mere fact of publication.[94] But it is held that if the publication is not privileged the jury may infer malice upon proof of publication and its falsity.[95]

K. Trial, Sentence, and Review — 1. Trial[96] — a. In General. In states where the jury are the judges both of the law and the facts, counsel may present and argue the law to the jury, although his theory differs from that of the court in its instructions.[97] It has been held that the libel should not be read to the jury until defendant has cross-examined witnesses called to prove publication.[98] Any part of the libelous pamphlet given in evidence may, it is held, be read in argument although not read in the opening of the evidence.[99]

b. Province of Court and Jury — (I) *In General.* In many states it is provided either by constitution or by statute that in libel cases the jury shall determine both the law and the facts.[1] This rule is held not to affect the right of the court to

charged. Com. *v.* Moore, 2 Chest. Co. Rep. (Pa.) 358.

In a prosecution for slander of a female it is not necessary for defendant, in order to entitle himself to an acquittal on the ground of the female's general reputation, to prove beyond a reasonable doubt that her reputation for chastity is bad. Ballew *v.* State, (Tex. Cr. App. 1905) 85 S. W. 1063; Manning *v.* State, 37 Tex. Cr. 180, 39 S. W. 118.

91. *Alabama.* — Graves *v.* State, 9 Ala. 447.

Kansas.— State *v.* Verry, 36 Kan. 416, 13 Pac. 838.

New Hampshire.— State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217.

Pennsylvania.— Com. *v.* Moore, 2 Chest. Co. Rep. 358. See also Com. *v.* Cochran, 23 Lanc. L. Rev. 267.

United States.— U. S. *v.* Callender, 25 Fed. Cas. No. 14,709; U. S. *v.* Cooper, 25 Fed. Cas. No. 14,865; U. S. *v.* Haswell, 26 Fed. Cas. No. 15,324.

See 32 Cent. Dig. tit. "Libel and Slander," § 440.

92. Com. *v.* McClure, 3 Kulp (Pa.) 464. See also Beal *v.* State, 99 Ala. 234, 13 So. 783.

The fact that the prosecutor and defendant were not on terms of friendly intimacy will not alone amount to such evidence of malice as to destroy the privilege attaching to the publication complained of. Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

93. Com. *v.* Scouton, 20 Pa. Super. Ct. 503; Com. *v.* Little, 12 Pa. Super. Ct. 636.

94. Com. *v.* McClure, 3 Kulp (Pa.) 464. See also Com. *v.* Scouton, 20 Pa. Super. Ct. 503.

95. England *v.* State, (Tex. Cr. App. 1899) 49 S. W. 379. *Compare* Beal *v.* State, 99 Ala. 234, 13 So. 783.

Evidence to rebut presumption of malice see Pledger *v.* State, 77 Ga. 242, 3 S. E. 320; State *v.* Ford, 82 Minn. 452, 85 N. W. 217; Com. *v.* Swallow, 8 Pa. Super. Ct. 539.

To sustain the defense that the publication was not negligently made, the jury must be satisfied that defendant used all the care and caution to ascertain the truth which a fair-minded, careful man would take. Com. *v.* Moore, 2 Chest. Co. Rep. (Pa.) 358.

96. Trial of criminal causes generally see Criminal Law, 12 Cyc. 504 *et seq.*

97. State *v.* Whitmore, 53 Kan. 343, 36 Pac. 748, 42 Am. St. Rep. 288; State *v.* Verry, 36 Kan. 416, 13 Pac. 838.

The reading to the jury of the statute upon which an information is based is not error. State *v.* Powell, 66 Mo. App. 598.

98. Taylor *v.* State, 4 Ga. 14, holding, however, that the fact that the libel is read in violation of this rule of practice is not a sufficient ground for a new trial.

99. U. S. *v.* Crandell, 25 Fed. Cas. No. 14,885, 4 Cranch C. C. 683.

1. *California.*— People *v.* Seeley, 139 Cal. 118, 72 Pac. 834; People *v.* McDowell, 71 Cal. 194, 11 Pac. 868.

Iowa.— Forshee *v.* Abrams, 2 Iowa 571.

Minnesota.— State *v.* Ford, 82 Minn. 452, 85 N. W. 217.

New Jersey.— Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747 (holding that this provision declares the right of the jury with due regard for the views of the court to decide whether the meaning and tendency of the publication are such as to bring it within the legal definition of a libel, whether it was privileged or was true, and whether the motives with which it was published were good and the end to be accomplished justifiable); State *v.* Patterson, 2 N. J. L. 218.

Pennsylvania.— See Pittock *v.* O'Niell, 63 Pa. St. 253, 3 Am. Rep. 544.

South Carolina.— State *v.* Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616; State *v.* Lehre, 2 Brev. 446, 4 Am. Dec. 596.

Texas.— Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

See 32 Cent. Dig. tit. "Libel and Slander," § 443.

decide all questions of law relating to the admission of evidence,[2] or its duty to instruct as to the principles of criminal law and the law of libel that are of a technical nature,[3] nor does it authorize the jury to say that what the statute declares to be a criminal libel is not such.[4]

(II) *Meaning of Language Used.* If the defamatory matter is plain and unambiguous, its meaning is for the court;[5] but if the publication is not clearly defamatory it is not for the jury to determine whether it is actionable.[6]

(III) *Person Defamed.* Whether the defamatory matter was published concerning any particular individual, or whether that individual was intended, is a question of fact for the jury.[7]

(IV) *Publication.* It is for the jury to determine whether defendant is the author or publisher of the libel.[8]

(V) *Truth of Charge.* The question whether the charge is true is for the jury,[9] but it is for the court to decide whether the case is a proper one for the submission of the truth in evidence.[10]

(VI) *Privilege.* The question of privilege is for the court where the facts are undisputed.[11]

(VII) *Malice.* The question of actual malice is one for the jury.[12]

c. Instructions — (I) *In General.* It is not error to instruct that it is the policy of the law to discourage libels,[13] or to refuse an instruction containing a peroration on the invaluable blessings of a free and independent press.[14] It is not error to refuse to instruct upon a point upon which no evidence had been introduced.[15]

(II) *Defamatory Character of Words.* It is error to instruct that a certain charge is libelous when in fact it is libelous only on proof of extrinsic facts.[16]

2. Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

3. *California.*— People *v.* Seeley, 139 Cal. 118, 12 Pac. 834.

Iowa.— Forshee *v.* Abrams, 2 Iowa 571.

New Jersey.— Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.

South Carolina.— State *v.* Syphrett, 27 S. C. 29, 2 S. E. 624, 13 Am. St. Rep. 616.

Texas.— McArthur *v.* State, 41 Tex. Cr. 635, 57 S. W. 847.

See 32 Cent. Dig. tit. "Libel and Slander," § 443. See also *infra*, X, K, 1, c, (V).

4. People *v.* McDowell, 71 Cal. 194, 11 Pac. 868; State *v.* Jeandell, 5 Harr. (Del.) 475; State *v.* Patterson, 2 N. J. L. J. 218; Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

5. State *v.* White, 28 N. C. 418; Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397; Banner Pub. Co. *v.* State, 16 Lea (Tenn.) 176, 57 Am. Rep. 216.

Meaning ascribed by innuendo.— Whether the language alleged to be libelous will bear the meaning ascribed to it by the innuendo is for the court and whether such meaning was intended by defendant is for the jury. State *v.* Smiley, 37 Ohio St. 30, 41 Am. Rep. 487; State *v.* Cass, 8 Ohio S. & C. Pl. Dec. 214, 5 Ohio N. P. 381; Com. *v.* Wolfinger, 16 Pa. Co. Ct. 257, 7 Kulp 537; Com. *v.* Cochran, 23 Lanc. L. Rev. 78.

On demurrer to an indictment for libel, the question of libel is for the court and not for the jury. State *v.* Norton, 89 Me. 290, 36 Atl. 394.

6. *Maine.*— State *v.* Norton, 89 Me. 290, 36 Atl. 394.

North Carolina.— State *v.* Harwell, 129 N. C. 550, 40 S. E. 48; State *v.* White, 28 N. C. 418.

Ohio.— Boyle *v.* State, 6 Ohio Cir. Ct. 163, 3 Ohio Cir. Dec. 397.

Pennsylvania.— Com. *v.* Keenan, 67 Pa. St. 203; Com. *v.* Owens, 9 Kulp 536; Com. *v.* Chambers, 15 Phila. 415.

Utah.— People *v.* Glassman, 12 Utah 238, 42 Pac. 956.

See 32 Cent. Dig. tit. "Libel and Slander," § 443.

7. State *v.* Jeandell, 5 Harr. (Del.) 475; Banner Pub. Co. *v.* State, 16 Lea (Tenn.) 176, 57 Am. Rep. 216.

8. People *v.* Storke, 128 Cal. 486, 60 Pac. 1090, 60 Pac. 420, holding that where defendant introduces an admitted writing of a third person to prove by comparison authorship by him and not by defendant, and an expert witness testifies that no resemblance exists, it is error for the judge to strike out the admitted writing.

9. McArthur *v.* State, 59 Ark. 431, 27 S. W. 628; Com. *v.* Scouton, 20 Pa. Super. Ct. 503; State *v.* Clifford, 58 W. Va. 681, 52 S. E. 864.

10. Com. *v.* Blanding, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

11. Com. *v.* Costello, 1 Pa. Dist. 745; Com. *v.* Murphy, 8 Pa. Co. Ct. 399.

12. State *v.* Shippman, 83 Minn. 441, 86 N. W. 431; Com. *v.* Costello, 1 Pa. Dist. 745; Com. *v.* Warfel, 5 Lanc. L. Rev. (Pa.) 113.

13. People *v.* Crespi, 115 Cal. 50, 46 Pac. 863.

14. State *v.* Powell, 66 Mo. App. 598.

15. Pledger *v.* State, 77 Ga. 242, 3 S. E. 320.

16. Baker *v.* State, 97 Ga. 452, 25 S. E.

(III) *Guilt of Defendant.* It is proper to instruct that if the jury should entertain any reasonable doubt as to the guilt of defendant they should acquit.[17]

(IV) *Malice.* The rules governing instructions in criminal cases generally are applicable to instructions as to malice in prosecutions for defamation.[18] It is not error to charge that the law presumes everyone intends the natural and probable consequences of his acts.[19] Where the publication is privileged, an instruction that, if defendant made the publication from malice to gratify a feeling of revenge, he is guilty is not error.[20]

(V) *Effect of Constitutional and Statutory Provisions Making Jury Judges Both of Law and of Fact.* Under a constitutional provision that the jury shall be the judges both of the law and of the fact, it is not error for the court to explain the law applicable to the case,[21] and to state that they should not disregard such instructions unless they are sure they are not acting from caprice or prejudice but from a deep and confident conviction that the court was wrong and they are right.[22]

d. Verdict. The verdict must find defendant guilty[23] or not guilty[24] of the charge as specified in the indictment.

2. Sentence and Punishment.[25] At common law the offense of libel is punishable by fine and imprisonment,[26] and provision to the same effect is sometimes made by statute.[27]

3. Review. The general rules governing new trials[28] and proceedings on appeal or error[29] in criminal cases generally are applicable to prosecutions for defamation.

341. See also State *v.* Grinstead, 10 Kan. App. 78, 61 Pac. 976.

When a publication is libelous only as tending to bring one into contempt, but not as representing him to be unworthy of public office, it is reversible error to submit the case to the jury on the latter theory. Squires *v.* State, 39 Tex. Cr. 96, 45 S. W. 147, 73 Am. St. Rep. 904.

Province of court and jury as to meaning of language used see *supra*, X, K, 1, b, (II).

17. Smith *v.* Com., 98 Ky. 437, 33 S. W. 419, 17 Ky. L. Rep. 1010.

Where an admission by defendants is made at the trial of facts which constitute the crime of malicious and criminal libel, the question of reasonable doubt as to their guilt should not be left to the jury. Com *v.* Di Silvestro, 15 Pa. Dist. 21, 32 Pa. Co. Ct. 193.

Instructions as to justification of a charge of unchastity see State *v.* Rice, 56 Iowa 431, 9 N. W. 343; Shaw *v.* State, 28 Tex. App. 236, 12 S. W. 741.

18. See cases cited *infra*, this note.

Particular instructions as to malice see the following cases:

Alabama.— Riley *v.* State, 132 Ala. 13, 31 So. 731.

Florida.— Eldridge *v.* State, 27 Fla. 162, 9 So. 448.

Kentucky.— Smith *v.* Com., 98 Ky. 437, 33 S. W. 419, 17 Ky. L. Rep. 1010.

North Carolina.— State *v.* Misenheimer, 123 N. C. 758, 31 S. E. 852.

Texas.— Stayton *v.* State, 46 Tex. Cr. 205, 78 S. W. 1071, 108 Am. St. Rep. 988.

See 32 Cent. Dig. tit. "Libel and Slander," § 444.

19. Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; State *v.* Mason, 26 Oreg. 273, 38 Pac. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779; State *v.* Nichols, 15 Wash. 1, 45 Pac. 647.

20. Haase *v.* State, 53 N. J. L. 34, 20 Atl. 751. See also Tippens *v.* State, (Tex. Cr. App. 1898) 43 S. W. 1000.

21. State *v.* Powell, 66 Mo. App. 598; Benton *v.* State, 59 N. J. L. 551, 36 Atl. 1041; People *v.* Sherlock, 166 N. Y. 180, 59 N. E. 830, 15 N. Y. Cr. 412 [*affirming* 56 N. Y. App. Div. 422, 68 N. Y. Suppl. 74, 15 N. Y. Cr. 297]. See State *v.* Brock, 61 S. C. 141, 39 S. E. 359. And see *supra*, X, K, 1, b, (I), text and note 3.

22. People *v.* Seeley, 139 Cal. 118, 72 Pac. 834; State *v.* Heacock, 106 Iowa 191, 76 N. W. 654.

23. Webber *v.* State, 10 Mo. 4; Sharff *v.* Com., 2 Binn. (Pa.) 514.

A verdict is sufficient when returned in the following form: "We, the jury, find the defendant guilty, and leave punishment with court." Conrand *v.* State, 65 Ark. 559, 47 S. W. 628.

24. Com. *v.* Guild, Thach. Cr. Cas. (Mass.) 329.

25. Sentence in criminal cases generally see Criminal Law, 12 Cyc. 769.

Punishment in criminal cases generally see Criminal Law, 12 Cyc. 953.

26. State *v.* Burnham, 9 N. H. 34, 31 Am. Dec. 217.

Fine held not excessive.— In State *v.* Belvel, 89 Iowa 405, 56 N. W. 545, 27 L. R. A. 846, it was held that a fine of five hundred dollars for the publication of a grossly offensive libel without any provocation which could be urged in mitigation is not excessive.

27. State *v.* Butman, 19 La. Ann. 164.

28. See Criminal Law, 12 Cyc. 701 *et seq.*

New trial see Taylor *v.* State, 4 Ga. 14.

29. See Criminal Law, 12 Cyc. 792.

L. Limitation of Prosecution.[30] Under a statute in North Carolina providing a two-year limitation for the prosecution of all misdemeanors except malicious misdemeanors, an indictment for falsely and maliciously attempting to destroy the reputation of an innocent woman falls within the exception of the statute.[31]

LIBER. As a noun, literally "a Book,"[1] *q. v.*; a distinct part or principal division of a work.[2] As an adjective, FREE, *q. v.*; or EXEMPT,[3] *q. v.*; a free man.[4] (See LIBER HOMO.)

LIBERAL. Free in bestowal or concession; generously inclined; ready to impart or bestow.[5] (Liberal: Construction, see CONSTRUCTION. Interpretation, see INTERPRETATION.)

LIBERARI FACIAS. Literally "That you cause to be delivered." A writ of execution for the delivery of a portion of the premises of the debtor to the creditor, not sold under a levari facias, as will satisfy the claim.[6]

LIBERATA PECUNIA NON LIBERAT OFFERENTEM. A maxim meaning "Money being restored does not set free the party offering."[7]

LIBERATE. A conditional writ ordering the sheriff to cause goods taken in custody of the law to be appraised, and to deliver them to the creditor, if he will accept them on the valuation, which he may do, or not, at his election.[8]

LIBER ET LEGALIS HOMO. A term said to be the definition and touchstone for qualification for jury duty.[9] (See, generally, GRAND JURIES; JURIES.)

LIBER HOMO. As used in the ancient acts of parliament, and in modern law, a term meaning FREEHOLDER,[10] *q. v.*

LIBERTAS EST CUM QUISQUE QUOD VELIT FACIAT MODO SECUNDUM LEGES, BONAS, COMMUNI CONSENSU LATAS, CERTAS PRÆFINITAS, APERTAS. A maxim meaning "Liberty is the privilege of doing what one pleases, subject to certain good, predetermined laws, enacted by common consent."[11]

LIBERTAS EST NATURALIS FACULTAS EJUS QUOD CUIQUE FACERE LIBET, NISI QUOD DE JURE AUT VI PROHIBETUR. A maxim meaning "Liberty is that natural faculty which permits every one to do anything he pleases except that which is restrained by law or force."[12]

Appeal and error see the following cases:
Kansas.— State *v.* Osborn, 54 Kan. 473, 38 Pac. 572.
Maine.— State *v.* Goold, 62 Me. 509.
Missouri.— State *v.* Forrester, 63 Mo. App. 530.
New Jersey.— Drake *v.* State, 53 N. J. L. 23, 20 Atl. 747.
New York.— People *v.* Carroll, 48 N. Y. App. Div. 201, 62 N. Y. Suppl. 790.
Texas.— Lefever *v.* State, (Cr. App. 1899) 49 S. W. 383; Bowen *v.* State, (App. 1892) 18 S. W. 464.
See 32 Cent. Dig. tit. "Libel and Slander," § 446.

30. Limitation of prosecution generally see CRIMINAL LAW, 12 Cyc. 254.

31. State *v.* Claywell, 98 N. C. 731, 3 S. E. 920.

1. Scoville *v.* Toland, 21 Fed. Cas. No. 12,553, where McLean, J., in his opinion said: "[The word] signifies primarily bark, the bark being used to write on, before paper was invented."

2. Burrill L. Dict.

3. Black L. Dict.

4. Doe *v.* Vardill, 2 Cl. & F. 571, 591, 6 Eng. Reprint 1270.

5. Century Dict. See also Cooper *v.* Carlisle, 17 N. J. Eq. 525, 533, an agreement "to pay as well, or as liberal, as he had paid," etc.

Liberal art is "[an art] in which the mind or imagination is chiefly concerned." New Orleans *v.* Robira, 42 La. Ann. 1098, 1100, 8 So. 402, 11 L. R. A. 141. See also FINE ARTS.

"Liberal reward" see Shuey *v.* U. S., 92 U. S. 73, 76, 23 L. ed. 697.

"Liberality" compared with the terms "benevolence" and "charity" see Morice *v.* Durham, 10 Ves. Jr. 522, 524, 32 Eng. Reprint 947.

"Liberally" see Kenau *v.* Graham, 135 Ala. 585, 596, 33 So. 699; Kœnig *v.* Nott, 8 Abb. Pr. (N. Y.) 384, 393.

6. English L. Dict.

7. Black L. Dict. [*citing* Coke Litt. 207].

8. *In re* Reed, 20 Fed. Cas. No. 11,640, 3 N. Y. Leg. Obs. 262, 265, 21 Vt. 635.

9. Hayes *v.* Territory, 2 Wash. Terr. 286, 289, 5 Pac. 927.

10. Rhinehart *v.* Schuyler, 7 Ill. 473, 518 [*quoting* Sullivan Lect. p. 243]. See also McCafferty *v.* Guyer, 59 Pa. St. 109, 117.

11. Peloubet Leg. Max. [*citing* Lofft. Max. 342].

12. Black L. Dict. [*citing* Coke Litt. 116].

LIBERTAS EST POTESTAS FACIENDI ID QUOD JURE LICEAT. A maxim meaning "Liberty is the power of doing what is sanctioned by law."[13]

LIBERTAS EST SUI QUEMQUE JURIS DIMITTENDI AC RETINENDI ESSE DOMINUM. A maxim meaning "Liberty is the right to alienate or retain his own right."[14]

LIBERTAS IMESTIMABILIS RES EST. A maxim meaning "Liberty is an inestimable thing; a thing above price."[15]

LIBERTAS NON RECIPIT ÆSTIMATIONEM. A maxim meaning "Freedom does not admit of valuation."[16]

LIBERTAS OMNIBUS REBUS FAVORABILIOR EST. A maxim meaning "Liberty is more favored than all things."[17]

LIBERTINUS. A person freed.[18]

LIBERTY. Freedom;[19] individual freedom;[20] personal freedom.[21] In its broad sense, as understood in this country, and as usually employed in constitutional declarations, the right not only of freedom from servitude, imprisonment, or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation;[22] freedom from restraint under conditions essential

13. Tayler L. Gloss.
14. Morgan Leg. Max.
15. Black L. Dict. [*citing* Dig. 50, 17, 106].
16. Burrill L. Dict. [*citing* Bracton fol. 14].
17. Burrill L. Dict. [*citing* Dig. 50, 17, 122].
18. Doe *v.* Vardill, 2 Cl. & F. 571, 591, 6 Eng. Reprint 1270.
19. Black L. Dict.
20. Caldwell *v.* State, 1 Stew. & P. (Ala.) 327, 442.
It means the enjoyment of the rights which belong to us as individuals. People *v.* Judson, 11 Daly (N. Y.) 1, 12.
21. *In re* Davis, 10 Am. Bankr. Rep. 189, 197.
22. See the following cases:
Alabama.— Caldwell *v.* State, 1 Stew. & P. 327, 442.
Arkansas.— Helena *v.* Dwyer, 64 Ark. 424, 427, 42 S. W. 1071, 62 Am. St. Rep. 206, 39 L. R. A. 266.
California.— Ward *v.* Flood, 48 Cal. 36, 50, 17 Am. Rep. 405.
District of Columbia.— Lansburgh *v.* District of Columbia, 11 App. Cas. 512, 521.
Illinois.— Mathews *v.* People, 202 Ill. 389, 401, 67 N. E. 28, 95 Am. St. Rep. 241, 63 L. R. A. 73; Bessette *v.* People, 193 Ill. 334, 344, 62 N. E. 215, 56 L. R. A. 558; Booth *v.* People, 186 Ill. 43, 48, 57 N. E. 798, 799, 78 Am. St. Rep. 229, 50 L. R. A. 762; People *v.* Chicago Live-Stock Exch., 170 Ill. 556, 561, 48 N. E. 1062, 62 Am. St. Rep. 404, 39 L. R. A. 373; Ritchie *v.* People, 155 Ill. 98, 104, 40 N. E. 454, 46 Am. St. Rep. 315, 20 L. R. A. 79; Braceville Coal Co. *v.* People, 147 Ill. 66, 71, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Frorer *v.* People, 141 Ill. 171, 186, 31 N. E. 395, 16 L. R. A. 492, per Scholfield, J.
Kansas.— Coffeyville Vitrified Brick, etc., Co. *v.* Perry, 69 Kan. 297, 303, 76 Pac. 848, 66 L. R. A. 185.
Louisiana.— State *v.* New Orleans, 113 La. 371, 378, 36 So. 999, 67 L. R. A. 70.
Michigan.— Kuhn *v.* Detroit, 70 Mich. 534, 537, 38 N. W. 470.
Missouri.— See State *v.* Continental Tobacco Co., 177 Mo. 1, 35, 75 S. W. 737; State *v.* Julow, 129 Mo. 163, 172, 31 S. W. 781, 50 Am. St. Rep. 443, 29 L. R. A. 257; State *v.* Loomis, 115 Mo. 307, 313, 22 S. W. 350, 351, 21 L. R. A. 789; Snyder *v.* Warford, 11 Mo. 513, 515, 49 Am. Dec. 94.
Nebraska.— Low *v.* Rees Printing Co., 41 Nebr. 127, 144, 59 N. W. 362, 43 Am. St. Rep. 670, 24 L. R. A. 702.
Nevada.— *Ex p.* Boyce, 27 Nev. 299, 306, 75 Pac. 1, 65 L. R. A. 47.
New York.— *In re* Davies, 168 N. Y. 89, 105, 61 N. E. 118, 56 L. R. A. 855; People *v.* Warden, 157 N. Y. 113, 128, 51 N. E. 1006, 68 Am. St. Rep. 763, 43 L. R. A. 264; People *v.* Havnor, 149 N. Y. 195, 198, 43 N. E. 541, 52 Am. St. Rep. 707, 31 L. R. A. 689; People *v.* Gillson, 109 N. Y. 389, 398, 17 N. E. 343, 4 Am. St. Rep. 465; People *v.* Marx, 99 N. Y. 377, 386, 2 N. E. 29, 52 Am. Rep. 34, 3 N. Y. Cr. 200; *In re* Jacobs, 98 N. Y. 98, 106, 50 Am. Rep. 636; Bertholf *v.* O'Reilly, 74 N. Y. 509, 515, 30 Am. Rep. 323; Grossman *v.* Caminez, 79 N. Y. App. Div. 15, 17, 79 N. Y. Suppl. 900; Buffalo *v.* Collins Baking Co., 39 N. Y. App. Div. 432, 434, 57 N. Y. Suppl. 347; People *v.* Rosenberg, 67 Hun 52, 55, 22 N. Y. Suppl. 56; Bell *v.* Gaynor, 14 Misc. 334, 336, 36 N. Y. Suppl. 122; Wilson *v.* Commercial Telegram Co., 3 N. Y. Suppl. 633.
Pennsylvania.— Brittain's Application, 5 Pa. Co. Ct. 318, 320.
Rhode Island.— State *v.* Dalton, 22 R. I. 77, 86, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.
South Carolina.— McCullough *v.* Brown, 41 S. C. 220, 238, 19 S. E. 458, 23 L. R. A. 410.
South Dakota.— State *v.* Scougal, 3 S. D. 55, 71, 51 N. W. 858, 44 Am. St. Rep. 756, 15 L. R. A. 477.
Tennessee.— Marshall, etc., Co. *v.* Nashville, 109 Tenn. 495, 507, 71 S. W. 815; State *v.*

to equal enjoyment of the same right by others;[23] freedom from all restraints but such as are justly imposed by law;[24] or regulated by law.[25] Liberty has been classified as being absolute,[26] civil,[27] natural,[28] personal,[29] or political liberty.[30] The term is sometimes used as synonymous with franchise,[31] right, privilege,[32] or

Schlitz Brewing Co., 104 Tenn. 715, 746, 59 S. W. 1033, 78 Am. St. Rep. 941; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 429, 53 S. W. 955, 76 Am. St. Rep. 682, 56 L. R. A. 316.

Vermont.— State *v.* Cadigan, 73 Vt. 245, 252, 50 Atl. 1079, 87 Am. St. Rep. 714, 57 L. R. A. 666.

Virginia.— Young *v.* Com., 101 Va. 853, 862, 45 S. E. 327.

West Virginia.— Maupin *v.* Scottish Union, etc., Ins. Co., 53 W. Va. 557, 571, 45 S. E. 1003; State *v.* Goodwill, 33 W. Va. 179, 181, 10 S. E. 285, 25 Am. St. Rep. 863, 6 L. R. A. 621.

Wisconsin.— State *v.* Kreutzberg, 114 Wis. 530, 534, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748.

United States.— Northern Securities Co. *v.* U. S., 193 U. S. 197, 296, 24 S. Ct. 436, 48 L. ed. 679; Booth *v.* Illinois, 184 U. S. 425, 428, 22 S. Ct. 425, 46 L. ed. 623; Allgeyer *v.* Louisiana, 165 U. S. 578, 590, 17 S. Ct. 427, 41 L. ed. 832; Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 762, 4 S. Ct. 652, 28 L. ed. 585; *Ex p.* Virginia, 100 U. S. 339, 344, 25 L. ed. 676; Munn *v.* Illinois, 94 U. S. 113, 142, 24 L. ed. 77; Greenwich Ins. Co. *v.* Carroll, 125 Fed. 121, 126; Stockton Laundry Case, 26 Fed. 611, 614; *In re* Davis, 10 Am. Bankr. Rep. 189, 197 [*quoting* Brannon Fourteenth Amendment, p. 110].

23. Crowley *v.* Christensen, 137 U. S. 86, 89, 11 S. Ct. 13, 34 L. ed. 620 [*quoted* in Kentucky Bd. of Pharmacy *v.* Cassidy, 115 Ky. 690, 702, 74 S. W. 730, 25 Ky. L. Rep. 102; State *v.* Kreutzberg, 114 Wis. 530, 538, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748].

It "consists in doing what we ought to will, and in not being constrained to do what we ought not to will." Montesquieu [*quoted* in State *v.* Kreutzberg, 114 Wis. 530, 538, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748].

It does not mean freedom from physical restraint simply, but embraces the right of each individual to be free in the enjoyment of the faculties with which he has been endowed by his creator, subject only to such restraints as are necessary for the common welfare. Ruhstrat *v.* People, 185 Ill. 133, 136, 57 N. E. 41, 76 Am. St. Rep. 30, 49 L. R. A. 181; Braceville Coal Co. *v.* People, 147 Ill. 66, 71, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340; Palmer *v.* Tingle, 55 Ohio St. 423, 441, 45 N. E. 313; State *v.* Dalton, 22 R. I. 77, 86, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775. See also Young *v.* Com., 101 Va. 853, 862, 45 S. E. 327; Spencer Soc. Statics 94 [*quoted* in State *v.* Kreutzberg, 114 Wis. 530, 538, 90 N. W. 1098, 91 Am. St. Rep. 934, 58 L. R. A. 748].

"The fundamental principle upon which liberty is based, in free and enlightened government, is equality under the law of the land." Braceville Coal Co. *v.* People, 147 Ill. 66, 70, 35 N. E. 62, 37 Am. St. Rep. 206, 22 L. R. A. 340.

24. Butchers' Benev. Assoc. *v.* Crescent City Live-Stock Landing, etc., Co., 16 Wall. (U. S.) 36, 127, 21 L. ed. 394; *In re* Marshall, 102 Fed. 323, 324.

25. Kentucky Bd. of Pharmacy *v.* Cassidy, 115 Ky. 690, 702, 74 S. W. 730, 25 Ky. L. Rep. 102; U. S. *v.* Hudson, 65 Fed. 68, 74.

The term does not mean license but freedom regulated by law. State *v.* Powell, 58 Ohio St. 324, 344, 50 N. E. 900, 41 L. R. A. 854.

26. Black L. Dict. [*citing* 1 Blackstone Comm. 125].

27. Civil liberty see 7 Cyc. 156.

28. "Natural liberty" consists "properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature." Snyder *v.* Walford, 11 Mo. 513, 515, 49 Am. Dec. 94.

29. Personal liberty consists in the power of locomotion, of changing situation, of removing one's person to whatever place one's inclination may direct, without imprisonment or restraint unless by due course of law. Black L. Dict. [*citing* 1 Blackstone Comm. 134].

30. Political liberty is an effectual share in the making and administration of the laws. Black L. Dict. [*citing* Leiber Civ. Lib.].

As used in connection with other words see the following phrases: "At liberty" (see Miller *v.* Shuttleworth, 7 C. B. 105, 62 E. C. L. 103), "at liberty to tow" (Stuart *v.* British, etc., Steam Nav. Co., 2 Aspin. 497, 32 L. T. Rep. N. S. 257, 262), "liberty of the subject" (Bowden *v.* Yoxall, [1901] 1 Ch. 1, 2, 70 L. J. Ch. 5, 83 L. T. Rep. N. S. 419, 49 Wkly. Rep. 247; Lancashire *v.* Hunt, [1895] W. N. 52, 53), "liberty of working the coal" (Hamilton *v.* Dunlop, 10 App. Cas. 813, 822; Sutherland *v.* Heathcote, [1892] 1 Ch. 475, 478, 61 L. J. Ch. 248, 66 L. T. Rep. N. S. 210), "liberty to apply" (Penrice *v.* Williams, 23 Ch. D. 353, 357, 52 L. J. Ch. 593, 48 L. T. Rep. N. S. 868, 31 Wkly. Rep. 496), "liberty to call at any port" (Leduc *v.* Ward, 20 Q. B. D. 475, 482, 6 Aspin. 290, 57 L. J. Q. B. 379, 58 L. T. Rep. N. S. 908, 36 Wkly. Rep. 537), "liberty to tow and be towed" (Potter *v.* Burrell, [1897] 1 Q. B. 97, 104, 8 Aspin. 200, 66 L. J. Q. B. 63, 75 L. T. Rep. N. S. 491, 45 Wkly. Rep. 145), and "set at liberty by their owners" (Columbia *v.* Williams, 3 Conn. 467, 470).

31. 2 Blackstone Comm. 37 [*quoted* in Spring Valley Water Works *v.* Schlottler, 62 Cal. 69, 106; Central R., etc., Co. *v.* State, 54 Ga. 401, 409]. See also Com. *v.* Alger, 7 Cush. (Mass.) 53, 71 [*citing* Jacob L. Dict]; and FRANCHISES, 19 Cyc. 145 *et seq.*

32. Com. *v.* Alger, 7 Cush. (Mass.) 53, 71 [*citing* Jacob L. Dict.], where it is said that

license.[33] In a derivative sense, the term denotes the place, district, or boundaries within which a special franchise is enjoyed, an immunity claimed, or a jurisdiction exercised.[34] (Liberty: Generally, see CONSTITUTIONAL LAW. Of Speech, see CONSTITUTIONAL LAW; LIBEL AND SLANDER. Of the Press, see CONSTITUTIONAL LAW; LIBEL AND SLANDER. Religious, see CONSTITUTIONAL LAW; RELIGIOUS SOCIETIES; SUNDAY. Restraint of, see ARREST; FALSE IMPRISONMENT; HABEAS CORPUS. See also JAIL LIBERTIES.)

LIBERTY OF A PORT. In marine insurance, a power subordinate to the general course of the voyage.[35] (See, generally, MARINE INSURANCE.)

LIBERTY OF SPEECH. See CONSTITUTIONAL LAW; LIBEL AND SLANDER.

LIBERTY OF THE GLOBE. As applied to a vessel in a marine policy, a term meaning that she may go to any part of the world.[36] (See, generally, MARINE INSURANCE.)

LIBERTY OF THE PRESS. See CONSTITUTIONAL LAW; LIBEL AND SLANDER.

LIBERUM CORPUS NULLAM RECIPIT ÆSTIMATIONEM. A maxim meaning "The body of a freeman does not admit of valuation; the life of a freeman is above all valuation."[37]

LIBERUM EST CUIQUE APUD SE EXPLORARE AN EXPEDIAT SIBI CONSILIUM. A maxim meaning "Every one is free to ascertain for himself whether a recommendation is advantageous to his interests."[38]

LIBERUM EST CUIQUE APUD SE EXPLORARE; AUT EXPEDIAT SIBI CONSILIUM. A maxim meaning "It is free for every one to weigh the matter in his own mind; or to have resort to counsel."[39]

LIBERUM TENEMENTUM. A plea interposed by a defendant for the purpose of trying his right to a freehold.[40]

LIBRARY. A term which may mean either the room or place where books are kept, or the books in the aggregate.[41] (Library: Bequest For, see CHARITIES. Establishment of by City, see MUNICIPAL CORPORATIONS. Exemption From — Seizure and Sale, see EXEMPTIONS; Taxation, see TAXATION.)

LICEAT EOS EXHAEREDARE QUOS OCCIDERE LICEBAT. A maxim meaning "It may be lawful to disinherit those whom it is lawful to deprive of life."[42]

LICENSE. Permission or authority[43] to do a particular thing.[44] (See, generally, LICENSES.)

this "is strictly conformable to the sense of the term as used in Magna Charta, in the Declaration of Rights, and in English statutes, grants, and legal instruments."

It imports, ex termini, that it is a privilege to be exercised over another man's estate. Bourne *v.* Taylor, 10 East 188, 205, 10 Rev. Rep. 267, where it is said: "A man's right of dominion over his own estate is never called a liberty."

"Liberties of the people" see *In re* Pierce, 44 Wis. 411, 441 [*cited* in State *v.* Cunningham, 81 Wis. 440, 453, 51 N. W. 724, 15 L. R. A. 561].

"Liberties and free usages" see Northumberland *v.* Houghton, L. R. 5 Exch. 127, 130, 39 L. J. Exch. 66, 22 L. T. Rep. N. S. 49, 18 Wkly. Rep. 495.

33. Curtiss *v.* Hoyt, 19 Conn. 154, 169, 48 Am. Dec. 149. See also LICENSE.

34. Black L. Dict.

35. Allegre *v.* Maryland Ins. Co., 8 Gill & J. (Md.) 190, 200, 29 Am. Dec. 536, the words used in this policy being "with liberty of Martinico."

36. Eyre *v.* Marine Ins. Co., 6 Whart. (Pa.) 247, 254.

37. Burrill L. Dict. [*citing* 3 Kent Comm. 365].

38. Black L. Dict.

Applied in Upton *v.* Vail, 6 Johns. (N. Y.) 181, 184, 5 Am. Dec. 210.

39. Tayler L. Gloss.

40. Hunter *v.* Hatton, 4 Gill (Md.) 115, 45 Am. Dec. 117. See Holman *v.* Taylor, 31 Cal. 338, 340; Shank *v.* Cross, 9 Wend. (N. Y.) 160, 161; Helvis *v.* Lamb, 2 Salk. 453; Pettigrew *v.* Doyle, 17 U. C. C. P. 459, 467. And see 15 Cyc. 130.

41. Carter *v.* Andrews, 16 Pick. (Mass.) 1, 9.

42. Tayler L. Gloss.

43. U. S. *v.* The James Morrison, 4 N. Y. Leg. Obs. 333, 338 [*citing* Gibbons *v.* Ogden, 9 Wheat (U. S.) 1, 6 L. ed. 23].

44. U. S. *v.* The James Morrison, 4 N. Y. Leg. Obs. 333, 338 [*citing* Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1, 6 L. ed. 23]; U. S. *v.* Plainter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262.

LICENSES

By Ernest G. Chilton * and Walter H. Michael †

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* Author of "Livery-Stable Keepers," 25 Cyc. 1504.
† Author of "Elections," 15 Cyc. 268; "Interpleader," 23 Cyc. 1; "Joint Stock Companies." 23 Cyc. 466; and joint author of "Easements," 14 Cyc. 1134; "Gifts," 20 Cyc. 1189.

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CROSS-REFERENCES

LICENSES FOR OCCUPATIONS AND PRIVILEGES

For Matters Relating to:
License:
Compelling Grant of, see MANDAMUS.
In Respect to Trade-Mark, see TRADE-MARKS AND TRADE-NAMES.
Of Vessel, see SHIPPING.
To Make, Use, or Sell Patented Article, see PATENTS.
To Produce Play, see LITERARY PROPERTY.
To Use Copyrighted Work, see COPYRIGHT.
Marriage License, see MARRIAGE.
Tax on:
License or Franchise, see TAXATION.
Property in General, see TAXATION.
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LICENSES IN RESPECT OF REAL PROPERTY

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License:
As Defense:
In Action on the Case, see CASE.
To Action For Trespass, see TRESPASS.
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By Municipal Corporation to Use Streets, see MUNICIPAL CORPORATIONS.
By Tenant in Common, see TENANTS IN COMMON.
Effect of on Easements, see EASEMENTS.
For Mining, see MINES AND MINERALS.
Possession Under as Defense to Action of Ejectment, see EJECTMENT.
Subject to Execution, see EXECUTIONS.
To Cut Ice, see WATERS.
To Divert Water, see WATERS.
To Erect Dam, see WATERS.
To Fish, see FISH AND GAME.
To Hunt Game, see FISH AND GAME.
To Use Street, see MUNICIPAL CORPORATIONS.
To Use Water, see WATERS.
Licensee:
As Party Defendant to Condemnation Proceedings, see EMINENT DOMAIN.
Injuries to, see LANDLORD AND TENANT; NEGLIGENCE; RAILROADS.
Title of to Support Ejectment, see EJECTMENT.
Right to Fixtures as Between Licensor and Licensee, see FIXTURES.

I. FOR OCCUPATIONS AND PRIVILEGES.*

A. Definition. License, in its general sense, means a right or permission granted by some competent authority to do what is unlawful at common law, or

* By Ernest G. Chilton.

is made so by statute or ordinance, including the one authorizing or requiring the license.[1] A privilege is the exercise of an occupation or business which requires a license from some proper authority, designated by some general law, and not free to all, or any, without such license.[2] It follows that an occupation or privilege license is the permission granted to an individual by a competent authority to engage in and carry on the particular business or calling to which it refers.[3]

B. Power to License or Tax — 1. In General. Power to license, which,

1. Laundry License Case, 22 Fed. 701, 10 Sawy. 532.

Other definitions are: "Authority to do a particular thing." U. S. *v.* The Planter, 27 Fed. Cas. No. 16,054, Newb. Adm. 262, 268.

"A grant of permission or authority." State *v.* McFetridge, 56 Wis. 256, 259, 14 N. W. 185.

"The grant of a privilege." See CONSTITUTIONAL LAW, 8 Cyc. 938.

"The granting of a special privilege to one or more persons, not enjoyed by citizens generally, or, at least, not by a class to which the licensee belongs." Silver *v.* Sparta, 107 Ga. 275, 278, 33 S. E. 31; State *v.* Frame, 39 Ohio St. 399, 413; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 814, 15 S. E. 1000, 17 L. R. A. 385.

"A permit to do business which could not be done without the license." Sonora *v.* Curtin, 137 Cal. 583, 585, 70 Pac. 674; San Francisco *v.* Liverpool, etc., Ins. Co., 74 Cal. 113, 122, 15 Pac. 380, 5 Am. St. Rep. 425; Harmon *v.* Chicago, (Ill. 1891) 26 N. E. 697, 700; Sinnot *v.* Davenport, 22 How. (U. S.) 227, 240, 16 L. ed. 243.

"Consent or permission." Winooski *v.* Gokey, 49 Vt. 282, 286.

"Permit." Neuman *v.* State, 76 Wis. 112, 116, 45 N. W. 30.

"'Permission or authority;' 'freedom to act;' 'to be left free;' 'allowable.'" Hartford F. Ins. Co. *v.* Peoria, 156 Ill. 420, 427, 40 N. E. 967.

"A privilege granted by the state, usually on payment of a valuable consideration, though this is not essential." Hubman *v.* State, 61 Ark. 482, 489, 33 S. W. 843; State *v.* Columbia, 6 Rich. (S. C.) 404, 417.

"A right granted by some competent authority to do an act which, without such license, would be illegal." Home Ins. Co. *v.* Augusta, 50 Ga. 530, 537; Savannah *v.* Charlton, 36 Ga. 460, 461; Wilkie *v.* Chicago, 188 Ill. 444, 453, 58 N. E. 1004, 80 Am. St. Rep. 182; Carbondale *v.* Wade, 106 Ill. App. 654, 663; Shuman *v.* Ft. Wayne, 127 Ind. 109, 115, 26 N. E. 560, 11 L. R. A. 378; State *v.* Hardy, 7 Nebr. 377, 380; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71, 75; Anderson *v.* Brewster, 44 Ohio St. 576, 587, 9 N. E. 683; State *v.* Hipp, 38 Ohio St. 199, 226; Caldwell *v.* Fulton, 31 Pa. St. 475, 72 Am. Dec. 760; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276, 279.

"A license confers the right to do that which without the license would be unlawful." Jefferson County *v.* Mayr, 31 Colo. 173, 175, 74 Pac. 458; People *v.* Raims, 20 Colo. 489, 493, 39 Pac. 341.

In its secondary sense a license means the written document by which the right or permission is conferred, and is not essential to the existence of the authority itself. Elmore *v.* Overton, 104 Ind. 548, 4 N. E. 197, 54 Am. Rep. 343; Moore *v.* St. Paul, 61 Minn. 427, 63 N. W. 1087; U. S. *v.* Cutting, 3 Wall. (U. S.) 441, 18 L. ed. 241.

The popular understanding of the word "license" is a permission to do something which without the license would not be allowable. Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654. See also Hubman *v.* State, 61 Ark. 482, 33 S. W. 843; Standard Oil Co. *v.* Com., 82 S. W. 1020, 26 Ky. L. Rep. 985; State *v.* Hardy, 7 Nebr. 377.

The object of a license is to confer a right which does not exist without a license. Hubman *v.* State, 61 Ark. 482, 33 S. W. 843; Savannah *v.* Charlton, 36 Ga. 460; Shuman *v.* Ft. Wayne, 127 Ind. 109, 26 N. E. 560, 11 L. R. A. 378; People *v.* Lyng, 74 Mich. 579, 42 N. W. 139; Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654; Chilvers *v.* People, 11 Mich. 43; Anderson *v.* Brewster, 44 Ohio St. 576, 9 N. E. 683; Adler *v.* Whitbeck, 44 Ohio St. 539, 9 N. E. 672; Matthews *v.* Jensen, 21 Utah 207, 61 Pac. 303.

2. Burke *v.* Memphis, 94 Tenn. 692, 30 S. W. 742; Clarke *v.* Montague, 3 Lea (Tenn.) 274; Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456; Robertson *v.* Heneger, 5 Sneed (Tenn.) 257; French *v.* Baker, 4 Sneed (Tenn.) 193; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276. See also Turnpike Cases, 92 Tenn. 369, 22 S. W. 75; Columbia *v.* Guest, 3 Head (Tenn.) 413.

Other definitions are: "Any occupation which is not open to every citizen, but can only be exercised by a license from some constituted authority." French *v.* Baker, 4 Sneed (Tenn.) 193.

"That which cannot be enjoyed without legal authority." Cate *v.* State, 3 Sneed (Tenn.) 120, 121. See also Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408 [*citing* Tiedeman Lim. Pol. Pow. p. 281, distinguishing between a license and a tax].

"To constitute a privilege the grant must confer authority to do something which without the grant would be illegal, for if what is to be done under the license is open to every one without it, the grant would be merely idle and nugatory, conferring no privilege whatever." Chicago *v.* Collins, 175 Ill. 445, 457, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408.

3. Furman Farm Imp. Co. *v.* Long, 113 Ala. 203, 21 So. 339.

strictly speaking, is simply a power to sell a privilege,[4] may be maintained when a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public.[5] And the fact that the taxing power is a party to a contract or lease does not impair the right to tax the business pursued on the leased premises by virtue of that contract.[6] The power to license may be exercised for regulation, revenue, or prohibition,[7] but not for the purpose of creating a monoply.[8]

2. Power of Congress — a. Generally. Where congress possesses constitutional power to regulate trade or commerce, it may regulate by licenses as well as by other modes.[9]

b. In States. It follows therefore that congress has power to impose, for the support of the general government, license-taxes on businesses and avocations carried on in the several states;[10] and such federal license-tax on a given business or avocation does not interfere with the states' right to regulate[11] or prohibit[12] such business or avocation within their borders.

c. In Territories. It follows also that congress may provide by direct legislation for a system of licenses for the support of local government in territories.[13]

d. In District of Columbia. So too congress may by virtue of its power to exercise exclusive legislation in all cases over the District of Columbia provide in the District a system of licenses for the purposes of municipal revenue.[14]

3. Power of States — a. In General. In the absence of any inhibition, express or implied, in the state constitution,[15] the legislature may, either in the exercise of the police power or for the purposes of revenue, levy license-taxes on occupations or privileges within the limits of the state;[16] provided of course that

4. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560.

5. Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

6. New Orleans *v.* Crappel, 18 La. Ann. 725.

7. State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459. See State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

8. State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459.

Monopoly generally see MONOPOLIES.

9. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

10. Plumley *v.* Com., 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

11. Plumley *v.* Com., 155 U. S. 461, 15 S. Ct. 154, 39 L. ed. 223.

12. Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497. See also Block *v.* Jacksonville, 36 Ill. 301; State *v.* Collins, 20 Iowa 85; Com. *v.* Keenan, 11 Allen (Mass.) 262; Com. *v.* Holbrook, 10 Allen (Mass.) 200; Com. *v.* Thorniley, 6 Allen (Mass.) 445.

13. *In re* Wynn-Johnson, 1 Alaska 630; U. S. *v.* Binns, 1 Alaska 553.

14. Lasley *v.* District of Columbia, 14 App. Cas. (D. C.) 407; Stoutenburgh *v.* Hennick, 129 U. S. 141, 9 S. Ct. 256, 32 L. ed. 637.

15. People *v.* Martin, 60 Cal. 153; Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995. See also State *v.* Union Cent. L. Ins. Co., 8 Ida. 240, 67 Pac. 647.

16. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

California.— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Illinois.— Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588, holding further that where the constitution authorizes the taxation of certain occupations enumerated therein, the state's power to tax is not limited to the particular occupation specified.

Kansas.— Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486.

Montana.— State *v.* Camp Sing, 18 Mont. 128, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635.

New Hampshire.— State *v.* Forcier, 65 N. H. 42, 17 Atl. 577.

North Carolina.— State *v.* Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758.

Ohio.— Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

South Carolina.— State *v.* Hayne, 4 S. C. 403.

South Dakota.— *In re* Watson, 17 S. D. 486, 97 N. W. 463.

Tennessee.— Jenkins *v.* Erwin, 8 Heisk. 456.

Virginia.— Western Union Tel. Co. *v.* Richmond, 26 Gratt. 1.

Wisconsin.— State *v.* Benzenberg, 101 Wis. 172, 76 N. W. 345.

United States.— Nashville, etc., R. Co. *v.* Alabama, 128 U. S. 96, 9 S. Ct. 28, 32 L. ed.

such power must be exercised in subordination to the requirements of the federal constitution.[17]

b. Delegation of Power by States[18]—(i) *In General.* In the absence of constitutional inhibition, express or implied, the legislature may delegate to municipal corporations or quasi-municipal corporations, power to levy and collect occupation and privilege taxes within their corporate limits.[19]

352; Pembina Consol. Silver Min., etc., Co. *v.* Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 L. ed. 650.

See 32 Cent. Dig. tit. "Licenses," § 4.

Sovereign power of state to require license. —To say that a state cannot tax an individual within its jurisdiction, and carrying on an occupation within its limits, would be a denial of its sovereignty as a state. Territory *v.* Farnsworth, 5 Mont. 303, 5 Pac. 869.

17. Howe Mach. Co. *v.* Gage, 100 U. S. 676, 25 L. ed. 754; Welton *v.* Missouri, 91 U. S. 275, 23 L. ed. 347; Brown *v.* Maryland, 12 Wheat. (U. S.) 419, 6 L. ed. 678. See also Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 19 L. ed. 382.

18. Implied power of municipality to license under statute giving power to regulate, restrain, or tax see MUNICIPAL CORPORATIONS.

Inherent power of municipality to license in absence of statutory authority see MUNICIPAL CORPORATIONS.

Municipal regulation of: Licensees Under Police Power, see MUNICIPAL CORPORATIONS. Occupations in General, see MUNICIPAL CORPORATIONS.

Power of municipality to require license of person living outside corporate limits see MUNICIPAL CORPORATIONS.

Territorial limits of municipal police power see MUNICIPAL CORPORATIONS.

19. *Alabama.*— Kentz *v.* Mobile, 120 Ala. 623, 24 So. 952; Nashville, etc., R. Co. *v.* Attalla, 118 Ala. 362, 24 So. 450; Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; *Ex p.* Montgomery, 64 Ala. 463; Goldthwaite *v.* Montgomery, 50 Ala. 486; Osborne *v.* Mobile, 44 Ala. 493; Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

Arkansas.— Little Rock *v.* Prather, 46 Ark. 471; Baker *v.* State, 44 Ark. 134; Little Rock *v.* Barton, 33 Ark. 436; Washington *v.* State, 13 Ark. 752.

California.— *Ex p.* Jackson, 143 Cal. 564, 77 Pac. 457; *Ex p.* Roach, 104 Cal. 272, 37 Pac. 1044; El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716; *In re* Lawrence, 69 Cal. 608, 11 Pac. 217; *Ex p.* Mount, 66 Cal. 448, 6 Pac. 78; People *v.* Martin, 60 Cal. 153; *Ex p.* Newton, 53 Cal. 571; San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475; *Ex p.* Hurl, 49 Cal. 557; Sacramento *v.* Crocker, 16 Cal. 119; Sacramento *v.* California Stage Co., 12 Cal. 134; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Florida.— Canova *v.* Williams, 41 Fla. 509, 27 So. 30.

Georgia.— Martin *v.* Statesboro, 100 Ga. 419, 28 S. E. 450; Johnston *v.* Macon, 62 Ga. 645; Home Ins. Co. *v.* Augusta, 50 Ga. 530.

Illinois.— Wilkie *v.* Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; Kiel *v.* Chicago, 176 Ill. 137, 52 N. E. 29; Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Carrollton *v.* Bazette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522; Braun *v.* Chicago, 110 Ill. 186; Howland *v.* Chicago, 108 Ill. 496; Huck *v.* Chicago, etc., R. Co., 86 Ill. 352; Wiggins *v.* Chicago, 68 Ill. 372.

Indiana.— Wiley *v.* Owens, 39 Ind. 429.

Kansas.— Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; Fretwell *v.* Troy, 18 Kan. 271.

Kentucky.— Com. *v.* Pearl Laundry Co., 105 Ky. 259, 49 S. W. 26, 20 Ky. L. Rep. 1172; Kniper *v.* Louisville, 7 Bush 599; Crosdale *v.* Cynthiana, 50 S. W. 977, 21 Ky. L. Rep. 36.

Louisiana.— Mandeville *v.* Baudot, 49 La. Ann. 236, 21 So. 258; State *v.* McVea, 26 La. Ann. 151.

Massachusetts.— Boston *v.* Schaffer, 9 Pick. 415.

Minnesota.— Moore *v.* Minneapolis, 43 Minn. 418, 45 N. W. 719; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278; St. Paul *v.* Troyer, 3 Minn. 291.

Missouri.— American Union Express Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382; St. Louis *v.* Laughlin, 49 Mo. 559.

Nebraska.— New York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065; Templeton *v.* Tekamah, 32 Nebr. 542, 49 N. W. 373; Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

New York.— People *v.* Saratoga Springs Sewer, etc., Commission, 90 N. Y. App. Div. 555, 86 N. Y. Suppl. 445.

North Carolina.— State *v.* Irvin, 126 N. C. 989, 35 S. E. 430.

Pennsylvania.— Butler's Appeal, 73 Pa. St. 448; Durach's Appeal, 62 Pa. St. 491.

South Carolina.— Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408; *In re* Jager, 29 S. C. 438, 7 S. E. 605; *In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681; Charleston *v.* Oliver, 16 S. C. 47; State *v.* Columbia, 6 S. C. 1.

Tennessee.— Adams *v.* Somerville, 2 Head 363; Columbia *v.* Beasly, 1 Humphr. 232, 34 Am. Dec. 646.

Texas.— Blessing *v.* Galveston, 42 Tex. 641; Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

Utah.— Matthews *v.* Jensen, 21 Utah 207, 61 Pac. 303; Ogden *v.* Crossman, 17 Utah 66, 53 Pac. 985.

Virginia.— Gordon *v.* Newport News, 102 Va. 649, 47 S. E. 828; Norfolk *v.* Griffith-Powell Co., 102 Va. 115, 45 S. E. 889.

Washington.— Fleetwood *v.* Reed, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

(II) *For What Purposes.* A legislative grant to a municipality to impose license-taxes may be either for the purpose of regulation or that of taxation,[20] and include, where the business to be regulated may act prejudicially upon the health, morals, or peace of the inhabitants, the discretionary power as to the persons who may carry on such business and the place where it may be transacted.[21]

(III) *To Be Exercisable Exclusively or Concurrently.* The statute may in terms grant to a municipality exclusive power to impose license-taxes within its corporate limits,[22] and in such case the right of the state itself is temporarily taken away;[23] but, in the absence of express conferment of exclusive power, the delegated power may be exercisable concurrently with the state,[24] or one of the counties thereof.[25]

(IV) *Resumption.* The legislature has the undoubted right by a later act to divest a municipality of the power delegated to impose license-taxes and resume the exercise of the power itself.[26]

(V) *Construction and Effect* — (A) *Construction* — (1) Strict Rule Applicable. The general rule that the powers of the municipality are to be construed with strictness are peculiarly applicable to the power delegated to it to impose license-taxes.[27]

United States.— Second Nat. Bank *v.* Caldwell, 13 Fed. 429.

See 32 Cent. Dig. tit. "Licenses," § 5. See also Municipal Corporations.

Power, however, to tax the business of a national bank may not be delegated by the legislature to a municipality. Macon *v.* Macon First Nat. Bank, 59 Ga. 648; Carthage *v.* Carthage First Nat. Bank, 71 Mo. 508, 36 Am. Rep. 494; Chattanooga Nat. Bank *v.* Chattanooga, 8 Heisk. (Tenn.) 814.

20. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85; *Ex p.* Montgomery, 64 Ala. 463.

California.— El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716; *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; *In re* Guerrero, 69 Cal. 88, 10 Pac. 261; *Ex p.* Mount, 66 Cal. 448, 6 Pac. 78; Los Angeles *v.* Southern Pac. R. Co., 61 Cal. 59.

Kansas.— Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486.

New Jersey.— Morgan *v.* Orange, 50 N. J. L. 389, 13 Atl. 240.

South Carolina.— *In re* Jager, 29 S. C. 438, 7 S. E. 605.

Washington.— *In re* Garfinkle, 37 Wash. 650, 80 Pac. 188; Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

See 32 Cent. Dig. tit. "Licenses," § 5.

Compare Baker *v.* State, 44 Ark. 134; Washington *v.* State, 13 Ark. 752 (both holding that there is no restraint in the power of the legislature to authorize municipalities to regulate tax callings, except that license-taxes must not be imposed for revenue); Kniper *v.* Louisville, 7 Bush (Ky.) 599 (holding that while statutes delegating to municipalities power to exact license-taxes keep within revenue purposes they are beyond control of the courts).

21. St. Paul *v.* Troyer, 3 Minn. 291; *In re* Jager, 29 S. C. 438, 7 S. E. 605, where a petition for a rehearing was refused.

22. Rogers *v.* People, 9 Colo. 450, 12 Pac. 843, 59 Am. Rep. 146; Huffsmith *v.* People, 8 Colo. 175, 6 Pac. 157, 54 Am. Rep. 550; Hetzer *v.* People, 4 Colo. 45; State *v.* Willard, 39 Mo. App. 251; Carroll *v.* Campbell, 25 Mo. App. 630. See also Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995; Harrison *v.* State, 9 Mo. 530.

23. Huffsmith *v.* People, 8 Colo. 175, 6 Pac. 157, 54 Am. Rep. 550; State *v.* Willard, 39 Mo. App. 251.

24. Henback *v.* State, 53 Ala. 523, 25 Am. Rep. 650; Wright *v.* Atlanta, 54 Ga. 645; Drysdale *v.* Pradat, 45 Miss. 445; Harrison *v.* State, 9 Mo. 530. See also New Orleans *v.* Turpin, 13 La. Ann. 56; Pond *v.* State, 47 Miss. 39.

25. *In re* Lawrence, 69 Cal. 608, 11 Pac. 217; Paton *v.* People, 1 Colo. 77.

Conflict between city and county ordinances. — Where the power delegated to a city to regulate a license is exercisable concurrently with the county and there is a conflict between the ordinances of the city and those of the county in respect to regulating and licensing a given business, the ordinances of the city have superior force within the corporate limits of the city. Los Angeles County *v.* Eikenberry, 131 Cal. 461, 63 Pac. 766; *Ex p.* Mansfield, 106 Cal. 400, 39 Pac. 775; *Ex p.* Roach, 104 Cal. 272, 37 Pac. 1044.

26. Heinssen *v.* State, 14 Colo. 228, 23 Pac. 995; Wilkie *v.* Chicago, 188 Ill. 444, 58 N. E. 1004, 80 Am. St. Rep. 182; Chicago *v.* Phœnix Ins. Co., 126 Ill. 276, 18 N. E. 668.

27. *Connecticut.*—Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

Georgia.— Johnston *v.* Macon, 62 Ga. 645.

Illinois.— Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545.

Indiana.— Terre Haute *v.* Kersey, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298.

Missouri.— State *v.* Clarke, 54 Mo. 17, 14 Am. Rep. 471.

Pennsylvania.— See Bennett *v.* Birmingham, 31 Pa. St. 15.

(2) What Confers Power to License — (a) In General. The objects attained by the exercise of the powers of taxation and of license not being one and the same thing, the power delegated to a municipality to tax will not confer authority to license.[28] But it is the generally received doctrine that the power granted to a municipality to regulate[29] or to prohibit[30] includes the power to license as a means to those ends.

(b) For Revenue Purposes. While the power to license for revenue purposes may be expressly conferred[31] and the power to prohibit should be construed to include the taxing power to effect this object,[32] yet a legislative grant of power to a municipal corporation to license any business or occupation within its corporate limits does not necessarily include a power to impose license for revenue purposes.[33]

(B) *Effect* — (1) In General. When the legislature confers upon a municipality the power of imposing occupation and privilege taxes, it grants all the power possessed by itself in relation to the imposition of such taxes;[34] and a municipality can then impose such taxes, in its discretion, on all subjects within its jurisdiction, not withheld from taxation by the legislature,[35] whether they be

Texas.— Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

Utah.— Matthews *v.* Jensen, 21 Utah 207, 61 Pac. 303.

See 32 Cent. Dig. tit. "Licenses," § 6.

Compare St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462; Dunham *v.* Rochester, 5 Cow. (N. Y.) 462.

28. Fort Smith *v.* Ayers, 43 Ark. 82; Wiley *v.* Owens, 39 Ind. 429; Duckwall *v.* New Albany, 25 Ind. 283; Burlington *v.* Bumgardner, 42 Iowa 673; Laundry License Case, 22 Fed. 701.

29. Standard Oil Co. *v.* Com., 82 S. W. 1020, 26 Ky. L. Rep. 985.

30. Wysong *v.* Lebanon, 163 Ind. 132, 71 N. E. 194; Smith *v.* Madison, 7 Ind. 86; Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725.

31. Morgan *v.* Orange, 50 N. J. L. 389, 13 Atl. 240.

32. Hodges *v.* Nashville, 2 Humphr. (Tenn.) 61.

33. *Alabama.*—Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441.

California.— Matter of Guerrero, 69 Cal. 88, 10 Pac. 261. *Compare* San Jose *v.* San Jose, etc., R. Co., 53 Cal. 475.

Iowa.— Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734; Burlington *v.* Bumgardner, 42 Iowa 673.

Maryland.—State *v.* Roberts, 11 Gill & J. 502.

Massachusetts.— Com. *v.* Stodder, 2 Cush. 562, 48 Am. Dec. 679.

Michigan.— Chilvers *v.* People, 11 Mich. 43.

Missouri.— St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. 291; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150.

New Jersey.— Clark *v.* New Brunswick, 43 N. J. L. 175; Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364, 36 Am. Dec. 518; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; State *v.* Hoboken, 33 N. J. L. 280; Essex County *v.* Barber, 7 N. J. L. 64.

New York.— New York *v.* Second Ave. R. Co., 32 N. Y. 261; People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596; Brooklyn *v.* Nodine, 26 Hun 512.

North Carolina.— State *v.* Bean, 91 N. C. 554.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268; Cincinnati *v.* Bryson, 15 Ohio 625, 45 Am. Dec. 593.

Pennsylvania.— Bennett *v.* Birmingham, 31 Pa. St. 15.

Texas.— Hoefling *v.* San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608.

See 32 Cent. Dig. tit. "Licenses," § 6.

Authority, however, to grant licenses for any lawful purpose includes authority to exact license-fees for revenue purposes. Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

The amount of the license-fee is the test whether the license is for revenue or regulation. Burlington *v.* Putnam Ins. Co., 31 Iowa 102.

Useful occupations. — While a legislative grant of power to a municipality to license does not ordinarily confer the power to exact license for purposes of revenues on useful occupations, yet where the statute giving the right places such occupations on the same footing as those which serve for amusement only, the municipality may tax useful occupations for revenue. Adams Express Co. *v.* Owensboro, 85 Ky. 265, 3 S. W. 370, 8 Ky. L. Rep. 908; St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150; Mays *v.* Cincinnati, 1 Ohio St. 268.

34. Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

Extent of exercise of power.— The power delegated to a municipality to impose license-taxes necessarily includes the discretion to determine the extent to which it is advisable and necessary to exercise such power. Ogden City *v.* Crossman, 17 Utah 66, 53 Pac. 985.

35. Gordon *v.* Newport News, 102 Va. 649, 47 S. E. 828; Norfolk *v.* Griffith-Powell Co., 102 Va. 115, 45 S. E. 889; Woodall *v.* Lynchburg, 100 Va. 318, 40 S. E. 915; Newport News, etc., R., etc., Co. *v.* Newport News,

taxed by the state or not.[36] But a legislative grant to a municipality of a power to tax occupations and privileges does not enable it to create a privilege for the sole purpose of taxing it.[37]

(2) As to Fixing Duration of License. When a power to license any occupation or business is vested in a municipality, such power also involves the necessity of determining with reasonable certainty the extent and duration of the license.[38]

(3) As to Granting Exclusive License. While the mere power to license, or to license and regulate, does not confer the power to grant an exclusive license,[39] yet authority delegated to a municipality to grant or refuse a license empowers it to grant such exclusive license.[40]

(4) As to Refusing License. The power given by the legislature to a municipality to regulate and license any occupation includes the power to refuse a license, even where statutory or preliminary requirements are complied with.[41]

(5) As to Prohibiting Occupation. Although the power delegated to a municipality to regulate and license a legitimate and useful occupation does not include the power to prohibit it absolutely,[42] yet such power to license an occupation, whether useful or not, involves, in the exercise of it, the power to prohibit without a license, under a pain or penalty.[43]

C. Acts[44] and Ordinances[45] — 1. Constitutionality and Validity[46] — a. In General. Both the state and municipalities upon which the legislature has conferred authority may, for the purpose of revenue, impose a license-tax on any business or occupation whatsoever, and the validity of the act or ordinance impos-

100 Va. 157, 40 S. E. 645; Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

36. New Orleans *v.* Turpin, 13 La. Ann. 56; Woodall *v.* Lynchburg, 100 Va. 318, 40 S. E. 915; Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645; Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

37. Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554.

38. Darling *v.* St. Paul, 19 Minn. 389; Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

39. Chicago *v.* Rumpff, 45 Ill. 90, 92 Am. Dec. 196; Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390; Logan *v.* Pyne, 43 Iowa 524, 22 Am. Rep. 261.

40. Burlington, etc., County Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390. See also Rosa *v.* New Orleans, 1 La. 126, holding that a city, after granting the exclusive right of selling oysters in certain public places, may permit them to be sold elsewhere within the city limits.

The exclusive power, however, to grant a license includes the power to withhold a license, and to thus make a license granted exclusive of all others. Carroll *v.* Campbell, 25 Mo. App. 630.

41. St. Paul *v.* Troyer, 3 Minn. 291; People *v.* Grant, 126 N. Y. 473, 27 N. E. 964.

Exclusive power to grant a license includes the power to withhold a license. Carroll *v.* Campbell, 25 Mo. App. 630.

42. *Ex p.* Sikes, 102 Ala. 173, 15 So. 522, 24 L. R. A. 774; *Ex p.* Cowert, 92 Ala. 94, 9 So. 225; *Ex p.* Anniston, 90 Ala. 516; 7 So. 779; Miller *v.* Jones, 80 Ala. 89; *Ex p.* Burnett, 30 Ala. 461; Darling *v.* St. Paul, 19 Minn. 389; People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

43. Vinson *v.* Monticello, 118 Ind. 103, 19 N. E. 734; Burlington *v.* Bumgardner, 42 Iowa 673; Crosdale *v.* Cynthiana, 50 S. W. 977, 21 Ky. L. Rep. 36.

An ordinance, however, which makes no provision for obtaining a license, but makes it unlawful to carry on a given business without obtaining such license, is void. Darling *v.* St. Paul, 19 Minn. 389.

44. Statutes generally see Statutes.

45. Ordinances generally see Municipal Corporations.

46. Constitutional guaranty: Against Class Legislation see Constitutional Law. Against Deprivation of Property Generally see Constitutional Law. Of Equal Protection of Laws see Constitutional Law.

Inhibition against special legislation generally see Statutes.

License as: A contract within the meaning of the constitutional provision against impairment of the obligation of contracts see Constitutional Law, 8 Cyc. 938. A denial of privileges and immunities see Constitutional Law, 8 Cyc. 1046. Infringement of the right of freedom of speech or of the press see Constitutional Law, 8 Cyc. 893. Infringement of the right to acquire, hold, or dispose of property see Constitutional Law, 8 Cyc. 891. Infringement of vested rights see Constitutional Law, 8 Cyc. 900. Regulation of trade provisions and business as within due process of law see Constitutional Law, 8 Cyc. 1115.

License involving interstate commerce see Commerce.

Uniformity and equality of taxation generally see Taxation.

ing the tax will be upheld by the courts.[47] So too an act or ordinance imposing a license purely for regulation will be upheld,[48] unless it appears that the occupation or business taxed is of such a nature as not to require regulation or supervision.[49] While it has been held that, regardless of whether the license-tax be levied under the police or the taxing powers, it must not amount to a prohibition of any useful or legitimate occupation;[50] yet the true rule, and the one supported by the great weight of authority, is that the tax must not operate as the virtual prohibition of a useful and legitimate occupation when such tax is levied under the police power,[51] but that it may so operate if imposed under the taxing power,[52] or under the power to prohibit.[53]

b. Unreasonable Searches and Seizures. A statute relative to licenses on trades and provisions which provides that when the rates of license depend upon the profits of the business or amount of business done, the applicant may be examined upon such matters and be required to subscribe to an affidavit that he has truly answered all questions touching the amount of license is not, it seems, unconstitutional as subjecting the citizen to unreasonable searches and seizures.[54]

c. Illegal Interference With Rights of Citizens. An ordinance fixing the amount of a license-fee for the privilege of doing business high enough to make it partake of the character of excise taxes is not in violation of a constitutional provision against illegal interference with the rights of a citizen.[55] Nor is such constitutional provision violated by an ordinance imposing a license-fee on all persons using the streets for automobiles or any kind of vehicle drawn by horses, when such ordinance is enacted under a statute conferring power to license and regulate the use of the streets by persons who use vehicles thereon.[56] That the motive of the legislature in imposing a privilege tax on a given class of persons not paying an *ad valorem* tax was to deprive them of their advantage of exemp-

47. Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588; Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; St. Louis *v.* McCann, 157 Mo. 301, 57 S. W. 1016; St. Louis *v.* Sternberg, 69 Mo. 289; Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131. See also St. Louis *v.* Langhem, 49 Mo. 559.

When a tax is partly for revenue and partly for regulation it must, in order to be valid, conform to the limitations under the taxing power except so far as a departure is necessary to make it regulative. San Francisco *v.* Liverpool, etc., Ins. Co., 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425.

48. McDonald *v.* State, 81 Ala. 279, 2 So. 829, 60 Am. Rep. 158; Wills *v.* Ft. Smith, 70 Ark. 221, 66 S. W. 922; Brewster *v.* Pine Bluff, 70 Ark. 28, 65 S. W. 934; Standard Oil Co. *v.* Com., 82 S. W. 1020, 26 Ky. L. Rep. 985; Brownbach *v.* North Wales, 194 Pa. St. 609, 45 Atl. 660, 49 L. R. A. 446.

49. Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; State Wyatt *v.* Ashbrook, 154 Mo. 375, 55 S. W. 627, 77 Am. St. Rep. 765, 48 L. R. A. 265; Schnaier *v.* Navarre Hotel, etc., Co., 182 N. Y. 83, 74 N. E. 561, 108 Am. St. Rep. 790, 70 L. R. A. 722; People *v.* Beattie, 96 N. Y. App. Div. 382, 89 N. Y. Suppl. 193.

50. *In re* Quong Woo, 13 Fed. 229, 7 Sawy. 526. See also Fretwell *v.* Troy, 18 Kan. 271.

51. *Alabama.*— Kendrick *v.* State, 142 Ala. 43, 39 So. 203; *Ex p.* Burnett, 30 Ala. 461.

Indiana.— Sweet *v.* Wabash, 41 Ind. 7.

Kansas.—Lyons *v.* Cooper, 39 Kan. 324, 18 Pac. 296.

Michigan.— Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; Chaddock *v.* Day, 75 Mich. 527; 42 N. W. 977, 13 Am. St. Rep. 468, 4 L. R. A. 809; Kitson *v.* Ann Arbor, 26 Mich. 325.

Missouri.—St. Louis *v.* Boatman's Ins., etc., Co., 47 Mo. 150.

Nebraska.— Caldwell *v.* Lincoln, 19 Nebr. 596, 27 N. W. 647.

New York.— People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

Ohio.— Sipe *v.* Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184.

Utah.— Matthews *v.* Jensen, 21 Utah 207, 61 Pac. 303.

United States.— Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186.

See 32 Cent. Dig. tit. "Licenses," § 7 *et seq.*

52. Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560. See State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

53. Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; Poyer *v.* Desplaines, 22 Ill. App. 576. See also Standard Oil Co. *v.* Com., 82 S. W. 1020, 26 Ky. L. Rep. 985.

54. Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

Search and seizure generally see SEARCHES AND SEIZURES.

55. Gundling *v.* Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 L. ed. 725.

56. Sterling *v.* Bowling Green, 26 Ohio Cir. Ct. 581.

tion from *ad valorem* taxation cannot be urged against the validity of the act imposing the privilege tax.[57]

d. Uncertainty as to Class of Persons Taxed. Whenever an act imposing a license-tax on a given class of persons gives no definition of that class, but in describing it uses words having no fixed or reasonably certain meaning, such act is void.[58]

e. Failure to Specify Occupation Taxed. A statute which subjects to license taxation all persons carrying on a business other than those specifically mentioned in the act, and graduates and fixes the license therefor, is not invalid because it does not name each particular occupation.[59] Nor is an ordinance levying an occupation tax on the occupations taxable by statute void because it does not specify each and every occupation on which the tax is levied.[60]

f. Failure to Fix License-Fee. Where the city charter does not give the city officers discretion in fixing a license-fee, an ordinance which imposes an occupation license and fails to fix the fee therefor,[61] or leaves it to a city official,[62] is void.

g. Illegal Method of Enforcement. An act or ordinance which imposes an occupation tax and provides only an invalid method for its enforcement is itself invalid.[63]

h. Equality and Uniformity — (i) *In General.* The requirement in a state constitution that taxation shall be uniform and equal refers particularly to the taxation of property, and does not necessarily prohibit the imposition of a license-tax on a business or avocation.[64] Accordingly it has been repeatedly held that the fact that one class of business is taxed and another is not,[65] or that different

57. Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

58. Lockwood *v.* District of Columbia, 24 App. Cas. (D. C.) 569.

59. State *v.* Tolman, 106 La. 662, 31 So. 320.

60. Witherspoon *v.* State, 39 Tex. Cr. 65, 44 S. W. 164, 1096.

61. Mt. Clemens *v.* Sherbert, 122 Mich. 674, 81 N. W. 926.

62. Driscoll *v.* Salem, 67 N. J. L. 113, 50 Atl. 475.

63. German-American F. Ins. Co. *v.* Minden, 51 Nebr. 870, 71 N. W. 995.

64. *California.*— *Ex p.* Hurl, 49 Cal. 557; People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581; People *v.* Naglee, 1 Cal. 232, 52 Am. Dec. 312.

Georgia.— McGhee *v.* State, 92 Ga. 21, 17 S. E. 276; Weaver *v.* State, 89 Ga. 639, 15 S. E. 840; Savannah *v.* Weed, 84 Ga. 683, 11 S. E. 235, 8 L. R. A. 270; Rome *v.* McWilliams, 52 Ga. 251; Home Ins. Co. *v.* Augusta, 50 Ga. 530.

Illinois.— Wiggins Ferry Co. *v.* East St. Louis, 102 Ill. 560; Walker *v.* Springfield, 94 Ill. 354; People *v.* Thurber, 13 Ill. 554.

Indiana.— Terre Haute *v.* Kersey, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 295; Bright *v.* McCullough, 27 Ind. 223.

Kansas.— *In re* Martin, 62 Kan. 638, 64 Pac. 43; Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486.

Louisiana.— State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; New Orleans *v.* Pontchartrain, etc., R. Co., 41 La. Ann. 519, 7 So. 83; Walters *v.* Duke, 31 La. Ann. 668; Plaquemines Parish *v.* Bowman, 30 La. Ann. 1403.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828; St. Louis *v.* Sternberg, 4 Mo. App. 453.

Montana.— State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.

Nevada.— *Ex p.* Robinson, 12 Nev. 263, 28 Am. Rep. 794.

New Jersey.— Standard Underground Cable Co. *v.* Atty.-Gen., 46 N. J. Eq. 270, 19 Atl. 733, 19 Am. St. Rep. 394.

North Carolina.— State *v.* Irvin, 126 N. C. 989, 35 S. E. 430; State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472; Gatlin *v.* Tarboro, 78 N. C. 119.

Pennsylvania.— Knisely *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86; Kneeland *v.* Pittsburgh, 9 Pa. Cas. 101, 11 Atl. 657.

Virginia.— Com. *v.* Moore, 25 Gratt. 951.

Washington.— *In re* Garfinkle, 37 Wash. 650, 80 Pac. 188; Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205.

Wisconsin.— Morrill *v.* State, 38 Wis. 428, 20 Am. Rep. 12.

See 32 Cent. Dig. tit. "Licenses," § 8.

65. *Arizona.*— Sydow *v.* Territory, 4 Ariz. 207, 36 Pac. 214.

California.— People *v.* Coleman, 4 Cal. 46, 60 Am. Dec. 581.

Georgia.— Stewart *v.* Kehrer, 115 Ga. 184, 41 S. E. 680; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Weaver *v.* State, 89 Ga. 639, 15 S. E. 840; Davis *v.* Macon, 64 Ga. 128, 37 Am. Rep. 60; Cutliff *v.* Albany, 60 Ga. 597.

Kentucky.— Strater Bros. Tobacco Co. *v.* Com., 78 S. W. 871, 25 Ky. L. Rep. 1717; Bullitt *v.* Paducah, 3 S. W. 802, 8 Ky. L. Rep. 870.

businesses or avocations are taxed unequally,[66] does not affect the validity or uniformity of the tax.

(II) *As to Occupations and Privileges of Same Class.* While the constitutional requirement of uniformity does not necessarily prohibit a license-tax on business or avocation, yet such requirement is violated by a tax which does not fall alike on all persons engaged in the particular business or avocation taxed.[67] But if the tax is uniform as to all persons engaged in the particular business or avocation taxed,[68] or if all persons engaged therein are classified for taxation

Louisiana.— New Orleans *v.* Dubarry, 33 La. Ann. 481, 39 Am. Rep. 273. See also State *v.* Hammond Packing Co., 110 La. 181, 34 So. 368, 98 Am. St. Rep. 459.

Mississippi.— Holberg *v.* Macon, 55 Miss. 112.

Missouri.— Kansas City *v.* Richardson, 90 Mo. App. 450.

New Jersey.— Kolb *v.* Boonton, 64 N. J. L. 163, 44 Atl. 873.

New York.— Bradley *v.* Rochester, 54 Hun 140, 7 N. Y. Suppl. 237.

North Carolina.— Royster Guano Co. *v.* Tarboro, 126 N. C. 68, 35 S. E. 231; State *v.* Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595. See also State *v.* Carter, 129 N. C. 560, 40 S. E. 11.

North Dakota.— *In re* Lipschitz, (1903) 95 N. W. 157.

Pennsylvania.—Pittsburg *v.* Coyle, 165 Pa. St. 61, 30 Atl. 452; Butler's Appeal, 73 Pa. St. 448; Com. *v.* Muir, 1 Pa. Super. Ct. 578.

South Carolina.— Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

South Dakota.— *In re* Watson, 17 S. D. 486, 97 N. W. 463.

Tennessee.— Flournoy *v.* Lewis, 2 Tenn. Cas. 45.

Texas.— Fahey *v.* State, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182.

Wyoming.—State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198.

United States.— Singer Mfg. Co. *v.* Wright, 33 Fed. 121; *Ex p.* Thornton, 12 Fed. 538, 4 Hughes 220.

See 32 Cent. Dig. tit. "Licenses," § 8.

Unless there be in the organic law something inconsistent with the power of the legislature to exempt a particular business or an occupation or calling from an occupation tax, such power exists. New Orleans *v.* Lusse, 21 La. Ann. 1.

66. Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921; *Ex p.* Hurl. 49 Cal. 557; Augusta *v.* Clark, 124 Ga. 254, 52 S. E. 881; Rome *v.* McWilliams, 52 Ga. 251; Hadtner *v.* Williamsport, 15 Wkly. Notes Cas. (Pa.) 138; State *v.* Columbia, 6 S. C. 1.

67. *Colorado.*— Ames *v.* People, 25 Colo. 508, 55 Pac. 725.

Illinois.— Peoria *v.* Guggenheim, 61 Ill. App. 374.

Louisiana.— Cullinan *v.* New Orleans, 28 La. Ann. 102; State *v.* Endom, 23 La. Ann. 663; New Orleans *v.* Home Mut. Ins. Co., 23 La. Ann. 449.

Mississippi.—Adams *v.* Mississippi Lumber Co., 84 Miss. 23, 36 So. 68; Adams *v.* Kuykendall, 83 Miss. 571, 35 So. 830.

Missouri.— St. Louis *v.* Spiegel, 75 Mo. 145.

Nebraska.— Caldwell *v.* Lincoln, 19 Nebr. 569, 27 N. W. 647.

Pennsylvania.— Com. *v.* Wormser, 7 Pa. Dist. 318; Williamsport *v.* Stearns, 12 Pa. Co. Ct. 625.

South Carolina.— Standard Oil Co. *v.* Spartanburg, 66 S. C. 37, 44 S. E. 377.

Tennessee.— Vosse *v.* Memphis, 9 Lea 294.

Texas.— Hoefling *v.* San Antonio, 85 Tex. 228, 20 S. W. 85, 16 L. R. A. 608; Poteet *v.* State, 41 Tex. Cr. 268, 53 S. W. 869; *Ex p.* Overstreet, 39 Tex. Cr. 474, 46 S. W. 825; *Ex p.* Jones, 38 Tex. Cr. 482, 43 S. W. 513.

Virginia.— Standard Oil Co. *v.* Fredericksburg, (1906) 52 S. E. 817.

Wisconsin.— State *v.* Whitchon, 122 Wis. 110, 99 N. W. 468; State *v.* Benzenberg, 101 Wis. 172, 76 N. W. 345.

See 32 Cent. Dig. tit. "Licenses," § 9.

Instances of unreasonable classification.— The following classifications of persons engaged in the same business or calling: Persons dealing in goods actually in the limits of the municipality imposing the tax and persons dealing in goods outside the corporate limits. *Ex p.* Frank, 52 Cal. 606, 28 Am. Rep. 642. Persons keeping powder in quantities of more than fifty pounds, and persons keeping a less quantity. Orleans Parish *v.* Cochran, 20 La. Ann. 373. Cotton buyers who are merchants, and cotton buyers who are not merchants. Rainey *v.* State, 41 Tex. Cr. 254, 53 S. W. 882, 96 Am. St. Rep. 786.

68. *Alabama.*— Gamble *v.* Montgomery, (1905) 39 So. 353.

California.—Sacramento *v.* Crocker, 16 Cal. 119.

Georgia.— Martin *v.* Statesboro, 100 Ga. 419, 28 S. E. 450; Joseph *v.* Milledgeville, 97 Ga. 513, 25 S. E. 323; Weaver *v.* State, 89 Ga. 639, 15 S. E. 840.

Illinois.— Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Braun *v.* Chicago, 110 Ill. 186; Howland *v.* Chicago, 108 Ill. 496.

Iowa.— Cook *v.* Marshall County, 119 Iowa 384, 93 N. W. 372; Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 70 Am. St. Rep. 548; Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734; Iowa Eclectic Medical College Assoc. *v.* Schrader, 87 Iowa 659, 55 N. W. 24, 20 L. R. A. 355; Christie *v.* Life Indemnity, etc., Co., 82 Iowa 360, 48 N. W. 94; Iowa Railroad Land Co. *v.* Soper, 39 Iowa 112.

according to natural and well recognized lines of distinction,[69] the constitutional requirement of uniformity is not violated. Nor does it matter how few the per-

Kentucky.— Smith *v.* Louisville, 6 S. W. 911, 9 Ky. L. Rep. 779.

Louisiana.— Browne *v.* Selser, 106 La. 691, 31 So. 290; State *v.* Traders' Bank, 41 La. Ann. 329, 6 So. 582; Weise *v.* Thibaut, 34 La. Ann. 556; Hodgson *v.* New Orleans, 21 La. Ann. 301; State *v.* King, 21 La. Ann. 201; State *v.* Volkman, 20 La. Ann. 585; Merriam *v.* New Orleans, 14 La. Ann. 318; New Orleans *v.* Staiger, 11 La. Ann. 68; Municipality No. 2 *v.* Dubois, 10 La. Ann. 56; State *v.* Rebassa, 9 La. Ann. 305; Heres *v.* Powell, 6 La. Ann. 586.

Massachusetts.— Com. *v.* Danziger, 176 Mass. 290, 57 N. E. 461.

Mississippi.— Holberg *v.* Macon, 55 Miss. 112.

Missouri.— St. Louis *v.* Freivogel, 95 Mo. 533, 8 S. W. 715; St. Louis *v.* Bowler, 94 Mo. 630, 7 S. W. 434; St. Louis *v.* Sternberg, 69 Mo. 289; American Union Express Co. *v.* St. Joseph, 66 Mo. 675, 27 Am. Rep. 382.

Montana.— State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.

Nebraska.— Templeton *v.* Tekamah, 32 Nebr. 542, 49 N. W. 373; Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53; State *v.* Carter, 129 N. C. 560, 40 S. E. 11; Cobb *v.* Durham County, 122 N. C. 307, 30 S. E. 338; Rosenbaum *v.* Newbern, 118 N. C. 83, 24 S. E. 1; State *v.* Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595; State *v.* Powell, 100 N. C. 525, 6 S. E. 424; Gatlin *v.* Tarboro, 78 N. C. 119.

Pennsylvania.— Kneeland *v.* Pittsburgh, 9 Pa. Cas. 101, 11 Atl. 657; Com. *v.* Muir, 1 Pa. Super. Ct. 578; Danville *v.* Weaver, 17 Pa. Co. Ct. 17.

South Carolina.—Hill *v.* Abbeville, 59 S. C. 396, 38 S. E. 11.

Tennessee.— Fulgum *v.* Nashville, 8 Lea 635.

Texas.— Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768; Trezvant *v.* State, (Cr. App. 1892) 20 S. W. 582; *Ex p.* Williams, 31 Tex. Cr. 262, 20 S. W. 580, 21 L. R. A. 783; *Ex p.* Butin, 28 Tex. App. 304, 13 S. W. 10; Thompson *v.* State, 17 Tex. App. 253.

Utah.— Cache County *v.* Jensen, 21 Utah 207, 61 Pac. 303.

Virginia.— Newport News, etc., R. Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645; Com. *v.* Moore, 25 Gratt. 951; Slaughter *v.* Com., 13 Gratt. 767.

See 32 Cent. Dig. tit. "Licenses," § 9.

When municipal tax not tainted by invalidity of state tax.—Where the state constitution provides that no political corporation shall impose a greater license-tax than is imposed by the general assembly for state purposes, and the license-tax levied by the city does not exceed that levied on the same occupation in the city by the state and falls alike on all persons engaged in the occupation, it is valid, even if the state should have invalidated her own license-tax by illegal discrimination between persons pursuing the same business in different subdivisions of the state. New Orleans *v.* Pontchartrain R. Co., 41 La. Ann. 519, 7 So. 83.

The fact that national banks are exempt from an occupation tax does not render the statute imposing the tax void for want of uniformity, if the statute applies to all banks subject to state taxation. Brooks *v.* State, (Tex. Civ. App. 1900) 58 S. W. 1032.

69. *California.*— *Ex p.* Lemon, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946.

Georgia.— Augusta *v.* Clark, 124 Ga. 254, 52 S. E. 881; Singer Mfg. Co. *v.* Wright, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; Johnston *v.* Macon, 62 Ga. 645.

Iowa.— Des Moines *v.* Bolton, 128 Iowa 108, 102 N. W. 1045.

Missouri.— State *v.* Bixman, 162 Mo. 1, 62 S. W. 828; St. Charles *v.* Elsner, 155 Mo. 671, 56 S. W. 291; Aurora *v.* McGannon, 138 Mo. 38, 39 S. W. 469; Kansas City *v.* Richardson, 90 Mo. App. 450; St. Louis *v.* Bircher 7 Mo. App. 169.

Montana.— State *v.* McKinney, 29 Mont. 375, 74 Pac. 1095; State *v.* French, 17 Mont. 54, 41 Pac. 1078, 30 L. R. A. 415.

South Dakota.— *In re* Watson, 17 S. D. 486, 97 N. W. 463.

Virginia.— Standard Oil Co. *v.* Fredericksburg, 105 Va. 82, 52 S. E. 817.

United States.— American Harrow Co. *v.* Shaffer, 68 Fed. 750.

See 32 Cent. Dig. tit. "Licenses," § 9.

When question of classification cannot be raised.—Where an ordinance divides amusements into different classes for the purpose of licensing them, the objection that the ordinance is invalid because the classification is ambiguous and because it authorizes the mayor to decide in what class an entertainment may belong, cannot be raised in a suit to enforce the ordinance in regard to an amusement, regarding the classification of which there is no uncertainty. Webber *v.* Chicago, 148 Ill. 313, 36 N. E. 70.

Instances of reasonable classification.— The following have received judicial sanction as reasonable classifications of persons engaged in the same business or calling: Wholesaler and retailer. Kinsely *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86; Com. *v.* Clark, 195 Pa. St. 634, 46 Atl. 286, 86 Am. St. Rep. 694, 67 L. R. A. 348; Singer Mfg. Co. *v.* Wright, 33 Fed. 121. Producer and middleman. Davis *v.* Macon, 64 Ga. 128, 37 Am. Rep. 60. Persons who pay annual taxes under the revenue laws and those who pay no such taxes. State *v.* Willingham, 9 Wyo. 290, 62 Pac. 797, 87 Am. St. Rep. 948, 52 L. R. A. 198. Saloon-keepers giving singing and dancing entertainments, and those who give no such entertainments. State *v.* Becker, 30 La. Ann. 682. Insurance com-

sons are who may be included in a class so long as all who are or may come into the like situation or circumstances be embraced in the class.[70]

(III) *Classification According to Amount of Business or Capital.*[71] It is well settled that in imposing a license-tax a classification for such tax according to the amount of business done,[72] or according to the amount of capital employed therein,[73] does not offend the constitutional provision which requires uniformity of taxation.

(IV) *Different Rates in Different Localities.* An act or ordinance requiring a license to pursue a given business is not in violation of the constitutional provision requiring taxes to be uniform if it merely imposes different rates on the basis of the population of the locality in which the license business is situated or carried on;[74] but the rule is otherwise if the license-fee is imposed mainly for the purpose of revenue, so that it may be regarded as a pure tax in the constitutional sense.[75]

panies according to the amount of premiums received. State *v.* Liverpool, etc., Ins. Co., 40 La. Ann. 463, 4 So. 504. Fishermen according to the depth of water in which they fish. Morgan *v.* Com., 98 Va. 812, 35 S. E. 448.

70. Durach's Appeal, 62 Pa. St. 491; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Stratton *v.* Morris, 89 Tenn. 497, 15 S. W. 87, 12 L. R. A. 70; Budd *v.* State, 3 Humphr. (Tenn.) 483, 39 Am. Dec. 189; Norfolk, etc., News Co. *v.* Norfolk, 105 Va. 139, 52 S. E. 851.

71. Amount of license-fee or tax in general see *infra*, I, K, 1, d.

72. *California.*— *Ex p.* Hurl, 49 Cal. 557; Sacramento *v.* Crocker, 16 Cal. 119.

Kentucky.— Rankin *v.* Henderson, 7 S. W. 174, 9 Ky. L. Rep. 861.

Maryland.— State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812.

Michigan.—Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

North Carolina.— Cobb *v.* Durham County, 122 N. C. 307, 30 S. E. 338; State *v.* Powell, 100 N. C. 525, 6 S. E. 424; Gatlin *v.* Tarboro, 78 N. C. 119.

Pennsylvania.— Williamsport *v.* Wenner, 172 Pa. St. 173, 33 Atl. 544; Allentown *v.* Gross, 132 Pa. St. 319, 19 Atl. 269.

United States.— Ficklen *v.* Shelby County Taxing Dist., 145 U. S. 1, 12 S. Ct. 810, 36 L. ed. 601; *Ex p.* Thornton, 12 Fed. 538.

See 32 Cent. Dig. tit. "Licenses," § 10.

Instances.— Auctioneers in accordance with the kinds of property sold. Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892. Building and loan associations according to their gross receipts. Southern Bldg., etc., Assoc. *v.* Norman, 98 Ky. 294, 32 S. W. 952, 17 Ky. L. Rep. 887, 56 Am. St. Rep. 367, 31 L. R. A. 41. See State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472. Insurance companies in proportion to the amount of premiums received. Walker *v.* Springfield, 94 Ill. 364; Burlington *v.* Putnam Ins. Co., 31 Iowa 102; Fidelity, etc., Co. *v.* Louisville, 106 Ky. 207, 50 S. W. 35, 20 Ky. L. Rep. 1785. Livery-stable keepers in proportion to the number of carriages kept for hire. Howland *v.* Chicago, 108 Ill. 496. Merchants according to the amount of sales. San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; *Ex p.* Mount, 66 Cal. 448, 6 Pac. 78; Sacramento *v.* Crocker, 16 Cal. 119; State *v.* Merchants' Trading Co., 114 La. 529, 38 So. 443; Gatlin *v.* Tarboro, 78 N. C. 119; Knisely *v.* Cotterel, 196 Pa. St. 614, 46 Atl. 861, 50 L. R. A. 86; Williamsport *v.* Wenner, 172 Pa. St. 173, 33 Atl. 544; Allentown *v.* Gross, 132 Pa. St. 319, 19 Atl. 269; Williamsport *v.* Stearns, 2 Pa. Dist. 351; Clark *v.* Titusville, 184 U. S. 329, 22 S. Ct. 382, 46 L. ed. 569; *Ex p.* Thornton, 12 Fed. 538, 4 Hughes 220. Packers and canners of oysters in proportion to the number of bushels packed. State *v.* Applegarth, 81 Md. 293, 31 Atl. 961, 28 L. R. A. 812.

Must be in exact proportion.— But if the tax purporting to be levied according to the business done is not in exact proportion thereto it violates the rule of uniformity. Johnston *v.* Macon, 62 Ga. 645.

But the fact that license-taxes are not graduated in proportion to the amount of business is not a violation of the rule of uniformity. Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786.

73. *Alabama.*— Saks *v.* Birmingham, 120 Ala. 190, 24 So. 728.

Colorado.— American Smelting, etc., Co. *v.* People, (1905) 82 Pac. 531.

Kansas.— *In re* Martin, 62 Kan. 638, 64 Pac. 43; Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486.

Louisiana.— See State *v.* Traders' Bank, 41 La. Ann. 329, 6 So. 502.

Mississippi.— Vicksburg Bank *v.* Worrell, 67 Miss. 47, 7 So. 219.

See 32 Cent. Dig. tit. "Licenses," § 10.

In Louisiana, where the constitution provides for the graduation of license-taxes, it has been held that an act which places all persons pursuing a given occupation in the same class, regardless of the difference in their capital, is invalid. State *v.* Traders' Bank, 41 La. Ann. 329, 6 So. 582.

74. East St. Louis *v.* Wehrung, 46 Ill. 392; State *v.* O'Hara, 36 La. Ann. 93; Blessing *v.* Galveston, 42 Tex. 641; Texas Banking, etc., Co. *v.* State, 42 Tex. 636.

75. St. Louis *v.* Spiegel, 75 Mo. 145. See

i. Taxation According to Value. The requirement of a license as a condition precedent to the right to engage in a given business or calling does not conflict with the constitutional provision that taxation of property shall be in exact proportion to its value,[76] even though the license-tax be imposed for revenue purposes.[77] But the fact that the license-tax on a given occupation may be graduated by valuation does not make it a property tax or invalidate the act or ordinance imposing it.[78]

j. Double Taxation. While but one occupation tax can be imposed on a person who pursues but one business or avocation,[79] and, when a license to do a general business has been exacted, another license cannot be imposed for the doing of a particular act or series of acts constituting an integral part of such general business,[80] yet the objection that two occupation taxes constitute double taxation cannot be successfully urged, so long as each tax is levied upon a separate and distinct business or calling.[81] That the property used in a given business or occupation is taxed as property *ad valorem* does not interfere with the right to impose a license-tax.[82]

also State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472.

76. *Alabama.*— McCaskell *v.* State, 53 Ala. 510.

Illinois.— Cole *v.* Hall, 103 Ill. 30.

Louisiana.— Boye *v.* Girardey, 28 La. Ann. 717.

Maryland.— Rohr *v.* Gray, 80 Md. 274, 30 Atl. 632.

Missouri.— Kansas City *v.* Richardson, 90 Mo. App. 450.

New Jersey.— Johnson *v.* Asbury Park, 58 N. J. L. 604, 33 Atl. 850; Johnson *v.* Loper, 46 N. J. L. 321.

North Carolina.— State *v.* Powell, 100 N. C. 525, 6 S. E. 424.

Ohio.— Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463; *Ex p.* Mosler, 8 Ohio Cir. Ct. 324, 40 Ohio Cir. Dec. 82.

South Carolina.— *In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681.

Tennessee.— Jenkins *v.* Ewin, 8 Heisk. 456; Adams *v.* Somerville, 2 Head 363.

Virginia.— Hirsh *v.* Com., 21 Gratt. 785; Lewellen *v.* Lockharts, 21 Gratt. 570. See also Morgan *v.* Com., 98 Va. 812, 35 S. E. 448.

See 32 Cent. Dig. tit. "Licenses," § 13.

Where the constitution forbids a license-tax, except in cases where a business or calling cannot be reached by the *ad valorem* system, whether a business can or cannot be reached by the *ad valorem* system is a question primarily for the legislature. Thomas *v.* Snead, 99 Va. 613, 39 S. E. 586; Morgan *v.* Com., 98 Va. 812, 35 S. E. 448; Com. *v.* Moore, 25 Gratt. (Va.) 951.

License-tax in lieu of ad valorem tax.— Under a constitutional provision requiring that all property shall be taxed in proportion to its value, a municipality, empowered by the legislature to levy occupation taxes, has no power to impose on personalty, used in a business for the exercise of which license-fees are paid, the license-tax in lieu of the *ad valorem* tax provided by the constitution. Levi *v.* Louisville, 97 Ky. 394, 30 S. W. 973, 16 Ky. L. Rep. 872.

77. Johnson *v.* Asbury Park, 58 N. J. L. 604, 33 Atl. 850. See also Kansas City *v.* Richardson, 90 Mo. App. 450, construing the charter of Kansas City.

78. *In re* Martin, 62 Kan. 638, 64 Pac. 43; Newton *v.* Atchison, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486. See also Goldsmith *v.* Huntsville, 120 Ala. 182, 24 So. 509.

79. Walker *v.* New Orleans, 31 La. Ann. 828. See Bishoff *v.* State, 43 Fla. 67, 30 So. 808, holding that ordinances fixing a different license-tax from a prior ordinance and providing that payments made on applications for licenses under such prior ordinance should be applied in payment of the license-tax under the new and different rate are not unconstitutional as imposing double taxation. *Compare* Chicago Packing, etc., Co. *v.* Chicago, 88 Ill. 221, 30 Am. Rep. 545, holding that under Acts (1872), § 62, packing houses may constitutionally be charged a license simultaneously both by a village and a city if "within the distance of one mile without the city or village limits."

80. Gambill *v.* Endrich, 143 Ala. 506, 39 So. 297, holding that the general rule is as stated in the text, but that the business of selling liquors is an exception to the general rule, so that the state has the power in that business to regulate and require a separate license for each article sold.

81. Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83, holding that it is not double taxation to require a license-tax of both an insurance company and the agents working for it, since the occupation of an insurance company and that of its agents are separate and distinct.

82. *Arkansas.*— Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

California.— *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888.

Georgia.— Carson *v.* Forsyth, 94 Ga. 617, 20 S. E. 116. *Compare* Johnston *v.* Macon, 62 Ga. 645, holding that a tax on a private wagon not employed in any hauling business for others is a tax on property, and on pay-

k. Discrimination Against Non-Residents.[83] Except in the case of foreign corporations which are not regarded as citizens in a constitutional sense,[84] an act or ordinance which taxes the business or occupation of a non-resident in a different manner or at a different rate from that of a resident violates the constitutional provision that "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[85] And the rule that non-residents must not be discriminated against applies even where the discrimination operates only within the limits of a municipality.[86]

l. Discrimination in Favor of Non-Residents. On the other hand it has been held that an ordinance which provides for the payment of a license-tax by resi-

ment thereof it cannot be taxed again as for business.

Illinois.—Walker *v.* Springfield, 94 Ill. 364.

Indiana.— Levy *v.* State, 161 Ind. 251, 68 N. E. 172.

Kansas.— Lebanon *v.* Welker, 9 Kan. App. 887, 58 Pac. 1036.

Kentucky.— Covington *v.* Woods, 98 Ky. 344, 33 S. W. 84, 17 Ky. L. Rep. 927. *Compare* Livingston *v.* Paducah, 80 Ky. 656, holding that a tax of three dollars on family vehicles already subject to an *ad valorem* tax imposes a double tax grossly in disproportion to the amount of other tax and virtually amounting to taking private property for public use without compensation.

Missouri.— Aurora *v.* McGannon, 138 Mo. 38, 39 S. W. 469; Troy *v.* Harris, 102 Mo. App. 51, 76 S. W. 662; Lamar *v.* Adams, 90 Mo. App. 35; St. Louis *v.* Bircher, 7 Mo. App. 169; St. Louis *v.* Green, 6 Mo. App. 591.

North Carolina.— State *v.* Stevenson, 109 N. C. 730, 14 S. E. 385, 26 Am. St. Rep. 595; State *v.* French, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590.

South Carolina.— State *v.* Columbia, 6 S. C. 1.

Tennessee.— Jenkins *v.* Ewin, 8 Heisk. 456.

Virginia.— Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645; Morgan *v.* Com., 98 Va. 812, 35 S. E. 448; Com. *v.* Moore, 25 Gratt. 951.

United States.— American Harrow Co. *v.* Shaffer, 68 Fed. 750.

See 32 Cent. Dig. tit. "Licenses," § 14.

83. Discrimination: Against non-residents see CONSTITUTIONAL LAW, 8 Cyc. 1046 notes 93, 94. Between products of one state and those of other states see CONSTITUTIONAL LAW, 8 Cyc. 1046.

84. See FOREIGN CORPORATIONS, 19 Cyc. 1253.

85. Kiowa County *v.* Dunn, 21 Colo. 185, 40 Pac. 357; Nashville *v.* Althrop, 5 Coldw. (Tenn.) 554; *In re* Watson, 15 Fed. 511.

But if the ordinance does not discriminate against non-residents, in terms or by necessary implication, it will be regarded as a valid exercise of the police power, and not a discriminating trade regulation. Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734 (holding that an ordinance requiring transient merchants selling within the city to pay a license did not discriminate in favor of residents); Caldwell Prunelle, 57 Kan. 511, 46 Pac. 949 (where a larger tax was required of a photographer who traveled but did not reside in the city than from a resident regularly engaged in the business); *Ex p.* Thornton, 12 Fed. 538, 4 Hughes 229 (holding that a law fixing a different license-tax on sample merchants than on other merchants was not constitutional as discriminating against non-resident merchants, as the courts could not assume that a merchant is necessarily a resident and that a sample merchant is necessarily a non-resident).

86. *Georgia.*—Gould *v.* Atlanta, 55 Ga. 678.

Illinois.— Lucas *v.* Macomb, 49 Ill. App. 60.

Indiana.— Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857.

Kentucky.— Simrall *v.* Coddington, 90 Ky. 444, 14 S. W. 369, 12 Ky. L. Rep. 404, 29 Am. St. Rep. 398, 9 L. R. A. 556; Daniel *v.* Richmond, 78 Ky. 542.

Michigan.—Saginaw *v.* Saginaw Cir. Judge, 106 Mich. 32, 63 N. W. 985; Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137.

New Jersey.— Thompson *v.* Ocean Grove Camp Meeting Assoc., 55 N. J. L. 507, 26 Atl. 798; Morgan *v.* Orange, 50 N. J. L. 389, 13 Atl. 240.

Ohio.— Radebaugh *v.* Plain City, 11 Ohio Dec. (Reprint) 612, 28 Cinc. L. Bul. 107.

Pennsylvania.—Shamokin *v.* Flannigan, 156 Pa. St. 43, 26 Atl. 780; Sayre *v.* Phillips, 148 Pa. St. 482, 24 Atl. 76, 33 Am. St. Rep. 842, 16 L. R. A. 49; Wilcox *v.* Knoxville, 12 Pa. Co. Ct. 641; Easton City *v.* Easton Beef Co., 5 Pa. Co. Ct. 68; Burgess *v.* Fennel, 3 Del. Co. 354; West Pittston *v.* Dymond, 8 Kulp 12.

Tennessee.—Nashville *v.* Althrop, 5 Coldw. 554.

Wyoming.— Clements *v.* Casper, 4 Wyo. 494, 35 Pac. 472.

United States.— Ward *v.* Maryland, 12 Wall. 418, 20 L. ed. 449.

See 32 Cent. Dig. tit. "Licenses," § 12.

Violating other constitutional provisions.— An ordinance requiring "every non-resident person who shall sell, exchange, or dispose of any goods, wares, or merchandise of his own, or of other non-resident owners" to pay for a license, is unconstitutional, as being a general law without uniform operation, and as being in contravention of the federal government's power to regulate inter-

dents of the municipality only does not discriminate in favor of those who dwell outside of the city.[87]

m. Reasonableness of Fee[88] — (i) *In General.* It is well settled that the amount of an occupation tax, imposed in the exercise of the police power, may include not only the cost of issuing a license but also a reasonable compensation for the expense of supervision over the licensed occupation.[89] But whenever it is manifest that the amount of such tax imposed in the exercise of police power is substantially in excess of the reasonable expense of issuing a license and of regulating the occupation to which it pertains,[90] or is virtually prohibitory,[91] the act or ordinance imposing the tax is invalid.

state commerce. Pacific Junction *v.* Dyer, 64 Iowa 38, 19 N. W. 862.

87. Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

88. Amount of license-fee or tax in general see *infra*, I, K, 1, d.

89. *Alabama.*—Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85. See also Kentz *v.* Mobile, 120 Ala. 623, 24 So. 952.

Arkansas.— Fayetteville *v.* Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509.

Florida.— Jacksonville *v.* Ledwith, 26 Fla. 163, 7 So. 885, 23 Am. St. Rep. 558, 9 L. R. A. 69.

Illinois.— Spiegler *v.* Chicago, 216 Ill. 114, 74 N. E. 718; Kinsley *v.* Chicago, 124 Ill. 359, 16 N. E. 260; Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; U. S. Distilling Co. *v.* Chicago, 112 Ill. 19; Braun *v.* Chicago, 110 Ill. 186; Howland *v.* Chicago, 108 Ill. 496; Gartside *v.* East St. Louis, 43 Ill. 47. See also Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588.

Indiana.— Wysong *v.* Lebanon, 163 Ind. 132, 71 N. E. 194; Indianapolis *v.* Bieler, 138 Ind. 30, 36 N. E. 857; Emerich *v.* Indianapolis, 118 Ind. 279, 20 N. E. 795; Wiley *v.* Owens, 39 Ind. 429; Thomasson *v.* State, 15 Ind. 449; Smith *v.* Madison, 7 Ind. 86.

Iowa.—Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795; Decorah *v.* Dunstan, 38 Iowa 96; Burlington *v.* Putnam Ins. Co., 31 Iowa 103.

Kansas.— *In re* Martin, 62 Kan. 638, 64 Pac. 43.

Maine.— State *v.* Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L. R. A. 544.

Michigan.— Van Baalen *v.* People, 40 Mich. 258; Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740. See also Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116.

Minnesota.— St. Paul *v.* Dow, 37 Minn. 20, 32 N. W. 860, 5 Am. St. Rep. 811; St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278. See also Mankato *v.* Fowler, 32 Minn. 364, 20 N. W. 361.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588.

New Jersey.— Blanke *v.* Board of Health, 64 N. J. L. 42, 44 Atl. 847.

Ohio.— Baker *v.* Cincinnati, 11 Ohio St. 534.

Pennsylvania.—Johnson *v.* Philadelphia, 60 Pa. St. 445; Western Union Tel. Co. *v.* Philadelphia, 9 Pa. Cas. 300, 12 Atl. 144.

See 32 Cent. Dig. tit. "Licenses," § 15.

90. *Arkansas.*—Ft. Smith *v.* Ayers, 43 Ark. 82.

Indiana.—Duckwall *v.* New Albany, 25 Ind. 283.

Iowa.— Ottumwa *v.* Zekind, 95 Iowa 622, 64 N. W. 646, 58 Am. St. Rep. 447, 29 L. R. A. 734.

Maryland.— State *v.* Rowe, 72 Md. 548, 20 Atl. 179; Vansant *v.* Harlem Stage Co., 59 Md. 330.

Minnesota.— State *v.* Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437; St. Paul *v.* Traeger, 25 Minn. 248, 33 Am. Rep. 462.

Mississippi.— Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367.

Missouri.— Springfield *v.* Jacobs, 101 Mo. App. 339, 73 S. W. 1097; Knox *v.* Thompson, 19 Mo. App. 523.

New Hampshire.—State *v.* Angelo, 71 N. H. 224, 51 Atl. 905.

New Jersey.—Muhlenbrinck *v.* Long Branch Com'rs, 42 N. J. L. 364, 36 Am. Dec. 518; North Hudson County R. Co. *v.* Hoboken, 41 N. J. L. 71; State *v.* Hoboken, 33 N. J. L. 280.

New York.— People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

North Carolina.— State *v.* Moore, 113 N. C. 697, 18 S. E. 342, 22 L. R. A. 472; State *v.* Bean, 91 N. C. 954.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268; Cincinnati *v.* Bryson, 15 Ohio 625, 45 Am. Dec. 593; Glaser *v.* Cincinnati, 31 Cinc. L. Bul. 243.

United States.— American Fertilizer Co. *v.* North Carolina Bd. of Agriculture, 43 Fed. 609, 11 L. R. A. 179; Philadelphia *v.* Western Union Tel. Co., 40 Fed. 615; Laundry License Case, 22 Fed. 701.

See 32 Cent. Dig. tit. "Licenses," § 15.

91. *Alabama.*— Ex p. Burnett, 30 Ala. 461.

Indiana.— Sweet *v.* Wabash, 41 Ind. 7.

Kansas.— Lyons *v.* Cooper, 39 Kan. 324, 18 Pac. 296.

Michigan.— Brooks *v.* Mangan, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137; Chaddock *v.* Day, 75 Mich. 527, 42 N. W. 977, 13 Am. St. Rep. 468, 4 L. R. A. 809; Kitson *v.* Ann Arbor, 26 Mich. 325.

Missouri.— St. Louis *v.* Boatmen's Ins., etc., Co., 47 Mo. 150.

(II) *Presumption of.* An occupation tax imposed under the police power will be presumed by the courts to be reasonable, unless the contrary appears on the face of the act or ordinance imposing it or is established by proper evidence.[92]

(III) *When Question of Law.* Where the tax is imposed under the police power and its reasonableness does not appear on the face of the act or ordinance imposing it, the facts bearing on the reasonableness of the tax should be admitted in the evidence and then the question of reasonableness becomes one of law for the court.[93]

(IV) *When Discretion in Fixing Amount Reviewable.* The act of the authority imposing a license-tax is regarded as discretionary and not subject to review, if it is exacted in the exercise of taxing power,[94] or in the exercise of power

Nebraska.— Caldwell *v.* Lincoln, 19 Nebr. 569, 27 N. W. 647.

New York.—People *v.* Jarvis, 19 N. Y. App. Div. 466, 46 N. Y. Suppl. 596.

Ohio.— Sipe *v.* Murphy, 49 Ohio St. 536, 31 N. E. 884, 17 L. R. A. 184.

Utah.— See Matthews *v.* Jensen, 21 Utah 207, 61 Pac. 303, holding further that a right to license a business or occupation does not imply a right to exact a tax merely for revenue, and when the object is revenue the power to license for that purpose must be conferred in unequivocal terms.

United States.— See Atlantic, etc., Tel. Co. *v.* Philadelphia, 190 U. S. 160, 23 S. Ct. 817, 47 L. ed. 995.

See 32 Cent. Dig. tit. "Licenses," § 15.

A partial restriction.—The legislature, however, may, in the exercise of the police power, impose such sums for license as will operate as a partial restriction upon certain occupations and upon the keeping of certain kinds of property. Tenney *v.* Lenz, 16 Wis. 566.

92. *Alabama.*— Gamble *v.* Montgomery, (1905) 39 So. 353; Van Hook *v.* Selma, 70 Ala. 361, 45 Am. Rep. 85.

Arkansas.— Fayetteville *v.* Carter, 52 Ark. 301, 12 S. W. 573, 6 L. R. A. 509.

Florida.— Atkins *v.* Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158.

Iowa.— Iowa City *v.* Newell, 115 Iowa 55, 87 S. W. 739; Burlington *v.* Putnam Ins. Co., 31 Iowa 103.

Massachusetts.— Com. *v.* Patch, 97 Mass. 221.

Michigan.— Van Baalen *v.* People, 40 Mich. 258.

Missouri.— St. Louis *v.* Weber, 44 Mo. 547.

Nebraska.— Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588.

Pennsylvania.— Oil City *v.* Oil City Trust Co., 11 Pa. Co. Ct. 350; Borough *v.* Second Ave. Traction Co., 28 Pittsb. Leg. J. 278.

Texas.— *Ex p.* Gregory, 20 Tex. App. 210, 54 Am. Rep. 516.

Washington.— Seattle *v.* Barto, 31 Wash. 141, 71 Pac. 735.

See 32 Cent. Dig. tit. "Licenses," § 15.

Compare State *v.* Glavin, 67 Conn. 29, 34 Atl. 708; New Haven *v.* New Haven Water Co., 44 Conn. 105; Welch *v.* Hotchkiss, 39 Conn. 140, 12 Am. Rep. 383.

93. Iowa City *v.* Newell, 115 Iowa 55, 87 N. W. 739. See Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795, holding that the reasonableness of the tax is usually, if not always, a question for the court and not for the jury.

94. *Alabama.*— Southern Car, etc., Co. *v.* State, 133 Ala. 624, 32 So. 235.

Illinois.— Wiggins Ferry Co. *v.* St. Louis, 102 Ill. 560.

Iowa.— Burlington *v.* Putnam Ins. Co., 31 Iowa 102.

Kentucky.— Adams Express Co. *v.* Owensboro, 85 Ky. 265, 3 S. W. 370, 8 Ky. L. Rep. 908. See also Hall *v.* Com., 101 Ky. 382, 41 S. W. 2, 19 Ky. L. Rep. 578.

Massachusetts.— Boston *v.* Schaffer, 9 Pick. 415.

New Jersey.— Johnson *v.* Asbury Park, 58 N. J. L. 604, 33 Atl. 850.

New York.— Brooklyn *v.* Nodine, 26 Hun 512.

North Carolina.— State *v.* Roberson, 136 N. C. 587, 48 S. E. 595. See State *v.* Hunt, 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758, holding further that it is only when the license-fee is exacted solely as a police regulation that the courts can inquire whether it is so unreasonable as to amount to a prohibition.

Texas.— Hirshfield *v.* Dallas, 29 Tex. App. 242, 15 S. W. 124.

Utah.— Ogden *v.* Crossman, 17 Utah 66, 53 Pac. 985.

Washington.—Stull *v.* De Mattos, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; Fleetwood *v.* Read, 21 Wash. 547, 58 Pac. 665, 47 L. R. A. 205; Walla Walla *v.* Ferdon, 21 Wash. 308, 57 Pac. 796.

United States.— McCray *v.* U. S., 195 U. S. 27, 24 S. Ct. 769, 49 L. ed. 78.

See 32 Cent. Dig. tit. "Licenses," § 15.

Compare Fretwell *v.* Troy, 18 Kan. 271, 275, where the court says that "while it may not be true, that a city having authority to collect revenue by license may impose any sum, however large, as license, and thus in effect destroy certain kinds of business, yet before in such a case an ordinance imposing a license is declared void on account of the amount therefor, it should appear that the necessities of the city do not require so large a revenue, or that there has been an unjustifiable attempt to discriminate against certain kinds of business by casting the whole burden of taxation upon them."

to prohibit.[95] But the act of the licensing authority in fixing the amount of a tax imposed under the police power merely is reversible by the courts on the clear abuse of discretion.[96]

2. Repeal of[97] — a. Statutes — (I) *When Repealed.* A statute imposing a system of license-taxes operates to repeal an existing statute relating to the same subject, when it contains an express provision for such repeal;[98] but there can be no repeal by implication, unless the statutes are in their provisions utterly inconsistent and repugnant.[99]

(II) *Effect* — (A) *As to Ordinances.* In the absence of a saving clause, the repeal of a statute authorizing municipalities to impose privilege taxes operates to repeal ordinances which have been enacted pursuant to such statute.[1]

(B) *As to Accrued Taxes.* Where the repealing statute does not provide for saving existing rights, the repeal of a statute levying a privilege tax relieves a person against whom such a tax has accrued from liability for its payment;[2] but the rule is otherwise where at the time of the enactment of the repealing statute there is in force a general statutory construction act which provides that the repeal of a statute shall not affect any rights accrued under the statute repealed.[3]

(C) *As to Unexpired License.* The repeal of a statute under which an unexpired license was issued does not operate to abrogate it.[4]

(D) *As to Right to Sell Goods Bought During Licensed Period.* Where one purchases a stock of goods under license and the privilege is repealed after his license has expired, but before his stock is exhausted, he will, if he sells the balance afterward, be liable for the penalties of the repealing act.[5]

b. Ordinances. A provision of an ordinance creating a remedy to collect a license-tax is repealed by the repeal of the provision imposing the tax.[6]

D. Subjects of License or Tax — 1. In General. The requirement by the state of a license is not restricted to businesses or occupations which are immoral, vexatious, or injurious to society,[7] but extends to all occupations, except where the power of the state to exact the license is expressly limited by the constitution of the United States or by the constitution of the state itself.[8]

95. Dennehy *v.* Chicago, 120 Ill. 627, 12 N. E. 227; Poyer *v.* Desplaines, 22 Ill. App. 576; Standard Oil Co. *v.* Com., 82 S. W. 1020, 26 Ky. L. Rep. 985.

96. Allentown *v.* Western Union Tel. Co., 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; Kittanning Electric Light, etc., Co. *v.* Kittanning, 11 Pa. Super. Ct. 31; North Braddock *v.* Central Dist., etc., Tel. Co., 11 Pa. Super. Ct. 24; North Braddock *v.* Second Ave. Traction Co., 8 Pa. Super. Ct. 233; Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768.

97. Amendment of statutes generally see Statutes.

Repeal of statutes generally see Statutes.

98. Bradstreet Co. *v.* Jackson, 81 Miss. 233, 32 So. 999; State *v.* Burgoyne, 7 Lea (Tenn.) 173, 40 Am. Rep. 60.

99. Adams Express Co. *v.* Owensboro, 85 Ky. 265, 3 S. W. 370, 8 Ky. L. Rep. 908; Adams Express Co. *v.* Lexington, 83 Ky. 657; State *v.* Hammond Packing Co., 110 La. 180, 34 So. 368, 98 Am. St. Rep. 459; Hunter *v.* Memphis, 93 Tenn. 571, 26 S. W. 828; Cate *v.* State, 3 Sneed (Tenn.) 120.

1. Santa Monica *v.* Guidinger, 137 Cal. 658, 70 Pac. 732 (holding further that the enactment of a statute limiting the power of a municipality to impose license-taxes to purposes of regulation repeals an existing ordinance levying a license-tax for revenue); Washington Borough *v.* Sherwood, 9 Pa. Dist. 766.

2. Bradstreet Co. *v.* Jackson, 81 Miss. 233, 32 So. 999.

3. State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111.

4. Foster *v.* Dow, 29 Me. 442.

5. State *v.* Burgoyne, 7 Lea (Tenn.) 173, 40 Am. Rep. 60.

6. Sonora *v.* Curtin, 137 Cal. 583, 70 Pac. 674.

7. Atlanta Nat. Bldg., etc., Assoc. *v.* Stewart, 109 Ga. 80, 35 S. E. 73; Braun *v.* Chicago, 110 Ill. 186.

8. Osborne *v.* Mobile, 44 Ala. 493; Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588; Banta *v.* Chicago, 172 Ill. 204, 50 N. E. 233, 40 L. R. A. 611; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921; Turnpike Cases, 92 Tenn. 369, 22 S. W. 75; Kurth *v.* State, 86 Tenn. 134, 5 S. W. 593; Jenkins *v.* Ewin, 8 Heisk. (Tenn.) 456; Butchers Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 21 L. ed. 394. *Compare* Chicago *v.* Collins, 175 Ill. 445, 51 N. E. 907, 67 Am. St. Rep. 224, 49 L. R. A. 408, holding that with reference to something which is a right, free, and open to all, a license cannot possibly exist.

2. Particular Occupations and Privileges. As proper subjects for license or tax the following occupations or privileges have been sanctioned by the court: Any commercial or professional business;[9] corporate franchises and privileges;[10] dealing in "futures";[11] the keeping and use of animals;[12] the keeping of billiard or pool tables for profit;[13] the keeping of bowling alleys;[14] keeping concert and dancing halls;[15] keeping laundries;[16] keeping a restaurant;[17] mechanical

What business or occupation so far affects the public welfare and good order as to require a license is a matter of legislative control, which when exercised in good faith is outside the jurisdiction of the courts. Oil City *v.* Oil City Trust Co., 151 Pa. St. 454, 25 Atl. 124, 31 Am. St. Rep. 770.

A sale, however, of property by public officers or persons appointed for that purpose is not a business or occupation subject to a license-tax. Levy *v.* State, 161 Ind. 251, 68 N. E. 172.

Nor is one who comes to a city under a specific employment to attend to a special matter subject to an occupation tax. Evers *v.* Mayfield, 85 S. W. 697, 27 Ky. L. Rep. 481.

9. See Constitutional Law, 8 Cyc. 1116 note 92.

10. *Alabama.*—Troy Fertilizer Co. *v.* State, 134 Ala. 333, 32 So. 618.

Louisiana.— New Orleans *v.* Orleans R. Co., 42 La. Ann. 4, 7 So. 59, 21 Am. St. Rep. 365.

New Jersey.— Lumberville Delaware Bridge Co. *v.* State Bd. of Assessors, 55 N. J. L. 529, 26 Atl. 711, 25 L. R. A. 134; State *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

South Carolina.— Florida Cent., etc., R. Co. *v.* Columbia, 54 S. C. 266, 32 S. E. 408.

United States.— Duryea *v.* American Woodworking Mach. Co., 133 Fed. 329. See also Minot *v.* Philadelphia, etc., R. Co., 18 Wall. 206, 21 L. ed. 888.

See 32 Cent. Dig. tit. "Licenses," § 47.

To entitle a city to levy a license-tax on railway corporations it is not necessary that the right so to do be reserved in the ordinance granting the franchise. Newport News, etc., R., etc., Co. *v.* Newport News, 100 Va. 157, 40 S. E. 645.

A municipal corporation has no power under the "general welfare" clause of its charter to enact an ordinance providing that water companies shall be annually licensed, and shall pay a certain sum to the city for police purposes. Wilks-Barre *v.* Crystal Spring Water Co., 7 Kulp (Pa.) 31.

11. Alexander *v.* State, 86 Ga. 246, 12 S. E. 408, 10 L. R. A. 859; Memphis Brokerage Assoc. *v.* Cullen, 11 Lea (Tenn.) 75. See also Commerce, 7 Cyc. 483 note 57.

12. *Kansas.*— Iola *v.* Sugg, 8 Kan. App. 529, 56 Pac. 541.

Massachusetts.— Com. *v.* Coates, 169 Mass. 354, 47 N. E. 1011.

Michigan.— Van Horn *v.* People, 46 Mich. 183, 9 N. W. 246, 41 Am. Rep. 159.

New Hampshire.— State *v.* Colby, 67 N. H. 391, 36 Atl. 252.

Tennessee.— Mabry *v.* Tarver, 1 Humphr. 94.

Texas.— *Ex p.* Cooper, 3 Tex. App. 489, 30 Am. Rep. 152.

See 32 Cent. Dig. tit. "Licenses," § 41.

Compare Gibson *v.* Pulaski County, 2 Ark. 309.

13. *Kentucky.*— Metz *v.* Com., 2 Metc. 14.

Louisiana.— Merriam *v.* New Orleans, 14 La. Ann. 318.

Maryland.— Schmetzer *v.* State, 63 Md. 420; Germania *v.* State, 7 Md. 1.

Massachusetts.— Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.

Nebraska.—Morgan *v.* State, 64 Nebr. 369, 90 N. W. 108.

See 32 Cent. Dig. tit. "Licenses," § 43.

But see Washington *v.* State, 13 Ark. 752.

Regardless, however, of any profit to the owner thereof, the state has power to levy an occupation tax on a pool table run in connection with a saloon. Wright *v.* State, 41 Tex. Cr. 200, 53 S. W. 640.

Keeping tables for amusement only.— A statute requiring the keeper of a billiard table to pay a license does not include keeping one for mere amusement, and without compensation, either directly or indirectly. Clark *v.* State, 46 Ala. 307; Trade *v.* Benseman, 31 Tex. 277. But see Sears *v.* West, 5 N. C. 291, 3 Am. Dec. 694.

Keeping a billiard table is not a privilege within the meaning of the constitution allowing a tax to be imposed on privileges and therefore is not taxable. Stevens *v.* State, 2 Ark. 291, 35 Am. Dec. 72.

14. Spaight *v.* State, 29 Ala. 32; Smith *v.* Madison, 7 Ind. 86. See also Washington *v.* State, 13 Ark. 752.

15. State *v.* Schonhausen, 37 La. Ann. 42.

16. St. Joseph *v.* Lung, 93 Mo. App. 626, 67 S. W. 697; State *v.* Camp Sing, 18 Mont. 128, 44 Pac. 516, 56 Am. St. Rep. 551, 32 L. R. A. 635. See also Com. *v.* Pearl Laundry Co., 105 Ky. 259, 49 S. W. 26, 20 Ky. L. Rep. 1172 (holding further that one who launders towels as part of a towel-supply business for which he paid a license-tax, or one who merely receives and collects soiled clothes as the agent of another person, is not subject to the license-tax required for conducting a laundry); Independence *v.* Cleveland, 167 Mo. 384, 67 S. W. 216.

17. St. Johnsbury *v.* Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. St. Rep. 731.

The lessee, however, of a stall in a market-house who furnishes meals to the public does not keep an eating house within the meaning of a statute which requires that such persons

trades and pursuits in general;[18] mercantile business in general;[19] publishing a newspaper;[20] raising or grazing sheep;[21] sales of goods;[22] sales on exchanges;[23] selling certain publications;[24] selling foreign merchandise;[25] selling news-

shall take out a license and pay a license-fee. State *v.* Hall, 73 N. C. 252.

18. New Orleans *v.* Lagman, 43 La. Ann. 1180, 10 So. 244; Davidson *v.* State, 77 Md. 388, 26 Atl. 415. See also People *v.* O'Connell, 1 N. Y. App. Div. 110, 36 N. Y. Suppl. 1092; Lanzer *v.* Unterberg, 9 Misc. (N. Y.) 210, 29 N. Y. Suppl. 683.

Photography is not a mechanical pursuit so as to come within a constitutional provision exempting mechanical pursuits from the payment of an occupation tax. Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768.

19. *Alaska.*— *In re* Pacific Cold Storage Co., 1 Alaska 429.

Arkansas.— Engles *v.* Day, 3 Ark. 273.

California.— *Ex p.* Mount, 66 Cal. 448, 6 Pac. 78; Sacramento *v.* Crocker, 16 Cal. 119.

Louisiana.— New Orleans *v.* Koen, 38 La. Ann. 328; Iberia *v.* Chiapella, 30 La. Ann. 1143. See also Holmes *v.* Pettis, 6 La. Ann. 400.

Mississippi.— Craig *v.* Pattison, 74 Miss. 881, 21 So. 756; Pitts *v.* Vicksburg, 72 Miss. 181, 16 So. 418.

Missouri.— State *v.* Rodecker, 145 Mo. 450, 46 S. W. 1083; State *v.* Whittaker, 33 Mo. 457; Troy *v.* Harris, 102 Mo. App. 51, 76 S. W. 662.

Montana.— State *v.* Johnson, 20 Mont. 367, 51 Pac. 820.

North Carolina.— State *v.* Chadbourn, 80 N. C. 479, 30 Am. Rep. 94.

Pennsylvania.— Com. *v.* Teller, 144 Pa. St. 545, 22 Atl. 922; Butler's Appeal, 73 Pa. St. 448; Berks County *v.* Bertolet, 13 Pa. St. 522; Com. *v.* Bailey, 20 Pa. Super. Ct. 210; Com. *v.* Robb, 14 Pa. Super. Ct. 597; Com. *v.* Tombler Grocery Co., 6 Pa. Dist. 8; Com. *v.* Swift, 19 Pa. Co. Ct. 572; Com. *v.* Brinton, 14 Pa. Co. Ct. 460. See also Com. *v.* Pocono Mountain Ice Co., 23 Pa. Super. Ct. 267; Com. *v.* Stilz, 5 Pa. Dist. 673.

Tennessee.— Murray *v.* State, 11 Lea 218; Adams *v.* Somerville, 2 Head 363.

Texas.— Edwards *v.* State, (Cr. App. 1902) 69 S. W. 144.

See 32 Cent. Dig. tit. "Licenses," § 30.

To constitute a merchant within the meaning of the revenue laws of Kentucky the business of buying and selling should be the pursuit and vocation by which the party makes his living. State *v.* Smith, 5 Humphr. (Tenn.) 394.

A person selling on the market square country produce from his wagon and who has paid a curbage tax is not required to pay a license-tax as a merchant. Brown *v.* Com., 98 Va. 366, 36 S. E. 485.

A manufacturer who sells nothing but his own products and these only at the place of manufacture is not liable for the mercantile tax. Com. *v.* Crum Lynne Iron, etc., Co., 27 Pa. Super. Ct. 508.

A farmer who sells the product of his own farm, and occasionally that of his neighbor, cannot be rated as a dealer in goods and commodities within the meaning of the mercantile tax law. Barton *v.* Morse, 10 Phila. (Pa.) 360.

A plumber who has no place of business but his workshop and does not do business as a buyer or seller is not a dealer in goods, wares, and merchandise within the meaning of the law imposing mercantile license-taxes. Com. *v.* Gormly, 173 Pa. St. 586, 34 Atl. 282.

A trustee to whom goods are assigned for the payment of the assignor's debts is not liable to the merchant's tax, where he sells from the store without replenishing the stock. Ayrnett *v.* Edmundson, 9 Baxt. (Tenn.) 610.

Non-resident merchants.— The statute authorizing certain cities to impose a merchants' tax on merchants generally does not apply to non-resident merchants soliciting orders through their agents. Easton *v.* Easton Beef Co., 5 Pa. Co. Ct. 68.

20. Norfolk *v.* Norfolk Landmark Pub. Co., 95 Va. 564, 28 S. E. 959.

21. *Ex p.* Mirande, 73 Cal. 365, 14 Pac. 888; State *v.* Wheeler, 23 Nev. 143, 44 Pac. 430.

Driving sheep to be sheared into county imposing tax.— Under a county ordinance imposing a license-tax on persons engaged in raising or grazing sheep, one herding and pasturing his sheep in one county, except that he drives them to a farm in the county imposing the license-tax to be sheared, where they remain for a few days, is not liable for the license-tax. El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716.

Merely driving sheep through a county imposing tax.— A county ordinance imposing a license-tax on all persons engaged in the business of raising, grazing, and pasturing sheep within the county does not require the payment of a license by one who merely drives his sheep through the county as expeditiously as possible. Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293.

Question of fact.— The question whether persons who drive flocks of sheep across a county to pasture and graze in the county, so as to charge them under an ordinance licensing persons engaged in the business of raising, grazing, or herding sheep in the county, is a question of fact in each particular case. Inyo County *v.* Erro, 119 Cal. 119, 51 Pac. 32.

22. See COMMERCE, 7 Cyc. 483.

23. See COMMERCE, 7 Cyc. 484 note 58.

24. Thompson *v.* State, 17 Tex. App. 253, "Police Gazette," and the like.

25. Ward *v.* State, 31 Md. 279, 1 Am. Rep. 50; Com. *v.* Seltzer, 2 Woodw. (Pa.) 23; Webber *v.* Com., 33 Gratt. (Va.) 898.

papers;[26] selling to employees or tenants;[27] theaters and shows;[28] vehicles and means of transportation in general;[29] vehicles used in carrying passengers or property for hire or profit;[30] vehicles used by merchants or manufacturers in their own

A merchant tailor or his agent who sells by sample, taking measures and sending the cloth from another state, is liable for the privilege tax. Singleton *v.* Fritsch, 4 Lea (Tenn.) 93.

To authorize a person to sell foreign merchandise without a license he must have received it in exchange for articles of his manufacture or for produce of his own agriculture. Colson *v.* State, 7 Blackf. (Ind.) 590.

26. See COMMERCE, 7 Cyc. 484 note 60.

27. Thibaut *v.* Kearney, 45 La. Ann. 149, 12 So. 139, 18 L. R. A. 596; Craig *v.* Pattison, 74 Miss. 881, 21 So. 756; Alcorn *v.* State, 71 Miss. 464, 15 So. 37; *In re* Delaware, etc., Canal Co., 8 Pa. Co. Ct. 496. But see Luling *v.* Labranche, 30 La. Ann. 972.

28. See CONSTITUTIONAL LAW, 8 Cyc. 900, 1115 note 83. See also THEATERS AND SHOWS.

29. *Arkansas.*— Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

Missouri.— Kansas City *v.* Richardson, 90 Mo. App. 450. See also Hannibal *v.* Price, 29 Mo. App. 280.

New Jersey.— Cary *v.* North Plainfield, 49 N. J. L. 110, 7 Atl. 42.

New York.— Brooklyn *v.* Breslin, 57 N. Y. 591.

Pennsylvania.— Millerstown *v.* Bell, 123 Pa. St. 151, 16 Atl. 612.

See 32 Cent. Dig. tit. "Licenses," § 25.

Instances.— Automobiles (Com. *v.* Boyd, 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; State *v.* Cobb, 113 Mo. App. 156, 87 S. W. 551), bicycles (Davis *v.* Petrinovich, 112 Ala. 654, 21 So. 344, 36 L. R. A. 615. See also Densmore *v.* Erie, 20 Pa. Co. Ct. 513), row-boats (Poyer *v.* Desplaines, 22 Ill. App. 576), street sprinkling carts (St. Louis *v.* Woodruff, 4 Mo. App. 169), and trading carts (Zemurray *v.* Bouldin, 87 Miss. 583, 40 So. 15. See also Vicksburg, etc., R. Co. *v.* State, 62 Miss. 105).

Under a charter empowering a city to impose a tax on vehicles for street use, and also a tax on occupation, a city may impose a license-tax on vehicles for use in particular occupations in addition to that imposed for street use. St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045.

30. *Alabama.*— Browne *v.* Mobile, 122 Ala. 159, 25 So. 223.

Illinois.— Howland *v.* Chicago, 108 Ill. 496. See also Joyce *v.* East St. Louis, 77 Ill. 156.

Indiana.— Terre Haute *v.* Kersey, 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298; Scudder *v.* Hinshaw, 134 Ind. 56, 33 N. E. 791.

Iowa.— Des Moines *v.* Bolton, 128 Iowa 108, 102 N. W. 1045.

Kentucky.— Swetman *v.* Covington, 82 S. W. 386, 26 Ky. L. Rep. 701.

Massachusetts.— Com. *v.* Page, 155 Mass. 227, 29 N. E. 512.

Michigan.— Kerrigan *v.* Poole, 131 Mich. 305, 91 N. W. 163.

Missouri.— See Knox City *v.* Thompson, 19 Mo. App. 523.

Nebraska.— York *v.* Chicago, etc., R. Co., 56 Nebr. 572, 76 N. W. 1065.

New Jersey.— Belmar *v.* Barkalow, 67 N. J. L. 504, 52 Atl. 157.

New York.— Brooklyn *v.* Breslin, 57 N. Y. 591; People *v.* Saratoga Springs Sewer, etc., Comm., 90 N. Y. App. Div. 555, 86 N. Y. Suppl. 445; New York *v.* Reesing, 77 N. Y. App. Div. 417, 79 N. Y. Suppl. 331.

Ohio.— Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463. See also Cincinnati *v.* Bryson, 15 Ohio 625, 45 Am. Dec. 593.

Pennsylvania.— Gibson *v.* Coraopolis, 22 Pittsb. Leg. J. N. S. 64.

United States.— Washington *v.* Wheaton, 29 Fed. Cas. No. 17,239, 1 Cranch C. C. 318.

See 32 Cent. Dig. tit. "Licenses," § 26 *et seq.*

An electric carriage or automobile, although a vehicle, does not belong to the class of vehicles made the subject of license-tax by the act of the late legislative assembly of the District of Columbia of Aug. 23, 1871, imposing a tax on the proprietors of "hacks, cabs, omnibuses, and other vehicles for the transportation of passengers for hire," not having been known and in use as a vehicle at the time of the passage of that act. Washington Electric Vehicle Transp. Co. *v.* District of Columbia, 19 App. Cas. (D. C.) 462.

A city authorized to license expressmen can only license expressmen carrying on their business entirely within the city and cannot compel the express company carrying parcels from a place without to a place within a city, or *vice versa* to pay a license. Cairo *v.* Adams' Express Co., 54 Ill. App. 87.

One who has paid a license-tax as livery-stable keeper need not pay an additional license-tax on his vehicles. Taxing Dist. *v.* Brackett, 4 Lea (Tenn.) 323; Bell *v.* Watson, 3 Lea (Tenn.) 328.

A farmer who after his crop is laid by employs his horses and wagon in hauling wood for another party is not subject to a license on vehicles used in carrying property for hire. Gardner *v.* Lewis, 3 Lea (Tenn.) 195.

One's carts with which he hauls water for sale are not subject to a tax on vehicles for hire. Lafferranderie *v.* New Orleans, 3 La. 246.

Where a wagon is hired by its owner to another who uses it as a dray within a city where drays used for the purpose of carriage are subject to a privilege tax, the owner is liable for the tax. Hagan *v.* Hardie, 8 Heisk. (Tenn.) 812.

One engaged in running what is known as a "move wagon," moving furniture for hire at so much per load, always driving the

private business;[31] and vessels.[32] And among the persons whose occupations have been declared to be properly subject to license or tax are the following: Architects;[33] attorneys;[34] auctioneers;[35] bakers;[36] banks;[37] bill-posters;[38] brewers;[39] bridge companies;[40] brokers;[41] carriers;[42] cigar and tobacco dealers;[43] confec-

wagon and loading and unloading it himself, does not let his wagon for hire, within the meaning of a statute requiring a license from one who lets a wagon for hire. Orr *v.* State, 39 Tex. Cr. 124, 44 S. W. 1102.

Including vehicles used for pleasure.— Under a statute giving boroughs authority to levy a license-tax on vehicles used for hire, an ordinance placing a license-tax on vehicles which does not limit the tax to vehicles used for hire and which include wagons for pleasure is invalid. Mt. Oliver *v.* Hazelbart, 26 Pittsb. Leg. J. N. S. (Pa.) 400.

Vehicle let without driver.— An ordinance imposing a license for every vehicle or conveyance which is running for hire or profit does not apply to a conveyance which is let without a driver and is under the personal control of the hirer or his representatives. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

Hearses.— An ordinance imposing a license on each vehicle for passengers not having an annual hack license does not include hearses. Burlington *v.* Unterkircher, 99 Iowa 401, 68 N. W. 795.

Violating constitutional inhibition.— The levy by a city ordinance of an annual tax of twenty-five dollars upon every vehicle for transporting passengers or baggage drawn by two animals violates the constitutional inhibition against cities taxing an occupation more than one-half the amount levied thereon by the city. *Ex. p.* Slaren, 3 Tex. App. 662.

31. Heller *v.* Mobile, 48 Ala. 218; Johnson *v.* Macon, 114 Ga. 426, 40 S. E. 322; Kansas City *v.* Smith, 93 Mo. App. 217.

Under an ordinance taxing drays run for a profit.— A dray run by a merchant from his store to depots for accommodation of those buying goods of him is taxable, although he makes no charge for its use. Knoxville *v.* Sanford, 13 Lea (Tenn.) 545.

Non-resident manufacturer.— The fact that an owner of vehicles used to deliver merchandise to customers within a city from the place of manufacture outside the city limits did not reside in the city renders him none the less liable to a city tax on each vehicle used in the transportation of such merchandise. Kentz *v.* Mobile, 120 Ala. 623, 24 So. 952.

But unless strictly within the terms of the statute, vehicles used by merchants in the carriage of goods in their own private business are not taxable. Farwell *v.* Chicago, 71 Ill. 269; Henderson *v.* Marshall, 58 S. W. 518, 22 Ky. L. Rep. 671; St. Louis *v.* Grone, 46 Mo. 574; Dooley *v.* Bristol, 102 Va. 232, 46 S. E. 296.

32. See COMMERCE, 7 Cyc. 466, 483.

33. Burke *v.* Memphis, 94 Tenn. 692, 30 S. W. 742. See BUILDERS AND ARCHITECTS, 6 Cyc. 33.

34. *Florida.*— Young *v.* Thomas, 17 Fla. 169, 35 Am. Rep. 93.

Georgia.— Savannah *v.* Hines, 53 Ga. 616.

Louisiana.— State *v.* King, 21 La. Ann. 201; State *v.* Fellowes, 12 La. Ann. 344; State *v.* Waples, 12 La. Ann. 343.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289; Simmons *v.* State, 12 Mo. 268, 49 Am. Dec. 131.

North Carolina.— Wilmington *v.* Macks, 86 N. C. 88, 41 Am. Rep. 443; Holland *v.* Isler, 77 N. C. 1.

South Carolina.— State *v.* Hayne, 4 S. C. 403.

Texas.— *Ex p.* Williams, 31 Tex. Cr. 262, 20 S. W. 580, 21 L. R. A. 783; Trezvant *v.* State, (Cr. App. 1892) 20 S. W. 582; Hart *v.* State, 21 Tex. App. 318, 17 S. W. 127.

See 32 Cent. Dig. tit. "Licenses," § 19. See also CONSTITUTIONAL LAW, 8 Cyc. 900, 938 note 51.

But see Lawyers' Tax Cases, 8 Heisk. (Tenn.) 565.

A license to practise law vests no right beyond legislative control, nor confers any immunity from an occupation tax. State *v.* King, 21 La. Ann. 201; Languille *v.* State, 4 Tex. App. 312.

Taxing members of firm separately.— Authority to tax all persons exercising any profession may be exercised by taxing each member of a law firm separately. Jones *v.* Page, 44 Ala. 657; Blanchard *v.* State, 30 Fla. 223, 11 So. 785, 18 L. R. A. 409; Wilder *v.* Savannah, 70 Ga. 760, 48 Am. Rep. 598; Lanier *v.* Macon, 59 Ga. 187.

Non-resident attorneys.— However, a statute authorizing cities to impose licenses on attorneys residing therein does not authorize a tax on attorneys not residing therein, but having offices and doing business therein. Garden City *v.* Abbott, 34 Kan. 283, 8 Pac. 473.

35. See AUCTIONS AND AUCTIONEERS, 4 Cyc. 1039 *et seq.* See also COMMERCE, 7 Cyc. 483 note 57; CONSTITUTIONAL LAW, 8 Cyc. 938.

36. Mobile *v.* Yuille, 3 Ala. 137, 36 Am. Dec. 441; *In re* Meuschke, 26 Pittsb. Leg. J. N. S. (Pa.) 342.

37. See BANKS AND BANKING.

38. Rogers *v.* Sandersville, 120 Ga. 192, 47 S. E. 557. See also CONSTITUTIONAL LAW, 8 Cyc. 1047 note 95.

39. See COMMERCE, 7 Cyc. 484 note 57; CONSTITUTIONAL LAW, 8 Cyc. 1047 note 95.

40. See COMMERCE, 7 Cyc. 479.

41. See COMMERCE, 7 Cyc. 483 note 57.

42. See *infra*, text and notes 57, 60, 91 94, 97, 98.

43. Mobile *v.* Craft, 94 Ala. 156, 10 So. 534; Winston *v.* Taylor, 99 N. C. 210, 6 S. E. 114; Metz *v.* Hagerty, 51 Ohio St. 521, 38 N. E. 11; Knoxville Cigar Co. *v.* Cooper, 99

tioners;[44] corporations;[45] dairymen;[46] dealers in or sellers of oleomargarine;[47] dealers in second-hand goods;[48] dealers in trading-stamp enterprises;[49] dentists;[50] detectives;[51] domestic corporations;[52] druggists;[53] drummers and canvassers;[54] emigrant agents;[55] employment agents;[56] express companies;[57] factors and brokers;[58] farriers;[59] ferries;[60] foreign corporations;[61] foreign insurance companies;[62] grocery dealers;[63] hawkers and peddlers;[64] hospitals;[65] ice dealers;[66] innkeepers;[67] insurance brokers[68] or companies;[69] itinerant merchants or traders;[70]

Tenn. 472, 42 S. W. 687. See also COMMERCE, 7 Cyc. 483 note 57.

One whose chief business is that of a dry-goods merchant and who keeps a small stock of tobacco which he sells in very small quantities for the accommodation of his dry-goods customers is not a tobacco dealer and he is therefor not liable for selling without a license. Carter *v.* State, 44 Ala. 29.

44. See CONSTITUTIONAL LAW, 8 Cyc. 938 note 52.

45. See CONSTITUTIONAL LAW, 8 Cyc. 1116 note 90.

46. Orleans Police Jury *v.* Nougues, 11 La. Ann. 739.

47. See Foon.

48. See CONSTITUTIONAL LAW, 8 Cyc. 1115 note 85.

49. See CONSTITUTIONAL LAW, 8 Cyc. 1115 note 87.

50. *In re* Thompson, 36 Wash. 377, 78 Pac. 899. See PHYSICIANS AND SURGEONS.

51. See DETECTIVES.

52. See COMMERCE, 7 Cyc. 477.

53. See CONSTITUTIONAL LAW, 8 Cyc. 1115 note 80.

54. *Ex p.* Taylor, 58 Miss. 478. 38 Am. Rep. 336. See also *In re* Nichols, 48 Fed. 164. But see State *v.* Washmood, 58 Ark. 609, 26 S. W. 11.

However, one who, having a regular place of business, makes a single sale of flour sent to him from a distant state, and paid for, is not a drummer within the meaning of the statute requiring drummers to obtain a license. State *v.* Miller, 93 N. C. 511, 53 Am. Rep. 469.

55. State *v.* Roberson, 136 N. C. 587, 48 S. E. 595; Williams *v.* Fears, 179 U. S. 270, 21 S. Ct. 128, 45 L. ed. 186. But see Joseph *v.* Randolph, 71 Ala. 499, 46 Am. Rep. 347; Fraser *v.* McConway, etc., Co., 82 Fed. 257. And see CONSTITUTIONAL LAW, 8 Cyc. 1046 note 87; 1116 note 92.

An emigrant, within the act requiring a license in order to solicit emigrants, is one who leaves his country for any lawful reason with a design to settle elsewhere and takes his family and property with him. Varner *v.* State, 110 Ga. 595, 36 S. E. 93.

A person who comes into the state and employs on his own behalf laborers to work for him outside the state is not an emigrant agent within the meaning of a statute imposing a tax on such agents. Theus *v.* State, 114 Ga. 53, 39 S. E. 913; Carr *v.* Duplin County, 136 N. C. 125, 48 S. E. 597, construing N. C. Acts (1903), c. 247, § 74.

Person living near border line of state.— A statute imposing a license-tax on emigration agents does not apply to a person living near the border line of a state who employs laborers for service in his business beyond the limits of the state. Kendrick *v.* State, 142 Ala. 43, 39 So. 203.

Officer or corporation procuring laborers to work under himself.— An officer of a foreign corporation who comes into a state to procure laborers to work for him in another state on work which he manages for the corporation, and who receives no compensation for carrying the laborers out of the state, is not engaged in the business of an emigrant agent within the statute exacting a license-tax from persons engaged in such business. Lane *v.* Rowan County Com'rs, 139 N. C. 443, 52 S. E. 140.

56. Price *v.* People, 193 Ill. 114, 61 N. E. 844, 86 Am. St. Rep. 306, 55 L. R. A. 588. See also CONSTITUTIONAL LAW, 8 Cyc. 1116 note 87.

57. See COMMERCE, 7 Cyc. 479.

58. See FACTORS AND BROKERS, 19 Cyc. 187 *et seq.*

59. Bessette *v.* People, 193 Ill. 334, 62 N. E. 215, 51 L. R. A. 558. *Contra*, People *v.* Beattie, 96 N. Y. App. Div. 383, 89 N. Y. Suppl. 193; *In re* Aubrey, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952. *Compare* CONSTITUTIONAL LAW, 8 Cyc. 1115 note 87.

60. See COMMERCE, 7 Cyc. 479; FERRIES; MUNICIPAL CORPORATIONS.

61. See FOREIGN CORPORATIONS, 19 Cyc. 1253. See also COMMERCE, 7 Cyc. 477; CONSTITUTIONAL LAW, 8 Cyc. 1116 note 91.

62. See INSURANCE; MUNICIPAL CORPORATIONS.

63. Henry *v.* State, 26 Ark. 523; French *v.* Baker, 4 Sneed (Tenn.) 193. See, however, Guerin *v.* Asbury Park, 57 N. J. L. 292, 30 Atl. 472, construing N. J. Pamphl. Laws, p. 293.

64. See HAWKERS AND PEDDLERS, 21 Cyc. 374 *et seq.* See also CONSTITUTIONAL LAW, 8 Cyc. 1115 note 86.

65. See HOSPITALS.

66. Kansas *v.* Vindquest, 36 Mo. App. 584; State *v.* Worth, 116 N. C. 1007, 21 S. E. 204.

However, one manufacturing ice and selling his product is not a dealer within a statute imposing a tax on wholesale dealers in ice. Kansas City *v.* Butt, 88 Mo. App. 237; Egan *v.* State, (Tex. Cr. App. 1902) 68 S. W. 273.

67. See INNKEEPERS, 22 Cyc. 1073.

68. See INSURANCE; MUNICIPAL CORPORATIONS.

69. See INSURANCE. See also COMMERCE, 7 Cyc. 480; CONSTITUTIONAL LAW, 8 Cyc. 938 note 52.

70. *Georgia.*— Burr *v.* Atlanta, 64 Ga. 225.

junk dealers;[71] dealers in second-hand goods;[72] keepers of gaming houses;[73] liquor dealers;[74] livery-stable keepers;[75] lumber dealers;[76] manufacturers;[77] meat

Illinois.— Carrollton *v.* Bazzette, 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522, opinion of the court delivered by Carter, J.

Indiana.— Simoyan *v.* Rohan, 36 Ind. App. 495, 76 N. E. 176.

Iowa.— Cedar Falls *v.* Gentzer, 123 Iowa 670, 99 N. W. 561; Snyder *v.* Closson, 84 Iowa 184, 50 N. W. 678.

Massachusetts.— Com. *v.* Crowell, 156 Mass. 215, 30 N. E. 1015.

Nevada.— *Ex p.* Siebenhauer, 14 Nev. 365, Hawley, J., delivering the opinion of the court.

North Carolina.— State *v.* Gorham, 115 N. C. 721, 20 S. E. 179, 44 Am. St. Rep. 494, 25 L. R. A. 810; Wilmington *v.* Roby, 30 N. C. 250.

See 32 Cent. Dig. tit. "Licenses," § 31.

The fact that a duly authorized physician has the right to practise medicine anywhere in the state does not authorize him to become an itinerant vendor of his medicines without paying a license therefor. State *v.* Gouss, **85 Iowa 21, 51 N. W. 1147,** construing McClain's Iowa Code, § 2532.

A statute giving cities and towns power to define by ordinance who shall be considered transient merchants is not a grant of power to declare those persons to be merchants who by usual acceptance in the business world are not such. State *v.* Nelson, 128 Iowa 740, 105 N. W. 327.

Permanent merchants are not liable to be taxed as transient vendors; and where they opened their store subsequent to the annual assessment and action thereon by the board of supervisors they are not subject to taxation for that year. Bangle *v.* Holden, 52 Miss. 804.

One who acts as agent for a non-resident firm and takes orders for future delivery, the packages being made up by the firm and shipped to him for delivery and collection, is not an itinerant merchant or transient vendor within an ordinance requiring such to take out a license. Naegle *v.* Centralia, 81 Ill. App. 334.

An employee of a firm who takes orders for the sale of coffee, teas, and spices to be delivered on a future day to householders within a neighboring city for their own consumption, such orders being taken and the goods afterward being paid for within the limits of the city, is neither an itinerant merchant nor a transient vendor of merchandise and cannot be required to take out a license from the city as such. Waterloo *v.* Heely, 81 Ill. App. 310.

A traveling salesman receiving a stated salary and expenses, exposing samples and soliciting orders from customers which he sends to his employers, who ship the goods to the purchasers, is not a merchant within an ordinance requiring a transient merchant to take out a license. State *v.* Nelson, 128 Iowa 740, 105 N. W. 327.

An itinerant optician who merely prescribes and collects for spectacles, having his orders filled and charged to him by a supply house, is not subject to a license-tax as an itinerant merchant. Waukon *v.* Fisk, 124 Iowa 464, 100 N. W. 475.

One who goes from place to place soliciting orders for the enlargement of pictures and the furnishing of frames therefor, to be paid for on delivery if the work is satisfactory to the purchaser, is subject to a license-tax as an itinerant merchant. Twining *v.* Elgin, 38 Ill. App. 356.

Non-residents.— A statute authorizing the imposition of a license-tax on all persons engaging in a transient retail business does not authorize a license on non-residents doing a transient business in the state. Danville *v.* Leiberman, 16 Pa. Co. Ct. 394.

71. Duluth *v.* Bloom, 55 Minn. 97, 56 N. W. 580, 21 L. R. A. 689; Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

A citizen of another town who buys from a certain number of carriage manufacturers who are customers of his bits of new iron left from larger pieces used in the manufacture of their carriages, and which are not available for use in that line, is not a junk dealer so as to be obliged to take out a municipal license. Com. *v.* Ringold, 182 Mass. 308, 65 N. E. 374.

72. Lasley *v.* District of Columbia, 14 App. Cas. (D. C.) 407; State *v.* Segel, 60 Minn. 507, 62 N. W. 1134; Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463. See also Shelton *v.* Silverfield, 104 Tenn. 67, 56 S. W. 1023.

Book seller dealing in such stock as is usually kept in a book store who buy and sell in connection with their other business, and incidental thereto, second-hand books, are not dealers in second-hand goods within the meaning of an ordinance requiring dealers in second-hand goods to procure a license. Eastman *v.* Chicago, 79 Ill. 178.

73. See CONSTITUTIONAL LAW, 8 Cyc. 1115 note 84. See also GAMING.

74. See CONSTITUTIONAL LAW, 8 Cyc. 900, 938 note 52, 1115 notes 77, 78 See also INTERNAL REVENUE; INTOXICATING LIQUORS.

75. See LIVERY-STABLE KEEPERS.

76. Campbell *v.* Anthony, 40 Kan. 652, 20 Pac. 492; Folkes *v.* State, 63 Miss. 81, construing Miss. Code (1880), § 585.

But the fact that a merchant in a country town sometimes takes lumber or shingles in payment of a debt or in exchange for goods kept by him for sale does not make him a lumber dealer within a statute imposing a license-tax on lumber dealers. State *v.* Barnes, 126 N. C. 1063, 35 S. E. 605, construing N. C. Laws (1899), c. 11, § 58.

77. *Georgia.*— Alexander *v.* State, 109 Ga. 805, 35 S. E. 271.

Louisiana.— Barnard *v.* Gall, 43 La. Ann. 959, 10 So. 5; New Orleans *v.* Clark, 15 La. Ann. 614.

New Jersey.— Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

dealers;[78] merchants;[79] milk dealers;[80] money lenders;[81] note-shavers;[82] packers and carriers of oysters;[83] patent medicine vendors;[84] pawnbrokers;[85] persons dealing in food;[86] pharmacists;[87] photographers;[88] physicians and surgeons;[89] pilots;[90] pipe-line companies;[91] plumbers;[92] produce dealers;[93] railroad companies;[94] sewing-machine agents;[95] soda-water dealers;[96] steamship companies;[97] street railroad companies;[98] teachers;[99] telegraph and telephone companies;[1]

North Carolina.— Royster Guano Co. *v.* Tarboro, 126 N. C. 68, 35 S. E. 231.

Ohio.— Eagle *v.* Sohn, 41 Ohio St. 691, 52 Am. Rep. 103. See also Tippecanoe *v.* Boercher, 5 Ohio Cir. Ct. 6, 3 Ohio Cir. Dec. 4.

See 32 Cent. Dig. tit. "Licenses," § 23.

A company employed in publishing a newspaper is not a manufacturing company within the meaning of a statute imposing a license-tax. Evening Journal Assoc. *v.* State Bd. of Assessors, 47 N. J. L. 36, 54 Am. Rep. 114.

A merchant tailor who fashions suits of clothes from purchased cloth is not a manufacturer within the statute requiring a manufacturer to pay a license-fee. State *v.* Johnson, 20 Mont. 367, 51 Pac. 820.

The business of refining crude cotton oil is not a manufacturing business within the constitutional provision authorizing the imposition of license-taxes on the business of manufacturing cotton seed oil. Union Oil Co. *v.* Marrero, 52 La. Ann. 357, 26 So. 766.

78. *Florida.*— Johnson *v.* Armour, 31 Fla. 413, 12 So. 842.

Georgia.— Stewart *v.* Kehrer, 115 Ga. 184, 41 S. E. 680.

Michigan.— Ash *v.* People, 11 Mich. 347, 83 Am. Dec. 740.

Minnesota.— St. Paul *v.* Colter, 12 Minn. 41, 90 Am. Dec. 278. *Compare* St. Paul *v.* Laidler, 2 Minn. 190, 72 Am. Dec. 89.

Missouri.— St. Louis *v.* Freivogel, 95 Mo. 533, 8 S. W. 715; Rockville *v.* Merchant, 60 Mo. App. 365; St. Louis *v.* Spiegel, 16 Mo. App. 210.

New York.— Rochester *v.* Pettinger, 17 Wend. 265.

North Carolina.— Lacy *v.* Armour Packing Co., 134 N. C. 567, 47 S. E. 53. See also State *v.* Green, 126 N. C. 1032, 35 S. E. 462.

Pennsylvania.—Com. *v.* Hiller, 7 Pa. Dist. 471; Harrisburg *v.* Deimler, 19 Pa. Co. Ct. 542.

South Carolina.— Camden *v.* Roberts, 55 S. C. 374, 33 S. E. 456.

Tennessee.— Eastman *v.* Jackson, 10 Lea 162.

Virginia.— Sledd *v.* Com., 19 Gratt. 813.

See 32 Cent. Dig. tit. "Licenses," § 37.

The requirement of the revenue as to butchers' licenses does not apply to a person who buys for meat the bodies of animals already slaughtered and cuts them up and retails them at a market stall. Henback *v.* State, 53 Ala. 523, 25 Am. Rep. 650.

79. See COMMERCE, 7 Cyc. 483 note 57.

80. Littlefield *v.* State, 42 Nebr. 223, 60 N. W. 724, 47 Am. St. Rep. 697, 28 L. R. A. 588; People *v.* Mulholland, 19 Hun (N. Y.) 548.

81. State *v.* Tolman, 106 La. 662, 31 So. 320; State *v.* Knox, 52 Mo. 418. See also Morton *v.* Macon, 111 Ga. 162, 36 S. E. 627, 50 L. R. A. 485.

82. Trentham *v.* Moore, 111 Tenn. 346, 76 S. W. 904.

But a statute imposing a license-tax on persons shaving notes does not apply to the purchase of a judgment on a note for less than the face thereof. Mace *v.* Buchanan, (Tenn. Ch. App. 1899) 52 S. W. 505.

83. See COMMERCE, 7 Cyc. 484 note 59.

84. Laffer's Appeal, 13 Phila. (Pa.) 499; Love *v.* State, 31 Tex. Cr. 469, 20 S. W. 978.

85. Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116; Hunt *v.* Philadelphia, 35 Pa. St. 277. See also Schaul *v.* Charlotte, 118 N. C. 733, 24 S. E. 526; and CONSTITUTIONAL LAW, 8 Cyc. 1115 note 85; PAWNBROKERS.

86. See CONSTITUTIONAL LAW, 8 Cyc. 1115 note 81.

87. State *v.* Heinemann, 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34.

88. Mullinnix *v.* State, 42 Tex. Cr. 526, 60 S. W. 768.

89. See CONSTITUTIONAL LAW, 8 Cyc. 115 note 79, 900, 1046 note 91. See also PHYSICIANS AND SURGEONS.

90. See PILOTS.

91. See COMMERCE, 7 Cyc. 480.

92. See CONSTITUTIONAL LAW, 8 Cyc. 900, 1115 note 81.

93. Kansas City *v.* Lorber, 64 Mo. App. 604.

However, one who sells meats alone is not a produce dealer. District of Columbia *v.* Oyster, 4 Mackey (D. C.) 285, 54 Am. Rep. 275.

94. See COMMERCE, 7 Cyc. 480, 483 note 57. See also RAILROADS.

95. St. Louis *v.* Bowler, 94 Mo. 630, 7 S. W. 434.

96. First Municipality *v.* Manuel, 4 La. Ann. 328.

97. See COMMERCE, 7 Cyc. 483.

98. See STREET RAILROADS.

99. Union County *v.* James, 21 Pa. St. 525. See also SCHOOLS AND SCHOOL-DISTRICTS.

1. *Kansas.*— *In re* Chipchase, 56 Kan. 357, 43 Pac. 264.

Nebraska.— Western Union Tel. Co. *v.* Fremont, 39 Nebr. 692, 58 N. W. 415, 26 L. R. A. 698.

New York.— Philadelphia *v.* Postal Tel. Cable Co., 21 N. Y. Suppl. 556.

Pennsylvania.— Chester *v.* Western Union Tel. Co., 154 Pa. St. 464, 25 Atl. 1134; Allentown *v.* Western Union Tel. Co., 148 Pa. St. 117, 23 Atl. 1070, 33 Am. St. Rep. 820; West-

turnpike companies;[2] vendors of lottery tickets;[3] warehousemen;[4] water companies;[5] and wood dealers.[6]

3. Exemptions — a. In General. In the absence of constitutional inhibition, express or implied,[7] any particular business or occupation or class of persons engaged therein may be exempted by the state from license taxation.[8]

b. Construction of Statutory and Constitutional Provisions. An exemption from license taxation under a constitutional or statutory provision is in derogation of common right and must receive a strict interpretation.[9]

c. Occupations and Classes of Persons Exempted. Among the many occupations and classes of persons whose exemption from taxation by statutory provision has been upheld by the courts are the following: Clerks;[10] disabled or indigent confederate soldiers;[11] manufacturers;[12] and mechanical trades and pursuits.[13]

ern Union Tel. Co. *v.* Philadelphia, 9 Pa. Cas. 300, 12 Atl. 144.

Tennessee.— Western Union Tel. Co. *v.* Harris, (Ch. App. 1899) 52 S. W. 748.

Wisconsin.— See Wisconsin Tel. Co. *v.* Oshkosh, 62 Wis. 32, 21 N. W. 828.

See also Commerce, 7 Cyc. 482; Telegraphs and Telephones.

2. See Toll-Roads.

3. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497; France *v.* Washington, 9 Fed. Cas. No. 5,028, 5 Cranch C. C. 667.

4. See Warehousemen.

5. See Waters.

6. Washington *v.* Casanave, 29 Fed. Cas. No. 17,225, 5 Cranch C. C. 500.

7. New Orleans *v.* Louisiana Sav. Bank, etc., Co., 31 La. Ann. 637.

8. New Orleans *v.* Mülé, 38 La. Ann. 826; Oil City *v.* Oil City Trust Co., 151 Pa. St. 454, 25 Atl. 124, 31 Am. St. Rep. 770; Durach's Appeal, 62 Pa. St. 491; Com. *v.* Muir, 1 Pa. Super. Ct. 575.

But the classification for exemption must not be unreasonable so as to deny equal protection of the law to all persons similarly situated with reference to that law. Levy *v.* Royston, 84 Miss. 15, 36 So. 69; State *v.* Whitcom, 122 Wis. 110, 99 N. W. 468.

9. State *v.* American Sugar Refining Co., 51 La. Ann. 562, 25 So. 447; Morehouse Parish *v.* Brigham, 41 La. Ann. 665, 6 So. 257; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921. See also People *v.* Morgan, 59 N. Y. App. Div. 302, 69 N. Y. Suppl. 263.

Implied exemption.— Under an act providing that no one shall be exempt from the privilege taxes imposed thereby "except as herein provided," there cannot be an implied exemption in favor of one who takes a given business, because he also carries on another business that is licensed. Knoxville Cigar Co. *v.* Cooper, 99 Tenn. 472, 42 S. W. 687.

The exemption of importers from a mercantile license-tax refers to those who import merchandise from abroad through the ports of entry, and not to those who buy from sister states. Com. *v.* H. C. Tombler Grocery Co., 6 Pa. Dist. 8.

One who claims exemption, either total or partial, from an occupation tax must justify his claim by the clearest grant of organic or statute law. Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

Retroactive operation of constitutional or statutory provisions.— An amendment to a constitution which exempts from license certain occupations is not retroactive, so as to exempt those occupations from license-taxes due prior to the adoption of the amendment. State *v.* New Orleans, 40 La. Ann. 697, 4 So. 891.

10. State *v.* Chapman, 35 La. Ann. 75.

11. Coxwell *v.* Goddard, 119 Ga. 369, 46 S. E. 412; Hartfield *v.* Columbus, 109 Ga. 112, 34 S. E. 288; Holliman *v.* Hawkinsville, 109 Ga. 107, 34 S. E. 214.

12. State *v.* American Sugar Refining Co., 108 La. 603, 32 So. 965; State *v.* A. W. Wilbert's Sons Lumber, etc., Co., 51 La. Ann. 1223, 26 So. 106; State *v.* American Biscuit Mfg. Co., 47 La. Ann. 160, 16 So. 750; State *v.* Dupré, 42 La. Ann. 561, 7 So. 727; New Orleans *v.* Ernst, 35 La. Ann. 746; Rex *v.* Mainwaring, 10 B. & C. 66, 8 L. J. M. C. O. S. 36, 5 M. & R. 57, 21 E. C. L. 38.

Question of law.— The question as to whether a given person is a manufacturer, and therefore exempt from license taxation, is one of law for the court. State *v.* American Sugar Refining Co., 108 La. 603, 32 So. 965.

One who fails to bring himself clearly within the strict definition of a manufacturer will be denied exemption as such. State *v.* Eckendorf, 46 La. Ann. 131, 14 So. 518; New Orleans *v.* Mannessier, 32 La. Ann. 1075; New Orleans *v.* New Orleans Coffee Co., 46 La. Ann. 86, 14 So. 502; Tippecanoe *v.* Boercher, 5 Ohio Cir. Ct. 6, 3 Ohio Cir. Dec. 4; Com. *v.* Vetterlein, 29 Pa. Super. Ct. 294; Naff *v.* Russell, 2 Coldw. (Tenn.) 36.

13. State *v.* Hirn, 46 La. Ann. 1443, 16 So. 403; New Orleans *v.* Pohlmann, 45 La. Ann. 219, 12 So. 116; State *v.* Dielenschneider, 44 La. Ann. 1116, 11 So. 823; New Orleans *v.* Lagman, 43 La. Ann. 1180, 10 So. 244; Theobalds *v.* Conner, 42 La. Ann. 787, 7 So. 689; People *v.* Sawyer, 106 Mich. 428, 64 N. W. 333; *Ex p.* Butin, 28 Tex. App. 304, 13 S. W. 10. See also New Orleans *v.* Robira, 42 La. Ann. 1098, 8 So. 402, 11 L. R. A. 141.

Although a mechanic employs assistance, he is still engaged in a mechanical pursuit within the constitutional exemption from a license-tax. New Orleans *v.* Bayley, 35 La. Ann. 545.

In like manner exemptions from license taxation of persons selling the products of their own or leased lands have been sanctioned.[14]

d. Exemption in Corporate Charters. A provision in a charter of a corporation exempting it from taxation does not include an exemption from license taxation.[15]

E. Eligibility For License — 1. Who Entitled Generally. It is competent for the state, or for a municipality to which the power has been delegated, to annex any condition to the granting of a license which it deems proper.[16] But in the absence of any provision to the contrary in the act or ordinance requiring a license to pursue a given occupation, business, or calling, whoever may have the legal capacity to contract is entitled, as a matter of right, to the license on payment of the prescribed fee.[17]

2. Examination of Applicant. Under a statute requiring an examination of an applicant for a license, as to his experience and ability to carry on a given trade or business, it is error for the licensing board to examine him merely as to the theory, without referring to his experience.[18]

F. Persons Having Right to Issue License — 1. In General. The officer or public body having the power to issue the license is generally specifically mentioned in the act or ordinance requiring such license.[19]

2. Discretion of in Granting or Refusing. The power vested in the officer or public body to grant licenses, unless mandatory in terms,[20] carries with it the right to exercise a reasonable discretion;[21] but this discretion is to be exercised reason-

A master builder who employs a workman to execute a contract, although he may superintend the work and in doing so uses the square, spirit level, and straight edge, is not exempt under a constitutional provision declaring persons pursuing any trade shall be liable to pay a license-tax except those engaged in a mechanical pursuit. New Orleans *v.* Leibe, 45 La. Ann. 346, 12 So. 625.

14. *In re* Abel, 10 Ida. 288, 77 Pac. 621; Kansas City *v.* Overton, 68 Kan. 560, 75 Pac. 549; State *v.* Spaugh, 129 N. C. 564, 40 S. E. 60. See also King *v.* Labranche, 35 La. Ann. 305.

15. State *v.* Citizens' Bank, 52 La. Ann. 1086, 27 So. 709; New Orleans *v.* State Nat. Bank, 34 La. Ann. 892; New Orleans *v.* Louisiana Sav. Bank, etc., Co., 31 La. Ann. 637; Knoxville, etc., R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115, 53 L. R. A. 921.

16. People *v.* Meyers, 95 N. Y. 223; Metropolitan Bd. of Excise *v.* Barrie, 34 N. Y. 657; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711; Pullman Southern Car Co. *v.* Nolan, 22 Fed. 276. See also State *v.* Briggs, 45 Oreg. 366, 77 Pac. 750, 78 Pac. 361.

Conditions which have been upheld as reasonable: The payment of both a city and state tax as a condition precedent to the actual issuance of the license. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292. Disclosure by applicant of the name of each and every agent representing him. Kiel *v.* Chicago, 69 Ill. App. 685. Disclosure by applicant of the probable amount of his business. San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797. Furnishing by applicant of written recommendations as to his character. Whitten *v.* Covington, 43 Ga. 421; Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116. Proof that applicant is a suitable person to carry on the business. *In re* Bickerstaff, 70 Cal. 35, 11 Pac. 393.

Recommendation that a license be granted to two persons cannot be taken to recommend a license to one of them. Batchelder *v.* Erb, 47 N. J. L. 92.

17. Furman Farm Implement Co. *v.* Long, 113 Ala. 203, 21 So. 339; People *v.* Perry, 13 Barb. (N. Y.) 206.

Demanding additional tax.—Under the Alabama statute requiring corporations doing business in the state to pay an annual privilege tax, the judge of probate is not authorized to demand payment of the county tax as a condition to issuing a license to such a corporation. Phoenix Carpet Co. *v.* State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 160.

18. People *v.* Scott, 96 Hun (N. Y.) 174, 33 N. Y. Suppl. 229.

19. State *v.* Bezoni, 51 Mo. 254; Com. *v.* Bacon, 8 Serg. & R. (Pa.) 135; Stevenson *v.* Deal, 2 Pars. Eq. Cas. (Pa.) 212.

20. Matter of O'Rourke, 9 Misc. (N. Y.) 564, 30 N. Y. Suppl. 375; Com. *v.* Stokley, 12 Phila. (Pa.) 316. See also People *v.* Perry, 13 Barb. (N. Y.) 206, construing an ordinance requiring a license to be mandatory in its effect, although permissive in form.

21. People *v.* Grant, 126 N. Y. 473, 27 N. E. 964; People *v.* Thacher, 42 Hun (N. Y.) 349; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088; Com. *v.* Baldwin, 14 Phila. (Pa.) 93; State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

Power to revoke a license at pleasure necessarily includes the power to judge of the propriety of issuing the license. People *v.* New York, 7 How. Pr. (N. Y.) 81.

A declaration of willingness to grant the license on certain conditions does not exhaust

ably, not arbitrarily.[22] If he had no power to issue the license, no action will lie against a licensing officer for refusal to grant a license, even though he assigned a false reason for his refusal.[23] Although a licensing officer refuses to license a person desiring to pursue a given occupation, the latter cannot restrain the former from interfering with his pursuit of the business without a license, as the latter has an adequate remedy at law.[24]

G. Mandamus to Procure License.[25] If the power vested in the licensing officer is mandatory in form[26] or in effect[27] mandamus will lie to compel him to grant a license; but the writ will not lie where it is within the discretion of the licensing officer to refuse the license.[28]

H. Form and Requisites of License. While neither any particular form of writing nor any technical words seem to be required, the license should at least be sufficiently definite in terms to make plain the protection intended to be afforded and the privilege intended to be given under it.[29]

I. Operation and Effect of License — 1. IN GENERAL. The granting of a license is nothing more than a mere form of imposing a tax, and its principal purpose and effect is to insure the licensee that he shall be subject to no penalties prescribed by the licensing authorities;[30] but, by issuing a license, the licensing authority does not surrender its right to subject the licensee to a reasonable regulation for the public good in the pursuit of the business.[31]

2. WHEN IT TAKES EFFECT — a. In General. A license to pursue a given occupation or business takes effect from its actual delivery,[32] and not from its date,[33] or from the date of the act or ordinance granting it.[34]

b. Not Retroactive. In the absence of express provision therefor in the statute requiring the license,[35] the granting of a license has no retroactive effect, so as

the discretion of the licensing officer. State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

22. Harrison *v.* People, 101 App. 224; Swift *v.* People, 63 Ill. App. 453; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088; Com. *v.* Baldwin, 14 Phila. (Pa.) 93. *Compare* People *v.* New York, 7 How. Pr. (N. Y.) 81, where it was held that the mayor's discretion to license stage-drivers is absolute, that he is not bound to assign any reason for his decision, and that impeachment is the only remedy for an abuse of power.

23. State *v.* Bezoni, 51 Mo. 254.

24. Klinesmith *v.* Harrison, 18 Ill. App. 467.

25. For matters relating to mandamus generally see MANDAMUS.

26. Matter of O'Rourke, 9 Misc. (N. Y.) 564, 30 N. Y. Suppl. 375; Com. *v.* Stokley, 12 Phila. (Pa.) 316; State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

27. Phœnix *v.* State, 118 Ala. 143, 22 So. 627, 72 Am. St. Rep. 143; People *v.* Perry, 13 Barb. (N. Y.) 206.

28. Harrison *v.* People, 101 Ill. App. 224; People *v.* Wurster, 14 N. Y. App. Div. 556, 43 N. Y. Suppl. 1088; People *v.* Grant, 58 Hun (N. Y.) 455, 12 N. Y. Suppl. 879; People *v.* Thacher, 42 Hun (N. Y.) 349; People *v.* New York, 7 How. Pr. (N. Y.) 81; Com. *v.* Baldwin, 14 Phila. (Pa.) 93; State *v.* Hagood, 30 S. C. 519, 9 S. E. 686, 3 L. R. A. 841.

Defective petition.— Nor will a mandamus be granted to compel a licensing officer to sign a license where the petition for the license is not signed as required by the statute imposing the license-tax. Welsford *v.* Weidlein, 23 Kan. 601.

29. Com. *v.* Brahany, 123 Mass. 245, holding that where a license is required for the privilege of keeping a certain animal, the description must be so definite and accurate as to furnish the means of identifying the animal which the license protects.

What not equivalent to license.— If the graduates of a school are required to obtain a license before they are entitled to pursue a given calling, their diplomas cannot be regarded as the equivalent of licenses. *In re* Villeré, 33 La. Ann. 998, holding further that an order admitting one to practise as an attorney in all the courts of the state is equivalent to the required license.

30. License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

31. Keck *v.* Cincinnati, 6 Ohio S. & C. Pl. Dec. 97. See also Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173.

32. State *v.* Pate, 67 Mo. 488. See Elsberry *v.* State, 52 Ala. 8, holding that a license does not relate back and cover time previous to its delivery, so as to protect the licensee from prosecution for carrying on such business without a license.

33. State *v.* Pate, 67 Mo. 448. *Compare* Charleston *v.* Corleis, 2 Bailey (S. C.) 186, holding that the granting of an occupation license from a day past protects the licensee from prosecution for offenses between the date of the license and the date of its delivery.

34. Sights *v.* Yarnalls, 12 Gratt. (Va.) 292. See also State *v.* Hughes, 24 Mo. 147.

35. McIver *v.* Clarke, 71 Miss. 444, 14 So. 257; Harness *v.* Williams, 64 Miss. 600, 1 So. 759.

to protect the licensee against prosecution for acts done prior to the actual issue of the license.[36]

3. As to Territory in Which to Pursue Occupation. A license issued by a state to pursue a certain calling enables the licensee to pursue such calling in any county of the state;[37] but where the statute provides that the license shall not be exercised in any city or county other than that in which it is issued, the license cannot be exercised beyond the limits of the city or town in which it is so issued.[38]

4. No Protection For Different Business. A license to pursue a given occupation does not confer the right to pursue another distinctly different one.[39]

5. Confers No Right to Violate Criminal Laws. Neither a federal[40] nor a municipal license[41] authorizes the licensee to violate the criminal laws of the state; nor does a state license entitle a licensee to pursue his business in violation of the criminal laws of the state,[42] or in violation of the ordinances of a city.[43]

6. Does Not Create Monopoly. A license to pursue a given occupation does not necessarily give to the licensee the exclusive right to pursue such occupation.[44]

7. Whom It Protects. Although the payment of the license-tax by one person does not protect a plurality of persons, whether acting as copartners or otherwise, where the privilege conferred upon the licensee is purely personal,[45] yet where the tax is levied on the business itself, and not on the person or persons engaged therein, a license issued to one of the persons engaged in such business protects all engaged therein.[46] A license to one partner individually affords protection only for those acts which in law are merely his individual acts, and hence confers no authority upon his partners or on the partnership.[47] And a license to a partnership does not protect the members thereof in their individual business.[48] But where the license-tax is levied on a particular business, and not on the individuals engaged therein, the payment of the tax protects all engaged in the business, whether they were partners at the time of securing the license or became such subsequently.[49] So too an occupation license issued to a firm protects one of its members who becomes the assignee of the partnership effects and continues to transact the business at the same place on the retirement of his copartner.[50]

36. Elsberry *v.* State, 52 Ala. 8; State *v.* Pate, 67 Mo. 488; Rogers *v.* State, 35 Tex. Cr. 543, 34 S. W. 634. *Compare* Charleston *v.* Corleis, 2 Bailey (S. C.) 186.

37. Latta *v.* Williams, 87 N. C. 126.

38. Salfner *v.* State, 84 Md. 299, 35 Atl. 885.

39. Odell *v.* Atlanta, 97 Ga. 670, 25 S. E. 173; State *v.* Union, etc., Ins. Co., 8 Ida. 240, 67 Pac. 647; New Orleans *v.* Metropolitan Loan, etc., Bank, 31 La. Ann. 310. See also Com. *v.* Ellis, 158 Mass. 555, 33 N. E. 651; Com. *v.* Brahany, 123 Mass. 245.

40. Block *v.* Jacksonville, 36 Ill. 301; State *v.* Carney, 20 Iowa 32; State *v.* Keenan, 11 Allen (Mass.) 262; Com. *v.* Holbrook, 10 Allen (Mass.) 200; Pervear *v.* Massachusetts, 5 Wall. (U. S.) 475, 18 L. ed. 608; License Tax Cases, 5 Wall. (U. S.) 462, 18 L. ed. 497.

41. State *v.* Lindsay, 34 Ark. 372; Port Clinton *v.* Shafer, 5 Pa. Dist. 583.

42. Blaufield *v.* State, 103 Tenn. 593, 53 S. W. 1090. But see State *v.* Duncan, 16 Lea (Tenn.) 79.

43. Com. *v.* Ellis, 158 Mass. 555, 33 N. E. 651; Com. *v.* Lagorio, 141 Mass. 81, 6 N. E. 546; Com. *v.* Fenton, 139 Mass. 195, 29 N. E. 653.

44. New York *v.* Reesing, 38 Misc. (N. Y.) 129, 77 N. Y. Suppl. 82; Butchers' Union Slaughter-House, etc., Co. *v.* Crescent City Live-Stock Landing, etc., Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. ed. 585.

45. Stokes *v.* Prescott, 4 B. Mon. (Ky.) 37; State *v.* Morrison, 126 N. C. 1123, 36 S. E. 329; State *v.* Rhyne, 119 N. C. 905, 26 S. E. 126. See also State *v.* Smith, 93 N. C. 516; Lewis *v.* Dugar, 91 N. C. 16, both holding further that under the statute governing the subject a drummer is not protected from the penalty imposed by the statute, unless he shall be actually in possession of the license while doing business.

46. Carter *v.* State, 60 Miss. 456.

47. Long *v.* State, 27 Ala. 32; Harding *v.* Hagar, 63 Me. 515.

48. Harding *v.* Hagar, 63 Me. 515.

49. Harness *v.* Williams, 64 Miss. 600, 1 So. 759; Carter *v.* State, 60 Miss. 456.

50. Spielman *v.* State, 27 Md. 520; St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878 (holding further that an ordinance requiring the license for the privilege of conducting the particular business and declaring the location of the business shall not be changed without the mayor's consent, and that the license shall not be transferable or used for the benefit of any person other than to whom it is issued, does not indicate that where a license was issued to a firm and one of the partners retired, the license should not

J. Transfer and Termination of Rights — 1. TRANSFER. In the absence of express provision to the contrary,[51] a license which is a special privilege conferred by the government on the individual is construed to be a personal trust and confidence which cannot be assigned without the consent of the granting power.[52]

2. TERMINATION — a. Power to Fix. The power to license any occupation or business also involves the necessity of determining the duration of the license;[53] but under a statute providing that if a proper privilege tax has been paid before its passage, it shall protect the privilege to the expiration of the license a person who has paid his privilege tax prior to the passage of the statute will be protected so far as the privilege is concerned.[54]

b. How Terminated — (I) *BY REVOCATION* — (A) *Power to Revoke.* A mere occupation or privilege license granted by a state is always revokable, the correlative power to revoke the license being a necessary consequence of the main power to grant it.[55] And this correlative power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect.[56] But in the absence of authority therefor in its charter,[57] a municipality may not impose a license-tax on an occupation or privilege on condition that the license shall be revokable upon the violation of the ordinance regulating such occupation or privilege.[58] Nor can the mayor, when the power of revocation is given by the charter

protect the continuing partner); U. S. *v.* Glab, 99 U. S. 225, 25 L. ed. 273. See also Hinckley *v.* Germania F. Ins. Co., 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445; U. S. *v.* Davis, 37 Fed. 468.

51. *In re* Umholtz, 191 Pa. St. 177, 43 Atl. 75; Michelson *v.* White, (Tex. Civ. App. 1894) 25 S. W. 801.

52. *Alabama.*— Southern Car, etc., Co. *v.* State, 133 Ala. 624, 32 So. 235; Long *v.* State, 27 Ala. 32.

Illinois.— Munsell *v.* Temple, 8 Ill. 93.

Iowa.— Lewis *v.* U. S., Morr. 199.

Louisiana.— Sacerdotte *v.* Matossy, 4 Mart. N. S. 26.

Massachusetts.— Com. *v.* Lavery, 188 Mass. 13, 73 N. E. 884.

Mississippi.— Seal *v.* Donnelly, 60 Miss. 658; Sullivan *v.* Lafayette County, 58 Miss. 790; Arthur *v.* Commercial, etc., Bank, 9 Sm. & M. 394, 48 Am. Dec. 719.

Missouri.— Ragan *v.* McCoy, 29 Mo. 356.

New Jersey.—Hall *v.* Hoagland, 38 N. J. L. 350.

Oregon.— Hackett *v.* Multnomah R. Co., 12 Oreg. 124, 6 Pac. 659, 53 Am. Rep. 327; Hackett *v.* Wilson, 12 Oreg. 25, 6 Pac. 652.

Pennsylvania.— *In re* Buck, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816.

See 32 Cent. Dig. tit. "Licenses," § 73.

A provision, however, simply prohibiting the transfer of a license does not prohibit the holder of a license from employing an agent to sell for him thereunder. Myerdock *v.* Com., 26 Gratt. (Va.) 988.

53. Darling *v.* St. Paul, 19 Minn. 389; Newson *v.* Galveston, 76 Tex. 559, 13 S. W. 368, 7 L. R. A. 797 (holding that where a city by its charter is given power to control market places one who spends money in fitting up a private market under a license granted pursuant to an ordinance limiting the duration of the privilege to one year acquires no vested right to exercise his business therein and cannot complain of the refusal to renew his license pursuant to a subsequent ordinance prohibiting private markets within a given area); Roche *v.* Jones, 87 Va. 484, 12 S. E. 965.

54. Vicksburg Bank *v.* Adams, 74 Miss. 179, 21 So. 401.

55. *Massachusetts.*— Calder *v.* Kurby, 5 Gray 597.

Missouri.— Freleigh *v.* State, 8 Mo. 606.

New York.— People *v.* New York Tax, etc., Com'rs, 47 N. Y. 501; People *v.* Roper, 35 N. Y. 629.

Ohio.— Hirn *v.* State, 1 Ohio St. 15.

Tennessee.— State *v.* Burgoyne, 75 Tenn. 173, 40 Am. Rep. 60.

United States.— Doyle *v.* Continental Ins. Co., 94 U. S. 535, 24 L. ed. 148; Christ Church *v.* Philadelphia County, 24 How. 300, 16 L. ed. 602; Phalen *v.* Virginia, 8 How. 163, 12 L. ed. 1030; Manchester F. Ins. Co. *v.* Herriott, 91 Fed. 711.

See 32 Cent. Dig. tit. "Licenses," § 75.

Compare State *v.* Steele, 37 La. Ann. 316.

56. Humphrey *v.* Pegues, 16 Wall. (U. S.) 244, 21 L. ed. 326; Tomlinson *v.* Jessup, 15 Wall. (U. S.) 454, 21 L. ed. 204.

57. Schwuchow *v.* Chicago, 68 Ill. 444; Com. *v.* Kinsley, 133 Mass. 578; Martin *v.* State, 23 Nehr. 371, 36 N. W. 554; Child *v.* Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

58. Lowell *v.* Archambault, 189 Mass. 70, 75 N. E. 65, 1 L. R. A. N. S. 458; Greater New York Athletic Club *v.* Wurster, 19 Misc. (N. Y.) 443, 43 N. Y. Suppl. 703; Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706. *Compare* Grand Rapids *v.* Braudy, 105 Mich. 670, 64 N. W. 29, 55 Am. St. Rep. 472, 32 L. R. A. 116 (where it is held that, despite the absence in its charter of express power to revoke, a municipality has the right to insist, as a condition precedent to the issue of the license, that the applicant shall agree that his license may be revoked at will, and the municipality has the

to the common council, revoke a municipal license,[59] unless expressly authorized so to do by ordinance or otherwise.[60]

(B) *Indirect Revocation.* Municipal license may be revoked indirectly as well as directly.[61]

(C) *Estoppel to Question Revocation.* But one who accepts a license from a municipality on condition that it may be revoked at discretion, when the municipality has statutory power to impose such condition, thereby assents to the terms imposed, and is estopped to question the right to revoke,[62] and such estoppel applies even though no notice of intention to revoke be given to him.[63]

(D) *Remedy For Unauthorized Revocation.* The remedy of a licensee for the unauthorized revocation of his license is an action for damages.[64]

(II) *By Death.* A license to pursue a given occupation or business is a personal privilege which terminates at the holder's death.[65] So too is a license granted to a partnership terminated by the dissolution of the firm by death or otherwise.[66]

K. License-Fees and Taxes — 1. Liability For — a. In General. A person liable for a license-tax is liable therefor in any place where he is carrying on a business, whether it be his domicile or not, unless he can show payment in the place of his domicile.[67] Again, while a person cannot be liable for the amount of a license-tax under a statute on account of acts done before the passage of the statute,[68] yet the fact that he did not pay at the time the law required him so to do does not release him from liability for the past period.[69]

b. Persons Liable.[70] As a general rule one who is engaged in two separate

right to reserve such provision for revocation in the license); St. Charles *v.* Hackman, 133 Mo. 634, 34 S. W. 878 (where the court, irrespective apparently of charter provisions, lays down the broad rule that a municipality may revoke the license during the currency of its term).

59. Smith *v.* Major, 16 Ohio Cir. Ct. 302, 8 Ohio Cir. Dec. 652.

60. Spiegler *v.* Chicago, 216 Ill. 114, 74 N. E. 718, holding that an ordinance which provides that a license granted by a city to dealers in oil shall be revocable by the mayor at any time on proof of violation of any of the provisions of the ordinance of the city by the licensee limits the right of revocation to a violation of the ordinance in which the provision is found. *Compare* State *v.* St. Paul, 34 Minn. 250, 25 N. W. 449, holding that where the charter of a municipality grants to the common council the reasonable power to revoke licenses, the council cannot by ordinance or otherwise confer the power of revocation upon the mayor.

61. Laing *v.* Americus, 86 Ga. 756, 13 S. E. 107 (holding that where without express statutory authority the city authorizes a license to a fish dealer to place a fish box on a street, it may at any time require its removal, although by so doing it breaks up his business as a fish dealer before his license expires); People *v.* Meyer, 5 N. Y. Suppl. 69 (holding further that a license granted by a municipality to occupy stalls in a public market is indirectly revoked by the subsequent abolition of the market by the legislature).

62. Schwuchow *v.* Chicago, 68 Ill. 444; People *v.* Sewer, etc., Com'rs, 90 N. Y. App. Div. 555, 86 N. Y. Suppl. 445; Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706. See also Sights *v.* Yarnalls, 12 Gratt. (Va.) 292, holding that under a city ordinance providing that the council may at any time annul a license issued by its order, the order itself may be rescinded before a license had been granted by the council.

63. Com. *v.* Kinsley, 133 Mass. 578; Child *v.* Bemus, 17 R. I. 230, 21 Atl. 539, 12 L. R. A. 57.

64. Hutchins *v.* Durham, 118 N. C. 457, 24 S. E. 723, 32 L. R. A. 706; Smith *v.* Major, 16 Ohio Cir. Ct. 362, 8 Ohio Cir. Dec. 649. See also State *v.* St. Paul, 34 Minn. 250, 25 N. W. 449, holding that where the mayor attempts to revoke a municipal license and the subject-matter of such license is not in any respect or in any circumstances within his jurisdiction, the attempted revocation is not a judicial or quasi-judicial act and therefore is not reviewable by certiorari.

The measure of damages for the unauthorized revocation of a license is such damages as the licensee may have sustained by such unwarranted interference, and not the amount of the license-fee. Smith *v.* Major, 16 Ohio Cir. Ct. 362, 8 Ohio Cir. Dec. 649.

65. *In re* Buck, 185 Pa. St. 57, 39 Atl. 821, 64 Am. St. Rep. 816; Blumenthal's Petition, 125 Pa. St. 412, 18 Atl. 395.

66. Barksdale *v.* Hairston, 81 Va. 764.

67. Capella *v.* Carradine, 19 La. Ann. 305. See also Mendocino County *v.* Mendocino Bank, 86 Cal. 255, 24 Pac. 1002.

68. Capella *v.* Carradine, 19 La. Ann. 305.

69. State *v.* Raymond, 12 Mont. 226, 29 Pac. 732.

70. Persons whose occupations are subject to taxation see *supra*, I, C.

and distinct occupations is subject to license-tax on both occupations.[71] So too one who conducts the same business at different places, whether the business be wholesale[72] or retail,[73] is liable to a license-tax on the business conducted in each place.

c. Persons Not Liable. Under a statute authorizing a license-tax to pursue a given occupation or business, a levy of the tax is not justified if the person on whom the tax is levied be not actually engaged in the business to which the tax pertains,[74] or if he has no intention to derive, either directly or indirectly, a profit or means of livelihood from the business, whether such profit is realized or not.[75] Again, under a statute authorizing a license-tax on a particular business, one who in connection with such business performs certain incidental acts for his own benefit is not liable to a tax.[76]

d. Amount of Liability[77] — (I) *Right to Increase.* Where a city has full power to tax an occupation, it may increase the rate, on a particular class of persons engaged therein at any time before the expiration of the period for the enforcement of the tax,[78] even if such increase be made after the tax first levied has been paid.[79]

(II) *Pro Rata Amount.* If a statute authorizing the levy of a fixed amount as an annual business license makes no provision for a *pro rata* license, a person commencing business in the latter part of the year must pay the full amount of the license required to be assessed.[80] Where, however, the license, under the statute, must be for the year if the tax cannot be ascertained in advance, but may be by the quarter if the amount can be ascertained, one taking out a license to pursue a certain business who goes out of business within three months need only pay for a quarter of the year.[81]

(III) *Computation of Amount.* The mode of levy prescribed by statute or ordinance will ordinarily govern the computation of the amount of a license-tax, as where provision is made for a levy in proportion to the paid-up capital stock of a corporation,[82] in proportion to the value of the goods or merchandise which

71. *Alabama.*— Jebeles *v.* State, 117 Ala. 174, 23 So. 676; Mobile *v.* Richards, 98 Ala. 594, 12 So. 793; Mobile *v.* Craft, 94 Ala. 156, 10 So. 534.

District of Columbia.— Lasley *v.* District of Columbia, 14 App. Cas. 407.

Georgia.— Wilder *v.* Savannah, 70 Ga. 760, 48 Am. Rep. 598; Keely *v.* Atlanta, 69 Ga. 583. See also Carson *v.* Forsyth, 94 Ga. 617, 20 S. E. 116.

Louisiana.—Murrell *v.* Bokenfohr, 108 La. 19, 32 So. 176.

North Carolina.— Royster Guano Co. *v.* Tarboro, 126 N. C. 68, 35 S. E. 231.

Tennessee.— Crain *v.* State, 2 Yerg. 390.

One who conducts a wholesale and retail business owes a license both on the wholesale and retail business. Thompson *v.* New Orleans, etc., R. Co., 108 La. 52, 32 So. 177; New Orleans *v.* Koen, 38 La. Ann. 328.

72. State *v.* Holmes, 28 La. Ann. 765, 26 Am. Rep. 110.

73. Walters *v.* Duke, 31 La. Ann. 668.

This rule applies even where one of the places of business is merely a branch establishment, provided the business at the principal and branch establishments is carried on separately. Murrell *v.* Bokenfohr, 108 La. 19, 32 So. 176.

74. *Ex p.* Ah Pong, 19 Cal. 106.

75. Weil *v.* State, 52 Ala. 19. *Compare* Lebanon County *v.* Reynolds, 7 Watts & S. (Pa.) 329, holding that one who is attorney in fact and guardian of the heirs of an estate, and manages and directs the same and receives a fixed compensation for his services, has a taxable employment within the meaning of a statute making "occupations" subject to license-tax.

Giving away property.— Since the word "business," in a commercial sense, means something done or carried on for a livelihood or profit, the giving away of property is not a business within a charter provision authorizing the taxation of business. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

76. Mono County *v.* Flanigan, 130 Cal. 105, 62 Pac. 293; Hays *v.* Com., 107 Ky. 655, 55 S. W. 425, 21 Ky. L. Rep. 1418; Evers *v.* Mayfield, 85 S. W. 697, 27 Ky. L. Rep. 481.

77. Double taxation see *supra*, I, C, 1, j.
Reasonableness of fee see *supra*, I, C, 1, m.

78. Com. *v.* Wagner, 9 Pa. Co. Ct. 625.

79. Savannah *v.* Crawford, 75 Ga. 35.

80. Hart *v.* Beauregard, 22 La. Ann. 238.

81. Eastman *v.* Litterer, 13 Lea (Tenn.) 723.

82. In determining a license-tax levied in proportion to the paid-up capital stock of a corporation, the amount is regulated by the entire capital stock, paid up, and not by the capital stock actually employed in the cor-

the licensee has for sale,[83] or in proportion to the amount of business done by the licensee.[84]

2. Levy and Assessment of — a. Necessity For. The cardinal rule in taxation that whenever a tax is to be fixed by assessment the due assessment must precede any valid claim of such tax does not apply to license-taxes,[85] except where the statute expressly so provides,[86] or where the tax is according to value, or depends upon the ascertainment of person or value by some designated official.[87]

b. Unauthorized Assessment. An unauthorized assessment of a license-tax imposes no liability or duty upon the person assessed.[88]

3. Lien on Property For. In order to accomplish the certain collection of license-taxes, the statute may declare that such taxes shall be a lien on the property assessed and entitled to be paid in preference to all mortgages and encumbrances.[89]

4. Payment and Collection of — a. Payment — (I) *In General.* Payment of a fine imposed for failure to take out a license does not discharge the debt for the amount of the tax.[90]

(II) *Time of Payment.* Payment of a license-tax cannot be made a condition precedent to the issuing of the license,[91] nor is payment due for the license before it has been actually taken out.[92]

(III) *To Whom Payable.* The amount of a given license-tax is generally payable to the officer designated in the statute imposing the tax to perform the active functions relative to the collection and payment of the money.[93]

porate business. Southern Car, etc., Co. *v.* State, 133 Ala. 624, 32 So. 235.

If the statute does not indicate the date on which the tax is to accrue, it will not be construed to accrue on the day on which the statute took effect, so that if a corporation reduces its capital stock after that date, in the subsequent year, it is chargeable with the tax on the amount of its capital stock before such reduction. Brewing Imp. Co. *v.* State Bd. of Assessors, 65 N. J. L. 466, 47 Atl. 426.

83. Where the amount of a license-tax is levied in proportion to the value of the stock of goods which the licensee has for sale, he must pay in proportion to the whole stock of goods which he has for sale, notwithstanding that he has purchased a part of them from a firm in which he was a partner and that the tax had already been paid upon them by the firm (Mayes *v.* Edwin, 8 Humphr. (Tenn.) 290); but goods taken from customers for payment of debts due are not a part of the stock, so as to be taken into consideration in computing the amount of the tax (Harness *v.* Williams, 64 Miss. 600, 1 So. 759).

84. If a license-tax is levied by a city in proportion to the business done, a licensee, when the amount of the tax is to be determined, is entitled to a credit for the business done outside of the city, on which he has paid a license elsewhere. New Orleans *v.* Liverpool, etc., Co., 52 La. Ann. 1904, 28 So. 267.

85. Texas, etc., Ins. Co. *v.* State, 42 Tex. 636.

86. Foppiano *v.* Speed, 113 Tenn. 167, 82 S. W. 222, holding that under a statute requiring the assessor to make and return to the clerk of the county the name of each person liable to a privilege tax, the word "assess" meant simply the listing of names of persons exercising privileges, with the designation of the privilege.

87. State *v.* Adler, 68 Miss. 487, 9 So. 645.

88. Com. *v.* American Tobacco Co., 173 Pa. St. 531, 34 Atl. 223.

89. Morris *v.* Lalaurie, 39 La. Ann. 47, 1 So. 659.

90. Lexington *v.* Wilson, 118 Ky. 221, 80 S. W. 811, 26 Ky. L. Rep. 81. See also Nurdlinger *v.* Irvine, 2 Pa. Cas. 235, 4 Atl. 166.

91. German-American F. Ins. Co. *v.* Minden, 51 Nebr. 870, 71 N. W. 995; State *v.* Bennett, 19 Nebr. 191, 26 N. W. 714.

92. Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143; State *v.* Aitken, 61 Nebr. 490, 85 N. W. 395.

Extension of time.— In the absence of express authority in the statute imposing a license-tax, the person upon whom rests the duty of collecting the tax has no power to enter into any agreement to extend the time of payment. State *v.* Beard, 11 Rob. (La.) 243.

Retroactive effect.— Where a statute imposing a privilege tax requires a tax-collector to date the license from the first day of the month of its issuance, the payment of the tax at any time during the month of the issuance of the license has a retroactive effect, and a contract in reference to the business, made during the month of the issuance of the license, is valid. American F. Ins. Co. *v.* Vicksburg First Nat. Bank, 73 Miss. 469, 18 So. 931.

93. St. Clair *v.* Rempublicam, 4 Yeates (Pa.) 207; Stevenson *v.* Deal, 2 Pars. Eq. Cas. (Pa.) 212.

If the statute is silent as to the receiver of the tax and such tax is for county revenue

(iv) *Medium of Payment.* If the act or ordinance imposing a license-tax specifies the medium of payment, that medium alone is receivable in payment of the tax.[94]

b. Collection — (i) *In General.* Where no adequate remedy is provided for the enforcement of a license-tax, the right to do so is implied.[95]

(ii) *Where Enforceable.* A license-tax, levied for the privilege of keeping certain property, is enforceable where the property is kept.[96]

(iii) *Against Whom Enforceable.* As a general rule a license-tax like any other tax is collectable from the person against whom it is levied, if levied as the law directs.[97]

(iv) *How Enforced* — (a) *By Action* — (1) Form of. If the act or ordinance imposing a license-tax fails to prescribe for its enforcement a civil remedy, specific and adequate,[98] or prescribes a remedy which is merely cumulative,[99] or contains an illegal provision for enforcement by fine[1] or penalty,[2] the appropriate form of action for the recovery thereof is the common-law action for debt.[3] But when by law a different adequate remedy for the collection of the tax is provided, such remedy is deemed to be exclusive, and the licensing authority cannot maintain an action as for debt.[4]

(2) Jurisdiction. As a general rule the recovery of a license-tax is allowable only in a court of civil jurisdiction.[5]

(3) When Maintainable. In the absence of express statutory authority,[6] an action to recover an amount alleged to be due as a license cannot be maintained where the license has never been taken out.[7] But if the license has been actually taken out the licensing authority may maintain a civil suit as for debt for the collection of the license-fee, notwithstanding the fact that the act or ordinance

the county tax-collector is the proper person to receive the same. Ventura County *v.* Clay, 112 Cal. 65, 44 Pac. 488.

94. State *v.* Pilsbury, 29 La. Ann. 787. See East St. Louis *v.* Wider, 46 Ill. 351, holding further that where a city ordinance provides that only currency of the United States or "city orders" shall be the legal tender for certain licenses issued by the city, and by an act of the legislature certificates of indebtedness issued by the board of police commissioners are receivable for city taxes, such certificates are not legal tender for a license. See also Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

Metropolitan police warrants, under the precise terms of the statute, are receivable for licenses throughout the metropolitan police district. State *v.* New Orleans, 27 La. Ann. 493.

If the act or ordinance fails to specify the medium of payment, the collector of the license-tax has no right to receive anything but money in payment therefor, and his acceptance of anything other than money for the tax will not constitute payment. Munsell *v.* Temple, 8 Ill. 93; State *v.* Beard, 11 Rob. (La.) 243.

95. Lexington *v.* Wilson, 118 Ky. 221, 80 S. W. 811, 26 Ky. L. Rep. 81.

96. Arnold *v.* Ford, 53 N. Y. App. Div. 25, 65 N. Y. Suppl. 528.

Place of liability see *supra*, I, I, 1, a.

97. Arnold *v.* Ford, 53 N. Y. App. Div. 25, 65 N. Y. Suppl. 528.

98. Johnson *v.* Armour, 31 Fla. 413, 12 So. 842; Lexington *v.* Wilson, 118 Ky. 221, 80 S. W. 811, 26 Ky. L. Rep. 81; State *v.* Gazlay, 5 Ohio 14; Philadelphia *v.* Atlantic, etc., Tel. Co., 109 Fed. 55. See also Portland Dry Dock, etc., Ins. Co. *v.* Portland, 12 B. Mon. (Ky.) 77; State *v.* Hibbard, 3 Ohio 63.

99. Anniston *v.* Southern R. Co., 112 Ala. 557, 20 So. 915; Perry County *v.* Selma, etc., R. Co., 58 Ala. 546; State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111; Summit County *v.* Gustaveson, 18 Utah 351, 54 Pac. 977.

1. State *v.* Fleming, 112 Ala. 179, 20 So. 846; Templeton *v.* Tekamah, 32 Nebr. 542, 49 N. W. 373.

2. State *v.* Poulterer, 16 Cal. 514; Johnson *v.* Armour, 31 Fla. 413, 12 So. 842; New Castle *v.* Chicago Electric Illuminating Co., 16 Pa. Co. Ct. 663; Harrisburg City *v.* East Harrisburg Pass. R. Co., 4 Pa. Dist. 683. *Compare* State *v.* Poultherer, 16 Cal. 514. *Contra*, Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845.

3. Rule in Louisiana.— In the absence of constitutional prohibition the common-law action for debt is the appropriate remedy for the recovery of license-taxes. McGuire *v.* Vogh, 36 La. Ann. 812.

4. Johnston *v.* Louisville, 11 Bush (Ky.) 527.

5. Santa Barbara *v.* Stearns, 51 Cal. 499.

6. Mendocino County *v.* Mendocino Bank, 86 Cal. 255, 24 Pac. 1002.

7. Monterey County *v.* Abbott, 77 Cal. 541, 18 Pac. 113, 20 Pac. 73; Santa Cruz *v.* Santa Cruz R. Co., 56 Cal. 143. See also Los Angeles *v.* Southern Pac. R. Co., 61 Cal. 59, opinion by McKinstry, J.

imposing the license-tax provides for its collection by fine, penalty, or imprisonment.[8]

(4) In Whose Name. As a general rule an action or proceeding to recover a privilege tax may be brought in the name of the licensing authority.[9]

(5) Against Whom. Any person who, without taking out a license, carries on a business or occupation subject to a privilege tax, may be sued therefor.[10]

(6) Pleading, Evidence, and Practice. In actions to recover a license-tax the pleadings,[11] the evidence,[12] and matters relating to review of the proceedings on appeal[13] or by certiorari[14] are governed by the rules applicable to civil actions in general.

(B) *By Levy and Sale of Property.* In the absence of constitutional inhibition the legislature has power to prescribe the mode of enforcing license-taxes and may lawfully authorize a seizure and sale of the delinquent's personal property for the purpose of collecting such tax.[15]

(C) *By Penalty, or by Fine or Imprisonment.* Under the rule that a license-tax or an occupation or privilege tax cannot be collected by penalty,[16] or by fine

8. Cincinnati *v.* Beuhausen, 10 Ohio Dec. (Reprint) 652, 22 Cinc. L. Bul. 421; New Castle *v.* Chicago Electric Illuminating Co., 16 Pa. Co. Ct. 663.

Penalty, fine, and imprisonment see *infra*, I, K, 4, b, (IV), (C).

Even the actual payment of a fine for a violation of the law relating to license is no legal bar to the right to collect a license-fee. Nurdlinger *v.* Irvine, 2 Pa. Cas. 235, 4 Atl. 166.

9. State *v.* Poulterer, 16 Cal. 514.

General power of the licensing authority to sue is not affected by a provision in the act or ordinance imposing the tax that suit therefor shall be by direction of the tax-collector. El Dorado County *v.* Meiss, 100 Cal. 268, 34 Pac. 716.

Suit in collector's name.— In the absence of statutory provisions to the contrary, the person designated in the statute imposing a license-tax as the person to collect the same may, in his own name, proceed to do so by civil suit. Texas Banking, etc., Co. *v.* State, 42 Tex. 636.

10. State *v.* Nashville Sav. Bank, 16 Lea (Tenn.) 111. See also Arnold *v.* Ford, 53 N. Y. App. Div. 25, 65 N. Y. Suppl. 528.

11. For matters relating to pleading generally see Pleading.

Complaint.— The complaint need not set out the ordinance, but may merely state its substance and aver its violation. Nashville, etc., R. Co. *v.* Alabama City, 134 Ala. 414, 32 So. 731. And when an ordinance provides that a certain person may direct suit to collect a license and suit is brought, it is not necessary to set up that such person did direct the suit to be brought. San Luis Obispo County *v.* Hendricks, 71 Cal. 242, 11 Pac. 682.

Answer or plea.— An allegation in an answer denying the legality of the tax and averring that there is no law which requires the payment of a license is sufficient as a plea of the illegality of the license-tax. State *v.* Lundie, 47 La. Ann. 1596, 18 So. 636. But a plea that a proper license was procured is bad, if it fails to aver that the license so procured was paid for. Southern Car, etc., Co. *v.* State, 133 Ala. 624, 32 So. 235.

12. See, generally, Evidence.

The return of an officer made in the performance of his duty to direct the collecting officer where to make collections is not evidence, in a suit to collect a license-tax, that the person named therein pursues the business or avocation in question. Com. *v.* Hart, 1 Ashm. (Pa.) 77.

13. See, generally, Appeal and Error.

The record must show that defendant comes clearly within the provisions of the act, otherwise the judgment of the lower court will be reversed. Com. *v.* Kirkbride, 1 Phila. (Pa.) 252, holding further that the record of the lower court must set forth that the judgment was for an assessment or rate, and not for a license.

14. See, generally, Certiorari.

Record.— Although the right to impose and collect a license-tax be admitted, yet when collection by suit is attempted the record, as against a certiorari, must be self-sustaining and sufficient to put the court in possession of all the facts as well as the ordinance imposing the tax. York *v.* Miller, 11 York Leg. Rec. (Pa.) 138.

15. State *v.* Green, 27 Nebr. 64, 42 N. W. 913; Wrought Iron Range Co. *v.* Carver, 118 N. C. 328, 24 S. E. 352; Wynne *v.* Wright, 18 N. C. 19; Cowles *v.* Brittain, 9 N. C. 204. See also Stewart *v.* Atlanta Beef Co., 93 Ga. 12, 18 S. E. 981, 44 Am. St. Rep. 119. But see McGuire *v.* Vogh, 36 La. Ann. 812, holding that the mode of collecting taxes upon property by the sale of it is inapplicable to license-taxes, for the reason that it is upon an occupation that the license is imposed and a license cannot be collected by the sale of an occupation.

In the absence of statutory authority, however, a tax is not collectable by levy and sale of property. Johnson *v.* Armour, 31 Fla. 413, 12 So. 842.

16. Templeton *v.* Tekamah, 32 Nebr. 542, 49 N. W. 373; Magneau *v.* Fremont, 30 Nebr. 843, 47 N. W. 280, 27 Am. St. Rep. 436, 9 L. R. A. 786. See also New York *v.* Eighth

or imprisonment,[17] provisions to that effect in acts or ordinances imposing the tax are void.

5. Disposition of Moneys Collected. The acts or ordinances imposing license-taxes usually specify the disposition to be made of moneys collected.[18] But where the constitution provides that license money shall be appropriated to a certain use, a tax collected and paid as a condition of obtaining a license is license money and must be disposed of as such.[19]

6. Refunding or Recovering[20] — a. Who May Recover. *Prima facie* the right of action to recover back a license-tax paid under duress is in the party who paid it.[21]

b. From Whom Recoverable. When the act or ordinance imposing the license-tax is invalid no relationship of principal and agent exists between the collector of the tax and the authority imposing it, and consequently an action for the recovery of such tax lies against the collector.[22]

c. Payments Recoverable — (i) *Voluntary.* In the absence of express statutory provision to the contrary,[23] the recovery back of a license-tax which was voluntarily paid will not be tolerated.[24]

Ave. R. Co., 118 N. Y. 389, 23 N. E. 550; New York *v.* Broadway, etc., R. Co., 97 N. Y. 275; New Castle *v.* Electric Illuminating Co., 16 Pa. Co. Ct. 663. *Compare* Charleston *v.* Ashley Phosphate Co., 34 S. C. 541, 13 S. E. 845, holding that where a municipality, empowered to provide the manner of collecting license-taxes imposed by it, enacts an ordinance providing that the failure to pay the amount required for a license will subject one to the penalties prescribed, it is confined to the mode which it has prescribed for enforcing payment, and can resort to no other.

17. German-American F. Ins. Co. *v.* Minden, 51 Nebr. 870, 71 N. W. 995; State *v.* Green, 27 Nebr. 64, 42 N. W. 913.

18. San Luis Obispo County *v.* Greenberg, 120 Cal. 300, 52 Pac. 797; Ottawa *v.* La Salle County, 12 Ill. 339; Anonymous, 1 Pick. (Mass.) 475; Zeigler *v.* Com., 59 Pa. St. 92.

When a particular "treasury" is not specified a constitutional provision for the taxation of certain privileges and occupations, and that the amount thus raised shall be paid into the treasury, means the state treasury, and not a county treasury. Straub *v.* Gordon, 27 Ark. 625.

19. Auburn School Dist. *v.* Boyd, 63 Nebr. 829, 89 N. W. 417; Steidl *v.* State, 63 Nebr. 695, 88 N. W. 853; State *v.* Aitken, 61 Nebr. 490, 85 N. W. 395.

20. Recovery of taxes paid in general see Taxation.

21. Noyes *v.* State, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

22. Sturgis First Nat. Bank *v.* Watkins, 21 Mich. 483.

23. Caldwell *v.* Lincoln, 19 Nebr. 569, 27 N. W. 647, construing the statute enabling persons who pay invalid taxes to recover the same back as applicable to a void license-tax paid under protest.

24. *Alabama.*— Cahaba *v.* Burnett, 34 Ala. 400.

Alaska.— *In re* Hill's Bottling License, 1 Alaska 436.

Arkansas.— Helena *v.* Dwyer, 65 Ark. 155, 45 S. W. 349.

California.— O'Brien *v.* Colusa County, 67 Cal. 503, 8 Pac. 37; Garrison *v.* Tillinghast, 18 Cal. 408; Brumagim *v.* Tillinghast, 18 Cal. 265, 79 Am. Dec. 176.

Georgia.— Schaefer *v.* Georgia R. Co., 66 Ga. 39.

Illinois.— Holder *v.* Galena, 19 Ill. App. 409.

Indiana.— Ligonier *v.* Ackerman, 46 Ind. 552, 15 Am. Rep. 323.

Kentucky.— Maysville *v.* Melton, 42 S. W. 754, 19 Ky. L. Rep. 1033, holding that money paid for a license to conduct a lottery is voluntarily paid, although the license affords the licensee no protection, where, with the knowledge of the existence of a law forbidding such a license, he insisted that it should be issued to him. *Compare* Harrodsburg *v.* Renfrow, 58 S. W. 795, 22 Ky. L. Rep. 806, 51 L. R. A. 897.

Louisiana.— Fuselier *v.* St. Landry Parish, 107 La. 221, 31 So. 678.

Massachusetts.—Emery *v.* Lowell, 127 Mass. 138; Cook *v.* Boston, 9 Allen 393.

Mississippi.— Jackson *v.* Newman, 59 Miss. 385, 42 Am. Rep. 367. *Compare* Leonard *v.* Canton, 35 Miss. 189, where under the circumstances of the particular case recovery back was allowed.

Nebraska.— Baker *v.* Fairbury, 33 Nebr. 674, 50 N. W. 950.

New Jersey.— Camden *v.* Green, 54 N. J. L. 591, 25 Atl. 357, 33 Am. St. Rep. 686.

New York.— People *v.* Wilmerding, 136 N. Y. 363, 33 N. E. 1099.

Ohio.— Mays *v.* Cincinnati, 1 Ohio St. 268. *Compare* Burkhart *v.* Columbus, 9 Ohio Dec. (Reprint) 839, 17 Cinc. L. Bul. 342.

South Carolina.—Robinson *v.* Charleston, 2 Rich. 317, 45 Am. Dec. 739.

South Dakota.— Steffen *v.* State, (1905) 103 N. W. 44.

Tennessee.— Cauvin *v.* Nashville, 3 Baxt. 453.

Texas.— Houston *v.* Feeser, 76 Tex. 365, 13 S. W. 266.

(II) *Involuntary.* The actual payment, however, of a license-tax made by the payer to prevent the immediate seizure of his person[25] or property,[26] or to obtain his release after arrest,[27] is considered involuntary, and its recovery back will be permitted. But it is the payment, not a vague arrangement or bargain to pay, which must have been extorted by duress in order to permit recovery.[28]

d. Pleading, Evidence, and Practice. The rules governing pleading,[29] evidence,[30] and trial[31] in civil actions generally are applicable to actions for the recovery back of license-taxes which have been paid.

7. Enjoining Wrongful Assessment or Collection. Even though the act or ordinance imposing a license-tax be alleged to be invalid or unconstitutional, injunction will not lie to restrain its collection where an adequate remedy at law exists,[32] where irreparable injury or other ground for equitable interposition is not shown to exist,[33] or where judgment has been taken for a license-tax imposed

Wisconsin.—Custin *v.* Viroqua, 67 Wis. 314, 30 N. W. 515.

See 32 Cent. Dig. tit. "Licenses," § 68.

Threats or apprehension of judicial proceedings to enforce payment of a license-tax does not render the payment of such tax under protest an involuntary payment. Southern R. Co. *v.* Florence, 141 Ala. 493, 37 So. 844; Maxwell *v.* San Luis Obispo County, 71 Cal. 466, 12 Pac. 484; Betts *v.* Reading, 93 Mich. 77, 52 N. W. 940; Irving *v.* St. Louis County, 33 Mo. 575; Claflin *v.* McDonough, 33 Mo. 412, 84 Am. Dec. 54; Aetna Iron, etc., Co. *v.* Taylor, 13 Ohio Cir. Ct. 602, 5 Ohio Cir. Dec. 242; C. & J. Michel Brewing Co. *v.* State, (S. D. 1905) 103 N. W. 40.

Where a city by ordinance prohibits an occupation, after issuing a license therefor, the licensee may recover the unearned portion of the money voluntarily paid for the license. Pearson *v.* Seattle, 14 Wash. 438, 44 Pac. 884.

25. Hill *v.* District of Columbia, 7 Mackey (D. C.) 481; Douglas *v.* Kansas City, 147 Mo. 428, 48 S. W. 851; Toledo *v.* Buechele, 19 Ohio Cir. Ct. 127, 10 Ohio Cir. Dec. 280. See also Cauvin *v.* Nashville, 3 Baxt. (Tenn.) 453.

The duress which renders the payment involuntary must be of the person who makes such payment. Noyes *v.* State, 46 Wis. 250, 1 N. W. 1, 32 Am. Rep. 710.

26. Scottish Union, etc., Ins. Co. *v.* Herriott, 109 Iowa 606, 80 N. W. 665, 77 Am. St. Rep. 548; Sturgis First Nat. Bank *v.* Watkins, 21 Mich. 483; Smith *v.* Tecumseh First Nat. Bank, 17 Mich. 479. See also Cauvin *v.* Nashville, 3 Baxt. (Tenn.) 453.

27. District of Columbia *v.* Chapman, 25 App. Cas. (D. C.) 95. *Compare* Bean *v.* Middlesborough, 57 S. W. 478, 22 Ky. L. Rep. 415, holding that where one who is arrested for violating a city ordinance requiring the payment of a license-tax procured a dismissal of the warrant by taking out a license instead of standing his trial and proving his innocence as he might have done, the tax was voluntarily paid and cannot be recovered from the city.

28. Schaefer *v.* Georgia R. Co., 66 Ga. 39; Savannah *v.* Feeley, 66 Ga. 31.

29. See, generally, Pleading.

Complaint.—Where a complaint alleges that the payment was made under protest with notice that suit would be brought to recover the same and that it was made under a mutual mistake of law, the court on motion will require plaintiff to elect on which claim he will proceed. C. & J. Michel Brewing Co. *v.* State, (S. D. 1905) 103 N. W. 40.

30. See, generally, Evidence.

Burden of proof.— In order to entitle plaintiff to maintain an action to recover back a license-tax the burden rests with him to show that the tax was imposed without authority, that the authority imposing the tax actually received the money paid, and that the payment was not made voluntarily. Phœbus *v.* Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

31. See, generally, Trial.

Questions of law and fact.— Unless the facts are undisputed (Betts *v.* Reading, 93 Mich. 77, 52 N. W. 940), the question of voluntary or involuntary payment of a license-tax is one of fact and not of law (Hill *v.* District of Columbia, 7 Mackey (D. C.) 481).

32. Western Union Tel. Co. *v.* Winnsboro, 71 S. C. 231, 50 S. E. 870. But see Southern Express Co. *v.* Ensley, 116 Fed. 756, holding that the mere fact that the fee can be paid and recovered back is not such an adequate remedy at law as to authorize the refusal of an injunction to restrain the enforcement of the ordinance imposing the tax.

33. Allen *v.* Pullman Palace Car Co., 139 U. S. 658, 11 S. Ct. 682, 35 L. ed. 303; Shelton *v.* Platt, 139 U. S. 591, 11 S. Ct. 646, 35 L. ed. 273; Titusville Second Nat. Bank *v.* Caldwell, 13 Fed. 428.

Payment or tender of tax as prerequisite to right to restrain.— Even where irreparable injury may result to a corporation from a proceeding looking to the forfeiture of its charter for non-payment of the license-tax, such proceeding will not be restrained unless a payment and tender or refusal of the tax is made prior to the filing of the bill. Morenci Copper Co. *v.* Freer, 127 Fed. 199.

On the ground of possible inability to pay the tax, whereby it may work irreparable injury by breaking up complainant's business, injunction will not lie. Youngblood *v.* Sexton, 32 Mich. 406, 20 Am. Rep. 654.

by a void act or ordinance.[34] But injunction will lie to restrain the collection of a license-tax whose unconstitutionality has been judicially declared.[35]

L. Rights of Unlicensed and Unauthorized Persons — 1. To Recover on Contract — a. In General. The rule is that where a statute imposes a penalty for engaging in a given business or calling without a license, a contract made by one who has no license is not invalid, the penalty attaching to the person and not affecting the contract;[36] but the rule is otherwise where the statute expressly prohibits such business or calling without a license,[37] or expressly vitiates all contracts made by an unlicensed person while engaged therein.[38]

b. For Services Thereunder — (i) *In General.* The rule is that where a statute prohibits and makes it highly penal for any person to pursue a given business or calling without having previously obtained a license, such person cannot recover for his services performed while pursuing such business or calling, notwithstanding a contract providing therefor.[39] Nor can an unlicensed person

34. Francis *v.* Robinson, (Tex. Civ. App. 1905) 89 S. W. 803.

35. Waters-Peirce Oil Co. *v.* Little Rock, 39 Ark. 412.

Injunction generally see Injunctions.

In Georgia the rule is that if the court to which the application for an injunction is made deems the act or ordinance imposing the license-tax to be unconstitutional, then it will enjoin, in the exercise of its equity powers, any attempt to collect the tax. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795; Decker *v.* McGowan, 59 Ga. 805. *Compare* Southern Express Co. *v.* Ensley, 116 Fed. 756.

Who may join in application.— Where the act imposing a tax is void, those against whom the exaction is sought may unite in an application to enjoin the enforcement of the act, and are not driven to their separate actions of trespass against the tax-collector who attempts to collect that for which there is no authority. Hewin *v.* Atlanta, 121 Ga. 723, 49 S. E. 765, 67 L. R. A. 795.

36. *Delaware.*— Rogers *v.* Bailey, 4 Harr. 256.

Iowa.— Hill *v.* Smith, Morr. 70.

Nevada.— Mandlebaum *v.* Gregovich, 17 Nev. 87, 28 Pac. 121, 45 Am. Rep. 433; Drexler *v.* Tyrrell, 15 Nev. 114.

Pennsylvania.— Rahter *v.* Lancaster First Nat. Bank, 92 Pa. St. 393.

United States.— Armstrong *v.* Toler, 11 Wheat. 258, 6 L. ed. 468.

See 32 Cent. Dig. tit. "Licenses," § 76.

A note given for property purchased at an auction sale is not void because the auctioneer had not taken out a license, as required by law. Gunnaldson *v.* Nyhus, 27 Minn. 440, 8 N. W. 147.

37. De Wit *v.* Lander, 72 Wis. 120, 39 N. W. 349.

Where a license required by a statute is for the protection of the public, and to prevent improper persons from acting in a particular capacity, and not for revenue purposes only, the imposition of the penalty amounts to a positive prohibition of a contract made in violation of the statute. Taliaferro *v.* Moffertt,, 54 Ga. 150.

However, the fact that the broker who procures a sale of realty is unlicensed does not invalidate the contract of sale. Ober *v.* Stephens, 54 W. Va. 354, 46 S. E. 195.

Nor can one engaged or employed in the business for which no license has been obtained set up a statute making a contract void in dealing with the outside not in the inside management. Decell *v.* Hazlehurst Oil Mill, etc., Co., 83 Miss. 346, 35 So. 761.

38. Rash *v.* Farley, 91 Ky. 344, 15 S. W. 862, 12 Ky. L. Rep. 913, 34 Am. St. Rep. 233; Rash *v.* Halloway, 82 Ky. 674; Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449; Anding *v.* Levy, 57 Miss. 51, 34 Am. Rep. 435.

Effect of repeal of statute.— Contracts made by a person in his business during the time he is not licensed are not made valid by the subsequent repeal of the statute rendering them void. Decell *v.* Lewenthal, 57 Miss. 331, 34 Am. Rep. 449.

39. *Colorado.*— Hittson *v.* Browne, 3 Colo. 304.

Illinois.— Tedrick *v.* Hiner, 61 Ill. 189; Hughes *v.* Dougherty, 62 Ill. App. 464; Sellers *v.* Phillips, 37 Ill. App. 74; East St. Louis *v.* Freels, 17 Ill. App. 339.

Maine.— Harding *v.* Hager, 60 Me. 340.

Massachusetts.— Stewartson *v.* Lothrop, 12 Gray 52; Ames *v.* Gilman, 10 Metc. 239.

New York.— Johnston *v.* Dahlgren, 166 N. Y. 354, 59 N. E. 987; Bloom *v.* Saberski, 8 Misc. 311, 28 N. Y. Suppl. 731; Ferdon *v.* Cunningham, 20 How. Pr. 154. See also Schieck *v.* Herzog, 7 Misc. 546, 27 N. Y. Suppl. 988.

See 32 Cent. Dig. tit. "Licenses," § 78.

An actor, however, may recover for his services in an unlicensed theatrical exhibition, unless it appears that he knew that his employer had no license. Roys *v.* Johnson, 7 Gray (Mass.) 162.

Express prohibition without particular words.— Where a statute enacts, for the purpose of securing a more effectual compliance with its requirements in respect to the licensing of certain occupations, that no one shall engage in or carry on any such occupation until he shall have obtained a license as provided by law, it is an express prohibition, without more particular words. Hall *v.* Bishop, 3 Daly (N. Y.) 109.

Where the statute expressly declares null and void all contracts made with any person

recover for his services by declaring on them as those of an agent only.[40] The defense that plaintiff was not licensed is an affirmative one and provable only when so pleaded.[41]

(II) *Partners.* As to whether partners may recover in a joint action for services rendered by the firm, only one member of which is duly licensed, the authorities are in conflict, some holding that such services are recoverable in a joint action,[42] and others taking the contrary view.[43]

2. To Recover Damages For Negligence. There is a conflict of authority where the statute imposes a penalty for failure to take out a license as to whether an unlicensed person may recover damages to his business caused by negligence, it being held in one jurisdiction that he cannot recover,[44] and in another that he is entitled to recover.[45]

3. To Enjoin Interference With Business. Where the license-fee demanded to pursue a given business is exorbitant and beyond the power of the licensing authority to exact, an injunction will lie at the instance of an unlicensed person pursuing such business to restrain any interference therewith.[46]

M. Penalties and Enforcement Thereof — 1. Penalties — a. Power to Impose. In the absence of constitutional or statutory inhibition, the authority to impose reasonable[47] fines and penalties for the failure to pay a license-tax is regarded as a necessary incident to the power to levy such tax.[48]

b. When They Attach. A license-tax may in some instances be delinquent for a long period of time before the penalty for such delinquency attaches.[49]

c. Liability For. The mere failure to procure the license does not create the liability for the penalty; it is the fact of carrying on the business without license.[50]

who shall violate the act, in reference to the business carried on in disregard of the law, the same rule of course obtains. McIver *v.* Clarke, 69 Miss. 408, 10 So. 581.

40. Tedrick *v.* Hiner, 61 Ill. 189.

41. Lanzer *v.* Unterberg, 9 Misc. (N. Y.) 210, 29 N. Y. Suppl. 683; American Type Founders' Co. *v.* Conner, 6 Misc. (N. Y.) 391, 26 N. Y. Suppl. 742; Margolys *v.* Goldstein, 96 N. Y. Suppl. 185.

42. Harland *v.* Lilienthal, 53 N. Y. 438; Arden *v.* Tucker, 4 B. & Ad. 815, 24 E. C. L. 355; Raynard *v.* Chase, 1 Burr. 2; Turner *v.* Reynall, 14 C. B. N. S. 328, 9 Jur. N. S. 1077, 32 L. J. C. P. 164, 8 L. T. Rep. N. S. 281, 11 Wkly. Rep. 700, 108 E. C. L. 328. See also Schnaier *v.* Navarre Hotel, etc., Co., 182 N. Y. 83, 74 N. E. 1125, 108 Am. St. Rep. 790, 70 L. R. A. 722.

43. Hittson *v.* Browne, 3 Colo. 304; McIver *v.* Clarke, 69 Miss. 408, 10 So. 581.

44. Sherman *v.* Fall River Iron Works Co., 5 Allen (Mass.) 213.

45. Huffmire *v.* Brooklyn, 22 N. Y. App. Div. 406, 48 N. Y. Suppl. 132, upon the theory that the courts will not add to the penalty imposed by a statute a forfeiture of the right to indemnity for defendant's negligence.

46. Chicago *v.* Ferris Wheel Co., 60 Ill. App. 384.

Injunction generally see Injunctions.

47. What is a reasonable fine or penalty to impose for non-payment of a license-tax depends upon the nature of the offense and the circumstances. Reading *v.* Reading Steam Heat, etc., Co., 20 Pa. Co. Ct. 411. See also Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384.

Unauthorized change of amount of penalty. — Where a statute granting to a levee board power to levy and collect privilege taxes specifically fixes the damages to be paid for the non-payment of such tax at ten per cent of the amount thereof, the levee board has no power to change such amount by order. Zemurray *v.* Bouldin, 87 Miss. 583, 40 So. 15.

48. *Alabama.*— Shelton *v.* Mobile, 30 Ala. 540, 68 Am. Dec. 143.

Georgia.— McGhee *v.* State, 92 Ga. 21, 17 S. E. 276; Weaver *v.* State, 89 Ga. 639, 15 S. E. 840.

Michigan.— Chilvers *v.* People, 11 Mich. 43.

Missouri.— St. Louis *v.* Sternberg, 69 Mo. 289; St. Louis *v.* Life Assoc. of America, 53 Mo. 466.

New Jersey.— Haynes *v.* Cape May, 52 N. J. L. 180, 19 Atl. 176.

Ohio.— Cincinnati *v.* Buckingham, 10 Ohio 257.

Pennsylvania.— Reading *v.* Reading Steam Heat, etc., Co., 20 Pa. Co. Ct. 411.

Virginia.— Blanchard *v.* Bristol, 100 Va. 469, 41 S. E. 948.

United States.— License Tax Cases, 72 U. S. 462, 18 L. ed. 497.

Power of municipality to impose penalty generally see Municipal Corporations.

49. Ukiah Guaranty Co. *v.* Curry, 148 Cal. 256, 82 Pac. 1048.

Where an appeal is taken from the appraisement for which the law provides, no penalty for delay is incurred until the appeal is disposed of. Com. *v.* Potter, 159 Pa. St. 583, 28 Atl. 492.

50. St. Louis *v.* Sternberg, 69 Mo. 289.

2. Enforcement — a. By Civil Action. An act or ordinance imposing a license usually prescribes an action of debt as a method of enforcing the penalties for the non-payment of the tax.[51]

b. By Criminal Prosecution.[52] Both the state and municipalities also, when the power so to do is delegated to them, have the right to enforce penalties for non-payment of license-taxes by criminal prosecution or a proceeding in the nature of such a prosecution.[53] No question of evil intent arises in a criminal prosecution for the penalty, the essence of the offense consisting in pursuing the avocation without license when one is required by law.[54]

c. By Distress and Sale of Property. Sometimes municipalities enforce the penalties for non-payment of license-taxes by distress and sale of property;[55] but

A license that has been issued in the name of another to engage in the business of a common victualler does not protect one who is actually engaged in such business as principal for his own profit from liability for the penalty imposed by statute for assuming to act as common victualler without license. Com. *v.* Lavery, 188 Mass. 13, 73 N. E. 884.

Failure to receive compensation while carrying on the occupation without a license renders accused none the less liable to the penalty. State *v.* Rucker, 24 Mo. 557.

A retired lawyer who tries a single case for a neighbor gratuitously is not a practising lawyer, so as to be liable for a penalty under the statute for practising without having paid the privilege license-tax. McCargo *v.* State, (Miss. 1887) 1 So. 161.

One not properly included within an ordinance imposing a license-tax cannot be subjected to the penalties prescribed merely because he might have been subjected to a license-tax by an appropriate ordinance. Waukon *v.* Fisk, 24 Iowa 464, 100 N. W. 475.

Effect of invalidity of portion of act imposing penalties.— Where one section of a statute requires a license for selling merchandise except from those dealing in certain articles, and another provides a penalty for selling merchandise without a license, and the third excepts from the immediately preceding section persons selling commodities manufactured within the state, the sections must be construed together, and an unlicensed person cannot be held liable for a violation of one section if either of the others are unconstitutional. Ames *v.* People, 25 Colo. 508, 55 Pac. 725.

51. Waterhouse *v.* Dorr, 4 Me. 333.

Debt generally see Debt, Action of.

Declaration or complaint.— In all actions founded on a statute against unlicensed persons, the declaration must allege that the offense proceeded on is an offense against the statute. People *v.* Bartow, 6 Cow. (N. Y.) 290 (holding further that a declaration that follows the words of the statute is sufficient); Crain *v.* State, 2 Yerg. (Tenn.) 390 (holding further that the expression in the declaration "by force of the statute in such cases made and provided an action hath accrued" is equivalent to the conclusion "against the form of the statute"). See also Browne *v.* Mobile, 122 Ala. 159, 25 So. 223.

Where the petition for a privilege of retailing oil without a license does not allude to purchasers, it will be considered to be for the privilege denounced in those engaging in retailing oil without a license required by statute. Com. *v.* Standard Oil Co., 87 S. W. 1090, 27 Ky. L. Rep. 1073.

Burden of proof.— In an action to recover the statutory penalty for doing business without a license, plaintiff need not show want of license but defendant must prove his license. Indiana Millers' Mut. F. Ins. Co. *v.* People, 65 Ill. App. 355.

52. **Criminal law and criminal procedure** generally see Criminal Law.

53. Ames *v.* People, 25 Colo. 508, 55 Pac. 725; St. Louis *v.* Green, 70 Mo. 562; St. Louis *v.* Sternberg, 69 Mo. 289; State *v.* Rucker, 24 Mo. 557; State *v.* Hayne, 4 S. C. 403. See also State *v.* Stearns, 31 N. H. 106.

Constitutionality of act or ordinance.— An act or ordinance subjecting the person who fails or refuses to pay his license-tax to imprisonment is not in violation of a constitutional provision declaring that no person shall be imprisoned for debt except in cases of fraud, since a license-tax is not a debt in the constitutional sense of the word. Rosenbloom *v.* State, 64 Nebr. 342, 89 N. W. 1053, 57 L. R. A. 922; Charleston *v.* Oliver, 16 S. C. 47.

The information in the prosecution for a penalty for failure or refusal to obtain a license must set forth that it was the duty of defendant to obtain a license, and also those conditions which would enable him to obtain one if he applied. State *v.* Tyrrell, 73 Conn. 407, 47 Atl. 686; State *v.* Gallagher, 72 Conn. 604, 45 Atl. 430. See, generally, Criminal Law; Indictments and Informations.

Burden of proof.— In a criminal prosecution to recover a statutory penalty for failure or refusal to obtain a license, the prosecutor must show a case clearly and distinctly within its provisions. Atlantic City *v.* Turner, 67 N. J. L. 520, 51 Atl. 691.

54. Com. *v.* Lavery, 188 Mass. 13, 73 N. E. 884; State *v.* Myers, 63 Mo. 324; State *v.* Jacobs, 38 Mo. 379; State *v.* Willis, 37 Mo. 192; State *v.* Whittaker, 33 Mo. 457; State *v.* Cox, 32 Mo. 566; State *v.* Jamison, 23 Mo. 330.

55. Reading *v.* Reading Steam Heat, etc., Co., 20 Pa. Co. Ct. 411; State *v.* Manz, 6

to warrant a distress and sale or forfeiture of property authority must be expressly conferred by the legislature.[56]

N. Offenses Against License and Registration Laws[57] — **1. In General.** By statute or ordinance in most if not all of the states violations of the license or registration laws are made offenses punishable by criminal prosecution.[58]

2. What Constitutes Offense — a. Carrying on Business Without License — (I) *Single or Continuous Acts.* Unless the statute expressly so provides, a single act pertaining to a particular business is not, when done without a license, engaging in or carrying on such business, so as to constitute the offense;[59] it is only repeated and continuous acts that constitute the offense.[60]

(II) *Compensation or Profit.* Except when the gist of the offense is the occupation of letting of property for hire, in which case whether the offense has been committed depends upon the actual receipt by the accused of compensation for the use of his property,[61] the rule is that no offense has been committed where the accused pursued the occupation without intent to derive profit therefrom, directly or indirectly.[62]

(III) *Exclusiveness of Business.* It is not an element of the offense that the business or occupation in question be the accused's exclusive business or occupation.[63]

b. Failure to Register. A failure of licensee to register within the time required by statute constitutes an offense in some states.[64]

3. Persons Liable — a. In General. Any person who without taking out a license engages in a business,[65] or employs another person to engage therein as his agent,[66] may be prosecuted for a violation of the act or ordinance requiring the license.

b. Agents. It is settled law that an agent may be prosecuted for engaging in a business for which his principal has not taken out a license.[67] And this rule

Coldw. (Tenn.) 557. See also Kneedler *v.* Norristown, 100 Pa. St. 368, 45 Am. Rep. 384.

56. Butler's Appeal, 73 Pa. St. 448.

57. Criminal law generally see Criminal Law.

58. See the statutes of the several states; and cases cited *infra*, note 59 *et seq.*

59. Grant *v.* State, 73 Ala. 13; Martin *v.* State, 59 Ala. 34; Weil *v.* State, 52 Ala. 19; Harris *v.* State, 50 Ala. 127; Moore *v.* State, 16 Ala. 411; State *v.* Sheppard, 138 N. C. 579, 50 S. E. 231; Merritt *v.* State, 19 Tex. App. 435; Halfin *v.* State, 18 Tex. App. 410; Standford *v.* State, 16 Tex. App. 331. See also State *v.* Gorham, 115 N. C. 721, 20 S. E. 179, 44 Am. St. Rep. 494, 25 L. R. A. 810; Mansfield *v.* State, 17 Tex. App. 468.

60. Weil *v.* State, 52 Ala. 19; Harris *v.* State, 50 Ala. 127; Mansfield *v.* State, 17 Tex. App. 468; La Norris *v.* State, 13 Tex. App. 33, 44 Am. Rep. 699.

61. Des Plaines *v.* Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; Germania *v.* State, 7 Md. 1.

The manner of receiving compensation is immaterial. Com. *v.* Killian, 109 Mass. 345, 12 Am. Rep. 714; U. S. *v.* Duvall, 25 Fed. Cas. No. 15,016, 2 Cranch C. C. 42.

62. Grant *v.* State, 73 Ala. 13; Weil *v.* State, 52 Ala. 19; Harris *v.* State, 50 Ala. 127; Eubanks *v.* State, 17 Ala. 181. But see State *v.* Rucker, 24 Mo. 557, construing Mo. Rev. Code (1845), p. 162.

63. Grant *v.* State, 73 Ala. 13; Weil *v.* State, 52 Ala. 19; Harris *v.* State, 50 Ala. 127.

64. McGhee *v.* State, 92 Ga. 21, 17 S. E. 276, where the statute required that the tax should be paid in full at the time of commencing the business specified, and also required registration at the time the tax was paid or within three months thereafter; and in that case it was held that defendant was technically guilty for a failure to register, notwithstanding the fact that he had actually paid the tax required before commencing business.

65. State *v.* Foster, 22 R. I. 163, 46 Atl. 833, 50 L. R. A. 339.

66. Perkins *v.* State, 92 Ala. 66, 9 So. 536.

67. *Alabama.*— Nashville, etc., R. Co. *v.* Attala, 118 Ala. 362, 24 So. 450; Abel *v.* State, 90 Ala. 631, 8 So. 760; *Ex p.* Knox, 64 Ala. 463; Elsberry *v.* State, 52 Ala. 8; Montgomery *v.* Schoemaker, 51 Ala. 114.

Illinois.— Walker *v.* Springfield, 94 Ill. 364.

Kansas.— Campbell *v.* Anthony, 40 Kan. 652, 20 Pac. 492; Wyandotte *v.* Corrigan, 35 Kan. 21, 10 Pac. 99.

Mississippi.—Mitchell *v.* Meridian, 67 Miss. 644, 7 So. 493.

Missouri.— Springfield *v.* Smith, 138 Mo. 645, 40 S. W. 757, 60 Am. St. Rep. 569, 37 L. R. A. 446; St. Joseph *v.* Ernst, 95 Mo. 360, 8 S. W. 558; Isbell *v.* State, 13 Mo. 86; Troy *v.* Harris, 102 Mo. App. 51, 76 S. W. 662; Farmington *v.* Rutherford, 94 Mo. App. 328, 68 S. W. 83; State *v.* O'Connor, 65 Mo. App. 324; State *v.* Keith, 46 Mo. App. 525.

has been held to apply even though such agent had no pecuniary interest in the business.[68] On the other hand, where the tax is levied on the owner of the business and not upon the business itself, an agent of the owner is not liable to prosecution for the non-payment of the tax.[69]

4. Prosecutions For[70] — a. Indictment[71] — (I) *Form and Contents Generally.* The indictment must allege the facts which constitute the offense, which requirement, however, is satisfied by following the language of the statute.[72]

(II) *Particular Allegations* — (A) *Levy of Tax.* That the license-tax has been levied must be alleged in the indictment if the tax was imposed by the county and not by the state.[73]

(B) *Amount of Tax.* An indictment need not state the price of the license-fee,[74]

68. Dentler *v.* State, 112 Ala. 70, 20 So. 592; Abel *v.* State, 90 Ala. 631, 8 So. 760. *Compare* O'Rourke *v.* State, 6 Ohio Cir. Ct. 612, 3 Ohio Cir. Dec. 611, holding that a mere driver of a vehicle, having no special interest or ownership therein, cannot be held liable for punishment for the violation of a statute which provides that the owner of all vehicles used upon the streets of the city shall pay annual tax fees therefor.

69. Troy *v.* Harris, 102 Mo. App. 51, 76 S. W. 662. See also Cincinnati *v.* Withers, 5 Ohio S. & C. Pl. Dec. 570.

70. Criminal procedure generally see Criminal Law.

71. Indictment or information generally see Indictments and Informations.

72. Com. *v.* Danziger, 176 Mass. 290, 57 N. E. 461; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; Territory *v.* Harris, 8 Mont. 140, 19 Pac. 286; Cousins *v.* Com., 19 Gratt. (Va.) 807.

Forms of sufficient indictments.— An indictment charging accused with having conducted the business of an agent of the Armour Packing Company, a packing-house, without having registered with the ordinary and paid the tax required by statute is not defective in failing to allege that the Armour Packing Company is a corporation. Leps *v.* State, 120 Ga. 139, 47 S. E. 572. An indictment charging defendant on a certain day with unlawfully soliciting emigrants to labor without the state, without having obtained a license therefor, states a crime with sufficient definiteness, although it does not specify the specific acts of hiring or soliciting. State *v.* Napier, 63 S. C. 60, 41 S. E. 13. An indictment charging that A unlawfully did sell music not manufactured by the seller within this state, without having a license therefor according to law, is not defective, music being a species of goods, wares, and merchandise. Com. *v.* Nax, 13 Gratt. (Va.) 789. Where certain publications are specifically enumerated in the statute as among those the sale of which cannot be pursued as an occupation without the payment of a tax therefor, it is not necessary that the indictment should further describe them than by name. Baldwin *v.* State, 21 Tex. App. 591, 3 S. W. 109. An indictment against a person for dealing as a merchant without a license, which alleges that defendant "did then and there unlawfully deal as a merchant at a certain store, and did then and there sell divers goods, wares and merchandise, to wit: One black coat to L., for the sum of six dollars without then and there having a merchant's license or any legal license therefor," is sufficient. State *v.* Jacobs, 38 Mo. 379. An indictment charging that defendant did, at his place occupied for that purpose, unlawfully deal as a merchant without then and there having a license authorizing him to deal as a merchant, by then and there selling, etc., is sufficiently specific. State *v.* Willis, 37 Mo. 192.

When not sufficiently specific.— When the amount of the penalty for keeping a billiard table varies with the kind of table kept, an indictment states no offense if it does not aver the kind of table kept. Hill *v.* State, 120 Ala. 392, 24 So. 929. Where the offense denounced by the statute is not the non-payment of the tax, but the failure to record the receipt for its payment, an information which charges the non-payment of the tax merely fails to charge an offense known to law. Lewis *v.* State, 14 Tex. App. 230. Under a statute taxing distinctly "each agency for sewing machines" fifty dollars and "each agent," etc., ten dollars, an indictment is insufficient which charges one with carrying on the business of a sewing-machine agent without paying the license-tax. Hendon *v.* State, 61 Miss. 146.

Want of license.— An indictment for carrying on a business which does not aver that the business was carried on without a license is bad. Mork *v.* Com., 6 Bush (Ky.) 397; Com. *v.* Smith, 6 Bush (Ky.) 303.

Prices and persons to whom sales are made. — It is not a ground for quashing an indictment for dealing as a merchant without a license that the price and the person to whom sold are omitted. State *v.* Miller, 24 Mo. 532. But as to the necessity of averring to whom the goods are sold see Spielman *v.* State, 27 Md. 520.

Amount of sales.— An indictment under a license law requiring merchants to pay for a license according to the amount of their annual sales must allege the amount of defendant's annual sales. State *v.* Chapeau, 4 S. C. 378.

73. Osborn *v.* State, 33 Tex. 545; Crews *v.* State, 10 Tex. App. 292; Spears *v.* State, 8 Tex. App. 467.

74. Cousins *v.* State, 50 Ala. 113, 20 Am. Rep. 290.

required except where the penalty for the offense is regulated by the amount of the license-fee.[75]

(c) *Failure to Pay.* An indictment is fatally defective which omits to charge that defendant has failed or refused to pay the required license-tax.[76]

(d) *Following Occupation.* The gist of the offense being the actual following of the taxable occupation as an occupation, the indictment must allege that the accused was following the occupation.[77]

(iii) *Variance.* An indictment for selling a certain kind of property without license will not warrant a conviction on proof that some other kind was sold;[78] nor is an indictment for selling goods without taking out a license, charging an unlawful sale to two as partners, supported by evidence of a sale to one.[79] Again, an indictment for selling foreign merchandise without license for money is not sustained by proof that the merchandise was sold for produce.[80]

b. Defenses. It is no defense to a prosecution for conducting one business that the accused has a license for another business, distinctly different in character,[81] or that he applied to the proper officer for a requisite license and tendered the fee.[82] So too that a license has been taken out and paid for is no defense to a prosecution for acts done prior to the actual issue of the license,[83] even where the license was antedated so as to cover the unlicensed period.[84]

c. Evidence. Evidence in prosecutions of this character, including the burden of proof[85] and the admissibility[86] as well as the weight and sufficiency of

75. Sheffield *v.* State, 14 Tex. App. 238; Crews *v.* State, 10 Tex. App. 292; Archer *v.* State, 9 Tex. App. 78.

76. Mayers *v.* State, 8 Ark. 222; District of Columbia *v.* Nau, 20 D. C. 547; State *v.* Strauss, 77 N. C. 500; State *v.* Hayne, 4 S. C. 403.

77 *Alabama.*— Merritt *v.* State, 59 Ala. 46; Eubanks *v.* State, 17 Ala. 181, holding further that to charge that defendant did keep a "ten-pin alley" is not equivalent to charging that defendant was engaged in the business of keeping a ten-pin alley. But see Childs *v.* State, 52 Ala. 14; Huttenstein *v.* State, 37 Ala. 157.

Connecticut.— State *v.* Gallagher, 72 Conn. 604, 45 Atl. 430.

Indiana.— Alcott *v.* State, 8 Blackf. 6.

Minnesota.— State *v.* Finch, 78 Minn. 118, 80 N. W. 856, 46 L. R. A. 437.

North Carolina.— State *v.* Roberts, 106 N. C. 662, 10 S. E. 900.

Texas.— Rather *v.* State, 15 Tex. App. 556.

See 32 Cent. Dig. tit. "Licenses," § 89.

78. Com. *v.* Standard Oil Co., 80 S. W. 206, 25 Ky. L. Rep. 2116.

79. State *v.* Miller, 93 N. C. 511, 53 Am. Rep. 469.

80. Colson *v.* State, 7 Blackf. (Ind.) 590.

81. State *v.* Stone, 6 Vt. 295.

82. State *v.* Myers, 63 Mo. 324.

That the provision of an ordinance that the payment of the license-tax shall be in money is void is an objection that cannot be raised by the accused, if he tendered no money or scrip for a license. Ft. Smith *v.* Scruggs, 70 Ark. 549, 69 S. W. 679, 91 Am. St. Rep. 100, 58 L. R. A. 921.

83. Elsherry *v.* State, 52 Ala. 8.

84. State *v.* Raymond, 12 Mont. 226, 29 Pac. 732.

85. See Criminal Law, 12 Cyc. 379 *et seq.*

Burden on state.— In a prosecution for pursuing an occupation without license the state should show the proper levy of the license, together with the amount of such levy. Barnes *v.* State, 44 Tex. Cr. 473, 72 S. W. 177. On an indictment for violating a statute imposing a tax on merchants dealing in sewing-machines, but exempting machines on which a tax has been paid by manufacturers, the burden is on the state to prove that the machines dealt in by the agent, he being a merchant, were of the manufacture designated in the indictment, and that the manufacturer had not paid the tax required by law. Summers *v.* State, 89 Ga. 645, 15 S. E. 842; Weaver *v.* State, 89 Ga. 639, 15 S. E. 840.

Burden is on accused to show that he had a license. Porter *v.* State, 58 Ala. 66; St. Louis *v.* Weitzel, 130 Mo. 600, 31 S. W. 1045; *In re* Oliver, 21 S. C. 318, 53 Am. Rep. 681. Likewise the burden rests on accused to show that he has possession of the license in a prosecution for sales by him as agent without a license in his possession, where it appears that a license was issued to his employer which would authorize sales only by that one of the employer's agents having possession of the license. State *v.* Morrison, 126 N. C. 1123, 36 S. E. 329.

86. See Criminal Law, 12 Cyc. 390 *et seq.*

Admissible.— On a trial for engaging in the business of a dealer in playing cards without license, evidence of sales within the period of limitation against the offense having been given, sales prior to such period may also be given to show the intent with which the ones complained of were made. Dentler *v.* State, 112 Ala. 70, 20 So. 592. In a prosecution for keeping a dog without a license, testimony is not incompetent because it tends to

evidence,[87] is subject to the same rules which control in criminal cases in general.[88]

d. Trial. The general practice in the trial of criminal cases generally,[89] including the rules governing the giving or refusing to give instructions to the jury,[90] the rules governing questions of law and of fact,[91] and the rules governing

show that the accused kept more than one, although he could not be convicted under the complaint for keeping more than one. Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352. On an indictment for keeping a billiard table for public use without a license, the state may show that the table was accessible to any one coming into the place to play thereon, the understanding, however, being that in games played on such table the loser must treat the winner at the bar and that the games are not otherwise paid for. Schmetzer *v.* State, 63 Md. 420, 2 Atl. 576. In a prosecution for conducting the business of a packing house without having the tax required by statute, it is not error to admit in evidence way-bills of cars loaded with packing house products consigned to the packing house, in order to show that the accused paid freight on the goods, had been stored in a warehouse of the packing company, and otherwise acted as its agent. Leps *v.* State, 120 Ga. 139, 47 S. E. 572.

Not admissible.— Where a prosecution for pursuing a given occupation without a license is based on the fact that defendant pursued the occupation in a certain year, it is error to admit the records of a commissioners' court showing a levy of the tax on the occupation in question for a previous year. Howe *v.* State, (Tex. Cr. App. 1904) 78 S. W. 1064.

87. See CRIMINAL LAW, 12 Cyc. 485 *et seq.*

Sufficiency.— In the prosecution under a statute for doing business without a license, on proof of carrying on the business, and on failure of the accused to show that he had taken out a license, conviction is proper, although there is no affirmative proof on the part of the state that the accused had no license. Porter *v.* State, 58 Ala. 66. On an indictment for carrying on business without a license, evidence that defendant was three, four, or five times engaged in distilling rum is sufficient to authorize conviction. Grant *v.* State, 73 Ala. 13. For other cases where the evidence has been held sufficient see McGhee *v.* State, 92 Ga. 21, 17 S. E. 276; State *v.* Raymond, 12 Mont. 226, 29 Pac. 732.

Insufficiency.— Proof of one act of hiring or soliciting will not warrant a conviction of a violation of the statute forbidding carrying on the business of an emigrant agent. State *v.* Napier, 63 S. C. 60, 41 S. E. 13. Nor will conviction stand for acting as an emigrant agent without a license where the evidence fails to show that the accused solicited or procured any resident of the state to remove from the same with an intention to settle elsewhere. Woodson *v.* State, 114 Ga. 844, 40 S. E. 1013. Nor will the fact alone support a conviction for failure to procure a license for a wagon that the accused, who is the owner of such wagon, used it in one or two instances for hire. Cheyenne *v.* O'Connell, 6 Wyo. 491, 46 Pac. 1088. Nor is the evidence sufficient to sustain a conviction for pursuing the occupation of a traveling medical specialist where some of the state's witnesses testify that defendant stated to them that he was a traveling specialist, but the defendant denies that he was a traveling specialist, and the only facts shown relative to the question are that after taking up his residence in a certain place and county and filing his certificate there, he removed to another place where he kept an office and practised medicine. Howe *v.* State, (Tex. Cr. App. 1904) 78 S. W. 1064. Nor will a judgment of conviction in a prosecution of an alleged member of a firm for selling patent medicines without license stand where there is no evidence showing him to be a partner or that he had anything to do with the sale. Good *v.* People, 184 Ill. 396, 56 N. E. 369.

88. See, generally, CRIMINAL LAW, 12 Cyc. 70; EVIDENCE, 16 Cyc. 821.

89. See CRIMINAL LAW, 12 Cyc. 504 *et seq.*

90. See CRIMINAL LAW, 12 Cyc. 611 *et seq.*

Erroneous instructions.— In a prosecution for making a sale of a given article without a license, the time when the sale took place not appearing, it is error to give a general charge for the state. Reid *v.* State, 141 Ala. 578, 37 So. 922. So too when defendant is charged with the offense of pursuing the occupation of selling a certain article without a license, it is erroneous for the court, in charging, to describe the offense as that of selling such article. Viser *v.* State, 10 Tex. App. 86. Again, where, in a prosecution for carrying on a business of putting up lightning rods without a license, it appears that defendant, after the rods were sold by another, delivered and put them up, an instruction that if defendant had more rods in his possession than were necessary to complete the work in question he must be found guilty is erroneous. State *v.* Sheppard, 138 N. C. 579, 50 S. E. 231. And in a prosecution for keeping an animal without a license, as required by statute, a refusal to charge that a delay of nine days to procure a license for the animal on becoming its keeper was reasonable is proper. Com. *v.* Wermouth, 174 Mass. 74, 54 N. E. 352.

91. See CRIMINAL LAW, 12 Cyc. 587 *et seq.*

Questions for jury.— Whether or not the making of two sales without a license will warrant a conviction for engaging in and carrying on a business without a license is a question for the jury. Merritt *v.* State, 59 Ala. 46. So too in a prosecution under a statute making it a misdemeanor to pursue a given calling in a town without a license,

verdicts[92] control the trial in a prosecution for an offense against the license laws.

II. IN RESPECT OF REAL PROPERTY.*

A. Definition. A license in respect of real estate is an authority to do a particular act or series of acts upon the land of another without possessing any estate therein.[93]

B. Distinguished From Various Interests in Land.[94] When the parties reduce their agreement to writing under seal it is sometimes difficult to determine whether they have created a mere license or some interest or estate in the land, and this must turn on the interpretation of the instrument in each particular case. Where the instrument in terms is a grant to use and occupy the land it cannot be construed as a mere license. It is an easement, a lease, or a profit *a prendre* according to the purpose and terms of the instrument.[95] The test to determine whether an agreement for the use of real estate is a lease or a license is whether the contract gives exclusive possession of the premises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license, and this

where the evidence shows that the place where defendant pursued such calling is not an incorporated town, the question whether such place is a town within the meaning of the statute is a question for the jury. Murphy *v.* State, 66 Miss. 46, 5 So. 626.

92. See CRIMINAL LAW, 12 Cyc. 686 *et seq.*

A special verdict, on a charge of pursuing a calling without a license, which does not find whether or not the accused had a license or that he was required to exhibit one by the proper authorities and failed so to do (State *v.* Crump, 104 N. C. 763, 10 S. E. 468), or a special verdict, in a prosecution for the violation of an ordinance imposing a tax on various occupations, which fails clearly to state the occupation carried on by accused and to set forth the specific provision of the ordinance which accused violated (State *v.* Finlayson, 113 N. C. 628, 18 S. E. 200), is fatal and defective.

93. *California.*— Emerson *v.* Bergin, 76 Cal. 197, 201, 18 Pac. 264.

Delaware.— Weldon *v.* Philadelphia, etc., R. Co., 2 Pennew. 1, 10, 43 Atl. 156.

Georgia.— Augusta, etc., R. Co. *v.* Augusta Southern R. Co., 96 Ga. 562, 23 S. E. 501.

Idaho.— Howes *v.* Barmon, (1905) 81 Pac. 48.

Maine.— Moore *v.* Stetson, 96 Me. 197, 202, 52 Atl. 767; Pitman *v.* Poor, 38 Me. 237.

Massachusetts.— Cook *v.* Stearns, 11 Mass. 533, 537.

New Jersey.— East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248, 253.

New York.— Bagg *v.* Robinson, 12 Misc. 299, 304, 34 N. Y. Suppl. 37; Mumford *v.* Whitney, 15 Wend. 380, 390, 30 Am. Dec. 60.

Pennsylvania.— Baldwin *v.* Taylor, 166 Pa. St. 507, 511, 31 Atl. 250.

South Dakota.— Price, etc., Co. *v.* Madison, 17 S. D. 247, 253, 95 N. W. 933.

Texas.— Carro *v.* Tucker, 2 Tex. App. Civ. Cas. § 454.

Washington.— Wiseman *v.* Eastman, 21 Wash. 163, 183, 57 Pac. 398.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 115, 54 Am. Dec. 158, 3 Chandl. 117.

United States.— Sullivan Timber Co. *v.* Mobile, 110 Fed. 186, 195.

See 32 Cent. Dig. tit. "License," § 96.

Other definitions are: "A permission to do some act or series of acts on the lands of the licensor, without having any permanent interest in it." Bouvier L. Dict.

"Authority given to do some act, or a series of acts, on the land of another, without passing any interest in the land." Anderson L. Dict.

"A personal and revocable privilege to do some act or series of acts upon the land of another without possessing any estate therein." Great Falls Waterworks Co. *v.* Great Northern R. Co., 21 Mont. 487, 497, 54 Pac. 963.

94. For distinction between leases and licenses to dig minerals see MINES AND MINERALS.

95. *Illinois.*— Willoughby *v.* Lawrence, 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758.

Indiana.— Gilmore *v.* Hamilton, 83 Ind. 196; Bracken *v.* Rushville, etc., Gravel Road Co., 27 Ind. 346.

Iowa.— Cook *v.* Chicago, etc., R. Co., 40 Iowa 451; Wetherell *v.* Brobst, 23 Iowa 586.

Kentucky.— Porter *v.* Barclay, 7 Ky. L. Rep. 747.

Massachusetts.— Roberts *v.* Lynn Ice Co., 187 Mass. 402, 73 N. E. 523.

Michigan.— Kent Furniture Mfg. Co. *v.* Long, 111 Mich. 383, 69 N. W. 657.

Minnesota.— Bolland *v.* O'Neal, 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 362.

Mississippi.— Gex *v.* Dill, 86 Miss. 10, 38 So. 193.

New York.— Greenwood Lake, etc., R. Co. *v.* New York, etc., R. Co., 134 N. Y. 435, 31 N. E. 874; Jackson *v.* Buel, 9 Johns. 298.

Oregon.— Bingham *v.* Salene, 15 Oreg. 208, 14 Pac. 523, 3 Am. St. Rep. 152.

Rhode Island.— Providence Gas Co. *v.* Thurber, 2 R. I. 15, 55 Am. Dec. 621.

See 32 Cent. Dig. tit. "Licenses," § 99.

* By Walter H. Michael

is a question of law arising out of the construction of the instrument.[96] If the contract is for the exclusive possession and profits of the land it is a lease and not a license no matter in what medium the rent is to be paid.[97] A mere permission to occupy the land of another for any purpose is a license and not a lease,[98] or easement.[99] A license as elsewhere shown need not be in writing.[1] While the grant of an easement is within the statute of frauds and must be in writing.[2]

C. Creation[3] — **1. In General.** Inasmuch as a license gives no estate in land, no formality is necessary for its creation. It may be created by a written instrument,[4] but no writing is necessary. A license may in all cases be created by parol,[5]

96. Roberts *v.* Lynn Ice Co., 187 Mass. 402, 73 N. E. 523; Porter *v.* Merrill, 124 Mass. 534; Central Mills Co. *v.* Hart, 124 Mass. 123; White *v.* Maynard, 111 Mass. 250, 15 Am. Rep. 28; Young *v.* Boston, 104 Mass. 95; Hamblett *v.* Bennett, 6 Allen (Mass.) 140; Swain *v.* Mizner, 8 Gray (Mass.) 182, 69 Am. Dec. 244; Fiske *v.* Framingham Mfg. Co., 14 Pick. (Mass.) 491; Gex *v.* Dill, 86 Miss. 10, 38 So. 193.

97. *Arkansas.*— Crane *v.* Patton, 57 Ark. 340, 21 S. W. 466.

Connecticut.— Smith *v.* Simons, 1 Root 318, 1 Am. Dec. 48.

Indiana.— Heywood *v.* Fulmer, 158 Ind. 658, 32 N. E. 574.

Maine.— Freeman *v.* Underwood, 66 Me. 229.

Pennsylvania.— Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

Virginia.— Hodgson *v.* Perkins, 84 Va. 706, 5 S. E. 710.

United States.— U. S. *v.* Gratiot, 14 Pet. 526, 10 L. ed. 573.

See 32 Cent. Dig. tit. "Licenses," § 98.

98. Lowell *v.* Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; Druse *v.* Wheeler, 22 Mich. 439; Coney Island, etc., R. Co. *v.* Brooklyn Cable Co., 53 Hun (N. Y.) 169, 6 N. Y. Suppl. 108; Dolittle *v.* Eddy, 7 Barb. (N. Y.) 74. An executory contract for the sale and purchase of land, giving to the purchaser a right to enter and possess the premises until default in the payment of the purchase-money, without any reservation of rent or fixed time, is, as respects the possession, a license, and not a lease, and the relation of landlord and tenant does not exist. In such case if the contract is broken by the purchaser, the vendor has a right to enter without notice or demand of possession. Stone *v.* Sprague, 20 Barb. (N. Y.) 509.

99. *Illinois.*— Forbes *v.* Balenseifer, 74 Ill. 183.

Indiana.— Parish *v.* Kaspare, 109 Ind. 586, 10 N. E. 109.

Kansas.— Randal *v.* Elder, 12 Kan. 257.

Massachusetts.— Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Bachelder *v.* Wakefield, 8 Cush. 243.

Minnesota.— Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

New Jersey.— Lawrence *v.* Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702.

New York.— *Ex p.* Coburn, 1 Cow. 568.

Pennsylvania.— Thompson *v.* McElarney, 82 Pa. St. 174.

Vermont.— Western Union Tel. Co. *v.* Bullard, 67 Vt. 272, 31 Atl. 286.

Wisconsin.— Duinneen *v.* Rich, 22 Wis. 550.

See 32 Cent. Dig. tit. "Licenses," § 99.

1. See *infra*, II, C.

2. See Easements, 14 Cyc. 1144.

3. Parol license to divert water see Waters and Watercourses.

Parol license to flow lands see Waters and Watercourses.

Parol evidence to vary written license see Evidence.

Operation and effect of statute of frauds as to executed parol licenses see Fraud.

Application of statute of frauds to creation see Frauds.

4. See Freeman *v.* Underwood, 66 Me. 229.

5. *Connecticut.*— Collins Co. *v.* Marcy, 25 Conn. 239.

Idaho.— Howes *v.* Barmon, (1905) 81 Pac. 48, 69 L. R. A. 568.

Illinois.— Woodward *v.* Seely, 11 Ill. 157, 50 Am. Dec. 445; Carter *v.* Wingard, 47 Ill. App. 296.

Indiana.— Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370. And see Rogers *v.* Cox, 96 Ind. 157, 49 Am. Rep. 152.

Maine.— Harmon *v.* Harmon, 61 Me. 222; Ricker *v.* Kelly, 1 Me. 117, 10 Am. Dec. 38.

Maryland.— Jacob Tome Inst. *v.* Davis, 87 Md. 591, 41 Atl. 166.

Minnesota.— See Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Missouri.— Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

Montana.— Great Falls Waterworks Co. *v.* Great Northern R. Co., 21 Mont. 487, 54 Pac. 963.

New Hampshire.— Batchelder *v.* Sanborn, 24 N. H. 474.

New Jersey.— Freeman *v.* Headly, 33 N. J. L. 523.

New York.— Walter *v.* Post, 6 Duer 363, 4 Abb. Pr. 382; Jamieson *v.* Millemann, 3 Duer 255; *Ex p.* Coburn, 1 Cow. 568.

South Dakota.— Price, etc., Co. *v.* Madison, 17 S. D. 247, 95 N. W. 933.

Vermont.— Clark *v.* Dustin, 52 Vt. 568.

Wisconsin.— Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245; Clute *v.* Carr, 20 Wis. 531, 91 Am. Dec. 442.

England.— Winter *v.* Brockwell, 8 East 308, 9 Rev. Rep. 454; Web *v.* Paternoster, Palm. 71; Wood *v.* Lake, Say. 3.

unless it is otherwise provided by statute.[6] And a written license, although under seal, has only the same effect as a parol license.[7] So also a subsequent ratification of acts previously done is equivalent to precedent authority.[8]

2. Implied License — a. In General. A license may be inferred from the acts of the parties,[9] from their relations, from the exigencies of the case, and from the usages and customs of a civilized community.[10] Thus in order to constitute a license to enter the house of another, it is not necessary that express authority should be given.[11] And indeed the entry of the house of another, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life, cannot be regarded as a trespass.[12]

b. Permitting Acts on Land. When the owner of land, with full knowledge of the facts, tacitly permits another repeatedly to do acts upon the land, a license may be implied from his failure to object.[13]

c. Sale of Property on Land. The owner of real estate may sell whatever is capable of severance, and such sale is a license to enter and remove the property sold.[14]

d. Ineffectual Attempt to Convey or Agreement to Convey. While an ineffectual attempt to convey or lease land of course passes no title, but may nevertheless operate as a license to enter and occupy until the license is revoked;[15]

See 32 Cent. Dig. tit. "Licenses," § 103.

6. People *v.* Macy, 22 Hun (N. Y.) 577.

7. Price, etc., Co. *v.* Madison, 17 S. D. 247, 95 N. W. 933.

8. Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23; Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

A license given by an agent who is not shown to have any authority to give it is inoperative unless ratified. Bohn *v.* Hatch, 133 N. Y. 64, 30 N. E. 659.

9. Syron *v.* Blakeman, 22 Barb. (N. Y.) 336; Walter *v.* Post, 6 Duer (N. Y.) 363; Adams *v.* Burton, 43 Vt. 36.

10. Harmon *v.* Harmon, 61 Me. 222; Lakin *v.* Ames, 10 Cush. (Mass.) 198.

11. Cutler *v.* Smith, 57 Ill. 252.

12. Lakin *v.* Ames, 10 Cush. (Mass.) 198.

Illustrations.— Thus where families are on intimate terms and have long been in the habit of visiting each other and crossing the grounds without objection these facts will justify the jury in finding an implied license (Martin *v.* Houghton, 45 Barb. (N. Y.) 258, 31 How. Pr. 82); so if a person visits the house of another to see him on business and is allowed to enter or does enter without force that would be deemed a license (Cutler *v.* Smith, 57 Ill. 252), and a person who opens a place of business impliedly licenses the public to enter for the purpose of transacting business (Gowen *v.* Philadelphia Exch. Co., 5 Watts & S. (Pa.) 141, 40 Am. Dec. 489).

13. *Illinois.*— Cutler *v.* Smith, 57 Ill. 252.

Maine.— Harmon *v.* Harmon, 61 Me. 222.

Massachusetts.— Pevey *v.* Skinner, 116 Mass. 129.

New Hampshire.— Knowles *v.* Dow, 22 N. H. 387, 55 Am. Dec. 163.

New York.— Syron *v.* Blakeman, 22 Barb. 336; Kuechenmeister *v.* Brown, 13 Misc. 139, 34 N. Y. Suppl. 180.

Vermont.— Adams *v.* Burton, 43 Vt. 36.

Wisconsin.— Thayer *v.* Jarvis, 44 Wis. 388.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

See 32 Cent. Dig. tit. "Licenses," § 702.

The habitual use of a footpath across one's premises for years, without objection, warrants the finding of a license from him therefor. Driscoll *v.* Newark, etc., Lime, etc., Co., 37 N. Y. 637, 97 Am. Dec. 761.

Depositing materials in street.— The fact that a party constructing a building deposits materials therefor in the street, and keeps them there during the erection of the building, with full knowledge of the village authorities, is sufficient to imply a consent to such use of the street. Seneca Falls *v.* Zalinski, 8 Hun (N. Y.) 571.

A license from a city to use space underneath a sidewalk will be implied from long and continuous use, although not expressly given. West Chicago Masonic Assoc. *v.* Cohn, 94 Ill. App. 333.

Fencing abandoned highway.— Where the course of travel on a highway left the surveyed road and went to one side on plaintiff's land, and plaintiff fenced and worked the part of the highway abandoned, such acts amount to a license to the public to use the substituted portion. Prouty *v.* Bell, 44 Vt. 72.

14. Rogers *v.* Cox, 96 Ind. 157, 49 Am. Rep. 152; Folsom *v.* Moore, 19 Me. 252; Clark *v.* Vermont, etc., R. Co., 28 Vt. 103.

15. Little *v.* Willford, 31 Minn. 173, 17 N. W. 282; Van Deusen *v.* Young, 29 N. Y. 9; White *v.* Fuller, 38 Vt. 193. And see Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Illustration.— A deed to county commissioners for a lot on which it is made obligatory to erect a jail, although it may be faulty in its requisites, and not operative as a conveyance, is good as a license to enter and possess the premises for the purposes speci-

a mere agreement to sell or transfer real property does not of itself constitute a license to the contemplated purchaser to enter.[16]

e. Agreement in Respect of Uncertain Boundary Lines. Where the boundary line between adjoining proprietors is unknown a parol agreement to recognize a certain line until the true one can be ascertained is in effect a license to each proprietor from the other to occupy to the temporary line until such time as the true one is known.[17] But an assent to a supposed boundary does not amount to a license to cut timber on the land included between the real and the supposed boundary.[18]

D. Evidence of License[19] and Questions For Jury. While there may be cases in which the law will imply a license in the absence of proof of direct authority,[20] it is generally considered a question of fact for the jury,[21] or the court sitting as a jury.[22]

E. Operation and Effect — 1. Acts Justified by License. While a license operates only as an excuse for the act or acts licensed and passes no interest in the land,[23] it is effectual to justify everything done in accordance with its terms prior to the revocation,[24] and likewise any acts without which the acts licensed could not be done;[25] but it is not reasonable and therefore not legal to presume

fied. Sullivant *v.* Franklin County Com'rs, 3 Ohio 89.

16. Lyford *v.* Putnam, 35 N. H. 563; Eggleston *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 162; Cooper *v.* Stower, 9 Johns. (N. Y.) 331; Suffern *v.* Townsend, 9 Johns, (N. Y.) 35; Lee *v.* Summers, 2 Oreg. 260.

17. Shores *v.* Bell, 58 Vt. 319, 4 Atl. 874. Plaintiff and defendant owned adjoining lands. Defendant asked plaintiff, a surveyor, if he knew and would show him the boundary line of their land, and plaintiff, with his compass, ascertained and marked what both supposed to be the true line, but which in fact was on plaintiff's land. Defendant afterward cut wood on the land, and plaintiff brought suit in trespass *quare clausum fregit*, it was held that defendant had a license to occupy to the line so marked. Parks *v.* Pratt, 52 Vt. 449.

18. Schraeder Min., etc., Co. *v.* Packer, 129 U. S. 688, 9 S. Ct. 385, 32 L. ed. 760.

19. Sufficiency of evidence to show license see Flora *v.* Carbeau, 38 N. Y. 111; Bohn *v.* Hatch, 15 N. Y. Suppl. 550 [*affirmed* in 133 N. Y. 64, 30 N. E. 659]; Cumberland Valley R. Co. *v.* McLanahan, 59 Pa. St. 23.

20. Lakin *v.* Ames, 10 Cush. (Mass.) 198.

21. Davis *v.* Chautauqua Lake Sunday School Assembly, 2 N. Y. St. 365.

22. St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 102 Ill. 514.

23. Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675; Cook *v.* Stearns, 11 Mass. 533; Baltimore, etc., R. Co. *v.* Algire, 63 Md. 319; Jackson *v.* Babcock, 4 Johns. (N. Y.) 418. And see Newport Hospital *v.* Carter, 15 R. I. 285, 3 Atl. 412.

A parol license to build a bridge on the land of another does not authorize the building of a second bridge when the first has been swept away by a flood. Hall *v.* Boyd, 14 Ga. 1.

24. *Indiana.*—Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295.

Massachusetts. — Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203; Whitmarsh *v.* Walker, 1 Metc. 313.

New Hampshire.— Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Marston *v.* Gale, 24 N. H. 176; Sampson *v.* Burnside, 13 N. H. 264.

New Jersey. — Freeman *v.* Headley, 32 N. J. L. 225.

New York.— Selden *v.* Delaware, etc., Canal Co., 29 N. Y. 634; Pierrepont *v.* Barnard, 6 N. Y. 279; Eggleston *v.* New York, etc., R. Co., 35 Barb. 162; Syron *v.* Blakeman, 22 Barb. 336; Davis *v.* Townsend, 10 Barb. 333; Woodruff *v.* Beekman, 43 N. Y. Super. Ct. 282; Miller *v.* Auburn, etc., R. Co., 6 Hill 61.

North Carolina.— Bridges *v.* Purcell, 18 N. C. 492.

Pennsylvania.— Pursell *v.* Stover, 110 Pa. St. 43, 20 Atl. 403.

Texas.— Merriwether *v.* Dixon, 28 Tex. 15.

Vermont.— Prouty *v.* Bell, 44 Vt. 72.

Wisconsin.— Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245.

England.—Wood *v.* Manley, 11 A. & E. 34, 3 Jur. 1028, 9 L. J. Q. B. 27, 3 P. & D. 5. 39 E. C. L. 43; Wallis *v.* Harrison, 4 M. & W. 538; Smith *v.* Faverell, 2 Mod. 6.

Application of rule.— A parol license to cut and carry away standing timber, when fully executed before revocation, constitutes a good defense to an action of trover brought by the person giving the license to recover the value of the timber. Pierrepont *v.* Barnard, 6 N. Y. 279. A verbal license to enter upon land to remove goods, the property of the licensee, is valid until revoked, and will afford a perfect defense to an action for such entry. Whitmarsh *v.* Walker, 1 Metc. (Mass.) 313; Woods *v.* Manley, 11 A. & E. 34, 3 Jur. 1028, 9 L. J. Q. B. 27, 3 P. & D. 5, 39 E. C. L. 43. One who under a parol contract to purchase land has gone into possession and torn down a building thereon with the owner's assent does not become liable for the destruction thereof on refusing to carry out the agreement to purchase the property. Freeman *v.* Headley, 32 N. J. L. 225.

25. Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Woodruff *v.* Beekman, 43 N. Y. Super. Ct. 282; Clark *v.* Glidden, 60 Vt. 702, 15 Atl. 358. And see Curtis *v.* Galvin, 1

a more extensive license than is essential to the enjoyment of what is expressly granted,[26] and one who exceeds the license or abuses his authority is liable for the consequential damages arising therefrom.[27] Being revocable at will no statute of limitations can operate to cut off the defense of justification for acts done under the license before revocation,[28] but after it has been revoked it will protect the licensee no further.[29]

2. To Whom License Available. As shown in another section a license is not assignable,[30] and is not available in favor of any one but the person to whom it is granted.[31] Nevertheless a license will apply to and protect the agents and servants of the licensee whenever from the circumstances it can be presumed that there was an implicit license to such persons,[32] and a license to a firm, one of whose members is deceased, properly belongs to the firm, and will protect it in doing the acts licensed.[33]

3. Miscellaneous. One in possession under a license is estopped to deny the licensor's title,[34] and the licensor is not estopped by a license to put up an after-acquired title in the land with respect to which a license was given.[35] Being revocable at will a license is no bar to an action for repossession of the land.[36] No right to impeach a deed on the ground that it is fraudulent as to creditors is given to one who claims no title but only a parol license to enter and occupy from the grantor, and this made after execution of the deed.[37] A mere license to dig certain property (mineral phosphates) confers no title thereto until it has been dug and removed.[38]

F. Whether Assignable. A license is founded in personal confidence,[39] a mere personal privilege extending only to the person to whom it is given,[40] and is therefore not assignable, and an attempted assignment terminates the privilege.[41]

Allen (Mass.) 215; Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

Application of rule.— A license to draw wood across land includes a license to take down so much of the fence as is necessary to perform such work, and the licensee will not be liable for the escape of cattle through an opening so made by him in the fence unless he negligently left the same open when not engaged in drawing the wood. Sayles *v.* Bemis, 57 Wis. 315, 15 N. W. 432.

Injuries from acts licensed.— A license to perform certain acts exempts the licensee from liability for injuries necessarily resulting from doing the acts in a careful manner, but not for damages for anything beyond that limit. Woodruff *v.* Beekman, 43 N. Y. Super. Ct. 282.

26. Gardner *v.* Rowland, 24 N. C. 247.

27. Gardner *v.* Rowland, 24 N. C. 247; Kissecker *v.* Monn, 36 Pa. St. 313, 78 Am. Dec. 379.

Application of rule.— If a party who possesses a license to enter on the land of another takes down a gate erected thereon to enable him to enter and neglects to restore it to its place, whereby his swine are enabled to trespass upon plaintiff's land, he is liable for the damages caused thereby. Kissecker *v.* Monn, 36 Pa. St. 313, 78 Am. Dec. 379.

28. Merriwether *v.* Dixon, 28 Tex. 15.

29. Marston *v.* Gale, 24 N. H. 176.

30. See *infra*, II, F.

31. *Illinois.*— Galena, etc., R. Co. *v.* Jacobs, 20 Ill. 478.

Maine.— Hill *v.* Lord, 48 Me. 83.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

New York.— Jackson *v.* Babcock, 4 Johns. 418.

England.— Howes *v.* Ball, 7 B. & C. 481, 6 L. J. K. B. O. S. 106, 1 M. & R. 288, 31 Rev. Rep. 256, 14 E. C. L. 218.

See 32 Cent. Dig. tit. "Licenses," § 108.

32. Sterling *v.* Worden, 51 N. H. 217, 12 Am. Rep. 80. See also Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.

33. Frankford *v.* Lennig, 2 Phila. (Pa.) 403.

34. Glynn *v.* George, 20 N. H. 114. And see Merriwether *v.* Dixon, 28 Tex. 15.

35. Brown *v.* Galley, Lalor (N. Y.) 308.

36. Eggleston *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 162.

37. Woodside *v.* Howard, 69 Me. 160.

38. The Dauntless, 19 Fed. 798.

39. Mumford *v.* Whitney, 15 Wend. (N. Y.) 380, 30 Am. Dec. 60; *Ex p.* Coburn, 1 Cow. (N. Y.) 568.

40. East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248; Greenwood Lake, etc., R. Co. *v.* New York, etc., R. Co., 134 N. Y. 435, 31 N. E. 874.

41. *Arkansas.*— Bates *v.* Duncan, 64 Ark. 339, 42 S. W. 410, 62 Am. St. Rep. 190.

Connecticut.— Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

Florida.— Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Iowa.— Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658; Cook *v.* Chicago, etc., R. Co., 40 Iowa 451.

Maine.— Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206; Pease *v.* Gibson, 6 Me. 81.

Massachusetts.— Ruggles *v.* Lesure, 24 Pick. 187.

But a license coupled with an interest follows the interest and passes to the assignee of the same.[42]

G. Revocation and Termination[43] — **1. Right to Revoke — a. In General.** A mere license which is nothing more than a personal privilege is revocable at the pleasure of the licensor,[44] and the fact that the license was created by a

Michigan.—Ward *v.* Rapp, 79 Mich. 469, 44 N. W. 934; Morrill *v.* Mackman, 24 Mich. 279, 9 Am. Rep. 124.

Minnesota.— Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Missouri.— Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484.

Montana.— Fabian *v.* Collins, 3 Mont. 215.

New Hampshire.— Blaisdell *v.* Portsmouth, etc., R. Co., 51 N. H. 483; Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287; Sampson *v.* Burnside, 13 N. H. 264.

New Jersey.— East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248.

New York.— Greenwood Lake, etc., R. Co. *v.* New York, etc., R. Co., 134 N. Y. 435, 31 N. E. 874; Mendenhall *v.* Klinck, 51 N. Y. 246; Mumford *v.* Whitney, 15 Wend. 380, 30 Am. Dec. 60; *Ex p.* Coburn, 1 Cow. 568; Jackson *v.* Babcock, 4 Johns. 418.

Oregon.— Stimson *v.* Hardy, 27 Oreg. 584, 41 Pac. 116.

Pennsylvania.— Pearson *v.* Hartman, 100 Pa. St. 84; Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Funk *v.* Haldeman, 53 Pa. St. 229.

South Dakota.— Polk *v.* Carney, 17 S. D. 436, 97 N. W. 360.

Tennessee.— Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 3 Chandl. 158, 54 Am. Dec. 158.

England.— Howes *v.* Bell, 7 B. & C. 481, 6 L. J. K. B. O. S. 106, 1 M. & R. 288, 31 Rev. Rep. 256, 14 E. C. L. 218; Rex *v.* Newton, J. Bridgm. 113.

Canada.— Sharp *v.* McKeen, 4 N. Brunsw. 524; Ross *v.* Fox, 13 Grant Ch. (U. C.) 683.

See 32 Cent. Dig. tit. "Licenses," § 111.

Reason for rule.— A man may well accord a privilege upon his lands to one person which he would refuse to all others. Hence it is held that a personal license is not assignable, and that an assignment by a licensee determines his right. Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732.

42. *Illinois.*— Russell *v.* Hubbard, 59 Ill. 335.

Maine.— Putnam *v.* White, 76 Me. 551; Mason *v.* Sprague, 47 Me. 18.

New Jersey.— East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248.

New York.— Ziegele *v.* Richelieu, etc., Nav. Co., 3 N. Y. App. Div. 77, 38 N. Y. Suppl. 1022.

Wisconsin.— Keystone Lumber Co. *v.* Kolman, 94 Wis. 465, 69 N. W. 165, 59 Am. St. Rep. 905, 34 L. R. A. 821.

England.— Basset *v.* Maynard, Cro. Eliz. 819; Wickham *v.* Hawker, 10 L. J. Exch. 153, 7 M. & W. 63.

See 32 Cent. Dig. tit. "Licenses," § 111.

43. Revocation of license by municipal corporation see Municipal Corporation.

44. *Alabama.*— Riddle *v.* Brown, 20 Ala. 412, 56 Am. Dec. 202.

Arkansas.— McLeod *v.* Dial, 63 Ark. 10, 37 S. W. 306; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

Connecticut.—Collins Co. *v.* Marcy, 25 Conn. 239; Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

Georgia.— Fluker *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 12 Am. St. Rep. 328, 2 L. R. A. 843; Wingard *v.* Tift, 24 Ga. 179.

Idaho.— Howes *v.* Barmon, (1905) 81 Pac. 48.

Illinois.— Hibbard *v.* Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; Lamber *v.* Manning, 171 Ill. 612, 49 N. E. 509; Totel *v.* Bonnefoy, 123 Ill. 653, 14 N. E. 687, 5 Am. St. Rep. 570; St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; Tanner *v.* Volentine, 75 Ill. 624; Kamphouse *v.* Gaffner, 73 Ill. 453; Kimball *v.* Yates, 14 Ill. 464.

Indiana.— Noftsger *v.* Barkdoll, 148 Ind. 531, 47 N. E. 960; Shirley *v.* Crabb, 138 Ind. 200, 37 N. E. 130, 46 Am. St. Rep. 376; Parish *v.* Kaspare, 109 Ind. 586, 10 N. E. 109.

Kentucky.— Illinois Cent. R. Co. *v.* Waldrop, 72 S. W. 1116, 24 Ky. L. Rep. 2127.

Maine.— Seidensparger *v.* Spear, 17 Me. 123, 35 Am. Dec. 234.

Maryland.— Classen *v.* Chesapeake Guano Co., 81 Md. 258, 31 Atl. 808; Baltimore, etc., R. Co. *v.* Potomac Coal Co., 51 Md. 327, 34 Am. Rep. 316.

Massachusetts.— Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Clapp *v.* Boston, 133 Mass. 367; Owen *v.* Field, 12 Allen 457; Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203; Ruggles *v.* Lesure, 24 Pick. 187; Cook *v.* Stearns, 11 Mass. 533.

Michigan.— Nowlin Lumber Co. *v.* Wilson, 119 Mich. 406, 78 N. W. 338; Wood *v.* Michigan Air Line R. Co., 90 Mich. 334, 51 N. W. 263; Williams *v.* Flood, 63 Mich. 487, 30 N. W. 93; Hitchens *v.* Shaller, 32 Mich. 496; Druse *v.* Wheeler, 22 Mich. 439.

Minnesota.— Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639; Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Missouri.— Pitzman *v.* Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536; Wheeler *v.* St. Joseph Stock Yards, etc., Co., 66 Mo. App. 260.

Montana.—Great Falls Water Works Co. *v.* Great Northern R. Co., 21 Mont. 487, 54 Pac. 963; Fabian *v.* Collins, 3 Mont. 215.

New Hampshire.— Dodge *v.* McClintock, 47 N. H. 383; Houston *v.* Loffee, 46 N. H. 505.

written instrument, or even conferred by deed, does not affect the rule of revocability at the option of the licensor.[45]

b. Where Money Has Been Expended on Property Licensed. In a number of the states, when the licensee has acted under the authority conferred and has incurred expense in the execution of it, by making valuable improvements or otherwise, equity regards it as an executed contract and will not permit it to be revoked, regarding it substantially as an easement, the revocation of which would be a fraud on the licensee.[46] But upon principle these cases can be supported only

New Jersey.— Hetfield *v.* Central R. Co., 29 N. J. L. 571; East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248; Lawrence *v.* Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702.

New York.— Brown *v.* New York, 176 N. Y. 571, 68 N. E. 1115; White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Bohn *v.* Hatch, 133 N. Y. 64, 30 N. E. 659; Crosdale *v.* Lanigan, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551; Wheelock *v.* Noonan, 108 N. Y. 179, 15 N. E. 67, 2 Am. St. Rep. 405; Cronkhite *v.* Cronkhite, 94 N. Y. 323; Wiseman *v.* Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Murdock *v.* Prospect Park, etc., R. Co., 73 N. Y. 579; Flora *v.* Carbean, 38 N. Y. 111; Brown *v.* New York, 78 N. Y. App. Div. 361, 79 N. Y. Suppl. 943; Clifford *v.* O'Neil, 12 N. Y. App. Div. 1, 42 N. Y. Suppl. 607; Sweeney *v.* St. John, 28 Hun 634; Davis *v.* Townsend, 10 Barb. 333.

North Carolina.— Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. C. 658, 10 S. E. 659.

Oregon.— Stinson *v.* Hardy, 27 Oreg. 584, 41 Pac. 116.

Pennsylvania.— Baldwin *v.* Taylor, 166 Pa. St. 507, 31 Atl. 250; Crosland *v.* Pottsville Borough, 126 Pa. St. 511, 18 Atl. 15, 12 Am. St. Rep. 891; New York, etc., R. Co. *v.* Young, 33 Pa. St. 175; Read *v.* St. Ambrose Church, 6 Pa. Co. Ct. 76.

South Carolina.— Couch *v.* Burke, 2 Hill 534.

Tennessee.— Memphis *v.* Lenore, 6 Coldw. 412.

Texas.— Carro *v.* Tucker, 2 Tex. App. Civ. Cas. § 454.

Vermont.— Hall *v.* Chaffee, 13 Vt. 150.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245; Duinneen *v.* Rich, 22 Wis. 550; Chynoweth *v.* Tenney, 10 Wis. 397.

United States.— Williams *v.* Morrison, 28 Fed. 872, 32 Fed. 177; Northern Pacific R. Co. *v.* Barnesville, etc., R. Co., 4 Fed. 298, 2 McCrary 203.

England.— Fentiman *v.* Smith, 4 East 107, 7 Rev. Rep. 533; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838.

See 32 Cent. Dig. tit. "Licenses," § 116.

45. *Minnesota.*— Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

New Jersey.— East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248.

New York.— Jackson *v.* Babcock, 4 Johns. 418.

North Carolina.—Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540.

England.—Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838.

46. *Arkansas.*— Johnson *v.* Lewis, 47 Ark. 66, 14 S. W. 466; Wynn *v.* Garland, 19 Ark. 23, 68 Am. Dec. 190.

California.— Smith *v.* Green, 109 Cal. 228, 41 Pac. 1022; Flickinger *v.* Shaw, 87 Cal. 126, 25 Pac. 268, 22 Am. St. Rep. 234, 11 L. R. A. 134.

Colorado.— Tynon *v.* Despain, 22 Colo. 240, 43 Pac. 1039; Chicosa Irrigating Ditch Co. *v.* El Moro Ditch Co., 10 Colo. App. 276, 50 Pac. 731; De Graffenried *v.* Savage, 9 Colo. App. 131, 47 Pac. 902.

Georgia.— Hiers *v.* Mill Haven Co., 113 Ga. 1002, 39 S. E. 444; Macon *v.* Franklin, 12 Ga. 239; Sheffield *v.* Collier, 3 Ga. 82. And see Augusta *v.* Burum, 93 Ga. 68, 19 S. E. 820, 26 L. R. A. 340; Rawson *v.* Bell, 46 Ga. 19.

Indiana.— Joseph *v.* Wild, 146 Ind. 249, 45 N. E. 467; Brauns *v.* Glesige, 130 Ind. 167, 29 N. E. 1061; Saucer *v.* Keller, 129 Ind. 475, 28 N. E. 1117; Nowlin *v.* Whipple, 120 Ind. 596, 22 N. E. 669, 6 L. R. A. 159; Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490, 11 N. E. 482; Simons *v.* Morehouse, 88 Ind. 391; Lane *v.* Miller, 27 Ind. 534; Dodge *v.* Johnson, 32 Ind. App. 471, 67 N. E. 560.

Iowa.— Upton *v.* Brazier, 17 Iowa 153; Beatty *v.* Gregory, 17 Iowa 109, 85 Am. Dec. 546; Wickersham *v.* Orr, 9 Iowa 253, 74 Am. Dec. 348.

Kansas.— Kastner *v.* Benz, 67 Kan. 486, 73 Pac. 67.

Nevada.— Lee *v.* McLeod, 12 Nev. 280.

New Jersey.— Hudson Tel. Co. *v.* Jersey City, 49 N. J. L. 303, 8 Atl. 123, 60 Am. Rep. 619; Raritan Water-Power Co. *v.* Veghte, 21 N. J. Eq. 463. But see Baughart *v.* Flummerfelt, 43 N. J. L. 28; Lawrence *v.* Springer, 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702.

Oregon.— Bowman *v.* Bowman, 35 Oreg. 279, 57 Pac. 546; Garrett *v.* Bishop, 27 Oreg. 349, 41 Pac. 10; McBroom *v.* Thompson, 25 Oreg. 559, 37 Pac. 57, 42 Am. St. Rep. 806; Curtis *v.* Le Grande Hydraulic Water Co., 20 Oreg. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484; Combs *v.* Slayton, 19 Oreg. 99, 26 Pac. 661; Huston *v.* Bybee, 17 Oreg. 140, 20 Pac. 51, 2 L. R. A. 568; Coffman *v.* Robbins, 8 Oreg. 278.

Pennsylvania.— Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Lacy *v.* Arnett, 33 Pa. St. 169; Resick *v.* Kern, 14 Serg. & R. 267, 16 Am. Dec. 497; Le Fevre *v.* Le Fevre, 4 Serg. & R. 241, 8 Am. Dec. 696.

Texas.— Risien *v.* Brown, 73 Tex. 135, 10 S. W. 661.

on the ground that what was called a license was something more than a mere license. In many cases the license is connected with a grant, and then the party who has given it cannot in general revoke it so as to defeat his grant to which it was incident. In other cases there was not a mere license, but an oral agreement to grant an easement, followed by permanent and substantial improvements made upon faith of the agreement, which equity regards as sufficient part performance to take the case out of the statute of frauds, and some cases proceed avowedly on these grounds.[47] According to the better opinion, however, where nothing more than a mere oral license appears, it is revocable at the will of the licensor, whatever expenditures the licensee may have made, provided the licensee has reasonable notice and opportunity to remove his fixtures and improvements. To hold otherwise would be to override the statute of frauds and convert an executed license into an estate in land, which is going a greater length than equity ever went under the doctrine of part performance; nor does the case involve any

Vermont.—Western Union Tel. Co. *v.* Bullard, 67 Vt. 272, 31 Atl. 286; Clark *v.* Glidden, 60 Vt. 702, 15 Atl. 358.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

United States.— National Waterworks Co. *v.* Kansas City, 65 Fed. 691.

See 32 Cent. Dig. tit. "Licenses," § 120 *et seq.*

Applications of doctrine.— A license under which the licensee has constructed a levee on the licensor's land cannot be revoked, where the revocation would cause great and irreparable injury to the licensee's land; and a court of equity, on the ground of equitable estoppel, will enjoin the licensor from subsequently tearing down the levee. Grimshaw *v.* Belcher, 88 Cal. 217, 26 Pac. 84, 22 Am. St. Rep. 298. Consent by the owner of the fee that an adjoining proprietor may drain his land by cutting a ditch over the land of the one giving the consent creates an irrevocable license, where the licensee, on the faith of the license, expends money and erects valuable improvements necessary to enjoy the license. Brantley *v.* Perry, 120 Ga. 760, 48 S. E. 332. A parol license to build a dam, which might cause the grantor's land to be overflowed, being executed, is irrevocable. Lacy *v.* Arnett, 33 Pa. St. 169. Where the owner of land gives parol permission to a railroad company to enter thereon and construct its road-bed, such license is revocable only as long as it is executory, and after the company has spent large sums of money in pursuance thereof, in the construction of its road-bed and road, such license cannot be revoked. Messick *v.* Midland R. Co., 128 Ind. 81, 27 N. E. 419. Where a right granted to erect scales in a town was a mere license, and revocable as such, yet where, before the revocation, the licensees had ordered a scale suitable to the place, paid the freight thereon, and some of the grading had been done, and the plan of licensees' building had been enlarged so as to make room for the scale-beam on the inside, and these facts were known to the city council, they are estopped from revoking the license. Spencer *v.* Andrew, 82 Iowa 14, 47 N. W. 1007, 12 L. R. A. 115.

Limitations of doctrine.— The fact that a landowner silently acquiesces in the erection of a structure imposing a burden on his land will not estop him to revoke the implied license. Ewing *v.* Rhea, 37 Oreg. 583, 62 Pac. 790, 82 Am. St. Rep. 783, 52 L. R. A. 140 [*overruling* Cartes *v.* La Grand Water Co., 20 Oreg. 31]; Hallock *v.* Suitor, 37 Oreg. 9, 60 Pac. 384; Lavery *v.* Arnold, 36 Oreg. 84, 57 Pac. 906, 58 Pac. 524. A mere naked license which is predicated on the invasion of another's right and which is in effect a trespass upon his property does not so encourage a party to act upon the faith of the implied permission as to render it irrevocable, even when money has been expended in improving property under a belief that the unavailed use relied upon will never be interrupted. Ewing *v.* Rhea, 37 Oreg. 583, 62 Pac. 583, 82 Am. St. Rep. 783, 52 L. R. A. 140. So permission to erect a grain house on a railroad company's land adjacent to its track is a mere license, and it is not rendered irrevocable by the licensee's purchase of an adjoining lot, at the suggestion of the railroad's general superintendent, who gave the license, with the expectation of using it in connection with the building; for that is not such an expenditure of money on the faith of the license as will estop the licensor to revoke it. Kipp *v.* Coenen, 55 Iowa 63, 7 N. W. 417.

47. *Georgia.*— Cook *v.* Pridgen, 45 Ga. 331, 12 Am. Rep. 582.

Illinois.— St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; Russell *v.* Hubbard, 59 Ill. 335.

Minnesota.— Johnson *v.* Skillman, 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192.

Missouri.— Pitzman *v.* Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536.

New Jersey.— Van Horn *v.* Clark, 56 N. J. Eq. 476, 40 Atl. 203.

England.— McManus *v.* Cooke, 35 Ch. D. 681, 51 J. P. 708, 56 L. J. Ch. 662, 56 L. T. Rep. N. S. 900, 35 Wkly. Rep. 754; Devonshire *v.* Eglin, 14 Beav. 530, 20 L. J. Ch. 495, 51 Eng. Reprint 389; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838.

Canada.— Nicol *v.* Tackaberry, 10 Grant Ch. (U. C.) 109.

See 32 Cent. Dig. tit. "Licenses," § 121.

matter of estoppel *in pais* against the licensor or render him liable to an action for damages.[48]

48. *Alabama.*— Turner *v.* Mobile, 135 Ala. 73, 33 So. 132; Hicks *v.* Swift Creek Mill Co., 133 Ala. 411, 31 So. 947, 91 Am. St. Rep. 38, 57 L. R. A. 720 [*distinguishing* Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439].

Connecticut.— Collins Co. *v.* Marcy, 25 Conn. 239; Foot *v.* New Haven, etc., R. Co., 23 Conn. 214; Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

Delaware.— Jackson, etc., Co. *v.* Philadelphia, etc., R. Co., 4 Del. Ch. 180.

Idaho.— Howes *v.* Barmon, (1905) 81 Pac. 48, 69 L. R. A. 568.

Illinois.— West Chicago St. R. Co. *v.* People, 214 Ill. 9, 73 N. E. 393; Lambe *v.* Manning, 171 Ill. 612, 49 N. E. 509; Dwight *v.* Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; St. Louis Nat. Stock Yards *v.* Wiggins Ferry Co., 112 Ill. 384, 54 Am. Rep. 243; Lake Shore, etc., R. Co. *v.* Hoffert, 40 Ill. App. 631.

Maryland.— Partridge *v.* Baltimore First Independent Church, 39 Md. 631; Hays *v.* Richardson, Gill & J. 366.

Massachusetts.— Whittemore *v.* New York, etc., R. Co., 174 Mass. 363, 54 N. E. 867; Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Morse *v.* Copeland, 2 Gray 302; Cook *v.* Stearns, 11 Mass. 533.

Michigan.— Nowlin Lumber Co. *v.* Wilson, 119 Mich. 406, 78 N. W. 338; Hitchens *v.* Shaller, 32 Mich. 496.

Minnesota.— Watson *v.* Chicago, etc., R. Co., 46 Minn. 321, 48 N. W. 1129.

Missouri.— Cook *v.* Ferbert, 145 Mo. 462, 46 S. W. 947; Pitzman *v.* Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536 [*overruling* Baker *v.* Chicago, etc., R. Co., 57 Mo. 265; Fuhr *v.* Dean, 26 Mo. 116, 69 Am. Dec. 484, so far as they hold the contrary].

Montana.— Great Falls Waterworks Co. *v.* Great Northern R. Co., 21 Mont. 487, 54 Pac. 963.

New Hampshire.— Taylor *v.* Gerrish, 59 N. H. 569; Houston *v.* Laffee, 46 N. H. 505 [*overruling* in effect Miller *v.* Tobie, 41 N. H. 84; Cowles *v.* Kidder, 24 N. H. 364, 57 Am. Dec. 287; Carleton *v.* Reddington, 21 N. H. 291, 57 Am. Dec. 287]; Sampson *v.* Burnside, 13 N. H. 264; Ameriscoggin Bridge *v.* Bragg, 11 N. H. 102; Woodbury *v.* Parshley, 7 N. H. 237, 26 Am. Dec. 739; Putney *v.* Day, 6 N. H. 430, 25 Am. Dec. 470; Harris *v.* Gillingham, 6 N. H. 9, 23 Am. Dec. 701.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Crosdale *v.* Lanigan, 129 N. Y. 604, 29 N. E. 824, 26 Am. St. Rep. 551 [*reversing* 13 N. Y. Suppl. 31]; Eckerson *v.* Crippen, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487; Wiseman *v.* Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Babcock *v.* Utter, 1 Abb. Dec. 27, 1 Keyes 115, 397, 32 How. Pr. 432; Kommer *v.* Daly, 104 N. Y. App. Div. 528, 93 N. Y. Suppl. 1021; Little *v.* American Tel., etc., Co., 96 N. Y. App. Div. 559, 89 N. Y. Suppl. 136; Fonda, etc., R. Co. *v.* Olmstead, 84 N. Y. App. Div. 127, 81 N. Y. Suppl. 1041; Dempsey *v.* Kipp, 62 Barb. 311; Ketcham *v.* Newman, 14 Daly 57; Mumford *v.* Whitney, 15 Wend. 380, 30 Am. Dec. 60.

North Carolina.— Bass *v.* Roanoke Nav., etc., Co., 111 N. C. 439, 16 S. E. 402, 19 L. R. A. 247; Richmond, etc., R. Co. *v.* Durham, etc., R. Co., 104 N. C. 658, 10 S. E. 659; McCracken *v.* McCracken, 88 N. C. 272; Bridges *v.* Purcell, 18 N. C. 492. A parol license to use land may be revoked, upon a reasonable opportunity being given to remove improvements made thereunder. Kivett *v.* McKeithan, 90 N. C. 106.

Ohio.— Rodefer *v.* Pittsburg, etc., R. Co., 72 Ohio St. 272, 74 N. E. 183, 70 L. R. A. 844 [*overruling* in effect Meek *v.* Breckenridge, 29 Ohio St. 642; Hornback *v.* Cincinnati, etc., R. Co., 20 Ohio St. 81; Wilson *v.* Chalfant, 15 Ohio 248, 45 Am. Dec. 574].

Rhode Island.— Foster *v.* Browning, 4 R. I. 47, 67 Am. Dec. 505.

South Carolina.— McClellan *v.* Taylor, 54 S. C. 430, 32 S. E. 527; Trammell *v.* Trammell, 11 Rich. 471; Clinton *v.* McKenzie, 5 Strobh. 36.

Utah.— Yeager *v.* Woodruff, 17 Utah 361, 53 Pac. 1045.

Washington.— Hathaway *v.* Yakima Water, etc., Co., 14 Wash. 469, 44 Pac. 896, 53 Am. St. Rep. 874.

West Virginia.— Pifer *v.* Brown, 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Clute *v.* Carr, 20 Wis. 531, 91 Am. Dec. 442. Where one person without consideration verbally grants the use of his land to another, regardless of whether, when the permission is given, the parties contemplate that the privilege will be permanent, and whether such other enters on the land and expends money thereon to facilitate the enjoyment of such privilege, the transaction creates only a mere revocable license. Huber *v.* Stark, 124 Wis. 359, 102 N. W. 12, 109 Am. St. Rep. 937.

England.— Webber *v.* Lee, 9 Q. B. D. 315, 47 J. P. 4, 51 L. J. Q. B. 485, 47 L. T. Rep. N. S. 215, 30 Wkly. Rep. 866; Adams *v.* Andrews, 15 Q. B. 284, 15 Jur. 149, 20 L. J. Q. B. 33, 69 E. C. L. 284; Taplin *v.* Florence, 10 C. B. 744, 15 Jur. 402, 20 L. J. C. P. 137, 70 E. C. L. 744; Cocker *v.* Cowper, 1 C. M. & R. 418, 5 Tyrw. 103; Fentiman *v.* Smith, 4 East 107, 7 Rev. Rep. 533; Ruffey *v.* Henderson, 8 Eng. L. & Eq. 305; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 3 M. & W. 838.

Canada.—Cronkhite *v.* Miller, 2 N. Brunsw. Eq. 203; Fielder *v.* Bannister, 8 Grant Ch. (U. C.) 257.

See 32 Cent. Dig. tit. "Licenses," § 120 *et seq.*

c. Valuable Consideration Paid. According to the weight of authority the fact that a valuable consideration is given for a license does not render it irrevocable,[49] although there are some decisions to the contrary.[50]

d. License Coupled With an Interest — (I) *In General.* Where a license to use property for specific purposes, under a contract perpetual in its purport, is not specially restricted, and is coupled with an interest necessary to the possession and enjoyment of the rights acquired, then the license is irrevocable so long as the interest continues.[51]

(II) *Sale of Property on Land.* The sale of personal property upon the land of the seller gives the purchaser a license to enter upon the land for the purpose of removing it, and this license cannot be revoked unless the licensee fails to act within a reasonable time.[52] An oral sale of trees or perennial growing crops

Applications of doctrine.— The occupation of land and the making of valuable manufacturing improvements thereon in execution of a void agreement, such occupancy not having ripened into a right by prescription, does not create a license to use the land, irrevocable as long as the improvements are maintained. Carley *v.* Gitchell, 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428. Where a railroad company constructs tracks on land under a mere license from the owner, the latter may revoke the license and bring ejectment. Minneapolis Western R. Co. *v.* Minneapolis, etc., R. Co., 58 Minn. 128, 59 N. W. 983; Eggleston *v.* New York, etc., R. Co., 35 Barb. (N. Y.) 162. A license to a city to flow lands with sewage is revocable, at the option of the licensor, after the construction of the sewer. Duryee *v.* New York, 96 N. Y. 477.

A parol license of a privilege to be executed on land is revocable, so far as its further enjoyment is concerned; and the licensor is under no obligation to place the licensee *in statu quo*. Batchelder *v.* Hibbard, 58 N. H. 269.

49. *Minnesota.*— Minneapolis Mill Co. *v.* Minneapolis, etc., R. Co., 51 Minn. 304, 53 N. W. 639.

Missouri.— Cook *v.* Ferbert, 145 Mo. 462, 46 S. W. 947.

New Hampshire.— Dodge *v.* McClintock, 47 N. H. 383.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Eckerson *v.* Crippen, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487; Wiseman *v.* Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479.

North Carolina.— Kivett *v.* McKeithan, 90 N. C. 106.

Pennsylvania.— Baldwin *v.* Taylor, 166 Pa. St. 507, 31 Atl. 250; Dark *v.* Johnston, 55 Pa. St. 164, 93 Am. Dec. 732; Huff *v.* McCauley, 53 Pa. St. 206, 91 Am. Dec. 203. *Contra*, Read *v.* St. Ambrose Church, 6 Pa. Co. Ct. 76.

Washington.— Hathaway *v.* Yakima Water, etc., Co., 14 Wash. 469, 44 Pac. 896, 53 Am. St. Rep. 874.

Wisconsin.— Thoemke *v.* Fiedler, 91 Wis. 386, 64 N. W. 1030; Duinneen *v.* Rich, 22 Wis. 550.

England.— Cocker *v.* Cowper, 1 C. M. & R. 418, 5 Tyrw. 103; Fentiman *v.* Smith, 4 East 107, 7 Rev. Rep. 533; Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838.

See 32 Cent. Dig. tit. "Licenses," §§ 118, 121.

50. Van Ohlen *v.* Van Ohlen, 56 Ill. 528; Harlan *v.* Logansport Natural Gas Co., 133 Ind. 323, 32 N. E. 930; Martin *v.* O'Brien, 34 Miss. 21. And see Merriam *v.* Meriden, 43 Conn. 173.

51. *Alabama.*— Ferris *v.* Hoaglan, 121 Ala. 240, 25 So. 834.

Arkansas.— McLeod *v.* Dial, 63 Ark. 10, 37 S. W. 306.

Illinois.— Barney *v.* Lincoln Park, 203 Ill. 397, 67 N. E. 801.

Indiana.— Coal *v.* Peters Box, etc., Co., 87 Ind. 531; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Miller *v.* State, 39 Ind. 267; Bracken *v.* Rushville, etc., Gravel Road Co., 27 Ind. 346; Snowden *v.* Wilas, 19 Ind. 10, 81 Am. Dec. 370.

Maryland.— Long *v.* Buchanan, 27 Md. 502, 92 Am. Dec. 653.

Missouri.— Darlington *v.* Missouri Pac. R. Co., 99 Mo. App. 1, 72 S. W. 122.

New Hampshire.— Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80.

North Carolina.— Williamston, etc., R. Co. *v.* Battle, 66 N. C. 540.

Pennsylvania.— Funk *v.* Haldeman, 53 Pa. St. 229.

Texas.— Carro *v.* Tucker, 2 Tex. App. Civ. Cas. § 454.

Wyoming.— Metcalf *v.* Hart, 3 Wyo. 513, 27 Pac. 900, 31 Pac. 407, 31 Am. St. Rep. 122.

United States.— U. S. *v.* Baltimore, etc., R. Co., 24 Fed. Cas. No. 14,510, 1 Hughes 138.

England.— Wood *v.* Ledbitter, 9 Jur. 187, 14 L. J. Exch. 161, 13 M. & W. 838; Thomas *v.* Sorrell, Vaugh. 330.

See 32 Cent. Dig. tit. "Licenses," § 117.

52. *Indiana.*— Rogers *v.* Cox, 96 Ind. 157, 49 Am. Rep. 152.

Maryland.— Long *v.* Buchanan, 27 Md. 502, 92 Am. Dec. 653.

Massachusetts.— Giles *v.* Simonds, 15 Gray 441, 77 Am. Dec. 373; Heath *v.* Randall, 4 Cush. 195.

North Carolina.— Whitaker *v.* Cawthorne, 14 N. C. 389.

Vermont.— Barnes *v.* Barnes, 6 Vt. 388.

Wisconsin.— Chynoweth *v.* Tenney, 10 Wis. 397.

gives the vendee a license to enter and sever them from the soil, which is revocable until they are severed; but after they are severed the license to enter upon the land and remove them as chattels is irrevocable.[53]

(III) *Placing Property on Another's Land With His Permission.* A similar case occurs where one places his property on the premises of another by the latter's permission, in which case it is said the implied license to enter and remove it is irrevocable.[54]

(IV) *Right of Lessor to Pass Over Lessee's Premises.* For a like reason a license to pass across the lessor's premises to and from leased land is not revocable while the lease is in force.[55]

2. How Revoked or Terminated — a. By Express Notice. A license may be revoked by express notice, giving the licensee a reasonable opportunity to withdraw and remove his property from the premises.[56] A license may be revoked by

England.— Wood *v.* Manley, 11 A. & E. 34, 3 Jur. 1028, 9 L. J. Q. B. 27, 3 P. & D. 5, 39 E. C. L. 43.

See 32 Cent. Dig. tit. "Licenses," §§ 116, 117.

53. *Florida.*— Jenkins *v.* Lykes, 19 Fla. 148, 45 Am. Rep. 19.

Indiana.— Spacy *v.* Evans, 152 Ind. 431, 52 N. E. 605; Cool *v.* Peters Box, etc., Co., 87 Ind. 531; Owens *v.* Lewis, 46 Ind. 488, 15 Am. Rep. 295; Watson *v.* Adams, 32 Ind. App. 281, 69 N. E. 696. A license granted by a parol contract for the sale of a tree growing permanently on the land of the licensor may be revoked at any time before the tree is cut down. Armstrong *v.* Lawson, 73 Ind. 498.

Iowa.— Garner *v.* Mahoney, 115 Iowa 356, 88 N. W. 828.

Maine.— Pierce *v.* Ganton, 98 Me. 553, 57 Atl. 889; Folsom *v.* Moore, 19 Me. 252. A license to enter realty and cut timber by a simple contract is irrevocable as to that part of the timber which has been severed from the land in execution of the contract, but as to the timber not severed from the land it is revocable, not only at the owner's will, but by his death or by his conveyance of the land without reservation. Emerson *v.* Shores, 95 Me. 237, 49 Atl. 1051, 85 Am. St. Rep. 404.

Massachusetts.— Fletcher *v.* Livingston, 153 Mass. 388, 26 N. E. 1001; United Soc. *v.* Brooks, 145 Mass. 410, 14 N. E. 622; Drake *v.* Wells, 11 Allen 141; Giles *v.* Simonds, 15 Gray 441, 77 Am. Dec. 373; Driscoll *v.* Marshall, 15 Gray 62.

Michigan.— White *v.* King, 87 Mich. 107, 49 N. W. 518; Williams *v.* Flood, 63 Mich. 487, 30 N. W. 93.

Mississippi.— Walton *v.* Lowrey, 74 Miss. 484, 21 So. 243.

New Hampshire.— Hodsdon *v.* Kennett, 73 N. H. 225, 60 Atl. 686.

Rhode Island.— An instrument purporting to convey all the standing wood on a certain lot of land, "with two years from the date hereof to cut and remove said wood in," does not convey any interest in the land; but it is a mere license or executory contract, revocable at any time before the timber is cut. Fish *v.* Capwell, 18 R. I. 667, 29 Atl. 840, 49 Am. St. Rep. 807, 25 L. R. A. 159.

South Dakota.— Polk *v.* Carney, 17 S. D. 436, 97 N. W. 360.

Washington.— Welever *v.* Advance Shingle Co., 34 Wash. 331, 75 Pac. 863.

Wisconsin.— Bruley *v.* Garvin, 105 Wis. 625, 81 N. W. 1038, 48 L. R. A. 839; Keystone Lumber Co. *v.* Kolman, 94 Wis. 465, 69 N. W. 165, 59 Am. St. Rep. 905, 34 L. R. A. 821.

England.— Hewitt *v.* Isham, 7 Exch. 77, 21 L. J. Exch. 35.

Canada.— Breckenridge *v.* Woolner, 8 N. Brunsw. 303; New Brunswick, etc., Land Co. *v.* Kirk, 6 N. Brunsw. 443; Kerr *v.* Connell, 2 N. Brunsw. 233.

See 32 Cent. Dig. tit. "Licenses," § 117 *et seq.*

Exercise of license within reasonable time necessary.— A reservation decided to be a parol license to enter upon land "at any and all times," and cut and carry away growing wood, must be acted upon within a reasonable time, and, if not acted upon within a period of more than three years may be revoked. Hill *v.* Cutting, 113 Mass. 107; Hill *v.* Hill, 113 Mass. 103, 18 Am. Rep. 455.

54. Giles *v.* Simonds, 15 Gray (Mass.) 441, 77 Am. Dec. 373; Arrington *v.* Larrabee, 10 Cush. (Mass.) 512; Sterling *v.* Warden, 51 N. H. 217, 12 Am. Rep. 80; Patrick *v.* Colerick, 7 L. J. Exch. 135, 3 M. & W. 483.

55. Powers *v.* Harlow, 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154. Where the owners of adjoining real estate entered into a contract for the common construction of a hotel, each reserving the right to use the ground-floor portion, except the rotunda, and doors were constructed between the rotunda and a saloon operated in a room owned by one of such coöwners, the operator of the saloon had an implied license to use the rotunda as a passageway to the saloon so long as the doors remained open. Belser *v.* Moore, 73 Ark. 296, 84 S. W. 219.

56. *Georgia.*— Flukar *v.* Georgia R., etc., Co., 81 Ga. 461, 8 S. E. 529, 12 Am. St. Rep. 328, 2 L. R. A. 843.

Illinois.— Forbes *v.* Balenseifer, 74 Ill. 183.

Massachusetts.— Ruggles *v.* Lasure, 24 Pick. 187.

New York.— Bennett *v.* Scutt, 18 Barb. 347.

Pennsylvania.— Troxell *v.* Lehigh Crane Iron Co., 42 Pa. St. 513.

a sale and conveyance of the land without reserving the privilege to the licensee, or by a lease or mortgage of the same, for a mere license cannot work a breach of the warranty of title.[57]

b. By Sale, Lease, or Mortgage of the Land. A license is revoked by a sale of the premises under an execution against the licensor;[58] so also by a taking of the premises under the law of eminent domain.[59]

c. By Action of Trespass. An action of trespass against the licensee revokes his license.[60]

d. By Death or Insanity of Either Party. The death of either party works a revocation of the license.[61] And likewise the insanity of the licensor puts an end to the license.[62]

e. By Attempted Assignment. As heretofore shown, a licensee also forfeits his right by an attempted assignment of the license.[63]

f. By Obstructing Use of Land or Appropriating to Inconsistent Use. A license may be revoked by obstructing the land licensed to be used,[64] but an appro-

South Carolina.— Couch *v.* Burke, 2 Hill 534.

Washington.— Anderson *v.* Northern Pac. R. Co., 19 Wash. 340, 53 Pac. 345.

See 32 Cent. Dig. tit. "Licenses," § 124.

Illustration.—Where defendant under parol license built a bridge, one end of which was on plaintiff's land, and this end of the bridge was washed away and defendant gave notice to plaintiff not to rebuild, this terminated the license. Couch *v.* Burke, 2 Hill (S. C.) 534.

57. *Connecticut.*— Francis Gowdy Distilling Co. *v.* Grant, 65 Conn. 473, 32 Atl. 936.

Florida.— Jenkins *v.* Sykes, 19 Fla. 148, 45 Am. Rep. 19.

Illinois.—Entwhistle *v.* Henke, 211 Ill. 273, 71 N. E. 990, 103 Am. St. Rep. 196; Forbes *v.* Balenseifer, 74 Ill. 183; Kamphouse *v.* Gaffner, 73 Ill. 453.

Maryland.— Carter *v.* Harlan, 6 Md. 20.

Massachusetts.— Worthen *v.* Garno, 182 Mass. 243, 65 N. E. 67; Hodgkins *v.* Farrington, 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209; Barry *v.* Worcester, 143 Mass. 476, 10 N. E. 186; Drake *v.* Wells, 11 Allen 141; Stevens *v.* Stevens, 11 Metc. 251, 45 Am. Dec. 203; Cook *v.* Stearns, 11 Mass. 533.

Michigan.— Minneapolis, etc., R. Co. *v.* Marble, 112 Mich. 4, 70 N. W. 319; Maxwell *v.* Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639; Buell *v.* Irwin, 24 Mich. 145.

Missouri.— Houx *v.* Seat, 26 Mo. 178, 72 Am. Dec. 202.

New Hampshire.— Lamprey *v.* Eastman, 68 N. H. 198, 34 Atl. 741.

New York.— White *v.* Manhattan R. Co., 139 N. Y. 19, 34 N. E. 887; Cahoon *v.* Bayand, 123 N. Y. 298, 25 N. E. 376; Eckerson *v.* Crippen, 110 N. Y. 585, 18 N. E. 443, 1 L. R. A. 487; Winne *v.* Ulster County Sav. Inst., 37 Hun 349; Eggleston *v.* New York, etc., R. Co., 35 Barb. 162; Andrews *v.* Delhi, etc., Tel. Co., 73 N. Y. Suppl. 1129.

North Carolina.— Whitaker *v.* Cawthorne, 14 N. C. 389.

Rhode Island.— Fish *v.* Capwell, 18 R. I. 667, 29 Atl. 840, 49 Am. St. Rep. 807, 25 L. R. A. 159.

South Dakota.— Price, etc., Co. *v.* Madison, 17 S. D. 247, 95 N. W. 933.

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England.— Roffey *v.* Henderson, 17 Q. B. 574, 16 Jur. 84, 21 L. J. Q. B. 49, 79 E. C. L. 574. And see Coleman *v.* Foster, 1 H. & N. 37, 4 Wkly. Rep. 489.

Canada.— Gesner *v.* Cairns, 7 N. Brunsw. 595; Cole *v.* Brunt, 35 U. C. Q. B. 103.

See 32 Cent. Dig. tit. "Licenses," § 125.

58. Taylor *v.* Gerrish, 59 N. H. 569.

59. Clapp *v.* Boston, 133 Mass. 367.

60. Memphis *v.* Wait, 102 Tenn. 274, 52 S. W. 161; Lockhart *v.* Geir, 54 Wis. 133, 11 N. W. 245.

61. *Connecticut.*— Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

Indiana.— Spacy *v.* Evans, 152 Ind. 431, 52 N. E. 605, 48 N. E. 355; Laughery Turnpike Co. *v.* McCreary, 147 Ind. 526, 46 N. E. 906.

Massachusetts.— Ruggles *v.* Leasure, 24 Pick. 187; Johnson *v.* Carter, 16 Mass. 443.

Michigan.— Estelle *v.* Peacock, 48 Mich. 469, 12 N. W. 659.

New Jersey.— East Jersey Iron Co. *v.* Wright, 32 N. J. Eq. 248.

New York.— Eggleston *v.* New York, etc., R. Co., 35 Barb. 162; Clark *v.* Strong, 105 N. Y. App. Div. 179, 93 N. Y. Suppl. 514; Vandenburgh *v.* Van Bergen, 13 Johns. 212.

North Carolina.— Carter *v.* Page, 26 N. C. 424; Bridges *v.* Purcell, 18 N. C. 492.

Vermont.— Chandler *v.* Spear, 22 Vt. 388.

Wisconsin.— Hazelton *v.* Putnam, 3 Pinn. 107, 54 Am. Dec. 158, 3 Chandl. 117.

United States.— De Haro *v.* U. S., 5 Wall. 599, 18 L. ed. 681; Hunt *v.* Rousmanier, 8 Wheat. 174, 5 L. ed. 589.

See 32 Cent. Dig. tit. "Licenses," § 115; 5 Lawson's Rights and Remedies, § 2674.

62. Berry *v.* Potter, 52 N. J. Eq. 664, 29 Atl. 323.

63. See *supra*, II, F.

64. Forbes *v.* Balenseifer, 74 Ill. 183; Illinois Cent. R. Co. *v.* Waldrop, 72 S. W. 1116,

priation of the land to any use inconsistent with the enjoyment of the license works a revocation.[65]

g. By Expiration of Time, Abandonment, and Non-User.[66] Where a license in terms is limited in point of time it expires at the end of the stipulated period, and the subsequent possession of the licensee is that of a mere trespasser.[67] A license once enjoyed may be released by abandonment and non-user of the premises.[68] And the right to enter upon the lands of another for any purpose may be lost by long negligence and disuse which will raise a presumption of release, especially where the licensor has in the meantime made an inconsistent use of the property.[69]

3. Notice of Revocation. Where the licensee has movable property on the premises, he should be given reasonable notice of a revocation of the license and an opportunity to remove it.[70] But where the termination of the license necessitates no removal of property, no notice is necessary.[71]

H. Action Against Intruder. It has been held that the grant of a license does not create such an interest or estate in the licensee as will enable him to maintain an action in his own name against one who disturbs his enjoyment of the license.[72] But on the other hand it has been held that one in the enjoyment of a mere license subject to revocation may maintain an action of trespass for an invasion of his rights by a stranger.[73]

I. Action Against Licensor. Although the right of the licensor to revoke

24 Ky. L. Rep. 2127; Fowler *v.* Hyland, 48 Mich. 179, 12 N. W. 26 (closing up right of way); Quimby *v.* Straw, 71 N. H. 160, 51 Atl. 656.

65. Forbes *v.* Balenseifer, 74 Ill. 183; Simpson *v.* Wright, 21 Ill. App. 67; Wheeler *v.* St. Joseph Stock-Yards, etc., Co., 66 Mo. App. 260.

66. Abandonment of license to cut timber see Logs and Logging.

67. Mason *v.* Holt, 1 Allen (Mass.) 45; Reed *v.* Merrifield, 10 Metc. (Mass.) 155; Glynn *v.* George, 20 N. H. 114; Gilmore *v.* Wilson, 53 Pa. St. 194.

68. Lake Erie, etc., R. Co. *v.* Michener, 117 Ind. 465, 20 N. E. 254; Fischer *v.* Johnson, 106 Iowa 181, 76 N. W. 658.

Partial abandonment.— The abandonment of a right of way by a railroad company for the purpose of operating its freight and passenger trains may not constitute such an abandonment as will authorize the former owner to recover possession, if it still be used by the company for purposes incident to and in connection with its business. Columbus *v.* Columbus, etc., R. Co., 37 Ind. 294; Muhle *v.* New York, etc., R. Co., 86 Tex. 459, 25 S. W. 607; Ft. Worth, etc., R. Co. *v.* Sweatt, 20 Tex. Civ. App. 543, 50 S. W. 162.

69. Curtiss *v.* Hoyt, 19 Conn. 154, 84 Am. Dec. 149; Tatum *v.* St. Louis, 125 Mo. 647, 28 S. W. 1002; Ten Broeck *v.* Livingston, 1 Johns. Ch. (N. Y.) 357.

70. Great Falls Waterworks Co. *v.* Great Northern R. Co., 21 Mont. 487, 54 Pac. 963; Carter *v.* Page, 26 N. C. 424; Comer *v.* Felton, 61 Fed. 731, 10 C. C. A. 28; Mellor *v.* Watkins, L. R. 9 Q. B. 400, 23 Wkly. Rep. 55; Wilson *v.* Tavener, [1901] 1 Ch. 578, 84 L. T. Rep. N. S. 48; Cornish *v.* Stubbs, L. R. 5 C. P. 334, 39 L. J. C. P. 202, 22 L. T. Rep. N. S. 21, 18 Wkly. Rep. 547. *Compare* Pitzman *v.* Boyce, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536.

Application of rule.— Claimant owned a dry dock, with its only ingress and egress through a basin on state land which opened into the Erie canal. The canal waters flowed out through claimant's land. An existing swing bridge, part of the towpath, was built by claimant with the consent of the state. This bridge the state determined to remove, and offered claimant the privilege of erecting an elevated bridge in its place, which he refused. The state then erected a stationary bridge, too low for water traffic, which, owing to the time when it was built, prevented the prior removal of two canal boats belonging to claimant. It was held that the privilege claimant enjoyed was one revocable at will of the state, but the state was bound to afford him reasonable notice and opportunity to remove his two boats; and upon his failure to remove the same was liable for damages sustained by claimant. Putnam *v.* State, 132 N. Y. 344, 30 N. E. 743.

Sufficiency of notice.— Where one has erected and uses a house upon the land of another under a license from the latter, a recovery in ejectment by a grantee of the owner of the land after the expiration of the license, with possession taken and held for more than a year, is sufficient notice of the owner's intention to resume his rights. Prince *v.* Case, 10 Conn. 375, 27 Am. Dec. 675.

71. Wilson *v.* St. Paul, etc., R. Co., 41 Minn. 56, 42 N. W. 600, 4 L. R. A. 378.

72. Stockport Waterworks Co. *v.* Potter, 3 H. & C. 300, 10 Jur. N. S. 1005, 10 L. T. Rep. N. S. 748; Hill *v.* Tupper, 2 H. & C. 121, 9 Jur. N. S. 725, 32 L. J. Exch. 217, 8 L. T. Rep. N. S. 792, 11 Wkly. Rep. 784. See also Fletcher *v.* Livingston, 153 Mass. 388, 26 N. E. 1001.

73. Case *v.* Weber, 2 Ind. 108; Miller *v.* Greenwich Tp., 62 N. J. L. 771, 42 Atl. 735; Paul *v.* Hazelton, 37 N. J. L. 106.

the license is undisputed, yet the licensee may maintain an action for damages against him for breach of contract in revoking it, for a contract may be ineffectual for the purpose of conveying a permanent interest in land and at the same time be effectual for the protection of other rights.[74] Where a mere license has been granted to pass over the land of another, no damages for the obstruction of such way can be recovered against the owner of the land,[75] unless there is some concealed trap, machine, or excavation in the way which the licensee could not have discovered by the use of ordinary diligence while in the use of the license.[76]

LICENTIOUS. The doing what one pleases without regard to the rights of others, and such is its meaning in the definition of wantonness as the licentious act of one toward the person of another;[1] lewd.[2] (See, generally, LEWDNESS.)

LICENTIOUSLY. In a licentious manner, freely, loosely, dissolutely.[3] (See, generally, LEWDNESS.)

LICENTIOUSNESS. The indulgence of the arbitrary will of the individual without regard to ethics or law, or respect for the rights of others;[4] lewdness or LASCIVIOUSNESS,[5] *q. v.* (See, generally, LEWDNESS.)

LICET. Literally, "Although."[6]

LICET DISPOSITIO DE INTERESSE FUTURO SIT INUTILIS, TAMEN FIERI POTEST DECLARATIO PRÆCEDENS QUÆ SORTIATUR EFFECTUM, INTERVENIENTE NOVO ACTU. A maxim meaning "Although the grant of a future interest is inoperative, yet it may become a declaration precedent, taking effect upon the intervention of some new act."[7]

LICET SÆPIUS REQUISITUS. Literally, "Although often requested." In pleading, a phrase used in the old Latin forms of declarations and literally translated in the modern precedents.[8]

LICITA BENE MISCENTUR, FORMULA NISI JURIS OBSTET. A maxim meaning "Lawful acts [done by several authorities] are well mingled, [*i. e.*, become united or consolidated into one good act,] unless some form of law forbid."[9]

74. Kerrison *v.* Smith, [1897] 2 Q. B. 445, 66 L. J. Q. B. 762, 77 L. T. Rep. N. S. 344.

Illustration.— An action will lie for the breach of a written contract, by which A, for a valuable consideration, agrees with B that B may dig and carry away cinders from a cinder-tip, forming part of A's land, although the contract, not being under seal, is incapable of granting or passing an easement. Smart *v.* Jones, 15 C. B. N. S. 717, 10 Jur. N. S. 678, 33 L. J. C. P. 154, 10 L. T. Rep. N. S. 271, 12 Wkly. Rep. 430, 109 E. C. L. 717.

Pleading.— A declaration alleging that plaintiff, with the assent of defendants, had maintained a line of pipes on a right of way granted to him by them, and that they, without his knowledge, took up and carried away the pipes, shows a cause of action, regardless of plaintiff's right to maintain the pipes under his grant; it setting up an unrevoked license, and defendants, if desiring to traverse the fact of license, or to show that it has been revoked, being required to plead accordingly. Despeaux *v.* Delano, 71 N. J. L. 280, 59 Atl. 10.

75. Quinn *v.* Anderson, 70 Cal. 454, 11 Pac. 746.

76. Macnner *v.* Carroll, 46 Md. 193.

1. Bouvier L. Dict. [*quoted* in Welch *v.* Durand, 36 Conn. 182, 184, 4 Am. Rep. 55; State *v.* Brigman, 94 N. C. 888, 889].

2. Abbott L. Dict. [*quoted* in Holton *v.* State, 28 Fla. 303, 309, 9 So. 716].

3. State *v.* Lawrence, 19 Nebr. 307, 313, 27 N. W. 126.

4. Black L. Dict.

5. Black L. Dict.

6. Burrill L. Dict. See also Kirlee's Case, 3 Leon. 66, 67; Buckley *v.* Thomas, Plowd. 118, 127*a*, where it is said: "And this Word (*licet*) of itself, without more Matter is neither an Affirmative nor a Negative, but the Matter governs it, and it does not govern the Matter. As *licet* he be, is an Affirmative, and *licet* he be not is a Negative."

7 Broom Leg. Max. [*citing* Bacon Max. p. 94, reg. 14].

Applied or quoted in Head *v.* Goodwin, 37 Me. 181, 187; Jones *v.* Richardson, 10 Metc. (Mass.) 481, 492; McCaffrey *v.* Woodin, 65 N. Y. 459, 461, 22 Am. Rep. 644; Miller *v.* Jones, 17 Fed. Cas. No. 9,576; Holroyd *v.* Marshall, 2 De G. F. & J. 596, 63 Eng. Ch. 596, 45 Eng. Reprint 752.

8. Burrill L. Dict. [*citing* 2 Chitty Pl. 90]. See also People *v.* Central Pac. R. Co., 76 Cal. 29, 42, 18 Pac. 90; State *v.* Cowles, 5 Ohio St. 87, 92; Fellowes *v.* Ottawa Gas Co., 19 U. C. C. P. 174, 178; Reid *v.* Carroll, 8 U. C. Q. B. 275, 277. See also, generally, PLEADING.

9. Black L. Dict. [*citing* Bacon Max. p. 94, reg. 24].

LICITATION. A mode of dividing property held in common by two or more persons.[10] (See, generally, PARTITION.)

LIE. As a noun, a FALSEHOOD,[11] *q. v.* As a verb, to subsist; to exist; to be substantial; to be proper or available.[12]

LIEGE SUBJECT. A term generally understood as meaning a natural born subject.[13] (See, generally, ALIENS; CITIZENS.)

10. Hayes *v.* Cuny, 9 Mart. (La.) 87, 89.

11. English L. Dict. See also Beswick *v.* Chappel, 8 B. Mon. (Ky.) 486, 487; Benton *v.* Pratt, 2 Wend. (N. Y.) 385, 389, 20 Am. Dec. 623; Dottarer *v.* Bushey, 16 Pa. St. 204, 209.

12. Black L. Dict.

When a right of way is said to "lie" see Hays *v.* Richardson, 1 Gill & J. (Md.) 366, 380.

"Lying," the participle, employed in connection with other words has been construed among others in the following phrases: "Being and lying." Walsh *v.* Ringer, 2 Ohio 327, 328, 15 Am. Dec. 555. "Lying about." Lawrence *v.* King, L. R. 3 Q. B. 345, 348, 9 B. & S. 325, 37 L. J. M. C. 78, 18 L. T. Rep. N. S. 356, 16 Wkly. Rep. 966. See also Morris *v.* Jeffries, L. R. 1 Q. B. 261, 35 L. J. M. C. 143, 13 L. T. Rep. N. S. 629, 14 Wkly. Rep. 310. "Lying at anchor." Reid *v.* Lancaster F. Ins. Co., 90 N. Y. 382, 386; Walsh *v.* New York Floating Dry Dock Co., 8 Daly (N. Y.) 387, 389 [*affirmed* in 77 N. Y. 448, 453]. "Lying days." Commercial Steamship Co. *v.* Boulton, L. R. 10 Q. B. 346, 348, 3 Aspin. 111, 44 L. J. Q. B. 219, 33 L. T. Rep. N. S. 707, 23 Wkly. Rep. 854. "Lying-in." Harty *v.* Malloy, 67 Conn. 339, 345, 35 Atl. 259. "Lying in the port." Glynn *v.* Margetson, [1893] A. C. 351, 353, 7 Aspin. 366, 62 L. J. Q. B. 466, 69 L. T. Rep. N. S. 1, 1 Reports 193. "Lying in wait." See LYING IN WAIT. "Lying on." Carson *v.* Doe, 4 Houst. (Del.) 328, 336. "Lying up." Dows *v.* Howard Ins. Co., 5 Rob. (N. Y.) 473, 480. "Lying upon." Sullivan *v.* Moreno, 19 Fla. 200, 223. "Lying west and adjacent." Ferguson *v.* Dent, 8 Mo. 667, 669.

13. Com. *v.* Woelper, 3 Serg. & R. (Pa.) 29, 34, 8 Am. Dec. 628 [*citing* Coke Litt. 129; Inst. 742].

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* Author of "Fires," 19 Cyc. 977; "Fish and Game," 19 Cyc. 986; "Improvements," 22 Cyc. 1; "Joint Tenancy," 23 Cyc. 482; and joint author of "Gaming," 20 Cyc. 873; and of "A Treatise of the Law of Agency."

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I. DEFINITION, NATURE, AND CLASSIFICATION.

A. In General. A lien, in a limited and technical sense, signifies the right by which a person in possession of personal property holds and retains it against the owner in satisfaction of a demand due to the party retaining it;[1] but in its more extensive meaning and common acceptation it is understood and used to denote a legal claim or charge on property, either real or personal, as security for the payment of some debt or obligation; it is not strictly a property in or right to the thing itself but more properly constitutes a charge or security thereon,[2]

1. Bouvier L. Dict. And see the following cases:
Arkansas.— Alexander *v.* Pardue, 30 Ark. 359, 361.
Connecticut.— Fishell *v.* Morris, 57 Conn. 547, 551, 18 Atl. 717, 6 L. R. A. 82.
Kentucky.— Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 832, 21 Ky. L. Rep. 1221.
Maine.—Hamilton *v.* Buck, 36 Me. 536, 539.
New Jersey.— Stansbury *v.* Patent Cloth Mfg. Co., 5 N. J. L. 433, 517.
New York.— Crommelin *v.* New York, etc., R. Co., 10 Bosw. 77, 80; Trust *v.* Pirsson, 1 Hilt. 292, 296; Storm *v.* Waddell, 2 Sandf. Ch. 494, 558.
Pennsylvania.— Riddle's Appeal, 3 Pa. Cas. 566, 570, 7 Atl. 232.
Tennessee.— Neil *v.* Staten, 7 Heisk. 290.
Texas.— Houston, etc., R. Co. *v.* Bremond, 66 Tex. 159, 162, 18 S. W. 448.
Utah.— Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74, 91.
Wisconsin.— Boorman *v.* Wisconsin Rotary Engine Co., 36 Wis. 207, 211.
United States.— Downer *v.* Brackett, 7 Fed. Cas. No. 4,043, 21 Vt. 599, 602.
England.— Hammonds *v.* Barclay, 2 East 227, 235.
Canada.— Emerson *v.* Niagara Nav. Co., 2 Ont. 528, 539.
And see *infra*, I, B.

By the civil law a lien, *jus retentionis*, is defined to be "a right to detain a thing until a demand is satisfied." See Ames *v.* Dyer, 41 Me. 397.

Distinction between lien and pledge.— In the case of simple lien there can be no power of sale or disposition of the goods which is inconsistent with the retention of the possession by the person entitled to the lien, whereas in the case of a pledge or pawn of goods, to secure the payment of money at a certain day, on default by the pawnor, the pawnee may sell the goods deposited and realize the amount, and become a trustee for the overplus for the pawnor; or, even if no day of payment be named, he may, upon waiting a reasonable time, and taking the proper steps, realize his debt in like manner. Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J. Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13. See, generally, PLEDGES.

The doctrine of lien as between debtor and creditor is so equitable that it cannot be favored too much; but as between one class of creditors and another there is not the same reason for favor. Jacobs *v.* Latour, 5 Bing. 130, 6 L. J. C. P. O. S. 243, 2 M. & P. 201, 15 E. C. L. 506.

2. Anderson L. Dict.; Black L. Dict.; Bouvier L. Dict. And see the following cases:
Alabama.— Hines *v.* Duncan, 79 Ala. 112, 117, 58 Am. Rep. 580; Mobile Bldg., etc., Assoc. *v.* Robertson, 65 Ala. 382.
Arkansas.—Whiting *v.* Beebe, 12 Ark. 421, 570.
Illinois.— Bliss *v.* Clark, 39 Ill. 590, 594, 89 Am. Dec. 330.
Indiana.— Bell *v.* Hines, 16 Ind. App. 184, 44 N. E. 576, 577.
Iowa.— Grant *v.* Whitwell, 9 Iowa 152, 157.
Kansas.— Mendenhall *v.* Burnette, 58 Kan. 355, 363, 49 Pac. 93.
Maine.— Ames *v.* Dyer, 41 Me. 397, 399.
Massachusetts.— Rowley *v.* Bigelow, 12 Pick. 307, 313, 23 Am. Dec. 607.
Michigan.— Lafferty *v.* People's Sav. Bank, 76 Mich. 35, 51, 43 N. W. 34.
Minnesota.— Minnesota Debenture Co. *v.* Dean, 85 Minn. 473, 476, 89 N. W. 848; Atwater *v.* Manchester Sav. Bank, 45 Minn. 341, 346, 48 N. W. 187, 12 L. R. A. 741.
Mississippi.— Elson *v.* Barrier, 56 Miss. 394, 396; Andrews *v.* Wilkes, 6 How. 554, 562, 38 Am. Dec. 450.
Nebraska.— Sessions *v.* Irwin, 8 Nebr. 5, 8.
New York.—Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 56, 20 Am. Rep. 451; Roch-

although the thing is not in the possession of the one to whom the debt or obligation is due.[3] There is no distinction between absolute and conditional liens. Although the latter may be defeated by the conditions, they are nevertheless liens until the contingency happens.[4] Liens, so far as the source of their creation is concerned, are divisible into common-law, equitable, maritime, and statutory.[5]

B. Common-Law Liens. A common-law lien is the right to retain the possession of personal property until some debt due on, or secured by, such property shall be paid or satisfied.[6] It merely secures the lienor in the possession of

ester Distilling Co. *v.* O'Brien, 72 Hun 462, 464, 25 N. Y. Suppl. 281; Storm *v.* Waddell, 2 Sandf. Ch. 494, 558.

North Carolina.—Frick *v.* Hilliard, 95 N. C. 117, 122; Thigpen *v.* Leigh, 93 N. C. 47, 49.

Oklahoma.— Jackson *v.* Kincaid, 4 Okla. 554, 561, 46 Pac. 587.

Pennsylvania.— Wood's Appeal, 30 Pa. St. 274, 277; Ingles *v.* Bringhurst, 1 Dall. 341, 345, 1 L. ed. 167; Lowrie's Estate, 5 Lanc. L. Rev. 295.

Utah.— Gillmor *v.* Dale, 27 Utah 372, 377, 75 Pac. 932; Russell *v.* Harkness, 4 Utah 197, 202, 7 Pac. 865.

Virginia.— Buckner *v.* Metz, 77 Va. 107, 115.

West Virginia.— Morrison *v.* Clarksburg Coal, etc., Co., 52 W. Va. 331, 340, 43 S. E. 102; Central City Brick Co. *v.* Norfolk, etc., R. Co., 44 W. Va. 286, 294, 28 S. E. 926; U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 704, 21 S. E. 769.

United States.— *In re* Laird, 109 Fed. 550, 555, 48 C. C. A. 538; The Menominie, 36 Fed. 197, 199; Downer *v.* Brackett, 7 Fed. Cas. No. 4,043, 21 Vt. 599, 602; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212, 225; U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545.

Other definitions.— "A special right which one has in that of which another has the general property; and, to the extent of the lien, it is an abridgment of the dominion which the latter has in the thing." Hayden *v.* Delay, Litt. Sel. Cas. (Ky.) 278, 279.

"A security . . . given by law to secure the payment of money." Gilchrist *v.* Helena, etc., R. Co., 58 Fed. 708, 711.

The word "lien" is ordinarily used as a noun (*In re* Abbott, 198 Pa. St. 493, 48 Atl. 435), and sometimes is used as equivalent to "claim or demand" (see Stone *v.* Browning, 49 Barb. (N. Y.) 244).

A lien is entirely distinct from the debt or obligation which it secures and may or may not be asserted as such, and the debt itself may be enforced with or without its aid. Rochester Distilling Co. *v.* O'Brien, 72 Hun (N. Y.) 462, 25 N. Y. Suppl. 281.

A lien upon land is not an estate or interest in it (Brackett *v.* Gidmore, 15 Minn. 245; Bidwell *v.* Webb, 10 Minn. 59, 83 Am. Dec. 56; Power *v.* Bowdle, 3 N. D. 107, 54 N. W. 404, 44 Am. St. Rep. 511, 21 L. R. A. 328; Morrison *v.* Clarksburg Coal, etc., Co., 52 W. Va. 331, 43 S. E. 102), even though, under some statutes, there is an agreement to that effect (Solomon *v.* Franklin, 7 Ida. 316, 62 Pac. 1030).

The words "lien on certain property" as security do not import a sale or mortgage (Milliman *v.* Neher, 20 Barb. (N. Y.) 37); and a lien cannot be construed as a mortgage (Russell *v.* Harkness, 4 Utah 197, 7 Pac. 865); but a lien in the nature of a mortgage is a mortgage itself (McLanahan *v.* Reeside, 9 Watts (Pa.) 508, 36 Am. Dec. 136, holding that an agreement that certain notes shall be a lien in the nature of a mortgage on certain land with a deed of conveyance in fee constitutes a mortgage so as to give a preference in regard to a lien over subsequent judgment creditors). See, generally, MORTGAGES.

A lien is not a collateral contract it is a right in, or claim against, some interest in the subject of the contract, created by the laws as an incident of the contract itself. Pelham *v.* The B. F. Woolsey, 3 Fed. 457.

No action can be maintained by the lienholder which requires title for its maintenance. Elson *v.* Barrier, 56 Miss. 394.

3. Downer *v.* Brackett, 7 Fed. Cas. No. 4,043, 21 Vt. 599. And see cases cited *supra*, note 2.

4. Storm *v.* Waddell, 2 Sandf. Ch. (N. Y.) 494.

5. The Menominie, 36 Fed. 197.

6. *Alabama.*— Mobile Bldg., etc., Assoc. *v.* Robertson, 65 Ala. 382.

Arkansas.— Hamlett *v.* Tallman, 30 Ark. 505.

Connecticut.— Fishell *v.* Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82.

Kentucky.— Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221.

Maine.— Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379.

New Hampshire.— Stillings *v.* Gibson, 63 N. H. 1; Jacobs *v.* Knapp, 50 N. H. 71.

New Jersey.— Stansbury *v.* Patent Cloth Mfg. Co., 5 N. J. L. 433.

New York.— Grinnell *v.* Suydam, 3 Sandf. 132; McFarland *v.* Wheeler, 26 Wend. 467.

North Carolina.— Arnold *v.* Porter, 122 N. C. 242, 29 S. E. 414.

Pennsylvania.— Corry First Nat. Bank *v.* Childs, 10 Phila. 452.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

United States.— Peck *v.* Jenness, 7 How. 612, 12 L. ed. 841; The Menominie, 36 Fed. 197.

England.— Donald *v.* Suckling, L. R. 1 Q. B. 585, 7 B. & S. 783, 12 Jur. N. S. 795, 35 L. J.

the property on which the lien attaches, to hold it as security for the debt or obligation, but not to sell it.[7]

C. Equitable Liens. An equitable lien is one which a court of equity recognizes as distinct from strictly legal rights, and is always ready to enforce regardless of what rights the applicant may have in a court of law.[8] The term "equitable lien" merely denotes a charge or encumbrance of one person upon the property of another. It is not a right of property in the subject-matter of the lien nor a right of action therefor, nor does it depend upon possession; but is merely a right to have the property subjected to the payment of a debt or claim,[9] and it applies as well to charges arising by express engagement of the owner of property as to a duty or intention implied on his part to make the property answerable for a specific debt or engagement.[10]

D. Statutory Liens. Liens are also frequently defined or provided for by statute.[11] Such statutes embrace in a modified form the common-law liens,[12] and also frequently provide for liens in cases to which the common-law lien does not apply.[13] Statutory liens, however, have been looked upon with jealousy,[14] and generally will only be extended to cases expressly provided for by the statute,[15] and then only where there has been a strict compliance with all the statutory requisites essential to their creation and existence.[16] A statutory lien is provided

Q. B. 232, 14 L. T. Rep. N. S. 772, 15 Wkly. Rep. 13. And see the cases cited *supra*, page 660, note 1.

Whatever its origin, it rests upon the idea that the party having it has the right to retain the thing itself, whatever it may be, as by keeping or carriage, till the services in relation thereto, by work or labor, or by materials furnished, shall have been paid and satisfied by the general owner of the property upon which the lien exists. Ames *v.* Dyer, 41 Me. 397.

7. Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531; Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371, 102 Am. St. Rep. 926; Marsh *v.* The Minnie, 16 Fed. Cas. No. 9,117. And see *infra*, III, H; and cases cited in the preceding note.

8. Tinsley *v.* Durfey, 99 Ill. App. 239. See Gladstone *v.* Birley, 2 Meriv. 401, 3 M. & S. 205, 15 Rev. Rep. 465, 35 Eng. Reprint 993; Black L. Dict. 720; Bouvier L. Dict.

An equitable lien is valid in Massachusetts, although no remedy for its enforcement is provided by the state jurisprudence. Fletcher *v.* Morey, 9 Fed. Cas. No. 4,864, 2 Story 555.

9. See Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580; Arnold *v.* Porter, 122 N. C. 242, 29 S. E. 414; Davis *v.* Flagstaff Silver Min. Co., 2 Utah 74; Peck *v.* Jenness, 7 How. (U. S.) 612, 12 L. ed. 841; Shakers Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632; The Menominie, 36 Fed. 197; *Ex p.* Foster, 9 Fed. Cas. No. 4,960, 2 Story 131.

10. Shakers Soc. *v.* Watson, 68 Fed. 730, 15 C. C. A. 632, 755.

11. See the statutes of the several states.

Impairment of obligation of contract by statutes relating to liens see CONSTITUTIONAL LAW, 8 Cyc. 1005.

Impairment of vested rights by statutes relating to liens see CONSTITUTIONAL LAW, 8 Cyc. 900.

Cal. Code Civ. Proc. § 1180, defines a lien as "a charge imposed upon specific property by which it is made security for the performance of an act." Frowenfeld *v.* Hastings, 134 Cal. 128, 66 Pac. 178; People *v.* Hulbert, 71 Cal. 72, 12 Pac. 43.

Under the Louisiana law the term "lien" is a legal term used generally to signify any encumbrance on property, and is usually employed in connection with privileges and rarely with mortgages. Benjamin's Succession, 39 La. Ann. 612, 2 So. 187. Under Rev. Civ. Code, art. 3188, a "privilege" is a right which the nature of the debt gives to a creditor, enabling him to be preferred before other creditors including those holding mortgages. Carroll *v.* Bancker, 43 La. Ann. 1078, 1194, 10 So. 187.

A statutory lien repudiates everything in the nature of an equitable lien.— Ridgely *v.* Iglehart, 3 Bland (Md.) 540.

A statute of one state cannot create a lien on property in another state nor provide any mode of proceeding which will give such an effect to an extraterritorial transaction. De Witt *v.* Burnett, 3 Barb. (N. Y.) 89. See, generally, STATUTES.

12. Wenz *v.* McBride, 20 Colo. 195, 36 Pac. 1105.

13. See the statutes of the different states.

14. Corry First Nat. Bank *v.* Childs, 10 Phila. (Pa.) 452.

15. Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305, holding that where a lien is created by statute and the lien itself as well as the estate against which it is sought to be enforced is purely legal, a court of chancery is not authorized to extend the lien to cases not provided for by the statute.

Estoppel cannot extend liens created by statute.— Gile *v.* Atkins, 93 Me. 223, 44 Atl. 896, 74 Am. St. Rep. 341.

16. Higgins *v.* Higgins, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57; Miller *v.* Cumberland Cotton Factory, 26 Md. 478; Wells *v.* Newman, 12 Quebec Super. Ct. 216.

for not only where the statute expressly declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt or charge due,[17] but also where it declares that a person shall have the right under given circumstances to hold certain property for or subject to the payment of a certain claim or charge, even though the word "lien" is not used in the statute.[18]

E. Special and General Liens. Liens are also divided into particular or special and general. A particular or special lien is a right to retain property of another for some particular claim or charge upon the identical property detained.[19] A general lien is the right to retain the property of another to secure a general balance due from the owner.[20] A general lien, however, is not favored, and can only be established either by contract, express or necessarily implied, or by custom or usage of trade or of the parties.[21]

II. CREATION AND PROCEEDINGS TO PERFECT.

A. In General. Generally a lien can only be created with the owner's consent; that is by a contract express or implied with the owner of the property or with someone by him duly authorized,[22] or without his consent by the operation

In Louisiana, under Civ. Code, arts. 3152, 3280, liens and privileges are *stricti juris* and cannot be extended by implication or analogy, but exist only where they are expressly granted by law and then only by virtue of an exact compliance with the legal requisites essential to their creation and existence. Landry *v.* Blanchard, 16 La. Ann. 173; Gause *v.* Bullard, 16 La. Ann. 107; Fisk *v.* Moores, 11 Rob. 279; Cain *v.* Bouligny, 7 Rob. 159; Whatley *v.* Austin, 1 Rob. 21; Hoffman *v.* Laurans, 18 La. 70; Grant *v.* Fiol, 17 La. 158; Hagan *v.* Sompeyrac, 3 La. 154. The provisions of the local laws are to be alone consulted for the existence and enforcement of privileges (Gause *v.* Bullard, *supra*), which, as against third persons, must be clearly and conclusively established (Rochford *v.* Geraghty, 10 La. Ann. 429), it being necessary that the express law which gives the right of preference should be shown (Landry *v.* Blanchard, *supra*; Gause *v.* Bullard, *supra*).

17. The Menominie, 36 Fed. 197.

18. The Menominie, 36 Fed. 197.

19. Taggard *v.* Buckmore, 42 Me. 77; Rohrbach *v.* Germania F. Ins. Co., 62 N. Y. 47, 20 Am. Rep. 451; Crommelin *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 77; Black L. Dict. See Hall *v.* Griffith, 5 Ont. 478.

An order to pay money out of a particular fund gives a party a specific lien thereon. Smith *v.* Everett, 4 Bro. Ch. 64, 29 Eng. Reprint 780.

20. Taggard *v.* Buckmore, 42 Me. 77; Crommelin *v.* New York, etc., R. Co., 10 Bosw. (N. Y.) 77; Black L. Dict.

21. Crommelin *v.* N. Y., etc., R. Co., 10 Bosw. (N. Y.) 77; Bock *v.* Gorrissen, 2 De G. F. & J. 434, 7 Jur. N. S. 81, 30 L. J. Ch. 39, 3 L. T. Rep. N. S. 424, 9 Wkly. Rep. 209, 63 Eng. Ch. 339, 45 Eng. Reprint 689; *In re* Spotten, Ir. R. 11 Eq. 412; Gladstone *v.* Birley, 2 Meriv. 401, 3 M. & S. 205, 15 Rev. Rep. 465, 35 Eng. Reprint 993.

A custom of trade sufficient for such a lien is not established by mere evidence of the popular opinion of the members of that trade that a right of general lien was or ought to be a privilege of their trade. *In re* Spotten, Ir. R. 11 Eq. 412. See, generally, CUSTOMS AND USAGES.

22. *California.*— Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546; Lowe *v.* Woods, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301.

Illinois.— Cameron *v.* Sexton, 110 Ill. App. 381, holding that a charge in the nature of a lien may be created on real property by an express agreement.

Indiana.— Picquet *v.* McKay, 2 Blackf. 465.

Kentucky.— Hayden *v.* Delay, Litt. Sel. Cas. 278; Harned *v.* Mutual L. Ins. Co., 53 S. W. 27, 21 Ky. L. Rep. 750.

Maine.— Small *v.* Robinson, 69 Me. 425, 31 Am. Rep. 299; Ames *v.* Dyer, 41 Me. 397.

Massachusetts.— Hollingsworth *v.* Dow, 19 Pick. 228; Jarvis *v.* Rogers, 15 Mass. 389.

New Hampshire.— Jacobs *v.* Knapp, 50 N. H. 71.

New York.— Trust *v.* Pirsson, 1 Hilt. 292; Storm *v.* Waddell, 2 Sandf. Ch. 494.

West Virginia.— U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

England.— Castellain *v.* Thompson, 13 C. B. N. S. 105, 32 L. J. C. P. 79, 7 L. T. Rep. N. S. 424, 4 Wkly. Rep. 147; Buxton *v.* Baughan, 6 C. & P. 674, 25 E. C. L. 633; Kirchner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948. See Norris *v.* Williams, 1 Cromp. & M. 842, 2 L. J. Exch. 257.

Canada.— Byers *v.* McMillan, 15 Can. Sup. Ct. 194 [*reversing* 3 Manitoba 361].

And see *infra*, II, B, C.

A lien created by one not the true owner nor his agent, and without the owner's consent, is not good against the owner. Walker *v.* Burt, 57 Ga. 20; Hill *v.* Burgess, 37 S. C. 604, 15 S. E. 963. But *compare* Cross *v.* Knickerbocker, 8 Phila. (Pa.) 496.

One vested with the legal title but unauthorized to act for another having an equitable interest cannot by a contract to which the latter is not a party and to which he in

of some positive rule of law,[23] as by statute.[24] A person cannot acquire a lien by his own wrongful act.[25] Although it is usual to speak of lien by contract, this is more in the nature of an agreement for a pledge, and a lien in its proper sense is a right which the law gives.[26]

B. By Express or Implied Contract. In order that a lien may be created by a contract, express or implied, it is generally necessary that the language of the contract or the attendant circumstances should clearly indicate an intention of the parties to create a lien upon the specific property,[27] and should show a specific

no way assents create in favor of the creditor of such other party, a lien on his interest in the property. Atlantic Trust, etc., Co. *v.* Nelms, 116 Ga. 912, 43 S. E. 380.

It is not one of the functions of courts to create liens. Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560.

A mere declaration does not create a lien unless the legal estate be transferred. Latham *v.* Skinner, 62 N. C. 292.

23. *California.*— Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546.

Kentucky.— Hayden *v.* Delay, Litt. Sel. Cas. 278.

Maine.— Ames *v.* Dyer, 41 Me. 397.

Michigan.— Frost *v.* Atwood, 73 Mich. 67, 41 N. W. 96, 16 Am. St. Rep. 560.

New York.— Trust *v.* Pirsson, 1 Hilt. 292.

England.— Kirchner *v.* Venus, 5 Jur. N. S. 395, 12 Moore P. C. 361, 7 Wkly. Rep. 455, 14 Eng. Reprint 948.

Whenever the law gives a creditor a right to have a debt satisfied from the proceeds of property or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. *In re* Trim, 24 Fed. Cas. No. 14,174, 2 Hughes 355.

A right to compel the application of the proceeds of certain taxes to a claim does not give the one having such right a lien thereon. Southern Bank *v.* Louisiana Nat. Bank, 32 La. Ann. 290.

24. Ames *v.* Dyer, 41 Me. 397; U. S. Blowpipe Co. *v.* Spencer, 40 W. Va. 698, 21 S. E. 769.

One who clears land under contract with the owner has a lien thereon for the work performed under 2 Ballinger Annot. Codes and St. § 5962, if he has not waived it, although no lien was referred to in the agreement. Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

25. Frick *v.* Kabaker, 116 Iowa 494, 90 N. W. 498; Randel *v.* Brown, 2 How. (U. S.) 406, 11 L. ed. 318; Madden *v.* Kempster, 1 Campb. 12. And see *infra*, II, C, 2, b, text and note 46.

Goods delivered to a person claiming them wrongfully who pays freight and other charges thereon cannot be detained for those expenses against the rightful owner. Lempriere *v.* Pasley, 2 T. R. 485.

26. Citizens' Bank *v.* Maureau, 37 La. Ann. 857; Hoss *v.* Williams, 24 La. Ann. 568; Ridgely *v.* Inglehart, 3 Bland (Md.) 540; Chambers *v.* Davidson, L. R. 1 P. C. 296, 12 Jur. N. S. 967, 36 L. J. P. C. 17, 4 Moore P. C. N. S. 158, 15 Wkly. Rep. 34, 16 Eng. Reprint 276; Gladstone *v.* Birley, 2 Meriv. 401, 3 M. & S. 205, 15 Rev. Rep. 465, 35 Eng. Reprint 993.

27. *Arkansas.*— Peay *v.* Feild, 30 Ark. 600, holding, however, that a recital in a note that the maker recognizes a statutory lien for the debt does not create a lien if in truth the statute does not give one.

California.— Stone *v.* Harris, 146 Cal. 555, 80 Pac. 711; Meyer *v.* Quiggle, 140 Cal. 495, 74 Pac. 40; Kreling *v.* Kreling, 118 Cal. 413, 50 Pac. 546.

Illinois.— Cameron *v.* Sexton, 110 Ill. App. 381.

Kentucky.— Gilmore *v.* Washburne, 57 S. W. 13, 22 Ky. L. Rep. 266; Davis *v.* Murray, 5 Ky. L. Rep. 239.

Maryland.— Owens *v.* Claytor, 56 Md. 129.

Nebraska.—Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221.

New York.— Hale *v.* Omaha Nat. Bank, 33 N. Y. Super. Ct. 40.

Pennsylvania.— *In re* Fair Hope North Savage Fire Brick Co., 183 Pa. St. 96, 38 Atl. 519.

Tennessee.— Langley *v.* Vaughn, 10 Heisk. 553; Kinsey *v.* McDearmon, 5 Coldw. 392.

Texas.— Johnson *v.* Phelps, etc., Windmill Co., (Civ. App. 1896) 37 S. W. 764; Vickers *v.* Kennedy, (Civ. App. 1896) 34 S. W. 458.

Virginia.— Williams *v.* Price, 5 Munf. 507.

United States.— Randel *v.* Brown, 2 How. 406, 11 L. ed. 318 (holding that a lien cannot arise where from the nature of the contract between the parties it would be inconsistent with the express terms or the clear intent of the contract); Tompkins *v.* Little Rock, etc., R. Co., 15 Fed. 6; Allen *v.* Ogden, 1 Fed. Cas. No. 233, 1 Wash. 174.

England.— Richards *v.* Symons, 8 Q. B. 90, 10 Jur. 6, 15 L. J. Q. B. 35, 55 E. C. L. 90; Robertson *v.* Showler, 2 D. & L. 687, 14 L. J. Exch. 190, 13 M. & W. 609.

Canada.— Abell *v.* Middleton, 2 Ont. L. Rep. 209; Dundas *v.* Desjardins Canal Co., 17 Grant Ch. (U. C.) 27. See Doe *v.* Papst, 8 U. C. Q. B. 574; Reg. *v.* Askin, 2 U. C. Q. B. 626.

See 32 Cent. Dig. tit. "Liens," § 24. And see *infra*, II, C, 1.

Express contracts of indemnity as to liens see INDEMNITY.

Covenants creating liens on land as covenants running with the land see COVENANTS, 11 Cyc. 1092.

A power of attorney to sell property to pay the debts of the maker creates a lien on the property which the courts will enforce (American L. & T. Co. *v.* Billings, 58 Minn.

appropriation of that property;[28] and if it is intended to create a lien at the time of the execution of a contract, the words creating the lien should be *in præsenti*.[29] Thus a mere promise or undertaking to pay out of a particular fund when received, the promisor retaining control of the fund, creates no lien on the fund.[30]

C. Equitable Liens[31] **— 1. By Express Agreement.** As a general rule every express executory agreement which is in writing,[32] based upon a valuable and adequate consideration,[33] whereby a person clearly indicates an intention[34] to

187, 59 N. W. 998), unless the power of sale is dependent upon a future contingency, in which event a lien does not arise, at least until the happening of the contingency (Harrison *v.* Hobbs, 1 Bibb (Ky.) 152).

One not engaged in the business of warehousing or storage does not acquire a lien on a chattel by merely permitting another to deposit it in an unoccupied room of his premises. Alt *v.* Weidenberg, 6 Bosw. (N. Y.) 176.

A contract entitling one to certain fruit crops to be raised on certain trees does not create a lien on the land on which the trees are planted which can be enforced by the recovery of a money judgment. Butler *v.* Stark, 79 S. W. 204, 25 Ky. L. Rep. 1886.

A provision for forfeiture of the property subject to a lien, contained in the contract creating such lien, is void under Ida. Rev. St. § 3334. Solomon *v.* Franklin, 7 Ida. 316, 62 Pac. 1030.

28. Langley *v.* Vaughn, 10 Heisk. (Tenn.) 553; Jones *v.* Starkey, 16 Jur. 510. And see *infra*, II, C, 1.

29. Hale *v.* Omaha Nat. Bank, 33 N. Y. Super. Ct. 40.

If words relating to a proposed lien express future action in regard to the creation of the lien and the lien is also to take effect by attaching in the future, future action and effect only is intended by the parties and no lien whatever is created that could attach to the property. Hale *v.* Omaha Nat. Bank, 33 N. Y. Super. Ct. 40.

Where a particular time of payment is fixed by the contract which is or may be subsequent to the time when the owner is entitled to a return of his property, there is no lien. Wiles Laundry Co. *v.* Hahlo, 105 N. Y. 234, 11 N. E. 500, 59 Am. Rep. 496; Rhodes *v.* Hinds, 79 N. Y. App. Div. 379, 79 N. Y. Suppl. 437.

30. *Illinois.*— Hamilton *v.* Downer, 152 Ill. 651, 38 N. E. 733 [*affirming* 46 Ill. App. 541].

Iowa.— Cook *v.* Black, 54 Iowa 693, 7 N. W. 121.

Kentucky.— Davenport *v.* Rule, 14 Ky. L. Rep. 175.

Minnesota.—Hale *v.* Dressen, 76 Minn. 183, 78 N. W. 1045.

Mississippi.— Hart *v.* Livermore Foundry, etc., Co., 72 Miss. 809, 17 So. 769; Alexander *v.* Berry, 54 Miss. 422.

Nebraska.— Phillips *v.* Hogue, 63 Nebr. 192, 88 N. W. 180.

New Jersey.— American Pin Co. *v.* Wright, 60 N. J. Eq. 147, 46 Atl. 215.

New York.— Gibson *v.* Stone, 43 Barb. 285, 28 How. Pr. 468; Hale *v.* Omaha Nat. Bank, 33 N. Y. Super. Ct. 40; Marine, etc., Bank *v.* Jauncey, 3 Sandf. 257; Rogers *v.* Hosack, 18 Wend. 319. *Compare* Richardson *v.* Rust, 9 Paige 243.

Texas.— Girand *v.* Barnard, (Civ. App. 1898) 47 S. W. 482.

United States.— Franklin *v.* Browning, 117 Fed. 226, 54 C. C. A. 258; *In re* Olzendam Co., 117 Fed. 179; Strang *v.* Richmond, etc., R. Co., 101 Fed. 511, 41 C. C. A. 474; *Ex p.* Tremont Nail Co., 24 Fed. Cas. No. 14,168.

England.— Williams *v.* Lucas, 2 Cox Ch. 160, 30 Eng. Reprint 73; Barrington *v.* Evans, 3 Y. & C. Exch. 384; Alexander *v.* Hammond, 3 Wkly. Rep. 145.

See 32 Cent. Dig. tit. "Liens," § 24. And see *infra*, II, C, 1, 3.

31. **Equitable liens as affected by bankruptcy of creditor** see Bankruptcy, 5 Cyc. 365.

32. To create an equitable lien upon real estate there must generally exist a contract in writing out of which the equity springs, in the absence of other equitable circumstances. Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580 (holding that a parol agreement to create such a lien is within the statute of frauds and payment thereunder will not create an equitable lien upon the real estate unless rights inherent in the transaction have sprung up to support it); McClintock *v.* Laing, 22 Mich. 212; Marquat *v.* Marquat, 7 How. Pr. (N. Y.) 417 (holding that a parol agreement to give a mortgage to third persons who advanced purchase-money does not give them an equitable lien on the land).

A seal is not necessary to a writing creating an equitable lien. Swigert *v.* Kentucky Bank, 17 B. Mon. (Ky.) 268.

33. Eaton *v.* Patterson, 2 Stew. & P. (Ala.) 9 (holding also that what will be a sufficient consideration must depend upon the circumstances of each case); Patrick *v.* Morrow, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107; Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999.

Where an agreement to indemnify is a part of the consideration, no lien attaches before a breach of the covenant to indemnify. Michigan State Bank *v.* Hastings, 1 Dougl. (Mich.) 224, 41 Am. Dec. 549.

34. Although the form or peculiar nature of the contract is immaterial an intention to create a lien must clearly appear from the language of the instrument itself and from attendant circumstances. Elmore *v.* Sy-

make or appropriate[35] as security for a debt or other obligation[36] some particular property, real or personal, or fund therein described or identified,[37] or whereby the party promises to assign or transfer the property as security, creates an equitable lien upon the property so indicated which is enforceable against the property in the hands, not only of the original contractor, but also of his heirs, personal

monds, 183 Mass. 321, 67 N. E. 314; Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875; Knott *v.* Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266; Walker *v.* Brown, 165 U. S. 654, 17 S. Ct. 453, 41 L. ed. 865 [*reversing* 63 Fed. 204, 11 C. C. A. 135 (*affirming* 58 Fed. 23)]. And see cases cited in the following notes.

If the instrument evinces a purpose that a lien should exist and falls short of its creation, proceeding upon the maxim that equity considers as done that which ought to be done, the courts will carry out the just purposes of the contracting parties. Sutton *v.* Gibson, 84 S. W. 335, 27 Ky. L. Rep. 111; Lanning *v.* Tompkins, 45 Barb. (N. Y.) 308; Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875.

If the instrument itself declares the lien it needs no aid from the court of equity. Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875.

35. Wemple *v.* Hauenstein, 19 N. Y. App. Div. 552, 46 N. Y. Suppl. 288.

A mere agreement to pay out of a particular property or fund is not sufficient to establish an equitable lien. There must be an appropriation of the fund or property *pro tanto*, either by giving an order or by otherwise transferring it in such a manner that the holder of the fund or property will be authorized to pay the amount directly to the creditor without further intervention of the debtor.

Colorado.— See Patrick *v.* Morrow, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107.

District of Columbia.—Woods *v.* Dickinson, 7 Mackey, 301.

New York.— Williams *v.* Ingersoll, 89 N. Y. 508; Addison *v.* Enoch, 48 N. Y. App. Div. 111, 62 N. Y. Suppl. 613 [*affirmed* in 168 N. Y. 658, 61 N. E. 1127]; Wemple *v.* Hauenstein, 19 N. Y. App. Div. 552, 46 N. Y. Suppl. 288; Wood *v.* Mitchell, 17 N. Y. Suppl. 782.

Pennsylvania.— Cabada *v.* De Jongh, 10 Phila. 422.

Washington.— Hossack *v.* Graham, 20 Wash. 184, 55 Pac. 36.

United States.— Wright *v.* Ellison, 1 Wall. 16, 17 L. ed. 555 (holding that there must be a distinct appropriation of the funds by the debtor and an agreement that the creditor should be paid out of it, and that it is not enough that the fund may have been created through the efforts and outlays of the party claiming the lien); Cushing *v.* Chapman, 115 Fed. 237; *In re* Butler, 105 Fed. 549, 44 C. C. A. 584.

England.— Robey, etc., Perseverance Ironworks *v.* Ollier, L. R. 7 Ch. 695, 27 L. T. Rep. N. S. 362, 20 Wkly. Rep. 956.

See 32 Cent. Dig. tit. "Liens," § 26. And see *supra*, II, B.

An order to pay a debt out of a particular fund belonging to the debtor creates a specific equitable lien on the fund in favor of the creditor. Woods *v.* Dickinson, 7 Mackey (D. C.) 301; Bradley *v.* Root, 5 Paige (N. Y.) 632.

To dedicate property to particular purposes so as to provide that a specified creditor and that creditor alone shall be authorized to seek payment from it or its value is to create an equitable lien upon it. Walker *v.* Brown, 165 U. S. 654, 17 S. Ct. 453, 41 L. ed. 865 [*reversing* 63 Fed. 204, 11 C. C. A. 135 (*affirming* 58 Fed. 23)].

Necessity for delivery.— There can be no appropriation by way of lien of chattels susceptible of delivery which will prevail against third persons without a delivery good at common law. Malcolm *v.* Harnish, 27 Nova Scotia 262.

36. Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212 [*affirmed* in 94 U. S. 806, 24 L. ed. 324], holding that the lien must amount to a charge upon the property so that it may be recognized and enforced in a court of justice. And see cases cited in the following notes.

A personal debt not contracted on the credit of real estate and not charged on it by agreement cannot be declared an equitable lien thereon. Bennett *v.* Nichols, 12 Mich. 22.

37. Lighthouse *v.* Third Nat. Bank, 162 N. Y. 336, 56 N. E. 738 [*reversing* 25 N. Y. App. Div. 630, 52 N. Y. Suppl. 488]; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284 (holding that unless the agreement plainly describes or designates particular land it will be regarded as a mere executory contract and enforceable only as such); Industrial Lumber Co. *v.* Texas Pine Land Assoc., 31 Tex. Civ. App. 375, 72 S. W. 875; Knott *v.* Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266; Pomeroy Eq. Jur. § 1235. It is indispensable to an equitable lien that the property intended to be charged therewith should be identified or described with a reasonable degree of certainty. Hazenwinkle Grain Co. *v.* McComb, 116 Ill. App. 541.

After-acquired property.—Whenever parties by their contract intend to create a positive lien or charge either upon real or personal property, and whether then owned by the assignor or contractor or not, or if personal property whether it is then in being or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto. Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284.

representatives, assigns, or purchasers or encumbrancers with notice.[38] Under like circumstances a mere verbal agreement may create a similar lien on personal property.[39]

2. By Implication — a. In General. An equitable lien may also arise in the absence of an express contract out of general considerations of right and justice, based upon those maxims which lie at the foundation of equitable jurisprudence.[40] But in order that such a lien may be claimed, either the aid of a court of equity must be requisite to the owner so that he can be compelled to do equity,[41] or there must be some element of fraud in the matter as a ground of equitable relief.[42] Such a lien has been held to arise where a party innocently and in good faith, but under a mistake as to the condition of the title, renders services, makes improvements, or incurs expenses that are permanently beneficial to another's property.[43]

38. *Alabama.*— Ross *v.* Perry, 105 Ala. 533, 16 So. 915.

Colorado.— Patrick *v.* Morrow, 33 Colo. 509, 81 Pac. 242, 108 Am. St. Rep. 107.

District of Columbia.— Woarms *v.* Hammond, 5 App. Cas. 238.

Georgia.— Howes *v.* Whipple, 41 Ga. 322.

Illinois.— Chadwick *v.* Clapp, 69 Ill. 119.

Maryland.— Duvall *v.* Hambleton, 98 Md. 12, 55 Atl. 431; Johnson *v.* Johnson, 40 Md. 180; Sullivan *v.* Tuck, 1 Md. Ch. 59.

Massachusetts.— Elmore *v.* Symonds, 183 Mass. 321, 67 N. E. 314; Falmouth Nat. Bank *v.* Cape Cod Ship Canal Co., 166 Mass. 550, 44 N. E. 617; Pinch *v.* Anthony, 8 Allen 536.

Michigan.— Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580.

Nebraska.— Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837.

New York.— New York Nat. Deposit Bank *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625]; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284; Hendricks *v.* Robinson, 2 Johns. Ch. 283 [*affirmed* in 17 Johns. 438].

Rhode Island.— Edwards *v.* Barstow, 21 R. I. 562, 45 Atl. 579.

South Carolina.— Dow *v.* Ker, Speers Eq. 413. See Massey *v.* McIlwain, 2 Hill Eq. 421.

Vermont.— Sowles *v.* Hall, 73 Vt. 55, 50 Atl. 550.

West Virginia.— Knott *v.* Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266; Smith *v.* Patton, 12 W. Va. 541.

United States.— Walker *v.* Brown, 165 U. S. 654, 17 S. Ct. 453, 41 L. ed. 865 [*reversing* 63 Fed. 204, 11 C. C. A. 135 (*affirming* 58 Fed. 23)]; Ketchum *v.* St. Louis, 101 U. S. 306, 25 L. ed. 999; Tysen *v.* Wabash R. Co., 15 Fed. 763, 11 Biss. 510; Clarke *v.* Southwick, 5 Fed. Cas. No. 2,863, 1 Curt. 297. See Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755.

Canada.— Abell *v.* Middleton, 2 Ont. L. Rep. 209.

See 32 Cent. Dig. tit. "Liens," § 26.

Where the condition of an escrow is the payment of certain notes by the grantees such notes constitute an equitable lien on the land. Ober *v.* Pendleton, 30 Ark. 61.

39. *Alabama.*— Jackson *v.* Rutherford, 73 Ala. 155.

New York.—Schermerhorn *v.* Gardenier, 107 N. Y. App. Div. 564, 95 N. Y. Suppl. 494 [*reversing* 46 Misc. 280, 94 N. Y. Suppl. 253]; Arnold *v.* Morris, 7 Daly 498.

West Virginia.— Knott *v.* Shepherdstown Mfg. Co., 30 W. Va. 790, 5 S. E. 266.

United States.— See Ross *v.* Saunders, 123 Fed. 737.

England.— Gurnell *v.* Gardner, 4 Giffard 626, 9 Jur. N. S. 1220, 9 L. T. Rep. N. S. 367, 12 Wkly. Rep. 67, 66 Eng. Reprint 857.

See 32 Cent. Dig. tit. "Liens," § 26.

40. See Sewell *v.* Drake, 85 S. W. 748, 27 Ky. L. Rep. 571; Kelly *v.* Kelly, 54 Mich. 30, 19 N. W. 580; Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332; Cleggett *v.* Kittle, 6 W. Va. 452.

Damages resulting from a breach of an agreement may constitute an equitable lien. See Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485 [rehearing *denied* in 67 S. W. 343].

An assignee of a claim who has expended in reducing it to judgment more than the amount recovered has an equitable lien on the judgment for the amount of his expenditures, where the assignment proves defective and a creditor of his assignor brings attachment against him. Whitaker *v.* Williams, 20 Conn. 527.

41. Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332.

42. Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332 [*citing* 3 Pomeroy Eq. Jur. § 1241].

43. *Mississippi.*— Miller *v.* Pickens, 26 Miss. 182.

New Jersey.— Haggerty *v.* McCanna, 25 N. J. Eq. 48.

Rhode Island.— Phillips *v.* Browne, 20 R. I. 79, 37 Atl. 490.

Tennessee.— Mechanics' Sav. Bank, etc., Co. *v.* Scoggin, (Ch. App. 1899) 52 S. W. 718.

Vermont.— Green *v.* McDonald, 75 Vt. 93, 53 Atl. 332, holding, however, that where there is no contract giving a lien for services and they are not induced by any fraud on the part of the owner, no lien can be decreed.

England.— Unity Joint Stock Mut. Banking Assoc. *v.* King, 25 Beav. 72, 4 Jur. N. S. 470, 27 L. J. Ch. 585, 6 Wkly. Rep. 264, 53 Eng. Reprint 563; Rennie *v.* Young, 2 De G.

b. Payment of Debt or Claim For Which Another Is Liable. Where debts or claims against one's property are paid in good faith by another upon the express or implied request of the owner,[44] the one so paying is entitled to an equitable lien on the property for his reimbursement. But one is not entitled to such lien if he voluntarily pays the debts of a third person without request,[45] or if he makes such a payment in order to obtain wrongful possession of the property.[46]

3. Advancement of Funds. An equitable lien for advances may exist where advancements of money or funds are made on the faith of certain property, real or personal, under an agreement or circumstances showing that it is the intention of the parties to pledge such property as security for the advancements,[47] provided the specific property or its proceeds on which the advancements were invested can be traced or identified.[48] But in the absence of such contract or circumstances advances made by one person to another, although constituting a personal debt, do not give a right to an equitable lien on the borrower's property.[49]

& J. 136, 27 L. J. Ch. 753, 59 Eng. Ch. 108, 44 Eng. Reprint 939.

For matters relating to improvements generally see Improvements.

This rule does not apply where moneys are expended with the knowledge of the real state of the title. Rennie *v.* Young, 2 De G. & J. 136, 27 L. J. Ch. 753, 59 Eng. Ch. 108, 44 Eng. Reprint 939.

Defaulting contractors.— In the absence of a statute creditors of defaulting contractors have no equitable lien upon the property of others for work, materials, or supplies furnished to such contractors for use on such property. Denison, etc., R. Co. *v.* Ranney-Alton Mercantile Co., 104 Fed. 595, 44 C. C. A. 65.

44. Harrod *v.* Johnson, 5 Ky. L. Rep. 247; Fowler *v.* Parsons, 143 Mass. 401, 9 N. E. 799, holding that where one who claims goods stands by and knowingly allows another who honestly believes himself to be the owner to pay the custom duties on them there is an equitable lien in favor of the latter for the sum so paid. See Winks *v.* Hassall, 9 B. & C. 372, 7 L. J. K. B. O. S. 265, 17 E. C. L. 171; Holroyd *v.* Griffiths, 3 Drew 428, 61 Eng. Reprint 966.

45. Taylor *v.* Baldwin, 10 Barb. (N. Y.) 626.

46. Guilford *v.* Smith, 30 Vt. 49. See *supra*, II, A, text and note 25.

47. *Alabama.*— Eutaw Bank *v.* Alabama State Bank, 87 Ala. 163, 7 So. 91; Powell *v.* Jones, 72 Ala. 392.

District of Columbia.— Long *v.* Scott, 24 App. Cas. 1.

Iowa.— Atlantic Trust Co. *v.* Carbondale Coal Co., 99 Iowa 234, 68 N. W. 697, lien on accounts.

Michigan.— Osgood *v.* Osgood, 78 Mich. 290, 44 N. W. 325.

Minnesota.— Hughes *v.* Mullaney, 92 Minn. 485, 100 N. W. 217.

Nebraska.— Ogden *v.* Warren, 36 Nebr. 715, 55 N. W. 221.

New York.— Leary *v.* Corvin, 181 N. Y. 222, 73 N. E. 984, 106 Am. St. Rep. 542 [*modifying* 92 N. Y. App. Div. 544, 88 N. Y. Suppl. 109]; Perry *v.* Protestant Episcopal Church Bd. of Missions, 102 N. Y. 99, 6 N. E. 116; New York Nat. Deposit Bank *v.* Sardy, 26 Misc. 555, 57 N. Y. Suppl. 625.

South Carolina.— Read *v.* Gaillard, 2 Desauss. Eq. 552, 2 Am. Dec. 696, holding that where a person has negotiated a loan by letter and promised to secure it by a bill of sale of specific property the lender has a lien upon such property.

Texas.— Brown *v.* Pitts, (Civ. App. 1896) 37 S. W. 623.

Wisconsin.—Boorman *v.* Wisconsin Rotary Engine Co., 36 Wis. 207.

United States.— Howard *v.* Delgado, 121 Fed. 26, 57 C. C. A. 270; *In re* Olzendam Co., 117 Fed. 179; Perry *v.* Godbe, 82 Fed. 141; Hubbard *v.* Bellew, 10 Fed. 849.

England.— Swainston *v.* Clay, 3 De G. J. & S. 558, 68 Eng. Ch. 422, 46 Eng. Reprint 752, 4 Giffard 187, 66 Eng. Reprint 672, 9 Jur. N. S. 401, 32 L. J. Ch. 503, 32 L. J. Ch. 388, 8 L. T. Rep. N. S. 563, 7 L. T. Rep. N. S. 704, 11 Wkly. Rep. 811, 11 Wkly. 301; Middleton *v.* Magnay, 2 H. & M. 233, 10 L. T. Rep. N. S. 408, 12 Wkly. Rep. 706; *Ex p.* Watts, 9 Jur. N. S. 238, 32 L. J. Bankr. 35, 7 L. T. Rep. N. S. 585, 1 New Rep. 170. See Minnitt *v.* Talbot, L. R. 1 Ir. 143.

Canada.— See Bew *v.* Shortreed, Cass. Dig. 500.

See 32 Cent. Dig. tit. "Liens," § 28.

Advances under a contract with a testator that the latter would devise to the person making the advances certain land does not entitle such person as against the testator's creditors to enforce a lien on the land to the amount of his advances, upon the testator's failure to devise the land to him. Beach *v.* Bullock, 19 R. I. 121, 32 Atl. 165.

48. Person *v.* Oberteuffer, 59 How. Pr. (N. Y.) 339.

49. *Iowa.*— Miner *v.* Rhynders, 111 Iowa 725, 82 N. W. 909.

Louisiana.— See as to advances toward the purchase of slaves Gause *v.* Bullard, 16 La. Ann. 107; Cochran *v.* Walker, 10 La. Ann. 431.

Nebraska.— Walther *v.* Knutzen, 37 Nebr. 420, 55 N. W. 1060.

New York.— Dodge *v.* Wilbur, 10 N. Y. 579 [*affirming* 5 Sandf. 397]; Macmanus *v.* Thurber, 3 N. Y. Suppl. 33.

Thus an equitable lien does not arise on the specific property from the mere fact that one of two or more purchasers pays more than his share of the purchase-price,[50] or that one loans money to another to be used in purchasing land.[51] Likewise in the absence of contract an equitable lien does not arise for money advanced to improve property,[52] although there is an understanding at the time that a lien shall be given on the property improved, where there is no writing or written memorandum except the giving of notes,[53] and there is no charge of accident or fraud by which the execution of such lien is prevented.[54]

D. Proceedings to Perfect. In some jurisdictions, by statute, a lien can have no effect as against third persons unless it is recorded[55] in a prescribed time[56] and manner.[57]

III. INCIDENTS OF LIEN.

A. Property Subject to Lien — 1. In General. Originally liens applied only to chattels,[58] but now where a lien or equitable claim constituting a charge *in rem* is a matter of agreement it may be enforced in equity upon real estate and also upon personal estate, or upon money in the hands of third persons.[59] The property must be tangible and liable to execution.[60] Further than this the par-

Wisconsin.— Miller *v.* Price, 20 Wis. 117.

United States.— Ross *v.* Saunders, 123 Fed. 737; Adams *v.* Citizens' Bank, 84 Fed. 270, 28 C. C. A. 329 [*reversing* 84 Fed. 268].

England.—See Tripp *v.* Armitage, 1 H. & H. 442, 3 Jur. 249, 8 L. J. Exch. 107, 4 M. & W. 687.

See 32 Cent. Dig. tit. "Liens," § 28.

One making advances to aid a claimant in the prosecution of a claim has no equity in the cause of action which the court can protect. Jones *v.* U. S., 15 Ct. Cl. 204.

Further advances after the accomplishment of the original agreement under which an equitable lien existed does not entitle the lender to a lien for such further advances. Miner *v.* Rhynders, 111 Iowa 725, 82 N. W. 909.

50. Brown *v.* Budd, 2 Ind. 442.

51. Cecil *v.* And, 7 Ky. L. Rep. 298; Collinson *v.* Owens, 6 Gill & J. (Md.) 4; Osgood *v.* Osgood, 78 Mich. 290, 48 N. W. 325; Marquat *v.* Marquat, 7 How. Pr. (N. Y.) 417.

52. Printup *v.* Barrett, 46 Ga. 407; Weathersby *v.* Sleeper, 42 Miss. 732. See Hooper *v.* Cooke, 20 Beav. 639, 2 Jur. N. S. 527, 25 L. J. Ch. 467, 52 Eng. Reprint 750.

53. Printup *v.* Barrett, 46 Ga. 407.

54. Printup *v.* Barrett, 46 Ga. 407.

55. Rhoton's Succession, 34 La. Ann. 893. See Rose *v.* Peterkin, 13 Can. Sup. Ct. 677; Peterkin *v.* McFarlane, 9 Ont. App. 429.

An agreement to lease a lot of land on which the lessee was to erect houses is not a "lien" which under Md. Acts (1845), c. 287, § 7, must be recorded in order to give a preference over mechanics' liens. Mills *v.* Matthews, 7 Md. 315.

Under Nebr. Rev. St. c. 43, § 16, a lienholder, under an instrument which is not required to be recorded, cannot override a prior lien by reason of the owner's failure to record it. Galway *v.* Malchow, 7 Nebr. 285.

56. Rhoton's Succession, 34 La. Ann. 893; Lapene *v.* Meegel, 26 La. Ann. 80, holding that the recording of a lien too late is equivalent to not recording it at all so far as seizing creditors are concerned; and recording it after the property on which alone it can be executed has been seized and taken possession of by the sheriff does not affect the seizing creditor's rights.

57. Robinson *v.* Brooks, 31 Wash. 60, 71 Pac. 721, holding that a notice of a lien is bad *in toto* where the one filing it wilfully and knowingly includes non-alienable items. See Powell *v.* Nolan, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

Recordation as mortgage.— The right to enforce a contract as one creating an equitable lien, where it is not claimed that such contract constitutes a legal mortgage, cannot be affected by failure to record it as a mortgage, as required by statute to render it enforceable against creditors or purchasers without notice. Chattanooga Nat. Bank *v.* Rome Iron Co., 102 Fed. 755.

58. See Stansbury *v.* Patent Cloth Mfg. Co., 5 N. J. L. 433.

59. Fletcher *v.* Morey, 9 Fed. Cas. No. 4,864, 2 Story 555; Justice *v.* Fooks, 57 L. T. Rep. N. S. 868.

Personal and even transitory and fluctuating property may be the subject of a lien at the pleasure of the contracting parties. Williams *v.* Price, 5 Munf. (Va.) 507.

A copyright of a book may be the subject of a lien in favor of the publisher for his disbursements. Brook *v.* Wentworth, 3 Anstr. 881.

La. Civ. Code, arts. 3253–3270, contemplate that privileges bearing on both movables and immovables shall be first satisfied from the movables before resorting to the immovables. Rogers *v.* Walker, 24 Fed. 344.

Enforcement of preëxisting liens against homestead see HOMESTEADS, 21 Cyc. 509 *et seq.*

Lien on property in hands of receiver see RECEIVERS.

Property encumbered by lien as subject to execution see EXECUTIONS, 17 Cyc. 957 *et seq.*

60. Fidelity Ins., etc., Co. *v.* Roanoke Iron Co., 81 Fed. 439.

ticular property that may be attached in a given case depends upon the provisions of the contract creating the lien;[61] but in no case can a person give a lien upon property beyond the extent of his interest therein.[62] A lien on certain property also attaches to money recovered for its conversion;[63] but it does not attach to rents derived from the property, unless specifically included;[64] nor can a lien attach to public property,[65] or, subject to certain exceptions, to property exempt by statute.[66]

2. After-Acquired Property. In the absence of a contract stipulating for a lien on after-acquired property, a lien attaches only to property on hand at the time it is created.[67] But where the parties by their contract clearly show an intention to create a positive lien or charge upon real or personal property, whether then owned by the contractor or not, or, if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the contractor acquires a title thereto, against him and all persons asserting a claim thereto under him, either voluntarily or with notice.[68] Such lien, however, has been held to be subject to intervening rights of creditors and third persons.[69]

B. Necessity For, and Right To, Possession — 1. At Common Law. Since a lien upon personal property at common law is founded upon possession, actual

A man's creditors have no legal claim on his labor unless his earnings are realized and invested in some kind of property which can be reached by process of execution. Welch *v.* Kline, 57 Pa. St. 428.

A cause of action for a personal tort is not property in the sense that any one but the injured can have any right in it, and therefore is not subject to lien. Hammons *v.* Great Northern R. Co., 53 Minn. 249, 54 N. W. 1108.

61. Nobles *v.* Christian, etc., Grocery Co., 113 Ala. 220, 20 So. 961; Bringhurst *v.* Mutual Bldg., etc., Assoc., 19 Tex. Civ. App. 355, 47 S. W. 831; Washington Bank *v.* Nock, 9 Wall. (U. S.) 373, 19 L. ed. 717.

One having a contract lien on two funds may look to both of them for the full amount of his debt until it is satisfied. Merrifield *v.* Tyler, 9 Ky. L. Rep. 399.

A writing purporting to create a lien on all the estate of a party thereto must be so construed as to comprehend all that part of his property susceptible of being impressed with a lien by a writing of that purport, executed and recorded in the manner in which it was. Higgins *v.* Higgins, 121 Cal. 487, 53 Pac. 1081, 66 Am. St. Rep. 57.

62. Turner *v.* Letts, 20 Beav. 185, 1 Jur. N. S. 1057, 24 L. J. Ch. 638, 3 Wkly. Rep. 352, 494. See Wilson *v.* Anderton, 1 B. & Ad. 450, 9 L. J. K. B. O. S. 48, 20 E. C. L. 555.

63. Scott *v.* Farmers', etc., Nat. Bank, (Tex. Civ. App. 1902) 66 S. W. 485 [rehearing *denied* in 67 S. W. 343].

64. Heller *v.* National Mar. Bank, 89 Md. 602, 43 Atl. 800, 73 Am. St. Rep. 212, 45 L. R. A. 438.

65. Townsend *v.* Cleveland Fire Proofing Co., 18 Ind. App. 568, 47 N. E. 707; Rowley *v.* Conklin, 89 Minn. 172, 94 N. W. 548; Jordan *v.* Taylor Falls Bd. of Education, 39 Minn. 298, 39 N. W. 801; Reg. *v.* Fraser, 11 Nova Scotia 431.

66. Stahl *v.* Lowe, 38 S. W. 862, 18 Ky. L. Rep. 946, holding that an equitable lien based on a verbal promise to mortgage a crop of tobacco not yet planted will not be enforced where the tobacco is exempt from execution for its full value. See, generally, Exemptions, 18 Cyc. 1369 *et seq.*

67. Thornsberry *v.* Thornsberry, 68 S. W. 129, 24 Ky. L. Rep. 130.

68. *Alabama.* — Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349.

California. — Bibend *v.* Liverpool, etc., F., etc., Ins. Co., 30 Cal. 78.

Illinois. — Borden *v.* Croak, 131 Ill. 68, 22 N. E. 793, 19 Am. St. Rep. 23, holding that the intention to create a lien on such after-acquired property must be fully expressed.

Kentucky. — Thornsberry *v.* Thornsberry, 68 S. W. 129, 24 Ky. L. Rep. 130.

Maine. — Morrill *v.* Noyes, 56 Me. 458, 96 Am. Dec. 486.

Mississippi. — Sillers *v.* Lester, 48 Miss. 513.

Missouri. — Wright *v.* Bircher, 72 Mo. 179, 37 Am. Rep. 433.

New York. — Coats *v.* Donnell, 94 N. Y. 168 [*affirming* 48 N. Y. Super. Ct. 46]; Wisner *v.* Ocumpaugh, 71 N. Y. 113; McCaffrey *v.* Woodin, 65 N. Y. 459, 22 Am. Rep. 644 [*reversing* 62 Barb. 316]; New York Nat. Deposit Bank *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625]; Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. 284.

United States. — Mitchell *v.* Winslow, 17 Fed. Cas. No. 9,673, 2 Story 630.

Canada. — Suter *v.* Merchants' Bank, 24 Grant Ch. (U. C.) 365, holding that the Dominion Act, 34 Vict. c. 5, § 47, enables a person making advances to a manufacturer to stipulate for a lien on warehouse receipts to be subsequently granted to the manufacturer.

See 32 Cent. Dig. tit. "Liens," § 3.

69. Coats *v.* Donnell, 94 N. Y. 168.

or constructive, and the right to detain the property until some claim in which the lien originates is satisfied or discharged,[70] it follows that it is indispensable to the existence of such a lien that the claimant should have an independent and exclusive possession, actual or constructive, of the property.[71] The right of lien does not exist while the person against whom it is claimed has the actual custody of the property,[72] or even where it is in the possession of the lienor if such possession is not properly acquired or retained.[73] The right to retain the property when properly obtained is not affected by any subsequent encumbrance created by the owner;[74] but such right does not relieve him from the necessity of producing the instrument or other property which he holds when regularly required for the purposes of a cause.[75] Continued possession of the property is essential only as between the lienor and third parties; as between the immediate parties the lien may continue after change of possession.[76]

2. By the Civil Law. The general rule of the civil law is that possession of movables is not necessary to the validity of a lien, whether created by contract or by act of the law, and that such lien will attach upon movable property, even in the hands of a *bona fide* purchaser without notice.[77]

3. In Equity. In equity a lien may exist independently of possession;[78] but it is necessary that the property or fund be distinctly traced or identified.[79]

4. By Statute. Under some statutes it is required that the lienor shall have possession or the right of possession of the personal property on which he claims a lien.[80] Under other statutes, however, a lien without possession has the

70. See *supra*, I, B.

71. *Alabama.* — Alabama State Bank *v.* Barnes, 82 Ala. 607, 2 So. 349; Voss *v.* Robertson, 46 Ala. 483.

Kentucky.— Allen *v.* Shortridge, 1 Duv. 34. See Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221.

Maine.— Miller *v.* Marston, 35 Me. 153, 56 Am. Dec. 694; Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; Newhall *v.* Vargas, 15 Me. 314, 33 Am. Dec. 617.

Maryland.— Barry *v.* Boninger, 46 Md. 59.

Massachusetts.— King *v.* Indian Orchard Canal Co., 11 Cush. 231.

Mississippi.— Stewart *v.* Flowers, 44 Miss. 513, 7 Am. Rep. 707.

Nevada.— Reed *v.* Ash, 3 Nev. 116.

New York.— McCaffrey *v.* Wooden, 62 Barb. 316; McFarland *v.* Wheeler, 26 Wend. 467; Reed *v.* Darrow, 2 Edw. 412.

North Carolina.— Tedder *v.* Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714.

Ohio.— Jordan *v.* James, 5 Ohio 88.

Oregon.— McDearmid *v.* Foster, 14 Oreg. 417, 12 Pac. 813.

Pennsylvania.— Fitzgerald *v.* Elliott, 162 Pa. St. 118, 29 Atl. 346, 42 Am. St. Rep. 812; Clemson *v.* Davidson, 5 Binn. 392.

United States.— Peck *v.* Jenness, 7 How. 612, 12 L. ed. 841; *Ex p.* Foster, 9 Fed. Cas. No. 4,960, 2 Story 131.

England.— Heywood *v.* Waring, 4 Campb. 291; Shaw *v.* Neale, 6 H. L. Cas. 581, 4 Jur. N. S. 695, 37 L. J. Ch. 444, 6 Wkly. Rep. 635, 10 Eng. Reprint 1422.

See 32 Cent. Dig. tit. "Liens," § 4.

Possession by an agent, servant, or warehouse keeper acting under the authority of a party having a lien is sufficient to preserve a lien. Allen *v.* Spencer, 1 Edm. Sel. Cas. (N. Y.) 117.

Possession of indicia of title to property sufficient to sustain lien see Rice *v.* Austin, 17 Mass. 197.

72. Emerson *v.* Niagara Nav. Co., 2 Ont. 528.

73. Allen *v.* Megguire, 15 Mass. 490 (holding that a creditor who happens to have in his hands personal property belonging to his debtor has no lien thereon, but must attach as other creditors for his debt); Randel *v.* Brown, 2 How. (U. S.) 406, 11 L. ed. 318 (fraudulent possession).

74. Gafford *v.* Stearns, 51 Ala. 434.

75. Hunter *v.* Leathley, 5 M. & R. 522.

76. Allen *v.* Spencer, 1 Edm. Sel. Cas. (N. Y.) 117, holding also that in the latter case the only question to be determined is whether the party has surrendered and abandoned his lien. See Scott *v.* Neshit, 14 Ves. Jr. 438, 9 Rev. Rep. 318, 33 Eng. Reprint 589.

Change of possession as effecting waiver or loss of lien see *infra*, III, E, 4.

77. See Tatham *v.* Andree, 9 Jur. N. S. 1019, 9 L. T. Rep. N. S. 2, 1 Moore P. C. N. S. 386, 2 New Rep. 554, 12 Wkly. Rep. 22, 15 Eng. Reprint 747.

78. Grinnell *v.* Suydam, 3 Sandf. (N. Y.) 132; *Ex p.* Foster, 9 Fed. Cas. No. 4,960, 2 Story 131.

79. Grinnell *v.* Suydam, 3 Sandf. (N. Y.) 132.

An equitable lien cannot be enforced against money or property representing it unless the money or a specific substitute for it can be identified. Grinnell *v.* Suydam, 3 Sandf. (N. Y.) 132; Drake *v.* Taylor, 7 Fed. Cas. No. 4,067, 6 Blatchf. 14.

80. Booker *v.* Reilly, 85 N. Y. App. Div. 614, 82 N. Y. Suppl. 1008 (holding, however, that a lien will not arise where the possession

same operation and effect that existed in common-law liens accompanied by possession.[81]

C. Debts and Liabilities Secured — 1. In General. At common law a lien for which goods may be held must be for a debt incurred for some services or work rendered by the claimant on the goods against which the lien is asserted.[82] Such lien may be asserted, although part of the debt is barred by the statute of limitations.[83] Where a lien is created by contract, the debts or liabilities secured thereby depend upon the provisions of the agreement;[84] but a lien created by contract for one debt or liability does not cover another and different debt or liability to the same person,[85] especially where the rights of third parties have intervened.[86]

2. For Supplies or Raw Material Furnished Manufactory. In some jurisdictions provision is made by statute for a lien for supplies or raw material furnished for the operation of a manufacturing establishment, upon certain conditions happening or being complied with.[87]

is obtained wrongfully); Tedder *v.* Wilmington, etc., R. Co., 124 N. C. 342, 32 S. E. 714; *In re* Engle, 1 Ohio S. & C. Pl. Dec. 101, 1 Ohio N. P. 110; Prendergast *v.* Williamson, 6 Tex. Civ. App. 725, 26 S. W. 421. And see the statutes of the several states.

81. Grant *v.* Whitwell, 9 Iowa 152; Beall *v.* White, 94 U. S. 382, 24 L. ed. 173. And see the statutes of the several states.

82. Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221. And see cases cited *supra*, I, B.

Manufacturer's lien for the price of manufacturing goods left with him see Bailment, 5 Cyc. 193 note 68; Manufactures.

A subcontractor or any servant of the person entitled to the lien acquires no interest in the property by reason of the qualified rights or interests of his employer. Jacobs *v.* Knapp, 50 N. H. 71.

83. Spears *v.* Hartly, 3 Esp. 81, 6 Rev. Rep. 814. See also Matter of Broomhead, 5 D. & L. 52, 16 L. J. Q. B. 355.

84. See Price *v.* Moses, 10 Rich. (S. C.) 454; Talbot *v.* McPherson, 23 Fed. Cas. No. 13,728, 2 Cranch C. C. 281.

A right of lien on one person's goods for another's debt must be clearly and distinctly conferred before a court can recognize it. Turner *v.* Haji Goolam Mohomed Azam, [1904] A. C. 826, 9 Aspin. 598, 74 L. J. P. C. 17, 91 L. T. Rep. N. S. 216, 20 T. L. R. 599.

Interest.— Where money is charged upon land under any instrument or contract, to be paid at a fixed date, the general rule is that as between the owner of the charge and the owner of the land the charge carries interest from the time when the money becomes payable, although nothing is said in the instrument or contract as to interest. *In re* Drax, L. R. 1 Ch. 781, 72 L. J. Ch. 505, 88 L. T. Rep. N. S. 510, 51 Wkly. Rep. 612.

85. Price *v.* Moses, 10 Rich. (S. C.) 454; Talbot *v.* McPherson, 23 Fed. Cas. No. 13,728, 2 Cranch C. C. 281; Chilton *v.* Carrington, 15 C. B. 95, 3 C. L. R. 138, 1 Jur. N. S. 89, 24 L. J. C. P. 10, 3 Wkly. Rep. 17, 80 E. C. L. 95.

A subsequent agreement to pay interest on a privileged debt does not extend the privilege to the interest as against third persons. D'Auterive *v.* Degruy, 2 Mart. N. S. (La.) 116.

86. Talbot *v.* McPherson, 23 Fed. Cas. No. 13,728, 2 Cranch C. C. 281.

87. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452 (construing St. § 2487); Hicks *v.* Consolidation Coal Co., 77 Md. 86, 25 Atl. 979 (construing Code, §§ 189–193); Miller *v.* Cumberland Cotton Factory, 26 Md. 478 (construing the act of 1847); Virginia Development Co. *v.* Crozer Iron Co., 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893 (construing Code, § 2485); *In re* West Norfolk Lumber Co., 112 Fed. 759 (construing Va. Code, § 2485).

Raw material within the meaning of such statute has been held to include coal. Hicks *v.* Consolidation Coal Co., 77 Md. 86, 25 Atl. 979.

Supplies necessary to the operation of a manufacturing establishment within the meaning of such a statute are such as pertain to its output, and do not include material or machinery necessary to the construction, equipment, and completion of its plant (American Woodworking Mach. Co. *v.* Agelasto, 136 Fed. 399, 69 C. C. A. 243); but include pig iron furnished to a rolling-mill whose business it is to manufacture iron, steel, and other metals (Virginia Development Co. *v.* Crozer Iron Co., 90 Va. 126, 17 S. E. 806, 44 Am. St. Rep. 893).

A manufacturing company within the meaning of such a statute includes a corporation whose principal business is the manufacture of rough lumber into dressed and finished lumber for various uses, although incidentally engaged in buying and selling lumber. *In re* West Norfolk Lumber Co., 112 Fed. 759. A portable sawmill engaged in manufacturing lumber for the market is a "manufacturing establishment" within such a statute. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452.

Under the New Hampshire statute giving a lien for labor and materials to a person furnishing the same for a manufacturer of brick, against the kiln, such lien attached to all the kilns in which any part of the

D. Estoppel to Assert or Deny Lien.[88] A person is estopped to assert a lien where he has fraudulently prevented its discharge;[89] where he has taken other security and asserted it as valid;[90] or where by his acts or misrepresentations he has induced another to so act upon the belief that the lien does not exist that the latter would be prejudiced by its enforcement.[91] Likewise one is estopped to deny the existence of a lien as against another whom he has induced to act to his prejudice upon the belief that it does exist.[92]

E. Waiver, Loss, or Discharge of Lien — **1. In General.** A lien may be waived by express agreement,[93] written or parol,[94] based upon a valuable consideration,[95] as by a release to one claiming an interest in, or junior lien on, the property;[96] or it may be lost by operation of law.[97] It may also be waived or lost by implication, the question whether or not there is a waiver in a particular case being one of intention to be determined from the circumstances.[98] Thus a

work was done. Lavoie *v.* Burke, 69 N. H. 144, 38 Atl. 723.

Under Ky. St. § 2487, in order that a person furnishing such supplies or raw material may have a lien, the property or effects of the owner or operator of a manufacturing establishment must: (1) Be assigned for the benefit of creditors; (2) come into the hands of any executor, administrator, commissioner, receiver of a court, trustee, or assignee for the benefit of creditors; or (3) in any wise come to be distributed among the creditors whether by operation of law or by the act of such owner or operator. Bogard *v.* Tyler, 55 S. W. 709, 21 Ky. L. Rep. 1452, holding that one to whom the lumber was pledged to secure advances made under an agreement that he might sell the lumber and account for the proceeds is not "a receiver of a court" within the meaning of the statute; nor did the lumber "come to be distributed among creditors" within the meaning of the statute and therefore employees and materialmen had no lien.

Priority of mortgage.—A statute granting a lien for labor done for a manufacturing company, on franchises and property of such company, does not give priority over an antecedent mortgage. Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147.

88. Estoppel by failure to assert see, generally, ESTOPPEL, 16 Cyc. 761 And see *infra*, III, E, 6.

89. Carey *v.* Brown, 92 U. S. 171, 23 L. ed. 469.

90. Heathman *v.* Rogers, 153 Ill. 143, 38 N. E. 577 [*affirming* 54 Ill. App. 592]. And see *infra*, III, E, 3.

91. Maddox *v.* Austin, 5 Ky. L. Rep. 240; Alexander *v.* Ellison, 2 Ky. L. Rep. 49 (holding that one claiming under a lien contained in a deed or record who makes such representations as to lead another to believe that there is no such prior lien cannot afterward set up his lien against the latter on the ground of constructive notice from the record); Walker *v.* Brown, 165 U. S. 654, 17 S. Ct. 453, 41 L. ed. 865 [*reversing* 63 Fed. 204, 11 C. C. A. 135 (*affirming* 58 Fed. 23)].

92. Thorn *v.* Dill, 56 Tex. 145.

The default of a debtor in not giving security agreed upon will not prevent him from asserting the waiver of a statutory lien, where it appears that such default has been occasioned in part by the default of the creditor. Casey, etc., Mfg. Co. *v.* Weatherly, 101 Tenn. 318, 47 S. W. 432.

93. Danforth *v.* Pratt, 42 Me. 50.

Extent of waiver.— Where a state holding first liens upon the property and revenues of a corporation waives such liens in order to make bonds issued by such corporation and the interest thereon preferred liens on the net revenues of the company, such waiver applies only to the principal of the bonds with simple interest, and interest on the coupons of such bonds cannot be paid until after liens of the state are satisfied. Corcoran *v.* Chesapeake, etc., Canal Co., 1 MacArthur (D. C.) 358.

94. Stone *v.* Fairbanks, 53 Vt. 145, holding that a lien reserved by deed may be waived by parol.

95. Danforth *v.* Pratt, 42 Me. 50; Clark *v.* Costello, 79 Hun (N. Y.) 588, 29 N. Y. Suppl. 937, holding that a mere promise without consideration, by one who has a lien on a chattel, that he will send the chattel to the owner, is not a waiver of his lien.

96. Buckner *v.* McIlroy, 31 Ark. 631; Fisler *v.* Stewart, 191 Pa. St. 323, 43 Atl. 396, 71 Am. St. Rep. 769.

Application of the statute of frauds to promises to answer for debt, etc., in consideration of release, transfer, or forbearance of a lien see FRAUDS, STATUTE OF, 20 Cyc. 192.

97. Gallion *v.* Moberly, 9 Ky. L. Rep. 149, holding that a lien upon a life-estate is terminated by the death of the owner of such estate.

A lien created by operation of law as distinguished from one created by contract is dissolved by the death of the person against whose property it is asserted and the declaration of the insolvency of his estate. But this principle applies only to such liens as arise by operation of law for the enforcement of merely legal claims and not equitable liens. Long *v.* King, 117 Ala. 423, 23 So. 534.

98. Mims *v.* Macon, etc., R. Co., 3 Ga. 333; Pope *v.* Graham, 44 Tex. 196; Nickel *v.* Greenwold, 1 Tex. App. Civ. Cas. § 70; Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321; Avery *v.* Hackley, 20 Wall.

lien may be impliedly waived by acts or conduct on the part of the lien-holder inconsistent with the existence of the lien,[99] as by his entering into a special agreement inconsistent therewith,[1] or by wrongfully converting the property.[2] But one cannot waive a lien of which he has no knowledge;[3] nor is it lost by reason of the fact that he did not have it in mind at the time of the contract out of which it arises.[4] And although a junior lienor may discharge a prior lien for his own protection,[5] as a general rule a lien cannot be destroyed by

(U. S.) 407, 22 L. ed. 385 (holding that a valid lien is not divested by the mere fact of the holder of it subsequently taking a transfer of the equity of redemption made to him with a view of giving the lien a preference); U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545.

An intention to waive a lien will not be presumed in the absence of evidence clearly tending to show it (Muench *v.* Valley Nat. Bank, 11 Mo. App. 144; Stribling *v.* Splint Coal Co., 31 W. Va. 82, 5 S. E. 321); but where it is clear that such was the intention, a court of equity will enforce a release, although no formal release has been executed (Stribling *v.* Splint Coal Co., *supra*).

Waiver is sufficiently shown if the jury is satisfied of the fact from all the evidence in the case; and there need not be positive and direct testimony of the fact, free from contradiction. Williams *v.* Chapman, 7 Ga. 467.

An affirmative allegation in an answer that the lien had been waived by plaintiff is not itself proof of the alleged waiver. Moorman *v.* Beauchamp, 4 Bush (Ky.) 145.

99. Wallace *v.* Burnham, 28 La. Ann. 791 (coöperating in removing the property from the jurisdiction); Spaulding *v.* Adams, 32 Me. 211; Legg *v.* Willard, 17 Pick. (Mass.) 140, 28 Am. Dec. 282 (attachment of the property, at the suit of the party holding a lien thereon, on a claim secured by the lien); Harrison *v.* Scott, 10 Jur. 443, 5 Moore P. C. 357, 13 Eng. Reprint 528.

Retaining for storage of property on which the lien would exist excludes the idea of the lien. Blumenberg Press *v.* Mutual Mercantile Agency, 77 N. Y. App. Div. 87, 78 N. Y. Suppl. 1085.

A lien is not waived by the lien-holder refusing on demand to give a specification of the amount due for which the lien is claimed (Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106); nor where the lien is expressly reserved, by subsequently giving credit (Montieth *v.* Great Western Printing Co., 16 Mo. App. 450); nor is it waived as to other lien-holders by one lien-holder suing for the benefit of them all (Post's Appeal, 39 Pa. St. 328).

Giving of a bond by a garnishee in attachment conditioned for the safe-keeping and delivery of the property attached is no waiver of the garnishee's lien on the property. Outcalt *v.* Durling, 25 N. J. L. 443.

Purchase at execution sale not a waiver.— A person in possession of personal property under a lien is the owner of it as against all the world, including the actual owner and his judgment creditors, and no one has a right to disturb his possession without paying his claim; and he does not lose his right to claim the property, where it has been seized under a writ of execution against the owner, by purchasing it at a sale under the writ, his action in that regard being no more than a prudent precaution to save the property from sacrifice. Brown *v.* Petersen, 25 App. Cas. (D. C.) 359.

1. *Illinois.*— Stevens *v.* Faucet, 24 Ill. 483.
New Hampshire.— Pickett *v.* Bullock, 52 N. H. 354.
New York.— Trust *v.* Pirsson, 1 Hilt. 292; Trust *v.* Person, 3 Abb. Pr. 84.
United States.— U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545.
England.— Alliance Bank *v.* Broom, 2 Dr. & Sm. 289, 10 Jur. N. S. 1121, 34 L. J. Ch. 256, 11 L. T. Rep. N. S. 332, 5 New Rep. 69, 13 Wkly. Rep. 127, 62 Eng. Reprint 631.
Canada.— Dempsey *v.* Carson, 11 U. C. C. P. 462.
See 32 Cent. Dig. tit. "Liens," § 8.

If a special agreement for a particular mode of payment or for payment at a future period is made in any case in which a right of lien would otherwise be implied the lien does not exist. If such an agreement is made before the claimant acquires possession of the chattel no lien is created, if made thereafter it is a waiver of the lien. Trust *v.* Pirsson, 1 Hilt. (N. Y.) 292.

An agreement among creditors, in regard to the purchase of a debtor's property at sheriff's sale, is not a discharge of his liability to them. Allen *v.* Rafsnyder, 9 Phila. (Pa.) 199.

Where one having a lien by statute also reserves a lien by special contract, the two liens being inconsistent, it must be presumed that the parties intended to substitute the lien by contract for the statutory lien. Howe *v.* Wiscasset Brick, etc., Co., 78 Me. 227, 3 Atl. 650.

2. Peoples' Bank *v.* Frick Co., 13 Okla. 179, 73 Pac. 949; Gurr *v.* Cuthbert, 12 L. J. Exch. 309.

3. Boynton *v.* Braley, 54 Vt. 92.

4. Stringham *v.* Davis, 23 Wash. 568, 63 Pac. 230.

5. New England L. & T. Co. *v.* Robinson, 56 Nebr. 50, 76 N. W. 415, 71 Am. St. Rep. 657, holding that the holder of a lien against property may discharge any prior lien existing against it for his own protection, and, for the purpose of reimbursing himself, and the amount due on the lien discharged to his own lien upon the property, and it is not necessary that this right should be stipulated

the act of another than him in whose favor it exists,[6] unless there was fraud or deception in its inception.[7] Nor can one against whom a lien exists impair or affect it except by discharge.[8] A lien lost or destroyed is the same as if it had never existed.[9]

2. Change in Form of Principal Obligation. A mere change in the form of the principal obligation — that is, of the evidence of indebtedness — will not operate to discharge a lien to which a creditor has become entitled unless his intention or willingness to relinquish it is apparent or is shown;[10] but the lien under the new obligation only extends to the amount of the first obligation.[11]

3. Taking Security. An express stipulation and agreement of the parties for security excludes the idea of lien and limits their rights to the extent of the express contract which they have made.[12] But where a lien has once attached, the taking of other and additional security for the debt does not of itself discharge or release the lien unless such appears to be the intention of the parties.[13]

4. Parting With Possession. As a general rule a common law or other lien dependent upon possession is waived or lost by the lien-holder voluntarily and unconditionally parting with possession or control of the property to which it attaches;[14] and such lien cannot be restored thereafter by resumption of posses-

for in an express contract between the property owner and the holder of the lien.

6. Fitzgerald *v.* Fowlkes, 60 Miss. 270; Lewis *v.* Dillard, 76 Fed. 688, 22 C. C. A. 488, holding that an agreement between certain lien-holders on a specific piece of property cannot affect another lien-holder thereon who is not a party to the agreement.

7. Briggs *v.* Planters' Bank, Freem. (Miss.) 574.

8. Tinney *v.* Wolston, 41 Ill. 215.

9. Pharis *v.* Leachman, 20 Ala. 662; Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

10. Cansler *v.* Sallis, 54 Miss. 446; Howell *v.* Bush, 54 Miss. 437; Lewis *v.* Starke, 10 Sm. & M. (Miss.) 120; McDonald *v.* Hulse, 16 Mo. 503; Jaquess *v.* Hamilton County, 1 Disn. (Ohio) 121, 12 Ohio Dec. (Reprint) 524; Wabash, etc., Canal Co. *v.* Beers, 2 Black (U. S.) 448, 17 L. ed. 327.

If the circumstances indicate that the parties intended to rely only on the new security and to extinguish the lien, effect will be given to that purpose. Lewis *v.* Starke, 10 Sm. & M. (Miss.) 120.

11. McDonald *v.* Hulse, 16 Mo. 503.

12. Chambers *v.* Davidson, L. R. 1 P. C. 296, 12 Jur. N. S. 967, 36 L. J. P. C. N. S. 17, 4 Moore P. C. N. S. 158, 15 Wkly. Rep. 34, 16 Eng. Reprint 276.

13. *Kentucky.*— Harrod *v.* Johnson, 5 Ky. L. Rep. 247.

Michigan.— Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

Missouri.— Montieth *v.* Great Western Printing Co., 16 Mo. App. 450.

New Jersey.— Security Trust Co. *v.* Temple Co., 67 N. J. Eq. 514, 58 Atl. 865; Schanck *v.* Arrowsmith, 9 N. J. Eq. 314.

New York.— Payne *v.* Wilson, 74 N. Y. 348; Gove *v.* Morton Trust Co., 96 N. Y. App. Div. 177, 89 N. Y. Suppl. 247.

Texas.— Pope *v.* Graham, 44 Tex. 196; Nickel *v.* Greenwood, 1 Tex. App. Civ. Cas. § 70.

England.— Angus *v.* McLachlan, 23 Ch. D. 330, 52 L. J. Ch. 587, 48 L. T. Rep. N. S. 863, 31 Wkly. Rep. 641; Mason *v.* Morley, 34 Beav. 471, 11 Jur. N. S. 459, 34 L. J. Ch. 422, 12 L. T. Rep. N. S. 414, 13 Wkly. Rep. 669, 55 Eng. Reprint 717; Cood *v.* Pollard, 10 Price 109, 9 Price 544, 23 Rev. Rep. 713. See *Ex p.* Willoughby, 16 Ch. D. 604, 44 L. T. Rep. N. S. 111, 29 Wkly. Rep. 935; Solarte *v.* Maes Hilbers, 1 L. J. K. B. 196.

See 32 Cent. Dig. tit. "Liens," § 10.

Taking security payable at a future time waives a lien. Wrightson *v.* Bettinger, 2 Ohio Cir. Ct. 381, 1 Ohio Cir. Dec. 543; Hewison *v.* Guthrie, 2 Bing. N. Cas. 755, 2 Hodges 51, 5 L. J. C. P. 283, 3 Scott 298, 29 E. C. L. 748.

An equitable lien upon chattels is waived by the acceptance of a chattel mortgage as a security for the indebtedness. Heathman *v.* Rogers, 153 Ill. 143, 38 N. E. 577.

An equitable lien once acquired is not waived or merged by subsequently taking a legal lien on the same premises if there is an intervening encumbrance so that the owner of the legal and equitable liens has an interest in keeping them separate. Payne *v.* Wilson, 74 N. Y. 348.

14. *Alabama.*— Voss *v.* Robertson, 46 Ala. 483.

Connecticut.— Fishell *v.* Morris, 57 Conn. 547, 18 Atl. 717, 6 L. R. A. 82.

Illinois.— Stevens *v.* Faucet, 24 Ill. 483.

Kentucky.— Cincinnati Cooperage Co. *v.* Woodyard, 54 S. W. 831, 21 Ky. L. Rep. 1221.

Michigan.— De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656.

New York.— Grinnell *v.* Suydam, 3 Sandf. 132; Grinnell *v.* Cook, 3 Hill 485, 38 Am. Dec. 663; Urquhart *v.* McIver, 4 Johns. 103.

North Carolina.— Block *v.* Dowd, 120 N. C. 402, 27 S. E. 129.

Ohio.— Wrightson *v.* Bettinger, 2 Ohio Cir. Ct. 381, 1 Ohio Cir. Dec. 543.

Pennsylvania.— Fitzgerald *v.* Elliott, 162

sion.[15] But the lien is not waived or destroyed where the lien-holder only conditionally parts with it; as where by special agreement he allows the owner to take the property into his possession without prejudice to the lien,[16] or where he delivers it to an agent, servant, or trustee to hold for his benefit and subject to his lien.[17] Nor is the lien lost where the property is taken from his possession without his consent by force or fraud.[18]

5. SALE OF PROPERTY. A lien may also be waived or extinguished by a sale of the property to which it attaches.[19] Thus the sale of personal property by the lien-holder in a manner other than that authorized by statute operates as a forfeiture of his lien.[20] A lien is also divested by a sale of the property to enforce the lien,[21] or by a sale under a decree enforcing a paramount lien.[22] But where custody is not essential to the preservation of a lien, as in case of a lien created by contract, it is not necessarily divested by a removal or sale of the property.[23]

6. FAILURE TO ASSERT LIEN. Where a lien-holder, when the property upon which he claims a lien is demanded of him, fails to assert his lien but claims to retain possession of the property upon some other ground than as security, he thereby waives his lien.[24] But a mere failure to assert the lien without distinctly

Pa. St. 118, 29 Atl. 316, 42 Am. St. Rep. 812; Bean *v.* Bolton, 3 Phila. 87.

South Carolina.— Packer *v.* Johnson, 1 Nott & M. 1.

Wisconsin.— Sensenbrenner *v.* Mathews, 48 Wis. 250, 3 N. W. 599, 33 Am. Rep. 809; Smith *v.* Scott, 31 Wis. 420.

United States.— Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740; The Menominie, 36 Fed. 197; U. S. *v.* Barney, 24 Fed. Cas. No. 14,525, 3 Hughes 545.

England.— See Hartley *v.* Hitchcock, 1 Stark. 408, 18 Rev. Rep. 790, 2 E. C. L. 158.

See 32 Cent. Dig. tit. "Liens," § 11. See also *supra*, III, B.

Causing the goods to be taken in execution at the lien-holder's own suit destroys his right of lien thereon, although the goods are never removed from his premises. Jacobs *v.* Latour, 5 Bing. 130, 2 M. & P. 201, 6 L. J. C. P. O. S. 243, 15 E. C. L. 243.

A lien created by contract as distinguished from one created by operation of law is not destroyed by permitting the general owner or his assignee to take possession of the property if it may be done consistently with the contract and the course of business and the intention of the parties. Spaulding *v.* Adams, 32 Me. 211.

15. Sensenbrenner *v.* Mathews, 48 Wis. 250, 3 N. W. 599, 33 Am. Rep. 809; Hartley *v.* Hitchcock, 1 Stark. 408, 18 Rev. Rep. 790, 2 E. C. L. 158.

After delivery to carrier.— One who has a lien on goods in his possession, if he afterward delivers them to a carrier to be conveyed on account and at the risk of his principal, cannot assert his lien by stopping the goods *in transitu* and procuring them to be redelivered to him by virtue of a bill of lading signed by the carrier in the course of transportation. Sweet *v.* Pym, 1 East 4, 5 Rev. Rep. 497.

16. De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656; Gregory *v.* Morris, 96 U. S. 619, 24 L. ed. 740; The Menominie, 36 Fed. 197. *Contra*, McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467 [*reversing* 10 Wend. 318].

The onus of proof is on the lien-holder as against the owner of the property, to show that his lien still continues. Bean *v.* Bolton, 3 Phila. (Pa.) 87.

17. Nash *v.* Mosher, 19 Wend. (N. Y.) 431; Urquhart *v.* McIver, 4 Johns. (N. Y.) 103; Dewing *v.* Hutton, 40 W. Va. 521, 21 S. E. 780; Caldwell *v.* Lawrence, 10 Wis. 331; McCombie *v.* Davies, 7 East 5. See also *supra*, III, B.

18. De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656; Allen *v.* Spencer, 1 Edm. Sel. Cas. (N. Y.) 117.

19. Coit *v.* Waples, 1 Minn. 134. See Foltz *v.* Peters, 16 Ind. 244, holding that where on a sale of property subject to a lien the holder of the lien agrees to pay for the property a sum additional to the amount of such lien the sale is an extinguishment of the lien.

A sale of a legal title by one who has a lien on an outstanding equitable title extinguishes such lien. Post's Appeal, 39 Pa. St. 328.

20. Coit *v.* Waples, 1 Minn. 134.

21. Schmidt *v.* Gatewood, 2 Rich. Eq. (S. C.) 162.

22. Jones *v.* Arkansas Mechanical, etc., Co., 38 Ark. 17, holding that such a sale extinguishes a junior lien or transfers it to the proceeds of the sale.

23. Vestal *v.* Craig, 25 Ind. App. 573, 58 N. E. 752; Young *v.* Kimhall, 23 Pa. St. 193, sheriff's sale.

24. *California.*— Sutton *v.* Stephan, 101 Cal. 545, 36 Pac. 106.

Indiana.— Picquet *v.* McKay, 2 Blackf. 465.

Massachusetts.— Folsom *v.* Barrett, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320.

New York.—Dows *v.* Morewood, 10 Barb. 183; De Bouverie *v.* Gillespie, 2 Edm. Sel. Cas. 472.

Pennsylvania.— Bean *v.* Bolton, 3 Phila. 87.

England.— Boardman *v.* Sill, 1 Camph. 410 note; Weeks *v.* Goode, 6 C. B. N. S. 367, 95 E. C. L. 367; Jones *v.* Cliff, 5 C. & P. 560, 24 E. C. L. 708; Dean *v.* Byrnes, 11 L. T.

putting his right to hold the property on some other ground does not amount to a waiver.[25]

7. Lapse of Time. An equitable lien may be lost by a negligent and unreasonable delay in proceeding to enforce it.[26] In some jurisdictions such a lien is not barred by lapse of less time than is sufficient to raise the presumption that such lien has been satisfied.[27] In other jurisdictions, however, it is held that such lien is barred by lapse of time sufficient to bar the debt which it secures.[28]

8. Payment. A lien is discharged by a proper payment of the debt or obligation which it secures.[29]

9. Making Excessive Demands. The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender nor waive his lien for the sum really due,[30] if his demand is made in good faith and in the belief that he is entitled to such sum, and no payment or tender is made of the amount actually due.[31] But if the demand of a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with any tender and amounts to a waiver of the lien.[32]

Rep. N. S. 97, 3 Moore P. C. N. S. 92, 13 Wkly. Rep. 299, 16 Eng. Reprint 35.

25. Corbett *v.* Cushing, 15 Daly (N. Y.) 170, 4 N. Y. Suppl. 616; Everett *v.* Coffin, 6 Wend. (N. Y.) 603, 22 Am. Dec. 551; White *v.* Gainer, 2 Bing. 23, 9 E. C. L. 464, 1 C. & P. 324, 12 E. C. L. 194, 2 L. J. C. P. O. S. 101, 9 Moore C. P. 41.

26. Halsted *v.* Davison, 10 N. J. Eq. 290; *Ex p.* Douglas, 3 Deac. & C. 310.

Acts necessary to be done to prevent the loss of a lien by lapse of time may be waived by a parol agreement of parties as between themselves. Wallace's Appeal, 5 Pa. St. 103.

27. Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99 (holding that the statute of limitations does not apply to an equitable lien on land and that a lapse of twenty years adverse possession is necessary to bar it); Clarke *v.* Southwick, 5 Fed. Cas. No. 2,863, 1 Curt. 297. See Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

28. Ray *v.* Ray, 24 Misc. (N. Y.) 155, 53 N. Y. Suppl. 300, lapse of six years under statute of limitations.

The statute of limitations in general ceases to run against a lien after a suit to enforce it is brought and an order of reference is made. Northwest Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561.

29. Blumenberg Press *v.* Mutual Mercantile Agency, 77 N. Y. App. Div. 87, 78 N. Y. Suppl. 1085; Faber *v.* Wagner, 10 N. D. 287, 86 N. W. 963; Stephens *v.* Moodie, (Tex. Civ. App. 1895) 30 S. W. 490 (holding also that the lien is extinguished, although the payment is by mistake entered as a credit on another debt); Miller *v.* Arthur, 102 Va. 356, 46 S. E. 323 (holding also that the owner of the land subject to liens cannot by taking receipts in his wife's name on the payment of the liens by him from his own estate keep them alive in her favor).

Application of proceeds of judicial sale to liens see Judicial Sales.

Where an amount less than that claimed on a lien is tendered in full payment and the lien-holder accepts it, saying that he will apply it on his claim, it is nevertheless a discharge of the lien. Rosema *v.* Porter, 112 Mich. 13, 70 N. W. 316.

Sufficiency of payment to discharge a lien see Post's Appeal, 39 Pa. St. 328; Glover *v.* Southern Loan, etc., Co., 31 Ont. 552. And see, generally, Payment.

Payment in depreciated currency as a discharge of a lien see Prince William School Bd. *v.* Stuart, 80 Va. 64, Confederate currency.

Taking of the debtor's acceptances on time, although not operating as payment unless so agreed, suspends the remedy and hence is a waiver of a lien on chattels for a demand for services upon them, to meet which the acceptances were given. Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358.

30. The Norway, Brown & L. 404, 11 Jur. N. S. 892, 13 L. T. Rep. N. S. 50, 3 Moore P. C. N. S. 245, 13 Wkly. Rep. 1085, 16 Eng. Reprint 92.

Excessive demand as waiver of tender see Tender.

31. Folsom *v.* Barrett, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320.

32. Folsom *v.* Barrett, 180 Mass. 439, 62 N. E. 723, 91 Am. St. Rep. 320; Stephenson *v.* Lichtenstein, (N. J. Sup. 1905) 59 Atl. 1033; The Norway, Brown & L. 404, 11 Jur. N. S. 892, 13 L. T. Rep. N. S. 50, 3 Moore P. C. N. S. 245, 13 Wkly. Rep. 1085, 16 Eng. Reprint 92; Dirks *v.* Richards, C. & M. 626, 43 E. C. L. 298, 6 Jur. 562, 4 M. & G. 574, 41 E. C. L. 340, 5 Scott N. R. 534; Jones *v.* Tarlton, 1 Dowl. P. C. N. S. 625, 6 Jur. 348, 11 L. J. Exch. 267, 9 M. & W. 675; Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J. Exch. 324, 4 M. & W. 270; Willis *v.* Sweet, 20 Nova Scotia 449.

Joining lien claims with non-lien claims abandons the lien and the claim ceases to have priority of right upon the property to which, without such joinder, it would be entitled. Bicknell *v.* Trickey, 34 Me. 273. It has been held in such case that the owner must tender the proper amount of the lien unless the holder either expressly or by fair implication dispenses with it. Scarfe *v.* Morgan, 1 H. & H. 292, 2 Jur. 569, 7 L. J.

F. Assignment of Liens — **1. At Common Law.** A common-law or other possessory lien may be assigned or transferred, provided it is accompanied by a delivery of possession of the property to which it attaches.[33] But such assignment must be in strict subordination to the rights of the owner of the property to which the lien attaches.[34]

2. Statutory Liens. In the absence of a statutory provision to the contrary a statutory lien declaratory of the common law is not assignable so as to enable the assignee to prosecute the claim in his own name and avail himself of the lien.[35] But a statutory lien not declaratory of the common law and not dependent upon possession may pass at least in equity by assignment of the debt to which it attaches.[36]

3. Equitable Liens. An equitable lien may be transferred by an assignment of the debt or obligation which it secures, although not named in the instrument of assignment,[37] except where the lien is one not reserved by contract or declared by a court of equity.[38] But such a lien cannot be transferred without also assigning the debt which it secures.[39]

G. Priorities[40] — **1. In General.** Common-law liens as distinguished from contract or statutory liens attach to the property without reference to ownership, and override all other rights in the property.[41] But as to other liens both legal and equitable, it is a well settled rule, in the absence of statutory regulation, that a lien which is prior in time gives a prior claim and is entitled to satisfaction, out of the subject-matter it binds, before other subsequent liens binding the same property,[42]

Exch. 324, 4 M. & W. 270; McBride *v.* Bailey, 6 U. C. C. P. 523; Kendal *v.* Fitzgerald, 21 U. C. Q. B. 585; Buffalo, etc., R. Co. *v.* Gordon, 16 U. C. Q. B. 283.

Amending the writ before judgment, striking out the non-lien items, and taking judgment for the lien claim items preserves the lien. Sands *v.* Sands, 74 Me. 239.

33. Davis *v.* National Surety Co., 139 Cal. 223, 72 Pac. 1001; De Witt *v.* Prescott, 51 Mich. 298, 16 N. W. 656; Wing *v.* Griffin, 1 E. D. Smith (N. Y.) 162, holding that if the assignment is made without a delivery of the property the assignee has no claim against a person who subsequently obtains possession of the property. But see Daubigny *v.* Duval, 5 T. R. 604.

A finding that "plaintiff transferred and delivered" to another his lien is sufficient on the issue of an assignment or transfer without a further finding of delivery of possession of the property. Davis *v.* National Surety Co., 139 Cal. 223, 72 Pac. 101.

34. Coit *v.* Waples, 1 Minn. 134.

35. Pearsons *v.* Tincker, 36 Me. 384; Tewksbury *v.* Bronson, 48 Wis. 581, 4 N. W. 749; Caldwell *v.* Lawrence, 10 Wis. 331.

36. Westmoreland *v.* Foster, 60 Ala. 448. And see *infra*, III, F, 3.

37. *Arkansas.*— Talieferro *v.* Barnett, 37 Ark. 511. *Compare* Roberts *v.* Jacks, 31 Ark. 597, 25 Am. Rep. 584.

Kentucky.— Forwood *v.* Dehoney, 5 Bush 174.

Minnesota.— Woodland Co. *v.* Mendenhall, 82 Minn. 483, 85 N. W. 164, 83 Am. St. Rep. 445.

New York.— Payne *v.* Wilson, 74 N. Y. 348.

Pennsylvania.— Hartman *v.* Keown, 101 Pa. St. 338.

England.— See *Ex p.* Perfect, 1 Mont. 25; *Ex p.* Waring, 19 Ves. 345, 13 Rev. Rep. 217, 34 Eng. Reprint 1235. *Compare Ex p.* Lambton, L. R. 10 Ch. 405, 44 L. J. Bankr. 81, 32 L. T. Rep. N. S. 380, 23 Wkly. Rep. 662.

See 32 Cent. Dig. tit. "Liens," § 17. See also Assignments, 4 Cyc. 69 *et seq.*

38. Owen *v.* Reed, 27 Ark. 122.

39. Buckner *v.* McIlroy, 31 Ark. 631.

40. Necessity for recording as affecting priority of lien see *supra*, II, D.

Liens prior or superior to garnishment see Garnishment, 20 Cyc. 1130.

Priority of dower over other liens see Dower, 14 Cyc. 915 *et seq.*

Priorities in creditors' suits see Creditors' Suits, 12 Cyc. 61 *et seq.*

Priority of liens against wife's separate estate see Husband and Wife, 21 Cyc. 1495.

Priorities of liens on property in hands of receivers see Receivers.

Priority between executions and other liens and claims see Executions, 17 Cyc. 1064.

Priority between mechanic's lien and other liens and claims see Mechanics' Liens.

41. Sullivan *v.* Clifton, 55 N. J. L. 324, 39 Am. St. Rep. 652.

42. Fisken *v.* Milwaukee Bridge, etc., Works, 86 Mich. 199, 49 N. W. 133; Voorhis *v.* Westervelt, 43 N. J. Eq. 642, 12 Atl. 533, 3 Am. St. Rep. 315; Puryear *v.* Taylor, 12 Gratt. (Va.) 401 (holding that where liens are given by statute and are merely legal, that which is prior in time takes precedence); Rankin *v.* Scott, 12 Wheat. (U. S.) 177, 6 L. ed. 592.

Assignments for benefit of creditors do not defeat preëxisting liens. See Assignments For the Benefit of Creditors, 4 Cyc. 274.

Priorities between special liens cannot be questioned by a general lienor. Farmers' L.

unless the prior lien be intrinsically defective,[43] or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant;[44] and no agreement between holders of prior and subsequent liens can cause a subsequent lien to supersede an intermediate one.[45] Thus as a general rule in equity if the liens are equal in all other respects the one prior in time will prevail.[46] But if the junior lienor has an advantage at law,[47] or a superior equity, his lien is entitled to priority, although another lienor is prior in time.[48] A specific equitable lien has preference over a subsequent general legal lien.[49] Priorities of statutory liens are generally regulated by the statutes creating them;[50] but a statutory lien cannot prejudice a lien existing before the statute creating it.[51]

2. CONCURRENT LIENS. If the liens are concurrent, that is, are established by

& T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250, 26 N. E. 784, 11 L. R. A. 740.

43. Rankin *v.* Scott, 12 Wheat. (U. S.) 177, 6 L. ed. 592.

44. Parker *v.* Kelly, 10 Sm. & M. (Miss.) 184; Romig *v.* West Point Butter, etc., Assoc., 12 Nebr. 567, 11 N. W. 884; Rankin *v.* Scott, 12 Wheat. (U. S.) 177, 6 L. ed. 592.

Mere delay in proceeding to execution is not such an act as will destroy the priority of a lien. Rankin *v.* Scott, 12 Wheat. (U. S.) 177, 6 L. ed. 592.

A mere exchange of one form of security for another for the same debt does not admit to priority a lien which was junior to the debt originally secured. Thorpe *v.* Durbon, 45 Iowa 192.

Where the interests of the junior lienor require that the prior lienor should do or omit to do a particular thing, they should give him notice thereof before they seek to hold him responsible for any such acts or omissions by postponing his lien to theirs. Horning's Appeal, 90 Pa. St. 388.

45. Southern Grocer Co. *v.* Adams, 112 La. 60, 36 So. 226; Parker *v.* Kelly, 10 Sm. & M. (Miss.) 184, holding that a lien cannot be displaced except by some act of the party holding it which will postpone him to a subsequent claimant.

46. *Alabama.*— Kirksey *v.* Means, 42 Ala. 426; Eaton *v.* Patterson, 2 Stew. & P. 9.

Arkansas.— Doswell *v.* Adler, 28 Ark. 82; Byers *v.* Engles, 16 Ark. 543.

Kentucky.— Gibbons *v.* Germantown, etc., Turnpike Road Co., 14 Bush 389; Williams *v.* Gaitskill, 10 S. W. 628, 11 S. W. 84, 10 Ky. L. Rep. 785.

New York.— Monroe *v.* Bonanno, 28 N. Y. Suppl. 375, 31 Abb. N. Cas. 1; Wilkes *v.* Harper, 2 Barb. Ch. 338; Griffin *v.* Burtnett, 4 Edw. 673.

Tennessee.— Jordan *v.* Everett, 93 Tenn. 390, 24 S. W. 1128.

Virginia.— Cox *v.* Romine, 9 Gratt. 27.

See 32 Cent. Dig. tit. "Liens," § 18.

In adjusting priorities a first lien which has been paid by one personally liable to pay that and a second lien will be deemed in equity as thereby satisfied, although such first lien was paid by him through a third person holding it for him. Wise *v.* Fuller, 29 N. J. Eq. 257.

47. Cox *v.* Romine, 9 Gratt. (Va.) 27.

48. Trimble *v.* Puckett, 93 Ky. 218, 19 S. W. 591, 14 Ky. L. Rep. 209; Parker *v.* Baxter, 19 Hun (N. Y.) 410; Rawls *v.* Deshler, 28 How. Pr. (N. Y.) 66 [*affirmed* in 4 Abb. Dec. 12, 3 Keyes 572]; Bradley *v.* Root, 5 Paige (N. Y.) 632; Hendricks *v.* Robinson, 2 Johns. Ch. (N. Y.) 283 [*affirmed* in 17 Johns. 438]; Cox *v.* Romine, 9 Gratt. (Va.) 27.

Where the prior lien is secret and another has made advances in good faith without notice on the property and has had possession thereof, the latter lien will be preferred. Cox *v.* Romine, 9 Gratt. (Va.) 27.

While in a contest between a lien upon an equitable interest and one upon a full legal title the latter, although subsequent in time, may be preferred to the former, if the holder thereof be an innocent and *bona fide* holder without notice, yet it will not be so preferred if he, at the time of obtaining his lien, had full knowledge of the outstanding equity on the prior lien. Jones *v.* Lapham, 15 Kan. 540.

Equitable lien with possession as against prior lien with subsequent legal title.— While possession of personal property wrongfully taken by a person who has an equitable lien on it cannot prevail against a prior or superior equitable lien, coupled with a legal title acquired after the wrongful taking, yet the title of the latter does not attach, as against the former, to property which was substituted by the owner, under whom each party claims, for a part of the property covered by the lien which he had disposed of. Eutaw Bank *v.* Alabama State Bank, 87 Ala. 163, 7 So. 91.

Actual knowledge by a creditor when his debt was contracted that the title to certain land appeared of record in the name of the vendee and his expectation to look to the land as a means of satisfying the debt created no equity superior to that of other creditors without such knowledge or expectation. Miller *v.* Albright, 60 Ohio St. 48, 53 N. E. 490.

49. Dwight *v.* Newell, 3 N. Y. 185; Stevens *v.* Watson, 4 Abb. Dec. (N. Y.) 302.

50. See the statutes of the several states.

51. Weinprender *v.* His Creditors, 5 La. 349.

the same act,[52] there is no preference between them, but each lienor is entitled to his ratable share of the property or fund to which the liens attach.[53]

H. Removal or Transfer of Property — 1. In General. As a general rule one having a lien on personalty has, in the absence of statutory provisions to that effect, no right, either at law or in equity, to sell or remove the property by virtue of his lien.[54] Nor can the owner, without the lienor's consent, sell property covered by the lien.[55]

2. Rights and Liabilities of Purchasers. A valid lien created on real or personal estate is enforceable against the property in the hands of any person, other than a *bona fide* purchaser for value without notice, who subsequently acquires the estate;[56] and under some statutes even against an innocent purchaser without notice.[57] As between purchasers at different times of different parcels of land, the whole of which is subject to prior liens, the land is chargeable in equity in the inverse order of its alienation,[58] after the tracts still remaining in the debtor have been applied to the discharge of the encumbrance;[59] and this rule applies as well where the lien is a creditor's lien as where it is created by contract,[60] and although part of the lands are acquired after the time when the lien attached.[61]

3. Criminal Responsibility. Under some statutes it is a criminal offense for the

52. Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231.

Liens cannot be regarded as concurrent because there is doubt or conflict of evidence as to which first attached. Jones *v.* Howard, 99 Ga. 451, 27 S. E. 765, 59 Am. St. Rep. 231.

53. Stiles *v.* Galbreath, (N. J. Ch. 1905) 60 Atl. 224.

Where one of two or more concurrent lienors receives the whole fund he must account therefor to his fellow lien claimants, according to their ratable shares. Stiles *v.* Galbreath, (N. J. Ch. 1905) 60 Atl. 224.

54. *Illinois.*— McCaffrey *v.* Knapp, etc., Co., 74 Ill. App. 80 [*quoting* 2 Kent. Comm. 642].

Michigan.— Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531.

West Virginia.— Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371, 102 Am. St. Rep. 926.

United States.— Omaha First Nat. Bank *v.* Illinois Trust, etc., Bank, 84 Fed. 34.

England.— Thames Iron Works Co. *v.* Patent Derrick Co., 1 Johns. & H. 93, 6 Jur. N. S. 1013, 29 L. J. Ch. 714, 2 L. T. Rep. N. S. 208, 8 Wkly. Rep. 408, 70 Eng. Reprint 676.

Canada.— McNeil *v.* Keleher, 15 U. C. C. P. 470.

Sale by lienor as forfeiting lien see *supra*, III, E. 5.

55 Shepard *v.* Briggs, 26 Vt. 149, holding that where two parties own property upon which one has a lien a sale of the property by the other in order to avoid such lien is void as to the lien-holder.

Criminal responsibility for selling without the lienor's consent see *infra*, III, H, 3.

56. *Arkansas.*—Bard *v.* Van Etten, 72 Ark. 494, 82 S. W. 836; Talieferro *v.* Barnett, 37 Ark. 511.

Kentucky.— Helfrech Lumber, etc., Co. *v.* Honaker, 76 S. W. 342, 25 Ky. L. Rep. 717.

Massachusetts.— Pinch *v.* Anthony, 8 Allen 536.

Missouri.— Stark *v.* Hicklin, 112 Mo. App. 419, 87 S. W. 106.

New York.— Marsh *v.* Titus, 3 Hun 550, 6 Thomps. & C. 29, not valid against *bona fide* purchaser without notice.

North Dakota.— Black *v.* Minneapolis, etc., Elevator Co., 7 N. D. 129, 73 N. W. 90, holding, however, that where a lienor has no right of possession of the property such a purchaser is not liable to him for conversion if he has done nothing to affect the lienor's right other than refusing to deliver the property to him.

Ohio.— Doerner *v.* Nieberding, 3 Ohio Dec. (Reprint) 519.

Tennessee.— De Arusmant *v.* De Lagerty, 9 Lea 188.

West Virginia.— Smith *v.* Patton, 12 W. Va. 541.

United States.— Clarke *v.* Southwick, 5 Fed. Cas. No. 2,863, 1 Curt. 297.

See 32 Cent. Dig. tit. "Liens," § 20; and *supra*, II, C, 1.

The policy of the law is against upholding secret liens and charges to the injury of innocent purchasers and encumbrancers for value. Palmer *v.* Howard, 72 Cal. 293, 13 Pac. 858, 1 Am. St. Rep. 60.

A bona fide purchaser's taking collateral guaranty of a third party indemnifying him against liens does not deprive him of the protection of the law. The Detroit, 7 Fed. Cas. No. 3,832, Brown Adm. 141.

57. Pressly *v.* Ellis, 48 Miss. 574.

58. Crawford *v.* Richeson, 101 Ill. 351; Beddow *v.* Dewitt, 45 Pa. St. 326.

Marshaling assets and securities generally see Marshaling Assets and Securities.

59. Lloyd *v.* Galbraith, 32 Pa. St. 103; Hartman *v.* Longacre, 13 Montg. Co. Rep. (Pa.) 54.

60. Hunt *v.* Ewing, 12 Lea (Tenn.) 519.

61. Crawford *v.* Richeson, 101 Ill. 351.

owner of personal property subject to a lien or claim to sell or dispose of it without the lienor's consent and without satisfying such debt or claim.[62]

I. Right to Set Aside Lien. A person has a right to institute an action to set aside a lien only where he is injuriously affected by it.[63]

IV. Enforcement and Protection of Lien.[64]

A. At Law — 1. In General. At common law a lien being merely the right to retain possession of certain property until a debt or claim is satisfied,[65] in the absence of statute, a suit at law for the retention or recovery of possession is the only extent to which such lien is enforceable.[66] As to other liens of which a court of law may have jurisdiction, it can order a sale of the property only upon execution.[67]

2. Where Property Is Converted or Injured. Where a common-law lienor is wrongfully deprived of the possession of the property on which his lien exists or it is injured, he may maintain detinue or replevin for the goods or trover for their value to the amount of his claim;[68] or under execution or attachment he may have a sale of the property;[69] or, if the injury is to property of which the lienor has not possession, he may maintain an action on the case where the injuries affect his security.[70]

B. In Equity — 1. In General. A court of equity has general jurisdiction of liens, and in the absence of statutory provisions will foreclose them in obedience to the well settled rules of equitable jurisprudence.[71] Unless the law has provided

62. Ellerson *v.* State, 69 Ala. 1; State *v.* Johnson, 51 S. C. 268, 28 S. E. 905, holding, however, that a defendant could not be convicted under Code Cr. Proc. § 277, for selling personal property under lien, where the property was seized and sold by judicial process, against his will, and he afterward recovered its value in an action in trover. See also Chattel Mortgages, 7 Cyc. 61 *et seq.*

The words "lien" and "claim" in Ala. Code (1876), § 4353, prohibiting the sale of personal property subject to a lien or claim, are used in a kindred sense and embrace mere charges or encumbrances upon the general ownership, and not the general ownership itself. Ellerson *v.* State, 69 Ala. 1.

To constitute the offense of selling personal property covered by a lien under Ala. Code (1876), § 4353, it must appear that the prosecutor had a claim or lien of which the accused had knowledge, and that the accused removed or sold the property for the purpose of hindering, delaying, or defrauding the prosecutor (Ellerson *v.* State, 69 Ala. 1), and these facts must be established beyond all reasonable doubt (Ellerson *v.* State, *supra*).

Sufficiency of indictment.—An indictment for selling or removing personal property covered by a lien which follows the form prescribed by statute is sufficient. Ellerson *v.* State, 69 Ala. 1. See, generally, Indictments and Informations.

63. Arkadelphia Lumber Co. *v.* McNutt, 68 Ark. 417, 59 S. W. 761, 82 Am. St. Rep. 299.

64. Jurisdiction to enforce liens in general see Courts, 11 Cyc. 688.

Jurisdiction of justice of peace to enforce lien see Justices of the Peace, 24 Cyc. 478.

Jurisdiction to enforce liens on decedent's estate see Executors and Administrators, 18 Cyc. 909.

Pendency of proceedings for enforcement as cause for abatement see Abatement and Revival, 1 Cyc. 43.

Time for enforcement see *supra*, III, E, 7.

65. See *supra*, I, B.

66. Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371, 102 Am. St. Rep. 926. But see Stansbury *v.* Patent Cloth Mfg. Co., 5 N. J. L. 433. And see *infra*, IV, A, 2.

On trial of right of property a lien-holder must not only show the existence of his lien but possession of the property on which the lien is held. Buckner *v.* Lancaster, (Tex. Civ. App. 1897) 40 S. W. 631.

67. Heine *v.* Levee Com'rs, 11 Fed. Cas. No. 6,325, 1 Woods 246 [*affirmed* in 19 Wall. 655, 22 L. ed. 223].

68. Gafford *v.* Stearns, 51 Ala. 434; Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371, 102 Am. St. Rep. 926. See, generally, Detinue, 14 Cyc. 243 *et seq*; Trover and Conversion; Replevin.

69. Burrough *v.* Ely, 54 W. Va. 118, 46 S. E. 371, 102 Am. St. Rep. 926.

70. Ehrman *v.* Oats, 101 Ala. 604, 14 So. 361. And see Case, Action on, 6 Cyc. 691.

71. Howe Mach. Co. *v.* Miner, 28 Kan. 441; Boorman *v.* Wisconsin Rotary Engine Co., 36 Wis. 207; Heine *v.* Levee Com'rs, 11 Fed. Cas. No. 6,325, 1 Woods 246 [*affirmed* in 19 Wall. 655, 22 L. ed. 223]. See, generally, Equity, 16 Cyc. 88.

A specific lien upon the income of property which has gone into the hands of a third party may be enforced in equity against that party. Ritten *v.* Union Pac. R. Co., 20 Fed. Cas. No. 11,865*a*.

Rights of junior lienor on foreclosure.—The holder of a junior lien on a tract of land, not made a party to the foreclosure of a prior lien upon a larger tract, including the

another mode of enforcement,[72] a court of equity is the only proper tribunal for enforcing an equitable lien,[73] regardless of what rights the lienor may have in a court of law.[74] A court of equity is also the proper tribunal in which to enforce statutory liens where the statutes provide no method of enforcement,[75] except where the lien is in the nature of a pledge and possession accompanies the lien.[76] But as a general rule a court of equity has no jurisdiction to enforce payment of common-law liens or of statutory liens for which a method of enforcement is provided,[77] unless jurisdiction has been acquired for other purposes;[78] nor will equity interfere to foreclose a lien when there is a full and complete remedy at law.[79]

2. Keeping Alive or Restoring Lien. A court of equity will keep alive or restore a lien where the equities of the case require it and the parties intended that it should not be extinguished,[80] as where it has been discharged through fraud or mistake,[81] unless innocent third parties will be affected by its restoration.[82]

3. Where Property Is Converted by Third Person. Where property subject to a lien is taken and sold by one who has converted it, the absolute owner of the

former, cannot enforce his lien against the purchaser at the foreclosure sale without first compensating him to the extent that he has discharged such prior lien, on the tract subject to the junior lien. Spencer *v.* Jones, 92 Tex. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

72. Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

73. *Illinois.*— Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116; South Park Com'rs *v.* Phillips, 27 Ill. App. 380.

Maryland.— Ridgely *v.* Iglehart, 3 Bland 540.

Michigan.—Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531; Smith *v.* Jackman, 115 Mich. 192, 73 N. W. 228; Walker *v.* Casgrain, 101 Mich. 604, 60 N. W. 291.

Vermont.— Lamson *v.* Worcester, 58 Vt. 381, 4 Atl. 145.

United States.— Fletcher *v.* Morey, 9 Fed. Cas. No. 4,864, 2 Story 555; Vallette *v.* Whitewater Valley Canal Co., 28 Fed. Cas. No. 16,820, 4 McLean 192. See Townsend *v.* Vanderwerker, 160 U. S. 171, 40 L. ed. 383.

See 32 Cent. Dig. tit. "Liens," § 30.

Equitable liens will generally be enforced distributively against all those holding an interest in the property to which they attached. Poston *v.* Eubank, 3 J. J. Marsh. (Ky.) 42. But this principle does not apply to parties who are purchasers *pendente lite.* Poston *v.* Eubank, *supra.*

Accounting for rents and profits.— Where property is sold to enforce an equitable lien thereon the holder of the legal estate cannot be compelled to account to the equitable lienor for the rents and profits received by him while occupying the premises. Whitehouse *v.* Cargill, 88 Me. 479, 34 Atl. 276. But where a court of equity has dominion of property subject to a lien and a receiver thereof has been appointed, whatever rents and profits arise therefrom will be dedicated along with the *corpus* of the fund to the satisfaction of the lien. Pepper *v.* Shepherd, 4 Mackey (D. C.) 269.

Either a legal or equitable estate in lands may be made liable for an equitable lien in a court of equity. Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305.

74. Tinsley *v.* Durfey, 99 Ill. App. 239.

75. Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116; Gibbons *v.* Hamilton, 33 How. Pr. (N. Y.) 83; Gilchrist *v.* Helena, Hot Springs, etc., R. Co., 58 Fed. 708 [*distinguishing* Howe Mach. Co. *v.* Miner, 28 Kan. 441].

76. Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

77. Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531; Buchan *v.* Sumner, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; Burrough *v.* Ely, 54 W. Va. 118, 36 S. E. 371, 102 Am. St. Rep. 926. See Esdale *v.* Oxenham, 3 B. & C. 225, 5 D. & R. 49, 27 Rev. Rep. 331, 10 E. C. L. 110.

78. Aldine Mfg. Co. *v.* Phillips, 118 Mich. 162, 76 N. W. 371, 74 Am. St. Rep. 380, 42 L. R. A. 531.

79. Howe Mach. Co. *v.* Miner, 28 Kan. 441.

80. *Illinois.*— Kohlsaat *v.* Illinois Trust, etc., Bank, 102 Ill. App. 110.

Indiana.— Backer *v.* Pyne, 130 Ind. 288, 30 N. E. 21, 30 Am. St. Rep. 231.

Iowa.— Delaware R. Constr. Co. *v.* Davenport, etc., R. Co., 46 Iowa 406.

Mississippi.— Cansler *v.* Sallis, 54 Miss. 446; Howell *v.* Bush, 54 Miss. 437; Lewis *v.* Starke, 10 Sm. & M. 120.

New York.— Barnes *v.* Camack, 1 Barb. 392.

A lien may be kept alive in favor of one who has paid the lien-holder, although the latter has satisfied and discharged it of record. Richards *v.* Griffith, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156.

81. Kern *v.* A. P. Hotaling Co., 27 Oreg. 205, 40 Pac. 168, 50 Am. St. Rep. 710; Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953.

82. Richards *v.* Griffith, 92 Cal. 493, 28 Pac. 484, 27 Am. St. Rep. 156 (where the equity is a latent one); Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. 953.

property must sue at law for its value, but a mere lienor must proceed in equity to fix his lien on the proceeds in the hands of the wrong-doer.[83]

C. By Statute — 1. In General. The remedy for enforcing statutory liens is generally provided for by the statutes creating the liens, in which case all the provisions must be strictly adhered to as to the form, time, and manner of the enforcement.[84] Under some statutes a lienor may have the property sold to satisfy his claim,[85] although the debts of inferior lien-holders are not yet due.[86] A lienor on personal property is entitled under some statutes, if his claim is not paid within a specified time after demand, to sell the property,[87] by summary execution, upon an affidavit showing the existence of the lien and its amount,[88] provided in either case all the statutory requirements are complied with.[89] Provision is also made entitling the debtor to replevin the property upon his giving a proper bond or undertaking.[90]

2. Compelling Enforcement. In some jurisdictions by statute an owner of property subject to a lien may by petition compel the lien-holder to proceed for its enforcement.[91]

D. Defenses. One who may defend against a lien may object that the lien had expired, or that the remedy upon it was lost, before the action commenced

83. Judge *v.* Curtis, 72 Ark. 132, 78 S. W. 746.

84. Wilson *v.* Vick, (Tex. Civ. App. 1899) 51 S. W. 45. See Myers *v.* Humphries, (Tex. Civ. App. 1898) 47 S. W. 812.

Enforcement of statutory liens in equity see *supra*, IV, B, 1.

Under N. Y. Code Civ. Proc. §§ 687, 1738, a warrant may be issued to the sheriff to seize a chattel, on which a lien is claimed and which is not in plaintiff's possession, to keep it to abide final judgment; but defendant on giving an undertaking may have an order discharging the warrant. Quon Kee *v.* Hip Sing Tong Soc., 25 Misc. 320, 54 N. Y. Suppl. 570.

85. Stultz *v.* Farthing, 13 Ky. L. Rep. 172.

A statute is constitutional which authorizes the sale of real estate to satisfy liens thereon. Livingston *v.* Moore, 15 Fed. Cas. No. 8,416, Baldw. 424 [*affirmed* in 7 Pet. 469, 8 L. ed. 751].

An inferior lienor is entitled to have such sale made and he cannot be prevented therefrom by another who has a superior lien on the same property. Herbert *v.* Babin, 6 Mart. N. S. (La.) 614.

If land subject to several liens is not susceptible of division the holder of the superior lien is entitled to have the whole tract sold and his debt first paid out of the proceeds. Stultz *v.* Farthing, 13 Ky. L. Rep. 172.

If it is necessary to survey the land in order to properly identify and describe it such survey should be made before judgment. Sebree *v.* Coleman, 22 S. W. 852, 15 Ky. L. Rep. 242.

86. Stultz *v.* Farthing, 13 Ky. L. Rep. 172.

87. Keith *v.* Maguire, 170 Mass. 210, 48 N. E. 1090; Huntsman *v.* Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838.

Pending a dispute between the lienor and other creditors as to the amount and nature of his debt he is not entitled to sell the property under such statute. Huntsman *v.* Linville River Lumber Co., 122 N. C. 583, 29 S. E. 838.

88. Allen *v.* Middleton, 99 Ga. 758, 27 S. E. 752.

Under Ga. Civ. Code, § 2816, upon the trial of a claim arising upon the levy of such an execution, it is not necessary for plaintiff to prove either the amount of his debt or the existence of his lien. Allen *v.* Middleton, 99 Ga. 758, 27 S. E. 752. Where an issue made by the debtor in resistance to such a summary execution is found in favor of the creditor, the latter is entitled only to a special judgment declaring the existence and amount of his lien and providing for its enforcement against the specific property, whether it has been replevied or not. Triest *v.* Watts, 58 Ga. 73.

A general judgment is unauthorized in such proceedings, and as it is not capable of affecting the sureties on a replevin bond, it will not be set aside at their instance. Triest *v.* Watts, 58 Ga. 73.

La. Code Pr. art. 284 gives a right to a writ of provisional seizure in all cases where the creditor has a privilege. Adams *v.* Lewis, 7 Mart. N. S. 153.

89. Coit *v.* Waples, 1 Minn. 134.

Notice of intended sale.— Under Mass. Pub. St. c. 192, §§ 24, 25, providing for the sale of personal property on which there is a lien for work and labor or for money expended, and also providing for notice of the intended sale to the "owner" of the property, notice to a person who with the consent of the owner of his goods stores them as his own is sufficient. Keith *v.* Maguire, 170 Mass. 210, 48 N. E. 1090.

90. Peppers *v.* Coil, 113 Ga. 234, 38 S. E. 823 (holding that under such a statute it is not necessary for a levying officer to take a forthcoming bond); Quon Kee *v.* Hip Sing Long Soc., 25 Misc. (N. Y.) 320, 54 N. Y. Suppl. 570. See, generally, Executions, 17 Cyc. 1124.

91. Harrisburg *v.* Miller, 6 Pa. Dist. 347, 19 Pa. Co. Ct. 63, holding that the act of May 16, 1891, section 8, making such a provision,

against him.[92] But a claim of set-off to a larger amount than the lien is no answer to the lien unless it has been agreed between the parties that the one should be deducted from the other.[93]

E. Procedure[94] — **1. In General.** Procedure to enforce a lien may be in the form of a bill in equity,[95] a petition,[96] or cross petition;[97] or, as has been held, it may be enforced or protected by a special pleading in an action of detinue for the property.[98]

2. Parties and Interveners. Two or more parties having liens on the same property may join in an action to enforce their liens.[99] If the action is brought by one lien-holder all other lien-holders on the same property should be made parties defendant,[1] as should also all persons interested therein or against whom any relief is sought.[2] A lien-holder who is not a party to a suit to foreclose another lien on the same property has a right to intervene therein, and to have the status of his lien determined.[3]

3. Pleading. Plaintiff in an action to enforce a lien should set forth fully all facts relied on as showing the existence of his lien, and the relief sought,[4] includ-

applies to liens generally, although acquired under other statutes.

92. Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

93. Pinnock *v.* Harrison, 1 H. & H. 114, 7 L. J. Exch. 137, 3 M. & W. 532.

94. Right to trial by jury see Juries.

95. Ducker *v.* Gray, 3 J. J. Marsh. (Ky.) 163, holding that a bill to enforce an equitable lien is a proceeding *in rem*. And see cases cited *supra*, IV, B, 1.

96. See Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713. And see cases cited *supra*, IV, C.

97. Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713; McKibben *v.* Worthington, 45 S. W. 233, 20 Ky. L. Rep. 61.

A summons is not necessary on a cross petition under Ky. Civ. Code, § 692, unless such petition prays for a personal judgment (Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713; McKibben *v.* Worthington, 45 S. W. 233, 20 Ky. L. Rep. 61); or unless the cross petitioner's lien is acquired pending the original suit (Mitchell *v.* Fidelity Trust, etc., Co., *supra*). A failure to have summons served on defendant, although the cross petitioner asks for a personal judgment, does not deprive him of his right to sale and participation in the proceeds. McKibben *v.* Worthington, *supra*.

Defendant debtor's failing to answer such cross petition is a confession of the facts alleged therein. McKibben *v.* Worthington, 45 S. W. 233, 20 Ky. L. Rep. 61.

98. Riorden *v.* Brown, 1 U. C. C. P. 199.

A lien cannot be given in evidence in such an action under a plea denying plaintiff's property. Stephens *v.* Cousins, 16 U. C. Q. B. 329.

99. Boyd *v.* Jones, 2 S. W. 552, 8 Ky. L. Rep. 602; Brown *v.* Small, 10 Ky. L. Rep. 361; Miller *v.* Condit, 52 Minn. 455, 55 N. W. 47; Beltzhoover *v.* Maple, 130 Pa. St. 335, 18 Atl. 650; Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147 (by 2 Ballinger Annot. Codes & St. § 5910). And see, generally, Joinder and Splitting of Actions.

1. Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713; McKibben *v.* Worthington, 45 S. W. 233, 20 Ky. L. Rep. 61; Gest *v.* Packwood, 39 Fed. 525. *Compare* Clarke *v.* Southwick, 5 Fed. Cas. No. 2,863, 1 Curt. 297.

The validity and effect of such liens may be inquired into and determined as an original question in such suit. Gest *v.* Packwood, 39 Fed. 525.

2. Combs *v.* Krish, 84 S. W. 562, 27 Ky. L. Rep. 154; Robinson *v.* Dix, 18 W. Va. 528. See New York Nat. Deposit Bank *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 51 N. Y. Suppl. 625], holding that it is not necessary for one of several consignees who had demurred to the complaint in a replevin action and had been discharged to be made a party to the reconstructed action to establish a lien.

3. Douglas *v.* Robertson, (Tex. Civ. App., 1903) 72 S. W. 868; Thornton *v.* Fairfax, 29 Gratt. (Va.) 669, holding that one who has acquired a lien since suit commenced may, although not a party, be heard upon mere motion or petition to ask an application of surplus to his claims provided his title is not disputed; but if it is a bill may be necessary.

Right of lien-holder to intervene in attachment see Attachment, 4 Cyc. 726.

4. Shuck *v.* Price, 60 S. W. 487, 22 Ky. L. Rep. 1261; Swearingen *v.* Hartford F. Ins. Co., 56 S. C. 355, 34 S. E. 449; Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147.

That the debt is due, in the sense of being payable, need not be alleged if its existence is shown. New York Nat. Deposit Bank *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625].

Demanding too large a sum will not defeat the petition. Busfield *v.* Wheeler, 14 Allen (Mass.) 139. And see Ruggles *v.* Muskegon Cir. Judge, 124 Mich. 472, 83 N. W. 149, holding that the question whether lien proceedings are void because plaintiff in-

ing a description of the property on which the lien is claimed.[5] Under some statutes the petition should also contain a statement of all other liens held against the property.[6] To affect third parties it must be averred in the petition to enforce the lien that they had actual notice of the lien at the time they acquired their rights.[7]

4. VERDICT AND JUDGMENT. The verdict of the jury in an action to enforce a lien must respond to the issue as to whether or not a lien exists.[8] A judgment or decree foreclosing a lien can be rendered only where that matter is in issue,[9] and there is proof that the lien exists;[10] and must be supported by the verdict and the admissions contained in the pleading of the parties.[11] Such judgment or decree should ascertain and state the amount of the liens and their priorities,[12] and should order a sale of so much of the property covered as will satisfy the lien;[13] or if there is more than one lien claimed, should order a sale to satisfy all the liens established by the evidence.[14] A personal judgment may be rendered where there is an amount due in excess of the amount covered by the lien,[15] or where a balance remains unpaid after the application of the proceeds of the property subject to the lien.[16]

LIEU. See IN LIEU OF.

LIEU LANDS. The name applied to lands in a grant of public lands in aid of a railroad, which are to be selected by the company to take the place of lands

cluded in his statement more than was due cannot be tried upon *ex parte* affidavits in a motion to quash the proceedings.

Variance.— Under allegations setting forth a lien on property under a written contract a party cannot prove a lien contracted for by parol. Morris *v.* Hubbard, 10 S. D. 259, 72 N. W. 894.

5. Boyd *v.* Jones, 2 S. W. 552, 8 Ky. L. Rep. 602, holding, however, that it is sufficient if the description is contained in the deeds filed as exhibits, and in the judgment. See Shuck *v.* Price, 60 S. W. 487, 22 Ky. L. Rep. 1261. But see Busfield *v.* Wheeler, 14 Allen (Mass.) 139.

Ownership of the property by the debtor need not be distinctly alleged where facts are alleged from which the status of the debtor to the property could be determined, and his equitable obligation to plaintiff with reference thereto could be declared. New York Nat. Deposit Bank *v.* Rogers, 44 N. Y. App. Div. 357, 61 N. Y. Suppl. 155 [*affirming* 26 Misc. 555, 57 N. Y. Suppl. 625]; Ramsey *v.* Johnson, 8 Wyo. 476, 58 Pac. 755, 80 Am. St. Rep. 948.

6. Mitchell *v.* Fidelity Trust, etc., Co., 47 S. W. 446, 20 Ky. L. Rep. 713; McKibben *v.* Worthington, 45 S. W. 233, 20 Ky. L. Rep. 61, holding, however, that this requirement is obviated when the other lien-holders file cross petitions making the amounts definite.

7. McClenney *v.* McClenney, 3 Tex. 192, 49 Am. Dec. 738, holding that the execution of a lien on the property in another state is not notice which will affect creditors or subsequent purchasers of the same property, and unless actual notice is averred a demurrer to the petition will be sustained.

8. Goldstein *v.* Leake, 138 Ala. 573, 36 So. 458.

Judicial liens.— Where a lien is judicial, as in the case of an attachment lien, it is not necessary that it shall be foreclosed by a verdict, but a judgment foreclosing it may be rendered without a finding of the jury that it exists. Slayden *v.* Palmo, (Tex. Civ. App. 1905) 90 S. W. 908.

9. Ft. Jefferson Imp. Co. *v.* Dupoyster, 112 Ky. 792, 66 S. W. 1048, 24 Ky. L. Rep. 1199, 2 L. R. A. N. S. 263.

Appeal from decree enforcing lien see APPEAL AND ERROR, 2 Cyc. 545.

10. Murray *v.* Dallas Homestead, etc., Assoc., (Tex. Civ. App. 1898) 48 S. W. 604.

11. Handel *v.* Elliott, 60 Tex. 145, holding that in a suit on a debt and to enforce a lien, a finding by the jury as to the debt will not support a judgment of foreclosure of the lien, even though the lien was orally admitted before the charge to the jury.

12. Carnahan *v.* Ashworth, (Va. 1898) 31 S. E. 65. And see CREDITORS' SUITS, 12 Cyc. 56.

13. Ducker *v.* Gray, 3 J. J. Marsh. (Ky.) 163.

The value of the property need not be ascertained before its sale is ordered. Grantham *v.* Lucas, 24 W. Va. 231.

A decree ordering a sale of more property than is subject to the lien will be corrected and affirmed on appeal, if proper in other respects. Helm *v.* Weaver, 69 Tex. 143, 6 S. W. 420; Peel *v.* Gary, 54 Tex. 253.

14. Adkins *v.* Glazebrook, 4 Ky. L. Rep. 987; Wabash, etc., Canal Co. *v.* Beers, 2 Black. (U. S.) 448, 17 L. ed. 327.

15. Canadian, etc., Mortg., etc., Co. *v.* Clarita Land, etc., Co. 140 Cal. 672, 74 Pac. 301; Byron *v.* New York, 59 How. Pr. (N. Y.) 455.

Erroneous personal judgment see APPEAL AND ERROR, 3 Cyc. 429 note 96.

16. American Trading, etc., Co. *v.* Gottstein, 123 Iowa 267, 98 N. W. 770, 101 Am. St. Rep. 319.

within the limits of the grant and designated therein, which have been previously appropriated by settlers or for other purposes.[1] (See, generally, PUBLIC LANDS.)

LIEUTENANT-GOVERNOR. See STATES.

LIFE.[2] Possession of animate existence; that period between birth and death; in the law of inheritance it begins with conception; in abortion, with quickening;[3] in civil rights, with birth.[4] (Life: Annuity, see ANNUITIES. Constitutional Protection, see CONSTITUTIONAL LAW. Estate, see ESTATES. Insurance, see LIFE INSURANCE. Tables, see DAMAGES; DEATH; EVIDENCE.)

LIFE ANNUITIES. See ANNUITIES.

LIFE-ESTATE. See ESTATES.

1. Elling *v.* Thexton, 7 Mont. 330, 339, 16 Pac. 931.

2. **As used in connection with other words** see the following phrases: "During her natural life" (Bishop *v.* Selleck, 1 Day (Conn.) 299, 300; Flower *v.* Franklin, 5 Watts (Pa.) 265, 269; Kinnard *v.* Kinnard, 5 Watts (Pa.) 108; Hide *v.* Parrat, 2 Vern. Ch. 331, 23 Eng. Reprint 813), "during the life thereof" (Benham *v.* Minor, 38 Conn. 252, 253), "during the life of the person attainted" (Wallach *v.* Van Riswick, 92 U. S. 202, 208, 23 L. ed. 473), and "life employment" (Jackson *v.* Illinois Cent. R. Co., 76 Miss. 607, 612, 24 So. 874).

3. **As applied to an infant** "life begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb." 1 Blackstone Comm. 129 [*quoted* in Com. *v.* Parker, 9 Metc. (Mass.) 263, 266, 43 Am. Dec. 396].

4. English L. Dict.

"Life" is the immediate gift of God, and a right inherited by nature in every individual. 1 Blackstone Comm. 129 [*quoted* in Evans *v.* People, 1 Cow. Cr. (N. Y.) 494, 501]. To the same effect see Butchers' Benev. Assoc. *v.* Crescent City Livestock Landing, etc., Co., 16 Wall. (U. S.) 36, 127, 21 L. ed. 394, dissenting opinion of Wayne, J.

LIFE INSURANCE

By Emlin McClain*
Chief Justice Supreme Court of Iowa

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* Author of "Carriers," 6 Cyc. 352; "Fire Insurance," 19 Cyc. 565; "Insurance," 22 Cyc. 1380; "A Treatise on the Law of Crimes," etc., etc.

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I. NATURE OF THE CONTRACT.

A. Definitions and Kinds of Insurance[1] — 1. Life Insurance Generally.

The contract of life insurance is a mutual agreement by which one party under-

1. **Accident insurance** see ACCIDENT INSURANCE. **Mutual benefit insurance** see MUTUAL BENEFIT INSURANCE.

takes to pay a given sum upon the happening of a particular event contingent upon the duration of human life in consideration of the payment of a smaller sum immediately, or in periodical payments.[2] To render a contract one of life insurance the payment must be contingent upon the duration of human life.[3]

2. ENDOWMENT INSURANCE. Endowment insurance, which is a form of life insur-

2. This is substantially the definition given by Bunyon, an English writer on the subject, who defines life insurance to be "that in which one party agrees to pay a given sum upon the happening of a particular event consequent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another." Bunyon on Insurance, 1. In State *v.* Merchants' Exch. Mut. Benev. Soc., 72 Mo. 146, 159, this definition is quoted and said to be "probably as complete as any to be found in the textbooks." See also Nye *v.* Grand Lodge A. O. U. W., 9 Ind. App. 131, 36 N. E. 429; State *v.* Citizens' Ben. Assoc., 6 Mo. App. 163; Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; Olmsted *v.* Keyes, 85 N. Y. 593; Columbia Bank *v.* Equitable L. Assur. Soc., 79 N. Y. App. Div. 601, 80 N. Y. Suppl. 428; Ritter *v.* Mutual L. Ins. Co., 169 U. S. 139, 151, 18 S. Ct. 300, 42 L. ed. 693, where it is said: "Life insurance imports a mutual agreement whereby the insurer, in consideration of the payment by the assured of a named sum annually or at certain times, stipulates to pay a larger sum at the death of the assured. The company takes into consideration, among other things, the age and health of the parents and relatives of the applicant for insurance, together with his own age, course of life, habits and present physical condition; and the premium exacted from the assured is determined by the probable duration of his life, calculated upon the basis of past experience in the business of insurance."

Other definitions.—In Dalby *v.* London, etc., Life-Assur. Co., 15 C. B. 365, 387, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 80 E. C. L. 365, it is said by Baron Parke: "The contract commonly called life-assurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity for his life,— the amount of the annuity being calculated, in the first instance, according to the probable duration of the life: and, when once fixed, it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except when bonuses have been given by prosperous offices) the same, on the other. This species of insurance in no way resembles a contract of indemnity." In Paterson *v.* Powell, 9 Bing. 320, 329, 2 L. J. C. P. 13, 2 Moore & S. 399, 23 E. C. L. 598, Chief Justice Tindal speaks of life insurance as involving "a premium paid, in consideration of the insurers incurring the risk of paying a larger sum upon a given contingency." In St. John *v.* American Mut. L. Ins. Co., 13 N. Y. 31, 38, 64 Am. Dec. 529, a contract of life insurance is described as follows: "An insurance upon the life of an individual, is a contract by which the insurer, for a certain sum of money or premium proportioned to the age, health, profession, and other circumstances of the person whose life is insured, engages that if such person shall die within the period limited in the policy, the insurer shall pay the sum specified in the policy, according to the terms thereof, to the person in whose favor such policy is granted. The risk of the insurer is the death of the person whose life is the object of the security." And in Mutual L. Ins. Co. *v.* Allen, 138 Mass. 24, 24 Am. Rep. 245, the contract is described as one "by which the insurer, in consideration of an annual payment to be made by the assured, promises to pay to her a certain sum upon the death of the person whose life is insured." In Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 663, 41 Atl. 4, life insurance is defined as "Protection given to one person against the damage he may suffer through the death of another." In some cases it has been defined shortly as "a promise to pay a certain sum upon the death of the assured." Ellison *v.* Straw, 119 Wis. 502, 508, 97 N. W. 168. See also Cason *v.* Owens, 100 Ga. 142, 143, 28 S. E. 75 (where it is said: "An insurance on life is a contract by which the insurer, for a stipulated sum, engages to pay a certain amount of money if another dies within the time limited by the policy"); Tennes *v.* Northwestern Mut. L. Ins. Co., 26 Minn. 271, 272, 3 N. W. 346; Talcott *v.* Field, 34 Nebr. 611, 614, 52 N. W. 400, 33 Am. St. Rep. 662.

Life insurance by mutual benefit societies see MUTUAL BENEFIT INSURANCE.

Life insurance as a contract of indemnity see *infra*, I, B, 2, text and note 22.

3. State *v.* Federal Inv. Co., 48 Minn. 110, 50 N. W. 1028, referred to *infra*, I, A, 2, text and note 5.

Accident insurance not life insurance see Standard L., etc., Ins. Co., 86 Fed. 567, 30 C. C. A. 253, 41 L. R. A. 194; ACCIDENT INSURANCE, 1 Cyc. 237.

Contract for annuity distinguished.—A contract to pay an annuity during life in consideration of a gross sum paid to the company when the contract is entered into is not a contract of life insurance. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

An unincorporated exchange is not engaged in the business of life insurance so as to be suable under a common name, under Cal. Code Civ. Proc. § 388, by beneficiaries of a gratuity fund payable on the death of members. Swift *v.* San Francisco Stock, etc., Bd., 67 Cal. 567, 572, 8 Pac. 94.

ance, is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated.[4] To constitute a contract one of endowment insurance the payment must be contingent upon the duration of human life.[5]

3. Term Insurance. Insurance is none the less "life insurance" because it is not for the full term of the life of the insured, but for a term of years only, or until he shall arrive at a certain age.[6]

4. Advance Insurance. A contract with an insurance company by which the insured in consideration of a gross sum paid to him by the company agrees to pay to the company certain specified periodical payments for a term of years or for life only, if life should terminate within that period, the making of such payment being secured by a bond and deed of trust or mortgages on real property and there being no provision for repayment of the principal sum in any event, is not a loan but a contract of insurance, and as such it is governed by the same rules of construction as are applied in the case of ordinary contracts of insurance.[7] The

4. State *v.* Federal Inv. Co., 48 Minn. 110, 111, 50 N. W. 1028, where it is said: "The contract of life insurance, or of insurance upon a life, in the ordinary form, is a contract to pay a certain sum of money on the death of the insured. Another form, known as 'endowment insurance,' is a contract to pay a certain sum to the insured if he lives a certain length of time, or, if he dies before that time, to some other person indicated. In either of these forms the contract is, strictly speaking, an insurance on the life of the party, although the latter is generally denominated 'endowment' insurance." And see Carr *v.* Hamilton, 129 U. S. 252, 253, 9 S. Ct. 295, 32 L. ed. 669, where an endowment policy is defined as one "payable at a certain time at all events, or sooner if the party should die sooner." See also Levy *v.* Van Hagen, 69 Ala. 17; Briggs *v.* McCullough, 36 Cal. 542; Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; Walker *v.* Giddings, 103 Mich. 344, 61 N. W. 512; State *v.* Orear, 144 Mo. 157, 45 S. W. 1081; Brummer *v.* Cohn, 86 N. Y. 11, 40 Am. Rep. 503.

Endowment insurance is life insurance notwithstanding the fact that the company is to pay the agreed sum at the expiration of a fixed period if the insured lives until then, as this "is only a new and additional element in the contract not inconsistent with its other, which is its chief constituent part, to wit: the undertaking to pay on the death of the assured within the specified term." Briggs *v.* McCullough, 36 Cal. 542, 551. See also Endowment, etc., Assoc. *v.* State, 35 Kan. 253, 262, 10 Pac. 872; Carter *v.* John Hancock Mut. L. Ins. Co., 127 Mass. 153. *Compare,* however, Tennes *v.* Northwestern Mut. L. Ins. Co., 26 Minn. 271, 272, 3 N. W. 346 (where it is said of such insurance: "The contract is not one purely of life insurance. So far as it is an agreement to pay, upon the death of the husband within the ten years, it assures his life, and is a contract of life insurance, but the agreement to pay at the end of the ten years, though the husband be still alive, is not one assuring his life"); Talcott *v.* Field, 34 Nebr. 611, 614, 52 N. W. 400, 33 Am. St. Rep. 662; Miller *v.* Campbell, 140 N. Y. 457, 463, 35 N. E. 651; Ellison *v.* Straw, 119 Wis. 502, 508, 97 N. W. 168.

5. State *v.* Federal Inv. Co., 48 Minn. 110, 50 N. W. 1028, holding therefore that a corporation which undertakes to provide the means for investing small sums of money for certificate holders, to be paid by them in monthly instalments until the accumulations shall reach a sufficient amount to redeem, in their order, the certificates issued. is neither a life, endowment, nor casualty insurance company.

6. Briggs *v.* McCullough, 36 Cal. 542, 550, where it is said: "The term 'life insurance' is not alone applicable to an insurance for the full term of one's life. On the contrary, it may be for a term of years, or until the assured shall arrive at a certain age. It is simply an undertaking on the part of the insurer that either at the death of the assured, whenever that event may occur, or on his death, if it shall happen within a specified term, or before attaining a certain age, as the case may be, there shall be paid a stipulated sum. In either form it is, strictly speaking, an insurance on the life of the party."

"Term insurance contract."— A policy of life insurance which by its terms is to remain in force for one year, but is renewable from year to year thereafter, during the life of the insured, on payment of the stipulated premiums, except as reduced by the application of the surplus and guaranty fund of the company, although it gives the insured a continuing interest in such fund, is a "term insurance contract for one year or less," within the New York statute relating to notice for the purpose of forfeiture for nonpayment of premiums. Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473. See *infra,* X, C, 6, h.

7. United Security L. Ins., etc., Co. *v.* Bond, 16 App. Cas. (D. C.) 579. And see United Security L. Ins., etc., Co. *v.* Ritchey, 187 Pa. St. 173, 40 Atl. 978; Missouri, etc., Trust Co. *v.* Krumseig, 77 Fed. 32, 23 C. C. A. 1.

same is true of other contracts of a like character, such as a similar contract to furnish funds for the building of a house.[8]

5. Tontine Insurance. Tontine insurance is a form of life insurance by which the policy-holder agrees, in common with the other policy-holders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years called the tontine period, the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force.[9] It is a modification based upon the original tontine principle, said to have been invented about 1650 by Lorenzo Tonti, an Italian banker, the general idea of which was that money or property was loaned, owned, or invested for the benefit of a number of persons, who at first received its income, the share of a deceased member increasing the sum divisible among the survivors, and the last survivor taking the whole income or principal as the case might be.[10]

6. Assessment Insurance. Assessment insurance is an insurance contract, the benefit of which is dependent on the collection of an assessment from persons holding similar contracts.[11]

7. "Insured" and "Assured." Although attempts have been made to distinguish between the words "insured" and "assured," and it has been contended that the former applies to the person whose life is insured, while the latter applies to the person for whose benefit the insurance is effected, there is no such distinction in the law. On the contrary the terms are used interchangeably and their application is determined by the connection and context.[12]

8. "Insurant." The term "insurant" is sometimes used to designate the

8. Thus a contract by which the company agrees to furnish funds for the construction of a house for the other party to the contract, to be repaid by monthly instalments which shall cease upon death, has been held to be a contract of life insurance. State *v.* Beardsley, 88 Minn. 20, 92 N. W. 472.

9. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 627, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93 [*citing* Century Dict.].

Nature of such contracts see Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4; Romer *v.* Equitable L. Ins. Co., 102 Ill. App. 621; Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; New York L. Ins. Co. *v.* Miller, 56 S. W. 975, 22 Ky. L. Rep. 230; Pierce *v.* Equitable Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Avery *v.* Equitable L. Assur. Soc., 117 N. Y. 451, 23 N. E. 3; Uhlmann *v.* New York L. Ins. Co., 109 N. Y. 421, 17 N. E. 363, 4 Am. St. Rep. 482; Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309; Ellison *v.* Straw, 119 Wis. 502, 97 N. W. 168.

10. Anderson L. Dict.

"Tontine," in French law, is "a species of association or partnership formed among persons who are in receipt of perpetual or life annuities, with the agreement that the shares or annuities of those who die shall accrue to the survivors. . . . The principle is used in some forms of life insurance." Black L. Dict.

11. Jacobs *v.* Omaha Life Assoc., 146 Mo. 523, 48 S. W. 462; Hanford *v.* Massachusetts Ben. Assoc., 122 Mo. 50, 26 S. W. 680.

Where fixed premiums are provided for without authority to make additional assessments the insurance is life insurance and not assessment insurance. Jacobs *v.* Omaha Life Assoc., 146 Mo. 523, 48 S. W. 462; Thassler *v.* German American Mut. L. Assoc., 67 Mo. App. 505. But although fixed annual premiums are provided for, if there is also authority to levy additional premiums by way of assessment, the insurance is on the assessment plan. Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400; Hanford *v.* Massachusetts Ben. Assoc., 122 Mo. 50, 26 S. W. 680.

12. Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 504, 2 S. Ct. 949, 27 L. ed. 800, where it was said: "There are undoubtedly instances where this distinction between the terms assured and insured is observed, though we do not find any judicial consideration of it. The application of either term to the party for whose benefit the insurance is effected, or to the party whose life is insured, has generally depended upon its collocation and context in the policy." See also Cyrenius *v.* Mutual L. Ins. Co., 145 N. Y. 576, 40 N. E. 225 [*affirming* 73 Hun 365, 26 N. Y. Suppl. 246]; Hogle *v.* Guardian L. Ins. Co., 6 Rob. (N. Y.) 567, 4 Abb. Pr. N. S. 346 (where it is said that "the meaning of the term 'assured' is to be derived from the connection"); New York L. Ins. Co. *v.* Ireland, (Tex. 1891) 17 S. W. 617; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287; Brockway *v.* Connecticut Mut. L. Ins. Co., 29 Fed. 766. *Compare* Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381, 389. And see 1 Joyce Ins. § 1.

Construction in particular cases see *infra*, IV, B, 2, text and note 55; X, C, 6, h, note 24; XIII, D, 1, a.

person to whom an insurance policy is issued, as in the statutes prohibiting discrimination between "insurants" of the same class.[13]

B. Insurable Interest Necessary — 1. By Statute. In England by statute, for the reason "that the making Insurances on Lives, or other Events, wherein the Assured shall have no Interest, hath introduced a mischievous kind of Gaming," it was enacted that no insurance should be made "on the Life or Lives of any Person or Persons, or on any other Event or Events whatsoever, wherein the Person or Persons for whose Use, Benefit, or on whose Account such Policy or Policies shall be made, shall have no Interest, or by way of Gaming or Wagering; and that every Assurance made, contrary to the true Intent and Meaning hereof, shall be null and void, to all Intents and Purposes whatsoever;" and it was further required that the name of the person for whose benefit or on whose account the policy was made should be inserted therein, and that no greater sum should be recovered or received from the insurer than the amount or value of the interest of the insured in such life or lives or other event or events.[14] Under this statute insurance taken out by or for the benefit of a person not having an interest is void.[15] This statute has never been recognized as applicable in the United States,[16] and no general statutory provisions of a similar character are found in the various states, although in some of the states there are special provisions relating to insurable interests.[17]

13. Standard Dict. And see State L. Ins. Co. *v.* Strong, 127 Mich. 346, 86 N. W. 825; Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374; Urwan *v.* Northwestern Nat. L. Ins. Co., 125 Wis. 349, 103 N. W. 1102. See *infra*, IV, A, 1, f.

14. St. 14 Geo. III, c. 48.

15. Cook *v.* Field, 15 Q. B. 460, 14 Jur. 951, 19 L. J. Q. B. 441, 69 E. C. L. 460; Worthington *v.* Curtis, 1 Ch. D. 419, 45 L. J. Ch. 259, 33 L. T. Rep. N. S. 828, 24 Wkly. Rep. 221; North American L. Assur. Co. *v.* Brophy, 2 Ont. L. Rep. 559.

Where the premiums were paid by the assured and the beneficiary had no knowledge of the existence of the policy until after the death of the assured, it was held that the beneficiary might recover, although without an insurable interest. North American L. Assur. Co. *v.* Craigen, 13 Can. Sup. Ct. 278 [*affirming* 6 Can. L. T. 538, 18 Nova Scotia 440]. See *infra*, I, D, 1.

Amount of interest.— The first provision of the statute does not require any particular amount of interest. According to it, if there was interest, however small, the policy would not be avoided. Dalby *v.* India, etc., Life-Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365. And see India, etc., L. Assur. Co. *v.* Dalby, 4 De G. & Sm. 462, 15 Jur. 982, 64 Eng. Reprint 913.

The limitation of the amount of recovery to the pecuniary interest of the beneficiary was held to render invalid a policy effected by a father on the life of his son in which he had no pecuniary interest. Halford *v.* Kymer, 10 B. & C. 724, 8 L. J. K. B. O. S. 311, 21 E. C. L. 306.

Naming beneficiary.—As to the requirement that the beneficiary or person interested be named see Evans *v.* Bignold, L. R. 4 Q. B. 622, 38 L. J. Q. B. 293, 20 L. T. Rep. N. S. 659, 17 Wkly. Rep. 882; Hodson *v.* Observer L. Assur. Soc., 8 E. & B. 40, 3 Jur. N. S. 1125, 26 L. J. Q. B. 303, 5 Wkly. Rep. 712, 92 E. C. L. 40; Collett *v.* Morrison, 9 Hare 162, 21 L. J. Ch. 878, 41 Eng. Ch. 162, 68 Eng. Reprint 458; Wakeman *v.* Metropolitan L. Ins. Co., 30 Ont. 705.

Extended to Ireland.—By 29 & 30 Vict. c. 42, the provisions of the statute of 14 Geo. III were extended to Ireland. Prior to that it was not necessary in Ireland for the insuring party to have any interest in the life assured. British Assur. Co. *v.* Magee, Cooke & Al. 182; Anonymous, 3 Law Rep. N. S. 108.

16. Loomis *v.* Eagle L., etc., Ins. Co., 6 Gray (Mass.) 396; Lord *v.* Dall, 12 Mass. 115, 7 Am. Dec. 38; Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576.

17. **In Indiana** it is provided that the assignment of a life policy to a person having no insurable interest shall render the policy void (Davis *v.* Brown, 159 Ind. 644, 65 N. E. 908), and that the insurance on a life in which the beneficiary has no insurable interest taken without the knowledge of the assured is void (American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935).

In Missouri by statute an unmarried woman, and this includes a widow, may insure the life of her brother. Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438.

In New York a wife may insure the life of her husband. Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun 336, 13 N. Y. Suppl. 36.

In mutual benefit companies.— Statutory provisions are found in many of the states as to who may be the beneficiaries in certificates of insurance in mutual benefit companies. Harding *v.* Littlehale, 150 Mass. 100, 22 N. E. 703; New York L. Ins. Co. *v.* Rosenheim, 56 Mo. App. 27; Steinhausen *v.* Preferred Mut. Acc. Assoc., 59 Hun (N. Y.) 336, 13 N. Y. Suppl. 36. And see Mutual Benefit Insurance.

2. At Common Law. It seems to have been thought at one time that, in analogy to fire and marine insurance,[18] life insurance is a contract of indemnity requiring an insurable interest to support it;[19] but such an analogy is misleading. The contract of life insurance is not, as in fire insurance, to pay the value of the property lost or destroyed not exceeding the sum named in the policy,[20] nor, as in marine insurance, to pay the agreed value of the property lost or destroyed,[21] but it is to pay a specified sum on a contingency involving the death of the person insured, without regard to the value of the life itself. It is now well settled as a general rule that life insurance is not a contract of indemnity.[22] Nevertheless there is the objection to a life insurance contract not supported by any insurable interest which exists as to a fire insurance contract of the same character,[23] that it is a wagering or gaming contract, although the courts have not very definitely agreed as to the ground on which this objection shall be based. Some courts have said that in the absence of any specific statute, such as that found in England,[24] a mere wagering contract of life insurance is not necessarily invalid,[25] but by the great weight of authority in this country wagering contracts are invalid,[26] and on this ground a life insurance contract not supported by an insurable interest is void as against public policy.[27]

18. See Fire Insurance, 19 Cyc. 583; Marine Insurance.

19. Godsall *v.* Boldero, 9 East 72.

20. See Fire Insurance, 19 Cyc. 583.

21. See Marine Insurance.

22. *Indiana.*— Nye *v.* Grand Lodge, A. O. U. W., 9 Ind. App. 131, 36 N. E. 429.

Massachusetts.— Mutual L. Ins. Co. *v.* Allen, 138 Mass. 24, 27, 52 Am. Rep. 245, where it is said that life insurance "is not a contract of indemnity for actual loss, but a promise to pay a certain sum on the happening of a future event from which loss or detriment may ensue."

New Jersey.—Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576, 585, where it is said: "An insurance upon life has, in fact, but a remote resemblance to a marine or fire insurance. In the latter, the particular object is to indemnify against a pecuniary loss; and the event upon which the money is made payable, is the happening of the loss, the contract being in terms to pay whatever is lost, not exceeding a specified sum. But a life insurance is a contract to pay a certain specific sum on the happening of a particular event, which may or may not occasion a pecuniary loss. Where that event is the death of the insured himself, there is nothing like an indemnity against loss to him, for he can never receive the money. In such a case, the object is to provide for some relative or friend, or creditor, and this person who is to be benefitted by his death has, in many cases, the same motive to desire it, as in the case where the premium is paid and the insurance obtained by a third person." See also Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576; Merchants', etc., Transp. Co. *v.* Borland, 53 N. J. Eq. 282, 31 Atl. 272.

New York.— Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith 268. See also Olmsted *v.* Keyes, 85 N. Y. 593; Embler *v.* Hartford Steam Boiler Inspection, etc., Co., 8 N. Y. App. Div. 186, 40 N. Y. Suppl. 450.

Pennsylvania.— Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192. See also Com. *v.* American L. Ins. Co., 162 Pa. St. 586, 29 Atl. 660, 42 Am. St. Rep. 844.

United States.— Central Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370; Sides *v.* Knickerbocker L. Ins. Co., 16 Fed. 650.

England.— Dalby *v.* India, etc., Life-Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365 [*overruling* Godsall *v.* Boldero, 9 East 72]. And see India, etc., L. Assur. Co. *v.* Dalby, 4 De G. & Sm. 462, 15 Jur. 982, 64 Eng. Reprint 913.

See 28 Cent. Dig. tit. "Insurance," § 172. See also *infra*, XII, H, 5. *Compare infra*, IV, B, 1, b.

23. See Fire Insurance, 19 Cyc. 583.

24. See *supra*, I, B, 1.

25. Vivar *v.* Supreme Lodge K. of P., 52 N. J. L. 455, 20 Atl. 36; Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576. And see Shepherd *v.* Sawyer, 6 N. C. 26, 5 Am. Dec. 517.

26. Love *v.* Harvey, 114 Mass. 80; Waugh *v.* Beck, 114 Pa. St. 422, 6 Atl. 923, 60 Am. Rep. 354; Pritchet *v.* Insurance Co. of North America, 3 Yeates (Pa.) 458; Irwin *v.* Williar, 110 U. S. 499, 4 S. Ct. 160, 28 L. ed. 225. And see Gaming, 20 Cyc. 921.

27. *Alabama.*—White *v.* Equitable Nuptial Ben. Union, 76 Ala. 251, 52 Am. Rep. 325.

Connecticut.—Fuller *v.* Metropolitan L. Ins. Co., 70 Conn. 647, 41 Atl. 4.

Georgia.— West *v.* Sanders, 104 Ga. 727, 31 S. E. 619.

Illinois.— Golden Rule *v.* People, 118 Ill. 492, 9 N. E. 342; Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180.

Indiana.— Franklin L. Ins. Co. *v.* Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Prudential Ins. Co. *v.* Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380.

Kansas.— Metropolitan L. Ins. Co. *v.* Elison, 22 Kan. 199, 83 Pac. 410, 3 L. R. A. N. S. 934; Missouri Valley L. Ins. Co. *v.* McCrum, 36 Kan. 146, 12 Pac. 517, 59 Am.

C. What Constitutes Insurable Interest — 1. Relationship — a. In General. Some courts seem to have been inclined to hold that mere relationship without definite pecuniary interest is not sufficient to constitute an insurable interest, apparently following the English statute,[28] which requires pecuniary interest in every case;[29] but the weight of authority is in favor of a more liberal rule which recognizes relationship alone as sufficient if it is close enough to indicate that the policy has been obtained in good faith and not for the purpose of speculation upon a hazard in which the insured has no interest.[30] In such cases it is said to be sufficient that the person taking the insurance has some such interest arising from his relation to the insured, as creditor or surety, or from the ties of blood or marriage, that will justify a reasonable expectation of advantage or benefit from the continuance of his life; and that it is not necessary that such expectation of advantage or benefit shall be always capable of pecuniary estimation. Otherwise the contract is a mere wager by which the party taking the policy is directly interested in the early death of the insured. Such policies have a tendency to create a desire for the event and are therefore against public policy.[31] The relationship must be such as to give rise to the presumption of

Rep. 537; Missouri Valley L. Ins. Co. *v.* Sturges, 18 Kan. 93, 26 Am. Rep. 761.

Kentucky.— Basye *v.* Adams, 81 Ky. 368.

Louisiana.— Rombach *v.* Piedmont, etc., L. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239.

Massachusetts.— Loomis *v.* Eagle L., etc., Ins. Co., 6 Gray 396; Lord *v.* Dall, 12 Mass. 115, 7 Am. Dec. 38.

Michigan.— Mutual Ben. Assoc. *v.* Hoyt, 46 Mich. 473, 9 N. W. 497.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083; Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321. And see Whitmore *v.* Supreme Lodge K. & L. of H., 100 Mo. 36, 13 S. W. 495; Gambo *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44.

New Hampshire.— Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650.

New York.— Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516, 523, 527 (where it is said that life policies not supported upon interest "not only afford facilities for a demoralizing system of gaming, but furnish strong temptations to the party interested to bring about, if possible, the event insured against," and the court reaches the conclusion "that the statute of 14 Geo. III, avoiding wager policies upon lives was simply declaratory of the common law, and that all such policies would have been void, independently of that act); Valton *v.* National Loan Fund L. Assur. Soc., 22 Barb. 9.

North Carolina.— Trinity College *v.* Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291; Burbage *v.* Windley, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409.

Ohio.— Union Cent. L. Ins. Co. *v.* Hilliard, 63 Ohio St. 478, 59 N. E. 230, 81 Am. St. Rep. 644, 53 L. R. A. 462.

Pennsylvania.— Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Seigrist *v.* Schmoltz, 113 Pa. St. 326, 6 Atl. 47; McDermott *v.* Prudential Ins. Co., 7 Luz. Leg. Reg. 246. See also Riner *v.* Riner, 166 Pa. St. 617, 31 Atl. 347, 45 Am. St. Rep. 693; Ruth *v.* Katterman, 112 Pa. St. 251, 3 Atl. 833.

Texas.— Mayher *v.* Manhattan L. Ins. Co., 87 Tex. 169, 27 S. W. 124.

United States.— Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924; Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251; Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42; Langdon *v.* Union Mut. L. Ins. Co., 14 Fed. 272.

See 28 Cent. Dig. tit. "Insurance," § 158 *et seq.*

What law governs see *infra*, IV, B, 7, a, note 97.

The general statutes prohibiting gaming have sometimes been relied upon as rendering a wagering policy void, but it is a question of legal construction whether an insurance contract comes within the purview of such statute. Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516; Valton *v.* National Loan Fund L. Assur. Soc., 22 Barb. (N. Y.) 9.

Recovery of premiums paid where contract is void for want of insurable interest see *infra*, V, E, 2, notes 71, 73.

Question for jury see Langdon *v.* Union Mut. L. Ins. Co., 14 Fed. 272. And *infra*, XIII, H, 2.

28. Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100. See *infra*, I, C, 1, b, 2, a.

29. See *supra*, I, B, 1.

30. Loomis *v.* Eagle L., etc., Ins. Co., 6 Gray (Mass.) 396; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287; Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501. And see the cases more specifically cited *infra*, I, C, 1, b–g.

31. Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924. And see Rombach *v.* Piedmont, etc., L. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239; Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Batdorf *v.* Fehler, 6 Pa. Cas. 559, 9 Atl. 468; Crosswel *v.* Connecticut Indemnity Assoc., 51 S. C. 103, 28 S. E. 200.

some material or physical benefit to be reasonably expected from the continuance of the life insured.[32]

b. Parent and Child. It has sometimes been said in definite terms that the relationship of parent and child without right or liability as to support and without other direct pecuniary interest is not sufficient to sustain a policy taken by one on the life of the other.[33] But a more liberal rule seems to be supported by many authorities, in accordance with which such relationship is sufficient in itself to show such interest as will support a policy by the one on the life of the other.[34] Of course the mutual legal rights and liabilities of a father and a minor child are such as to give the one an insurable interest in the life of the other.[35] And where one without insurable interest in the life of another procured a policy of insurance on the life of the latter for the benefit of the latter's daughter, there being no evidence that the person taking the policy was to receive any benefit from the transaction, the policy was upheld.[36]

32. Fitzgerald *v.* Hartford L., etc., Ins. Co., 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288; Lord *v.* Dall, 12 Mass. 115, 7 Am. Dec. 38; Life Ins. Clearing Co. *v.* O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.

Courts have sometimes found the required insurable interest, even among relatives, in a claim for services (Rombach *v.* Piedmont, etc., L. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239; Carpenter *v.* U. S. Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943, 41 Am. St. Rep. 880, 23 L. R. A. 571), or a possible statutory liability for support (Reserve Mut. Ins. Co. *v.* Kane, 81 Pa. St. 154, 22 Am. Rep. 741); but in other jurisdictions it is held that a statutory liability for support of a parent or an adult child does not create an insurable interest (People's Mut. Ben. Soc. *v.* Templeton, 16 Ind. App. 126, 44 N. E. 809; Life Ins. Clearing Co. *v.* O'Neill, 106 Fed. 800, 45 C. C. A. 641 54 L. R. A. 225).

That the prospective custodian of the minor children of the insured has an insurable interest in his life see Matlock *v.* Bledsoe, (Ark. 1905) 90 S. W. 848.

33. *Illinois.*— Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180; Cisna *v.* Sheibley, 88 Ill. App. 385; Chicago Guaranty Fund Life Soc. *v.* Dyon, 79 Ill. App. 100.

Indiana.—Continental L. Ins. Co. *v.* Vogler, 89 Ind. 572, 46 Am. Rep. 185; Prudential Ins. Co. *v.* Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; People's Mut. Ben. Soc. *v.* Templeton, 16 Ind. App. 126, 44 N. E. 809.

United States.— Life Ins. Clearing Co. *v.* O'Neill, 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.

England.— Harse *v.* Pearl L. Assur. Co., [1903] 2 K. B. 92, 72 L. J. K. B. 638, 89 L. T. Rep. N. S. 94.

Canada.—Wakeman *v.* Metropolitan L. Ins. Co., 30 Ont. 705.

34. *Iowa.*— Farmers', etc., Bank *v.* Johnson, 118 Iowa 282, 91 N. W. 1074.

New York.— Geoffroy *v.* Gilbert, 5 N. Y. App. Div. 98, 38 N. Y. Suppl. 643 [*affirmed* in 154 N. Y. 741, 49 N. E. 1097]; Grattan *v.* National L. Ins. Co., 15 Hun 74; O'Rourke *v.* John Hancock Mut. L. Ins. Co., 10 Misc. 405, 31 N. Y. Suppl. 130.

Pennsylvania.—Carpenter *v.* U. S. Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943, 41 Am. St. Rep. 880, 23 L. R. A. 571; Reserve Mut. Ins. Co. *v.* Kane, 81 Pa. St. 154, 22 Am. Rep. 741 [*affirming* 9 Phila. 234].

South Carolina.— Crosswel *v.* Connecticut Indemnity Assoc., 50 S. C. 103, 28 S. E. 200.

United States.—Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924.

See 28 Cent. Dig. tit. "Insurance," § 159.

Son-in-law and father or mother-in-law.— A son-in-law has no insurable interest by virtue of his relationship alone in the life of his father-in-law or mother-in-law (Rombach *v.* Piedmont, etc., L. Ins. Co., 35 La. Ann. 233, 48 Am. Rep. 239; Stambaugh *v.* Blake, (Pa. 1888) 15 Atl. 705; Ramsay *v.* Myers, 6 Pa. Dist. 468), and *vice versa* (Adams *v.* Reed, (Ky. 1896) 36 S. W. 568); but circumstances may be such as to create an insurable interest (Matlock *v.* Bledsoe, (Ark. 1905) 90 S. W. 848, insurance for the benefit of the insured's mother-in-law, with the intention that she shall become on his death the custodian of his minor children), and a company, by issuing a policy to a son-in-law on the life of his father-in-law with knowledge of the relationship, may be estopped to deny the validity of the policy (Smith *v.* People's Mut. Ben. Soc., 64 Hun (N. Y.) 534, 19 N. Y. Suppl. 432; and *infra*, I, G).

35. Mitchell *v.* Union L. Ins. Co., 45 Me. 104, 71 Am. Dec. 529; Loomis *v.* Eagle L., etc., Ins. Co., 6 Gray (Mass.) 396.

Grandfather and granddaughter.— Applying the liberal rule, grandfather and granddaughter have been held to have each an insurable interest in the life of the other. Breese *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775; Hilliard *v.* Sanford, 6 Ohio S. & C. Pl. Dec. 449, 4 Ohio N. P. 363.

Assumed relation.— One who has out of friendship and without any bond of kinship assumed the position of father to another has been held to have an insurable interest in the life of the other. Carpenter *v.* U. S. Life Ins. Co., 161 Pa. St. 9, 28 Atl. 943, 41 Am. St. Rep. 880, 23 L. R. A. 571.

36. McCann *v.* Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026.

c. Brother and Sister. The relation of brother or sister to the life insured has been held sufficient without pecuniary interest to support a policy of life insurance.[37]

d. Uncle or Aunt and Nephew or Niece. The relationship between uncle or aunt and nephew or niece is not in itself sufficient to support a policy taken by one on the life of the other.[38] But if there is a reasonable ground of expectation of support to be furnished the insurance is valid.[39]

e. Cousins. The mere relationship of cousin is not such as to constitute an insurable interest.[40]

f. Husband and Wife. Husband and wife are each presumed to have such a pecuniary interest in the continuance of the life of the other as will support a policy of insurance on such life;[41] and it has been held that where a man and woman live together as husband and wife either has an insurable interest in the life of the other, irrespective of whether there is a valid marriage.[42]

g. Persons Engaged to Be Married. Likewise as between a man and a woman who are engaged to be married, there is such interest on the part of each in the

37. Lord *v.* Dall, 12 Mass. 115, 7 Am. Dec. 38; Hosmer *v.* Welch, 107 Mich. 470, 65 N. W. 280, 67 N. W. 504; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287 [*affirming* 9 Fed. Cas. No. 5,027]; Fidelity Mut. Life Assoc. *v.* Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193. *Contra,* Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100. Such relationship constitutes a good and valid consideration in law for a gift or grant, and divests the transaction of that gambling aspect which is presented where there is nothing but a speculative interest in the death of another, without any interest in his life to counterbalance it, and is free from those dangerous tendencies which render such policies contrary to good morals. Ætna L. Ins. Co. *v.* France, *supra.* The leading case on the subject, however, is one in which the court found that the sister had a reasonable expectation of support from the brother. Lord *v.* Dall, *supra.* Where the policy-holder had assumed a moral obligation to support the life assured, who was his infant stepsister, it was held that the policy was supported by sufficient interest. Barnes *v.* London, etc., L. Ins. Co., [1892] 1 Q. B. 864.

In Missouri by statute such relationship is sufficient. Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438. And see Reynolds *v.* Prudential Ins. Co., 88 Mo. App. 679.

38. *Indiana.*— Prudential Ins. Co. *v.* Jenkins, 15 Ind. App. 297, 43 N. E. 1056, 57 Am. St. Rep. 228.

Kansas.— Metropolitan L. Ins. Co. *v.* Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. N. S. 934.

Missouri.— Singleton *v.* St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321.

Pennsylvania.— Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Crone *v.* Prudential Ins. Co., 11 Pa. Dist. 433.

Texas.— Wilton *v.* New York L. Ins. Co., 34 Tex. Civ. App. 156, 78 S. W. 403.

39. Berdan *v.* Milwaukee Mut. L. Ins. Co., 135 Mich. 396, 99 N. W. 411; McGraw *v.* Metropolitan L. Ins. Co., 5 Pa. Super. Ct. 488, 41 Wkly. Notes Cas. 62; Crone *v.* Prudential Ins. Co., 11 Pa. Dist. 433, 5 Dauph. Co. Rep. 133; Cronin *v.* Vermont L. Ins. Co., 20 R. I. 570, 40 Atl. 497.

40. Brady *v.* Prudential L. Ins. Co., 5 Luz. Leg. Reg. (Pa.) 505.

41. *Massachusetts.*— Mutual L. Ins. Co. *v.* Allen, 138 Mass. 24, 52 Am. Rep. 245.

Missouri.— Gambs *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44. And see Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

New York.— Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283.

Vermont.— Currier *v.* Continental L. Ins. Co., 57 Vt. 496, 52 Am. Rep. 134.

Wisconsin.— Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094.

United States.— Watson *v.* Centennial Mut. L. Assoc., 21 Fed. 698.

England.— Reed *v.* Royal Exch. Assur. Co., 2 Peake N. P. 70.

Statutory provisions.— In several states there are statutes under which life insurance in favor of a married woman inures to her separate use and benefit and that of her children to the exclusion of her husband or his creditors.

Massachusetts.— Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720.

Missouri.— Baker *v.* Young, 47 Mo. 453; Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328.

New York.— Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395.

Ohio.— Fraternal Mut. L. Ins. Co. *v.* Applegate, 7 Ohio St. 292.

Tennessee.—Gosling *v.* Caldwell, 1 Lea 454, 27 Am. Rep. 774; Rison *v.* Wilkerson, 3 Sneed 565.

Wisconsin.— Kerman *v.* Howard, 23 Wis. 108.

And see *In re* Soutar's Policy Trust, 26 Ch. D. 236, 54 L. J. Ch. 256, 32 Wkly. Rep. 701; Schultze *v.* Schultze, 56 L. J. Ch. 356, 56 L. T. Rep. N. S. 231. See also EXEMPTIONS, 18 Cyc. 1436; FRAUDULENT CONVEYANCES, 20 Cyc. 361.

42. Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040; Scott *v.* Scott, 77 S. W. 1122, 25 Ky. L. Rep. 1356; Ruoff *v.* John Hancock Mut. L. Ins. Co., 86 N. Y. App. Div. 447, 83 N. Y. Suppl. 758.

life of the other as to support a contract of insurance on the life of one for the benefit of the other.[43]

2. Pecuniary Interest — a. In General. Where there are no ties of blood or marriage between the person whose life is insured and the person who procures the policy on such life there must be some pecuniary interest of the latter in the life of the former to sustain the insurance.[44] But an indirect advantage is sufficient,[45] and a moral obligation will support the policy.[46] It is enough that in the ordinary course of events pecuniary loss or disadvantage will naturally and probably result from the death of the one whose life is insured to the person obtaining the policy.[47] While some courts have been inclined to limit the amount of the insurance to the actual pecuniary interest,[48] the general inclination seems to be to support the policy, although the amount of the pecuniary interest is less than the amount of the policy,[49] unless the interest is so disproportionately small as to show the contract to be a mere wager.[50]

b. Creditors. A creditor has an insurable interest in the life of his debtor.[51]

43. *Illinois.*— Johnson *v.* Van Epps, 14 Ill. App. 201 [*affirmed* in 110 Ill. 551].

Missouri.— Chisholm *v.* National Capitol L. Ins. Co., 52 Mo. 213, 217, 14 Am. Rep. 414, where it is said that such insurance is "not a mere wagering contract and therefore cannot be said to contravene any principle of public policy. The plaintiff had an interest in the life of Clark, a valid contract of marriage was subsisting between them. Had he lived and violated the contract she would have had her action for damages. Had he observed and kept the same, then as his wife she would have been entitled to support."

New York.— Bogart *v.* Thompson, 24 Misc. 581, 53 N. Y. Suppl. 622.

Texas.— Taylor *v.* Travelers' Ins. Co., 15 Tex. Civ. App. 254, 39 S. W. 185.

Wisconsin.— Opitz *v.* Karel, 118 Wis. 527, 95 N. W. 948, 99 Am. St. Rep. 1004, 62 L. R. A. 982.

In mutual benefit societies see Mutual Benefit Insurance.

44. Hinton *v.* Mutual Reserve Fund Life Assoc., 135 N. C. 314, 47 S. E. 474, 102 Am. St. Rep. 545, 35 L. R. A. 161; Burbage *v.* Windley, 108 N. C. 357, 12 S. E. 839, 12 L. R. A. 409.

A religious society has no insurable interest on the life of one of its members, although he has been a contributor to its funds. Trinity College *v.* Travelers' Ins. Co., 113 N. C. 244, 18 S. E. 175, 22 L. R. A. 291.

A building association has no insurable interest in the life of a stock-holder not indebted to it. Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243.

45. Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576.

46. Cronin *v.* Vermont L. Ins. Co., 20 R. I. 570, 40 Atl. 497; Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64, 39 C. C. A. 625.

47. Hoyt *v.* New York L. Ins. Co., 3 Bosw. (N. Y.) 440.

48. Beard *v.* Sharp, 100 Ky. 606, 38 S. W. 1057, 18 Ky. L. Rep. 1029; Hays *v.* Lapeyre, 48 La. Ann. 749, 19 So. 821, 35 L. R. A. 647; Seigrist *v.* Schmoltz, 113 Pa. St. 326, 6 Atl. 47.

49. Givens *v.* Veeder, 9 N. M. 256, 50 Pac. 316; Burke *v.* Prudential Ins. Co., 155 Pa. St. 295, 26 Atl. 445; Ulrich *v.* Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 24 Am. St. Rep. 534, 13 L. R. A. 433; Grant *v.* Kline, 115 Pa. St. 618, 9 Atl. 150; Equitable L. Ins. Co. *v.* Hazlewood, 75 Tex. 338, 12 S. W. 621, 16 Am. St. Rep. 893, 7 L. R. A. 217.

50. Amick *v.* Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722; Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Cooper *v.* Schaeffer, 7 Pa. Cas. 405, 11 Atl. 548; Mowry *v.* Home L. Ins. Co., 9 R. I. 346; Cammack *v.* Lewis, 15 Wall. (U. S.) 643, 21 L. ed. 244. Where the amount of the insurance greatly exceeded the pecuniary interest but both the insured and the agent of the company had regarded the policy as valid it was held that the insured was entitled to recover for the amount which could be recovered under the policy. London, etc., L. Ins. Co. *v.* Lapierre, 1 Montreal Leg. N. 506.

As to amount of recovery and disposition of proceeds see *infra*, XII, B; XII, D, 3.

As to recovery of premiums see *infra*, V, E, 2.

51. *California.*— Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

Indiana.— Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684; Amick *v.* Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722.

Iowa.— Belknap *v.* Johnston, 114 Iowa 265, 86 N. W. 267.

Massachusetts.— Morrell *v.* Trenton Mut. L., etc., Ins. Co., 10 Cush. 282, 57 Am. Dec. 92.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

New York.— Talbert *v.* Storum, 7 N. Y. App. Div. 456, 39 N. Y. Suppl. 1047; Rawls *v.* American L. Ins. Co., 36 Barb. 357.

Pennsylvania.— Ulrich *v.* Reinoche, 143 Pa. St. 238, 22 Atl. 862, 24 Am. St. Rep. 534, 13 L. R. A. 433; Grant *v.* Kline, 115 Pa. St. 618, 9 Atl. 150; Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; American L., etc., Ins. Co. *v.* Robertshaw, 26 Pa. St. 189. See also Siegrist *v.* Schmoltz, 113 Pa. St. 326, 6 Atl. 47.

United States.— Gordon *v.* Ware Nat.

The creditor's insurable interest covers not only the amount of the indebtedness,[52] but also advances agreed to be made,[53] and the costs of taking out and keeping up the insurance.[54]

e. Other Pecuniary Interests. A partner who has advanced the capital for the business has an insurable interest in the life of his copartner;[55] and it seems that in any mutual venture in which one person invests money in reliance on the personal efforts of the other to yield a return the former has an insurable interest in the life of the latter.[56] A surety has an insurable interest in the life of his principal,[57] and an executor has an insurable interest in the life of a person who

Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; Brockway *v.* Mutual Ben. L. Ins. Co., 9 Fed. 249.

See 28 Cent. Dig. tit. "Insurance," § 162.

Even though the debt is discharged by a compromise among creditors or an assignment of the debtor's property, a moral and equitable obligation to pay the remainder of the debt not thus in fact satisfied is sufficient to give the creditor an insurable interest. Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64, 39 C. C. A. 625. See *supra*, I, C, 2, a, text and note 46.

A creditor of a firm has an insurable interest in the life of one of the partners. Morrell *v.* Trenton Mut. L., etc., Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92.

Debtor's wife.— A creditor has no insurable interest in the life of the debtor's wife. Wheeland *v.* Atwood, 7 Pa. Super. Ct. 86, 42 Wkly. Notes Cas. 178; Cameron *v.* Barcus, 31 Tex. Civ. App. 46, 71 S. W. 423.

Even in England where the insurable interest is limited to a direct pecuniary interest, the creditor has an insurable interest in his debtor's life (Knox *v.* Turner, L. R. 5 Ch. 515, 39 L. J. Ch. 750, 23 L. T. Rep. N. S. 227, 18 Wkly. Rep. 873; Preston *v.* Neele, 12 Ch. D. 760, 40 L. T. Rep. N. S. 303, 27 Wkly. Rep. 642; Lindenau *v.* Desborough, 8 B. & C. 586, 15 E. C. L. 290, 3 C. & P. 353, 14 E. C. L. 606, 7 L. J. K. B. O. S. 42, 3 M. & R. 45; Branford *v.* Saunders, 25 Wkly. Rep. 650); but it is held that a promise by a creditor to his debtor that the payment of the debt shall not be enforced during the creditor's lifetime is not sufficient to give the debtor an insurable interest in the life of the creditor, there being no consideration for the promise not to enforce the debt (Hebdon *v.* West, 3 B. & S. 579, 9 Jur. N. S. 747, 32 L. J. Q. B. 85, 7 L. T. Rep. N. S. 854, 11 Wkly. Rep. 422, 113 E. C. L. 579).

Claim of creditor unenforceable under statute of frauds see FRAUDS, STATUTE OF, 20 Cyc. 308, text and note 13.

52. Strode *v.* Meyer Bros. Drug Co., 101 Mo. App. 627, 74 S. W. 379; Simpson *v.* Walker, 2 L. J. Ch. 55.

53. Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

Where one contracted to support another for life in consideration of a policy of insurance on the life of the latter for the benefit of the former, the party who furnished support had an insurable interest, like an ordinary creditor, for the just amount of his claim for support; the balance belonging to the estate of the insured. Siegrist *v.* Schmoltz, 113 Pa. St. 326, 6 Atl. 47.

54. Exchange Bank *v.* Loh, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372; Shaffer *v.* Spangler, 144 Pa. St. 223, 22 Atl. 865; Ulrich *v.* Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 24 Am. St. Rep. 534, 13 L. R. A. 433; Grant *v.* Kline, 115 Pa. St. 618, 9 Atl. 150.

Balance for benefit of family.— A policy will be valid made by a debtor in favor of his creditor, the balance beyond the debt to inure to the debtor's family. American L., etc., Ins. Co. *v.* Robertshaw, 26 Pa. St. 189.

Payment of dues on a policy and funeral expenses does not give an insurable interest. Crone *v.* Prudential Ins. Co., 11 Pa. Dist. 433, 5 Dauph. Co. Rep. 133.

Not satisfaction of debt.— Payment of insurance money to the creditor is not *pro tanto* a satisfaction of the debt. Humphrey *v.* Arabin, L. & G. 318; *Ex p.* Andrews, 1 Madd. 573, 2 Rose 410, 16 Rev. Rep. 263, 56 Eng. Reprint 210.

Subrogation see *infra*, XII, H, 5.

In England the debtor's estate has no interest in the insurance taken by a creditor. Lea *v.* Hinton, 19 Beav. 324, 52 Eng. Reprint 374.

55. Valton *v.* National Fund L. Assur. Co., 20 N. Y. 32 [*reversing* 22 Barb. 9]; Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800. But it is said that the partnership relation alone does not give rise to an insurable interest such as to support a policy taken by one of the partners on the life of the other. Powell *v.* Dewey, 123 N. C. 103, 31 N. E. 381, 68 Am. St. Rep. 818.

56. Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith (N. Y.) 268. A partner having a legal claim on his copartner for services, skill, etc., in carrying out the partnership enterprise, may have an insurable interest in his life. Adams *v.* Reed, (Ky. 1896) 36 S. W. 568.

Persons who advance funds to conduct the business of a corporation may have an insurable interest in the life of the manager and promoter. Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650.

57. Embry *v.* Harris, 107 Ky. 61, 52 S. W. 958, 21 Ky. L. Rep. 714; Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192; Lea *v.* Hinton, 5 De G. M. & G. 823, 54 Eng. Ch. 645, 43 Eng. Reprint 1090; Downes *v.* Green, 8 Jur. 899, 13 L. J. Exch. 159, 12 M. & W. 481.

has granted an annuity to the testator.[58] An assignee of a life-tenant of realty has an insurable interest in the life of the tenant,[59] and a common carrier may insure against loss from injury to passengers.[60] But an assignee in bankruptcy has no insurable interest in the life of the bankrupt after his discharge.[61]

D. Insurable Interest of the Insured — 1. In General. Every person has an insurable interest in his own life which will support a policy taken by him in favor of himself or his estate.[62] And there is no reason of public policy why one who procures insurance on his own life should not make the benefit payable to another without regard to whether the latter has any insurable interest.[63] In the absence of bad faith or fraud,[64] the policy may be made payable to any one without regard to insurable interest,[65] and recovery may be had on the policy in an action brought by the beneficiary without proof of insurable interest.[66]

58. Tidswell *v.* Ankerstein, 1 Peake N. P. 151.

59. Harvey's Estate, 15 Pa. Dist. 298.

60. Kansas City, etc., R. Co. *v.* Southern Railway News Co., 151 Mo. 373, 52 S. W. 205, 74 Am. St. Rep. 545, 45 L. R. A. 380. See also PASSENGER INSURANCE.

61. *In re* McKinney, 15 Fed. 535.

62. *Massachusetts.*— Loomis *v.* Eagle, etc., Ins. Co., 6 Gray 396.

Missouri.— Judson *v.* Walker, 155 Mo. 166, 55 S. W. 1083.

New York.— Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Valton *v.* National Fund L. Assur. Co., 20 N. Y. 32 [*reversing* 22 Barb. 9].

Vermont.— Fairchild *v.* North Eastern Mut. L. Assoc., 51 Vt. 613.

United States.— Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251.

England.— Wainwright *v.* Bland, 1 Gale 406, 5 L. J. Exch. 147, 1 M. & Rob. 481, 1 M. & W. 32, 1 Tyrw. & G. 417.

Canada.— North American L. Ins. Co. *v.* Craigen, 13 Can. Sup. Ct. 278 [*affirming* 6 Can. L. J. 538, 18 Nova Scotia 440].

Insurance in favor of the estate of the assured is valid, although the policy may have been taken out and paid for by one having no insurable interest. Prudential Ins. Co. *v.* Leyden, 47 S. W. 767, 20 Ky. L. Rep. 881; Brennan *v.* Prudential Ins. Co., 148 Pa. St. 199, 23 Atl. 901.

63. *District of Columbia.*— U. S. Mutual Acc. Assoc. *v.* Hodgkin, 4 App. Cas. 516.

Indiana.— Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Langford *v.* Freeman, 60 Ind. 46.

Massachusetts.— Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Pennsylvania.— Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192. And see Hill *v.* United L. Ins. Co., 154 Pa. St. 29, 25 Atl. 771, 35 Am. St. Rep. 807.

Vermont.— Fairchild *v.* North Eastern Mut. Life Assoc., 51 Vt. 613.

United States.— Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287.

See 28 Cent. Dig. tit. "Insurance," § 138; and cases cited in the note following. See also *infra*, I, E.

Estoppel of company.— Where a life insurance policy recites that it is issued on the application of the insured, and the company takes the note of the beneficiary, a grandson of the insured, in payment for the first premium, there being no deception as to the real party to the insurance, the company is estopped to deny that the policy was issued on the application of the insured. New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286.

64. Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955; Albert *v.* New York Mut. L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668; Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638; Crosswel *v.* Connecticut Indemnity Assoc., 51 S. C. 103, 28 S. E. 200. See also *infra*, I, D, 2.

65. Goodrich *v.* Treat, 3 Colo. 408; Classey *v.* Metropolitan L. Ins. Co., 84 Hun (N. Y.) 350, 32 N. Y. Suppl. 335; Tucker *v.* Mutual Ben. L. Ins. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505 [*affirmed* in 121 N. Y. 718, 24 N. E. 1102]; Carraher *v.* Metropolitan L. Ins. Co., 11 N. Y. St. 665; and other cases in the preceding and following note. It has been so held under the English statute of 14 Geo. III, c. 48. North American L. Assur. Co. *v.* Craigen, 13 Can. Sup. Ct. 278.

66. Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236; Prudential Ins. Co. *v.* Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Pacific Mut. L. Ins. Co. *v.* Williams, 79 Tex. 633, 15 S. W. 478; Foster *v.* Preferred Acc. Ins. Co., 125 Fed. 536; American Employers' Liability Ins. Co. *v.* Barr, 68 Fed. 873, 16 C. C. A. 51; Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825 [*affirmed* in 74 Fed. 10, 20 C. C. A. 262]; Langdon *v.* Union Mut. L. Ins. Co., 14 Fed. 272; and other cases cited in the preceding note.

Under a Louisiana statute prohibiting gifts of movables in excess of one tenth of the whole value of the estate of the donor, it was held that a policy taken by a married man payable to his concubine, such policy constituting his entire estate, was invalid to the extent of nine tenths of the policy, and that the proceeds of the policy in excess of one tenth should go to his children. New York L. Ins. Co. *v.* Neal, 114 La. 652, 38 So. 485.

2. In Case of Fraud. But if the policy is in fact procured for a beneficiary who has no insurable interest and at his expense, thereby enabling him to effect insurance on the life of another in whose life he has no insurable interest, the policy is invalid.[67]

E. Assignee Without Insurable Interest. On the principle that one who has a valid policy on his own life may make such disposition of the proceeds as he sees fit, regardless of any insurable interest in his life on the part of the person to whom the benefit is made payable, the weight of authority is to the effect that an assignment of such a policy to one without insurable interest is valid if made in good faith and not as a cloak for the procuring of insurance by one without insurable interest.[68] There are cases, however, to the contrary;[69] but some of these are to be explained as holding only that if an assignee without insurable interest takes the policy agreeing to pay premiums the assignment

67. *Illinois.*—Cisna *v.* Sheibley, 88 Ill. App. 385.

Kentucky.— Griffin *v.* Equitable L. Assur. Soc., 84 S. W. 1164, 27 Ky. L. Rep. 313.

Missouri.— Reynolds *v.* Prudential Ins. Co., 88 Mo. App. 679.

North Carolina.— Hinton *v.* Mutual Reserve Fund Life Assoc., 135 N. C. 314, 47 S. E. 474, 65 L. R. A. 161, 102 Am. St. Rep. 545, 65 L. R. A. 161.

Pennsylvania.— Keystone Mut. Ben. Assoc. *v.* Norris, 115 Pa. St. 446, 8 Atl. 638, 2 Am. St. Rep. 572; Ruth *v.* Katterman, 112 Pa. St. 251, 3 Atl. 833.

Virginia.— Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243.

United States.— Brockway *v.* New Jersey Mut. Ben. L. Ins. Co., 9 Fed. 249.

England.—Shilling *v.* Accidental Death Ins. Co., 2 H. & N. 42, 26 L. J. Exch. 266, 5 Wkly. Rep. 567; Shilling *v.* Accidental Death Ins. Co., 27 L. J. Exch. 16.

See also *supra*, I, D, 1, text and note 64.

In Indiana such a transaction is prohibited by statute. American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935.

The fact that the beneficiary subsequently pays the premiums for the purpose of keeping the insurance alive for the benefit of the estate of the assured will not vitiate the policy. Heinlein *v.* Imperial L. Ins. Co., 101 Mich. 250, 59 N. W. 615, 45 Am. St. Rep. 409, 25 L. R. A. 627.

68. *Arkansas.*— Matlock *v.* Bledsoe, (1905) 90 S. W. 848.

Illinois.— Moore *v.* Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882 [*affirming* 76 Ill. App. 433].

Indiana.—Davis *v.* Brown, 159 Ind. 644, 65 N. E. 908. And see Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Langford *v.* Freeman, 60 Ind. 46.

Kentucky.— Adams *v.* Reed, 38 S. W. 420, 18 Ky. L. Rep. 858, 35 L. R. A. 692.

Massachusetts.— King *v.* Cram, 185 Mass. 103, 69 N. E. 1049; Dixon *v.* National L. Ins. Co., 168 Mass. 48, 46 N. E. 430; Mutual L. Ins. Co. *v.* Allen, 138 Mass. 24, 52 Am. Rep. 245.

Michigan.— Prudential Ins. Co. *v.* Liersch, 122 Mich. 436, 81 N. W. 258.

Mississippi.— Murphy *v.* Red, 64 Miss. 614, 1 So. 761, 60 Am. Rep. 68.

Nebraska.— Chamberlain *v.* Butler, 61 Nebr. 730, 86 N. W. 481, 87 Am. St. Rep. 478, 54 L. R. A. 338.

New Hampshire.— Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650.

New York.— Steinback *v.* Diepenbrock, 158 N. Y. 24, 52 N. E. 662, 70 Am. St. Rep. 424, 44 L. R. A. 417 [*affirming* 1 N. Y. App. Div. 417, 37 N. Y. Suppl. 279]; St. John *v.* American Mut. L. Ins. Co., 13 N. Y. 31, 64 Am. Dec. 529; Fuller *v.* Kent, 13 N. Y. App. Div. 529, 43 N. Y. Suppl. 649; Valton *v.* National Loan Fund L. Assur. Soc., 22 Barb. 9 [*reversed* on other grounds in 20 N. Y. 32].

Rhode Island.— Clark *v.* Allen, 11 R. I. 439, 23 Am. Rep. 496.

South Carolina.— Crosswel *v.* Connecticut Indemnity Assoc., 51 S. C. 103, 28 S. E. 200.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997; Aetna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287; Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251; Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

England.— Ashley *v.* Ashley, 3 Sim. 149, 6 Eng. Ch. 149, 57 Eng. Reprint 955.

See 28 Cent. Dig. tit. "Insurance," § 166.

An assignment by a beneficiary having an insurable interest to one having no such interest is valid. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129.

Provisions of a policy, prohibiting assignment to one without interest or limiting recovery by the assignee to the amount of his interest, were held not applicable to assignments changing the beneficiary, the assignee not being a creditor, but one designated by the insured to receive the proceeds of the policy. Moore *v.* Chicago Guaranty Fund Life Soc., 178 Ill. 202, 52 N. E. 882 [*affirming* 76 Ill. App. 433].

69. *Indiana.*— Franklin L. Ins. Co. *v.* Sefton, 53 Ind. 380; Franklin L. Ins. Co. *v.* Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Thornburg *v.* Ætna L. Ins. Co., 30 Ind. App. 682, 66 N. E. 922; Kessler *v.* Kuhns, 1 Ind. App. 511, 27 N. E. 980.

Kansas.— Metropolitan L. Ins. Co. *v.* Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A.

is contrary to public policy.[70] If the procurance of the policy by the insured and transfer of it to an assignee is for the purpose of enabling the assignee to have insurance on the life of the insured in which he has no insurable interest, the policy is void.[71] In any case an assignment to one having an insurable interest, as relative, creditor, or otherwise, is valid.[72] Courts which hold an assignment to one without insurable interest to be invalid usually protect the assignee who has paid the premiums, only to the extent of the premiums paid, allowing the estate of the

N. S. 934; Missouri Valley L. Ins. Co. *v.* McCrum, 36 Kan. 146, 12 Pac. 517, 59 Am. Rep. 537; Missouri Valley L. Ins. Co. *v.* Sturges, 18 Kan. 93, 26 Am. Rep. 761. An agreement by which one half of the insurance provided for in a life policy was assigned by the insured and the beneficiary to one having no insurable interest in the life of the insured on consideration that he should pay the premiums as they accrued is against public policy, and neither the assignee nor the beneficiary who participated in the transaction can recover on the policy. Metropolitan L. Ins. Co. *v.* Elison, *supra*.

Kentucky.— Basye *v.* Adams, 81 Ky. 368; New York L. Ins. Co. *v.* Brown, 66 S. W. 613, 23 Ky. L. Rep. 2070; Schlamp *v.* Berner, 51 S. W. 312, 21 Ky. L. Rep. 324.

Missouri.— Mutual L. Ins. Co. *v.* Richards, 99 Mo. App. 88, 72 S. W. 487; Heusner *v.* Mutual L. Ins. Co., 47 Mo. App. 336. And see New York L. Ins. Co. *v.* Rosenbaum, 56 Mo. App. 27.

Pennsylvania.— Blake *v.* Metzgar, 150 Pa. St. 291, 24 Atl. 755; Brennan *v.* Franey, 142 Pa. St. 301, 21 Atl. 803; Hoffman *v.* Hoke, 122 Pa. St. 377, 15 Atl. 437, 1 L. R. A. 229; Stambaugh *v.* Blake, (Pa. 1888) 15 Atl. 705; Ruth *v.* Katterman, 112 Pa. St. 251, 3 Atl. 833; Hendicks *v.* Reeves, 2 Pa. Super. Ct. 545. And see Vanormer *v.* Hornberger, 142 Pa. St. 575, 21 Atl. 887; Lenig *v.* Eisenhart, 127 Pa. St. 59, 17 Atl. 684.

Texas.— Dugger *v.* New York Mut. L. Ins. Co., (Civ. App. 1904) 81 S. W. 335; Wilton *v.* New York L. Ins. Co., 34 Tex. Civ. App. 156, 78 S. W. 403. See also Mayher *v.* Manhattan L. Ins. Co., 87 Tex. 169, 27 S. W. 124.

See 28 Cent. Dig. tit. "Insurance," § 166.

70. Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801; Franklin L. Ins. Co. *v.* Sefton, 53 Ind. 380; Franklin L. Ins. Co. *v.* Hazzard, 41 Ind. 116, 13 Am. Rep. 313; Metropolitan L. Ins. Co. *v.* Elison, 72 Kan. 199, 83 Pac. 410, 3 L. R. A. N. S. 934; Downey *v.* Hoffer, 110 Pa. St. 109, 20 Atl. 655. See also Milner *v.* Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L. R. A. 95; Langford *v.* Freeman, 60 Ind. 46; Powell *v.* Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818. But *compare* Prudential Ins. Co. *v.* Liersch, 122 Mich. 436, 81 N. W. 258. The early Indiana cases are thus explained in Davis *v.* Brown, 159 Ind. 644, 65 N. E. 908.

But the fact that the assignee pays the premiums for the insured will not defeat his right under the assignment. Vezina *v.* New York L. Ins. Co., 6 Can. Sup. Ct. 30 [*reversing* 25 L. C. Jur. 232, 3 Montreal Leg. N. 322].

Estoppel of company by consenting to assignment see Smith *v.* People's Mut. Ben. Soc., 64 Hun (N. Y.) 534, 19 N. Y. Suppl. 432.

71. *Massachusetts.*— Stevens *v.* Warren, 101 Mass. 564.

North Carolina.— Hinton *v.* Mutual Reserve Fund Life Assoc., 135 N. C. 314, 47 S. E. 474, 102 Am. St. Rep. 545, 65 L. R. A. 161. And see Powell *v.* Dewey, 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818.

Pennsylvania.— Keystone Mut. Ben. Assoc. *v.* Norris, 115 Pa. St. 446, 8 Atl. 638, 2 Am. St. Rep. 572. And see Vanormer *v.* Hornberger, 142 Pa. St. 575, 21 Atl. 887; Lenig *v.* Eisenhart, 127 Pa. St. 59, 17 Atl. 684.

Virginia.— See New York L. Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997; Warnock *v.* Davis, 104 U. S. 775, 26 L. ed. 924. See also Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

Canada.— New York L. Ins. Co. *v.* Parent, 3 Quebec 163.

Policy not void in its inception.— Where the insured applied for a life policy for the benefit of his estate, and afterward assigned it to his employer, who with others had encouraged him to take it out, but who had no insurable interest, and there was no evidence of an agreement to assign at any time prior to the assignment, although the assignee advanced the premium, it was held that, although the policy might be void as against the assignee by reason of his procuring the death of assured, the mere fact of assignment for an illegal object was insufficient to show that the policy was void in its inception, as against the estate. New York L. Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305 [*distinguishing* New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997].

72. *Arkansas.*— Matlock *v.* Bledsoe, (1905) 90 S. W. 848, holding that a mother-in-law, to whom her son-in-law assigned a policy of insurance on his life, with the intention that she should, on his death, become the custodian of his minor children, had, under such circumstances, an insurable interest in his life.

Massachusetts.— King *v.* Cram, 185 Mass. 103, 59 N. E. 1049.

Maryland.— Clogg *v.* MacDaniel, 89 Md. 416, 43 Atl. 795.

Pennsylvania.— Wheeland *v.* Atwood, 192 Pa. St. 237, 43 Atl. 946, 73 Am. St. Rep. 803; McHale *v.* McDonnell, 175 Pa. St. 632, 34 Atl. 966.

insured to recover the balance.[73] The assignment does not necessarily render the policy void.[74]

F. Termination of Interest. As life insurance is not a mere contract of indemnity and the necessity of insurable interest relates only to the inception of the contract and is important only to remove the objection that it is against public policy, the termination of an insurable interest on the part of the holder of the policy does not invalidate it.[75]

G. Estoppel to Deny Interest. The company having issued the policy with knowledge of the nature of the interest of the person to whom the policy is

Wisconsin.—Bursinger *v.* Watertown Bank, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848.

United States.— Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

See 28 Cent. Dig. tit. "Insurance," § 166; and *infra*, VI, A.

Security for premiums advanced.—One who has advanced premiums on a policy and received an assignment as security has an insurable interest in the life of the assured. Reed *v.* Provident Sav. L. Assur. Soc., 36 N. Y. App. Div. 250, 55 N. Y. Suppl. 292.

The pledgee of a policy of insurance to secure a debt may sell it and the assignee under the sale takes good title to the policy and its proceeds, although he has no insurable interest in the life assured. Gordon *v.* Ware Nat. Bank, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550.

Under a statutory provision making causes of action assignable, an assignment of a life policy to secure a loan is valid, at least to the extent of the assignee's claim, although the assignee has no insurable interest. Farmers', etc., Bank *v.* Johnson, 118 Iowa 282, 91 N. W. 1074.

As collateral security.— An assignee who holds a policy as collateral security for repayment of money advanced need not prove insurable interest, although it is required by the policy which is made payable to the assured or his assigns that the claim of an assignee shall be subject to proof of interest. Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

In England policies of life insurance are securities for money. Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 30 L. J. Ch. 882, 4 L. T. Rep. N. S. 695, 9 Wkly. Rep. 801, 54 Eng. Reprint 775.

73. *Georgia.*— Quillian *v.* Johnson, 122 Ga. 49, 49 S. E. 801.

Kentucky.—Barbour *v.* Larue, 106 Ky. 546, 51 S. E. 5, 21 Ky. L. Rep. 94.

Missouri.— Mutual L. Ins. Co. *v.* Richards, 99 Mo. App. 88, 72 S. W. 487.

Texas.— Hatch *v.* Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411.

Virginia.— Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243; New York L. Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997.

Amount of debt secured.—Where an assignment was made as collateral to one having no other insurable interest it was held that the assignee would be protected only to the amount of the debt secured. Helmetag *v.* Miller, 76 Ala. 183, 52 Am. Rep. 316.

A statutory prohibition of assignment to a person having no insurable interest is applicable to defense by the company against the assignment but cannot be urged by the assignee. Groff *v.* Mutual L. Ins. Co., 92 Ill. App. 207. Such a statute is not retroactive so as to render invalid an assignment previously made. Strike *v.* Wisconsin Odd Fellows Mut. L. Ins. Co., 95 Wis. 583, 70 N. W. 819.

74. While a policy of life insurance assigned to one having no insurable interest in the life of assured cannot be enforced by the assignee, the assignment does not render the policy void, but there may be a recovery thereon by the administrator of assured, the policy being payable to his "executors, administrators, or assigns"; and this is true, although the assured may, when he took out the policy, have contemplated the assignment he made, as the application and policy both recognize his right to assign the policy, and do not limit the assignment to some person having an insurable interest. New York L. Ins. Co. *v.* Brown, 66 S. W. 613, 23 Ky. L. Rep. 2070.

But if by the assignment the policy is rendered invalid the estate of the insured cannot recover from the assignee the amount which the company has paid him under the void assignment. Powell *v.* Mutual Ben. L. Ins. Co., 123 N. C. 103, 31 S. E. 381, 68 Am. St. Rep. 818.

In Indiana, by statute, an assignment except as security for debt with remainder over to the beneficiary of the estate of the insured renders the policy void, but such a statute is not applicable to a policy issued in another state. Davis *v.* Brown, 159 Ind. 644, 65 N. E. 908.

As to the effect of a void assignment see *infra*, VI.

75. Clogg *v.* McDaniel, 89 Md. 416, 43 Atl. 795; Rawls *v.* American L. Ins. Co., 36 Barb. (N. Y.) 357 [*affirmed* in 27 N. Y. 282, 84 Am. Dec. 280]; Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192; Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64, 39 C. C. A. 625; Sides *v.* Knickerbocker L. Ins. Co., 16 Fed. 650.

That life insurance is not a contract of indemnity see *supra*, I, B, 2, text and note 22.

issued cannot defeat recovery thereon for want of insurable interest;[76] nor on the other hand can the person to whom the policy is issued set up want of insurable interest rendering the policy invalid as a ground for recovering back the premiums,[77] or set up lack of insurable interest in the beneficiary for the purpose of avoiding an accounting to the beneficiary for the proceeds.[78]

II. THE MAKING OF THE CONTRACT AND EXECUTORY CONTRACTS TO INSURE.

A. Powers of Officer or Agent. A general agent may bind the company by an agreement as to rate of premiums,[79] or other terms of the contract, even as against the express provisions of a policy subsequently issued, there being no negligence on the part of the insured in failing to advise himself as to the terms of the policy;[80] but if the want of authority of the agent to vary the terms of the application is brought home to the applicant, oral communications of the insured to the agent are not to be considered in determining the validity of the insurance.[81] If the agent has exceeded his authority as to the terms of the proposed

Divorce.— A policy payable to the wife of the person whose life is insured does not become invalid in the event of a divorce. Supreme Commandery O. K. of G. R. *v.* Everding, 20 Ohio Cir. Ct. 689, 11 Ohio Cir. Dec. 419; Hatch *v.* Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251.

Amount of recovery.— In the absence of any controlling provision in the contract the holder of a policy, valid at its inception, is entitled to recover the full amount of the insurance without reference to subsequent diminution or cessation of insurable interest. Corson's Appeal, 113 Pa. St. 438, 6 Atl. 213, 57 Am. Rep. 479; Corson *v.* Garnier, 15 Wkly. Notes Cas. (Pa.) 451; Sides *v.* Knickerbocker L. Ins. Co., 16 Fed. 650; Dalby *v.* India, etc., Life-Assur. Co., 15 C. B. 365, 3 C. L. R. 61, 18 Jur. 1024, 24 L. J. C. P. 2, 3 Wkly. Rep. 116, 80 E. C. L. 365; Law *v.* London Indisputable Life Policy Co., 3 Eq. Rep. 338, 1 Jur. N. S. 178, 1 Kay & J. 223, 24 L. J. Ch. 196, 3 Wkly. Rep. 154, 69 Eng. Reprint 438.

As to amount of recovery see *infra*, XII, B.

76. U. S. Mutual Acc. Assoc. *v.* Hodgkin, 4 App. Cas. (D. C.) 516; Smith *v.* Peoples' Mut. Ben. Soc., 64 Hun (N. Y.) 534, 19 N. Y. Suppl. 432; Foster *v.* Preferred Acc. Ins. Co., 125 Fed. 536.

Incontestable clause.— A clause in the policy rendering it incontestable after a specified period does not estop the company from contesting it after the expiration of such period on the ground of want of insurable interest. Brady *v.* Prudential L. Ins. Co., 5 Luz. Leg. Reg. (Pa.) 505; Clement *v.* New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 70 Am. St. Rep. 650, 42 L. R. A. 247; Anctil *v.* Manufacturers' L. Ins. Co., [1899] A. C. 604, 68 L. J. P. C. 123, 81 L. T. Rep. N. S. 279; Manufacturers' L. Ins. Co. *v.* Anctil, 28 Can. Sup. Ct. 103. See *infra*, XI, E, 2.

77. Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100. See also Hare *v.* Pearl L. Assur. Co., [1904] 1 K. B. 558, 73 L. J. K. B. 373, 90 L. T. Rep. N. S. 245, 20 T. R. 264, 52 Wkly. Rep. 457. And see *infra*, VIII, E, 2, note 71.

78. Hurd *v.* Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. See also Mechanicks Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Stambaugh *v.* Blake, (Pa. 1888) 15 Atl. 705.

79. Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659.

80. La Marche *v.* New York L. Ins. Co., 126 Cal. 498, 58 Pac. 1053; McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119].

Acceptance of application.— The statement of the secretary of the company to the applicant that his application has been accepted and that a policy would be issued was held binding on the company, although as a matter of fact its board of directors having authority to accept applications had not acted. Moulton *v.* Masonic Mut. Ben. Soc., 64 Kan. 56, 67 Pac. 533.

Binding contract of insurance before issuance of policy.— It has been held in some states that the general agent of a life insurance company has implied authority to bind the company by a contract for temporary insurance on receipt of the application and premium and prior to the issuance of the policy, and further than this that such authority is not affected by restrictions in the application, unless they are called to his attention. Halle *v.* New York L. Ins. Co., 58 S. W. 822, 22 Ky. L. Rep. 740. See also Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565 (holding that the question as to the agent's authority was properly submitted to the jury); Starr *v.* New York Mut. L. Ins. Co., 41 Wash. 228, 83 Pac. 116. And see *infra*, II, B, 3. In other states, however, the contrary has been held. Cotton States L. Ins. Co. *v.* Scurry, 50 Ga. 48; Todd *v.* Piedmont, etc., L. Ins. Co., 34 La. Ann. 63.

81. Fidelity Mut. Life Assoc. *v.* Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813;

contract, the company cannot reject that part which the agent was without authority to make and enforce the rest, but must accept or reject *in toto*.[82]

B. Offer and Acceptance — 1. In General. As a rule,[83] until there has been a proposition for insurance by the applicant and acceptance thereof by the company, there is no contract, and the acceptance must be signified by some act on the part of the company.[84] If the stipulation in the application is that the insurance shall not take effect until the policy is delivered, the delivery of the policy constitutes the binding acceptance by the company.[85] In such case the applica-

Chamberlain *v.* Prudential Ins. Co., 109 Wis. 4, 85 N. W. 128, 83 Am. St. Rep. 851; Miller *v.* Northwestern Mut. L. Ins. Co., 111 Fed. 465, 49 C. C. A. 330.

Further as to powers of agents see Insurance, 22 Cyc. 1427 *et seq.*

82. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68, holding therefore that the fact that an agent of a life insurance company was a special agent, with no right to make a loan for the company, was no defense in an action against the company by an applicant for a policy to recover the premium paid in advance, on the ground that the agent agreed, as additional consideration for her taking out the policy, that the company would make her a loan, which the company refused to do.

83. In the formation of a contract of life insurance the offer is generally made by the insured by applying for a policy, and the contract is consummated by acceptance of the application and issue of a policy. See the cases cited in the notes following, and *infra*, III, B. But there is nothing in the nature of the contract to prevent its formation by an offer of a policy by the company and its acceptance by the insured. See Yore *v.* Bankers', etc., Mut. Life Assoc., 88 Cal. 609, 26 Pac. 514. And see, generally, Contracts, 9 Cyc. 247 *et seq.* In either case the parties must reach an agreement; mutual assent is essential. Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448. See also Hubbard *v.* State L. Ins. Co., 129 Iowa 13, 105 N. W. 332; Dickerson *v.* Prudential Sav., etc., Assur. Soc., 52 S. W. 825, 21 Ky. L. Rep. 611; Busher *v.* New York L. Ins. Co., 72 N. H. 551, 58 Atl. 41; and other cases cited in the notes following. And see Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

The payment to an insurance agent of a sum equal to the first premium, and the taking of a receipt therefor, which expressly declares that, if the application is accepted by the company, the insurance shall take effect from the date of application, but that if the application is not accepted the money shall be returned, and the receipt surrendered, does not amount to a contract of insurance until acceptance by the company, and, if the insured die before acceptance, the company is not liable. Steinle *v.* New York L. Ins. Co., 81 Fed. 489, 26 C. C. A. 491.

Waiver of application.— An application for an insurance policy is waived by delivering it as a complete contract, with a provision stamped on it that it is based on an application for another policy issued to insured a few days before, although the policy provides that it is issued in consideration of the application therefor. Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92.

Where a policy has lapsed and become void it can only be revived by a new contract. Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

Reinsurance see *infra*, VII, C, 2.

A decoy policy issued to a solicitor was held valid in his hands where he had accepted such policy and in good faith paid the premium to one entitled to receive it, believing that he was thereby securing valid insurance. Union L. Ins. Co. Haman, 54 Nebr. 599, 74 N. W. 1090.

84. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Mayes, 61 Ala. 163.

Connecticut.— Rogers *v.* Charter Oak L. Ins. Co., 41 Conn. 97.

Illinois.— Covenant Mut. Ben. Assoc. *v.* Conway, 10 Ill. App. 348.

Minnesota.— Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448.

Mississippi.— Jacobs *v.* New York L. Ins. Co., 71 Miss. 658, 15 So. 639.

New Hampshire.— Busher *v.* New York L. Ins. Co., 72 N. H. 551, 58 Atl. 41.

Texas.— Connecticut Mut. L. Ins. Co. *v.* Rudolph, 45 Tex. 454; Coker *v.* Atlas Acc. Ins. Co., (Civ. App. 1895) 31 S. W. 703.

Wisconsin.— Rossiter *v.* Aetna L. Ins. Co., 91 Wis. 121, 64 N. W. 876.

United States.—Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

Canada.— Armstrong *v.* Provident Sav. L. Assur. Soc., 2 Ont. L. Rep. 771.

See 28 Cent. Dig. tit. "Insurance," § 196.

An alteration of the risk between the time of the original proposal and the time for issuing the policy relieves the company from all obligation to issue the policy as applied for. Canning *v.* Farquhar, 16 Q. B. D. 727, 55 L. J. Q. B. 225, 54 L. T. Rep. N. S. 350, 34 Wkly. Rep. 423.

85. *Minnesota.*— Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448.

Mississippi.— New York L. Ins. Co. *v.* McIntosh, 86 Miss. 236, 38 So. 775.

Missouri.— Kilcullen *v.* Metropolitan L. Ins. Co., 108 Mo. App. 61, 82 S. W. 966.

North Carolina.— Ray *v.* Security Trust, etc., Ins. Co., 126 N. C. 166, 35 S. E. 246.

Virginia.— Oliver *v.* Mutual L. Ins. Co., 97 Va. 134, 33 S. E. 536.

tion may be withdrawn before the policy is issued and accepted,[86] and if the applicant refuses to accept the policy when issued, there is no completed contract for insurance.[87]

2. DELAY IN ACCEPTING APPLICATION. Mere delay of the company in accepting an application which is subject to its approval, although such delay may be unnecessary, does not give rise to a contract of insurance.[88]

3. BINDING AGREEMENT BEFORE ISSUANCE OF POLICY. Unless it is stipulated that the insurance shall not take effect until delivery of the policy there may be a binding contract of insurance on the acceptance by the company of the application, or on delivery of the application to the agent and its acceptance by him, when he has authority, express or apparent,[89] to make a binding contract.[90] But in order that there may be a binding contract of insurance before issuance of a

United States.— Weinfeld *v.* Mutual Reserve Fund Life Assoc., 53 Fed. 208.

Canada.— Whitla *v.* Royal Ins. Co., 14 Manitoba 90.

Execution and delivery of policy see *infra*, III, B.

Prepayment of premiums see *infra*, III, D.

86. Globe Mut. L. Ins. Co. *v.* Snell, 19 Hun (N. Y.) 560; Travis *v.* Nederland L. Ins. Co., 104 Fed. 486, 43 C. C. A. 653; Barron *v.* Fitzgerald, 6 Bing. N. Cas. 201, 4 Jur. 88, 9 L. J. C. P. 153, 8 Scott 460, 37 E. C. L. 582. And see Hubbard *v.* State L. Ins. Co., 129 Iowa 13, 105 N. W. 332.

87. Hogben *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53. See also Yore *v.* Bankers', etc., Mut. Life Assoc., 88 Cal. 609, 26 Pac. 514.

Acceptance of policy see *infra*, III, C.

88. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Mayes, 61 Ala. 163.

North Carolina.— Ross *v.* New York L. Ins. Co., 124 N. C. 395, 32 S. E. 733.

South Dakota.— Brink *v.* Merchants', etc., United Mut. Ins. Assoc., 17 S. D. 235, 95 N. W. 929.

Texas.— Connecticut Mut. L. Ins. Co. *v.* Rudolph, 45 Tex. 454.

United States.— Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; Misselhorn *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 545; Kohen *v.* Mutual Reserve Fund Life Assoc., 28 Fed. 705.

See 28 Cent. Dig. tit. "Insurance," § 199.

89. See *supra*, II, A, note 80.

90. *California.*— Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

Connecticut.— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Indiana.— Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96.

Kentucky.— Halle *v.* New York L. Ins. Co., 58 S. W. 822, 22 Ky. L. Rep. 740; Lee *v.* Union Cent. L. Ins. Co., 41 S. W. 319, 19 Ky. L. Rep. 608.

New York.— Calandra *v.* Life Assoc. of America, 84 N. Y. Suppl. 498.

South Dakota.— See Bowen *v.* Mutual L. Ins. Co., (1905) 104 N. W. 1040.

Washington.— Starr *v.* New York Mut. L. Ins. Co., 41 Wash. 228, 83 Pac. 116.

United States.— Keen *v.* New York Mut. L. Ins. Co., 131 Fed. 559; Shattuck *v.* New York Mut. L. Ins. Co., 21 Fed. Cas. No. 12,715, 4 Cliff. 598.

See also *infra*, III, B, 2, a, text and note 10.

Illustration.— An application for a life policy was made on a printed form with none of the blanks filled, and provided that it was the basis and part of a proposed contract for insurance which should not take effect until the first premium should be paid during the continuance of the insured in good health and until the policy should be issued. As a part of the same transaction and at the same time a binding receipt was executed, wholly in writing, reciting that the applicant had paid to the soliciting agent a certain sum, and that such agent had furnished the applicant with a binding receipt therefor, making the insurance in force from that date, provided that the application should be approved and the policy be duly signed by the secretary at the head office of the company and issued, and that such policy if issued should take effect as of the date of such receipt. Under the circumstances it was held that the receipt controlled the application, and when the application was accepted, a binding policy of insurance was created, although the policy was not actually issued at the home office of the company until after assured had died, and for that reason was never delivered. Starr *v.* New York Mut. L. Ins. Co., 41 Wash. 228, 83 Pac. 116.

Parol evidence.— Where the agent of an insurance company issued to an applicant for insurance a binding receipt, so as to make the insurance in force from the date of the application on a policy thereon being subsequently issued, it was held that parol evidence was inadmissible to show that the receipt was in fact not a binding receipt, under a statute declaring that the execution of a contract should supersede oral negotiations preceding or accompanying its execution. Bowen *v.* New York Mut. L. Ins. Co., (S. D. 1905) 104 N. W. 1040.

Antedating the policy.— If the application is accepted and the policy prepared in accordance therewith, and the insured is notified that the policy has been issued, it may be dated back to correspond with the application. Armstrong *v.* Provident Sav. L. Assur. Soc., 2 Ont. L. Rep. 771.

policy, there must be a complete and final agreement to this effect,[91] and the contract must be consummated before the death of the applicant.[92] The mere receipt by an agent of the first premium, or of a note therefor, subject to the approval of the application by the company, does not constitute a contract of temporary insurance, prior to the acceptance of the application by the company.[93] A contract may be made for ordinary life insurance under an agreement that it is to be in force pending the delivery of an endowment policy, and the contract will not be invalid because at the time the company has no power to issue endowment policies.[94]

The measure of damages for failure to issue a policy in accordance with a binding agreement to do so is the value of the policy which should have been issued. Mobile L., etc., Ins. Co. *v.* Egger, 67 Ala. 134; Piedmont L. Ins. Co. *v.* Young, 58 Ala. 476, 29 Am. Rep. 770; Union Cent. L. Ins. Co. *v.* McHugh, 7 Nebr. 66.

91. *Arkansas.*— Cooksey *v.* New York Mut. L. Ins. Co., 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26, holding that an application for life insurance, which recited that the soliciting agent had furnished the applicant with a binding receipt "making the insurance in force from" date, provided the application should be approved and the policy issued, and the soliciting agent's receipt, which recited that he had received a specified sum from the applicant to be applied as the first annual premium, when the policy should be delivered, with a proviso for refunding the sum on the insurer declining to issue the policy, did not constitute a contract for temporary insurance, to remain in force until the policy should be issued or the application rejected.

Iowa.— Hubbard *v.* State L. Ins. Co., 129 Iowa 13, 105 N. W. 332.

Massachusetts.— Marks *v.* Hope Mut. L. Ins. Co., 117 Mass. 528.

South Dakota.— Bowen *v.* Mutual L. Ins. Co., (1905) 104 N. W. 1040.

United States.— Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

Rescission of incomplete agreement.—Where plaintiff delivered an application for a life policy and a note for the first premium to the agent of an insurer, pursuant to an agreement that the same were to be deposited in a bank until plaintiff should be satisfied that everything concerning the negotiations was right, it was held that, if not satisfied with the proposed contract, plaintiff could rescind the agreement and demand the return of his note. Hubbard *v.* State L. Ins. Co., 129 Iowa 13, 105 N. W. 332.

92. Thus in an action on a life policy, where it was shown that the agent of the insurer, under the authority given by the insured, signed insured's name to the application and executed an assignment of insured's wages for the premium between half-past nine A. M. and twelve o'clock noon on a certain day, and the name of the beneficiary was inserted in the application on the same day, but in fact after the death of the insured, and the testimony only raised a mere suspicion that insured was alive when the agent signed the application, and the insured and the agent had agreed that the agent should write up a policy for a specified sum, when the first premium could be taken out of certain wages of insured, which could not be done until two days before the agent prepared the application and the assignment of wages for the premium, it was held that no contract of life insurance was consummated before the death of the insured. Dickey *v.* Continental Casualty Co., (Tex. Civ. App. 1905) 89 S. W. 436.

Death after binding contract for temporary insurance.— Where, however, a binding contract is made for temporary insurance before the issue of a policy, the company will be liable notwithstanding the subsequent death of the insured before the policy is issued. Lee *v.* Union Cent. L. Ins. Co., 41 S. W. 319, 19 Ky. L. Rep. 608; Starr *v.* New York Mut. L. Ins. Co., 41 Wash. 228, 83 Pac. 116, and other cases cited *supra*, this section, note 90.

93. *Arkansas.*— Cooksey *v.* New York Mut. L. Ins. Co., 73 Ark. 117, 83 S. W. 317, 108 Am. St. Rep. 26.

Georgia.— Cotton States L. Ins. Co. *v.* Scurry, 50 Ga. 48.

Kentucky.—Hill *v.* Penn Mut. L. Ins. Co., 90 S. W. 544, 28 Ky. L. Rep. 790.

Louisiana.— Todd *v.* Piedmont, etc., L. Ins. Co., 34 La. Ann. 63.

Massachusetts.— Marks *v.* Hope Mut. L. Ins. Co., 117 Mass. 528.

Texas.— Connecticut Mut. L. Ins. Co. *v.* Rudolph, 45 Tex. 454.

Wisconsin.— Rossiter *v.* Aetna L. Ins. Co., 91 Wis. 121, 64 N. W. 876.

United States.— New York Mut. L. Ins. Co. *v.* Young, 23 Wall. 85, 23 L. ed. 152; Mohrstadt *v.* New York Mut. L. Ins. Co., 115 Fed. 81, 52 C. C. A. 675; Pace *v.* Provident Sav. L. Assur. Soc., 113 Fed. 13, 51 C. C. A. 32; Steinle *v.* New York L. Ins. Co., 81 Fed. 489, 26 C. C. A. 491.

Refusal of application.— If the company refuses to issue a policy in accordance with the application there is no binding contract of insurance. Mohrstadt *v.* New York Mut. L. Ins. Co., 115 Fed. 81, 52 C. C. A. 675.

94. Calandra *v.* Life Assoc. of America, 84 N. Y. Suppl. 498, holding also that under such a contract the insured has a right to demand an endowment policy within a reasonable time, and, on breach by the company, to recover the excess of premiums paid by him over that due for an ordinary policy.

III. THE POLICY.

A. Form and Requisites — 1. Oral or Written. There may be a valid oral contract of insurance,[95] but as a rule such contracts are in writing. When the written instrument is delivered and accepted, it constitutes the best evidence of the contract and merges all prior or contemporaneous oral agreements.[96]

2. Seal Not Required. It is not essential that the instrument be under seal.[97] And if the instrument be under seal a stipulation added to the policy, although not under seal, will be binding on the company.[98] Even though corporations be required to make such contracts under seal a court of equity may ignore the requirement and enforce a contract not under seal.[99]

3. Statutory Requirements. There are sometimes statutory provisions requiring that a life insurance policy shall contain the entire contract between the parties,[1] or requiring that conditions and restrictive provisions in a policy shall, to constitute a defense to an action thereon, be written or printed in a certain manner or type,[2] or prohibiting the incorporation of certain provisions in a policy.[3] In some states, in the case of life as well as fire insurance, a standard form of policy is prescribed by statute.[4]

B. Execution and Delivery — 1. Signing and Countersigning. If a policy of life insurance appears to be executed in due form and is delivered in the ordinary course of business, the insured is not bound to inquire whether the persons signing the policy as officers or directors of the company have authority to do so.[5] Where it is stipulated in the policy that it shall not be valid until countersigned by a certain officer or agent, and there is no waiver of the stipulation, a policy which is not so countersigned is not binding.[6] Such a stipulation, however, may be waived, if the intention to execute is sufficiently clear, and it has been held that if the policy is actually delivered without being countersigned, it is binding

95. Alabama Gold L. Ins. Co. *v.* Mayes, 61 Ala. 163; Pacific Mut. Ins. Co. *v.* Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566. See also Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365. And see Fire Insurance, 19 Cyc. 595.

96. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493; Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532.

97. See Fire Insurance, 19 Cyc. 602.

98. Gates *v.* Home Mut. L. Ins. Co., 5 Ohio Dec. (Reprint) 313, 4 Am. L. Rec. 395.

99. Wright *v.* Sun Mut. L. Ins. Co., 29 U. C. C. P. 221 [*affirmed* in 5 Can. Sup. Ct. 466].

1. See N. Y. Laws (1906), c. 326, § 16, providing that every life insurance policy shall contain the entire contract between the parties, and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application, or other writings, unless the same are indorsed upon or attached to the policy when issued, and that any waiver of such provision shall be void.

2. Under Va. Code, § 3252, providing that no "condition" or "restrictive provision" of a policy shall be valid as a defense to an action on the policy, unless printed in type of a certain size, or written with pen and ink, it is of no consequence whether the language used be in the form of a "condition," an "agreement," or a "restrictive provision," the section applying with equal force in either case. National Life Assoc. *v.* Berkeley, 97 Va. 571, 34 S. E. 469, holding further that under such statute the whole clause relied on must be in writing or in type of the prescribed size, or it cannot be relied on as a defense.

3. See N. Y. Laws (1906), c. 326, § 17, prohibiting a provision in a policy of life insurance that the person soliciting such insurance, or any person who is engaged in the business of soliciting insurance for the company issuing the policy, is the agent of the insured, or any provision to make the acts or representations of such person binding on the insured.

4. See N. Y. Laws (1906), c. 326, § 101, prescribing four standard forms of policies, namely: (1) An ordinary life policy; (2) a limited payment life policy; (3) an endowment policy; and (4) a term policy. See also Fire Insurance, 19 Cyc. 601.

5. *In re* County L. Assur. Co., L. R. 5 Ch. 288, 39 L. J. Ch. 471, 22 L. T. Rep. N. S. 537, 18 Wkly. Rep. 390; Prince of Wales L., etc., Assur. Co. *v.* Harding, E. B. & E. 183, 4 Jur. N. S. 851, 27 L. J. Q. B. 297, 96 E. C. L. 183.

6. Badger *v.* American Popular L. Ins. Co., 103 Mass. 244, 4 Am. Rep. 547; Noyes *v.* Phœnix Mut. L. Ins. Co., 1 Mo. App. 584; Prall *v.* Mutual Protection L. Assur. Soc., 5 Daly (N. Y.) 298 [*affirmed* in 63 N. Y. 608]; McCully *v.* Phœnix Mut. L. Ins. Co., 18 W. Va. 782. See also Newcomb *v.* Pru-

notwithstanding the stipulation.[7] Where a life policy stipulates that it shall not be binding on the company unless it is countersigned by a certain agent, and the actual time of countersigning is after the death of the insured, of which both the agent and the company are at the time ignorant, the policy does not take effect.[8] The authority of an agent to countersign is personal and cannot be delegated.[9]

2. Delivery by Insurer — a. Necessity. A complete contract may be made by the unqualified acceptance of the application without the delivery of a policy, where such delivery is not by the terms of the application expressly made a condition to the insurance taking effect.[10] But under usual stipulations the execution and delivery of the policy in accordance with the terms of the application are necessary to constitute a completed contract.[11]

dential Fund Soc., 5 Colo. App. 140, 38 Pac. 61; Dickey *v.* Continental Casualty Co., (Tex. Civ. App. 1905) 89 S. W. 436. And see Fire Insurance, 19 Cyc. 601.

Policy on life of the agent who is to countersign.— In Badger *v.* American Popular L. Ins. Co., 103 Mass. 244, 4 Am. Rep. 547, it was held that a policy of life insurance which provided that it should not be in force until countersigned by a certain person as agent was not valid where it was not so countersigned, there being no evidence of waiver of the stipulation by the company, although such agent was himself the insured and the policy had been received and retained by him. But in Norton *v.* Phœnix Mut. L. Ins. Co., 36 Conn. 503, 4 Am. Rep. 98, the contrary was held on the ground that under the circumstances of the case such countersigning could not have been in the contemplation of the parties.

7. *Missouri.*— Kantrener *v.* Penn Mut. L. Ins. Co., 5 Mo. App. 581.

New York.— Prall *v.* Mutual Protection L. Assur. Soc., 5 Daly 298 [*affirmed* in 63 N. Y. 608].

Pennsylvania.— Myers *v.* Keystone Mut. L. Ins. Co., 27 Pa. St. 268, 67 Am. Dec. 462.

United States.— Whitcomb *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,530.

Canada.— Confederation Life Assoc. *v.* O'Donnell, 16 Can. Sup. Ct. 717 [*affirming* 21 Nova Scotia 169].

See 28 Cent. Dig. tit. "Insurance," § 212; and Fire Insurance, 19 Cyc. 601.

8. Dickey *v.* Continental Casualty Co., (Tex. Civ. App. 1905) 89 S. W. 436; McCully *v.* Phœnix Mut. L. Ins. Co., 18 W. Va. 782.

9. McCully *v.* Phœnix Mut. L. Ins. Co., 18 W. Va. 782. See also Lynn *v.* Burgoyne, 13 B. Mon. (Ky.) 400.

10. *Connecticut.*— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Georgia.— New York L. Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. 273, 69 Am. St. Rep. 134, 42 L. R. A. 88; Southern L. Ins. Co. *v.* Kempton, 56 Ga. 339.

Kentucky.— Mutual L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800.

Nevada.— Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116, 8 Am. Rep. 705.

New York.— Fried *v.* Royal Ins. Co., 50 N. Y. 243.

See 28 Cent. Dig. tit. "Insurance," § 225 *et seq.* And see *supra*, II, B, 3.

11. *Indiana.*— Reserve Loan L. Ins. Co. *v.* Hockett, 35 Ind. App. 842, 73 N. E. 842; Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190.

Iowa.— Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201.

Kentucky.— Hill *v.* Penn Mut. L. Ins. Co., 90 S. W. 544, 28 Ky. L. Rep. 790; Mutual L. Ins. Co. *v.* Lucas, 79 S. W. 279, 25 Ky. L. Rep. 2052; Dickerson *v.* Provident Sav. L. Assur. Soc., 52 S. W. 825, 21 Ky. L. Rep. 611.

Massachusetts.— Markey *v.* Mutual Ben. L. Ins. Co., 126 Mass. 158; Faunce *v.* State Mut. L. Assur. Co., 101 Mass. 279.

Minnesota.— Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153.

New Hampshire.— Busher *v.* New York L. Ins. Co., 72 N. H. 551, 58 Atl. 41.

North Carolina.— Ray *v.* Security Trust, etc., Ins. Co., 126 N. C. 166, 35 S. E 246.

Texas.— Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978.

West Virginia.— McCully *v.* Phœnix Mut. L. Ins. Co., 18 W. Va. 782.

Wyoming.— Summers *v.* Mutual L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 109 Am. St. Rep. 992.

United States.— Kohen *v.* Mutual Reserve Fund Life Assoc., 28 Fed. 705; Misselhorn *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 545. And see Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284.

Canada.— Confederation Life Assoc. *v.* O'Donnell, 13 Can. Sup. Ct. 218.

See 28 Cent. Dig. tit. "Insurance," § 225 *et seq.* And see *supra*, II, B, 1.

Presumption.— In view of the custom of the company to contract by written policies there is strong presumption where no policy has been issued that there is no contract and no intention to contract otherwise than by a policy made and delivered. Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

A recital of execution and delivery without a delivery in fact is not effectual if something remains to be done before the delivery is to be complete. Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190; Faunce *v.* State Mut. L. Assur. Co., 101 Mass. 279.

b. What Constitutes Delivery. Delivery to a third person for the insured may be a sufficient delivery.[12] Where nothing remains to be done but to issue a policy in accordance with the terms of the application by way of acceptance of such application, the contract becomes complete when the policy is placed in the mail, postage prepaid, for delivery in due course to the insured.[13] Likewise the placing of the completed policy in the hands of the agent for delivery without condition to the insured completes the contract, although the actual delivery by the agent to the insured is not made before the death of the insured.[14] But if the delivery to the agent of the company is with the understanding that it is to be delivered by the agent to the insured only after the performance of some condition, then until the condition is performed and it becomes the duty of the agent to deliver the policy to the insured the contract is not completed.[15] Delivery by the agent to the insurance broker through whom the application for the insurance was made is a good delivery.[16] The delivery may be actual or constructive,[17] but to show a constructive delivery it must appear that something was said or done, or both,

Delivery in escrow see ESCROWS, 16 Cyc. 564.

12. New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800; Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717 (holding that where one to whom the policy was delivered for the insured, who was sick, put it in his safe and kept it, at the request of the wife of the insured, there was a sufficient delivery); and other cases cited in the notes following.

13. *Arkansas.*— Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

Iowa.— Armstrong *v.* New York Mut. L. Ins. Co., 121 Iowa 362, 96 N. W. 954.

Michigan.— Dailey *v.* Preferred Masonic Mut. Acc. Assoc., 102 Mich. 289, 57 N. W. 184, 26 L. R. A. 171.

United States.— Yonge *v.* Equitable L. Assur. Soc., 30 Fed. 902.

Canada.— Girard *v.* Metropolitan L. Ins. Co., 20 Quebec Super. Ct. 532.

14. *Georgia.*— New York L. Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. 273, 69 Am. St. Rep. 134, 42 L. R. A. 88; Southern L. Ins. Co. *v.* Kempton, 56 Ga. 339.

Illinois.— Massachusetts Ben. Life Assoc. *v.* Sibley, 158 Ill. 411, 42 N. E. 137.

Kentucky.— New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800; Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717.

Minnesota.— Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215.

Mississippi.— Alabama Gold L. Ins. Co. *v.* Herron, 56 Miss. 643.

Nevada.— See Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116, 8 Am. Rep. 705.

New York.— Fried *v.* Royal Ins. Co., 50 N. Y. 243.

South Carolina.— Going *v.* Mut. Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

Vermont.— Porter *v.* Mutual L. Ins. Co., 70 Vt. 504, 41 Atl. 970.

United States.— Union Cent. L. Ins. Co. *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263 [*reversing* on other grounds 101 Fed. 33].

See 28 Cent. Dig. tit. "Insurance," § 226.

Mailing policy to agent not a delivery to the insured see Neff *v.* Metropolitan L. Ins. Co., (Ind. App. 1905) 73 N. E. 1041; Busher *v.* New York L. Ins. Co., 72 N. H. 551, 58 Atl. 41.

15. *Indiana.*— Neff *v.* Metropolitan L. Ins. Co., (App. 1905) 73 N. E. 1041.

Iowa.— Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201.

Massachusetts.— Markey *v.* Mutual Ben. L. Ins. Co., 118 Mass. 178; Markey *v.* Mutual Ben. L. Ins. Co., 103 Mass. 78; Hoyt *v.* Mutual Ben. L. Ins. Co., 98 Mass. 539.

Missouri.— Noyes *v.* Phœnix Mut. L. Ins. Co., 1 Mo. App. 584.

New Jersey.— McClave *v.* Mutual Reserve Fund Life Assoc., 55 N. J. L. 187, 26 Atl. 78.

New York.— Prall *v.* Mutual Protection L. Assur. Soc., 5 Daly 298 [*affirmed* in 63 N. Y. 608].

Canada.— Confederation Life Assoc., *v.* O'Donnell, 13 Can. Sup. Ct. 218.

Countersigning see *supra*, III, B, 1.

Prepayment of premiums see *infra*, III, D.

Delivery in escrow see ESCROWS, 16 Cyc. 564.

16. New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800, where the policy was held binding, although the insured died before the broker delivered it to the wife of the insured.

17. Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154. Where an insurance solicitor procured three applications for insurance, one for himself and two for others, and policies were issued on these applications, and left on the desk of the company's local manager, in envelopes addressed to the respective parties insured, to be taken by the solicitor and delivered, and the solicitor took the policies, delivered two of them, and retained his own, it was held that his policy had been duly delivered to him. Massachusetts Ben. Life Assoc. *v.* Sibley, 158 Ill. 411, 42 N. E. 137.

Actual delivery of the policy into the possession of the insured is not necessary where he examines the policy, assents to its terms, and pays the premium. De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

with the intent thereby to give effect to the policy.[18] Delivery of a policy to the insured merely for examination or inspection is not such a delivery as will create a binding contract.[19] As a rule the possession of the policy by the insured or the beneficiary is *prima facie* evidence of delivery.[20] In the absence of fraud an agreement that a policy not yet actually delivered shall be in force from its date is binding.[21]

c. Conditional Delivery. The delivery may be on condition that something further be done by the insured before the taking effect of the policy and until such condition is performed the delivery is not effectual to complete the contract.[22] The rule applies, for example, where a policy is delivered on the condition that it shall not take effect until the first premium is paid.[23] But if the condition is one on which the policy may be canceled or terminated, and not a condition precedent to its taking effect, then the policy is effectual from delivery.[24]

d. Life and Health at Time of Delivery — (i) *IN GENERAL.* It is a usual condition of a life insurance policy that the delivery shall not be effectual to create a binding contract unless the insured is alive and in good health when the policy is delivered and the first premium paid,[25] and under such conditions the death of the insured before the delivery of the policy will prevent its becoming effectual.[26] And this is true, even in the absence of such a condition, if the policy is not to take effect until delivery, for the death of the insured makes a

18. Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154. And see Markey *v.* Mutual Ben. L. Ins. Co., 126 Mass. 158. Where the premium for a life insurance policy had not been paid and the agent had not waived payment except as to one half, it was held that the fact that he wrote the applicant that "your policy" had arrived was not equivalent to its constructive delivery, but the language used meant simply that the policy written for the applicant had come. Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190.

19. Markey *v.* Mutual Ben. L. Ins. Co., 126 Mass. 158; Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154; Rey *v.* Equitable L. Assur. Soc., 16 N. Y. App. Div. 194, 44 N. Y. Suppl. 745; Confederation Life Assoc. *v.* O'Donnell, 13 Can. Sup. Ct. 218.

20. Massachusetts Ben. Life Assoc. *v.* Sibley, 158 Ill. 411, 42 N. E. 137. And see Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92.

Policy not countersigned.— But in a New York case it was held that mere possession by the assignee of the assured of a life policy which recites on its face that it is to take effect only when countersigned by a certain person, and which is not so countersigned, is no evidence that the policy was ever delivered to the insured. Prall *v.* Mutual Protection L. Assur. Soc., 5 Daly (N. Y.) 298 [*affirmed* in 63 N. Y. 608]. As to the necessity for countersigning see *supra*, III, B, 1.

21. Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873.

22. Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667; Rey *v.* Equitable L. Assur. Soc., 16 N. Y. App. Div. 194, 44 N. Y. Suppl. 745; Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744; Hood *v.* Prudential Ins. Co., 26 Pa. Super. Ct. 527.

Delivery in escrow see ESCROWS, 16 Cyc. 564.

Condition as to life and health of the insured see *infra*, III, B, 2, d.

23. Rey *v.* Equitable L. Assur. Soc., 16 N. Y. App. Div. 194, 44 N. Y. Suppl. 745 (holding that a conditional delivery of a policy was shown by proof that the insured signed a paper reciting the receipt of the policy and stating that it was "held for examination and not in force, as no premium has been paid"); Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744.

Prepayment of premiums see *infra*, III, D.

24. Parker *v.* Bond, 121 Ala. 529, 25 So. 898; Shields *v.* Equitable L. Assur. Soc., 121 Mich. 690, 80 N. W. 793.

25. Such a stipulation is valid. Metropolitan L. Ins. Co. *v.* Willis, (Ind. App. 1906) 76 N. E. 560; and other cases cited in the notes following.

26. *Indiana.*— Reserve Loan L. Ins. Co. *v.* Hockett, 35 Ind. App. 842, 73 N. E. 842.

Iowa.— Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201.

Kentucky.— Mutual L. Ins. Co. *v.* Lucas, 79 S. W. 279, 25 Ky. L. Rep. 2052.

Missouri.— Misselhorn *v.* Mutual Reserve Fund Life Assoc., 30 Mo. App. 589.

New Jersey.— McClave *v.* Mutual Reserve Fund Life Assoc., 55 N. J. L. 187, 26 Atl. 78.

Oregon.— See Stringham *v.* New York Mut. L. Ins. Co., 44 Oreg. 447, 75 Pac. 822.

United States.— Paine *v.* Pacific Mut. L. Ins. Co., 51 Fed. 689, 2 C. C. A. 459; Misselhorn *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 545; Kohen *v.* Mutual Reserve Fund Life Assoc., 28 Fed. 705.

Canada.— Girard *v.* Metropolitan L. Ins. Co., 20 Quebec Super. Ct. 532.

See 28 Cent. Dig. tit. "Insurance," § 228.

Payment of premium while alive and in sound health see *infra*, III, D, 1, text and note 62.

subsequent contract with him impossible,[27] and if the contract were with a person other than the insured as beneficiary, it would be void, if for no other reason, on the ground of mistake.[28] So also, under such a condition, the policy does not become effectual, unless there is a waiver,[29] if the insured is in ill health at the time of its delivery or payment of the premium.[30] In the absence of such a condition in the policy it will take effect on delivery notwithstanding ill health of the insured, and the company will be liable thereon,[31] unless it is entitled to avoid the contract on the ground of fraudulent representations or concealment.[32]

(II) *WAIVER OF CONDITION.* A condition that a policy of life insurance shall

27. *Colorado.*—Newcomb *v.* Provident Fund Soc., 5 Colo. App. 140, 38 Pac. 61.

Connecticut.— Rogers *v.* Charter Oak L. Ins. Co., 41 Conn. 97.

Massachusetts.— Marks *v.* Hope Mut. L. Ins. Co., 117 Mass. 528.

Missouri.— Noyes *v.* Phœnix Mut. L. Ins. Co., 1 Mo. App. 584.

Texas.— Connecticut Mut. L. Ins. Co. *v.* Rudolph, 45 Tex. 454; Dickey *v.* Continental Casualty Co., (Civ. App. 1905) 89 S. W. 436.

United States.— Paine *v.* Pacific Mut. L. Ins. Co., 51 Fed. 689, 2 C. C. A. 459; Misselhorn *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 545. And see Piedmont, etc., L. Ins. Co. *v.* Ewing, 92 U. S. 377, 23 L. ed. 610.

28. See Paine *v.* Pacific Mut. L. Ins. Co., 51 Fed. 689, 2 C. C. A. 459. See also CONTRACTS, 9 Cyc. 399.

29. See *infra*, III, B, 2, d, (II).

30. *Indiana.*— Metropolitan L. Ins. Co. *v.* Willis, (App. 1906) 76 N. E. 560.

Kentucky.— Hill *v.* Penn Mut. L. Ins. Co., 90 S. W. 544, 28 Ky. L. Rep. 790; New York Mut. L. Ins. Co. *v.* Sinclair, 71 S. W. 853, 24 Ky. L. Rep. 1543.

Massachusetts.— Gallant *v.* Metropolitan L. Ins. Co., 167 Mass. 79, 44 N. E. 1073.

Nebraska.— Life Ins. Clearing Co. *v.* Altschuler, 55 Nebr. 341, 75 N. W. 862.

New Hampshire.—Packard *v.* Metropolitan L. Ins. Co., 72 N. H. 1, 54 Atl. 287.

New Jersey.— Langstaff *v.* Metropolitan L. Ins. Co., 69 N. J. L. 54, 54 Atl. 518.

New York.— Volker *v.* Metropolitan L. Ins. Co., 1 Misc. 374, 21 N. Y. Suppl. 456; Maloney *v.* Northwestern Masonic Aid Assoc., 8 N. Y. App. Div. 575, 40 N. Y. Suppl. 918.

North Dakota.— Thompson *v.* Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900.

Ohio.— Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908.

Oregon.— Stringham *v.* New York Mut. L. Ins. Co., 44 Oreg. 447, 75 Pac. 822.

United States.— Austin *v.* Mutual Reserve Fund Life Assoc., 132 Fed. 555; Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216.

England.— British Equitable Ins. Co. *v.* Great Western R. Co., 38 L. J. Ch. 314, 20 L. T. Rep. N. S. 422, 17 Wkly. Rep. 561.

See also *infra*, IX, D, 7, a.

After medical examination.— Such a condition applies only to unsoundness of health arising after the medical examination. Metropolitan L. Ins. Co. *v.* Moore, 117 Ky. 651, 79 S. W. 219, 25 Ky. L. Rep. 1613. The company is not bound, however, by an examination made by its physician prior to the date of the policy. Gallant *v.* Metropolitan L. Ins. Co., 167 Mass. 79, 44 N. E. 1073.

The expression "sound health" in such a provision in a life insurance policy means generally the absence of any vice in the constitution, and of any disease of a serious nature that has a direct tendency to shorten life, in contradistinction to a mere temporary ailment or indisposition. Packard *v.* Metropolitan L. Ins. Co., 72 N. H. 1, 54 Atl. 287. See also Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908.

Bright's disease.— An applicant for life insurance, who from a time prior to his application until his death some years after delivery of the policy suffered from nephritis or Bright's disease, which was the direct, although remote, cause of his death, was not "in good health" when the policy was delivered, within the meaning of a provision therein that it should not take effect until delivered while the applicant was in good health, nor until the first premium was paid while he was also in good health. Austin *v.* Mutual Reserve Fund Life Assoc., 132 Fed. 555.

Pistol shot wound.— Mutual L. Ins. Co. *v.* Sinclair, 71 S. W. 853, 24 Ky. L. Rep. 1543.

Insanity.— The provision as to sound health applies where the applicant is, on inquest, found to be insane and committed to an asylum, remaining insane until the time of his death. Metropolitan L. Ins. Co. *v.* Willis, (Ind. App. 1906) 76 N. E. 560.

The actual and not merely the apparent good health of the insured determines the liability of the company. Thompson *v.* Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900.

Time of delivery by mail.— Where an insured receives a policy by mail, the time of delivery, within a provision of the application requiring a delivery while he is in good health, is the time of mailing. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

31. See Grier *v.* New York Mut. L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

32. Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216; British Equitable Ins. Co. *v.* Great Western R. Co., 38 L. J. Ch. 314, 20 L. T. Rep. N. S. 422, 17 Wkly. Rep. 561. See *infra*, IX, D, 7.

not take effect unless the insured is in good health at the time of its delivery and payment of the first premium may be waived by the company or its agent having authority in the premises;[33] and it has been held that where an insurance policy and the application therefor both provide that when the application is approved and the policy issued it shall be in force from the date of the application, a provision in the application that the contract shall not take effect until the first premium is paid during the good health of the applicant is merely a provisional agreement authorizing the company to withhold delivery of the policy until such payment in good health, and after actual delivery the company is estopped, in the absence of fraud, to assert that the policy is void because of ill health of the insured.[34] Such a condition is not waived by delivery of the policy, if at the time false representations are made as to the health of the insured or if his ill health is concealed, and the company and its agent are ignorant thereof,[35] or, according to some of the cases, if the company and its agent are ignorant of the ill health of the insured, whether there is any fraud or not.[36]

33. *Illinois.*— John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181].

Indiana.— Metropolitan L. Ins. Co. *v.* Willis, (App. 1906) 76 N. E. 560, holding that there was a waiver where the evidence showed that, although the insured was insane at the time the policy was delivered, defendant's agent, who took the application, delivered the policy and collected the premiums, received from the insured's wife nearly one hundred weekly payments after being informed that insured was insane and in an asylum, telling the wife, in response to her inquiry as to whether under the circumstances she should pay the premiums, that defendant company had paid many a claim "that died in the insane hospital," and that she was not responsible for what happened to insured after the policy was written.

Kentucky.— National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881; Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717.

New York.— Ames *v.* Manhattan L. Ins. Co., 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759 [*affirmed* in 167 N. Y. 584, 60 N. E. 1106]. And see Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041.

Texas.— Northwestern L. Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695, holding that a provision in a life policy that it should not become operative until payment of the first premium and actual delivery of the policy to the insured while in good health was waived and the contract of insurance consummated, where an authorized agent of the company collected the premium and delivered the policy with knowledge of the ill-health of the insured.

Authority of agent.— An agent, not a mere clerk, but vested with a discretion to withhold a policy if he finds that the insured is not in good health, and having authority to collect the premium, may bind the company by collecting the premium and delivering the policy with knowledge that the insured is not in good health, notwithstanding a clause in the policy that agents and collectors have no authority to alter or discharge any contract in relation to the insurance, or to waive any forfeiture thereof. Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695. And see John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181]; Metropolitan L. Ins. Co. *v.* Willis, (Ind. App. 1906) 76 N. E. 560; National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881; Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717. *Compare* Paine *v.* Pacific Mut. L. Ins. Co., 51 Fed. 689, 2 C. C. A. 459, holding that a local agent without authority to waive the conditions of the policy cannot make it effectual by accepting a portion of the premium from someone who acts for the assured. See also *infra*, III, D, 3, b.

Ratification by company.— Even when the agent has no authority to waive the condition as to the health of the insured by collection of the premium and delivery of the policy, the company may ratify his act and thereby render the policy binding, and it does so if it retains the premium with knowledge of the ill health of the insured. Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695.

Acts not constituting a waiver.— An agreement between a life insurance company and an applicant for insurance that the latter shall have sixty days in which to pay the premium and take the policy does not waive a condition in the policy that it shall not be in force unless the first premium shall be paid during the applicant's continuance in good health. New York Mut. L. Ins. Co. *v.* Sinclair, 71 S. W. 853, 24 Ky. L. Rep. 1543. Nor is the act of the agent in receiving the policy through the mail a delivery to the applicant constituting a waiver. New York Mut. L. Ins. Co. *v.* Sinclair, *supra*.

34. Grier *v.* New York Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

35. Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216.

36. Thompson *v.* Travelers' Ins. Co., 13

(III) *Contract Consummated Before Delivery.* If a binding contract of insurance is consummated by the unconditional acceptance of an application or otherwise, before the issue or delivery of a policy, the subsequent death or ill health of the insured does not affect the company's liability.[37] If there is no stipulation to the contrary the unconditional acceptance of the application completes the contract and subsequent change of health or death of the insured before complete delivery of the policy is immaterial.[38]

C. Acceptance — 1. Necessity For and Variance. The signing of an application with the execution and tender of a policy does not necessarily show a completed contract of insurance, but as a rule the policy must be accepted by the insured.[39] Acceptance may be presumed from the receipt and retention of the policy by the insured without objection.[40] If the policy tendered to the insured materially differs from that called for by the application,[41] or if the company refuses to make a loan to the applicant promised as part of the consideration for his taking the insurance,[42] or if the terms of the contract are not fully settled by the application,[43] the contract is not complete until the insured has accepted the policy tendered.[44] Where a binding contract of insurance is made by application and acceptance thereof, the applicant will not be bound if the policies issued

N. D. 444, 101 N. W. 900; Stringham *v.* New York Mut. L. Ins. Co., 44 Oreg. 447, 75 Pac. 822. To constitute a waiver of the condition by the act of the agent in delivering the policy with knowledge that the insured is not in sound health such knowledge must be of a dangerous illness. Maloney *v.* Northwestern Masonic Aid Assoc., 8 N. Y. App. Div. 575, 40 N. Y. Suppl. 918.

Delivery by agent after death of insured.— If the agent makes delivery of the policy to someone for the assured in ignorance of the fact that the insured had died the policy does not take effect by such delivery. Newcomb *v.* Provident Fund Soc., 5 Colo. App. 140, 38 Pac. 61.

37. *Georgia.*— New York L. Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. 273, 69 Am. St. Rep. 134, 42 L. R. A. 88; Southern L. Ins. Co. *v.* Kempton, 56 Ga. 339.

Kentucky.— New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 800.

Minnesota.— Schwartz *v.* Germania L. Ins. Co., 21 Minn. 215.

Nevada.— Cooper *v.* Pacific Mut. L. Ins. Co., 7 Nev. 116, 8 Am. Rep. 705.

New York.— Fried *v* Royal Ins. Co., 50 N. Y. 243.

United States.— Phillips *v.* Union Cent. L. Ins. Co., 101 Fed. 33 [*reversed* on other grounds in 102 Fed. 19, 41 C. C. A. 263].

Binding agreement before issue of policy see *supra*, II, B, 3.

38. Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448, 21 Minn. 215.

39. Hoghen *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53; Rogers *v.* Charter Oak L. Ins. Co., 41 Conn. 97; Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48; Whiting *v.* Mutual L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317; Watkins *v.* Bowers, 119 Mass. 383; Ætna L. Ins. Co. *v.* Hocker, (Tex. Civ. App. 1905) 89 S. W. 26.

40. Watkins *v.* Bowers, 119 Mass. 383.

Rebuttal of presumption.— See Watkins *v.* Bowers, 119 Mass. 383; Myers *v.* Keystone Mut. L. Ins. Co., 27 Pa. St. 268, 67 Am. Dec. 462.

Reasonable time for acceptance.— Where one applies for a policy of a particular kind or class, giving his note for the premium, he has a reasonable time in which to examine and return the policy if not of the kind or class ordered. Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48.

41. *California.*— Yore *v.* Bankers', etc., Mut. Life Assoc., 88 Cal. 609, 26 Pac. 514.

Georgia.— Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48.

Kentucky.— Louisville Mut. L. Ins. Co. *v.* Gorman, 40 S. W. 571, 19 Ky. L. Rep. 295.

New York.— Tifft *v.* Phœnix Mut. L. Ins. Co., 6 Lans. 198.

United States.— New York Mut. L. Ins. Co. *v.* Young, 23 Wall. 85, 23 L. ed. 152.

Canada.— Mowat *v.* Provident Sav. L. Assur. Soc., 27 Ont. App. 675; Sun Mut. L. Ins. Co. *v.* Beland, 5 Montreal Leg. N. 42.

See 28 Cent. Dig. tit. "Insurance," § 229.

Mistake see *infra*, IV, A, 2, b.

42. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68, holding that a contract for insurance by which, as additional consideration for the applicant's taking the policy, the company promised to make a loan to her, was an entire contract, to be accepted or rejected *in toto*; and therefore the applicant could refuse to take the policy, and recover the premium paid in advance, where the company refused to make the loan.

43. Hogben *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53; Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48; Myers *v.* Keystone Mut. L. Ins. Co., 27 Pa. St. 268, 67 Am. Dec. 462.

44. **Question for jury.**— Whether there has been an acceptance is generally a question for the jury. Parker *v.* Bond, 121 Ala. 529, 25 So. 898; Equitable L. Assur. Soc. *v.* Mueller, 99 Ill. App. 460; New York L. Ins. Co. *v.* Easton, 69 Ill. App. 479. In an action on a policy of life insurance, which was found in the safe-deposit box of the insured, where the

in pursuance thereof vary materially from the application,[45] unless the departure is waived by the applicant.[46] Examination of the policy and assent to its terms by the insured is a sufficient acceptance without an actual delivery.[47]

2. EFFECT OF ACCEPTANCE. After an unqualified acceptance of a policy there is a binding contract, and both the insured and the company are bound by the terms of the policy,[48] in the absence of fraud[49] or mistake,[50] even though the policy varies from the application.[51] The insured is charged with knowledge of statements contained in the policy in the absence of fraud.[52] The acceptance of a policy as written, however, does not waive any statutory provision as to the effect of the policy.[53] Where a policy is accepted by the insured and the premiums received by the company, the latter cannot escape liability on the ground that the application was not signed by the insured, but by another for him,[54] or even on the ground that the signature is not genuine,[55] or that the application was not made by the insured.[56]

3. CONDITIONAL ACCEPTANCE. The acceptance may be conditional, so that until the performance of the condition there is no binding contract,[57] and if the condi-

evidence showed that the insured objected to the form of the policy, but took it from the agent without any change, it was held that whether there was a delivery and acceptance of the policy was for the jury. Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284.

45. See Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544, holding, however, that where the application was for insurance in the amount of twenty-five thousand dollars, and the company issued two policies for ten thousand dollars each, and one for five thousand dollars, there was no such material variance of the policies from the application as would relieve the applicant from agreements made therein.

46. Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544, holding that by accepting policies issued in pursuance of a contract for insurance, the applicant waived departure from any provisions of the application requiring the policies to be issued as of the date of the application. See also Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689. And see *infra*, III, C, 2; IV, A, 2, b.

47. De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719. See *supra*, III, B, 2, b.

48. *Georgia.*— Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426.

North Carolina.— Roddey *v.* Talbot, 115 N. C. 287, 20 S. E. 375.

Pennsylvania.— Mecke *v.* New York L. Ins. Co., 8 Phila. 6.

Wisconsin.— Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

United States.— New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934; New York Mut. L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154; McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119 [*reversed* on the facts in 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64]; Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190.

Liability for premium.— Where the insured accepts the policy he is liable for the premium, and he cannot afterward withdraw and defend an action by the company therefor on the ground that the policy stipulated that it should not take effect until the premium should be paid in cash, since the company could waive such stipulation by delivery of the policy without such payment. New York L. Ins. Co. *v.* Stone, 42 Mo. App. 383. See also *infra*, III, D, 3; V, D, 1.

49. **Fraud** see *infra*, IV, A, 2, a.

50. **Mistake** see *infra*, IV, A, 2, b.

51. See the cases above cited. And see *infra*, IV, A, 2, b.

52. National Union *v.* Arnhorst, 74 Ill. App. 482; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532. See also *infra*, IV, A, 2, b.

53. White *v.* Connecticut Mut. L. Ins. Co., 29 Fed. Cas. No. 17,545, 4 Dill. 177.

54. Prudential Ins. Co. *v.* Cummins, 19 Ky. L. Rep. 1770, 44 S. W. 431; Pickett *v.* Metropolitan L. Ins. Co., 20 N. Y. App. Div. 114, 46 N. Y. Suppl. 693.

55. Home Mut. Life Assoc. *v.* Riel, (Pa. 1889) 17 Atl. 36.

56. Bohringer *v.* Empire Mut. L. Ins. Co., 2 Thomps. & C. (N. Y.) 610, holding that where the agent of a life insurance company received from J a written application for a policy, and without the knowledge of J copied the application into the blanks of another company, of which he was also agent, and the second company issued a policy to J upon such application, and received from him several premiums upon such policy, it was no defense, in an action upon the policy by the representatives of J after his death, that the application for the policy was not made or signed by J.

57. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68; Harnickell *v.* New York L. Ins. Co., 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150 [*affirming* 40 Hun 558]; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365, holding that where a life insurance policy is tendered, an acceptance on condition that the beneficiaries be changed does not, until approved by the company, close the contract, even though the insured could have accepted it as it stood and then assigned it to the proposed beneficiaries.

tion is not accepted or performed by the company the policy is not binding on the company,[58] and the applicant is not bound on his part.[59]

D. Prepayment of Premiums — 1. Necessity in General. The payment of the first premium is a necessary concurrent act on the part of the insured and unless the company has waived payment the contract does not become binding until such payment is made.[60] It is usual, however, to expressly stipulate in the application or policy, or in both, that the company shall not become bound until the first premium has actually been paid to and accepted by the company or its authorized agent, and under such a stipulation prepayment of the first premium before the happening of the loss is, in the absence of a waiver, essential to the validity of the policy.[61] A stipulation that the policy shall not be binding unless the first premium is paid while the insured is alive and in sound health is valid

Option not to retain policy.— Under a condition that the assured shall have the privilege within sixty days of notifying the company that he will not retain the policy his inaction after a reasonable effort to give such notice does not render the policy binding. Watkins *v.* Bowers, 119 Mass. 383.

58. Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

59. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68, where the applicant received the policy into her possession upon a condition that the company should make her a loan, which had been promised as additional consideration for her taking out the policy, and the company refused to make the loan.

60. *Connecticut.*— Rogers *v.* Charter Oak L. Ins. Co., 41 Conn. 97.

Illinois.— Roberts *v.* Ætna L. Ins. Co., 101 Ill. App. 313.

Indiana.— Union Cent. L. Ins. Co. *v.* Pauley, 8 Ind. App. 85, 35 N. E. 190.

Kentucky.— St. Louis Mut. L. Ins. Co. *v.* Kennedy, 6 Bush 450.

Minnesota.— Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154.

New York.— Rey *v.* Equitable L. Assur. Soc., 16 N. Y. App. Div. 194, 44 N. Y. Suppl. 745.

North Carolina.— Barnes *v.* Piedmont, etc., L. Ins. Co., 74 N. C. 22.

Pennsylvania.— Collins *v.* Insurance Co., 7 Phila. 201.

United States.— Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

See 28 Cent. Dig. tit. "Insurance," § 231 *et seq.*

The agent's failure to account to the company for a premium received by him cannot affect the company's liability. De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

61. *Colorado.*—Newcomb *v.* Provident Fund Soc., 5 Colo. App. 140, 38 Pac. 61.

Illinois.— Kearney *v.* Ætna L. Ins. Co., 109 Ill. App. 609.

Indiana.— Neff *v.* Metropolitan L. Ins. Co., (App. 1905) 73 N. E. 1041; Union Cent. L. Ins. Co. *v.* Pauley, 8 Ind. App. 85, 35 N. E. 190.

Iowa.— Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201.

Kentucky.— Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875; Mutual L. Ins. Co. *v.* Lucas, 79 S. W. 279, 25 Ky. L. Rep. 2052.

Louisiana.— Hardie *v.* St. Louis Mut. L. Ins. Co., 26 La. Ann. 242.

Massachusetts.— Dunham *v.* Morse, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473; Whiting *v.* Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317; Markey *v.* Mutual Ben. L. Ins. Co., 103 Mass. 78; Hoyt *v.* Mutual Ben. L. Ins. Co., 98 Mass. 539.

Nebraska.— Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331.

New Hampshire.— Brown *v.* Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205.

New York.— Russell *v.* Prudential L. Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656 [*reversing* 73 N. Y. App. Div. 617, 76 N. Y. Suppl. 1029]; How *v.* Union Mut. L. Ins. Co., 80 N. Y. 32; Hewitt *v.* American Union L. Ins. Co., 66 N. Y. App. Div. 80, 73 N. Y. Suppl. 105, 85 N. Y. App. Div. 279, 83 N. Y. Suppl. 232; Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910 [*affirmed* in 165 N. Y. 631, 59 N. E. 1129]; Quinby *v.* New York L. Ins. Co., 71 Hun 104, 24 N. Y. Suppl. 593.

North Carolina.— Ormond *v.* Fidelity Life Assoc., 96 N. C. 158, 1 S. E. 796; Whitley *v.* Peidmont, etc., L. Ins. Co., 71 N. C. 480.

Ohio.— State L. Ins. Co. *v.* Harvey, 72 Ohio St. 174, 73 N. E. 1056.

Pennsylvania.— Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744; Brady *v.* Northwestern Masonic Aid Assoc., 190 Pa. St. 595, 42 Atl. 962.

South Dakota.— Bowen *v.* New York Mut. L. Ins. Co., (1905) 104 N. W. 1040.

Virginia.— Mutual L. Ins. Co. *v.* Oliver, 95 Va. 445, 28 S. E. 594.

Wisconsin.— McDonald *v.* Provident Sav. L. Assur. Co., 108 Wis. 213, 84 N. W. 154, 81 Am. St. Rep. 885.

United States.— Giddings *v.* Northwestern Mut. L. Ins. Co., 102 U. S. 108, 26 L. ed. 92; Mutual Reserve Fund Life Assoc. *v.* Simmons, 107 Fed. 418, 46 C. C. A. 393; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284; Davis *v.* Massachusetts Mut. L. Ins. Co., 7 Fed. Cas. No. 3,642, 13 Blatchf. 462.

and binding.[62] A tender is a sufficient compliance with the condition that the first premium must be paid before a policy shall take effect.[63]

2. **By Whom Made.** If a premium is actually paid by the agent of the company for the insured under an agreement between them, and such payment is accepted by the company, this will be sufficient to bind the company.[64] But where a policy of life insurance provides that it shall not take effect until payment of the first premium during the life of the insured, a payment of such premium by a third person without the knowledge of the insured is of no effect,[65]

England.— London, etc., L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116.

Canada.— Sun L. Assur. Co. *v.* Page, 15 Ont. App. 704; Tiernan *v.* People's Life Ins. Co., 23 Ont. App. 342 [*affirming* 26 Ont. 596].

See 28 Cent. Dig. tit. "Insurance," § 231 *et seq.*

Stipulation in application.— Where an application for a life policy provides that the application is to become a part of the policy issued thereon and that the policy shall not take effect until the first premium is paid, and that the policy issued shall be accepted subject to the conditions therein contained, a policy will not take effect until the premium is paid. Bowen *v.* Mut. L. Ins. Co., (S. D. 1905) 104 N. W. 1040.

Referring the agent to a third person, who has arranged with the applicant to pay the premium, is not equivalent to actual payment, where the agent does not call on such person for payment and retains the policy. Hoyt *v.* Mutual Ben. L. Ins. Co., 98 Mass. 539. See also Markey *v.* Mutual Ben. L. Ins. Co., 103 Mass. 78.

Discount of note.— Where on applying for a policy the insured gives the agent his note and the agent indorses and discounts it, reporting the premium as paid and accounting therefor to the company, and the policy, executed the day following, recites payment of the premium in cash, and after the insured's death the note is paid by his estate, there is a cash payment of the premium and not a payment by note. Jacobs *v.* Omaha L. Assoc., 146 Mo. 523, 48 S. W. 462.

Where agent is the insured.—In a late Ohio case H, who was agent of a life insurance company, procured from the company the issuance to himself of a policy of insurance on his own life, which policy contained a provision requiring prepayment of the first premium. Upon the delivery of the policy, H being unable to pay the premium, D, his son-in-law, who was a stranger to the policy, for the purpose of paying said premium for H, furnished or paid to H himself, as agent for the company, the amount due from the latter to the company as and for such premium. This transaction was without the knowledge or consent of the company, and no part of the money received by H was ever accounted for or paid over by him to the company. It was held that H could not act for himself and for his principal in the same transaction, and the payment to and receipt by him of the money from D was not a payment of the premium to the company or its authorized agent; and such payment was not a compliance with the condition of the policy, and did not bind the company or put the policy in force. State L. Ins. Co. *v.* Harvey, 72 Ohio St. 174, 73 N. E. 1056.

62. *Georgia.*— Reese *v.* Fidelity Mut. Life Assoc., 111 Ga. 482, 36 S. E. 637.

Iowa.— Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201.

Massachusetts.— Whiting *v.* Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317.

Nebraska.— Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331.

New Jersey.— Langstaff *v.* Metropolitan L. Ins. Co., 69 N. J. L. 54, 54 Atl. 518; McClave *v.* Mutual Reserve Fund L. Assoc., 55 N. J. L. 187, 26 Atl. 78.

North Carolina.— Ormond *v.* Fidelity Life Assoc., 96 N. C. 158, 1 S. E. 796.

Oregon.— Stringham *v.* Mutual Ins. Co., 44 Oreg. 447, 75 Pac. 822.

South Dakota.— Bowen *v.* New York Mut. L. Ins. Co., (1905) 104 N. W. 1040.

Wisconsin.— Rossiter *v.* Ætna L. Ins. Co., 91 Wis. 121, 64 N. W. 876.

See 28 Cent. Dig. tit. "Insurance," § 234. And see *supra*, III, B, 2, d.

63. Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

64. Mississippi Valley L. Ins. Co. *v.* Neyland, 9 Bush (Ky.) 430; Thompson *v.* American Tontine L., etc., Ins. Co., 46 N. Y. 674; Continental L. Ins. Co. *v.* Ashcraft, 3 Pa. Cas. 210, 3 Atl. 774; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284. Where the first premium is paid by a note and the agent advances the amount thereof to the company, taking the note himself, there is a sufficient compliance with a condition requiring actual payment of the premium before any liability on the part of the company. Krause *v.* Equitable L. Assur. Soc., 99 Mich. 461, 58 N. W. 496. And see Dunn *v.* Ahrams, 97 Ga. 762, 25 S. E. 766.

Agreement by agent to pay see *infra*, III, D, 3, a, (II), text and note 85.

65. Whiting *v.* Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317. See also Piedmont, etc., Ins. Co. *v.* Ewing, 92 U. S. 377, 23 L. ed. 610.

Payment by supposed beneficiary.— It has been held, however, that where a policy is payable to the personal representative of the insured, the fact that the premium is paid by one who has no insurable interest, under the belief that the insurance is for his benefit, does not render the policy void. Prudential Ins. Co. *v.* Cummins, 44 S. W. 431, 19 Ky. L. Rep. 1770.

even though made with the money of the insured,[66] and it cannot be given effect by being ratified by his administrator after his death.[67]

3. Waiver — a. Of Prepayment — (1) *In General.* Prepayment of the first premium, as a condition precedent to the taking effect of a policy of life insurance, whether the condition is express or implied, may be waived by the company or its authorized agent;[68] and a waiver may be shown by parol notwithstanding prepayment is required by express stipulation in the policy or application.[69] Such condition is waived, assuming that the agent has authority, express or implied, to

66. Whiting *v.* Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317.

67. Whiting *v.* Massachusetts Mut. L. Ins. Co., 129 Mass. 240, 37 Am. Rep. 317.

68. *Arkansas.*— Mutual L. Ins. Co. *v.* Abbey, (1905) 88 S. W. 950.

California.— Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Connecticut.— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Illinois.— Mutual L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795; Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155; Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156; Michigan Mut. L. Ins. Co., *v.* Hall, 60 Ill. App. 159.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132; Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96; Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873.

Kansas.— New York L. Ins. Co. *v.* McGowan, 18 Kan. 300.

Kentucky.— Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 53 S. W. 260, 21 Ky. L. Rep. 916; Mississippi Valley L. Ins. Co. *v.* Neyland, 9 Bush 430; National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881.

Louisiana.— Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898.

Massachusetts.— Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92.

Minnesota.— Union Cent. L. Ins. Co. *v.* Taggart, 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474.

Missouri.— New York L. Ins. Co. *v.* Stone, 42 Mo. App. 383 (holding that the insured, after accepting a policy, could not defend an action for the premium on the ground that the policy stipulated that it should not take effect until payment of the premium in cash); Kelly *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 554.

Nebraska.— Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331; Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090; Pythian Life Assoc. *v.* Preston, 47 Nebr. 374, 66 N. W. 445.

New York.— Stewart *v.* Union Mut. L. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147 [*reversing* 76 Hun 267, 27 N. Y. Suppl. 724]; Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210; Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; Cross *v.* Security Trust, etc., Ins. Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120]; Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910 [*affirmed* in 165 N. Y. 631, 59 N. E. 1129]. *Compare* How *v.* Union Mut. L. Ins. Co., 80 N. Y. 32.

North Carolina.— Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28.

Ohio.— Little *v.* Eureka F. & M. Ins. Co., 38 Ohio St. 110.

Pennsylvania.— Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744; Imbrie *v.* Manhattan L. Ins. Co., 178 Pa. St. 6, 35 Atl. 556.

South Carolina.—Stepp *v.* National L., etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Tennessee.—Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

Texas.— Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398; Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Utah.— Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

Vermont.— Porter *v.* Mutual L. Ins. Co., 70 Vt. 504, 41 Atl. 970.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204; Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. 285, 20 L. ed. 398; Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284; O'Brien *v.* Union Mut. L. Ins. Co., 22 Fed. 586; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

See 28 Cent. Dig. tit. "Insurance," § 231 *et seq.*

Ill health after extension of credit.—Where the agent extends credit for the first premium and it is paid within the time for which the extension was given, it is immaterial that the insured has in the meantime become ill. De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

69. Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873, holding also that an oral agreement between the insurer and the insured that the insurer shall hold the policy until payment of the first quarterly premium, during which time it shall be in full force, does not contradict the terms of the policy itself as to payment of the premium in advance.

bind the company,[70] by an express agreement that the premium or a part thereof may be paid at a future date,[71] or by taking a due-bill therefor from the insured,[72] or his promissory note,[73] or by the unconditional delivery of the policy to the insured without prepayment of the premium,[74] or by refusing a sufficient tender of the amount of the premium.[75] There is no waiver of payment of the premium, however, by delivery of the policy where the delivery is with the understanding or on condition that the policy shall not take effect until such payment;[76] and

70. **Authority of agent** see *infra*, III, D, 3, a, (II).

71. Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156; Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96; Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92; Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090; Pythian Life Assoc. *v.* Preston, 47 Nebr. 374, 66 N. W. 445; Cross *v.* Security Trust, etc., Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120].

Presumption.— Delivery of the policy on prepayment of less than the stipulated premium gives rise to a presumption of credit for the balance. Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156.

Policy on life of agent to be paid for out of commissions.— An action may be maintained and a recovery had on a policy of life insurance on which the first premium has not been paid, where it appears that the insured had been appointed local agent of the company, and the policy was delivered to him under the agreement that the commissions which he should earn should be applied by the company to the payment of the premium, notwithstanding the fact that he never earned any commissions. Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744.

72. Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

73. *Arkansas.*— Mutual L. Ins. Co. *v.* Abbey, (1905) 88 S. W. 950.

California.— Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386.

Illinois.— Mutual L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; Michigan Mut. L. Ins. Co. *v.* Hall, 60 Ill. App. 159.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132.

Kansas.— New York L. Ins. Co. *v.* McGowan, 18 Kan. 300.

Kentucky.— Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 53 S. W. 260, 21 Ky. L. Rep. 916; National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881.

Louisiana.— Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898.

Minnesota.— Union Cent. L. Ins. Co. *v.* Taggart, 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474.

Missouri.— Kelly *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 554.

New York.— Stewart *v.* Union Mut. L. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147 [*reversing* 27 N. Y. Suppl. 724].

Ohio.— Little *v.* Eureka F. & M. Ins. Co., 38 Ohio St. 110.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Texas.— Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Utah.— Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

Vermont.— Porter *v.* Mutual L. Ins. Co., 70 Vt. 504, 41 Atl. 570.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126; Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. 285; Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172.

Canada.— See Moffatt *v.* Reliance Mut. L. Assur. Soc., 45 U. C. Q. B. 561.

See 28 Cent. Dig. tit. "Insurance," § 243.

Forfeiture on non-payment of note see *infra*, X, C, 2.

74. *California.*— Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Illinois.— Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

North Carolina.— Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

Pennsylvania.—Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744.

Tennessee.—Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

United States.— Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284; O'Brien *v.* Union Mut. L. Ins. Co., 22 Fed. 586.

But *compare* Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910 [*affirmed* in 165 N. Y. 631, 59 N. E. 1129].

75. Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

76. Rey *v.* Equitable L. Assur. Soc., 16 N. Y. App. Div. 194, 44 N. Y. Suppl. 745; Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744. See also Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910 [*affirmed* in 165 N. Y. 631, 59 N. E. 1129].

Acceptance of the note of the insured for the first premium and delivery of the policy to him on the condition that the policy is not to go into effect until the note is paid is not a waiver of payment of the premium in

the same is true of other action not inconsistent with an intention on the part of the company to insist upon such condition.[77]

(II) *Authority of Agent.* As a rule a general agent has authority to waive the implied condition or an express stipulation in the application or policy that the policy shall not take effect until the first premium has been paid,[78] but the agent's authority in this respect may be limited by an express provision in the

order to put the policy into effect. McDonald *v.* Provident Sav. L. Assur. Soc., 108 Wis. 213, 84 N. W. 154.

Delivery for inspection does not constitute a waiver of the requirement of prepayment. Quinby *v.* New York L. Ins. Co., 71 Hun 104, 24 N. Y. Suppl. 593.

Conditional delivery of policy see *supra*, III, B, 2, c.

Question for jury.— Where a life policy requiring the first premium to be paid before the company becomes liable thereon is delivered before the payment of the first premium, an issue, in an action thereon, whether the delivery was absolute, or was with the understanding that the policy should not take effect till the premium was paid, is for the jury. Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744.

77. Acts not constituting waiver.— A life-insurance agent who has several times notified an applicant of the arrival of the policy does not waive payment of the premium by failure to specially urge the applicant to make the payment. Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190. Where an application for a life policy stipulated that the policy should not take effect until the first premium was paid and the policy issued, and the applicant made a partial payment of the first premium and received a receipt from the agent, which recited that, if a policy should be issued, the receipt would be accepted in payment of the first premium if the balance was paid on the delivery of the policy, and that no other person than the secretary or president of the insurer could make contracts or waive forfeitures, and the policy issued provided that the annual premium should be paid in advance on the delivery of the policy, it was held that the insurer did not hind itself to pay the policy unless the first premium was paid in full at the time of the delivery of the policy. Bowen *v.* New York Mut. L. Ins. Co., (S. D. 1905) 104 N. W. 1040. Prepayment of the premium is not waived by the act of the company in mailing the policy to its agent (Neff *v.* Metropolitan L. Ins. Co., (Ind. App. 1905) 73 N. E. 1041); or by its act in reporting the policy to the insurance department as among the policies in force where it appears that it was the custom of the company to report such policies as were outstanding subject to correction by later reports of lapsed policies (Poste *v.* American Union L. Ins. Co., 32 N. Y. App. Div. 189, 52 N. Y. Suppl. 910 [*affirmed* in 165 N. Y. 631, 59 N. E. 1129]); or by an agreement between the applicant and the agent whereby the agent is to hold the policy until a specified date, and is then to accept one half of the premium in cash and take the applicant's note for the balance (New York Mut. L. Ins. Co. *v.* Lucas, 79 S. W. 279, 25 Ky. L. Rep. 2052).

Where the insured is agent the fact that the policy comes into his possession is not a waiver of the requirement as to prepayment of premium. State L. Ins. Co. *v.* Harvey, 72 Ohio St. 174, 73 N. E. 1056.

Acceptance of a worthless check for the first premium on a policy does not amount to payment or waive prepayment as required by the policy. Brady *v.* Northwestern Masonic Aid Assoc., 190 Pa. St. 595, 42 Atl. 962.

78. *Arkansas.*— Mutual L. Ins. Co. *v.* Abbey, (1905) 88 S. W. 950.

California.— Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386.

Connecticut.— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565.

Illinois.— John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795; Michigan Mut. L. Ins. Co. *v.* Hall, 60 Ill. App. 159.

Kentucky.— Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 53 S. W. 260, 21 Ky. L. Rep. 918; Mississippi Valley L. Ins. Co. *v.* Neyland, 9 Bush 430; National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881; Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717.

Nebraska.— Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090; Pythian Life Assoc. *v.* Preston, 47 Nebr. 374, 66 N. W. 445.

New York.— Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210; Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; Cross *v.* Security Trust, etc., Ins. Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120].

Pennsylvania.—Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744.

Tennessee.—Southern L. Ins. Co. *v.* Booker, 9 Heisk. 606, 24 Am. Rep. 344.

Texas.— Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Utah.— Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

United States.— Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. 285, 20 L. ed. 398; New York Mut. L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284; O'Brien *v.* Union Mut. L. Ins. Co., 22 Fed. 586; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

Canada.— See Moffatt *v.* Reliance Mut. L. Assur. Soc., 45 U. C. Q. B. 561.

But *compare* Ormond *v.* Fidelity Life Assoc., 96 N. C. 158, 1 S. E. 796.

Who is a general agent.— An agent who,

application and policy.[79] In general an agent having authority to receive the first premium and deliver policies has implied authority to waive prepayment.[80] A special agent has no implied authority to waive prepayment of the premium.[81] The company may, however, either expressly or by acquiescence or other conduct, give a special agent, or a general agent whose powers are restricted, authority to waive prepayment of the premium,[82] or ratify his unauthorized

acting under general directions, has charge of a company's affairs, and is authorized to deliver policies and receive premiums, without instructions limiting his power, is a general agent, even though his authority be restricted to a single state. Southern L. Ins. Co. *v.* Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344.

Where a married woman is appointed general agent of a life insurance company, but her husband acts for her, with the knowledge of the officers of the company, he has the authority of a general agent. Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210.

Conversion of note by agent.— The fact that the agent converts to his own use the note of the insured taken by him in payment of the first premium does not render the company any the less liable on the policy. Michigan Mut. L. Ins. Co. *v.* Hall, 60 Ill. App. 159.

79. By the weight of authority, where an application and policy expressly provide that the contract shall not take effect until payment of the first premium in cash, and that the agent shall have no authority to alter the contract or extend credits, the company, in the absence of elements of estoppel or ratification, is not bound by the act of its agent in delivering the policy without payment of the premium in cash, as where he extends credit or takes a note therefor.

Indiana.— Neff *v.* Metropolitan L. Ins. Co., (App. 1905) 73 N. E. 1041.

Massachusetts.— Dunham *v.* Morse, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473.

New Hampshire.— Brown *v.* Massachusetts Mut. L. Ins. Co., 59 N. H. 298, 47 Am. Rep. 205.

New York.— Russell *v.* Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656 [*reversing* 76 N. Y. Suppl. 1029, and *distinguishing* Stewart *v.* Union Mut. L. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147]; Hewitt *v.* American Union L. Ins. Co., 85 N. Y. App. Div. 279, 83 N. Y. Suppl. 232.

North Carolina.— Ormond *v.* Fidelity Life Assoc., 96 N. C. 158, 1 S. E. 796.

United States.— Mutual Reserve Fund L. Assoc. *v.* Simmons, 107 Fed. 418, 46 C. C. A. 393; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284; Davis *v.* Massachusetts Mut. L. Ins. Co., 7 Fed. Cas. No. 3,642, 13 Blatchf. 462; Tiernan *v.* People's L. Ins. Co., 23 Ont. App. 342 [*affirming* 26 Ont. 596].

Contra.— Some of the courts, however, have held that acceptance of a note for the first premium or other waiver of prepayment by a general agent is binding on the company, although the policy provides that agents are not authorized to modify any contract on behalf of the company and cannot extend the time of payment of any premium, or any note given therefor, or give credit, or waive forfeiture, etc. John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795; National L. Ins. Co. *v.* Tweddell, 58 S. W. 699, 22 Ky. L. Rep. 881; Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 53 S. W. 260, 21 Ky. L. Rep. 916; Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594. See also O'Brien *v.* Union Mut. L. Ins. Co., 22 Fed. 586.

Limitations in receipt.— The insured has the right to rely upon the delivery of the policy and the execution of his note as a payment of the premium, without an examination of the receipt, which is signed by the secretary of the company, and so is not bound by a provision, printed on the receipt in red ink, that it is not to be valid unless countersigned by the agent on receiving the premium, insured having the right to assume that the general agent is acting within the scope of his authority. Washington L. Ins. Co. *v.* Menefee, 107 Ky. 244, 53 S. W. 260, 21 Ky. L. Rep. 916.

80. Brooklyn L. Ins. Co. *v.* Miller, 12 Wall. (U. S.) 285, 20 L. ed. 398 [*affirming* 17 Fed. Cas. No. 9,564]; New York Mut. L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719; and other cases above cited.

A by-law of a mutual insurance company making the agent effecting insurance the insured's agent in receiving premiums does not make him his agent in receiving the first premium, where the contract between the agent and the company makes him its agent in collecting such premium by authorizing him to retain it as his fee. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

81. Charter Oak L. Ins. Co. *v.* Smith, 6 Ohio Dec. (Reprint) 625, 7 Am. L. Rec. 147.

A subagent having only authority to solicit applications, collect premiums, and deliver policies has not the authority to give credit or receive anything but cash in payment. Continental L. Ins. Co. *v.* Willets, 24 Mich. 268. See also Mutual L. Ins. Co. *v.* Abbey, (Ark. 1905) 88 S. W. 950.

82. *Arkansas.*—Mutual L. Ins. Co. *v.* Abbey, (1905) 88 S. W. 950.

Louisiana.— Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898.

New York.— Cross *v.* Security Trust, etc., Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120].

waiver.[83] Ordinarily the premium is payable in money, and the agent cannot bind the company by accepting property or services in payment.[84] An unauthorized agreement by the agent with the insured that the agent will pay the premium for the insured will not bind the company.[85]

b. Of Condition as to Health of Insured. A provision in a policy that it shall not be valid unless the premium is paid when the insured is in good health may be waived by an agent having authority to take applications, collect premiums, and deliver policies.[86]

4. Evidence of Payment. If the first premium on a life insurance policy is in fact not paid, an acknowledgment of payment in the policy, so far as it is merely a receipt for money, is only *prima facie* evidence, and the amount may be recovered;[87] but so far as the acknowledgment is contractual, it cannot be contradicted, in the absence of fraud, at least after unconditional delivery of the policy, so as to avoid the contract on the ground of non-payment.[88] The posses-

Texas.— Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Vermont.— Porter *v.* New York Mut. L. Ins. Co., 70 Vt. 504, 41 Atl. 970.

United States.— Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284.

Acquiescence by general agent in custom of subagent.—When the general agent of an insurance company has knowledge of frequent violations by a subagent of a rule of the company prohibiting the acceptance of notes for premiums, and makes no serious objection, the company must be deemed to have waived the application of the rule. New York Mutual L. Ins. Co. *v.* Logan, 87 Fed. 637, 31 C. C. A. 172.

83. Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132 (failure to repudiate agent's taking of note after knowledge thereof): Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898 (receipt and retention of note taken for premium); Stewart *v.* Union Mut. L. Ins. Co., 155 N. Y. 257, 49 N. E. 876, 42 L. R. A. 147 [*reversing* 76 Hun 267, 27 N. Y. Suppl. 724]; Cross *v.* Security Trust, etc., Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120]; Imbrie *v.* Manhattan L. Ins. Co., 178 Pa. St. 6, 35 Atl. 556.

Even after the death of the insured.— Cross *v.* Security Trust, etc., Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189 [*affirmed* in 171 N. Y. 671, 64 N. E. 1120].

Ratification by the company of the act of the agent in accepting a note in payment of the first premium, which by the terms of the policy should have been paid in cash, will bind the company notwithstanding a provision that the terms of the policy can only be waived by written agreement signed by the president or secretary. Imbrie *v.* Manhattan L. Ins. Co., 178 Pa. St. 6, 35 Atl. 556.

84. Mutual Ben. L. Ins. Co. *v.* Nicoll, 9 Ky. L. Rep. 719; Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720; Hoffman *v.* John Hancock Mut. L. Ins. Co., 92 U. S. 161, 23 L. ed. 539. The company, however, may bind itself to accept payment of the premium in property or services (Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96, in advertising); and the agent may accept that portion of the premium which is equivalent to his commission in property or services instead of cash (John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795).

85. Hawley *v.* Michigan Mut. L. Ins. Co., 92 Iowa 593, 61 N. W. 201; Mutual Ben. L. Ins. Co. *v.* Nicoll, 9 Ky. L. Rep. 719; Hewitt *v.* American Union L. Ins. Co., 66 N. Y. App. Div. 80, 73 N. Y. Suppl. 105, 85 N. Y. App. Div. 279, 83 N. Y. Suppl. 232. *Compare*, however, Mississippi Valley L. Ins. Co. *v.* Neyland, 9 Bush (Ky.) 430.

Actual payment by agent see *supra*, III, D, 2.

86. Connecticut Indemnity Assoc. *v.* Grogan, 52 S. W. 959, 21 Ky. L. Rep. 717; Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331; Ames *v.* Manhattan L. Ins. Co., 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759. See *supra*, III, B, 2, d, (II).

87. Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

88. Teutonia L. Ins. Co. *v.* Anderson, 77 Ill. 384; Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22; Massachusetts Ben. L. Assoc. *v.* Sibley, 57 Ill. App. 246; Dobyns *v.* Bay State Beneficiary Assoc., 144 Mo. 95, 45 S. W. 1107; Grier *v.* Mutual L. Ins. Co., 132 N. C. 542, 44 S. E. 28; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592; Southern L. Ins. Co. *v.* Booker, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344; and other cases cited *supra*, III, D, 3, a.

Delivery necessary.— But recital in the policy of prepayment of premium is no evidence of that fact where the policy has not been delivered. Mutual L. Ins. Co. *v.* Oliver, 95 Va. 445, 28 S. E. 594.

A receipt for the premium will not estop the company as against an assignee of the policy from showing that the premium was not in fact paid before delivery, and that the delivery was by a special agent without authority; such a receipt is a personal voucher to the insured and not a representation to his assignee. Charter Oak L. Ins. Co. *v.* Smith, 6 Ohio Dec. (Reprint) 625, 7 Am. L. Rec. 147.

sion of a policy providing that it shall not be delivered until prepayment of the premium is *prima facie* evidence of such payment.[89]

E. Right to Possession of Policy. The person who contracts for the policy and pays the premiums is entitled to its possession.[90] But if a policy is taken for the benefit of another who is to pay the subsequent premiums the policy belongs to such beneficiary.[91] As between the administrator of the insured and the guardian of the beneficiary the latter has the right to possession.[92] As between the beneficiary and a third person having no interest in the policy the beneficiary has the right to possession.[93]

IV. VALIDITY, CONSTRUCTION, AND OPERATION OF THE CONTRACT.

A. Validity[94] **— 1. Illegality — a. In General.** A contract of life insurance which is made in violation of an express statutory prohibition, or the terms of which are contrary to public policy, and the nature of which is known to both parties, is illegal and void and no recovery can be had thereon.[95]

b. Insurance Against Death by Suicide, or in Consequence of Criminal Act. A stipulation in a life-insurance policy that it shall be payable, although the insured may be executed for a crime, is contrary to public policy and void;[96] and the same is true of a stipulation insuring against death by suicide while sane,[97] or

89. Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155; Page *v.* Virginia L. Ins. Co., 131 N. C. 115, 42 S. E. 543; Quinby *v.* New York L. Ins. Co., 71 Hun (N. Y.) 104, 24 N. Y. Suppl. 593.

Receipt not countersigned.—The possession of the policy and a receipt for a premium not countersigned by the agent was held not evidence of payment where the receipt itself recited that if payment was made to an agent such agent must countersign the receipt. Ormond *v.* Fidelity Life Assoc., 96 N. C. 158, 1 S. E. 796.

90. Bowers *v.* Barker, 58 N. H. 565.

As between the assignee of the insured and the beneficiary, the latter has no right to possession. If his rights are endangered by the assignee's possession he must seek protection in equity. Bowers *v.* Parker, 58 N. H. 565.

91. Sheets *v.* Sheets, 4 Colo. App. 450, 36 Pac. 310.

92. Massachusetts Mut. L. Ins. Co. *v.* Hayes, 16 Ill. App. 233.

93. Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666.

94. See also Fire Insurance, 19 Cyc. 625.

Illegality of contracts generally see Contracts, 9 Cyc. 465 *et seq.*

Effect of war on existing contracts see *infra*, X, C, 8, c; and, generally, War.

Want of insurable interest see *supra*, I, B — G.

Ultra vires contracts: Generally see Insurance, 22 Cyc. 1400. Recovery of premiums paid see *infra*, V, E, 2, text and note 74.

Contracts by infants see Infants, 22 Cyc. 589 text and notes 30, 31, 593 note 52.

95. *Illinois.*—Wheeler *v.* Mutual Reserve Fund L. Assoc., 102 Ill. App. 48.

Kansas.— Brenner *v.* Kansas Mut. L. Ins. Co., 6 Kan. App. 152, 51 Pac. 303.

Massachusetts.— Hatch *v.* Mutual L. Ins. Co., 120 Mass. 550, 21 Am. Rep. 541.

Pennsylvania.— Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327; Collins *v.* Metropolitan L. Ins. Co., 13 Pa. Dist. 384.

United States.— Burt *v.* Union Cent. L. Ins. Co., 187 U. S. 362, 23 S. Ct. 139, 47 L. ed. 216 [*affirming* 105 Fed. 419, 44 C. C. A. 548]; Ritter *v.* Mutual L. Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693 [*affirming* 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583].

England.— Perpetual L. Assur. Amicable Soc. *v.* Bolland, 4 Bligh N. S. 194, 5 Eng. Reprint 70, 2 Dow. & Cl. 1, 6 Eng. Reprint 630.

Statute not applicable to foreign corporation.—It has been held that the Illinois statute (Laws (1883), p. 107, § 8), relating to accumulation of a surplus, general, or guaranty fund by life insurance companies and prohibiting payment of such funds to members as endowments, or as tontine profits, or as payments to members otherwise than for mortuary benefits, etc., has no application to foreign insurance companies doing business in the state by comity and under a general statute which does not require them to comply with the provisions of such statute, and a policy issued by such a company is not illegal if authorized by the laws of the state of the company's incorporation. Wheeler *v.* Mutual Reserve Fund Life Assoc., 102 Ill. App. 48.

Recovery of premiums paid see *infra*, V, E, 2.

96. Collins *v.* Metropolitan L. Ins. Co., 13 Pa. Dist. 384; Burt *v.* Union Cent. L. Ins. Co., 187 U. S. 362, 23 S. Ct. 139, 47 L. ed. 216 [*affirming* 105 Fed. 419, 44 C. C. A. 548]; Perpetual L. Assur. Amicable Soc. *v.* Bolland, 4 Bligh N. S. 194, 5 Eng. Reprint 70, 2 Dow & Cl. 1, 6 Eng. Reprint 630.

97. Ritter *v.* Mutual L. Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693 [*affirming* 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583].

against death in consequence of a criminal act on the part of the insured.[98] Whether a policy covers such risks in the absence of express stipulation and the effect of a stipulation against such risks are elsewhere considered.[99]

c. Insurance Without Knowledge of Insured. It is against public policy to allow one person to have insurance on the life of another without the knowledge of the latter.[1] Indeed it is sometimes made a felony to take out insurance on the life of another without his knowledge.[2]

d. Gaming Contracts. The fact that the amount to be paid by way of participation in accumulations is left contingent on the insured surviving until the end of the accumulation period does not render the contract invalid as a gaming contract.[3] As has been seen, a policy on the life of a person in whose life the person taking the policy has no insurable interest is void as a gaming contract.[4]

e. Risks Prohibited on Account of Age. It is sometimes made unlawful by statute to insure the life of a person who is under or beyond a specified age, and a policy issued in violation of such a prohibition is void;[5] but such a statute has been held to relate to original insurance only and not to apply to the transfer of risks from one company to another or to reinsurance of such risks.[6]

f. Discriminations. In some states there are statutes prohibiting any discrimination by life insurance companies between insurants of the same class as to rates, dividends, or benefits, or the allowance of any valuable consideration not specified in the policy, as an inducement to insurance, and contracts in violation of such a prohibition are illegal and void.[7] The statutes also subject the company

98. Hatch *v.* Mutual L. Ins. Co., 120 Mass. 550, 21 Am. Rep. 541; Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327. *Contra*, Sun L. Ins. Co. *v.* Taylor, 108 Ky. 408, 56 S. W. 668, 94 Am. St. Rep. 383, 22 Ky. L. Rep. 37.

99. See *infra*, XII, A.

1. Metropolitan L. Ins. Co. *v.* Monohan, 102 Ky. 13, 42 S. W. 924, 19 Ky. L. Rep. 992 (insurance procured by wife on life of husband); Metropolitan L. Ins. Co. *v.* Blesch, 58 S. W. 436, 22 Ky. L. Rep. 530 (insurance procured by daughter on life of father); Metropolitan L. Ins. Co. *v.* Reinke, 15 Ky. L. Rep. 125; Fulton *v.* Metropolitan L. Ins. Co., 1 Misc. (N. Y.) 478, 21 N. Y. Suppl. 470 (insurance for daughter on life of father).

But where the agent had knowledge of the fact that the insurance was on the life of a person who was ignorant of the taking out of the policy, it was held that the company could not object that the policy was procured by fraud or without the knowledge of the insured. Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180, where a son took out a policy on the life of his father.

Recovery of premiums paid see *infra*, V, E, 2.

2. See Work *v.* American Mut. L. Ins. Co., 31 Ind. App. 153, 67 N. E. 458.

Recovery of premiums paid see *infra* V, E, 2.

3. Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547; Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309.

4. See *supra*, I, B, 2.

5. Brenner *v.* Kansas Mut. Life Assoc., 6 Kan. App. 152, 51 Pac. 303 (over sixty years); Rand *v.* Massachusetts Ben. Life Assoc., 20 N. Y. App. Div. 392, 46 N. Y. Suppl. 725 [*affirming* 18 Misc. 336, 42 N. Y. Suppl. 26] (over sixty years under Massachusetts statute). See also MUTUAL BENEFIT INSURANCE.

6. Rand *v.* Massachusetts Ben. Life Assoc., 20 N. Y. App. Div. 392, 46 N. Y. Suppl. 725 [*affirming* 18 Misc. 336, 42 N. Y. Suppl. 26], construing a Massachusetts statute.

7. State L. Ins. Co. *v.* Strong, 127 Mich. 346, 86 N. W. 825; Tillinghast *v.* Craig, 17 Ohio Cir. Ct. 531, 9 Ohio Cir. Dec. 459; Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374; Kelley *v.* Mutual L. Ins. Co., 109 Fed. 56, Iowa statute. See also State *v.* Schwarzschild, 83 Me. 261, 22 Atl. 164 (where it is said that the true construction of such a statute "is to require life insurance companies to give equal terms to those persons whom it insures that are of the same class, and to stipulate the terms of insurance in their policies, and to accord to none any other"); People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753]; Com. *v.* Morningstar, 2 Pa. Dist. 41, 12 Pa. Co. Ct. 34.

In the Iowa statute entitled, "An act to prevent discrimination in life insurance," and which contains a number of specific provisions prohibiting discriminations, and the further provision, "nor shall any company make any contract, other than is plainly expressed in the policy issued thereon," such general provision is limited by the title of the act and the specific provisions, and applies only to discriminations. Kelley *v.* New York Mut. L. Ins. Co., 109 Fed. 56.

Statute applicable to benevolent associations see Citizens' L. Ins. Co. *v.* Insurance Commissioner, 128 Mich. 85, 87 N. W. 126; and, generally, MUTUAL BENEFIT INSURANCE.

Action on premium note see *infra*, V, D, 2, b.

or its agent, or both, to a penalty for violation thereof,[8] or to indictment and fine.[9] Such a statute applies where an insurant is by a special contract to be a member of an advisory board, and to receive advantages over other members not belonging to such board.[10] But a provision for issuing a first year term policy with the privilege of taking a whole life policy at the end of the first year is not unlawful on the ground of discrimination, as such a contract is not in its entirety the equivalent of a simple term policy, and the insured therefore are not of the same class.[11] Nor is such a statute violated by discrimination as to distribution of surplus between those who die within an accumulation period and those who survive such period,[12] or by a contract by which the company, in consideration of the insurance, agrees to make a loan to the insured.[13]

g. Partial Invalidity. The fact that a separable provision in a policy of life insurance, such as a tontine clause, is invalid, does not render the whole policy invalid.[14] But the company cannot insist that one of two or more options offered to the insured is invalid because *ultra vires* and insist on holding the insured to the contract excluding such option.[15]

2. Fraud and Mistake[16] — a. Fraud — (i) *On the Part of the Company.* Fraud on the part of a life insurance company or its agent, by which a person is induced to take out a policy, will render the contract voidable at his option,[17]

Recovery of premiums paid see *infra*, V, E, 2.

8. In Illinois the statute prohibiting discrimination by a life insurance company or allowance of rebates of premium (Laws (1891), 107) makes the company severally as well as jointly liable with its agent. The company and its agent may be sued separately, and judgment obtained against each, but there can be but one recovery; nor can there be more than one recovery against the company for the same rebate, whether made by the act of one or a dozen of its agents. Metropolitan L. Ins. Co. *v.* People, 106 Ill. App. 516 [*affirmed* in 209 Ill. 42, 70 N. E. 643]; Franklin L. Ins. Co. *v.* People, 103 Ill. App. 554; New York L. Ins. Co. *v.* People, 95 Ill. App. 136 [*affirmed* in 195 Ill. 430, 63 N. E. 264].

Unauthorized act of agent.— A life insurance company is liable for the statutory penalty imposed by Ill. Laws (1891), 107, for permitting discrimination between insurants, although the rebate of premium is allowed by its agent without its knowledge and in violation of its instructions. Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643 [*affirming* 106 Ill. App. 516]; Franklin L. Ins. Co. *v.* People, 103 Ill. App. 554; New York L. Ins. Co. *v.* People, 95 Ill. App. 136 [*affirmed* in 195 Ill. 430, 63 N. E. 264].

Amendment in action for penalty see Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643 [*affirming* 106 Ill. App. 516]; New York L. Ins. Co. *v.* People, 95 Ill. App. 136 [*affirmed* in 195 Ill. 430, 63 N. E. 264].

Judgment against company and continuance against agent.— In Illinois it is proper to render judgment against the company in an action for the penalty, and continue the case against its agent, who, although a party, has not been served. Metropolitan L. Ins. Co. *v.* People, 209, Ill. 42, 70 N. E. 643 [*affirming* 106 Ill. App. 516].

Compelling agent to testify see New York L. Ins. Co. *v.* People, 95 Ill. App. 136 [*affirmed* in 195 Ill. 430, 63 N. E. 264].

9. See State *v.* Schwarzschild, 83 Me. 261, 22 Atl. 164 (holding that no violation of the Maine statute was charged in an indictment which charged that defendant allowed a rebate premium payable on a policy that he issued, but failed to aver that such rebate was not stipulated in the policy); People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753] (statute is constitutional and applies to foreign as well as domestic corporations); Com. *v.* Morningstar, 2 Pa. Dist. 41, 12 Pa. Co. Ct. 34 (variance between indictment and proof as to person to whom rebate was offered).

Policy must have been issued and indictment must so allege. See Com. *v.* Morningstar, 2 Pa. Dist. 41, 12 Pa. Co. Ct. 34.

Proof of corporate existence see People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753].

Variance as to time of offense no ground for reversal see People *v.* Formosa, 131 N. Y. 478, 30 N. E. 492, 27 Am. St. Rep. 612 [*affirming* 61 Hun 272, 16 N. Y. Suppl. 753].

10. State L. Ins. Co. *v.* Strong, 127 Mich. 346, 86 N. W. 825.

11. Bankers' L. Ins. Co. *v.* Howland, 73 Vt. 1, 48 Atl. 435, 57 L. R. A. 374.

12. Rothschild *v.* New York L. Ins. Co., 97 Ill. App. 547.

13. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68.

14. Wheeler *v.* Mutual Reserve Fund Life Assoc., 102 Ill. App. 48. See also Fire Insurance, 19 Cyc. 626.

15. Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197.

16. See also Fire Insurance, 19 Cyc. 625.

17. *Connecticut.*—Hogben *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61

unless he is barred by inexcusable negligence or acquiescence;[18] and if he repudiates the contract within a reasonable time after knowledge of the fraud,

Am. St. Rep. 53; Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488.

Iowa.— Armstrong *v.* New York Mut. L. Ins. Co., 121 Iowa 362, 96 N. W. 954.

Massachusetts.— Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503 (holding that if a married woman who signs her husband's name without his knowledge or consent to an application for a policy of insurance which is issued upon his life for her benefit, and which, by the rules of the insurance company to which it is subject, is rendered void by her act, was innocent of any fraudulent intent, and was deceived by the agent of the company and induced by his fraudulent representation to make the application, she can rescind the contract when she discovers the fraud and recover the premiums paid); Penn Mut. L. Ins. Co. *v.* Crane, 134 Mass. 56, 45 Am. Rep. 282 (holding that the insured could rescind and defend an action on a premium note because of false and fraudulent representations by the company's agent that certain persons named and known to the insured were to be members of a local board of directors to be organized for the management of the company's affairs). To the same effect as the case last cited see Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25.

Minnesota.— McCarty *v.* New York L. Ins. Co., 74 Minn. 530, 77 N. W. 426.

New Hampshire.— Delouche *v.* Metropolitan L. Ins. Co., 69 N. H. 587, 45 Atl. 414.

North Carolina.— Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252; Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519.

Pennsylvania.— New Era Life Assoc. *v.* Weigle, 128 Pa. St. 577, 18 Atl. 393, false representations as to the company's financial condition or solvency.

Tennessee.— Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Martin *v.* Aetna L. Ins. Co., 1 Tenn. Cas. 361.

Texas.— Life Assoc. of America *v.* Goode, 71 Tex. 90, 8 S. W. 639 (holding, however, that the evidence was insufficient to show that representations as to the solvency of an insurance company were false or fraudulent); Equitable L. Assur. Soc. *v.* Maverick, (Civ. App. 1904) 78 S. W. 560.

Wisconsin.— Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

United States.— McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119].

England.— Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715.

See also CONTRACTS, 9 Cyc. 411.

Fraud of agent in writing false answers in application see *infra*, IX, B, 4, d, (II).

Limitations may be imposed upon the agent's authority to bind the company by representations by provisions in the application or policy. Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309; New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934 [*reversing* 14 Fed. 846].

Small type in policy.— Intent to deceive on the part of the company cannot be presumed from the fact that some portions of the policy are printed in smaller type than others. Whitehouse *v.* Travelers' Ins. Co., 29 Fed. Cas. No. 17,566.

Person not party to contract.— One who has procured the issuance of a policy cannot avoid it for fraud and recover back the premiums paid, after the policy has gone into effect, if he is not a party to the contract. U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533.

Joinder of beneficiary.— It has been held, however, that the beneficiary must join with the insured in rescinding the contract for fraud. Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386. But *compare* Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361. See *infra*, VIII, D, 2.

18. Failure of the insured to read the policy when it is delivered to him and accepted will bar his right to rescind on the ground that by reason of fraud on the part of the company or its agent it does not correspond with his application or with oral representations of the agent (Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; Massey *v.* Cotton States L. Ins. Co., 70 Ga. 794; King *v.* Mayes, 3 Indian Terr. 362, 58 S. W. 573; Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51; Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22; Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* on the facts 99 Fed. 856, 40 C. C. A. 119]; New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532. See *infra*, IV, A, 2, b, text and note 31), unless his delay in reading the same is not unreasonable under the circumstances, or his omission in this respect is caused by the fraud of the company or its agent (Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Bostwick *v.* New York Mut. L. Ins. Co., *supra*; McMaster *v.* New York L. Ins. Co., *supra*. See also McCarty *v.* New York L. Ins. Co., 74 Minn. 530, 77 N. W. 426; Knauer *v.* Globe Mut. L. Ins. Co., 48 N. Y. Super. Ct. 454).

Failure to read application.— Where an applicant for a life insurance policy, although able to read and having full opportunity to examine the written application presented by the soliciting agent for his signature, signed the same without reading it, relying on false and fraudulent representations made by such agent as to certain privileges which the insurance company would accord him if he procured the policy, and the policy subsequently issued and delivered to him was one corresponding with the kind for which the

but not otherwise,[19] he may set up the fraud as a defense in an action by the company to recover premiums or on a premium note,[20] or sue to recover premiums paid,[21] or in some jurisdictions sue in equity to have the policy declared void and recover the premiums paid,[22] or, in a proper case, he may maintain an action of deceit against the company or the agent, or both, to recover any damages sustained by reason of the fraud.[23] The right to rescind or sue for damages is subject of course to the same limitations as govern in other cases of fraud in

written application called, it was held that the applicant could not, as against a general agent of the company, who was in the position of a *bona fide* holder of a promissory note given in payment of the first premium on the policy, set up the defense that, by reason of such fraudulent misrepresentations by the soliciting agent, he was induced to sign an application which he really did not intend to make. Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426.

That the insured reposed great confidence in the company's agent committing the fraud may disprove laches in not discovering the fraud and in the meantime retaining the policy. Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758.

By signing an application for insurance the applicant is not estopped to claim that fraud was practised on him by the company's agent in obtaining his signature. Cooke *v.* National Life Assoc., (R. I. 1897) 36 Atl. 838.

Acceptance of benefits and delay in rescinding see the note following.

19. *Georgia.*— Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; MacIntyre *v.* Cotton States L. Ins. Co., 82 Ga. 478, 9 S. E. 1124.

Indian Territory.— King *v.* Mayes, 3 Indian Terr. 362, 58 S. W. 573.

Michigan.— National Life, etc., Co. *v.* Omans, 137 Mich. 365, 100 N. W. 595.

Minnesota.— McCarty *v.* New York L. Ins. Co., 74 Minn. 530, 77 N. W. 426, question for jury.

Missouri.— Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51; Zallee *v.* Connecticut Mut. L. Ins. Co., 12 Mo. App. 111.

North Carolina.— See Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252.

Pennsylvania.— Mecke *v.* New York L. Ins. Co., 8 Phila. 6.

Tennessee.— Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758, two months not unreasonable delay.

Texas.— Equitable L. Assur. Soc. *v.* Maverick, (Civ. App. 1904) 78 S. W. 560.

United States.— McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119]; New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934 [*reversing* 14 Fed. 846].

England.— Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715, holding, however, that the delay was not fatal under the circumstances.

Fraud not waived by mere reception of policy see Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361.

Payment of premiums under protest after discovery of the fraud, and pending unsuccessful efforts to have the matter adjusted, is not such ratification or laches as will prevent rescission. Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252.

Acceptance of benefits.— One who has accepted the benefits under a contract of life insurance with knowledge of the right to rescind for fraud cannot subsequently repudiate it. Wheeler *v.* Odd Fellows' Mut. Aid, etc., Assoc., 44 Minn. 513, 47 N. W. 149; and other cases cited *supra*, this note.

Substituted policy.— Where the insured, who had been induced to take out a policy by the false representations of the company's agent, demanded a substituted policy according to such representations, but a policy different from that demanded was delivered to him, it was held that his receiving the same, but at the same time repudiating it as unsatisfactory, could not be regarded as a waiver of his right to rely upon the fraud in the original transaction. Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361.

20. See *infra*, V, D, 2, b.

21. See *infra*, V, E, 5.

22. Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361; Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715. See also *infra*, VIII.

23. Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25; Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309; May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389; McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285. See Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51.

The measure of damages is the amount of premiums paid with interest (Hedden *v.* Griffin, 136 Mass. 229, 49 Am. Rep. 25; May *v.* New York Safety Reserve Fund Soc., 14 Daly (N. Y.) 389; Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252; McKindley *v.* Drew, 69 Vt. 210, 37 Atl. 285), less the value, if any, to him of the insurance received while it remained in force (McKindley *v.* Drew, *supra*).

Damages too remote.— Where a complaint in an action by a policy-holder against a life insurance company alleged that he applied to defendant for policies the premiums under which should be the same in each year, but that defendant issued policies to plaintiff with intent to defraud him, falsely representing that a specified sum per annum would carry the policies; that when plaintiff had become of an age and in such a condition that he could not obtain insurance, and after he had paid premiums for several

connection with contracts.[24] As a rule mere expressions of opinion by the agent or mere promises or representations as to the advantages of the plan of insurance offered and the probable profits to be derived by the insured from the contract, or other representations as to the future, cannot be relied upon as constituting a fraud.[25]

(II) *On the Part of the Insured.* Under the usual provisions of a policy of life insurance, and even in the absence of express provision therein, fraud on

years, defendant for the first time informed him that his policies were not policies calling for the same premium each year, but that they were participating premium policies, and that his premium would be raised; and damages were prayed for, in addition to the damages asked in another count, which had been for the premiums paid, with interest, it was held that the count in question sought to recover damages too remote and speculative to constitute the foundation of a cause of action. Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51.

24. See CONTRACTS, 9 Cyc. 411 *et seq.*; FRAUD, 20 Cyc. 12 *et seq.*

Materiality of representations.— The representations must be material, and the question of materiality is for the court, and not for the jury. Penn Mut. L. Ins. Co. *v.* Crane, 134 Mass. 56, 45 Am. Rep. 282. A statement by an insurance agent that the first premium upon a policy would be two hundred and thirteen dollars, when in fact it was two hundred and twenty-two dollars and fifty cents, is not such a misrepresentation as will make void a promissory note for the former sum given by the insured to the agent, who, by agreement, paid the first premium and sought to collect from the insured only the amount of the note. Dunn *v.* Abrams, 97 Ga. 762, 25 S. E. 766.

Rescission in toto.— The insured, if he rescinds at all for fraud, must rescind *in toto*; he cannot repudiate a part of the contract and enforce the rest. Preston *v.* Travellers' Ins. Co., 58 N. H. 76; Bostwick *v.* Mutual L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705. See CONTRACTS, 9 Cyc. 438.

Placing company in statu quo.—It has been said that when the insured rescinds for fraud he must restore the company to its former situation (Bostwick *v.* Mutual L. Ins. Co., 116 Wis. 692, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Kellner *v.* Mutual L. Ins. Co., 43 Fed. 623), and that the contract cannot be rescinded unless the parties can be restored to the same condition in which they were when the contract was made (Kellner *v.* Mutual L. Ins. Co., *supra*). The better opinion, however, is that if the fraud is not discovered until after part performance, the insured does not lose his right to rescind because the contract has been partly performed and the company cannot be fully restored to its former position. McCarty *v.* New York L. Ins. Co., 74 Minn. 530, 77 N. W. 426; Morton *v.* Gleason, 61 Vt. 474, 18 Atl. 45. On this point see CONTRACTS, 9 Cyc. 437–442. The insured need not offer to pay any part of the premium or return the policy or a binding receipt given by the company. Equitable L. Assur. Soc. *v.* Maverick, (Tex. Civ. App. 1904) 78 S. W. 560.

Knowledge of agent.— It has been held that the insured may rescind, although the agent making the false representations did not know they were false. Equitable L. Assur. Soc. *v.* Maverick, (Tex. Civ. App. 1904) 78 S. W. 560. On this question see CONTRACTS, 9 Cyc. 421 *et seq.*

25. Cunyns *v.* Guenther, 96 Ala. 564, 11 So. 649 (holding that a statement by the agent of a life insurance company that the company "would allow an advance dividend," even though not fulfilled, was not such a misrepresentation of fact as would avoid a premium note); Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51 (representations as to "level rate" policy and probability as to earnings and dividends); Avery *v.* Equitable L. Assur. Soc., 117 N. Y. 451, 23 N. E. 3 (representations as to the cash value of a tontine policy at the end of the tontine period); Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309 (representations as to advantages of tontine policy); Hale *v.* Continental L. Ins. Co., 12 Fed. 359, 20 Blatchf. 515 (representations as to the profits from endowment insurance). See also MacIntyre *v.* Cotton States L. Ins. Co., 82 Ga. 478, 9 S. E. 1124; and CONTRACTS, 9 Cyc. 416, 418. *Compare*, however, Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. 488 (holding that where an insurance agent's representations as to the total cost of a ten-year endowment policy was both false and fraudulent, and the insured relied upon it in taking the policy and giving his notes in payment of the first premium, the representations were of fact and not mere matter of opinion or ordinary trade talk, and that the insured was entitled to rescind); Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519 (misrepresentations as to the earnings of the company and their application in reduction of premiums); U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533 (false representations as to amount of premiums and benefits and as to the time when the policy would be fully paid); Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361 (allowing rescission for false representations that the dividends would amount to enough each year to pay a part of the premiums); Equitable L. Assur. Soc. *v.* Maverick, (Tex. Civ. App. 1904) 78 S. W. 560 (representations as to the provisions which would be embodied in the policy); Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715 (representation that premiums or assessments could not exceed a certain amount).

Illiteracy and ignorance.— But where an

the part of the insured in obtaining the policy will avoid the same, unless waived by the company.[26]

b. Mistake. Mistake has the same effect upon contracts of life insurance as upon other contracts.[27] There may be such mutual mistake as to amount of insurance, premium, or other matters covered by the agreement of the parties that the policy issued in consequence of such mistake is invalid.[28] A mistake in drawing up the policy, by reason of which it varies from the application, will not invalidate the contract where the variance is immaterial,[29] or where it is waived by the insured by accepting and retaining the policy;[30] and if an applicant for insurance accepts and retains a policy without examining it, he cannot afterward repudiate the contract on the ground of mistake because the policy does not correspond with his application,[31] unless his failure to examine the policy or his delay in

illiterate woman, ignorant of life insurance matters, was induced to take out life insurance by the agent's representations that she could "draw out" her claim at the end of ten years, and the policy as written gave her no such privilege, it was held that she could, on discovering that fact, repudiate the contract and recover the money paid as premiums. Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252.

26. See *infra*, IX; XI.

27. Effect of mistake generally see CONTRACTS, 9 Cyc. 388 *et seq.*

28. Fowler *v.* Scottish Equitable L. Ins. Soc., 4 Jur. N. S. 1169, 28 L. J. Ch. 225, 7 Wkly. Rep. 5 (mistake as to conditions); Ætna L. Ins. Co. *v.* Brodie, 5 Can. Sup. Ct. 1 (mistake as to amount of insurance); Christmas *v.* Bordua, 15 Rev. Lég. 534 (mistake as to amount of premium).

29. Porter *v.* New York Mut. L. Ins. Co., 70 Vt. 504, 41 Atl. 970 (holding that dating a policy eight days later than called for by the application was an immaterial variance as against the company); Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544 (where the application was for insurance in the amount of twenty-five thousand dollars, and the company issued two policies for ten thousand dollars each and one policy for five thousand dollars).

Variance from verbal understanding.—The fact that an applicant for life insurance desired the policy to be made payable to a particular person, and this was the verbal understanding with the agent prior to the written application, while the policy as issued was made payable, in accordance with the application, to the legal representatives of the insured, does not constitute a variance of which the company can take advantage to defeat the contract. Phillips *v.* Union Cent. L. Ins. Co., 101 Fed. 33 [*reversed* on other grounds in 102 Fed. 19, 41 C. C. A. 263].

30. *Georgia.*— Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; Leigh *v.* Brown, 99 Ga. 258, 25 S. E. 621; Jones *v.* Methvin, 97 Ga. 449, 25 S. E. 318.

Indian Territory.— King *v.* Mayes, 3 Indian Terr. 362, 58 S. W. 573; Perry *v.* Archard, 1 Indian Terr. 487, 42 S. W. 421.

North Carolina.— Roddey *v.* Talbot, 115 N. C. 287, 20 S. E. 375.

Wisconsin.— Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

United States.— New York Mut. L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154; Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544; McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119 [*reversed* on the facts in 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64]; Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190.

See also *supra*, III, C, 2.

Necessity for acceptance of policy varying from application see *supra*, III, C, 1.

31. *Georgia.*— Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; Massey *v.* Cotton States L. Ins. Co., 70 Ga. 794.

Illinois.— National Union *v.* Arnhorst, 74 Ill. App. 482.

Missouri.— Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504.

New York.— Wilson *v.* National L. Ins. Co., 31 Misc. 403, 65 N. Y. Suppl. 550 [*affirmed* in 56 N. Y. App. Div. 624, 67 N. Y. Suppl. 1150].

Virginia.— Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22.

Wisconsin.— Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

United States.— McMaster *v.* New York L. Ins. Co., 99 Fed. 856, 40 C. C. A. 119 [*reversed* on the facts in 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64]; New York L. Ins. Co. *v.* McMaster, 83 Fed. 63, 30 C. C. A. 532.

See also CONTRACTS, 9 Cyc. 391.

Reasonable time for examination of policy. — One who orders a policy of insurance of a particular class, and gives his note for the amount of the premium which the agent of the company has advanced, has a reasonable time within which to discover that a policy sent to him by mail is not of the class ordered, and to object to and return the same. If his offer to return, made in due time, be rejected, his retention of the policy thereafter, without appropriating it or making any use of it, will not subject him to pay the note. Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48.

Contra.— Although this rule is supported by the great weight of authority, there are some cases which are, or seem to be, to the contrary. In Mowat *v.* Provident Sav. L. Assur. Soc., 27 Ont. App. 675, it was held that where a policy of life insurance is delivered to the applicant, he is under no obligation to read the same, but is entitled to

examining it is not unreasonable or is due to fraud on the part of the company or of its agent.[32]

c. Unconscionable Contracts. A policy under which the amount of insurance is paid to the insured at the time the policy is issued and payment of the premiums is secured by a mortgage with the provision that the death of the insured shall extinguish the mortgage is an enforceable contract, and not voidable as being unconscionable.[33]

d. Reformation in Equity.[34] Where by reason of fraud or mistake a policy of insurance does not express the real contract between the parties, it may, subject to the principles governing the reformation of contracts generally,[35] be reformed in equity to correspond with their real agreement;[36] but to entitle the insured to reformation of a policy because it fails to express the preliminary parol agreement, such agreement and the fraud or mistake must be clearly proved,[37] and he must not have acquiesced or been guilty of laches after discovery of the fraud or mistake, or been guilty of inexcusable negligence in failing to discover it.[38]

assume, in the absence of anything done by the company to call his attention to particular provisions therein, that it is in accordance with his application, and therefore, where a person applied to a company for insurance at a fixed annual premium for life, and the policy sent to him contained a provision that the premium might be increased, but he did not read the policy, and, pursuant to notices from the company, paid seven annual premiums at the original rate, and in the eighth year the company demanded a larger premium, it was held that he was not barred by acquiescence or delay from repudiating the policy because of its variance from his application.

32. Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119].

33. United Security L. Ins., etc., Co. *v.* Ritchey, 187 Pa. St. 173, 40 Atl. 978. And see United Security L. Ins., etc., Co. *v.* Bond, 16 App. Cas. (D. C.) 579.

34. Modification by agreement see *infra*, VIII, A.

35. See, generally, REFORMATION OF INSTRUMENTS.

36. *Georgia.*— Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228.

Kentucky.— Welch *v.* Welch, 13 Ky. L. Rep. 639, mutual mistake either of law or fact.

New Hampshire.— Eastman *v.* Provident Mut. Relief Assoc., 65 N. H. 176, 18 Atl. 745, 23 Am. St. Rep. 29, 5 L. R. A. 712, mistake either of law or of fact.

New York.— Goldsmith *v.* Union Mut. L. Ins. Co., 18 Abb. N. Cas. 325 [*reversing* 17 Abb. N. Cas. 15].

Ohio.— Continental L. Ins. Co. *v.* Goodsall, 5 Ohio Dec. (Reprint) 160, 3 Am. L. Rec. 338.

Pennsylvania.— Seybert *v.* Ætna L. Ins. Co., 4 Luz. Leg. Reg. 219.

United States.— McMaster *v.* New York L. Ins. Co., 78 Fed. 33 [*reversed* on the facts in 87 Fed. 63, 30 C. C. A. 532].

England.— Collett *v.* Morrison, 9 Hare 162, 21 L. J. Ch. 878, 41 Eng. Ch. 162, 68 Eng. Reprint 458.

See 28 Cent. Dig. tit. "Insurance," § 266 *et seq.*

False statements by agent.— Reformation of the contract is not necessary to sustain a recovery on a policy issued upon an application in which the agent of the company, without the knowledge of the insured, has written a false answer to a question contained therein. Germania L. Ins. Co. *v.* Lunkenheimer, 127 Ind. 536, 26 N. E. 1082. See *infra*, IX, B, 4, d, (II).

37. New York L. Ins. Co. *v.* McMaster, 87 Fed. 63, 30 C. C. A. 532 [*reversing* 78 Fed. 33]. See also Avery *v.* Equitable L. Assur. Soc., 117 N. Y. 451, 23 N. E. 3 (holding that, in the absence of proof of mutual mistake, a representation by the agent of an insurance company that the cash value of a tontine policy would amount to a certain sum at the end of the tontine period did not warrant a reformation of the policy, after expiration of the tontine period, so as to make it contain an absolute covenant as to the amount of such cash value); McConnell *v.* Provident Sav. L. Assur. Soc., 92 Fed. 769, 34 C. C. A. 663; Parsons *v.* Bignold, 7 Jur. 591, 15 L. J. Ch. 379, 13 Sim. 518, 36 Eng. Ch. 518, 60 Eng. Reprint 201; and other cases cited in the note following.

The burden is on the assured seeking reformation to show that the policy does not conform to the intention of the parties by reason of a mutual mistake. Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228.

38. *Georgia.*— Massey *v.* Cotton States L. Ins. Co., 70 Ga. 794. In this case an insurer obtained from a life insurance company an ordinary life policy, the character of which plainly appeared in print, both on the margin and in the body of the policy. He paid the premium thereon for ten years, but when called on for the eleventh annual premium he filed a bill against the company, alleging that its agents had represented to him, and he believed, that his application was for a ten-year, paid-up policy, when in fact it was for an ordinary policy, and that the company issued and delivered to him an ordinary life policy when he believed it to be a ten-

3. Who May Question Validity of Policy. The administrator of a debtor on whose life the creditor has taken out insurance cannot contest the validity of the policy, but such defense can only be set up, if at all, by the company.[39]

B. Construction and Operation — 1. General Rules of Construction — a. Liberal Construction in Favor of Insured.[40] If the policy is so ambiguous as to be reasonably susceptible of two constructions, the ambiguity is to be resolved in favor of the insured.[41] The language of the policy being that of the company, all the conditions and provisions favorable to the company are to be strictly construed.[42] The rule applies, however, only where the language or some of the

year paid-up policy, and seeking to compel the issuance of a paid-up policy, or to rescind the contract and recover the premiums paid by him. It was held that by the use of reasonable diligence he could have had knowledge of the truth, and that equity would not relieve him against the results of his own gross neglect.

Missouri.— Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504.

New York.— Wilson *v.* National L. Ins. Co., 31 Misc. 403, 65 N. Y. Suppl. 550 [*affirmed* in 56 N. Y. App. Div. 624, 67 N. Y. Suppl. 1151].

Texas.— Cowen *v.* Equitable L. Assur. Soc., (Civ. App. 1904) 84 S. W. 404.

United States.— McConnell *v.* Provident Sav. L. Assur. Soc., 92 Fed. 769, 34 C. C. A. 653.

39. Maynard *v.* Virginia L. Ins. Co., 132 N. C. 711, 44 S. E. 405.

Estoppel to deny insurable interest see *supra*, I, G.

40. Liberal construction in favor of beneficiaries see *infra*, IV, B, 3.

41. *Arkansas.*—Providence Sav. L. Assur. Soc. *v.* Rentlinger, 58 Ark. 528, 25 S. W. 835.

Georgia.— Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

Illinois.—Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875]; Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]; National Acc. Soc. *v.* Ralstin, 101 Ill. App. 192; Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156.

Iowa.— Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Dunn, 106 Ky. 591, 51 S. W. 20, 21 Ky. L. Rep. 213; Mutual Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 69 S. W. 1, 24 Ky. L. Rep. 580.

Massachusetts.— Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

Minnesota.— Robson *v.* Supreme Ct. U. O. of F., 93 Minn. 24, 100 N. W. 381; Symonds *v.* Northwestern Mut. L. Ins. Co., 23 Minn. 491.

New York.— Greeff *v.* Equitable L. Assur. Soc., 40 N. Y. App. Div. 180, 57 N. Y. Suppl. 871 [*reversed* on other grounds in 160 N. Y. 19, 54 N. E. 712, 73 Am. St. Rep. 659, 46 L. R. A. 288].

North Carolina.—Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

Ohio.— Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3.

Oregon.— Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213; Stringham *v.* New York Mut. L. Ins. Co., 44 Oreg. 447, 75 Pac. 822.

Vermont.— Frink *v.* Brotherhood Acc. Co., 75 Vt. 249, 54 Atl. 176.

West Virginia.— Logan *v.* Provident Sav. L. Assur. Soc., 57 W. Va. 384, 50 S. E. 529.

Wisconsin.— Hull *v.* Northwestern Mut. L. Ins. Co., 39 Wis. 397.

United States.— McMaster *v.* New York L. Ins. Co., 78 Fed. 53 [*reversed* on other grounds in 87 Fed. 63, 30 C. C. A. 532]; Sheerer *v.* Manhattan L. Ins. Co., 16 Fed. 720.

England.— Notman *v.* Anchor Assur. Co., 4 C. B. N. S. 476, 4 Jur. N. S. 712, 27 L. J. C. P. 275, 6 Wkly. Rep. 688, 93 E. C. L. 476.

See 28 Cent. Dig. tit. "Insurance," § 292 *et seq.* And see Fire Insurance, 19 Cyc. 656.

By-laws.— The rule of construction as to ambiguous clauses applies to provisions in the by-laws of a mutual company, although the member is chargeable with knowledge of the by-laws. Frink *v.* Brotherhood Acc. Co., 75 Vt. 249, 54 Atl. 176.

42. *Arkansas.*— Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835, holding that all reasonable doubts whether statements inserted or referred to in an insurance policy are warranties or representations should be resolved in favor of the insured.

Illinois.— Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875]; National Acc. Soc. *v.* Ralstin, 101 Ill. App. 192.

Massachusetts.— Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

Minnesota.— Symonds *v.* Northwestern Mut. L. Ins. Co., 23 Minn. 491.

Ohio.— Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

Vermont.— Frink *v.* Brotherhood Acc. Co., 75 Vt. 249, 54 Atl. 176.

England.— Notman *v.* Anchor Assur. Co., 4 C. B. N. S. 476, 4 Jur. N. S. 712, 27 L. J. C. P. 275, 6 Wkly. Rep. 688, 93 E. C. L. 476.

Construction to avoid forfeiture see *infra*, IV, A, 1, c.

terms of the contract remain doubtful after applying the usual rules of construction.[43] It is said that any ambiguous declaration in the application is to be construed in favor of the company;[44] but where the application is filled in by the company or its agent, it should be construed most favorably to the applicant.[45]

b. For Purpose of Affording Indemnity. In some of the cases it has been said that the object of the policy is to afford indemnity, and it should be so construed in case of ambiguity as to effect that purpose.[46] Properly speaking, however, a contract of life insurance, except in the case of insurance in favor of a creditor on the life of his debtor and other like cases,[47] is not a contract of indemnity at all.[48]

c. To Avoid Forfeiture. For the reasons indicated in the preceding paragraphs as well as under the general rule that forfeiture is to be avoided, the conditions and provisions of the policy with reference to forfeiture should be strictly construed in favor of the insured and against the company.[49] But the court cannot, in order to avoid a forfeiture, go farther than a fair construction of the language used will permit.[50]

d. Construction by Parties. In accordance with the general rule as to the construction of contracts,[51] the construction which the parties themselves have put upon a contract of life insurance will be taken into consideration and generally followed in determining their intention.[52]

e. Entire Contract Construed Together. The entire contract is to be construed together for the purpose of giving force and effect to each clause.[53]

43. Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571.

44. Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272. But to the contrary in fire insurance see Krell *v.* Chicasaw Farmers' Mut. F. Ins. Co., 127 Iowa 748, 104 N. W. 364. See also FIRE INSURANCE, 19 Cyc. 656 *et seq.*

45. Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155 (holding that statements in an application in the handwriting of the company's medical examiner are to be construed most strongly against the company); Hewey *v.* Metropolitan L. Ins. Co., 100 Me. 523, 62 Atl. 600 (holding that an application signed in blank by one desiring insurance and filled in by the company or its agents should be construed most favorably to the applicant).

46. Traders' Mut. L. Ins. Co. *v.* Humphrey, 109 Ill. App. 246 [*affirmed* in 207 Ill. 540, 69 N. E. 875]; Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]; Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

47. See *supra*, I, C, 2.

48. See *supra*, I, B, 2, text and note 22.

49. *Illinois.* — Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]; Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Dunn, 106 Ky. 591, 51 S. W. 20, 21 Ky. L. Rep. 213.

Minnesota.— Symonds *v.* Northwestern Mut. L. Ins. Co., 23 Minn. 491.

North Carolina.— Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

Ohio.— Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3.

Oregon.—Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

West Virginia.— Logan *v.* Provident Sav. L. Assur. Soc., 57 W. Va. 384, 50 S. E. 529.

Wisconsin.— Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800; Hull *v.* Northwestern Mut. L. Ins. Co., 39 Wis. 397.

United States.— McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119]; Nederland L. Ins. Co. *v.* Meinert, 127 Fed. 651, 62 C. C. A. 377; McMaster *v.* New York L. Ins. Co., 78 Fed. 33 [*reversed* on other grounds in 87 Fed. 63, 30 C. C. A. 532]; Cotten *v.* Fidelity, etc., Co., 41 Fed. 506; Young *v.* New York Mut. L. Ins. Co., 30 Fed. Cas. No. 18,168, 2 Sawy. 325 [*reversed* on other grounds in 23 Wall. 85, 23 L. ed. 152].

See 28 Cent. Dig. tit. "Insurance," § 295; and *infra*, X, A, 2.

50. Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800.

51. See CONTRACTS, 9 Cyc. 588; FIRE INSURANCE, 19 Cyc. 661.

52. Taylor *v.* Hill, 86 Wis. 99, 50 N. W. 738; Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169.

53. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358; Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503; Urwan *v.* Northwestern Nat. L. Ins. Co., 125 Wis. 349, 103 N. W. 1102. Where an insurance policy appears as one large sheet embracing four pages, on one sheet of which is the main contract, on another printed conditions, on another a copy of the application and certain agreements of the applicant, and on the fourth the general indorsement that the folded paper contains a life insurance policy, the main contract referring in terms to the

f. General and Specific Provisions. As between general and specific provisions relating to the same subject-matter the specific provisions will control.[54]

2. As to Parties. The person by whom the policy is procured for his own benefit on the life of another is the party to the contract rather than the one on whose life the insurance is procured.[55] But where the policy is procured by a person on his own life for the benefit of another the beneficiary is bound by the terms of the contract.[56]

3. As to Designation of Beneficiaries. In determining who is the beneficiary under the terms of a policy of life insurance, the courts are governed by the intention of the parties as indicated by the circumstances and conditions surrounding them at the time the contract was made as applied to the language of the instrument.[57] The beneficiaries need not be named, if they are otherwise described so that they may be identified.[58] The designation of the beneficiaries may be made in a separate paper furnished by the company for that purpose.[59] The language of the policy designating the beneficiary is to be treated as of testamentary character and is to receive as nearly as possible the same construction as if used in a will.[60] In determining the intention as to the beneficiaries, the policy should be so con-

conditions and to the application, the entire sheet and the contents of the same will be considered the policy. Grevenig *v.* Washington L. Ins. Co., 112 La. 879, 36 So. 790, 104 Am. St. Rep. 474. See also *infra*, IV, B, 3, text and note 61.

54. Northwestern Mut. L. Ins. Co. *v.* Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Lewis *v.* Penn Mut. L. Ins. Co., 3 Mo. App. 372; Moore *v.* Lichtenberger, 26 Pa. Super. Ct. 268.

No implication.— As against an express condition or covenant relating to a particular matter no conditions will be considered as arising by implication. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

55. North American L. Ins. Co. *v.* Wilson, 111 Mass. 542 (holding that where a policy of insurance was made to A on the life of B, and was payable to A, B was not a party to the contract, although he caused the insurance to be effected and paid the premiums, and therefore he could not avoid the policy for fraud of the agent or maintain an action for money had and received against the company to recover the premiums paid); Cyrenius *v.* Mutual L. Ins. Co., 145 N. Y. 576, 40 N. E. 225 [*affirming* 73 Hun 365, 26 N. Y. Suppl. 248] (holding that where a life insurance policy insuring the life of a father was issued upon an application signed by both the father and the son, in which the son was named as beneficiary, and the policy was made payable to the "assured," after due notice of the death of the "person whose life is hereby insured," the contract was with the son in his own name and for his own benefit, and the father's administrator could not maintain an action on the policy); Ferdon *v.* Canfield, 104 N. Y. 143, 10 N. E. 146; Smith *v.* Ætna L. Ins. Co., 5 Lans. (N. Y.) 545 [*affirmed* in 49 N. Y. 211]; Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800; Brockway *v.* Connecticut Mut. L. Ins. Co., 29 Fed. 766.

A wife is a party to a contract of insurance on her husband's life where she signs the application for the policy as the beneficiary, and the covenant in the policy is to pay the husband at the time named, if living, or, if he should die prior to such time, then to pay the wife or her legal representatives. Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Who may sue to recover premiums paid see *infra*, V, E, 6, b.

Who may sue on policy see *infra*, XIII, D, 1, a.

56. Kohen *v.* Mutual Reserve Fund Life Assoc., 28 Fed. 705; Caffery *v.* John Hancock Mut. L. Ins. Co., 27 Fed. 25.

Provisions as to forfeiture binding on beneficiary see *infra*, X, A, 4; X, C, 5.

As to designation of beneficiaries see *infra*, IV, B, 3.

57. See Sauerbier *v.* Union Cent. L. Ins. Co., 39 Ill. App. 620; Bogart *v.* Thompson, 24 Misc. (N. Y.) 581, 53 N. Y. Suppl. 622; and other cases cited in the notes following.

Who are beneficiaries and entitled to proceeds see *infra*, XII, D.

Construction of word "assured" see *supra*, I, A, 7.

58. Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538; Sauerbier *v.* Union Cent. L. Ins. Co., 39 Ill. App. 620.

Children.— A policy is not void for uncertainty because the beneficiaries are designated only as the "children of" a person named. Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538. See *infra*, XII, D, 1, e.

Unborn children may be made the beneficiaries; and where the description is ambiguous or uncertain, as where a father insures his life for the benefit of his wife "and children," parol or other extrinsic evidence is admissible to show the intention to have unborn children included in the designation. Sauerbier *v.* Union Cent. L. Ins. Co., 39 Ill. App. 620. See also *infra*, XII, D, 1, e.

59. Arnott *v.* Prudential Ins. Co., 17 N. Y. Suppl. 710.

60. Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689; Lehman *v.* Lehman, 215 Pa. St. 344,

strued if possible as to give effect to every clause and word,[61] and obviously clerical errors will be corrected or disregarded.[62] The policy is to be construed as of the time of its original issue.[63]

4. As to Amount of Insurance. As life insurance is not a contract of indemnity but a contract to pay a specified sum on the happening of the contingency provided for therein,[64] the amount named in the policy generally determines the liability of the company.[65] In the case of one having an indefinite pecuniary interest in the life of the insured the policy will be valid for the amount specified therein.[66] But to obviate objections on the ground of public policy the amount of insurance by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest and premiums with interest during the expectancy of the life insured according to life-tables.[67] The amount of insurance may be designated by reference in the policy to a schedule attached thereto,[68] or other reference.[69] In a case of assessment life insurance the amount of recovery as well as the remedy of the insured will depend upon the terms of the contract. He may be entitled to recover only the amount, not exceeding a certain sum, actually realized on an assessment to be made,[70] or he may be entitled to recover a specified sum, irrespective of assessments, or the amount which a certain assessment would realize if made, whether it is in fact made and collected or not.[71]

5. As to Duration and Termination of Risk. The risk is presumed to commence from the date of the policy in the absence of any provision or agreement to the

64 Atl. 598 [*affirming* 29 Pa. Super. Ct. 60]; Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503; Knights Templars, etc., Mut. Aid Assoc. *v.* Greene, 79 Fed. 461. See *infra*, XII, D, 1.

61. Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503. And see *supra*, IV, B, 1, e.

62. Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503, holding that where a policy was payable to A, "trustee, and the children" of the insured, the "and" should be read "for," to give effect to the intention of the insured.

63. Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689.

64. See *supra*, I, B, 2, text and note 22.

65. See *infra*, XII, B.

66. Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244.

67. Shaffer *v.* Spangler, 144 Pa. St. 223, 22 Atl. 865; Ulrich *v.* Reinoehl, 143 Pa. St. 238, 22 Atl. 862, 24 Am. St. Rep. 534, 13 L. R. A. 433; Cooper *v.* Shaeffer, 7 Pa. Cas. 405, 11 Atl. 548.

68. Bruton *v.* Metropolitan L. Ins. Co., 48 Hun (N. Y.) 204.

69. Under a statute requiring insurance companies to specify the exact sum which they promise to pay on each contingency insured against the amount may be sufficiently fixed by reference in the policy to a classification of risks. Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339.

70. Eggleston *v.* Centennial Life Assoc., 19 Fed. 201. See also Rambousek *v.* Supreme Council of M. T., 119 Iowa 263, 19 N. W. 277; Tobin *v.* Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663; Newman *v.* Covenant Mut. Ben. Assoc., 72 Iowa 242, 33 N. W. 662; Ranisbarger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770; Oriental Ins. Assoc. *v.* Glancey, 70 Md. 101, 16 Atl. 391.

Remedy on contract see *infra*, XIII, A.

71. Wood *v.* Farmers' Life Assoc., 121 Iowa, 44, 95 N. W. 226; Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508; Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Neskern *v.* Northwestern Endowment, etc., Assoc., 30 Minn. 406, 15 N. W. 683; Ball *v.* Granite State Mut. Aid Assoc., 64 N. H. 291, 9 Atl. 103; Smith *v.* Northwestern Nat. L. Ins. Co., 123 Wis. 586, 102 N. W. 57.

Absolute promise not dependent on assessment.— An unconditional contract to pay, within a certain time after notice and proof of the death of the insured, the sum, not exceeding a certain amount, "represented by the payment of $2 by each member," or each member of a certain class or division, is a contract to pay the amount which an assessment of that amount on each member or each member of the class would realize if made and collected, and not the amount collected on such an assessment; the promise to pay not being contingent on the making or collecting of the assessment, and the company taking the risk as to members who do not pay. U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60. See also Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508; Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631 (where the contract was to pay "an amount equal to $1.50 for each certificate in force at the time such amount shall become due," but not to exceed a certain sum); Neskern *v.* Northwestern Endowment, etc., Assoc., 30 Minn. 406, 15 N. W. 683; Prudential Mut. Aid. Soc. *v.* Cromleigh, 3 Walk. (Pa.) 332; McKnight *v.* Mutual L. Assoc., 15 Wkly.

contrary,[72] and to continue until the happening of the contingency provided for or the termination of the risk by forfeiture on account of non-payment of premiums or the like, or until the expiration of the term named if the contract is a contract of term insurance.[73]

6. With Reference to Attached or Accompanying Papers, Etc.— a. In General. Attached or accompanying papers executed contemporaneously with the execution of the policy and as a part of the contract are to be read and construed with it in determining its meaning and effect.[74] But the intention of the parties as declared in the policy will not be defeated by inconsistent expressions in collateral instruments.[75]

Notes Cas. (Pa.) 400 (where the contract was to pay on the death of the insured five dollars for every membership of one thousand dollars then in the company).

Proof and presumption as to amount of assessment.— It has been held that where the contract is to pay within a certain time "a sum equal to the amount received from one death assessment," but not exceeding a certain amount, the insured can recover nominal damages only in the absence of proof of the amount realized by one death assessment. Bell *v.* Granite State Mut. Aid Assoc., 64 N. H. 291, 9 Atl. 113. See also Rambousek *v.* Supreme Council of M. T., 119 Iowa 263, 93 N. W. 277; Newman *v.* Covenant Mut. Ben. Assoc., 72 Iowa 242, 33 N. W. 662. On the other hand, where one of the by-laws of an insurance company provided that a beneficiary should be entitled to a sum equal to what would be realized from an assessment on members in good standing, not exceeding the amount of the certificate, it was held that the beneficiary was entitled to recover the full amount of the certificate in the absence of proof by the company that an assessment so levied would not have returned a sum equal to such amount, the burden being upon the company to show this fact. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226. So, where an assessment life insurance association issued a certificate covenanting to pay the estate of the insured five thousand dollars upon his death, "as provided in the constitution," and the constitution provided that the company should not be liable in case of the death of a member for more than one-fifth of the net amount of the bi-monthly premiums next following such death on all the members of the department to which the deceased member belonged, for each one thousand dollars death benefit named in the certificate but this did not prohibit the board of directors from paying the loss in full, it was held that the amount stated in the certificate was *prima facie* the amount due thereon, and that, in the absence of evidence showing the department to which the deceased belonged and the amount of bi-monthly premiums next after his death, a verdict for the full amount of the certificate was properly directed. La Manna *v.* National Security Life, etc., Soc., 10 N. Y. Suppl. 221 [*affirmed* in 128 N. Y. 613, 28 N. E. 253]. See also Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919; Lueders *v.* Hartford L., etc., Ins. Co., 12 Fed. 465, 4 McCrary 149.

Waiver by failure to raise objections in trial court see Garretson *v.* Equitable Mut. Life, etc., Assoc., 74 Iowa 419, 38 N. W. 127.

Contracts to levy assessments and pay over proceeds see *infra*, V, C, 1.

72. Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; Philadelphia L. Ins. Co. *v.* American L., etc., Ins. Co., 23 Pa. St. 65.

Taking effect of the contract see also *supra*, III, B, C, D.

73. Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473 [*affirming* 91 Fed. 728].

Tontine policy.— Under a life policy dated Sept. 19, 1885, which provides that "the tontine period shall be fifteen years," and that, on the completion of the period, certain accumulations shall be paid to the assured in a manner prescribed the tontine period expires with the close of Sept. 18, 1900, entitling the assured to demand payment on the day following. Ellison *v.* Straw, 119 Wis. 502, 97 N. W. 168.

Effect of termination of insurable interest see *supra*, I, F.

Cancellation, surrender, and rescission see *infra*, VIII.

Forfeiture for breach of warranty, covenant, or condition subsequent see *infra*, X.

Estoppel, waiver, and agreements affecting right to forfeit policy see *infra*, XI.

74. *Alabama.*—Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361, health certificate.

Arkansas.— Fidelity Mut. L. Ins. Co. *v.* Bussell, 75 Ark. 25, 86 S. W. 814, premium note.

Illinois.— Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

Indiana.— Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414, agreement containing warranties.

Ohio.— Jander *v.* Mutual L. Ins. Co., 16 Ohio Cir. Ct. 536, 9 Ohio Cir. Dec. 462, guaranty for a paid-up policy.

Texas.— Laughlin *v.* Fidelity Mut. Life Assoc., 8 Tex. Civ. App. 448, 28 S. W. 411, premium note.

United States.— Sheerer *v.* Manhattan L. Ins. Co., 20 Fed. 886, agreement for paid-up policy.

75. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am.

b. Memoranda on Margin or Back of Policy or on Attached Slip. Words and figures written or printed on the margin of a policy of life insurance, on its back, or on an attached slip, with reference to the terms and conditions of the contract, constitute a part of the contract and are to be taken into account in its construction.[76]

c. Prospectuses and Circulars. By the weight of authority, representations made in a prospectus or circular issued by a life insurance company are no part of the contract evidenced by a policy issued by it.[77]

d. Constitution, By-Laws, Etc. The constitution and by-laws of a mutual company of which the member is presumed to have knowledge may be taken into account in construing the contract of such company;[78] and they may be made a part of the contract by reference;[79] but provisions in the by-laws are not a part of the contract and do not control the terms of the policy unless incorporated therein by specific reference.[80] In some states it is required by statute that any provision of the constitution or by-laws referred to in the policy as forming a part of the contract shall be attached thereto by correct copy.[81]

St. Rep. 411, 32 L. R. A. 473; Fithian *v.* Northwestern L. Ins. Co., 4 Mo. App. 386; McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119]; Glass *v.* Masons' Fraternal Acc. Assoc., 112 Fed. 495.

Where a premium note stipulates that a failure to pay interest thereon shall forfeit the policy, but the policy provides that after a complete annual premium has been paid it shall be non-forfeiting, courts will not permit the manifest intent of the parties as declared in the policy to be defeated by the inconsistent expression in the note. Fithian *v.* Northwestern L. Ins. Co., 4 Mo. App. 386.

76. *Alabama.*—Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361.

Illinois.— Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

Massachusetts.— Porter *v.* U. S. Life Ins. Co., 160 Mass. 183, 35 N. E. 678; Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

New Hampshire.— Cowles *v.* Continental L. Ins. Co., 63 N. H. 300.

Ohio.— Jander *v.* Mutual L. Ins. Co., 16 Ohio Cir. Ct. 536, 9 Ohio Cir. Dec. 462, guaranty for a paid-up policy.

Vermont.— Patch *v.* Phœnix Mut. L. Ins. Co., 44 Vt. 481.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204.

Apportionment of assessments.— A memorandum furnishing the basis on which an apportionment of assessments shall be made under the provisions of the constitution of a mutual society constitutes a part of the contract. Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169.

A due-bill attached to an insurance policy and executed at the same time constitutes a part of it. Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

77. MacIntyre *v.* Cotton States L. Ins. Co., 82 Ga. 478, 9 S. E. 1124; Mutual Ben. L. Ins. Co. *v.* Ruse, 8 Ga. 534; Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516 [*reversing* 26 Barb. 556]; Odell *v.* Manhattan L. Ins. Co., 9 Ohio Dec. (Reprint) 589, 15 Cinc. L. Bul. 197; Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea (Tenn.) 488. *Contra*, Southern Mut. L. Ins. Co. *v.* Montague, 84 Ky. 653, 2 S. W. 443, 8 Ky. L. Rep. 579, 4 Am. St. Rep. 218.

78. Condon *v.* Mutual Reserve Fund L. Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149; Mutual L. Ins. Co. *v.* Bratt, 55 Md. 200; Greeff *v.* Equitable L. Assur. Soc., 40 N. Y. App. Div. 180, 57 N. Y. Suppl. 871 [*reversing* 24 Misc. 96, 52 N. Y. Suppl. 503]; Seymour *v.* Mutual Reserve Fund Life Assoc., 14 Misc. (N. Y.) 151, 35 N. Y. Suppl. 793.

A contract with a mutual company cannot be construed unless the constitution and by-laws are before the court. Condon *v.* Mutual Reserve Fund Life Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149.

79. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339.

80. Goodson *v.* National Masonic Acc. Assoc., 91 Mo. App. 339; Lagrone *v.* Timmerman, 46 S. C. 372, 24 S. E. 290.

81. Under a statute requiring that a copy of any provision of the constitution or by-laws of the company which is made a part of the contract shall be attached to the policy, provisions of such constitution and by-laws not expressly incorporated into the contract in accordance with such statute cannot be treated as a part of the contract. Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278. See also Boyden *v.* Massachusetts Masonic Life Assoc., 167 Mass. 242, 45 N. E. 735, holding also that a provision in a policy that "said member agrees to be bound by the by-laws and rules of the Association now in force," etc., did not render the policy subject to a by-law not contained therein nor attached thereto. It has been held, however, that such a statute may be complied with so as to authorize the introduction of the by-laws in evidence by tendering a copy within a reasonable time and offering to attach the same. Supreme Lodge K. of P. *v.* Hunziker, 87 S. W. 1134, 27 Ky. L. Rep. 1201. The constitution of the company may be looked to for the purpose of ascertaining the amount recoverable under the policy, although no copy is attached.

Where the by-laws become part of the contract, subsequent changes therein do not affect its terms.[82]

e. Application as Part of the Contract — (I) *In General.* The application is to be considered with the policy in the construction of the contract;[83] and by express reference in the policy the application may be made a part of the contract, as indicating the conditions in consideration of which the policy is issued.[84] Thus express stipulations, conditions, and warranties in the application may be made binding upon the insured as effectually as though embodied in the policy.[85] By proper reference answers or other statements contained in a medical examination may be made part of the application;[86] but a special report of the medical examiner and statements therein are not part of the application.[87] Statements in an application other than that on which the policy is issued do not become a part of the contract;[88] and a collateral stipulation entered into at the time the application is

Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278.

A statute referring only to the application and requiring a copy to be attached to the policy (see *infra*, IV, B, 6, e, (II)) does not require the attaching of a copy of the provisions of the constitution or by-laws which are made a part of the contract by reference. Fitzgerald *v.* Metropolitan Acc. Assoc., 106 Iowa 457, 76 N. W. 809.

82. Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; Weiler *v.* Equitable Aid Union, 92 Hun (N. Y.) 277, 36 N. Y. Suppl. 734; Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689; Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13; Jarman *v.* Knight Templars', etc., Life Indemnity Co., 95 Fed. 70.

83. *Alabama.*—Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361.

Arkansas.— Fidelity Mut. L. Ins. Co. *v.* Bussell, 75 Ark. 25, 86 S. W. 814.

Kentucky.— Hopkins *v.* Hopkins, 92 Ky. 324, 17 S. W. 864, 13 Ky. L. Rep. 707.

Louisiana.— Weinberger *v.* Merchants' Ins. Co., 41 La. Ann. 31, 5 So. 728.

Maine.— Philbrook *v.* New England Mut. F. Ins. Co., 37 Me. 137.

New York.— Studwell *v.* Mutual Ben. Life Assoc., 61 N. Y. Super. Ct. 287, 19 N. Y. Suppl. 709.

United States.— Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190.

Canada.— Venner *v.* Sun L. Ins. Co., 17 Can. Sup. Ct. 394; Fitzrandolph *v.* Mutual Relief Soc., 17 Can. Sup. Ct. 333.

See 28 Cent. Dig. tit. "Insurance," § 308.

84. *Alabama.*— Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361.

Illinois.— Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992.

Indiana.— Standard L., etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105; Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

Missouri.— Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668.

Texas.— Parish *v.* Mutual Ben. L. Ins. Co., 19 Tex. Civ. App. 457, 49 S. W. 153.

United States.— Mutual L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154.

Variance between original and copy.— If the application is incorporated by copy attached to the policy and there is a variance between the original and the copy, the original, expressly referred to in the copy, will control. Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

Unanswered questions in an application are not to be considered as any part of the contract. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129.

A letter accompanying an application and necessary to an understanding of its terms is to be regarded as a part of the application. Ætna L. Ins. Co. *v.* Frierson, 114 Fed. 56, 51 C. C. A. 424.

Construction of application see *supra*, IV, B, 1, a.

85. *Alabama.*— Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361.

Colorado.— Webb *v.* Bankers' L. Ins. Co., 19 Colo. App. 456, 76 Pac. 738.

Illinois.— Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992 [*reversing* 89 Ill. App. 59]; Blasingame *v.* Royal Circle, 111 Ill. App. 202.

Iowa.— Mandego *v.* Centennial Mut. Life Assoc., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877.

United States.— Kelley *v.* New York Mut. L. Ins. Co., 75 Fed. 637.

86. *Alabama.*— Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361.

Colorado.— Northwestern L. Assur. Co. *v.* Tietze, 16 Colo. App. 205, 64 Pac. 773.

Missouri.— Keller *v.* Home L. Ins. Co., 95 Mo. App. 627, 69 S. W. 612.

New Jersey.— Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

New York.— Holden *v.* Metropolitan L. Ins. Co., 11 N. Y. App. Div. 426, 42 N. Y. Suppl. 310.

87. Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 75 N. W. 101; United Brethren Mut. Aid Soc. *v.* Kinter, 12 Wkly. Notes Cas. (Pa.) 76. See Leonard *v.* New England Mut. L. Ins. Co., 22 R. I. 519, 48 Atl. 808.

88. Where, in a suit on a policy containing a clause making the application therefor a part of the policy, it appeared that the policy was issued in place of the original policy issued on the application introduced in evi-

made, but not a part of such application, is not incorporated into the policy by reference to the application.[89] Where the application is not referred to in the policy it does not control, modify, or add to its terms,[90] and where there is a conflict between the provisions of a policy and the application the policy will control.[91]

(II) *Statutory Requirement That Copy Be Attached to Policy.* It is provided by statute in several states that unless a copy of the application be incorporated into or attached to the policy, the company cannot rely upon, or take advantage of, any statements, conditions, or warranties contained in the application.[92] Under such statutory provisions the application, a copy of which has not been attached to the policy as required, cannot be pleaded or proved in behalf of the company;[93] but as against the company the provisions of the application may be pleaded and proved, as the company will not be allowed to take advantage

dence as the one referred to, and that no formal application for the new policy was ever made, it was held that it was competent for the insurer to show that both parties understood the reference to be to the application for the original policy, but that in the absence of any proof other than the reference itself it could not be so held. Nelson *v.* Equitable L. Assur. Soc., 73 Ill. App. 133.

89. Northwestern L. Assur. Co. *v.* Tietze, 16 Colo. App. 205, 64 Pac. 773; Union Cent. L. Ins. Co. *v.* Fox, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885.

90. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

91. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Logan *v.* Provident Sav. L. Assur. Soc., 57 W. Va. 384, 50 S. E. 529; Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689; McMaster *v.* New York L. Ins. Co., 183 U. S. 25, 22 S. Ct. 10, 46 L. ed. 64 [*reversing* 99 Fed. 856, 40 C. C. A. 119]; Glass *v.* Masons' Fraternal Acc. Assoc., 112 Fed. 495.

92. *Iowa.*— Johnson *v.* Des Moines Life Assoc., 105 Iowa 273, 75 N. W. 101; Cook *v.* Federal Life Assoc., 74 Iowa 746, 35 N. W. 500.

Kentucky.— Provident Sav. L. Assur. Soc. *v.* Puryear, 109 Ky. 381, 59 S. W. 15, 22 Ky. L. Rep. 980; Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875; Western, etc., L. Ins. Co. *v.* Galvin, 68 S. W. 655, 24 Ky. L. Rep. 444; Provident Sav. L. Assur. Soc. *v.* Beyer, 67 S. W. 827, 23 Ky. L. Rep. 2460.

Massachusetts.— Nugent *v.* Greenfield Life Assoc., 172 Mass. 278, 52 N. E. 440; Considine *v.* Metropolitan L. Ins. Co., 165 Mass. 462, 43 N. E. 201.

Ohio.— Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4; Dickmeier *v.* Prudential Ins. Co., 6 Ohio S. & C. Pl. Dec. 161, 4 Ohio N. P. 13.

Pennsylvania.— Fisher *v.* Fidelity Mut. Life Assoc., 188 Pa. St. 1, 41 Atl. 467; Hendel *v.* Reverting Fund Assur. Assoc., 2 Pa. Dist. 116; Cohen *v.* Home Mut. Life Assoc., 4 Pa. Co. Ct. 146.

See 28 Cent. Dig. tit. "Insurance," § 216; and *infra*, XIII, G, 2, b, (II).

A statutory provision prohibiting the making by a life insurance company of any contract of insurance or agreement as to such contract other than as plainly expressed in the policy is to be construed as including the application as a part of the policy, in view of the statutory provisions requiring a true copy of the application to be attached to the policy. Mutual L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154.

Answers to a medical examiner are not necessarily a part of the application to be attached by copy to the policy. Williams *v.* Prudential Ins. Co., 35 Pittsb. Leg. J. N. S. (Pa.) 12.

An application for revival of a lapsed policy is not such an application as is required to be attached to the policy by copy. Holden *v.* Metropolitan L. Ins. Co., 188 Mass. 212, 74 N. E. 337.

What law applicable.— The statutory provisions as to attaching copy of application which are in force within the jurisdiction in which the contract is finally consummated are applicable in this respect, although the application for the insurance is made in another state. Supreme Lodge K. of P. *v.* Hunziker, 87 S. W. 1134, 27 Ky. L. Rep. 1201; Leonard *v.* State Mut. L. Assur. Co., 27 R. I. 121, 61 Atl. 52, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25 [*affirming* 90 Fed. 390]. A statute relating to the attaching of a copy of the application to any policy "which has been issued in" the state does not apply to a contract fully made and executed in another state, although the assured is a resident of the state in which there is such statutory provisions and in which the suit is brought. Johnson *v.* New York Mut. L. Ins. Co., 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833. See also *infra*, IV, B, 7.

93. *Iowa.*— Cook *v.* Federal Life Assoc., 74 Iowa 746, 35 N. W. 500.

Kentucky.— Metropolitan L. Ins. Co. *v.* Moore, 117 Ky. 651, 79 S. W. 219, 25 Ky. L. Rep. 1613; Provident Sav. Life Assur. Soc. *v.* Beyer, 67 S. W. 827, 23 Ky. L. Rep. 2460.

Ohio.— Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4.

Pennsylvania.—Mahon *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 409, 22 Atl. 876; Pickett *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 79, 22 Atl. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661.

of its own wrong in failing to attach the copy.[94] If the copy attached is not a substantially correct and complete copy of the original application, the statute is not complied with and the application cannot be relied on by the company.[95]

7. With Reference to Place of Contract —a. Governed by Law of State Where Executed and Delivered. The general rule is that the contract of insurance is governed by the laws of the state where it is executed and delivered and becomes a binding contract so far as such laws relate to the nature, validity, and interpretation of the contract.[96] But as to the distribution of the proceeds, and the rights of the beneficiary with reference thereto, the law of the state where the contract is enforced will govern.[97]

United States.—Albro *v.* Manhattan L. Ins. Co., 119 Fed. 629.

And see the other cases cited in the preceding note.

To show fraud, however, statements of the applicant not included in any application may be proved. Norristown Title, etc., Co. *v.* John Hancock Mut. L. Ins. Co., 5 Montg. Co. Rep. (Pa.) 83.

94. Norristown Title, etc., Co. *v.* John Hancock Mut. L. Ins. Co., 132 Pa. St. 385, 19 Atl. 270; Cohen *v.* Home Mut. Life Assoc., 4 Pa. Co. Ct. 146; Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278.

95. Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 75 N. W. 101; Seiler *v.* Economic Life Assoc., 105 Iowa 87, 74 N. W. 941, 43 L. R. A. 537; Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Nugent *v.* Greenfield Life Assoc., 172 Mass. 278, 52 N. E. 440; Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599; Manhattan L. Ins. Co. *v.* Albro, 127 Fed. 281, 62 C. C. A. 213 [*affirming* 119 Fed. 629].

Small type.— The statute sometimes requires that the copy attached be plainly printed and not in small type. Letzler *v.* Pacific Mut. L. Ins. Co., 119 Ky. 924, 85 S. W. 177, 27 Ky. L. Rep. 372; Burruss *v.* National Life Assoc., 96 Va. 543, 32 S. E. 49.

A photographic copy in reduced size but legible has been held sufficient. Arter *v.* Northwestern Mut. L. Ins. Co., 130 Fed. 763, 65 C. C. A. 156.

96. *Arkansas.*— Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355.

Kentucky.— Hexter *v.* U. S. Life Ins. Co., 11 Ky. L. Rep. 903. And see Supreme Lodge K. of P. *v.* Hunziker, 87 S. W. 1134, 27 Ky. L. Rep. 1201.

Louisiana.— Grevenig *v.* Washington L. Ins. Co., 112 La. Ann. 879, 36 So. 790.

Massachusetts.—Johnson *v.* New York Mut. L. Ins. Co., 180 Mass. 407, 62 N. E. 733, 63 L. R. A. 833.

New Hampshire.— Seely *v.* Manhattan L. Ins. Co., 72 N. H. 49, 55 Atl. 425.

New York.— St. John *v.* American Mut. L. Ins. Co., 2 Duer 419 [*affirmed* in 13 N. Y. 31, 64 Am. Dec. 529].

Rhode Island.— Leonard *v.* State Mut. L. Assur. Co., 27 R. I. 121, 61 Atl. 52, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698.

Texas.— Cowen *v.* Equitable L. Assur. Soc. (Civ. App. 1904) 84 S. W. 404.

Wisconsin.— Presbyterian Ministers' Fund *v.* Thomas, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919.

United States.— New York Mut. L. Ins. Co. *v.* Cohen, 179 U. S. 262, 21 S. Ct. 106, 45 L. ed. 181; Supreme Council A. L. of H. *v.* Getz, 112 Fed. 119, 50 C. C. A. 153.

See 28 Cent. Dig. tit. "Insurance," § 293.

Place of suit.— A contract completely executed and delivered in a foreign state is not affected by the provisions of the statutes where suit is brought thereon. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

What law governs: Attaching copy of application to policy see *supra*, IV, B, 6, e, (II), note 92. Notice before forfeiture for nonpayment of premium or assessment see *infra*, X, C, 6, h, (I), text and note 15.

97. *Alabama.*— Continental L. Ins. Co. *v.* Webb, 54 Ala. 688.

Massachusetts.— Millard *v.* Brayton, 177 Mass. 533, 59 N. E. 436, 83 Am. St. Rep. 294, 52 L. R. A. 117.

Ohio.— New York L. Ins. Co. *v.* Block, 12 Ohio Cir. Ct. 224, 6 Ohio Cir. Dec. 166.

Pennsylvania.— Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. Rep. 900.

Canada.— National Trust Co. *v.* Hughes, 14 Manitoba 41.

See 28 Cent. Dig. tit. "Insurance," § 293.

Surrender value.— The statute of the state where the company is incorporated requiring a surrender value on lapsed policies is not applicable to a contract finally delivered in another state. Washington L. Ins. Co. *v.* Glover, 78 S. W. 146, 25 Ky. L. Rep. 1327.

Presumption as to law of another state.— The law of the state where the contract is executed is presumed in the absence of proof to be the same as that of the state in which suit is brought thereon. Ash *v.* Fidelity Mut. Life Assoc., 26 Tex. Civ. App. 501, 63 S. W. 944. Even though it is stipulated that the contract is to be construed according to the laws of a state named in the contract, where no evidence of those laws has been introduced they must be disregarded, since judicial knowledge does not extend to them. New York L. Ins. Co. *v.* Smith, 139 Ala. 303, 35 So. 1004.

Wagering policies.—It is said that a wagering policy cannot be enforced in a state in which such policies are invalid, although valid in the state where executed. McDermott *v.* Prudential Ins. Co., 7 Kulp (Pa.)

b. What Constitutes Final Execution and Delivery. The state where the policy is finally delivered by the agent of the company to the assured who there pays the premiums, delivery and payment of premium being essential to the final execution and taking effect of the contract, is the state in which the contract is made and by the laws of which it is to be construed, in the absence of any special provision to the contrary.[98] If the contract is to become effective on the approval of the application at the home office it is to be construed as a contract made in the state where the company thus accepts and approves the application, although the policy is subsequently delivered to the assured in another state.[99]

c. Place of Transacting Business. Under statutes requiring foreign companies to comply with prescribed provisions before being authorized to transact business in the state, a policy finally executed and delivered in such state to a person residing there is governed by the laws of that state.[1]

d. Place of Performance. Unless the parties to the contract have indicated some other intention the place of performance will ordinarily be deemed to be the place where the contract is finally executed and is to be construed as to performance by the laws of that state.[2] And the state where by the terms of the

246. But to the contrary it has been held that a wagering policy executed in another state, such policy being valid at common law, will be presumed to be valid in that state, although invalid by the law of the state in which suit is brought thereon. St. John *v.* American Mut. L. Ins. Co., 2 Duer (N. Y.) 419.

Beneficiaries.— Although by provision of the contract it is to be construed according to the laws of the state in which the company is incorporated, nevertheless in determining the rights of the parties under the contract in an action by beneficiaries to enforce it the contract is subject to the laws of the domicile of the assured. New York L. Ins. Co. *v.* Block, 12 Ohio Cir. Ct. 224, 6 Ohio Cir. Dec. 166. The beneficiary reviving a contract of insurance made by the assured in another state of which the latter continues to be a resident does not thereby make the laws of his own state applicable thereto, as the insured still remains the contracting party. Bottomley *v.* Metropolitan L. Ins. Co., 170 Mass. 274, 49 N. E. 438.

98. *Indiana.*— Wiestling *v.* Warthin, 1 Ind. App. 217, 27 N. E. 576.

Louisiana.— Lake Charles *v.* Equitable L. Assur. Soc., 114 La. 836, 38 So. 578; Grevenig *v.* Washington L. Ins. Co., 112 La. 879, 36 So. 790, 104 Am. St. Rep. 474.

Missouri.— Horton *v.* New York L. Ins. Co., 151 Mo. 604, 52 S. W. 356.

Ohio.— Plant *v.* Mutual L. Ins. Co., 26 Ohio Cir. Ct. 499.

Tennessee.— Roberts *v.* Winton, 100 Tenn. 484, 45 S. W. 673, 41 L. R. A. 275.

United States.— Supreme Lodge K. of P. *v.* Meyer, 198 U. S. 508, 25 S. Ct. 754, 49 L. ed. 1146 [*affirming* 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839 (*affirming* 82 N. Y. App. Div. 359, 81 N. Y. Suppl. 813)]; Albro *v.* Manhattan L. Ins. Co., 119 Fed. 629; Kelley *v.* Mutual L. Ins. Co., 109 Fed. 56; Fidelity Mut. Life Assoc. *v.* Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25 [*affirming* 90 Fed. 390]; Mutual Ben. L. Ins. Co. *v.* Robinson, 54 Fed. 580; Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 561.

Place of countersigning.— If the policy is sent to the agent of the company for delivery to the assured with the condition that it shall not become operative until countersigned by the agent and the premium paid, it is to be construed in accordance with the laws of the state where it is thus countersigned and delivered. Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398; Northwestern Mut. L. Ins. Co. *v.* Elliott, 5 Fed. 225, 7 Sawy. 17.

99. Voorheis *v.* People's Mut. Ben. Soc., 91 Mich. 469, 51 N. W. 1109; Equitable L. Assur. Soc. *v.* Trimble, 83 Fed. 85, 27 C. C. A. 404; Equitable L. Assur. Soc. *v.* Nixon, 81 Fed. 796, 26 C. C. A. 620.

Mailing of policy and premium note.— Where an application for life insurance was signed in Wisconsin and forwarded to the insurer's office in Pennsylvania, and there a policy was issued and mailed to the applicant, who in Wisconsin received it and mailed the insurer a note payable in Pennsylvania for the premium, it was held that the contract evidenced by the policy and note was a Pennsylvania one. Presbyterian Ministers' Fund *v.* Thomas, 126 Wis. 281, 105 N. W. 801, 110 Am. St. Rep. 919.

1. Corley *v.* Travelers' Protective Assoc., 105 Fed. 854, 46 C. C. A. 278; Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 561 [*affirming* 46 Fed. 439]. *Compare*, however, Seiders *v.* Merchants' Life Assoc., 93 Tex. 194, 54 S. W. 753, holding that the fact that the laws of Texas require foreign insurance corporations, as a condition precedent to their doing business in that state, to establish an office, and appoint an agent upon whom service of process can be made, does not, where the principal and premiums are made payable in another state, operate to make the contract performable in, and its legal effect to be determined by, the laws of Texas.

2. Bottomley *v.* Metropolitan L. Ins. Co., 170 Mass. 274, 49 N. E. 438; Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516.

contract the premiums are to be paid to the company and the loss is to be paid by the company to the insured is to be deemed the place of performance of the contract.[3]

e. Special Stipulations as to Law Which Shall Govern. By stipulation in the contract it may be provided that it is to be construed with reference to the law of a state other than that in which it is executed or to be performed.[4] But the parties cannot by such a stipulation prevent the statutes of the state in which the contract was executed from being applicable thereto.[5]

V. PREMIUMS, DUES, AND ASSESSMENTS.

A. Amount of Premium. Question can seldom arise as to the amount of the premium under a policy of life insurance, since it is generally fixed by the terms of the policy.[6] Where an extra premium is charged because of the condition or habits of the insured, and provision is made for subsequent reduction thereof if on reëxamination the company is satisfied of the removal of the cause for the extra charge, it is for the company to determine whether such cause has been removed, and the court will not interfere with its determination on a bill by the insured.[7]

B. Payment in General[8] — **1. AUTHORITY OF AGENT OF COMPANY TO ACCEPT PAYMENT.** Payment of premiums to a general agent of a life insurance company

3. *Arkansas.*—Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

Indiana.— Fidelity Mut. Life Assoc. *v.* McDaniel, 25 Ind. App. 608, 57 N. E. 645.

Texas.— Seiders *v.* Merchants' Life Assoc., 93 Tex. 194, 54 S. W. 753; Metropolitan L. Ins. Co. *v.* Bradley, (Civ. App. 1904) 79 S. W. 367 [*reversed* on other grounds in 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509].

United States.— Mutual L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159.

Canada.— National Trust Co. *v.* Hughes, 14 Manitoba 41; Equitable L. Assur. Co. *v.* Perrault, 26 L. C. Jur. 382.

In the absence of proof of the place of actual delivery it will be presumed that the contract is to be governed by the law of the state where the premiums are payable and payment of the insurance is to be made. Summitt *v.* U. S. Life Ins. Co., 123 Iowa 681, 99 N. W. 563.

4. Johnson *v.* New York L. Ins. Co., 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 211, 38 Pac. 1034; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 202, 38 Pac. 1031; New York Mut. L. Ins. Co. *v.* Hill, 118 Fed. 708, 55 C. C. A. 536 [*affirming* 113 Fed. 44]; New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132.

Waiver of statute.— In such case the provision of a statute of the state by the laws of which the contract is to be governed cannot be waived. New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

5. Dolan *v.* Mutual Reserve Fund Life Assoc., 173 Mass. 197, 53 N. E. 398; Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Fidelity Mut. Life Assoc. *v.* Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; Albro *v.* Manhattan L. Ins. Co., 119 Fed. 629; New York L. Ins. Co. *v.* Russell, 77 Fed. 94, 23 C. C. A. 43.

Statutes not incorporated.— A provision that the contract shall be governed by and construed according to the law of the state where the company is incorporated does not make the statute of such a state a part of the contract which is finally executed and delivered in another state and accordingly it was held that the insufficiency of notice of maturity of premium under the New York statute was immaterial in an action in Arkansas on a policy issued by a New York company, in which it was provided that the contract should be construed according to the laws of New York. Mutual Reserve Fund Life Assoc. *v.* Minehart, 72 Ark. 630, 83 S. W. 323; New York Mut. L. Ins. Co. *v.* Hathaway, 106 Fed. 815, 45 C. C. A. 655. See *infra*, X, C, 6, h, (I), text and note 15.

6. **Increase according to age.**— Under a contract providing for payment of premiums in accordance with the table of ages showing a gradual increase of the premium from the first age named to the last containing no figures for ages beyond sixty, it was held that the insured was not entitled to continue to pay premiums beyond the age of sixty at the rate fixed for that age, but that the premiums might still be increased thereafter proportionately to the increasing age. Nail *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1899) 54 S. W. 109.

"Level rate" policy explained see Ijams *v.* Provident Sav. L. Assur. Soc., 185 Mo. 466, 84 S. W. 51.

7. Manby *v.* Gresham L. Assur. Co., 29 Beav. 439, 7 Jur. N. S. 383, 31 L. J. Ch. 94, 4 L. T. Rep. N. S. 397, 9 Wkly. Rep. 547, 54 Eng. Reprint 697.

8. See also *infra*, X, C.

authorized to transact the company's business and without notice of any limitation of his authority to receive payments is sufficient to bind the company.[9] Payment to a general agent apparently authorized to receive it will be sufficient whether in conformity with the terms of the policy or not.[10] But payment to a special agent having no authority to receive payment or to a local examining physician is not payment to the company.[11] A requirement that payment be made at the company's principal office is not varied by an indorsement on the

Effect of custom or usage see CUSTOMS AND USAGES, 12 Cyc. 1068.

9. Mowry *v.* Home L. Ins. Co., 9 R. I. 346; Southern L. Ins. Co. *v.* McCain, 96 U. S. 84, 24 L. ed. 653. See, generally, PRINCIPAL AND AGENT.

Place of payment.— An agent authorized to collect premiums has implied authority to direct where premiums shall be paid, and the insured acting in pursuance of his direction or arrangement is protected until he has notice of revocation of such authority. O'Reilly *v.* Guardian Mut. L. Ins. Co., 1 Hun (N. Y.) 460.

Notice printed on the back of the policy to the effect that payments of premiums to the agent will not be deemed valid unless a receipt signed by the officers of the company is given for such payment is not a limitation on the power of a general agent and payment to such agent is valid without such a receipt. McNeilly *v.* Continental L. Ins. Co., 66 N. Y. 23. Such printed notice is waived where the agent is authorized to receive payment without a receipt being furnished him. McNeilly *v.* Continental L. Ins. Co., *supra*.

Waiver of restriction in policy.— A restriction in the policy as to the agent's power with reference to payment of premiums may be waived by general public announcement that he has authority to receive premiums without such restriction. Hartford L., etc., Ins. Co. *v.* Hayden, 90 Ky. 39, 13 S. W. 585, 11 Ky. L. Rep. 993.

Continuance of agency.— The agency once established continues binding on the company so far as to relieve the insured from a forfeiture on account of payments made or tendered to such agent without notice of revocation of authority. Braswell *v.* American L. Ins. Co., 75 N. C. 8; Seamans *v.* Northwestern Mut. L. Ins. Co., 3 Fed. 325, 1 McCrary 508.

Termination of agency.— Agency of a firm to receive payment of premiums is terminated by the death of one of the partners, and payment to the survivor with notice of such death is not valid payment to the company. Martine *v.* International L. Assur. Soc., 5 Lans. (N. Y.) 535, 62 Barb. 181.

Removal of agency from state.— If the company, being bound to have an agent in the state to whom premiums may be paid, revokes the authority of its agent for that purpose, the insured will not be in default if he tenders payment to the former agent and it is refused. Manhattan L. Ins. Co. *v.* Warwick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218.

Payment or tender to an agent in the Confederate states representing a northern insurance company was held sufficient to prevent forfeiture during the time intercourse between the two sections was interrupted by the civil war. Statham *v.* New York L. Ins. Co., 45 Miss. 581, 7 Am. Rep. 737; Martine *v.* International L. Assur Soc., 62 Barb. (N. Y.) 181; Robinson *v.* International L. Assur. Soc., 52 Barb. (N. Y.) 450 [*affirmed* in 42 N. Y. 54, 1 Am. Rep. 400]. But where tender to such agent was refused by him on account of limitations on his authority recognized by the policy, it was held that such tender was not binding on the company. New York L. Ins. Co. *v.* Davis, 95 U. S. 425, 24 L. ed. 453. And in a similar case it was held that the refusal of the agent to accept tender of one premium for want of authority did not relieve the insured from tendering subsequent premiums. Manhattan L. Ins. Co. *v.* Le Pert, 52 Tex. 504. *Compare*, however, New York L. Ins. Co. *v.* Clopton, 7 Bush (Ky.) 179, 3 Am. Rep. 290. Further as to the effect of war see *infra*, X, C, 8, c.

Suit by agent against insured.— Payment to the agent is deemed to be made to the company and if the agent pays the premium to the company he cannot in his own name sue to recover the amount thus paid, not being the assignee or successor in interest of the company. Chapin *v.* Betts, 14 Ohio Cir. Ct. 335, 7 Ohio Cir. Dec. 422.

Acceptance by agent of prepayment of premiums necessary to give effect to the policy see *supra*, III, D.

Authority of agent to accept subsequent payments of premiums to avoid forfeiture of the policy for non-payment see *infra*, XI.

Authority as to method of payment see *supra*, III, D; *infra*, V, B, 4.

10. Eclectic L. Ins. Co. *v.* Fahrenkrug, 68 Ill. 463.

Usage.— Where the company has been in the habit of accepting without objection payments made to agents otherwise than in accordance with the provisions of the policy, a payment in compliance with such usage is good. People *v.* Globe Mut. L. Ins. Co., 65 How. Pr. (N. Y.) 239; Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663.

11. Teeter *v.* United L., etc., Ins. Assoc., 159 N. Y. 411, 54 N. E. 72 [*affirming* 11 N. Y. App. Div. 259, 42 N. Y. Suppl. 119].

One who is a mere broker in securing insurance from a company, although he is the agent of other companies, cannot bind the company in which the insurance is procured by any arrangement as to the payment of premiums. How *v.* Union Mut. L. Ins. Co., 80 N. Y. 32.

margin of the instrument that receipts for premiums paid at agencies are to be signed by the officers of the company.[12]

2. By Whom Payment to Be Made — a. In General. Premiums may be paid by the insured or the beneficiary,[13] or by the agent of the company under an agreement between him and the insured or beneficiary.[14] Where a policy is payable to the personal representative of the insured, the fact that the premiums are paid by one who has no insurable interest, under the belief that the insurance is for his benefit, does not render the policy void.[15]

b. Liability to Beneficiary For Breach of Agreement to Keep Policy in Force. One who obligates himself by valid contract to pay the premiums necessary to keep a policy in force is liable in damages for a breach of the contract by which the policy becomes forfeited.[16] The measure of damages for breach of such an agreement is the amount lost to the person who would have been entitled to the proceeds of the policy.[17]

3. Time For Payment[18] — a. In General. Premiums are payable on the dates fixed by the contract, and the fact that the policy does not go into effect on a date corresponding to the date fixed for payment of subsequent premiums does not change the provisions of the contract as to when such subsequent premiums become payable.[19] If, however, the time for payment of a subsequent premium is made to depend upon the time of dating or delivering the policy, the insured may rely on such provision and will not be in default for not paying in accordance with a stipulation inserted without his knowledge making the premium payable on a different date.[20] The policy may provide for or allow the annual premium to be paid in instalments,[21] in which case each instalment must be paid

12. New York L. Ins. Co. *v.* Davis, 95 U. S. 425, 24 L. ed. 453.

13. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

Forfeiture for non-payment see *infra*, X, C.

Where a husband acting for his wife in procuring insurance for her on his life executes a loan certificate to the company for part of the premium, thus putting the policy in force will not be allowed to repudiate the provision thus made. Provident Sav. L. Assur. Soc. *v.* Duncan, 1 Tenn. Ch. App. 562.

14. See *supra*, III, D, 2. See also Fire Insurance, 19 Cyc. 607.

15. Prudential Ins. Co. *v.* Cummins, 44 S. W. 431, 19 Ky. L. Rep. 1770.

16. Ainsworth *v.* Backus, 5 Hun (N. Y.) 414; *In re* Arthur, 14 Ch. D. 603, 49 L. J. Ch. 556, 43 L. T. Rep. N. S. 46, 28 Wkly. Rep. 972.

Rights and liabilities of assignee of policy as to premiums see *infra*, VI, C, 5, c, (II).

17. The creditor holding a policy of insurance on the life of his debtor which the debtor has covenanted to keep up, on forfeiture of the policy for default of debtor to pay premiums is entitled to recover the sum which the insurance company would accept as present payment by way of commutation of annual premiums to keep the policy alive. *Ex p.* Bank of Ireland, L. R. 17 Ir. 507. See also Hawkins *v.* Coulthurst, 5 B. & S. 343, 10 Jur. N. S. 876, 33 L. J. Q. B. 192, 12 Wkly. Rep. 825, 117 E. C. L. 343.

Damages, not amount which should have been paid.— On breach of covenant to pay premiums the covenantee is entitled to recover only the damage suffered by such breach and not the amount of premiums which the covenantor should have paid. Browne *v.* Price, 4 C. B. N. S. 598, 4 Jur. N. S. 882, 27 L. J. C. P. 290, 6 Wkly. Rep. 721, 93 E. C. L. 598; National Assur., etc., Assoc. *v.* Best, 2 H. & N. 605, 27 L. J. Exch. 19, 6 Wkly. Rep. 78.

18. See also *infra*, X, C, 6.

Waiver of forfeiture for non-payment by extending time for payment see *infra*, XI.

19. Sydnor *v.* Metropolitan L. Ins. Co., 26 Pa. Super. Ct. 521; Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513; Armstrong *v.* Provident Sav. L. Assur. Soc., 2 Ont. L. Rep. 771.

Grace.— A rule allowing thirty days grace does not apply to premiums coming due prior to the adoption of the rule. Nall *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1899) 54 S. W. 109.

Notice see *infra*, X, C, 6.

20. McMaster *v.* New York L. Ins. Co., 78 Fed. 33 [*reversed* on other grounds in 87 Fed. 63, 30 C. C. A. 532]. Where the policy was issued in express consideration of prepayment of premium for two years, it was held that such prepayment kept the policy in force for two years from date of actual issuance of policy and payment of premium, even though another premium became due by the terms of the policy before the expiration of the two years. Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213.

21. Under a policy giving the assured the option of paying the annual advance premium in instalments, on failure of the insured to express his election the contract was construed as one insuring him from year

when it falls due according to the terms of the contract in order to keep the policy in force.[22]

b. Right to Discount. A discount allowed by an insurance company on punctual payment of premiums belongs, in the absence of an agreement to the contrary, not to the agent, but to the insured.[23]

4. Method of Payment — a. In General. As a rule premiums must be paid in cash and an agent has no implied authority to accept payment in property or by giving credit on an indebtedness due to himself individually.[24] It has been held, however, that he may accept that portion which is equivalent to his commission in property instead of cash.[25]

b. By Credit on Account. If a mutual account is kept between the company and the insured a charging of a premium to the insured by the officers of the company is equivalent to payment.[26] The same is true where the company holds funds to the credit of a policy and the insured has requested that they be applied in renewal thereof.[27] But the fact that the company charges a premium to its agent is not equivalent to payment as between the company and the insured.[28]

c. By Note, Check, or Draft. The company or its general agent, where the insured has no notice of any limitations on his authority, may accept a note in payment of a periodical premium or a part thereof, and such acceptance constitutes payment as fully as though made in cash.[29] Therefore if the insured is entitled to paid-up insurance for the portion of the amount named in the policy depending on the number of premiums paid, the paid-up insurance to which he is entitled is to be

to year with the right, as to the first year at least, to pay in instalments. Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156.

22. Under a provision for payment of an advance annual premium in instalments the payment of the first instalment does not extend credit for other instalments for the end of the year but they must be paid when they fall due, nor does a provision in such a policy that from the amount to be paid on the death of the insured the company may deduct any balance of the year's premium not paid at the commencement of the year extend credit to the insured to the end of the year for subsequent instalments. Howard *v.* Continental L. Ins. Co., 48 Cal. 229.

23. Reg. *v.* Parr, 39 L. J. Ch. 73, 21 L. T. Rep. N. S. 555, 18 Wkly. Rep. 110.

24. *Illinois.*— John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181].

Indiana.— Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

Montana.— Sullivan *v.* Germania L. Ins. Co., 15 Mont. 522, 39 Pac. 742, holding that the local agent and manager of an insurance company had no power to agree that the premiums on a policy issued by him should be credited on account of rents due by him to the policy-holder for offices rented for the company and rooms rented for himself.

New York.— Cyrenius *v.* Mutual L. Ins. Co., 18 N. Y. App. Div. 599, 46 N. Y. Suppl. 549.

Texas.— Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720.

United States.— Hoffman *v.* John Hancock Mut. L. Ins. Co., 92 U. S. 161, 23 L. ed. 539.

See also *supra*, III, D, 1; *infra*, X, C, 1.

Payment in Confederate money sustained see Sands *v.* New York L. Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Robinson *v.* International L. Assur. Soc., 42 N. Y. 54, 1 Am. Rep. 400 [*affirming* 52 Barb. 450].

25. John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181].

26. Butler *v.* American Popular L. Ins. Co., 42 N. Y. Super. Ct. 342. See also *infra*, X, C, 7, a, text and note 43.

27. Provident Sav. L. Assur. Soc. *v.* King, 117 Ill. App. 556 [*affirmed* in 216 Ill. 416, 75 N. E. 166].

28. Wright *v.* Equitable L. Assur. Soc., 41 N. Y. Super. Ct. 1; Acey *v.* Fernie, 10 L. J. Exch. 9, 7 M. & W. 151.

29. *Arkansas.*— Mutual L. Ins. Co. *v.* Abbey, (1905) 88 S. W. 950.

Georgia.— Massachusetts Ben. L. Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. And see Mutual Reserve Fund Life Assoc. *v.* Stephens, 115 Ga. 192, 41 S. E. 679.

Indiana.— Franklin L. Ins. Co. *v.* Wallace, 93 Ind. 7; Northwestern Mut. L. Ins. Co. *v.* Little, 56 Ind. 504.

Massachusetts.— Fergison *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

Michigan.— Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830; Michigan Mut. L. Ins. Co. *v.* Bowes, 42 Mich. 19, 51 N. W. 962.

Minnesota. — Symonds *v.* Northwestern Mut. L. Ins. Co., 23 Minn. 491.

Nebraska.— Union L. Ins. Co. *v.* Parker, 66 Nebr. 395, 92 N. W. 604, 103 Am. St. Rep. 714, 62 L. R. A. 390.

Ohio.— Northwestern Mut. L. Ins. Co. *v.* Bonner, 36 Ohio St. 51.

Pennsylvania.— Security L. Ins., etc., Co. *v.* Elliott, 3 Wkly. Notes Cas. 504.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

determined by taking into account the premiums paid in notes.[30] So payment may be made by a check or a draft on a third person, if it is accepted by the company as payment.[31]

5. PAYMENT BY DIVIDENDS. Premiums may be paid by the application of dividends declared to the policy-holder.[32] So on the expiration of insurance under the term plan the insured may be entitled to dividends which he can apply on premiums for renewed insurance.[33] The credit to which the insured is entitled on his premiums by reason of the dividends earned is dependent on the action of the company within its authority in declaring the amount of such dividends.[34]

6. EVIDENCE OF PAYMENT. A receipt for a premium paid is not a new contract

Utah.— Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

Canada.— Moffatt *v.* Reliance Mut. L. Assur. Soc., 45 U. C. Q. B. 561.

See 28 Cent. Dig. tit. "Insurance," § 398. And see *supra*, III, D, 3, a.

Ratification.— The acceptance by the agent of a note for a portion of the premium will bind the company where, with knowledge thereof, it does not repudiate his action. New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680. See *supra*, III, D, 3, a, (II).

The acceptance of a note for the annual premium is a waiver of payment of premium and brings into operation conditions of the policy referring to payment by note. Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

The transfer of the note operates as payment and the company cannot afterward forfeit the policy for non-payment. Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537.

Renewal notes.— Payment of a subsequent premium may be made with the consent of the company by giving a new note in renewal of preceding notes and including the amount of such premium. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358. But under an agreement by which a note was executed for a premium which was to be renewed at the request of the insured until three annual payments had been made it was held that the insured was not entitled to a renewal without tender of cash payment of the next annual premium, the agreement not requiring that notes be accepted by the company for subsequent premiums. Mutual L. Ins. Co. *v.* Smith, 98 Ga. 771, 25 S. E. 727.

Note of agent.— Where the agent gave his note for the amount of the premium which was, however, not delivered to the company and was destroyed by the agent afterward on receipt of the premium it was held that the execution of the note by the agent did not constitute payment. Reese *v.* Fidelity Mut. Life Assoc., 111 Ga. 482, 36 S. E. 637.

Payment of first premium by note to put policy into effect see *supra*, III, D, 3, a, (I).

Sufficiency of payment by note or check to prevent forfeiture see *infra*, X, C, 7, c.

Forfeiture for non-payment of premium note see *infra*, X, C, 2.

30. Northwestern Mut. L. Ins. Co. *v.* Bonner, 36 Ohio St. 51; Bussing *v.* Life Ins. Co., 6 Ohio Dec. (Reprint) 607, 7 Am. L. Rec. 52.

31. Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Northwestern L. Assur. Co. *v.* Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61; Mutual L. Ins. Co. *v.* Munson, 2 Tex. Unrep. Cas. 649. See also *infra*, X, C, 7, d.

Time of mailing check.— Where the agent received a check in payment of a premium and directed it to be mailed to the company the time of mailing was held to be the time of payment, the check being honored on presentation. Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

Check of third person not accepted.— Where the insured arranged with a mercantile company that the premium on his policy should be paid by such company by check, but the check was not sent in time and was refused by the company with notice to the mercantile company of that fact, it was held that payment had not been made, although the insured had received no notice of the non-acceptance of the check. Mullins *v.* Hartford L. Ins. Co., 26 Tex. Civ. App. 383, 63 S. W. 909.

32. New York L. Ins. Co. *v.* Clemmitt, 77 Va. 366; Manhattan L. Ins. Co. *v.* Hoelzle, 16 Fed. Cas. No. 9,025. See also *infra*, X, C, 7, e.

Dividends applied to loans.— It may be provided in the policy that dividends or profits are applicable to premium loans already made rather than to advance premiums. Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355.

On paid-up insurance.— If the insured is entitled to proportionate paid-up insurance, depending on the premiums paid, the dividends applied to the payment of premiums are to be taken into account. Hogue *v.* Northwestern Mut. L. Ins. Co., 114 Fed. 778.

33. Real Estate Title Ins., etc., Co. *v.* Ætna L. Ins. Co., 181 Pa. St. 61, 37 Atl. 639.

34. Ætna L. Ins. Co. *v.* Hartley, 67 S. W. 19, 68 S. W. 1081, 24 Ky. L. Rep. 57; Fry *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1896) 38 S. W. 116.

Clerical error.— Under a stipulation that dividends shall be applied in payment of premiums so as to keep the policy in force the company is not estopped by clerical error in sending out notices with reference to one premium from afterward demanding premiums at the proper rate on account of the mistake. Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519.

extending the insurance but evidence of payment required to avoid forfeiture of the policy.[35] It is evidence of the fact of payment.[36]

C. Assessments — 1. Promise to Pay. The fact that a contract with an assessment insurance company is unilateral, in that the company has made a promise to pay the death loss, while the insured has not agreed to pay assessments, does not avoid the contract, where the company has actually received assessments.[37]

2. Power to Make, and Validity.[38] The members of a mutual company are bound by the acts of the managers or directors in making assessments to meet losses and expenses,[39] and so long as the latter act within the scope of their authority the members cannot complain that the assessments are unreasonable.[40] And, when authorized, the rate of assessment may be increased as the experience of the company may require.[41] Assessments, however, must be such as are

35. Northwestern Mut. L. Ins. Co. *v.* Amerman, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799.

36. Prince of Wales L., etc., Assur. Co. *v.* Harding, E. B. & E. 183, 4 Jur. N. S. 851, 27 L. J. Q. B. 297, 96 E. C. L. 183.

Signature of receipt.— A stipulation that the receipt given for payment of premium must be signed by the president or secretary is intended only to protect the company against unauthorized payment to local agents or collectors and has no application if the money is sent directly to the company's office. Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302.

A receipt signed by the insured himself as clerk of the general agent of the company is insufficient to establish the fact of payment. Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389.

37. Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966.

38. **Levying and collection of assessments in case of insolvency** see Insurance, 22 Cyc. 1407.

Mutual benefit associations see Mutual Benefit Insurance.

39. **Expenses.**— It is proper, independently of any statutory provision, to pay expenses out of assessments, and to set aside a certain percentage of assessments for such purpose. Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321.

Assessments for reserve fund sustained see Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321.

40. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854; Gaut *v.* Mutual Reserve Fund Life Assoc., 121 Fed. 403; Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169. See also Manby *v.* Gresham L. Assur. Soc., 29 Beav. 439, 7 Jur. N. S. 383, 31 L. J. Ch. 94, 4 L. T. Rep. N. S. 397, 9 Wkly. Rep. 547, 54 Eng. Reprint 697. And see Mutual Benefit Insurance.

41. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854; Gaut *v.* Mutual Reserve Fund Life Assoc., 121 Fed. 403; Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169. See also Fullenwider *v.* Supreme Council R. L., 73 Ill. App. 321; Nall *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1899) 54 S. W. 109. And see Mutual Benefit Insurance.

Where the constitution of a mutual life insurance company doing business on the assessment plan authorized the board of directors to fix the amount of each assessment at such sum as it should deem necessary to meet death losses, and apportion the same among the members, and its policies provided that they should be governed by and construed according to the constitution, it was held that a memorandum on the back of a policy giving a table of rates on each one thousand dollars of insurance, which "shall be the basis of the assessment rate for each member according to the age," must be construed as merely fixing the basis for apportionment as between the members of different ages, and at most as an estimate of the probable cost of insurance, the accuracy of which would be determined by the actual experience of the company, and not as a contract that the assessments should not exceed those given. Haydel *v.* Mutual Reserve Fund Life Assoc., *supra*.

Dependent upon age.— A clause in the policy of an assessment association providing that the rate of assessment may be changed each five years to correspond with the actual mortality experience of the association allows it to change the rates as to different ages to meet the results of its experience. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854. See also Gaut *v.* Mutual Reserve Fund Life Assoc., 121 Fed. 403; Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169. Where the charter of a mutual assessment life insurance company gives it the power to change the rate or basis of assessments upon its policy-holders from time to time, and its contracts do not prohibit such change, the fact that it changes its method and graduates its assessments according to the age of the policy-holder when each assessment is made, instead of basing them on his age when the policy was issued, which was the method pursued for a number of years, does not entitle a policy-holder to refuse to pay the same, and to recover damages for breach of contract, unless it is shown that the increase was fraudulent or unnecessary, although the change increased the assessments to such an extent as to render them prohibitive to persistent members. Gaut *v.* Mutual Reserve Fund Life Assoc., *supra*.

authorized by the constitution and by-laws of the company and by the policies or certificates issued to the members assessed.[42]

3. WHEN PAYABLE. Under a provision of the contract and by-laws by which notice of an assessment is to be given to the member, the time allowed after notice for payment commences to run from the time when the notice is or should be received by the member.[43] And the period of limitation on an action to recover such an assessment commences to run from the time when the assessment is payable under the provisions in accordance with which the notice is given.[44]

4. TIME OF QUESTIONING VALIDITY. The time within which the validity of an assessment may be questioned may be limited by the provisions in the by-laws.[45]

Condition and application of reserve fund.— A provision of the constitution of an assessment life insurance company that its reserve fund above a certain sum in excess of sums represented by outstanding bonds "may be applied to the payment of claims in excess of the American Experience Table of Mortality," or to make up any deficiency existing in the death fund after the collection of an assessment, is permissive rather than mandatory; and where other provisions vest the board of directors with power to devote the reserve fund to other purposes, it cannot be held that an assessment was invalid because the reserve fund was largely in excess of the sum named. Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169. And a provision that at the expiration of each period of five years the reserve fund shall be apportioned between the existing members in each class, which shall include the holders of all policies issued in the same year, and bonds be issued to each member for his proportion, the principal of which after ten years may be used in payment of assessments, and that at such apportionment "the rate of assessment may be changed to correspond with the actual mortality experience of the association," cannot be construed to deprive the directors of the power given them by other provisions, and necessary to the continued life of the company, to fix the amount of each assessment at such sum as might be necessary to meet the company's losses. Haydel *v.* Mutual Reserve Fund Life Assoc., *supra*.

42. Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 61 N. W. 331; Moore *v.* Lichtenberger, 26 Pa. Super. Ct. 268; Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854; Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556.

Anticipation of death losses.— Under articles of association providing that "upon every death loss an assessment may be made on the policy-holders in the company, in such amounts, and under such regulations, as shall be prescribed in the by-laws," assessments can only be made for and upon death losses that have previously occurred, and not merely on the basis of losses which may be anticipated in the future. Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 61 N. W. 331.

Unauthorized increase.— An increase in the rate of assessments which is not made with reference to the actual mortality experience of the association, as the policy expressly provides in the case of an increase, is unauthorized, and the insured's failure to pay it does not forfeit his membership or his rights under the policy. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

If a life association adopts an unauthorized basis of assessment, and, because a member refuses to pay, declares his policy forfeited and disclaims all liability, he may consider the policy at an end and sue immediately for its value. Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854. But mere notice by an assessment insurance company that if certain increased assessments are not paid in a given time it will declare the contract void is a conditional repudiation, and no action will lie for the breach of the contract until the company declares the contract void. Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556.

Estoppel.— A member of a life insurance association who assents to an increase in his assessments by voting therefor at a stock-holder's meeting cannot complain that it is unreasonable (Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854, where the vote was by proxy); but the mere fact that illegal assessments have been paid by a policy-holder does not estop him to object to subsequent assessments on the same basis as unauthorized (Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 61 N. W. 331).

Construction of contract by parties.— It has been held, however, that when the provisions of a policy leave it in doubt as to whether a limitation was thereby placed on the power of the company to make assessments exceeding a certain rate, the making of numerous assessments above such rate, and their payment by the policy-holder without objection, constitutes a construction by the parties which will be followed by the courts in determining their respective rights. Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169.

43. Ferrenbach *v.* Mutual Reserve Fund Life Assoc., 121 Fed. 945.

44. Hope Mut. L. Ins. Co. *v.* Taylor, 2 Rob. (N. Y.) 278.

45. Survick *v.* Valley Mut. Life Assoc., (Va. 1895) .23 S. E. 223.

D. Actions For Premiums or Assessments — 1. Recovery of Premiums or Assessments. Action may be maintained by the company to recover a premium or assessment which has become due and payable, although there may be a right of forfeiture because of non-payment.[46] That the company has gone into liquidation during the life of the policy is no defense in an action for the premium where the company is solvent and has reinsured its risks with a solvent company.[47] Under a statute prohibiting any order enjoining a domestic insurance corporation otherwise than on the application of the attorney-general, it was held that an injunction could not be maintained against a coöperative company on the application of a member to stay enforcement of assessments against him.[48]

2. Actions on Premium Notes — a. By Whom Brought. Action on a premium note may be brought in the name of the company or in the name of the agent to whom it is executed or to whom it has been transferred by the company.[49]

b. Defenses. In an action by a life insurance company on a premium note it is a good defense that the note was not executed by him or was never delivered as a binding contract,[50] that it is without consideration,[51] because, for example, the contract has never taken effect by reason of want of authority of the agent

46. New Era Life Assoc. *v.* Rossiter, 132 Pa. St. 314, 19 Atl. 140; Equitable Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092. A stipulation in a policy of life insurance that it is not to become operative until payment of the cash premium, being entirely for the benefit of the company, it may waive the same and deliver the policy and sue the insured for the premium. New York L. Ins. Co. *v.* Stone, 42 Mo. App. 383.

Evidence of membership.— In an action against a member of a mutual company for an assessment the application for insurance and entries on the books showing the issuance of a policy were held sufficient to establish the fact of membership, although defendant denied the issuance of a policy. New Era Life Assoc. *v.* Rossiter, 132 Pa. St. 314, 19 Atl. 140.

An agent cannot sue the insured for a premium advanced by him. The obligation of the insured is to pay the premium to the company and the agent does not, by payment of the premium, become assignee of or successor to the company with reference to such obligation. Chapin *v.* Betts, 14 Ohio Cir. Ct. 335, 7 Ohio Cir. Dec. 422.

Damages for refusal to accept policy.— Where an applicant for a policy of insurance binds himself to pay the first premium on presentation of the policy, but it is also agreed that the company shall not incur any liability until the premium has been actually paid and received by the company, and the application is accepted by the company and a policy issued and tendered to the applicant, and he refuses to accept the same, the company cannot recover the whole amount of the premium as liquidated damages, but are entitled to such damages only as have been occasioned by the applicant's refusal to accept the policy. Royal Victoria L. Ins. Co. *v.* Richards, 31 Ont. 483.

Term insurance.— If the contract is for insurance for a specified term only with privilege to the insured to continue it by paying additional premiums from time to time, there is no obligation on the part of insured to pay such additional premiums. Union Mut. L. Ins. Co. *v.* Adler, (Ind. App. 1905) 73 N. E. 835, 75 N. E. 1088.

Limitation of action to recover assessment see *supra*, V, C, 3, text and note 44.

47. Equitable L. Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092. But as the member is not bound to accept insurance in a company to which his insurer has transferred its business, he is liable after such transfer for only so much of the premium as is necessary to cover the period during which the original insurance was in force. Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504.

48. Seymour *v.* Mutual Reserve Fund Life Assoc., 14 Misc. (N. Y.) 151, 35 N. Y. Suppl. 793.

49. *Delaware.*— Maher *v.* Moore, (1898) 42 Atl. 721.

Michigan.— Marskey *v.* Turner, 81 Mich. 62, 45 N. W. 644.

North Carolina.— Roddey *v.* Talbot, 115 N. C. 287, 20 S. E. 375.

Vermont.— Norton *v.* Gleason, 61 Vt. 474, 18 Atl. 45.

Canada.— Alexander *v.* Taylor, 25 L. C. Jur. 252.

50. **Validity of signature.**— The insured cannot set up by way of defense in an action against him on a premium note that the note was not signed by him, where he has accepted the benefit of the contract of insurance on the assumption by the company as known to him that such note bore his signature. Dean *v.* Ætna L. Ins. Co., 62 N. Y. 642.

Delivery.— That the note sued on was never delivered to the company as a binding contract is a good defense, whatever may have been the authority of the company's agent in the transaction, and however ignorant the company may have been of its non-delivery. Michigan L. Ins. Co., 26 Ill. App. 349.

51. **Accommodation note.**— Where a mutual company had only authority under its charter to accept notes for premiums, it was held that no recovery could be had on a

who entered into the same,[52] or because of rejection of the application by the company, the note having been given in advance for the first premium;[53] that the preliminary contract for insurance in connection with which the note was executed has been rescinded by defendant for failure of the company to comply with the terms of such contract;[54] that defendant has returned the policy, as authorized by the preliminary contract, because not satisfactory;[55] that the contract under which the note was given was illegal because in violation of a statute;[56] or that the note was obtained by false and fraudulent representations and defendant has seasonably rescinded the contract on that ground.[57] The insured cannot rescind for breach of contract after the insurance has gone into effect and he has enjoyed to some extent the benefit of insurance, for there is not an entire failure of consideration;[58] but in such case he may recoup or set off such damages as he has sustained in an action on the premium note.[59] The insured must exercise his right to rescind within a reasonable time after he becomes aware by the delivery to him of the policy that the company has not complied with its agreement.[60] Failure of the company to carry out agreements as to something to be done by it after the policy takes effect will not entitle the insured to defend

note given by way of accommodation by one who was not a member. Mutual Ben. L. Ins. Co. *v.* Davis, 12 N. Y. 569.

Note to agent who pays premium.— Although a policy of life insurance stipulates on its face that it shall not take effect until the first premium is paid, it is not rendered invalid because the application signed by the insured before he receives the policy, and which is copied in and made a part of the policy, states that the first premium has not been paid, when as a matter of fact this first premium is, before the delivery of the policy, paid to the company by the agent who writes the insurance, and the payment of such premium by the agent, in pursuance of an agreement between him and the insured, is a valuable consideration for a promissory note given to the agent by the insured. Dunn *v.* Abrams, 97 Ga. 762, 25 S. E. 766.

52. Dunham *v.* Morse, 158 Mass. 132, 32 N. E. 1116, 35 Am. St. Rep. 473; Anchor L. Ins. Co. *v.* Pease, 44 How. Pr. (N. Y.) 385.

53. Woods *v.* Van Kirk, 5 Pa. Dist. 135, 17 Pa. Co. Ct. 158.

54. Parker *v.* Bond, 121 Ala. 529, 25 So. 898; Jones *v.* Gilbert, 93 Ga. 604, 20 S. E. 48; Franklin L. Ins. Co. *v.* Cardwell, 65 Ind. 138 (holding, however, that the answer was not sufficient to set up total or partial failure of consideration); Sun Mut. L. Ins. Co. *v.* Beland, 5 Montreal Leg. N. 42.

55. Parker *v.* Bond, 121 Ala. 529, 25 So. 898.

56. State L. Ins. Co. *v.* Strong, 127 Mich. 346, 86 N. W. 825 (holding that under Comp. Laws (1897), § 7219, prohibiting any discrimination by life insurance companies between insured of the same class as to rates, dividends, or benefits, or the allowance of any valuable consideration not specified in the policy, as an inducement to insurance, a premium note given by an insured who, by a special contract, was to be a member of an advisory board, and to receive advantages over other members not belonging to such board could not be enforced, as the contract of insurance and such special contract were part of one transaction, forming the consideration for the note, and within the prohibition of such section); Tillinghast *v.* Craig, 17 Ohio Cir. Ct. 531, 9 Ohio Cir. Dec. 459 (holding that a note given for balance of premium after deducting an unlawful rebate is void).

57. Allen *v.* Smith, (Ala. 1905) 39 So. 615 (holding, however, that the evidence was insufficient to support a verdict that a note was obtained by fraud); Penn Mut. L. Ins. Co. *v.* Crane, 134 Mass. 56, 45 Am. Rep. 282; Norton *v.* Gleason, 61 Vt. 474, 18 Atl. 45.

Retention of the policy and delay in rescinding may bar such defense. Allen *v.* Smith, (Ala. 1905) 39 So. 615; King *v.* Mayes, 3 Indian Terr. 362, 58 S. W. 573; National Life, etc., Co. *v.* Omans, 137 Mich. 365, 100 N. W. 595; Roddey *v.* Talbot, 115 N. C. 287, 20 S. E. 375; Norton *v.* Gleason, 61 Vt. 474, 18 Atl. 45; Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22. See *supra*, IV, A, 2, a.

What constitutes fraud as ground for rescission see *supra*, IV, A, 2, a.

Limitations on right to rescind see *supra*, IV, A, 2, a.

58. Franklin L. Ins. Co. *v.* Cardwell, 65 Ind. 138; Life Assoc. of America *v.* Cravens, 60 Mo. 388; Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504; Jackson *v.* Alabama Gold L. Ins. Co., 1 Tex. App. Civ. Cas. § 750; Home Life Assoc. *v.* Walsh, 36 Nova Scotia 73.

59. Life Assoc. of America *v.* Cravens, 60 Mo. 388; Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504.

60. Porter *v.* Holmes, 122 Ga. 780, 50 S. E. 923; Leigh *v* Brown, 99 Ga. 258, 25 S. E. 621; Jones *v.* Methvin, 97 Ga. 449, 25 S. E. 318; Jones *v.* Gilbert, 93 Ga. 604 20 S. E. 48; Perry *v.* Archard, 1 Indian Terr. 487, 42 S. W. 421; Life Assoc. of America *v.* Cravens, 60 Mo. 388; Roddey *v.* Talbot, 115 N. C. 287, 20 S. E. 375; Fennell *v.* Zimmerman, 96 Va. 197, 31 S. E. 22.

against his premium note.[61] And the right of the company to avoid the policy on account of a breach of conditions subsequent does not entitle the insured to defend against his premium note on the ground that it is without consideration.[62] It is no defense in an action on a premium note that liability under the policy is suspended while the note is overdue and unpaid,[63] or that the company has gone into liquidation during the life of the policy, where it is solvent and has reinsured its risks with a solvent company.[64]

c. Assessment Notes. It is sometimes the practice of companies doing business on the assessment plan to take notes for premiums which are absolute on their face but are security only for such assessments as may be duly made upon them, and they can be enforced only to the extent of such assessments.[65]

E. Recovery of Premiums Paid — 1. Where No Insurance Has Been Effected or Performance Is Prevented. Where an applicant for life insurance pays the premium in advance and no insurance is effected, or if the policy is void, so that the consideration entirely fails, he may as a rule recover the premiums paid.[66] If the company receives a premium for a form of policy which it has no power to issue the insured may recover back the premium paid or any increased premium,[67] or he may recover anything paid for a privilege for which the com-

61. Cunyus *v.* Guenther, 96 Ala. 564, 11 So. 649 (promise to allow an advance dividend); Harris *v.* Scrivener, (Tex. Civ. App. 1903) 78 S. W. 705, (Civ. App. 1904) 79 S. W. 827 (agreement to change beneficiary).

As to fraud see *supra*, IV, A, 2, a.

62. Economic Life Assoc. *v.* Spinney, 116 Iowa 385, 89 N. W. 1095.

63. Equitable Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092. A condition in an insurance policy that a note taken in settlement for a premium should not be deemed a payment of the premium, but only an extension of the time for such payment, and that if the note was not paid at maturity the company should not be liable for any loss occurring while the note was so dishonored, but the whole amount of the premium included in the note should be considered as earned, and be collectable by the company, was construed to authorize the taking of such a note, and it was held that when a note was so taken and the policy was delivered, the note became and remained operative until its maturity, and that, if the note was not paid when due, the operation of the policy was suspended until the note should be paid, and that the delivery of the policy to the assured was a sufficient consideration to support the note as between the insured and the company. Marskey *v.* Turner, 81 Mich. 62, 45 N. W. 644.

64. Equitable Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092.

Transfer of assets.— Where the company transfers all its assets to another company a policy-holder is not bound to continue his insurance in the new company but is entitled to treat his contract as at an end and demand whatever damages he has sustained. Such a transfer, however, after the policy has been in force is not a complete defense in an action on the premium note, but entitles the policy-holder to a deduction to the extent of the value of the insurance for the term covered by the note subsequent to the transfer. Vette *v.* Evans, 111 Mo. App. 588, 86 S. W. 504.

65. Mutual Ben. L. Ins. Co. *v.* Jarvis, 22 Conn. 133. See also Fire Insurance, 19 Cyc. 611.

Evidence.— Although the declaration of an agent of an insurance company taking a note to it is inadmissible to vary the contract, yet it is admissible to show that the note, although absolute in terms, was received by the company in connection with its charter and printed regulations as security only for assessments to be made. Mutual Ben. L. Ins. Co. *v.* Jarvis, 22 Conn. 133.

Assessments on insolvency or dissolution of company see Insurance, 22 Cyc. 1407, 1423.

66. *Connecticut.*— Hogben *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53.

Georgia.— Cotton State L. Ins. Co. *v.* Carter, 65 Ga. 228.

Iowa.— Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68.

Kentucky.— Metropolitan L. Ins. Co. *v.* Blesch, 58 S. W. 436, 22 Ky. L. Rep. 530; Mutual L. Ins. Co. *v.* Gorman, 40 S. W. 571, 19 Ky. L. Rep. 295.

Massachusetts.— Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503.

New York.— Fulton *v.* Metropolitan L. Ins. Co., 1 Misc. 478, 21 N. Y. Suppl. 470 [*affirmed* in 4 Misc. 76, 23 N. Y. Suppl. 598].

Ohio.— Metropolitan L. Ins. Co. *v.* Felix, 73 Ohio St. 46, 75 N. E. 941; Connecticut Mut. L. Ins. Co. *v.* Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781; Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197.

England.— Fowler *v.* Scottish Equitable L. Ins. Soc., 4 Jur. N. S. 1169, 28 L. J. Ch. 225, 7 Wkly. Rep. 5.

67. Calandra *v.* Life Assoc. of America, 84 N. Y. Suppl. 498.

pany had no right under the contract to make an extra charge.[68] But if the risk has in fact attached, although it has afterward terminated, and the insured has therefore had some benefit from the contract he cannot recover back the premiums.[69] Where performance of the conditions of the policy as to payment of annual premiums by the insured has been prevented by war and the policy has been thereby terminated, the insured may recover the premium paid after deducting the actual cost of the insurance while the policy was in force.[70]

2. WHERE CONTRACT IS VOID FOR ILLEGALITY. Where the policy is one which could not be enforced against the company because the contract is void as being against public policy or otherwise illegal, and the parties are *in pari delicto*, the insured cannot recover back the premiums paid.[71] It is otherwise if the parties are not *in pari delicto*,[72] and if the insured has acted in good faith and paid the premiums under the belief that the contract was valid and enforceable he may recover back the premiums.[73] If the contract is merely *ultra vires* and the com-

68. Forbes *v.* American Mut. L. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360.

69. Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694 [*affirming* 102 Ill. App. 280]; Continental L. Ins. Co. *v.* Houser, 111 Ind. 266, 12 N. E. 479; Muller *v.* State L. Ins. Co., 27 Ind. App. 46, 60 N. E. 958.

On lapsed policies.— The fact that a policy has lapsed does not entitle the policy-holder to recover back from the company in an action in equity the premiums previously paid. There is no trust relation between the policy-holder and the company rendering the company trustee of the premiums paid on the policy. Taylor *v.* Charter Oak L. Ins. Co., 59 How. Pr. (N. Y.) 468 [*affirmed* in 9 Daly 489].

70. Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

Effect of war see *infra*, X, C, 8, c.

71. *Illinois.*— Wheeler *v.* Mutual Reserve Fund Life Assoc., 102 Ill. App. 48, gaming contract.

Indiana.— Work *v.* American Mut. L. Ins. Co., 31 Ind. App. 153, 67 N. E. 458, policy taken without the knowledge of the insured, the act being made a felony by statute.

Kentucky.— Griffin *v.* Equitable Assur. Soc., 119 Ky. 856, 84 S. W. 1164, 27 Ky. L. Rep. 313.

Ohio.— Brokamp *v.* Metropolitan L. Ins. Co., 16 Ohio Cir. Ct. 630, 8 Ohio Cir. Dec. 116.

Pennsylvania.— McDermott *v.* Prudential Ins. Co., 7 Kulp 246.

England.— Lowry *v.* Bourdieu, Dougl. (3d ed.) 468; Howard *v.* Refuge Friendly Soc., 54 L. T. Rep. N. S. 644; Andree *v.* Fletcher, 3 T. R. 266, 2 T. R. 161, 1 Rev. Rep. 701.

See CONTRACTS, 9 Cyc. 546 *et seq.*

Illegality see *supra*, IV, A, 1.

Want of insurable interest does not entitle the insured to recover the premiums paid if there is no fraud on the part of the company, although the agent has innocently misstated the law as to the validity of the insurance. Hare *v.* Pearl L. Assur. Co., [1904] 1 K. B. 558, 73 L. J. K. B. 373, 90 L. T. Rep. N. S. 245, 20 T. R. 264, 52 Wkly. Rep. 457. See also McDermott *v.* Prudential Ins. Co., 7 Kulp (Pa.) 246. That one who has procured a policy on the life of another is estopped to show want of insurable interest and sue to recover back premiums paid see Lewis *v.* Phœnix Mut. L. Ins. Co., 39 Conn. 100. And see *supra*, I, G.

Insurable interest see *supra*, I, B, *et seq.*

72. Urwan *v.* Northwestern Nat. L. Ins. Co., 125 Wis. 349, 103 N. W. 1102, holding that a policy-holder to whom a special privilege is accorded in violation of the statute against discrimination is not *in pari delicto* with the company, so as to be precluded from maintaining an action to recover money paid to it under such illegal contract. See also American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; and other cases in the note following.

73. American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935; Fulton *v.* Metropolitan L. Ins. Co., 19 N. Y. Suppl. 660; Dowker *v.* Canada L. Assur. Co., 24 U. C. Q. B. 591. Thus although a policy taken by one person on the life of another without the knowledge and consent of the latter is void, premiums paid thereon in good faith in the belief that the policy is valid can be recovered back. Griffin *v.* Equitable Assur. Soc., 119 Ky. 856, 84 S. W. 1164, 27 Ky. L. Rep. 313; Metropolitan L. Ins. Co. *v.* Asmus, 78 S. W. 204, 25 Ky. L. Rep. 1550. But see McDermott *v.* Prudential Ins. Co., 7 Kulp (Pa.) 246. The premium may be recovered back as having been paid under a mistake of law. Metropolitan L. Ins. Co. *v.* Blesch, 58 S. W. 436, 22 Ky. L. Rep. 530, holding that premiums paid by a daughter for insurance procured on the life of her father without his consent, which was void as against public policy, could be recovered back by her as money paid under mistake of law, where she paid them under the conviction that the insurance was valid and upon the agent's assurance that in no event would she lose the money paid. See also Fulton *v.* Metropolitan L. Ins. Co., 1 Misc. (N. Y.) 478, 21 N. Y. Suppl. 470 [*affirmed* in 4 Misc. 76, 23 N. Y. Suppl. 598]. In like manner a wife may recover premiums paid by

pany is not estopped from relying on such defense, the insured may recover back the premiums paid.[74]

3. WHERE CONTRACT IS VOIDABLE BY COMPANY. If the contract is voidable merely at the election of the company, and not void, as for want of a medical examination,[75] or for misrepresentation,[76] or because of some other objection which the company has waived,[77] the insured having in fact had the insurance for which he has contracted, he cannot recover back the premium paid. But it has been held that to constitute a consideration for the payment of premiums, so as to bar their recovery back, it is essential that the company incur a liability which is not affected by any infirmity which it may elect to interpose as a defense to an action on the policy if the life insured should end.[78]

4. WHERE CONTRACT IS INVALID OR FORFEITED ON ACCOUNT OF FRAUD OR FAULT OF INSURED. If the policy is invalid and unenforceable from the beginning or rendered invalid subsequently by any fraud or fault of the insured, such as misrepresentations made in procuring it, failure to pay premiums, or other breach of condition subsequent, the insured is not entitled to recover back premiums paid.[79]

her for the insurance on her husband's life, which is void because taken out and carried without his consent or knowledge, where she acted in good faith. Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503; Metropolitan L. Ins. Co. *v.* Felix, 73 Ohio St. 46, 75 N. E. 941. Where plaintiff was induced by fraudulent representations of the company's agent to procure insurance on her husband's life without his knowledge, which was void under the rules of the company, it was held that she could recover back the premiums paid on discovering the fraud and could not be required to accept a paid-up policy for a part of the amount of the original insurance corresponding to the premiums paid. Delouche *v.* Metropolitan L. Ins. Co., 69 N. H. 587, 45 Atl. 414. And where a wife without her husband's consent procures a policy on his life and uses his money in paying the premiums, he may recover the amount so paid, although the policy is void. Metropolitan L. Ins. Co. *v.* Smith, 59 S. W. 24, 22 Ky. L. Rep. 868, 53 L. R. A. 817; Metropolitan L. Ins. Co. *v.* Trende, 53 S. W. 412, 21 Ky. L. Rep. 909; Metropolitan L. Ins. Co. *v.* Reinke, 15 Ky. L. Rep. 125. Where the agent of the company had knowledge that the person taking out a policy on the life of a brother payable to herself signed his name to the application, the person taking the policy may recover back the premium, although the company did not have actual knowledge of the facts rendering the policy invalid, the knowledge of the agent being imputed to the company. Fulton *v.* Metropolitan L. Ins. Co., 19 N. Y. Suppl. 660. Where a person, being misled by misrepresentations of the agent as to a rule requiring the signature to the application of the person whose life was insured, took a policy on the life of another without the knowledge of the insured and without his signing the application, it was held that in the absence of any evidence of fraud the person taking the policy and paying the premiums was entitled to recover back the premiums so paid. McCann *v.* Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026. And it was so held where the rule requiring the signature of the insured to the application was not embodied in the application itself but in a receipt book given to the person taking the policy after it was so taken but before making the payment sought to be recovered. Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503; Fulton *v.* Metropolitan L. Ins. Co., 19 N. Y. Suppl. 660.

74. Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197. See *supra*, V, E, 1.

75. Mailhoit *v.* Metropolitan L. Ins. Co., 87 Me. 374, 32 Atl. 989, 47 Am. St. Rep. 336.

76. Low *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 1088, 10 Am. L. Rec. 313.

77. Fay *v.* Prudential Ins. Co., 80 N. Y. App. Div. 350, 80 N. Y. Suppl. 683; McElwain *v.* Metropolitan L. Ins. Co., 50 N. Y. App. Div. 63, 63 N. Y. Suppl. 293; Palmer *v.* Metropolitan L. Ins. Co., 21 N. Y. App. Div. 287, 47 N. Y. Suppl. 347; Wakeman *v.* Metropolitan L. Ins. Co., 30 Ont. 705.

No waiver.— But if the company, although entitled to retain the premium on waiving the objection, has not taken that position in an action to recover back the premium paid it cannot afterward on appeal elect to treat the policy as valid. Fulton *v.* Metropolitan L. Ins. Co., 19 N. Y. Suppl. 660.

Rescission by insured for fraud.— Where false and fraudulent answers were written by the medical examiner, although they were not binding on the insured, yet as their falsity would constitute a *prima facie* defense in an action on the policy difficult to meet after the death of the insured, it was held that he was entitled to repudiate the contract and recover the premiums paid. Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758.

78. Metropolitan L. Ins. Co. *v.* Felix, 73 Ohio St. 46, 75 N. E. 941. See Connecticut Mut. L. Ins. Co. *v.* Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 781.

79. Grant *v.* Alabama Gold L. Ins. Co., 76 Ga. 575; Lewis *v.* Carr, 86 Ill. App. 412; Ætna L. Ins. Co. *v.* Paul, 10 Ill. App. 431; Low *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 247, 6 Cinc. L. Bul. 666; U. S. Life Ins. Co. *v.* Smith, 92 Fed. 503, 34 C. C. A. 506; Kellner *v.* New York Mut. L. Ins. Co., 43 Fed. 623.

But it is said that where a policy is rendered void by statements in the application which, although untrue in fact, are made without actual fraud on the part of the insured and under an innocent misapprehension of the purport of the questions, there is no contract and premiums paid may be recovered back.[80]

5. Where Contract Is Avoided or Rescinded by Insured For Fraud or Breach by Company. If a policy is invalid because of fraud on the part of the company's agent, or if it has been rescinded by the insured for fraud, the insured is entitled to recover back the premiums paid,[81] unless he has lost his right by unreasonable delay.[82] And if the insured refuses to accept the policy when tendered in pursuance of a contract therefor, or repudiates and offers to return the policy within a reasonable time after its receipt, because it does not correspond to the policy called for by the contract, he is entitled to recover back any advance premiums paid.[83] But in such case he cannot rescind and recover premiums if he accepts and retains the policy with knowledge of the variance, or even in ignorance thereof due to

80. Connecticut Mut. L. Ins. Co. *v.* Pyle, 44 Ohio St. 19, 4 N. E. 465, 58 Am. Rep. 821. See also New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934.

81. *Iowa.*— Armstrong *v.* New York Mut. L. Ins. Co., 121 Iowa 362, 96 N. W. 954.

Massachusetts.— Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503.

New Hampshire.—Delouche *v.* Metropolitan L. Ins. Co., 69 N. H. 587, 45 Atl. 414.

North Carolina.— Caldwell *v.* Virginia L. Ins. Co., 140 N. C. 100, 52 S. E. 252.

Tennessee.— Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361.

Wisconsin.— Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705.

England.— Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715.

What constitutes fraud for purpose of rescission see *supra*, IV, A, 2, a.

Limitations on right to rescind see *supra*, IV, A, 2, a.

Reinstatement.— The insured rescinding the contract on account of fraud of the company's agent is not obliged to accept the company's offer to reinstate the insurance. Delouche *v.* Metropolitan L. Ins. Co., 69 N. H. 587, 45 Atl. 414.

Notwithstanding estoppel.—Even though the company has estopped itself from repudiating the policy, the insured may recover back the premiums paid in consequence of mistake or fraudulent representations. Hogben *v.* Metropolitan L. Ins. Co., 69 Conn. 503, 38 Atl. 214, 61 Am. St. Rep. 53. Where plaintiff had been induced by fraudulent representations of the company's agent to take a policy on her husband's life without his knowledge, which was invalid, it was held that on discovering the fraud she might recover back the premiums paid, although the company could not have repudiated the policy on that ground. In such case the person paying the premium would not be bound to allow the insurance to continue and expose herself to possible litigation. Delouche *v.* Metropolitan L. Ins. Co., 69 N. H. 587, 45 Atl. 414.

Insolvency of company.— In an action to recover premiums paid on the ground of false representations of the company as to its solvency proof of insolvency long after payment of the premiums sought to be recovered does not make out a cause of action. Life Assoc. of America *v.* Goode, 71 Tex. 90, 8 S. W. 639.

82. The fact that the insured retains for an unreasonable time a policy which might have been rescinded for fraud of the company's agent may defeat the right to recover premiums paid. Armstrong *v.* New York Mut. L. Ins. Co., 121 Iowa 362, 96 N. W. 954. See also Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; Mecke *v.* New York L. Ins. Co., 8 Phila. (Pa.) 6; Bostwick *v.* New York Mut. L. Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705. And see *supra*, IV, A, 2, a.

83. *California.*— La Marche *v.* New York L. Ins. Co., 126 Cal. 498, 58 Pac. 1053; McKay *v.* New York L. Ins. Co., 124 Cal. 270, 56 Pac. 1112.

Georgia.— Cotton States L. Ins. Co. *v.* Carter, 65 Ga. 228.

New York.— Rohrschneider *v.* Knickerbocker L. Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Tifft *v.* Phœnix Mut. L. Ins. Co., 6 Lans. 198.

North Carolina.— Gwaltney *v.* Providence Sav. L. Assur. Soc., 130 N. C. 629, 41 S. E. 795.

Washington.— Anderson *v.* New York L. Ins. Co., 34 Wash. 616, 76 Pac. 109.

Wisconsin.— Urwan *v.* Northwestern Nat. L. Ins. Co., 125 Wis. 349, 103 N. W. 1102.

Canada.— Mowat *v.* Provident Sav. L. Assur. Soc., 27 Ont. App. 675.

See 28 Cent. Dig. tit. "Insurance," § 457 *et seq.* And see *supra*, III, C, 1; VIII, E, 3.

A mere misunderstanding on the part of the insured as to the terms of the policy called for by the contract will not entitle him to recover back advance premiums paid. Condon *v.* Mutual Reserve Fund Life Assoc., 89 Md. 99, 42 Atl. 944, 73 Am. St. Rep. 169, 44 L. R. A. 149.

Without consent of beneficiary.— If the policy is not in accordance with the contract the insured may refuse to receive it and recover back the premium paid without a joinder by the beneficiary in an offer to surrender the policy. La Marche *v.* New York L. Ins. Co., 126 Cal. 498, 58 Pac. 1053.

his negligence in failing to read the policy.[84] So also it has been held that on breach of contract on the part of the company in wrongfully terminating or forfeiting the insurance the insured may rescind on his part and recover the premiums which he has paid under the contract.[85] To the contrary, however, and perhaps with better reason, it has been said that the premiums cannot be recovered after the risk has attached, although the company has subsequently wrongfully declared a forfeiture of the policy, the remedy of the insured being an action for damages for such breach or a suit for specific performance.[86] In any view the insured is entitled to recover back the advance premium where the company fails to deliver a policy in accordance with the application within a reasonable time or within the time called for by the preliminary contract,[87] or to perform other stipulations of the preliminary contract forming part of the consideration for the agreement to take the policy.[88]

6. Action to Recover Premiums Paid — a. Form of Action. The proper form of action to recover back premiums paid is an action at law for money had and received by the company for the use of the person making the payments.[89]

84. Johnson *v.* White, 120 Ga. 1010, 48 S. E. 426; Massey *v.* Cotton States L. Ins. Co., 70 Ga. 794; Mecke *v.* New York L. Ins. Co., 8 Phila. (Pa.) 6. See also *supra*, III, C, 2; IV, A. 2, b.

85. *Iowa.*— Van Werden *v.* Equitable L. Assur. Soc., 99 Iowa 621, 68 N. W. 892.

Missouri.— Puschman *v.* Hartford L., etc., Ins. Co., 92 Mo. App. 640; Bishop *v.* Covenant Mut. L. Ins. Co., 85 Mo. App. 302.

Oregon.— Thompson *v.* New York L. Ins. Co., 21 Oreg. 466, 28 Pac. 628.

Pennsylvania.— Kerns *v.* Prudential Ins. Co., 11 Pa. Super. Ct. 209. In such case the company has suffered no loss from the fact that the policy has been in force and the insured has received no substantial benefit from the insurance. American L. Ins. Co. *v.* McAden, 109 Pa. St. 399, 1 Atl. 256.

Tennessee.—Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

Texas.— American Union L. Ins. Co. *v.* Wood, (Civ. App. 1900) 57 S. W. 685.

The reorganization of a mutual company under legislative authority, which does not affect its rights and liabilities, does not entitle the insured to recover back the premiums. Muller *v.* State L. Ins. Co., 27 Ind. App. 45, 60 N. E. 958.

Refusal to reinstate.— On wrongful refusal of the company to reinstate the insured he may recover the assessments paid. Puschman *v.* Hartford L., etc., Ins. Co., 92 Mo. App. 640.

86. Standley *v.* Northwestern Mut. L. Ins. Co., 95 Ind. 254; Keyser *v.* Mutual Reserve Fund Life Assoc., 60 N. Y. App. Div. 297, 70 N. Y. Suppl. 32; Skudera *v.* Metropolitan L. Ins. Co., 17 Misc. (N. Y.) 367, 39 N. Y. Suppl. 1059.

The measure of damages, where the company has transferred its business and the insured elects to rescind on that ground, is the amount of premiums paid less the value of the insurance while it has been in force. Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423.

87. Stilwell *v.* Covenant Mut. L. Ins. Co., 83 Mo. App. 215; New York Mut. L. Ins. Co. *v.* Elliott, 93 Tex. 144, 53 S. W. 1014; Sengfelder *v.* New York Mut. L. Ins. Co., 5 Wash. 121, 31 Pac. 428; Summers *v.* New York Mut. L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 109 Am. St. Rep. 992, 66 L. R. A. 812.

Amount of note paid.— Where no policy has been issued in accordance with the preliminary contract the insured may recover from the company the amount of any note for advance premiums which he has been compelled to pay to a *bona fide* holder. Godfrey *v.* New York L. Ins. Co., 70 Minn. 224, 73 N. W. 1.

Agent's personal note for repayment.— Where the agent signed a personal note for the repayment of a first premium, the risk having been declined by the company, the payee by awaiting in good faith the efforts of the company to secure the payment of such note for the return premium does not discharge the company from its obligation to make such repayment, although the agent is guilty of fraud toward the company. New York Mut. L. Ins. Co. *v.* Herron, 79 Miss. 381, 30 So. 691.

88. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68, holding that a contract for insurance, by which, as additional consideration for the insured taking the policy, the agent agrees that the company will make a loan to the insured, is an entire contract, which must be accepted or rejected *in toto*, and if the company refuses to make the loan, the insured may refuse to accept the policy and recover back the advance premium paid by him.

89. Fulton *v.* Metropolitan L. Ins. Co., 1 Misc. (N. Y.) 478, 21 N. Y. Suppl. 470 [*affirmed* in 4 Misc. 76, 23 N. Y. Suppl. 598]; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400; Summers *v.* New York Mut. L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 109 Am. St. Rep. 992, 66 L. R. A. 812. See also Continental L. Ins. Co. *v.* Houser, 89 Ind. 258, 111 Ind. 266, 12 N. E. 479; McCann *v.* Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026; Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503; Dowker *v.* Canada L. Insur. Co., 24 U. C. Q. B. 591.

Premiums may also be recovered, however, in a suit in equity, where there are special grounds for equity jurisdiction.[90]

b. Who May Sue. The person who has paid the premiums is the proper plaintiff in an action to recover premiums paid.[91] There is no privity of contract between the beneficiary in an insurance policy and the company, so as to entitle the beneficiary to recover premiums paid, where the policy was taken out without her knowledge by a stranger, who paid all the premiums, and there is nothing to show that he acted as her agent.[92]

c. Pleadings. The complaint in an action to recover back premiums paid on account of refusal of the company to fulfil its contract must aver the conditions of the contract and performance by plaintiff on his part.[93] The declaration may be in assumpsit under the common money counts.[94]

d. Defenses. The company is liable for premiums received by its agents, although it is provided in the policy that receipts for premiums must be signed by the secretary and countersigned by the person to whom payment is made.[95] But if payment has been made in the form of a draft which has been duly protested and dishonored the company is not liable in an action to recover such premium.[96]

e. Limitation of Action. As a rule the statute of limitations commences to run against an action to recover premiums from the time of payment,[97] except where there is the element of fraud, in which case it would commence to run from the time when the fraud is or ought to be discovered.[98]

f. Recovery of Interest. The insured is generally entitled to recover interest on the premium from the time it was paid.[99]

90. Bennett *v.* Massachusetts Mut. L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361; Fowler *v.* Scottish Equitable L. Ins. Soc., 4 Jur. N. S. 1169, 28 L. J. Ch. 225, 17 Wkly. Rep. 5.

91. Sullivan *v.* Metropolitan L. Ins. Co., 174 Mass. 467, 54 N. E. 879, 75 Am. St. Rep. 365; Fulton *v.* Metropolitan L. Ins. Co., 1 Misc. (N. Y.) 478, 21 N. Y. Suppl. 470 [*affirmed* in 4 Misc. 76, 23 N. Y. Suppl. 598]; Universal L. Ins. Co. *v.* Cogbill, 30 Gratt. (Va.) 72; Dowker *v.* Canada L. Assur. Co., 24 U. C. Q. B. 591. And see McDermott *v.* Prudential Ins. Co., 7 Kulp. (Pa.) 246; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400. See also *supra*, IV, B, 2.

The one whose life is insured by a policy issued to another is not a party to the contract and cannot recover back the premiums, although paid by himself. Trabandt *v.* Connecticut Mut. L. Ins. Co., 131 Mass. 167; North America L. Ins. Co. *v.* Wilson, 111 Mass. 542. See also *supra*, IV, B, 2.

But a husband whose money is used by his wife in procuring insurance on his life without his knowledge, which insurance is void, may recover the premiums. Metropolitan L. Ins. Co. *v.* Smith, 59 S. W. 24, 22 Ky. L. Rep. 868, 53 L. R. A. 817; Metropolitan L. Ins. Co. *v.* Trende, 53 S. W. 412, 21 Ky. L. Rep. 909; Metropolitan L. Ins. Co. *v.* Reinke, 15 Ky. L. Rep. 125. The burden is on the husband in such case to prove that it was his own money that was so used. Metropolitan L. Ins. Co. *v.* Reinke, *supra*.

92. Sullivan *v.* Metropolitan L. Ins. Co., 174 Mass. 467, 54 N. E. 879, 75 Am. St. Rep. 365. Premiums paid by a third person on a policy taken out in the name of the person insured, but apparently without her knowledge, under an agreement with the agent that the person so paying the premiums would get the face of the policy, or if not, that the money would be repaid, cannot be recovered by the administrator of the person insured, the policy having been cancelled in her life-time. McDermott *v.* Prudential Ins. Co., 7 Kulp (Pa.) 246.

93. Continental L. Ins. Co. *v.* Houser, 89 Ind. 258, 111 Ind. 266, 12 N. E. 479.

94. Fulton *v.* Metropolitan L. Ins. Co., 4 Misc. (N. Y.) 76, 23 N. Y. Suppl. 598; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400; Summers *v.* New York Mut. L. Ins. Co., 12 Wyo. 369, 75 Pac. 937, 109 Am. St. Rep. 992, 66 L. R. A. 812; Dowker *v.* Canada L. Assur. Co., 24 U. C. Q. B. 591.

95. Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720.

Authority of agent.— If the company gives an insurance broker instructions to secure payment of premiums when application is made, it is responsible for the return of such premiums when the risk is refused. Gentry *v.* Connecticut Mut. L. Ins. Co., 15 Mo. App. 215.

96. Whiting *v.* Equitable L. Assur. Soc., 60 Fed. 197, 8 C. C. A. 558.

97. Metropolitan L. Ins. Co. *v.* Blesch, 58 S. W. 436, 22 Ky. L. Rep. 530.

From demand only under special circumstances see American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935.

98. See Life Assoc. of America *v.* Goode, 71 Tex. 90, 8 S. W. 639; and, generally, LIMITATIONS OF ACTIONS.

99. Rohrschneider *v.* Knickerbocker L. Ins. Co., 76 N. Y. 216, 32 Am. Rep. 290; Ameri-

7. RELIEF AGAINST PREMIUM NOTE. Where an applicant for insurance gives his note for the premium in advance and no insurance is effected or he is entitled to repudiate the contract in accordance with the principles stated in the preceding paragraphs, he may sue in equity to cancel the note, or, if it has been transferred to a *bona fide* holder, to compel the company to pay it.[1]

VI. ASSIGNMENT OR TRANSFER.

A. Right to Assign or Transfer[2] — 1. IN GENERAL. A policy of life insurance is a chose in action and the insured, if the insurance is payable to him, or, in the event of his death, to his personal representatives, may assign the same, unless the assignment is prohibited by statute;[3] and in the absence of such prohibition, a policy payable to the wife of the insured or another may be assigned by the concurrent act of the insured and the beneficiary.[4] It has also been held that a beneficiary to whom a policy is payable may assign the same.[5] Although the pol-

can L. Ins. Co. *v.* McAden, 109 Pa. St. 399, 1 Atl. 256; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400. And see, generally, INTEREST, 22 Cyc. 1506.

From demand only under special circumstances see American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935.

1. State Mut. L. Ins. Co. *v.* Gorman, 40 S. W. 571, 19 Ky. L. Rep. 295, where the applicant refused to accept the policy tendered him because different from that applied for.

Promise of agent to return note.— Where the applicant executed a note to the agent for the premium, supposing that it was payable to the company, the agent's agreement that the note was to be returned if the application was not accepted was the agreement of the company. State Mut. L. Ins. Co. *v.* Gorman, 40 S. W. 571, 19 Ky. L. Rep. 295.

2. Assignment in fraud of creditors see FRAUDULENT CONVEYANCES, 20 Cyc. 361.

3. *Connecticut.*—Colburn's Appeal, 74 Conn. 463, 51 Atl. 139, assignment by husband directly to wife.

Georgia.— Steele *v.* Gatlin, 115 Ga. 929, 42 S. E. 253.

Illinois.— Conyne *v.* Jones, 51 Ill. App. 17.

Indiana.— Bushnell *v.* Bushnell, 92 Ind. 503, 602; Harley *v.* Heist, 86 Ind. 196, 45 Am. Rep. 285; Hutson *v.* Merrifield, 51 Ind. 24, 19 Am. Rep. 722.

Louisiana.— Miller *v.* Manhattan L. Ins. Co., 110 La. 652, 34 So. 723; Stuart *v.* Sutcliffe, 46 La. Ann. 240, 14 So. 912; Hearing's Succession, 26 La. Ann. 326.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761; New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742.

Massachusetts.— Winchester *v.* Stebbins, 16 Gray 52; Palmer *v.* Merrill, 6 Cush. 282, 52 Am. Dec. 782.

Michigan.— Iowa County Sav. Bank *v.* McLean, 84 Mich. 625, 48 N. W. 159.

New York.— Columbia Bank *v.* Equitable L. Assur. Soc., 61 N. Y. App. Div. 594, 70 N. Y. Suppl. 767; Cannon *v.* Northwestern Mut. L. Ins. Co., 29 Hun 470. See also Olmsted *v.* Keyes, 85 N. Y. 593.

Ohio.— Eckel *v.* Renner, 41 Ohio St. 232.

Pennsylvania.—Hill *v.* United L. Ins. Assoc., 154 Pa. St. 29, 25 Atl. 771, 35 Am. St. Rep. 807.

South Carolina.— Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764.

United States.—New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997; *In re* Welling, 113 Fed. 189, 51 C. C. A. 151.

England.— *Ex p.* Ibbetson, 8 Ch. D. 519, 39 L. T. Rep. N. S. 1, 26 Wkly. Rep. 843.

See 28 Cent. Dig. tit. "Insurance," § 468 *et seq.*; and other cases cited in the notes following. See also *supra*, I, E, text and note 72.

Whether the assignee must have an insurable interest see *supra*, I, E.

4. *Colorado.*— Collins *v.* Dawley, 4 Colo. 138, 34 Am. Rep. 72; New York Mut. L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889.

District of Columbia.— Ford *v.* Travelers' Ins. Co., 6 Mackey 384.

Indiana.— Damron *v.* Penn. Mut. L. Ins. Co., 99 Ind. 478.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Maryland.— Whitridge *v.* Barry, 42 Md. 140; Emerick *v.* Coakley, 35 Md. 188.

Missouri.— Baker *v.* Young, 47 Mo. 453; New York L. Ins. Co. *v.* Rosenheim, 56 Mo. App. 27.

Pennsylvania.— Kulp *v.* Brant, 162 Pa. St. 222, 29 Atl. 729.

Rhode Island.— Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

Tennessee.— Scobey *v.* Waters, 10 Lea 551.

Wisconsin.— Archbald *v.* Mutual L. Ins. Co., 38 Wis. 542.

United States.— Robinson *v.* Mutual Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194.

See HUSBAND AND WIFE, 21 Cyc. 1486.

Whether the rights of the beneficiary can be defeated by an assignment by the assured see *infra*, VI, C, 5.

5. Farmers', etc., Bank *v.* Johnson, 118

icy is made payable to the legal representatives of the assured it is assignable by the assured as though payable to him.[6] In states recognizing the common-law rule that a chose in action is not assignable, an assignment of the policy does not vest the legal title in the assignee, but such assignment will be effectual in equity.[7] Statutory provisions as to assignments of choses in action are applicable to assignments of life policies.[8]

2. Assignment of Interest. Even though the assignor has only a contingent or a part interest in the proceeds of the policy, as where the proceeds are payable to him on the contingency that he survive a beneficiary to whom the insurance is primarily payable, or where the policy is for the benefit of the assignor and others, such interest may be assigned.[9] In such case the assignee takes no greater interest than the assignor has, and when the assignor's interest ceases the assignment is no longer operative.[10]

3. Where Wife of Insured Is Beneficiary; Statutory Provisions. Unless prevented by statute, a married woman to whom a policy on the life of her husband is made payable may by joining with her husband make an assignment to his

Iowa 282, 91 N. W. 1074; Hewlett *v.* Home for Incurables, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447; Boyden *v.* Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 N. E. 669; Olmsted *v.* Keyes, 85 N. Y. 593. See also Conway *v.* Caswell, 121 Ga. 254, 48 S. E. 956.

6. *Kentucky.*— Meadows *v.* Meadows, 13 Ky. L. Rep. 495.

Louisiana.—Stuart *v.* Sutcliffe, 46 La. Ann. 240, 14 So. 912.

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 266, 20 L. R. A. 761; New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742.

Pennsylvania.— O'Grady *v.* Prudential Ins. Co., 3 Pa. Super. Ct. 548.

Tennessee.— Hancock *v.* Fidelity Mut. L. Ins. Co., (Ch. App. 1899) 53 S. W. 181.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997.

See 28 Cent. Dig. tit. "Insurance," § 468.

7. Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398; New York Mut. L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200].

An assignment of a part of the money payable under the policy made before the death of the insured will be valid in equity. Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398.

8. Steele *v.* Gatlin, 115 Ga. 929, 42 S. E. 253; New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742; Marts *v.* Cumberland Mut. F. Ins. Co., 44 N. J. L. 478.

9. *Colorado.*— New York Mut. L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889.

Connecticut.— Connecticut Mut. L. Ins. Co. *v.* Burroughs, 34 Conn. 305, 91 Am. Dec. 725.

Maryland.— Hewlett *v.* Home for Incurables, 74 Md. 350, 24 Atl. 324, 17 L. R. A. 447.

Massachusetts.— Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

New York.— McDonough *v.* Ætna L. Ins. Co., 38 Misc. 625, 78 N. Y. Suppl. 217.

Pennsylvania.— Herr *v.* Reinoehl, 209 Pa. St. 483, 58 Atl. 862; Entwistle *v.* Travelers' Ins. Co., 17 Pa. Super. Ct. 180.

Rhode Island.— Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

Tennessee.— Box *v.* Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

A policy payable to the wife and children of the insured is assignable by the insured and his wife, so as to pass their interest, although such assignment cannot affect the rights of the children. Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

Where the policy is payable to the wife or her legal representatives the children have no contingent interest and an assignment by the wife is valid. Newcomb *v.* New York Mut. L. Ins. Co., 18 Fed. Cas. No. 10,147.

After the happening of the contingency on which the insurance becomes payable absolutely to the beneficiary an assignment by the beneficiary will be valid. Windhorst *v.* Wilhelms, 1 Ohio Cir. Ct. 28, 1 Ohio Cir. Dec. 17.

10. Connecticut Mut. L. Ins. Co. *v.* Burroughs, 34 Conn. 305, 91 Am. Dec. 725 (holding that where a policy of insurance on the life of a husband was payable to the wife for her sole use, and in case of her death before his to her children, and the wife made an absolute assignment of the policy for a valuable consideration, but afterward died before the husband, the interest of the assignee ceased on her death, since her interest was contingent on her surviving her husband and ceased upon her death before him); Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824 (to the same effect). See also New York Mut. L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889.

Right to dividend.— Where the contingent interest of the assignor of an insurance policy ceases and the assignment is no longer operative, the assignee acquires no right to a dividend which has accrued on the policy. Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

Repayment of premiums.— It has been held, however, that where an assignee pays an annual premium on the policy after the assignment and the assignment becomes no

creditors in payment of or as security for his debts.[11] In some states, however, there are statutory provisions prohibiting the assignment by a married woman of a policy for her benefit on her husband's life.[12] There are also statutes in some jurisdictions which expressly or impliedly prohibit the assignment by a husband himself, or by both husband and wife, of a policy on his life expressed to be for the benefit of his wife, although the policy may be payable to himself or his personal representatives.[13] In New York all policies of insurance issued upon the lives of husbands for the benefit of their wives are under the present statute assignable by the wife with the written consent of the husband, or in case of her death by her legal representatives with such consent.[14] The right to assign is not

longer operative because of the termination of the contingent interest of the assignor, the assignee is equitably entitled to a repayment from the proceeds of the policy. Connecticut Mut. L. Ins. Co. *v.* Burroughs, 34 Conn. 305, 91 Am. Dec. 725.

11. *Colorado.*— Collins *v.* Dawley, 4 Colo. 138, 34 Am. Rep. 72.

District of Columbia.— Ford *v.* Travelers' Ins. Co., 6 Mackey 384.

Indiana.— Damron *v.* Penn Mut. L. Ins. Co., 99 Ind. 478.

Kentucky.— New York L. Ins. Co. *v.* Miller, 56 S. W. 975, 22 Ky. L. Rep. 230.

Maryland.— Whitridge *v.* Barry, 42 Md. 140; Emerick *v.* Coakley, 35 Md. 188.

Minnesota.— See Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666.

Missouri.— Baker *v.* Young, 47 Mo. 453.

Pennsylvania.— Herr *v.* Reinoehl, 209 Pa. St. 483, 58 Atl. 862; Kulp *v.* Brant, 162 Pa. St. 222, 29 Atl. 729; Hendricks *v.* Reeves, 2 Pa. Super. Ct. 545.

Rhode Island.— Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

Tennessee.— Williams *v.* Corson, 2 Tenn. Ch. 269.

Wisconsin.— Canterbury *v.* Northwestern Mut. L. Ins. Co., 124 Wis. 169, 102 N. W. 1096; Archibald *v.* Chicago Mut. L. Ins. Co., 38 Wis. 542.

Under Ky. St. § 2127, providing that no part of a married woman's estate shall be subjected to the payment of any liability upon a contract made after marriage to answer for the debt of another, including her husband, "unless such estate shall have been set apart for that purpose by deed of mortgage or other conveyance," the wife's written assignment of a policy of insurance for her benefit on the life of her husband, to secure a loan made to the husband or to indemnify his surety, is valid. New York L. Ins. Co. *v.* Miller, 56 S. W. 975, 22 Ky. L. Rep. 230. This statute may be complied with by any suitable conveyance, and a pledge by a wife, in a note, accompanied by delivery, of a policy of insurance on the life of her husband payable to her, to secure a debt of the husband, is valid. Wirgman *v.* Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174.

In Louisiana a life insurance policy in which a married woman is named as beneficiary vests a complete title in her as separate paraphernal property, which cannot be pledged as security for the debts of her husband or of the community. Putnam *v.* New York L. Ins. Co., 42 La. An. 739, 7 So. 602.

Discharge of wife as surety merely.—Where husband and wife jointly execute and deliver a written assignment of a policy on his life, payable to her, to secure the payment of notes of the husband, and not for her benefit nor in her business, as is known to the assignee, she becomes at most merely a surety for her husband, and if the time for payment of the debt is extended without her knowledge or consent, this will discharge her and set the policy free. Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666.

12. Smith *v.* Head, 75 Ga. 755; Pratt *v.* Globe Mut. L. Ins. Co., (Tenn. 1875) 17 S. W. 352, construing the New York act of 1840.

13. Unity Mut. L. Assur. Assoc. *v.* Dugan, 118 Mass. 219; Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720; Wanschaff *v.* Masonic Mut. Ben. Soc., 41 Mo. App. 206; Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094; Strike *v.* Wisconsin Odd Fellows Mut. L. Ins. Co., 95 Wis. 583, 70 N. W. 819; Cusson *v.* Faucherm, 3 Quebec Super. Ct. 265. See Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328.

An attempted assignment of a policy not assignable by the wife under such statutory provision is not made valid by an indorsement of her guaranty of the validity and sufficiency of the assignment, nor by subsequent payments of premiums in good faith by the assignee. De Jonge *v.* Goldsmith, 46 N. Y. Super. Ct. 131 [*affirmed* in 86 N. Y. 614].

For premiums paid.—An assignment by the husband and wife as security to the assignee for any premiums he shall pay on the policy is not invalid under a statutory prohibition of assignment by the wife. Robinson *v.* New Jersey Mut. Ben. L. Ins. Co., 20 Fed. Cas. No. 11,961, 16 Blatchf. 194. And see Connecticut Mut. L. Ins. Co. *v.* Van Campen, 11 N. Y. Suppl. 103.

Policy not affected by will.— In Massachusetts, under the statute in effect prohibiting the assignment by a husband of a policy on his life expressed to be for the benefit of his wife, such a policy cannot be affected by the will of the husband. Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720.

14. N. Y. Laws (1896), c. 272, § 22; N. Y. Laws (1879), c. 248. And see Sherman *v.* Allison, 177 N. Y. 574, 69 N. E. 1131 [*affirming* 77 N. Y. App. Div. 49, 80 N. Y. Suppl. 148] (holding that the written consent of the

affected by a statutory provision that insurance in favor of a married woman inures to her separate use independently of her husband.[15]

B. Method of Assignment — 1. IN PAROL. In the absence of any requirement in the policy or by statute that the assignment be in writing,[16] a parol assignment accompanied by delivery of the policy is sufficient;[17] and the delivery of

husband required by the statute may be shown by written assignment, executed by the husband and wife separately); Dannhauser *v.* Wallenstein, 169 N. Y. 199, 62 N. E. 160 [*reversing* on another point 52 N. Y. App. Div. 312, 65 N. Y. Suppl. 219] (holding, however, that nothing short of a written consent by a husband to an assignment by his wife will amount to a compliance with the statute); Spencer *v.* Myers, 150 N. Y. 269, 44 N. E. 942, 55 Am. St. Rep. 675, 34 L. R. A. 175; Miller *v.* Campbell, 140 N. Y. 457, 35 N. E. 651; Brick *v.* Campbell, 122 N. Y. 337, 24 N. E. 493, 10 L. R. A. 259 [*reversing* 55 N. Y. Super. Ct. 569]; Anderson *v.* Goldsmidt, 103 N. Y. 617, 9 N. E. 495 [*affirming* 38 Hun 360]; Rathborne *v.* Hatch, 90 N. Y. App. Div. 161, 85 N. Y. Suppl. 775 [*affirmed* in 181 N. Y. 584, 74 N. E. 1125]; Morshauser *v.* Pierce, 64 N. Y. App. Div. 558, 72 N. Y. Suppl. 328 (holding, however, that a policy taken out by the husband on his own life and subsequently assigned to his wife may be assigned by her); Travelers' Ins. Co. *v.* Healey, 86 Hun (N. Y.) 524, 33 N. Y. Suppl. 911; Harvey *v.* Van Cott, 71 Hun (N. Y.) 394, 25 N. Y. Suppl. 25; Connecticut Mut. L. Ins. Co. *v.* Van Campen, 11 N. Y. Suppl. 103; Milhous *v.* Johnson, 4 N. Y. Suppl. 199 (where there was held not to be sufficient evidence of a written consent on the part of the husband to comply with the statute).

The New York act of 1840, c. 80, by which a married woman was authorized to cause to be insured, for her sole use, the life of her husband, and which provided that the amount of insurance when due should be payable to her, free from the claims of the representatives of the husband or any of his creditors, was construed by the courts to render a policy issued thereunder non-assignable. See Frank *v.* New York Mut. L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807 [*modifying* 12 Daly 267]; Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474; Smillie *v.* Quinn, 90 N. Y. 492; Brummer *v.* Cohn, 86 N. Y. 11, 40 Am. Rep. 503 [*affirming* 9 Daly 36, 62 How. Pr. 171]; Wilson *v.* Lawrence, 76 N. Y. 585 [*affirming* 13 Hun 238]; Barry *v.* Brune, 71 N. Y. 261; Barry *v.* Equitable L. Assur. Soc., 59 N. Y. 587; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395. See, however, Living *v.* Domett, 26 Hun 150.

By the New York act of 1873 (Laws (1873), c. 341), since repealed, power was conferred upon married women to assign policies made payable to them, or for their benefit, when they had no children, on complying with certain formalities. See Miller *v.* Campbell, 140 N. Y. 457, 35 N. E. 651; Frank *v.* New York Mut. L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807 [*modifying* 12 Daly 267]; Barry *v.* Equitable L. Assur. Soc., 59 N. Y. 587; Bloomingdale *v.* Lisberger, 24 Hun 355.

15. Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41; Wirgman *v.* Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174; Baker *v.* Young, 47 Mo. 453; Rison *v.* Wilkerson, 3 Sneed (Tenn.) 565. Under such a statute a wife acquires good title to a policy assigned to her by her husband. Colburn's Appeal, 74 Conn. 463, 51 Atl. 139, 92 Am. St. Rep. 231.

Ky. St. § 654, providing that a policy of insurance made payable to any married woman, or to any person in trust for her, shall inure to her separate use and that of her children, independently of her husband or his creditors, etc., does not affect the legality of a transfer of the beneficial interest in a policy on a husband's life, payable to his wife, if alive at his death, by the joint act of both husband and wife. Wirgman *v.* Miller, 98 Ky. 620, 33 S. W. 937, 17 Ky. L. Rep. 1174.

In Tennessee a husband and father who has taken out a policy of insurance on his own life, payable to him, his executors, administrators, and assigns, may assign or dispose of the same by will, notwithstanding Code, §§ 2294, 2478, providing that life insurance effected by a husband on his own life shall inure to the benefit of his widow or children or next of kin, and be distributed as personal property, without being in any manner subject to the debts of the husband, since such sections apply only when the policy remains undisposed of by the husband in his lifetime. Williams *v.* Corson, 2 Tenn. Ch. 269.

16. In Georgia, under statutory provisions making the law of fire insurance applicable to life insurance and requiring a policy of fire insurance to be in writing, it was held that as an assignment of a policy of fire insurance created a new contract such an assignment must be written and therefore that by analogy an assignment of a life policy must be in writing. Steele *v.* Gatlin, 115 Ga. 929, 42 S. E. 253.

Who may question validity.— The objection that the assignment is not in writing as required by the policy is available to any one claiming an interest under the policy. Travelers' Ins. Co. *v.* Healey, 86 Hun (N. Y.) 524, 33 N. Y. Suppl. 911.

Rules of company.— As between the assignee and the administrator of the assignor the validity of the assignment cannot be questioned on the ground that it does not conform to the rules of the company with reference to such assignment, if otherwise valid. Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602.

17. *Indiana.*— Western Assur. Co. *v.* McCarty, 18 Ind. App. 449, 48 N. E. 265; State

the policy alone with intent that such delivery shall operate as an assignment is sufficient.[18] But a delivery alone which under the circumstances is consistent with some other purpose than that of assignment will not show an intent on the part of the beneficiary to part with his right.[19] Possession alone is not sufficient to show an assignment.[20]

2. By Written Instrument.[21] As a rule, any writing indicating the intention to pass the interest in the proceeds of the policy to the assignee is sufficient as an assignment;[22] but a writing indicating testamentary disposition but not valid as a

v. Tomlinson, 16 Ind. App. 662, 45 N. E. 1116, 59 Am. St. Rep. 335.

Kentucky.— Lockett *v.* Lockett, 80 S. W. 1152, 26 Ky. L. Rep. 300.

New York.—Barnett *v.* Prudential Ins. Co., 91 N. Y. App. Div. 435, 86 N. Y. Suppl. 842.

South Carolina.—Macauley *v.* Central Nat. Bank, 27 S. C. 215, 3 S. E. 193.

Tennessee.— Hancock *v.* Fidelity Mut. L. Ins. Co., (Ch. App. 1899) 53 S. W. 181; Box *v.* Lanier, 2 Tenn. Ch. App. 1.

A mere direction by the assured to the company to pay the proceeds of the policy to a person named is not sufficient to constitute an assignment where there is no authority for designating a new beneficiary in that manner. Alvord *v.* Luckenbach, 106 Wis. 537, 82 N. W. 535.

18. Marcus *v.* St. Louis Mut. L. Ins. Co., 68 N. Y. 625 [*reversing* 7 Hun 5]; Box *v.* Lanier, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458; Hancock *v.* Fidelity Mut. L. Ins. Co., (Tenn. Ch. App. 1899) 53 S. W. 181.

Equitable assignment.— Where a divorced wife having possession of a policy in her favor on the life of her husband gave the policy to him in pursuance of his agreement to have their son made the beneficiary it was held that the transaction was sufficient as an equitable assignment to cut off the rights of the wife as beneficiary. Cockrell *v.* Cockrell, 79 Miss. 569, 31 So. 203. An equitable assignment by delivery under a parol agreement may be valid. Dufaur *v.* Professional L. Assur. Co., 25 Beav. 599, 4 Jur. N. S. 841, 27 L. J. Ch. 817, 53 Eng. Reprint 766; Mangham *v.* Ridley, 8 L. T. Rep. N. S. 309. But see Howes *v.* Prudential Assur. Co., 49 L. T. Rep. N. S. 133. And *compare* Crossley *v.* City of Glasgow L. Assur. Co., 4 Ch. D. 421, 46 L. J. Ch. 65, 36 L. T. Rep. N. S. 285, 25 Wkly. Rep. 264, holding that there was no equitable assignment, where there was no agreement to that effect, but the policy was accompanied by a letter stating that the necessary assignment was thereafter to be prepared.

Sufficiency of evidence to show equitable assignment see *In re* King, 14 Ch. D. 179, 49 L. J. Ch. 73, 28 Wkly. Rep. 344; Spencer *v.* Clarke, 9 Ch. D. 137, 47 L. J. Ch. 692, 27 Wkly. Rep. 133; Chowne *v.* Baylis, 31 Beav. 351, 8 Jur. N. S. 1028, 31 L. J. Ch. 757, 8 L. T. Rep. N. S. 39, 11 Wkly. Rep. 5, 54 Eng. Reprint 1174; Brougham *v.* Squire, 1 Drew. 151, 61 Eng. Reprint 409; Cook *v.* Black, 1 Hare, 390, 6 Jur. 164, 11 L. J. Ch. 268, 23 Eng. Ch. 390, 66 Eng. Reprint 1084.

19. Cyrenius *v.* New York Mut. L. Ins. Co., 73 Hun (N. Y.) 365, 26 N. Y. Suppl. 248 [*affirmed* in 145 N. Y. 576, 40 N. E. 225].

20. Cuyler *v.* Wallace, 183 N. Y. 291, 76 N. E. 1 [*reversing* 101 N. Y. App. Div. 207, 91 N. Y. Suppl. 690].

Reassignment.— Where a policy was assigned by a son to his father it was held that a contention that the policy, showing upon its face that the son was the person insured, was reassignable and transferable to him by mere delivery without any writing, and when found in the possession of the son after the death of the father would be presumed to have been assigned for a valuable consideration, could not be sustained as, in the absence of a written assignment, the burden is on the holder to show that he is a *bona fide* owner and the manner in which he obtained the policy. Cuyler *v.* Wallace, 183 N. Y. 291, 76 N. E. 1 [*reversing* 101 N. Y. App. Div. 207, 91 N. Y. Suppl. 690], holding also that the evidence was insufficient to show a reassignment.

21. **Whether policy passes under assignment for benefit of creditors** see Assignments For Benefit of Creditors, 4 Cyc. 213 note 26.

22. Swift *v.* Railway Pass., etc., Mut. Aid, etc., Assoc., 96 Ill. 309; Grogan *v.* U. S. Industrial Ins. Co., 90 Hun (N. Y.) 521, 36 N. Y. Suppl. 687; Stoll *v.* Mutual Ben. L. Ins. Co., 115 Wis. 558, 92 N. W. 277.

A blank assignment delivered by the assured to her husband was held sufficient to authorize the husband to fill in the name of an assignee and make the assignment effectual as a direct assignment from the wife to such assignee for the purpose for which the husband executed the power. Connecticut Mut. L. Ins. Co. *v.* Westervelt, 52 Conn. 586.

Failure to affix revenue stamp.— The fact that the written assignment executed and delivered does not have the requisite revenue stamp affixed does not render it invalid, and the assignee may affix the stamp and cancel it, although he has no direct authority from the assignor to do so, it not being claimed that the assignee intended to defraud the government. Farmers', etc., Bank *v.* Johnson, 118 Iowa 282, 91 N. W. 1074.

Acknowledging and recording are not necessary to the validity of the assignment. Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996. The assignment of an insurance policy by a husband to his wife is not such a transfer from husband to wife as is required by statute to be acknowledged and recorded. Steeley *v.* Steeley, 64 S. W. 642, 23 Ky. L. Rep. 996; Burges *v.* New York L. Ins. Co.,

will cannot be given effect as an assignment.[23] Although the policy is required to be under seal an assignment thereof may be made by an instrument not under seal.[24]

3. DELIVERY AND ACCEPTANCE. The policy or the instrument making an assignment thereof must generally be delivered to the assignee in order to make the assignment effectual.[25] But delivery may be constructive and the assignment may be sustained where the intent of the assignor is clearly shown, although the instrument of assignment and the policy remain in the physical custody of the assignor.[26] Filing the assignment with the company or sending it a copy or duplicate, in accordance with a requirement of the company to that effect, has in some jurisdictions been held a sufficient substitute for an actual delivery to the assignee,[27] at least where the assignee is notified by the assignor of the fact of assignment.[28]

(Tex. Civ. App. 1899) 53 S. W. 602. An assignment of a policy of insurance is not invalidated because the authority and genuineness of the signature of the notary before whom it was acknowledged was not attested by the clerk of a court of record, where the policy provided only that the assignment should be executed in duplicate and both copies sent to the home office of the insurer. Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602.

Assignment by will see Hardy *v.* Shannon, 19 Quebec Super. Ct. 325.

23. Bartlett *v.* Goodrich, 36 N. Y. Suppl. 770.

Conditioned on survival.— An assignment conditioned that it shall be null if the assignor survives the assignee is not a testamentary instrument and need not be executed in the form of a will. Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602.

24. O'Grady *v.* Prudential Ins. Co., 3 Pa. Super. Ct. 548.

25. *Illinois.*— Weaver *v.* Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173 [*reversing* 80 Ill. App. 370].

Louisiana.— Risley's Succession, 11 Rob. 298.

Maine.— Dexter *v.* Sav. Bank *v.* Copeland, 77 Me. 263.

New York.— Hurlbut *v.* Hurlbut, 49 Hun 189, 1 N. Y. Suppl. 854.

Pennsylvania.— Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192.

Wisconsin.— Alvord *v.* Luckenbach, 106 Wis. 537, 82 N. W. 535.

See 28 Cent. Dig. tit. "Insurance," § 480.

A written assignment of a part of the proceeds of the insurance without delivery of the policy does not constitute an assignment of the policy nor create any lien on the proceeds. Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Falk *v.* James, 49 N. J. Eq. 484, 23 Atl. 813.

Executory agreement to assign.—A writing indicating that the intention of the insured was to take and hold the policy for the benefit of persons named but not accompanied by the delivery of the policy was held to amount only to an executory agreement to create a trust in future which was not enforceable even in equity. *In re* Webb, 49 Cal. 541. Where insured before his death signed an order directing the company to pay the proceeds of his policy to a creditor but the policy was not delivered, it was held that plaintiff's remedy after the death of the insured was to have an administrator appointed and have the money collected by him on the order. O'Brien *v.* Continental Casualty Co., 184 Mass. 584, 69 N. E. 308.

A letter from the insured to the company requesting it to make the insurance payable, in case he shall die before the policy matures, to a certain person, does not amount to an assignment of the policy to such person, and, in the absence of assent on the part of the company, confers no right upon such person to demand payment of the insurance. Alvord *v.* Luckenbach, 106 Wis. 537, 82 N. W. 535.

26. Hewitt *v.* Provident Life, etc., Co., 10 Ohio Dec. (Reprint) 53, 18 Cinc. L. Bul. 220; Madeira's Appeal, (Pa. 1886) 4 Atl. 908; Smith *v.* Hawthorn, 22 Pa. Co. Ct. 519.

Notice to the assignee of the fact of the assignment may excuse manual delivery. Otis *v.* Beckwith, 49 Ill. 121; Chamberlain *v.* Williams, 62 Ill. App. 423.

Delivery to the attorney or representative of the assignee is sufficient. New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742.

Assignment from parent to child.— In the case of an assignment by a parent to his child or adopted child, actual delivery of the assignment or policy to the assignee has been held unnecessary. Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602.

27. McDonough *v.* Ætna L. Ins. Co., 38 Misc. (N. Y.) 625, 78 N. Y. Suppl. 217; Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602. But compliance with the provisions of the policy as to sending a duplicate of the assignment to the company is not essential as between the assignor and the assignee, and it has been held that the indorsement of an assignment on the back of the policy and the exhibition of it to the assignee is sufficient. Richardson *v.* White, 167 Mass. 58, 44 N. E. 1072.

Entry on books.— An assignment indorsed on the policy and entered on the books of the company has been held good, although the policy was retained by the assignor. Scully's Estate, 31 Pittsb. Leg. J. N. S. (Pa.) 307.

28. Colburn's Appeal, 74 Conn. 463, 51

Elsewhere it has been held that a mere compliance with the conditions of the policy requiring that in case of assignment a copy thereof be furnished to the company is not sufficient.[29] Acceptance will be presumed when the fact of assignment is communicated to the assignee and no objection thereto is made, the assignment being beneficial to him.[30]

C. Validity, Construction, and Effect of Assignment or Transfer — **1. In General.** The validity of an assignment, in so far as it depends upon the right to assign,[31] the method of assignment,[32] the rights of creditors of the assignor,[33] or insurable interest of the assignee,[34] has been elsewhere considered. An assignment may be illegal because in violation of a statutory provision or contrary to public policy;[35] but it is not against public policy to make an assignment on condition that the insurance shall revert to the assignor if he survives the assignee.[36]

2. Notice to or Consent of Company. The company may by provisions in the contract affix such conditions as it sees fit with respect to the assignment of a policy;[37] and as a rule in the absence of such notice to or consent of the company as is required by the policy the assignment is of no validity as against the company,[38]

Atl. 139, 92 Am. St. Rep. 231; Hurlbut *v.* Hurlbut, 49 Hun (N. Y.) 189, 1 N. Y. Suppl. 854.

29. Weaver *v.* Weaver, 182 Ill. 287, 55 N. E. 338, 74 Am. St. Rep. 173 [*reversing* 80 Ill. App. 370]; Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192; Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

Treating incomplete assignment as original designation of beneficiary.— Where A applied for a policy of insurance on his life, and when he called to lift the policy told the company's agent that he wanted the policy transferred to B, and the agent furnished him with a blank form of assignment which he executed in duplicate, one being forwarded to the company, and the other retained by A who also retained the policy and paid all the premiums, it was held in a suit to determine whether A's administrator or B was entitled to the fund, that while the assignment, as such, was invalid for want of delivery to B, yet, it being apparent that A's original intention was to insure his own life for B's benefit, the form of the transaction was immaterial, and the assignment would be treated as a direction by A to pay the money to B, given simultaneously with the issuing of the policy, and with the same effect as if written therein, and therefore that B was entitled to the fund. Scott *v.* Dickson, 108 Pa. St. 6, 56 Am. Rep. 192.

30. Colburn's Appeal, 74 Conn. 463, 51 Atl. 139, 92 Am. St. Rep. 231; Chamberlain *v.* Williams, 62 Ill. App. 423.

31. See *infra*, VI, A.

32. See *infra*, VI, B.

33. See Fraudulent Conveyances, 20 Cyc. 361.

34. See *supra*, I, E.

35. See Contracts, 9 Cyc. 465 *et seq.*; and *supra*, VI, A, 3.

Assignee without insurable interest see *supra*, I, E.

Tontine assignment to fiducial agency.— Where ten persons, holding policies of insurance on their individual lives for like amounts, executed tontine assignments to a fiducial agency in trust to collect and distribute the proceeds of their respective policies, in case of death, to the survivors, it was held that the assignment was valid so far as it was made for the purpose of creating the fiducial agency a trustee to collect the shares. Whether the assignment was valid in so far as it provided for payment of the proceeds of the respective policies, in case of death to the survivors, or whether, as was contended, the transaction was a wagering contract, was not decided. Hill *v.* United L. Ins. Assoc., 154 Pa. St. 29, 25 Atl. 771, 35 Am. St. Rep. 807.

36. Conyne *v.* Jones, 51 Ill. App. 17. See also Johnson *v.* Van Epps, 110 Ill. 551.

37. McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

38. Moise *v.* Mutual Reserve Fund Life Assoc., 45 La. Ann. 736, 13 So. 170; O'Brien *v.* Continental Casualty Co., 184 Mass. 584, 69 N. E. 308; Stevens *v.* Warren, 101 Mass. 564; Wallace *v.* Des Moines Bankers' Life Assoc., 80 Mo. App. 102; Marcus *v.* St. Louis Mut. L. Ins. Co., 7 Hun (N. Y.) 5; Newman *v.* John Hancock Mut. L. Ins. Co., 45 Misc. (N. Y.) 320, 90 N. Y. Suppl. 471.

Notice within a reasonable time is sufficient, although not received before the death of the insured. New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742.

Assent to assignment.— A letter acknowledging receipt of an assignment and stating that it would be placed on file for such attention as it may deserve when the policy becomes a claim is a sufficient assent to the assignment. Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521. But acknowledgment of receipt of the assignment does not constitute a promise by the company to pay the loss to the assignee. Morrill *v.* Manhattan L. Ins. Co., 183 Ill. 260, 55 N. E. 656; Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172;

unless the requirement has been waived by the company.[39] In the absence of stipulations in the contract, notice of the assignment is not required to be given to the company to complete the assignee's right to recover against it;[40] and as between the assignor or those claiming under him and assignee notice to and consent of the company is not necessary even though required by the terms of the policy.[41] The provision as to notice to the company and consent by it being for the protection of the company, want of such notice and consent cannot be relied

Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151. Nor does the assent to the assignment estop the company from contesting the validity of the policy or the assignment. Franklin Ins. Co. *v.* Wolff, 23 Ind. App. 549, 54 N. E. 772; Venner *v.* Sun L. Ins. Co., 17 Can. Sup. Ct. 394.

The assignor is estopped from claiming that the assignment is invalid because not indorsed on the policy as required by its terms. Connecticut Mut. L. Ins. Co. *v.* Tucker, 27 R. I. 170, 61 Atl. 142.

Change of beneficiary.— Where a life policy provided that insured might, with the consent of the company, assign it, or, before assignment, change the beneficiary, a trust document executed by insured, appointing a trustee to administer the fund to be derived from the policy, amounted to a change of beneficiary and ot to an assignment, and hence it was valid, although not consented to by the insurer. Howe *v.* Louisville Fidelity Trust Co., 89 S. W. 521, 28 Ky. L. Rep. 485.

After loss.— After the maturity of the policy by the happening of the loss, consent of the company to the assignment is immaterial. Meagher *v.* Life Union, 65 Hun (N. Y.) 354, 20 N. Y. Suppl. 247; Mower *v.* Reverting Fund Assur. Assoc., 1 Pa. Super. Ct. 170, 37 Wkly. Notes Cas. 554.

39. Corcoran *v.* New York Mut. L. Ins. Co., 183 Pa. St. 443, 39 Atl. 50; Corcoran *v.* New York Mut. L. Ins. Co., 179 Pa. St. 132, 36 Atl. 203; John Hancock Mut. L. Ins. Co. *v.* White, 20 R. I. 457, 40 Atl. 5.

What constitutes waiver.— By paying the proceeds of the policy into court for the lawful owner (Mechanicks' Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Opitz *v.* Karel, 118 Wis. 527, 95 N. W. 948, 99 Am. St. Rep. 1004, 62 L. R. A. 982), or filing an interpleader asking the determination of the ownership of the fund between the beneficiary and the assignee (McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855; John Hancock Mut. L. Ins. Co. *v.* White, 20 R. I. 457, 40 Atl. 5), the company waives objection to the validity of the assignment. But where the company paid the insurance to the beneficiary who did not produce the policy but claimed that it was lost it was held that such fact raised no presumption that the policy had been assigned so as to put the company on inquiry. Corcoran *v.* New York Mut. L. Ins. Co., 179 Pa. St. 132, 36 Atl. 203. The company does not waive the benefit of a clause requiring notice or consent by giving directions which are in accordance with the terms of the policy as to the method to be pursued. McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

Acceptance of a premium with notice of an assignments waives any objection thereto. Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210.

40. Mutual Protection Ins. Co. *v.* Hamilton, 5 Sneed (Tenn.) 269, holding also that a memorandum underneath the policy directing notice to be given of assignment was not such stipulation.

41. *Alabama.*— Piedmont, etc., L. Ins. Co. *v.* Young, 58 Ala. 476, 29 Am. Dec. 770.

Indiana.— Prudential Ins. Co. of America *v.* Young, 14 Ind. App. 560, 43 N. E. 253, 56 Am. St. Rep. 319.

Kentucky.— Lee *v.* Murrell, 9 Ky. L. Rep. 104.

Louisiana.— Richardson's Succession, 14 La. Ann. 1.

Maryland.— Robinson *v.* Cator, 78 Md. 72, 26 Atl. 959.

Massachusetts.— Hewins *v.* Baker, 161 Mass. 320, 37 N. E. 441.

New Jersey.— Travelers' Ins. Co. *v.* Grant, 54 N. J. Eq. 208, 33 Atl. 1050.

New York.— Marcus *v.* St. Louis Mut. L. Ins. Co., 68 N. Y. 625 [*reversing* 7 Hun 5]; McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855; Columbia Bank *v.* Equitable L. Assur. Soc., 61 N. Y. App. Div. 594, 70 N. Y. Suppl. 767; Fuller *v.* Kent, 13 N. Y. App. Div. 529, 43 N. Y. Suppl. 649.

Wisconsin.— Optiz *v.* Karel, 118 Wis. 527, 95 N. W. 948, 99 Am. St. Rep. 1004, 62 L. R. A. 982.

United States.— Brockway *v.* Connecticut Mut. L. Ins. Co., 29 Fed. 766.

England.— *In re* Turcan, 40 Ch. D. 5, 58 L. J. Ch. 101, 59 L. T. Rep. N. S. 712, 37 Wkly. Rep. 70.

For company's benefit.— Stipulations in the policy as to method of assignment are for the benefit of the company only. Hogue *v.* Minnesota Packing, etc., Co., 59 Minn. 39, 60 N. W. 812; Mechanicks' Nat. Bank *v.* Comins, 72 N. H. 12, 55 Atl. 191, 101 Am. St. Rep. 650; Burges *v.* New York L. Ins. Co., (Tex. Civ. App. 1899) 53 S. W. 602.

The reasons which require the assent of the company in case of assignment of fire policies do not apply to policies of insurance on life. New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742. See FIRE INSURANCE, 19 Cyc. 633.

Creditors of the assignor, by levying on the

on by the assured or persons claiming under him to defeat the effect of a payment made by the company in pursuance of such an assignment.[42]

3. CONSTRUCTION.[43] An assignment to wife and children will be construed to include children by another wife than the one mentioned in the assignment.[44] The assignment may be conditional, reserving the right to name another assignee;[45] or it may provide for the termination of the assignee's interest and reversion to the assignor.[46]

4. CONSIDERATION. A policy of life insurance may, like other choses in action, be assigned by way of gift;[47] but, except in the case of gifts, a valuable consideration is necessary to support the assignment, even as between the assignor and assignee;[48] and want of consideration may render an assignment fraudulent as against creditors of the assignor.[49] The sufficiency of the consideration is governed by the rules applicable to other cases of contract.[50] An assignment under seal imports a consideration.[51]

5. ASSIGNMENT OR TRANSFER AS SECURITY[52] — a. In General. A policy of life insurance may be pledged by delivery to secure a debt, although a formal assignment is not made,[53] or it may be assigned as collateral security.[54] Whether the

policy and giving notice to the company, acquire no rights as against a prior *bona fide* assignee, although no notice of the assignment had been given to the company. Columbia Bank *v.* Equitable L. Assur. Soc., 61 N. Y. App. Div. 594, 70 N. Y. Suppl. 767. See ASSIGNMENTS, 4 Cyc. 75.

42. Ramsay *v.* Myers, 6 Pa. Dist. 468.

43. Whether policy passes under assignment for benefit of creditors see ASSIGNMENTS FOR BENEFIT OF CREDITORS, 4 Cyc. 213 note 26.

44. Smith *v.* Hawthorn, 22 Pa. Co. Ct. 519.

45. Penn Mut. L. Ins. Co. *v.* Union Trust Co., 83 Fed. 891.

46. Conyne *v.* Jones, 51 Ill. App. 17; Sanson's Estate, 15 Pa. Dist. 295.

Reassignment of tontine policy.— A provision in an assignment of a tontine policy by which the assignee's interest determines on the expiration of the tontine dividend period, if the assured shall then be living, and thereon reverts to him, does not, as against legatees and distributees of assured, render a reassignment to the assignee necessary on assured surviving the tontine period, where assured informed the agent of the company that he desired the policy to continue for the benefit of the assignee, and subsequently paid the increased premiums until his death. Sanson's Estate, 15 Pa. Dist. 295.

47. Miller *v.* Manhattan L. Ins. Co., 110 La. 652, 34 So. 723; Mutual L. Ins. Co. *v.* Houchins, 52 La. Ann. 1137, 27 So. 657; McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855; Pearson *v.* Amicable Assur. Office, 27 Beav. 229, 54 Eng. Reprint 89. See also Olmsted *v.* Keyes, 85 N. Y. 593; Ashley *v.* Ashley, 3 Sim. 149, 6 Eng. Ch. 149, 57 Eng. Reprint 955; and ASSIGNMENTS, 4 Cyc. 30; GIFTS, 20 Cyc. 1200.

Delivery of the policy by way of gift, although not a complete assignment, entitles the donee to possession of the policy. Rummens *v.* Hare, 1 Ex. D. 169, 34 L. T. Rep. N. S. 407, 24 Wkly. Rep. 385, 46 L. J. Exch. 30.

Gift causa mortis.— A policy of life insurance may be the subject of a gift *causa mortis*. Amis *v.* Witt, 33 Beav. 619, 55 Eng. Reprint 509; Witt *v.* Amis, 1 B. & S. 109, 7 Jur. N. S. 499, 30 L. J. Q. B. 318, 4 L. T. Rep. N. S. 283, 9 Wkly. Rep. 691, 10 E. C. L. 109. See also GIFTS, 20 Cyc. 1237.

48. See ASSIGNMENTS, 4 Cyc. 31. See also Chowne *v.* Baylis, 31 Beav. 351, 8 Jur. N. S. 1028, 31 L. J. Ch. 757, 8 L. T. Rep. N. S. 39, 11 Wkly. Rep. 5, 54 Eng. Reprint 1174.

49. See FRAUDULENT CONVEYANCES, 20 Cyc. 361.

50. See ASSIGNMENTS, 4 Cyc. 31.

The duty to make good a fraudulent misappropriation of funds is a sufficient obligation to support an assignment of a life insurance policy. Chowne *v.* Baylis, 31 Beav. 351, 8 Jur. N. S. 1028, 31 L. J. Ch. 757, 8 L. T. Rep. N. S. 39, 11 Wkly. Rep. 5, 54 Eng. Reprint 1174.

51. Von Schuckmann *v.* Heinrich, 182 N. Y. 538, 75 N. E. 1135 [*affirming* 93 N. Y. App. Div. 278, 87 N. Y. Suppl. 673] (holding that an assignment of a life policy under seal and acknowledged imports a valid consideration, so that, although reciting that it is in consideration of love and affection, one attaching it has the burden of proving that there was not further consideration, if it was necessary for its validity); McDonough *v.* Ætna L. Ins. Co., 38 Misc. (N. Y.) 625, 78 N. Y. Suppl. 217; Mutual Protection Ins. Co. *v.* Hamilton, 5 Sneed (Tenn.) 269. See also ASSIGNMENTS, 4 Cyc. 31.

52. See, generally, CHATTEL MORTGAGES; PLEDGES.

53. Embry *v.* Harris, 107 Ky. 61, 52 S. W. 958, 21 Ky. L. Rep. 714; Hays *v.* Lapeyre, 48 La. Ann. 749, 19 So. 821, 35 L. R. A. 647; Travelers' Ins. Co. *v.* Healey, 19 Misc. (N. Y.) 584, 44 N. Y. Suppl. 1043. See also *supra*, I, E, text and note 72.

54. Risley's Succession, 11 Rob. (La.) 298;

assignment is absolute in form or expressly as security, the assignee will have a right to the proceeds only to the extent of his claim.[55] But an absolute assignment, although in fact only for security, will entitle the assignee to maintain an action on the policy and receive the proceeds.[56]

b. Mortgage. A policy of life insurance may be mortgaged.[57]

c. Rights and Liabilities of Assignee or Mortgagee — (i) *As to Debt Secured.* The assignee who holds the policy by way of security is entitled only to the amount of his claim and advances with interest.[58] But the assignment may

Hutchings *v.* Miner, 46 N. Y. 456, 7 Am. Rep. 369; Marsh *v.* McNair, 48 Hun (N. Y.) 117; McCord *v.* Noyes, 3 Bradf. Surr. (N. Y.) 139; Tate *v.* Commercial Bldg. Assoc., 97 Va. 74, 33 S. E. 382, 75 Am. St. Rep. 770, 45 L. R. A. 243; Moore *v.* Woolsey, 3 C. L. R. 207, 1 Jur. N. S. 468, 4 E. & B. 243, 24 L. J. Q. B. 40, 3 Wkly. Rep. 66, 82 E. C. L. 242; Winter *v.* Easum, 2 De G. J. & S. 272, 10 Jur. N. S. 759, 12 Wkly. Rep. 1018, 67 Eng. Ch. 272, 46 Eng. Reprint 380; Myers *v.* United Guarantee, etc., Assur. Co., 7 De G. M. & G. 112, 3 Eq. Rep. 579, 1 Jur. N. S. 833, 3 Wkly. Rep. 440, 56 Eng. Ch. 112, 44 Eng. Reprint 44. See also *supra*, I, E, text and note 72.

55. *California.*— Clarke *v.* Fast, 128 Cal. 422, 61 Pac. 72.

Missouri.— New York Mut. L. Ins. Co. *v.* Richards, 99 Mo. App. 88, 72 S. W. 487.

Pennsylvania.— Corcoran *v.* New York Mut. L. Ins. Co., 183 Pa. St. 443, 39 Atl. 50.

Virginia.— Roanoke First Nat. Bank *v.* Terry, 99 Va. 194, 37 S. E. 843; Roller *v.* Moore, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136.

Wisconsin.— McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

United States.— Widaman *v.* Hubbard, 88 Fed. 806.

See also *infra*, VI, C, 5, c, (I).

As interest may appear.— A transfer to an assignee as his interest may appear is a qualified and not an absolute assignment. Barrett *v.* Northwestern Mut. L. Ins. Co., 99 Iowa 906, 68 N. W. 906.

The mere fact that the policy is assigned to a creditor who pays the premiums is not sufficient evidence to sustain the finding that the assignment is only as collateral security. Cunningham *v.* Smith, 70 Pa. St. 450.

56. *California.*— Gilman *v.* Curtis, 66 Cal. 116, 4 Pac. 1094.

Kentucky.— Cash *v.* Hayden, 83 S. W. 136, 26 Ky. L. Rep. 1045.

Missouri.— Arn *v.* Arn, 81 Mo. App. 133.

New York.— Tenant *v.* Dudley, 68 Hun 225, 22 N. Y. Suppl. 876 [*reversed* on other grounds in 144 N. Y. 504, 39 N. E. 644]. Palmer *v.* New York Mut. L. Ins. Co., 38 Misc. 318, 77 N. Y. Suppl. 869.

Pennsylvania.— Sommer *v.* New England Mut. L. Ins. Co., 21 Pa. Super. Ct. 501.

United States.— Clark *v.* Equitable L. Assur. Soc., 133 Fed. 816.

See *infra*, VI, C, 5, c, (I), note 58; XII, F; XIII, D, 1, a, (III).

57. Dungan *v.* New Jersey Mut. Ben. L. Ins. Co., 38 Md. 242, 46 Md. 469; King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547; Matthews *v.* Sheehan, 69 N. Y. 585; Filon *v.* Knowles, 2 Wkly. Notes Cas. (Pa.) 226; Pedder *v.* Mosely, 31 Beav. 159, 7 L. T. Rep. N. S. 205, 54 Eng. Reprint 1099. And see Chattel Mortgages, 6 Cyc. 990 note 22, 1038 note 92.

58. Hendricks *v.* Reeves, 2 Pa. Super. Ct. 545; McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233; Stokoe *v.* Cowan, 29 Beav. 637, 7 Jur. N. S. 901, 30 L. J. Ch. 882, 4 L. T. Rep. N. S. 69, 9 Wkly. Rep. 801, 54 Eng. Reprint 775; Vaughan *v.* Vanderstegen, 2 Drew. 289, 2 Wkly. Rep. 293, 61 Eng. Reprint 730; Johnson *v.* Swire, 3 Giffard 194, 7 Jur. N. S. 670, 4 L. T. Rep. N. S. 677, 66 Eng. Reprint 379. See *supra*, VI, C, 5, a, text and note 55; *infra*, XII, F.

The assignee is entitled under such an assignment to be reimbursed for the indebtedness due him and his expenses in keeping up the policy, and is under obligation to account to the personal representatives of the assured for the balance.

Georgia.— Morris *v.* Georgia Loan, etc., Co., 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.

Kentucky.— Baldwin *v.* Haydon, 70 S. W. 300, 24 Ky. L. Rep. 900; Burnam *v.* White, 22 S. W. 555, 16 Ky. L. Rep. 241.

Maryland.— Harrison *v.* McConkey, 1 Md. Ch. 34.

Michigan.— Maybury *v.* Berkery, 102 Mich. 126, 60 N. W. 699; McDonald *v.* Birss, 99 Mich. 329, 58 N. W. 359; Metropolitan L. Ins. Co. *v.* O'Brien, 92 Mich. 584, 52 N. W. 1012.

New York.— King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547; Elsberg *v.* Sewards, 66 Hun 28, 21 N. Y. Suppl. 10; Earle *v.* New York L. Ins. Co., 7 Daly 303; Sharp *v.* Rose, 20 N. Y. Suppl. 826.

Pennsylvania.— Wheeland *v.* Atwood, 42 Wkly. Notes Cas. 178.

Tennessee.— Rison *v.* Wilkerson, 3 Sneed 565.

Texas.— Lewy *v.* Gilliard, 76 Tex. 400, 13 S. W. 304; Cawthon *v.* Perry, 76 Tex. 383, 13 S. W. 268.

Utah.— Jones *v.* New York L. Ins. Co., 15 Utah 522, 50 Pac. 620.

Virginia.— Roller *v.* Moore, 86 Va. 512, 10 S. E. 241, 6 L. R. A. 136.

United States.— Page *v.* Burnstine, 102 U. S. 664, 26 L. ed. 268; Cammack *v.* Lewis,

be as security also for advances to be subsequently made.[59] And an assignment for security will also cover renewals of the indebtedness.[60]

(II) *As to Premiums.* The assignee for security has a claim on the policy or its proceeds for premiums paid by him for the purpose of preserving the security,[61]

15 Wall. 643, 21 L. ed. 244; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215.

And see *infra*, XII, F.

Trust as to balance.— The assignee taking the policy as security with the agreement, express or implied, to pay the balance to another, after satisfying his claim and expenses, holds such balance in trust for the person entitled thereto.

Georgia.—Grenville *v.* Crawford, 13 Ga. 355.

Kentucky.— Griffin *v.* Equitable Assur. Soc., 119 Ky. 856, 84 S. W. 1164, 27 Ky. L. Rep. 313; Wrather *v.* Stacy, 82 S. W. 420, 26 Ky. L. Rep. 683.

Mississippi.— Hiserodt *v.* Hamlett, 74 Miss. 37, 20 So. 143.

New Jersey.— Sell *v.* Steller, 53 N. J. Eq. 397, 32 Atl. 211.

England.— Martin *v.* West of England L., etc., Ins. Co., 4 Jur. N. S. 158.

Assignee has legal title.— But the assignee has the legal title to the proceeds of the policy and may recover the full amount from the company with the resulting obligation of accounting therefor.

California.— Gilman *v.* Curtis, (1884) 3 Pac. 114.

Maryland.— Robinson *v.* Hurst, 78 Md. 59, 26 Atl. 956, 44 Am. St. Rep. 266.

Minnesota.— Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182.

Texas.— Andrews *v.* Union Cent. L. Ins. Co., 92 Tex. 584, 50 S. W. 572 [*reversing* (Civ. App. 1898) 44 S. W. 610].

United States.— Swick *v.* Home Ins. Co., 23 Fed. Cas. No. 13,692, 2 Dill. 160.

See also *supra*, VI, C, 5, a, text and note 56; *infra*, XII, F; XIII, D, 1, a, (III).

A settlement between the assignee and the assured will be binding on the assignee in determining the extent of his interest. Babcock *v.* Bonnell, 80 N. Y. 244; Hirsch *v.* Mayer, 31 N. Y. App. Div. 627, 54 N. Y. Suppl. 1075; Shackelford *v.* Mitchill, 16 Daly (N. Y.) 268, 10 N. Y. Suppl. 122.

Barred debt.— The creditor to whom a policy is assigned as collateral acquires a lien for the amount of his claim against the assignor and expenses incurred in keeping the policy in force, although the indebtedness secured is barred and can no longer be legally enforced. Conway *v.* Caswell, 121 Ga. 254, 48 S. E. 956; Hight *v.* Taylor, 97 Ind. 392; Townsend *v.* Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513.

Successive assignments.— Where the owner of a life policy assigned it to plaintiff as security for a loan, and subsequently assigned it to defendant's testator as security for a loan of double the amount of plaintiff's loan, and the insured lived twenty-five years thereafter, and all premiums were paid by defendant's testator furnishing plaintiff two-thirds of the amount and plaintiff adding one-third, and paying the company, it was held that plaintiff was not entitled to receive payment in full of principal and interest of his loan and premiums paid by him to the exclusion of defendant from participation in the proceeds of the policy, but each party should be repaid the amount of premium paid by him, with interest thereon, and the balance of the proceeds of the policy applied to payment of plaintiff's loan, or divided between the parties in proportion to the amount of premium paid by each. Shaw *v.* Cornell, 59 N. Y. App. Div. 573, 69 N. Y. Suppl. 660.

59. Upshaw *v.* Mutual Loan Assoc., 29 Misc. (N. Y.) 143, 60 N. Y. Suppl. 242; Roanoke First Nat. Bank *v.* Terry, 99 Va. 194, 37 S. E. 843.

60. Dewees *v.* Osborne, 178 Ill. 39, 52 N. E. 942; Corcoran *v.* New York Mut. L. Ins. Co., 183 Pa. St. 443, 39 Atl. 50.

61. *Massachusetts.*— Kendall *v.* Equitable L. Assur. Soc., 171 Mass. 568, 51 N. E. 464.

Minnesota.— Brown *v.* U. S. Equitable L. Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968.

Texas.— Hatch *v.* Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411; Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

Wisconsin.— McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

United States.— Widaman *v.* Hubbard, 88 Fed. 806.

England.— *In re* Miller, 6 Ch. D. 790, 37 L. T. Rep. N. S. 38, 25 Wkly. Rep. 881; Gill *v.* Downing, L. R. 17 Eq. 316, 30 L. T. Rep. N. S. 157, 22 Wkly. Rep. 360; Norris *v.* Caledonian Ins. Co., L. R. 8 Eq. 127, 38 L. J. Ch. 721, 20 L. T. Rep. N. S. 939, 17 Wkly. Rep. 954; Money *v.* Gibbs, Dr. & Wal. 394; Busted *v.* West of England F., etc., Assur. Co., 5 Ir. Ch. 553; Bellamy *v.* Brickenden, 2 Johns. & H. 137, 70 Eng. Reprint 1002; Fitzwilliam *v.* Price, 4 Jur. N. S. 889; Hodgson *v.* Hodgson, 2 Keen 704, 7 L. J. Ch. 5, 16 Eng. Ch. 704, 48 Eng. Reprint 800; *In re* Kerr, 38 L. J. Ch. 539, 17 Wkly. Rep. 989; Aylwin *v.* Witty, 30 L. J. Ch. 860, 9 Wkly. Rep. 720; *Re* Walker, 68 L. T. Rep. N. S. 517, 3 Reports 455; Leete *v.* Wallace, 58 L. T. Rep. N. S. 577.

Canada.— *In re* Ontario Mut. L. Assur. Co., 30 Ont. 666.

See also cases cited *supra*, VI, C, 5, c, (I), note 58.

Duty of assignor to pay premiums.—Under a stipulation in the policy that the payment of one third of the annual premiums should be deferred until the death of assured and be a charge on the policy, it was held that the assignor was bound to discharge such encumbrance as between him and his as-

together with interest thereon,[62] unless the assignment is invalid for fraud or illegality participated in by the assignee.[63] A mortgagee is entitled to foreclose on failure of the mortgagor to keep up the premiums.[64] In general premiums paid to keep the policy alive are chargeable on the proceeds of the insurance;[65] but a mere volunteer acquires no lien on the proceeds of the policy by paying the premium in order to keep it alive.[66] One who ought to pay the premiums cannot give a lien on the policy to another for money advanced by the latter to pay such premiums;[67] nor can one have a lien for premiums which are not in fact paid.[68] An assignee who has obligated himself to pay premiums may be liable in damages for failure to keep the policy in force;[69] or such failure may amount to a forfeiture of his rights as against another who has paid such premiums.[70]

signee. Gatayes *v.* Flather, 34 Beav. 387, 55 Eng. Reprint 684.

Covenant by assignor.— Under a deed of assignment of a life policy containing a covenant by the assignor to keep up the premiums and that on his failure to do so the assignee might pay the premiums and sue for the recovery of the same from the assignor, it was held that an action of debt would lie to recover an annual premium thus paid by the assignee upon default of the assignor. Barber *v.* Butcher, 8 Q. B. 863, 10 Jur. 814, 15 L. J. Q. B. 289, 55 E. C. L. 863.

Effect of bankruptcy.— The liability of the mortgagor to keep up the premiums may be discharged by proceedings in bankruptcy. Mitcalfe *v.* Hanson, L. R. 1 H. L. 242, 35 L. J. Q. B. 225; Saunders *v.* Best, 17 C. B. N. S. 731, 10 Jur. N. S. 1204, 11 L. T. Rep. N. S. 421, 13 Wkly. Rep. 160, 112 E. C. L. 731; Elder *v.* Beaumont, 8 E. & B. 353, 4 Jur. N. S. 23, 27 L. J. Q. B. 25, 6 Wkly. Rep. 57, 92 E. C. L. 353.

Statute of limitations.— Limitations as against the right to recover premiums paid do not commence to run until the policy has become payable. Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

62. Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824; Widaman *v.* Hubbard, 88 Fed. 806; and other cases cited in the preceding note.

63. Mattack *v.* Mutual L. Ins. Co., 5 Pa. Dist. 113; Pennell *v.* Millar, 23 Beav. 172, 3 Jur. N. S. 850, 26 L. J. Ch. 699, 5 Wkly. Rep. 215, 53 Eng. Reprint 68.

64. Ford *v.* Tynte, 41 L. J. Ch. 758, 27 L. T. Rep. N. S. 304; Parker *v.* Anglesea, 25 L. T. Rep. N. S. 482, 20 Wkly. Rep. 162.

65. It was so held where the mortgagor of a policy, having been relieved from liability to pay premiums by his bankruptcy, continued to pay them in order to keep the policy in force for the benefit of the mortgagee. Shearman *v.* British Empire Mut. L. Assur. Co., L. R. 14 Eq. 4, 41 L. J. Ch. 466, 26 L. T. Rep. N. S. 570, 20 Wkly. Rep. 620. See also Falcke *v.* Scottish Imperial Ins. Co., 34 Ch. D. 234, 56 L. J. Ch. 707, 56 L. T. Rep. N. S. 220, 35 Wkly. Rep. 143; *In re* Leslie, 23 Ch. D. 552, 48 L. T. Rep. N. S. 564, 52 L. J. Ch. 762, 31 Wkly. Rep. 561.

Amount of recovery affected by special agreement.— Where a beneficiary of a life policy assigned it to defendant with a condition that, at maturity, one thousand five hundred dollars of the proceeds should be paid to the assignor, and the assignee paid assessments amounting to two thousand eight hundred dollars, and the total sum due on the policy was two thousand seven hundred and seventy-four dollars, the assignee was only entitled to the total amount less one thousand five hundred dollars. Light *v.* Lauser, 174 Pa. St. 608, 34 Atl. 350.

66. See *infra*, XII, G.

67. Clack *v.* Holland, 19 Beav. 262, 18 Jur. 1007, 24 L. J. Ch. 13, 2 Wkly. Rep. 402, 52 Eng. Reprint 350.

68. Grey *v.* Ellison, 1 Giffard 438, 2 Jur. N. S. 511, 25 L. J. Ch. 666, 4 Wkly. Rep. 497, 65 Eng. Reprint 990.

69. Ainsworth *v.* Backus, 5 Hun (N. Y.) 414; Garner *v.* Moore, 3 Drew. 277, 24 L. J. Ch. 687, 3 Wkly. Rep. 497, 61 Eng. Reprint 909. Where an assignment of a policy was made to defendant with the agreement that he should pay the premiums and for his default in paying such premiums the policy became forfeited, it was held that there might be a recovery against defendant by the assignor for failure to keep the policy alive, the fact that the assured in the policy had not died being a matter which affected the amount of recovery and not the right to recover. Ainsworth *v.* Backus, *supra*.

Agreement not proved.— The assignee is not liable unless an agreement on his part to pay the premiums is proved. Killoran *v.* Sweet, 72 Hun (N. Y.) 194, 25 N. Y. Suppl. 295 [*affirmed* in 144 N. Y. 703, 39 N. E. 857], holding that where a life insurance policy was assigned to secure the assignee against a contingent liability dependent on the life of the assured, and the assignee was paid by a third person a sum sufficient to pay the premiums while such contingency existed, but he did not agree to pay them, he was not liable in damages to the insured's estate for permitting the policy to lapse by failure to apply the money received to the payment of such premiums. See also Van Duersen *v.* Scanlan, 8 Ohio Dec. (Reprint) 362, 7 Cinc. L. Bul. 188.

70. Brown *v.* U. S. Equitable L. Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Kavanagh *v.* Waldron, 9 Ir. Eq. 279, 3 J. & L. 214. And one who keeps up the policy by payment of premiums may acquire the entire right to the insurance money as against other claimants whose rights have become forfeited. Foster *v.* Roberts, 29 Beav.

(III) *Redemption.* As an assignee for security has only the right to be reimbursed for his claim, advances, premiums, etc.,[71] the assignor or any other person having an interest in the policy may redeem by satisfying all the claims of such assignee,[72] unless the right to redeem has been cut off by an authorized sale or other disposition of the policy on non-payment of the debt.[73] The assignment of the policy as security does not divest the assignor of the general property therein, and after payment or tender of the debt to the assignee he is entitled to the possession of the policy,[74] and to a reassignment;[75] but reassignment is not essential to revest title in the assignor.[76] After extinguishment of the assignee's claims the proceeds are subject to disposition in payment of the debts of the assignor.[77] A mortgagor of a policy has the same right to redeem as a mortgagor of other personal property.[78]

(IV) *Surrender Value.* The pledgee or assignee as security for a life policy may take its surrender value on default of the insured in payment of the debt,[79]

467, 7 Jur. N. S. 400, 30 L. J. Ch. 666, 4 L. T. Rep. N. S. 760, 9 Wkly. Rep. 605, 54 Eng. Reprint 708; Brown *v.* Freeman, 4 De G. & Sm. 444, 64 Eng. Reprint 906; Godsal *v.* Webb, 2 Keen 99, 7 L. J. Ch. 103, 16 Eng. Ch. 99, 48 Eng. Reprint 566.

71. See *supra*, VI, C, 5, c, (I).

72. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469; Hirsch *v.* Mayer, 165 N. Y. 236, 59 N. E. 89; Bohleber *v.* Waelden, 150 N. Y. 405, 44 N. E. 1041; Salt *v.* Northampton, [1892] A. C. 1, 61 L. J. Ch. 49, 65 L. T. Rep. N. S. 765, 40 Wkly. Rep. 529; Lawley *v.* Hooper, 3 Atk. 278, 26 Eng. Reprint 962; Morland *v.* Isaac, 20 Beav. 389, 1 Jur. N. S. 989, 24 L. J. Ch. 753, 3 Wkly. Rep. 397, 52 Eng. Reprint 653; Nesbitt *v.* Berridge, 4 De G. J. & S. 45, 10 Jur. N. S. 53, 9 L. T. Rep. N. S. 588, 3 New. Rep. 53, 12 Wkly. Rep. 283, 69 Eng. Ch. 45, 46 Eng. Reprint 831; Drysdale *v.* Piggott, 8 De G. M. & G. 546, 2 Jur. N. S. 1078, 25 L. J. Ch. 878, 4 Wkly. Rep. 773, 57 Eng. Ch. 546, 44 Eng. Reprint 500; Lake *v.* Brutton, 8 De G. M. & G. 440, 2 Jur. N. S. 839, 25 L. J. Ch. 842, 57 Eng. Ch. 440, 44 Eng. Reprint 460; Gottlieb *v.* Cranch, 4 De G. M. & G. 440, 17 Jur. 704, 22 L. J. Ch. 912, 53 Eng. Ch. 440, 43 Eng. Reprint 579; Holland *v.* Smith, 6 Rep. 11, 9 Rev. Rep. 801; Murphy *v.* Taylor, 1 Ir. Ch. 92; Hoffman *v.* Cooke, 5 Ves. Jr. 623, 31 Eng. Reprint 772; *Ex p.* Shaw, 5 Ves. Jr. 620, 31 Eng. Reprint 771.

Accounting for proceeds.— The assignee may be required to account for the proceeds of the policy above the amount of his claim. Culver *v.* Guyer, 129 Ala. 602, 29 So. 779.

When the assignee's claim becomes barred by limitations the beneficiary may maintain suit on the policy without regard to such claim. Washington L. Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123.

73. Palmer *v.* New York Mut. L. Ins. Co., 38 Misc. (N. Y.) 318, 77 N. Y. Suppl. 869.

74. Clark *v.* U. S. Equitable L. Assur. Soc., 133 Fed. 816; Courtenay *v.* Wright, 2 Giffard 337, 6 Jur. N. S. 1283, 3 L. T. Rep. N. S. 433, 9 Wkly. Rep. 153, 66 Eng. Reprint 141.

75. Bohleber *v.* Waeldin, 69 Hun (N. Y.) 79, 23 N. Y. Suppl. 391; Williams *v.* Atkyns, 2 J. & L. 603.

The assignor is not entitled to a reassignment until the debt is extinguished. Kendall *v.* U. S. Equitable L. Assur. Soc., 171 Mass. 568, 51 N. E. 464.

76. Alabama Gold L. Ins. Co. *v.* Garmany, 74 Ga. 51.

77. Hirsch *v.* Mayer, 165 N. Y. 236, 59 N. E. 89; Beyer *v.* Adams, 3 Jur. N. S. 710, 26 L. J. Ch. 841, 5 Wkly. Rep. 795.

But for unsecured claims the assignee may be entitled to hold the surplus as against the representatives of the insured. *In re* Haselfoot, L. R. 13 Eq. 327, 41 L. J. Ch. 286, 26 L. T. Rep. N. S. 146.

78. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469; King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547; Matthews *v.* Sheehan, 69 N. Y. 585.

Form of action.— In New York it has been held that where the mortgagee has collected the amount of the policy the balance, after deducting the amount of the debt secured and other proper items, may be recovered by the person entitled in an action as for money had and received, and that a technical action to redeem is not necessary. King *v.* Van Vleck, 109 N. Y. 363, 16 N. E. 547.

79. Palmer *v.* New York Mut. L. Ins. Co., 38 Misc. (N. Y.) 318, 77 N. Y. Suppl. 869. *Compare* Hawkins *v.* Woodgate, 7 Beav. 565, 8 Jur. 743, 29 Eng. Ch. 565, 49 Eng. Reprint 1185.

Assignment by wife without written consent of husband.— But where an insurance policy was made payable to the wife of the insured as beneficiary, or to the husband's representatives in case of the wife's death before him, and the wife promised plaintiff to assign the policy to him as collateral for a debt of her husband, and in pursuance of such promise sent him an instrument by which she agreed to collect and pay over the policy to him, but there was evidence that the husband never assented to the transfer, and he did not give the written consent to the assignment required by the New York statute (Laws (1896), p. 220, c. 272, § 22), it was held that all the wife could assign was her right to receive the amount payable on the death of her husband, and plain-

and the insured has no right, as against the company, after such surrender and settlement, to reinstatement by way of redemption on payment of the debt.[80] It has also been said that a mortgagee may, on default and after due notice to the assured to redeem, surrender the policy to the company for its reserve or equitable value, as an advantageous mode of sale and foreclosure,[81] but such notice to redeem is necessary.[82]

(v) *Conversion.* The insured may maintain an action to recover damages for conversion as against an assignee of the policy for security.[83]

(vi) *Priority of Claims.* The assignee of a life insurance policy stands in the shoes of the assignor and takes subject to any equity in favor of third persons;[84] and he takes subject to defenses existing at the time of the assignment under statutory provisions to that effect applicable to choses in action.[85] The company may by the terms of the policy be entitled to priority as to loans made to the insured, even though it has no prior assignment;[86] but the company is not entitled to priority as to claims of which the assignee was not charged with notice.[87] A notice of the assignment given to the company will be sufficient to protect the assignee as against the claims of subsequent assignees;[88] but such notice will not give the assignee priority over a prior equitable mortgagee who has possession, even though he has not notified the company.[89] The assignee may be guilty of laches which will defeat his claim as against a subsequent *bona fide* assignee without notice.[90]

(vii) *Marshaling Assets.* The equitable doctrine of marshaling assets is applicable between different holders of liens on the same policy.[91]

(viii) *Rights as Against Company.*[92] The assignee takes the policy subject to the rules of the company, and in the absence of a statute or express agreement

tiff did not acquire a right to an absolute assignment of the policy, which would include the right to surrender the policy and receive the surrender value. Rathborne *v.* Hatch, 90 N. Y. App. Div. 161, 85 N. Y. Suppl. 775 [*affirmed* in 181 N. Y. 584, 74 N. E. 1125].

80. Palmer *v.* New York Mut. L. Ins. Co., 38 Misc. (N. Y.) 318, 77 N. Y. Suppl. 869.

81. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469.

82. Dungan *v.* Newark Mut. Ben. L. Ins. Co., 46 Md. 469, holding that if the company accepts a surrender without such notice, it will only acquire the interest of the mortgagee and hold subject to the right of redemption as the mortgagee held before the surrender.

83. Wheeler *v.* Pereles, 40 Wis. 424, where the assignee for security converted the policy by surrendering it to the company and taking another in lieu thereof. See also Toplitz *v.* Bauer, 161 N. Y. 325, 55 N. E. 1059.

84. Brown *v.* Equitable L. Assur. Soc., 75 Minn. 412, 78 N. W. 103, 671, 79 N. W. 968; Columbia Bank *v.* Equitable L. Assur. Soc., 61 N. Y. App. Div. 594, 70 N. Y. Suppl. 767; Culmer *v.* American Grocery Co., 21 N. Y. App. Div. 556, 48 N. Y. Suppl. 431; Burridge *v.* Row, 8 Jur. 299, 13 L. J. Ch. 173; British Equitable Ins. Co. *v.* Great Western R. Co., 38 L. J. Ch. 132, 19 L. T. Rep. N. S. 476, 17 Wkly. Rep. 43.

But a preëxisting general creditor has no priority over the claims of the assignee. Brooke *v.* Morris, 111 Ga. 879, 36 S. E. 937.

An assignee from one having apparent title may be protected, although the assignment is set aside. Lawrance *v.* Galsworthy, 3 Jur. N. S. 1049.

The provisions of the English statute as to notice of assignment relate only to liabilities of the company to the assignees with reference to their priority, and not to the relative rights of persons claiming to be interested in the proceeds of the policy. Newman *v.* Newman, 28 Ch. D. 674, 54 L. J. Ch. 598, 52 L. T. Rep. N. S. 422, 33 Wkly. Rep. 505.

85. Westbury *v.* Simmons, 57 S. C. 467, 35 S. E. 764; West of England Bank *v.* Batchelor, 51 L. J. Ch. 199, 46 L. T. Rep. N. S. 132, 30 Wkly. Rep. 364.

86. Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172.

87. *In re* Jeffery, 20 Wkly. Rep. 857.

88. North British Ins. Co. *v.* Hallett, 7 Jur. N. S. 1263, 9 Wkly. Rep. 880.

89. Spencer *v.* Clarke, 9 Ch. D. 137, 47 L. J. Ch. 692, 27 Wkly. Rep. 133.

90. Bridge *v.* Connecticut Mut. L. Ins. Co., 152 Mass. 343, 25 N. E. 612; Webster *v.* British Empire Mut. L. Assur. Co., 15 Ch. D. 169, 49 L. J. Ch. 769, 43 L. T. Rep. N. S. 229, 28 Wkly. Rep. 818; Neale *v.* Molineux, 2 C. & K. 672, 61 E. C. L. 672.

91. Heyman *v.* Dubois, L. R. 13 Eq. 158, 41 L. J. Ch. 224, 25 L. T. Rep. N. S. 558; Lea *v.* Hinton, 5 De G. M. & G. 823, 54 Eng. Ch. 823, 43 Eng. Reprint 1090; Ford *v.* Tynte, 41 L. J. Ch. 758, 27 L. T. Rep. N. S. 304. See Marshaling Assets and Securities.

92. Priority of claim as against company see *supra*, VI, C, 5, c, (vi).

Surrender value see *supra*, VI, C, 5, c, (iv).

is not entitled to notice of time of payment of premiums;[93] and in general the assignee takes subject to the stipulations and conditions contained in the contract as between the assignee and the company.[94] On the other hand the assignee is entitled to the incidental rights of the assignor, such as participation in distribution of surplus.[95]

6. Consent of Beneficiary. Under a policy of life insurance, in the absence of any express stipulations authorizing a change of beneficiary by the assured without the consent of the original beneficiary,[96] the beneficiaries named in the policy have a vested interest in the proceeds from the time the policy is taken which cannot be defeated by an assignment without their consent.[97] Under a policy for the benefit of the wife and children of the insured, an assignment by the insured will not cut off their interest even though it is contingent at the time

93. See *infra*, X, C, 6, g.

But where the company has consented to the assignment it should give notice to the assignee. Elgutter *v.* Mutual Reserve Fund Life Assoc., 52 La. Ann. 1733, 28 So. 289; McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

Notice required by statute see *infra*, X, C, 6, h, (I), text and note 25.

94. Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511; Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172. See *infra*, X, A, 4; X, C, 5.

Suicide clause.— Thus the company may as against the assignee insist that the rights of the assignor have been forfeited under the suicide clause subsequent to the assignment (Solicitors', etc., L. Assur. Soc. *v.* Lamb, 2 De G. J. & S. 251, 10 Jur. N. S. 739, 33 L. J. Ch. 426, 10 L. T. Rep. N. S. 792, 12 Wkly. Rep. 941, 67 Eng. Ch. 251, 46 Eng. Reprint 372; Jackson *v.* Foster, 1 E. & E. 463, 5 Jur. N. S. 1247, 29 L. J. Q. B. 8, 7 Wkly. Rep. 578, 102 E. C. L. 463); unless he is within an exception in the policy in favor of assignees (White *v.* British Empire Mut. L. Assur. Co., L. R. 7 Eq. 394, 38 L. J. Ch. 53, 19 L. T. Rep. N. S. 306, 17 Wkly. Rep. 26; Jones *v.* Consolidated Inv. Assur. Co., 26 Beav. 256, 5 Jur. N. S. 214, 28 L. J. Ch. 66, 53 Eng. Reprint 896; City Bank *v.* Sovereign L. Assur. Co., 50 L. T. Rep. N. S. 565, 32 Wkly. Rep. 658). See *infra*, XII, A, 2, e.

Notice of breach of condition.— The company should within a reasonable time after discovering a breach of contract on the part of the insured affecting the validity of the policy give notice thereof to the assignee. Union Nat. Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800.

95. Sommer *v.* New England Mut. L. Ins. Co., 11 Pa. Dist. 100, 27 Pa. Co. Ct. 221.

96. Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41; Mutual L. Ins. Co. *v.* Twyman, 92 S. W. 335, 28 Ky. L. Rep. 1153 [*overruling* 89 S. W. 178, 28 Ky. L. Rep. 167]. See *infra*, XII, D, 2, c.

A provision requiring notice to the insured of "any assignment" refers to assignments by the beneficiary and is not a reservation to the insured of the right to change the beneficiary by assignment. Irwin *v.* Travelers' Ins. Co., 16 Tex. Civ. App. 683, 39 S. W. 1097.

Assent of the beneficiary to an assignment by the assured operates as an assignment by the beneficiary. Conway *v.* Caswell, 121 Ga. 254, 48 S. E. 956.

97. *Arkansas.*—Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

California.— Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Illinois.— New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

Indiana.— Harley *v.* Heist, 86 Ind. 196, 45 Am. Rep. 285.

Kentucky.— Robinson *v.* Duvall, 79 Ky. 83, 42 Am. Rep. 208; Meadows *v.* Meadows, 13 Ky. L. Rep. 495.

Louisiana.— Lambert *v.* Penn Mut. L. Ins. Co., 50 La. Ann. 1027, 24 So. 16; Pilcher *v.* New York L. Ins. Co., 33 La. Ann. 322.

Maine.— Tremblay *v.* Ætna L. Ins. Co., 97 Me. 547, 55 Atl. 509, 94 Am. St. Rep. 521.

Massachusetts.— Potter *v.* Spilman, 117 Mass. 322; Knickerbocker L. Ins. Co. *v.* Weitz, 99 Mass. 157; Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720.

Minnesota.— Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666; Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

New Hampshire.— City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645; Stokell *v.* Kimball, 59 N. H. 13.

New York.— Ferdon *v.* Canfield, 104 N. Y. 143, 10 N. E. 146; Lockwood *v.* Bishop, 51 How. Pr. 221. See also Baron *v.* Brummer, 100 N. Y. 372, 3 N. E. 474; Fowler *v.* Butterly, 78 N. Y. 68, 34 Am. Rep. 507 [*affirming* 44 N. Y. Super. Ct. 148 (*affirming* 53 How. Pr. 471)].

North Carolina.—Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217 [*overruling* Conigland *v.* Smith, 79 N. C. 303].

Pennsylvania.— Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. Rep. 900.

Rhode Island.— Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

the assignment is made.[98] The surrender by the insured of a policy payable to a beneficiary and the acceptance in lieu thereof of a new policy payable to another beneficiary is in effect an assignment and is invalid as to the original beneficiary.[99]

7. Effect of Mistake or Fraud. An assignment of a life insurance policy,[1]

Tennessee.— D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768; Scobey *v.* Waters, 10 Lea 551; Gosling *v.* Caldwell, 1 Lea 454, 27 Am. Rep. 774.

Texas.— Irwin *v.* Travelers' Ins. Co., 16 Tex. Civ. App. 683, 39 S. W. 1097.

Vermont.— Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503.

United States.— Washington Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370.

Canada.—Dolen *v.* Metropolitan L. Ins. Co., 26 Ont. 67.

See also *infra*, VIII, B, 2; XII, D, 2, c.

Contra.— In Wisconsin it has been held that an insured who has procured the policy at his own expense for the benefit of another and paid the premiums and retained possession of the policy may dispose of the insurance money by will to the exclusion of the beneficiary named in the policy, or assign the same to a third person in his lifetime without the consent of the beneficiary. Breitung's Estate, 78 Wis. 33, 46 N. W. 491, 47 N. W. 17; Foster *v.* Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; Kerman *v.* Howard, 23 Wis. 108; Clark *v.* Durand, 12 Wis. 223. But this rule has since been modified. See *infra*, XII, D, 2, a, note 86.

Legal heirs or representatives.— A policy made payable to the legal heirs of the insured cannot be assigned by him so as to cut off their vested interest. Gosling *v.* Caldwell, 1 Lea (Tenn.) 454, 27 Am. Rep. 774. But a policy naming the legal representatives of the insured as beneficiaries is in effect a policy for the assured's own benefit and the policy or proceeds may be disposed of as any other property. See *supra*, VI, A, 1, text and note 6.

Disposition by will.— In the absence of a reservation in the policy of a right to cut off or modify the interests of the beneficiary, the assured cannot by will affect such interest, since from the time the policy is issued an irrevocable trust is created in favor of the beneficiary. Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503. And see Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720; and *infra*, XII, D, 2, c, (IV). But to the contrary in Wisconsin see *supra*, this note.

Knowledge by beneficiary not essential.— Even though the beneficiary has no knowledge of the existence of the policy until after the death of the insured an assignment by insured is invalid and the beneficiary cannot be compelled after his death to consent to such assignment, for the purpose of enabling the assignee to recover thereunder. Potter *v.* Spilman, 117 Mass. 322.

If the rights of the beneficiary are contingent on surviving the insured, the assignment will be valid if the beneficiary does not so survive. New York Mut. L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889; Burton *v.* Burton, 56 N. Y. App. Div. 1, 67 N. Y. Suppl. 338; New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997. See *supra*, VI, A, 2.

98. *Indiana.*— Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Kentucky.— Robinson *v.* Duvall, 79 Ky. 83, 42 Am. Rep. 208.

Massachusetts.— Knickerbocker L. Ins. Co. *v.* Weitz, 99 Mass. 157.

Minnesota.—Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666 [*following* Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289].

New York.— Ferndon *v.* Canfield, 104 N. Y. 143, 10 N. E. 146 [*affirming* 39 Hun 571]; Travelers' Ins. Co. *v.* Healey, 19 Misc. 564, 44 N. Y. Suppl. 1043; Carpenter *v.* Negus, 17 Misc. 172, 40 N. Y. Suppl. 995; Barry *v.* Equitable L. Assur. Soc., 14 Abb. Pr. N. S. 385 note.

Pennsylvania.— Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. Rep. 900; Germania L. Ins. Co. *v.* Brown, 5 Lanc. L. Rev. 394.

Tennessee.— D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

Canada.— Bliss *v.* Ætna L. Ins. Co., 19 Nova Scotia 363.

And see other cases cited *supra*, note 97.

But the wife may bind herself by consent to such assignment, although for the benefit of the husband. Gunter *v.* Williams, 1 N. Brunsw. Eq. 401. Where it was required that the assignment must be in writing, the mere delivery thereof by the husband and wife for their joint benefit was held not to operate as an assignment but only as a pledge of the wife's contingent interest. Travelers' Ins. Co. *v.* Healey, 86 Hun (N. Y.) 524, 33 N. Y. Suppl. 911 [*reversing* 28 N. Y. Suppl. 478].

The husband as guardian of his children cannot by assignment of a policy for their benefit cut off their vested interest. Pratt *v.* Globe Mut. L. Ins. Co., 3 Tenn. Cas. 174.

99. Pingrey *v.* National L. Ins. Co., 144 Mass. 374, 11 N. E. 562; Barry *v.* Mutual L. Ins. Co., 49 How. Pr. (N. Y.) 504; Bunnell *v.* Shilling, 28 Ont. 336. See *infra*, VIII, B, 2. *Compare* Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Cancellation by assignee.— The assignee of a policy issued in favor of a beneficiary who does not consent to the assignment is guilty of a conversion in causing the policy to be canceled and a new policy issued in its stead payable to such assignee. Wheeler *v.* Pereles, 43 Wis. 332.

1. See Assignments, 4 Cyc. 61.

like any other assignment or contract,[2] may be void because made under a mutual mistake.[3] So an assignment may be voidable because procured by fraud, so that it will be set aside.[4] An assignment procured by duress or undue influence will be set aside.[5]

8. Estoppel to Question Assignment. An assignor of a policy who has assented to the payment of premiums by the assignee cannot question the validity of the assignment as against the assignee who has thus paid the premiums,[6] or as against the company who has paid the policy to the assignee.[7] The beneficiary cannot question an assignment by the insured to one who with knowledge of the beneficiary has made advancements to the assured on the faith of such assignment.[8] But in the absence of knowledge on the part of the beneficiary there will be no estoppel as to him.[9]

9. What Law Governs. An assignment of a life policy is governed by the law

2. See Contracts, 9 Cyc. 388 *et seq.*

3. Price *v.* Atchison First Nat. Bank, 62 Kan. 743, 64 Pac. 639; Scott *v.* Coulson, [1903] 2 Ch. 249, 72 L. J. Ch. 600, 88 L. T. Rep. N. S. 653 [*affirming* 51 Wkly. Rep. 394].

4. McKeldin *v.* McKeldin, 104 Ky. 345, 47 S. W. 246, 20 Ky. L. Rep. 588; Wienecke *v.* Arbin, 88 Md. 182, 40 Atl. 709, 44 L. R. A. 142; Mutual Ben. L. Ins. Co. *v.* Wayne County Sav. Bank, 68 Mich. 116, 35 N. W. 853. See Assignments, 4 Cyc. 61; Contracts, 9 Cyc. 411 *et seq.*

Illustrations.— Where the assignee is induced to part with his interest in the policy for a small sum in ignorance of the fact known to the other party that the insured is dangerously ill, the sale is void and the assignee may recover from the purchaser of the policy its real value at the time of the assignment. Jones *v.* Keene, 2 M. & Rob. 348. So where the insured in a policy payable to his divorced wife induced her to assign the policy to him under the representation that their child should be the beneficiary such child was held entitled to the proceeds of the policy, although the husband fraudulently procured himself to be made the new beneficiary. Cockrell *v.* Cockrell, 79 Miss. 569, 31 So. 203.

Fraud not shown.— But if it appears that the assignee has been a party to the fraud (Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41), or the evidence does not establish the existence of legal fraud the assignment will be upheld (Pack *v.* Washington L. Ins. Co., 181 N. Y. 585, 74 N. E. 1122 [*affirming* 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210]; Morschauser *v.* Pierce, 64 N. Y. App. Div. 558, 72 N. Y. Suppl. 328; Bohleber *v.* Waelden, 80 Hun (N. Y.) 349, 30 N. Y. Suppl. 312; Washington L. Ins. Co. *v.* Lawrence, 53 Barb. (N. Y.) 307; Pioso *v.* Bitzer, 209 Pa. St. 503, 58 Atl. 891; Potts *v.* Temperance L. Assur. Co., 23 Ont. 73).

Company not party to fraud.—Where the company has paid the policy to the assignee without knowledge of any fraud in the assignment it will be protected. Northwestern Mut. L. Ins. Co. *v.* Roth, 118 Pa. St. 329, 12 Atl. 283; Barber *v.* Morris, 1 M. & Rob. 62.

5. Cason *v.* Owens, 100 Ga. 142, 28 S. E. 75; Plant *v.* Plant, 76 Miss. 560, 25 So. 151; Fowler *v.* Butterly, 78 N. Y. 68, 34 Am. Rep. 507 [*affirming* 53 How. Pr. 471].

The mere advice of a physician to a patient as to the assignment of a life policy will not constitute undue influence unless the influence so exerted was so strong as to substitute the will of the physician for that of the patient. Penn Mut. L. Ins. Co. *v.* Union Trust Co., 83 Fed. 891.

Persuasion and influence of husband.—And where a wife has power to transfer her interest in a policy of insurance on her husband's life by assignment, the fact that such assignment is procured by the persuasion and influence of the husband does not avoid it, in the absence of fraud. Connecticut Mut. L. Ins. Co. *v.* Ryan, 8 Mo. App. 535.

6. Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684; New York L. Ins. Co. *v.* Rosenheim, 56 Mo. App. 27.

7. Northwestern Mut. L. Ins. Co. *v.* Roth, 118 Pa. St. 329, 12 Atl. 283.

Inconsistent statements to company.— Where the assignor of life insurance policies wrote to the insurance company that the assignments were obtained from him by fraud and conspiracy between the assignee and his (assignor's) father, that he was told they were a matter of form and a temporary arrangement only for the accommodation of his father, and that he was induced to execute them by urgent request of his father, without time to consider the matter or take advice in relation thereto, it was held that this did not estop him from alleging that the assignments were void because of his incapacity, by reason of drunkenness, to make the same. Bursinger *v.* Watertown Bank, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848.

8. Fisher *v.* Fisher, 28 Ont. 459.

Contingent interests of children.— The wife to whom the policy is payable if living at the time of her husband's death cannot interpose the contingent interest of the children who would be entitled to the proceeds if she should die before the death of her husband, to defeat an assignment of her rights. Herr *v.* Reinoehl, 20 Lanc. L. Rev. (Pa.) 291.

9. Norfolk Nat. Bank *v.* Flynn, 58 Nebr. 253, 78 N. W. 505.

of the place where the assignment is made.[10] But on the question whether or not the policy is assignable, as that involves the contract itself as evidenced by the policy, the law of the place where the contract was made will control.[11]

VII. REINSURANCE.[12]

A. Authority of Company to Reinsure. The power of a company to make contracts of reinsurance will be determined in general by its charter and the statutory provisions under which it is authorized to do business.[13] But the general power to make contracts of reinsurance on its risks does not authorize a company to transfer all its business and its assets, which constitute a trust fund for its policy-holders, to another company, and such a contract is void.[14]

B. Relation of Original Policy-Holder to Reinsuring Company. The mere contract of reinsurance creates no privity between the original insured and the reinsurer,[15] although in some states the reinsuring company becomes liable to an action by the beneficiary named in the original policy, because its contract of reinsurance is ultimately for his benefit.[16] Where the reinsuring company, by agreement, undertakes to reinsure the members of the other company on execution of applications for reinsurance on the part of such members, any member desiring to take advantage of the provision may do so without being compelled to submit to reëxamination or comply with other conditions as to age and health.[17]

C. Liability of Reinsurer — 1. As Between the Two Companies.[18] The contract of reinsurance is not rendered invalid by failure of the company which pro-

10. *Connecticut.*—Connecticut Mut. L. Ins. Co. *v.* Westervelt, 52 Conn. 586.

Illinois.— Pomeroy *v.* Manhattan L. Ins. Co., 40 Ill. 398.

Indiana.— Criswell *v.* Whitney, 13 Ind. App. 67, 41 N. E. 78; Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Louisiana.— Miller *v.* Manhattan L. Ins. Co., 110 La. 652, 34 So. 723.

Massachusetts.— New York Mut. Life Ins. Co. *v.* Allen, 138 Mass. 24, 52 Am. Rep. 245.

New York.— Barry *v.* U. S. Equitable L. Assur. Soc., 59 N. Y. 587; Spencer *v.* Myers, 73 Hun 274, 26 N. Y. Suppl. 371.

Tennessee.— Pratt *v.* Globe Mut. L. Ins. Co., (1875) 17 S. W. 352.

United States.— Newcomb *v.* Mutual L. Ins. Co., 18 Fed. Cas. No. 10,147.

England.— Lee *v.* Ahdy, 17 Q. B. D. 309, 55 L. T. Rep. N. S. 297, 34 Wkly. Rep. 653; Le Feuvre *v.* Sullivan, 10 Moore P. C. 1, 14 Eng. Reprint 389.

Canada.— *Re* Ontario Mut. L. Assur. Co., 30 Ont. 666.

See 28 Cent. Dig. tit. "Insurance," § 469.

11. Milhous *v.* Johnson, 51 Hun (N. Y.) 639, 4 N. Y. Suppl. 199; Mutual L. Ins. Co. *v.* Terry, 62 How. Pr. (N. Y.) 325; Bunnell *v.* Shilling, 28 Ont. 336.

12. See also Fire Insurance, 19 Cyc. 638.

Effect of statutory restriction as to age of insured see *supra*, IV, A, 1, e, text and note 6.

Extrinsic evidence is admissible to show that a policy of insurance is a contract to reinsure, although it contains no words indicative of the fact. Philadelphia L. Ins. Co. *v.* American L., etc., Ins. Co., 23 Pa. St. 65.

13. See Fire Insurance, 19 Cyc. 638; Insurance, 22 Cyc. 1400.

In New Jersey the provision of 2 Gen. St. p. 1755, prohibiting an insurance company from making a contract of reinsurance until certain requirements have been complied with renders invalid the reinsurance of a particular risk by a company not having complied with such provision. Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 64 N. J. L. 340, 45 Atl. 762. But where a New Jersey company without having complied with the statutory provisions reinsured the risks of an Iowa company and subsequently repudiated its policies and the contract between the two companies was rescinded by the Iowa company, it was held that the Iowa company could not maintain an action to recover the premiums paid to the new Jersey company, in the absence of proof of any actual loss sustained by the Iowa company. Iowa L. Ins. Co. *v.* Eastern Mut. L. Ins. Co., 63 N. J. L. 439, 43 Atl. 720.

14. Price *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 262; Barden *v.* St. Louis Mut. L. Ins. Co., 3 Mo. App. 248; Mason *v.* Cronk, 125 N. Y. 496, 28 N. E. 224; Raymon *v.* Security Trust, etc., Ins. Co., 44 Misc. (N. Y.) 31, 89 N. Y. Suppl. 753; Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

15. Travelers' Ins. Co. *v.* California Ins. Co, 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769.

16. See *infra*, VII, C, 2.

17. New York Nat. Mut. Ins. Co. *v.* Home Ben. Soc., 181 Pa. St. 443, 37 Atl. 519, 50 Am. St. Rep. 666. See also Peoples' Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660.

18. After death of insured.— It is imma-

cures the reinsurance to comply with promissory representations made without fraud that it will continue to carry a part of the risk under the original policy.[19] But the company issuing the reinsurance may have the policy canceled when the original policy has terminated.[20] As between the two companies, the one issuing a general policy of reinsurance on the risks of the other is not entitled to the benefit of reinsurance on specific risks.[21] Under an agreement by the original insurer to employ counsel and defend the claim, the reinsuring company by allowing the defense to proceed makes the attorney of the original insurer its own so as to be bound by the result.[22] A contract of reinsurance may be avoided if obtained by fraud or misrepresentation.[23]

2. As Between Reinsuring Company and Original Policy-Holder. The policy-holder is not bound to accept the benefit of a contract of reinsurance and, if he elects to look only to the company issuing his policy, he has a right to do so and in such case can assert no claim as against the reinsuring company.[24] Persons insured may, however, by accepting the terms of the contract to reinsure, or by accepting policies of reinsurance from the reinsuring company, as provided in the contract to reinsure, acquire contractual rights directly against the reinsuring company;[25] or in some states the beneficiaries under original policies may sue the

terial that at the time of reinsurance the insured had already died, if that fact was unknown to the parties to the contract of reinsurance. Philadelphia L. Ins. Co. *v.* American L., etc., Ins. Co., 23 Pa. St. 65.

19. Prudential Assur. Co. *v.* Ætna L. Ins. Co., 52 Conn. 576; Prudential Assur. Co. *v.* Ætna L. Ins. Co., 23 Fed. 438.

20. India, etc., L. Assur. Co. *v.* Dalby, 4 De G. & Sm. 462, 15 Jur. 982, 64 Eng. Reprint 913.

21. Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379 [*affirming* 1 Thomps. & C. 463].

22. Strong *v.* American Cent. L. Ins. Co., 4 Mo. App. 7.

23. In Traill *v.* Baring, 4 De G. J. & S. 318, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 12 Wkly. Rep. 678, 69 Eng. Ch. 247, 46 Eng. Reprint 941, a life assurance society reassured a portion of its risk on one of its policies with a second society, stating that a third society had reassured part of the risk, and that the remainder beyond what it was proposed that the second society should take would be retained by itself, the first society. This was the intention of the first society at the time, but in the interval between the proposal to the second society and the completion of the reassurance with it, the first society, for reasons connected with its own business, but without the intervention of any new fact, or new information, or change of opinion as to the value of the life ultimately assured, changed its prior intention and reassured the whole of the risk beyond what was to be taken by the second society with the third society. The first society, however, did not communicate its change of intention to the second society, but allowed them to complete their reassurance. Under these circumstances it was held that the second society could avoid the contract of reinsurance and maintain a suit in equity to cancel the policy.

24. Atty.-Gen. *v.* Continental L. Ins. Co., 6 N. Y. St. 644.

25. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660; Seymour *v.* Chicago Guaranty Fund L. Soc., 54 Minn. 147, 55 N. W. 907; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300 [*reversing* 41 N. Y. Super. Ct. 296]; Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379 [*affirming* 1 Thomps. & C. 463]; Hayden *v.* Franklin L. Ins. Co., 136 Fed. 285, 69 C. C. A. 423. And see National Mut. Ins. Co. *v.* Home Ben. Soc., 181 Pa. St. 443, 37 Atl. 519, 59 Am. St. Rep. 666; Roach *v.* Kentucky Mut. Sec. Fund Co., 28 S. C. 431, 6 S. E. 286.

Whether a transferred risk or an original contract of insurance.—Where defendant insurance company contracted with another insurance company about to quit business to reinsure all the latter company's members who were then in good standing, and the written request for insurance made by one of such members to defendant showed that it was not an application for new insurance, and defendant, in the policy issued thereon, referred to the insured's application to the other company, and made it a part of its contract, and the insurance was also for the same amount, it was held that the policy issued by defendant was a transferred risk and not an original contract of insurance. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660. It was further held that where defendant, in a former action settling the affairs of the other company, claimed and recovered those premiums received, but not earned, by reason of such contract of transfer, and this claim embraced the insurance in question, it showed conclusively that such insurance was transferred and not original insurance. People's Mut. Assur. Fund *v.* Boesse, *supra*.

Agreement necessary.—If a company undertakes to assume the contracts and liabilities of another company and issues an invitation to members of the latter to exchange policies for those of the reinsuring company,

reinsuring company on its contract of reinsurance with the original company, as on a contract made for their benefit.[26] The original insured may avail himself of the benefits of the contract of reinsurance unaffected by any compromise, payment, or release as between the two companies to which he is not a party.[27] The validity and operation of the contract of reinsurance as affected by representations or warranties in the original contract of insurance generally relate to the time of the original insurance;[28] but new conditions will be binding upon the insured if accepted by him or embodied in the new contract accepted by him.[29]

VIII. MODIFICATION, CANCELLATION, SURRENDER, AND RESCISSION.

A. Modification by Mutual Agreement.[30] A policy of life insurance may, like any other contract,[31] be modified by new and distinct parol contract;[32] but the assent of the insured to a modification of the terms of the policy will not be binding upon the beneficiary without his consent, unless authorized by the original

giving an option as to the kind of policy to be accepted, there is no contract between a policy-holder and the reinsuring company until some form of policy has been agreed upon and accepted. Cotton *v.* Southwestern Mut. L. Ins. Co., 115 Iowa 729, 87 N. W. 675.

Requirement of written acceptance of reinsuring policy.—Where a contract by an insurance company to reinsure the risks of another company binding it to issue its policies to all persons insured in the old company requires a written acceptance of the new policies by the insured, a letter written to the reinsuring company by a person insured, stating that he desires a transfer of the insurance, is an acceptance by him in advance of the policy subsequently issued. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660. If the reinsuring company after the issue of its policy, and without having received a written acceptance thereof as required by its contract to reinsure, notifies the insured that premiums are due and receives payment of them, it will be deemed to have waived its right to such acceptance. People's Mut. Assur Fund *v.* Boesse, *supra*.

The relations between the insured and the reinsurer are determined by the original contract which the reinsurer has undertaken to carry out. Hayden *v.* Franklin L. Ins. Co., 136 Fed. 285, 69 C. C. A. 423.

26. Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379 [*affirming* 1 Thomps. & C. 463]; Traveler's Ins. Co. *v.* California Ins. Co., 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769. See CONTRACTS, 9 Cyc. 377.

27. Glen *v.* Hope Mut. L. Ins. Co., 56 N. Y. 379 [*affirming* 1 Thomps. & C. 463]. And see Strong *v.* American Cent. L. Ins. Co., 4 Mo. App. 7.

28. Seymour *v.* Chicago Guaranty Fund Life Soc., 54 Minn. 147, 55 N. W. 907; Cahen *v.* Continental L. Ins. Co., 69 N. Y. 300 [*reversing* 41 N. Y. Super. Ct. 296].

Misrepresentations in application.— As between the reinsured company and the original insured the latter is not bound to produce his original application made a part of his contract and prove the truth of its statements, no issue as to the truth of such statements having been raised by the reinsuring company. Roach *v.* Kentucky Mut. Security Fund Co., 28 S. C. 431, 6 S. E. 286.

Health certificate as additional consideration for reinsuring policy.—Where a company enters into a contract to reinsure the risks of another company, which is about to quit business, and issues to a person insured a policy which recites that it is issued "for and in consideration, and upon the faith of" the statements and warranties contained in the application for the original insurance, the reinsuring company cannot show that the policy was issued upon the faith of a health certificate executed by the insured at the time of the issue of the policy, as this would be to show an inconsistent, and not merely an additional, consideration. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660.

Estoppel by recitals of policy.—Where a policy issued by a reinsuring company recites that it is issued in pursuance of its contract to reinsure, it cannot afterward say that the policy was issued as an original policy and on a health certificate executed by the insured at the time, unless it is shown that the statement in the policy was made by mistake or through fraud. People's Mut. Assur. Fund *v.* Boesse, 92 Ky. 290, 17 S. W. 630, 13 Ky. L. Rep. 660.

29. Davitt *v.* National Life Assoc., 36 N. Y. App. Div. 632, 56 N. Y. Suppl. 839.

30. See CONTRACTS, 9 Cyc. 593.

31. See CONTRACTS, 9 Cyc. 593 *et seq.*; EVIDENCE, 17 Cyc. 734.

32. Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511; Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

Not under seal.— In the absence of a statute requiring a policy to be sealed, it may be modified by adding a stipulation not under seal. Gates *v.* Home Mut. L. Ins. Co., 5 Ohio Dec. (Reprint) 313, 4 Am. L. Rec. 395.

Without the consent of the insured, the insurer cannot by letters or notices affect the status of the parties under the contract. Welsh *v.* Chicago Guaranty Fund Life Soc., 81 Mo. App. 30.

contract.[33] A modification after the death of the insured, which makes the policy correspond to the agreement of the parties, is binding on the company.[34]

B. Cancellation or Surrender by Mutual Agreement — 1. Assent of Parties to Contract. Subject to the qualifications hereafter stated, a policy of life insurance may be canceled or surrendered by mutual agreement, so as to terminate the rights and obligations of the parties under the contract;[35] but there must be a meeting of minds, or mutual assent, to constitute a surrender or cancellation,[36] and the insured must be mentally competent.[37] Failure of the insured to tender subsequent premiums does not show assent to an attempted forfeiture for non-

Stipulations against change by parol are valid and for the benefit of both parties, and should be given effect. Atlas Reduction Co. *v.* New Zealand Ins. Co., 138 Fed. 497, 71 C. C. A. 21 [*affirming* 121 Fed. 929].

Subsequent stipulations for forfeiture on non-payment of a loan do not supersede the provisions of the policy for forfeiture for non-payment of premiums. Bryant *v.* Mutual Ben. L. Ins. Co., 109 Fed. 748.

Representations by the company made subsequent to the execution and delivery of the policy and not upon a new consideration are not binding as part of the contract, the insurance being an entire contract for life and not a contract from year to year. Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea (Tenn.) 488.

33. Union Cent. L. Ins. Co. *v.* Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737.

Change of beneficiary see *infra*, XII, D, 2, c.

Assent of beneciary to cancellation or surrender see *infra*, VIII, B, 2.

34. International Order of Twelve, etc., *v.* Boswell, (Tex. App. Civ. Cas. 1899) 48 S. W. 1108.

35. Mosser *v.* Knights Templars', etc., Life Indemnity Co., 115 Mich. 672, 74 N. W. 230; Milne *v.* Northwestern L. Assur. Co., 23 Misc. (N. Y.) 553, 52 N. Y. Suppl. 766; Fulton *v.* Metropolitan L. Ins. Co., 4 Misc. (N. Y.) 76, 23 N. Y. Suppl. 598 [*affirming* 1 Misc. 478, 21 N. Y. Suppl. 470]; New York Mut. L. Ins. Co. *v.* Allen, 178 U. S. 351, 20 S. Ct. 913, 44 L. ed. 1098; Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121. Thus a cancellation by mutual agreement if the insured is in default for non-payment of premiums will terminate the contract, although a forfeiture could not have been declared by the company on account of its failure to give statutory notice. New York Mut. L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088 [*reversing* 76 Fed. 617, 22 C. C. A. 425].

Consideration.— The surrender of the old policy is a consideration for the issuance of a new one on different terms. Lamb *v.* Mutual Reserve Fund Life Assoc., 106 Fed. 637.

Surrender for other purpose than cancellation.— It may be a question whether a surrender of the policy to the insurer or its agent was for the purpose of terminating the contract or as security for loan (New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; Raymond *v.* Metropolitan L. Ins. Co., 86 Mo. App. 391), or in exchange for another policy to be delivered (Harnickell *v.* New York L. Ins. Co., 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150 [*affirming* 40 Hun 558]).

36. Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898; Krause *v.* Equitable L. Assur. Soc., 99 Mich. 461, 58 N. W. 496; *In re* City Mut. Ins. Co., 24 Ont. 100.

Return of policy to agent.—In an action on a life policy, the fact that the insured did not promptly pay his premium note held by the agent, who had paid the amount of the premium to the company, and that the insured returned the policy to the agent to have the premiums made payable quarterly instead of annually, the latter neglecting, however, to have this done before the death of insured, did not show a cancellation of the policy. Krause *v.* Equitable L. Assur. Soc., 99 Mich. 461, 58 N. W. 496.

A mere offer by the company to return the premium will not effect a cancellation unless the insured accepts the offer and surrenders the policy. McCollum *v.* New York Mut. L. Ins. Co., 55 Hun (N. Y.) 103, 8 N. Y. Suppl. 249.

Entries by the company in its books showing cancellation, but made without the knowledge of the insured or the beneficiary, will not affect his rights. Chase *v.* Phœnix Mut. L. Ins. Co., 67 Me. 85; Dean *v.* Ætna L. Ins. Co., 2 Hun (N. Y.) 358.

Subsequent claim for premiums.— The action of the company in making a claim for subsequent premiums when they mature constitutes a rejection of an offer of surrender on the part of the insured. Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978.

Refusal of premium.— The insured may compel the company to receive premiums on the policy when due and continue the risk unless the company goes into liquidation. Union Cent. L. Ins. Co. *v.* Poettker, 5 Ohio Dec. (Reprint) 263, 4 Am. L. Rec. 109.

Notice of acceptance.— Whether notice to the company of acceptance of proffered cancellation is within a reasonable time is a question of law. Wilmot *v.* Charter Oak L. Ins. Co., 46 Conn. 483.

Surrender procured by fraud or made under mistake see *infra*, VIII, B, 3.

37. In an action to recover on an insurance policy, which the insured had exchanged for another, under which recovery

payment, so as to constitute a cancellation by agreement;[38] and under a provision that failure to pay an assessment within thirty days after notice shall be accepted as evidence of the decision of the insured to terminate his insurance, the intention to terminate may be repudiated by showing acts on the part of the insured inconsistent with such intention.[39] After death has occurred, the rights of the parties become fixed and an offer of cancellation cannot be accepted by the other party.[40] The insured may abandon the insurance by refusal to pay premiums with the intention of forfeiting the insurance in accordance with the provisions of the policy;[41] but an intention to abandon will not be presumed,[42] and the taking out of another policy before final default in payment of premiums on the first policy will not establish an abandonment.[43] In the absence of fraud, if both of the parties to a contract of life insurance treat the policy as void, neither can revive it without the consent of the other.[44]

2. Assent of Beneficiary. As the beneficiary has a vested interest in the contract,[45] the insured cannot, by surrendering the policy, cut off the rights of the beneficiary without his or her consent,[46] unless permitted to do so by the terms of

was barred by the manner of his death, where evidence intended to establish his insanity at the time of such exchange showed that, during the later months of his life, and prior to the exchange, he had grown quarrelsome and sullen, treated his mother unkindly, had trouble with his fellow laborers, and at times had delusions that men were chasing him and trying to kill him, and that he finally committed suicide, but there was no evidence that he had ever acted in an irrational manner relative to business matters, it was held that it was not error to take from the jury the question of his sanity. Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924.

38. Smith *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 188, 1 Cinc. L. Bul. 284.

39. Greenwald *v.* United L. Ins. Assoc., 18 Misc. (N. Y.) 91, 42 N. Y. Suppl. 973.

40. Krause *v.* Equitable L. Assur. Soc., 99 Mich. 461, 58 N. W. 496; Travelers' Ins. Co. *v.* Jones, 32 Tex. Civ. App. 146, 73 S. W. 978; Porter *v.* New York Mut. L. Ins. Co., 70 Vt. 504, 41 Atl. 970.

41. Deppen *v.* Southern Mut. L. Ins. Co., 8 Ky. L. Rep. 57; Green *v.* Hartford L. Ins. Co., 139 N. C. 309, 51 S. E. 887, 1 L. R. A. N. S. 623; Mutual L. Ins. Co. *v.* Hill, 178 U. S. 347, 20 S. Ct. 914, 44 L. ed. 1097; Ryan *v.* Mutual Reserve Fund Life Assoc., 96 Fed. 796.

Where an assessment policy-holder voluntarily ceases to pay assessments and abandons his policy, he cannot complain if the company cancels the policy. Green *v.* Hartford L. Ins. Co., 139 N. C. 309, 51 S. E. 887, 1 L. R. A. N. S. 623.

42. Manhattan L. Ins. Co. *v.* Wright, 126 Fed. 82, 61 C. C. A. 138.

Intention not to pay premiums, communicated by the insured to an agent having no authority to change the contract for the company, does not terminate the contract. Taylor *v.* Provident Sav. L. Assur. Soc., 134 Fed. 932.

43. Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436.

44. Fulton *v.* Metropolitan L. Ins. Co., 4 Misc. (N. Y.) 76, 23 N. Y. Suppl. 598.

45. See *supra*, VI, C, 6; *infra*, XII, D, 2.

46. *California.*— Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386; Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Connecticut.— Chapin *v.* Fellowes, 36 Conn. 132, 4 Am. Rep. 49.

Illinois.— New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

Louisiana.— Lawrence *v.* Penn Mut. L. Ins. Co., 113 La. 87, 36 So. 898.

Maine.— Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905.

Massachusetts.— Haskell *v.* Equitable L. Assur. Soc., 181 Mass. 341, 63 N. E. 899; Pingrey *v.* National L. Ins. Co., 144 Mass. 374, 11 N. E. 562.

Michigan.— Lockwood *v.* Michigan Mut. L. Ins. Co., 108 Mich. 334, 66 N. W. 229.

Minnesota.— Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

New York.— Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787 [*reversing* 33 Hun 425]; Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385; Peckham *v.* Grindlay, 17 Abb. N. Cas. 18; Matter of Booth, 11 Abb. N. Cas. 145; Whitehead *v.* New York L. Ins. Co., 63 How. Pr. 394; Barry *v.* Mutual L. Ins. Co., 49 How. Pr. 504. *Compare*, however, Garner *v.* Germania L. Ins. Co., 17 Abb. N. Cas. (N. Y.) 7.

Ohio.— Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

Pennsylvania.— Mattack *v.* Mutual L. Ins. Co., 5 Pa. Dist. 113; Jones *v.* Jones, 23 Pa. Co. Ct. 254.

Tennessee.— D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

Texas.— Washington L. Ins. Co. *v.* Berwald, 97 Tex. 111, 76 S. W. 442 [*affirming*

the contract.[47] This rule has no application, however, until the contract has been fully consummated;[48] and even where the contract has been consummated, a surrender of the policy by the insured without the consent of the beneficiary may be expressly or impliedly ratified by the latter.[49]

3. Impeachment For Fraud or Mistake[50] — a. Fraud. The surrender of a policy of life insurance and a release of rights thereunder may be avoided by the insured or the beneficiary, as the case may be, if it was procured by fraud.[51] But

(Civ. App. 1903) 72 S. W. 435. Where a policy providing that on default of payment of premiums a paid-up term policy for a specified length of time should be issued and the insured defaulted and subsequently executed a note for the premium providing for absolute forfeiture of the insurance if the note was not paid at maturity, it was held that the beneficiary had a vested right in the paid-up term policy which could not be cut off by the execution of the note without the consent of such beneficiary. Union Cent. L. Ins. Co. *v.* Wilkins, (Tex. Civ. App. 1898) 47 S. W. 546.

United States. — Leonhard *v.* Provident Sav. L. Assur. Soc., 130 Fed. 287, 64 C. C. A. 533; Timayenis *v.* Union Mut. L. Ins. Co., 21 Fed. 223. *Compare* Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Canada. — Bunnell *v.* Shilling, 28 Ont. 336.

See 28 Cent. Dig. tit. "Insurance," § 518.

And see *infra*, XII, D. 2.

In Louisiana a life insurance policy in which a married woman is named as beneficiary vests a title in her as separate paraphernal property, and it cannot afterward be converted into separate property of the husband or into a community asset by its surrender to the insured and the issuance to the latter of a new policy in which another and different beneficiary is named without the consent of the former beneficiary. Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602. If such substituted policy is only intended as security for a previously existing indebtedness of the insured to the last named beneficiary, and the recitals of the policy clearly indicate that it is issued in the place of a previously existing one, the company cannot be held liable therefor, having been adjudged liable for the full amount of the surrendered policy. The bar of equitable estoppel does not apply so as to put upon the insurance company an unconditional obligation. Putnam *v.* New York L. Ins. Co., *supra*.

Forfeiture.—Where the assured had not the right to cut off the beneficiary by surrendering the policy and receiving the surrender value, yet where the company acted in good faith, paying the surrender value on the production of a receipt to which the name of the beneficiary was forged, the company was held not liable under the policy as it had been forfeited by non-payment of premiums. Schneider *v.* U. S. Life Ins. Co., 123 N. Y. 109, 25 N. E. 321, 20 Am. St. Rep. 727 [*reversing* 52 Hun 130, 4 N. Y. Suppl. 797]. See *infra*, VIII, A, 3; XII, D, 2, c, (II), note 95.

Beneficiary entitled to surrender value see *infra*, VIII, E, 1.

47. See the cases above cited; and *infra*, XII, D, 2, c, (III).

Surrender by pledgee or mortgagee see *supra*, VI, C, 5, c, (IV).

48. Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96, holding that one who has applied for insurance for the benefit of another is under no obligation to consummate the contract so as to procure a policy for the beneficiary named, and as long as it remains executory the person procuring the insurance and the insurance company may, by mutual consent, decline to complete it without consulting the beneficiary, who can only become such upon the completion of the contract.

Return of undelivered policy.—Where the solicitor of an insurance company was willing to procure two policies for a person whose life was to be insured, and to take his notes for the premium for the first year, but in fact delivered only one of them, and with the consent of the insured declined to deliver the other policy, and returned it with a surrendered note for the premium to the company, which canceled the policy, it was held that the beneficiaries named in the undelivered policy had no vested right thereto. Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

49. Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385.

Ratification not shown.—It has been held, however, that a finding that there was no ratification by a wife of the surrender by her husband of a policy on his life for her benefit was justified, although it appeared that she was notified of the surrender on the day it was made and did not notify the company of her dissent until after the husband's death about a month later, where during this time his health was rapidly failing and her attention was constantly required in taking care of him; and it was further held that where the wife indorsed the check received by the husband for a returned premium on such surrender, but she testified that she wrote her name at the request of her husband, without knowing what it was, and the court so found, such finding was conclusive, and that the indorsement was not a ratification. Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385.

50. **Suit in equity to set aside cancellation or surrender** see *infra*, VIII, E, 5, a.

Avoiding surrender and release for fraud in an action at law see VIII, E, 5, i.

51. Heinlein *v.* Imperial L. Ins. Co., 101 Mich. 250, 59 N. W. 615, 45 Am. St. Rep.

to entitle him to avoid a surrender and release for fraud because of false statements knowingly made by the company or its agent, it must appear that the statements were made with the intention that they should be acted upon by him and that they were a substantial inducement to the surrender and release, and it must further appear, not only that he would not have executed the release had he been told the truth, but also that he would not have done so had no statement been made.[52] Mistake of law combined with fraud or misconduct on the part of the company or its agent may be ground for setting aside a surrender and cancellation.[53] A contract for the surrender of a life insurance policy, unlike a contract for life insurance, is not *uberrimæ fidei*, so as to be voidable for failure of the company or its agent to disclose facts affecting the risk.[54]

b. Mistake. A surrender or cancellation of a policy of insurance may also, in a proper case, be avoided on the ground of mutual mistake.[55] But as a rule one who surrenders a policy and executes a release to the company cannot avoid the same on the ground that he thought it was something else, where his mistake was due to not reading the release, although able to do so, and no fraud was practised upon him.[56]

409, 25 L. R. A. 627; Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830; and cases cited in the notes following.

Laches.— When a holder of a policy is induced to surrender it and accept another in its place by false representations as to the terms of the new policy and as to their effect being more favorable to the assured than the terms of the old one, laches will not be imputed to him from his not reading the new policy and discovering that it did not correspond with the representations, for a period of five years, the new policy being so obscure in its terms as that only experts in insurance matters could understand it. Knauer *v.* Globe Mut. L. Ins. Co., 48 N. Y. Super. Ct. 454. See *supra*, IV, A, 2, a.

52. Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121.

Misrepresentation by physician as to health. — In Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121, the holder of a policy of life insurance determined to surrender it and obtain a surrender value, at the same time taking out a new policy. For the purpose of effecting the change, he went to the office of the agent of the company, where he was examined by its physician and rejected as an applicant for new insurance on the ground that he had an affection of the heart. At the same time the physician stated to him that the disease was not in itself dangerous and would not cause his death, but would prevent him from obtaining insurance in any other company, and advised him to retain the policy he thus held. The insured, however, surrendered the policy, and he and his wife, who was the beneficiary, executed a release thereon. In fact his disease, as the physician knew, was likely to cause his death at any time, and did so within a few days thereafter. Under these circumstances it was held that the wife could not avoid the release because of the false statement made by the physician, which was not the inducement to its execution, nor intended to be so, although, if the physician had stated the truth within his knowledge, it might have prevented the surrender of the policy.

Fraud and duress not shown see Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905; Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385.

53. Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830. See also Heinlein *v.* Imperial L. Ins. Co., 101 Mich. 250, 59 N. W. 615, 45 Am. St. Rep. 409, 25 L. R. A. 627.

54. Potts *v.* Temperance, etc., L. Ins. Co., 23 Ont. 73, holding therefore that where the insured in a life policy having no surrender value applied to the insurers to purchase it, and they did so for a small sum, he being at the time, to their knowledge as well as his own, seriously ill with heart disease, there was no evidence of fraud to submit to the jury in an action by his executors to set aside the transaction, and that the surrender must stand, even though the insured was at the time of the surrender under the delusion that he would live a long time, and the physician permitted him to remain under that delusion, knowing that he could not recover.

55. Thus, where a creditor carrying a six-thousand-dollar policy on the life of his debtor, in order to be relieved from the burden of the premiums, surrendered the same for twenty-five hundred dollars, under the rules of the company, subsequent to the death of the insured, of which both of the parties were ignorant, it was held that the surrender, not being by way of compromise, but under such mutual mistake of fact, should be set aside and the policy reinstated in equity. Riegel *v.* American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857 [*reversing* 7 Pa. Co. Ct. 445], 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166 [*reversing* 1 Pa. Dist. 721, 12 Pa. Co. Ct. 177].

56. Wagner *v.* Montpelier Nat. L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121, holding that

C. Rescission For Breach of Contract or Fraud — 1. By Insured — a. For Breach of Contract. On breach of contract by the company wrongfully terminating the insurance the insured may have rescission as to his obligations under the contract.[57] The act of the company in transferring its assets and ceasing to do business is a breach of contract on which the insured may be relieved from obligation to make further payments under the contract.[58] Increase of premiums by the company beyond the terms of the contract is ground for rescission by the insured.[59]

b. For Fraud. The insured is also entitled to rescind where he was induced to take out the insurance by the fraud of the company or its agent, unless his right to do so is barred by waiver or laches;[60] or where, without his knowledge, the agent inserted in the application for the policy such misrepresentations as would, if made by the insured, avoid the policy, although the company may be estopped to set up the agent's fraud to avoid the policy.[61]

2. By Company. In like manner the company, unless barred by waiver or laches, may rescind for fraud on the part of the insured,[62] or avoid the policy for breach of warranty, covenant, or condition subsequent.[63]

D. Rescission or Cancellation in Equity[64] **— 1. In General.** The insured may maintain a suit in equity in a proper case to rescind or cancel the contract for fraud on the part of the company or its agent,[65] or for breach of contract.[66] In like manner the company may maintain a suit in equity to cancel a policy because of fraud on the part of the insured or the beneficiary, as the case may be,[67] or

the beneficiary of a policy who executed to the company a release of liability thereon upon its surrender could not avoid such release on the ground that she signed it without reading it, at the instance of her husband, who was the insured, and in the belief that it was merely a receipt for accrued earnings and left the policy in force, where she was able to read, and no fraud was practised upon her by the company or its agent.

57. Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519; American Union L. Ins. Co. *v.* Wood, (Tex. Civ. App. 1900) 57 S. W. 685.

Reasonable time for delivering a policy under a contract of insurance is a question for the trial court in an action for rescission of such contract. Calandra *v.* Life Ins. Co. of America, 84 N. Y. Suppl. 498.

58. Meade *v.* St. Louis Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 1; Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423. And see Insurance, 22 Cyc. 1403, 1404.

59. Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715.

60. See *supra*, IV, A, 2, a, (I); *infra*, VIII, D, E.

61. Michigan Mut. L. Ins. Co. *v.* Reed, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349. See *infra*, IX, E.

62. See *infra*, IX, A, 3.

63. Connecticut Mut. L. Ins. Co. *v.* Home Ins. Co., 6 Fed. Cas. No. 3,107, 17 Blatchf. 142. See *infra*, X.

64. See, generally, Cancellation of Instruments, 6 Cyc. 282.

65. Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361; Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715.

66. Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715, unauthorized increase of premiums.

67. John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566; New York L. Ins. Co. *v.* Bangs, 103 U. S. 780, 26 L. ed. 608; Equitable L. Assur. Soc. *v.* Patterson, 1 Fed. 126; French *v.* Connelly, 2 Anstr. 454; Prince of Wales Assoc. Co. *v.* Palmer, 25 Beav. 605, 53 Eng. Reprint 768; Traill *v.* Baring, 4 De G. J. & S. 318, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 12 Wkly. Rep. 678, 69 Eng. Ch. 247, 46 Eng. Reprint 941; Fenn *v.* Craig, 3 Jur. 22, 3 Y. & C. Exch. 216; Whittingham *v.* Thornbaugh, 2 Vern. Ch. 206, 23 Eng. Reprint 734; Mutual L. Assur. Co. *v.* Anderson, 1 N. Brunsw. Eq. 466; National L. Assur. Co. *v.* Egan, 20 Grant Ch. (U. C.) 469; New York L. Ins. Co. *v.* Parent, 3 Quebec 163. See also *infra*, IX, A, 3; and Cancellation of Instruments, 6 Cyc. 294 note 36.

After death of the insured.— In some cases it has been held that the company cannot maintain a suit in equity to cancel a policy for fraud after the death of the insured, and particularly after an action at law, in which the fraud may be set up as a defense, has been commenced on the policy, unless there are special circumstances rendering the remedy in equity necessary to prevent irreparable injury. Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202; Guardian Mut. L. Ins. Co. *v.* Sandal, 7 Ohio Dec. (Reprint) 503, 3 Cinc. L. Bul. 559; Phœnix Mut. L. Ins. Co. *v.* Bailey, 13 Wall. (U. S.) 616, 20 L. ed. 501; Ætna L. Ins. Co. *v.* Smith, 73 Fed. 318 (holding also that such a case is not aided by a demand in the bill for the perpetuation of testimony, since a bill for that purpose is multifarious if it also asks for relief);

because the policy is a wager policy by reason of want of insurable interest.[68] As a rule, however, when the company seeks such equitable relief, it must do equity by returning the premiums paid, with interest.[69] In a proper case the company may sue in equity to cancel a policy for breach by the insured of a condition subsequent by which the policy is rendered void;[70] but non-payment of premiums by the insured is not alone ground for cancellation of the policy in equity.[71]

2. PARTIES. In a suit by an insurance company to cancel a life policy the beneficiaries are proper and necessary parties.[72] On the other hand it has been held that the beneficiary is not a necessary party to a suit by the insured to cancel a policy for fraud and recover premiums paid.[73]

E. Rights and Remedies of Insured and Beneficiary — 1. SURRENDER VALUE. By the terms of a contract of life insurance or by statute the insured may be entitled to have the surrender value of his policy on its surrender or cancellation.[74] Such surrender value is to be determined by the period which the policy has run, the amount of annual premium, the age of the insured, and the

Hoare *v.* Bremridge, L. R. 14 Eq. 522 [*affirmed* in L. R. 8 Ch. 22, 42 L. J. Ch. 1, 27 L. T. Rep. N. S. 593, 21 Wkly. Rep. 43]. *Compare*, however, John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566, where a suit at law which had been brought on a life insurance policy fraudulently obtained was enjoined and the policy decreed to be canceled. And see Security Trust Co. *v.* Tarpey, 66 Ill. App. 589 (where a suit to cancel a policy brought in the lifetime of the insured was sustained, although he died pending the suit); Traill *v.* Baring, 4 De G. J. & S. 318, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 12 Wkly. Rep. 678, 69 Eng. Ch. 247, 46 Eng. Reprint 941 (where a suit to enjoin an action at law on a policy of reinsurance and cancel the same on the ground of fraud was sustained after the death of the insured).

Res judicata.—Where there is no newly discovered evidence, the company cannot maintain a bill to cancel a policy or enjoin a judgment thereon, because of fraud, where it has had full opportunity to plead the fraud in an action at law against it on the policy. New York L. Ins. Co. *v.* Bangs, 103 U. S. 780, 26 L. ed. 608.

68. Deshrough *v.* Curlewis, 2 Jur. 740, 3 Y. & C. Exch. 175; North American L. Assur. Co. *v.* Craigen, 13 Can. Sup. Ct. 278; North American L. Assur. Co. *v.* Brophy, 2 Ont. L. Rep. 559. See *supra*, I, B.

69. See *infra*, IX, A, 3, note 30.

70. Connecticut Mut. L. Ins. Co. *v.* Home Ins. Co., 6 Fed. Cas. No. 3,107, 17 Blatchf. 142, holding that where by the terms of a life insurance policy it was to become void if the insured should become so far intemperate as to impair his health, and the beneficiary refused to recognize the cancellation of the policy upon the happening of such contingency, and continued to tender premiums, which were refused, the company could maintain a bill in equity for cancellation and surrender of the policy. See *infra*, X, B, 3.

71. Globe Mut. L. Ins. Co. *v.* Reals, 79 N. Y. 202, holding that the fact that the premiums on a life policy were not paid in cash, as required by the policy, but by the notes of the insured, which were delivered when he was in his last illness, was not ground for cancellation of the policy in equity.

72. Equitable L. Assur. Soc. *v.* Patterson, 1 Fed. 126, holding that infant children of the insured are necessary parties where they have an interest in the policy contingent upon their mother's death before the insured.

73. Martin *v.* Ætna L. Ins. Co., 1 Tenn. Cas. 361.

To the contrary, however, it has been held that where a husband has taken a policy of life insurance in the name of his wife, the obligations imposed by the contract of insurance are to both of them, and both must join in demanding a rescission of the policy for alleged fraud on the part of the agent of the insurance company in inducing the payment of the premiums, and the husband alone cannot, without her consent, effect a rescission, by redelivering the policy to the agent who effected the insurance. And it has been held therefore that the husband is properly nonsuited in an action by him alone to recover back the premium, upon a rescission attempted by him alone, without a release by the wife of the obligation of the insurance company to her. Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386.

74. See Haskell *v.* Equitable L. Assur. Soc., 181 Mass. 341, 63 N. E. 899; People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522. See also *infra*, X, C, 9, c, (v).

What law governs foreign insurance company.— Under a policy issued by a foreign corporation doing business in Massachusetts it was held that the Massachusetts statute fixing the surrender value had no application as it relates only to domestic corporations and that if a surrender value is claimed under the laws of the state where the company is organized the law of such state must be pleaded. Haskell *v.* Equitable L. Assur. Soc., 181 Mass. 341, 63 N. E. 899.

probability of the continuance of his life according to the usual life-tables.[75] The value of an unmatured, paid-up policy is the unearned premium called the reserve and is to be computed in the same manner as that of a policy upon which annual premiums are paid.[76] The beneficiary is entitled to the surrender value as against the insured.[77] The creditors of the insured are not entitled to the surrender value in the absence of a showing that the beneficiary has consented to the surrender.[78]

2. Paid-Up Policy. Under a provision by which on default in payment of premiums the insured is entitled to a paid-up policy for such amount as the premiums paid would have secured, the insured may elect to abandon the payment of premiums and demand a paid-up policy for the proper amount;[79] but in the absence of any provision in the contract for the issuance of a paid-up policy, an agreement on the part of the company to issue such policy is without consideration.[80] The insured must pursue the method provided in the contract for securing such paid-up policy,[81] and if the original policy is lost he must tender release

75. Farley *v.* Union Mut. L. Ins. Co., 9 N. Y. St. 273.

Apportionment of reserve.— In an action to recover damages for breach of contract to make settlement by which the insured was entitled to participate in the profits, it was held that the amount of the reserve fund and the financial standing of the company should be taken into account, the financial standing of the company being material for the purpose of determining how much of the reserve could be applied in making a settlement. Nashville L. Ins. Co. *v.* Mathews, 8 Lea (Tenn.) 499.

Net reserve less surrender charge.— Under the terms of a particular policy it was held that the "full cash surrender value" referred to the net reserve accrued on the policy less a surrender charge provided for in the policy. Bryant *v.* Mutual Ben. L. Ins. Co., 109 Fed. 748.

An agreement of assured to ratify any plan adopted by the company for equitable distribution of its surplus and profits does not bind him to accept an apportionment made by the company by which he is not awarded the amount equitably due under his policy. Kellner *v.* New York Mut. L. Ins. Co., 43 Fed. 623.

76. People *v.* Security L. Ins., etc., Co., 78 N. Y. 114, 34 Am. Rep. 522, 7 Abb. N. Cas. 198.

77. Sheets *v.* Sheets, 4 Colo. App. 450, 36 Pac. 310; Haskell *v.* Equitable L. Assur. Soc., 181 Mass. 341, 63 N. E. 899; Jones *v.* Jones, 23 Pa. Co. Ct. 254; Timayenis *v.* Union Mut. L. Ins. Co., 21 Fed. 223. Where a policy of insurance on the life of a married man is issued for the benefit of his wife, to whom he is largely indebted, and who pays all the premiums except the first, the policy is the property of the wife, who is entitled to retain, as against the insured, the proceeds of a surrender of the policy. Sheets *v.* Sheets, *supra*. One who has taken a policy payable to his wife if living, otherwise to their children, cannot collect the cash surrender value if there has been a child of the marriage, although such child has died. D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768. But where the policy was for the benefit of surviving children and the children of the named deceased child or children it was held that the assured being eighty years of age and his only surviving children being adults the assured and his children could give a legal discharge so as to require the legal surrender value of the policy to be paid to them. Webster *v.* New England Mut. L. Ins. Co., 21 D. C. 227. In New York L. Ins. Co. *v.* Bonner, 11 Nebr. 169, 7 N. W. 745, it is held that one who has taken a policy on his own life payable to a beneficiary, and subsequently surrendered it for another policy, may bring an action in his own name to recover back the surrender value of the first on the cancellation of the second, without joining the beneficiary. But this holding is under a statute authorizing the person with whom a contract is made for the benefit of another to bring action thereon without joining with him the person for whose benefit it is prosecuted.

Exchange of policies.— As the beneficiary cannot be cut off by a surrender of the policy and the acceptance of another in place thereof naming another beneficiary (see *supra*, VI, C, 6; VIII, B, 2; XII, D, 2), where a policy was exchanged for a paid-up policy which was subsequently surrendered for another, the latter being assigned without the knowledge of the beneficiary, it was held that the beneficiary might ratify the exchange and repudiate the surrender (People *v.* Globe Mut. L. Ins. Co., 96 N. Y. 675 [*affirming* 15 Abb. N. Cas. 75]).

78. Haskell *v.* Equitable L. Assur. Soc., 181 Mass. 341, 63 N. E. 899, where a trustee in bankruptcy sought to recover the surrender value of a policy on the life of the bankrupt.

79. Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481; American L. Ins., etc., Co. *v.* Shultz, 82 Pa. St. 46; Union Cent. L. Ins. Co. *v.* McHugh, 7 Nebr. 66; Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423; Watts *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,294, 16 Blatchf. 228. And see *infra*, X, C, 9, c, (IV).

80. Kerr *v.* Union Mut. L. Ins. Co., 69 Hun (N. Y.) 393, 23 N. Y. Suppl. 619.

81. Keyser *v.* New York Mut. L. Ins. Co., 104 Ill. App. 72.

of all liability under the old policy.[82] The paid-up policy must be demanded while the original policy remains in force;[83] but after the issuance of a paid-up policy has been agreed upon the time of surrender of the original policy is not of the essence of the contract.[84] The beneficiary and not the insured is entitled to the paid-up policy.[85] An assignee in bankruptcy in the absence of proof that the assignor was insolvent at the time the premiums were paid has no interest in the policy.[86] If the company wrongfully refuses to issue a paid-up policy as required by its contract, it is liable to an action for damages for breach of contract, or an action for specific performance, at the option of the insured.[87] The measure of damages for failure to issue a paid-up policy is the market value of the policy with interest, and not the amount of premiums paid.[88]

3. RECOVERY OF PREMIUMS PAID.[89] Under a provision in the contract the insured may be entitled on surrender of the policy to a return of a fair proportion of the premiums paid;[90] and without any such contract provision the insured is entitled

An offer to surrender made to an agent who does not inform the policy-holder as to the proper procedure until the time prescribed for obtaining the paid-up policy has expired is sufficient. O'Connor *v.* Germania L. Ins. Co., 11 Misc. (N. Y.) 192, 32 N. Y. Suppl. 1106.

Demand is properly made on the general agent of the company, although he has no authority to issue policies, there being no provision in the original policy as to the person to whom it shall be surrendered. Union Cent. L. Ins. Co. *v.* Whetzel, 29 Ind. App. 658, 65 N. E. 15.

An assignment by the insured of the policy which is surrendered cannot be required. Manhattan L. Ins. Co. *v.* Olmsted, 10 Kan. App. 196, 63 Pac. 279.

A written surrender from one having no beneficial interest in the policy cannot be required. White *v.* Pennsylvania Mut. L. Ins. Co., 6 Mo. App. 587.

Unpaid premium notes.—Where a portion of the premiums have been accepted in premium notes which are made a lien on the policy, a paid-up policy should be issued on the proper portion of the original policy determined by the premiums paid subject to the lien on such premium notes. Brooklyn Ins. Co. *v.* Dutcher, 95 U. S. 269, 24 L. ed. 410. But the company is not entitled to interest on the premium notes up to the maturity of the policy and the insured may have his paid-up policy determined by the premiums paid. Bruce *v.* Continental L. Ins. Co., 58 Vt. 253, 2 Atl. 710.

82. Lindenthal *v.* Germania L. Ins. Co., 26 Misc. (N. Y.) 443, 57 N. Y. Suppl. 472.

83. Keohler *v.* Phœnix Mut. L. Ins. Co., 4 Ky. L. Rep. 903; People *v.* Widows', etc., Ben. L. Ins. Co., 15 Hun (N. Y.) 8.

Waiver of punctuality in payment of premiums will not be a waiver of punctuality in giving notice or a demand for a paid-up policy. Hanthorne *v.* Brooklyn L. Ins. Co., 5 Mo. App. 73.

If time for payment of premiums is extended, the demand for a paid-up policy may be made during such extension. Union Cent. L. Ins. Co. *v.* Whetzel, 29 Ind. App. 658, 65 N. E. 15.

84. Sheerer *v.* Manhattan L. Ins. Co., 16 Fed. 720.

85. Continental L. Ins. Co. *v.* Hamilton, 41 Ohio St. 274; Timayenis *v.* Union Mut. L. Ins. Co., 21 Fed. 223; Watts *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,294.

86. Belt *v.* Brooklyn L. Ins. Co., 12 Mo. App. 100.

87. Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481.

The claim for damages is assignable by the insured or beneficiary. Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481.

88. *Illinois.*— Phœnix Mut. L. Ins. Co. *v.* Baker, 85 Ill. 410.

Missouri.— Rumbold *v.* Penn Mut. L. Ins. Co., 7 Mo. App. 71.

Nebraska.— Union Cent. L. Ins. Co. *v.* McHugh, 7 Nebr. 66.

New York.— Farley *v.* Union L. Ins. Co., 118 N. Y. 685, 23 N. E. 1151 [*affirming* 41 Hun 303].

Pennsylvania.— Price *v.* Guardian Mut. L. Ins. Co., 5 Wkly. Notes Cas. 250. *Compare* American L. Ins., etc., Co. *v.* Shultz, 82 Pa. St. 46, holding that the measure of damages is not the amount of premiums paid, but the difference between the value of a paid-up policy and the life policy held by plaintiff.

Compare Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481, holding that the insured is entitled to recover such an amount as damages as would be sufficient to purchase such a policy as was stipulated for in a good and responsible life insurance company.

Burden of proof.— It devolves upon plaintiff to prove damages, and where no damages are proved, he can at most recover only nominal damages. Missouri Valley L. Ins. Co. *v.* Kelso, 16 Kan. 481. See also Price *v.* Guardian Mut. L. Ins. Co. 5 Wkly. Notes Cas. (Pa.) 250.

The beneficiaries must be made parties to an action for damages for failure to issue a paid-up policy, to entitle the insured to recover more than nominal damages. Watts *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,294.

89. See also *supra*, V, E.

90. Hayward *v.* Knickerbocker L. Ins. Co.,

to recover the premiums paid on surrendering or rescinding the contract on account of the failure of the company to issue the kind of policy contracted for,[91] or other breach of contract on the part of the company in issuing the policy,[92] or wrongfully terminating it,[93] or for fraudulent representations or acts of the agent by which valid insurance is defeated.[94] The insured must act promptly in giving notice that he will not accept the insurance and insisting on the return of the premium;[95] and even where the insured is entitled to rescind and have back premiums paid, he cannot exercise such right after the beneficiary has acquired a vested interest without the tender of a release from such beneficiary.[96] Where the contract is abandoned and rescinded by mutual agreement, the insured may be entitled to recover premiums paid.[97]

4. Substituted Policy. Where, without the consent of the beneficiary, a policy is wrongfully surrendered by the insured and canceled and a substituted policy issued by the company, the beneficiary is entitled to the benefit of the substituted policy.[98]

5. Remedies For Wrongful Surrender, Cancellation, or Termination of Contract — a. Action to Set Aside Cancellation or Surrender. A suit in equity may be maintained by the insured or the beneficiary, according to the circumstances, to set aside a surrender and cancellation of a policy and revive or reinstate the same, and to recover what may be due thereon, where the surrender and cancellation was procured by fraud on the part of the company or its agent,[99] or, in a

12 Daly (N. Y.) 42, holding that an agreement indorsed upon the back of a policy of life insurance that in case the holder wishes to cancel it after three annual premiums have been paid, a fair proportion of the premiums will be returned, if applied for before the policy has expired, is not void for uncertainty; that in an action thereon by the insured, it may be shown by extrinsic evidence what would be a fair proportion of the premiums to be returned; and that for such purpose expert testimony showing the surrender value is competent.

The insured is not estopped from claiming such return by continuing to make payment of premiums pending the action to recover under the contract. Hayward *v.* Knickerbocker L. Ins. Co., 12 Daly (N. Y.) 42.

91. People's Mut. Ins. Fund *v.* Bricken, 92 Ky. 297, 17 S. W. 625, 13 Ky. L. Rep. 586; U. S. Life Ins. Co. *v.* Wright, 33 Ohio St. 533. See *supra*, V, E, 5.

If the policy is ultra vires, and therefore void, the insured may recover premiums paid. Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197.

92. Key *v.* National L. Ins. Co., 107 Iowa 446, 78 N. W. 68.

93. Scott *v.* Mutual Reserve Fund Life Assoc., 137 N. C. 515, 50 S. E. 221; Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519; Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459, 31 Am. Rep. 555.

94. *California.*— McKay *v.* New York L. Ins. Co., 124 Cal. 270, 56 Pac. 1112.

Indiana.— American Mut. L. Ins. Co. *v.* Bertram, 163 Ind. 51, 70 N. E. 258, 64 L. R. A. 935.

Massachusetts.— Fisher *v.* Metropolitan L. Ins. Co., 162 Mass. 236, 38 N. E. 503.

New York.— Miller *v.* Union Cent. L. Ins. Co., 86 Hun 6, 33 N. Y. Suppl. 112.

North Carolina.— Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519.

Ohio.— Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459, 31 Am. Rep. 555.

See also *supra*, V, E, 1, 5.

95. Howland *v.* Continental L. Ins. Co., 121 Mass. 499; New York L. Ins. Co. *v.* Miller, 11 Tex. Civ. App. 536, 32 S. W. 550.

96. Jurgens *v.* New York L. Ins. Co., 114 Cal. 161, 45 Pac. 1054, 46 Pac. 386.

97. Fulton *v.* Metropolitan L. Ins. Co., 4 Misc. (N. Y.) 76, 23 N. Y. Suppl. 598 [*affirming* 1 Misc. 478, 21 N. Y. Suppl. 470].

98. Where a policy in favor of a wife was surrendered by the husband and canceled, without the wife's consent, and a substituted policy issued by the company to the husband and assigned by him to a creditor having notice of the fraud, it was held that the wife was entitled to recover on the policy on the husband's death, that the wife, being without notice of the transaction, was not estopped either on the ground of laches or limitation, or by reason of an unused assignment to the husband obtained by fraud and coercion, and that the holder of the policy as collateral, having had notice of the fraud, was not entitled to repayment of the money expended by him in the payment of premiums. Matlock *v.* Mutual L. Ins. Co., 5 Pa. Dist. 113. See also Chapin *v.* Fellowes, 36 Conn. 132, 4 Am. Rep. 49; Barry *v.* Mutual L. Ins. Co., 49 How. Pr. (N. Y.) 504.

99. Duffy *v.* Metropolitan L. Ins. Co., 94 Me. 414, 47 Atl. 905; Heinlein *v.* Imperial L. Ins. Co., 101 Mich. 250, 59 N. W. 615, 45 Am. St. Rep. 409, 25 L. R. A. 627; Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830; Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385. See *supra*, VIII, A, 3, a.

proper case, on the ground of mutual mistake,[1] or where the surrender was wrongfully made by the insured without the assent of the beneficiary,[2] unless the right to such relief is barred by laches,[3] or by the fact that the policy has been forfeited for non-payment of premiums.[4]

b. Action to Declare Policy in Force. If the company wrongfully cancels a policy or refuses to receive the premiums on the ground that the policy has become forfeited a court of equity will order a restoration at the suit of the insured and declare the policy to be in force.[5]

c. Action For Damages For Breach of Contract — (i) *In General.* A suit in equity is not the only remedy. If a life insurance company wrongfully cancels a policy or declares it forfeited, the insured or the beneficiary, as the case may be, may maintain an action at law to recover damages for the breach of

1. Riegel *v.* American L. Ins. Co., 140 Pa. St. 193, 21 Atl. 392, 23 Am. St. Rep. 225, 11 L. R. A. 857 [*reversing* 7 Pa. Co. Ct. 445], 153 Pa. St. 134, 25 Atl. 1070, 19 L. R. A. 166 [*reversing* 1 Pa. Dist. 721, 12 Pa. Co. Ct. 177]. See *supra*, VIII, A, 3, b.

2. Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787 [*reversing* 33 Hun 425]; Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385; Whitehead *v.* New York L. Ins. Co., 63 How. Pr. (N. Y.) 394; Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806. And see the cases cited *supra*, VIII, B, 2.

Amount of recovery by beneficiaries.— Where a policy of insurance is fraudulently or wrongfully surrendered by the insured without the consent of the beneficiary, the company is liable to the beneficiary after the death of the insured, not merely for the surrender value, but for the whole of the policy less unpaid premiums and interest. Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787.

3. The suit must be seasonably brought. Tabor *v.* Michigan Mut. L. Ins. Co., 44 Mich. 324, 6 N. W. 830. But a delay of less than two months in filing a bill to obtain the reëstablishing of an insurance policy, the surrender of which has been procured by fraud, is not such delay as to preclude relief, the insured having died meanwhile, and the beneficiary being his wife, and no injury being caused to the company. Tabor *v.* Michigan Mut. L. Ins. Co., *supra*. See also Stilwell *v.* New York Mut. L. Ins. Co., 72 N. Y. 385.

4. Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787 [*reversing* 33 Hun 425] (holding that where a policy had by its terms been forfeited by reason of non-payment of premiums prior to its surrender by the insured in consideration of a sum paid him, the forfeiture was not waived by the surrender, and the beneficiary could not repudiate the surrender and at the same time seek a benefit under it as a revival of the forfeited policy); Leonhard *v.* Provident Sav. L. Assur. Co., 130 Fed. 287, 64 C. C. A. 533. In Schneider *v.* U. S. Life Ins. Co., 123 N. Y. 109, 25 N. E. 321, 20 Am. St. Rep. 727 [*reversing* 52 Hun 130, 4 N. Y. Suppl. 797], defendant insurance company, on the application of a husband, issued a policy on his life in favor of his wife, conditioned to be void on default in paying the quarterly premiums. Her husband was duly notified that a premium would be due upon a certain date, but before that time surrendered the policy and received the surrender value. At the time of the surrender, he produced a paper under seal, purporting to be signed and acknowledged by his wife, requesting the surrender and releasing the company from further liability. This paper was a forgery, and the wife had no knowledge of the existence of the policy until her husband's death. The company, however, acted in good faith, and the premium was not paid. It was held that, as the company was no party to the fraud, the policy was forfeited by the non-payment of the premium, and the wife could not recover on it.

Failure to pay or tender premiums excused. — Such a suit is not barred by failure to pay or tender premiums after surrender or cancellation, where the conduct of the company was tantamount to a declaration that it would not receive them, or where the insured or the beneficiary was entitled to notice that they were due and such notice was not given. Heinlein *v.* Imperial L. Ins. Co., 101 Mich. 250, 59 N. W. 615, 45 Am. St. Rep. 409, 25 L. R. A. 627; Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787 [*reversing* 33 Hun 425]. See also Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806. *Compare*, however, Leonhard *v.* Provident Sav. L. Assur. Co., 130 Fed. 287, 64 C. C. A. 533.

5. Day *v.* Connecticut Gen. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200; Hayner *v.* American Popular L. Ins. Co., 69 N. Y. 435; Cohen *v.* New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522; Kelly *v.* Security Mut. L. Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601; Mansbach *v.* Metropolitan L. Ins. Co., 17 Hun (N. Y.) 340; Mausbach *v.* Metropolitan L. Ins. Co., 53 How. Pr. (N. Y.) 496; Union Cent. L. Ins. Co. *v.* Poettker, 5 Ohio Dec. (Reprint) 263, 4 Am. L. Rec. 109. See also *infra*, X, C, 10.

contract.[6] Of course to sustain the action the cancellation must have been wrongful.[7]

(II) *Damages* — (A) *Premiums Paid.* On wrongful refusal of the company to receive premiums and treat the policy as continuing in force or wrongful cancellation of the same, the insured or the beneficiary, as the case may be, may recover as damages all the premiums paid, with interest from the time of payment.[8]

(B) *Value of Policy.* But the damages recoverable for wrongful forfeiture or cancellation are not necessarily limited to the premiums paid with interest; they may be measured by the value of the policy at the time of its wrongful forfeiture or cancellation.[9]

d. Election to Treat Policy as Still in Force. Instead of suing to recover the present value of the policy or in equity to have it declared valid the assured may continue to tender the premiums as they become due and on his death the full

6. *Connecticut.*— Day *v.* Connecticut Gen. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693.
Missouri.— Smith *v.* Charter Oak L. Ins. Co., 64 Mo. 330.
New York.— Kelly *v.* Security Mut. L. Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601; Speer *v.* Phœnix Mut. L. Ins. Co., 36 Hun 322.
North Carolina.— Smallwood *v.* Virginia L. Ins. Co., 133 N. C. 15, 45 S. E. 519.
Virginia.— Clemmitt *v.* New York L. Ins. Co., 76 Va. 355.
Wisconsin.— Merrick *v.* Northwestern Nat. L. Ins. Co., 124 Wis. 221, 102 N. W. 593, 109 Am. St. Rep. 931.
United States.— Hancock *v.* New York L. Ins. Co., 11 Fed. Cas. No. 6,011.
The wife as beneficiary need not join her husband in an action by him for damages resulting from the wrongful act of the company in declaring the policy forfeited. Merrick *v.* Northwestern Nat. L. Ins. Co., 124 Wis. 221, 102 N. W. 593, 109 Am. St. Rep. 931.

7 Thus where an assessment policy-holder voluntarily ceases payment of assessments and abandons his policy, he cannot afterward recover damages if the company cancels it. Green *v.* Hartford L. Ins. Co., 139 N. C. 309, 51 S. E. 887, 1 L. R. A. N. S. 623.

8. *Georgia.*— Alabama Gold L. Ins. Co. *v.* Garmany, 74 Ga. 51.
Missouri.— McKee *v.* Phœnix Ins. Co., 28 Mo. 383, 75 Am. Dec. 129; Suess *v.* Imperial L. Ins. Co., 64 Mo. App. 1.
North Carolina.— Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659; Burrus *v.* Virginia L. Ins. Co., 124 N. C. 9, 32 S. E. 323.
Ohio.— See Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459, 31 Am. Rep. 555.
Virginia.— McCall *v.* Phœnix Mut. L. Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558.
England.— Mutual Reserve L. Ins. Co. *v.* Foster, 20 T. L. R. 715.
Recovery of premiums paid see also *supra*, VIII, E, 3.
In mutual company.—Where the company had the right by contract to cancel the policy on notice and return of membership fee it was held that on the illegal cancellation for an alleged failure to pay an assessment levied the measure of damages was only the membership fee. Clifford *v.* Protective Life Assoc., 36 Misc. (N. Y.) 287, 73 N. Y. Suppl. 467.

9. *Illinois.*— Brooklyn L. Ins. Co. *v.* Weck, 9 Ill. App. 358.
Missouri.— Smith *v.* Charter Oak L. Ins. Co., 64 Mo. 330.
New York.— Kelly *v.* Security Mut. L. Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601.
Ohio.— Northwestern Nat. L. Ins. Co. *v.* Hare, 26 Ohio Cir. Ct. 197.
Texas.— Piedmont, etc., L. Ins. Co. *v.* Fitzgerald, 1 Tex. App. Civ. Cas. § 1345.
Virginia.— Clemmitt *v.* New York L. Ins. Co., 76 Va. 355.
Wisconsin.— Merrick *v.* Northwestern Nat. L. Ins. Co., 124 Wis. 221, 102 N. W. 593, 109 Am. St. Rep. 931.
United States.— Hancock *v.* New York L. Ins. Co., 11 Fed. Cas. No. 6,011.
Such action may be maintained by the beneficiary after the death of the insured. Smith *v.* Charter Oak L. Ins. Co., 64 Mo. 330. But the action may be maintained during the lifetime of the insured either by the insured or by the beneficiary. Merrick *v.* Northwestern Nat. L. Ins. Co., 124 Wis. 221, 102 N. W. 593, 109 Am. St. Rep. 931; Hancock *v.* New York L. Ins. Co., 11 Fed. Cas. No. 6,011.
Unpaid premiums should be deducted from the value of the policy. Clemmitt *v.* New York L. Ins. Co., 76 Va. 355.
After the death of the insured, the measure of damages is the face value of the policy in the absence of any evidence that its collectable value is less. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].
Where insured is uninsurable.— Where a life insurance company wrongfully declares a policy forfeited, and the insured is no longer insurable, the damages are to be ascertained by discounting the amount of the policy for the number of years of the insured's expectancy of life and deducting from that sum

amount of the policy may be recovered.[10] The beneficiary may await the event on which the policy becomes payable and after the death of the insured sue for the amount payable under the policy.[11]

e. Action on Implied Promise to Receive Premiums. Where the company refuses to receive premiums and wrongfully declares a policy forfeited, the insured cannot maintain an action of assumpsit on the theory of an implied promise to receive the premiums and keep the policy in force.[12]

f. Enforcement of Trust. It is said that there is no such relation of trust between a mutual life company and its officers on the one hand and the policy-holder on the other as will support an equitable action to restore canceled participating policies, canceled, paid-up policies issued in their place, and for an accounting.[13]

g. Action For Conversion — (i) *In General.* Since one named as beneficiary in a policy of life insurance which has been delivered into his possession has a vested right therein unless power to divest his right is reserved to the insured, he may maintain an action against the company for conversion, if it wrongfully accepts a surrender of the policy or cancels the same.[14]

(ii) *Damages.* The measure of damages in an action by the beneficiary for conversion is the value of the policy with interest from the time of the conversion.[15]

h. Action For Procuring Cancellation Without Authority. One who without authority surrenders and procures the cancellation of a policy on another's life is liable to the representative of the insured after his death or to the beneficiary, as the case may be, for the amount of the policy.[16]

i. Avoiding Release For Fraud in Action at Law. It is proper, in a suit at law on a policy of life insurance, for plaintiff to meet a plea of surrender and release by replication that the release was obtained by fraud, whether the fraud is in the execution or in misrepresentation as to material facts inducing execution, where the issue involves simply a question of fraud between the parties.[17]

the discounted premiums for that period. Kelley *v.* Security Mut. L. Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601. See also Toplitz *v.* Bauer, 161 N. Y. 325, 55 N. E. 1059; Keyser *v.* Mutual Reserve Fund Life Assoc., 60 N. Y. App. Div. 297, 70 N. Y. Suppl. 32; Speer *v.* Phœnix Mut. L. Ins. Co., 36 Hun (N. Y.) 322.

If the insured is still insurable at the time of the breach the measure of damages is the difference between the then present value of the premiums which would have to be paid during the probable life of the insured under the policy issued by defendant and the present value of the premiums which he would be compelled to pay under a policy which could then be obtained from another responsible company. Speer *v.* Phœnix Mut. L. Ins. Co., 36 Hun (N. Y.) 322. And see Keyser *v.* Mutual Reserve Fund Life Assoc., 60 N. Y. App. Div. 297, 70 N. Y. Suppl. 32.

Interest on the value of the policy should be allowed from the time of the breach. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; Smith *v.* Charter Oak L. Ins. Co., 64 Mo. 330.

10. Metropolitan L. Ins. Co. *v.* McCormick, 19 Ind. App. 49, 49 N. E. 44, 65 Am. St. Rep. 392. And see Day *v.* Connecticut Gen. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693.

11. Clement *v.* New York L. Ins. Co., 76 Va. 355.

12. Day *v.* Connecticut Gen. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693.

13. Hencken *v.* U. S. Life Ins. Co., 98 N. Y. 627 [*affirming* 11 Daly 282].

14. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

Assignment.— If the beneficiary has assigned the policy as security after the conversion thereof by the company and before the bringing of action the suit may be brought in the name of the beneficiary for the use of the assignee. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

15. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

The face value of the policy, with interest, is the measure of damages, in the absence of evidence that its collectable value is less. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

16. Gray *v.* Murray, 3 Johns. Ch. (N. Y.) 167.

17. Wagner *v.* National L. Ins. Co., 90 Fed. 395, 33 C. C. A. 121. See, generally, Release.

IX. FRAUD, MISREPRESENTATION, AND BREACH OF WARRANTY OR CONDITION PRECEDENT.

A. Fraud — 1. In General. Insurance procured with a fraudulent purpose on the part of the insured as against the company,[18] or by means of representations which are intentionally fraudulent, even though they relate to matters not material,[19] is voidable. But to constitute such fraudulent representations as to avoid the policy on that ground the representation must be made by the assured with knowledge of its falsity and with intent that it be acted upon, and it must be actually acted upon by the company to its injury.[20]

2. Concealment. In England the courts apply to life insurance the same rule with reference to concealment which is generally recognized in marine insurance, and hold that the policy is avoided if the insured has failed to disclose any fact material to the risk which would have influenced a reasonably prudent insurer in determining whether to enter into the contract.[21] In the United States, however, the courts have refused to apply to life insurance the technical rules as to concealment which have been developed in England and adopted in this country as to marine insurance,[22] and hold that the concealment must be fraudulent to defeat a

18. Parker *v.* Des Moines Life Assoc., 103 Iowa 117, 78 N. W. 826.

Intent to commit suicide.— A policy procured with an intent to commit suicide is void in its inception. Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826. See also *infra*, XII, A, 2, a, note 19; XIII, G, 2, d, (I), note 25.

19. Supreme Council C. K. & L. of A. *v.* Beggs, 110 Ill. App. 139.

Application as part of contract see *supra*, IV, B, 6, e, (I).

Statutes requiring copy of application to be attached or incorporated see *supra*, IV, B, 6, e, (II).

Fraud of a representative of insured in procuring the policy vitiates the contract. National L. Ins. Co. *v.* Minch, 53 N. Y. 144 [*reversing* 6 Lans. 100].

Fraud by medical examiner is punishable under statute in Pennsylvania, although the wrong-doer is not to profit thereby. Com. *v.* Duff, 7 Pa. Dist. 370.

20. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Patten *v.* United L., etc., Ins. Assoc., 141 N. Y. 589, 36 N. E. 739 [*affirming* 70 Hun 200, 24 N. Y. Suppl. 269].

Fraud on medical examiner.— Under Iowa Code (1897), § 1812, by which the company is estopped from setting up false representations as to the condition of health of the insured if the medical examiner has issued a certificate of health or declared the applicant a fit subject for insurance, unless the insurance was procured by the fraud or deceit of the insured, the fraud or deceit which will defeat the insurance is such as induced the medical examiner to report favorably on the application, and not fraud or deceit by means of false warranties or statements in the policy or application on which the company has relied. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Welch *v.* Union Cent. L. Ins. Co., 117 Iowa 394, 90 N. W. 828; Peterson *v.* Des Moines Life Assoc., 115 Iowa 668, 87 N. W. 397; Brown *v.* Modern Woodmen of America, 115 Iowa 450, 88 N. W. 965; Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807; Stewart *v.* Equitable Mut. Life Assoc., 110 Iowa 528, 81 N. W. 782; Weimer *v.* Economic Life Assoc., 108 Iowa 451, 79 N. W. 123; Welch *v.* Union Cent. L. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774.

Presumptions as to fraud see *infra*, XIII, G, 1, d, (III).

21. London Assurance *v.* Mansel, 11 Ch. D. 363, 48 L. J. Ch. 331, 41 L. T. Rep. N. S. 225, 27 Wkly. Rep. 444; Lindenau *v.* Desborough, 8 B. & C. 586, 14 E. C. L. 606, 3 C. & P. 353, 15 E. C. L. 290, 7 L. J. K. B. O. S. 42, 3 M. & R. 45; Wainwright *v.* Bland, 1 Gale 406, 5 L. J. Exch. 147, 1 M. & Rob. 481, 1 M. & W. 32; Rawlins *v.* Desborough, 2 M. & Rob. 328; Huguenin *v.* Rayley, 6 Taunt. 186, 16 Rev. Rep. 599, 1 E. C. L. 568.

22. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Phœnix Mut. L. Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644. But see Lefavour *v.* Insurance Co., 1 Phila. (Pa.) 558.

Reason for rejection of rule.— "A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely, if ever, arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge it is claimed avoid the policy is closed. The application is generally prepared, and the questions are generally answered, under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's strong motive for securing the business, there is

recovery on the policy.[23] If the applicant has answered the questions asked in the application he is justified in assuming that no further information is desired.[24] On the other hand if he wholly fails to answer questions the company waives information as to matters thus asked for by accepting the application without objection.[25] If, however, the applicant purports to answer a question by giving only an incomplete answer, concealing facts which should properly be stated in response to the question, and these concealed facts are material, the policy is voidable.[26] So if a material change for the worse in the health of the applicant takes place after the application and medical examination, it is the duty of the applicant to disclose it.[27] The failure to disclose facts of which the applicant is ignorant[28] or which are immaterial to the risk[29] is not of course ground for avoiding the policy.

3. Rescission and Cancellation. Rescission and cancellation may be granted in a suit in equity brought by the company on account of fraud on the part of the insured.[30]

danger that facts communicated to him may not find their way into the application. With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent nondisclosure shall avoid the policy. Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel, should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear, not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice." Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 435, 19 C. C. A. 286, 38 L. R. A. 33, 70.

23. German-American Mut. Life Assoc. *v.* Farley, 102 Ga. 720, 29 S. E. 615; Smith *v.* Ætna L. Ins. Co., 49 N. Y. 211 [*affirming* 5 Lans. 545]; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52, 7 Am. Rep. 410; Drakeford *v.* Supreme Conclave K. of D., 61 S. C. 338, 39 S. E. 523; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

24. Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280 [*affirming* 36 Barb. 357]; Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; Swick *v.* Home Ins. Co., 23 Fed. Cas. No. 13,692, 2 Dill. 160.

25. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

26. Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. (Mass.) 42; London Assurance *v.* Mansel, 11 Ch. D. 363, 48 L. J. Ch. 331, 41 L. T. Rep. N. S. 225, 27 Wkly. Rep. 444.

Peculiar facts.— No doubt all courts would agree to the rule that any peculiar fact, to the knowledge of the applicant, materially affecting the risk and unknown to the company, should be disclosed. Penn. Mut. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; Lindenau *v.* Desborough, 8 B. & C. 586, 15 E. C. L. 290, 3 C. & P. 353, 14 E. C. L. 606, 7 L. J. K. B. O. S. 42, 3 M. & R. 45; Rawlins *v.* Desborough, 2 M. & Rob. 328; Huguenin *v.* Rayley, 6 Taunt. 186, 16 Rev. Rep. 599, 1 E. C. L. 568.

Specific wrongs need not be disclosed, however, in answer to a question as to occupation. Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70.

27. Thompson *v.* Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900; Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216; Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365; British Equitable Ins. Co. *v.* Great Western R. Co., 38 L. J. Ch. 314, 20 L. T. Rep. N. S. 422, 17 Wkly. Rep. 561. And see Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Sovereign Camp W. of W. *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331. *Contra*, Grier *v.* New York Mut. L. Ins. Co., 132 N. C. 542, 44 S. E. 28.

28. Mutual Ben. L. Ins. Co. *v.* Robinson, 59 Ill. 123, 14 Am. Rep. 8; March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887.

29. American L. Ins. Co. *v.* Mahone, 56 Miss. 180.

30. New York L. Ins. Co. *v.* Bangs, 103 U. S. 780, 26 L. ed. 608 (holding, however, that the evidence was not sufficient to show

B. Representations and Warranties or Conditions Precedent — 1. How Distinguished. A warranty is a statement of the contract with reference to the conditions on which it is predicated, the truth of which is made a condition precedent to its validity;[31] while a representation is a statement made as an inducement to a proposed contract of insurance and collateral to the contract.[32]

2. How Made — a. Representations. Representations as distinguished from warranties may in the nature of the case be made either orally or by writing, and the representations, the falsity of which is relied on to defeat the policy, are generally incorporated into the application for insurance.[33]

b. Warranties or Conditions Precedent. To create a warranty or condition precedent, the statement relied on must be made a part of the contract by incorporating into the policy either the statement itself or an appropriate reference thereto.[34] If the application is not made a part of the contract by reference in the policy, a warranty in the application alone as to the truth of the statements made therein is not a part of the contract in such sense that error or mistake in such statements will avoid the policy without regard to their materiality as representations.[35] Statements in an application which is by reference made a part of the policy, however, are of the same effect as if made in the policy itself, and if

the fraud alleged); London, etc., Ins. Co. *v.* Seymour, L. R. 17 Eq. 85, 43 L. J. Ch. 120, 29 L. T. Rep. N. S. 641, 22 Wkly. Rep. 201; French *v.* Connelly, Anstr. 454; Prince of Wales, etc., Assoc. Co. *v.* Palmer, 25 Beav. 605, 53 Eng. Reprint 768; Traill *v.* Baring, 4 De G. J. & S. 318, 10 Jur. N. S. 377, 33 L. J. Ch. 521, 10 L. T. Rep. N. S. 215, 3 New Rep. 681, 12 Wkly. Rep. 678, 69 Eng. Ch. 247, 46 Eng. Reprint 941; Fenn *v.* Craig, 3 Jur. 22. 3 Y. & C. Exch. 216; Whittingham *v.* Thornburgh, 2 Vern. Ch. 206, 23 Eng. Reprint 734; New York Mut. L. Assur. Co. *v.* Anderson, 1 Truem. Eq. Rep. (N. Brunsw. 466) (where, however, the charge of fraud was not sustained by the evidence); New York L. Ins. Co. *v.* Parent, 3 Quebec 163.

Mo. Rev. St. (1899) § 7890, providing that no misrepresentation made in obtaining a life insurance policy shall be deemed material, or render the policy void, unless it actually contributed to the contingency or event on which the policy is to become due, and whether it so contributed in any case shall be a question for the jury, does not restrain the power of courts of equity to relieve against actual fraud perpetrated or attempted against life insurance companies. Schuermann *v.* Union Cent. L. Ins. Co., 165 Mo. 641, 65 S. W. 723.

Fraud of the company's agent in imposing on it a spurious application instead of the genuine one made by the insured is no ground for rescission at the suit of the company. Massachusetts L. Ins. Co. *v.* Eshelman, 30 Ohio St. 647.

Return or tender of premiums paid. — That the company attempting to rescind must return or tender back premiums paid as a condition for rescission see Metropolitan L. Ins. Co. *v.* Moore, 117 Ky. 651, 79 S. W. 219, 25 Ky. L. Rep. 1613, 1748; Home Mut. Life Assoc. *v.* Riel, 1 Mona. (Pa.) 615; North American L. Assur. Co. *v.* Brophy, 2 Ont. L. Rep. 559.

31. *Indiana.* — Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475.

Massachusetts. — Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Minnesota. — See Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

New Jersey. — Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774, 67 N. J. L. 367, 51 Atl. 692.

New York. — Cushman *v.* U. S. Life Ins. Co., 63 N. Y. 404 [*reversing* 4 Hun 783].

Ohio. — Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155. And see Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

Oregon. — Buford *v.* New York L. Ins. Co., 5 Oreg. 334.

Pennsylvania. — Seybert *v.* Ætna L. Ins. Co., 4 Luz. Reg. 219.

United States. — See Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

See 28 Cent. Dig. tit. "Insurance," § 558; and Fire Insurance, 19 Cyc. 681.

Promissory warranties and conditions subsequent see *infra*, X.

32. Supreme Council C. K. & L. of A. *v.* Beggs, 110 Ill. App. 139; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; Buford *v.* New York L. Ins. Co., 5 Oreg. 334. And see Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

33. See cases cited *passim* IX, B–D.

Oral representations see Mutual Ben. L. Ins. Co. *v.* Robertson, 59 Ill. 123, 14 Am. Rep. 8.

34. Mutual Ben. L. Ins. Co. *v.* Robertson, 59 Ill. 123, 14 Am. Rep. 8; Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

35. *Alabama.* — Mutual Ben. L. Ins. Co. *v.* Lehman, 132 Ala. 640, 32 So. 733.

Georgia. — German-American Mut. Life Assoc. *v.* Farley, 102 Ga. 720, 29 S. E. 615.

Illinois. — Supreme Council C. K. & L. of A. *v.* Beggs, 110 Ill. App. 139.

untrue will render the policy void.[36] It is a sufficient reference to the application to make it a part of the policy that the policy is expressly recited to have been made in consideration of the representations in the application with the stipulation that its statements are true;[37] but the mere recital in the policy that it is in consideration of the representations made in the application does not convert such representations into warranties.[38]

3. Construction in General. Warranties in insurance policies are not favored in law,[39] and where the parties do not use express terms to denote that the truth of a statement is a condition precedent, the court ought not to construe it to be such without great reason.[40] Consequently statements will be construed as representations rather than warranties unless the provisions of the application and policy taken together necessarily preclude such a construction,[41] and all reasonable doubts as to whether statements inserted or referred to in the policy are warran-

Iowa.— Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

Louisiana.— Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322.

New York.—Fitzgerald *v.* Supreme Council Catholic Mut. Ben. Assoc., 167 N. Y. 568, 60 N. E. 1110 [*affirming* 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005].

United States.—Home L. Ins. Co. *v.* Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. ed. 667; Moulor *v.* American L. Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. ed. 447; McClain *v.* Provident Sav. L. Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

Statements to medical examiner.— Thus statements made in the medical examination, although warranted by the applicant to be true, are not warranties unless covered by some reference thereto in the policy. American Popular L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198; Home L. Ins. Co. *v.* Fisher, 188 U. S. 726, 23 S. Ct. 380, 47 L. ed. 667. But the statements in a medical examination may be made warranties by proper reference in the policy. Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835; National Union *v.* Arnhorst, 74 Ill. App. 482 [*reversed* on other grounds in 179 Ill. 486, 53 N. E. 988]; Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571 [*affirming* 4 Daly 285]. If the medical examination is not a part of the application, a reference to the application and a warranty of the truth of the statements therein will not make the statements in the medical examination warranties. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462; Boehm *v.* Commercial Alliance L. Ins. Co., 35 N. Y. Suppl. 1103 [*affirming* 9 Misc. 529, 30 N. Y. Suppl. 660].

36. *Arkansas.*— Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835.

Indiana.— Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264; Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475.

Massachusetts.— Miles *v.* Connecticut Mut. L. Ins. Co., 3 Gray 580; Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. 42.

Mississippi.— Co-operative Life Assoc. *v.* Leflore, 53 Miss. 1.

New York.— Higbee *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603; Wynn *v.* Provident Life, etc., Co., 99 N. Y. App. Div. 103, 91 N. Y. Suppl. 167; Robinson *v.* Supreme Commandery, U. O. of G. C., 38 Misc. 97, 77 N. Y. Suppl. 111.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

United States.— Doll *v.* Equitable L. Assur. Soc., 138 Fed. 705, 71 C. C. A. 121; Kelley *v.* New York Mut. L. Ins. Co., 75 Fed. 637; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; France *v.* Ætna L. Ins. Co., 9 Fed. Cas. No. 5,027.

But see Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816.

Answers written by agent.—If the answers in an application are correctly written by the company's agent as verbally given to him by the applicant, they are in law the answers and statements of the applicant. Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210; Hewey *v.* Metropolitan L. Ins. Co., 100 Me. 523, 62 Atl. 600. As to fraud, mistake, or negligence of agent see *infra*, IX, B, 4, d.

Application as part of contract see *supra*, IV, B, 6, e, (I).

Statutes requiring copy of application to be attached see *supra*, IV, B, 6, e, (II).

Alteration of application as barring defenses reserved therein see *infra*, XIII, A, 3, a, note 86.

37. Kelsey *v.* Universal L. Ins. Co., 35 Conn. 225; Aloe *v.* Mutual Reserve Life Assoc., 147 Mo. 561, 49 S. W. 553; Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462; Hambrough *v.* New York Mut. L. Ins. Co., 72 L. T. Rep. N. S. 140.

38. Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; American Popular L. Ins. Co. *v.* Day, 39 N. J. L. 89, 23 Am. Rep. 198.

39. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

40. Wheelton *v.* Hardisty, 8 E. & B. 232, 5 Jur. N. S. 14, 27 L. J. Q. B. 241, 6 Wkly. Rep. 539, 92 E. C. L. 232.

41. Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663, 39 Pac. 189; Modern Woodmen Acc. Assoc. *v.* Shryock, 54 Nebr. 250, 74 N. W. 607, 39 L. R. A. 826; Kettenbach *v.* Omaha Life Assoc., 49 Nebr. 842, 69 N. W. 135; Fidelity Mut. Life Assoc. *v.* Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193.

ties or representations should be resolved in favor of the assured.[42] If the policy provides that in case any statements made in the application are untrue the company may at its option cancel the policy, a false statement in the application will not be construed as a warranty.[43] The fact that a statement is referred to in the policy or even inserted therein does not conclusively stamp it as a warranty.[44] In case answers in the application are warranted to be true, the warranties cannot be extended beyond the answers as actually given;[45] and only such statements as are strictly in answer to inquiries contained in the application are made warranties by a reference to the application in the policy.[46] Where the policy is issued with reference to a previous application for a different policy, the warranty is only as to the truthfulness of the statements at the time of the making of the original application.[47] If in the questions and answers there is any ambiguity for which the company is responsible, it is to be resolved against the company in determining whether the answers are false.[48]

4. Falsity — a. Effect in General. In the absence of a provision in the policy making it absolutely void in case of the falsity of the statements therein warranted to be true, a breach of such a warranty merely renders the policy voidable at the option of the company;[49] and similarly the effect of the falsity of material or fraudulent statements which do not constitute warranties is to render the policy voidable at the company's option.[50] In neither case therefore can there be a recovery on the policy unless the company has by estoppel, waiver, or stipulation for incontestability lost the right to avoid liability.[51] Where the situation in a particular case is such as will, as a matter of law, carry with it a forfeiture of the

42. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816.

Arkansas.— Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835.

Illinois.— Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 535 [*affirmed* in 201 Ill. 260, 66 N. E. 388].

Iowa.— Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73; Stewart *v.* Equitable Mut. Life Assoc., 110 Iowa 528, 81 N. W. 782.

Minnesota.— Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

Nebraska.— Royal Neighbors of America *v.* Wallace, 64 Nebr. 330, 89 N. W. 758.

United States.— McClain *v.* Provident Sav. L. Assur. Soc., 110 Fed. 80, 49 C. C. A. 31.

See 28 Cent. Dig. tit. "Insurance," § 564. And see *supra*, IV, B, 1.

43. Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190.

44. Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816 (holding that the question whether it is to be construed as a warranty or merely as a representation depends rather on the form of the expression, the apparent purpose of the insertion, and its connection with other parts of the application and policy, construed together as an entire contract); Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322; Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Price *v.* Phœnix Mut. Ins. Co., 17 Minn. 497, 10 Am. Dec. 166. *Contra*, Co-operative Life Assoc. *v.* Leflore, 53 Miss. 1.

45. Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182.

Although a policy provides that the answers are warranties, the omission to answer a question is not a warranty that there is nothing to answer, nor is a partial answer a warranty beyond what is stated. Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

46. Federal Life Assoc. *v.* Smith, 86 Ill. App. 427; Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

47. Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155 [*affirmed* in 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19].

48. *Illinois.*— Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155.

Minnesota.—Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

New Jersey.— Mackinnon *v.* Fidelity, etc., Co., 72 N. J. L. 29, 60 Atl. 180.

New York.—Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 265, 56 N. Y. Suppl. 1005. And see Mowry *v.* World Mut. L. Ins. Co., 7 Daly 321 [*affirmed* in 74 N. Y. 360].

United States.— New York Mut. Reserve L. Ins. Co. *v.* Dohler, 137 Fed. 550, 70 C. C. A. 134.

See 28 Cent. Dig. tit. "Insurance," § 564.

49. Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493; Selby *v.* New York Mut. L. Ins. Co., 67 Fed. 490 [*affirmed* in 72 Fed. 980, 19 C. C. A. 331].

50. Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

51. Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715. And see *supra*, IX, A, 1, 3; *infra*, IX, B, 4, b, c, 5.

Estoppel, waiver, and incontestability clause see *infra*, XI.

policy as a penalty, that result will follow whether or not it has been expressly stipulated for and declared.[52]

b. Ignorance of Falsity — (I) *Effect as to Representations.* Representations as to a material matter[53] which are false in fact avoid the policy, although not fraudulently made.[54] But so far as the questions propounded in the application call for answers founded upon the knowledge or belief of the applicant, a misstatement or omission to answer will not avoid the policy unless wilfully and knowingly made with an attempt to deceive.[55]

(II) *Effect as to Warranties or Conditions Precedent.* The language of the policy may be such as to make the truth of the statements of the assured a condition precedent to the validity of the policy regardless of the knowledge, belief, or good faith of the assured, and this is generally the case with warranties.[56]

52. Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322.

53. See *infra*, IX, B, 5.

54. *Georgia.*— Southern L. Ins. Co. *v.* Wilkinson, 53 Ga. 535.

Illinois.—Schwartz *v.* Berkshire L. Ins. Co., 91 Ill. App. 494.

Maryland.— Bankers' L. Ins. Co. *v.* Miller, 100 Md. 1, 59 Atl. 116; Mutual Ben. L. Ins. Co. *v.* Wise, 34 Md. 582.

Massachusetts.—Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. 42; Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Ohio.— Miller *v.* Western Farmers' Mut. Ins. Co., 1 Handy 208, 12 Ohio Dec. (Reprint) 105; Low *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 1088, 10 Am. L. Rec. 313; Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155 [*affirmed* in 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19].

Pennsylvania.— Aicher *v.* Metropolitan L. Ins. Co., 13 Phila. 139.

United States.— Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596.

See 28 Cent. Dig. tit. "Insurance," § 545.

55. Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816; Globe Mut. L. Ins. Assoc. *v.* March, 118 Ill. App. 261; Metropolitan L. Ins. Co. *v.* Larson, 85 Ill. App. 143; Supreme Lodge K. of H. *v.* Dickson, 102 Tenn. 255, 52 S. W. 862. *Compare* Royal Neighbors of America *v.* Wallace, (Nebr. 1905) 102 N. W. 1020, 5 Nebr. (Unoff.) 519, 99 N. W. 256.

56. *Colorado.*— Webb *v.* Bankers' L. Ins. Co., 19 Colo. App. 456, 76 Pac. 738.

Georgia.— Supreme Conclave K. of D. *v.* Wood, 120 Ga. 328, 47 S. E. 940.

Iowa.— Peterson *v.* Des Moines Life Assoc., 115 Iowa 668, 87 N. W. 397.

Kansas.— Modern Woodmen of America *v.* Von Wald, 6 Kan. App. 231, 49 Pac. 782.

Minnesota.— Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

New Jersey.— Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291; Glutting *v.* Metropolitan L. Ins. Co., 50 N. J. L. 287, 13 Atl. 4.

New York.— Baker *v.* Home L. Ins. Co., 64 N. Y. 648 [*affirming* 2 Hun 402]; Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571 [*affirming* 4 Daly 285]; Breeze *v.* Metropolitan L. Ins. Co., 24 N. Y. App. Div. 377, 48 N. Y. Suppl. 753 [*distinguishing* Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372]; Elliot *v.* Mutual Ben. Life Assoc., 76 Hun 378, 27 N. Y. Suppl. 696; Barteau *v.* Phœnix Mut. L. Ins. Co., 67 Barb. 354 [*affirmed* in 67 N. Y. 595]; Ritzler *v.* World Mut. L. Ins. Co., 42 N. Y. Super. Ct. 409; Neill *v.* American Popular L. Ins. Co., 42 N. Y. Super. Ct. 259; Brennan *v.* Security L. Ins., etc., Co., 4 Daly 296; Hook *v.* Michigan Mut. L. Ins. Co., 44 Misc. 478, 90 N. Y. Suppl. 56; Woehrle *v.* Metropolitan L. Ins. Co., 21 Misc. 88, 46 N. Y. Suppl. 862 [*reversing* 20 Misc. 719, 45 N. Y. Suppl. 1151]; Higgins *v.* John Hancock Mut. L. Ins. Co., 20 Misc. 231, 45 N. Y. Suppl. 414; Bernard *v.* United L. Ins. Assoc., 8 Misc. 499, 28 N. Y. Suppl. 756.

Ohio.— Penniston *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 830, 8 Am. L. Rec. 361; Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

Pennsylvania.— March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Connell *v.* Metropolitan L. Ins. Co., 16 Pa. Super. Ct. 520.

Rhode Island.— Leonard *v.* State Mut. L. Assur. Co., 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698.

Tennessee.— Standard L., etc., Ins. Co. *v.* Lauderdale, 94 Tenn. 635, 30 S. W. 732.

Texas.— Texas Mut L. Ins. Co. *v.* Davidge, 51 Tex. 244; National Fraternity & Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

United States.— Standard L., etc., Ins. Co. *v.* Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337; McClain *v.* Provident Sav., etc., Assur. Soc., 105 Fed. 834; Hubbard *v.* Mutual Reserve Fund Life Assoc., 100 Fed. 719, 40 C. C. A. 665; Provident Sav. L. Assur. Soc. *v.* Llewellyn, 58 Fed. 940, 7 C. C. A. 479; Brockway *v.* New Jersey Mut. Ben. L. Ins. Co., 9 Fed. 249; Holabird *v.* Atlantic Mut. L. Ins. Co., 12 Fed. Cas. No. 6,587, 2 Dill. 166 note.

England.— Thomson *v.* Weems, 9 App. Cas. 671.

Canada.—Fitzrandolph *v.* Nova Scotia Mut. Relief Soc., 17 Can. Sup. Ct. 333; Hartigan *v.* International L. Assur. Soc., 8 L. C. Jur. 203.

See 28 Cent. Dig. tit. "Insurance," § 545.

But if the language of the policy and application reasonably indicate to the assured that his statements are to be as to his honest belief and to the best of his knowledge, such stipulations will be construed as not amounting to a strict warranty of the truth of the statements; but a warranty as to the honest belief of the assured based upon his knowledge, and hence the falsity of the answer will not defeat recovery on the policy unless such falsity was known or reasonably could have been known to the assured.[57]

c. Substantial and Literal Truth. While it has sometimes been said that the answers in the application which are expressly made warranties must be strictly and literally true or the policy will be avoided,[58] the general rule is that substantial truth in representations is all that is required.[59]

57. *Alabama.*— Providence Sav. L. Assur. Soc. *v.* Pruett, 141 Ala. 688, 37 So. 700.

Georgia.— O'Connell *v.* Supreme Conclave K. of D., 102 Ga. 143, 28 S. E. 282, 66 Am. St. Rep. 159.

Illinois.— Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388 [*affirming* 103 Ill. App. 534]; Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 58 N. E. 970, 80 Am. St. Rep. 169, 52 L. R. A. 649 [*affirming* 90 Ill. App. 444]; Ætna L. Ins. Co. *v.* King, 84 Ill. App. 171.

Kansas.— Washington L. Ins. Co. *v.* Haney, 10 Kan. 525.

Massachusetts.— Clapp *v.* Massachusetts Ben. Assoc., 146 Mass. 519, 16 N. E. 433.

Minnesota.—Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

Nebraska.— Royal Neighbors of America *v.* Wallace, (1905) 102 N. W. 1020, 5 Nebr. (Unoff.) 519, 99 N. W. 256.

New York.— Peck *v.* Washington L. Ins. Co., 181 N. Y. 585, 74 N. E. 1122 [*affirming* 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210]; Louis *v.* Connecticut Mut. L. Ins. Co., 172 N. Y. 659, 65 N. E. 1119 [*affirming* 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683]; Fitch *v.* American Popular L. Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005; Egan *v.* Supreme Council C. B. L. 32 N. Y. App. Div. 245, 52 N. Y. Suppl. 978.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

United States.—Moulor *v.* American L. Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 28 L. ed. 447; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287.

England.— Fowkes *v.* Manchester, etc., L. Assur., etc., Assoc., 3 B. & S. 917, 32 L. J. Q. B. 153, 8 L. T. Rep. N. S. 309, 11 Wkly. Rep. 622, 113 E. C. L. 917; Jones *v.* Provincial Ins. Co., 3 C. B. N. S. 65, 26 L. J. C. P. 272, 3 Jur. N. S. 1004, 5 Wkly. Rep. 885, 91 E. C. L. 65.

Canada.— Confederation Life Assoc. *v.* Miller, 14 Can. Sup. Ct. 330.

See 28 Cent. Dig. tit. "Insurance," § 546.

However, a provision that representations and answers in the application are fully true constitutes a warranty of their truth so far as they rest upon the applicant's own knowledge. Sweeney *v.* Metropolitan L. Ins. Co., 19 R. I. 171, 36 Atl. 9, 61 Am. St. Rep. 751, 38 L. R. A. 297. And a warranty as to truthfulness of statements in an application is not rendered a mere representation by a statement that insured has made no intentional omission or concealment of any material fact. McGowan *v.* Supreme Ct. I. O. F., 107 Wis. 462, 83 N. W. 775.

Absolute knowledge as to truth of facts impossible.— Thus if the questions propounded to the applicant relate to matters as to which he could not have absolute knowledge, or as to which proof would be impossible after his death, the statements will not be construed as absolute warranties. Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 58 N. E. 970, 80 Am. St. Rep. 169, 52 L. R. A. 649 [*affirming* 90 Ill. App. 444]; Continental L. Ins. Co. *v.* Rogers, 119 Ill. 474, 10 N. E. 242, 59 Am. Rep. 810; Fitzgerald *v.* Supreme Council C. M. B. A., 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005.

Matters of opinion.— If the questions submitted to the applicant call for an opinion, the answers will not be construed as strict warranties of the truth of the facts stated, but only as to the belief of the assured. Henn *v.* Metropolitan L. Ins. Co., 67 N. J. L. 310, 51 Atl. 689; Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119]; Horn *v.* Amicable Mut. L. Ins. Co., 64 Barb. (N. Y.) 81; Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519.

58. *Connecticut.*— Fell *v.* John Hancock Mut. L. Ins. Co., 76 Conn. 494, 57 Atl. 175.

Iowa.— Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

Minnesota.— Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

New York.—Cushman *v.* U. S. Life Ins. Co., 4 Hun 783 [*reversed* on other grounds in 63 N. Y. 404].

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

Virginia.— Metropolitan L. Ins. Co. *v.* Rutherford, 98 Va. 195, 35 S. E. 361.

United States.— Farrell *v.* Security Mut. L. Ins. Co., 125 Fed. 684, 60 C. C. A. 374.

See, however, Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

59. *Iowa.*— Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

d. Falsity Due to Mistake, Negligence, or Fraud of Agent — (I) *In General.* Misstatements by way of representation or warranty which are made through the fraud of the company's agent cannot be relied on by it to defeat the policy,[60] and especially is this so where the insured is misled by the agent into making the false statements.[61] But the insured must act in good faith, and if by collusion between him and the agent false statements are made for the purpose of securing the insurance, he cannot recover notwithstanding the agent's participation in the fraud.[62]

(II) *False Answers Written by Agent.* An insurance company cannot dispute the truthfulness of false statements written in the application for insurance by its agent without fraud or collusion on the part of the applicant,[63] where the applicant

Maine.— Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102.

Minnesota.—Newman *v.* Springfield F. & M. Ins. Co., 17 Minn. 123.

New York.— Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603.

United States.— Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

"Substantially true" as applied to answers means without qualification in all respects material to the risk. Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102.

60. McArthur *v.* Home Life Assoc., 73 Iowa 336, 35 N. W. 430, 5 Am. St. Rep. 684; Massachusetts L. Ins. Co. *v.* Eshelman, 30 Ohio St. 647; Shaddinger *v.* Metropolitan L. Ins. Co., 2 Ohio S. & C. Pl. Dec. 402, 30 Cinc. L. Bul. 337.

Soliciting agents.— This has been held to be true, although the agent is only a solicitor not authorized to issue contracts of insurance. Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532; Foster *v.* Pioneer Mut. Ins. Assoc., 37 Wash. 288, 79 Pac. 798. On the contrary it has been held that if the agent's power is expressly limited to that of soliciting insurance, his fraud in writing untrue answers in the application, even without the knowledge of the assured, will not prevent the company from taking advantage of such misstatements to defeat the policy. Ryan *v.* World Mut. L. Ins. Co., 41 Conn. 168, 19 Am. Rep. 490; New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934 [*reversing* 14 Fed. 846].

61. Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577; Standard L., etc., Ins. Co. *v.* Fraser, 76 Fed. 705, 22 C. C. A. 499.

62. *Alabama.*—Triple Link Mut. Indemnity Assoc. *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34.

Maryland.—Globe Reserve Mut. L. Ins. Co. *v.* Duffy, 76 Md. 293, 25 Atl. 227, holding that if the insured knows of the false answers he becomes an accomplice, and no recovery can be had on the policy. See, however, Keystone Mut. Ben. Assoc. *v.* Jones, 72 Md. 363, 20 Atl. 195.

New York.— Hook *v.* Michigan Mut. L. Ins. Co., 44 Misc. 478, 90 N. Y. Suppl. 56.

North Carolina.—Sprinkle *v.* Knights Templar, etc., Indemnity Co., 124 N. C. 405, 32 S. E. 734.

Texas.— Centennial Mut. Life Assoc. *v.* Parham, 80 Tex. 518, 16 S. W. 316.

United States.— Maier *v.* Fidelity Mut. Life Assoc., 78 Fed. 566, 24 C. C. A. 239.

See 28 Cent. Dig. tit. "Insurance," § 1003.

However, insured is not bound to institute an investigation as to the conditions on which the policy is issued in order to ascertain whether the agent has acted fraudulently. Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532. And under statutes providing that false answers in an application will not invalidate the policy if an agent of the company had knowledge of the falsity, the fact of collusion between insured and the agent in making false statements will not relieve the company. Prudential Ins. Co. *v.* Kilbane, 15 Ohio Cir. Ct. 62, 8 Ohio Cir. Dec. 790; New York L. Ins. Co. *v.* Russell, 77 Fed. 94, 23 C. C. A. 43.

Conspiracy to defraud company as an offense see CONSPIRACY, 8 Cyc. 632 note 72.

63. *Alabama.*—Triple Link Mut. Indemnity Assoc. *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34.

Illinois.— Hartford L., etc., Co. *v.* Gray, 80 Ill. 28, *semble.*

Indiana.— Michigan Mut. L. Ins. Co. *v.* Leon, 138 Ind. 636, 37 N. E. 584.

Kansas.— Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856.

Kentucky.— Wright *v.* Northwestern Mut. L. Ins. Co., 91 Ky. 208, 15 S. W. 242, 12 Ky. L. Rep. 850.

Maine.— Hewey *v.* Metropolitan L. Ins. Co., 100 Me. 523, 62 Atl. 600; Marston *v.* Kennebec Mut. L. Ins. Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412.

Maryland.— Keystone Mut. Ben. Assoc. *v.* Jones, 72 Md. 363, 20 Atl. 195.

Michigan.— Van Houten *v.* Metropolitan L. Ins. Co., 110 Mich. 682, 68 N. W. 982; Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Temmink *v.* Metropolitan L. Ins. Co., 72 Mich. 388, 40 N. W. 469.

Minnesota.— Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 532.

Mississippi.— Lewis *v.* Mutual Reserve Fund Life Assoc., (1900) 27 So. 649.

New York.— Jacobs *v.* Northwestern L. Assur. Co., 164 N. Y. 582, 58 N. E. 1088 [*affirming* 30 N. Y. App. Div. 285, 51 N. Y. Suppl. 967]; Brink *v.* Guaranty Mut. Acc. Assoc., 130 N. Y. 675, 29 N. E. 1035 [*affirming* 7 N. Y. Suppl. 847]; O'Brien *v.* Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954; Miller *v.* Phœnix Mut. L. Ins. Co., 107 N. Y. 292,

made truthful answers to the agent, even though such statements are expressly

14 N. E. 271; Baker *v.* Home L. Ins. Co., 64 N. Y. 648 [*affirming* 2 Hun 402]; Rowley *v.* Empire Ins. Co., 36 N. Y. 550; Williams *v.* Metropolitan L. Ins. Co., 109 N. Y. App. Div. 843, 96 N. Y. Suppl. 823; O'Farrell *v.* Metropolitan L. Ins. Co., 22 N. Y. App. Div. 495, 48 N. Y. Suppl. 199; Singleton *v.* Prudential Ins. Co., 11 N. Y. App. Div. 403, 42 N. Y. Suppl. 446; Peters *v.* U. S. Industrial Ins. Co., 10 N. Y. App. Div. 533, 42 N. Y. Suppl. 348 [*affirmed* in 154 N. Y. 758, 49 N. E. 1103]; Robinson *v.* Metropolitan L. Ins. Co., 1 N. Y. App. Div. 269, 37 N. Y. Suppl. 146 [*affirmed* in 157 N. Y. 711, 53 N. E. 1131]; McArthur *v.* Globe Mut. L. Ins. Co., 14 Hun 348; Carmichael *v.* John Hancock Mut. L. Ins. Co., 45 Misc. 597, 90 N. Y. Suppl. 1033; Boylan *v.* Prudential Ins. Co., 18 Misc. 444, 42 N. Y. Suppl. 52; Bernard *v.* United L. Ins. Assoc., 12 Misc. 10, 33 N. Y. Suppl. 22 [*reversing* 11 Misc. 441, 32 N. Y. Suppl. 223]; Corbitt *v.* Metropolitan L. Ins. Co., 10 Misc. 221, 30 N. Y. Suppl. 1069.

Pennsylvania.— Mullen *v.* Union Cent. L. Ins. Co., 182 Pa. St. 150, 37 Atl. 988, 7 Kulp 422.

West Virginia.— McCall *v.* Phœnix Mut. L. Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558.

United States.— Continental L. Ins. Co. *v.* Chamberlain, 132 U. S. 304, 10 S. Ct. 87, 33 L. ed. 341; New Jersey Mut. L. Ins. Co. *v.* Baker, 94 U. S. 610, 24 L. ed. 268; American L. Ins. Co. *v.* Mahone, 21 Wall. 152, 22 L. ed. 593; Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. 222, 20 L. ed. 617, 29 Fed. Cas. No. 17,676; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

See 28 Cent. Dig. tit. "Insurance," § 999.

Contra.—McCoy *v.* Metropolitan L. Ins. Co., 133 Mass. 82.

Recovery of premiums paid see *supra*, V, E, 3, note 77.

Abbreviation or omission of answers.— The same rule obtains where the applicant answers fully and truthfully, and the agent of the insurer charged with the duty of asking the questions and writing the answers abbreviates an answer or omits part of it. Ætna L. Ins. Co. *v.* Paul, 10 Ill. App. 431; Higgins *v.* Phœnix Mut. L. Ins. Co., 74 N. Y. 6 [*affirming* 10 Hun 459]; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325.

Imposing spurious application on company see *supra*, IX, A, 3, note 30.

Insertion of agent's conclusions from facts. — Mistake of calculation or conclusion on the part of the agent not induced by any fault of insured cannot be relied on by the company by way of defense. Miller *v.* Phœnix Mut. L. Ins. Co., 107 N. Y. 292, 14 N. E. 271; Brink *v.* Guaranty Mut. Acc. Assoc., 7 N. Y. Suppl. 847 [*affirmed* in 130 N. Y. 675, 29 N. E. 1035]; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325 [*affirming* 54 Fed. 580]; Langdon *v.* Union Mut. L. Ins. Co., 14 Fed. 272.

Statements as to health or physical condition.— If the agent, when acting as medical examiner or otherwise for the company, writes the answers of the applicant as to his health or physical condition, and without misrepresentation on the part of the applicant falsely states the facts, the company cannot rely on the false statements as a defense. Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388 [*affirming* 103 Ill. App. 534]; Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577; Globe Reserve Mut. L. Ins. Co. *v.* Duffy, 76 Md. 293, 25 Atl. 227; Taylor *v.* Mutual Ben. L. Ins. Co., 10 Hun (N. Y.) 52; Bushaw *v.* Woman's Mut. Ins., etc., Co., 3 Silv. Sup. (N. Y.) 591, 8 N. Y. Suppl. 423; Bentley *v.* Owego Mut. Ben. Assoc., 1 Silv. Sup. (N. Y.) 177, 5 N. Y. Suppl. 223; Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196 [*reversed* on other grounds in 36 Ohio St. 201]; New York Mut. L. Ins. Co. *v.* Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286. See, however, Seybert *v.* Ætna L. Ins. Co., 4 Luz. Leg. Reg. (Pa.) 219.

Statements written by medical examiner.— The general rule is applicable to statements written by a medical examiner having authority to fill out applications. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850; Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835; Haley *v.* Prudential Ins. Co., 189 Ill. 317, 59 N. E. 545 [*affirming* 91 Ill. App. 363]; Arnhorst *v.* National Union, 179 Ill. 486, 53 N. E. 988 [*reversing* 74 Ill. App. 482]; Royal Neighbors *v.* Bowman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201 [*affirming* 75 Ill. App. 566]; Tarpey *v.* Security Trust Co., 80 Ill. App. 378; Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204; Mutual Reserve Fund Life Assoc. *v.* Ogletree, 77 Miss. 7, 25 So. 869; Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372 [*affirming* 28 Hun 430]; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Flynn *v.* Equitable L. Ins. Co., 78 N. Y. 568, 34 Am. Rep. 561 [*affirming* 15 Hun 521]; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Alger *v.* Metropolitan L. Ins. Co., 84 Hun (N. Y.) 271, 32 N. Y. Suppl. 323; Connecticut Gen. L. Ins. Co. *v.* McMurdy, 89 Pa. St. 363; Leonard *v.* State Mut. L. Assur. Co., 24 R. I. 249, 51 Atl. 1049, 56 Am. St. Rep. 698; Leonard *v.* New England Mut. L. Ins. Co., 22 R. I. 519, 48 Atl. 808; Bennett *v.* Mutual L. Ins. Co., 107 Tenn. 371, 64 S. W. 758; Equitable L. Ins. Co. *v.* Hazelwood, 75 Tex. 338, 12 S. W. 621, 16 Am. St. Rep. 893, 7 L. R. A. 217; Order of Columbus *v.* Fuqua, (Tex. Civ. App. 1904) 60 S. W. 1020; New York L. Ins. Co. *v.* Russell, 77 Fed. 94, 23 C. C. A. 43. And see Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155, holding that where the statements in an application for insurance are in the handwriting of the medical examiner of the in-

made warranties on the basis of which the policy is issued.[64] The theory on which the falsity of answers written in the application by the agent is charged to the company and not to the insured is that the agent represents the company in filling out or assisting to fill out the application,[65] and this has been held to be so in some jurisdictions, notwithstanding any stipulation in the application that the agent in taking the application is to be considered the agent of the applicant.[66]

5. Materiality — a. General Rules. Misrepresentations defeat a policy so far[67]

surer, they will be taken most strongly against it. *Compare* Flynn *v.* Equitable L. Assur. Soc., 67 N. Y. 500, 23 Am. Rep. 134 [*reversing* 7 Hun 387].

Rescission of contract.— If both the company and the insured acted in good faith, either may rescind because of the agent's fraud. New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934, *semble*. And see Michigan Mut. L. Ins. Co. *v.* Reed, 84 Mich. 524, 47 N. W. 1106, 13 L. R. A. 349.

Collusion between agent and insured see *supra*, IX, B, 4, d, (1).

64. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210.

Illinois.— Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388 [*affirming* 103 Ill. App. 534].

Indiana.— Germania L. Ins. Co. *v.* Lunkenheimer, 127 Ind. 536, 26 N. E. 1082.

Minnesota.— Otte *v.* Hartford L. Ins. Co., 88 Minn. 423, 93 N. W. 608, 97 Am. St. Rep. 503.

New York.— Quinn *v.* Metropolitan L. Ins. Co., 10 N. Y. App. Div. 483, 41 N. Y. Suppl. 1060.

United States.— Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325; Fletcher *v.* New York L. Ins. Co., 13 Fed. 526, 4 McCrary 440; Lueder *v.* Hartford L., etc., Ins. Co., 12 Fed. 465, 4 McCrary 149.

See 28 Cent. Dig. tit. "Insurance," § 999 *et seq.*

Contra.—See McCoy *v.* Metropolitan L. Ins. Co., 133 Mass. 82; Seybert *v.* Ætna L. Ins. Co., 4 Luz. Leg. Reg. (Pa.) 219.

65. *Illinois.*— Metropolitan L. Ins. Co. *v.* Larson, 85 Ill. App. 143.

Michigan.— Jones *v.* Preferred Bakers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

New York.— Mowry *v.* Rosendale, 74 N. Y. 360 [*affirming* 7 Daly 321].

Ohio.— Continental L. Ins. Co. *v.* Goodall, 5 Ohio Dec. (Reprint) 160, 3 Am. L. Rec. 338.

Washington.— Foster *v.* Pioneer Mut. L. Ins. Assoc., 37 Wash. 288, 79 Pac. 798.

United States.— Continental L. Ins. Co. *v.* Chamberlain, 132 U. S. 304, 10 S. Ct. 87, 33 L. ed. 341; Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. 222, 20 L. ed. 617.

See 28 Cent. Dig. tit. "Insurance," § 1001.

To the contrary it has been held that the company's agent in acting for the applicant becomes the agent of the latter. O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834, 91 Am. St. Rep. 643.

A life insurance broker who receives a percentage from the company's agent for risks brought is the agent of the person who employs him to obtain insurance, and the applicant is hence responsible for a false answer written in the application by the broker. Penniston *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 678, 4 Cinc. L. Bul. 935.

66. Royal Neighbors of America *v.* Bowman, 177 Ill. 27, 52 N. E. 264, 69 Am. St. Rep. 201 [*affirming* 75 Ill. App. 566]; New York Fidelity, etc., Co. *v.* Oehne, 94 Ill. App. 117; Howe *v.* Provident Fund Soc., 7 Ind. App. 586, 34 N. E. 830; Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318 [*reversing* 49 N. Y. App. Div. 473, 63 N. Y. Suppl. 674, and *overruling* Bernard *v.* United L. Ins. Assoc., 14 N. Y. App. Div. 142, 43 N. Y. Suppl. 527 [*reversing* 17 Misc. 115, 39 N. Y. Suppl. 356]; Wilkens *v.* Mutual Reserve Fund Life Assoc., 54 Hun (N. Y.) 294, 7 N. Y. Suppl. 589; Kabok *v.* Phœnix Mut. L. Ins. Co., 4 N. Y. Suppl. 718]; Reilly *v.* Empire L. Ins. Co., 99 N. Y. App. Div. 535, 90 N. Y. Suppl. 866; Bernard *v.* United L. Ins. Assoc., 12 Misc. (N. Y.) 10, 33 N. Y. Suppl. 22 [*reversing* 11 Misc. 441, 32 N. Y. Suppl. 223]. *Contra*, Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; New York L. Ins. Co. *v.* Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934; Hubbard *v.* Mutual Reserve Fund Life Assoc., 80 Fed. 681; Biggar *v.* Rock L. Assur. Co., [1902] 1 K. B. 516, 71 L. J. K. B. 79, 85 L. T. Rep. N. S. 636.

Limitations on agent's authority.— A provision in a policy withholding from agents authority "to make, alter, or discharge this or any other contract in relation to the matter of this insurance" does not limit the powers of agents as to preparing and accepting an application for insurance. Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 7 C. C. A. 444, 22 L. R. A. 325. Nor can insurers protect themselves under secret instructions to their agents that they are agents only for the purpose of receiving and transmitting the application and the premium. Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617. And see *infra*, XI, B, 2.

67. National Union *v.* Arnhorst, 74 Ill. App. 482 [*reversed* on other grounds in 179 Ill. 486, 53 N. E. 988]; Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102; Lueders *v.* Hartford L., etc., Ins. Co., 12 Fed. 465, 4 McCrary 149; Fletcher *v.* New York L. Ins. Co., 11 Fed. 377, 3 McCrary 603; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

and only so far[68] as they are material to the contract; and representation is material in such sense when knowledge of the truth as to the fact misstated might reasonably influence the company in determining whether or not to enter into the contract as made.[69] The company may, however, make any fact material by specifically inquiring about it and providing in the contract that the answers of the applicant shall be warranties.[70] Therefore falsity in the statements in the policy or in the application which are made warranties will avoid the insurance without regard to the materiality of such statements to the risk.[71]

b. Statutory Rules. Statutory provisions are found in many states prohibiting

Intent to deceive is not essential to defeat the policy if the false statement is as to a material matter. Provident Sav. L. Assur. Soc. *v.* Dees, 86 S. W. 522, 27 Ky. L. Rep. 670.

68. *Illinois.*— Supreme Council C. K. & L. of A. *v.* Beggs, 110 Ill. App. 139.

Indiana.— Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475.

Massachusetts.— Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Michigan.— New Era Assoc. *v.* Mactavish, 133 Mich. 68, 94 N. W. 599.

New Jersey.— Dewees *v.* Manhattan Ins. Co., 34 N. J. L. 244.

New York.— Barteau *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 595. *Compare* Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

United States.— Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp. 9.

See 33 Cent. Dig. tit. "Life Insurance," § 548.

69. Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475; Bankers' Union of the World *v.* Mixon, (Nebr. 1905) 103 N. W. 1049; Valton *v.* National Fund L. Assur. Soc., 20 N. Y. 32 [*reversing* 22 Barb. 9], 4 Abb. Dec. 437, 1 Keyes 21 [*reversing* 17 Abb. Pr. 268].

Knowledge of agent.— A misrepresentation as to a fact which is within the knowledge of the company or its agents is not material, for the company is not thereby deceived into entering into a contract which it would not otherwise have made. Prudential Ins. Co. *v.* Leyden, 47 S. W. 767, 20 Ky. L. Rep. 881; Quinn *v.* Metropolitan L. Ins. Co., 10 N. Y. App. Div. 483, 41 N. Y. Suppl. 1060. But as to warranties the company is not precluded from relying upon their truth by causing an investigation of the facts to be made by its agent. Russell *v.* Canada Life Assur. Co., 32 U. C. C. P. 256 [*affirmed* in 8 Ont. App. 716]. Knowledge of agent as affecting waiver see *infra*, XI, C, 2.

By stipulation in the contract.— The parties may make a fact material which would otherwise be immaterial, or make immaterial a fact otherwise material. Rupert *v.* Supreme Court, U. O. F., 94 Minn. 293, 102 N. W. 715.

70. *Illinois.*— Connecticut Mut. L. Ins. Co. *v.* Young, 77 Ill. App. 440.

Louisiana.— Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 55 L. R. A. 322.

Minnesota.— Rupert *v.* Supreme Court U. O. F., 94 Minn. 293, 102 N. W. 715; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Dec. 166.

New Hampshire.—Dwyer *v.* New York Mut. L. Ins. Co., 72 N. H. 572, 58 Atl. 502.

New York.— Valton *v.* National Fund L. Assur. Co., 20 N. Y. 32.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

See 33 Cent. Dig. tit. "Life Insurance," § 548.

71. *Alabama.*— Kelly *v.* Life Ins. Clearing Co., 113 Ala. 453, 21 So. 361; Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210.

Illinois.— Connecticut Mut. L. Ins. Co. *v.* Young, 77 Ill. App. 440.

Maine.— Johnson *v.* Maine, etc., Ins. Co., 83 Me. 182, 22 Atl. 107, holding that as to stipulations which are made warranties the court cannot without statutory authority pronounce them immaterial.

Massachusetts.— Miles *v.* Connecticut Mut. L. Ins. Co., 3 Gray 580.

Mississippi.— Co-operative Life Assoc. *v.* Lefiore, 53 Miss. 1.

Missouri.— Aloe *v.* Mutual Reserve Fund Life Assoc., 147 Mo. 561, 49 S. W. 553.

New York.— Barteau *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 595; Fitch *v.* American Popular L. Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372; Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603; Schame *v.* Metropolitan L. Ins. Co., 76 N. Y. App. Div. 271, 78 N. Y. Suppl. 582; Clements *v.* Connecticut Indemnity Co., 29 N. Y. App. Div. 131, 51 N. Y. Suppl. 442.

Texas.— Pacific Mut. L. Ins. Co. *v.* Terry, (Civ. App. 1904) 84 S. W. 656.

Virginia.— Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383, 98 Va. 195, 35 S. E. 361.

United States.— Knickerbocker L. Ins. Co. *v.* Trefz, 104 U. S. 197, 26 L. ed. 708 [*affirming* 24 Fed. Cas. No. 14,166]; Davey *v.* Ætna L. Ins. Co., 20 Fed. 482 [*reversed* on other grounds in 123 U. S. 739, 8 S. Ct. 331, 31 L. ed. 315]; Schultz *v.* New York Mut. L. Ins. Co., 6 Fed. 672; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 9 Flipp. 9; Holabird *v.* Atlantic Mut. L. Ins. Co., 12 Fed. Cas. No. 6,587, 2 Dill. 166 note; Swick *v.* Home Ins. Co., 23 Fed. Cas. No. 13,692, 2 Dill. 160.

See 33 Cent. Dig. tit. "Life Insurance," § 548.

Province of jury as to materiality of statements see *infra*, XIII, H, 2, a.

the company from relying for a defense on statements or representations of the applicant made in good faith unless they relate to some matter material to the risk or to a matter contributing to the death of the party whose life is insured.[72] Such statutes are constitutional as within the police power of the state,[73] but they do not apply to policies in force at the time of enactment.[74] Under such statutes the answers which are relied upon by the company as being untrue must be shown to have been made with an intent to deceive,[75] that is, they must be wilfully false and fraudulent,[76] and they must also relate to material matters.[77] Although the provisions of the statute may expressly relate only to false statements and misrepresentations they are construed as applicable also to such statements or representations as are made warranties in the policy itself or by reference to the application,[78] and also to statements contained in an application for reinstatement.[79] The parties cannot avoid the statute by an express stipulation that the policy shall be null and void on account of false statements notwithstanding any statutes or laws to the contrary, and that such statements shall be deemed material.[80]

72. See the statutes of the different states.

Assessment companies are not included under the Missouri statute requiring that the representation must be as to a matter contributing to the death of the insured in order to be material. Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400; Jacobs *v.* Omaha Life Assoc., 142 Mo. 49, 43 S. W. 375; Hanford *v.* Massachusetts Ben. Assoc., 122 Mo. 50, 26 S. W. 680. And see Franklin L. Ins. Co. *v.* American Nat. Bank, 74 Ark. 1, 84 S. W. 789, construing the Missouri statute to the same effect. The amendment of the Missouri statute of 1897 brought foreign assessment companies only within its provisions. Williams *v.* St. Louis L. Ins. Co., 189 Mo. 70, 87 S. W. 499 [*reversing* 97 Mo. App. 449, 71 S. W. 376]; Aloe *v.* Fidelity Mut. Life Assoc., (Mo. 1899) 55 S. W. 993. But in Texas the statute is construed as including policies issued by assessment associations. Seiders *v.* Merchants' Life Assoc., 93 Tex. 194, 54 S. W. 753 [*reversing* (Civ. App. 1899) 51 S. W. 547].

73. Schuermann *v.* Union Cent. L. Ins. Co., 165 Mo. 641, 65 S. W. 723; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70.

74. Leonard *v.* State Mut. L. Assur. Co., 27 R. I. 121, 61 Atl. 52, 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698.

75. Levie *v.* Metropolitan L. Ins. Co., 163 Mass. 117, 39 N. E. 792.

76. Ashford *v.* Metropolitan L. Ins. Co., 80 Mo. App. 638; Andrews *v.* National L. Ins. Co., 7 Ohio S. & C. Pl. Dec. 307; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, 70.

Under the English statute (55 Vict. c. 39, § 33) a breach of warranty will avoid the policy if it is as to a material matter, although the statement is made in good faith. Jordan *v.* Provincial Provident Inst., 28 Can. Sup. Ct. 554; Venner *v.* Sun L. Ins. Co., 17 Can. Sup. Ct. 394.

Statutory estoppel to deny truth of medical examiner's report see *infra*, XI, C, 2, note 53.

77. Provident Sav. L. Assur. Soc. *v.* Dees, 86 S. W. 522, 27 Ky. L. Rep. 670; Northwestern Mut. L. Ins. Co. *v.* Risley, 22 Ohio Cir. Ct. 160, 12 Ohio Cir. Dec. 186.

By the Missouri statute a matter misrepresented must contribute to the death of the assured else it is not to be deemed material. Christian *v.* Connecticut Mut. L. Ins. Co., 143 Mo. 460, 45 S. W. 268; Ashford *v.* Metropolitan L. Ins. Co., 98 Mo. App. 505, 72 S. W. 712. But this does not apply to fraudulent misrepresentations as to a material matter. Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668; Klostermann *v.* Germania L. Ins. Co., 6 Mo. App. 582. And see Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73, applying the Missouri statute.

Under the North Carolina statute the misrepresentations must be as to matters materially contributing to a loss or fraudulently evading the payment of increased premiums. Albert *v.* New York Mut. L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693.

78. White *v.* Provident Sav. L. Assur. Soc., 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; Jenkins *v.* Covenant Mut. L. Ins. Co., 171 Mo. 375, 71 S. W. 688; Deane *v.* Southwestern Mut. Life Assoc., 86 Mo. App. 459; Hartford L. Ins. Co. *v.* Stallings, 110 Tenn. 1, 72 S. W. 960; White *v.* Connecticut Mut. L. Ins. Co., 29 Fed. Cas. No. 17,545, 4 Dill. 177.

In Pennsylvania it is held that the statute applies only to warranties in the application and not to express covenants of the policy itself not directly dependent upon the warranty in the application. Connell *v.* Metropolitan L. Ins. Co., 8 Del. Co. 184, 16 Pa. Super. Ct. 520.

79. Jenkins *v.* Covenant Mut. L. Ins. Co., 171 Mo. 375, 71 S. W. 688.

80. Fidelity Mut. Life Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; Hermany *v.* Fidelity Mut. Life Assoc., 151 Pa. St. 17, 24 Atl. 1064; Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211; Lovell *v.* Alliance L. Ins. Co., 15 Fed. Cas. No. 8,552.

This rule applies to policies issued by foreign companies doing business in the state where the statute exists. Fletcher *v.* New

C. Effect on Rights of Beneficiary. The rights of the beneficiary being dependent upon the validity of the contract, any fraud, false statements, or breach of warranty rendering the policy void as to the assured will defeat it also as to the beneficiary.[81]

D. Matters Relating to Person Insured — 1. Age. Falsity in statements as to the age of the insured which are made warranties will generally defeat the policy;[82] and even where the statements of applicants as to age are not made warranties they are, as representations, material, and if substantially false there can be no recovery.[83]

2. Status as Being Married or Single. The statement of a married man that he is single,[84] or that he is a widower,[85] is such material misrepresentation as to avoid the policy.

3. Residence. If the statements in the application are made warranties, a false statement as to the applicant's place of residence will defeat the policy.[86]

4. Habits. If statements as to the habits of the insured are by the terms of the policy made warranties, the falsity thereof avoids the policy.[87] Thus misstate-

York L. Ins. Co., 13 Fed. 526, 4 McCrary 440. But the general law of the state where the contract is entered into and where it is to be performed as to the materiality of the warranties is not affected by a statute of the state where the company is organized providing that false representations not actually contributing to the contingency on which the policy is payable do not vitiate the policy. Sieders *v.* Merchants' Life Assoc., (Tex. Civ. App. 1899) 51 S. W. 547.

81. *Missouri.*— Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Pennsylvania.— March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887.

Virginia.— Burruss *v.* Hartford Nat. Life Assoc., 96 Va. 543, 32 S. E. 49.

England.— Everett *v.* Desborough, 5 Bing. 503, 7 L. J. C. P. O. S. 223, 3 M. & P. 190, 30 Rev. Rep. 709, 15 E. C. L. 693; Maynard *v.* Rhode, 1 C. & P. 360, 5 D. & R. 266, 12 E. C. L. 215.

Canada.— Venner *v.* Sun L. Ins. Co., 17 Can. Sup. Ct. 394.

Joint application.—An application for a policy on the life of the husband in favor of the wife, signed by both, is binding on each. Knickerbocker L. Ins. Co. *v.* Trefz, 104 U. S. 197, 26 L. ed. 708 [*affirming* 24 Fed. Cas. No. 14,166]. *Compare* Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800.

The personal representative of the insured is not entitled to recover where insured has been guilty of fraud, material misrepresentation, or breach of warranty. Prudential Ins. Co. of America *v.* Fredericks, 41 Ill. App. 419; Cawley *v.* National Employers' Acc., etc., Assur. Assoc., Cab. & E. 597.

82. *Alabama.*—Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210.

Missouri.— Linz *v.* Massachusetts Mut. L. Ins. Co., 8 Mo. App. 363.

New York.— Brecse *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775; Schmitt *v.* National Life Assoc., 84 Hun 128, 32 N. Y. Suppl. 513; Kabok *v.* Phœnix Mut. L. Ins. Co., 4 N. Y. Suppl. 718.

Pennsylvania.— United Brethren Mut. Aid. Soc. *v.* White, 12 Wkly. Notes Cas. 147.

United States.—Ætna L. Ins. Co. *v.* France, 91 U. S. 510, 23 L. ed. 401 [*reversing* 9 Fed. Cas. No. 5,027]. *Compare* Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287 [*affirming* 9 Fed. Cas. No. 5,027], where the statement of his age by the applicant was "as nearly as he could recollect."

See 28 Cent. Dig. tit. "Insurance," § 671.

Reformation of policy.— But it has been held that if there is a provision in the policy by which it may be reformed as to the amount of premium on account of any misstatement as to age due to mistake, the company will be precluded from relying on the misstatement as a breach of warranty. Singleton *v.* Prudential Ins. Co., 11 N. Y. App. Div. 403, 42 N. Y. Suppl. 446.

83. Dolan *v.* Mutual Reserve Fund Life Assoc., 173 Mass. 197, 53 N. E. 398; Low *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 1088, 10 Am. L. Rec. 313, 8 Ohio Dec. (Reprint) 247, 6 Cinc. L. Bul. 666 [*affirmed* in 41 Ohio St. 273]; Cerri *v.* Ancient Order of Foresters, 25 Ont. App. 22.

84. Jeffries *v.* Economical Mut. L. Ins. Co., 22 Wall. (U. S.) 47, 22 L. ed. 833; Jeffries *v.* Union Mut. L. Ins. Co., 1 Fed. 450, 1 McCrary 114 [*affirmed* in 110 U. S. 305, 4 S. Ct. 8, 28 L. ed. 156].

85. United Brethren Mut. Aid Soc. *v.* White, 100 Pa. St. 12.

86. Fitch *v.* American Popular L. Ins. Co., 2 Thomps. & C. (N. Y.) 247 [*reversed* on other grounds in 59 N. Y. 557, 17 Am. Rep. 372]; Hutchison *v.* Hartford L., etc., Ins. Co., (Tex. Civ. App. 1897) 39 S. W. 325.

If there is ambiguity as to whether the statement relates to temporary or permanent residence the doubt will be resolved in favor of the insured. Mobile L. Ins. Co. *v.* Walker, 58 Ala. 290; Bonner *v.* Continental L. Ins. Co., 8 Ohio Dec. (Reprint) 697, 9 Cinc. L. Bul. 219; Grogan *v.* London, etc., Industrial Assur. Co., 50 J. P. 134, 53 L. T. Rep. N. S. 761. And see *supra*, IX, B, 3, as to rule of construction in case of ambiguity.

87. Holterhoff *v.* Mutual Ben. L. Ins. Co.,

ments of the applicant as to the use of stimulants, if made warranties, will defeat a recovery;[88] and even though such representations are not made warranties they are material to the risk and substantial falsity therein avoids the policy.[89] But whether statements as to temperate habits or denials of excessive use of stimulants are regarded as warranties or as material representations, they are to be construed as referring to continuous or periodical excessive indulgence which has become habitual and not to exceptional and occasional acts.[90] To constitute intemperate habits or excessive use of stimulants, however, it is not necessary that the use shall be continuous and daily,[91] or throughout life;[92] it is sufficient to avoid the policy if insured was subject to frequent sprees or fits of intoxication.[93] The representations or warranties as to habits may refer to the past,[94] the present,[95] or the future,[96] according to the frame of the questions and answers. In determining a question of fraud regarding representations in respect to the habits of the person on whose life insurance is sought to be effected not only the answers or statements of such person, but those of his physician and of his friend, on all

5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

88. Franklin L. Ins. Co. *v.* American Nat. Bank, 74 Ark. 1, 84 S. W. 789; Mutual L. Ins. Co. *v.* Gividen, 13 Ky. L. Rep. 970; Mengel *v.* Northwestern Mut. L. Ins. Co., 176 Pa. St. 280, 35 Atl. 197; Davey *v.* Ætna L. Ins. Co., 20 Fed. 482.

89. *Kentucky.*— Provident Sav. L. Assur. Soc. *v.* Dees, 86 S. W. 522, 27 Ky. L. Rep. 670; Union Cent. L. Ins. Co. *v.* Lee, 47 S. W. 614, 20 Ky. L. Rep. 839.

Louisiana.— Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322.

Massachusetts.— Rainger *v.* Boston Mut. Life Assoc., 167 Mass. 109, 44 N. E. 1088.

Missouri.— Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

See 28 Cent. Dig. tit. "Insurance," § 676.

Intent to deceive is immaterial if the representations in this respect are false. Hartwell *v.* Alabama Gold L. Ins. Co., 33 La. Ann. 1353, 39 Am. Rep. 294.

90. *California.*— Holtum *v.* Germania L. Ins. Co., 139 Cal. 645, 73 Pac. 591.

Indiana.— Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877.

Minnesota.— Chambers *v.* Northwestern Mut. L. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549.

New York.— Van Valkenburgh *v.* American Popular L. Ins. Co., 70 N. Y. 605. And see Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. 462, holding that the statement that the insured has never used opium, in answer to an inquiry as to the use of opium as a narcotic stimulant, refers to such use as an ordinary condition of health and not to its use as a medical remedy.

Ohio.— Union Mut. L. Ins. Co. *v.* Reif, 7 Ohio Dec. (Reprint) 290, 1 Cinc. L. Bul. 290. See, however, Northwestern Mut. L. Ins. Co. *v.* Risley, 22 Ohio Cir. Ct. 160, 12 Ohio Cir. Dec. 186.

Texas.— Pacific Mut. L. Ins. Co. *v.* Terry, (Civ. App. 1904) 84 S. W. 656; Equitable L. Assur. Soc. *v.* Liddell, 32 Tex. Civ. App. 252, 74 S. W. 87; National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576 (holding that a statement that insured has never used narcotics relates to use amounting to a custom or habit); New York Mut. L. Ins. Co. *v.* Simpson, (Civ. App. 1894) 28 S. W. 837.

United States.— Ætna L. Ins. Co. *v.* Davey, 123 U. S. 739, 8 S. Ct. 331, 31 L. ed. 315; Knickerbocker L. Ins. Co. *v.* Foley, 105 U. S. 350, 26 L. ed. 1055; Provident Sav. L. Assur. Soc. *v.* Exchange Bank, 126 Fed. 360, 61 C. C. A. 310; Bacon *v.* New England O. of P., 123 Fed. 152; Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*.

See 28 Cent. Dig. tit. "Insurance," § 676.

See, however, Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322; Malicki *v.* Chicago Guaranty Fund Life Soc., 119 Mich. 151, 77 N. W. 690.

91. Union Mut. L. Ins. Co. *v.* Reif, 36 Ohio St. 596, 38 Am. Rep. 613.

92. Des Moines Life Assoc. *v.* Owen, 16 Colo. App. 60, 63 Pac. 781.

93. Shea *v.* Great Camp K. of M., 31 N. Y. App. Div. 633, 52 N. Y. Suppl. 333; Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272; Mutual Ben. L. Ins. Co. *v.* Godfrey, 2 Cinc. Super. Ct. 379; Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100 [*affirming* 19 Fed. 405]; Bacon *v.* New England O. of P., 123 Fed. 152; Brockway *v.* Mutual Ben. L. Ins. Co., 9 Fed. 249.

94. New York Mut. L. Ins. Co. *v.* Gividen, 13 Ky. L. Rep. 970.

However, under a statute providing that false statements do not prevent a recovery unless fraudulent or material, false statements as to previous habits of drinking are not material unless they existed to such an extent as to affect the health or physical condition of the applicant. New York Mut. L. Ins. Co. *v.* Thomson, 94 Ky. 253, 22 S. W. 87, 14 Ky. L. Rep. 200.

95. John Hancock Mut. L. Ins. Co. *v.* Daly, 65 Ind. 6; New York Mut. L. Ins. Co. *v.* Gividen, 13 Ky. L. Rep. 970; Reichard *v.* Manhattan L. Ins. Co., 31 Mo. 518; Bacon *v.* New England O. of P., 123 Fed. 152.

96. See *infra*, X, B, 3.

which the contract of insurance was based, should be considered.[97] Intemperate habits need not be disclosed unless called for by some general or specific question.[98]

5. Occupation. Falsity of a statement which is made a warranty as to the occupation of the assured will avoid the policy;[99] but statements as to occupation which are not specifically made warranties need only be substantially true if in good faith.[1] A fraudulent concealment of occupation will defeat the insurance.[2]

6. Financial Condition. The pecuniary circumstances of the assured may be material to the estimation of the risk, so that misrepresentations in regard thereto may avoid the policy.[3]

7. Health and Physical Condition[4] — a. General Rules. The company may require, as a condition precedent to the taking effect of the policy, that the applicant shall be in good health at the time the first premium is paid or the policy is

97. Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

98. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280 [*affirming* 36 Barb. 357].

99. Fell *v.* John Hancock Mut. L. Ins. Co., 76 Conn. 494, 57 Atl. 175; Fitch *v.* American Popular L. Ins. Co., 2 Thomps. & C. (N. Y.) 247 [*reversed* on other grounds in 59 N. Y. 557, 17 Am. Rep. 372]; United Brethren Mut. Aid Soc. *v.* White, 100 Pa. St. 12; Murphey *v.* American Mut. Acc. Assoc., 90 Wis. 206, 62 N. W. 1057.

Materiality and connection with death.— The materiality of the fact warranted as to occupation or the connection between the occupation misdescribed and the loss need not be inquired into. It was so held where insured represented that he was a farmer, when in fact he was a slave-taker, although his death was not caused or in any way connected with his occupation of taking slaves. Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466.

Past, present, and future occupations.— The occupation to be disclosed is that in which applicant is engaged at the time of effecting the insurance. Mowry *v.* World Mut. L. Ins. Co., 7 Daly (N. Y.) 321 [*affirmed* in 74 N. Y. 360]; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466. However, a condition that insured "shall not be connected in any capacity with" the sale of intoxicating liquors was held to refer to the future, and not to such connection prior to the issuance of the policy. McGurk *v.* Metropolitan L. Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563.

Regular and occasional occupation.— The warranty as to occupation relates to the regular business of the insured and not to casual undertakings or engagements. Perrin *v.* Prudential Ins. Co., 30 Misc. (N. Y.) 608, 62 N. Y. Suppl. 720 [*affirming* 29 Misc. 597, 61 N. Y. Suppl. 249]; Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922. So it was held that one who occasionally waited on the customers of a saloon-keeper by way of accommodation and without consideration was not in any way connected with the sale of liquor, within the terms of a policy. Collins *v.* Metropolitan L. Ins. Co., 32 Mont. 329, 346, 80 Pac. 609, 1092, 108 Am. St. Rep. 578. And a warranty that applicant was not engaged in the sale of alcoholic beverages was held not to be broken, although as servant in a hotel he was occasionally called to serve liquor to the guests. Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 38 Atl. 315. But where the statement in the application was that a bar owned by applicant was tended by the clerk exclusively and that applicant attended to other business, the policy was held to be defeated by the fact that applicant occasionally went behind the bar to wait on customers. Malicki *v.* Chicago Guaranty Fund Life Soc., 119 Mich. 151, 77 N. W. 690.

The fact that applicant has not been engaged for some months in his calling, no other occupation having been followed in the meantime, will not render the statement as to occupation a misstatement. Clemens *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 567.

1. Brink *v.* Guaranty Mut. Acc. Assoc., 130 N. Y. 675, 29 N. E. 1035 [*affirming* 7 N. Y. Suppl. 847]; Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Smith *v.* Prudential Ins. Co., 10 N. Y. App. Div. 148, 41 N. Y. Suppl. 925; Hadley *v.* Provident Sav. L. Assur. Soc., 90 Fed. 390 [*affirmed* in 102 Fed. 856, 43 C. C. A. 25].

2. See, generally, *supra*, IX, A, 2.

Facts unknown to applicant.— The fact that the person whose life is insured is engaged in an illegal business unknown to the applicant for the policy will not render the insurance void. Lord *v.* Dall, 12 Mass. 115, 7 Am. Dec. 38.

It is not a fraudulent concealment for one who describes his occupation as that of a bank teller to fail to disclose the fact that he is a habitual embezzler (Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70); nor for one who describes himself as an esquire to fail to state that he is an ironmonger (Perrins *v.* Marine, etc., Travelers' Ins. Co., 2 E. & E. 317, 6 Jur. N. S. 627, 29 L. J. Q. B. 242, 2 L. T. Rep. N. S. 633, 8 Wkly. Rep. 563, 105 E. C. L. 317).

3. Valton *v.* National Fund L. Assur. Co., 20 N. Y. 32 [*reversing* 22 Barb. 9], 4 Abb. Dec. 437, 1 Keyes 21 [*reversing* 17 Abb. Pr. 268].

4. Statements as to treatment in hospital see *infra*, IX, D, 8, note 25.

delivered.[5] The company may also require the applicant to warrant that he is in sound condition mentally and physically and that he has never had any bodily or mental infirmity except as stated in the policy or the application,[6] and breach of such warranty consisting of false statements as to health or mental and physical condition will defeat the insurance.[7] If statements as to health and physical condition are warranted to be true,[8] or if, by express stipulation in the contract they are made material,[9] their falsity avoids the policy, although otherwise they might be immaterial; and generally, whether or not there is any warranty or stipulation of materiality, statements as to previous or existing conditions of health in general or as to specific diseases are deemed material representations the falsity of which will defeat a recovery under the policy issued on the basis thereof.[10] If the statements are made warranties it is immaterial whether or not the insured

5. Thompson *v.* Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900 (in which case the liability of the company depends upon the actual and not the mere apparent good health of the applicant at the time mentioned); Cable *v.* U. S. Life Ins. Co., 111 Fed. 19, 49 C. C. A. 216; British Equitable Ins. Co. *v.* Great Western R. Co., 38 L. J. Ch. 314, 20 L. T. Rep. N. S. 422, 17 Wkly. Rep. 561. And see Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Sovereign Camp, W. of W. *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331. See *supra*, III, B, 2, d.

Duty to disclose change in health after application and before delivery of policy see *supra*, IX, A, 2.

Estoppel or waiver as to condition see *infra*, XI, D, 1, note 59.

6. Standard L., etc., Ins. Co. *v.* Sale, 121 Fed. 664, 57 C. C. A. 418, 61 L. R. A. 337.

7. *Iowa.*— Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807.

Louisiana.— Weil *v.* New York L. Ins. Co., 47 La. Ann. 1405, 17 So. 853.

Michigan.— Tobin *v.* Modern Woodmen of America, 126 Mich. 161, 85 N. W. 472.

Missouri.— Aloe *v.* Mutual Reserve Fund Life Assoc., 147 Mo. 561, 49 S. W. 553.

New Jersey.— Finn *v.* Metropolitan L. Ins. Co., 67 N. J. L. 17, 50 Atl. 589.

New York.— Cushman *v.* U. S. Life Ins. Co., 63 N. Y. 404 [*reversing* 4 Hun 783]; Smith *v.* Ætna L. Ins. Co., 45 N. Y. 211 [*affirming* 5 Lans. 545]; Trudden *v.* Metropolitan L. Ins. Co., 50 N. Y. App. Div. 473, 64 N. Y. Suppl. 183; Hanna *v.* Brooklyn Mut. Life Assoc., 11 N. Y. App. Div. 245, 42 N. Y. Suppl. 228; Boland *v.* Industrial Ben. Assoc., 74 Hun 385, 26 N. Y. Suppl. 433; Barteau *v.* Phœnix Mut. L. Ins. Co., 3 Thomps. & C. 576; Weinstraub *v.* Metropolitan L. Ins. Co., 27 Misc. 540, 58 N. Y. Suppl. 295; Wright *v.* Equitable L. Assur. Soc., 50 How. Pr. 367.

United States.— Doll *v.* Equitable L. Assur. Soc., 138 Fed. 705, 71 C. C. A. 121; John Hancock Mut. L. Ins. Co. *v.* Houpt, 113 Fed. 572.

Canada.— Nova Scotia Mut. Relief Soc. *v.* Webster, 16 Can. Sup. Ct. 718; Moore *v.* Connecticut Mut. L. Ins. Co., 3 Ont. App. 230; Tompkins *v.* Metropolitan L. Ins. Co., 14 Quebec Super. Ct. 246; Masson *v.* L'Association de Prévoyance Mutuelle, 29 L. C. Jur. 161.

See 28 Cent. Dig. tit. "Insurance," § 681 *et seq.*

8. New York Mut. L. Ins. Co. *v.* Simpson, 88 Tex. 333, 31 S. W. 501, 53 Am. St. Rep. 757, 28 L. R. A. 765 [*reversing* (Civ. App. 1894) 28 S. W. 837].

By statute, however, it may be necessary that statements relied on as breaches of warranty shall be as to a material matter. Fidelity Mut. Life Assoc. *v.* Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193. And see *supra*, IX, B, 5, b.

9. Mutual Ben. L. Ins. Co. *v.* Wise, 34 Md. 582.

10. Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102; Bankers' L. Ins. Co. *v.* Miller, 100 Md. 1, 59 Atl. 116; Murphy *v.* Prudential Ins. Co., 205 Pa. St. 444, 55 Atl. 19; March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383.

Previous diseases or injuries.— This is true, although the misrepresentations are as to previous diseases or injuries (Metropolitan L. Ins. Co. *v.* Moravee, 214 Ill. 186, 73 N. E. 415; Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102), for such previous condition may be material to the company in determining whether it shall accept the risk; and it is therefore not essential to constitute a defense on account of such misrepresentations that the death shall have been the result of or shall have been contributed to by the previous disease or injury (Petitpain *v.* Mutual Reserve Fund Life Assoc., 52 La. Ann. 503, 27 So. 113; Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129; Ætna L. Ins. Co. *v.* France, 91 U. S. 510, 23 L. ed. 401; Conover *v.* Massachusetts Mut. L. Ins. Co., 6 Fed. Cas. No. 3,121, 3 Dill. 217; Holloman *v.* Life Ins. Co., 12 Fed. Cas. No. 6,623, 1 Woods 674).

Statutory provisions that misrepresentations shall not avoid the policy unless made with an intent to deceive, or unless the matter misrepresented increases the risk of loss, do not prevent the company from relying on misrepresentations as to health and physical condition as a defense. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129; Hogan *v.* Metropolitan L. Ins. Co., 164 Mass. 448, 41 N. E. 663; Keatley *v.* Travelers' Ins. Co., 187 Pa. St. 197, 40 Atl. 808; Fidelity

had knowledge of their falsity;[11] but as to statements relied upon by the company as constituting misrepresentations it is necessary to show that they were false to the knowledge of the insured,[12] unless they materially affect the risk.[13] If, however, it appears from the form of the questions and answers, or from the application construed as a whole, that the answers are merely expressions of opinion or belief, or qualified as being true to the best of the applicant's knowledge, the falsity of the matters to which they relate does not avoid the policy, even though such matters are material, unless the applicant knew or should have known the truth of the matter and answered in bad faith.[14] Falsity in statements relied on as defeating the insurance is to be determined by ascertaining whether they are substantially untrue with reference to the purpose for which they are made.[15] Thus answers as to diseases, injuries, or physical condition are not rendered untruthful by failure to disclose temporary derangements, ailments, or injuries existing or preëxisting, which do not affect the general health and are not serious in their

Mut. Life Assoc. *v.* Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813. Further as to statutory provisions relating to materiality see *supra*, IX, B, 5, b.

11. *Indiana.*— Continental L. Ins. Co. *v.* Yung, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630; Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264.

New York.— Story *v.* United L., etc., Ins. Assoc., 125 N. Y. 761, 27 N. E. 408 [*affirming* 4 N. Y. Suppl. 373]; Breeze *v.* Metropolitan L. Ins. Co., 24 N. Y. App. Div. 377, 48 N. Y. Suppl. 753.

Ohio.— Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155.

Pennsylvania.— Connell *v.* Metropolitan L. Ins. Co., 16 Pa. Super. Ct. 520, 8 Del. Co. 184; Aicher *v.* Metropolitan L. Ins. Co., 6 Wkly. Notes Cas. 332.

Vermont.— Powers *v.* Northeastern Mut. Life Assoc., 50 Vt. 630.

Wisconsin.— Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

See 28 Cent. Dig. tit. "Insurance," § 685.

12. *New York.*— Peck *v.* Washington L. Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

Ohio.— Ohio Mut. Life Assoc. *v.* Draddy, 10 Ohio S. & C. Pl. Dec. 591, 8 Ohio N. P. 140.

Pennsylvania.— Schaible *v.* Washington L. Ins. Co., 9 Phila. 136 [*affirmed* in 1 Wkly. Notes Cas. 369].

Tennessee.— Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239; Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

West Virginia.— Schwarzback *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

England.— Sweet *v.* Fairlie, 6 C. & P. 1, 25 E. C. L. 291.

See 28 Cent. Dig. tit. "Insurance," § 685.

An intentionally false statement as to condition of health whereby the assured conceals the existence of disease which is material will defeat recovery. Archibald *v.* Chicago Mut. L. Ins. Co., 38 Wis. 542.

To constitute a fraud on the medical examiner it must be shown that the statements of the applicant were known by him to be false and that the examiner was thereby deceived. Welch *v.* Union Cent. L. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774, 117 Iowa 394, 90 N. W. 828. So incorrect statements to the examining physician will not avoid the policy where his report as to the applicant's condition and not the statements of the applicant were relied on by the company. Higbie *v.* Guardian Mut. L. Ins. Co., 53 N. Y. 603 [*affirming* 66 Barb. 462]; Hogle *v.* Guardian L. Ins. Co., 6 Rob. (N. Y.) 567, 4 Abb. Pr. N. S. 346.

13. Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. (Mass.) 42. And see cases cited *supra*, note 10.

14. *Kansas.*—Washington Ins. Co. *v.* Haney, 10 Kan. 525.

Michigan.— Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365.

Minnesota.— Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

New York.— Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Horn *v.* Amicable Mut. L. Ins. Co., 64 Barb. 81; Hogle *v.* Guardian L. Ins. Co., 6 Rob. 567, 4 Abb. Pr. N. S. 346.

Ohio.— Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155 [*affirmed* in 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19].

Pennsylvania.— United Brethren Mut. Aid Soc. *v.* Kinter, 12 Wkly. Notes Cas. 76.

Tennessee.— Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

See 28 Cent. Dig. tit. "Insurance," § 685.

Constructive knowledge.— If the applicant had knowledge of facts sufficient to put him on notice as to the truth of the matter in question, his false answer avoids the policy, although he answered in good faith. Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. (Mass.) 42. And see cases cited *supra*, this note.

Opinion of physician.— A charge of fraud sufficient to avoid the policy cannot be based on the false opinion of a physician not employed by it, when accompanied by a correct statement of the facts on which the opinion rested. Security Trust Co. *v.* Tarpey, 182 Ill. 52, 54 N. E. 1041 [*affirming* 80 Ill. App. 378].

15. See *supra*, IX, B, 4, c; and cases cited *infra*, note 16.

nature;[16] and even where the questions by their terms include trivial illnesses and injuries unconnected with any specific disease, they should be interpreted to refer to only such illnesses as affect the risk.[17] The applicant is not bound to do more than answer fairly the questions asked, and failure to disclose facts which might have been material if called for will not defeat recovery under the policy.[18] Representations and warranties will be construed as referring to the present condition of the applicant unless it is otherwise specified.[19]

b. Illustrations. These principles considered in the preceding section are illustrated by many cases involving statements as to general physical condition

16. *Indiana.*—North Western Mut. L. Ins. Co. *v.* Heimann, 93 Ind. 24.

Kansas.— Northwestern Mut. L. Ins. Co. *v.* Woods, 54 Kan. 663, 39 Pac. 189.

Michigan.— Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365 [*citing* Pudritzky *v.* Supreme Lodge K. of H., 76 Mich. 428, 43 N. W. 373]; Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894.

New York.— Tooker *v.* Security Trust Co., 165 N. Y. 608, 58 N. E. 1093 [*affirming* 26 N. Y. App. Div. 372, 49 N. Y. Suppl. 814]; Cushman *v.* U. S. Iife Ins. Co., 70 N. Y. 72; Barteau *v.* Phœnix Mut. L. Ins. Co., 3 Thomps. & C. 576 [*affirmed* in 67 N. Y. 595]; McGrath *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 376; Fitch *v.* American Popular L. Ins. Co., 11 Alb. L. J. 91 [*reversed* on other grounds in 59 N. Y. 557, 17 Am. Rep. 372].

Ohio.— Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196 [*reversed* on other grounds in 36 Ohio St. 201, 38 Am. Rep. 573]; Ohio Mut. Life Assoc. *v.* Draddy, 10 Ohio S. & C. Pl. Dec. 591, 8 Ohio N. P. 140.

Pennsylvania.— Clemens *v.* New York Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 567.

Tennessee.— Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

Texas.— Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695.

Vermont.— Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

United States.— Connecticut Mut. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. ed. 708; Knickerbocker L. Ins. Co. *v.* Trefz, 104 U. S. 197, 26 L. ed. 708 [*affirming* 24 Fed. Cas. No. 14,166]; Caruthers *v.* Kansas Mut. L. Ins. Co., 108 Fed. 487; Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211; Conver *v.* Phœnix Mut. L. Ins. Co., 6 Fed. Cas. No. 3,143, 3 Dill. 224 note.

See 28 Cent. Dig. tit. "Insurance," § 689.

The fact that the insured does not recover from an existing illness and that it causes his death does not necessarily constitute a defense, although such illness was not disclosed in the answers, where it was apparently of a temporary character. Sovereign Camp W. of W. *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331; Watson *v.* Mainwaring, 4 Taunt. 763.

17. *Alabama.*— Alabama Gold L. Ins. Co. *v.* Johnston, 80 Ala. 467, 2 So. 125, 59 Am. Rep. 816.

Arkansas.— Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850; Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835.

Illinois.— Illinois Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537.

Massachusetts.— See Tyler *v.* Ideal Ben. Assoc., 172 Mass. 536, 52 N. E. 1383.

Minnesota.— Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

Tennessee.— Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

Canada.— Compagnie d'Assurance La Canadienne *v.* Pilot, 5 Quebec Q. B. 521.

See 28 Cent. Dig. tit. "Insurance," § 684.

18. *Illinois.*— Iowa L. Ins. Co. *v.* Zehr, 91 Ill. App. 93.

Iowa.— Stewart *v.* Equitable Mut. Life Assoc., 110 Iowa 528, 81 N. W. 782.

Tennessee.— Endowment Rank K. of P. *v.* Cogbill, 99 Tenn. 28, 41 S. W. 340.

Texas.— Mutual Reserve Fund Life Assoc. *v.* Sullivan, (Civ. App. 1895) 29 S. W. 190.

United States.— New York Mut. L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

See 28 Cent. Dig. tit. "Insurance," § 687.

Apparent discrepancies in the answers will not be held to be a breach of warranty. Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594.

Failure to answer does not avoid the policy where the company accepts the application without objection. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

Partial answers.— Failure to make answer as to particular diseases inquired about will not be excused by answering as to other diseases of which the particular diseases are the result (Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383; Life Ins. Clearing Co. *v.* Bullock, 91 Fed. 487, 33 C. C. A. 365); but it does not constitute a breach of warranty to state only one of several diseases from which the applicant has suffered (Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182, holding, however, that the non-disclosure may amount to fraud). *Contra*, Mutual Reserve Fund Life Assoc. *v.* Cotter, 72 Ark. 620, 83 S. W. 321.

19. World Mut. L. Ins. Co. *v.* Schultz, 73 Ill. 586; Connecticut Mut. L. Ins. Co. *v.* Moss, 6 Ky. L. Rep. 49; Peacock *v.* New York L. Ins. Co., 20 N. Y. 293 [*affirming* 1 Bosw. 338].

Duty to disclose change in health between time of application and issuance of policy see *supra*, IX, A, 2.

Promissory warranties see *infra*, X, A, 1.

and condition of health. Thus a statement that the applicant is not suffering or has not had any disease[20] or serious illness,[21] or that he is in good health or sound health,[22] or in good physical condition and free from bodily infirmities,[23] is not false so as to defeat the insurance unless the disease, injury, or infirmity relied on is shown to have been such as to affect the general health or probable continu-

20. Illinois L. Ins. Co. *v.* Lindley, 110 Ill. App. 161; Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196 [*reversed* on other grounds in 36 Ohio St. 201, 38 Am. Rep. 573]; Rand *v.* Provident Sav. L. Assur. Soc., 97 Tenn. 291, 37 S. W. 7; Holloman *v.* Life Ins. Co., 12 Fed. Cas. No. 6,623, 1 Woods 674.

21. *Illinois.*— Illinois Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537.

New York.— Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. 462.

South Carolina.— Drakeford *v.* Supreme Conclave K. of D., 61 S. C. 338, 39 S. E. 523.

Texas.— Sovereign Camp W. of W. *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331.

United States.— Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596.

See 28 Cent. Dig. tit. "Insurance," § 681 *et seq.*

Scope of term.— A statement that the applicant has had no serious illness will be construed to refer to serious illness permanently impairing the constitution and rendering the risk unusually hazardous. Illinois Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537. Such language must be understood in its ordinary acceptation (Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462), and means an illness permanently impairing the health (Drakeford *v.* Supreme Conclave K. of D., 61 S. C. 338, 39 S. E. 523) and having a permanent detrimental effect on the physical system (Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596). One who is so addicted to the liquor habit that he takes twenty-five drinks daily, and enters an institution for alcoholism, where treatment is discontinued because his physical and nervous condition is such that the treatment cannot be continued, and who is so prostrated that he remains in bed most of the time is "seriously ill." Wynn *v.* Provident L., etc., Co., 99 N. Y. App. Div. 103, 91 N. Y. Suppl. 167.

22. *Iowa.*— Sieverts *v.* National Benev. Assoc., 95 Iowa 710, 64 N. W. 671.

Maine.— Jeffrey *v.* United Order of G. C., 97 Me. 176, 53 Atl. 1102.

New Hampshire.— Packard *v.* Metropolitan L. Ins. Co., 72 N. H. 1, 54 Atl. 287.

New York.— Edington *v.* Ætna L. Ins. Co., 77 N. Y. 564.

Ohio.— Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908; Ohio Mut. Life Assoc. *v.* Draddy, 10 Ohio S. & C. Pl. Dec. 591, 8 Ohio N. P. 140.

Pennsylvania.— Clemens *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 567; Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599.

United States.— Manhattan L. Ins. Co. *v.* Carder, 82 Fed. 986, 27 C. C. A. 344; Goucher *v.* Northwestern Traveling Men's Assoc., 20 Fed. 596; Conver *v.* Phœnix Mut. L. Ins. Co., 6 Fed. Cas. No. 3,143.

See 28 Cent. Dig. tit. "Insurance," § 681 *et seq.*

Good health.— A statement that applicant is in good health means that he is free from sensible disease and any apparent derangement of the functions by which health may be tested (Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102), or free from any disease or ailment that affects the general soundness and healthfulness of the system seriously as distinguished from a temporary indisposition which does not tend to weaken or undermine the constitution (Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365 [*citing* Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894]). A warranty by an applicant for a policy of insurance on the life of a third person that he is in good health means simply that he is well to ordinary observation and to outward appearance. Grattan *v.* Metropolitan L. Ins. Co., 92 N. Y. 274, 44 Am. Rep. 372 [*affirming* 28 Hun 430].

Sound health means in general the absence of any vice in the constitution and of any disease of a serious nature having a direct tendency to shorten life. Packard *v.* Metropolitan L. Ins. Co., 72 N. H. 1, 54 Atl. 287; Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908; Manhattan L. Ins. Co. *v.* Carder, 82 Fed. 986, 27 C. C. A. 344. A statement that applicant is in sound health does not import entire freedom from infirmities, but simply a reasonably good state of health, and imports that his life is such that it may be insured with ordinary safety and on common terms. Galbraith *v.* Arlington Mut. L. Ins. Co., 12 Bush (Ky.) 29. The fact that an applicant is an idiot or a cripple does not preclude him from being in sound health. Robinson *v.* Metropolitan L. Ins. Co., 1 N. Y. App. Div. 269, 37 N. Y. Suppl. 146 [*affirmed* in 157 N. Y. 711, 53 N. E. 1131].

23. Standard Life, etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105; Wilkinson *v.* Connecticut Mut. L. Ins. Co., 30 Iowa 119, 6 Am. Rep. 657; Rupert *v.* Supreme Court U. O. F., 94 Minn. 293, 102 N. W. 715.

A bodily infirmity is something that materially impairs the bodily powers and amounts to an actual inroad on the physical health or condition. Black *v.* Travellers' Ins. Co., 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500.

A misrepresentation as to physical condition does not avoid a contract of life insurance unless it is such as to deceive the company about a matter material to the risk or is

ance of life or impair the constitution, and not in its nature simply transitory or a temporary indisposition.[24]

warranted to be true. Providence Sav. L. Assur. Soc. *v.* Pruett, 141 Ala. 688, 37 So. 700.

Serious bodily injury.— A statement that applicant had not received any serious bodily injury was false where, a year before making the application, the applicant while fencing received a blow from a foil on or near the Adam's apple, and raised a little blood, and was confined to his bed for a few days, the blow having produced an injury on the inside of the windpipe. Bancroft *v.* Home Ben. Assoc., 8 N. Y. St. 129. And a severe injury of concussion of the brain from a fall on the head must be disclosed under a question relating to serious personal injury. New York Mut. L. Ins. Co. *v.* Snyder, 93 U. S. 393, 23 L. ed. 887 [*affirming* 22 Fed. Cas. No. 13,154]. Construction of term "serious personal injury" see Maine Union Mut. L. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617.

Insured is entitled to a liberal construction in his favor of an answer as to previous physical injuries. Such answers relate to matters of opinion, and are warranties only of the *bona fide* belief of the applicant. Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715.

24. See cases cited *supra*, note 20 *et seq.*

Apoplexy.—In a particular case it was held that owing to a discrepancy between the policy and the application, the failure of the applicant to correctly state the time of the occurrence of an attack of apoplexy could not be relied on by the company, although it was material. Nova Scotia Mut. Relief Soc. *v.* Webster, 16 Can. Sup. Ct. 718 [*affirming* 20 Nova Scotia 347].

Cold.— A mere cold is not such a disease or illness as is required to be disclosed. Metropolitan L. Ins. Co. *v.* Larson, 85 Ill. App. 143; Sieverts *v.* National Benev. Assoc., 95 Iowa 710, 64 N. W. 671; Metropolitan L. Ins. Co. *v.* McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

Consumption.—A tubercular affection of the lungs must be disclosed under a question as to local diseases. Scoles *v.* Universal L. Ins. Co., 42 Cal. 523.

Cough.— Although a cough may be a mere symptom of disease, yet when information with reference thereto is called for it should be given. Hubbard *v.* Mutual Reserve Fund Life Assoc., 100 Fed. 719, 40 C. C. A. 665.

Dyspepsia.— The existence of dyspepsia in its milder forms is not a disease or illness, but a temporary ailment only. World Mut. L. Ins. Co. *v.* Schultz, 73 Ill. 586; Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13; McClain *v.* Provident Sav. L. Assur. Soc., 110 Fed. 80, 49 C. C. A. 31. But a statement by a woman afflicted for nearly twenty years by severe dyspepsia yielding to treatment with difficulty that she was in good health was held to be untrue. Jeffrey *v.* United Order of Golden Cross, 97 Me. 176, 53 Atl. 1102.

Fits.— An epileptic or other fit from an accidental cause is not an infirmity or disease which the applicant is required to disclose in answer to the question whether he has been affected by or subject to fits. Brink *v.* Guaranty Mut. Acc. Assoc., 7 N. Y. Suppl. 847; Shattock *v.* Shawe, 1 M. & Rob. 498.

Gout.— Symptoms of gout which a physician would have interpreted as the presence of gout in the system do not render untrue a statement that the applicant has never been afflicted with gout. Fowkes *v.* Manchester, etc., L. Ins. Co., 3 F. & F. 440.

Headache.— An answer negativing disease or illness is not shown to be untrue by proof that the applicant has been subject to headaches. Illinois Masons' Benev. Soc. *v.* Winthrop, 85 Ill. 537; Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462. And a denial that the applicant has had headaches is not shown to be untrue by proof that when overworked he was subject to headaches. New York Mut. L. Ins. Co. *v.* Simpson, (Tex. Civ. App. 1894) 28 S. W. 837.

Heart disease.— An anemic murmur indicating no structural defect of the heart but arising simply from temporary debility or weakness is not a bodily infirmity. Manufacturers' Acc. Indemnity Co. *v.* Dorgan, 58 Fed. 945, 7 C. C. A. 581.

Hernia.—Where applicant had suffered from hernia within a year previous to his application, it was held that a negative answer to a question calling for particulars of any previous weakness was a misrepresentation. Levie *v.* Metropolitan L. Ins. Co., 163 Mass. 117, 39 N. E. 792.

Kidney trouble does not necessarily show the existence of disease of the kidneys (Hogan *v.* Metropolitan L. Ins. Co., 164 Mass. 448, 41 N. E. 663); but one having Bright's disease is not in good health within the language of a question as to that matter (Austin *v.* Mutual Reserve Fund Life Assoc., 132 Fed. 555).

Liver trouble.— A slight disorder of the liver does not necessarily indicate disease of the liver. Connecticut Mut. L. Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 5 S. Ct. 119, 28 L. ed. 708.

Mental or nervous disease.— Attempted suicide does not necessarily show a mental or nervous disease. Mutual Reserve Fund Life Assoc. *v.* Farmer, 65 Ark. 581, 47 S. W. 850.

Nearsightedness is not a bodily infirmity. Cotten *v.* Fidelity, etc., Co., 41 Fed. 506.

Priapism, although not a disease in itself but only a symptom, must be disclosed under a question calling for an answer with reference thereto. Hubbard *v.* Mutual Reserve Fund Life Assoc., 100 Fed. 719, 40 C. C. A. 665.

Sores.— A question as to "open sores" means such sores as result from some functional derangement and not from wounds or

8. Prior Consultations With or Treatment By Physician. A false statement as to whether applicant has consulted or been attended or treated by a physician is material to the risk and will defeat a recovery,[25] especially where it is

accidental injuries. Home Mut. Life Assoc. *v.* Gillespie, 110 Pa. St. 84, 1 Atl. 340.

Spitting of blood.— If the answers are made warranties, a failure to disclose any spitting of blood in response to a question calling for such statement will defeat recovery. Mutual Ben. L. Ins. Co. *v.* Miller, 39 Ind. 475; Smith *v.* Northwestern Mut. L. Ins. Co., 196 Pa. St. 314, 46 Atl. 426; Arnold *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 61. Any serious attack of spitting of blood should be disclosed in response to a question calling for information on that subject (Foot *v.* Ætna L. Ins. Co., 4 Daly (N. Y.) 285 [*reversed* on other grounds in 61 N. Y. 571]) and a denial as to spitting of blood specifically inquired about is material and will defeat recovery (Murphy *v.* Prudential Ins. Co., 205 Pa. St. 444, 55 Atl. 19); but such a question calls for information only as to such spitting or coughing up of blood as a reasonable person might suppose to indicate some ill health or physical condition affecting the applicant's desirability as a risk (Peterson *v.* Des Moines Life Assoc., 115 Iowa 668, 87 N. W. 397; Dreier *v.* Continental L. Ins. Co., 24 Fed. 670; Geach *v.* Ingall, 9 Jur. 691, 15 L. J. Exch. 37, 14 M. & W. 95). A question as to spitting of blood calls for information as to hemorrhage. March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887.

Throat disease.— An inquiry as to throat disease included among other past or present diseases means something more than temporary inflammation from which the insured has already recovered. Eisner *v.* Guardian Mut. L. Ins. Co., 8 Fed. Cas. No. 4,323.

Typhoid fever.—Failure to disclose a severe attack of typhoid fever in answer to a question as to serious illness will defeat recovery. Meyers *v.* Woodmen of the World, 193 Pa. St. 470, 44 Atl. 563; U. S. National L. Ins. Co. *v.* Reppond, (Tex. Civ. App. 1904) 81 S. W. 1012.

Vertigo.— A false statement that applicant has never had vertigo is not material where the trouble was merely temporary and did not affect the general health. Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

25. *Illinois.*— Connecticut Mut. L. Ins. Co. *v.* Young, 77 Ill. App. 440.

Indiana.— Philadelphia Fidelity Mut. Life Assoc. *v.* McDaniel, 25 Ind. App. 608, 57 N. E. 645. *Compare* Union Cent. L. Ins. Co. *v.* Pauly, 8 Ind. App. 85, 35 N. E. 190.

New York.— Dentz *v.* O'Neill, 25 Hun 442; Phillips *v.* New York L. Ins. Co., 9 N. Y. Suppl. 836.

Pennsylvania.— Wyman *v.* Fidelity Mut. Life Assoc., 17 Pa. Co. Ct. 259. *Compare* Smith *v.* Metropolitan L. Ins. Co., 183 Pa. St. 504, 38 Atl. 1038.

United States.— Hubbard *v.* Mutual Reserve Fund Life Assoc., 100 Fed. 719, 40 C. C. A. 665. And see Priestly *v.* Provident Sav. Co., 112 Fed. 271.

England.— Morrison *v.* Muspratt, 4 Bing. 60, 5 L. J. C. P. O. S. 63, 12 Moore C. P. 231, 13 E. C. L. 399.

See 28 Cent. Dig. tit. "Insurance," § 691.

Who is medical attendant.— A physician who merely makes a casual prescription for a friend cannot be called his medical attendant. That term means a person to whom the care of a sick person has been intrusted. Edington *v.* New York Mut. L. Ins. Co., 67 N. Y. 185 [*reversing* 5 Hun 1]. And see Hutton *v.* Waterloo L. Assur. Co., 1 F. & F. 735; Huckman *v.* Fernie, 1 H. & H. 149, 2 Jur. 444, 7 L. J. Exch. 163, 3 M. & W. 505. A particular physician who has been employed on several occasions extending through a period of years, no other physician having been employed during that time, comes within the description of applicant's "usual medical attendant" (Monk *v.* Union Mut. L. Ins. Co., 6 Rob. (N. Y.) 455); but one who had treated the applicant three years previously and had removed the year following and never treated him again, another physician having been called, is not a "usual medical attendant" (Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388 [*affirming* 103 Ill. App. 534]).

Family physician.— A question as to applicant's family physician calls for the name of the physician who usually attends upon and is consulted by the members of the family in the capacity of a physician (Reid *v.* Piedmont, etc., L. Ins. Co., 58 Mo. 421), and it is immaterial whether the physician who thus attends the members of the family is the one usually consulted by the assured himself (Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166).

What constitutes medical attendance.— Medical attendance inquired for in the application is attendance for a real or supposed disease (Helwig *v.* Mutual L. Ins. Co., 132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578 [*reversing* 58 Hun 366, 12 N. Y. Suppl. 172]. And see Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666); and one who calls at a physician's office, submits to examination, and receives a prescription, paying a fee, is attended by the physician, although he receives no treatment at home (White *v.* Provident Sav. L. Assur. Soc., 163 Mass. 108, 39 N. E. 771, 27 L. R. A. 398; Gilligan *v.* Supreme Council of R. A., 26 Ohio Cir. Ct. 42).

What constitutes consulting a physician.— A question whether the applicant has consulted physicians calls only for consultations in respect of matters material to the risk, and not for consultations in respect of some indisposition not properly called a disease. Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516. A question as to consultation for any disease does not refer to drunkenness, there being a separate question as to intoxi-

warranted to be true.[26] But even where the answers are made warranties substantial truth is all that is required.[27] In analogy with the rule as to disclosure of temporary or slight ailments,[28] it is held that medical consultation or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction of the language of the application.[29] Although a policy provides that the answers of the applicant with reference to

cation (Supreme Lodge K. P. of W. *v.* Taylor, (Ala. 1897) 24 So. 247), and consultation with a physician as to general physical condition without regard to any disease and not for treatment is not within the scope of the question (Valentini *v.* Metropolitan L. Ins. Co., 106 N. Y. App. Div. 487, 94 N. Y. Suppl. 758; New York Mut. Reserve L. Ins. Co. *v.* Dobler, 137 Fed. 550, 70 C. C. A. 134. See, however, Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666). It constitutes a consultation where the applicant permitted a physician to examine and prescribe for him, although he did not summon the physician and objected to having him summoned, and neglected to take his medicine. Flippen *v.* State L. Ins. Co., 30 Tex. Civ. App. 362, 70 S. W. 787. A question, "Has the party employed or consulted, individually, any physician?" has been construed to refer to employment or consultation in regard to the application for life insurance and not to consultation or employment at any time during applicant's life. New York World Mut. L. Ins. Co. *v.* Schultz, 73 Ill. 586.

Inmate of hospital.— Thus where insured stated that he had never been an inmate of a hospital and his answers were made warranties it was held that proof of his having been an inmate would defeat the insurance without regard to any explanation to the effect that he was there for some other reason than such ill health as would be material to the risk. Farrell *v.* Security Mut. L. Ins. Co., 125 Fed. 684, 60 C. C. A. 374. But a person is not "under treatment in a hospital" where he has gone by appointment to have some foreign substance taken from the eye and has not remained in the hospital save for the time necessary for the operation. Chinnery *v.* U. S. Industrial Ins. Co., 15 N. Y. App. Div. 515, 44 N. Y. Suppl. 581.

26. *Arizona.*— New York Mut. L. Ins. Co. *v.* Arhelger, 4 Ariz. 271, 36 Pac. 895.

Massachusetts.— Cobb *v.* Covenant Mut. Ben. Assoc., 153 Mass. 176, 26 N. E. 230, 25 Am. St. Rep. 619, 10 L. R. A. 666.

Michigan.— Moore *v.* Mutual Reserve Fund Life Assoc., 133 Mich. 526, 95 N. W. 573.

New Hampshire.—Dwyer *v.* New York Mut. L. Ins. Co., 72 N. H. 572, 58 Atl. 502.

New York.— McCollum *v.* New York Mut. L. Ins. Co., 124 N. Y. 642, 27 N. E. 412 [*affirming* 55 Hun 103, 8 N. Y. Suppl. 249]; Clements *v.* Connecticut Indemnity Co., 29 N. Y. App. Div. 131, 51 N. Y. Suppl. 442; Wilkens *v.* Mutual Reserve Fund Life Assoc., 54 Hun 294, 7 N. Y. Suppl. 589; Fitch *v.* American Popular L. Ins. Co., 2 Thomps. & C. 247 [*reversed* on other grounds in 59 N. Y. 557, 17 Am. Rep. 372]; Sullivan *v.* Metropolitan L. Ins. Co., 12 N. Y. Suppl. 923.

Pennsylvania.— United Brethren Mut. Aid Soc. *v.* O'Hara, 120 Pa. St. 256, 13 Atl. 932.

Texas.— National L. Ins. Co. *v.* Reppond, (Civ. App. 1904) 81 S. W. 1012; Flippen *v.* State L. Ins. Co., 30 Tex. Civ. App. 362, 70 S. W. 787.

United States.— Farrell *v.* Security Mut. L. Ins. Co., 125 Fed. 684, 60 C. C. A. 374; Priestly *v.* Provident Sav. Co., 112 Fed. 271; Caruthers *v.* Kansas Mut. L. Ins. Co., 108 Fed. 487; Sladden *v.* New York L. Ins. Co., 86 Fed. 102, 29 C. C. A. 596.

Canada.— Russell *v.* Canada L. Assur. Co., 32 U. C. C. P. 256.

See 28 Cent. Dig. tit. "Insurance," § 691.

27. Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611.

28. See *supra*, IX, D, 7.

29. *Arkansas.*—Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

Illinois.— Metropolitan L. Ins. Co. *v.* Larson, 85 Ill. App. 143.

Maryland.— Fidelity Mut. Life Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197.

Michigan.—Blumenthal *v.* Berkshire L. Ins. Co., 134 Mich. 216, 96 N. W. 17, 104 Am. St. Rep. 604; Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365; Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894.

Mississippi.— Mutual Reserve Fund Life Assoc. *v.* Ogletree, 77 Miss. 7, 25 So. 869.

New York.— Valentini *v.* Metropolitan L. Ins. Co., 106 N. Y. App. Div. 487, 94 N. Y. Suppl. 758; Crosby *v.* Security Mut. L. Ins. Co., 86 N. Y. App. Div. 89, 83 N. Y. Suppl. 140.

Tennessee.— Woodward *v.* Iowa L. Ins. Co., 104 Tenn. 49, 56 S. W. 1020.

Vermont.— See Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516.

United States.— McClain *v.* Provident Sav. L. Assur. Soc., 110 Fed. 80, 49 C. C. A. 31; Hubbard *v.* Mutual Reserve Fund Life Assoc., 100 Fed. 719, 40 C. C. A. 665.

See 28 Cent. Dig. tit. "Insurance," § 691.

However, the question may be so framed as to call for a disclosure of consultation or attendance for slight ailments. Providence L. Assur. Soc. *v.* Reutlinger, 58 Ark. 528, 25 S. W. 835; Metropolitan L. Ins. Co. *v.* McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

What constitutes medical attendance or consultation see *supra*, this section, note 25.

medical consultation or attendance shall be warranties, the omission to answer a question is not a warranty that there is nothing to answer, nor is a partial answer a warranty beyond what is stated;[30] but if the answers are warranted to be full, true, and complete, a partial answer will constitute a breach of warranty.[31]

9. Family History. Falsity of statements which are warranted to be true as to the applicant's family history, such as statements as to the sanity or the causes of death of his parents or other relatives, will avoid the policy irrespective of their materiality or of the applicant's knowledge of their falsity.[32] As representations, however, such statements are not necessarily material,[33] and if not so they

30. Dilleber *v.* Home L. Ins. Co., 69 N. Y. 256, 25 Am. Rep. 182 (holding, however, that the partial answer may constitute fraudulent concealment. See *supra*, IX, A, 2); Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516. And see Rupert *v.* Supreme Ct. U. O. F., 94 Minn. 293, 102 N. W. 715 (holding that an answer to a question concerning previous consultations of physicians which admits one examination and omits others, but which does not purport to be a full and complete reply to all questions in that connection, and which is accepted in its obviously incomplete form, does not prevent a recovery); Higgins *v.* Phœnix Mut. L. Ins. Co., 74 N. Y. 6 (holding that where the answer was, "Refer to Dr. A. T. Mills," it did not affirm any fact, and therefore there was no breach of warranty in not disclosing other medical attendants). See, however, Mutual Reserve Fund Life Assoc. *v.* Cotter, 72 Ark. 620, 83 S. W. 321.

31. Brady *v.* United L. Ins. Assoc., 60 Fed. 727, 9 C. C. A. 252.

32. *Illinois.*— Hartford L., etc., Ins. Co. *v.* Gray, 91 Ill. 159; Bloomington Mut. Life Ben. Assoc. *v.* Cummins, 53 Ill. App. 530.

New York.— Baker *v.* Home L. Ins. Co., 64 N. Y. 648 [*affirming* 2 Hun 402, 4 Thomps. & C. 582].

Rhode Island.— Jerrett *v.* John Hancock Mut. L. Ins. Co., 18 R. I. 754, 30 Atl. 793.

Texas.— Kansas Mut. L. Ins. Co. *v.* Pinson, 94 Tex. 553, 63 S. W. 531, (Civ. App. 1901) 64 S. W. 818.

Wisconsin.— McGowan *v.* Supreme Ct. of I. O. F., 107 Wis. 462, 83 N. W. 775.

See 28 Cent. Dig. tit. "Insurance," § 693.

The fact that applicant did not know that the disease from which one of his relatives suffered constituted insanity did not relieve him from the effect of a negative answer to an inquiry as to insanity, where the answer was warranted to be true. Johnson *v.* Maine, etc., Ins. Co., 83 Me. 182, 22 Atl. 107. If, however, an applicant answers that no hereditary taint exists in his family "to my knowledge," the existence of a taint does not defeat the policy unless applicant knew of it. Northwestern Mut. L. Ins. Co. *v.* Gridley, 100 U. S. 614, 25 L. ed. 746 [*affirming* 11 Fed. Cas. No. 5,808, 14 Blatchf. 107]. And where the inquiry is as to the cause of death of relatives, a false statement made in good faith will not defeat recovery, as the cause of death of a person is often a matter of opinion merely. Supreme Lodge K. of H. *v.* Dickson, 102 Tenn. 255, 52 S. W. 862.

The materiality of a false answer as to insanity is not open to question, where the answer is warranted to be true. Johnson *v.* Maine, etc., Ins. Co., 83 Me. 182, 22 Atl. 107.

Construction of answers.— If the answers as to number and age of relatives is ambiguous (Fitzgerald *v.* Supreme Council Catholic Mut. Ben. Assoc., 167 N. Y. 568, 60 N. E. 1110 [*affirming* 39 N. Y. App. Div. 251, 56 N. Y. Suppl. 1005]), or substantially true (Provident Sav. L. Assur. Soc. *v.* Beyer, 67 S. W. 827, 23 Ky. L. Rep. 2460; Swift *v.* Massachusetts Mut. L. Ins. Co., 2 Thomps. & C. (N. Y.) 302), or if there is no answer to the inquiry (Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800), the insurance will not be avoided.

"Heart disease," within the meaning of a question in an application for a life policy whether the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease, is to be construed only as an inquiry whether such relatives have been afflicted with such disease in a hereditary form. Gridley *v.* Northwestern Mut. L. Ins. Co., 11 Fed. Cas. No. 5,808, 14 Blatchf. 107 [*affirmed* in 100 U. S. 614, 25 L. ed. 746]. A statement that "phlebitis and heart disease" were the cause of a death is not necessarily equivalent to a statement that organic heart disease had existed for any length of time, or existed at the time of death. Bidwell's Succession, 52 La. Ann. 744, 27 So. 281.

"Insanity," as used in an application, includes not only such forms of the disease as affect the health, but also chronic dementia where the patient is quiet and harmless and in good health. Johnson *v.* Maine, etc., Ins. Co., 83 Me. 182, 22 Atl. 107. Insanity does not as a matter of law constitute an unsound condition of health, so as to falsify a statement that the health of a relative of applicant is "sound." Jacklin *v.* Hartford Nat. Life Assoc., 75 Hun (N. Y.) 595, 27 N. Y. Suppl. 1112 [*affirming* 24 N. Y. Suppl. 746]. If the disease inquired about with reference to relatives is a disease hereditary in character, the cause of death of the relative must have been hereditary to render the answer untrue. Peasley *v.* Safety Deposit L. Ins. Co., 15 Hun (N. Y.) 227; Northwestern Mut. L. Ins. Co. *v.* Gridley, 100 U. S. 614, 25 L. ed. 746 [*affirming* 11 Fed. Cas. No. 5,808, 14 Blatchf. 107]; Sinclair *v.* Phœnix Mut. L. Ins. Co., 22 Fed. Cas. No. 12,896.

33. Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 58 N. E. 970, 80 Am. St. Rep.

must have been known to the applicant to be false in order to defeat a recovery.[34]

10. Prior Applications For Insurance. Falsity in a statement which is made a warranty as to whether the applicant has previously applied for insurance in any other company and been rejected or no policy been issued will defeat a recovery under the policy issued on such application.[35] Indeed a misstatement as to such a matter is material and will defeat recovery whether made a warranty or not.[36]

169, 52 L. R. A. 649; Germania Ins. Co. *v.* Rudwig, 80 Ky. 223; New Era Assoc. *v.* Mactavish, 133 Mich. 68, 94 N. W. 599; Buell *v.* Connecticut Mut. L. Ins. Co., 4 Fed. Cas. No. 2,104, 2 Flipp 9.

34. Davis *v.* Supreme Lodge K. of H., 35 N. Y. App. Div. 354, 54 N. Y. Suppl. 1023; Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462; New York Mut. L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072.

Estoppel to deny knowledge.— An unconditional affirmative or negative answer to questions relative to health or hereditary ailments of relatives precludes the insured from showing want of knowledge of the fact as to which the statement is made. Hartford L., etc., Ins. Co. *v.* Gray, 91 Ill. 159.

35. *Michigan.*— Finch *v.* Modern Woodmen of America, 113 Mich. 646, 71 N. W. 1104.

New Jersey.— Finn *v.* Metropolitan L. Ins. Co., 70 N. J. L. 255, 57 Atl. 438 [*affirming* 67 N. J. L. 17, 50 Atl. 589].

New York.— Stuart *v.* Mutual Reserve Fund Life Assoc., 78 Hun 191, 28 N. Y. Suppl. 944.

Ohio.— Penniston *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 830, 8 Am. L. Rec. 361, 7 Ohio Dec. (Reprint) 678, 4 Cinc. L. Bul. 935.

Pennsylvania.— Meyer-Burns *v.* Pennsylvania Mut. L. Ins. Co., 189 Pa. St. 579, 42 Atl. 297.

Virginia.— Hartford Nat. Life Assoc. *v.* Hopkins, 97 Va. 167, 33 S. E. 539.

United States.— Jeffries *v.* Economical Mut. L. Ins. Co., 22 Wall. 47, 22 L. ed. 833; Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544; Webb *v.* Security Mut. L. Ins. Co., 106 Fed. 808, 45 C. C. A. 648, 52 L. R. A. 122, 126 Fed. 635, 61 C. C. A. 383.

See 28 Cent. Dig. tit. "Insurance," § 679.

Knowledge and good faith.— The fact that the applicant is ignorant of his rejection by another company, and hence falsely answers in good faith, does not alter the rule. Kelly *v.* Life Insurance Clearing Co., 113 Ala. 453, 21 So. 361; American Union L. Ins. Co. *v.* Judge, 191 Pa. St. 484, 43 Atl. 374. But falsity of an answer that no physician has ever given an unfavorable opinion of an applicant's life with reference to insurance cannot be made out by showing a confidential communication from the medical examiner to the medical director of which the applicant had no knowledge to the effect that he could not recommend the applicant without further examination. Security Mut. L. Ins. Co. *v.* Webb, 106 Fed. 808, 45 C. C. A. 648, 52 L. R. A. 122.

36. *Illinois.*— Peterson *v.* Manhattan L. Ins. Co., 115 Ill. App. 421.

Michigan.— Ferris *v.* Home L. Assur. Co., 118 Mich. 485, 76 N. W. 1041.

New York.— Edington *v.* Ætna L. Ins. Co., 77 N. Y. 564 [*reversing* 13 Hun 543], 100 N. Y. 536, 3 N. E. 315.

Ohio.— Penniston *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 830, 8 Am. L. Rec. 361.

Pennsylvania.— American Union L. Ins. Co. *v.* Judge, 191 Pa. St. 484, 43 Atl. 374; March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Wyman *v.* Fidelity Mut. Life Assoc., 17 Pa. Co. Ct. 259.

See 28 Cent. Dig. tit. "Insurance," § 679.

Knowledge and good faith.— A statement that applicant has never been rejected by any other company will not defeat a recovery if he had never been informed of such rejection and made his answer in good faith. Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211.

An informal, unwritten examination, not based on a written application, and stopped by the examiner as useless, is within the meaning of a question whether "any proposition or negotiation or examination for life insurance has been made in this or any other company, on which a policy has not been issued." New York Mut. L. Ins. Co. *v.* Nichols, (Tex. Civ. App. 1894) 24 S. W. 910, 26 S. W. 998.

Previous applications to or rejections by beneficial associations.—Where the question is as to previous application in "any mutual company or association," a negative answer will be false and will defeat the insurance if the applicant has been rejected by a mutual benefit or fraternal society paying death benefits. Bruce *v.* Connecticut Mut. L. Ins. Co., 74 Minn. 310, 77 N. W. 210. See, however, Philadelphia Fidelity Mut. L. Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211. But it has been held not to be a false answer to a question as to applications for insurance "in any company" if the applicant fails to disclose an application for insurance in a mutual benefit or fraternal society, as there is a recognized distinction between life insurance companies and mutual benefit or fraternal associations (See Mutual Benefit Insurance), and the applicant might properly consider the question as relating to companies only. Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73; White *v.* National L. Ins. Co., 11 Ohio Dec. (Reprint) 857, 30 Cinc. L. Bul. 237; Philadelphia Fidelity Mut. L. Assoc. *v.* Miller, *supra*. *Contra*, Meyer-Burns *v.* Penn-

An answer which conceals the fact of insured's having made a prior application or having been rejected defeats a recovery,[37] but a mere failure to answer a question concerning prior applications or rejections will not constitute concealment.[38]

11. Other Existing Insurance. Answers to questions as to other existing insurance on the life of the applicant are material, and the falsity thereof will defeat a recovery on the policy issued to an applicant on the faith thereof.[39] If a ques-

sylvania Mut. L. Ins. Co., 189 Pa. St. 579, 42 Atl. 297. Duty to disclose existing mutual benefit insurance see *infra*, note 39.

Statements as to prior applications for insurance.—An application for insurance, as that term is used in a question calling for information as to prior applications for insurance, is complete when an application blank is filled out and signed by the applicant and delivered to the agent of an insurance company. Edington *v.* Ætna L. Ins. Co., 77 N. Y. 564 [*reversing* 13 Hun 543], 100 N. Y. 536, 3 N. E. 315. And see Security Mut. L. Ins. Co. *v.* Webb, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122, 126 Fed. 635. But breach of warranty cannot be predicated on such a statement in an application made to the same company for another policy, the application for the policy sued on not containing such a statement (Jans *v.* Workingman's Co-operative Assoc. U. L. of N. Y., 10 Misc. (N. Y.) 785, 30 N. Y. Suppl. 1057), unless the policy sued on is expressly issued on the basis of such other application (Security Mut. L. Ins. Co. *v.* Webb, 106 Fed. 808, 45 C. C. A. 648, 55 L. R. A. 122). A company insuring risks rejected by other companies which permits applicant to use a previously rejected application containing the statement that he had never been rejected by any company cannot rely on such statement as a defense. Security Trust Co. *v.* Tarpey, 182 Ill. 52, 54 N. E. 1041 [*affirming* 80 Ill. App. 378]. And where the question was, "Has any application ever been made to this or any other company, upon which a policy was not issued?" it was held that a negative answer was not improper, although an application had been made which had not been finally passed upon. Langdon *v.* Union Mut. L. Ins. Co., 14 Fed. 272.

Statements as to prior rejections.— The refusal of the medical examiner to consider an application because of previously acquired knowledge that the applicant is not a suitable risk constitutes a rejection of an application within the meaning of a question calling for information as to prior applications. Edington *v.* Ætna L. Ins. Co., 77 N. Y. 564 [*reversing* 13 Hun 543], 100 N. Y. 536, 3 N. E. 315. So where applicant had been a member of another company which failed, and a third company agreed to reinsure him but subsequently refused to do so on account of his age, it was held that such refusal was a declining to insure within the terms of the last application. Gessel *v.* Republic L. Ins. Co., 7 Ohio Dec. (Reprint) 159, 1 Cinc. L. Bul. 189. But where the statement was that applicant had never applied for insurance which had not been issued and it was shown that applicant had applied to another company which had written out and sent to its representative a policy to be delivered to applicant which was never delivered because of a controversy between the company and its agent, there was no falsity in the statement shown such as to defeat the policy on such application, as the issuance of the policy referred to in the application did not include delivery. Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

37. London Assur. *v.* Mansel, 11 Ch. D. 363, 48 L. J. Ch. 331, 41 L. T. Rep. N. S. 225, 27 Wkly. Rep. 444; *Re* General Provincial L. Assur. Co., 18 Wkly. Rep. 396.

38. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129; Phœnix Mut. L. Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644; Manhattan L. Ins. Co. *v.* Willis, 60 Fed. 236, 8 C. C. A. 594, since imperfect or unsatisfactory answers are waived by issuance of the policy.

39. Moore *v.* Mutual Reserve Fund Life Assoc., 133 Mich. 526, 95 N. W. 573; Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774; McCollum *v.* New York Mut. L. Ins. Co., 124 N. Y. 642, 27 N. E. 412 [*affirming* 55 Hun 103, 8 N. Y. Suppl. 249].

Existing accident insurance.— Such a question to an applicant for life insurance will not require answer as to accident insurance. Mutual Reserve L. Ins. Co. *v.* Dobler, 137 Fed. 550, 70 C. C. A. 134.

Existing mutual benefit insurance need not be disclosed in answer to a general question concerning other existing insurance. Pennsiton *v.* Union Cent. L. Ins. Co., 6 Ohio Dec. (Reprint) 830, 8 Am. L. Rec. 361; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70. *Compare* Seidenspinner *v.* Metropolitan L. Ins. Co., 70 N. Y. App. Div. 476, 74 N. Y. Suppl. 1108. Duty to disclose prior application to beneficial or fraternal organization see *supra*, note 36.

Existing, paid-up insurance must be disclosed as "other insurance." Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 62 L. R. A. 774.

Inaccuracy in a statement as to the name of the company or the description of the policy referred to in answers to such questions will not affect the validity of the insurance. Commercial Mut. Acc. Co. *v.* Bates, 176 Ill. 194, 52 N. E. 49 [*affirming* 74 Ill. App. 335]; Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

Knowledge of applicant.—The inquiry as to other insurance and the warranty as to the truth of the answers to such inquiry relate

tion as to the existence of any other insurance is truthfully answered in the affirmative, there is no breach of warranty, although the applicant fails to fully disclose all the other insurance which he has;[40] but a question calling for full information as to other insurance is not truthfully answered by naming some only of the companies in which the applicant has policies.[41]

12. Interest of Beneficiary. A false statement that the relation between the beneficiary and the insured is that of husband and wife will avoid the policy;[42] but if the relation stated is that of debtor and creditor, further statements as to the nature or amount of the indebtedness,[43] or as to the creditor's being a friend of insured and dependent on him,[44] are immaterial.

X. Forfeiture For Breach of Promissory Warranty, Covenant, or Condition Subsequent.

A. In General — 1. Promissory Warranties or Conditions Subsequent. Where the performance of promissory warranties or conditions subsequent, that is, promises or conditions to be performed after the policy takes effect, are agreed to by the parties, such warranties or conditions must be performed or the policy will be avoided.[45]

2. Construction of Provisions For Forfeiture. A provision for forfeiture on account of promissory warranty or condition subsequent, being for the benefit of the company, is to be strictly construed, and a forfeiture will be enforced only when it appears that such is the plain intent and meaning of the contract; and if there are repugnant conditions the court will enforce such as are in favor of the insured and will prevent a forfeiture.[46]

3. As a Defense. The invalidity of the policy on account of a forfeiture may

only to the insurance known to the applicant. Aufderheide *v.* German-American Mut. Life Assoc., 66 Mo. App. 285. But if the other insurance has been procured by the applicant himself he will be conclusively presumed to know of its existence. Williams *v.* St. Louis L. Ins. Co., 97 Mo. App. 449, 71 S. W. 376.

40. Robinson *v.* Supreme Commandery U. O. of G. C. of W., 38 Misc. (N. Y.) 97, 77 N. Y. Suppl. 111.

41. Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70. *Contra*, Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299.

42. Travelers' Ins. Co. *v.* Lampkin, 5 Colo. App. 177, 38 Pac. 335; Van Cleave *v.* Union Casualty, etc., Co., 82 Mo. App. 668; Makel *v.* John Hancock Mut. L. Ins. Co., 95 N. Y. App. Div. 241, 88 N. Y. Suppl. 757.

However, a direction to "write policy payable in case of death to A, whose relation to me is that of wife," insured being a single man, was held not to be a warranty nor a material representation. Standard Life, etc., Ins. Co. *v.* Martin, 133 Ind. 376, 33 N. E. 105. And illegality of the marriage between the parties, unless known to the applicant, will not render the policy void on account of misstatement in that respect. U. S. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 5 Am. Rep. 535.

43. Reed *v.* Provident Sav. L. Assur. Soc., 36 N. Y. App. Div. 250, 55 N. Y. Suppl. 292; Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800.

44. Mace *v.* Provident Life Assoc., 101 N. C. 122, 7 S. E. 674.

45. Washburn *v.* Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011; Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694; Schultz *v.* New York Mut. L. Ins. Co., 6 Fed. 672; and other cases cited in the notes following.

Fraud not necessary.— A statutory provision requiring that answers to interrogatories in the application must be shown to be wilfully false in order to defeat the policy has no reference to the conditions in the policy itself. Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908.

Warranties or conditions as to cause of death see *infra*, XII, A.

Application as part of policy see *supra*, IV, B, 6, e.

46. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358; Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; Thompson *v.* Security Trust, etc., Ins. Co., 63 S. C. 290, 41 S. E. 464; Hull *v.* Northwestern Mut. L. Ins. Co., 39 Wis. 397. See also *supra*, IV, B, 1, c.

Post mortem without notice.— Notwithstanding the condition that a post mortem examination without notice to the company should render the policy void, yet where the examination was without the assent of the beneficiary and without knowledge on the part of the physician as to the provisions of the policy, and the company was afforded opportunity to be represented at a reëxamination, and there was no suggestion that a

be relied on as a defense without previous declaration by the company that the policy is void. Rescission and tender back of premiums is not necessary.[47]

4. Parties Affected. The beneficiary is bound by any provision for forfeiture contained in the contract, although the fact constituting the ground of forfeiture may not be known to him.[48]

B. Particular Warranties or Conditions — 1. Residence or Travel.[49] A condition in the policy that the insured shall not reside beyond certain specified limits is valid, and a violation of such condition without the consent of the company will defeat recovery, whether death results from the prohibited residence or not.[50] The company may also prescribe limits for traveling, and a breach of the conditions of the policy in this respect will avoid it.[51] There is no forfeiture, however, by reason of a change of residence or travel which is within a permit given by the company either in the policy or subsequently.[52] The provisions of the policy as to residence and traveling and of permits for residence or travel beyond the prescribed limits are to be construed together, and if there is such

reëxamination would have disclosed anything not apparent on the first examination, it was held that forfeiture would not be sustained. Loesch *v.* Union Casualty, etc., Co., 176 Mo. 654, 75 S. W. 621.

Failure to furnish proof of truth of statements in application.—Under a provision that if any statements in the application are claimed to be untrue a forfeiture shall result only if the party in interest fails to furnish the company satisfactory proof of the truth of such statements, a forfeiture will not be sustained if the evidence furnished at the request of the company is such as a person of ordinary common sense and honesty would consider satisfactory, whether it is accepted by the company or not. Thompson *v.* Security Trust, etc., Ins. Co., 63 S. C. 290, 41 S. E. 464.

47. Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694.

48. Frank *v.* Mutual L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807; Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283 [*reversing* 6 Rob. 393, 6 Abb. Pr. N. S. 144, 37 How. Pr. 126]; Smith *v.* Penn Mut. L. Ins. Co., 11 Wkly. Notes Cas. (Pa.) 295; Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800. See also *infra*, XII, A, 2, e.

Effect of conditions and warranties as against assignee of policy see *supra*, VI, C, 5, c, (VIII).

Forfeiture for non-payment of premiums see *infra*, X, C.

49. **Waiver of forfeiture** see *infra*, XI.

50. Nightingale *v.* State Mut. L. Ins. Co., 5 R. I. 38; and other cases cited in the notes following. See also *infra*, XII, A, 1, b, (II).

Residence as part of description of insured in application or policy see *supra*, IX, D, 3.

51. Hathaway *v.* Trenton Mut. L., etc., Ins. Co., 11 Cush. (Mass.) 448; Douglas *v.* Knickerbocker L. Ins. Co., 83 N. Y. 492, 55 How. Pr. 104 [*affirming* 45 N. Y. Super. Ct. 313]; and other cases cited in the notes following. See also *infra*, XII, A, 1, b, (II).

52. Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244; Taylor *v.* Ætna L. Ins. Co., 13 Gray (Mass.) 434 (holding that where the permission was to pass by sea between certain ports "on first class decked vessels," the policy was not forfeited by going as steerage passenger in such vessel); Casler *v.* Connecticut Mut. L. Ins. Co., 22 N. Y. 427 (holding that permission to travel within "settled limits of the United States" meant the established boundaries of the United States, and that death during a trip overland across the plains to California did not defeat recovery under the policy); Converse *v.* Knights Templars', etc., L. Indemnity Co., 93 Fed. 148, 35 C. C. A. 232 (holding that where the place of death is outside of the limits of residence authorized by the policy, but the insured is at such place in pursuance of travel permitted by the policy, the policy is not avoided). A permit should not be construed as limiting a right as to residence which exists under the terms of the policy itself. Forbes *v.* American Mut. L. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360. It being specified in the permit that the insured contemplated going to a place beyond the limits named in the policy for residence and that he was authorized to reside at such place for twelve months, it was held that such permit should not be construed as limiting the twelve months' residence to begin at the time when in the ordinary course of travel starting within a reasonable time he should reach the place designated, but that it should be construed as authorizing twelve months' residence at that place commencing at any time. Notman *v.* Anchor Assur. Co., 4 C. B. N. S. 476, 4 Jur. N. S. 712, 27 L. J. C. P. 275, 6 Wkly. Rep. 688, 93 E. C. L. 476.

Stoppages on journey.—Permission to travel outside of the limits prescribed for residence does not necessitate a continuous journey, but the insured is entitled to make reasonable stops for purposes consistent with his character as a traveler. Converse *v.* Knights Templars', etc., Life Indemnity Co., 93 Fed. 148, 35 C. C. A. 232.

Post-dating a permit to reside in a restricted territory, which is intended to secure a present right, does not prevent it from operating in accordance with the intention

travel or residence as is not included within the provisions of the policy and permit the policy will be avoided.[53]

2. **Occupation.** Certain occupations are sometimes excluded so that death resulting while engaged in such occupations is not a loss within the terms of the policy;[54] and where the policy specifies the occupation of the insured it may prohibit a change of occupation without the consent of the company.[55] The stipulations against change of occupation apply only to the abandonment of the existing occupation and engaging in another employment as a usual business, and merely occasional or incidental occupation or employment not thus engaged in as a business will not avoid the policy.[56] Mere intention to engage in another pursuit does not constitute a change of occupation.[57]

3. **Habits.** Breach of a promissory warranty or condition that the insured will not contract or practise any vicious habits tending to shorten life, or that he will not become so far intemperate as to impair his health, will forfeit the policy,[58]

of the parties. Walsh *v.* Ætna L. Ins. Co., 30 Iowa 133, 6 Am. Rep. 664.

53. Rainsford *v.* Royal Ins. Co., 33 N. Y. Super. Ct. 453.

Discretion of company as to permits. — Where the policy provides that permits to reside and travel outside of the limits specified will be given on reasonable terms, the terms are within the discretion of the company and if violated there can be no recovery. The court cannot ascertain what would have been reasonable terms as to additional premiums and allow recovery on the payment of such additional charges. Douglas *v.* Knickerbocker L. Ins. Co., 83 N. Y. 493.

Inability to return within the limited time given by the permit for travel or residence outside the limits prescribed in the policy will not relieve the insured from the forfeiture resulting from the violation of the terms of the permit. In such case the insured by availing himself of the permit takes the chances of being able to return. Evans *v.* U. S. Life Ins. Co., 64 N. Y. 304 [*affirming* 3 Hun 587, 6 Thomps. & C. 331]. But where return within the time specified in the permit might, on account of sickness existing preceding the time for the return, have rendered death probable, it was held that the insured was excused for not returning within the specified time. Baldwin *v.* New York L. Ins., etc., Co., 3 Bosw. (N. Y.) 530.

Death from epidemic excluded from a permit to travel does not include death from yellow fever not prevalent as an epidemic at the time. Pohalski *v.* Mutual L. Ins. Co., 36 N. Y. Super. Ct. 234 [*affirmed* in 56 N. Y. 640].

54. Ayer *v.* New England Mut. L. Ins. Co., 109 Mass. 430. See also *infra*, XII, A, 1, b, (IV).

Military service.—A provision for forfeiture on entering into any military service without the consent of the company includes only such service as will render the person entering it liable to duty in the field as a combatant and service under the military authorities as a laborer or employee engaged in an ordinary occupation is not within the prohibition. Welts *v.* Connecticut Mut. L. Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518 [*affirming* 46 Barb. 412].

Saloon-keeper.—Where the policy prohibited the insured from keeping a liquor saloon without the consent of the company it was held that his acquiring a half interest in a saloon without becoming the keeper of it did not avoid the policy. Union Cent. L. Ins. Co. *v.* Hughes, 110 Ky. 26, 60 S. W. 850, 22 Ky. L. Rep. 1549.

55. Estabrooks *v.* Union Casualty, etc., Co., 74 Vt. 473, 52 Atl. 1048, 93 Am. St. Rep. 916.

56. Stone *v.* U. S. Casualty Co., 34 N. J. L. 371; North American L. etc., Ins. Co. *v.* Burroughs, 69 Pa. St. 43, 8 Am. Dec. 212; Ætna L. Ins. Co. *v.* Dunn, 138 Fed. 629, 71 C. C. A. 79; McNevin *v.* Canadian Railway Acc. Ins. Co., 2 Ont. L. Rep. 521. See Accident Insurance, 1 Cyc. 252.

57. Ætna L. Ins. Co. *v.* Frierson, 114 Fed. 56, 51 C. C. A. 424.

58. *Georgia.*—Waters *v.* Supreme Conclave K. of D., 105 Ga. 151, 31 S. E. 155.

Indiana.— Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

New York.— Horton *v.* Equitable L. Assur. Soc., 3 Alb. L. J. 233.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

Pennsylvania.— Knight *v.* New York Mut. L. Ins. Co., 9 Wkly. Notes Cas. 501.

South Carolina.— Williford *v.* Ætna L. Ins. Co., 64 S. C. 329, 42 S. E. 165.

United States.— Ætna L. Ins. Co. *v.* Davey, 123 U. S. 739, 8 S. Ct. 331, 31 L. ed. 315 [*reversing* 20 Fed. 482]; Schultz *v.* New York Mut. L. Ins. Co., 6 Fed. 672; Connecticut Mut. L. Ins. Co. *v.* Home Ins. Co., 6 Fed. Cas. No. 3,107, 17 Blatchf. 142.

Canada.— Boyce *v.* Phœnix Mut. L. Ins. Co., 14 Can. Sup. Ct. 723 [*affirming* 2 Montreal Q. B. 323].

See 28 Cent. Dig. tit. "Insurance," § 881.

Exception of death due to intemperance, etc., see *infra*, XII, A, 1, b, (I), text and note 6.

Intemperate habits. — Under the general stipulation not to practise any pernicious

unless waived by the company.[59] A stipulation against intemperance such as to impair the health does not necessarily mean habitual intemperance but includes any acts of intemperance producing such impairment.[60]

C. Non-Payment of Premiums or Assessments — 1. In General. A condition in the policy that it shall terminate or be avoided on failure to pay any premium or instalment thereof at the time specified in the contract is valid and constitutes a condition subsequent, the non-performance of which avoids the policy,[61]

habits obviously tending to shorten life the insurance will be defeated by contracting the habit of the excessive use of alcoholic liquors. Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272; Schultz *v.* New York Mut. L. Ins. Co., 6 Fed. 672.

A statement in the application that the applicant will not practise pernicious habits obviously tending to shorten life does not become a promissory warranty in the absence of any provision in the policy making such statement a warranty. Knecht *v.* New York Mut. L. Ins. Co., 90 Pa. St. 118, 35 Am. Rep. 641.

Cancellation of contract. — Intemperate habits as a ground for the cancellation or forfeiture of a contract by the company before loss cannot be taken advantage of as a defense after the loss has occurred unless the intemperance continued to the time of the death. Union Cent. L. Ins. Co. *v.* Hughes, 110 Ky. 26, 60 S. W. 850, 22 Ky. L. Rep. 1549. Intemperate habits will be a ground for forfeiture before loss only where it is so stipulated in the contract. Purdy *v.* Bankers' Life Assoc., 101 Mo. App. 91, 74 S. W. 486.

Uncontrollable impulse. — The fact that the impulse to indulge in dissipation is uncontrollable does not prevent such indulgence being a breach of promissory warranty not to use liquor to excess. Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

Medical advice. — But it has been held that a stipulation that insured shall not become so intemperate as to impair his health is not broken if his health is impaired by the excessive use of alcoholic stimulants taken in good faith for medical purposes under the advice of a physician. Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371.

Bill in equity lies to cancel policy see Connecticut Mut. L. Ins. Co. *v.* Home Ins. Co., 6 Fed. Cas. No. 3,107, 17 Blatchf. 142. And see *supra*, VIII, D. 1.

Insanity and suicide from intemperance. — Where the policy provides that it shall be void, if the assured become so far intemperate as seriously and permanently to injure his health, or induce delirium tremens, or die by his own hand, a persistence in the habit of drinking, producing insanity, during which the assured committed suicide, discharges the insurers from liability. Stratton *v.* North American Mut. L. Ins. Co., 7 Leg. Gaz. (Pa.) 313. See also Jarvis *v.* Connecticut Mut. L. Ins. Co., 13 Fed. Cas. No. 7,226; and *infra*, XII, A, 2, d, (1). *Compare infra*, XII, A, 2, c, note 26.

59. See *infra*, XI.

60. Connecticut Mut. L. Ins. Co. *v.* Attee, 3 Ohio Cir. Ct. 650, 2 Ohio Cir. Dec. 378; Ætna L. Ins. Co. *v.* Davey, 123 U. S. 789, 8 S. Ct. 331, 31 L. ed. 315 (holding that if the substantial cause of the death of the insured was an excessive use of alcoholic stimulants, not taken in good faith for medical purposes or under medical advice, his health was impaired by intemperance, within the meaning of the words, "so far intemperate as to impair his health," although he may not have had delirium tremens, and although, previously to his last illness, he had not indulged in strong drink for such a long period of time or so frequently as to become habitually intemperate; and that whether death was so caused is a matter to be determined by the jury under all the evidence); Davey *v.* Ætna L. Ins. Co., 38 Fed. 650 [*affirmed* in 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371]. The company cannot avail itself of such a provision, however, unless as a matter of fact and not merely as matter of opinion on the part of the company the insured is so intemperate as to impair his health. Janneck *v.* Metropolitan L. Ins. Co., 162 N. Y. 574, 57 N. E. 182 [*affirming* 13 N. Y. App. Div. 514, 43 N. Y. Suppl. 669]. See also Williford *v.* Ætna L. Ins. Co., 64 S. C. 329, 42 S. E. 165.

Permanent impairment. — Under a stipulation as to serious and permanent impairment it must be shown, to defeat the policy, that the use of intoxicating liquors to the extent of impairing health resulted in a permanent impairment. Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 24 N. E. 86, 375.

Cause of death. — It is not necessary that the intemperance shown shall have been the immediate cause of death. Connecticut Mut. L. Ins. Co. *v.* Attee, 3 Ohio Cir. Ct. 650, 2 Ohio Cir. Dec. 378. *Compare* Hanna *v.* Connecticut Mut. L. Ins. Co., 150 N. Y. 526, 44 N. E. 1099 [*affirming* 8 Misc. 431, 28 N. Y. Suppl. 661].

61. *California.* — Cayford *v.* Metropolitan L. Ins. Co., 144 Cal. 763, 78 Pac. 258.

Connecticut. — Wilmot *v.* Charter Oak L. Ins. Co., 46 Conn. 483.

Illinois. — Roberts *v.* Ætna L. Ins. Co., 101 Ill. App. 313; Bennett *v.* Union Cent. L. Ins. Co., 104 Ill. App. 402.

Indiana. — Tibbits *v.* Mutual Ben. L. Ins. Co., 159 Ind. 671, 65 N. E. 1033.

Iowa. — Carpenter *v.* Centennial Mut. Life Assoc., 68 Iowa 453, 27 N. W. 456, 56 Am. Rep. 855.

in the absence of waiver or estoppel on the part of the company.[62] In like manner failure to pay an assessment in an assessment company as required by

Kentucky.— Letzler *v.* Pacific Mut. L. Ins. Co., 119 Ky. 924, 85 S. W. 177, 27 Ky. L. Rep. 372; Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875; St. Louis Mut. L. Ins. Co. *v.* Grigsby, 10 Bush 310; Franklin L. Ins. Co. *v.* McAfee, 90 S. W. 216, 28 Ky. L. Rep. 676.

Louisiana.— Epstein *v.* Mutual Aid, etc., L. Ins. Assoc., 28 La. Ann. 938.

Maine.— Coombs *v.* Charter Oak L. Ins. Co., 65 Me. 382.

Missouri.— Ashbrook *v.* Phœnix Mut. L. Ins. Co., 94 Mo. 72, 6 S. W. 462.

New Jersey.— Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

New York.— Conway *v.* Phœnix Mut. L. Ins. Co., 140 N. Y. 79, 35 N. E. 420; Holly *v.* Metropolitan L. Ins. Co., 105 N. Y. 437, 11 N. E. 507; Bogardus *v.* New York L. Ins. Co., 101 N. Y. 328, 4 N. E. 522; Baldwin *v.* Provident Sav. L. Assur. Soc., 23 N. Y. App. Div. 5, 48 N. Y. Suppl. 463 [*affirmed* in 162 N. Y. 636, 57 N. E. 1103]; Lamb *v.* Prudential Ins. Co., 22 N. Y. App. Div. 552, 48 N. Y. Suppl. 123; Simons *v.* New York L. Ins. Co., 38 Hun 309; Werner *v.* Metropolitan L. Ins. Co., 11 Daly 176. See also Wheeler *v.* Connecticut Mut. L. Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594; Howell *v.* Knickerbocker L. Ins. Co., 44 N. Y. 276, 4 Am. Rep. 675 [*reversing* 3 Rob. 232, 19 Abb. Pr. 217].

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67; Metropolitan L. Ins. Co. *v.* Walton, 25 Ohio Cir. Ct. 587.

Pennsylvania.—Lantz *v.* Vermont L. Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 23 Am. St. Rep. 202, 10 L. R. A. 577.

Texas.— Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117.

Washington.— Nixon *v.* Travelers' Ins. Co., 25 Wash. 254, 65 Pac. 195.

West Virginia.—Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

United States.— Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765; Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662; New York L. Ins. Co. *v.* Stacham, 93 U. S. 24, 23 L. ed. 789 (holding that the ordinary stipulation in a policy for the payment of an annual premium conditioned to be void on non-payment does not convert the contract to one of insurance from year to year, but the premiums provided for constitute an annuity, the whole of which is the consideration for the entire insurance, and the condition as to payment of premiums is a condition subsequent, making, by its non-performance, the policy void); D'Orlu *v.* Bankers', etc., Mut. L. Assoc., 46 Fed. 355; Tait *v.* New York L. Ins. Co., 23 Fed. Cas. No. 13,726, 1 Flipp. 288.

England.—Phœnix L. Assur. Co. *v.* Sheridan, 8 H. L. Cas. 745, 7 Jur. N. S. 174, 31 L. J. Q. B. 91, 3 L. T. Rep. N. S. 564, 11 Eng. Reprint 621.

See 28 Cent. Dig. tit. "Insurance," § 891 *et seq.*

Additional premiums.— Failure to pay the additional premium necessary to continue in force a permit to engage in an occupation prohibited by the policy without such permit will work a forfeiture if the prohibited service continues beyond the term of the permit already paid for. Ayer *v.* New England Mut. L. Ins. Co., 109 Mass. 430.

Default as to an instalment of premium.— It may be provided that a default in payment of any instalment of premium shall forfeit the policy. Cayford *v.* Metropolitan L. Ins. Co., 144 Cal. 763, 78 Pac. 258; Letzler *v.* Pacific Mut. L. Ins. Co., 119 Ky. 924, 85 S. W. 177, 27 Ky. L. Rep. 372; Baldwin *v.* Provident Sav. L. Assur. Soc., 23 N. Y. App. Div. 5, 48 N. Y. Suppl. 463 [*affirmed* in 162 N. Y. 636, 57 N. E. 1103]; Phœnix L. Assur. Co. *v.* Sheridan, 8 H. L. Cas. 745, 7 Jur. N. S. 174, 31 L. J. Q. B. 91, 3 L. T. Rep. N. S. 564, 11 Eng. Reprint 621. In the absence of any specific provision as to default of payment of instalments a general provision of the policy for forfeiture in case of default for failure to pay premiums is applicable to the payment of instalments of a premium where the assured has availed himself of the privilege of paying the premium by instalments. Nixon *v.* Travelers' Ins. Co., 25 Wash. 254, 65 Pac. 195. See also Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662.

Strict performance.— The insured is bound to a strict performance of the conditions of the policy as to payment of premiums, unless he is relieved from such performance by the company. Catoir *v.* American L. Ins., etc., Co., 33 N. J. L. 487.

The incontestable clause does not apply to default in payment of premiums. Metropolitan L. Ins. Co. *v.* Walton, 25 Ohio Cir. Ct. 587.

Default to another association paying premiums.— Where the insured was a member of an association organized to maintain insurance on the lives of its members for their benefit under an arrangement by which the association was primarily liable for the payment of such premiums which were repaid to it by its members in instalments, it was held that default of a member to the association in the payment of an instalment did not constitute a default as to the insurance company so as to defeat the policy. Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22.

Non-payment on surrendered policy.— Where the consideration for the issue of a life policy is the surrender of an existing policy, the fact that the last premium due on the surrendered policy was never paid is immaterial in an action on the new policy. Kantrener *v.* Penn Mut. L. Ins. Co., 5 Mo. App. 581.

62. See *infra*, XI.

the policy or certificate may operate as a forfeiture.[63] But where there is in the policy no stipulation or condition for forfeiture on account of non-payment of premiums, a default in payment will not operate in itself as a forfeiture, nor can it be insisted upon by the company as constituting a forfeiture in the absence of any notice.[64] The time of payment may be made material by the contract so that a failure to pay involves an absolute forfeiture which cannot be relieved against in equity.[65]

2. Of Note. By the weight of authority, in the absence of any stipulation with reference to forfeiture for non-payment of a note given for premium, the premium must be regarded as paid by the note, and default in payment of the note will not forfeit the insurance;[66] but it is otherwise where forfeiture for non-payment of premium notes is provided for in the policy,[67] or in the note

63. Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74; Green *v.* Hartford L. Ins. Co., 139 N. C. 309, 51 S. E. 887, 1 L. R. A. N. S. 623. See also Carpenter *v.* Centennial Mut. Life Assoc., 68 Iowa 453, 27 N. W. 456, 56 Am. Rep. 855; and Mutual Benefit Insurance.

Effect of guaranty deposit.— Where the articles of an assessment life insurance company provided for a guaranty deposit by each member to secure the payment of his assessments, but also provided that a member should continue such only so long as he should pay all dues and assessments, but that in case of default his deposit might be applied in payment of mortuary assessments, and there was no provision for replacement of such deposit when once used, it was held that the guaranty deposit did not operate to continue a membership in force after default in the payment of dues or assessments; that such deposit was for the protection of other members, and the defaulting member had no interest therein. Mee *v.* Bankers' Life Assoc., 69 Minn. 210, 72 N. W. 74.

64. Perry *v.* Bankers' L. Ins. Co., 47 N. Y. App. Div. 567, 62 N. Y. Suppl. 553; Woodfin *v.* Asheville Mut. Ins. Co., 51 N. C. 558; Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3; Union Cent. L. Ins. Co. *v.* Morrow, 7 Ohio S. & C. Pl. Dec. 118.

Notice see *infra*, X, C, 4, 6, d–i.

Term insurance.— If the contract provides for insurance only for the term for which premium is paid the failure to pay a subsequent premium on the expiration of the term for which a premium has been paid will terminate the liability of the company. McConnell *v.* Provident Sav. L. Assur. Soc., 92 Fed. 769, 34 C. C. A. 663.

65. New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789. See also Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662.

66. *Illinois.*— New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132.

Louisiana.— Trager *v.* Louisiana Equitable L. Ins. Co., 31 La. Ann. 235.

Massachusetts.—McAllister *v.* New England Mut. L. Ins. Co., 101 Mass. 558, 3 Am. Rep. 404.

New York.— Shaw *v.* Republic L. Ins. Co., 67 Barb. 586 [*affirmed* in 69 N. Y. 286].

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

See 28 Cent. Dig. tit. "Insurance," § 897. And see *infra*, X, C, 7, c, note 49.

Contra.— In other cases it has been held that if the policy provides for forfeiture on non-payment of premium in cash and a note is taken for the premium, the failure to pay the note at maturity operates as a forfeiture. Wilmot *v.* Charter Oak L. Ins. Co., 46 Conn. 483; St. Louis Mut. L. Ins. Co. *v.* Grigsby, 10 Bush (Ky.) 310.

Permanent loan.— If the note contains no provision as to when it shall be paid, it is in the nature of a permanent loan to be paid out of the dividends or to be taken from the policy when it becomes payable, and failure to pay it before the death of the insured will not work a forfeiture. Northwestern Mut. L. Ins. Co. *v.* Bonner, 36 Ohio St. 51. See also Northwestern Mut. L. Ins. Co. *v.* Little, 56 Ind. 504.

67. *Alabama.*— Imperial L. Ins. Co. *v.* Glass, 96 Ala. 568, 11 So. 671.

Georgia.— National Life Assoc. *v.* Brown, 103 Ga. 382, 29 S. E. 927.

Illinois.— Bennett *v.* Union Cent. L. Ins. Co., 104 Ill. App. 402.

Kentucky.— Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875; Union Cent. L. Ins. Co. *v.* Duvall, 16 Ky. L. Rep. 398.

Louisiana.— Fenn *v.* Union Cent. L. Ins. Co., 48 La. Ann. 541, 19 So. 623.

Massachusetts.— Bigelow *v.* State Mut. L. Assur. Assoc., 123 Mass. 113; Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500.

Michigan.— McIntyre *v.* Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Minnesota.— Bauholzer *v.* New York L. Ins. Co., 74 Minn. 387, 77 N. W. 295, 78 N. W. 244.

New Jersey.— Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

New York.— How *v.* Union Mut. L. Ins. Co., 80 N. Y. 32.

Ohio.— Robert *v.* New England Mut. Ins. Co., 2 Disn. 106 [*affirming* 1 Disn. 355, 12 Ohio Dec. (Reprint) 668].

Texas.— National L. Ins. Co. *v.* Reppond, (Civ. App. 1904) 81 S. W. 1012; Union Cent. L. Ins. Co. *v.* Hughes, (Civ. App. 1902)

itself,[68] or in, or indorsed upon, a receipt given therefor;[69] and such a provision in the note may be taken advantage of by the company, although the note is executed to the agent in his representative capacity.[70] Whether a policy is forfeited by non-payment of a note taken by the agent of the company, payable to himself, depends upon the circumstances.[71] If the company accepts the note

70 S. W. 1010; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117.

Wisconsin.— Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800.

United States.— Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765 [*affirming* 23 Fed. Cas. No. 13,964, 2 Woods 547]. And see Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204.

England.— London, etc., L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116 [*reversing* 23 Ont. App. 666 (*affirming* 27 Ont. 477)].

Canada.— McGeachie *v.* North American L. Assur. Co., 20 Ont. App. 187 [*reversing* 22 Ont. 151, and *affirmed* in 23 Can. Sup. Ct. 148]; Watts *v.* Atlantic Mut. L. Ins. Co., 31 U. C. C. P. 53.

See 28 Cent. Dig. tit. "Insurance," § 897. And see *infra*, X, C, 7, c, text and note 49.

Non-payment of instalment.— A policy terminable by failure "to pay when due any notes or other obligations given for premium" is determined by failure to pay an instalment due on a premium note. Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500; McIntyre *v.* Michigan State Ins. Co., 52 Mich. 188, 17 N. W. 781.

Application of dividends see *infra*, X, C, 7, e.

Note for first premium.— Even though the policy recites the payment of the first premium, if in fact a note has been taken therefor and the policy provides that failure to pay any note shall render it void, the company may insist upon the forfeiture for non-payment of the note thus taken. Leeper *v.* Franklin L. Ins. Co., 93 Mo. App. 602, 67 S. W. 941; London, etc., L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116.

Non-payment of principal.— Where a premium note was taken payable in five years and the stipulation in the policy required the annual payment of certain cash sums and interest on the premium note, it was held that the payment of the annual cash premium and the interest on the note constituted the complete annual payment required by the policy. Ohde *v.* Northwestern L. Ins. Co., 40 Iowa 357.

Although the insured has not been heard of for seven years prior to the maturity of the policy, that fact alone does not constitute proof of his death prior to the maturity of the note so as to prevent forfeiture for non-payment. Hancock *v.* American L. Ins. Co., 62 Mo. 26.

68. *New Jersey.*— Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

New York.— Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283 [*reversing* 6 Abb. Pr. N. S. 144].

Pennsylvania.— Kerns *v.* New Jersey Mut. L. Ins. Co., 86 Pa. St. 171; Seeley *v.* Union Cent. L. Ins. Co., 10 Pa. Super Ct. 270.

Tennessee.—Ressler *v.* Fidelity Mut. L. Ins. Co., 110 Tenn. 411, 75 S. W. 735.

Texas.— National L. Ins. Co. *v.* Manning, (Civ. App. 1905) 86 S. W. 618; Laughlin *v.* Fidelity Mut. Life Assoc., 8 Tex. Civ. App. 448, 28 S. W. 411.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765.

See 28 Cent. Dig. tit. "Insurance," § 897.

A statutory provision that the full contract shall be embodied in the policy does not render invalid a stipulation in the note that default in payment shall render the policy void. Fidelity Mut. L. Ins. Co. *v.* Price, 117 Ky. 25, 77 S. W. 384, 25 Ky. L. Rep. 1148.

69. Fidelity Mut. L. Ins. Co. *v.* Bussell, 75 Ark. 25, 86 S. W. 814; Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204.

70. Union Cent. L. Ins. Co. *v.* Duvall, 16 Ky. L. Rep. 398; London, etc., L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116.

71. If the note, although payable to the agent, is received by him for the company and indorsed to it, default in payment will be a default to the company. Fidelity Mut. L. Ins. Co. *v.* Bussell, 75 Ark. 25, 86 S. W. 814. See also London & Lancashire L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116 [*reversing* 23 Ont. App. 666 (*affirming* 27 Ont. 477)]. On the other hand, where the agent of an insurance company was authorized to take the note of the insured, payable to himself for the cash premium, the company to charge him with its amount, and in case the note should not be paid he should have the right to turn it over to the company and receive credit, it was held that a note so given and afterward turned over to the company was not a note given for the premium within a provision in the policy for forfeiture for non-payment of premium or any note given therefor. Southern Mut. L. Ins. Co. *v.* Best, 8 Ky. L. Rep. 535. And where an agent authorized to take nothing but cash for premiums takes a note, thereby becoming liable to the company for the cash and individually subject to loss in case the note is not paid, the non-payment of the note does not forfeit the policy. Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

of a third person in lieu of cash payment by the assured, default in payment of such note will not forfeit the policy.[72]

3. Of Interest. It may also be provided that the insurance shall be forfeited on default in payment of interest on premium notes.[73] But it has been held that the maxim, "*De minimis non curat lex*," applies to a default to a trifling amount in the payment of interest on a premium note containing a provision that default in the payment of interest works a forfeiture.[74]

4. How Forfeiture Is Effected. In the absence of any specific provision for forfeiture the failure to pay a stipulated premium or an assessment suspends the policy and it may be revived by payment thereof unless the company has by some action on its part effected a forfeiture.[75] But specific provision may be made in the policy or in a premium note by which on default in payment the insurance becomes at once forfeited without any action on the part of the company.[76] If some right of election is expressly contemplated by the terms of the contract, there is no forfeiture until the company has indicated its election.[77] And if the contract involves some action on the part of the company for the purpose of determining the amount due by way of premium or assessment there is no forfeiture until the assured is notified of the amount to be paid.[78]

72. Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; Galvin *v.* Union Cent. L. Ins. Co., 115 Ky. 547, 74 S. W. 275, 24 Ky. L. Rep. 2452, 103 Am. St. Rep. 336; Michigan Mut. L. Ins. Co. *v.* Bowes, 42 Mich. 19, 51 N. W. 962.

73. *Maryland.*— Knickerbocker L. Ins. Co. *v.* Dietz, 52 Md. 16.

Missouri.— Russum *v.* St. Louis Mut. L. Ins. Co., 1 Mo. App. 228.

Ohio.— Insurance Co. *v.* Robinson, 40 Ohio St. 270.

Tennessee.— Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

United States.—Anderson *v.* St. Louis Mut. L. Ins. Co., 1 Fed. Cas. No. 362, 1 Flipp. 559.

See 28 Cent. Dig. tit. "Insurance," § 898.

Interest on loan.—A provision in a contract of loan from the company for which its paid-up policy is pledged as collateral that on default in payment of interest the policy shall be surrendered to the company at its option for its cash surrender value is void. New York L. Ins. Co. *v.* Curry, 115 Ky. 100, 72 S. W. 736, 24 Ky. L. Rep. 1930, 103 Am. St. Rep. 297, 61 L. R. A. 268.

Application of dividends see *infra*, X, C, 7, e.

74. Van Norman *v.* Northwestern Mut. L. Ins. Co., 51 Minn. 57, 52 N. W. 988.

75. Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3; McEvoy *v.* Michigan Mut. L. Ins. Co., 2 Ohio Cir. Dec. 329; Washington Mut. F. Ins. Co. *v.* Rosenberger, 84 Pa. St. 373.

76. *Illinois.*— U. S. Life Ins. Co. *v.* Ross, 159 Ill. 476, 42 N. E. 859 [*reversing* 57 Ill. App. 98]; Bennett *v.* Union Cent. L. Ins. Co., 104 Ill. App. 402. See also Lehman *v.* Clark, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648.

Kentucky.— Crutchfield *v.* Union Cent. L. Ins. Co., 113 Ky. 53, 67 S. W. 67, 23 Ky. L. Rep. 2300.

Minnesota.—Banholzer *v.* New York L. Ins. Co., 74 Minn. 387, 77 N. W. 295, 78 N. W. 244.

New York.— Attorney-General *v.* Continental L. Ins. Co., 93 N. Y. 70; Roehner *v.* Knickerbocker L. Ins. Co., 63 N. Y. 160.

Texas.— Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117.

Vermont.— Fraser *v.* Home L. Ins. Co., 71 Vt. 482, 45 Atl. 1046.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252 [*affirming* 23 Fed. Cas. No. 1,057]; Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212; Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238.

See 28 Cent. Dig. tit. "Insurance," § 904.

Contra.— But in Ohio it has been held that a provision in a premium note that the policy shall become forfeited on default in payment, being made for the benefit of the company, should be construed only as giving to it the privilege of exercising the option to forfeit on that ground, and that the evidence as to acts of the agent in attempting to secure payment of the note after its maturity was inconsistent with an election by the company to treat the policy as forfeited. Mutual L. Ins. Co. *v.* French, 30 Ohio St. 240, 27 Am. Rep. 443 [*affirming* 2 Cinc. Super. Ct. 321]; Wilson *v.* Home Ins. Co., 6 Ohio Dec. (Reprint) 708, 7 Am. L. Rec. 480.

Waiver of forfeiture see *infra*, XI.

Return of premiums or premium note.— Where the policy provides that default shall operate as a forfeiture without notice it is not necessary that the company return uncarned premiums or the dishonored instrument, non-payment of which caused the forfeiture. Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238.

Cancellation in equity for non-payment of premium see *supra*, VIII, D, I, text and note 71.

77. Union Cent. L. Ins. Co. *v.* Jones, 17 Ind. App. 592, 47 N. E. 342.

78. Home L. Ins. Co. *v.* Pierce, 75 Ill. 426; Columbus Mut. Life Assoc. *v.* Hanrahan, 98

5. Forfeiture as to Beneficiary. The rights of the beneficiary are forfeited by any default on the part of the insured which by the terms of the contract works a forfeiture.[79] So the assignee of a policy is defeated by a forfeiture on the part of the insured,[80] unless by an agreement the policy is to be continued in force until the assignee has had an opportunity to pay the premium or assessment.[81]

6. Time For Payment and Notice Thereof — a. Time in General.[82] In determining whether the payment of the premium or assessment is timely so as to prevent forfeiture for non-payment, the stipulation of the policy as to time is, as a rule, of the essence of the contract,[83] and in general the specific provisions of the policy will control so that a tender after the time specified will not prevent the forfeiture.[84] The fact that a policy is not delivered until several days after its date furnishes no excuse for non-payment of premiums on the days specified in the

Ill. App. 22; Eddy *v.* Phœnix Mut. L. Ins. Co., 65 N. H. 27, 18 Atl. 89, 23 Am. St. Rep. 17; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 [*affirming* 51 How. Pr. 263]; Meeder *v.* Provident Sav. L. Assur. Soc., 58 N. Y. App. Div. 80, 68 N. Y. Suppl. 518; Nall *v.* Provident Sav. L. Assur. Soc., (Tenn. 1899) 54 S. W. 109; Hartford Ins. Co. *v.* Hyde, 101 Tenn. 396, 48 S. W. 968. See also *infra*, X, C, 6, d.

Assessments.— To establish a forfeiture of a life policy for non-payment of an assessment, it should be affirmatively shown that the assessment was made as authorized, and for a proper purpose; and the fact that the insured, a few days prior to his death, mailed to the company a check for the amount of premium is not such a recognition of the correctness of the amount as will relieve the company from proving it. Hartford L. Ins. Co. *v.* Hyde, 101 Tenn. 396, 48 S. W. 968.

Dividends.— If the insured is entitled to credit on his premium for dividends, there can be no forfeiture for default until he is notified of the amount of dividends applicable. Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355. See also *infra*, X, C, 7, e.

Notice of time for payment see *infra*, X, C, 6, c–i.

79. Forbes *v.* Union Cent. L. Ins. Co., 151 Ind. 39, 51 N. E. 84; Baker *v.* Union Mut. L. Ins. Co., 43 N. Y. 283 [*reversing* 6 Rob. 393, 6 Abb. Pr. N. S. 144, 37 How. Pr. 126]; Simons *v.* New York L. Ins. Co., 38 Hun (N. Y.) 309; Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800. Where the assignment by the wife as beneficiary was voidable by her but the policy had been forfeited before it was avoided it was held that she could not subsequently on avoiding the assignment recover on the policy. Frank *v.* Mutual L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807. See also *infra*, X, C, 8, e.

Where the beneficiary agrees to pay premiums she, as well as the insured, clearly becomes bound by clauses relating to payment and providing for forfeiture in case of non-payment. Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358.

Payment of premium notes.— It has been held that if a party who effects an insurance upon another's life for the benefit of the latter's wife passes to the insurer his promissory note for the premium, instead of paying the premium in money, the insurer is under no obligation to the beneficiary to enforce the notes against the maker, any more than he would have been to receive them originally instead of the money for the premiums, and therefore if when the notes are paid, the payment, by an arrangement between the parties to the notes, is applied to a different purpose, such payment does not inure to the benefit of the beneficiary in the policy as a payment of the premium. Timayenis *v.* Union Mut. L. Ins. Co., 21 Fed. 223.

80. Smith *v.* Penn Mut. L. Ins. Co., 11 Wkly. Notes Cas. (Pa.) 295. See *supra*, VI, C, 5, c, (VIII).

81. Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

82. Evidence of custom or usage see Customs and Usages, 12 Cyc. 1068.

83. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; New York L. Ins. Co. *v.* Stratham, 93 U. S. 24, 23 L. ed. 789; Sheerer *v.* Manhattan L. Ins. Co., 16 Fed. 720.

84. *Georgia.*— Kentucky Mut. L. Ins. Co. *v.* Clancy, 111 Ga. 865, 36 S. E. 944.

Indiana.— Tibbitts *v.* Mutual Ben. L. Ins. Co., 159 Ind. 671, 65 N. E. 1033.

Iowa.— Williams *v.* Washington L. Ins. Co., 31 Iowa 541.

Massachusetts.— French *v.* Hartford L., etc., Ins. Co., 169 Mass. 510, 48 N. E. 268.

Missouri.— Gaterman *v.* American L. Ins. Co., 1 Mo. App. 300.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

United States.— New York L. Ins. Co. *v.* Stratham, 93 U. S. 24, 23 L. ed. 789; Sheerer *v.* Manhattan L. Ins. Co., 16 Fed. 720.

And see the cases cited *supra*, X, C, 1.

Where the policy required payment to be made at or before twelve o'clock M on certain days, such requirement as to the hour in the day before which payment must be made was held not to be modified by the provision that in case premium should not be paid "on or before the several days hereinafter mentioned for the payment thereof" the policy should cease. Tibbits *v.* Mutual Ben. L. Ins. Co., 159 Ind. 671, 65 N. E. 1033. But notwithstanding such a provision in the policy it was

policy.[85] The general rules as to payment are applicable to premiums payable in instalments.[86] If it is optional with the assured to elect as to annual or quarterly payments he should not be held in default for quarterly payment until it appears that he has elected to pay in that manner.[87] If the day of payment falls on Sunday the premium is not payable until Monday;[88] and, if an extension of time by way of grace is allowed by the terms of the policy, there is no forfeiture for non-payment until the time for grace has expired.[89] If death occurs before the expiration for the time of payment as fixed either in the policy or in an extension of grace granted by the terms of the policy or otherwise there can be no forfeiture for non-payment.[90]

b. Demand and Protest. While no demand of payment need be shown, unless required by the policy, even, according to the better opinion, although

held that where notes were taken for a premium with the provision that if not paid on or before maturity the policy should cease, such notes might be paid during business hours on the date of maturity and need not be paid at or before twelve o'clock M. Leigh *v.* Knickerbocker L. Ins. Co., 26 La. Ann. 436.

To agent producing receipt.— If the provision is for payment by specified time at the office of the company or to a duly authorized agent producing a receipt of the company payment must be made at the office or to such duly authorized agent within the specified time. Kentucky Mut. L. Ins. Co. *v.* Clancy, 111 Ga. 865, 36 S. E. 944; Williams *v.* Washington L. Ins. Co., 31 Iowa 541. Such a provision, however, does not require the production of the receipt by an agent as a condition precedent to the forfeiture of the policy for non-payment. Straube *v.* Pacific Mut. L. Ins. Co., 123 Cal. 677, 56 Pac. 546.

Period covered by first payment.— Where a premium for two years was paid on issuance of the policy, it was held that there was no forfeiture within that period for non-payment of subsequent premium, although the next period for payment as specified by the policy was before the expiration of such two-year period. Stinchcombe *v.* New York L. Ins. Co., (Oreg. 1905) 80 Pac. 213. If the policy provides that the premium paid in advance shall continue the policy in force for a specified period such period should be computed from the date of the policy and not from the date of default in paying a subsequent premium. Union Mut. L. Ins. Co. *v.* Adler, (Ind. App. 1905) 73 N. E. 835 [rehearing *denied* in 75 N. E. 1088].

85. Tibbits *v.* Mutual Ben. L. Ins. Co., 159 Ind. 671, 65 N. E. 1033. See also Methvin *v.* Fidelity Mut. Life Assoc., 129 Cal. 251, 61 Pac. 1112.

86. Kentucky L., etc., Ins. Co. *v.* Kaufman, 102 Ky. 6, 42 S. W. 1104, 19 Ky. L. Rep. 969; Werner *v.* Metropolitan L. Ins. Co., 11 Daly (N. Y.) 176. If the dates for payment of quarterly instalments are specified it is immaterial whether the policy is itself dated and delivered on one of the days thus fixed. Methvin *v.* Fidelity Mut. L. Assoc., 129 Cal. 251, 61 Pac. 1112. See Stramback *v.* Fidelity Mut. L. Ins. Co., 94 Minn. 281, 102 N. W. 731.

87. Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156; Perry *v.* Bankers' L. Ins. Co., 167 N. Y. 607, 60 N. E. 1118 [*affirming* 47 N. Y. App. Div. 567, 62 N. Y. Suppl. 553].

Election.— By giving his note for the whole amount of the annual premium the insured elects not to avail himself of a privilege to pay in quarterly instalments. National L. Ins. Co. *v.* Manning, (Tex. Civ. App. 1905) 86 S. W. 618.

88. Northey *v.* Bankers' Life Assoc., 110 Cal. 547, 42 Pac. 1079; Hammond *v.* American Mut. L. Ins. Co., 76 Mass. 1, 10 Gray (Mass.) 306; Campbell *v.* International L. Assur. Soc., 4 Bosw. (N. Y.) 298. And see, generally, TIMES.

89. U. S. Life Ins. Co. *v.* Ross, 57 Ill. App. 98 [*reversed* on other grounds in 159 Ill. 476, 42 N. E. 859]; Worden *v.* Guardian Mut. L. Ins. Co., 39 N. Y. Super. Ct. 317; Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; Taylor *v.* Provident Sav. Life Assur. Soc., 134 Fed. 932; Stuart *v.* Freeman, [1903] 1 K. B. 47, 72 L. J. K. B. 1, 87 L. T. Rep. N. S. 516, 51 Wkly. Rep. 211. But a stipulation that failure to pay assessments for six months prior to death shall not defeat the insurance does not amount to a provision for six months' grace in payment of assessments as against a stipulation that assessments shall be paid within thirty days. Mutual Reserve Fund Life Assoc. *v.* Lovenberg, 24 Tex. Civ. App. 355, 59 S. W. 314. Under provisions of a contract involving payment of annual dues and mortuary premiums, it was held that a provision that payments might be made within six months was applicable to both. Spinks *v.* Mutual Reserve Fund Life Assoc., 137 Fed. 169.

Default in interest on note.— If a note given for a premium is negotiable and entitled to days of grace a tender of the interest within the days of grace will prevent a forfeiture for non-payment of interest at maturity. Jarman *v.* St. Louis Mut. L. Ins. Co., 13 Fed. Cas. No. 7,221, 1 Flipp. 548.

90. Protection L. Ins. Co. *v.* Palmer, 81 Ill. 88; Kentucky L., etc., Ins. Co. *v.* Kaufman, 102 Ky. 6, 42 S. W. 1104, 19 Ky. L. Rep. 969; Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516 [*reversing* 26 Barb. 556]; Rogers *v.* Capitol L. Ins. Co., 1 Wkly. Notes Cas. (Pa.) 589.

Death during extension of time granted see *infra*, X, C, 6, c.

default is in the payment of a premium note,[91] yet if an order or draft is accepted in payment there must be a demand at maturity, to fix a forfeiture.[92] But in the event of non-payment on presentation at maturity no protest for non-payment is necessary.[93]

c. Extension of Time Before Default. An agreement before default for extension of time of payment of premium or premium note is supported upon a sufficient consideration and valid.[94] A general agent has authority to extend the time of payment,[95] unless there is a specific provision in the policy limiting his authority in that respect.[96]

d. Notice in General. In the absence of any statutory provision[97] it is competent to provide for forfeiture on default in payment of premiums in accordance with the terms of the contract without notice or demand.[98] But if the amount of payment required is not known to the insured notice of the amount must be given before there can be a forfeiture.[99] And notice may also be required

91. Roehner *v.* Knickerbocker L. Ins. Co., 63 N. Y. 160 [*affirming* 4 Daly 512]. But see Mutual L. Ins. Co. *v.* French, 30 Ohio St. 240, 27 Am. Rep. 443 [*affirming* 2 Cinc. Super. Ct. 321].

92. Eury *v.* Standard L., etc., Ins. Co., 89 Tenn. 427, 14 S. W. 929, 10 L. R. A. 534; Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866 [*reversing* 5 Fed. 238].

93. Knickerbocker L. Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866 [*reversing* 5 Fed. 238].

94. Michigan Mut. L. Ins. Co. *v.* Custer, 128 Ind. 25, 27 N. E. 124; Homer *v.* Guardian Mut. L. Ins. Co., 67 N. Y. 478; Dean *v.* Ætna L. Ins. Co., 62 N. Y. 642.

Acceptance of part payment of a premium does not raise the presumption of an understanding that time was to be given for payment of the balance. Continental L. Ins. Co. *v.* Willets, 24 Mich. 268; National L. Ins. Co. *v.* Manning, (Tex. Civ. App. 1905) 86 S. W. 618.

Conditional extension.— An agreement by an agent of a life insurance company to extend a premium note of a policy-holder on condition that the latter would pay a personal indebtedness to the agent is indivisible, the condition exacted being the sole consideration for the agreement to extend; and where such condition was not performed, the fact that it was one the agent had no right to impose, and was illegal, does not render the agreement to extend obligatory or effective to continue the policy in force contrary to its terms, after default in the payment of the note. Union Cent. L. Ins. Co. *v.* Berlin, 90 Fed. 779, 33 C. C. A. 274.

Waiver of forfeiture for non-payment of premiums see *infra*, XI.

95. Dean *v.* Ætna L. Ins. Co., 62 N. Y. 642; Shear *v.* Phœnix Mut. L. Ins. Co., 4 Hun (N. Y.) 800; Wyman *v.* Phœnix Mut. L. Ins. Co., 3 Silv. Sup. (N. Y.) 392, 6 N. Y. Suppl. 289; Fraser *v.* Home L. Ins. Co., 71 Vt. 482, 45 Atl. 1046; Moffatt *v.* Reliance Mut. L. Assur. Soc., 45 U. C. Q. B. 561. And see U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

96. Conway *v.* Phœnix Mut. L. Ins. Co., 140 N. Y. 79, 35 N. E. 420; Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657 [*affirming* 16 Hun 494]. But it is immaterial that a general agent has no power to give an extension if the insured has no notice of limitations on his power. Fraser *v.* Home L. Ins. Co., 71 Vt. 482, 45 Atl. 1046.

Notwithstanding such limitation of authority in the policy the company may actually authorize its exercise by the agent. Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436.

Evidence of acquiescence in the course of conduct of an agent in extending the time of payment is admissible on the question of his authority to do so. Wyman *v.* Phœnix Mut. L. Ins. Co., 3 Silv. Sup. (N. Y.) 392, 6 N. Y. Suppl. 289.

Waiver of forfeiture by accepting premiums see *infra*, XI, D, 4.

Waiver by course of business see *infra*, XI, D, 2, b.

97. **Notice required by statute** see *infra*, X, C, 6, h.

98. Mutual Reserve Fund Life Assoc. *v.* Minehart, 72 Ark. 630, 83 S. W. 323; Manhattan L. Ins. Co. *v.* Savage, 63 S. W. 278, 23 Ky. L. Rep. 483; Behling *v.* Northwestern Nat. L. Ins. Co., 117 Wis. 24, 93 N. W. 800. See also *supra*, X, C, 4.

Knowledge of terms.— Such a stipulation is binding, although the assured has no actual knowledge thereof by reason of his having omitted to take the policy into his possession. Security L. Ins., etc., Co. *v.* Gober, 50 Ga. 404.

After extension of time, under a contract providing for forfeiture on default without notice, the policy lapses on failure to pay within the extended period. Manhattan L. Ins. Co. *v.* Pentecost, 105 Ky. 642, 49 S. W. 425, 20 Ky. L. Rep. 1442.

99. Home L. Ins. Co. *v.* Pierce, 75 Ill. 426; Eddy *v.* Phœnix Mut. L. Ins. Co., 65 N. H. 27, 18 Atl. 89, 23 Am. St. Rep. 17; Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738 [*affirming* 18 N. Y. Suppl. 305]; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 [*affirming* 51 How. Pr. 263]. See also Nall *v.* Provident

because of uniform and continued custom on the part of the company to give notice.[1]

e. Notice Required by Contract. If by the terms or nature of the contract notice is required before forfeiture, such notice is necessary and default in payment will not *ipso facto* work a forfeiture of the policy;[2] but when notice has been given failure to pay within a reasonable time thereafter will result in a forfeiture.[3] A promise after execution and delivery of the policy and with reference to a particular payment to become due that the company will give notice thereof

Sav. L. Assur. Soc., (Tenn. Ch. App. 1899) 54 S. W. 109. And see *supra*, X, C, 4, text and note 78.

1. Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34; Atty.-Gen. *v.* Continental L. Ins. Co., 33 Hun (N. Y.) 138; Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; Hartford Ins. Co. *v.* Hyde, 101 Tenn. 396, 48 S. W. 968. *Compare*, however, Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765 [*affirming* 23 Fed. Cas. No. 13,964, 2 Woods 547]; Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663. But it has been held that where an insurance company in an action on a policy defends on the ground of failure to pay the premiums when due, testimony for plaintiff to show that the company has been in the habit of notifying the insured when the premiums were due by him, but had in the particular instance complained of failed to do so, is inadmissible in evidence, unless it be shown that the notice has been purposely omitted with the design of forfeiting the policy. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., *supra*.

2. *California.*— Mills *v.* Home Ben. Life Assoc., 105 Cal. 232, 38 Pac. 723.

Colorado.— Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875.

Indiana.—Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

Iowa.— Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73; Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34.

Maryland.— Baltimore Mut. Endowment Assessment Assoc. *v.* Essender, 59 Md. 463.

Michigan.—Warner *v.* Hartford Nat. Life Assoc., 100 Mich. 157, 58 N. W. 667.

New York.—Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 27.

Tennessee.—Nall *v.* Provident Sav. L. Assur. Soc., (Ch. App. 1899) 54 S. W. 109.

United States.— Mutual Reserve Fund Life Assoc. *v.* Hamlin, 139 U. S. 297, 11 S. Ct. 614, 35 L. ed. 167.

See 28 Cent. Dig. tit. "Insurance," § 905 *et seq.*

After extension of time to pay an accrued premium and the receipt of instalments of such premium under the provisions of the extension, there cannot be a forfeiture for failure to pay a further instalment without the notice required by the policy for forfeiture on default of payment. Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73.

Notice of assessment.— If the company is required to give the assured notice of an assessment the policy is not forfeited for non-payment of an assessment until notice thereof, specifying the amount of such assessment, has been given; and it is not sufficient to notify the assured that he shall pay in advance the same amount as required under a previous assessment. Baltimore Mut. Endowment Assessment Assoc. *v.* Essender, 59 Md. 463; Warner *v.* Hartford Nat. Life Assoc., 100 Mich. 157, 58 N. W. 667.

If the policy requires notice of an assessment "and the number thereof" failure of the notice to announce the number prevents a forfeiture. Greenwald *v.* United L. Ins. Assoc., 18 Misc. (N. Y.) 91, 42 N. Y. Suppl. 973.

Notice of forfeiture.— The notice must be of a forfeiture for non-payment and not simply a notice of the amount to be paid. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300.

Time of notice.— Under a stipulation that premiums are payable on a certain quarterly date in each year, "of which thirty days previous notice will be issued," means that the notices must be issued thirty days previous to the quarter days named for payment. Freeze *v.* Dominion Safety Fund Life Assoc., 33 N. Brunsw. 238. See also Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73.

Information of failure to receive notice.— The duty imposed on the insured to inform the company of his failure to receive notice of an assessment cannot be imposed as a condition in such sense that non-performance of such duty will cause a forfeiture. Mutual Reserve Fund Life Assoc. *v.* Hamlin, 139 U. S. 297, 11 S. Ct. 614, 35 L. ed. 167.

Mistake of employee.— Where the failure of an insurance company to send to the insured a certain notice waives the forfeiture of a policy for non-payment of an assessment, the fact that the failure to send the notice was due to a mistake of an employee is not material. Mills *v.* Home Ben. Life Assoc., 105 Cal. 232, 38 Pac. 723.

3. Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404, holding that under a provision contemplating the mailing of notice of accrued premium, but not prescribing the consequences of failure to give such notice, the policy is not continued in force indefinitely in the event of failure to give notice, but the insured is entitled to a reasonable time after the date fixed by the policy in which to pay the premium, and if the premium has been repeatedly demanded without payment there can be no recovery on the death of the insured.

is supported by a sufficient consideration and prevents a forfeiture in the absence of such notice.[4]

f. Notice by Mail.[5] A provision in the policy for forfeiture thirty days after notice has been mailed to the insured means thirty days after mailing, and not after receipt of notice, and it is immaterial whether a notice properly mailed has been received by the insured or not;[6] but in the absence of any provision that mailing of notices is sufficient, evidence of non-receipt may be introduced to overcome proof of the giving of notice by mail.[7] The date of the notice for the purpose of determining the time for payment or forfeiture thereafter is not the date of the paper mailed, but the time of mailing or delivery,[8] or the time when the notice was or should have been received in the due and regular course of the mail.[9] The notice must be mailed to the last known address of the insured, and mailing to another address will not be sufficient unless it is actually received by the insured.[10]

g. Notice to Beneficiary or Assignee. The usual provision for notice to the insured does not require that notice be given to an assignee, although the assignment has been by the consent of the company,[11] nor to the beneficiary unless the company is advised that the insured no longer represents the beneficiary, in which case notice to the beneficiary is necessary.[12] A promise made after the execution of the policy and with reference to a particular payment to become due that the company will give the assignee notice thereof is supported by a sufficient consideration and prevents forfeiture until such notice has been given.[13]

h. Notice Required by Statute — (i) *NEW YORK STATUTE.* In New York a statute expressly provides for notice as a prerequisite to forfeiture of life insurance policies for non-payment of premiums;[14] and as the statute governs New

4. Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 27.

5. **Mailing of notice under statute** see *infra*, X, C, h, text and notes 23–27.

6. Epstein *v.* Mutual Aid, etc., L. Ins. Assoc., 28 La. Ann. 938; Teeter *v.* United L., etc., Ins. Assoc., 11 N. Y. App. Div. 259, 42 N. Y. Suppl. 119; Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404; New York L. Ins. Co. *v.* Scott, 23 Tex. Civ. App. 541, 57 S. W. 677; Survick *v.* Valley Mut. Life Assoc., (Va. 1895) 23 S. E. 223.

Prepayment of postage see *infra*, XIII, G, 2, f, text and note 58.

7. Mills *v.* Home Ben. Life Assoc., 105 Cal. 232, 38 Pac. 723; Garretson *v.* Equitable Mut. Life, etc., Assoc., 74 Iowa 419, 38 N. W. 127. And see Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738 [*affirming* 18 N. Y. Suppl. 305].

8. Williams *v.* Young Men's Mut. Life Assoc., 6 Ohio Dec. (Reprint) 1168, 11 Am. L. Rec. 48, 8 Cinc. L. Bul. 31.

9. Ferrenbach *v.* Mutual Reserve Fund Life Assoc., 121 Fed. 945.

10. Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875; Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473. See also *infra*, X, C, 6, h, text and note 26.

The assured may advise an agent authorized to collect premiums of a change of address to which future notices are to be sent. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34.

Mailing notice to the wife of the insured by his direction is sufficient. Beezley *v.* Des Moines Life Assoc., 100 Iowa 436, 69 N. W. 549.

11. Franklin L. Ins. Co. *v.* American Nat. Bank, 74 Ark. 1, 84 S. W. 789; Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172; Wood *v.* Confederation L. Ins. Co., 2 Truem. Eq. Rep. (N. Brunsw.) 217.

By statute see *infra*, X, C, 6, h, (I), text and note 25.

12. Rowe *v.* Brooklyn L. Ins. Co., 16 Misc. (N. Y.) 323, 38 N. Y. Suppl. 621; Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806 [*affirming* 9 Ohio Dec. (Reprint) 583, 15 Cinc. L. Bul. 180], holding that after a mutual life insurance company learned that the beneficiary, a wife, who was entitled to the profits earned, had left her husband, the insured, and sued for alimony, it was bound to notify her before the premium fell due, and a notice sent to him before receiving information of separation was not sufficient as against her to justify forfeiture for non-payment of the premium.

Notice to beneficiary under statute see *infra*, X, C, 6, h, (I), notes 24, 25.

13. Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 27.

14. N. Y. Laws (1906), c. 326, § 29, re-enacting Laws (1897), c. 218, § 2, amending Laws (1892), c. 690, § 92. For the earlier provisions see Laws (1876), c. 341; Laws (1877), c. 321.

Statute part of contract.— The statute becomes a part of every contract to which it is applicable, and governs the rights and obligations of the parties in precisely the same

York contracts of insurance with residents of other states, the courts of other states as well as of New York have been frequently called upon to construe and apply it.[15] This important statute provides that no life insurance corporation

way and to the same extent as if all its terms and conditions had been actually incorporated into the policy. Baxter *v.* Brooklyn L. Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293 [*affirming* 44 Hun 184]; Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. 687; and other cases cited in the notes following. And the statute must be given full effect notwithstanding any condition in the policy to the contrary. Baxter *v.* Brooklyn L. Ins. Co., *supra*. As to waiver see *infra*, X, C, 6, i, note 35.

Construction of statute.— Promptness of payment of life insurance premiums is essential, and although forfeitures are not generally regarded with favor they are necessary and should be fairly enforced in regard to such payments. A statute requiring notice of time of payment of premium and effect of non-payment thereof should not be construed so as to make it a trap for either the company or the assured. Nederland L. Ins. Co. *v.* Meinert, 199 U. S. 171, 26 S. Ct. 15, 50 L. ed. 139 [*reversing* 127 Fed. 651, 62 C. C. A. 377].

Effect of failure to give statutory notice see *infra*, this section, note 29.

Waiver of statutory notice see *infra*, X, C, 6, i, text and note 35.

Change or repeal of law.— A change in the law as to the requirement of notice cannot affect a policy issued while the previous statute was in force unless the policy by its terms expired at the end of each year unless the premium for the next year was paid. Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. 687. And it was so held where the statute was not repealed but in effect reënacted and continued. Hathaway *v.* New York Mut. L. Ins. Co., 99 Fed. 534. But in Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473 [*affirming* 91 Fed. 728], it was held that N. Y. Laws (1877), c. 321, providing that no life insurance company should declare a policy forfeited for non-payment of premiums until it had given the insured a prescribed notice, did not become a part of contracts of insurance made while it was in force, but merely suspended the operation of the provisions of such contracts declaring forfeitures until the required notice was given; and hence the repeal of such statute as to term insurance contracts by Laws (1892), c. 690, left the contracts made by the parties in full force, and was not an impairment of their obligation.

15. Application of statute in other states.— This statute has no application to contracts made by New York insurance companies with a resident of another state where the contract is made in the other state and is not a New York contract (Mutual Reserve Fund Life Assoc. *v.* Minehart, 72 Ark. 630, 83 S. W. 323; Grevenig *v.* Washington L. Ins. Co., 112 La. 879, 36 So. 790; Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404, holding that where an application for a life policy in a New York company is made and the policy is delivered in Texas, the New York statute prohibiting forfeitures for non-payment of premiums, unless written notice shall have been duly addressed to the insured, forms no part of the contract, although the policy itself provides, in general terms, but without reference to the New York law, for a notice of accruing premiums; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 202, 38 Pac. 1031; New York Mut. L. Ins. Co. *v.* Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. ed. 788 [*reversing* 118 Fed. 708, 55 C. C. A. 536]; New York Mut. L. Ins. Co. *v.* Cohen, 179 U. S. 262, 21 S. Ct. 106, 45 L. ed. 181 [*reversing* 97 Fed. 985, 38 C. C. A. 696]; New York Mut. L. Ins. Co. *v.* Hathaway, 106 Fed. 815, 45 C. C. A. 655. And see *supra*, IV, B, 7), unless the statute is rendered applicable by an express provision of the contract (see *infra*, this note). In a number of cases, on the other hand, it has been held, even in the absence of an express stipulation in the contract, that the statute does apply to contracts which are in legal contemplation made in New York with residents of other states, either directly or through agents of the company in the other states. Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Summitt *v.* U. S. L. Ins. Co., 123 Iowa 681, 99 N. W. 563; Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Nall *v.* Provident Sav. L. Assur. Soc., (Tenn. Ch. App. 1899) 54 S. W. 109; Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. 687; New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132; New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127; Equitable L. Assur. Soc. *v.* Trimble, 83 Fed. 85, 27 C. C. A. 404; Equitable L. Assur. Soc. *v.* Nixon, 81 Fed. 796, 26 C. C. A. 620; Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215. In a late Texas case, however, the decision was influenced by the fact that the present statute (like the act of 1897) requires the notice to be addressed and mailed to the insured at his last known post-office address "in this state," that is, in New York, whereas the statutes prior to 1897 omit the words quoted, and it was held that by reason of this change the present statute cannot be applied where the insured lives in Texas and the policy is delivered there, although the premiums and policy itself are payable in New York, at least where the statute is not made applicable by an express provision in the policy. Metropolitan L. Ins. Co. *v.* Bradley, 93 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509 [*reversing* (Civ. App. 1904) 79 S. W. 367].

Foreign corporation doing business in New York.— Where a Vermont corporation did

doing business in this state[16] shall within one year after the default in payment of any premium, instalment, or interest declare forfeited, or lapsed, any policy hereafter issued or renewed,[17] and not issued upon the payment of monthly or weekly

business as a life insurance company in the state of New York, having an office and an agent in New York city, and a resident of New Jersey effected insurance in such company by delivering, through his agent, an application to its general agent in New York, and receiving the policy there from such general agent, it was held that the contract of insurance was a New York contract, and subject to the laws of that state as to forfeiture for non-payment of premiums. Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215.

Express provision making the policy a New York contract.— It has repeatedly been held that the contract is a New York contract, and the statute applies, where the policy is issued in that state by a corporation thereof and the application or policy provides that it is to be construed by the laws thereof. Johnson *v.* New York L. Ins. Co., 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99; Banholzer *v.* New York L. Ins. Co., 74 Minn. 387, 77 N. W. 295, 78 N. W. 244; New York L. Ins. Co. *v.* English, 95 Tex. 391, 67 S. W. 884; Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 202, 38 Pac. 1031; Nederland L. Ins. Co. *v.* Meinert, 127 Fed. 651, 62 C. C. A. 377 [*reversed* on other grounds in 199 U. S. 171, 26 S. Ct. 15, 50 L. ed. 139]; New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132; Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493. It has recently been held, however, by the supreme court of the United States, that a general declaration in the policy that it is to be construed to have been made in the state of New York does not make applicable to it the New York law, in conflict with express stipulations in the policy itself. New York Mut. L. Ins. Co. *v.* Hill, 193 U. S. 551, 24 S. Ct. 538, 48 L. ed. 788 [*reversing* 118 Fed. 708, 55 C. C. A. 536], holding that where a contract contains a stipulation that it shall be construed to have been made in New York without referring to the law of that state requiring notice, and also contains another stipulation by which the assured expressly waives all further notice required by any statute, the latter stipulation is paramount and to that extent limits the applicability of the New York law in reference to notice to policyholders. And in accord with this see Metropolitan L. Ins. Co. *v.* Bradley, 98 Tex. 230, 82 S. W. 1031 [*reversing* (Civ. App. 1904) 79 S. W. 367], holding that where an application for an insurance policy on the life of a resident of Texas provided that the answers and statements contained therein should be the basis and become part of the contract of insurance, and waived notice to pay premiums, and the policy provided that the answers and statements contained in the application were made a part of the contract, and that the contract was completely set forth in the policy and application taken together, it could not be presumed that the parties intended that the contract was to be governed by the provisions of the statute of New York requiring notice to pay premiums to be given to insured as a condition of declaring the policy forfeited. See also Mutual Reserve Fund Life Assoc. *v.* Minehart, 72 Ark. 630, 83 S. W. 323; New York Mut. L. Ins. Co. *v.* Hathaway, 106 Fed. 815, 45 C. C. A. 655.

After forfeiture and reinstatement.—Where a policy of insurance issued in New York on the "renewable term" plan is forfeited by failure to pay premiums, a reinstatement of the policy, on the same terms, is not the making of a new contract, but merely a cancellation of the forfeiture, leaving the original policy in force as a New York contract. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

16. Policies issued to non-residents.— The statute is not limited in its application to policies issued to citizens of New York, but extends to all policies issued by companies doing business in the state. New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132. *Compare* Metropolitan L. Ins. Co. *v.* Bradley, 98 Tex. 230, 82 S. W. 1031, 68 L. R. A. 509 referred to *supra*, this section, note 15.

Foreign insurance companies.— The statute applies to foreign insurance companies doing business in the state. Strauss *v.* Union Cent. L. Ins. Co., 170 N. Y. 349, 63 N. E. 347; Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215.

Assessment companies.— The statute is not applicable, however, to companies or associations doing business on the assessment plan. Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738; Greenwald *v.* United L. Ins. Assoc., 18 Misc. (N. Y.) 91, 42 N. Y. Suppl. 973. See also Bopple *v.* Supreme Tent K. of M. of W., 18 N. Y. App. Div. 488, 45 N. Y. Suppl. 1096. *Compare* Elmer *v.* Mutual Ben. Life Assoc. of America, 19 N. Y. Suppl. 289 [*affirmed* in 138 N. Y. 642, 34 N. E. 512]. But it is applicable to policies payable out of a fund created by assessments. Jacklin *v.* National Life Assoc., 24 N. Y. Suppl. 746 [*affirmed* in 75 Hun 595, 27 N. Y. Suppl. 1112].

17. Effect of statute on preëxisting contracts.— The original statute was held not to apply to policies issued before it took effect, and such a policy might become forfeited by its provisions without the statutory notice. Cyrenius *v.* New York Mut. L. Ins. Co., 13 N. Y. St. 204.

Renewals.— The statute is applicable to policies renewed after it took effect, and the payment of an annual premium constitutes

premiums,[18] or unless the same is a term insurance contract for one year or less;[19] nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest, or instalment or any portion thereof[20] required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest, or instalment,[21] unless a written or printed notice stating the amount of such premium, interest, instalment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is pay-

such renewal. Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 17 N. E. 396; Wyman *v.* Phœnix Mut. L. Ins. Co., 45 Hun (N. Y.) 184.

Estoppel to deny application of statute.— Even where the statute does not apply the company may be estopped to deny its application and claim a forfeiture without having given the statutory notice, if it had assured the holder of the policy that such notice would be given. Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 17 N. E. 396.

18. A policy issued upon the payment of a monthly or weekly premium is thus excepted from the statute. Baldwin *v.* Provident Sav. L. Assur. Soc., 23 N. Y. App. Div. 5, 48 N. Y. Suppl. 463 [*affirmed* in 162 N. Y. 636, 57 N. E. 1103].

19. Term insurance.— A policy which by its terms is to remain in force for one year, but is renewable from year to year thereafter during the life of the insured on payment of the stipulated premiums, except as reduced by the application of the surplus and guaranty fund of the company, although it gives the insured a continuing interest in such fund, is a "term insurance contract for one year or less" within the meaning of this exception from the operation of the statute. Rosenplanter *v.* Provident Sav. L. Assur. Soc., 91 Fed. 728 [*affirmed* in 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473]. And so of a policy calling for renewal from month to month. Baldwin *v.* Provident Sav. L. Assur. Soc., 23 N. Y. App. Div. 5, 48 N. Y. Suppl. 463 [*affirmed* in 162 N. Y. 636, 57 N. E. 1103]. But a regular life policy which has lapsed and been reinstated on payment of a part of the premium and the execution of notes for the balance containing a provision that all benefits shall be forfeited if the notes are not paid at maturity is not a contract of term insurance within such exception. New York L Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336. The fact that periodical assessments are declared to be the consideration for the continuance of the insurance in each successive year does not render the policy a contract of term insurance. McDougall *v.* Provident Sav. L. Assur. Soc., 64 Hun (N. Y.) 515, 19 N. Y. Suppl. 481 [*reversed* on other grounds in 135 N. Y. 551, 32 N. E. 251].

20. Premium notes.— The provisions of the statute are applicable to default in the payment of premium notes containing the provision that non-payment of the note at maturity shall constitute a forfeiture. Strauss *v.* Union Cent. L. Ins. Co., 170 N. Y. 349, 63 N. E. 347 (where part of the premium, when due, was paid in cash and the balance by a note reciting that the policy would be forfeited on default); New York L. Ins. Co. *v.* English, 95 Tex. 391, 67 S. W. 884; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680. In Banholzer *v.* New York L. Ins. Co., 74 Minn. 387, 77 N. W. 295, 78 N. W. 244, purporting to follow the construction placed upon the statute by the New York court, there was a decision to the contrary. But as to the contrary construction in New York see Strauss *v.* Union Cent. L. Ins. Co., *supra*.

Mortality assessments, which, by terms of the policy, are uncertain in amount and time of payment, and which are payable only on notice and demand, are not premiums or interest payments, within the meaning of the act. Merriman *v.* Keystone Mut. Ben. Assoc., 138 N. Y. 116, 33 N. E. 738. See as to assessments *supra*, this section, note 16.

Semiannual payments.— The earlier statute (Laws (1876), c. 341, § 1) forbidding forfeiture of any policy by reason of the non-payment of "any annual premium or interest, or any portion thereof" without notice, applied as well to policies providing for the payment of semiannual premiums. Germania L. Ins. Co. *v.* Peetz, (Tex. Civ. App. 1898) 47 S. W. 687.

Extensions.— Under such statute there can be no forfeiture after an extension of time for payment without the statutory notice having been given. Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336.

21. Provision as to one year's grace.— The statute prohibits the company from declaring forfeitures within one year after default in the payment of a premium, but it does not give the insured one year after receiving the notice before the company can declare a forfeiture. The provision as to one year grace applies only to cases where the company has failed to send notices at all. Schuell *v.* New York Mut. L. Ins. Co., 53 N. Y. App. Div. 172, 65 N. Y. Suppl. 889.

Under the earlier statute (Laws (1877), c. 321) there was no such limitation as this, and if the company did not avail itself of the provisions of the statute by giving notices there was no forfeiture preventing recovery under the policy, although premiums due had not been paid for several years. New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127. But where the premiums had not been paid for twelve years nor any tender thereof been made it was held that the administrator could not recover for a loss under the policy, the ground being that the demand was stale irrespective of statu-

able,[22] shall have been duly addressed and mailed[23] to the person whose life is insured,[24] or the assignee of the policy, if notice of the assignment has been given to the corporation,[25] at his or her last known post-office address in this

tory regulations as to forfeitures. Lone *v.* New York Mut. L. Ins. Co., 33 Wash. 577, 74 Pac. 689.

Statute not retroactive.— The act of 1897, amending Laws (1892), c. 690, by enacting that the provision of such law which required a notice to be given before the forfeiture of a life insurance policy could be declared for non-payment of premiums should protect such policy from forfeiture for one year only, and that it should become forfeited in accordance with its terms, and without notice, at the expiration of a year from the time of the default, is not retroactive, and did not operate to work an immediate forfeiture of a policy previously issued, upon which the insured had been in default for more than a year prior to the taking effect of the act, where such policy was not a term policy, but an entire contract for the life of the insured, which had not, therefore, expired by its own limitations. Hathaway *v.* New York Mut. L. Ins. Co., 99 Fed. 534.

22. Sufficiency of notice.— The requirement of the statute as to what the notice must contain must be at least substantially complied with. Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 202, 38 Pac. 1031. And see *infra*, note 28. A notice stating that a premium will be due and payable on a certain date, "if said policy be in force on that day," is not insufficient because of the addition of the words quoted. Summitt *v.* U. S. Life Ins. Co., 123 Iowa 681, 99 N. W. 563.

N. Y. Laws (1877), c. 321, § 1, providing that life insurance companies doing business in the state might declare a policy forfeited for non-payment of any annual premium only on mailing a written thirty-day notice, stating the amount of the premium, the place where, and the person to whom, it was payable, contained a proviso that a notice stating when the premium would fall due, and that, if not paid, the policy and all the premiums thereon would become forfeited and void, mailed at least thirty and not more than sixty days prior to the day when the premium was payable, should have the same effect as the notice before provided for, it was held that a notice stating that the annual premium on a certain policy would be due on a certain day, if all previous premiums should be duly paid, and the policy should be otherwise in force, and that if not then paid, the policy and all payments thereon would become forfeited and void, was sufficient within the proviso, although it did not state the amount of the premium, or to whom or where payable. Trimble *v.* New York L. Ins. Co., 20 Wash. 386, 55 Pac. 429.

23. Mailing of notice.— The mailing of the notice properly addressed and with postage prepaid, within the time prescribed by the statute, is all that is required, and whether or not it is actually received by the insured is immaterial. Nielsen *v.* Provident Sav. L. Assur. Soc., (Cal. 1901) 66 Pac. 663; Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404; New York L. Ins. Co. *v.* Scott, 23 Tex. Civ. App. 541, 57 S. W. 677; McConnell *v.* Provident Sav. L. Assur. Soc., 92 Fed. 769, 34 C. C. A. 663.

Mailing of notice under a provision in the policy see *supra*, X, C, 6, f.

Mistake as to name of addressee.— A notice directed to the insured, giving only the initial of his middle name, instead of the full name as given in the application, was held sufficient in the absence of evidence that there was any other person of a similar name in the city in which insured lived. Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404.

24. To whom addressed.— Under this provision it is clear that the notice is to be addressed, not to the beneficiary, but to the person whose life is insured. See Rowe *v.* Brooklyn L. Ins. Co., 11 N. Y. App. Div. 532, 42 N. Y. Suppl. 646 [*affirmed* in 162 N. Y. 604, 57 N. E. 1123]. Even under the earlier statute (Laws (1877), c. 321, amending Laws (1876), c. 341), where the notice was required to be addressed and mailed "to the person whose life is assured," instead of "insured," as in the present statute, it was held that the notice was required to be addressed to the person whose life was insured and not to the beneficiary (Osborne *v.* Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616; Linn *v.* New York L. Ins. Co., 78 Mo. App. 192; Rowe *v.* Brooklyn L. Ins. Co., 11 N. Y. App. Div. 532, 42 N. Y. Suppl. 646 [*affirmed* in 162 N. Y. 604, 57 N. E. 1123]); even though the contract was made with the beneficiary and the premiums were paid by him (Rowe *v.* Brooklyn L. Ins. Co., *supra*). The case last cited in effect overrules Rowe *v.* Brooklyn L. Ins. Co., 16 Misc. (N. Y.) 323, 38 N. Y. Suppl. 621, which was to the contrary.

Joint policy to husband and wife.— Where in an action on a life policy issued on the lives of, and to, plaintiff and his wife, it appeared that a notice had been mailed by defendant, addressed to plaintiff and his wife jointly, and received by plaintiff, it was held that plaintiff could not avail himself of his failure to deliver the notice to his wife, or to inform her of its receipt, and claim that the policy was not forfeited because she had not received notice. Mullen *v.* New York Mut. L. Ins. Co., (Tex. Civ. App. 1895) 32 S. W. 911.

25. Notice to assignee.— Where a foreign or domestic life insurance company has due notice of the assignment of a policy issued in the state, it cannot forfeit the same within one year for failure of the assignee to pay the premium, unless it gives him the statutory notice to pay the same and of an intent

state,[26] postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such premium, at least fifteen and not more than forty-five days prior to the day when the same is payable.[27] The notice shall also state that unless such premium, interest, instalment, or portion thereof then due shall be paid to the corporation, or to the duly appointed agent or person authorized to collect such premium by or before the day it falls due, the policy and all payments thereon will become forfeited and void except as to the right to a surrender value or paid-up policy as in this chapter provided.[28] If the payment demanded by

to forfeit if not paid, and notice to the insured alone in such a case is not enough. Strauss *v.* Union Cent. L. Ins. Co., 170 N. Y. 349, 63 N. E. 347 [*affirming* 60 N. Y. App. Div. 632, 70 N. Y. Suppl. 1149 (*affirming* 33 Misc. 333, 67 N. Y. Suppl. 509)].

Beneficiary not the "assignee."— The person for whose benefit a policy of insurance is taken out on another's life, as in the case of a policy on a husband's life for the benefit of his wife, is not an "assignee" of the policy within the meaning of the statute, and notice to such beneficiary is not required. Linn *v.* New York L. Ins. Co., 78 Mo. App. 192. See the preceding note.

26. Place of address.— The notice must, as is expressly required by the statute, be addressed to the last known post-office address of the insured or of the beneficiary, as the case may be, or it will have no effect unless it is shown to have been actually received. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 17 N. E. 396.

Notice of a change in the address of the assured, given to a bank authorized to collect premiums and deliver receipts for a foreign insurance company, is notice to the company. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

Presumption of receipt of notice.— There is no presumption that a person to whom a letter was mailed received the same, unless it appears that he then resided in the town to which the letter was addressed. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

27. Date of giving notice.— The notice is not sufficient unless it is given the required length of time before the date on which the policy is to become forfeited for non-payment. New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680; Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473 [*affirming* 91 Fed. 728]; Hicks *v.* National L. Ins. Co., 60 Fed. 690, 9 C. C. A. 215; New York L. Ins. Co. *v.* Dingley, 93 Fed. 153, 35 C. C. A. 245. Where the notice required by the statute is given before the premium becomes due, no further notice is necessary. Conway *v.* Phœnix Mut. L. Ins. Co., 140 N. Y. 79, 35 N. E. 420.

Grace.— Under N. Y. Laws (1877), c. 321, § 1, providing that life insurance companies doing business in the state might declare any policy forfeited for non-payment of any annual premium on giving a certain notice at least thirty, and not more than sixty, days prior to the day when the premium was payable, it was held that a notice on September 20 in relation to a premium due October 31, complied with the statute, although the policy provided for a month's grace on any payments of premiums falling due, but assessed a fine of ten per cent for the time deferred, wherever it was availed of. Trimble *v.* New York L. Ins. Co., 20 Wash. 386, 55 Pac. 429.

28. Sufficiency of notice as to contents.— This requirement of the statute as to what the notice shall state must be at least substantially complied with or the notice will be ineffectual. Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 585; Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Schad *v.* Security Mut. Life Assoc., 11 N. Y. App. Div. 487, 42 N. Y. Suppl. 314 [*affirmed* in 155 N. Y. 640, 49 N. E. 1104]; Security Trust, etc., Ins. Co. *v.* Hallum, 32 Tex. Civ. App. 134, 73 S. W. 554; Griesemer *v.* Mutual L. Ins. Co., 10 Wash. 202, 38 Pac. 1031; Nederland L. Ins. Co. *v.* Meinert, 127 Fed. 651, 62 C. C. A. 377 [*reversed* as to the sufficiency of the notice in 199 U. S. 171, 26 S. Ct. 15, 50 L. ed. 139]. See also *supra*, this section, note 22.) A notice stating when the premium will be due, etc., and that members neglecting to pay when their premiums are due "are carrying their own risk," is insufficient, the words quoted not being equivalent to the statement required by the statute that unless the premium is paid "the policy and all payments thereon will become forfeited and void." Phelan *v.* Northwestern Mut. L. Ins. Co., *supra*. And so it has been held of a notice informing the insured that his policy would be forfeited unless the premium should be paid when due to a designated agent at a certain place, instead of following the statute, which is "to the corporation, or to a duly appointed agent," etc. (Seely *v.* Manhattan L. Ins. Co., *supra*); of a notice to pay "within 30 days from the date of notice; otherwise your policy will be forfeited," without notifying the insured that all payments which had been made thereon would be forfeited (Merriman *v.* Keystone Mut. Ben. Assoc., 18 N. Y. Suppl. 305 [*affirmed* in 138 N. Y. 116, 33 N. E. 738]); of a notice that a policy would "cease to be in force" if a specified premium should not be paid when due (Schad *v.* Security

such notice shall be made within its time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed, until the expiration of thirty days after the mailing of such notice.[29] The affidavit of any officer, clerk, or agent of the corporation, or any one authorized to mail such notice, that the notice required by this section, has

Mut. Life Assoc., 11 N. Y. App. Div. 487, 42 N. Y. Suppl. 314 [*affirmed* in 155 N. Y. 640, 49 N. E. 1104); and of a notice which merely declared that if the premium should not be paid at maturity "the policy lapses," without referring to the insured's right to the surrender value or a paid-up policy (Security Trust, etc., Co. *v.* Hallum, *supra*).

Notices held sufficient.— But a literal following of the words of the statute is not necessary. "A notice which contains statements reminding the assured of the time and place when and where to make any payments required by the terms of the contract, the amount thereof, and the effect of non-payment is sufficient, although it does not follow literally the words of the statute." McDougall *v.* Provident Sav. L. Assur. Soc., 135 N. Y. 551, 32 N. E. 251, holding that where a policy for the term of only one year provided for a renewal for successive years on the payment of specified "premiums and expense charges" at the end of each year, a notice stating the date when the premium would become due, and that in order to continue and extend the insurance it was necessary that the "payments" required for that purpose should be made on or before the date specified, was sufficient. See also Schuell *v.* New York Mut. L. Ins. Co., 53 N. Y. App. Div. 172, 65 N. Y. Suppl. 889, holding that a notice was not insufficient as being merely advisory and not definitely fixing any date. A notice correctly stating the amount of the premium, the time when it will become payable, and that it will be payable to the company at its office in the city of New York (as is provided in the policy), and continuing with the statement that unless the premium is paid to the company, "or to a person authorized to collect such premium holding the company's receipt therefor, signed," etc., by or before the day it falls due, "or within ten days thereafter (ten days grace being hereby allowed)" the policy will become forfeited, etc., is not rendered insufficient because of the addition of the words above quoted. Summitt *v.* U. S. Life Ins. Co., 123 Iowa 681, 99 N. W. 563. It was held by the supreme court of the United States in a late case that prefixing the words "the conditions of your policy provide" to that part of the notice of the time for payment of the premium which, under the statute, must state that, unless paid by or before the day it falls due, the policy and all payments thereon will become forfeited and void, did not render such notice insufficient as a basis for forfeiture for non-payment, although the policy in fact provided for a forfeiture only in case of non-payment of the premium within thirty days after it should become due. Nederland L. Ins. Co. *v.* Meinert, 199 U. S. 171, 26 S. Ct. 15, 50 L. ed. 139 [*reversing* 127 Fed. 651, 62 C. C. A. 377].

29. Failure to give notice prevents forfeiture.— Under this statute, as under the earlier statutes to substantially the same effect, failure of the company to give the prescribed notice prevents the forfeiture of a policy, under the present statute within one year after the default (see *supra*, this section, note 21), by reason of non-payment of premium, and entitles the insured's representatives or the beneficiary or assignee to recover thereon notwithstanding such non-payment. Osborne *v.* Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616; Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Strauss *v.* Union Cent. L. Ins. Co., 170 N. Y. 349, 63 N. E. 347; Baxter *v.* Brooklyn L. Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293 [*affirming* 44 Hun 184]; Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441; Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 17 N. E. 396; Wyman *v.* Phœnix Mut. L. Ins. Co., 45 Hun (N. Y.) 184; New York L. Ins. Co. *v.* English 95 Tex. 391, 67 S. W. 884; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680; Griesemer *v.* New York Mut. L. Ins. Co., 10 Wash. 202, 38 Pac. 1031; Nederland L. Ins. Co. *v.* Meinert, 127 Fed. 651, 62 C. C. A. 377 [*reversed* on other grounds in 199 U. S. 171, 26 S. Ct. 15, 50 L. ed. 139]; New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127; Rosenplanter *v.* Provident Sav. L. Assur. Soc., 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473 [*affirming* 91 Fed. 728]. And see Seely *v.* Manhattan L. Ins. Co., 73 N. H. 339, 61 Atl. 535.

Payment or tender before action on policy. — Under such a statute, where the prescribed notice had not been given and the insured died leaving a premium unpaid, it was held that an action could be maintained on the policy without paying or tendering such premium. Baxter *v.* Brooklyn L. Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293 [*affirming* 44 Hun 184]. And see Osborne *v.* Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616; Mutual L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127.

The burden of showing the giving of the statutory notice, in an action on a policy, is on the company. See *infra*, XIII, G, 1, d, (II), text and note 79.

been duly addressed and mailed by the corporation issuing such policy shall be presumptive evidence that such notice has been duly given.[30]

(II) *Other Statutes.* There are also statutes in some of the other states requiring certain notice of premiums or assessments.[31] Thus in Massachusetts there is a statute providing that where a policy is issued by a company "doing business on the assessment plan," the insured shall have fifteen days after notice to pay an assessment.[32]

i. Waiver of Notice. The right to notice given by the contract may be waived by the insured. Thus it may be waived by conduct of the insured indicating to the company that no notice will be effectual, as by advising the agent that the policy is to be allowed to lapse.[33] It has repeatedly been held, however, that the provisions of a statute requiring notice as a prerequisite to forfeiture for non-payment of premiums, such as the New York statute,[34] cannot be waived by any provision in the policy or otherwise.[35] The insured, however, after a default

30. The affidavit of a clerk or agent of the insurer, or one authorized to mail the notice, that the notice had been duly addressed and mailed, supplemented by his testimony to the same effect, meets the requirements of the statute. Summitt *v.* U. S. Life Ins. Co., 123 Iowa 681, 99 N. W. 563.

Sufficiency of affidavit.— The affidavit must show the mailing of such a notice as is required by the statute; and therefore an affidavit stating that a notice has been duly served, but not showing that the notice stated the amount of the premium due, the place where it was payable, the person to whom payable, and that unless it was paid before the day it fell due the policy would become forfeited, etc., is insufficient. Seely *v.* Manhattan L. Ins. Co., 72 N. H. 49, 55 Atl. 425. An affidavit that a notice stating the amount due, etc., on "his policy," was mailed to the assured, is insufficient to show compliance with the statute, both because it does not show that the notice related to the policy in suit and because it does not give the contents of the notice, in order that its sufficiency may be determined. McCall *v.* Prudential Ins. Co., 98 N. Y. App. Div. 225, 90 N. Y. Suppl. 644.

Proof of official character of affiant.— Such affidavit cannot be received in evidence where the only proof that it was made by the proper officer is contained in the affidavit itself. Fischer *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 575, 56 N. Y. Suppl. 260 [*affirmed* in 167 N. Y. 178, 60 N. E. 431].

Rebuttal.— The statute merely makes the affidavit referred to therein presumptive evidence that the required notice has been duly given. Evidence to rebut such presumption may therefore be given by the adverse party, and it may consist in part of evidence that such notice was not received by the insured. Equitable L. Assur. Soc. *v.* Nixon, 81 Fed. 796, 26 C. C. A. 620.

Other proof of the giving of notice.— Evidence that a notice was found among the policy-holder's effects, after his death, forty-seven days after its date, and seventeen days after the premium was due, without proof as to when it was mailed or to what address, while the address on the notice itself is not the last known post-office address of the policy-holder, is not sufficient to establish the fact that such notice was in fact mailed and addressed in compliance with the statute. Phelan *v.* Northwestern Mut. L. Ins. Co., 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441.

Question for jury.— Whether there was a mailing of a notice is a question for the jury; the recollection of the clerk of the insurer's agent, the only witness testifying that the notice was sent, depending on an examination of the due sheet, the check mark on which opposite insured's name indicating that the notice was sent to him, there being no proof that the notice was not returned to the agent, although the envelope containing it bore his return address, and the persons having charge of insured's mail testifying that the notice was not received. Howell *v.* Hancock Mut. L. Ins. Co., 107 N. Y. App. Div. 200 95 N. Y. Suppl. 87.

31. See the statutes of the several states.

32. Mass. St. (1896) c. 515, § 2. This statute does not apply to a policy during a seven-year period, when the insured was required to pay fixed quarterly premiums only, although after such period he would have to pay assessments, in view of St. (1890) c. 421, § 1, providing that an assessment plan is determined, "not upon fixed payments but upon the collection from time to time of an assessment." French *v.* Hartford L., etc., Ins. Co., 169 Mass. 510, 48 N. E. 268.

33. Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875; Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875; Leonhard *v.* Provident Sav. L. Assur. Soc., 130 Fed. 287, 64 C. C. A. 533; Macumber *v.* St. Louis L. Ins. Co., 16 Fed. Cas. No. 8,929.

Effect as to beneficiary.— Where a beneficiary in a mutual insurance policy did not have a vested interest therein, she was bound by acts of the insured, which constituted a waiver of the insurer's obligation to give notice of the maturity of premiums. Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875.

34. See *supra*, X, C, 6, h, (I).

35. Harrington *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Osborne *v.*

in the payment of premiums; may enter into a contract for cancellation of his policy, or he may surrender his policy and enter into a new contract of a kind to which the statute in relation to notice does not apply.[36]

7. Sufficiency of Payment or Tender — a. Mode and Sufficiency in General.[37] Generally, to prevent a forfeiture for non-payment of a premium or assessment, the full amount due[38] must be actually paid or tendered[39] at the time[40] and place[41] fixed by the terms of the contract. Retention of money sent by the insured to the company in payment of a premium prevents a forfeiture for non-payment,

Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616; Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96; Baxter *v.* Brooklyn L. Ins. Co., 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293 [*affirming* 44 Hun 184]; New York L. Ins. Co. *v.* Orlopp, 25 Tex. Civ. App. 284, 61 S. W. 336; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680; New York Mut. L. Ins. Co. *v.* Hill, 118 Fed. 708, 55 C. C. A. 536 [*affirming* 113 Fed. 44]; New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127; Equitable L. Assur. Soc. *v.* Trimble, 83 Fed. 85, 27 C. C. A. 404; Equitable L. Assur. Soc. *v.* Nixon, 81 Fed. 796, 26 C. C. A. 620; Phinney *v.* New York Mut. L. Ins. Co., 67 Fed. 493.

36. Johnson *v.* New York L. Ins. Co., 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99, holding that N. Y. Laws (1877), c. 321, § 1, prohibiting a forfeiture of a life policy for non-payment of premiums, unless the insurer notified the insured of the amount due, and that his policy would be forfeited if he did not pay such amount in thirty days, did not apply where the insured, after default in the payment of premiums, accepted a certificate entitling him to paid-up insurance for a limited period, as under the certificate a non-payment of premiums worked no forfeiture, although, under N. Y. Laws (1879), c. 347, § 1, the policy would have remained in force for a similar length of time if it had been declared forfeited by compliance with said chapter 321.

A cancellation by mutual agreement where the insured is in default for non-payment of premiums will terminate the contract, although a forfeiture could not have been declared by the company because of its failure to give the statutory notice. New York Mut. L. Ins. Co. *v.* Phinney, 178 U. S. 327, 20 S. Ct. 906, 44 L. ed. 1088 [*reversing* 76 Fed. 617, 22 C. C. A. 425].

Consideration.— An agreement after default recognizing the policy as lapsed cannot affect the operation of the statute if it is without consideration and is not to be supported as an estoppel. New York Mut. L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132.

37. See also *supra*, V, B, 4.

38. **Part payment of a premium** will not prevent a forfeiture in the absence of any agreement of the company to that effect. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300; Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

The maxim "De minimis non curat lex" applies to default in the payment of interest on a premium note amounting to a few cents and such default will not constitute a forfeiture. Van Norman *v.* Northwestern Mut. L. Ins. Co., 51 Minn. 57, 52 N. W. 988.

39. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300; Mississippi Co-operative Life Assoc. *v.* McConnico, 53 Miss. 233; Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167. And see the cases cited *supra*, X, C, 1–3.

In Confederate currency.— Payment to an agent in one of the Confederate states during the Civil war made and accepted in Confederate currency was a sufficient payment to keep the policy in force. Martine *v.* International L. Assur. Soc., 62 Barb. (N. Y.) 181; Robinson *v.* International L. Assur. Soc., 52 Barb. (N. Y.) 450 [*affirmed* in 42 N. Y. 541, 1 Am. Rep. 460].

40. **Time of payment and notice** see *supra*, X, C, 6.

After death of the assured.— If payment has not been made before the death of the assured the policy is forfeited, and no subsequent tender to or acceptance by an agent authorized only to receive premiums will defeat the forfeiture. Lewis *v.* Phœnix Mut. L. Ins. Co., 44 Conn. 72; Miller *v.* Union Cent. L. Ins. Co., 110 Ill. 102. But if the death occurs before the expiration of the time for payment under the policy or under a valid extension of the time for payment it will prevent a forfeiture, although the subsequent payment was accepted without knowledge of that fact. Stuart *v.* Freeman, [1903] 1 K. B. 47, 72 L. J. K. B. 1, 87 L. T. Rep. N. S. 516, 51 Wkly. Rep. 211. In such case payment after death is sufficient. Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544].

Payment by check.— So a check of insured indorsed to the company by his wife in his name while he was delirious and received by the company before his death was held to constitute payment, although returned within two days and after the insured was dead. Union Cent. L. Ins. Co. *v.* Duvall, 46 S. W. 518, 20 Ky. L. Rep. 441. See *infra*, X, C, 7, d.

41. An agreement made by an agent before the issuance of the policy that the premiums shall be payable at a bank in the town where the application is made will not be valid as a modification of the provisions of the policy with reference to place of payment. Greenwood *v.* New York L. Ins. Co., 27 Mo. App. 401. But notwithstanding a stipulation that premiums must be paid at the company's office a notification to the insured to pay at

and the company cannot assert that the money was retained as bailee.[42] A policy cannot be forfeited for non-payment of premiums as required by the contract, if by agreement with the company the amount is to be charged to the insured on an account with the company,[43] or, it has been held, if the agent of the company having authority in the premises has agreed with the insured to become personally responsible to the company for the amount of the premium and to look to the insured for payment.[44] The act of the company in charging the amount of the premium to the agent does not amount to payment.[45]

b. Remittance by Mail or Express. If the company authorizes remittance of premiums by mail the payment is made when a letter containing the proper remittance is deposited in the post-office properly addressed and stamped;[46] and

a bank designated will be a waiver of such stipulation, and the fact that the bank has made an assignment and its business is being carried on by its assignee will not prevent the tender being sufficient to prevent forfeiture, in the absence of any notification to the insured of a change in the direction as to place of payment. Manhattan L. Ins. Co. *v.* Fields, (Tex. Civ. App. 1894) 26 S. W. 280.

Failure to keep agent to receive payments. — Tender having been made to the agent of a New York company in Richmond, Va., through whom the policy was issued and payments had previously been made and the agent having refused to receive the payment on the ground that his authority had been revoked, it was held that the policy was not forfeited for non-payment, as it was the duty of the company to keep an agent in the state uninterruptedly through whom they should make all renewed contracts of insurance with the citizens of Virginia, and that Richmond and not New York was the proper place for the payment of the premium. Manhattan L. Ins. Co. *v.* Warwick, 20 Gratt. (Va.) 614, 3 Am. Rep. 218.

42. Life Ins. Clearing Co. *v.* Altschuler, 55 Nebr. 341, 75 N. W. 862.

43. Missouri Valley L. Ins. Co. *v.* Dunklee, 16 Kan. 158, holding that an arrangement between the proper officer of the company and the insured, a special agent of the company, to charge the premiums to the insured on the books of the company, will prevent a forfeiture for non-payment, although the rules of the company provide that all premiums shall be payable in cash, and on the death of the insured it appears that the insured was indebted to the company at the time such agreement was made. See also *supra*, V, B, 4, b.

44. Bouton *v.* American Mut. L. Ins. Co., 25 Conn. 542, holding that an agent authorized to receive a premium may bind the company by an agreement with the insured that he shall become personally responsible and that he will look to the insured for payment of the amount; and that such an arrangement constitutes payment as between the insured and the company.

Unauthorized agreement.— But where assessments were payable directly to the home office and the agent, without authority, promised the insured that he would send to the company any sums required by way of assessments as they might fall due so as to keep the policy alive, but failed to do so, it was held that in the absence of ratification by the company of the agent's acts the policy was forfeited for non-payment. Mississippi Co-operative Life Assoc. *v.* McConnico, 53 Miss. 233. See also *supra*, V, B, 4, a.

45. Upon a policy of assurance on the life of A, the premium became due on the 15th of March, but was not paid until the 12th of April, when the country agent of the insurance company, through whom the insurance had been effected, gave a receipt for the amount of the premium. The instructions given by the company to the agent were that the premium on every life policy must be received within fifteen days from the time of its becoming due; if not paid within that time that he was to give immediate notice to the office of that fact, and in the event of his omitting to do so, that his account would be debited for the amount, after the fifteen days had expired. No notice was given to the company of the non-payment of the premium within the fifteen days; it was therefore entered in their books as paid on the 15th of March, and the agent was debited for the amount. It was held: (1) That the mere debiting the agent with the premium could not be considered as a payment to the company by the assured; (2) that as the agent had no authority to contract for the company, the fact of his receiving the money after the expiration of the fifteen days, and the entry in the company's books, debiting him with the amount, were no evidence of a new agreement between the company and the assured. Acey *v.* Fernie, 10 L. J. Exch. 9, 7 M. & W. 151.

46. Palmer *v.* Phœnix Mut. L. Ins. Co., 84 N. Y. 63; McCluskey *v.* National Life Assoc., 77 Hun (N. Y.) 556, 28 N. Y. Suppl. 931 [*affirmed* in 149 N. Y. 616, 44 N. E. 1126]; Primeau *v.* National Life Assoc., 77 Hun (N. Y.) 418, 28 N. Y. Suppl. 794 [*affirmed* in 144 N. Y. 716, 39 N. E. 858].

Delay.— If a company invites transmission of premiums by mail by giving directions in relation thereto the timely mailing of the remittance will be sufficient, although it does not in fact reach the company until after the premium has fallen due. Hartford L., etc., Ins. Co. *v.* Eastman, 54 Nebr. 90, 74 N. W. 394.

Usage.— So if the mail has been the method employed for transmitting premiums the policy is not forfeited by the failure of the

if the company authorizes the sending of premiums by express or post-office money order a premium thus remitted will prevent a forfeiture, although it does not reach the company in time or at all.[47]

c. By Note. The acceptance by the company or its authorized agent of a note at the maturity of a premium will constitute payment so as to avoid a forfeiture;[48] but the note may be so conditioned that on failure to pay it at maturity the insurance will be forfeited.[49] The acceptance of a note for the amount of a future premium, maturing at the date when the premium is to fall due, does not constitute payment or waive payment of such premium.[50] And acceptance of a note by an agent having no authority to postpone payment of premiums or accept payment otherwise than in cash will not prevent a forfeiture.[51]

d. By Check, Draft, or Order. Payment by check, draft, or order will be sufficient to prevent forfeiture if authorized or accepted by the company;[52] and a provision in a policy requiring payment in cash is waived by habitual acceptance of good checks in lieu of cash.[53] But if a check is given as conditional payment only and is not in fact paid until after the death of the insured there can be no recovery.[54] Provision for payment of future premiums or assessments by an order on the employer of the insured will not prevent forfeiture for non-payment where the insured has terminated his employment and left no funds in the hands of his employer with which to make such payment.[55]

e. By Application of Dividends, Etc. If the company has dividends due to the insured its duty is to make application of such dividends to premium or

remittance mailed in apt time to reach the company until past due. Hollowell *v.* Virginia L. Ins. Co., 126 N. C. 398, 35 S. E. 616. Even though the policy requires payment at the home office a usage may be shown as between the company and the assured by which remittances by mail have been recognized as a proper method of making payment and the loss of a remittance so made (Guilfoyle *v.* National Life Assoc., 36 N. Y. App. Div. 343, 55 N. Y. Suppl. 236), or failure to arrive in time (Kenyon *v.* Hartford Nat. Life Assoc., 39 N. Y. App. Div. 276, 57 N. Y. Suppl. 60), will not occasion a forfeiture.

47. Protection L. Ins. Co. *v.* Foote, 79 Ill. 361; Currier *v.* Continental L. Ins. Co., 53 N. H. 538.

48. Mutual L. Ins. Co. *v.* Abbey, 76 Ark. 328, 88 S. W. 950; Franklin L. Ins. Co. *v.* Wallace, 93 Ind. 7; Michigan Mut. L. Ins. Co. *v.* Bowes, 42 Mich. 19, 51 N. W. 962; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765. See also *supra*, V, B, 4, c.

49. Forbes *v.* Union Cent. L. Ins. Co., 151 Ind. 89, 51 N. E. 84; New England Mut. L. Ins. Co. *v.* Hasbrook, 32 Ind. 447; Sullivan *v.* Connecticut Indemnity Assoc., 101 Ga. 809, 29 S. E. 41; Manhattan L. Ins. Co. *v.* Myers, 109 Ky. 372, 59 S. W. 30, 22 Ky. L. Rep. 875. And see *supra*, X, C, 2. But without some such provision with reference to forfeiture for non-payment of the note default in such payment will not work a forfeiture. Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Thum *v.* Wolstenholme, 21 Utah 446, 61 Pac. 537. *Compare* Security L. Ins., etc., Co. *v.* Elliott, 3 Wkly. Notes Cas. (Pa.) 504. See also *supra*, X, C, 2.

50. Union Mut. L. Ins. Co. *v.* Adler, (Ind. App. 1905) 73 N. E. 835 [rehearing *denied* in 75 N. E. 1088]; Beezley *v.* Des Moines L. Assoc., 100 Iowa 436, 69 N. W. 549.

Waiver see *infra*, XI, D. 4.

51. Mutual L. Ins. Co. *v.* Abbey, 76 Ark. 328, 88 S. W. 950 (soliciting agent employed by a general agent has no such authority); Smith *v.* New England Mut. L. Ins. Co., 63 Fed. 769, 11 C. C. A. 411; London, etc., L. Assur. Co. *v.* Fleming, [1897] A. C. 499, 66 L. J. P. C. 116. See also *supra*, V, B, 1, 4, c.

52. Union Cent. L. Ins. Co. *v.* Duvall, 46 S. W. 518, 20 Ky. L. Rep. 441 (holding that acceptance of a check by the company constituted payment, although it was indorsed by the wife of the insured in his name while he was delirious and received by the company on the day of his death and returned within two days); MacMahon *v.* United States L. Ins. Co., 128 Fed. 388, 63 C. C. A. 130, 68 L. R. A. 87 (holding that if payment by draft is authorized it will be sufficient to prevent forfeiture, although the bank has in the meantime suspended payment). See also *supra*, V, B, 4, c.

53. Hartford L., etc., Ins. Co. *v.* Eastman, 54 Nebr. 90, 74 N. W. 394.

Where an agent has been permitted to accept payment of premiums by check and has a general authority to collect premiums his acceptance of a check in payment will bind the company. Travelers' Ins. Co. *v.* Brown, 138 Ala. 526, 35 So. 463.

54. Neill *v.* Union Mut. L. Ins. Co., 7 Ont. App. 171.

55. Brown *v.* Pacific Mut. L. Ins. Co., 109 Mo. App. 137, 82 S. W. 1122; Herbert *v.* Standard L., etc., Ins. Co., 23 Ohio Cir. Ct. 225.

interest, so as to avoid a forfeiture.[56] Even if the dividend has not yet been declared but has accrued only, it should be applied to prevent a forfeiture.[57] But if a dividend is declared after the forfeiture, although as of a prior date at which it had not yet accrued, it will not relieve from the intervening forfeiture.[58] An "advance insurance fund" in a mutual company is to be applied to keep the policy in force;[59] but a bonus deducted by an insurance company from a loan is not money in the hands of the company applicable to the payment of premiums to prevent a forfeiture.[60]

8. Excuses For Non-Payment — a. In General. Failure to pay a premium or assessment when due will not result in a forfeiture of the policy, if there is legal excuse for such non-payment, as where the payment is prevented by the act of God or of the law, or by the act of the company,[61] or if the payment thereof is waived by the company or by an agent having express or implied authority in the premises;[62] but there are very few circumstances which will excuse a failure to pay in accordance with the terms of the contract, independent of the consent or acts of the company.[63]

b. Illness or Insanity. The impossibility of payment which arises from incapacity of the insured by reason of illness or insanity does not relieve him from the consequences of non-payment.[64]

56. *Indiana.*— Franklin L. Ins. Co. *v.* Wallace, 93 Ind. 7, holding that equity will compel the application of dividends earned by the policy to prevent a forfeiture.

Kentucky.— Northwestern Mut. L. Ins. Co. *v.* Fort, 82 Ky. 269, 6 Ky. L. Rep. 271. See Richardson *v.* Kentucky Mut. L. Ins. Co., 18 S. W. 165, 14 Ky. L. Rep. 187.

Minnesota.— Van Norman *v.* Northwestern Mut. L. Ins. Co., 51 Minn. 57, 52 N. W. 988.

Missouri.— Russum *v.* St. Louis Mut. L. Ins. Co., 1 Mo. App. 228.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15, holding that where a mutual life insurance company has in its possession dividends belonging to a policy-holder more than sufficient to pay an accruing premium when it falls due, the company has the right and is bound, if the premium is not paid, to make such an appropriation, and cannot declare the policy forfeited for failure to pay the premium in question, especially where the insured has been in the habit of applying the dividends to the payment of premiums.

Tennessee.— Smith *v.* St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

If there is a provision for the application by the company of dividends to the extinguishment of premium notes and interest the company is bound to apply the dividends so as to prevent a forfeiture. Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355; Northwestern Mut. L. Ins. Co. *v.* Fort, 82 Ky. 269, 6 Ky. L. Rep. 271; Northwestern Mut. L. Ins. Co. *v.* Lowry, 13 Ky. L. Rep. 205; Ewald *v.* Northwestern Mut. L. Ins. Co., 60 Wis. 431, 19 N. W. 513.

Mode of application.— Where the arrangement is that dividends be applied to matured premium notes or loans, and the insured pays interest in cash, such course of business controls the general principle of law requiring payment upon notes to be credited first upon the interest and then upon the principal. Anderson *v.* St. Louis Mut. L. Ins. Co., 1 Fed. Cas. No. 362.

No surplus.— Failure to distribute a surplus by way of dividends is not sufficient ground for relief against forfeiture for non-payment where at the time of default there was no surplus for distribution. Jones *v.* Northwestern Mut. L. Ins. Co., 10 Ohio Dec. (Reprint) 631, 22 Cinc. L. Bul. 318.

The tontine plan does not require that the funds of each class be kept separate and the share of the fund belonging to each policy be applied to prevent default on such policy. Bogardus *v.* New York L. Ins. Co., 101 N. Y. 328, 4 N. E. 522.

57. Megarge *v.* Mutual L. Ins. Co., 15 Phila. (Pa.) 226.

58. New York Mut. L. Ins. Co. *v.* Girard L. Ins., etc., Co., 100 Pa. St. 172.

59. Kelly *v.* Fidelity Mut. L. Assoc., 30 Pittsb. Leg. J. N. S. (Pa.) 429.

60. Smith *v.* Penn Mut. L. Ins. Co., 11 Wkly. Notes Cas. (Pa.) 295.

61. Hillyard *v.* Mutual Ben. L. Ins. Co., 35 N. J. L. 415; Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286; and other cases cited under the sections following.

62. **Waiver** see *infra*, XI.

63. See Carpenter *v.* Centennial Mut. Life Assoc., 68 Iowa 452, 27 N. W. 456, 56 Am. Rep. 855; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765; Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662; and other cases cited under the sections following.

Neglect of agent of insured.— The failure to pay a premium is not excused because it was due to neglect on the part of the agent of the insured who usually sent the premiums to the company for him. Jones *v.* New York L. Ins. Co., 122 N. C. 578, 29 S. E. 846.

Failure of company to give notice see *supra*, X, C, 6, d – i.

Effect of custom or usage see CUSTOMS AND USAGES, 12 Cyc. 1068.

64. Carpenter *v.* Centennial Mut. Life As-

c. State of War. In a number of states it has been held that an impossibility arising out of a state of war which renders commercial intercourse between the insured and the company unlawful has been held to be sufficient excuse.[65] In other jurisdictions, however, there are decisions to the contrary.[66]

d. Fault of Company.[67] A failure of the company to comply with the contract on its part or other misconduct or unauthorized act or neglect which occasions default of the insured in the payment of the premium will excuse such default on the part of the insured.[68] This is true, for example, in the case of an unauthorized forfeiture by the company and refusal on that account to receive the premiums,[69] the demand of a larger premium than the company is entitled to receive coupled with the assertion of a right to exact such improper premium in the future,[70] insistence on the payment of assessments which it has no right to

soc., 68 Iowa 453, 27 N. W. 456, 56 Am. Rep. 855 (holding that such fact does not present a case of impossibility of performance caused by the act of God); Wheeler *v.* Connecticut Mut. L. Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594 [*affirming* 16 Hun 317]; Howell *v.* Knickerbocker L. Ins. Co., 44 N. Y. 276, 281, 4 Am. Rep. 675 [*reversing* 19 Abb. Pr. 217] (where it is said: "The payment of the premium was an act which could have been performed by any other person than the . . . [assured]; its payment did not necessarily depend upon his continued capacity or existence; and hence, although he was, shortly prior to the expiration of the policy, when about to pay the premium, rendered incapable by the act of God . . . [the beneficiary] is without the rule that relieves a party from the consequences of an omission to do an act rendered impossible by omnipotent power"); Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662.

A court of equity cannot relieve against a forfeiture in such case. Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662.

65. *Kentucky.*— New York L. Ins. Co. *v.* Clopton, 7 Bush 179, 3 Am. Rep. 290.

New Jersey.— Mutual Ben. L. Ins. Co. *v.* Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741 [*reversing* 35 N. J. L. 415].

New York.— Martine *v.* International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529; Sands *v.* New York L. Ins. Co., 50 N. Y. 626, 10 Am. Rep. 535; Cohen *v.* New York Mut. L. Ins. Co., 50 N. Y. 610, 10 Am. Rep. 522.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630; Mutual Ben. L. Ins. Co. *v.* Atwood, 24 Gratt. 497, 18 Am. Rep. 652.

United States.— Hamilton *v.* Mutual L. Ins. Co., 11 Fed. Cas. No. 5,986, 9 Blatchf. 234; Hancock *v.* New York L. Ins. Co., 11 Fed. Cas. No. 6,011.

See 28 Cent. Dig. tit. "Insurance," § 959; and *infra*, X, C, 9, a, note 79. And see, generally, WAR.

Tender to agent.— The fact that during the state of war the agent of the company representing it continued to reside in the domicile of the assured and that no tender of payment of premiums was made to him is immaterial. Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. (Va.) 630.

66. Worthington *v.* Charter Oak L. Ins. Co., 41 Conn. 372, 19 Am. Rep. 495; Dillard *v.* Manhattan L. Ins. Co., 44 Ga. 119, 9 Am. Rep. 167; Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400; Tait *v.* New York L. Ins. Co., 23 Fed. Cas. No. 13,726, 1 Flipp. 288. In the supreme court of the United States it has been held by a divided court that while the Civil war did not relieve an assured residing within one of the Confederate states from liability for forfeiture of his policy on account of non-payment of premium to a company domiciled in a northern state, yet that the assured had an equitable claim against the company for the surrender value of his policy at the time of forfeiture occasioned by his inability on account of the war to continue his payments, with interest on such equitable value from the time of the closing of the war. New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789. And to the same effect see Abell *v.* Penn Mut. L. Ins. Co., *supra*.

Recovery of premiums paid when policy is terminated see *supra*, V, E, 1, text and note 70.

67. Waiver see *infra*, XI, D, 2.

68. Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300; Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286; Girard L. Ins. Co. *v.* New York Mut. L. Ins. Co., 86 Pa. St. 236.

Failure of company to give notice see *supra*, X, C, 6, d–i.

Tender after office hours.— Inability of the insured to make payment at the office of the company because of the absence of the officers or agents does not excuse where it does not appear that the effort to make payment was during reasonable office hours. Fidelity Mut. Life Assoc. *v.* Troy, 20 Ohio Cir. Ct. 644, 10 Ohio Cir. Dec. 761.

69. Shaw *v.* Republic L. Ins. Co., 69 N. Y. 286; Doney *v.* Prudential Ins. Co., 99 N. Y. App. Div. 23, 90 N. Y. Suppl. 757; Girard L. Ins. Co. *v.* New York Mut. L. Ins. Co., 86 Pa. St. 236; Hight *v.* Continental L. Ins. Co., 12 Fed. Cas. No. 6,478*a*.

But if the attempted forfeiture is not unconditional the insured should tender the premium subsequently falling due. Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

70. Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300; Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1.

make,[71] or insolvency of company, transfer of its assets, and cessation of business.[72] Failure to make a subsequent tender will not forfeit the policy if the company has indicated to the insured that such tender will be declined if made.[73] In the absence of any statute the failure of the company to maintain an agent in the state of the domicile of the insured through which payment of premiums may be made is no excuse for non-payment, the premiums being payable at the home office.[74]

e. Attempted Surrender of Policy. An arrangement between the insured and the company for the surrender of the policy and the substitution of another, such arrangement being invalid as to the beneficiary under the first policy, does not excuse failure to tender the payments due by the terms of the policy which the insured has thus ineffectually attempted to surrender, and the beneficiary will be defeated in an action under the surrendered policy by reason of such default.[75]

f. Pending Negotiations or Application For Change or Surrender. Pending negotiations for a change in the policy may excuse a tender of an accruing premium on the existing policy,[76] but an application by the insured for a change which has not been responded to by the company will not excuse a failure to tender an accruing premium.[77]

71. Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495]; Colby *v.* Life Indemnity, etc., Co., 57 Minn. 510, 59 N. W. 539; Mutual Reserve Fund Life Assoc. *v.* Taylor, 99 Va. 208, 37 S. E. 854.

But a mere attempt to provide for future increase of assessments will not justify an injunction against the company to prevent a declaration of forfeiture for assessments not affected by such proposed change. Friedlander *v.* Mutual Reserve Fund Life Assoc., 34 Misc. (N. Y.) 285, 69 N. Y. Suppl. 618.

72. Jones *v.* Life Assoc. of America, 83 Ky. 75, 7 Ky. L. Rep. 1; People *v.* Empire Mut. L. Ins. Co., 92 N. Y. 105 [*affirming* 28 Hun 358, and *reversing* 64 How. Pr. 51].

Termination of business by the company and transfer of assets to another company warrant the termination of the contract by the insured and recovery by him from the company, of such damages payable out of its assets, as he may be equitably entitled to; the measure of damages being the amount of premiums paid less the value of the insurance which he has already enjoyed. Lovell *v.* St. Louis Mut. L. Ins. Co., 111 U. S. 264, 4 S. Ct. 390, 28 L. ed. 423.

Readiness and willingness to pay.— But it has been held that one who would excuse refusal to pay premiums on the ground of insolvency must show that had the company not been insolvent he would have been ready and willing to pay. People *v.* Globe Mut. L. Ins. Co., 32 Hun (N. Y.) 147; Atty.-Gen. *v.* Continental L. Ins. Co., 64 How. Pr. (N. Y.) 519.

The mere fact that the company has become unsafe while continuing to do ordinary business will not constitute an excuse. Taylor *v.* Charter Oak L. Ins. Co., 9 Daly (N. Y.) 489.

73. Travelers' Ins. Co. *v.* Pulling, 159 Ill. 603, 43 N. E. 762 [*affirming* 55 Ill. App. 452]; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 [*affirming* 51 How. Pr. 263]; Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806; Smith *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 188, 1 Cinc. L. Bul. 284.

74. Bulger *v.* Washington L. Ins. Co., 63 Ga. 328; Quinn *v.* Manhattan L. Ins. Co., 28 La. Ann. 135; Bird *v.* Penn Mut. L. Ins. Co., 3 Fed. Cas. No. 1,430, 2 N. Y. Wkly. Dig. 83, 11 Phila. (Pa.) 485, 2 Wkly. Notes Cas. 410. But see Dorion *v.* Positive Government L. Assur. Co., 23 L. C. Jur. 261. *Compare supra*, V, B, 1, note 9.

75. Weatherbee *v.* New York L. Ins. Co., 178 Mass. 575, 60 N. E. 381; Schneider *v.* U. S. Life Ins. Co., 123 N. Y. 109, 25 N. E. 321, 20 Am. St. Rep. 727 [*reversing* 52 Hun 130, 4 N. Y. Suppl. 797]; Miles *v.* Connecticut Mut. L. Ins. Co., 147 U. S. 177, 13 S. Ct. 275, 37 L. ed. 128. See *supra*, X, C, 5.

Premiums paid under the new policy cannot be applied to the old policy wrongfully surrendered, in order to keep the old policy alive for the beneficiary. Leonhard *v.* Provident Sav. L. Assur. Soc., 130 Fed. 287, 64 C. C. A. 533.

Notice not excused.— But failure of the company to give notice of forfeiture of the original policy would relieve the beneficiary from such forfeiture. Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787.

Waiver.— If the new policy is a continuation or renewal only of the one surrendered its issuance is a waiver of any failure to pay the premium under the first policy. Garner *v.* Germania L. Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256.

New policy not forfeited.— Where the consideration for issuance of a new policy is the surrender of an existing policy the fact that the last premium on the surrendered policy has never been paid is immaterial in a suit on the new policy. Kantrener *v.* Penn Mut. L. Ins. Co., 5 Mo. App. 581.

76. Ætna L. Ins. Co. *v.* Curley, 47 S. W. 585, 20 Ky. L. Rep. 723.

77. Kentucky Mut. L. Ins. Co. *v.* Clancy, 111 Ga. 865, 36 S. E. 944.

g. Reinsurance by Company. The fact that the company has reinsured the risk will not excuse failure of the insured to tender premiums as they become due.[78]

9. Rights of Insured After Default — a. In General. After forfeiture in accordance with the terms of the contract the rights of the insured are terminated and as a rule equity will not interfere to restore the policy.[79]

b. Reinstatement — (i) *In General.* But under provisions in the policy the insured may be entitled on such conditions as are imposed therein to a restoration of the policy, which, after such restoration, continues to be the contract of the parties as before.[80] The insured complying with the conditions imposed for reinstatement may recover as against the company refusing to recognize his right.[81] And by his compliance with the conditions for reinstatement the insured is presumed to assent to such conditions and to be reinstated on the basis proposed.[82]

78. Matter of Empire Mut. L. Ins. Co., 64 How. Pr. (N. Y.) 51.

Reinsurance generally see *supra*, VII.

79. Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400; Klein *v.* New York L. Ins. Co., 104 U. S. 88, 26 L. ed. 662; New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789; Anderson *v.* St. Louis Mut. L. Ins. Co., 1 Fed. Cas. No. 362, 1 Flipp. 559.

Where a policy has lapsed and become void it can only be revived by a new contract. Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

Non-payment during war.—But contrary to the doctrine of the cases just cited it was held that equity would relieve against forfeiture for non-payment which became impossible by reason of the existence of war. Martine *v.* International L. Ins. Soc., 53 N. Y. 339, 13 Am. Rep. 529; Bird *v.* Penn Mut. L. Ins. Co., 3 Fed. Cas. No. 1,430, 2 N. Y. Wkly. Dig. 83, 11 Phila. (Pa.) 485, 2 Wkly. Notes Cas. 410. And see *supra*, X, C, 8, c.

The right to a loan provided for in the policy is forfeited by non-payment of premium in accordance with the terms of the policy. Union Cent. L. Ins. Co. *v.* Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737.

Recovery of premiums paid see *supra*, V, E.

80. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473. And see *supra*, X, C, 1–3.

Consideration.— There must be compliance by the insured with the terms of the policy for restoration or a contract based upon a sufficient consideration. Kearney *v.* Ætna L. Ins. Co., 109 Ill. App. 609. An extension of time after forfeiture is not void for want of mutuality as insured by asking and accepting an extension impliedly agrees to continue the risk and pay the premiums. Homer *v.* Guardian Mut. L. Ins. Co., 67 N. Y. 478.

An offer to restore on receipt of a premium in default if sent at once is not a continuing offer and delay in taking advantage of the offer defeats the privilege. Servoss *v.* Western Mut. Aid Soc., 67 Iowa 86, 24 N. W. 604.

Who may reinstate.— The authority to reinstate is usually limited to specified officers but a secretary or assistant secretary has such authority. Piedmont, etc., L. Ins. Co. *v.* McLean, 31 Gratt. (Va.) 517; Page *v.* Metropolitan L. Ins. Co., 23 Quebec Super. Ct. 503. An agent has no authority to revive a forfeited policy by giving an antedated receipt. Diboll *v.* Ætna L. Ins. Co., 32 La. Ann. 179.

Election.—Where the policy provides two plans of reinstatement and requires an election as between them on the part of the insured, a failure to so elect will defeat the right to reinstatement. Knapp *v.* Homeopathic Mut. L. Ins. Co., 117 U. S. 411, 6 S. Ct. 807, 29 L. ed. 960.

Acceptance of the benefits of such provision is an acknowledgment of forfeiture of the policy, but as the policy-holder may readily misunderstand his true condition with reference to the forfeiture the company cannot take advantage of and insist on such acknowledgment made in ignorance of the true condition of affairs. Columbus Mut. Life Assoc. *v.* Hanrahan, 98 Ill. App. 22.

81. Lovick *v.* Provident Life Assoc., 110 N. C. 93, 14 S. E. 506.

The insured is justified in assuming the consent of the company to reinstatement when he has done all that is required of him in reliance on the provision of the contract or the company's previous course of dealing. Travelers' Ins. Co. *v.* Brown, 138 Ala. 526, 35 So. 463; Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

Reasonable compliance.— If the condition imposed for reinstatement is reasonably complied with the insurance is continued in force. Miesell *v.* Globe Mut. L. Ins. Co., 76 N. Y. 115.

Laches.— Insured having complied with the conditions for reinstatement does not acquiesce in the refusal of the company to reinstate him by failing to bring suit to enforce his rights. Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

Application for reinstatement need not be attached to policy under statute see *supra*, IV, B, 6, e, (II), note 92.

82. Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204; Metropolitan L. Ins. Co. *v.* McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661; Teeter *v.* United L. Ins. Assoc., 159 N. Y. 411, 54 N. E. 72 [*affirming* 11 N. Y. App. Div. 259, 42 N. Y. Suppl. 119].

Failure to ask reinstatement after an illegal attempt of the company to forfeit does not waive objection to such wrongful forfeiture.[83]

(II) *TIME.* The reinstatement must be applied for within the time limited in the contract.[84] There can be no reinstatement after the death of insured while the policy is suspended on account of default.[85]

(III) *CONDITIONS.* It is usual for the company as a condition to reinstatement of a forfeited policy to require some act on the part of the insured, such as that he shall furnish a certificate of health at the time the reinstatement is asked,[86] or

83. Purdy *v.* Bankers' Life Assoc., 101 Mo. App. 91, 74 N. W. 486. If the company has illegally declared the policy forfeited the assured is not bound to tender subsequent premiums uncertain in amount and of which no notices were given in order to preserve his right under the policy, but may sue in equity to have the policy continued or elect to treat it as terminated and recover its full value or wait until it becomes payable according to its terms and then try the question of forfeiture; and if the assured relies upon the policy as still in force the company cannot urge as a defense to an action thereon after a loss that he assented to the forfeiture by failing to promptly protest and bring suit to reinstate. Keuyon *v.* Hartford Nat. Life Assoc., 39 N. Y. App. Div. 276, 57 N. Y. Suppl. 60.

84. Johnson *v.* New York L. Ins. Co., 109 Iowa 708, 78 N. W. 905, 50 L. R. A. 99; Elgutter *v.* Mutual Reserve Fund Life Assoc., 52 La. Ann. 1733, 28 So. 289; Doney *v.* Prudential Ins. Co., 99 N. Y. App. Div. 23, 90 N. Y. Suppl. 757; Donald *v.* Piedmont, etc., L. Ins. Co., 4 S. C. 321.

Where the provision was that if death should occur within six months after default in payment of a mortuary call the policy should nevertheless be payable, the death of insured having occurred more than six months after a mortuary call which was not paid, it was held that there could be no recovery, although in the meantime there had been further mortuary calls on other members. The default was not relieved against by that fact, there having been no further calls on the member in default. Brown *v.* Mutual Reserve Fund Life Assoc., 137 Cal. 278, 70 Pac. 187.

85. *Illinois.*—Ætna L. Ins. Co. *v.* Bradway, 90 Ill. App. 576.

Kansas.— Mound City Mut. L. Ins. Co. *v.* Twining, 19 Kan. 349.

Michigan.— Clark *v.* Metropolitan L. Ins. Co., 107 Mich. 160, 65 N. W. 1.

Nebraska.— Parker *v.* Knights Templars', etc., Life Indemnity Co., 70 Nebr. 268, 97 N. W. 281.

Texas.— National L. Ins. Co. *v.* Manning, (Civ. App. 1905) 86 S. W. 618.

England.— Pritchard *v.* Merchants', etc., Mut. L. Ins. Soc., 3 C. B. N. S. 622, 4 Jur. N. S. 307, 27 L. J. C. P. 169, 6 Wkly. Rep. 340, 91 E. C. L. 622; Want *v.* Blunt, 12 East 183, 11 Rev. Rep. 340.

Canada.— Manufacturers' L. Ins. Co. *v.* Gordon, 20 Ont. App. 309; Page *v.* Metropolitan L. Ins. Co., 23 Quebec Super. Ct. 503.

86. See cases cited *infra*, this note.

A certificate of health given as a condition of reinstatement is not a warranty as to absolute health but only that the state of health is practically the same as when the policy was issued. Mulligan *v.* Prudential Ins. Co., 76 Conn. 676, 58 Atl. 230; Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; French *v.* Mutual Reserve Fund Life Assoc., 111 N. C. 391, 16 S. E. 427, 32 Am. St. Rep. 803; Ohio Mut. Life Assoc. *v.* Draddy, 10 Ohio S. & C. Pl. Dec. 591, 8 Ohio N. P. 140; National L. Ins. Co. *v.* Manning, (Tex. Civ. App. 1905) 86 S. W. 618. But in general such statements are warranties to the same extent as when made in connection with an original contract of insurance. Ash *v.* Fidelity Mut. Life Assoc., 26 Tex. Civ. App. 501, 63 S. W. 944. Statutory provisions (see *supra*, IX, B, 5, b) that misrepresentations shall not avoid the policy unless the matter misrepresented has actually contributed to the loss apply to a warranty contained in an application for reinstatement. Jenkins *v.* Covenant Mut. L. Ins. Co., 171 Mo. 375, 71 S. W. 688. A certificate of health relates to the time of application for reinstatement (Day *v.* Mutual Ben. L. Ins. Co., 1 MacArthur (D. C.) 598; Mutual Ben. L. Ins. Co. *v.* Higginbotham, 95 U. S. 380, 24 L. ed. 499), and the period of delinquency (Reilly *v.* Chicago Guaranty Fund Life Soc., 75 Minn. 377, 77 N. W. 982).

Condition as to sound health.— If the company instead of requiring a certificate imposes as a condition that the insured is in sound health at the time of reinstatement the reinstatement is ineffectual notwithstanding the requisite premium has been paid, unless the condition is complied with or waived. Ronald *v.* Mutual Reserve Fund Life Assoc., 132 N. Y. 378, 30 N. E. 739 [*affirming* 10 N. Y. Suppl. 632 (*affirming* 7 N. Y. Suppl. 152, 23 Abb. N. Cas. 271)]; Mutual Reserve Fund Life Assoc. *v.* Lovenberg, 24 Tex. Civ. App. 355, 59 S. W. 314; Garber *v.* Globe Mut. L. Ins. Co., 9 Fed. Cas. No. 5,214.

Waiver.—Where the assured's agent, on paying the delinquent dues, stated that the assured had a swollen foot, and had been on his annual spree, the fact that the representative of the insurer required proofs of death, and the certificate of the clergyman who officiated at the burial, and furnished blanks in each case, and gave instructions as to the filing thereof, and promised to pay the policy on approval of the board of directors, did not constitute a waiver. Ronald *v.* Mutual Reserve Fund Life Assoc., 132 N. Y. 378, 30 N. E. 739 [*affirming* 10 N. Y. Suppl. 632

the certificate of a medical examiner that he is in good health.[87] Without compliance with the conditions the insured is not entitled to reinstatement.[88] And the company is justified in exercising its judgment as to the sufficiency of the showing in case of doubt.[89] The company cannot impose conditions not authorized by the policy,[90] but on the other hand the insured cannot complain if he does not bring himself within the conditions entitling him to reinstatement.[91]

(IV) *EFFECT OF FRAUD OR MISSTATEMENT.* A revived policy does not go into effect if a declaration or warranty contained in the application therefor is untrue.[92]

(*affirming* 7 N. Y. Suppl. 152, 23 Abb. N. Cas. 271)].

No certificate required.—Failure of the company to require a certificate of good health as a condition for reinstatement will be a waiver of the condition. Rockwell *v.* Mutual L. Ins. Co., 27 Wis. 372; Ætna L. Ins. Co. *v.* Smith, 88 Fed. 440, 31 C. C. A. 575; Page *v.* Metropolitan L. Ins. Co., 23 Quebec Super. Ct. 503. So if the provision is for reinstatement "upon satisfactory evidence of good health," etc., a receipt for payment made after delinquency is a waiver of satisfactory evidence as a condition precedent. Mutual Reserve Fund Life Assoc. *v.* Bozeman, 21 Tex. Civ. App. 490, 52 S. W. 94.

87. Graveson *v.* Cincinnati Life Assoc., 8 Ohio Cir. Ct. 171, 6 Ohio Cir. Dec. 327.

Waiver.—By sending notices to the insured of the maturity of subsequent premiums the company waives a provision requiring medical examination as a condition to reinstatement and cannot afterward refuse to receive subsequent payments made in compliance with the notices. Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875. Retaining a premium tendered after default until too late for reinstatement and then returning it on the claim that the policy has lapsed is a waiver of conditions as to reinstatement. Mettner *v.* Northwestern Nat. L. Ins. Co., 127 Iowa 205, 103 N. W. 112.

Refusal to reinstate.—If the company refuses to reinstate because the reëxamination is unsatisfactory the assured is entitled to be placed in the position he occupied when the agreement relating to a proposed reinstatement was entered into. Appleton *v.* Phenix Mut. L. Ins. Co., 59 N. H. 541, 47 Am. Rep. 220.

88. Gaff *v.* Pennsylvania Mut. L. Ins. Co., 10 Ohio Dec. (Reprint) 86, 18 Cinc. L. Bul. 310; Handler *v.* Mutual Reserve Fund Life Assoc., 90 L. T. Rep. N. S. 192.

Conditional acceptance of overdue premium or assessment as waiver of default see *infra*, XI, D, 4, b, (II).

89. Diholl *v.* Ætna L. Ins. Co., 32 La. Ann. 179.

90. Coburn *v.* Life Indemnity, etc., Co., 52 Minn. 424, 54 N. W. 373; Mutual L. Ins. Co. *v.* French, 30 Ohio St. 240, 27 Am. Rep. 443.

Refusal as waiver of default.—A refusal to reinstate except on conditions not required by the policy is a waiver of subsequent default in payment of premiums. Te Bow *v.* Washington L. Ins. Co., 172 N. Y. 623, 65 N. E. 1123 [*affirming* 59 N. Y. App. Div. 310, 69 N. Y. Suppl. 289].

91. Fidelity Mut. L. Ins. Co. *v.* Price, 117 Ky. 25, 77 S. W. 384, 27 Ky. L. Rep. 1148; Metropolitan L. Ins. Co. *v.* Walton, 25 Ohio Cir. Ct. 587; Handler *v.* Mutual Reserve Fund Life Assoc., 90 L. T. Rep. N. S. 192.

92. Bottomley *v.* Metropolitan L. Ins. Co., 170 Mass. 274, 49 N. E. 438; Ætna L. Ins. Co. *v.* Rehlaender, 68 Nebr. 284, 94 N. W. 129; Metropolitan L. Ins. Co. *v.* McTague, 49 N. J. L. 587, 9 Atl. 766, 60 Am. Rep. 661.

Fraud.—If reinstatement is secured by fraud of the insured the contract of renewal is invalidated. Ash *v.* Fidelity Mut. L. Assoc., 26 Tex. Civ. App. 501, 63 S. W. 944.

Representation of third person.—If the insurance is based solely on the representations of one who acts for the insured in procuring the insurance, such representations will be binding on the insured, although the person acting for him has no authority. Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

Unnecessary certificate.—If there has been in fact no default and the insured is still entitled under the terms of the contract to pay the premium, any certificate of health which he may have given in misapprehension as to his rights and which the company could not require will be immaterial and a misstatement or breach of warranty in such certificate will not avoid the policy. Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Ætna L. Ins. Co. *v.* Sanford, 200 Ill. 126, 65 N. E. 661; Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485; Bridge *v.* National Life Assoc., 11 Misc. (N. Y.) 658, 33 N. Y. Suppl. 553 [*affirmed* in 1 N. Y. App. Div. 630, 37 N. Y. Suppl. 1144]; Smith *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 188, 1 Cinc. L. Bul. 284.

Waiver.—Where the company has other information tending to establish the falsity of a certificate for reinstatement, it will not be held from such fact alone to have acted upon such information and waived the misstatement in the certificate. Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

Incontestable clause.—A provision in the policy that it shall be incontestable after five years except for non-payment of premiums does not render it incontestable on the ground of breach of condition in procuring reinstatement. Ash *v.* Fidelity Mut. Life Assoc., 26 Tex. Civ. App. 501, 63 S. W. 944. *Compare infra*, XI, E, 2, note 96.

c. Provisions as to Non-Forfeiture — (I) *In the Policy.* As a policy on which premiums have been paid at a fixed rate which is to continue unchanged for life or for a term of years has a surrender value,[93] which it is inequitable to forfeit for non-payment of further premiums without returning some equivalent to the insured, it is quite common to provide in the policy that in the event of forfeiture or danger of forfeiture the insured may have either at his election or by specific provision one of the three following advantages: Extended insurance under the original policy for such additional term as the surrender value will provide, or a paid-up policy for a smaller sum, or the return of the surrender value in cash.[94] A stipulation for a paid-up policy upon surrender of the original policy is not an independent contract but is enforceable only in connection with the other provisions of the policy.[95] If the insured is entitled under the terms of the policy to one of two or more advantages afforded him by his contract in the event of forfeiture he must exercise his option in the method pointed out and elect which benefit he shall receive; otherwise he is not entitled to any return.[96]

(II) *By Statute.* In some of the states there are statutes providing for non-forfeiture after the payment of a specified number of premiums, under which the insured is entitled to some benefit on account of the surrender value.[97] The

Injunction against enforcement.— A bill in equity will lie to enjoin the prosecution of a pending suit at law upon a policy of life insurance, and to compel the surrender of the policy for cancellation, where the policy was reinstated during the insured's last illness, after it had been allowed to lapse for non-payment of premiums, upon the false and fraudulent certification of the insured and his physician that he was then in as good health as when first examined upon his application for the policy. John Hancock Mut. L. Ins. Co. *v.* Dick, 114 Mich. 337, 72 N. W. 179, 43 L. R. A. 566.

93. Computation of surrender value see *infra*, X, C, 5, d, (V).

Right to paid-up policy or surrender value on cancellation see *supra*, VIII, E, 1, 2.

94. See cases cited *infra*, this note.

Endowment or tontine policies.— There is no distinction as to the right to a paid-up policy between endowment and ordinary life policies (Southern Mut. L. Ins. Co. *v.* Montague, 84 Ky. 653, 2 S. W. 443, 8 Ky. L. Rep. 579, 4 Am. St. Rep. 218); but under a tontine policy which provides for distribution after a certain period of the accumulated surplus to the survivors among the policy-holders there is no surrender value and therefore no right to a paid-up policy in case of forfeiture (Equitable L. Assur. Soc. *v.* Spillman, 56 S. W. 710, 22 Ky. L. Rep. 183).

Payment of loan.— If under a provision in the policy the company has loaned to the insured the surrender value of the policy there is nothing left after satisfaction of such loan to be applied to the extension of the insurance or the purchase of a paid-up policy. Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172.

The beneficiary is not estopped by the act of the insured in accepting extended insurance for a larger amount but for a shorter term which the net reserve will purchase, there being neither allegation nor proof that assured was acting as the agent of such beneficiary. Newark Mut. Ben. L. Ins. Co. *v.* Dunn, 106 Ky. 591, 51 S. W. 20, 21 Ky. L. Rep. 213.

95. Douglas *v.* Knickerbocker L. Ins. Co., 83 N. Y. 492 [*affirming* 45 N. Y. Super. Ct. 313].

96. Keyser *v.* New York Mut. L. Ins. Co., 104 Ill. App. 72; **Knapp** *v.* Homœopathic Mut. L. Ins. Co., 117 U. S. 411, 6 S. Ct. 807, 29 L. ed. 960; Coffey *v.* Universal L. Ins. Co., 7 Fed. 301, 10 Biss. 354.

Election to take paid-up policy see *infra*, X, C, 5, c, (IV).

Election by minor.— The duty to elect within the time specified is not obviated by the fact that assured has died and such election must be made by beneficiaries who are minors. Mutual Ben. L. Ins. Co. *v.* Harvey, 117 Ky. 834, 79 S. W. 218, 25 Ky. L. Rep. 1992, 111 Am. St. Rep. 269.

The original policy does not remain in force after forfeiture during the time given to the assured within which he may make an election as to how the surrender value shall be applied. Blake *v.* National L. Ins. Co., 123 Cal. 470, 56 Pac. 101.

97. See the statutes of the several states; and cases cited *infra*, this note.

In California the insured is entitled, after payment of three annual premiums, to a paid-up policy on surrender of the original policy by the assured while its terms are in full force. Straube *v.* Pacific Mut. L. Ins. Co., 123 Cal. 677, 56 Pac. 546. This statute must be considered as part of the contract and is applicable to policies for a single year with an agreement to renew from year to year without examination on payment of a fixed premium. Nielson *v.* Provident Sav. L. Assur. Soc., 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146, (Cal. 1901) 66 Pac. 663. The demand and surrender may be made by the beneficiary after the death of the assured, and the company by disclaiming any liability arising from the death

statutory provision relating to non-forfeiture cannot be waived by any provision in the policy.[98] In general the statutes relating to non-forfeiture of life insur-

of the assured waives a surrender that might be required under the terms of the statute. Nielson *v.* Provident Sav. L. Assur. Soc., *supra*. The statute requires every insurance contract, unless otherwise specially provided, to contain a stipulation for non-forfeiture and declares that every insurance company violating such provision shall forfeit its right to do business within the state, but it does not relieve the assured from forfeiture for non-payment of premiums as provided by a policy issued in violation of such statute. Straube *v.* Pacific Mut. L. Ins. Co., 123 Cal. 677, 56 Pac. 546. A tender of the premium after default will not prevent a forfeiture for previous failure to pay a premium when due. D'Orlu *v.* Bankers', etc., Mut. Life Assoc., 46 Fed. 355.

In **Kentucky** the statute prescribing how life insurance policies shall be valued by the insurance commissioner in determining the solvency of the company has no application to the valuation of the policy for the purpose of determining insured's rights in the event of forfeiture, such valuation being provided for by the policy itself. Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172.

In **Massachusetts** the statute providing for extending life insurance policies forfeited for non-payment of premiums applies to foreign as well as domestic companies. Morris *v.* Penn Mut. L. Ins. Co., 120 Mass. 503. See *contra*, Smith *v.* New York Mut. L. Ins. Co., 5 Fed. 582. Such statute applies to a default on a note given in payment of a premium. Marston *v.* Massachusetts L. Ins. Co., 59 N. H. 92. It is not applicable to policies issued before its passage, although subsequent to such passage a certificate is given by the company acknowledging the receipt of an annual premium. Shaw *v.* Berkshire L. Ins. Co., 103 Mass. 254.

In **Missouri** the statute declares that a policy shall not be forfeited after the payment of three annual premiums, but the policy-holder shall be entitled to paid-up insurance by which is meant insurance for life fully paid up. It is immaterial that the policy makes it optional with the insured as to the character of the insurance he will accept. Nichols *v.* New York Mut. L. Ins. Co., 176 Mo. 355, 75 S. W. 664. If the law of the state in which the company is organized prescribes a surrender value or paid-up insurance, or temporary insurance in case of default, and such provisions are made a part of the policy, then there is substantial compliance with the requirements of the Missouri statute. Nichols *v.* New York Mut. L. Ins. Co., 176 Mo. 355, 75 S. W. 664; Epperson *v.* New York L. Ins. Co., 90 Mo. App. 432. The policy must provide for an unconditional cash surrender value at least equal to the net single premium for temporary insurance without deduction of indebtedness to the company other than for loans advanced in payment of premiums. Smith *v.* Mutual Ben. L. Ins. Co., 173 Mo. 329, 72 S. W. 935. The basis for ascertaining the net value is the amount of premium paid, without regard to allowance for future charges. Moore *v.* Northwestern L. Ins. Co., 112 Mo. App. 696, 87 S. W. 988. A policy on the assessment plan has no net value. Hayden *v.* Franklin L. Ins. Co., 136 Fed. 285, 69 C. C. A. 423. The statutory provision prohibiting a forfeiture of policies on which two annual premiums have been paid and providing for temporary insurance is not unconstitutional. Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305. Demand for a fully paid-up policy for a fixed amount as provided for by the statute must be made within the time limited. Cravens *v.* New York L. Ins. Co., *supra*. The statute is not applicable to assessment insurance (Hayden *v.* Franklin L. Ins. Co., 136 Fed. 285, 69 C. C. A. 423; Mutual Reserve L. Ins. Co. *v.* Roth, 122 Fed. 853, 59 C. C. A. 63), but it is held that a policy on the accumulative reserve plan with a stated annual premium and a provision for assessment in case of emergency, payments being optional with the insured, was not an assessment contract as the emergency assessment was on the policy and not on the assured (Folkens *v.* Northwestern Nat. L. Ins. Co., 98 Mo. App. 480, 72 S. W. 720). The fact that the policy contains an assessment clause does not take it out of the statutory provision which applies to policies "of insurance on life." Moore *v.* Northwestern Nat. L. Ins Co., 112 Mo. App. 696, 87 S. W. 988. A policy is not *ipso facto* forfeited by mere non-payment of a premium note according to its tenor, but if the company desires to rely on the forfeiture it must so declare to the policy-holder. Raymond *v.* Metropolitan L. Ins. Co., 86 Mo. App. 391. If the statute provides for non-forfeiture after payment of two full annual premiums, and that upon the death of insured during the term of temporary insurance, no condition having been violated except that relating to the payment of premiums, the company shall be liable for the full amount insured, a provision in a policy requiring the payment of three full annual premiums before the insured is entitled to temporary insurance is void. Equitable L. Assur. Soc. *v.* Pettus, 140 U. S. 226, 11 S. Ct. 822, 35 L. ed. 479 [*affirming* 32 Fed. 273].

98. Cravens *v.* New York L. Ins. Co., 148 Mo. 583, 50 S. W. 519, 71 Am. St. Rep. 628, 53 L. R. A. 305; Equitable L. Assur. Soc. *v.* Pettus, 140 U. S. 226, 11 S. Ct. 822, 35 L. ed. 497 [*affirming* 32 Fed. 273]. But *compare* Washington L. Ins. Co. *v.* Glover, 78 S. W. 146, 25 Ky. L. Rep. 1327; Caffery *v.* John Hancock Mut. L. Ins. Co., 27 Fed. 25; Des-

ance policies of the state in which the policy is issued and the contract is finally consummated will govern.[99]

(III) *EXTENDED INSURANCE FOR LIMITED TIME.* It is sometimes provided by statute or by the contract that upon forfeiture the insurance shall be extended for a limited term or the surrender value of the policy shall be applied to the purchase of continued insurance.[1] The provision of a policy for applying the sur-

mazes *v.* Mutual Ben. L. Ins. Co., 7 Fed. Cas. No. 3,821, 19 Alb. L. J. 220.

99. Moore *v.* Northwestern L. Ins. Co., 112 Mo. App. 696, 87 S. W. 988; Price *v.* Connecticut Mut. L. Ins. Co., 48 Mo. App. 281; Equitable L. Assur. Soc. *v.* Pettus, 140 U. S. 226, 11 S. Ct. 822, 35 L. ed. 497 [*affirming* 32 Fed. 273]; Equitable L. Assur. Soc. *v.* Winning, 58 Fed. 541, 7 C. C. A. 359. But it has been held that a policy issued by a foreign company through a general agent in the state acting purely in a ministerial capacity is not a contract governed by the law of the state as to non-forfeiture. Smith *v.* New York Mut. L. Ins. Co., 5 Fed. 582; Whitcomb *v.* Phœnix Mut. L. Ins. Co., 29 Fed. Cas. No. 17,530. The original non-forfeiture act of Massachusetts being expressly limited to companies chartered by the authority of the commonwealth does not apply to a foreign corporation doing business in Massachusetts, nor was it extended by the supplemental act further than to include contracts of foreign companies made within the state. Desmazes *v.* Mutual Ben. L. Ins. Co., 7 Fed. Cas. No. 3,821, 19 Alb. L. J. 220. But by a later statute the act is made applicable to foreign insurance companies doing business in Massachusetts without regard to the question whether the contract of insurance is made there or in the state where the company is incorporated. Holmes *v.* Charter Oak L. Ins. Co., 131 Mass. 64. Under the Missouri statute a policy issued by a company doing business in another state and containing an agreement for surrender value is valid, although it does not fully comply with the statutes of the state. Epperson *v.* New York L. Ins. Co., 90 Mo. App. 432.

1. Michigan Mut. L. Ins. Co. *v.* Mayfield, 90 S. W. 607, 28 Ky. L. Rep. 825; Crutchfield *v.* Union Cent. L. Ins. Co., 67 S. W. 8, 23 Ky. L. Rep. 2265; Tate *v.* Mutual Ben. L. Ins. Co., 131 N. C. 389, 42 S. E. 892. And see *supra*, X, C, 9, c. (I), (II).

Demand.— Under a policy controlled by the provisions of the New York statute in relation to non-forfeiture there must be a demand within six months for the extended insurance, and in the absence of such demand no benefit accrues to the insured after forfeiture. Nielson *v.* Provident Sav. L. Assur. Soc., (Cal. 1901) 66 Pac. 663.

Election.—Where a life policy provided that the insurer, after default in the payment of premiums after premiums had been paid for three or more years, should be liable only for a paid-up policy for a fractional part of the face thereof as shown in the table of paid-up insurance, and declared that the insured, on default after payment of three annual premiums, might, by giving notice to the insurer within thirty days, elect, in lieu of the paid-up insurance provided for, to take extended insurance, it was held that, as the provision for paid-up insurance went into force automatically on default in the payment of the premium, the insured could not substitute the extended insurance without making an election so to do. Michigan Mut. L. Ins. Co. *v.* Mayfield, 90 S. W. 607, 28 Ky. L. Rep. 825.

Reserve on policy.— Under a statute providing that on forfeiture the reserve on the policy shall on demand be applied to continue the policy in force, it was held that a fund known as the "guaranty fund" to be applied in the reduction of premiums and after five years to extension of the insurance in case of lapse was a reserve fund within the meaning of the statute. Nielsen *v.* Provident Sav. L. Assur. Soc., 139 Cal. 332, 73 Pac. 168, 96 Am. St. Rep. 146.

Vested right.— If the policy stipulates for extended insurance the right thereto cannot be modified by the adoption of a plan less favorable to the assured. Provident Sav. L. Assur. Soc. *v.* Bailey, 118 Ky. 36, 80 S. W. 452, 25 Ky. L. Rep. 2251.

Application of net reserve or dividends.— If the policy provides for applying the net reserve and dividend additions to the purchase of term insurance, the dividends are to be used in increasing the term of the insurance for the face of the policy and not in securing increased insurance. Newark Mut. Ben. L. Ins. Co. *v.* Dunn, 106 Ky. 591, 51 S. W. 20, 21 Ky. L. Rep. 213. If the policy provides for paid-up insurance without profits the assured is not entitled to the application of net reserve or accumulated dividends to keep the policy in force for a longer time. Straube *v.* Pacific Mut. L. Ins. Co., 123 Cal. 677, 56 Pac. 546.

Deduction of indebtedness.— Where the insured held a participating policy in a mutual benefit association, under which, when forfeiture was incurred for non-payment of premiums, his proportion of accumulated profits was to be applied to the extension of the insurance, and the policy had been taken out by a seventy per cent cash payment, and a thirty per cent payment represented by a certificate of indebtedness, and the policy provided that only "the net reserve, less any indebtedness to the company on the policy," should be applied to its extension, and that the certificate of indebtedness should be a lien on the policy, it was held that the amount of the certificate must be deducted from the accumulated profits before they could be applied in the extension of the

render value to the purchase of term insurance secures only the right to the limited insurance provided for from the time of forfeiture,[2] and the company is under no obligation to pay anything until the death of the insured.[3] After the expiration of such term insurance as the policy provides for, the insured has no further claim against the company nor right to extend the policy.[4]

(IV) *PAID-UP POLICY.* It is frequently provided by policies, and sometimes by statute, that in case of forfeiture the insured shall be entitled to a paid-up policy for a certain amount.[5] Under a stipulation by which after forfeiture the insured is entitled to a paid-up policy for such sum as the surrender value will purchase the insured must make his election within the specified time, if elec-

policy. Tate *v.* Mutual Ben. L. Ins. Co., 131 N. C. 389, 42 S. E. 892.

Commutation.— Under a provision for commutation in the event of forfeiture by which the insured becomes entitled to a new policy for an amount proportioned to the number of premiums paid on the old policy, such new policy runs for the entire term of the life of the assured and is in fact a paid-up policy. St. Louis Mut. L. Ins. Co. *v.* Grigsby, 10 Bush (Ky.) 310; Dorr *v.* Phœnix Mut. L. Ins. Co., 67 Me. 438.

Beneficiary.— If the policy is extended beyond the time of the death of the insured by a provision for term insurance after forfeiture, the extension is for the benefit of the beneficiary named and not for the estate of the assured. Morehead *v.* Mayfield, 109 Ky. 51, 58 S. W. 473, 22 Ky. L. Rep. 580.

Payment of premium by note.— A provision for extended insurance on forfeiture after the payment of the second premium is not available in a case where the second premium has been paid by a note, although the note is subsequently paid at maturity. Tilley *v.* Confederation Life, 7 Brit. Col. 144. But where there was a provision for forfeiture on account of failure to pay interest on premium notes it was held that the forfeiture so provided for did not apply to paid-up premiums and the extended insurance to which the assured thereupon became entitled was only to future benefits which might have been derived from the policy. Northwestern Mut. L. Ins. Co. *v.* Little, 56 Ind. 504. And similarly it was held that a stipulation in the premium note for forfeiture in the event of non-payment did not destroy the right to extended insurance specifically provided for in the policy. Drury *v.* New York L. Ins. Co., 115 Ky. 681, 73 S. W. 663, 25 Ky. L. Rep. 68, 103 Am. St. Rep. 351, 61 L. R. A. 714.

Deducting indebtedness.— Provisions for extended insurance after forfeiture are usually accompanied by the provision that before the surrender value is applied to such purpose it shall be used in extinguishing any indebtedness of the insured to the company, and under such a stipulation if nothing is left after the loans of the company to the insured made on the security of the policy have been paid for, the surrender value is exhausted and there can be no extended insurance. Rife *v.* Union Cent. L. Ins. Co., 129 Cal. 455, 62 Pac. 48; Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172; Sharpe *v.* New York L. Ins. Co., 5 Nebr. (Unoff.) 278, 98 N. W. 66; Omaha Nat. Bank *v.* Newark Mut. Ben. L. Ins. Co., 81 Fed. 935. Indebtedness on premium notes which are made liens on the policy must be extinguished from the surrender value before applying it to the extension of the insurance. Northwestern Mut. L. Ins. Co. *v.* Bonner, 36 Ohio St. 51; Omaha Nat. Bank *v.* Mutual Ben. L. Ins. Co., 84 Fed. 122, 28 C. C. A. 300. But a note given in payment of a premium containing a stipulation for deducting its amount from the policy in case of loss, but no agreement for forfeiture in case of its non-payment, is not an indebtedness on account of the policy within a provision thereof for extended insurance. New York L. Ins. Co. *v.* Smith, 139 Ala. 303, 35 So. 1004.

2. Prudential Ins. Co. *v.* Devoe, 98 Md. 584, 56 Atl. 809; Sharpe *v.* New York Ins. Co., (Nebr. 1904) 98 N. W. 66.

3. Andrews *v.* Ætna L. Ins. Co., 92 N. Y. 596.

4. Hamilton *v.* Mutual Ben. L. Ins. Co., 109 Ga. 381, 34 S. E. 593; Omaha Nat. Bank *v.* Mutual Ben. L. Ins. Co., 84 Fed. 122, 28 C. C. A. 300.

5. Hughes *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 111; Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358; Weatherbee *v.* New York L. Ins. Co., 182 Mass. 342, 65 N. E. 382; Union Cent. L. Ins. Co. *v.* McHugh, 7 Nebr. 66; Brockhaus *v.* Kemna, 7 Fed. 609, 10 Biss. 338. See also *supra*, VIII, E, 2; X, C, 9, c, (I), (II).

Amount of paid-up policy.— The amount for which a paid-up policy is to be issued is measured by the premiums paid. Hughes *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 111; Lewis *v.* Pennsylvania Mut. L. Ins. Co., 3 Mo. App. 372. Where the policy provided that it should not be forfeited for non-payment after payment of two annual premiums, and that the holder might have a paid-up policy for the full amount of premiums paid, it was held that plaintiff having paid premiums to a total amount exceeding the face of the policy was entitled to a paid-up policy for the whole amount of premiums paid. Christy *v.* Homeopathic Mut. L. Ins. Co., 93 N. Y. 345.

Damages for refusal to issue paid-up policy. — The measure of recovery in an action for damages for breach of a contract to issue a paid-up policy is such sum as would at the time of refusal have purchased a paid-up

tion is required,[6] and comply with the conditions of the policy in that respect within the time limited by its terms.[7] If the provision is that the insured may before the forfeiture of his policy exchange it for a paid-up policy for an amount dependent upon the premiums paid, the right must be exercised before default in payment of premiums.[8] The more usual provision is that the original policy must be surrendered within a specified period after the forfeiture, and such surrender within the stipulated time is a condition precedent to the right of the insured to demand a paid-up policy,[9] unless there is sufficient legal excuse for the

policy of the amount for which a paid-up policy should have been issued by the company under its contract. Mound City Mut. L. Ins. Co. *v.* Twining, 12 Kan. 475; Williams *v.* Metropolitan L. Ins. Co., 35 N. Y. App. Div. 82, 54 N. Y. Suppl. 595; Gates *v.* Home L. Ins. Co., 7 Ohio Dec. (Reprint) 40, 1 Cinc. L. Bul. 78. The measure of damages has also been said to be the fair cash value of the paid-up policy at the time of the breach of contract, with interest. Union Cent. L. Ins. Co. *v.* McHugh, 7 Nebr. 66.

Dividends.— It may be provided in the contract that the forfeiture by the insured shall work a forfeiture of the right to dividends, although a paid-up policy is to be issued in an amount proportionate to the premiums paid. Bryant *v.* Mutual Ben. L. Ins. Co., 109 Fed. 748.

6. Madison *v.* Northwestern Mut. L. Ins. Co., 141 Cal. 475, 75 Pac. 113; New York L. Ins. Co. *v.* Meinken, 80 S. W. 175, 25 Ky. L. Rep. 2113 [rehearing *denied* in 81 S. W. 239, 26 Ky. L. Rep. 339]; Crutchfield *v.* Union Cent. L. Ins. Co., 67 S. W. 67, 23 Ky. L. Rep. 2300; Inloes *v.* Prudential Ins. Co., 109 Mo. App. 104, 82 S. W. 1089.

Demand on an agent of the company is sufficient, although he has no authority to issue policies, if the policy does not require surrender to any particular person. Union Cent. L. Ins. Co. *v.* Whetzel, 29 Ind. App. 658, 65 N. E. 15.

After death of insured there can be no proper demand for a paid-up policy if the right to such policy is one which can only be exercised while the original policy is still in force. Bussing *v.* Union Mut. L. Ins. Co., 7 Ohio Dec. (Reprint) 442, 3 Cinc. L. Bul. 144. But if the right is one which may be exercised within the specified time after default the person entitled to the benefit of the policy may within that time, although after the death of the insured, claim the paid-up policy. Wheeler *v.* Connecticut Mut. L. Ins. Co., 82 N. Y. 543, 37 Am. Rep. 594 [*reversing* 16 Hun 317]. The right to such a policy is a property right which survives to the representatives of the assured. Winchell *v.* John Hancock Mut. L. Ins. Co., 30 Fed. Cas. No. 17,866.

Self-executing provisions.— If by the terms of the policy the right to paid-up insurance accrues without any required action on the part of the insured, the representatives of the assured or the beneficiary may maintain an action for such paid-up insurance after his death. Ætna L. Ins. Co. *v.* Sugg, 86 S. W. 967, 27 Ky. L. Rep. 846; Drury *v.* New York L. Ins. Co., 74 S. W. 663, 25 Ky. L. Rep. 68, 61 L. R. A. 714.

Before the death of insured under such circumstances there is no right of action to determine the interest of the beneficiary in such paid-up insurance. Harlow *v.* St. Louis Mut. L. Ins. Co., 54 Miss. 425, 28 Am. Rep. 358; Lyon *v.* Union Mut. L. Ins. Co., 17 N. Y. Suppl. 756. The right to such paid-up insurance will therefore not depend on the surrender of the policy and the taking out of a new policy. Chase *v.* Phœnix Mut. L. Ins. Co., 67 Me. 85; Kerr *v.* Union Mut. L. Ins. Co., 69 Hun (N. Y.) 393, 23 N. Y. Suppl. 619.

An offer to surrender is unnecessary where there has been an absolute refusal by the company to issue a paid-up policy. Barrett *v.* Mutual L. Ins. Co., 85 S. W. 749, 27 Ky. L. Rep. 586.

7. Schumacher *v.* Manhattan L. Ins. Co., 21 Fed. Cas. No. 12,490.

8. Bussing *v.* Union Mut. L. Ins. Co., 34 Ohio St. 222 [*affirming* 6 Ohio Dec. (Reprint) 607, 7 Am. L. Rec. 52]; Smith *v.* National L. Ins. Co., 11 Wkly. Notes Cas. (Pa.) 156; Sheerer *v.* Manhattan L. Ins. Co., 20 Fed. 886; Winchell *v.* John Hancock Mut. L. Ins. Co., 30 Fed. Cas. No. 17,866. The insured is not entitled to a paid-up policy where he ceases to pay before the expiration of the tontine period, it being provided in the policy that previous to the completion of the tontine period the policy can have no surrender value in cash or a paid-up policy; and this is true, although a writing delivered with the policy stipulates that the amount of the policy "may be reduced at any time at the desire of the insured, to any less amount, or an amount equal to the sum of the premiums paid in on said policy, the premiums, after the reduction, being reduced in the same proportion as the amount assured is reduced," as that stipulation has no reference to a paid-up policy. Equitable L. Assur. Soc. *v.* Spillman, 56 S. W. 710, 22 Ky. L. Rep. 183.

Minor beneficiaries.— It is no excuse for failing to thus surrender the original policy before forfeiture that the beneficiaries are minors who must be represented by a guardian. Jander *v.* Mutual L. Ins. Co., 16 Ohio Cir. Ct. 536, 9 Ohio Cir. Dec. 462.

If time for payment has been extended, demand for a paid-up policy may be made before expiration of the extension. Union Cent. L. Ins. Co. *v.* Whetzel, 29 Ind. App. 658, 65 N. E. 15.

9. *Indiana.*— Wells *v.* Vermont L. Ins. Co.,

delay.[10] The right to a paid-up policy under the conditions of the contract arises

28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578, 88 Am. St. Rep. 208.

Mississippi.—Bonner *v.* Mutual L. Ins. Co., (1904) 36 So. 538.

Nebraska.—McLaughlin *v.* Equitable L. Assur. Soc., 38 Nebr. 725, 57 N. W. 557.

New Jersey.— Hudson *v.* Knickerbocker L. Ins. Co., 28 N. J. Eq. 167.

New York.— Stayner *v.* Equitable L. Assur. Soc., 22 Misc. 53, 49 N. Y. Suppl. 380.

Ohio.— Jones *v.* Northwestern Mut. L. Ins. Co., 10 Ohio Dec. (Reprint) 631, 22 Cinc. L. Bul. 318.

Texas.— Equitable L. Assur. Soc. *v.* Evans, 25 Tex. Civ. App. 563, 64 S. W. 74.

Virginia.— Universal L. Ins. Co. *v.* Devore, 88 Va. 778, 14 S. E. 532.

See 28 Cent. Dig. tit. "Insurance," § 939.

Relief in equity.— Time being of the essence of the contract equity will not relieve from the default. The forfeiture for nonpayment of the premiums renders the policy absolutely void without any action on the part of the company unless the assured avails himself of his privilege. Atty.-Gen. *v.* Continental L. Ins. Co., 93 N. Y. 70.

In Kentucky the general rule requiring surrender of the original policy within the stipulated time is followed where the provision of the policy requires the active duty of surrendering the original policy in order to have the benefit of a paid-up policy. Northwestern Mut. L. Ins. Co. *v.* Barbour, 92 Ky. 427, 17 S. W. 796, 13 Ky. L. Rep. 619, 15 L. R. A. 449; Hexter *v.* U. S. Life Ins. Co., 91 Ky. 356, 15 S. W. 863, 12 Ky. L. Rep. 921. *Compare* Montgomery *v.* Phœnix Mut. L. Ins. Co., 14 Bush 51. But where the stipulation is that the company will within a specified time issue a paid-up policy it is said that time is not of the essence of the contract and, although surrender of the original policy is required, such surrender may be made within a reasonable time. New York Mut. L. Ins. Co. *v.* Jarboe, 102 Ky. 80, 42 S. W. 1097, 19 Ky. L. Rep. 1501, 80 Am. St. Rep. 343, 39 L. R. A. 504; Johnson *v.* Southern Mut. L. Ins. Co., 79 Ky. 403, 3 Ky. L. Rep. 26; Washington L. Ins. Co. *v.* Glover, 78 S. W. 146, 25 Ky. L. Rep. 1327; Germania L. Ins. Co. *v.* Saur, 7 Ky. L. Rep. 297. And five years is said to be a reasonable time within which to make demand and surrender the original policy. Washington L. Ins. Co. *v.* Lyne, 119 Ky. 162, 83 S. W. 122, 26 Ky. L. Rep. 1070; Mutual L. Ins. Co. *v.* O'Neil, 116 Ky. 742, 76 S. W. 839, 25 Ky. L. Rep. 983; Washington L. Ins. Co. *v.* Miles, 112 Ky. 743, 66 S. W. 740, 23 Ky. L. Rep. 1705; Manhattan L. Ins. Co. *v.* Patterson, 109 Ky. 624, 60 S. W. 383, 22 Ky. L. Rep. 1282, 95 Am. St. Rep. 393, 53 L. R. A. 378; New York L. Ins. Co. *v.* Warren Deposit Bank, 75 S. W. 234, 25 Ky. L. Rep. 325. Indeed it is said that as the original policy is void the insured need not surrender it before bringing suit for a paid-up policy. New York Mut. L. Ins. Co. *v.* Jarboe, *supra*. But a longer delay has been said to constitute laches defeating any right of action on account of the refusal of the company to issue a paid-up policy. Mutual L. Ins. Co. *v.* O'Neil, *supra*; Equitable L. Assur. Soc. *v.* Warren Deposit Bank, (1903) 75 S. W. 275 [rehearing *denied* in 76 S. W. 391, 25 Ky. L. Rep. 839]. And it has been said further that representations in the prospectus that the policy is non-forfeitable will prevent the company relying upon a stipulation in the policy that the right to paid-up insurance will be forfeited unless the policy is surrendered within thirty days. Southern Mut. L. Ins. Co. *v.* Montague, 84 Ky. 653, 2 S. W. 443, 8 Ky. L. Rep. 579, 4 Am. St. Rep. 218 [*affirming* 5 Ky. L. Rep. 515].

10. Excuses for delay.— Failure to comply with the conditions within the specified time may be excused if the insured has indicated to the company his desire to comply and has been prevented from carrying out his purpose by the withholding of necessary information on the part of the company. Morrison *v.* American Popular L. Ins. Co., 17 Fed. Cas. No. 9,841. So if the company has given the insured time beyond the specified period to search for the policy which has been lost there will be no forfeiture until the insured has delayed beyond a reasonable time so as to justify the inference that his claim has been abandoned. Lindenthal *v.* Germania L. Ins. Co., 174 N. Y. 76, 66 N. E. 629 [*reversing* 73 N. Y. Suppl. 1139]. And where in a suit to compel the issuance of a paid-up policy, it was shown that the policy had been stolen from the insured so that without fault on his part he was unable to comply with the conditions by surrendering it within the time specified, it was held that equitable relief might be afforded. Wilcox *v.* Equitable L. Assur. Soc., 173 N. Y. 50, 65 N. E. 857, 93 Am. St. Rep. 579 [*reversing* 55 N. Y. App. Div. 529, 67 N. Y. Suppl. 269]. If the company has refused to accept performance by the insured of conditions entitling him to a paid-up policy, the ground of refusal being an injunction restraining the company from issuing such a policy, it cannot subsequently rely upon the default without giving insured notice and opportunity to comply with the conditions of the policy (Coffey *v.* Universal L. Ins. Co., 7 Fed. 301, 10 Biss. 354); but the fact of the injunction will not excuse the insured from offering to surrender his policy as condition to the right to have a paid-up policy (Universal L. Ins. Co. *v.* Whitehead, 58 Miss. 226, 38 Am. Rep. 322). If payment of premiums is prevented by the existence of a state of war the assured or his representatives may be entitled to the value of a paid-up policy as of the date when default in the payment of premiums first occurred. Crawford *v.* Ætna L. Ins. Co., 2 Tenn. Cas. 329. Acts relied upon to excuse delay in complying with the conditions for securing

after default in payment of a premium note or interest;[11] but payment of outstanding premium notes and interest thereon may be made a condition to the right to a paid-up policy,[12] or the conditions may be such that the non-payment of a premium note or interest thereon will forfeit the right not only to the original insurance, but also to any paid-up policy.[13] If, however, the contract can be construed as providing for a paid-up policy subject only to the deduction of outstanding indebtedness on account of premium notes and interest from the amount to be paid at maturity, default in the payment of notes or interest thereon will not forfeit the policy.[14]

(v) *SURRENDER VALUE.* The policy[15] or a statute may provide for a return of the surrender value of a policy or a portion thereof in cash to the insured on a forfeiture.[16] In determining the surrender value it is usually provided that any indebtedness to the company on account of premium notes, interest, or loans shall be deducted.[17] Where there is an option to surrender the policy before forfeit-

a paid-up policy must be pleaded. Stayner *v.* Equitable L. Assur. Soc., 22 Misc. (N. Y.) 53, 49 N. Y. Suppl. 380.

11. Southern Mut. L. Ins. Co. *v.* Montague, 84 Ky. 653, 2 S. W. 443, 8 Ky. L. Rep. 579, 4 Am. St. Rep. 218 [*affirming* 5 Ky. L. Rep. 515]; American Ins. Co. *v.* Klink, 65 Mo. 78.

12. *Georgia.*— Moses *v.* Brooklyn L. Ins. Co., 50 Ga. 196.

Minnesota.—Van Norman *v.* Northwestern Mut. L. Ins. Co., 51 Minn. 57, 52 N. W. 988.

Ohio.— Union Cent. L. Ins. Co. *v.* Buxer, 62 Ohio St. 365, 57 N. E. 66, 49 L. R. A. 737; Bussing *v.* Union Mut. L. Ins. Co., 7 Ohio Dec. (Reprint) 442, 3 Cinc. L. Bul. 144.

Texas.— Union Cent. L. Ins. Co. *v.* Wilkes, 92 Tex. 468, 49 S. W. 1038 [*reversing* (Civ. App. 1898) 47 S. W. 546].

United States.— Dutcher *v.* Brooklyn L. Ins. Co., 8 Fed. Cas. No. 4,202 [*affirmed* in 95 U. S. 269, 24 L. ed. 410].

See 28 Cent. Dig. tit. "Insurance," § 936.

13. Alabama Gold L. Ins. Co. *v.* Thomas, 74 Ala. 578; Holly *v.* Metropolitan L. Ins. Co., 105 N. Y. 437, 11 N. E. 507; Insurance Co. *v.* Robinson, 40 Ohio St. 270.

Interest.— The paid-up policy when issued may be subject to the condition of payment of interest on outstanding notes. Holman *v.* Continental L. Ins. Co., 54 Conn. 195, 6 Atl. 405, 1 Am. St. Rep. 97; Knickerbocker L. Ins. Co. *v.* Harlan, 56 Miss. 512; People *v.* Knickerbocker L. Ins. Co., 103 N. Y. 480, 9 N. E. 35; Patch *v.* Phœnix Mut. L. Ins. Co., 44 Vt. 481.

Estoppel.— The mere fact that the policy is represented to be a paid-up policy does not estop the company from insisting on a provision therein that it shall be forfeited on non-payment of interest on outstanding notes. Fowler *v.* Metropolitan L. Ins. Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805 [*reversing* 41 Hun 357]; Heim *v.* Metropolitan L. Ins. Co., 7 Daly (N. Y.) 536; McQuitty *v.* Continental L. Ins. Co., 15 R. I. 573, 10 Atl. 635.

14. Symonds *v.* Northwestern Mut. L. Ins. Co., 23 Minn. 491; Eddy *v.* Phœnix Mut. L. Ins. Co., 65 N. H. 27, 18 Atl. 89, 23 Am. St. Rep. 17; Gardner *v.* Union Cent. L. Ins. Co., 5 Fed. 430.

The unauthorized insertion by the company in a paid-up policy of a stipulation for forfeiture on non-payment of interest on premium notes outstanding does not authorize a forfeiture for non-payment of interest. Cole *v.* Knickerbocker L. Ins. Co., 63 How. Pr. (N. Y.) 442.

15. Southern Mut. L. Ins. Co. *v.* Hodge, 13 Ky. L. Rep. 42. And see *supra*, X, C, 9, c, (I).

16. Hazen *v.* Massachusetts Mut. L. Ins. Co., 170 Mass. 254, 49 N. E. 119. And see *supra*, VIII, E, 1; X, C, 9, c, (II).

Beneficiary.— By statute in Massachusetts the surrender value may be secured on application by the insured provided the beneficiary named in the policy joins therein. Hazen *v.* Massachusetts Mut. L. Ins. Co., 170 Mass. 254, 49 N. E. 119.

Amount.— A construction of the language of the policy is to be avoided which makes the contract provide for a surrender value less in amount when the insured has obtained a loan than where no loan has been obtained. Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 69 S. W. 1, 24 Ky. L. Rep. 580.

The valuation, prescribed by law for determining the solvency of a company, has no application to the valuation of a policy for the purpose of determining the rights of the insured on forfeiture. Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 115 Ky. 757, 74 S. W. 1066, 25 Ky. L. Rep. 172.

What law governs as to surrender value see *supra*, IV, B, 7, a, note 97.

17. *Georgia.*— Northwestern Mut. L. Ins. Co. *v.* Ross, 63 Ga. 199.

Kentucky.— Newark Mut. Ben. L. Ins. Co. *v.* Louisville First Nat. Bank, 69 S. W. 1, 24 Ky. L. Rep. 580; Hines *v.* Kentucky Mut. L. Ins. Co., 33 S. W. 202, 18 Ky. L. Rep. 1; Northwestern Mut. L. Ins. Co. *v.* Lowry, 13 Ky. L. Rep. 205; Southern Mut. L. Ins. Co. *v.* Hodge, 13 Ky. L. Rep. 42.

Massachusetts.— Bigelow *v.* State Mut. L. Assur. Assoc., 123 Mass. 113; Pitt *v.* Berkshire L. Ins. Co., 100 Mass. 500.

Ohio.—Bonner *v.* Northwestern Mut. L. Ins. Co., 7 Ohio Dec. (Reprint) 207, 1 Cinc. L. Bul. 293.

ure, a right of action to enforce such right accrues only on the exercise of the option, and is not available if the policy has become forfeited.[18] By provision of the policy the surrender value may become forfeited by default in payment of premium.[19]

10. Action to Determine Rights. On the refusal of the company to accept payment of premium as required by the policy, by non-payment of which the policy is to become forfeited, the insured may maintain an action in equity to have the policy declared valid and in force.[20] So after forfeiture, if the insured is entitled by the terms of the policy to reinstatement on certain conditions, he may maintain an action in equity to compel such reinstatement.[21] But equity alone will not decree issuance of a paid-up policy if the policy itself provides that in the event of the death of the insured after forfeiture there shall be a recovery of an amount proportionate to the premiums paid.[22]

Wisconsin.— Hull *v.* Northwestern Mut. L. Ins. Co., 39 Wis. 397.

See 28 Cent. Dig. tit. "Insurance," § 933.

But under a policy providing for a surrender value on the basis of cash payment without reference to premium notes it has been held that the notes being merely liens on the policy to be deducted from the amount to be paid when the insured died were not to be considered in estimating the equitable value. Southern Mut. L. Ins. Co. *v.* Hodge, 13 Ky. L. Rep. 42; Fithian *v.* Northwestern L. Ins. Co., 4 Mo. App. 386.

Premiums still unpaid and which are not estimated in determining the surrender value are not to be deducted from such surrender value. Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480. But where an annual premium is payable in instalments and the insurance is forfeited on account of failure to pay one such instalment the balance of the instalments of the year's annual premium may be deducted from the surrender value. Van Creelan *v.* Massachusetts Mut. L. Ins. Co., 35 La. Ann. 226.

18. Thorensen *v.* Massachusetts Ben. Assoc., 68 Minn. 477, 71 N. W. 668.

19. Kinne *v.* Michigan Mut. L. Ins. Co., 92 Wis. 335, 66 N. W. 359.

State of war.— But where the default in payment of premium was due to the existence of war making such payment impossible, it was held that the policy-holder whose policy thus became forfeited was entitled to a return of its equitable value, that is, the difference between the cost of a new policy and the present value of the premiums yet to be paid on the forfeited policy. New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789; Davis *v.* New York L. Ins. Co., 7 Fed. Cas. No. 3,644, 3 Hughes 437. And see *supra*, X, C, 8, c.

20. Bulger *v.* Washington L. Ins. Co., 63 Ga. 328; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 [*affirming* 51 How. Pr. 263]; Hayner *v.* American Popular L. Ins. Co., 36 N. Y. Super. Ct. 211; National L. Ins. Co. *v.* Tullidge, 39 Ohio St. 240; American L. Ins. Co. *v.* McAden, 109 Pa. St. 399, 1 Atl. 256. And see *supra*, VIII, E, 5, b.

Option.— The policy-holder may elect to consider the policy at an end and sue to recover its value or may raise the question of forfeiture either in a direct equitable proceeding for that purpose or in an action on the policy brought after it has by its terms become payable. Day *v.* Connecticut Gen. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693. But in England it is said that it is premature to decide such questions until a loss has occurred, and such an action was dismissed on defendant's undertaking not to rely on non-payment as a bar to any future action. Honour *v.* Equitable L. Assur. Soc., [1900] 1 Ch. 852, 69 L. J. Ch. 420, 82 L. T. Rep. N. S. 144, 48 Wkly. Rep. 347.

Joinder of parties.— There is no joint right of action, however, in behalf of the insured and the beneficiary, as the measure of damages as to the two parties is not the same. Knights Templar, etc., Life Indemnity Co. *v.* Gravett, 49 Ill. App. 252.

21. Bradbury *v.* Mutual Reserve Fund Life Assoc., 53 N. J. Eq. 306, 31 Atl. 775; Bagley *v.* Mutual Reserve Fund Life Assoc., 39 N. Y. App. Div. 655, 57 N. Y. Suppl. 1133 [*affirming* 24 Misc. (N. Y.) 634, 54 N. Y. Suppl. 189].

Mutual company.— It has been held that rights of membership in a mutual company as against attempts to declare them forfeited are determined by mandamus and not by an action in equity for reinstatement. O'Reily *v.* New York Mut. L. Ins. Co., 2 Abb. Pr. N. S. (N. Y.) 167. But to the contrary see Bradbury *v.* Mutual Reserve Fund Life Assoc., 53 N. J. Eq. 306, 31 Atl. 775.

Joinder.— There is a privity of interest between the insured and one to whom he has assigned the policy sufficient to enable them to join in a suit to have the policy reinstated. Elgutter *v.* Mutual Reserve Fund Life Assoc., 52 La. Ann. 1733, 28 So. 289.

22. Harlow *v.* St. Louis Mut. L. Ins. Co., 54 Miss. 425, 28 Am. Rep. 358; Lyon *v.* Union Mut. L. Ins. Co., 17 N. Y. Suppl. 756.

Specific performance.— A contract to deliver a paid-up policy after receipt of two annual premiums in case the policy should cease on non-payment of premiums cannot be specifically enforced as the insured has an adequate remedy at law. Nestel *v.* Knickerbocker L. Ins. Co., 12 Phila. (Pa.) 477.

XI. ESTOPPEL, WAIVER, AND AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.[23]

A. Applicability of Doctrine — 1. In General. It is always permissible to show a waiver of the conditions of a life insurance policy or a course of conduct on the part of the insurer from which it might be justly and reasonably inferred that a forfeiture would not be exacted; and courts are always prompt to seize hold of any circumstance to indicate an election to waive a forfeiture, or an agreement to do so, on which insured has relied and acted.[24] While it is sometimes said as to waiver as well as estoppel that there must be reliance by the insured on any waiver of forfeiture or other cause of invalidity,[25] the weight of authority is in accord with the rule that any conduct on the part of the company inconsistent with its reliance on a breach will be a waiver of the breach irrespective of any consideration or technical estoppel.[26] A waiver as to the assured

23. Effect of mistake, negligence, or fraud of agent as to false statements see *supra*, IX, B, 4, d.

Waiver as to reinstatement: Waiver of conditions see X, C, 9, b, (III). Waiver of fraud see X, C, 9, b, (IV), note 92.

24. Graham *v.* Security Mut. L. Ins. Co., (N. J. 1905) 62 Atl. 681.

25. Equitable L. Assur. Soc. *v.* McElroy, 83 Fed. 631, 28 C. C. A. 365.

26. *Alabama.*— Washburn *v.* Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011.

Illinois.— Covenant Mut. Life Assoc. *v.* Baughman, 73 Ill. App. 544.

New Jersey.— Graham *v.* Security Mut. L. Ins. Co., 72 N. J. L. 298, 62 Atl. 681.

New York.— Meeder *v.* Provident Sav. L. Assur. Soc., 171 N. Y. 432, 64 N. E. 167 [*affirming* 58 N. Y. App. Div. 80, 68 N. Y. Suppl. 518]; Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653.

Virginia.— McLean *v.* Piedmont, etc., L. Ins. Co., 29 Gratt. 361.

See 28 Cent. Dig. tit. "Insurance," § 941 *et seq.* And see cases cited *infra*, this note; and FIRE INSURANCE, 19 Cyc. 777 *et seq.*

Consideration.— If, however, insured relies on an agreement as to extension of time of payment or like matter, a consideration therefor becomes necessary. Bennett *v.* Union Cent. L. Ins. Co., 203 Ill. 439, 67 N. E. 971 [*reversing* 104 Ill. App. 402]; Marvin *v.* Universal L. Ins. Co., 16 Hun (N. Y.) 494; Evans *v.* U. S. Life Ins. Co., 3 Hun (N. Y.) 587. *Compare* Dilleber *v.* Knickerbocker L. Ins. Co., 76 N. Y. 567 [*affirming* 7 Daly 540], where there was held to be a sufficient consideration to support an agreement allowing insured to pay premiums within a reasonable time after they should become due. But a waiver once becoming effectual may not be retracted, although without consideration. Mettner *v.* Northwestern Nat. L. Ins. Co., 127 Iowa 205, 103 N. W. 112.

Provisions as to prepayment of premium.— A clause exempting the company from liability under the policy until actual prepayment of the premium is made may be waived. Peck *v.* Washington L. Ins. Co., 181 N. Y. 585, 74 N. E. 1122 [*affirming* 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210]; Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. 762, 107 Am. St. Rep. 548; Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398. And see *supra*, III, D, 3.

Provisions for forfeiture for non-payment of subsequent premiums are for the benefit of the company and may be waived by it. Washburn *v.* Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011; Bouton *v.* American Mut. L. Ins. Co., 25 Conn. 542; Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544]; Bennett *v.* Union Cent. L. Ins. Co., 104 Ill. App. 402; Rutherford *v.* Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202; Mutual Ben. L. Ins. Co. *v.* Hillyard, 37 N. J. L. 444, 18 Am. Rep. 741 (holding that the prompt payment of each subsequent premium as required by the policy is not a condition precedent); Young *v.* Mutual L. Ins. Co., 30 Fed. Cas. No. 18,168, 2 Sawy. 325 [*reversed* on other grounds in 23 Wall. 85, 23 L. ed. 152]. No new consideration is necessary to support a waiver of the forfeiture. Knarston *v.* Manhattan L. Ins. Co., 140 Cal. 57, 73 Pac. 740; Mettner *v.* Northwestern Nat. L. Ins. Co., 127 Iowa 205, 103 N. W. 112. Further as to waiver of nonpayment see *infra*, XI, E, 2, b; XI, D, 4, b.

Warranties.— The doctrine of waiver applies to warranties. National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576. Breach of warranty renders the policy merely voidable at the option of the company and the company may waive such breach and insist on performance by assured, or may by its conduct estop itself of taking advantage of a known breach. New York L. Ins. Co. *v.* Baker, 83 Fed. 647, 27 C. C. A. 658 [*affirming* 77 Fed. 550].

Fraudulent concealment may be waived as a defense, as it renders the contract voidable at the election of the company. Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84.

Fraudulent representations may be such as to render the contract void, and in such case cannot be the subject of waiver (American Cent. Ins. Co. *v.* Antram, 86 Miss. 224, 38 So. 626); but ordinarily the right to defend on the ground of false representations may be waived (Union Nat. Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800; Na-

inures to the advantage of the beneficiary,[27] and independent of any waiver as to the assured, the company may waive the right to avoid the policy as against the beneficiary.[28] On the other hand, as a statutory provision for non-forfeiture cannot be waived by the assured,[29] an attempted waiver by the assured would be ineffectual as to the beneficiary.[30]

2. As Dependent on Knowledge or Notice. Estoppel or waiver involves knowledge or notice of that which the company estops itself from insisting upon or waives the right to insist upon by way of defense, and in the absence of knowledge or notice the company is not precluded from asserting the defense.[31]

tional Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576).

Forfeiture on account of violation of the provisions of the permit or the policy as to residence or travel may be waived (Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465), as by accepting subsequent premiums with knowledge of breach of the conditions (Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244; Wing *v.* Harvey, 5 De G. M. & G. 265, 2 Eq. Rep. 533, 18 Jur. 394, 23 L. J. Ch. 511, 2 Wkly. Rep. 370, 54 Eng. Ch. 210, 43 Eng. Reprint 872), or by accepting an additional premium paid for the privilege which has already been enjoyed in violation of the terms of the policy (Girdlestone *v.* North British Mercantile Ins. Co., L. R. 11 Eq. 197, 40 L. J. Ch. 230, 23 L. T. Rep. N. S. 392).

Equivocal acts on the part of the company are not sufficient to show a waiver of the plain terms of the contract. Manufacturers' L. Ins. Co. *v.* Gordon, 20 Ont. App. 309.

Laches of assured in availing himself of a waiver by waiting an unreasonable length of time before taking steps to ascertain when his premium is payable may defeat his right to rely on such waiver (Grant *v.* Alabama Gold L. Ins. Co., 76 Ga. 575); but unless the delay continues for so long a period as to warrant the conclusion that assured has abandoned his policy, the failure to pay after waiver of default will not defeat the insurance (Lindenthal *v.* Germania L. Ins. Co., 174 N. Y. 76, 66 N. E. 629).

27. Meeder *v.* Provident Sav. L. Assur. Soc., 171 N. Y. 432, 64 N. E. 167 [*affirming* 58 N. Y. App. Div. 80, 68 N. Y. Suppl. 518]; Frank *v.* Mutual L. Ins. Co., 102 N. Y. 266, 6 N. E. 667, 55 Am. Rep. 807.

28. Union Nat. Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800.

29. See *supra*, X, C, 6, i.

30. New York Mut. L. Ins. Co. *v.* Hill, 97 Fed. 263, 38 C. C. A. 159, 49 L. R. A. 127.

31. Northwestern L. Ins. Co. *v.* Montgomery, 116 Ga. 799, 43 S. E. 79 (holding that by consenting to the assignment of the policy the company is not precluded from setting up as against the assignee fraud in the original application of which it had no notice at the time of such consent); Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807 (holding that a recognition of the policy as valid is not a waiver of fraud of which the company had no notice); Lamb *v.* Prudential Ins. Co., 22 N. Y. App. Div. 552, 48 N. Y. Suppl. 123 (holding that it is essential to waiver of forfeiture that there be a recognition of the validity of the policy after knowledge of the fact constituting the forfeiture); Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544 (holding that treating for a settlement is not a waiver of any defense unknown to the company at the time).

Acceptance of premiums or assessments is not a waiver of a breach of condition not known to the company. Houdeck *v.* Merchants', etc., Ins. Co., 102 Iowa 303, 71 N. W. 354; Finch *v.* Modern Woodmen of America, 113 Mich. 646, 71 N. W. 1104; Thompson *v.* Travelers' Ins. Co., 11 N. D. 274, 91 N. W. 75, 13 N. D. 444, 101 N. W. 900; Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67; Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476; Bennecke *v.* Connecticut Mut. L. Ins. Co., 105 U. S. 355, 26 L. ed. 990; Globe Mut. L. Ins. Co. *v.* Wolff, 95 U. S. 326, 24 L. ed. 387; Lorie *v.* Connecticut Mut. L. Ins. Co., 15 Fed. Cas. No. 8,509.

Merely requesting proofs of loss such as are required by the policy and furnishing blanks for the purpose does not constitute a waiver of defenses of which the company has no knowledge. Ronald *v.* Mutual Reserve Fund Life Assoc., 132 N. Y. 378, 30 N. E. 739 [*affirming* 57 Hun 592, 10 N. Y. Suppl. 632 (*affirming* 7 N. Y. Suppl. 152, 23 Abb. N. Cas. 271)]; Stuart *v.* Mutual Reserve Fund Life Assoc., 78 Hun (N. Y.) 191, 28 N. Y. Suppl. 944; Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101; Home L. Ins. Co. *v.* Myers, 112 Fed. 846, 50 C. C. A. 544; Hubbard *v.* Mutual Reserve Fund Life Assoc., 80 Fed. 681.

Misrepresentation as to habits or disease.— Recognition of the validity of the policy will not waive the defense of misrepresentation as to habits or disease unless the fact of misrepresentation is known to the company. Thompson *v.* Travelers' Ins. Co., 13 N. D. 444, 101 N. W. 900; Knight *v.* New York Mut. L. Ins. Co., 14 Phila. (Pa.) 187.

Non-payment of premiums.— Accepting a premium after the death of assured without notice of that fact does not waive forfeiture on account of default in payment. Mobile L. Ins. Co. *v.* Pruett, 74 Ala. 487; Franklin L. Ins. Co. *v.* McAfee, 90 S. W. 216, 28 Ky. L. Rep. 676. See, however, Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544]. A statement by an officer to the beneficiary that assured had paid a certain premium will not constitute a waiver of a subsequent forfeiture arising from non-payment of the premium, if made under a mis-

B. As Affected by Power of Officers or Agents — 1. In General. A waiver by an officer or a general agent is binding on the company;[32] but ordinarily a mere soliciting or collecting agent does not have authority to waive conditions of the policy;[33] nor has an adjuster.[34] The agent intrusted with the making of the contract may waive conditions affecting its validity;[35] and also provisions for

take of fact. Robertson *v.* Metropolitan L. Ins. Co., 88 N. Y. 541 [*reversing* 47 N. Y. Super. Ct. 377].

Effect of knowledge or notice see *infra*, XI, C.

32. Ætna L. Ins. Co. *v.* Hartley, 67 S. W. 19, 68 S. W. 1081, 24 Ky. L. Rep. 57; Schmidt *v.* Charter Oak L. Ins. Co., 2 Mo. App. 339; Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744; Selvage *v.* John Hancock Mut. L. Ins. Co., 12 Fed. 603; France *v.* Ætna L. Ins. Co., 9 Fed. Cas. No. 5,027.

The secretary or assistant secretary of the company has power to waive default in payment of premiums. Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289 [*reversing* 17 N. Y. Suppl. 333]; Piedmont, etc., L. Ins. Co. *v.* McLean, 31 Gratt. (Va.) 517; Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

General agent.— An agent to whom the company intrusts the general management of its business in a particular state or locality, authorizing him to take applications, issue and deliver policies, and receive premiums, generally has power to waive conditions (Metropolitan L. Ins. Co. *v.* Sullivan, 112 Ill. App. 500; Hartford, etc., Ins. Co. *v.* Hayden, 90 Ky. 39, 13 S. W. 585, 11 Ky. L. Rep. 993); and such agents have authority to waive forfeitures by accepting premiums after default (Knarston *v.* Manhattan L. Ins. Co., 124 Cal. 74, 56 Pac. 773; Wagaman *v.* Security Mut. L. Ins. Co., 110 Mo. App. 616, 85 S. W. 117). But it is said that such powers do not necessarily involve as matter of law the power to waive conditions as to payment of premiums (Merserau *v.* Phœnix Mut. L. Ins. Co., 66 N. Y. 274. And see Bouton *v.* American Mut. L. Ins. Co., 25 Conn. 542, holding that a provision that the policy shall be countersigned by a certain agent and delivered does not give him authority to accept payment of a subsequent annual premium so as to waive a forfeiture); and the mere power to receive premiums does not imply the power to waive forfeiture or accept premiums after due (Kolgers *v.* Guardian L. Ins. Co., 58 Barb. (N. Y.) 185, 9 Abb. Pr. N. S. 91; Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67; Nashville L. Ins. Co. *v.* Ewing, 2 Baxt. (Tenn.) 305). Nor do such agents have authority to waive the condition that the policy shall not go into effect until the first premium is paid. Reese *v.* Fidelity Mut. Life Assoc., 111 Ga. 482, 36 S. E. 637; Russell *v.* Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656; Tomsecek *v.* Travelers' Ins. Co., 113 Wis. 114, 88 N. W. 1013, 90 Am. St. Rep. 846, 57 L. R. A. 455. However, an agent clothed with authority to transact generally the company's business in a state and to collect the premiums, and granted permission to accept notes to himself in lieu of cash premium payments, the company looking to him instead of the policy-holder, has authority to bind the company by accepting notes in lieu of cash payments of premiums, whether he paid the company or not. Mutual L. Ins. Co. *v.* Abbey, 76 Ark. 328, 88 S. W. 950.

A district superintendent is not a principal officer of the company within a provision as to modification of the policy. Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80. And see Raub *v.* New York L. Ins. Co., 14 N. Y. St. 573; Murphy *v.* Prudential Ins. Co., 30 Pa. Super. Ct. 560.

33. *Arkansas.*— Mutual L. Ins. Co. *v.* Abbey, 76 Ark. 328, 88 S. W. 950.

New Jersey.— Metropolitan L. Ins. Co. *v.* McGrath, 52 N. J. L. 358, 19 Atl. 386.

Rhode Island.— Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513.

United States.— Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190.

Canada.— Bemier *v.* Martin, 9 Quebec Super. Ct. 421.

See 28 Cent. Dig. tit. "Insurance," § 947 *et seq.*

34. Berger *v.* Ætna L. Ins. Co., 48 Misc. (N. Y.) 385, 95 N. Y. Suppl. 541; Emanuel *v.* Maryland Casualty Co., 47 Misc. (N. Y.) 378, 94 N. Y. Suppl. 36.

35. *Illinois.*— John Hancock Mut. L. Ins. Co. *v.* Schlink, 74 Ill. App. 181.

Iowa.— Walsh *v.* Ætna L. Ins. Co., 30 Iowa 133, 6 Am. Rep. 664.

New York.— Ames *v.* Manhattan L. Ins. Co., 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759; Boos *v.* World Mut. L. Ins. Co., 4 Hun 133, 6 Thomps. & C. 364 [*affirmed* in 64 N. Y. 236].

Texas.— Equitable L. Ins. Co. *v.* Hazlewood, 75 Tex. 338, 12 S. W. 621, 16 Am. St. Rep. 893, 7 L. R. A. 217.

Washington.— Cole *v.* Union Cent. L. Ins. Co., 22 Wash. 26, 60 Pac. 68, 47 L. R. A. 201.

See 28 Cent. Dig. tit. "Insurance," § 947 *et seq.*

Payment of first premium.— Thus the condition that the policy shall not take effect until the first premium is paid in money while the insured is in good health may be waived by the agent (Grier *v.* New York Mut. L. Ins. Co., 132 N. C. 542, 44 S. E. 28), and a prohibition against waiver by agent of non-payment of premiums when due does not refer to the first premium recited in the policy as paid (Miller *v.* Brooklyn L. Ins. Co., 12 Wall. (U. S.) 285, 20 L. ed. 398 [*affirming* 17 Fed. Cas. No. 9,564]). But it is said that an agent having authority merely to contract as to the issuance of poli-

forfeiture of the policy for breach of conditions subsequent, such as prohibited residence.[36]

2. Limitations as to Power to Waive. A stipulation in the policy that no agent has power to modify the terms of the contract or waive its conditions is notice to insured of the limited authority of the agent in these respects, and under such a stipulation insured cannot rely on any actual conduct of the agent as constituting a modification or waiver.[37] So a requirement that a modification or waiver of the terms of the contract must be in writing indorsed on the policy is a limitation binding on insured.[38] However, these limitations may be waived by subsequent acts or conduct of an officer or agent of the company,[39] or by its own

cies does not have authority to vary stipulations as to the payment of premiums. Carter *v.* Cotton States L. Ins. Co., 56 Ga. 237; Willcuts *v.* Northwestern Mut. L. Ins. Co., 81 Ind. 300; Coombs *v.* Charter Oak L. Ins. Co., 65 Me. 382. And see Russell *v.* Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656; and *supra*, III, D, 3, a, (II).

36. Germania L. Ins. Co. *v.* Koehler, 168 Ill. 293, 48 N. E. 297, 61 Am. St. Rep. 108; Walsh *v.* Ætua L. Ins. Co., 30 Iowa 133, 6 Am. Rep. 664.

37. *Connecticut.*— Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

Dakota.— Clevenger *v.* New York Mut. L. Ins. Co., 2 Dak. 114, 3 N. W. 313.

Massachusetts.— Porter *v.* U. S. Life Ins. Co., 160 Mass. 183, 35 N. E. 678.

Michigan.— Mallory *v.* Metropolitan L. Ins. Co., 97 Mich. 416, 56 N. W. 773.

New Jersey.— Dimick *v.* Metropolitan L. Ins. Co., 69 N. J. L. 384, 55 Atl. 291, 2 L. R. A. 774.

New York.— Russell *v.* Prudential Ins. Co., 176 N. Y. 178, 68 N. E. 252, 98 Am. St. Rep. 656; McCollum *v.* New York Mut. L. Ins. Co., 124 N. Y. 642, 27 N. E. 412 [*affirming* 55 Hun 103, 8 N. Y. Suppl. 249]; Cyrenius *v.* Mutual L. Ins. Co., 18 N. Y. App. Div. 599, 46 N. Y. Suppl. 549; Wilkins *v.* Mutual Reserve Fund Life Assoc., 54 Hun 294, 7 N. Y. Suppl. 589; Koelges *v.* Guardian L. Ins. Co., 2 Lans. 480.

Ohio.— Union Cent. L. Ins. Co. *v.* Hook, 62 Ohio St. 256, 56 N. E. 906; Jander *v.* Mut. L. Ins. Co., 16 Ohio Cir. Ct. 536, 9 Ohio Cir. Dec. 452; Gaff *v.* Pennsylvania Mut. L. Ins. Co., 10 Ohio Dec. (Reprint) 86, 18 Cinc. L. Bul. 310.

Pennsylvania.— Lantz *v.* Vermont L. Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 23 Am. St. Rep. 202, 10 L. R. A. 577; Knight *v.* New York Mut. L. Ins. Co., 14 Phila. 187.

Virginia.— Metropolitan L. Ins. Co. *v.* Hall, 104 Va. 572, 52 S. E. 345.

Washington.— Nixon *v.* Travellers' Ins. Co., 25 Wash. 254, 65 Pac. 195.

United States.— Iowa L. Ins. Co. *v.* Lewis, 187 U. S. 335, 23 S. Ct. 126, 47 L. ed. 204.

See 28 Cent. Dig. tit. "Insurance," § 947 *et seq.*

Authority in fact.—Notwithstanding a limitation in the policy of the power to extend the time of payment to certain officers named, the company may actually authorize some other officer or agent to give an extension (Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436); and although a life policy required the payment of premiums to be made in cash, and provided that agents were not authorized to change contracts or waive performance, parol evidence is admissible, in an action on such policy, to show that the agent who extended the time for the payment of such premium had authority to do so (Knickerbocker L. Ins. Co. *v.* Norton, 96 U. S. 234, 24 L. ed. 689).

Secret limitations on a general agent's authority, however, are not binding on insured. Fraser *v.* Home L. Ins. Co., 71 Vt. 482, 45 Atl. 1046; Maine Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 20 L. ed. 617; McGowan *v.* Charter Oak L. Ins. Co., 16 Fed. Cas. No. 8,807.

Ratification.— Where an agent, without authority to waive a forfeiture, took a renewal note in the place of a note for the premium on which the maker had defaulted, the acquiescence in the renewal by the company and its receipt of the second note and a transfer of it by indorsement operated as a waiver. Neal *v.* Gray, 124 Ga. 510, 52 S. E. 622.

38. Hutson *v.* Prudential Ins. Co. of America, 122 Ga. 847, 50 S. E. 1000; Crutchfield *v.* Union Cent. L. Ins. Co., 113 Ky. 53, 67 S. W. 67, 23 Ky. L. Rep. 2300; Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657; Spitz *v.* Mutual Ben. L. Assoc. of America, 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469. See, however, Page *v.* Metropolitan L. Ins. Co., 23 Quebec Super. Ct. 503.

39. *Alabama.*— U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

Illinois.— John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181]; Penn Mut. L. Ins. Co. *v.* Keach, 134 Ill. 583, 26 N. E. 106 [*affirming* 32 Ill. App. 427]; Metropolitan L. Ins. Co. *v.* Sullivan, 112 Ill. App. 500; Germania L. Ins. Co. *v.* Koehler, 63 Ill. App. 188.

Michigan.— Hilt *v.* Metropolitan L. Ins. Co., 110 Mich. 517, 68 N. W. 300.

Missouri.—James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Burdick *v.* Security Life Assoc., 77 Mo. App. 629.

New York.— Dilleber *v.* Knickerbocker L. Ins. Co., 76 N. Y. 567 [*affirming* 7 Daly 540].

conduct, as by accepting overdue premiums or collateral security covering overdue as well as unmatured premium notes.[40]

C. Effect of Knowledge or Notice[41] — 1. On the Part of the Company. The company cannot avoid a policy because of misrepresentations or breach of condition or warranty on the part of insured where, at the time of issuing the policy or of subsequently recognizing its validity, it had knowledge or notice of the falsity of the representations or the facts constituting the breach.[42] This rule applies to misrepresentations or breach of condition or warranty as to the health and bodily condition of the insured,[43] or as to his occupation[44] or his

North Carolina.— Gwaltney *v.* Provident Sav. L. Assur. Soc., 132 N. C. 925, 44 S. E. 659.

Ohio.— Union Mut. L. Ins. Co. *v.* McMillen, 24 Ohio St. 67.

Tennessee.— Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937.

Texas.— New York Provident Sav. L. Assur. Soc. *v.* Oliver, 22 Tex. Civ. App. 8, 53 S. W. 594; Northwestern Mut. L. Ins. Co. *v.* Freeman, 19 Tex. Civ. App. 632, 47 S. W. 1025.

United States.—Mutual Reserve Fund Life Assoc. *v.* Cleveland Woolen Mills, 82 Fed. 508, 27 C. C. A. 212.

See 23 Cent. Dig. tit. "Insurance," § 947 *et seq.*

General agents.— This result is reached in some cases by saying that the term "agent" as used in the limitation does not apply to a general agent. Hartford L., etc., Ins. Co. *v.* Hayden, 90 Ky. 39, 13 S. W. 585, 11 Ky. L. Rep. 993; Marcus *v.* St. Louis Mut. L. Ins. Co., 68 N. Y. 625.

Real or apparent scope of authority.— Such waiver must be within the real or apparent scope of the agent's authority. Fidelity Mut. L. Ins. Co. *v.* Bussell, 75 Ark. 25, 86 S. W. 814; Collins *v.* Metropolitan L. Ins. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578.

40. Bennett *v.* Union Cent. L. Ins. Co., 203 Ill. 439, 67 N. E. 971; Union Cent. L. Ins. Co. *v.* Whetzel, 29 Ind. App. 658, 65 N. E. 15; Equitable L. Assur. Soc. *v.* Cole, 13 Tex. Civ. App. 486, 35 S. W. 720. And see Porter *v.* U. S. Life Ins. Co., 160 Mass. 183, 35 N. E. 678.

Ratification.— By knowingly permitting agents to waive conditions in the policy without objection the company ratifies such course of conduct and waives the conditions of the policy in that respect. Mound City Mut. L. Ins. Co. *v.* Huth, 49 Ala. 529; Knickerbocker L. Ins. Co. *v.* Norton, 96 U. S. 234, 24 L. ed. 689; Ætna L. Ins. Co. *v.* Smith, 88 Fed. 440, 31 C. C. A. 575; New York Mut. L. Ins. Co. *v.* Logan, 57 Fed. 637, 31 C. C. A. 172. But a mere course of dealing on the part of the agents is not sufficient to show a waiver by the company unless it is such as to justify the inference of knowledge on the part of the company and approval of the usage (Lewis *v.* Phœnix Mut. L. Ins. Co., 44 Conn. 72; Stewart *v.* Union Mut. L. Ins. Co., 76 Hun (N. Y.) 267, 27 N. Y. Suppl. 724); and generally knowledge on the part of the company is essential to a valid ratification (Sullivan *v.* Germania L. Ins. Co., 15 Mont. 522, 39 Pac. 742). Accepting the benefit of the act of an agent in connection with a waiver estops the company from afterward repudiating the waiver. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646. Thus whatever may be the power of an agent's receiving an overdue premium, the company by retaining the money ratifies his act and so waives the forfeiture. Hodsdon *v.* Guardian L. Ins. Co., 97 Mass. 144, 93 Am. Dec. 73; Shaft *v.* Phœnix Mut. L. Ins. Co., 8 Hun (N. Y.) 632; U. S. National L. Ins. Co. *v.* Tullidge, 39 Ohio St. 240; Fraser *v.* Home L. Ins. Co., 71 Vt. 482, 45 Atl. 1046; Dutton *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,211.

41. **Knowledge or notice as element of estoppel or waiver** see *supra*, XI, A, 2.

42. *Connecticut.*— Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80, *semble.*

Iowa.— Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

Texas.— Mutual Reserve Fund Life Assoc. *v.* Sullivan, (Civ. App. 1895) 29 S. W. 190.

West Virginia.— Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

United States.— Life Ins. Clearing Co. *v.* Bullock, 91 Fed. 487, 33 C. C. A. 365.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

43. *Illinois.*— Security Trust Co. *v.* Tarpey, 182 Ill. 52, 54 N. E. 1041 [*affirming* 80 Ill. App. 378].

Missouri.— Coolidge *v.* Charter Oak L. Ins. Co., 1 Mo. App. 109.

New York.—Ames *v.* Manhattan L. Ins. Co., 167 N. Y. 584, 60 N. E. 1106 [*affirming* 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759], 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Baker *v.* Home L. Ins. Co., 64 N. Y. 648 [*affirming* 2 Hun 402]; Hamilton *v.* Fidelity Mut. L. Assoc., 27 N. Y. App. Div. 480, 50 N. Y. Suppl. 526.

North Carolina.— Follette *v.* U. S. Mutual Acc. Assoc., 110 N. C. 377, 14 S. E. 923, 28 Am. St. Rep. 693, 15 L. R. A. 668; Follette *v.* U. S. Mutual Acc. Assoc., 107 N. C. 240, 12 S. E. 370, 22 Am. St. Rep. 878, 12 L. R. A. 315.

Texas.— Sun Life Ins. Co. of America *v.* Phillips, (Civ. App. 1902) 70 S. W. 603.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

44. **Triple Link Mut. Indemnity Assoc.** *v.*

habits,[45] and also to misrepresentations as to previous unaccepted applications for insurance.[46]

2. On the Part of Officers or Agents.[47] The company is chargeable with knowledge or notice possessed by its officers or which should be in their possession in the ordinary performance of their duties;[48] likewise with knowledge or notice on the part of general agents who act in connection with the acceptance of risks and issuance of policies;[49] but mere soliciting agents or agents for the collection of premiums do not represent the company in such sense that their knowl-

Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34; McDonald *v.* Metropolitan L. Ins. Co., 68 N. H. 4, 38 Atl. 500, 73 Am. St. Rep. 548; Singleton *v.* Prudential Ins. Co., 11 N. Y. App. Div. 403, 42 N. Y. Suppl. 446; New York Acc. Ins. Co. *v.* Clayton, 59 Fed. 559, 8 C. C. A. 213; Pacific Mut. L. Ins. Co. *v.* Snowden, 58 Fed. 342, 7 C. C. A. 264.

Extent of waiver.—It seems that knowledge of untrue statements as to present occupation will not waive breach of future warranty with reference thereto. Wright *v.* Northwestern Mut. L. Ins. Co., 11 Ky. L. Rep. 519.

45. Pomeroy *v.* Rocky Mountain Ins., etc., Inst., 9 Colo. 295, 12 Pac. 153, 59 Am. Rep. 144, (1885) 7 Pac. 295; De Witt *v.* Home Forum Ben. Order, 95 Wis. 305, 70 N. W. 476.

46. *Louisiana.*— Union Nat. Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800.

Michigan.— Moore *v.* Mutual Reserve Fund Life Assoc., 133 Mich. 526, 95 N. W. 573, holding, however, that waiver of the fact of former rejection will not be binding on the company if induced by false statements by the assured as to the cause of such rejection.

Missouri.— Carr *v.* Pacific Mut. L. Ins. Co., 100 Mo. App. 602, 75 S. W. 180.

New York.— Hackett *v.* Supreme Council C. B. L., 168 N. Y. 588, 60 N. E. 1112 [*affirming* 44 N. Y. App. Div. 524, 60 N. Y. Suppl. 806]; Singleton *v.* Prudential Ins. Co., 11 N. Y. App. Div. 403, 42 N. Y. Suppl. 446; Lanigan *v.* Prudential Ins. Co., 63 Hun 408, 18 N. Y. Suppl. 287; Koenig *v.* United L. Ins. Assoc., 16 Misc. 531, 38 N. Y. Suppl. 506.

Ohio.— Herbert *v.* Standard L., etc., Ins. Co., 23 Ohio Cir. Ct. 225.

Rhode Island.— O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834, 91 Am. St. Rep. 643.

See 28 Cent. Dig. tit. "Insurance," § 966 *et seq.*

47. **Knowledge of falsity of answers written in application by agent** see *supra*, IX, B, 4, d, (II).

48. Pomeroy *v.* Rocky Mountain Ins., etc., Inst., 9 Colo. 295, 12 Pac. 153, 59 Am. Rep. 144, (1885) 7 Pac. 295; Baltimore L. Ins. Co. *v.* Howard, 95 Md. 244, 52 Atl. 397. And see cases cited *supra*, XI, C, 1.

To charge the company with an officer's knowledge it must have come to him while in the discharge of his official duties. Sweet *v.* Citizens' Mut. Relief Soc., 78 Me. 541, 7 Atl. 394.

49. *Georgia.*— German-American Mut. Life Assoc. *v.* Farley, 102 Ga. 720, 29 S. E. 615.

Illinois.— New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89]; Globe Mut. L. Ins. Assoc. *v.* Ahern, 191 Ill. 167, 60 N. E. 906 [*affirming* 92 Ill. App. 326]; Germania L. Ins. Co. *v.* Koehler, 168 Ill. 293, 48 N. E. 297, 61 Am. St. Rep. 108; Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]; Ætna L. Ins. Co. *v.* Paul, 10 Ill. App. 431.

Indiana.— Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1; Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

Iowa.— Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473; Miller *v.* Mutual Ben. L. Ins. Co., 31 Iowa 216, 7 Am. Rep. 122.

Kentucky.— See Rogers *v.* Farmers' Mut. Aid Assoc., 106 Ky. 371, 50 S. W. 543, 20 Ky. L. Rep. 1925.

North Carolina.— Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

Ohio.— Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155.

Texas.— Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695.

Wisconsin.— Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207.

See 28 Cent. Dig. tit. "Insurance," § 968 *et seq.*

Contrary to the weight of authority it has been held that the company may rely on statements or warranties of the assured which are expressly made the foundation of the contract, notwithstanding the agent may have had knowledge of their falsity. Barteau *v.* Phœnix Mut. L. Ins. Co., 67 N. Y. 595; Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571; Sparrow *v.* Mutual Ben. L. Ins. Co., 22 Fed. Cas. No. 13,214.

Stipulation to contrary.— A stipulation in the policy that an agent's knowledge of the falsity of a representation shall not constitute a waiver is valid and binding (Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80. And see Hutchison *v.* Hartford L., etc., Ins. Co., (Tex. Civ. App. 1897) 39 S. W. 325), in the absence of statute provision to the contrary (Marston *v.* Kennebec Mut. L. Ins.

edge or notice to them is imputed to the company.[50] Knowledge of a clerk[51] or subagent[52] is imputed to the company under some circumstances; and a medical examiner acting for the company in determining the condition of the applicant's health is the agent of the company in such sense that his knowledge with reference to the actual condition of health of the applicant is the knowledge of the company.[53]

Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412).

If the agent and the applicant conspire to defraud the company, however, the agent's knowledge is not imputed to the company. Sprinkle *v.* Knights Templar, etc., Life Indemnity Co., 126 N. C. 678, 36 S. E. 112. And see New York L. Ins. Co. *v.* Hord, 77 S. W. 380, 25 Ky. L. Rep. 1219, 78 S. W. 207, 25 Ky. L. Rep. 1531; Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207.

50. Galbraith *v.* Arlington Mut. L. Ins. Co., 12 Bush (Ky.) 29; Vose *v.* Eagle L., etc., Ins. Co., 6 Cush. (Mass.) 42; Ash *v.* Fidelity Mut. Life Assoc., (Tex. Civ. App. 1901) 63 S. W. 944; U. S. Life Ins. Co. *v.* Smith, 92 Fed. 503, 34 C. C. A. 506. See, however, Rogers *v.* Farmers' Mut. Aid Assoc., 106 Ky. 371, 50 S. W. 543, 20 Ky. L. Rep. 1925; Continental L. Ins. Co. *v.* Chamberlain, 132 U. S. 304, 10 S. Ct. 87, 33 L. ed. 341.

51. Fitzgerald *v.* Hartford L., etc., Ins. Co., 56 Conn. 116, 13 Atl. 673, 17 Atl. 411, 7 Am. St. Rep. 288, holding that if an officer or agent refers an applicant to a clerk for information as to the validity of the policy, knowledge imparted to the clerk in connection with the transaction is notice to the company.

52. Continental L. Ins. Co. *v.* Goodall, 5 Ohio Dec. (Reprint) 160, 3 Am. L. Rec. 338, holding that a subagent employed by the regular agent to take an application is such agent of the company that knowledge on his part of other insurance will be imputed to the company.

53. Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73; Mystic Workers, etc., *v.* Troutman, 113 Ill. App. 84; Sternaman *v.* Metropolitan L. Ins. Co., 170 N. Y. 13, 62 N. E. 763, 88 Am. St. Rep. 625, 57 L. R. A. 318 [*reversing* 49 N. Y. App. Div. 473, 63 N. Y. Suppl. 674]; National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576.

It has been held, however, that where the examiner has nothing to do with the acceptance of risks, and his only duty is to take down answers of the applicant, his knowledge that the answers are untrue will not be imputed to the company. John Hancock Mut. L. Ins. Co. *v.* Houpt, 113 Fed. 572; Caruthers *v.* Kansas Mut. L. Ins. Co., 108 Fed. 487.

Knowledge acquired unofficially.—To charge the company with knowledge, the examiner must have acquired it in the performance of his official duties. National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576. Hence where the examiner acts for different companies, knowledge acquired by him as examiner of another company will not as a rule be imputed to the company issuing the policy on an application made through him (Foot *v.* Ætna L. Ins. Co., 61 N. Y. 571 [*affirming* 4 Daly 285]; New York Mut. L. Ins. Co. *v.* Nichols, (Tex. Civ. App. 1894) 24 S. W. 910); but it has been held that if the examiner has in mind at the time of accepting an application facts on which he rejected an application made by the same person to another company, this will impute the knowledge of those facts to the company for which he accepts the risk (Koenig *v.* United L. Ins. Assoc., 12 N. Y. App. Div. 454, 42 N. Y. Suppl. 752. *Contra*, see National Fraternity *v.* Karnes, *supra*).

Statements of the examiner as to the effect of other insurance are not binding on the company. Leonard *v.* State Mut. L. Assur. Co., 23 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 698.

Estoppel to dispute examiner's report.—The certificate of the examining physician of the company is evidence of its recitals and conclusive as to the state of health of applicant unless the opinion of the physician was influenced by fraudulent representations or concealment of material facts; and the company will not be allowed to prove that the physician was incompetent as he is the agent of the company. Holloman *v.* Life Ins. Co., 12 Fed. Cas. No. 6,623, 1 Woods 674. However, concealment or misrepresentations by the applicant in answers which are made warranties will render the policy void, even though the company's physician examines the applicant and reports favorably as to the matters about which the applicant has answered. Smith *v.* Ætna L. Ins. Co., 49 N. Y. 211 [*affirming* 5 Lans. 545]. Under the Iowa statute the company is estopped to set up as a defense that the insured was not in the state of health required by the company as reported by its medical examiner unless such report was secured by the fraud or deceit of the insured, that is, unless the medical examiner was misled or deceived by the fraudulent statements of the insured. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Peterson *v.* Des Moines Life Assoc., 115 Iowa 668, 87 N. W. 397; Brown *v.* Modern Woodmen of America, 115 Iowa 450, 88 N. W. 965; Metzradt *v.* Modern Brotherhood of America, 112 Iowa 522, 84 N. W. 498; Nelson *v.* Nederland L. Ins. Co., 110 Iowa 600, 81 N. W. 807; Stewart *v.* Equitable Mut. Life Assoc., 110 Iowa 528, 81 N. W. 782; Weimer *v.* Economic Life Assoc., 108 Iowa 451, 79 N. W. 123; Welch *v.* Union Cent. L. Ins. Co., 108

3. What Constitutes Knowledge or Notice. To constitute a waiver there must be actual knowledge on the part of the company or notice to it sufficient to charge it with knowledge as distinct from mere inference;[54] and knowledge that warranties are in part untrue will not prevent the company from relying on other warranties as to the untruthfulness of which it has no knowledge.[55] It has been held that the company is not chargeable with notice of facts stated in a former application made to it by the same applicant unless the later application refers to the former;[56] but that the company is chargeable with knowledge of the existence of a former policy issued by it to the applicant.[57]

D. Implied Waiver — 1. By Issuing Policy. The issuance of a policy with knowledge of the falsity of statements warranted to be true,[58] or with knowledge of a breach of any condition precedent to the taking effect of the policy, is a waiver of such defense;[59] and the same is true where the company, with knowledge of the

Iowa 224, 78 N. W. 853, 50 L. R. A. 774, 117 Iowa 394, 90 N. W. 828. Such estoppel relates not only to the condition of health of insured at the time the policy is issued, but to all matters inquired about bearing on the health and physical condition of the applicant as affecting the risk. Peterson *v.* Des Moines Life Assoc., *supra*. The medical examiner contemplated by this statute is the person who by the authority of the company makes the actual examination and report. Wood *v.* Farmers' Life Assoc., *supra*; Peterson *v.* Des Moines Life Assoc., *supra*.

54. O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834, 91 Am. St. Rep. 643; National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576; Burruss *v.* National Life Assoc., 96 Va. 543, 32 S. E. 49; Cable *v.* U. S. L. Ins. Co., 111 Fed. 19, 49 C. C. A. 216.

55. Moore *v.* Mutual Reserve Fund Life Assoc., 133 Mich. 526, 95 N. W. 573, holding that, although the company has knowledge of the falsity of statements, yet if reliance is placed on an explanation which is untrue there is no waiver.

56. Rhode *v.* Metropolitan L. Ins. Co., 132 Mich. 503, 93 N. W. 1076. And see Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894.

To the contrary it has been said that the company is chargeable with notice of a former application and examination forwarded to its general agent and not accepted. New York Mut. L. Ins. Co. *v.* Nichols, (Tex. Civ. App. 1894) 24 S. W. 910, 26 S. W. 998. And see O'Rourke *v.* John Hancock Mut. L. Ins. Co., 23 R. I. 457, 50 Atl. 834, 91 Am. St. Rep. 643, where there was no reference in one application to the other, but it was held that the company had notice by reason of the applicant's name, age, residence, and parents' names being the same.

57. Lanigan *v.* Prudential Ins. Co., 63 Hun (N. Y.) 408, 18 N. Y. Suppl. 287.

This is not true under all circumstances, however. Hood *v.* Prudential Ins. Co., 26 Pa. Super. Ct. 527.

58. Security Trust Co. *v.* Tarpey, 182 Ill. 52, 54 N. E. 1041 [*affirming* 80 Ill. App. 378]; Kelly *v.* Metropolitan L. Ins. Co., 15 N. Y. App. Div. 220, 44 N. Y. Suppl. 179.

Other existing insurance.— Issuing a policy with the knowledge of other existing insurance estops the company from relying upon misrepresentation as to such insurance. Hood *v.* Prudential Ins. Co., 13 Pa. Dist. 305, 29 Pa. Co. Ct. 654; Standard L., etc., Ins. Co. *v.* Davis, (Tex. Civ. App. 1898) 45 S. W. 826.

59. See cases cited *infra*, this note.

Failure to answer questions.— The issuance of a policy is a waiver of any objection to the application on account of failure of the applicant to answer the questions propounded therein. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; American L. Ins. Co. *v.* Mahone, 56 Miss. 180; Thies *v.* Kentucky Mut. L. Ins. Co., 13 Tex. Civ. App. 280, 35 S. W. 676; Phœnix Mut. L. Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644; Manhattan L. Ins. Co. *v.* Willis, 60 Fed. 236, 8 C. C. A. 594.

Failure to make application.— Invalidity of the policy resulting from the fact that insured had made no application for insurance is not waived by the issuance of a policy. McElwain *v.* Metropolitan L. Ins. Co., 33 N. Y. App. Div. 60, 53 N. Y. Suppl. 253. And see Wells *v.* Metropolitan L. Ins. Co., 19 N. Y. App. Div. 18, 46 N. Y. Suppl. 80 [*affirmed* in 163 N. Y. 572, 57 N. E. 1128]. *Compare supra*, II, B, 1, note 83.

Good health.— The condition that the policy shall not take effect unless the assured is at the time of its delivery in good health is one which is waived by the delivery of the policy with knowledge of applicant's ill health. Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Grier *v.* New York Mut. L. Ins. Co., 132 N. C. 542, 44 S. E. 28. And see *supra*, III, D, 3, b; IX, D, 7, a. But the giving of time within which to pay the premium and take the policy does not waive the requirement that the assured must be in good health when the policy was finally delivered. New York Mut. L. Ins. Co. *v.* Sinclair, 71 S. W. 853, 24 Ky. L. Rep. 1543.

Prepayment of first premium.— The company is estopped by delivering the policy from proving, for the purpose of avoiding the insurance, that the premium, the receipt of which is acknowledged in the policy, has not in fact been paid. Union L. Ins. Co. *v.* Winn, 87 Ill. App. 257. And see *supra*, III,

facts, issues a policy in favor of a person not entitled under its by-laws to become a beneficiary.[60]

2. By Inducing Insured to Commit a Forfeiture — a. In General. If the company through its officers or agents so acts as to induce conduct on the part of the insured constituting a breach of the conditions of the policy, it cannot avoid liability because of the breach.[61]

D, 3, a. So an agent by delivering the policy may waive prepayment in cash. Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041. And see *supra*, III, D, 3, a, (II).

Issuance of new policy as waiver of forfeiture for non-payment of premium on original policy see *supra*, X, C, 8, e, note 75.

60. Smith *v.* People's Mut. Ben. Soc., 64 Hun (N. Y.) 534, 19 N. Y. Suppl. 432.

61. *Alabama.*— Washburn *v.* Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011; Piedmont, etc., L. Ins. Co. *v.* Young, 58 Ala. 476, 29 Am. Rep. 770, holding that where assured had obtained what he believed to be a "participating" policy, and some time before the next premium fell due verbally notified the agent that he wished a paid-up policy, and the agent stated that it was all right and that he would attend to it, and several times afterward, being approached by the assured, said that it would be attended to, the company is estopped from saying that assured did not hold a participating policy, and that the one held by assured had by its terms been forfeited for non-payment of premiums.

California.— Knarston *v.* Manhattan L. Ins. Co., 124 Cal. 74, 56 Pac. 773.

District of Columbia.— Webster *v.* New England Mut. L. Ins. Co., 21 D. C. 227.

Illinois.— Bennett *v.* Union Cent. L. Ins. Co., 203 Ill. 439, 67 N. E. 971 [*reversing* 104 Ill. App. 402].

Michigan.— Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

New York.— Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 27 [*affirming* 2 Hun 616, 5 Thomps. & C. 193]; Kelly *v.* Security Mut. L. Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Suppl. 601; Marvin *v.* Universal L. Ins. Co., 16 Hun 494.

Wisconsin.— Guetzkow *v.* Michigan Mut. L. Ins. Co., 105 Wis. 448, 81 N. W. 652.

United States.— Provident Sav. L. Assur. Soc. *v.* Duncan, 115 Fed. 277, 53 C. C. A. 69; Robinson *v.* St. Louis Mut. L. Ins. Co., 20 Fed. Cas. No. 11,964.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.* See also *supra*, X, C, 8, d.

Contractual and statutory provisions.— An express stipulation that a forfeiture cannot be waived except by agreement signed in writing has reference only to express agreements to waive forfeiture, and do not preclude waiver by conduct on the part of the agents of the company. Metropolitan L. Ins. Co. *v.* Sullivan, 112 Ill. App. 500. And see *supra*, XI, B, 2. A waiver by extension of time of payment is not an alteration of the written contract which can be made only by writing under statutory provisions. Knarston *v.* Manhattan L. Ins. Co., 140 Cal. 57, 73 Pac. 740.

Prior oral agreement.—However, statements not amounting to fraud or mistake made by the agent during the negotiation for a policy cannot be shown to vary the terms of the written contract subsequently entered into. Wells *v.* Vermont L. Ins. Co., 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578, 88 Am. St. Rep. 208; Fowler *v.* Metropolitan L. Ins. Co., 116 N. Y. 389, 22 N. E. 576, 5 L. R. A. 805 [*reversing* 41 Hun 357]; Union Mut. L. Ins. Co. *v.* Mowry, 96 U. S. 544, 24 L. ed. 674.

Extension of time of payment will waive default in payment of premiums when originally due. Knarston *v.* Manhattan L. Ins. Co., 140 Cal. 57, 73 Pac. 740; Mills *v.* Home Ben. Life Assoc., 105 Cal. 232, 38 Pac. 723; Ætna L. Ins. Co. *v.* Sanford, 200 Ill. 126, 65 N. E. 661 [*affirming* 98 Ill. App. 376]; Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; John *v.* Southern Mut. L. Ins. Co., 3 Ky. L. Rep. 26; Dunn *v.* National L. Ins. Co., 69 N. H. 224, 39 Atl. 1075; De Frece *v.* National L. Ins. Co., 136 N. Y. 144, 32 N. E. 556 [*affirming* 64 Hun 635, 19 N. Y. Suppl. 8]; Homer *v.* Guardian Mut. L. Ins. Co., 67 N. Y. 478; Lantz *v.* Insurance Co., 25 Wkly. Notes Cas. (Pa.) 356; Murphy *v.* Southern L. Ins. Co., 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761; Battin *v.* Northwestern Mut. L. Ins. Co., 130 Fed. 874, 65 C. C. A. 358. But if the extension is on condition that there has been no alteration in the health of the assured in the meantime, the risk is on the insured pending the delay that he may change his health or die and the insurance be lost (Conway *v.* Phœnix Mut. L. Ins. Co., 140 N. Y. 79, 35 N. E. 420), and extension of time on a note given for the first premium does not waive prompt payment of subsequent premiums (Mobile L. Ins. Co. *v.* Pruett, 74 Ala. 487). An unaccepted proposal for extension, made before the premium falls due, will not relieve from the consequences of a default in payment when due. Manhattan L. Ins. Co. *v.* Savage, 63 S. W. 278, 23 Ky. L. Rep. 483; Ætna L. Ins. Co. *v.* Ragsdale, 95 Va. 579, 29 S. E. 328. The fact that the collector of a life insurance company called on insured for the premium after it was due, and, on being told that insured was out but had the money to pay the premium, said he would call again, did not show an extension of time of payment or a waiver of forfeiture, where the premium was never collected. Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1904) 84 S. W. 404. And the fact that insured construes the letter of an agent into an extension of time will not give it that effect, where it is not

b. Course of Business. If by its course of dealing with insured,[62] or by its general course of business known to him,[63] the company misleads him into believing that the strict terms of the policy as to payment of premiums will not be insisted upon, it cannot afterward take advantage of a forfeiture thus induced.

reasonably susceptible of such construction. Manhattan L. Ins. Co. *v.* Savage, 63 S. W. 278, 23 Ky. L. Rep. 483. Further as to extension of time see *supra*, X, C, 6, c.

Notice and demand as to premiums.— Assurance that a forfeiture will not be claimed until notice is given prevents the company from relying on forfeiture without the giving of such notice, although notice is not required by the terms of the contract (Fitzpatrick *v.* Mutual, etc., Benev. L. Ins. Assoc., 25 La. Ann. 443; Baker *v.* Michigan Mut. Protective Assoc., 118 Mich. 431, 76 N. W. 970; Carter *v.* Brooklyn L. Ins. Co., 110 N. Y. 15, 17 N. E. 396; True *v.* Bankers' Life Assoc., 78 Wis. 287, 47 N. W. 520), and an agreement to give notice will relieve insured from a forfeiture for non-payment of a premium of which no notice is given (Leslie *v.* Knickerbocker L. Ins. Co., 63 N. Y. 27 [*affirming* 2 Hun 616, 5 Thomps. & C. 193]. *Contra*, Union Mut. L. Ins. Co. *v.* Mowry, 96 U. S. 544, 24 L. ed. 674. And see Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663), and an agent authorized to collect premiums may bind the company by an assurance that personal demand will be made on insured for future premiums (Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34. See, however, Metropolitan L. Ins. Co. *v.* Hall, 104 Va. 572, 52 S. E. 345; Morey *v.* New York L. Ins. Co., *supra*). Duty to give notice in order to effect forfeiture for non-payment of premiums see *supra*, X, C, 6, d–i.

A refusal to reinstate on the ground that the policy has lapsed estops the company from insisting on default in payment of subsequent premiums. Te Bow *v.* Washington L. Ins. Co., 172 N. Y. 623, 65 N. E. 1123 [*affirming* 59 N. Y. App. Div. 310, 69 N. Y. Suppl. 289]. And see *supra*, X, C, 9, b.

A secret intention to insist on a forfeiture will not prevail against deliberate acts amounting to a waiver. Modern Woodmen of America *v.* Lane, 62 Nebr. 89, 86 N. W. 943.

Fault of company excusing non-payment or non-tender of premium see *supra*, X, C, 8, d.

62. *Illinois.*— Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544]; Ætna L. Ins. Co. *v.* Sanford, 98 Ill. App. 376 [appeal *dismissed* in 197 Ill. 310, 64 N. E. 377, and judgment *affirmed* in 200 Ill. 126, 65 N. E. 661].

Indiana.— National L. Maturity Ins. Co. *v.* Whitacre, 15 Ind. App. 506, 43 N. E. 905.

Kansas.— Mound City Mut. L. Ins. Co. *v.* Twining, 19 Kan. 349.

Missouri.— James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Bergmann *v.* St. Louis L. Ins. Co., 2 Mo. App. 262.

New York.— Dilleber *v.* Knickerbocker L. Ins. Co., 76 N. Y. 567 [*affirming* 7 Daly 540]; De Frece *v.* National L. Ins. Co., 136 N. Y. 144, 32 N. E. 556 [*affirming* 19 N. Y. Suppl. 8]; Buckbee *v.* U. S. Insurance, etc., Co., 18 Barb. Ch. 541.

Ohio.— Union Cent. L. Ins. Co. *v.* Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737, *semble*. See, however, Meyers *v.* Metropolitan L. Ins. Co., 7 Ohio S. & C. Pl. Dec. 573, 6 Ohio N. P. 34.

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; Megarge *v.* Insurance Co., 38 Leg. Int. 469.

Tennessee.— Ætna L. Ins. Co. *v.* Fallow, 110 Tenn. 720, 77 S. W. 937.

Texas.— Piedmont, etc., L. Ins. Co. *v.* Fitzgerald, 1 Tex. App. Civ. Cas. § 1345.

United States.— Hartford L., etc., Ins. Co. *v.* Unsell, 144 U. S. 439, 12 S. Ct. 671, 36 L. ed. 496 [*affirming* 32 Fed. 443]; New York L. Ins. Co. *v.* Eggleston, 96 U. S. 572, 24 L. ed. 841; Beatty *v.* Mutual Reserve Fund Life Assoc., 75 Fed. 65, 21 C. C. A. 227; Spoeri *v.* Massachusetts Mut. L. Ins. Co., 39 Fed. 752.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

However, a lenient course of dealing with insured does not constitute payment so as to serve as a basis for insisting on a paid-up policy for a portion of the amount. Union Cent. L. Ins. Co. *v.* Buxer, 62 Ohio St. 385, 57 N. E. 66, 49 L. R. A. 737. And see Bergmann *v.* St. Louis L. Ins. Co., 2 Mo. App. 262.

63. *Georgia.*— Cotton States L. Ins. Co. *v.* Lester, 62 Ga. 247, 35 Am. Rep. 122.

Illinois.— U. S. Life Ins. Co. *v.* Ross, 159 Ill. 476, 42 N. E. 859 [*reversing* 57 Ill. App. 98]; Home L. Ins. Co. *v.* Pierce, 75 Ill. 426.

Iowa.— Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34. See, however, Mandego *v.* Centennial Mut. L. Assoc., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877.

Michigan.— Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

Missouri.— Andrus *v.* Fidelity Mut. L. Ins. Assoc., 168 Mo. 151, 67 S. W. 582; Hanley *v.* Life Assoc. of America, 69 Mo. 380 [*affirming* 4 Mo. App. 253]; Thompson *v.* St. Louis Mut. Life Co., 52 Mo. 469; Wagamar *v.* Security Mut. L. Ins. Co., 110 Mo. App. 616, 85 S. W. 117; Goedecke *v.* Metropolitan L. Ins. Co., 30 Mo. App. 601.

New Hampshire.— Appleton *v.* Phœnix Mut. L. Ins. Co., 59 N. H. 541, 47 Am. Rep. 220.

New York.— Kolgers *v.* Guardian L. Ins. Co., 10 Abb. Pr. N. S. 176 [*reversed* on another ground in 57 N. Y. 638].

Pennsylvania.— Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

United States.— Phœnix Mut. L. Ins. Co. *v.* Doster, 106 U. S. 30, 1 S. Ct. 18, 27 L. ed.

3. By Failing to Assert Forfeiture. A breach of warranty must be insisted on by the company when insured demands performance, or it is waived;[64] but mere inaction on the part of the company after receiving information of facts giving it the right to avoid the policy will not constitute a waiver of such right.[65] The failure of the company to return overdue premium notes[66] or to demand a

65; Modern Woodmen of America *v.* Tevis, 111 Fed. 113, 49 C. C. A. 256. See, however, Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663.

See 28 Cent. Dig. tit. "Insurance," § 1026 *et seq.*

A local custom in a particular city of receiving overdue premiums will not constitute a waiver of provisions of the policy as to forfeiture. Haupt *v.* Phœnix Mut. L. Ins. Co., 110 Ga. 146, 35 S. E. 342.

Occasional indulgences. — A permanent waiver will not be inferred from occasional indulgences shown to assured. Richardson *v.* Kentucky Mut. L. Ins. Co., 18 S. W. 165, 14 Ky. L. Rep. 187; Parker *v.* Knights Templars, etc., Life Indemnity Co., 70 Nebr. 268, 97 N. W. 281; Marston *v.* Massachusetts L. Ins. Co., 59 N. H. 92; Schmertz *v.* U. S. Life Ins. Co., 118 Fed. 250, 55 C. C. A. 104; Smith *v.* New England Mut. L. Ins. Co., 63 Fed. 769, 11 C. C. A. 411.

The course of business must be such as to create the belief on the part of assured that the strict conditions of the policy have been waived (Winindger *v.* Globe Mut. L. Ins. Co., 30 Fed. Cas. No. 17,874, 3 Hughes 257), and such as to induce the act or omission causing the forfeiture (Globe Mut. L. Ins. Co. *v.* Wolff, 95 U. S. 326, 24 L. ed. 387 [*reversing* 9 Fed. Cas. No. 5,214]). So if acceptances of past-due payments have been by way of favors (Easley *v.* Valley Mut. Life Assoc., 91 Va. 161, 21 S. E. 235), or expressly at the option of the company (New York Mut. L. Ins. Co. *v.* Girard L., etc., Co., 100 Pa. St. 172), they afford no excuse for subsequent delinquency.

Usage of the company to give notice notwithstanding strict provisions for forfeiture without notice may be shown as establishing a condition on which the insured had the right to rely. Suess *v.* Imperial L. Ins. Co., 86 Mo. App. 10; Atty.-Gen. *v.* Continental L. Ins. Co., 33 Hun (N. Y.) 138; Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806 [*affirming* 9 Ohio Dec. (Reprint) 583, 15 Cinc. L. Bul. 180]; Tullidge *v.* National L. Ins. Co., 39 Ohio St. 240 [*affirming* 8 Ohio Dec. (Reprint) 222, 6 Cinc. L. Bul. 341]; Hartford Ins. Co. *v.* Hyde, 101 Tenn. 396, 48 S. W. 968. But to the contrary, holding that a usage to give notice is a favor only and not a waiver of the specific terms of the contract providing for forfeiture, see Mandego *v.* Centennial Mut. Life Assoc., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877 [apparently *overruling* Mayer *v.* Chicago Mut. L. Ins. Co., 38 Iowa 304, 18 Am. Rep. 34]; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765 [*affirming* 23 Fed. Cas. No. 13,964, 2 Woods 547]; Haydel *v.* Mutual Reserve Fund Life Assoc., 104 Fed. 718, 44 C. C. A. 169; Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663; Redmond *v.* Canadian Mut. Aid Assoc., 18 Ont. App. 335; Campbell *v.* National L. Ins. Co., 24 U. C. C. P. 133. But a voluntary custom to notify insured persons of the time for payment of premiums does not waive the right to insist on a forfeiture for non-payment in accordance with the terms of the contract. Mandego *v.* Centennial Mut. Life Assoc., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877. And see Morey *v.* New York L. Ins. Co., 17 Fed. Cas. No. 9,795, 2 Woods 663. Evidence of such waiver is said not to be admissible unless it is shown that the notice which it was the custom to give was purposely omitted with the design of working a forfeiture. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15. So a usage to collect through an agent may be shown to defeat a forfeiture where no notice of change of the usage (Rutherford *v.* Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202; Sick *v.* Covenant Mut. L. Ins. Co., 79 Mo. App. 609; Union Cent. L. Ins. Co. *v.* Pottker, 33 Ohio St. 459, 31 Am. Rep. 555) or change of agent (Elgutter *v.* Mutual Reserve Fund Life Assoc., 52 La. Ann. 1733, 28 So. 289; Meyer *v.* Knickerbocker L. Ins. Co., 73 N. Y. 516, 29 Am. Rep. 200 [*affirming* 51 How. Pr. 263]; Smith *v.* Union Cent. L. Ins. Co., 7 Ohio Dec. (Reprint) 188, 1 Cinc. L. Bul. 284; Briggs *v.* National L. Ins. Co. 11 Fed. 458), is given.

64. National L. Ins. Co. *v.* Minch, 53 N. Y. 144.

65. Ashbrook *v.* Phœnix Mut. L. Ins. Co., 94 Mo. 72, 6 S. W. 462; Adreveno *v.* Mutual Reserve Fund Life Assoc., 38 Fed. 806.

However, the failure to notify a creditor for whose benefit insurance was effected that the company intended to avoid the policy because of false answers in the application was held to be a waiver as to the creditor of the right to terminate the insurance. Union Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800.

66. New York L. Ins. Co. *v.* Warren Deposit Bank, 75 S. W. 234, 25 Ky. L. Rep. 325; Manhattan L. Ins. Co. *v.* Savage, 63 S. W. 278, 23 Ky. L. Rep. 483; Sharpe *v.* New York L. Ins. Co., 5 Nebr. (Unoff.) 278, 98 N. W. 66; How *v.* Union Mut. L. Ins. Co., 80 N. Y. 32. See, however, Johnson *v.* Southern Mut. L. Ins. Co., 79 Ky. 403.

Waiver as against beneficiary. — It has been held, however, that retaining the premium notes after default without taking any action to dissolve the contract continues it in force

return of the policy[67] does not waive default in payment of the notes; nor does the company waive a forfeiture by recognizing the right to reinstatement.[68] It constitutes a waiver, however, where the company, with knowledge of the facts, admits that the policy subsists or that it is liable thereunder,[69] and by insisting on but one of several known grounds of forfeiture the company waives the right to avoid the policy on the other grounds.[70]

4. By Demanding or Accepting Premiums or Assessments — a. Forfeiture in General. If the company, with knowledge of facts giving it a right to avoid the policy,[71] accepts a premium or assessment, it thereby waives the right to forfeit the policy.[72] The company may, however, avoid this rule by accepting

as to a beneficiary having no knowledge of the default. Trager *v.* Louisiana Equitable L. Ins. Co., 31 La. Ann. 235. *Compare* Union Nat. Bank *v.* Manhattan L. Ins. Co., 52 La. Ann. 36, 26 So. 800.

The fact that the insurer holds the policy as bailee of the insured is not a waiver of due payment of premiums. Howard *v.* Mutual Ben. L. Ins. Co., 6 Mo. App. 577.

Retention of premiums or assessments as waiver see *infra*, XI, D, 4, a.

67. Manhattan L. Ins. Co. *v.* Savage, 63 S. W. 278, 23 Ky. L. Rep. 483, where insured has a right to reinstatement on certain conditions.

68. Blake *v.* National L. Ins. Co., 123 Cal. 470, 56 Pac. 101; Banholzer *v.* New York L. Ins. Co., 74 Minn. 387, 77 N. W. 295, 78 N. W. 244; Linn *v.* New York L. Ins. Co., 78 Mo. App. 192.

69. Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922; Rowe *v.* Brooklyn L. Ins. Co., 16 Misc. (N. Y.) 323, 38 N. Y. Suppl. 621; North Carolina Mut. L. Ins. Co. *v.* Powell, 71 N. C. 389; New York Mut. L. Ins. Co. *v.* Young, 23 Wall. (U. S.) 85, 23 L. ed. 152 [*affirming* 30 Fed. Cas. No. 18,168].

By offering to pay a part of a claim the company does not waive a complete defense, however. Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

Collecting assessments to pay claim.— The fact that a mutual life insurance company has realized the money with which to make payment of a member's claim makes it none the less the duty of the company to resist payment if the claim is illegal for falsity of representations. Mayer *v.* Equitable Reserve Fund Life Assoc., 42 Hun (N. Y.) 237.

70. Home L. Ins. Co. *v.* Pierce, 75 Ill. 426; Moore *v.* National Acc. Soc., 38 Wash. 31, 80 Pac. 171.

However, by claiming that the contract never became binding on account of breach of conditions at its inception, the company does not waive the defense of subsequent breaches (McCollum *v.* New York Mut. L. Ins. Co., 55 Hun (N. Y.) 103, 8 N. Y. Suppl. 249 [*affirmed* in 124 N. Y. 642, 27 N. E. 412]), and a suicide clause under which the company is liable only for the premiums paid is not waived by insisting that the policy has been canceled (Scherar *v.* Prudential Ins. Co., 63 Nebr. 530, 88 N. W. 687, 56 L. R. A. 611).

71. See *supra*, XI, A, 2.

72. *Connecticut.*—Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490; Fitzgerald *v.* Hartford L., etc., Ins. Co., 56 Conn. 116, 13 Atl. 673, 7 Am. St. Rep. 288, 17 Atl. 411.

Georgia. — German-American Mut. Life Assoc. *v.* Farley, 102 Ga. 720, 29 S. E. 615.

Illinois.— Northwestern Mut. L. Ins. Co. *v.* Amerman, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799 [*reversing* 16 Ill. App. 528]; Metropolitan L. Ins. Co. *v.* Sullivan, 112 Ill. App. 500; Metropolitan L. Ins. Co. *v.* Quandt, 69 Ill. App. 649; Mutual Ben. Life Assoc. of America *v.* Coats, 48 Ill. App. 185.

Kansas.— Johnson *v.* Massachusetts Ben. Assoc., 9 Kan. App. 238, 59 Pac. 669.

Missouri.— Summers *v.* Fidelity Mut. Aid Assoc., 84 Mo. App. 605.

Nebraska.— Modern Woodmen of America *v.* Colman, 68 Nebr. 660, 94 N. W. 814, 96 N. W. 154.

New York.— Magner *v.* Mutual Life Assoc., 17 N. Y. App. Div. 13, 44 N. Y. Suppl. 862 [*affirmed* in 162 N. Y. 657, 57 N. E. 1116]; Singleton *v.* Prudential Ins. Co., 11 N. Y. App. Div. 403, 42 N. Y. Suppl. 446; Britton *v.* Mutual Ben. L. Ins. Co., 3 Thomps. & C. 442; Flannigan *v.* Prudential Ins. Co., 20 Misc. 539, 46 N. Y. Suppl. 687; O'Rourke *v.* John Hancock Mut. L. Ins. Co., 10 Misc. 405, 31 N. Y. Suppl. 130, 9 Misc. 198, 30 N. Y. Suppl. 215.

North Dakota.— Thompson *v.* Travelers' Ins. Co., 11 N. D. 274, 91 N. W. 75.

Tennessee.—Chicago Guaranty Fund Life Soc. *v.* Ford, 104 Tenn. 533, 58 S. W. 239.

Texas.— Ætna L. Ins. Co. *v.* Hanna, 81 Tex. 487, 17 S. W. 35; Morris *v.* Travelers' Ins. Co., (Civ. App. 1897) 43 S. W. 898.

United States.— Cotten *v.* Fidelity, etc., Co., 41 Fed. 506; Watson *v.* Centennial Mut. Life Assoc., 21 Fed. 698.

See 28 Cent. Dig. tit. "Insurance," § 1041 *et seq.*

Breach of condition as to residence or travel.— Accepting premiums with knowledge of residence or travel in prohibited territory is a waiver of the breach of condition. Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244; Germania L. Ins. Co. *v.* Koehler, 63 Ill. App. 188; Germania Ins. Co. *v.* Rudwig, 80 Ky. 223, 3 Ky. L. Rep. 712; Schmidt *v.* Charter Oak L. Ins. Co., 2 Mo. App. 339. See, however, Garber *v.* Globe Mut. L. Ins. Co., 95 U. S. 326, 24 L. ed. 387 (*reversing* 9 Fed. Cas. No. 5,214].

the payments conditionally;[73] and the retention of premiums with knowledge acquired subsequently to their payment of a breach of condition existing at the time of payment will not constitute a waiver.[74]

b. Forfeiture For Non-Payment of Premiums or Assessments[75] — (i) *In General.* The acceptance of a premium or assessment is a waiver of forfeiture on account of a default in not paying it in due time;[76] but by accepting one instalment of premium after it has become due the company does not waive a default

False statements as to age.— The fact that a false statement has been made as to the age of applicant affecting his classification is waived where with knowledge of the misstatement the company continues to collect assessments in accordance with the classification made. Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13; Hemmings *v.* Sceptre Life Assoc., [1905] 1 Ch. 365, 74 L. J. Ch. 231, 92 L. T. Rep. N. S. 221, 21 T. L. R. 207.

False statements as to health, habits, and occupation.— The rule stated in the text is applicable to acceptance of premiums with knowledge of false statements as to health, habits, and occupation. McGurk *v.* Metropolitan L. Ins. Co., 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563; Continental L. Ins. Co. *v.* Thoena, 26 Ill. App. 495; Hilt *v.* Metropolitan L. Ins. Co., 110 Mich. 517, 68 N. W. 300; Silk *v.* Mutual Reserve Fund Life Assoc., 159 Pa. St. 625, 28 Atl. 445; Northwestern Mut. L. Ins. Co. *v.* Freeman, 19 Tex. Civ. App. 632, 47 S. W. 1025; Phœnix Mut. L. Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644. And see Metropolitan L. Ins. Co. *v.* Anderson, 79 Md. 375, 29 Atl. 606, where a misstatement as to cause of death of members of assured's family was thus waived.

The company is estopped to cancel the policy after accepting premiums until the insured has reached such physical condition that he cannot obtain desirable insurance in any other reputable company. Mutual Ben. L. Ins. Co. *v.* Robinson, 54 Fed. 580.

73. Northwestern Mut. L. Ins. Co. *v.* Amerman, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799 [*reversing* 16 Ill. App. 528], holding that if the payment is made and accepted with the mutual understanding that there is an existing occupation which so long as it continues renders the policy void, the acceptance of the premium is not a waiver of such breach. And see *infra*, XI, D, 4, b, (II).

74. Harris *v.* Equitable L. Assur. Soc., 64 N. Y. 196 [*affirming* 6 Thomps. & C. 108]; Thompson *v.* Travelers' Ins. Co., 11 N. D. 274, 91 N. W. 75; Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476; Austin *v.* Mutual Reserve Fund Life Assoc., 132 Fed. 555; Mutual L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154; McConnell *v.* Provident Sav. L. Assur. Soc., 92 Fed. 769, 34 C. C. A. 663.

However, a delay in tendering back premiums, or a failure to tender them back, may be such as to defeat the company's right to rescind the contract. Floyd *v.* Prudential Ins. Co., 72 Mo. App. 455 (decided under a statute); Home Mut. L. Assoc. *v.* Riel, 1 Mona. (Pa.) 615. And see Baker *v.* New York L. Ins. Co., 83 Fed. 647, 27 C. C. A. 658 [*affirming* 77 Fed. 550].

Retention of premium notes as waiver see *supra*, XI, D, 3.

75. Authority of agent to accept overdue payment see *supra*, XI, B, 3.

Retention of premium note as waiving forfeiture see *supra*, XI, D, 3.

Retention of premiums or assessments as waiving forfeiture see *supra*, XI, D, 4, a.

Waiver of condition as to prepayment of premium see *supra*, III, D, 3.

76. *District of Columbia.*—United Security L. Ins., etc., Co. *v.* Bond, 16 App. Cas. 579.

Georgia.— Massachusetts Ben. L. Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Piedmont, etc., L. Ins. Co. *v.* Lester, 59 Ga. 812; American L. Ins. Co. *v.* Green, 57 Ga. 469; Georgia Masonic Mut. L. Ins. Co. *v.* Gibson, 52 Ga. 640.

Iowa.— Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73.

Kansas.— Bingler *v.* Mutual Ben. L. Ins. Co., 10 Kan. App. 6, 61 Pac. 673.

Maine.— Williams *v.* Maine State Relief Assoc., 89 Me. 158, 36 Atl. 63.

New York.— Ryer *v.* Prudential Ins. Co., 85 N. Y. App. Div. 7, 82 N. Y. Suppl. 971; Arnott *v.* Prudential Ins. Co., 63 Hun 628, 17 N. Y. Suppl. 710.

Wisconsin.— McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233.

United States.— Globe Mut. L. Ins. Co. *v.* Wolff, 95 U. S. 326, 24 L. ed. 387.

See 28 Cent. Dig. tit. "Insurance," § 1056 *et seq.*

Acceptance of payment of a premium note after maturity is a waiver of default on account of non-payment of such note when due. Union Cent. L. Ins. Co. *v.* Wilkes, (Tex. Civ. App. 1898) 47 S. W. 546.

Part payment accepted by the company after maturity waives forfeiture. Griffin *v.* Prudential Ins. Co., 43 N. Y. App. Div. 499, 60 N. Y. Suppl. 79; New York L. Ins. Co. *v.* Smith, (Tex. Civ. App. 1897) 41 S. W. 680.

Payment by crediting dividends.— If the company elects to credit a dividend on the premium the policy continues in force, although the company could not have been compelled thus to apply the dividend. Ætna L. Ins. Co. *v.* Hartley, 67 S. W. 19, 68 S. W. 1081, 24 Ky. L. Rep. 57.

Payment by note, check, or order.— The acceptance of an order (Pacific Mut. L. Ins.

as to a subsequent instalment.[77] A default is also waived by receiving subsequent premiums or assessments from a delinquent policy-holder.[78] Indeed a demand of a premium or assessment on account of which a forfeiture might be claimed or an attempt to collect it is a waiver of the forfeiture, for it is a recognition of the continuance of the contract;[79] but a mere promise to accept an overdue premium if paid within a given time is not sufficient of itself to revive the policy, being without consideration;[80] nor is a promise to call again for a delinquent premium.[81]

(II) *Conditional Acceptance of Premiums or Assessments.*[82] The acceptance of a premium or assessment, in order to constitute a waiver of a default, must be unconditional. Hence if the money is accepted on a condition, the continuance of the policy in force depends upon a fulfilment of the condition,[83] unless the company subsequently waives it.[84] Thus the acceptance or retention of premiums after forfeiture may be on the condition that the insured

Co. *v.* Walker, 67 Ark. 147, 53 S. W. 675) or check (Hollowell *v.* Virginia L. Ins. Co., 126 N. C. 398, 35 S. E. 616) in payment of a premium waives forfeiture for non-payment. So the acceptance of a note is a waiver (Neal *v.* Gray, 124 Ga. 510, 52 S. E. 622), but the forfeiture may be had on non-payment of the note in accordance with its conditions (Fidelity Mut. L. Ins. Co. *v.* Price, 117 Ky. 25, 77 S. W. 384, 25 Ky. L. Rep. 1148; Hastings *v.* Brooklyn L. Ins. Co., 63 Hun (N. Y.) 624, 17 N. Y. Suppl. 333; Wood *v.* Confederation L. Ins. Co., 2 N. Brunsw. E. 217). See *supra*, X, C, 2.

77. Collins *v.* Metropolitan L. Ins. Co., 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578.

78. Metropolitan L. Ins. Co. *v.* Mulleady, 53 S. W. 282, 21 Ky. L. Rep. 879; De Frece *v.* National L. Ins. Co., 136 N. Y. 144, 32 N. E. 556 [*affirming* 19 N. Y. Suppl. 8]; Butler *v.* American Popular L. Ins. Co., 42 N. Y. Super. Ct. 342; Com. *v.* Provident Life Assoc., 163 Pa. St. 374, 30 Atl. 163.

Premiums earned or assessments made before default.— However, the company may insist on payment of premiums earned before the forfeiture without waiving such forfeiture. Union Cent. L. Ins. Co. *v.* Wilkes, 92 Tex. 468, 49 S. W. 1038 [*reversing* (Civ. App. 1898) 47 S. W. 546]; Union Cent. L. Ins. Co. *v.* Chowning, 8 Tex. Civ. App. 455, 28 S. W. 117; Laughlin *v.* Fidelity Mut. Life Assoc., 8 Tex. Civ. App. 448, 28 S. W. 411. And this is true as to assessments in a mutual company for losses happening before the assessment is made. Mandego *v.* Centennial Mut. Life Assoc., 64 Iowa 134, 17 N. W. 656, 19 N. W. 877.

Non-waiver stipulation.— A stipulation in a notice of assessment that it is not to be held a waiver of any existing forfeiture for non-payment by the insured of previous assessments is ineffective. Beatty *v.* Mutual Reserve Fund Life Assoc., 75 Fed. 65, 21 C. C. A. 227.

79. *California.*— Murray *v.* Home Ben. Life Assoc., 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133, 105 Cal. 232, 38 Pac. 723.

Illinois.— Chicago L. Ins. Co. *v.* Warner, 80 Ill. 410.

Indiana.— Union Cent. L. Ins. Co. *v.* Jones, 17 Ind. App. 592, 47 N. E. 342; Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Kentucky.— Union Cent. L. Ins. Co. *v.* Spinks, 119 Ky. 261, 83 S. W. 615, 26 Ky. L. Rep. 1205, 84 S. W. 1160, 27 Ky. L. Rep. 325, 69 L. R. A. 264; Moreland *v.* Union Cent. L. Ins. Co., 104 Ky. 129, 46 S. W. 516, 20 Ky. L. Rep. 432; Johnson *v.* Southern Mut. L. Ins. Co., 79 Ky. 403; Union Cent. L. Ins. Co. *v.* Moreland, 56 S. W. 653, 22 Ky. L. Rep. 14; Union Cent. L. Ins. Co. *v.* Duvall, 46 S. W. 518, 20 Ky. L. Rep. 441.

Ohio.— Swander *v.* Northern Cent. L. Ins. Co., 25 Ohio Cir. Ct. 3.

Texas.— National L. Ins. Co. *v.* Reppond, (Civ. App. 1904) 81 S. W. 1012.

See 28 Cent. Dig. tit. "Insurance," § 1056 *et seq.*

80. Lantz *v.* Vermont L. Ins. Co., 139 Pa. St. 546, 21 Atl. 80, 23 Am. St. Rep. 202, 10 L. R. A. 577. And see Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513.

81. Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513. See *supra*, XI, D, 2.

82. **Conditions of reinstatement** see *supra*, X, C, 9, b, (II).

83. La Société Bienveillante St. Roch *v.* Moisan, 7 Quebec Q. B. 128 [*reversing* 12 Quebec Super. Ct. 189]. And see cases cited *infra*, this note *et seq.*

Acceptance by agent subject to company's approval.— The agent may accept a premium after default to be held until the company determines whether it will issue a renewal certificate, without such acceptance being a waiver. Lamb *v.* Prudential Ins. Co., 22 N. Y. App. Div. 552, 48 N. Y. Suppl. 123; Regan *v.* Prudential Ins. Co., 33 Misc. (N. Y.) 78, 67 N. Y. Suppl. 197 [*reversing* 65 N. Y. Suppl. 1143]; McGowan *v.* Charter Oak L. Ins. Co., 16 Fed. Cas. No. 8,807.

A condition cannot be imposed after payment has been accepted unconditionally.— Ætna L. Ins. Co. *v.* Sanford, 98 Ill. App. 376 [appeal *dismissed* in 197 Ill. 310, 64 N. E. 377, and judgment *affirmed* in 200 Ill. 126, 65 N. E. 661]; Bingler *v.* Mutual Ben. L. Ins. Co., 10 Kan. App. 6, 61 Pac. 673; True *v.* Minnesota Bankers' Life Assoc., 78 Wis. 287, 47 N. W. 520.

84. Baltimore L. Ins. Co. *v.* Howard, 95 Md. 244, 52 Atl. 397 (holding that the unconditional acceptance of a subsequent

is then in good health,[85] or that a medical certificate of good health be furnished,[86] in which case there is no waiver unless insured is in good health and he furnishes the certificate.

5. By Negotiating For Settlement or Requiring Proofs of Death. If, with notice of facts entitling it to avoid the policy,[87] the company enters into negotiations for a settlement,[88] or requires the furnishing of proofs of death at some trouble and expense,[89] it is estopped from insisting on a forfeiture.

E. Provisions as to Non-Forfeiture and Incontestability — 1. Non-Forfeiture For Default in Payment of Premiums. A non-forfeiture clause providing for paid-up insurance in proportion to the premiums paid before default[90] does not preclude a forfeiture of the original policy for default after payment of the first premium,[91] but merely entitles insured to paid-up insurance which is non-forfeitable.[92] The provision for paid-up insurance controls other stipulations in the policy as to absolute forfeiture for non-payment,[93] and also provisions as to forfeiture for non-payment of premium notes or interest;[94] and a policy distinctly

premium is a waiver of the previous condition); McQuillan *v.* Mutual Reserve Fund Life Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233; Rasmusen *v.* New York L. Ins. Co., 91 Wis. 81, 64 N. W. 301 (both holding that the condition is waived where the premium is retained for an unreasonable time after non-compliance with the condition).

However, a subsequent assessment or receipt of premiums after a conditional waiver will not constitute in itself a waiver if compliance with the condition is still insisted upon. Stiepel *v.* German American Mut. Life Assoc., 55 Mo. App. 224; Mutual Protection L. Ins. Co. *v.* Laury, 84 Pa. St. 43; Mutual Reserve Fund Life Assoc. *v.* Lovenberg, 24 Tex. Civ. App. 355, 59 S. W. 314.

85. *Iowa.*— Servoss *v.* Western Mut. Aid Soc., 67 Iowa 86, 24 N. W. 604.

New York.— Marvin *v.* Universal L. Ins. Co., 85 N. Y. 278, 39 Am. Rep. 657 [*affirming* 16 Hun 494].

Pennsylvania.— Girard L. Ins. Co. *v.* New York Mut. L. Ins. Co., 86 Pa. St. 236; Sydnor *v.* Metropolitan L. Ins. Co., 26 Pa. Super. Ct. 521.

Rhode Island.— Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513.

United States.— Hartford L., etc., Ins. Co. *v.* Unsell, 144 U. S. 439, 12 S. Ct. 671, 36 L. ed. 496 [*affirming* 32 Fed. 443].

See 28 Cent. Dig. tit. "Insurance," § 1066.

86. *California.*— Nielsen *v.* Provident Sav. L. Assur. Soc., (1901) 66 Pac. 663.

Kentucky.— Fidelity Mut. L. Ins. Co. *v.* Price, 117 Ky. 25, 77 S. W. 384, 25 Ky. L. Rep. 1148.

New York.— Ronald *v.* Mutual Reserve Fund Life Assoc., 132 N. Y. 378, 30 N. E. 739 [*affirming* 10 N. Y. Suppl. 632]; Bradley *v.* John Hancock Mut. L. Ins. Co., 20 N. Y. App. Div. 22, 46 N. Y. Suppl. 627; Peacock *v.* New York L. Ins. Co., 1 Bosw. 338 [*affirmed* in 20 N. Y. 293].

Texas.— New York L. Ins. Co. *v.* Scott, 23 Tex. Civ. App. 541, 57 S. W. 677.

Wisconsin.— Rockwell *v.* Mutual L. Ins. Co., 20 Wis. 335.

United States.— Union Cent. L. Ins. Co. *v.* Berlin, 101 Fed. 673, 41 C. C. A. 592.

See 28 Cent. Dig. tit. "Insurance," § 1066.

87. See *supra*, XI, A, 2.

88. Mutual Ben. L. Ins. Co. *v.* Lehman, 132 Ala. 640, 32 So. 733; Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; New York L. Ins. Co. *v.* Baker, 83 Fed. 647, 27 C. C. A. 658 [*affirming* 77 Fed. 550].

89. Burnham *v.* Interstate Casualty Co., 116 Mich. 142, 75 N. W. 445; Kidder *v.* Knights Templars, etc., Life Indemnity Co., 94 Wis. 538, 69 N. W. 364.

If the company does not ask for proofs of death, and notifies the beneficiary that it will contest payment, it does not waive a forfeiture by receiving proofs of death. Sharpe *v.* Commercial Travelers' Mut. Acc. Assoc., 139 Ind. 92, 37 N. E. 353.

90. See *supra*, X, C, 9, c, (IV).

91. Mound City Mut. L. Ins. Co. *v.* Huth, 49 Ala. 529.

92. Gates *v.* Home Mut. L. Ins. Co., 5 Ohio Dec. (Reprint) 313, 4 Am. L. Rec. 395. And see Mound City Mut. L. Ins. Co. *v.* Huth, 49 Ala. 529.

Right to paid-up policy after death.—Where an insurance policy provides that "if after having received not less than three annual payments this policy shall be surrendered while in force, a new policy will be issued for the whole amount of even dollars of premium received by the company," the stipulation that the surrender of the policy should be made while in force is a condition precedent to the issue of a paid-up policy or the right to demand one, and it is too late to demand a paid-up policy after the death of the insured, the policy having been abandoned more than a year before that time by the non-payment of the premium. Koehler *v.* Phœnix Mut. L. Ins. Co., 4 Ky. L. Rep. 903.

93. Southern Mut. L. Ins. Co. *v.* Montague, 5 Ky. L. Rep. 515.

94. Tutt *v.* Covenant Mut. L. Ins. Co., 19 Mo. App. 677; Fithian *v.* Northwestern L. Ins. Co., 4 Mo. App. 386. And see Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358, holding that non-payment of a premium note containing a forfeiture clause forfeits the general policy but not the contract of paid-up insurance based on premiums already paid.

made non-forfeitable in part will not be controlled by any provisions in the application as to forfeiture.[95]

2. INCONTESTABILITY. A clause, now often inserted in policies, that after being in force a specified time they shall not be disputed or shall be incontestable precludes any defense after the stipulated period on account of false statements which were warranted to be true,[96] even though they were made fraudulently.[97]

To the contrary it has been said that a non-forfeiture provision as to premiums is not applicable to stipulations for forfeiture in notes taken in payment of premiums. Insurance Co. *v.* Robinson, 40 Ohio St. 270; Nettleton *v.* St. Louis L. Ins. Co., 18 Fed. Cas. No. 10,128, 7 Biss. 293.

95. Chase *v.* Phœnix Mut. L. Ins. Co., 67 Me. 85.

96. *Georgia.*— Northwestern L. Ins. Co. *v.* Montgomery, 116 Ga. 799, 43 S. E. 79; Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.

Missouri.— Williams *v.* St. Louis L. Ins. Co., 189 Mo. 70, 87 S. W. 499.

New York.— Vetter *v.* Massachusetts Nat. Life Assoc., 29 N. Y. App. Div. 72, 51 N. Y. Suppl. 393.

Texas.— Franklin Ins. Co. *v.* Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014.

Wisconsin.— Patterson *v.* National Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 69 Am. St. Rep. 899, 42 L. R. A. 253.

United States.— Austin *v.* Mutual Reserve Fund Life Assoc., 132 Fed. 555.

England.— Wood *v.* Dwarris, 11 Exch. 493, 25 L. J. Exch. 129, 4 Wkly. Rep. 262.

The clause usually contains exceptions in favor of certain defenses (Wheelton *v.* Hardisty, 8 E. & B. 232, 26 L. J. Q. B. 265, 5 Wkly. Rep. 784, 92 E. C. L. 232), such as the breach of promissory stipulations entered into by the insured (Vetter *v.* Massachusetts Nat. Life Assoc., 29 N. Y. App. Div. 72, 51 N. Y. Suppl. 393).

Assignment of policy.— The clause does not apply to defenses based on an assignment of the policy (Clement *v.* New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 70 Am. St. Rep. 650, 42 L. R. A. 247, where the assignee had no insurable interest in the life); nor does it cut off the right of the company to set up an assignment of the policy to a creditor as a partial defense under a clause preventing recovery of the excess over the debt due the creditor and the premiums paid (McQuillan *v.* Mutual Reserve Fund L. Assoc., 112 Wis. 665, 87 N. W. 1069, 88 N. W. 925, 88 Am. St. Rep. 986, 56 L. R. A. 233).

Correction of policy as to amount of insurance.— Where the policy states the amount of the insurance to be a certain sum, "subject to correction for misstatement of age," the incontestability clause does not preclude a reduction of the company's liability to the amount purchased by the paid-in premiums based on insured's true age. Doll *v.* Prudential Ins. Co., 21 Pa. Super. Ct. 434.

Non-payment of premiums.— The clause does not preclude the company from disputing liability or declaring the policy forfeited for non-payment of premiums after the period of incontestability has arrived. Schmertz *v.* U. S. Life Ins. Co., 118 Fed. 250, 55 C. C. A. 104. And see *supra*, X, C, 1, note 61.

The expiration of the time necessary to bring the clause into operation does not defeat a bill for cancellation previously brought by the company (John Hancock Mut. L. Ins. Co. *v.* Houpt, 113 Fed. 572); nor does it apply where insured dies before the expiration of the prescribed period, although by statute no action on the policy could be brought within a period equal to that mentioned in the clause (Kelley *v.* New York Mut. L. Ins. Co., 109 Fed. 56).

The period during which the policy is incontestable depends of course on the terms of the contract. People's Mut. Ben. Soc. *v.* Templeton, 13 Ind. App. 26, 44 N. E. 809.

Renewed or reinstated policies.— The incontestable clause is applicable to representations in a certificate for reinstatement (Teeter *v.* United L. Ins. Assoc., 159 N. Y. 411, 54 N. E. 72 [*affirming* 11 N. Y. App. Div. 259, 42 N. Y. Suppl. 119]); and it is not defeated by making the insurance renewable from quarter to quarter on payment of the stipulated premiums less the return premiums awarded, since such a policy is a continuing policy (Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473). *Compare supra*, X, C, 9, b, (IV), note 92.

Incontestability clause as affecting: Condition against suicide see *infra*, XII, A, 2, f. Excepted cause of death see *infra*, XII, A, 1, b, (III), (B), note 14. Necessity of insurable interest see *supra*, I, G, note 76. Time to sue on policy see *infra*, XIII, C, 2, a, note 20.

97. Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Wright *v.* Mutual Ben. L. Assoc. of America, 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L. R. A. 731; Bates *v.* United L. Ins. Assoc., 68 Hun (N. Y.) 144, 22 N. Y. Suppl. 626 [*affirmed* in 142 N. Y. 677, 37 N. E. 824]; Clement *v.* New York L. Ins. Co., 101 Tenn. 22, 46 S. W. 561, 70 Am. St. Rep. 650, 42 L. R. A. 247. See, however, New York L. Ins. Co. *v.* Weaver, 114 Ky. 295, 70 S. W. 628, 24 Ky. L. Rep. 1086.

The clause is not against public policy as applied to the defense of fraud (Massachusetts Ben. L. Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261; Reagan *v.* Union Mut. L. Ins. Co., 189 Mass. 555, 76 N. E. 217, 109 Am. St. Rep. 659, 2 L. R. A. N. S. 821; Murray *v.* State Mut. L. Ins. Co., 22 R. I. 524, 48 Atl. 800, 53 L. R. A. 742), even though it provides that the policy shall be incontestable from its date (Union Cent.

XII. THE LOSS.

A. Causes of Loss — 1. Death in General — a. Time of Death. In the absence of some stipulation in the policy to the contrary effect,[98] the loss usually provided for in the ordinary life policy accrues at the time of the death of the assured subsequent to the taking effect of the policy.[99] In the case of term insurance of course death not occurring within the term limited in the policy will not constitute a loss under the policy.[1]

b. Deaths Which Are Not a Loss[2] — (I) *In General.* There may be a valid stipulation in a policy of life insurance wholly exempting the company from liability, or, as is sometimes the case, providing for payment of a reduced amount, where the death of the insured is due to certain excepted causes,[3] such as death caused by smallpox or other specified disease,[4] death from the casualties or consequences of war,[5] or death due to intemperance or the use of intoxicating liquors.[6]

L. Ins. Co. *v.* Fox, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885; Patterson *v.* Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 69 Am. St. Rep. 899, 42 L. R. A. 253. *Contra*, Welch *v.* Union Cent. L. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774; Reagan *v.* Union Mut. L. Ins. Co., *supra*. And see New York L. Ins. Co. *v.* Weaver, 114 Ky. 295, 70 S. W. 628, 24 Ky. L. Rep. 1086).

98. Thus if the policy provides that the full amount shall only be paid in the event insured dies after one year from the date of the policy, and the policy takes effect on the day of its date, that day should be excluded in computing the period of one year referred to in the policy. Walker *v.* John Hancock Mut. L. Ins. Co., 167 Mass. 188, 45 N. E. 89.

Disappearance.— Under a stipulation that disappearance shall not be evidence of death until the full term of expectation has expired, the beneficiary cannot recover on the theory that insured has not been heard from for more than seven years, without alleging also the expiration of the full term of expectancy. Porter *v.* Home Friendly Soc., 114 Ga. 937, 41 S. E. 45.

99. See cases cited *infra*.

Death within limited time.— It may be provided that in the event of death occurring within a specified time after the issuance of the policy, only a specified portion of the amount named in the policy shall be payable. Metropolitan L. Ins. Co. *v.* Drach, 101 Pa. St. 278.

1. Lockyer *v.* Offley, 1 T. R. 252, 1 Rev. Rep. 194, so holding even though the death resulted from a mortal wound received while the policy was in force.

2. Death caused by assignee or beneficiary of insured see XII, D, 2, d.

3. See cases cited in the notes following.

Qualified liability see also *infra*, XII, B, 2.

4. Metropolitan L. Ins. Co. *v.* Bergen, 64 Ill. App. 685 (pulmonary disease); McAndiless *v.* Metropolitan L. Ins. Co., 45 Mo. App. 578 (consumption); Bankers' Union of the World *v.* Mixon, (Nebr. 1905) 103 N. W. 1049 (smallpox); Carson *v.* Metropolitan L. Ins. Co., 1 Pa. Super. Ct. 572 (pulmonary disease).

Pneumonia is not a "pulmonary disease" within such a provision of the policy. Metropolitan L. Ins. Co. *v.* Bergen, 64 Ill. App. 685; Carson *v.* Metropolitan L. Ins. Co., 1 Pa. Super. Ct. 572.

5. Welts *v.* Connecticut Mut. L. Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518 [*affirming* 46 Barb. 412], holding, however, that where the assured, not being in the military service, was shot and killed by a party of armed men not in uniform, who were engaged in robbing other citizens in the vicinity, the death did not come within the exception of the policy as to death from casualities of war or rebellion.

Death of a slave engaged in armed resistance to the authority of a patrol was held not to be a case of death by means of invasion, insurrection, riot, or civil commotion, or of any military or usurped authority, or by the hands of justice. Spruill *v.* North Carolina Mut. L. Ins. Co., 46 N. C. 126.

6. Miller *v.* Mutual Ben. Ins. Co., 34 Iowa 222; Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272; Davey *v.* Ætna L. Ins. Co., 20 Fed. 482 [*reversed* on other grounds in 123 U. S. 739, 31 L. ed. 515].

Such a provision relates to the voluntary excessive use of intoxicating liquors, and does not cover a case where death results from the use of intoxicating liquor prescribed or administered by a physician by way of medicine. New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 752; Endowment Rank K. of P. *v.* Allen, 104 Tenn. 623, 58 S. W. 241.

Intemperance as breach of warranty see *supra*, X, B, 3.

Negligence in treatment will not prevent death from delirium tremens being within the exception as to death by the voluntary use of intoxicating liquors. New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 752.

Intoxication at the time of injury.— Under an exception of liability on account of death or injury happening while under the influence of intoxicating liquor, it was held that the company might take advantage of the exception if assured was under the influence of liquor at the time when the injury was sustained, from which death resulted,

In like manner there may be a stipulation exempting from liability where death is caused by the use of opiates.[7]

(II) *Death Beyond Prescribed Residence or Travel Limits.*[8] Death of the insured outside of the prescribed limits of residence or travel[9] is not a loss covered by the policy, unless the assured had a requisite permit for such residence or travel.[10]

(III) *Death Due to Violation of Law*—(A) *In Absence of Stipulation in Policy.* As a matter of public policy, without stipulation in the contract, there can be no recovery on account of death due to the commission of a crime resulting in the infliction of capital punishment,[11] or caused by voluntary submission to an illegal attempt to commit an abortion.[12]

(B) *Under Stipulation in Policy.* It is usually, however, provided in the policy that the contract does not extend to, or that the liability shall be reduced in case of, death caused by breach of law on the part of the assured,[13] or occurring in known violation of law.[14]

although not intoxicated at the time of his death. Mair *v.* Railway Pass. Assur. Co., 37 L. T. Rep. N. S. 356.

Change of habits as ground of forfeiture see *supra*, X, B, 3.

7. Renn *v.* Supreme Lodge K. of P., 83 Mo. App. 442, holding, however, that the exception did not cover death from an overdose of morphine taken to allay physical pain.

8. **Change of residence** as ground of forfeiture see *supra*, X, B, 1.

Travel outside of prescribed limits as ground of forfeiture see *supra*, X, B, 1.

9. **Condition as to residence or travel** see *supra*, X, B, 1.

10. Notman *v.* Anchor Assur. Co., 4 C. B. N. S. 476, 4 Jur. N. S. 712, 27 L. J. C. P. 275, 6 Wkly. Rep. 688, 93 E. C. L. 476; Vyse *v.* Wakefield, 8 Dowl. P. C. 912, 4 Jur. 611, 9 L. J. Exch. 274, 7 M. & W. 126 [*affirming* 8 Dowl. P. C. 377, 4 Jur. 509, 6 M. & W. 442]. *Compare* Baldwin *v.* New York L. Ins., etc., Co., 3 Bosw. (N. Y.) 530, where the company was held liable, although the death occurred outside the limits prescribed, it appearing that deceased had a permit for a limited term but was unable on account of illness to return at the expiration of the permit. See *supra*, X, B, 1.

11. Collins *v.* Metropolitan L. Ins. Co., 27 Pa. Super. Ct. 353 [*affirming* 13 Pa. Dist. 384]; Burt *v.* Union Cent. L. Ins. Co., 187 U. S. 362, 23 S. Ct. 139, 47 L. ed. 216 [*affirming* 105 Fed. 419, 44 C. C. A. 548]; Amicable Soc. *v.* Bolland, 4 Bligh N. S. 194, 5 Eng. Reprint 70, 2 Dow. & Cl. 1, 6 Eng. Reprint 630 [*reversing* 3 Russ. 351, 3 Eng. Ch. 351, 38 Eng. Reprint 608].

An assignee of the assured who has committed a capital offense for which he is convicted and executed subsequently to the assignment acquires no rights under such assignment. Burt *v.* Union Cent. L. Ins. Co., 187 U. S. 362, 23 S. Ct. 139, 47 L. ed. 216; Amicable Soc. *v.* Bolland, 4 Bligh N. S. 194, 5 Eng. Reprint 70, 2 Dow. & Cl. 1, 6 Eng. Reprint 630.

Death while committing felony.—In the absence of any stipulation in the policy, the fact that assured comes to his death while in the commission of a felony does not constitute a defense. McDonald *v.* Order of Triple Alliance, 57 Mo. App. 87.

12. Hatch *v.* Mutual L. Ins. Co., 120 Mass. 550, 552, 21 Am. Rep. 541 (where it is said: "We can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy"); Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327.

13. Travelers Ins. Co. *v.* Seaver, 19 Wall. (U. S.) 531, 22 L. ed. 155, death resulting from engaging in an illegal horse-race.

14. Haley *v.* Prudential Ins. Co., 189 Ill. 317, 59 N. E. 545 [*affirming* 91 Ill. App. 363] (death of insured as the result of being shot by police officer while attempting to escape after committing a robbery); Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327 (abortion voluntarily submitted to for which there is no medical necessity). See Smith *v.* Ætna L. Ins. Co., 115 Iowa 217, 88 N. W. 368, 91 Am. St. Rep. 153, 6 L. R. A. 221. See also cases cited *infra*, in this note.

A voluntary criminal act known by insured to be a crime against the law is what is contemplated. Cluff *v.* Mutual Ben. L. Ins. Co., 13 Allen (Mass.) 308. Where the insured was killed while doing what would constitute either robbery or larceny unless he acted under some special belief which would avoid the otherwise criminal character of his act, it was held that such special belief must be as to his legal right to do the act. Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317.

One killed while attempting to commit a crime dies in violation of law, although the immediate occasion of his death may be an accident. Murray *v.* New York L. Ins. Co., 96 N. Y. 614, 48 Am. Rep. 658 [*affirming* 30 Hun 428].

In commission of assault.—If the assured is killed by one who is lawfully resisting an assault, the death of the insured will be within the exception of the policy. Bloom *v.* Franklin L. Ins. Co., 97 Ind. 478, 49 Am. Rep. 469; Wolff *v.* Connecticut Mut. L. Ins.

(iv) *Death While Engaged in Prohibited Occupation.*[15] By a stipulation in the policy liability for death while engaged in a specific occupation may be excepted,[16] or limited.[17]

(v) *Proximate Cause.* Where the company seeks relief from liability on account of a death expressly or impliedly excepted from the terms of the policy, it must appear in order to sustain the defense that the death was the proximate result of a prohibited cause.[18]

2. Suicide — a. In Absence of Express Stipulation. It is contrary to the implied intention of the parties and against public policy to allow a recovery in favor of the personal representatives of one who has insured his life for the benefit of his estate and whose death has been caused by suicide, the assured understanding at the time the physical and moral nature of his act of self-destruction.[19]

Co., 5 Mo. App. 236. And see Mair *v.* Railway Pass. Assur. Co., 37 L. T. Rep. N. S. 356. On the other hand, if the assault by the assured is justifiable, his death at the hand of the party assaulted will not be within the exception. Prudential L. Ins. Co. *v.* Higbee, 57 S. W. 614, 22 Ky. L. Rep. 495; Overton *v.* St. Louis Mut. L. Ins. Co., 39 Mo. 122, 90 Am. Dec. 455; Harper *v.* Phœnix Ins. Co., 18 Mo. 109, 19 Mo. 506; Brown *v.* Supreme Lodge K. of P., 83 Mo. App. 633.

Suicide is not a violation of law within such an exception. Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495 [*affirming* 42 Hun 245]; Patrick *v.* Excelsior L. Ins. Co., 4 Hun (N. Y.) 263; Freeman *v.* National Ben. Soc., 5 N. Y. St. 82. See also *infra*, XII, A, 2.

The incontestability clause does not prevent the company from contesting payment of the policy on the ground that insured was executed after proper conviction of a capital offense. Collins *v.* Metropolitan L. Ins. Co., 21 Pa. Super. Ct. 353. But under an exception in the policy as to death "in consequence of his own criminal action," insured was held to be entitled to the protection of the incontestable clause as against any defense on account of such exception. Sun L. Ins. Co. *v.* Taylor, 108 Ky. 408, 56 S. W. 668, 22 Ky. L. Rep. 37, 94 Am. St. Rep. 383. Incontestability clause see *supra*, XI, E, 2.

Mutual companies.—The exception of death in known violation of law is valid as between a mutual company and one of its members. Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317.

15. Change of occupation as ground of forfeiture see *supra*, X, B, 2.

16. Moore *v.* Citizens' Mut. L. Ins. Assoc., 75 Hun (N. Y.) 262, 26 N. Y. Suppl. 1014.

Temporary engagement.— The mere fact of engaging in a hazardous undertaking not within the scope of employment permitted by the policy will not defeat recovery for death during such employment, if the undertaking was not in pursuance of the assumption of the prohibited occupation as a business. Mortensen *v.* Central L. Assur. Assoc., 124 Iowa 277, 99 N. W. 1059; Summers *v.* U. S. Insurance, etc., Co., 13 La. Ann. 504; Tucker *v.* Hartford Mut. Ben. L. Ins. Co., 50 Hun (N. Y.) 50, 4 N. Y. Suppl. 505 [*affirmed* in 121 N. Y. 718, 24 N. E. 1102]. Prohibited occupations see *supra*, X, B, 2.

17. La Rue *v.* Kansas Mut. L. Ins. Co., 68 Kan. 539, 75 Pac. 494, death during military service for which no special permit had been procured.

18. *Illinois.*— Haley *v.* Prudential Ins. Co., 189 Ill. 317, 59 N. E. 545 [*affirming* 91 Ill. App. 363].

Iowa.— Miller *v.* Mutual Ben. Ins. Co., 34 Iowa 222.

Maryland.— Mutual L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Massachusetts.— Cluff *v.* Mutual Ben. L. Ins. Co., 13 Allen 308.

Minnesota.— Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631.

New York.— Bradley *v.* Mutual Ben. L. Ins. Co., 45 N. Y. 422, 6 Am. Rep. 115 [*reversing* 3 Lans. 341]; Goetzmann *v.* Connecticut Mut. L. Ins. Co., 3 Hun 515, 5 Thomps. & C. 572.

Ohio.— New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1; Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

United States.— Supreme Lodge K. of P. *v.* Beck, 181 U. S. 49, 21 S. Ct. 532, 45 L. ed. 740 [*affirming* 94 Fed. 751, 36 C. C. A. 467]; Davey *v.* Ætna L. Ins. Co., 20 Fed. 482 [*reversed* on other grounds in 123 U. S. 739, 31 L. ed. 315].

See 28 Cent. Dig. tit. "Insurance," § 1151.

If the result is so closely connected with the prohibited cause that it is a part of the same transaction it is the proximate result. Travelers Ins. Co. *v.* Seaver, 19 Wall. (U. S.) 531, 22 L. ed. 155.

19. Ritter *v.* New York Mut. L. Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693 [*affirming* 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583 (*affirming* 60 Fed. 505)].

To the contrary it has been held that where there was no intention to commit suicide at the time the policy was taken, subsequent death by suicide will not defeat recovery thereunder, in the absence of any stipulation on the subject. Supreme Lodge K. of P. *v.* Trebbe, 74 Ill. App. 545; Campbell *v.* Supreme Conclave I. O. H., 66 N. J. L. 274, 49 Atl. 550, 54 L. R. A. 576.

Insane suicide.— If, however, the self-de-

b. Under Stipulations of the Contract. It is usual, however, to stipulate in the policy against liability in case of death by suicide, or where the insured dies by his own hand or as a result of his own act, or dies by self-destruction;[20] or to provide that the company shall be liable only for the premiums and assessments paid,[21] or the legal reserve of the policy.[22]

c. Intent to Take Life. A provision in the policy by which the company is not to be liable if the insured commits suicide[23] or dies by his own hand[24] or as

struction is the result of a perverted condition of the mental and moral faculties such as to render the insured incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or of an uncontrollable insane impulse, it is not such self-destruction as will defeat recovery. Ritter *v.* New York Mut. L. Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693; Connecticut Mut. L. Ins. Co. *v.* Akens, 150 U. S. 468, 14 S. Ct. 155, 37 L. ed. 1148; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121, 3 S. Ct. 99, 27 L. ed. 878; Horn *v.* Anglo-Australian, etc., L. Ins. Co., 7 Jur. N. S. 673, 30 L J. Ch. 511, 4 L. T. Rep. N. S. 142, 9 Wkly. Rep. 359. See further *infra*, XII, A, 2, d.

A fraudulent intent to commit suicide at the time the policy is taken will render the policy void. Treat *v.* Merchants Life Assoc., 198 Ill. 431, '4 N. E. 992 [*reversing* 98 Ill. App. 59]; Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826. See also *supra*, IX, A, 1, note 18.

Effect on the claim of the beneficiary see *infra*, XII, A, 2, e.

20. See cases cited *infra*, XII, A, 2, c, d.

Assent to a provision as to suicide is presumed from the voluntary acceptance of a policy containing such provision. Brunner *v.* Equitable L. Assur. Soc., 100 Ill. App. 22.

Statutory provisions.— In Missouri, the companies doing business in the state are prohibited from setting up a defense under the suicide clause, unless it be shown that the insured contemplated suicide at the time he made his application. Keller *v.* Travelers' Ins. Co., 58 Mo. App. 557; Knights Templars', etc., Life Indemnity Co. *v.* Jarman, 187 U. S. 197, 23 S. Ct. 108, 47 L. ed. 139 [*affirming* 104 Fed. 638, 44 C. C. A. 93]; Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 561 [*affirming* 46 Fed. 439]. See also McDonald *v.* Bankers Life Assoc., 154 Mo. 618, 55 S. W. 999. It is not sufficient under such provision for the company to show that the insured, at the time of his application, had merely considered the subject of suicide, without forming a definite purpose to commit suicide. Ætna L. Ins. Co. *v.* Florida, 69 Fed. 932, 16 C. C. A. 618, 30 L. R. A. 87. This statutory provision is not applicable to assessment companies (Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400; Toomey *v* Supreme Lodge K. of P., 147 Mo. 129, 48 S. W. 936; Haynie *v.* Knights Templars', etc., Life Indemnity Co., 139 Mo. 416, 41 S. W. 461; Huff *v.* Sovereign Camp W. of W., 85 Mo. App. 96; Wallace *v.* Bankers' Life Assoc., 80 Mo. App. 102; Elliott *v.* Safety Fund Life Assoc., 76 Mo. App. 562; Sparks *v.* Knight Templars, etc., Life Indemnity Co., 61 Mo. App. 109. To the contrary see Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 561 [*affirming* 46 Fed. 439]) but it is applicable to accident policies (Logan *v.* Fidelity, etc., Co., 146 Mo. 114, 47 S. W. 948). The statute does not, however, prohibit a provision in an accident policy that suicide is a reduced risk. Whitfield *v.* Ætna L. Ins. Co., 144 Fed. 356, 75 C. C. A. 358 [*affirming* 125 Fed. 269, and not *following* Keller *v.* Travelers' Ins. Co., 58 Mo. App. 557]. The statutory provision is applicable if the policy is delivered within the state by a resident agent, although executed at the company's office in another state. Knights Templar, etc., Life Indemnity Co. *v.* Berry, 50 Fed. 511, 1 C. C. A. 501. Under the Iowa statute prohibiting discrimination between persons insured of the same class and expectancy, a provision in a policy of a stipulated premium association that suicide within two years shall not be one of the risks assumed is valid, as the provision relating to discrimination does not apply to such an association. Beverly *v.* Northern Life Assoc., 112 Iowa 730, 84 N. W. 933.

21. *Illinois.*— Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180.

Iowa.— Beverly *v.* Northern Life Assoc., 112 Iowa 730, 84 N. W. 933.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

Missouri.— Adkins *v.* Columbia L. Ins. Co., 70 Mo. 27, 35 Am. Rep. 410.

New York.— Thommen *v.* Jewelers', etc., Co., 15 Misc. 473, 37 N. Y. Suppl. 222.

Wisconsin.— Hart *v.* Fraternal Alliance, 108 Wis. 490, 84 N. W. 851; Salentine *v.* New Jersey Mut. Ben. L. Ins. Co., 79 Wis. 580, 48 N. W. 855, 12 L. R. A. 690.

United States.— Whitfield *v.* Ætna L. Ins. Co., 144 Fed. 356, 75 C. C. A. 358 [*affirming* 125 Fed. 269]; Salentine *v.* Mutual Ben. L. Ins. Co., 24 Fed. 159.

22. Frey *v.* Germania L. Ins. Co., 56 Mich. 29, 22 N. W. 100.

23. Grand Lodge I. O. of M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123 [*affirming* 68 Ill. App. 125]; John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41; Coverston *v.* Connecticut Mut. L. Ins. Co., 6 Fed. Cas. No. 3,290; Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*.

24. Fowler *v.* Mutual L. Ins. Co., 4 Lans. (N. Y.) 202; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*.

the result of self-destruction[25] relieves the company from liability for intentional self-killing; but whatever the form of the stipulation, if the death of the insured is the unintended result of his own act, the company is nevertheless liable.[26]

d. Insanity Under Suicide Clause — (i) *In Absence of Special Stipulation.* Under the principle stated in the preceding paragraph that self-killing, within the usual stipulations against liability in case of suicide, death by his own hand, or self-destruction, must be intentional to defeat recovery, it has been settled by the great weight of authority that self-destruction as the result of an insane impulse or an inability due to insanity to understand the moral character, general nature, consequences, and effect of the act is not within such exception or condition in the policy.[27]

(ii) *Sane or Insane.* It is usual to frame the stipulation of the suicide clause so as to cover death by one's own act, or self-destruction, "sane or insane," or otherwise to exclude the rule stated in the preceding paragraph that self-destruction while insane is not covered by the condition as to suicide alone, and under such a stipulation the insanity of the assured at the time of self-destruction

Same as suicide.—"Death by his own hand," in the policy, means the same as suicide. New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258; Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363. Such words cannot be interpreted in their literal sense, but the intention of the parties must be sought, and the words will be construed as exempting the company from liability on account of the voluntary destruction of the insured, by whatever means accomplished. Phillips *v.* Louisiana Equitable L. Ins. Co., 26 La. Ann. 404, 21 Am. Rep. 549.

A warranty that assured will not die by his own hand has the same effect as a condition that the policy shall be void if assured shall die by his own hand. New York Mut. L. Ins. Co. *v.* Leubrie, 71 Fed. 843, 18 C. C. A. 332.

Indefinite provision.— A condition that the policy shall be void if the insured shall die by his own hand or act, voluntarily "or otherwise," is too indefinite and uncertain to be enforced. Jacobs *v.* National L. Ins. Co., 1 MacArthur (D. C.) 632.

25. Sargeant *v.* National L. Ins. Co., 189 Pa. St. 341, 41 Atl. 351.

26. See cases cited *infra*, this note.

Accidental killing is not self-destruction or death by own hand. Knights Templars', etc., Life Indemnity Co. *v.* Crayton, 209 Ill. 550, 70 N. E. 1066 [*affirming* 110 Ill. App. 648]; Northwestern Mut. L. Ins. Co. *v.* Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192; Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 222; Pierce *v.* Travelers' L. Ins. Co., 34 Wis. 389; Union Mut. L. Ins. Co. *v.* Payne, 105 Fed. 172, 45 C. C. A. 193; U. S. *v.* Nelson, 29 Fed. 202 [*affirmed* in 30 Fed. 112].

See 28 Cent. Dig. tit. "Insurance," § 1152.

Overdose of drug or medicine.— Death resulting from an excessive dose of some drug or medicine, even though known to be dangerous in character, but taken without intention of causing death, is not death by his own hand or self-destruction. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 5 Am. Rep. 535; Michigan Mut. L. Ins. Co. *v.* Naugle, 130 Ind. 79, 29 N. E. 393; Brignac *v.* Pacific Mut. L. Ins. Co., 112 La. 574, 36 So. 595, 66 L. R. A. 322; Courtemanche *v.* Supreme Court I. O. O. F., 136 Mich. 30, 98 N. W. 749, 64 L. R. A. 668; Penfold *v.* Universal L. Ins. Co., 85 N. Y. 317, 39 Am. Rep. 660. See also Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101.

Intoxication.— If the insured takes an overdose of a dangerous drug while intoxicated, the question is whether, although intoxicated, he had an intention to destroy his life. Equitable L. Assur. Soc. *v.* Paterson, 41 Ga. 338, 5 Am. Rep. 535. *Compare supra*, X, B, 3, note 58.

Negligence immaterial.— The question is not one depending on the negligence of the assured in the act which caused his death, but upon his intent. Mutual L. Ins. Co. *v.* Laurence, 8 Ill. App. 488. And it is immaterial also that death was the probable result of the act of the insured in his condition. Northwestern Mut. L. Ins. Co. *v.* Hazelett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

Physical infirmity causing suicide.— If the intention is to take life, it is immaterial that assured is suffering from physical infirmity which he seeks to escape by terminating his life. Oil City Bank *v.* Guardian Mut. L. Ins. Co., 6 Leg. Gaz. (Pa.) 348.

Unlawfulness of the act is immaterial if the intention of the assured is not thereby to take his own life. Evans *v.* Phœnix Mut. Relief Assoc., 1 Pa. Dist. 27.

Insanity as affecting the question whether self-killing is intentional is discussed *infra*, XII, A, 2, d.

Questions for jury see *infra*, XIII, H, 2, a.

Presumption and burden of proof see *infra*, XIII, G, 1, e, (II).

Sufficiency of evidence see *infra*, XIII, G, 3, d.

27. *Georgia.*— Life Assoc. of America *v.*

will not defeat the exception.[28] Such a stipulation is valid.[29] It is reason-

Waller, 57 Ga. 533; Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103.

Illinois.— Central Mut. L. Ins. Assoc. *v.* Anderson, 195 Ill. 135, 62 N. E. 838; Grand Lodge I. O. of M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123 [*affirming* 68 Ill. App. 125]; New Home Life Assoc. *v.* Hagler, 29 Ill. App. 437.

Indiana.— Michigan Mut. L. Ins. Co. *v.* Naugle, 130 Ind. 79, 29 N. E. 393.

Kentucky.— Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577; St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush 268.

Maine.— Eastabrook *v.* Union Mut. L. Ins. Co., 54 Me. 224, 89 Am. Dec. 743.

Maryland.— Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414.

Michigan.— Blackstone *v.* Standard L., etc., Ins. Co., 74 Mich. 592, 42 N. W. 156, 3 L. R. A. 486; John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41.

Minnesota.— Scheffer *v.* U. S. National L. Ins. Co., 25 Minn. 534.

Ohio.— Schultz *v.* Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676.

Pennsylvania.— Connecticut Mut. L. Ins. Co. *v.* Groom, 86 Pa. St. 92, 27 Am. Rep. 689; American L. Ins. Co. *v.* Isett, 74 Pa. St. 176; Oil City Bank *v.* Guardian Mut. L. Ins. Co., 6 Leg. Gaz. 348; Boileau *v.* Insurance Co., 1 Wkly. Notes Cas. 145.

Tennessee.— Phadenhauer *v.* Germania L. Ins. Co., 7 Heisk. 567, 19 Am. Rep. 623.

Texas.— New York Mut. L. Ins. Co. *v.* Walden, (Civ. App. 1894) 26 S. W. 1012.

Vermont.— Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

United States.— Ritter *v.* Mutual L. Ins. Co., 169 U. S. 139, 18 S. Ct. 300, 42 L. ed. 693 [*affirming* 70 Fed. 954, 17 C. C. A. 537, 42 L. R. A. 583]; Manhattan L. Ins. Co. *v.* Broughton, 109 U. S. 121, 3 S. Ct. 99, 27 L. ed. 878; Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433; New York Mut. L. Ins. Co. *v.* Terry, 15 Wall. 580, 21 L. ed. 236 [*affirming* 23 Fed. Cas. No. 13,839, 1 Dill. 403]; New York Mut. L. Ins. Co. *v.* Leubrie, 71 Fed. 843, 18 C. C. A. 332; Edwards *v.* Travelers' L. Ins. Co., 20 Fed. 661 [*affirmed* in 122 U. S. 457, 30 L. ed. 1178]; Waters *v.* Connecticut Mut. L. Ins. Co., 2 Fed. 892; Coverston *v.* Connecticut Mut. L. Ins. Co., 6 Fed. Cas. No. 3,290; Gay *v.* Union Mut. L. Ins. Co., 10 Fed. Cas. No. 5,282, 9 Blatchf. 142; Hiatt *v.* New York Mut. L. Ins. Co., 12 Fed. Cas. No. 6,449*a*, 2 Dill. 572 note [*affirmed* in 2 Black 635, 17 L. ed. 459]; Wolf *v.* Mutual Ben. L. Ins. Co., 30 Fed. Cas. No. 17,925*a*.

See 28 Cent. Dig. tit. "Insurance," § 1159.

To the contrary it has been said in several well considered cases that the exception of suicide is not to be limited to an act in its nature criminal, but covers all self-destruction which is intentional or not, the result of an irresistible insane impulse, although the insured may have been incapable of appreciating the moral nature of his act. Cooper *v.* Massachusetts Mut. L. Ins. Co., 102 Mass. 227, 3 Am. Rep. 451; Dean *v.* American Mut. L. Ins. Co., 4 Allen (Mass.) 96; Isett *v.* American L. Ins. Co., 4 Leg. Gaz. (Pa.) 170; Hathaway *v.* National L. Ins. Co., 48 Vt. 335; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363; Nimick *v.* Mutual Ben. L. Ins. Co., 18 Fed. Cas. No. 10,266, 3 Brewst. 502; White *v.* British Empire Mut. L. Assur. Co., L. R. 7 Eq. 394, 38 L. J. Ch. 53, 19 L. T. Rep. N. S. 306, 17 Wkly. Rep. 26; Dufaur *v.* Professional L. Ins. Co., 25 Beav. 599, 4 Jur. N. S. 841, 27 L. J. Ch. 817, 53 Eng. Reprint 766; Borradaile *v.* Hunter, 7 Jur. 443, 12 L. J. C. P. 225, 5 M. & G. 639, 5 Scott N. R. 418. But *compare* Clift *v.* Schwabe, 3 C. B. 437, 54 E. C. L. 437, 2 C. & K. 134, 61 E. C. L. 134, 17 L. J. C. P. 2; Horn *v.* Anglo-Australian, etc., L. Ins. Co., 7 Jur. 673, 30 L. J. Ch. 511, 4 L. T. Rep. N. S. 142, 9 Wkly. Rep. 359.

In New York the rule finally adopted is that unconsciousness of the moral obliquity of the act of self-destruction, if consciously committed, and not the result of an irresistible insane impulse, will not take the case out of the exception as to suicide. Newton *v.* Mutual Ben. L. Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335; Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561 [*affirming* 41 N. Y. Super. Ct. 476]; Van Zandt *v.* Mutual Ben. L. Ins. Co., 55 N. Y. 169, 14 Am. Rep. 215 [*distinguishing* Breasted *v.* Farmers' L. & T. Co., 8 N. Y. 299, 59 Am. Dec. 482 (*affirming* 4 Hill 73)].

Intemperance causing a deranged mental condition will not take the case out of the exception as to suicide, where there is a provision that the policy shall become void if insured shall impair his health by intemperance. Jarvis *v.* Connecticut Mut. L. Ins. Co., 13 Fed. Cas. No. 7,226. See *supra*, X, B, 3, note 58.

28. Weld *v.* Mutual L. Ins. Co., 61 Ill. App. 187; Sparks *v.* Knight Templars', etc., Life Indemnity Co., 61 Mo. App. 109; Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; New York Mut. L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154. And see cases cited *infra*, note 29 *et seq.*

29. *District of Columbia.*— Somerville *v.* Knights Templars, etc., Life Indemnity Assoc., 11 App. Cas. 417.

Nebraska.— Scherar *v.* Prudential Ins. Co., 63 Nebr. 530, 88 N. W. 687, 56 L. R. A. 611.

New York.— De Gogorza *v.* Knickerbocker L. Ins. Co., 65 N. Y. 232.

Ohio.— Northwestern Mut. L. Ins. Co. *v.* Maguire, 19 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 562.

Pennsylvania.— Tritschler *v.* Keystone Mut. Ben. Assoc., 180 Pa. St. 205, 36 Atl. 734.

Texas.— Mutual Reserve Fund Life Assoc. *v.* Payne, (Civ. App. 1895) 32 S. W. 1063.

United States.— New York Mut. L. Ins. Co. *v.* Snyder, 93 U. S. 393, 23 L. ed. 887 [*affirming* 22 Fed. Cas. No. 13,154]; Bigelow *v.*

able,[30] not against public policy,[31] and self-executing.[32] Such a condition is to be applied in accordance with its plain terms, and the degree or nature of the insanity is immaterial.[33] Under it the company is discharged if the insured purposely takes his own life,[34] but it does not admit of an interpretation including death by accident or mistake.[35] If the act is done for the purpose of self-destruction the insured need have no conception of the wrong involved in its commission.[36] But while the person need not be conscious of the moral quality or consequences of his act, it is usually stated that he must be conscious of its physical nature and consequences.[37] In other words, the act must have been done for the purpose of self-destruction.[38] In some cases, however, it is stated that the insured need not understand the physical natnre and effect of his act.[39] Where as is sometimes the

Berkshire L. Ins. Co., 93 U. S. 284, 23 L. ed. 918; New York Mut. L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154; Kelley *v.* Mutual L. Ins. Co., 75 Fed. 637; Chapman *v.* Republic L. Ins. Co., 5 Fed. Cas. No. 2,606, 6 Biss. 238.

See 28 Cent. Dig. tit. "Insurance," § 1155.

A clause in the application whereby the insured warrants and agrees that he will not commit suicide, whether sane or insane, relieves the company from liability in event of the suicide of the insured, where by the policy the application was made a part of the contract. Ellinger *v.* New York Mut. L. Ins. Co., [1905] 1 K. B. 31, 10 Com. Cas. 22, 74 L. J. K. B. 39, 91 L. T. Rep. N. S. 733, 21 T. L. R. 20, 53 Wkly. Rep. 134.

30. Brunner *v.* Equitable L. Assur. Soc., 100 Ill. App. 22.

31. Northwestern Mut. L. Ins. Co. *v.* Churchill, 105 Ill. App. 164; Northwestern Mut. Ins. Co. *v.* Churchill, 105 Ill. App. 159; Latimer *v.* Sovereign Camp W. of W., 62 S. C. 145, 40 S. E. 155.

32. Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694 [*affirming* 102 Ill. App. 280].

Other language to same effect.— Other forms of condition, intended to secure the same exception, are given the same interpretation, as for instance, "self destruction, felonious or otherwise" (Riley *v.* Hartford L., etc., Ins. Co., 25 Fed. 315), "suicide, voluntary or involuntary" (Keels *v.* Mutual Reserve Fund Life Assoc., 29 Fed. 198; Edwards *v.* Travelers' L. Ins. Co., 20 Fed. 661 [*affirmed* in 122 U. S. 457, 30 L. ed. 1178]), suicide which if committed in possession of the faculties unimpaired would be deemed self-destruction (Keefer *v.* Modern Woodmen of America, 203 Pa. St. 129, 52 Atl. 164), and self-destruction, the result of disease (Connecticut Mut. L. Ins. Co. *v.* Akens, 150 U. S. 468, 14 S. Ct. 155, 37 L. ed. 1148).

33. *Illinois.*— Seitzinger *v.* Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478 [*affirming* 106 Ill. App. 449].

Iowa.— Scarth *v.* Security Mut. Life Soc., 75 Iowa 346, 39 N. W. 658.

Missouri.— Brower *v.* Supreme Lodge Nat. Reserve Assoc., 74 Mo. App. 490.

New York.— De Gogorza *v.* Knickerbocker L. Ins. Co., 65 N. Y. 232.

North Carolina.— Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39.

Vermont.— Billings *v.* Accident Ins. Co., 64 Vt. 78, 24 Atl. 656, 33 Am. St. Rep. 913, 17 L. R. A. 89.

United States.— Bigelow *v.* Berkshire L. Ins. Co., 93 U. S. 284, 23 L. ed 918; Clarke *v.* Equitable L. Assur. Soc., 118 Fed. 374, 55 C. C. A. 200; Chapman *v.* Republic L. Ins. Co., 5 Fed. Cas. No. 2,606, 6 Biss. 238.

34. Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277; Hart *v.* Modern Woodmen of America, 60 Kan. 678, 57 Pac. 936, 72 Am. St. Rep. 380; Streeter *v.* Western Union Mut. Life, etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882.

35. Hart *v.* Modern Woodmen of America, 60 Kan. 678, 57 Pac. 936, 72 Am. St. Rep. 380; Brown *v.* Sun L. Ins. Co., (Tenn. Ch. App. 1899) 57 S. W. 415, 51 L. R. A. 252; Parish *v.* Mutual Ben. L. Ins. Co., 19 Tex. Civ. App. 457, 49 S. W. 153. See Clarke *v.* Equitable L. Assur. Soc., 118 Fed. 374, 55 C. C. A. 200.

An act done in a state of unconsciousness or involuntarily is nothing more nor less than an accident. Streeter *v.* Western Union Mut. Life, etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882.

36. Jenkins *v.* National Union, 118 Ga. 587, 45 S. E. 449; Streeter *v.* Western Union Mut. Life, etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882. See also cases cited in following note.

37. Manhattan L. Assur. Co. *v.* Beard, 112 Ky. 455, 66 S. W. 35, 23 Ky. L. Rep. 1747; Mutual Benefit L. Ins. Co. *v.* Davies, 87 Ky. 541, 9 S. W. 812; Masonic Life Assoc. *v.* Pollard, 89 S. W. 219, 28 Ky. L. Rep. 301; Adkins *v.* Columbia L. Ins. Co., 70 Mo. 27, 35 Am. Rep. 410; Pagenhardt *v.* Metropolitan Ins. Co., 6 Ohio S. & C. Pl. Dec. 190, 4 Ohio N. P. 169. And see Hart *v.* Modern Woodmen of America, 60 Kan. 678, 57 Pac. 936, 72 Am. St. Rep. 380.

38. Parish *v.* Mutual Ben. L. Ins. Co., 19 Tex. Civ. App. 457, 49 S. W. 153.

39. Zerulla *v.* Supreme Lodge O. of M. P., 118 Ill. App. 191 [*citing* Seitzinger *v.* Modern Woodmen of America, 204 Ill. 58, 68 N. E. 478 (*affirming* 106 Ill. App. 449)]; Clarke *v.* Equitable L. Assur. Soc., 118 Fed. 374, 55 C. C. A. 200. But see Supreme Lodge M. P. *v.* Gelbke, 198 Ill. 365, 64 N. E. 1058 [*reversing* 100 Ill. App. 190, and *distinguished* in Seitzinger *v.* Modern Woodmen of America, *supra*]; Nelson *v.* Equitable L. Assur. Soc., 73 Ill. App. 133.

case, the words "voluntary or involuntary" are employed in conjunction with the phrase "sane or insane," all doubt is removed as to the non-liability of the company when death is effected as a result of action on the part of the insured.[40]

e. Effect as to Beneficiary. In the absence of any express exception as to suicide or self-destruction, the beneficiary is not defeated by the wrongful act of the assured in taking his own life, such defense being available only as against the assured or his personal representatives.[41] But an express exception of liability in case of suicide is a limitation upon the contract good as against the beneficiary [42]

f. Effect of Incontestable Clause. The usual clause rendering the policy incontestable after it has been in force for a specified time excludes the defense of breach of condition by suicide, after the policy has thus become incontestable.[43]

B. Amount to Be Paid — 1. In General. As the usual contract of life insur-

40. Haynie v. Knights Templars', etc., Life Indemnity Co., 139 Mo. 416, 41 S. W. 461.

41. *Illinois.*— Supreme Lodge K. P. *v.* Kutscher, 72 Ill. App. 462 [*reversed* on other grounds in 179 Ill. 340, 53 N. E. 620, 70 Am. St. Rep. 115].

Iowa.— Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826.

Minnesota.— Kerr *v.* Minnesota Mut. Ben. Assoc., 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631.

New York.— Fitch *v.* American Popular L. Ins. Co., 59 N. Y. 557, 17 Am. Rep. 372; Patrick *v.* Excelsior L. Ins. Co., 67 Barb. 202.

Pennsylvania.— Morris *v.* State Mut. L. Assur. Co., 183 Pa. St. 563, 39 Atl. 52.

Wisconsin.—Patterson *v.* Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 69 Am. St. Rep. 899, 42 L. R. A. 253.

To the contrary, on the theory that death by the wilful and deliberate act of the insured is impliedly excepted from the risk for which the company is liable, it has been held that such implied exception is good against the beneficiary. Hopkins *v.* Northwestern L. Assur. Co., 94 Fed. 729.

Fraudulent intent.—If, however, the suicide of the insured is considered sufficient to defeat the policy in the absence of express stipulation, only where the intent to commit suicide existed at the time the policy was taken, the beneficiary will not be defeated unless such fraudulent intent is made to appear. Seiler *v.* Economic Life Assoc., 105 Iowa 87, 74 N. W. 941, 43 L. R. A. 537; Supreme Conclave I. O. of H. *v.* Miles, 92 Md. 613, 48 Atl. 845, 84 Am. St. Rep. 528. See *supra*, IX, A, 1, note 18.

42. *District of Columbia.*—National Union *v.* Thomas, 10 App. Cas. 277.

Illinois.— Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694 [*affirming* 102 Ill. App. 280]. And see Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992 [*reversing* 98 Ill. App. 59], holding the application binding on the beneficiaries.

Missouri.— Haynie *v.* Knights Templars', etc., Life Indemnity Co., 139 Mo. 416, 41 S. W. 461.

South Carolina.— Latimer *v.* Sovereign Camp W. of W., 62 S. C. 145, 40 S. E. 155.

South Dakota.— Dischner *v.* Piqua Mut. Aid, etc., Assoc., 14 S. D. 436, 85 N. W. 998.

England.— Ellinger *v.* New York Mut. L. Ins. Co., [1905] 1 K. B. 31, 10 Com. Cas. 22, 74 L. J. K. B. 39, 91 L. T. Rep. N. S. 733, 21 T. L. R. 20, 53 Wkly. Rep. 134 [*affirming* [1904] 1 K. B. 832, 9 Com. Cas. 217, 73 L. J. K. B. 546, 90 L. T. Rep. N. S. 484, 20 T. L. R. 368, 52 Wkly. Rep. 368].

A covenant by the assured not to take his own life being a part of the consideration for the contract is binding on the beneficiary. New York Mut. L. Ins. Co. *v.* Kelly, 114 Fed. 268, 52 C. C. A. 154 [*reversing* 109 Fed. 56].

An express stipulation that the condition against self-destruction shall not defeat recovery by an assignee to the extent of any *bona fide* interest acquired by him is not invalid as holding out an inducement to the assured to commit suicide. Moore *v.* Woolsey, 3 C. L. R. 207, 4 E. & B. 243, 1 Jur. N. S. 468, 24 L. J. Q. B. 40, 3 Wkly. Rep. 66, 82 E. C. L. 243.

Effect as against assignee see *supra*, VI, C, 5, c, (VIII), note 94.

43. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299; Mutual Reserve Fund Life Assoc. *v.* Payne, (Tex. Civ. App. 1895) 32 S. W. 1063.

Risk not assumed.— Even though the stipulation of the policy is that death by suicide is a risk not assumed by the company, such defense is cut off after the policy has become incontestable (Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 434, 32 L. R. A. 473), unless there is a special provision limiting the effect of the incontestable clause (Patterson *v.* Natural Premium Mut. L. Ins. Co., 100 Wis. 118, 75 N. W. 980, 69 Am. St. Rep. 899, 42 L. R. A. 253). Under a statute providing that the policy shall be incontestable after being in force for a specified period, save for fraud, by reason of any errors, omissions, or misstatements of the insured, it was held that the statute was not a limitation on the company's right to defend on the ground of suicide. Starck *v.* Union Cent. L. Ins. Co., 134 Pa. St. 45, 19 Atl. 703, 19 Am. St. Rep. 674, 7 L. R. A. 576.

Limited liability for suicide.— Even though the policy provides for payment of net value

ance is not a contract of indemnity, but an agreement to pay a specified sum of money on the happening of a contingency which is uncertain only as to time, the amount to be paid on the happening of the contingency is that specified in the contract itself, without regard to the damage which has accrued to the estate of the assured or his assignee or the beneficiary named, as the result of the death of the assured.[44]

2. UNDER PAID-UP POLICY FOR REDUCED AMOUNT. If the policy provides that on forfeiture by non-payment of premium a paid-up policy shall be issued for such an amount as the premiums already paid would secure,[45] then the liability of the company for such forfeiture is limited to the amount for which a paid-up policy has been or would have been issued.[46]

3. PARTICIPATION IN DIVIDENDS. Under the terms of the contract, the company may be liable for dividends in addition to the amount specified in the policy.[47]

4. SHARE IN TONTINE FUNDS. Under the plan of tontine insurance, the company may be liable to policy-holders whose policies are still in force at the end of the tontine period, for a share of the profits on policies of the same class; but this is a liability to surviving policy-holders as creditors, and not to those entitled to the proceeds of such policies maturing by death before the termination of the tontine period.[48]

or return of premiums paid as the only liability in case of death by suicide, the right to thus insist on the limited liability only, in such a case, is lost when the policy becomes incontestable. Mareck *v.* Mutual Reserve Fund Life Assoc., 62 Minn. 39, 64 N. W. 68, 54 Am. St. Rep. 613; Simpson *v.* Virginia L. Ins. Co., 115 N. C. 393, 20 S. E. 517. *Contra*, see Hall *v.* Mutual Reserve Fund Life Assoc., 19 Pa. Super. Ct. 31; Childress *v.* Fraternal Union, 113 Tenn. 252, 82 S. W. 832.

Operation and effect of incontestable clause in general see *supra*, XI, E, 2.

44. Hoyt *v.* New York L. Ins. Co., 3 Bosw. (N. Y.) 440; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith (N. Y.) 268. See also Bevin *v.* Connecticut Mut. L. Ins. Co., 23 Conn. 244. And see *supra*, I, A, 1; IV, B, 4.

Mistake as to age.— Where through mutual mistake as to the age of insured a lower rate of premium has been paid than necessary to sustain a policy in the amount contracted for, the beneficiary may recover the sum for which the premiums paid would have procured insurance had the age been correctly stated. Continental L. Ins. Co. *v.* Goodall, 5 Ohio Dec. (Reprint) 160, 3 Am. L. Rec. 338.

Amount recoverable by assignee of policy see *infra*, XII, E.

Policy for benefit of creditor see *infra*, XII, F, 2.

Insurable interest see *supra*, I, B–G.

45. See *supra*, X, C, 9, c, (IV).

46. Jenkins *v.* Sun L. Ins. Co., 87 S. W. 1143, 27 Ky. L. Rep. 1142; Baltimore Mut. L. Ins. Co. *v.* Bratt, 55 Md. 200; Horton *v.* New York L. Ins. Co., 151 Mo. 604, 52 S. W. 356.

47. Vogler *v.* World Mut. L. Ins. Co., 51 How. Pr. (N. Y.) 301. And see Laing *v.* Pennsylvania Mut. Ins. Co., 1 Phila. (Pa.) 249.

The amount of the dividends must be determined in accordance with the plan under which the contract is issued. Fuller *v.* Metropolitan L. Ins. Co., 37 Fed. 163.

The beneficiary is entitled to a distributive share of accumulations or profits accruing under the policy and to be distributed during the lifetime of the assured. New York L. Ins. Co. *v.* Ireland, (Tex. 1891) 17 S. W. 617, 14 L. R. A. 278. See also Gilly *v.* Burley, 22 Beav. 619, 2 Jur. N. S. 897, 4 Wkly. Rep. 769, 52 Eng. Reprint 1247; Windus *v.* Tredegar, 15 L. T. Rep. N. S. 108. But see Colleret *v.* Ætna L. Ins. Co., 3 Quebec Pr. 394, holding that the beneficiary cannot withdraw the profits during the life of the insured.

Under an endowment policy providing that upon surrender at the expiration of ten years the holder shall have his full share of the endowment fund, not exceeding a specific sum, the assured is not entitled absolutely to the sum named but only to his share, not exceeding that sum. Congower *v.* Equitable Mut. L., etc., Assoc., 94 Iowa 499, 63 N. W. 192.

48. New York L. Ins. Co. *v.* Miller, 56 S. W. 975, 22 Ky. L. Rep. 230. And see cases cited *infra*, this note.

Policy-holder a creditor.— The holder of such a policy at the conclusion of the tontine period is a creditor and entitled to have the company render an account. Pierce *v.* Equitable L. Assur. Soc., 145 Mass. 56, 12 N. E. 858, 1 Am. St. Rep. 433; Ellison *v.* Straw, 119 Wis. 502, 97 N. W. 168. But as the relation between the holder of the policy and the company is that of debtor and creditor merely, and not one of trust, the policy-holder is entitled only to the amount apportioned to him in accordance with the tontine plan, and cannot maintain a bill in equity for an accounting unless fraud or irregularity is shown. Avery *v.* Equitable L. Assur. Co., 117 N. Y. 451, 23 N. E. 3; Uhlman *v.* New York L. Ins. Co., 109 N. Y. 421,

5. Deductions and Offsets — a. General Indebtedness. Any indebtedness due to the company from the person entitled to the insurance money may be deducted from the amount to be paid.[49]

b. Unpaid Premiums. The amount of unpaid premiums for which credit has been given to the assured may be deducted from the amount payable on the policy.[50]

C. Notice and Proof[51] — 1. In General Essential to Recovery. The usual clause requiring notice and proof of death of assured, and providing that the company will pay within a specified time thereafter, makes such notice and proof a condition precedent to recovery.[52]

17 N. E. 363, 4 Am. St. Rep. 482; Bogardus *v.* New York L. Ins. Co., 101 N. Y. 328, 4 N. E. 522; Gadd *v.* Equitable L. Assur. Soc., 97 Fed. 834; Everson *v.* Equitable L. Assur. Soc., 71 Fed. 570, 18 C. C. A. 251 [*affirming* 68 Fed. 258]. See, generally, Insurance, 22 Cyc. 1402.

A holder of a participating policy is not entitled to recover more than his fair proportion of the reserved fund, or the value of a paid-up policy which the proportion will buy, but the presumption in the case of a company in active business would be that it had ready the full share of the policy-holder. Nashville L. Ins. Co. *v.* Mathews, 8 Lea (Tenn.) 499.

49. Life Assoc. of America *v.* Neville, 72 Ala. 517; Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; Spooner *v.* Hilbish, 92 Va. 333, 23 S. E. 751.

Beneficiary as surety.— Where the policy was payable to the wife, and the assured secured a loan thereon, the wife becoming surety, it was held that, under a provision for the deduction of indebtedness, the amount payable to the wife on the death of the insured was not subject to deduction to the extent of the amount of the loan. Union Cent. L. Ins. Co. *v.* Woods, 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205.

Assignment for security.— Tender of the amount due on a loan from the company for which the policy has been assigned as security is not necessary before instituting suit for the balance due on the policy. Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373.

An assignee entitled to have the policy converted into cash before the death of assured is not subject to deduction of general indebtedness of the assured from the cash surrender value, there being a provision in the policy for deducting general indebtedness of the assured only on maturity of the policy by death. Entwistle *v.* Travelers' Ins. Co., 17 Pa. Super. Ct. 180.

50. O'Brien *v.* Union Mut. L. Ins. Co., 22 Fed. 586.

Postponed instalments.— By provisions in the policy, instalments of annual premiums, payment of which the assured has been allowed to postpone, and which have not been paid at the time of his death, may be deducted from the amount payable under the policy. Imperial L. Ins. Co. *v.* Glass, 96 Ala. 568, 11 So. 671; Howard *v.* Continental L. Ins. Co., 48 Cal. 229; Leonard *v.* Charter Oak L. Ins. Co., 65 Conn. 529, 33 Atl. 511; Northwestern L. Assur. Co. *v.* Schulz, 94 Ill. App. 156; Union Cent. L. Ins. Co. *v.* Spinks, 84 S. W. 1160, 27 Ky. L. Rep. 325, 83 S. W. 615, 26 Ky. L. Rep. 1205, 69 L. R. A. 264; Carter *v.* John Hancock Mut. L. Ins. Co., 127 Mass. 153; Albert *v.* New York Mut. L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693; Hesterberg *v.* Equitable L. Ins. Co., 1 Cinc. Super. Ct. 483.

Semiannual instalment.— A "privilege and condition" on the back of a life policy, providing that, if premiums are paid in semiannual instalments, any instalment which, at the maturity of the contract, is necessary to complete the full year's premium, shall be deducted from the amount of the claim, which is declared by the policy to form a part of the contract, applies only to those policies which on their face reserve an annual premium, and has no application to a policy which expressly grants the assurance in consideration of the payment of semiannual premiums. Bracher *v.* U. S. Equitable L. Assur. Soc., 103 N. Y. App. Div. 269, 92 N. Y. Suppl. 1105 [*reversing* 42 Misc. 290, 86 N. Y. Suppl. 557].

So an assessment to meet death losses in an assessment company which have accrued before the death of the member for which claim is made may be deducted from the amount payable under such claim. Wagner *v.* Keystone Mut. Ben. Assoc., 8 Pa. Dist. 231.

Deferred premiums.— Under a provision for deducting indebtedness due to the company, no deduction can be made for deferred premiums as they are neither due nor earned at the time of the death. Hartford Nat. Life Assoc. *v.* Berkeley, 97 Va. 571, 34 S. E. 469.

Notes payable out of dividends.— But premium notes which by the contract are to be paid out of dividends cannot be deducted from the amount of the loss. Brooks *v.* Phœnix Mut. L. Ins. Co., 4 Fed. Cas. No. 1,960, 16 Blatchf. 182.

51. **Admissibility and effect as evidence** see *infra*, XIII, G, 2, h, (II), (C), 3, d.

52. Jackson *v.* Southern Mut. L. Ins. Co., 36 Ga. 429.

Notice without proof is not sufficient where both are required. O'Reilly *v.* Guardian Mut. L. Ins. Co., 60 N. Y. 169, 19 Am. Rep. 151 [*reversing* 1 Hun 460, 3 Thomps. & C. 487].

A more liberal construction will be given such a provision relating to a condition

2. How Given. Any one qualified to act in the matter of making a claim against the company for the insurance money may give the notice and proofs.[53] The notice and proofs should be given as directed in the policy or by some officer or agent authorized to bind the company as to the proper method of forwarding.[54]

3. Within What Time. If the time for giving notice and furnishing proofs is specified, the requirement should be complied with;[55] but the time will not be essential as a condition precedent unless made so by express stipulation.[56] The usual requirement that notice be immediately given is satisfied by notice within a reasonable time, considering the circumstances of the case.[57]

4. Sufficiency as to Form. The requirement as to proofs does not necessitate direct evidence, but only such proof or showing as ought to be satisfactory.[58] The

subsequent to the event than to provisions which are to be complied with prior to the loss. Woodmen Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291.

Requirements not contained in the policy cannot be made conditions to the company's liability. Braker *v.* Connecticut Indemnity Assoc., 27 N. Y. App. Div. 234, 50 N. Y. Suppl. 547.

53. Wuesthoff *v.* Germania L. Ins. Co., 107 N. Y. 580, 14 N. E. 811 [*reversing* 52 N. Y. Super. Ct. 208], holding that one acting as guardian of an infant beneficiary had sufficient authority to give notice, although not legally appointed.

Furnished by another.— Where the policy required that proofs of death contain answers to certain questions, but did not specify by whom the answers should be made, it was held sufficient that such answers were by one who had paid the premiums, although not the beneficiary. Kelly *v.* Metropolitan L. Ins. Co., 15 N. Y. App. Div. 220, 44 N. Y. Suppl. 179.

54. Dean *v.* Ætna L. Ins. Co., 2 Hun (N. Y.) 358, 4 Thomps. & C. 497 [*reversed* on other grounds in 62 N. Y. 642]; Delamater *v.* Prudential Ins. Co., 1 Silv. Sup. (N. Y.) 538, 5 N. Y. Suppl. 586.

55. Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99; Winchell *v.* John Hancock Mut. L. Ins. Co., 30 Fed. Cas. No. 17,866.

56. Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213.

A statutory provision as to time for furnishing proofs may be waived by the terms of the policy providing for a longer time. Ellis *v.* Massachusetts Mut. L. Ins. Co., 113 Cal. 612, 45 Pac. 988, 54 Am. St. Rep. 373.

Duty of company to furnish blanks.— If it is required by the policy that notice and proofs be on blanks to be furnished by the company, the failure to send such blanks so as to enable the claimant to act within the specified time will prevent the company from taking advantage of the delay. Provident L. Ins., etc., Co. *v.* Baum, 29 Ind. 236; Robinson *v.* Northwestern Nat. Ins. Co., 92 Minn. 379, 100 N. W. 226; Prentice *v.* Knickerbocker L. Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651 [*affirming* 43 N. Y. Super. Ct. 352].

Literal compliance is not to be insisted upon if not required in order to carry out the evident intention and purpose of the parties to the contract, and the object to be accomplished. Woodmen Acc. Assoc. *v.* Pratt, 62 Nebr. 673, 87 N. W. 546, 89 Am. St. Rep. 777, 55 L. R. A. 291. Thus if without fault of the beneficiary, and without his knowledge of the death of the assured, notice and proofs are delayed until after the specified time, the company will not be relieved. Peele *v.* Provident Fund Soc., 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400. But where the assured disappeared in 1883, and proofs were furnished in 1894 of his death at the time of his disappearance, it was held that the proofs were too late. Harrison *v.* Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893.

57. Crane *v.* Standard L., etc., Ins. Co., 6 Ohio S. & C. Pl. Dec. 118, 3 Ohio N. P. 318; Munz *v.* Standard L., etc., Ins. Co., 26 Utah 69, 72 Pac. 182, 99 Am. St. Rep. 830, 62 L. R. A. 435.

In case of war.— Thus where the insured was during the Civil war domiciled within the Confederate lines, and died during the war, his personal representatives were held bound only to give information of his death and its date within a reasonable time after the ending of the war. Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. (Va.) 630.

58. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Under two policies.— Where the loss is covered by two different policies in the same company, sufficient proof as to one loss may be made by reference to the proof under the other policy. Loomis *v.* Eagle L., etc., Ins. Co., 6 Gray (Mass.) 396; Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

The affidavit of the undertaker as to the burial of the insured is not a sufficient compliance with a statute requiring proofs of death within a specified time. Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459.

A physician's certificate of the death is not an essential part of the proof, unless expressly required by the policy, or by a usage of the company made known to the plaintiff before he took the policy. Taylor *v.* Ætna

particulars as to immaterial matters, or even the cause of death where that is immaterial, need not be given.[59]

5. WAIVER — a. In General. The company may waive the requirement of notice and proofs by any action on its part inconsistent with insistence on such requirement.[60]

b. Failure or Refusal to Furnish Blanks. If the company fails to furnish blanks for proofs after a promise to do so, it waives the condition as to furnishing such proofs.[61] And if it refuses to furnish blanks for proofs, or states that proofs

L. Ins. Co., 13 Gray (Mass.) 434. A physician, not in practice, who is present at the death of the party insured as a friend and neighbor, and examines and prescribes for him, is not necessarily an "attending physician," within the meaning of that phrase as employed in the condition of the policy requiring an affidavit of the medical attendant as part of the proofs of death. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580.

Verification.— One claiming the proceeds of an insurance policy and making proofs of loss on account thereof does not invalidate the same by adding after his personal signature the word "executor," where it appears that he took oath to such proofs and made claim for the proceeds of the policy in his own personal capacity and not as executor. Globe Mut. L. Ins. Assoc. *v.* March, 118 Ill. App. 261.

Questions of law and fact as to sufficiency see *infra*, XIII, H, 2, a.

59. Life Assur. Co. of America *v.* Haughton, 31 Ind. App. 626, 67 N. E. 950; Connecticut Mut. L. Ins. Co. *v.* Siegel, 9 Bush (Ky.) 450; Potter *v.* Union Cent. L. Ins. Co., 195 Pa. St. 557, 46 Atl. 111.

Falsity as to immaterial matters.— The sufficiency of the proofs is not impaired by a false statement as to the person entitled to the insurance. Bowen *v.* National Life Assoc., 63 Conn. 460, 27 Atl. 1059; Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433.

60. Prentice *v.* Knickerbocker L. Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651 [*affirming* 43 N. Y. Super. Ct. 352]; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith (N. Y.) 268. Thus where the holder of a policy on another's life was advised by the company that its agents would have information as to the death of the assured if it occurred, and the company received premiums from the policy-holder after the death of the assured without knowledge of that fact, and retained such premiums, it was held that notice and proofs by the policy-holder were waived. Prentice *v.* Knickerbocker L. Ins. Co., *supra*.

Recognition of liability.— An offer to compromise or promise to pay the loss is a waiver of proofs. McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601; Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Willison *v.* Jewelers', etc., Co., 34 Misc. (N. Y.) 216, 68 N. Y. Suppl. 1129; Berry *v.* Mobile L. Ins. Co., 3 Fed. Cas. No. 1,358.

Oral notice of death received and acted upon is a waiver of the written notice required in the policy. Edwards *v.* Travelers' L. Ins. Co., 20 Fed. 661.

After expiration of time.— Waiver may be established by proof of acts indicating an intent to waive the condition, although they are subsequent to the time fixed for furnishing notice and proofs. No new consideration is necessary, nor need a technical estoppel be shown. Prentice *v.* Knickerbocker L. Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480.

Notice not substitute for proofs.— Failure of the company on receiving proper notice to advise claimants that such notice is not sufficient to constitute compliance with the condition as to proof is not a waiver of the latter condition. O'Reilly *v.* Guardian Mut. L. Ins. Co., 60 N. Y. 169, 19 Am. Rep. 151 [*reversing* 1 Hun 460, 3 Thomps. & C. 487].

Power of agent.— An agent having authority to furnish blanks for proofs may waive the requirement that such proofs be furnished. Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480. But the power of an agent to waive the condition as to notice and proofs may be denied by express provision of the policy. Legnard *v.* Standard L., etc., Ins. Co., 81 N. Y. App. Div. 320, 81 N. Y. Suppl. 516. But a provision in the policy that its conditions shall not be waived by an agent was held not applicable to the condition as to notice and proofs. Berry *v.* Mobile L. Ins. Co., 3 Fed. Cas. No. 1,358.

To whose benefit waiver accrues.— The beneficiary is entitled to the advantage of proofs furnished by another and accepted without objection. Wallace *v.* Metropolitan L. Ins. Co., 14 Pa. Super. Ct. 617; Timayenis *v.* Union Mut. L. Ins. Co., 21 Fed. 223. On the other hand the personal representative of the assured may have the advantage of proofs accepted without objection from one claiming to be beneficiary. Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601.

61. Standard L., etc., Ins. Co. *v.* Schmaltz, 66 Ark. 588, 53 S. W. 49, 74 Am. St. Rep. 112.

After expiration of time.— The furnishing of blanks after the time for making proofs has expired is a waiver of the condition as to time. Prentice *v.* Knickerbocker L. Ins. Co., 77 N. Y. 483, 33 Am. Rep. 651 [*affirming* 43 N. Y. Super. Ct. 352]. And see *supra*, XII, C, 3, note 56.

are unnecessary, on the ground that there is no liability under the policy, such conduct is a waiver of the condition as to proofs.[62]

c. Retaining Defective Proofs. By accepting and retaining proofs which are not such as are required by the contract, the company waives objection thereto.[63]

d. Denial of Liability. The act of the company in denying its liability under the policy is a waiver of the condition as to furnishing proofs, for it is an indication to the insured that the furnishing of proofs will be useless.[64]

D. To Whom Payable — 1. Under Provisions of Policy — a. Estate of Insured. Where the insured himself is named as beneficiary, the insurance money becomes a part of his estate in the hands of his executor or administrator.[65] The proceeds of a policy taken by one person on the life of another, however,

62. *Iowa.*— Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459; Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485.

Missouri.— McDonald *v.* Bankers' Life Assoc., 154 Mo. 618, 55 S. W. 999.

New Hampshire.— Seely *v.* Manhattan L. Ins. Co., 72 N. H. 49, 55 Atl. 425.

New York.—Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480; Meagher *v.* Life Union, 65 Hun 354, 20 N. Y. Suppl. 247; O'Rourke *v.* John Hancock Mut. L. Ins. Co., 10 Misc. 405, 31 N. Y. Suppl. 130; Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27; Baker *v.* New York State Mut. Ben. Assoc., 9 N. Y. St. 653. See also Dean *v.* Ætna L. Ins. Co., 62 N. Y. 642 [*reversing* 2 Hun 358, 4 Thomps. & C. 497].

Pennsylvania.— White *v.* Metropolitan L. Ins. Co., 22 Pa. Super. Ct. 501; Pennsylvania Cent. Ins. Co. *v.* Gayman, 7 Leg. Gaz. 234.

South Carolina.— Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Dial *v.* Virginia Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

Texas.— Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398.

Denial of liability as waiver see *infra*, XII, C, 5, d.

63. Globe Mut. L. Ins. Assoc. *v.* Wagner, 188 Ill. 133, 58 N. E. 970, 80 Am. St. Rep. 169, 52 L. R. A. 649 [*affirming* 90 Ill. App. 444]; Globe Mut. L. Ins. Assoc. *v.* March, 118 Ill. App. 261; McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400; De Van *v.* Commercial Travelers' Mut. Acc. Assoc., 92 Hun (N. Y.) 256, 36 N. Y. Suppl. 931; Grogan *v.* U. S. Industrial Ins. Co., 90 Hun (N. Y.) 521, 36 N. Y. Suppl. 687; Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213. But *compare* O'Reilly *v.* Guardian Mut. L. Ins. Co., 60 N. Y. 169, 19 Am. Rep. 151 [*reversing* 1 Hun 460].

Notice of objection should be promptly given if the proofs furnished are not such as are required. American L. Ins. Co. *v.* Mahone, 56 Miss. 180; Peacock *v.* New York L. Ins. Co., 1 Bosw. (N. Y.) 338; Guldenkirch *v.* U. S. Mutual Acc. Assoc., 5 N. Y. Suppl. 428; Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

Requiring further information will be a waiver of defects in other respects in the proofs furnished. Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856; McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

Sufficiency in form only is admitted by accepting and retaining the proofs without objection. The truth of the statements contained in the proofs is not thereby admitted. Crotty *v.* Union Mut. L. Ins. Co., 144 U. S. 621, 12 S. Ct. 749, 36 L. ed. 566 [*distinguishing* Manhattan L. Ins. Co. *v.* Francisco, 17 Wall. (U. S.) 672, 21 L. ed. 698].

64. *District of Columbia.*—National Union *v.* Thomas, 10 App. Cas. 277.

Illinois.—Metropolitan L. Ins. Co. *v.* Mitchell, 175 Ill. 322, 51 N. E. 637; Metropolitan L. Ins. Co. *v.* Zeigler, 69 Ill. App. 447.

Indiana.—Rutherford *v.* Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202.

Iowa.— Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459.

Maryland.— Prudential Ins. Co. of America *v.* Devoe, 98 Md. 584, 56 Atl. 809; McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

Missouri.— Welsh *v.* Chicago Guaranty Fund Life Soc., 81 Mo. App. 30.

Texas.—Woodall *v.* Pacific Mut. L. Ins. Co., (Civ. App. 1904) 79 S. W. 1090.

Statement that proofs are not necessary because of non-liability see *supra*, XII, C, 5, b.

Refusal on another ground.— If the refusal to pay is based on some other ground than that of failure to furnish sufficient proofs, objection on account of want of or defect in proofs cannot afterward be raised. Standard Loan, etc., Ins. Co. *v.* Thornton, 97 Tenn. 1, 40 S. W. 136. And see Baltimore Mut. L. Ins. Co. *v.* Thomas, 101 Md. 501, 61 Atl. 293. But *compare* Hart *v.* Fraternal Alliance, 108 Wis. 490, 84 N. W. 851, holding that there was no waiver where the denial of liability was made after plaintiff was in fault and could not have influenced his action with respect to furnishing proofs of death.

For instance a claim of forfeiture on account of failure to pay premiums waives any breach of condition as to furnishing proofs. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15; Equitable L. Assur. Soc. *v.* Winning, 58 Fed. 541, 7 C. C. A. 359.

65. White *v.* Smith, 2 Tex. App. Civ. Cas. § 399; Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Situs.— The proceeds of the insurance as a part of the estate are to be distributed in accordance with the law of the residence of

prima facie belong to the person taking the insurance. There is no implication that the insurance is for the benefit of the estate of the person whose life is insured.[66]

b. Legal Representatives. Unless the intention of the insured is otherwise indicated, a policy payable to his legal representatives is payable to his executors or administrators as assets of his estate.[67] But from the context and surrounding circumstances it may be shown that his intent was that it should be payable to his heirs or next of kin, in which case such disposition will be made of the proceeds.[68]

c. Executors or Administrators. The proceeds of a policy payable to heirs, executors, or administrators are payable to legal representatives as assets for the satisfaction of debts.[69] But by specification in the policy, the executor or administrator may take in trust for beneficiaries named, and the proceeds under such a provision are not subject to the payment of debts.[70]

d. Heirs or Next of Kin. As the proceeds of a policy of insurance are personal property, the term "heirs" used to indicate the persons to whom such proceeds are to be distributed designates those who take the personal estate of the deceased in case of intestacy.[71] The proceeds of a policy payable to the heirs of the

the assured. Mayo *v.* Equitable L. Assur. Soc., 71 Miss. 590, 15 So. 791.

Intention of assured.— But it does not necessarily follow that the proceeds of a policy payable to the "estate of the assured" pass to the administrator for the payment of debts. The intention of the assured may be shown for the purpose of ascertaining the beneficiary to whom the insurance money shall be paid. Pace *v.* Pace, 19 Fla. 438; Clinton *v.* Hope Ins. Co., 45 N. Y. 454.

Succession.— Under the statutes of Louisiana with relation to the sale of "the succession of a living person," the proceeds of a policy payable on the death of the assured do not constitute a part of his succession. Emonot's Succession, 109 La. 359, 33 So. 368; Stuart *v.* Sutcliffe, 46 La. Ann. 240, 14 So. 912. Nor is the naming of a beneficiary in a policy of insurance a donation of movables invalid in excess of one-tenth part of the whole value of the estate. Johnson's Succession, 115 La. 20, 38 So. 880.

66. John Hancock Mut. L. Ins. Co. *v.* Lawder, 22 R. I. 416, 48 Atl. 383. And see Ferdon *v.* Canfield, 104 N. Y. 143, 10 N. E. 146.

67. People *v.* Phelps, 78 Ill. 147; Wason *v.* Colburn, 99 Mass. 342.

68. Schultz *v.* Citizens' Mut. L. Ins. Co., 59 Minn. 308, 61 N. W. 331; Loos *v.* John Hancock Mut. L. Ins. Co., 41 Mo. 538; Griswold *v.* Sawyer, 125 N. Y. 411, 26 N. E. 464 [*reversing* 56 Hun 12, 8 N. Y. Suppl. 517, 565]; Pittel *v.* Fidelity Mut. Life Assoc., 86 Fed. 255, 30 C. C. A. 21.

Collection by administrator.— If by statute the proceeds of insurance go to the widow and children exempt from payment of decedent's debts, the administrator may collect the insurance money, but it is to be distributed to the persons entitled thereto and not applied to the benefit of creditors. Kelley *v.* Mann, 56 Iowa 625, 10 N. W. 211. And see *infra*, XII, D, 3, b.

Administration is not necessary, however, and the company cannot refuse payment to those ultimately entitled to the insurance money because no administration has been granted. Pratt *v.* Manhattan L. Ins. Co., 47 La. Ann. 855, 17 So. 341.

69. *Connecticut.*— Phœnix Mut. L. Ins. Co. *v.* Opper, 75 Conn. 295, 53 Atl. 586.

Georgia.— Rawson *v.* Jones, 52 Ga. 458.

Massachusetts.— Harding *v.* Littlehale, 150 Mass. 100, 22 N. E. 703.

New York.—Bartlett *v.* Goodrich, 153 N. Y. 421, 47 N. E. 794 [*affirming* 36 N. Y. Suppl. 770].

United States.— Jack *v.* Mutual Reserve Fund Life Assoc., 113 Fed. 49, 51 C. C. A. 36.

Administrator of beneficiary.— Where the policy was payable to a person named, wife of assured, "his executors, administrators or assigns," it was held that the possessive pronoun "his" should be construed as "her" to carry out the manifest intention of the assured. Haerther *v.* Mohr, 114 Iowa 636, 87 N. W. 692. The term "administrators," used with reference to children indicated in the policy as beneficiaries, and who survive the assured, may be construed as trustees or guardians, and the proceeds will be held for the benefit of such children. Schmidt's Estate, 30 Pittsb. Leg. J. (Pa.) 126.

70. Golder *v.* Chandler, 87 Me. 63, 32 Atl. 784; Stowe *v.* Phinney, 78 Me. 244, 3 Atl. 914, 57 Am. Rep. 796; Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720; *In re* Van Dermoor, 42 Hun (N. Y.) 326; Burton *v.* Farinholt, 86 N. C. 260.

Trustees may be named in the policy to hold for the benefit of children or others for whose benefit the insurance is taken. Silvey *v.* Hodgdon, 52 Cal. 363; Wolf *v.* Pearce, 45 S. W. 865, 20 Ky. L. Rep. 296; Cables *v.* Prescott, 67 Me. 582; Butler *v.* State Mut. L. Assur. Co., 125 N. Y. 769, 27 N. E. 409 [*affirming* 55 Hun 296, 8 N. Y. Suppl. 411]; *Re* Berryman, 17 Ont. Pr. 573.

71. Knights Templars, etc., Mut. Aid Assoc. *v.* Greene, 79 Fed. 461.

assured are not, like the proceeds of one payable to legal representatives, a part of the estate of the assured, but they go to the persons falling within the designation of heirs.[72] The widow is not a "legal heir," by virtue of her right as widow, to a share in the estate of the assured;[73] but if by statute the wife is entitled to share as distributee in her husband's personalty, she is within the term "legal heirs" in a life insurance policy;[74] and if by statute she is entitled to a larger share of her husband's property in the absence of direct descendants than she would otherwise have merely as widow, she is to that extent an "heir."[75]

e. Children The word "children" comprehends only immediate offspring unless a clear intention to use it in a larger sense can be fairly collected from the instrument in which it is employed.[76] So ordinarily it does not include grandchildren,[77] or lineal descendants remoter in degree.[78] A provision in the policy for "children" is to be construed as intended for the benefit of those subsequently born to the assured, as well as those in being at the time the policy is taken.[79]

Member of family.— An infant taken into the family of assured but not legally adopted is not included within the term "legal heirs." Merchant *v.* White, 77 N. Y. App. Div. 539, 79 N. Y. Suppl. 1, 12 N. Y. Annot. Cas. 233 [*affirming* 37 Misc. 376, 75 N. Y. Suppl. 756].

72. Yore *v.* Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81; Hubbard *v.* Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; Schoep *v.* Bankers' Alliance Ins. Co., 104 Iowa 354, 73 N. W. 825; Mullins *v.* Thompson, 51 Tex. 7; White *v.* Smith, 2 Tex. App. Civ. Cas. § 399.

Heirs on condition.— If the policy is payable to the wife if she survive, otherwise to the heirs of assured, the heirs do not have a vested interest. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Johnson *v.* Van Epps, 110 Ill. 551.

Heirs or assigns.— A policy payable to heirs or assigns of the assured, and not assigned, inures to the benefit of the heirs. Hubbard *v.* Turner, 93 Ga. 752, 20 S. E. 640, 30 L. R. A. 593; Mullins *v.* Thompson, 51 Tex. 7.

Illegitimate children so recognized as to be entitled to inherit from the father are his heirs within the terms of a policy payable to "legal heirs," although their existence is not known to the company, and payment of the insurance money to the legitimate children does not relieve the company from liability to the illegitimate children for their shares. Brown *v.* Iowa L. of H., 107 Iowa 439, 78 N. W. 73.

Next of kin.— The term "heirs" includes those who are next of kin, and a sister or brother of the insured is not excluded from such designation by a statute authorizing insurance for the benefit of wife and children. *In re* Andress, 6 Ohio S. & C. Pl. Dec. 174, 5 Ohio N. P. 253. The term "next of kin" added to other designation of beneficiaries is not to be limited to the classes thus specifically described. Maxwell *v.* Family Protective Union, 115 Ga. 475, 41 S. E. 552.

73. Johnson *v.* Supreme Lodge K. of H., 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732; Gauch *v.* St. Louis Mut. L. Ins. Co., 88 Ill. 251, 30 Am. Rep. 554; Phillips *v.* Carpenter, 79 Iowa 600, 44 N. W. 898 (but now by Code, § 3313, the term "legal heirs" includes the surviving wife or husband); Mearns *v.* Ancient Order of United Workmen, 22 Ont. 34; Matter of Duncombe, 3 Ont. L. Rep. 510.

74. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Lyons *v.* Yerex, 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452.

75. Alexander *v.* Northwestern Masonic Aid Assoc., 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161 [*affirming* 27 Ill. App. 29]; Jamieson *v.* Knights Templar, etc., Mut. Aid Assoc., 9 Ohio Dec. (Reprint) 388, 12 Cinc. L. Bul. 272. And *compare* Phillips *v.* Carpenter, 79 Iowa 600, 44 N. W. 898.

76. Russell *v.* Russell, 64 Ala. 500; Continental L. Ins. Co. *v.* Webb, 54 Ala. 688.

Rights of adopted child under policy see ADOPTION OF CHILDREN, 1 Cyc. 935.

No beneficiary.— Where a policy was made payable to children without condition, and no children were born to the assured, it was held that the executor of the assured could not maintain an action on the policy. McElwee *v.* New York L. Ins. Co., 47 Fed. 798.

77. Russell *v.* Russell, 64 Ala. 500; Continental L. Ins. Co. *v.* Webb, 54 Ala. 688; U. S. Trust Co. *v.* Mutual Benefit L. Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Ives *v.* New York Mutual L. Ins. Co., 129 N. C. 28, 39 S. E. 631; Elgar *v.* Equitable L. Assur. Soc., 113 Wis. 90, 88 N. W. 927. But *compare* Continental L. Ins. Co. *v.* Palmer, 42 Conn. 60, 19 Am. Rep. 530; Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689.

78. Continental L. Ins. Co. *v.* Webb, 54 Ala. 688.

79. Roquemore *v.* Dent, 135 Ala. 292, 33 So. 178, 93 Am. St. Rep. 33; Virgin *v.* Marwick, 97 Me. 578, 55 Atl. 520; Scull *v.* Ætna L. Ins. Co., 132 N. C. 30, 43 S. E. 504, 95 Am. St. Rep. 615, 60 L. R. A. 615. But *compare* Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105, when under a policy expressed to be for the benefit of the wife and children of the assured, it was held that the entire interest in the policy vested at once in the wife and children then in being, to the exclusion of future born children.

Vested interest of **beneficiary** see *infra*, XII, D, 2, a.

Although the policy names as beneficiaries the wife and children of assured, other children than those by the wife to whom the assured is married at the time of taking the policy are included.[80] But if the policy specifies as beneficiaries the wife of the assured and "their children," children by another wife are not included.[81]

f. Wife or Widow — (i) *In General.* Under a policy designating the wife of the insured as beneficiary, the person holding that relation to the insured at the time the policy is issued, and not the one who may become his wife by a subsequent marriage after the death of the former, is to be deemed the beneficiary under the policy.[82] If the designation of the beneficiary as the wife of the assured is descriptive only, it is immaterial whether or not she is his lawful wife.[83] But if the insurance is to be paid to the wife of the insured under that general designation, then the question is as to who is in fact the wife of insured at the time of his death.[84]

(ii) *Divorced Wife.* A subsequent divorce will not defeat the right of the person designated in the policy as wife to recover thereunder.[85]

2. Rights of Beneficiary — a. Vested Interest. The beneficiary designated in an ordinary life insurance policy has a vested interest from the time the contract

80. *California.*— Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492.

Georgia.— Helmken *v.* Meyer, 118 Ga. 657, 45 S. E. 450.

Iowa.— Koehler *v.* Centennial Mut. L. Ins. Co., 66 Iowa 325, 23 N. W. 687.

Minnesota.— Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

Missouri.— McDermott *v.* Centennial Mut. Life Assoc., 24 Mo. App. 73.

Pennsylvania.— Lehman *v.* Lehman, 215 Pa. St. 344, 64 Atl. 598 [*affirming* 29 Pa. Super. Ct. 60]; Sharples *v.* Darlington, 2 Chest. Co. Rep. 121.

See 28 Cent. Dig. tit. "Insurance," § 1463.

The family.— Children by a former marriage are included in the provision of a policy payable to "the family." Hutson *v.* Jenson, 110 Wis. 26, 85 N. W. 689.

81. Ætna Mut. L. Ins. Co. *v.* Clough, 68 N. H. 298, 44 Atl. 520; Lockwood *v.* Bishop, 51 How. Pr. (N. Y.) 221; Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120; Evans *v.* Opperman, 76 Tex. 293, 13 S. W. 312. *Contra*, State L. Ins. Co. *v.* Redman, 91 Mo. App. 49; Stigler *v.* Stigler, 77 Va. 163.

Wife and children by her.— If the policy is expressly for the benefit of a wife named and children by her, and no children of hers survive, the insurance goes to her, although there are surviving children by another marriage. Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120.

82. Day *v.* Case, 5 N. Y. St. 397; *In re* Eaton, 23 Ont. 593.

83. Ducksbury *v.* Supreme Lodge S. of H., 4 Lack. Leg. N. (Pa.) 172; Supplee *v.* Knights of Birmingham, 18 Wkly. Notes Cas. (Pa.) 280.

Fiancée.— Where a fraternal society issued a certificate payable to a person named as the fiancée of the assured, it was held that the benefit was payable to such person, although the assured had a wife living at the time of the issuance of the certificate. Woodmen of the World *v.* Rutledge, 133 Cal. 640, 65 Pac. 1105.

Where insured had abandoned his wife and was engaged to be married to another woman who was designated in the policy by her proper christian name as his wife and his death occurred before the consummation of a lawful marriage, it was held that the person named was entitled to the benefit, although she was not his wife. Bogart *v.* Thompson, 24 Misc. (N. Y.) 581, 53 N. Y. Suppl. 622.

84. Rice *v.* Rice, 63 S. W. 586, 23 Ky. L. Rep. 635.

Woman recognized as wife.— One who claims as wife is entitled to recover if her relations to the assured have been such as to entitle her to the rights of wife under the laws of the state of his residence. Watson *v.* Centennial Mut. Life Assoc., 21 Fed. 698.

A policy procured at the wife's solicitation for her benefit is payable to the wife, although procured by the money of the husband. Pingree *v.* Jones, 80 Ill. 177.

Wife's separate property in insurance on husband's life see Husband and Wife, 21 Cyc. 1370.

85. *Connecticut.*— Phœnix Mut. L. Ins. Co. *v.* Dunham, 46 Conn. 79, 33 Am. Rep. 14.

Missouri.— McKee *v.* Phœnix L. Ins. Co., 28 Mo. 383, 75 Am. Rep. 129.

New Jersey.— American Legion of Honor *v.* Smith, 45 N. J. Eq. 466, 17 Atl. 770.

Ohio.— Overhiser *v.* Overhiser, 63 Ohio St. 77, 57 N. E. 965, 81 Am. St. Rep. 612, 50 L. R. A. 552.

United States.— Connecticut Mut. L. Ins. Co. *v.* Schaefer, 94 U. S. 457, 24 L. ed. 251.

Contra.— See Hart *v.* Tudor, 2 Quebec Super. Ct. 534.

Termination of insurable interest does not defeat the right to the benefit provided for in the policy see *supra*, I, F.

Pending divorce.— So the fact that the wife named as beneficiary has a suit pending

of insurance is made, in the absence of any stipulation for change of beneficiary by the insured.[86] The beneficiary has a vested interest not only in the policy under the terms of the contract, but in any extended insurance to which the assured is entitled on account of the net reserve, upon failure to pay a premium

for divorce at the time of the maturity of the policy does not preclude her from claiming the proceeds. Ætna L. Ins. Co. *v.* Mason, 14 R. I. 583.

86. *Alabama.*— Drake *v.* Stone, 58 Ala. 133.

California.— Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Colorado.— New York Mut. L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889.

Connecticut.— Lemon *v.* Phœnix Mut. L. Ins. Co., 38 Conn. 294.

Illinois.— Glanz *v.* Gloeckler, 104 Ill. 573, 44 Am. Rep. 94 [*affirming* 10 Ill. App. 484]; Sauerbier *v.* Union Cent. L. Ins. Co., 39 Ill. App. 620; Hubbard *v.* Stapp, 32 Ill. App. 541.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 168 Ind. 379, 72 N. E. 132; Harley *v.* Heist, 86 Ind. 196, 45 Am. Rep. 285; Wilburn *v.* Wilburn, 83 Ind. 55; Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

Iowa.— Wilmaser *v.* Continental L. Ins. Co., 66 Iowa 417, 23 N. W. 903, 55 Am. Rep. 277.

Kentucky.— Weisert *v.* Muehl, 81 Ky. 336; Robinson *v.* Duvall, 79 Ky. 83, 42 Am. Rep. 208.

Louisiana.— Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602; Pilcher *v.* New York L. Ins. Co., 33 La. Ann. 322; Kugler's Succession, 23 La. Ann. 455.

Maine.— Laughlin *v.* Norcross, 97 Me. 33, 53 Atl. 834; National L. Ins. Co. *v.* Haley, 78 Me. 268, 4 Atl. 415, 57 Am. Rep. 807.

Maryland.— Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, 51 Atl. 838.

Minnesota.—Allis *v.* Ware, 28 Minn. 166, 9 N. W. 666; Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.

Missouri.— U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 69 S. W. 370 [expressly *overruling* Gambs *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44, and impliedly *overruling* Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328]; Packard *v.* Connecticut Mut. L. Ins. Co., 9 Mo. App. 469.

New Hampshire.— City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645.

New York.— Garner *v.* Germania L. Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 258; Sangunitto *v.* Goldey, 88 N. Y. App. Div. 78, 84 N. Y. Suppl. 989; Geoffroy *v.* Gilbert, 5 N. Y. App. Div. 98, 38 N. Y. Suppl. 643; Ruppert *v.* Union Mut. Ins. Co., 7 Rob. 155; Sterrit *v.* Lee, 24 Misc. 324, 52 N. Y. Suppl. 1132.

North Carolina.—Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217 [*overruling* Conigland *v.* Smith, 79 N. C. 303].

Ohio.— Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806.

Pennsylvania.— Entwistle *v.* Travelers' Ins. Co., 202 Pa. St. 141, 51 Atl. 759; Spencer's Estate, 11 Pa. Dist. 419.

Rhode Island.— Connecticut Mut. L. Ins. Co. *v.* Baldwin, 15 R. I. 106, 23 Atl. 105.

Tennessee.—D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768. But *compare* Gosling *v.* Caldwell, 1 Lea 454, 27 Am. Rep. 774; Rison *v.* Wilkerson, 3 Sneed 565.

United States.— Washington City Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 9 S. Ct. 41, 32 L. ed. 370.

Canada.— Mumford *v.* Mumford, 7 Can. L. T. Occ. Notes 325, 19 Nova Scotia 210; Campbell *v.* Dunn, 22 Ont. 98.

See 28 Cent. Dig. tit. "Insurance," § 1470.

The vested right of the beneficiary was first recognized "where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions." Washington City Cent. Nat. Bank *v.* Hume, 128 U. S. 195, 206, 9 S. Ct. 41, 32 L. ed. 370. Thus under statutes authorizing issuance for the benefit of the wife it was held that the wife acquired a vested interest which could not be defeated by the assured. Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720; Eadie *v.* Slimmon, 26 N. Y. 9, 82 Am. Dec. 395; Holt *v.* Everall, 2 Ch. D. 266, 45 L. J. Ch. 433, 34 L. T. Rep. N. S. 599, 24 Wkly. Rep. 471. And under a recent statute to the same effect in Wisconsin (Rev. St. § 2347) the court has adopted the same view (Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094 [*overruling* so far as in conflict Strike *v.* Wisconsin Odd Fellows Mut. L. Ins. Co., 95 Wis. 583, 79 N. W. 819]), although in the earlier cases in that state the vested interest of the beneficiary had been denied (Breitung's Estate, 78 Wis. 33, 46 N. W. 891, 47 N. W. 17; Foster *v.* Gile, 50 Wis. 603, 7 N. W. 555, 8 N. W. 217; Kerman *v.* Howard, 23 Wis. 108; Clark *v.* Durand, 12 Wis. 223). But without any such qualification, the overwhelming weight of authority supports the proposition that regardless of any such special considerations the beneficiary named has a vested interest.

Gifts.— Even though the benefit provided is a pure gratuity, the beneficiary has a vested interest, the designation of such beneficiary being valid as an executed gift; but in these cases there was a delivery of the policy, actual or implied, to the beneficiary. *In re* Dobbel, 104 Cal. 432, 38 Pac. 78, 43 Am. St. Rep. 123; Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955; Foley *v.* McMahon, 73 Ill. 66; Virgin *v.* Marwick, 97 Me. 578,

when due.[87] And under the usual provisions for distribution of accumulations after a specified period, such distribution should be made to the beneficiary and not to the assured, unless it is otherwise provided.[88] Likewise the beneficiary has a vested interest in a paid-up policy for a portion of the amount originally insured, to which the assured is entitled under the terms of the contract or by statute.[89] Even though the right of the beneficiary is made contingent on surviving the assured, such contingent interest is nevertheless vested, and the assured can make other provision as to the disposition of the proceeds only subject to the contingent right of the beneficiary, or after the contingent interest has terminated.[90]

b. Conditional Interests. The right of the beneficiary may be conditioned so that if the assured survives a certain age the sum assured or the accumulations of the policy may be paid to him or his legal representatives to the exclusion of such beneficiary.[91] Or the assured may be given the option of exercising the

55 Atl. 520; McGlynn *v.* Curry, 82 N. Y. App. Div. 431, 81 N. Y. Suppl. 855. And it has been said that without something corresponding to a completed delivery the gift is not executed. Kreh *v.* Moses, 22 Ont. 307. Where a policy was taken by a wife on the life of her husband, in favor of her children, and after payment of several premiums assigned by her to a creditor who paid the successive premiums, the gift was held to be only executed to the children in the proportion in which the premiums had been paid by the insured. Landrum *v.* Knowles, 22 N. J. Eq. 594.

In trust.— A provision by which the assured or someone named by him holds the policy in trust for the beneficiary confers a vested interest on such beneficiary. Small *v.* Jose, 86 Me. 120, 29 Atl. 976; Phipard *v.* Phipard, 55 Hun (N. Y.) 433, 8 N. Y. Suppl. 728; Butler *v.* State Mut. L. Assur. Co., 55 Hun (N. Y.) 296, 8 N. Y. Suppl. 441 [*affirmed* in 125 N. Y. 769, 27 N. E. 409]; Brubaker *v.* Brubaker, 18 Lanc. L. Rev. (Pa.) 156.

Legal heirs.— It is said that a designation of "legal heirs" as beneficiaries creates an irrevocable interest in those then living, and on their birth in those subsequently born. Yore *v.* Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81. But where the policy was payable to the wife if she survived her husband, otherwise to his heirs, it was held that as he could have no heirs until his death, there was no restriction on his disposition of the policy by changing beneficiary after the death of his wife. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086. And see *infra*, XII, D, 1, d.

Guardian and ward.— A policy taken by a guardian in the name of his wards to protect them and his bondsmen vests an interest in the wards as beneficiaries, and they do not simply hold the policy in trust. Herring *v.* Sutton, 129 N. C. 107, 39 S. E. 772.

By statute.— In Mississippi (Code (1892), § 1964), the rule that the beneficiary acquires a vested interest is statutory. Jackson Bank *v.* Williams, 77 Miss. 398, 26 So. 965, 78 Am. St. Rep. 530.

Insurable interest in the beneficiary is immaterial in determining whether such beneficiary has a vested right. Standard L., etc., Ins. Co. *v.* Catlin, 106 Mich. 138, 63 N. W. 897; Bloomstein *v.* Bloomstein, 1 Tenn. Ch. App. 187; Hurd *v.* Doty, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746. And see *supra*, I, D. If the beneficiary has a vested interest, then the legal representatives of such beneficiary succeed to such interest regardless of the question whether they have an insurable interest. Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, 51 Atl. 838.

Forfeiture as against beneficiary see *supra*, X, A, 4; X, C, 5.

Waiver by insured of premium notice as affecting beneficiary see *supra*, X, C, 6, i.

87. Mutual Ben. L. Ins. Co. *v.* Dunn, 106 Ky. 591, 51 S. W. 20, 21 Ky. L. Rep. 213.

88. New York L. Ins. Co. *v.* Ireland, (Tex. 1891) 17 S. W. 617, 14 L. R. A. 278.

89. Weatherbee *v.* New York L. Ins. Co., 182 Mass. 342, 65 N. E. 383; Brockhaus *v.* Kemna, 7 Fed. 609, 10 Biss. 338. And see *supra*, X, C, 9, c, (IV).

90. *Illinois.*— Johnson *v.* Van Epps, 110 Ill. 551 [*affirming* 14 Ill. App. 201].

Massachusetts.— Com. *v.* Unity Mut. L. Assur. Co., 117 Mass. 337.

Missouri.— U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641.

Wisconsin.— Ellison *v.* Straw, 116 Wis. 207, 92 N. W. 1094.

United States.— Eiseman *v.* Judah, 8 Fed. Cas. No. 4,321, 1 Flipp. 627.

Policy payable to wife or children.— If the policy is payable to the wife, or in the event of her prior death, to the children, both wife and children have a vested conditional interest. Entwistle *v.* Travelers' Ins. Co., 202 Pa. St. 141, 51 Atl. 759; D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

91. Levy *v.* Van Hagen, 69 Ala. 17; Tennes *v.* Northwestern Mut. L. Ins. Co., 26 Minn. 271, 3 N. W. 346; Miller *v.* Campbell, 2 Misc. (N. Y.) 518, 22 N. Y. Suppl. 388.

Trust as to proceeds.— Even though the policy is to be payable to the assured after reaching a certain age, instead of to the beneficiary, parol evidence is competent to show an intention to create a trust in favor of the beneficiary. Bancroft *v.* Russell, 157 Mass. 47, 31 N. E. 710.

right to convert the policy into an obligation payable to him as against the beneficiary.[92]

c. Change of Beneficiary — (I) *In General.* Under the rule that the beneficiary has a vested interest in the policy, a change of beneficiary cannot be effected without his consent unless provision is made therefor in the policy or contract,[93] or in a statute which becomes a part of the contract.[94]

(II) *By Taking New Policy.* The assured cannot by surrendering the policy with the consent of the company, and accepting a new policy naming a different beneficiary, defeat the vested rights of the vested beneficiary under the surrendered policy.[95] But after the termination of any beneficial interest in the

92. Travelers' Ins. Co. *v.* Healey, 25 N. Y. App. Div. 53, 49 N. Y. Suppl. 29 [*affirmed* in 164 N. Y. 607, 58 N. E. 1093].

93. *Arkansas.*— Franklin L. Ins. Co. *v.* Galligan, 71 Ark. 295, 73 S. W. 102, 100 Am. St. Rep. 73.

California.— Griffith *v.* New York L. Ins. Co., 101 Cal. 627, 36 Pac. 113, 40 Am. St. Rep. 96.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132; Harley *v.* Heist, 86 Ind. 196, 45 Am. Rep. 285.

Kentucky.— Weisert *v.* Muehl, 81 Ky. 336.

Louisiana.— Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602; Pilcher *v.* New York L. Ins. Co., 33 La. Ann. 332.

Missouri.— U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641 [expressly *overruling* Gambs *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44, and impliedly *overruling* Charter Oak L. Ins. Co. *v.* Brant, 47 Mo. 419, 4 Am. Rep. 328]; Packard *v.* Connecticut Mut. L. Ins. Co., 9 Mo. App. 469.

New York.— Garner *v.* Germania L. Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256; Sangunitto *v.* Goldey, 88 N. Y. App. Div. 78, 84 N. Y. Suppl. 989.

Pennsylvania.— Entwistle *v.* Travelers' Ins. Co., 202 Pa. St. 141, 51 Atl. 759.

Vermont.— Atkins *v.* Atkins, 70 Vt. 565, 41 Atl. 503.

Canada.— Campbell *v.* Dunn, 22 Ont. 98.

See 28 Cent. Dig. tit. "Insurance," § 1470.

See also cases cited *supra*, XII, D, 2, a.

Assignment without consent of beneficiary see *supra*, VI, C, 6.

Certificate of mutual benefit association see MUTUAL BENEFIT INSURANCE.

A provision in a life insurance policy requiring notice to the insured of "any assignment" refers to assignments by the beneficiary, and is not a reservation to the insured of the right to change the beneficiary. Irwin *v.* Travelers' Ins. Co., 16 Tex. Civ. App. 683, 39 S. W. 1097.

94. See Lamb *v.* Mutual Reserve Fund Life Assoc., 106 Fed. 637.

In Ontario by Rev. St. (1897) c. 203, § 159, cl. 2, it is provided that the husband, wife, children, grandchildren, and mother of the insured shall constitute a class which may be known as preferred beneficiaries, and all other beneficiaries may be known as ordinary beneficiaries. And by section 160 it is provided that the insured may by an instrument in writing attached to, indorsed on, or identifying the policy by its number or otherwise, vary the benefit or beneficiary within the preferred class, or he may apportion the insurance money or alter the apportionment as between several beneficiaries of such class, and further that he may make or alter an apportionment by will. For cases in which these provisions have been considered see Potts *v.* Potts, 31 Ont. 452; *Re* Cheesborough, 30 Ont. 639; *Re* Carbery, 30 Ont. 40; McIntyre *v.* Silcox, 29 Ont. 593; Videan *v.* Westover, 29 Ont. 1; *In re* Mills, 28 Ont. 563; *Re* Grant, 26 Ont. 120, 485; Simmons *v.* Simmons, 24 Ont. 662; Graham *v.* Canada L. Assur. Co., 24 Ont. 607; Neilson *v.* Ontario Trust Corp., 24 Ont. 517; *Re* Cameron, 21 Ont. 634; Mingeaud *v.* Packer, 21 Ont. 267 [*affirmed* in 19 Ont. App. 290]; Scott *v.* Scott, 20 Ont. 313; Book *v.* Book, 1 Ont. L. Rep. 86 [*reversing* 32 Ont. 206].

In Quebec 41 & 42 Vict. (Q), c. 13, enables a person who has effected an insurance for the benefit of his wife, or of his wife and children, etc., to revoke the benefit to the person or persons named in the policy and to make a reapportionment. See Rees *v.* Hughes, 3 Quebec Q. B. 443.

95. Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602; Pingrey *v.* National L. Ins. Co., 144 Mass. 374, 11 N. E. 562; Ricker *v.* Charter Oak L. Ins. Co., 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; Barry *v.* Mutual L. Ins. Co., 49 How. Pr. (N. Y.) 504; Bunnell *v.* Shilling, 28 Ont. 336. But *compare* Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Surrender without consent of beneficiary in general see *supra*, VIII, B, 2.

Intent.— In a controversy between beneficiaries under successive policies, it may become important to ascertain the intent of the insured by referring to the different policies, and the applications therefor, and the reasons for making the substitution of one for another. Towne *v.* Towne, 93 Ill. App. 159. And it may appear that the second policy was not a mere substitute for the first, but constituted an independent contract. Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217. Thus where the assignee of a policy refused to pay the premiums thereon, and it was surrendered and a new policy taken out payable to another beneficiary than the one named in the first, it was held that the facts did not show a fraudulent conspiracy to deprive the beneficiary under the first policy

person named as beneficiary, as for instance by the death of the wife who is to receive the insurance money in the event she survives the assured, the assured may by the surrender of the policy and the acceptance of another in its place designate a new beneficiary.[96]

(III) *Under a Provision Authorizing Such Change.* There may be a stipulation in the policy or contract of insurance by which the assured has the contract right to change the beneficiary, with the assent of the company, by taking a new policy or otherwise. Under such a stipulation the beneficiary has not a vested interest, and the designation of a new beneficiary will be valid.[97] To

of the benefit of the insurance. Matlack *v.* Philadelphia Seventh Nat. Bank, 180 Pa. St. 360, 36 Atl. 1082. And see Britton *v.* New York Mut. L. Ins. Co., 12 Daly (N. Y.) 164.

Second policy deemed continuation.— Where the second policy is identical in amount, rate of premium, and conditions, with the first, and the only difference is as to the name of the beneficiary, the second may be considered a continuation of the first, and the original beneficiary is entitled to the proceeds of the second policy. Lemon *v.* Phœnix Mut. L. Ins. Co., 38 Conn. 294; Chapin *v.* Fellowes, 36 Conn. 132, 4 Am. Rep. 49; Norwood *v.* Guerdon, 60 Ill. 253; Garner *v.* Germania L. Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256; Matlack *v.* Philadelphia Seventh Nat. Bank, 180 Pa. St. 360, 36 Atl. 1082. But a settlement with the company under the surrendered policy will defeat recovery under the substituted policy. Putnam *v.* New York L. Ins. Co., 42 La. Ann. 739, 7 So. 602; Barry *v.* Brune, 71 N. Y. 261; Kelly *v.* Connecticut Mut. L. Ins. Co., 27 N. Y. App. Div. 336, 50 N. Y. Suppl. 139.

Forfeiture of first policy for non-payment of premiums.— It has been held that if after its surrender the original policy has become forfeited for non-payment of premiums, no action thereon can be maintained by the beneficiary upon it, although the assured has intentionally allowed it to become forfeited and has taken the new policy as a substitute therefor, continuing to pay premiums on such new policy. Weatherbee *v.* New York L. Ins. Co., 182 Mass. 342, 65 N. E. 383; Weatherbee *v.* New York L. Ins. Co., 178 Mass. 575, 60 N. E. 381; Miles *v.* Connecticut Mut. L. Ins. Co., 147 U. S. 177, 13 S. Ct. 275, 37 L. ed. 128. With sounder reason, however, it has been held that by issuing the new policy in consideration of the surrender of the old, the company has waived further payment of premiums on the old policy, and the beneficiary may recover thereunder. Garner *v.* Germania L. Ins. Co., 110 N. Y. 266, 18 N. E. 130, 1 L. R. A. 256. At any rate, if the company has not taken the proper steps, by giving notice, to effect a forfeiture of the old policy, the beneficiary may sue thereon. Whitehead *v.* New York L. Ins. Co., 102 N. Y. 143, 6 N. E. 267, 55 Am. Rep. 787; Manhattan L. Ins. Co. *v.* Smith, 44 Ohio St. 156, 5 N. E. 417, 58 Am. Rep. 806. See also *supra*, VIII, B, 5, a, text and note 4. Of course, if the beneficiary is regarded as having no vested interest, the assured may surrender the policy and accept a new one, naming a different beneficiary, and the original beneficiary will have no right to treat the new policy as a continuation of the old. Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Trust as to proceeds of new policy.— The original beneficiary, if regarded as having a vested interest, may be entitled to have the proceeds of the new policy treated as a trust fund for his benefit. Barry *v.* Brune, 71 N. Y. 261 [*affirming* 8 Hun 395]; Dutton *v.* Willner, 52 N. Y. 312; Matlack *v.* New York Mut. L. Ins. Co., 5 Pa. Dist. 113, 37 Wkly. Notes Cas. 526. So if the beneficiary has paid premiums to keep the policy alive, he may, without regard to the doctrine of vested interest, be entitled to an equitable share in the proceeds of the new policy. National L. Ins. Co. *v.* Haley, 78 Me. 268, 4 Atl. 415, 57 Am. Rep. 807.

96. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Johnson *v.* Van Epps, 110 Ill. 551; Bickerton *v.* Jacques, 28 Hun (N. Y.) 119, 12 Abb. N. Cas. 25. See also Union Mut. L. Ins. Co. *v.* Stevens, 19 Fed. 671.

Beneficiary's estate.— But where the wife of assured was named as beneficiary, and a policy delivered to her, and afterward on her death a new policy was issued specifying the "estate" as beneficiary therein, it was held that the word "estate" referred to the estate of the wife named in the original policy. Cooper *v.* Metropolitan L. Ins. Co., 1 N. Y. App. Div. 291, 37 N. Y. Suppl. 129.

The legal representatives or heirs of the assured named as beneficiaries in the original policy, in the event of the death of the wife before the assured, do not have such vested interest as that the assured cannot after the death of the wife take a policy in favor of a new beneficiary. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086; Johnson *v.* Van Epps, 110 Ill. 551.

97. *Colorado.*—Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875.

District of Columbia.— Washington Beneficial Endowment Assoc. *v.* Wood, 4 Mackey 19, 54 Am. Rep. 251.

Georgia.— Bilbro *v.* Jones, 102 Ga. 161, 29 S. E. 118.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132.

Kentucky.— Mutual L. Ins. Co. *v.* Twyman, 92 S. W. 335, 28 Ky. L. Rep. 1153, 89 S. W. 178, 28 Ky. L. Rep. 167; Wrather *v.* Stacy, 82 S. W. 420, 26 Ky. L. Rep. 683.

effect a change of beneficiary even where the assured has a right to make such change, the designation of the new beneficiary must be in the method pointed out by the contract.[98]

New York.— Cellery *v.* John Hancock Mut. L. Ins. Co., 57 N. Y. App. Div. 227, 68 N. Y. Suppl. 128.

United States.— Hopkins *v.* Northwestern L. Assur. Co., 99 Fed. 199, 40 C. C. A. 1; Robinson *v.* U. S. Mutual Acc. Assoc., 68 Fed. 825.

A statutory provision entitling the wife to the proceeds of insurance on the life of her husband free from his debts does not prevent a change of beneficiary in a policy taken in her favor by her husband, in which change of beneficiary is authorized. Mente *v.* Townsend, 68 Ark. 391, 59 S. W. 41; Hopkins *v.* Hopkins, 92 Ky. 324, 17 S. W. 864, 13 Ky. L. Rep. 707.

By contract with the assured a beneficiary may acquire a vested property right in the proceeds of a certificate, although it is subject to change. Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086. But in the absence of a contract, the beneficiary cannot by voluntarily and gratuitously paying the assessments acquire a vested interest. Nix *v.* Donovan, 18 N. Y. Suppl. 435.

On condition.—If the assured asks a change of beneficiary, on condition that the original beneficiary does not claim under the policy, such change does not affect the rights of the original beneficiary, and the new beneficiary cannot recover until the rights of the former beneficiary are in some way barred. Helfrich *v.* John Hancock Mut. L. Ins. Co., 8 Misc. (N. Y.) 320, 28 N. Y. Suppl. 535.

Second change.— The insured having the right to change the beneficiary is not bound by such change, and may make a subsequent designation which will be valid. Stoll *v.* Mutual Ben. L. Ins. Co., 115 Wis. 558, 92 N. W. 277.

Change not made.— Where there is a provision reserving the right to change the beneficiary, but that right has not been exercised, the beneficiary is entitled to the proceeds of the policy and may after the death of the insured sue for wrongful conversion by the company. New York Mut. L. Ins. Co. *v.* Allen, 212 Ill. 134, 72 N. E. 200 [*affirming* 113 Ill. App. 89].

98. *Georgia.*— Nally *v.* Nally, 74 Ga. 669, 58 Am. Rep. 458.

Illinois.— Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 [*reversing* 117 Ill. App. 565].

New York.—Sangunitto *v.* Goldey, 88 N. Y. App. Div. 78, 84 N. Y. Suppl. 989.

Wisconsin.— Berg *v.* Damkoehler, 112 Wis. 587, 88 N. W. 606.

United States.— Saling *v.* Bolander, 125 Fed. 701, 60 C. C. A. 469; Eiseman *v.* Judah, 8 Fed. Cas. No. 4,321, 1 Flipp. 627.

England.— *In re* Davies, [1892] 3 Ch. 63, 61 L. J. Ch. 595, 67 L. T. Rep. N. S. 548, 41 Wkly. Rep. 13.

Waiver.— Conditions which are for the benefit of the company may be waived by it. Lamb *v.* Mutual Reserve Fund Life Assoc., 106 Fed. 637. So the company may consent to an informal change so as to make it effectual. Atlantic Mut. L. Ins. Co. *v.* Gannon, 179 Mass. 291, 60 N. E. 933. But the company cannot, after the death of insured and the consequent vesting of the rights of the beneficiary, waive, as against the beneficiary, provisions of the policy relative to change of beneficiary. Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 [*reversing* 117 Ill. App. 565]. The act of an insurance company in filing a bill of interpleader and paying the proceeds of the policy into court cannot be urged by either of the claimants as against the other as a waiver by the company of non-compliance by insured with provisions of the policy for changing the beneficiary (Freund *v.* Freund, *supra*); nor does the act of an insurance company in furnishing to the insured at a branch office forms of notice to change the beneficiary constitute a waiver of a requirement of the policy that the change of beneficiary be made by the company at its home office (Freund *v.* Freund, *supra*).

The consent of the company, being required by the contract, an attempted change not assented to by the company will not be valid (Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 [*reversing* 117 Ill. App. 565], holding that a New York statute (Laws [1892], p. 2015, c. 690, § 211), requiring the consent of the insurance company to a change of beneficiary by insured becomes a part of a New York policy issued while such statute is in force, and is controlling on the subject covered thereby, although the policy is silent concerning the same; Canavan *v.* John Hancock Mut. L. Ins. Co., 39 Misc. (N. Y.) 782, 81 N. Y. Suppl. 304; John Hancock Mut. L. Ins. Co. *v.* White, 20 R. I. 457, 40 Atl. 5), even under a statute permitting change of beneficiary without the consent of the original beneficiary (Newman *v.* John Hancock Mut. L. Ins. Co., 45 Misc. (N. Y.) 320, 90 N. Y. Suppl. 471). But where the policy is payable to the executor or administrator of the insured it would seem that he may designate a specific beneficiary without the consent of the company. Gaston *v.* Bailey, 14 Ind. App. 581, 43 N. E. 254. See also *supra*, VI, C, 2.

Change not perfected at death of insured.— The rights of a beneficiary in a life insurance policy become fixed at the death of insured, and are not affected by a contemplated change of beneficiary, which insured had intended to make, but which had not been perfected in accordance with the statute and terms of the policy at the time of his death. Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 [*reversing* 117 Ill. App. 565].

Equitable relief in case of defective change. — Under N. Y. Laws (1892), p. 2015, c. 690,

(iv) *Disposition of Proceeds by Will.* Policies payable to the assured[99] or his legal representatives[1] may be disposed of by him by will as a part of his estate. But policies otherwise payable cannot be so disposed of.[2] By statute it has sometimes been provided that a policy in favor of a married woman upon the life of her husband, for her sole use, may, in case such woman has no children or any issue of any children, be disposed of by her will.[3] By making the insurance money payable to the devisee of the assured, any interest on the part of the estate of the assured is excluded.[4]

d. Rights Where Death Results From Act of Beneficiary. If the assignee or beneficiary feloniously causes the death of the assured, there can be no recovery in favor of such wrong-doer under the policy, regardless of whether there is any violation of the stipulations in the policy itself.[5] Where the assignee or beneficiary is thus defeated, the amount of the policy becomes payable to the heirs or

§ 211, requiring consent of a life insurance company to a change of beneficiary, and under a policy requiring such consent to be indorsed on the policy by the company at its home office, equity will not effect a change of beneficiary attempted to be made by insured, but not completed in accordance with the statute and policy at the time of his death. Freund *v.* Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283 [*reversing* 117 Ill. App. 565].

Mutilation.— Although the assured has the right to change beneficiary with the consent of the company, he cannot do so by adding the name of another beneficiary in the instrument itself, and the original beneficiary may show the mutilation and recover on the contract as originally made. Provident Sav. L. Assur. Soc. *v.* Dees, 86 S. W. 522, 27 Ky. L. Rep. 670.

99. Golder *v.* Chandler, 87 Me. 63, 32 Atl. 784; Hamilton *v.* McQuillan, 82 Me. 204, 19 Atl. 167; Leonard *v.* Harney, 173 N. Y. 352, 66 N. E. 2 [*modifying* 63 N. Y. App. Div. 294, 71 N. Y. Suppl. 546].

A statute providing that life insurance money shall not constitute a part of decedent's estate for payment of his debts, but shall descend in certain proportions to the widow and children, does not prevent a solvent testator having a wife but no children from disposing of insurance money upon his life by will (Hamilton *v.* McQuillan, 82 Me. 204, 19 Atl. 167); nor does a statute providing that such a policy shall survive to the benefit of his widow and children exempt from his debts (Williams *v.* Carson, 9 Baxt. (Tenn.) 516). But a statute providing that a policy of insurance upon the life of any person, expressed to be for the benefit of any married woman shall inure to her separate use and benefit and that of her children, independently of her husband or his creditors, has been held to prevent a disposition of the policy by the will of the insured. Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720. See also *supra*, VI, A, 3.

1. Fox *v.* Senter, 83 Me. 295, 22 Atl. 173; Williams *v.* Carson, 9 Baxt. (Tenn.) 516.

2. Wilmaser *v.* Continental L. Ins. Co., 66 Iowa 417, 23 N. W. 903, 55 Am. Rep. 277; McClure *v.* Johnson, 56 Iowa 620, 10 N. W. 217; Gould *v.* Emerson, 99 Mass. 154, 96 Am. Dec. 720. *Compare supra*, VI, C, 6, note 97.

3. See Bradshaw *v.* New York Mut. L. Ins. Co., 109 N. Y. App. Div. 375, 95 N. Y. Suppl. 780, holding that a policy declared to be payable on insured's death to his wife for her sole use, if living, in conformity with the statute, and if not living, to their children or their guardian for their use, was within the statute, and in case of the death of the wife without issue prior to the death of her husband passed under the residuary clause of her will, although the policy was procured by the husband who kept it in his possession and paid the premiums thereon.

4. House *v.* Northwestern L. Assur. Co., 200 Pa. St. 173, 49 Atl. 937; Worley *v.* Northwestern Masonic Aid Assoc., 10 Fed. 227, 3 McCrary 53.

5. *Illinois.*— Schreiner *v.* High Court I. C. O. of F., 35 Ill. App. 576.

Iowa.— Schmidt *v.* Northern Life Assoc., 112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141.

Tennessee.— Box *v.* Lanier, 2 Tenn. Ch. App. 1, 112 Tenn. 393, 79 S. W. 1042, 64 L. R. A. 458.

United States.— New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997; Prather *v.* Michigan Mut. L. Ins. Co., 19 Fed. Cas. No. 11,368.

England.— Cleaver *v.* Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147, 56 J. P. 180, 61 L. J. Q. B. 128, 66 L. T. Rep. N. S. 220, 40 Wkly. Rep. 230.

An insane beneficiary causing the death of the assured by an act which is not felonious on account of such insanity does not forfeit his right to recover under the policy. Holdom *v.* Ancient Order of United Workmen, 159 Ill. 619, 43 N. E. 772, 50 Am. St. Rep. 183, 31 L. R. A. 67.

Cancellation of the policy.— It is a fraud to take insurance on the life of another with intent to hasten his death, and the company is entitled to have such a policy canceled in equity. Prince of Wales, etc., Assoc. Co. *v.* Palmer, 25 Beav. 605, 53 Eng. Reprint 768.

If the assignee has an interest only to the extent of premiums paid by him, this interest only will be forfeited by his felonious act in causing the death of the assured. New York L. Ins. Co. *v.* Davis, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

personal representatives who in the absence of the assignment or designation of a beneficiary would have been entitled to the proceeds of the insurance.[6]

3. Distribution to Beneficiaries — a. To Beneficiary as Against Administrator. The administrator or other legal representative of the estate has no right as against the beneficiary to receive the insurance money as the assets of the estate.[7] When, however, the policy has been disposed of by will the executor of insured may claim the proceeds as against the special legatee.[8]

b. To Legal Representatives of Beneficiary.[9] As the beneficiary has a vested interest from the time the policy takes effect,[10] the death of the beneficiary named in the policy before the maturity of the policy by the death of the assured does not defeat the beneficiary's rights, and the legal representatives of such beneficiary are entitled to the proceeds.[11] But if the interest of the beneficiary is con-

6. Cleaver *v.* Mutual Reserve Fund Life Assoc., [1892] 1 Q. B. 147, 56 J. P. 180, 61 L. J. Q. B. 128, 66 L. T. Rep. N. S. 220, 40 Wkly. Rep. 230; Standard L. Assur. Co. *v.* Trudeau, 9 Quebec Q. B. 499 [*affirming* 16 Quebec Super. Ct. 539. See also Schmidt *v.* Northern Life Assoc., 112 Iowa 41, 83 N. W. 800, 51 L. R. A. 141.

7. *Illinois.*— Pinneo *v.* Goodspeed, 120 Ill. 524, 12 N. E. 196 [*affirming* 22 Ill. App. 50].

Louisiana.— Emonot's Succession, 109 La. 359, 33 So. 368.

Maine.— Douglass *v.* Parker, 84 Me. 522, 24 Atl. 956; Cragin *v.* Cragin, 66 Me. 517, 22 Am. Rep. 588.

New York.— Senior *v.* Ackerman, 2 Redf. Surr. 302.

Ohio.— See Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120.

Pennsylvania.— Weiss' Appeal, 133 Pa. St. 84, 19 Atl. 311; Bomberger *v.* Union Ben. Mut. Aid Soc., 3 Pa. Cas. 293, 6 Atl. 41; Tiedeken's Estate, 11 Phila. 95.

Canada.— Matter of Duncombe, 3 Ont. L. Rep. 510.

If collected by the administrator, he holds it in trust for the beneficiary. Kimball *v.* Gilman, 60 N. H. 54; *In re* Van Dermoor, 42 Hun (N. Y.) 326.

Where a beneficiary of a wagering policy collects the money due on the policy, however, he is liable to the legal representatives of the assured therefor. Riner *v.* Riner, 166 Pa. St. 617, 31 Atl. 347, 45 Am. St. Rep. 693; Vanormer *v.* Hornberger, 142 Pa. St. 575, 21 Atl. 887; Brennan *v.* Franey, 142 Pa. St. 301, 21 Atl. 803; Lenig *v.* Eisenhart, 127 Pa. St. 59, 17 Atl. 684; Stambaugh *v.* Blake, (Pa. 1888) 15 Atl. 705; Ruth *v.* Katterman, 112 Pa. St. 251, 3 Atl. 833; Cheeves *v.* Anders, 87 Tex. 287, 28 S. W. 274, 47 Am. St. Rep. 107; Mayher *v.* Manhattan L. Ins. Co., 87 Tex. 169, 27 S. W. 124. See also Hoffman *v.* Hoke, 122 Pa. St. 377, 15 Atl. 437, 1 L. R. A. 229. But the right of the legal representatives of an assured person to recover the proceeds of a speculative life policy from a person who has received the money ceases where an executor or administrator has received and in good faith distributed it. Blake *v.* Metzger, 150 Pa. St. 291, 24 Atl. 755.

8. Archambault *v.* Citizens Ins. Co., 24 L. C. Jur. 293.

9. Descent of interest of beneficiary see Descent and Distribution, 14 Cyc. 27.

10. See *supra*, XII, D, 2, a.

11. *Connecticut.*— Phœnix Mut. L. Ins. Co. *v.* Dunham, 46 Conn. 79, 33 Am. Rep. 14.

Massachusetts.— Swan *v.* Snow, 11 Allen 224.

New Jersey.— Brown *v.* Murray, 54 N. J. Eq. 594, 35 Atl. 748.

New York.— U. S. Trust Co. *v.* Mutual Ben. L. Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Waldheim *v.* John Hancock L. Ins. Co., 13 N. Y. Suppl. 577.

North Carolina.— Simmons *v.* Biggs, 99 N. C. 236, 5 S. E. 235; Conigland *v.* Smith, 79 N. C. 303.

Pennsylvania.— *In re* Anderson, 85 Pa. St. 202.

See 28 Cent. Dig. tit. "Insurance," § 1472.

Especially is this true if the provision of the policy is that the proceeds shall be paid to the beneficiary named, or his or her heirs or representatives. Drake *v.* Stone, 58 Ala. 133; Dobbel's Estate, 104 Cal. 432, 38 Pac. 87, 43 Am. St. Rep. 123; Preston *v.* Connecticut Mut. L. Ins. Co., 95 Md. 101, 51 Atl. 838; Geoffroy *v.* Gilbert, 5 N. Y. App. Div. 98, 38 N. Y. Suppl. 643 [*reversing* 15 Misc. 60, 36 N. Y. Suppl. 884]; Sterritt *v.* Manhattan L. Ins. Co., 58 N. Y. Suppl. 1149 [*affirming* 24 Misc. 324, 52 N. Y. Suppl. 1132]; Hunter *v.* Scott, 108 N. C. 213, 12 S. E. 1027; Gass *v.* U. S. Life Ins. Co., 4 Ohio S. & C. Pl. Dec. 234, 3 Ohio N. P. 216; U. B. Mutual Aid Soc. *v.* Miller, 107 Pa. St. 162; Degintner's Appeal, 83 Pa. St. 337; Hardy's Estate, 12 Phila. (Pa.) 29; Baltz's Estate, 12 Phila. (Pa.) 29. If, however, the beneficiary is held not to have a vested interest then the legal representatives of such beneficiary dying before the assured have no interest. Gambs *v.* Covenant Mut. L. Ins. Co., 50 Mo. 44.

In Tennessee where the beneficiary is a married woman, who dies before the assured leaving a husband who survives the assured, her husband, not her children or other next of kin, takes the benefit of such insurance *jure mariti* as he takes other choses in action of the wife; and the husband, not the wife's personal representative, is entitled to sue for and recover same. D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

ditioned on surviving the assured, the legal representatives of such beneficiary are not entitled to the proceeds, and the insurance money becomes a part of the estate of the assured as though no such beneficiary had been named.[12]

c. As Between Beneficiaries. If the provisions of the policy expressly or by implication indicate that as between two or more possible beneficiaries the person or persons entitled to participate in the proceeds shall be such of the persons named as survive the assured, then the beneficiaries are to be determined by such survivorship, and the representatives of those who may die before the assured have no interest.[13] But under the usual provision for payment of the proceeds to the wife of the assured if living, and if not living to the children, it is generally held that each of the children who would have had a vested interest at the time of issuance of the policy had there been no contingent provision for the wife acquires a vested contingent interest and is entitled to share in the proceeds in the event that the wife does not survive the assured, the representatives of those dying before the death of the assured being entitled to the share which such child would have taken had he survived,[14] although in some jurisdictions it is held that

Surviving husband's rights as to wife's interest in insurance on his life see DESCENT AND DISTRIBUTION, 14 Cyc. 71.

Statutory provisions.— A statute relating to the distribution of the proceeds of a policy on the death of the person entitled thereto does not apply to policies already in force. Plaut *v.* Mutual L. Ins. Co., 26 Ohio Cir. Ct. 499.

12. *Colorado.*— Anderson *v.* Groesbeck, 26 Colo. 3, 55 Pac. 1086.

Connecticut.— Keller *v.* Gaylor, 40 Conn. 343.

Massachusetts.— Bancroft *v.* Russell, 157 Mass. 47, 31 N. E. 710.

Minnesota.— Lamberton *v.* Bogart, 46 Minn. 409, 49 N. W. 230.

New York.—Waldheim *v.* John Hancock Mut. L. Ins. Co., 8 Misc. 506, 28 N. Y. Suppl. 766; Cole *v.* Knickerbocker L. Ins. Co., 63 How. Pr. 442.

Ohio.—Ryan *v.* Rothweiler, 50 Ohio St. 595, 35 N. E. 679.

Pennsylvania.— *In re* Gray, 25 Pittsb. Leg. J. N. S. 219.

Texas.—Schumacher *v.* Schumacher, 32 Tex. Civ. App. 497, 75 S. W. 50.

Canada.—Wicksteed *v.* Munro, 13 Ont. App. 486; *In re* Ætna L. Ins. Co. *v.* Gosselin, 2 Quebec Super. Ct. 392.

Reservation to legal representatives of assured.— The rule stated in the text is especially applicable if the provision of the policy is that on the death of the beneficiary before the death of the assured the proceeds shall be paid to the legal representatives of assured or persons designated by him. Johnson *v.* Van Epps, 110 Ill. 551 [*affirming* 14 Ill. App. 201]; Boyden *v.* Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 N. E. 669; Schumacher *v.* Schumacher, 32 Tex. Civ. App. 497, 75 S. W. 50. See also Merchant *v.* White, 77 N. Y. App. Div. 539, 79 N. Y. Suppl. 1 [*affirming* 37 Misc. 376, 75 N. Y. Suppl. 756].

Several beneficiaries.— If the policy is payable to the wife and children of the assured if they survive him, no portion of the insurance money becomes payable to the representatives of the assured, provided any of the beneficiaries named survive. Fish *v.* Massachusetts Mut. L. Ins. Co., 186 Mass. 358, 71 N. E. 786; Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217; Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120; Clark *v.* Dawson, 195 Pa. St. 137, 45 Atl. 674.

13. Covenant Mut. Ben. Assoc. *v.* Hoffman, 110 Ill. 603; Bell *v.* Kinneer, 101 Ky. 271, 40 S. W. 686, 19 Ky. L. Rep. 545, 72 Am. St. Rep. 410; Bickel *v.* Bickel, 79 S. W. 215, 25 Ky. L. Rep. 1945; Anderson *v.* Goldsmidt, 103 N. Y. 617, 9 N. E. 495; Lerch *v.* Freutel, 36 Misc. (N. Y.) 581, 73 N. Y. Suppl. 1078; Elgar *v.* Equitable L. Assur. Soc., 113 Wis. 90, 88 N. W. 927.

To wife on condition of survival.— The right of the wife as beneficiary may be made conditional on her surviving the assured, and under such a condition the estate of the wife or her personal representatives have no interest as against the children who are designated as beneficiaries in the event of such death of the wife. Mutual L. Ins. Co. *v.* Hagerman, 19 Colo. App. 33, 72 Pac. 889; Fidelity Trust Co. *v.* Marshall, 178 N. Y. 468, 71 N. E. 8 [*affirming* 93 N. Y. App. Div. 607, 87 N. Y. Suppl. 1134]; Brown's Appeal, 125 Pa. St. 303, 17 Atl. 419, 11 Am. St. Rep. 900.

Such a construction is imperative where the policy expressly refers to the surviving children of the assured. Small *v.* Jose, 86 Me. 120, 29 Atl. 976; U. S. Trust Co. *v.* Mutual Ben. L. Ins. Co., 115 N. Y. 152, 21 N. E. 1025; Lane *v.* De Mets, 59 Hun (N. Y.) 462, 13 N. Y. Suppl. 347. Even though the policy is made payable to the wife or her legal representatives, if it provides that on her death before that of the assured the benefit shall go to her children, her estate, if she dies before the assured, is not entitled to the benefit, but it goes to the children. Conrad's Estate, 89 Iowa 396, 56 N. W. 535, 48 Am. St. Rep. 353.

14. *Connecticut.*— Continental L. Ins. Co. *v.* Palmer, 42 Conn. 60, 19 Am. Rep. 530.

Iowa.— Conrad's Estate, 89 Iowa 396, 56 N. W. 535, 48 Am. St. Rep. 396.

the child must have survived the wife in order that his representatives may take.[15] As between two or more beneficiaries named without condition as to survivorship, each acquires a vested interest, and if one of them dies before the assured, his representatives are entitled to the interest which he would have had if he had survived.[16] As between the beneficiaries named without condition, distribution should be made *per capita*, the representatives of one deceased taking the interest which that one would have taken had he survived.[17] If the policy designates the heirs of the assured as beneficiaries, distribution should be made in accordance with the rules under which the personal estate is divided.[18] If the right of a beneficiary as against the estate of the assured or as against other beneficiaries is made conditional on such beneficiary surviving, there is no presumption in the case of death from a common disaster that the beneficiary has survived the assured, and the conditional benefit becomes absolute only on proof of actual survival.[19]

Michigan.— Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689.

New Hampshire.— Connecticut Mut. L. Ins. Co. *v.* Fish, 59 N. H. 126.

Pennsylvania.— *In re* Thorne, 33 Pittsb. Leg. J. 233.

Tennessee.— Glenn *v.* Burns, 100 Tenn. 295, 45 S. W. 784.

See 28 Cent. Dig. tit. "Insurance," § 1474.

Children surviving the wife are at any rate vested with an interest on her death so that the legal representatives of any of them dying before the assured are entitled to the interest which such child would have taken if he had survived the assured. Millard *v.* Brayton, 177 Mass. 533, 59 N. E. 436, 83 Am. St. Rep. 294, 52 L. R. A. 117; Michigan Mut. L. Ins. Co. *v.* Basler, 140 Mich. 233, 103 N. W. 596; Smith *v.* Ætna L. Ins. Co., 68 N. H. 405, 44 Atl. 531; Frank *v.* Bauman, 35 Cinc. L. Bul. 59; Watt *v.* Gideon, 8 Pa. Dist. 395, 22 Pa. Co. Ct. 499. But *compare* Continental L. Ins. Co. *v.* Webb, 54 Ala. 688.

15. Walsh *v.* Mutual L. Ins. Co., 133 N. Y. 408, 31 N. E. 228, 28 Am. St. Rep. 651 [*reversing* 61 Hun 91, 15 N. Y. Suppl. 697]; U. S. Trust Co. *v.* Mutual Ben. L. Ins. Co., 115 N. Y. 152, 21 N. E. 1025 [*reversing* 56 N. Y. Super. Ct. 412, 4 N. Y. Suppl. 543]; Murray *v.* Macdonald, 22 Ont. 557. But *compare* Hull *v.* Hull, 62 How. Pr. (N. Y.) 100.

16. Small *v.* Jose, 86 Me. 120, 29 Atl. 976.

When the policy provided for payment to the representatives of the beneficiary there was no survivorship. Macaulay *v.* Central Nat. Bank, 27 S. C. 215, 3 S. E. 193.

Reservation to legal representatives of assured.— But by making the policy payable to beneficiaries with the provision that if they die before the assured the benefit shall go to the legal representatives of the assured, the interest of such beneficiary is made contingent on surviving the assured, and the personal representatives of a beneficiary dying before the assured have no claim upon the proceeds. Andrus *v.* Fidelity Mut. L. Ins. Assoc., 168 Mo. 151, 67 S. W. 582. This would be the result in any case under the view that the beneficiary has no vested interest. Shields *v.* Sharp, 35 Mo. App. 178. And see *supra*, XII, D, 3, b, text and note 12.

17. Cragin *v.* Cragin, 66 Me. 517, 22 Am. Rep. 588.

Wife and children.— And this rule is applied in some cases, although the beneficiaries are the wife and children, the wife taking no greater share than each of the children; the rule of distribution of the estate as between the surviving wife and children being held to have no application. Heydenfeldt *v.* Jacobs, 107 Cal. 373, 40 Pac. 492; Wilburn *v.* Wilburn, 83 Ind. 55; Bell *v.* Kinneer, 101 Ky. 271, 40 S. W. 686, 19 Ky. L. Rep. 545, 72 Am. St. Rep. 410; *In re* Crane, 47 La. Ann. 896, 17 So. 431; Cragin *v.* Cragin, 66 Me. 517, 22 Am. Rep. 588; Taylor *v.* Hill, 86 Wis. 99, 56 N. W. 738. But in other cases it has been thought that the provision was in the nature of a testamentary disposition, and that the distribution should be in accordance with statutory rules for the distribution of the estate of a deceased person. McLin *v.* Calvert, 78 Ky. 472; Gault *v.* Gault, 80 S. W. 493, 25 Ky. L. Rep. 2308; Johnson *v.* Johnson, 57 S. W. 469, 22 Ky. L. Rep. 422; Kelley *v.* Ball, 19 S. W. 581, 14 Ky. L. Rep. 132; Schneider *v.* Northwestern Mut. L. Ins. Co., 33 Mo. App. 64; Connecticut Mut. L. Ins. Co. *v.* Fish, 59 N. H. 126; Richardson *v.* Michener, 11 Ohio Dec. (Reprint) 830, 30 Cinc. L. Bul. 120. In England, under the Married Women's Property Act, the wife and children take the policy as joint tenants. *In re* Davies, [1892] 1 Ch. D. 90, 61 L. J. Ch. 650, 66 L. T. Rep. N. S. 104; *In re* Seyton, 34 Ch. D. 511, 56 L. J. Ch. 775, 56 L. T. Rep. N. S. 479, 35 Wkly. Rep. 373; *In re* Adams, 23 Ch. D. 525, 52 L. J. Ch. 642, 48 L. T. Rep. N. S. 727, 31 Wkly. Rep. 810 [not *following In re* Mellor, 7 Ch. D. 200, 47 L. J. Ch. 246, 26 Wkly. Rep. 309].

If the policy is charged with the payment of a debt of the assured, the beneficiaries under the policy are bound to pay the debt *pro rata*. *Re* Tatham, 2 Ont. L. Rep. 343.

18. Leavitt *v.* Dunn, 56 N. J. L. 309, 28 Atl. 590, 44 Am. St. Rep. 402; Young Men's Mut. Life Assoc. *v.* Pollard, 3 Ohio Cir. Ct. 577, 2 Ohio Cir. Dec. 333.

19. Balder *v.* Middeke, 92 Ill. App. 227;

d. Effect of Payment of Premiums. Although payment of premiums by the beneficiary is immaterial with reference to the acquisition of a vested interest,[20] yet the fact of having paid the premiums may have some bearing in determining the intention of the parties as to who is entitled to the proceeds;[21] and, as between beneficiaries, the fund may be distributed in proportion to the premiums paid by each.[22] And one who has paid the premiums in order to keep the policy alive will be entitled to reimbursement out of the proceeds as against other beneficiaries.[23]

e. Agreements Between Beneficiaries. There may be contractual agreements between the beneficiaries as to the distribution of the proceeds among them which will be binding.[24]

E. Rights of Assignees.[25] It follows as of course that where there has been a valid assignment of a policy of life insurance the assignee is entitled to the proceeds, subject to the terms and conditions of the agreement of assignment.[26] In case of a void assignment the assignee may retain out of the proceeds premiums paid by him to keep the policy in force,[27] or if he does not receive the proceeds he is entitled to have the premiums paid returned to him by the one who receives the benefits.[28] Where the company makes no objection on the ground of lack of insurable interest,[29] it has been held that where, after an assignment to a person without an insurable interest, the insured makes a subsequent assignment of the policy to another also without insurable interest, the first assignee is entitled to the proceeds.[30] But where the second assignment is by the assignee he cannot claim the proceeds as against his assignee.[31]

F. Rights of Creditors.[32] The fact that the beneficiary named in a policy is

Fuller *v.* Linzee, 135 Mass. 468; Northwestern Mut. L. Ins. Co. *v.* Greiner, 115 Mich. 639, 74 N. W. 187; U. S. Casualty Co. *v.* Kacer, 169 Mo. 301, 69 S. W. 370, 92 Am. St. Rep. 641.

Presumptions as to survivorship in general see DEATH, 13 Cyc. 308.

20. See *supra*, XII, D, 2, a.

21. Plaut *v.* New York Mut. L. Ins. Co., 26 Ohio Cir. Ct. 499; Pfleger *v.* Browne, 28 Beav. 391, 54 Eng. Reprint 416; Triston *v.* Hardy, 14 Beav. 232, 51 Eng. Reprint 275.

22. Brashears *v.* Metropolitan L. Ins. Co., 1 App. Cas. (D. C.) 420; Dickey *v.* Pocomoke City Nat. Bank, 89 Md. 280, 43 Atl. 33; Landrum *v.* Knowles, 22 N. J. Eq. 594; Shaw *v.* Cornell, 59 N. Y. App. Div. 573, 69 N. Y. Suppl. 660 [*reversing* 33 Misc. 696, 68 N. Y. Suppl. 1054].

23. *California.*— Stockwell *v.* New York Mut. L. Ins. Co., 140 Cal. 198, 73 Pac. 833, 98 Am. St. Rep. 25.

Connecticut.— Phœnix Mut. L. Ins. Co. *v.* Dunham, 46 Conn. 79, 33 Am. Rep. 14.

New York.— Von Schuckmann *v.* Heinrich, 93 N. Y. App. Div. 278, 87 N. Y. Suppl. 673.

North Carolina.—Hooker *v.* Sugg, 102 N. C. 115, 8 S. E. 919, 11 Am. St. Rep. 717, 3 L. R. A. 217.

Ohio.— Kritline *v.* Odd Fellows' Beneficial Assoc., 5 Ohio S. & C. Pl. Dec. 592, 7 Ohio N. P. 439.

Tennessee.— Bloomstein *v.* Bloomstein, 1 Tenn. Ch. App. 187.

Texas.— Hatch *v.* Hatch, 35 Tex. Civ. App. 373, 80 S. W. 411.

Canada.— National Trust Co. *v.* Hughes, 14 Manitoba 41.

Contribution.— Against a claim for contribution by one of the beneficiaries of a life policy who has paid premiums, against other beneficiaries entitled to share in the proceeds, the statute of limitations begins to run only from the death of assured. Stockwell *v.* New York Mut. L. Ins. Co., 140 Cal. 198, 83 Pac. 833, 98 Am. St. Rep. 25.

24. Willoughby *v.* Willoughby, 70 S. C. 516, 50 S. E. 208. See also Malburg *v.* Metropolitan L. Ins. Co., 127 Mich. 568, 86 N. W. 1026; Fuss *v.* Kroner, 11 Ohio Dec. (Reprint) 85, 24 Cinc. L. Bul. 400.

25. **Forfeiture as against assignee** see *supra*, VI, C, 5, c, (VIII).

26. **Assignment or transfer of policy** see *supra*, VI.

Transfer to person without insurable interest see *supra*, I, E.

27. City Sav. Bank *v.* Whittle, 63 N. H. 587, 3 Atl. 645; Downey *v.* Hoffer, 110 Pa. St. 109, 20 Atl. 655; Cooper *v.* Weaver, (Pa. 1887) 11 Atl. 780; Gilbert *v.* Moose, 104 Pa. St. 74, 49 Am. Rep. 570; *In re* Power, [1889] 1 Ir. 6.

28. Connecticut Mut. L. Ins. Co. *v.* Burroughs, 34 Conn. 305, 91 Am. Dec. 725; Harley *v.* Heist, 86 Ind. 196, 45 Am. Rep. 285; Heusner *v.* Mutual L. Ins. Co., 47 Mo. App. 336.

29. **Validity of assignment to person without insurable interest** see *supra*, I, E.

30. Meyers *v.* Schumann, 54 N. J. Eq. 414, 34 Atl. 1066.

31. Connecticut Mut. L. Ins. Co. *v.* Fisher, 30 Fed. 662.

32. **Exemption of life insurance policy or proceeds** see EXEMPTIONS, 18 Cyc. 1436.

a creditor of the assured does not in itself prevent the recovery by such beneficiary of the entire insurance money.[33] But by contract the creditor named as beneficiary may be under obligation to account for the proceeds after satisfaction of the debt, and of expenses incurred in keeping up the policy.[34] And in general a creditor holding a policy on the life of his debtor procured by the consent of the latter, or at his expense, is entitled only to reimbursement, and is bound to account for the balance to the legal representatives of the debtor.[35] The general creditors of the assured have no claim to the proceeds of a policy taken by their debtor for another's benefit.[36]

G. Rights of Third Persons Paying Premiums.[37] A mere stranger paying.

Constitutionality of exemption of life insurance see CONSTITUTIONAL LAW, 8 Cyc. 1008 note 91.

Creditor's suit to reach proceeds of life insurance see CREDITORS' SUITS, 12 Cyc. 29.

Garnishment of life insurance policy or proceeds see GARNISHMENT, 20 Cyc. 997.

Assignment of policy as fraudulent conveyance see FRAUDULENT CONVEYANCES, 20 Cyc. 361.

Payments for life insurance as fraudulent conveyance see FRAUDULENT CONVEYANCES, 20 Cyc. 397.

Rights of trustee in bankruptcy see BANKRUPTCY, 5 Cyc. 349.

33. *Indiana.*— Amick *v.* Butler, 111 Ind. 578, 12 N. E. 518, 60 Am. Rep. 722.

New York.— Ferguson *v.* Massachusetts Mut. L. Ins. Co., 32 Hun 306 [*affirmed* in 102 N. Y. 647].

North Carolina.— Maynard *v.* Virginia L. Ins. Co., 132 N. C. 711, 44 S. E. 405.

Pennsylvania.— Shaak *v.* Meily, 136 Pa. St. 161, 20 Atl. 515; Grant *v.* Kline, 115 Pa. St. 618, 9 Atl. 150.

Texas.— Andrews *v.* Union Cent. L. Ins. Co., 24 Tex. Civ. App. 425, 58 S. W. 1039.

United States.— Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42.

England.— Bruce *v.* Garden, L. R. 5 Ch. 32, 39 L. J. Ch. 334, 22 L. T. Rep. N. S. 895, 18 Wkly. Rep. 384; Henson *v.* Blackwell, 4 Hare 434, 14 L. J. Ch. 329, 30 Eng. Ch. 434, 67 Eng. Reprint 718; Freme *v.* Brade, 2 De G. & J. 582, 4 Jur. N. S. 748, 27 L. J. Ch. 697, 6 Wkly. Rep. 739, 59 Eng. Ch. 457, 44 Eng. Reprint 1115; Lewis *v.* King, 44 L. J. Ch. 259, 31 L. T. Rep. N. S. 571.

See 28 Cent. Dig. tit. "Insurance," § 1480.

Insurable interest of creditors see *supra*, I, C, 2, b.

Recovery by assignee for security see *supra*, VI, C, 5, c, (I).

34. *Arkansas.*— McDonald *v.* Humphries, 56 Ark. 63, 19 S. W. 234.

Georgia.— Raley *v.* Ross, 59 Ga. 862.

Massachusetts.— Tateum *v.* Ross, 150 Mass. 440, 23 N. E. 230.

New York.— Mandeville *v.* Kent, 88 Hun 132, 34 N. Y. Suppl. 622; New York Mut. L. Ins. Co. *v.* Wager, 27 Barb. 354.

Texas.— Goldbaum *v.* Blum, 79 Tex. 638, 15 S. W. 564; Andrews *v.* Union Cent. L. Ins. Co., (Civ. App. 1898) 44 S. W. 610.

See 28 Cent. Dig. tit. "Insurance," § 1480.

35. *Kentucky.*— Cox *v.* Higginbotham, 83 S. W. 137, 26 Ky. L. Rep. 1043; Lee *v.* New York Mut. L. Ins. Co., 82 S. W. 258, 26 Ky. L. Rep. 577.

Missouri.—Strode *v.* Meyer Bros. Drug Co., 101 Mo. App. 627, 74 S. W. 379.

New Hampshire.— Lanouette *v.* Laplante, 67 N. H. 118, 36 Atl. 981.

Pennsylvania.— Matlack *v.* Philadelphia Seventh Nat. Bank, 180 Pa. St. 360, 36 Atl. 1082; Shaffer *v.* Spangler, 144 Pa. St. 223, 22 Atl. 865.

South Carolina.— Rivers *v.* Gregg, 5 Rich. Eq. 274.

United States.— Crotty *v.* Union Mut. L. Ins. Co., 144 U. S. 621, 12 S. Ct. 749, 36 L. ed. 566.

Canada.— Conway *v.* Britannia L. Assur. Co., 8 L. C. Jur. 162.

See 28 Cent. Dig. tit. "Insurance," § 1480.

To the contrary it has been said that, although the company might have resisted payment of the claim under the policy to the creditor beyond the amount of his claim, the latter having received the full amount was not accountable for the balance remaining after satisfying the sum actually borrowed, with interest. Coon *v.* Swan, 30 Vt. 6.

Counsel fees incurred by the creditor in collecting the insurance money may be included as a part of the expenses for which he is entitled to reimbursement. Shaffer *v.* Spangler, 144 Pa. St. 223, 22 Atl. 865.

Funeral expenses paid by the creditor may be included as a part of his claim on the insurance money. Shaffer *v.* Spangler, 144 Pa. St. 223, 22 Atl. 865.

Policy in excess of indebtedness.—The mere fact that a policy in favor of the creditor is in an amount exceeding the amount of the indebtedness does not create a presumption that the policy was intended merely as collateral security. Grant *v.* Kline, 115 Pa. St. 618, 9 Atl. 150.

36. Sternberg *v.* Levy, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438; Shafer's Estate, 8 Pa. Dist. 221 [*affirmed* in 194 Pa. St. 420, 45 Atl. 311]; Hancock *v.* Fidelity Mut. L. Ins. Co., (Tenn. Ch. App. 1899) 53 S. W. 181.

Preference of creditors.— The fact that assured takes a policy in favor of another, whom he requests to pay certain creditors, does not constitute a preference of creditors in such sense as to be void. *In re* Schaefer, 194 Pa. St. 420, 45 Atl. 311.

37. **Rights as between beneficiaries** see *supra*, XII, D, 3, d.

Rights of assignee see *supra*, VI, C, 5, c, (II).

the premiums is not entitled to reimbursement as against the person entitled to the proceeds.[38] The proceeds of policies procured with stolen money may be followed and recovered by the person whose money was used in procuring such policies.[39]

H. Payment, Discharge, and Subrogation — 1. Time For Payment. By a provision in the policy the loss may be payable after a specified time from the receipt of notice and proofs.[40]

2. Persons to Whom Payment Should Be Made — a. Person Entitled as Beneficiary or Assignee. Payment should in general be made to the person who as legal representative of the assured's estate, or beneficiary named in the contract, or assignee of the contract, has the right to receive the insurance money.[41]

b. Person Equitably Entitled. Under a provision in the policy that the com-

38. Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. 862; Meier *v.* Meier, 88 Mo. 566 [*affirming* 15 Mo. App. 68]; Lockwood *v.* Bishop, 51 How. Pr. (N. Y.) 221; Malone's Estate, 8 Wkly. Notes Cas. (Pa.) 179; *In re* Winchilsea's Policy Trusts, 39 Ch. D. 168, 58 L. J. Ch. 20, 59 L. T. Rep. N. S. 167, 37 Wkly. Rep. 77; *In re* Leslie, 23 Ch. D. 552, 52 L. J. Ch. 762, 48 L. T. Rep. N. S. 564, 31 Wkly. Rep. 561; Burridge *v.* Row, 8 Jur. 299, 13 L. J. Ch. 173.

A trustee of a policy cannot retain from the amount collected thereon the premiums paid by him, his only claim being against the estate receiving such proceeds. Love *v.* Love, (Pa. 1888) 12 Atl. 498.

Premiums paid by the wife for the purpose of preventing the forfeiture of the policy should be returned to her, although the policy is payable to the heirs. Weisert *v.* Muehl, 81 Ky. 336; Cox *v.* Higginbotham, 83 S. W. 137, 26 Ky. L. Rep. 1043.

Premiums paid by administrator.— Although one to whom insured assigned his life policy prevails over insured's administrator in an action between them for the proceeds thereof, the administrator should be allowed for a premium which became due before insured's death, and had to be paid and was paid by the administrator after insured's death. Von Schuckmann *v.* Heinrich, 93 N. Y. App. Div. 278, 87 N. Y. Suppl. 673 [*affirmed* in 182 N. Y. 538, 75 N. E. 1135].

39. Holmes *v.* Gilman, 64 Hun (N. Y.) 227, 19 N. Y. Suppl. 151, 28 Abb. N. Cas. 288 [*reversing* 18 N. Y. Suppl. 56, 27 Abb. N. Cas. 341, and *reversed* on other grounds in 138 N. Y. 369, 34 N. E. 205, 34 Am. St. Rep. 463, 20 L. R. A. 566]; Holmes *v.* Davenport, 14 N. Y. Suppl. 738, 27 Abb. N. Cas. 75. See also Trusts.

Where the beneficiary has paid a part of the premiums from his own funds he is entitled to share *pro rata*. Dayton *v.* H. B. Claflin Co., 19 N. Y. App. Div. 120, 45 N. Y. Suppl. 1005 [*reversing* 19 N. Y. Suppl. 151, 28 Abb. N. Cas. 288].

40. See cases cited *infra*, this note.

Policy payable to insured.— A provision that the insurance money shall be payable to the beneficiaries ninety days after notice and proofs of death, or to the assured on his living to a specified age, does not entitle the company to ninety days after the assured has reached the specified age before making payment to him on demand. Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

The company is not bound to wait until the expiration of the ninety days before making payment to the person appearing to be entitled to the insurance money. Home Mut. Life Assoc. *v.* Seager, 128 Pa. St. 533, 18 Atl. 517.

When action on policy may be begun see *infra*, XIII, A, 2; XIII, C, 1.

41. See Mellerup *v.* Travelers' Ins. Co., 95 Iowa 317, 63 N. W. 665.

Persons entitled to proceeds see *supra*, XII, D, E, F.

Intent immaterial.— Payment to one who by the terms of the contract is entitled to the insurance money will protect the company as against another who claims that the insurance was intended to be for his benefit. Voss *v.* Connecticut Mut. L. Ins. Co., 131 Mich. 597, 92 N. W. 102.

Good faith.— A payment of a life policy to the person designated as beneficiary, described as insured's wife in the application for insurance and in the policy, on her furnishing proof of the insured's death, is a valid payment as against the representative of the insured, when made in good faith and without knowing that the beneficiary was not insured's wife. Metropolitan L. Ins. Co. *v.* Louisville Trust Co., 89 S. W. 268, 28 Ky. L. Rep. 426.

Guardian.— If the person entitled to the insurance money is a minor, the company will be protected by payment to his guardian. Brooks *v.* Metropolitan L. Ins. Co., 70 N. J. L. 36, 56 Atl. 168; Wuesthoff *v.* Germania L. Ins. Co., 107 N. Y. 580, 14 N. E. 811; Wuesthoff *v.* Germania L. Ins. Co., 52 N. Y. Super. Ct. 208. See also Taylor *v.* Hill, 86 Wis. 99, 56 N. W. 738. But the payment must be to the guardian as guardian, and not in the capacity of executor claiming as such. Stoll *v.* Mutual Ben. L. Ins. Co., 115 Wis. 558, 92 N. W. 277. A guardian *ad litem* is a proper person to receive payment under provisions of a policy authorizing payment to the guardian of a beneficiary. Wuesthoff *v.* Germania L. Ins. Co., *supra*. In Ontario moneys payable to infants under a policy of life insurance may, where no trustee or guardian is appointed under Ont. Rev. St. c. 136, §§ 11, 12, be paid to the executors of the will of the insured, as provided by section 12, without security being given by them, and payment to

pany may pay the insurance money to any relative or other person appearing to be equitably entitled to it, and making the receipt of such person conclusive as to the company's liability, the discretion of the company in making payment to such person is conclusive.[42]

c. **Option as to Person Entitled.** Under a similar provision to the effect that payment to legal representatives or beneficiaries named, or relatives, shall be conclusive, the company has an option as to the person to whom the payment shall be made within such provision.[43]

3. SETTLEMENT AND DISCHARGE — a. **Compromise Binding.** In the absence of fraud or mistake a settlement in which the liability of the company has been determined is binding on the parties.[44] But if such settlement has been procured

them is a good discharge to the insurers. Dodds *v.* Ancient Order of United Workmen, 25 Ont. 570.

The person making proofs is not the proper person to receive payment if he is not the person designated in the policy as beneficiary. Carraher *v.* Metropolitan L. Ins. Co., 11 N. Y. St. 665.

Several beneficiaries should receive each his share, in the absence of any provision for paying the whole to one person for all. Brown *v.* Iowa L. of H., 107 Iowa 439, 78 N. W. 73; Emmeluth *v.* Home Ben. Assoc., 12 N. Y. St. 654.

Payment to an assignee will discharge the company if made without notice of any fraud or illegality in such assignment. Milne *v.* Northwestern L. Assur. Co., 23 Misc. (N. Y.) 553, 52 N. Y. Suppl. 766; Northwestern Mut. L. Ins. Co. *v.* Roth, 87 Pa. St. 409; Hettinger *v.* Aid Soc., 1 Del. Co. (Pa.) 466; Manhattan L. Ins. Co. *v.* Hennessy, 99 Fed. 64, 39 C. C. A. 625.

42. American Security, etc., Co. *v.* Prudential Ins. Co., 16 App. Cas. (D. C.) 318; Thomas *v.* Prudential Ins. Co., 158 Ind. 461, 63 N. E. 795; Bradley *v.* Prudential Ins. Co., 187 Mass. 226, 72 N. E. 989; Brennan *v.* Prudential Ins. Co., 170 Pa. St. 488, 32 Atl. 1042; Thomas *v.* Prudential Ins. Co., 148 Pa. St. 594, 24 Atl. 82.

As against assignee.— But payment under such provision is not good as against an assignee, of whose interest the company has had notice. Wilkinson *v.* Metropolitan L. Ins. Co., 64 Mo. App. 172. But *compare* Floyd *v.* Prudential Ins. Co., 72 Mo. App. 455.

As against beneficiary.— Nor does such provision take away the right of action in favor of a beneficiary named in the policy. Ruoff *v.* John Hancock Mut. L. Ins. Co., 86 N. Y. App. Div. 447, 83 N. Y. Suppl. 758; Golden *v.* Metropolitan L. Ins. Co., 35 N. Y. App. Div. 569, 55 N. Y. Suppl. 143. But as between persons to any one of whom the company has a right to make payment, no one has a vested interest. Wokal *v.* Belsky, 53 N. Y. App. Div. 167, 65 N. Y. Suppl. 815.

Action on such policy should be brought by the executor or administrator of insured. Lewis *v.* Metropolitan L. Ins. Co., 178 Mass. 52, 59 N. E. 439, 86 Am. St. Rep. 463.

Interpleader to determine rights to proceeds see INTERPLEADER, 23 Cyc. 29, note 25.

43. Western, etc., L. Ins. Co. *v.* Galvin, 68 S. W. 655, 24 Ky. L. Rep. 444; Brooks *v.* Metropolitan L. Ins. Co., 70 N. J. L. 36, 56 Atl. 168; State *v.* Schaffer, (N. J. 1887) 11 Atl. 154; Canavan *v.* John Hancock Mut. L. Ins. Co., 39 Misc. (N. Y.) 782, 81 N. Y. Suppl. 304.

No vested interest.— No one of the persons within such provision has a vested interest as against another. Providence County Sav. Bank *v.* Vadnais, 26 R. I. 122, 58 Atl. 454. But the provision is for the protection of the company, and does not entitle a relative or personal representative to the insurance money as against a beneficiary named. Golden *v.* Metropolitan L. Ins. Co., 35 N. Y. App. Div. 569, 55 N. Y. Suppl. 143; McNally *v.* Metropolitan L. Ins. Co., 199 Pa. St. 481, 49 Atl. 299 [*affirming* 16 Pa. Super. Ct. 111].

Change of beneficiary.— Such a provision does not obligate the company to change the beneficiary on the designation of the assured. Malburg *v.* Metropolitan L. Ins. Co., 127 Mich. 568, 86 N. W. 1026.

As against an assignee, the company is not justified in making payment to the wife of the assured. Wilkinson *v.* Metropolitan L. Ins. Co., 63 Mo. App. 404.

Exercise of option.— By promising payment to a particular relative who is not charged with notice of the provision as to an option, the company makes a binding election to pay to such relative. Shea *v.* U. S. Industrial Ins. Co., 23 N. Y. App. Div. 53, 48 N. Y. Suppl. 548.

44. Massachusetts Mut. L. Ins. Co. *v.* Hayes, 21 Ill. App. 258; Milne *v.* Northwestern L. Assur. Co., 23 Misc. (N. Y.) 553, 52 N. Y. Suppl. 766; Brennan *v.* Prudential Ins. Co., 170 Pa. St. 488, 32 Atl. 1042; McKenty *v.* Universal L. Ins. Co., 16 Fed. Cas. No. 8,854, 3 Dill. 448.

Reference.— An agreement to refer the cause of death to the company's medical officer for the purpose of determining the company's liability is not void as against public policy. Campbell *v.* American Popular L. Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591.

Estoppel.— By a settlement in which a check for the insurance money is given to the beneficiary, the company estops itself from denying that the beneficiary was the real party in interest. Northwestern Mut. L.

by fraud with which the company is chargeable, it may be disregarded, and the amount legally due under the policy may be recovered.[45]

b. Receipt or Release. A receipt in full for the amount due under the policy is *prima facie* evidence of settlement and satisfaction.[46]

4. Interest and Penalty. Interest is payable on the amount due under the policy from the date of demand after it has become due by the terms of the contract.[47] By statute the company may be liable to a penalty for failing to pay when the policy becomes due.[48]

5. Subrogation. The doctrine of subrogation, applied in fire and marine insurance, by which the insurance company is entitled to recover in the name or right of the insured against a wrong-doer who has caused the destruction of the property covered by the policy,[49] has no application in life insurance, for the reason that there is no right of action for causing the death of a person save as

Ins. Co. *v.* Kidder, 162 Ind. 382, 70 N. E. 489, 66 L. R. A. 89.

45. Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355; Michigan Mut. L. Ins. Co. *v.* Naugle, 130 Ind. 79, 29 N. E. 393; McLean *v.* Equitable L. Assur. Soc., 100 Ind. 127, 50 Am. Rep. 779.

Question for jury.— Whether the agent of an insurance company was sincere and acting in good faith in representing to a beneficiary that an incontestable clause was of doubtful interpretation, by which the beneficiary was induced to settle for less than the face of the policy, is for the jury in an action by the beneficiary to recover the balance due under the policy. Franklin L. Ins. Co. *v.* Villeneuve, 29 Tex. Civ. App. 128, 68 S. W. 203.

46. Benseman *v.* Prudential Ins. Co., 13 Pa. Super. Ct. 363.

Fraud.— But a release procured by fraudulent representation of the company's agent that the policy is void on account of breach of warranty, such not being the fact, is not binding. Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695. And if by some fraudulent representation the beneficiary is induced to accept a less amount than is legally due, he may sue for the balance without returning or tendering back the money already received. Mowry *v.* National Protective Soc., 27 Pa. Super. Ct. 390.

A settlement for a less sum than is due is without consideration as to the balance, and will not prevent recovery of the balance of the amount actually due. Caine *v.* Farmers', etc., Life Assoc., 115 Ill. App. 307; Northwestern Nat. L. Ins. Co. *v.* Blasingame, (Tex. Civ. App. 1905) 85 S. W. 819.

47. *Illinois.*— Massachusetts Mut. L. Ins. Co. *v.* Robinson, 98 Ill. 324.

Kentucky.— Supreme Lodge K. of H. *v.* Lapp, 74 S. W. 656, 25 Ky. L. Rep. 74.

Louisiana.— Trager *v.* Louisiana Equitable L. Ins. Co., 31 La. Ann. 235.

Massachusetts.— Davis *v.* National L. Ins. Co., 188 Mass. 299, 74 N. E. 330; Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

Wisconsin.— Smith *v.* Northwestern Nat. L. Ins. Co., 123 Wis. 586, 102 N. W. 57.

United States— Unsell *v.* Hartford L., etc., Ins. Co., 32 Fed. 443.

England.— Higgins *v.* Sargent, 2 B. & C. 348, 3 D. & R. 613, 2 L. J. K. B. O. S. 33, 26 Rev. Rep. 379, 9 E. C. L. 158.

See 28 Cent. Dig. tit. "Insurance," § 1494.

But a tontine dividend does not bear interest. Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

An assignee is not entitled to interest until he is in a position to give to the company a full legal discharge. Toronto Sav. Bank *v.* Canada L. Assur. Co., 14 Grant Ch. (U. C.) 509.

Lost policy.— Interest is not payable on a sum recoverable on a lost policy. Bushman *v.* Morgan, 5 Sim. 635, 9 Eng. Ch. 635, 58 Eng. Reprint 478.

48. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; New York L. Ins. Co. *v.* English, (Tex. Civ. App. 1902) 70 S. W. 440 [*reversed* on other grounds in 96 Tex. 268, 72 S. W. 58]; Franklin Ins. Co. *v.* Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014.

Under the Georgia statute, providing that damages may be recovered if the refusal to pay is in bad faith, such refusal need not be fraudulent. Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; New York Mut. L. Ins. Co. *v.* Watson, 30 Fed. 653.

Under the Texas statute, the company is not liable for the statutory penalty if there is uncertainty as to who is entitled to the proceeds, and the company proceeds promptly by bill of interpleader. Stevens *v.* Germania L. Ins. Co., 26 Tex. Civ. App. 156, 62 S. W. 824.

Not retroactive.— Such a statutory provision is not applicable to losses occurring before its enactment. Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511.

For refusal to make an assessment when the amount to be paid is dependent upon the proceeds of an assessment, the company may be liable in damages. Jackson *v.* North-Western Mut. Relief Assoc., 73 Wis. 507, 41 N. W. 708, 2 L. R. A. 786.

Accident insurance.— The Texas statute does not apply to accident insurance. Ætna L. Ins. Co. *v.* Parker, 96 Tex. 287, 72 S. W. 168, 580 [*affirming* 30 Tex. Civ. App. 521, 72 S. W. 621]; Fidelity, etc., Co. *v.* Dorough, 107 Fed. 389, 46 C. C. A. 364.

49. See Fire Insurance, 19 Cyc. 893; Marine Insurance.

such remedy is given by statute;[50] and for the further reason that life insurance is not a contract of indemnity.[51] The company is not entitled to recover against the wrong-doer who has caused the death of the insured, as there is no such relation between the wrong-doer and the company as to entitle the latter having an interest in the life of the insured only by contract to a recovery for the tort.[52] On the other hand the wrong-doer is not entitled to have the amount received from the insurance company taken into account in determining the measure of liability for his wrong.[53]

6. Recovery of Payments. If by fraud of one claiming the proceeds of the policy the company is induced to make a payment which it is not legally under obligation to make, it may recover back the sum paid.[54]

XIII. Actions on Policies.[55]

A. Right of Action — 1. Nature and Form. An action on a policy of life insurance is ordinarily simply for breach of contract and must be brought in a court of law;[56] but if there is an equitable ground of relief a suit in equity will lie.[57] If there is an equitable ground of relief, the court may, in the same action in

50. Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571; Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580.

51. See *supra*, I, B, 2, text and note 22.

52. Connecticut Mut. L. Ins. Co. *v.* New York, etc., R. Co., 25 Conn. 265, 65 Am. Dec. 571; Mobile L. Ins. Co. *v.* Brame, 95 U. S. 754, 24 L. ed. 580.

Accident insurance.— For similar reasons, an accident insurance company cannot recover against one whose wrong has caused the accident under which the company is rendered liable. Ætna L. Ins. Co. *v.* Parker, 96 Tex. 287, 72 S. W. 168, 580 [*affirming* 30 Tex. Civ. App. 521, 72 S. W. 621].

53. See Damages, 13 Cyc. 70.

54. Reynolds *v.* Ætna L. Ins. Co., 160 N. Y. 635, 55 N. E. 305; National L. Ins. Co. *v.* Jones, 59 N. Y. 649 [*affirming* 1 Thomps. & C. 466]; National L. Ins. Co. *v.* Minch, 3 Hun (N. Y.) 354, 5 Thomps. & C. 545; National L. Ins. Co. *v.* Minch, 6 Lans. (N. Y.) 100 [*reversed* on the facts in 53 N. Y. 144]; Mutual L. Ins. Co. *v.* Wager, 27 Barb. (N. Y.) 354; Centennial Mut. Life Assoc. *v.* Parham, 80 Tex. 518, 16 S. W. 316; Metropolitan L. Ins. Co. *v.* Harper, 17 Fed. Cas. No. 9,505, 3 Hughes 260.

The burden of showing fraud is on the company. Mutual L. Ins. Co. *v.* Wager, 27 Barb. (N. Y.) 354.

Action for deceit.— An insurance company by paying the insurance after acknowledgment of the fraud of the agent of the insured inducing it to issue the policy ratifies the contract so that it cannot afterward recover the money paid by it, in an action for damages against the agent (New York L. Ins. Co. *v.* Hord, 77 S. W. 380, 25 Ky. L. Rep. 1219 [rehearing *denied* in 78 S. W. 207, 25 Ky. L. Rep. 1531]), or the beneficiary (New York L. Ins. Co. *v.* Weaver, 114 Ky. 295, 70 S. W. 628, 24 Ky. L. Rep. 1086).

55. Abatement of action see Abatement and Revival, 1 Cyc. 10 *et seq.*

56. Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873; De Ghettoff *v.* London Assur. Co., 4 Bro. P. C. 436, 2 Eng. Reprint 295.

Quantum valebat.— The principle of a recovery on a *quantum valebat* has no application to policies of life insurance which are indivisible, so that where a policy has been forfeited for non-payment of premiums there cannot be a proportionate recovery thereon on the ground that it provided for the issuance on its surrender before forfeiture of a paid-up policy proportionate in amount to the number of premiums paid, where no application for such paid-up policy nor offer to surrender by the insured is shown. Meyer *v.* Manhattan L. Ins. Co., 144 Ind. 439, 43 N. E. 448.

Forfeited policy.— An action in equity cannot be maintained upon a lapsed policy, upon the theory of a trust relation between the policy-holders and the company, to recover the premiums actually paid. Taylor *v.* Charter Oak L. Ins. Co., 8 Abb. N. Cas. (N. Y.) 331 [*affirmed* in 9 Daly 489]. See also *supra*, VIII, E, 5, f.

57. See, generally, Equity.

Where the policy had not been delivered before the death of the insured, but the contract to insured was completed before such time, a bill in equity may be maintained. Kentucky Mut. Ins. Co. *v.* Jenks, 5 Ind. 96.

When action is equitable.— Where the issuance of a policy pursuant to a preliminary agreement for insurance is averred, the proceeding is an action at law on the policy, and not in equity to enforce the agreement. Prudential Ins. Co. *v.* Sullivan, 27 Ind. App. 30, 59 N. E. 873. An action by a beneficiary for the difference between the face of the policy and a sum accepted in compromise, where the complaint does not offer to restore the sum paid in compromise and rescission is not touched on in the judgment, cannot be regarded as a suit for rescission. Westerfeld *v.* New York L. Ins. Co., 129 Cal. 68, 58 Pac. 92, 61 Pac. 667. An action to recover damages for the breach of a contract of insurance for failure to pay over the accumulated reserve on a tontine policy is an

equity, render judgment on the policy where it matures before trial.[58] Where the insurer violates its contract of insurance the insured may elect whether to enforce the contract or to treat it as rescinded and recover for the breach.[59] If the contract is repudiated by the insurance company the insured may at once sue to recover the value of the policy.[60] An action at law lies to recover the sum due on a policy, although the amount is to be realized by an assessment,[61] even before an assessment has been levied,[62] it not being necessary or proper to resort to mandamus proceedings[63] or an equitable suit to compel the company to levy the assessment,[64] unless there is express condition in the policy requiring such procedure in the first instance.[65]

2. CONDITIONS PRECEDENT — a. In General.[66] The happening of the event on which the policy becomes payable as specified by the policy gives rise to a cause of action unless there is by the terms of the contract some condition precedent to be performed by the insured before he is entitled to maintain an action.[67] A reference of the claim to a grievance committee of the insurer is sometimes made a condition precedent by the policy.[68] Payment of a first premium, as required

action at law rather than in equity, although the complaint contains averments looking to equitable relief, where such averments may be rejected as surplusage. And a claim that there were other persons similarly situated with plaintiff respecting the surplus or profits, so that an account in equity is necessary, is not sustained by allegations that defendant had issued to other persons a large number of policies on a semitontine insurance plan, when taken in connection with an allegation immediately preceding that defendant claimed the right to retain a large portion of its assets to which plaintiff is entitled on account of certain other policies issued by defendant not of the same class as plaintiff's policy and not entitled to share ratably with her. Such an action is not within N. Y. Laws (1892), c. 690, which is designed to provide for the case of one seeking by an extensive accounting or injunction to interfere with the prosecution of the business of an insurance company, so as to require the suit to be brought on application to the attorney-general. Hackett *v.* Equitable Life Assur. Soc., 50 N. Y. App. Div. 266, 63 N. Y. Suppl. 1092 [*affirming* 30 Misc. 523, 63 N. Y. Suppl. 847].

58. Smith *v.* Northwestern Nat. L. Ins. Co., 123 Wis. 586, 102 N. W. 57. See, generally, EQUITY, 16 Cyc. 106, 109.

59. Van Werden *v.* Equitable Life Assur. Soc., 99 Iowa 621, 68 N. W. 892. See *supra*, VIII, E, 5, a–c.

60. Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556. See *supra*, VIII, E, 5, c.

What constitutes repudiation.—An attempt by the company to coerce out of the assessment class all the young and good risks, thus leaving the burdens of the assessment class to fall on those least able to bear them; or a notice by a mutual insurance company that they will declare a policy forfeited if a certain assessment declared by the insured to be illegal is not paid at a certain time, especially where, when the insured sued, the time had elapsed and the policy had not been forfeited, or a fraudulent misappropriation by the officers of the company of large sums belonging to it as trustee of its members, and making assessments in bad faith and not to meet expenses, but to compel policy-holders above sixty years of age to abandon their policies, are not such absolute repudiations of the policy as will justify an action by the insured. Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556.

61. Reynolds *v.* Equitable Acc. Assoc., 59 Hun 13, 1 N. Y. Suppl. 738. See also Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; O'Brien *v.* Home Ben. Soc., 117 N. Y. 310, 22 N. E. 954 (action at law for damages for breach of contract in refusing to levy an assessment); Smith *v.* People's Mut. Ben. Soc., 64 Hun (N. Y.) 534, 19 N. Y. Suppl. 432 (to the same effect); U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60. See also *infra*, XIII, A, 2, b, 3, a, text and note 91.

Waiver of objections see Garretson *v.* Equitable Mut. L., etc., Assoc., 74 Iowa 419, 38 N. W. 127.

62. See *infra*, XIII, A, 2, b.

63. Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159; Bates *v.* Detroit Mut. Ben. Assoc., 47 Mich. 646.

64. Darrow *v.* Family Fund Soc., 116 N. Y. 537, 22 N. E. 1093, 15 Am. St. Rep. 430, 6 L. R. A. 495. See also Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; U. S. Mut. Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60.

65. Eggleston *v.* Centennial Mut. Life Assoc., 18 Fed. 14, 5 McCrary 484, 19 Fed. 201; Lueder *v.* Hartford, etc., Ins. Co., 12 Fed. 465, 4 McCrary 149. See also Ranisbarger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770; Oriental Ins. Assoc. *v.* Glancey, 70 Md. 101, 16 Atl. 391.

66. **Notice and proofs of death** see *supra*, XII, C.

67. See, generally, ACTIONS, 1 Cyc. 692.

68. Maxwell *v.* Family Protective Union,

by the policy, before the death of the insured and while he is in good health, where not waived, is a condition precedent.[69] Possession of the policy is not a condition precedent, where it has been assigned to the insurer as security for a loan to the insured.[70]

b. Levy of Assessment. Although the payment is to be made from assessments, the right to sue is not dependent, unless made so by the contract, upon the prior levy of an assessment,[71] or the amount of the assessment.[72]

c. Demand.[73] Unless the policy provides therefor, no demand for payment[74] or for the levy of an assessment[75] need be made before the action is commenced, except in so far as a demand for payment is made necessary by statute, in order to recover statutory damages in excess of the claim, or attorney's fees, or both, in case the demand is refused.[76] Even if demand for payment is otherwise necessary, it is not required, where the insurer, on notice of death, denies any liability.[77]

d. Tender.[78] A tender of premiums may be a condition precedent to bringing an action on the policy;[79] but a tender of a sum accepted in settlement under alleged fraudulent representations by the company or its agent is not required;[80] and where the right to forfeit the policy because of non-payment of a premium has been waived, payment of the premium need not be tendered in order to maintain an action on the policy after the death of the insured;[81] nor need a tender

115 Ga. 475, 41 S. E. 552, holding that a stipulation for such a reference applied to members only and not to the beneficiary of a deceased member.

69. Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331. See *supra*, III, D.

70. Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373 [*affirmed* in 160 N. Y. 703, 57 N. E. 1125].

71. Kansas Protective Union *v.* Gardner, 41 Kan. 397, 21 Pac. 233; Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607; Fitzgerald *v.* Equitable Reserve Fund Life Assoc., 15 Daly (N. Y.) 229, 5 N. Y. Suppl. 837 [*affirming* 3 N. Y. Suppl. 214]. And see Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Follis *v.* U. S. Mutual Acc. Assoc., 94 Iowa 435, 62 N. W. 807, 58 Am. St. Rep. 408, 28 L. R. A. 78; Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; U. S. Mutual Acc. Assoc. *v.* Barry, 131 U. S. 100, 9 S. Ct. 755, 33 L. ed. 60. And see *supra*, XIII, A, 1, text and notes 61–65.

Contra under special provisions of contract see Ranisharger *v.* Union Mut. Aid Assoc., 72 Iowa 191, 33 N. W. 626; Bailey *v.* Mutual Ben. Assoc., 71 Iowa 689, 27 N. W. 770; Oriental Ins. Co. *v.* Glancey, 70 Md. 101, 16 Atl. 391. And see *supra*, XIII, A, 1, text and note 65.

Neglect of officers to levy an assessment see *infra*, XIII, A, 3, a, text and note 91.

72. Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607.

73. See, generally, ACTIONS, 1 Cyc. 694–700.

74. Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84; Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303.

75. Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159; Kansas Protective Union *v.* Gardner, 41 Kan. 397, 21 Pac. 233; Kansas Protective Union *v.* Whitt, 36 Kan. 760, 14 Pac. 275, 59 Am. Rep. 607.

76. Northwestern L. Assur. Co. *v.* Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61, holding, under a Texas statute expressly providing for a demand for such purpose, that a demand was necessary, notwithstanding its apparent futility, and that an action on the policy was not itself such a demand as the statute contemplated.

Sufficiency of demand.— Demands by a recognized agent of the beneficiary are a sufficient basis for an action on the policy. Hull *v.* Alabama Gold L. Ins. Co., 79 Ga. 93, 3 S. E. 903.

77. Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277.

78. See, generally, TENDER.

79. See *supra*, III, D; X, C. But a tender of premiums was held unnecessary before an action on a policy where, pursuant to a judgment the policy was adjudged to be in force upon payment by the insured of overdue premiums within a certain time, or, at the insured's election, that a paid-up policy should be issued to him, and after the surrender to the insurer of the policy for a paid-up policy the judgment was reversed by striking out the provision in reference to a paid-up policy, where the insurer had not returned the policy and deed of cancellation. Hayner *v.* American Popular L. Ins. Co., 69 N. Y. 435.

80. Westerfeld *v.* New York L. Ins. Co., (Cal. 1899) 58 Pac. 92; Caine *v.* Farmers', etc., Life Assoc., 115 Ill. App. 307; Manhattan L. Ins. Co. *v.* Burke, 23 Ohio Cir. Ct. 39; Northwestern Life Assoc. *v.* Findley, 29 Tex. Civ. App. 494, 68 S. W. 695. *Contra*, Manhattan L. Ins. Co. *v.* Burke, 69 Ohio St. 294, 70 N. E. 74, 100 Am. St. Rep. 666, 68 Ohio St. 681, 69 N. E. 1135.

81. Washburn *v.* Union Cent. L. Ins. Co., 143 Ala. 485, 38 So. 1011; Hanley *v.* Life Assoc. of America, 4 Mo. App. 253. See *supra*, XI.

be made where it clearly appears that it would not be accepted.[82] Where policies have been assigned to the company as security for a loan to the insured, a tender of the amount due need not be made before an action by the personal representatives of the insured for the balance due on the policies.[83] Although the policy provides that the insurance shall be paid on its presentation, with proof of death, the tender of the policy before the commencement of the suit is not a condition precedent.[84] If a tender is refused the amount thereof need not be brought into court where it would have to be deducted from the amount, if any, recovered by the insured.[85]

3. Defenses — a. In General. Many of the defenses to an action on a policy have already been considered.[86] The defenses of which the company may avail itself are not restricted to the reasons set forth in its notice to the beneficiary of its refusal to pay, where the beneficiary has not been misled thereby.[87] The fact that the company has paid the policy to the wrong person is no defense to an action brought by the person entitled thereto;[88] and it is no defense to an action by the legal owner that third persons have equities in the policy,[89] as where the action is brought by the pledgee of the policy and the debt owing by the insured to the pledgee has been paid.[90] Neglect of the officers of the company to order an assessment is no defense.[91] The company cannot urge defenses which are personal to the insured or his representatives in connection with an assignment of the policy;[92] and the terms of the contract by which the insured obtained the money with which to pay premiums are no defense to an action on the policy.[93] It is no answer to a defense of fraud that the company has not returned the premiums paid,[94] except where, by statute, the right to defend on the ground of false representations by the insured is conditioned on the payment into court of the premiums paid with interest.[95] A defense, such as a forfeiture, may be waived by failure to present it until after several trials of the same action.[96]

b. Set-Off and Counter-Claim. The company may set off claims against the insured the same as in other civil actions.[97] If the action is brought by the personal

82. Union Cent. L. Ins. Co. *v.* Caldwell, 68 Ark. 505, 58 S. W. 355; Griesemer *v.* Mutual L. Ins. Co., 10 Wash. 202, 38 Pac. 1031.

83. Steele *v.* Connecticut Gen. L. Ins. Co., 31 N. Y. App. Div. 389, 52 N. Y. Suppl. 373 [*affirmed* in 160 N. Y. 703, 57 N. E. 1125].

84. Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459.

85. Schwartz *v.* Germania L. Ins. Co., 18 Minn. 448.

86. Particular defenses: Want of insurable interest see *supra*, I, B–G. Contract not consummated see *supra*, II; III. Non-payment of first premium see *supra*, III, D. Illegality see *supra*, IV, A, 1. Fraud and mistake see *supra*, IV, A, 2; IX. Cancellation, surrender, and rescission see *supra*, VIII. Misrepresentation, fraud, concealment, and breach of warranty see *supra*, IX; XI. Forfeiture for breach of promissory warranty, covenant, or condition subsequent see *supra*, X; XI. Non-payment of premiums or assessments see *supra*, X, C. Payment see *supra*, XII, H. Settlement and discharge see *supra*, XII, H, 3.

Alteration of application as barring defenses reserved therein.— An insurance company may, by a culpable alteration of an application for a policy of insurance, lose its defenses reserved therein, without affecting the part of the transaction made for the benefit of the insured, although the application is by the terms of the policy made a part thereof, the contract being to that extent severable. Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

87. Hubbard *v.* Mutual Reserve Fund Life Assoc., 80 Fed. 681 [*affirmed* in 100 Fed. 719, 40 C. C. A. 665].

88. McGrew *v.* New York Mut. L. Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20.

89. McElroy *v.* John Hancock Mut. L. Ins. Co., 88 Md. 137, 41 Atl. 112, 71 Am. St. Rep. 400.

90. Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

91. Birnbaum *v.* Passenger Conductors' L. Ins. Co., 15 Wkly. Notes Cas. (Pa.) 518. See also *supra*, XIII, A, 1, text and notes 61–65; XIII, A, 2, b.

92. Evers *v.* Life Assoc. of America, 59 Mo. 429.

93. Merchants' Life Assoc. *v.* Yoakum, 98 Fed. 251, 39 C. C. A. 56.

94. Flynn *v.* Equitable L. Ins. Co., 78 N. Y. 568, 34 Am. Rep. 561. See *supra*, V, E, 3, 4.

95. Aloe *v.* Fidelity Mut. Life Assoc., 164 Mo. 675, 55 S. W. 993 (holding that a certain company was not an assessment company, and hence within the statute); Lavin *v.* Empire L. Ins. Co., 101 Mo. App. 434, 74 S. W. 366.

96. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15.

Waiver of forfeiture see *supra*, XI.

97. See, generally, Recoupment, Set-Off, and Counter-Claim.

representatives of the insured a claim of the company against the insured which was due at the time of his death may be set off,[98] but not a claim which did not mature until after his death.[99] However, the demands must be mutual, so that if the policy is payable to the executor or administrator of the insured, a claim of the company against the decedent cannot be set off,[1] except where the insured had at the time of his death a present valuable interest in the policy.[2]

B. Place of Bringing Suit — 1. Jurisdiction.[3] Where the company is a foreign corporation the general rules relating to actions against foreign corporations on contracts in general are applicable.[4] A foreign insurance company doing business within a state, under its statutes, is to be considered, for the purpose of being sued, as domiciled within the state.[5] A contract of insurance issued under the law of the state where the action is brought is presumed to be in force there and may be sued on in that state, although plaintiff was not a resident thereof.[6] A stipulation in a policy of a foreign company that the insured waives the right to sue on it except in the state incorporating the company is void as against public policy, especially where in violation of an express statute existing in the state in which the action is brought.[7]

2. Venue.[8] In some states there are statutory provisions as to the county in

Judgments against insured.— It not being denied that the amount of two judgments, pleaded as a counter-claim to plaintiff's action on a certificate of insurance, was due from plaintiff to defendant, it should be allowed as a set-off against the amount realized from the assessment ordered, and which it is adjudged plaintiff is entitled to under the certificate. Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485.

An assessment levied after the action was brought cannot be set off against the claim. Hendel *v.* Reverting Fund Assur. Assoc., 2 Pa. Dist. 116.

98. Boyden *v.* Massachusetts Mut. L. Ins. Co., 153 Mass. 544, 27 N. E. 669.

99. Ladd *v.* Union Mut. L. Ins. Co., 116 Fed. 878.

1. McKown *v.* Manhattan L. Ins. Co., 91 Fed. 352.

2. Ladd *v.* Union Mut. L. Ins. Co., 116 Fed. 878.

3. **Jurisdiction** generally see Courts.

4. See Foreign Corporations, 19 Cyc. 1323 *et seq.*

State in which policy found.— A policy of life insurance issued by a New York company to a person who was domiciled and died in Kentucky is not enforceable by his executors in Louisiana merely because the policy is found there. Moise *v.* Mutual Reserve Fund Life Assoc., 45 La. Ann. 736, 13 So. 170.

That the company's principal office is in another state is no objection. North Western Mut. L. Ins. Co. *v.* Lowery, 20 S. W. 607, 14 Ky. L. Rep. 600.

Where cause of action arises.— In some states an action against a foreign insurance company cannot be maintained unless the cause of action arose within the state. The cause of action arises within the state where the insured is a resident of, and dies within, the state of the forum. Griesa *v.* Massachusetts Ben. Assoc., 15 N. Y. Suppl. 71 [*affirmed* in 133 N. Y. 619, 30 N. E. 1146]. But where an agreement for insurance was made in the state of the forum, but the amount paid was to be refunded if the application was rejected, and the rules of the foreign corporation required proof of death claims to be made at the home office, where an assessment was to be made and the claims paid, the claim of a beneficiary, after the death of the insured, was not a cause of action arising in the state of the forum. Rodgers *v.* Mutual Endowment Assessment Assoc., 17 S. C. 406.

Actions against foreign corporations upon foreign contracts in general see Foreign Corporations, 19 Cyc. 1340.

5. Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

Evidence of compliance with statutes.— A certificate issued by an insurance commissioner reciting that the company has complied with all the laws is *prima facie* evidence that such company has complied with the statute requiring it to file with the insurance commissioner the name of an agent on whom process may be served. Harrigan *v.* Home L. Ins. Co., 128 Cal. 531, 58 Pac. 180, 61 Pac. 99.

Withdrawal from state.— The fact that a foreign life insurance company had at one time transacted business in Kansas under a license issued by the superintendent of insurance, and that it had filed in his office, as required by statute, its "written consent, irrevocable," to the institution of suits against it in the state, and the issuance of summons against it directed to the superintendent of insurance, does not subject it to suit on a policy wholly executed in another state, if, previous to the issuance of such policy, it had withdrawn or been expelled from Kansas, and had ceased to do business there. Mutual Reserve Fund Life Assoc. *v.* Boyer, 62 Kan. 31, 61 Pac. 387, 50 L. R. A. 538.

6. Green *v.* Equitable Mut. Life, etc., Assoc., 105 Iowa 628, 75 N. W. 635.

7. Reichard *v.* Manhattan L. Ins. Co., 31 Mo. 518.

8. Venue generally see Venue.

which an action on a policy may be brought.[9] Where the venue statute applicable to actions on contracts in general governs, the action may usually be brought in the county where the cause of action arises,[10] or where the insurance company is located,[11] or, in some states, where the contract was made.[12] The cause of action "arises" in the county where the insured died,[13] although it has been held, under a policy providing for delivery of a check to the beneficiary within a specified time after the death of the insured, that the cause of action arises in the county where the beneficiary resided at the time the claim was payable.[14] The company cannot, by a stipulation in the policy, limit the right to sue to the courts of a certain county where, in the absence of such stipulation, the action might be brought in other counties.[15]

C. Time of Bringing Suit[16] — **1. Postponement of Right to Sue.** The usual provision in the policy that no action shall be brought thereon until a specified time after notice and proof of death is a valid one, and an action cannot be maintained until after the expiration of the time named.[17] Such a provision in the

9. See the statutes of the several states.

In **Georgia** an action against an insurance company must be brought in the county where its principal office is located, or where it has an agency or place of doing business when suit is brought, and which agency or place of doing business was located in such county at the time the cause of action accrued or the contract was made, out of which the cause of action arose. Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103; Empire State Ins. Co. *v.* Collins, 54 Ga. 376. The fact that the contract out of which the suit arose was entered into at a time when the company had in the county where the action is brought a resident agent with an office therein does not show that the action was properly brought in such county, where it does not appear that the company had established, either in the office occupied by the agent or elsewhere in the county, an agency of its own under its own control for the transaction of its business. Orebaugh *v.* Equity Life Assoc., 115 Ga. 842, 42 S. E. 208.

In **Iowa** the statute provides that insurance companies may be sued in any county in which their principal place of business is kept or in which the contract of insurance is made. Such statute has been held not restricted to actions for loss under policies of insurance but to include any action for breach of a contract relating to insurance. Cameron *v.* Mutual Life, etc., Co., 121 Iowa 477, 96 N. W. 961. An indivisible contract involving the taking out of a policy, the sale thereof by the company, and the payment to the company by the insured of certain shares of stock is, although other matters are involved, a contract of insurance within such statute. Cameron *v.* Mutual Life, etc., Co., *supra*. If the action is commenced in the county in which the contract was made, the company is not entitled to a change of venue to the county where its principal place of business is kept. Teller *v.* Waterloo Equitable Mut. Life Assoc., 108 Iowa 17, 78 N. W. 674.

In **Ohio** the statutory provision that an action against an insurance company may be brought "in the county where the loss or some part thereof occurred" applies to life insurance companies, so that an action may be brought in the county where the insured died. Union Cent. L. Ins. Co. *v.* Pyers, 36 Ohio St. 544.

In **Pennsylvania**, under a statute authorizing suits to be brought against insurance companies in the county where the "property insured" is located, and making such provision applicable to life insurance companies, an action may be brought in the county where the insured resided. Quinn *v.* Fidelity Ben. Assoc., 100 Pa. St. 382; Coyle *v.* Metropolitan L. Ins. Co., 8 Kulp 169; Shrom *v.* National L. Ins. Co., 11 Wkly. Notes Cas. 530. See also Spangler *v.* Pennsylvania Mut. Aid Soc., 12 Wkly. Notes Cas. 312. *Compare* Whalen *v.* Pennsylvania Mut. Aid Soc., 2 Leg. Rec. 370, holding that an action may be brought in any county where the company takes risks.

10. See, generally, VENUE.

11. Bankers' L. Ins. Co. *v.* Robbins, 53 Nebr. 44, 73 N. W. 269, 55 Nebr. 117, 75 N. W. 585, holding that an insurance company is situated, within the meaning of the statute, in any county in the state in which it maintains an agent or servant engaged in transacting the business for which it exists.

12. Yore *v.* Bankers', etc., Mut. Life Assoc., 88 Cal. 609, 26 Pac. 514, holding that a contract is made where the application for insurance was made and accepted, and not where the policy was issued, when the policy issued was not in accordance with the terms proposed in the application.

13. Rippstein *v.* St. Louis Mut. L. Ins. Co., 57 Mo. 86; Bankers' L. Ins. Co. *v.* Robbins, 53 Nebr. 44, 73 N. W. 269, 55 Nebr. 117, 75 N. W. 585; Bruil *v.* Northwestern Mut. Relief Assoc., 72 Wis. 430, 39 N. W. 529.

14. Hosley *v.* Wisconsin Odd Fellows Mut. L. Ins. Co., 86 Wis. 463, 57 N. W. 48.

15. Matt *v.* Iowa Mut. Aid Assoc., 81 Iowa 135, 46 N. W. 857, 25 Am. St. Rep. 483.

16. Statutory limitations see LIMITATIONS OF ACTIONS.

Computation of time see TIME.

17. Jackson *v.* Southern Mut. L. Ins. Co., 36 Ga. 429; Gallenbeck *v.* Northwestern Mut.

policy, however, may be waived, as by an absolute denial of liability under the policy so that an action may be brought at once after such denial.[18]

2. Limitation of Time to Sue[19] — a. Validity. Policies usually provide that an action thereon must be brought within a specified period shorter than that prescribed by the statute of limitations applicable to such an action; and if the action is not brought within the specified period it cannot be maintained, in the absence of some valid excuse or waiver.[20] A six-months' or one-year limitation thus imposed by contract is valid,[21] provided the circumstances do not make the limitation unreasonable,[22] and there is no statute specially providing against such a contractual limitation.[23] But a by-law of a mutual company limiting the time to sue is

Relief Assoc., 84 Minn. 184, 87 N. W. 614; Miller *v.* Eagle L., etc., Ins. Co., 2 E. D. Smith (N. Y.) 268.

Additional proofs.— Where proofs of death were received by the insurer more than ninety days before suit brought, as required by its by-laws, the fact that the company requested additional proofs on specific matters, which were furnished, does not render a subsequent action, within ninety days from the date of furnishing such additional proofs, premature. Wood *v.* Farmers' Life Assoc., 121 Iowa 44, 95 N. W. 226; Thomas *v.* Guaranty Fund Life Assoc., 73 Mo. App. 371; Bankers' Reserve Life Assoc. *v.* Finn, 64 Nebr. 105, 89 N. W. 672.

18. Columbus Mut. Life Assoc. *v.* Plummer, 86 Ill. App. 446; Phillips *v.* U. S. Beneficial Soc., 120 Mich. 142, 79 N. W. 1; Pendleton *v.* Knickerbocker L. Ins. Co., 5 Fed. 238 [*reversed* on other grounds in 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866]; Citizens' Ins. Co. *v.* Boisvert, 11 Quebec 377; Whyte *v.* Western Assur. Co., 22 L. C. Jur. 215. But see McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188, holding that where the policy required proofs to be filed within sixty days after death, and payment was to be made within forty-five days after the filing of the proofs, the company's denial of liability immediately after the death, even if a waiver of such proofs, does not give a right of action before the expiration of forty-five days after death.

19. Statutory limitations see Limitations of Actions.

20. Sullivan *v.* Prudential Ins. Co., 172 N. Y. 482, 65 N. E. 268; Kettenring *v.* Northwestern Masonic Aid Assoc., 96 Fed. 177. See also Vincent *v.* Mutual Reserve Fund Life Assoc., 74 Conn. 684, 51 Atl. 1066.

Excuses for delay see *infra*, XIII, C, 2, b.

Actions to which limitation applies.— The contract limitation on actions on any death claim does not apply to an action against an insurance company for fraudulent representations inducing a settlement of a death claim against it. Wabash Valley Protective Union *v.* James, 8 Ind. App. 449, 35 N. E. 919.

Effect of incontestable liability clause.— A clause in a policy, providing that if the insured should die three or more years after the date thereof, and after all due premiums were paid, the policy should be incontestable, did not preclude the company from asserting as a defense to an action on such a policy that the action was not brought within six months from the insured's death, as required by the policy. Brady *v.* Prudential Ins. Co., 168 Pa. St. 645, 32 Atl. 102.

21. *Georgia.*— Metropolitan L. Ins. Co. *v.* Caudle, 122 Ga. 608, 50 S. E. 337.

Illinois.— Ronan *v.* Michigan Mut. L. Ins. Co., 96 Ill. App. 355; Richter *v.* Michigan Mut. L. Ins. Co., 66 Ill. App. 606.

Kentucky.— Lee *v.* Union Cent. L. Ins. Co., 56 S. W. 724, 22 Ky. L. Rep. 1712. *Contra*, Union Cent. L. Ins. Co. *v.* Spinks, 119 Ky. 261, 83 S. W. 615, 84 S. W. 1160, 26 Ky. L. Rep. 1205, 27 Ky. L. Rep. 325, 69 L. R. A. 264.

Massachusetts.— Lewis *v.* Metropolitan L. Ins. Co., 180 Mass. 317, 62 N. E. 369.

New York.— Sweetser *v.* Metropolitan L. Ins. Co., 8 Misc. 251, 28 N. Y. Suppl. 543, holding that a condition in a policy that no suit shall be brought after six months, and that all statutes of limitations to the contrary are expressly waived, is valid.

Ohio.— Prudential Ins. Co. *v.* Howle, 19 Ohio Cir. Ct. 621, 10 Ohio Cir. Dec. 290.

Wisconsin.— Griem *v.* Fidelity, etc., Co., 99 Wis. 530, 75 N. W. 67.

United States.— Spinks *v.* Mutual Reserve Fund Life Assoc., 137 Fed. 169.

See 28 Cent. Dig. tit. "Insurance," § 1545.

Computation of time.— When a policy provides that no action can be maintained thereon after six months from the death of the insured, and such period expires on Sunday, an action commenced on the following Monday is barred by the express terms of the policy. Ryer *v.* Prudential Ins. Co. of America, 185 N. Y. 6, 77 N. E. 727 [*reversing* 110 N. Y. App. Div. 897, 95 N. Y. Suppl. 1158], construing N. Y. Laws (1892), c. 677, §§ 26, 27. Computation of time generally see Time.

22. Magner *v.* Mutual Life Assoc., 17 N. Y. App. Div. 13, 44 N. Y. Suppl. 862 [*affirmed* in 162 N. Y. 657, 57 N. E. 1116], holding that a by-law requiring an action on a policy to be commenced within six months from the death of insured is unreasonable as applied to a case in which the company delayed its final determination as to paying the claim until three days before the end of the six months.

23. Massachusetts Ben. Life Assoc. *v.* Hale, 96 Ga. 802, 23 S. E. 849 (holding, where the policy provided that the contract should be governed by the laws of a particular state which at the time the policy was issued pro-

not a bar to the right to sue after such time, where it is not made a part of the policy.[24]

b. Excuses For Delay. The contractual limitation may be avoided by showing the impossibility of bringing the action within the time limited, as for instance the refusal of a physician to furnish a certificate of the cause of death.[25] The infancy of the beneficiaries, however, is no excuse.[26]

c. When Limitations Commence to Run. The contract limitation, where the policy gives the company a certain time within which to make payment before action can be brought, such as a specified time after proofs of death are made, is usually held to begin to run only from the date when an action might first have been brought on the policy.[27]

d. Time When Action Commenced and Second Action. The ascertainment of the time when an action on a policy was actually commenced is apparently governed by the rules relating to statutory limitations in general.[28] An amendment

vided against contract limitations for less than the statute of limitations, that a stipulation requiring suit to be brought within less time than allowed by statute in such state was void); Rutherford *v.* Prudential Ins. Co., 34 Ind. App. 531, 73 N. E. 202. *Compare* Styles *v.* Supreme Council of R. A., 29 Ont. 38, holding that a statute providing that an action on a contract of insurance may be commenced at any time within the term of one year, notwithstanding any stipulation or agreement to the contrary, refers to a stipulation giving less time than one year for bringing the action and does not limit a contract stipulation allowing suit to be brought within three years.

24. Mutual Acc., etc., Assoc. *v.* Kayser, 14 Wkly. Notes Cas. (Pa.) 86.

25. O'Neill *v.* Massachusetts Ben. Assoc., 63 Hun (N. Y.) 292, 18 N. Y. Suppl. 22.

Impossibility, waiver, or estoppel.— No action which is commenced after the expiration of the time within which it is agreed any action shall be commenced can be maintained, unless the performance of the condition to bring suit within the specified time is: (1) Rendered impossible through the existence of such facts as by the law of contract will excuse the performance of such a condition; (2) is waived by the insurer; or (3) the company has been guilty of such conduct as in law will constitute an estoppel to the assertion of its non-performance. Vincent *v.* Mutual Reserve Fund Life Assoc., 74 Conn. 684, 51 Atl. 1066.

26. O'Laughlin *v.* Union Cent. L. Ins. Co., 11 Fed. 280, 3 McCrary 543.

Effect of infancy on running of statute of limitations see LIMITATIONS OF ACTIONS.

27. *Iowa.*— McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188.

Kansas.— Standard L., etc., Ins. Co. *v.* Davis, 59 Kan. 521, 53 Pac. 856.

Nebraska.— Kettenbach *v.* Omaha Life Assoc., 49 Nebr. 842, 69 N. W. 135.

New York.— Bloodgood *v.* Massachusetts Ben. Life Assoc., 19 Misc. 460, 44 N. Y. Suppl. 563, holding that where the policy provided that no suit should be brought within ninety days from the date of furnishing proofs of death, and the answer alleged that sufficient proofs had not been delivered, the one-year limitation contained in the policy is not a bar to the action.

Oregon.— Stinchcombe *v.* New York L. Ins. Co., 46 Oreg. 316, 80 Pac. 213.

Rhode Island.— Wilkinson *v.* John Hancock Mut. L. Ins. Co., 27 R. I. 146, 61 Atl. 43.

United States.— See New York Fidelity, etc., Co. *v.* Love, 111 Fed. 773, 49 C. C. A. 602.

See 28 Cent. Dig. tit. "Insurance," § 1546.

But see Meyers *v.* Metropolitan L. Ins. Co., 7 Ohio S. & C. Pl. Dec. 573, 6 Ohio N. P. 34, holding that a provision in a policy that no suit or action shall be instituted after six months from the date of "the death of the insured" means that the suit must be brought before six months after the date of death without regard to when the proofs of death are made.

Company preventing making of proofs of death.— Where a policy declared that proof of death should be made on blanks furnished by the company, and that no action should be begun after one year from assured's death, without reference to the time of furnishing such proofs, the words in the limitation clause, "without reference to the time of furnishing proofs of death," refer only to the time when proofs are furnished, and do not apply to a case where the making of proofs of death was prevented by the company's refusal to furnish blanks. Methvin *v.* Fidelity Mut. Life Assoc., 129 Cal. 251, 61 Pac. 1112.

Commencement of running of statutory limitation see LIMITATIONS OF ACTIONS.

28. See LIMITATIONS OF ACTIONS, *post*, p. 963.

Filing of declaration and issue of summons.— A statute provided that an action shall for all purposes be considered to have been commenced and pending at the time of filing the declaration, if summons shall be issued thereon. The declaration was filed with a waiver of summons and an entry of appearance for defendant signed by an agent duly authorized to accept and acknowledge service of process. Subsequently, but after the expiration of the period of limitation, a summons was issued and served upon the same agent who, so far as appeared, was the only

of the complaint by changing the representative character of plaintiff,[29] or by substituting a new plaintiff,[30] has been held not to change the cause of action so as to allow a contract bar to be interposed when the amendment is made after the stipulated time for bringing the action. Except where there is a statutory provision with reference to a new action after the failure of the former action which is expressly made applicable to contract limitations,[31] a second action commenced after the contract bar has become completed cannot be maintained, although the first has been terminated by dismissal or nonsuit, so that no trial has been had on the merits of the case,[32] the statute as to second actions under the statute of limitations having no application to contract limitations.[33]

e. Waiver and Estoppel.[34] Since the contractual limitation of time to sue is for the benefit of the company, it may be waived by it.[35] The company cannot rely on the defense of limitations where it has prevented the action being brought within the time stipulated.[36] Conducting negotiations with the insured which induced him to believe that a settlement would be effected without suit waives the contract limitation.[37] The company's denial of liability a considerable time before the expiration of the stipulated time within which to sue constitutes no waiver.[38] An agent of the company ordinarily has no power to make such

person on whom it could have been served, and in compliance with such service defendant appeared. It was held that the action was commenced, within the meaning of the statute, on the day the declaration was filed. New York Fidelity, etc., Co. *v.* Love, 111 Fed. 773, 49 C. C. A. 602.

29. New York Fidelity, etc., Co. *v.* Freeman, 109 Fed. 847, 48 C. C. A. 692, 54 L. R. A. 680.

30. U. S. Insurance Co. *v.* Ludwig, 108 Ill. 514.

31. American Cent. Ins. Co. *v.* Noe, 75 Ark. 406, 88 S. W. 572; Union Cent. L. Ins. Co. *v.* Skipper, 115 Fed. 69, 52 C. C. A. 663, construing Arkansas statute.

32. Keystone Mut. Ben. Assoc. *v.* Norris, 115 Pa. St. 446, 8 Atl. 638, 2 Am. St. Rep. 572. See also Vincent *v.* Mutual Reserve Fund Life Assoc., 74 Conn. 684, 51 Atl. 1066; Bowe *v.* Knickerbocker L. Ins. Co., 27 Hun (N. Y.) 312, where a surety was refused leave to discontinue an action to recover insurance in behalf of attaching creditors on the ground that the discontinuance would prevent another action against the insurer because of the lapse of the stipulated time provided for in the policy for bringing an action.

33. Lewis *v.* Metropolitan L. Ins. Co., 180 Mass. 317, 62 N. E. 369; Prudential Ins. Co. *v.* Howle, 19 Ohio Cir. Ct. 621, 10 Ohio Cir. Dec. 290.

34. Estoppel generally see ESTOPPEL.

35. Covenant Mut. L. Assoc. *v.* Baughman, 73 Ill. App. 544; Sullivan *v.* Prudential Ins. Co. of America, 172 N. Y. 482, 65 N. E. 268; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 86 Am. Dec. 362; Ames *v.* New York Union Ins. Co., 14 N. Y. 253; Berger *v.* Ætna L. Ins. Co., 48 Misc. (N. Y.) 385, 95 N. Y. Suppl. 541.

To whom benefit of waiver inures.— A waiver of a condition in a life policy limiting the time of suing thereon to six months from the date of the insured's death, wrought by the representations of the company's superintendent made to the beneficiary, inures to the benefit of the personal representative of the insured who institutes suit on the policy. Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601.

36. Methvin *v.* Fidelity Mut. Life Assoc., 129 Cal. 251, 61 Pac. 1112; Sweetser *v.* Metropolitan L. Ins. Co., 8 Misc. (N. Y.) 251, 28 N. Y. Suppl. 543; Hall *v.* Union Cent. L. Ins. Co., 23 Wash. 610, 63 Pac. 505, 83 Am. St. Rep. 844, 51 L. R. A. 288.

37. New York Metropolitan L. Ins. Co. *v.* Dempsey, 72 Md. 288, 19 Atl. 642; Magner *v.* Brooklyn Mut. Life Assoc., 17 N. Y. App. Div. 13, 44 N. Y. Suppl. 862 [*affirmed* in 162 N. Y. 657, 57 N. E. 1116]; Peters *v.* Empire L. Ins. Co., 90 N. Y. Suppl. 296; Mutual Reserve Fund Life Assoc. *v.* Tolbert, (Tex. Civ. App. 1895) 33 S. W. 295. But see Vincent *v.* Mutual Reserve Fund Life Assoc., 74 Conn. 684, 51 Atl. 1066, holding that where the negotiations were apparently carried on in good faith and the company made no promise nor prevented the insured from bringing his suit, the mere fact that negotiations were carried on until a short time prior to the expiration of the year limited, and that plaintiff believed no suit would be necessary, especially where he brought an action within the time limited but it failed because the complaint contained no *ad damnum* clause, there was no waiver or estoppel.

Investigation agreed to be without prejudice.— Where an officer of an insurance company, authorized to waive a forfeiture of a beneficiary's rights under a policy by neglect to sue his claim, wrote, in reference to the same, that the company had not been able to see the matter as he did, and saw no reason for changing its view, and, closing, said a further investigation would be allowed without prejudice to the interests of the company, and an investigation was accordingly made, the company did not waive the forfeiture. Carlson *v.* Metropolitan L. Ins. Co., 172 Mass. 142, 51 N. E. 525.

38. Metropolitan L. Ins. Co. *v.* Caudle, 122 Ga. 608, 50 S. E. 337.

waiver,[39] unless he is a general agent authorized to bind the company by contract.[40] So acts of the company after the stipulated time has elapsed, such as requesting proofs of loss which are furnished at great expense, estop it from relying on the defense of limitations.[41] The company's retention of the policy and other papers until after the stipulated time in which to sue has elapsed,[42] or the failure to deliver the policy in the first instance,[43] in connection with other circumstances, may preclude the right to insist on the defense of limitations.

D. Parties[44] — 1. Plaintiffs — a. Who May Sue — (I) *Beneficiary.* In code states the beneficiary named in a policy may sue as the real party in interest.[45] In other states the right of the beneficiary to sue is limited to cases where the policy is specifically made payable to him.[46] The beneficiary cannot sue if his

39. Carlson *v.* Metropolitan L. Ins. Co., 172 Mass. 142, 51 N. E. 525; Berger *v.* Ætna L. Ins. Co., 48 Misc. (N. Y.) 385, 95 N. Y. Suppl. 541.

Estoppel.—Where a claimant under a policy of insurance forfeited his rights by a failure to sue his claim within a certain time after the insured died, the company is not estopped to claim the forfeiture because he failed to sue in reliance on an agent's statement that the claim was paid, where it does not appear that he was authorized to make it, or that it was ever ratified by or known to the company, and it was not made within the scope of his real or apparent authority. Carlson *v.* Metropolitan L. Ins. Co., 172 Mass. 142, 51 N. E. 525.

40. Hall *v.* Union Cent. L. Ins. Co., 23 Wash. 610, 63 Pac. 505, 83 Am. St. Rep. 844, 51 L. R. A. 288.

41. Behymer *v.* Metropolitan L. Ins. Co., 4 Ohio S. & C. Pl. Dec. 266, 3 Ohio N. P. 183.

42. Tobin *v.* Workingmen's Co-operative Assoc., 66 N. Y. App. Div. 21, 72 N. Y. Suppl. 926 (question for jury); Dougherty *v.* Metropolitan L. Ins. Co., 3 N. Y. App. Div. 313, 38 N. Y. Suppl. 258; Robinson *v.* Metropolitan L. Ins. Co., 1 N. Y. App. Div. 269, 37 N. Y. Suppl. 146 [*affirmed* in 157 N. Y. 711, 53 N. E. 1131]. But see Lewis *v.* Metropolitan L. Ins. Co., 180 Mass. 317, 62 N. E. 369 (holding that retention of the policy will not estop the company from relying on the contractual limitation, where liability was disclaimed four weeks after the death, and it was not shown that anything was done with an attempt to deceive or did deceive either plaintiff or the original claimant); Sullivan *v.* Prudential Ins. Co. of America, 172 N. Y. 482, 65 N. E. 268 [*reversing* 63 N. Y. App. Div. 280, 71 N. Y. Suppl. 525].

43. Union Cent. L. Ins. Co. *v.* Phillips, 102 Fed. 19, 41 C. C. A. 263 [*reversing* on other grounds 101 Fed. 33].

44. Parties generally see Parties.

Interpleader see Interpleader, 23 Cyc. 11; Parties.

45. Hogle *v.* Guardian L. Ins. Co., 4 Abb. Pr. N. S. (N. Y.) 346. *Compare* Winterhalter *v.* Workmen's Guarantee Fund Assoc., 75 Cal. 245, 17 Pac. 1, holding that the executor of a will, devising all the testator's property to his mother, is the proper party to sue for and receive the money due on a policy on testator's life, payable subject to the will of the insured.

46. *Maine.*— Martin *v.* Ætna L. Ins. Co., 73 Me. 25.

Maryland.— Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Rhode Island.— Munroe *v.* Providence Permanent Firemen's Relief Assoc., 19 R. I. 363, 34 Atl. 149.

Texas.— Pacific Mut. L. Ins. Co. *v.* Williams, 79 Tex. 633, 15 S. W. 478; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511, holding that a policy payable to the widow of the insured, half in her own right and half for the use of her children, and which directs the wife to act as guardian without giving security, is collectable by the widow alone.

United States.— Connecticut Mut. L. Ins. Co. *v.* Luchs, 108 U. S. 498, 2 S. Ct. 949, 27 L. ed. 800; Brockway *v.* Connecticut Mut. L. Ins. Co., 29 Fed. 766.

See 28 Cent. Dig. tit. "Insurance," § 1560. See also *supra*, IV, B, 2.

In Massachusetts, by the act of 1894, the beneficiary of a life policy is given a right of action thereon in his own name. Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303. Formerly, it seems, the beneficiary could not sue. Wright *v.* Vermont L. Ins. Co., *supra*; Nims *v.* Ford, 159 Mass. 575, 35 N. E. 100. But see Forbes *v.* American Mut. L. Ins. Co., 15 Gray 249, 77 Am. Dec. 360.

In Vermont a person for whose benefit a policy under seal is issued cannot sue thereon in his own name (Fairchild *v.* North Eastern Mut. Life Assoc., 51 Vt. 613), where the promise is made to the insured (Tripp *v.* Vermont L. Ins. Co., 55 Vt. 100), although, if the declaration alleges a consideration moving from the insured, and a promise to pay the wife and children of the insured or their legal representatives, the action cannot be maintained in the name of the administrator, but should be maintained in the name of the wife and children (Davenport *v.* Northeastern Mut. Life Assoc., 47 Vt. 528).

If the beneficiary is dead her husband may sue. D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768.

The administrator of the beneficiary is the proper party to sue on the policy, after the death of the beneficiary, if the beneficiary might have sued in his own name. Emerson *v.* Metropolitan L. Ins. Co., 185 Mass. 318, 70 N. E. 200.

interest in the policy has been divested by assignment, or other act of the insured, or of himself.[47] The right of the beneficiary to sue on the policy does not necessarily preclude an action by the personal representatives of the insured,[48] except where it is otherwise provided by statute;[49] but if the policy is payable to the "assured," and the beneficiary made the application for the policy and paid the premiums, the beneficiary is the assured, so that the personal representatives of the deceased cannot sue.[50]

(II) *Personal Representatives or Heirs.* If the policy is payable to the personal representatives of the insured, although for the benefit of another person or persons named in the policy, the personal representatives are alone entitled to sue.[51] The fact that the policy is payable to the personal representatives of the insured does not preclude the right of the heirs of the insured to sue thereon, where there is no necessity for administration of the estate.[52]

(III) *Assignee or Pledgee.* The pledgee of the policy may sue,[53] but if the debt has been paid the pledgor may sue.[54] The assignee of the policy may sue thereon in his own name,[55] except in some of those states which still retain to a considerable extent the common-law system of procedure.[56]

Action by guardian ad litem.— Although the amount due to the children of the insured is by the terms of the policy made payable to their general guardian, it may nevertheless be recovered in an action prosecuted in their behalf by a guardian *ad litem*. Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166.

47. Bowen *v.* National Life Assoc., 63 Conn. 460, 27 Atl. 1059.

48. McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254, 38 N. E. 435; Munroe *v.* Providence Permanent Firemen's Relief Assoc., 19 R. I. 363, 34 Atl. 149.

Trustee of express trust.— If the policy is payable to the executor or administrator of the insured for the benefit of third persons, the executor or administrator may sue as a trustee of an express trust. Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Grattan *v.* National L. Ins. Co., 15 Hun (N. Y.) 74.

49. See the statutes of the several states.

In Massachusetts the statute provides that the representative of the insured may sue on the policy only with the consent of the beneficiary, and it is held thereunder that an action by a person as an administratrix of the insured, who was also named in the policy as beneficiary, will be presumed to be with her assent as beneficiary, and that an action by the administratrix will be presumed to be with the consent of the beneficiary, where he knew of the suit and did not bring one in his own name within the time required by the policy. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129.

50. Cyrenius *v.* New York Mut. L. Ins. Co., 145 N. Y. 576, 40 N. E. 225 [*affirming* 73 Hun 365, 26 N. Y. Suppl. 248]; Smith *v.* Ætna L. Ins. Co., 5 Lans. (N. Y.) 545; Brockway *v.* Connecticut Mut. L. Ins. Co., 29 Fed. 766.

Construction of "assured" see *supra*, I, A, 7; IV, B, 2.

51. Massachusetts Mut. L. Ins. Co. *v.* Robinson, 98 Ill. 324; Stowe *v.* Phinney, 78 Me. 244, 3 Atl. 914, 57 Am. Rep. 796; Lee *v.* Chase, 58 Me. 432; Flynn *v.* North American L. Ins. Co., 115 Mass. 449; Bailey *v.* New England Mut. L. Ins. Co., 114 Mass. 177, 19 Am. Rep. 329.

Where the policy is under seal, the action for its breach must be by the covenantee or his legal representative. Brann *v.* Maine Ben. Life Assoc., 92 Me. 341, 42 Atl. 500; McCarthy *v.* Metropolitan L. Ins. Co., 162 Mass. 254, 38 N. E. 435.

Action by administrator in individual capacity.— Where the policy is payable to the "executors, administrators, or assigns" of the insured, an action cannot be brought by an administrator in his individual capacity. Ladd *v.* Union Mut. L. Ins. Co., 116 Fed. 878.

52. Sun L. Ins. Co. *v.* Phillips, (Tex. Civ. App. 1902) 70 S. W. 603.

Substitution of widows and heirs.— In an action by an administrator on a policy, he may be dismissed and the widow and heirs of the insured substituted as plaintiffs, where the latter are the proper parties to sue. Teutonia L. Ins. Co. *v.* Mueller, 77 Ill. 22.

53. Archibald *v.* Chicago Mut. L. Ins. Co., 38 Wis. 542. See *supra*, VI, C, 5, a, c, (I).

54. Clark *v.* Equitable L. Assur. Soc., 133 Fed. 816.

55. Burroughs *v.* State Mut. L. Assur. Co., 97 Mass. 359; Archibald *v.* Chicago Mut. L. Ins. Co., 38 Wis. 542.

Intervention in action by assignee for benefit of creditors.— Where plaintiff, in an action on life policies, claims by virtue of assignment of the policies, the assignee of insured for the benefit of creditors cannot intervene in the action by showing that the policies had been pledged by insured to secure a note; that the assignee had notified plaintiff that he, as assignee, should claim the proceeds of the policies; and that plaintiff had, without his knowledge, obtained an assignment of them from the pledgee by paying the note, which was for a much smaller sum than the amount of the policies. Palmer *v.* New York Mut. L. Ins. Co., 55 N. Y. Super. Ct. 352.

56. U. S. Life Ins. Co. *v.* Ludwig, 103 Ill.

b. Joinder of Plaintiffs. If two or more persons are beneficiaries under the policy, one of them cannot sue alone, without joining the others as plaintiffs or defendants or showing an excuse for failure to join,[57] except that if the policy provides for the payment of different sums to different persons they cannot join as plaintiffs to recover the several sums due.[58] If the action is by an administrator, the heirs of the insured need not be joined.[59] If the action is by an assignee of the policy, neither the personal representatives nor the beneficiary need be joined.[60] One who insured his life for the benefit of another may sue on the policy without joining the beneficiary.[61]

2. Defendants. One who claims an adverse interest in the policy is properly made a defendant to an action to recover the amount of the policy;[62] but one who claims the policy under an alleged assignment by the insured in his lifetime is not a necessary party to an action by the administrator of the insured.[63] The widow of an intestate is not, merely by reason of such relationship, a proper defendant in an action by the administrator.[64] An insurance company which becomes consolidated with another company cannot be sued as the original company, but only in the name of the consolidated corporation.[65]

E. Service of Process. The process may be served upon an insurance company as in other cases of actions against corporations,[66] except in so far as actions against insurance companies are governed by special statutory provisions.[67] In order to secure jurisdiction in actions against foreign insurance companies, it is often provided by statute for the appointment by the companies of an agent or attorney to receive process, and that in default of such an appointment service may be made upon some state officer, or some other like means is provided to facilitate the service of process.[68]

305 (holding that an assignee cannot maintain an action at law on a policy in his own name, although payment of premiums is made by the assignee, or for his benefit, after notice to the company of his assignment); New York Mut. L. Ins. Co. *v.* Allen, 113 Ill. App. 89 [*affirmed* in 212 Ill. 134, 72 N. E. 200].

57. Voss *v.* Connecticut Mut. L. Ins. Co., 119 Mich. 161, 77 N. W. 697, 44 L. R. A. 689. *Compare* Evans *v.* Coventry, 2 Jur. N. S. 557, 25 L. J. Ch. 489, 4 Wkly. Rep. 466; Fraser *v.* Phœnix Mut. L. Ins. Co., 36 U. C. Q. B. 422; Campbell *v.* U. S. National L. Assur. Co., 34 U. C. Q. B. 35.

Estoppel of company to object.— Where an insurance company, on receiving notice of a loss under a life policy payable to two persons if they survived the insured, but one of whom died before the loss, instructed the living beneficiary and insured's administrator that the interest of the dead beneficiary reverted to the estate of the insured, and proof of loss should be made by the living beneficiary and the administrator of the insured, it was held that the company could not afterward raise the objection, in a suit on the policy, that the administrator of the deceased beneficiary was not a party plaintiff. Andrus *v.* Fidelity Mut. L. Ins. Assoc., 168 Mo. 151, 67 S. W. 582.

58. Keary *v.* Mutual Reserve Fund Life Assoc., 30 Fed. 359.

59. Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398.

60. St. John *v.* American Mut. L. Ins. Co., 2 Duer (N. Y.) 419 [*affirmed* in 13 N. Y. 31, 64 Am. Dec. 529].

61. Kerr *v.* Union Mut. L. Ins. Co., 69 Hun (N. Y.) 393, 23 N. Y. Suppl. 619.

62. Wokal *v.* Belsky, 53 N. Y. App. Div. 167, 65 N. Y. Suppl. 815.

63. New York L. Ins. Co. *v.* Smith, 67 Fed. 694, 14 C. C. A. 635.

64. Alabama Gold L. Ins. Co. *v.* Cobb, 57 Ala. 547; New York L. Ins. Co. *v.* Jack, 76 Miss. 788, 25 So. 871.

65. Franklin L. Ins. Co. *v.* Adams, 90 Ill. App. 658.

66. See, generally, Process.

67. See the statutes of the several states.

In Pennsylvania service may be made outside of the county where the action is brought in the county where the insured resided at the time of his death. See Dillon *v.* Metropolitan L. Ins. Co., 4 Pa. Dist. 262, 16 Pa. Co. Ct. 126, 7 Kulp 507; Coyle *v.* Metropolitan L. Ins. Co., 8 Kulp 169; Anspach *v.* Guardian Mut. Aid Soc., 10 Wkly. Notes Cas. 568. The return of service need not state that the insured was a resident of the county where suit was brought. Coyle *v.* Metropolitan L. Ins. Co., *supra*. A rule to arbitrate is "process," within the statute authorizing service of process in any county of the state, where suit is brought in the county where the insurance is located. Charles *v.* Keystone Mut. Ben. Assoc., 3 Del. Co. 78.

68. Millan *v.* Mutual Reserve Fund Life Assoc., 103 Fed. 764, holding that the Virginia statutes do not apply to service of process upon a foreign "assessment" company. See, generally, Process.

Such statutes are not retroactive.— Ellis *v.* Connecticut Mut. L. Ins. Co., 8 Fed. 81, 19 Blatchf. 383.

F. Pleading[69]**—1. Complaint — a. General Requisites.** The complaint should contain a statement of the contract or policy, the consideration, the performance of all the conditions precedent on the part of plaintiff, and the failure of the company to pay the amount due.[70] In some states a statutory short form of declaration

State officer on whom service may be made. — In North Carolina service may be made, where a corporation has not appointed an agent, either on the insurance commissioner or on the secretary of the corporation commission. Fisher *v.* Traders' Mut. L. Ins. Co., 136 N. C. 217, 48 S. E. 667. See, generally, Process.

Who are agents.— A person who collects or remits premiums due a foreign insurance company is an agent on whom service, in an action on a policy, may be made, under the Mississippi statute (Sadler *v.* Mobile L. Ins. Co., 60 Miss. 391), even though at the time of the service he was not in the company's employ (Pervangher *v.* Union Casualty, etc., Co., 81 Miss. 32, 32 So. 909). In Nebraska the statute defining an agent "to all intents and purposes" includes within the "purposes" service of summons. Bankers' L. Ins. Co. *v.* Robbins, 55 Nebr. 117, 75 N. W. 585. An agent appointed at an annual salary for special service in matters referred to him, who was sent into a foreign state, where the company did business, to investigate a claim under a policy, and who was authorized to compromise it, within stated terms, leaving him a certain discretion as to the amount, sufficiently represents the company to enable the state courts to acquire jurisdiction by service of process on him. Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569. And see Ætna L. Ins. Co. *v.* Hanna, 81 Tex. 487, 17 S. W. 35; Fey *v.* I. O. O. F. Mutual L. Ins. Soc., 120 Wis. 358, 98 N. W. 206. See, generally, Process.

What constitutes doing business in state.— An insurance company, although having assumed to withdraw from the state by recalling its agents, refusing to issue new policies, and giving notice to the state insurance commissioner, nevertheless continues to do business in the state, so as to be amenable to state process through service therein on a proper agent, by continuing to collect premiums on its outstanding policies through a former agent in the state, and to pay losses accruing under such policies. Connecticut Mut. L. Ins. Co. *v.* Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569. See Foreign Corporations, 19 Cyc. 1267 *et seq.*; Process.

Revocability of appointment.— The appointment of an agent, or power of attorney given a state officer, as a condition to doing business in the state, has been held irrevocable. Moore *v.* Mutual Reserve Fund Life Assoc., 129 N. C. 31, 39 S. E. 637. *Contra*, see Woodward *v.* Mutual Reserve L. Ins. Co., 84 N. Y. App. Div. 324, 82 N. Y. Supnl. 908, construing North Carolina statutes. See, generally, Process.

The withdrawal of the company from business in the state does not usually revoke the appointment of an agent or officer to accept service of process in actions on its policies or contractual liabilities incurred while doing business in the state. New York Home Ben. Soc. *v.* Muehl, 109 Ky. 479, 59 S. W. 520, 22 Ky. L. Rep. 1378, 60 S. W. 371, 22 Ky. L. Rep. 1264; Merrill *v.* Knickerbocker L. Ins. Co., 4 Ky. L. Rep. 729 (statutes held not retroactive); Moore *v.* Mutual Reserve Fund Life Assoc., 129 N. C. 31, 39 S. E. 637; Biggs *v.* Mutual Reserve Fund Life Assoc., 128 N. C. 5, 37 S. E. 955; D'Arcy *v.* Connecticut Mut. L. Ins. Co., 108 Tenn. 567, 69 S. W. 768. But see Millan *v.* Mutual Reserve Fund Life Assoc., 103 Fed. 764. See, generally, Process.

Sufficiency of writ.— A copy of process in which the day, month, and year of its issuance are left blank, mailed to a foreign insurance company, is insufficient. Millan *v.* Mutual Reserve Fund Life Assoc., 103 Fed. 764. See, generally, Process.

In Pennsylvania service of process upon a foreign insurance company, which has complied with the provisions of the registry law and has designated an office and an agent, must be made at such office and upon the designated agent. Hall *v.* Metropolitan L. Ins. Co., 15 Pa. Dist. 144, 32 Pa. Co. Ct. 14; Potts *v.* Prudential Ins. Co., 6 Pa. Dist. 520; Henry *v.* Prudential Ins. Co., 9 Kulp 384.

Power of insurance commissioner to appoint agent to receive service see Equity Life Assoc. *v.* Gammon, 118 Ga. 236, 44 S. E. 978.

69. Pleading generally see Pleading.

Joinder of causes of action see Joinder and Splitting of Actions, 23 Cyc. 376.

70. *Alabama.*— Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

California.— San Francisco Sav. Union *v.* Long, (1898) 53 Pac. 907.

Illinois.— Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614.

Missouri.— Howe *v.* Pacific Mut. L. Ins. Co., 75 Mo. App. 63.

Ohio.— Hall *v.* Scottish Rite Knights Templar, etc., Aid Assoc., 6 Ohio Cir. Ct. 137, 3 Ohio Cir. Dec. 384.

See 28 Cent. Dig. tit. "Insurance," § 1575.

Consideration.— Alleging the consideration substantially as recited in the policy is sufficient, against the objection that a part of the consideration was secured to be paid by separate obligations not disclosed in the complaint. Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264. A petition is not open to the objection that it shows the contract was without consideration, where it alleges that the consideration was that insured should pay defendant out of his monthly wages a certain sum in monthly instalments, where the insured died before the first monthly instalment became due, but it was agreed that the insurance should be binding on the day of the delivery of the application, before any instal-

is allowed, but such form is proper only under the particular circumstances prescribed in the statute.[71]

b. Anticipating Defenses. The complaint need not anticipate defenses,[72] such as limitations,[73] death by suicide,[74] the falsity of answers of the insured in his application,[75] or that an assignment of the policy is void as a wagering transaction.[76]

c. Setting Up Policy. As in other actions on a written contract,[77] the policy itself, or so much thereof as pertains to the contract, the breach of which is complained of, should be set out in the complaint or by way of exhibit in an action brought thereon.[78] Ordinarily the policy need not be set out in its entirety,[79] although in some states, by statute, a copy of the policy is required to be attached

ment became due. Pacific Mut. Ins. Co. *v.* Shaffer, 30 Tex. Civ. App. 313, 70 S. W. 566.

Surrender of policy.— Allegations as to the right to surrender a policy and take a paid-up policy for the amount of the premiums, after the payment of three annual premiums, are not equivalent to an averment of surrender of the policy at the expiration of the three years. Wells *v.* Vermont L. Ins. Co., 28 Ind. App. 620, 62 N. E. 501, 63 N. E. 578, 88 Am. St. Rep. 208.

Sufficiency against individual defendants.— A complaint on a policy issued on the life of plaintiff's husband for plaintiff's benefit which alleged that the individual defendants had possession of and claimed some interest in the policy and prayed that they be compelled to produce the same and assert their claims is not demurrable at the instance of the individual defendants. Godfrey *v.* Wilson, 70 Ind. 50. But see McCabe *v.* McCabe, 67 N. Y. App. Div. 589, 73 N. Y. Suppl. 852.

Theory of action.— See Congower *v.* Equitable Mut. Life, etc., Assoc., 94 Iowa 499, 63 N. W. 192 (action held to be brought upon a second certificate for which the insured surrendered the original certificate instead of on the original certificate); Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430 (action to recover a certain sum under statute, where plaintiff admitted the non-payment of premiums, held to be based on the policy and not on an account stated).

Jurisdictional allegations in action against foreign insurance company see Universal L. Ins. Co. *v.* Bachus, 51 Md. 28.

71. Lee *v.* Mutual Reserve Fund Life Assoc., 97 Va. 160, 33 S. E. 556; Grubbs *v.* National Life Maturity Ins. Co., 94 Va. 589, 27 S. E. 464, holding that when plaintiff elects to bring a form of action different from that prescribed in the statute, the declaration filed must conform to the rules governing in the form of action adopted.

72. Triple Link Mut. Indemnity Assoc. *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34; Germania L. Ins. Co. *v.* Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Laudenschlager *v.* Northwestern Endowment, etc., Assoc., 36 Minn. 131, 30 N. W. 447; Standard L., etc., Ins. Co. *v.* Koen, 11 Tex. Civ. App. 273, 33 S. W. 133. See, generally, PLEADING.

73. Kettenring *v.* Northwestern Masonic Aid Assoc., 99 Fed. 532, holding, under the Illinois practice, that matter in avoidance of limitations contained in insurance policies cannot be pleaded in the declaration but is matter for replication after the limitation has been pleaded by defendant.

74. Modern Woodmen of America *v.* Noyes, 158 Ind. 503, 64 N. E. 21.

75. Triple Link Mut. Indemnity Assoc. *v.* Williams, 121 Ala. 138, 26 So. 19, 77 Am. St. Rep. 34; Chambers *v.* Northwestern Mut. L. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549; Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 38 Atl. 315.

76. Davis *v.* Brown, 159 Ind. 644, 65 N. E. 908.

77. See CONTRACTS, 9 Cyc. 712–714; PLEADING.

78. Richter *v.* Michigan Mut. L. Ins. Co., 66 Ill. App. 606; Abe Lincoln Mut. Life, etc., Soc. *v.* Miller, 23 Ill. App. 341; Fehl *v.* Phœnix Mut. L. Ins. Co., 14 Pa. Co. Ct. 183; Manhattan L. Ins. Co. *v.* Willis, 60 Fed. 236, 8 C. C. A. 594, holding that it is sufficient to describe generally a policy sued on as a policy of insurance covenanting to pay to the assured, his executors, etc., a specified sum on proof of his death during the continuance of the policy, without stating the other terms and conditions thereof.

Allegations in the complaint in conflict with provisions in the policy render the complaint demurrable. Burton *v.* Connecticut Mut. L. Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405.

Effect of failure to demur.— Where defendant, in an action on an insurance policy, had answered without demurring to the declaration, which merely referred to the policy without annexing a copy, he could not object to the admission of the policy in evidence, on the ground that the declaration, as construed in connection with the policy, was ambiguous. Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

Time and place.— A complaint which alleges the time when the contract was made, which was antecedent to the suit and not within the statute of limitations, need not state when the application was executed; and it is not necessary to allege the place where the contract was made or to state whether the application for insurance was made a part of the contract of insurance. Lauer *v.* Equitable L. Assur. Soc., 10 Ohio S. & C. Pl. Dec. 397, 8 Ohio N. P. 117.

79. Northwestern Mut. L. Ins. Co. *v.* Freeman, (Tex. Civ. App. 1898) 47 S. W. 1025.

Effect of attaching copy or setting forth in hæc verba.— Where a declaration sets out a policy of insurance *in hæc verba*, and then

to the complaint.[80] It is not necessary to set out the application, even though it contains stipulations on the part of the insured,[81] unless by the terms of the policy such stipulations in the application are incorporated into, and made a part of, the policy.[82]

d. Beneficial Interest — (I) *In General.* The interest of plaintiff must be alleged, where it does not clearly appear from the policy as set up or from other facts stated in the complaint.[83] If the insurance was procured by plaintiff upon the life of another it must be alleged that plaintiff had an insurable interest in the life insured.[84] But the interest of the person insuring his own life need not be alleged, where the policy, as set forth in the declaration, shows the interest of plaintiff.[85]

(II) *In Case of Assignment.* If the action is brought by an assignee of the policy he must make such allegations as will show that he is entitled to bring the action.[86]

e. Accrual of Cause of Action. If the cause of action does not accrue until a specified time after the making of the proofs of loss, plaintiff must state the facts to show that the action is not prematurely brought, although it is not necessary to expressly allege that the stipulated time has elapsed.[87]

f. Performance of Conditions Precedent. It is necessary to allege the performance of conditions and promissory warranties contained in the contract;[88]

states its legal effect incorrectly, the latter will be treated as surplusage. Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614. A copy of a life policy, although not ordinarily constituting a part of the petition in an action thereon, may, where plaintiff has expressly made it so, be considered as a part thereof for the purpose of disposing of a general demurrer thereto. Coldham *v.* American Casualty, etc., Co., 8 Ohio Cir. Ct. 620, 4 Ohio Cir. Dec. 548.

80. Lauer *v.* Equitable L. Assur. Soc., 10 Ohio S. & C. Pl. Dec. 397, 8 Ohio N. P. 117.

81. *California.*— Berliner *v.* Travelers' Ins. Co., 121 Cal. 451, 53 Pac. 922.

District of Columbia.— Jacobs *v.* National L. Ins. Co., 1 MacArthur 632.

Illinois.— Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180.

Indiana.— Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132; Penn Mut. L. Ins. Co. *v.* Wiler, 100 Ind. 92, 50 Am. Rep. 769; Continental L. Ins. Co. *v.* Kessler, 84 Ind. 310; Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264; Knights Templar, etc., Life Indemnity Co. *v.* Dubois, 26 Ind. App. 38, 57 N. E. 943.

North Carolina.— Britt *v.* Mutual Ben. L. Ins. Co., 105 N. C. 175, 10 S. E. 896.

United States.— Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519.

See 28 Cent. Dig. tit. "Insurance," § 1588.

Variance between certificate and application.— Where a certificate of life insurance in a mutual company, and the application therefor, are not made a part of the declaration by profert, a motion in arrest of judgment for a variance between them and the declaration is properly overruled. Oriental Ins. Assoc. *v.* Glancey, 70 Md. 101, 16 Atl. 391.

82. Fehl *v.* Phœnix Mut. L. Ins. Co., 14 Pa. Co. Ct. 183; Bidwell *v.* Connecticut L. Ins. Co., 3 Fed. Cas. No. 1,393, 3 Sawy. 261. But see Phœnix Acc., etc., Assoc. *v.* Horton, 29 Ind. App. 198, 64 N. E. 105, action before a justice of the peace.

83. See Knorr *v.* New York State Mut. Ben. Assoc., 79 Hun (N. Y.) 83, 29 N. Y. Suppl. 508.

84. Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180; Burton *v.* Connecticut Mut. L. Ins. Co., 119 Ind. 207, 21 N. E. 746, 12 Am. St. Rep. 405; Continental L. Ins. Co. *v.* Volger, 89 Ind. 572, 46 Am. Rep. 185.

Sufficiency of allegations.— An allegation that the policy in suit was not speculative, without affirmatively setting out an insurable interest, is sufficient, after verdict, on motion in arrest, and therefore on writ of error. Kentucky L., etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42.

85. Massachusetts Mut. L. Ins. Co. *v.* Kellogg, 82 Ill. 614.

86. Griffin *v.* Prudential Ins. Co., 43 N. Y. App. Div. 499, 60 N. Y. Suppl. 79; Manhattan L. Ins. Co. *v.* Burke, 23 Ohio Cir. Ct. 39.

If the policy is conditioned to be payable to an assignee only on proof of an insurable interest the fact and nature of such interest must be averred (Alabama Gold L. Ins. Co. *v.* Mobile Mut. Ins. Co., 81 Ala. 329, 1 So. 561), except where the assignee is a mere trustee for the debtor, as where he holds the policy as collateral security for a debt (Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114).

87. Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519.

88. Metropolitan L. Ins. Co. *v.* Rutherford, 95 Va. 773, 30 S. E. 383; Home Life Assoc. *v.* Randall, 30 Can. Sup. Ct. 97.

Conditions precedent and promissory warranties see *supra*, X.

It is ordinarily sufficient to make such allegations in general terms, as by alleging that

for example that the premiums have been paid;[89] that notice and proof of death have been duly given to the company;[90] and that demand for payment or for the levy of an assessment has been made.[91]

g. Waiver or Estoppel. If plaintiff relies on waiver or estoppel as to any defense which would otherwise be available to defendant, the facts constituting such waiver or estoppel may be pleaded in the first instance.[92]

h. Amount of Recovery. If the amount of the recovery depends upon the amount of the assessment levied, the amount of such assessment must be alleged.[93]

plaintiff has duly performed all the conditions on his part. Security Acc., etc., Assoc. *v.* Lee, 160 Ind. 249, 66 N. E. 745; Modern Woodmen of America *v.* Noyes, 158 Ind. 503, 64 N. E. 21; Pacific Mut. L. Ins. Co. *v.* Turner, 17 Ind. App. 644, 47 N. E. 231; Ohlsen *v.* Equitable L. Assur. Soc., 25 Misc. (N. Y.) 230, 55 N. Y. Suppl. 73, 28 N. Y. Civ. Proc. 226; Lauer *v.* Equitable L. Assur. Soc., 10 Ohio S. & C. Pl. Dec. 397, 8 Ohio N. P. 117; New York Mut. L. Ins. Co. *v.* Leubrie, 71 Fed. 843, 18 C. C. A. 332.

89. **Payment of premiums.**— The payment of premiums should be alleged, either directly or by necessary implication. Bogardus *v.* New York L. Ins. Co., 101 N. Y. 328, 4 N. E. 522; Stewart *v.* Union Mut. L. Ins. Co., 63 Hun (N. Y.) 328, 17 N. Y. Suppl. 886. But see Supreme Lodge K. of P. *v.* McLennan, 69 Ill. App. 599. *Compare* Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151, holding that plaintiff need not allege in his declaration facts defeating a part of his claim under statutory provisions of the policy, as that but part of the premiums have been paid, by reason of which under the terms of the policy only a part of the sum insured is payable. See *supra*, XIII, A, 2, a.

Facts relied on to avoid a forfeiture for non-payment of premiums must be alleged. Scheifers *v.* Massachusetts Mut. L. Ins. Co., 46 Ohio St. 418, 21 N. E. 635.

Sufficiency of allegations see Michigan Mut. L. Ins. Co. *v.* Custer, 128 Ind. 25, 27 N. E. 124; New York Mut. L. Ins. Co. *v.* Wilson, 34 S. W. 708, 17 Ky. L. Rep. 1316, holding that an allegation that defendant's agent extended the time of payment, without averring that the agent was authorized to do so, was insufficient.

Where failure to pay does not work a forfeiture.— As, under the non-forfeiture law of New York, a failure to tender a premium, without the notice specified in the state law to be given by the company, does not work a forfeiture, it is not necessary, in an action on the policy, to allege a tender. Osborne *v.* Home L. Ins. Co., 123 Cal. 610, 56 Pac. 616 (construing New York statute); Baxter *v.* Brooklyn L. Ins. Co., 44 Hun (N. Y.) 184 [*affirmed* in 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293].

90. **Notice and proof of death.**— Where the policy makes the giving of notice and furnishing of proof of death a condition precedent, there should be an averment of the performance of the condition. Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459, holding that both a waiver of proof of death and the giving of proof may be alleged. But it is usually sufficient to generally allege performance of such conditions (Excelsior Mut. Aid Assoc. *v.* Riddle, 91 Ind. 84), without setting out what the proofs were (Ohlsen *v.* Equitable L. Assur. Soc., 25 Misc. (N. Y.) 230, 55 N. Y. Suppl. 73, 28 N. Y. Civ. Proc. 226, holding that where satisfactory proofs were required to be delivered it is sufficient to allege that satisfactory proofs were made without stating what the proofs were). See *supra*, XII, C.

91. **Demand.**— Where a demand of payment or for the levy of an assessment is necessary, the complaint must allege the making of such demand and its refusal. Lester *v.* Piedmont, etc., L. Ins. Co., 55 Ga. 475; Taylor *v.* National Temperance Relief Union, 94 Mo. 35, 6 S. W. 71. See also Curtis *v.* Mutual Ben. Life Co., 48 Conn. 98. See *supra*, XIII, A, 2, c.

If no demand is necessary for the levy of an assessment, of course it need not be alleged. Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Sufficiency of allegations.— A complaint on a life insurance policy stating that satisfactory proofs of the death of insured "were delivered by the plaintiff herein to the defendant herein, and payment of said sum of $5,000 was demanded and refused by the defendant," sufficiently alleges a demand by plaintiff on the insurer. Ohlsen *v.* Equitable L. Assur. Soc., 25 Misc. (N. Y.) 230, 55 N. Y. Suppl. 73, 28 N. Y. Civ. Proc. 226.

92. Railway Officials' Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037; Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459 (holding that it is not necessary to state that facts were pleaded for the purpose of showing a waiver or estoppel); Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331; Battin *v.* Northwestern Mut. L. Ins. Co., 130 Fed. 874, 65 C. C. A. 358 (holding that an allegation that defendant has in his dealings with assured, now deceased, treated the policy as in force, without stating the facts showing the nature of such dealings and treatment, is not sufficiently specific).

Under allegations of performance of the conditions of the contract, a waiver cannot be relied on (see *infra*, XIII, F, 7, a; and, generally, CONTRACTS, 9 Cyc. 754), unless waiver is alleged in the reply.

93. Brann *v.* Maine Ben. Life Assoc., 92 Me. 341, 42 Atl. 500. See also Meyers *v.* United L. Ins. Assoc., 17 N. Y. Suppl. 727.

So if the amount of the recovery depends upon plaintiff's share in the endowment fund, where the agreement is to pay the insured his full share of the funds, not exceeding a specified sum, the amount of his share in the fund must be alleged.[94] On the other hand, if the amount of recovery does not depend on the assets of the insurer, applicable to the payment of the claim, no allegation in regard thereto is necessary.[95]

i. Non-Payment. The complaint must contain either an express allegation of non-payment of the policy or allege facts from which the failure to pay will be implied.[96]

2. Answer — a. In General. The requisites and sufficiency of an answer in an action on a policy are governed by the rules applicable to answers in civil actions in general.[97]

b. Defenses[98] — (i) *Necessity of Pleading.* Affirmative defenses must be specially pleaded.[99]

94. Congower *v.* Equitable Mut. L., etc., Assoc., 94 Iowa 499, 63 N. W. 192.

95. Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159 (holding, that where the amount recoverable was seventy-five per cent of the amount collected by an assessment, but the policy contained no restriction as to the amount assessable against each member, the complaint need not aver the number of members subject to assessment, nor the amount which would be realized by assessment, nor that the assessment was made and collected); Warner *v.* Hartford Nat. Life Assoc., 100 Mich. 157, 58 N. W. 667.

96. Richards *v.* Travelers' Ins. Co., 80 Cal. 505, 22 Pac. 939; Taylor *v.* National Temperance Relief Union, 94 Mo. 35, 6 S. W. 71; Prudential Ins. Co. *v.* Simmons, 18 Ohio Cir. Ct. 879, 6 Ohio Cir. Dec. 165.

97. See Pleading.

A denial of any information sufficient to form a belief as to whether plaintiff's intestate was the owner of the policy sued on authorized the company to show that, before the intestate acquired any rights in the policy, it was assigned by the insured. McDonough *v.* Ætna L. Ins. Co., 38 Misc. (N. Y.) 625, 78 N. Y. Suppl. 217. An answer does not deny the death of assured by merely denying that he died on the day stated in the complaint, his death being admitted in other portions of the answer. Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826.

An admission of the performance by plaintiff of all conditions precludes the company from showing that the insured was not in good health at the time he paid the first premium, as required as a condition precedent by the policy. Fidelity Title, etc., Co. *v.* Illinois L. Ins. Co., 213 Pa. St. 415, 63 Atl. 51. The capacity in which defendant is sued, where it had changed its name after the issuance of the policy sued on, is admitted by a plea of the general issue. Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544].

Service with answer of order for trial.— An ordinary life policy is not an instrument "for the absolute payment of money upon demand, or at a particular time," under N. Y. Code Civ. Proc. § 1778, requiring that in an action upon such an instrument, with the answer, an order of a judge shall be served directing the trial of the issues presented by the pleadings. New York L. Ins. Co. *v.* Universal L. Ins. Co., 88 N. Y. 424; McKee *v.* Metropolitan L. Ins. Co., 25 Hun (N. Y.) 583; Ogle *v.* Knickerbocker L. Ins. Co., 4 Month. L. Bul. (N. Y.) 22; Anonymous, 6 Cow. (N. Y.) 41.

Affidavit of defense.— An action on a policy is within the statute requiring affidavits of defense in all actions of assumpsit. Cohen *v.* Home Mut. Life Assoc., 4 Pa. Co. Ct. 146. For rule in Pennsylvania prior to the act of 1887 see Riley *v.* Mutual Ben. Assoc., 2 Ches. Co. Rep. (Pa.) 305 [*following* Morton *v.* New York Mut. L. Ins. Co., 12 Phila. (Pa.) 246, and *explaining* Lycoming F. Ins. Co. *v.* Dickinson, 4 Wkly. Notes Cas. (Pa.) 271]. Sufficiency of affidavit of defense explicitly denying that policy had been issued, that application had been accepted, or that the company had ever so stated, as going to the whole of plaintiff's claim see Mutual L. Ins. Co. *v.* Keen, 135 Fed. 677, 68 C. C. A. 315 [*affirming* 131 Fed. 559].

Service of answer on co-defendant.— When the company stands ready to pay the amount due on a policy when the proper beneficiary is determined, an objection, in an action by persons claiming to be such beneficiaries, that it has not been served with a copy of the answers of contesting beneficiaries, has no merit. Spencer *v.* Grand Lodge, A. O. U. W., 53 N. Y. App. Div. 627, 65 N. Y. Suppl. 1146 [*affirming* 22 Misc. 147, 48 N. Y. Suppl. 590].

Want of jurisdiction sufficiency of plea see Universal L. Ins. Co. *v.* Bachus, 51 Md. 28.

Conflicting allegations see Penn. Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132.

98. **Defenses** see *supra*, XIII, A, 3.

99. Kruger *v.* Life, etc., Assoc., 106 Cal. 98, 39 Pac. 213; Maher *v.* Empire L. Ins. Co., 110 N. Y. App. Div. 723, 96 N. Y. Suppl. 496; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668. See, generally, Pleading.

For instance defendant must specially plead such defenses as non-payment of assessments, falsity of statements in the application, etc. See *infra*, XIII, E, 7, a.

(II) *Sufficiency of Plea* — (A) *In General.* An answer stating new matter as a defense must state facts which if true will defeat the action, or so much of it as is attempted to be answered.[1] An answer alleging a forfeiture of the policy sued on must affirmatively show conformance to the prescribed method of making such forfeiture.[2]

(B) *Misrepresentations of Insured.* The facts constituting misrepresentation or fraud must be stated,[3] and the particular answer or answers which are claimed to have been false must be specifically alleged.[4] A general allegation of fraud will be limited to the facts specified as constituting the fraud.[5] It seems that the false representations must be shown to have been relied on, and to have formed an inducement to the making of the contract,[6] although there is authority

Statutes.— A statute permitting general averments of performance of conditions, and prohibiting general denial of performance, prevents a plea of *non assumpsit* in an action on a policy being sufficient to sustain a defense of non-performance, where the declaration contains an averment of performance. Dimick *v.* Metropolitan L. Ins. Co., 67 N. J. L. 367, 51 Atl. 692.

1. See, generally, Pleading.

A plea of payment to another is sufficient, although it fails to aver that such other had filed proofs of loss. Brooks *v.* Metropolitan L. Ins. Co., 70 N. J. L. 36, 56 Atl. 168. So a plea of payment to the mother of the insured, and a receipt from her, is sufficient, where the policy authorizes payment to certain persons, including the mother, and provides that the production of a receipt should be conclusive evidence that the insurance was paid to the persons lawfully entitled to receive it. Pfaff *v.* Prudential Ins. Co., 141 Pa. St. 562, 21 Atl. 663.

Notice and proofs of loss.— Where there were several conditions as to notice and proofs of death, an answer was insufficient where it did not specify particularly which condition was not complied with. Evarts *v.* U. S. Mutual Acc. Assoc., 16 N. Y. Suppl. 27.

Cause of death.— An allegation that the insured did "immorally, wrongfully, and wickedly commit suicide," substantially alleges that he did it while sane. Northwestern Benevolent, etc., Assoc. *v.* Bloom, 21 Ill. App. 159. And it has been held that a plea alleging suicide is sufficient, although it did not charge that insured was sane when he committed suicide, on the theory that an insane person is incapable of committing suicide. Triple Link Mut. Indemnity Assoc. *v.* Froebe, 90 Ill. App. 299 An averment as to the manner of death of the insured and the circumstances attending it was immaterial, where the defense was that the death of the insured was caused by the use of intoxicating liquors. Horton *v.* Equitable L. Assur. Soc., 2 Alb. L. J. 255.

2. Union Cent. L. Ins. Co. *v.* Jones, 17 Ind. App. 592, 47 N. E. 342.

Failure to pay premiums or assessments.— Under the New York statute, where a company relies on a forfeiture for the non-payment of premiums as a defense, it must allege both that the premiums were not paid, and that the statutory notice was served before the policy was declared to be forfeited. Fischer *v.* Metropolitan L. Ins. Co., 167 N. Y. 178, 60 N. E. 431 [*affirming* 37 N. Y. App. Div. 575, 56 N. Y. Suppl. 260]. A mere averment that it is untrue that plaintiff has paid all premiums is too general. Hendel *v.* Reverting Fund Assur. Assoc., 2 Pa. Dist. 116. A general allegation that the insured was duly notified of an assessment and failed and refused to pay it within the time limited is insufficient, where it does not affirmatively show that the assessment was legally made. Murphy *v.* Mutual Reserve Fund Life Assoc., 114 Fed. 404. And see Kelly *v.* Fidelity Mut. Life Assoc., 198 Pa. St. 147, 47 Atl. 958; Whitthorne *v.* St. Louis Mut. L. Ins. Co., 3 Tenn. Ch. 147.

3. Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Breach of warranty and fraud.— An answer averring that statements in the application were false and fraudulent is sufficient to raise both the questions of a breach of warranty and fraud. Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

Several breaches of warranty should not be pleaded as separate defenses, but as a single defense. Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490.

Requiring insured to file application and medical examination in the office of the clerk of court see Mealey *v.* Metropolitan L. Ins. Co., 23 Fed. 25.

4. Chambers *v.* Northwestern Mut. L. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549; Studwell *v.* Charter Oak L. Ins. Co., 17 Hun (N. Y.) 602, holding that the answer should specify particularly in what the violation consists.

Failure to expressly allege that the false representations were contained in the application is not fatal where plaintiff could not have been misled thereby. Metropolitan L. Ins. Co. *v.* Ethier, 34 Mich. 277.

5. Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

6. Provident Sav. L. Assur. Soc. *v.* Pruett, 141 Ala. 688, 37 So. 700; Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Warranties or representations.— "When the statements and answers are warranties it is sufficient to plead them and aver that they were false, without reference to their materiality, for they will be deemed to be material whether they are so or not, and without

holding to the contrary.[7] Where a statute provides that the application cannot be relied on unless attached to the policy, a plea of fraud in the application is insufficient, unless it shows that the application was attached to the policy.[8]

3. REPLY. Whether a reply is necessary is governed by the rules relating to pleadings in civil actions in general.[9] The reply must not state conclusions of law,[10] nor materially depart from the allegations in the complaint.[11] If intended as a denial, it must be specific and not evasive[12] nor argumentative.[13] If allegations in the reply are inconsistent the pleader may be required to elect between them.[14] The reply must be to the entire answer,[15] unless it particularly specifies that it is intended only as a partial answer. A reply to a plea that the insured committed suicide by poisoning himself, alleging that he did not intentionally poison himself, is sufficient.[16]

4. DEMURRER. As in other civil actions, the sufficiency of the complaint as stating a cause of action may be raised by a demurrer.[17]

5. AMENDMENTS. The complaint in an action on a life insurance policy,[18] or the

reference to whether they were intentionally or innocently made, for if false they may be availed of by the insurer to render the policy void, although the insured may have believed them to be true. But when the statements and answers are not warranties, but mere representations, to avail as a defense it must be averred and proved that they were false, that the insured at the time knew they were false, or made them so recklessly or under such circumstances as that in good conscience wilful falsehood should be imputed to him, and that the fact concealed or the falsehood expressed was material." Ætna L. Ins. Co. *v.* King, 84 Ill. App. 171, 175.

7. Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

8. Parker *v.* Des Moines Life Assoc., 108 Iowa 117, 78 N. W. 826; McConnell *v.* Iowa Mut. Aid Assoc., 79 Iowa 757, 43 N. W. 188; Hebb *v.* Kittanning Ins. Co., 138 Pa. St. 174, 20 Atl. 837; Metropolitan L. Ins. Co. *v.* Jenkins, 4 Pa. Cas. 197, 10 Atl. 474.

9. See PLEADING.

In New York an answer containing new matter constituting a defense by way of avoidance need not be replied to except where the court, in the exercise of its discretion, so requires. A reply has been ordered where the defense was the making and non-payment of an assessment (Rogers *v.* Mutual Reserve Fund Life Assoc., 1 How. Pr. N. S. 194), and also where the answer alleged that the policy was procured by false representation and it had lapsed by reason of non-payment of assessments (Schwan *v.* Mutual Trust Fund Life Assoc., 9 N. Y. Civ. Proc. 82).

Equitable replication under practice in England see Reis *v.* Scottish Equitable L. Assur. Soc., 2 H. & N. 19, 3 Jur. N. S. 417, 26 L. J. Exch. 279, 5 Wkly. Rep. 592.

10. Fidelity Mut. L. Ins. Co. *v.* Batson, 136 Ala. 330, 34 So. 166.

11. Scott *v.* Insurance Co., 9 Phila. (Pa.) 266. See, generally, PLEADING.

12. Fidelity Mut. L. Ins. Co. *v.* Batson, 136 Ala. 330, 34 So. 166.

13. New York L. Ins. Co. *v.* La Boiteaux, 7 Ohio Dec. (Reprint) 182, 1 Cinc. L. Bul. 278.

14. Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155, holding, however, that an election should not be required where the denial is in the nature of a confession and avoidance and merely gives color to the defense.

Construction of pleading.— A denial in a reply of a failure to pay the assessments during a certain year, together with an allegation that the insurer had subsequently demanded, received, and retained annual payments, and had thereby waived the alleged prior breaches, does not admit the failure to pay assessments, and is not inconsistent with the denial of such failure. Tobin *v.* Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663.

15. Northwestern Masonic Aid Assoc. *v.* Bodurtha, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414.

16. Connecticut Mut. L. Ins. Co. *v.* Smith, 39 Ill. App. 569.

17. See, generally, PLEADING.

Plea or demurrer.—In an action on a policy on the life of a debtor for the benefit of his creditor, assigned by the beneficiary for his own debt, where the complaint alleges that the insured became indebted to the beneficiary more than four years prior to the date of the policy, a defense that the beneficiary had no insurable interest because the debt was barred by the statute of limitations must be raised by plea and not by demurrer, since the averment of indebtedness is not inconsistent with the fact of an original promise in writing to pay at a date within four years. Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

Sufficiency of demurrer as pointing out the reasons for the insufficiency of the facts alleged in the complaint as an excuse for the failure to bring suit within a year see Vincent *v.* Mutual Reserve Fund Life Assoc., 74 Conn. 684, 51 Atl. 1066.

Order sustaining demurrer and granting leave to amend see Owen *v.* New York L. Ins. Co., 18 Fed. Cas. No. 10,631, 1 Hughes 322.

18. New York L. Ins. Co. *v.* Hendren, 24 Gratt. (Va.) 536.

A new cause of action cannot be introduced by amendment on the trial. Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430.

answer[19] or replication[20] may be amended, by leave of court, subject to the rules relating to amendments of pleadings in civil actions in general.[21]

6. Bill of Particulars. Subject to the rules governing the granting of a motion for a bill of particulars in civil actions in general,[22] it is proper to require the company to furnish a bill of particulars apprising plaintiff of the matters on which it relies as a breach of warranty or misrepresentations in the application for the insurance.[23] Where the answer alleged that the policy was a wagering policy and speculative in character, it was held proper to require the company to specify in what respect this was so.[24]

7. Issues, Proof, and Variance — a. In General. The proof must be within the issues.[25] It must correspond with the allegations of the pleadings,[26] but an immaterial variance is not fatal.[27] The general rule is that a waiver by the insurer cannot be shown under an allegation in the complaint of the performance of conditions precedent or subsequent,[28] although there is authority to the con-

19. Dimick *v.* Metropolitan L. Ins. Co., 67 N. J. L. 367, 51 Atl. 692; Louis *v.* Connecticut Mut. L. Ins. Co., 172 N. Y. 659, 65 N. E. 1119 [*affirming* 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683].

20. Scott *v.* Insurance Co., 9 Phila. (Pa.) 266, where amendment was allowed to prevent a departure.

21. See Pleading.

22. See Pleading.

23. Dwight *v.* Germania L. Ins. Co., 84 N. Y. 493 [*affirming* 22 Hun 167]; Taylor *v.* Security Mut. L. Ins. Co., 73 N. Y. App. Div. 319, 76 N. Y. Suppl. 671; Richter *v.* Equitable L. Assur. Soc., 22 N. Y. App. Div. 75, 47 N. Y. Suppl. 763; Marshall *v.* Emperor L. Assur. Soc., L. R. 1 Q. B. 35, 6 B. & S. 886, 12 Jur. N. S. 293, 35 L. J. Q. B. 89, 13 L. T. Rep. N. S. 281, 118 E. C. L. 886.

24. Taylor *v.* Security Mut. L. Ins. Co., 73 N. Y. App. Div. 319, 76 N. Y. Suppl. 671.

25. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493 (holding that on an issue as to insured's habit of drinking to excess, evidence that the witness had talked with insured about his drinking, without offering to show what he had said about it, was properly refused); Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090 (holding that the question whether credit had been extended by the insurer to the insured for the consideration to be paid by the insured was presented by the pleadings under an allegation that the insurer was, on the death of the insured, to pay the beneficiaries "for a consideration to be paid" by the insured, and a denial).

Suicide.— Where the proofs of loss state that the death of the insured was by his own hand, but the answer does not expressly allege that the insured committed suicide, the issue is complete if the reply denies that the insured committed suicide. Prudential Ins. Co. *v.* Breustle, 41 S. W. 9, 19 Ky. L. Rep. 544.

Issues raised by answer in general see Greenfield *v.* Massachusetts Mut. L. Ins. Co., 47 N. Y. 430; Williford *v.* Ætna L. Ins. Co., 64 S. C. 329, 42 S. E. 165; Hartford Nat. Life Assoc. *v.* Hopkins, 97 Va. 167, 33 S. E. 539.

Materiality of issue see Kansas Mut. L. Ins. Co. *v.* Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388.

26. Shove *v.* Shove, 79 Wis. 497, 48 N. W. 647.

Variance between pleading and policy.— There is a variance where the complaint states that the certificates were payable to plaintiff assignee on the death of the insured, where the certificates themselves state that they were payable to the assignee if living at the death of the insured, payment to be made within ninety days after proof of death. Souder *v.* Home Friendly Soc., 72 Md. 511, 20 Atl. 137. Reference in the declaration to the policy, without setting out a copy thereof or any contract inconsistent therewith, and the introduction of the policy in evidence, does not constitute a variance. Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151. Setting out the policy as an absolute contract, without alleging the conditions subsequent contained in the policy, which is introduced in evidence, does not constitute such a variance as will prevent the admission of the policy. Forbes *v.* American Mut. L. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360.

27. Michigan Mut. L. Ins. Co. *v.* Custer, 128 Ind. 25, 27 N. E. 124; Phœnix Mut. L. Ins. Co. *v.* Hinesley, 75 Ind. 1; Archibald *v.* Chicago Mut. L. Ins. Co., 38 Wis. 542.

28. Garlick *v.* Metropolitan L. Ins. Co., 109 N. Y. App. Div. 175, 95 N. Y. Suppl. 645; Ryer *v.* Prudential Ins. Co., 85 N. Y. App. Div. 7, 82 N. Y. Suppl. 971 [*followed* in Ryer *v.* Prudential Ins. Co., 110 N. Y. App. Div. 897, 95 N. Y. Suppl. 1158 (*reversed* on other grounds in 185 N. Y. 6, 77 N. E. 727)]. See De Frece *v.* National L. Ins. Co., 19 N. Y. Suppl. 8 [*affirmed* in 136 N. Y. 144, 32 N. E. 556], holding that an allegation that deceased "complied with the terms of said agreement so far as the same were to be complied with by him," is not equivalent to alleging that deceased "duly performed all the terms and conditions of the policy," so as to render inadmissible evidence of a waiver of forfeiture for failure to pay premiums; and that where, without any proof being offered by plaintiff, the company proceeds to prove the forfeiture for nonpayment of premiums, the insurer assumes

trary.[29] There is no variance between the pleading of full performance and proof that certain questions which had apparently been incorrectly answered in the application had in fact been correctly answered, although incorrectly recorded.[30] Evidence of a waiver of fuller proofs of death than those furnished is admissible under an allegation that plaintiff made satisfactory proofs of death according to the terms and conditions of the policy.[31] Where the answer sets up false representations, evidence thereof is admissible, although it is not expressly alleged that the misrepresentations were contained in the application;[32] but where misrepresentations in the written application are alleged, evidence of oral representations is inadmissible.[33] Where the company denied that certain persons had any authority to revive policies, evidence is admissible to show the general custom of the company in regard to the revival of policies.[34] If non-payment of the premium on a certain day is averred in the answer, evidence of failure to pay a premium falling due after such date is inadmissible.[35] In some states allegations of new matter in the answer are deemed controverted without a reply, where no reply is required by the insurer, so that the insured or his representative may give evidence in avoidance of such new matter without any reply.[36]

b. Matters to Be Proved. Material facts alleged in the complaint and not denied in the answer need not be proved.[37] Plaintiff need not show the furnishing of proofs of death where the only defense is suicide, as to which the insurer obtains the affirmative of the issue.[38] Where the admissions in the answer and on the trial, and the policy, make a *prima facie* case, it is in the discretion of the court whether to require plaintiff to put the application in evidence.[39]

c. Evidence Admissible Under General Denial — (i) *In General.* Ordinarily new matter constituting a defense must be specially pleaded and cannot be shown under a plea of the general issue.[40] Non-performance of conditions in the policy;[41] the non-payment of premiums or assessments;[42] misrepresentations or

the affirmative and plaintiff may in rebuttal show a waiver of the condition notwithstanding the complaint alleged that deceased performed all the terms and conditions of the policy. See also FIRE INSURANCE, 19 Cyc. 923.

Evidence of a custom of the company to receive premiums after due, provided the insured was in good health, is not admissible unless such custom is alleged in the pleadings. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 13 Phila. (Pa.) 90.

29. James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Foster *v.* Fidelity, etc., Co., 99 Wis. 447, 75 N. W. 69, 40 L. R. A. 833.

30. Carmichael *v.* John Hancock Mut. L. Ins. Co., 48 Misc. (N. Y.) 386, 95 N. Y. Suppl. 587.

31. American L. Ins. Co. *v.* Mahone, 56 Miss. 180.

32. Metropolitan L. Ins. Co. *v.* Ethier, 34 Mich. 277.

33. Bankers' Life Assoc. *v.* Lisco, 47 Nebr. 340, 66 N. W. 412.

34. Regan *v.* Prudential Ins. Co., 33 Misc. (N. Y.) 78, 67 N. Y. Suppl. 197.

35. Meeder *v.* Provident Sav. L. Assur. Soc., 58 N. Y. App. Div. 80, 68 N. Y. Suppl. 518.

36. Jacobs *v.* Northwestern L. Assur. Co., 164 N. Y. 582, 58 N. E. 1088 [*affirming* 30 N. Y. App. Div. 285, 51 N. Y. Suppl. 967].

37. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Knickerbocker L. Ins. Co. *v.* Schneider, 131 U. S. Appendix clxxii, 25 L. ed. 694.

If the terms of the policy, as contained in copies annexed to the complaint, are not denied, proof thereof need not be made. Murray *v.* New York L. Ins. Co., 85 N. Y. 236; Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

An admission that proof of death had been furnished the insurer will not preclude the introduction of the documentary evidence. John Hancock Mut. L. Ins. Co. *v.* Moore, 34 Mich. 41.

38. Meyer *v.* Supreme Lodge K. of P., 82 N. Y. App. Div. 359, 81 N. Y. Suppl. 813.

39. Megrue *v.* United L. Ins. Assoc., 71 Hun (N. Y.) 174, 24 N. Y. Suppl. 618.

40. See *supra*, XIII, F, 2, b, (I); and, generally, PLEADING.

Amount of assessment.— In an action of assumpsit on a policy of life insurance, which provided for the payment of a benefit of not more than fifteen hundred dollars, or such sum as an assessment levied upon all the members at a fixed rate would produce, where there is a plea of the general issue, defendant may show what an assessment would have produced in order to limit the recovery. Metropolitan Safety Fund Acc. Assoc. *v.* Windover, 37 Ill. App. 170 [*affirmed* in 137 Ill. 417, 27 N. E. 538].

41. Dimick *v.* Metropolitan L. Ins. Co., 67 N. J. L. 367, 51 Atl. 692.

42. World Mut. Ben. Assoc. *v.* Worthing, 59 Nebr. 587, 81 N. W. 620; Fischer *v.*

a breach of warranty in the application;[43] want of insurable interest in plaintiff,[44] fraud in inducing the insurer to accept a past-due premium,[45] objections to the capacity in which the insurer is sued,[46] and failure to furnish proofs of death[47] cannot be urged under a general denial or a plea of the general issue, but must be specially pleaded. But it has been held that the defense that an action was not brought within the time stipulated in the contract need not be specially pleaded,[48] and that the general issue raises the question as to whether proofs of death were furnished.[49] Under a denial of information sufficient to form a belief as to plaintiff's intestate's ownership of the policy, evidence that the insured assigned the policy before the intestate acquired any right in it is admissible.[50] If the execution and delivery of the policy is not specially denied on oath, the company cannot claim that the policy has never been delivered, where the statute provides that no proof need be made of a written instrument sued on, the execution of which is not denied under oath.[51]

(II) *In Reply.* A mere denial in the reply will not authorize evidence to show an excuse for the non-performance of conditions alleged in the answer to have been broken,[52] nor evidence to show that the company is estopped to rely on, or has waived, misrepresentations[53] or conditions precedent.[54] Insanity of the insured cannot be shown as a defense to a plea of suicide unless specially pleaded.[55]

G. Evidence[56] — **1. Presumptions and Burden of Proof — a. In General.** Plaintiff, to establish a *prima facie* case, must prove: (1) The existence of the contract or policy sued on;[57] (2) the death of the insured or the happening of the event provided for in the policy;[58] and (3) the giving of notice and proof of death, as required by the policy.[59] On the other hand the burden is on the

Metropolitan L. Ins. Co., 167 N. Y. 178, 60 N. E. 431 [*affirming* 37 N. Y. App. Div. 575, 56 N. Y. Suppl. 260]. See also Mullen *v.* Mutual L. Ins. Co., 89 Tex. 259, 34 S. W. 605.

43. Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388] (holding that it is immaterial whether the matters in the application are warranties or merely representations); Metropolitan L. Ins. Co. *v.* Zeigler, 69 Ill. App. 447; Benjamin *v.* Connecticut Indemnity Assoc., 44 La. Ann. 1017, 11 So. 628, 32 Am. St. Rep. 362; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166 (limiting the rule to representations as distinguished from warranties); Carmichael *v.* John Hancock Mut. L. Ins. Co., 48 Misc. (N. Y.) 386, 95 N. Y. Suppl. 587. *Contra,* Jacobs *v.* National L. Ins. Co., 1 MacArthur (D. C.) 484; Leonard *v.* State Mut. L. Assur. Co., 24 R. I. 7, 51 Atl. 1049, 96 Am. St. Rep. 696; Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 38 Atl. 315.

44. Kennedy *v.* New York L. Ins. Co., 10 La. Ann. 809; Forbes *v.* American Mut. L. Ins. Co., 15 Gray (Mass.) 249, 77 Am. Dec. 360; Goodwin *v.* Massachusetts Mut. L. Ins. Co., 73 N. Y. 480.

45. Life Ins. Clearing Co. *v.* Altschuler, 55 Nebr. 341, 75 N. W. 862.

46. Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. 1072 [*affirming* 102 Ill. App. 544].

47. Meyer *v.* Supreme Lodge K. of P., 82 N. Y. App. Div. 359, 81 N. Y. Suppl. 813.

48. McElhone *v.* Massachusetts Ben. Assoc., 2 App. Cas. (D. C.) 397; O'Laughlin *v.* Union Cent. L. Ins. Co., 11 Fed. 280, 3 McCrary 543.

49. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

50. McDonough *v.* Ætna L. Ins. Co., 38 Misc. (N. Y.) 625, 78 N. Y. Suppl. 217.

51. Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 379, 72 N. E. 132.

52. Gartside *v.* Connecticut Mut. L. Ins. Co., 8 Mo. App. 593.

53. Knight *v.* New York Mut. L. Ins. Co., 14 Phila. (Pa.) 187, 9 Wkly. Notes Cas. 501; Texas Mut. L. Ins. Co. *v.* Davidge, 51 Tex. 244; Hayes *v.* Virginia Mut. Protection Assoc., 76 Va. 225.

54. Bernhard *v.* Washington L. Ins. Co., 40 Iowa 442; Anders *v.* Life Ins. Clearing Co., 62 Nebr. 585, 87 N. W. 331.

55. Schultz *v.* Home L. Ins. Co., 6 Ohio Dec. (Reprint) 808, 8 Am. L. Rec. 306, 4 Cinc. L. Bul. 848.

56. Evidence generally see Evidence.

57. See *infra,* XIII, G, 1, c.

58. See *infra,* XIII, G, 1, e.

59. See cases cited *infra,* this note.

Prima facie case.— Where plaintiff produces a policy, the identity of which is admitted, and proofs of death duly executed, and a letter from the insurer acknowledging receipt of such proofs in due time, all of which are admitted in evidence without objection, a *prima facie* case is made out. Provident Sav. L. Assur. Soc. *v.* Cannon, 103 Ill. App. 534 [*affirmed* in 201 Ill. 260, 66 N. E. 388]. See also Union L. Ins. Co. *v.* Winn, 87 Ill. App. 257.

company to show a violation of conditions avoiding an otherwise valid policy,[60] or exceptions in the policy which limit the liability of the company.[61]

b. Insurable Interest and Right to Sue. Where the policy is issued to one person upon the life of another, the burden is on plaintiff to show his insurable interest in the life of the person insured.[62] And if the policy is payable to an assignee only on proof of an insurable interest, the burden of proving the possession of such an interest is on him.[63] If the beneficiary claims interest other than that asserted in the proofs of death, the burden is on him to prove it.[64] Where the policy is payable to a named creditor, if living, he must show the continuance of the relation and the amount of the debt.[65] The burden is generally on plaintiff to show his right to sue.[66]

c. Existence and Validity of Contract. The burden of proving a delivery of the policy is on plaintiff, although a *prima facie* case is established by proving

Presumptions.— There is no presumption that proofs of death furnished to the insurance company were given it by one claiming rights under the policy. Barnett *v.* Prudential Ins. Co. of America, 91 N. Y. App. Div. 435, 86 N. Y. Suppl. 842. Where preliminary proofs of death have been delivered insurer, and these proofs are in his possession and are not accounted for or produced, it will be presumed that they were sufficient. Hincken *v.* Mutual Ben. L. Ins. Co., 50 N. Y. 657.

Payment to third person.— Where the company attempts to justify on the ground of payment to a creditor of the insured, where the policy is payable to the creditor, as his interest may appear, otherwise to the executor, administrator, or assigns of the insured, the burden is on the company to show that the deceased was indebted to the creditor, and the amount of the debt. Andrews *v.* Union Cent. L. Ins. Co., 92 Tex. 584, 50 S. W. 572. In an action by an executrix of the insured, the company having paid the policy to an assignee, the burden of proof is on plaintiff to show that the assignment on the policy was not valid, or that the assignee had no insurable interest in the life of deceased. Home Mut. Life Assoc. *v.* Seager, 128 Pa. St. 533, 18 Atl. 517.

60. Malicki *v.* Chicago Guaranty Fund Life Soc., 119 Mich. 151, 77 N. W. 690. See also *infra*, XIII, G, 1, d.

61. Metropolitan L. Ins. Co. *v.* McKenna, 73 Ill. App. 283.

Liability of insurer and amount thereof.— Where the company agrees to pay, after assessment, a specified certain amount in excess of a fixed sum, if the number of members exceed the number of dollars payable, plaintiff must prove that the assessment was made (Fairchild *v.* North Eastern Mut. Life Assoc., 51 Vt. 613); but if the fixed sum is payable only if there was a sufficient number of members, the burden of proof is on the company to show that there was not a sufficient number of members to pay the amount named (Hall *v.* Scottish Rite Knights Templar, etc., Aid Assoc., 6 Ohio Cir. Ct. 137, 3 Ohio Cir. Dec. 384; International Order of Twelve, etc. *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108). Where the company is obliged to make an assessment for payment of the claim, and it appears that no such assessment has been made, it will be presumed, in the absence of proof to the contrary, that had the assessment been made it would have realized the full amount of the policy. Fitzgerald *v.* Equitable Reserve Fund Life Assoc., 15 Daly (N. Y.) 229, 5 N. Y. Suppl. 837.

62. Holabird *v.* Atlantic Mut. L. Ins. Co., 2 Fed. Cas. No. 6,587, 2 Dill. 166 note. But see Manhattan L. Ins. Co. *v.* Burke, 23 Ohio Cir. Ct. 39.

63. Alabama Gold L. Ins. Co. *v.* Mobile Mut. Ins. Co., 81 Ala. 329, 1 So. 561.

64. Brady *v.* Prudential L. Ins. Co., 5 Luz. Leg. Reg. (Pa.) 505.

65. Crotty *v.* Union Mut. L. Ins. Co., 144 U. S. 621, 12 S. Ct. 749, 36 L. ed. 566.

66. Hildenbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. 128.

Applications of rule.— If the policy is assigned by the insured to a creditor, "as his interest may appear," the burden of proof is on such creditor to show the extent of his interest. Elsberg *v.* Sewards, 66 Hun (N. Y.) 28, 21 N. Y. Suppl. 10. If a policy is payable to a certain person, if living, and his administrator sues on the policy, the burden is on the administrator to show that his decedent survived the insured. Hildenbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. 128. If the allegation that plaintiffs are the beneficiaries named in the policy is denied, and plaintiffs are in possession of the policy, which is filed as a part of their petition, no proof thereof on the part of plaintiffs is necessary, the burden of showing the contrary being on the company. Hartford L., etc., Ins. Co. *v.* Wayland, 20 S. W. 199, 14 Ky. L. Rep. 243.

Assignee.— Where plaintiff assigned a policy to testator to secure an indebtedness, present and prospective, from insured to testator, the burden was on the executrix, claiming the proceeds of the policy under such assignment, both to allege and prove an existing indebtedness, there being no presumption that testator had an insurable interest in plaintiff's life sufficient to sustain the assignment. Troy *v.* London, (Ala. 1905) 39 So. 713. It will not be presumed that the assignee of a policy was a fictitious person. McDonough *v.* Ætna L. Ins. Co., 38 Misc. (N. Y.) 625, 78 N. Y. Suppl. 217.

that the policy, complete in form, came from the insured's custody.[67] A policy is presumed to have been delivered at the time it bears date, where, on the death of the insured, it is in the possession of the beneficiary.[68] If there is no evidence of delivery of the policy, the burden is on the insured to show that the policy was intended to go into effect without such delivery.[69] Knowledge of the insured of the stipulations in the policy will be conclusively presumed, after the policy has been in his possession for several years, in the absence of fraud or mistake.[70] A copy of the application attached to the policy, offered in evidence by plaintiff, will be presumed to be a true copy.[71] It will not be presumed that the application was ever attached to the policy, where the statute provides that an application not attached to the policy will not be considered a part thereof.[72] Where the company admits the execution of the policy and the death of the insured before the first premium was due, the burden is on it to prove that the policy was not in force or that it was procured by fraud.[73] Where a receipt for the first premium provided, if the application was accepted, for insurance in accordance with all the conditions and stipulations of the policies of the company, and the policy is alleged to have been issued but never delivered, it will be presumed that the policy issued contained the conditions and stipulations of the policies which the company was at that time issuing.[74]

d. Forfeiture or Avoidance of Policy — (I) *In General.* Where the conditions of the policy provide for a forfeiture, the burden of proof is on the company to establish a breach of the conditions relied on for such forfeiture.[75] The burden is on the company to clearly show the right to a forfeiture, by a production of its by-laws, or some proper proof of what they contain.[76] On the other hand the burden of showing a waiver of a forfeiture is on plaintiff.[77]

(II) *Non-Payment of Premiums or Assessments.* Ordinarily, where the company pleads the failure to pay premiums or assessments, the burden is on it to prove such failure.[78] And if a statute requires service of notice by the company on the insured before a forfeiture can be declared, the company has the

67. Coffin *v.* New York L. Ins. Co., 127 Fed. 555, 62 C. C. A. 415.

Presumption of acceptance of policy see *supra*, III, C, 1, text and note 40.

68. Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592.

69. Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154.

Presumption against existence of contract from non-delivery of policy see *infra* III, B, 2, a, note 11.

70. Union Cent. L. Ins. Co. *v.* Hook, 62 Ohio St. 256, 56 N. E. 906. See *supra*, IV, A, 2, a, b.

71. Holleran *v.* Life Assur. Co. of America, 18 Pa. Super. Ct. 573.

72. Mahon *v.* Pacific Mut. L. Ins. Co., 144 Pa. St. 409, 22 Atl. 876.

73. Page *v.* Virginia L. Ins. Co., 131 N. C. 115, 42 S. E. 543.

74. Lee *v.* Union Cent. L. Ins. Co., 56 S. W. 724, 22 Ky. L. Rep. 1712.

75. Ziegler *v.* Mutual Aid, etc., L. Ins. Assoc., McGloin (La.) 284; Dial *v.* Virginia Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

76. Triple Link L. Ins. Co. *v.* Johnson, 101 Ill. App. 559 [*affirmed* in 200 Ill. 359, 65 N. E. 634].

77. Franklin L. Ins. Co. *v.* McAfee, 90 S. W. 216, 28 Ky. L. Rep. 676; Moore *v.* Mutual Reserve Fund Life Assoc., 133 Mich. 526, 95 N. W. 573; Kolgers *v.* Guardian L. Ins. Co., 9 Abb. Pr. N. S. (N. Y.) 91.

Authority of agent.— A collecting agent of an insurance company will not be presumed to be authorized to waive any condition of a policy. Bryan *v.* National L. Ins. Assoc., 21 R. I. 149, 42 Atl. 513. But where a certificate of mutual insurance provided that a waiver of any forfeiture must be in writing, signed by the secretary and one other officer previously authorized by the board of directors or executive committee, but no form of waiver was prescribed, and the authority was not required to be in writing, and the insured incurred a forfeiture by non-payment of premiums, and afterward paid the premiums to the company's assistant cashier, taking therefor receipts purporting to have been signed by the secretary and cashier, it was held that, as it would be presumed that the officers signing and issuing the receipts were duly authorized, the assistant cashier's denial of authority only created a conflict of evidence requiring a submission of that question to the jury. Spitz *v.* Mutual Ben. Life Assoc., 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469.

78. Thomas *v.* Northwestern Mut. L. Ins. Co., 142 Cal. 79, 75 Pac. 665; Tobin *v.* Western Mut. Aid Soc., 72 Iowa 261, 33 N. W. 663; Hodsdon *v.* Guardian L. Ins. Co., 97

burden of proving the service of such notice.[79] So if a non-payment of a premium note is relied on the company must show that it demanded payment thereof.[80] Likewise the burden is on the company to show what the correct amount of an unpaid premium is, where the amount is variable, and knowledge thereof rests solely with the company.[81] The possession of the policy raises a presumption of payment of the first premium on which its existence depends;[82] and payment of the last premium which fell due before the loss, at or before maturity, authorizes the inference that all prior premiums were paid in time, or afterward on waiver of the forfeiture.[83]

(III) *FRAUD OR MISREPRESENTATIONS OF INSURED.* Where the company alleges misrepresentations on the part of the insured, the burden of proving such misrepresentations is on the company.[84] Fraud in a representation of good health will not be presumed merely because the insured died soon after obtaining the insur-

Mass. 144, 93 Am. Dec. 73; Page *v.* Virginia L. Ins. Co., 131 N. C. 115, 42 S. E. 543. See Globe Mut. L. Ins. Assoc. *v.* March, 118 Ill. App. 261, holding that the burden of proving the non-payment of premiums accruing under an insurance policy is on defendant, where plaintiff was in the possession of and produced the policy sued on and established *prima facie* by evidence the other essentials to recovery.

79. Seely *v.* Manhattan L. Ins. Co., 72 N. H. 49, 55 Atl. 425 (construing New York statute); Baxter *v.* Brooklyn L. Ins. Co., 44 Hun (N. Y.) 184 [*affirmed* in 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293]. See *supra*, X, C, 6, h.

80. Pulling *v.* Travelers' Ins. Co., 55 Ill. App. 452 [*affirmed* in 159 Ill. 603, 43 N. E. 762].

81. Goodwin *v.* Provident Sav. L. Assur. Assoc., 97 Iowa 226, 66 N. W. 157, 59 Am. St. Rep. 411, 32 L. R. A. 473.

82. Page *v.* Virginia L. Ins. Co., 131 N. C. 115, 42 S. E. 543; Stepp *v.* Washington Nat. Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Presumption of credit for premium see *supra*, III, D, 3, a, (I), note 71.

83. Dutton *v.* New York L. Ins. Co., 8 Fed. Cas. No. 4,211.

84. *Colorado.*— Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875.

Georgia.— O'Connell *v.* Supreme Conclave Knights of Damon, 102 Ga. 143, 28 S. E. 282 66 Am. St. Rep. 159.

Illinois.— Globe Mut. L. Ins. Assoc. *v.* Ahern, 191 Ill. 167, 60 N. E. 806 [*affirming* 92 Ill. App. 326]; Supreme Lodge Bohemian Slavonian K. & L. *v.* Matejowsky, 190 Ill. 142, 60 N. E. 101 [*affirming* 92 Ill. App. 385]; Triple Link L. Ins. Co. *v.* Johnson, 101 Ill. App. 559 [*affirmed* in 200 Ill. 359, 65 N. E. 634]; Federal Life Assoc. *v.* Smith, 86 Ill. App. 427; Mutual Reserve Fund Life Assoc. *v.* Powell, 79 Ill. App. 482.

Indiana.— Northwestern Mut. L. Ins. Co. *v.* Hazlett, 105 Ind. 212, 4 N. E. 582, 55 Am. Rep. 192.

Iowa.— Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568.

Kentucky.— New York L. Ins. Co. *v.* Graham, 2 Duv. 506.

Louisiana.— Boisblanc *v.* Louisiana Equitable L. Ins. Co., 34 La. Ann. 1167.

Maryland.— Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244.

Massachusetts.— Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

Mississippi.— Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

Missouri.— Jefferson *v.* German-American Mut. Life Assoc., 69 Mo. App. 126.

New Jersey.— Trenton Mut. L., etc., Ins. Co. *v.* Johnson, 24 N. J. L. 576.

New York.— Peck *v.* Washington L. Ins. Co., 181 N. Y. 585, 74 N. E. 1122 [*affirming* 91 N. Y. App. Div. 597, 87 N. Y. Suppl. 210]; Spencer *v.* Citizens' Mut. L. Ins. Assoc., 142 N. Y. 505, 37 N. E. 617 [*affirming* 3 Misc. 458, 23 N. Y. Suppl. 179]; Jones *v.* Brooklyn L. Ins. Co., 61 N. Y. 79; Breese *v* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775.

Ohio.— Union Mut. L. Ins. Co. *v.* Reif, 7 Ohio Dec. (Reprint) 200, 1 Cinc. L. Bul. 290.

Pennsylvania.— Cobb *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 228; Holleran *v.* Life Assur. Co. of America, 18 Pa. Super. Ct. 573.

Tennessee.— Mobile L. Ins. Co. *v.* Morris, 3 Lea 101, 31 Am. Rep. 631; Gordon *v.* U. S. Casualty Co., (Ch. App. 1899) 54 S. W. 98.

Vermont.— Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 38 Atl. 315.

West Virginia.— Logan *v.* New York Provident Sav. L. Assur. Soc., 57 W. Va. 384, 50 S. E. 529.

United States.— Piedmont, etc., L. Ins. Co. *v.* Ewing, 92 U. S. 377, 23 L. ed. 610; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70; Brockway *v.* New Jersey Mut. Ben. L. Ins. Co., 9 Fed. 249; Holabird *v.* Atlantic Mut. L. Ins. Co., 12 Fed. Cas. No. 6,587, 2 Dill. 166 note; Sinclair *v.* Phœnix Mut. L. Ins. Co., 22 Fed. Cas. No. 12,896; Swick *v.* Home Ins. Co, 23 Fed. Cas. No. 13,692, 2 Dill. 160.

England.— Leete *v.* Gresham L. Ins. Soc., 15 Jur. 1161, 7 Eng. L. & Eq. 578.

See 28 Cent. Dig. tit. "Insurance," § 1650.

Contra.— Sweeney *v.* Metropolitan L. Ins. Co., 19 R. I. 171, 36 Atl. 9, 61 Am. St. Rep. 751, 38 L. R. A. 297.

As to representations the burden is on the company relying upon their falsity to show that they were wilfully or knowingly false

ance.[85] On the other hand, the fact that an application is signed by the applicant himself is *prima facie* evidence that the answers therein contained are his answers, and the burden is on plaintiff to show that the fact was otherwise.[86] So if plaintiff claims that a misrepresentation as to a former rejection was immaterial because it could not mislead the company, he must show that the company knew of such former rejection.[87] And if the insured suppressed in his application the fact of the existence of other insurance on his life, in violation of a condition of the policy, it will be conclusively presumed that the suppression was intentional.[88] An adjudication of insanity, followed by the commitment of the patient to an asylum for the insane, does not create a conclusive presumption of the continuance of insanity several years after the discharge of the patient from such asylum.[89]

e. Death of Insured and Cause Thereof — (i) *General Rule.* The burden of proving the death of the insured is on plaintiff,[90] although he need not prove the cause of death, where the contract does not require the notice of death to

when made and that they were material to the risk and relied upon by the company. Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388 [*affirming* 103 Ill. App. 534]; Ætna L. Ins. Co. *v.* Rehlaender, 68 Nebr. 284, 94 N. W. 129; Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908; Macdonald *v.* Law Union F., etc., Ins. Co., L. R. 9 Q. B. 328, 43 L. J. Q. B. 131, 30 L. T. Rep. N. S. 545, 22 Wkly. Rep. 530; Cazenove *v.* British Equitable Ins. Co., 6 Jur. N. S. 826, 29 L. J. C. P. 160, 1 L. T. Rep. N. S. 484, 8 Wkly. Rep. 243; Duckett *v.* Williams, 2 C. & M. 348, 3 L. J. Exch. 141, 4 Tyrw. 240. Mere falsity in a statement in the application does not give rise to a presumption of fraud or intent to deceive. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Dolan *v.* Mutual Reserve Fund Life Assoc., 173 Mass. 197, 53 N. E. 398. But where a material statement is known by the applicant to be false and is made with a view of procuring insurance and is acted upon by the company to its injury the law will presume an attempt to deceive such as to constitute actual fraud. Northwestern L. Ins. Co. *v.* Montgomery, 116 Ga. 799, 43 S. E. 79; Royal Neighbors of America *v.* Wallace, (Nebr. 1905) 102 N. W. 1020, 5 Nebr. (Unoff.) 519, 99 N. W. 256. If the applicant has knowledge of facts furnishing reason to believe that he is afflicted with a fatal disease, his statement that he is in good health will be presumed to involve a fraudulent concealment. Royal Neighbors of America *v.* Wallace, (Nebr. 1905) 102 N. W. 1020, 5 Nebr. (Unoff.) 519, 99 N. W. 256.

Warranty.— As to the truth of matters which by strict warranty are made conditions precedent to the validity of the policy, the burden is on the assured. Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381.

In Connecticut the burden of proving the truth of the answers in the application, where the truth is denied by the company, is on plaintiff. Fell *v.* John Hancock Mut. L. Ins. Co., 76 Conn. 494, 57 Atl. 175; Murray *v.* Supreme Lodge O. of P., 74 Conn. 715, 52 Atl. 722. But where fraud is also alleged in the answer, the burden of proving the fraud is on the company. Murray *v.* Supreme Lodge O. of P., *supra.* In determining the truth of the answers, however, the jury may consider the presumption in favor of the truth of the declarations of a deceased person (Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490), which presumption makes a *prima facie* case for plaintiff on the introduction of the policy, although the presumption is not entitled to be considered as having probative force, requiring such presumption to be weighed as evidence in the final determination of the issue of fact as to whether the representations are true (Vincent *v.* Mutual Reserve Fund Life Assoc., 77 Conn. 281, 58 Atl. 963).

Statutes.— Where it is provided by statute that the issuance of a certificate of health by the medical examiner of an insurance company estops the company from alleging or proving that insured was not in the condition of health required by the policy at the time of effecting insurance, unless the same was procured by the fraud of the assured, the burden is on the company to show that the policy or health certificate was procured by fraud. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568.

85. Eclectic L. Ins. Co. *v.* Fahrenkrug, 68 Ill. 463.

86. Hartford L., etc., Ins. Co. *v.* Gray, 80 Ill. 28; Fletcher *v.* New York L. Ins. Co., 14 Fed. 846; Lee *v.* Guardian L. Ins. Co., 15 Fed. Cas. No. 8,190. *Contra,* Hewey *v.* Metropolitan L. Ins. Co., 100 Me. 523, 62 Atl. 600.

87. Hackett *v.* Supreme Council, C. B. L., 44 N. Y. App. Div. 524, 60 N. Y. Suppl. 806.

88. Studwell *v.* Mutual Ben. Life Assoc. of America, 61 N. Y. Super. Ct. 287, 19 N. Y. Suppl. 709 [*affirmed* in 139 N. Y. 615, 35 N. E. 204].

89. New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

90. Wackerle *v.* Mutual L. Ins. Co., 14 Fed. 23, 4 McCrary 508. See also Prudential Assur. Co. *v.* Edmonds, 2 App. Cas. 487.

Presumption of continuance of life and of death arising from absence see Death, 13 Cyc. 295-305.

state its cause.[91] If the company claims that the death of the insured was caused by the use of narcotics or intoxicants, within a clause avoiding the policy in the case of death from such causes, the burden of proving such contention is on the company;[92] although where, as a condition precedent to the payment of the claim, the policy requires the opinion of the surgeon of the insurer, that the insured did not die of intemperance, plaintiff must prove the decision of the surgeon or account for its absence.[93] If the defense is that plaintiff murdered the insured, the burden of proof is on the company.[94] So the burden of proving the defense that the insured came to his death in consequence of the violation by him of a criminal law is on the company;[95] but where the insured is shown to have died in violating a criminal law, as by an abortion, the company need not show that there was no medical necessity for the abortion.[96]

(II) *Suicide.*[97] The presumption is that the death of the insured was not by suicide, where the evidence is compatible either with the theory of accidental death or self-destruction,[98] although the presumption does not apply to the death of an insane person.[99] It follows that the burden of proving death by suicide is on the company,[1] and this is so, although the proofs of death furnished by plain-

Continuing to pay premiums after disappearance of assured does not estop the beneficiary from relying on the presumption of death after continued absence of assured for seven years. Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465.

91. Buffalo Loan, etc., Co. *v.* Knights Templar, etc., Mut. Aid Assoc., 56 Hun (N. Y.) 303, 9 N. Y. Suppl. 346 [*affirmed* in 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839].

92. Denver L. Ins. Co. *v.* Price, 18 Colo. App. 30, 69 Pac. 313; Van Valkenburgh *v.* American Popular L. Ins. Co., 70 N. Y. 605 [*affirming* 9 Hun 583]; New York L. Ins. Co. *v.* La Boiteaux, 5 Ohio Dec. (Reprint) 242, 4 Am. L. Rec. 1.

Presumptions.— Where the insured is shown to have been intemperate after the policy was issued, the presumption is that he became so after that date. Gartside *v.* Connecticut Mut. L. Ins. Co., 8 Mo. App. 593.

93. Campbell *v.* American Popular L. Ins. Co., 1 MacArthur (D. C.) 246, 29 Am. Rep. 591.

94. Prather *v.* Michigan Mut. L. Ins. Co., 19 Fed. Cas. No. 11,368.

95. Supreme Lodge K. P. *v.* Lipscomb, 50 Fla. 406, 39 So. 637.

96. Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327.

97. See also Accident Insurance, 1 Cyc. 289.

98. *Illinois.*— Supreme Court of Honor *v.* Barker, 96 Ill. App. 490; Fidelity, etc., Co. *v.* Weise, 80 Ill. App. 499. But see Guardian Mut. L. Ins. Co. *v.* Hogan, 80 Ill. 35, 22 Am. Rep. 180, holding that, where there is no evidence as to the cause of death in an action on a life insurance policy, the presumption that it was from natural causes, and not an act of self-destruction, does not arise merely from the fact that under the evidence there may be doubt as to whether the death was caused by suicide.

Iowa.— Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459; Carnes *v.* Iowa State Traveling Men's Assoc., 106 Iowa 281, 76 N. W. 683, 68 Am. St. Rep. 306.

Kansas.— New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

Kentucky.— Western New York Masonic Life Assoc. *v.* Pollard, 89 S. W. 219, 28 Ky. L. Rep. 301; Union Casualty, etc., Co. *v.* Goddard, 76 S. W. 832, 25 Ky. L. Rep. 1035.

Vermont.— Walcott *v.* Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923.

Wisconsin.— Agen *v.* Metropolitan L. Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905.

United States.— Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519; Keels *v.* Mutual Reserve Fund Life Assoc., 29 Fed. 198.

See 28 Cent. Dig. tit. "Insurance," § 1663.

99. Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577; Germain *v.* Brooklyn L. Ins. Co., 26 Hun (N. Y.) 604.

1. *California.*— Dennis *v.* Union Mut. L. Ins. Co., 84 Cal. 570, 24 Pac. 120.

Colorado.—Ross-Lewin *v.* Germania L. Ins. Co., 20 Colo. App. 262, 78 Pac. 305; Lampkin *v.* Travelers' Ins. Co., 11 Colo. App. 249, 52 Pac. 1040.

District of Columbia.— National Union *v.* Bennet, 20 App. Cas. 527; National Union *v.* Thomas, 10 App. Cas. 277.

Illinois.— Gooding *v.* U. S. Life Ins. Co., 46 Ill. App. 307.

Indiana.— Travelers' Ins. Co. *v.* Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110.

Iowa.— Inghram *v.* National Union, 103 Iowa 395, 72 N. W. 559.

Kansas.— New York Mut. L. Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. 996, 35 L. R. A. 258.

Louisiana.— Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589.

Maryland.— Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244.

tiff state the cause of death as suicide,[2] and the verdict of the coroner's jury was suicide.[3] The sanity of every person is presumed, in the absence of evidence to the contrary,[4] and insanity cannot be presumed from the mere fact of suicide.[5] It follows that where it is shown that the insured committed suicide, the burden is on plaintiff in an action on the policy, in order to recover the amount of the policy, where suicide is a defense thereto, to show that the insured was insane at the time of the act.[6]

2. Admissibility — a. In General. The rules relating to the admissibility of evidence in civil actions in general are applicable to actions on policies of life insurance;[7] and only the particular application of such rules to actions on policies will be considered in this connection.

Minnesota.— Sartell *v.* Royal Neighbors of America, 85 Minn. 369, 88 N. W. 985.

New York.— Seybold *v.* Supreme Tent K. of M. of W., 86 N. Y. App. Div. 195, 83 N. Y. Suppl. 149; Harms *v.* Metropolitan L. Ins. Co., 67 N. Y. App. Div. 139, 73 N. Y. Suppl. 513; Germain *v.* Brooklyn L. Ins. Co., 30 Hun 535.

Ohio.— Schultz *v.* Insurance Co., 40 Ohio St. 217, 48 Am. Rep. 676.

Pennsylvania.—Fisher *v.* Fidelity Mut. Life Assoc., 188 Pa. St. 1, 41 Atl. 467.

Texas.— Equitable L. Assur. Soc. *v.* Liddell, 32 Tex. Civ. App. 252, 74 S. W. 87; New York Mut. L. Ins. Co. *v.* Simpson, (Civ. App. 1894) 28 S. W. 837.

United States.— Home Ben. Assoc. *v.* Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. ed. 1160; Fidelity, etc., Co. *v.* Love, 111 Fed. 773, 49 C. C. A. 602; Coverston *v.* Connecticut Mut. L. Ins. Co., 6 Fed. Cas. No. 3,290; Rinker *v.* Manhattan L. Ins. Co., 20 Fed. Cas. No. 11,851; Snyder *v.* Mutual L. Ins. Co., 22 Fed. Cas. No. 13,154 [*affirmed* in 93 U. S. 393, 23 L. ed. 887]. And see Ritter *v.* New York Mut. L. Ins. Co., 69 Fed. 505.

See 28 Cent. Dig. tit. "Insurance," § 1663. See also *supra*, XII, A, 2, c, note 26.

2. Union Mut. L. Ins. Co. *v.* Payne, 105 Fed. 172, 45 C. C. A. 193; Supreme Lodge K. of P. of W. *v.* Beck, 94 Fed. 751, 36 C. C. A. 467. See Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 87 Wis. 325, 58 N. W. 399. *Contra*, see Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; Newark Mut. Ben. L. Ins. Co. *v.* Newton, 22 Wall. (U. S.) 32, 22 L. ed. 793; Hassencamp *v.* Mutual Ben. L. Ins. Co., 120 Fed. 475, 56 C. C. A. 625; Keels *v.* Mutual Reserve Fund Life Assoc., 29 Fed. 198.

3. Metzradt *v.* Modern Brotherhood of America, 112 Iowa 522, 84 N. W. 498; Goldschmidt *v.* New York Mut. L. Ins. Co., 102 N. Y. 486, 7 N. E. 408; New York Mut. L. Ins. Co. *v.* Hayward, (Tex. Civ. App. 1894) 27 S. W. 36; Supreme Lodge K. of P. of W. *v.* Beck, 94 Fed. 751, 36 C. C. A. 467.

4. Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561; Nimick *v.* Mut. L. Ins. Co., 18 Fed. Cas. No. 10,266.

5. *Illinois.*— Royal Circle *v.* Achterrath, 204 Ill. 549, 68 N. E. 492, 98 Am. St. Rep. 224, 63 L. R. A. 452.

Kentucky.— See Masonic Life Assoc. *v.* Pollard, 89 S. W. 219, 28 Ky. L. Rep. 301.

Maryland.— Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414.

New York.— Weed *v.* Mutual Ben. L. Ins. Co., 70 N. Y. 561 [*affirming* 41 N. Y. Super. Ct. 476]; Weed *v.* Mutual Ben. L. Ins. Co., 35 N. Y. Super. Ct. 386; Coffey *v.* Home L. Ins. Co., 35 N. Y. Super. Ct. 314, 44 How. Pr. 481.

Wisconsin.— Karrow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

United States.— Ritter *v.* New York Mut. L. Ins. Co., 69 Fed. 505.

See 28 Cent. Dig. tit. "Insurance," § 1663.

6. *Illinois.*— Dickerson *v.* Northwestern Mut. L. Ins. Co., 200 Ill. 270, 65 N. E. 694 [*affirming* 102 Ill. App. 280]; Ætna L. Ins. Co. *v.* King, 84 Ill. App. 171; Nelson *v.* Equitable L. Assur. Soc., 73 Ill. App. 133.

Maryland.—Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414.

Tennessee.— Phadenhauer *v.* Germania L. Ins. Co., 7 Heisk. 567, 19 Am. Rep. 623. But *compare* Brown *v.* Sun L. Ins. Co., (Ch. App. 1899) 57 S. W. 415, 51 L. R. A. 252.

Wisconsin.— Karrow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

United States.— Hopkins *v.* Northwestern L. Assur. Co., 94 Fed. 729; Coverston *v.* Connecticut Mut. L. Ins. Co., 6 Fed. Cas. No. 3,290; Gay *v.* Union Mut. L. Ins. Co., 10 Fed. Cas. No. 5,282, 9 Blatchf. 142; Hiatt *v.* New York Mut. L. Ins. Co., 12 Fed. Cas. No. 6,449*a*, 2 Dill. 572 note; Jarvis *v.* Connecticut Mut. L. Ins. Co., 13 Fed. Cas. No. 7,226; Terry *v.* New York Mut. L. Ins. Co., 23 Fed. Cas. No. 13,839, 1 Dill. 403 [*affirmed* in 15 Wall. 580, 21 L. ed. 236].

See 28 Cent. Dig. tit. "Insurance," § 1663.

Provisions of policy.— But in an action on a policy which stipulates that if insured should die by his own hand when insane, the company should be liable for the premiums actually paid, with interest, the burden of showing the condition of mind of the insured is on the defense. Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577.

7. See Evidence.

Time to sue.— Testimony of plaintiff's counsel that he delayed bringing the action by reason of the superintendent's assurances that the company would pay the claim if just is competent only to show that plaintiff acted

b. Evidence as to the Contract — (i) *Creation, Validity, and Ownership.* On an issue as to the delivery,[8] acceptance,[9] validity,[10] or ownership[11] of the policy, any legal evidence is admissible which tends to throw light on such facts.

(ii) *Policy, Application, and Other Parts of Contract.* Except where otherwise provided by statute, all papers on which the company acted when it decided to grant a policy are admissible in an action upon it.[12] The policy on which the action is brought is admissible[13] without the application, where the latter is not made a part of the policy;[14] although if it refers to an application as a part of it, it is inadmissible without the application,[15] except where the application is in the hands of the opposing party and is material only to the latter's affirmative defense.[16] In the absence of statutory provision to the contrary the application, if made a part of the contract of insurance, is admissible in evidence,[17]

on such assurances for the purpose of estopping defendant if it was responsible for them. Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601.

A letter written by a state agent to the soliciting and collecting agent after the death of insured had fixed the rights of the parties is properly excluded. John Hancock Mut. L. Ins. Co. *v.* Schlink, 175 Ill. 284, 51 N. E. 795 [*affirming* 74 Ill. App. 181].

8. New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867 (holding that evidence that the insured was in possession of the policy and claimed it prior to his death was admissible to show that it had gone into effect); Atkins *v.* New York L. Ins. Co., (Tex. Civ. App. 1901) 62 S. W. 563 (holding that evidence of an agreement that when the policy arrived it might be accepted or rejected at the option of the insured was admissible to explain subsequent acts of the parties); Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284 (holding that monthly reports of an insurance agent are inadmissible to show that the company knew of the agent's practice of delivering policies in advance of the payment of premiums).

Declarations of the insured before his death, not in the presence of the insurer, are not admissible to show that the policy was delivered to him and that he did not acquiesce in the rejection of the application and the cancellation of the policy. New York L. Ins. Co. *v.* Johnson, 72 S. W. 762, 24 Ky. L. Rep. 1867, 75 S. W. 257, 25 Ky. L. Rep. 438.

Rules of company.— Printed instructions forbidding agents to deliver policies unless the applicant was in good health at the time of delivery, not communicated to the insured, are inadmissible. Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

9. Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92, holding that evidence that the wife of insured objected to his accepting the policy in suit is immaterial on an issue whether he afterward accepted it.

10. Hood *v.* Prudential Ins. Co., 22 Pa. Super. Ct. 244.

11. Allen *v.* Hartford L. Ins. Co., 72 Conn. 693, 45 Atl. 955.

12. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

Certificate of good health.— Where a wife takes out a policy on the life of her husband, and the husband furnishes a certificate of good health, after its execution but before delivery, the certificate is admissible in evidence in behalf of the company where there is a question for the jury whether the husband acted as the wife's agent in furnishing the certificate. Estes *v.* World Mut. L. Ins. Co., 6 Hun (N. Y.) 349.

13. Prudential Ins. Co. of America *v.* Devoe, 98 Md. 584, 56 Atl. 809; Fidelity Title, etc., Co. *v.* Illinois L. Ins. Co., 213 Pa. St. 415, 63 Atl. 51; Norristown Title Trust, etc., Co. *v.* John Hancock Mut. L. Ins. Co., 132 Pa. St. 385, 19 Atl. 270 (holding that it is admissible, although it does not name the beneficiary, when it is followed by evidence showing who was the beneficiary); Moore *v.* Bestline, 23 Pa. Super. Ct. 6 (holding that it is admissible notwithstanding the application is not attached as required by the statute).

Effect of policy containing abstract of application.— Abstracts of the application and medical examination contained in the last sheets of the policy introduced by plaintiff will be presumed, in the absence of any evidence of mistake, to be correct, and they are competent evidence of the contents, execution, and genuineness of the originals; and if, in connection with the proofs of loss also introduced by plaintiff, they show a breach of the warranty in the application, there can be no recovery. Sladden *v.* New York L. Ins. Co., 86 Fed. 102, 29 C. C. A. 596.

Proof of payment of premiums.— A policy in regular form is admissible without proving that the first or any premiums thereon have been paid, since a denial of payment is matter of defense. Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090.

14. Edington *v.* New York Mut. L. Ins. Co., 67 N. Y. 185; Albert *v.* New York Mut. L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693.

15. Lycoming Mut. Ins. Co. *v.* Sailer, 67 Pa. St. 108. *Contra*, Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

16. Dougherty *v.* Metropolitan L. Ins. Co., 3 N. Y. App. Div. 313, 38 N. Y. Suppl. 258.

17. Northwestern L. Assur. Co. *v.* Tietze, 16 Colo. App. 205, 64 Pac. 773.

After policy is introduced by plaintiff.— If the application is made a part of the policy and plaintiff introduces the policy, defendant

but in some states by statute it is not admissible unless a copy is attached to the policy or has been furnished to the insured.[18]

(III) *ARTICLES OF ASSOCIATION AND BY-LAWS.* Either party may offer in evidence the articles of association and by-laws of the insurer to determine the rights of the parties;[19] but they are not admissible where they constitute no part of the contract of insurance,[20] nor where not attached to the policy as required by a statute.[21]

(IV) *PAROL EVIDENCE.* The general rules as to the admissibility of parol evidence to sustain, vary, or contradict a written contract[22] apply to parol evidence to sustain, vary, or contradict the application, policy, or other writing constituting the contract between the insured and the insurer.[23]

e. Right to Sue. On an issue as to plaintiff's right to sue, any legal evidence to show or disprove his right to the proceeds of the policy is admissible.[24]

d. Fraud and Misrepresentations — (I) *GENERAL RULES.* On an issue whether insured misrepresented or concealed his physical condition or other facts as they existed before or at the time of making the application for insurance, any legal evidence bearing on the truth or falsity of the representation is admissible.[25]

may introduce all of the application where material to the defense pleaded. Silverman *v.* Empire L. Ins. Co., 24 Misc. (N. Y.) 399, 53 N. Y. Suppl. 407.

18. See the statutes of the several states.

In some states, by statute, an application for a policy is not admissible in evidence unless it is attached to the policy. Stork *v.* Supreme Lodge K. of P., 113 Iowa 724, 84 N. W. 721 (holding that the Iowa statute applies to fraternal societies); Griffin *v.* Equitable Assur. Soc., 119 Ky. 856, 84 S. W. 1164, 27 Ky. L. Rep. 313; Custer *v.* Fidelity Mut. Aid Assoc., 211 Pa. St. 257, 60 Atl. 776; Morris *v.* State Mut. L. Assur. Co., 183 Pa. St. 563, 39 Atl. 52; Connell *v.* Metropolitan L. Ins. Co., 8 Del. Co. (Pa.) 184. But see Carrigan *v.* Massachusetts Ben. Assoc., 26 Fed. 230 (holding that the statute does not prohibit the introduction of an application not attached to the policy for the purpose of showing fraud in the procuring of the contract). Evidence of the custom of a company in attaching a copy of the application and by-laws to policies when issued is inadmissible to show that the application and by-laws had been attached to a particular policy. Custer *v.* Fidelity Mut. Aid Assoc., 211 Pa. St. 257, 60 Atl. 776. A printed indorsement on the back of an application for a life policy which recites that the insured accepts it as a copy of the application, but agrees that the original shall be admitted as the correct application if the copy varies therefrom, is not a waiver of the statutory provision that the application for a policy shall not be received in evidence unless attached thereto. Zimmer *v.* Central Acc. Ins. Co., 207 Pa. St. 472, 56 Atl. 1003. The copy attached need not be a facsimile, but must be so exact that on comparison it may be said to be a true copy, without resorting to construction. Johnson *v.* Des Moines L. Ins. Co., 105 Iowa 273, 75 N. W. 101. See also *supra*, IV, B, 6, e, (II).

In other states, by statute, the application is not admissible unless copies of it have been furnished the insured. Andrews *v.* National L. Ins. Co., 7 Ohio S. & C. Pl. Dec. 307, 7 Ohio N. P. 322.

19. Hayden *v.* Franklin L. Ins. Co., 136 Fed. 285, 69 C. C. A. 423.

20. McDonald *v.* Bankers' Life Assoc., 154 Mo. 618, 55 S. W. 999.

21. Mowry *v.* National Protective Soc., 27 Pa. Super. Ct. 390; Fahey *v.* Empire L. Ins. Co., 5 Lack. Leg. N. (Pa.) 377.

22. See EVIDENCE, 17 Cyc. 567 *et seq.*

23. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493; Bolton *v.* Bolton, 73 Me. 299; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244; Breeze *v.* Metropolitan L. Ins. Co., 24 N. Y. App. Div. 377, 48 N. Y. Suppl. 753.

24. See New York L. Ins. Co. *v.* Jack, 76 Miss. 788, 25 So. 871; Mace *v.* Provident Life Assoc., 101 N. C. 122, 7 S. E. 674; Equitable L. Ins. Co. *v.* Hazlewood, 75 Tex. 338, 12 S. W. 621, 16 Am. St. Rep. 893, 7 L. R. A. 217; Mutual L. Ins. Co. *v.* Mellott, (Tex. Civ. App. 1900) 57 S. W. 887.

In case of assignment.— If the company claims that the policy has been pledged as collateral security for a debt, and the action is brought by the beneficiary, the assignment is admissible in evidence, since if the debt has not been paid the right of action is in the pledgee. Archibald *v.* Mutual L. Ins. Co., 38 Wis. 542.

25. See, generally, EVIDENCE.

Opinion as to health before application.— An opinion as to the physical condition of the insured a considerable time prior to the issuance of the policy is not admissible to prove his health at the date of the policy. American L. Ins. Co. *v.* Mahone, 21 Wall. (U. S.) 152, 22 L. ed. 593.

Intent to commit suicide.— Evidence of other insurance obtained and other acts and declarations of the insured in connection therewith is admissible as a part of the *res gestæ* to show that the policy sued on was procured in pursuance of a fraudulent pur-

A non-expert witness may state the physical condition of the insured before the

pose to obtain a large amount of insurance and then commit suicide. Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400; Smith *v.* National Ben. Soc., 123 N. Y. 85, 25 N. E. 197, 9 L. R. A. 616 [*affirming* 51 Hun 575, 4 N. Y. Suppl. 521].

Employment of insured.— Where the company claimed a breach of warranty that insured was not connected with the sale of liquor, evidence that insured received no consideration for an occasional service rendered to a saloon-keeper was material, as tending to show the exact relation of insured to the saloon-keeper's business. Collins *v.* Metropolitan L. Ins. Co., 32 Mont. 329, 346, 80 Pac. 609, 1092, 108 Am. St. Rep. 578.

Intemperance.— A third person cannot testify as to the effect of intemperance on the health of the insured, where he knew nothing of his health for more than five years before the policy was issued. Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100. Evidence as to the business habits, pursuits, and associations of the insured at and before the time of issuing the policy is admissible, as bearing on the question whether he was temperate, as stated in his answers in the application for the policy. Chambers *v.* Northwestern Mut. L. Ins. Co., 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549.

Age of insured.— The record of a baptism of a granddaughter of the insured to show that the insured must have been older than stated in the application is inadmissible, since it is only evidence of the fact of baptism and not of its date. McGuirk *v.* Mutual Ben. L. Co., 20 N. Y. Suppl. 908. The record of the naturalization of the insured is admissible, on an issue of a misrepresentation of the insured's age in the application for the policy, where there is evidence tending to show that it refers to the insured, the question of the identity being for the jury. Dolan *v.* Mutual Reserve Fund Life Assoc., 173 Mass. 197, 53 N. E. 398.

Expert testimony.— The testimony of expert physicians, who were medical examiners of defendant life insurance company, and had passed on the application in question, one of them having personally made the examination therefor, was competent, in an action on the policy issued on such application. Albert *v.* Mutual L. Ins. Co., 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693. See, generally, EVIDENCE, 17 Cyc. 73, 74.

Insanity.— To show insanity prior to the application for insurance a physician's certificate prepared from statements of the relatives and friends of the insured and constituting part of his admission papers to an insane asylum is not admissible to show what was the mental condition of insured at a time previous to his confinement in the asylum. Butler *v.* St. Louis L. Ins. Co., 45 Iowa 93.

Report of examination for pension.— The report of physicians who examined a person on his application for a pension is not admissible, as tending to show the falsity of statements afterward made by him in an application for life insurance, where it does not appear that he knew of the report or its contents. Mutual L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

The certificate of the physician who examined the insured is admissible, where he acted by the consent of both the company and the insured, although he was not the regular examining physician of the company (Mutual Ben. L. Ins. Co. *v.* Cannon, 48 Ind. 264); but where the company introduces the certificate of its medical examiner it cannot dispute statements therein (Maclin *v.* New England Mut. L. Ins. Co., 33 La. Ann. 801).

A copy of the official certificate of death is admissible to show the cause of death as bearing on a breach of warranty (Ohmeyer *v.* Supreme Forest Woodmen Circle, 91 Mo. App. 189. See also Woolsey *v.* Ellenville, 84 Hun (N. Y.) 236, 32 N. Y. Suppl. 543), but is not admissible to show the existence of a certain disease several years before the death of the insured (McKinley *v.* Metropolitan L. Ins. Co., 6 Misc. (N. Y.) 9, 26 N. Y. Suppl. 63).

Other evidence admissible on issue as to falsity of representations.— Evidence is admissible as to whether the insured attended his business regularly at the time he made his application. Valentini *v.* Metropolitan L. Ins. Co., 106 N. Y. App. Div. 487, 94 N. Y. Suppl. 758. The company may show that the deceased had consumption and died within a year after the date of the policy, in connection with other evidence that insured was treated for consumption within the year preceding the policy. Murphy *v.* Prudential Ins. Co., 205 Pa. St. 444, 55 Atl. 19. Evidence of payments of sick benefits from other companies before the application was made is admissible. Seidenspinner *v.* Metropolitan L. Ins. Co., 175 N. Y. 95, 67 N. E. 123 [*reversing* 70 N. Y. App. Div. 476, 74 N. Y. Suppl. 1108]. If the insured represented that she never had any serious personal injury, the record of a damage suit instituted shortly after the taking out of the policy, to recover damages for an injury sustained before the application for insurance, is admissible. Cooperative Life Assoc. *v.* Leflore, 53 Miss. 1. Evidence is admissible to show that within a few days after the application the insured was taking medical treatment for a disease which it is claimed he had at the time of the application, and of which he died within a few months thereafter. Modern Woodmen of America *v.* Van Wald, 6 Kan. App. 231, 49 Pac. 782. Where the company shows that a person of the same name as the insured was rejected by another company, it must further show that such person was in fact the insured. Fidelity Title, etc., Co. *v.* Illinois L. Ins. Co., 213 Pa. St. 415, 63 Atl. 51. But where the sole defense was the untrue statement by insured that no proposal to insure his life had been declined, it was error to

application for insurance,[26] and may state whether his acts were rational or irrational;[27] but he cannot state whether the insured was afflicted with a certain disease.[28] So a witness may testify as to all the facts which he knows that tend to establish a habit of intemperance;[29] but he cannot testify to his opinion as to the effect of such intemperance upon the health of the insured.[30] A physician may testify that he attended the insured within a specified time before the application,[31] and that the insured suffered from a certain disease prior to the date of the application.[32] Where a physician has testified that he prescribed for the insured, a druggist may testify that he filled the prescription;[33] but a prescription claimed to have been prepared for insured by a physician is inadmissible in evidence in the absence of proof that such prescription was taken by the insured to the druggist to be filled.[34] In rebuttal third persons may testify as to the good health of the insured at the time of the application.[35]

(II) *BAD FAITH OF INSURED.* Evidence bearing on the question of good faith on the part of the insured in answering questions in his application, where otherwise relevant and competent, is admissible to show the bad faith or good faith of the insured.[36] For instance, evidence of the good character of the insured has been held admissible to show good faith;[37] while evidence that the insured had applied to other companies,[38] or that like false answers were made in applying for

exclude an application to another company for insurance, subscribed in the name of the insured, although there was no evidence of the identity of the subscriber with the insured, identity of names being presumptively evidence of the identity of persons, and although the defense would not have been established without proof of failure to receive a policy on the application. Spiegel *v.* Empire L. Ins. Co., 96 N. Y. Suppl. 201. Where the undisputed testimony shows that the health of the insured was not misrepresented in his application, evidence as to his health later, and as to the disease of which he died, is immaterial. Morrison *v.* Wisconsin Odd Fellows' Mut. L. Ins. Co., 59 Wis. 162, 18 N. W. 13. The records of medical institutions or of physicians as to the examination of the insured before the application for insurance are only admissible where the identity of the person examined is first established. Metropolitan L. Ins. Co. *v.* Mitchell, 72 Ill. App. 621. Evidence that the insured had been rejected by another insurance company is not, standing by itself, admissible. Trudden *v.* Metropolitan L. Ins. Co., 50 N. Y. App. Div. 473, 64 N. Y. Suppl. 183. Evidence that the husband who was the beneficiary of the insured knew of the hopelessness of her condition at the time the application was made is admissible as tending to sustain a defense of a conspiracy to defraud the company. Reininghaus *v.* Merchants' Life Assoc., 116 Iowa 364, 89 N. W. 1113. Where the company claims that the insured falsely stated the cause of the death of a relative, the disease of which the relative died may be shown. Keefe *v.* Supreme Council, 52 N. Y. App. Div. 616, 64 N. Y. Suppl. 1012.

Rebuttal.— To contradict evidence that at a certain time the insured walked about the streets the company may show that at such time he walked but little. Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio 614, 68 N. E. 4.

An offer to show that the insured falsely represented that he had not been treated by a physician for any serious disease is properly refused, where it is not limited or directed to a time prior to the issuance of the policy. Carson *v.* Metropolitan L. Ins. Co., 1 Pa. Super. Ct. 572.

26. United Brethren Mut. Aid Soc. *v.* O'Hara, 120 Pa. St. 256, 13 Atl. 932.

27. Higbee *v.* Guardian Mut. L. Ins. Co., 66 Barb. (N. Y.) 462 [*affirmed* in 53 N. Y. 603].

28. United Brethren Mut. Aid Soc. *v.* O'Hara, 120 Pa. St. 256, 13 Atl. 932.

29. Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100. See also United Brethren Mut. Aid Soc. *v.* O'Hara, 120 Pa. St. 256, 13 Atl. 932, holding that it was not error to permit a witness to answer the question whether he had ever seen the assured drink more than once, where he had stated in his application that his habits of life were temperate.

30. Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100.

31. Rhode *v.* Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400.

32. Head Camp, Pacific Jurisdiction, W. of W. *v.* Loeher, 17 Colo. App. 247, 68 Pac. 136.

33. Flippen *v.* State L. Ins. Co., 30 Tex. Civ. App. 362, 70 S. W. 787.

34. Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611.

35. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280; Hummer *v.* Insurance Co., 19 York Leg. Rec. (Pa.) 189.

36. Fidelity Mut. Life Assoc. *v.* Ficklin, 74 Md. 172, 21 Atl. 680, 23 Atl. 197; Mace *v.* Provident Life Assoc., 101 N. C. 122, 7 S. E. 674.

37. German-American Mut. Life Assoc. *v.* Farley, 102 Ga. 720, 29 S. E. 615.

38. Brown *v.* Greenfield Life Assoc., 172 Mass. 498, 53 N. E. 129.

other insurance,[39] have been held admissible to show bad faith. Where the answer is in regard to the cause of the death of a relative, evidence is admissible, as bearing on the good faith of the insured, as to his source of knowledge and the probable accuracy thereof.[40] A family physician who has furnished a written statement in regard to the health of the applicant for insurance may be asked whether his statement was made truthfully and in good faith.[41]

(III) *Admissions and Declarations* — (A) *Of Insured.* Subject to the general rules relating to evidence of declarations or admissions as a part of the *res gestæ*,[42] it has been held that declarations or admissions of the insured before or after the application for his insurance as to his health or age are admissible to show the falsity of his answers in the application and his knowledge thereof.[43] The weight of authority, however, appears to be to the contrary.[44]

39. Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70.

40. Keefe *v.* Supreme Council Catholic Mut. Ben. Assoc., 37 N. Y. App. Div. 276, 55 N. Y. Suppl. 827, 52 N. Y. App. Div. 616, 64 N. Y. Suppl. 1012; Supreme Lodge K. of H. *v.* Dickson, 102 Tenn. 255, 52 S. W. 862.

41. Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280.

42. See Evidence, 16 Cyc. 1192 *et seq.*

43. *Connecticut.*— Kelsey *v.* Universal L. Ins. Co., 35 Conn. 225.

Indiana.— Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

Iowa.— Welch *v.* Union Cent. L. Ins. Co., 108 Iowa 224, 78 N. W. 853, 50 L. R. A. 774.

Maine.— Ashury L. Ins. Co. *v.* Warren, 66 Me. 523, 22 Am. Rep. 590.

England.— Aveson *v.* Kinnaird, 6 East 188, 2 Smith K. B. 286, 8 Rev. Rep. 455.

See 28 Cent. Dig. tit. "Insurance," § 1681.

44. *California.*— Yore *v.* Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81.

Mississippi.— Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

New York.— Rawls *v.* American Mut. L. Ins. Co., 27 N. Y. 282, 84 Am. Dec. 280 [*affirming* 36 Barb. 357]; Swift *v.* Massachusetts Mut. L. Ins. Co., 2 Thomps. & C. 302; Mulliner *v.* Guardian Mut. L. Ins. Co., 1 Thomps. & C. 448. *Contra,* Cahen *v.* Continental L. Ins. Co., 41 N. Y. Super. Ct. 296.

Ohio.— Union Cent. L. Ins. Co. *v.* Cheever, 36 Ohio St. 201, 38 Am. Rep. 573; Fraternal Mut. L. Ins. Co. *v.* Applegate, 7 Ohio St. 292; Union Cent. L. Ins. Co. *v.* Cheever, 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19.

South Carolina.— Dial *v.* Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

Virginia.— Valley Mut. Life Assoc. *v.* Teewalt, 79 Va. 421.

United States.— Wilson *v.* Life Assoc. of America, 30 Fed. Cas. No. 17,818.

See 28 Cent. Dig. tit. "Insurance," § 1681.

Admissibility to show knowledge.— While such declarations are not admissible to prove facts showing false statements, yet such facts being otherwise proved, the declarations of the insured are competent to show that he had knowledge thereof. Union Cent. L. Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271. *Contra,* Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

Statements in relation to application for pension.— Statements made to a third person by one applying for a pension, as to his physical condition at that time, are inadmissible in a suit upon a policy afterward applied for and obtained by the pensioner; and affidavits of insured's neighbors in support of his application for a pension, containing statements as to his health, are inadmissible where it does not appear that insured himself procured the affidavits or knew of their contents. New York Mut. L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

Remote declarations.— Declarations and admissions of the insured as to his disease and physical condition, made prior to and at a period of time remote from the application and issuance of the policy, and not in connection with any act or fact showing the state of his health at that time, are inadmissible for the purpose of disputing the representations in the policy. Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185 [*affirming* 5 Hun 1, and *distinguishing* Swift *v.* Massachusetts Mut. L. Ins. Co., 63 N. Y. 186, 20 Am. Rep. 522].

Statements in other applications for insurance.— Where defendant claimed the policy void by reason of falsity of answers in the application, which answers were made warranties, applications made by insured to other companies were not admissible as admissions against insured, unless it was first shown that the answers in such applications which purported to have been made by insured were in fact made by him. Trudden *v.* Metropolitan L. Ins. Co., 50 N. Y. App. Div. 473, 64 N. Y. Suppl. 183. An application for a different policy from the one in suit, signed by the husband in the name of the widow, and not by her in person, although it would be competent evidence against her in an action upon the policy issued thereon, is not competent evidence in favor of another insurance company sued upon the policy in controversy to show a different statement of the age of the insured, in the absence of proof that she was actually cognizant of the facts and statements made in the other policy. Yore *v.* Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81.

(B) *In Proofs of Death.* The proofs of death are admissible in behalf of the company to show that the disease of which the insured died was treated before the application for insurance;[45] although where proofs of death are offered solely to show compliance with the condition precedent in the policy to the right to sue, and the company offers no evidence, the proofs cannot be used as evidence of a breach of warranty apparent on the face of the papers.[46] A condition in a policy that proofs of death shall be evidence of the facts therein stated in behalf of, but not against, the company, is valid.[47]

(IV) *Materiality of Representations.* Evidence is inadmissible to show that facts suppressed or falsely represented in the application would have been deemed material in passing upon the application and that the company would not have issued the policy had it known the truth in regard thereto.[48] But insurance experts may state the usage of insurance companies generally in respect to charging higher rates of premium or in rejecting risks when made aware of the particular fact in question.[49]

(V) *Parol Evidence.* Parol evidence as to the actual answers made by the applicant to the agent who filled out the application is admissible where it is claimed that the answers given were not the same as the answers appearing in the application.[50] So it may be shown that the company's agent read the questions, keeping the paper in his own hands and writing down the answers of the insured, and that the insured did not know what diseases were named in such questions.[51] Where the application for insurance is not admissible in evidence, parol evidence as to false answers therein is not admissible,[52] although, if the

Where the insured is the agent of the beneficiary, declarations of the insured are admissible. Furniss *v.* Mutual L. Ins. Co., 46 N. Y. Super. Ct. 467.

45. Kipp *v.* Metropolitan L. Ins. Co., 41 N. Y. App. Div. 298, 58 N. Y. Suppl. 494. To the same effect see Helwig *v.* Mutual L. Ins. Co., 132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578; Donnelly *v.* Metropolitan L. Ins. Co., 43 Misc. (N. Y.) 87, 86 N. Y. Suppl. 790.

46. Rondinella *v.* Metropolitan L. Ins. Co., 30 Pa. Super. Ct. 223; Baldi *v.* Metropolitan L. Ins. Co., 30 Pa. Super. Ct. 213.

47. Donnelly *v.* Metropolitan L. Ins. Co., 43 Misc. (N. Y.) 87, 86 N. Y. Suppl. 790; Howard *v.* Metropolitan L. Ins. Co., 18 Misc. (N. Y.) 74, 41 N. Y. Suppl. 33.

48. *Illinois.*— Northwestern Benev., etc., Assoc. *v.* Hall, 118 Ill. 169, 8 N. E. 764.

Iowa.— Newton *v.* Southwestern Mut. Life Assoc., 116 Iowa 311, 90 N. W. 73.

Michigan.— New Era Assoc. *v.* Mactavish, 133 Mich. 68, 94 N. W. 599.

New York.— Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119]; Edington *v.* Ætna L. Ins. Co., 13 Hun 543 [*reversed* on other grounds in 77 N. Y. 564]; Valton *v.* National Loan Fund L. Assur. Soc., 17 Abb. Pr. 268 [*affirmed* in 4 Abb. Dec. 437, 1 Keyes 21].

North Carolina.—Mace *v.* Provident Life Assoc., 101 N. C. 122, 7 S. E. 674.

Ohio.— Massachusetts L. Ins. Co. *v.* Eshelman, 30 Ohio St. 647.

See 28 Cent. Dig. tit. "Insurance," § 1681.

Compare Mobile L. Ins. Co. *v.* Walker, 58 Ala. 290; Hartman *v.* Keystone Ins. Co., 21 Pa. St. 466; Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

49. Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70.

Evidence of custom.— It is incompetent to prove a custom among insurance companies with regard to accepting applications by persons who had attempted suicide. Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119].

50. Marston *v.* Kennebec Mut. L. Ins. Co., 89 Me. 266, 36 Atl. 389, 56 Am. St. Rep. 412; Ames *v.* Manhattan L. Ins. Co., 31 N. Y. App. Div. 180, 52 N. Y. Suppl. 759 [*affirmed* in 167 N. Y. 584, 60 N. E. 1106]; Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155 [*affirmed* in 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19]; New York Mut. L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331. See also Alabama Gold L. Ins. Co. *v.* Garner, 77 Ala. 210 (holding that the agent who wrote the policy cannot be allowed, in the absence of evidence as to a mistake as to the age of insured made therein, to state that "if any mistake was made, it must have been made by" him); Grattan *v.* Metropolitan L. Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617. *Contra,* Rinker *v.* Ætna L. Ins. Co., 214 Pa. St. 608, 64 Atl. 82 [*affirming* 6 Lack. Jur. 122].

51. Cheever *v.* Union Cent. L. Ins. Co., 5 Ohio Dec. (Reprint) 268, 4 Am. L. Rec. 155 [*affirmed* in 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19].

52. Stork *v.* Supreme Lodge K. of P. of W., 113 Iowa 724, 84 N. W. 721; Nugent *v.* Greenfield Life Assoc., 172 Mass. 278, 52

policy itself provides that it shall be void if the insured is not in good health at the date of its execution, the insurer may show by the testimony of the medical examiner that the insured was not in good health at the date of the execution of the policy, although the application is not admissible.[53]

e. Breach of Condition Subsequent as to Habits. Where the policy provides that it shall become void in case of the insured's impairing his health by certain habits, evidence is admissible to show a forfeiture on such grounds.[54]

f. Payment of Premiums or Assessments. The evidence admissible on the issue as to the payment of premiums or assessments is largely governed by the rules relating to the admissibility of evidence of payments in general.[55] Plaintiff may show the payment of all premiums.[56] A letter inclosing the amount of premiums is admissible to show a tender.[57] If a specified notice by the company of the time when the premium was due is necessary, evidence of mailing the notice, without showing prepayment of postage, is inadmissible.[58] Where a legal excuse for non-payment is shown, evidence of the financial ability of the insured to pay

N. E. 440; Considine *v.* Metropolitan L. Ins. Co., 165 Mass. 462, 43 N. E. 201; Fidelity Title, etc., Co. *v.* Illinois L. Ins. Co., 213 Pa. St. 415, 63 Atl. 51.

What law governs.— Where the application is inadmissible in the state where the policy was issued, but is admissible in the state where the action is brought, evidence of the falsity of the representations is admissible. Des Moines Life Assoc. *v.* Owen, 10 Colo. App. 131, 50 Pac. 210.

53. Hood *v.* Prudential Ins. Co., 22 Pa. Super. Ct. 244.

54. Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199 (holding that where the insured agreed not to use intoxicating liquors to excess, "nor" to practise any pernicious habit that obviously tended to shorten life, the refusal to permit a medical expert to state whether he regarded the excessive use of intoxicating liquor a pernicious habit was not error); Davey *v.* Ætna L. Ins. Co., 20 Fed. 482 [*reversed* on other grounds in 123 U. S. 739, 8 S. Ct. 331, 31 L. ed. 315].

Intoxicating liquors.—Evidence of the quantity the insured usually drank prior to the insurance, and what he afterward drank, in connection with the opinions of experts that such amounts would seriously impair a man's health, is inadmissible. Odd Fellows Mut. L. Ins. Co. *v.* Rohkopp, 94 Pa. St. 59. Evidence that alcoholic stimulants were prescribed by a physician is admissible. Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371. See *supra*, IX, D, 4; X, B, 3.

55. See PAYMENT. See also Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134; Dial *v.* Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

Declarations of an agent of the company to a third person are admissible to prove the payment of a premium by the insured. Union L. Ins. Co. *v.* Haman, 54 Nebr. 599, 74 N. W. 1090.

Evidence held admissible.— Evidence of the physical condition of the insured may be admissible to show that the failure to pay a premium was not intentional. Ætna L. Ins. Co. *v.* Hartley, 67 S. W. 19, 68 S. W. 1081, 24 Ky. L. Rep. 57. *Compare*, however, *supra*, X, C, 8, b. An employee of the insurance company may testify as to a notice sent a policy-holder of the maturity of premium notes, where the latter denies having received such notice. Union Cent. L. Ins. Co. *v.* Morrow, 16 Ohio Cir. Ct. 351, 8 Ohio Cir. Dec. 419. If part of the correspondence relating to payment of premiums is admitted, other parts thereof pertaining thereto should not be rejected. Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556.

Evidence held inadmissible.— Payment cannot be proved by an unsealed receipt where the policy requires a sealed receipt as evidence of payment. American L. Ins. Co. *v.* Green, 57 Ga. 469. A book of the insured in which some of his payments of premiums had been entered, unaccompanied by any evidence to sustain it, is not admissible to show that certain dues were unpaid. Petherick *v.* General Assembly O. of A., 114 Mich. 420, 72 N. W. 262. A witness cannot state whether the policy was in force at the time of the death of the insured, where the policy and the application are silent as to the premium note, and the note contains no provisions as to any forfeiture for non-payment. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134. Proof of a statement of intention to forfeit the policy if a premium was not paid when due, and of a forfeiture pursuant thereto, is admissible against the company, in connection with other evidence, as tending to raise an estoppel against the company. Equitable L. Assur. Soc. *v.* Winning, 58 Fed. 541, 7 C. C. A. 359.

56. Crosswell *v.* Connecticut Indemnity Assoc., 51 S. C. 103, 28 S. E. 200.

57. Hartford L., etc., Ins. Co. *v.* Unsell, 144 U. S. 439, 12 S. Ct. 671, 36 L. ed. 496.

58. Provident Sav. L. Assur. Soc. *v.* Nixon, 73 Fed. 144, 19 C. C. A. 414.

Affidavit of mailing of notice.— Under a statute making the affidavit of any officer of the company that the notice was mailed presumptive evidence thereof, such affidavit cannot be received in evidence where the only proof that it was made by the proper officer

the premium is admissible in connection therewith.[59] Where failure to pay a premium note is relied on, evidence is admissible to show that the insurer had no interest in the note, but that it belonged to its agent.[60] The general rules as to the admissibility of parol evidence to vary, explain, or contradict a written instrument[61] are applicable to evidence to vary or contradict the written contract as to the time and place of payment of premiums or the effect of non-payment.[62]

g. Estoppel and Waiver. On an issue as to whether the company was estopped to urge, or had waived, a forfeiture, evidence of declarations or admissions of officers or agents of the company in regard thereto is admissible,[63] provided they were within the scope of the officer's or agent's authority.[64] The authority of the company to remit forfeitures may be shown by introducing its charter and by-laws.[65] Evidence of a custom in positive conflict with the terms of the policy is inadmissible,[66] as is a mere prospectus of the company importing that it was careful to prevent forfeitures,[67] or the fact that the insured was at all times financially able to pay the premiums.[68] So declarations by the insured as to his opinion that the premium had been paid are incompetent to prove a waiver of payment.[69] Evidence to show the amount of business transacted by the company is too remote, in connection with evidence of an officer that he did not know of the breaches of warranty when the policy was issued.[70]

h. Death of Insured and Cause Thereof — (i) *FACT OF DEATH.* On an issue as to whether the insured is really dead, any legal evidence tending to prove or disprove the fact is admissible.[71]

is contained in the affidavit itself. Fischer *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 575, 56 N. Y. Suppl. 260.

59. Brooklyn L. Ins. Co. *v.* Bledsoe, 52 Ala. 538.

60. Thies *v.* Kentucky Mut. L. Ins. Co., 13 Tex. Civ. App. 280, 35 S. W. 676.

61. See EVIDENCE, 17 Cyc. 567 *et seq.*

62. Mobile L. Ins. Co. *v.* Pruett, 74 Ala. 487; Sullivan *v.* Cotton States L. Ins. Co., 43 Ga. 423; Thompson *v.* Knickerbocker L. Ins. Co., 104 U. S. 252, 26 L. ed. 765; Union Mut. L. Ins. Co. *v.* Mowry, 96 U. S. 544, 24 L. ed. 674. See also Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436; Rockwell *v.* Mutual L. Ins. Co., 21 Wis. 548.

An acknowledgment in a policy of the receipt of a premium cannot be contradicted by parol, to invalidate the contract, in the absence of fraud in procuring the delivery of the policy. Kendrick *v.* Mutual Ben. L. Ins. Co., 124 N. C. 315, 32 S. E. 728, 70 Am. St. Rep. 592. See *supra*, III, D, 4.

Evidence of a custom of the company to receive premiums after they fell due is admissible. Girard L. Ins., etc., Co. *v.* New York Mut. L. Ins. Co., 97 Pa. St. 15. *Contra*, Howell *v.* Knickerbocker L. Ins. Co., 3 Rob. (N. Y.) 232. See *supra*, XI, D, 2, b.

63. Penn Mut. L. Ins. Co. *v.* Norcross, 163 Ind. 370, 72 N. E. 132; Metropolitan L. Ins. Co. *v.* Gibbs, 34 Tex. Civ. App. 131, 78 S. W. 398; Washington L. Ins. Co. *v.* Berwald, (Tex. Civ. App. 1903) 72 S. W. 436.

Expressions of opinion by the superintendent of insurance as to the legal rights of parties, based upon an *ex parte* statement, contained in a letter to him, are neither a judicial decision nor competent evidence in an action involving such rights. Calandra *v.* Life Assoc. of America, 84 N. Y. Suppl. 498.

64. Franklin L. Ins. Co. *v.* Sefton, 53 Ind. 380; Hastings *v.* Brooklyn L. Ins. Co., 3 Silv. Sup. (N. Y.) 545, 6 N. Y. Suppl. 374.

65. Kolgers *v.* Guardian L. Ins. Co., 58 Barb. (N. Y.) 185, 9 Abb. Pr. N. S. 91.

66. Busby *v.* North America L. Ins. Co., 40 Md. 572, 17 Am. Rep. 634.

67. Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516.

68. Mutual Reserve Fund Life Assoc. *v.* Beatty, 93 Fed. 747, 35 C. C. A. 573.

69. Berliner *v.* Travelers' Ins. Co., (Cal. 1898) 53 Pac. 922.

70. Hennessy *v.* Metropolitan L. Ins. Co, 74 Conn. 699, 52 Atl. 490.

71. See Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18, where many questions as to the admissibility of evidence on this issue are considered.

Letters of administration taken out on the insured's estate are not admissible to prove the fact of his death. Mutual Assur. Soc. *v.* Holt, 29 Gratt. (Va.) 612.

Evidence of the good character of the beneficiary is inadmissible. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Rumor.— Evidence of a report in the neighborhood that insured was not dead, but had run off to defraud the company, is not admissible to corroborate certain of defendant insurance company's witnesses, who had testified that they saw the assured some time after his alleged death. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Affectionate relations of deceased and wife. — In an action by a wife on a policy on her husband's life, where defendant denies that the husband is dead, evidence that plaintiff and her husband were attached to each other, and lived together on affectionate terms up to the time of his disappearance, is admissible

(II) *Cause of Death*—(A) *In General.* Proofs of death are not admissible on behalf of plaintiff to show the cause thereof, but are admissible on behalf of the company as admissions of plaintiff.[72] Where it is claimed that plaintiff murdered the insured, evidence is admissible to show that he previously obtained policies on the life of the insured from other companies.[73] If it is claimed that the insured died in the known violation of a law, the record of the trial and acquittal of one who killed the insured is incompetent to prove a breach of the condition.[74]

(B) *Suicide*—(1) In General. Where the defense is that the insured committed suicide, any legal evidence is admissible which tends to throw light on the circumstances and causes of the insured's death,[75] such as evidence as to the condition or state of mind of the insured before his death,[76] or evidence as to the motives or intentions of the insured in regard to self-destruction.[77] On the other hand evidence is not admissible to show that the insured was an atheist,[78] or believed that he could from the spirit world control his affairs in this world.[79] Declarations of the insured shortly before his death, showing an intention to commit suicide, are admissible,[80] except where they are ambiguous;[81] but where the

as tending to throw some light, in connection with other evidence, on the nature and cause of his long continued absence. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Former absconding.— Evidence that the insured more than twelve years before had absconded and was gone for some time, until he was supposed to have been murdered, and that he was a boy of bad habits and loose moral character, is properly excluded on the ground of remoteness. Tisdale *v.* Connecticut Mut. L. Ins. Co., 28 Iowa 12.

Conspiracy.— The existence of an alleged conspiracy to defraud is admissible only for the purpose of strengthening the probability that the insured is not dead. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668. Evidence of repute in the family of the insured concerning the fact of his death is competent only to rebut any inference of a combination to defraud the insurer. Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922.

Evidence other than the presence of the person insured is admissible to refute the fact of death. Schneider *v.* Ætna L. Ins. Co., 32 La. Ann. 1049, 36 Am. Rep. 276.

Commission of crime.— The refusal to permit the company to show that the insured had committed a crime in another state, for the purpose of disclosing a motive for his concealment, has been held not a material error. Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

72. See *infra*, XIII, G, 2, h, (II), (C).

73. New York Mut. L. Ins. Co. *v.* Armstrong, 117 U. S. 591, 6 S. Ct. 877, 29 L. ed. 997.

74. Cluff *v.* Mutual Ben. L. Ins. Co., 99 Mass. 317.

75. See Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877.

Expert testimony.—Where the only issue in an action on an insurance policy is whether deceased committed suicide or shot himself accidentally, expert testimony as to the effect of morphine on a person whose brain is affected is irrelevant and inadmissible. Ætna L. Ins. Co. *v.* Shoemaker, 59 Ill. App. 643. Where the evidence shows that the death resulted from the taking of morphine or opium, and also that the insured was not accustomed to the use of morphine, a physician may testify as to whether one not accustomed to handling morphine could have any conception of how much an eighth or a quarter of a grain was. New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294.

Custom.— Evidence on behalf of plaintiff that it was the custom for druggists to sell morphine to any one is admissible to show that the insured did not understand the character of the statement made by him that the reason why he refused to tell the doctor called in to attend him where he got the morphine was that "he did not want to hurt anybody's business." New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294.

Settlement of other insurance by the beneficiary after the death of the insured is irrelevant. Continental Ins. Co. *v.* Delpeuch, 82 Pa. St. 225.

76. Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211.

77. Sharland *v.* Washington L. Ins. Co, 101 Fed. 206, 41 C. C. A. 307.

For instance, evidence of a conversation at the time of taking out the policy as to payment of losses on suicides, and the threat to not take the policy if it did not cover death by suicide, has been held admissible (Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992); as has evidence of the financial embarrassment, worry, and intemperance of the insured shortly before his death (Furbush *v.* Maryland Casualty Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605), and also a statement found on his body that he had committed suicide (Weld *v.* Mutual L. Ins. Co., 61 Ill. App. 187).

78. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580.

79. Continental Ins. Co. *v.* Delpeuch, 82 Pa. St. 225.

80. Rens *v.* Northwestern Mut. Relief Assoc., 100 Wis. 266, 75 N. W. 991.

81. Ross-Lewin *v.* Germania L. Ins. Co., 20 Colo. App. 262, 78 Pac. 305.

declarations were made a number of years before the death of the insured they are properly excluded as too remote.[82]

(2) INSANITY AS CAUSE OF SUICIDE. Where plaintiff claims that the insured was insane when he committed suicide, evidence as to his acts, conduct, and delusions, including the act of self-destruction and the attending circumstances, is admissible.[83] Non-expert witnesses may state the facts as to the mental condition of the insured shortly before his death and of their impressions as to his sanity.[84] The attending physician may testify as to declarations by the insured shortly before his death that he had an uncontrollable impulse to take his life.[85]

(c) *Proofs of Death.* To show compliance with the conditions in the policy plaintiff may introduce in evidence the proofs of death;[86] but such proofs are not evidence against the company of any fact stated therein.[87] So the company may introduce in evidence the proofs of death as representations on the part of the party for whose benefit the policies were taken, as to the death and the manner of the death of the insured;[88] but such proofs are not conclusive of the

82. Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182 (two years); Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519 (four years).

83. Grand Lodge I. O. of M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123. See Wolff *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,929, 2 Flipp. 355, holding that suicide, or an attempt or threat to commit suicide, may be considered in connection with the previous demeanor and conduct of the insured as evidence of insanity.

Motive.— On the question of the insanity of the assured, who had committed suicide, evidence of a current rumor that on the night preceding his death he had burned his brother's rival livery stable is not admissible to show the probable motive of his committing suicide, in the absence of evidence that such rumor had been communicated to him before he committed the act. St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush (Ky.) 268.

84. Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536; Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433; New York Mut. L. Ins. Co. *v.* Leubrie, 71 Fed. 843, 18 C. C. A. 332.

Hypothetical questions.— On the question of the insanity of an assured, who had committed suicide, the opinion of unprofessional witnesses as to whether a person under a given state of facts and circumstances would have taken his own life is not competent evidence. St. Louis Mut. L. Ins. Co. *v.* Graves, 6 Bush (Ky.) 268.

Knowledge of circumstances of suicide.— The opinion of witnesses that the mental condition of an insured person, who shot himself while insane, was such that he could not control his physical actions, such opinion being based upon the witnesses' observation of the person's mental condition previous to the suicide, and not upon their knowledge of the circumstances of the suicide, has no tendency to prove that the killing was involuntary. Streeter *v.* Western Union Mut. Life, etc., Soc., 65 Mich. 199, 31 N. W. 779, 8 Am. St. Rep. 882.

Opinion expressed before death.— The admission of evidence of the conversation between two non-professional witnesses a few hours before the death of the insured, showing the expression of an opinion as to his condition the same as that to which they testified, is not prejudicial error. Connecticut Mut. L. Ins. Co. *v.* Lathrop, 111 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536.

85. Hathaway *v.* National L. Ins. Co., 48 Vt. 335.

86. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Maier *v.* Massachusetts Ben. Assoc., 107 Mich. 687, 65 N. W. 552; Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302; Pickett *v.* Metropolitan L. Ins. Co., 20 N. Y. App. Div. 114, 46 N. Y. Suppl. 693; Chinnery *v.* U. S. Industrial Ins. Co., 15 N. Y. App. Div. 515, 44 N. Y. Suppl. 581.

Proof of execution is not necessary where, in dealings between the parties before action, they were considered, discussed, and acted on as genuine. Wall *v.* Royal Soc. of Good Fellows, 179 Pa. St. 355, 36 Atl. 748.

Notice to produce.— The statement in the declaration that proofs of death had been furnished operates as implied notice to the company to produce the written notice and proofs of death. Continental L. Ins. Co. *v.* Rogers, 19 Ill. App. 580.

Reading to jury see *infra*, XIII, H, 1.

Evidence of mailing.— To show that notice had been given, evidence of the mailing of the notice by plaintiff is admissible. Mandell *v.* Fidelity, etc., Co., 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291.

87. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18; Ætna L. Ins. Co. *v.* Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454; Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

A stipulation in the policy that the proofs shall be evidence of the facts therein stated in behalf of but not against the company is valid. Donnelly *v.* Metropolitan L. Ins. Co., 43 Misc. (N. Y.) 87, 86 N. Y. Suppl. 790; Howard *v.* Metropolitan L. Ins. Co., 18 Misc. (N. Y.) 74, 41 N. Y. Suppl. 33.

88. *Illinois.*— Modern Woodmen of America *v.* Davis, 84 Ill. App. 439 [*affirmed* in 184 Ill. 236, 56 N. E. 300].

facts stated therein and may be explained,[89] or shown to be erroneous; or they may be shown to have been made by mistake or under a misapprension.[90] Of course

Indiana.— Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

Kansas.— Modern Woodmen of America *v.* Von Wald, 6 Kan. App. 231, 49 Pac. 782.

Louisiana.— Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589.

Maryland.— Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Nebraska.— Modern Woodmen of America *v.* Kozak, 63 Nebr. 146, 88 N. W. 248.

New York.— Buffalo Loan, etc., Co. *v.* Knights Templar, etc., Mut. Aid Assoc., 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839 [*affirming* 56 Hun 303, 9 N. Y. Suppl. 346]; Chinnery *v.* U. S. Industrial Ins. Co., 15 N. Y. App. Div. 515, 44 N. Y. Suppl. 581 (holding that the attending physician's certificate of death might be introduced, although it appeared on his examination that he was ignorant of some of the facts certified); Lund *v.* Masonic Life Assoc., 81 Hun 287, 30 N. Y. Suppl. 775; Goldschmidt *v.* New York Mut. L. Ins. Co., 33 Hun 441.

Wisconsin.— Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101.

United States.— Newark Mut. Ben. L. Ins. Co. *v.* Newton, 89 U. S. 32, 22 L. ed. 793.

See 28 Cent. Dig. tit. "Insurance," § 1702.

Contra.— Mutual L. Ins Co. *v.* Schmidt, 6 Ohio Dec. (Reprint) 901, 8 Am. L. Rec. 629 [*affirmed* in 40 Ohio St. 112].

To establish a loss within exceptions contained in the policy, so as to relieve the company from liability, proofs of death are admissible. Hanna *v.* Connecticut Mut. L. Ins. Co., 150 N. Y. 526, 44 N. E. 1099 [*affirming* 8 Misc. 431, 28 N. Y. Suppl. 661]; Proppe *v.* Metropolitan L. Ins. Co., 13 Misc. (N. Y.) 266, 34 N. Y. Suppl. 172.

A physician's certificate of death, when made *ex parte,* is not proof of the cause of death as against the opposite party, but, when explained and affirmed at the trial as to its statements by the physician who made it, it may be considered as part of the evidence. Davey *v.* Ætna L. Ins. Co., 38 Fed. 650 [*affirmed* in 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371]. The statement of the attending physician accompanying the proofs of death and required by the policy is not admissible in favor of either party (Helwig *v.* New York Mut. L. Ins. Co., 58 Hun (N. Y.) 366, 12 N. Y. Suppl. 172 [*reversed* on other grounds in 132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578]); but where introduced in evidence without qualification by plaintiff to prove the death the company may avail itself of its contents (Helwig *v.* New York Mut. L. Ins. Co., 132 N. Y. 331, 30 N. E. 834, 28 Am. St. Rep. 578).

Statements in proofs furnished to other companies are not admissible where there is no primary testimony as to the cause of death. Trudden *v.* Metropolitan L. Ins. Co., 50 N. Y. App. Div. 473, 64 N. Y. Suppl. 183.

Affidavits taken by the company concerning matters occurring before the death of the insured, without plaintiff's knowledge, are inadmissible against plaintiff in connection with proofs of death furnished by plaintiff. Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611.

89. **Until such explanation,** however, the proofs of death are to be taken as true and *prima facie* evidence of the facts they contain. Hassencamp *v.* Mutual Ben. L. Ins. Co., 120 Fed. 475, 56 C. C. A. 625.

90. *District of Columbia.*— Day *v.* Mutual Ben. L. Ins. Co., 1 MacArthur 598.

Illinois.— Modern Woodmen of America *v.* Davis, 184 Ill. 236, 56 N. E. 300 [*affirming* 84 Ill. App. 439].

Kansas.— Wildey Casualty Co. *v.* Sheppard, 61 Kan. 351, 59 Pac. 651, 47 L. R. A. 650; Employers' Liability Assur. Corp. *v.* Anderson, 5 Kan. App. 18, 47 Pac. 331.

Louisiana.— Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589.

Maryland.— Baltimore Mut. L. Ins. Co. *v.* Stibbe, 46 Md. 302.

Massachusetts.— Abraham *v.* Mutual Reserve Fund Life Assoc., 183 Mass. 116, 66 N. E. 605.

Michigan.— Phillips *v.* U. S. Benev. Soc., 120 Mich. 142, 79 N. W. 1.

Minnesota.— Beckett *v.* Northwestern Masonic Aid Assoc., 67 Minn. 298, 69 N. W. 923.

New York.— Bradley *v.* John Hancock Mut. L. Ins. Co., 20 N. Y. App. Div. 22, 46 N. Y. Suppl. 627; Hartford Nat. Life Assoc. *v.* Sturtevant, 78 Hun 572, 29 N. Y. Suppl. 529; Spencer *v.* Citizens' Mut. L. Ins. Assoc., 3 Misc. 458, 23 N. Y. Suppl. 179; Tuthill *v.* United L. Ins. Assoc., 21 N. Y. Suppl. 191.

Pennsylvania.— Baldi *v.* Metropolitan L. Ins. Co., 24 Pa. Super. Ct. 275.

Wisconsin.— Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101. See also Jarvis *v.* Northwestern Mut. Relief Assoc., 102 Wis. 546, 78 N. W. 1089, 72 Am. St. Rep. 895.

United States.— Pythias Knights' Supreme Lodge *v.* Beck, 181 U. S. 49, 21 S. Ct. 532, 45 L. ed. 741; Hassencamp *v.* Mutual Ben. L. Ins. Co., 120 Fed. 475, 56 C. C. A. 625.

See 28 Cent. Dig. tit. "Insurance," § 1702.

Proofs do not estop the claimant from showing the facts to be otherwise than as thus stated. John Hancock Mut. L. Ins. Co. *v.* Dick, 117 Mich. 518, 76 N. W. 9, 44 L. R. A. 846; Wells *v.* Metropolitan L. Ins. Co., 163 N. Y. 572, 57 N. E. 1128 [*affirming* 19 N. Y. App. Div. 18, 46 N. Y. Suppl. 80]; Neill *v.* American Popular L. Ins. Co., 42 N. Y. Super. Ct. 259; Baldi *v.* Metropolitan L. Ins. Co., 24 Pa. Super. Ct. 275; Rondinella *v.* Metropolitan Ins. Co., 12 Pa. Dist. 265, 28 Pa. Co. Ct. 517; Connecticut Mut. L. Ins. Co. *v.* Schwenk, 94 U. S. 593, 24 L. ed. 294.

A physician's certificate, even though required by the terms of the policy, is not con-

the proofs of death are not admissible against plaintiff as an admission unless it is shown that they were furnished by or on behalf of plaintiff.[91]

(D) *Coroner's Inquest.* Neither a copy of the verdict nor the evidence at a coroner's inquest is admissible to show the cause of death,[92] except, it seems, where delivered as a part of the proofs of death.[93] Plaintiff, however, may show the cause of death by a *post mortem* inquisition, made under the authority of the coroner.[94]

i. Payment or Excuse For Failure to Pay. The general rules applicable to the admissibility of evidence as to payments in general are applicable.[95] In some states, by statute, evidence of bad faith in failing to pay losses is admissible to sustain a judgment for reasonable counsel fees.[96]

3. Weight and Sufficiency — a. In General. The weight and sufficiency of the evidence in an action on a life policy is governed by the rules relating to the weight and sufficiency of evidence in civil actions in general.[97] The uncontradicted proofs of death are sufficient, as against plaintiff, to show the cause of

clusive on the claimant as to the cause of death. Denver L. Ins. Co. *v.* Price, 18 Colo. App. 30, 69 Pac. 313; Redmond *v.* Industrial Ben. Assoc., 150 N. Y. 167, 44 N. E. 769 [*affirming* 78 Hun 104, 28 N. Y. Suppl. 1075]; Boland *v.* Industrial Ben. Assoc., 74 Hun (N. Y.) 385, 26 N. Y. Suppl. 433; Boylan *v.* Prudential Ins. Co., 18 Misc. (N. Y.) 444, 42 N. Y. Suppl. 52; Baldi *v.* Metropolitan L. Ins. Co., 24 Pa. Super. Ct. 275; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719.

Statements in the proofs showing death by suicide are not conclusive, and may be contradicted by evidence taking the case out of the suicide clause. Supreme Tent K. of M. of W. *v.* Stensland, 105 Ill. App. 267; Prudential Ins. Co. of America *v.* Breustle, 41 S. W. 9, 19 Ky. L. Rep. 544; Spruill *v.* Northwestern Mut. L. Ins. Co., 120 N. C. 141, 27 S. E. 39; Fisher *v.* Fidelity Mut. Life Assoc., 188 Pa. St. 1, 41 Atl. 467; Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 82 Wis. 255, 52 N. W. 101; Pythias Knights' Supreme Lodge *v.* Beck, 181 U. S. 49, 21 S. Ct. 532, 45 L. ed. 741 [*affirming* 94 Fed. 751, 36 C. C. A. 467]; Home Ben. Assoc. *v.* Sargent, 142 U. S. 691, 12 S. Ct. 332, 35 L. ed. 1160 [*affirming* 35 Fed. 711]; Union Mut. L. Ins. Co. *v.* Payne, 105 Fed. 172, 45 C. C. A. 193; Zimmerman *v.* Masonic Aid Assoc., 75 Fed. 236; Keels *v.* Mutual Reserve Fund Life Assoc., 29 Fed. 198.

91. Barnett *v.* Prudential Ins. Co., 91 N. Y. App. Div. 435, 86 N. Y. Suppl. 842.

92. *Illinois.*— U. S. Life Ins. Co. *v.* Kielgast, 26 Ill. App. 567.

Indiana.— Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277.

Kentucky.— Ætna L. Ins. Co. *v.* Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454.

Michigan.— Wasey *v.* Travelers' Ins. Co., 126 Mich. 119, 85 N. W. 459.

New York.— Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119, and *following* Goldschmidt *v.* New York Mut. L. Ins. Co., 102 N. Y. 486, 7 N. E. 408].

Ohio.— Insurance Co. *v.* Schmidt, 40 Ohio St. 112.

Texas.— Texas Mut. L. Ins Co. *v.* Brown, 2 Tex. Unrep. Cas. 160.

See 28 Cent. Dig. tit. "Insurance," § 1702.

93. Northwestern Mut. L. Ins. Co. *v.* Maguire, 19 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 562; Sharland *v.* Washington L. Ins. Co., 101 Fed. 206, 41 C. C. A. 307. *Contra*, U. S. Life Ins. Co. *v.* Kielgast, 26 Ill. App. 567.

Inquest furnished after proofs of death.— Where proofs of death as forwarded were complete before an inquest was asked for, and the papers on the inquest were sent to the company, on its request, by plaintiff's counsel, as a matter of accommodation, such papers were not a part of the proofs of death, so as to be admissible against plaintiff in an action on the policy. Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119].

94. Grand Lodge O. of M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. 59, 61 Am. St. Rep. 123 [*affirming* 68 Ill. App. 125].

95. See Payment.

Payment to one other than plaintiff see Metropolitan L. Ins. Co. *v.* O'Farrell, 10 Kan. App. 151, 62 Pac. 673; Home Mut. Life Assoc. *v.* Seager, 128 Pa. St. 533, 18 Atl. 517.

96. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. See *supra*, XII, H, 4.

To show the good faith of the company in refusing to pay the loss within the time required by law, evidence is not admissible to show a rumor in the neighborhood that the insured was not dead. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18. On the other hand the affidavits produced to the company as a required preliminary proof of the death of the insured are not competent to show bad faith on the part of the company in refusing to pay the loss. Travelers' Ins. Co. *v.* Sheppard, *supra*.

97. See Evidence, 17 Cyc. 753 *et seq.*

Sufficiency of evidence to prove particular facts — *Bad faith in failure of insurer to pay claim.*— Hull *v.* Alabama Gold L. Ins. Co., 79 Ga. 93, 3 S. E. 903.

death,[98] but not the truth of other facts recited therein.[99] The fact that a policy was found with other papers of the insured, after his death, is *prima facie* sufficient to show its delivery as a valid contract of existing insurance.[1]

b. False Representations of Insured. The evidence to show that the insured made a false representation in the application for insurance must be clear, satisfactory, and convincing.[2] The presumption that the insured read the application before signing is sufficient to rebut testimony that the insured did not answer a question as to a former rejection, without introducing the medical examiner of

Death from certain habits.— Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659; Miller *v.* Mutual Ben. Ins. Co., 34 Iowa 222; Arnold *v.* Connecticut Mut. L. Ins. Co., 95 Me. 331, 49 Atl. 1103.

Furnishing of proofs of death.— Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303. Fault in failure to furnish proofs of death in time. Railway Officials' Acc. Assoc. *v.* Armstrong, 22 Ind. App. 406, 53 N. E. 1037.

Good health of insured at time of delivery of policy.—Woodmen of the World *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331.

Payment of premiums.— Mutual L. Ins. Co. *v.* Abbey, 76 Ark. 328, 88 S. W. 950; Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277 (holding that receipt is *prima facie* evidence of payment of premium); Ferguson *v.* Union Mut. L. Ins. Co., 187 Mass. 8, 72 N. E. 358; Chickering *v.* Globe Mut. L. Ins. Co., 116 Mass. 321; Sharpe *v.* New York L. Ins. Co., 5 Nebr. (Unoff.) 278, 98 N. W. 66; Lord *v.* Bankers' L. Ins. Co., 18 N. Y. App. Div. 246, 45 N. Y. Suppl. 935; Riley *v.* Pennsylvania Mut. L. Ins. Co., 189 Pa. St. 307, 42 Atl. 191. The delivery of a policy of insurance is *prima facie* evidence that the premium mentioned therein has been paid. Globe Mut. L. Ins. Assoc. *v.* Meyer, 118 Ill. App. 155; Union L. Ins. Co. *v.* Parker, 66 Nebr. 395, 92 N. W. 604, 103 Am. St. Rep. 714, 62 L. R. A. 390. See also *supra*, III, D, 4.

Payment by insurer.— Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389; Northwestern Mut. L. Ins. Co. *v.* Roth, 118 Pa. St. 329, 12 Atl. 283.

Preventing plaintiff from bringing suit within the contractual limitation.— Home Friendly Soc. *v.* Roberson, 100 Md. 85, 59 Atl. 279.

Return of policy and cancellation.— Atkins *v.* New York L. Ins. Co., (Tex. Civ. App. 1901) 62 S. W. 563.

Waiver by, or estoppel of, insurer.— Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875; Painter *v.* Industrial Life Assoc., 131 Ind. 68, 30 N. E. 876 (waiver of failure to pay premiums when due); Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204 (evidence to show custom to accept delinquent payments); Graham *v.* Security Mut. L. Ins. Co., 72 N. J. L. 298, 62 Atl. 681; Berger *v.* Ætna L. Ins. Co., 48 Misc. (N. Y.) 385, 95 N. Y. Suppl. 541; Babcock *v.* Pacific Mut. L. Ins. Co., 36 Misc. (N. Y.) 306, 73 N. Y. Suppl. 453 (waiver of filing of proofs of death); Blakiston *v.* American L. Ins. Co., 15 Phila. (Pa.) 315 (holding that forfeiture for nonpayment of a premium when due is waived on proof of the general custom of insurance companies to accept premiums after they become due and that it is not necessary to show that defendant adopted such a custom); Dargan *v.* Equitable L. Assur. Soc., 71 S. C. 356, 51 S. E. 125; Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476 (waiver of misrepresentation as to health).

Waiver of contractual limitation of time to sue see Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601; Mutual Reserve Fund Life Assoc. *v.* Tolbert, (Tex. Civ. App. 1895) 33 S. W. 295.

98. Dennis *v.* Union Mut. L. Ins. Co., 84 Cal. 570, 24 Pac. 120; Mutual Ben. L. Ins. Co. *v.* Newton, 22 Wall. (U. S.) 32, 22 L. ed. 793. See also *supra*, XIII, G, 2, h, (II), (C).

99. Redmond *v.* Industrial Ben. Assoc., 78 Hun (N. Y.) 104, 28 N. Y. Suppl. 1075.

1. Jones *v.* New York L. Ins. Co., 168 Mass. 245, 47 N. E. 92.

Sufficiency of evidence to show delivery of policy see Coffin *v.* New York L. Ins. Co., 127 Fed. 555, 62 C. C. A. 415. See also *supra*, III, B, 2.

2. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568.

Proof of attendance by a physician is *prima facie* sufficient to show a breach of the warranty that the insured had not been under the care of a physician within a specified time. Rhode *v.* Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400.

Former rejections of application for insurance.— Proof that a mutual benefit association had declined to issue a certificate of membership to insured is not sufficient to prove a breach of warranty, in an action on a life insurance policy, to the effect that no company or association had ever declined to grant a policy on insured's life. White *v.* National L. Ins. Co., 11 Ohio Dec. (Reprint) 857, 30 Cinc. L. Bul. 237.

A conspiracy between an agent and the insured to defraud a life insurance company is established when it is shown that at the time of the application the applicant was suffering from a serious disease, and that, after one application had been rejected, another was made, and a different physician, who was not so strict, was intentionally procured to make the examination, on which the application was accepted. Nassal *v.* Metropolitan L. Ins. Co., 19 Misc. (N. Y.) 413, 44 N. Y. Suppl. 261.

the insurer to rebut such evidence.[3] Statements of witnesses that they knew the insured, and that she apparently was in robust health, are insufficient to discredit the positive statements of a physician that he had treated her for heart disease.[4] The fact that the insured was fourteen years old and was at home at the time of the death of certain members of his family is insufficient to show that he knew the cause of their death.[5]

c. Right to Sue.[6] To prove that plaintiff was a creditor of the insured, and the amount of the debt, a recital in the policy and the creditor's statement in the proofs of death are insufficient.[7] Possession of the policy by the alleged widow and children of the insured, who are named as beneficiaries therein, and the filing of it with the petition, is *prima facie* sufficient to show the truth of their allegations that they are the beneficiaries named.[8] A mere statement of the person taking out the policy on the life of another that he had given the policy to the latter is insufficient to show that the insured succeeded in his lifetime to the rights of the former.[9] Where the application stated that the assured had a pecuniary interest in the life to the amount insured, neither the application nor the policy is *prima facie* proof of the fact, which must be established by other affirmative evidence.[10]

d. Death of Insured and Cause Thereof. The death of the insured need not be proved beyond a reasonable doubt,[11] nor need the defense that plaintiff mur-

Sufficiency of evidence to show misrepresentations in general see Metzradt *v.* Modern Brotherhood of America, 112 Iowa 522, 84 N. W. 498; Provident Sav. L. Assur. Soc. *v.* Beyer, 67 S. W. 827, 23 Ky. L. Rep. 2460; Murphy *v.* Mutual Ben. L., etc., Ins. Co., 6 La. Ann. 518; Maine Ben. Assoc. *v.* Parks, 81 Me. 79, 16 Atl. 339, 10 Am. St. Rep. 240; Malicki *v.* Chicago Guaranty Fund Life Soc., 123 Mich. 148, 81 N. W. 1073; Williams *v.* St. Louis L. Ins. Co., 189 Mo. 70, 87 S. W. 499; Bancroft *v.* Home Ben. Assoc., 120 N. Y. 14, 23 N. E. 997, 8 L. R. A. 68 [*affirming* 54 N. Y. Super. Ct. 332]; Newton *v.* Mutual Ben. L. Ins. Co., 76 N. Y. 426, 32 Am. Rep. 335 [*affirming* 15 Hun 595]; Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; O'Farrell *v.* Metropolitan L. Ins. Co., 44 N. Y. App. Div. 554, 60 N. Y. Suppl. 945; Koenig *v.* United L. Ins. Assoc., 12 N. Y. App. Div. 454, 42 N. Y. Suppl. 752 (knowledge of insertion of answer); O'Shaughnessy *v.* Workingman's Co-operative Assoc., 13 Misc. (N. Y.) 188, 34 N. Y. Suppl. 170; Smith *v.* Metropolitan L. Ins. Co., 183 Pa. St. 504, 38 Atl. 1038; Rondinella *v.* Metropolitan L. Ins. Co., 18 Pa. Super. Ct. 613; United Brethren Mut. Aid Soc. *v.* Kinter, 12 Wkly. Notes Cas. (Pa.) 76; Pacific Mut. L. Ins. Co. *v.* Terry, (Tex. Civ. App 1904) 84 S. W. 656; Metropolitan L. Ins. Co. *v.* Rutherford, 98 Va. 195, 35 S. E. 361, 719; Home L. Ins. Co. *v.* Sibert, 96 Va. 403, 31 S. E. 519; Murphey *v.* American Mut. Acc. Assoc., 90 Wis. 206, 62 N. W. 1057; Black *v.* Travelers' Ins. Co., 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500.

Sufficiency of evidence to show misrepresentations as to age see Yore *v.* Booth, 110 Cal. 238, 42 Pac. 808, 52 Am. St. Rep. 81 (holding that evidence that proof of death furnished by plaintiff states that insured was born in 1829 does not require a finding that the statement by insured in his application that he was born in 1830 was false); Collins *v.* German-American Mut. Life Assoc., 112 Mo. App. 209, 86 S. W. 891 (evidence of identity); Wynn *v.* Provident Life, etc., Co., 99 N. Y. App. Div. 103, 91 N. Y. Suppl. 167; Lee *v.* Supreme Council Catholic Benev. Legion, 64 N. Y. App. Div. 622, 72 N. Y. Suppl. 274; Hartshorn *v.* Metropolitan L. Ins. Co., 55 N. Y. App. Div. 471, 67 N. Y. Suppl. 13; Butler *v.* Supreme Council Catholic Benev. Legion, 43 N. Y. App. Div. 531, 60 N. Y. Suppl. 70; Mahaney *v.* Mutual Reserve Fund Life Assoc., 69 Hun (N. Y.) 12, 23 N. Y. Suppl. 213; McCarthy *v.* Catholic Knights L. of A., 102 Tenn. 345, 52 S. W. 142; Hayes *v.* Union Mut. L. Assur. Co., 44 U. C. Q. B. 360.

Sufficiency of evidence to show that alteration in application was made after it was mailed to the company see Breese *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775.

3. Hackett *v.* Supreme Council, Catholic Benev. Legion, 44 N. Y. App. Div. 524, 60 N. Y. Suppl. 806 [*affirmed* in 168 N. Y. 588, 60 N. E. 1112].

4. Kipp *v.* Metropolitan L. Ins. Co., 41 N. Y. App. Div. 298, 58 N. Y. Suppl. 494.

5. Sinclair *v.* Phœnix Mut. L. Ins. Co., 22 Fed. Cas. No. 12,896.

6. **Sufficiency of evidence to show assignment of policy** see Bickel *v.* Bickel, 79 S. W. 215, 25 Ky. L. Rep. 1945 (mental capacity); Evans *v.* Bulman, 91 Md. 84, 46 Atl. 315.

7. Crotty *v.* Union Mut. L. Ins. Co., 144 U. S. 621, 12 S. Ct. 749, 36 L. ed. 566.

8. Hartford L., etc., Ins. Co. *v.* Wayland, 20 S. W. 199, 14 Ky. L. Rep. 243.

9. Cyrenius *v.* Mutual L. Ins. Co., 13 N. Y. St. 204.

10. Ruse *v.* Mutual Ben. L. Ins. Co., 23 N. Y. 516.

11. Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922.

dered the insured be so proved.[12] Suicide of the insured as a defense is sufficiently established by a preponderance of the evidence.[13] Circumstantial evidence is sufficient to prove suicide,[14] provided the circumstances exclude with reasonable certainty any hypothesis of death by accident or by the act of another.[15] The verdict of a coroner's jury finding that insured committed suicide is *prima facie* evidence of the cause of his death.[16] Evidence that the cause of the insured's death was insanity is not sufficient to show that he committed suicide.[17] Suicide is not *prima facie* evidence of insanity,[18] nor is an attempt or threat to commit sui-

Sufficiency of evidence to prove fact of death see Rogers *v.* Manhattan L. Ins. Co., 138 Cal. 285, 71 Pac. 348; Supreme Lodge, etc., K. of H. *v.* Goldberger, 72 Ill. App. 320 [*reversed* on other grounds in 175 Ill. 19, 51 N. E. 647]; Baxter *v.* Covenant Mut. Life Assoc., 77 Minn. 80, 79 N. W. 596; Nelson *v.* Masonic Mut. Life Assoc., 57 N. Y. App. Div. 214, 68 N. Y. Suppl. 290; Johnson *v.* Pennsylvania R. Co., 43 N. Y. App. Div. 453, 60 N. Y. Suppl. 129.

Sufficiency of evidence as to beneficiary surviving the insured see Hilderbrandt *v.* Ames, 27 Tex. Civ. App. 377, 66 S. W. 128.

12. Jack *v.* Mutual Reserve Fund Life Assoc., 113 Fed. 49, 51 C. C. A. 36.

A fair preponderance of the evidence is sufficient to sustain the defense that plaintiff, in an action on a life insurance policy, murdered the insured to obtain the insurance money. Prather *v.* Michigan Mut. L. Ins. Co., 19 Fed. Cas. No 11,368.

Sufficiency of evidence to show murder see Kentucky Mut. L. Ins. Co. *v.* Mellott, (Tex. Civ. App. 1900) 57 S. W. 887.

13. Kerr *v.* Modern Woodmen of America, 117 Fed. 593, 54 C. C. A. 655; Sharland *v.* Washington L. Ins. Co., 101 Fed. 206, 41 C. C. A. 307. See also Brown *v.* Sun L. Ins. Co., (Tenn. Ch. App. 1899) 57 S. W. 415, 51 L. R. A. 252.

Sufficiency of evidence to show that the insured committed suicide see Jenkin *v.* Pacific Mut. L. Ins. Co., 131 Cal. 121, 63 Pac. 180; Stout *v.* Pacific Mut. L. Ins. Co., 130 Cal. 471, 62 Pac. 732; Ross-Lewin *v.* Germania L. Ins. Co., 20 Colo. App. 262, 78 Pac. 305; National Union *v.* Bennet, 20 App. Cas. (D. C.) 527; Somerville *v.* Knights Templars', etc., Life Indemnity Assoc., 11 App. Cas. (D. C.) 417; Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992; Rumbold *v.* Supreme Council Royal League, 103 Ill. App. 596; Supreme Ct. of H. *v.* Schwartz, 96 Ill. App. 587; Chicago Guaranty Fund Life Soc. *v.* Wilson, 55 Ill. App. 138; Sovereign Camp W. of W. *v.* Haller, 24 Ind. App. 108, 56 N. E. 255; Travelers' Ins. Co. *v.* Nitterhouse, 11 Ind. App. 155, 38 N. E. 1110; Beverly *v.* Supreme Tent M. of W., 115 Iowa 524, 88 N. W. 1054; Smith *v.* Ætna L. Ins. Co., 115 Iowa 217, 88 N. W. 368, 56 L. R. A. 271; Metzradt *v.* Modern Brotherhood of America, 112 Iowa 522, 84 N. W. 498; Stephenson *v.* Bankers' Life Assoc., 108 Iowa 637, 79 N. W. 459; Inghram *v.* National Union, 103 Iowa 395, 72 N. W. 559; Ætna L. Ins. Co. *v.* Milward, 118 Ky. 716, 82 S. W. 364, 26 Ky. L. Rep. 589, 68 L. R. A. 285; Union Casualty, etc., Co. *v.* Goddard, 76 S. W. 832, 25 Ky. L. Rep. 1035; Boynton *v.* Equitable L. Assur. Soc., 105 La. 292, 29 So. 490, 52 L. R. A. 687; Wolff *v.* Mutual Reserve Fund L. Assoc., 51 La. Ann. 1260, 26 So. 89; Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 15 So. 388, 49 Am. St. Rep. 348, 24 L. R. A. 589; Wasey *v.* Travelers' Ins. Co., 126 Mich. 119, 85 N. W. 459; Lancaster *v.* Washington L. Ins. Co., 62 Mo. 121; Kornfeld *v.* Supreme Lodge O. M. of P., 72 Mo. App. 604; Modern Woodmen of America *v.* Kozak, 63 Nebr. 146, 88 N. W. 248; Seybold *v.* Supreme Tent K. of M. of W., 86 N. Y. App. Div. 195, 83 N. Y. Suppl. 149; Sweezey *v.* Prudential L. Ins. Co. of America, 3 Misc. (N. Y.) 608, 22 N. Y. Suppl. 1054; Northwestern Mut. L. Ins. Co. *v.* Maguire, 19 Ohio Cir. Ct. 502, 10 Ohio Cir. Dec. 562; New York Mut. L. Ins. Co. *v.* Tillman, 84 Tex. 31, 19 S. W. 294; Equitable L. Assur. Soc. *v.* Liddell, 32 Tex. Civ. App. 252, 74 S. W. 87; New York Mut. L. Ins. Co. *v.* Hayward, 12 Tex. Civ. App. 392, 34 S. W. 801, (1894) 27 S. W. 36; Agen *v.* Metropolitan L. Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905; Rens *v.* Northwestern Mut. Relief Assoc., 100 Wis. 266, 75 N. W. 991; Johns *v.* Northwestern Mut. Relief Assoc., 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587; Hassencamp *v.* Mutual Ben. L. Ins. Co., 120 Fed. 475, 56 C. C. A. 625; Cochran *v.* New York Mut. L. Ins. Co., 79 Fed. 46; Snyder *v.* New York Mut. L. Ins. Co., 22 Fed. Cas. No. 13,154 [*affirmed* in 93 U. S. 393, 23 L. ed. 887].

14. Germania L. Ins. Co. *v.* Ross-Lewin, 24 Colo. 43, 51 Pac. 488, 65 Am. St. Rep. 215.

15. Leman *v.* Manhattan L. Ins. Co., 46 La. Ann. 1189, 49 Am. St. Rep. 348, 15 So. 388, 24 L. R. A. 589.

16. Walther *v.* New York Mut. L. Ins. Co., 65 Cal. 417, 4 Pac. 413. See also *supra*, XIII, G, 2, h, (II), (D).

17. Walcott *v.* Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923.

18. Merritt *v.* Cotton States L. Ins. Co., 55 Ga. 103; Texas Mut. L. Ins. Co. *v.* Brown, 2 Tex. Unrep. Cas. 160; Moore *v.* Connecticut Mut. L. Ins. Co., 17 Fed. Cas. No. 9,755, 1 Flipp. 363; Wolff *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,929, 2 Flipp. 355.

Materiality of evidence.—Although the mere fact that a man commits suicide does not ever raise a presumption of insanity at the time, it is a fact which, in connection with other evidence, becomes very pertinent to the issue, especially where the suicide is immediately preceded by the murder, or attempted mur-

cide.[19] Evidence that the insured was insane at times is insufficient to show suicide while insane.[20]

H. Trial[21] — **1. Course and Conduct in General.** The course and conduct of the trial in an action on a policy of life insurance are governed by the rules applicable to civil actions in general.[22] A stipulation in a certificate of insurance that any action thereon shall be tried before a referee is void as against public policy.[23] An order to have the body of the insured exhumed for autopsy should not be granted the company where no effort was made to procure an autopsy while the body was with the coroner,[24] nor where the application therefor is based on inadmissible statements of the deceased.[25]

2. Questions of Law and Fact — a. In General. The general rules relating to the province[26] of the court and jury in civil actions control as to questions of law,[27]

der, of members of the suicide's family, and the destruction of his property, without any apparent motive, or even provocation. Karow *v.* New York Continental Ins. Co., 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17.

Sufficiency of evidence that the insured was insane when he committed suicide see Cotton States L. Ins. Co. *v.* Merritt, 59 Ga. 664; Central Mut. L. Ins. Assoc. *v.* Anderson, 195 Ill. 135, 62 N. E. 838; Supreme Council K. of E. of W. *v.* Heineman, 78 S. W. 406, 25 Ky. L. Rep. 1604.

19. Wolff *v.* Connecticut Mut. L. Ins. Co., 30 Fed. Cas. No. 17,929, 2 Flipp. 355.

20. New York Knickerbocker L. Ins. Co. *v.* Peters, 42 Md. 414.

21. See, generally, Trial.

Examination of party before trial see Discovery, 14 Cyc. 339 *et seq.*

22. See Trial.

Order of proof.—Where a *prima facie* case is made by plaintiff, without extrinsic evidence that statements in the application are true, such evidence is admissible in rebuttal after evidence by defendant tending to show misrepresentations in the application. Vincent *v.* Mutual Reserve Fund Life Assoc., 77 Conn. 281, 58 Atl. 963. It is not error to allow the policy to be introduced in evidence after plaintiff rested, and after argument by defendant for nonsuit, and without proving the execution and genuineness of the policy, especially where it appears that the policy was incorporated in the complaint as a part thereof. Stepp *v.* National Life, etc., Assoc., 37 S. C. 417, 16 S. E. 134.

Requiring introduction of application.—Where the admissions in the answer and on the trial, and the policy, make a *prima facie* case for plaintiff, it is in the discretion of the court whether or not to require plaintiff to put the application in evidence. Megrue *v.* United L. Ins. Assoc., 71 Hun (N. Y.) 174, 24 N. Y. Suppl. 618.

Reading to jury.—Preliminary proofs of death should not be read in full to the jury on behalf of the insured where there is no contention that they were not properly furnished. Cook *v.* Standard L., etc., Ins. Co., 84 Mich. 12, 47 N. W. 568. Where defendant, on the demand of plaintiff, produced the proofs of death, plaintiff may read to the jury the indorsements thereon to show when the proofs were received by defendant, without being required to read the proofs themselves, where the proofs and indorsements are regarded as separate instruments. Schwarzbach *v.* Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227.

Right to open and close.—Where the sole defense is suicide (Stormont *v.* Waterloo L., etc., Assur. Co., 1 F. & F. 22), or death in violation of law (Murray *v.* New York L. Ins. Co., 85 N. Y. 236), defendant has the right to open and close.

23. Sanford *v.* Commercial Travelers' Mut. Acc. Assoc., 147 N. Y. 326, 41 N. E. 694 [*affirming* 86 Hun 380, 33 N. Y. Suppl. 512].

24. Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277.

25. Grangers' L. Ins. Co. *v.* Brown, 57 Miss. 308, 34 Am. Rep. 446.

26. See, generally, Trial.

27. **Questions of law** for the court: The construction of the contract of insurance. Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199. See also Nielsen *v.* New York Provident Sav. L. Assur. Soc., (Cal. 1901) 66 Pac. 663. The legal effect and the sufficiency of proofs of loss furnished in compliance with the requirements of the policy. McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436; Hermany *v.* Fidelity Mut. L. Assoc., 151 Pa. St. 17, 24 Atl. 1064; Gauche *v.* London, etc., Ins. Co., 10 Fed. 347, 4 Woods 102. See also Fire Insurance, 19 Cyc. 963. Whether a given state of admitted or proved facts as to non-payment of premiums works a forfeiture or lapse of a policy. Massachusetts Ben. Life Assoc. *v.* Robinson, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. Whether plaintiff is entitled to interest. Supreme Lodge K. of H. *v.* Lapp, 74 S. W. 656, 25 Ky. L. Rep. 74. See, generally, Interest, 22 Cyc. 157 *et seq.* Whether the cause of death is within the exceptions in the policy. Dezell *v.* Fidelity, etc., Co., 176 Mo. 253, 75 S. W. 1102; Martin *v.* Equitable Acc. Assoc., 61 Hun (N. Y.) 467, 16 N. Y. Suppl. 279; Martin *v.* Manufacturers' Acc. Indemnity Co., 60 Hun (N. Y.) 535, 15 N. Y. Suppl. 309. Whether the occasional use of intoxicating liquors or an occasional case of excess renders a person of intemperate habits. Drakeford *v.* Supreme Conclave K. of D., 61 S. C. 338, 39 S. E. 523.

and as to questions of fact for the jury[28] in actions upon a policy of life insurance as in other cases.

28. Questions of fact for the jury: The cause of the death of the insured. Ætna L. Ins. Co. *v.* Davey, 123 U. S. 739, 8 S. Ct. 331, 31 L. ed. 315; Supreme Lodge K. of P. *v.* Lloyd, 107 Fed. 70, 46 C. C. A. 153; De Camp *v.* New Jersey Mut. L. Ins. Co., 7 Fed. Cas. No. 3,719. The contents of a lost policy (Metropolitan L. Ins. Co. *v.* Dempsey, 72 Md. 288, 19 Atl. 642), the falsity (Peterson *v.* Des Moines Life Assoc., 115 Iowa 668, 87 N. W. 397; Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Mutual Ben. L. Ins. Co. *v.* Wise, 34 Md. 582; Levie *v.* Metropolitan L. Ins. Co., 163 Mass. 117, 39 N. E. 792; Sternaman *v.* Metropolitan L. Ins. Co., 181 N. Y. 514, 73 N. E. 1133; Kenyon *v.* Knights Templar, etc., Assoc., 122 N. Y. 247, 25 N. E. 299 [*affirming* 48 Hun 278]; Seidenspinner *v.* Metropolitan L. Ins. Co., 70 N. Y. App. Div. 476, 74 N. Y. Suppl. 1108; Keefe *v.* Supreme Council Mut. Ben. Assoc., 52 N. Y. App. Div. 616, 64 N. Y. Suppl. 1012; Breese *v.* Metropolitan L. Ins. Co., 37 N. Y. App. Div. 152, 55 N. Y. Suppl. 775; Davis *v.* Supreme Lodge K. of H., 35 N. Y. App. Div. 354, 54 N. Y. Suppl. 1023; McGinley *v.* U. S. Life Ins. Co., 8 Daly 390; McGrath *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 376; Home Mut. L. Assoc. *v.* Gillespie, 110 Pa. St. 84, 1 Atl. 340; Woodward *v.* Iowa L. Ins. Co., 104 Tenn. 49, 56 S. W. 1020; Sovereign Camp W. of W. *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331; Mutual L. Ins. Co. *v.* Baker, 10 Tex. Civ. App. 515, 31 S. W. 1072; Billings *v.* Metropolitan L. Ins. Co., 70 Vt. 477, 41 Atl. 516; Knickerbocker L. Ins. Co. *v.* Trefz, 104 U. S. 197, 26 L. ed. 708; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287; Maine Union Mut. L. Ins. Co. *v.* Wilkins, 13 Wall. (U. S.) 222, 20 L. ed. 617; Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33, 70), and fraudulent character (Peterson *v.* Des Moines Life Assoc., *supra*; Coughlin *v.* Metropolitan L. Ins. Co., 189 Mass. 538, 76 N. E. 192; Levie *v.* Metropolitan L. Ins. Co., *supra*; Edington *v.* Mutual L. Ins. Co., 67 N. Y. 185; Louis *v.* Connecticut Mut. L. Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Suppl. 683 [*affirmed* in 172 N. Y. 659, 65 N. E. 1119]; Fitch *v.* America Popular L. Ins. Co., 11 Alb. L. J. 91; Northwestern Mut. L. Ins. Co. *v.* Risley, 22 Ohio Cir. Ct. 160, 12 Ohio Cir. Dec. 186; Connecticut Mut. L. Ins. Co. *v.* McWhirter, 73 Fed. 444, 19 C. C. A. 519; Rawlins *v.* Desborough, 2 M. & Rob. 328; Miller *v.* Confederation L. Assur. Co., 11 Ont. 120 [*affirmed* in 14 Ont. App. 218 (*affirmed* in 14 Can. Sup. Ct. 330)]; Bridgman *v.* London L. Assur. Co., 44 U. C. Q. B. 536), of a representation contained in an application for insurance. The materiality of a representation (Globe Mut. L. Ins. Assoc. *v.* Wagner, 90 Ill. App. 444 [*affirmed* in 188 Ill. 133, 58 N. E. 970]; Supreme Council R. A. *v.* Brashears, *supra*; Coughlin *v.* Metropolitan L. Ins. Co., *supra*; Tyler *v.* Ideal Ben. Assoc., 172 Mass. 536, 52 N. E. 1083; Campbell *v.* New England Mut. L. Ins. Co., 98 Mass. 381; Ætna Ins. Co. *v.* Grube, 6 Minn. 82; Louis *v.* Connecticut Mut. L. Ins. Co., *supra*; Northwestern Mut. L. Ins. Co. *v.* Risley, *supra*; Smith *v.* Metropolitan L. Ins. Co., 183 Pa. St. 504, 38 Atl. 1038; Proctor *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 523; Fidelity Mut. Life Assoc. *v.* Harris, 94 Tex. 25, 57 S. W. 635, 86 Am. St. Rep. 813; Ætna L. Ins. Co. *v.* France, 94 U. S. 561, 24 L. ed. 287 [*affirming* 9 Fed. Cas. No. 5,027]; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25 [*affirming* 90 Fed. 390]; Penn Mut. L. Ins. Co. *v.* Mechanics' Sav. Bank, etc., Co., *supra*; Huguenin *v.* Rayley, 6 Taunt. 186, 16 Rev. Rep. 599, 1 E. C. L. 568), except where the representations are made material by stipulations in the policy (Campbell *v.* New England Mut. L. Ins. Co., *supra*; Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166; Schuermann *v.* Union Cent. L. Ins. Co., 165 Mo. 641, 65 S. W. 723; Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196; Ætna L. Ins. Co. *v.* France, 91 U. S. 510, 23 L. ed. 401; Philadelphia Fidelity Mut. Life Assoc. *v.* Miller, 92 Fed. 63, 34 C. C. A. 211; Ferguson *v.* Provincial Provident Inst., 15 Ont. Pr. 366), or their materiality is a matter of common knowledge (Royal Neighbors of America *v.* Wallace, 64 Nebr. 330, 89 N. W. 758; McGowan *v.* Supreme Court I. O. of F., 104 Wis. 173, 80 N. W. 603), or where the uncontradicted evidence in regard thereto clearly shows their materiality or immateriality (Bankers' L. Ins. Co. *v.* Miller, 100 Md. 1, 59 Atl. 116; March *v.* Metropolitan L. Ins. Co., 186 Pa. St. 629, 40 Atl. 1100, 65 Am. St. Rep. 887; Lutz *v.* Metropolitan L. Ins. Co., 186 Pa. St. 527, 40 Atl. 1104; Proctor *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 523). The reasonableness of the delay in returning a reinstatement contract with overdue premiums. Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733. Whether an agent of the company has been guilty of fraud (McCann *v.* Metropolitan L. Ins. Co., 177 Mass. 280, 58 N. E. 1026; Franklin L. Ins. Co. *v.* Villeneuve, 29 Tex. Civ. App. 128, 68 S. W. 203), and whether plaintiff was connected therewith (McCann *v.* Metropolitan L. Ins. Co., *supra*). Whether the use of liquor is occasional or habitual. Drakeford *v.* Supreme Conclave K. of D., 61 S. C. 338, 39 S. E. 523. Whether a person acting as such was in reality an agent of the company (U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646), as well as the extent of his authority (Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E.

b. Taking Case From Jury — (I) *General Rules.* Whether it is proper to grant a nonsuit or direct a verdict in an action on a life policy is governed by the rules applicable to the trial of civil actions in general.[29]

(II) *False Representations.* It has been said that if there is a rational doubt of the falsity of answers in the application for insurance a verdict should

601). Whether a premium has been paid. Union Cent. L. Ins. Co. *v.* Hollowell, 20 Ind. App. 150, 50 N. E. 399. Whether the insurer has waived the non-payment of a premium or assessment. James *v.* Mutual Reserve Fund Life Assoc., 148 Mo. 1, 49 S. W. 978; Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289; King *v.* Masonic Life Assoc., 87 Hun (N. Y.) 591, 34 N. Y. Suppl. 563; Mutual L. Ins. Co. *v.* French, 30 Ohio St. 240, 27 Am. Rep. 443; United Brethren Mut. Aid Soc. *v.* Schwartz, 10 Pa. Cas. 242, 13 Atl. 769; Jackson *v.* Northwestern Mut. Relief Assoc., *supra*. Whether the insured's note was accepted by the agent of the company as an absolute or conditional payment. Security L. Ins., etc., Co. *v.* Elliott, 3 Wkly. Notes Cas. (Pa.) 504. See, generally, Payment. Whether the policy was delivered to take effect at once (Snyder *v.* Nederland L. Ins. Co., 202 Pa. St. 161, 51 Atl. 744), and whether it was accepted by the insured (Equitable L. Assur. Soc. *v.* Mueller, 99 Ill. App. 460). Whether the proofs of loss were actually furnished. McFarland *v.* U. S. Mutual Acc. Assoc., 124 Mo. 204, 27 S. W. 436. Whether the time of payment was extended by a general agent so as to avoid a forfeiture. Wyman *v.* Phœnix Mut. L. Ins. Co., 3 Silv. Sup. (N. Y.) 392, 6 N. Y. Suppl. 289. Whether there was a mailing of a notice which the statute makes a prerequisite to forfeiture of a policy for non-payment of premiums. Howell *v.* John Hancock Mut. L. Ins. Co., 107 N. Y. App. Div. 200, 95 N. Y. Suppl. 87. Whether the insurer is estopped from asserting that the action was not commenced within the time provided in the policy. Walsh *v.* Metropolitan L. Ins. Co., 105 N. Y. App. Div. 186, 93 N. Y. Suppl. 445. Who is an attending physician, within the meaning of that phrase as employed in a life policy requiring an affidavit of the medical attendant as part of the proofs of death. Gibson *v.* American Mut. L. Ins. Co., 37 N. Y. 580.

Definition of terms.— It is for the court to define the words "sickness and disease," as used in a question in an application for life insurance as to whether the applicant had had any sickness or disease within seven years, and for the jury to say whether an ailment proved was within the definition. Cheever *v.* Union Cent. L. Ins. Co., 8 Ohio Dec. (Reprint) 175, 6 Cinc. L. Bul. 196.

Propriety of stopping at prohibited place of residence.— Where the insured, in passing, as a passenger, over a usual route of conveyance from one place of permitted residence to another, stopped at a place of prohibited residence to consult a physician, and on his advice remained there, and died shortly thereafter, whether such interruption of the journey was improper was a mixed question of law and fact for the jury. Converse *v.* Knights Templars', etc., Life Indemnity Co., 93 Fed. 148, 35 C. C. A. 232.

29. See Dismissal and Nonsuit; Trial.

Proofs of loss.—Where the evidence shows that the insurer had not waived proofs of death and no proofs of death have been filed by plaintiff, a nonsuit is proper. Wallace *v.* Metropolitan L. Ins. Co., 14 Pa. Super. Ct. 617. Evidence that the insured furnished written proofs of loss, which were retained by the insurer without objecting to their sufficiency, is sufficient evidence that the insured had a just claim on the policy to preclude the directing of a verdict. Manhattan L. Ins. Co. *v.* Francisco, 17 Wall. (U. S.) 672, 21 L. ed. 698. The weight to be given admissions in proofs of loss made by a beneficiary in an action on a life policy is a question for the jury, to be determined by a consideration of all the facts and circumstances showing or tending to show a knowledge of their contents or otherwise. Modern Woodmen of America *v.* Kozak, 63 Nebr. 146, 88 N. W. 248.

Submission to jury as determined by existence or sufficiency of evidence of particular facts — *Agency of person procuring insurance in behalf of insurer.*— Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207.

Cancellation or surrender of policy.—Frain *v.* Metropolitan L. Ins. Co., 67 Mich. 527, 35 N. W. 108; Boorman *v.* Northwestern Mut. Relief Assoc., 90 Wis. 144, 62 N. W. 924.

Delivery and acceptance of policy.— Heiman *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 153, 10 Am. Rep. 154; Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; Page *v.* Virginia L. Ins. Co, 131 N. C. 115, 42 S. E. 543; McCarthy *v.* Mutual Reserve Fund Life Assoc., 32 Tex. Civ. App. 548, 74 S. W. 921; U. S. Life Ins. Co. *v.* Ross, 102 Fed. 722, 42 C. C. A. 601; Smith *v.* Provident Sav. L. Assur. Soc., 65 Fed. 765, 13 C. C. A. 284.

Estoppel or waiver.— Sheldon *v.* Connecticut Mut. L. Ins. Co., 25 Conn. 207, 65 Am. Dec. 565; Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894; Hastings *v.* Brooklyn L. Ins. Co., 138 N. Y. 473, 34 N. E. 289; Cross *v.* Security Trust, etc., Ins. Co., 58 N. Y. App. Div. 602, 69 N. Y. Suppl. 189; Spitz *v.* Mutual Ben. Life Assoc., 5 Misc. (N. Y.) 245, 25 N. Y. Suppl. 469; Kolgers *v.* Guardian L. Ins. Co., 10 Abb. Pr. N. S. (N. Y.) 176; Mutual Protection L. Ins. Co *v.* Lanry, 84 Pa. St. 43; White *v.* Metropolitan L. Ins. Co., 22 Pa. Super. Ct. 501; Lantz *v.* Insurance Co., 25 Wkly. Notes Cas. (Pa.) 356; Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207.

not be directed for defendant.[30] If the evidence is conflicting in some particulars, leaving inferences and deductions to be drawn in arriving at the ultimate fact, the case should not be taken from the jury, regardless of the weight of evi-

Extent of loss.— La Manna *v.* National Security Life, etc., Co., 128 N. Y. 613, 28 N. E. 253 [*affirming* 10 N. Y. Suppl. 221]; Walcott *v.* Metropolitan L. Ins. Co., 64 Vt. 221, 24 Atl. 992, 33 Am. St. Rep. 923.

Good health of insured when policy delivered.— Barker *v.* Metropolitan L. Ins. Co., 188 Mass. 542, 74 N. E. 945; Plumb *v.* Penn Mut. L. Ins. Co., 108 Mich. 94, 65 N. W. 611; Genung *v.* Metropolitan L. Ins. Co., 60 N. Y. App. Div. 424, 69 N. Y. Suppl. 1041; Barnes *v.* Fidelity Mut. Life Assoc., 191 Pa. St. 618, 43 Atl. 341, 45 L. R. A. 264 (holding that whether an insured who, at the time of the payment of the premium and delivery of the policy, was in bed with a cold which developed into pneumonia, which caused his death two days later, was in "good health" within the meaning of the policy, is for the jury); Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599; Woodmen of the World *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331.

Identity of application signed by insured.— Walsh *v.* Metropolitan L. Ins. Co., 105 N. Y. App. Div. 186, 93 N. Y. Suppl. 445.

Insurable interest.— McGraw *v.* Metropolitan L. Ins. Co., 5 Pa. Super. Ct. 488; Langdon *v.* Union Mut. L. Ins. Co., 14 Fed 272.

Intemperance so as to impair health after application.— Janneck *v.* Metropolitan L. Ins. Co., 13 N. Y. App. Div. 514, 43 N. Y. Suppl. 669.

New agreement.— Krause *v.* Equitable L. Assur. Soc., 105 Mich. 329, 63 N. W. 440; Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

Payment of claim.— Mellerup *v.* Travelers' Ins. Co., 95 Iowa 317, 63 N. W. 665. Where a life policy is settled for less than its face by representations by the company that the policy is not collectable when in fact it is collectable, and suit is afterward brought for the balance due thereon, the question whether there was any consideration which would render the settlement a valid accord and satisfaction should be submitted to the jury. Franklin Ins. Co. *v.* Villeneuve, 25 Tex. Civ. App. 356, 60 S. W. 1014.

Payment of premiums.— Spencer *v.* Travelers' Ins. Co., 112 Mo. App. 86, 86 S. W. 899; Neuendorff *v.* World Mut. L. Ins. Co., 69 N. Y. 389; O'Connell *v.* Fidelity, etc., Co., 87 N. Y. App. Div. 306, 84 N. Y. Suppl. 315; Going *v.* Mutual Ben. L. Ins. Co., 58 S. C. 201, 36 S. E. 556; Mutual Reserve Fund Life Assoc. *v.* Hamlin, 139 U. S. 297, 11 S. Ct. 614, 35 L. ed. 167. See also Frain *v.* Metropolitan L. Ins. Co., 67 Mich. 527, 35 N. W. 108.

Waiver of proofs of loss.—Jennings *v.* Metropolitan L. Ins. Co., 148 Mass. 61, 18 N. E. 601; Reynolds *v.* Equitable Acc. Assoc., 59 Hun (N. Y.) 13, 1 N. Y. Suppl. 738; Delamater *v.* Prudential Ins. Co., 1 Silv. Sup. (N. Y.) 538, 5 N. Y. Suppl. 586; Dial *v.* Valley Mut. Life Assoc., 29 S. C. 560, 8 S. E. 27.

Waiver of contractual limitations as to time to sue.— Bowen *v.* Preferred Acc. Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Suppl. 840; Tobin *v.* Workingmen's Co-operative Assoc., 66 N. Y. App. Div. 21, 72 N. Y. Suppl. 926.

30. Henn *v.* Metropolitan L. Ins. Co., 67 N. J. L. 310, 51 Atl. 689.

Health at time of application.— Where the right to recover on a life policy depends on whether insured was in sound health at the time he was insured, and plaintiff's testimony would warrant a verdict for her, and defendant's testimony a verdict for it, the case is for the jury. Dorey *v.* Metropolitan L. Ins. Co., 172 Mass. 234, 51 N. E. 974.

Evidence held sufficient to take case to jury see Metropolitan L. Ins. Co. *v.* Moravec, 214 Ill. 186, 73 N. E. 415; New Home Life Assoc. *v.* Owen, 39 Ill. App. 413; Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568; Supreme Council R. A. *v.* Brashears, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244; Wright *v.* Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303; Levie *v.* Metropolitan L. Ins. Co., 163 Mass. 117, 39 N. E. 792; Rhode *v.* Metropolitan L. Ins. Co., 129 Mich. 112, 88 N. W. 400; Henn *v.* Metropolitan L. Ins. Co., 67 N. J. L. 310, 51 Atl. 689; Tucker *v.* United Life, etc., Ins. Assoc., 133 N. Y. 548, 30 N. E. 723; Edington *v.* New York Mut. L. Ins. Co., 67 N. Y. 185; Boos *v.* World Mut. L. Ins. Co., 64 N. Y. 236; Schmitt *v.* Michigan Mut. L. Ins. Co., 101 N. Y. App. Div. 12, 91 N. Y. Suppl. 448; Bowen *v.* Preferred Acc. Ins. Co., 82 N. Y. App. Div. 458, 81 N. Y. Suppl. 840; O'Farrell *v.* Metropolitan L. Ins. Co., 44 N. Y. App. Div. 554, 60 N. Y. Suppl. 945; Doty *v.* New York State Mut. Ben. Assoc., 5 Silv. Sup. (N. Y.) 581, 9 N. Y. Suppl. 42; Boos *v.* World Mut. L. Ins. Co., 4 Hun (N. Y.) 133, 6 Thomps. & C. 364 [*affirmed* in 64 N. Y. 236]; McGrath *v.* Metropolitan L. Ins. Co., 6 N. Y. St. 376; Union Cent. L. Ins. Co. *v.* Cheever, 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19; O'Hara *v.* United Brethren Mut. Aid Soc., 134 Pa. St. 417, 19 Atl. 683, 684; Home Mut. Life Assoc. *v.* Gillespie, 110 Pa. St. 84, 1 Atl. 340; Proctor *v.* Metropolitan L. Ins. Co., 20 Pa. Super. Ct. 523; Cobb *v.* Metropolitan L. Ins. Co., 19 Pa. Super. Ct. 228; Holleran *v.* Life Assur. Co. of America, 18 Pa. Super. Ct. 573; Cowen *v.* Equitable L. Assur. Soc., (Tex. Civ. App. 1905) 84 S. W. 404; Mutual Reserve Fund Life Assoc. *v.* Bozeman, 21 Tex. Civ. App. 490, 52 S. W. 94; McGowan *v.* Supreme Court I. O. of F., 104 Wis. 173, 80 N. W. 603; Mouler *v.* American L. Ins. Co., 101 U. S. 708, 25 L. ed. 1077; Black *v.* Travelers' Ins. Co., 121 Fed. 732, 58 C. C. A. 14, 61 L. R. A. 500; Hubbard *v.* Mutual Reserve Fund Life Assoc.,

dence.[31] On the other hand, where a material false representation or breach of warranty is shown by the uncontradicted evidence, and no waiver thereof by the insurer is proved, a nonsuit should be granted or a verdict directed for defendant.[32]

(III) *DEATH AND CAUSE THEREOF.* Since circumstantial evidence of death is sufficient to support an action on a life policy, a nonsuit should not be granted, if such evidence is produced, although the policy stipulates for direct and positive proof.[33] If there is a dispute as to the controlling facts as to the cause of death, or if the undisputed facts are so inconclusive in their nature that reasonable men may draw different inferences, the question is for the jury.[34] But where the reasonable probabilities from the evidence all point to suicide as the cause of death so as to establish it in the light of reason and common sense, with such certainty as to leave no room for reasonable controversy on the subject, the question should be decided by the trial court as one of law.[35]

3. INSTRUCTIONS — a. General Rules In an action on a life insurance policy the necessity for and sufficiency of instructions are governed by the general rules applicable to instructions in civil actions in general.[36] For example instructions in such an action must be unambiguous[37] and they must not be contradictory[38]

100 Fed. 719, 40 C. C. A. 665; Trefz *v.* Knickerbocker L. Ins. Co., 24 Fed. Cas. No. 14,166.

31. Haughton *v.* Ætna L. Ins. Co., 165 Ind. 32, 73 N. E. 592, 74 N. E. 613.

32. *Connecticut.*—Ward *v.* Metropolitan L. Ins. Co., 66 Conn. 227, 33 Atl. 902, 50 Am. St. Rep. 80.

Mississippi.— Mutual Reserve Fund Life Assoc. *v.* Opp, (1901) 30 So. 69.

New York.— Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. St. Rep. 729; Finn *v.* Prudential Ins. Co., 98 N. Y. App. Div. 588, 90 N. Y. Suppl. 697; Trudden *v.* Metropolitan L. Ins. Co., 69 N. Y. App. Div. 392, 74 N. Y. Suppl. 1083; Brady *v.* Industrial Ben. Assoc., 79 Hun 156, 29 N. Y. Suppl. 768; Boland *v.* Industrial Ben. Assoc., 74 Hun 385, 26 N. Y. Suppl. 433; Studwell *v.* Mutual Ben. Life Assoc., 61 N. Y. Super. Ct. 287, 19 N. Y. Suppl. 709 [*affirmed* in 139 N. Y. 615, 35 N. E. 204]; Furniss *v.* New York Mut. L. Ins. Co., 46 N. Y. Super. Ct. 467.

Pennsylvania.—Smith *v.* Northwestern Mut. L. Ins. Co., 196 Pa. St. 314, 46 Atl. 426; Quirk *v.* Metropolitan L. Ins. Co., 12 Pa. Super. Ct. 250.

Texas.— Security Mut. L. Ins. Co. *v.* Calvert, (Civ. App. 1905) 87 S. W. 889.

United States.— Priestly *v.* Provident Sav. Co., 112 Fed. 271.

See 28 Cent. Dig. tit. "Insurance," §§ 1758, 1759.

Stating grounds of motion.—Where defendant's motion to dismiss and for the direction of a verdict in an action on a policy were general, and did not specify as a ground a particular breach of warranty as proved by the evidence, there was no error in submitting the case to the jury, although the facts proved were sufficient to show the breach. Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

33. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18.

Sufficiency of evidence of identity of deceased to go to jury see Potter *v.* Union Cent. L. Ins. Co., 195 Pa. St. 557, 46 Atl. 111; Wackerle *v.* Mutual L. Ins. Co., 14 Fed. 23, 4 McCrary 508.

34. Seybold *v.* Supreme Tent K. of M. of W., 86 N. Y. App. Div. 195, 83 N. Y. Suppl. 149.

Evidence as to suicide held sufficient to raise question for jury see Treat *v.* Merchants' Life Assoc., 198 Ill. 431, 64 N. E. 992; Ætna L. Ins. Co. *v.* Kaiser, 115 Ky. 539, 74 S. W. 203, 24 Ky. L. Rep. 2454; Arnold *v.* Connecticut Mut. L. Ins. Co., 95 Me. 331, 49 Atl. 1103; Sartell *v.* Royal Neighbors of America, 85 Minn. 369, 88 N. W. 985; Hale *v.* Life Indemnity, etc., Co., 61 Minn. 516, 63 N. W. 1108, 52 Am. St. Rep. 616; Harms *v.* Metropolitan L. Ins. Co., 67 N. Y. App. Div. 139, 73 N. Y. Suppl. 513; Goldschmidt *v.* New York Mut. L. Ins. Co., 12 N. Y. Suppl. 866; Washburn *v.* National Acc. Soc., 10 N. Y. Suppl. 366; Dischner *v.* Piqua Mut. Aid, etc., Assoc., 14 S. D. 436, 85 N. W. 998.

Insanity as question for jury see Mutual Ben. L. Ins. Co. *v.* Daviess, 87 Ky. 541, 9 S. W. 812, 10 Ky. L. Rep. 577; Arnold *v.* Connecticut Mut. L. Ins. Co., 95 Me. 331, 49 Atl. 1103; McClure *v.* New York Mut. L. Ins. Co., 55 N. Y. 651; Charter Oak L. Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. ed. 433.

35. Agen *v.* Metropolitan L. Ins. Co., 105 Wis. 217, 80 N. W. 1020, 76 Am. St. Rep. 905. And see Hart *v.* Fraternal Alliance, 108 Wis. 490, 84 N. W. 851 *Compare* Welts *v.* Connecticut Mut. L. Ins. Co., 46 Barb. (N. Y.) 412.

36. See TRIAL.

Correct instructions as curing incorrect instructions see Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493; Union Cent. L. Ins. Co. *v.* Hollowell, 14 Ind. App. 611, 43 N. E. 277; Roche *v.* Supreme Lodge K. of H., 21 N. Y. App. Div. 599, 47 N. Y. Suppl. 774.

37. Christian *v.* Connecticut Mut. L. Ins. Co., 143 Mo. 460, 45 S. W. 268.

38. Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199.

or misleading,[39] and must be confined to the issues[40] and applicable to the evidence.[41] So the instructions must not give undue prominence to any particular testimony.[42] The court must not invade the province of the jury in its charge,[43] nor, on the other hand, submit questions of law to the jury.[44] A request to instruct is generally necessary,[45] but the request may be refused unless it can be given in the language thereof without modification.[46] A request to instruct is properly refused where the matter has been covered by the general charge or other specific instructions.[47] When requested it is the duty of the court to give full instructions, correctly stating the law of the case.[48]

39. *Alabama.*—U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

Colorado.— Denver L. Ins. Co. *v.* Crane, 19 Colo. App. 191, 73 Pac. 875; Des Moines Life Assoc. *v.* Owen, 16 Colo. App. 60, 63 Pac. 781.

Iowa.— Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568.

Michigan.— Wasey *v.* Travelers' Ins. Co., 126 Mich. 119, 85 N. W. 459.

New York.— Dwight *v.* Germania L. Ins. Co., 103 N. Y. 341, 8 N. E. 654, 57 Am. Rep. 729.

Texas.— Texas Mut. L. Ins. Co. *v.* Brown, 2 Tex. Unrep. Cas. 160.

40. *Illinois.*— Ætna L. Ins. Co. *v.* Sanford, 200 Ill. 126, 65 N. E. 661 [*affirming* 98 Ill. App. 376]; Covenant Mut. Life Assoc. *v.* Cox, 71 Ill. App. 39.

Missouri.— Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

Ohio.— Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272.

Texas.— National Fraternity *v.* Karnes, 24 Tex. Civ. App. 607, 60 S. W. 576.

United States.— Connecticut Mut. L. Ins. Co. *v.* Hillmon, 107 Fed. 834, 46 C. C. A. 668.

41. *Alabama.*—U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646.

Illinois.— Provident Sav. L. Assur. Soc. *v.* Cannon, 201 Ill. 260, 66 N. E. 388.

Michigan.— Brown *v.* Metropolitan L. Ins. Co., 65 Mich. 306, 32 N. W. 610, 8 Am. St. Rep. 894.

Minnesota.— Price *v.* Phœnix Mut. L. Ins. Co., 17 Minn. 497, 10 Am. Rep. 166, holding that proof that the insured had gastritis will not sustain a charge that he had chronic gastritis, nor will such proof sustain the charge that he had a "severe sickness or disease," within the terms of the policy.

Missouri.— Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691.

New York.— Regan *v.* Prudential Ins. Co., 33 Misc. 78, 67 N. Y. Suppl. 197.

Ohio.— Northwestern Mut. L. Ins. Co. *v.* Risley, 22 Ohio Cir. Ct. 160, 12 Ohio Cir. Dec. 186.

Pennsylvania.— Wells *v.* New England Mut. L. Ins. Co., 191 Pa. St. 207, 43 Atl. 126, 71 Am. St. Rep. 763, 53 L. R. A. 327.

Wisconsin.— Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733.

United States.— Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922; New York Mut. L. Ins. Co. *v.* Snyder, 93 U. S. 393, 23 L. ed. 887.

42. See Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204.

43. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. 646; Northwestern Mut. L. Ins. Co. *v.* Muskegon Nat. Bank, 122 U. S. 501, 7 S. Ct. 1221, 30 L. ed. 1100, holding that instructions which attempted to define for the jury the number of times the assured must have got drunk or had a spree, or how closely such excesses must have succeeded each other, to constitute him an "habitual drunkard," and thus avoid or forfeit the policy, are rightfully refused. See also Supreme Lodge K. of P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877.

44. Nielsch *v.* Provident Sav. L. Assur. Soc., (Cal. 1901) 66 Pac. 663.

45. See TRIAL.

46. Baldi *v.* Metropolitan Ins. Co., 18 Pa. Super. Ct. 599, where a request was refused because it could not be given without explanation of the meanings of the terms used therein.

47. Union Cent. L. Ins. Co. *v.* Fox, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885; New York Fidelity, etc., Co. *v.* Egbert, 84 Fed. 410, 28 C. C. A. 281.

48. See Carmichael *v.* John Hancock Mut. L. Ins. Co., 48 Misc. (N. Y.) 386, 95 N. Y. Suppl. 587; Regan *v.* Prudential Ins. Co., 33 Misc. (N. Y.) 78, 67 N. Y. Suppl. 197.

Questions of law.— In an action on a life policy, where the defense is a breach of assured's warranty that he had no disease of a certain kind, the inference from the certificate of the attending physician as to the cause of death is a proper subject for argument to the jury, but not a question of law requiring an instruction as to what the certificate tends to prove outside of the facts recited therein. Continental L. Ins. Co. *v.* Yung, 113 Ind. 159, 15 N. E. 220, 3 Am. St. Rep. 630.

Presumption of innocence.— A charge that an insured is entitled to the presumption of innocence should be given on request, where the insurer charges that insured obtained the policy by fraud. Guiltinan *v.* Metropolitan L. Ins. Co., 69 Vt. 469, 38 Atl. 315.

Instructions as to burden of proof.— An instruction that the burden of proof is on a party to "establish" a certain fact is erroneous, not being synonymous with the requirement of a preponderance of evidence. Endowment Rank O. of K. P. *v.* Steele, 107

b. False Representations. Instructions bearing on the issue of false representations in the application for insurance[49] need not take up each particular

Tenn. 1, 63 S. W. 1126. The court left it to the jury to say if the insured was sane and if other evidence pointed "irresistibly" to suicide, saying that if he was sane they would have to scan the evidence very closely and overcome "many doubts and a strong presumption" of the law to find suicide. It was held to be an unfair enlargement of the burden of proof. Bachmeyer *v.* Mutual Reserve Fund Life Assoc., 87 Wis. 325, 58 N. W. 399. An instruction that to show fraud "the facts must lead naturally and clearly to the facts sought to be established, and must be inconsistent with any other reasonable or probable theory," is not erroneous, in connection with a further charge that to establish the defense only a fair preponderance of evidence is required. Ley *v.* Metropolitan L. Ins. Co., 120 Iowa 203, 94 N. W. 568. And see, generally, Federal Life Assoc. *v.* Smith, 86 Ill. App. 427; New York Mut. L. Ins. Co. *v.* Nichols, (Tex. Civ. App. 1894) 24 S. W. 910.

Presumption that policy is valid.— An instruction that the presumption was that the policy was valid until the contrary was made to appear, and that "this is only one form of saying that the burden of proof rests upon the defendant, and not upon the plaintiff, to show that the policy is not a legal and binding contract, as it purports to be," was not erroneous as a whole. Hale *v.* Life Indemnity, etc., Co., 65 Minn. 548, 68 N. W. 182.

Effect of policy as contract.—Where there is an averment of performance of all the conditions of the policy, and the court has charged that the parties are bound by all its conditions, it is error to add, "unless there is something in the evidence that satisfies you that the parties did not know, and did not enter into this policy knowing its terms and conditions," since the action is for the enforcement of the whole policy, and not set it aside or evade its conditions. Metropolitan L. Ins. Co. *v.* Howle, 62 Ohio St. 204, 56 N. E. 908.

Instruction as to issuance and delivery of policy see Regan *v.* Prudential Ins. Co., 33 Misc. (N. Y.) 78, 67 N. Y. Suppl. 197; Home Mut. Life Assoc. *v.* Riel, 1 Mona. (Pa.) 615, 17 Atl. 36; Dargan *v.* Equitable L. Assur. Soc., 71 S. C. 356, 51 S. E. 125; International Order of Twelve, etc. *v.* Boswell, (Tex. Civ. App. 1899) 48 S. W. 1108 (forgery); Clausen *v.* Jones 18 Tex. Civ. App. 376, 45 S. W. 183.

Instructions as to construction of policy see Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199.

Assignment of interest by beneficiary.— A charge that the beneficiary in a policy could assign his interest, "subject to the same limitations as provided for and conditioned on the contract," does not ignore the conditions relative to assignments printed in the policy. Crosswel *v.* Connecticut Indemnity Assoc., 51 S. C. 103, 28 S. E. 200.

Instructions as to forfeiture for intemperance impairing health or use of opiates see Renn *v.* Supreme Lodge K. P., 83 Mo. App. 442; Williford *v.* Ætna L. Ins. Co., 64 S. C. 329, 42 S. E. 165; Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371. An instruction defining "delirium tremens" to signify "that diseased condition of the brain said to be produced by the excessive and prolonged use of spirituous liquors" is as favorable to the insurance company as it has a right to expect. Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 24 N. E. 86, 375.

Instructions as to good health at time of issuance of policy see Barker *v.* Metropolitan L. Ins. Co., 188 Mass. 542, 74 N. E. 945; Metropolitan L. Ins. Co. *v.* Howle, 68 Ohio St. 614, 68 N. E. 4; Woodmen of the World *v.* Locklin, 28 Tex. Civ. App. 486, 67 S. W. 331, sufficient definition of serious illness.

Instructions as to waiver of ground of forfeiture see Ætna L. Ins. Co. *v.* Sanford, 200 Ill. 126, 65 N. E. 661; Penn Mut. L. Ins. Co. *v.* Keach, 134 Ill. 583, 26 N. E. 106; Jones *v.* Preferred Bankers' L. Assur. Co., 120 Mich. 211, 79 N. W. 204; Howell *v.* John Hancock Mut. L. Ins. Co., 107 N. Y. App. Div. 200, 95 N. Y. Suppl. 87; Ætna L. Ins. Co. *v.* Hanna, 81 Tex. 487, 17 S. W. 35; Schmertz *v.* U. S. Life Ins. Co., 118 Fed. 250, 55 C. C. A. 104.

Forfeiture of policy by travel. — The court properly instructed the jury that the policy was not avoided by the insured going to China and Japan, even though in violation of the terms of the policy, the evidence being sufficient to show a waiver. Mutual Ben. L. Ins. Co. *v.* Martin, 108 Ky. 11, 55 S. W. 694, 21 Ky. L. Rep. 1465.

49. See cases cited *infra*, this note.

Definition of warranty as meaning more than an agreement — it means a guaranty — is improper, since the words have distinct meanings. Masons' Union L. Ins. Assoc. *v.* Brockman, 20 Ind. App. 206, 50 N. E. 493.

Falsity of one answer.—An instruction that the jury cannot find for the insurer unless both answers claimed to be false were shown to be false was misleading, where the falsity of either would avoid the policy. Des Moines Life Assoc. *v.* Owen, 16 Colo. App. 60, 63 Pac. 781.

Acts amounting to breach of warranty.— An instruction that the insured warranted the answers in his application to be full, complete, and true, but not informing them what would amount to a breach or what the legal consequences of a breach would be, is properly refused. Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

Answers as relating to policy sued on.— An instruction that if any of the answers made

disease named in the application and specifically charge that a false statement in regard thereto precludes a recovery.[50] The distinction between material and immaterial representations must not be disregarded in the charge.[51] If the policy provides that it shall be void if the representations are false "or" fraudulent, an instruction that a recovery could not be defeated unless the misrepresentation was both false and fraudulent is erroneous.[52]

c. Death of Insured and Cause Thereof.[53] An instruction that the presumption of law is against suicide is sufficient, and the court will not be required to give to the jury the reasons on which such presumption rests.[54] It has been held, however, that it is improper to instruct that the presumption of law is against suicide, where there is substantial evidence on that issue.[55] A charge that the presumption is against suicide, whether the insured was sane or insane, is misleading, where the uncontradicted evidence shows that the insured was suffering from a species of insanity usually attended with suicidal tendencies.[56] It is proper to charge that the jury may consider, on the issue of death by suicide, the instinctive love of life which ordinarily exists.[57]

d. Insanity of Insured.[58] Where plaintiff relies on the insanity of the insured to defeat a plea of death by suicide it is proper to refuse an instruction intimating that the plea of insanity has led to abuse in the administration of justice, and which advises the jury that it must be examined with care.[59] If suicide is a defense even when committed while insane it is proper to instruct that it is immaterial whether the insured was sane or insane, if he committed suicide.[60]

4. VERDICT AND FINDINGS. The rules governing general verdicts[61] and special

by insured, and which were warranted by him to be true, were not true, their verdict should be for defendant, is properly refused, where it is a question of fact whether or not the answers referred to relate to the policy sued on. Ames *v.* Manhattan L. Ins. Co., 40 N. Y. App. Div. 465, 58 N. Y. Suppl. 244.

Instructions held sufficient or erroneously refused see Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877; Metropolitan L. Ins. Co. *v.* Dempsey, 72 Md. 288, 19 Atl. 642; New York L. Ins. Co. *v.* Flack, 3 Md. 341, 56 Am. Dec. 742; Wilson *v.* Royal Neighbors of America, 139 Mich. 423, 102 N. W. 957; Blumenthal *v.* Berkshire L. Ins. Co., 134 Mich. 216, 96 N. W. 17, 104 Am. St. Rep. 604; Elliott *v.* Des Moines Life Assoc., 163 Mo. 132, 63 S. W. 400; Christian *v.* Connecticut Mut. L. Ins. Co., 143 Mo. 460, 45 S. W. 268; Union Cent. L. Ins. Co. *v.* Cheever, 7 Ohio Dec. (Reprint) 254, 2 Cinc. L. Bul. 19; Hayes *v.* Virginia Mut. Protection Assoc., 76 Va. 225; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25.

Instructions held insufficient or properly refused see Globe Mut. L. Ins. Assoc. *v.* Ahern, 191 Ill. 167, 60 N. E. 806; Union L. Ins. Co. *v.* Jameson, 31 Ind. App. 28, 67 N. E. 199; McAllister *v.* Connecticut Mut. L. Ins. Co., 78 Ky. 531; Malicki *v.* Chicago Guaranty Fund Life Soc., 123 Mich. 148, 81 N. W. 1073; Hann *v.* National Union, 97 Mich. 513, 56 N. W. 834, 37 Am. St. Rep. 365; Arnold *v.* Metropolitan L. Ins. Co., 22 Pa. Super. Ct. 575; Jackson *v.* Northwestern Mut. Relief Assoc., 78 Wis. 463, 47 N. W. 733.

50. Doty *v.* New York State Mut. Ben. Assoc., 5 Silv. Sup. (N. Y.) 581, 9 N. Y. Suppl. 42 [*affirmed* in 132 N. Y. 596, 30 N. E. 1151].

51. Spring *v.* Chautauqua Mut. Life Assoc., 14 N. Y. Suppl. 904 [*affirmed* in 131 N. Y. 586, 30 N. E. 67].

52. Texas Mut. L. Ins. Co. *v.* Davidge, 51 Tex. 244.

53. Instructions as to fact of death see Fidelity Mut. Life Assoc. *v.* Mettler, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922. An instruction that the continued absence of the insured without being heard from by his relatives and friends should be given due weight is not objectionable where the jury are not left to infer death from the mere fact of disappearance. Fidelity Mut. Life Assoc. *v.* Mettler, *supra*.

Instruction as to proofs of death as prima facie evidence of cause of death see Ætna L. Ins. Co. *v.* Ward, 140 U. S. 76, 11 S. Ct. 720, 35 L. ed. 371; Sargent *v.* Home Ben. Assoc., 35 Fed. 711.

54. Sharland *v.* Washington L. Ins. Co., 101 Fed. 206, 41 C. C. A. 307.

55. Sackberger *v.* National Grand Lodge I. O. T. L., 73 Mo. App. 38.

56. Wasey *v.* Travelers' Ins. Co., 126 Mich. 119, 85 N. W. 459.

57. Supreme Lodge K. P. *v.* Foster, 26 Ind. App. 333, 59 N. E. 877.

58. See, generally, INSANE PERSONS.

59. Marceau *v.* Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 866, 36 Pac. 813.

60. Jenkins *v.* National Union, 118 Ga. 587, 45 S. E. 449.

61. See Hayes *v.* Virginia Mut. Protection Assoc., 76 Va. 225, holding that a finding "for the defendant on the issue joined" was proper as a finding on all the issues, where there were several issues involved.

verdicts,[62] and findings by the court,[63] in actions on life insurance policies, are the same as those that apply in civil actions generally.[64]

I. New Trial. New trials of actions on life insurance policies are governed by the same rules that apply in civil actions generally.[65]

J. Judgment — 1. General Rules. The judgment must conform to the pleadings and evidence,[66] and to the verdict or findings.[67] While the relief granted is not confined to that especially prayed for,[68] relief different from that prayed for in the complaint will not generally be granted.[69] And in other respects judgment is also governed by the rules applicable to judgments in civil actions in general.[70]

A special verdict controls a general one where they are inconsistent. Maceman *v.* Equitable L. Assur. Soc., 69 Minn. 285, 72 N. W. 111.

62. See cases cited *infra*, this note.

Propriety of special interrogatories.—Where the defense was suicide, it was proper to refuse to submit a special finding as to whether the deceased committed suicide, since such finding was directly involved in the general issue; and it was proper to refuse a special finding as to whether the insured was killed by any other person because not presenting a controlling issue, inasmuch as it did not follow that defendant would not be liable if the death was by accident. Inghram *v.* National Union, 103 Iowa 395, 72 N. W. 559. An interrogatory as to whether the insured had any illness affecting his health between the time of his examination by the physician of the insurer and the time that he signed certain health certificates was properly refused for failure to include therein a definition of sound health, which, under the facts and circumstances of the case, was an important question for the jury to consider. Ohio Mut. Life Assoc. *v.* Draddy, 10 Ohio S. & C. Pl. Dec. 591, 8 Ohio N. P. 140.

Sufficiency of findings see Germania L. Ins. Co. *v.* Lunkenheimer, 127 Ind. 536, 26 N. E. 1082; Standard L., etc., Ins. Co. *v.* Strong, 13 Ind. App. 315, 41 N. E. 604.

Immaterial findings see John Hancock Mut. L. Ins. Co. *v.* Daly, 65 Ind. 6.

Setting aside findings.— A special finding in effect that the health of insured had changed in the six days between his application and the delivery of the policy should be set aside where the evidence as to his health at each date is precisely the same. Temple *v.* Massachusetts Ben. Life Assoc., 124 N. C. 66, 32 S. E. 380.

63. Conway *v.* Supreme Council C. K. of A., 131 Cal. 437, 63 Pac. 727, holding that the failure to find on the issue as to whether the claim was barred by limitations was error.

Admitted facts.— Payment of fees, where admitted, need not be made the subject of a finding. Northwestern Benev. Soc. *v.* Dudley, 27 Ind. App. 327, 61 N. E. 207.

64. See Trial.

65. Holtum *v.* Germania L. Ins. Co., 139 Cal. 645, 73 Pac. 591 (holding that it was proper to grant a new trial to the insurer on the ground that the verdict that the evidence did not show a breach of representations was contrary to the evidence); Given *v.* Prudential Ins. Co., 44 N. Y. App. Div. 549, 60 N. Y. Suppl. 959 (holding that a new trial should be granted the insurer on affidavits of newly discovered witnesses that another person was substituted and examined under the name of deceased); Leonard *v.* New England Mut. L. Ins. Co., 22 R. I. 519, 48 Atl. 808 (holding that the fact that the question whether the application was signed by the insured after the answers were reduced to writing, as submitted to the jury, raised only a remotely material issue, constituted no ground for a new trial); Wackerle *v.* Mutual L. Ins. Co., 14 Fed. 23, 4 McCrary 508. See, generally, New Trial.

66. Mutual L. Ins. Co. *v.* Dingley, 100 Fed. 408, 40 C. C. A. 459, 49 L. R. A. 132. See, generally, Judgments, 23 Cyc. 816.

67. See Metropolitan L. Ins. Co. *v.* Bowser, 20 Ind. App. 557, 50 N. E. 86.

68. New York L. Ins. Co. *v.* English, (Tex. Civ. App. 1902) 70 S. W. 440.

69. Wilton *v.* New York L. Ins. Co., 34 Tex. Civ. App. 156, 78 S. W. 403, holding that where the payee of a life policy had no insurable interest in the life insured, and in a suit for the face of the policy did not seek in the petition to recover the premiums paid, the court did not err in not rendering judgment for them.

70. See Judgments, 23 Cyc. 623.

Judgment non obstante veredicto.—In an action against an insurance company, where there is a verdict for defendant, it is no ground for judgment *non obstante veredicto* that defendant, in reply to notice to produce the records of all its dealings in Georgia, produced, as it was allowed to do by Ga. Code, § 3517, a transcript of all its dealings with plaintiff. Grant *v.* Alabama Gold L. Ins. Co., 76 Ga. 575.

A motion in arrest of judgment will not be granted because the verdict is "for the defendant on the issue joined," since the verdict will be considered as intended to apply to all the issues, where there is more than one issue. Hayes *v.* Virginia Mut. Protective Assoc., 76 Va. 225.

Default judgment.— The amount claimed in an action on a policy is a liquidated sum and may be verified by affidavit. Knickerbocker L. Ins. Co. *v.* Hoeske, 32 Md. 317. A life insurance policy is not such an instrument in writing for the payment of money as

2. Amount of Recovery. Where plaintiff was entitled to recover only the amount of one assessment, not exceeding a specified sum, and there is no evidence of the amount realized by an assessment, only nominal damages are recoverable.[71] If the insurer has offered in its answer to return a premium received, a judgment therefor is proper, although it was not paid into court as alleged in the answer.[72] Where the policy provides for its payment in annual instalments, and the company refuses to pay the first instalment when due, judgment cannot be rendered for the whole amount with execution to issue for the various instalments as they fall due.[73] Interest is ordinarily recoverable from the time the policy was payable.[74] In some states, by statute, damages may be assessed for vexatious or unreasonable delay or refusal to pay the amount of the policy,[75] as by authorizing a recovery of reasonable attorney's fees.[76]

3. Enforcement. The judgment on a policy in a mutual insurance company need not be collected from the fund raised by a particular assessment.[77] Where a lien on the property of the insured is given by statute, the lien attaches to the judgment and continues until it is satisfied.[78]

K. Appeal and Error.[79] The general rules that questions not urged in the

will permit a judgment by default for want of an affidavit of defense to be taken thereon, since the contingencies on which the policy is to become due, such as the death of the insured, furnishing proofs of death, etc., do not appear from the face of the policy to have taken place or been performed. Riley *v.* Mutual Ben. Assoc., 2 Chest. Co. Rep. (Pa.) 305; Morton *v.* New York Mut. L. Ins. Co., 12 Phila. (Pa.) 246. Where the payment of the premium is alleged, and defendant's default, it is not necessary to prove such payment. Union Cent. L. Ins. Co. *v.* Lipscomb, (Tex. Civ. App. 1894) 27 S. W. 307. If a motion to set aside a default judgment is made, the affidavit must show a meritorious defense (Pacific Mut. L. Ins. Co. *v.* Williams, 79 Tex. 633, 15 S. W. 478), which is not shown where the defense is a forfeiture of the policy unless there is proof that such forfeiture has in no way been waived, and that on another trial the result will probably be different (Union Cent. L. Ins. Co. *v.* Lipscomb, *supra*.

Protection against claims of third persons see Pray *v.* Life Indemnity, etc., Co., 104 Iowa 114, 73 N. W. 485.

71. Ball *v.* Granite State Mut. Aid Assoc., 64 N. H. 291, 9 Atl. 103. *Contra*, see Covenant Mut. Life Assoc. *v.* Kentner, 188 Ill. 431, 58 N. E. 966 [*affirming* 89 Ill. App. 495].

72. Fraser *v.* Ætna L. Ins. Co., 114 Wis. 510, 90 N. W. 476.

73. New York L. Ins. Co. *v.* English, 96 Tex. 268, 72 S. W. 58 [*reversing* on other grounds (Civ. App. 1902) 70 S. W. 440].

74. See *supra*, XII, H, 4.

75. Cotton States L. Ins. Co. *v.* Edwards, 74 Ga. 220; Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511; Mutual L. Ins. Co. *v.* Watson, 30 Fed. 653.

76. Travelers' Ins. Co. *v.* Sheppard, 85 Ga. 751, 12 S. E. 18 (holding that the statute applies to a loss under a policy issued in Georgia by a Connecticut corporation, even though the laws of Connecticut do not impose such liability; but the insurer's liability cannot be made to include the expenses of possible future litigation by a motion for a new trial, writ of error, etc.); Piedmont, etc., L. Ins. Co. *v.* Ray, 50 Tex. 511 (holding that the Texas statute does not apply to losses occurring before its passage). And see Supreme Lodge K. P. *v.* Lipscomb, 50 Fla. 406, 39 So. 637, act constitutional and not repealed. See also Fire Insurance, 19 Cyc. 972.

Amount of fees recoverable.— A petition in an action on a life policy alleging that ten per cent on the amount due on the policy, amounting to two hundred and seven dollars, is a reasonable attorney's fee for prosecuting that action, will sustain a judgment for two hundred and fifty dollars for such fees; that in fact being ten per cent of the amount due. Washington L. Ins. Co. *v.* Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123.

77. McKnight *v.* Mutual Life Assoc., 15 Wkly. Notes Cas. (Pa.) 400.

Refusal to obey decree requiring levy.— After a decree requiring an association to levy an assessment on its members to pay a policy, which it fails to do, litigation having been pending thereon for six years, a personal decree against it for the amount, with interest from the time the assessment should have been made, is proper, and this, although defendant is a non-resident corporation. Newman *v.* Covenant Mut. Ins. Assoc., 76 Iowa 56, 40 N. W. 87, 14 Am. St. Rep. 196, 1 L. R. A. 659.

Order after judgment.— Where the judgment is rendered some years after the death of the insured, without terms or conditions, it is improper to grant an order some months thereafter restricting its enforcement to assessments collected and to be collected by the insurer from its members. Seitzinger *v.* New Era Life Assoc., 11 Pa. St. 557, 4 Atl. 516.

78. San Francisco Sav. Union *v.* Long, (Cal. 1898) 53 Pac. 907.

79. See, generally, Appeal and Error, 2 Cyc. 474.

lower court and not properly preserved for review will not be noticed on appeal;[80] that error must appear from the record;[81] that the presumptions are in favor of the judgment rather than against it;[82] that a verdict or findings based on conflicting evidence will not be disturbed;[83] and that the appellate court will not reverse because of the erroneous rejection or admission of evidence,[84] or error in giving or refusing instructions,[85] unless the complaining party was prejudiced thereby, apply to appeals from a judgment in an action on a policy of life insurance. Where newly discovered evidence that the insured is alive is filed in the appellate court the cause will be remanded for the trial of such issue.[86]

LIFE, LIBERTY, AND PROPERTY. See CONSTITUTIONAL LAW.

LIFE NET. See JUMPING NET.

LIFE-TABLES. Tables by which an estimate of the duration of a person's life or ability to earn a living is made.[1] (Life-Tables: As Evidence — Generally, see EVIDENCE; In Action For Death, see DEATH; In Action For Personal Injury, see NEGLIGENCE. Judicial Notice, see EVIDENCE.)

LIFTS. A mining phrase, meaning rests or stopping points along the shaft of the mine, at which there were switches on the track, by which the descending cars could be turned off or placed back on the track.[2] (See, generally, MINES AND MINERALS.)

80. *Colorado.*— Great Western Mut. Aid Assoc. *v.* Colmar, 7 Colo. App. 275, 43 Pac. 159.

Illinois.— Metropolitan L. Ins. Co. *v.* Quandt, 69 Ill. App. 649, holding that the objection that the beneficiary has no insurable interest in the policy cannot be raised for the first time in the appellate court.

Iowa.— Garretson *v.* Equitable Mut. Life, etc., Assoc., 74 Iowa 419, 38 N. W. 127.

Wisconsin.— Smith *v.* Northwestern Nat. L. Ins. Co., 123 Wis. 586, 102 N. W. 47, finding of fact not excepted to not considered.

United States.— Kentucky L. etc., Ins. Co. *v.* Hamilton, 63 Fed. 93, 11 C. C. A. 42.

See 28 Cent. Dig. tit. "Insurance," § 1796.

81. Ætna L. Ins. Co. *v.* Deming, 123 Ind. 384, 24 N. E. 86, 375; Metropolitan L. Ins. Co. *v.* Gierl, 16 Ohio Cir. Ct. 294, 9 Ohio Cir. Dec. 162; Speiser *v.* Phœnix Mut. L. Ins. Co., 119 Wis. 530, 97 N. W. 207; Miller *v.* Brooklyn L. Ins. Co., 12 Wall. (U. S.) 285, 20 L. ed. 398. See also O'Farrell *v.* Metropolitan L. Ins. Co., 23 N. Y. App. Div. 623, 48 N. Y. Suppl. 695.

82. Holterhoff *v.* Mutual Ben. L. Ins. Co., 5 Ohio Dec. (Reprint) 141, 3 Am. L. Rec. 272 (holding that it will be presumed that the jury understood that the general rules of law given by the court were to be applied only to the representation involved in the issues and had no reference to questions as to the truth or materiality of other statements); Fairchild *v.* North Eastern Mut. Life Assoc., 51 Vt. 613 (holding that a finding that the insurer waived a condition in a policy by a certain act precludes the presumption that the act was unintentional).

83. Old Wayne Mut. Life Assoc. *v.* Nordby, 122 Ind. 446, 24 N. E. 159; Rovinsky *v.* Northern Assur. Co., 100 Me. 112, 60 Atl. 1025; Cummings *v.* Kennebec Mut. L. Ins. Co., 89 Me. 37, 35 Atl. 1032, holding that a verdict will be set aside as rendered through sympathy or prejudice, in disregard of the evidence, where eight of the answers given by the deceased in the application, the truth of which was warranted, were false, and five of them were also fraudulent); McGinley *v.* U. S. Life Ins. Co., 8 Daly (N. Y.) 390 [*affirmed* in 77 N. Y. 495]; Wackerle *v.* Mutual L. Ins. Co., 14 Fed. 23, 4 McCrary 508.

84. *Iowa.*— Hart *v.* National Masonic Acc. Assoc., 105 Iowa 717, 75 N. W. 508, holding that it is not prejudicial error to permit plaintiff to testify that the conditions of the policy had been fulfilled, where the allegation of compliance with the conditions of the policy was not sufficiently controverted by the answer.

Missouri.— Price *v.* Home Ins. Co., 54 Mo. App. 119.

New York.— Williams *v.* Metropolitan L. Ins. Co., 35 N. Y. App. Div. 82, 54 N. Y. Suppl. 595.

South Carolina.— Crosswell *v.* Connecticut Indemnity Assoc., 50 S. C. 469, 29 S. E. 236.

United States.— Connecticut Mut. L. Ins. Co. *v.* Lathrop, 11 U. S. 612, 4 S. Ct. 533, 28 L. ed. 536.

See 28 Cent. Dig. tit. "Insurance," § 1803.

85. Hennessy *v.* Metropolitan L. Ins. Co., 74 Conn. 699, 52 Atl. 490; Crosswell *v.* Connecticut Indemnity Assoc., 50 S. C. 469, 29 S. E. 236; Smith *v.* Covenant Mut. Ben. Assoc., 16 Tex. Civ. App. 593, 43 S. W. 819; Provident Sav. L. Assur. Soc. *v.* Hadley, 102 Fed. 856, 43 C. C. A. 25; New York Mut. L. Ins. Co. *v.* Selby, 72 Fed. 980, 19 C. C. A. 331.

86. Schneider *v.* Ætna L. Ins. Co., 30 La. Ann. 1198.

1. English L. Dict. See also Galveston, etc., R. Co. *v.* Johnson, 24 Tex. Civ. App. 180, 183, 58 S. W. 622.

2. Woodward Iron Co. *v.* Jones, 80 Ala. 123, 124.

LIGAN. In nautical parlance, a term used where the goods cast into the sea to lighten the vessel to save her from some danger are so heavy that they sink, and the mariners tie a buoy or something to them so that they may find them again.[3] (See DERELICT; FLOTSAM; JETSAM; and, generally, MARINE INSURANCE; SHIPPING.)

LIGEANCE. The true and faithful obedience of a liegeman or subject to his liege lord, or soveraigne.[4] (See ALLEGIANCE.)

LIGEANTIA EST QUASI LEGIS ESSENTIA; EST VINCULUM FIDEI. A maxim meaning "Allegiance is, as it were, the essence of law; it is the chain of faith."[5]

LIGEANTIA NATURALIS NULLIS CLAUSTRIS COERCETUR, NULLIS METIS REFRÆNATUR, NULLIS FINIBUS PREMITUR. A maxim meaning "Natural allegiance is restrained by no barriers, reined by no bounds, compressed by no limits."[6]

LIGHT. As a noun, means of communicating light or fire; something to kindle with.[7] As an adjective, of short weight; weighing less than the proper or standard amount.[8] (Light: And Air — Easement, see ADJOINING LANDOWNERS; EASEMENTS; Obstruction of, see ADJOINING LANDOWNERS; EASEMENTS; EMINENT DOMAIN; Pollution of, see NUISANCES. On Street, see MUNICIPAL CORPORATIONS. On Train or Track, see CARRIERS; RAILROADS. On Vessel, see COLLISION.)

LIGHTER. A vessel used in assisting to load and unload other vessels;[9] and in common parlance, it includes boats plying for hire, and carrying passengers or goods;[10] a craft plying for hire for the carrying of goods.[11] (Lighter: Admiralty Jurisdiction, see ADMIRALTY. Loading and Unloading, see SHIPPING.)

LIGHTERAGE. The price paid for unloading ships by lighters or boats.[12]

LIGHTERMAN. Any person working or navigating for hire a lighter, barge, boat, or other like craft.[13] (See, generally, SHIPPING.)

LIGHTHOUSE. A structure, usually in the form of a tower, containing signal-lights for the guidance of vessels at night, at dangerous points of a coast, shoals, etc.[14] (See, generally, EMINENT DOMAIN; NAVIGABLE WATERS.)

LIGHT LADEN. A shipping term of no settled meaning, the meaning depending upon the context or circumstances under which it is used.[15] (See, generally, SHIPPING.)

LIGHTNING. A discharge of atmospheric electricity, accompanied by a vivid flash of light, commonly from one cloud to another, sometimes from a cloud to the earth;[16] a sudden discharge of electricity from a cloud to earth, etc., produc-

3. Lacaze *v.* Com., 1 Add. (Pa.) 59, 64; The Gas Float Whitton No. 2, [1896] P. 42, 51, 8 Aspin. 110, 65 L. J. Adm. 17, 73 L. T. Rep. N. S. 698, 44 Wkly. Rep. 263 [*citing* Constable's Case, 5 Coke 106*a*]. *Compare* Murphy *v.* Dunham, 38 Fed. 503, 509.

4. Coke Litt. 129*a*.

5. Black L. Dict. [*citing* Coke Litt. 129*a*].

6. Black L. Dict.

7. Century Dict. See also Williams *v.* Fireman's Fund Ins. Co., 54 N. Y. 569, 571, 13 Am. Rep. 620; Bretsch *v.* Plate, 82 N. Y. App. Div. 399, 401, 81 N. Y. Suppl. 868.

8. Century Dict. See also Warren Featherborne Co. *v.* Roberts, 128 Fed. 745, 746.

9. The Mamie, 5 Fed. 813, 820.

"Into lighters" see Petersen *v.* Freebody, [1895] 2 Q. B. 294, 297, 8 Aspin. 55, 65 L. J. Q. B. 12, 73 L. T. Rep. N. S. 163, 14 Reports 493, 44 Wkly. Rep. 5.

10. Reed *v.* Ingham, 26 Eng. L. & Eq. 164, 170, where the word "wherry" is construed in like manner, and is distinguished from a tug.

11. Reg. *v.* Reed, 28 Eng. L. & Eq. 133, 135.

"Lighter, vessel, barge, or other craft" see Blanford *v.* Morrison, 15 Q. B. 724, 731, 14 Jur. 1130, 19 L. J. Q. B. 533, 69 E. C. L. 723.

12. Western Transp. Co. *v.* Hawley, 1 Daly (N. Y.) 327, 332, holding that the term is not properly applicable to the unloading of a canal-boat at one wharf or pier instead of another.

"Lighterage at shipper's risk" see The Seguranca, 68 Fed. 1014, 1016, where these words were employed in a bill of lading.

13. Kennaird *v.* Cary, [1898] 2 Q. B. 578, 584.

14. Black L. Dict., where it is said that they are usually erected by government, and subject to governmental regulation.

"Lighthouse purposes" see 8 Cyc. 1125 note 56.

15. The Ceres, 72 Fed. 936, 938, 19 C. C. A. 243 [*affirming* 61 Fed. 701, 702].

16. Webster Dict. [*quoted* in Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 445, 22 N. W. 740, where it is said: "The sound produced by the electricity in passing rapidily through the atmosphere constitutes thunder"].

ing a vivid flash of light, etc.;[17] a sudden discharge of electricity from a cloud to the earth, or from the earth to a cloud, or from one cloud to another; that is, from a body positively charged to one negatively charged, producing a vivid flash of light, and usually a loud report called thunder.[18] (Lightning: Insurance, see LIGHTNING INSURANCE. Liability For Fire Caused by, see FIRE INSURANCE; NEGLIGENCE. See also ACT OF GOD; CYCLONE; and, generally, ELECTRICITY.)

LIGHTNING INSURANCE. A contract[19] by which the insurer, for a consideration, agrees to indemnify the insured against loss of or damage to property by lightning.[20] The contract frequently comprises a part of a fire or live stock policy, being incorporated therein by means of what is called the lightning clause.[21] (See LIGHTNING; and, generally, FIRE INSURANCE; INSURANCE; LIVE-STOCK INSURANCE.)

LIGIOSO. A Spanish word meaning LITIGIOUS,[22] *q. v.*

LIGNA ET LAPIDES SUB "ARMORUM" APPELLATIONE NON CONTINENTUR. A maxim meaning "Sticks and stones are not contained under the name of 'arms.'"[23]

LIKE. While the context often determines its signification[24] the term is

17. Webster Dict. [*quoted* in Babcock *v.* Montgomery Mut. Ins. Co., 4 N. Y. 326, 336].

18. Imperial Dict. [*quoted* in Spensley *v.* Lancashire Ins. Co., 62 Wis. 443, 445, 22 N. W. 740].

19. See, generally, INSURANCE.

20. See Wilson *v.* Hawkeye Ins. Co., 70 Iowa 91, 30 N. W. 22; Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 192, 85 N. W. 454, 86 Am. St. Rep. 535; De Graff *v.* Queen Ins. Co., 38 Minn. 501, 504, 38 N. W. 696, 8 Am. St. Rep. 685; Boright *v.* Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796; Beakes *v.* Phœnix Ins Co., 143 N. Y. 402, 38 N. E. 453, 26 L. R. A. 267; Beakes *v.* Commercial Union Assur. Co., 20 N. Y. Suppl. 37; Clark *v.* Franklin Farmers' Mut. F. Ins. Co., 111 Wis. 65, 86 N. W. 549; Spensley *v.* Lancashire Ins. Co., 54 Wis. 433, 441, 11 N. W. 894. In Spensley *v.* Lancashire Ins. Co., *supra*, it was said: "The policy before us is a general insurance against lightning, and most certainly covers all known effects of electricity coming under the general head of lightning." See also 19 Cyc. 830.

21. See, generally, FIRE INSURANCE; LIVE-STOCK INSURANCE.

22. White *v.* Gay, 1 Tex. 384, 387.

23. Black L. Dict. [*citing* Bracton fol. 144b].

24. As used in connection with other words see the following phrases: "And the like" (Diamond State Iron Co. *v.* Giles, 7 Houst. (Del.) 557, 567, 11 Atl. 189); "in like manner" (Bertody *v.* Ison, 69 Ga. 317, 318; People *v.* Pinckney, 67 Hun (N. Y.) 428, 431, 22 N. Y. Suppl. 118; Stuyvesant Real Estate Co. *v.* Sherman, 40 Misc. (N. Y.) 205, 206, 81 N. Y. Suppl. 642; Badger *v.* Daniel, 79 N. C. 372, 387; Brown *v.* Pike, 74 N. C. 531, 534; Lewis *v.* Puxley, 16 M. & W. 733, 743; *Ex p.* Aldridge, 2 B. & C. 600, 601, 4 D. & R. 83, 9 E. C. L. 263; *Re* Wilder, 27 Beav. 418, 420, 54 Eng. Reprint 164; Shanley *v.* Baker, 4 Ves. Jr. 732, 734, 31 Eng. Reprint 378); "in like proportion" (Parke County Coal Co. *v.* Campbell, 140 Ind. 28, 31, 39 N. E. 149, 558; Morrow *v.* Greeting, 15 Ind. App. 358, 41 N. E. 848, 849, 44 N. E. 59); "like animal" (Lyon *v.* Marine, 55 Fed. 964, 967, 5 C. C. A. 359); "like authority" (Ft. Leavenworth R. Co. *v.* Lowe, 114 U. S. 525, 532, 5 S. Ct. 995, 29 L. ed. 264); "like case" (*In re* Henderson, 157 N. Y. 423, 428, 52 N. E. 183; *In re* Mather, 84 N. Y. Suppl. 1105, 1107); "like character" (Brown *v.* State, 40 Ga. 689, 693); "like circumstances" (Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 246, 38 L. J. Exch. 177, 18 Wkly. Rep. 92; Strick *v.* Swansea Canal Co., 16 C. B. N. S. 245, 257, 10 L. T. Rep. N. S. 460, 12 Wkly. Rep. 711, 111 E. C. L. 245. See Manchester, etc., R. Co. *v.* Denaby Main Co., 14 Q. B. D. 209); "like description and quantity" (Great Western R. Co. *v.* Sutton, L. R. 4 H. L. 226, 252, 38 L. J. Exch. 177, 18 Wkly. Rep. 92); "like effect" (Reg. *v.* General Medical Education Council, etc., [1897] 2 Q. B. 203, 206, 66 L. J. Q. B. 588, 76 L. T. Rep. N. S. 706, 46 Wkly. Rep. 2; Reg. *v.* Harwich, 1 E. & B. 617, 619, 72 E. C. L. 616); "like formal instruments" (Singluff *v.* Tindal, 40 S. C. 504, 506, 19 S. E. 137); "like good condition" (Kiff *v.* Atchison, etc., R. Co., 32 Kan. 263, 266, 4 Pac. 401); "like kind" (Huff *v.* Com., 14 Gratt. (Va.) 648, 649; State *v.* Gaughan, (W. Va. 1904) 48 S. E. 210, 212); "like nature" (Southland Frozen Meat, etc., Export Co. *v.* Nelson, [1898] A. C. 442, 443; *In re* Empire Assur. Corp., L. R. 4 Eq. 341, 346, 16 L. T. Rep. N. S. 346; Parker *v.* Great Western R. Co., 6 E. & B. 77, 105, 2 Jur. N. S. 325, 25 L. J. Q. B. 209, 4 Wkly. Rep. 365, 88 E. C. L. 76); "like occupations" (Allerton *v.* Chicago, 6 Fed. 555, 558, 9 Biss. 552); "like offence" (Com. *v.* Fontain, 127 Mass. 452, 455); "like penalty" (Bradlaugh *v.* Clarke, 8 App. Cas. 354, 357, 47 J. P. 405, 52 L. J. Q. B. 505, 48 L. T. Rep. N. S. 681, 31 Wkly. Rep. 677); "like pleading" (Mumford *v.* Keet, 154 Mo. 36, 48, 55 S. W. 271); "like proceedings" (People *v.* Jackson, 8 Mich. 110, 112; *In re* Stuart, 67 Mo. App. 61, 65; Reg. *v.* Surrey Justices, L. R. 5 Q. B. 87, 91, 39

generally defined to mean analogous;[25] resembling;[26] having resemblance; similar; equal; same in quantity, amount, or extent;[27] having the same, or nearly the same, appearance, qualities, or characteristics; resembling; similar to;[28] equal in quantity, quality, or degree; exactly corresponding.[29] (See LIKELY; LIKEWISE.)

LIKELY. Probable;[30] in all probability.[31] (See LIKE; LIKEWISE.)

LIKEWISE.[32] In like manner, moreover, too;[33] ALSO,[34] *q. v.*

LIME-KILN. A structure adapted to the burning of lime.[35]

LIMESTONE ROCK. A term used as synonymous with solid rock or bed rock.[36] (See BED.)

LIMIT.[37] As a noun, a word meaning boundary, border, the outer line of a thing.[38] As a verb, to mark out, define, indicate the extent or duration of;[39]

L. J. M. C. 49, 18 Wkly. Rep. 156); "like processes" (Hopkins *v.* Benson, 21 Me. 399, 401); "like punishment" (Com. *v.* Andrews, 2 Mass. 409, 410); "like purpose" (Matthews *v.* Associated Press, 136 N. Y. 333, 336, 32 N. E. 981, 32 Am. St. Rep. 741); "like remainder" (Surtees *v.* Hopkinson, L. R. 4 Eq. 98, 104, 36 L. J. Ch. 305, 16 L. T. Rep. N. S. 8, 15 Wkly. Rep. 395); "like remedies" (Houghton *v.* Field, 2 Cush. (Mass.) 141, 145); "like service and proof" (Exley *v.* Berryhill, 37 Minn. 182, 184, 33 N. W. 567); "like sum" (Toledo, etc., R. Co. *v.* People, 81 Ill. 141, 142); "like tenor" (Lexington *v.* Union Nat. Bank, 75 Miss. 1, 4, 22 So. 291); "like territory" (Matthews *v.* Associated Press, 136 N. Y. 333, 336, 32 N. E. 981, 32 Am. St. Rep. 741); "like the sample" (Smith *v.* Foote, 81 Hun (N. Y.) 128, 130, 30 N. Y. Suppl. 679); "like trusts" (Brigg *v.* Brigg, 54 L. J. Ch. 464, 465, 52 L. T. Rep. N. S. 753, 33 Wkly. Rep. 454; Bashford *v.* Chaplin, [1881] W. N. 126); "of a like nature" (*In re* Empire Assur. Corp., L. R. 4 Eq. 341, 346, 16 L. T. Rep. N. S. 346); "other like crime" (Anderson *v.* Winfree, 85 Ky. 597, 605, 4 S. W. 351, 11 S. W. 307, 9 Ky. L. Rep. 181); "to the like effect" (Reg. *v.* General Cemetery Co., 6 E. & B. 415, 420, 2 Jur. N. S. 972, 25 L. J. Q. B. 342, 88 E. C. L. 415; Reg. *v.* Harwich, 1 E. & B. 617, 619, 72 E. C. L. 616); "under the like circumstances" (Strick *v.* Swansea Canal Co., 16 C. B. 245, 257, 10 L. T. Rep. N. S. 460, 12 Wkly. Rep. 711, 111 E. C. L. 243).

25. *In re* Rugheimer, 36 Fed. 369, 373 [*citing* Phelps *v.* Oaks, 117 U. S. 236, 239, 6 S. Ct. 714, 29 L. ed. 888; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 301, 23 L. ed. 898].

26. Webster Dict. [*quoted* in Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787, 788; Munford *v.* Keet, 154 Mo. 36, 48, 55 S. W. 271]. But see Com. *v.* Fontain, 127 Mass. 452, 455.

27. Webster Dict. [*quoted* in Mumford *v.* Keet, 154 Mo. 36, 48, 55 S. W. 271].

"Like services" does not necessarily mean "identical with." U. S. *v.* Wallace, 116 U. S. 398, 400, 6 S. Ct. 408, 29 L. ed. 675, construing U. S. Rev. St. § 847.

28. Webster Dict. [*quoted* in Lincoln Center *v.* Linker, 7 Kan. App. 282, 53 Pac. 787, 788].

"'Like' does not necessarily mean the same in all particulars, but rather the contrary." Houghton *v.* Field, 2 Cush. (Mass.) 141, 145.

29. Webster Dict. [*quoted* in Badger *v.* Daniel, 79 N. C. 372, 387].

30. Century Dict. [*quoted* in O'Brien *v.* New York, etc., R. Co., 13 N. Y. Suppl. 305].

Distinguished from "probable" and "probability" see Howard *v.* State, 108 Ala. 571, 577, 18 So. 813.

While the term is not synonymous with "probable," yet the two words may in certain connections mean practically the same thing. Knoll *v.* Third Ave. R. Co., 46 N. Y. App. Div. 527, 530, 62 N. Y. Suppl. 16. *Compare* Higgins *v.* United Traction Co., 96 N. Y. App. Div. 69, 70, 89 N. Y. Suppl. 76.

31. Standard Dict. [*quoted* in Union Gold Min. Co. *v.* Crawford, 29 Colo. 511, 520, 69 Pac. 600].

"Likely to become chargeable" see Cornish *v.* Parsonsfield, 22 Me. 433, 436.

"Likely to produce death" see Meriwether *v.* State, 104 Ga. 500, 501, 30 S. E. 806.

"Likely to waste" see Millard *v.* Hall, 24 Ala. 209, 230.

32. Given as a definition of "even" see 16 Cyc. 817.

33. *Ex p.* Joffee, 46 Mo. App. 360, 368.

34. State Bank *v.* Ewing, 17 Ind. 68, 74; *Ex p.* Joffee, 46 Mo. App. 360, 368.

"Likewise my house" see Farrish *v.* Cook, 6 Mo. App. 328, 332.

"Likewise Sam, Nan, and Cuff" see King *v.* Sharp, 6 Humphr. (Tenn.) 55, 56.

35. Slight *v.* Gutzlaff, 35 Wis. 675, 678, 17 Am. Rep. 476.

36. Sullivan County *v.* Ruth, 106 Tenn. 85, 93, 59 S. W. 138.

37. Distinguished from "probability" see Howard *v.* State, 108 Ala. 571, 577, 18 So. 813.

Given as a definition of "bound" see 5 Cyc. 860.

Limits of the act see Walton Imp. Com'rs *v.* Walford, L. R. 10 Q. B. 180, 186, 44 L. J. Q. B. 74, 31 L. T. Rep. N. S. 825, 23 Wkly. Rep. 292.

"Prescribed limits" see Caswell *v.* Cook, 11 C. B. N. S. 637, 650, 103 E. C. L. 635.

38. Casler *v.* Connecticut Mut. L. Ins. Co., 22 N. Y. 427, 431, where it is said that it means "nothing else, except when used to convey the idea of restraint."

39. Anderson L. Dict.

"Limit and control" see Queen Anne County *v.* Talbot County, 99 Md. 13, 20, 57 Atl. 1.

and sometimes used as synonymous with to lessen or to ABRIDGE,[40] *q. v.* (See ESTABLISH; FIX; LIMITATION; LOCATE.)

LIMITATION.[41] In its ordinary sense, restriction[42] or circumspection.[43] In its ordinary legal and popular sense, the word refers to the time within which an action may be brought, or some act done, to preserve a right.[44] As applied to estates, a word which has two well-known and distinct meanings;[45] in the one, its primary sense, it signifies the marking out the bounds or limits of the estate;[46] in the other it signifies simply the creating of an estate.[47] (Limitation: In Covenant, see COVENANTS. In Instrument of Writing, see CONTRACTS; COVENANTS; DEEDS; WILLS. Of Action, see LIMITATIONS OF ACTIONS. Of Amount — Affecting Jurisdiction, see APPEAL AND ERROR; COURTS; JUSTICES OF THE PEACE; REMOVAL OF CAUSES; Of Damages, see DAMAGES; Of Guaranty, see GUARANTY. Of Amount of Indebtedness — Of Bank, see BANKS AND BANKING; Of Corporation, see CORPORATIONS; Of County, see COUNTIES; Of Municipality, see MUNICIPAL CORPORATIONS; Of State, see STATES; Of Territory, see TERRITORIES; Of Town, see TOWNS. Of Amount of Property — Of Corporation, see CORPORATIONS; Which Can Be Condemned, see EMINENT DOMAIN; Which Can Be Devised or Bequeathed, see WILLS. Of Appropriation in Aid of Corporation, see COUNTIES; MUNICIPAL CORPORATIONS. Of Claim of Patent, see PATENTS. Of Compensation to Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. Of Estate — In General, see ESTATES; Created by Deed, see DEEDS; Created by Will, see WILLS. Of Jurisdiction, see COURTS. Of Liability — Of Carrier, see CARRIERS; SHIPPING; Of Guarantor, see GUARANTY; Of Insurer, see FIRE INSURANCE, and the Insurance titles; Of Master, see MASTER AND SERVANT; Of Telegraph Company, see TELEGRAPHS AND TELEPHONES; Of Vessel Owner, see COLLISION; SHIPPING. Of Lien — Generally, see LIENS; Of Judgment, see JUDGMENTS. Of Liquidated

40. Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 6, 28 N. W. 685, where the words "change or limit" are construed.

The word ordinarily means to fix the extent of the subject to which it is applied, rather than to fix the duration of time within which a right, growing out of the subject, may be enforced. Gulf, etc., R. Co. *v.* Trawick, 68 Tex. 314, 318, 4 S. W. 567, 2 Am. St. Rep. 494.

41. **Distinguished from "condition"** see Smith *v.* White, 5 Nebr. 405, 407; Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 583. See also Kane *v.* Gott, 24 Wend. (N. Y.) 641, 662, 35 Am. Dec. 641. See also ESTATES.

42. Schwoerer *v.* Connolly, 44 Misc. (N. Y.) 222, 224, 88 N. Y. Suppl. 818.

The word "limitation" as used in the Mont. Const. art. 8, § 3, providing that the appellate jurisdiction of the supreme court, which extends to all cases at law and in equity, subject to such limitation and regulations as may be prescribed by law, was held not to give to the legislature authority to limit absolutely the absolute jurisdiction of the supreme court to the extent of cutting off the right of appeal, but merely to enable the legislature to enact reasonable regulation as to the time at which and the mode by which appeals should be taken to the supreme court. Finlen *v.* Heinze, 27 Mont. 107, 69 Pac. 829, 70 Pac. 517, the opinion of the court being delivered by Brantley, C. J., Pigott, J., concurring, but Milburn, J., dissenting.

43. Wharton L. Lex.

44. Finlen *v.* Heinze, 27 Mont. 107, 115, 69 Pac. 829, 70 Pac. 517.

45. Starnes *v.* Hill, 112 N. C. 1, 19, 16 S. E. 1011, 22 L. R. A. 598 [*citing* 2 Fearne Rem. § 24].

46. Starnes *v.* Hill, 112 N. C. 1, 19, 16 S. E. 1011; Millan *v.* Kephart, 18 Gratt. (Va.) 1, 7.

47. Starnes *v.* Hill, 112 N. C. 1, 19, 16 S. E. 1011.

In its most technical sense, the word when used in the habendum clause of a deed, is an appropriate term under which to declare the nature and extent of the estate granted, and the uses for which the grant is made. Mills *v.* Davison, 54 N. J. Eq. 659, 665, 35 Atl. 1072, 55 Am. St. Rep. 594, 35 L. R. A. 113.

A limitation is conclusive of the time of continuance and of the extent of the estate granted, and beyond which it is declared that its creation is not to be extended and continued. Smith *v.* Smith, 23 Wis. 176, 181, 99 Am. Dec. 153. It marks the period which determines the estate, without any act on the part of him who has the next expectant interest. Brattle Square Church *v.* Grant, 3 Gray (Mass.) 142, 147, 63 Am. Dec. 725.

"A condition is to be carefully distinguished from a limitation. It is the character and quality of the estate granted, and not the terms used in their creation, that distinguishes them. The latter requires no entry to determine the estate, but terminates it *ipso facto* by the happening of the event referred to . . . . while the former is determined only by the re-entry of the grantor or his heirs for the condition broken." Bryan *v.* Spires, 3 Brewst. (Pa.) 580, 583. The principal difference between a condition

Damages, see DAMAGES. Of Power to Levy Taxes, see COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; TAXATION; TOWNS. Of Risks and Liability of Insurer, see FIRE INSURANCE, and the Insurance Titles. Of Term of Charter, see CORPORATIONS. Of Term of Punishment, see CRIMINAL LAW. On Issue of Bonds, see COUNTIES; MUNICIPAL CORPORATIONS. Words of, see DEEDS; WILLS.)

LIMITATION OF ACTION. See LIMITATIONS OF ACTIONS.

and a limitation is that a condition does not defeat the estate, when broken, until it is avoided by the act of the grantor, but a limitation marks the period which is to determine the estate, without entry or claim. Smith *v.* White, 5 Nebr. 405, 407 [*citing* Stearns *v.* Godfrey, 16 Me. 158, 160]. A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate. The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor, or passes to the person by whom it is granted, by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act. Hoselton *v.* Hoselton, 166 Mo. 182, 188, 65 S. W. 1005. See also 16 Cyc. 607.

LIMITATIONS OF ACTIONS

EDITED BY A. S. H. BRISTOW AND JOHN LEHMAN

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I. DEFINITION, NATURE, AND OBJECT.

A. Definition The term "limitation" has been defined to mean the time which is prescribed by the authority of the law, during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment,[1] or the time at the end of which no action at law or suit in equity can be maintained,[2] the latter sense being the one in which the term is generally used in this title.

B. Nature and Object. The essential attribute of a statute of limitations is that it accords and limits a reasonable time within which a suit may be brought upon causes of action which it affects.[3] Statutes of limitation do not confer any right of action, but are enacted to restrict the period within which the right, otherwise unlimited, might be asserted.[4] Statutes of this character have sometimes been said to be founded in part at least on the general experience of mankind that claims which are valid are not usually allowed to remain neglected, and that the lapse of years without any attempt to enforce a demand creates a presumption against its original validity or that it has ceased to exist,[5] the negligence or laches of plaintiff being also advanced as an additional ground by some of the authorities.[6] But the basic principle most generally relied upon by the authorities is that statutes of limitation are statutes of repose, the object of which is to suppress fraudulent and stale claims from springing up at great distances of time and surprising the parties or their representatives when all the proper vouchers and evidences are lost or the facts have become obscure from the lapse of time or the defective

1. See ADVERSE POSSESSION, 1 Cyc. 968 *et seq.*

2. Angell Lim. 1 [*quoted* in Arrington *v.* Liscom, 34 Cal. 365, 381, 94 Am. Dec. 722; Busby *v.* Florida Cent. R. Co., 45 S. C. 312, 315, 23 S. E. 50; Reynolds *v.* Baker, 6 Coldw. (Tenn.) 221, 224; Campbell *v.* Holt, 115 U. S. 620, 622, 6 S. Ct. 209, 29 L. ed. 483].

Statutes of limitation are acts limiting the time within which actions shall be brought. Battle *v.* Shivers, 39 Ga. 405. See also Baker *v.* Kelley, 11 Minn. 480; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

Acts regulating proceedings at law, as the time limited for entering an appeal, staying an execution, serving a notice, and such like, and acts regulating the rights of two persons against a third, as to preferences between them, although they limit the time within which certain acts shall be done, do not come within the meaning of statutes of limitation. Battle *v.* Shivers, 39 Ga. 405, 409.

Statute requiring affidavit as to accrual of action within prescribed period.— A statute requiring plaintiff in replevin to file an affidavit that his cause of action accrued within two years is not a statutory limitation of the action. Payne *v.* Bruton, 10 Ark. 53.

Statute making book of accounts evidence in action commenced within prescribed time. — In Neville *v.* Northcutt, 7 Coldw. (Tenn.) 294, it was held that a statute which makes a book of accounts evidence of the sale and delivery of goods, in an action to recover the value of such goods, commenced within two years after the sale and delivery thereof, merely declares a rule of evidence, and is not a statute of limitations.

3. Keyser *v.* Lowell, 117 Fed. 400, 54 C. C. A. 574.

A statute which neither accords nor limits any time for the commencement of actions but absolutely nullifies the causes of action and prohibits any suits thereon is not a statute of limitations. Keyser *v.* Lowell, 117 Fed. 400, 54 C. C. A. 574.

4. Riddlesberger *v.* Hartford F. Ins. Co., 7 Wall. (U. S.) 386, 19 L. ed. 257.

Statute no basis of claim for affirmative relief.— The statute of limitations can, it is held, be pleaded only as a defense and cannot be made the basis of a claim for affirmative relief. Johnson *v.* Wynne, 64 Kan. 138, 67 Pac. 549; Burditt *v.* Burditt, 62 Kan. 576, 64 Pac. 77; Corlett *v.* Mutual Ben. L. Ins. Co., 60 Kan. 134, 55 Pac. 844.

Lapse of statutory bar no ground for injunction see INJUNCTIONS, 22 Cyc. 801, text and note 37.

5. *Georgia.*— Battle *v.* Shivers, 39 Ga. 405.

Michigan.— McKisson *v.* Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507.

New Jersey.— Buchannan *v.* Rowland, 5 N. J. L. 721.

Texas.— Gautier *v.* Franklin, 1 Tex. 732.

Vermont.— Cartier *v.* Page, 8 Vt. 146.

United States.— Riddlesbarger *v.* Hartford F. Ins. Co., 7 Wall. 386, 19 L. ed. 257; Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. ed. 529.

Compare McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754, holding that the view that statutes of limitation proceed upon a presumption of payment has been exploded.

Limitation of actions distinguished from presumption of payment see *infra*, I, D.

6. Battle *v.* Shivers, 39 Ga. 405; Gautier *v.* Franklin, 1 Tex. 732. See also Buchannan *v.* Rowland, 5 N. J. L. 721.

memory or death, or removal of witnesses.[7] It is held, however, that the statute is for the benefit and repose of individuals and not to secure general objects of policy and morals.[8]

C. Distinguished From Prescription.[9] According to some writers the term "prescription" covers both senses in which the word "limitation" has been used, that is to say, as conferring a right, and as taking away a remedy merely.[10] On the other hand, however, the difference between a statute of limitation and the law of prescription has been declared to consist as a general rule in this: that the former takes away a remedy, and the latter confers a right.[11] But prescription and limitation are convertible terms as applied to easements,[12] or, it is held, so far as the title to property is concerned, or at least so far as the title to real property is concerned.[13]

D. Distinguished From Presumption of Payment.[14] The statute of limitations is to be distinguished from what is known as the presumption of payment arising from lapse of time. This presumption is an artificial and arbitrary rule of the law derived by analogy from the English statute of limitations. It originated in equity but was afterward engrafted into the common law. It is a mere rule of evidence and is subject to rebuttal, whereas the statute of limitations makes the lapse of time a positive and absolute legal bar.[15] It is said that there

7. Arnett *v.* Zinn, 20 Nebr. 591, 31 N. W. 240; Hurley *v.* Cox, 9 Nebr. 230, 2 N. W. 705; Spring *v.* Gray, 22 Fed. Cas. No. 13,259, 5 Mason 305 [*affirmed* in 6 Pet. 151, 8 L. ed. 352]. See also Wright *v.* Oakley, 5 Metc. (Mass.) 400, 410 (where it is said: "It is founded on the fact, established by experience, that after a certain lapse of time, loss of proof may be presumed from the death of witnesses, their dispersion or loss of memory, and the loss of vouchers, so that rights cannot safely and satisfactorily be investigated and adjusted; and therefore suits shall not be maintained"); McKisson *v.* Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; Baker *v.* Kelley, 11 Minn. 480; Amaker *v.* New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582; Gautier *v.* Franklin, 1 Tex. 732; Bettman *v.* Cowley, 19 Wash. 207, 216, 53 Pac. 53, 40 L. R. A. 815 (where it is said: "Statutes of limitation are statutes of repose, intended to put at rest controverted questions of fact, to insure to a degree certainty in testimony by compelling its production before it is affected by the infirmities of memory"); Campbell *v.* Haverhill, 155 U. S. 610, 617, 15 S. Ct. 217, 39 L. ed. 280 (where it is said: "As was said of the statute of limitations by Mr. Justice Story (Bell *v.* Morrison, 1 Pet. (U. S.) 351, 360, 7 L. ed. 174): 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses'"); Riddlesbarger *v.* Hartford F. Ins. Co., 7 Wall. (U. S.) 386, 19 L. ed. 257.

8. Quick *v.* Corlies, 39 N. J. L. 11; Clark *v.* Augustine, 62 N. J. Eq. 689, 51 Atl. 68; State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177.

9. Prescription defined see PRESCRIPTION.

10. See Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379 [*citing* Angell Lim. 1]; Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483.

"The terms 'prescribe' and 'prescription' in French, seem to be synonymous with the English words, to 'limit' and 'limitation.' Prescription is the term used in the Louisiana reports for limitation, and in the translation of Pothier on Obligations, Vol. 1, 350, in the chapter on limitations, prescription is always used for limitation." Chenot *v.* Lefevre, 8 Ill. 637, 642.

11. Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379; Billings *v.* Hall, 7 Cal. 1.

12. Murray *v.* Scribner, 74 Wis. 602, 604, 43 N. W. 549, where it is said: "Prescription properly applies only to incorporeal hereditaments." See also Mueller *v.* Fruen, 36 Minn. 273, 30 N. W. 886.

Acquirement of easement by prescription see EASEMENTS, 14 Cyc. 1145.

13. Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379. See also Churchill *v.* Louie, 135 Cal. 608, 67 Pac. 1052.

14. Presumption of payment generally see PAYMENT.

15. *Arkansas.*— Brian *v.* Tims, 10 Ark. 597.

California.— McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

Missouri.— Cape Girardeau County *v.* Harbison, 58 Mo. 90.

New Jersey.—Thorpe *v.* Corwin, 20 N. J. L. 311.

New York.— Pratt *v.* Huggins, 29 Barb. 277. See also Bean *v.* Tonnele, 94 N. Y. 381, 46 Am. Rep. 153.

Pennsylvania.— Gregory *v.* Com., 121 Pa. St. 611, 15 Atl. 452, 6 Am. St. Rep. 804.

Virginia.— Clendenning *v.* Thompson, 91 Va. 518, 22 S. E. 233.

Wisconsin.— Pritchard *v.* Howell, 1 Wis. 131, 60 Am. Dec. 363.

is no such inconsistency between statutes of limitations and the common-law doctrine of presumption of payment as to make them incongruous, when applicable at the same time to the same cause of action.[16]

II. ORIGIN AND HISTORY.

By the common law there was no fixed time for the bringing of actions. Limitations are created by statute and derive their authority therefrom.[17] From the reign of Henry I, there was a succession of statutes narrowing the latitude of the common law in this respect,[18] culminating in the statute of 32 Henry VIII, c. 2, and the subsequent statute of 21 James I, c. 16,[19] the act of James I being said to be the first general statute on the subject.[20] Statutes similar to the last mentioned, although with varying modifications, now exist both in England and in the different jurisdictions of this country.[21]

III. VALIDITY AND CONSTRUCTION.

A. Constitutionality[22] — **1. In General.** General and special laws of limitation are recognized as founded on sound policy and are sustained, except for some feature specially obnoxious to constitutional objections.[23]

United States.— Postmaster-Gen. *v.* Rice, 19 Fed. Cas. No. 11,312, Gilp. 554. See also Riddlesbarger *v.* Hartford F. Ins. Co., 7 Wall. 386, 19 L. ed. 257.

See 33 Cent. Dig. tit. "Limitation of Actions," § 1.

In North Carolina it has been held that Rev. Code, c. 65, § 18, providing that presumption of payment shall arise within ten years after the right of action shall have accrued, is not a statute of limitations, but raises a presumption which may be rebutted. Currie *v.* Clark, 101 N. C. 329, 7 S. E. 805.

16. Brian *v.* Tims, 10 Ark. 597.

17. Battle *v.* Shivers, 39 Ga. 405; Jones *v.* Central R., etc., Co., 18 Ga. 247; Buchannan *v.* Rowland, 5 N. J. L. 721; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31, 45 (where it is said: "It is undoubtedly true that it was a rule of the common law, that a right never dies, or in other words was not barred by lapse of time"); Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280; Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401. See also People *v.* Gilbert, 18 Johns. (N. Y.) 227.

Limitations are legislative and not judicial acts, and a rule of court in the nature of an act of limitations is void. Reist *v.* Heilbrenner, 11 Serg. & R. (Pa.) 131, holding that a rule of court abating all pending suits where either party thereto is dead, unless such party's representatives are substituted within a year, operates as an act of limitation, and is void, since limitations are legislative and not judicial acts. See also Missouri *v.* Illinois, 200 U. S. 496, 26 S. Ct. 268, 50 L. ed. 572.

18. Buchannan *v.* Rowland, 5 N. J. L. 721.

19. Angell Lim. 10. See also Battle *v.* Shivers, 39 Ga. 405; Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520; Morris *v.* Venderen, 1 Dall. (Pa.) 64, 1 L. ed. 38; Boehm *v.* Engle, 1 Dall. (Pa.) 15, 1 L. ed 17; Alexandria Bank *v.* Dyer, 14 Pet. (U. S.) 141, 10 L. ed. 391; Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280; Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401.

20. Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280. See also Brian *v.* Tims, 10 Ark. 597, 601, where it is said: "Those statutes previous to this one, having been sometimes temporary, were always contracted as to their field of operation and extremely crude; and they generally run back to some remarkable fixed period, such as, the last return of King John from Ireland, or to the first coronation of Richard I, whereby the period increased every day; and, in the language of Lord Coke, 'many suits, troubles and inconveniences did arise, and therefore a more direct and commodious course was taken, which was to endure forever, and calculated so to impose diligence on, and vigilance in, him that was to bring his action, so that by one constant law certain limitations might serve both for the time present and for all time to come.'"

21. See the statutes of the various jurisdictions.

22. Constitutional law generally see CONSTITUTIONAL LAW, 8 Cyc. 695.

23. Nash *v.* Fletcher, 44 Miss. 609. See also Preston *v.* Louisville, 84 Ky. 118; Covington *v.* Hoadley, 83 Ky. 444; Terrell *v.* Manpin, 83 S. W. 591, 26 Ky. L. Rep. 1203; Saloy *v.* Woods, 40 La. Ann. 585, 4 So. 209; Davidson *v.* Lindop, 36 La. Ann. 765; Perry *v.* Turner, 55 Mo. 418; Smith *v.* Cleveland, 17 Wis. 556; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566; Nash *v.* El Dorado County, 24 Fed. 252.

Statutes of limitation as class legislation see CONSTITUTIONAL LAW, 8 Cyc. 1057 note 87 *et seq.*

Statute discriminating between residents and non-residents.— A state statute of limitations, which provides in effect that when defendant is out of the state the statute of limitations shall not run against plaintiff if the latter resides in the state, but shall if

2. Reduction or Extension of Time For Bringing Suits — a. In General. It is competent for the legislature within certain limits either by extending or reducing the period of limitation to regulate the time within which even existing causes of action may be brought.[24] But the power to enact such statutes is subject to the fundamental condition that a reasonable time shall be allowed for the exercise of the right of action,[25] whether existing or prospective, after it comes within the the prospective or present operation of the statute and before the bar becomes

he resides out of the state, is not unconstitutional, as infringing the provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." Chemung Canal Bank *v.* Lowery, 93 U. S. 72, 23 L. ed. 806.

Invalidity of state acts of limitations in conflict with federal legislation see Henshaw *v.* Bissell, 18 Wall. (U. S.) 255, 21 L. ed. 835; Montgomery *v.* Bevans, 17 Fed. Cas. No. 9,735, 1 Sawy. 653.

Validity of laws suspending statutes of limitation during Civil war see Calhoun *v.* Kellogg, 41 Ga. 231; Brian *v.* Banks, 38 Ga. 300; Johnson *v.* Winslow, 63 N. C. 552; Johnston *v.* Gill, 27 Gratt. (Va.) 587; Huffman *v.* Alderson, 9 W. Va. 616; Stewart *v.* Bloom, 11 Wall. (U. S.) 493, 20 L. ed. 176; Davie *v.* Hatcher, 7 Fed. Cas. No. 3,610, 1 Woods 456.

24. *Arkansas.*— Dyer *v.* Gill, 32 Ark. 410.

Colorado.— Edelstein *v.* Carlile, 33 Colo. 54, 78 Pac. 680.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Georgia.— See Calhoun *v.* Kellogg, 41 Ga. 231.

Illinois.— People *v.* Simon, 176 Ill. 165, 52 N. E. 910, 68 Am. St. Rep. 175, 44 L. R. A. 801.

Iowa.— Norris *v.* Tripp, 111 Iowa 115, 82 N. W. 610. See also Malthy *v.* Cooper, Morr. 59.

Maine.— Sampson *v.* Sampson, 63 Me. 328. See also Lunt *v.* Stevens, 24 Me. 534.

Maryland.— Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825.

Massachusetts.— Bigelow *v.* Bemis, 2 Allen 496; Loring *v.* Alline, 9 Cush. 68; Peirce *v.* Tobey, 5 Metc. 168.

Michigan.— People *v.* Wayne County Cir. Judge, 37 Mich. 287.

Minnesota.— Brisbin *v.* Farmer, 16 Minn. 215; Burwell *v.* Tullis, 12 Minn. 572; Baker *v.* Kelley, 11 Minn. 480; Heyward *v.* Judd, 4 Minn. 483; Holcombe *v.* Tracy, 2 Minn. 241.

Mississippi.— Briscoe *v.* Anketell, 28 Miss. 361, 61 Am. Dec. 553.

Missouri.—Stepheus *v.* St. Louis Nat. Bank, 43 Mo. 385.

Montana.— Sherman *v.* Nason, 25 Mont. 283, 64 Pac. 768.

Nebraska.— O'Brien *v.* Gaslin, 20 Nebr. 347, 30 N. W. 274; Horbach *v.* Miller, 4 Nebr. 31.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

New Hampshire.—Willard *v.* Harvey, 24 N. H. 344. See also Hall *v.* Hall, 64 N. H. 295, 9 Atl. 219.

New Jersey.—Martson *v.* Seabury, 3 N. J. L. 435, 4 Am. Dec. 409.

New Mexico.— Stern *v.* Bates, 9 N. M. 286, 50 Pac. 325.

New York.— Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585 [*affirming* 22 Misc. 488, 50 N. Y. Suppl. 940].

North Dakota.— Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

Pennsylvania.— Bowden *v.* Philadelphia, etc., R. Co., 196 Pa. St. 562, 46 Atl. 843.

South Carolina.— Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25.

Texas.— Odum *v.* Garner, 86 Tex. 374, 25 S. W. 18; Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655; Parker *v.* Buckner, 67 Tex. 20, 2 S. W. 746; McMillian *v.* Werner, 35 Tex. 419; De Cordova *v.* Galveston, 4 Tex. 470.

Virginia.— Johnston *v.* Gill, 27 Gratt. 587.

Washington.—Bettman *v.* Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815; Bowman *v.* Colfax, 17 Wash. 344, 49 Pac. 551.

Wisconsin.— Lawton *v.* Waite, 103 Wis. 244, 79 N. W. 321, 45 L. R. A. 616. See also Eaton *v.* Manitowoc County, 40 Wis. 668; Baker *v.* Columbia County, 39 Wis. 444; Smith *v.* Cleveland, 17 Wis. 556.

United States.— Alabama Bank *v.* Dalton, 9 How. 522, 13 L. ed. 242; Davie *v.* Hatcher, 7 Fed. Cas. No. 3,610, 1 Woods 456; Milligan *v.* Hovey, 17 Fed. Cas. No. 9,605, 3 Biss. 13; Wright *v.* Scott, 30 Fed. Cas. No. 18,092, 4 Wash. 16.

See 33 Cent. Dig. tit. "Limitation of Actions," § 11. And see Constitutional Law, 8 Cyc. 920 *et seq.*, 1011 *et seq.*

Rule applied to state constitutional provision.— In Dyer *v.* Gill, 32 Ark. 410, it was held that the constitutional convention of 1874 had the power to restore the application of the ten-year statute of limitation to sealed instruments, executed after the adoption of the constitution of 1868, when the instrument was not barred at the time by the limitation applicable to unsealed instruments.

25. *District of Columbia.*— Gwin *v.* Brown, 21 App. Cas. 295.

Georgia.— Central Bank *v.* Solomon, 20 Ga. 408.

Iowa.— Norris *v.* Tripp, 111 Iowa 115, 82 N. W. 610; Cassady *v.* Grimmelman, 108 Iowa 695, 77 N. W. 1067; Kennedy *v.* Des Moines, 84 Iowa 187, 50 N. W. 880.

Kansas.— Auld *v.* Butcher, 2 Kan. 135.

Maine.— MacNichol *v.* Spence, 83 Me. 87, 21 Atl. 748.

New York.—Gilbert *v.* Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118 [*affirming* 33 N. Y. App. Div. 371, 54 N. Y. Suppl. 113].

effective.[26] The period fixed by the legislature is subject to review by the court and will be deemed unreasonable where it is so manifestly inadequate as to amount to a denial of justice.[27] The question of reasonable time is one primarily for the legislature to determine. The courts cannot fix a time different from that fixed by the legislature within which suits may be brought, nor if the legislature fails to fix any time can the courts supply the legislative lapse.[28] It has been held that the legislature need not fix an exact time, but the limitation fixed may depend upon the happening of a subsequent event, provided such subsequent event cannot possibly happen until after the expiration of a reasonable time.[29] In some jurisdictions the time between the date of the passage of an act shortening the period of limitation and the date at which it takes effect will be considered in determining whether a reasonable time has been allowed for preëxisting causes of action, and if it affords a reasonable opportunity for parties to commence actions between the time of its passage and the time when by its terms it is to go into effect it is constitutional.[30] But in other jurisdictions this view has been repudiated on the

North Carolina.— Culbreth *v.* Downing, 121 N. C. 205, 28 S. E. 294, 61 Am. St. Rep. 661; Nichols *v.* Norfolk, etc., R. Co., 120 N. C. 495, 26 S. W. 643; Strickland *v.* Draugham, 91 N. C. 103.

North Dakota.— Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

Pennsylvania.— Peterson *v.* Delaware, etc., R. Co., 9 Kulp 552.

South Carolina.— Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25.

United States.—Sohn *v.* Waterson, 17 Wall. 596, 21 L. ed. 737; Pereles *v.* Watertown, 19 Fed. Cas. No. 10,980, 6 Biss. 79; Piatt *v.* Vattier, 19 Fed. Cas. No. 11,117, 1 McLean 146 [*affirmed* in 9 Pet. 405, 9 L. ed. 173]; Society for Propagation of Gospel *v.* Wheeler, 22 Fed. Cas. No. 13,156, 2 Gall. 105. See also Webster *v.* Cooper, 14 How. 488, 14 L. ed. 510.

See 33 Cent. Dig. tit. "Limitation of Actions," § 11.

26. Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

27. Gwin *v.* Brown, 21 App. Cas. (D. C.) 295; Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715; Pereles *v.* Watertown, 19 Fed. Cas. No. 10,980, 6 Biss. 79. *Compare* Smith *v.* Morrison, 22 Pick. (Mass.) 430.

Periods held to be unreasonable see Williams *v.* Port Chester, 72 N. Y. App. Div. 505, 76 N. Y. Suppl. 631; Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558.

Periods held to be reasonable see Krone *v.* Krone, 37 Mich. 308; Adamson *v.* Davis, 47 Mo. 268; Bockee *v.* Crosby, 3 Fed. Cas. No. 1,593, 2 Paine 432; Marsh *v.* Burroughs, 16 Fed. Cas. No. 9,111.

Special rule for determining reasonable time.— In Culbreth *v.* Downing, 121 N. C. 205, 28 S. E. 294, 61 Am. St. Rep. 661, it was held that where a statute is enacted after a cause of action has accrued, limiting the time in which such action may be brought, a reasonable time for its commencement is the balance of time unexpired according to the law as it stood when the limiting statute was passed, provided it shall never exceed the time allowed by the new statute. *Compare* Bowden *v.* Philadelphia, etc., R. Co., 196 Pa. St. 562, 46 Atl. 843; Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; Focht *v.* Reading Stove Works, 21 Pa. Co. Ct. 524.

28. *Massachusetts.*— Smith *v.* Morrison, 22 Pick. 430.

Michigan.— Krone *v.* Krone, 37 Mich. 308; People *v.* Wayne County Cir. Judge, 37 Mich. 287; Ludwig *v.* Stewart, 32 Mich. 27.

New York.— Williams *v.* Port Chester, 72 N. Y. App. Div. 505, 76 N. Y. Suppl. 631.

North Dakota.— Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715 [*criticizing* Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653].

United States.—Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365.

See 33 Cent. Dig. tit. "Limitation of Actions," § 11.

Compare State *v.* Swope, 7 Ind. 91 [*criticized* in De Moss *v.* Newton, 31 Ind. 219]; Holcombe *v.* Tracy, 2 Minn. 241; Fiske *v.* Briggs, 6 R. I. 557.

29. Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

30. *Florida.*— Hart *v.* Bostwick, 14 Fla. 162.

Kentucky.— See Hedger *v.* Rennaker, 3 Metc. 255.

Maryland.— State *v.* Jones, 21 Md. 432.

Massachusetts.— Bigelow *v.* Bemis, 2 Allen 496; Peirce *v.* Tobey, 5 Metc. 168; Smith *v.* Morrison, 22 Pick. 430.

Minnesota.— Duncan *v.* Cobb, 32 Minn. 460, 21 N. W. 714; Stine *v.* Bennett, 13 Minn. 153; Holcombe *v.* Tracy, 2 Minn. 241.

North Dakota.— Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715; Merchants' Nat. Bank *v.* Braithwaite, 7 N. D. 358, 75 N. W. 244, 66 Am. St. Rep. 653.

Pennsylvania.— Clay *v.* Iseminger, 187 Pa. St. 108, 41 Atl. 38.

Texas.— Link *v.* Houston, 94 Tex. 378, 59

ground that it makes the statute perform its office before it takes effect.[31] Where the time within which a right of action may be enforced is limited by the legislative enactment which creates the right, the legislature is the exclusive judge of the reasonableness of the limitation and it is not the province of the courts to inquire concerning it.[32]

b. Statutes Affecting Causes of Action Already Barred. The general rule is laid down in most jurisdictions that the legislature cannot remove a statutory bar to a cause of action that has already become complete.[33] But in some jurisdictions a distinction has been made between a statutory bar operating to invest persons with title to property and a bar which constitutes merely a defense to a personal demand; and it is accordingly held that in actions upon contract, or in any class of actions in which a party does not become invested with title to property by the statutes of limitation, the legislature may by repealing the statute, even after the right of action is barred, restore the remedy and divest the other party of the statutory bar.[34]

3. Suspension of Operation of Statute. While as a general rule the legislature has no power to suspend the operation of a statute of limitations retrospectively, so as to revive a right of action after it has been barred, it has the power to suspend the operation of the statute prospectively or retrospectively so far as not to affect actions already barred.[35]

B. Construction[36] — 1. In General. The rules governing the construction

S. W. 566, 60 S. W. 664; Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655.

Wisconsin.— Eaton *v.* Manitowoc County, 40 Wis. 668; Baker *v.* Columbia County, 39 Wis. 444.

United States.— Wrightman *v.* Boone County, 82 Fed. 412.

See 33 Cent. Dig. tit. "Limitation of Actions," § 11.

31. Price *v.* Hopkin, 13 Mich. 318; Gilbert *v.* Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118. See also Burnes *v.* Simpson, 9 Kan. 658.

32. De Moss *v.* Newton, 31 Ind. 219; Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566.

33. *Arkansas.*— Dyer *v.* Gill, 32 Ark. 410.

Delaware.— Bishop *v.* Wilds, 1 Harr. 87.

Florida.— Hart *v.* Bostwick, 14 Fla. 162.

Indiana.— Right *v.* Martin, 11 Ind. 123.

Iowa.— Harwood *v.* Quimby, 44 Iowa 385; Higgins *v.* Mendenhall, 42 Iowa 675; Norris *v.* Slaughter, 1 Greene 338.

Kansas.— Keith *v.* Keith, 26 Kan. 26; Morton *v.* Sharkey, McCahon 113.

Kentucky.— Lawrence *v.* Louisville, 96 Ky. 595, 29 S. W. 450, 16 Ky. L. Rep. 672, 49 Am. St. Rep. 309, 27 L. R. A. 560.

Massachusetts.— Bigelow *v.* Bemis, 2 Allen 496. *Compare* Danforth *v.* Croton Water Co., 178 Mass. 472, 59 N. E. 1033, 86 Am. St. Rep. 495.

Minnesota.—See Lambert *v.* Slingerland, 25 Minn. 457.

Missouri.— Kreyling *v.* O'Reilly, 97 Mo. App. 384, 71 S. W. 372.

North Carolina.— Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917; Varner *v.* Johnston, 112 N. C. 570, 17 S. E. 483; Pearsall *v.* Kenan, 79 N. C. 472, 28 Am. Rep. 336.

Oklahoma.— Schnell *v.* Jay, 4 Okla. 157, 46 Pac. 598.

South Carolina.— Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25.

Virginia.— Kesterson *v.* Hill, 101 Va. 739, 45 S. E. 288.

Washington.— Seattle *v.* De Wolfe, 17 Wash. 349, 49 Pac. 553.

See 33 Cent. Dig. tit. "Limitation of Actions," § 11. And see Constitutional Law, 8 Cyc. 923 note 57, 1011 note 15 *et seq.*

In an action against a city for damages to property caused by a mob, it has been held that a municipal corporation has not the same right to immunity as an individual under the statute of limitations, after claims are barred, in case of repeal of the statute, or an extension of the limitation. Hagerstown *v.* Schner, 37 Md. 180.

34. Keller *v.* McHuffman, 15 W. Va. 64; Huffman *v.* Alderson, 9 W. Va. 616; Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483. See also Hulbert *v.* Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; People *v.* Starkweather, 42 N. Y. Super. Ct. 325; *In re* Moench, 39 Misc. (N. Y.) 480, 80 N. Y. Suppl. 222; Stewart *v.* Bloom, 11 Wall. (U. S.) 493, 20 L. ed. 176. *Compare* Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585; Matter of Guttroff, 39 Misc. (N. Y.) 483, 80 N. Y. Suppl. 219; Talbott *v.* Wright, 23 Fed. Cas. No. 13,733. See also Constitutional Law, 8 Cyc. 923 note 58.

If an action for the recovery of property either real or personal is barred by statute, a subsequent statute cannot be given retroactive effect so as to destroy the title vested by the statutory bar. Hall *v.* Webb, 21 W. Va. 318. See also Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; Shriver *v.* Shriver, 86 N. Y. 575.

35. Johnson *v.* Winslow, 63 N. C. 552. See also Constitutional Law, 8 Cyc. 921 note 55.

36. Construction of statutes generally see Statutes.

of statutes generally with a view to effecting the legislative intent are applicable to statutes of limitations.[37] Although statutes of limitations were regarded by

37. People *v.* Judge Newaygo Cir. Ct. 27 Mich. 138.

Construction with reference to other statutory provisions see the following cases:

Arkansas.— Walker *v.* Peay, 22 Ark. 103.

Illinois.— Norton *v.* Colby, 52 Ill. 198; Campbell *v.* Harris, 30 Ill. 395.

Indian Territory.— Schwab Clothing Co. *v.* Cromer, 1 Indian Terr. 661, 43 S. W. 951.

Michigan.— Parsons *v.* Wayne County, 37 Mich. 287.

Minnesota.— Holcombe *v.* Tracy, 2 Minn. 241.

Missouri.— Long *v.* Long, 141 Mo. 352, 44 S. W. 341 (holding that Rev. St. (1889) § 6784, allowing another action on the same grounds to be brought within a year after a nonsuit, does not curtail, but extends, the time allowed by other sections of the limitation law); Billion *v.* Walsh, 46 Mo. 492.

New York.— Hayden *v.* Pierce, 144 N. Y. 512, 39 N. E. 638; Clark *v.* Lake Shore, etc., R. Co., 94 N. Y. 217.

Ohio.— Clark *v.* Eddy, 10 Ohio Dec. (Reprint) 539, 22 Cinc. L. Bul. 63.

Vermont.— Bailey *v.* Russell, 1 Tyler 334.

Washington.— Baer *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286.

United States.— Pruseux *v.* Welch, 20 Fed. Cas. No. 11,456.

See 33 Cent. Dig. tit. "Limitations of Actions," § 14.

Conflict between general and particular acts.— Where a general limitation law applicable to numerous classes of cases conflicts with a law applicable only to a particular class the latter controls. Sutton *v.* Hancock, 118 Ga. 436, 45 S. E. 504. See also Cairns *v.* Ottawa Water Com'rs., 25 U. C. C. P. 551, special limitation in charter of defendant.

Statutory provision allowing different periods of limitation.— It has been held that where different sections of the statute of limitations are equally applicable, the one allowing the longer period governs. Crum *v.* Johnson, 3 Nebr. (Unoff.) 826, 92 N. W. 1054. See Alexander *v.* Overton, 22 Nebr. 227, 34 N. W. 629. And see *infra*, V, P.

Adoption of construction of state statutes in federal courts see COURTS, 11 Cyc. 889 note 21 *et seq.*

Statutes held operative as repeal or amendment.— In the following cases it was held that the effect of legislation was to repeal or amend former provisions for limitation of actions:

California.— San Francisco, etc., Land Co. *v.* Hartung, 138 Cal. 223, 71 Pac. 337; Morton *v.* Folger, 15 Cal. 275.

District of Columbia.— Gwin *v.* Brown, 21 App. Cas. 295.

Florida.— Jernigan *v.* Holden, 34 Fla. 530, 16 So. 413.

Georgia.— Goss *v.* Roberts, 54 Ga. 494; Adams *v.* Davis, 47 Ga. 339; Wynn *v.* Lee, 5 Ga. 217.

Illinois.— Spaulding *v.* White, 173 Ill. 127, 50 N. E. 224.

Indiana.— Leyner *v.* State, 8 Ind. 490.

Iowa.— Springer *v.* Clay County, 35 Iowa 241.

Kansas.— Elliott *v.* Lochnane, 1 Kan. 126.

Louisiana.— Wade *v.* Caspari, 24 La. Ann. 211.

Maine.— Crehore *v.* Mason, 23 Me. 413.

Minnesota.— Brisbin *v.* Farmer, 16 Minn. 215.

New Jersey.— Tomlin *v.* Hildreth, 65 N. J. L. 438, 47 Atl. 649.

North Carolina.—Smith *v.* Rogers, 65 N. C. 181.

Oregon.— Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055.

Pennsylvania.— Spees *v.* Boggs, 204 Pa. St. 504, 54 Atl. 346.

West Virginia.— State *v.* Brookover, 38 W. Va. 141, 18 S. E. 476; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470.

United States.— Ogden *v.* Blackledge, 2 Cranch 272, 2 L. ed. 276; Davis *v.* Mills, 121 Fed. 703, 58 C. C. A. 123; St. Louis, etc., R. Co. *v.* O'Loughlin, 49 Fed. 440, 1 C. C. A. 311; Stimpson *v.* Pond, 23 Fed. Cas. No. 13,455, 2 Curt. 502.

See 33 Cent. Dig. tit. "Limitation of Actions," § 12.

Statutes inoperative as repeal or amendment.— In the following cases the statutes in question were construed as inoperative by way of repeal or amendment:

Alabama.— Rawls *v.* Doe, 23 Ala. 240, 48 Am. Dec. 289.

Georgia.— Fellows *v.* Guimarin, Dudley 100.

Illinois.— Ballenger *v.* McKee, 36 Ill. 255.

Kentucky.— Louisville *v.* Garr, 97 Ky. 583, 31 S. W. 281, 32 S. W. 748, 17 Ky. L. Rep. 640; Trimble *v.* Vaughn, 6 Bush 544.

Louisiana.— Goddard *v.* Urquhart, 6 La. 659.

Maine.— Ingalls *v.* Cole, 47 Me. 530.

Minnesota.— Ott *v.* Great Northern R. Co., 70 Minn. 50, 72 N. W. 833; Brown *v.* Heron Lake, 67 Minn. 146, 69 N. W. 710.

Mississippi.— Simmons *v.* Pickett, 24 Miss. 467; White *v.* Johnson, 23 Miss. 68.

Missouri.— Seibert *v.* Copp, 62 Mo. 182.

New Jersey.— Vail *v.* Easton, etc., R. Co., 44 N. J. L. 237.

New York.— Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; Scovil *v.* Scovil, 45 Barb. 517.

North Carolina.— Oliver *v.* Perry, 61 N. C. 581.

Pennsylvania.—Miller *v.* Franciscus, 40 Pa. St. 335.

Tennessee.— Campbell *v.* Crockett, 8 Yerg. 225.

West Virginia.— Sturm *v.* Fleming, 31 W. Va. 701, 8 S. E. 263.

United States.— U. S. *v.* Henderson, 11 Wall. 652, 20 L. ed. 235; Fellows *v.* Pedrick, 8 Fed. Cas. No. 4,724, 4 Wash. 477.

some of the earlier decisions as an unconscionable and dishonorable defense,[38] the attitude of the courts generally has long since been to view such statutes with favor as founded on sound policy and as being beneficial in their effects, and hence it may be laid down as a general rule that they are entitled to receive if not a a liberal at least a reasonable construction in furtherance of their manifest object.[39] Thus in the construction of a statute of limitations general words are to have a general operation, and the statute is not to be subjected to judicial exceptions arising from a supposed equity — in other words, the courts cannot engraft on the statute exceptions not clearly expressed in the statute itself.[40] On the other hand it is a familiar principle that a statute of limitations should not be applied to cases not clearly within its provisions.[41] Even cases within the reason

See 33 Cent. Dig. tit. "Limitation of Actions," § 12.

38. See People *v.* Judge Newaygo Cir. Ct., 27 Mich. 138; Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; Spring *v.* Gray, 22 Fed. Cas. No. 13,259, 5 Mason 305.

39. *Connecticut.*— Hart's Appeal, 32 Conn. 520.

Georgia.—Dickinson *v.* McCamy, 5 Ga. 486, 48 Am. Dec. 298.

Kentucky.— Phillips *v.* Pope, 10 B. Mon. 163, holding that statutes of limitation, especially when relating to land, should receive a liberal construction with a view to the attainment of their object, which is to give repose to parties in their possession, under an apparent right.

Louisiana.— Arrowsmith *v.* Durell, 21 La. Ann. 295.

Maryland.— Green *v.* Johnson, 3 Gill & J. 389.

Michigan.— Smith *v.* Smith, 91 Mich. 7, 51 N. W. 694.

Texas.— Gautier *v.* Franklin, 1 Tex. 732.

United States.— Campbell *v.* Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. ed. 280; McCluny *v.* Silliman, 3 Pet. 270, 7 L. ed. 676; Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Fisher *v.* Harnden, 9 Fed. Cas. No. 4,819, Paine 55; Roberts *v.* Pillow, 20 Fed. Cas. No. 11,909, Hempst. 6241 [*reversed* on another point in 13 How. 472, 14 L. ed. 228]; Spring *v.* Gray, 22 Fed. Cas. No. 13,259, 5 Mason 305 [*affirmed* in 6 Pet. 151, 8 L. ed. 352].

See 33 Cent. Dig. tit. "Limitation of Actions," § 13.

Compare Elder *v.* Bradley, 2 Sneed (Tenn.) 247.

Construction in equity.— Statutes of limitation receive the same construction, by analogy, in equity as at law. U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

40. *Alabama.*— Howell *v.* Hair, 15 Ala. 194.

Arkansas.— Pryor *v.* Ryburn, 16 Ark. 671; State Bank *v.* Morris, 13 Ark. 291; Erwin *v.* Turner, 6 Ark. 14.

California.— Davis *v.* Hart, 123 Cal. 384, 55 Pac. 1060.

Kansas.— Swickard *v.* Bailey, 3 Kan. 507.

Mississippi.— Young *v.* Cook, 30 Miss. 320; Dozier *v.* Ellis, 28 Miss. 730.

Missouri.— Collins *v.* Pease, 146 Mo. 135, 47 S. W. 925.

Montana.— Coady *v.* Reins, 1 Mont. 424.

New Hampshire.— See Pike *v.* Jenkins, 12 N. H. 255.

New York.— Bucklin *v.* Ford, 5 Barb. 393.

North Carolina.—State University *v.* Campbell, 5 N. C. 185.

Tennessee.— Peak *v.* Buck, 3 Baxt. 71; Cocke *v.* McGinnis, Mart. & Y. 361, 17 Am. Dec. 809.

Wisconsin.— Woodbury *v.* Shackleford, 19 Wis. 55.

United States.— Dulles *v.* Jones, 9 How. 530, 13 L. ed. 245; Alabama Bank *v.* Dalton, 9 How. 522, 13 L. ed. 242; Lewis *v.* Lewis, 7 How. 776, 782, 12 L. ed. 909 (where it is said: "There is no rule better settled, in the construction of statutes of limitations, than that effect must be given to them according to their language. If they made no exception in favor of infants, femmes coverts, or non-residents, the courts can make none. And when the exceptions of a statute of limitations are repealed, the act stands as though it had been originally passed without them"); Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62; Amy *v.* Watertown, 22 Fed. 418.

The enumeration of specific exceptions to a statute of limitations by the legislature excludes by implication all other exceptions. Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051. See also Sacia *v.* De Graaf, 1 Cow. (N. Y.) 356.

Exception sustained apart from express statutory provision.— It has been held that the time during which the courts were closed by the Civil war was to be excluded in suits subsequently brought from the computation of the statutory period of limitation, although exception for such cause was not provided for in the statute. Coleman *v.* Holmes, 44 Ala. 124, 4 Am. Rep. 121; Hanger *v.* Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939. See also *infra*, VI, H, 6.

41. *Alabama.*— Yniestra *v.* Tarleton, 67 Ala. 126.

Louisiana.— Garland *v.* Scott, 15 La. Ann. 143.

Minnesota.— Baker *v.* Kelley, 11 Minn. 480.

Missouri.— Hauser *v.* Thompson, 56 Mo. App. 85.

Nevada.— Henry *v.* Confidence Gold, etc., Min. Co., 1 Nev. 619.

Texas.— Field *v.* Gantier, 8 Tex. 74; Gautier *v.* Franklin, 1 Tex. 732.

Washington.— Suter *v.* Wenatchee Water

but not within the words of the statute are not barred, but may be considered as omitted cases which the legislature did not deem proper to limit.[42]

2. PROSPECTIVE OR RETROACTIVE OPERATION — a. In General. As a general rule statutes of limitations will not be given a retroactive effect, unless it clearly appears that the legislature so intended.[43] But a statute of limitations may have effect upon actions which have already accrued as well as upon actions which

Power Co., 35 Wash. 1, 76 Pac. 298, 102 Am. St. Rep. 881.

Wisconsin.— Fisk *v.* Jenewein, 75 Wis. 254, 43 N. W. 950, 44 N. W. 515.

United States.— Kirkman *v.* Hamilton, 6 Pet. 20, 8 L. ed. 305; Davis *v.* Mills, 121 Fed. 703, 58 C. C. A. 123; Missouri Sav., etc., Co. *v.* Rice, 84 Fed. 131, 28 C. C. A. 305.

See 33 Cent. Dig. tit. "Limitation of Actions," § 15.

Compare Forster *v.* Cumberland Valley R. Co., 23 Pa. St. 371.

Cases construed as falling within statutory bar see Neal *v.* Duffee, 54 Ga. 591; Harris *v.* Gray, 49 Ga. 585, 15 Am. Rep. 684; George *v.* Gardner, 49 Ga. 441; Ellis *v.* Murray, 28 Miss. 129; Dickerson *v.* New Jersey Cent. R. Co., 7 Pa. Dist. 104; Tompkins *v.* Broocks, (Tex. Civ. App. 1897) 43 S. W. 70; Northwestern Bank *v.* Hays, 37 W. Va. 475, 16 S. E. 561; Falkner *v.* Dorman, 7 Wis. 388; Adams *v.* Woods, 2 Cranch (U. S.) 336, 2 L. ed. 297.

42. Baker *v.* Kelley, 11 Minn. 480.

43. *Alabama.*— Bradford *v.* Barclay, 42 Ala. 375. *Compare* Martin *v.* Martin, 35 Ala. 560.

Arizona.— Curtis *v.* Boquillas Land, etc., Co., (1904) 76 Pac. 612.

Arkansas.— Fayetteville Bldg., etc., Assoc. *v.* Bowlin, 63 Ark. 573, 39 S. W. 1046; Vaughan *v.* Parr, 20 Ark. 600; Moore *v.* McLendon, 10 Ark. 512; Calvert *v.* Lowell, 10 Ark. 147; Baldwin *v.* Cross, 5 Ark. 510.

California.— See Bates *v.* Gregory, (1889) 22 Pac. 683; Benjamin *v.* Eldridge, 50 Cal. 612.

Connecticut.— Hull *v.* Minor, 2 Root 223.

Georgia.— Central Bank *v.* Solomon, 20 Ga. 408. See also Garrard *v.* Cody, 51 Ga. 555.

Illinois.— Walker *v.* People, 202 Ill. 34, 66 N. E. 827; Thompson *v.* Alexander, 11 Ill. 54; Bruce *v.* Schuyler, 9 Ill. 221, 46 Am. Dec. 447; Rhinehart *v.* Schuyler, 7 Ill. 473; Tufts *v.* Rice, 1 Ill. 64; Blackburn University *v.* Weer, 21 Ill. App. 29; Smart *v.* Morrison, 15 Ill. App. 226.

Indiana.— State *v.* Parsons, 147 Ind. 579, 47 N. E. 17, 62 Am. St. Rep. 430.

Iowa.— Thoeni *v.* Dubuque, 115 Iowa 482, 88 N. W. 967; Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506; Hinch *v.* Weatherford, 2 Greene 244; Gordon *v.* Mounts, 2 Greene 243; Norris *v.* Slaughter, 1 Greene 338. See also Higgins *v.* Mendenhall, 42 Iowa 675. *Compare* Sleeth *v.* Murphy, Morr. 321, 41 Am. Dec. 232.

Kansas.— Burnes *v.* Simpson, 9 Kan. 658; Auld *v.* Butcher, 2 Kan. 135.

Kentucky.— Lawrence *v.* Louisville, 96 Ky. 595, 29 S. W. 450, 16 Ky. L. Rep. 672, 49 Am. St. Rep. 309, 27 L. R. A. 560.

Louisiana.— See Leonard *v.* Fluker, 4 Rob. 148. *Compare* De Armas *v.* De Armas, 3 La. Ann. 526.

Maine.— MacNichol *v.* Spence, 83 Me. 87, 21 Atl. 748; Quimby *v.* Buzzell, 16 Me. 470.

Massachusetts.— King *v.* Tirrell, 2 Gray 331; Holyoke *v.* Haskins, 5 Pick. 20, 16 Am. Dec. 372. See also Loring *v.* Alline, 9 Cush. 68.

Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868; McKisson *v.* Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507; Stambaugh *v.* Snoblin, 32 Mich. 296; Ludwig *v.* Stewart, 32 Mich. 27; Smith *v.* Humphrey, 20 Mich. 398; Harrison *v.* Metz, 17 Mich. 377; Price *v.* Hopkins, 13 Mich. 318.

Mississippi.— See Weir *v.* Monahan, 67 Miss. 434, 7 So. 291.

Missouri.— Tice *v.* Fleming, 173 Mo. 49, 72 S. W. 689, 96 Am. St. Rep. 479; Weber *v.* Manning, 4 Mo. 229. See also Paddleford *v.* Dunn, 14 Mo. 517.

New York.— Goillotel *v.* New York, 87 N. Y. 441; Belknap *v.* Sickles, 7 Daly 249. See also Hall *v.* Brennan, 140 N. Y. 409, 35 N. E. 663; McMaster *v.* State, 103 N. Y. 547, 9 N. E. 313. *Compare* Acker *v.* Acker, 81 N. Y. 143; Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585.

North Carolina.— See Doggett *v.* Moseley, 52 N. C. 587.

Ohio.— Shuman *v.* Drayton, 14 Ohio Cir. Ct. 328, 8 Ohio Cir. Dec. 12.

Oregon.— Pitman *v.* Bump, 5 Oreg. 17.

Pennsylvania.— Lingenfelter *v.* Ritchey, 58 Pa. St. 485, 98 Am. Dec. 308; Eakin *v.* Raub, 12 Serg. & R. 330; Dickerson *v.* Central R. Co., 7 Pa. Dist. 104; Blackwell *v.* Ace, 3 C. Pl. 177.

Rhode Island.— Rotchford *v.* Union R. Co., 25 R. I. 70, 54 Atl. 932.

South Carolina.— Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25; Munro *v.* Hill, 25 S. C. 476.

Texas.— Ogden *v.* Lund, 11 Tex. 688.

Vermont.— Richardson *v.* Cook, 37 Vt. 599, 88 Am. Dec. 622; Wires *v.* Farr, 25 Vt. 41.

Virginia.— Duval *v.* Malone, 14 Gratt. 24.

West Virginia.— Lawyer *v.* Barker, 45 W. Va. 468, 31 S. E. 964; Walker *v.* Burgess, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. Rep. 775; Castro *v.* Greer, 44 W. Va. 332, 30 S. E. 100; Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

United States.— Sohn *v.* Waterson, 17 Wall. 596, 21 L. ed. 737; McKean *v.* Archer, 52 Fed. 791; McCormick *v.* Eliot, 43 Fed. 469; Vaughan *v.* East Tennessee, etc., R. Co., 28 Fed. Cas. No. 16,898, 1 Flipp. 621.

accrued after its passage.[44] Whether it does so or not will depend upon the language of the act, and the apparent intent of the legislature to be gathered therefrom.[45]

b. Statutes Expressly Prospective or Retroactive. So statutes of limitations are frequently expressly restricted under specified conditions in some instances to causes of action subsequently accruing.[46] In the same way the statute sometimes in express terms, or by necessary implication, is made to apply with modifications

Canada.— *In re* Roden, 25 Ont. App. 12.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

Compare Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

44. Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

Constitutionality of retroactive statutes of limitations see *supra*, III, A, 2.

45. Quimby *v.* Buzzell, 16 Me. 470; Fiske *v.* Briggs, 6 R. I. 557; Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

46. *Alabama.*— Harrison *v.* Heflin, 54 Ala. 552; Bedell *v.* Smith, 37 Ala. 619; Strong *v.* Catlin, 35 Ala. 607.

Arkansas.— Calvert *v.* Lowell, 10 Ark. 147; Carneal *v.* Thompson, 9 Ark. 55; Wilson *v.* Keller, 8 Ark. 507; Hawkins *v.* Campbell, 6 Ark. 513; Couch *v.* McKee, 6 Ark. 484. See also Davis *v.* Sullivan, 7 Ark. 449.

California.— See Benjamin *v.* Eldridge, 50 Cal. 612.

Colorado.— Edelstein *v.* Carlile, 33 Colo. 54, 78 Pac. 680.

Illinois.— Robertson *v.* Wheeler, 162 Ill. 566, 44 N. E. 870; McMillan *v.* McCormick, 117 Ill. 79, 7 N. E. 132; Means *v.* Harrison, 114 Ill. 248, 2 N. E. 64; Dickson *v.* Chicago, etc., R. Co., 77 Ill. 331; Milner *v.* Briggs, 45 Ill. 349; Campbell *v.* Harris, 30 Ill. 395; Beesley *v.* Spencer, 25 Ill. 216; Hotaling *v.* Huntington, 64 Ill. App. 655; Corrigan *v.* Reilly, 64 Ill. App. 124; Kluge *v.* Kluge, 47 Ill. App. 337; Jones *v.* Lander, 21 Ill. App. 510; Blackburn University *v.* Weer, 21 Ill. App. 29; Smart *v.* Morrison, 15 Ill. App. 226; Gibbons *v.* Goodrich, 3 Ill. App. 590.

Indiana.— Bradley *v.* Spain, 7 Ind. App. 694, 34 N. E. 1011.

Iowa.— McDonald *v.* Jackson, 55 Iowa 37, 7 N. W. 408.

Kentucky.— Hayden *v.* Hayden, 3 Metc. 189; Henderson *v.* Hayne, 2 Metc. 342; Ashbrook *v.* Quarles, 15 B. Mon. 20; Kellar *v.* Sinton, 14 B. Mon. 307.

Louisiana.— State *v.* Blohm, 26 La. Ann. 538; Harrison *v.* Adger, 24 La. Ann. 565.

Maine.— Weymouth *v.* Gorham, 22 Me. 385.

Michigan.— Hathaway *v.* Washington Milling Co., 139 Mich. 708, 103 N. W. 164; Lastly *v.* Cramer, 2 Dougl. 307. See also Stambaugh *v.* Snoblin, 32 Mich. 296.

Mississippi.— Hambrick *v.* Jones, 64 Miss. 240, 8 So. 176; Newman *v.* Foster, (1887) 1 So. 505; Carothers *v.* Hurley, 41 Miss. 71; Briscoe *v.* Anketell, 28 Miss. 361, 61 Am. Dec. 553; West Feliciana R. Co. *v.* Stockett, 13 Sm. & M. 395.

Missouri.—Connecticut Mut. L. Ins. Co. *v.* St. Louis, 98 Mo. 422, 11 S. W. 969; Burch *v.* Winston, 57 Mo. 62; McCartney *v.* Alderson, 54 Mo. 320; St. Charles Tp. *v.* Georges, 50 Mo. 194; Kreyling *v.* O'Reilly, 97 Mo. App. 384, 71 S. W. 372; McElroy *v.* Ford, 81 Mo. App. 500; Cranor *v.* School Dist., 81 Mo. App. 152.

Montana.— Wilson *v.* Pickering, 28 Mont. 435, 72 Pac. 821.

New Hampshire.— Hall *v.* Hall, 64 N. H. 295, 9 Atl. 219.

New York.— Viets *v.* Troy Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Watson *v.* Forty-Second St., etc., R. Co., 93 N. Y. 522 [*affirming* 48 N. Y. Super. Ct. 44]; Goillotel *v.* New York, 87 N.Y. 441, 10 Abb. N. Cas. 318 [*reversing* 55 How. Pr. 114]; Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585; Drake *v.* Wilkie, 30 Hun 537; Carpenter *v.* Shimer, 24 Hun 464 [*disapproving* Dubois *v.* Kingston, 20 Hun 500]; Coe *v.* Mason, 41 Barb. 612; Glen Cove Mut. Ins. Co. *v.* Harrold, 20 Barb. 298; Gillespie *v.* Rosekrants, 20 Barb. 35; Matter of Guttroff, 39 Misc. 483, 80 N. Y. Suppl. 219; Fairbanks *v.* Wood, 17 Wend. 329; Van Hook *v.* Whitlock, 3 Paige 409. See also Didier *v.* Davison, 2 Barb. Ch. 477.

North Carolina.— Glover *v.* Flowers, 95 N. C. 57; Gaither *v.* Sain, 91 N. C. 304; Blue *v.* Gilchrist, 84 N. C. 239; Libbett *v.* Maultshy, 71 N. C. 345. See also Williams *v.* McNair, 98 N. C. 332, 4 S. E. 131, 133.

Ohio.— Ham *v.* Kunzi, 56 Ohio St. 531, 47 N. E. 536; Webster *v.* American Bible Soc., 50 Ohio St. 1, 33 N. E. 297; Hazlet *v.* Critchfield, 7 Ohio, Pt. II, 153; Bigelow *v.* Bigelow, 6 Ohio 96; Shank *v.* Eacops, Tapp. 189; McClurg *v.* Cole, 8 Ohio Dec. (Reprint) 42, 5 Cinc. L. Bul. 287; Hall *v.* Prindle, 2 Ohio Dec. (Reprint) 261, 2 West. L. Month. 193. See also McKinney *v.* McKinney, 8 Ohio St. 423.

South Carolina.— Heyward *v.* Farmers' Min. Co., 42 S. C. 138, 19 S. E. 963, 20 S. E. 64, 46 Am. St. Rep. 702, 28 L. R. A. 42; Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25; State *v.* Pinckney, 22 S. C. 484; Bolt *v.* Dawkins, 16 S. C. 198; Bratton *v.* Guy, 12 S. C. 42.

Tennessee.— Stephens *v.* Martin, 85 Tenn. 278, 2 S. W. 206; Keeble *v.* Tompkins, 2 Baxt. 473.

Texas.— Voigt *v.* Gulf, etc., R. Co., 94 Tex. 357, 60 S. W. 658 [*reversing* (Civ. App. 1900) 59 S. W. 578]; Anderson *v.* Wynne, 25 Tex. Civ. App. 440, 62 S. W. 119. See also Pew *v.* Ward, 10 Tex. 179.

Utah.— Garland *v.* Bear Lake, etc., Waterworks, etc., Co., 9 Utah 350, 34 Pac. 368.

in some instances to existing causes of action.[47] It is not unusual for the legislature to affix to the statute an express proviso intended to preserve whatever exist-

Washington.— Raymond *v.* Morrison, 9 Wash. 156, 37 Pac. 318; Ward *v.* Huggins, 7 Wash. 617, 32 Pac. 740, 1015, 36 Pac. 285.

United States.— McKean *v.* Archer, 52 Fed. 791; Pruseux *v.* Welch, 20 Fed. Cas. No. 11,456, decided under Ohio statute.

England.— Doe *v.* Page, 5 Q. B. 767, Dav. & M. 601, 8 Jur. 999, 13 L. J. Q. B. 153, 48 E. C. L. 767.

Canada.— Doe *v.* Belding, 4 N. Brunsw. 534.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

47. *Alabama.*— Bettis *v.* Saint, 28 Ala. 214.

Alaska.— See Tyee Consol. Min. Co. *v.* Langstedt, 1 Alaska 439.

Arkansas.— Goodman *v.* Pareira, 70 Ark. 49, 66 S. W. 147; Fayetteville Bldg., etc., Assoc. *v.* Bowlin, 63 Ark. 573, 39 S. W. 1046; Pettus *v.* Harris, 11 Ark. 294; Carneal *v.* Thompson, 9 Ark. 55; Watson *v.* Higgins, 7 Ark. 475; Hawkins *v.* Hensley, 4 Ark. 167.

California.— See Clarke *v.* Huber, 25 Cal. 593.

Connecticut.— Edwards *v.* White, 12 Conn. 28.

Florida.— Wade *v.* Doyle, 17 Fla. 522; Sanderson *v.* Thomas, 17 Fla. 468; Spencer *v.* McBride, 14 Fla. 403.

Georgia.— Neal *v.* Duffee, 54 Ga. 591; Cooper *v.* Lowery, 54 Ga. 198. See also Garrard *v.* Cody, 51 Ga. 555.

Idaho.— Schneider *v.* Hussey, 2 Ida. (Hasb.) 8, 1 Pac. 343.

Illinois.— Township 16 School Trustees *v.* Chamberlain, 14 Ill. 495.

Iowa.— Norris *v.* Tripp, 111 Iowa 115, 82 N. W. 610; Campbell *v.* Long, 20 Iowa 382; Montgomery *v.* Chadwick, 7 Iowa 114; Phares *v.* Walters, 6 Iowa 106; Bennett *v.* Bevard, 6 Iowa 82; Roop *v.* Seaton, 4 Greene 252.

Kansas.—Keith *v.* Keith, 26 Kan. 26; Barnes *v.* Garvey, 4 Kan. 555; Smith *v.* Cline, 3 Kan. 506; Root *v.* Bradley, 1 Kan. 437; Elliott *v.* Lochnane, 1 Kan. 126; Morton *v.* Sharkey, McCahon 113.

Kentucky.— Mattingly *v.* Corbit, 7 B. Mon. 376; Lewis *v.* Harbin, 5 B. Mon. 564. See also Luckett *v.* Dunn, 3 Litt. 218.

Maine.— Sampson *v.* Sampson, 63 Me. 328; Quimby *v.* Buzzell, 16 Me. 470. See also Wellman *v.* Southard, 30 Me. 425.

Massachusetts.—Darling *v.* Wells, 1 Cush. 508; Brigham *v.* Bigelow, 12 Metc. 268; Willard *v.* Clarke, 7 Metc. 435.

Michigan.— McKisson *v.* Davenport, 83 Mich. 211, 47 N. W. 100, 10 L. R. A. 507.

Minnesota.— Bradley *v.* Norris, 63 Minn. 156, 65 N. W. 357; Lambert *v.* Slingerland, 25 Minn. 457; Stine *v.* Bennett, 13 Minn. 153. See also Burk *v.* Western Land Assoc., 40 Minn. 506, 42 N. W. 479.

Mississippi.— Harper *v.* Tapley, 35 Miss. 506.

Missouri.— Seibert *v.* Copp, 62 Mo. 182; Gilker *v.* Brown, 47 Mo. 105; Callaway County *v.* Nolley, 31 Mo. 393; Kreyling *v.* O'Reilly, 97 Mo. App. 384, 71 S. W. 372.

Montana.— Sherman *v.* Nason, 25 Mont. 283, 64 Pac. 768; Guiterman *v.* Wishon, 21 Mont. 458, 54 Pac. 566.

New Jersey.— Smith *v.* Tucker, 17 N. J. L. 82.

New Mexico.— Orman *v.* Van Arsdell, (1904) 78 Pac. 48; Stern *v.* Bates, 9 N. M. 286, 50 Pac. 325.

New York.— Clarke *v.* Gibbons, 83 N. Y. 107 [*reversing* 18 Hun 13]; Acker *v.* Acker, 81 N. Y. 143 [*reversing* 16 Hun 173]; McMahon *v.* Arnold, 107 N. Y. App. Div. 132, 94 N. Y. Suppl. 775; Van Dyke's Estate, 7 N. Y. St. 710.

North Carolina.— Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757; Cox *v.* Brown, 51 N. C. 100.

North Dakota.— Osborne *v.* Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 46 L. R. A. 715.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376; Fegley *v.* Easton, 2 Pa. Co. Ct. 505.

Rhode Island.—Thompson *v.* Hoxsie, 24 R. I. 493, 53 Atl. 873.

South Carolina.— Lawton *v.* Perry, 40 S. C. 255, 18 S. E. 861.

Texas.— Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655; Rucker *v.* Dailey, 66 Tex. 284, 1 S. W. 316; Garvin *v.* St. Clair, 17 Tex. 435; Clay *v.* Clay, 13 Tex. 195; Harper *v.* Nichol, 13 Tex. 151; Cayce *v.* Lewis, 2 Tex. 294.

Utah.— Guthiel *v.* Gilmer, 27 Utah 496, 76 Pac. 628.

Vermont.— Cardell *v.* Carpenter, 42 Vt. 234; Wires *v.* Farr, 25 Vt. 41; Royce *v.* Hurd, 24 Vt. 620.

West Virginia.— State *v.* Brookover, 38 W. Va. 141, 18 S. E. 476; State *v.* Mines, 38 W. Va. 125, 18 S. E. 470; Huffman *v.* Callison, 6 W. Va. 301.

United States.— Alabama State Bank *v.* Dalton, 9 How. 522, 13 L. ed. 242; Lamb *v.* Powder River Live Stock Co., 132 Fed. 434, 65 C. C. A. 570, 67 L. R. A. 558 (construing Colorado statute); Thompson *v.* McConnell, 107 Fed. 33, 46 C. C. A. 124 (construing Texas statute); Caulk *v.* Pace, 53 Fed. 709, 3 C. C. A. 631 (construing Florida statute); Pruseux *v.* Welch, 20 Fed. Cas. No. 11,456 (construing Ohio statute).

Canada.— Stover *v.* Marchand, 10 Manitoba 322; Notman *v.* Crooks, 10 U. C. Q. B. 105.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

Retroactive constitutional provision for limitation of actions.— In Grigsby *v.* Peak, 57 Tex. 142, it was held that section 14, art. 12, of the Texas constitution of 1869, limiting the time for bringing actions in the case of persons under disabilities to seven years after the removal of the disability instead of five as before, applied to persons whose

ing rights there may be at the time of the enactment for a short period, to enable parties to submit whatever claim of right they may have to the court for determination.[48]

c. Statutes Not Expressly Referring to Existing Causes of Action. When the statute declares generally that no action, or no action of a certain class, shall be brought, except within a certain limited time after it shall have accrued, the language of the statute would naturally make it apply to past actions as well as to those arising in the future.[49] But if an action accrued more than the limited time before the statute was passed, a literal interpretation of the statute would have the effect of absolutely barring such action at once. Such an intent would be unconstitutional, and it will be presumed not to have been in the mind of the legislature.[50] To avoid such a result and to give the statute a construction that will enable it to stand, different modes have been adopted by the various courts. One is to make the statute apply only to causes of action arising after its passage, thus leaving all actions existing at the passage of the act under the operation of prior limitation laws or without any limitation whatever.[51] On the other hand the rule is frequently laid down that inasmuch as statutes of limitation affect the remedy only, the statute in force at the time of suit brought governs the case and operates in the absence of saving clauses on causes of action accruing prior to its passage.[52] And in giving effect to this view, the rule adopted in some jurisdictions is to construe the statute as applying to such existing actions only as have already run out a portion of the statutory time, but which still have a reasonable time left for

disability had been removed when the constitution was adopted, provided the action was not already barred under the previous law, it being apparent that it was the intention to give a retrospective and not a prospective operation to the constitutional provision. To the same effect see French *v.* Strumberg, 52 Tex. 92.

Act construed to be prospective as well as retroactive see Rice *v.* U. S., 122 U. S. 611, 7 S. Ct. 1377, 30 L. ed. 793.

Constitutional provision construed as prospective as well as retroactive see Vaughan *v.* Norwood, 44 Ark. 101.

48. Tyee Consol. Min. Co. *v.* Jennings, 137 Fed. 863, 70 C. C. A. 393.

49. Martson *v.* Seabury, 3 N. J. L. 435, 4 Am. Dec. 409; Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

50. Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

51. *Illinois.*— McMillan *v.* McCormick, 117 Ill. 79, 7 N. E. 132; Watt *v.* Kirby, 15 Ill. 200; Township 16 School Trustees *v.* Chamberlain, 14 Ill. 495; Thompson *v.* Alexander, 11 Ill. 54. See also Walker *v.* People, 202 Ill. 34, 66 N. E. 827; Means *v.* Harrison, 114 Ill. 248, 2 N. E. 64.

Iowa.— Thoeni *v.* Dubuque, 115 Iowa 482, 88 N. W. 967. *Compare* Hinch *v.* Weatherford, 2 Greene 244; Forsyth *v.* Ripley, 2 Greene 181; Norris *v.* Slaughter, 1 Greene 338; Sleath *v.* Murphy, Morr. 321, 41 Am. Dec. 232.

Maine.— MacNichol *v.* Spence, 83 Me. 87, 21 Atl. 748.

Michigan.— Harrison *v.* Metz, 17 Mich. 377.

Mississippi.—Garrett *v.* Beaumont, 24 Miss. 377; Boyd *v.* Barrenger, 23 Miss. 269. See also West Feliciana R. Co. *v.* Stockett, 13 Sm. & M. 395. *Compare* Benson *v.* Stewart, 30 Miss. 49.

South Carolina.— Munro *v.* Hill, 25 S. C. 476; Nichols *v.* Briggs, 18 S. C. 473.

Virginia.— Day *v.* Pickett, 4 Munf. 104.

West Virginia.— Lawyer *v.* Barker, 45 W. Va. 468, 31 S. E. 964; Walker *v.* Burgess, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. Rep. 775; Casto *v.* Greer, 44 W. Va. 332, 30 S. E. 100; Maslin *v.* Hiett, 37 W. Va. 15, 16 S. E. 437.

United States.—Murray *v.* Gibson, 15 How. 421, 14 L. ed. 755, following Mississippi rule *supra*. See also Sohn *v.* Waterson, 17 Wall. 596, 21 L. ed. 737.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

52. *Alabama.*— Martin *v.* Martin, 35 Ala. 560.

Arkansas.— Walker *v.* Mississippi Bank, 7 Ark. 500.

Indiana.— State *v.* Clark, 7 Ind. 468; State *v.* Swope, 7 Ind. 91; Stipp *v.* Brown, 2 Ind. 647; Pritchard *v.* Spencer, 2 Ind. 486; Winston *v.* McCormick, 1 Ind. 56.

Kentucky.— See Fish *v.* Genett, 56 S. W. 813, 22 Ky. L. Rep. 177.

Massachusetts.— Brigham *v.* Bigelow, 12 Metc. 268.

Minnesota.— Cook *v.* Kendall, 13 Minn. 324; Holcombe *v.* Tracy, 2 Minn. 241.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

New Hampshire.— Gilman *v.* Cutts, 23 N. H. 376.

New York.— Acker *v.* Acker, 81 N. Y. 143; Matter of Warner, 39 N. Y. App. Div. 91, 56 N. Y. Suppl. 585.

United States.— Patterson *v.* Gaines, 6 How. 550, 12 L. ed. 553.

See 33 Cent. Dig. tit. "Limitation of Actions," § 27.

prosecution before the statutory time expires — which reasonable time is to be estimated by the court, leaving all other actions accruing prior to the statute, unaffected by the statute,[53] while the construction adopted by many other courts is to consider the statute as affecting existing causes of action only from the time when they are first subjected to its operation,[54] unless at least they are sooner barred under the old law.[55] In Louisiana and Texas the courts have adopted the rule of the civil law that upon the substitution of a new term of limitation after prescription begins to run the time which elapsed under the law preceding the alteration is to be computed according to that law, and that which follows is to be computed according to the new law; or, in other words, the time which elapsed under the former law will be counted in the ratio that it bears to the whole period, and the time of the new law will be computed upon the basis of the ratio that the unexpired time under the old law bears to the whole time.[56]

53. Dale *v.* Frisbie, 59 Ind. 530; Gimbel *v.* Smidth, 7 Ind. 627; State *v.* Clark, 7 Ind. 468; State *v.* Swope, 7 Ind. 91; Manchester *v.* Doddridge, 3 Ind. 360; Stipp *v.* Brown, 2 Ind. 647; Pritchard *v.* Spencer, 2 Ind. 486; Winston *v.* McCormick, 1 Ind. 56; Fiske *v.* Briggs, 6 R. I. 557; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283. See also Holcombe *v.* Tracy, 2 Minn. 241; Marston *v.* Seabury, 3 N. J. L. 435, 4 Am. Dec. 409; Fullerton *v.* Spring, 3 Wis. 667; Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737. *Compare* McEntire *v.* Brown, 28 Ind. 347.

54. *Alabama.*— Martin *v.* Martin, 35 Ala. 560; Cox *v.* Davis, 17 Ala. 714, 52 Am. Dec. 199; Niekles *v.* Haskins, 15 Ala. 619, 50 Am. Dec. 154; Henry *v.* Thorpe, 14 Ala. 103.

Arkansas.— Lee *v.* Leech, 9 Ark. 423; Watson *v.* Higgins, 7 Ark. 475; Hawkins *v.* Campbell, 6 Ark. 513; Lucas *v.* Tunstall, 6 Ark. 443; Dickerson *v.* Morrison, 6 Ark. 264; Baldwin *v.* Cross, 5 Ark. 510. See also Brian *v.* Tims, 10 Ark. 597.

California.—Lehmaier *v.* King, 10 Cal. 373; Nelson *v.* Nelson, 6 Cal. 430. See also Morris *v.* De Celis, 51 Cal. 55; Billings *v.* Hall, 7 Cal. 1; Billings *v.* Harvey, 6 Cal. 381. *Compare* Scarborough *v.* Dugan, 10 Cal. 305.

Georgia.— Ross *v.* Central R., etc., Co., 53 Ga. 371; Central Bank *v.* Solomon, 20 Ga. 408.

Idaho.— See Schneider *v.* Hussey, 2 Ida. (Hasb.) 8, 1 Pac. 343.

Kansas.— See Morton *v.* Sharkey, McCahon 113.

Maryland.— Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825; Manning *v.* Carruthers, 83 Md. 1, 34 Atl. 254.

Missouri.— Forcht *v.* Short, 45 Mo. 377; Hauser *v.* Hoffman, 32 Mo. 334; Weber *v.* Manning, 4 Mo. 229. See also Weir *v.* Cordz-Fisher Lumber Co., 186 Mo. 388, 85 S. W. 341; Seibert *v.* Copp, 62 Mo. 182; Callaway County *v.* Nolley, 31 Mo. 393. *Compare* Ridgley *v.* The Reindeer, 27 Mo. 442.

Montana.— Gillette *v.* Hibbard, 3 Mont. 412; Coady *v.* Reins, 1 Mont. 424.

New York.—Brewster *v.* Brewster, 32 Barb. 428; Ward *v.* Kilts, 12 Wend. 137; People *v.* Columbia County, 10 Wend. 363; Sayre *v.* Wisner, 8 Wend. 661; Spoor *v.* Wells, 3 Barb. Ch. 199. *Compare* Calkins *v.* Calkins, 3 Barb. 305; Lawrence *v.* Leake, etc., Orphan House, 2 Den. 577; Williamson *v.* Field, 2 Sandf. Ch. 533.

Oklahoma.— Huber *v.* Zimmerman, 8 Okla. 573, 58 Pac. 737; Southgate *v.* Frier, 8 Okla. 435, 57 Pac. 841; Schnell *v.* Jay, 4 Okla. 157, 46 Pac. 598.

Pennsylvania.— Bowden *v.* Philadelphia, etc., R. Co., 196 Pa. St. 562, 46 Atl. 843; Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; Focht *v.* Reading Stove Works, 21 Pa. Co. Ct. 524.

Washington.— Baer *v.* Choir, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; Packscher *v.* Fuller, 6 Wash. 534, 33 Pac. 875. See also McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

United States.—Sohn *v.* Waterson, 17 Wall. 596, 21 L. ed. 737 [*affirming* 22 Fed. Cas. No. 13,161, 1 Dill. 358]; Lewis *v.* Lewis, 7 How. 776, 12 L. ed. 909 [on certificate from 15 Fed. Cas. No. 8,319, 3 McLean 568]; Ross *v.* Duval, 13 Pet. 45, 10 L. ed. 51; Cleveland Ins. Co. *v.* Reed, 5 Fed. Cas. No. 2,889, 1 Biss. 180. *Compare* Murray *v.* Gibson, 15 How. 421.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

55. Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Trapnall *v.* Burton, 24 Ark. 371. See also Hart *v.* Bostwick, 14 Fla. 162, decided under express statutory provision.

In North Carolina the rule is laid down that where the period of limitation is shortened before a cause of action is barred, the reasonable time thereafter in which an action may be brought is the length of time remaining in which the action could have been brought under the old law, not to exceed the time allowed by the new statute. Carson *v.* Norfolk, etc., R. Co., 128 N. C. 95, 38 S. E. 287; Culbreth *v.* Downing, 121 N. C. 205, 28 S. E. 294, 61 Am. St. Rep. 661.

56. Dunlop *v.* Minor, 26 La. Ann. 117; Fisk *v.* Bergerot, 21 La. Ann. 111; Whitworth *v.* Ferguson, 18 La. Ann. 602; Deal *v.* Patterson, 12 La. Ann. 728; Tate *v.* Garland, 12 La. Ann. 525; Thompson *v.* Scales, 11 La. 560; Mayor *v.* Ripley, 11 La. 144; Xanpi *v.* Orso, 11 La. 57; Goddard *v.* Urquhart, 6 La. 659; Reeves *v.* Adams, 5 La. 288; Union Cotton Manufactory *v.* Lobdell, 7 Mart. N. S. (La.) 108; Odum *v.* Garner, 86 Tex. 374, 25

d. Extension of Statutes to Pending Actions. In the absence of language making such construction necessary, an act of limitation will not be construed so as to make it apply to actions pending, or to defenses that have been pleaded at the time the statute goes into effect.[57] An act which merely limits the time within which an action may be brought is not susceptible of a construction which shall make it apply to a suit pending at the time such act takes effect, although the suit is commenced after the passage of the act,[58] especially when at the time action was brought there was no other statute in force as to such actions.[59] It has been held that an act expressly alluding to rights of action accrued before it took effect will not embrace actions pending at the time of its passage.[60] But a statute of limitations will operate retrospectively so as to include pending suits, where the statute clearly indicates that it is to have this effect.[61]

e. Extension of Statutes to Actions Already Barred. A statute of limitation will not be construed so as to affect causes of action already barred, if such construction can be reasonably avoided.[62]

f. Effect of Postponement of Operation of Statute. The fact that a statute of limitations is postponed in its operation, and is not to take effect from its passage, has been held to be a circumstance showing that the statute was intended to

S. W. 18; Gautier *v.* Franklin, 1 Tex. 732, Martin *v.* Kuykendall, (Tex. Civ. App. 1894) 26 S. W. 144.

Computation of time elapsing between adoption of new law and repeal of old law.— In Gautier *v.* Franklin, 1 Tex. 732, it was held that the time elapsing between the repeal of the old law and the adoption of the new one is to be computed as a part of the former term of prescription.

Construction of statute in absence of prior statute.— In Rice's Succession, 15 La. Ann. 649, it was held that where prior to the passage of the act of April, 1853, there was no term of prescription applicable to domestic judgments, domestic judgments rendered anterior to the passage of the act could not be barred before the lapse of the time limited for its promulgation. See also Valderes *v.* Bird, 10 Rob. (La.) 396; Bourg *v.* Monginot, 1 Rob. (La.) 331.

57. *Alabama.*— Bradford *v.* Barclay, 42 Ala. 375.

Kentucky.— Fenwick *v.* Phillips, 3 Metc. 87.

Maine.— See Deake's Appeal, 80 Me. 50, 12 Atl. 790.

Massachusetts.— See Battles *v.* Fobes, 18 Pick. 532, 19 Pick. 578 note.

North Carolina.— Ridley *v.* Seaboard, etc., R. Co., 124 N. C. 34, 32 S. E. 325; Harrell *v.* Norfolk, etc., R. Co., 122 N. C. 822, 29 S. E. 56; Nichols *v.* Norfolk, etc., R. Co., 120 N. C. 495, 26 S. E. 643; Parker *v.* Norfolk, etc., R. Co., 119 N. C. 677, 25 S. E. 722.

United States.— Parlin *v.* U. S., 1 Ct. Cl. 174.

Statutes expressly excluding pending actions see Shelley *v.* Wescott, 23 App. Cas. (D. C.) 135; Alexander *v.* Gibbon, 118 N. C. 796, 24 S. E. 748, 54 Am. St. Rep. 757.

58. Vreeland *v.* Bergen, 34 N. J. L. 438.

59. Curtis *v.* Boquillas Land, etc., Co., (Ariz. 1904) 76 Pac. 612.

60. Hedger *v.* Rennaker, 3 Metc. (Ky.) 255. See also Bradford *v.* Barclay, 42 Ala. 375; Smith *v.* Morrison, 22 Pick. (Mass.) 430.

61. Bishop *v.* Wilds, 1 Harr. (Del.) 87; Bates *v.* Cullum, 177 Pa. St. 633, 35 Atl. 861, 55 Am. St. Rep. 753, 34 L. R. A. 440; Huffman *v.* Alderson, 9 W. Va. 616. See also Webster *v.* Cooper, 14 How. (U. S.) 488, 14 L. ed. 510; Grantham *v.* Powell, 10 U. C. Q. B. 306.

62. *Alabama.*— Ivey *v.* Blum, 53 Ala. 172; Bradford *v.* Barclay, 42 Ala. 375.

Arkansas.— Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248; Couch *v.* McKee, 6 Ark. 484. See also Durritt *v.* Trammell, 11 Ark. 183.

Idaho.—Pridgeon *v.* Greathouse, 1 Ida. 359.

Indiana.— See McKinney *v.* Springer, 8 Blackf. 506.

Kentucky.— Cassity *v.* Storms, 1 Bush 452.

Massachusetts.— Kinsman *v.* Cambridge, 121 Mass. 558; Wright *v.* Oakley, 5 Metc. 400.

New York.— People *v.* Columbia County, 10 Wend. 363; Sayre *v.* Wisner, 8 Wend. 661.

North Carolina.— Whitehurst *v.* Dey, 90 N. C. 542; Phillips *v.* Cameron, 48 N. C. 390; Taylor *v.* Harrison, 13 N. C. 374. See also Varner *v.* Johnston, 112 N. C. 570, 17 S. E. 483.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

Pennsylvania.— Robb *v.* Harlan, 7 Pa. St. 292.

Vermont.—Wires *v.* Fair, 25 Vt. 41; Briggs *v.* Hubbard, 19 Vt. 86; Lowry *v.* Keyes, 14 Vt. 66.

See 33 Cent. Dig. tit. "Limitation of Actions," § 16 *et seq.*

Rule applied under express saving of statute see Wright *v.* Oakley, 5 Metc. (Mass.) 400; Battles *v.* Fobes, 18 Pick. (Mass.) 532, 19 Pick. 578 note (where it appeared also that the statutory bar was pleaded before the change of limitation took effect); Stine *v.* Bennett, 13 Minn. 153; Fuller, etc., Co. *v.* Johnson, 8 Okla. 601, 58 Pac. 745.

be retrospective in its operation and therefore applicable to existing as well as prospective cases of action.[63]

g. When Cause of Action Accrues. In determining what law of limitation shall control in a given case, the question is frequently presented as to when the cause of action arose; and it may be stated as a general rule that the cause of action arises when the party has a right to apply to the proper tribunal for relief.[64] Hence statutes applying to causes of action subsequently accruing are generally construed to govern in actions on contracts to be performed subsequent to the passage of the statutes, although executed at a prior date.[65] But under a statute providing in express terms that it shall not be construed so as to affect "any rights, liabilities or causes of action" that may have accrued before it shall take effect, a contrary rule has been laid down.[66]

IV. OPERATION AND EFFECT AS BAR.

A. In General.[67] Except in cases of direct technical trusts,[68] the statute of limitations operates as a bar, in equity as well as in law,[69] and this *ex vigore suo* and not by the discretion or courtesy of the courts.[70] It does not operate as a rule of evidence by producing a presumption of payment only, but as a positive bar.[71] Except where the statute by its terms absolutely extinguishes the debt or

63. *Kentucky.*— Hedger *v.* Rennaker, 3 Metc. 255.

Massachusetts.— Smith *v.* Morrison, 22 Pick. 430.

Minnesota.— Duncan *v.* Munro, 32 Minn. 460, 21 N. W. 714; Stine *v.* Bennett, 13 Minn. 153; Burwell *v.* Tullis, 12 Minn. 572.

Wisconsin.— Eaton *v.* Manitowoc County Sup'rs, 40 Wis. 668.

United States.— Wrightman *v.* Boone County, 82 Fed. 412.

64. Chandler *v.* Chandler, 21 Ark. 95. See also Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

65. Chandler *v.* Chandler, 21 Ark. 95; Harsh *v.* Hanauer, 15 Ark. 252; De Cordova *v.* Galveston, 4 Tex. 470. See also Garland *v.* Bear Lake, etc., Waterworks, etc., Co., 9 Utah 350, 34 Pac. 368.

This rule has been applied to actions on notes, bonds, and mortgages (Beesley *v.* Spencer, 25 Ill. 216; State *v.* Orr, 16 Ohio St. 522; King *v.* Nichols, 16 Ohio St. 80 [*reversing* 2 Obio Dec. (Reprint) 564, 4 West. L. Month. 25]; Jennings *v.* Peay, 50 S. C. 327, 28 S. E. 949; Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298; Stoddard *v.* Owings, 42 S. C. 88, 20 S. E. 25), and to an action to enforce a trust, where it appeared that the trust began after the passage of the limitation act, although an alleged agreement out of which the trust arose was made before its passage (Blackwell *v.* Ace, 3 C. Pl. (Pa.) 177).

66. Means *v.* Harrison, 114 Ill. 248, 2 N. E. 64; Blackburn University *v.* Weer, 21 Ill. App. 29; Smart *v.* Morrison, 15 Ill. App. 226. See also Bradley *v.* Spain, 7 Ind. App. 694, 34 N. E. 1011.

67. Limitations applicable to particular actions see *infra*, V.

Statute as bar to defenses in general see *infra*, V, O.

68. Johnson *v.* Ames, 11 Pick. (Mass.) 173; Farman *v.* Brooks, 9 Pick. (Mass.) 212; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 89, 11 Am. Dec. 417; Coster *v.* Murray, 5 Johns. Ch. (N. Y.) 522; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16. See also Beckford *v.* Wade, 17 Ves. Jr. 87, 11 Rev. Rep. 20, 34 Eng. Reprint 34. See also *infra*, V, L, 3.

69. Johnson *v.* Ames, 11 Pick. (Mass.) 173; Farnam *v.* Brooks, 9 Pick. (Mass.) 212. See also *infra*, V, L, 1.

70. Johnson *v.* Ames, 11 Pick. (Mass.) 173; Farnam *v.* Brooks, 9 Pick. (Mass.) 212.

A positive rule of law.— The statute of limitations is a positive rule of law which must be enforced by the courts when pleaded and found applicable, and when it does not apply it must be so held. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712.

Lapse of entire statutory period essential. — To constitute a bar the statute must have run for the full statutory period. Tufts *v.* Rice, 1 Ill. 64; Harper *v.* Topley, 35 Miss. 506.

71. Johnson *v.* Albany, etc., R. Co., 54 N. Y. 416, 13 Am. Rep. 607; Waltermire *v.* Westover, 14 N. Y. 16; Jones *v.* Merchants' Bank, 4 Rob. (N. Y.) 221; Kincaid *v.* Richardson, 9 Abb. N. Cas. (N. Y.) 315. See also Grant *v.* Burr, 54 Cal. 298.

In Iowa under statute it was at one time provided that in actions upon contracts the statute of limitations shall not apply if from the answer of defendant or from his testimony as a witness it appears affirmatively that the cause of action still justly subsists. Stewart *v.* McMillan, 34 Iowa 455; McNitt *v.* Helm, 29 Iowa 302; Howells *v.* Patton, 26 Iowa 531; Hendershott *v.* Ping, 24 Iowa 134; Robey *v.* Knowlton, 23 Iowa 544; Webster *v.* Rees, 23 Iowa 269; Porter *v.* McKinzie, 20 Iowa 462. But this revision was repealed by Laws (1870), c. 167, § 35, which took

demand itself,[72] the general rule with respect to debts or mere money demands is that statutes of limitation are regarded as barring the remedy, and not as extinguishing the cause of action.[73] But with respect to actions for the recovery of real or personal property, the weight of authority is in favor of the proposition

effect April 29, 1870, with the proviso that the repeal should not affect pending actions. Stewart *v.* McMillan, *supra.*

Limitation distinguished from presumption of payment see *supra*, I, D.

72. Maples *v.* Avery, 6 Conn. 20; Pittman *v.* Elder, 76 Ga. 371; Peel *v.* Bryson, 72 Ga. 331, holding that the fact that a statute bars the right as well as the remedy does not, however, apply to the court of jurisdiction to hear and determine causes within its provisions. See also Baker *v.* Stonebraker, 36 Mo. 338.

73. *Alabama.*— Jones *v.* Jones, 18 Ala. 248.

California.— McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Connecticut.— Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721; Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

District of Columbia.— Boogher *v.* Byers, 10 App. Cas. 419; District of Columbia *v.* Metropolitan R. Co., 8 App. Cas. 322.

Idaho.— Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44.

Illinois.— Suppiger *v.* Gruaz, 137 Ill. 216; Staninger *v.* Tabor, 103 Ill. App. 330.

Kentucky.— Kellar *v.* Sinton, 14 B. Mon. 307; Com. *v.* McGowan, 4 Bibb 62, 7 Am. Dec. 737.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415.

Maryland.— Booth *v.* U. S., 11 Gill & J. 373; Oliver *v.* Gray, 1 Harr. & G. 204. *Compare* Carroll *v.* Waring, 3 Gill & J. 491.

Massachusetts.— Townsend *v.* Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513; Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783; Hancock *v.* Franklin Ins. Co., 114 Mass. 155; Wright *v.* Oakley, 5 Metc. 400; Thayer *v.* Mann, 19 Pick. 535; Bulger *v.* Roche, 11 Pick. 36, 22 Am. Dec. 359.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

New Jersey.— Colton *v.* Depew, 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650.

New York.— Johnson *v.* Albany, etc., R. Co., 54 N. Y. 416, 13 Am. Rep. 607; Borst *v.* Corey, 15 N. Y. 505; Waltermire *v.* Westover, 14 N. Y. 16; Maxwell *v.* Cottle, 72 Hun 529, 25 N. Y. Suppl. 635; Hulbert *v.* Clark, 57 Hun 558, 11 N. Y. Suppl. 417 [*affirmed* in 128 N. Y. 295], 28 N. E. 638, 14 L. R. A. 59. Pratt *v.* Huggins, 29 Barb. 277; Jones *v.* Merchants' Bank, 4 Rob. 221; Williams *v.* Port Chester, 76 N. Y. Suppl. 620; Kincaid *v.* Richardson, 9 Abb. N. Cas. 315; Lincoln *v.* Battelle, 6 Wend. 475.

North Carolina.— Capehart *v.* Dettrick, 91 N. C. 344.

Ohio.— Fisher *v.* Mossman, 11 Ohio St. 42. *Compare* Hill *v.* Henry, 17 Ohio 9; Brooks *v.* Otis, 2 Ohio Dec. (Reprint) 355, 2 West, L. Month. 490.

Oregon.— Goodwin *v.* Morris, 9 Oreg. 322; Myer *v.* Beal, 5 Oreg. 130.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770.

South Carolina.— Amaker *v.* New, 33 S. C. 28, 11 S. E. 386, 8 L. R. A. 687; Nichols *v.* Briggs, 18 S. C. 473; Wilson *v.* Kelly, 16 S. C. 216; Smith *v.* Mitchell, Rice 316, 33 Am. Dec. 119.

Tennessee.— Marshall *v.* Hudson, 9 Yerg. 57.

Texas.— Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273; Nix *v.* Cardwell, 2 Tex. Unrep. Cas. 266; Davis *v.* Wrigley, 1 Tex. App. Civ. Cas. § 730. *Compare* Ross *v.* Mitchell, 28 Tex. 150.

United States.— Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 29 L. ed. 483; Sturges *v.* Crowninshield, 4 Wheat. 122, 4 L. ed. 529; Brunswick Terminal Co. *v.* National Bank, 88 Fed. 607; Miller *v.* Houston, etc., R. Co., 55 Fed. 366, 5 C. C. A. 134; Le Roy *v.* Crowinshield, 15 Fed. Cas. No. 8,269, 2 Mason 151; Sparks *v.* Pico, 22 Fed. Cas. No. 13,211, McAllister 497.

England.— Harris *v.* Quine, L. R. 4 Q. B. 653, 10 B. & S. 644, 38 L. J. Q. B. 331, 20 L. T. Rep. N. S. 947, 17 Wkly. Rep. 967; Higgins *v.* Scott, 2 B. & Ad. 413, 9 L. J. K. B. O. S. 262, 22 E. C. L. 176; Huber *v.* Steiner, 2 Bing. N. Cas. 202, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501; Quantock *v.* England, 5 Burr. 2628, 2 W. Bl. 702; Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401; Lynbug *v.* Weightman, 5 Esp. 198; Spears *v.* Hartly, 3 Esp. 81, 6 Rev. Rep. 814; Wainford *v.* Barker, 1 Ld. Raym. 232.

See 33 Cent. Dig. tit. "Limitation of Actions," § 649.

A limitation imposed by a statute granting a right of action for damages for death caused by wrongful act, which did not exist at common law, and which did not obtain in the absence of the statute which prescribed that such action must commence within a specified time, is held to be a condition imposed upon the exercise of the right of action granted, and not a limitation of the remedy alone. Rodman *v.* Missouri Pac. R. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704. To the same effect see Hamilton *v.* Hannibal, etc., R. Co., 39 Kan. 56, 18 Pac. 57; Taylor *v.* Cranberry Iron, etc., Co., 94 N. C. 525; The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358.

In Wisconsin the rule is broadly stated that the effect of the statute of limitations is to extinguish the right upon which it has completely operated. Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 376, 79 N. W. 433, 74 Am. St. Rep. 871 (where it is said: "What is meant by the term 'extinguish the right' as used in the adjudications and by the text writers, in discussing the subject under consideration, is not actual

that where one has had the peaceable, undisturbed, open possession of personal[74] as well as real property,[75] with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his rights.

B. Bar of One of Two Remedies as Affecting the Other.[76] As a general rule where a party has two remedies for the enforcement of a right, the one he chooses is not barred by the statute of limitations, merely because the other if he had resorted to it would have been; at least this is true where the statute does not affect the right, but the remedy only.[77] On other hand where a

satisfaction of the right by the operation of the statute of limitations. The idea is that a right to insist upon the statutory bar is a vested property right protected by the constitution, the effect of which is to forever prevent the judicial enforcement of the demand affected by it, against the will of the owner of the prescriptive right. Deprivation of the remedy under such circumstances that there can be no adverse restoration of it is a destruction or extinguishment of the right to which such remedy relates. The law deals only with enforceable rights, and if such a right be changed to a mere moral obligation, in a legal sense it no longer exists at all); Pierce *v.* Seymour, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737; Carpenter *v.* State, 41 Wis. 36; Brown *v.* Parker, 28 Wis. 21; Knox *v.* Cleveland, 13 Wis. 245; Hill *v.* Kricke, 11 Wis. 442; Sprecker *v.* Wakeley, 11 Wis. 432. See also Kahn *v.* Lesser, 97 Wis. 217, 72 N. W. 739.

74. *Alabama.*— Grunewald Co. *v.* Copeland, 131 Ala. 345, 30 So. 878; Jones *v.* Jones, 18 Ala. 248; Howell *v.* Hair, 15 Ala. 194.

Arkansas.— Hicks *v.* Fluit, 21 Ark. 463.

Georgia.— Southwestern R. Co. *v.* Atlantic, etc., R. Co., 53 Ga. 401, holding that the claimant does not lose the benefit of the statute because the personal property has been carried beyond the state.

Kentucky.— Dragoo *v.* Cooper, 9 Bush 629, holding that five years continued adverse possession of stolen property by an innocent holder invests him with a good legal title, protected by the bar of the statute of limitations.

Massachusetts.— Chapin *v.* Freeland, 142 Mass. 383, 8 N. E. 128, 56 Am. Rep. 701.

Mississippi.— Clark *v.* Slaughter, 34 Miss. 65.

New Hampshire.— Baker *v.* Chase, 55 N. H. 61.

South Carolina.— Gregg *v.* Bigham, 1 Hill 299, 26 Am. Dec. 181; Cockfield *v.* Hudson, 2 Bay 425.

Tennessee.— Garrett *v.* Vaughan, 1 Baxt. 113; Kirkman *v.* Philips, 7 Heisk. 222.

Texas.— Connor *v.* Hawkins, 71 Tex. 582, 9 S. W. 684; Winburn *v.* Cochran, 9 Tex. 123; Bowyer *v.* Robertson, (Civ. App. 1895) 29 S. W. 916.

Vermont.— Merrill *v.* Bullock, 59 Vt. 389, 8 Atl. 157; Preston *v.* Briggs, 16 Vt. 124.

United States.— Campbell *v.* Holt, 115 U. S. 620, 6 S. Ct. 209, 20 L. ed. 483; Shelby *v.* Guy, 11 Wheat. 361, 6 L. ed. 495; Brent *v.* Chapman, 5 Cranch 358, 3 L. ed. 125.

See 1 Cent. Dig. tit. "Adverse Possession," § 619 *et seq.*

In Maine it has been held that the possession of a chattel continued for ten years under claim of ownership will not of itself vest title therein; it would be evidence tending to show title therein, but liable to be controlled by other proof. Moulton *v.* Lawrence, 50 Me. 100.

In Oregon it has been held that the statute of limitation affects the remedy only and not the right or title to personal property. Goodwin *v.* Morris, 9 Oreg. 322; Myer *v.* Beal, 5 Oreg. 130.

75. See ADVERSE POSSESSION, 1 Cyc. 1135, note 85 *et seq.*

76. **Whether bar is fixed by form of action or cause of action** see *infra*, V, A.

77. *Alabama.*— Ware *v.* Curry, 67 Ala. 274; Chapman *v.* Lee, 64 Ala. 483; Ivey *v.* Owens, 28 Ala. 641.

Arkansas.— St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. 463.

Connecticut.— Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721; Ferriss *v.* Ferriss, 1 Root 365.

Georgia.— Shipp *v.* Davis, 78 Ga. 201, 2 S. E. 549; Elkins *v.* Edwards, 8 Ga. 325.

Illinois.— Bedell *v.* Janney, 9 Ill. 193; Illinois Cent. R. Co. *v.* Davis, 71 Ill. App. 99.

Kansas.— McDonald *v.* Hutchinson Wholesale Grocer Co., 65 Kan. 17, 68 Pac. 1083.

Louisiana.— School Directors *v.* Anderson, 28 La. Ann. 739; Templeman *v.* Pegues, 24 La. Ann. 537; Lastrapes *v.* Rocquet, 23 La. Ann. 68.

Massachusetts.— Graves *v.* Dawson, 133 Mass. 419; Thayer *v.* Mann, 19 Pick. 535; Lamb *v.* Clark, 5 Pick. 193.

Minnesota.— Jackson *v.* Holbrook, 36 Minn. 494, 32 N. W. 852, 1 Am. St. Rep. 683.

Mississippi.— Miller *v.* Jefferson College, 5 Sm. & M. 651; Miller *v.* Helm, 2 Sm. & M. 687.

Missouri.— Fender *v.* Haseltine, 106 Mo. App. 28, 79 S. W. 1018.

New York.— People *v.* Everest, 4 Hill 71; Lincoln *v.* Battele, 6 Wend. 475.

North Carolina.— Robertson *v.* Dunn, 87 N. C. 191.

Ohio.— Fisher *v.* Mossman, 11 Ohio St. 42; Davis *v.* Ford, Wright 200; Plant *v.* Murphy, 5 Ohio Dec. (Reprint) 544.

Pennsylvania.— Evans *v.* See, 23 Pa. St.

plaintiff has elected one of two remedies for the enforcement of a right, and such action is barred by the statute, he is bound by his election, and cannot thereafter resort to the other remedy for which a different limitation is provided.[78]

C. Bar of Debt as Affecting Security — 1. In General. The rule sustained by the weight of authority is that where the security for a debt is a lien on the property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred.[79] There are cases, however, in some juris-

88. See also Pierce *v.* McClurg, 1 Chest. Co. Rep. 241.

Tennessee.— McCombs *v.* Guild, 9 Lea 81; Kirkman *v.* Phillips, 7 Heisk. 222.

Texas.— Jackson *v.* Palmer, 52 Tex. 427; Ennis *v.* Gilder, 32 Civ. App. 351, 74 S. W. 585.

United States.— See The Conemaugh, 135 Fed. 240.

England.— Hunt *v.* Burn, 2 Salk. 421.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 69, 649, 656.

Compare State *v.* Foulks, 83 Ind. 374, holding that one cannot by attempting to sue on the contract contained in an official bond thereby avoid the plea of the statute of limitations, which plea would be good to a suit on the bond.

A suit by persons claiming under a patent to quiet their title is not barred by the fact that the statute of limitations has run against the right to have the patent reformed, where it appears that such persons may have the patent boundary run so as to include the tract claimed without reforming the title. Hendrickson *v.* Boreing, 32 S. W. 278, 17 Ky. L. Rep. 737.

The fact that the right to enforce by execution the collection of a judgment against a railroad company for damages to property has been lost by limitation does not cut off the right of the owner to intervene in a suit to foreclose a mortgage of the railroad property. Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001.

A bill for relief against a judgment will not be granted, where it appears that in settling a debt plaintiff paid a certain amount in cash and gave his note for the residue, the amount of both of which by mistake exceeded the amount of the debt, and plaintiff made no effort to recover the overpayment until after judgment against him on the note, and the statute of limitations has barred recovery of the overpayment. U. S. Bank *v.* Daniel, 12 Pet. (U. S.) 32, 9 L. ed. 989.

Where an action against an administrator on his bond is barred an action has been held not to be maintainable against him as trustee on his implied liability. Robinson *v.* Elam, 11 Ky. L. Rep. 307.

Individual not protected by bar available to him in representative capacity.— In Fuller *v.* McEwen, 17 Ohio St. 288, it was held that where an executor is residuary legatee of property charged with a debt an action may be brought against him as legatee, although the statute of limitations protects him as executor.

78. *Kentucky.*— Mortimer *v.* Louisville, etc., R. Co., 10 Bush 485. See also Willis *v.* Caldwell, 10 B. Mon. 199.

Michigan.— Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607.

Missouri.— Garrett *v.* Conklin, 52 Mo. App. 654; McCormick *v.* Kaye, 41 Mo. App. 263.

Nebraska.— Reeves *v.* Nye, 28 Nebr. 571, 44 N. W. 736, where plaintiff borrowed personalty from defendant, agreeing to return it in a certain time, and pay a consideration for its use, and plaintiff not having returned the property as promised, defendant requested its return, and thereafter plaintiff sold it to a third person, and it was held that defendant having waived the tort and set up his damages as a set-off to an action on contract by plaintiff, the statute of limitations began to run on his claim from the time of making demand for the return of the property.

Vermont.— Lapham *v.* Briggs, 27 Vt. 26. See also Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411, holding that the fact that an equitable action might be maintained for relief does not bring an action at law therefor within the limitation prescribed for equitable actions.

79. *Connecticut.*— Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721.

Louisiana.— Christian *v.* Lassiter, 23 La. Ann. 573.

New York.— Hurlbert *v.* Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59.

Ohio.— Fisher *v.* Mossman, 1 Ohio St. 42.

United States.— Waterfield *v.* Rice, 111 Fed. 625, 49 C. C. A. 504.

In South Dakota the rule exists under express statute that a lien is not extinguished by the bar of the debt or principal obligation. Alexander *v.* Ransom, 16 S. D. 302, 92 N. W. 418.

The lien of a justice's judgment, a transcript of which is filed, is not destroyed or impaired by the bar of the statute against an action founded on the judgment. Waltermire *v.* Westover, 14 N. Y. 16; Kincaid *v.* Richardson, 9 Abb. N. Cas. (N. Y.) 315.

The indebtedness for which a judgment bond is given is merged in the bond, and the bond will not be defeated by the subsequent running of the statute of limitations against the debt. Acheson *v.* Shenk, 2 Leg. Gaz. (Pa.) 361.

Attorney's lien.— Where a client was indebted to his attorney at the time of the placing the mortgage in the attorney's hands for collection, the attorney's lien on the mortgage continues, and is enforceable against the proceeds thereof when collected, although his claim against the client was barred by limita-

dictions which lay down a different rule, but these cases generally depend upon local statutes or upon the theory that the statute of limitations not only bars the remedy but destroys and annihilates the debt.[80]

2. Pledge or Collateral Security.[81] It is a general rule that a creditor may hold and realize on collaterals pledged to secure a debt, although action on the principal obligation be barred by limitation.[82]

3. Mortgage.[83] According to the weight of judicial authority, if the statute of limitations has not barred the remedy on a mortgage or deed for security, such remedy may be enforced, although action on the debt secured or the evidence thereof be barred.[84] But in several jurisdictions it is held that, as the mortgage

tion after the mortgage was received, but before it was collected. Maxwell *v.* Cottle, 72 Hun (N. Y.) 529, 25 N. Y. Suppl. 635. But where an attorney's claim for professional services in prosecuting an action to judgment is barred by limitation, it is held that his lien on the judgment is also barred. Reavey *v.* Clark, 9 N. Y. Suppl. 216.

80. California Sav. Bank *v.* Parrish, 116 Cal. 254, 48 Pac. 73; McCracken County *v.* Mercantile Trust Co., 84 Ky. 344, 1 S. W. 585, 8 Ky. L. Rep. 314; Flewellen *v.* Cochran, 19 Tex. Civ. App. 499, 48 S. W. 39. See also Hulbert *v.* Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59.

The lien of a partner for advances by him to the firm existing on the partnership property, including the realty, is in equity purely personal, and expires when the claim is barred by limitation. Rice *v.* Pennypacker, 5 Houst. (Md.) 279.

81. Pledge generally see Pledges.

82. *Georgia.*— Conway *v.* Caswell, 121 Ga. 254, 48 S. E. 956.

Kentucky.— Pollock *v.* Smith, 107 Ky. 509, 54 S. W. 740, 21 Ky. L. Rep. 1227.

Maryland.— Farmers' Bank *v.* Iglehart, 6 Gill 50.

Massachusetts.— Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783; Hancock *v.* Franklin Ins. Co., 114 Mass 155. See also Townsend *v.* Tyndale, 165 Mass. 293, 43 N. E. 107, 52 Am. St. Rep. 513.

Missouri.— Chouteau *v.* Allen, 70 Mo. 290.

New York.— Drake *v.* Wetmore, 67 Hun 77, 21 N. Y. Suppl. 1117; Jones *v.* Merchants' Bank, 4 Rob. 221.

Pennsylvania.— Sproul *v.* Standard Plate Glass Co., 201 Pa. St. 103, 50 Atl. 1003; Caven *v.* Harsh, 186 Pa. St. 132, 40 Atl. 321; Hartranft's Estate, 153 Pa. St. 530, 34 Am. St. Rep. 717, 26 L. R. A. 104; Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282, 21 Atl. 169, 170; Geyer *v.* Western Ins. Co., 3 Pittsb. 41.

Tennessee.—Connecticut Mut. L. Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. 345, 58 L. R. A. 694.

Texas.— Goldfrank *v.* Young, 64 Tex. 432; Hudson *v.* Wilkinson, 61 Tex. 606; Tombler *v.* Palestine Ice Co., 17 Tex. Civ. App. 596, 43 S. W. 896.

West Virginia.— Roots *v.* Mason City Salt Min. Co., 27 W. Va. 483.

United States.— Brent *v.* Washington Bank, 10 Pet. 596, 9 L. ed. 547; Gage *v.* Riverside Trust Co., 86 Fed. 984; Miller *v.* Houston City R. Co., 55 Fed. 366.

England.— Higgins *v.* Scott, 2 B. & Ad. 413, 9 L. J. K. B. O. S. 262, 22 E. C. L. 176; Spears *v.* Hartly, 3 Esp. 81, 6 Rev. Rep. 814.

Canada.— Wiley *v.* Ledyard, 10 Ont. Pr. 182; Waterous Engine Works Co. *v.* Wilson, 11 Manitoba 287.

See 33 Cent. Dig. tit. "Limitation of Actions," § 651.

Compare Russell *v.* Roque, 13 Ala. 149; German-American Sav. Bank *v.* Hanna, 124 Iowa 374, 100 N. W. 57; Van Eaton *v.* Napier, 63 Miss. 220.

In California it is held under statute that the lien of the pledge is extinguished after the lapse of the time within which action may be brought on the principal obligation (Mutual L. Ins. Co. *v.* Pacific Fruit Co., 142 Cal. 477, 76 Pac. 67; Conway *v.* Supreme Council C. K. of A., 131 Cal. 437, 63 Pac. 727), unless the debt has been reduced to judgment or in some other equally effective form has been kept alive and enforceable (Commercial Sav. Bank *v.* Hornberger, 140 Cal. 16, 73 Pac. 625. See also Zellerbach *v.* Allenberg, 99 Cal. 57, 33 Pac. 786; Spect *v.* Spect, 88 Cal. 437, 26 Pac. 203, 22 Am. St. Rep. 314, 13 L. R. A. 137; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225; Grant *v.* Burr, 54 Cal. 298).

83. Mortgage generally see Mortgages.

84. *Alabama.*— Doe *v.* McLoskey, 1 Ala. 708.

Connecticut.— Hough *v.* Bailey, 32 Conn. 288; Haskell *v.* Bailey, 22 Conn. 569; Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721; Baldwin *v.* Norton, 2 Conn. 161.

Florida.— Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329; Browne *v.* Browne, 17 Fla. 607, 35 Am. Rep. 96.

Georgia.— Elkins *v.* Edwards, 8 Ga. 325.

Idaho.— Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44.

Maine.— Joy *v.* Adams, 26 Me. 330.

Maryland.— Demuth *v.* Old Town Bank, 85 Md. 315, 37 Atl. 266, 60 Am. St. Rep. 322; Earnshaw *v.* Stewart, 64 Md. 513, 2 Atl. 734; Lingan *v.* Henderson, 1 Bland 236.

Massachusetts.— Norton *v.* Palmer, 142 Mass. 433, 8 N. E. 346; Hannan *v.* Hannan, 123 Mass. 441, 25 Am. Rep. 121; Balch *v.* Onion, 4 Cush. 559; Eastman *v.* Foster, 8 Metc. 19; Thayer *v.* Mann, 19 Pick. 535.

Michigan.— Webber *v.* Ryan, 54 Mich. 70, 19 N. W. 751; Powell *v.* Smith, 30 Mich.

is a mere incident of the debt, or security for its payment, when the right of recovery as to the debt is barred, the mortgage is also barred.[85]

451; Goodrich *v.* Leland, 18 Mich. 110; Michigan Ins. Co. *v.* Brown, 11 Mich. 265. See also Shelden *v.* Warner, 45 Mich. 638, 8 N. W. 529.

Nebraska.— Campbell *v.* Upton, 56 Nebr. 385, 76 N. W. 910; Cheney *v.* Campbell, 28 Nebr. 376, 44 N. W. 451; Cheney *v.* Janssen, 20 Nebr. 128, 29 N. W. 289; Cheney *v.* Woodruff, 20 Nebr. 124, 29 N. W. 275; Herdman *v.* Marshall, 17 Nebr. 252, 22 N. W. 690; Cheney *v.* Cooper, 14 Nebr. 415, 16 N. W. 471; Stevenson *v.* Craig, 12 Nebr. 464, 12 N. W. 1; Hale *v.* Christy, 8 Nebr. 264; Yarnal *v.* Hupp, 3 Nebr. (Unoff.) 1, 90 N. W. 645.

Nevada.— Cookes *v.* Culbertson, 9 Nev. 199; Mackie *v.* Lansing, 2 Nev. 302; Henry *v.* Confidence Gold, etc., Min. Co., 1 Nev. 619.

New Jersey.— Palmer *v.* White, 65 N. J. L. 69, 46 Atl. 706; Colton *v.* Depew, 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650; Blue *v.* Everett, 56 N. J. Eq. 455, 39 Atl. 765.

New York.— Hulbert *v.* Clark, 128 N. Y. 295, 28 N. E. 638, 14 L. R. A. 59; Dinniny *v.* Gavin, 4 N. Y. App. Div. 298, 39 N. Y. Suppl. 485; Gillette *v.* Smith, 18 Hun 10; Pratt *v.* Huggins, 29 Barb. 277; Kincaid *v.* Richardson, 9 Abb. N. Cas. 315; Heyer *v.* Pruyn, 7 Paige 465, 34 Am. Dec. 355. See also Borst *v.* Corey, 15 N. Y. 505. *Compare* Jackson *v.* Sackett, 7 Wend. 94.

North Carolina.— Miller *v.* Coxe, 133 N. C. 578, 45 S. E. 940; Robinson *v.* McDowell, 133 N. C. 182, 45 S. E. 545, 98 Am. St. Rep. 704; Meuzel *v.* Hinton, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647; Hooker *v.* Yellowley, 128 N. C. 297, 38 S. E. 889; Hedrick *v.* Byerly, 119 N. C. 420, 25 S. E. 1020; Taylor *v.* Hunt, 118 N. C. 168, 24 S. E. 359; Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696; Arrington *v.* Rowland, 97 N. C. 127, 1 S. E. 555; Long *v.* Miller, 93 N. C. 227; Capehart *v.* Dettrick, 91 N. C. 344. See also Lewis *v.* McDowell, 88 N. C. 261.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

Ohio.— Kerr *v.* Lydecker, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842; Fisher *v.* Mossman, 11 Ohio St. 42; Gary *v.* May, 16 Ohio 66; Longworth *v.* Taylor, 2 Cinc. Super. Ct. 39. See also Dater *v.* Bruner, 8 Ohio Dec. (Reprint) 699, 9 Cinc. L. Bul. 220.

Rhode Island.— Ballou *v.* Taylor, 14 R. I. 277.

South Carolina.— McGowan *v.* Reid, 27 S. C. 262, 3 S. E. 337; Nichols *v.* Briggs, 18 S. C. 473.

South Dakota.— Alexander *v.* Ransom, 16 S. D. 302, 92 N. W. 418.

Tennessee.— Wallace *v.* Goodlett, 104 Tenn. 670, 58 S. W. 343.

Vermont.— Gleason *v.* Kinney, 65 Vt. 560, 27 Atl. 208; Richmond *v.* Aiken, 25 Vt. 324; Reed *v.* Shepley, 6 Vt. 602.

Virginia.— Smith *v.* Washington City, etc., R. Co., 33 Gratt. 617.

West Virginia.— Criss *v.* Criss, 28 W. Va. 388; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

Wisconsin.— Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Cerney *v.* Pawlot, 66 Wis. 262, 28 N. W. 183; Potter *v.* Stransky, 48 Wis. 235, 4 N. W. 95; Knox *v.* Galligan, 21 Wis. 470; Whipple *v.* Barnes, 21 Wis. 327; Wiswell *v.* Baxter, 20 Wis. 713.

Wyoming.— Wild *v.* Stephens, 1 Wyo. 366.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682; Metropolis Bank *v.* Guttschlick, 14 Pet. 19, 10 L. ed. 335; Cheney *v.* Stone, 29 Fed. 885; Sparks *v.* Pico, 22 Fed. Cas. No. 13,211, McAllister 497. *Compare* London, etc., Bank *v.* Dexter, 126 Fed. 593.

England.— Higgins *v.* Scott, 2 B. & Ad. 413, 9 L. J. K. B. O. S. 262, 22 E. C. L. 176.

See 33 Cent. Dig. tit. "Limitation of Actions," § 652.

The life of a parol mortgage is measured by that of the principal obligation. Story *v.* Doris, 110 Ga. 65, 35 S. E. 314.

The fact that part of the notes to secure which a mortgage is given are barred by limitation does not defeat the right of action on the mortgage to collect the portion of the debt represented by the notes barred. Brackenbridge *v.* Cummings, 18 Pa. Super. Ct. 64.

A second mortgage executed after the statute of limitations has barred a suit on a note secured by the first mortgage, but before suit to foreclose the first mortgage is barred, does not take precedence of such mortgage, as the bar of the debt secured by the first mortgage did not bar the mortgage. Mackie *v.* Lansing, 2 Nev. 302.

Where the assignor of a mortgage had guaranteed its payment the fact that limitation had run against a personal action on the guaranty when suit was commenced by the assignee to establish her claim under the assignment to the proceeds of a policy on the insured premises does not release her equitable lien on such proceeds. Hyde *v.* Hartford F. Ins. Co., 70 Nebr. 503, 97 N. W. 629.

85. *California.*— Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387; Booth *v.* Hoskins, 75 Cal. 271, 17 Pac. 225; Wells *v.* Harter, 56 Cal. 342; Wormouth *v.* Hatch, 33 Cal. 121; Low *v.* Allen, 26 Cal. 141; Cunningham *v.* Hawkins, 24 Cal. 403, 85 Am. Dec. 73; Coster *v.* Brown, 23 Cal. 142; Heinlin *v.* Castro, 22 Cal. 100; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754; Lord *v.* Morris, 18 Cal. 482.

Colorado.— McGovney *v.* Gwillim, (1901) 65 Pac. 346. *Compare* Longan *v.* Carpenter, 1 Colo. 205.

Illinois.— Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919; Schifferstein *v.* Allison, 123 Ill. 662, 15 N. E. 275; McMillan *v.* McCormick, 117 Ill. 79, 7 N. E. 132; Emory *v.* Keighan, 88 Ill. 482; March *v.* Mayers, 85 Ill. 177;

4. Vendor's Lien.[86] The general rule is that, although a debt for unpaid purchase-money may be barred by limitation, the lien therefor on the land of the vendor retaining the legal title is not barred, provided there be no such open, adverse possession, for the period in which actions for recovery of realty must be brought, as will cut off the right to enforce the equitable lien for the purchase-money.[87] And this rule is applied in some jurisdictions where the vendor has conveyed the land by absolute deed, taking no mortgage or other security, as well as where he has retained the title and executed only a bond for title.[88] So it has

Hagan *v.* Parsons, 67 Ill. 170; Medley *v.* Elliott, 62 Ill. 532; Brown *v.* Devine, 61 Ill. 260; Pollock *v.* Maison, 41 Ill. 516; Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Wooley *v.* Yarnell, 39 Ill. App. 595; Jones *v.* Lander, 21 Ill. App. 510.

Indiana.— Lilly *v.* Dunn, 96 Ind. 220.

Iowa.— Brown *v.* Rockhold, 49 Iowa 282.

Kansas.— Kulp *v.* Kulp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; Ft. Scott *v.* Schulenberg, 22 Kan. 648; Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765.

Kentucky.— Worsham *v.* Lancaster, 47 S. W. 448, 20 Ky. L. Rep. 701; Cincinnati First Nat. Bank *v.* Thomas, 3 S. W. 12, 8 Ky. L. Rep. 690.

Louisiana.— Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775; Chapman *v.* Citizens' Bank, 31 La. Ann. 395; Linderman's Succession, 3 La. Ann. 714; Grayson *v.* Mayo, 2 La. Ann. 927. See also Berry *v.* Marshall, 23 La. Ann. 244.

Texas.— Stone *v.* McGregor, (1905) 87 S. W. 334; Bitter *v.* Calhoun, (1888) 8 S. W. 523; Ross *v.* Mitchell, 28 Tex. 150; Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72; Duty *v.* Graham, 12 Tex. 427, 62 Am. Dec. 534.

Washington.— George *v.* Butler, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396.

See 33 Cent. Dig. tit. "Limitation of Actions," § 652.

Sale by trustee after debt barred.— In Texas the distinction is made that while the mortgage is a mere incident of the debt, so that when an action is barred on the latter there is no remedy in the courts to enforce the former, yet the statute does not operate on any remedy which the creditor may have outside of the courts. Accordingly it has been held that where a deed for security has been given the trustee may execute the power of sale after the debt is barred by limitation. Fievel *v.* Zuber, 67 Tex. 275, 3 S. W. 273 [*overruling* Blackwell *v.* Barnett, 52 Tex. 326]; Goldfrank *v.* Young, 64 Tex. 432 (holding that an injunction will not issue to restrain a sale of land conveyed in trust to secure the payment of a note, because an action on a note would be barred by the statute); Sprague *v.* Ireland, 36 Tex. 654; Brinkerhoff *v.* Goree, 35 Tex. Civ. App. 142, 79 S. W. 592; Peacock *v.* Cummings, 34 Tex. Civ. App. 431, 78 S. W. 1002.

Mortgage to indemnify surety.— A suit to foreclose a mortgage given to indemnify the mortgagee as parol surety for the mortgagor, which contained no covenant to pay the debt, is barred in the same time as suit on the debt. Lilly *v.* Dunn, 96 Ind. 220. In Waller *v.* Todd, 3 Dana (Ky.) 50, 28 Am. Dec. 94, it was held that where a deed of trust was made to a surety for his indemnity, it will be presumed after a lapse of ten years that his liability as surety has ceased; and in the absence of all proof of payment, made by him as surety, the deed will be no longer effective against the vendor's creditors.

Effect of waiver of limitation of debt.— In a jurisdiction where a mortgage securing the debt ceases to exist when the debt is extinguished by limitation, it has been held that a waiver of the limitation does not revive the mortgage thus extinguished to the prejudice of subsequent recorded encumbrances. Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775.

Under express statute in some jurisdictions the rule of the text now prevails (Whipple *v.* Johnson, 66 Ark. 204, 49 S. W. 827; American Mortg. Co. *v.* Milam, 64 Ark. 305, 42 S. W. 417; San Jose' Safe Deposit Bank *v.* Madera Bank, 144 Cal. 574, 78 Pac. 5; Maddux *v.* Jones, 51 Miss. 531; Huntington *v.* Bobbitt, 46 Miss. 528; Stanton *v.* Gibbins, 103 Mo. App. 264, 77 S. W. 95; Little *v.* Reid, 75 Mo. App. 266), although a contrary rule obtained prior to the statutes (Coldcleugh *v.* Johnson, 34 Ark. 312. Birnie *v.* Main, 29 Ark. 591; Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78; Nevitt *v.* Bacon, 32 Miss. 212, 66 Am. Dec. 609; Benson *v.* Stewart, 30 Miss. 49; Trotter *v.* Erwin, 27 Miss. 772; Miller *v.* Trustees, 13 Miss. 651; Miller *v.* Helm, 2 Sm. & M. (Miss.) 687; Eyermann *v.* Piron, 151 Mo. 107, 52 S. W. 229; Tucker *v.* Wells, 111 Mo. 399, 20 S. W. 114; Benton County *v.* Czarlinsky, 101 Mo. 275, 14 S. W. 114; Booker *v.* Armstrong, 93 Mo. 49, 4 S. W. 727; Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. 391, 3 Am. St. Rep. 511; Wood *v.* Augustine, 61 Mo. 46; Cape Girardeau County *v.* Harbison, 58 Mo. 90; Chouteau *v.* Burlando, 20 Mo. 483).

86. Vendor's lien generally see Vendor and Purchaser.

87. Coldcleugh *v.* Johnson, 34 Ark. 312; Hardin *v.* Boyd, 113 U. S. 756, 5 S. Ct. 711, 28 L. ed. 1141; Lewis *v.* Hawkins, 23 Wall. (U. S.) 119, 23 L. ed. 113; Buckner *v.* Street, 15 Fed. 365, 5 McCrary 59. But see Trotter *v.* Erwin, 27 Miss. 772.

88. Hood *v.* Hammond, 128 Ala. 569, 30 So. 540, 86 Am. St. Rep. 159; Phillips *v.* Adams, 78 Ala. 225; Ware *v.* Curry, 67 Ala. 274; Shorter *v.* Frazer, 64 Ala. 74; Flinn *v.* Barber, 61 Ala. 530; Bizzell *v.* Nix, 60 Ala. 281, 31 Am. Rep. 38; Relfe *v.* Relfe, 34 Ala.

been held that a vendor's lien is not barred by the mere fact that an action for the purchase-money is barred whether the legal title has not passed to the vendee or whether it has passed by a deed expressly reserving a lien.[89] But it is held in several jurisdictions that the lien of a vendor who has parted with his legal title is a mere incident of the debt for the purchase-money, and that therefore it cannot be enforced after the bar of the statute has attached to the debt.[90]

D. Bar of Security as Affecting Debt. The mere fact that the security for a debt is extinguished or barred by the statute of limitations does not operate as a bar or extinguishment of the principal obligation.[91]

E. To Whom and Against Whom Bar Is Available[92] — **1. In General.** Unless they are included in some exception established by law, statutes of limitations run as a general rule for and against all persons whether they be natural[93]

500, 73 Am. Dec. 467; Driver *v.* Hudspeth, 16 Ala. 348; Baltimore, etc., R. Co. *v.* Trimple, 51 Md. 99; Magruder *v.* Peter, 11 Gill & J. (Md.) 217; McCormick *v.* Gibson, 3 Gill & J. (Md.) 12; Ringgold *v.* Bryan, 3 Md. Ch. 488. See also Doe *v.* McLoskey, 1 Ala. 708; Crawford *v.* Severson, 5 Gill (Md.) 443; Moreton *v.* Harrison, 1 Bland (Md.) 491.

An action to dissolve a sale on the ground that the purchaser has not paid the notes given for the price is not prescribed by the running of the statute against the notes. School Directors *v.* Anderson, 28 La. Ann. 739.

89. Tunstall *v.* Withers, 86 Va. 892, 11 S. E. 565; Paxton *v.* Rich, 85 Va. 378, 7 S. E. 531, 1 L. R. A. 639; Coles *v.* Withers, 33 Gratt. (Va.) 186 (where the vendor's lien was reserved on the face of the deed); Hanna *v.* Wilson, 3 Gratt. (Va.) 243, 46 Am. Dec. 190 (where the vendor retained the legal title as security for the purchase-money); Evans *v.* Johnson, 39 W. Va. 299, 19 S. E. 623, 45 Am. St. Rep. 912, 23 L. R. A. 737; Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 29 Am. St. Rep. 800.

90. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 307; Stephens *v.* Shannon, 43 Ark. 464; Waddell *v.* Carlock, 41 Ark. 523; Linthicum *v.* Tapscott, 28 Ark. 267; Cassell *v.* Lowry, 164 Ind. 1, 72 N. E. 640; Tate *v.* Hawkins, 81 Ky. 577, 50 Am. Rep. 181; Borst *v.* Corey, 15 N. Y. 505.

In California the rule of the text has been laid down under express statutory provision. California Sav. Bank *v.* Parrish, 116 Cal. 254, 48 Pac. 73.

In Texas a vendor who has expressly retained a lien either in the purchase-money note or the deed may recover the land, although the note is barred by limitation. McKelvain *v.* Allen, 58 Tex. 383; Jackson *v.* Palmer, 52 Tex. 427; Barber *v.* Hoffman, (Civ. App. 1896) 37 S. W. 769. This rule applies where the vendee of the purchaser buys with notice that the title is dependent on the payment of the purchase-money. Jackson *v.* Palmer, *supra*; Finks *v.* Abeel, 33 Civ. App. 567, 77 S. W. 650. But a vendor holding a purchase-money note secured by a vendor's lien reserved by deed cannot in a suit to recover his money enforce the lien after the note is barred by the statute of limitations. Hale *v.* Baker, 60 Tex. 217. The assignee of a purchase-money note, given on an executory sale of land to which the vendor has retained the superior title, who has taken no transfer of such vendor's title, has only a lien to secure his note and is without remedy when the note is barred. Farmers' L. & T. Co. *v.* Beckley, 93 Tex. 267, 54 S. W. 1027. A personal judgment on a note given for purchase-money will preserve the vendor's lien, although otherwise the statute of limitations would bar the note; and in such a case the lien may be foreclosed against a subsequent purchaser from the vendee. Beck *v.* Tarrant, 61 Tex. 402.

91. Frost *v.* Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Hearn *v.* Kennedy, 85 Cal. 55, 24 Pac. 606; Mechanics' Bldg., etc., Assoc. *v.* King, 83 Cal. 440, 23 Pac. 376; Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159. See also Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919; Mitchell *v.* Holland, 16 Can. Sup. Ct. 687.

Effect of collateral security as preventing bar see *infra*, V, D, 5.

92. **Limitation of actions by or against husband or wife** see HUSBAND AND WIFE, 21 Cyc. 1548.

Limitation in suits between cotenants see TENANCY IN COMMON.

For and against whom adverse possession operates see ADVERSE POSSESSION, 1 Cyc. 1111 *et seq.*

Actions by or against executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 422 *et seq*, 913 *et seq.*

Running of statute against persons under disabilities see *infra*, VI, F.

Application of statute to non-residents see *infra*, VI, F, 2.

Application of statutes to foreign corporations see *infra*, VI, F, 2, d, (II), (D), (5).

Pleading statute by attorney against client see ATTORNEY AND CLIENT, 4 Cyc. 971.

Actions by or against partners see PARTNERSHIP.

Effect on guarantor of bar against principal debtor see GUARANTY, 20 Cyc. 1486.

Effect on surety of bar against principal debtor see PRINCIPAL AND SURETY.

Application of statute to particular actions see *infra*, V.

93. Smith *v.* Palfrey, 28 La. Ann. 615.

or artificial.[94] A plaintiff as well as defendant may set up the statute of limitations.[95] With respect to personal obligations which concern only the debtor himself,[96] or with respect to property which he possesses the power to charge or dispose of,[97] the defense of the statute is generally regarded as a personal privilege and cannot be interposed by a stranger. But where the debtor places his property beyond his control by devise, deed, or otherwise,[98] or subjects it to liens,[99]

A British subject, who before the treaty of 1794, took a bond in the name of a citizen of the United States, could not, it has been held, avoid a statute of limitations, by claiming the benefit of the clause of the treaty which removed all legal impediments in the recovery of British debts. Auld *v.* Hoyl, 2 Fed. Cas. No. 652, 1 Cranch C. C. 544.

94. People *v.* Trinity Church, 22 N. Y. 44 [*affirming* 30 Barb. 537] (holding that a corporation is a "person" within the meaning of the statute); Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 129, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360] (where it is said: "In suits by or against a corporation, the statute of limitations may be pleaded, as in suits between private persons"); U. S. Bank *v.* McKenzie, 2 Fed. Cas. No. 927, 2 Brock. 393; Wych *v.* East India Co., 3 P. Wms. 309, 24 Eng. Reprint 1078; South-Sea Co. *v.* Wymondsell, 3 P. Wms. 143, 24 Eng. Reprint 1004.

95. Watkins *v.* Dorsett, 1 Bland (Md.) 530; Toll *v.* Wright, 37 Mich. 93; Waters *v.* Pape, 1 Tex. App. Civ. Cas. § 714.

96. *Alabama.*— Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126.

California.— Lord *v.* Morris, 18 Cal. 482. See also Ward *v.* Waterman, 85 Cal. 488, 24 Pac. 930.

District of Columbia.— Chafee *v.* Blatchford, 6 Mackey 459.

Georgia.— See Dawson *v.* Callaway, 18 Ga. 573.

Illinois.— Emory *v.* Keighan, 94 Ill. 543; Cartwright *v.* Cartwright, 68 Ill. App. 74.

Iowa.— Dunton *v.* McCook, 93 Iowa 258, 61 N. W. 977.

Louisiana.— Durnford *v.* Clark, 3 La. 199.

Oregon.— Tinsley *v.* Lombard, 46 Oreg. 9, 78 Pac. 895.

Pennsylvania.— *In re* Rockafield, 4 Lanc. L. Rev. 113.

Texas.— Swearingen *v.* Hendley, 1 Tex. Unrep. Cas. 639.

Virginia.— Smith *v.* Hutchinson, 78 Va. 683, holding further that the court cannot of its own motion interpose a plea of statute of limitations.

West Virginia.— Welton *v.* Boggs, 45 W. Va. 620, 32 S. E. 232, 72 Am. St. Rep. 833; Baltimore, etc., R. Co. *v.* Vanderwerker, 44 W. Va. 229, 28 S. E. 829; Clarke *v.* Hogeman, 13 W. Va. 718.

United States.— Miller *v.* Houston City St. R. Co., 55 Fed. 366, 5 C. C. A. 134.

See 33 Cent. Dig. tit. "Limitation of Actions," § 658.

Other creditors whose claims are not barred cannot complain of the debtor's failure to set up the statute. Brookville Nat. Bank *v.* Kimble, 76 Ind. 195; Brigham *v.* Fawcett, 42 Mich. 542, 4 N. W. 272; *In re* Sheppard, 180 Pa. St. 57, 36 Atl. 422; Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732.

97. Lord *v.* Morris, 18 Cal. 482.

98. *California.*— Low *v.* Allen, 26 Cal. 141; Coster *v.* Brown, 23 Cal. 142; Grattan *v.* Wiggins, 23 Cal. 16; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754; Lord *v.* Morris, 18 Cal. 482.

Georgia.— Rawlins *v.* Rawlins, 75 Ga. 632.

North Carolina.— Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466.

Pennsylvania.— Way *v.* Hooton, 156 Pa. St. 8, 26 Atl. 784.

Texas.— Nix *v.* Cardwell, 2 Tex. Unrep. Cas. 266.

West Virginia.— McClaugherty *v.* Croft, 43 W. Va. 270, 27 S. E. 246; Werdendaugh *v.* Reid, 20 W. Va. 588.

United States.— Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682.

See 33 Cent. Dig. tit. "Limitation of Actions," § 658.

A grantee assuming a mortgage debt is entitled to avail himself of the statute. Smith *v.* Davis, 90 Mo. App. 533.

One to whom a debtor corporation has merely contracted to sell its property but who has not been vested with either the full equitable title or possession under his contract cannot interpose the defense of limitation in a suit to foreclose a mortgage given by the corporation. Hanchett *v.* Blair, 100 Fed. 817.

In an action to reform a release of a mortgage as made by mistake, where the present owner of the property is made a defendant, but was not a party to the release, he cannot plead the statute of limitations, it being a personal privilege, especially where he had notice of the existence of the mortgage at the time he acquired his interest in the property. Perry *v.* Williams, 40 Misc. (N. Y.) 57, 81 N. Y. Suppl. 204.

In order to make up the aggregate period required to bar an action to foreclose, a grantee of mortgaged premises may add to the time the limitation has run in his favor since he acquired the land the time it had run in favor of his grantor. Paine *v.* Dodds, (N. D. 1905) 103 N. W. 931.

Plea of statute by alleged fraudulent grantee see FRAUDULENT CONVEYANCES, 20 Cyc. 428, 721 note 74.

99. *California.*— Brandenstein *v.* Johnson, 140 Cal. 29, 73 Pac. 744; Wood *v.* Goodfellow, 43 Cal. 185; Lord *v.* Morris, 18 Cal. 482.

Louisiana.— Durnford *v.* Clark, 3 La. 199.

Massachusetts.— See Thayer *v.* Mann, 19 Pick. 535.

or where the person setting up the defense stands in a relation of privity in estate with the debtor,[1] as heirs and legatees[2] or the assignee of any assignable demand,[3] the person who succeeds directly to the rights of the debtor or who stands in the place of the debtor with respect to the property may avail himself of the statute. So the rule has been stated that where a court of equity has taken possession of the estate of the debtor for the purpose of distribution, and proceeded to ascertain the debts and encumbrances to enable it properly to administer and distribute the assets, any creditor interested in the fund is permitted to interpose the defense of the statute of limitations.[4]

2. State or Government[5]— a. Operation of Statute Against State or Government. In the absence of express statutory provision to the contrary,[6] statutes of

New York.— See Perry *v.* Fries, 85 N. Y. Suppl. 1064.

North Carolina.— Miller *v.* Coxe, 133 N. C. 578, 45 S. E. 940; Hill *v.* Hilliard, 103 N. C. 34, 9 S. E. 639.

Texas.— Nix *v.* Cardwell, 2 Tex. Unrep. Cas. 266.

Washington.— De Voe *v.* Rundle, 33 Wash. 604, 74 Pac. 836.

See 33 Cent. Dig. tit. "Limitation of Actions," § 658.

Compare Wild *v.* Stephens, 1 Wyo. 366.

Claims already reduced to judgment against debtor.— In a suit by a judgment creditor to subject to the payment of his judgment land of the debtor, and to declare fraudulent a prior judgment confessed by the debtor in favor of another creditor, complainant cannot assert that the debt for which the latter judgment was confessed was at the time barred by the statute of limitations, since the debtor had already failed to interpose the plea of the statute. Elliot *v.* Trahern, 35 W. Va. 634, 14 S. E. 223. See also Stoutz *v.* Huger, 107 Ala. 248, 18 So. 126.

1. *Georgia.*— Dawson *v.* Callaway, 18 Ga. 573.

Illinois.— Cartwright *v.* Cartwright, 68 Ill. App. 74.

Iowa.— Day *v.* Baldwin, 34 Iowa 380.

Kansas.— Meyer *v.* Reimer, 65 Kan. 822, 70 Pac. 869.

West Virginia.— Woods *v.* Douglass, 52 W. Va. 517, 44 S. E. 234 (a *cestui que trust*); Walker *v.* Burgess, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. Rep. 775.

See 33 Cent. Dig. tit. "Limitation of Actions," § 658.

2. Bybee *v.* Poynter, 117 Ky. 109, 77 S. W. 698, 25 Ky. L. Rep. 1251; Jones *v.* Commercial Bank, 78 Ky. 413; Hopkins *v.* Stout, 6 Bush (Ky.) 375. Woods *v.* Woods, 99 Tenn. 50, 41 S. W. 345; McClaugherty *v.* Croft, 43 W. Va. 270, 27 S. E. 246.

Effect of prior waiver of bar by ancestor.— The heirs and successors of a debtor who in his lifetime waives the bar of the statute cannot be permitted to assert and urge such defense after his death. Shields *v.* Shiff, 124 U. S. 351, 8 S. Ct. 510, 31 L. ed. 445.

3. Thompson *v.* Sickles, 46 Barb. (N. Y.) 49; Walker *v.* Burgess, 44 W. Va. 399, 30 S. E. 99, 67 Am. St. Rep. 775. See also McCartney *v.* Tyrer, 94 Va. 198, 26 S. E. 419.

An assignee in an assignment fraudulent on its face as to creditors cannot have the assistance of a court of equity to quash an attachment laid upon the property by plaintiff in a suit at law against the assignor, on the ground that such plaintiff's debt is barred by limitations when defendant himself has not interposed such a defense to the suit. Chafee *v.* Blatchford, 6 Mackey (D. C.) 459.

4. McCartney *v.* Tyrer, 94 Va. 198, 26 S. E. 419. To the same effect see *In re* Lafferty, 122 Fed. 558, where the debtor was adjudged a bankrupt and one of his creditors interposed the plea.

5. State generally see States.

6. *California.*— People *v.* Melone, 73 Cal. 574, 15 Pac. 294.

Kentucky.— Straus *v.* Com., 1 Duv. 149.

Mississippi.— Furlong *v.* State, 58 Miss. 717.

Nevada.— State *v.* Yellow Jacket Silver Min. Co., 14 Nev. 220.

New York.— People *v.* Clarke, 9 N. Y. 349.

Rhode Island.— State *v.* Pawtuxet Turnpike Co., 8 R. I. 521, 94 Am. Dec. 123.

Virginia.— Nimmo *v.* Com., 4 Hen. & M. 57, 4 Am. Dec. 488; Kemp *v.* Com., 1 Hen. & M. 85.

Wisconsin.— Coleman *v.* Peshtigo Co., 47 Wis. 180, 2 N. W. 111.

See 33 Cent. Dig. tit. "Limitation of Actions," § 36.

Proceedings to enforce payment of tax.— A Minnesota statute providing that limitation "shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens," and naming the several classes of actions, none of which are analogous to proceedings to enforce payment of taxes, is inapplicable to such proceeding. Brown County *v.* Winona, etc., Co., 38 Minn. 397, 37 N. W. 949. Although section 3235 of the Revised Statutes of Missouri provides that the statute of limitations "shall apply to actions brought in the name of this State, or for its benefit, in the same manner as to actions by private parties," it has been held that such section does not apply to an action by the state to enforce a lien given by law for city taxes, since section 6846 of the Revenue Law in express term declares "that the provisions of said section 3253 shall not apply to actions brought by the State under

limitations do not as a general rule run against the sovereign or government, whether state or federal.[7] But the rule is otherwise where the mischiefs to be

the revenue law." State *v.* Piland, 81 Mo. 519; Jefferson *v.* Whipple, 71 Mo. 519; State *v.* Heman, 70 Mo. 441. *Compare* St. Louis *v.* Newman, 45 Mo. 138.

Under an article of the Louisiana code which declares "that prescription runs against all persons, unless they are included in some exceptions established by law," it has been held that the state when it sues should not be excepted from the operation and effect of the statute of limitation. Zacharie's Succession, 30 La. Ann. 1260; State *v.* White, 23 La. Ann. 733; Graham *v.* Tignor, 23 La. Ann. 570.

The lord proprietary of Maryland, in actions brought by him on sheriff's bonds, was held to be barred by the limitations of the act of July 10, 1729, chapter 25, which provided that "all actions thereafter to be brought on sheriffs' bonds thereafter to be passed, should be sued or brought within the space of five years after the passing of such bond, and not afterwards." Lord Proprietary *v.* Bond, 1 Harr. & M. (Md.) 210.

7. *Alabama.*— Swann *v.* Lindsey, 70 Ala. 507; Ware *v.* Greene, 37 Ala. 494; Wright *v.* Swan, 6 Port. 84.

Arkansas.— McNamee *v.* U. S., 11 Ark. 148.

Georgia.— State *v.* Paxson, 119 Ga. 730, 46 S. E. 872; Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210; Brinsfield *v.* Carter, 2 Ga. 143.

Illinois.— Catlett *v.* People, 151 Ill. 16, 37 N. E. 855; People *v.* Brown, 67 Ill. 435; State Bank *v.* Brown, 2 Ill. 106. See also Madison County *v.* Bartlett, 2 Ill. 67.

Indiana.— Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401; Eel River R. Co. *v.* State, 155 Ind. 433, 57 N. E. 388; Jackson County *v.* State, 106 Ind. 270, 6 N. E. 623; State *v.* St. Joseph County, 90 Ind. 359.

Kentucky.— Hardin *v.* Taylor, 4 T. B. Mon. 516.

Louisiana.— State *v.* New Orleans Debenture Redemption Co., 112 La. 1, 36 So. 205; Reed *v.* Creditors, 39 La. Ann. 115, 1 So. 784.

Maryland.— Booth *v.* U. S., 11 Gill & J. 373.

Massachusetts.— Stoughton *v.* Baker, 4 Mass. 522, 3 Am. Dec. 236.

Mississippi.— Josselyn *v.* Stone, 28 Miss. 753; State *v.* Joiner, 23 Miss. 500; Parmilee *v.* McNutt, 1 Sm. & M. 179; Bledsoe *v.* Doe, 4 How. 13.

Missouri.— State *v.* Fleming, 19 Mo. 607; Parks *v.* State, 7 Mo. 194.

Nebraska.— Blazier *v.* Johnson, 11 Nebr. 404, 9 N. W. 543.

New York.— People *v.* Van Rensselaer, 8 Barb. 189; People *v.* Gilbert, 18 Johns. 227.

Ohio.— State University *v.* Satterfield, 2 Ohio Cir. Ct. 86, 1 Ohio Cir. Dec. 377; State University *v.* Ayer, 10 Ohio Dec. (Reprint) 125, 19 Cinc. L. Bul. 11.

Pennsylvania.— Glover *v.* Wilson, 6 Pa. St. 290; McKeehan *v.* Com., 3 Pa. St. 151.

Rhode Island.— State *v.* Pawtuxet Turnpike Co., 8 R. I. 521, 94 Am. Dec. 123.

South Carolina.— Harlock *v.* Jackson, 3 Brev. 254.

Tennessee.— Wilson *v.* Hudson, 8 Yerg. 398.

Texas.— Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248; Governor *v.* Allbright, 21 Tex. 753; Lawless *v.* Wright, (Civ. App. 1905) 86 S. W. 1039. See also State *v.* Burnett, (Civ. App. 1900) 59 S. W. 599. *Compare* Governor *v.* Burnett, 27 Tex. 32 (holding that, although the general rule is that the state is not bound by statute of limitations unless provision is made in the statute to that effect, yet that suits by the state without express provision by the statute should be barred if not brought within the longest period of limitation); State *v.* Purcell, 16 Tex. 305.

Vermont.— State *v.* Weeks, 4 Vt. 215.

Wisconsin.— Baxter *v.* State, 10 Wis. 454.

United States.— Stanley *v.* Schwalby, 147 U. S. 508, 13 S. Ct. 418, 37 L. ed. 259; U. S. *v.* Insley, 130 U. S. 263, 9 S. Ct. 485, 32 L. ed. 968; Gibson *v.* Chouteau, 13 Wall. 92, 20 L. ed. 534; U. S. *v.* Belknap, 73 Fed. 19; U. S. *v.* Southern Pac. R. Co., 39 Fed. 132 (holding that a bill filed by the United States as the real party, and not merely the nominal party, to revoke patents improperly issued, is not barred by the statute of limitations); San Francisco Sav. Union *v.* Irwin, 28 Fed. 708; U. S. *v.* Mitchell, 26 Fed. 607; U. S. *v.* Alexandria, 19 Fed. 609, 4 Hughes 545; U. S. *v.* Southern Colorado Coal, etc., Co., 18 Fed. 273, 5 McCrary 563 [*reversed* on another point in 123 U. S. 307, 8 S. Ct. 131, 31 L. ed. 183]; U. S. *v.* Spiel, 8 Fed. 143, 3 McCrary 107; McGlinchy *v.* U. S., 16 Fed. Cas. No. 8,803, 4 Cliff. 312; Miller *v.* Lindsey, 17 Fed. Cas. No. 9,580, 1 McLean 32 [*affirmed* in 6 Pet. 666, 8 L. ed. 538]; Perkins *v.* U. S., 19 Fed. Cas. No. 10,990, 4 Cliff. 321; U. S. *v.* Nourse, 27 Fed. Cas. No. 15,901, 4 Cranch C. C. 151 [*reversed* on another point in 6 Pet. 470, 8 L. ed. 467]; U. S. *v.* Williams, 28 Fed. Cas. No. 16,721, 5 McLean 133.

Canada.— Alstadt *v.* Gortner, 31 Ont. 495; Doe *v.* Howard, 5 U. C. Q. B. O. S. 462; Reg. *v.* Williams, 39 U. C. Q. B. 397.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 35, 36.

Illustrations.— The rule stated in the text applies to personal actions against state officers (Com. *v.* Hutchinson, 10 Pa. St. 466; Com. *v.* Floyd, 2 Pittsb. (Pa.) 342. See also Kemp *v.* Com., 1 Hen. & M. (Va.) 85); to actions against the sureties on the official bonds of state officers (Parks *v.* State, 7 Mo. 194; Com. *v.* Johnson, 6 Pa. St. 136; McKeehan *v.* Com., 3 Pa. St. 151); to judgments recovered for the use of the state by an officer thereof (Com. *v.* Baldwin, 1 Watts (Pa.) 54, 26 Am. Dec. 33; Com. *v.* Floyd,

remedied are of such a nature that the state must necessarily be included,[8] where the state goes into business in concert or in competition with her citizens,[9] or where a party seeks to enforce his private rights by suit in the name of the state or government, so that the latter is only a nominal party.[10]

b. Right of State or Government to Invoke Statute. Statutes of limitations may, it is held, be pleaded for the benefit of the state or government, although it is not expressly named in the statutes.[11]

3. Municipal or Public Corporation.[12] Municipalities are sometimes expressly designated by the statute of limitations as coming within its provisions.[13] More-

supra); to actions brought on claims or debts held by the state as the assignee or transferee of some natural person (U. S. *v.* White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374, holding that the fact that the United States sues as transferee of a note does not make the statute of limitations available as a defense unless the statute had begun to run against the note before its transfer; State *v.* Schooldistrict, 34 Kan. 237, 8 Pac. 208); and to actions brought in the name of a state officer where the state is the real plaintiff (Ware *v.* Greene, 37 Ala. 494; Parmilee *v.* McNutt, 1 Sm. & M. (Miss.) 179. *Compare* Jamison *v.* Rumph, 2 Mill (S. C.) 206).

That a party embraced in the provisions of the statute is interested in the same security with the state makes the rule that the statute of limitations does not bind the state unless it is named in the statute none the less applicable. Glover *v.* Wilson, 6 Pa. St. 290.

Where a sinking fund belongs to the state exclusively the statute of limitations cannot be pleaded in bar of the suit brought to collect a debt due to said fund. Hill *v.* Josselyn, 13 Sm. & M. (Miss.) 597.

State not included in the designation "body corporate or politic."— A provision that the statute shall be applicable to all actions brought by or against all bodies corporate or politic does not include the state. Des Moines County *v.* Harker, 34 Iowa 84.

Effect of statute expressly excepting state from suits for land.— The fact that the state is expressly excepted from the limitation of suits for land raises no presumption that it is subject to limitations as to other suits. Brown *v.* Sneed, 77 Tex. 471, 14 S. W. 248; State *v.* Purcell, 16 Tex. 305; State *v.* Kroner, 2 Tex. 492.

Suits on marshal's bonds.— The statute of limitations does not apply to suits brought on marshal's bonds by the United States. U. S. *v.* Godbold, 25 Fed. Cas. No. 15,219, 3 Woods 550; U. S. *v.* Rand, 27 Fed. Cas. No. 16,116, 4 Sawy. 272.

8. Gibson *v.* Chouteau, 13 Wall. (U. S.) 92, 20 L. ed. 534.

9. Calloway *v.* Cossart, 45 Ark. 81.

10. *Alabama.*— Miller *v.* State, 38 Ala. 600.

Georgia.— Moody *v.* Fleming, 4 Ga. 115, 48 Am. Dec. 210.

Indiana.— State *v.* Halter, 149 Ind. 292, 47 N. E. 665.

Missouri.— State *v.* Pratte, 8 Mo. 286, 40 Am. Dec. 140.

Pennsylvania.— Com. *v.* Severn, 11 Phila. 310.

United States.— Curtner *v.* U. S., 149 U. S. 662, 13 S. Ct. 985, 37 L. ed. 890; U. S. *v.* Des Moines Valley R. Co., 70 Fed. 435 [*affirmed* in 84 Fed. 40, 28 C. C. A. 267].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 35, 36.

Right of action in government as trustee.— The United States having in 1852 purchased, as trustee for the Chickasaw Indians under treaty with that tribe, certain bonds of the state of Tennessee, the right of action of the government on the coupons of such bonds could not be barred by the statute of limitations of Tennessee, either while it held them in trust for the Indians, or since it became the owner of such coupons. U. S. *v.* Nashville, etc., R. Co., 118 U. S. 120, 6 S. Ct. 1006, 30 L. ed. 81. So where lands are held in trust by the state and the beneficiaries have no right to sue, a statute does not run against the state's right of action for trespass on the trust lands. Greene Tp. *v.* Campbell, 16 Ohio St. 11. See also Atty.-Gen. *v.* Midland R. Co., 3 Ont. 511 [*following* Reg. *v.* Williams, 39 U. C. Q. B. 397].

11. Cowles *v.* State, 115 N. C. 173, 20 S. E. 770; Baxter *v.* State, 10 Wis. 454; Stanley *v.* Schwalby, 147 U. S. 508, 13 S. Ct. 418, 37 L. ed. 259 [*reversing* 85 Tex. 348, 19 S. W. 264]. See also Auditor *v.* Halbert, 78 Ky. 577; Reg. *v.* Martin, 20 Can. Sup. Ct. 240. *Compare* Male High School *v.* Auditor, 80 Ky. 336; Whatley *v.* Patten, 10 Tex. Civ. App. 77, 31 S. W. 60. *Compare* U. S. *v.* Nourse, 27 Fed. Cas. No. 15,901, 4 Cranch C. C. 151; Rustomjee *v.* Reg., 1 Q. B. D. 487, 45 L. J. Q. B. 249, 34 L. T. Rep. N. S. 278, 24 Wkly. Rep. 428.

Action by collector to recover fees.— Under a statute declaring "that every claim against the United States, cognizable by the Court of Claims" shall be barred within six years after the claim accrues, it has been held that the statute does not run against a collector in regard to his percentage of fees while the money collected remains in his official custody. Lawson *v.* U. S., 14 Ct. Cl. 332.

12. Limitation of actions by and against counties see Counties, 11 Cyc. 610.

Municipal corporation generally see Municipal Corporations.

13. Pimental *v.* San Francisco, 21 Cal. 351; Wolf *v.* New Orleans, 27 La. Ann. 309; St.

over, where municipalities are not so designated the general rule is that statutes of limitations run not only for but against municipalities,[14] except in litigation respecting public rights, or property held upon a public trust.[15] A town may avail itself of the statute of limitations.[16] In the same way the statute of limitations may be interposed in all actions by a town to enforce mere private rights,[17] but it is held to be no defense to actions involving public rights.[18] Public corporations, such as lunatic asylums[19] or school-districts,[20] are, when clothed with capacity to sue and be sued, amenable to the plea of the statute of limitations. So it is held that the statute of limitations runs for school-districts in the same manner as it does for individuals.[21]

4. Successor in Right or Title. As a general rule the statute of limitations may be invoked by a successor in right or title.[22] So the general proposition seems to be undisputed that where the bar of the statute is complete against

Paul, etc., R. Co. *v.* Minneapolis, 45 Minn. 400, 48 N. W. 22; St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17; Foxworthy *v.* Hastings, 23 Nebr. 772, 37 N. W. 657. See also Cole *v.* Economy Tp., 13 Pa. Co. Ct. 549; Sullivan *v.* Barrie, 45 U. C. Q. B. 12; Featherston *v.* Lochine, 9 Quebec Super. Ct. 37.

In Missouri it has been held that where the statute of limitations applies in terms to demands in favor of the state, it must also apply by implication to a municipality created by the state. St. Louis *v.* Newman, 45 Mo. 138. In Jefferson *v.* Whipple, 71 Mo. 519, it was held that a city suing for taxes by personal action is amenable to the defense of the statute of limitations.

14. *Illinois.*— School Dist. No. 5 *v.* School Dist. No. 1, 105 Ill. 653; Piatt County *v.* Goodell, 97 Ill. 84; Ramsay *v.* Clinton County, 92 Ill. 225; Logan County *v.* Lincoln, 81 Ill. 156.

Iowa.— Burlington *v.* Burlington, etc., R. Co., 41 Iowa 134.

Kansas.— Ft. Scott *v.* Schulenberg, 22 Kan. 648, fact that the mayor is interested adversely to the city in a cause of action belonging to it does not suspend the statute.

Texas.— Mellinger *v.* Houston, 68 Tex. 36, 3 S. W. 249.

United States.—Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231 [*followed* in Washington, etc., R. Co. *v.* District of Columbia, 136 U. S. 653, 10 S. Ct. 1075, 34 L. ed. 549] (holding that the District of Columbia is a municipal corporation within the meaning of the rule); Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158.

See 33 Cent. Dig. tit. "Limitation of Actions, §§ 38, 55.

15. *Alabama.*— Reed *v.* Birmingham, 92 Ala. 339, 9 So. 161.

Illinois.— Russell *v.* Lincoln, 200 Ill. 511, 65 N. E. 1088; Piatt County *v.* Goodell, 97 Ill. 84; Logan County *v.* Lincoln, 81 Ill. 156; Alton *v.* Illinois Transp. Co., 12 Ill. 38, 52 Am. Dec. 479; Pew *v.* Litchfield, 115 Ill. App. 13.

Missouri.— Williams *v.* St. Louis, 120 Mo. 403, 25 S. W. 561.

Pennsylvania.— Magee *v.* Com., 46 Pa. St. 358; *In re* Gay Street, 6 Pa. Co. Ct. 187.

Tennessee.— Memphis *v.* Looney, 9 Baxt. 130.

United States.— Louisville Sinking Fund *v.* Buckner, 48 Fed. 533; Simplot *v.* Chicago, etc., R. Co., 16 Fed. 350, 5 McCrary 158; Hogan *v.* Ingle, 12 Fed. Cas. No. 6,583, 2 Cranch C. C. 352. *Compare* Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 38, 55.

Compare Helena *v.* Horner, 58 Ark. 151, 23 S. W. 966; Ft. Smith *v.* McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Teass *v.* St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802; Forsyth *v.* Wheeling, 19 W. Va. 318; Wheeling *v.* Campbell, 12 W. Va. 36.

16. Sturtevant *v.* Pembroke, 130 Mass. 373.

17. Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089; People *v.* Oran, 121 Ill. 650, 13 N. E. 726; Piatt County *v.* Goodell, 97 Ill. 84.

18. Mecartney *v.* People, 202 Ill. 51, 66 N. E. 873; Greenwood *v.* La Salle, 137 Ill. 225, 26 N. E. 1089; People *v.* Oran, 121 Ill. 650, 13 N. E. 726; Piatt County *v.* Goodell, 97 Ill. 84. But see Oxford Tp. *v.* Columbia, 38 Ohio St. 87.

19. McClanahan *v.* Western Lunatic Asylum, 88 Va. 466, 13 S. E. 977; Western Lunatic Asylum *v.* Miller, 29 W. Va. 326, 1 S. E. 740, 6 Am. St. Rep. 644.

20. May *v.* School Dist. No. 22, 22 Nebr. 205, 34 N. W. 377, 3 Am. St. Rep. 266. *Compare* School Trustees *v.* Arnold, 58 Ill. App. 103.

21. Gallatin Bank *v.* Baber, 6 Lea (Tenn.) 273, holding that the statute of limitations may be relied on as a defense to an action on a claim against a school-district both by the board of school commissioners and their disbursing officer. See also May *v.* School Dist. No. 22, 22 Nebr. 205, 34 N. W. 377, 3 Am. St. Rep. 266.

22. *Illinois.*— Hinkley *v.* Greene, 52 Ill. 223.

Indiana.— Kennedy *v.* Warnica, 136 Ind. 161, 36 N. E. 22.

Kentucky.—Moore *v.* Shepherd, 2 Duv. 125; Buckler *v.* Rogers, 53 S. W. 529, 22 Ky. L. Rep. 1.

New York.— Ferguson *v.* Broome, 1 Bradf. Surr. 10.

the person from whom right or title was derived, it is operative and binding against the successor.[23]

5. Trustees and Cestuis Que Trustent[24] — a. In General. In cases of direct, technical trust, statutes of limitation will not, while it continues, run against the beneficiary in favor of the trustee;[25] but it will run against the trustee of a naked trust in favor of the beneficiary,[26] or in favor of a stranger, as well in equity against the beneficiary as at law against the trustee.[27]

b. Effect on Beneficiary of Limitation Against Trustee.[28] The general rule is that whenever the right of action in a trustee who is vested with the legal estate and is competent to sue is barred by limitation, the right of the *cestui que trust*

South Carolina.— Massey *v.* Massey, 2 Hill Eq. 492.

Tennessee.— Peck *v.* Wheaton, Mart. & Y. 353.

See 33 Cent. Dig. tit. "Limitation of Actions," § 43. And see *supra*, IV, E, 1, text and note 98 *et seq.*

Subsequent mortgagee or purchaser of equity of redemption.— In those jurisdictions where the view obtains that a bar of the debt bars the mortgage the rule has been laid down that the statutory bar against the debt may be pleaded by a purchaser from the mortgagor. Grattan *v.* Wiggins, 23 Cal. 16; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754; Ewell *v.* Daggs, 108 U. S. 143, 2 S. Ct. 408, 27 L. ed. 682. See also Green *v.* Tippah County, 58 Miss. 337. But it has been laid down as the rule in Georgia that a purchaser whose right accrued subsequent to the mortgage debt barred by the statute can avail himself of the statute when he is sued to foreclose the equity of redemption only when he has become the owner of the legal title or the entire equity of redemption or is in possession of the mortgaged property. Sanger *v.* Nightingale, 122 U. S. 176, 7 S. Ct. 1109, 30 L. ed. 1105. It has been held that a junior mortgagee may avail himself of the defense of limitations in an action to foreclose the senior mortgage. Johnston *v.* Lasker Real Estate Assoc., 2 Tex. Civ. App. 494, 21 S. W. 961; Scott *v.* Sloan, 2 Tex. Civ. App. 302, 23 S. W. 42. A second mortgagee of chattels who has foreclosed and bought in the mortgaged property may, it is held, plead limitation against the first mortgagee, although the mortgagor has waived his right and the first mortgage was not barred when the second was given. Dunn *v.* Smith, (Tex. Civ. App. 1893) 23 S. W. 449. A subsequent mortgagee or purchaser of the equity of redemption can avail himself of the protection of the statute of limitations against a prior mortgagee, although the mortgagor is a party to the action and refuses to plead the statute. Hill *v.* Hilliard, 103 N. C. 34, 9 S. E. 639. See also Hopkins *v.* Clyde, 71 Ohio St. 141, 72 N. E. 846, 104 Am. St. Rep. 737; De Voe *v.* Rundle, 33 Wash. 604, 74 Pac. 836.

Adverse possession by purchaser against mortgagee see Adverse Possession, 1 Cyc. 1069 *et seq.*

23. Weatherford *v.* Union Pac. R. Co., (Nebr. 1905) 104 N. W. 183; Smith *v.* Uzzell, 61 Tex. 220; Inman *v.* Barnes, 13 Fed. Cas. N. 7,048, 2 Gall. 315. See also Rodman *v.* Sanders, 44 Ark. 504.

Statute not arrested by change of ownership.— A change in the ownership of a cause of action does not arrest the running of the statute after it has once commenced (Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783 [*affirming* 82 Hun 98, 31 N. Y. Suppl. 202]; Bucklin *v.* Bucklin, 1 Abb. Dec. 242, 1 Keyes 141; Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240; McEuen *v.* Girard, 2 Rawle (Pa.) 311), but that all of the successive owners have only the same period in which to sue as had the original claimant (McEuen *v.* Girard, *supra*).

The grantee of heirs whose title to the land accrued in their minority may, in ejectment, against the defense of limitations, show the disability of his grantors at any time within the statutory period. Huls *v.* Buntin, 47 Ill. 396.

Operation of statute against grantees of federal or state government see Adverse Possession, 1 Cyc. 1113 *et seq.*

24. **Trust** generally see Trust.

25. *California.*— *In re* Beisel, 110 Cal. 267, 40 Pac. 961, 42 Pac. 819.

District of Columbia.— Ebbinghaus *v.* Killian, 1 Mackey 247.

Mississippi.— Jordan *v.* McKenzie, 30 Miss. 32.

North Carolina.— Johnston *v.* Overman, 55 N. C. 182.

Pennsylvania.—*In re* Passmore, 194 Pa. St. 632, 45 Atl. 417; Coates' Estate, 2 Pars. Eq. Cas. 258.

South Carolina.— Hutchinson *v.* Hutchinson, 4 Desauss. Eq. 77.

Virginia.— McCormick *v.* Wright, 79 Va. 524. See also Spotswood *v.* Dandridge, 4 Hen. & M. 139, holding that it must be shown that the relation was fiduciary in respect to plaintiff or those under whom he claims, and that it is not sufficient that it is fiduciary as to a third person.

United States.— See Nash *v.* Ingalls, 101 Fed. 645.

See 33 Cent. Dig. tit. "Limitation of Actions," § 44. And see *infra*, V, L, 3.

26. Dees *v.* Moss Point Baptist Church, (Miss. 1895) 17 So. 1.

27. Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172.

28. **Adverse possession against trust estates** see Adverse Possession, 1 Cyc. 1068 *et seq.*, 1121.

is also barred;[29] and this rule applies whether the *cestui que trust* be *sui juris*,[30] or under disability during the period of limitation,[31] or whether entitled in posses-

29. *Alabama.*— Molton *v.* Henderson, 62 Ala. 426; Bryan *v.* Weems, 29 Ala. 423, 65 Am. Dec. 407.

Arkansas.—Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

Florida.— Mathews *v.* Durkee, 34 Fla. 559, 16 So. 411.

Georgia.— Wingfield *v.* Virgin, 51 Ga. 139. See also Loyless *v.* Blackshear, 43 Ga. 327.

Indiana.— See Diffenderfer *v.* Scott, 5 Ind. App. 243, 32 N. E. 87.

Kentucky.— Rosson *v.* Anderson, 9 B. Mon. 423; Couch *v.* Couch, 9 B. Mon. 160.

North Carolina.— Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240; Clayton *v.* Cagle, 97 N. C. 300, 1 S. E. 523.

Pennsylvania.— Smilie *v.* Biffle, 2 Pa. St. 52, 44 Am. Dec. 156.

Virginia.— Sheppard *v.* Turpin, 3 Gratt. 357.

United States.— See Trimble *v.* Woodhead, 102 U. S. 647, 26 L. ed. 290.

See 33 Cent. Dig. tit. "Limitation of Actions," § 660.

Where one competent trustee has allowed the statutory bar to run against a claim for a conversion by an executor of a co-trustee, the beneficiary cannot maintain a bill against such executor. Fleming *v.* Gilmer, 35 Ala. 62.

30. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

31. *Alabama.*— Molton *v.* Henderson, 62 Ala. 426. *Compare* Moore *v.* Wallis, 18 Ala. 458.

Arkansas.— Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

California.— Dennis *v.* Bint, 122 Cal. 111, 54 Pac. 578, 68 Am. St. Rep. 17; Patchett *v.* Pacific Coast R. Co., 100 Cal. 505, 35 Pac. 73; McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814. *Compare* Crosby *v.* Dowd, 61 Cal. 557.

Connecticut.—Wilmerding *v.* Russ, 33 Conn. 67.

Georgia.— Salter *v.* Salter, 80 Ga. 178, 4 S. E. 391, 12 Am. St. Rep. 249; Crawley *v.* Richardson, 78 Ga. 213; Grimsby *v.* Hudnell, 76 Ga. 378, 2 Am. St. Rep. 46; Knorr *v.* Raymond, 73 Ga. 749; Ford *v.* Cook, 73 Ga. 215; Morgan *v.* Woods, 69 Ga. 599; Merritt *v.* Merritt, 66 Ga. 324; Beavers *v.* Brewster, 62 Ga. 574; Schnell *v.* Toomer, 56 Ga. 168; Brady *v.* Walters, 55 Ga. 25; Wingfield *v.* Virgin, 51 Ga. 139; Worthy *v.* Johnson, 10 Ga. 358, 54 Am. Dec. 393; Pendergrast *v.* Foley, 8 Ga. 1. *Compare* Monroe *v.* Simmons, 86 Ga. 344, 12 S. E. 643.

Kentucky.—Willson *v.* Louisville Trust Co., (1898) 44 S. W. 121; Barclay *v.* Goodloe, 83 Ky. 493; Coleman *v.* Walker, 3 Metc. 65, 77 Am. Dec. 163; Darnall *v.* Adams, 13 B. Mon. 273; Edwards *v.* Woolfolk, 17 B. Mon. 376; Rooson *v.* Anderson, 9 B. Mon. 423; Couch *v.* Couch, 9 B. Mon. 160; May *v.* Slaughter, 3 A. K. Marsh. 505.

Louisiana.— Copse *v.* Eddins, 15 La. Ann. 528.

Maryland.—Weaver *v.* Leiman, 52 Md. 708; Crook *v.* Glenn, 30 Md. 55.

Mississippi.— See Weir *v.* Monahan, 67 Miss. 434, 7 So. 291. *Compare* Parmele *v.* McGinty, 52 Miss. 475; Pearson *v.* McMillan, 37 Miss. 588; Fearn *v.* Shirley, 31 Miss. 301, 64 Am. Dec. 575; Bacon *v.* Gray, 23 Miss. 140.

Missouri.— Schiffman *v.* Schmidt, 154 Mo. 204, 55 S. W. 451.

North Carolina.— Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240; Wellborn *v.* Finley, 52 N. C. 228; Rennett *v.* Williamson, 42 N. C. 121; Burkhead *v.* Colson, 22 N. C. 77.

Ohio.— Moore *v.* Armstrong, 10 Ohio 11, 36 Am. Dec. 63. *Compare* Ward *v.* Ward, 12 Ohio Cir. Dec. 59.

Pennsylvania.— Smilie *v.* Biffle, 2 Pa. St. 52, 44 Am. Dec. 156.

South Carolina.— Long *v.* Cason, 4 Rich. Eq. 60.

Tennessee.—Wooldridge *v.* Planters' Bank, 1 Sneed 297; Williams *v.* Otey, 8 Humphr. 563. *Compare* Wilson *v.* Kilcannon, 4 Hayw. 182.

Texas.— Collins *v.* McCarty, 68 Tex. 150, 3 S. W. 730, 2 Am. St. Rep. 475; McAdams *v.* McAdams, 10 Tex. Civ. App. 653, 32 S. W. 87.

Utah.— Digman *v.* Nelson, 26 Utah 186, 72 Pac. 936; Jenkins *v.* Jensen, 24 Utah 108, 66 Pac. 773, 91 Am. St. Rep. 783.

United States.— Meeks *v.* Vassault, 16 Fed. Cas. No. 9,393, 3 Sawy. 206 [*affirmed* in 100 U. S. 564, 23 L. ed. 735]; Williamson *v.* Beardsley, 137 Fed. 467, 69 C. C. A. 615.

See 33 Cent. Dig. tit. "Limitation of Actions," § 660.

Limitations having begun to run against a trustee or an undisclosed agent acting as a principal are not suspended by the subsequent coming forward of a married woman as *cestui que trust* or as the undisclosed principal. Barden *v.* Stickney, 132 N. C. 416, 43 S. E. 912, 130 N. C. 62, 40 S. E. 842.

Sale of property by trustee.— If a trustee possessing the legal title estops himself from suing by the sale of the property, thus uniting with the purchaser in a breach of trust, the principle that when the trustee is barred the beneficiaries are barred, whether under disability or not, does not apply. Parker *v.* Hall, 2 Head (Tenn.) 641. To the same effect see Harris *v.* Smith, 98 Tenn. 286, 39 S. W. 343; Bayless *v.* Elean, 1 Coldw. (Tenn.) 96; Herron *v.* Marshall, 5 Humphr. (Tenn.) 473, 42 Am. Dec. 444. On the other hand it is held that where a trustee for a minor conveys trust land as his own to one taking without actual notice of the trust, although the deed of trust be recorded and the purchaser takes possession, the prescription in favor of the purchaser commences then to run against the minor. Perry *v.* Christie, 65 Ga. 642.

sion,[32] or in remainder,[33] it being held to be immaterial whether the remainder be vested[34] or contingent.[35]

6. Parent and Child.[36] The statute of limitations applies in actions between parent and child.[37]

7. Insolvent Debtors.[38] A defendant who has taken the benefit of the Insolvent Debtor's Act may plead the statute of limitations to a claim on which the statute had completely run before he filed his petition.[39]

8. Claimants of Property Out of Possession. The statute does not apply as respects the acquisition of title to property to any one not in possession. A mere claim, for whatever time, unaccompanied by actual possession, can give no right under the statute.[40]

F. Waiver and Estoppel — 1. Waiver[41] — a. In General. A statute limiting the time within which actions shall be brought has been said to be for the benefit and repose of individuals and not to secure general objects of policy or morals,[42] and hence it may be laid down as a general rule that the protection may be waived by one entitled to rely upon it.[43] The law does not compel him to resort to this defense, nor can others insist upon it for him.[44] A waiver of the effect of the bar of the statute may be accomplished by an express agreement to that effect,[45] or by a new promise or part payment.[46] So too a waiver may be implied where the debtor fails to properly plead the statute;[47] but a waiver of the statute

32. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

33. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; Johnson *v.* Cook, 122 Ga. 524, 50 S. E. 367. See also Smilie *v.* Biffle, 2 Pa. St. 52, 44 Am. Dec. 156.

34. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; Meeks *v.* Olpherts, 100 U. S. 564, 25 L. ed. 735.

35. Chase *v.* Cartright, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207; Edwards *v.* Woolfolk, 17 B. Mon. (Ky.) 376; Herndon *v.* Pratt, 59 N. C. 327; Waring *v.* Cheraw, etc., R. Co., 16 S. C. 416.

36. Parent and child generally see Parent and Child.

37. Dugan *v.* Gittings, 3 Gill (Md.) 138, 43 Am. Dec. 306; Jaeger *v.* Herancourt, 7 Ohio Dec. (Reprint) 1, 1 Cinc. L. Bul. 10, holding that being under parental influence by intendment of law will not prevent the running of the statute. *Compare* Caborne *v.* Godfrey, 3 Desauss. Eq. (S. C.) 514, 5 Am. Dec. 593.

38. Insolvency in general see Insolvency, 22 Cyc. 1249.

Claims against bankrupt see Bankruptcy, 5 Cyc. 323.

39. Wilson *v.* Ramsay, 1 Nott & M. (S. C.) 109.

Pendency of insolvency or bankruptcy proceedings as suspending statute see *infra*, VI, H, 1, d.

40. Sewell *v.* Nelson, 113 Ky. 171, 67 S. W. 985, 23 Ky. L. Rep. 2438.

Necessity of actual possession to constitute adverse possession see Adverse Possession, 1 Cyc. 982 note 11 *et seq.*

41. Waiver of statutory bar by executor or administrator see Executors and Administrators, 18 Cyc. 424 *et seq.*, 937 *et seq.*

42. Wells *v.* Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; Quick *v.* Corlies, 39 N. J. L. 11; Clark *v.* Augustine, 62 N. J. Eq. 689, 51 Atl. 68; State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177. See also Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293.

43. *California.*— Wells *v.* Enright, 127 Cal. N. W. 833, 94 L. R. A. 647.

Georgia.— Dawson *v.* Callaway, 18 Ga. 573.

Indiana.— Brookville Nat. Bank *v.* Kimble, 76 Ind. 195.

Michigan.— Brigham *v.* Fawcett, 42 Mich. 542, 4 N. W. 272.

Nebraska.— Atchison, etc., R. Co. *v.* Miller, 16 Nebr. 661, 21 N. W. 451.

New Jersey.— Quick *v.* Corlies, 39 N. J. L. 11; Clark *v.* Augustine, 62 N. J. Eq. 689, 51 Atl. 68; Christie *v.* Bridgman, 51 N. J. Eq. 331, 25 Atl. 939, 30 Atl. 429.

Ohio.— Joyce *v.* Hart, 11 Ohio Dec. (Reprint) 487, 27 Cinc. L. Bul. 144.

Pennsylvania.— Biddle *v.* Moore, 3 Pa. St. 161.

Vermont.— State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177.

United States.— Allen *v.* Smith, 129 U. S. 465, 9 S. Ct. 338, 32 L. ed. 732; Randon *v.* Toby, 11 How. 493, 13 L. ed. 784.

England.— Quantock *v.* England, 5 Burr. 2628, 2 W. Bl. 702.

See 33 Cent. Dig. tit. "Limitation of Actions," § 662.

Where a provision requiring suits to be brought within a given time is jurisdictional, and not in the nature of a statute of limitations, such provision cannot be waived. Hamner *v.* U. S., 13 Ct. Cl. 7.

44. Dawson *v.* Callaway, 18 Ga. 573; Brookville Nat. Bank *v.* Kimble, 76 Ind. 195. See also *supra*, IV, E, 1, text and note 96.

45. See *infra*, IV, F, 1, b.

46. See *infra*, VII.

47. *California.*— Grattan *v.* Wiggins, 23 Cal. 16.

Georgia.— Peel *v.* Bryson, 72 Ga. 331.

Louisiana.— Marioneaux *v.* Brugier, McGloin 257, where a plea of prescription was

may not be implied from a mere submission to arbitration of a matter in controversy.[48]

b. Agreements to Waive[49] — (i) *In General.* It not infrequently happens that there is an agreement between the parties to waive the statute of limitations.[50] In some of the decisions the rule is broadly laid down that contracts to waive the right to plead the statute of limitations before the cause of action is barred are

withdrawn and a declinatory exception was filed by leave of court.

Michigan.— Brigham *v.* Fawcett, 42 Mich. 542, 4 N. W. 272.

Nebraska.— Bell *v.* Rice, 50 Nebr. 547, 70 N. W. 25; Scroggin *v.* National Lumber Co., 41 Nebr. 195, 59 N. W. 548; Taylor *v.* Courtney, 15 Nebr. 190, 16 N. W. 842.

New Jersey.— See Hibler *v.* Johnston, 18 N. J. L. 266.

New York.— Thompson *v.* Sickles, 46 Barb. 49.

Pennsylvania.— Heath *v.* Page, 48 Pa. St. 130. *Compare* McIntosh *v.* Condron, 20 Pa. Super. Ct. 118, where it was intimated that a different rule obtained under statute.

Wisconsin.— Moulton *v.* Williams, 101 Wis. 236, 77 N. W. 918.

See 33 Cent. Dig. tit. "Limitation of Actions," § 661.

The assignee of a note may in an action thereon waive an objection that a set-off against his assignor, averred in the answer, is barred by the statute. Thompson *v.* Sickles, 46 Barb. (N. Y.) 49.

The fact that an amicable action was entered by agreement and proceeded to trial without pleadings has been held not to preclude defendant from setting up the bar of the statute of limitations. Mosgrove *v.* Golden, 101 Pa. St. 605.

An appearance in response to a void service of summons will not impliedly waive the benefit of the statute of limitations, when the void service is followed by a valid service and the statutory period becomes complete after the first and before the second service. Moulton *v.* Williams, 101 Wis. 236, 237, 77 N. W. 918, where the court said: "The only way the statute could have been impliedly waived was by failure of the defendant to properly plead and insist upon it."

Pleading statute generally see *infra*, VIII.

48. See ARBITRATION AND AWARD, 3 Cyc. 608 notes 12, 13. And see *infra*, VI, H, 3, a.

49. **Effect of agreement as acknowledgment or new promise** see *infra*, VII, A, 7, e, (I).

Waiver of bar of claims against decedent's estate see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 937 *et seq.*

50. See cases cited *infra*, this note.

Contract waiving statutory bar as to interest as well as principal see Yaws *v.* Jones, (Tex. 1892) 19 S. W. 443.

Suspension of statute by agreement not to sue within specified time.— In Smith *v.* Lawrence, 38 Cal. 24, 99 Am. Dec. 344, it was held that if, pending the running of a statute of limitations, the time of payment and the right to sue is for a valuable consideration extended by the creditor in writing with the assent of the debtor, the statute does not run during the time of the suspension, and that it is not necessary that the contract extending the time for payment be signed by the debtor. See also Johnston *v.* Lasker Real Estate Assoc., 2 Tex. Civ. App. 494, 21 S. W. 961; Holladay *v.* Littlepage, 2 Munf. (Va.) 316, holding that an agreement between the creditor and debtor that a suit would not be brought until the debtor's return from a voyage will bar the operation of the statute of limitations until such return. On the other hand it has been held that a mere agreement for delay is not equivalent to an agreement not to plead the statute for the purpose of staying the statute. Raby *v.* Stuman, 127 N. C. 463, 37 S. E. 476; Cecil *v.* Henderson, 121 N. C. 244, 28 S. E. 481; Hill *v.* Hilliard, 103 N. C. 34, 9 S. E. 639. An extension of the time of payment procured by one joint debtor, without the knowledge, consent, or subsequent ratification of his co-debtor, will not avoid the running of the statute of limitations. Boynton *v.* Spafford, 162 Ill. 113, 44 N. E. 379, 53 Am. St. Rep. 274.

Agreements construed as not amounting to agreements to waive statute see the following cases:

District of Columbia.— Mann *v.* McDonald, 6 App. Cas. 548.

Georgia.— Georgia R., etc., Co. *v.* Kent, 92 Ga. 782, 19 S. E. 720.

Iowa.— Gates *v.* Ballon, 56 Iowa 741, 10 N. W. 258.

Pennsylvania.— Farmers' Bank *v.* Gilson, 6 Pa. St. 51.

South Carolina.— Steele *v.* Jennings, 1 McMull. 297.

Vermont.— Rowell *v.* Lewis, 72 Vt. 163, 47 Atl. 783.

See 33 Cent. Dig. tit. "Limitation of Actions," § 65.

Proof of waiver.— In Louisiana it has been held that waiver of prescription on an obligation under five hundred dollars may be proved by one witness. Segond *v.* Landry, 1 Rob. (La.) 335.

Independent action for breach of waiver.— In East India Co. *v.* Paul, 14 Jur. 253, 7 Moore P. C. 85, 13 Eng. Reprint 811, it was intimated that there may be an agreement that in consideration of an inquiry into the merits of a dispnted claim no advantage shall be taken of the statute of limitations, in respect to the time employed in the inquiry and an action may be brought for a breach of such agreement. In Newell *v.* Clark, 73 N. H. 289, 61 Atl. 555, it was held that the only way in which advantage can be taken of an agreement to waive the statute is to plead it as the foundation of an estoppel or to bring an action upon it.

An agreement between counsel not to set

contrary to public policy and void,[51] and this rule has been applied to waivers for a definite period[52] as well as to waivers in absolute terms.[53] But the general rule is that statutes of limitations may be waived by agreement for a definite or limited time[54] or for an indefinite or unlimited time;[55] and this whether the waiver is made contemporaneously with and as a part of the original transaction in controversy[56] or subsequently thereto.[57]

(II) *NECESSITY OF AGREEMENT IN WRITING.* In several of the cases holding waivers of limitation acts to be valid and binding the agreement was in writing,[58] and in some of the jurisdictions it is held that such agreement is within

up the statute of limitations cannot be extended to matters not included in the agreement. Jared *v.* Vanvlett, 13 Ill. App. 517.

51. See Moxley *v.* Ragan, 10 Bush (Ky.) 156, 19 Am. Rep. 61; Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Green *v.* Coos Bay Wagon Road Co., 23 Fed. 67, 10 Sawy. 625.

In Louisiana under article 3423 of the civil code, providing that "one cannot renounce a prescription not yet acquired," etc., it has been held that no anticipated renunciation can be made of the right of pleading a prescription which may be thereafter acquired, but that a party may renounce the benefit of the time which has already run to stop the prescription from being accomplished, such a renunciation being regarded in the light of an interruption of the prescription such as would result from the acknowledgment of the debt. Segond *v.* Landry, 1 Rob. 335; Carraby *v.* Navarre, 3 La. 262. See also Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775.

52. Wright *v.* Gardner, 98 Ky. 454, 33 S. W. 622, 35 S. W. 1116, 17 Ky. L. Rep. 1345, holding that an agreement to waive the statute for a definite time, made at the time of the original contract, was against public policy. *Compare* Crane *v.* French, 38 Miss. 503.

53. Crane *v.* French, 38 Miss. 503 (where a distinction was drawn in this respect between agreements never to set up the statute and waivers for a definite period); Nunn *v.* Edmiston, 9 Tex. Civ. App. 562, 29 S. W. 1115. See also Cameron *v.* Cameron, 95 Ala. 344, 10 So. 506; Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346.

54. State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600; Wells *v.* Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647; Smith *v.* Lawrence, 38 Cal. 24, 99 Am. Dec. 344; Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293; Webber *v.* Williams College, 23 Pick. (Mass.) 302.

55. Mann *v.* Cooper, 2 App. Cas. (D. C.) 226; Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555; Quick *v.* Corlies, 39 N. J. L. 11; State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177.

Construction and effect of unlimited waiver. — It has been held that where a waiver is made it is held to be continuous, unless by its terms it is limited to a specified time. State *v.* Sheldon, 68 Vt. 259, 35 Atl. 177. *Compare* Stearns *v.* Stearns, 32 Vt. 678. On the other hand it has been intimated that after an agreement to waive the statute has been entered into, in consideration of forbearance to sue the court will place some limit of time beyond which the statute will not be suspended. Wells *v.* Enright, 127 Cal. 669, 60 Pac. 439, 49 L. R. A. 647. Thus it has been held that a contract of this character will suspend the running of the statute during the time the parties act upon the agreement. State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600. See also Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293. In other decisions it is held that the statute will run against a contract to waive it as well as against any other contract. Cameron *v.* Cameron, 95 Ala. 344, 10 So. 506; Newell *v.* Clark, 73 N. H. 289, 61 Atl. 555. See also Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346. So it is held that agreements to waive the statute are to be regarded as a new promise operating merely to postpone its operation from the date of the promise (Bowmar *v.* Peine, 64 Miss. 99, 8 So. 166; Maddux *v.* Jones, 51 Miss. 531; McIntosh *v.* Condron, 20 Pa. Super. Ct. 118; Hoffman *v.* Fisher, 2 Wkly. Notes Cas. (Pa.) 17; Moore *v.* Taylor, 2 Tenn. Ch. App. 556. See also *infra*, VII, A, 7, e, (I).

56. Quick *v.* Corlies, 39 N. J. L. 11; State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177. *Compare* State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600; Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555.

57. *California.*— State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600.

District of Columbia.—See Mann *v.* Cooper, 2 App. Cas. 226.

Maine.— Warren *v.* Walker, 23 Me. 453.

Massachusetts.— Webber *v.* Williams College, 23 Pick. 302.

Missouri.— Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555.

United States.— Randon *v.* Toby, 11 How. 493, 13 L. ed. 784.

See 33 Cent. Dig. tit. "Limitation of Actions," § 62 *et seq.*

Waiver after debt is barred. — A promise not to plead the statute of limitations after the debt is barred is not contrary to public policy. Lowry *v.* Dubose, 2 Bailey (S. C.) 425; Jordan *v.* Jordan, 85 Tenn. 561, 3 S. W. 896.

58. *California.*— State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600.

Maine.— Warren *v.* Walker, 23 Me. 453.

Massachusetts.— Webber *v.* Williams College, 23 Pick. 302.

the contemplation of statutes requiring "an acknowledgment or promise" to be in writing.[59] But in other jurisdictions it is held that the contract is not required to be in writing.[60]

(III) *Consideration.* To render an agreement to waive the statute of limitations binding, there must be some evidence of a valuable consideration and this whether the agreement is made before the claim is barred[61] or after the bar has become complete.[62] An agreement by a debtor, before the debt is barred, to waive the statute in consideration of the creditor's forbearance to sue will, if the agreement to forbear is performed by the creditor, be regarded as supported by a valuable consideration or as operating as an estoppel against the debtor to set up the statute.[63]

New Jersey.— Quick *v.* Corlies, 39 N. J. L. 11.

New York.— See Utica Ins. Co. *v.* Bloodgood, 4 Wend. 652.

Vermont.— State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177.

See 33 Cent. Dig. tit. "Limitation of Actions," § 63 *et seq.*

59. Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Green *v.* Coos Bay Wagon Road Co., 23 Fed. 67, 10 Sawy. 625.

Requirement of written acknowledgment or promise see *infra,* VII, A, 9.

60. Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162; Warren *v.* Walker, 23 Me. 453; Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555; Monroe *v.* Herrington, 110 Mo. App. 509, 85 S. W. 1002. See also Cecil *v.* Henderson, 121 N. C. 244, 28 S. E. 481; Hill *v.* Hilliard, 103 N. C. 34, 9 S. E. 639; Joyner *v.* Massey, 97 N. C. 148, 1 S. E. 702; Barcroft *v.* Roberts, 91 N. C. 363; Haymore *v.* Yadkin, 85 N. C. 268; Daniel *v.* Edgecombe County, 74 N. C. 494; Lyon *v.* Lyon, 43 N. C. 201. *Compare* Hodgdon *v.* Chase, 32 Me. 169; Hodgdon *v.* Chase, 29 Me. 47.

61. State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600 (holding that where defendants' written request that proceedings should not be taken until requested by them was accompanied by a written proposition to waive the statute of limitations if plaintiff should forbear to sue, the mere acceptance thereof by plaintiff did not constitute a sufficient consideration for defendants' agreement to waive the statute, but plaintiff's subsequent compliance with the request constituted a sufficient consideration); Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Green *v.* Coos Bay Wagon Road Co., 23 Fed. 67, 10 Sawy. 625 (holding that a naked promise by a creditor to postpone for a specified time the payment of a debt, it not appearing whether the contract was written or oral, is without consideration and void as a contract, and will not prevent the running of the statute against the right of the creditor to maintain an action thereon). See also Mann *v.* Cooper, 2 App. Cas. (D. C.) 226; Warren *v.* Walker, 23 Me. 453; Quick *v.* Corlies, 39 N. J. L. 11.

Waiver in consideration of waiver.— In Noyes *v.* Hall, 28 Vt. 645, it was held that a mutual agreement between two persons that neither will take advantage of the statute of limitations against the claims of the other, but that they will thereafter settle without objection on that account, will prevent the operation of the statute and the expression of opinion by one that there will be nothing due from him upon such settlement, will have no effect upon the agreement. So, where, before the answer filed, it was agreed by the parties that neither party should set up the statute of limitations to the claim of the other, and defendant answered, and did not therein rely on the statute, the agreement was binding on plaintiff, and he could not afterward set up the statute against defendant's claim. Sumter *v.* Morse, 2 Hill Eq. (S. C.) 87.

62. Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162; Stockett *v.* Sasscer, 8 Md. 374. *Compare* Jordan *v.* Jordan, 85 Tenn. 561, 3 S. W. 896.

A waiver under seal has been held to import a consideration. McIntosh *v.* Condron, 20 Pa. Super. Ct. 118.

63. *California.*— State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600.

District of Columbia.— Mann *v.* Cooper, 2 App. Cas. 226.

Iowa.— Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293.

Maine.—Warren *v.* Walker, 23 Me. 453. See also Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162. *Compare* Hodgdon *v.* Chase, 29 Me. 47.

Massachusetts.—Webber *v.* Williams College, 23 Pick. 302.

Missouri.— Bridges *v.* Stephens, 132 Mo. 524, 34 S. W. 555.

New Jersey.— Quick *v.* Corlies, 39 N. J. L. 11.

North Carolina.— Cecil *v.* Henderson, 119 N. C. 422, 25 S. E. 1018; Hill *v.* Hilliard, 103 N. C. 34, 9 S. E. 639; Joyner *v.* Massey, 97 N. C. 148, 1 S. E. 702; Barcroft *v.* Roberts, 91 N. C. 363; Haymore *v.* Yadkin, 85 N. C. 268; Daniel *v.* Edgecombe County, 74 N. C. 494.

South Carolina. — Lowry *v.* Dubois, 2 Bailey 425.

Tennessee.— Jordan *v.* Jordan, 85 Tenn. 561, 3 S. W. 896.

Vermont.— State Trust Co. *v.* Sheldon, 68 Vt. 259, 35 Atl. 177. See also Burton *v.* Stevens, 24 Vt. 131, 58 Am. Dec. 153.

United States.— Randon *v.* Toby, 11 How. 493, 13 L. ed. 784.

England.— Gardner *v.* McMahon, 3 Q. B.

2. Estoppel.[64] The doctrine of equitable estoppel may in a proper case be invoked to prevent defendant from relying upon the statute of limitations,[65] it being laid down as a general principle that when a defendant electing to set up the statute of limitations previously by deception or any violation of duty toward plaintiff, has caused him to subject his claim to the statutory bar, he must be charged with having wrongfully obtained an advantage which equity will not allow him

561, 2 G. & D. 593, 6 Jur. 712, 11 L. J. Q. B. 297, 43 E. C. L. 867; Lade *v.* Trill, 6 Jur. 272.

See 33 Cent. Dig. tit. "Limitation of Actions," § 63 *et seq.*

Contra.— Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548 [*distinguishing* and *explaining* Gaylord *v.* Van Loan, 15 Wend. (N. Y.) 308; Utica Ins. Co. *v.* Bloodgood, 4 Wend. (N. Y.) 652].

Rule inapplicable to contract made after completion of statutory bar.—Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162. See also Pittsburgh, etc., R. Co. *v.* Graham, 36 Pa. St. 77.

64. Estoppel generally see Estoppel, 16 Cyc. 671 *et seq.*

65. See cases cited *infra*, this note.

Circumstances amounting to estoppel see the following cases:

Alabama.— Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626.

Georgia.— Parker *v.* Beall, 67 Ga. 334.

Indiana.— Putnam County *v.* State, 106 Ind. 531, 7 N. E. 254.

Iowa.—Wilson *v.* McElroy, 83 Iowa 593, 50 N. W. 55.

Kentucky.— Tucker *v.* Bentley, (1887) 2 S. W. 769; Newton *v.* Carson, 80 Ky. 309; Walker *v.* Sayers, 5 Bush 579.

Louisiana.—Harvey *v.* Harvey, 44 La. Ann. 80, 10 So. 410; Taylor *v.* Robertson, 23 La. Ann. 211.

Mississippi.— Union Mortg., etc., Co. *v.* Peters, 72 Miss. 1058, 18 So. 497, 30 L. R. A. 829; Matthews *v.* Matthews, 66 Miss. 239, 6 So. 201; Perkins *v.* Coleman, 51 Miss. 298.

Missouri.— Missouri Pac. R. Co. *v.* B. F. Coombs, etc., Commission Co., 71 Mo. App. 299; Swofford Bros. Dry Goods Co. *v.* Goss, 65 Mo. App. 55.

New York.— Brookman *v.* Metcalf, 4 Rob. 568.

North Carolina.— Ransom *v.* Shuler, 43 N. C. 304.

Pennsylvania.— Armstrong *v.* Levan, 109 Pa. St. 177, 1 Atl. 204, holding a promise to pay any loss arising from the commission of a tort before the statute had run operates as an estoppel if such promise is relied on by plaintiff.

Tennessee.— Lengar *v.* Hazlewood, 11 Lea 539.

Texas.— Park *v.* Prendergast, 4 Tex. Civ. App. 566, 23 S. W. 535.

Vermont.— Burton *v.* Stevens, 24 Vt. 131, 58 Am. Dec. 153.

Virginia.— Bowles *v.* Woodson, 6 Gratt. 78.

United States.— Randon *v.* Toby, 11 How. 493, 13 L. ed. 784; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

Circumstances not amounting to estoppel see the following cases:

Alabama.— Lewis *v.* Ford, 67 Ala. 143.

California.— Lent *v.* Shear, 26 Cal. 361.

Georgia.— Cade *v.* Burton, 45 Ga. 456.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Kentucky.— Reid *v.* Hamilton, 92 Ky. 619, 18 S. W. 770, 13 Ky. L. Rep. 849; Kennedy *v.* Foster, 14 Bush 479; Carr *v.* Robinson, 8 Bush 269; Coleman *v.* Walker, 3 Metc. 65, 77 Am. Dec. 163.

Michigan.— Kimball *v.* Cannon, 59 Mich. 290, 26 N. W. 519.

Missouri.— Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Monroe *v.* Herrington, 110 Mo. App. 509, 85 S. W. 1002.

New York.— Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743; Hill *v.* McDonald, 58 Hun 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431; Bucklin *v.* Chapin, 1 Lans. 443.

Pennsylvania.— Verrier *v.* Gullion, 97 Pa. St. 63; Moore *v.* Juvenal, 92 Pa. St. 484; Pittsburgh, etc., R. Co. *v.* Graham, 2 Grant 259; Philadelphia *v.* Brown, 3 Pa. Co. Ct. 327.

South Carolina.— Steele *v.* Jennings, 1 McMull. 297.

Texas.— McFaddin *v.* Prater, (1887) 3 S. W. 306.

United States.— Andreae *v.* Redfield, 98 U. S. 225, 25 L. ed. 158; Phelan *v.* O'Brien, 13 Fed. 656, 4 McCrary 466.

Statute of limitation as inconsistent pleading.—Where a suit was instituted on a note, and defendant pleaded a total failure of consideration, and alleged a parol warranty of the property for which the note was given, as a part of his defense, it was held that plaintiff could not avoid this defense by insisting on the statute of limitations, although more than four years had elapsed from the time of such parol warranty. Morrow *v.* Hanson, 9 Ga. 398, 54 Am. Dec. 346. So where defendant in a suit for specific performance of an agreement to convey land according to the conditions of a title bond, reciting payment of the consideration, filed a cross complaint, contradicting such recital, and demanding the purchase-money, it was held that plaintiff could not set up by reply the statute of limitations as a bar to the demand, as the statutory bar was waived by relying on the contract. Hamilton *v.* Plaut, 81 Ind. 417. So it is held that a party cannot have a deed declared a mortgage and at the same time plead the statute of limitations against the debt. Savage *v.* Gant, (Tenn. Ch. App. 1900) 57 S. W. 170. If on the trial of a cause defendant insists that stale demands shall be allowed by the jury, he cannot set up the statute against similar demands of a like nature on the part of plaintiff. Princeton, etc., Turnpike Co. *v.* Gulick, 14 N. J. L. 545. A

to hold.[66] Thus defendant will be estopped to set up the statute of limitations in bar of plaintiff's claim when the delay which would otherwise give operation to the statute has been induced by the promise or representation that the statutory bar would not be interposed.[67] And the same rule has been applied where defendant has caused plaintiff to subject his claim to the statutory bar by procuring an injunction against its enforcement.[68]

G. Stipulation Period Shorter Than Statutory Period. In the absence of special statutory provision to the contrary[69] the parties may stipulate for a period of limitation shorter than that fixed by the statute of limitations,[70] and the stipulation violates no principle of public policy, provided at least the period

suit to quiet title against a vendor's lien is an equitable suit, and plaintiff cannot obtain relief when he himself shows in his pleadings that he has not paid the consideration on account of which the lien complained of exists, although any action on the part of the vendor to enforce payment is barred by limitations. Cassell *v.* Lowry, 164 Ind. 1, 72. N. E. 640. See also Gage *v.* Riverside Trust Co., 86 Fed. 984. A defendant, by filing an admission of plaintiff's case, in order to obtain the right to open and close, under the forty-first rule of the court of common pleas of Massachusetts, is not thereby estopped from setting up in defense the statute of limitations. Emmons *v.* Hayward, 11 Cush. (Mass.) 48. An indorser of a note may set up the statute of limitations, although he has pleaded payments made since the statute began to run, for the purpose of reducing the amount, the payments, however, not having been made by or ratified by him. McMullen *v.* Rafferty, 24 Hun (N. Y.) 363 [*affirmed* in 89 N. Y. 456].

Delay induced by agreement to submit controversy to arbitration.—Where plaintiff is induced to delay suing by defendant's agreement to submit the controversy to arbitration, and to abide by and perform the award, which he does not do, these facts, although not an exception recognized in the statute of limitations, may yet estop defendant from setting up the statute. Davis *v.* Dyer, 56 N. H. 143.

An executed accord, although not itself enforceable, may be pleaded as an estoppel *in pais* to avoid the bar of limitations, when one of the parties thereto has been thereby induced to delay action on his claim till after the expiration of the statutory limitation. Swofford Bros. Dry-Goods Co. *v.* Goss, 65 Mo. App. 55.

The fact that mutual statements of indebtedness between two persons were prepared and exhibited for the purpose of settlement, one of which included a note, will not estop the owner of the note, in an action thereon, to plead limitations to defendant's account, when it is sought to be used as a set-off. Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

In Connecticut it has been held that a person cannot be debarred by an equitable estoppel from availing himself in a court of law of the statute of limitations. Hartford County Bank *v.* Waterman, 26 Conn. 324.

Estoppel to set up bar against mortgage by recital in deed.— In Christian *v.* John, 111 Tenn. 92, 76 S. W. 906, it was held that a grantee by assuming a mortgage on the lands granted is estopped to show that it was not an existing encumbrance at the time of the conveyance, because barred by the statute of limitations.

66. Clark *v.* Augustine, 62 N. J. Eq. 689, 51 Atl. 68. To the same effect see Chase *v.* Carney, 60 Ark. 491, 31 S. W. 43; Davis *v.* Ramage, 65 S. W. 340, 23 Ky. L. Rep. 1420.

Injunctions to restrain interposition of statute see INJUNCTIONS, 22 Cyc. 796 notes 9, 10.

Effect of fraudulent concealment of cause of action see *infra*, VI, D, 2, b.

67. Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293, 62 L. R. A. 395, holding that an assurance or representation not amounting to a contract may give rise to an estoppel.

Fraudulent representations as to duration of statutory period.— In Hopperton *v.* Louisville, etc., R. Co., 34 S. W. 895, 17 Ky. L. Rep. 1322, it was held that the defense of limitations is not overcome by the fact that plaintiff forbore to bring suit relying upon the false representations of the plaintiff as to the time constituting the statutory bar.

Estoppel arising from agreement to waive statute see *supra*, IV, F, 1, b, (III).

For what period estoppel effectual.— It is held that a representation that the statute would not be interposed would be effectual as an estoppel only so long as the creditor reasonably relied upon defendant's representations as an excuse for not instituting the action. Holman *v.* Omaha, etc., R., etc., Co., 117 Iowa 268, 90 N. W. 833, 94 Am. St. Rep. 293, 62 L. R. A. 395. See also Cowart *v.* Perrine, 21 N. J. Eq. 101.

68. MacKenzie *v.* Wooley, 39 La. Ann. 944, 3 So. 128; Davis *v.* Hoopes, 33 Miss. 173. See also Clark *v.* Augustine, 62 N. J. Eq. 689, 51 Atl. 68. *Compare* Telgen *v.* Drake, 13 N. D. 502, 101 N. W. 893.

Effect of injunction as suspending statute see *infra*, VI, H, 2, c.

69. See Cray *v.* Hartford F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280.

70. Brown *v.* Savannah Mut. Ins. Co., 21 Ga. 97; Better *v.* Prudential Ins. Co., 16 Daly (N. Y.) 344, 11 N. Y. Suppl. 70; Riddlesbarger *v.* Hartford F. Ins. Co., 7 Wall. (U. S.) 386, 19 L. ed. 257; Cray *v.* Hartford

fixed by agreement be not so unreasonable as to show imposition or undue advantage in some way.[71]

H. What Law Governs — 1. In General. Statutes of limitation are generally considered as municipal regulations founded on local policy, which have no coercive authority abroad, and with which foreign jurisdictions have no concern, and hence the general rule is that in respect to the limitation of actions the law of the forum governs.[72]

2. Actions on Contracts — a. In General. As a general rule since statutes of limitations affect the remedy only an action on a contract is governed by the *lex fori*, that is, by the statutes of the state or country in which the action is brought and not by the *lex loci contractus* or the *lex domicilii*.[73] And it is held to be immaterial that the statutory bar has fully run against the contract in the jurisdiction

F. Ins. Co., 6 Fed. Cas. No. 3,375, 1 Blatchf. 280. *Compare* French *v.* Lafayette Ins. Co., 9 Fed. Cas. No. 5,102, 5 McLean 461 [*affirmed* in 18 How. 404, 15 L. ed. 451].

In New York under the direct provisions of the code, it is competent for parties by written contract to limit the time for bringing an action thereon to a shorter period than allowed by the statutes in the absence of contract. Butler *v.* Supreme Council A. L. of H., 105 N. Y. App. Div. 164, 93 N. Y. Suppl. 1012.

Stipulations in contract of carriage see Carriers, 6 Cyc. 508 notes 60, 61.

Stipulations in fire insurance policies see Fire Insurance, 19 Cyc. 905 *et seq.*

Stipulations in life insurance policies see Life Insurance, *ante.*

71. Brown *v.* Savannah Mut. Ins. Co., 24 Ga. 97.

72. Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415 (holding that the statute of limitations of Minnesota, prescribing the effect of absence from the state with respect to the time when an action may be commenced, pertains solely to the remedy, and cannot be asserted in support of an action in Maine); Ruggles *v.* Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482; Gassaway *v.* Hopkins, 1 Head (Tenn.) 583; Hutchings *v.* Lamson, 96 Fed. 720, 37 C. C. A. 564; Underwood *v.* Patrick, 94 Fed. 468, 36 C. C. A. 330; Brunswick Terminal Co. *v.* Baltimore National Bank, 88 Fed. 607 [*reversed* on another point in 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625].

The period at which infants arrive at age for the purpose of setting the statute of limitations in motion against them is determined by the law of the forum. Burgett *v.* Williford, 56 Ark. 187, 19 S. W. 750, 35 Am. St. Rep. 96.

Limitation law governing actions on judgment of another state see Judgments, 23 Cyc. 1564 note 54 *et seq.*

73. *Alabama.*— Jones *v.* Jones, 18 Ala. 248 [*overruling* Goodman *v.* Munks, 8 Port. 84]; Crawford *v.* Childress, 1 Ala. 482.

Alaska.— Van Schuyver *v.* Hartman, 1 Alaska 431.

Arkansas.— Carter *v.* Adamson, 21 Ark. 287.

Connecticut.— Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240; Atwater *v.* Townsend, 4 Conn. 47, 10 Am. Dec. 97; Medbury *v.* Hopkins, 3 Conn. 472.

Dakota.— Star Wagon Co. *v.* Matthiessen, 3 Dak. 233, 14 N. W. 107.

District of Columbia.— Willard *v.* Wood, 4 Mackey 538.

Georgia.— Obear *v.* Birmingham First Nat. Bank, 97 Ga. 587, 25 S. E. 335, 33 L. R. A. 384.

Indiana.— Hendricks *v.* Comstock, 12 Ind. 238, 74 Am. Dec. 205; State *v.* Swope, 7 Ind. 91.

Iowa.— Bruce *v.* Luck, 4 Greene 143.

Kansas.— Hoggett *v.* Emerson, 8 Kan. 262. See Munn *v.* Taulman, 1 Kan. 254, 81 Am. Dec. 508.

Kentucky.— Farmers', etc., Nat. Bank *v.* Lovell, (1886) 1 S. W. 426; Bennett *v.* Devlin, 17 B. Mon. 353; Kellar *v.* Sinton, 14 B. Mon. 307; Graves *v.* Graves, 2 Bibb. 207, 4 Am. Dec. 697; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.

Louisiana.— Walworth *v.* Routh, 14 La. Ann. 205; Tate *v.* Garland, 12 La. Ann. 525; Lucas' Succession, 11 La. Ann. 296; Ducker's Succession, 10 La. Ann. 758; Bacon *v.* Dahlgreen, 7 La. Ann. 599; Brown *v.* Stone, 4 La. Ann. 235; Young *v.* Crossgrove, 4 La. Ann. 233 (holding that where the maker of a note was, before its execution and until his death, a resident of this state, and his succession was open and all of his available property situated here, the fact that the note was dated and payable in another state will not, in an action on the note against his succession here, make the case an exception to the general rule that the *lex fori* governs prescription); Lacoste *v.* Benton, 3 La. Ann. 220; Newman *v.* Goza, 2 La. Ann. 642; Erwin *v.* Lowry, 2 La. Ann. 314, 46 Am. Dec. 545; Union Cotton Manufactory *v.* Lobdell, 7 Mart. N. S. 108. *Compare* Harrison *v.* Stacy, 6 Rob. 15.

Maine.— Thompson *v.* Reed, 75 Me. 404; Thibodeau *v.* Levassuer, 36 Me. 362.

Massachusetts.— Brigham *v.* Bigelow, 12 Metc. 268; Bulger *v.* Roche, 11 Pick. 36, 22 Am. Dec. 359; McRae *v.* Mattoon, 10 Pick. 49; Byrne *v.* Crowninshield, 17 Mass. 55; Pearsall *v.* Dwight, 2 Mass. 84, 3 Am. Dec. 35.

Michigan.— Home L. Ins. Co. *v.* Elwell, 111 Mich. 689, 70 N. W. 334; Howard *v.* Coon, 93 Mich. 442, 53 N. W. 513.

where it was made,[74] or that the parties had remained subjects of the foreign state or country, until the term of limitation had expired.[75] In determining whether a foreign statute of limitations is to be considered as governing the nature, validity, or legal effect of a contract, or as only a law regulating the remedy to be had for enforcing the contract, it is immaterial what are the

Minnesota.— Bigelow *v.* Ames, 18 Minn. 527; Cook *v.* Kendall, 13 Minn. 324; Fletcher *v.* Spaulding, 9 Minn. 64.

Mississippi.— Perkins *v.* Guy, 55 Miss. 153, 30 Am. Rep. 510; Hamilton *v.* Cooper, Walk. 542, 12 Am. Dec. 588.

Missouri.— Stirling *v.* Winter, 80 Mo. 141; McMerty *v.* Morrison, 62 Mo. 140; Carson *v.* Hunter, 46 Mo. 467, 2 Am. Rep. 529; King *v.* Lane, 7 Mo. 241, 37 Am. Dec. 187; Lyman *v.* Campbell, 34 Mo. App. 213.

New Hampshire.— Paine *v.* Drew, 44 N. H. 306.

New York.— New York L. Ins. Co. *v.* Aitkin, 125 N. Y. 660, 26 N. E. 732 [*reversing* 58 N. Y. Super. Ct. 586, 11 N. Y. Suppl. 349]; Miller *v.* Brenham, 68 N. Y. 83 [*affirming* 7 Hun 330]; Hixson *v.* Rodbourn, 67 N. Y. App. Div. 424, 73 N. Y. Suppl. 779 [*reversing* 36 Misc. 19, 72 N. Y. Suppl. 42]; Carpentier *v.* Minturn, 6 Lans. 56; Gans *v.* Frank, 36 Barb. 320; Lincoln *v.* Battelle, 6 Wend. 475; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482; Nash *v.* Tupper, 1 Cai. 402, 2 Am. Dec. 197; Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478.

Pennsylvania.— Ward *v.* Hallam, 1 Yeates 329; Morgan *v.* Camden, etc., R. Co., 2 Pa. Co. Ct. 97, 18 Wkly. Notes Cas. 128.

Rhode Island.— Crocker *v.* Arey, 3 R. I. 178.

South Carolina.— Sawyer *v.* Macaulay, 18 S. C. 543; Hinton *v.* Townes, 1 Hill 439; Levy *v.* Boas, 2 Bailey 217, 23 Am. Dec. 134.

Tennessee.— Barbour *v.* Erwin, 14 Lea 716; Peebles *v.* Green, 6 Lea 471; Hubbard *v.* Epps, 9 Baxt. 231; Gassaway *v.* Hopkins, 1 Head 583; Estes *v.* Kyle, Meigs 34.

Texas.— Carrigan *v.* Semple, 72 Tex. 306, 12 S. W. 178; Gautier *v.* Franklin, 1 Tex. 732; Tilliard *v.* Hall, 11 Tex. Civ. App. 381, 32 S. W. 863.

Vermont.— Graves *v.* Weeks, 19 Vt. 178; Cartier *v.* Page, 8 Vt. 146.

Washington.— Adams *v.* Kelly, 2 Wash. Terr. 263, 5 Pac. 601.

West Virginia.— Urton *v.* Hunter, 2 W. Va. 83.

Wisconsin.— Brown *v.* Bicknell, 1 Pinn. 226, 39 Am. Dec. 299.

United States.— Scudder *v.* Union Nat. Bank, 91 U. S. 406, 23 L. ed. 245; Hanger *v.* Abbott, 6 Wall. 532, 18 L. ed. 939; Flowers *v.* Foreman, 23 How. 132, 16 L. ed. 405 (holding that where a person residing in Maryland sold land in Louisiana, with warranty, to a resident of Louisiana, from which the vendee was evicted, a suit on the warranty, brought in the United States circuit court for the district of Maryland, is determined by the Maryland statute of limitations); Townsend *v.* Jemison, 9 How. 407, 13 L. ed. 194; McElmoyle *v.* Cohen, 13 Pet. 312, 10 L. ed. 177; Hawkins *v.* Barney, 5 Pet. 457, 8 L. ed. 190; McCluny *v.* Silliman, 3 Pet. 270, 7 L. ed. 676; Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 88 Fed. 607 [*reversed* on another point in 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625]; Egberts *v.* Dibble, 8 Fed. Cas. No. 4,307, 3 McLean 86; Jones *v.* Hays, 13 Fed. Cas. No. 7,467, 4 McLean 521; Le Roy *v.* Crowninshield, 15 Fed. Cas. No. 8,269, 2 Mason 151; Nicholls *v.* Rodgers, 18 Fed. Cas. No. 10,260, 2 Paine 437. See also Walsh *v.* Mayer, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338.

England.— Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401; Duplex *v.* De Roven, 2 Vern. Ch. 540, 23 Eng. Reprint 950. See also Harris *v.* Quine, L. R. 4 Q. B. 653, 10 B. & S. 644, 38 L. J. Q. B. 331, 20 L. T. Rep. N. S. 947, 17 Wkly. Rep. 967.

Canada.— Carrell *v.* Wallace, 8 Manitoba 357; McLenaghan *v.* Hetherington, 9 Nova Scotia 165; Bryson *v.* Graham, 3 Nova Scotia 271.

See 33 Cent. Dig. tit. "Limitation of Actions," § 4.

Determination of character of instrument with reference to limitation acts.— It has been held that when certain classes of contracts are enumerated in a statute of a state establishing a prescription, a contract sued on in the courts of that state must be declared to be within or without the statute according to the character which the laws of that state attribute to it. Young *v.* Crossgrove, 4 La. Ann. 233; La Coste *v.* Benton, 3 La. Ann. 220. Thus where an instrument executed in another state is negotiable by its laws, but not negotiable by the laws of the forum, an action thereon will not be barred by the prescription established by the laws of the forum for negotiable instruments. Lacoste *v.* Benton, *supra*. In Watson *v.* Brewster, 1 Pa. St. 381, it was held that notes with scrawl seals must be treated as specialties, and exempt from the statute, although they had been executed in another state, by the laws of which they were not specialties, and were subject to its statute of limitations.

Foreign contract fixing period of limitation. — Since limitation of actions is governed by the law of the forum, it has been held that the courts of one state will not as a matter of comity enforce a contract made in another state, fixing the time within which a suit arising out of such contract shall be brought. Adams Express Co. *v.* Walker, 83 S. W. 106, 26 Ky. L. Rep. 1025, 67 L. R. A. 412.

74. Wilcox *v.* Williams, 5 Nev. 206.

75. Thompson *v.* Reed, 75 Me. 404; Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Carson *v.* Hunter, 46 Mo. 467, 2 Am. Rep. 529; Graves *v.* Weeks, 19 Vt. 178.

particular words made use of in the act, if in effect it only operates to suspend or take away the remedy.[76]

b. Statutes Expressly Imposing Limitations on Foreign Contracts. Sometimes statutory bars are expressly prescribed for causes of action arising on foreign contracts.[77] The several states may, in virtue of their reserved sovereignty, bar by statute remedies upon contract made in sister states, if suit be not brought for their enforcement within the period prescribed. That the period limited by statute within which to bring suit upon actions or contracts arising in this state is greater than the period prescribed for those arising on contracts in other states is not material.[78]

3. Actions of Tort. The rule in favor of the *lex fori*, in determining what law governs as to the limitation of actions, applies to actions for torts,[79] as for instance, actions for damages for personal injuries,[80] for injuries to animals,[81] or for the wrongful seizure of property.[82]

4. Statutes Extinguishing Right of Action — a. In General. When the statute of limitations of a particular state or country not only bars the right of action, but extinguishes the claim or title itself *ipso facto* and declares it a nullity after the lapse of the prescribed period, and the parties have been resident within the jurisdiction during the whole of that period, so that it has actually and fully operated upon the case, it must be held to be an extinguishment of the debt or claim, wherever an attempt may be made to enforce it.[83] Under this rule it is

76. Cartier *v.* Page, 8 Vt. 146. See also Lincoln *v.* Battelle, 6 Wend. (N. Y.) 475, holding that a law of a foreign state, authorizing proceedings calling on creditors to present their demands against a debtor by a specified day, and declaring the effect of omission to be, not only to take away the remedy, but to extinguish the debt, will be considered, where there is no insolvency, and no surrender of property, in the nature of a statute of limitations, affecting the remedy, and not the validity of the contract.

77. Hawse *v.* Burgmire, 4 Colo. 313; Read *v.* Edwards, 2 Nev. 262.

Determination of situs of contract.— In Hawse *v.* Burgmire, 4 Colo. 313, it was held that where a note was dated, executed, and delivered in Colorado, although for an indebtedness arising without the state, it is a Colorado contract, and in an action thereon the two-year limitation law on all foreign contracts does not apply. In Read *v.* Edwards, 2 Nev. 262, it was held that the Nevada act of Dec. 19, 1862, requiring a suit on a contract, etc., executed out of the territory, to be brought within six months of the accrual of the cause of action, does not apply to a joint note executed out of the territory by one of the makers, and subsequently executed here by the other maker, and thus completed within the territory. A note was made in Missouri, dated April 6, 1858, payable one day after, and Aug. 12, 1858, in Kansas, a mortgage was given to secure it, stipulating therein that, if default was made in the payment of the note for two years from the date of the mortgage, that instrument might be foreclosed. It was held that the clause in the mortgage was effective to extend the time of payment with reference to the land two years from the date of the mortgage, and made it a Kansas contract, so that the statute of limitations relative to contracts made out of the state did not apply to the note, and that suit on the note and mortgage brought Aug. 13, 1863, was one day too late, by the Kansas statute concerning contracts within the state, as the cause of action accrued Aug. 12, 1860. Chick *v.* Willetts, 2 Kan. 384. A life policy issued by an insurance company of another state, which expressly provides that it shall not be operative until countersigned by the general agent of the insurance company at San Francisco, in the state of California, and which was so countersigned, is, it is held, a written contract executed in that state within the meaning of the statute of limitations. Curtiss *v.* Ætna L. Ins. Co., 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114.

78. Hawse *v.* Burgmire, 4 Colo. 313.

79. Morgan *v.* Camden, etc., R. Co., 2 Pa. Co. Ct. 97, 18 Wkly. Notes Cas. 128; McCluny *v.* Silliman, 3 Pet. (U. S.) 270, 7 L. ed. 676.

80. Montague *v.* Cummings, 119 Ga. 139, 45 S. E. 979; Krogg *v.* Atlanta, etc., R. Co., 77 Ga. 202, 4 Am. St. Rep. 77; Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387; Morgan *v.* Metropolitan St. R. Co., 51 Mo. App. 523; Dickerson *v.* Central R. Co., 7 Pa. Dist. 104; Morgan *v.* Camden, etc., R. Co., 2 Pa. Co. Ct. 97, 18 Wkly. Notes Cas. 128; Johnston *v.* Canadian Pac. R. Co., 50 Fed. 886 [*affirmed* in 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470]; Nonce *v.* Richmond, etc., R. Co., 33 Fed. 429. See also Southern R. Co. *v.* Mayes, 113 Fed. 84.

81. Hurley *v.* Missouri Pac. R. Co., 57 Mo. App. 675, action against railroad for injury to animal caused by failure to fence road.

82. Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057, action against sheriff for wrongful seizure of property by deputy.

83. *Dakota.*— Rathbone *v.* Coe, 6 Dak. 91, 50 N. W. 620.

held that when personal property is held adversely in one state for a sufficient time to acquire title thereto, such title will be recognized in other states.[84] But it is held that where before the foreign statute has become fully operative by way of extinguishment of the debt or claim as between two citizens or residents of the foreign state or country, one of them has permanently changed his domicile and becomes a citizen of another state or country, the statute will be inoperative as an absolute bar in the courts of the latter state or country.[85]

b. Statutes Conferring Right and Fixing Limitation. Where by statute a right of action is given which did not exist by the common law, and the statute giving the right fixes the time within which the right may be enforced, the time so fixed becomes a limitation or condition on such right, and will control, no matter in what forum the action is brought.[86] But this rule is held to be inapplicable where no limit of time is prescribed by the statute giving the right of action, although a limitation is imposed by the general statutes of the state.[87]

Kentucky.— Cargile *v.* Harrison, 9 B. Mon. 518.

Maine.— Lamberton *v.* Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415.

Mississippi.— Perkins *v.* Guy, 55 Miss. 153, 30 Am. Rep. 510.

Missouri.— McMerty *v.* Morrison, 62 Mo. 140; Baker *v.* Stonebraker, 36 Mo. 338; Lyman *v.* Campbell, 34 Mo. App. 213.

Ohio.— Pittsburg, etc., R. Co. *v.* Hine, 25 Ohio St. 629; Bonte *v.* Taylor, 24 Ohio St. 628.

Wisconsin.— Eingartner *v.* Illinois Steel Co., 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871; Brown *v.* Parker, 28 Wis. 21.

United States.— Walsh *v.* Mayer, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338; Gilpin *v.* Plummer, 10 Fed. Cas. No. 5,451, 2 Cranch C. C. 54.

England.— Huber *v.* Steiner, 2 Bing. N. Cas. 202, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501. See also Don *v.* Lippman, 5 Cl. & F. 1, 7 Eng. Reprint 303.

Canada.— See Gunn *v.* Harper, 30 Ont. 650, where the court refused to entertain jurisdiction of an action to have a conveyance of lands situated in another state declared to be a mortgage on the ground amongst others that defendant set up that plaintiff's title had been extinguished by the operation of the statute of limitations, thereby raising a question of title, the determination of which involved the application of the law of a foreign country.

See 33 Cent. Dig. tit. "Limitation of Actions," § 4.

84. Howell *v.* Hair, 15 Ala. 194; Freeman *v.* Baldwin, 13 Ala. 246; Broh *v.* Jenkins, 9 Mart. (La.) 526, 13 Am. Dec. 320; Morgan *v.* Metropolitan St. R. Co., 51 Mo. App. 522; Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495. See also Jones *v.* Jones, 18 Ala. 248; Cargile *v.* Harrison, 9 B. Mon. (Ky.) 518; Finnell *v.* Southern Kansas R. Co., 33 Fed. 427. *Compare* Blackburn *v.* Morton, 18 Ark. 384; Goodwin *v.* Morris, 9 Oreg. 322.

85. Moores *v.* Winter, 67 Ark. 189, 53 S. W. 1057; Alexander *v.* Burnet, 5 Rich. (S. C.) 189; Canadian Pac. R. Co. *v.* Johnston, 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470 [*affirming* 50 Fed. 886]; Finnell *v.* Southern Kansas R. Co., 33 Fed. 427; Huber *v.* Steiner, 2 Bing. N. Cas. 202, 2 Dowl. P. C. 781, 1 Hodges 206, 4 L. J. C. P. 233, 2 Scott 304, 29 E. C. L. 501. See also Van Schuyver *v.* Hartman, 1 Alaska 431; Perry *v.* Lewis, 6 Fla. 555; Lee *v.* Cassin, 15 Fed. Cas. No. 8,184, 2 Cranch C. C. 112. *Compare* Maryland *v.* Todd, 16 Fed. Cas. No. 9,220, 1 Biss. 69.

86. *Georgia.*— Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106; Akin *v.* Freeman, 49 Ga. 51.

Kansas.— Rodman *v.* Missouri Pac. R. Co., 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704.

Minnesota.— Negaubauer *v.* Great Northern R. Co., 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674.

Ohio.— Pittsburg, etc., R. Co. *v.* Hine, 25 Ohio St. 629.

Texas.— Ross *v.* Kansas City Southern R. Co., 34 Tex. Civ. App. 586, 79 S. W. 626, holding that the rule that a remedy created by a statute which allows but a specified time for its enforcement must be enforced in foreign jurisdictions within that time is not affected by the fact that a railroad invoking the rule was incorporated in another state than that in which the statute exists, where its road extended through that state, and it was liable to suit there, and the person invoking the statute also lived in the state at and since the time that his cause of action arose.

United States.— The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, 30 L. ed. 358; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625; Theroux *v.* Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52; Finnell *v.* Southern Kansas R. Co., 33 Fed. 427; Boyd *v.* Clark, 8 Fed. 849.

Law governing in actions for death by wrongful act see DEATH, 13 Cyc. 340 note 2.

87. Pulsifer *v.* Greene, 96 Me. 438, 52 Atl. 921; Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122. See also Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262 [*reversing* 28 Fed. 907]. *Compare* Attrill *v.* Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779, 14 Am. St. Rep. 344.

Statutory liability of stock-holder.— Where the period of limitation for enforcing the

5. Statutes Giving Effect to Foreign Acts of Limitation. In many of the states, while the foregoing general rule making the *lex fori* the law controlling the limitation of actions is recognized, various statutory provisions exist giving effect to foreign acts of limitation under prescribed conditions, a condition usually imposed having reference to the residence of the parties, particularly the defendant, in the foreign jurisdiction.[88]

statutory liability of a stock-holder in a corporation is not prescribed by the statute which confers such right, but is found in the general statute of limitations of the state in which the corporation is organized, such statute of limitations has no extraterritorial force. Pulsifer *v.* Greene, 96 Me. 438, 52 Atl. 921; Whitman *v.* Citizens' Bank, 110 Fed. 503, 49 C. C. A. 122. See also Johnston *v.* Canadian Pac. R. Co., 50 Fed. 886 [*affirmed* in 61 Fed. 738, 9 C. C. A. 587, 25 L. R. A. 470]. *Compare* Brunswick Terminal Co. *v.* Baltimore Nat. Bank, 99 Fed. 635, 40 C. C. A. 22, 48 L. R. A. 625 [*reversing* 88 Fed. 607] (holding that Ga. Code (1882), § 3766, providing that all suits for the enforcement of rights accruing to individuals under statutes, "acts of incorporation," or by operation of law, shall be brought within twenty years after the right of action accrues, and not the statute of limitations of Maryland, applies to an action in Maryland against a stock-holder as created by the charter of the corporation within the rule that, where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation, the law of the forum, where contrary thereto, does not govern); Hutchings *v.* Lamson, 96 Fed. 720, 37 C. C. A. 564.

Where a right of action for a tort is given by a statute of another state, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that state, the *lex fori*, not the *lex loci*, applies on the subject of limitation. O'Shields *v.* Georgia Pac. R. Co., 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152 [*distinguishing* Selma, etc., R. Co. *v.* Lacey, 49 Ga. 106]. In an action to recover damages by reason of an illegal levy of a certain execution levied by defendant as sheriff in a county in Tennessee, although the acts complained of were not unlawful in Georgia, in which the suit was brought, but only in Tennessee, yet, inasmuch as the Tennessee statute providing for the right of action does not prescribe any limitations upon the time within which suit may be brought, the general statute governing such suit is applicable, and the statute of Georgia, fixing two years as the period within which such an action may be brought, governs. Montague *v.* Cummings, 119 Ga. 139, 45 S. E. 979.

88. *Alabama.*— Holley *v.* Coffee, 123 Ala. 406, 26 So. 239; Wright *v.* Strauss, 73 Ala. 227.

California.— Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646; Allen *v.* Allen, 90 Cal. 64, 27 Pac. 30.

Illinois.— Strong *v.* Lewis, 204 Ill. 35, 37, 68 N. E. 556; Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337; Collins *v.* Manville, 170 Ill. 614, 48 N. E. 914; O'Donnell *v.* Lewis, 104 Ill. App. 198; McGuigan *v.* Rolfe, 80 Ill. App. 256; Great Western Tel. Co. *v.* Stubbs, 55 Ill. App. 210; Humphrey *v.* Cole, 14 Ill. App. 56. See also Hyman *v.* McVeigh [*quoted* in Strong *v.* Lewis, *supra*].

Indiana.— Mechanics' Bldg. Assoc. *v.* Whitacre, 92 Ind. 547; Wright *v.* Johnson, 42 Ind. 29; Morrison *v.* Kendall, 6 Ind. App. 212, 33 N. E. 370.

Iowa.— Davis *v.* Harper, 48 Iowa 513; Lloyd *v.* Perry, 32 Iowa 144; Webster *v.* Rees, 23 Iowa 269; Petchell *v.* Hopkins, 19 Iowa 531; Sloan *v.* Waugh, 18 Iowa 224.

Kansas.— Crooker *v.* Pearson, 41 Kan. 410, 21 Pac. 270; Hoggett *v.* Emerson, 8 Kan. 262.

Kentucky.— John Shillito Co. *v.* Richardson, 102 Ky. 51, 42 S. W. 847, 19 Ky. L. Rep. 1020; Labatt *v.* Smith, 83 Ky. 599 [*overruling* Allen *v.* Hill, 78 Ky. 119]; O'Bannon *v.* O'Bannon, 13 Bush 583; Manders' Committee *v.* Eastern State Hospital, 84 S. W. 761, 27 Ky. L. Rep. 254; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499; Cincinnati First Nat. Bank *v.* Thomas, 3 S. W. 12, 8 Ky. L. Rep. 690.

Louisiana.— Walworth *v.* Routh, 14 La. Ann. 205.

Massachusetts.— Broadway Nat. Bank *v.* Baker, 176 Mass. 294, 57 N. E. 603; McCann *v.* Randall, 147 Mass. 81, 71 N. E. 75, 9 Am. St. Rep. 666.

Minnesota.— Drake *v.* Bigelow, 93 Minn. 112, 100 N. W. 664; Powers Mercantile Co. *v.* Blethen, 91 Minn. 339, 97 N. W. 1056; Luce *v.* Clarke, 49 Minn. 356, 51 N. W. 1162; Fletcher *v.* Spaulding, 9 Minn. 64.

Mississippi.—Wright *v.* Mordaunt, 77 Miss. 537, 27 So. 640, 73 Am. St. Rep. 536; Robinson *v.* Moore, 76 Miss. 89, 23 So. 631.

Missouri.— Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506.

Montana.— Chevrier *v.* Robert, 6 Mont. 319, 12 Pac. 702; Knox *v.* Gerhauser, 3 Mont. 267.

Nebraska.— Webster *v.* Davies, 44 Nebr. 301, 62 N. W. 484; Hower *v.* Aultman, 27 Nebr. 251, 42 N. W. 1039.

Nevada.— Lewis *v.* Hyams, 26 Nev. 68, 63 Pac. 126, 64 Pac. 817, 99 Am. St. Rep. 677.

New York.— Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393; Howe *v.* Welch, 14 Daly 80, 3 N. Y. St. 576; Holmes *v.* Hengen, 41 Misc. 521, 85 N. Y. Suppl. 35; Belden *v.* Wilkinson, 33 Misc. 659, 68 N. Y. Suppl. 205; Goldberg *v.* Lippmann, 6 Misc. 35, 25 N. Y. Suppl. 1003. See also Beer *v.* Simpson, 65 Hun 17, 19 N. Y. Suppl. 578.

Ohio.— Horton *v.* Horner, 16 Ohio 145; Horton *v.* Horner, 14 Ohio 437; State *v.* Shipley, 7 Ohio 246; Gibbons *v.* Ewell, 1 Handy 561, 12 Ohio Dec. (Reprint) 290; Gordon *v.*

6. Federal Statutes in State Courts. Where a suit within the jurisdiction of a state court is one which under act of congress may be removed into the courts of the United States or one the jurisdiction over which congress might vest exclusively in the courts of the United States, congress has the power to prescribe for it the law of limitations in the state courts.[89]

V. Limitations Applicable to Particular Actions.[90]

A. As Affected by Nature or Form of Remedy. While under some statutes of limitation it is the form of the action and not the cause of action which fixes the bar,[91] under other statutes it is frequently asserted that it is the nature of the cause of action, such as a legacy, a foreign judgment, a widow's interest, an award at common law, or a distributive share, rather than the form of the action, which determines the applicability of the statute of limitations, and plaintiff cannot avoid the bar of the statute by merely changing the form of action.[92] Where a common-law remedy is given to enforce an equitable right to which the statute

Preston, Wright 340; Worth *v.* Wilson, Wright 162; Clark *v.* Eddy, 10 Ohio Dec. (Reprint) 539, 22 Cinc. L. Bul. 63; Dux *v.* Louis, 1 Ohio Dec. (Reprint) 363, 8 West. L. J. 285.

Oregon.— Van Santvoord *v.* Roethler, 35 Oreg. 250, 57 Pac. 628, 76 Am. St. Rep. 472; McCormick *v.* Blanchard, 7 Oreg. 232.

Pennsylvania.— Shinn *v.* Healy, 23 Pa. Co. Ct. 123. See also Dickerson *v.* New Jersey Cent. R. Co., 7 Pa. Dist. 104.

Tennessee.— Kempe *v.* Bader, 86 Tenn. 189, 6 S. W. 126.

Texas.— Carrigan *v.* Semple, 72 Tex. 306, 12 S. W. 178; Thompson *v.* Berry, 26 Tex. 263; Kirkman *v.* Hendrick, 8 Tex. 253; Smith *v.* Crosby, 2 Tex. 414; Gautier *v.* Franklin, 1 Tex. 732; McDowell *v.* Collier, 2 Tex. App. Civ. Cas. § 266.

Washington.— Freundt *v.* Hahn, 24 Wash. 8, 63 Pac. 1107, 85 Am. St. Rep. 939.

Wyoming.— Bonnifield *v.* Price, 1 Wyo. 223.

United States.— Taylor *v.* Union Pac. R. Co., 123 Fed. 155 (decided under Nebraska statute); Martin *v.* Wilson, 120 Fed. 202, 58 C. C. A. 181 (decided under Illinois statute); Horner *v.* Perry, 112 Fed. 906 (decided under Missouri statute); Seattle Nat. Bank *v.* Pratt, 111 Fed. 841, 49 C. C. A. 662 (decided under New York statute); Aultman *v.* Syme, 79 Fed. 238, 24 C. C. A. 539 (decided under New York statute); Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388 (decided under New York statute); Hudson *v.* Bishop, 32 Fed. 519 (decided under Iowa statute); Penfield *v.* Chesapeake, etc., R. Co., 29 Fed. 494 [*affirmed* in 134 U. S. 351, 10 S. Ct. 566, 33 L. ed. 940] (decided under New York statute); Osgood *v.* Artt, 10 Fed. 365, 11 Biss. 160 (decided under Illinois statute); Maryland *v.* Todd, 16 Fed. Cas. No. 9,220, 1 Biss. 69 (decided under Indiana statute); Talbott *v.* Wright, 23 Fed. Cas. No. 13,733 (decided under Indiana statute).

See 33 Cent. Dig. tit. "Limitation of Actions," § 4 *et seq.*

Effect of statutes on saving clauses as to non-residence see *infra*, VI, F, 2, d, (II), (D), (4), (b), bb, (bb).

89. Mitchell *v.* Clark, 110 U. S. 633, 4 S. Ct. 170, 28 L. ed. 279; Arnson *v.* Murphy, 109 U. S. 238, 3 S. Ct. 184, 27 L. ed. 920, holding that the federal rather than the state statute of limitation governs an action to recover money alleged to have been illegally exacted by the collector of customs duties, although the action be originally brought in the state court.

Federal statutes limiting actions for official acts during the Civil war.— In Milligan *v.* Hovey, 17 Fed. Cas. No. 9,605, 3 Biss. 13, it was held that the act of congress of March 3, 1863 (12 U. S. St. at L. 757), providing that no suit or prosecution shall be maintained for any wrong committed at any time during the rebellion by virtue or under color of any authority derived from the president of the United States, or any act of congress unless the same shall be commenced within two years next after the wrongs complained of were committed, was within the power of congress and binding on state tribunals. See also State *v.* Gatzweiler, 49 Mo. 17, 8 Am. Rep. 119; Mitchell *v.* Clark, 110 U. S. 633, 4 S. Ct. 170, 28 L. ed. 279; Clark *v.* Dick, 5 Fed. Cas. No. 2,818, 1 Dill. 8.

Application of state statutes in federal courts see Courts, 11 Cyc. 885 note 15, 900 22 *et seq.*

90. **Limitation of action on judgments** see Judgments, 23 Cyc. 1508 note 87 *et seq.*

Limitation of actions on justices' judgments see Justices of the Peace, 24 Cyc. 614 note 19 *et seq.*

91. Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607. See also Roy *v.* St. Gervais Corp., 17 Quebec Super. Ct. 377.

92. *Georgia.*— Persoll *v.* Scott, 64 Ga. 767. where a father gave to his son a wool carder worth two thousand dollars by way of advancement, and afterward took possession of and used the carder, and it was held that the claim against his estate for the use of the carder was subject to the bar of the statute of limitations in like manner as in debt.

Maryland.— See Young *v.* Mackall, 3 Md. Ch. 398.

Mississippi.— Brooks *v.* Spann, 63 Miss. 198.

of limitation cannot be pleaded, it cannot be pleaded to the action at law.[93] Where an action at law can be maintained for the enforcement of a right, the statute of limitations may be pleaded in bar of it, notwithstanding a court of equity may have concurrent jurisdiction of the case, and that forum is resorted to.[94] In some jurisdictions the rule is laid down that the character of an action is determined for the purpose of applying the statute of limitations by the prayer of the petition or complaint.[95] In other jurisdictions, however, it is held that in deciding whether the statute relating to actions for equitable relief applies to a pending action, the nature of the action will not depend alone on the relief prayed for, but the facts set forth, or all the allegations thereof, must be considered in determining whether the action is legal or equitable.[96]

B. Recovery of Real Property[97] — **1. In General.** Various statutory provisions exist in the different jurisdictions applicable to actions for the recovery of real property.[98]

New York.— Crouse *v.* McKee, 14 N. Y. St. 158; Jex *v.* New York, 13 N. Y. St. 545.

Ohio.— Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307; Bayles *v.* Crossman, 5 Ohio Dec. (Reprint) 354, 5 Am. L. Rec. 13.

Pennsylvania.— Wickersham *v.* Lee, 83 Pa. St. 422; Hannum *v.* West Chester, 63 Pa. St. 475 (holding that an occupation or use is a continuing trespass for which ejectment, trespass, or case will lie, unaffected by the bar of the statute so far as the right is concerned, and that nothing but adverse possession, or use for twenty-one years, can bar the right of action itself); De Haven *v.* Bartholomew, 57 Pa. St. 126; Rank *v.* Hill, 2 Watts & S. 56, 37 Am. Dec. 483; Patterson *v.* Nichol, 6 Watts 379, 31 Am. Dec. 473; Doebler *v.* Snavely, 5 Watts 225; *In re* Dillebaugh, 4 Watts 177; Thompson *v.* McGaw, 2 Watts 161; Richards *v.* Bickley, 13 Serg. & R. 395; Landes *v.* Norristown, 9 Pa. Cas. 557, 13 Atl. 189.

Tennessee.— Merritt *v.* Parks, 6 Humphr. 332; Callaway *v.* McMillian, 11 Heisk. 557. *Compare* Knott *v.* Cunningham, 2 Sneed 204.

Vermont.— Bedell *v.* Tracy, 65 Vt. 494, 26 Atl. 1031.

United States.—Harkison *v.* Harkinson, 101 Fed. 71, 41 C. C. A. 201.

See 33 Cent. Dig. tit. "Limitation of Actions," § 66.

Under a statute enabling taxpayers to reclaim taxes paid on land not taxable, the action has been held to be in substance an action of assumpsit for money had and received, and is barred if not brought within the time prescribed by statute for bringing this form of action. Garland County *v.* Gaines, 47 Ark. 558, 2 S. W. 460.

Effect of bar of one of two remedies see *supra*, IV, B.

93. Bethune *v.* Dougherty, 30 Ga. 770. See also Mobile Bay Pilotage *v.* The Cuba, 28 Ala. 185; Chapman *v.* Woodward, 16 La. Ann. 167.

94. Somerset Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 278; Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714; Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; Brundage *v.* Port Chester, 102 N. Y. 494, 7 N. E. 398 [*affirming* 31 Hun 129]; Zweigle *v.* Hohman, 75 Hun 377, 27 N. Y. Suppl. 111 (holding that an action to have a legacy declared a charge upon real estate was barred by the six-year statute of limitations, since the remedy in equity and at law is concurrent); Hann *v.* Culver, 73 Hun (N. Y.) 109, 25 N. Y. Suppl. 880; Jex *v.* New York, 13 N. Y. St. 545, 28 N. Y. Wkly. Dig. 115; Cocke *v.* McGinnis, Mart. & Y. (Tenn.) 361, 17 Am. Dec. 809.

95. Bender *v.* Looney, 22 La. Ann. 488; Burch *v.* Willis, 21 La. Ann. 492; Biggs *v.* D'Aquin, 13 La. Ann. 21; Wilson *v.* McGreal, 12 La. Ann. 357. See also Le Blanc *v.* Robertson, 41 La. Ann. 1023, 6 So. 720; Christy *v.* Farlin, 49 Mich. 319, 13 N. W. 607.

96. Sheaf *v.* Dodge, 161 Ind. 270, 68 N. E. 292; Indiana Tp. Independent School Dist. *v.* Washington Tp. Independent School Dist., 123 Iowa 455, 99 N. W. 106; Hoyt *v.* Putnam, 39 Hun (N. Y.) 402 (holding that where before plaintiff can recover land his title must be restored by a reformation of his deed, his action, as to the application of statutes of limitation, is an action for the reformation of a deed, and is barred by the shorter term applicable to such an action); McTeague *v.* Coulter, 38 N. Y. Super. Ct. 208; Logan *v.* Robertson, (Tex. Civ. App. 1904) 83 S. W. 395. See also Sargent *v.* Tacoma, 10 Wash. 212, 38 Pac. 1048.

97. Adverse possession as affecting particular actions see Adverse Possession, 1 Cyc. 1137 *et seq.*

Limitation of proceedings for assignment or recovery of dower see Dower, 14 Cyc. 982 *et seq.*

Limitation of proceedings to recover curtesy see Curtesy, 12 Cyc. 1020 note 33 *et seq.*

98. *Alabama.*— Allen *v.* Clarke, 106 Ala. 600, 17 So. 713.

Arkansas.— Chandler *v.* Neighbors, 44 Ark. 479.

California.— Adams *v.* Hopkins, (1902) 69 Pac. 228.

Georgia.— Doris *v.* Story, 122 Ga. 611, 50 S. E. 348; Watkins *v.* Woolfolk, 5 Ga. 261.

Illinois.— Mason *v.* Odum, 210 Ill. 471, 71 N. E. 386, 102 Am. St. Rep. 180.

Indian Territory.— Sittel *v.* Wright, 3 Indian Terr. 684, 64 S. W. 576.

Kentucky.— Rose *v.* Ware, 76 S. W. 505, 25 Ky. L. Rep. 947.

2. Equitable Actions and Remedies.[99] By analogy to the statute of limitations at law barring an action for the recovery of lands after the lapse of a specified period from the accrual of the right of action, the lapse of the same period is usually a bar in equity to the recovery of an equitable estate, or for the enforcement of a right cognizable only in equity.[1] Moreover where equity exercises

Louisiana.— Rocques *v.* Levecque, 110 La. 306, 34 So. 454.

Missouri.— Quick *v.* Rufe, 164 Mo. 408, 64 S. W. 102. See also Charles *v.* Morrow, 99 Mo. 638, 12 S. W. 903.

New Hampshire.— Foster *v.* Marshall, 22 N. H. 491.

New York.— People *v.* Arnold, 4 N. Y. 508; Marvin *v.* Lewis, 61 Barb. 49.

Ohio.— Thompson *v.* Casson, 4 Ohio St. 233; Thompson *v.* Green, 4 Ohio St. 216; Hall *v.* Bradfield, 12 Ohio Cir. Dec. 339.

Pennsylvania.— Hunt *v.* Wall, 75 Pa. St. 413; McCallion *v.* Broomall, 2 Del. Co. 321. See also Hannum *v.* West Chester, 63 Pa. St. 475; Reid *v.* Anderson, 6 Lanc. Bar 26; Dickson *v.* Porter, 2 Pa. Dist. 159.

Texas.— Rutherford *v.* Carr, (1905) 87 S. W. 815 [*reversing* (Civ. App. 1905) 84 S. W. 659]; Stafford *v.* Stafford, 96 Tex. 106, 70 S. W. 75; Benavides *v.* Hunt, 79 Tex. 383, 15 S. W. 396; Snowden *v.* Rush, 69 Tex. 593, 6 S. W. 767; Craig *v.* Harless, 33 Tex. Civ. App. 257, 76 S. W. 594; Green *v.* Robertson, 30 Tex. Civ. App. 236, 70 S. W. 345 (holding that in a suit to recover land sold for taxes, the facts pleaded in regard to such suit being for the purpose of showing the tax judgment invalid, the statute of limitations as to actions for the recovery of land is alone applicable, and not that fixing the time in which a suit to set aside a judgment or a bill of review may be brought); Aransas Pass Harbor Co. *v.* Aransas Pass First Nat. Bank, 28 Tex. Civ. App. 372, 67 S. W. 906; Chandler *v.* Peters, (Civ. App. 1898) 44 S. W. 867. See also Turner *v.* Cochran, 30 Tex. Civ. App. 549, 70 S. W. 1024.

Washington.— Krutz *v.* Isaacs, 25 Wash. 666, 66 Pac. 141.

United States.— Mercer *v.* Selden, 1 How. 37, 11 L. ed. 38.

Canada.— Ross *v.* Pomeroy, 28 Grant Ch. (U. C.) 435.

See 33 Cent. Dig. tit. "Limitation of Actions," § 73 *et seq.* And see the statutes of the various states.

Limitation of actions of ejectment see Ejectment, 15 Cyc. 78 note 72.

Limitation of actions for forcible entry and detainer see Forcible Entry and Detainer, 19 Cyc. 1148 note 44 *et seq.*

Recovery of right of way.— The Washington statute (Ballinger Annot. Codes and St. § 4797), requiring actions to recover real estate to be brought within ten years, applies to an action by a railroad company to recover a part of its right of way from a person in adverse possession thereof. Northern Pac. R. Co. *v.* Hasse, 28 Wash. 353, 68 Pac. 882, 92 Am. St. Rep. 840; Northern Pac. R. Co. *v.* Ely, 25 Wash. 384, 65 Pac. 555, 87 Am. St. Rep. 766, 54 L. R. A. 526. In Arkansas, however, the right of way across another's land, whether appurtenant to the land or in gross, is not within the terms of the statute of limitations relating to land. Johnson *v.* Lewis, 47 Ark. 66, 14 S. W. 466.

Action for land and to establish title through lost deed.— While a suit to supply evidence of a lost deed and to perpetuate testimony will be barred by laches, if not brought within a reasonable time after the loss of the deed, an action for the land and to establish title through the lost deed will only be barred by a limitation barring recovery of land. Shepard *v.* Cummings, 44 Tex. 502.

99. Statutes applicable to equitable actions generally see *infra*, V, L.

1. *Alabama.*— Nininger *v.* Norwood, 72 Ala. 277, 47 Am. Rep. 412; Burden *v.* Stein, 27 Ala. 104, 62 Am. Dec. 758.

California.— Goodnow *v.* Parker, 112 Cal. 437, 44 Pac. 738; People *v.* Center, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; Oakland *v.* Carpentier, 13 Cal. 540.

Indiana.— Bradshaw *v.* Van Winkle, 133 Ind. 134, 32 N. E. 877.

Iowa.— Montgomery County *v.* Severson, 64 Iowa 326, 17 N. W. 197, 20 N. W. 458 (holding that a claim of right to the possession of lands, although resting upon an equity, is sufficient to support the defense of the statute of limitations; it need not rest upon the legal or proper title); Ball *v.* Keokuk, etc., R. Co., 62 Iowa 751, 16 N. W. 592; Harbour *v.* Rhinehart, 39 Iowa 672; Williams *v.* Allison, 33 Iowa 278; Hamilton *v.* Wright, 30 Iowa 480; Johnson *v.* Hopkins, 19 Iowa 49; McLenan *v.* Sullivan, 13 Iowa 521; Wright *v.* Leclaire, 3 Iowa 221 (holding that a bill to compel specific performance of an agreement to convey land is governed by the limitations applicable to real actions, and not by those which apply to personal property). *Compare* Good *v.* Norley, 28 Iowa 188.

Kansas.— Reihl *v.* Likowski, 33 Kan. 515, 6 Pac. 886.

Kentucky.— See Trimble *v.* Spicer, 58 S. W. 579, 22 Ky. L. Rep. 711; Spicer *v.* Seale, 50 S. W. 47, 20 Ky. L. Rep. 1869.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. 212.

Missouri.— Cooper *v.* Deal, 114 Mo. 527, 22 S. W. 31; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Dunn *v.* Miller, 96 Mo. 324, 9 S. W. 640; Barrett *v.* Allegheny Nat. Bank, 6 Mo. App. 317.

New York.— Borst *v.* Corey, 15 N. Y. 505.

Tennessee.— Cummings *v.* Stovall, 6 Lea 679; Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427; Peck *v.* Bullard, 2 Humphr. 41.

Vermont.— Robinson *v.* Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522.

United States.— John *v.* Smith, 91 Fed. 827.

concurrent jurisdiction, it will consider itself bound by, and will apply, the statutes of limitation as statutes, rather than by analogy;[2] and where the statute operates on the right so that the cause of action is extinguished or barred, the bar prevents its enforcement in equity.[3] The rule is laid down that in those cases where the main ground of action is fraud or mistake, whereby defendant has attained the legal title to the land in controversy, and the chief contention between the parties is with respect to the fraud or mistake alleged, yet if plaintiff alleges facts which show, as matter of law, that he is entitled to the possession of the property, and a part of the relief asked is that he be let into possession, or that his title to the land be quieted, the action is in reality for the recovery of real property, and is not barred except by the statutory limitation barring such actions.[4] At present, however, there are in many jurisdictions statutes expressly applicable to causes in equity, and their effect is simply a question of statutory construction.[5]

3. Enforcement of Vendor's Lien.[6] In the absence of a statute fixing the time within which an action to enforce a vendor's lien must be brought,[7] the lien is fre-

England.— Hovenden *v.* Annesley, 2 Sch. & Lef. 624, 9 Rev. Rep. 119.

Canada.— Connor *v.* McPherson, 18 Grant Ch. (U. C.) 607.

See 33 Cent. Dig. tit. "Limitation of Actions," § 75.

Laches and non-claim of an equitable estate for the statutory period of limitations, the owner not being under disability, will constitute a bar to equitable relief, where there has been no fraud, and the possession has been held under a claim unequivocally adverse. Banks *v.* Judah, 8 Conn. 145; Sumner *v.* Child, 2 Conn. 607; Elmendorf *v.* Taylor, 10 Wheat. (U. S.) 152, 6 L. ed. 289; Chemical Nat. Bank *v.* Kissane, 32 Fed. 429, 13 Sawy. 20; Bond *v.* Hopkins, 1 Sch. & Lef. 413; Stackhouse *v.* Barnston, 10 Ves. Jr. 453, 32 Eng. Reprint 921.

Action by vendee in possession to compel conveyance.— In Kentucky by virtue of Gen. St. c. 71, art. 4, § 20, the statute of limitations does not apply to an action by a vendee of land in possession to obtain a conveyance. Howard *v.* Howard, 96 Ky. 445, 29 S. W. 285.

2. *Alabama.*— Underhill *v.* Mobile Fire Dept. Ins. Co., 67 Ala. 45; Crocker *v.* Clements, 23 Ala. 296; Gunn *v.* Brantley, 21 Ala. 633.

Illinois.— Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868.

Kentucky.— Breckenridge *v.* Churchill, 3 J. J. Marsh. 11.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881.

New York.— Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Ray *v.* Ray, 24 Misc. 155, 53 N. Y. Suppl. 300 (holding that the ten-year statute of limitations (Code Civ. Proc. § 388) applies to equity cases exclusively and not to cases where the remedies at law and equity are concurrent and that in the latter cases the six-year statute is applicable); Humbert *v.* Trinity Church, 7 Paige 195.

Pennsylvania.— U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

Tennessee.— Shelby *v.* Shelby, Cooke 179, 5 Am. Dec. 686.

United States.— Godden *v.* Kimmell, 99 U. S. 201, 25 L. ed. 431; Wagner *v.* Baird, 7 How. 234, 12 L. ed. 681; Nash *v.* Ingalls, 101 Fed. 645, 41 C. C. A. 545; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506 [*affirmed* in 101 U. S. 503, 25 L. ed. 829]; Pratt *v.* Northam, 19 Fed. Cas. No. 11,376, 5 Mason 95.

3. Peyton *v.* Stith, 5 Pet. (U. S.) 485, 8 L. ed. 200; Lewis *v.* Marshall, 5 Pet. (U. S.) 470, 8 L. ed. 195; Hunt *v.* Wickliffe, 2 Pet. (U. S.) 201, 7 L. ed. 397; Taylor *v.* Holmes, 14 Fed. 498 [*affirmed* in 127 U. S. 489, 8 S. Ct. 1192, 32 L. ed. 179].

4. South Tule Independent Ditch Co. *v.* King, 144 Cal. 450, 77 Pac. 1032; Murphy *v.* Crowley, 140 Cal. 141, 73 Pac. 820, (1902) 70 Pac. 1024; Goodnow *v.* Parker, 112 Cal. 437, 44 Pac. 738; Williams *v.* Allison, 33 Iowa 278; Dunn *v.* Miller, 96 Mo. 324, 9 S. W. 640; Names *v.* Names, 48 Nebr. 701, 67 N. W. 751. *Compare* Hoyt *v.* Putnam, 39 Hun (N. Y.) 402.

Fraud or mistake as affecting computation of period of limitation see *infra*, VI, B, 21, 23.

Limitation of actions to set aside fraudulent conveyances see Fraudulent Conveyances, 20 Cyc. 720 *et seq.*

Limitation of suits to quiet title generally see Quieting Title.

5. *Georgia.*— Griffin *v.* Lee, 90 Ga. 224, 15 S. E. 810.

New York.— Butler *v.* Johnson, 111 N. Y. 204, 18 N. E. 643; *In re* Neilley, 95 N. Y. 382; Zweigle *v.* Hohman, 75 Hun 377, 27 N. Y. Suppl. 111.

South Dakota.— Houts *v.* Hoyne, 14 S. D. 176, 84 N. W. 773.

Texas.— Boon *v.* Chamberlain, 82 Tex. 480, 18 S. W. 655.

United States.— Teall *v.* Schroder, 158 U. S. 172, 15 S. Ct. 768, 39 L. ed. 938.

See 33 Cent. Dig. tit. "Limitation of Actions," § 75.

6. **Vendor's lien** generally see Vendor and Purchaser.

Effect of bar of debt on vendor's lien see *supra*, IV, C, 4.

7. Hitt *v.* Pickett, 91 Ky. 644, 11 S. W. 9, 12 Ky. L. Rep. 51; Lucy *v.* Hopkins, 13 S. W. 518, 11 Ky. L. Rep. 907; Fullerton *v.* Spring,

quently treated as merely an incident of the debt, and the statute which applies to an action to recover the debt applies also to one for the enforcement of the lien.[8] On the other hand it has been held that in an action to enforce a lien of a vendor who has retained the legal title in himself, the limitation applicable in actions of ejectment or for possession is to be applied by analogy in the absence of any statutory provisions in relation thereto.[9]

4. PARTITION.[10] It has been held that the statutes of limitation applicable to actions for recovery of real property do not apply to actions or proceedings for the partition of land, and that unless a specified limitation is prescribed by statute, such actions are governed by the general statutes providing that all actions not limited by any other statute shall be brought within a prescribed period.[11] On the other hand it is held that the statute of limitations relating to real actions is not confined to ejectment, but may be relied on to defeat a bill for partition by one cotenant against another.[12]

5. FORECLOSURE OF MORTGAGE OR DEED FOR SECURITY.[13] Courts of equity, adopting by analogy the statute of limitations applicable to proceedings at law, have frequently adopted the rule that the right of the mortgagee to foreclose is presumed to be barred after the lapse of such a period as is prescribed by the statute for enforcing a right to enter upon lands, which by 32 Henry VIII, and 21 James I, was twenty years,[14] although in several jurisdictions there are at present

3 Wis. 667, holding that such action must be brought within ten years from the accrual of the right.

8. Thompson *v.* Thompson, 3 Lea (Tenn.) 126; Sheratz *v.* Nicodemus, 7 Yerg. (Tenn.) 9; Wood *v.* Neely, 7 Baxt. (Tenn.) 586; Flewellen *v.* Cochran, 19 Tex. Civ. App. 499, 48 S. W. 39; Bearrow *v.* Wright, 17 Tex. Civ. App. 641, 43 S. W. 902. See also Day *v.* Baldwin, 34 Iowa 380; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028.

9. McGehee *v.* Blackwell, 28 Ark. 27, holding that an action on a note, given for the price of land by the assignee thereof, who succeeded to the vendor's lien, may be brought within nine years, the period limited for the bringing of actions of ejectment, although action on the note was barred in seven years. See also Hardin *v.* Boyd, 113 U. S. 756, 5 S. Ct. 771, 28 L. ed. 1141.

10. Partition generally see PARTITION.

11. McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500; Nutter *v.* Hawkins, 93 Ind. 260; Armstrong *v.* Cavitt, 78 Ind. 476; Nicholson *v.* Caress, 59 Ind. 39; Jenkins *v.* Dalton, 27 Ind. 78; King *v.* Wartelle, 14 La. Ann. 740; Aiken *v.* Ogilvie, 12 La. Ann. 353; Pizerot *v.* Meuillon, 3 Mart. (La.) 97 (holding that an action for the division of gains or partition of an estate is prescribed in thirty years); Lindell Real Estate Co. *v.* Lindell, 133 Mo. 386, 33 S. W. 466.

12. Kotz *v.* Belz, 178 Ill. 434, 53 N. E. 367; Brandenburg *v.* McGuire, 105 Ky. 10, 44 S. W. 96, 19 Ky. L. Rep. 1598; Stout *v.* Rigney, 107 Fed. 545, 44 C. C. A. 459.

13. Foreclosure of mortgages generally see MORTGAGES.

Mortgage or deed for security as sealed instrument see *infra*, V, E, 2.

Mortgage or deed for security, as written contract see *infra*, V, F, 8.

Application in equity of limitation of action for debt at law see *infra*, V, L, 8.

14. *Alabama.*— Goodwyn *v.* Baldwin, 59 Ala. 127; Coyle *v.* Wilkins, 57 Ala. 108.

District of Columbia.— Sis *v.* Boarman, 11 App. Cas. 116.

Indiana.— Catterlin *v.* Armstrong, 101 Ind. 258; Catterlin *v.* Armstrong, 79 Ind. 514.

Iowa.— Newman *v.* De Lorimer, 19 Iowa 244.

Maine.— Frisbee *v.* Frisbee, 86 Me. 444, 29 Atl. 1115.

Maryland.— Baltimore, etc., R. Co. *v.* Trimble, 51 Md. 99.

Massachusetts.—Anthony *v.* Anthony, 161 Mass. 343, 37 N. E. 386.

Mississippi.— Benson *v.* Stewart, 30 Miss. 49.

Missouri.— Orr *v.* Rode, 101 Mo. 387, 13 S. W. 1066.

Nebraska.— Baldwin *v.* Burt, 43 Nebr. 245, 61 N. W. 601; Merriam *v.* Goodlett, 36 Nebr. 384, 54 S. W. 686; Cheney *v.* Campbell, 28 Nebr. 376, 44 N. W. 451; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Nebr. 500, 30 N. W. 686.

New Hampshire.— Howard *v.* Hildreth, 18 N. H. 105.

Vermont.— Richmond *v.* Aiken, 25 Vt. 324.

West Virginia.— Camden *v.* Alkire, 24 W. Va. 674; Wayt *v.* Carwithen, 21 W. Va. 516.

United States.— Opie *v.* Castleman, 32 Fed. 511 [*reversed* in 145 U. S. 214, 12 S. Ct. 822, 36 L. ed. 680].

England.— Fearnside *v.* Flint, 22 Ch. D. 579, 52 L. J. Ch. 479, 48 L. T. Rep. N. S. 154, 31 Wkly. Rep. 378; Sutton *v.* Sutton, 22 Ch. D. 511, 52 L. J. Ch. 333, 48 L. T. Rep. N. S. 95, 31 Wkly. Rep. 369; Christophers *v.* Sparke, 2 Jac. & W. 223, 37 Eng. Reprint 612; White *v.* Ewer, 2 Vent. 340 (where the Lord Keeper declared that he would "not relieve Mortgages after 20

special provisions of the statute of limitations applicable to proceedings to foreclose mortgages.[15]

6. Redemption From Mortgage or Deed For Security.[16] Likewise, in the absence of express statutory provision,[17] a mortgagor may redeem at any time within the period prescribed by the statute for the limitation of the rights of entry and actions for the recovery of lands.[18] And it may be stated as a general rule that when an action to redeem by the mortgagor would be barred by the statute

Years; for that the Statute of 21 Jac. 16, did adjudge it reasonable to limit the Time of one's Entry to that Number of Years: unless there are such particular Circumstances as may vary the ordinary Case, as Infants, *femes covert*, &c., are provided for by the very Statute; tho those Matters in Equity are to be governed by the Course of the Court, that 'tis best to square the Rules of Equity, as near the Rules of Reason and Law as may be"); Hillary *v.* Waller, 12 Ves. Jr. 239, 33 Eng. Reprint 92. See also Dearman *v.* Wyche, 9 L. J. Ch. 76, 9 Sim. 570, 16 Eng. Ch. 570, 59 Eng. Reprint 478.

Canada.— See Faulds *v.* Harper, 11 Can. Sup. Ct. 639; Cogswell *v.* Grant, 37 Can. L. J. N. S. 428; Fetcher *v.* Rodden, 1 Ont. 155. *Compare* Allan *v.* McTavish, 2 Ont. App. 278; McDonald *v.* Elliott, 12 Ont. 98.

See 33 Cent. Dig. tit. "Limitation of Actions," § 78.

15. *Arkansas.*— Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Nix *v.* Draughon, 54 Ark. 340, 15 S. W. 893, holding that the mortgage is discharged when the debt is barred.

Illinois.— Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 524, 41 N. E. 919; Schifferstein *v.* Allison, 123 Ill. 662, 15 N. E. 275 [*affirming* 24 Ill. App. 294].

Michigan.— Highstone *v.* Franks, 93 Mich. 52, 52 N. W. 1015, holding that, under Howell St. § 8709, the action must be brought within fifteen years after the mortgage becomes due and payable. *Compare* Detroit Sav. Bank *v.* Truesdail, 38 Mich. 430, decided before the enactment of the above statute.

Minnesota.— Bradley *v.* Norris, 63 Minn. 156, 65 N. W. 357; Slingerland *v.* Sherer, 46 Minn. 422, 49 N. W. 237, holding, however, that where, in an action of foreclosure, plaintiff seeks to obtain a personal judgment against the mortgagor for the debt, as well as a decree of foreclosure, the six-year limitation prescribed by Gen. St. c. 66, § 6, for actions on contract or other obligations, and not the fifteen-year limitation prescribed by section 11 for actions to foreclose mortgages, applies, so far as the action is one for a personal judgment. *Compare* Ayer *v.* Stewart, 14 Minn. 97; Ozmun *v.* Reynolds, 11 Minn. 459.

North Carolina.— Jenkins *v.* Wilkinson, 113 N. C. 532, 18 S. E. 696; Fraser *v.* Bean, 96 N. C. 327, 2 S. E. 159.

Wisconsin.— Whipple *v.* Barnes, 21 Wis. 327.

See 33 Cent. Dig. tit. "Limitation of Actions," § 78.

16. Redemption from mortgage as equitable action see *infra*, V, L, 9.

17. Raynor *v.* Drew, 72 Cal. 307, 13 Pac. 866; Dodge *v.* Clark, 17 Cal. 586; Cal. Code Civ. Proc. §§ 346, 347; Moore *v.* Ross, 139 Ind. 200, 38 N. E. 817 (holding that a sale on mortgage foreclosure is a sale on execution within Burns Rev. St. (1894) § 294 [Rev. St. (1881) § 293], providing that an action by an execution debtor to recover the land sold on execution must be brought "within ten years after the sale"); Mooney *v.* Byrne, 163 N. Y. 86, 57 N. E. 163 [*reversing* 44 N. Y. Suppl. 1124]; Shriver *v.* Shriver, 86 N. Y. 575; Finn *v.* Lally, 1 N. Y. App. Div. 411, 37 N. Y. Suppl. 437; Wood *v.* Baker, 60 Hun (N. Y.) 337, 14 N. Y. Suppl. 821. See also Helton *v.* Mortin, 52 Ind. 529; Faulds *v.* Harper, 9 Ont. App. 537 [*reversed* on another point in 11 Can. Sup. Ct. 639]. *Compare* Hubbell *v.* Sibley, 50 N. Y. 468 [*affirming* 5 Lans. 51]; Miner *v.* Beekman, 50 N. Y. 337.

In South Dakota it has been held that Comp. Laws, §§ 4834–4847, relating to "the time of commencing actions for the recovery of real property" do not refer to or include in any of their provisions actions in equity for an accounting and for leave to redeem; but section 4856 of the succeeding article, relating to the "time of commencing actions other than for the recovery of real property," providing that "an action for relief not hereinbefore provided for must be commenced within ten years after the cause of action shall have accrued," governs an action for an accounting under a mortgage and to redeem. Houts *v.* Hoyne, 14 S. D. 176, 84 N. W. 773.

18. *Alabama.*— Wiley *v.* Ewing, 47 Ala. 418; Gunn *v.* Brantley, 21 Ala. 633.

Connecticut.— Lockwood *v.* Lockwood, 1 Day 295; Skinner *v.* Smith, 1 Day 124.

Iowa.— Smith *v.* Foster, 44 Iowa 442; Montgomery *v.* Chadwick, 7 Iowa 114.

Maine.— Frisbee *v.* Frisbee, 86 Me. 444, 29 Atl. 1115; McPherson *v.* Hayward, 81 Me. 329, 17 Atl. 164; Hurd *v.* Coleman, 42 Me. 182; Phillips *v.* Sinclair, 20 Me. 269.

Michigan.— See Cook *v.* Finkler, 9 Mich. 131.

Missouri.— McNair *v.* Lot, 34 Mo. 285, 84 Am. Dec. 78, 25 Mo. 182.

Nebraska.— Names *v.* Names, 48 Nebr. 701, 67 N. W. 751.

New York.—Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.

Ohio.— Estep *v.* Adams, 4 Ohio Dec. (Reprint) 40, 1 Clev. L. Rec. 51.

United States.— Hughes *v.* Edwards, 9

of limitations, a similar action instituted by any one claiming under him will also be barred.[19]

7. Title Under Grant of Public Land.[20] The general rule is that the statute of limitations applicable to actions for the recovery of real property, or for the recovery of the possession thereof, is applicable to actions to test title to lands under public grant or patent, or to recover possession under such title,[21] although in some jurisdictions special statutes of limitation have been enacted governing this class of actions.[22]

Wheat. 489, 6 L. ed. 142. See also Babcock *v.* Wyman, 19 How. 289, 15 L. ed. 644.

England.— Barron *v.* Martin, Coop. 189, 35 Eng. Reprint 526, 19 Ves. Jr. 327, 34 Eng. Reprint 1234; Reeks *v.* Postlethwaite, Coop. 160, 10 Eng. Ch. 160, 35 Eng. Reprint 515; Whiting *v.* White, Coop. 1, 10 Eng. Ch. 166, 35 Eng. Reprint 455, 2 Cox Ch. 290, 30 Eng. Reprint 135; Jenner *v.* Tracey, 3 P. Wms. 287 note.

See 33 Cent. Dig. tit. "Limitation of Actions," § 79.

In Wisconsin a suit to redeem must be brought within ten years, as this is an equitable action, coming within the clause of the statute limiting actions not otherwise specified. Knowlton *v.* Walker, 13 Wis. 264.

19. Tucker *v.* White, 22 N. C. 289.

The right of a junior mortgagee, who is not made a party to a proceeding to foreclose a prior mortgage, to redeem from such foreclosure, is absolutely barred in ten years under the Iowa statute. Gower *v.* Winchester, 33 Iowa 303.

Person not a party to decree of sale.— A five-year limitation in suits to redeem land sold under decree of foreclosure in chancery, by "any person, not a party to the decree of sale, who shall claim under the mortgagor or grantor," applies to suits by the heirs, etc., of a purchaser from the mortgagor; and this, although the decree is rendered void as to them by failure to revive the suit against them on the death of the ancestor before final decree. Hunt *v.* Ellison, 32 Ala. 173.

Judgment creditors.— In Iowa, when judgment creditors are not made parties to the foreclosure of a senior mortgage lien, their right to redeem is absolutely barred in ten years from the date of their judgments, and cannot be extended by the levy of an execution on the land before the expiration of the ten years. Albee *v.* Curtis, 77 Iowa 644, 42 N. W. 508.

20. Public lands generally see Public Lands.

Adverse possession against grantee of federal or state government see Adverse Possession, 1 Cyc. 1113 note 56 *et seq.*

21. *California.*— Norris *v.* Moody, 84 Cal. 143, 24 Pac. 37; Galindo *v.* Wittenmeyer, 49 Cal. 12; Richardson *v.* Williamson, 24 Cal. 289.

New Mexico.— Farish *v.* New Mexico Min. Co., 5 N. M. 279, 21 Pac. 654.

Ohio.—Walworth *v.* Collinwood, 8 Ohio Cir. Ct. 477, 4 Ohio Cir. Dec. 503.

Tennessee.—Neal *v.* East Tennessee College, 6 Yerg. 190; Dunlap *v.* Gibbs, 4 Yerg. 94.

United States.— Curtner *v.* U. S., 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890; Manning *v.* San Jacinto Tin Co., 9 Fed. 726, 7 Sawy. 418. See also Kirk *v.* Smith, 9 Wheat. 241, 6 L. ed. 81.

See 33 Cent. Dig. tit. "Limitation of Actions," § 80.

Compare American Emigrant Co. *v.* Fuller, 83 Iowa 599, 50 N. W. 48 (holding that as the Swamp Land Act of 1850 was a grant *in præsenti*, and vested title to the land covered thereby in the states, a certification of a part of such land by the secretary of the interior as being included in a subsequent grant in aid of railroads is only a cloud on the title of the states' grantee; and while no possession is had thereunder, his suit to quiet title is not within the provisions of Miller Code, § 2529, subdivision 5, barring actions to recover land if not brought within ten years from the time the cause of action accrues); Trustees *v.* Payne, 3 T. B. Mon. (Ky.) 161 (holding that the seven-year limitation does not apply where the title adverse to the occupant is a grant by the state, or where both parties claim the same survey).

Contract to convey mining claim.— In Herron *v.* Eagle Min. Co., 37 Oreg. 155, 61 Pac. 417, it was held that the interest acquired by a locator in possession of a mining claim prior to his compliance with provisions of United States statutes entitling him to a patent is mere personalty and not an interest in real property within Hill Annot. Laws, § 382, providing that a suit for the determination of an interest in real property shall be deemed within the limitations of actions for the recovery of real property, and hence such statute has no application to an action for specific performance of a contract to convey such mining claims.

22. Collings *v.* Pease, 146 Mo. 135, 47 S. W. 925; Bushey *v.* Glenn, 107 Mo. 331, 17 S. W. 969 (holding that the two-year limitation relating to military bounty lands prescribed by Gen. St. (1866) p. 745, § 1, which took effect Aug. 1, 1866 (p. 882, § 2), applies to an adverse possession of such lands after such date, and the limitation of ten years is inapplicable); Baker *v.* Woodward, 12 Oreg. 3, 6 Pac. 173 (holding, however, that the five-year limitation prescribed by Code, § 378, as to actions to annul patents to land from the United States or the state, applies only to controversies arising under section 501, relating to claims under the Donation Act, between rival claimants under the United States or the state). *Compare* Rogers *v.* Brown, 61 Mo. 187.

8. Title Under Judicial or Execution Sale.[23] It is frequently provided that all actions against purchasers for the recovery of land sold at judicial or execution sales shall be brought within a specified period after the date of such sale, and not thereafter;[24] and such statutes are held to be applicable to actions to set aside sales on the ground of fraud.[25]

C. Recovery of Personal Property.[26] Various statutes exist in the different jurisdictions prescribing the time within which an action for the taking, detention, or for the recovery of personal property must be brought.[27]

D. Contracts in General[28] — **1. General Statement.** By the express wording of the various statutes based on 21 James I, or by judicial construction, practically all simple contracts are held to be within the purview of and governed by such statutes.[29] In a number of jurisdictions all actions upon any simple contract, at least those not specifically enumerated in the statute, must be brought

23. Limitation of actions for recovery of possession by execution purchaser see Executions, 17 Cyc. 1315 note 45.

Judicial sales generally see Judicial Sales, 24 Cyc. 1.

24. Bland *v.* Fleeman, 58 Ark. 84, 23 S. W. 4 (holding that the statute is binding on courts both of equity and law); Orr *v.* Cravens, 128 Ind. 359, 27 N. E. 494; Orr *v.* Owens, 128 Ind. 229, 27 N. E. 493; Sedwick *v.* Ritter, 128 Ind. 209, 27 N. E. 610; Lafayette Second Nat. Bank *v.* Corey, 94 Ind. 457; Brown *v.* Maher, 68 Ind. 14. See also Tenny *v.* Porter, 61 Ark. 329, 33 S. W. 211.

Lands purchased at tax-sale.— In an action of trespass to try title to lands bought at tax-sale, in which the ten-year statute of limitations was pleaded, the purchaser at the tax-sale is barred in the same time in which the real owner would be if there had been no sale. Jordan *v.* Higgins, 63 Tex. 150. In Phillips *v.* Wilmarth, 98 Iowa 32, 66 N. W. 1053, it was held that the general statute of limitations contained in Miller Code, § 2529, providing that an action to recover real property shall not be brought after ten years from the time the cause of action accrues, cannot be invoked in favor of a tax title to land of which the holder has not held possession for ten years.

Sale under void default judgment.— In Texas the three-year statute of limitation is not available as a defense to an action by a landowner to recover lands from the purchaser at an execution sale under a default judgment shown to be void on the face of the record. Stegall *v.* Huff, 54 Tex. 193.

25. Hindman *v.* O'Connor, 54 Ark. 627, 16 S. W. 1052, 13 L. R. A. 490. *Compare* Williams *v.* Allison, 33 Iowa 278, where the limitation applicable to action for the recovery of real property was applied.

26. Acquisition of title to personalty by adverse possession see *supra*, IV, A, text and note 74.

Adverse possession for statutory period as bar to action of detinue see Detinue, 14 Cyc. 248 note 38.

Limitation applicable to action of trover see *infra*, V, I, 3, note 20.

Limitation applicable to suit to redeem mortgaged personalty see Chattel Mortgages, 7 Cyc. 85 note 68 *et seq.*

Limitation of suit to foreclose chattel mortgage see Chattel Mortgages, 7 Cyc. 95 note 48 *et seq.*

27. *Alabama.*— Lockard *v.* Nash, 64 Ala. 385; Bohannon *v.* Chapman, 17 Ala. 696; Sims *v.* Canfield, 2 Ala. 555.

Arkansas.— Payne *v.* Bruton, 10 Ark. 53, holding that the action of replevin is embraced in the class of cases which are limited to three years after the cause of action accrues.

Georgia.— See Everett *v.* Whitfield, 27 Ga. 133.

Kentucky.— Divine *v.* Bullock, 3 Metc. 418.

Louisiana.— Cox *v.* Van Ahlefeldt, 105 La. 543, 30 So. 175; White *v.* White, 50 La. Ann. 104, 23 So. 95; Stewart *v.* Pickard, 10 Rob. 18.

Michigan.— Bresnahan *v.* Nugent, 92 Mich. 76, 52 N. W. 735.

Ohio.— Raymond *v.* Moore, 1 Cinc. Super. Ct. 456, holding that where one claims to hold another as trustee of personalty under a mere constructive, and not an express, trust of which he had notice, he must assert his claim within four years from the time when the trust is alleged to have originated, in analogy to the statute limiting actions for detaining personalty.

Texas.— Ross *v.* Early, 39 Tex. 390; Scoby *v.* Sweatt, 28 Tex. 713; Luter *v.* Hutchinson, 30 Tex. Civ. App. 511, 70 S. W. 1013.

Virginia.— Owen *v.* Sharp, 12 Leigh 427; Garland *v.* Enos, 4 Munf. 504.

United States.— See St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. ed. 289.

See 33 Cent. Dig. tit. "Limitation of Actions," § 86 *et seq.*

28. Contract generally see Contracts, 9 Cyc. 213.

Limitation of action on fire insurance policy see Fire Insurance, 19 Cyc. 906 note 62.

Limitations as to contract to sell or convey see *infra*, V, F, 3.

29. *Louisiana.*— Smith *v.* Braun, 37 La. Ann. 225 (holding that the one-year prescription applicable to an action for damages *ex delicto* does not apply to an action for breach of promise of marriage, as such damages would arise *ex contractu*); Union Parish School Directors *v.* Trimble, 32 La. Ann. 793.

Maine.— Topsham *v.* Blondell, 82 Me. 152, 19 Atl. 93, which was an action of debt for the recovery of taxes.

within a specified period after the accrual of the cause of action.[30] In other jurisdictions the statute contains a clause applicable to actions on contracts, obligations, and liabilities, not founded upon an instrument in writing, and is held to include all actions at law not specified in other portions of the statute.[31] The third section of 21 James I, and acts of limitation founded thereon adopted in the various states, providing that all actions upon the case, etc., shall be brought within a given period next after the cause of the action arose, have invariably been construed to include the action of assumpsit.[32] At present, however, in

Massachusetts.— Mill Dam Foundery *v.* Hovey, 21 Pick. 417.

New Hampshire.— Hall *v.* Hall, 8 N. H. 129. See also Wilson *v.* Towle, 19 N. H. 244, holding that an action of debt against a devisee of land, to recover money charged thereon, is not an action grounded upon any lending or contract not under seal, and not therefore within the statute.

North Carolina.— Burwell *v.* Linthicum, 100 N. C. 145, 5 S. E. 735.

Pennsylvania.— Green, etc., R. Co. *v.* Moore, 64 Pa. St. 79.

Tennessee.— Rice *v.* Alley, 1 Sneed 51; Tisdale *v.* Munroe, 3 Yerg. 320. See also Ezell *v.* Giles County Justices, 3 Head 583.

Texas.— Robinson *v.* Varnell, 16 Tex. 382, holding that the words, "Actions of debt, grounded on any contract in writing," include all suits brought to recover money for the breach of a contract in writing, without regard to the technical distinction between debt and damages.

United States.— See Chicago, etc., R. Co. *v.* Pullman Southern Car Co., 56 Fed. 705, 6 C. C. A. 90, decided under Louisiana code.

England.— London, etc., Tobacco Pipe Makers Co. *v.* Loder, 16 Q. B. 765, 15 Jur. 1194, 20 L. J. Q. B. 414, 71 E. C. L. 765; Sanders *v.* Benson, 4 Beav. 350, 49 Eng. Reprint 374.

Canada.— Masson *v.* Merchants Bank, 14 Quebec Super. Ct. 293.

See 33 Cent. Dig. tit. "Limitation of Actions," § 9.

The action of debt on simple contract, under 21 James I, c. 16, is one of the actions *ex contractu* to recover a sum certain which must be brought within six years next after cause of action accrued. Walker *v.* Witter, Dougl. (3d ed.) 1; London, etc., Tobacco Pipe Makers Co. *v.* Loder, 6 Eng. L. & Eq. 309.

An action for the recovery of money paid for intoxicating liquors, instituted under Iowa Code (1873), § 1550, which provides that all payments for intoxicating liquor sold in violation of that chapter shall be held to have been received on a valid promise, in consideration of a receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money, is not barred until five years have elapsed from the time the payment was made; the statute of limitations applicable to contracts governing such action, and not the statute relative to penalties and forfeitures. Woodward *v.* Squires, 41 Iowa 677.

Special prescription for charges for board and lodging see Naud *v.* Marcotte, 2 Quebec Pr. 145 [*affirming* 15 Quebec Super. Ct. 360]; Gosselin *v.* Aubé, 10 Quebec Super. Ct. 447; McGoun *v.* Cuthbert, 10 Quebec Super. Ct. 158; Cleary *v.* Burke, 10 Quebec Super. Ct. 150.

30. *Alabama.*— Hairston *v.* Sumner, 106 Ala. 381, 17 So. 709; Griel *v.* Pollak, 105 Ala. 249, 16 So. 704.

Georgia.— Farrar *v.* Southwestern R. Co., 116 Ga. 337, 42 S. E. 527, statutory period of four years.

Kentucky.— Altsheler *v.* Conrad, 82 S. W. 257, 26 Ky. L. Rep. 538.

New York.— Mittleton *v.* Twombly, 125 N. Y. 520, 26 N. E. 621 [*affirming* 58 N. Y. Super. Ct. 561, 9 N. Y. Suppl. 924]; Miller *v.* Wood, 116 N. Y. 351, 22 N. E. 553; Crowley *v.* Johnston, 96 N. Y. App. Div. 319, 89 N. Y. Suppl. 258; Mason *v.* Henry, 83 Hun 546, 31 N. Y. Suppl. 1068 [*affirmed* in 152 N. Y. 529, 46 N. E. 837]; Matter of Meehan, 29 Misc. 167, 60 N. Y. Suppl. 1003; Miller *v.* Parkhurst, 9 N. Y. St. 759; Elliott *v.* Cronk, 13 Wend. 35.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342; Dacovich *v.* Schley, 134 Fed. 72, 67 C. C. A. 198 [*reversing* 132 Fed. 394]; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523.

See 33 Cent. Dig. tit. "Limitation of Actions," § 91.

31. *California.*—Gibson *v.* Henley, 131 Cal. 6, 63 Pac. 61; Churchill *v.* Pacific Imp. Co., 96 Cal. 490, 31 Pac. 560; Piller *v.* Southern Pac. R. Co., 52 Cal. 42; Ashley *v.* Vischer, 24 Cal. 322, 85 Am. Dec. 65.

Iowa.— Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909.

Mississippi.— Madison County *v.* Collier, 79 Miss. 220, 30 So. 610.

Ohio.— King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25; Reynolds *v.* Green, 1 Cinc. Super. Ct. 262.

Texas.— Walter A. Wood Mowing, etc., Mach. Co. *v.* Hancock, 4 Tex. Civ. App. 302, 23 S. W. 384.

See 33 Cent. Dig. tit. "Limitation of Actions," § 90 *et seq.*

32. *Alabama.*— Griel *v.* Pollak, 105 Ala. 249, 16 So. 704.

Connecticut.— Robbins *v.* Harvey, 5 Conn. 335.

Illinois.— Bedell *v.* Janney, 9 Ill. 193.

Indiana.— Indianapolis, etc., R. Co. *v.* Center Tp., 143 Ind. 63, 40 N. E. 134.

Iowa.— Maltby *v.* Cooper, Morr. 59.

Maryland.— Green *v.* Johnson, 3 Gill & J. 389 [*overruling* Grant *v.* Beall, 4 Harr. & M. 419].

most of the states by statutory amendment the various statutes of limitation include the action of assumpsit *eo nomine*.[33]

2. Contracts of Employment[34] **— a. In General.** Contracts of employment are within the provisions of the statute of limitations relating to simple contracts, and actions thereon are governed thereby, in the absence of special statutory provisions relating to them.[35] In Louisiana the right of action of workmen, laborers, servants, and officers and sailors of vessels, for the payment of their wages is prescribed in one year.[36] However, the word "servant," as used in this statute, means menial servant, and the statute does not apply to an action for specific work, or work done by the job under a contract, or a *quantum meruit*, and the materials furnished for such work.[37]

b. Professional Services. In Louisiana an action for professional services by an attorney or physician is barred by express statute after three years from the accrual of the right of action.[38] In other jurisdictions such action is held to be

Massachusetts.— Haven *v.* Foster, 9 Pick. 112, 19 Am. Dec. 353.

New York.— Shepard *v.* Hoit, 7 Hill 198.

Ohio.— Williams *v.* Williams, 5 Ohio 444. *Compare* Haines *v.* Lytle, 1 Ohio Dec. (Reprint) 198, 4 West. L. J. 1, holding that a plea of the statute of limitations for fifteen years is inapplicable to a declaration in assumpsit containing the common counts.

Oregon.— Baldro *v.* Tolmie, 1 Oreg. 176.

Pennsylvania.— Harris *v.* Christian, 10 Pa. St. 233; Alexander *v.* Leckey, 9 Pa. St. 120; Robinson *v.* Cameron County, 1 Walk. 305.

United States.— Washington, etc., R. Co. *v.* District of Columbia, 136 U. S. 653, 10 S. Ct. 1075, 34 L. ed. 549; Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 10 S. Ct. 19, 33 L. ed. 231; McCluny *v.* Silliman, 3 Pet. 270, 7 L. ed. 676; Beatty *v.* Burnes, 8 Cranch 98, 3 L. ed. 500. See also Britton *v.* Butler, 4 Fed. Cas. No. 1,903, 9 Blatchf. 456.

England.— Piggott *v.* Rush, 4 A. & E. 912, 2 Harr. & W. 29, 6 L. J. K. B. 272, 6 N. & M. 376, 31 E. C. L. 398; Harris *v.* Saunders, 4 B. & C. 411, 6 D. & R. 471, 3 L. J. K. B. 239, 28 Rev. Rep. 310, 10 E. C. L. 638; Leigh *v.* Thornton, 1 B. & Ald. 625, 19 Rev. Rep. 407; Chievly *v.* Bond, 4 Mod. 105; Chandler *v.* Vilett, 2 Saund. 120.

See 33 Cent. Dig. tit. "Limitation of Actions," § 71.

Compare Harral *v.* Wright, 57 Ga. 484 (holding that the law of prescription is not applicable to an action of assumpsit); Phillips *v.* Cage, 12 Sm. & M. (Miss.) 141 (holding that the clause "actions of account and upon the case," in the fourth section of Miss. St. Lim. (1822) relates exclusively to special actions of that character, and not to actions of assumpsit upon open accounts); Gore *v.* McLaughlin, 3 W. Va. 489 (holding that the act of Feb. 27, 1866, extending the time in which suits of trespass and trespass on the case may be brought in certain counties, does not apply to an action of trespass on the case in assumpsit, or to actions *ex contractu*, but only to actions of trespass and trespass on the case).

Effect of waiving tort and suing in assumpsit see Assumpsit, Action of, 4 Cyc. 337 note 83.

An exception in the statutes in favor of merchants' accounts applies as well to actions of assumpsit as to actions of account. Bedell *v.* Janney, 9 Ill. 193; Marseilles *v.* Kenton, 1 Phila. (Pa.) 181; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, 3 L. ed. 23. *Compare* Russell *v.* Robertson, 1 U. C. Q. B. 235.

33. See the statutes of the various states. And see Assumpsit, Action of, 4 Cyc. 336 note 82.

34. **Contract of employment** generally see Master and Servant.

35. Cooper *v.* Claxton, 122 Ga. 596, 50 S. E. 399; Bowen *v.* Johnson, 12 Ga. 9; Newport, etc., R. Co. *v.* Hay, 8 Ky. L. Rep. 115; Wells *v.* Caldwell, 9 Humphr. (Tenn.) 609; Pruitt *v.* Durant, 84 Tex. 8, 19 S. W. 281.

36. Vaughn *v.* Terrell, 23 La. Ann. 62; Martin *v.* Bryan, 12 La. Ann. 722 (holding that an action to recover wages of the officers, sailors, and crews of ships and other vessels is prescribed in one year, whether they are employed by the season or by the month); Millaudon *v.* Martin, 6 Rob. (La.) 534; Tietjen *v.* Penniman, 1 La. 267; Nichols *v.* Hanse, 8 Mart. N. S. (La.) 492, 2 La. 382; Dewar *v.* Beirne, McGloin (La.) 75 (holding likewise that where a person is employed in a particular capacity, the fact that he occasionally renders services of a higher order or different character does not change the prescription applicable).

37. Wells *v.* Hawley, 24 La. Ann. 271; Copse *v.* Eddins, 15 La. Ann. 528; Setter *v.* Landry, 12 La. Ann. 842; Keys *v.* Riley, 12 La. Ann. 19; Maggoffin *v.* Cowan, 11 La. Ann. 554; Morancy *v.* Police Jury, 10 La. Ann. 222; Nachtrib *v.* Prague, 6 La. Ann. 759; Gallaspy *v.* Livingston, 5 La. Ann. 671; Keaghey *v.* Barnes, 11 Rob. (La.) 139; Palmer *v.* Smith, 9 Rob. (La.) 396; Harrod *v.* Woodruff, 3 Rob. (La.) 335; Townsend *v.* Caldwell, 1 Rob. (La.) 433; Ariail *v.* Fenwick, 19 La. 413; Cresap *v.* Winter, 14 La. 553 (holding that the wages of an overseer are prescribed by three years from the time the services were rendered, although continuous down to the suit); Sargent *v.* Knox, 10 La. 231; Ditch *v.* Wilkinson, 10 La. 201; Morrison *v.* Leeds, 6 La. 591; Coote *v.* Cotton, 5 La. 12; Ogden *v.* Fowler, 4 La. 112; McNutt *v.* Boyce, 6 Mart. N. S. (La.) 308.

38. Taylor *v.* New Orleans, 41 La. Ann.

barred at the expiration of the statutory period applicable to other simple contracts or liabilities.[39]

3. Contracts of Carriage.[40] Viewed with reference to the statute of limitations, an action against a carrier for injury resulting from a breach of contract for safe carriage is one on contract, and not in tort, and is therefore governed by the statute fixing the period within which actions for breach of contract must be brought.[41]

4. Subscription or Liability of Corporation Stock-Holders.[42] The rule is laid down that the right of action on subscriptions to the stock of an incorporated company, or an action by creditors against stock-holders of an insolvent corporation, is barred within the same period that an action of debt founded on a contract not under seal, or an action of assumpsit or on the case founded on contract, is barred.[43] In some jurisdictions, however, it has been held that since the stock-holders' liability for corporate debts is statutory, and not founded on contract, an action to enforce such liability is not governed by a statute requiring all actions "founded upon any lending or contract without specialty" to be commenced within a prescribed period.[44]

5. Effect of Collateral Security.[45] It has been held that a simple contract debt is not protected from the statute of limitations because accompanied by col-

891, 6 So. 723 (holding that La. Rev. Civ. Code, art. 3538, governs such actions, whether the services for which the fees are claimed are rendered under a contract, or under a quasi-contract); Linton *v.* Harman, 5 La. Ann. 603; Arbonneaux *v.* Letorey, 6 Rob. (La.) 456; Howe *v.* Brent, 6 Mart. N. S. (La.) 248; Morse *v.* Brandt, 2 Mart. N. S. (La.) 515. See also Fox *v.* Thibault, 33 La. Ann. 32.

39. Hazlip *v.* Leggett, 6 Sm. & M. (Miss.) 326; Reavey *v.* Clark, 9 N. Y. Suppl. 216, 18 N. Y. Civ. Proc. 272.

40. Carriers generally see Carriers, 6 Cyc. 352.

41. *Alabama.*— Alabama Great Southern R. Co. *v.* Eichofer, 100 Ala. 224, 14 So. 56.

Georgia.— Patterson *v.* Augusta, etc., R. Co., 94 Ga. 140, 21 S. E. 283.

Illinois.— Illinois Cent. R. Co. *v.* Johnson, 34 Ill. 389.

Iowa.— Cobb *v.* Illinois Cent. R. Co., 38 Iowa 601.

Minnesota.— Blakeley *v.* Le Duc, 22 Minn. 476.

Tennessee.— Louisville, etc., R. Co. *v.* Neil, 11 Lea 270.

Canada.— Sayers *v.* British Columbia Electric R. Co., 12 Brit. Col. 102; Whitman *v.* Western Counties R. Co., 17 Nova Scotia 405.

See 33 Cent. Dig. tit. "Limitation of Actions," § 95.

Compare Galveston, etc., R. Co. *v.* Clemons, 19 Tex. Civ. App. 452, 47 S. W. 731, holding that an action against a carrier for failure to deliver goods lost in transit, for which a bill of lading was taken, is within the Rev. St. (1895) § 3354, providing that actions for conversion of personal property shall be brought within two years, and not section 3356, providing that actions for indebtedness founded on written contracts shall be brought within four years.

In Louisiana an action for delivery of merchandise or other effects shipped on board any kind of vessels is prescribed by one year. Pitkin *v.* Rousseau, 14 La. Ann. 511.

42. Liability of shareholders to creditors of corporations generally see Corporations, 10 Cyc. 649 *et seq.*

Non-liability of stock-holders for debts barred see Corporations, 10 Cyc. 685 note 97 *et seq.*

Subscription for shares generally see Corporations, 10 Cyc. 364 *et seq.*

Liability of corporate stock-holders as liability created by statute see *infra*, V, K, 4.

43. *Georgia.*— Georgia Mfg., etc., Co. *v.* Amis, 53 Ga. 228.

Indiana.— Falmouth *v.* Shawhan, 107 Ind. 47, 5 N. E. 408.

Louisiana.— New Orleans, etc., R. Co. *v.* Estlin, 12 La. Ann. 184; Brown *v.* Union Ins. Co., 3 La. Ann. 177; Percy *v.* Millaudon, 3 La. 568.

Massachusetts.— Becker *v.* Atlas Bank, 9 Metc. 182.

New York.—Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287 [*overruling* Freeland *v.* McCullough, 1 Den. 414, 43 Am. Dec. 685]; Lindsay *v.* Hyatt, 4 Edw. 97.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Graham, 36 Pa. St. 77, 2 Grant 259.

South Carolina.— South Carolina Mfg. Co. *v.* Bank, 6 Rich. Eq. 227.

See 33 Cent. Dig. tit. "Limitation of Actions," § 97.

Compare Lawler *v.* Walker, 18 Ohio 151.

44. Andrews *v.* Bacon, 38 Fed. 777; Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243; Cork, etc., R. Co. *v.* Goode, 13 C. B. 826, 17 Jur. 555, 22 L. J. C. P. 198, 1 Wkly. Rep. 410, 76 E. C. L. 826.

45. Bar of security as affecting debt see *supra*, IV, D.

Bar of debt as affecting security see *supra*, IV, C.

lateral security.[46] Under express statutory provision, however, it has been held that an action on a debt is not barred so long as a right of action remains on collateral security given for such debt.[47]

E. Sealed Instruments — 1. In General. In most jurisdictions an action on an instrument under seal is governed, as to the period of limitation, by special statutory provisions barring actions on contracts, or writings under seal within a prescribed period, and not by statutes relating to simple contracts and agreements generally,[48] although in several jurisdictions the period of limitation applicable to actions on simple contracts applies to specialties as well.[49] An action to enforce payment of a legacy made a charge on land,[50] or an action on a note, merely because it is secured by mortgage, is not governed by the statute applicable to sealed instruments.[51] The mere fact that property or a right therein is assigned by an instrument to which a seal is attached does not render the action one on a sealed instrument within the meaning of the statute of limitations.[52]

2. Mortgage or Deed For Security.[53] The rule is frequently announced that an action to foreclose a mortgage on real estate is not a suit for the determination of any right to or interest in real property, nor is it an action on a simple contract debt, but is an action founded on an instrument under seal, and is governed by the statute of limitations applicable to such actions.[54] In some jurisdictions it

46. Slaymaker *v.* Wilson, 1 Penr. & W. (Pa.) 216. See also Low *v.* Allen, 26 Cal. 141; Kempner *v.* Laney, 14 Phila. (Pa.) 646, holding that an unsealed warrant of attorney to confess judgment, attached to an unsealed note, does not prevent the application of the statute of limitations. *Compare* Morris *v.* Hanniek, 10 Phila. (Pa.) 571.

Giving pledge or security as acknowledgment see *infra*, VII, A, 7, e, (III).

47. Hargraves *v.* Igo, 64 N. H. 619, 15 Atl. 137; Alexander *v.* Whipple, 45 N. H. 502 (holding that where a note has been secured by a mortgage under seal it makes no difference in the application of the above rule whether or not the property mortgaged is still available for the payment of the mortgage debt); Meredith Bridge Sav. Bank *v.* Ladd, 40 N. H. 459; Demerritt *v.* Batchelder, 28 N. H. 533.

48. *Alabama.*— Mobile, etc., R. Co. *v.* Gilmer, 85 Ala. 422, 5 So. 138.

Arkansas.— Smith *v.* Carder, 33 Ark. 709.

Georgia.— Milledge *v.* Gardner, 29 Ga. 700 (holding that the unsealed indorsement of a sealed instrument is a contract under seal which is not barred within twenty years); Flynt *v.* Hatchett, 9 Ga. 328.

Louisiana.— Thompson *v.* Thompson, 11 La. 324.

Massachusetts.— Loring *v.* Whittemore, 13 Gray 228.

Michigan.— Near *v.* Lowe, 49 Mich. 482, 13 N. W. 825.

New York.— Dwinelle *v.* Edey, 102 N. Y. 423, 7 N. E. 422 [*affirming* 66 How. Pr. 328]; New York *v.* Third Ave. R. Co., 42 Misc. 599, 87 N. Y. Suppl. 584.

Pennsylvania.— Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126.

South Carolina.— Bradley *v.* Jennings, 15 Rich. 34; Smith *v.* Swain, 7 Rich. Eq. 112.

South Dakota.— Gibson *v.* Allen, (1905) 104 N. W. 275.

See 33 Cent. Dig. tit. "Limitation of Actions," § 100 *et seq.*

49. Toothaker *v.* Boulder, 13 Colo. 219, 22 Pac. 468; Chick *v.* Willetts, 2 Kan. 384.

50. Loder *v.* Hatfield, 71 N. Y. 92.

51. Seymour *v.* Street, 5 Nebr. 85; Crouse *v.* McKee, 14 N. Y. St. 158.

52. Tolles' Appeal, 54 Conn. 521, 9 Atl. 402 (where an assignment of property by a debtor to his creditor by a sealed instrument, to be disposed of and the proceeds devoted to the payment of the debt due, the residue to be reassigned to the debtor, was held to have no more effect than any other instrument by reason of its being under seal); Coleman *v.* Second Ave. R. Co., 38 N. Y. 201 [*affirming* 48 Barb. 371]. See also Keller *v.* West, Bradley, etc., Co., 39 Hun (N. Y.) 348, holding that a right of action is not necessarily to be treated as on a covenant within the application of the statute of limitations merely because a seal was affixed to what otherwise would have been a simple agreement.

53. Foreclosure of mortgage as action for possession of land see *supra*, V, B, 5.

Mortgage or deed for security as written contract see *infra*, V, F, 8.

54. *Arkansas.*— Hance *v.* Holiman, 69 Ark. 57, 60 S. W. 730.

Florida.— Coe *v.* Finlayson, 41 Fla. 169, 26 So. 704; Jordan *v.* Sayre, 24 Fla. 1, 3 So. 329; Browne *v.* Browne, 17 Fla. 607, 35 Am. Rep. 96.

Indiana.— Crawford *v.* Hazelrigg, 117 Ind. 63, 18 N. E. 603, 2 L. R. A. 139.

Louisiana.— Seyburn *v.* Deyris, 25 La. Ann. 483; Gentes *v.* Blasco, 20 La. Ann. 403.

Maryland.— Watkins *v.* Harwood, 2 Gill & J. 307.

Nevada.— Bassett *v.* Monte Christo Gold, etc., Min. Co., 15 Nev. 293.

New York.— See Hauselt *v.* Patterson, 124 N. Y. 349, 26 N. E. 937; Colgan *v.* Dunne, 50 Hun 443, 3 N. Y. Suppl. 309.

Ohio.— Kerr *v.* Lydecker, 51 Ohio St. 240, 37 N. E. 267, 23 L. R. A. 842 (holding that a mortgage is a specialty, and an action for

is held that a suit to foreclose a mortgage, not containing a covenant to pay, is barred when the debt secured by it is barred, and hence is not governed by the statute of limitations applicable to sealed instruments.[55] Indeed the rule has been broadly laid down that where a debt secured by a mortgage is barred by the statute of limitations the mortgage is also barred.[56]

3. Note Under Seal. In the absence of express statutory provision, a note under seal is governed, as to the period of limitation, by the statute applicable to other specialties.[57] However, the limitation governing actions on simple contracts applies to the liability of a surety on a sealed note, or to an indorsement thereon.[58]

4. Coupons. Coupons detached from the bonds to which they were formerly

its foreclosure and sale of the premises comes within the provisions of Ohio Rev. St. § 4980, and the period of limitation is fifteen years, unless extended by virtue of Ohio Rev. St. § 4992); Smith *v.* O'Connor, 6 Ohio Dec. (Reprint) 934, 8 Am. L. Rec. 742, 5 Cinc. L. Bul. 414 [*reversed* in 40 Ohio St. 214]. See, however, Dater *v.* Bruner, 8 Ohio Dec. (Reprint) 699, 9 Cinc. L. Bul. 220, holding that the fifteen-year limitation as to actions on specialties does not apply to the foreclosure of mortgages.

Oregon.— Anderson *v.* Baxter, 4 Oreg. 105.

Texas.— King *v.* Brown, 80 Tex. 276, 16 S. W. 39.

United States.— Union Bank *v.* Stafford, 12 How. 327, 13 L. ed. 1008; Eubanks *v.* Leveridge, 8 Fed. Cas. No. 4,544, 4 Sawy. 274.

See 33 Cent. Dig. tit. "Limitation of Actions," § 102.

55. *Arkansas.*— Holiman *v.* Hance, 61 Ark. 115, 32 S. W. 488.

Indiana.— Lilly *v.* Dunn, 96 Ind. 220.

Kentucky.— Prewitt *v.* Wortham, 79 Ky. 287.

New York.—Hill *v.* McDonald, 58 Hun 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431.

Virginia.— Wolf *v.* Violett, 78 Va. 57.

See 33 Cent. Dig. tit. "Limitation of Actions," § 102.

Agreement to assume mortgage.— In Willard *v.* Wood, 164 U. S. 502, 17 S. Ct. 176, 41 L. ed. 531, it was held that an agreement by the grantee in a deed signed by the grantor only to assume an existing mortgage on the land conveyed is, in the District of Columbia, only a simple contract, and an action for its enforcement is therefore barred in three years.

56. George *v.* Butler, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396; Damon *v.* Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927. See also *infra*, V, L, 8.

57. *Alabama.*— Garner *v.* Toney, 107 Ala. 352, 18 So. 161.

Arkansas.— Simpson *v.* Brown-Desnoyers Shoe Co., 70 Ark. 598, 70 S. W. 305 (holding that where a note and mortgage, both under seal, were executed after the act of 1889, the period of limitations is five years); Andrews *v.* Simms, 33 Ark. 771; Dyer *v.* Gill, 32 Ark. 410.

Georgia.— Barnes *v.* Walker, 115 Ga. 108, 41 S. E. 243 (holding that a note signed by two parties as makers, the signature of each being followed by the letters "L. S.," and which had the words "given under the hand and seal of" each party in the body of the note, contained a sufficient recital that it was under seal to make it a sealed instrument, within Civ. Code, § 3765, authorizing action thereon within twenty years); Stansell *v.* Corley, 81 Ga. 453, 8 S. E. 868; Bonner *v.* Metcalf, 58 Ga. 236. *Compare* Chambers *v.* Kingsberry, 68 Ga. 828, holding that to render a promissory note a sealed instrument it should be so recited in the body of the instrument, and that a note in the usual form, with the seal added after the signature, is barred by the limitation of six years.

Michigan.— Goodrich *v.* Leland, 18 Mich. 110.

Missouri.— Pennington *v.* Castleman, 6 Mo. 257.

South Carolina.— Munro *v.* Hill, 25 S. C. 476; Glenn *v.* Caldwell, 4 Rich. Eq. 168. See also McMakin *v.* Gowan, 18 S. C. 502.

See 33 Cent. Dig. tit. "Limitation of Actions," § 103.

Compare Glover *v.* Flowers, 95 N. C. 57 (holding that in North Carolina, prior to 1868, there was no statute of limitations barring actions on sealed notes); Bennett *v.* Allen, 10 Pa. Co. Ct. 256 (where the note was held not to be a sealed instrument).

58. Andrews *v.* Simms, 33 Ark. 771 (holding that the indorsement of a note under seal constitutes a new contract from that of the note, and that the statute of limitations of ten years applies to the note, and that of five years to the indorsement. Somers *v.* Florida Pebble Phosphate Co., 50 Fla. 275, 39 So. 61; Redmond *v.* Pippen, 113 N. C. 90, 18 S. E. 50; Welfare *v.* Thompson, 83 N. C. 276; Spencer *v.* Holman, 113 Wis. 340, 89 N. W. 132.

In Georgia a distinction is drawn between a contract of indorsement and a contract of suretyship, and it is held that the indorsement of a sealed instrument, although the signature of the indorser has no seal attached to it, is itself a contract under seal, and the statutory bar applicable to it is twenty years. Baldwin Fertilizer Co. *v.* Carmichael, 116 Ga. 762, 42 S. E. 1002. But with respect to a surety the rule of the text has been applied. Ridley *v.* Hightower, 112 Ga. 476, 37 N. E. 733.

A warrant of attorney under seal, attached to an unsealed note, does not extend the period of limitation of an action on the latter. Walrod *v.* Manson, 23 Wis. 393, 99 Am. Dec. 187.

annexed retain the same nature and character, and do not thereby become simple contract debts, and as to the period of limitation are governed by the same statute as other sealed instruments.[59]

5. Covenants in Deed.[60] An action for breach of covenants of warranty contained in a deed has been held to be an action on a sealed instrument within the various statutes of limitation.[61]

6. Bonds.[62] It may be stated as a general proposition that the period of limitation governing sealed instruments generally is applicable to all classes of bonds,[63] such as bonds of officials or persons acting in a fiduciary capacity,[64] bonds for

59. Coler *v.* Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; Kelly *v.* Forty-second St., etc., R. Co., 37 N. Y. App. Div. 500, 55 N. Y. Suppl. 1096; Philadelphia, etc., R. Co. *v.* Fidelity Ins., etc., Co., 105 Pa. St. 216 [*affirming* 16 Phila. 21]; Kenosha *v.* Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725; Huey *v.* Macon County, 35 Fed. 481; Nash *v.* El Dorado County, 24 Fed. 252; Kershaw *v.* Hancock, 10 Fed. 541, 18 Blatchf. 383; Burton *v.* Koshkonong, 4 Fed. 373. See also Toronto Gen. Trusts Corp. *v.* Central Ontario R. Co., 8 Ont. L. Rep. 604 [*affirming* 6 Ont. L. Rep. 534, 40 Can. L. J. N. S. 33]. *Compare* Mather *v.* San Francisco, 115 Fed. 37, 52 C. C. A. 631, holding that under the statute of limitations of California (Code Civ. Proc. § 337) which requires an action on a written instrument to be brought within four years, an action on interest coupons attached to municipal bonds is barred in four years from the time the coupons respectively matured, although such coupons have not been detached from the bonds.

Void bonds.— Where bonds issued by a town are void, but the town is liable on an implied contract to repay, with interest, the money advanced thereon, the interest coupons are not sealed instruments, and an action thereon is barred after six years. Smith *v.* Greenwich, 145 N. Y. 649, 40 N. E. 254 [*affirming* 80 Hun 118, 30 N. Y. Suppl. 56].

Coupons attached to county bonds see Counties, 11 Cyc. 573 note 62.

60. Limitation of actions for breach of covenants generally see Covenants, 11 Cyc. 1134 note 42 *et seq.*

61. Thomas *v.* Bland, 91 Ky. 1, 14 S. W. 955, 12 Ky. L. Rep. 640, 11 L. R. A. 240; Bronson *v.* Coffin, 108 Mass. 175, 11 Am. Rep. 335; Clark *v.* Swift, 3 Metc. (Mass.) 390; Johnson *v.* Hesser, 61 Nebr. 631, 85 N. W. 894; Kern *v.* Kloke, 21 Nebr. 529, 32 N. W. 574. See also Post *v.* Campau, 42 Mich. 90, 3 N. W. 272. *Compare* Burrus *v.* Wilkinson, 31 Miss. 537.

In Indiana it has been held that an action upon a covenant of warranty contained in a deed is governed by the statute of limitations fixing the period within which "actions upon contracts in writing" must be commenced. Hyatt *v.* Mattingly, 68 Ind. 271.

In Iowa it is held that an action for a breach of warranty against encumbrances is governed by statute relating to written contracts. Yancey *v.* Tatlock, 93 Iowa 386, 61 N. W. 997.

Breach of covenant for quiet enjoyment.— In Heath *v.* Whidden, 24 Me. 383, it was held that, although the statute has provided no particular time for the purpose, if twenty years have elapsed from the time the cause of action arose, for breach of the covenants for quiet enjoyment, without any explanation, satisfaction will be presumed; but no period short of that, without other circumstances tending to raise the presumption, will be sufficient.

Assumpsit on a covenant against encumbrances is held to be barred if not instituted within six years. Guerin *v.* Smith, 62 Mich. 369, 28 N. W. 906.

Covenant to pay rent see Landlord and Tenant, 24 Cyc. 1199 note 6.

A ground-rent reserved by deed has been held not to be within the statute of limitations. McQuesney *v.* Hiester, 33 Pa. St. 435.

62. Bonds generally see Bonds, 5 Cyc. 721.

63. *Connecticut.*— Kingsbury *v.* Phips, 2 Root 357.

Louisiana.— Sheppard *v.* Scheene, 28 La. Ann. 816; Rogay *v.* Juilliard, 25 La. Ann. 305.

Missouri.— Henoch *v.* Chaney, 61 Mo. 129; Miner *v.* Howard, 93 Mo. App. 569, 67 S. W. 692.

New York.— Shackelton *v.* Hart, 12 Abb. Pr. 325 note, 20 How. Pr. 39.

Ohio.— Bobo *v.* Norton, 10 Ohio St. 514.

Tennessee.— Hay *v.* Lea, 8 Yerg. 89; Lawrence *v.* Beidleman, 7 Yerg. 107; Galbreath *v.* Knoxville, (Ch. App. 1900) 59 S. W. 178.

Virginia.— Lipscomb *v.* Davis, 4 Leigh 303.

See 33 Cent. Dig. tit. "Limitation of Actions," § 108 *et seq.*

A replevin bond which has never been forfeited in the statutory mode is a mere money demand, on which, under the Texas statute, an action is barred in four years, not in ten, as would be the case had the bond been forfeited. After four years therefore a judgment or forfeiture cannot be entered on such a bond. Poland *v.* Henry, 64 Tex. 542; McArthur *v.* Barnes, 10 Tex. Civ. App. 318, 31 S. W. 212.

A recognizance is held not to be within the bar of the statute of limitations providing that suits on obligations for "the payment of money only" shall be brought within sixteen years. Elsasser *v.* Haines, 52 N. J. L. 10, 18 Atl. 1095.

Limitation of action on bail-bond see Bail, 5 Cyc. 52 note 13.

64. *Georgia.*— Ragland *v.* Justices Inferior Ct., 10 Ga. 65.

the payment of money,[65] and bonds for title,[66] in the absence of specific statutes governing the same.[67]

7. County Warrants.[68] A county warrant, to which the seal of the county is attached, is a specialty, and governed by the statute applicable to sealed instruments generally.[69] County warrants not under seal are governed as to the period of limitations by the statute governing other instruments for the payment of money,[70] in the absence of legislation expressly providing a different limitation.[71]

F. Written Contracts[72] **— 1. In General.** In some jurisdictions the statute prescribes a period of limitation for actions on simple contracts in writing different from the period prescribed for actions on sealed instruments,[73] while in other jurisdictions no distinction is made between sealed and unsealed instruments, and the same period is prescribed for all actions founded on contracts in writing, where

Indiana.— Owen *v.* State, 25 Ind. 107.

Louisiana.—Weintz *v.* Kramer, 44 La. Ann. 35, 10 So. 416; Brown *v.* Gunning, 19 La. 462.

Missouri.— Martin *v.* Knapp, 45 Mo. 48.

Nebraska.— Chicago, etc., R. Co. *v.* Philpott, 56 Nebr. 212, 76 N. W. 550.

New Jersey.— Newark *v.* Stout, 52 N. J. L. 35, 18 Atl. 943.

Pennsylvania.— Alcorn *v.* Com., 66 Pa. St. 172; Miles *v.* Com., 2 Walk. 64.

Texas.— Governor *v.* Burnett, 27 Tex. 32; Governor *v.* Allbright, 21 Tex. 753.

Vermont.— See Brainerd *v.* Stewart, 33 Vt. 402.

Virginia.— Alexander *v.* Byrd, 85 Va. 690, 8 S. E. 577; Sharpe *v.* Rockwood, 78 Va. 24. See also Elam *v.* Commercial Bank, 86 Va. 92, 9 S. E. 498.

See 33 Cent. Dig. tit. "Limitation of Actions," § 109.

Actions on justices' bonds see JUSTICES OF THE PEACE, 24 Cyc. 430 note 9.

Liability on official bond as liability created by statute see *infra*, V, K, 2, text and note 32.

65. *Alabama.*— Cobb *v.* Garner, 105 Ala. 467, 17 So. 47, 53 Am. St. Rep. 136; Mahone *v.* Haddock, 44 Ala. 92.

Illinois.— See also People *v.* Oran, 121 Ill. 650, 13 N. E. 726 [*affirming* 19 Ill. App. 174].

Kentucky.— French *v.* Bowling, 35 S. W. 1182, 27 Ky. L. Rep. 639.

Maryland.— Gillespie *v.* Creswell, 12 Gill & J. 36.

Vermont.— Mattocks *v.* Bellamy, 8 Vt. 463.

Virginia.— Kerlin *v.* Kerlin, 85 Va. 475, 7 S. E. 849; Garland *v.* Pamplin, 32 Gratt. 305.

See 33 Cent. Dig. tit. "Limitation of Actions," § 110.

66. Bedell *v.* Smith, 37 Ala. 619; Caldwell *v.* Montgomery, 8 Ga. 106; Day *v.* Baldwin, 34 Iowa 380.

Specific performance of title bond.— In Wright *v.* Le Claire, 4 Greene (Iowa) 420, it was held that limitations provided by the act of 1843, section 4, requiring actions for rent, on account, on single or penal bonds, on notes or writing obligatory, or for the payment of money, for delivery of property and for performance of covenants, on awards of arbitrators, and all actions of assumpsit, to be brought within six years, do not apply to an action to enforce performance of a bond for title to land.

67. *Delaware.*— Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90.

Kentucky. — Richardson *v.* Chanslor, 103 Ky. 425, 45 S. W. 774, 20 Ky. L. Rep. 121; Robinson *v.* Elam, 90 Ky. 300, 14 S. W. 84, 12 Ky. L. Rep. 271; Com. *v.* Hammond, 10 B. Mon. 62.

Massachusetts.— Prescott *v.* Read, 8 Cush. 365; Austin *v.* Moore, 7 Metc. 116.

Mississippi.— Furlong *v.* State, 58 Miss. 717.

North Carolina.— Jackson *v.* Martin, 136 N. C. 196, 48 S. E. 672.

South Carolina.— Strain *v.* Babb, 30 S. C. 342, 9 S. E. 271, 14 Am. St. Rep. 905.

Virginia.—Winston *v.* Street, 2 Patt. & H. 169.

See 33 Cent. Dig. tit. "Limitation of Actions," § 108 *et seq.*

68. County warrant generally see COUNTIES, 11 Cyc. 531 *et seq.*

69. Johnson *v.* Wakulla County, 28 Fla. 720, 9 So. 690; Brewer *v.* Otoe County, 1 Nebr. 373; Heffleman *v.* Pennington County, 3 S. D. 162, 54 N. W. 851; Jennings *v.* Taylor, 102 Va. 191, 45 S. E. 913. See, however, Crudup *v.* Ramsey, 54 Ark. 168, 15 S. W. 458, holding that as the statute does not authorize the making of county warrants under seal, the unauthorized addition of a seal by the county clerk, when executing them, will not bring them within the provisions of the statute of limitations as to sealed instruments.

70. Van Winkle *v.* Pointe Coupee Parish Police Jury, 22 La. Ann. 76; Valleau *v.* Newton County, 81 Mo. 591; Arapahoe *v.* Albee, 24 Nebr. 242, 38 N. W. 737, 8 Am. St. Rep. 202 [*distinguishing* Brewer *v.* Otoe County, 1 Nebr. 373]; King Iron Bridge, etc., Co. *v.* Otoe County, 27 Fed. 800 [*reversed* on other grounds in 120 U. S. 225, 7 S. Ct. 552, 30 L. ed. 623]. See also COUNTIES, 11 Cyc. 546 note 58 *et seq.*

71. Wilson *v.* Knox County, 132 Mo. 387, 34 S. W. 45, 477 [*overruling* Wilson *v.* Knox County, (Mo. 1894) 28 S. W. 896]; Knox County *v.* Morton, 68 Fed. 787, 15 C. C. A. 671 [*affirming* 65 Fed. 369].

72. County warrants sealed and unsealed see *supra*, V, E, 7.

Judgment not a contract in writing see JUDGMENTS, 23 Cyc. 1508 note 87.

73. Smith *v.* Harrison, 33 Ala. 706; Haynes *v.* Wesley, 112 Ga. 668, 37 S. E. 990, 81 Am.

no other period of limitation is fixed by statute for the particular action.[74] In still other jurisdictions, even though no distinction may be made between sealed and unsealed instruments, a distinction is made between actions founded on contracts in writing generally and contracts in writing for the payment of money or delivery of property, and different periods of limitation are fixed for the two classes of instruments.[75]

2. What Constitutes a Written Contract. The statutory description of an action as "founded on an instrument in writing" refers to contracts, obligations, or liabilities growing, not remotely or ultimately, but immediately, out of written instruments.[76] Parol acceptance of an offer in writing does not give rise to an

St. Rep. 72; Brown *v.* Grove, 80 Fed. 564, 25 C. C. A. 644.

74. McCord *v.* Slavin, 143 Cal. 325, 76 Pac. 1104; Campbell *v.* Campbell, 133 Cal. 33, 65 Pac. 134; Bancroft *v.* San Francisco Tool Co., (Cal. 1897) 47 Pac. 684; Norton *v.* Brophy, 56 Ill. App. 661; Hart *v.* Otis, 41 Ill. App. 431; Deering *v.* Veal, 78 S. W. 886, 25 Ky. L. Rep. 1809. See also Hawk *v.* Barton, 130 Cal. 654, 63 Pac. 64.

An offer of reward by advertisement is a written contract, within the meaning of the statute of limitations, and a suit thereon is barred in four years. Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634.

75. Gilmore *v.* Logan, 30 La. Ann. 1276; Brou *v.* Becnel, 22 La. Ann. 610; Thompson *v.* Simmons, 22 La. Ann. 450; Garrahan *v.* Curley, 11 La. Ann. 462; Wing *v.* Evans, 73 Iowa 409, 35 N. W. 495; Howe *v.* Mittelberg, 96 Mo. App. 490, 70 S. W. 396; Shelton *v.* Wyman, 1 Mo. App. 130.

76. *California.*— Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899 (holding that an action by a vendee of land to recover the price on the failure of the vendor to convey is not, in the absence of any stipulation for repayment, an action founded on contract in writing, within Code Civ. Proc. § 337, requiring such actions to be brought in four years); McCarthy *v.* Mt. Tecarte Land, etc., Co., 111 Cal. 328, 43 Pac. 956; Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115 (holding that a written certificate of title given by an abstractor is not an "instrument of writing" within the meaning of Code Civ. Proc. § 339); San Francisco *v.* Luning, 73 Cal. 610, 15 Pac. 311; Louvall *v.* Gridley, 70 Cal. 507, 11 Pac. 777; Ashley *v.* Vischer, 24 Cal. 322, 85 Am. Dec. 65 (holding that a receipt for money which adds "to be applied to the account of John Morrison" is both a receipt and a contract; a liability to account is shown, founded on an instrument in writing, within the statute, and an action on it is not barred until four years have expired); Chipman *v.* Morrill, 20 Cal. 130.

Georgia.— Raleigh, etc., R. Co. *v.* Pullman Co., 122 Ga. 700, 50 S. E. 1008.

Illinois.— Phillips *v.* Pitcher, 80 Ill. App. 219.

Indiana.—Terre Haute, etc., R. Co. *v.* State, 159 Ind. 438, 65 N. E. 401.

Texas.— Robinson *v.* Varnell, 16 Tex. 382 (holding that "actions of debt, grounded on any contract in writing," include all suits brought to recover money for the breach of a contract in writing, without regard to the technical distinction between debt and damages); Glover *v.* Storrie, 18 Tex. Civ. App. 67, 43 S. W. 1035.

Virginia.— Newport News, etc., Co. *v.* Newport News St. R. Co., 97 Va. 19, 32 S. E. 789.

United States.— Streeper *v.* Victor Sewing Mach. Co., 112 U. S. 676, 5 S. Ct. 327, 28 L. ed. 852; Galveston *v.* New York Guaranty Trust Co., 107 Fed. 325, 46 C. C. A. 319; San Francisco *v.* Jones, 20 Fed. 188.

See 33 Cent. Dig. tit. "Limitation of Actions," § 113.

Contracts held to be founded on instruments in writing.— In the following cases the contract was held to be founded on an instrument in writing, within the purview of the statute of limitations:

California.— People *v.* Weineke, 122 Cal. 535, 55 Pac. 579.

Georgia.— Hill *v.* Hackett, 80 Ga. 53, 4 S. E. 856.

Illinois.— Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790.

Indiana.— Midland R. Co. *v.* Fisher, 125 Ind. 19, 24 N. E. 756, 21 Am. St. Rep. 189, 8 L. R. A. 604; Jones *v.* Clark, 9 Ind. 341; Raymond *v.* Simonson, 4 Blackf. 77; Neighbors *v.* Simmons, 2 Blackf. 75.

Iowa.— Talcott *v.* Noel, 107 Iowa 470, 78 N. W. 39.

Kansas.— Lingren *v.* Fletcher, 8 Kan. App. 376, 56 Pac. 328.

Kentucky.— Bement *v.* Ohio Valley Banking, etc., Co., 99 Ky. 109, 35 S. W. 139, 18 Ky. L. Rep. 37, 59 Am. St. Rep. 445.

Mississippi.— Fowlkes *v.* Lea, 84 Miss. 509, 36 So. 1036, 68 L. R. A. 925; Cock *v.* Abernathy, 77 Miss. 872, 28 So. 18.

Missouri.— Turnbull *v.* Watkins, 2 Mo. App. 235.

Ohio.— Adelbert College *v.* Toledo, etc., R. Co., 13 Ohio Cir. Ct. 590, 5 Ohio Cir. Dec. 240; Waring *v.* Baltimore, etc., R. Co., 7 Ohio Dec. (Reprint) 553, 3 Cinc. L. Bul. 893.

Texas.—Wilkinson *v.* Johnson, 83 Tex. 392, 18 S. W. 746; Galveston, etc., R. Co. *v.* Johnson, 74 Tex. 256, 11 S. W. 1113; Texas Western R. Co. *v.* Gentry, 69 Tex. 625, 8 S. W. 98; Robinson *v.* Varnell, 16 Tex. 382; Eccles *v.* Daniels, 16 Tex. 136; Sanborn *v.* Plowman, 20 Tex. Civ. App. 484, 49 S. W. 639; Stringfellow *v.* Elsea, (Civ. App. 1898) 45 S. W. 418; Schurenberg *v.* Wilhelm, (Civ. App. 1893) 23 S. W. 817; Murphy *v.* Gage, (Civ.

agreement or contract in writing, within the meaning of statutes relating to limitations governing actions on contracts in writing.[77]

3. Contract to Sell or Convey.[78] An action to enforce the specific performance of a written contract to sell or convey, or to recover damages for its breach, has been held to be founded on a contract in writing within the meaning of the statute of limitations, or to fall within the terms of statutes relating to contracts generally.[79]

4. Bills and Notes[80] **— a. In General.** Statutes providing that all actions

App. 1893) 21 S. W. 396; Walters *v.* Galveston, etc., R. Co., 1 Tex. App. Civ. Cas. § 753; Howard *v.* Moore, 1 Tex. Civ. App. Civ. Cas. § 225.

Utah.— Victor Sewing Mach., etc., Co. *v.* Crockwell, 3 Utah 152, 1 Pac. 470.

West Virginia.—West Virginia, etc., R. Co. *v.* McIntire, 44 W. Va. 210, 28 S. E. 696.

United States.—Atlantic Trust Co. *v.* Woodbridge Canal, etc., Co., 86 Fed. 975.

See 33 Cent. Dig. tit. "Limitation of Actions," § 113.

A letter merely reciting what has been done under a contract assumed to have been previously made, and which does not state all the terms of the contract, is not an "evidence of indebtedness, in writing," within the meaning of Ill. Rev. St. c. 83, § 16, which provides that actions on evidences of indebtedness in writing may be begun within ten years after the cause of action accrues. Wilson *v.* Williams, (Ill. 1891) 33 N. E. 884 [*affirming* 42 Ill. App. 612].

Contract partly written and partly oral.— In Platt *v.* Scribner, 18 Ohio Cir. Ct. 452, 9 Ohio Cir. Dec. 771, it was held that Rev. St. § 4980, providing that an action on a promise in writing must be brought within fifteen years from the time that the cause of action accrues, applies to a promise in writing which forms part of a parol contract, otherwise within the six-year limitation.

A suit on an appeal-bond is governed by Tex. Rev. St. (1879) art. 3205, limiting to four years an action for debt founded on a contract in writing. Wooldridge *v.* Rawlings, (Tex. 1890) 14 S. W. 667. An appeal-bond conditioned to pay a money demand is a written contract for the payment of money, within Horner Rev. St. (1897) § 293, cl. 5, barring actions on such contracts in ten years. Taylor *v.* Smith, 22 Ind. App. 418, 53 N. E. 1048.

Lost contracts in writing.— The time prescribed in the statute for the limitation of actions on a written contract is not affected by the subsequent loss of the writing which may be proved by secondary evidence of its contents. Bagley *v.* Eaton, 10 Cal. 126.

77. Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79 [*affirming* 40 Ill. App. 115]; Colston *v.* Louisville Trust Co., 44 S. W. 377, 19 Ky. L. Rep. 1758; Kingman *v.* Davis, 63 Nebr. 578, 88 N. W. 777, holding that where a written order for goods and merchandise makes no mention of price or terms, and contains no promise of payment, it does not become a promise in writing, within Nebr. Code Civ. Proc. § 10, relating to limitations on written contracts, when the order is filled.

An offer of bounty entered on the records of a county board, and accepted by enlistment according to the conditions of the order, does not constitute a contract in writing, within the meaning of the Indiana statute of limitations. Marion County *v.* Shipley, 77 Ind. 553. *Compare* Sithin *v.* Shelby County, 66 Ind. 109.

78. **Contract to convey lands** generally see Vendor and Purchaser.

Sale of goods or chattels generally see Sales.

Specific performance generally see Specific Performance.

Application of limitation of action at law to suit for specific performance see *infra*, V, L, 4.

Limitation of action on title bond see *supra*, V, E, 6, text and note 66.

79. *California.*— Thomas *v.* Pacific Beach Co., (1896) 44 Pac. 475 (actions for purchase-price of land); Luco *v.* Torro, (1888) 18 Pac. 866 (action to enforce contract to convey land).

Illinois.— Memory *v.* Niepert, 131 Ill. 623, 23 N. E. 431 [*affirming* 33 Ill. App. 131]; Ames *v.* Moir, 130 Ill. 582, 22 N. E. 535 [*affirming* 27 Ill. App. 88]; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790; Cochrane *v.* Oliver, 7 Ill. App. 176.

Indiana.— Prenatt *v.* Runyon, 12 Ind. 174, holding that a written order for articles, and a promise to call and pay for them, implies an agreement to pay a reasonable price, and is a written order which, under the Indiana statute, is not barred by six years.

Kentucky.— Elliott *v.* Saufley, 89 Ky. 52, 11 S. W. 200, 10 Ky. L. Rep. 958.

Minnesota.—Lewis *v.* Prendergast, 39 Minn. 301, 39 N. W. 802, action to compel specific performance of contract to convey lands.

New York.— Plet *v.* Willson, 134 N. Y. 139, 31 N. E. 336.

Pennsylvania.—Wilson *v.* Boud, 166 Pa. St. 273, 31 Atl. 78; Ake's Appeal, 74 Pa. St. 116.

Texas.— Laredo Electric Light, etc., Co. *v.* U. S. Electric Lighting Co., (1894) 26 S. W. 310; Page *v.* Payne, 41 Tex. 143; Voelcker *v.* McKay, (Civ. App. 1901) 61 S. W. 424, 60 S. W. 798; Meade *v.* Warring, (Civ. App. 1896) 35 S. W. 308.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 94, 116.

80. **Bill or note** generally see Commercial Paper, 7 Cyc. 495.

founded upon bills of exchange, negotiable notes, orders, etc., shall be commenced within a given period,[81] are held not to be applicable to notes not transferable by indorsement or delivery, they being governed by the longer period of limitation applicable to other written instruments and evidences of indebtedness.[82]

b. Attested Notes. In several jurisdictions the statutory limitations applicable to other instruments in writing do not apply to actions on promissory notes, signed in the presence of an attesting witness,[83] although in at least one jurisdic-

81. Simons *v.* Butters, 48 Ill. 226 (holding that the statutory limitation of actions on notes is sixteen years, and on bills of exchange five years, notwithstanding the fact that the accepter of a bill of exchange stands in the same position as the maker of the note); Wardwell *v.* Sterne, 22 La. Ann. 28; Durand *v.* Hienn, 20 La. Ann. 345; Lacey *v.* Hall, 6 La. Ann. 1 (holding, however, that where defendant was indebted to plaintiff, and plaintiff drew bills on defendant which were accepted by him, but not paid, plaintiff being under the necessity of taking them up as a drawer, defendant is liable to plaintiff for the original account, although it appears to have been settled by the acceptance; and hence the claim is not barred by the five-year prescription which would apply if the action was on the acceptances); Courmes *v.* Cavelier, 5 La. Ann. 276; Harman *v.* Claiborne, 1 La. Ann. 342; Tyson *v.* McGill, 15 La. 145; New Orleans *v.* Ripley, 11 La. 144; Sublett *v.* McKinney, 19 Tex. 438; Rogers *v.* Durant, 140 U. S. 298, 11 S. Ct. 754, 35 L. ed. 481. See also Biscoe *v.* Stine, 11 Ark. 39; Calvert *v.* Lowell, 10 Ark. 147; Robichaud *v.* Thorne, 21 La. Ann. 611.

Under the California statute plaintiff has four years within which to bring suit on any note after his right of action accrues. Collins *v.* Driscoll, 69 Cal. 550, 11 Pac. 244; Dussol *v.* Bruguiere, 50 Cal. 456.

In the District of Columbia, where Md. Act, p. 715, c. 23, § 2, is in force, an action on a note is barred by the lapse of three years. Shepherd *v.* Thompson, 122 U. S. 231, 7 S. Ct. 1229, 30 L. ed. 1156.

In Quebec the debt arising from money lent and acknowledged by a promissory note made at the time of the loan has an existence separate and distinct from the note itself, and hence the note may be prescribed in five years while the loan may be subject only to a longer period. Bouchard *v.* Bherer, 5 Rev. de Jur. 263. See also Zampino *v.* Blancheri, 24 Quebec Super. Ct. 265; Robert *v.* Charbonneau, 22 Quebec Super. Ct. 466. *Compare* Vachon *v.* Poulin, 7 Quebec Q. B. 60 [*affirming* 12 Quebec Super. Ct. 323].

An indorsement of a note is a written contract, and it has been held that an action founded thereon is not barred until fifteen years. Haines *v.* Tharp, 15 Ohio 130. *Compare* Whisler *v.* Bragg, 31 Mo. 124; Lawson *v.* Watson, 8 Baxt. (Tenn.) 72.

82. *Illinois.*— Watts *v.* Rice, 192 Ill. 123, 61 N. E. 337.

Indiana.— Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

Kentucky.— Louisville Banking Co. *v.* Buchanan, 107 Ky. 125, 52 S. W. 967, 21 Ky. L. Rep. 756; White *v.* Curd, 86 Ky. 191, 5 S. W. 553, 9 Ky. L. Rep. 505; Bramblette *v.* Deposit Bank, 79 S. W. 193, 25 Ky. L. Rep. 1850; Magoffin *v.* Boyle Nat. Bank, 69 S. W. 702, 24 Ky. L. Rep. 585.

Louisiana.—Fort *v.* Delee, 22 La. Ann. 180; Collins *v.* McElroy, 15 La. Ann. 639; Lancaster *v.* Carriel, 5 La. Ann. 147; Young *v.* Crossgrove, 4 La. Ann. 233; Spiller *v.* Davidson, 4 La. Ann. 171; Burton *v.* Chaney, 3 La. Ann. 338; Harrell's Succession, 3 La. Ann. 323; Owen *v.* Holmes, 12 Rob. 148; Whiting *v.* Prentice, 12 Rob. 141; Baird *v.* Livingston, 1 Rob. 182; Union Cotton Manufactory Co. *v.* Lobdell, 7 Mart. N. S. 108.

Missouri.— Waltemar *v.* Schnick, 102 Mo. App. 133, 76 S. W. 1053.

New York.— See Matteson *v.* Palser, 56 N. Y. App. Div. 91, 67 N. Y. Suppl. 612, 31 N. Y. Civ. Proc. 198.

South Dakota.— Iowa Loan, etc., Co. *v.* Shnose, (1905) 103 N. W. 22.

Tennessee.—Tisdale *v.* Munroe, 3 Yerg. 320.

United States.— New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508]; Goodall *v.* Tucker, 13 How. 469, 14 L. ed. 227; Hill *v.* Tucker, 13 How. 458, 14 L. ed. 223; Union Mut. L. Ins. Co. *v.* Hanford, 27 Fed. 588.

See 33 Cent. Dig. tit. "Limitation of Actions," § 120.

Note not on footing of bill of exchange.— In Caldwell *v.* Evans, 5 Bush (Ky.) 380, 96 Am. Dec. 358, it was held that the fact that a note is negotiable and payable at a certain bank does not place it on the footing of a bill of exchange, within the meaning of the statute (Ky. Rev. St. c. 63, art. 3, § 2), and that an actual transfer to the bank would be necessary to have such effect, and therefore an action by the payee of such note is not barred in five years.

83. Pulsifer *v.* Pulsifer, 66 Me. 442; Merrill *v.* Merrill, 63 Me. 78; Stanley *v.* Kempton, 30 Me. 118; Boody *v.* Lunt, 19 Me. 72; Boutelle *v.* Carpenter, 182 Mass. 417, 65 N. E. 799; Shaw *v.* Smith, 150 Mass. 166, 22 N. E. 887, 6 L. R. A. 348; Daggett *v.* Daggett, 124 Mass. 149; Rockwood *v.* Brown, 1 Gray (Mass.) 261; Sibley *v.* Phelps, 6 Cush. (Mass.) 172; Walker *v.* Warfield, 6 Metc. (Mass.) 466 (holding, however, that where a witness attests the signature of one maker of a note, and another maker afterward signs it, it is not an attested note as to the latter, within the provision of the statute of limitations. St. (1786) c. 52, § 5); Commonwealth Ins. Co. *v.* Whitney, 1 Metc. (Mass.) 21; Smith *v.* Dunham, 8 Pick. (Mass.) 246 (holding,

tion such action must be brought by the original payee or his personal representative in order to avoid the bar of the statute.[84] Where such note is payable in specific articles, the exception to the statute is held not to apply.[85]

5. BANK-BILLS. The statute of limitations applicable to other negotiable instruments does not apply to bank-bills,[86] until such bills have ceased to circulate as currency.[87]

6. RECEIPT FOR MONEY WITH PROMISE TO REPAY. A receipt or written contract acknowledging the receipt of money and promising to repay it is within the limitation prescribed by statute for actions on instruments for the payment of money generally.[88]

7. BANK-BOOKS. In some jurisdictions an action by a depositor for the balance of his account, as evidenced by his bank pass-book, is an action upon an evidence of indebtedness in writing, within the meaning of the statute of limitations, and barred within the period prescribed for such actions.[89] On the other hand, however, it has been held that there is no limitation to an action against a bank to recover money deposited therein.[90]

8. MORTGAGE OR DEED AS SECURITY.[91] In some jurisdictions the rule is that a

however, that one who sees a note signed has no right to subscribe his name as a witness at another time, and without the knowledge and consent of the promisor, and a note thus subscribed will not come within the exception in the statute of limitations in regard to attested notes); Frye *v.* Barker, 4 Pick. (Mass.) 382; Lapham *v.* Briggs, 27 Vt. 26 (holding, however, that a single witness to a joint note must have attested all the signatures to fortify the note against the statute of limitations).

Instruments not amounting to promissory notes.— In the following cases the instrument was held not to be a promissory note, and therefore not within the exception to the statute. Sloan *v.* McCarty, 134 Mass. 245; Lime Rock F. & M. Ins. Co. *v.* Hewett, 60 Me. 407; Young *v.* Weston, 39 Me. 492.

A non-negotiable instrument is in Maine barred by the six-year statute (Rev. St. c. 81, § 66), although executed in the presence of an attesting witness. Chapman *v.* Wright, 79 Me. 595, 12 Atl. 546. But a different rule has been laid down in Massachusetts. Sibley *v.* Phelps, 6 Cush. (Mass.) 172.

Attested indorsement.— In Gray *v.* Bowden, 23 Pick. (Mass.) 282, it was held that where the maker of a note made an indorsement thereon, acknowledging it to be due, which indorsement was attested by a witness, the note did not thereby become an "attested note," within Rev. St. c. 120, §§ 4–7, limiting actions on such notes to twenty years.

84. Pitts *v.* Holmes, 10 Cush. (Mass.) 92; Drury *v.* Vannevar, 5 Cush. (Mass.) 442; Sigourney *v.* Severy, 4 Cush. (Mass.) 176; Houghton *v.* Mann, 13 Metc. (Mass.) 128; Village Bank *v.* Arnold, 4 Metc. (Mass.) 587; Kinsman *v.* Wright, 4 Metc. (Mass.) 219; Hodges *v.* Holland, 19 Pick. (Mass.) 43; Mosher *v.* Allen, 16 Mass. 451; Russell *v.* Swan, 16 Mass. 314, holding that if an action on a note which is attested within the state be brought in the name of one of the promisees as indorsee, it will not be considered as brought in the name of the original promisee so as to save the note from the operation of the statute.

85. Dennett *v.* Goodwin, 32 Me. 44; Gilman *v.* Wells, 7 Me. 25; Meed *v.* Ellis, Brayt. (Vt.) 203. *Compare* Bragg *v.* Fletcher, 20 Vt. 351.

86. Dougherty *v.* Western Bank, 13 Ga. 287; Long *v.* Yanceyville Bank, 81 N. C. 41.

87. Kimbro *v.* Fulton Bank, 49 Ga. 419; Butts *v.* Vicksburg, etc., R. Co., 63 Miss. 462; Samples *v.* Georgia City Bank, 21 Fed. Cas. No. 12,278, 1 Woods 523. *Compare* State *v.* Tennessee Bank, 5 Baxt. (Tenn.) 101, holding that Code, § 2779, excepting from the six-year limitation all notes "issued or put in circulation as money," applies to notes issued by banking corporations, whether the notes have ceased to circulate as money or not, or whether the bank has or has not ceased to exist as a corporation.

88. Long *v.* Straus, 107 Ind. 94, 6 N. E. 123, 7 N. E. 763, 57 Am. Rep. 87; De Vay *v.* Dunlap, 7 Ind. App. 690, 35 N. E. 195; Pool *v.* Fontelieu, 26 La. Ann. 613; Moorman *v.* Sharp, 35 Mo. 283; Reyburn *v.* Casey, 29 Mo. 129.

89. Palmer *v.* Woods, 149 Ill. 146, 35 N. E. 1122 [*affirming* 48 Ill. App. 630]; Schalucky *v.* Field, 124 Ill. 617, 16 N. E. 904, 7 Am. St. Rep. 399; Jassoy *v.* Horn, 64 Ill. 379; Locke *v.* Gonic First Nat. Bank, 65 N. H. 670, 23 Atl. 529. *Compare* Talcott *v.* Larned First Nat. Bank, 53 Kan. 480, 36 Pac. 1066, 24 L. R. A. 737 (holding that a pass-book given by a bank to a depositor is not a written contract, but is a mere receipt for the amount deposited, and an action thereon is barred by the three-year limitation. Civ. Code, § 18); Quattrochi *v.* Farmers, etc., Bank, 89 Mo. App. 500 (holding that entry of a deposit in a pass-book is not a writing for the payment of money within Mo. Rev. St. (1899) § 4272).

90. Green *v.* Odd Fellows' Sav., etc., Bank, 65 Cal. 71, 2 Pac. 887.

91. Foreclosure of mortgage as action for recovery of realty see *supra*, V, B, 5.

mortgage reciting the indebtedness it is given to secure, and containing the mortgagor's express promise to pay the same, constitutes a written evidence of debt, within the meaning of the statute of limitations, and is barred within the period prescribed for actions founded on written evidences of indebtedness.[92]

G. Unwritten Contracts — 1. In General. An action on a debt or liability not founded on or evidenced by an instrument in writing is in many jurisdictions barred by statute in a designated period shorter than that prescribed for actions on instruments in writing.[93] A written contract is generally defined as one which in all its terms is in writing, and a contract partly in writing and partly oral is in legal effect an oral contract, an action on which is governed, as to the period of limitation, by the statute governing verbal contracts generally.[94] Indeed the

Mortgage or deed for security as sealed instrument see *supra*, V, E, 2.

92. *California.*— Newhall *v.* Sherman, 124 Cal. 509, 57 Pac. 387; Clausen *v.* Meister, 93 Cal. 555, 29 Pac. 232; Union Water Co. *v.* Murphy's Flat Fluming Co., 22 Cal. 620, holding that in an action to foreclose a mortgage, which contained no covenant or agreement to pay the debt, and where there was no note or other written obligation to pay the money, the action is founded on a written contract and is therefore barred by the statute of limitations of actions founded on written contracts.

Illinois.— Field *v.* Brokaw, 148 Ill. 654, 37 N. E. 80 [*affirming* 33 Ill. App. 138].

Indiana.— Nichol *v.* Henry, 98 Ind. 34; Ætna L. Ins. Co. *v.* Finch, 84 Ind. 301.

Iowa.— White *v.* Savery, 50 Iowa 515.

Ohio.— Morrison *v.* Martin, 10 Ohio Dec. (Reprint) 738, 23 Cinc. L. Bul. 246.

Vermont.— Porter *v.* Shattuck, 75 Vt. 270, 54 Atl. 958, 98 Am. St. Rep. 823.

See 33 Cent. Dig. tit. "Limitation of Actions," § 129.

Compare Louisiana Union Bank *v.* Stafford, 12 How. (U. S.) 327, 13 L. ed. 1008.

93. *California.*— Patterson *v.* Doe, 130 Cal. 333, 62 Pac. 569; Todd *v.* Los Angeles Bd. of Education, 122 Cal. 106, 54 Pac. 527; San Luis Obispo County *v.* Farnum, 108 Cal. 567, 41 Pac. 447.

Connecticut.— Bunnel *v.* Taintor, 4 Conn. 568; Gaylord *v.* Couch, 5 Day 223; Hall *v.* Rowley, 2 Root 161; Ives *v.* Beech, 2 Root 125.

Indian Territory.— Hanks *v.* Hendricks, 3 Indian Terr. 415, 58 S. W. 669.

Kansas.— Howard *v.* Ritchie, 9 Kan. 102; Provident Loan Trust Co. *v.* Wolcott, 5 Kan. App. 473, 47 Pac. 8.

Kentucky.— Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428; Buckler *v.* Rogers, 53 S. W. 529, 22 Ky. L. Rep. 1, 54 S. W. 848, 21 Ky. L. Rep. 1265.

Texas.— Beitel *v.* Dobbin, (Civ. App. 1898) 44 S. W. 299; Harrison *v.* Sulphur Springs, (Civ. App. 1896) 35 S. W. 744.

Utah.— Thompson *v.* Cheeseman, 15 Utah 43, 48 Pac. 477.

See 33 Cent. Dig. tit. "Limitation of Actions," § 132.

Street improvement certificate.— The sum shown to be due by a street improvement certificate issued by a city against an abutting owner is held to be a "debt," within the meaning of Tex. Rev. St. art. 3203, requiring actions for debt not evidenced by written contract to be brought within two years. O'Connor *v.* Koch, 9 Tex. Civ. App. 586, 29 S. W. 400.

94. *California.*—Hertwick *v.* National City, 102 Cal. 377, 36 Pac. 667.

Illinois.— Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Loomis, 142 Ill. 560, 32 N. E. 424 [*reversing* 43 Ill. App. 599].

Indiana.— Falmouth, etc., Turnpike Co. *v.* Shawhan, 107 Ind. 47, 5 N. E. 408; Hackleman *v.* Henry County, 94 Ind. 36; High *v.* Shelby County, 92 Ind. 580; Marion County *v.* Shipley, 77 Ind. 553.

Iowa.— Hulbert *v.* Atherton, 59 Iowa 91, 12 N. W. 780; Kinsey *v.* Louisa County, 37 Iowa 438; Baker *v.* Johnson County, 33 Iowa 151.

Kansas.— Guild *v.* McDaniels, 43 Kan. 548, 23 Pac. 607.

Kentucky. — Botkin *v.* Middlesborough Town, etc., Co., 66 S. W. 747, 23 Ky. L. Rep. 1904.

Massachusetts.— Codman *v.* Rogers, 10 Pick. 112.

Michigan.—Kalamazoo Novelty Mfg. Works *v.* Macalister, 40 Mich. 84.

Missouri.— Kauz *v.* Great Council I. O. of R. M. 13 Mo. App. 341.

North Carolina.— Burwell *v.* Linthicum, 100 N. C. 145, 5 S. E. 735.

Pennsylvania.— Prouty *v.* Kreamer, 199 Pa. St. 273, 49 Atl. 66.

Virginia.— See Gloucester County *v.* Catlett, 86 Va. 158, 9 S. E. 999.

United States.—Ætna L. Ins. Co. *v.* Middleport, 31 Fed. 874.

See 33 Cent. Dig. tit. "Limitation of Actions," § 133.

Compare Hughes Bros. Real Estate, etc., Assoc. *v.* Smith, 83 Tex. 499, 18 S. W. 955, where plaintiff contracted in writing to furnish and put up an iron fence around defendant's premises, and thereafter orally agreed to change the quality of the iron used in the fence, and it was held that, since the oral agreement did not have the effect to destroy the written contract, the statute of limitations, relating to oral contracts, would not apply to an action concerning the construction of the fence.

A suit on a lost note is not on an unwritten contract, so as to be barred in five years. O'Neil *v.* O'Neil, 123 Ill. 361, 14 N. E. 844.

rule has been laid down that if an agreement, as set forth in writing, is so indefinite as to necessitate a resort to parol testimony to make it complete, in applying the statute of limitations it must be treated as an oral contract.[95]

2. Implied Contract. In most jurisdictions no distinction is made in the statutes between actions on express and implied contracts, not evidenced by any instrument in writing, the same limitation being applicable to both.[96] The same limitation is applied where the action on the implied contract arises from the duty created by a written contract.[97] In some jurisdictions, however, statutes prescribing the period of limitation for actions founded on contracts not in writing have been construed to apply only to contracts actually or expressly made, and not to contracts raised by implication of law.[98]

95. Railway Pass., etc., Mut. Aid, etc., Assoc. *v.* Loomis, 142 Ill. 560, 32 N. E. 424 [*reversing* 43 Ill. App. 599]; Plumb *v.* Campbell, 129 Ill. 101, 18 N. E. 790, where, however, the instrument was held to be a written contract.

96. *Arkansas.*— Dismukes *v.* Halpern, 47 Ark. 317, 1 S. W. 554.

California.— Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899.

District of Columbia.— Willard *v.* Wood, 1 App. Cas. 44; Sturgis *v.* Holliday, MacArthur & M. 385.

Georgia.— Harris *v.* Smith, 68 Ga. 461.

Illinois.— District No. 5 School Directors *v.* District No. 1 School Directors, 105 Ill. 653; Shelburne *v.* Robinson, 8 Ill. 597.

Indiana.— Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703; Schultz *v.* Cass County, 95 Ind. 323; Hopewell *v.* Kerr, 9 Ind. App. 11, 36 N. E. 48.

Iowa.— Harrah *v.* Jacobs, 75 Iowa 72, 39 N. W. 187, 1 L. R. A. 152; Hamilton *v.* Dubuque, 50 Iowa 213; Callanan *v.* Madison County, 45 Iowa 561; Brown *v.* Painter, 44 Iowa 368; Lamb *v.* Whitrow, 31 Iowa 164.

Kansas.— Burrows *v.* Johntz, 57 Kan. 778, 48 Pac. 27; Seibert *v.* Baxter, 36 Kan. 189, 12 Pac. 934.

Kentucky.— Bridges *v.* Reed, 9 Bush 329; Robinson *v.* Jennings, 7 Bush 630; Combs *v.* Beatty, 3 Bush 613; Joyce *v.* Joyce, 1 Bush 474; Duke *v.* Pigman, 62 S. W. 867, 23 Ky. L. Rep. 209; Avritt *v.* Russell, 58 S. W. 811, 22 Ky. L. Rep. 752.

Nebraska.— Markey *v.* Sheridan County School Dist. No. 18, 58 Nebr. 479, 78 N. W. 952.

New York.— Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552 [*modifying* 50 Hun 55, 3 N. Y. Suppl. 110]; Van Nest *v.* New York, 113 N. Y. 652, 21 N. E. 414; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606; Jex *v.* New York, 111 N. Y. 330, 19 N. E. 52; Diefenthaler *v.* New York, 111 N. Y. 331, 19 N. E. 48; Peirson *v.* Wayne County, 87 Hun 605, 34 N. Y. Suppl. 568 [*distinguishing* Spaulding *v.* Arnold, 6 N. Y. Suppl. 336]; Zweigle *v.* Hohman, 75 Hun 377, 27 N. Y. Suppl. 111; Ackerson *v.* Niagara County, 72 Hun 616, 25 N. Y. Suppl. 196 [*affirming* 18 N. Y. Suppl. 219]; Fletcher *v.* Updike, 3 Hun 350, 5 Thomps. & C. 513; Rider *v.* Union India Rubber Co., 4 Bosw. 169; Robinson *v.* Brooklyn, 9 N. Y. St. 716 [*affirmed* in 124 N. Y. 626, 26 N. E. 338].

Ohio.— Yearly *v.* Long, 40 Ohio St. 27; Neilson *v.* Fry, 16 Ohio St. 552, 91 Am. Dec. 110; Wheeling, etc., R. Co. *v.* Fries, 18 Ohio Cir. Ct. 721, 6 Ohio Cir. Dec. 204; Platt *v.* Black, 10 Ohio Cir. Ct. 499, 6 Ohio Cir. Dec. 817; Board of County Com'rs *v.* McClure, 6 Ohio S. & C. Pl. Dec. 338, 7 Ohio N. P. 187.

Pennsylvania.— Etter *v.* Greenawalt, 98 Pa. St. 422; Wickersham *v.* Lee, 83 Pa. St. 422; Hill *v.* Meyers, 46 Pa. St. 15; *In re* Cone, 9 Pa. Co. Ct. 257.

South Carolina.— Lanier *v.* Griffin, 11 S. C. 565; Duke *v.* Fulmer, 5 Rich. Eq. 121.

Tennessee.— Butler *v.* Winters, 2 Swan 91.

Texas.— Darrow *v.* Summerville, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833; Faires *v.* Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528 [*reversing* (Civ. App. 1895) 29 S. W. 669]; Corsicana First Nat. Bank *v.* Cohen, (Civ. App. 1899) 55 S. W. 530; Miers *v.* Betterton, 18 Tex. Civ. App. 430, 45 S. W. 430; Grandjean *v.* San Antonio, (Civ. App. 1897) 38 S. W. 837.

West Virginia.— Jackson *v.* Hough, 38 W. Va. 236, 18 S. E. 575.

United States.— Harpending *v.* New York Reformed Protestant Dutch Church, 16 Pet. 455, 10 L. ed. 1029; Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169, 46 C. C. A. 222; Percy *v.* Cockrill, 53 Fed. 872, 4 C. C. A. 73; Pickering *v.* Leiberman, 41 Fed. 376.

See 33 Cent. Dig. tit. "Limitation of Actions," § 134.

97. Pennsylvania Co. *v.* Chicago, etc., R. Co., 144 Ill. 197, 33 N. E. 415 (holding that the receipt given for goods which have been delivered to a railroad company for shipment is not the contract on which an action for their loss is based, within the meaning of the statute of limitations barring in ten years actions on written contracts, but such action is based on the breach of the duty imposed on common carriers when the carriage and delivery of goods is undertaken, and is barred in five years); Knight *v.* St. Louis, etc., R. Co., 141 Ill. 110, 30 N. E. 543 [*affirming* 40 Ill. App. 471]; Illinois Cent. R. Co. *v.* Miller, 32 Ill. App. 259; Heiserman *v.* Burlington, etc., R. Co., 63 Iowa 732, 18 N. W. 903.

98. *Connecticut.*— Baker *v.* Lee, 52 Conn. 145.

Louisiana.— Reddick *v.* White, 46 La. Ann. 1198, 15 So. 487; Cousins *v.* Kelsey, 33 La. Ann. 880; Newton's Succession, 33 La. Ann. 621; Gaude *v.* Gaude, 28 La. Ann. 181; Devot

H. Accounts[99] — **1. In General.** By 21 James I, it is provided that all actions of account other than such as concern the trade of merchandise between merchant and merchant, etc., shall be brought within six years next after the cause of such action, and not after.[1] Founded on this statute, enactments have been passed in the various states providing that all actions on open, unliquidated, mutual accounts shall be barred within a designated period from the accrual of the last item therein.[2]

2. What Constitutes an Open Account. An open account, within the meaning of the various statutes of limitation, is one in which some term of the contract is not settled by the parties, or where there are current dealings between them, and the account is kept open because of some contemplated future dealings, whether the account consists of one or many items.[3] The account must be mutual, open

v. Marx, 19 La. Ann. 491; Bourdette *v.* Board of School Directors, McGloin 4. *Compare* Regis *v.* Hebert, 16 La. Ann. 224.

Maine.— Jordan *v.* Robinson, 15 Me. 167.

Mississippi.— Musgrove *v.* Jackson, 59 Miss. 390, holding that Code (1871), § 2151, as amended by the act of Feb. 26, 1876, which provides that actions on "verbal contracts" shall be commenced within three years, applies only to express contracts, and does not bar an action to recover illegal taxes paid under compulsion.

England.— Hodsden *v.* Harridge, 2 Saund. 61h.

See 33 Cent. Dig. tit. "Limitation of Actions," § 134.

99. Accounts and accounting generally see Accounts and Accounting, 1 Cyc. 351.

Accrual of right of action on accounts see *infra*, VI, B, 17.

Action of account as action not specially provided for see *infra*, V, N, text and note 85.

Partnership accounts see Partnership.

1. Cottam *v.* Partridge, 11 L. J. C. P. 161, 4 M. & G. 271, 4 Scott N. R. 819, 43 E. C. L. 146; Cathing *v.* Skoulding, 6 T. R. 189; Welford *v.* Liddel, 2 Ves. 400, 28 Eng. Reprint 255.

2. *Alabama.*— Wilson *v.* Calvert, 18 Ala. 274, holding that where there are mutual accounts or dealings between the parties, the account consisting of debits and credits on each side, if a part of the account be not barred by the statute none of the account is.

Delaware.— Moore *v.* Morris, 1 Pennew. 412, 41 Atl. 889.

Georgia.— Lang *v.* Camp Phosphate Co., 113 Ga. 1011, 39 S. E. 474; Addison *v.* Christy, 49 Ga. 431.

Illinois.— Ayers *v.* Richards, 12 Ill. 146.

Louisiana.— Goodman *v.* Rayburn, 27 La. Ann. 639; French *v.* Riggs, 21 La. Ann. 657; Williams *v.* Greiner, 20 La. Ann. 151; Yarborough's Succession, 16 La. Ann. 258; Andrew *v.* Keenan, 14 La. Ann. 705.

Mississippi.— Phillips *v.* Cage, 12 Sm. & M. 141, holding that the "actions of account and on the case," referred to in the statute of limitations of 1822, section 4, relate exclusively to special actions of that character, and not to actions of assumpsit on open accounts.

Missouri.— See Searles *v.* Lum, 81 Mo. App. 607, holding, however, that the statute of limitations of Mississippi governing the bringing of actions on current accounts or accounts stated does not include actions on contracts classified as specialties, such as awards and judgments.

Nebraska.— Mizer *v.* Emigh, 63 Nebr. 245, 88 N. W. 479.

New York.— Ochs *v.* Frey, 47 N. Y. App. Div. 390, 62 N. Y. Suppl. 67.

Ohio.— Courson *v.* Courson, 19 Ohio St. 454.

See 33 Cent. Dig. tit. "Limitation of Actions," § 136.

Compare Baugher *v.* Conn, 1 Pa. Co. Ct. 184, holding that the statute of limitations does not apply to mutual accounts.

Store accounts.— The Virginia statute (Code (1849), c. 149, § 5), requiring actions for the price of articles charged in store accounts to be brought within two years, applies only to accounts of retail, and not to those of wholesale, merchants. Wortham *v.* Smith, 15 Gratt. (Va.) 487; Tomlin *v.* Kelly, 1 Wash. (Va.) 190. The Texas statute (Act Lim. (1841) § 3) is confined to articles charged in any store account and does not include a physician's bill. Ellett *v.* Moore, 6 Tex. 243; Shaline *v.* Goodman, 2 Tex. App. Civ. Cas. § 267.

3. *Alabama.*— Hairston *v.* Sumner, 106 Ala. 381, 17 So. 709; Chambers *v.* Seay, 87 Ala. 558, 6 So. 341; Gayle *v.* Johnston, 72 Ala. 254, 47 Am. Rep. 405 (holding that the burial expenses of deceased are not an open account within the statute barring an action on an open account after three years, but that a demand for the services of a physician rendered an intestate during his life is an "open account" within the purview of such statute when the value of his services was not agreed on); Battle *v.* Reid, 68 Ala. 149; Taylor *v.* Forsey, 56 Ala. 426; Bradford *v.* Barclay, 39 Ala. 33; Mims *v.* Sturtevant, 18 Ala. 359; Goodwin *v.* Harrison, 6 Ala. 438; Sheppard *v.* Wilkins, 1 Ala. 62 (holding that where several loads of grain were sold and delivered at the same time, without stipulation as to price, the obligation to pay therefor is an open account). See also Todd *v.* Todd, 15 Ala. 743; Maury *v.* Mason, 8 Port. 211, holding that moneys collected on debts of another are not matters of open account within the meaning of the statute of limitations.

and current between the parties in order that it may fall within the purview of the statute.[4]

3. Merchant's Accounts. The statute of 21 James I, section 3, expressly excepts from the operation of the statute accounts current of trade and merchandise between merchants.[5] In the same way statutes founded on the foregoing statute in the various jurisdictions in this country expressly except such accounts, and fix

California.— Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70.

Florida.— Salomon *v.* Pioneer Co-operative Co., 21 Fla. 374, 58 Am. Rep. 667, holding that the statute applies as well to wholesale as to retail store accounts.

Georgia.— Reid *v.* Wilson, 109 Ga. 424, 34 S. E. 608.

Indiana.— See Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703.

Iowa.— Higley *v.* Burlington, etc., R. Co., 99 Iowa 503, 68 N. W. 829, 61 Am. St. Rep. 250.

New York.—Perrine *v.* Hotchkiss, 2 Thomps. & C. 370 [*affirmed* in 59 N. Y. 649], holding that the statute is not intended to embrace mere cross demands, but only a mutual, open, and current account that is unliquidated. See also Matter of Gladke, 45 N. Y. App. Div. 625, 60 N. Y. Suppl. 869, holding that an account on which appeared but three credits in five years is not a "mutual, open, and current account," within the Code Civ. Proc. § 386, starting the running of limitations at the time of the last item in such accounts.

Washington.— Bellingham Bay Imp. Co. *v.* Fairhaven, etc., R. Co., 17 Wash. 371, 49 Pac. 514.

Wyoming.— Hay *v.* Peterson, 6 Wyo. 419, (1896) 45 Pac. 1073, 34 L. R. A. 581.

United States.— New Orleans, etc., R. Co. *v.* Lindsay, 4 Wall. 650, 18 L. ed. 328 (holding that a demand cannot be regarded as an "open account," within the statute of limitation, when it is founded on a contract which, although not fulfilled according to the letter, either as to time or place of delivery, yet, with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties); Spring *v.* Gray, 6 Pet. 151, 8 L. ed. 352 (holding that the foundation of the action must be an account, not a contract).

See 33 Cent. Dig. tit. "Limitation of Actions," § 137.

Instalments of subscriptions of stockholders, fixed and required to be paid in by resolutions of the board of directors, cannot be regarded as open accounts, and prescribed against as such. New Orleans, etc., R. Co. *v.* Lea, 12 La. Ann. 388.

A tax bill is not an open account within the statute of limitations. New Orleans *v.* Locke, 14 La. Ann. 854. See also Clegg *v.* Galveston County, 1 Tex. App. Civ. Cas. § 58.

A witness' certificate is not an open account, so as to be barred by the statute of limitations of three years. Carville *v.* Reynolds, 9 Ala. 969.

The claim of an agent against his principal for services is not embraced in the words "open accounts," which, by the Louisiana statute, are prescribed in three years, but the ten-year prescription is applicable to such demand. Beatty *v.* Hawkins, 45 La. Ann. 512, 12 So. 887 (holding that items on the credit side of an account, furnished by an agent at the instance of the heirs of his principal, are not barred by the prescription of either three or five years); Dolhonde *v.* Laurans, 21 La. Ann. 406; Millaudon *v.* Lesseps, 17 La. Ann. 246; Cooper *v.* Harrison, 12 La. Ann. 631.

An action for contribution by a maker of a note, who has paid it, against a co-maker, is not an action on an open account, within the meaning of the statute of limitations, although partial payments have been made by defendant. Truss *v.* Miller, 116 Ala. 494, 22 So. 863.

Where goods and merchandise are sold at specified prices, or aggregating a specified sum, the claim is not on its face an open account. Battle *v.* Reid, 68 Ala. 149; Drinkwater *v.* Holliday, 11 Ala. 134; Caruthers *v.* Mardis, 3 Ala. 599; Rocca *v.* Klein, 74 Cal. 526, 16 Pac. 323 (holding that where plaintiff had sold goods to defendant for a number of years, and had credited him with payment of cash and merchandise, not considering that defendant had an account against him, it is not a "mutual, open, and current account," as provided for in Code Civ. Proc. § 344, but is governed by section 339, providing that actions on contracts not in writing shall be brought within two years); McCay *v.* McDowell, 80 Iowa 146, 45 N. W. 730.

4. Gwinn *v.* Hamilton, (Cal. 1885) 7 Pac. 837; Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724; Fennell *v.* Black, 24 Misc. (N. Y.) 728, 53 N. Y. Suppl. 797; Meehan *v.* Figliuolo, 88 N. Y. Suppl. 920. See also Miner *v.* Howard, 93 Mo. App. 569, 67 S. W. 692.

A "mutual" account, within Wis. Rev. St. § 4226, limiting suits to six years, is not one where all the items are charged in favor of one party and against the other. Fitzpatrick *v.* Phelan, 58 Wis. 250, 16 N. W. 606.

5. *Ex p.* Seaber, 1 Deac. 543, 5 L. J. Bankr. 42, 2 Mont. & A. 588, 38 E. C. L. 759; Webber *v.* Tivill, 2 Saund. 124; Catling *v.* Skoulding, 6 T. R. 189; Scudemore *v.* White, 1 Vern. 456, 23 Eng. Reprint 582. See also Russell *v.* Robertson, 1 U. C. Q. B. 235.

Abolition of statutory exception.— The exception in 21 James I, c. 16, § 3, of merchants' accounts from the limitation of six years prescribed by that section was abolished by 19 & 20 Vict. c. 99, § 9, which also provided that no statute-barred claim should be enforceable by reason only that some other

a different period of limitation therefor.[6] However, the trade or merchandise which can present an account protected by the exception of the statute must be not only between merchant and merchant, but between plaintiff and defendant. The account — the business of merchandise which it produces — must be between them.[7] It must be a direct concern of trade; liquidated demands or bills and notes, which are only traced up to the trade of merchandise, are too remote to come within the description, and they are not excepted from the bar.[8] So it is held that the accounts must be open and current accounts where there are mutual dealings — mutual credits or debits.[9]

4. Accounts Stated. An account stated is defined to be an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions;[10] and the period of limitation in an action thereon depends upon whether it is a written or verbal statement.[11]

matter of claim comprised in the same account arose within the six years. Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234, holding that the phrase "comprised in the same account" means that "would have been comprehended in."

6. *Kentucky.*— Hearn *v.* Van Ingen, 7 Bush 426; Campbell *v.* Finck, 2 Duv. 107; Smith *v.* Dawson, 10 B. Mon. 112; Dyott *v.* Letcher, 6 J. J. Marsh. 541; Fennell *v.* Myers, 76 S. W. 136, 25 Ky. L. Rep. 589.

Louisiana.— Toledano *v.* Gardiner, 2 La. Ann. 779.

Massachusetts.— Bass *v.* Bass, 6 Pick. 362, 8 Pick. 187.

New York.— Ramchander *v.* Hammond, 2 Johns. 200.

Pennsylvania.— Stiles *v.* Donaldson, 2 Yeates 105, 2 Dall. 264, 1 L. ed. 375; Marseilles *v.* Kenton, 1 Phila. 181.

Texas.— Dwight *v.* Matthews, 94 Tex. 533, 62 S. W. 1052 [*reversing* (Civ. App. 1901) 60 S. W. 805]; Willard *v.* Guttman, (Civ. App. 1897) 43 S. W. 901.

Virginia.— Moore *v.* Mauro, 4 Rand. 488.

United States.— Mandeville *v.* Wilson, 5 Cranch 15, 3 L. ed. 23 [*affirming* 30 Fed. Cas. No. 17,820, 1 Cranch C. C. 433].

See 33 Cent. Dig. tit. "Limitation of Actions," § 136 *et seq.*

7. *Alabama.*— McCulloch *v.* Judd, 20 Ala. 703.

Indiana.— Brackenridge *v.* Baltzell, Smith 217.

Kentucky.— Dyott *v.* Letcher, 6 J. J. Marsh. 541.

New York.— Ramchander *v.* Hammond, 2 Johns. 200; Coster *v.* Murray, 5 Johns. Ch. 522 [*affirmed* in 20 Johns. 576].

West Virginia.— Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

United States.—Spring *v.* Gray, 6 Pet. 151, 8 L. ed. 352 [*affirming* 22 Fed. Cas. No. 13,259, 5 Mason 305].

England.— Sturt *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765; Forbes *v.* Skelton, 1 Jur. 117, 6 L. J. Ch. 159, 8 Sim. 335, 8 Eng. Ch. 335; Cranch *v.* Kirkman, 1 Peake N. P. 121. See also Cottam *v.* Partridge, 11 L. J. C. P. 161, 4 M. & G. 271, 43 E. C. L. 146, 4 Scott N. R. 819, holding that an open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an "account as concerns the trade of merchandise between merchant and merchant," within the exception of the statute.

8. Ramchander *v.* Hammond, 2 Johns. (N. Y.) 200; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

9. McCulloch *v.* Judd, 20 Ala. 703 (holding that an account containing several items of debit against defendant for goods bought, and a single item of credit for cash paid, is not an account arising out of "trade of merchandise between merchant and merchant," within the proviso of the statute of limitations); Brackenridge *v.* Baltzele, Smith (Ind.) 217; Davis *v.* Tiernan, 2 How. (Miss.) 786; Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

10. See Accounts and Accounting, 1 Cyc. 364 note 18.

11. *California.*— Kahn *v.* Edwards, 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Sannickson *v.* Brown, 5 Cal. 57.

Connecticut.— Ashley *v.* Hill, 6 Conn. 246.

Georgia.— Lark *v.* Cheatham, 80 Ga. 1, 5 S. E. 290.

Kentucky.— Edwards *v.* Davis, 4 Bibb 211.

Louisiana.— Flower *v.* O'Bannon, 43 La. Ann. 1042, 10 So. 376; Darby *v.* Lastrapes, 28 La. Ann. 605; Prudhomme *v.* Plauche, 27 La. Ann. 133; Blanc *v.* Scruggs, 26 La. Ann. 208; Betzer *v.* Coleman, 23 La. Ann. 785; James *v.* Fellowes, 20 La. Ann. 116; Graham *v.* Sykes, 15 La. Ann. 49.

Mississippi.— Norton *v.* Phelps, 54 Miss. 467, holding that an account presented to a trustee in a trust deed by creditors, for money and supplies advanced for the estate and beneficiary, showing a balance at the date of the account of a stated sum, which the trustee admitted to be "correct, due and owing" from the estate, is an account stated between the creditors and trustee, and governed by the six-year statute of limitations.

Pennsylvania.— Thompson *v.* Fisher, 13 Pa. St. 310.

Texas.— Ballard *v.* Murphy, (App. 1890) 15 S. W. 42.

Virginia.— Radford *v.* Fowlkes, 85 Va. 820, 8 S. E. 817.

I. Torts[12] — **1. In General.** By the statute of 21 James I, all actions on the case for torts, other than slander, must be brought within six years from the time that the cause of action accrues.[13]

2. Injuries to Person.[14] In many jurisdictions the statutes prescribe a different limitation for actions for injuries to the person,[15] or rights of another not arising

See 33 Cent. Dig. tit. "Limitation of Actions," § 138.

12. Tort generally see Torts.

Limitation of actions for conspiracy see Conspiracy, 8 Cyc. 658 note 69 *et seq.*

Limitation of action for criminal conversation see Husband and Wife, 21 Cyc. 1628, text and note 9.

Limitation of actions for libel or slander see Libel and Slander, *ante*, p. 432.

Limitation of action for malicious prosecution see Malicious Prosecution.

13. Darley Main Colliery Co. *v.* Mitchell, 11 App. Cas. 127, 51 J. P. 148, 55 L. J. Q. B. 529, 54 L. T. Rep. N. S. 882; Lamb *v.* Walker, 3 Q. B. D. 389, 47 L. J. Q. B. 451, 38 L. T. Rep. N. S. 643, 26 Wkly. Rep. 775; Nicklin *v.* Williams, 2 C. L. R. 1304, 10 Exch. 259; Swayn *v.* Stephens, Cro. Car. 245 (holding that the action of trover is within the purview of the statute); Backhouse *v.* Bonomi, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 9 Wkly. Rep. 769; Saunders *v.* Edwards, 1 Ld. Raym. 61, 1 Sid. 95.

In Louisiana the statute provides a limitation of one year to actions for damages resulting from offenses or quasi-offenses. Goodwin *v.* Bodcaw Lumber Co., 109 La. 1050, 34 So. 74; Warner *v.* New Orleans, etc., R. Co., 104 La. 536, 29 So. 226; Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64; Burney *v.* Ludeling, 47 La. Ann. 73, 16 So. 507 (holding, however, that the obligation of persons who have acquired minors' property from their tutor, acting without authority, to restore it, is not governed by the prescription of one year mentioned in Civ. Code, art. 3536, relating to actions for offenses or quasi-offenses); Gillaspie's Succession, 35 La. Ann. 779; Campbell *v.* Miltenberger, 26 La. Ann. 72 (holding, however, that an action for damages for a breach of contract for the recovery of an iron fence is not an action for damages caused by the commission of an offense or quasi-offense, to which the prescription of one year will apply); Millspaugh *v.* New Orleans, 20 La. Ann. 323; Jennings *v.* Gosselin, 20 La. Ann. 214; White *v.* Maguire, 16 La. Ann. 338; Goodloe *v.* Holmes, 2 La. Ann. 400; Wood *v.* Foster, 3 La. 338; Fisk *v.* Browder, 6 Mart. N. S. 691; Semple *v.* Buhler, 6 Mart. N. S. 665; Ritchie *v.* Wilson, 3 Mart. N. S. 585; Deliole *v.* Morgan, 2 Mart. N. S. 24; Case *v.* Citizens Bank, 100 U. S. 446, 25 L. ed. 695; Copp *v.* Louisville, etc., R. Co., 50 Fed. 164.

14. Limitation of actions for assault and battery see Assault and Battery, 3 Cyc. 1080 note 29.

Limitation of actions for wrongful death see Death, 13 Cyc. 339 note 97.

Limitation of actions for false imprisonment see False Imprisonment, 19 Cyc. 339 note 57.

Limitation of action for seduction see Seduction.

15. *Alabama.*— Mobile, etc., R. Co. *v.* Crenshaw, 65 Ala. 566.

Connecticut.— Fitzgerald *v.* Scovil Mfg. Co., 77 Conn. 528, 60 Atl. 132, holding that the Reversion of 1902 (Conn. Gen. St. (1902) § 1119), which provides that no action against a municipal or other corporation for injury to the person shall be brought but within one year from the date of the injury, applies to actions against any corporation, public or private, for any injury to the person, and supersedes Pub. Acts (1897), p. 883, c. 189, allowing six years within which to sue for a personal injury except that an action against a municipal, railway, or street railway corporation must be brought in one year.

District of Columbia.—Jackson *v.* Emmons, 19 App. Cas. 250.

Illinois.— See Waller *v.* Chicago, 11 Ill. App. 209, holding that the statute limiting the right of action for damages for an injury to the person to two years does not apply to an action by a parent for loss of services of his child, and expenses of caring for him.

Kansas.— Atchison, etc., R. Co. *v.* King, 31 Kan. 708, 3 Pac. 565.

Nebraska.— Foxworthy *v.* Hastings, 23 Nebr. 772, 37 N. W. 657.

New Jersey.—North Hudson County R. Co. *v.* Flanagan, 57 N. J. L. 236, 696, 30 Atl. 476, 32 Atl. 216, holding, however, that the statute (Supp. Rev. p. 824, § 9), requiring every action for injuries caused by the wrongful act, neglect, or default of a railroad corporation to be commenced within two years after the accrual of the cause thereof does not apply to street railway cases.

Ohio.— Alston *v.* Cleveland, etc., R. Co., 2 Ohio Cir. Ct. 45, 1 Ohio Cir. Dec. 353. See also Shuman *v.* Drayton, 14 Ohio Cir. Ct. 328, 8 Ohio Cir. Dec. 12, holding that an action for injuries resulting from malpractice did not, prior to May 18, 1894, belong to the class of actions for malicious injuries so as to be governed by the provision as to limitations of such actions.

Pennsylvania.— Rodebaugh *v.* Philadelphia Traction Co., 190 Pa. St. 358, 42 Atl. 953; Boroswitz *v.* Union Traction Co., 8 Pa. Dist. 676, 23 Pa. Co. Ct. 243.

Texas.— Kelly *v.* Western Union Tel. Co., 17 Tex. Civ. App. 344, 43 S. W. 532; Martin *v.* Western Union Tel. Co., 6 Tex. Civ. App. 619, 26 S. W. 136; Galveston, etc., R. Co. *v.* Roemer, 1 Tex. Civ. App. 191, 20 S. W. 843.

from contract from that prescribed for actions founded on contract.[16] Where the injury complained of is the result of a breach of contract the limitation which applies to the contract, and not the one which applies to the tort, controls.[17] An action for a personal injury resulting from negligence or want of due care is not governed as to the period of limitation by the statute applicable to actions for assault and battery, but by the statute applicable to actions on the case generally.[18]

Virginia.— Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

West Virginia.— Curry *v.* Mannington, 23 W. Va. 14.

See 33 Cent. Dig. tit. "Limitation of Actions," § 142.

And see the statutes of the various states.

In New York actions for personal injuries generally and actions for personal injuries resulting from negligence are differentiated, and a different period of limitation prescribed for the two classes of cases. Maxson *v.* Delaware, etc., R. Co., 112 N. Y. 559, 20 N. E. 544 [*reversing* 48 Hun 172]; Webber *v.* Herkimer, etc., St. R. Co., 109 N. Y. 311, 16 N. E. 358 [*affirming* 35 Hun 44]; Dickenson v. New York, 92 N. Y. 584 [*affirming* 28 Hun 254, 3 N. Y. Civ. Proc. 93 (*reversing* 62 How. Pr. 255)]; Burrell *v.* Preston, 54 Hun 70, 7 N. Y. Suppl. 177. In Jorgensen *v.* Reformed Low Dutch Church, 7 Misc. 1, 27 N. Y. Suppl. 318 [*affirming* 26 N. Y. Suppl. 876, 23 N. Y. Civ. Proc. 232], it was held that an action by a husband for injuries received by his wife falling through an opening in the sidewalk, which was alleged to be covered with wooden doors, contrary to law, and to be a public nuisance, is not an action for injuries "resulting from negligence," and consequently the six-year statute of limitation, and not the three-year statute, applies. In Groth *v.* Washburn, 34 Hun 509, it was held that an action by a husband to recover for injuries inflicted on his wife by defendant's negligence was not an action for personal injury, but for an injury to property, and therefore within the bar of the six-year limitation prescribed by Code, § 382.

In Canada an action for the recovery of damages for personal injuries is prescribed by one year. Thibault *v.* Vanier, 11 Quebec Super. Ct. 495. See also Montreal *v.* McGee, 30 Can. Sup. Ct. 582; Miller *v.* Ryerson, 22 Ont. 369 (action for malpractice); Griffith *v.* Harwood, 9 Quebec Q. B. 299.

16. *California.*— Taylor *v.* Bidwell, 65 Cal. 489, 4 Pac. 491.

Kansas.— Hatfield *v.* Malin, 6 Kan. App. 855, 50 Pac. 108.

Maine.— Landers *v.* Smith, 78 Me. 212, 3 Atl. 463.

Missouri.— Stone *v.* Rottman, 183 Mo. 552, 82 S. W. 76.

Virginia.— Cohen *v.* Bellenot, (1899) 32 S. E. 455.

Washington.— Quaker City Nat. Bank *v.* Tacoma, 27 Wash. 259, 67 Pac. 710.

West Virginia.—Flint *v.* Gilpin, 29 W. Va. 740, 3 S. E. 33.

United States.— Cockrill *v.* Butler, 78 Fed. 679; Shippen *v.* Tankersley, 13 Fed. Cas. No. 537, 4 McCrary 259.

See 33 Cent. Dig. tit. "Limitation of Actions," § 142.

In Iowa the same limitation is prescribed for all actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statutory penalty. Emmert *v.* Grill, 39 Iowa 690; Nord *v.* Burlington, etc., R. Co., 37 Iowa 498; Sherman *v.* Western Stage Co., 22 Iowa 556, 24 Iowa 515; Fadden *v.* Satterlee, 43 Fed. 568.

17. *Alabama.*— McGill *v.* Monette, 37 Ala. 49.

Indiana.— Staley *v.* Jameson, 46 Ind. 159, 15 Am. Rep. 285.

Kansas.— Howard *v.* Ritchie, 9 Kan. 102.

Kentucky.— Menefee *v.* Alexander, 107 Ky. 279, 53 S. W. 653, 21 Ky. L. Rep. 980.

Louisiana.— Levert *v.* Sharpe, 52 La. Ann. 599, 27 So. 64, holding that a claim for attorney's fees for dissolving an injunction is a cause of action arising *ex contractu* on the injunction bond, and is not subject to a prescription of one year, under Rev. Civ. Code, art. 3536, prescribing limitation of actions for torts.

England.— Hony *v.* Hony, 1 Cond. Ch. 297, 1 Sim. & St. 568, 24 Rev. Rep. 235, 1 Eng. Ch. 568, holding that for a tort quasi *ex contractu*, such as malfeasance, misfeasance, or non-feasance, an action of assumpsit will lie, and the limitation applicable is that prescribed for breach of contract and not for tort.

See 33 Cent. Dig. tit. "Limitation of Actions," § 142.

18. *District of Columbia.*— Gains *v.* Engel, 19 D. C. 221.

Maryland.— Baltimore City Pass. R. Co. *v.* Tanner, 90 Md. 315, 45 Atl. 188.

Minnesota.— Ott *v.* Great Northern R. Co., 70 Minn. 50, 72 N. W. 833.

Mississippi.— Bell *v.* Kansas City, etc., R. Co., 68 Miss. 19, 8 So. 508.

United States.—Gabriellson *v.* Waydell, 67 Fed. 342 [*reversed* on other grounds in 72 Fed. 648, 19 C. C. A. 58, 73 Fed. 1021, 19 C. C. A. 680].

See 33 Cent. Dig. tit. "Limitation of Actions," § 142.

Compare Tobin *v.* Houston, etc., R. Co., 56 Tex. 641, holding that the statute of limitations providing that "all actions for injuries done to the person of another, as of assault, battery, wounding or imprisonment," must be brought within a year after the cause of such actions, applies to actions for injuries caused by the negligence of a railroad company.

3. Injuries to Property[19] **— a. In General.** An injury to property, as the term is used in the various statutes of limitation, has been defined to be an actionable act whereby the estate of another is lessened, other than by personal injury, or a breach of contract, and in most jurisdictions a different limitation has been prescribed therefor from that prescribed for either of the above enumerated causes of action.[20]

19. **Limitation of action for wrongful execution** see Executions, 17 Cyc. 1577 note 60.

Injuries to animals by railroads see Railroads.

Action by owner for taking or injuring property without compensation see Eminent Domain, 15 Cyc. 997 note 60 *et seq.*

20. *Arkansas.*— Kurtz *v.* Kurtz, 22 Ark. 226 (trover and conversion); Ford *v.* Ford, 22 Ark. 134.

California.— Horton *v.* Jack, (1894) 37 Pac. 652 (trover and conversion); Zumwalt *v.* Dickey, 92 Cal. 156, 28 Pac. 212 (trespass committed by animals); Gale *v.* McDaniel, 72 Cal. 334, 13 Pac. 871 (malicious destruction of stable and saloon by fire); Heilbron *v.* Heinlen, 70 Cal. 482, 12 Pac. 385 (trespass by animals).

Connecticut.— Newton *v.* New York, etc., R. Co., 56 Conn. 21, 12 Atl. 644, holding that actions brought under Sess. Laws (1881), p. 48, fixing the liability for fires communicated by railroad locomotives without contributory negligence by the person injured, are not penal, and Gen. St. p. 494, § 10, which provides for the bringing of penal actions within one year has no application.

District of Columbia.— Meloy *v.* Johnston, 2 MacArthur 202, trespass for mesne profits.

Illinois.— See Epling *v.* Dickson, 170 Ill. 329, 48 N. E. 1001 [*reversing* 61 Ill. App. 78]; Chicago, etc., Co. *v.* McAuley, 121 Ill. 160, 11 N. E. 67.

Indiana.— Lucas *v.* Marine, 40 Ind. 289 (action for nuisance); Ohio, etc., R. Co. *v.* Simon, 40 Ind. 278; Southern Indiana R. Co. *v.* Brown, 30 Ind. App. 684, 66 N. E. 915.

Kansas.— Ryns *v.* Gruble, 31 Kan. 767, 3 Pac. 518, holding that under Civ. Code, § 18, declaring that actions for taking, detaining, or injuring personal property must be brought within two years, and actions on official bonds of sheriffs, etc., within five years, an action on a sheriff's bond for the wrongful levy on and sale of personal property must be brought within two years.

Kentucky.— See Louisville *v.* Seibert, 51 S. W. 310, 21 Ky. L. Rep. 328.

Maryland.— Tongue *v.* Nutwell, 31 Md. 302, trespass for mesne profits.

Massachusetts.— Gardiner *v.* Boston, etc., Corp., 9 Cush. 1, action for damage arising from change of grade of street. See also Edwards *v.* Woodbury, 156 Mass. 21, 30 N. E. 175, holding that where the damages claimed by a wife as a result of intoxicating liquors furnished to her husband by defendant were for her personal property destroyed by the husband while intoxicated, the action is not within Pub. St. c. 197, § 3, providing, among other things, that actions for the taking or conversion of personal property shall be commenced within two years, but that such action was governed by the six-year limitation.

Nebraska.— Chicago, etc., R. Co. *v.* O'Connor, 42 Nebr. 90, 60 N. W. 326 (action by abutting owner for damages for obstruction in public street); Brashier *v.* Tolleth, 31 Nebr. 622, 48 N. W. 398 (action against mortgagee for sale of chattels before maturity of debt).

New York.— Maxson *v.* Delaware, etc., R. Co., 112 N. Y. 559, 20 N. E. 544 [*reversing* 48 Hun 172]; Lanfer *v.* Sayles, 5 N. Y. App. Div. 582, 39 N. Y. Suppl. 377; Miller *v.* Wood, 41 Hun 600 [*affirmed* in 116 N. Y. 351, 22 N. E. 553] (holding that an action for damages occasioned by false representations is an action for "an injury to property," and is barred therefore in six years under the statute). See also Outhouse *v.* Outhouse, 13 Hun 130.

North Carolina.— Williams *v.* Lanier, 44 N. C. 30; Swink *v.* Fort, 19 N. C. 113, trespass *vi et armis* for personal property.

Ohio.— Cameron *v.* Cincinnati, 9 Ohio Dec. (Reprint) 754, 17 Cinc. L. Bul. 153.

Pennsylvania.—Moore *v.* Lancaster, (1904) 58 Atl. 890; Lentz *v.* Carnegie, 145 Pa. St. 612, 23 Atl. 219, 27 Am. St. Rep. 717; Landes *v.* Norristown, 9 Pa. Cas. 557, 13 Atl. 189, action for injury from change of grade of streets. See also Delaware, etc., R. Co. *v.* Burson, 61 Pa. St. 369, holding that the limitation act of March 27, 1713, relating to actions on the case and in trespass *quare clausum fregit* applies only to suits and actions known to common-law proceedings or forms of action, and is not a bar to a claim for compensation for damages done by a railroad company in taking private property for the use of the railroad.

South Carolina.— Thompson *v.* Schmidt, 3 Hill 35, conversion of slave.

Texas.— Connor *v.* Hawkins, 71 Tex. 582, 9 S. W. 684; Ross *v.* Early, 39 Tex. 390 (holding that a land certificate is only a chattel, and an action for its wrongful conversion must be brought within two years); Greer *v.* Gill, 13 Tex. Civ. App. 380, 35 S. W. 328; Ft. Worth, etc., R. Co. *v.* McAnulty, 7 Tex. Civ. App. 321, 26 S. W. 414.

United States.—Whitenack *v.* Philadelphia, etc., R. Co., 57 Fed. 901 (state limitation act relating to action for nuisance applied in federal court); Barnard *v.* Tayloe, 2 Fed. Cas. No. 1,008, 5 Cranch C. C. 403 (trover).

Canada.— Senésac *v.* Central Vermont R. Co., 9 Quebec Super. Ct. 319.

See 33 Cent. Dig. tit. "Limitation of Actions," § 143.

b. Overflowing Land. Actions for injuries caused by the overflow of land are governed by the limitation applicable to civil actions for any injury to the person or rights of another not arising from contract, and not by the limitation applicable to actions for a trespass to real or personal property,[21] in the absence of special statutory provisions applicable to such actions.[22]

J. Liability For Acts or Omissions in Official Capacity.[23] While actions against a public official or his sureties on his bond for misfeasance, malfeasance, or non-feasance of office are regarded as actions *ex contractu*, and governed, as to the period of limitation, by the statute applicable to such actions,[24] yet actions against persons in their official capacity are frequently treated as *ex delicto*, and

In Louisiana a statute providing that actions for offenses and quasi-offenses must be brought in one year is applicable to actions for injury to property of plaintiff. Gilmore *v.* Schenck, 115 La. 386, 39 So. 40; Shields *v.* Whitlock, 110 La. 714, 34 So. 747; Johnson *v.* Meyer, 36 La. Ann. 333; Wood *v.* Harispe, 26 La. Ann. 511; Whitehead *v.* Dugan, 25 La. Ann. 409; De Lizardi *v.* New Orleans Canal, etc., Co., 25 La. Ann. 414; Burch *v.* Willis, 21 La. Ann. 492; Williams *v.* Greiner, 20 La. Ann. 151; Harris *v.* New Orleans, etc., R. Co., 16 La. Ann. 140; Lutz *v.* Forbes, 13 La. Ann. 609; Foley *v.* Bush, 13 La. Ann. 126; Harper *v.* Municipality No. 1, 12 La. Ann. 346; Anty *v.* Adle, 9 La. Ann. 490; Edwards *v.* Turner, 6 Rob. 382; Deliole *v.* Morgan, 2 Mart. N. S. 24. See also Gaty *v.* Babers, 32 La. Ann. 1091 (where defendant, while acting in good faith, and under the belief that it was his property, sold certain machinery belonging to plaintiffs, and it was held that the action to recover its value was not one *ex delicto*, prescribed in one year, but arose from a quasi-contract, and was only prescribed in ten years); Inge *v.* Police Jury, 14 La. Ann. 117 (holding that the prescription of one year against actions arising from offenses and quasi-offenses was not applicable to an action for damages for partial destruction of property occupied by the construction of a levee under legal authority).

Action for wrongful attachment.— In California the limitation of two years applicable to an action upon a contract, obligation, or liability not founded upon an instrument of writing, governs an action for the malicious suing out of process, such as execution or attachment. McCusker *v.* Walker, 77 Cal. 208, 19 Pac. 382. In Bear *v.* Marx, 63 Tex. 298, it was held that Rev. St. art. 3202, providing that "actions for malicious prosecution" must be begun within a year from the cause of action accrued, does not apply to an action for exemplary damages for the wrongful suing out of an attachment. See also ATTACHMENT, 4 Cyc. 841 note 67.

Injuries committed during Civil war under color of authority.— By Act Cong. March 3, 1863 (12 U. S. St. at L. 755), it was provided that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made, or other trespasses or wrongs done or committed, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the president of the United States or by or under any act of congress, unless the same shall have been commenced within two years next after such arrest, etc. Culter *v.* Kouns, 110 U. S. 720, 4 S. Ct. 274, 28 L. ed. 305; Mitchell *v.* Clark, 110 U. S. 633, 4 S. Ct. 170, 312, 28 L. ed. 279; Britton *v.* Butler, 4 Fed. Cas. No. 1,904, 11 Blatchf. 350; Clark *v.* Dick, 5 Fed. Cas. No. 2,818, 1 Dill. 8.

21. Eagle, etc., Mfg. Co. *v.* Gibson, 62 Ala. 369; Polly *v.* McCall, 37 Ala. 20; Roundtree *v.* Brantley, 34 Ala. 544, 73 Am. Dec. 470 (holding that while trespass in one sense means an injury or wrong, and in that sense would include every cause of action, at least in tort, yet trespass has in law a well ascertained and fixed meaning, and refers to injuries which are immediate and not consequential); Daneri *v.* Southern California R. Co., 122 Cal. 507, 55 Pac. 243. See also Arnold *v.* Hudson River R. Co., 55 N. Y. 661; Geer *v.* Durham Water Co., 127 N. C. 349, 37 S. E. 474; Ridley *v.* Seaboard, etc., R. Co., 124 N. C. 34, 32 S. E. 325. See also Larochelle *v.* Price, 19 Quebec Super. Ct. 403; Brissette *v.* Pilsbury, 4 Rev. de Jur. 243.

22. *Indiana.*—Wabash, etc., Canal *v.* Spears, 16 Ind. 441, 79 Am. Dec. 444.

Kansas.— Hardesty *v.* Ball, 43 Kan. 151, 23 Pac. 937, 22 Pac. 1095.

Massachusetts.— Call *v.* Middlesex County Com'rs., 2 Gray 232, holding that the limitation of three years from the taking of the land, provided by Mass. Rev. St. c. 39, § 58, against recovery of damages to land by railroad corporations, applies also to damages by flowage of land by a dam erected by a private corporation.

Minnesota.—Pye *v.* Mankato, 38 Minn. 536, 38 N. W. 621.

Canada.— Brissette *v.* Pillsbury, 4 Rev. de Jur. 243.

See 33 Cent. Dig. tit. "Limitation of Actions," § 144.

23. Officer generally see OFFICERS.

Sheriffs and constables generally see SHERIFFS AND CONSTABLES.

Limitation of actions against justices of the peace see JUSTICES OF THE PEACE, 24 Cyc. 426 notes 67, 68.

Liability of public officer as liability created by statute see *infra*, V, K, 2.

24. Com. *v.* Tilton, 63 S. W. 602, 23 Ky. L. Rep. 753; Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 488; Brigham *v.* Bussey, 26 La.

governed by the limitation applicable to other actions on the case [25] in the absence of statutory provisions prescribing a specific limitation for such actions.[26] In some jurisdictions it has been held that the statute of limitations cannot be pleaded to an action on the case against a sheriff for misfeasance, malfeasance, or non-feasance in office.[27]

Ann. 676; Clements *v.* Biossat, 26 La. Ann. 243; Spalding *v.* Walden, 23 La. Ann. 474; State *v.* Winfree, 12 La. Ann. 643; Wilson *v.* McGreal, 12 La. Ann. 357; Fontenot *v.* Fontenot, 4 La. Ann. 488; Offutt *v.* Collins, 11 Rob. (La.) 491; Brown *v.* Penn, McGloin (La.) 265; State *v.* Purcell, 16 Tex. 305. See also Blood *v.* Darrah, 2 N. H. 215; Williams *v.* Sims, 1 Rich. Eq. (S. C.) 53. *Compare* Caillouet *v.* Franklin, 32 La. Ann. 220; Taylor *v.* Graham, 15 La. Ann. 418.

Claim "founded on a record."— A claim against a sheriff for not satisfying prior liens out of the proceeds of land sold by him is excepted out of the act of limitations, as being "founded on a record," although the suit be not technically on the record. Farmers' Bank *v.* Gardner, 4 Harr. (Del.) 430.

Official bonds as sealed instruments see *supra*, V, E, 6, text and note 64.

25. *Indiana.*— Landers *v.* Fisher, 2 Ind. App. 64, 28 N. E. 204.

Maine.— Garlin *v.* Strickland, 27 Me. 443.

New York.— Paff *v.* Kinney, 1 Bradf. Surr. 1.

Ohio.— State *v.* Conway, 18 Ohio 234; State *v.* Fouts, 1 Ohio Dec. (Reprint) 214, 4 West. L. J. 166.

Pennsylvania.— Stephens *v.* Downey, 53 Pa. St. 424.

United States.— Cockrill *v.* Cooper, 86 Fed. 7, 29 C. C. A. 529 [*reversing* 78 Fed. 679].

See 33 Cent. Dig. tit. "Limitation of Actions," § 146 *et seq.*

26. *Indiana.*—Ware *v.* State, 74 Ind. 181.

Iowa.— Whitney *v.* Gammon, 103 Iowa 363, 72 N. W. 551 (holding, however, that Code (1873), § 2529, subd. 3, limiting the time for bringing an action against a sheriff on a liability incurred by the doing of an act in his official capacity, has no application to a suit by a claimant of property sold on execution to recover on a bond executed by the judgment creditor to indemnify the sheriff and any claimant of the property); Keoknk County *v.* Howard, 41 Iowa 11; State *v.* Henderson, 40 Iowa 242; State *v.* Dyer, 17 Iowa 223; Poweshiek County *v.* Ogden, 7 Iowa 177.

Louisiana.— Brice *v.* Jones, 5 La. Ann. 635; McCluskey *v.* Webb, 4 Rob. 201; Morton *v.* Reynolds, 4 Rob. 26; Drouet *v.* Rice, 2 Rob. 374. See also Robert *v.* Brown, 14 La. Ann. 597.

Minnesota.— Hall *v.* Swensen, 65 Minn. 391, 67 N. W. 1024, holding, however, that the mere failure of a sheriff receiving money on redemption of land sold by him to pay the same to the party entitled thereto before any demand is made on him for it is not the omission of an official duty, within the three-year limitation of Gen. St. (1894) § 5137.

Missouri.— Mitchell *v.* Fulbright, 32 Mo. 551; State *v.* Hawkins, 103 Mo. App. 251, 77 S. W. 98, holding that by statute no suit can be instituted against a notary or his sureties more than three years after the cause of action accrues.

New Jersey.— McLaren *v.* McVicar, 41 N. J. L. 271.

New York.— Hill *v.* Haas, 170 N. Y. 566, 62 N. E. 1096 [*affirming* 46 N. Y. App. Div. 360, 61 N. Y. Suppl. 515]; Kings County *v.* Walter, 4 Hun 87 (holding, however, that the statute of limitations of one year for acts done by a sheriff in his official capacity and by virtue of his office, or by the omission of an official duty, is not applicable to a cause of action against the sheriff for procuring payment by means of a sworn bill and false vouchers for board of fictitious persons who were never confined in the county jail); Dennison *v.* Plumb, 18 Barb. 89; Frankel *v.* Elias, 60 How. Pr. 74 (holding, however, that a motion to compel payment of a surplus remaining in the sheriff's hands after execution sale is not an action on a liability incurred by the doing of an act in the sheriff's official capacity, or by the omission of an official duty, which is barred in one year, but is governed by the three-year limitation prescribed by section 383, subdivision 1, for actions against a sheriff for non-payment of money collected on execution).

Pennsylvania.— Mellick *v.* Osterstock, 11 Pa. Co. Ct. 82.

Wisconsin.— Bishop *v.* McGillis, 80 Wis. 575, 50 N. W. 779, 27 Am. St. Rep. 63.

Canada.— Hodgins *v.* Huron, 3 Grant Err. & App. (U. C.) 169; Spry *v.* Mumby, 11 U. C. C. P. 285; Crooks *v.* Williams, 39 U. C. Q. B. 530; Harrison *v.* Brega, 20 U. C. Q. B. 324; Denaut *v.* Principal Officers, etc., 10 U. C. Q. B. 189; Molleur *v.* Faubert, 2 Quebec Pr. 281. See also Peterborough *v.* Edwards, 31 U. C. Q. B. 231; McFarlane *v.* McDougall, 3 U. C. Q. B. O. S. 73.

See 33 Cent. Dig. tit. "Limitation of Actions," 146 *et seq.*

A guardian is not a public officer within the meaning of Ind. Rev. St. § 293, subd. 2, requiring an action against such officer for misfeasance or malfeasance to be brought within six years after the cause therefor shall have accrued. Pcelle *v.* State, 118 Ind. 512, 21 N. E. 288.

A deputy sheriff is entitled when sued for an act done in his official capacity to the benefit of any limitation imposed by statute on the time for commencing an action for the same cause against the sheriff. Cumming *v.* Brown, 43 N. Y. 514.

27. Gaither *v.* Slaughter, 1 Dana (Ky.) 369 (holding that the motion of a county

K. Liabilities Created by Statute[28] — **1. In General.** In many jurisdictions it is provided by statute that actions on liabilities created by statute, other than a penalty or forfeiture, shall be barred within a prescribed period.[29] In the absence of express provision, a liability created by statute has been regarded as a specialty, and held to be governed by the limitation applicable to actions based on specialties.[30]

creditor against a delinquent collector is not barred by any statute of limitations, nor affected by lapse of time short of twenty years); Newcomer *v.* Keedy, 2 Md. 19; French *v.* O'Neale, 2 Harr. & M. (Md.) 401; Lee *v.* Peachy, 3 Call (Va.) 220.

28. Enforcement of lien on logs and lumber see LOGGING, *post*.

Limitation applicable to mechanics' liens see MECHANICS' LIENS.

Enforcement of maritime liens see MARITIME LIENS.

Limitation of actions for enforcement of taxes in general see TAXATION.

Enforcement of assessments and special taxes for public improvements see MUNICIPAL CORPORATIONS.

29. *California.*— Sonoma County *v.* Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; Dranga *v.* Rowe, 127 Cal. 506, 59 Pac. 944; San Diego *v.* Higgins, 115 Cal. 170, 46 Pac. 923; Los Angeles County *v.* Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; San Francisco *v.* Luning, 73 Cal. 610, 15 Pac. 311; People *v.* Hulbert, 71 Cal. 72, 12 Pac. 43. See also Miller *v.* Batz, 131 Cal. 402, 63 Pac. 680, where, however, the action was held to be founded on contract, and not on a liability created by statute.

Georgia.— Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, 2 S. E. 686. See also Peavy *v.* Turner, 107 Ga. 401, 33 S. E. 409 (holding that the fact that a lien is by statute created in favor of attorneys at law, and that an attorney is in a given instance proceeding thereunder to foreclose his lien for fees does not make the debt thus sought to be collected a statutory liability so as to be within Civ. Code, § 3766, fixing twenty years as the period of limitation in such cases); Pare *v.* Mahone, 32 Ga. 253 (holding that the fact that the remedy used to enforce a debt is one specially provided by statute does not make the debt itself a "statutory liability," within the meaning of the provision which exempts certain liabilities from the operation of the statute of limitations).

Idaho.— Ada County *v.* Ellis, 5 Ida. 333, 48 Pac. 1071.

Kansas.— Frame *v.* Ashley, 59 Kan. 477, 53 Pac. 474 [*reversing* 4 Kan. App. 265, 45 Pac. 927]; Davis *v.* Clark, 58 Kan. 454, 49 Pac. 665; Durein *v.* Pontious, 34 Kan. 353, 8 Pac. 428; State *v.* Pfefferle, 33 Kan. 718, 7 Pac. 597; Richards *v.* Wyandotte County, 28 Kan. 326; Seglem *v.* Yaeger, 8 Kan. App. 655, 56 Pac. 508; Cloud County *v.* Hostetler, 6 Kan. App. 286, 51 Pac. 62. See also Van Auken *v.* Garfield Tp., 66 Kan. 594, 72 Pac. 211, where the obligation was held not to be a statutory one.

Kentucky.— Chicago, etc., R. Co. *v.* Com., 115 Ky. 278, 72 S. W. 1119, 24 Ky. L. Rep. 2124; Com. *v.* Nute, 115 Ky. 239, 72 S. W. 1090, 24 Ky. L. Rep. 2138; Schroer *v.* Central Kentucky Insane Asylum, 113 Ky. 288, 68 S. W. 150, 24 Ky. L. Rep. 150; Kentucky Female Orphan School *v.* Fleming, 10 Bush 234.

Massachusetts.— Crosby *v.* Bennett, 7 Metc. 17.

Michigan.— Thurston *v.* Prentiss, 1 Mich. 193.

Minnesota.— Pine County *v.* Lambert, 57 Minn. 203, 58 N. W. 990; Mower County *v.* Crane, 51 Minn. 201, 53 N. W. 629; Redwood County *v.* Winona, etc., Land Co., 40 Minn. 512, 42 N. W. 473 [*overruling* Brown County *v.* Winona, etc., Land Co., 38 Minn. 397, 37 N. W. 949].

Missouri.— Turner *v.* Burns, 42 Mo. App. 94; Young *v.* Kansas City, etc., R. Co., 33 Mo. App. 509.

Nebraska.— See Lincoln St. R. Co. *v.* Lincoln, 61 Nebr. 109, 84 N. W. 802; Denman *v.* Chicago, etc., R. Co., 52 Nebr. 140, 71 N. W. 967.

New York.— Matter of Campbell, 96 N. Y. App. Div. 561, 89 N. Y. Suppl. 569.

Ohio.— Baltimore, etc., R. Co. *v.* Stankard, 56 Ohio St. 224, 46 N. E. 577, 60 Am. St. Rep. 745, 49 L. R. A. 381; Davis *v.* Lewis, 16 Ohio Cir. Ct. 138, 8 Ohio Cir. Dec. 772.

Oregon.— State *v.* Baker County, 24 Oreg. 141, 33 Pac. 530.

Pennsylvania.— See Council *v.* Moyamensing, 2 Pa. St. 224.

United States.— Atlanta *v.* Chattanooga Foundry, etc., Works, 127 Fed. 23, 61 C. C. A. 387, 64 L. R. A. 721; San Francisco *v.* Jones, 20 Fed. 188. See also Philadelphia *v.* Atlantic, etc., Tel. Co., 109 Fed. 55.

See 33 Cent. Dig. tit. "Limitations of Actions," § 151.

In New Jersey, where the obligation is a creature of statute, the statute of limitations does not bar an action thereon in six years, as it would do if the obligation rested on contract. Smith *v.* Jersey City, 52 N. J. L. 184, 18 Atl. 1050; Outwater *v.* Passaic, 51 N. J. L. 345, 18 Atl. 164; McFarlan *v.* Morris Canal, etc., Co., 44 N. J. L. 471; Jersey City *v.* Sackett, 44 N. J. L. 428; Cowenhoven *v.* Middlesex County, 44 N. J. L. 232; Dickinson *v.* Trenton, 35 N. J. Eq. 416. See also Holy Communion Church *v.* Patterson Extension R. Co., 63 N. J. L. 470, 43 Atl. 696, where the action was held not to rest on a statutory duty but on a common-law liability.

30. Lane *v.* Morris, 10 Ga. 162, 8 Ga. 468; Atwood *v.* Rhode Island Agricultural Bank, 1 R. I. 376.

2. Liability of Public Officers.[31] The limitation applicable to actions on liabilities created by statute has been applied to actions against public officers, and this where the action was brought on the official bond,[32] as well as where the action was brought independently of that instrument.[33]

3. Official Salary or Statutory Fee. There is authority to the effect that actions for official salaries or statutory fees are not actions on debts arising on contract, express or implied, but are actions on demands founded on statute, and hence are not governed by the limitation applicable to the former class of actions.[34] According to other decisions, however, such actions are regarded as founded on contract, and governed by the limitation applicable to such actions.[35] In some jurisdictions the limitation of actions of this character is fixed by special statutory provision.[36]

4. Liability of Corporate Stock-Holders.[37] In many jurisdictions the liability of a stock-holder for a debt of a corporation is held to be a liability created by statute within the meaning of limitation acts, and the period of limitation applicable is that governing other actions founded on statutory liability.[38] In other jurisdictions the statutory liability of a stock-holder in a corporation for the debts of the corporation is regarded as in the nature of a specialty, and actions to

31. **Official bond as sealed instrument** see *supra*, V, E, 6, text and note 64.
Liability for acts or omissions in official capacity in general see *supra*, V, J.

32. Graham County *v.* Van Slyck, 52 Kan. 622, 35 Pac. 299. *Compare* Placer County *v.* Dickerson, 45 Cal. 12; Kenton County *v.* Lowe, 91 Ky. 367, 16 S. W. 82, 13 Ky. L. Rep. 97, holding that the covenant in a sheriff's bond that he will well and truly discharge the duties of his office, and pay over all moneys that might come into his hands to those entitled, is an express stipulation that he will be liable on such bond for the county levy collected as provided by statute, and is governed by the seven-year limitation; and Gen. St. c. 71, art. 3, § 2, providing that an action on a liability created by statute shall be commenced within five years after the cause of action accrued, unless some other time is fixed by the statute creating the liability, does not apply.

33. People *v.* Van Ness, 76 Cal. 121, 18 Pac. 139; Shackelford *v.* Staton, 117 N. C. 73, 23 S. E. 101. *Compare* State *v.* Stock, 38 Kan. 154, 16 Pac. 106, holding that the three-year statute of limitation (Code Civ. Proc. § 18, subd. 2), applicable to actions on liabilities created by statute, has no application to an original action in the supreme court, instituted by the attorney-general in the name of the state, to compel the officers of a county to keep their offices at the county-seat, and to determine its location; it being but an exercise of the sovereign power of the state compelling obedience to its statutory mandates.

34. Outwater *v.* Passaic, 51 N. J. L. 345, 18 Atl. 164; Cowenhoven *v.* Middlesex County, 44 N. J. L. 232.

35. Mathesie *v.* Knox County, 82 Ind. 172; Lancaster County *v.* Brinthall, 29 Pa. St. 38.

In Arkansas it has been held that an action by a county treasurer for statutory commissions on moneys collected and turned over by him is on a liability not in writing, so as to be barred after the lapse of three years. Baugh *v.* Prairie County, 66 Ark. 360, 50 S. W. 876.

36. State *v.* Jumel, 30 La. Ann. 861 (holding, however, that the two-year prescription in Rev. St. 179, only applies to those claims of sheriffs and clerks which require evidence to establish them, not to those whose amounts have been fixed by law); Dunbar *v.* Murphy, 11 La. Ann. 713 (holding, however, that Civ. Code, art. 3503, defining the prescription of the fees of parish judges, sheriffs, clerks, and attorneys, does not include the compensation due to experts employed in the trial of actions); Cowles *v.* Hall, 113 N. C. 359, 18 S. E. 329 (holding, however, that Code, c. 10, § 155, subd. 8, prescribing the period within which an action may be brought for fees due an officer, by the judgment of a court, applies only to actions by officers, and not to a proceeding by a plaintiff for leave to issue execution on a judgment which included fees of officers in court which had been paid by him as they accrued); Crawford *v.* Crain, 19 Tex. 145; Flores *v.* Thorn, 8 Tex. 377 (holding that a witness' claim for fees for attendance is barred in two years).

37. **Liability of shareholders to creditors of corporations generally** see Corporations, 10 Cyc. 649 *et seq.*

38. *California.*— Hunt *v.* Ward, 99 Cal. 612, 34 Pac. 335, 37 Am. St. Rep. 87; Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40; Moore *v.* Boyd, 74 Cal. 167, 15 Pac. 670; Green *v.* Beckman, 59 Cal. 545.

Massachusetts.— Hinsdale *v.* Larned, 16 Mass. 65.

New York.— Conklin *v.* Furman, 57 Barb. 484, 8 Abb. Pr. N. S. 161. See also Van Hook *v.* Whitlock, 26 Wend. 43, 37 Am. Dec. 246 [*affirming* 7 Paige 373].

Ohio.— Hawkins *v.* Iron Valley Furnace Co., 40 Ohio St. 507; Baldwin *v.* Atwater Coal Co., 8 Ohio Dec. (Reprint) 296, 8 Cinc. L. Bul. 296.

enforce such liability are governed by the period of limitation applicable to actions on specialties,[39] in the absence of express statutory provisions fixing a period of limitation for such actions.[40]

5. Injuries to Property.[41] An action for injury to property, where the liability is created by statute, is held to be governed by the limitation applicable to other actions based upon a statutory liability.[42]

6. Penalties and Forfeitures[43] — **a. In General.** In many jurisdictions special limitations are expressly imposed by statute in actions for a forfeiture or penalty given by statute, it appearing to be the manifest intent of the legislature in some instances, in framing the provisions of the statute of limitations, to separate and distinguish actions on contracts, and for causes founded on good and valuable considerations, from actions on statutes for penalties and forfeitures, and to apply to the latter class shorter periods of limitation than to the former.[44] The terms "penalties" and "forfeitures," as used in the various statutes of limitation, have

United States.— See Godfrey *v.* Terry, 97 U. S. 171, 24 L. ed. 944.

See 33 Cent. Dig. tit. "Limitation of Actions," § 155.

In Illinois, under Rev. St. c. 83, § 15, which provides that all civil actions not otherwise provided for shall be begun within five years next after the cause of action accrued, an action to enforce the liability of corporate officers, created by c. 32, § 16, is not barred until the lapse of five years from the maturity of the debt sued for. Wolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521 [*reversing* on another point 30 Ill. App. 70].

In Pennsylvania the period of limitation applicable to actions against stock-holders is fixed by express statutory provision. Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033 [*affirming* 22 Pittsb. Leg. J. N. S. 253] (holding that Pa. Act, March 28, 1867, § 1, providing that no actions shall be brought against any "stockholder or director, in any corporation or association," to charge him with any claim for materials or moneys for which said corporation or association could be sued, etc., except within six years after "delivery" of the materials or the loaning of the moneys, etc., is not applicable to members of a banking partnership which has no stock-holders, and whose so-called directors are merely managing partners); Amer *v.* Armstrong, 6 Pa. Co. Ct. 392.

39. Thornton *v.* Lane, 11 Ga. 459; U. S. Bank *v.* Dallam, 4 Dana (Ky.) 574; Bullard *v.* Bell, 4 Fed. Cas. No. 2,121, 1 Mason 243.

Liability of directors.— The same rule has been applied to the liability of directors imposed by statute. Hargroves *v.* Chambers, 30 Ga. 580; Neal *v.* Moultrie, 12 Ga. 104.

Liability of corporation stock-holders as liability under contract not under seal see *supra*, V, D, 4, text and note 43 *et seq.*

40. Terry *v.* Anderson, 95 U. S. 628, 24 L. ed. 365 (decided under Georgia statute); Terry *v.* Tubman, 92 U. S. 156, 23 L. ed. 537 (holding that the liability of a stock-holder of a bank whose insolvency occurred prior to June 1, 1865, is barred by the Georgia statute of limitations of March 16, 1869, if not commenced before Jan. 1, 1870, by the direct provisions of such statute).

41. **Limitation of actions for injuries to property** generally see *supra*, V, I, 3.

42. McFarlan *v.* Morris Canal, etc., Co., 44 N. J. L. 471 (action for compensation for property taken by a canal company); Jersey City *v.* Sackett, 44 N. J. L. 428 (action for sum awarded a landowner for the taking of his land for the use of a street); Seymour *v.* Pittsburg, etc., R. Co., 44 Ohio St. 12, 4 N. E. 236 (action against railroad company under "fence law"). See also Ohio, etc., R. Co. *v.* Erwin, 45 Ill. App. 558. *Compare* Clark *v.* Amsterdam Water Com'rs, 148 N. Y. 1, 42 N. E. 414 [*reversing* 74 Hun 294, 26 N. Y. Suppl. 214]; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167; Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511, holding that the six-year limitation for common-law actions applies to actions for injuries resulting from a change in the grade of a street, under the act of May 24, 1878, providing for damages in such cases.

43. **Forfeiture** generally see Forfeitures, 19 Cyc. 1355.

Penalty generally see Penalty.

Limitation of criminal prosecution see Criminal Law, 12 Cyc. 254 *et seq.*

Proceedings for violation of customs laws see Customs Duties, 12 Cyc. 1178 note 13.

44. *Colorado.*— Atchison, etc., R. Co. *v.* Tanner, 19 Colo. 559, 36 Pac. 541; Gregory *v.* German Bank, 3 Colo. 332, 25 Am. Rep. 760; Larsen *v.* Janes, 1 Colo. App. 313, 29 Pac. 183.

Connecticut.— Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. 47.

Illinois.— Gridley *v.* Barnes, 103 Ill. 211; Junker *v.* Kuhnen, 18 Ill. App. 478; Kimball *v.* Hurlbut, 12 Ill. App. 500; Ellis *v.* Olney First Nat. Bank, 11 Ill. App. 275.

Indiana.— Brown *v.* Clow, 158 Ind. 403, 62 N. E. 1006; Pennsylvania Co. *v.* State, 142 Ind. 428, 41 N. E. 937, holding, however, that Burns Rev. St. (1894) § 294 (Rev. St. (1881) § 293), providing that "for forfeitures or penalties given by statute" actions shall be commenced within the two years after the cause of action has accrued, does not apply to actions in the name of the state to recover penalties, since Burns Rev. St. (1894) § 305 (Rev. St. (1881) § 304) provides that "limitations of actions shall not bar the State . . . except as to sureties."

Iowa.— Herriman *v.* Burlington, etc., R. Co., 57 Iowa 187, 9 N. W. 378, 10 N. W. 340.

Kansas.— Wey *v.* Schofield, 53 Kan. 248, 36 Pac. 333; Fuller *v.* Wells, Fargo, etc., Co.,

been construed as having reference to penalties and forfeitures created by statute alone, and inflicted for derelictions of duty, or failure to perform specific acts, or for the commission of acts prohibited by statute.[45] So it is held that statutes prescribing the period within which penal actions must be brought are not to be so construed as to defeat an action under a remedial statute or an action under a statute penal in its nature in which the damages recoverable are not a technical penalty or are incidental merely.[46] There are authorities to the effect that

42 Kan. 551, 22 Pac. 561; Joyce *v.* Means, 41 Kan. 234, 20 Pac. 853; Roe *v.* Elk County, 1 Kan. App. 219, 40 Pac. 1082.

Kentucky.— Com. *v.* Equitable Life Assur. Soc., 100 Ky. 341, 38 S. W. 491, 18 Ky. L. Rep. 778; Means *v.* Frame, 5 Dana 535; Chiles *v.* Harrison, 1 Litt. 150, holding that a motion against a clerk for having issued an erroneous fee bill, as given by the act of 1816, is an action within the meaning of the act of 1796, limiting the prosecutions on penal acts of assembly to one year.

Louisiana.— State *v.* Edwards, 107 La. 49, 31 So. 381.

Maine.— Cumberland, etc., Canal Corp. *v.* Hitchings, 57 Me. 146; Thacher *v.* Jones, 31 Me. 528; Mansfield *v.* Ward, 16 Me. 433.

Massachusetts.— O'Connell *v.* O'Leary, 145 Mass. 311, 14 N. E. 143; Barnicoat *v.* Folling, 3 Gray 134.

Minnesota.— State *v.* Buckman, (1905) 104 N. W. 240; Merchants' Nat. Bank *v.* Northwestern, etc., Mfg. Co., 48 Minn. 349, 51 N. W. 117.

Missouri.— Revelle *v.* St. Louis, Iron Mountain, etc., R. Co., 74 Mo. 438.

Montana.— State Sav. Bank *v.* Johnson, 18 Mont. 440, 45 Pac. 662, 56 Am. St. Rep. 591, 33 L. R. A. 552.

New Hampshire.— Ashland Sav. Bank *v.* Bailey, 66 N. H. 334, 21 Atl. 221; Pike *v.* Madbury, 12 N. H. 262.

New Jersey.— Boswell *v.* Robinson, 33 N. J. L. 273.

New York.— Trinity Church *v.* Vanderbilt, 98 N. Y. 170; Merchants' Bank *v.* Bliss, 35 N. Y. 412 [*affirming* 1 Rob. 391 (*affirming*, in part 21 How. Pr. 365)]; Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287, 3 Den. 589; Chapman *v.* Comstock, 58 Hun 325, 11 N. Y. Suppl. 920; Nimmons *v.* Tappan, 2 Sweeny 652; Fowler *v.* Van Surdam, 1 Den. 557; Freeland *v.* McCullough, 1 Den. 414, 43 Am. Dec. 685; Van Hook *v.* Whitlock, 26 Wend. 43, 37 Am. Dec. 246.

Ohio.— Cooper *v.* Rowley, 29 Ohio St. 547; Lawler *v.* Burt, 7 Ohio St. 340 [*overruling* Lawler *v.* Walker, 18 Ohio 151].

Pennsylvania.— Harrisburg Bank *v.* Com., 26 Pa. St. 451.

South Carolina.— State *v.* Dent, 1 Rich. 469; State *v.* Youngblood, 2 McCord 241; Charleston Dist. Public Bldgs. *v.* Andrews, 10 Rich. Eq. 4.

Texas.— Davidson *v.* Missouri Pac. R. Co., 3 Tex. App. Civ. Cas. § 173.

Vermont.— Wheelock *v.* Sears, 19 Vt. 559; Forbes *v.* Davison, 11 Vt. 660, holding, however, that the first section of the statute of limitations of 1797, limiting actions for penalties to one year, does not apply to an action for the penalty for making a fraudulent conveyance.

United States.— Adams *v.* Woods, 2 Cranch 336, 2 L. ed. 297; Atlanta *v.* Chattanooga Foundry, etc., Works, 127 Fed. 23; Patterson *v.* Wade, 115 Fed. 770, 53 C. C. A. 1; Ratican *v.* St. Louis Terminal R. Assoc., 114 Fed. 666; Davis *v.* Mills, 113 Fed. 678; Raymond *v.* U. S., 20 Fed. Cas. No. 11,596, 14 Blatchf. 51; U. S. *v.* Woolsey, 28 Fed. Cas. No. 16,763.

Canada.— Mason *v.* Mossop, 29 U. C. Q. B. 500; Newburn *v.* Street, 21 U. C. Q. B. 498.

See 33 Cent. Dig. tit. "Limitation of Actions," § 158 *et seq.*

Penalty or forfeiture under copyright laws see COPYRIGHT, 9 Cyc. 973.

45. Jeffersonville R. Co. *v.* Gabbert, 25 Ind. 431; State *v.* Robb, 16 Ind. 413; State *v.* Bangor, 30 Me. 341; Adams *v.* Palmer, 6 Gray (Mass.) 338; Stoddard County *v.* Malone, 115 Mo. 508, 22 S. W. 469. See also Goodridge *v.* Rogers, 22 Pick. (Mass.) 495 (holding that an action under St. (1785) § 62, by a tenant against his cotenant, for an injury done to land held in common, to recover treble damages, one moiety for his own use, and the other for the use of all the cotenants except defendant, is not within St. (1878) c. 12, which limits the bringing of all penal actions); Coburn *v.* Odell, 30 N. H. 540 (holding that Rev. St. c. 211, § 9, providing that prosecutions on penal statutes shall be brought within a certain time, does not apply to the statute of 1838, regulating the sale of spirituous liquors); Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287.

46. *Alabama.*—Walker *v.* Chapman, 22 Ala. 116.

Connecticut.— Plumb *v.* Griffin, 74 Conn. 132, 50 Atl. 1.

Georgia.— Banks *v.* Darden, 18 Ga. 318 (holding that the charter of a bank providing that, when the debts of such bank shall exceed three times the amount of its capital stock the "directors . . . shall be liable for the same . . . and may be sued" therefor, creates an obligation quasi *ex contractu*; and therefore the statute of limitations applying to penal liability affords no defense in an action against the directors); Neal *v.* Moultrie, 12 Ga. 104.

Illinois.— Woolverton *v.* Taylor, 132 Ill. 197, 23 N. E. 1007, 22 Am. St. Rep. 521 [*reversing* 30 Ill. App. 70]; Weisenborn *v.* People, 53 Ill. App. 32; Chicago *v.* Enright, 27 Ill. App. 559, holding that an action of debt for a penalty for the violation of a municipal ordinance is purely a civil action, and is therefore not governed by the statute of limitations relating to prosecutions for fines and forfeitures under penal statutes.

statutes of this character do not apply to a civil action for the recovery of a delinquent tax.[47]

b. Effect of Interest of Prosecutor. Some of the statutes differentiate actions for penalties or forfeitures where the recovery is wholly for the benefit of the government from actions where the recovery goes in whole or in part to the prosecutor, informer, or person aggrieved,[48] and fix a shorter period of limitation for the latter class of actions.[49]

L. Equitable Actions and Remedies[50] — **1. In General.** While formerly the various statutes of limitation did not *in totidem verbis* apply to demands purely equitable, yet courts of equity, acting in accordance with legal analogies, adopted such statutes in cases analogous to those in which they would apply at law.[51] In some jurisdictions, however, it is held that while equity may adopt such limitations if it is deemed expedient, yet *proprio vigore* as limitations appli-

Iowa.— State *v.* Mateer, 105 Iowa 66, 74 N. W. 912.

Kentucky.— Boyd *v.* Randolph, 91 Ky. 472, 16 S. W. 133, 13 Ky. L. Rep. 53.

Nebraska.— Coy *v.* Jones, 30 Nebr. 798, 47 N. W. 208, 10 L. R. A. 658; Howell *v.* Roberts, 29 Nebr. 483, 45 N. W. 923.

New Hampshire.— Whitaker *v.* Warren, 60 N. H. 20, 49 Am. Rep. 302, holding that such statutes do not apply to cases of unliquidated damages, even though the statute on which they are founded is in some respects penal.

New York.— Corning *v.* McCullough, 1 N. Y. 47, 49 Am. Dec. 287, 3 Den. 589.

South Carolina.— Lipscomb *v.* Seegers, 19 S. C. 425.

Tennessee.— Woodward *v.* Alston, 12 Heisk. 581.

See 33 Cent. Dig. tit. "Limitation of Actions," § 158 *et seq.*

47. Los Angeles County *v.* Ballerino, 99 Cal. 593, 32 Pac. 581, 34 Pac. 329; San Luis Obispo County *v.* Hendricks, 71 Cal. 242, 11 Pac. 682; *In re* Wolfe, 15 N. Y. Suppl. 539, 2 Connoly Surr. 600; *In re* Vanderbilt, 10 N. Y. Suppl. 239, 2 Connoly Surr. 319.

Limitation of proceeding for enforcement of taxes in general see TAXATION.

48. *Georgia.*—Western Union Tel. Co. *v.* Nunnally, 86 Ga. 503, 12 S. E. 578.

Massachusetts.— Com. *v.* Frost, 5 Mass. 53.

New Hampshire.— State *v.* Nashua, etc., R. Co., 58 N. H. 182.

New Jersey.— Boswell *v.* Robinson, 33 N. J. L. 273.

United States.— Goodridge *v.* Union Pac. R. Co., 35 Fed. 35.

See 33 Cent. Dig. tit. "Limitation of Actions," § 167.

49. Coburn *v.* Odell, 30 N. H. 540; Grover *v.* Morris, 73 N. Y. 473; State *v.* Moore, Meigs (Tenn.) 476; Missouri *v.* Kansas City, etc., R. Co., 32 Fed. 722. *Compare* Wilcox *v.* Fitch, 20 Johns. (N. Y.) 472, holding that a *qui tam* action which gives one half of the sum recovered to the people, and the other half to the prosecutor, is not within the statute of limitations, and a suit may be brought within a reasonable time.

50. Equitable actions for recovery of real property see *supra*, V, B, 2.

Laches and stale demands see EQUITY, 16 Cyc. 150 *et seq.*

Lapse of statutory period as ground for enjoining action at law see INJUNCTIONS, 22 Cyc. 81 note 37.

Limitation of creditors' suits see CREDITORS' SUITS, 12 Cyc. 43 note 76 *et seq.*

Application of statute to action for cancellation of conveyances see CANCELLATION OF INSTRUMENTS, 6 Cyc. 304 text and note 86.

Fraud as affecting accrual of action see *infra*, VI, B, 21.

Ignorance or mistake as affecting accrual of action see *infra*, VI, B, 23; VI, D, 2.

51. *Alabama.*— Askew *v.* Hooper, 28 Ala. 634; Johnson *v.* Toulmin, 18 Ala. 50, 52 Am. Dec. 212; Johnson *v.* Johnson, 5 Ala. 90.

Arkansas.— Borden *v.* Peay, 20 Ark. 293.

California.— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674; Piller *v.* Southern Pac. R. Co., 52 Cal. 42; Grattan *v.* Wiggins, 23 Cal. 16.

Illinois.— Bourland *v.* Peoria County, 16 Ill. 538.

Indiana.— McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

Iowa.— Spencer Dist. Tp. *v.* Riverton Dist. Tp., 62 Iowa 30, 17 N. W. 105; Relf *v.* Eberly, 23 Iowa 467.

Kansas.— Chick *v.* Willetts, 2 Kan. 384.

Kentucky.— McDowell *v.* Heath, 3 A. K. Marsh. 222; Lewis *v.* Stafford, 4 Bibb 318.

Louisiana.— See Browder *v.* Hook, 24 La. Ann. 200.

Maryland.— Harwood *v.* Rawlings, 4 Harr. & J. 126.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. 212.

Mississippi.— Mitchell *v.* Woodson, 37 Miss. 567; Sugg *v.* Thrasher, 30 Miss. 135; Wood *v.* Ford, 29 Miss. 57; Mandevill *v.* Lane, 28 Miss. 312.

Missouri.— Perry *v.* Craig, 3 Mo. 516. See also White *v.* Pendry, 25 Mo. App. 542.

Nevada.— White *v.* Sheldon, 4 Nev. 280.

New Jersey.— Bennett *v.* Finnegan, (Ch. 1895) 33 Atl. 401; Williams *v.* Hilliard, 38 N. J. Eq. 373; Wanmaker *v.* Van Buskirk, 1 N. J. Eq. 685, 23 Am. Dec. 748; Conover *v.* Conover, 1 N. J. Eq. 403.

New York.— McCotter *v.* Lawrence, 4 Hun 107, 6 Thomps. & C. 392; Humbert *v.* Trinity Church, 24 Wend. 587; Bloodgood *v.* Kane, 8 Cow. 360 [*affirming* 7 Johns. Ch. 90, 11 Am. Dec. 417]; Stafford *v.* Bryan, 1 Paige 239; Lansing *v.* Starr, 2 Johns. Ch. 150.

cable to actions at law alone they do not attach to or reach the remedy in equity;[52] and that equity will interpose to prevent the bar of the statute, positive as it is, where conscience requires it.[53] Now, however, in many jurisdictions, by statutory enactment, the limitations applicable to suits at law are equally applicable to equitable demands.[54]

2. Concurrent Jurisdiction of Law and Equity. In some jurisdictions, the rule has been broadly laid down that a court of equity is only bound to apply the statute of limitations where its jurisdiction is concurrent with that of a court of law.[55]

North Carolina.— Bailey *v.* Carter, 42 N. C. 282.

Oregon.— Anderson *v.* Baxter, 4 Oreg. 105.

Pennsylvania.— Hamilton *v.* Hamilton, 18 Pa. St. 20, 55 Am. Dec. 585; Pittsburgh, etc., R. Co. *v.* Graham, 2 Grant 259; Amer *v.* Armstrong, 6 Pa. Co. Ct. 392; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31; Buchanan's Estate, 2 Chest. Co. Rep. 74; Whetham *v.* Pennsylvania, etc., Canal, etc., Co., 9 Phila. 284.

Rhode Island.— Manchester *v.* Mathewson, 3 R. I. 237.

South Carolina.— Cumming *v.* Berry, 1 Rich. Eq. 114; Van Rhyn *v.* Vincent, 1 McCord Eq. 310.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Dunlap *v.* Gibbs, 4 Yerg. 94; Jackson *v.* Hodges, 2 Tenn. Ch. 276.

Texas.— McMasters *v.* Mills, 30 Tex. 591.

Vermont.— Robinson *v.* Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522; Spear *v.* Newell, 13 Vt. 288, holding that while the statute of limitations does not constitute directly a defense to a bill in chancery, yet the court will, in analogy to the statute, presume a settlement and payment from the lapse of the same time, if the presumption be not rebutted by evidence that satisfactorily accounts for the delay, and the case does not come within the exceptions of the statute.

Virginia.— Harrison *v.* Harrison, 1 Call 419.

United States.— Hall *v.* Law, 102 U. S. 461, 26 L. ed. 217; Hardy *v.* Harbin, 11 Fed. Cas. No. 6,060, 4 Sawy. 536.

See 33 Cent. Dig. tit. "Limitation of Actions," § 168 *et seq.*

And see Equity, 16 Cyc. 177 note 44 *et seq.*

Quieting title.—A suit to remove a cloud on title has been held to be only barred like any other case in equity by the general statute of limitations. Hodgen *v.* Guttery, 58 Ill. 431. See also Quieting Title.

52. Kocher *v.* Kocher, 56 N. J. Eq. 545, 39 Atl. 535; Smith *v.* Moore, 4 N. J. Eq. 485; Peacock *v.* Newbold, 4 N. J. Eq. 61; King *v.* Berry, 3 N. J. Eq. 44; Williams *v.* Bradbury, 9 Tex. 487; Beardsley *v.* Hall, 9 Tex. 119; Hall *v.* Russell, 101 U. S. 503, 25 L. ed. 829 [*affirming* 11 Fed. Cas. No. 5,943, 3 Sawy. 506]; Anonymous, Freem. 301, 22 Eng. Reprint 1223. See Everett *v.* Whitfield, 27 Ga. 133; Williams *v.* Emberson, 22 Tex. Civ. App. 522, 55 S. W. 595. And see Equity, 16 Cyc. 178 note 49.

Petition to restrain execution of judgment. —The statute of limitations has been held not to be applicable to a petition to restrain execution of a judgment because of payments thereon. Barnes *v.* Lloyd, 1 How. (Miss.) 584.

53. Carrard *v.* Niles, (N. J. Ch. 1900) 45 Atl. 266; Hedges *v.* Norris, 32 N. J. Eq. 192, holding that the statute of limitations is not a bar to a suit in equity for the recovery of a legacy payable out of the personal estate only.

Injunction against plea of statute see Injunctions, 22 Cyc. 796 note 9 *et seq.*

54. *Alabama.*— Liddell *v.* Carson, 122 Ala. 518, 26 So. 133; Coyle *v.* Wilkins, 57 Ala. 108. See also Millsap *v.* Stanley, 50 Ala. 319.

Kentucky.— Ferguson *v.* Covington, etc., R., etc., Co., 108 Ky. 662, 57 S. W. 460, 22 Ky. L. Rep. 371.

Louisiana.— Hennessey *v.* Stempel, 52 La. Ann. 449, 26 So. 1004.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742.

New York.— Gallup *v.* Bernd, 132 N. Y. 370, 30 N. E. 743; Loder *v.* Hatfield, 71 N. Y. 92 [*affirming* 4 Hun 36, 6 Thomps. & C. 229]; Still *v.* Holbrook, 23 Hun 517; Elwood *v.* Deifendorf, 5 Barb. 398; McTeague *v.* Coulter, 38 N. Y. Super. Ct. 208; Fogal *v.* Pirro, 17 Abb. Pr. 113; McCartee *v.* Camel, 1 Barb. Ch. 455. See also Matter of Campbell, 96 N. Y. App. Div. 561, 89 N. Y. Suppl. 569.

Ohio.— Zuellig *v.* Hemerlie, 60 Ohio St. 27, 53 N. E. 447, 71 Am. St. Rep. 707; Neal *v.* Nash, 23 Ohio St. 483; Larwill *v.* Burke, 19 Ohio Cir. Ct. 449, 10 Ohio Cir. Dec. 605; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15.

United States.— Nash *v.* Ingalls, 101 Fed. 645, 41 C. C. A. 545.

See 33 Cent. Dig. tit. "Limitation of Actions," § 168 *et seq.*

55. *Georgia.*—Wylly *v.* Collins, 9 Ga. 223.

Indiana.— Smith *v.* Calloway, 7 Blackf. 86; Raymond *v.* Simonson, 4 Blackf. 77.

Kentucky.— Clay *v.* Clay, 7 Bush 95.

Maryland.— Oswald *v.* Hoover, 43 Md. 360; Bowie *v.* Stonestreet, 6 Md. 418, 61 Am. Dec. 318.

Missouri.— Kelly *v.* Hurt, 74 Mo. 561; Johnson *v.* Smith, 27 Mo. 591.

New Jersey.— Williams *v.* Reilly, 41 N. J. Eq. 137, 3 Atl. 692; Partridge *v.* Wells, 30 N. J. Eq. 176; Shibla *v.* Ely, 6 N. J. Eq. 181.

New York.— Rundle *v.* Allison, 34 N. Y. 180; Atty.-Gen. *v.* Purmort, 5 Paige 620; Paff *v.* Kinney, 1 Bradf. Surr. 1.

Pennsylvania.— Kutz's Appeal, 40 Pa. St. 90; Zacharias *v.* Zacharias, 23 Pa. St. 452; Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450.

Where, however, courts of equity and courts of law have concurrent jurisdiction, the statute of limitations applicable to suits at law apply where the equity forum is sought, rather in obedience to the statute than by analogy.[56]

3. TRUSTS.[57] While as a general proposition direct, technical, and continuing trusts which are in no respect cognizable at law cannot be reached or affected by the statute of limitations,[58] yet the foregoing rule to the effect that the statute of limitations applies in equity wherever there is a concurrent remedy at law is very generally held to be applicable in favor of a *cestui que trust* seeking equitable relief against a trustee in the case of a trust not falling within the peculiar and exclusive jurisdiction of the court.[59]

South Carolina.— Estes *v.* Stokes, 2 Rich. 133; Sims *v.* Sims, 2 Hill Eq. 61.

Tennessee.— McDonald *v.* McDonald, 8 Yerg. 145; Cocke *v.* McGinnis, Mart. & Y. 361, 17 Am. Dec. 809.

Texas.— Tinnen *v.* Mebane, 10 Tex. 246, 60 Am. Dec. 205.

West Virginia.— Cranmer *v.* McSword, 24 W. Va. 594; Heiskell *v.* Power, 23 W. Va. 717.

United States.— Sullivan *v.* Portland, etc., R. Co., 94 U. S. 806, 24 L. ed. 324 [*affirming* 23 Fed. Cas. No. 13,596, 4 Cliff. 212]; Gest *v.* Packwood, 39 Fed. 525; Etting *v.* Marx, 4 Fed. 673, 4 Hughes 312; Baird *v.* Wolfe, 2 Fed. Cas. No. 760, 4 McLean 549; Dubois *v.* McLean, 7 Fed. Cas. 4,107, 4 McLean 486; Ferson *v.* Sanger, 8 Fed. Cas. No. 4,751, 2 Ware 256, 5 N. Y. Leg. Obs. 43; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Stevens *v.* Sharp, 23 Fed. Cas. No. 13,410, 6 Sawy. 113; Wisner *v.* Ogden, 30 Fed. Cas. No. 17,914, 4 Wash. 631.

See 33 Cent. Dig. tit. "Limitation of Actions," § 169.

56. *Alabama.*— Underhill *v.* Mobile Fire Dept. Ins. Co., 67 Ala. 45; Crocker *v.* Clement's, 23 Ala. 296; Wood *v.* Wood, 3 Ala. 756; Maury *v.* Mason, 8 Port. 211.

Arkansas.— Baldwin *v.* Williams, 74 Ark. 316, 86 S. W. 423, 109 Am. St. Rep. 81.

Colorado.— Dunne *v.* Stotesbury, 16 Colo. 89, 26 Pac. 333.

District of Columbia.— Washington L. & T. Co. *v.* Darling, 21 App. Cas. 132; Patten *v.* Warner, 11 App. Cas. 149.

Illinois.— Quayle *v.* Guild, 91 Ill. 378; Hancock *v.* Harper, 86 Ill. 445; Manning *v.* Warren, 17 Ill. 267.

Indiana.— Smith *v.* Calloway, 7 Blackf. 86; Judah *v.* Brandon, 5 Blackf. 506.

Kentucky.— Clay *v.* Clay, 7 Bush 95; Breckenridge *v.* Churchill, 3 J. J. Marsh. 11.

Maryland.— Wilhelm *v.* Caylor, 32 Md. 151; *In re* Mitchell, 21 Md. 585; Teackle *v.* Gibson, 8 Md. 70; Hertle *v.* Schwartze, 3 Md. 366; Sindall *v.* Campbell, 7 Gill 66.

Massachusetts.— Com. *v.* Cochitnate Bank, 3 Allen 42.

Mississippi.— Leflore County *v.* Allen, 80 Miss. 298, 31 So. 815.

Missouri.— Rogers *v.* Brown, 61 Mo. 187.

Montana.— Mantle *v.* Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

New Jersey.— Smith *v.* Wood, 42 N. J. Eq. 563, 7 Atl. 881 [*affirmed* in 44 N. J. Eq. 603, 17 Atl. 1104]; Somerset Bank *v.* Veghte, 42 N. J. Eq. 39, 6 Atl. 278.

New York.— *In re* Neilley, 95 N. Y. 382; Zweigle *v.* Hohman, 75 Hun 377, 27 N. Y. Suppl. 111; Drake *v.* Wilkie, 30 Hun 537; Bruen *v.* Hone, 2 Barb. 586; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103; Bloodgood *v.* Kane, 8 Cow. 360; Humbert *v.* Trinity Church, 7 Paige 195 [*affirmed* in 24 Wend. 587]; Souzer *v.* De Meyer, 2 Paige 574; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]; House *v.* Agate, 3 Redf. Surr. 307.

Pennsylvania.— U. S. Bank *v.* Riddle, 2 Pars. Eq. Cas. 31.

Tennessee.— Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556.

Texas.— Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

Vermont.— Tharp *v.* Tharp, 15 Vt. 105.

Virginia.— Redford *v.* Clarke, 100 Va. 115, 40 S. E. 630.

West Virginia.—Maxwell *v.* Wilson, 54 W. Va. 495, 46 S. E. 349; Sibley *v.* Stacey, 53 W. Va. 292, 44 S. E. 420; Burbridge *v.* Sadler, 46 W. Va. 39, 32 S. E. 1028.

United States.— Carrol *v.* Green, 92 U. S. 509, 23 L. ed. 728; Hale *v.* Coffin, 114 Fed. 567; Cooper *v.* Hill, 94 Fed. 582, 36 C. C. A. 402; Thompson *v.* German Ins. Co., 76 Fed. 892; Chemical Nat. Bank *v.* Kissane, 32 Fed. 429, 13 Sawy. 20; Hall *v.* Russell, 11 Fed. Cas. No. 5,943, 3 Sawy. 506 [*affirmed* in 101 U. S. 503, 25 L. ed. 829]; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143; Sullivan *v.* Portland, etc., R. Co., 23 Fed. Cas. No. 13,596, 4 Cliff. 212 [*affirmed* in 94 U. S. 806, 24 L. ed. 324].

See 33 Cent. Dig. tit. "Limitation of Actions," § 170. And see EQUITY, 16 Cyc. 178 note 52.

57. Trust generally see TRUSTS.

Effect on beneficiary of limitation against trustee see *supra*, IV, E, 5, b.

Existence of trust as affecting running of statute see *infra*, VI, B, 20.

Adverse possession by trustee against cestui que trust see ADVERSE POSSESSION, 1 Cyc. 1062 *et seq.*

58. See *infra*, VI, B, 20, a.

59. See *infra*, VI, B, 20, b.

Special limitations applicable to trusts see Waller *v.* Jones, 107 Ala. 331, 18 So. 277; Green *v.* Gaston, 56 Miss. 748; Templeton *v.* Tompkins, 45 Miss. 424; Barry *v.* Hill, 166

4. Specific Performance.[60] The rule is laid down in some jurisdictions that the general statutes of limitations do not apply to actions for specific performance,[61] but in other jurisdictions it is held that where the statute has fixed a period of limitation barring the analogous claim at law, a bill for specific performance filed after the expiration of such period will be dismissed.[62]

5. Reformation of Instrument.[63] Even in jurisdictions where the statute of limitations is acted on only as a guide to the discretion of the court, in cases of bills filed to correct mistakes in contracts, and for the reformation of instruments, the courts will refuse to grant relief, as in cases of fraud, if the period of limitation has elapsed between the filing of the bill and the time when the mistake was discovered, or when by the use of due diligence it ought to have been discovered.[64]

6. Establishment of Lost Instrument.[65] Statutes of limitation have been held to have no application to bills filed to establish a lost deed or will.[66]

7. Enforcement of Vendor's Lien.[67] In the absence of statutory provision to that effect,[68] a vendor's lien for the unpaid purchase-money for land is not lost or destroyed because an action at law on the debt is barred by the statute of limitations.[69]

8. Foreclosure of Mortgage or Deed For Security.[70] In many jurisdictions by

Pa. St. 344, 31 Atl. 126; Roy *v.* Townsend, 78 Pa. St. 329; Mellor *v.* Reed, 5 Pa. Co. Ct. 372; Barrett *v.* Bamber, 9 Phila. (Pa.) 202.

Enforcement of trust as proceeding not specially provided for see *infra*, V, N, text and note 87.

60. Time to sue for specific performance generally see Specific Performance.

Limitation of actions on contracts to sell or convey see *supra*, V, F, 3.

61. Washburn *v.* Washburn, 39 N. C. 306; Swan *v.* Shanhan, 1 Ohio Cir. Ct. 216, 1 Ohio Cir. Dec. 119; Peake *v.* Young, 40 S. C. 41, 18 S. E. 237; Vardeman *v.* Lawson, 17 Tex. 10; Holman *v.* Criswell, 15 Tex. 394; Hemming *v.* Zimmerschitte, 4 Tex. 159. *Compare* Dull *v.* Blum, 68 Tex. 299, 4 S. W. 489.

62. Lowell *v.* Kier, 50 Cal. 646; Castner *v.* Walrod, 83 Ill. 171, 25 Am. Rep. 369; Hall *v.* Doran, 13 Iowa 368; Collard *v.* Tuttle, 4 Vt. 491, 24 Am. Dec. 627.

63. Time to sue for reformation generally see Reformation of Instruments.

Reformation of instrument as action not specially provided for see *infra*, V, N, text and note 84.

Accrual of right of action see *infra*, VI, B, 23.

64. Dodge *v.* Essex Ins. Co., 12 Gray (Mass.) 65; Oakes *v.* Howell, 27 How. Pr. (N. Y.) 145; Norton *v.* Davis, 83 Tex. 32, 18 S. W. 430; Tarrant County *v.* McLemore, (Tex. 1888) 8 S. W. 94; Stone *v.* Sledge, (Tex. Civ. App. 1894) 24 S. W. 697; Blair *v.* Bromley, 5 Hadd. 452, 5 Hare 542, 11 Jur. 115, 16 L. J. Ch. 105, 26 Eng. Ch. 542, 67 Eng. Reprint 1026 [*affirming* 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354, 22 Eng. Ch. 354, 41 Eng. Reprint 979]; Brooksbank *v.* Smith, 6 L. J. Exch. 34, 2 Y. & C. Exch. 58. *Compare* Terril *v.* Southall, 3 Bibb (Ky.) 458; Sprague *v.* Cochran, 144 N. Y. 104, 38 N. E. 1000 [*reversing* 70 Hun 512, 24 N. Y. Suppl. 369]; Payne *v.* Ross, 10 Tex. Civ. App. 419, 30 S. W. 670 (holding that the statute of limitations will not run against the right of a purchaser of land who entered into possession, and whose title has never been disputed, to have the description in the deed corrected to make it conform to the original intention of the parties); Fore *v.* Foster, 86 Va. 104, 9 S. E. 497.

In Ohio the statute (Rev. St. § 4974) providing that limitation shall not run against an action by a vendee in possession of real property, to obtain a conveyance thereof, applies to an action by such vendee to correct a mistake in the deed under which he claims. Poag *v.* Shaw, 10 Ohio Cir. Ct. 448, 6 Ohio Cir. Dec. 523.

65. Lost instrument generally see Lost Instruments.

Action for land and to establish title through lost deed see *supra*, V, B, 1, note 98.

66. Rockwell *v.* Servant, 54 Ill. 251; Everitt *v.* Everitt, 41 Barb. (N. Y.) 385; Anderson *v.* Akard, 15 Lea (Tenn.) 182, holding that statutes of limitation have no application to a suit by one in possession of land to set up a lost deed; the suit not being one for the recovery of land, but one asserting an equitable remedy, to which one is entitled to resort whenever the exigency may arise.

67. Vendor's lien generally see Vendor and Purchaser.

Application of limitation for recovery of real property see *supra*, V, B, 3.

68. Washington *v.* Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555; Madison County *v.* Powell, 71 Miss. 618, 15 So. 109; McNair *v.* Stanton, 57 Miss. 298.

69. Chapman *v.* Lee, 64 Ala. 483; Lewis *v.* McDowell, 88 N. C. 261; Lincoln *v.* Purcell, 2 Head (Tenn.) 143, 73 Am. Dec. 196; Randall *v.* Jaques, 20 Fed. Cas. No. 11,553. *Compare* Borst *v.* Corey, 15 N. Y. 505. See also *supra*, IV, C, 4.

70. Foreclosure of mortgages generally see Mortgages.

special statutory enactment or judicial construction, where the statutory period necessary to bar an action on the debt by the mortgagee has expired, a foreclosure in equity will likewise be barred,[71] while in other jurisdictions it is held that the bar of a suit at law to recover the debt is no defense to a suit in equity to enforce the lien.[72]

9. REDEMPTION FROM MORTGAGE SALE.[73] The general rule is that courts of equity will follow the analogies of the law as to the limitation of the right to redeem mortgaged property.[74]

10. ACCOUNTING.[75] The rule has been laid down that the statutory limitation applicable to an action at law for an account is likewise applicable to a bill in equity for an accounting.[76]

Application of period for recovery of real property see *supra*, V, B, 5.

Mortgage or deed of security as sealed instrument see *supra*, V, E, 2.

Mortgage or deed of security as written instrument see *supra*, V, F, 8.

Limitation of suit to foreclose chattel mortgage see CHATTEL MORTGAGES, 7 Cyc. 95 note 48 *et seq.*

71. *Arkansas.*— Duke *v.* State, 56 Ark. 485, 20 S. W. 600; Hall *v.* Denckla, 28 Ark. 506.

Illinois.— Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Manning *v.* Warren, 17 Ill. 267.

Louisiana.— Chapman *v.* Citizens' Bank, 31 La. Ann. 395.

Mississippi.— Green *v.* Mizelle, 54 Miss. 220.

Ohio.— Morrison *v.* Martin, 10 Ohio Dec. (Reprint) 738, 23 Cinc. L. Bul. 246. *Compare* Dater *v.* Bruner, 8 Ohio Dec. (Reprint) 699, 9 Cinc. L. Bul. 220.

United States.— Allen *v.* O'Donald, 28 Fed. 17 [*affirmed* in 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843]; Cleveland Ins. Co. *v.* Reed, 5 Fed. Cas. No. 2,889, 1 Biss. 180, holding that statutes for foreclosure are rules of property, and also laws of limitation; and, in the absence of laws limiting proceedings in equity, the limitations as to similar demands at common law are considered as proper rules to be observed in courts of chancery.

See 33 Cent. Dig. tit. "Limitation of Actions," § 178. And see *supra*, IV, C, 3.

72. *Alabama.*— Coyle *v.* Wilkins, 57 Ala. 108.

Connecticut.—Belknap *v.* Gleason, 11 Conn. 160, 27 Am. Dec. 721.

District of Columbia.— Peters *v.* Suter, 2 MacArthur 516.

Georgia.— Elkins *v.* Edwards, 8 Ga. 325.

Maine.— Joy *v.* Adams, 26 Me. 330.

Massachusetts.— Thayer *v.* Mann, 19 Pick. 535; Bacon *v.* McIntire, 8 Metc. 87; Crain *v.* Paine, 4 Cush. 483, 50 Am. Dec. 807.

Michigan.— McKinney *v.* Miller, 19 Mich. 142.

Missouri.— See Chouteau *v.* Burlando, 20 Mo. 482, holding that where a mortgage was given for wild and unimproved land of which neither party was in possession, there being evidence that the debts were unpaid, a lapse of thirty years was no bar to a foreclosure of the mortgage.

New York.— See Heyer *v.* Pruyn, 7 Paige 465, 34 Am. Dec. 355.

Pennsylvania.—Council *v.* Moyamensing, 2 Pa. St. 224.

Virginia.— Hopkins *v.* Cockerell, 2 Gratt. 88.

See 33 Cent. Dig. tit. "Limitation of Actions," § 178. And see *supra*, IV, C, 3.

73. Redemption of mortgages generally see MORTGAGES.

Application of limitation for recovery of real property see *supra*, V, B, 6.

Limitation of suit to redeem mortgaged personalty see CHATTEL MORTGAGES, 7 Cyc. 85 note 68 *et seq.*

74. *Alabama.*— Coyle *v.* Wilkins, 57 Ala. 108.

Arkansas.— Bland *v.* Fleeman, 58 Ark. 84, 23 S. W. 4.

Connecticut.— Crittendon *v.* Brainard, 2 Root 485.

Maine.— Phillips *v.* Sinclair, 20 Me. 269.

Maryland.— Boyd *v.* Harris, 2 Md. Ch. 210; Hertle *v.* McDonald, 2 Md. Ch. 128.

Missouri.— Kelly *v.* Hurt, 61 Mo. 463.

New York.— Hubbell *v.* Sibley, 50 N. Y. 468 [*affirming* 5 Lans. 51]; Miner *v.* Beekman, 50 N. Y. 337 [*affirming* 11 Abb. Pr. N. S. 147, 42 How. Pr. 33].

Ohio.— Robinson *v.* Fife, 3 Ohio St. 551.

United States.— Dexter *v.* Arnold, 7 Fed. Cas. No. 3,859, 3 Sumn. 152.

See 33 Cent. Dig. tit. "Limitation of Actions," § 179.

Compare Yarbrough *v.* Newell, 10 Yerg. (Tenn.) 376 (holding that the statute of limitations cannot be set up in bar of a bill to redeem mortgaged personal property); Hammonds *v.* Hopkins, 3 Yerg. (Tenn.) 525.

75 Accounts and accounting generally see ACCOUNTS AND ACCOUNTING, 1 Cyc. 351.

Limitation of actions on accounts generally see *supra*, V, H.

Limitation of bill for account of an annuity see ANNUITIES, 2 Cyc. 470 note 42.

Limitation of suit for accounting by guardian see GUARDIAN AND WARD, 21 Cyc. 159 note 42 *et seq.*

Limitation of action for accounting by executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1120 note 95 *et seq.*

Partnership accounting see PARTNERSHIP.

76. *Alabama.*—Cleveland *v.* Williamson, 57 Ala. 402; Bradford *v.* Spyker, 32 Ala. 134.

M. Special Remedies or Proceedings.[77] In some jurisdictions it is held that the statute of limitations has no application to special proceedings.[78] In other jurisdictions it is provided by statute that the word "action" as used in the statute is to be construed, when it is necessary so to do, as including a special proceeding, or any proceeding therein, or in an action,[79] or the word "action" is so judicially construed, when necessary.[80] So the rule has been laid down that the general statutes of limitation should apply in every case where a common-law form of action could be resorted to if no special remedy had been provided.[81]

N. Actions or Proceedings Not Specifically Provided For. In most jurisdictions there are clauses in the various statutes of limitations providing that all actions for relief not provided for in the other clauses of the statute must be commenced within the period designated in such clause.[82] Such a clause in the general statute of limitations has been held to apply to an action for the rescis-

Illinois.— Richardson *v.* Gregory, 126 Ill. 166, 18 N. E. 777 [*affirming* 27 Ill. App. 621]; Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833 [*affirming* 18 Ill. App. 562]; Hancock *v.* Harper, 86 Ill. 445.

Kentucky.— Brink *v.* Brink, 1 Bibb 255.

Maine.— Spaulding *v.* Farwell, 70 Me. 17.

Maryland.— Wilhelm *v.* Caylor, 32 Md. 151.

Mississippi.— Prewett *v.* Buckingham, 28 Miss. 92.

Missouri.— Coudrey *v.* Gilliam, 60 Mo. 86.

New Jersey.— Cowart *v.* Perrine, 18 N. J. Eq. 454.

New York.— Carr *v.* Thompson, 87 N. Y. 160; Mann *v.* Fairchild, 14 Barb. 548.

North Carolina.— Bruner *v.* Threadgill, 88 N. C. 361; Spruill *v.* Sanderson, 79 N. C. 466.

United States.— See Livingston *v.* Story, 11 Pet. 351, 9 L. ed. 746.

See 33 Cent. Dig. tit. "Limitations of Actions," § 181.

77. Time of commencing proceedings to review action of lower court see APPEAL AND ERROR, 2 Cyc. 789 *et seq.*

Time of appeal from decision of county boards see COUNTIES, 11 Cyc. 602.

Time of taking proceedings for removal of causes see REMOVAL OF CAUSES.

Time to institute proceedings to revive action on death of party see ABATEMENT AND REVIVAL, 1 Cyc. 103 *et seq.*

Time for motion for new trial see NEW TRIAL.

Time for making or entering motions in general see MOTIONS.

Motion to set aside execution sale see EXECUTIONS, 17 Cyc. 1281 *et seq.*

Enforcement of assessments and special taxes for public improvements see MUNICIPAL CORPORATIONS.

Time for presentation of claims against decedent's estate see 18 Cyc. 468 *et seq.*

78. Hartley *v.* Keokuk, etc., R. Co., 85 Iowa 455, 52 N. W. 352; Cuthbertson *v.* Locke, 70 Iowa 49, 30 N. W. 13 (where it was held that the bar of the statute could not be interposed in proceedings to establish the boundaries and corners of land); Heald *v.* Heald, 5 Me. 387; State *v.* Crowell, 1 Ohio Dec. (Reprint) 41, 1 West. L. J. 305 (holding that a motion to amerce a sheriff is not within the statute of limitations which refers to actions). See also Spang *v.* Deibler, 1 Pa. Co. Ct. 670. See, however, Philips *v.* State, 5 Ohio St. 122, 64 Am. Dec. 635, holding that a lapse of time sufficient to bar an action on the administration bond will bar proceedings by citation and attachment.

79. Matter of Miller, 70 Hun (N. Y.) 61, 23 N. Y. Suppl. 1104; Matter of Depuy, 54 Hun (N. Y.) 638, 8 N. Y. Suppl. 229; People *v.* French, 31 Hun (N. Y.) 617, 13 Abb. N. Cas. 413 (holding that a proceeding by mandamus is especially within Code, § 414, declaring the rules of limitation applicable to special proceedings); Smith *v.* Remington, 42 Barb. (N. Y.) 75; Prewett *v.* Hilliard, 11 Humphr. (Tenn.) 423 (holding that the statute of limitations applies to motions). See also Berlin *v.* Hall, 48 Barb. (N. Y.) 442; Paff *v.* Kinney, 1 Bradf. Surr. (N. Y.) 1.

80. Hart's Appeal, 32 Conn. 520 (holding that the statute of limitations, although in terms applicable to actions only, applies to all claims against a decedent's estate which may be the subjects of actions, however presented); Johnson *v.* Rees, 4 Houst. (Del.) 600 (holding that the statute will run against a proceeding by fieri facias attachment for a tax due to an incorporated company); Pasiana *v.* Powell, 21 La. Ann. 584; McCoy *v.* Nichols, 4 How. (Miss.) 31.

81. Banks *v.* Coyle, 2 A. K. Marsh. (Ky.) 564; Clowes *v.* New York, 47 Hun (N. Y.) 539 (where an action was brought to have an assessment for taxes declared invalid to the extent of the alleged illegal excess, and to recover such excess, and it was held that if the action be regarded as at law, the period of limitation was six years from the time the cause of action accrued, and if it be regarded as an action in equity, the period was ten years from the time the assessment became a lien on the property); Beck *v.* Bethlehem, 2 Pa. Co. Ct. 511, 3 Lanc. L. Rev. 386; Craft *v.* South Chester, 2 Pa. Co. Ct. 508. See also Hanna *v.* Meconkey, 11 Phila. (Pa.) 549. *Compare* Fegley *v.* Easton, 2 Pa. Co. Ct. 505, holding that the Pennsylvania statute of March 27, 1713, limiting certain common-law actions to six years does not apply to proceedings to assess damages caused by a change in a street grade by a statutory proceeding.

82. *Arkansas.*— Bird *v.* Smith, 8 Ark. 368.

sion of a contract on the ground of fraud;[83] for the reformation of an instrument on the ground of mistake;[84] to an action of account or for an accounting;[85] to proceedings by mandamus for the enforcement of a substantial right;[86] to suits for the establishment or enforcement of a trust;[87] to actions for the recovery of

California.— Lux *v.* Haggin, 69 Cal. 255, 10 Pac. 674, holding that the clause applies to suits in equity as well as to actions at law.

Florida.— Branch *v.* Cole, 18 Fla. 368.

Illinois.— People *v.* Boyd, 132 Ill. 60, 23 N. E. 342 [*affirming* 30 Ill. App. 608]; American Ins. Co. *v.* Arbuckle, 32 Ill. App. 369; Bassett *v.* Bassett, 20 Ill. App. 543, an action for alienation of affections.

Indiana.— Royse *v.* Turnbaugh, 117 Ind. 539, 20 N. E. 485, suit to quiet title.

Iowa.— Willard *v.* Wright, 81 Iowa 714, 45 N. W. 886, suit to quiet title.

Kentucky.— Allen *v.* Frohman, 96 Ky. 313, 28 S. W. 497, 16 Ky. L. Rep. 634; Cleveland Orphan Inst. *v.* Helm, 74 S. W. 274, 24 Ky. L. Rep. 2485; Buckler *v.* Rogers, 53 S. W. 529, 22 Ky. L. Rep. 1, 54 S. W. 848, 21 Ky. L. Rep. 1265.

Louisiana.— Muntz *v.* Broom, 11 La. Ann. 472; Barelli *v.* Riviere, 3 La. Ann. 46, holding that all personal actions, except those for which the law has provided a shorter term, are, pursuant to Civ. Code, art. 3508, prescribed by ten years if the creditor be present.

Michigan.— Stewart *v.* Sprague, 71 Mich. 50, 38 N. W. 673.

Minnesota.— Thornton *v.* Webb, 13 Minn. 498; Cook *v.* Kendall, 13 Minn. 324; Eastman *v.* St. Anthony Falls Water Power Co., 12 Minn. 137.

Mississippi.— Washington *v.* Soria, 73 Miss. 665, 19 So. 485, 55 Am. St. Rep. 555.

Missouri.— Hoester *v.* Sammellman, 101 Mo. 619, 14 S. W. 728.

Montana.— Toombs *v.* Hornbuckle, 3 Mont. 193.

New York.— Plett *v.* Wilson, 50 Hun 60, 4 N. Y. Suppl. 507; Wood *v.* Monroe County, 50 Hun 1, 2 N. Y. Suppl. 369; *In re* Striker, 23 Hun 647; McCotter *v.* Lawrence, 4 Hun 407, 6 Thomps. & C. 392; Kelly *v.* Potter, 16 N. Y. Suppl. 446.

Ohio.— Bryant *v.* Swetland, 48 Ohio St. 194, 27 N. E. 100; Hawkins *v.* Lasley, 40 Ohio St. 37; Mathers *v.* Hewitt, 8 Ohio Dec. (Reprint) 616, 9 Cinc. L. Bul. 63; Plant *v.* Murphy, 5 Ohio Dec. (Reprint) 544, 6 Am. L. Rec. 479.

Pennsylvania.— Croft *v.* South Chester, 3 Del. Co. 8.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Bruce *v.* Baxter, 7 Lea 477; Holbert *v.* Seawright, 3 Baxt. 169.

Texas.— Watson *v.* Texas, etc., R. Co., (Civ. App. 1903) 73 S. W. 830; Starnes *v.* Beitel, 20 Tex. Civ. App. 524, 50 S. W. 202; Blount *v.* Bleker, 13 Tex. Civ. App. 227, 35 S. W. 863; Phelan *v.* Wiley, 2 Tex. App. Civ. Cas. § 735; Millington *v.* Texas, etc., R. Co., 2 Tex. Civ. App. § 171.

See 33 Cent. Dig. tit. "Limitation of Actions," § 190 *et seq.*

Compare Quinn *v.* Kellogg, 4 Colo. App. 157, 35 Pac. 49 (holding that there is no statute of limitations applicable to a suit to remove a cloud on title); Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. ed. 628.

A quo warranto proceeding, prosecuted by the state for the purpose of ousting one charged with unlawfully exercising the office of a police magistrate, is not affected by the statute of limitations barring ordinary civil actions not otherwise provided for, since it is a matter of public concern, and the maxim *nullum tempus occurrit regi* applies. McPhail *v.* People, 160 Ill. 77, 43 N. E. 382, 52 Am. St. Rep. 306 [*affirming* 56 Ill. App. 289]. But it is held that the statute applies to the remedy by quo warranto when its object is to enforce private rights. People *v.* Boyd, 30 Ill. App. 608 [*affirmed* in 132 Ill. 60, 23 N. E. 342].

83. Mulford *v.* Wimbish, 2 La. Ann. 443; Wolf *v.* Schmidt, 15 Daly (N. Y.) 107, 2 N. Y. Suppl. 705; Chicago, etc., R. Co. *v.* Titterington, 84 Tex. 218, 19 S. W. 472, 31 Am. St. Rep. 39; Evans *v.* Goggan, 5 Tex. Civ. App. 129, 23 S. W. 854.

84. Hoester *v.* Sammelmann, 101 Mo. 619, 14 S. W. 728; Bryant *v.* Swetland, 48 Ohio St. 194, 27 N. E. 100.

85. Bonney *v.* Stoughton, 122 Ill. 536, 13 N. E. 833; Quayle *v.* Guild, 91 Ill. 378; Wolf *v.* Wolf, 97 Iowa 279, 66 N. W. 170; Wagoner *v.* Phillips, 22 La. Ann. 151; Miller *v.* Parkhurst, 9 N. Y. St. 759.

Special statutes applicable to actions on accounts see *supra*, V, H.

Limitation of suit in equity for accounting see *supra*, V, L, 10.

86. *California.*— Farrell *v.* San Francisco Police Com'rs, 1 Cal. App. 5, 81 Pac. 674.

Maryland.— George's Creek Coal Co. *v.* Allegany County Com'rs, 59 Md. 255.

Montana.— Territory *v.* Potts, 3 Mont. 364.

Nebraska.— State *v.* King, 34 Nebr. 196, 51 N. W. 754, 33 Am. St. Rep. 635; State *v.* Sherman County School Dist. No. 9, 30 Nebr. 520, 46 N. W. 613, 27 Am. St. Rep. 420.

New York.— People *v.* Westchester County, 12 Barb. 446; People *v.* French, 12 Abb. N. Cas. 156.

See 33 Cent. Dig. tit. "Limitation of Actions," § 201.

Time of commencing mandamus proceedings generally see MANDAMUS.

87. *California.*— Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570.

Indiana.— Martin *v.* Martin, 118 Ind. 227, 20 N. E. 763.

Missouri.— Hunter *v.* Hunter, 50 Mo. 445.

New York.— Rhinelander *v.* Farmers' L. & T. Co., 172 N. Y. 519, 65 N. E. 499 [*affirming* 58 N. Y. App. Div. 619, 69 N. Y. Suppl. 1144]; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663; Yeoman *v.* Townshend, 74 Hun 625, 26 N. Y. Suppl. 606; McArthur *v.*

damages for injuries to the person or to property;[88] and to creditors' actions to charge a decedent's estate or the devisee.[89] In some jurisdictions, however, such clauses specially except actions concerning real estate from their operation.[90]

O. Defenses — 1. In General. Pure defenses are held not to be barred by the statute of limitations.[91] In an action on a contract, a plea of failure or part failure of consideration is a plea arising out of the contract sought to be enforced, and cannot be met by a reply of the statute of limitations;[92] nor does the statute apply to pleas in bar alleging payment.[93] Where the title of a person in undisputed possession of land is challenged, he may set forth any equitable defense in favor of his right to the property, and the statute of limitations will not run so as to prevent him from setting forth such defense.[94] The defense of reduction or recoupment which arises out of the same transaction as the claim survives as long as the cause of action upon the claim exists, although an affirmative action upon the subject of it may be barred by the statute of limitations.[95]

Gordon, 51 Hun 511, 4 N. Y. Suppl. 584 [*modified* and *affirmed* in 126 N. Y. 597, 27 N. E. 1033]; Rodman *v.* Devlin, 23 Hun 590; Roberts *v.* Sykes, 30 Barb. 173, 8 Abb. Pr. 345; Pierson *v.* Morgan, 1 Silv. Sup. 82, 4 N. Y. Suppl. 898, 17 N. Y. Civ. Proc. 124 [*affirming* 20 Abb. N. Cas. 428].

North Carolina.— Ritchie *v.* Fowler, 132 N. C. 788, 44 S. E. 616.

Texas.— Farmers' L. & T. Co. *v.* Beckley, 93 Tex. 267, 54 S. W. 1027.

See 33 Cent. Dig. tit. "Limitation of Actions," § 204.

Special statutes applicable to suits to enforce trusts see *supra*, V, L, 3, note 59.

88. Shortle *v.* Terre Haute, etc., R. Co., 131 Ind. 338, 30 N. E. 1084; Shortle *v.* Louisville, etc., R. Co., 130 Ind. 505, 30 N. E. 639; Thomas *v.* Union Pac. R. Co., 1 Utah 235.

Limitation of actions for injuries to property generally see *supra*, V, I, 3.

Limitation of action for personal injuries generally see *supra*, V, I, 2.

89. Adams *v.* Fassett, 149 N. Y. 61, 43 N. E. 408 [*affirming* 73 Hun 430, 26 N. Y. Suppl. 447]; Mortimer *v.* Chambers, 63 Hun (N. Y.) 335, 17 N. Y. Suppl. 874; Wood *v.* Wood, 26 Barb. (N. Y.) 356.

90. Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211; Burt *v.* C. W. Cook Sheep Co., 10 Mont. 571, 27 Pac. 399; Ballard *v.* Scruggs, 90 Tenn. 585, 18 S. W. 259, 25 Am. St. Rep. 703; Wynne *v.* Kennedy, 11 Tex. Civ. App. 693, 33 S. W. 298. See also Barelli *v.* Riviere, 3 La. Ann. 46.

Limitation of actions for recovery of property generally see *supra*, V, B.

91. Robinson *v.* Glass, 94 Ind. 211 (holding that a person sued upon a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defense interposed); Wilhite *v.* Hamrick, 92 Ind. 594. See also Muse *v.* Yarborough, 11 La. 521.

92. Redman *v.* Hampton, 26 Mo. App. 504; Evans *v.* Yongue, 8 Rich (S. C.) 113.

93. *Georgia.*— Blackshear *v.* Dekle, 120 Ga. 766, 48 S. E. 311, holding that where, in a suit on a note long past due, defendant pleaded payment, alleging that plaintiff had accepted lumber in satisfaction of a note, such defense was not barred by limitations, although such time may have elapsed that it would be too late to sue for the value of the lumber, or to set up its delivery as a counterclaim.

Kentucky.— Grover *v.* Tingle, 53 S. W. 281, 21 Ky. L. Rep. 885.

New Jersey.— King *v.* King, 9 N. J. Eq. 44.

South Carolina.— Compty *v.* Aiken, 2 Bay 481, holding that a receipt or acquittance of any kind is not affected by the statute of limitations, and may be set-off against a bond.

Vermont.— Tinkham *v.* Smith, 56 Vt. 187.

See 33 Cent. Dig. tit. "Limitation of Actions," § 212.

94. Mott *v.* Fiske, 155 Ind. 597, 58 N. E. 1053; Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837, 61 Nebr. 336, 338, 85 N. W. 285, where the court remarked: "The limitation law may, in a possessory action deprive a suitor of his sword, but of his shield never."

Fraud in conveyance relied upon by plaintiff.— In Wilhite *v.* Hamrick, 92 Ind. 594, it was held that where in an action for the recovery of real estate, defendant answers that the conveyances under which plaintiff claims title were executed for the purpose of hindering, delaying, and defrauding the creditors of the original grantor, a reply that the alleged fraud in such conveyances, if any, was committed more than six years before the commencement of the suit, is bad on demurrer, for the reason that the limitation pleaded is not applicable to matter of defense.

95. *Alabama.*— Conner *v.* Smith, 88 Ala. 300, 7 S. W. 150.

California.— Grant *v.* Burr, 54 Cal. 298.

Connecticut.— Beecher *v.* Baldwin, 55 Conn. 419, 12 Atl. 401, 3 Am. St. Rep. 57.

Illinois.— Brown *v.* Miller, 38 Ill. App. 262; Sherman *v.* Sherman, 36 Ill. App. 482.

Kansas.— Morris *v.* Hulme, 71 Kan. 628, 81 Pac. 169.

Louisiana.— Lastrapes *v.* Rocquet, 23 La. Ann. 68; Nichols *v.* Hause, 2 La. 382; Bushnell *v.* Brown, 4 Mart. N. S. 499; Davenport *v.* Fortier, 3 Mart. N. S. 695; Thompson *v.* Milburn, 1 Mart. N. S. 468.

Minnesota.— Aultman *v.* Torrey, 55 Minn. 492, 57 N. W. 211.

2. Set-Off, Counter-Claim, and Cross Demand.[96] The rule is well recognized that in the absence of statutory provision to the contrary the statute of limitations may be pleaded to a set-off.[97] However, in many jurisdictions the rule under statute is that where defendant pleads a set-off to plaintiff's demand, to which plaintiff replies the statute of limitations, defendant is nevertheless entitled to a set-off, where it was a legal, subsisting claim at the time the right of action accrued to plaintiff on the claim in suit.[98]

Mississippi.— Feld *v.* Coleman, 72 Miss. 545, 17 So. 378.

South Carolina.— Welsh *v.* Usher, Riley Eq. 121.

Texas.— Rosborough *v.* Picton, 12 Tex. Civ. App. 113, 34 S. W. 791, 43 S. W. 1033, holding that a defense of reduced acreage in a land grant may be made at any time to a suit brought for the purchase-money.

United States.— Williams *v.* Neely, 134 Fed. 1, 67 C. C. A. 171.

England.— Ord *v.* Ruspini, 2 Esp. 569.

Compare Plant *v.* Murphy, 5 Ohio Dec. (Reprint) 544, 6 Am. L. Rec. 479.

See 33 Cent. Dig. tit. "Limitation of Actions," § 214.

Recoupment generally see Recoupment, Set-Off, and Counter-Claim.

96. Set-off and counter-claim generally see Recoupment, Set-Off, and Counter-Claim.

Demands barred as set-off or counter-claim in actions by personal representatives see Executors and Administrators, 18 Cyc. 902 *et seq.*

97. *Alabama.*— Washington *v.* Timberlake, 74 Ala. 259; Harwell *v.* Steel, 17 Ala. 372.

Connecticut.— Gorham *v.* Bulkley, 49 Conn. 91. See also Maples *v.* Avery, 6 Conn. 20.

Georgia.— Saulsbury *v.* Iverson, 73 Ga. 733; Finney *v.* Brumby, 64 Ga. 510; Lee *v.* Lee, 31 Ga. 26, 76 Am. Dec. 681, holding moreover that a demand barred by the statute and afterward revived by a new promise is no set-off to an action commenced during the time that the demand was barred.

Kentucky.— Gilchrist *v.* Williams, 3 A. K. Marsh. 235; Williams *v.* Gilchrist, 3 Bibb 49.

Maine.— Nason *v.* McCulloch, 31 Me. 158.

Maryland.— Watkins *v.* Harwood, 2 Gill & J. 307.

Massachusetts.— Tyler *v.* Boyce, 135 Mass. 558.

Mississippi.— See McLeod *v.* Gray, (1888) 4 So. 544.

New Jersey.— Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206.

New York.— Dieffenbach *v.* Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482.

Ohio.— Irwin *v.* Garretson, 1 Cinc. Super. Ct. 533.

Oklahoma.— McClure *v.* Johnson, 10 Okla. 663, 668, 65 Pac. 103.

Pennsylvania.— State Insane Hospital *v.* Philadelphia County, 205 Pa. St. 336, 54 Atl. 1032; Milne's Appeal, 99 Pa. St. 483; Reed *v.* Marshall, 90 Pa. St. 345; Taylor *v.* Gould, 57 Pa. St. 152 (holding that the claims which on their face are barred by the statute of limitations are not admissible in set-off without evidence to take them out of the statute); King *v.* Coulter, 2 Grant 77; Crist *v.* Garner, 2 Penr. & W. 251; Jacks *v.* Moore, 1 Yeates 391; Seitzinger *v.* Alspach, 2 Pa. Cas. 359, 4 Atl. 203; Enterline *v.* Miller, 27 Pa. Super. Ct. 463; Keim *v.* Kaufman, 4 Pa. Dist. 234, 15 Pa. Co. Ct. 539; Hutchinson *v.* Hutchinson, 4 Lanc. L. Rev. 3; Morris *v.* Pott, 1 Leg. Rec. 175.

Texas.— Holliman *v.* Rogers, 6 Tex. 91; Walker *v.* Fearhake, 22 Tex. Civ. App. 61, 52 S. W. 629; Campbell *v.* Park, 11 Tex. Civ. App. 455, 33 S. W. 754.

England.— Hicks *v.* Hicks, 3 East 16.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 214, 215.

Application of statute to counter-claims.— The rule of the text applies to counter-claims, at least where the matter set up by way of counter-claim constitutes, as in the case of set-off, an independent cause of action (McClure *v.* Johnson, 10 Okla. 663, 668, 65 Pac. 103. See also Robinson *v.* Glass, 94 Ind. 211) unless a different rule is provided by statute (Neville *v.* Brock, 91 Ill. App. 140; Folsom *v.* Winch, 63 Iowa 477, 19 N. W. 305). But a different rule has been applied where the facts set up as a counter-claim do not constitute an independent cause of action, having no relation to the cause of action set out in the complaint. Campbell *v.* Hughes, 73 Hun (N. Y.) 14, 25 N. Y. Suppl. 1021, holding that in an action by a partner against his copartner for an accounting, a counter-claim for damages, arising from a breach by plaintiff of the partnership agreement is not an independent cause of action. See also Maders *v.* Lawrence, 49 Hun (N. Y.) 360, 2 N. Y. Suppl. 159.

Where debt is brought on a simple contract to avoid the statute of limitations a set-off of the same nature will be regarded as in debt also, so as to apply the law to both parties alike. Cole *v.* Kerr, Wright (Ohio) 675.

98. Conner *v.* Smith, 88 Ala. 300, 7 So. 150; Folsom *v.* Winch, 63 Iowa 477, 19 N. W. 305; Allen *v.* Maddox, 40 Iowa 124; Sargeant *v.* Sargeant, 18 Vt. 330; Walker *v.* Clements, 12 Q. B. 1046, 69 E. C. L. 1046. See also Neville *v.* Brock, 91 Ill. App. 140 (holding that a defendant may plead a set-off or counter-claim barred by the statute of limitations while held and owned by him to any action the cause of which was owned by plaintiff, or person under whom he claims before such set-off or counter-claim was so barred); Ware *v.* Howley, 68 Iowa 633, 27 N. W. 789.

In Indiana, by statutory enactment, the life of a set-off is equal to that of the original claim, and is only barred when the original claim is barred, although no excess can be re-

P. Applicability of Different Limitations to Same Action or Proceeding. Where different limitations are apparently made applicable by statute to the same action or proceeding, and the longer period has run against the action, defendant may plead and be protected by either statute.[99] Where there is conflict between two periods of limitation, the limitation, it is held, should be based upon the longest term given by statute to bring the suit.[1]

VI. COMPUTATION OF STATUTORY PERIOD.

A. Accrual of Right of Action in General — 1. GENERAL RULES. The statute of limitations begins to run from the time when a complete cause of action accrues, that is, when a suit may be maintained,[2] and not until that time.[3] The running

covered by defendant. Peden *v.* Cavins, 134 Ind. 494, 34 N. E. 7, 39 Am. St. Rep. 276; Warring *v.* Hill, 89 Ind. 497; Armstrong *v.* Caesar, 72 Ind. 280; Fankboner *v.* Fankboner, 20 Ind. 62; Fox *v.* Barker, 14 Ind. 309; Livingood *v.* Livingood, 6 Blackf. 268; Huffman *v.* Wyrick, 5 Ind. App. 183, 31 N. E. 823.

99. Morgan *v.* King, 27 Colo. 539, 63 Pac. 416; Waymire *v.* Waymire, 144 Ind. 329, 43 N. E. 267; Kilcrease *v.* Shelby, 23 Miss. 161.

1. Adlebert College *v.* Toledo, etc., R. Co., 13 Ohio Cir. Ct. 590, 5 Ohio Cir. Dec. 240. See also Sonoma County *v.* Hall, 132 Cal. 589, 62 Pac. 257, 312, 65 Pac. 12, 459; *In re* Pomeroy, (Mont. 1905) 81 Pac. 629; Crum *v.* Johnson, 3 Nebr. (Unoff.) 826, 92 N. W. 1054; Multnomah County *v.* Kelly, 37 Oreg. 1, 60 Pac. 202.

2. *California.*— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152.

Florida.— Bennett *v.* Herring, 1 Fla. 387.

Illinois.— Shelburne *v.* Robinson, 8 Ill. 597.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Raymond *v.* Simonson, 4 Blackf. 77.

Kentucky.— Dobyns *v.* Schoolfield, 10 B. Mon. 311; Banks *v.* Coyle, 2 A. K. Marsh. 564.

Louisiana.— Hardee *v.* Dunn, 13 La. Ann. 161.

Maine.— Brown *v.* Houdlette, 10 Me. 399.

Maryland.— Young *v.* Mackall, 3 Md. Ch. 398.

Minnesota.— Ganser *v.* Ganser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461.

Mississippi.— Johnson *v.* Pyles, 11 Sm. & M. 189.

Missouri.— Gray *v.* Givens, 26 Mo. 291.

Nebraska.— Fenner *v.* Kime, 5 Nebr. (Unoff.) 548, 99 N. W. 483.

New Hampshire.— Odlin *v.* Greenleaf, 3 N. H. 270.

New Jersey.—French *v.* Higgins, 66 N. J. L. 579, 50 Atl. 344; Larason *v.* Lambert, 12 N. J. L. 247.

North Carolina.— Eller *v.* Church, 121 N. C. 269, 28 S. E. 364.

Pennsylvania.— Hamilton *v.* Hamilton, 18 Pa. St. 20, 55 Am. Dec. 585; Hall *v.* Vandegrift, 3 Binn. 374; Jones *v.* Conoway, 4 Yeates 109; Hoskins *v.* Lindsay, 1 Del. Co. 249.

South Carolina.— Smith *v.* Blythewood, Rice 245, 33 Am. Dec. 111.

Tennessee.— Mayfield *v.* Seawell, Cooke 437.

Wisconsin.— Martin *v.* Martin, 108 Wis. 284, 84 N. W. 439, 81 Am. St. Rep. 895.

England.— Coburn *v.* Colledge, [1897] 1 Q. B. 702, 66 L. J. Q. B. 462, 76 L. T. Rep. N. S. 608, 45 Wkly. Rep. 488.

See 33 Cent. Dig. tit. "Limitation of Actions," § 217.

The phrase "cause of action" as used in the statute of limitations means "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court." Coburn *v.* Colledge, [1897] 1 Q. B. 702, 706, 66 L. J. Q. B. 462, 76 L. T. Rep. N. S. 608, 45 Wkly. Rep. 488. And see, generally, 6 Cyc. 705.

Claims against state — special statutory provisions.—Acts (1889), p. 265, § 1, provides that "any person or persons having or claiming to have a money demand against the State . . . arising at law or equity, express or implied, accruing within fifteen years from the time of the commencement of the action, may bring suit against the State therefor." It was held that the limitation relates to the time when the claim arose, not to the time when the right of action accrued, which was when the act was passed; and hence there can be no recovery on a claim arising more than fifteen years before the passage of the act. May *v.* State, 133 Ind. 567, 33 N. E. 352.

3. *Alabama.*— Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Lucas *v.* Thorington, 7 Ala. 605.

Arkansas.— Jett *v.* Hempstead, 25 Ark. 462.

Illinois.— Askew *v.* Springer, 111 Ill. 662; Merchants' Despatch Co. *v.* Topping, 89 Ill. 65; Staninger *v.* Tabor, 103 Ill. App. 330.

Indiana.— Atherton *v.* Williams, 19 Ind. 105.

Iowa.— Owen *v.* Higgins, 113 Iowa 735, 84 N. W. 713; Deming *v.* Haney, 23 Iowa 77.

Louisiana.— Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378; Gueno *v.* Soumastre, 1 La. Ann. 44.

Missouri.— Rabsuhl *v.* Lack, 35 Mo. 316.

Nebraska.— Brown *v.* Silver, (1901) 96 N. W. 281.

New York.— Matter of Purdy, 56 N. Y. App. Div. 544, 67 N. Y. Suppl. 642; Van Nest *v.* Lott, 16 Abb. Pr. 130.

of the statute is not delayed until plaintiff can get sufficient evidence to maintain his action.[4] It has been asserted that when there are two remedies, pursuing either of which a party may have the same relief, and the rights to the two remedies accrue at different times, the statute begins to run from the time when the right to pursue the earlier remedy accrues.[5] But where a party has a right of election to sue in tort or assumpsit, he may in certain cases maintain his action of assumpsit, although his right to maintain an action of tort is barred. And in such a case the tort-feasor cannot set up his own wrong for the purpose of invoking the defense of the statute.[6]

2. When Right Accrues[7] — a. In General. "The accrual of the cause of action" means the right to institute and maintain a suit;[8] and whenever one person may sue another a cause of action has accrued and the statute begins to run.[9] So whether at law or in equity the cause of action arises when and only when the aggrieved party "has the right to apply to the proper tribunals for relief."[10] The statute does not attach to a claim for which there is no right of action, and

South Carolina.— McBee *v.* Loftis, 1 Strobh. Eq. 90, holding that the same rule applies to the presumption arising from lapse of time.

South Dakota.— Brannon *v.* White Lake Tp., 17 S. D. 83, 95 N. W. 284.

Tennessee.— See Graham *v.* Nelson, 5 Humphr. 605.

Texas.— Hardeman County *v.* Foard County, 19 Tex. Civ. App. 212, 47 S. W. 30, 536.

United States.— Miller *v.* Perris Irr. Dist., 85 Fed. 693.

See 33 Cent. Dig. tit. "Limitation of Actions," § 218.

4. Brown *v.* Clingman, 47 La. Ann. 25, 16 So. 564. And see Gale *v.* McDaniel, 72 Cal. 334, 13 Pac. 871.

5. Parmelee *v.* Price, 105 Ill. App. 271. And see Cottrell *v.* Manlove, 58 Kan. 405, 49 Pac. 519; Conklin *v.* Furman, 8 Abb. Pr. N. S. (N. Y.) 161 [*affirmed* in 48 N. Y. 527].

6. Lamb *v.* Clark, 5 Pick. (Mass.) 193; Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487; Moore *v.* Williams, 6 Misc. (N. Y.) 264, 26 N. Y. Suppl. 766; Robertson *v.* Dunn, 87 N. C. 191; McCombs *v.* Guild, 9 Lea (Tenn.) 81; Angell Lim. § 72. *Compare* Reeves *v.* Nye, 28 Nebr. 571, 44 N. W. 736.

Illustration.— In an action by a foreign state to recover on an implied contract on the part of defendants to pay for the support of their idiotic son, defendants cannot set up their own fraud for the purpose of shortening the time within which the action may be brought. People *v.* Ettenson, (Kan. 1899) 56 Pac. 749.

7. See, generally, Actions, 1 Cyc. 739 *et seq.*

8. Larason *v.* Lambert, 12 N. J. L. 247. See also the cases cited *supra*, VI, A, 1.

9. *Arkansas.*— Jett *v.* Hempstead, 25 Ark. 462.

Minnesota.— Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901.

Missouri.— Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403.

New Jersey.— Larason *v.* Lambert, 12 N. J. L. 247.

North Carolina.— The statute of limitations begins to run against a cause as soon as plaintiff, being then under no disability, is at liberty to sue. Eller *v.* Church, 121 N. C. 269, 28 S. E. 364 [*followed* in Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212].

South Carolina.— Smith *v.* Blythewood, Rice 245, 33 Am. Dec. 111.

United States.— See Buntin *v.* Chicago, etc., R. Co., 41 Fed. 744, 747, in which the court said: "Of course, courts and lawyers understand by the cause of action that it is that act or thing which gives a party the right to sue; the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy. The cause of action, in other words, is the act done by a defendant, by which the plaintiff is injured, and for which the law undertakes to give him redress."

See 33 Cent. Dig. tit. "Limitation of Actions," § 218.

Dissolution of corporation.— Under Mo. Rev. St. (1889) § 2513, providing that on the dissolution of any corporation the president, directors, or managers shall be trustees to wind up its affairs, and sue for debts, etc., a cause of action in favor of such trustees arises on the dissolution of the corporation, and the statute of limitations then begins to run against the trustee's right of action. Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403.

The right to commence an action exists the moment the cause of action accrues, and the cause of action cannot be said to have accrued until the right to bring an action upon it exists. Weiser *v.* McDowell, 93 Iowa 772, 61 N. W. 1094. And see Ware *v.* State, 74 Ind. 181; Miller *v.* Perris Irr. Dist., 85 Fed. 693; Angell Lim. § 42.

Action to recover compensation as receiver. — The statute does not begin to run against a receiver's right of action to recover compensation from the party at whose instance he was appointed, until his account is settled and allowed by the court. Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 117. See, generally, Receivers.

10. *Indiana.*— Atherton *v.* Williams, 19 Ind. 105.

does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained.[11] The true test therefore to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result. The fact that he might previously have brought a premature or groundless action is immaterial.[12]

b. Right Dependent Upon Future Event. Where a party's right depends upon the happening of a certain event in the future, the cause of action accrues and the statute begins to run only from the time when the event happens.[13] This rule applies where a right of action on a barred debt is revived by a new promise,[14] which is to be fulfilled on the happening of some contingency [15] or the occurrence of some other future event.[16]

3. Necessity For Persons Capable of Suing and Being Sued.[17] The statute of limitations does not begin to run until there are in being a person capable of suing and one capable of being sued.[18]

Minnesota.— Gauser *v.* Gauser, 83 Minn. 199, 86 N. W. 18, 85 Am. St. Rep. 461.

New Jersey.— Culver *v.* Culver, 31 N. J. Eq. 448.

Washington.— Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 173, 70 Pac. 266.

England.— Whalley *v.* Whalley, 3 Bligh 1, 4 Eng. Reprint 506, 1 Meriv. 436, 35 Eng. Reprint 734; Angell Lim. § 42 [*citing* 2 Story Eq. Jur. § 1521*a*].

11. Com. *v.* McGowan, 4 Bibb (Ky.) 62, 7 Am. Dec. 737; Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378; Cooper *v.* Cooper, 61 Miss. 676, 696, where the court said: "The statute never runs except against a cause of action, and a cause of action implies not only the existence of a right but such a denial of it, either actual or constructive, as puts the party entitled under a necessity to act if he would preserve it."

12. Walden *v.* Crafts, 2 Abb. Pr. (N. Y.) 301, 305; Horner *v.* Speed, 2 Patt. & H. (Va.) 616. And see the cases cited in the preceding note.

A right of action to recover a legacy does not accrue, and the statute of limitations does not begin to run, until the legacy becomes payable according to the terms of the will. Gilbert *v.* Taylor, 148 N. Y. 298, 42 N. E. 713 [*modifying* 76 Hun 92, 27 N. Y. Suppl. 828]. And see, generally, Wills.

13. *Georgia.*— Allen *v.* Stevens, 102 Ga. 596, 29 S. E. 443.

Iowa.— Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506.

New Jersey.— Culver *v.* Culver, 31 N. J. Eq. 448.

New York.— Gilbert *v.* Taylor, 148 N. Y. 298, 42 N. E. 713 [*modifying* 76 Hun 92, 27 N. Y. Suppl. 828], action to recover a legacy payable at the death of a life beneficiary.

Washington.— McClaine *v.* Fairchild, 23 Wash. 758, 63 Pac. 517.

England.— Atty.-Gen. *v.* Perse, 2 Dr. & War. 67.

Illustration.— Where a party's right to recover a greater or less fractional part of a sum of money in the hands of another depended upon whether a widow did or did not marry before she died, he was not bound to sue until she either married or died, and therefore the statute of limitations did not begin to run against him until the happening of one or the other of these events. Allen *v.* Stephens, 102 Ga. 596, 29 S. E. 443.

Promise to be performed on condition or contingency see *infra*, VI, B, 1, g.

Usufruct.— As against an action for an account from an usufructuary of the property or things which he has held in usufruct, prescription is computed from the time when the right to demand the account accrued, which is the date of the termination of the usufruct. Cochran *v.* Violet, 38 La. Ann. 525 [*followed* in Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539].

Reduction of excessive donations.— As against an action for forced heirs for the reduction of excessive donations by their ancestor, prescription begins to run only from the ancestor's death. Perrault *v.* Perrault, 32 La. Ann. 635.

14. See *infra*, VII.

15. Scott *v.* Thornton, 104 Tenn. 547, 58 S. W. 236, holding that where the debtor promised to pay when he should be able to do so, the statute did not begin to run until his ability to pay was shown.

16. Perkins *v.* Seigfried, 97 Va. 444, 34 S. E. 64, where testator acknowledged a debt in his will and directed his executor to pay it on the death of testator's sister.

17. In actions by and against executors and administrators see Executors and Administrators, 18 Cyc. 915 *et seq.*, 929 *et seq.*

18. *Alabama.*— Hopper *v.* Steele, 18 Ala. 828.

Alaska.— Van Schuyler *v.* Hartman, 1 Alaska 431.

Kentucky.— Com. *v.* McGowan, 4 Bibb 62, 7 Am. Dec. 737.

Maryland.— Ruff *v.* Bull, 7 Harr. & J. 14, 16 Am. Dec. 290.

New York.— Dunning *v.* Ocean Nat. Bank, 6 Lans. 296 [*affirmed* in 61 N. Y. 497, 19 Am. Rep. 293].

North Carolina.— Grant *v.* Hughes, 94 N. C. 231.

Tennessee.— Glass *v.* Williams, 16 Lea 697, holding that the statute does not begin

4. Provision For Payment Out of Particular Fund or in Particular Manner. It is a general rule that where payment is provided for out of a particular fund or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided or the method pursued.[19]

B. Accrual of Particular Rights of Action[20] — 1. On Contracts in General — a. General Rule. In accordance with the general rule stated above[21] the statute of limitations begins to run against a party to a contract when his right of action on the contract accrues; that is, when the contract is broken by the other party;[22] but not before that time.[23]

to run until there is a proper party against whom process can issue.

England.— Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118.

See 33 Cent. Dig. tit. "Limitation of Actions," § 219.

But see Tynan *v.* Walker, 35 Cal. 634, 95 Am. Dec. 152.

Estoppel of administrator.— Where an administrator makes an unauthorized sale of the assets of the estate, and he is estopped to deny its validity during his term of office, there being no right of action in any one to recover the property, the statute of limitations does not run until the appointment of his successor. Hopper *v.* Steele, 18 Ala. 828. See, generally, Executors and Administrators, 18 Cyc. 915 *et seq.*

19. Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580; Davis *v.* Lincoln County, 23 Nev. 262, 45 Pac. 982; Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766. And see Bibb County *v.* Orr, 12 Ga. 137.

As applied to payment of principal or interest of bonds see *infra*, VI, B, 11, b, (II), (C).

Where claims against a city are by ordinance made payable out of certain funds, prescription does not run until there are funds available. Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378. See also, generally, Municipal Corporations.

20. It is obvious from the preceding text that when it is determined at what time a particular right of action accrues, the question whether the statute of limitations has begun to run is at once solved unless the case falls within some exception to be discussed hereafter. In this connection the specific titles in this work should be consulted, for the title in hand deals only with decisions in which the statute of limitations is directly involved, whereas the time when particular causes of action accrue presents a wider question and is dealt with in many decisions not involving the statute.

21. See *supra*, VI, A, 1.

22. *Florida.*— Bennett *v.* Herring, 1 Fla. 387.

Kansas.— Atchinson, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051, (1902) 70 Pac. 933.

Kentucky.— Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428; Payne *v.* Smith, 7 J. J. Marsh 500.

Maine.— Brown *v.* Houdlette, 10 Me. 399.

Nebraska.— Cummins *v.* Tibbetts, 58 Nebr. 318, 78 N. W. 617; Reeves *v.* Nye, 28 Nebr. 571, 44 N. W. 736.

New York.— Campbell *v.* Culver, 56 N. Y. App. Div. 591, 67 N. Y. Suppl. 469; Compton *v.* Elliott, 48 N. Y. Super. Ct. 211.

Pennsylvania.— Campbell *v.* Boggs, 48 Pa. St. 524; Patterson *v.* Colmer, 4 Pa. Cas. 138, 6 Atl. 758.

South Carolina.— Sams *v.* Rhett, 2 McMull. 171.

Texas.— International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526; Walling *v.* Wheeler, 39 Tex. 480.

Virginia.— McAlexander *v.* Montgomery, 4 Leigh 61.

England.— East India Co. *v.* Paul, 14 Jur. 253, 7 Moore P. C. 85, 1 Eng. L. & Eq. 44, 13 Eng. Reprint 811.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 240, 245.

Agreement to pay interest on antecedent debt.— Where an agreement is made to pay interest on a preëxisting debt from the time the debt became due up to the time when a note was executed for the principal, the date of the execution of the note is the time when the statute begins to run against the agreement to pay interest. Prevo *v.* Lathrop, 2 Ill. 305.

Promise to pay for property converted.— Where defendant without permission took personal property belonging to plaintiff, and subsequently promised to pay him for it, the statute began to run against plaintiff's right of action in assumpsit at the time when the promise was made. Farnham *v.* Thomas, 56 Vt. 33.

Where a landlord wrongfully evicts a tenant holding under a lease, completely ending the tenant's enjoyment of the leased premises, limitations against an action for the breach run from the date of the eviction. Trube *v.* Montgomery, 7 Tex. Civ. App. 557, 27 S. W. 19. See Landlord and Tenant.

23. *Connecticut.*— See Baxter *v.* Gay, 14 Conn. 119.

Indiana.— Atherton *v.* Williams, 19 Ind. 105; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

Maine.— Hale *v.* Cushman, 96 Me. 148, 51 Atl. 874.

Minnesota.— Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614.

Missouri.— Braul *v.* Howard, 39 Mo. 21 (stipulation that each party to a sale should select an appraiser); Rabsuhl *v.* Lack, 35 Mo. 316.

b. Before Substantial Damage Results — (i) *In General.* Under the rule that an action for a breach of contract may be begun before substantial damage has been sustained,[24] a right of action accrues and the statute begins to run at the time the contract is broken, not at the time when actual damage results or is ascertained;[25] nor does the subsequent accrual of additional damages resulting from the same breach afford a new cause of action so as to create a new period of limitation.[26] Where the action is based on the breach of an implied undertaking to use care and skill in the performance of services, the form of the action, whether case or assumpsit, does not vary the foregoing rule.[27]

(ii) *Promise to Pay Debt of Promisee.* Where a contract is not one of indemnity,[28] but is for the payment of an existing debt of the promisee to a third person, the obligation of the promisor is to pay the debt when due and not when the promisee is damnified; therefore the statute runs from the date of the matu-

New York.— See Barnes *v.* Ryan, 66 Hun 170, 21 N. Y. Suppl. 127.

North Carolina.— Lane *v.* Wingate, 25 N. C. 326.

Washington.— Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117.

England.— Wittersheim *v.* Carlisle, 1 H. Bl. 631.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 240, 245.

Promise to pay debt discharged in bankruptcy.— It has been held that where there is a new promise to pay a debt discharged in bankruptcy, it is no bar to a suit brought on such new promise within the statutory period after the making of it that more than five years have elapsed since the original cause of action, or since the discharge in bankruptcy. Horner *v.* Speed, 2 Patt. & H. (Va.) 616.

Payment to agent; principal's right to affirm or repudiate.— Where payment *sub modo* of an admitted indebtedness has in fact been made to an agent in such manner that the principal is entitled to affirm or repudiate it upon learning the facts, the statute does not begin to run in the debtor's favor until the facts are known or the payment disaffirmed. The legal presumption of payment, growing out of the lapse of time which the statute raises is repelled by defendant's own showing that the payment relied on was such that plaintiff had the right to repudiate it when the facts became known to him. Runyon *v.* Snell, 116 Ind. 164, 18 N. E. 522, 9 Am. St. Rep. 839.

Action to set aside deed given in consideration of executory agreement.— Where the consideration for a deed is an executory undertaking by the grantee which is afterward broken by him, the statute does not begin to run against the grantor's right of action to set the deed aside until the breach of the grantee's undertaking. Gibson *v.* Fifer, 21 Tex. 260.

24. See Actions, 1 Cyc. 660; Contracts, 9 Cyc. 635 *et seq.*, 698.

25. *Maine.*— Manning *v.* Perkins, 86 Me. 419, 29 Atl. 1114.

Minnesota.— Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901.

Nebraska.— O'Connor *v.* Ætna L. Ins. Co., 67 Nebr. 122, 93 N. W. 137, 99 N. W. 845.

New York.— Crowley *v.* Johnston, 96 N. Y. App. Div. 319, 89 N. Y. Suppl. 258; Campbell *v.* Culver, 56 N. Y. App. Div. 591, 67 N. Y. Suppl. 469; Argall *v.* Bryant, 1 Sandf. 98; Compton *v.* Heissenbuttel, 2 Misc. 340, 21 N. Y. Suppl. 965 [*reversing* 1 Misc. 81, 20 N. Y. Suppl. 402]; Utica Bank *v.* Childs, 6 Cow. 238.

North Carolina.— Baucum *v.* Streater, 50 N. C. 70.

Pennsylvania.— Campbell *v.* Boggs, 48 Pa. St. 524; Downey *v.* Garard, 24 Pa. St. 52; Rankin *v.* Woodworth, 3 Penr. & W. 48.

Texas.— See Trube *v.* Montgomery, 7 Tex. Civ. App. 557, 27 S. W. 19.

United States.— Wilcox *v.* Plummer, 4 Pet. 172, 7 L. ed. 821.

England.— Battley *v.* Faulkner, 3 B. & Ald. 288, 22 Rev. Rep. 390, 5 E. C. L. 172; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237.

Canada.— Robertson *v.* Lovett, 11 Nova Scotia 250. See also Archambault *v.* St. Charles de Lachenaie, 12 Quebec K. B. 349.

But see Douglas *v.* Elkins, 28 N. H. 26.

26. Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237.

A statute providing that successive actions may be maintained on a contract whenever a new cause of action arises thereon does not apply to a case where the only matter claimed as constituting a new cause of action is the accrual of additional damages from the original breach of contract; and so the period of limitation for an action for that breach is not extended. Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381.

27. Argall *v.* Bryant, 1 Sandf. (N. Y.) 98; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237. And see *infra*, VI, B, 15, a, text and note 68.

Breach of duty by attorney see *infra*, VI, B, 3, c.

28. As to indemnity contracts see *infra*, VI, B, 6.

rity of the debt.[29] Thus the assumption of payment of a mortgage by a grantee of the mortgaged premises is not a mere contract of indemnity to save the grantor harmless from the mortgage, but is a direct personal undertaking to pay;[30] and the cause of action accrues and the statute begins to run when the mortgage debt falls due.[31] But if the debt is overdue when assumed, the statute begins to run from the time the contract of assumption is made.[32]

c. Renunciation Pending Performance. According to the rule that where one party to an executory contract renounces it before full performance has been made by the other, the latter is not bound to continue to perform but may sue at once for the breach,[33] it is held that the statute begins to run from the time of the renunciation.[34] But in order for this rule to apply the party to whom the renunciation is made must accept it as a breach and treat the contract as at an end.[35]

d. When Time of Performance Fixed. If the period for performance of the contract is fixed, the right of action accrues and the statute begins to run at the expiration of that period, not before.[36]

29. Patterson *v.* Colmer, 4 Pa. Cas. 138, 6 Atl. 758; Crofoot *v.* Moore, 4 Vt. 204. And see Compton *v.* Heissenbuttel, 2 Misc. (N. Y.) 340, 21 N. Y. Suppl. 965 [*reversing* 1 Misc. 81, 20 N. Y. Suppl. 402]; Joiner *v.* Perry, 1 Strobh. (S. C.) 76. *Compare* Sims *v.* Goudelock, 6 Rich. (S. C.) 100; Bexar Bldg., etc., Assoc. *v.* Newman, (Tex. Civ. App. 1893) 25 S. W. 461.

A contract between a firm and a retiring partner, providing that the firm shall pay existing, ascertained liabilities of the partnership, is not a contract of indemnity on which no recovery can be had until damage has been sustained, but is an undertaking to pay a sum certain and is broken so as to give the retired partner a cause of action thereon as soon as the firm fails to pay any of such liabilities when payment is lawfully demanded. Hence if a creditor of the old firm recovers judgment against the retired partner his right of action on the contract accrues, and the statute of limitations begins to run, at the time the judgment is rendered. Rowsey *v.* Lynch, 61 Mo. 560. See also, generally, PARTNERSHIP.

30. Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Patterson *v.* Colmer, 4 Pa. Cas. 138, 6 Atl. 758. See also, generally, INDEMNITY; MORTGAGES.

31. Patterson *v.* Colmer, 4 Pa. Cas. 138, 6 Atl. 758. See also Fender *v.* Haseltine, 106 Mo. App. 28, 79 S. W. 1018; and, generally, MORTGAGES.

Not before acceptance of deed.— Where the contract of assumption is made by the grantee's acceptance of a deed containing a provision that he assume the mortgage the statute cannot of course begin to run before the deed is accepted. Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765.

32. Robertson *v.* Stuhlmiller, 93 Iowa 326, 61 N. W. 986. See also Bement *v.* Ohio Valley Banking, etc., Co., 99 Ky. 109, 35 S. W. 139, 18 Ky. L. Rep. 37, 59 Am. St. Rep. 445.

33. See CONTRACTS, 9 Cyc. 635 *et seq.*, 698.

34. Boncsteel *v.* Van Etten, 20 Hun (N. Y.) 468; Henry *v.* Rowell, 31 Misc. (N. Y.) 384, 64 N. Y. Suppl. 488 [*affirmed* in 63 N. Y. App. Div. 620, 71 N. Y. Suppl. 1137]; Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436; Shimmins *v.* U. S., 10 Ct. Cl. 465. But *compare* Brand *v.* Donaldsonville, 28 La. Ann. 558.

35. Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. 83, 8 C. C. A. 14.

36. *California.*— Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39.

Georgia.— Rounsaville *v.* Wagner, 90 Ga. 29, 15 S. E. 780.

Iowa.— Bonbright *v.* Bonbright, 123 Iowa 305, 98 N. W. 784.

Kentucky.— Weber *v.* Weber, 76 S. W. 507, 25 Ky. L. Rep. 908.

Minnesota.— Pinch *v.* McCulloch, 72 Minn. 71, 74 N. W. 897.

New York.— McCotter *v.* Lawrence, 4 Hun 107, 6 Thomps. & C. 392.

Pennsylvania.— Rankin *v.* Woodworth, 3 Penr. & W. 48. And see Schotte *v.* Meredith, 138 Pa. St. 165, 20 Atl. 936.

South Dakota.— Meyer *v.* Minnehaha County School Dist. No. 31, 4 S. D. 420, 57 N. W. 68, where the time had been extended.

Texas.— Walling *v.* Wheeler, 39 Tex. 480. See also Darragh *v.* O'Connor, (Civ. App. 1902) 69 S. W. 644.

Wisconsin.—Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550.

England.—Wittersheim *v.* Carlisle, 1 H. Bl. 631; Sawkill *v.* Warman, 10 Mod. 104.

Promise to pay note when due.—Where one not a party to a note divides with the maker the consideration for which it was given, promising the maker to pay his half of the amount when the note becomes due, the statute will begin to run in bar of a suit for the breach of this promise as soon as the note becomes due and is unpaid; nor will its subsequent payment in full by the maker raise an implied assumpsit to him, by the party who made such promise, for money paid and advanced. Joiner *v.* Perry, 1 Strobh. (S. C.) 76.

Mutual dependent covenants; plaintiff's failure to perform.— Plaintiff and defendant entered into mutual and dependent covenants that plaintiff should execute a conveyance to defendant at a certain time and that defendant at the same time should execute certain notes or bonds for the purchase-price. It ap-

e. When Time of Performance Not Fixed—(i) *In General.* It is a general rule that where no time is fixed for performance by the promisor he must perform within a reasonable time, and the statute of limitations begins to run at the expiration of such time.[37] What constitutes a reasonable time depends upon the circumstances of the particular case[38] and is a question for the jury.[39] But in the absence of any agreement to the contrary money contracted to be lent on notes and mortgage is due and payable to the mortgagor upon delivery of the notes and mortgage to the mortgagee, and the statute then begins to run against the mortgagor's right of action to recover the money.[40]

(ii) *For Repayment of Loan.* But where no time is fixed for the repayment of money lent the obligation to pay arises at once and the statute immediately begins to run,[41] as in the case of money payable on demand.[42]

f. Promise to Pay on Demand.[43] A loan of money payable on demand creates a present debt, and the statute of limitation begins to run against the lender from the date of the loan.[44] But the parties may so frame their contract as to make a

peared that defendant had not executed the notes or bonds at the time specified but that plaintiff had not executed the conveyance at that time, although he had done so later and the conveyance had been accepted by defendant. In an action by plaintiff to recover on defendant's covenant to execute the notes or bonds at the time stipulated, it was held that the statute began to run against him at the time when the notes or bonds were to have been given, and that defendant's subsequent acceptance of the conveyance did not constitute a waiver of the covenant so as to postpone the running of the statute until the date of the acceptance, plaintiff not having averred that he was ready and willing and offered to convey at the stipulated time or that he was prevented from so doing by defendant, and there being no other evidence of waiver. Davis *v.* McMullen, 86 Va. 256, 9 S. E. 1095, in which the court said that if plaintiff desired to rely upon the fact that his cause of action did not accrue until the conveyance was accepted by defendant he should have so declared in the proper form of action or by filing a special replication to the plea of the statute.

37. *Iowa.*— Muscatine *v.* Chicago, etc., R. Co., 79 Iowa 645, 44 N. W. 909.

New Hampshire.— Douglas *v.* Elkins, 28 N. H. 26.

New York.— See Howes *v.* Woodruff, 21 Wend. 640. *Compare* Bogardus *v.* Young, 64 Hun 398, 19 N. Y. Suppl. 885.

Pennsylvania.— Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364.

South Carolina.— Stroman *v.* O'Cain, 13 S. C. 100. *Compare* Wilson *v.* Wilson, McMull. Eq. 329.

Texas.— Phillips *v.* Holman, 26 Tex. 276; Evans *v.* Hardeman, 15 Tex. 480. See also International, etc., R. Co. *v.* Pape, 73 Tex. 501, 11 S. W. 526.

England.— Crawford *v.* Crawford, 16 Wkly. Rep. 411.

See 33 Cent. Dig. tit. "Limitation of Actions," § 242.

A contract to marry is within the rule of the text making the statute begin to run after a reasonable time. Blackburn *v.* Mann, 85 Ill. 222. And see *infra*, VI, B, 12, c.

38. Moore *v.* Greene County, 87 N. C. 209; Evans *v.* Hardeman, 15 Tex. 480.

39. Evans *v.* Hardeman, 15 Tex. 480. *Compare* Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364, holding that in the particular case presented the question was one of law for the court.

40. McBride *v.* Lombard Mortg. Co., 44 Kan. 351, 24 Pac. 428. And see, generally, Mortgages.

41. *Alabama.*— Owen *v.* Henderson, 7 Ala. 641.

California.— Dorland *v.* Dorland, 66 Cal. 189, 5 Pac. 77. See also Santa Rosa Nat. Bank *v.* Barnett, 125 Cal. 407, 58 Pac. 85, overdrafts by depositor in bank.

Georgia.— Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. *Compare* Poole *v.* Trimble, 102 Ga. 773, 29 S. E. 871, holding that the debt becomes due in a reasonable time or upon demand made, and the statute will then begin to run.

Michigan.— Howard *v.* Pontiac Soc. First Presb. Church, 51 Mich. 125, 16 N. W. 307.

New Hampshire.— See Clay *v.* McKeen, 69 N. H. 86, 36 Atl. 877.

New York.— See Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285 [*affirming* 4 N. Y. Suppl. 177]; Bogardus *v.* Young, 64 Hun 398, 19 N. Y. Suppl. 885; Ray *v.* Ray, 24 Misc. 155, 53 N. Y. Suppl. 300; Anthony *v.* Herzberg, 2 N. Y. City Ct. 166 note.

Wisconsin.— See Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614.

See 33 Cent. Dig. tit. "Limitation of Actions," § 242.

42. See *infra*, VI, B, 1, f.

43. Demand as a condition precedent generally see *infra*, VI, C, 2, b.

Notes payable on demand see *infra*, VI, B, 11, a, (II), (A).

Deposit payable on demand see *infra*, VI, B, 10.

44. *Alabama.*— Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24.

California.— *In re* Galvin, Myr. Prob. 82.

Iowa.— Hall *v.* Letts, 21 Iowa 596.

Maine.—Ware *v.* Hewey, 57 Me. 391, 99 Am. Dec. 780, a loan "to be paid when called for."

preliminary demand a prerequisite to a right of action, and in such a case the statute does not begin to run until payment is demanded and refused.[45]

g. Promise to Be Performed on Condition or Contingency[46] — (i) *In General.* Where a contract provides that performance by the promisor shall take place on the happening of a certain event or the fulfilment of a certain condition, the cause of action accrues and the statute begins to run when the event occurs or the condition is complied with without performance of the promise being made,[47] not before that time.[48] Thus in case of a promise to repay money which the promisor requests the promisee to pay to a third person, the cause of action arises and the statute begins to run when the money is paid, and not when the promise

Maryland.— Fells Point Sav. Inst. *v.* Weldon, 18 Md. 320, 81 Am. Dec. 603; Darnall *v.* Magruder, 1 Harr. & G. 439, promise to pay "when called on to do so."

Michigan.— See Kimball *v.* Kimball, 16 Mich. 211.

Minnesota.— McArdle *v.* McArdle, 12 Minn. 98.

New York.— Payne *v.* Gardiner, 29 N. Y. 146 [*affirming* 39 Barb. 634], per Mullin, J. And see Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285 [*affirming* 4 N. Y. Suppl. 177].

Texas.— Cook *v.* Cook, 19 Tex. 434.

England.— *In re* Brown, [1893] 2 Ch. 300 (per Chitty, J.); Jackson *v.* Ogg, 1 Johns. 397, 5 Jur. N. S. 976, 7 Wkly. Rep. 730, 70 Eng. Reprint 476. *Compare* Knox *v.* Gye, 16 L. T. Rep. N. S. 76, 15 Wkly. Rep. 628.

See 33 Cent. Dig. tit. "Limitation of Actions," § 243.

There is no distinction between the law merchant and the common law as regards money payable on demand. *In re* Brown, [1893] 2 Ch. 300, 304, per Chitty, J.

45. Brown *v.* Brown, 28 Minn. 501, 11 N. W. 64.

46. See, generally, COMMERCIAL PAPER, 7 Cyc. 855.

47. *California.*—Leonard *v.* Leonard, (1902) 70 Pac. 1071.

Indiana.— Simons *v.* Beaver, 16 Ind. App. 492, 43 N. E. 972, 45 N. E. 673.

Kansas.— Patmor *v.* Rombauer, 46 Kan. 409, 26 Pac. 691.

Maine.— See Smith *v.* Fiske, 31 Me. 512.

Nevada.— See Jones *v.* Powning, 25 Nev. 399, 60 Pac. 833.

New York.— Compton *v.* Elliott, 48 N. Y. Super. Ct. 211.

North Carolina.— Baines *v.* Williams, 25 N. C. 481.

South Carolina.— Moore *v.* Caldwell, 8 Rich. Eq. 22.

Texas.— Tinsley *v.* Ardrey, 26 Tex. Civ. App. 561, 64 S. W. 803.

Vermont.— See Harvey *v.* National L. Ins. Co., 60 Vt. 209, 14 Atl. 7.

Washington.— McClaine *v.* Fairchild, 23 Wash. 758, 63 Pac. 517.

See 33 Cent. Dig. tit. "Limitation of Actions," § 241.

Agreement to reassign security on payment. — The statute of limitations begins to run against an action for damages for breach of an agreement to reassign a judgment assigned as collateral security, from the time of the payment of the debt. Wamhold *v.* Hoover, 110 Pa. St. 9, 20 Atl. 404. *Compare* McCallam *v.* Carswell, 75 Ga. 25.

Where a note provides for attorney's fees in case of non-payment at maturity, the claim for the fees accrues when the note matures and is unpaid, and the statute runs from that date. Wicks-Nease *v.* James, 31 Tex. Civ. App. 151, 72 S. W. 87.

48. *Alabama.*— Powell *v.* Jones, 72 Ala. 392.

California.—Ryer *v.* Stockwell, 14 Cal. 134, 73 Am. Dec. 634, holding that an offer of a reward for evidence that will lead to the arrest and conviction of a criminal is not payable until his conviction and that until conviction the statute does not begin to run. See also Melone *v.* Ruffino, 129 Cal. 514, 62 Pac. 93, 79 Am. St. Rep. 127.

District of Columbia.—Ross *v.* Fickling, 11 App. Cas. 442.

Indiana.— See Parker *v.* Siple, 76 Ind. 345.

Iowa.— Stevenson *v.* Robertson, 55 Iowa 689, 8 N. W. 661. And see Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506.

Kansas.— See Tipton *v.* Warner, 47 Kan. 606, 28 Pac. 712, where it was held under the terms of the contract that defendant was not in default until a certain election was made by plaintiff and that the statute did not begin to run until that time.

Kentucky.— Dixon *v.* Campbell, 3 Dana 603, where a subsequent agreement superseding the original contract added the contingency.

Louisiana.— Stewart *v.* Marston, 12 La. Ann. 356; Gueno *v.* Soumastre, 1 La. Ann. 44.

Minnesota.— Johnson *v.* Gilfillan, 8 Minn. 395.

Montana.— Noyes *v.* Young, 32 Mont. 226, 79 Pac. 1063.

New Hampshire.—Clay *v.* McKeen, 69 N. H. 86, 36 Atl. 877.

New Jersey.— Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660. And see Berry *v.* Doremus, 30 N. J. L. 399.

New York.— Raegener *v.* Medicus, 32 Misc. 591, 66 N. Y. Suppl. 460. And see Singleton *v.* Smith, 2 N. Y. St. 173.

North Carolina.— See Arrington *v.* Rowland, 97 N. C. 127, 1 S. E. 555.

Pennsylvania.— Keller *v.* Rhoads, 39 Pa. St. 513, 80 Am. Dec. 539; Pittsburgh, etc., R. Co. *v.* Plummer, 37 Pa. St. 413.

South Carolina.— Thompson *v.* Gordon, 3

is made.[49] So where the contract provides that the promisor shall pay money to the promisee when the same shall be collected, the statute begins to run from the time of collecting.[50] The case must be such, however, that the right of action is suspended until the happening of the contingency, else the running of the statute will not be postponed.[51]

(II) *WHERE TIME NOT FIXED.* Where a contract provides for the payment of money on a condition but fixes no time for payment or for performance of the condition, the money becomes payable and the statute begins to run at the expiration of a reasonable time for the performance of the condition.[52] What is a

Strobh. 196, promise to pay on death of third person.

Tennessee.— Menees *v.* Johnson, 12 Lea 561.

Texas.— National Cotton-Oil Co. *v.* Taylor, (Civ. App. 1898) 45 S. W. 478.

Vermont.— Dwight *v.* Eastman, 62 Vt. 398, 20 Atl. 594.

Virginia.— Bowles *v.* Elmore, 7 Gratt. 385.

Wisconsin.—Pinkum *v.* Eau Claire, 81 Wis. 301, 51 N. W. 550.

England.— Fenton *v.* Emblers, 3 Burr. 1278, 1 W. Bl. 353; Atty.-Gen. *v.* Perse, 2 Dr. & War. 67; Shutford *v.* Borough, Godb. 437; Savage *v.* Aldren, 2 Stark. 232, 19 Rev. Rep. 707, 3 E. C. L. 390.

See 33 Cent. Dig. tit. "Limitation of Actions," § 241.

Contract to share expenses of suit.—Where A consents to pay the expenses of a lawsuit in consideration of the promise of B to share such expenses "when ascertained," A has no cause of action until he pays the expenses and until such payment the statute does not begin to run against him. Dorwin *v.* Smith, 35 Vt. 69. See also Carter *v.* Carter, 28 Ill. App. 340.

Subscription to secure payment of bonds.— The breach of a subscription for corporate stock intended to secure the payment of several series of bonds of the corporation occurs on non-payment of the bonds first maturing, and prescription does not begin to run until that time. Haynes *v.* Wall, 13 La. Ann. 258.

Judgment as contingency.— Plaintiff having an account against A assigned it to defendant to be used by him as a set-off or counter-claim, in an action about to be commenced against him by A, under an agreement to pay plaintiff whatever amount should be allowed thereon in such action. Judgment in the action was entered on the report of a referee, allowing a certain amount on the assigned claim, but the judgment was afterward reversed and a new trial ordered, pending which the case was settled by the parties. An action was afterward brought to recover from defendant the amount allowed by the referee on the assigned claim. It was held that the statute of limitations did not commence to run, under the agreement, until the entry of judgment on the referee's report. It was also held that the subsequent reversal of the judgment did not affect plaintiff's right of action, which had then become vested. Chaplin *v.* Wilkinson, 62 Barb. (N. Y.) 46.

Contract of heir apparent to assign expectancy.— No cause of action arises on a contract of an heir apparent to assign his expectancy until the death of his ancestor, and the statute does not run until the death occurs. Clendening *v.* Wyatt, 54 Kan. 523, 38 Pac. 792, 33 L. R. A. 278.

49. Perkins *v.* Littlefield, 5 Allen (Mass.) 370; Stover *v.* Flack, 30 N. Y. 64 [*affirming* 41 Barb. 162], where an agreement between S and F provided that S should purchase corporate stock on their joint account but in his own name, and after S had subscribed for the stock the corporation became insolvent so that S was obliged to pay a sum equal to the value of the stock by virtue of his liability as stock-holder; and it was held that F's liability for his share of the amount so paid did not accrue until the payment was made. And see Leonard *v.* Leonard, (Cal. 1902) 70 Pac. 1071; Guill *v.* Guill, 60 Ga. 446.

50. *Alabama.*— Powell *v.* Jones, 72 Ala. 392.

District of Columbia.— Jackson *v.* Combs, 7 Mackey 608, 1 L. R. A. 742.

Indiana.— See Walker *v.* Larkin, 127 Ind. 100, 26 N. E. 684.

Missouri.— Alexander *v.* Clark, 83 Mo. 481.

Nebraska.— See Aultman *v.* Martin, 49 Nebr. 103, 68 N. W. 340.

New York.— Compton *v.* Elliott, 48 N. Y. Super. Ct. 211, holding that a demand is not necessary to set the statute in motion.

North Carolina.— Sprague *v.* Bond, 108 N. C. 382, 13 S. E. 143, where the contract provided that payment should be made out of the proceeds of certain land when the land should be sold.

Virginia.— Scott *v.* Osborne, 2 Munf. 413.

Collection by agent or attorney see *infra*, VI, B, 3, c, text and notes 22, 23.

Collection of mortgage.— A suit on a note payable when a certain mortgage held by the maker shall be collected must be brought within the statutory period after the mortgagee enters into possession of the mortgaged premises by virtue of the foreclosure so that his title becomes absolute. Morgan *v.* Plumb, 9 Wend. (N. Y.) 287.

51. Motley *v.* Montgomery, 2 Bailey (S. C.) 544.

52. Doe *v.* Thompson, 22 N. H. 217; Moore *v.* Greene County, 87 N. C. 209. And see Gennings *v.* Norton, 35 Me. 308. But *compare* Wilson *v.* Wilson, McMull. Eq. (S. C.) 329, in which a covenant for payment of money fixed no time for payment, and provided for a reference to arbitration in case of disagreement as to the amount, and it was held that the statute of limitations operated

reasonable time in such a case cannot be determined according to any precise rule but depends upon the particular circumstances involved.[53]

(III) *Where Event Has Already Happened.* If, however, when the contract is made the event has already happened the right of action accrues at once and the statute then begins to run.[54]

(IV) *Death of Promisor as Contingency*—(A) *In General.* Where a contract is so framed that a right of action does not accrue to the promisee until the death of the promisor, the statute does not begin to run until that event happens.[55] Thus where a contract for services provides for compensation to be paid after the death of the employer or out of his estate after his death, the statute of limitations does not begin to run against the employee's claim until the employer dies, unless the latter in his lifetime commits an actionable breach of the contract.[56] But where the employer in his lifetime repudiates the contract and prevents further rendition of the services, a right of action to recover for the

against the demand from the execution of the covenant.

Stipulation to repay excess of amount due.—Where a payment of a claim is made with a stipulation that the payee shall refund any excess over the amount due, the agreement contemplating an investigation or adjustment of the claim, there can be no breach of the agreement, and hence the statute will not begin to run, until the investigation or adjustment is made. And if no time for such investigation or adjustment is fixed, the law implies that it must be done in a reasonable time. Moore *v.* Greene County, 87 N. C. 209 [*following* Falls *v.* McKnight, 14 N. C. 421].

Where the promisor dies before the event happens, the statute does not run before his death. Harrison *v.* Harrison, 124 Iowa 525, 100 N. W. 344, where A employed B, promising to pay for the services when his (A's) indebtedness was paid off, but died before the indebtedness was discharged.

53. Moore *v.* Greene County, 87 N. C. 209.

54. Clark *v.* Howe, 23 Me. 560; Eller *v.* Church, 121 N. C. 269, 28 S. E. 364.

Agreement to refund to administrator.—Where a receipt, given to an administrator by an assignee of claims against the estate, provided that, if it should "turn out" that the assignee had received more than was due or that there were prior liens he would refund the overpayment, a cause of action arising out of a judgment rendered prior to the execution of the receipt accrued as soon as the administrator could reasonably have known of the existence of the judgment; that is, from the date of the receipt itself. Eller *v.* Church, 121 N. C. 269, 28 S. E. 364.

55. *Alabama.*—Pinson *v.* Gilbert, 57 Ala. 35.

Indiana.—Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441, holding that a mere privilege of making payment during the promisor's lifetime, the promisor having died without making payment, did not affect the rule.

Kentucky.—McDowell *v.* Hall, 2 Bibb 610.

New York.—Singleton *v.* Smith, 2 N. Y. St. 173, where a sole heir at law of an intestate agreed with the widow that she should have the use of personal property and that after her death the heir should be entitled thereto, and it was held that as to an action by the heir as administrator of the decedent to recover the property when converted by the widow's executor, the statute did not begin to run until the widow's death.

Ohio.—Kershaw *v.* Snowden, 36 Ohio St. 181, where money was received to be repaid on the recipient's death.

Tennessee.—Menees *v.* Johnson, 12 Lea 561, where a married woman by her contract charged her real estate with a debt and provided that if the debt were not paid before her death it should then be paid by her executor, and it was held that the statute did not begin to run until her death.

See 33 Cent. Dig. tit. "Limitation of Actions," § 244.

But to produce this result the essential terms of such a contract must be established. See Jones *v.* Powning, 25 Nev. 399, 60 Pac. 833; Matter of Long, 2 N. Y. St. 197; Walker *v.* Tyler, 94 Va. 532, 27 S. E. 434.

Where a note is payable on or before the death of the maker and another the statute of limitations does not begin to run against the note until both parties have died. Dwight *v.* Eastman, 62 Vt. 398, 20 Atl. 594.

Agreement not to enforce debt during debtor's lifetime.—Where an assignment of a policy of insurance on a husband's life, payable to his wife, is made to secure a debt of the husband on an agreement that no proceedings shall be taken to enforce collection of the debt during the husband's lifetime, the statute begins to run against the debt not from the date of the assignment but from the date of the husband's death. Damron *v.* Penn Mut. L. Ins. Co., 99 Ind. 478.

56. *Illinois.*—Quigly *v.* Harold, 22 Ill. App. 269.

Iowa.—Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288; Riddle *v.* Backus, 38 Iowa 81.

Michigan.—Sword *v.* Keith, 31 Mich. 247.

Minnesota.—*In re* Hess, 57 Minn. 282, 59 N. W. 193.

Pennsylvania.—Titman *v.* Titman, 64 Pa. St. 480. See also *In re* Egan, 30 Pittsb. Leg. J. N. S. 261.

services rendered accrues at once and the statute begins to run immediately,[57] according to well settled principles of the law of contracts.[58]

(B) *Contract to Make Will.* Where a contract provides that the promisor shall make a will in favor of the promisee or devise or bequeath property to him, as for instance by way of compensation for services, the statute of limitations does not begin to run until the death of the promisor, unless an actionable breach occurs in the latter's lifetime,[59] as where the promisor repudiates the contract and prevents further performance by the promisee, thus giving an immediate right of action and setting the statute in motion from that date.[60]

(C) *Promise of Compensation For Past Services.* Past services which do not appear to have been performed as a gratuity will support a promise to pay for them by testamentary provisions or out of the promisor's estate, so as to prevent the running of the statute until the promisor's death; for the subsequent promise implies that the services were rendered upon a previous request.[61]

2. Contracts of Employment in General.[62] Where a contract of employment provides for compensation when the work shall be completed the employee's

Tennessee.—Waddell *v.* Waddell, (Ch. App. 1897) 42 S. W. 46.

Vermont.— Sprague *v.* Sprague, 30 Vt. 483.

See 33 Cent. Dig. tit. "Limitation of Actions," § 244.

57. Bonesteel *v.* Van Etten, 20 Hun (N. Y.) 468 [*distinguishing* Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469].

58. See Contracts, 9 Cyc. 635 *et seq.*, 698; and *supra*, VI, B, 1, c.

59. *Alabama.*— Manning *v.* Pippen, 86 Ala. 357, 5 So. 572, 11 Am. St. Rep. 46.

Indiana.— Gullett *v.* Gullett, 28 Ind. App. 670, 63 N. E. 782.

Kentucky.— Gross *v.* Newman, 50 S. W. 530, 20 Ky. L. Rep. 1910.

Louisiana.— Copse *v.* Eddins, 15 La. Ann. 528; Nimmo *v.* Walker, 14 La. Ann. 581. *Compare* Watson *v.* Barber, 105 La. 799, 30 So. 127.

Massachusetts. — Morrissey *v.* Morrissey, 180 Mass. 480, 62 N. E. 972, promise to convey or devise.

Michigan.— Sword *v.* Keith, 31 Mich. 247.

New Jersey.— Stone *v.* Todd, 49 N. J. L. 274, 8 Atl. 300; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. 337, 105 Am. St. Rep. 660.

New York.— Leahy *v.* Campbell, 70 N. Y. App. Div. 127, 75 N. Y. Suppl. 72; Taylor *v.* Welsh, 92 Hun 272, 36 N. Y. Suppl. 952; Quackenbush *v.* Ehle, 5 Barb. 469; Eagan *v.* Kergill, 1 Dem. Surr. 464. See also Robinson *v.* Raynor, 28 N. Y. 494 [*reversing* 36 Barb. 128]; Williams *v.* Clements, 19 N. Y. Suppl. 613; Patterson *v.* Patterson, 13 Johns. 379.

North Carolina.— See Miller *v.* Lask, 85 N. C. 51, 39 Am. Rep. 678, holding, however, that the facts did not establish a definite agreement to make compensation by will.

Ohio.— Norris *v.* Clark, 7 Ohio Dec. (Reprint) 564, 3 Cinc. L. Bul. 994.

Pennsylvania.— Bash *v.* Bash, 9 Pa. St. 260.

South Carolina.—Price *v.* Price, Cheves Eq. 167, 34 Am. Dec. 608.

Wisconsin.— Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100.

See 33 Cent. Dig. tit. "Limitation of Actions," § 244.

Death of husband and wife.— Where a husband promised that upon the death of himself and his wife plaintiff should have all the property they left, it was held that plaintiff's right of action for a breach of the contract did not accrue until both husband and wife had died. Thomas *v.* Feese, 51 S. W. 150, 21 Ky. L. Rep. 206. And see Sharkey *v.* McDermott, 91 Mo. 647, 4 S. W. 107, 60 Am. Rep. 270.

Support of promisor for life.— Where a contract provides that the promisee shall support the promisor during the latter's lifetime, in consideration of a devise by the promisor, the statute of limitations does not begin to run against the promisee's claim until the death of the promisor, because until that event the promisee has not performed his part of the contract. Schoonover *v.* Vachon, 121 Ind. 3, 22 N. E. 777. And see Stone *v.* Todd, 49 N. J. L. 274, 8 Atl. 300. *Compare* Thompson *v.* Reed, 48 Ill. 118.

60. Bonesteel *v.* Van Etten, 20 Hun (N. Y.) 468 [*distinguishing* Quackenbush *v.* Ehle, 5 Barb. (N. Y.) 469]; Henry *v.* Rowell, 31 Misc. (N. Y.) 384, 64 N. Y. Suppl. 488 [*affirmed* in 63 N. Y. App. Div. 620, 71 N. Y. Suppl. 1137]. And see *supra*, VI, B, 1, c.

61. Bennett *v.* Lutz, 119 Iowa 215, 93 N. W. 288; Jilson *v.* Gilbert, 26 Wis. 637, 7 Am. Rep. 100. *Compare* Watson *v.* Barber, 105 La. 799, 30 So. 127.

62. **Services as president of corporation.**— A president of a corporation served for two years without any provision being made for his compensation except an understanding that he should be paid. At the beginning of the third year he was again elected president and a resolution or order passed fixing his compensation at a certain sum per month. It was held that the order amounted to a contract in writing to pay for both past and future services and that as against his action to recover compensation the statute of limitations ran only from the date of the order. Rosborough *v.* Shasta River Canal Co., 22 Cal. 556.

cause of action to recover his compensation accrues at the completion of the work, and the statute begins to run against him from that time.[63] Where a person is hired by the month or year his right to compensation accrues at the end of each month or year, and the statute then begins to run. Hence he can recover only what has accrued within the statutory period before the commencement of his action.[64] This principle applies to an officer of a corporation.[65] As against a cause of action to recover compensation for services rendered under an entire, indivisible contract, the statute begins to run when and only when the services are terminated or the work is completed, although the work may consist of numerous parts or items,[66] and although the contract provides that the compensation shall be made at stated intervals[67] or in instalments.[68] This rule applies where the employer prevents further rendition of services, as by discharging the employee,[69] or renouncing the contract;[70] the employee's action being to recover the value of the services actually rendered. Where such an entire contract is abandoned by the parties before completion, and the employee sues on a *quantum meruit*, it is held on the one hand that the statute begins to run only from the

63. Rounsaville *v.* Wagner, 90 Ga. 29, 15 S. E. 780; Hentz *v.* Havemeyer, 58 N. Y. App. Div. 36, 68 N. Y. Suppl. 440 [*affirmed* in 172 N. Y. 597, 64 N. E. 1122].

Where a building contract contemplates extra work, and provides that payment shall be by certain specific instalments, and then that the balance which may become due shall not be paid until the entire work be completed, no action will lie for the extra work while the contract remains executory, nor will the statute of limitations begin to run. Gibbons *v.* U. S., 15 Ct. Cl. 174.

64. *Illinois.*— Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398].

Louisiana.—Watson *v.* Barber, 105 La. 799, 30 So. 127. And see Dewar *v.* Beirne, McGloin 75.

New York.— *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768; Davis *v.* Gorton, 16 N. Y. 255, 69 Am. Dec. 694.

North Carolina.— Robertson *v.* Pickerell, 77 N. C. 302.

Texas.— McMullen *v.* Guest, 6 Tex. 275; Sinker *v.* Lemon, 1 Tex. App. Civ. Cas. § 290.

Wisconsin.— Butler *v.* Kirby, 53 Wis. 188, 10 N. W. 373.

Expectation of remuneration by will.— The rule of the text applies notwithstanding the employee did not bring his action in the employer's lifetime because he had an expectation that the employer would remunerate him by making testamentary provisions in his favor. Watson *v.* Barber, 105 La. 799, 30 So. 127. And see Freeman *v.* Freeman, 65 Ill. 106.

Right accruing on employer's death see *supra*, VI, B, 1, g, (IV), (A), text and note 56 *et seq.*

65. Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724.

Where an officer of a corporation is elected for a term of one year, with a compensation at a certain sum per month, the statute of limitations does not begin to run against any portion of his claim for salary until the end of the year. Rosborough *v.* Shasta River Canal Co., 22 Cal. 556.

66. *Arkansas.*— Iron Mountain, etc., R. Co. *v.* Stansell, 43 Ark. 275.

Delaware.— See Rodman *v.* Woolman, 2 Houst. 581.

Illinois.— O'Brien *v.* Sexton, 140 Ill. 517, 30 N. E. 461 (where the action was brought one day before the expiration of the statutory period after the termination of plaintiff's services and it was held that the statute was no bar); Chicago Catholic Bishop *v.* Bauer, 62 Ill. 188.

Indiana.— Littler *v.* Smiley, 9 Ind. 116.

Iowa.— Shorick *v.* Bruce, 21 Iowa 305.

Kansas.— Grisham *v.* Lee, 61 Kan. 533, 60 Pac. 312.

Massachusetts.— Hall *v.* Wood, 9 Gray 60.

New York.— Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109.

Texas.— Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40.

See 33 Cent. Dig. tit. "Limitation of Actions," § 274.

If the several items are merely parts of one transaction the statute begins to run from the date of the last item and all others are saved from the bar. O'Brien *v.* Sexton, 140 Ill. 517, 30 N. E. 461; Knight *v.* Knight, (Ind. App. 1892) 30 N. E. 421; Hall *v.* Wood, 9 Gray (Mass.) 60.

67. Shorick *v.* Bruce, 21 Iowa 305. And see O'Brien *v.* Sexton, 140 Ill. 517, 30 N. E. 461.

68. Iron Mountain, etc., R. Co. *v.* Stansell, 43 Ark. 275.

69. O'Brien *v.* Sexton, 140 Ill. 517, 30 N. E. 461; Chicago Catholic Bishop *v.* Bauer, 62 Ill. 188. See also Rodman *v.* Woolman, 2 Houst. (Del.) 581.

Under a statute providing that where an employer who has hired an employee for a certain time discharged him without just cause before that time has expired he shall be bound to pay him his wages for the full term of the contract, the employee's right of action accrues immediately upon his discharge and the statute then begins to run. Shoemaker *v.* Bryan, 12 La. Ann. 697, holding also that this applies to a pilot.

70. Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40.

time of the last item of service rendered,[71] and on the other hand that it runs against each item of service from the time of its rendition.[72] Where the contract of employment embraces several distinct items of service which can be and are separately performed and the compensation for each is settled and apportioned, the contract is severable, not entire, and as to each item a cause of action accrues and the statute begins to run when that particular service is rendered.[73] If the contract of employment does not fix any time for payment, the general rule is that the statute begins to run when the work is completed,[74] and not sooner;[75] for the promise to pay continues up to the time the work is finished.[76] Where services are rendered for a long period of time under an agreement wholly indefinite in regard to the period of employment and the mode or rate of compensation, the decisions are in conflict as to when the statute begins to operate.[77] In several jurisdictions the rule in such cases is that the contract is a continuing one, and that the employee's right of action accrues and the statute begins to run when and only when the services are fully performed or the employment otherwise terminated,[78] and it is immaterial whether the contract for the services is express or implied.[79] On the other hand it is held that in such cases the law implies a

71. McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

72. Schillo *v.* McEwen, 90 Ill. 77.

73. Bartel *v.* Mathias, 19 Oreg. 482, 24 Pac. 918. And see Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109; Robertson *v.* Pickerell, 77 N. C. 302.

Compensation of attorney see *infra*, VI, B, 3, b.

74. Adams *v.* Ft. Plain Bank, 36 N. Y. 255, 2 Transcr. App. 234; Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109; Peck *v.* New York, etc., U. S. Mail Steamship Co., 5 Bosw. (N. Y.) 226; Jones *v.* Lewis, 11 Tex. 359. See also Cooper *v.* Claxton, 122 Ga. 596, 50 S. E. 399; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470; Wilson *v.* Whitman, 3 Tenn. Ch. 37. *Compare* Schlueter *v.* Albert, 39 Mo. App. 154.

Physicians, in respect to their charges for services, are on the same footing with other persons undertaking to perform services which require skill for reward, and in the absence of any stipulation to the contrary the right to demand payment accrues when the service is rendered or performed, and the statute then commences to run. Gulick *v.* Fortson, 1 Tex. App. Civ. Cas. § 425. See also, generally, PHYSICIANS AND SURGEONS.

75. Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511; Vanhorn *v.* Scott, 28 Pa. St. 316; Zeigler *v.* Hunt, 1 McCord (S. C.) 577; Morrisey *v.* Faucett, 28 Wash. 52, 68 Pac. 352. And see Tinsley *v.* Penniman, 8 Tex. Civ. App. 495, 29 S. W. 175.

Where a builder's claim for extra work is really a claim for extra expense thrown on him by the owner, or where it cannot be determined what is extra work until the contract work is finished, the statute of limitations will not begin to run against the demand for extra work so long as the contract remains executory. Gibbons *v.* U. S., 15 Ct. Cl. 174.

76. Zeigler *v.* Hunt, 1 McCord (S. C.) 577.

77. See comments in Miller *v.* Lash, 85 N. C. 51, 39 Am. Rep. 678.

78. *Indiana.*— Schoonover *v.* Vachon, 121 Ind. 3, 22 N. E. 777; Littler *v.* Smiley, 9 Ind. 116; Crampton *v.* Logan, 28 Ind. App. 405, 63 N. E. 51; Purviance *v.* Purviance, 14 Ind. App. 269, 42 N. E. 364; Knight *v.* Knight, (App. 1892) 30 N. E. 421; Grave *v.* Pemberton, 3 Ind. App. 71, 29 N. E. 177; Taggart *v.* Tevanny, 1 Ind. App. 339, 27 N. E. 511; Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573.

Kansas.— Grisham *v.* Lee, 61 Kan. 533, 60 Pac. 312.

Michigan.— Carter *v.* Carter, 36 Mich. 207.

Texas.—Stevens *v.* Lee, 70 Tex. 279, 8 S. W. 40, where the services were rendered in consideration of a promise to convey land which was eventually broken by the promisor's renunciation of the contract. See also Jones *v.* Lewis, 11 Tex. 359.

Washington.— Morrissey *v.* Faucett, 28 Wash. 52, 68 Pac. 352.

Compensation fixed and payable monthly.— The same rule applies where services are rendered under a contract which, although indefinite as to the period of employment, fixes the rate of compensation at a certain sum per month. Ah How *v.* Furth, 13 Wash. 550, 43 Pac. 639.

Services of officer of corporation.— Where an agreement for services by an officer of a corporation was of a continuous character, but his term of office was from year to year, it was held that the statute commenced running only from the expiration of each year's term. Rosborough *v.* Shasta River Canal Co., 22 Cal. 556. And see Martin *v.* Fox, etc., Imp. Co., 19 Wis. 552.

The contract and services must be continuous.— Thus a contract for labor is not continuous where there is an interval of two years during which no labor is performed, and a new contract then made; and charges for labor under the first contract, against which the statute of limitations has run, cannot be recovered. Gavin *v.* Bischoff, 80 Iowa 605, 45 N. W. 306. See also Salvador *v.* Feeley, 105 Iowa 478, 75 N. W. 476.

79. Crampton *v.* Logan, 28 Ind. App. 405,

promise to pay for the services as they are rendered, so that an action may be brought at any time during the course of their rendition, and hence that no recovery can be had for services rendered more than the statutory period before action brought.[80] Still another rule is that where services are performed under a general hiring without any express agreement as to the time or measure of compensation or the term of employment, and the services continue for a series of years, no payments being made, the law, for the purpose of determining when the statute begins to run, will not imply an agreement that the payment of compensation shall be postponed to the termination of the employment but will regard the hiring as from year to year and the wages as payable at the same time,[81] unless the course of dealing between the parties raises an implication that the hiring is for shorter periods.[82] Under this rule, if there are no mutual accounts between the parties and no payments have been made, the employee's recovery is limited to compensation accruing within the statutory period before the action;[83] but if payments have been made within the statutory period before the action recovery may be had for services rendered during the statutory period prior to the first payment.[84]

3. Contract With Agent or Attorney[85] — a. In General. The question when

63 N. E. 51 [*citing* Story *v.* Story, 1 Ind. App. 284, 27 N. E. 573]; Knight *v.* Knight, 6 Ind. App. 268, 33 N. E. 456.

Whenever there is an indebtedness to plaintiff on account of services rendered, there is an implied promise to pay and a cause of action accrues; from which time the statute begins to run. McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

80. Miller *v.* Lash, 85 N. C. 51, 59, 39 Am. Rep. 678 [*distinguishing* Hauser *v.* Sain, 74 N. C. 552], the court saying: "We are of opinion then that the unexplained fact of labor performed and extending over a series of years raises no implication that payment is to be made at any fixed period, unless perhaps annually, as controlled by a prevalent custom appropriate to the kind of service and entering into the contract, when it so appears in evidence. The implied promise is to pay for services as they are rendered, and payment may be required whenever any are rendered; and thus the statute is silently and steadily excluding so much as are beyond the prescribed limitation." To the same effect see St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; Sidway *v.* Missouri Land, etc., Co., 187 Mo. 649, 86 S. W. 150; Ditch *v.* Wilkinson, 10 La. 201; Coate *v.* Cotton, 5 La. 12; Judice *v.* Brent, 6 Mart. N. S. (La.) 226; Dempsey *v.* McNabb, 73 Md. 433, 21 Atl. 378; *In re* Ward, 21 Ohio Cir. Ct. 753, 12 Ohio Cir. Dec. 44. But see Pressas *v.* Mendeburn, 4 La. 128; Duncan *v.* Poydras, 5 Mart. N. S. (La.) 492; Chadwick *v.* Waters, 3 Mart. N. S. (La.) 432, holding that services on board a boat of which defendant was owner could not be connected with services on board another boat owned by a corporation of which defendant was an agent and in which he had an interest, so as to constitute a continuous employment.

81. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398]; Davis *v.* Gorton, 16 N. Y. 255, 69 Am. Dec. 694 [*followed* in *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768]; Reid *v.* Farrar, 6 N. Y. St. 199; Nicholl *v.* Larkin, 2 Redf. Surr. (N. Y.) 236; Mosgrove *v.* Golden, 101 Pa. St. 605. But *compare* Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109; Schoch *v.* Garrett, 69 Pa. St. 144.

82. If monthly payments are made in accordance with the usual terms of such employments or with the usual course of dealing between the parties themselves, the rule of the text will give way and the compensation will be regarded as payable by the month; and so the statute will begin to run at the end of each month, thus barring so much of the compensation as accrues more than the statutory period before the action. Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398].

83. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398]; Freeman *v.* Freeman, 65 Ill. 106; *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768; Raynor *v.* Robinson, 36 Barb. (N. Y.) 128 [*reversed* on other grounds in 28 N. Y. 494]; Matter of Stewart, 21 Misc. (N. Y.) 412, 47 N. Y. Suppl. 1065; Nicholl *v.* Larkin, 2 Redf. Surr. (N. Y.) 236; Mosgrove *v.* Golden, 101 Pa. St. 605. See also Reid *v.* Farrar, 6 N. Y. St. 199. But *compare* Schoch *v.* Garrett, 69 Pa. St. 144.

But where there is a mutual, open, and current account between employer and employee, the matter of compensation forming one of the items, the statute runs from the date of the last item proved in the account on either side. Corinne Mill, etc., Co. *v.* Toponce, 152 U. S. 405, 14 S. Ct. 632, 38 L. ed. 493 [*affirming* 6 Utah 439, 24 Pac. 534]. See, generally, *infra*, VI, B, 17.

84. *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768; Gilbert *v.* Comstock, 93 N. Y. 484. See *infra*, VII, B.

85. See, generally, Attorney and Client, 4 Cyc. 889; Principal and Agent.

the statute of limitations begins to run against a right of action of a principal or client against his agent or attorney is one on which the decisions are somewhat inharmonious and the present state of the law is not altogether satisfactory. Much depends on the particular facts in the different cases that have arisen and this goes to explain some of the apparent conflict.[86] The statute does not of course run against the principal so long as the agent obeys his instructions;[87] and it has been held that it will not run until the principal has knowledge of some wrong committed by the agent inconsistent with the principal's rights.[88] In respect to the running of the statute there is a marked distinction between a general or continuing agency and a special one. If there be a general or continuing agency, the statute will not commence to run until the agency is in some way terminated; but if the agency be special, and relate to isolated transactions, in regard to which the agent received special authority from his principal, the statute will commence to run from each transaction, the right of action as to which will be barred or not according to the time which has elapsed from its respective date to the commencement of the suit.[89] Unless the death of one of the parties occurs,[90] the termination of a general or continuing agency cannot be effected so as to set the statute in motion, until an accounting is had or a demand for an accounting made and refused, or until there is an express repudiation of the agency communicated to the principal;[91] and the demand must be one intended to put an

As to collecting banks see BANKS AND BANKING, 5 Cyc. 510.

Action against agent on the ground of fraud see *infra*, VI, B, 21, d, (II), (B).

86. See comments in Mast *v.* Easton, 33 Minn. 161, 22 N. W. 253; Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273; Mitchell *v.* McLemore, 9 Tex. 151; Wood Lim. § 123.

87. Jaynes *v.* Sheffield, 49 Ga. 354; Brush *v.* Herlihy, 8 Ohio Dec. (Reprint) 104, 5 Cinc. L. Bul. 647; Mitchell *v.* McLemore, 9 Tex. 151.

88. Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101 (where the agent had misappropriated money); Perry *v.* Smith, 31 Kan. 423, 2 Pac. 784. And see McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924; Dunlevy *v.* Mowry, 8 Fed. Cas. No. 4,165, 2 Bond 214.

89. *Georgia.*— Rucker *v.* Maddox, 114 Ga. 899, 41 S. E. 68; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; Oliver *v.* Hammond, 85 Ga. 323, 11 S. E. 655.

Kentucky.— McHarry *v.* Irvin, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800, 9 Ky. L. Rep. 245.

North Carolina.— See Forsyth *v.* Lash, 89 N. C. 159; Northcot *v.* Casper, 41 N. C. 303, per Ruffin, C. J.

Oregon.— Quinn *v.* Gross, 24 Oreg. 147, 33 Pac. 535.

Pennsylvania.— Norris' Appeal, 71 Pa. St. 106.

South Carolina.— Parris *v.* Cobb, 5 Rich. Eq. 450; Hopkins *v.* Hopkins, 4 Strobh. Eq. 207, 53 Am. Dec. 663; Van Rhyn *v.* Vincent, 1 McCord Eq. 310. And see Lever *v.* Lever, 1 Hill Eq. 62.

West Virginia.— Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796, agent's right of action against principal.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 Wkly. Rep. 387.

Advances by agent for use of principal.— In a continuing agency where the agent advances money for the use of his principal the statute does not begin to run from the date of the advances but from the termination of the agency; but if under the circumstances of the case the agent has a right to demand repayment before the agency is terminated, the statute begins to run from the time when the right to make the demand accrues; or if any of the advances are repudiated by the principal, the statute runs from the time of the repudiation. Riverview Land Co. *v.* Dance, 98 Va. 239, 35 S. E. 720.

90. Where the services for which an agent is employed are continuous, protracted, and complicated, and cannot be completed until a number of tracts of land are sold by him and the purchase-money collected, his death pending performance terminates the agency and the statute begins to run only from that time. Johnston *v.* McCain, 145 Pa. St. 531, 22 Atl. 979. See also Oliver *v.* Hammond, 85 Ga. 323, 11 S. E. 655; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Burdick *v.* Garrick, L. R. 5 Ch. 323, 39 L. J. Ch. 369, 18 Wkly. Rep. 387, where the principal died during the continuance of the agency and it was held that the statute did not run until his death.

91. *Georgia.*— Rucker *v.* Maddox, 114 Ga. 899, 41 S. E. 68; Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 1130.

Kentucky.— McHarry *v.* Irvin, 85 Ky. 322, 3 S. W. 374, 4 S. W. 800, 9 Ky. L. Rep. 245.

Louisiana.— Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 483. And see O'Neill *v.* Leinicke, 49 La. Ann. 3, 31 So. 113.

Michigan.— See Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

New York.— See King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201; Cornwell *v.* Clement, 10 N. Y. App. Div. 446, 42 N. Y. Suppl. 295.

North Carolina.— Patterson *v.* Lilly, 90 N. C. 82; Forsyth *v.* Lash, 89 N. C. 159;

end to the agency and to withdraw the authority conferred.[92] Where a principal furnishes money to his agent for the purpose of having it applied to some specific purpose, such as the payment of a debt or the purchase of property on the principal's behalf, but the agent fails so to apply the money or misappropriates it, in some jurisdictions it is held that the principal's right of action accrues and the statute begins to run only when demand is made upon the agent[93] or the principal has notice of the agent's breach of duty;[94] while in others it is held that the cause of action accrues and the statute begins to run when a reasonable time has elapsed for the agent to perform his duty, no demand being required,[95] and that the operation of the statute is not postponed until the principal acquires knowledge of the facts constituting his cause of action.[96] Thus it is held that, although

Blount *v.* Robeson, 56 N. C. 73; Northcot *v.* Casper, 41 N. C. 303, per Ruffin, C. J.

South Carolina.—See Lever *v.* Lever, 1 Hill Eq. 62.

South Dakota.— Cole *v.* Baker, 16 S. D. 1, 91 N. W. 324.

Texas.— White *v.* Affleck, 1 Tex. Unrep. Cas. 78.

Illustrations.— Where one receives money from another from time to time to invest and collect the principal or interest and reinvest the same from time to time for the benefit of the other, and it is contemplated by the agreement between the parties that the person receiving the money shall use the same for the benefit of the other, and there is no time specified when the money is to be returned, such person holds the money subject to the demand of the other, and no limitation runs until there has been a demand and refusal, or such a lapse of time as that the law would presume a demand and refusal, or until an account has been rendered, accompanied by an offer to settle, or the one in possession has notified the owner that he no longer holds it as the owner's but claims the title to it himself. Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113. And see Rucker *v.* Maddox, 114 Ga. 899, 41 S. E. 68; Bacon *v.* Rives, 106 U. S. 99, 27 L. ed. 69. Plaintiff deposited with defendant, a confidential agent, money to be invested for plaintiff in certain securities and for an indefinite period. But defendant so used the money that there was no actual investment, or at least an improper and unauthorized one, and for a long time kept plaintiff in ignorance thereof. Upon discovery of the agent's breach of duty, plaintiff revoked his authority, disaffirmed his acts and demanded a return of the money. It was held plaintiff's cause of action then arose and that the statute began to run only from that time. King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201 [*explained* in Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559], holding further that the provision of N. Y. Code Civ. Proc. § 410, declaring that when a right of action exists, growing out of the receipt or detention of money by a person acting in a fiduciary capacity, the time within which an action must be commenced must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends, created no new rule of law, but was simply a codification of the law as it then existed.

92. Forsyth *v.* Lash, 89 N. C. 159.

93. Emerick *v.* Chesrown, 90 Ind. 47 (money furnished to pay debt); Havens *v.* Church, 104 Mich. 135, 62 N. W. 149 [*following* Kimball *v.* Kimball, 16 Mich. 211]; Buchanan *v.* Parker, 27 N. C. 597 (money furnished to purchase property). And see Baker *v.* Joseph, 16 Cal. 173; Grant *v.* Odiorne, 43 Ill. App. 402; Sawyer *v.* Tappan, 14 N. H. 352.

94. Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101. See also Wolf *v.* Wolf, 97 Iowa 279, 66 N. W. 170.

A third person participating in the agent's wrong-doing is subject to the same rule. Guernsey *v.* Davis, 67 Kan. 378, 73 Pac. 101.

95. Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559 [*distinguishing* King *v.* Mackellar, 109 N. Y. 215, 16 N. E. 201]; Stroman *v.* O'Cain, 13 S. C. 100; Mitchell *v.* McLemore, 9 Tex. 151; Crawford *v.* Crawford, 16 Wkly. Rep. 411. *Compare* White *v.* Affleck, 1 Tex. Unrep. Cas. 78, holding that the statute did not run as long as the agent did not repudiate his obligations to his principal, although he had not performed them.

Where the "reasonable time" has been fixed by the referee before whom the case was tried, and no exception has been taken to his finding, the case may be regarded as if that time had been fixed by the agreement of the parties, in which event upon the expiration of the time without performance by the agent a right of action accrues and the statute begins to run without demand. Stroman *v.* O'Cain, 13 S. C. 100.

96. Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559. And see Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558.

N. Y. Code Civ. Proc. § 410, provides that in cases where a demand is necessary and the right of action grows out of the receipt or detention of money by an agent, etc., or other person acting in a fiduciary capacity, the statutory period shall be computed from the time the person having a right to make the demand has actual knowledge of the facts upon which his right depends. This section applies only to cases where a demand is prerequisite to an action. If no demand is necessary a party seeking to recover

a foreign factor employed to sell goods may not be liable until demand,[97] yet a foreign agent who is employed to purchase goods but fraudulently obtains and misappropriates money furnished to him by his principal for that purpose becomes liable from the time the money is thus obtained or misappropriated and the statute then begins to run without the necessity for any demand.[98] Where a stock-broker buys stocks for a customer on margins put up by the customer, the broker paying the balance due above the margins and holding the stocks as security, no right of action accrues in favor of the broker against the customer for money advanced on account thereof until the contract is terminated, as by sale of the stocks on notice from either party.[99]

b. Attorney's Right to Compensation. In respect to the relation of attorney and client, the same distinction exists between general and special retainers as exists between general and special agencies.[1] Where an attorney at law is retained to perform legal services for a client in some particular matter, his right to compensation accrues and the statute begins to run when the services are rendered,[2] although the contract of retainer is not terminated;[3] and the same is true where different, independent items of services are rendered on different occasions, the statute beginning to run as to each item of service from the time it is performed.[4] If an attorney undertakes to prosecute a suit for a contingent fee payable out of what may be realized from the claim or judgment, the statute begins to run against his claim to compensation only when money is collected;[5] and this is true, although before the money is paid by the debtor the attorney has been discharged by the client.[6] It has been held, however, that in case of a retainer on a contingent fee if the client settles with defendant in the action before the attorney completes the litigation, the cause of action for services rendered accrues and the statute begins to run only when the attorney is informed of the settlement.[7] Where an attorney renders services for a long period of time, as under a general

money in the hands of his agent does not have the benefit of the provisions of the section, although he was ignorant of his rights; the statute begins to run when the cause of action accrues. Baker *v.* Moore, 4 N. Y. App. Div. 234, 36 N. Y. Suppl. 559.

97. See *infra*, VI, B, 3, e, (II).

98. Carr *v.* Thompson, 87 N. Y. 160 [*affirming* 9 Daly 279].

99. Kennedy *v.* Budd, 5 N. Y. App. Div. 140, 39 N. Y. Suppl. 81.

1. See Adams *v.* Mott, 44 Vt. 259. And see *supra*, VI, B, 3, a.

2. *Missouri.*— Harrison *v.* Hall, 8 Mo. App. 167.

Pennsylvania.— Hale *v.* Ard, 48 Pa. St. 22 [*approved* in Mosgrove *v.* Golden, 101 Pa. St. 605].

Texas.— Jones *v.* Lewis, 11 Tex. 359.

Vermont.— Adams *v.* Mott, 44 Vt. 259.

England.— Coburn *v.* Colledge, [1897] 1 Q. B. 702, 66 L. J. I. B. 462, 76 L. T. Rep. N. S. 698, 45 Wkly. Rep. 488, not from one month after the delivery of a bill of costs which is required by statute.

See 33 Cent. Dig. tit. "Limitation of Actions," § 275.

3. As where the attorney has done all that he has been called upon to do, but is still bound to render further services if any become necessary or are requested. Adams *v.* Mott, 44 Vt. 259.

4. Jones *v.* Lewis, 11 Tex. 359; Phillips *v.* Broadley, 9 Q. B. 744, 11 Jur. 264, 16 L. J. Q. B. 72, 58 E. C. L. 742. And see Harrison *v.* Hall, 8 Mo. App. 167; Hale *v.* Ard, 48 Pa. St. 22; Mott *v.* Riddell, 2 Tex. Unrep. Cas. 107.

5. Bartlett *v.* Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139; Shepherd *v.* Dickson, 38 La. Ann. 741; Morgan *v.* Brown, 12 La. Ann. 159, not at the date of the recovery of judgment. See also Foster *v.* Jack, 4 Watts (Pa.) 334, 339 (where Gibson, C. J., said: "His right to sue is not necessarily postponed until judgment is had; nor does it then necessarily arise, especially where money is to be collected, or the judgment is to be enforced by further proceedings. It may be his duty to expedite an execution, and attend to the thousand and one matters usually connected with it. When, then, shall his action accrue or the statute run? Not before demand be made, or the professional relation be dissolved"); Leake *v.* Cleburne, (Tex. Civ. App. 1896) 36 S. W. 97 (employment to defend certain suits on contingent fees, it being held that the attorney's cause of action accrued only when the entire litigation was terminated).

Contingency in general see *supra*, VI, A, 2, b; VI, B, 1, g.

6. Bartlett *v.* Odd-Fellows' Sav. Bank, 79 Cal. 218, 21 Pac. 743, 12 Am. St. Rep. 139.

7. Cobb *v.* Decatur First Nat. Bank, 91 Tex. 226, 42 S. W. 770; Henrietta Nat. Bank *v.* Barrett, (Tex. Civ. App. 1894) 25 S. W. 456.

retainer to attend to all his client's legal business, but without any agreement as to time or mode of payment, it has been held on the one hand that the fee for each item of service is due as soon as the service is rendered, and that the statute begins to run when each particular act of service is performed;[8] and on the other hand that the attorney is entitled to demand payment and the statute begins to run within a reasonable time, which will not exceed one year, so that the employment may be deemed a hiring by the year and a recovery can be had only for services performed within the statutory period before action brought,[9] unless the course of dealing between the parties raises an implication that compensation be made at shorter intervals.[10] Where an attorney at law is employed to prosecute or defend an action or to represent his client in some other legal proceeding, his right to recover compensation accrues and the statute begins to run when and only when the action or proceeding is terminated or the contract of retainer is otherwise ended; for such a contract is regarded as entire and continuous.[11] The test therefore is to determine when the services are so terminated as to give the attorney a present right of action.[12] This depends of course on the character and extent of the services to be rendered in the particular case,[13]

8. Jones *v.* Lewis, 11 Tex. 359; Montgomery *v.* Brown, (Tex. Civ. App. 1895) 31 S. W. 1084, contract to represent client in all future litigation in certain counties. And see Mott *v.* Riddell, 2 Tex. Unrep. Cas. 107.

9. Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398]; Mosgrove *v.* Golden, 101 Pa. St. 605.

10. As where monthly payments are made, in which case it may be deemed that the term of employment is by the month, and the statute will begin to run at the end of each month of service. Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398].

11. *Arkansas.*— Phelps *v.* Patterson, 25 Ark. 185. And see McNeil *v.* Garland, 27 Ark. 343.

California.— Hancock *v.* Pico, 47 Cal. 161. See also Johnson *v.* Lake Bank, 125 Cal. 6, 57 Pac. 664, 73 Am. St. Rep. 17.

Illinois.— Walker *v.* Goodrich, 16 Ill. 341.

Louisiana.— Looney *v.* Levy, 35 La. Ann. 1012, holding also that a continuity of services in other matters cannot interrupt the prescription. *Compare* Judice *v.* Brent, 6 Mart. N. S. 226 [*explained* in Coote *v.* Cotton, 5 La. 12].

Massachusetts.— Eliot *v.* Lawton, 7 Allen 274, 83 Am. Dec. 683, holding that the statute does not begin to run against any item of service until the suit is terminated or the relation of attorney and client otherwise dissolved.

Mississippi.— Johnson *v.* Pyles, 11 Sm. & M. 189.

New York.— Bathgate *v.* Haskin, 59 N. Y. 533 [*reversing* 5 Daly 361]; Mygatt *v.* Wilcox, 45 N. Y. 306, 6 Am. Rep. 90 [*affirming* 1 Lans. 55] (action for services and disbursements); Adams *v.* Ft. Plain Bank, 36 N. Y. 255 [*affirming* 23 How. Pr. 45] (action for services and disbursements); Wells *v.* Selina, 71 Hun 559, 25 N. Y. Suppl. 134; Gustine *v.* Stoddard, 23 Hun 99; Reavy *v.* Clark, 9 N. Y. Suppl. 216, 18 N. Y. Civ. Proc. 272. See also Dailey *v.* Devlin, 21 N. Y. App. Div. 62, 47 N. Y. Suppl. 296.

Pennsylvania.— Mattern *v.* McDwitt, 113 Pa. St. 402, 6 Atl. 83; Campbell *v.* Maple, 105 Pa. St. 304; Lichty *v.* Hugus, 55 Pa. St. 434. See also Foster *v.* Jack, 4 Watts 334.

Texas.— Jones *v.* Lewis, 11 Tex. 359; Montgomery *v.* Brown, (Civ. App. 1895) 31 S. W. 1084; Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96. *Compare* Mott *v.* Riddell, 2 Tex. Unrep. Cas. 107.

Vermont.— Noble *v.* Bellows, 53 Vt. 527; Davis *v.* Smith, 48 Vt. 52.

England.— Harris *v.* Quine, L. R. 4 Q. B. 653, 10 B. & S. 644, 38 L. J. Q. B. 331, 20 L. T. Rep. N. S. 947, 17 Wkly. Rep. 967; Rothery *v.* Munnings, 1 B. & Ad. 15, 8 L. J. K. B. O. S. 386, 20 E. C. L. 378; Martindale *v.* Falkner, 2 C. B. 706, 2 D. & L. 600, 10 Jur. 161, 15 L. J. C. P. 91, 52 E. C. L. 706; Harris *v.* Osbourn, 2 C. & M. 629, 2 L. J. Exch. 182, 4 Tyrw. 445; Whitehead *v.* Lord, 7 Exch. 691, 21 L. J. Exch. 239.

Canada.— Gowiley *v.* McAloney, 29 Nova Scotia 319; Millar *v.* Kanady, 5 Ont. L. Rep. 412; Lizars *v.* Dawson, 32 U. C. Q. B. 237.

See 33 Cent. Dig. tit. "Limitation of Actions," § 275, 284; and, generally, ATTORNEY AND CLIENT, 4 Cyc. 997, 998.

Subsequent services.—After bringing a suit for his fees, other services rendered by an attorney in the original suit, if not required by the client or for his benefit, will not revive the relation of attorney and client or avert the effect of the statute. Lichty *v.* Hugus, 55 Pa. St. 434. And see Bruyn *v.* Comstock, 56 Barb. (N. Y.) 9; Rothery *v.* Munnings, 1 B. & Ad. 15, 8 L. J. K. B. O. S. 386, 20 E. C. L. 378.

12. Adams *v.* Ft. Plain Bank, 36 N. Y. 255 [*affirming* 23 How. Pr. 45, and *citing* 2 Parsons Contr. 373]; Whitehead *v.* Lord, 7 Exch. 691, 21 L. J. Exch. 239.

Duration and termination of the relationship see, generally, ATTORNEY AND CLIENT, 4 Cyc. 952 *et seq.*, 997, 998.

13. See Johnson *v.* Pyles, 11 Sm. & M.

so that the attorney's right of action may accrue when final judgment is entered in the action,[14] although it has been held otherwise in case of an appeal or writ of error,[15] or at the death of the client pending the suit,[16] or upon reasonable notice to the client for a good and sufficient cause;[17] but not during a mere delay, although protracted or accruing after a compromise or agreement to settle the action, unless the retainer is otherwise brought to an end.[18] The continuance of the relation of attorney and client in a particular case or litigation will not, however, suspend the operation of the statute against the attorney's right of action for compensation for other and independent services, but the statute begins to run when such services are completed.[19]

c. Attorney's Neglect or Breach of Duty. Where an attorney at law is guilty of negligence or breach of duty in performing services for his client, the client's cause of action accrues and the statute begins to run at the time when the negligence or breach of duty occurs, not at the time when it is discovered or actual damage results or is fully ascertained;[20] and it is immaterial whether the remedy invoked is assumpsit or a special action on the case, for the gist of the action is

(Miss.) 189; Foster *v.* Jack, 4 Watts (Pa.) 334; Bruyn *v.* Comstock, 56 Barb. (N. Y.) 9.

14. Eliot *v.* Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683; Johnson *v.* Pyles, 11 Sm. & M. (Miss.) 189; Bathgate *v.* Haskin, 59 N. Y. 533 [*reversing* 5 Daly 361]; Bruyn *v.* Comstock, 56 Barb. (N. Y.) 9; Clarkson *v.* Young, 11 N. Y. Suppl. 562 [*affirmed* in 134 N. Y. 597, 31 N. E. 628]; Reavy *v.* Clark, 9 N. Y. Suppl. 216, 18 N. Y. Civ. Proc. 272; Rothery *v.* Munnings, 1 B. & Ad. 15, 8 L. J. K. B. O. S. 386, 20 E. C. L. 378 (holding that an additional charge for small incidental services rendered after judgment did not take the case out of the statute); Gilman *v.* Cockshutt, 18 Quebec Super. Ct. 552 (holding that "final judgment" in a statute which enacts that the action "for professional services and disbursements of advocates and attorneys is prescribed by five years, reckoning from the date of the final judgment in each case," mean final as opposed to interlocutory, and not final in the sense of being the judgment in last resort); Lizars *v.* Dawson, 32 U. C. Q. B. 237; Jones *v.* Hutton, 11 U. C. Q. B. 554. And see Adams *v.* Ft. Plain Bank, 36 N. Y. 255 [*affirming* 23 How. Pr. 45]. But *compare* Foster *v.* Jack, 4 Watts (Pa.) 334.

15. Gustine *v.* Stoddard, 23 Hun (N. Y.) 99 (in which an attorney's claim for services in an action where his client, although defeated at the circuit, was successful in the court of appeals, was held to be entire so that the statute of limitations did not begin to run against it until the final judgment; and this although the client had, before the final adjudication, assigned his right of action, subject to payment of fees, etc., to a third party); Lichty *v.* Hugus, 55 Pa. St. 434 (where the judgment was reversed and a venire facias de novo awarded, and it was held that this did not terminate the professional relationship so as to set the statute in motion); Harris *v.* Quine, L. R. 4 Q. B. 653, 10 B. & S. 644, 38 L. J. Q. B. 331, 20 L. T. Rep. N. S. 947, 17 Wkly. Rep. 967.

16. Campbell *v.* Maple, 105 Pa. St. 304; Whitehead *v.* Lord, 7 Exch. 691, 21 L. J. Exch. 239. And see ATTORNEY AND CLIENT, 4 Cyc. 998.

17. Eliot *v.* Lawton, 7 Allen (Mass.) 274, 83 Am. Dec. 683 (per Dewey, J.); Harris *v.* Osbourn, 2 C. & M. 629, 3 L. J. Exch. 182, 4 Tyrw. 445. See also ATTORNEY AND CLIENT, 4 Cyc. 954.

18. Bathgate *v.* Haskin, 59 N. Y. 533 [*reversing* 5 Daly 361] (where an attorney for a party defendant advised his client to settle by allowing plaintiff in the action to discontinue, which was assented to by the client, and after a delay of ten years the attorney moved for a dismissal for want of prosecution, which was granted; it being held that the relation of attorney and client was not terminated by the agreement to settle, but continued until the dismissal of the action, at which time, not before, the attorney's right of action accrued and the statute began to run); Gulf, etc., R. Co. *v.* Hutcheson, 3 Tex. App. Civ. Cas. § 96 (where a suit was compromised, and it was held that the attorney's cause of action did not accrue and the statute did not begin to run until the suit had been finally disposed of by the rendition and entry of the proper judgment in accordance with the compromise); Whitehead v. Lord, 7 Exch. 691, 693, 21 L. J. Exch. 239 (in which Pollock, C. B., said: "It could not be left to the jury to say whether the cause had not been brought to such a difficult and perplexing pass as to afford no reasonable prospect of arriving at a termination, and therefore to be considered, for all practical purposes, as brought to a conclusion"). See also Foster *v.* Jack, 4 Watts (Pa.) 334.

19. Hale *v.* Ard, 48 Pa. St. 22. But see Millar *v.* Kanady, 5 Ont. L. Rep. 412.

20. *Alabama.*— Mardis *v.* Shackleford, 4 Ala. 493.

Arkansas.— White *v.* Reagan, 32 Ark. 281.

California.— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

Georgia.— Gould *v.* Palmer, 96 Ga. 798, 22 S. E. 583; Lilly *v.* Boyd, 72 Ga. 83; Crawford *v.* Gaulden, 33 Ga. 173.

Missouri.— Schade *v.* Gehner, 133 Mo. 252,

the attorney's breach of contract to use diligence and skill, and the subsequent damages give no new cause of action.[21] Where the cause of action is the attorney's neglect to collect money for his client, the client's right of action accrues and the statute begins to run within a reasonable time for the beginning of proceedings to enforce the payment of the client's claim, as a reasonable time must be allowed the attorney to perform his duty;[22] but where the attorney neglects to prosecute the claim until it becomes barred by the statute of limitations, the client's right of action accrues at the time the claim becomes barred and the statute runs against him from that date.[23]

d. Failure to Pay Over Money Collected.[24] Where an agent or attorney employed to collect money for his principal or client collects the money but fails to pay it over, the statute of limitations begins to run in his favor at the time when the right of action for his breach of contract is complete,[25] and not before.[26] But just when the contract shall be considered broken is a question on which the cases are in conflict, the difficulty being in determining whether the duty of the agent or attorney is to pay over the money immediately, or within a reasonable time after collection, or upon the happening of some subsequent event.[27] In a number of jurisdictions it is the duty of the collecting agent or attorney to pay

34 S. W. 576; Rankin *v.* Schaeffer, 4 Mo. App. 108.

New York.— Crowley *v.* Johnston, 96 N. Y. App. Div. 319, 89 N. Y. Suppl. 258, an action based on the attorney's breach of contract in failing to record a mortgage; it being also held that a demand was not necessary.

Pennsylvania.— Moore *v.* Juvenal, 92 Pa. St. 484; Downey *v.* Garard, 24 Pa. St. 52. *Compare* Derrickson *v.* Cady, 7 Pa. St. 27.

South Carolina.— Sams *v.* Rhett, 2 McMull. 171; Thomas *v.* Erwin, Cheves 22, 34 Am. Dec. 586.

Tennessee.— See Smith *v.* Owen, 7 Lea 53, receipt of Confederate money in satisfaction of a judgment.

United States.— Wilcox *v.* Plummer, 4 Pet. 172, 7 L. ed. 821.

England.— Short *v.* McCarthy, 3 B. & Ald. 626, 22 Rev. Rep. 503, 5 E. C. L. 360; Brown *v.* Howard, 2 B. & B. 73, 4 Moore C. P. 508, 6 E. C. L. 43; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237; Smith *v.* Fox, 6 Hare 386, 12 Jur. 130, 17 L. J. Ch. 170, 31 Eng. Ch. 386, 67 Eng. Reprint 1216; Woods *v* Jones, 61 L. T. Rep. N. S. 551. See also Bean *v.* Wade, Cab. & E. 519.

See 33 Cent. Dig. tit. "Limitation of Actions," § 1301.

When the negligence is complete is sometimes a difficult question. A reasonable time must be allowed for the attorney to perform his duty, and what would be a reasonable time varies according to the circumstances of each case. Bean *v.* Wade, Cab. & E. 519.

21. Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115; Moore *v.* Juvenal, 92 Pa. St. 484; Thomas *v.* Ervin, Cheves (S. C.) 221, 34 Am. Dec. 586; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237. And see Gould *v.* Palmer, 96 Ga. 798, 22 S. E. 583.

22. Mardis *v.* Shackleford, 4 Ala. 493; McArthur *v.* Baker, 7 Ky. L. Rep. 440; Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364; Wilcox *v.* Plummer, 4 Pet. (U. S.) 172, 7 L. ed. 821. *Compare* Chunn *v.* Patton, 35 N. C. 421.

Failure to return uncollected notes.— But where notes are given to an attorney for collection, the attorney stipulating to return on request such of the notes as remain uncollected, the client's right of action for the attorney's failure to return the uncollected notes does not accrue and the statute does not begin to run until demand and refusal. Stevens *v.* Rogers, 16 Utah 105, 51 Pac. 261. And see Jouett *v.* Erwin, 9 La. 231.

23. Moore *v.* Juvenal, 92 Pa. St. 484; Fox *v.* Jones, (Tex. App. 1889) 14 S. W. 1007.

24. Unauthorized receipt of money see *infra*, VI, B, 14, b, (II), text and note 31.

25. Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273.

26. The statute cannot of course begin to run before the money has been collected, except in cases where the agent is charged with negligence in failing to make the collection. Knight *v.* Killebrew, 86 N. C. 400; Lawrence University *v.* Smith, 32 Wis. 587. And see *supra*, VI, B, 3, b.

27. In Missouri the decisions are in such direct conflict that no general principle can be deduced from them. See Carder *v.* Primm, 52 Mo. App. 102; Donahue *v.* Bragg, 49 Mo. App. 273; Aultman *v.* Adams, 35 Mo. App. 503; McClurg *v.* Hill, 7 Mo. App. 579; State v. Dailey, 4 Mo. App. 172.

In Georgia it is held that the statute begins to run from the time the fact of collection comes to the knowledge of the principal. Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113; Schofield *v.* Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315.

Where a husband as agent of his wife collected demands due the wife as her separate estate, it was held that the statute of limita-

over the money upon its receipt by him, and his contract is broken if he does not perform this duty within a reasonable time;[28] and so the right of action against him accrues and the statute begins to run when the money is collected or within a reasonable time thereafter, a demand by the principal or client not being regarded as indispensable.[29] In these jurisdictions the operation of the statute is not postponed by the failure of the agent or attorney to give notice to his principal or client that the money had been collected; but it is only where fraud is practised by the agent or attorney that the operation of the statute is postponed. The principal's ignorance of his rights is immaterial.[30] But where the agent or attorney fraudulently conceals the fact that the money has been collected it has been

tions begins to run against the wife's right from the time when she obtained knowledge of the fact of the collection. Riggan *v.* Riggan, 93 Va. 78, 24 S. E. 920.

In case of partial collections of which no notice is given to the client, the statute will not begin to run until the case is terminated by success or failure, or until the relation of attorney and client is terminated in the case. McCoon *v.* Galbraith, 29 Pa. St. 293.

28. *District of Columbia.*— Campbell *v.* Wilson, 2 Mackey 497.

Minnesota.— See Mast *v.* Easton, 33 Minn. 161, 22 N. W. 253.

New York.— Hickok *v.* Hickok, 13 Barb. 632, collection by an agent.

Pennsylvania.— Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273; Fleming *v.* Culbert, 46 Pa. St. 498; Agnew *v.* Fetterman, 4 Pa. St. 56, 58, 45 Am. Dec. 671.

South Carolina.— Estes *v.* Stokes, 2 Rich. 133. But *compare* Lever *v.* Lever, 1 Hill Eq. 62.

And see the cases in the following note.

29. *Connecticut.*— Hart's Appeal, 32 Conn. 520.

District of Columbia.— See Campbell *v.* Wilson, 2 Mackey 497, in which case, however, there was a demand and refusal.

Illinois.— Cagwin *v.* Ball, 2 Ill. App. 70.

Maine.— Coffin *v.* Coffin, 7 Me. 298 [*distinguishing* Staples *v.* Staples, 4 Me. 532].

Minnesota.— See Mast *v.* Easton, 33 Minn. 161, 22 N. W. 253.

Nebraska.— Campbell *v.* Roe, 32 Nebr. 345, 49 N. W. 452; Arnett *v.* Zinn, 20 Nebr. 591, 31 N. W. 240.

New York.— The rule of the text applies to agents. Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Yates *v.* Wing, 42 N. Y. App. Div. 356, 59 N. Y. Suppl. 78 (holding that this is true even though an account be necessary to determine the sum due); Hickok *v.* Hickok, 13 Barb. 632; Downs *v.* Wells, 14 N. Y. Suppl. 566, 16 N. Y. Suppl. 707; Douglass *v.* Murray, 7 N. Y. St. 837. *Compare* Lyle *v.* Murray, 4 Sandf. 590.

Ohio.— Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

South Carolina.— Estes *v.* Stokes, 2 Rich. 133. But *compare* Lever *v.* Lever, 1 Hill Eq. 62.

Tennessee.— Hawkins *v.* Walker, 4 Yerg. 188.

Virginia.— Hasher *v.* Hasher, 96 Va. 584, 32 S. E. 41.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 247, 363.

Attorneys at law and agents.— It has been held in several jurisdictions that with regard to the rule of the text there is no distinction between the liability of an attorney at law and that of an agent or attorney in fact. Coffin *v.* Coffin, 7 Me. 298; Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273. *Compare* Carder *v.* Primm, 52 Mo. App. 102. But in New York the case of an attorney at law has been held to be an exception to the rule of the text, his liability not accruing and the statute not beginning to run in his favor until demand and refusal to pay except in cases where he has applied the money to his own use or otherwise wrongfully dealt with it; the object of the rule being to protect the attorney from costs and annoyances of litigation so long as he acts in good faith and discharges his duties to his client. See Wood *v.* Young, 141 N. Y. 211, 218, 36 N. E. 193; Bronson *v.* Munson, 29 Hun (N. Y.) 54; Grinnell *v.* Sherman, 14 N. Y. Suppl. 544 (construing Code Civ. Proc. § 410); Taylor *v.* Bates, 5 Cow. (N. Y.) 376. *Compare* the New York cases in the following note.

30. *District of Columbia.*— Jackson *v.* Combs, 7 Mackey 608, 1 L. R. A. 742.

Minnesota.— Mast *v.* Easton, 33 Minn. 161, 22 N. W. 253.

Mississippi.— Cook *v.* Rives, 13 Sm. & M. 328, 53 Am. Dec. 88.

Nebraska.— Campbell *v.* Roe, 32 Nebr. 345, 49 N. W. 452.

Ohio.— Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

Pennsylvania.— Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273 (holding that the case of McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503, can be sustained only on the ground of fraudulent concealment); Fleming *v.* Culbert, 46 Pa. St. 498. See also Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364. *Compare* McCoon *v.* Galbraith, 29 Pa. St. 293.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 247, 376, 378.

"Under such circumstances the rule of law is that, unless by virtue of the contract itself or by some relation of the parties, the defendant was under a duty to make known the fact of payment, the defendant's mere silence amounting to nothing more than non-action, is not such a fraud upon the plaintiff as en-

frequently held that the statute begins to run only from the time when the principal or client discovers the fraud and learns that the money has been received;[31] and statements of the agent or attorney calculated to put the principal or client off his guard have been sufficient thus to postpone the running of the statute.[32] But in a number of jurisdictions it is held that the cause of action does not accrue until a demand is made on the agent or attorney, and therefore that the statute begins to run upon demand and refusal to pay, not sooner,[33] unless there are cir-

titles him to complain." Jackson *v.* Combs, 7 Mackey (D. C.) 608, 613, 1 L. R. A. 742.

In **New York** the agent or attorney must notify the client within a reasonable time that the money has been collected. Bronson *v.* Munson, 29 Hun 54 (construing Code Civ. Proc. § 410); Lyle *v.* Murray, 4 Sandf. 590; Christ *v.* Chetwood, 1 Misc. 418, 20 N. Y. Suppl. 841 [*affirmed* in 3 Misc. 614, 22 N. Y. Suppl. 1133] (construing Code Civ. Proc. § 410). If he does so the client must make a demand within a reasonable time thereafter, and by his neglect to make such demand he puts the statute in motion against himself. Bronson *v.* Munson, *supra* (construing Code Civ. Proc. § 410); Lyle *v.* Murray, *supra*; Stafford *v.* Richardson, 15 Wend. 302. It has also been held in a case involving some exceptional features that where the attorney suppresses the fact that the money has been collected and intentionally keeps the client in ignorance thereof the statute will not begin to run until the client first learns of the collection. Bronson *v.* Munson, *supra*, in which it is said that the provisions of Code Civ. Proc. § 410, is but a compilation of the law as it existed at the time the section was adopted and that the purpose of the codification was merely to clear away all doubts on the subject and to make a precise and accurate statement of the law. And see Birckhead *v.* De Forest, 120 Fed. 645, 57 C. C. A. 107, construing Code Civ. Proc. § 410, where a conclusion similar to that in Bronson *v.* Munson, *supra*, was reached.

31. *Illinois.*— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241].

Indiana.— Earnhart *v.* Robertson, 10 Ind. 8, decided under a statute relating to concealment of the cause of action.

Kansas.— Perry *v.* Wade, 31 Kan. 428, 2 Pac. 787; Voss *v.* Bachop, 5 Kan. 59.

Missouri.—Aultman *v.* Adams, 35 Mo. App. 503.

Pennsylvania.— Wickersham *v.* Lee, 83 Pa. St. 416; Morgan *v.* Tener, 83 Pa. St. 305 [*reversing* 10 Phila. 412]; McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503 note [*explained* in Campbell *v.* Boggs, 48 Pa. St. 524]. And see Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273.

United States.— Bracken *v.* Milner, 104 Fed. 522, applying Mo. Rev. St. § 4290, which provides that "if any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of an action," such action may be commenced within the statutory period after its commencement "shall have ceased to be so prevented."

As to **fraudulent concealment of the cause of action** see, generally, *infra*, VI, D, 2, h.

Under an **Alabama statute** (Code, § 2813) limitation does not run while the fact of the collection remains concealed, but the principal or client has only one year in which to sue after his discovery that the money has been collected. Porter *v.* Smith, 65 Ala. 169.

Investment by agent.— The investment of moneys in bonds and mortgages by an attorney in fact, instead of remitting them to his principal, as directed, is not a fraudulent concealment that will prevent the running of the statute of limitations from the time the money was demandable. Fleming *v.* Culbert, 46 Pa. St. 498. *Compare* Norris' Appeal, 71 Pa. St. 106.

32. Aultman *v.* Adams, 35 Mo. App. 503; Wickersham *v.* Lee, 83 Pa. St. 416; Morgan *v.* Tener, 83 Pa. St. 305 [*reversing* 10 Phila. 412]. And see Earnhart *v.* Robertson, 10 Ind. 8; Bronson *v.* Munson, 29 Hun (N. Y.) 54; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273.

Illustration.— Where the agent employed an attorney to collect a claim and the money was collected and misappropriated by the attorney, but the agent reported to his principal that the claim was uncollectable, it was held that the agent became liable for the attorney's fraud at the time when the money was collected; that it was immaterial whether the agent's report was made in good faith or otherwise, since it was sufficient to put the principal off his guard; and that the statute began to run against the principal only from his discovery of the fraud. Morgan *v.* Tener, 83 Pa. St. 305 [*reversing* 10 Phila. 412].

33. *Alabama.*— See Kimbro *v.* Waller, 21 Ala. 376.

Arkansas.— Taylor *v.* Spears, 8 Ark. 429.

Indiana.— Dodds *v.* Vannoy, 61 Ind. 89; Judah *v.* Dyott, 3 Blackf. 324, 25 Am. Dec. 112.

Kansas.— See Auld *v.* Butcher, 22 Kan. 400; Green *v.* Williams, 21 Kan. 64; Voss *v.* Bachop, 5 Kan. 59. *Compare* Perry *v.* Smith, 31 Kan. 423, 2 Pac. 784.

Kentucky.— Roberts *v.* Armstrong, 1 Bush 263, 89 Am. Dec. 624.

Louisiana.— See Wall *v.* Colbert, 36 La. Ann. 883; Jouett *v.* Erwin, 9 La. 231.

Michigan.— Ewers *v.* White, 114 Mich. 266, 72 N. W. 184; Kimball *v.* Kimball, 16 Mich. 211. And see Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580. But see the Michigan case cited in the following note.

cumstances under which a demand is dispensed with.[34] It is held in these jurisdictions, however, that the rule requiring a demand by the principal or client applies only where the agent or attorney has performed his duties and is in no default;[35] and that in order to impose upon the principal or client the duty of making a demand the agent or attorney must within a reasonable time give him notice that the money has been collected or it must appear that by ordinary diligence the principal or client could have ascertained the fact, otherwise the statute does not run.[36] Conversely it is there held that if the agent or attorney gives notice that the money has been collected the principal or client must make demand within a reasonable time, and that if he does not do so the statute will begin to run against him;[37] and that even if no notice is given to the principal or client yet if it appears that by the exercise of ordinary diligence he could have known of the collection, the statute will begin to run against him after the lapse of a reasonable time for making demand.[38] It has been said that in the absence of proof the law will presume that both notice and demand were made in a proper and reasonable time, and that in such a case the statute will begin to run from the lapse of a reasonable time after the money has been collected;[39] but the correctness of this proposition has been questioned.[40] Perhaps the conflict in the decisions is to some extent explained by the principle laid down in a leading Penn-

North Carolina.— Hyman *v.* Gray, 49 N. C. 155; Waring *v.* Richardson, 33 N. C. 77. And see Egerton *v.* Logan, 81 N. C. 172, holding that a demand and refusal set the statute in motion.

Oregon.— Quinn *v.* Gross, 24 Oreg. 147, 33 Pac. 535.

South Dakota.— Cole *v.* Baker, 16 S. D. 1, 91 N. W. 324.

Texas.— Merle *v.* Andrews, 4 Tex. 200.

United States.— Sneed *v.* Hanly, 22 Fed. Cas. No. 13,136, Hempst. 659.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 247, 363.

Non-resident agent.— Where an agent residing in another state is employed to collect money for his principal and there is no contract between them as to when or how the money collected shall be sent to the principal, the principal's right of action does not accrue and the statute does not begin to run until after demand and refusal. Green *v.* Williams, 21 Kan. 64.

Sufficiency of demand and refusal.— Where an attorney was employed to collect certain notes for his client, stating that if he collected the full amount he would "do what is right," and having collected the full amount, was asked by the client whether he would give the latter any of the money or whether he intended to keep it all, to which the attorney made no reply, it was held that there was a sufficient demand and refusal to set the statute in motion. Egerton *v.* Logan, 81 N. C. 172.

34. See Mardis *v.* Shackleford, 4 Ala. 493 (holding that an agreement of the attorney with his client to pay over money when collected dispenses with the necessity for formal demand); Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059 [*distinguishing* Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Kimball *v.* Kimball, 16 Mich. 211] (holding that where the agent's duty is merely to receive and remit the money and his duty to remit is fixed so that no accounting is necessary, the statute begins to run when an action may be brought, that is, upon the agent's receipt of the money). But *compare* Emerick *v.* Chesrown, 90 Ind. 47.

35. Jett *v.* Hempstead, 25 Ark. 462; Denton *v.* Embury, 10 Ark. 228.

36. Jett *v.* Hempstead, 25 Ark. 462; Quinn *v.* Gross, 24 Oreg. 147, 33 Pac. 535; Bonner *v.* McCreary, (Tex. Civ. App. 1895) 35 S. W. 197. And see Voss *v.* Bachop, 5 Kan. 59; Carder *v.* Primm, 52 Mo. App. 102; Donahue *v.* Bragg, 49 Mo. App. 273; McClurg *v.* Hill, 7 Mo. App. 579; Merle *v.* Andrews, 4 Tex. 200. *Compare* Aultman *v.* Adams, 35 Mo. App. 503.

The burden is upon the agent or attorney to show that the notice was given or that the principal or client could by ordinary diligence have known that the money was collected. Jett *v.* Hempstead, 25 Ark. 462.

37. Leigh *v.* Williams, 64 Ark. 165, 41 S. W. 323; Jett *v.* Hempstead, 25 Ark. 462; Quinn *v.* Gross, 24 Oreg. 147, 33 Pac. 535. And see Denton *v.* Embury, 10 Ark. 228.

38. Leigh *v.* Williams, 64 Ark. 165, 41 S. W. 323; Whitehead *v.* Wells, 29 Ark. 99; Jett *v.* Hempstead, 25 Ark. 462. And see Kimbro *v.* Waller, 21 Ala. 376; Means *v.* Jenkins, 18 Ill. App. 41; Hudson *v.* Kimbrough, 74 Miss. 341, 20 So. 885. *Compare* Denton *v.* Embury, 10 Ark. 228.

39. Voss *v.* Bachop, 5 Kan. 59. And see Teasley *v.* Bradley, 110 Ga. 497, 35 S. E. 782, 78 Am. St. Rep. 113 (where it is said, however, that if the relation is that of a confidential and continuing agency no such presumption would arise until the relation ceased); Schofield *v.* Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315.

40. Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604, where it is said that the question could hardly have arisen in Voss *v.* Bachop, 5 Kan. 59, so as to make its decision a precedent.

sylvania case[41] as follows: Where the agent or attorney is employed to collect a particular debt "he is not to be annoyed with an action the instant the money is in hand and before demand made," but is to have a reasonable time to remit or give notice of the collection; but if he does not remit or give notice within a reasonable time he is guilty of culpable negligence — a breach of contract with his principal or client — for which an action may be brought without demand; and because the right of action is then complete the statute begins to run from the time the "culpable negligence" or breach of contract occurs.[42] Demand and refusal as a condition precedent to the accrual of the principal's cause of action may result from mercantile usage or custom, as in the case of banks acting as collecting agents, but the usage or custom must be established by evidence.[43]

e. Failure of Factor to Remit Proceeds of Sale[44] — (i) *IN GENERAL.* Where goods are consigned to a factor for sale the general rule is that the statute does not begin to run against the consignor until the factor has rendered an account or instructions have been given to remit or a demand for an account has been made and not complied with, for until then the factor cannot be regarded as being in default.[45] But this rule may be varied by the effect of special instructions, by a

41. Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273 [*explaining* Krause *v.* Dorrance, 10 Pa. St. 462, 51 Am. Dec. 496, and *criticizing* McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503].

42. **Instruction approved.**— The following instruction to the jury has been held correct: "In general, when an agent has transacted business for his principal, especially when he has received money belonging to his principal, he should make report of those facts at the earliest convenient time to the principal, unless there is something in the agreement between them which excuses the agent from rendering such account; and at all events it is the duty of the agent, when a demand is made by the principal for an account, or for the payment of money received by him, to respond according to the nature of the demand; and if he fails to do so, he cannot claim the benefit of the statute of limitations unless the conduct of the principal may have been such as to excuse him. But in order that the principal may be subject to the operation of the statute upon his claim, he must have had knowledge, either by direct notice from the agent, or by some other means, of the facts that the agent has received money and holds it for his benefit." Quinn *v.* Gross, 24 Oreg. 147, 151, 33 Pac. 535.

43. Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449.

Custom of banks as to demand.— An established custom that current deposits and the proceeds of paper placed for collection with a bank are payable on demand operates to prevent the running of the statute of limitations against a depositor until payment has been refused or some act done, with his knowledge, obviating the necessity of demand (Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449); such as the suspension of specie payment and notice thereof (Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J (Md.) 422).

44. See, generally, FACTORS AND BROKERS, 19 Cyc. 143.

45. *California.*— Kane *v.* Cook, 8 Cal. 449, per Field, J.

Georgia.— Jaynes *v.* Sheffield, 49 Ga. 354.

Illinois.— F. H. Hill Co. *v.* Sommer, 55 Ill. App. 345.

New York.— Baird *v.* Walker, 12 Barb. 298.

Pennsylvania.— Jayne *v.* Mickey, 55 Pa. St. 260. See also Stiles *v.* Donaldson, 2 Yeates 105, 2 Dall. 264, 1 L. ed. 375.

United States.— See Toland *v.* Sprague, 12 Pet. 300, 9 L. ed. 1093, holding that the statute began to run from the date of the demand.

England.— Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610.

See 33 Cent. Dig. tit. "Limitation of Actions," § 363.

In the absence of some special instructions or particular usage, the statute will not begin to run against the consignor from the date on which the sales are made and the money received or from the date of the sale of the last article consigned. Fulkerson *v.* White, 22 Tex. 674, 680, in which the court said: "We think it was the duty of the consignees . . . to render an account to their principal, 'within a reasonable time, according to the course of business;' and that, to say the least, an action would not lie against them until after such an account was rendered; or until a reasonable time within which to render such account, had elapsed without its being rendered; or until there had been a conversion of the proceeds of the sales by the consignees, either open and actual, or to be presumed by the rules of law, under the circumstances of the case." And see Nagle *v.* Moody, 53 Tex. 266; Phillips *v.* Holman, 26 Tex. 276.

Payment on account.— Where salt was consigned for sale during a single season, and it was the evident intention of the parties that it was to be sold and the proceeds thereof paid to the consignor, and subsequently a payment was made on the account, and no action was brought for eight years thereafter,

particular course of dealing between the parties, or by local usage.[46] Thus where the contract of the parties provides that remittance shall be made upon receipt of the proceeds of the sales, there can be no occasion for any further instructions or any demand to put the factor in default, and the consignor's cause of action accrues upon the factor's failure to remit the proceeds when received.[47] It has been held, however, that in such a case it does not necessarily follow that the statute begins to run against the consignor from the date the factor receives the proceeds; but that it is the duty of the factor to inform the consignor of the receipt of the money, and that if he fraudulently conceals that fact the statute does not begin to run until the consignor discovers that the money has been received.[48]

(II) *Foreign Factor.* Where a foreign factor has given timely notice to his principal of the sale of the goods, he may await instructions without being in default, and hence the statute does not begin to run in his favor until a demand has been made upon him by his principal or instructions given to remit the proceeds.[49] But if from the usual course of business or special contract or instructions a different practice has been pursued, it may become the duty of the factor to remit upon receiving the money without waiting for a demand, and in such case the statute will run from the time of the receipt and failure to remit.[50]

4. Contracts of Sale[51] — a. In General. A right of action for the breach of a contract of sale accrues at the time the breach occurs and the statute of limitations then begins to run,[52] as in the case of the breach of any other contract,[53] not at a subsequent time when defendant refuses to make compensation for the breach;[54] nor is the running of the statute postponed until consequential damage results or is ascertained.[55] Thus the right of action of a purchaser of land for his vendor's breach of a written contract to convey after part payment of the purchase-money, tender of the balance, and a demand for the deed, accrues at the

the claim was barred. Holston Salt, etc., Co. *v.* Hargis, 73 Ga. 113.

Presumption of demand.— It has been said that after the lapse of a reasonable time a demand and an accounting may be presumed. Topham *v.* Broddick, 1 Taunt. 572, 10 Rev. Rep. 610, holding, however, that upon the facts of the particular case no such presumption could arise.

46. Fulkerson *v.* White, 22 Tex. 674.

Direction to pay to third person.— If the consignor at the time of the consignment direct that the proceeds of sale be paid to a third person, the consignee should still account with his principal in a reasonable time; but he is not liable to be sued until he has actually or impliedly broken his orders; and is not necessarily in default because he does not pay the proceeds of sale to such third person immediately upon receiving them. Fulkerson *v.* White, 22 Tex. 674.

47. Kane *v.* Cook, 8 Cal. 449.

48. Kane *v.* Cook, 8 Cal. 449, where it was held that a delay of three years to impart knowledge of the sale to the consignor could not be reconciled with honest intentions and necessarily led to the conclusion that the sale was concealed for a fraudulent purpose.

49. Walden *v.* Crafts, 4 E. D. Smith (N. Y.) 490, 2 Abb. Pr. 301. See also Stiles *v.* Donaldson, 2 Yeates (Pa.) 105, 2 Dall. 264, 1 L. ed. 375; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093, holding that the statute began to run from the date of the demand.

50. Middleton *v.* Twombly, 125 N. Y. 520, 26 N. E. 621 [*affirming* 58 N. Y. Super. Ct. 561, 9 N. Y. Suppl. 924].

51. **Breach of covenant** see Covenants, 11 Cyc. 1134.

Purchase-price payable in instalments; rescission under the Louisiana code.— Where property is sold to be paid for in instalments and default is made in the payment of the first instalment, as against a right of action to dissolve the sale prescription runs from the time of the first default and not from the date when the last instalment falls due. Gonsoulin *v.* Adams, 28 La. Ann. 598 [*following* George *v.* Knox, 23 La. Ann. 354]. But the vendor may waive the first default as by the extinguishment of that part of the debt by voluntary remission, and where he has done so and bases his action to rescind solely on the purchaser's default as to a later instalment, prescription runs from the date of the last default. Pike *v.* Charrotte, 39 La. Ann. 300, 1 So. 895; Edwards *v.* White, 34 La. Ann. 989.

52. East India Co. *v.* Paul, 14 Jur. 253, 7 Moore P. C. 85, 1 Eng. L. & Eq. 44, 13 Eng. Reprint 811, where the action was instituted by the buyer for the seller's failure to deliver the goods.

53. See *supra*, VI, B, 1, a.

54. East India Co. *v.* Paul, 14 Jur. 253, 7 Moore P. C. 85, 1 Eng. L. & Eq. 44, 13 Eng. Reprint 811.

55. Battley *v.* Faulkner, 3 B. & Ald. 288, 22 Rev. Rep. 300, 5 E. C. L. 172. See, generally, *supra*, VI, B, 1, b.

date of demand and refusal and the statute then begins to run.[56] Or if the contract fixes a time within which the conveyance shall be made, the statute begins to run at the expiration of that time.[57] If the vendor has broken his contract by conveying the property to a third person, the purchaser's right of action for damages accrues at the time of the conveyance and the statutory period is computed from that date.[58] It has been held, however, that an action for damages in lieu of specific performance of a contract to convey land is barred if when it was commenced the period of limitation provided for suits in equity had run against the purchaser's cause of action for specific performance;[59] and that the fact that after payment of the purchase-price the vendor conveyed the property to a third person does not change the cause of action into one for money had and received so that it can be deemed not to have accrued until the conveyance.[60]

b. Recovery of Price or Value.[61] A right of action to recover the purchase-price or value of goods sold and delivered accrues at the time of delivery, and the statute of limitations begins to run from that date, unless there is some agreement as to the time or manner of payment different from that which the law implies, which is that payment shall be made in cash on delivery.[62] If a term of credit is given to the buyer the right of action for the value of the goods accrues, and the statute begins to run when and only when the period of credit has expired;[63] and it has been so held, although the buyer contracted to give his note for the price and has failed to do so.[64] Where an entire contract for the sale of goods to be delivered at various times is terminated before full performance, and the seller sues for the value of the goods already delivered, the decisions are conflicting, it being held on the one hand that the statute begins to run as to each lot or parcel from the time of its delivery;[65] and on the other hand that it begins to run only when the last lot or parcel is delivered.[66]

56. Deming *v.* Haney, 23 Iowa 77, holding also that, although the purchaser can recover the purchase-money paid and accrued interest thereon, the action is not one for money had and received but for breach of contract. *Compare* Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899. See, generally, VENDOR AND PURCHASER.

57. Mitchell *v.* Sheppard, 13 Tex. 484.

58. Cochrane *v.* Oliver, 7 Ill. App. 176; Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. 117. And see Fogal *v.* Page, 13 N. Y. Suppl. 656; Harris *v.* Harris, 70 Pa. St. 170, where it appeared from the evidence that the purchaser had remained in possession for a number of years, making improvements until evicted by the third person.

59. Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783 [*affirming* 82 Hun 98, 31 N. Y. Suppl. 202]. See also Mitchell *v.* Sheppard, 13 Tex. 484.

60. Cooley *v.* Lobdell, 153 N. Y. 596, 47 N. E. 783 [*affirming* 82 Hun 98, 31 N. Y. Suppl. 202]. And see Peters *v.* Delaplaine, 49 N. Y. 362. But *compare* Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868; Fogal *v.* Page, 13 N. Y. Suppl. 656. See, generally, SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

61. Recovery of purchase-money by vendor of land see VENDOR AND PURCHASER.

62. Rous *v.* Walden, 82 Ind. 238; Turner *v.* Martin, 4 Rob. (N. Y.) 661; Foss-Schneider Brewing Co. *v.* Bullock, 59 Fed. 83, 8 C. C. A. 14.

Payment when goods are weighed.— If the contract provides that payment is to be made with the goods are weighed and their amount ascertained, the statute begins to run when the weighing and ascertainment of amount takes place, not at the date of delivery. National Cotton-Oil Co. *v.* Taylor, (Tex. Civ. App. 1898) 45 S. W. 478.

63. Appleman *v.* Michael, 43 Md. 269; Hendricks *v.* Robinson, 56 Miss. 694, 31 Am. Rep. 382 (custom of merchant in a certain city to give credit until the first of January); Effinger *v.* Henderson, 33 Miss. 449 (a similar custom); Tisdale *v.* Mitchell, 12 Tex. 68; Helps *v.* Winterbottom, 2 B. & Ad. 431, 9 L. J. K. B. O. S. 258, 22 E. C. L. 184. And see Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887, holding that open accounts become due and payable at the end of the year and that the statute then begins to run. But *compare* Brant *v.* Cook, 12 B. Mon. (Ky.) 267; Smyth *v.* Walton, 5 Tex. Civ. App. 673, 24 S. W. 1084, which cases hold otherwise as to a custom of giving credit.

Under Ky. St. § 2518, it has been held that limitations upon an action on a merchant's account for goods sold and delivered shall be computed from the first day of January next succeeding the respective dates or times of the delivery of the several articles charged in the account. Sams *v.* Stockton, 14 B. Mon. (Ky.) 232.

64. Appleman *v.* Michael, 43 Md. 269. *Compare* ACTIONS, 1 Cyc. 741.

65. Schillo *v.* McEwen, 90 Ill. 77.

66. McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470.

c. Breach of Warranty[67] — (I) *IN GENERAL.* A cause of action for a breach of warranty in a sale of personal property accrues at the time the warranty is broken and the statute of limitations then begins to run.[68] Some difficulty, however, arises in determining when particular warranties can be said first to be broken.[69] There are cases treating a false warranty as a fraud and holding that the running of the statute is postponed until the fraud is discovered or might be discovered in the exercise of ordinary diligence.[70]

(II) *WARRANTY OF TITLE.* Where a seller has no title to the goods at the time of the sale it has been held that, inasmuch as his implied warranty of title is broken immediately, the statute begins to run from the date of the sale.[71] On the other hand it has been held in such cases that the statute begins to run, not from the date of the sale but from the time when the buyer is disturbed in his possession by the true owner, or when he offers to return the goods in disaffirmance of the contract.[72]

(III) *WARRANTIES OF SOUNDNESS, KIND, AND QUALITY.*[73] Where unsound personal property is sold with a warranty of soundness the warranty is broken as

67. Breach of covenant of warranty see COVENANTS, 11 Cyc. 1134.

In a redhibitory action under the Louisiana code to rescind the sale of a chattel for a breach of warranty, prescription runs from the date of the sale and thus the seller had knowledge of the defect and did not declare it to the buyer. Riddle *v.* Kreinbiehl, 12 La. Ann. 297; Romer *v.* Woods, 6 La. Ann. 29. See Morgan *v.* Robinson, 12 Mart. 76, 13 Am. Dec. 366; Chretien *v.* Theard, 11 Mart. 11. This is true, although a demand is made in the petition that a note given as part of the price should be canceled and annulled. Comanx *v.* Doiron, 14 La. Ann. 184. But if the seller had knowledge of the defect and did not declare it to the buyer, prescription runs from the time when the buyer discovers the defect. Murphy *v.* Guiterez, 17 La. Ann. 269, 20 La. Ann. 407; Reynaud *v.* Guillotte, 1 Mart. N. S. 227. In the case of a contract for the manufacture and delivery of an article, prescription does not run against a redhibitory action to rescind (on account of defects rendering the article unfit for its intended purposes) until the article is constructed and delivered. Lobdell *v.* Parker, 3 La. 328. In an action to recover part of the price unpaid the buyer may set up the redhibitory vice as a matter of defense, although more than the statutory period has elapsed since the sale. On the other hand, it has been held that he cannot by a reconventional demand recover back part of the purchase-price after the lapse of the statutory period. Riddle *v.* Kreinbiehl, 12 La. Ann. 297.

68. Baucum *v.* Streater, 50 N. C. 70. And see the cases cited *infra*, VI, B, 4, c, (II); VI, B, 4, c, (III).

69. See J. Kennard, etc., Carpet Co. *v.* Dornan, 64 Mo. App. 17; Nickles *v.* U. S., 42 Fed. 757.

The solution of this question depends upon the general law of warranties in sales of goods. See, generally, SALES.

Where a judgment is assigned with a warranty that the judgment is for a certain sum, whereas part of the amount has been released, the assignee's right of action accrues and the statute begins to run at the date of the assignment, not when the discrepancy is discovered. Lewis *v.* Houston, 11 Tex. 642.

Sale of forged land-warrants. — The vendor of land-warrants "guaranteed" them to be "in all respects genuine and receivable at the general land office of the United States," but the commissioner of the land-office adjudged them to be "false and forged." It was held that the contract had reference to the decision of the commissioners as the event that was to determine the liability of the "guarantor"; that is, that the latter "guaranteed" a favorable decision by that tribunal, the contract thus being a promise dependent upon a contingency; and therefore that the cause of action on the warranty or "guaranty" accrued and the statute began to run at the time when the warrants were rejected by the commissioners, and not at the date of the contract. Johnson *v.* Gilfillan, 8 Minn. 395. And see the cases in the following note.

70. As in case of the sale of forged land certificates, it being held that the statute did not run until the certificates were declared by the proper land officers to be forgeries. Anding *v.* Perkins, 29 Tex. 348; Ripley *v.* Withee, 27 Tex. 14. And see the preceding note.

As to fraud see, generally, *infra*, VI, B, 21.

71. Chancellor *v.* Wiggins, 4 B. Mon. (Ky.) 201, 39 Am. Dec. 499; Scott *v.* Scott, 2 A. K. Marsh. (Ky.) 217; Perkins *v.* Whelan, 116 Mass. 542. *Compare* Nickles *v.* U. S., 42 Fed. 757.

72. Gross *v.* Kierski, 41 Cal. 111; Word *v.* Cavin, 1 Head (Tenn.) 506. See also Caplinger *v.* Vaden, 5 Humphr. (Tenn.) 629. But see Sargent *v.* Currier, 49 N. H. 310, 6 Am. Rep. 524.

73. Contract for manufacture and sale. — Where a contract is for the manufacture of an article to be delivered at a future day, it seems that the statute does not begin to run against a cause of action based on an implied warranty of fitness until the article is manufactured and delivered. Lobdell *v.* Parker, 3 La. 328.

soon as made and the statute begins to run from the date of the sale,[74] not from the time when the buyer sustains consequential damage.[75] Likewise where goods are warranted to be of a certain kind or quality, but are not of that kind or quality, the warranty is broken when made and the statutory period is computed from the date of the sale,[76] not at the time when special or consequential damage results,[77] or from the date when the breach is discovered; and this, although meanwhile the buyer is wholly unable to ascertain whether the goods comply with the warranty.[78] It seems to be conceded, however, that the rule would be otherwise if the warranty related to a future event by which its truth could be ascertained, as that fruit trees would bear a certain kind of fruit,[79] or that a carpet when laid would not develop grease spots.[80] Thus where machinery is sold with warranty and accepted on condition that it complies therewith, a cause of action for breach of the warranty does not accrue and the statute does not begin to run until a reasonable time has elapsed for making the necessary tests;[81] and the time taken by the parties in trying to make the machinery fulfil the stipulated conditions is the proper criterion of what is reasonable.[82]

5. Contracts of Guaranty.[83] The statute of limitations begins to run upon a contract of guaranty the moment a right of action on the contract accrues,[84] not before.[85] As to when the right of action accrues no general rule can be formulated, but the question must be determined according to the provisions of each particular contract.[86] A guaranty may, however, be broken as soon as made.

74. Baucum *v.* Streater, 50 N. C. 70; Motley *v.* Montgomery, 2 Bailey (S. C.) 544.

The seller's subsequent promise to refund the purchase-price if the buyer should discover that the seller knew the chattel was unsound does not postpone the running of the statute until such discovery. Motley *v.* Montgomery, 2 Bailey (S. C.) 544.

75. Baucum *v.* Streater, 50 N. C. 70. And see Taylor *v.* McMurray, 58 N. C. 357, holding that the same rule applies to a suit in equity to restrain collection of the purchase-price.

76. J. Kennard, etc., Carpet Co. *v.* Dornan, 64 Mo. App. 17 (per Rombauer, J.); Allen *v.* Todd, 6 Lans. (N. Y.) 222 (sale of fruit trees); Battley *v.* Faulkner, 3 B. & Ald. 288, 22 Rev. Rep. 390, 5 E. C. L. 172; Bogardus *v.* Wellington, 27 Ont. App. 530 (sale of fruit trees).

77. Battley *v.* Faulkner, 3 B. & Ald. 288, 22 Rev. Rep. 390, 5 E. C. L. 172.

78. J. Kennard, etc., Carpet Co. *v.* Dornan, 64 Mo. App. 17 (per Rombauer, J.); Allen *v.* Todd, 6 Lans. (N. Y.) 222; Battley *v.* Faulkner, 3 B. & Ald. 288, 22 Rev. Rep. 390, 5 E. C. L. 172. *Compare* Beach *v.* Branch, 57 Ga. 362, holding that the action must be brought within the statutory period after discovery of the defect.

79. Allen *v.* Todd, 6 Lans. (N. Y.) 222.

80. J. Kennard, etc., Carpet Co. *v.* Dornan, 64 Mo. App. 17, per Rombauer, J.

81. Felt *v.* Reynolds Rotary Fruit Evaporating Co., 52 Mich. 602, 18 N. W. 378.

82. Felt *v.* Reynolds Rotary Fruit Evaporating Co., 52 Mich. 602, 18 N. W. 378.

83. See, generally, Guaranty.

Continuing guaranty see *infra*, VI, B, 12, d.

84. Cummins *v.* Tibbetts, 58 Nebr. 318, 78 N. W. 617. See also Sollee *v.* Meugy, 1 Bailey (S. C.) 620.

85. Cooper *v.* Dedrick, 22 Barb. (N. Y.) 516; State Bank *v.* Knotts, 10 Rich. (S. C.) 543, 70 Am. Dec. 234; Thomas *v.* Croft, 2 Rich. (S. C.) 113, 44 Am. Dec. 279.

86. See Jones *v.* Trimble, 3 Rawle (Pa.) 381; Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311; Meade *v.* McDowell, 5 Binn. (Pa.) 195; Boyce *v.* Ewart, Rice (S. C.) 126; Adams *v.* Clarke, 14 Vt. 9; Holl *v.* Hadley, 2 A. & E. 758, 4 L. J. K. B. 126, 4 N. & M. 515, 29 E. C. L. 348; Colvin *v.* Buckle, 11 L. J. Exch. 33, 8 M. & W. 680.

Particular contracts of guaranty.—A guaranty that a note payable at a future day "is due" and that the "maker has nothing to file against it" is to be considered as referring to the time when the note arrives at maturity and the statute of limitations will not begin to run until that time. Adams *v.* Clarke, 14 Vt. 9. Where the guaranty is of the payment of notes or drafts made or to be made by a third person, the cause of action accrues and the statute begins to run when and only when there is a failure to pay such notes or drafts at maturity. State Bank *v.* Knotts, 10 Rich. (S. C.) 543, 70 Am. Dec. 234. Where a buyer of goods gives in payment therefor the note of a third person which he guarantees, the taking of the note by the seller operates as a giving of credit and the statute will not begin to run until the note falls due. Fowler *v.* Clearwater, 35 Barb. (N. Y.) 143. Where an attorney at law employed to collect a debt promises to pay the debt himself if he fails to collect it, the statute does not begin to run in his favor until the proceedings advised and instituted by him to enforce payment of the debt are terminated. Morrill *v.* Graham, 27 Tex. 646. *Compare* Freeman *v.* Bigham, 65 Ga. 580. Where a person guarantees the debt of another in consideration of the creditor's forbearance to sue the debtor, no cause of action accrues on the guaranty until there has

Thus where a person in good faith guarantees a signature which in fact is a forgery, his implied promise is broken at once, the right of action thereon accrues immediately, and the statute begins to run from the date of the guaranty.[87] And the same rule applies to an absolute unconditional guaranty of an obligation already overdue.[88]

6. Contracts of Indemnity[89] — a. In General. Where the condition of a bond or the promise in any other contract is to indemnify the obligee or promisee against loss or damage, the cause of action accrues and the statute begins to run when and only when the loss or damage occurs,[90] not when the act is done which causes the damage.[91] It has been held, however, that a liability to injury, when accompanied by any inconvenience or damage to the indemnitee on account of the indemnitor's neglect, constitutes a breach of the contract and gives an immediate right of action;[92] and that there is a breach as soon as a judgment is recovered against the indemnitee determining his liability, so that a right of action accrues and the statute begins to run, although the judgment is not paid.[93] But as a general rule where the contract is to indemnify against loss or damage arising from the payment of money, the cause of action begins to run from the time when the indemnitee pays the money, not from the time when he becomes liable to pay it;[94]

been a forbearance for a reasonable time, and meanwhile the statute does not run. Thomas *v.* Croft, 2 Rich. (S. C.) 113, 44 Am. Dec. 279.

Guaranty of solvency of maker of note.— Where a person pays a debt in notes of third persons and guarantees to make the notes good if the makers are insolvent, a right of action on the guaranty accrues and the statute begins to run when the insolvency is ascertained or might be ascertained with reasonable diligence. Mobile, etc., R. Co. *v.* Jones, 57 Ga. 198.

87. Lehigh Coal, etc., Co. *v.* Blakeslee, 189 Pa. St. 13, 41 Atl. 992, 69 Am. St. Rep. 788.

88. Little *v.* Edwards, 69 Md. 499, 16 Atl. 134, guaranty of an overdue judgment.

89. See, generally, Indemnity, 22 Cyc. 78.

90. *Arkansas.*—Carter *v.* Adamson, 21 Ark. 287.

California.— Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115.

Connecticut.— Graves *v.* Johnson, 48 Conn. 160, 40 Am. Rep. 162.

Kentucky.— Bottom *v.* Williamson, 3 Bush 521.

Maine.— Gennings *v.* Norton, 35 Me. 308. See also Page *v.* Frankfort, 9 Me. 115.

Maryland.— Hall *v.* Creswell, 12 Gill & J. 36.

Massachusetts.— Hall *v.* Thayer, 12 Metc. 130.

Missouri.— See Rowsey *v.* Lynch, 61 Mo. 560.

Nebraska.— Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

New York.— Taylor *v.* Barnes, 69 N. Y. 430.

South Carolina.— Sims *v.* Goudelock, 6 Rich. 100.

West Virginia.— Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737 [*followed* in Adkins *v.* Stephens, 38 W. Va. 557, 18 S. E. 740].

England.— Collinge *v.* Heywood, 9 A. & E. 633, 8 L. J. Q. B. 98, 1 P. & D. 502, 2 W. W. & H. 107, 36 E. C. L. 336 [*overruling* Bullock *v.* Lloyd, 2 C. & P. 119, 12 E. C. L. 482]; Huntley *v.* Saunderson, 1 Cromp. & M. 467, 2 L. J. Exch. 204, 3 Tyrw. 469; Reynolds *v.* Doyle, 1 Drinkw. 1, 4 Jur. 992, 1 M. & G. 753, 2 Scott N. R. 45, 39 E. C. L. 1009.

See 33 Cent. Dig. tit. "Limitation of Actions," § 308.

A right of action on a title insurance policy does not accrue, and the statute does not begin to run, until the insured is evicted by the holder of a superior title; and this, although the mortgage under which he is evicted was in existence when the title was guaranteed. Purcell *v.* Land Title Guarantee Co., 94 Mo. App. 5, 67 S. W. 726.

91. Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226; Adkins *v.* Fry, 38 W. Va. 549, 18 S. E. 737 [*followed* in Adkins *v.* Stephens, 38 W. Va. 557, 18 S. E. 740]; Huntley *v.* Sanderson, 1 Cromp. & M. 467, 2 L. J. Exch. 204, 3 Tyrw. 469.

92. Gennings *v.* Norton, 35 Me. 308. See, generally, Indemnity, 22 Cyc. 91 note 68.

93. Sibley *v.* Starkweather, 2 Silv. Sup. (N. Y.) 472, 6 N. Y. Suppl. 81 [*citing* Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. 439].

94. *Connecticut.*— Graves *v.* Johnson, 48 Conn. 160, 40 Am. Rep. 162.

Massachusetts.— Hall *v.* Thayer, 12 Metc. 130.

Mississippi.— McLean *v.* Ragsdale, 31 Miss. 701.

South Carolina.— Sims *v.* Goudelock, 6 Rich. 100.

England.— Collinge *v.* Heywood, 9 A. & E. 633, 8 L. J. Q. B. 98, 1 P. & D. 502, 2 W. W. & H. 107, 36 E. C. L. 336 [*overruling* Bullock *v.* Lloyd, 2 C. & P. 119, 12 E. C. L. 482]; Huntley *v.* Sanderson, 1 Cromp. & M. 467, 2 L. J. Exch. 204, 3 Tyrw. 469; Reynolds *v.* Doyle, 1 Drinkw. 1, 4 Jur. 992, 1 M. & G. 753, 2 Scott N. R. 45, 39 E. C. L. 1009.

See 33 Cent. Dig. tit. "Limitation of Actions," § 308. And see, generally, Indemnity, 22 Cyc. 91, text and note 68.

and this rule applies to the foreclosure of an indemnity mortgage given by a principal to his surety.[95]

b. Quasi-Contracts of Indemnity.[96] Where a person or corporation is by law primarily liable for the negligence, misfeasance, or malfeasance of another, the former's right to recover indemnity or reimbursement from the latter does not accrue until the former's liability has become finally fixed and ascertained; for the gist of such an action is the damage sustained by the person or corporation primarily liable.[97]

7. Contracts of Bailment in General.[98] A bailor's right of action against his bailee accrues at the time of the latter's breach of duty under the contract of bailment, and the statute of limitations then begins to run.[99] Unless the term of the bailment is limited no lapse of time bars the bailor's right to the property, and his right of action does not accrue and the statute does not begin to run until denial of the bailment and conversion of the property by the bailee[1] or someone claiming under him.[2] To set the statute in motion there must be some act of the bailee inconsistent with the bailment and changing the nature of his holding,[3] such as a refusal to deliver on demand.[4] *A fortiori* where the contract of bailment

95. Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115; McLean *v.* Ragsdale, 31 Miss. 701. See also, generally, Mortgages.

96. See also *infra*, VI, B, 14, c.

97. Power *v.* Munger, 52 Fed. 705, 3 C. C. A. 253 [*quoting* Wood Lim. § 179]. The following cases also support the proposition: Thompson *v.* Lobdell, 7 Rob. (La.) 369 (negligence of attorney for administrator); Veazie *v.* Penobscot R. Co., 49 Me. 119; Lincoln *v.* Lincoln First Nat. Bank, 67 Nebr. 401, 93 N. W. 698, 108 Am. St. Rep. 697, 60 L. R. A. 910; San Antonio *v.* Talerico, 98 Tex. 151, 81 S. W. 518 [*modifying* (Civ. App. 1903) 78 S. W. 28]. *Compare* Pennsylvania Co. *v.* Chicago, etc., R. Co., 144 Ill. 197, 33 N. E. 415 [*affirming* 44 Ill. App. 132].

98. See, generally, Bailments, 5 Cyc. 212 *et seq.*; Trover and Conversion.

99. Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487; Cohrs *v.* Fraser, 5 S. C. 351. See also Bollman Bros. Co. *v.* Peake, 96 Mo. App. 253, 69 S. W. 1058.

Loan of money by bailee.— It has been held, however, that where one who is a depositary or mandatary of money lends the money to another who becomes insolvent, whereby the money is lost, the bailor's cause of action accrues and the statute of limitations begins to run from the time of the borrower's failure. Sodowsky *v.* McFarland, 3 Dana (Ky.) 204. See also Depositaries, 13 Cyc. 808.

1. Marr *v.* Kübel, 4 Mackey (D. C.) 577; Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52; Reizenstein *v.* Marquardt, 75 Iowa 294, 39 N. W. 506, 9 Am. St. Rep. 477, 1 L. R. A. 318 (holding, however, that a refusal to deliver on demand is a conversion); Koonce *v.* Perry, 53 N. C. 58; Weeks *v.* Weeks, 40 N. C. 111, 47 Am. Dec. 358; Hill *v.* Hughes, 18 N. C. 336. See also Harral *v.* Wright, 57 Ga. 484 (holding that where the action is assumpsit to recover the value of goods converted by the bailee, the cause of action is to be considered as having accrued when the bailee finally ceased to hold consistently with or in subordination to the bailor's title; and that this time must be ascertained by the jury from all the evidence before them); Dickinson *v.* Dickinson, 2 Gratt. (Va.) 493. But *compare* Collier *v.* Poe, 16 N. C. 55, holding that the statute does not run between bailor and bailee either in law or in equity notwithstanding an adverse claim and user by the bailee.

Limitations in actions of trover see Trover and Conversion.

Contract of hire — whether continuing.— Where one receives a chattel of another and promises to account for its hire, without any agreement as to the amount to be paid or the time when the hiring shall terminate and the hire become due, the hire is payable as it is earned, or at most within a convenient and reasonable time thereafter; and the owner, after permitting the chattel to remain with the hirer for a number of years, has not the option to treat the entire demand as one continuous item against which the statute of limitations cannot run until the sum last due is payable, or to exempt it as a single item from the operation of the Alabama statute of three years. Mims *v.* Sturtevant, 18 Ala. 359. But it is held that where a person with the consent of the owner uses personal property of the latter for a number of years, no compensation being stipulated for, the statute does not affect the user's liability to make compensation for the use during the statutory period before action brought. Rider *v.* Union India Rubber Co., 5 Bosw. (N. Y.) 85.

2. Powell *v.* Powell, 21 N. C. 379, where the bailee having died, his administrator in the course of distributing the estate delivered the property to another who took and held it upon claim of right, and it was held that the statute then began to run.

3. Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52; Koonce *v.* Perry, 53 N. C. 58.

4. Earp *v.* Richardson, 78 N. C. 277, 81 N. C. 5. And see Reizenstein *v.* Marquardt, 75 Iowa 294, 39 N. W. 506, 9 Am. St. Rep. 477, 1 L. R. A. 318.

provides that the property shall be returned on demand, the statute begins to run when and only when a demand is made.[5] The time when the statute begins to run, however, may in certain instances vary, according to the character of the action, or the special circumstances attending the bailment. Thus while the statute may run against a cause of action in trover from the time of the conversion by the bailee,[6] the bailor may elect to sue for the bailee's breach of his express or implied contract to deliver the property on demand, and in such a case the cause of action accrues, and the statute begins to run when and only when a demand is made, notwithstanding there has been a previous conversion.[7] So where the bailee wrongfully sells the goods, and the bailor waiving the tort sues in assumpsit for money had and received to his use, the cause of action accrues and the statute begins to run at the date of the sale and the receipt of the money.[8] Again it has been held that the bailor is not necessarily bound to treat a failure to deliver on demand as a conversion, but where the bailee makes repeated promises to deliver or to make restitution in case of his inability to deliver, not claiming any adverse interest in the property, the bailor may rely on such promises and treat the bailment as continuing up to the time of an actual adverse holding or a final admission of inability to deliver the property, before which time the statute will not run.[9]

8. CONTRACTS OF CARRIAGE. The question when the statute of limitations begins to run in favor of a carrier of goods depends upon the terms of the particular contract of shipment and the time of the breach of that contract.[10] The statute does not of course begin to run until a cause of action accrues against the carrier.[11] Thus where goods are delivered to a carrier for transportation, but are destroyed while in the carrier's possession, the right of action on the contract to recover their value does not accrue until the loss of the goods occurs, and the statute does not begin to run until that time.[12] A cause of action against a carrier of goods for breach of duty under his contract of carriage, as in case of negligence whereby the goods are missent, accrues when the breach of duty occurs, and from that time the statute begins to run, not from the time when consequential damage results.[13] This is in accordance with well settled principles,[14] but there is authority

5. Parker *v.* Gaines, (Ark. 1889) 11 S. W. 693; Selleck *v.* Selleck, 107 Ill. 389; Northrop *v.* Smith, 8 N. Y. St. 161; Page *v.* Thrall, 11 Vt. 230. And see Harris *v.* Sigmund, 32 Pittsb. Leg. J. (Pa.) 153.

6. Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487. See TROVER AND CONVERSION.

7. Ganley *v.* Troy City Nat. Bank, 98 N. Y. 487; Moore *v.* Williams, 26 N. Y. Suppl. 766. And see Selleck *v.* Selleck, 107 Ill. 389; Wilkinson *v.* Verity, L. R. 6 C. P. 206, 40 L. J. C. P. 141, 24 L. T. Rep. N. S. 32, 19 Wkly. Rep. 604, where the bailor brought an action of detinue based on the bailee's breach of duty, and the principle stated in the text was held applicable. But *compare* Cohrs *v.* Fraser, 5 S. C. 351, where the goods were destroyed and the fact was known to the bailor, and it was held that the statute began to run, at the very latest, from the time when the bailor first learned of the loss of the goods, not at the date of the subsequent demand.

8. Moses *v.* Taylor, 6 Mackey (D. C.) 255.

9. Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52.

Promise to pay value of property.— In such a case if the bailee on final admission of his inability to deliver promises to pay the agreed value of the property, and the promise is accepted by the bailor, the statute runs only from that time. Blount *v.* Beall, 95 Ga. 182, 22 S. E. 52.

10. See Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

11. Merchants' Despatch Co. *v.* Topping, 89 Ill. 65.

12. Merchants' Despatch Co. *v.* Topping, 89 Ill. 65; Finn *v.* Western R. Corp., 102 Mass. 283, where the carrier received the goods but neglected to forward them and meanwhile they were destroyed.

13. Pennsylvania Co. *v.* Chicago, etc., R. Co., 144 Ill. 197, 33 N. E. 415 [*affirming* 44 Ill. App. 132], an action by one common carrier against a connecting carrier to whom the goods had been delivered by the former.

Non-delivery of goods sent by vessel.— Where goods are shipped on a particular vessel and are not delivered, prescription against an action to recover for the non-delivery begins to run from the date of the arrival of the vessel or the date on which the vessel ought to have arrived. Pitkin *v.* Rousseau, 14 La. Ann. 511, construing Civ. Code, § 3212, which declares when it shall be deemed that a ship has made a voyage. And see, generally, SHIPPING.

14. See *supra*, VI, B, 1, b; and *infra*, VI, B, 15, a.

for a more liberal rule.[15] In case of a carrier's unreasonable delay in the transportation of goods it has been held that there is a continuing wrong in that every day's delay creates a new cause of action for the damage then suffered, and that a recovery may be had for such damages as accrue within the statutory period before the action, although not for such as accrued before.[16]

9. Pledges.[17] Where property is pledged for the payment of a debt the pledgee's right to hold the property and apply it to the discharge of the debt does not become barred by the statute of limitations as long as the pledge continues and the debt is unpaid;[18] and this is true, although the statute has run against the obligee's right of action to recover the amount of the debt.[19]

10. Deposits — a. In General. Where a deposit of money is made, the general rule is that a cause of action accrues in favor of the depositor against the depositary only upon demand and refusal or the assertion of some adverse claim by the depositary.[20] *A fortiori* is this true where the parties by their agreement expressly make the deposit payable on demand or when called for.[21] A rather

15. Conversion by delivery to wrong person. — Where goods shipped are converted by the carrier, as where he delivers them to the wrong person, and it is not known that the consignee has actual knowledge of the conversion, the statute does not begin to run against the consignee until it becomes his duty to apply for the goods, and this depends on the terms of the contract under which the goods were shipped, the usual length of time required for their transportation, the reasonable course of business at the place of delivery, and other attendant circumstances. Houston, etc., R. Co. *v.* Adams, 49 Tex. 748, 30 Am. Rep. 116.

16. Jones *v.* Grand Trunk R. Co., 74 Me. 356, which was an action on the case to recover damages for the delay.

For continuing or repeated injury from torts see *infra*, VI, B, 18, b.

17. Redemption by pledgor see Pledges.

Conversion by pledgee see Pledges; Trover and Conversion.

Effect of security on the debt see *infra*, VI, B, 16.

18. Wilson *v.* Bannon, 1 Rob. (La.) 556; Chouteau *v.* Allen, 70 Mo. 290; Hartranft's Estate, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717. See also Hancock *v.* Franklin Ins. Co., 114 Mass. 155.

19. Hartranft's Estate, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717. See *supra*, IV, C, 2.

20. *Indiana.*— Lynch *v.* Jennings, 43 Ind. 276.

Louisiana.— Berard *v.* Boagni, 30 La. Ann. 1125.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603.

Missouri.— Battle *v.* Crawford, 68 Mo. 280.

New Jersey.— Rusling *v.* Rusling, 42 N. J. Eq. 594, 8 Atl. 534.

New York.— Payne *v.* Gardiner, 29 N. Y. 146 [*affirming* 39 Barb. 634]; Sheldon *v.* Heaton, 88 Hun 535, 34 N. Y. Suppl. 856; *In re* Waldron, 28 Hun 481.

Tennessee.— Goodwin *v.* Ray, 108 Tenn. 614, 69 S. W. 730, 91 Am. St. Rep. 761.

Texas.— See Altgelt *v.* Elmendorf, (Civ. App. 1905) 86 S. W. 41.

England.— *In re* Tidd, [1893] 3 Ch. 154, 62 L. J. Ch. 915, 69 L. T. Rep. N. S. 255, 3 Reports 657, 42 Wkly. Rep. 25. See Depositaries, 13 Cyc. 808. But see Buckner *v.* Patterson, Litt. Sel. Cas. (Ky.) 234, holding that where money is deposited with one man for the use of another, the cause of action accrues to the latter from the time of the deposit, and the statute of limitations commences running from that time.

As to certificates of deposit see Banks and Banking, 5 Cyc. 521; Commercial Paper, 7 Cyc. 853.

Wife's money received by husband.—Where a wife's money has been received and held by her husband and there is no direct evidence to show the terms on which he received it, and inference is warranted that he was to receive, hold, and manage it for her use and benefit as her depositary and without compensation, and he is under no legal obligation to return it, and the statute does not begin to run until demand or something equivalent thereto. Bartlett *v.* Wright, 29 Ill. App. 339; Brooks *v.* Brooks, 4 Redf. Surr. (N. Y.) 313, where a husband received securities belonging to the wife, invested and reinvested them in the joint names of himself and wife and afterward converted them to his own use.

Interest collected on securities deposited.— It has been held that where securities are left with a person for safe-keeping, the interest on the securities is payable as soon as collected and without the necessity of a demand, and that as against the cause of action to recover interest collected and not paid over, the statute runs from the time the interest was received by the bailee or depositary. Brooks *v.* Brooks, 4 Redf. Surr. (N. Y.) 313.

21. *Alabama.*— Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24, deposit of money "for safe-keeping" and to be returned "when called for."

California.— Zuck *v.* Culp, 59 Cal. 142; Schroeder *v.* Jahns, 27 Cal. 274.

Illinois.— Waldron *v.* Alexander, 35 Ill. App. 319, where a claim for eighteen years'

close but important distinction exists in this respect between a deposit and a loan,[22] for a loan without any fixed time for payment,[23] or payable on demand,[24] is due immediately, and the statute runs from the time the loan is made. But while a demand may generally be necessary to start the statute in motion, it must, as in other cases,[25] be made within a reasonable time;[26] but what is a reasonable time depends largely on the construction of the particular contract and the facts of the case,[27] and is not necessarily the time fixed by the statute of limitations.[28] It has been held that where the money deposited is appropriated by the depositary to his own use, an action may be maintained without a demand and that the statute runs from the date of the conversion,[29] although there is authority to the contrary.[30]

services was made against the estate of a decedent, and it appeared that decedent had been the depositary of the claimants' earnings under an agreement that claimant should have such sums from time to time as might suit her wants and convenience.

Massachusetts.— Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

New Jersey.— Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473.

New York.— Smiley *v.* Fry, 100 N. Y. 262, 3 N. E. 186 [*affirming* 49 N. Y. Super. Ct. 134]; Boughton *v.* Flint, 74 N. Y. 476 [*reversing* 13 Hun 206]; Sullivan *v.* Fosdick, 10 Hun 173 (deposit to be withdrawn only by drafts payable thirty days after sight); Matter of Wiltsie, 12 N. Y. St. 144, 6 Dem. Surr. 255 [*affirmed* in 1 N. Y. Suppl. 559], where husband received and used his wife's money in his business under an agreement to account on demand. *Compare* Bogardus *v.* Young, 64 Hun 389, 19 N. Y. Suppl. 885.

See 33 Cent. Dig. tit. "Limitation of Actions," § 362.

Deposit as a trust.— It has been held that such a transaction constitutes an express, continuing trust (although not cognizable solely in equity), so that the statute will not run until the depositary assumes a position of hosility to the trust relation or until the depositor demands the money. Schroeder *v.* Jahns, 27 Cal. 274; Baker *v.* Joseph, 16 Cal. 173; Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473. And see Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Zuck *v.* Culp, 59 Cal. 142; Grant *v.* Odiorne, 43 Ill. App. 402; Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070. *Compare* Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707; Bogardus *v.* Young, 64 Hun (N. Y.) 398, 19 N. Y. Suppl. 885. See, generally, *infra*, VI, B, 20.

Informing depositor of credit of interest.— Where the depositary wrote to the depositor stating that he had credited him with a certain amount of interest, it was held that this did not separate that sum from the principal and make it due so as to set the statute in motion against it. Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173.

The payment of a subscription toward the discharge of a church debt, "to be returned, if demanded, in case there is not a sufficient amount subscribed by" a certain date, is not a deposit within the meaning of a statute embodying the rule of the text. Duer *v.* Twelfth St. Reformed Church, 10 N. Y. Suppl. 526.

22. See Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24 (holding that in the absence of evidence of any extrinsic fact aiding in its construction a writing by which the depositary acknowledges to have received a certain number of dollars in gold "on deposit, to be paid" to the depositor "on demand," will be adjudged to be not a contract of bailment but a loan of money payable presently or on demand; and that the statute will commence to run against it not from the date of the demand but from the date of the writing); Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707 (holding that an instrument reciting "Due A. B. nine thousand dollars for cash deposited in trust with me," was a due-bill payable on demand); Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473; Payne *v.* Gardiner, 29 N. Y. 146 [*affirming* 39 Barb. 634]. And see, generally, DEPOSITARIES, 13 Cyc. 798 note 17.

23. See *supra*, VI, B, 1, e, (II).

24. See *supra*, VI, B, 1, f.

25. See *infra*, VI, C, 2, b.

26. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

27. Wright *v.* Paine, 62 Ala. 340, 34 Am. Rep. 24; Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

28. Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

29. Giles *v.* Merritt, 59 N. H. 325, where defendant deposited plaintiff's money in a bank in defendant's name under an agreement that plaintiff was to have the money whenever she wanted it, but that if she never wanted it, it was to become defendant's on her death; and defendant wrongfully withdrew the money from the bank, and converted it to his own use. And see Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559; Brooks *v.* Brooks, 4 Redf. Surr. (N. Y.) 313.

30. Baker *v.* Joseph, 16 Cal. 173, where plaintiff deposited money with defendant to be invested on loan and to be held, together with the interest, until called for, and defendant did not invest it but appropriated it to his own use, and it was held that the statute did not begin to run until demand and refusal to pay. And see Grant *v.* Odiorne, 43 Ill. App. 402.

b. Bank Deposits. In respect to the running of the statute no distinction is made by the American courts between ordinary deposits of money in a bank and deposits with a private individual;[31] and the law is well settled in this country that as to ordinary bank deposits the statute begins to run in favor of the bank when and only when payment is demanded and refused or demand is in some way dispensed with.[32] But a refusal of the bank to make payment, or a notification to the depositor that his deposit will not be paid to him on demand, dispenses with the necessity of a demand and sets the statute in motion.[33] Thus where the bank has suspended specie payment the statute begins to run against depositors from the time when they first have knowledge of the suspension,[34] this being

31. Payne *v.* Gardiner, 29 N. Y. 146 [*affirming* 39 Barb. 634].

32. *Arizona.*— Starr *v.* Stiles, (1888) 19 Pac. 225.

Georgia.— Munnerlyn *v.* Augustus Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159, 94 Ga. 356, 21 S. E. 575.

Louisiana.— Brown *v.* Pike, 34 La. Ann. 576.

Maryland.— Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. 449.

Massachusetts.— Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

Minnesota.— Branch *v.* Dawson, 33 Minn. 399, 23 N. W. 552.

Nebraska.— Citizens' Bank *v.* Fromholz, 64 Nebr. 284, 89 N. W. 775.

New York.— Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106 [*affirming* 48 N. Y. Super. Ct. 1]; Thomson *v.* Bank of British North America, 82 N. Y. 1 [*affirming* 45 N. Y. Super. Ct. 1].

Pennsylvania.— Humphrey *v.* Clearfield County Nat. Bank, 113 Pa. St. 417, 6 Atl. 155 [*following* McGough *v.* Jamison, 107 Pa. St. 336; Finkbone's Appeal, 86 Pa. St. 368]; Girard Bank *v.* Penn. Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507; Mifflin County Nat. Bank *v.* Fourth St. Nat. Bank, 8 Pa. Dist. 477, 22 Pa. Co. Ct. 495.

South Dakota.— Tobin *v.* McKinney, 14 S. D. 52, 84 N. W. 228.

Texas.— Arnold *v.* Penn, 11 Tex. Civ. App. 325, 32 S. W. 353, action against bank and its receiver.

Vermont.— Bellows Falls Bank *v.* Rutland County Bank, 40 Vt. 377.

See 33 Cent. Dig. tit. "Limitation of Actions," § 362.

Contra.— Pott *v.* Clegg, 11 Jur. 289, 16 L. J. Exch. 210, 16 M. & W. 321; Foley *v.* Hill, 8 Jur. 347, 13 L. J. Ch. 182, 1 Phil. 399, 19 Eng. Ch. 399, 41 Eng. Reprint 683 [*affirmed* in 2 H. L. Cas. 28, 9 Eng. Reprint, 1002].

"The engagement of a bank with its depositor is not to pay absolutely and immediately, but when payment shall be required at the banking-house. It becomes a mere custodian, and is not in default or liable to respond in damages until demand has been made and payment refused. Such are the terms of the contract implied in the transaction of receiving money on deposit, terms necessarily alike to the depositor and the banker. And it is only because such is the contract, that the bank is not under the obligation of a common debtor to go after its customer and return the deposit wherever he may be found." Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 98, 80 Am. Dec. 507. See also Howell *v.* Adams, 68 N. Y. 314, 321, in which it is said, per Andrews, J.: "We think it is in accordance with the general understanding of the commercial community, that a bank is not liable to depositors except after demand of payment."

The proceeds of collateral notes given as security for a line of discounts fall within the rule of the text. Humphrey *v.* Clearfield County Nat. Bank, 113 Pa. St. 417, 6 Atl. 155.

As to certificates of deposit see BANKS AND BANKING, 5 Cyc. 521; COMMERCIAL PAPER, 7 Cyc. 853.

Time of making demand.— Demand upon the bank need not be made within the period fixed by the statute of limitations. Girard Bank *v.* Penn Tp. Bank, 39 Pa. St. 92, 80 Am. Dec. 507. But see the English cases cited *supra*, this note.

Facts held insufficient to show demand or denial of liability see Dickinson *v.* Leominster Sav. Bank, 152 Mass. 49, 25 N. E. 12.

Deposit to plaintiff's credit without his knowledge; fraud and mistake.— Where money was deposited with a bank to plaintiff's credit but without his knowledge, and plaintiff was told by the president of the bank that no such deposit had been made, and in settlement with the bank plaintiff never received credit for the deposit, it was held in an action against the bank to recover the deposit that the case fell within a statute providing that in actions for relief on the ground of fraud and mistake the cause of action shall not be deemed to have accrued until the fraud or mistake is discovered by the aggrieved party. Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

33. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Mifflin County Nat. Bank *v.* Fourth St. Nat. Bank, 8 Pa. Dist. 477, 22 Pa. Co. Ct. 495, where the refusal and notification were communicated to one who was counsel for the depositor's assignee for the benefit of creditors.

34. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439, 31 Am. Dec. 113; Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449.

deemed sufficient to dispense with the necessity of a demand.[35] Presentment of the depositor's check is a sufficient demand for the amount of the check so as to set the statute in motion against the right of action to recover that amount,[36] but not as to any balance of the deposit.[37]

11. Instruments For the Payment of Money[38] **— a. Bills and Notes — (i)** ***In General.*** The statute of limitations begins to run on a promissory note, whether negotiable or not, whenever a cause of action thereon accrues; that is, from the time the holder has a right to demand payment.[39] Thus where a promissory note is payable at a definite time in the future a right of action thereon accrues and the statute of limitations begins to run at the maturity of the instrument, not at its date.[40] The same is true of a bill of exchange.[41] But when commercial paper

35. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Planters' Bank *v.* Farmers' Bank, 8 Gill & J. (Md.) 449.

36. Munnerlyn *v.* Augusta Sav. Bank, 88 Ga. 333, 14 S. E. 554, 30 Am. St. Rep. 159; Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743 [*reversing* 31 Hun 484].

The mere drawing and certifying of a check does not constitute a demand within the rule of the text. Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106 [*affirming* 48 N. Y. Super. Ct. 1].

Forged indorsement.— Presentment of a check by a person other than the payee and under a forged indorsement is not a demand which will set the statute in motion against the depositor; and payment of the check to such holder does not affect the depositor's rights. Bank of British North America *v.* Merchants' Nat. Bank, 91 N. Y. 106 [*affirming* 48 N. Y. Super. Ct. 1].

37. Viets *v.* Union Nat. Bank, 101 N. Y. 563, 5 N. E. 457, 54 Am. Rep. 743 [*reversing* 31 Hun 484]; Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 21 Atl. 956, 25 Am. St. Rep. 766 (an action by the depositor to recover the amount of an overcharge made by mistake against his account, he having before the action drawn out by check all his apparent balance, it being held that the statute was not put in motion, as to the amount of the overcharge, by the check for the apparent balance, and it being also held that under the circumstances there was no denial of liability by the bank that would amount to a waiver of demand.

38. **Street improvement apportionment warrant.**— Under a statute providing that an action on a statutory liability must be commenced within five years from the accrual of the cause of action, it was held that limitations commenced to run against an action by a contractor on a street improvement apportionment warrant, on its delivery to him, since he could then have begun suit to collect it. Smith *v.* Lawler, 78 S. W. 851, 25 Ky. L. Rep. 1781.

39. Andress' Appeal, 99 Pa. St. 421 [*citing* 2 Parsons Notes & Bills 641, 642]. And see Freundt *v.* Hahn, 24 Wash. 8, 63 Pac. 1107.

40. *Georgia.*— Black *v.* Swanson, 49 Ga. 424. See also Ryal *v.* Morris, 68 Ga. 834 (where the debtor insisted on having certain conditions that were not mentioned in the note complied with before he would make payment, and the creditor on this account delayed action until the note was barred, and it was held that these circumstances did not affect the operation of the statute); Moseley *v.* Jenkins, 65 Ga. 490.

Kentucky.— See Clay *v.* Clay, 7 Bush 95. But *compare* Adams *v.* Johnson, 11 Ky. L. Rep. 137.

Louisiana.— See Bernard *v.* Ledet, 22 La. Ann. 252; Payne *v.* Douglass, 20 La. Ann. 362.

Missouri.— Johnson *v.* Buckner, 4 Mo. 624.

North Carolina.— Triplett *v.* Foster, 115 N. C. 335, 20 S. E. 475.

South Carolina.— Miles *v.* Berry, 1 Hill 296, so holding, notwithstanding the maker had fraudulently obtained possession of the note without the payee's knowledge and had kept it secretly until the statutory period had expired.

Texas.— See Smith *v.* Wilson, 15 Tex. 132; Schneider *v.* Landers, 26 Tex. Civ. App. 169, 61 S. W. 727.

Washington.— Freundt *v.* Hahn, 24 Wash. 8, 63 Pac. 1107.

England.— Fryer *v.* Roe, 12 C. B. 437, 74 E. C. L. 437.

See 33 Cent. Dig. tit. "Limitation of Actions, § 259.

Surety on note executed to receiver.— Pursuant to an order of court a person as surety executed a promissory note to a receiver, the note maturing six months from its date. In an action brought against the surety ten years afterward it was held that, although the surety could not have properly paid the money to the receiver without an order of the court, yet as either party might by motion have compelled the satisfaction of the debt at any time after its maturity, the action was barred by the six-year statute of limitations. Turner *v.* Rankin, 80 Ky. 179.

Consent to extension of time of payment.— It has been held that where one signs a note, whether as surety or co-maker, and consents that the time of payment may be extended, but the extension is not granted, such consent as an acknowledgment has no other date than that which it bears; and prescription begins to run in his favor from that date. Mutual Nat. Bank *v.* Coco, 107 La. 268, 31 So. 628.

41. Wittersheim *v.* Carlisle, 1 H. Bl. 631.

matures for this and other purposes is a question depending wholly upon the law of bills and notes and is treated elsewhere in this work.[42]

(II) *When Payable on Demand* — (A) *In General.* Although there is some conflict in the authorities,[43] the law is well settled in most jurisdictions that a promissory note payable on demand with or without interest is due immediately, and that the statute of limitations runs in favor of the maker from the date of the execution of the instrument.[44] The same rule has been applied to due-bills.[45]

(B) *Bank-Notes.*[46] But an ordinary bank-note payable on demand and intended to circulate as money operates as a continuing promise to pay which is not broken until payment is demanded and refused. Until such demand and refusal the statute of limitations does not begin to run.[47] The fact that the bank has suspended payment or closed its doors does not amount to a refusal to pay so as to set the statute in motion if the bank still exists as a corporation,[48] although if in such an event the bank has no place of business a demand is dispensed with as a prerequisite to bringing an action.[49]

(III) *Transfer* — (A) *Liability of Transferrer in General.*[50] The liability of

42. See COMMERCIAL PAPER, 7 Cyc. 838–875; 8 Cyc. 21 *et seq.*

Certificates of deposit see COMMERCIAL PAPER, 7 Cyc. 853.

43. See COMMERCIAL PAPER, 7 Cyc. 847.

44. *California.*— Jones *v.* Nicholl, 82 Cal. 32, 22 Pac. 878.

Iowa.— Hall *v.* Letts, 21 Iowa 596.

Louisiana.—Andrews *v.* Rhodes, 10 Rob. 52.

Maine.— Ware *v.* Hewey, 57 Me. 391, 99 Am. Dec. 780.

Maryland.— Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603; Darnall *v.* Magruder, 1 Harr. & G. 439.

New Jersey.— De Raismes *v.* De Raismes, 70 N. J. L. 15, 56 Atl. 170 [*affirmed* in 71 N. J. L. 680, 60 Atl. 1133]; Larason *v.* Lambert, 12 N. J. L. 247.

New York.— Howland *v.* Edmonds, 24 N. Y. 307; Sheldon *v.* Heaton, 88 Hun 535, 34 N. Y. Suppl. 856; McMullen *v.* Rafferty, 24 Hun 363 [*affirmed* in 89 N. Y. 456]; White's Bank *v.* Ward, 35 Barb. 637; Anonymous, 2 N. Y. City Ct. 166 note.

North Carolina.— Causey *v.* Snow, 122 N. C. 326, 29 S. E. 359; Caldwell *v.* Rodman, 50 N. C. 139.

Pennsylvania.— *In re* Hartranft, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717; Milne's Appeal, 99 Pa. St. 483; Taylor *v.* Whitman, 3 Grant 138.

South Carolina.— The rule of the text was adopted in several early cases (Wilks *v.* Robinson, 3 Rich. 182; Smith *v.* Blythewood, Rice 245, 33 Am. Dec. 111; Harrison *v.* Cammer, 2 McCord 246); but a late case in which these earlier decisions are not mentioned holds that the statute does not run until demands made (Nash *v.* Woodward, 62 S. C. 418, 40 S. E. 895).

West Virginia.— Laidley *v.* Smith, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. Rep. 825.

United States.— Bartlett *v.* Rogers, 2 Fed. Cas. No. 1,079, 3 Sawy. 62.

England.— Norton *v.* Ellam, 1 M. & H. 69, 2 M. & W. 461, 1 Jur. 433, 6 L. J. Exch. 121; Christie *v.* Fonsick, 1 Selw. 372. But *compare* Hartland *v.* Jukes, 3 F. & F. 149, 1 H. & C. 667, 9 Jur. N. S. 180, 32 L. J. Exch. 162, 7 L. T. Rep. N. S. 792, 11 Wkly. Rep. 519, where the note was given to a bank as collateral security for a banking account.

Canada.— Bachand *v.* Lalumière, 21 Quebec Super. Ct. 449.

See 33 Cent. Dig. tit. "Limitation of Actions," § 366; and for a full discussion see COMMERCIAL PAPER, 7 Cyc. 848 *et seq.*

45. Edgell *v.* Coates, 3 Houst. (Del.) 325 (due-bill without date); Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707; Bonstead *v.* Cuyler, 116 Pa. St. 551, 8 Atl. 848; Andress' Appeal, 99 Pa. St. 421; Guignard *v.* Parr, 4 Rich. (S. C.) 184. But see Nash *v.* Woodward, 62 S. C. 418, 40 S. E. 895.

46. See also *supra*, V, F, 5.

Definition see 5 Cyc. 226.

47. Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382; Memphis Bank *v.* White, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772.

48. Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382; Memphis Bank *v.* White, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772.

Where bank-notes have ceased to circulate as currency and to be taken in and reissued by the bank, they are not exempt from the operation of the statute. See *supra*, V, F, 5, text and note 87. See also Butts *v.* Vicksburg, etc., R. Co., 63 Miss. 462, where notes were issued under statutory authority by a railroad company to circulate as money and not to be reissued for more than one year after the close of the Civil war. But under a Tennessee statute it makes no difference whether the notes have ceased to circulate as money or whether the bank has suspended payment or has ceased to exist as a corporation. State *v.* Tennessee Bank, 5 Baxt. (Tenn.) 101.

49. Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382.

50. As to witnessed notes under the Massachusetts statute see Pitts *v.* Holmes, 10 Cush.

an indorser of a promissory note becomes fixed when the note is presented at maturity, payment refused, and notice given,[51] and the statute of limitations begins to run in his favor from that time.[52] In case of a note payable on demand, no cause of action arises against the indorser and the statute does not begin to run in his favor until demand is made in compliance with the terms of his contract, and due notice of non-payment given.[53] Where reasonable presentment of a draft is made the statute does not begin to run until payment is refused by the drawee.[54] The liability of the drawer of a bill of exchange payable to his own order, to a subsequent indorser who pays it after it has been dishonored by the accepter, does not first accrue at the time of such payment, but at the time of the dishonor of the bill, and the statute then begins to run.[55]

(B) *Implied Warranty of Transferrer.* The implied warranties of a transferrer of a note[56] that the instrument is valid and legal,[57] that it was given for a valuable consideration,[58] and that the maker is solvent[59] are broken as soon as made and the statute of limitations begins to run at once.

b. Bonds[60] — (I) *CONDITIONED FOR THE PERFORMANCE OF SOME ACT OR DUTY.* Where a bond is conditioned for the performance of some act or duty by the obligor a cause of action accrues when the condition is broken and the

92; Drury *v.* Vannevar, 5 Cush. 442; Sigourney *v.* Severy, 4 Cush. 176; Hodges *v.* Holland, 19 Pick. 43.

51. See, generally, COMMERCIAL PAPER, 7 Cyc. 959, 1070; 8 Cyc. 21.

52. Hoffman *v.* Hollingsworth, 10 Ind. App. 353, 37 N. E. 960.

Liability "in the second instance."—Where an indorsement of a note provides that the indorser shall be liable "in the second instance," it seems that the statute begins to run in his favor at the time when it is determined that the debt cannot be collected from the maker. Stocks *v.* Moncas, 32 Ga. 380, holding that the action was not barred when brought within six years after the return of "*nulla bona*" on an execution against the maker, but more than six years after the indorsement.

Where an attorney employed to collect a note was liable as indorser "in the second instance," it was held that the statute of limitations as to his liability began to run from the time the debt could not be collected from the principal and when the attorney's liability was apparent to the client. Freeman *v.* Bigham, 65 Ga. 580. On the other hand it has been held that the liability of an indorser of a note is not altered, and the running of the statute in his favor is not interrupted, by his receiving the note in his capacity as an attorney for the purpose of suing on the instrument. Alexander *v.* Westmoreland Bank, 1 Pa. St. 395.

Indorsement after maturity.— It has been held that where a note is indorsed after maturity, the statute begins to run in the indorser's favor from the date of the indorsement, not from the maturity of the note, the rule being based on the principle that an indorsement after maturity constitutes a new contract. Graham *v.* Roberson, 79 Ga. 72, 3 S. E. 611. And see Brian *v.* Banks, 38 Ga. 300.

53. Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685 [*reversing* 31 Hun 578]; Anonymous, 2 N. Y. City Ct. 166 note. See also Mudd *v.* Harper, 1 Md. 110, 54 Am. Dec. 644, holding that the statute does not begin to run from the date of the transfer but that the indorsee should make demand within a reasonable time thereafter.

Where a demand note is payable at a specified place the statute does not begin to run in the indorser's favor until demand made at the place specified, and due notice given. Parker *v.* Stroud, 98 N. Y. 379, 50 Am. Rep. 685 [*reversing* 31 Hun 578].

Liability either as maker or guarantor.— But where one writes his name on the back of a non-negotiable demand note and thus becomes liable either as maker or guarantor, a cause of action accrues against him immediately upon the execution of the note, without demand, and the statute then begins to run. McMullen *v.* Rafferty, 89 N. Y. 456 [*affirming* 24 Hun 363].

54. Wood *v.* McMeans, 23 Tex. 481. And see COMMERCIAL PAPER, 8 Cyc. 22.

55. Hunt *v.* Taylor, 108 Mass. 508, the action being based on the bill, and the decision turning upon the undertaking of drawers as defined by their relation to the instrument.

56. See COMMERCIAL PAPER, 7 Cyc. 830 *et seq.*

57. Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828, assignment of non-negotiable instrument by indorsement and delivery.

58. Blethen *v.* Lovering, 58 Me. 437, transfer of negotiable note by indorsement "without recourse." And see Ware *v.* McCormack, 96 Ky. 139, 28 S. W. 157, 959, 16 Ky. L. Rep. 385 [*overruling* Wynn *v.* Poynter, 3 Bush (Ky.) 54].

59. Whisler *v.* Bragg, 31 Mo. 124, written assignment of non-negotiable note.

60. **Official bonds** generally see OFFICERS.

Bonds of sheriffs and constables see SHERIFFS AND CONSTABLES.

Bonds of executors and administrators see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1288.

statute of limitations begins to run from the date of the breach,[61] whether the obligee has suffered actual damage or not.[62] The operation of the statute is not deferred until the breach is discovered,[63] unless the breach amounts to fraud or the cause of action is fraudulently concealed.[64] When the breach occurs is a question depending upon the terms of the particular instrument.[65] If the bond provides that performance of the condition shall be made within a definite time, the cause of action accrues and the statute begins to run upon expiration of that time without performance being made;[66] while if no time is fixed for the performance of the condition a reasonable time will be allowed therefor.[67] Although the object of several conditions in a bond is to protect the obligee from the same evil, the statute does not necessarily begin to run on all of them at the same time;[68] as in the case where a bond operates as a continuing security for the performance of some duty and there are repeated breaches.[69]

(II) *CONDITIONED FOR THE PAYMENT OF MONEY* — (A) *In General.* Where the bond is conditioned for the payment of money only, the right of action accrues and the statute begins to run at the maturity of the bond, not at its date;[70]

Guardians' bonds see GUARDIAN AND WARD.

Municipal bonds and securities generally see MUNICIPAL CORPORATIONS.

Indemnity bonds see *supra*, VI, B, 6.

61. *Delaware.*— Wilmington, etc., Bank *v.* Wollaston, 3 Harr. 90, bond of bank cashier.

Illinois.— Bonham *v.* People, 102 Ill. 434.

Indiana.— Ware *v.* State, 74 Ind. 181, county auditor's bond.

Maryland.— Thruston *v.* Blackiston, 36 Md. 501, trustee's bond. And see Byrd *v.* State, 44 Md. 492.

Massachusetts.— McKim *v.* Glover, 161 Mass. 418, 37 N. E. 443, holding that the gist of an action on a trustee's bond conditioned to settle his account and make payment, etc., at the expiration of the trust, is not the breach of the trust *per se*, but the breach of the condition; and that this occurs at the expiration of the trust, although the breach of trust by which the breach of condition is caused occurred at an earlier date.

Nebraska.— Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

North Carolina.— Moore County *v.* MacRae, 89 N. C. 95.

Texas.— Kaufman *v.* Wolf, 77 Tex. 250, 13 S. W. 987 (an action against the sureties on an assignee's bond for misappropriation of money, in which it was held that the statute began to run from the date of the misappropriation and not from the date when a judgment against the assignee in another action had been affirmed); Mitchell *v.* Sheppard, 13 Tex. 484.

United States.— See Lamb *v.* Ewing, 54 Fed. 269, 4 C. C. A. 320.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 257, 262.

Refunding bond of legatee.— A refunding bond given by a legatee to an executor was conditioned that if a deficiency should "actually and *bona fide* happen" the legatee would refund "after request." It was held that the cause of action on the bond accrued and the statute began to run at the time when the deficiency was first ascertained and that a special request was unnecessary. Salisbury *v.* Brooks, 6 Harr. & J. (Md.) 293, 14 Am. Dec. 279.

Claim bond.— The statute does not begin to run against an action on a bond given by a claimant of property that has been levied on under execution until the rendition of judgment finally determining the title to the property. Denson *v.* Ham, (Tex. App. 1891) 16 S. W. 182. See also Zurcher *v.* Krobne, 63 Tex. 118.

62. Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226.

63. Ware *v.* State, 74 Ind. 181.

64. See Sparks *v.* Farmers' Bank, 3 Del. Ch. 274. And see, generally, *infra*, VI, B, 21, d, (II), (B).

65. McKim *v.* Glover, 161 Mass. 418, 37 N. E. 443.

66. Richardson *v.* Chanslor, 103 Ky. 425, 45 S. W. 774, 20 Ky. L. Rep. 121 (bond of assignee for benefit of creditors); Mitchell *v.* Sheppard, 13 Tex. 484.

67. Gennings *v.* Norton, 35 Me. 308.

Bond conditioned to clear premises from mortgage.— If a bond is conditioned to clear certain premises from a mortgage, no time being fixed for performance of the condition, the law will allow a reasonable time therefor after the mortgagee would be obliged to receive payment; at the expiration of which time the right of action will accrue to the obligee and the statute will begin to run. Gennings *v.* Norton, 35 Me. 308.

68. McKim *v.* Glover, 161 Mass. 418, 37 N. E. 443. And see Brown *v.* Houdlette, 10 Me. 399, per Mullen C. J.

69. See *infra*, VI, B, 12, a.

70. Glassgow *v.* Porter, 1 Harr. & J. (Md.) 109; Richman *v.* Richman, 10 N. J. L. 114; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15; Miles *v.* Roberts, 76 Fed. 919. And see Dugan *v.* Champion Coal, etc., Co., 105 Ky. 821, 49 S. W. 958, 20 Ky. L. Rep. 1641; Ætna L. Ins. Co. *v.* Lyon County, 82 Fed. 929.

Payable on presentation at place named.— It has been held that where a bond is payable at a specified time on presentation and delivery at a specified place, the statute begins to run at the maturity of the bond, although no presentation is made at the place named. Wurth *v.* Paducah, 116 Ky. 403, 76

but if no time is specified for payment the money is due at once and the statute runs from the date of the bond.[71]

(B) *Interest Coupons.*[72] Interest coupons of bonds, in the absence of some particular statute of limitations concerning them,[73] partake of the same nature as the bonds themselves and are subject to the same statute of limitations.[74] But while this is true it is held by the weight of authority that the right of action on the coupons accrues, and the statute begins to run, at the respective dates of their own maturity,[75] regardless of the time when the bonds mature,[76] and whether the coupons have been detached and transferred[77] or remain attached to the bond.[78] It follows that if an instalment of interest cannot be recovered by an action on the coupon, because barred by the statute, it cannot be recovered along with the principal in an action on the bond.[79]

(C) *Provisions For Payment Out of Particular Fund or In Particular Manner.* Where it is provided by law that state or county bonds, or the interest coupons thereon, or other municipal obligations, shall be payable out of a particular fund or in a particular manner, the statute of limitations does not begin to run unless it appears that the particular fund has been provided or the method pursued.[80]

c. Provisions For Acceleration of Maturity.[81] Where a written instrument is executed for the payment of money at a future date, stipulations are sometimes

S. W. 143, 25 Ky. L. Rep. 586, 105 Am. St. Rep. 225.

71. Ervin *v.* Brooks, 111 N. C. 358, 16 S. E. 240.

72. Coupons of county bonds see COUNTIES, 11 Cyc. 573.

73. See Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886, involving a Wisconsin statute.

74. See *supra*, V, E, 4, and the cases in the following notes.

75. Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15; Galveston *v.* Loonie, 54 Tex. 517; Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228; Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427; Griffin *v.* Macon County, 36 Fed. 885, 2 L. R. A. 353; Huey *v.* Macon County, 35 Fed. 481; Nash *v.* El Dorado County, 24 Fed. 252. And see Coler *v.* Santa Fe County Com'rs, 6 N. M. 88, 27 Pac. 619; Kelly *v.* Forty-Second St., etc., R. Co., 37 N. Y. App. Div. 500, 55 N. Y. Suppl. 1096; Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886.

76. Galveston *v.* Loonie, 54 Tex. 517; Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228; Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427 [*explaining* Lexington *v.* Butler, 14 Wall. (U. S.) 282, 20 L. ed. 809; Konosha *v.* Lamson, 9 Wall. (U. S.) 477, 19 L. ed. 725]; Griffin *v.* Macon County, 36 Fed. 885, 2 L. R. A. 353; Huey *v.* Macon County, 35 Fed. 481; Nash *v.* El Dorado County, 24 Fed. 252. And see Threadgill *v.* Anson County, 116 N. C. 616, 21 S. E. 425; Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886. But see Meyer *v.* Porter, 65 Cal. 67, 2 Pac. 884; Cushman *v.* Carver County Com'rs, 19 Minn. 295, both holding that the coupons are barred only when the bonds are barred; the point, however, not being much discussed in the opinions.

77. Clark *v.* Iowa City, 20 Wall. (U. S.) 583, 22 L. ed. 427.

78. Amy *v.* Dubuque, 98 U. S. 470, 25 L. ed. 228 (reviewing and explaining the United States supreme court decisions cited in the notes just above); Huey *v.* Macon County, 35 Fed. 481. See also Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886.

79. Griffin *v.* Macon County, 36 Fed. 885, 2 L. R. A. 353; Nash *v.* El Dorado County, 24 Fed. 252. See also Koshkonong *v.* Burton, 104 U. S. 668, 26 L. ed. 886.

80. *California.*— Sawyer *v.* Colgan, 102 Cal. 283, 36 Pac. 580; Freehill *v.* Chamberlain, 65 Cal. 603, 4 Pac. 646; Underhill *v.* Sonora, 17 Cal. 172.

Iowa.— Wetmore *v.* Monona County, 73 Iowa 88, 34 N. W. 751, swamp land warrant given by county clerk on county treasurer.

Louisiana.— See Gasquet *v.* City School Directors, 45 La. Ann. 342, 12 So. 506, school certificates.

Nevada.— Davis *v.* Lincoln County, 23 Nev. 262, 45 Pac. 982.

South Dakota.— Brannon *v.* White Lake Tp., 17 S. D. 83, 95 N. W. 284.

Washington.— Potter *v.* New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135.

United States.— Lincoln County *v.* Luning, 133 U. S. 529, 10 S. Ct. 363, 33 L. ed. 766; King Iron Bridge, etc., Co. *v.* Otoe County, 124 U. S. 459, 8 S. Ct. 582, 31 L. ed. 514, county warrants. *Compare* Hall *v.* New Orleans, 19 Fed. 870.

See 33 Cent. Dig. tit. "Limitation of Actions," § 264. See also COUNTIES, 11 Cyc. 546, 573.

Compare Wilson *v.* Knox County, (Mo. 1894) 28 S. W. 896.

81. See, generally, COMMERCIAL PAPER, 7 Cyc. 858, 860 *et seq.*

inserted whereby the money may fall due at an earlier date than that fixed for the regular maturity of the instrument. Thus it is sometimes provided in a note that upon failure to pay an instalment of interest when due both principal and interest shall become due and payable; or when several notes are given, maturing at different dates, it is often stipulated that upon failure to pay one at its maturity the others shall at once become due. Likewise where a mortgage or deed of trust is given to secure notes maturing at different dates, it is often provided that upon default in the payment of any one of the notes at its maturity, or of the interest due on any one of them, or of taxes, etc., on the mortgaged property, the entire debt shall immediately become due and payable. It is generally held, however, that such a provision is solely for the benefit of the creditor who may enforce it or not as he elects; that upon the default specified the provision does not of itself operate to accelerate the maturity of the debt and that the debtor cannot take advantage of it in computing the period of limitation.[82] In other jurisdictions, however, a contrary doctrine obtains.[83]

12. Continuing Contracts[84] — a. In General. There is some lack of harmony in the decisions concerning the question when a right of action accrues on a continuing contract so as to set the statute of limitations in motion. Of course if a continuing contract is entire an action can be maintained upon it only when a breach occurs or the contract is in some way terminated, and the statute begins to run from that time only.[85] The chief difficulty arises in case of repeated

82. *California.*— Belloc *v.* Davis, 38 Cal. 242.

Georgia.— See Ferst *v.* Larkin, 68 Ga. 293.

Illinois.— Watts *v.* Hoffman, 77 Ill. App. 411.

Iowa.— Watts *v.* Creighton, 85 Iowa 154, 52 N. W. 12.

Nebraska.— See Fletcher *v.* Daugherty, 13 Nebr. 224, 13 N. W. 207, a provision that upon failure to pay, etc., "the holder may elect to consider the whole note due, and it may be collected at once."

North Carolina.— Capehart *v.* Dettrick, 91 N. C. 344.

Tennessee.— Batey *v.* Walter, (Ch. App. 1897) 46 S. W. 1024 [*following* Wall *v.* Marsh, 9 Baxt. 438]. See also Doran *v.* O'Neal, (Ch. App. 1896) 37 S. W. 563.

United States.— Richardson *v.* Warner, 28 Fed. 343; Nebraska City Nat. Bank *v.* Nebraska City Hydraulic, etc., Co., 14 Fed. 763, 4 McCrary 319.

See 33 Cent. Dig. tit. "Limitation of Actions," § 281.

Stare decisis.— This principle is a rule of property and when it has become the settled law of the highest court of the state it is subject to the rule of *stare decisis*. Richardson *v.* Warner, 28 Fed. 343.

By accepting payment after default the creditor waives the default. Belloe *v.* Davis, 38 Cal. 242.

83. *Kansas.*— Sturgis First Nat. Bank *v.* Peck, 8 Kan. 660.

Kentucky.— Ryan *v.* Caldwell, 106 Ky. 543, 50 S. W. 966, 20 Ky. L. Rep. 2030.

South Carolina.— See Singleton *v.* Heriott, 3 Rich. 321.

Texas.— San Antonio Real Estate, etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; Harrison Mach. Works *v.* Reigor, 64 Tex. 89; Dodge *v.* Signor, 18 Tex. Civ. App. 45, 44 S. W. 926.

England.— Reeves *v.* Butcher, [1891] 2 Q. B. 509, 60 L. J. Q. B. 619, 65 L. T. Rep. N. S. 329, 39 Wkly. Rep. 626; Hemp *v.* Garland, 4 Q. B. 519, 3 G. & D. 402, 7 Jur. 302, 12 L. J. Q. B. 134, 45 E. C. L. 519.

See 33 Cent. Dig. tit. "Limitation of Actions," § 281.

Statutory provision.— For construction of analogous provisions in a Missouri statute relating to default in the payment of interest on tax bills see Burnes *v.* Ballinger, 76 Mo. App. 58. See also McFadden *v.* Brandon, 8 Ont. L. Rep. 610, where a mortgage contained the statutory provision that in default of payment of interest the principal should become payable.

By agreement or by estoppel the effect of the default may be obviated. San Antonio Real Estate, etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864.

Option expressly given.— In Texas if it is expressly made optional with the creditor to take advantage of the default, and he does not do so, the statute begins to run only from the regular date or dates of maturity, not from the date of default. San Antonio Real Estate, etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; Harrington *v.* Claflin, 28 Tex. Civ. App. 100, 66 S. W. 898; Bowman *v.* Rutter, (Tex. Civ. App. 1898) 47 S. W. 52; Molino Plough Co. *v.* Webb, 141 U. S. 616, 12 S. Ct. 100, 35 L. ed. 879.

84. **Of employment in general** see *supra*, VI, B, 2.

With attorney see *supra*, VI, B, 3, b.

General or continuing agency see *supra*, VI, B, 3, a.

Contract of hire see *supra*, VI, B, 7, note 1.

85. Littler *v.* Smiley, 9 Ind. 116; Burch *v.* Woodworth, 68 Mich. 519, 36 N. W. 721. And see Greenly *v.* Shelmidine, 83 N. Y. App. Div. 559, 82 N. Y. Suppl. 176; Alden *v.* Bar-

breaches of a continuing contract, and according to one theory the solution of this question depends largely upon the inquiry whether a complete right of action accrues at the time of the first breach.[86] Thus it is held that if a full recovery of damages can be had upon the first breach the statute then begins to to run; and when this right of action becomes barred plaintiff cannot recover for any subsequent breach through which it accrues within the statutory period before action;[87] otherwise where only partial or nominal damages are recoverable for the first breach.[88] On the other hand it has been asserted that where there are several breaches of a continuing contract, the promisee is not obliged to treat the contract as abandoned at the first breach or at any particular breach but has his election to rely upon it; and that if the several breaches amount to a total failure of performance and his action is brought on this theory, the statute does not begin to run against him until he elects to rely no longer on performance by the promisor.[89] Where a bond is conditioned generally and specifically for the performance of duties by the obligor, as in the case of a bond given by an agent, employee, or trustee, it is regarded as a continuing security; and in case of repeated breaches the statute runs from each as it occurs, so that, although a cause of action for one breach of condition is barred, an action may still be maintained for a subsequent breach occurring within the statutory period before suit.[90] The general principle, however, is well settled that where a cause of action has arisen from a breach of a contract the subsequent accrual of additional or consequential damages does not constitute a new cause of action so as to create a new period of limitation.[91]

b. Contracts For Support and Maintenance. Contracts to support and main-

nard, 15 Misc. (N. Y.) 512, 37 N. Y. Suppl. 1009; Dodge *v.* Hogan, 19 R. I. 4, 31 Atl. 268; Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

86. See Brown *v.* Houdlette, 10 Me. 399; and the cases cited *infra*, note 87.

87. Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428 (contract not to engage in a certain business); Brown *v.* Houdlette, 10 Me. 399 (action on a bond given for the liberty of the jail yard).

88. A contract to erect and maintain a fence imposes a continuing duty, and the construction of the fence cannot be separated from the maintenance so as to create separate periods of limitation for each. Hence where merely nominal damage results from the failure to erect and maintain a fence and the action is merely to recover for the breach of that duty, the statute constitutes no bar; but where actual damage results from the failure and the action is to recover compensatory damages the statute runs from the date when the actual damage occurs. Douglass *v.* Ohio River R. Co., 51 W. Va. 523, 41 S. E. 911.

89. Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39 (an action to recover money paid under a contract to supply water for irrigation); Carter *v.* Carter, 28 Ill. App. 340 (where plaintiff and defendant agreed that each should bear one-half the costs of an action brought as a test case, and after several trials in that action judgment for costs was rendered against plaintiff; and it was held that the contract was a continuing one; that plaintiff could await enforced payment of the costs at the end of the litigation and then recover from defendant, although more than the statutory period had elapsed since certain of the items of costs became due).

90. Midway Deposit Bank *v.* Hearne, 104 Ky. 819, 48 S. W. 160, 20 Ky. L. Rep. 1019 [*distinguishing* Davis *v.* Brown, 98 Ky. 475, 32 S. W. 614, 36 S. W. 534, 17 Ky. L. Rep. 1428]; McKim *v.* Glover, 161 Mass. 418, 37 N. E. 443; Northern Assur. Co. *v.* Borgelt, 67 Nebr. 282, 93 N. W. 226. See also Chunn *v.* Patton, 35 N. C. 421.

Damage beyond penal sum of bond.— Although the statute barred a cause of action for embezzlement by a bank clerk of an amount greater than the penal sum of his bond, it was held that this did not preclude the bank from suing the surety for a subsequent breach, since the former breach might well be waived by the bank. Midway Deposit Bank *v.* Hearne, 104 Ky. 819, 48 S. W. 160, 20 Ky. L. Rep. 1019. But *compare* Brown *v.* Houdlette, 10 Me. 399.

91. *California.*— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

Iowa.— Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381.

Pennsylvania.— Moore *v.* Juvenal, 92 Pa. St. 484.

United States.— Wilcox *v.* Plummer, 4 Pet. 172, 7 L. ed. 821.

England.— Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237.

And see *supra*, VI, B, 1, b.

For applications of this principle see *supra*, VI, B, 3, c; and *infra*, VI, B, 15.

tain a person have been held to be continuing contracts so that the statute does not begin to run against any part of the claim of the person furnishing the support until the contract expires by its own terms or is otherwise brought to an end.[92] A contract to support a person during his life is continuing and binding upon the promisor during the lifetime of the beneficiary. But while a right of action based on the promisor's failure or refusal to furnish the support is not barred during the beneficiary's lifetime,[93] the recovery is limited to such damages as have accrued within the statutory period before the beginning of the action.[94]

c. Contracts to Marry.[95] According to the general rules applying to contracts,[96] the cause of action on a contract to marry accrues at the time of the breach, and the statute then begins to run, not at the time of making the promise; hence it is immaterial that the promise was made more than the statutory period before action brought.[97] If no time is fixed for the marriage the law implies that it shall take place in a reasonable time;[98] and where the parties treat their contract as continuing, by recognizing its existence and promising its fulfilment, the statute begins to run only when one of the parties breaks the engagement.[99] If the marriage is from time to time postponed by defendant up to a date less than the statutory period prior to commencing suit, at which time defendant refused to marry plaintiff, the suit is not barred.[1]

d. Contracts of Guaranty.[2] The question of the proper construction of a continuing contract of guaranty is one on which the decisions are not harmonious;[3] and the few decisions involving the accrual of the right of action and the running of the statute on such contracts are either based on cases peculiar in their facts,[4] or are opposed in principle,[5] so that no general rule can be deduced from them.

13. Severable Contracts[6] — a. In General. Where a contract is severable or divisible, breaches of its severable parts will give rise to separate causes of action accruing at different times, so that the statute of limitations will begin to run at the time of each several breach.[7]

b. Debts Payable in Instalments. Where a debt is payable in instalments the general rule is that the statute begins to run as to each instalment from the time when it falls due, and that the creditor can recover only those instalments falling due within the statutory period before the beginning of the action.[8] But while

92. Carroll *v.* McCoy, 40 Iowa 38 (where plaintiff under a contract fixing no time for its termination supported defendant's infant child until the child's majority, and it was held that the contract was continuous until the child reached majority and that the statute did not begin to run til that time); Jackson *v.* Mull, 6 Wyo. 55, 42 Pac. 603.

93. McCay *v.* McDowell, 80 Iowa 146, 45 N. W. 730 (holding also that the action is not barred, although brought more than the statutory period after the refusal to support); Riddle *v.* Beattie, 77 Iowa 168, 41 N. W. 606. And see the cases in the following note.

94. McCay *v.* McDowell, 80 Iowa 146, 45 N. W. 730; Whitley *v.* Whitley, 80 S. W. 825, 26 Ky. L. Rep. 134 (where it was held that the cause of action based on defendant's failure to furnish support accrued yearly or at the end of each year); Lano *v.* Wingate, 25 N. C. 326.

95. See also, generally, Breach of Promise to Marry, 5 Cyc. 1001.

96. See *supra*, VI, B, 1, a.

97. Hanson *v.* Elton, 38 Minn. 493, 38 N. W. 614; Schroeder *v.* Michel, 98 Mo. 43, 11 S. W. 314; and see Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901; Costello *v.* Hunter, 12 Ont. 333.

98. Blackburn *v.* Mann, 85 Ill. 222. See, generally, *supra*, II, B, 1, e, (I).

99. Blackburn *v.* Mann, 85 Ill. 222; Grant *v.* Cornock, 16 Ont. App. 532. See also Clark *v.* Phillips, 4 Ky. L. Rep. 826.

1. Chamness *v.* Cox, 131 Ind. 118, 30 N. E. 901.

2. Contracts of guaranty in general see *supra*, VI, B, 5.

3. See Guaranty, 20 Cyc. 1438 *et seq.*

4. See Jones *v.* Trimble, 3 Rawle (Pa.) 381; Overton *v.* Tracey, 14 Serg. & R. (Pa.) 311.

5. See Poughkeepsie City Nat. Bank *v.* Phelps, 86 N. Y. 484; Parr's Banking Co. *v.* Yeates, [1898] 2 Q. B. 460, 67 L. J. Q. B. 851, 79 L. T. Rep. N. S. 321, 47 Wkly. Rep. 42.

6. Of employment in general see *supra*, VI, B, 2.

With agent or attorney see *supra*, II, B, 3.

7. See Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109; Bartel *v.* Mathias, 19 Oreg. 482, 24 Pac. 918.

8. *Arkansas.*—Davis *v.* Herrington, 53 Ark. 5, 13 S. W. 215.

this rule is well settled in regard to actions of assumpsit or their modern equivalent, it seems that a contrary rule applies to the common-law action of debt, since such an action will not lie until all the instalments are due.[9] And where by the terms of the contract the failure to pay an instalment of a debt matures the whole debt, by the terms of the contract the statute of limitations runs from the first default.[10]

14. Implied and Quasi-Contracts — a. In General. As against a cause of action based upon an implied or quasi-contract the statute of limitations begins to run when the cause of action accrues,[11] and thus depends largely upon the facts of each particular case.[12] Where an implied promise is based upon a contingency so that it is not enforceable until the contingency happens, the statute does not begin to run until the promise becomes absolute by the happening of the contingency.[13] Where a cause of action has accrued to a creditor and the debtor pays part of the debt but refuses to pay the balance, the refusal does not create any new liability or change the creditor's cause of action on the contract into one founded on a quasi-contract so as to create a new period of limitation.[14]

b. Money Received to Plaintiff's Use[15] — (i) *In General.* When money is

California.— De Uprey *v.* De Uprey, 23 Cal. 352.

District of Columbia.— Washington L. & T. Co. *v.* Darling, 21 App. Cas. 132.

Maine.— Burnham *v.* Brown, 23 Me. 400.

Maryland.— Baltimore, etc., Turnpike Co. *v.* Barnes, 6 Harr. & J. 57.

Minnesota.— Wood *v.* Cullen, 13 Minn. 394, instalments of salary.

New Jersey.— Berry *v.* Doremus, 30 N. J. L. 399.

New York.— See Mason *v.* New York, 28 Hun 115, an action by a court attendant to recover unpaid balances of salary, he having been paid one hundred dollars per month but claiming one hundred and twenty-five.

Ohio.— Pelton *v.* Bemis, 44 Ohio St. 51, 4 N. E. 714; Adelbert College *v.* Toledo, etc., R. Co., 5 Ohio S. & C. Pl. Dec. 14, 3 Ohio N. P. 15.

Pennsylvania.— Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694. See also Overton *v.* Tracey, 14 Serg. & R. 311.

Texas.— Miles *v.* Kelly, (Civ. App. 1894) 25 S. W. 724. And see Morrill *v.* Smith County, (Civ. App. 1895) 33 S. W. 899, bonds payable in instalments.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 280–281. See also *supra*, VI, B, 4, note 51.

But in case of an entire contract for services the rule is otherwise. See *supra*, VI, B, 2, text and note 66 *et seq.*

Promissory notes payable in instalments are within the rule of the text. Burnham *v.* Brown, 23 Me. 400; Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694. See, generally, Commercial Paper, 7 Cyc. 854.

Provisions for acceleration of maturity on default in paying instalments due on instrument for payment of money see *supra*, VI, B, 11, c.

As to instalments of interest see, generally, Interest. See also *supra*, VI, B, 11, b, (II), (B).

As to instalments of interest on notes see Commercial Paper, 7 Cyc. 864.

9. Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Rudder *v.* Price, 1 H. Bl. 547; Coke Litt. 292b. See, generally, Debt, Action of, 13 Cyc. 411.

10. Lycoming F. Ins. Co. *v.* Batcheller, 62 Vt. 148, 19 Atl. 982; Reeves *v.* Butcher, [1891] 2 Q. B. 509, 60 L. J. Q. B. 619, 65 L. T. Rep. N. S. 329, 39 Wkly. Rep. 626; Hemp *v.* Garland, 4 Q. B. 519, 3 G. & D. 402, 7 Jur. 302, 12 L. J. Q. B. 134, 45 E. C. L. 519; Manitoba Mortg., etc., Co. *v.* Daly, 10 Manitoba 425. See also Westcott *v.* Whiteside, 63 Kan. 49, 64 Pac. 1032.

11. Thompson *v.* Reed, 48 Ill. 118.

12. See Mann *v.* Curtis, 6 Rob. (N. Y.) 128; Davies *v.* Cram, 4 Sandf. (N. Y.) 355.

Services rendered.— Against an action on a *quantum meruit* for services rendered, the statute runs from the time the services terminate. Cooper *v.* Claxton, 122 Ga. 596, 50 S. E. 399. See also *supra*, VI, B, 2.

13. Goodnow *v.* Stryker, 62 Iowa 221, 14 N. W. 345, 17 N. W. 506. See, generally, *supra*, VI, B, 1, g.

14. Brundage *v.* Port Chester, 102 N. Y. 494, 7 N. E. 398 [*affirming* 31 Hun 129].

Illustration.— A village was indebted to a contractor in the sum of five thousand dollars, and had levied assessments to the amount of three thousand dollars against him for work on the streets. On a threat to sell his property the contractor accepted from the village the balance between the two sums, and the village canceled the assessments. It was held that no right of action accrued to plaintiff by the conduct of the village, since the attempted application of a void assessment did not operate as a payment of plaintiff's claim, but his only cause of action accrued at the maturity of his claim against the village, and the statute of limitations then began to run. Brundage *v.* Port Chester, 102 N. Y. 494, 7 N. E. 398 [*affirming* 31 Hun 129].

15. See, generally, Money Received.

Recovery of mesne profits see Ejectment, 15 Cyc. 209.

received by one person to and for the use of another or under such circumstances that it becomes his duty to pay it over to the latter, an action for money had and received may be brought to recover it without a demand,[16] and the statute begins to run from the date of the receipt of the money or at least within a reasonable time thereafter,[17] not from the date of a subsequent conversion by the recipi-

16. *Indiana.*— Parks *v.* Latterthwaite, 132 Ind. 411, 32 N. E. 82.

Montana.— See Chowen *v.* Phelps, 26 Mont. 524, 60 Pac. 54.

New York.—Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; *In re* Cole, 34 Hun 320.

Pennsylvania.— Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450.

Rhode Island.— Reynolds *v.* Hennessy, 15 R. I. 215, 2 Atl. 701.

Washington.— Spinning *v.* Pierce County, 20 Wash. 126, 54 Pac. 1006.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342; Merrill *v.* Monticello, 66 Fed. 165.

See, generally, MONEY RECEIVED.

But *compare* Sawyer *v.* Tappan, 14 N. H. 352; Hutchins *v.* Gilman, 9 N. H. 359.

17. *District of Columbia.*— Moses *v.* Taylor, 6 Mackey 255.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Iowa.— Brunson *v.* Ballou, 70 Iowa 34, 29 N. W. 794; Shreves *v.* Leonard, 56 Iowa 74, 8 N. W. 749.

Kentucky.— Hubbard *v.* Prather, 1 Bibb 178, where a person assigned a claim and afterward collected it. See also Roberts *v.* Phillips, 11 Bush 11.

Louisiana.— Hennessey *v.* Stempel, 52 La. Ann. 449, 26 So. 1004.

Maryland.— Berry *v.* Pierson, 1 Gill 234.

Massachusetts.— Hancock *v.* Franklin Ins. Co., 114 Mass. 155; Miller *v.* Miller, 7 Pick. 133, 19 Am. Dec. 264.

Missouri.— Johnson *v.* Smith, 27 Mo. 591, where an unauthorized person assumed to act as guardian for another. See also Greenabaum *v.* Elliott, 60 Mo. 25.

Montana.— See Chowen *v.* Phelps, 26 Mont. 524, 60 Pac. 54.

Nebraska.— Murphy *v.* Omaha, 1 Nebr. (Unoff.) 488, 95 N. W. 680.

New York.— Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606; Carr *v.* Thompson, 87 N. Y. 160 [*affirming* 9 Daly 279]; Yates *v.* Wing, 42 N. Y. App. Div. 356, 59 N. Y. Suppl. 78; St. John *v.* Coates, 63 Hun 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; *In re* Cole, 34 Hun 320 (where money was received by a husband "for the use and benefit" of his wife); Compton *v.* Elliott, 48 N. Y. Super. Ct. 211 [*following* Howard *v.* France, 43 N. Y. 593]; Downs *v.* Wells, 14 N. Y. Suppl. 566, 16 N. Y. Suppl. 707. And see Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552 [*affirming* 50 Hun 54, 3 N. Y. Suppl. 110]; Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Myers *v.* Cronk, 10 N. Y. St. 125. *Compare* Schroeppel *v.* Corning, 6 N. Y. 107 [*affirming* 10 Barb. 576] (where a lender of money at an illegal rate of interest took bonds and mortgages in consideration of the loan, and it was held that as against the borrower's right of action to recover money received by the lender on the bonds and mortgages the statute began to run when those securities were assigned to the lender, not when the latter received the money on them); Oldfirlo *v.* Vassar College, 68 N. Y. App. Div. 272, 73 N. Y. Suppl. 1112.

North Carolina.— Barden *v.* Stickney, 132 N. C. 416, 43 S. E. 912; Sweat *v.* Arrington, 3 N. C. 129.

Pennsylvania.— Johnston *v.* McCain, 188 Pa. St. 513, 41 Atl. 592; Hamilton *v.* Hamilton, 18 Pa. St. 20, 55 Am. Dec. 585; Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450. And see New Holland Turnpike Co. *v.* Farmers' Ins. Co., 144 Pa. St. 541, 22 Atl. 923; Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558.

Rhode Island.— Reynolds *v.* Hennessy, 15 R. I. 215, 2 Atl. 701.

South Carolina.— See Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761.

Texas.— See Wynne *v.* Willis, 76 Tex. 589, 13 S. W. 548.

Washington.— Spinning *v.* Pierce County, 20 Wash. 126, 54 Pac. 1006.

West Virginia.— Jackson *v.* Hough, 38 W. Va. 236, 18 S. E. 575. See also Windon *v.* Stewart, 43 W. Va. 711, 28 S. E. 776.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342 (payment of forged check by a bank); Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]. See also Astor *v.* Girard, 2 Fed. Cas. No. 595, 4 Wash. 711.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 266, 269.

But *compare* Sawyer *v.* Tappan, 14 N. H. 352; Hutchins *v.* Gilman, 9 N. H. 359.

But where a wife's money is received by her husband and there is no direct evidence to show the terms on which he receives it, a different rule applies. See *supra*, VI, B, 10, a, text and note 20.

Receipt of several sums at different times. — Where a pledgee of a note collected on the note more than the amount of the debt for which it was pledged, the excess being collected in several sums at different times, it was held that the statute began to run against the pledgor as to each of such collections from the time it was made. Hennessey *v.* Stempel, 52 La. Ann. 449, 26 So. 1004.

Payable on contingency.— If the money is payable on the happening of a contingency,

ent;[18] and this, although an accounting may be necessary to determine the amount due.[19] This principle has been applied to actions to recover taxes illegally exacted or erroneously paid,[20] or paid on exempt property,[21] and under invalid municipal assessments.[22] The principle is also applicable to actions to recover back money paid to defendant under an illegal contract.[23] Likewise where money is paid under an executory contract which is invalid only by reason of the legal incapacity of one of the parties to enter into that particular agreement, although otherwise capable of contracting, the cause of action to recover back the money paid accrues at the time of the payment and the statute runs from that date.[24] Where one person employs another to purchase property for their joint benefit, each furnishing part of the purchase-money, but the one making the purchase takes title in his own name and makes no accounting of the money advanced by the other, a cause of action accrues to the latter at the time the title is thus taken in violation of the agreement, and the statute begins to run immediately,[25] not when the wrong-doer afterward sells the property and receives the purchase-money on his own account.[26] Where a person having obtained possession of a promissory note to which he had no title has collected it and appropriated the proceeds to his own use, the true owner of the note may waive the tort and sue in assumpsit for money had and received, in which event the statute runs from the date when defendant received

the cause of action accrues and the statute begins to run only when the contingency happens. Keller *v.* Rhoads, 39 Pa. St. 513, 80 Am. Dec. 539. And see *supra*, VI, B, 1, g, (I).

Illustration.— Thus if a judgment be assigned as a security to indemnify the assignee for a liability he is under for the assignor, and the assignee assign it to another who has a knowledge of the facts and who collects the money, and the first assignee is relieved from his liability, the right of action to recover the money from the last assignee accrues when the liability of the first assignee ceases, and from that time the statute begins to run. Poe *v.* Foster, 4 Watts & S. (Pa.) 351.

Money payable to third person when he needs it.— Where money is received for the benefit of a third person and is payable at any time when the latter's circumstances are such that he is in need of it, the money is payable on demand and the statute begins to run against the beneficiary from the time he has the right to make the demand. Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741.

Recovery back of payments on violation of agreement.— It was agreed between the parties to a foreclosure suit that the mortgaged property should be taken at the sale in full satisfaction of whatever judgment might be rendered, and the mortgagor relying on this agreement did not insist on having the judgment reduced by payments which had been made by him. After the judgment had been rendered and satisfied by the sale the mortgagee repudiated the agreement and caused the sale to be set aside. The judgment having been paid, the mortgagor sued to recover back the sums which he had paid on the mortgage, and it was held that his cause of action accrued and the statute began to run only when the mortgagee repudiated the agreement. Savery *v.* Sypher, 39 Iowa 675.

Before the money has been received no cause of action can of course accrue and the statute does not begin to run (Garrett *v.* Garrett, 27 Ala. 687; Perry *v.* Smith, 31 Kan. 423, 2 Pac. 784), notwithstanding the wrong which enables defendant to receive the money was committed more than the statutory period before suit (Perry *v.* Smith, *supra*).

18. Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606.

19. Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Yates *v.* Wing, 42 N. Y. App. Div. 356, 59 N. Y. Suppl. 78.

20. Sioux City, etc., R. Co. *v.* O'Brien County, 118 Iowa 582, 92 N. W. 857. See TAXATION.

21. Scott *v.* Chickasaw County, 53 Iowa 47, 3 N. W. 820; Callanan *v.* Madison County, 45 Iowa 561. See TAXATION.

22. Trimmer *v.* Rochester, 134 N. Y. 76, 31 N. E. 255 [*following* Diefenthaler *v.* New York, 111 N. Y. 331, 19 N. E. 48]; Teall *v.* Syracuse, 120 N. Y. 184, 24 N. E. 450; Parsons *v.* Rochester, 43 Hun (N. Y.) 258; Brundage *v.* Portchester, 31 Hun (N. Y.) 129 [*affirmed* in 102 N. Y. 494, 7 N. E. 398]; Trimmer *v.* Rochester, 9 N. Y. Suppl. 695 [*affirmed* in 130 N. Y. 401, 29 N. E. 746]. See MUNICIPAL CORPORATIONS.

23. Hunt *v.* Burk, 22 Ga. 129.

24. Jefferson County *v.* Burlington, etc., R. Co., 66 Iowa 385, 16 N. W. 561, 23 N. W. 899, where bonds were delivered by a county under a contract which it had no legal capacity to make, the court treating the case as though the payment were made in money.

25. Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559 (holding also that the action being based upon defendant's conversion of plaintiff's money can be brought without a previous demand); *In re* Fink, 157 Pa. St. 292, 27 Atl. 724.

26. *In re* Fink, 157 Pa. St. 292, 27 Atl. 724.

the money, not from the date when the note was converted,[27] no demand being necessary to set the statute in motion;[28] nor is the rule altered by the fact that defendant obtained the possession of the note by fraud.[29]

(II) *By Attorney or Collecting Agent.* Even in a jurisdiction where a demand is prerequisite to an action to recover money collected by an agent or attorney for his principal or client,[30] if the receipt of the money is unauthorized and wrongful, the principal or client may waive the tort and sue for money had and received to his use, in which event no demand is necessary and the statute begins to run from the time the money is received.[31]

(III) *Payment on Judgment Afterward Modified or Reversed.* On the other hand, where money is paid on a judgment which is afterward modified or reversed by an appellate court, the judgment debtor's cause of action to recover back the money paid accrues at the time of the modification or reversal of the judgment, not at the date of the payment.[32]

(IV) *Recovery Back of Purchase-Price* — (A) *In General.* Where a purchaser of property does not receive what he has bargained for, his right to recover back the purchase-price as money paid on a consideration which has failed accrues at the time when the failure of consideration occurs, and the statute then begins to run.[33] This may be the date of the sale when the purchaser pays his money without receiving value,[34] or some subsequent time,[35] according to the terms of the contract and the facts of the case. Where the vendor of land receives the purchase-money but fails to convey to the purchaser, it is held on the one hand that if no demand is necessary to perfect the purchaser's right to a deed his cause of action to recover back the purchase-money accrues at the time the

27. Lamb *v.* Clark, 5 Pick. (Mass.) 193; Robertson *v.* Dunn, 87 N. C. 191, conversion of note by suing on it and obtaining judgment.

28. Robertson *v.* Dunn, 87 N. C. 191.

29. Lamb *v.* Clark, 5 Pick. (Mass.) 193.

30. See *supra*, VI, B, 3, c.

31. Bryant *v.* Peebles, 92 N. C. 176 (holding also that a subsequent election to treat the wrong-doer as a lawful agent does not affect the rule); Robertson *v.* Dunn, 87 N. C. 191 (implied agency). And see Johnson *v.* Smith, 27 Mo. 591; Merrill *v.* Monticello, 66 Fed. 165.

32. *Alabama.*— Crocker *v.* Clements, 23 Ala. 296.

California.— Applegarth *v.* Dean, 68 Cal. 491, 13 Pac. 587.

Illinois.— Hawley *v.* Simons, 74 Ill. App. 222.

Nebraska.— See Pawnee City First Nat. Bank *v.* Avery Planter Co., 69 Nebr. 329, 95 N. W. 622, 111 Am. St. Rep. 541.

United States.—Washington Bank *v.* Neale, 2 Fed. Cas. No. 951, 4 Cranch C. C. 627.

33. Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379; Rose *v.* Foord, (Cal. 1891) 28 Pac. 229. And see the cases in the following notes.

34. *Illinois.*— Lunt *v.* Wrenn, 113 Ill. 168.

Maine.— Bishop *v.* Little, 3 Me. 405, want of title in vendor of land.

North Carolina.— Barden *v.* Stickney, 132 N. C. 416, 43 S. E. 912 [*reaffirming* 130 N. C. 62, 40 S. E. 842] (failure of title to land); Austin *v.* Dawson, 75 N. C. 523 (sale of invalid bonds).

Rhode Island.— Furlong *v.* Stone, 12 R. I. 437 [*distinguishing* Sherman *v.* Akins, 4 Pick. (Mass.) 283], failure of title to land; it being held that the statute began to run when the money was paid, not at the time when ejectment was brought against the grantee.

Texas.— Rayner Cattle Co. *v.* Bedford, (Civ. App. 1898) 44 S. W. 410, failure of title to land.

West Virginia.— See Merchants' Nat. Bank *v.* Spates, 41 W. Va. 27, 23 S. E. 681, 56 Am. St. Rep. 828, assignment of invalid county order.

United States.— Union Pac. R. Co. *v.* Barnes, 64 Fed. 80, 12 C. C. A. 48, failure of title to land. See also Leather Manufacturers' Nat. Bank *v.* Merchants' Nat. Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342; Morton *v.* Nevada City, 21 Fed. 582 [*affirmed* in 52 Fed. 350, 3 C. C. A. 109], sale of void municipal bonds.

England.— Bree *v.* Holbech, Dougl. (3d ed.) 654, sale of forged mortgage.

Property set aside for future delivery.— Where a bond was sold and thereupon set aside for the buyer to be delivered at a subsequent time, it was held that a cause of action to recover back the purchase-price on the ground of failure of consideration accrued at the date of the sale and that the statute then began to run, for the delivery related back to that date. Austin *v.* Dawson, 75 N. C. 523.

35. *Arkansas.*— Glasscock *v.* Rosengrant, 55 Ark. 376, 18 S. W. 379.

California.— Richter *v.* Union Land, etc., Co., 129 Cal. 367, 62 Pac. 39 (involving a contract to supply water for irrigation and holding that the statute could not begin to run until the purchaser made his election not to rely on the contract but to sue for

money is paid in full, and the statute then begins to run.[36] On the other hand, it is held that if the contract contains no covenant to convey, and no time for executing the conveyance is fixed by the parties, the cause of action accrues and the statute begins to run only when the vendor does some act in disaffirmance of the contract so as to entitle the purchaser to rescind.[37] Where a contract to sell land has been assigned by the purchaser and is broken by the vendor's refusal to convey, the assignee's right of action to recover back from his assignor the money paid for the assignment accrues upon the vendor's refusal to give a deed, and the statutory period is computed from that date.[38] Where the contract provided that the vendor should execute a deed when he obtained his wife's relinquishment of dower, and the wife afterward died without having executed the relinquishment, and the vendor failed to execute the deed, it was held that the purchaser's cause of action to recover back the purchase-money accrued on the death of the wife and the statute then began to run; and this notwithstanding the purchaser was ignorant of the wife's death and resided in another state.[39]

(B) *When Paid Under Parol Contract to Convey Land.* Where payments are made by a purchaser under a parol contract for the sale of land the money cannot be recovered back until the vendor is in default; that is, when he elects to disaffirm; and the statute of limitations begins to run only from that date.[40]

the money paid to the vendor); Rose *v.* Foord, (1891) 28 Pac. 229 (the time when defendant confessed his inability to deliver the property).

Kentucky.— See Johnson *v.* Barnes, (1887) 4 S. W. 176.

Texas.— Beirne *v.* Kelsey, 21 Tex. 190, holding that a cause of action to recover back purchase-money paid for goods which were lost through the seller's fault accrued when the goods were lost and that the statute then began to run.

Virginia.—Garber *v.* Armentrout, 32 Gratt. 235, holding that where a conveyance by a husband and wife of the wife's land is set aside on the death of the husband, the statute of limitations does not begin to run against the claim of the grantee to recover the consideration paid, until the deed is set aside.

United States.— Geer *v.* School Dist. No. 11, 111 Fed. 682, 49 C. C. A. 539, a sale of void bonds by a school-district, the district for a long time afterward treating the bonds as valid by levying a tax for their payment and by repeatedly promising to pay them, and it being held that the statute did not begin to run until the district repudiated them. See also Merrill *v.* Monticello, 72 Fed. 462, 18 C. C. A. 636.

England.— Huggins *v.* Coates, 5 Q. B. 432, Dav. & M. 433, 8 Jur. 434, 13 L. J. Q. B. 46, 48 E. C. L. 432; Cowper *v.* Godmond, 9 Bing. 748, 2 L. J. C. P. 162, 2 Moore & S. 219, 23 E. C. L. 788, both holding that where annuities not void *ab initio* are subsequently set aside, a cause of action to recover back the consideration paid for them accrues at the time the annuities are avoided, and that the statute does not begin to run until that date.

See 33 Cent. Dig. tit. "Limitation of Actions," § 266 *et seq.*

36. Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899, holding that the purchaser's right of action must be deemed to be based upon an implied promise of the vendor to repay the money on default in making title. *Compare* Deming *v.* Haney, 23 Iowa 77. And see, generally, VENDOR AND PURCHASER.

37. Leinhart *v.* Forringer, 1 Penr. & W. (Pa.) 492. And see Graham *v.* Chandler, 38 Vt. 559.

38. Stewart *v.* Keith, 12 Pa. St. 238.

39. Kavenagh *v.* Weedon, 1 Ala. 231, holding also that the fact of the wife's death was not a matter so peculiarly within the vendor's knowledge as to render it necessary for him to notify the purchaser.

40. *Illinois.*—Collins *v.* Thayer, 74 Ill. 138, not until one or the other does some act showing an intention to rescind.

Kentucky.— Walker *v.* Walker, 55 S. W. 726, 21 Ky. L. Rep. 1521.

Maine.— Richards *v.* Allen, 17 Me. 296.

New York.— Fogal *v.* Page, 13 N. Y. Suppl. 656, where the vendor had conveyed to a third person and it was held that since the action was brought within the statutory period after the conveyance the statute was no bar.

Pennsylvania.— See Harris *v.* Harris, 70 Pa. St. 170.

Tennessee.— Hilton *v.* Duncan, 1 Coldw. 313.

Vermont.— Bedell *v.* Tracy, 65 Vt. 494, 26 Atl. 1031.

Tender of purchase-money and demand for deed.— Although in such a case a tender of the balance of the purchase-money and a demand for a deed may ordinarily be conditions precedent to the purchaser's right of action, yet if the vendor by his own act has deprived himself of the power to perform his part of the contract these conditions are waived. Richards *v.* Allen, 17 Me. 296. See, generally, VENDOR AND PURCHASER.

(v) *Payments Made Under Mistake.*[41] In the absence of a special statutory provision to the contrary the general rule is that where money is paid under a mistake a cause of action to recover it back arises immediately and the statute begins to run at the date of the payment,[42] not at the date when the mistake is discovered;[43] and no demand is necessary to set the statute in motion.[44] But in cases where an overpayment is made under a contract not yet fully performed, the cause of action cannot be said to accrue until defendant receives money which in equity and good conscience he is not entitled to retain; and thus the running of the statute may be postponed until a final settlement or estimate is made.[45]

41. Overpayments by executor or administrator see Executors and Administrators, 18 Cyc. 917.

42. *Georgia.*— See Maxwell *v.* Walsh, 117 Ga. 467, 43 S. E. 704.

Illinois.— International Bank *v.* Bartalott, 11 Ill. App. 620.

Indiana.— Schultz *v.* Cass County, 95 Ind. 323. But see Butt *v.* Jennings School Tp., 81 Ind. 69.

Iowa.— Shreves *v.* Leonard, 56 Iowa 74, 8 N. W. 749; Higgins *v.* Mendenhall, 51 Iowa 135, 50 N. W. 539 [*overruling* Higgins *v.* Mendenhall, 42 Iowa 675].

Kansas.— Jones *v.* Elk County School Dist. No. 19, 26 Kan. 490.

Massachusetts.— Sturgis *v.* Preston, 134 Mass. 372.

New Jersey.— Reading *v.* Den, 6 N. J. L. 186.

New York.— Morris *v.* Budlong, 78 N. Y. 543 [*reversing* 16 Hun 570].

Pennsylvania.— Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670.

United States.— Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342; U. S. Bank *v.* Daniel, 12 Pet. 32, 9 L. ed. 989 (holding that the rule is the same in equity as at law); Morton *v.* Nevada, 41 Fed. 582, 589 [*affirmed* in 52 Fed. 350, 3 C. C. A. 109].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 270, 370.

43. *Georgia.*— See Maxwell *v.* Walsh, 117 Ga. 467, 43 S. E. 704.

Indiana.— Schultz *v.* Cass County, 95 Ind. 323. But see Butt *v.* Jennings School Tp., 81 Ind. 69.

Iowa.— Higgins *v.* Mendenhall, 51 Iowa 135, 50 N. W. 539 [*overruling* Higgins *v.* Mendenhall, 42 Iowa 675]. See, however, the Iowa cases in the reading-note below.

Kansas.— Jones *v.* Elk County School Dist. No. 19, 26 Kan. 490.

New York.— Morris *v.* Budlong, 78 N. Y. 543 [*reversing* 16 Hun 570].

Pennsylvania.— Montgomery's Appeal, 92 Pa. St. 202, 37 Am. Rep. 670.

United States.— Morton *v.* Nevada, 41 Fed. 582, 589 [*affirmed* in 52 Fed. 350, 3 C. C. A. 109].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 270, 476.

But see Emerson *v.* Navarro, 31 Tex. 334, 98 Am. Dec. 534.

By statute, however, in some jurisdictions the cause of action is not deemed to accrue until the mistake is discovered, and the period is computed only from that time (Hayes *v.* Los Angeles County, 99 Cal. 74, 33 Pac. 766; Storm Lake Bank *v.* Buena Vista County, 66 Iowa 128, 23 N. W. 297; Lanning *v.* Transylvania County, 106 N. C. 505, 11 S. E. 622); but it is there held that plaintiff's means of obtaining knowledge is equivalent to actual knowledge or discovery of the mistake (Shain *v.* Sresovich, 104 Cal. 402, 38 Pac. 51), unless defendant has so conducted himself as to justify plaintiff in believing that no mistake has been made (Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784); and it seems that defendant's mere knowledge of the mistake is immaterial (Shain *v.* Sresovich, *supra*). Under such a statute plaintiff must allege and prove that he discovered the mistake within the statutory period before the commencement of the action and that he could not by reasonable diligence have discovered it sooner. German Security Bank *v.* Columbia Finance, etc., Co., 85 S. W. 761, 27 Ky. L. Rep. 581. The want or defect of title to land which the vendor sells under a *bona fide* belief that he has a legal right to do so does not constitute a mistake within the meaning of such a statute. Barden *v.* Stickney, 132 N. C. 416, 43 S. E. 912. A statute providing that in actions for relief on the ground of fraud the cause of action shall not be deemed to have accrued until the fraud shall have been discovered by the party aggrieved does not apply to an action to recover money paid under a mistake. Higgins *v.* Mendenhall, 51 Iowa 135, 50 N. W. 539 [*overruling* Higgins *v.* Mendenhall, 42 Iowa 675]. And see Morris *v.* Budlong, 78 N. Y. 543 [*reversing* 16 Hun 570]; Mask *v.* Tiller, 89 N. C. 423.

For other relief on the ground of mistake see *infra*, VI, B, 23.

Mistake as to quantity of land conveyed see Vendor and Purchaser.

44. Sturgis *v.* Preston, 134 Mass. 372; Leather Manufacturers' Nat. Bank *v.* Merchants' Bank, 128 U. S. 26, 9 S. Ct. 3, 32 L. ed. 342. But see Wyckoff *v.* Curtis, 7 Misc. (N. Y.) 444, 27 N. Y. Suppl. 1012 [*reversed* on other grounds in 10 Misc. 125, 30 N. Y. Suppl. 940]. See also, generally, Money Received; Payment.

45. Johnson *v.* Rutherford, 10 Pa. St. 455, in which an overpayment was made on account of work on a contract, and on a final settlement the final balance was paid, and it was held that the statute did not begin to run until the payment on the final settlement. To the same effect see Busch *v.* Wil-

c. Money Paid to Defendant's Use[46] — (I) *In General.* As a general rule where a person is obliged to pay money for which another is liable, or pays it at the other's request, his right of action to recover it from the latter accrues at the time of payment and the statute runs from that time.[47] Where several payments are made to discharge obligations for which another is primarily liable, a separate cause of action accrues when each payment is made, and the statute as to each cause of action runs from the date of the particular payment.[48] It has been held, however, that a right of action to recover money paid to defendant's use does not accrue and the statute does not begin to run until the time when defendant avails himself of the benefit of the payment, for until then no implied promise to repay can be said to arise.[49]

(II) *By Sureties, Indorsers, and Accommodation Parties to Commercial Paper*[50] — (A) *In General.* The right of action of a surety to recover reimbursement from his principal accrues when the surety pays the debt, and the statute begins to run from that time only,[51] not from the time of the rendition of

cox, 106 Mich. 514, 64 N. W. 485; Busch *v.* Jones, 94 Mich. 223, 53 N. W. 1051.

46. See, generally, Money Paid.

47. *California.*—Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998.

Illinois.— Hitt *v.* Shaver, 34 Ill. 9.

Kansas.— Clay County *v.* Streeter, 2 Kan. App. 498, 43 Pac. 985.

Maine.— Gilmore *v.* Bussey, 12 Me. 418, where an agent had given his note for labor performed for his principal, and was compelled to pay it. See also Luce *v.* McLoon, 58 Me. 321; Veazie *v.* Penobscot R. Co., 49 Me. 119.

Massachusetts.— Wheeler *v.* Young, 143 Mass. 143, 9 N. E. 531.

Michigan.— See Owen *v.* Baxter, 97 Mich. 539, 56 N. W. 930.

Mississippi.— Hebron *v.* Yerger, 65 Miss. 548, 5 So. 110, holding that where one conveys land with warranty of title, and debts owing by him are afterward charged on the land by decree, and the land is sold therefor and purchased by the grantee, the grantee's right of action against the grantor for the amount paid at the latter sale accrues and the statute of limitations begins to run from the time of payment; and that he need not delay suit until confirmation of the sale.

New Hampshire.— Sargent *v.* Currier, 49 N. H. 310, 6 Am. Rep. 524, where a buyer of personal property was compelled in order to retain the property to discharge an encumbrance thereon. See also Douglas *v.* Elkins, 28 N. H. 26.

New York.— Barker *v.* Cassidy, 16 Barb. 177; Frank *v.* Brewer, 7 N. Y. Suppl. 182; Butler *v.* Wright, 2 Wend. 369 [*affirmed* in 6 Wend. 284, 21 Am. Dec. 323].

North Carolina.—Deaver *v.* Carter, 34 N. C. 267, holding also that notice of the payment is unnecessary. See also Miller *v.* Eskridge, 23 N. C. 147.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

South Carolina.— Blakely *v.* Frazier, 11 S. C. 122 (payment by a factor of a reclamation on an overdraft made by the principal); Legare *v.* Fraser, 3 Strobh. 377, payment by a factor).

Texas.— West *v.* El Campo Land Co., (Civ. App. 1895) 32 S. W. 424, the right of a purchaser to recover from his vendor reimbursement for the payment of a charge which was the personal obligation of the vendor but which the purchaser had to pay to prevent forfeiture of the property to the state.

United States.— Power *v.* Munger, 52 Fed. 705, 3 C. C. A. 253.

But *compare* Benton *v.* Roberts, 63 Ga. 672, where money was paid on an execution which was afterward quashed for want of jurisdiction in the judge who issued it, and the court held that the statute did not begin to run until the execution was quashed.

Illustrations.—Where a mortgagee assigns a mortgage as collateral security to the debt of another, and the assignee forecloses the mortgage, and after sale applies the proceeds to the payment of the debt for which the mortgage was pledged, limitations in bar of the mortgagee's right of action against the debtor, as for money paid to his use, begin to run from the date of the sale and conversion, and not from the date of the decree of foreclosure, for the foreclosure does not operate as payment. Brown *v.* Tyler, 8 Gray (Mass.) 135, 69 Am. Dec. 239. Where an administrator and another bought land of the estate, and the administrator having settled therefor with the distributees sought reimbursement from his co-purchaser, it was held that the statute began to run from the date of the sale, not from the ratification by the distributees. Edge *v.* Edge, 62 Ga. 289.

48. Clay County v. Streeter, 2 Kan. App. 498, 43 Pac. 985, where a lessee stipulated to pay taxes during the term of the lease but failed to do so, and the taxes due annually were paid by the lessor. For other applications of this rule see *infra*, VI, B, 14, c, (II).

49. Irvine *v.* Angus, 93 Fed. 629, 35 C. C. A. 501. And see Goodnow *v.* Stryker, 61 Iowa 261, 16 N. W. 486 [*followed* in Goodnow *v.* Wells, 78 Iowa 760, 38 N. W. 172].

50. Subrogation of surety see Subrogation.

51. *California.*—Loewenthal *v.* Coonan, 135 Cal. 381, 67 Pac. 324, 87 Am. St. Rep. 115; Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998.

Colorado.— Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509.

judgment against the surety.[52] Payment by indorsers and accommodation parties to negotiable instruments is strongly analogous to payment by sureties.[53] Thus where an accommodation maker of a note pays the same to a *bona fide* holder and seeks reimbursement from the payee,[54] or where an indorser of a note has been compelled to pay it and seeks reimbursement from the maker or prior indorsers,[55] the cause of action accrues and the statute begins to run at the date when the payment is made, not at the maturity of the instrument. The general principle that the statute runs from the date of payment applies to partial pay-

Connecticut.— Graves *v.* Johnson, 48 Conn. 160, 40 Am. Rep. 162, surety on a note.

Illinois.— Bonham *v.* Galloway, 13 Ill. 68.

Indiana.— See Arbogast *v.* Hays, 98 Ind. 26.

Iowa.— Wilson *v.* Crawford, 47 Iowa 469 (holding also that a promise to pay at some indefinite time in the future does not suspend the right of action or the running of the statute); Walker *v.* Lathrop, 6 Iowa 516.

Kentucky.— Robinson *v.* Jennings, 7 Bush 630; Hikes *v.* Crawford, 4 Bush 19, not when he replevies the debt.

Maine.— Gilmore *v.* Bussey, 12 Me. 418.

Maryland.— Bullock *v.* Campbell, 9 Gill 182.

Massachusetts.— Thayer *v.* Daniels, 110 Mass. 345 [*followed* in Wheeler *v.* Young, 143 Mass. 143, 9 N. E. 531].

Minnesota.— Barnsback *v.* Reiner, 8 Minn. 59, surety on a note.

Mississippi.— Scott *v.* Nichols, 27 Miss. 94, 61 Am. Dec. 503. See also Loughridge *v.* Bowland, 52 Miss. 546.

Missouri.— Bushong *v.* Taylor, 82 Mo. 660; Burton *v.* Rutherford, 49 Mo. 255, payment of a note by surety.

Montana.— Oppman *v.* Steinbrenner, 17 Mont. 369, 42 Pac. 1015, where the surety's plea of the statute was stricken out as sham.

North Carolina.—Deaver *v.* Carter, 34 N. C. 267; Ponder *v.* Carter, 34 N. C. 242.

Ohio.— Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

Pennsylvania.—See Wesley Church *v.* Moore, 10 Pa. St. 273.

South Carolina.— Peters *v.* Barnhill, 1 Hill 234; Thompson *v.* Stevens, 2 Nott & M. 493.

Tennessee.— Glass *v.* Williams, 16 Lea 697; Reeves *v.* Pulliam, 7 Baxt. 119.

Texas.— Hammond *v.* Myers, 30 Tex. 375, 94 Am. Dec. 322 (payment in another state where the contract of suretyship was made); Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158.

Virginia.— See Harper *v.* McVeigh, 82 Va. 751, 1 S. E. 193.

England.— Davies *v.* Humphreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 307, 309.

Assumption of encumbrance by grantee.— This rule applies where the relation of principal and surety is created between a grantee and a grantor by the former's assuming payment of a mortgage or judgment for which the grantor is liable. Foster *v.* Marsh, 25 Iowa 300; Poe *v.* Dixon, 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713.

Other illustrations.— Where plaintiff and defendant together executed a note, and afterward defendant for a valuable consideration agreed to pay the whole of it, but failed to do so, and plaintiff paid it, it was held that by the agreement plaintiff became surety for defendant and that the statute of limitations commenced to run against plaintiff from the time he paid the note and not from the time the note became due and payable. Buell *v.* Burlingame, 11 Colo. 164, 17 Pac. 509. A gave a mortgage to secure a note executed by B and C; A died devising the mortgaged premises to B; and the mortgage having been foreclosed and B and C having died, B's administrator redeemed the premises by paying the amount due and then had half the sum allowed as a claim against C's estate. It was held that A's relation to B and C was substantially that of surety, and that B under the devise succeeded to his rights; that B's administrator acquired by the redemption the same right that B would have had to recover from C's estate one half the sum paid to redeem, as money paid to C's use, and that the statute began to run only from the time when the money was paid on redemption, regardless of the time when the cause of action accrued in favor of the creditor against B and C. Goodrich *v.* Leland, 18 Mich. 110.

52. Thompson *v.* Stevens, 2 Nott & M. (S. C.) 493; Glass *v.* Williams, 16 Lea (Tenn.) 697; Reeves *v.* Pulliam, 7 Baxt. (Tenn.) 119.

53. See McCrady *v.* Jones, 44 S. C. 406, 22 S. E. 414.

54. Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998; Frank *v.* Brewer, 7 N. Y. Suppl. 182.

If an accommodation accepter of a bill of exchange is compelled to pay it, his right of action for reimbursement accrues only at the time of the payment and the statute runs only from that time. Angrove *v.* Tippett, 11 L. T. Rep. N. S. 708.

55. Godfrey *v.* Rice, 59 Me. 308; Phipps *v.* Nye, 34 Miss. 330; Pope *v.* Bowman, 27 Miss. 194; Barker *v.* Cassidy, 16 Barb. (N. Y.) 177; Butler *v.* Wright, 2 Wend. (N. Y.) 369 [*affirmed* in 6 Wend. 284, 21 Am. Dec. 323]; McCrady *v.* Jones, 44 S. C. 406, 22 S. E. 414. But *compare* Woodruff *v.* Moore, 8 Barb. (N. Y.) 171 (where the note was barred when taken up by the indorser, and it was held that he could not recover on it against the maker); Farmers' Bank *v.* Gilson, 6 Pa. St. 51; Kennedy *v.* Carpenter, 2 Whart. (Pa.) 344.

An accommodation indorser seeking reimbursement from the maker is within the rule.

ments,[56] for separate actions may be brought to recover for each instalment paid.[57] If, however, a surety on a promissory note pays the note before it falls due, his cause of action against his principal accrues and the statute begins to run at the date of the maturity of the note, not at the date of payment.[58] The giving of a promissory note by a surety or accommodation indorser, if accepted by the creditor in full satisfaction of the debt, operates as payment so that the cause of action against the principal accrues and the statute begins to run at the date of the execution of the note, not at the date when it is actually paid;[59] but the law is to the contrary where the note is given and received, not in satisfaction of the debt, but merely to extend the time of payment by the surety.[60]

(B) *Contribution.*[61] A surety's cause of action to recover contribution from a cosurety accrues and the statute begins to run when and only when the surety pays the debt or more than his proportionate share thereof,[62] regardless of the time when the debt was contracted or fell due,[63] or when judgment was rendered against the surety.[64] The same rule applies to contribution between joint

Wilson *v.* Crawford, 47 Iowa 469; Bullock *v.* Campbell, 9 Gill (Md.) 182. *Compare* Price *v.* Emerson, 16 La. Ann. 95.

Bills of exchange.— An action by an indorser against the accepter of a bill of exchange is within the rule. Bowman *v.* Wright, 7 Bush (Ky.) 375.

56. Wilson *v.* Crawford, 47 Iowa 469; Bullock *v.* Campbell, 9 Gill (Md.) 182 (where it was said that the rule would be otherwise were the action founded on the note itself); Frank *v.* Brewer, 4 Silv. Sup. (N. Y.) 155, 7 N. Y. Suppl. 182; Davies *v.* Humphreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153. See also Butler *v.* Wright, 2 Wend. (N. Y.) 369 [*affirmed* in 6 Wend. 284, 21 Am. Dec. 323]; Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158.

57. Bullock *v.* Campbell, 9 Gill (Md.) 182. See, generally, PRINCIPAL AND SURETY.

58. Tillotson *v.* Rose, 11 Metc. (Mass.) 299.

59. Rodman *v.* Hedden, 10 Wend. (N. Y.) 499 [*citing* Witherby *v.* Mann, 11 Johns. (N. Y.) 518; Barclay *v.* Gooch, 2 Esp. 571]. See, generally, PRINCIPAL AND SURETY.

60. Norton *v.* Hall, 41 Vt. 471, where the surety when the debt fell due gave notes secured by mortgage as collateral security for his liability to the creditor, and paid the debt after the statutory period had elapsed after its maturity, it being held that the continued liability of the surety carried with it the relation of principal and surety and continued the liability of the principal to make reimbursements, so that the statute did not begin to run until actual payment.

61. **Contribution** generally see CONTRIBUTION, 9 Cyc. 802.

Contribution between partners see PARTNERSHIP.

Contribution between tenants in common see TENANCY IN COMMON.

62. *Alabama.*— Washington *v.* Norwood, 128 Ala. 383, 30 So. 405; Stallworth *v.* Preslar, 34 Ala. 505; Broughton *v.* Robinson, 11 Ala. 922.

Kentucky.— Robinson *v.* Jennings, 7 Bush 630.

Maine.— Crosby *v.* Wyatt, 23 Me. 156.

Massachusetts.— Wood *v.* Leland, 1 Metc. 387.

Mississippi.— Pass *v.* Grenada County, 71 Miss. 426, 14 So. 447.

Missouri.— Singleton *v.* Townsend, 45 Mo. 379, sureties on bill of exchange.

North Carolina.— Sherrod *v.* Woodward, 15 N. C. 360, 25 Am. Dec. 714.

Ohio.— Camp *v.* Bostwick, 20 Ohio St. 337, 5 Am. Rep. 669, in which the distinction is shown between the right to contribution and the right to subrogation.

Pennsylvania.— Lytle *v.* Mehaffy, 8 Watts 267.

South Carolina.— Knotts *v.* Butler, 10 Rich. Eq. 143. See also McCrady *v.* Jones, 44 S. C. 406, 411, 22 S. E. 414.

Tennessee.— Reeves *v.* Pulliam, 9 Baxt. 153; Maxer *v.* Carter, 10 Yerg. 521.

Texas.— Beck *v.* Tarrant, 61 Tex. 402.

Virginia.— Lomax *v.* Pendleton, 3 Call 538, Wythe 4, where one of two sureties received from the principal debtor property in trust to pay the latter's debts, and the surety gave his individual bond for some of the debts for which he was liable, and it was held that the bond did not operate as payment, and that the statute did not begin to run in favor of the cosurety until the trust was fully executed.

England.— Davies *v.* Humphreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153. And see Gardner *v.* Brooke, [1897] 2 Ir. 6.

See 33 Cent. Dig. tit. "Limitation of Actions," § 271.

63. Stallworth *v.* Preslar, 34 Ala. 505; Broughton *v.* Robinson, 11 Ala. 922; Crosby *v.* Wyatt, 23 Me. 156; Singleton *v.* Townsend, 45 Mo. 379; Beck *v.* Tarrant, 61 Tex. 402.

64. Reeves *v.* Pulliam, 9 Baxt. (Tenn.) 153; Maxey *v.* Carter, 10 Yerg. (Tenn.) 521.

A sale on execution does not constitute payment within the rule of the text, but the cause of action accrues and the statute begins to run only when the proceeds of the sale are appropriated to the debt. Lytle *v.* Mehaffy, 8 Watts (Pa.) 267.

In equity it has been held that a surety may sue a cosurety for contribution as soon

indorsers of a note.[65] If the surety makes partial payments in excess of his proportionate liability the statute runs as to each payment from the time it is made.[66]

15. Neglect of Duty Arising From Contract — a. General Rules. In cases of negligent performance of a contract or neglect of some duty imposed by contract, the cause of action accrues and the statute begins to run from the time of the breach or neglect, not from the time when consequential damages result or become ascertained; for the cause of action is founded on the breach of duty, not on the consequential damage, and the subsequent accrual or ascertainment of such damage gives no new cause of action.[67] In such cases the form of the action, whether case or assumpsit, is immaterial.[68] The principle is well illustrated in cases involving breaches of professional duty by attorneys.[69] A line of demarca-

as judgment has been rendered against him, although he has paid no part of the judgment, and that for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment. Therefore it seems that the statute begins to run from the date of the judgment ascertaining the surety's liability; but until that date it does not run. Wolmershausen *v.* Gullick, [1893] 2 Ch. 514, 62 L. J. Ch. 773, 68 L. T. Rep. N. S. 225, 753, 3 Reports 610. See also, generally, Principal and Surety.

65. Bunker *v.* Osborn, 132 Cal. 480, 64 Pac. 853.

66. Bushnell *v.* Bushnell, 77 Wis. 435, 46 N. W. 442, 9 L. R. A. 411. See also Davies *v.* Humphreys, 4 Jur. 250, 9 L. J. Exch. 263, 6 M. & W. 153.

67. *California.*— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

Illinois.— Pennsylvania Co. *v.* Chicago, etc., R. Co., 144 Ill. 197, 33 N. E. 415 [*affirming* 44 Ill. App. 132].

Indiana.— State *v.* Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244.

Iowa.— Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381, containing an exhaustive discussion of this principle.

Kansas.— Nashville, etc., R. Co. *v.* Dale, 68 Kan. 108, 74 Pac. 596.

Kentucky.— Ellis *v.* Kelso, 18 B. Mon. 296, negligent entry made by a clerk in his employer's books.

Montana.— Coady *v.* Reins, 1 Mont. 424.

Nebraska.— O'Connor *v.* Ætna L. Ins. Co., 67 Nebr. 122, 93 N. W. 137, 99 N. W. 845, paying money to the wrong person.

New York.— Campbell *v.* Culver, 56 N. Y. App. Div. 591, 67 N. Y. Suppl. 469 (omission of agent to pay taxes or notify his principal); Argall *v.* Bryant, 1 Sandf. 98 (erroneous publication of a notice in a newspaper); Troup *v.* Smith, 20 Johns. 33 (negligent survey of land).

Pennsylvania.— Guarantee Trust, etc., Co. *v.* Farmers', etc., Nat. Bank, 202 Pa. St. 94, 51 Atl. 765 (where a transfer agent of the commonwealth wrongfully transferred commonwealth loans); Lehigh Coal, etc., Co. *v.* Blakeslee, 189 Pa. St. 13, 19, 41 Atl. 992, 69 Am. St. Rep. 788; Owen *v.* Western Sav. Fund., 97 Pa. St. 47, 39 Am. Rep. 794; Moore *v.* Juvenal, 92 Pa. St. 484. And see Taylor *v.* Hammell, 201 Pa. St. 546, 51 Atl. 316.

South Carolina.— Sinclair *v.* State Bank, 2 Strobh. 344, action against an agent for negligence.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625, holding that the negligence of officers and agents of a bank is within the principle of the text.

United States.— Wilcox *v.* Plummer, 4 Pet. 172, 7 L. ed. 821.

England.— Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237.

See 33 Cent. Dig. tit. "Limitation of Actions, § 300.

Malpractice by a physician or surgeon has been held to fall within the rule of the text. Coady *v.* Reins, 1 Mont. 424; Fronce *v.* Nichols, 22 Ohio Cir. Ct. Rep. 539, 12 Ohio Cir. Dec. 472. But where a surgeon performs an operation negligently and thereafter is continuously negligent in his care and treatment of the patient, there may be a recovery of damages for the negligent treatment, although a cause of action based on the negligent operation is barred by the statute. Tucker *v.* Gillette, 22 Ohio Cir. Ct. Rep. 664, 12 Ohio Cir. Dec. 401, where a surgeon in performing an operation left in the patient's body a sponge which remained there, causing the patient injury, until the employment of another physician who removed it. See Physicians and Surgeons.

Failure to record mortgage.— It has been held that a right of action for breach of contract in failing to record a mortgage accrues on defendant's failure to perform that duty, and that the statute then begins to run; not when ultimate damage results (the recording of a second mortgage), or when defendant's default is discovered or when demand is made. Crowley *v.* Johnston, 96 N. Y. App. Div. 319, 89 N. Y. Suppl. 258. *Compare* Miles *v.* Vivian, 79 Fed. 848, 25 C. C. A. 208.

68. Coady *v.* Reins, 1 Mont. 424; Argall *v.* Bryant, 1 Sandf. (N. Y.) 98; Sinclair *v.* State Bank, 2 Strobh. (S. C.) 344; Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237.

69. See *supra*, VI, B, 3, c.

tion exists, however, between actions based upon the violation of some contractual right or duty and those based on the invasion of some other legal right or brought to recover consequential damages resulting from defendant's negligence or wrongdoing independent of any contractual relation.[70] In the latter class of cases the right of action accrues and the statute begins to run either when plaintiff's legal rights have been violated or when actual damage results from defendant's act, according to whether the act of defendant is or is not actionable *per se*.[71]

b. Contracts to Make Abstracts of Title. The right of action against an attorney or title examiner for making a false or incorrect report or abstract of title accrues when the examination of the title is reported or the abstract delivered, and the statute of limitations then begins to run, not when the error is discovered or consequential damage results.[72]

16. Effect of Taking Security For Debt. By the weight of authority the taking of a pledge or collateral security for the payment of a note or other indebtedness does not prevent the running of the statute of limitations against the right of action to recover the debt;[73] for in the absence of a statute or agreement to the contrary the mere taking of collateral security does not suspend the creditor's

70. See Argall *v.* Bryant, 1 Sandf. (N. Y.) 98; Wilcox *v.* Plummer, 4 Let. (U. S.) 172, 7 L. ed. 821; Power *v.* Munger, 52 Fed. 705, 3 C. C. A. 253.

But in California this distinction has been repudiated. Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

71. See *infra*, VI, B, 18, a.

72. *California.*— Lattin *v.* Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115.

Georgia.— Lilly *v.* Boyd, 72 Ga. 83.

Iowa.— Russell *v.* Polk County Abstract Co., 87 Iowa 233, 54 N. W. 212, 43 Am. St. Rep. 381, holding also that the contract in such a case is not a continuing one in the sense that a new cause of action will arise whenever special damage is suffered from its breach.

Missouri.— Schade *v.* Gehner, 133 Mo. 252, 34 S. W. 576; Rankin *v.* Schaeffer, 4 Mo. App. 108.

Pennsylvania.— Owen *v.* Western Sav. Fund, 97 Pa. St. 47, 39 Am. Rep. 794, action against a recorder of deeds.

See 33 Cent. Dig. tit. "Limitation of Actions," § 301. See also, generally, Abstracts of Title, 1 Cyc. 217.

73. Lyon *v.* State Bank, 12 Ala. 508 (holding that where the maker of a note with the assent of the sureties deposits cotton with the agreement that its proceeds shall be applied in payment of the note, the note is not withdrawn from the operation of the statute, although the cotton is sold and the proceeds applied in payment after the maturity of the note and within the statutory period before action brought); Market *v.* Plant, (Miss. 1887) 1 So. 250; Hartranft's Estate, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717; Marseilles *v.* Kenton, 17 Pa. St. 238, 247; Slaymaker *v.* Wilson, 1 Penr. & W. (Pa.) 216. See Hancock *v.* Franklin Ins. Co., 114 Mass. 155; Gresham *v.* Harcourt, 93 Tex. 149, 53 S. W. 1019 [*reversing* (Civ. App. 1899) 50 S. W. 1058], where a note was given by one partner to another and secured by a lien on the maker's interest in the partnership property, and it was held that the note became barred notwithstanding the lien could not be enforced during the existence of the partnership. But see Grimes *v.* Hagood, 27 Tex. 693, holding that where money is advanced on cotton received in store the cotton is the primary fund for the discharge of the sum advanced; that the creditor can bring a personal action against the debtor only when he can no longer look to the cotton as a source of reimbursement; and that until then the statute does not begin to run against his right to maintain such an action. See also Nagle *v.* Moody, 53 Tex. 266 [*following* Grimes *v.* Hagood, *supra*], where cotton was shipped to commission merchants who accepted the consignor's drafts drawn against the cotton, and these dealings of the parties having been mutual and continuing it was held that since until the cotton had been sold or otherwise accounted for the balance due could not be ascertained, as against the commission merchants' right of action to recover for the advances the statute did not begin to run before that date or before a reasonable time within which the cotton could have been sold and accounted for; and this notwithstanding the commission merchants had charged interest from the dates of payment of the drafts and had credited him with interest from the dates of the sales of cotton. And see *supra*, V, D, 5.

In Louisiana it is held that the statute does not run so long as the pledge continues. Citizens' Bank *v.* Hyams, 42 La. Ann. 729, 7 So. 700; Forstall *v.* Planters' Consol. Assoc., 34 La. Ann. 770; Latiolais *v.* Citizens' Bank, 33 La. Ann. 1444; Blanc *v.* Hertzog, 23 La. Ann. 199; Hall *v.* New Orleans, 19 Fed. 870. But *compare* Canonge *v.* Fuselier, 10 La. Ann. 697. It has been held that the pledgor himself may be in some cases the detainer *ad hoc* of the pledge for account of the pledgee, but when, having been so, he has sold the property pledged, it cannot be held that prescription of the debt remains interrupted. Conger *v.* New Orleans, 32 La. Ann. 1250.

right to sue.[74] The same rule has been applied with respect to a note secured by a mortgage.[75] But where securities are given and accepted as a conditional payment of the debt, the right of action on the debt is thereby suspended during their currency and the statute does not run.[76] On the other hand the giving of a demand note[77] as security for the performance of a contract does not accelerate the running of the statute on the contract, although a different result would follow if the note were accepted as performance.[78]

17. Accounts[79] — a. Mutual Accounts Current — (I) *General Rules.* Where there is a mutual, open, and current account consisting of reciprocal demands, the general rule is that the cause of action to recover the balance is deemed to accrue at the date of the last item proved, and that the statute of limitations runs from that time, so that if the last item on either side of the account is not barred it "draws to itself all the other items" which will become barred only when the statute has run against the last. This rule is primarily the result of judicial construction of the general statute of limitations, but in many jurisdictions has been expressly made a part of that statute.[80] The operation of the rule

74. See Actions, 1 Cyc. 741.

75. Market *v.* Plant, (Miss. 1887) 1 So. 250; Omaha Sav. Bank *v.* Simeral, 61 Nebr. 741, 86 N. W. 470 (holding that a note is barred after the expiration of the statutory period after its maturity, although it is secured by a real estate mortgage, and that the statute is a complete defense to the recovery of a personal judgment upon the note against a maker other than the mortgagor); Jackson *v.* Sackett, 7 Wend. (N. Y.) 94 (per Sutherland, J.). See also Kellar *v.* Stinton, 14 B. Mon. (Ky.) 307; and, generally, Mortgages.

Contra in Louisiana.— Forstall *v.* Planters' Consol. Assoc., 34 La. Ann. 770. But *compare* State Bank *v.* Williams, 21 La. Ann. 121.

By a New Hampshire statute actions on notes secured by mortgage may be brought so long as plaintiff is entitled to commence any action on the mortgage. For construction of this statute see Hargraves *v.* Igo, 64 N. H. 619, 15 Atl. 137; Alexander *v.* Whipple, 45 N. H. 502; Meredith Bridge Sav. Bank *v.* Ladd, 40 N. H. 459; Demerritt *v.* Batchelder, 28 N. H. 533.

For deficiency judgment when debt barred see Mortgages.

Where a deed absolute on its face is declared to be a mortgage, the statute begins to run against the debt only from the date of the decree, since at this date the true status of the instrument begins. Savage *v.* Gant, (Tenn. Ch. App. 1900) 57 S. W. 170.

76. Davis *v.* Davis, 104 Va. 65, 51 S. E. 216, where the securities were accepted from the debtor under an agreement that the securities "when and if paid shall be in full settlement" of the debt. See also Gaylord *v.* Copes, 10 Fed. 827, construing the law of Louisiana, where a debt was paid in stolen bonds, the title to which having failed the creditor was "evicted" and the bonds were rejected, and it was held that prescription could not avail against the debt.

77. The statute of limitations begins to run against a demand note from the date of its execution. See *supra*, VI, B, 11, a, (II), (A), and cross-reference there given.

78. Bonbright *v.* Bonbright, 123 Iowa 305, 98 N. W. 784.

79. See, generally, Accounts and Accounting, 1 Cyc. 351.

For definition see Accounts and Accounting, 1 Cyc. 362 *et seq.*

80. *Alabama.*— Cannon *v.* Copeland, 43 Ala. 201; Bradford *v.* Spyker, 32 Ala. 134; Wilson *v.* Calvert, 18 Ala. 274; Shaw *v.* Yarbrough, 3 Ala. 588; Marr *v.* Southwick, 2 Port. 351.

California.— Kutz *v.* Fleisher, 67 Cal. 93, 7 Pac. 195; Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70.

Connecticut.— See Nichols *v.* Leavensworth, 1 Day 245, holding that in an action of book debt, plaintiff may exhibit an account of more than six years' standing to countervail the account of defendant for articles delivered within six years.

Delaware.— Greenman *v.* Wilson, 4 Houst. 14; Booth *v.* Stockton, 1 Harr. 51. But *compare* Tatman *v.* Simpson, 2 Houst. 242.

Georgia.— Adams *v.* Holland, 101 Ga. 43, 28 S. E. 434; Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Rep. 447; Flournoy *v.* Wooten, 71 Ga. 168; Madden *v.* Blain, 66 Ga. 49; Schall *v.* Eisner, 58 Ga. 190. And see Morris *v.* Root, 65 Ga. 686.

Illinois.— Carpenter *v.* Plagge, 192 Ill. 82, 61 N. E. 530 [*modifying* 93 Ill. App. 445].

Indiana.— Sanders *v.* Sanders, 48 Ind. 84; Knipe *v.* Knipe, 2 Blackf. 340.

Iowa.— Mills *v.* Davies, 42 Iowa 91; Thorn *v.* Moore, 21 Iowa 285. And see Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618.

Kansas.— Waffle *v.* Short, 25 Kan. 503.

Maine.— Baker *v.* Mitchell, 59 Me. 223; Davis *v.* Smith, 4 Me. 337.

Massachusetts.— Safford *v.* Barney, 121 Mass. 300; Penniman *v.* Rotch, 3 Metc. 216; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45. See also James *v.* Clapp, 116 Mass. 358. But *compare* Gold *v.* Whitcomb, 14 Pick. 188 [*explained* in Penniman *v.* Rotch, *supra*].

as to mutual accounts is not confined to transactions between merchants, their

Minnesota.— Taylor *v.* Parker, 17 Minn. 469.

Mississippi.— The statute providing that where there are mutual, open accounts current between the parties the cause of action shall be deemed to have accrued at the time of the true date of the last item proved applies where there are items of indebtedness on both sides of the account within the period of limitation (three years). Abbey *v.* Owens, 57 Miss. 810.

Missouri.— Chadwick *v.* Chadwick, 115 Mo. 581, 22 S. W. 479; Penn *v.* Watson, 20 Mo. 13; Lancieri *v.* Kansas City Improved St. Sprinkling Co., 95 Mo. App. 319, 69 S. W. 29.

New York.— Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496; Haffner *v.* Schmuck, 49 N. Y. App. Div. 193, 61 N. Y. Suppl. 55 [*affirmed* in 168 N. Y. 649, 61 N. E. 1130]; Becker *v.* Jones, 37 Hun 35; Ross *v.* Ross, 6 Hun 80; Helmes *v.* Otis, 5 Lans. 137; Williams *v.* Davis, 7 N. Y. Civ. Proc. 282; Sickles *v.* Mather, 20 Wend. 72, 32 Am. Dec. 521; Chamberlin v. Cuyler, 9 Wend. 126; Tucker *v.* Ives, 6 Cow. 193.

North Carolina.— Robertson *v.* Pickerell, 77 N. C. 302; Kimboll *v.* Person, 3 N. C. 394; Newsome *v.* Person, 3 N. C. 242.

Pennsylvania.— McFarland *v.* O'Neil, 155 Pa. St. 260, 25 Atl. 756; Chambers *v.* Marks, 25 Pa. St. 296; Thomson *v.* Hopper, 1 Watts & S. 467; Van Swearingen *v.* Harris, 1 Watts & S. 356; Seitzinger *v.* Alspach, 2 Pa. Cas. 359, 4 Atl. 203; Bougher *v.* Conn, 1 Pa. Co. Ct. 184, 17 Phila. 81. And see McCain *v.* Peart, 145 Pa. St. 516, 22 Atl. 981; Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

Rhode Island.— Cargill *v.* Atwood, 18 R. I. 303, 27 Atl. 214.

South Carolina.— Mills *v.* Carrier, 30 S. C. 617, 9 S. E. 350, 741; Fitch *v.* Hilleary, 1 Hill 292. And see Sumter *v.* Morse, 2 Hill Eq. 87. *Compare* Cunningham *v.* Guignar, Dudley 351 [*criticizing* Fitch *v.* Hilleary, *supra*].

Utah.— Toponce *v.* Corinne Mill Canal, etc., Co., 6 Utah 439, 24 Pac. 534 [*affirmed* in 152 U. S. 405, 14 S. Ct. 632, 38 L. ed. 493].

Vermont.— The statute runs from the date of the transaction evidenced by the last item of credit proved on the trial (George *v.* Vermont Farm Mach. Co., 65 Vt. 287, 26 Atl. 722; Davis *v.* Smith, 48 Vt. 52; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253; Abbott *v.* Keith, 11 Vt. 525; Wood *v.* Barney, 2 Vt. 369; Hutchinson *v.* Pratt, 2 Vt. 146); not from the date of the transaction evidenced by the last item of debit (George *v.* Vermont Farm Mach. Co., *supra;* Abbott *v.* Keith, *supra*).

Wisconsin.— Hannan *v.* Engelmann, 49 Wis. 278, 5 N. W. 791.

United States.— Corinne Mill, etc., Co. *v.* Toponce, 152 U. S. 405, 14 S. Ct. 632, 38 L. ed. 493 [*affirming* 6 Utah 439, 24 Pac. 534].

England.— *Ex p.* Seaber, 1 Deac. 543, 551, 5 L. J. Bankr. 42, 2 Mont. & A. 588, 38 E. C. L. 759; Cranch *v.* Kirkman, 1 Peake N. P. 164; Catling *v.* Skoulding, 6 T. R. 189. The rule in England has, however, been abolished by statute. See *infra*, VI, B, 17, a, (VI), text and note 25 *et seq.*

See 33 Cent. Dig. tit. "Limitation of Actions," § 297.

Contra.— Smith *v.* Dawson, 10 B. Mon. (Ky.) 112; Landsdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330; Sprogle *v.* Allen, 38 Md. 331; Gage *v.* Dudley, 64 N. H. 271, 9 Atl. 786; Blair *v.* Drew, 6 N. H. 235. *Compare* Bennett *v.* Davis, 1 N. H. 19.

Such a statutory provision as those mentioned in the text does not exempt the account from the operation of the statute of limitations, but merely fixes the point of time from which that statute shall begin to run. Higgs *v.* Warner, 14 Ark. 192.

Illustrations.— In an action to recover a balance alleged to be due upon a store account, for goods sold and delivered, where the defense was the statute of limitations, it appeared that defendant at different times had delivered to plaintiff small quantities of butter and eggs to be credited upon the account. It was held that the action was "upon a mutual, open and current account, where there have been reciprocal demands between the parties," within the meaning of the provision of the New York statute which declares that in such a case the cause of action shall be deemed to have accrued from the time of the last item proved; and that as the last item was within six years the claim was not barred. Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496. Where transactions between a corporation and its president arose out of mutual charges and credits, and did not cease until the president's official connection with the company ended, limitations did not begin to run before such time. Danville, etc., R. Co. *v.* Kase, (Pa. 1898) 39 Atl. 301. An agent who advances money for the repair of his principal's real estate in the seventh year before action brought, and in the sixth year collects rent for his principal (the period of limitation being six years), is not precluded by the statute from claiming the expenditure as a credit when sued for the rent; there being in such case but one debt, indicated by the balance of acount between them. Blackstone *v.* Burton, 4 Phila. (Pa.) 15.

Mutual accounts between partners are within the rule of the text. Cannon *v.* Copeland, 43 Ala. 201; Bradford *v.* Spyker, 32 Ala. 134. See PARTNERSHIP.

Theory as to balance — form of action.— Within the meaning of the rule under discussion, where there are mutual accounts between two persons it is always the understanding that the account upon one side shall offset that upon the other, and in law the debt due from the one to the other is only the balance left after the application in

factors and servants.[81] It is commonly stated that the main ground upon which the rule as to mutual accounts rests, independent of express statutory provision, is that every new item and credit in an account given by one party to the other is an admission that there are some unsettled accounts between them; each item within the statutory period being regarded as equivalent to evidence of a promise which takes all the prior items out of the statute.[82] At all events the rule is not based upon, and does not fall within, the exception in the statute relating to mer-

reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496. Hence the action need not be in form to recover the balance, if such be its purpose or legal effect. Penniman *v.* Rotch, 3 Metc. (Mass.) 216; Green *v.* Disbrow, *supra*. Thus a statute providing that in actions "to recover the balance due upon a mutual and open account current the cause of action shall be deemed to have accrued at the time of the last item proved in such account," does not apply exclusively to such actions as are brought on accounts in which debits and credits are stated and a balance struck, but extends also to cases in which plaintiff seeks to recover the balance due to him, although he declares only on the debit side of the account. And in the latter case, if defendant does not file an account in offset, or prove items on his side of the account by way of payment, but relies on the statute of limitations, plaintiff may avoid the statute by showing that there was a mutual and open account current, and proving an item on either side within the statutory period. Penniman *v.* Rotch, *supra*; Becker *v.* Jones, 37 Hun (N. Y.) 35. And see Safford *v.* Barney, 121 Mass. 300 [*following* Penniman *v.* Rotch, *supra*], holding that plaintiff need not prove that a balance has been struck.

Delay in entering charge.— The rule of the text does not apply to an indebtedness which was not entered in the account until after the death of the party charged, and after the statutory period from the date of the transaction had expired. *In re* Huger, 100 Fed. 805. And see *Ex p.* Storer, 23 Fed. Cas. No. 13,490, 2 Ware 298.

Special agreement as to particular items.— When goods sold or work performed under a contract are properly the subject of a general account containing other items in addition, the bar of the statute will not apply to them in any other sense than to the general account, and an action may be maintained at any time within the statutory period since the date of the last item of the account. Mills *v.* Davies, 42 Iowa 91. Thus the fact that the prices of certain articles charged in the account were agreed upon between the parties will not place such articles in a different condition, respecting the operation of the statute, from the balance of the account which did not become the subject of a special agreement. Mills *v.* Davies, *supra*.

81. *Alabama.*— Bradford *v.* Spyker, 32 Ala. 134.

Georgia.— Morris *v.* Root, 65 Ga. 686.

Maine.— See Lancey *v.* Maine Cent. R. Co., 72 Me. 34.

Massachusetts.— Penniman *v.* Rotch, 3 Metc. 216.

Michigan.— Payne *v.* Walker, 26 Mich. 60.

New York.— Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496.

Pennsylvania.— Van Swearingen *v.* Harris, 1 Watts & S. 356; Seitzingor *v.* Alspach, 2 Pa. Cas. 359, 4 Atl. 203.

South Carolina.— Fitch *v.* Hilleary, 1 Hill 292. And see Sumpter *v.* Morse, 2 Hill Eq. 87.

See 33 Cent. Dig. tit. "Limitation of Actions," § 297.

Contra.— Smith *v.* Dawson, 10 B. Mon. (Ky.) 112; Landsdale *v.* Brashear, 3 T. B. Mon. (Ky.) 330; Blair *v.* Drew, 6 N. H. 235 [*followed* in Gage *v.* Dudley, 64 N. H. 271, 9 Atl. 786]; Lowe *v.* Dowbarn, 26 Tex. 507 [*overruling* Prigden *v.* McLean, 12 Tex. 420; Pridgen *v.* Hill, 12 Tex. 374, and *distinguishing* Hall *v.* Hodge, 2 Tex. 323]; Winn *v.* Bryant, 1 Tex. App. Civ. Cas. § 809; Hassler *v.* Kay, 1 Tex. App. Civ. Cas. § 665.

82. *Alabama.*— Bradford *v.* Spyker, 32 Ala. 134.

Illinois.— Millor *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429].

Maine.— Davis *v.* Smith, 4 Me. 337.

Massachusetts.— Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181; Cogswell *v.* Dolliver, 2 Mass. 217, 3 Am. Dec. 45. But *compare* Penniman *v.* Rotch, 3 Metc. 216, where it is said that this theory is superseded by the provision of the Rev. St. relating to mutual accounts.

North Carolina.— Newsome *v.* Person, 3 N. C. 242.

Pennsylvania.— Thomson *v.* Hopper, 1 Watts & S. 467; Van Swearingen *v.* Harris, 1 Watts and S. 356.

South Carolina.— Fitch *v.* Hilleary, 1 Hill 292. But *compare* Sumter *v.* Morse, 2 Hill Eq. 87, in which it was said that the reason of the rule is that no cause of action accrues until the mutual dealing has ceased; that it is only after the last item that a balance can be struck, and until then it is uncertain which party has the right to sue.

Vermont.— Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253; Abbott *v.* Keith, 11 Vt. 525.

England.— Catling *v.* Skoulding, 6 T. R. 189.

See 33 Cent. Dig. tit. "Limitation of Actions," § 297.

Effect of acknowledgment in general see *infra*, VII, A.

chants' accounts, but is wholly independent thereof.[83] In several jurisdictions the general rule as to mutual accounts is much limited in its scope. Thus it is held that the last item "draws to itself" only such earlier items as are then within the statutory period, that is, such items as are not barred at the date of the last item;[84] and that there must be not only items on both sides of the account, but items on both sides within the statutory period before the action.[85]

(II) *Necessity For Mutuality*—(A) *In General.* In most jurisdictions the rule that items within the period of limitation draws after them items beyond that period is strictly confined to mutual accounts showing a reciprocity of dealing between the parties. It is generally stated that there must be a mutual or an alternate course of dealing, giving rise to cross demands upon which the parties might respectively maintain actions. It follows that where there is no such mutuality of dealing, or where the items are all on one side of the account, the statute runs against each item from its date.[86] But in some jurisdictions the

But this theory has been criticized and it has been asserted that the rule is based upon the mutual understanding of the parties, express or implied, that they will continue to credit each other until one of them desires to terminate the course of dealing, and that the balance will then be ascertained, will become due, and be paid by the party indebted. Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Rep. 447.

In some states items in mutual accounts within the statutory period next before action brought do not amount to an admission of an unsettled account extending beyond the statutory period, nor alone furnish sufficient evidence of a promise to pay a balance, so as to take the case out of the statute of limitations. Sprogle *v.* Allen, 38 Md. 331; Gage *v.* Dudley, 64 N. H. 271, 9 Atl. 786; Blair *v.* Drew, 6 N. H. 235. *Compare* Bennett *v.* Davis, 1 N. H. 19.

83. Seitzinger *v.* Alspach, 2 Pa. Cas. 350, 4 Atl. 203; Abbott *v.* Keith, 11 Vt. 525, 530; Inglis *v.* Haigh, 9 Dowl. P. C. 817, 5 Jur. 704, 10 L. J. Exch. 406, 8 M. & W. 769, per Parke, B. But see Cranch *v.* Kirkman, 1 Peake N. P. 164.

As to accounts between merchants see *infra*, VI, B, 17, b.

In New Jersey the rule has been said to be founded on "an equitable extension" of the exception relating to merchants' accounts. Princeton, etc., Turnpike Co. *v.* Gulick, 14 N. J. L. 545; Belles *v.* Belles, 12 N. J. L. 339.

84. Abbey *v.* Owens, 57 Miss. 810, 813 (in which the court said: "The mutual dealing will not have the effect of reviving liability as to items fully barred at and before the date of such dealing. In other words, the cross-demand, upon the part of defendant, will operate to draw to the last item of the mutual accounts such items only as were not barred at the date of the origin of the cross-demand"); Courson *v.* Courson, 19 Ohio St. 454.

85. Abbey *v.* Owens, 57 Miss. 810; Gulick *v.* Princeton, etc., Turnpike Co., 14 N. J. L. 545; Craighead *v.* State Bank, 7 Yerg. (Tenn.) 399. And see Hibler *v.* Johnston, 18 N. J. L. 266; Belles *v.* Belles, 12 N. J. L. 339. *Compare* Smith *v.* Bruecastle, 7 N. J. L. 357; Burnet *v.* Bryan, 6 N. J. L. 377.

86. *Alabama.*— Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Wilson *v.* Calvert, 18 Ala. 274; Todd *v.* Todd, 15 Ala. 743.

California.— Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Fraylor *v.* Sonora Min. Co., 17 Cal. 594.

Colorado.— King *v.* Post, 12 Colo. 355, 21 Pac. 38.

Georgia.— Liseur *v.* Hitson, 95 Ga. 527, 20 S. E. 498; Lark *v.* Cheatham, 80 Ga. 1, 5 S. E. 290; Ford *v.* Clark, 72 Ga. 760.

Illinois.— Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Crum *v.* Higold, 32 Ill. App. 282; Jared *v.* Vanvleet, 13 Ill. App. 517.

Indiana.— Prenatt *v.* Runyon, 12 Ind. 174; Buntin *v.* Lagow, 1 Blackf. 373.

Louisiana.—Andrew *v.* Keenan, 14 La. Ann. 705, holding that in regard to an account for goods sold, by the terms of Laws (1850), p. 90, each item of the account is subject to its own prescription.

Michigan.— *In re* Hiscock, 79 Mich. 537, 44 N. W. 947; Kimball *v.* Kimball, 16 Mich. 211.

Nevada.— Warren *v.* Sweeney, 4 Nev. 101.

New Hampshire.—Bennett *v.* Davis, 1 N. H. 19.

New Jersey.— Gulick *v.* Princeton, etc., Turnpike Co., 14 N. J. L. 545; Miller *v.* Colwell, 5 N. J. L. 680. But *compare* Burnet *v.* Bryan, 6 N. J. L. 377.

New York.— Leahy *v.* Campbell, 70 N. Y. App. Div. 127, 75 N. Y. Suppl. 72; Palmer *v.* New York, 2 Sandf. 318; Hallock *v.* Losee, 1 Sandf. 220; Edmonstone *v.* Thomson, 15 Wend. 554; Kimball *v.* Brown, 7 Wend. 322; Tucker *v.* Ives, 6 Cow. 193; Atwater *v.* Fowler, 1 Edw. 417.

North Carolina.— Robertson *v.* Pickerell, 77 N. C. 302; Hussey *v.* Burgwyn, 51 N. C. 385.

Ohio.— Courson *v.* Courson, 19 Ohio 454.

Pennsylvania.— Adams *v.* Carroll, 85 Pa. St. 209; Clark *v.* Maguire, 35 Pa. St. 259; Lowber *v.* Smith, 7 Pa. St. 381; Hay *v.* Kramer, 2 Watts & S. 137; Ingram *v.* Sherard, 17 Serg. & R. 347; *In re* Davis, 1 Phila. 360.

South Carolina.— Cunningham *v.* Guignar, Dudley 351.

Texas.— See Jones *v.* Lewis, 11 Tex. 359; Mott *v.* Riddell, 2 Tex. Unrep. Cas. 107.

requirement as to mutuality either does not exist at all[87] or exists in a much modified form.[88]

Vermont.— Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253; Abbott *v.* Keith, 11 Vt. 525; Chipman *v.* Bates, 5 Vt. 143.

Wisconsin.— Dunn *v.* Fleming, 73 Wis. 545, 41 N. W. 707; Fitzpatrick *v.* Phelan, 58 Wis. 250, 16 N. W. 606.

United States.— Chew *v.* Baker, 5 Fed. Cas. No. 2,663, 4 Cranch C. C. 696.

England.— Cotes *v.* Harris, Buller N. P. 149.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 285, 286, 295, 296.

"In order to make a mutual account there must be indebtedness on both sides." Lark *v.* Cheatham, 80 Ga. 1, 5 S. E. 290.

Pensions unpaid for a series of years are within the rule of the text. Leonard *v.* U. S., 18 Ct. Cl. 382.

Accounts held not mutual.— In the following cases various accounts were held not to be mutual but to fall within the operation of the statute:

California.— Santa Rosa Nat. Bank *v.* Barnett, 125 Cal. 407, 58 Pac. 85, holding that where a depositor borrows money from a bank by means of overdrafts, and occasionally deposits money, which is applied to the overdrafts, the transaction is not a mutual account, and the statute runs from the date of each loan, notwithstanding the transaction opens with a credit to the depositor.

Colorado.— Beach *v.* Bennett, 16 Colo. App. 459, 66 Pac. 567.

Georgia.— McLaughlin *v.* Maund, 55 Ga. 689, where an account sued on covered work done through a series of years, and the evidence disclosed that the amount of each year's work became due at the close of the years respectively, and it was held that the statute commenced to run against such portions of the account from the time they became due.

New York.— Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448 (where an account kept by a husband of money received, invested, and expended for his wife was held not to be "a mutual, open and current account where there have been reciprocal demands between the parties" within the meaning of the New York statute); Bodell *v.* Gibson, 23 Hun 40; Huebner *v.* Roosevelt, 6 Daly 337.

Pennsylvania.— Clark *v.* Maguire, 35 Pa. St. 259 (holding that a sale of goods to one holding a due-bill of the vendor does not make out a case of mutual accounts such as will prevent the running of the statute); Hudson *v.* Hudson, 21 Pa. Super. Ct. 92.

Reciprocal causes of action not necessary.— Although the statement is frequently made that the account must consist of cross demands on which the parties each might maintain actions, it is not strictly accurate, as there is but one cause of action and that is for the balance of the account. It may be conceded that defendant when sued must have an account against plaintiff which he interposes as a set-off, but it is not necessary that each party should have an independent cause of action against the other. Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496 [*disapproving dicta* in Peck *v.* New York, etc., Steamship Co., 5 Bosw. (N. Y.) 226; Adams *v.* Carroll, 85 Pa. St. 209; Lowber *v.* Smith, 7 Pa. St. 381].

The words "reciprocal demands" as used in statutes and decisions dealing with this subject mean nothing more than "mutual accounts." The former phrase as used in the New York code of civil procedure has no different meaning from the latter phrase as used in the New York Revised Statutes. Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496.

Quantum of recovery.— Where some of the items in plaintiff's favor are within the statutory period before action he can of course recover for them whether he can recover for the earlier items or not. Dunbar *v.* Dunbar, (Me. 1886) 5 Atl. 384, holding that it is reversible error to instruct the jury that unless the items not barred were a part of the general account, plaintiff could not recover anything.

87. **Under the Iowa statutes** if there is a continuous, open, and current account, the cause of action shall be deemed to have accrued on the date of the last item therein as proved at the trial. And so it makes no difference that the items are all on one side of the account. Moser *v.* Crooks, 32 Iowa 172 (continuously accruing indebtedness for board, lodging, office-rent and care of horse, etc.); Wendeling *v.* Besser, 31 Iowa 248 (claim for continuous and interrupted board and lodging). See also Kilbourn *v.* Anderson, 77 Iowa 501, 42 N. W. 431.

88. **In Missouri** the account need not always be mutual. Where there is an express or implied agreement between the parties to the account that the account is to be kept open and considered as one and the same continuous transaction, the account will be considered as being continuous and as constituting but one demand, and the statute will begin to run at the date of the last item notwithstanding that the items are all on one side. Chadwick *v.* Chadwick, 115 Mo. 581, 22 S. W. 479; Ring *v.* Jamison, 66 Mo. 424 [*reversing* on other grounds 2 Mo. App. 584]; Boylan *v.* The Victory, 40 Mo. 244; Finney *v.* Brant, 19 Mo. 42; Gibson *v.* Jenkins, 97 Mo. App. 27, 70 S. W. 1076; Moore *v.* Renick, 95 Mo. App. 202, 68 S. W. 936; Thompson *v.* Brown, 50 Mo. App. 314. Whether such an agreement exists is a question for the jury. Moore *v.* Renick, *supra*; Thompson *v.* Brown, *supra*; Harrison *v.* Hall, 8 Mo. App. 167. Such an agreement will not be presumed but must be proved. Macke *v.* Davis, 61 Mo. App. 524; Thompson *v.* Brown, *supra*; Harrison *v.* Hall, 8 Mo. App. 167. So if there is no such express agreement and none can be legitimately inferred from the evidence, and the items of the account are all on one side, the statute runs from the date of each item.

(B) *What Constitutes Maturity*—(1) IN GENERAL. Mutual accounts being made up of matters of set-off,[89] to make an account mutual within the meaning of the rule under discussion the items on the different sides of the account must be capable of being set off against each other.[90] The account on both sides must be between plaintiff and defendant and must have originated between them,[91] and the parties must have dealt with each other in the same capacity or relation.[92] But not every case where the right of set-off exists is within the general rule as to

Sidway *v.* Missouri Land, etc., Co., 187 Mo. 649, 86 S. W. 150; Macke *v.* Davis, *supra*; Thompson *v.* Brown, *supra*; Harrison *v.* Hall, *supra*. It seems that the items of the account must be reduced to writing and charged against defendant in some book-account or paper memorandum contemporaneous with the creation of the various indebtednesses which the items represent. Sidway *v.* Missouri Land, etc., Co., *supra*, holding that in an action for services rendered a statement or bill of particulars made up twenty years afterward from a large number of letters which were not offered in evidence and without which plaintiff could not remember the various services, was not an account within the meaning of the rule under discussion. Where, however, the account is in fact mutual, open, and current, the general rule as to mutual accounts applies, for this rule is embodied in the Missouri statutes (Rev. St. § 6778). See the Missouri cases cited *supra*, VI, B, 17, a, (I). To fall within the provisions of this statute the account, in the language of the enactment, must be "mutual, open and current"—one "where there have been reciprocal demands between the parties." Thompson *v.* Brown, *supra*; Loeffel *v.* Hoss, 11 Mo. App. 133. Mere "mutual indebtedness" without more is not enough to withdraw an entire account from the operation of the statute of limitations if some of the items are within the bar. Thompson *v.* Brown, *supra*, holding that the fact that the creditor has given his note for money borrowed from the debtor does not bring the account within the statute quoted.

89. **Rule stated.**—"Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts." Angell Lim. § 149 [*quoting* opinion of Story, J., in Gordon *v.* Lewis, 10 Fed. Cas. 5, 614, 2 Sumn. 628]. "A natural equity arises where there are mutual credits between the parties, or where there is an existing debt on one side which constitutes a ground of credit on the other; or where there is an express or implied understanding, that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties." Angell Lim. § 149 [*quoting* opinion of Story, J., in Howe *v.* Sheppard, 12 Fed. Cas. No. 6,773, 2 Sumn. 409]. The foregoing statements are generally accepted as correct.

Arkansas.—McNeil *v.* Garland, 27 Ark. 343.

California.—Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70.

Illinois.—Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429].

Indiana.—Prenatt *v.* Runyon, 12 Ind. 174.

Massachusetts.—Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717.

Michigan.—See *in re* Hiscock, 79 Mich. 537, 538, 44 N. W. 947, where the court said that the phrase "mutual and open account current" as used in the Michigan statute indicates "a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that one will reduce the balance due on the other."

New York.—Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496; Huebner *v.* Roosevelt, 6 Daly 337.

See 33 Cent. Dig. tit. "Limitation of Actions," § 296.

90. Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]. And see Stewart's Appeal, 105 Pa. St. 307; Hudson *v.* Hudson, 21 Pa. Super. Ct. 92, and the cases cited in the preceding note.

91. *Colorado.*—King *v.* Post, 12 Colo. 355, 21 Pac. 38.

Georgia.—Morris *v.* Root, 65 Ga. 686, an account partly between plaintiff and defendant and partly between plaintiff and the wife of defendant.

Massachusetts.—Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717.

New York.—Green *v.* Ames, 14 N. Y. 225.

Pennsylvania.—Stewart's Appeal, 105 Pa. St. 307; Hay *v.* Kramer, 2 Watts & S. 137, where the items of debit were for goods sold by plaintiff to defendant, and the items on the credit side were to the credit of firms of which defendant was a member, and it was held that the account was not mutual within the general rule.

Wisconsin.—See Moore *v.* Blackman, 109 Wis. 528, 85 N. W. 429.

See 33 Cent. Dig. tit. "Limitation of Actions," § 296.

92. Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865.

Illustration.—A trustee is not liable to an action for money deposited with him upon an express trust to expend the same for the use and benefit of, and as directed by, the *cestui que trust*, until a demand by the *cestui que trust* and refusal by the trustee; and in the absence of any such demand and refusal, the claim of the *cestui que trust* against the trustee, and a claim of the latter against the former for services rendered in his individual capacity, are not "reciprocal demands," and do not constitute a "mutual account;" and the death of the *cestui que*

mutual accounts.[93] "Agreement, either express or implied, is of the very essence of such a mutual account current; because it is the act of the parties, and not the act of the law." The existence of such an account does not necessarily follow as a consequence of the fact that each party has an open account current against the other, and such fact is of itself no ground for even a *prima facie* presumption of a mutual course of dealing; but the two accounts will remain separate and independent unless there is evidence tending to show an express or implied agreement that they shall be converted into one entire and indivisible mutual account.[94] In brief the items on both sides must constitute parts of one actual account upon which they operate to offset or extinguish each other *pro tanto*, so that the balance on either side becomes the debt. Mere independent cross demands are not sufficient.[95] Thus cross demands consisting of promissory notes, bills of exchange, and the like are separate and independent causes of action which properly constitute no part of a mutual account and are insufficient to defer the running of the statute.[96] Items, however, which might not of themselves properly constitute part of a mutual account may become incorporated therein if there is an express or implied understanding of the parties that such items should constitute a part of their mutual dealings and enter into the account so as to become the subject of future adjustment in ascertaining the balance due;[97] and within this principle items for money loaned may constitute a part of the account.[98] It cannot be held that there are mutual accounts where one party denies liability on the claim of

trust during the continuance of the trust, makes no difference in this rule. Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865.

93. Higgs *v.* Warner, 14 Ark. 192 (where an administrator brought a suit on an open account for services rendered by his intestate, to which defendant pleaded the statute of limitations, and it was held that an account filed by defendant in the probate court and allowed against the estate of the intestate for debts due defendant, the items of which were within the statutory period next before the commencement of the suit, was not evidence of a mutual open account current between the parties, although it constituted a matter of set-off); Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717; Green *v.* Ames, 14 N. Y. 225.

94. Higgs *v.* Warner, 14 Ark. 192. And see Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717; Huebner *v.* Roosevelt, 6 Daly (N. Y.) 337; Chapman *v.* Chapman, 31 S. C. 405, 10 S. E. 106; Cunningham *v.* Guignar, Dudley (S. C.) 351.

Illustration.—Thus an account between a copartnership and a third person, and an account between such person and a surviving member of the firm after its dissolution, do not constitute a mutual account so as to affect the operation of the statute; and this notwithstanding the fact that the surviving partner has the collection of the partnership assets or has taken an assignment of the account with the firm. King *v.* Post, 12 Colo. 355, 21 Pac. 38; Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717; Stewart's Appeal, 105 Pa. St. 307.

Assignment of account.—Where a mutual, open, and current account exists between parties, and one of them purchases from a third person and holds an open account against the other, without notice to the latter and without any recognition of its validity by him, it does not become a part of the mutual account between them (Green *v.* Ames, 14 N. Y. 225. And see Hall *v.* Stone, 60 Hun (N. Y.) 309, 14 N. Y. Suppl. 603); and the demand so purchased and held becomes barred by the lapse of the statutory period from the time it accrued to the assignor, notwithstanding it was assigned before the statute attached and that there existed then and afterward continued a mutual account and reciprocal dealings between the assignee and the debtor (Green *v.* Ames, *supra*).

95. Higgs *v.* Warner, 14 Ark. 192; Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717; Perrine *v.* Hotchkiss, 2 Thomps. & C. (N. Y.) 370 [*affirmed* in 59 N. Y. 649]; Stokes *v.* Taylor, 104 N. C. 394, 10 S. E. 566. And see Swift *v.* Swift, 5 N. Y. App. Div. 587, 39 N. Y. Suppl. 384.

96. Ware *v.* Manning, 86 Ala. 238, 5 So. 682; Thompson *v.* Brown, 50 Mo. App. 314; Perrine *v.* Hotchkiss, 2 Thomps. & C. (N. Y.) 370 [*affirmed* in 59 N. Y. 649]; Cunningham *v.* Guignar, Dudley (S. C.) 351, due-bill given for money borrowed. See also Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83. But *compare* Ross *v.* Ross, 6 Hun (N. Y.) 80, holding that an account consisting of items in favor of one party for rents collected and for services, and items in favor of the other party for bonds and notes and accumulating interest, was a mutual account.

97. Plimpton *v.* Gleason, 57 Vt. 604.

Costs in legal proceedings may by agreement of the parties constitute items of a mutual account. Brotherson *v.* Consaulus, 5 N. Y. St. 105. But *compare* Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 1 West. L. J. 385.

98. Plimpton *v.* Gleason, 57 Vt. 604. And see Chadwick *v.* Chadwick, 115 Mo. 581, 22 S. W. 479. But *compare* Hudson *v.* Hudson, 21 Pa. Super. Ct. 92.

the other and credit is given to such party with full knowledge of the fact that it is clearly against his intention that the account shall be so applied.[99]

(2) PAYMENTS ON ACCOUNT. As a general rule payments made on account by one party and credited by the other, whether in money or goods, do not render the account mutual so as to defer the operation of the statute to the date of the last item, but if there are no other credits or mutual dealings the account is "without reciprocity" and "only on one side," [1] although there are decisions to

99. Bay City Iron Co. *v.* Emery, 128 Mich. 506, 87 N. W. 652; *In re* Hiscock, 79 Mich. 537, 44 N. W. 947.

1. *Arkansas.*— McNeil *v.* Garland, 27 Ark. 343.

California.— Adams *v.* Patterson, 35 Cal. 122; Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344.

Georgia.— Liseur *v.* Hitson, 95 Ga. 527, 20 S. E. 498; Lark *v.* Cheatham, 80 Ga. 1, 5 S. E. 290; Ford *v.* Clark, 72 Ga. 760.

Illinois.— Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Crum *v.* Higold, 32 Ill. App. 282.

Indiana.— Perrill *v.* Nichols, 89 Ind. 444; Prenatt *v.* Runyon, 12 Ind. 174.

Maine.— Dyer *v.* Walker, 51 Me. 104.

Maryland.— Webster *v.* Byrnes, 32 Md. 86.

Massachusetts.— Parker *v.* Schwartz, 136 Mass. 30, holding also that such an account cannot be made mutual by oral agreement of the parties. But *compare* Whipple *v.* Blackington, 97 Mass. 476, where all the items of debit and credit were of more than six years standing except the last which was a credit of cash collected on a third person's note given as collateral security for the account, and it was held that the statute began to run only from the date of this last item; the collection made on the collateral note being treated as a payment at the time the money was received.

Minnesota.— Cousins *v.* St. Paul, etc., R. Co., 43 Minn. 219, 45 N. W. 429.

Mississippi.—Abbey *v.* Owens, 57 Miss. 810.

Nevada.— Warren *v.* Sweeney, 4 Nev. 101.

New York.— Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496 (per Earl, J.); MacDonald *v.* Jaffa, 53 N. Y. App. Div. 484, 65 N. Y. Suppl. 1059; Peck *v.* New York, etc., Mail Steamship Co., 5 Bosw. 226; Pulver *v.* Esselstyn, 22 Misc. 429, 50 N. Y. Suppl. 756; Compton *v.* Bowns, 5 Misc. 213, 25 N. Y. Suppl. 465, 23 N. Y. Civ. Proc. 225 [*reversing* 3 Misc. 140, 22 N. Y. Suppl. 920]; Edmonstone *v.* Thomson, 15 Wend. 554 [*distinguishing* Chamberlain *v.* Cuyler, 9 Wend. 126].

Pennsylvania.— Adams *v.* Carroll, 85 Pa. St. 209; Lowber *v.* Smith, 7 Pa. St. 381; Hay *v.* Kramer, 2 Watts & S. 137; Ingram *v.* Sherard, 17 Serg. & R. 347. But *compare* Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

See 33 Cent. Dig. tit. "Limitation of Actions," § 296.

Nor will an overpayment alter this result; for to ascertain that there is an overpayment it will be necessary to go into the account, and this would "introduce the very evil the statute was intended to guard against." Lowber *v.* Smith, 7 Pa. St. 381 [*followed* in Davis' Estate, 1 Phila. (Pa.) 360].

Payment of the ascertained balance of an account in settlement of the dealings between the parties does not constitute an item of account from which the statute of limitations begins to run, within the meaning of N. Y. Code Civ. Proc. § 386. Compton *v.* Bowns, 5 Misc. (N. Y.) 213, 25 N. Y. Suppl. 465, 23 N. Y. Civ. Proc. 225 [*reversing* 3 Misc. 140, 22 N. Y. Suppl. 920]. And see Edmonstone *v.* Thomson, 15 Wend. (N. Y.) 554.

Delivery of goods.— The fact that the payment was made, and was intended by both parties to be made, in articles of personal property at a specified valuation, does not make the account mutual so as to defer the running of the statute. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Warren *v.* Sweeney, 4 Nev. 101; Lowber *v.* Smith, 7 Pa. St. 381. And see Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344, where defendant had delivered gold amalgam to plaintiff to be sent to the mint for coinage, the proceeds to be put to defendant's credit; and it was held that this did not render the account mutual. And so the fact that an employer gives clothing to his employee from time to time will not of itself render the account between them a mutual account. Miller *v.* Cinnamon, *supra*; Thompson *v.* Reed, 48 Ill. 118. But where goods are delivered by a debtor to his creditor who has an account against him, and are credited at a stated valuation, it will not be presumed that they are delivered in payment, but there must be proof that it was so intended and that both parties so understood. In the absence of proof of such an understanding the transaction will be treated as a sale and the account will become mutual. Norton *v.* Larco, 30 Cal. 126, 89 Am. Dec. 70 (holding that in such a case it will be presumed that the transaction was a sale); Abbey *v.* Owens, 57 Miss. 810; Warren *v.* Sweeney, *supra*; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496. And see Penniman *v.* Rotch, 3 Metc. (Mass.) 216. Therefore when it is sought to establish a mutual account, consisting of reciprocal demands, by showing the delivery of articles of personal property, the material question is whether it was the intention of the parties to treat it as payment upon account. Warren *v.* Sweeney, *supra*.

Return of article bought.— In an account for goods sold and delivered from time to time, a credit for the value of an article returned, if such article had been first purchased for cash and then returned and accepted, and the vendor by mutual consent express or implied was allowed to retain the purchase-price, whether considered as a credit for the money paid or for the sum treated as

the contrary.[2] Cash transactions for which no charges are made, as where services are rendered and paid for, do not properly constitute part of a mutual account between the parties;[3] and payment of specific items of charge, unaccompanied by any circumstances showing a recognition of any other account, does not affect the operation of the statute.[4] But if the account is in fact mutual, the statute will not operate to deprive plaintiff of the benefit of a payment made by him.[5] Likewise, although cash items form no part of a mutual account, so as to postpone the operation of the statute of limitations, cash payments made and received to be applied on general account, and on account of actual or supposed indebtedness, extinguish the indebtedness *pro tanto*, and if in any instance made in advance will apply to extinguish the next indebtedness, and the statute will have no application.[6]

(III) *NECESSITY FOR CONTINUITY*— (A) *In General.* In order for later items to take earlier items out of the operation of the statute there must be a continuous account, an "open account current." Where the transactions between the parties are independent and remote and there is nothing in their nature or in the evidence to connect them with each other the earlier items are not saved by the later ones.[7] This has been held to be true in a jurisdiction where the account

the price of the article returned upon a resale thereof, is a proper item on the credit side of such account, and sufficient to convert the account into a mutual one within the rule as to mutual accounts. White *v.* Campbell, 25 Mich. 463. But if such article was received in the first place without payment, and was afterward returned for mutual accommodation and convenience and not by way of barter or trade, the matter thus consummated is a single transaction which terminated without giving the right to either side to make it the matter of account (White *v.* Campbell, *supra*; Hay *v.* Kramer, 2 Watts & S. (Pa.) 137); and a credit given for an article thus returned denotes merely that the corresponding charge is stricken out (Campbell *v.* White, 22 Mich. 178).

Payment by one of two tenants in common to remove an encumbrance on the property owned by them, may, however, constitute an item of "a mutual and open account current" between them so as to defer the running of the statute. Dickinson *v.* Williams, 11 Cush. (Mass.) 258, 59 Am. Dec. 142.

2. Payne *v.* Walker, 26 Mich. 60 (payment on account for services); Beeler *v.* Finnel, 85 Mo. App. 438; Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253. And see Noyes *v.* Cushman, 25 Vt. 390; Hapgood *v.* Southgate, 21 Vt. 584.

Money returned.— In an account for household goods sold and delivered, an item of credit for "money returned" has no tendency to show a payment on account, but constitutes an independent and completed transaction. Campbell *v.* White, 22 Mich. 178.

3. Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401. See also Moore *v.* Blackman, 109 Wis. 528, 85 N. W. 429.

4. Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Harris *v.* Howard, 56 Vt. 695; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253.

Application of payments on account see *infra*, VII, B, 4.

Payment of particular item in account.— Where a particular charge in an account has been paid in cash and a receipt has been given for the payment, it cannot be considered an "unsettled item" in the account, and neither the charge nor the credit should appear therein for the purpose of computing limitation. Perry *v.* Chesley, 77 Me. 393. And see Penniman *v.* Rotch, 3 Metc. (Mass.) 216.

5. Lucas *v.* Thorington, 7 Ala. 605, the reason being that the statute applies only to accrued causes of action, while a payment by one of the parties to a mutual account gives rise to no right of action to recover it back.

6. Raux *v.* Brand, 90 N. Y. 309. And see Reid *v.* Farrar, 6 N. Y. St. 199, and *infra*, VII, B, 2, d.

7. *Arkansas.*— See St. Louis, etc., R. Co. *v.* Love, 74 Ark. 528, 86 S. W. 395; McNeil *v.* Garland, 27 Ark. 343.

Illinois.— Harris *v.* Jackson County Agricultural Bd., 9 Ill. App. 272.

Maine.— Perry *v.* Chesley, 77 Me. 393 [*following* Lancey *v.* Maine Cent. R. Co., 72 Me. 34].

Massachusetts.— Graham *v.* Stanton, 177 Mass. 321, 58 N. E. 1023.

Michigan.— *In re* Hiscock, 79 Mich. 537, 44 N. W. 947.

Missouri.— Loeffel *v.* Hoss, 11 Mo. App. 133.

New Jersey.— Belles *v.* Belles, 12 N. J. L. 339. And see Hibler *v.* Johnston, 18 N. J. L. 266; Princeton, etc., Turnpike Co. *v.* Gulick, 14 N. J. L. 545.

North Carolina.— Green *v.* Caldcleugh, 18 N. C. 320, 28 Am. Dec. 567.

Wisconsin.— See Moore *v.* Blackman, 109 Wis. 528, 85 N. W. 429, holding that a subsequent cash transaction wholly disconnected with the old account cannot be "tacked" thereto "so as to rejuvenate it."

United States.— *In re* Wooten, 118 Fed. 670. And see *In re* Huger, 100 Fed. 805.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 295, 296.

need not be mutual.[8] The continuity of an account between a copartnership and a third person is broken by the dissolution of the firm.[9] On the other hand it is not necessary that different items in a mutual account should arise out of the same express or implied contract.[10]

(B) *Cessation of Mutual Dealings For Statutory Period.* Where the mutual dealings have ceased for the statutory period after the date of the last item, so that during that time there are no items on either side of the account, the whole account is barred;[11] and in such a case subsequent items are unavailing to remove the bar.[12]

But a mere cessation of mutual dealing does not change the account into an account stated. See *infra*, VI, B, 17, c.

In Georgia where the rule as to mutual accounts is said to be based on an express or implied mutual understanding to give mutual credit, either party may terminate such an account at any time by an actual payment of the balance, or by stating the account for that purpose, or by demanding a settlement privately or by suit, or by any act which plainly shows to the other party his determination to deal no longer that way. But without proof of its termination, the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties until the complete bar of the statute has attached. Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Rep. 447. No hiatus less than the period of limitations can of itself operate as a bar or even affect or demonstrate an annulling of the implied understanding that each party might continue to credit the other upon the view of an ultimate adjustment of accounts. But on the question of fact whether the parties had terminated that course of mutual dealing, long gaps in the accounts might furnish some argument to the jury, along with other circumstances tending to show the breaking up of such relations as mutual creditors. As to that, each case must stand on its own facts. Gunn *v.* Gunn, *supra*.

8. **In Iowa** the account must be "continuous, open and current." Hickey *v.* Hickey, (1899) 81 N. W. 152 (holding that in the absence of an agreement to defer payment, items which were separate and distinct transactions occurring more than five years before beginning of action and forming no part of a continuous, open current account, are barred by the statute); Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724; Gavin *v.* Bischoff, 80 Iowa 605, 45 N. W. 306; Tucker *v.* Quimby, 37 Iowa 17 (where these terms are defined); Shorick *v.* Bruce, 21 Iowa 305. But *compare* Keller *v.* Jackson, 58 Iowa 629, 12 N. W. 618, holding that an account between the same parties, but with an interval of one year and nine months between two items, is nevertheless an open, current account, from the last item of which the statute of limitations will run.

The claim of an officer of a corporation for services rendered to the company under various resolutions, each fixing his compensation for a definite term, is not in the nature of an open account within the meaning of the statutory provision in favor of such accounts. Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724.

Quarterly charges of asylum. — But the quarterly charges of a state asylum form a "continuous, open, current account;" and a break of two years in such charges, caused by the patient's leaving the asylum without authority, during which period, while he spent part of the time at home and part in the county asylum, he remained at all times a charge on the county, does not destroy the continuity of the account. Cedar County *v.* Sager, 90 Iowa 11, 57 N. W. 634 [*distinguishing* Gavin *v.* Bischoff, 80 Iowa 605, 45 N. W. 306; Griffin *v.* Clay County, 63 Iowa 413, 19 N. W. 327; Tucker *v.* Quimby, 37 Iowa 17].

An account for board at a stipulated sum per week is a continuous account, and the cause of action thereon does not accrue at the end of each month so as to bar compensation for all months more than the statutory period before action brought. Beeler *v.* Finnel, 85 Mo. App. 438.

9. Eldridge *v.* Smith, 144 Mass. 35, 10 N. E. 717 (death of partner); Warren *v.* Maloney, 29 Mo. App. 101. And see King *v.* Post, 12 Colo. 355, 21 Pac. 38. See, generally, PARTNERSHIP.

Retiring partner succeeded by stranger. — And where the dissolution is effected by the retirement of one of the partners, and a stranger becomes his successor, there is no such devolution of the accounts of the old firm on the new as to entitle the latter to claim that the account is continuing and thus exempt from the statute. Warren *v.* Maloney, 29 Mo. App. 101.

10. Gibson *v.* Jenkins, 97 Mo. App. 27, 70 S. W. 1076.

11. *Delaware.* — Booth *v.* Stockton, 1 Harr. 51.

Kentucky. — Smith *v.* Dawson, 10 B. Mon. 112; Lansdale *v.* Brashear, 3 T. B. Mon. 330.

Maine. — Perry *v.* Chesley, 77 Me. 393.

Mississippi. — Abbey *v.* Owens, 57 Miss. 810.

Ohio. — Courson *v.* Courson, 19 Ohio St. 454.

The last item must be within the statutory period before action brought. Courson *v.* Courson, 19 Ohio St. 454. And see Abbey *v.* Owens, 57 Miss. 810.

As to merchants' accounts the rule is to the contrary. See *infra*, VI, B, 17, b.

12. Perry *v.* Chesley, 77 Me. 393 [*following* Lancey *v.* Maine Cent. R. Co., 72 Me. 34];

(iv) *Manner of Keeping Account.* In so far as the rule under discussion is concerned, the manner in which a mutual account is kept is unimportant,[13] although it may properly be considered as evidence bearing upon the good faith and honesty of the party keeping the account.[14] It matters not whether each party keeps the account in his own favor, or one keeps the account on both sides, since it is not the form of the entries, but the fact of the mutual crediting, which is to be considered.[15] But since in ordinary cases of mutual dealings the obligation is to pay the balance of the general account, not each particular item, it must appear that each new item of credit is paid by defendant with a view to lessen such balance; otherwise it is not equivalent to a new promise to pay what remains, and does not affect the operation of the statute.[16] Hence it has frequently been held that an entry by plaintiff of a credit to defendant without the latter's consent express or implied can have no effect to save earlier items of the account from the statutory bar.[17] But it is equally true that defendant cannot gain the advantage of the statute by neglecting to charge in his account a proper item of indebtedness actually existing in his favor against plaintiff; and in such a case plaintiff may enter the item as a credit to defendant and thus avoid the statute notwithstanding defendant insists that he is not entitled to have the item credited in his favor.[18] In brief to determine whether a particular item is

Courson *v.* Courson, 19 Ohio St. 454. And see Bradford *v.* Spyker, 32 Ala. 134 (holding that items of mutual dealing after suit brought are ineffectual to revive the cause of action); Graham *v.* Stanton, 177 Mass. 321, 58 N. E. 1023; Hibler *v.* Johnston, 18 N. J. L. 266 (where for a period of more than six years there were items on only one side of the account, and it was held that subsequent items on the other side did not revive the former mutual dealings).

13. Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253 (where this principle was applied to accounts kept in separate day-books); Abbott *v.* Keith, 11 Vt. 525, 529 (in which the court said: "The particular mode of keeping the account, whether on book or loose scraps of paper, or without any written charges . . . or in different forms, as in the present case, is unimportant. If all the items, in the expectation of the parties, have reference to, and are to be adjusted in, one accounting, it may be considered as one transaction, so far as the statute of limitations is concerned"). But *compare* Sidway *v.* Missouri Land, etc., Co., 187 Mo. 649, 86 S. W. 150.

Where an attorney's services are minuted in his register and other proper memorandum books, this is sufficient for the purpose of an account current within the meaning of the statute of limitations. The fact of his not having actually entered the account of charges, or made regular entries on formal account-books, is immaterial. There is no requirement that the books on which entries are made shall be of any particular kind, or the entries of any particular form. Payne *v.* Walker, 26 Mich. 60.

14. Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401.

15. Gunn *v.* Gunn, 74 Ga. 555, 58 Am. Rep. 447; Baker *v.* Mitchell, 59 Me. 223 (so by statute); Hutchinson *v.* Pratt, 2 Vt. 146. And see Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865.

Where defendant claims the benefit of a credit given to him in plaintiff's account, but insists that it should be for a larger sum, the result is the same as though defendant had kept an account against plaintiff. Newsome *v.* Person, 3 N. C. 242.

16. Miller *v.* Cinnamon, 168 Ill. 447, 458, 48 N. E. 45 [*reversing* 61 Ill. App. 429]. And see Abbott *v.* Keith, 11 Vt. 525.

17. *Michigan.* — Kimball *v.* Kimball, 16 Mich. 211.

Missouri. — Loeffel *v.* Hoss, 11 Mo. App. 133.

New Jersey. — Hibler *v.* Johnston, 18 N. J. L. 266.

New York. — Pulver *v.* Esselstyn, 22 Misc. 429, 50 N. Y. Suppl. 756.

Pennsylvania. — Chambers *v.* Marks, 25 Pa. St. 296 [*followed* in Hudson *v.* Hudson, 21 Pa. Super. Ct. 92], holding that the entry must be authenticated and proved to have been intended as a credit on the account.

Vermont. — Hodge *v.* Manley, 25 Vt. 210, 212, 60 Am. Dec. 253, in which the court said: "When it is said, however, that every new item of credit, or part payment, revives all preceding charges, and prevents the operation of the statute of limitations, it must be understood with this qualification: that the item of credit must arise from the mutual act and consent of both parties, and with the understanding, express or implied, that it is to enter into and become a part of their mutual dealing or account, and be the subject of future adjustment in ascertaining the general balance due thereon. For there is no propriety in permitting a party to defeat the operation of the statute on a mutual account, by making entries of credit, unless the charge has arisen by consent, or in their usual course of dealing."

18. Davis *v.* Smith, 48 Vt. 52. And see

properly a part of a mutual account "the true inquiry is, whether the item represents a legal indebtedness that should go into the account of the parties, and not whether either party has or has not in fact embraced the controverted item in his account." [19]

(v) *Effect of Giving Credit.* Where credit is given for goods sold which make up the debit items of the account, the statute begins to run, not at the date of the last item but at the expiration of the period of credit,[20] according to the general rule before stated;[21] and this, although the giving of credit is the result of local custom.[22]

(vi) *Statutory Restrictions.* In some jurisdictions where it is provided by statute that an acknowledgment or promise to take a debt out of the operation of the statute of limitations must be in writing and signed by the party chargeable,[23] it has been held that mutual and reciprocal accounts are of no avail to check the operation of the statute unless they are in writing and signed by the party charged, or unless part payment or its equivalent is made or the accounts are saved by some special statutory provision.[24] In England the Mercantile Law Amendment Act of 1856[25] expressly abolished the rule that items that arose more than the statutory period before the action are taken out of the statute of limitations by items arising within that period.[26]

b. Accounts Between Merchants, Their Factors or Servants — (i) *The Statutory Exception in General.* In some jurisdictions the statutes of limitations expressly exempt from their operation accounts between merchants, their factors or servants.[27] This was true of the English statute of 21 Jac. I,[28] prior to the Mercantile Law Amendment Act of 1856,[29] by which the exception was abolished.[30] While the statutes of limitations in many of the United States retained the exception substantially as found in the English statute of 21 Jac. I, or contained provisions somewhat similar,[31] in a number of states the exception

Bates *v.* Sabin, 64 Vt. 511, 24 Atl. 1013; Chapman *v.* Goodrich, 55 Vt. 354.

19. Davis *v.* Smith, 48 Vt. 52 [*approved* in Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Plimpton *v.* Gleason, 57 Vt. 604].

20. Effinger *v.* Henderson, 33 Miss. 449.

21. See *supra*, VI, B, 4, b, text and note 63.

22. Such as a custom that accounts with tradesmen shall be due and payable at the beginning of the year following that in which the indebtedness was created. Effinger *v.* Henderson, 33 Miss. 449. And see Higgs *v.* Warner, 14 Ark. 192, 195; Adkins *v.* Hutchings, 79 Ga. 260, 4 S. E. 887; Hendricks *v.* Robinson, 56 Miss. 694, 31 Am. Rep. 382. *Contra*, Smyth *v.* Walton, 5 Tex. Civ. App. 673, 24 S. W. 1084, holding that such a custom cannot affect the positive rule of the statute.

23. See *infra*, VII, A, 9.

24. Courson *v.* Courson, 19 Ohio St. 454 (holding that such promise or acknowledgment must be within six years before the action); Lowe *v.* Dowbarn, 26 Tex. 507; Williams *v.* Griffiths, 2 C. M. & R. 45, 1 Gale 65, 4 L. J. Exch. 129, 5 Tyrw. 748; Cottam *v.* Partridge, 11 L. J. C. P. 161, 4 M. & G. 271, 4 Scott N. R. 819, 43 E. C. L. 146. And see Hassler *v.* Kay, 1 Tex. App. Civ. Cas. § 665; Moore *v.* Blackman, 109 Wis. 528, 85 N. W. 429; Angell Lim. § 274.

25. St. 19 & 20 Vict. c. 97, which provides that "no Claim in respect of a Matter which arose more than Six Years before the Commencement of such Action or Suit shall be enforceable by Action or Suit by reason only of some other Matter or Claim comprised in the same Account having arisen within Six Years next before the Commencement of such Action or Suit."

The word "comprised" as used in this statute has been construed as equivalent to "that would have been comprehended" in; that is, that would have been an item in the account demanded. Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234.

26. Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234.

The prior English decisions rendered on this subject are of course no longer valuable as authorities in the English law; but as many of them have been followed by the American courts these and such others as are of any importance are cited in this article as tending to aid in the elucidation of the American law.

27. See the various local statutes of limitations.

28. This statute excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." St. 21 Jac. I, c. 16, § 3.

29. St. 19 & 20 Vict. 97.

30. See Knox *v.* Gye, L. R. 5 H. L. 656, 42 L. J. Ch. 234; Friend *v.* Young, [1897] 2 Ch. 421, 66 L. J. Ch. 737, 77 L. T. Rep. N. S. 50, 46 Wkly. Rep. 139.

31 See the local statutes of limitations, especially those of an early date.

has been superseded by other provisions embodying the general rule as to mutual accounts heretofore discussed, and is no longer retained in the statute;[32] while in other states merchants' accounts have been made the subject of special statutory provisions.[33]

(II) *Effect of the Exception.* Under the original exception in the statute the merchants' accounts included therein were held to be wholly exempt, and did not become barred, although there were no items on either side within the statutory period before the action.[34]

(III) *What Accounts Included.* The general exception in the statute as to merchants' accounts applies to all mutual, open accounts current which concern the trade of merchandise between merchant and merchant, their factors or servants;[35] but it is confined to such trade between such persons, and the accounts on both sides must relate to trade in merchandise.[36] The foundation of the action

The Alabama statute barring open accounts in three years does not apply to accounts between merchant and merchant. Marr *v.* Southwick, 2 Port. (Ala.) 351.

32. Lancey *v.* Maine Cent. R. Co., 72 Me. 34; Penniman *v.* Rotch, 3 Metc. (Mass.) 216; Green *v.* Disbrow, 79 N. Y. 1, 35 Am. Rep. 496; Atwater *v.* Fowler, 1 Edw. (N. Y.) 417. And see *supra*, VI, B, 17, a.

33. See the local statutes of limitations.

Kentucky.— The present statute (St. § 2520) provides that the cause of action is deemed to have accrued from the time of the last item proved in the account claimed, or "proved to be chargeable on the adverse side." See Seibert *v.* Albritton, 101 Ky. 241, 40 S. W. 698, 19 Ky. L. Rep. 402; Hearn *v.* Van Ingen, 7 Bush 426. Under this provision the statute of limitations runs as to a commission merchant's account for advances made on shipments of tobacco, not from the date of the last credit of proceeds of sales, but from the date when the last of the tobacco should with reasonable diligence have been sold, or, at most, after allowing a reasonable period after such time in which to have made up and rendered a statement of the balance due. Seibert *v.* Albritton, *supra*.

Louisiana.—Under Laws (1852), p. 90, prescription does not run on each separate item of a merchant's account for advances made in the shape of acceptances of drafts, and disbursements for necessary supplies, insurances, freights, etc., but upon the account as a whole. Andrew *v.* Keenan, 14 La. Ann. 705. In an action by a factor on an account current between him and his principal, embracing their dealings in that relation, the latter will not be permitted to isolate the items and apply to any particular item the prescription which might be applicable if it stood alone and if the relation of factor and principal did not exist. The various items are component parts of one account which is to be regarded as a whole. Toledano *v.* Gardiner, 2 La. Ann. 779.

34. *Kentucky.*— It was so held under the statute of limitations of 1796, which wholly exempted these accounts from its operation. Dyott *v.* Letcher, 6 J. J. Marsh. 541; Lansdale *v.* Brashear, 3 T. B. Mon. 330. But under the present statute, limitation is computed from the date of the last item. Hearn *v.* Van Ingen, 7 Bush 426.

Maine.— McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Bass *v.* Bass, 6 Pick. 362, 8 Pick. 187.

Pennsylvania.— Morgan *v.* Lehigh Valley Coal Co., 215 Pa. St. 443, 64 Atl. 633; Stiles *v.* Donaldson, 2 Yeates 105, 2 Dall. 264, 1 L. ed. 353; Marseilles *v.* Kenton, 1 Phila. 181.

Texas.—Whittlesey *v.* Spofford, 47 Tex. 13.

Virginia.— Coalter *v.* Coalter, 1 Rob. 79.

United States.— Mandeville *v.* Wilson, 5 Cranch 15, 3 L. ed. 23 [*affirming* 30 Fed. Cas. Nos. 17,820, 17,821, 1 Cranch C. C. 433, 452].

England.— Robinson *v.* Alexander, 8 Bligh N. S. 352, 5 Eng. Reprint 973, 2 Cl. & F. 717, 6 Eng. Reprint 1325. And see Inglis *v.* Haigh, 9 Dowl. P. C. 817, 5 Jur. 704, 10 L. J. Exch. 406, 8 M. & W. 769. *Contra*, Martin *v.* Heathcote, 2 Eden 169, 28 Eng. Reprint 861; Barber *v.* Barber, 18 Ves. Jr. 286, 34 Eng. Reprint 325, both of which, however, may be considered as overruled by Robinson *v.* Alexander, *supra*.

35. Brackenridge *v.* Baltzell, 1 Ind. 333; Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83; Stiles *v.* Donaldson, 2 Yeates (Pa.) 105, 2 Dall. 264, 1 L. ed. 353; Marseilles *v.* Kenton, 1 Phila. (Pa.) 181; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, 3 L. ed. 23 [*affirming* 30 Fed. Cas. Nos. 17,820, 17,821, 1 Cranch C. C. 433, 452]. And see San Antonio Water Works Co. *v.* Maury, 72 Tex. 112, 12 S. W. 166; Reagan *v.* Bonham, (Tex. App. 1890) 15 S. W. 502; Hein *v.* O'Connor, (Tex. App. 1891) 15 S. W. 414.

36. *Kentucky.*— Smith *v.* Dawson, 10 B. Mon. 112; Dyott *v.* Letcher, 6 J. J. Marsh. 541; Lansdale *v.* Brashear, 3 T. B. Mon. 330.

Mississippi.— Fox *v.* Fisk, 6 How. 328, holding also that both parties must have been merchants when the cause of action accrued.

New York.— Murray *v.* Coster, 20 Johns. 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522]; Ramchander *v.* Hammond, 2 Johns. 200.

Pennsylvania.— Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83; Hudson *v.* Hudson, 21 Pa. Super. Ct. 92.

South Carolina.—Van Rhyn *v.* Vincent, 1 McCord Eq. 310.

Tennessee.— Price *v.* Upshaw, 2 Humphr. 142.

must be an account, not a contract, although the parties are merchants.[37] Transactions between banking institutions,[38] items for work and labor,[39] and an attorney's claim for a particular legal service,[40] have been held not to be embraced by the exception. Accounts between partners, and suits for settlement of partnership accounts, do not concern the trade of merchandise between merchants and are not embraced by the exception whether the partners are actually merchants or not;[41] but mutual accounts between partners are within the general rule[42] that the stat-

Texas.—May *v.* Pollard, 28 Tex. 677; Winn *v.* Bryant, 1 Tex. App. Civ. Cas. § 809. *Compare* Hein *v.* O'Connor, (App. 1891) 15 S. W. 414.

Virginia.— Coalter *v.* Coalter, 1 Rob. 79.

United States.—Spring *v.* Gray, 6 Pet. 151, 163, 8 L. ed. 352 [*affirming* 22 Fed. Cas. No. 13,259, 5 Mason 305], in which Marshall, C. J., said: "The case protected by the exception is not every transaction between merchant and merchant, not every account which might exist between them, but it must concern the trade of merchandise. It is not an exemption from the act, attached to the merchant, merely as a personal privilege, but an exemption which is conferred on the business as well as on the persons between whom that business is carried on. The account must concern the trade of merchandise; and this trade must be, not an ordinary traffic between a merchant and any ordinary customer, but between merchant and merchant. This 'trade of merchandise,' which can furnish an account protected by the exception, must be not only between merchant and merchant, but between the plaintiff and defendant. The account — the business of merchandise which produces it — must be between them."

England.— Sturt *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765, holding that transactions between a merchant and a foreign prince and his government do not concern the trade of merchandise within the meaning of the statute. But see Cranch *v.* Kirkman, 1 Peake N. P. 164.

See 33 Cent. Dig. tit. "Limitation of Actions," § 292.

The agents or factors mentioned in the exception include only such agents or factors as are employed in the general mercantile concerns of their principals. The exception does not apply to every special agent who may be intrusted with a specific power, and whose liability arises from some special undertaking unconnected with the general concerns of his principal. Van Rhyn *v.* Vincent, 1 McCord Eq. (S. C.) 310.

37. Spring *v.* Gray, 6 Pet. (U. S.) 151, 8 L. ed. 352 [*affirming* 22 Fed. Cas. No. 13,259, 5 Mason 305]; Webber *v.* Tivill, 2 Saund. 121. And see Ramchander *v.* Hammond, 2 Johns. (N. Y.) 200.

An action on the case for money due on a contract between merchants for merchandise sold was held to be not within the exception. Webber *v.* Tivill, 2 Saund. 121.

A charter-party, a contract by which the owner lets his vessel to another for freight, does not change its character because the parties happen to be merchants. It is still a special contract whereby a compensation is stipulated for a service to be performed; and not an account concerning the trade of merchandise. Spring *v.* Gray, 6 Pet. (U. S.) 151, 8 L. ed. 352 [*affirming* 22 Fed. Cas. No. 13,259, 5 Mason 305]. Nor, it is held, is the nature of the transaction varied by the fact that the freight to be paid by the charterer, instead of being a specified sum, or a sum to be ascertained by some given rule, is dependent on the profits of the adventure; or that the sales of the outward and inward cargo, and all the expenses dependent on the enterprise, must be examined in order to ascertain the amount of freight. Spring *v.* Gray, *supra.*

Purchase of goods on joint account.—Where there is a joint purchase of goods, and one of the purchasers takes the whole of the goods, and agrees to account to the other for his share of them, or of the net proceeds, and to charge no commission in case of a sale, the transaction is not within the meaning of the exception. Murray *v.* Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522].

A promissory note has been held to constitute no part of a merchant's account within the meaning of the exception where the action was brought on the note (Ramchander *v.* Hammond, 2 Johns. (N. Y.) 200); but the contrary has been held where the action was brought not on the note but on the account, and the note was intended by the parties not as a payment but to evidence the maker's indebtedness and to enable the payee to obtain money on the instrument if necessary; the note apparently having expressly been made an item in the account (McGuire *v.* Bidwell, 64 Tex. 43).

38. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. 422.

39. Notwithstanding that the account is between merchants. Slocumb *v.* Holmes, 1 How. (Miss.) 139. But *compare* Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83, where it is said that the account may include labor or anything that is provable by books of original entry.

40. Mattern *v.* McDivitt, 113 Pa. St. 402, 6 Atl. 83.

41. *Alabama.*—Bradford *v.* Spyker, 32 Ala. 134.

Kentucky.— Patterson *v.* Brown, 6 T. B. Mon. 10.

Massachusetts. — Codman *v.* Rogers, 10 Pick. 112.

Texas.— Leavitt *v.* Gooch, 12 Tex. 95.

Virginia.— Coalter *v.* Coalter, 1 Rob. 79.

42. See *supra,* VI, B, 17, a, (I).

ute runs only from the date of the last item.[43] Moreover the exception in the statute extends only to cases where there is an open, mutual account current, consisting of reciprocal demands between two persons; not to cases where the demands are all on one side of the account,[44] where the account has been "settled" or stated,[45] or where there has been but a single transaction;[46] and as in the case of ordinary mutual accounts,[47] the making and crediting of a payment on account does not bring the account within the exception of the statute.[48]

(IV) *ACTIONS TO WHICH EXCEPTION APPLIES.* In England it was held that the exception as to merchants' accounts applied only to cases where an action of account would lie, or to actions on the case for not accounting; actions of assumpsit and of debt being excluded.[49] But in the United States no such restriction is recognized, and the exception in the statute applies to actions of assumpsit as well as to actions of account.[50]

c. Accounts Stated or Closed[51] — (I) *GENERAL RULES.* Where an account has been settled and stated and a balance agreed upon, a new cause of action is thereby created and the statute runs from the date of the settlement.[52] The same

43. Cannon *v.* Copeland, 43 Ala. 201; Bradford *v.* Spyker, 32 Ala. 134. See PARTNERSHIP.

44. *Indiana.*— See Brackenridge *v.* Baltzell, 1 Ind. 333, Smith 217.

Mississippi.— Fox *v.* Fisk, 6 How. 328.

New York.—Coster *v.* Murray, 5 Johns. Ch. 522 [*affirmed* in 20 Johns. 576, 11 Am. Dec. 333]; Atwater *v.* Fowler, 1 Edw. 417.

Pennsylvania.—Ingram *v.* Sherard, 17 Serg. & R. 347.

South Carolina.—Van Rhyn *v.* Vincent, 1 McCord Eq. 310. See also Deloach *v.* Turner, 6 Rich. 117.

Tennessee.— Price *v.* Upshaw, 2 Humphr. 142.

Texas.— Richardson *v.* Vaughan, 86 Tex. 93, 23 S. W. 640; May *v.* Pollard, 28 Tex. 677; Judd *v.* Sampson, 13 Tex. 19; Guichard *v.* Superveile, 11 Tex. 522.

United States.— Toland *v.* Sprague, 12 Pet. 300, 9 L. ed. 1093.

England.— Cotes *v.* Harris, Buller N. P. 149.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 292, 295, 296.

Failure of trial court to make finding as to mutuality.— Under Tex. Rev. St. art. 3203, § 5, providing that "actions upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents," must be commenced in two years, it was held that the statute was not a bar to an action on an open account commenced more than two years after the date of the last article charged, where the undisputed evidence showed that the parties dealt in the same character of goods, and that the accounts were mutual and current between them, although the trial court did not expressly find the latter fact. San Antonio Water Works Co. *v.* Maury, 72 Tex. 112, 12 S. W. 166.

45. Brackenridge *v.* Baltzell, 1 Ind. 333, Smith 217; Fox *v.* Fisk, 6 How. (Miss.) 328; Ramchander *v.* Hammond, 2 Johns. (N. Y.) 200; Toland *v.* Sprague, 12 Pet. (U. S.) 300, 9 L. ed. 1093. And see *infra*, VI, B, 17, c, (I).

The term "open account" is used in opposition to a stated account, where the account is closed by an assent to its correctness by the party charged. Whittlesey *v.* Spofford, 47 Tex. 13.

46. Marseilles *v.* Kenton, 17 Pa. St. 238; Guichard *v.* Superveile, 11 Tex. 522; Cohen *v.* Shwarts, (Tex. Civ. App. 1895) 32 S. W. 820. And see Murray *v.* Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522].

47. See *supra*, VI, B, 17, a, (II), (B), (2).

48. Judd *v.* Sampson, 13 Tex. 19; Guichard *v.* Superveile, 11 Tex. 522. And see Ingram *v.* Sherard, 17 Serg. & R. (Pa.) 347, payment made more than six years before suit brought.

49. Inglis *v.* Haigh, 9 Dowl. P. C. 817, 5 Jur. 704, 10 L. J. Exch. 406, 8 M. & W. 769; Coltman *v.* Partridge, 11 L. J. C. P. 161, 4 M. & G. 271, 4 Scott N. R. 891, 43 E. C. L. 146. See also Farrington *v.* Lee, 1 Mod. 268, 2 Mod. 311; Martin *v.* Delboe, 1 Mod. 70.

50. Brackenridge *v.* Baltzell, 1 Ind. 333, Smith 217; Dyott *v.* Letcher, 6 J. J. Marsh. (Ky.) 541; Union Bank *v.* Knapp, 3 Pick (Mass.) 96, 112, 15 Am. Dec. 181; Mandeville *v.* Wilson, 5 Cranch (U. S.) 15, 3 L. ed. 23 [*affirming* 30 Fed. Cas. Nos. 17,820, 17,821, 1 Cranch C. C. 433, 452]. And see Marseilles *v.* Kenton, 1 Phila. (Pa.) 181.

51. See also ACCOUNTS AND ACCOUNTING, 1 Cyc. 451.

52. *Arkansas.*— Higgs *v.* Warner, 14 Ark. 192.

California.— Anzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Georgia.— See Schall *v.* Eisner, 58 Ga. 190.

Indiana.— Brackenridge *v.* Baltzell, 1 Ind. 333, Smith 217.

Iowa.— Morse *v.* Minton, 101 Iowa 603, 70 N. W. 691; Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724. And see Hammond *v.* Hale, 61 Iowa 38, 15 N. W. 585.

Louisiana.— See Dixon *v.* Lyons, 13 La. Ann. 160.

Maine.— Lancey *v.* Maine Cent. R. Co., 72 Me. 34.

Massachusetts.— Belchertown *v.* Bridgman,

is true of accounts between merchants, the statement of such an account taking it

118 Mass. 486; Union Bank *v.* Knapp, 3 Pick. 96, 15 Am. Dec. 181.

New Hampshire.— Clay *v.* McKeen, 69 N. H. 86, 36 Atl. 877.

New York.— Agan *v.* File, 32 N. Y. Suppl. 1066.

North Carolina.— Kimboll *v.* Person, 3 N. C. 394.

Pennsylvania.— Morgan *v.* Lehigh Valley Coal Co., 215 Pa. St. 443; Lancaster County *v.* Lancaster City, 160 Pa. St. 411, 28 Atl. 854; McClelland *v.* West, 70 Pa. St. 183; Hudson *v.* Hudson, 21 Pa. Super. Ct. 92.

Vermont.— Abbott *v.* Keith, 11 Vt. 525.

Virginia.— Brooke *v.* Shelly, 4 Hen. & M. 266.

United States.— Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176; *Ex p.* Storer, 23 Fed. Cas. No. 13,490, 2 Ware 298. See also Chew *v.* Baker, 5 Fed. Cas. No. 2,663, 4 Cranch C. C. 696.

England.— Ashby *v.* James, 12 L. J. Exch. 295, 11 M. & W. 542; Farrington *v.* Lee, 1 Mod. 268, 3 Mod. 311; Webber *v.* Tivill, 2 Saund 124.

See 33 Cent. Dig. tit. "Limitation of Actions," § 298. See also, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 450.

It follows that if the statutory period has not elapsed since the statement of the account and its acceptance by the debtor, the statute cannot be pleaded as to the separate items. Sayward *v.* Dexter, 72 Fed. 758, 19 C. C. A. 176. And see the cases cited *supra*, this note.

The term "settle" as used in this connection means to adjust. See Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Where an account is stated annually a cause of action accrues at the time of each statement so that the statute bars a recovery except for the statutory period before action brought. Lancaster County *v.* Lancaster City, 160 Pa. St. 411, 28 Atl. 854. See also, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 364 note 20.

When account closed or settled.—"The conversion of an open account into an account stated, is an operation by which the parties assent to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an expressed understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. The parties may still impeach it for fraud or mistake. But so long as it is not impeached, the agreed statement serves in place of the original account, as the foundation of an action. It becomes an original demand, and amounts to an express promise to pay the actual sum stated. The creditor becomes entitled to recover the agreed balance, in an action based on the fact of its acknowledgment by the debtor, upon an adjustment of their respective claims." White *v.* Campbell, 25 Mich. 463, 467. The giving of a note for an amount due creates a presumption that the account is settled to date. And this presumption is strengthened by the closing of the old account, the commencement of a new one, and the payment thereof for which a receipt is given "in full account" to the date of payment. Morse *v.* Minton, 101 Iowa 603, 70 N. W. 691. An assignment for the benefit of creditors terminates an account against the assignor, and a payment by the assignee is a payment on the debt and is not an item of the account under the Iowa statute providing that "when there is a continuous, open, current account, the cause of action shall be deemed to have accrued on the date of the last item." Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907. Where a clerk of court and sheriff each received fees coming to the other, and by agreement each retained those received by him for the other, with intent to settle the same as an account, between them, it was held that the account became closed so that limitations began to run when the sheriff's term expired. Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West L. J. 385. Where a statute provided that a county should keep with a city an account of certain taxes and expenditures, and it was held that the statute contemplated a yearly settlement and balancing of the account, it was further held that the keeping of such an account was not a condition precedent to the county's right of action or right to a recovery; that all the items being in fact before the court and properly arraigned, the court would treat the case as if the annual balances had been actually struck, and therefore that the statute barred a recovery except for the statutory period before the action. Lancaster County *v.* Lancaster City, 160 Pa. St. 411, 28 Atl. 854.

Agreement as to collection of balance from other sources.— On a settlement an account was accepted as final, but it was agreed that the party in whose favor the balance was found should endeavor to realize on some accounts and sell certain land, to apply to the balance before resorting to the other party; which agreement he was unable to fully execute till nine years thereafter. It was held that the statute of limitations did not begin to run against the balance until after the nine years. Alexander *v.* Clark, 83 Mo. 481.

Item omitted by mistake.— When parties make out what they believe to be a correct itemized account of their mutual dealings, and the balance is thereupon ascertained and paid, the items can no longer be considered unsettled, although one item was omitted by mistake; and if within the statutory period thereafter, on discovering the omission, an action declaring on the entire account is brought to recover the real balance, the statute of limitations will bar the recovery.

out of the statutory exception.[53] But to produce this result there must be an "account stated" within the general rules governing accounts.[54] An account rendered,[55] or an account closed by cessation of dealings between the parties,[56] as by the death of one of them,[57] is not an account stated which will set the statute in motion from its date. Moreover a party claiming the benefit of the statute on the ground that the account has been converted into an account stated must show some word or act indicating that he assented to the account. Mere passive silence upon and after receiving the account, or the mere absence of any evidence of objections made by him, is not sufficient.[58] An account stated cannot be converted into an open, mutual account, for the purpose of deferring the running of the statute, by payments on the balance,[59] or by charges on one side only.[60] And

Lancey *v.* Maine Cent. R. Co., 72 Me. 34. And see Penn Bank's Estate, 152 Pa. St. 65, 25 Atl. 310. In such a case it makes no difference that a new account runs on from the date of the last item in the settled account, and is begun even before the balance in the settled account is paid. Lancey *v.* Maine Cent. R. Co., *supra*.

Assignment and reassignment of balance.— Where a mutual account is balanced and the balance assigned by the creditor to a third person, the assignment terminates and closes the account between the original parties, and the creditor cannot by taking a reassignment of the balance make it a part of a subsequent running account between them unless it is recognized by the debtor or there is some agreement between them that it shall become an item in such account; nor can he by taking such reassignment make it a part of the original account so as to save that account from the operation of the statute. Hall *v.* Stone, 60 Hun (N. Y.) 309, 14 N. Y. Suppl. 603 [*following* Green *v.* Ames, 14 N. Y. 225].

53. *Indiana.*— Brackenridge *v.* Baltzell, 1 Ind. 333, Smith 217.

Mississippi.— Fox *v.* Fisk, 6 How. 328.

New York.— Ramchander *v.* Hammond, 2 Johns. 200.

Pennsylvania.— Thompson *v.* Fisher, 13 Pa. St. 310; Bevan *v.* Cullen, 7 Pa. St. 281.

Texas.— Handel *v.* Macdonell, (Civ. App. 1894) 25 S. W. 133.

West Virginia.— Roots *v.* Mason City Salt, etc., Co., 27 W. Va. 483.

United States.— Toland *v.* Sprague, 12 Pet. 300, 9 L. ed. 1093.

England.— Webber *v.* Tivill, 2 Saund. 124; Martin *v.* Delbo, Sid. 465.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 292, 298.

54. Ryan *v.* Gross, 48 Ala. 370; McLellan *v.* Crofton, 6 Me. 307; White *v.* Campbell, 25 Mich. 463; Whittlesey *v.* Spofford, 47 Tex. 13. See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 364 *et seq.*, 369 *et seq.*

The fact that a balance is shown in the account and claimed in the suit does not make it any the less an open account. Whittlesey *v.* Spofford, 47 Tex. 13, 17.

Sufficiency of evidence to show account stated.— Where an account of more than six years' standing was footed on the books of plaintiff's intestate, and the balance carried to new account, and interest claimed thereon, the jury were not bound to regard this as conclusive evidence of an account then liquidated and stated, so that the statute of limitations should attach to it; but they might, if satisfied by the evidence, treat it as the act of the creditor alone, and of no effect. McLellan *v.* Crofton, 6 Me. 307.

55. White *v.* Campbell, 25 Mich. 463. And see Boyd *v.* Ernst, 36 Ill. App. 583. See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 370 *et seq.*

56. *Kentucky.*— Dyott *v.* Letcher, 6 J. J. Marsh. 541.

Maine.— McLellan *v.* Crofton, 6 Me. 307.

Massachusetts.— Bass *v.* Bass, 6 Pick. 362, 8 Pick. 187.

Michigan.— White *v.* Campbell, 25 Mich. 463.

Pennsylvania.— Marseilles *v.* Kenton, 1 Phila. 181.

Texas.—Whittlesey *v.* Spofford, 47 Tex. 13.

United States.— Mandeville *v.* Wilson, 5 Cranch 15, 3 L. ed. 23 [*affirming* 30 Fed. Cas. Nos. 17,820, 17,821, 1 Cranch C. C. 433, 452].

See, generally, ACCOUNTS AND ACCOUNTING, 1 Cyc. 370 note 71.

Necessity for continuity of account see *supra*, VI, B, 17, a, (III).

Presumption of payment.— But where a mutual account has been closed for more than twenty years and no dealings have accrued between the parties within that time, the presumption of payment arises whether the account be between merchants or others. Hancock *v.* Cook, 18 Pick. (Mass.) 30. And see, generally, PAYMENT.

57. McLellan *v.* Crofton, 6 Me. 307; Bass *v.* Bass, 6 Pick. (Mass.) 362, 8 Pick. (Mass.) 187.

58. Payne *v.* Walker, 26 Mich. 60; White *v.* Campbell, 25 Mich. 463; Whittlesey *v.* Spofford, 47 Tex. 13. And see ACCOUNTS AND ACCOUNTING, 1 Cyc. 379, 380.

59. Fox *v.* Fisk, 6 How. (Miss.) 328. And see Hammond *v.* Hale, 61 Iowa 38, 15 N. W. 585, where defendants sold out their business to one M, who assumed and agreed to pay an account owing by defendants to plaintiff, and it was held that the account became closed when assumed by M, and that payments thereon by M did not constitute items of credit which would defer the running of the statute.

60. Fox *v.* Fisk, 6 How. (Miss.) 328.

while the creditor may for certain purposes disregard the settlement and maintain his suit upon the original items, he cannot by so doing change the character of the account from that of an account stated to that of an open, current, and continuous account, for the purpose of avoiding the statute of limitations.[61] Where accounts are settled by carrying the balance forward instead of paying it in cash, they are not to be considered as open and running accounts from the beginning within the rule as to mutual accounts;[62] but the balance carried forward may form a part of a new mutual account so as to be saved from the statute by subsequent items within the statutory period.[63]

(II) *STATUTORY REQUIREMENTS AS TO WRITING AND SIGNATURE.* In some jurisdictions where it is provided by statute that a promise or acknowledgment to have the effect of reviving a debt barred by limitations must be in writing and signed by the party chargeable or his agent,[64] it has been held that in order for an account stated to remove the bar of the statute as to separate items in the account, it must be supported by some writing signed as provided, a parol settlement being insufficient.[65] It has been held otherwise, however, as to items not barred at the date of the settlement or statement of account.[66]

18. IN ACTIONS OF TORT[67] — a. General Rules. The test to determine when the

Where the account is between merchants, this is especially true if the charges are not of a mercantile character. Fox *v.* Fisk, 6 How. (Miss.) 328.

So if a presumption of payment has arisen from the lapse of twenty years after mutual dealings between merchants have ceased, a small item on the debit side not of a mercantile character and dated at a time when defendant had ceased to be a merchant, although within the twenty years, will not revive the whole account against defendant. Hancock *v.* Cook, 18 Pick. (Mass.) 30.

61. Porter *v.* Chicago, etc., R. Co., 99 Iowa 351, 68 N. W. 724.

62. Lark *v.* Cheatham, 80 Ga. 1, 5 S. E. 290; Schall *v.* Eisner, 58 Ga. 190; Belchertown *v.* Bridgman, 118 Mass. 486; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Estes *v.* Hamilton-Brown Shoe Co., 54 Mo. App. 543; Angell Lim. § 151.

Overdraft by depositor in bank.— So where an overdraft has been made by a depositor in a bank and the bank makes monthly balances of the depositor's account, carrying forward the balance each time, the bank's right of action to recover the overdraft is not saved from the statute on the principle of mutual, current accounts, at least not longer than the month next after the overdraft was made. Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181.

Errors and omissions in town treasurer's account.— The treasurer of a town, who has held the office for many consecutive years, and has accounted with the town by annual settlements, carrying forward the balance of each year's accounts into the new account, is barred by the statute of limitations from showing errors and omissions in an account rendered by him more than the statutory period before the date of the writ. Belchertown *v.* Bridgman, 118 Mass. 486. See also, generally, TOWNS.

63. Ready *v.* McDonald, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76; Schall *v.* Eisner, 58 Ga. 190; Union Bank *v.* Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Estes *v.* Hamilton-Brown Shoe Co., 54 Mo. App. 543; Angell Lim. § 151. And see Farrington *v.* Lee, 1 Mod. 268, 270, opinion of North, J.

64. See *infra*, VII, A, 9.

65. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171; Sperry *v.* Moore, 42 Mich. 353, 4 N. W. 13; Magarity *v.* Shipman, 93 Va. 64, 24 S. E. 466; Angell Lim. § 274.

In England, however, it was held that while Lord Tenterden's Act applied to a statement of an account where the items were all on one side (Jones *v.* Ryder, 1 H. & H. 256, 7 L. J. Exch. 216, 4 M. & W. 32), it did not apply to a statement of a mutual account (Ashby *v.* James, 12 L. J. Exch. 295, 11 M. & W. 542).

66. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371 [*followed* in Baird *v.* Crank, 98 Cal. 293, 33 Pac. 63; Kahn *v.* Edwards, 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141]. But see Magarity *v.* Shipman, 93 Va. 64, 24 S. E. 466.

67. In actions of deceit see *infra*, VI, B, 21, c, (II).

In actions for wrongful attachment see ATTACHMENT, 4 Cyc. 841.

In actions for malicious attachment see MALICIOUS PROSECUTION.

In actions for wrongful levy of execution see EXECUTIONS, 17 Cyc. 1577.

In actions for false imprisonment see FALSE IMPRISONMENT, 19 Cyc. 339.

In actions for libel or slander see LIBEL AND SLANDER, *ante*, p. 432.

In actions for malicious prosecution see MALICIOUS PROSECUTION.

In actions for seduction see SEDUCTION.

Recovery of damages for taking property for public use see EMINENT DOMAIN, 15 Cyc. 997 *et seq.*

Breach of duty arising out of contract see *supra*, VI, B, 15.

Negligence of attorney in performing legal services see *supra*, VI, B, 3, c.

statute of limitations begins to run against an action sounding in tort is whether the act causing the damage does or does not of itself constitute a legal injury, that is, an injury giving rise to a cause of action because it is an invasion of some right of plaintiff.[68] If the act is of itself not unlawful in this sense, and plaintiff sues to recover damages subsequently accruing from and consequent upon the act, the cause of action accrues and the statute begins to run when and only when the damages are sustained;[69] and this is true, although at the time the act is done it is apparent that injury will inevitably result.[70] But if the act of which the injury is the natural sequence is of itself a legal injury to plaintiff, a completed wrong, the cause of action accrues and the statute begins to run from the time the act is committed, be the actual damage however slight, and the statute will operate to bar a recovery not only for the present damages but for damages developing subsequently and not ascertainable at the time of the wrong done;[71] for in such a case the subsequent increase in the damages resulting gives no new cause of

68. See the following cases:

Connecticut.— Hartford County Bank *v.* Waterman, 26 Conn. 324.

Illinois.— McConnel *v.* Kibbe, 29 Ill. 483, 33 Ill. 175, 85 Am. Dec. 265.

Kansas.— Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224, opinion of Brewer, J.

New York.— Northrop *v.* Hill, 57 N. Y. 351, 15 Am. Rep. 501.

Texas.— Houston Water-Works *v.* Kennedy, 70 Tex. 233, 8 S. W. 36.

England.— Whitehouse *v.* Fellowes, 9 C. B. N. S. 901, 99 E. C. L. 901, 10 C. B. N. S. 765, 30 L. J. C. P. 305, 4 L. T. Rep. N. S. 177, 9 Wkly. Rep. 557, 100 E. C. L. 765.

69. *Alabama.*— Huntsville *v.* Ewing, 116 Ala. 576, 22 So. 984.

Connecticut.— Hartford County Bank *v.* Waterman, 26 Conn. 324.

Georgia.— Atkinson *v.* Atlanta, 81 Ga. 625, 7 S. E. 692.

Illinois.— McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

Kentucky.— Illinois Cent. R. Co. *v.* Hodge, 55 S. W. 688, 21 Ky. L. Rep. 1479.

Louisiana.— Mestier *v.* New Orleans, etc., R. Co., 16 La. Ann. 354. And see Heath *v.* Texas, etc., R. Co., 37 La. Ann. 728.

Missouri.— Howard County *v.* Chicago, etc., R. Co., 130 Mo. 652, 32 S. W. 651; Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130.

Nebraska.— Missouri Pac. R. Co. *v.* Hemingway, 63 Nebr. 610, 88 N. W. 673.

New Jersey.— Church of Holy Communion *v.* Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. 1030, 55 L. R. A. 81; Delaware, etc., Canal Co. *v.* Wright, 21 N. J. L. 469.

New York.— Ludlow *v.* Hudson River R. Co., 6 Lans. 128.

Pennsylvania.— See Cass *v.* Pennsylvania Co., 159 Pa. St. 273, 28 Atl. 161.

Texas.— Houston Water-Works *v.* Kennedy, 70 Tex. 233, 8 S. W. 36; Houston *v.* Parr, (Civ. App. 1898) 47 S. W. 393.

Washington.— Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 70 Pac. 266 (damages caused by poisonous fumes from smelter lawfully erected); Smith *v.* Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910.

West Virginia.— Henry *v.* Ohio River R. Co., 40 W. Va. 234, 242, 21 S. E. 863, in which the court said: "The action accrues when the damage is sustained by the plaintiff, not when the causes are first set in motion ultimately producing the injury as a consequence."

England.— Whitehouse *v.* Fellowes, 9 C. B. N. S. 901, 99 E. C. L. 901, 10 C. B. N. S. 765, 30 L. J. C. P. 305, 4 L. T. Rep. N. S. 177, 9 Wkly. Rep. 557, 100 E. C. L. 765; Gillon *v.* Boddington, 1 C. & P. 541, R. & M. 161, 12 E. C. L. 311; Backhouse *v.* Benomi, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 9 Wkly. Rep. 769, 11 Eng. Reprint 825 [*affirming* E. B. & E. 646, 96 E. C. L. 646 (*reversing* E. B. & E. 622, 96 E. C. L. 622)]; Roberts *v.* Read, 16 East 215, 14 Rev. Rep. 335 [*explained* in Betts *v.* Norris, 21 Me. 314, 8 Am. Dec. 264].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 299, 303 *et seq.*

Illustrations.— If an action be wrongfully brought in the name of one without his knowledge or consent, and he has to pay the costs upon its dismission, his right of action for the tort against the person who wrongfully sued in his name accrues, not from the commencement of the wrongful action, but only from the time when he is compelled to pay the money on account of it; and consequently it is held that the statute of limitations will begin to run only from the time when he is compelled to pay the money. Miller *v.* Eskridge, 23 N. C. 147. Plaintiff in 1860 assigned to defendant, as collateral security for a loan, a judgment against one J, the lien of which expired in 1863. Defendant neglected to revive the lien and J sold his land in 1866, so that the lien was lost; J being solvent at the time of the sale, but afterward dying insolvent. It was held that the cause of action accrued and the statute begun to run at the date of the sale, not at the date of the expiration of the lien. Hanna *v.* Holton, 78 Pa. St. 334, 21 Am. Rep. 20.

70. Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 70 Pac. 266.

71. *California.*— See Raynor *v.* Mintzer, 72 Cal. 585, 18 Pac. 82.

Connecticut.— Hartford County Bank *v.* Waterman, 26 Conn. 324.

action.[72] Nor does plaintiff's ignorance of the tort or injury, at least if there is no fraudulent concealment by defendant, postpone the running of the statute until the tort or injury is discovered.[73] Where the doing of an act is attended immediately by resulting actual damage, the statute begins to run at once.[74]

b. Continuing or Repeated Injury — (i) *General Rules.*[75] Cases frequently arise where damages resulting from an act are continuing or recurring so that they cannot presently be ascertained or estimated so as to be presently recoverable in a single action. In such cases separate and successive actions may be brought to recover the damages as they accrue, and a judgment rendered in one of such actions for damages accrued up to the time when suit was brought is no bar to another action to recover damages accruing after the judgment.[76] To cases of this character the statute of limitations does not have the same rigid application as to cases where all the damages may be recovered in a single action,[77] and the two

Iowa.— See Hunter *v.* Burlington, etc., R. Co., 84 Iowa 605, 51 N. W. 64.

Kansas.— Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

Michigan.— National Copper Co. *v.* Minnesota Min. Co., 57 Mich. 83, 23 N. W. 781, 58 Am. Rep. 333.

Missouri.— James *v.* Kansas City, 83 Mo. 567.

New York.— Northrop *v.* Hill, 57 N. Y. 352, 15 Am. Rep. 501 [*affirming* 61 Barb. 136].

Pennsylvania.— See Guarantee Trust, etc., Co. *v.* Farmers', etc., Nat. Bank, 202 Pa. St. 94, 51 Atl. 765.

Texas.— Houston Water-Works *v.* Kennedy, 70 Tex. 233, 8 S. W. 36; Kruegel *v.* Trinity Cemetery Co., (Civ. App. 1901) 63 S. W. 652 (action against a cemetery company for burying strangers in plaintiff's plot); Dallas *v.* Ross, 2 Tex. App. Civ. Cas. § 279. *Compare* House *v.* Phelan, 83 Tex. 595, 19 S. W. 140, where a chattel attached to and used in connection with plaintiff's homestead was wrongfully levied on and sold to satisfy delinquent taxes on personal property, and was left in plaintiffs' possession until it should be called for by the purchasers, and it was held that no right of action against which the statute of limitations would run accrued until the removal of the chattel by the purchasers.

Wisconsin.— See Grunert *v.* Brown, 119 Wis. 126, 95 N. W. 959.

England.— Wordsworth *v.* Harley, 1 B. & Ad. 391, 9 L. J. M. C. O. S. 50, 20 E. C. L. 531.

Canada.— Lavoie *v.* Beaudoin, 14 Quebec Super. Ct. 252.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 299, 303 *et seq.*

But under the Louisiana code prescription runs from the time the damage is sustained. Hotard *v.* Texas, etc., R. Co., 36 La. Ann. 450 (damage caused by a crevasse resulting from the excavation and removal of a levee, the crevasse occurring more than a year after the levee was removed); Mestier *v.* New Orleans, etc., R. Co., 16 La. Ann. 354. And see Griffin *v.* New Orleans Drainage Commission, 110 La. 840, 34 So. 799; Crow *v.* Manning, 45 La. Ann. 1221, 14 So. 122, wrongful seizure of property.

Wrongfully inducing bailee to deliver to stranger.— Where a railway company held goods in its warehouse for a consignee, and was induced by wrongful acts of the consignor to deliver them to one not the owner, limitations began to run on the cause of action by the company against the consignor at the time the latter's tortious act was committed, and not from the time when the company was compelled to pay to the consignee the value of the goods. Nashville, etc., R. Co. *v.* Dale, 68 Kan. 108, 74 Pac. 596.

Destruction of equitable lien on personalty. — As against a cause of action to recover damages for defendant's destruction of plaintiff's equitable lien on personal property, the statute runs from the date the lien was destroyed. Thus where plaintiff had an equitable lien on negotiable bonds and by a sale of the bonds the lien was destroyed, it was held that the statute applicable to an action to recover damages for an injury to property ran from the date of the sale, the lien being deemed personal property. Hovey *v.* Elliot, 53 N. Y. Super. Ct. 331.

72. Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

73. Guarantee Trust, etc., Co. *v.* Farmers', etc., Nat. Bank, 202 Pa. St. 94, 51 Atl. 765; Houston Water-Works *v.* Kennedy, 70 Tex. 233, 8 S. W. 36. And see *infra*, VI, D, 2.

74. Griffin *v.* New Orleans Drainage Commission, 110 La. 840, 34 So. 799; Guarantee Trust, etc., Deposit Co. *v.* Farmers', etc., Nat. Bank, 202 Pa. St. 94, 51 Atl. 765; Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484, a trespass.

Application of rule.— Thus where the action is for maliciously destroying property by fire, the statute runs from the time of the loss, and is not postponed until plaintiff discovers the perpetrator of the wrong or obtains evidence to establish that it was defendant. Gale *v.* McDaniel, 72 Cal. 334, 13 Pac. 871; Brown *v.* Clingman, 47 La. Ann. 25, 16 So. 564.

75. **Former adjudication** in cases of continuing or repeated injury see JUDGMENTS.

76. See JUDGMENTS, 23 Cyc. 623. See also specific titles, such as NUISANCES; TRESPASS.

77. See the following cases where the question is discussed at length: Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792;

main principles applying are as follows: Where continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, such as a continuing nuisance or trespass, there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained; and therefore so long as the cause of the injury exists and the damages continue to occur plaintiff is not barred of a recovery for such damages as have accrued within the statutory period beyond the action,[78] although a cause of action based solely on the original wrong may be barred;[79] but the recovery is limited to such damages as accrue within the

Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863; Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350.

78. *Connecticut.*— Knapp, etc., Mfg. Co. *v.* New York, etc., R. Co., 76 Conn. 311, 56 Atl. 512, 100 Am. St. Rep. 994, construction and temporary operation of railroad upon plaintiff's premises.

Georgia.— Monroe *v.* McCranie, 117 Ga. 890, 45 S. E. 246 (entering plaintiff's land and boxing his pine trees for turpentine and working the same for years); Smith *v.* Atlanta, 75 Ga. 110.

Illinois.— McConnel *v.* Kibbe, 29 Ill. 483, 33 Ill. 175, 85 Am. Dec. 265.

Iowa.— Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381. See also Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231, nuisance created by obstructions in street.

Kansas.— Western Union Tel. Co. *v.* Moyle, 51 Kan. 203, 32 Pac. 895 [*distinguishing* Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224], where telegraph wires were attached to plaintiff's building without his consent, and subsequently other wires were added which caused the damage sued for.

Louisiana.— See Drews *v.* Williams, [1898] 23 So. 897, 990, where the court said: "A continuing tort suspends prescription."

Maine.— Jones *v.* Grand Trunk R. Co., 74 Me. 356; Perkins *v.* Maine Cent. R. Co., 72 Me. 95, building and maintaining a railroad on plaintiff's land.

Massachusetts.— New Salem *v.* Eagle Mill Co., 138 Mass. 8 (action for damages sustained from continuance of a public nuisance); Prentiss *v.* Wood, 132 Mass. 486.

Missouri.— McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

New York.— Reed *v.* State, 108 N. Y. 407, 15 N. E. 735 [*followed* in Folts *v.* State, 118 N. Y. 406, 23 N. E. 567]; Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Baldwin *v.* Calkins, 10 Wend. 167.

Pennsylvania.— Barclay *v.* Grove, 9 Pa. Cas. 153, 11 Atl. 888, action for not removing machinery from plaintiff's premises after notice, the presence of the machinery having interfered with the use and rental of the premises.

Washington.— Doran *v.* Seattle, 24 Wash. 182, 64 Pac. 230, 85 Am. St. Rep. 948, 54 L. R. A. 532.

England.— Wilkes *v.* Hungerford Market Co., 2 Bing. N. Cas. 281, 1 Hodges 281, 5 L. J. C. P. 23, 2 Scott 446, 29 E. C. L. 537.

Canada.— Connors *v.* McLaggan, 4 N. Brunsw. 446.

See 33 Cent. Dig. tit. "Limitation of Actions," § 304.

Reason of rule.—It has been said that "the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury." Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224, 231, per Brewer, J. And see Kansas City *v.* Frohwerk, 10 Kan. App. 120, 62 Pac. 432.

79. *Connecticut.*— Knapp, etc., Mfg. Co. *v.* New York, etc., R. Co., 76 Conn. 311, 56 Atl. 512, 100 Am. St. Rep. 994.

Georgia.— Monroe *v.* McCranie, 117 Ga. 890, 45 S. E. 246.

Kansas.— Western Union Tel. Co. *v.* Moyle, 51 Kan. 203, 32 Pac. 895.

Massachusetts.— New Salem *v.* Eagle Mill Co., 138 Mass. 8; Prentiss *v.* Wood, 132 Mass. 486.

Missouri.— McGowan *v.* Missouri Pac. R. Co., 23 Mo. App. 203.

New York.— Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264.

See 33 Cent. Dig. tit. "Limitation of Actions," § 304.

Compare Krueger *v.* Grand Rapids, etc., R. Co., 51 Mich. 142, 16 N. W. 313, where it appeared that plaintiff had given his consent to the alleged wrongful act, the maintenance and use of railway tracks in the street, which was more than the statutory period before the action, and it was held that plaintiff could not after such a lapse of time show that his consent was obtained by fraud.

If the gravamen of the action is the original wrong, as where it is sought merely to recover damages resulting from the commission of that act or the creation of the condition rather than from the continuance, the statute runs from the time of the wrong done. McConnel *v.* Kibbe, 29 Ill. 483, 33 Ill. 175, 85 Am. Dec. 265; Doyle *v.* Sycamore, 81 Ill. App. 589. And see Griffin *v.* New Orleans Drainage Commission, 110 La. 840, 34 So. 799.

Right acquired by prescription.— An action cannot be maintained after the person maintaining a nuisance has acquired a prescriptive right to do so. James *v.* Kansas City, 83 Mo. 567; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365. *Compare* Chicago, etc.,

statutory period before the action.[80] Where continuing or repeated injury results to plaintiff from an act not of itself or in its inception unlawful or injurious to him, as in the case of a nuisance caused by a structure lawfully erected, no cause of action arises at the doing of the act or the erection of the structure, but aside from this the law is substantially the same as in the class of cases just mentioned; each recurrence of damage gives rise to a new and separate cause of action and the statute runs against each as it arises, so that a recovery may be had at any time during the continuance of the injury, for such damages as have accrued during the statutory period before the action unless sufficient time has elapsed to give defendant a prescriptive right to continue the cause of the injury.[81]

(II) *QUALIFICATIONS*—(A) *In General.* It has been held that successive actions for damages caused by nuisance or other tort can be maintained only where defendant is continually in fault,[82] and therefore that he cannot be charged as a continuing wrong-doer unless he has the right and is under the duty to terminate the cause of the injury;[83] but there is authority to the contrary.[84] It is well settled, however, that where the case is such that all damages, both past and future, can be presently estimated and recovered in one action, successive actions cannot be brought for recurring or continuing damages, and that the statute runs

R. Co. *v.* Willi, 53 Ill. App. 603. And see, generally, EASEMENTS, 14 Cyc. 1134; NUISANCES.

80. *Georgia.*—Monroe *v.* McCranie, 117 Ga. 890, 45 S. E. 246.

Illinois.— McConnel *v.* Kibbe, 29 Ill. 483, 33 Ill. 175, 85 Am. Dec. 265.

Maine.— Jones *v.* Grand Trunk R. Co., 74 Me. 356; Perkins *v.* Maine Cent. R. Co., 72 Me. 95.

New York.— Reed *v.* State, 108 N. Y. 407, 15 N. E. 735; Silsby Mfg. Co. *v.* State, 104 N. Y. 562, 11 N. E. 264; Baldwin *v.* Calkins, 10 Wend. 167.

Pennsylvania.— Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484.

England.— Wilkes *v.* Hungerford Market Co., 2 Bing. N. Cas. 281, 1 Hodges 281, 5 L. J. C. P. 23, 2 Scott 446, 29 E. C. L. 537.

See 33 Cent. Dig. tit. "Limitation of Actions," § 304.

But *compare* Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641.

81. *Alabama.*— Savannah, etc., R. Co. *v.* Buford, 106 Ala. 303, 17 So. 395.

Georgia.— Southern R. Co. *v.* Morris, 119 Ga. 234, 46 S. E. 85.

Illinois.— Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251.

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

Louisiana.— Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641.

New Jersey.— Holy Communion Church *v.* Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. 1030, 55 L. R. A. 81; Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Delaware, etc., Canal Co. *v.* Wright, 21 N. J. L. 469.

New York.— Wright *v.* Syracuse, etc., R. Co., 49 Hun 445, 3 N. Y. Suppl. 480 [*affirmed* in 124 N. Y. 668, 27 N. E. 854]. And see the New York cases cited in the preceding note.

Ohio.— Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88.

Texas.— Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350 [*followed* in Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061].

Washington.— Sterrett *v.* Northport Min., etc., Co., 30 Wash. 164, 70 Pac. 266, damages caused to plaintiff's orchard and crops by poisonous fumes from a smelter.

West Virginia.— Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

England.— Wilkes *v.* Hungerford Market Co., 2 Bing. N. Cas. 281, 1 Hodges 281, 5 L. J. C. P. 23, 2 Scott 446, 29 E. C. L. 537 (damage caused to a tradesman by the wrongful continuance of an obstruction originally lawful); Whitehouse *v.* Fellowes, 9 C. B. N. S. 901, 99 E. C. L. 901, 10 C. B. N. S. 765, 30 L. J. C. P. 305, 4 L. T. Rep. N. S. 177, 9 Wkly. Rep. 557, 100 E. C. L. 765.

See 33 Cent. Dig. tit. "Limitation of Actions," § 304 *et seq.*

82. Powers *v.* Council Bluffs, 45 Iowa 652, 658, 24 Am. Rep. 792, where the court said: "It may be a fault of commission or omission, but if the latter it must be something else than an omission to repair or arrest an injury resulting from negligence or unskillfulness, unless the remedy is to be applied upon the wrong-doer's premises."

83. Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

Thus where one enters the land of another and digs a trench thereon, limitation on the cause of action for injuries resulting commences to run at once; and the fact that he does not reënter and fill the ditch does not make him a continuous wrong-doer and hence liable for repeated actions as long as the ditch remains unfilled, for he has no right to reënter. Kansas Pac. R. Co. *v.* Mihlman, 17 Kan. 224.

84. Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88 [*following* Holmes *v.* Wilson, 10 A. & E. 503, 37 E. C. L. 273; Thompson *v.* Gibson, 9 Dowl. P. C. 717, 10 L. J. Exch. 330, 7 M. & W. 456].

from the time the original cause of action accrues, which may be the time the act causing the damage is committed or the time when consequential damage is sustained, according to whether the act is or is not an invasion of plaintiff's legal rights.[85]

(B) *Permanency of Cause of Injury.* In a number of cases the rule just stated requiring all the damages to be recovered in a single action has been made to depend upon the permanency of the injury, the rule applying where permanent damage results from a cause which is of a permanent character, and in such cases the resulting damages can be presently ascertained and may and must be recovered in a single action.[86] In regard to nuisances the law has been declared as follows: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated;" and thus there is but one cause of action which accrues and sets the statute in motion either at the time the nuisance is created or at the time when consequential damage results, according to whether the creation of the nuisance is or is not an invasion of plaintiff's legal rights.[87] This rule has, however, met with criticism,[88] and in some states has either not been recognized or has been repudiated,[89] and even in states where

85. *Arkansas.*— St. Louis, etc., R. Co. *v.* Anderson, 62 Ark. 360, 35 S. W. 791 [*following* St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804].

Georgia.— Atkinson *v.* Atlanta, 81 Ga. 625, 7 S. E. 692 [*distinguishing* Smith *v.* Atlanta, 75 Ga. 110].

Illinois.— Chicago, etc., R. Co. *v.* McAuley, 121 Ill. 160, 11 N. E. 67; Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341.

Indiana.— See Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

Iowa.— Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

Missouri.— James *v.* Kansas City, 83 Mo. 567.

New York.— Hogan *v.* Wolf, 10 N. Y. Suppl. 896.

North Carolina.— Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

Canada.— Kerr *v.* Atlantic, etc., R. Co., 25 Can. Sup. Ct. 197.

See 33 Cent. Dig. tit. "Limitation of Actions," § 304 *et seq.*

And see the cases cited in the following notes.

86. *Arkansas.*— St. Louis, etc., R. Co. *v.* Anderson, 62 Ark. 360, 35 S. W. 791.

Illinois.— Chicago, etc., R. Co. *v.* McAuley, 121 Ill. 160, 11 N. E. 67 (construction and operation of a railroad); Chicago, etc., R. Co. *v.* Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. Rep. 341 (construction and operation of a railroad in a public street).

Indiana.— Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Porter *v.* Midland R. Co., 125 Ind. 476, 25 N. E. 556, construction of railroad in a public street.

Iowa.— Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792.

Missouri.— James *v.* Kansas City, 83 Mo. 567.

Texas.— Lyles *v.* Texas, etc., R. Co., 73 Tex. 95, 11 S. W. 782.

See 33 Cent. Dig. tit. "Limitation of Actions," § 303 *et seq.* See, generally, JUDGMENTS, 23 Cyc. 1188, text and note 46; and such specific titles as NUISANCES; RAILROADS; TRESPASS; WATERS.

87. *Alabama.*— See Whaley *v.* Wilson, 112 Ala. 627, 20 So. 922.

Arkansas.— St. Louis, etc., R. Co. *v.* Anderson, 62 Ark. 360, 35 S. W. 791 [*following* St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804].

Colorado.— Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582.

Indiana.— See Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800.

Iowa.— Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792 [*quoting* from Troy *v.* Cheshire R. Co., 23 N. H. 83, 102, 55 Am. Dec. 177], negligent destruction of a ditch along a street running by plaintiff's property.

Missouri.— James *v.* Kansas City, 83 Mo. 567.

See 33 Cent. Dig. tit. "Limitation of Actions," § 303 *et seq.*

88. See Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381; and the cases in the following notes.

89. Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641 (the running and operation of a railroad in front of plaintiff's premises); Wells *v.* New Haven, etc., Co., 151 Mass. 46, 49, 23 N. E. 724, 21 Am. Rep. 423 [*followed* in Aldworth *v.* Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608] (in which the court said: "If the defendant's act was wrongful at the outset, as the jury have found, we see no way in which the continuance of its structure in its wrongful form could become rightful, as against the plaintiff, unless by release or grant, by

it was at one time strictly enforced the courts have declined to extend it so as to include structures not ordinarily regarded as permanent in location or character.[90] Moreover in applying the rule as to permanent nuisances a distinction must be made between cases where a structure of itself constitutes a nuisance or an actionable wrong, and cases where it becomes such only in connection with other causes operating from time to time. In the latter case the erection and maintenance of a structure constitutes no invasion of plaintiff's rights and while the structure may be permanent the nuisance is not.[91] Hence where the structure is permanent but the nuisance is transient and recurrent, depending upon accidents and contingencies, successive actions may be brought for each injury as it occurs and the statute will run in each case only from the time of the injury.[92] While it has been said that there is no fixed rule by which to determine whether a given structure is permanent,[93] and the difficulty of determining the question is recognized,[94] permanency of a structure is not to be determined from the single consideration of its enduring character, or from the fact that if not changed by the hand of man it will probably continue forever. To be permanent in a legal sense the structure must not only be enduring, but must be such that its continuance is lawful; because if not lawful it may be removed or abated and therefore cannot be deemed permanent.[95] Therefore a nuisance resulting from a cause which may legally be abated is not regarded as a permanent source of injury but as a continuing nuisance within the rules by which successive actions may be brought for the resulting damages as they from time to time occur, and by which a recovery may be had for all such damages as have accrued within the statutory period before the action.[96]

c. Removing Lateral and Subjacent Support.[97] Where defendant by excava-

prescription, or by the payment of damages. If originally wrongful, it has not become rightful merely by being built in an enduring manner. That which was a nuisance at first does not lose its character as such by being continued for six years, whatever effect the lapse of time might have upon equitable remedies for its removal"); Doran *v.* Seattle, 24 Wash. 182, 64 Pac. 230, 85 Am. St. Rep. 948, 54 L. R. A. 532. See also NUISANCES; RAILROADS; TRESPASS; WATERS.

90. Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381, in which frame buildings unlawfully erected in a public street were held not to constitute a permanent nuisance so as to fall within the principle of the text.

91. Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863. See, generally, NUISANCES.

92. Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994; Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061; Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427 [*distinguishing* Houston Water-Works *v.* Kennedy, 70 Tex. 233, 15 S. W. 484, 26 Am. St. Rep. 350, 8 S. W. 36]; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863. And see Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800; Howard County *v.* Chicago, etc., R. Co., 130 Mo. 652, 32 S. W. 651; Wood Lim. § 180, where the decision in Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792, is criticized on this ground.

93. Powers *v.* Council Bluffs, 45 Iowa 652, 656, 24 Am. Rep. 792. For particular instances, see MUNICIPAL CORPORATIONS; NUISANCES; RAILROADS; STREETS AND HIGHWAYS.

94. See Pettit *v.* Greene County Grand Junction, 119 Iowa 352, 93 N. W. 381; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

95. Baker *v.* Leka, 48 Ill. App. 353. And see Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, 15 N. E. 279, 5 Am. St. Rep. 532; Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589.

96. Southern R. Co. *v.* Morris, 119 Ga. 234, 46 S. E. 85; Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994; Baker *v.* Leka, 48 Ill. App. 353; Pettit *v.* Green County Grand Junction, 119 Iowa 352, 93 N. W. 381, unauthorized buildings in a public street. See, generally, NUISANCES. See also RAILROADS. *Compare* Whaley *v.* Wilson, 112 Ala. 627, 20 So. 922.

Action by life-tenant for improper grading of street.—An action by a life-tenant to recover damages for injury to the use or rental value of the property from the improper grading of a street is not barred by limitations, although more than the statutory period has elapsed since the street was completed, as the injury is not of that character where a single recovery may be had for the whole injury, the recovery sought being merely for the injury to the use of the property, and not for the injury to the fee; and as the injury is not necessarily of a permanent character, as it may be remedied by a regrading of the street, or by the extension of the sewerage system of the city along the street. Louisville *v.* Coleburne, 108 Ky. 420, 56 S. W. 681.

97. **Excavations due to mining** see MINES AND MINERALS.

tions made on his own land deprives plaintiff's adjoining land or buildings of lateral support whereby damage afterward results from the settling or caving in of plaintiff's land, the cause of action accrues and the statute begins to run at the time the damage occurs, not at the time the support is removed.[98] In such cases if continuous or repeated subsidence or caving-in of plaintiff's land occurs, successive actions may be brought for the damage thus occasioned as and when such damage occurs, so that a recovery may be had for such damages as have accrued within the statutory period before the action, although a cause of action to recover the damages first accrued may be barred.[99] Where the removal of the lateral support immediately results in actual damage, the statute begins to run at once, although the full extent of the damage is not then developed or ascertainable;[1] and even if subsequent consequential damage may be recoverable on the theory of a continuing nuisance or trespass,[2] the recovery will be limited to the damages accruing within the statutory period before the commencement of the action.[3] The removal of the subjacent support[4] of an upper floor of a building is of itself an infringement of the rights of the owner of that floor, and is actionable without showing special damage;[5] hence as against a cause of action based solely on the original wrong, the statute runs from the time of the removal of the support.[6] But a recovery of nominal damages for the infringement of such right is no bar to an action for actual damages subsequently occurring; successive actions for resulting actual damages may be brought as the damages are from time to time sustained, so that a recovery may be had for such damages as have accrued within the statutory period before the action, although the original cause of action is barred, but not for any damages sustained prior to that period.[7]

d. Severing and Removing Property From the Freehold. Cutting and carrying away timber may be deemed a continuing trespass, and in such a case the statute begins to run from the time the removal of the timber is completed.[8] Where property is severed from the freehold but remains on the premises for some time before being removed, an action of trespass for the removal is not barred if brought within the statutory period after the removal takes place, although more than the statutory period has elapsed since the severance.[9]

e. Obstructing or Diverting Waters and Watercourses[10] — (i) *GENERAL RULES.* Where obstructions erected by defendant, or other acts or omissions by him, not of themselves unlawful as to plaintiff, cause water to overflow plaintiff's land, a cause of action accrues and the statute begins to run when plaintiff sustains

98. Ludlow *v.* Hudson River R. Co., 6 Lans. (N. Y.) 128; Smith *v.* Seattle, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. Rep. 910; Crumbie *v.* Wallsend Local Bd., [1891] 1 Q. B. 503, 55 J. P. 421, 60 L. J. Q. B. 392, 64 L. T. Rep. N. S. 490 [*following* Darley Main Collier Co. *v.* Mitchell, 11 App. Cas. 127, 51 J. P. 148, 55 L. J. Q. B. 529, 54 L. T. Rep. N. S. 882]; Roberts *v.* Read, 16 East 215, 14 Rev. Rep. 335; Backhouse *v.* Bonomi, 9 H. L. Cas. 503, 7 Jur. N. S. 809, 34 L. J. Q. B. 181, 4 L. T. Rep. N. S. 754, 9 Wkly Rep. 769, 11 Eng. Reprint 825 [*affirming* E. B. & E. 646, 96 E. C. L. 646 (*reversing* E. B. & E. 622, 96 E. C. L. 622)]. See also Holy Communion Church *v.* Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. 1030, where excavations made by a railroad company disturbed the foundations of an adjacent church, and through the company's failure to provide a sufficient retaining wall the church was damaged by vibrations caused by the running of the company's trains.

99. Crumbie *v.* Wallsend Local Bd., [1891] 1 Q. B. 503, 55 J. P. 421, 60 L. J. Q. B. 392, 64 L. T. Rep. N. S. 490 [*following* Darley Main Collier Co. *v.* Mitchell, 11 App. Cas. 127, 51 J. P. 148, 55 L. J. Q. B. 529, 54 L. T. Rep. N. S. 882]. See also Holy Communion Church *v.* Paterson Extension R. Co., 66 N. J. L. 218, 49 Atl. 1030.

1. Griffin *v.* New Orleans Drainage Commission, 110 La. 839, 34 So. 799.

2. For the general principles see *supra*, VI, B, 18, b, (I).

3. Griffin *v.* New Orleans Drainage Commission, 110 La. 839, 34 So. 799.

4. Removal of subjacent support in mining see MINES AND MINERALS.

5. McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265. See, generally, ADJOINING LANDOWNERS, 1 Cyc. 790.

6. McConnel *v.* Kibbe, 29 Ill. 483, 33 Ill. 175, 85 Am. Dec. 265.

7. McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265.

8. Sullivan *v.* Davis, 29 Kan. 28.

9. Morgan *v.* Varick, 8 Wend. (N. Y.) 587.

10. Rights of action generally see WATERS. Overflow caused by mill-dams see MILLS.

damage from the overflow, not when the obstructions are erected or the other acts or omissions occur;[11] and this is true, although the cause of the overflow is an

11. *Alabama.*— Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984 (negligent cutting and maintenance of a ditch); Savannah, etc., R. Co. *v.* Buford, 106 Ala. 303, 17 So. 395 (where defendant railroad company in constructing an embankment stopped up a ditch which drained plaintiff's land, in consequence whereof the land was afterward flooded with surface water); Polly *v.* McCall, 37 Ala. 20.

Arkansas.— St. Louis, etc., R. Co. *v.* Stephens, (1904) 78 S. W. 766; St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515 [*following* St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804], obstructions caused by railway embankment. And see Little Rock, etc., R. Co. *v.* Chapman, 39 Ark. 463, 43 Am. Rep. 280, where a former obstruction had been removed but another was made, and it was held that the statute ran only from the time of injury sustained by the completion of the last obstruction.

Colorado.— Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582, gradual percolation of water from a ditch.

Georgia.— Athens Mfg. Co. *v.* Rucker, 80 Ga. 291, 4 S. E. 885, where the overflow was caused by increasing the height of a dam within the statutory period before the action, it being held immaterial that the dam had existed for twenty years, as it had caused no damaging overflow prior to the increase in its height.

Indiana.— Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. 233 (construction of embankment with insufficient culvert); Lebanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844 (where plaintiff alleged that defendant constructed a drain barely sufficient to carry off the waters conducted to it, and that defendant afterward constructed lateral drains which emptied into the main drain and thereby caused the waters to overflow plaintiff's land, it being held that the statute was to be computed from the time of the construction of the lateral drains.

Iowa.— Sullons *v.* Chicago, etc., R. Co., 74 Iowa 659, 38 N. W. 545, 7 Am. St. Rep. 501 (obstruction of stream by insufficient culvert); Miller *v.* Keokuk, etc., R. Co., 63 Iowa 680, 16 N. W. 567 (overflow from a ditch dug by defendant); Van Orsdol *v.* Burlington, etc., R. Co., 56 Iowa 470, 9 N. W. 379.

Kansas.— Union Trust Co. *v.* Cuppy, 26 Kan. 75 (insufficient culvert constructed by railroad company over a watercourse); Kansas City *v.* Frohwerk, 10 Kan. App. 120, 62 Pac. 432 (improper paving and guttering of a city street).

Kentucky.— Finley *v.* Williamsburg, 71 S. W. 502, 24 Ky. L. Rep. 1336.

Minnesota.— Hempstead *v.* Cargill, 46 Minn. 118, 48 N. W. 558; Thornton *v.* Turner, 11 Minn. 336, both involving overflow caused by a dam.

Missouri.— Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365.

Nebraska.— Chicago, etc., R. Co. *v.* Emmert, 53 Nebr. 237, 73 N. W. 540, 68 Am. St. Rep. 602 [*following* Fremont, etc., R. Co. *v.* Harlin, 50 Nebr. 698, 70 N. W. 263, 61 Am. St. Rep. 518, 36 L. R. A. 417], negligent construction of railway embankment, no culverts being made to carry off the flood waters of a river.

North Carolina.— Hocutt *v.* Wilmington, etc., R. Co., 124 N. C. 214, 32 S. E. 681, overflow caused by digging a ditch.

Ohio.— Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88, diversion of watercourse.

Texas.— Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061 (overflow caused by construction of a railway embankment without the necessary culverts required by statute); Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350 (surface water diverted from its natural course by the construction of a railroad); St. Louis, Southwestern R. Co. *v.* Beck, (Civ. App. 1904) 80 S. W. 538; Houston *v.* Houston, etc., R. Co., 26 Tex. Civ. App. 228, 63 S. W. 1056 (where a city paved its streets, and made changes in its sewers and drainage ditches, so that the flow of surface water through a certain culvert was increased beyond the capacity of the culvert, and overflowed plaintiff's property); Houston *v.* Parr, (Civ. App. 1898) 47 S. W. 393 (construction of drain or gutter by city); Bonner *v.* Wirth, 5 Tex. Civ. App. 560, 24 S. W. 306.

England.— Whitehouse *v.* Fellowes, 10 C. B. N. S. 765, 30 L. J. C. P. 305, 4 L. T. Rep. N. S. 177, 9 Wkly. Rep. 557, 100 E. C. L. 765.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 304, 305.

Compare Baker *v.* Leka, 48 Ill. App. 353.

Negligent construction of railroad bridge.— Where a railroad bridge is so negligently constructed across a watercourse as to form an unlawful obstruction and become a nuisance by causing an overflow, no right of action accrues to a landowner until he suffers actual injury from the overflow due to the obstruction, and until that time the statute does not begin to run against him. Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130; Omaha, etc., R. Co. *v.* Brown, 29 Nebr. 492, 46 N. W. 39 [*following* Omaha, etc., R. Co. *v.* Standen, 22 Nebr. 343, 35 N. W. 183]. And see Van Orsdol *v.* Burlington, etc., R. Co., 56 Iowa 470, 9 N. W. 379; Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708.

Injury to bridge by deflection of current.— Where obstructions placed in a stream caused the current to be deflected so as to injure a bridge, it was held that the statute did not begin to run until actual damage to the bridge occurred. Howard County *v.* Chicago,

obstruction of gradual growth not causing damage until the lapse of the statutory period after it first began.[12] But when the obstructions constitute of themselves some invasion of plaintiff's rights the cause of action accrues and the statute begins to run at the time when the obstruction is erected or completed.[13] The completion of the obstruction and the resulting damage may of course be practically contemporaneous and thus combine to fix the time when the statute begins to run,[14] irrespective of whether the erection of the obstruction is of itself an actionable wrong or not.

(II) *Repeated or Continuing Overflows and Diversions* — (A) *In General.* In accordance with the principles generally applicable to continuing nuisances and the like, previously discussed,[15] the law is well settled that where the obstructions or other acts of defendant are such as to cause repeated or varying overflows, as in case of rainfall or freshet, successive actions may be brought for the damages sustained from each overflow, and the statute will run against each separate cause of action from the time it accrues, so that as long as the overflows are repeated a recovery may be had for all damages occurring during the statutory period before the commencement of the action, although a recovery for damages previously accrued may be barred.[16] And the same rule has been applied

etc., R. Co., 130 Mo. 652, 32 S. W. 651. See, generally, Bridges, 5 Cyc. 415.

Unhealthy condition caused by overflow.— The rule of the text applies where the overflow puts the premises in an unhealthy condition. Missouri, etc., R. Co. *v.* Graham, 12 Tex. Civ. App. 54, 33 S. W. 576; Gulf, etc., R. Co. *v.* Goldman, 8 Tex. Civ. App. 257, 28 S. W. 267; Dallas *v.* Young, (Tex. Civ. App. 1894) 28 S. W. 1036.

12. Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130, where the overflow was caused by the negligent construction of a railroad bridge over a stream, and by defendant's neglect in allowing the channel finally to become choked by driftwood, etc. See also Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582; Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251. *Compare* Bird v. Hannibal, etc., R. Co., 30 Mo. App. 365.

13. St. Louis, etc., R. Co. *v.* Anderson, 62 Ark. 360, 35 S. W. 791; Baker *v.* Leka, 48 Ill. App. 350; Williams *v.* Mills County, 71 Iowa 367, 32 N. W. 444; Stout *v.* Kindt, 24 Pa. St. 449. See also Wells *v.* New Haven, etc., Co., 151 Mass. 46, 23 N. E. 724, 21 Am. St. Rep. 423.

14. Little Rock, etc., R. Co. *v.* Chapman, 39 Ark. 463, 43 Am. Rep. 280; St. Louis, etc., R. Co. *v.* Morris, 35 Ark. 622. And see Missouri, etc., R. Co. *v.* Graham, 12 Tex. Civ. App. 54, 33 S. W. 576.

15. See *supra*, VI, B, 18, b, (I).

16. *Arkansas.*— St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804, obstruction caused by road-bed of railway.

Illinois.— Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251; Chicago, etc., R. Co. *v.* Willi, 53 Ill. App. 603, failure of railroad to make a sufficient culvert under its road-bed.

Iowa.— Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473 [*distinguishing* Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792].

Kansas.— Union Trust Co. *v.* Cuppy, 26 Kan. 754, insufficient culvert constructed by railroad company over a watercourse.

Kentucky.— Finley *v.* Williamsburg, 71 S. W. 502, 24 Ky. L. Rep. 1336.

Massachusetts.— Wells *v.* New Haven, etc., Co., 151 Mass. 46, 23 N. E. 724, 21 Am. St. Rep. 423, diversion of watercourse and surface waters into a culvert whereby they were discharged upon plaintiff's land.

Missouri.— Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414, negligent construction of railroad bridge. *Compare* Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365.

New Jersey.— Delaware, etc., Canal Co. *v.* Lee, 22 N. J. L. 243; Delaware, etc., Canal Co. *v.* Wright, 21 N. J. L. 469, both involving overflows caused by insufficient culverts under a canal.

New York.— Reed *v.* State, 108 N. Y. 407, 15 N. E. 735 [*followed* in Folts *v.* State, 118 N. Y. 406, 23 N. E. 567] (damage caused by overflow from reservoir negligently constructed by the state, the court also holding that the injury was not permanent); Wright *v.* Syracuse, etc., R. Co., 49 Hun 445, 3 N. Y. Suppl. 480 [*affirmed* in 124 N. Y. 668, 27 N. E. 854] (diversion of watercourse causing overflow on plaintiff's land); Baldwin *v.* Calkins, 10 Wend. 167.

Ohio.— Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88, diversion of watercourse.

Pennsylvania.— Stout *v.* Kindt, 24 Pa. St. 449, diversion of surface waters.

West Virginia.— Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 304, 305. See also Canals, 6 Cyc. 275 note 44.

Compare Buntin *v.* Chicago, etc., R. Co., 41 Fed. 744.

Right to maintain successive actions see, generally, Nuisances; Waters.

Increase or other alteration of obstruction. —Although an obstruction causing an overflow of water on plaintiff's land may have

where it appears the overflow was actually continuous and uninterrupted from day to day.[17] Likewise a continuing diversion of a natural watercourse whereby a lower riparian owner is deprived of its use is a continuing injury not referable exclusively to the time when the diversion first occurred; and in such a case a recovery may be had for all damages accruing within the statutory period before the action, although not for damages accrued before that period.[18]

(B) *Permanent Obstructions.* In cases of permanent obstructions causing permanent overflows[19] it is generally held that since all the damages, both past and future, ordinarily can be presently estimated, they can and must be recovered in a single action; and therefore, according to the rule previously stated,[20] that the statute runs from the time when the obstruction is completed or made permanent, in case its erection constitutes an actionable wrong to plaintiff,[21] or from the time when the injury is first sustained from the overflow in case the erection of the obstruction is not wrongful or an invasion of plaintiff's rights;[22] or the completion of the obstruction may immediately result in the overflow, thus fixing the beginning of the statutory period irrespective of whether the creation of the obstruction is actionable *per se* or not.[23] But there are some cases in which this

been in existence for a period sufficient to give defendant the prescriptive right to maintain it, an increase in its height or any other alteration made during that period and causing an additional overflow gives rise to a new cause of action against which the statute runs only from the time of the overflow or of the damage caused thereby, and a recovery may be had under the rule of the text for all damages accruing within the statutory period before the commencement of the action. Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251; Ohio, etc., R. Co. *v.* Nuetzel, 43 Ill. App. 108 [*reversed* on other grounds in 143 Ill. 46, 32 N. E. 529]; Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; Baldwin *v.* Calkins, 10 Wend. (N. Y.) 167. And see Athens Mfg. Co. *v.* Rucker, 80 Ga. 291, 4 S. E. 885; Field *v.* Brown, 24 Gratt (Va.) 74.

17. Wells *v.* New Haven, etc., Co., 151 Mass. 46, 49, 23 N. E. 724, 21 Am. St. Rep. 423 (in which the court said: "The maintenance of a structure which will continue to cause a wrongful diversion of water upon the plaintiff's land, in quantities varying with the seasons, is a continuing nuisance, and an invasion of the plaintiff's right from day to day, and he may select his own time for bringing an action therefor, and he is not barred by the lapse of six years from the erection of the structure"); Prentiss *v.* Wood, 132 Mass. 486 (where an increase in the height of a dam caused the water to back up against plaintiff's mill); Spilman *v.* Roanoke Nav. Co., 74 N. C. 675 (percolation of water from a canal); Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88 (diversion of current of a stream so that it wore away the bank and overflowed plaintiff's land).

18. Colrick *v.* Swinburne, 105 N. Y. 503, 12 N. E. 427; Hannum *v.* West Chester, 63 Pa. St. 475. And see Arnold *v.* Hudson River R. Co., 55 N. Y. 661 [*reversing* 49 Barb. 108].

Pumping water to supply a town.—A town constructed an intake well or reservoir near a spring supplying a stream, thereby diverting the water of the spring from the stream to the well, from which it was pumped to a standpipe, and thence distributed to the town. The well had an overflow pipe through which the water if not pumped out would flow down and join the water in the stream from the spring without loss of quantity or quality. In an action by a lower riparian owner for damages for diversion of the stream, it was held that the proximate cause of the injury to him was not the well itself, but the daily pumping of the water, which constituted a continuing nuisance falling within the rule of the text. Aberdeen *v.* Bradford, 94 Md. 670, 51 Atl. 614.

19. What constitutes such permanency see, generally, WATERS. See also NUISANCES.

20. See *supra*, VI, B, 18, b, (II), (B).

21. St. Louis, etc., R. Co. *v.* Anderson, 62 Ark. 360, 35 S. W. 791.

22. *Alabama.*— Savannah, etc., R. Co. *v.* Buford, 106 Ala. 303, 17 So. 395.

Colorado.— Consolidated Home Supply Ditch, etc., Co. *v.* Hamlin, 6 Colo. App. 341, 40 Pac. 582, percolation of water from a ditch.

Iowa.— McCormick *v.* Winters, 94 Iowa 82, 62 N. W. 655; Haisch *v.* Keokuk, etc., R. Co., 71 Iowa 606, 33 N. W. 126; Van Orsdol *v.* Burlington, etc., R. Co., 56 Iowa 470, 9 N. W. 379.

Missouri.— Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365.

North Carolina.— Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708, obstruction caused by improper construction of railroad embankment and bridge.

United States.— Buntin *v.* Chicago, etc., R. Co., 41 Fed. 744.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 304, 305.

Compare Chicago, etc., R. Co. *v.* Willi, 53 Ill. App. 603.

23. Hardesty *v.* Ball, (Kan. 1890) 22 Pac. 1095; Missouri, etc., R. Co. *v.* Graham, 12

rule apparently is not recognized as qualifying the right to maintain successive actions.[24] The rule just stated can, however, apply only where there is a structure permanent in its nature, from which permanent damage necessarily and directly results.[25] Where the overflow is not permanent or not immediately or necessarily caused by the obstruction, but is recurrent, intermittent, or occasional, happening only when other causes, such as rainfall or flood, combine with the obstruction, each recurring overflow causing damage gives rise to a separate cause of action against each of which the statute will run from the time the overflow or damage happens, so that so long as the overflows recur a recovery may be had for all damages sustained within the statutory period before the action, notwithstanding the obstruction may be in fact of a permanent character;[26] and the same result follows where the obstruction is not permanent in a legal sense but is a nuisance

Tex. Civ. App. 54, 33 S. W. 576, both involving permanent injury resulting from overflow caused by a dam. And see Parker *v.* Atchison, 58 Kan. 29, 48 Pac. 631; Heard *v.* Middlesex Canal, 5 Metc. (Mass.) 81. *Compare* King *v.* U. S., 59 Fed. 9, holding that the statute began to run only when the full extent of the damage was ascertained.

24. Wells *v.* New Haven, etc., Co., 151 Mass. 46, 23 N. E. 724, 21 Am. St. Rep. 423 [*distinguishing* Fowle *v.* New Haven, etc., Co., 107 Mass. 352, 112 Mass. 334, 17 Am. Rep. 106] (where defendant railroad company built a culvert under its road-bed and in so doing brought together several natural streams and discharged them through the culvert upon plaintiff's adjoining land where such streams had not before flowed, the surface water also flowing through the culverts and the quantity of waters thus discharged varying with the seasons); Prentiss *v.* Wood, 132 Mass. 486. *Compare* Heard *v.* Middlesex Canal, 5 Metc. (Mass.) 81.

25. Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994; Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251; Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414; Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863. And see Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524. See, generally, *supra*, V, B, 18, b, (II), (B).

26. *Arkansas.*— St. Louis, etc., R. Co. *v.* Yarborough, 56 Ark. 612, 20 S. W. 515 [*following* St. Louis, etc., R. Co. *v.* Biggs, 52 Ark. 240, 12 S. W. 331, 20 Am. St. Rep. 174, 6 L. R. A. 804], obstruction by railway embankment.

Georgia.— Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994; Danielly *v.* Cheeves, 94 Ga. 263, 21 S. E. 524.

Illinois.— Baker *v.* Leka, 48 Ill. App. 353, diversion or overflow of surface water by means of a ditch.

Iowa.— Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473 [*distinguishing* Powers *v.* Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792].

Kentucky.— Louisville, etc., R. Co. *v.* Cornelius, 111 Ky. 752, 64 S. W. 732, 23 Ky. L. Rep. 1069 [*distinguishing* Louisville, etc., R. Co. *v.* Orr, 91 Ky. 109, 15 S. W. 8, 12 Ky. L. Rep. 756], improper construction of culvert by railroad company.

Missouri.— Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414. *Compare* Bird *v.* Hannibal, etc., R. Co., 30 Mo. App. 365.

New York.— Reed *v.* State, 108 N. Y. 407, 15 N. E. 735.

Texas.— Austin, etc., R. Co. *v.* Anderson, 79 Tex. 427, 15 S. W. 484, 23 Am. St. Rep. 350 [*followed* in Clark *v.* Dyer, 81 Tex. 339, 16 S. W. 1061; St. Louis Southwestern R. Co. *v.* Beck, (Civ. App. 1904); 80 S. W. 538; Bonner *v.* Wirth, 5 Tex. Civ. App. 560, 24 S. W. 306], overflow caused by improper construction of railroad and its embankments.

West Virginia.— Eells *v.* Chesapeake, etc., R. Co., 49 W. Va. 65, 38 S. E. 479, 87 Am. St. Rep. 787 (current of stream changed by railroad bridge); Henry *v.* Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863 (negligent construction of railroad embankment whereby an existing culvert was obstructed).

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 304, 305.

Compare Parker *v.* Atchison, 58 Kan. 29, 48 Pac. 631.

Election to consider injury permanent.— In cases of this character an election may be allowed plaintiff to consider the obstruction as giving defendant a permanent right or easement and to sue for the permanent injury occasioned thereby, in which event he cannot bring a subsequent action; but he is not bound to do so but may bring successive actions whenever he sustains damage, in which event the statute will run against each cause of action from the time it accrues. Baker *v.* Leka, 48 Ill. App. 353 (in which it was held that the principle upon which a second recovery would be barred after the first recovery of permanent damages is that of estoppel); Union Trust Co. *v.* Cuppy, 26 Kan. 754. See WATERS.

Rule as to assessment of damages.— In cases of the kind under discussion it is a legal right of either plaintiff or defendant to elect to have permanent damages assessed upon demand made in the pleadings, and when either makes the demand the judgment may be pleaded in bar of any subsequent action. Defendant is required to set up this or any other equity upon which he relies as well as to prove the averment on the trial. But where plaintiff is allowed without objection to have such damage apportioned the judgment is not a bar, and either party to a

subject to abatement,[27] where the overflow results from causes which can be easily and lawfully remedied by defendant,[28] or where the obstruction is so altered or increased as to cause additional and recurrent overflow.[29] On the other hand an obstruction not necessarily permanent or injurious in its nature but resulting in recurring overflow may eventually become permanent so as to cause permanent injury, and thus set the statute in motion against a recovery of both present and future damages.[30]

f. Personal Injuries.[31] In cases of injuries to the person the cause of action accrues and the statute begins to run at the time of the injury, notwithstanding the full extent of the injury is not then known or developed,[32] or that defendant's negligence which caused the injury occurred a long time previous thereto.[33] It has been held, however, that where injury results from a negligent act and the injury continues by reason of continued negligence, a recovery may be had for damages caused by the continuing negligence, although a cause of action based on the original negligent act is barred.[34] On the other hand it has

subsequent suit involving the same question may demand that both present and prospective damages be assessed, and upon proof of a previous partial assessment the jury may consider that fact in diminution of the permanent damage. Ridley *v.* Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. See WATERS.

27. Southern R. Co. *v.* Morris, 119 Ga. 234, 46 S. E. 85; Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994; Baker *v.* Leka, 48 Ill. App. 353, diversion of surface waters from defendant's to plaintiff's land by means of a ditch. And see Ohio, etc., R. Co. *v.* Elliott, 34 Ill. App. 589; Wells *v.* New Haven, etc., Co., 151 Mass. 46, 23 N. E. 734, 21 Am. St. Rep. 423.

28. Willitts *v.* Chicago, etc., R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608 (failure to keep a ditch open); Drake *v.* Chicago, etc., R. Co., 63 Iowa 302, 19 N. W. 215, 50 Am. Rep. 746. And see Augusta *v.* Lombard, 101 Ga. 724, 28 S. E. 994.

Grading and paving of street.— Where a city so grades and paves a street as to collect the surface water for a large area and discharge it on the property of plaintiff, through a failure to provide suitable outlets, the city has a legal right, and it is its legal duty, to terminate the cause of injury, and the damage thereby caused is a continuing damage within the rule of the text. Kansas City *v.* Frohwerk, 10 Kan. App. 120, 62 Pac. 432. And see MUNICIPAL CORPORATIONS.

29. Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251. See also Culver *v.* Chicago, etc., R. Co., 38 Mo. App. 130.

30. Bunten *v.* Chicago, etc., R. Co., 50 Mo. App. 414, negligent construction and maintenance of railroad bridge across a stream whereby the channel eventually became permanently filled, and the injury thus becoming permanent it was held that the statute ran from that time against plaintiff's entire cause of action.

31. In actions for death by wrongful act see DEATH, 13 Cyc. 339 *et seq.*

32. *California.*— Piller *v.* Southern Pac. R. Co., 52 Cal. 42, holding that the rule is not altered by the fact that plaintiff did not recover from his injuries for a long time.

Georgia.— Peterson *v.* Georgia R., etc., Co., 97 Ga. 798, 25 S. E. 370.

Illinois.— Leroy *v.* Springfield, 81 Ill. 114 (injury from defective sidewalk); Calumet Electric St. R. Co. *v.* Mahie, 66 Ill. App. 235.

Iowa.— Gustin *v.* Jefferson County, 15 Iowa 158.

Ohio.— Fronce *v.* Nichols, 22 Ohio Cir. Ct. 539, 12 Ohio Cir. Dec. 472, malpractice of surgeon.

Tennessee.— Fowlkes *v.* Nashville, etc., R. Co., 9 Heisk. 829.

Virginia.— Birmingham *v.* Chesapeake, etc., R. Co., 98 Va. 548, 37 S. E. 17; Anderson *v.* Hygeia Hotel Co., 92 Va. 687, 24 S. E. 269.

United States.— Madden *v.* Lancaster County, 65 Fed. 188, 12 C. C. A. 566, holding that under a Nebraska statute providing that certain actions against counties shall be commenced "within thirty days of the time of said injury or damage occurring," the action must be brought within thirty days from the time when the accident happened which caused the injury or damage.

Canada.— Miller *v.* Ryerson, 22 Ont. 369, as to malpractice.

See 33 Cent. Dig. tit. "Limitation of Actions," § 302.

Continuation of action after judgment.— Where a judgment awarding damages for bodily injuries reserved plaintiff's recourse for damages accruing after the judgment, it was held that a subsequent action was virtually a continuation of the original one and was well brought, although more than a year had elapsed since the date of the accident. Racicot *v.* Ferns, 17 Quebec Super. Ct. 337. *Contra*, Montreal *v.* McGee, 30 Can. Sup. Ct. 582.

33. Wabash County *v.* Pearson, 120 Ind. 426, 22 N. E. 134, 16 Am. St. Rep. 325, injury caused by defective bridge, it being held that plaintiff's cause of action accrued at the time of his injury, although defendant's negligence occurred many years before.

34. Tucker *v.* Gillette, 22 Ohio Cir. Ct. 664, 120 Ohio Cir. Dec. 401, where a surgeon negligently performed an operation and thereafter

been held that, although a trespass alleged to have caused plaintiff's injuries be a continuing one for which successive actions may be maintained, yet unless the evidence shows that by reason of its continuance separate and distinct injuries have been sustained, the injuries complained of, although continuing, must relate back to the time when they were first inflicted and the cause of action originally arose, and the statute will run from that time.[35] In the case of a trespass upon plaintiff's realty accompanied by an assault and battery upon plaintiff, it has been held that plaintiff may bring an action, the foundation of which is the trespass, upon the land, and may under proper averments and proof recover special damages for the assault and battery, although a separate action might have been brought therefor but is barred by the statute.[36]

g. Interference With Marital Relations. It has been held that a cause of action to recover damages for the seduction of plaintiff's wife, whereby plaintiff is deprived of her services, society, etc., accrues at "the time of the injury done by the defendant by the corruption of the body and mind of the wife," and that a plea of not guilty within six years is good on demurrer whether the action be trespass or case.[37] It seems, however, that a cause of action for alienating the affections of plaintiff's wife accrues when and only when the alienation is finally accomplished, and that the statute begins to run from that time.[38] A cause of action for enticing away plaintiff's husband accrues at the time of the enticement, and the statute then begins to run. There is no such continuing injury in such a case as will give rise to successive actions; but, unless there is a new enticement, all the damages suffered or to be suffered can and must be recovered in one action; future damages give rise to no new cause of action and do not revive the original right to sue.[39]

h. Negligence and Misconduct of Public Officers.[40] It has been frequently held that in cases of negligence or misconduct of public officers in the performance of their duties, the cause of action is founded on the breach of duty, and the statute runs from the time when the breach of duty occurs, not from the time when consequential damages result;[41] the same principle being applied as that governing

continued negligent in his treatment of the patient. See, generally, on this point PHYSICIANS AND SURGEONS.

35. Taylor v. Manhattan R. Co., 53 Hun (N. Y.) 305, 6 N. Y. Suppl. 488, in which plaintiff sought to recover damages for illness and loss of hearing caused by the operation of an elevated railroad in front of his premises.

36. Burson v. Cox, 6 Baxt. (Tenn.) 360.

37. Macfadzen v. Olivant, 6 East 387.

Limitations in actions for seduction generally see SEDUCTION.

38. Bockman v. Ritter, 21 Ind. App. 250, 52 N. E. 100, holding that a complaint for alienating a wife's affections, stating that four years before defendant began to poison the wife's mind, does not show that it is barred by the two years' statute of limitation, when it appears that the wife did not leave her husband and declare she would no longer live with him as a consequence of the husband's wrongful conduct, until two weeks before suit commenced.

39. Hogan v. Wolfe, 10 N. Y. Suppl. 896, 26 Abb. N. Cas. 1. But see Bailey v. King, 27 Ont. App. 703.

40. Particular instances see OFFICERS; MUNICIPAL CORPORATIONS; NOTARIES; SHERIFFS AND CONSTABLES.

41. *Indiana.*— State v. Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244, erroneous recording of a mortgage by a county recorder.

Kansas.— Bartlett v. Bullene, 23 Kan. 606, action against a notary for making a false certificate of acknowledgment.

Maine.— Betts v. Norris, 21 Me. 314, 38 Am. Dec. 264, action against deputy sheriff for not attaching sufficient property to satisfy the judgment.

New York.— Utica Bank v. Childs, 6 Cow. 238, action against notary for omitting to give notice of non-payment of a note.

Ohio.— Kerns v. Schoonmaker, 4 Ohio 331, 22 Am. Dec. 757, action against a justice of the peace for negligence in making an entry on his docket.

Pennsylvania.— Owen v. Western Sav. Fund, 97 Pa. St. 47, 39 Am. Rep. 794, action against recorder of deeds for giving false certificate of search.

South Carolina.— Rosborough v. Albright, 4 Rich. 39.

Vermont.— Hall v. Tomlinson, 5 Vt. 228, action against sheriff for making an irregular levy of an execution.

England.—See Godin v. Ferris, 2 H. Bl. 14, 3 Rev. Rep. 339.

Canada.— See Jones v. Bain, 12 U. C. Q. B. 550.

See 33 Cent. Dig. tit. "Limitation of Actions," § 312 *et seq.*; and the cross-references given in the preceding note.

negligent performance of contractual duties between private persons.[42] On the other hand a distinction has been made between breaches of public duty and breaches of private duty; it being held that in the case of public duty, although indirectly due to an individual, the violation gives rise to a right of action in favor of the individual against the officer only when the former sustains damage as a consequence thereof, and that the statute runs from that time, not from the time when the duty is violated.[43] It has been held, however, that where public officers make an illegal issue of municipal bonds which come into the hands of *bona fide* holders, the cause of action against the officers to recover consequential damages accrues when the bonds are transferred to such holders, and the statute runs from that time.[44]

19. In Actions to Recover Penalties.[45] Where a statute imposes a penalty for its violation, a cause of action to recover the penalty accrues when the penalty is incurred, and the statute of limitations then begins to run;[46] and according to the general rule,[47] the running of the statute is not interrupted until the action is commenced or the cause of action barred.[48] In cases where there are repeated violations successive penalties may be incurred, in which event successive rights of action accrue so that a recovery may be had for penalties incurred within the statutory period before the action, but not for penalties previously incurred.[49] Thus where a statute imposes a specific duty, positive or negative, and provides a penalty for each week, month, or year of its violation, a cause of action to recover the penalty accrues at the end of the first period of violation, so that while a recovery may be had for the penalties incurred within the statutory period before the action, a recovery for penalties incurred previous to that period is barred;[50] and this is true notwithstanding that aside from the statute of limitations the penalties incurred during several successive periods may be recovered in one action.[51] But the making and leaving open of an excavation without lawful authority is not in its nature a continuing act so as to extend the period of limitation of an action to recover a penalty therefor, where the statute imposing the penalty prohibits merely the making of the excavation.[52] Where a statute imposes a penalty upon a witness to a will, who omits to write his address opposite his signature, a cause of action to recover the penalty does not accrue and the statute of limitations does not begin to run until the death of the testator, as the will does not take effect until that time.[53]

20. Trusts[54] **— a. General Rule.** In case of a technical, or in other words, direct,

42. See *supra*, VI, B, 15, a.

43. People *v.* Cramer, 15 Colo. 155, 25 Pac. 302 (action against sheriff for negligence in levying attachment); Hartford County Bank *v.* Waterman, 26 Conn. 324 (action against sheriff for negligence in attaching real estate on mesne process).

44. Ontario *v.* Hill, 33 Hun (N. Y.) 250 [*affirmed* in 99 N. Y. 324, 1 N. E. 887]. And see Mitchell *v.* Strough, 35 Hun (N. Y.) 83 [*following* Ontario *v.* Hill, *supra*]; Venice *v.* Breed, 65 Barb. (N. Y.) 597. See also, generally, Municipal Corporations; Towns.

45. Particular applications of the statute in actions to recover penalties see such titles as Corporations, 10 Cyc. 1; Municipal Corporations; Railroads; Streets and Highways; Usury.

Failure of officer of corporation to file statutory report see Corporations, 10 Cyc. 871.

46. Hazelton *v.* Porter, 17 Colo. App. 1, 67 Pac. 170; Colorado Fuel, etc., Co. *v.* Lenhart, 6 Colo. App. 511, 41 Pac. 834; Trinity Church *v.* Vanderbilt, 98 N. Y. 170.

47. See *infra*, VI, F, 1; VI, I, 1.

48. Hazelton *v.* Porter, 17 Colo. App. 1, 67 Pac. 170; Colorado Fuel, etc., Co. *v.* Lenhart, 6 Colo. App. 511, 41 Pac. 834; Trinity Church *v.* Vanderbilt, 98 N. Y. 170; Patterson *v.* Wade, 115 Fed. 770, 53 C. C. A. 1.

49. Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72. And see the cases in the following note.

50. Atwood *v.* Lockwood, 76 Conn. 555, 57 Atl. 279; Wells *v.* Cooper, 57 Conn. 52, 17 Atl. 281; Bufford *v.* Hinson, 3 Head (Tenn.) 573; Londonderry *v.* Arnold, 30 Vt. 401.

51. Atwood *v.* Lockwood, 76 Conn. 555, 57 Atl. 279; Wells *v.* Cooper, 57 Conn. 52, 17 Atl. 281.

52. Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. 47.

53. Dodge *v.* Cornelius, 168 N. Y. 242, 61 N. E. 244 [*reversing* 40 N. Y. App. Div. 18, 57 N. Y. Suppl. 791]. As to such penalties see, generally, Wills.

54. As between tenants in common see Tenancy in Common.

Rule as to trusts between partners see Partnership.

express,[55] continuing trust, such as is exclusively within the jurisdiction of a court of equity,[56] the general rule is that the statute of limitations does not run between trustee and *cestui que trust* as long as the trust subsists, for the possession of the trustee is the possession of the *cestui que trust*, and the trustee holds according to his title. In order to set the statute in motion in favor of the trustee, the trust must terminate, as by its own limitations or by settlement of the parties, or there must be a repudiation of the trust by the trustee and an assertion of an adverse claim by him, and the fact made known to the *cestui que trust*.[57] The rule, however, is sub-

Adverse possession of trust property see ADVERSE POSSESSION, 1 Cyc. 1062 *et seq.*

Suits against executors and administrators to recover legacies and distributive shares see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 940 *et seq.*

Testamentary trusts to pay debts and the effect of such trusts on the operation of the statute as to creditors of testator see WILLS.

Suits to enforce payment of legacies charged on land devised see WILLS.

Limitations as to creditors' bills see CREDITORS' SUITS, 3 Cyc. 43.

55. That the trust must be express, not implied or constructive, see *infra*, VI, B, 20, b, (II), text and note 80.

56. That the trust must be a technical trust cognizable only in equity see *infra*, VI, B, 20, b, (I), text and note 60.

57. *Alabama.*— Kennedy *v.* Winn, 80 Ala. 165; Holt *v.* Wilson, 75 Ala. 58; McCarthy *v.* McCarthy, 74 Ala. 546; Causler *v.* Wharton, 62 Ala. 358; Pinkston *v.* Brewster, 14 Ala. 315; Maury *v.* Mason, 8 Port 211. And see Wood *v.* Wood, 3 Ala. 756.

Arkansas.— Brinkley *v.* Willis, 22 Ark. 1; Anderson *v.* Dunn, 19 Ark. 650.

California.— Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082; Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; McClure *v.* Colyear, 80 Cal. 378, 22 Pac. 175; Broder *v.* Conklin, 77 Cal. 330, 19 Pac. 513; Janes *v.* Throckmorton, 57 Cal. 368; Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384. And see Spencer *v.* Duncan, [1895] 40 Pac. 548; Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; Roach *v.* Caraffa, 85 Cal. 436, 25 Pac. 22; Wright *v.* Ross, 36 Cal. 413.

Delaware.— Perkins *v.* Cartmell, 4 Harr. 270, 42 Am. Dec. 753.

Florida.— Anderson *v.* Northrop, 30 Fla. 612, 12 So. 318.

Georgia.— Robson *v.* Jones, 27 Ga. 266; Johnson *v.* Brown, 26 Ga. 371; Scott *v.* Haddock, 11 Ga. 258; Simms *v.* Smith, 11 Ga. 195; Keaton *v.* Greenwood, 8 Ga. 97; Martin *v.* Greer, 1 Ga. Dec. 109. See also Bethune *v.* Dougherty, 30 Ga. 770; McDonald *v.* Sims, 3 Ga. 383.

Idaho.— Nasholds *v.* McDonell, 6 Ida. 377, 55 Pac. 894.

Illinois.— Ellis *v.* Ward, 137 Ill. 509, 25 N. E. 530; Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868 [*citing* Hancock *v.* Harper, 86 Ill. 445]; Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29; Walden *v.* Karr, 88 Ill. 49; Albretch *v.* Wolf, 58 Ill. 186; King *v.* Hamilton, 16 Ill. 190; Moran *v.* Pellifant, 28 Ill. App. 278; Hubbard *v.* U. S. Mortgage Co., 14 Ill. App. 40.

Indiana.— Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Jones *v.* Henderson, 149 Ind. 458, 49 N. E. 443; Colglazier *v.* Colglazier, 117 Ind. 460, 20 N. E. 490; Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244; Hileman *v.* Hileman, 85 Ind. 1; Cunningham *v.* McKindley, 22 Ind. 149; Cowan *v.* Henika, 19 Ind. App. 40, 48 N. E. 809; Talbott *v.* Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491. And see Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82, per Elliott J.

Iowa.— Long *v.* Vallean, 87 Iowa 675, 55 N. W. 31, 56 N. W. 748; Murphy *v.* Murphy, 80 Iowa 740, 45 N. W. 914.

Kentucky.— Helm *v.* Rogers, 81 Ky. 568; Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. 556, 46 Am. Dec. 528; Bohannon *v.* Streshley, 2 B. Mon. 437; Hendrick *v.* Robinson, 7 Dana 165; Pugh *v.* Bell, 1 J. J. Marsh. 398; Overstreet *v.* Bate, 1 J. J. Marsh. 367; Thomas *v.* White, 3 Litt. 177, 14 Am. Dec. 56; Lexington *v.* Lindsay, 2 A. K. Marsh. 443; Schwartz *v.* Castlen, 59 S. W. 743, 22 Ky. L. Rep. 1063 (suit by *cestui que trust* to cancel trust deed); Beach *v.* Cummins, 18 S. W. 360, 13 Ky. L. Rep. 881 (where the money was to be paid over to the beneficiaries whenever they should have sufficiently reformed from dissipation to be able to take care of it); Anderson *v.* Meredith, 9 S. W. 407, 9 Ky. L. Rep. 460. And see Bigstaff *v.* Lumkins, 16 S. W. 449, 13 Ky. L. Rep. 248.

Louisiana.— See Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 483.

Maine.— McGuire *v.* Linneus, 74 Me. 344.

Maryland.— Gordon *v.* Small, 53 Md. 550; Fishwick *v.* Sewell, 4 Harr. & J. 393; White *v.* White, 1 Md. Ch. 53.

Massachusetts.—St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; Davis *v.* Coburn, 128 Mass. 377 [*followed* in Warner *v.* Morse, 149 Mass. 400, 21 N. E. 960]; Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321; Jones *v.* McDermott, 114 Mass. 400 [*citing* Merriam *v.* Hassam, 14 Allen 516, 92 Am. Dec. 795; Farnam *v.* Brooks, 9 Pick. 212; Hemenway *v.* Gates, 5 Pick. 321]. See also McGuire *v.* Devlin, 158 Mass. 63, 32 N. E. 1028.

Michigan.— O'Toole *v.* Hurley, 115 Mich. 517, 73 N. W. 805; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580. See also Havens *v.* Church, 104 Mich. 135, 62 N. W. 149.

Minnesota.— Wilson *v.* Welles, 79 Minn. 53, 81 S. W. 549; Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406. And see Randall *v.* Constans, 33 Minn. 329, 23 N. W. 530.

Mississippi.— Westbrook *v.* Munger, 61 Miss. 329; Soggins *v.* Heard, 31 Miss. 426;

ject to the qualification that the *cestui que trust* may be barred of his remedy through

Gay *v.* Edwards, 30 Miss. 218. The code makes the statute of limitations applicable to trusts, but in the case of an express, technical trust the statute can be set in motion only by a breach of the trust, since until that occurs there is no cause of action. Cooper *v.* Cooper, 61 Miss. 676.

Missouri.— Ivy *v.* Yancy, 129 Mo. 501, 31 S. W. 937; Ricords *v.* Watkins, 56 Mo. 553; Smith *v.* Ricords, 52 Mo. 581; Ruff *v.* Milner, 92 Mo. App. 620.

Nevada.— White *v.* Sheldon, 4 Nev. 280.

New Jersey.— Smith *v.* Combs, 49 N. J. Eq. 420, 24 Atl. 9; Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631; Dean *v.* Dean, 9 N. J. Eq. 425; Shibla *v.* Ely, 6 N. J. Eq. 181; Cook *v.* Williams, 2 N. J. Eq. 209.

New York.— Zebley *v.* Farmers' L. & T. Co., 139 N. Y. 461, 34 N. E. 1067 [*reversing* 63 Hun 541, 18 N. Y. Suppl. 526]; *In re* Camp, 126 N. Y. 377, 27 N. E. 799 [*reversing* 10 N. Y. Suppl. 141]; Price *v.* Brown, 112 N. Y. 677, 20 N. E. 381; Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328; Reitz *v.* Reitz, 80 N. Y. 538 [*reversing* 14 Hun 536]; Barber *v.* White, 58 N. Y. 204; Greenly *v.* Shelmidine, 83 N. Y. App. Div. 559, 82 N. Y. Suppl. 176; Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523; Davis *v.* Davis, 86 Hun 400, 33 N. Y. Suppl. 477; Post *v.* Benchley, 48 Hun 83, 15 N. Y. St. 618 [appeal *dismissed* in 110 N. Y. 665, 18 N. E. 480]; Morgan *v.* Turner, 35 Misc. 399, 71 N. Y. Suppl. 996; Decouche *v.* Savetier, 3 Johns. Ch. 190, 8 Am. Dec. 478 note; Bertine *v.* Varian, 1 Edw. 343; Terry *v.* Bale, 1 Dem. Surr. 452. And see McArthur *v.* Gordon, 51 Hun 511, 4 N. Y. Suppl. 584 [*modified* and *affirmed* in 126 N. Y. 597, 27 N. E. 1033, 12 L. R. A. 667]; Wood *v.* Monroe County, 50 Hun 1, 2 N. Y. Suppl. 369; Rodman *v.* Devlin, 23 Hun 590; Barnes *v.* Courtright, 37 Misc. 60, 74 N. Y. Suppl. 203; Mount *v.* Mount, 35 Misc. 62, 71 N. Y. Suppl. 199 [*reversed* on other grounds in 68 N. Y. App. Div. 144, 74 N. Y. Suppl. 148]; Matter of McCormick, 27 Misc. 416, 59 N. Y. Suppl. 374; Spaulding *v.* Arnold, 6 N. Y. Suppl. 336; Hasbrouck *v.* Angevine, 1 N. Y. Suppl. 789.

North Carolina.— Davis *v.* Boyden, 123 N. C. 283, 31 S. E. 492; Maxwell *v.* Barringer, 110 N. C. 76, 14 S. E. 516, 28 Am. St. Rep. 668; Forsyth *v.* Lash, 89 N. C. 159; Robertson *v.* Dunn, 87 N. C. 191; Peacock *v.* Harris, 85 N. C. 146; West *v.* Sloan, 56 N. C. 102; Blount *v.* Robeson, 56 N. C. 73; Davis *v.* Cotten, 55 N. C. 430; State *v.* McBowen, 37 N. C. 9; Jones *v.* Person, 9 N. C. 269; Hamilton *v.* Shepperd, 7 N. C. 115.

Ohio.— Moore *v.* Idlor, 26 Ohio Cir. Ct. 502; Central Trust Co. *v.* Burke, 2 Ohio S. & C. Pl. Dec. 96, 1 Ohio N. P. 169.

Oregon.— Manandas *v.* Mann, 22 Oreg. 525, 30 Pac. 422.

Pennsylvania.— Kutz's Appeal, 40 Pa. St. 90; Rush *v.* Barr, 1 Watts 110; Durdon *v.* Gaskill, 2 Yeates 268; Coates' Estate, 2 Pars. Eq. Cas. 258; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31.

Rhode Island.— Sayles *v.* Tibbitts, 5 R. I. 79.

South Carolina.— Howard *v.* Quattlebaum, 46 S. C. 95, 24 S. E. 93; Gardner *v.* Holland, 42 S. C. 50, 19 S. E. 997; Nobles *v.* Hogg, 36 S. C. 322, 15 S. E. 359; McDonald *v.* May, 1 Rich. Eq. 91; Chaplin *v.* Givens, Rice Eq. 132; Housmeal *v.* Gigges, Bailey Eq. 482, 23 Am. Dec. 186. And see Starke *v.* Starke, 3 Rich. 438; Presley *v.* Davis, 7 Rich. Eq. 105, 62 Am. Dec. 396.

Tennessee.— Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427; Pinson *v.* Ivey, 1 Yerg. 296; Bryant *v.* Puckett, 3 Hayw. 252; Pinkerton *v.* Walker, 3 Hayw. 221.

Texas.— Byars *v.* Thompson, 80 Tex. 468, 15 S. W. 1087; Brotherton *v.* Weathersby, 73 Tex. 471, 11 S. W. 505; White *v.* Leavitt, 20 Tex. 703; Grumbles *v.* Grumbles, 17 Tex. 472; Redding *v.* Redding, 15 Tex. 249; McCarthy *v.* Woods, (Civ. App. 1905) 87 S. W. 405; Barnett *v.* Barnett, (Civ. App. 1904) 80 S. W. 537; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689; Canadian, etc., Mortg., etc., Co. *v.* Edinburgh-American Land Mortg. Co., 16 Tex. Civ. App. 520, 41 S. W. 140, 42 S. W. 864. See also Andrews *v.* Smithwick, 20 Tex. 111.

Utah.— Felkner *v.* Dooly, 28 Utah 236, 78 Pac. 365, 27 Utah 350, 75 Pac. 854; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652; Charter Oak L. Ins. Co. *v.* Gisborne, 5 Utah 319, 15 Pac. 253 [*affirmed* in 142 U. S. 326, 12 S. Ct. 277, 35 L. ed. 1029].

Vermont.— Drake *v.* Wild, 65 Vt. 611, 614, 27 Atl. 427 (in which the court said: "As between the trustee and *cestui que trust*, in the case of an express or direct trust, the statute of limitations has no application unless the trustee has repudiated the trust and claims the trust estate adversely, and such repudiation and adverse claim have been brought to the knowledge of the *cestui que trust*, after the latter is *sui juris*, and the connection is so wholly at an end as to indicate that the *cestui que trust* is no longer controlled by the influence proceeding from the trustee, which existed during the continuance of the trust"); Bigelow *v.* Catlin, 50 Vt. 408; Evarts *v.* Nason, 11 Vt. 122.

Virginia.— Saum *v.* Coffelt, 79 Va. 510.

Washington.— Irwin *v.* Holbrook, 26 Wash. 89, 66 Pac. 116.

West Virginia.— Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579; Key *v.* Hughes, 32 W. Va. 184, 9 S. E. 77; Heiskell *v.* Powell, 23 W. Va. 717; Nease *v.* Capehart, 8 W. Va. 95.

Wisconsin.— Boyd *v.* Eau Claire Mut. Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918; Williams *v.* Williams, 82 Wis. 393, 52 N. W. 429; Bostwick *v.* Dickson, 65 Wis. 593, 26 N. W. 549; Sheldon *v.* Sheldon, 3 Wis. 699.

United States.— New Orleans *v.* Warner, 175 U. S. 120, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508]; Gisborn *v.* Charter Oak L. Ins. Co., 142 U. S. 326, 12 S. Ct. 277, 35 L. ed. 1029 [*affirming* 5 Utah 319, 15 Pac. 253]; Riddle *v.* White-

laches or such a lapse of time as will give rise to a presumption of discharge or extinguishment of the trust.[58]

b. What Trusts Not Affected by Statute[59] — (i) *In General.* In determining what trusts are exempt from the statute of limitations the term "trust" is not to be given its general or popular meaning, but must be construed according to its technical signification so as not to include anything but actual trusts.[60] While no

hill, 135 U. S. 621, 10 S. Ct. 924, 34 L. ed. 283; Seymour *v.* Freer, 8 Wall. 202, 19 L. ed. 306; Oliver *v.* Piatt, 3 How. 333, 411, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,115, 2 McLean 267] (where the court said: "The mere lapse of time constitutes of itself no bar to the enforcement of a subsisting trust; and time begins to run against a trust only from the time when it is openly disavowed by the trustee, who insists upon an adverse right and interest, which is fully and unequivocally made known to the *cestui que trust*"); Boone *v.* Chiles, 10 Pet. 177, 9 L. ed. 388; Daniels *v.* Benedict, 50 Fed. 347; Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135; Trecothick *v.* Austin, 24 Fed. Cas. No. 14,164, 4 Mason 16; Wisner *v.* Ogden, 30 Fed. Cas. No. 17,914, 4 Wash. 631. And see U. S. *v.* Taylor, 104 U. S. 216, 222, 26 L. ed. 721.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 39 L. J. Ch. 369, 18 Wkly. Rep. 387; Soar *v.* Ashwell, [1893] 2 Q. B. 390, 60 L. T. Rep. N. S. 585, 4 Reports 602, 43 Wkly. Rep. 165; North American Land, etc., Co. *v.* Watkins, [1904] 1 Ch. 242; *In re* Bell, 34 Ch. D. 462, 56 L. J. Ch. 307, 55 L. T. Rep. N. S. 757, 35 Wkly. Rep. 212; *In re* Cross, 20 Ch. D. 109, 51 L. J. Ch. 645, 45 L. T. Rep. N. S. 777, 30 Wkly. Rep. 376; Clanricarde *v.* Henning, 30 Beav. 175, 7 Jur. N. S. 1113, 30 L. J. Ch. 865, 5 L. T. Rep. N. S. 168, 9 Wkly. Rep. 912, 54 Eng. Reprint 855; *Ex p.* Bolton, 1 Deac. & C. 556, 3 L. J. Bankr. 22, 1 Mont. & A. 60; Knight *v.* Bowyer, 3 De G. & J. 421, 4 Jur. N. S. 569, 27 L. J. Ch. 520, 6 Wkly. Rep. 565, 59 Eng. Ch. 421, 44 Eng. Reprint 1053; Milnes *v.* Cowley, 4 Price 103; Gray *v.* Bateman, 21 Wkly. Rep. 137. This subject has, however, been regulated by a number of statutes. See 3 & 4 Wm. IV, c. 27, § 25; Judicature Act (1873), § 25, subs. 2; 37 & 38 Vict. c. 57, § 10; 51 & 52 Vict. c. 59, § 8 (Trustee Act). The second rule of the twenty-fifth section of the Judicature Act of 1873, which provides that "no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations," is but a statutory declaration of a rule which had always been recognized and administered in courts of equity. *In re* Cross, *supra.*

Canada.— Gunn *v.* Adams, 8 Can. L. J. N. S. 211.

See 33 Cent. Dig. tit. "Limitation of Actions," § 494 *et seq.*

Continuance of trust relation.— "In the case of a continuing trust created by agreement, or resulting from it, the respective rights of the parties are conserved by and co-exist with the agreement, and consequently each may have his remedy to secure its object, while the trust relation subsists; and even after it may be disavowed or denied, until barred by statute or lapse of time. The rights and remedies of the parties in such case are reciprocal and commensurable. When the relation of trustee and *cestui que trust* is created by agreement or by the act of the parties in respect to a particular subject-matter, and it appears to have been intended that the trust should continue until the object of it should be accomplished, then it of necessity must subsist until its object is accomplished or the relation is dissolved by same act or declaration or course of conduct adverse in its nature to the continuance of the trust and the trust relation; and further, until the party whose right is denied has knowledge or can be presumed to be aware of such adverse act or declaration or course of conduct." Wright *v.* Ross, 36 Cal. 414, 434.

Although the complaint demands judgment only for a specific sum of money, the rule of the text will apply if the case is one solely cognizable in equity and the facts entitle plaintiff to equitable relief. Thacher *v.* Hope Cemetery Assoc., 46 Hun (N. Y.) 594.

58. *In re* Neilley, 95 N. Y. 382; Philips *v.* State, 5 Ohio St. 122, 64 Am. Dec. 635; Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718; Etting *v.* Marx, 4 Fed. 673, 4 Hughes 312; *In re* Cross, 20 Ch. D. 109, 51 L. J. Ch. 645, 45 L. T. Rep. N. S. 777, 30 Wkly. Rep. 376; Bright *v.* Legerton, 2 De G. F. & J. 606, 7 Jur. N. S. 559, 30 L. J. Ch. 338, 3 L. T. Rep. N. S. 713, 9 Wkly. Rep. 239, 63 Eng. Ch. 606, 45 Eng. Reprint 755 [*affirming* 29 Beav. 60, 54 Eng. Reprint 548]. See TRUSTS.

59. **What constitutes a trust** see, generally, TRUSTS.

60. *Alabama.*— Maury *v.* Mason, 8 Port. 211.

California.— Barker *v.* Hurley, 132 Cal. 21, 63 Pac. 1071.

Georgia.— Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Raymond *v.* Simonson, 4 Blackf. 77.

Kentucky.— Talbott *v.* Todd, 5 Dana 190.

Missouri.— Johnson *v.* Smith, 27 Mo. 591.

New Jersey.— Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707.

New York.— Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Murray *v.* Coster, 20 Johns. 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522]; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]. And see Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650

particular form of words is necessary to the creation of an express trust which will be exempt from the statute,[61] yet the purposes of the trust, its subject-matter, and the beneficiaries must be clearly defined, whether the trust involves real or personal property.[62] The fact that the instrument evidencing the obligation in controversy merely purports to create a trust is immaterial.[63] Moreover it is not every case of direct and express trust arising between trustee and *cestui que trust* that is exempt from the operation of the statute. The only class of trusts not affected by the statute are, in the language of Chancellor Kent,[64] "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction" of courts of equity. Therefore, whenever there is an adequate, concurrent remedy at law the statute will apply, although relief be sought in equity;[65] and the statute will run from the time the

[*affirmed* in 146 N. Y. 385, 42 N. E. 543].

Ohio.— Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

Pennsylvania.— Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450.

South Carolina.— Estes *v.* Stokes, 2 Rich. 133.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

Texas.— Tinnen *v.* Mebane, 10 Tex. 246, 60 Am. Dec. 205.

Virginia.— Cook *v.* Darby, 4 Munf. 444, 6 Am. Dec. 529, holding that an action against a common carrier for conversion of goods may be barred by limitation.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 495–503.

And see the cases in the following notes.

61. Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1022; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652. See, generally, TRUSTS.

62. Barker *v.* Hurley, 132 Cal. 21, 63 Pac. 1071. See, generally, TRUSTS.

63. Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707, where the instrument simply acknowledged a certain sum due "for cash deposited in trust." *Compare* Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473.

64. Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]. This is the leading American case on this point and has been widely followed. See the American cases cited in the following note.

65. *Alabama.*— Maury *v.* Mason, 8 Port. 211.

Florida.— Carter *v.* Bennett, 6 Fla. 214.

Georgia.— Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172; Thomas *v.* Brinsfield, 7 Ga. 154.

Illinois.— Hayward *v.* Gunn, 82 Ill. 385; Governor *v.* Woodworth, 63 Ill. 254.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301; Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163; Smith *v.* Calloway, 7 Blackf. 86; Raymond *v.* Simonson, 4 Blackf. 77; Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772.

Kentucky.— Clay *v.* Clay, 7 Bush 95; Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. 556, 46 Am. Dec. 528; Talbott *v.* Todd, 5 Dana 190.

Maryland.— Young *v.* Mackall, 3 Md. Ch. 398.

Michigan.— Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059.

Missouri.— Ricords *v.* Watkins, 56 Mo. 553; Johnson *v.* Smith, 27 Mo. 591; Keeton *v.* Keeton, 20 Mo. 530.

New Jersey.— Agens *v.* Agens, 50 N. J. Eq. 566, 25 Atl. 707; Gutch *v.* Fosdick, 48 N. J. Eq. 353, 22 Atl. 590, 27 Am. St. Rep. 473; Partridge *v.* Wells, 30 N. J. Eq. 176 [*affirmed* in 31 N. J. Eq. 363].

New York.— Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606; *In re* Neilley, 95 N. Y. 382; Brown *v.* Brown, 83 Hun 100, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Pierson *v.* McCurdy, 33 Hun 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615]; Murray *v.* Coster, 20 Johns. 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522]; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]; Paff *v.* Kinney, 1 Bradf. Surr. 1. And see Strough *v.* Jefferson County, 119 N. Y. 212, 23 N. E. 552 [*affirming* 50 Hun 54]; Wood *v.* Monroe County, 50 Hun 1, 2 N. Y. Suppl. 369.

North Carolina.— Egerton *v.* Logan, 81 N. C. 172.

Ohio.— Townsend *v.* Eichelberger, 51 Ohio St. 213, 38 N. E. 207; Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604 (holding that the provision in the Ohio statute exempting "the case of a continuing and subsisting trust" is merely in affirmance of the rule of the text); Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741 [*followed* in Com., etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558]; Barton *v.* Dickens, 48 Pa. St. 518; Zacharias *v.* Zacharias, 23 Pa. St. 452; Alexander *v.* Westmoreland Bank, 1 Pa. St. 395; Finney *v.* Cockran, 1 Watts & S. 112, 37 Am. Dec. 450; Lyon *v.* Marclay, 1 Watts 271; McEuen *v.* Girard, 2 Rawle 311; Hanna *v.* McConkey, 11 Phila. 549.

South Carolina.— Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963; Starke *v.* Starke, 3 Rich. 438; Estes *v.* Stokes, 2 Rich. 133; Hughes *v.* Hughes, Cheves 33; Lever *v.* Lever, 1 Hill Eq. 62; Van Rhyn *v.* Vincent, 1 McCord Eq. 310.

Tennessee.— Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625; Hughes *v.* Brown, 88 Tenn. 578, 13

cause of action first accrues.[66] This is in accordance with the general rule that the statute of limitations applies in equity whenever there is a concurrent remedy at law.[67] *A fortiori* the rule exempting trusts from the operation of the statute applies only in courts of equity jurisdiction or to cases in which equitable relief is sought; it has no application to actions of assumpsit and the like, and is not recognized in courts of common law.[68] Mere fiduciary or confidential relations between parties to a suit, in respect to the matters in controversy, will not *per se* prevent the running of the statute,[69] and the mere relation of debtor and creditor is insufficient.[70] Nor is a case exempt from the statute by reason of the fact that

S. W. 286, 8 L. R. A. 480; Boyd *v.* Lee, 12 Lea 77 (holding that the statute runs in favor of an executor *de son tort*); Peebles *v.* Green, 6 Lea 471; Nicholson *v.* Lauderdale, 3 Humphr. 200. *Compare* Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556.

Texas.— Kennedy *v.* Baker, 59 Tex. 150; Phillips *v.* Holman, 26 Tex. 276; Wingate *v.* Wingate, 11 Tex. 430; Tinnen *v.* Mebane, 10 Tex. 246, 60 Am. Dec. 205.

Virginia.— Sheppards *v.* Turpin, 3 Gratt. 373.

Wisconsin.— Merton *v.* O'Brien, 117 Wis. 437, 94 N. W. 340; Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5.

United States.— Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]; Wisner *v.* Ogden, 30 Fed. Cas. No. 17,914, 4 Wash. 631. And see Miles *v.* Vivian, 79 Fed. 848, 25 C. C. A. 208. *Compare* Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69.

England.— Sturt *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765; Lockey *v.* Lockey, Prec. Ch. 518, 24 Eng. Reprint 232.

See 33 Cent. Dig. tit. "Limitation of Actions," § 498.

But see Bigelow *v.* Catlin, 50 Vt. 408.

Were the rule otherwise "a plaintiff by electing his tribunal, might cut his opponent off from a defence, to which the law of the land entitles him." Lever *v.* Lever, 1 Hill Eq. (S. C.) 62. And see similar comments in Johnson *v.* Smith, 27 Mo. 591; Pierson *v.* McCurdy, 33 Hun (N. Y.) 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615].

But the rule is not always strictly followed. —See *infra*, VI, B, 20, b, (III).

66. *Indiana.*— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Maryland.— Young *v.* Mackall, 3 Md. Ch. 398.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741 [*followed* in Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558].

Texas.— Kennedy *v.* Baker, 59 Tex. 150.

United States.— Miles *v.* Vivian, 79 Fed. 848, 25 C. C. A. 208; Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636].

See 33 Cent. Dig. tit. "Limitation of Actions," § 498.

67. See EQUITY, 16 Cyc. 177 *et seq.*; and *supra*, V, L, 2.

68. *Illinois.*— Hayward *v.* Gunn, 82 Ill. 385.

Maryland.— Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. 449, 468, where the court said: "There is in a court of law no such bar to the operation of the act of limitations as 'trusts,' otherwise than as showing the terms of the contract between the parties, and time at which the plaintiffs' right of action accrued, and thus avoiding the statute by showing that by the terms of agreement sued on, there has been no such lapse of time, since the right to sue commenced as would create a bar."

Missouri.— Shortridge *v.* Harding, 34 Mo. App. 354.

Ohio.— Bigelow *v.* Bigelow, 6 Ohio 96.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741. But *compare* Fox *v.* Cash, 11 Pa. St. 207.

Tennessee.— Cocke *v.* McGinnis, Mart. & Y. 361, 17 Am. Dec. 809. And see Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480.

See 33 Cent. Dig. tit. "Limitation of Actions," § 498.

But see Bigelow *v.* Catlin, 50 Vt. 408.

69. Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]; Finney *v.* Cochran, 1 Watts & S. (Pa.) 112, 37 Am. Dec. 450; Merton *v.* O'Brien, 117 Wis. 437, 94 N. W. 340. And see Leach *v.* Moore, 57 Ark. 583, 22 S. W. 173; Keaton *v.* Greenwood, 8 Ga. 97; Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

This is undoubtedly the correct principle, and is inferentially supported by numerous decisions dealing with the relations of principal and agent and of attorney and client (see *infra*, VI, B, 20, b, (III)), but the decisions, while perhaps uniform in their recognition of the general principles dealing with this subject, are not very definite on the question of what constitutes a trust which is exempt from the statute (see *infra*, VI, B, 20, b, (III)).

70. *Alabama.*— May *v.* Coleman, 84 Ala. 325, 4 So. 144.

California.— *In re* Galvin, Myr. Prob. 82.

New York.— Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; *In re* Neilley, 95 N. Y. 382; Bogardus *v.* Young, 64 Hun 398, 19 N. Y. Suppl. 885; St. John *v.* Coates, 63 Hun 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]. And see Adams *v.* Olin, 140 N. Y. 150, 35

an accounting may be necessary to determine the amount due plaintiff, if the accounting can be taken in an action at law as well as in a suit in equity.[71] But a deposit of money in a bank in trust for a person other than the depositor may create the relation of trustee and *cestui que trust* between the depositor and the beneficiary so that the statute will not apply until the trust is repudiated.[72] It has been considered that for a person to be a trustee of an express trust within the rule exempting such trusts from the statute, he must hold the legal title to the property involved;[73] but the requirement has been held unnecessary [74] and is not generally recognized.[75] Where two or more persons share in paying the purchase-price of property under an agreement that title shall be taken and held by one of them for the joint benefit of all, and the property is purchased and title taken according to the terms of the agreement, a trust is created which is exempt from the operation of the statute until repudiated by the trustee.[76] A certificate that the maker thereof holds certain money to abide the settlement of disputes as to its ownership creates an express trust with no definite time fixed for its termination by payment, and hence limitations will not run against a claim on such certificate until the true owner has been ascertained, and a demand made by one showing a right to the money.[77] It seems, however, that a trust in order to be exempt from the statute must be an executed trust as distinct from an executory one,[78] as where the interests of the parties depend on contingencies the happening of which cannot be definitely foretold.[79]

(II) *IMPLIED OR CONSTRUCTIVE TRUSTS* — (A) *General Rules.* It is generally held that the rule that the statute of limitations does not run in favor of a trustee against the *cestui que trust* applies only to express trusts, and that implied or constructive trusts are within the operation of the statute, so that a suit to impose and enforce such a trust may become barred.[80] Thus "whenever a person takes

N. E. 448; Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Ray *v.* Ray, 24 Misc. 155, 53 N. Y. Suppl. 300, holding that even though the receipt of money under a promise that the lender should have a lien to secure it, should constitute a trust, the debt could be recovered in an action at law, and the fact that the lender is entitled to equitable relief does not extend the time in which the action must be brought.

Ohio.— Kershaw *v.* Snowden, 36 Ohio St. 181.

Pennsylvania.— Zacharias *v.* Zacharias, 23 Pa. St. 452; Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450.

Tennessee.—Cocke *v.* McGinnis, Mart. & Y. 361, 17 Am. Dec. 809.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 494–499.

71. Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Roberts *v.* Ely, 113 N. Y. 128, 20 N. E. 606; Yates *v.* Wing, 42 N. Y. App. Div. 356, 59 N. Y. Suppl. 78.

72. Mabie *v.* Bailey, 95 N. Y. 206; Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523.

Whether withdrawal of the money is a repudiation see *infra,* VI, B, 20, e, (II), (C).

73. Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625.

74. Johnson *v.* Brown, 26 Ga. 371; McIntyre *v.* McClenaghan, 12 S. C. 185.

75. See *infra,* VI, B, 20, c, (I).

76. Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482; Brotherton *v.* Weathersby, 73 Tex. 471, 11 S. W. 505. See also Broder *v.* Conklin, 77 Cal. 330, 19 Pac. 513; Horne *v.* Ingraham, 125 Ill. 198, 16 N. E. 868; O'Toole *v.* Hurley, 115 Mich. 517, 73 N. W. 805.

Joint interest in road franchise.—Where, by agreement, two parties obtained a road franchise in the name of one upon a bill drawn by the other, and each of them constructed one half of the road, and the one in whose name the franchise stood took possession and collected the tolls on their mutual account, on the understanding that they were to share equally therein, it was held that an express trust was created of which the party in possession was the trustee, and that the general rule applied. Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384.

77. Petersen *v.* Taylor, (Cal. 1893) 33 Pac. 436.

78. Harrigan *v.* Smith, (N. J. Ch. 1893) 40 Atl. 13; Laguerenne *v.* Farrar, 25 Tex. Civ. App. 404, 61 S. W. 953.

79. Laguerenne *v.* Farrar, 25 Tex. Civ. App. 404, 61 S. W. 953.

80. *Alabama.*— Martin *v.* Decatur Branch Bank, 31 Ala. 115, implied trust relating to personal property.

Arkansas.— Bland *v.* Fleeman, 58 Ark. 84, 23 S. W. 4; McGaughey *v.* Brown, 46 Ark. 25; Carter *v.* Cantrell, 16 Ark. 154, 163.

California.— Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386; Chapman *v.* California Bank, 97 Cal. 155, 31 Pac. 896; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88.

Connecticut.— Cone *v.* Dunham, 59 Conn.

possession of property in his own name and is afterward by matter of evidence or by construction of law changed into a trustee," the statute may be pleaded.[81]

145, 20 Atl. 311, 8 L. R. A. 647; Wilmerding *v.* Russ, 33 Conn. 67.

Illinois.— Quayle *v.* Guild, 91 Ill. 378.

Indiana.— Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301.

Kansas.— See Kennedy *v.* Kennedy, 25 Kan. 151.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582; Clarke *v.* Seay, 5 S. W. 589, 21 Ky. L. Rep. 394.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783.

Maryland.— McDowell *v.* Goldsmith, 6 Md. 319, 61 Am. Dec. 305.

Massachusetts.— Currier *v.* Studley, 159 Mass. 17, 33 N. E. 709; Carlow *v.* Dehon, 111 Mass. 195; Farnam *v.* Brooks, 9 Pick. 212.

Michigan.— Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059; German American Seminary *v.* Kiefer, 43 Mich. 105, 4 N. W. 636.

Minnesota.— Stillwater, etc., R. Co. *v.* Stillwater, 66 Minn. 176, 68 N. W. 836. And see Randall *v.* Constans, 33 Minn. 329, 338, 23 N. W. 5[illegible].

Mississippi.— Cooper *v.* Cooper, 61 Miss. 676; Prewett *v.* Buckingham, 28 Miss. 92; Murdock *v.* Hughes, 7 Sm. & M. 219.

Missouri.— Reed *v.* Lainter, 145 Mo. 341, 46 S. W. 1089 [*following* Landis *v.* Saxton, 105 Mo. 486, 16 S. W. 912, 24 Am. St. Rep. 403]; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Ricords *v.* Watkins, 56 Mo. 553; Keeton *v.* Keeton, 20 Mo. 530; Shortridge *v.* Harding, 34 Mo. App. 354.

New Jersey.— McClane *v.* Shepherd, 21 N. J. Eq. 76.

New York.— Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448; Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]; Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298 [*reversing* 36 Hun 247]; Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854; Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170; Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Pierson *v.* McCurdy, 33 Hun 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615]. And see Hawley *v.* Cramer, 4 Cow. 717.

North Carolina.— Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212 (where a trustee of an express trust which had terminated still held the fund); Wheeler *v.* Piper, 56 N. C. 249 (trust imposed on the ground of fraud); Edwards *v.* University, 21 N. C. 325, 30 Am. Dec. 170. And see Faggart *v.* Bost, 122 N. C. 517, 29 S. E. 833; North Carolina University *v.* State Nat. Bank, 96 N. C. 280, 3 S. E. 359; Robertson *v.* Dunn, 87 N. C. 191; Falls *v.* Torrance, 11 N. C. 412.

Pennsylvania.— Ashhurst's Appeal, 60 Pa. St. 290; Walker *v.* Walker, 16 Serg. & R. 379; Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558.

South Carolina.— Beard *v.* Stanton, 15 S. C. 164; Hughes *v.* Hughes, Cheves 33; Buchan *v.* James, Speers Eq. 375; Swindersine *v.* Miscally, Bailey Eq. 304.

Tennessee.— Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427; Loyd *v.* Curtis, 3 Humphr. 462; Nicholson *v.* Lauderdale, 3 Humphr. 200; Armstrong *v.* Campbell, 3 Yerg. 201, 24 Am. Dec. 556. *Compare* Smart *v.* Waterhouse, 10 Yerg. 94.

Texas.— Kennedy *v.* Baker, 59 Tex. 150; Hunter *v.* Hubbard, 26 Tex. 537; Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033.

Virginia.— Ledford *v.* Clarke, 100 Va. 115, 40 S. E. 630; Saum *v.* Coffelt, 79 Va. 510; Sheppard *v.* Turpin, 3 Gratt. 373 [*distinguishing* Rankin *v.* Bradford, 1 Leigh 133].

Wisconsin.— Merton *v.* O'Brien, 117 Wis. 437, 94 N. W. 340; Bottles *v.* De Baun, 116 Wis. 323, 93 N. W. 5; Howell *v.* Howell, 15 Wis. 55.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718 [*affirming* 15 Fed. 753]; Beaubien *v.* Beaubien, 23 How. 190, 16 L. ed. 484; Cooper *v.* Hill, 94 Fed. 582, 590, 36 C. C. A. 402; Hayden *v.* Thompson, 71 Fed. 60, 17 C. C. A. 592; Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]; Hayman *v.* Keally, 11 Fed. Cas. No. 6,265, 3 Cranch C. C. 325.

England.— Churcher *v.* Martin, 42 Ch. D. 312, 58 L. J. Ch. 586, 61 L. T. Rep. N. S. 113, 37 Wkly. Rep. 582; Clanricarde *v.* Henning, 30 Beav. 175, 7 Jur. N. S. 1113, 30 L. J. Ch. 865, 5 L. T. Rep. N. S. 163, 9 Wkly. Rep. 912, 54 Eng. Reprint 855; Townshend *v.* Townshend, 1 Bro. Ch. 550, 1 Cox C. C. 28, 28 Eng. Reprint 1292; Hovenden *v.* Annesley, 2 Sch. & Lef. 633, 9 Rev. Rep. 119; Beckford *v.* Wade, 17 Ves. Jr. 87, 34 Eng. Reprint 34, construing the statute applicable to the island of Jamaica.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 500–503.

The reason for the distinction between the effect of the statute upon express and implied trusts lies in the fact that in the latter kind of trusts the element of trust and confidence is absent. The relation of trustee and *cestui que trust* does not in fact exist, and the holding of an implied or constructive trustee is for himself, and therefore at all times adverse. Hughes *v.* Brown, 88 Tenn. 578, 590, 13 S. W. 286, 8 L. R. A. 480; Beckford *v.* Wade, 17 Ves. Jr. 87, 11 Rev. Rep. 20, 34 Eng. Reprint 34.

Mortgagee holding proceeds of sale.— A mortgagee who has received the proceeds of the sale of the mortgaged property is not trustee of an express trust; if in any sense a trustee he is simply trustee of an implied trust, and the case falls within the rule of the text. Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*reversing* 48 Hun 97]. See also, generally, MORTGAGES.

81. Ricords *v.* Watkins, 56 Mo. 553; Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298 [*re-*

This is true *a fortiori* where plaintiff seeks his remedy in a court of law having no equity jurisdiction.[82] In the case of a constructive or implied trust, except where the trust is imposed on the ground of fraud which is not immediately discovered, or there has been a fraudulent concealment of the cause of action, the statute begins to run in favor of the party chargeable as trustee from the time when the wrong is done by which he becomes thus chargeable,[83] or the time when the beneficiary can assert his rights;[84] not from the time when demand is made on the trustee,[85] or the trust is repudiated by him, for no repudiation of an

versing 36 Hun 247]; Robertson *v.* Dunn, 87 N. C. 191; Hunter *v.* Hubbard, 26 Tex. 537; Angell Lim. § 471. And see Murdock *v.* Hughes, 7 Sm. & M. (Miss.) 219; Brown *v.* Brown, 83 Hun (N. Y.) 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Decouche *v.* Savetier, 3 Johns. Ch. (N. Y.) 190, 8 Am. Dec. 478 note; Buchan *v.* James, Speers Eq. (S. C.) 375; Sheppard *v.* Turpin, 3 Gratt. (Va.) 373; and the cases in the preceding note. But *compare* Norris' Appeal, 71 Pa. St. 106, 124.

82. Shortridge *v.* Harding, 34 Mo. App. 354.

83. *Arkansas.*— See McGaughey *v.* Brown, 46 Ark. 25.

California.— Barker *v.* Hurley, 132 Cal. 21, 63 Pac. 1071; Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88. See also Chapman *v.* California Bank, 97 Cal. 155, 31 Pac. 896.

Connecticut.— Wilmerding *v.* Russ, 33 Conn. 67.

Georgia.— Keaton *v.* Greenwood, 8 Ga. 97, from the time of defendant's possession.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Iowa.— The statute runs in favor of the trustee "from the time he disowns the obligation of the trust and sets up a claim in his own right to the trust property." Otto *v.* Schlapkahl, 57 Iowa 226, 10 N. W. 651; Gebhard *v.* Sattler, 40 Iowa 152. And see Murphy *v.* Murphy, 80 Iowa 740, 45 N. W. 914.

Kentucky.— Covington, etc., R. Co. *v.* Bowler, 9 Bush 468.

Minnesota.— Stillwater, etc., R. Co. *v.* Stillwater, 66 Minn. 176, 68 N. W. 836.

Mississippi.— Cooper *v.* Cooper, 61 Miss. 676.

New York.— Lammer *v.* Stoddard, 103 N. Y. 672, 9 N. E. 328; Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854; Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170. And see Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448; Pierson *v.* McCurdy, 33 Hun 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615].

North Carolina.— Robertson *v.* Dunn, 87 N. C. 191.

Pennsylvania.— See Ashhurst's Appeal, 60 Pa. St. 290.

Texas.— Kennedy *v.* Baker, 59 Tex. 150; Oaks *v.* West, (Civ. App. 1901) 64 S. W. 1033.

West Virginia.— Beecher *v.* Foster, 51 W. Va. 605, 42 S. E. 647.

Wisconsin.— Howell *v.* Howell, 15 Wis. 55.

United States.— Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 500–503.

The reason seems to be that the wrong from which the trust originates is "as complete and absolute a denial of the rights of the injured party as it is possible to have, and every day which passes without reparation of the injury is a continuation or repetition of it." Howell *v.* Howell, 15 Wis. 55. And see Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190.

A statute providing that "actions to enforce a trust or compel an accounting where the trustee has neglected to discharge his trust or has repudiated the trust relation or has fully performed the same" must be brought within a certain period after they accrue, has no application to implied or constructive trusts and does not change the rule of the text. Stillwater, etc., R. Co. *v.* Stillwater, 66 Minn. 176, 68 N. W. 836. And see St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 44 Fed. 817 (*affirming* 32 Fed. 821)]. But *compare* Burk *v.* Western Land Assoc., 40 Minn. 506, 42 Nev. 479.

84. *Minnesota.*— Stillwater, etc., R. Co. *v.* Stillwater, 66 Minn. 176, 68 N. W. 836.

Missouri.— Smith *v.* Ricords, 52 Mo. 581.

New York.— Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543], where plaintiff was a minor when the cause of action accrued.

North Carolina.— Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212.

Texas.— Cole *v.* Noble, 63 Tex. 432; Kennedy *v.* Baker, 59 Tex. 150; Hunter *v.* Hubbard, 26 Tex. 537.

Wisconsin.— Howell *v.* Howell, 15 Wis. 55.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 500–503.

85. As where it is sought to charge him as trustee of money wrongfully received or appropriated by him. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Robertson *v.* Dunn, 87 N. C. 191; Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]. And see Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193.

Implied trust arising upon termination of express trust.— Where, however, a will gave money to a trustee for the benefit of B, but recited that on the death of B "I give and bequeath said amount to his children, to

implied or constructive trust is ordinarily necessary to mature a right of action and set the statute in motion.[86] But where a trust is imposed on the ground of fraud which is concealed or does not immediately become known to the defrauded party, the statute begins to run when facts constituting the fraud are discovered,[87] or when plaintiff acquires such knowledge as would enable him by the exercise of proper discretion and diligence to discover such facts,[88] according to the general principles of equity which apply to cases of fraud and fraudulent concealment.[89] But in order that this rule may apply, the existence of the fraud must be found as an ultimate or inferential fact. It cannot be assumed.[90]

(B) *Qualifications.* While the rule that implied or constructive trusts are within the statute is well settled as a general proposition, it is not invariable, and has in many cases been relaxed; and certain implied or constructive trusts have

share and share alike," it was held that the express trust terminated upon L's death; that thereafter the trustee held the fund simply upon an implied trust to pay over the money to B's children and was charged with no other duty than that imposed by law to pay over the money when called upon to do so; and that as to one of the children who demanded payment which the trustee refused, the statute began to run from the refusal, but that as to the others who made no demand, the statute ran from the time they were at liberty t sue, viz., the death of B. Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212.

86. Barker *v.* Hurley, 132 Cal. 21, 63 Pac. 1071; Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699; Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. 1033; Powell *v.* Howell, 15 Wis. 55.

87. *Georgia.*— Harrison *v.* Adcock, 8 Ga. 68.

Iowa.— See McLenan *v.* Sullivan, 13 Iowa 521.

Kansas.— Kahm *v.* Klaus, 64 Kan. 24, 67 Pac. 542, where plaintiff was induced by the fraud of defendant to execute a deed to him under the belief that it was a power of attorney, and it was held that the rule of the text applied not only to the cause of action for the declaration and enforcement of the constructive trust but also to the cause of action for the recovery of the rents and profits of the land.

Kentucky.— Talbott *v.* Todd, 5 Dana 190; Pugh *v.* Bell, 1 J. J. Marsh. 398.

Minnesota.— See Randall *v.* Constans, 33 Minn. 329, 338, 23 N. W. 530.

Missouri.— Ricords *v.* Watkins, 56 Mo. 553; Keeton *v.* Keeton, 20 Mo. 530. And see McMurray *v.* McMurray, 180 Mo. 526, 79 S. W. 701; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056.

New York.— Reitz *v.* Reitz, 80 N. Y. 538 [*reversing* 14 Hun 536]. *Compare* Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170, holding that the action must be brought on the ground of fraud.

Ohio.— Carpenter *v.* Canal Co., 35 Ohio St. 307, 317.

Pennsylvania.— See Olinger *v.* Shultz, 183 Pa. St. 469, 38 Atl. 1024; Norris' Appeal, 71 Pa. St. 106, a case of fraudulent concealment. But it seems that in cases of constructive fraud (as distinguished from actual fraud) the statute begins to run from the time the fraudulent act is committed, not from the time of the discovery. Hollinshead's Appeal, 103 Pa. St. 158.

South Carolina.— Jones *v.* Godwin, 10 Rich. Eq. 226; Wamburzee *v.* Kennedy, 4 Desauss. Eq. 474.

Texas.— Andrews *v.* Smithwick, 34 Tex. 544, where defendant having assigned a land certificate to plaintiff, fraudulently obtained possession of it and converted it to his own use, the court holding that he held the certificate as trustee for plaintiff, regardless of his claim of ownership, and that the statute did not run in his favor until plaintiff had actual notice of the fraud and adverse claim or by the use of ordinary diligence might have discovered such facts, and that the registration of the certificate did not constitute such notice.

United States.— Hardy *v.* Harbin, 27 Fed. Cas. No. 16,060, 4 Sawy. 536; Wyman *v.* Babcock, 30 Fed. Cas. No. 18,113, 2 Curt. 386 [*affirmed* in 19 How. 289, 15 L. ed. 644].

England.— Clanricarde *v.* Henning, 30 Beav. 175, 7 Jur. N. S. 1113, 30 L. J. Ch. 865, 5 L. T. Rep. N. S. 168, 9 Wkly. Rep. 912, 54 Eng. Reprint 855; Hovenden *v.* Annesley, 2 Sch. & Lef. 633, 9 Rev. Rep. 119.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 500–503.

A wrongful investment of trust funds in the trustee's individual name is always a concealment, and imperfect information is equivalent to concealment, if given in a way calculated to give a false impression. Norris' Appeal, 71 Pa. St. 106. *Compare* Fleming *v.* Culbert, 46 Pa. St. 498.

88. Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88; Harbach *v.* Marsh, 37 Nebr. 22, 55 N. W. 286; Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854 (construing Code Civ. Proc. § 382, subdiv. 5); Kennedy *v.* Baker, 59 Tex. 150. And see Haynie *v.* Hall, 5 Humphr. (Tenn.) 290, 42 Am. Dec. 427; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 44 Fed. 817 (*affirming* 32 Fed. 821)].

89. See *infra*, VI, D, 2, b.

90. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

been held to be subject to the same rules as an express trust so far as the operation of the statute is concerned.[91] Thus, even though the trust sought to be enforced is not an express trust, yet if it is one solely within the jurisdiction of a court of equity and is recognized and acknowledged by the person chargeable as trustee, it is not subject to the operation of the statute until it terminates or is repudiated by the trustee, according to the rule applying to express trusts.[92] Likewise the rule that in cases of implied or constructive trusts the statute begins to run from the time the wrong is done by which defendant becomes chargeable as trustee is confined to cases where the trust arises out of some wrong done by defendant whereby he becomes chargeable as a trustee *in invitum*.[93] Therefore, although the trust may in a sense be said to arise by implication, yet if it is not imposed upon the trustee by law and against his will, but is voluntarily assumed by him with the consent or at the request of the beneficiary, the statute will not run so long as he admits his obligations and makes no adverse claim;[94] as in cases where there is a trust but a person other than the appointed trustee voluntarily takes possession of the trust funds and proceeds to perform the duties of the real trustee with the beneficiary's consent.[95]

91. This is especially true in England, the relaxation of the rule being made apparently in the interests of justice rather than from any definite legal principle; and the line of demarcation between trusts which are within the statute and those which are not is not very clearly defined. See Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165; Patrick *v.* Simpson, 24 Q. B. D. 128, 50 L. J. Q. B. 7, 61 L. T. Rep. N. S. 686; Lee *v.* Sankey, L. R. 15 Eq. 204, 27 L. T. Rep. N. S. 809, 21 Wkly. Rep. 286; Scotland Life Assoc. *v.* Siddal, 3 De G. F. & J. 58, 7 Jur. N. S. 785, 4 L. T. Rep. N. S. 311, 9 Wkly. Rep. 541, 64 Eng. Ch. 58, 45 Eng. Reprint 800; Salter *v.* Cavanagh, 1 Dr. & Wal. 668.

92. *Alabama.*— Haney *v.* Legg, 129 Ala. 610, 30 So. 34, 87 Am. St. Rep. 81, a resulting trust.

California.— Broder *v.* Conklin, 77 Cal. 330, 19 Pac. 513. And see Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482.

Connecticut.— Corr's Appeal, 62 Conn. 403, 26 Atl. 478, a resulting trust.

Illinois.— Reynolds *v.* Sumner, 126 Ill. 58, 18 N. E. 334, 9 Am. St. Rep. 523, 1 L. R. A. 327, a resulting trust.

Indiana.— See Moore *v.* Worley, 24 Ind. 81. *Compare* Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Maryland.— Owens *v.* Crow, 62 Md. 491.

Massachusetts.— St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231, a resulting trust. And see Currier *v.* Studley, 159 Mass. 17, 33 N. E. 709, resulting trust in a seat on a stock exchange.

Missouri.— Butler *v.* Lawson, 72 Mo. 227. But *compare* Reed *v.* Painter, 145 Mo. 341, 46 S. W. 1089.

New Hampshire.— Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190, a resulting trust.

New York.— Reitz *v.* Reitz, 80 N. Y. 538 [*reversing* 14 Hun 536], a resulting trust.

Texas.— Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258; Cole *v.* Noble, 63 Tex. 432 (resulting trust); Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485 [rehearing *denied* in 67 S. W. 343]; Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689.

Wisconsin.— Fawcett *v.* Fawcett, 85 Wis. 332, 55 N. W. 405, 39 Am. St. Rep. 844, a resulting trust.

United States.— See Ray *v.* U. S., 50 Fed. 166.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 500–503.

Necessity for written acknowledgment of cestui's rights see TRUSTS. See also *infra*, VI, B, 20, b, (VII).

Necessity for agreement to hold for plaintiff's benefit.— It has been held, however, that there must be some agreement on the part of the constructive trustee to hold for the benefit of the person entitled to the property; that it is not sufficient that after the wrong done he does not assume a position inconsistent with that of a trustee. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5, where it appeared from the evidence that defendant converted money received by him as agent for plaintiff.

93. White *v.* Sheldon, 4 Nev. 280. And see the cases cited *infra*, note 94.

94. Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555; Butler *v.* Hyland, 89 Cal. 575, 26 Pac. 1108; Owens Crow, 62 Md. 491; St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231; White *v.* Sheldon, 4 Nev. 280. To the same effect see Faylor *v.* Faylor, 136 Cal. 92, 68 Pac. 482; Broder *v.* Conklin, 77 Cal. 330, 19 Pac. 513.

95. Owens *v.* Crow, 62 Md. 491, where the appointed trustee was given no duties to perform under the instrument creating the trust and so the beneficiary became the real owner of the legal title, and the beneficiary's father took entire control and management of the trust property. See also Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165.

(III) *RECEIPT OF PLAINTIFF'S MONEY OR PROPERTY BY DEFENDANT — CASES OF AGENCY.*[96] A person receiving from another money to be paid to a third or to be applied to some particular purpose is not necessarily a trustee of an express trust within the rule exempting such trusts from the statute, for an action at law will ordinarily lie against him for his failure to perform his duty.[97] For similar reasons the fact that defendant receives and holds money which it is his duty to pay over to plaintiff, as where an agent or attorney collects or receives money for his principal or client, does not constitute him a trustee so as to deprive him of the benefit of the statute.[98] But an agent or attorney may be given duties and responsibilities which are beyond those ordinarily incident to the relationship

96. See also *supra*, VI, B, 14, b.

97. *Illinois.*— Hayward *v.* Gunn, 82 Ill. 385.

Kentucky.— Clay *v.* Clay, 7 Bush 95, receipt of money to be loaned for benefit of plaintiff.

Missouri.— Johnson *v.* Smith, 27 Mo. 591.

New York.— Budd *v.* Walker, 113 N. Y. 637, 21 N. E. 72 (money received for investment); St. John *v.* Coates, 63 Hun 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Downs *v.* Wells, 12 N. Y. St. 624.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741 [*followed* in Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558] (receipt of money to be applied for the use of a third person); Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450; Lyon *v.* Marclay, 1 Watts 271. But *compare* Johnston *v.* Humphreys, 14 Serg. & R. 394.

South Carolina.— Stroman *v.* O'Cain, 13 S. C. 100.

Tennessee.— Peebles *v.* Green, 6 Lea 471, where plaintiff gave money to defendant to invest on real estate security, but defendant in landing it took a chattel mortgage instead. See also Avery *v.* Holland, 2 Overt. 71.

Texas.— Phillips *v.* Holman, 26 Tex. 276, holding that a contract wherein plaintiff assigned and transferred to defendant stock certificates, in trust, to be disposed of according to defendant's best judgment, plaintiff to receive thereupon the original cost and half the profits realized, with no stated time for performance and account, did not create that kind of "technical and continuing" trust exempt from the statute of limitations; but that it devolved on defendant to perform the obligation and account within a reasonable time. But *compare* Murchison *v.* Payne, 37 Tex. 305.

England.— Crawford *v.* Crawford, Ir. R. 2 Eq. 166, 16 Wkly. Rep. 411, holding that a solicitor receiving from time to time particular sums of money to be paid by him to discharge certain debts of his clients is not a trustee, and that the statute runs after a reasonable time has elapsed in which to pay the money as directed.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 494–499.

Compare Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69.

Where an indorser of a note is employed as an attorney to collect it by suit, he does not thereby become a trustee so as to lose the protection of the statute. Alexander *v.* Westmoreland Bank, 1 Pa. St. 395.

98. *Alabama.*— Kimbro *v.* Waller, 21 Ala. 376; Maury *v.* Mason, 8 Port. 211.

District of Columbia.— Campbell *v.* Wilson, 2 Mackey 497.

Georgia.— Schofield *v.* Woolley, 98 Ga. 548, 25 S. E. 769, 58 Am. St. Rep. 315.

Illinois.— Cagwin *v.* Ball, 2 Ill. App. 70.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82.

Kentucky.— Clay *v.* Clay, 7 Bush 95.

Michigan.— Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059 [*distinguishing* Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580].

Mississippi.— Cook *v.* Rives, 13 Sm. & M. 328, 53 Am. Dec. 88.

Missouri.— Shortridge *v.* Harding, 34 Mo. App. 354.

Montana.— See Chowen *v.* Phelps, 26 Mont. 524, 69 Pac. 54.

New York.— Wood *v.* Young, 141 N. Y. 211, 36 N. E. 193; Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448; Roberts *v.* Ely, 113 N. Y. 128, 29 N. E. 606; St. John *v.* Coates, 63 Hun 460, 18 N. Y. Suppl. 419 [*affirmed* in 140 N. Y. 634, 35 N. E. 891]; Hickok *v.* Hickok, 13 Barb. 632; Downs *v.* Wells, 12 N. Y. St. 624; Stafford *v.* Richardson, 15 Wend. 302. To the same effect see Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543], where a father who was guardian *ad litem* for his son received without legal authority the proceeds of a judgment in the son's favor, and it was held that the receipts of the money created merely the relation of debtor and creditor between the father and the son.

North Carolina.— Egerton *v.* Logan, 81 N. C. 172.

Ohio.— Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604.

Pennsylvania.— Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487; Agnew *v.* Fetterman, 4 Pa. St. 56, 45 Am. Dec. 671; Finney *v.* Cochran, 1 Watts & S. 112, 37 Am. Dec. 450; Commonwealth, etc., Co. *v.* Folz, 23 Pa. Super. Ct. 558. But see Fox *v.* Cash, 11 Pa. St. 207.

South Carolina.— Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963; Estes *v.* Stokes, 2 Rich. 133; Lever *v.* Lever, 1 Hill Eq. 62; Van Ryhn *v.* Vincent, 1 McCord Eq. 310.

Tennessee.— Nicholson *v.* Lauderdale, 3 Humphr. 200 (where an agent sold land for his principal and received the purchase-money); Cocke *v.* McGinnis, Mart. & Y. 361,

of principal and agent or attorney and client, and thus may become substantially if not practically a trustee.[99] Thus it has frequently been held that where an agent or attorney is intrusted with money or other property of his principal or client so that a fiduciary relation is created between them, as where the agent or attorney is given the power of investment, management, and general control on behalf of his principal or client, the case falls within the general rule exempting trusts from the statute;[1] and this notwithstanding the trust may not belong to that class of technical trusts which falls within the exclusive jurisdiction of a court of equity.[2] It results that where it is sought to raise a trust from the fact that defendant has received and holds money belonging to plaintiff the material inquiry is whether there was actually any agreement that the money should be held for plaintiff's benefit.[3]

17 Am. Dec. 809 (money received as gatekeeper and receiver of tolls).

Virginia.— Hasher *v.* Hasher, 96 Va. 584, 32 S. E. 41 (holding that the fact that the agent appointed by an heir to collect a share of an estate collects a part of the share some time after he collects the main portion does not make it a continuing trust so as to avoid the statute of limitations); Kinney *v.* McClure, 1 Rand. 284.

Wisconsin.— Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5, where an agent sold land for his principal and received the purchase-money.

United States.— Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]. *Contra*, Sneed *v.* Hanly, 22 Fed. Cas. No. 13,136, Hempst. 659.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 494–499.

99. See Forsyth *v.* Lash, 89 N. C. 159; *In re* Sharpe, [1892] 1 Ch. 154, 61 L. J. Ch. 193, 65 L. T. Rep. N. S. 806, 40 Wkly. Rep. 241. See, generally, TRUSTS.

1. *California.*—Schroeder *v.* Jahns, 27 Cal. 274; Baker *v.* Joseph, 16 Cal. 173. And see Millet *v.* Bradbury, 109 Cal. 170, 41 Pac. 865; Zuck *v.* Culp, 59 Cal. 142.

Georgia.— Oliver *v.* Hammond, 85 Ga. 323, 331, 11 S. E. 655, where a husband was general agent for his wife in the management of her property, and the court said (quoting Evans Princ. & Agt. 293): "Wherever a fiduciary relation exists between a principal and his agent, the statute of limitations does not apply in favor of the latter, and in an action for an account for the principal, the agent cannot set up the statute as a bar."

Illinois.— Grant *v.* Odiorne, 43 Ill. App. 402.

Massachusetts.— See Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

Michigan.— Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

New Jersey.— Cook *v.* Williams, 2 N. J. Eq. 209. And see Rusling *v.* Rusling, 42 N. J. Eq. 594, 8 Atl. 534.

North Carolina.— Forsyth *v.* Lash, 89 N. C. 159.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974. And see Altgelt *v.* Elmendorf, (Civ. App. 1905) 86 S. W. 41.

United States.— Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69.

England.— Burdick *v.* Garrick, L. R. 5 Ch. 233, 241, 39 L. J. Ch. 369, 18 Wkly. Rep. 387 (in which Lord Chancellor Hatherly said: "I do not say that in every case in which a bill might be filed against an agent the Statute of Limitations would not apply, but in all cases where the bill is filed against an agent on the ground of his being in a fiduciary relation, I think it would be right to say that the statute has no application"); Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165; North American Land, etc., Co. *v.* Watkins, [1904] 1 Ch. 242 [*affirmed* in [1904] 2 Ch. 233, 73 L. J. Ch. 626, 91 L. T. Rep. N. S. 425, 20 T. L. R. 642, and *explaining* Friend *v.* Young, [1897] 2 Ch. 421, 66 L. J. Ch. 737, 77 L. T. Rep. N. S. 50, 46 Wkly. Rep. 139; Watson *v.* Woodman, L. R. 20 Eq. 721, 45 L. J. Ch. 57, 24 Wkly. Rep. 471]; *In re* Bell, 34 Ch. D. 462, 56 L. J. Ch. 307, 55 L. T. Rep. N. S. 757, 35 Wkly. Rep. 212; Gray *v.* Bateman, 21 Wkly. Rep. 137. *Compare In re* Hindmarsh, 1 Dr. & Sm. 129, 1 L. T. Rep. N. S. 475, 8 Wkly. Rep. 203, 62 Eng. Reprint 327.

2. Bacon *v.* Rives, 106 U. S. 99, 1 S. Ct. 3, 27 L. ed. 69. And see Schroeder *v.* Jahns, 27 Cal. 274; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974.

3. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Brown *v.* Brown, 83 Hun (N. Y.) 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5. And see Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448.

Illustrations.— Where bounty money due a minor for enlisting in the army was collected by his father without the knowledge or consent of the son, it was held that in the absence of proof of any agreement that the father was to keep the money for the son, there was at most only an implied or constructive trust which was within the operation of the statute. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82. But where it appeared in evidence that a minor received pay for military service and intrusted the money to his father who invested it in land and acknowledged that he considered the land as belonging to the son, it was held that there was an express continuing trust to which the statute of limitations did not apply. Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579.

(IV) *Conveyance or Assignment of Property as Security For Payment of Debts*—(A) *In General.* Where property is conveyed or assigned by way of security for a debt, with a stipulation for its reconveyance or reassignment on payment of the debt secured, a trust is thereby created, or if the stipulation be by parol, an equitable mortgage enforceable as a trust,[4] which falls within the general rule exempting express continuing trusts from the operation of the statute.[5] This is true *a fortiori* of a conveyance of property in trust to pay debts,[6] but only to the extent of the property and debts embraced in the deed.[7] Where the maker of indorsed notes conveys lands to the surety or indorser as security for the latter's contingent liability, a trust and equitable lien is created in favor of the payee of the notes, which continues notwithstanding the liability of the surety or indorser becomes barred by limitations.[8] A pledge with a power of sale has been held to create a direct trust so that the pledgor's right to an accounting is not affected by the statute until demand and refusal or the assertion of an adverse claim by the pledgee.[9] Where land is conveyed under a contract that it shall be sold by the grantee who shall pay out of the proceeds certain debts of the grantor and repay the balance, a direct trust as to the proceeds is created within the general rule above mentioned.[10]

(B) *Assignments For Benefit of Creditors.*[11] Where a debtor makes an assignment for the benefit of his creditors, an express trust is thereby created, so that as against the claims of creditors not barred at the time of the assignment, the statute of limitations will not run in favor of the assignee until the trust is terminated as by resignation, removal, or discharge by order of court,[12] or until a settlement

4. Potter *v.* Kimball, 186 Mass. 120, 71 N. E. 308. See, generally, MORTGAGES; TRUSTS.

5. *Massachusetts.*— Potter *v.* Kimball, 186 Mass. 120, 71 N. E. 308; Carpenter *v.* Cushman, 105 Mass. 417.

Missouri.— Ruff *v.* Milner, 92 Mo. App. 620, a deed of trust to secure a debt.

New Jersey.— Waln *v.* Hance, 53 N. J. Eq. 660, 32 Atl. 169, 35 Atl. 1130.

North Carolina.— Maxwell *v.* Barringer, 110 N. C. 76, 14 S. E. 516, 28 Am. St. Rep. 668.

Oregon.— Manaudas *v.* Mann, 22 Oreg. 525, 30 Pac. 422.

Rhode Island.— See Sayles *v.* Tibbitts, 5 R. I. 79.

United States.— Gisborn *v.* Charter Oak L. Ins. Co., 142 U. S. 326, 12 S. Ct. 277, 35 L. ed. 1029 [*affirming* 5 Utah 319, 15 Pac. 253].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 495–503.

Compare Millard *v.* Hathaway, 27 Cal. 119.

6. Gibbs *v.* Cunningham, 4 Md. Ch. 322; Hill *v.* McDonald, 58 Hun (N. Y.) 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431. And see Sayles *v.* Tibbitts, 5 R. I. 79; Canadian, etc., Trust Co. *v.* Edinburgh-American Land Mortg. Co., 16 Tex. Civ. App. 520, 41 S. W. 140, 42 S. W. 864.

7. Gibbs *v.* Cunningham, 4 Md. Ch. 322, holding that claims of the trustee against the grantor were exempt from the statute so far as concerned the proceeds of the trust property, but not as to the proceeds of other property of the grantor not embraced in the trust deed; and that the statute ran against claims not included in the deed.

8. Eastman *v.* Foster, 8 Metc. (Mass.) 19. And see Sayles *v.* Tibbitts, 5 R. I. 79.

On the other hand where a principal debtor has deposited with his indorser or surety certain securities for the latter's indemnity, and the surety or indorser has collected on such securities a sum greater than that which he has been compelled to pay for the debtor, he may plead the statute in an action for money had and received brought against him by the debtor to recover the surplus. Finney *v.* Cochran, 1 Watts & S. (Pa.) 112, 37 Am. Dec. 450.

9. Purdy *v.* Sistare, 2 Hun (N. Y.) 126. See also PLEDGES.

10. Talbott *v.* Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491; Irwin *v.* Holbrook, 26 Wash. 89, 66 Pac. 116.

11. As to bankruptcy proceedings see BANKRUPTCY, 5 Cyc. 323 note 34.

12. *Massachusetts.*— Willard *v.* Clarke, 7 Metc. 435, per Shaw, C. J.

Minnesota.— *In re* St. Paul German Ins. Co., 58 Minn. 163, 59 N. W. 991, 49 Am. St. Rep. 497, 26 L. R. A. 737, per Canty, J.

North Carolina.— Davis *v.* Boyden, 123 N. C. 283, 31 S. E. 492.

Ohio.— Bettman *v.* Hunt, 12 Ohio Dec. (Reprint) 396, 12 Cinc. L. Bul. 286. *Contra*, Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212, decided on the ground that the claim was one on which an action at law would lie.

Pennsylvania.— Heckert's Appeal, 24 Pa. St. 482; *In re* Kaufman, 22 Pa. Co. Ct. 385. *Compare* Penn Bank's Estate, 152 Pa. St. 65, 25 Atl. 310, where a bank stated and delivered to a depositor his account showing a balance against him, and about the same time made a voluntary assignment for the benefit

is had[13] or payment is refused by the assignee;[14] and this, even though during the continuance of the trust a right of action against the debtor becomes barred.[15] And the same rule has been held to apply where the assets of an assigned estate come into the hands of an agent appointed by the creditors under the statute regulating such assignments.[16] But the trust does not affect the running of the statute between a creditor and the assignor.[17]

(c) *Insolvency Proceedings.*[18] Where the property of an insolvent debtor, in proceedings under the insolvency laws, goes into the possession of a trustee or assignee for the benefit of creditors, an express trust is thereby created so that as against the claims of creditors not then barred the statute of limitations will not run in favor of the assignee or trustee during the continuance of the trust;[19] and therefore a claim not barred at the commencement of the insolvency proceedings may be proved at a meeting of the creditors[20] or recovered in an action or by way of set-off against the assignee or trustee[21] after the statutory period has elapsed. But the operation of the statute upon a right of action by a creditor against the debtor is not affected by the trust, and the statute continues to run as if no insolvency had intervened.[22]

(v) *Directors of Corporations as Trustees.*[23] In some jurisdictions it is held that directors of banks or other corporations are not trustees of an express trust within the rule exempting such trusts from the operation of the statute, but that at most they are trustees of an implied trust and are within the protection of the statute.[24] But in other jurisdictions they are held to be trustees in whose favor the statute does not run during the continuance of the trust.[25]

of creditors, and the depositor for more than six years acquiesced in the correctness of the account and made no claim, at the second audit of the assigned estate presented a claim as creditor, asserting that the account rendered him was erroneous, and it was held that the statute of limitations had barred his right of action.

South Carolina.— Brooks *v.* Brooks, 12 S. C. 422.

Texas.— McIlhenny Co. *v.* Todd, 71 Tex. 400, 9 S. W. 445, 10 Am. St. Rep. 753.

Compare Richardson *v.* Whitaker, 103 Ky. 425, 45 S. W. 774.

13. Where one of the creditors for whose benefit the assignment was made settles in full with the assignee, the statute runs against an action by him for settlement of the trust; and this notwithstanding a statute providing that the statute of limitations shall not apply in the case of a continuing, subsisting trust. Richardson *v.* Whitaker, 103 Ky. 425, 45 S. W. 774.

14. Where payment is demanded by the creditor and positively refused by the trustee, there is such a repudiation of the trust as will set the statute in motion against the creditor's claim. Hill *v.* McDonald, 58 Hun (N. Y.) 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431. And see Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212.

15. Heckert's Appeal, 24 Pa. St. 482; *In re* Kaufman, 22 Pa. Co. Ct. 385.

16. McIntyre *v.* McClenaghan, 12 S. C. 185.

17. Parsons *v.* Clark, 59 Mich. 414, 26 N. W. 656. *In re* Kaufman, 22 Pa. Co. Ct. 385.

18. As to bankruptcy proceedings see BANKRUPTCY, 5 Cyc. 323 note 34.

19. *In re* Leiman, 32 Md. 225, 3 Am. Rep. 132; Parker *v.* Sanborn, 7 Gray (Mass.) 191; Willard *v.* Clarke, 7 Metc. (Mass.) 435 (per Shaw, C. J.); Minot *v.* Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444; *In re* Coates, 2 Pars. Eq. Cas. (Pa.) 258.

20. Minot *v.* Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444.

21. Parker *v.* Sanborn, 7 Gray (Mass.) 191, where the assignee sued on a debt due to the insolvent, and it was held that debts payable by the insolvent more than six years before the commencement of the action, but less than six years before the commencement of the insolvency proceedings, might be set off.

22. Collester *v.* Hailey, 6 Gray (Mass.) 517.

23. See also, generally, CORPORATIONS, 10 Cyc. 1.

24. Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Wallace *v.* Lincoln Sav. Bank, 89 Tenn. 630, 15 S. W. 448, 24 Am. St. Rep. 625 [*disapproving* language used in Shea *v.* Mabry, 1 Lea (Tenn.) 319]; Cullen *v.* Coal Creek Min., etc., Co., (Tenn. Ch. App. 1897) 42 S. W. 693; Cooper *v.* Hill, 94 Fed. 582, 36 C. C. A. 402, directors of national bank.

25. Ellis *v.* Ward, 137 Ill. 509, 25 N. E. 530; Ellis *v.* Ward, (Ill. 1889) 20 N. E. 671; Boyd *v.* Mutual Fire Assoc., 116 Wis. 155, 90 N. W. 1086, 94 N. W. 171, 96 Am. St. Rep. 948, 61 L. R. A. 918. *In re* Sharpe, [1892] 1 Ch. 154, 61 L. J. Ch. 193, 65 L. T. Rep. N. S. 806, 40 Wkly. Rep. 241 [*approved* in Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165]; *In re* Exchange Banking Co., 21 Ch. D. 519, 52 L. J. Ch. 217, 48 L. T. Rep.

(VI) *Funds in Public Treasury or Held by Municipalities and Public Officers.* Money regularly paid into a public treasury or coming into the hands of municipal corporations or public officers to be held, paid over, or invested according to law has in many cases been deemed to be held in trust within the rule exempting express trusts from the operation of the statute of limitations.[26] The rule is to the contrary, however, if the trust is not express, or arises *ex maleficio*, or the party entitled to the money can maintain an ordinary action at law to recover it.[27] Thus the receipt of money by a public officer or municipal corporation under claim and color of right does not constitute the officer or municipality an express trustee for the persons claiming to recover back the money as having been wrongfully exacted or received, and the statute of limitations applies.[28]

(VII) *Trusts Created or Established by Parol.*[29] A trust in order to be exempt from the operation of the statute need not always be created by an instrument in writing but may be created or established by parol, in so far as this is not forbidden by the statute of frauds. Thus express trusts of money or personal property may be created by parol,[30] and the facts upon which an implied or constructive trust is based may of course be proved by parol evidence and the trust thus established.[31]

N. S. 86, 31 Wkly. Rep. 174. See also Southern Mut. Ins. Co. *v.* Pike, 32 La. Ann. 488, holding that an officer of a corporation cannot acquire title by prescription to the books, accounts, and assets of the corporation unless he openly asserts an adverse claim thereto, and that the same rule applies where the officer has died and the property has come into the possession of his heir who has accepted the succession.

The managers of a savings bank are trustees for the depositors, so that where sued for mismanagement they cannot have the benefit of the statute of limitations. That a manager vacates his office does not set the statute in motion in his favor. Williams *v.* McKay, 40 N. J. Eq. 189, 197, 53 Am. Rep. 775 [*reversing* 38 N. J. Eq. 373, and *distinguishing* Spering's Appeal, 71 Pa. St. 11, 10 Am. Rep. 684], in which the court said: "In reaching this conclusion, the principle so often stated in the decisions and text-books is in nowise controverted, that a trust, to be exempt from the operation of the statute of limitations, must be of a nature to stand the triple test, viz.: first, it must be a direct trust; second, it must be of a kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust*."

26. *California.*— Miller *v.* Batz, 142 Cal. 447, 76 Pac. 42; San Luis Obispo County *v.* King, 69 Cal. 531, 11 Pac. 178.

Indiana.— Rush County *v.* State, 103 Ind. 497, 3 N. E. 165.

Kentucky.— Harrodsburg Bd. of Trustees *v.* Harrodsburg Educational Dist., 7 S. W. 312, 9 Ky. L. Rep. 605.

Maine.— McGuire *v.* Linneus, 74 Me. 344.

New York.— Wood *v.* Monroe County, 50 Hun 1, 2 N. Y. Suppl. 369; Spaulding *v.* Arnold, 6 N. Y. Suppl. 336, so holding notwithstanding the officer had mingled the money with other funds.

Tennessee.— Gas-Light Co. *v.* Memphis, 93 Tenn. 612, 30 S. W. 25.

Washington.— New York Security, etc., Co. *v.* Tacoma, 30 Wash. 661, 71 Pac. 194 [*following* Bidwell *v.* Tacoma, 26 Wash. 518, 67 Pac. 259; Potter *v.* New Whatcom, 20 Wash. 589, 56 Pac. 394, 72 Am. St. Rep. 135].

United States.— New Orleans *v.* Fisher, 91 Fed. 574, 34 C. C. A. 15. See also Counties, 11 Cyc. 610 note 55.

For particular applications of rule see Municipal Corporations; Officers; Schools and School-Districts; Sheriffs and Constables; Taxation.

Funds paid into the treasury of the United States have been held to be subject to the rule of the text. U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721. And see Courts, 11 Cyc. 974.

27. Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772; Stillwater, etc., R. Co. *v.* Stillwater, 66 Minn. 176, 68 N. W. 836; Strough *v.* Jefferson County Bd. of Supervisors, 119 N. Y. 212, 23 N. E. 552 [*affirming* 50 Hun 55, 3 N. Y. Suppl. 110] (holding in a case of misappropriation that a cause of action for money had and received accrued at the date of the misappropriation and the statute then began to run); Wood *v.* Monroe County, 50 Hun (N. Y.) 1, 2 N. Y. Suppl. 369. And see cases in the following note.

28. Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301; Newson *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163; Merrill *v.* Monticello, 66 Fed. 165 [*affirmed* in 72 Fed. 462, 18 C. C. A. 636]. To the same effect see Jasper Dist. Tp. *v.* Wheatland Dist. Tp., 62 Iowa 62, 17 N. W. 205; Robinson *v.* Brooklyn, 9 N. Y. St. 716; Tyler *v.* New York, 7 N. Y. St. 265; Robinson *v.* Cameron County, 1 Walk. (Pa.) 205.

29. Necessity of writing for creation of trust see Trusts.

30. Martin *v.* Greer, Ga. Dec. 109; Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165. See Trusts.

31. Broder *v.* Conklin, 77 Cal. 330, 19 Pac. 513; White *v.* Sheldon, 4 Nev. 280, 292,

c. Between Whom Statute Inoperative — (I) *In General.* The general rule is that for a trust to be exempt from the statute not only must it be an express trust cognizable solely in equity, but the contest or suit involving it must arise between the trustee and the *cestui que trust.*[32] But this rule is not always strictly adhered to and is subject to numerous qualifications.[33] Thus it has been held that a third person who knowingly participates in a trustee's breach of trust is no more entitled to avail himself of the statute than is the trustee.[34] Where property having been held under an express trust comes into the hands of a third person having notice of the trust, it is held in some cases that the third person occupies the position of an express trustee and is not protected by the statute;[35] although

where the court said: "That no parol agreement between the parties giving to an implied trust an effect or character different from that which the law would create from the acts of the parties could be admitted in evidence in cases of this kind there is little doubt, for that would be simply creating an express trust by parol, which the law does not tolerate. But that all the facts and circumstances out of which the implied trust is raised, may be proven is clear, otherwise the trust itself could not be established."

For implied or constructive trusts not within the statute of limitations see *supra*, VI, B, 20, b, (II).

32. *Georgia.*— Mason, *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172.

Illinois.— Hayward *v.* Gunn, 82 Ill. 385; Governor *v.* Woodworth, 63 Ill. 254.

Maryland.— Crook *v.* Glenn, 30 Md. 55.

Pennsylvania.— Lyon *v.* Marclay, 1 Watts 271. And see Parton *v.* Dickens, 48 Pa. St. 518.

Tennessee.— Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480, a bill to subject a trust estate to the payment of a debt contracted by the trustee for the benefit of the estate.

Utah.— Jenkins *v.* Jensen, 24 Utah 108, 66 Pac. 773, 91 Am. St. Rep. 783.

Virginia.— Hasher *v.* Hasher, 96 Va. 584, 32 S. E. 41.

England.— Lewellyn *v.* Mackworth, 15 Bacon Abr. 125; Townshend *v.* Townshend, 1 Bro. Ch. 550, 1 Cox. C. C. 28, 28 Eng. Reprint 1292; Hovenden *v.* Annesley, 2 Sch. & Lef. 633, 9 Rev. Rep. 119. As to the provisions of the Trustee Act of 1888 see Thorne *v.* Heard, [1895] A. C. 495, 64 L. J. Ch. 652, 73 L. T. Rep. N. S. 291, 11 Reports 254, 44 Wkly. Rep. 155 [*affirming* [1894] 1 Ch. 599 (*affirming* [1893] 3 Ch. 530)].

Authorized loan by trustee to stranger.— Where the trustee lends to a stranger money belonging to the trust, he being authorized to do so, and takes a note payable to himself as trustee, there is no breach of the trust and no trust either express or constructive is raised between the *cestui que trust* and the stranger. The only right of the *cestui que trust* rests on the simple contract existing between the trustee and the stranger, and the statute of limitations applies. Mason *v.* Mason, 33 Ga. 435, 83 Am. Dec. 172.

33. See the cases in the following notes.

34. Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84 [*citing* Pomeroy Eq. Jur. § 1080]; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135 (where a third person acting in collusion with the trustee fraudulently obtained trust property); Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165. And see Lee *v.* Sankey, L. R. 15 Eq. 204, 27 L. T. Rep. N. S. 809, 21 Wkly. Rep. 286; Scotland Life Assoc. *v.* Siddal, 3 De G. F. & J. 58, 7 Jur. N. S. 785, 4 L. T. Rep. N. S. 311, 9 Wkly. Rep. 541, 64 Eng. Ch. 58, 45 Eng. Reprint 800. *Compare* Barroll *v.* Forman, 88 Md. 188, 40 Atl. 883, holding that where it is attempted to charge a purchaser at a trust sale with liability for deferred payments previously paid by him by transfer of negotiable paper to one of the trustees, under circumstances showing knowledge on his part of a breach of trust by the trustee so paid, the statute of limitations runs from the maturity of the deferred payments, not from the transfer of the notes.

35. *Massachusetts.*—Blake *v.* Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414 (where the trustee pledged trust property to secure his own debt); Eastman *v.* Foster, 8 Metc. 19.

North Carolina.— See McLaurin *v.* Fairly, 59 N. C. 375.

Oregon.— Manaudas *v.* Mann, 22 Oreg. 525, 30 Pac. 422.

Pennsylvania.— Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24, a pledge to a third person.

Vermont.— Payne *v.* Hathaway, 3 Vt. 212.

England.— Soar *v.* Ashwell, [1893] 2 Q. B. 390, 69 L. T. Rep. N. S. 585, 4 Reports 602, 42 Wkly. Rep. 165 (money received by trustee's solicitor); *In re* Bell, 34 Ch. D. 462, 56 L. J. Ch. 307, 55 L. T. Rep. N. S. 757, 35 Wkly. Rep. 212 (money received by trustee's solicitor); Ernest *v.* Croysdill, 2 De G. F. & J. 175, 6 Jur. N. S. 740, 29 L. J. Ch. 580, 2 L. T. Rep. N. S. 616, 8 Wkly. Rep. 736, 63 Eng. Ch. 175, 45 Eng. Reprint 589.

Fraud the basis of rule.— In some cases the rule of the text has been considered to be founded on fraud. When it is said that a person who fraudulently receives or possesses himself of trust property is converted by a court of equity into a trustee, the expression is used for the purpose of describing the nature and extent of the remedy against him, and it denotes that the parties entitled beneficially have the same rights and remedies against him as they would be entitled to

in other cases it is held that he is merely a constructive trustee and that the statute applies in his favor,[36] especially where the trust funds may be recovered in an action at law.[37] But in cases of this character if the third person receives the trust property under an agreement to account for it or to hold it on the same trusts as it was held by the trustee, he then becomes an express trustee and is not protected by the statute.[38] Where an instrument creates a trust for the benefit of persons other than the grantor and his successors in interest, but for some extraneous reason the trust is void so that no title passes to the trustees, but the latter take possession of the property and administer it according to the terms of the instrument, an implied trust arises in favor of the grantor or those succeeding to his title in the property; and since the possession of the trustees cannot inure to the benefit of those whose title was intended to be defeated by the instrument, the trustees' possession is necessarily adverse and the statute runs in their favor.[39] But where an express trust passes title to the trustees but is invalid as to the nominated *cestuis que trustent*, so that the trustees hold for others and voluntarily assume and admit the trust, they are express trustees in whose favor the statute does not run while the trust is acknowledged by them.[40] The rule exempting trusts from the statute has been held to apply between the trustee and one to whom the beneficiary has transferred his interests by way of equitable assignment.[41] In this connection it has been said: "Where the possession of property is held by a trustee not by virtue of any personal right or personally asserted right on his part, but is colored by a trust and confidence in virtue of which he received it, the identity of the *cestui que trust* is of very little importance, but the relationship is all important; and, so long as the relation of trust exists, it is

against an express trustee who had fraudulently committed a breach of trust. The remedy is granted on the ground of fraud and is governed by the principle that the right of the party defrauded is not affected by lapse of time or generally speaking by anything done or omitted to be done, as long as he remains without any fault of his own in ignorance of the fraud that has been committed. Rolfe *v.* Gregory, 4 De G. J. & S. 576, 11 Jur. N. S. 98, 34 L. J. Ch. 274, 12 L. T. Rep. N. S. 162, 13 Wkly. Rep. 355, 69 Eng. Ch. 576, 46 Eng. Reprint 1042. And see Blake *v.* Traders' Nat. Bank, 145 Mass. 13, 12 N. E. 414. As to relief on the ground of fraud see, generally, *infra*, VI, B, 21.

36. Broder *v.* Conklin, 121 Cal. 282, 53 Pac. 699 (where the attorney of the assignee of an insolvent debtor purchased property of the insolvent from the assignee in fraud of the rights of creditors, and it was held that a constructive trust was thereby created in the creditors' favor, the cause of action in the enforcement of which accrued immediately on the purchase); Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386; *In re* Post, 13 R. I. 495; Kennedy *v.* Baker, 59 Tex. 150; Hunter *v.* Hubbard, 26 Tex. 537 (where the grantor in a deed of trust retained possession of some of the property and sold it to a stranger); Sheppard *v.* Turpin, 3 Gratt. (Va.) 373 [*distinguishing* Rankin *v.* Bradford, 1 Leigh (Va.) 163]. And see Carter *v.* Cantrell, 1 Ark. 154; Haynie *v.* Hall, 5 Humphr. (Tenn.) 290, 42 Am. Dec. 427.

37. Pierson *v.* McCurdy, 33 Hun (N. Y.) 520 [*affirmed* in 100 N. Y. 608, 2 N. E. 615], in which the court *disapproved* Ernest *v.* Croysdill, 2 De G. F. & J. 175, 6 Jur. N. S. 740, 29 L. J. Ch. 580, 2 L. T. Rep. N. S. 616, 8 Wkly. Rep. 736, 63 Eng. Ch. 175, 45 Eng. Reprint 589. And see Hovey *v.* Elliot, 53 N. Y. Super. Ct. 331.

38. Gay *v.* Edwards, 30 Miss. 218; Hamman *v.* Jackson, (Tex. Civ. App. 1894) 26 S. W. 799, where the attorney of an administrator collected money for him, acknowledged its receipt, and did not repudiate the trust relation, and it was held that the statute did not run. And see Moore *v.* Worley, 24 Ind. 81; McLaurin *v.* Fairly, 59 N. C. 375; Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258.

But a parol acknowledgment of the rights of the *cestui que trust* by the constructive trustee cannot operate to change the position to that of an express trustee where the property taken by him is real estate and the statutes require that express trusts of real estate can be created only by a signed instrument in writing. Nougues *v.* Newlands, 118 Cal. 102, 50 Pac. 386; Cooper *v.* Cooper, 61 Miss. 676. See TRUSTS.

39. Churcher *v.* Martin, 42 Ch. D. 312, 58 L. J. Ch. 586, 61 L. T. Rep. N. S. 113, 37 Wkly. Rep. 682, holding also that it made no difference that one of the trustees was the general devisee and legatee of the creator of the invalid trust, and thus was not only a trustee but also a beneficial owner.

40. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 41 N. E. 231 [*distinguishing* Churcher *v.* Martin, 42 Ch. D. 312, 58 L. J. Ch. 586, 61 L. T. Rep. N. S. 113, 37 Wkly. Rep. 682].

41. Bigelow *v.* Catlin, 50 Vt. 408, where the beneficiary drew an order on the trustee to pay to a third person a certain sum from the beneficiary's share of the estate, and the

a case of express trust, no matter who the *cestui que trust* may prove to be."[42] Where there are several trustees, it seems that in controversies arising between them and cognizable solely in equity the statute of limitations has no more application than in controversies between trustee and *cestui que trust*.[43] Where an agent of a trust estate has contracted debts in his own name but in reality on behalf of the estate, the statute does not begin to run against the creditor's equitable remedy to obtain payment from the trust estate until his legal remedies against the agent have been exhausted and have become unavailing; as where an execution against the agent has been returned *nulla bona* or the agent's insolvency has been legally ascertained; and it seems that his remedy in equity does not become barred so long as his remedy at law against the agent is not barred.[44]

(II) *Between Cestui in Possession and Trustee.*[45] Where the *cestui que trust* is in possession of the trust property the statute does not run against him in favor of the trustee as long as the trust subsists,[46] whether the trust be express or implied.[47] But the statute will begin to run when the *cestui* is ousted[48] or where he repudiates the trust and claims to hold adversely and the trustee has knowledge thereof.[49]

(III) *Between Husband and Wife.* The rule exempting express, continuing trusts from the operation of the statute applies to cases where property is held in trust by a wife for her husband,[50] or by a husband for his wife.[51] But the rule is otherwise where the trust is implied or constructive, for to such trusts the statute applies[52] unless the trustee's obligation is recognized and admitted by him.[53]

(IV) *Between Vendor and Purchaser.* The rule in equity is that from the time of a contract for the sale of land the vendor becomes a trustee of the legal title for the purchaser, and the purchaser becomes a trustee of the purchase-money for the vendor who has a lien upon the land therefor; and thus the case falls within the rule exempting trusts from the statute of limitations.[54]

order was accepted by the trustee, charged against the beneficiary's share, and assigned by the beneficiary, it being held that an equitable assignment was thereby created so as to constitute between the trustee and the assignee a direct trust relation.

42. St. Paul's Church *v.* Atty.-Gen., 164 Mass. 188, 200, 41 N. E. 231. And see Lister *v.* Pickford, 34 Beav. 576, 11 Jur. N. S. 649, 34 L. J. Ch. 582, 12 L. T. Rep. N. S. 587, 6 New Rep. 243, 3 Wkly. Rep. 827, 55 Eng. Reprint 757.

43. Overstreet *v.* Bate, 1 J. J. Marsh. (Ky.) 367.

44. Wylly *v.* Collins, 9 Ga. 223.

45. See also Adverse Possession, 1 Cyc. 1067.

46. McClure *v.* Colyear, 80 Cal. 378, 22 Pac. 175; Clark *v.* Clark, 21 Nebr. 402, 32 N. W. 157; Newmarket *v.* Smart, 45 N. H. 87; Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231.

47. Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231.

48. Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. 337, 11 Sawy. 231.

49. New Market *v.* Smart, 45 N. H. 87.

50. Corr's Appeal, 62 Conn. 403, 26 Atl. 478.

51. As where the husband holds separate property of the wife in trust for her.

Connecticut.— Comstock's Appeal, 55 Conn. 214, 10 Atl. 559.

Indiana.— Hileman *v.* Hileman, 85 Ind. 1, holding that where the husband takes the possession and management of the wife's separate property the presumption under the local statutes is that he does so as her trustee.

New Jersey.— Rusling *v.* Rusling, 42 N. J. Eq. 594, 8 Atl. 534; Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631.

Pennsylvania.— Kutz's Appeal, 40 Pa. St. 90.

Vermont.— Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427.

Compare Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448, 55 N. Y. St. 257, holding that the facts involved did not show an express trust and that section 410 of the code of civil procedure did not apply.

Where a husband is by statute a trustee of his wife's separate property, the trust is a continuing one and not within the operation of the statute of limitations until it is in some way terminated, as by an open repudiation of the trust and an adverse holding of the trust property. De Bardelaben *v.* Stoudenmire, 82 Ala. 574, 2 So. 488; Comstock's Appeal, 55 Conn. 214, 10 Atl. 559.

52. Reed *v.* Painter, 145 Mo. 341, 46 S. W. 1089; Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448. See *supra*, VI, B, 20, b, (II).

53. See Corr's Appeal, 62 Conn. 403, 26 Atl. 478. See also Milner *v.* Hyland, 77 Ind. 458; and *supra*, VI, B, 20, b, (II), (B).

54. Chicago, etc., R. Co. *v.* Hay, 119 Ill. 493, 10 N. E. 29. And see Coleman *v.* Hill, 44 Ark. 452. See Adverse Possession, 1

(v) *Between Debtor and Purchaser at Sheriff's Sale.* An express trust exempt from the operation of the statute may be created by a stranger's purchase of property at a sheriff's sale under an agreement to hold it for the benefit of the debtor.[55]

d. Changing Status of Debtor to That of Trustee. "A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust* becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls."[56] Thus "if before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust" which during its continuance will be exempt from the operation of the statute of limitations.[57] But this rule cannot apply where the creditor is incapable of making such an agreement, as in the case of a married woman under the common-law disability of coverture;[58] and if in such a case the agreement is made by the debtor with the creditor's husband, it affects only the husband's interest in the debt, which interest if never reduced to possession ceases on his death and becomes vested in the wife to whom a right of action then accrues and against whom the statute then begins to run.[59]

e. Termination of Trust[60] — (i) *In General.* Where an express trust is fully terminated either by its own limitations, or by settlement with the beneficiary, or by some act of the trustee intended and understood by both parties to be in discharge of the trust, the statute of limitations then begins to run in the trustee's favor,[61] for when the trust is terminated the trustee has no longer a right to hold the fund or property but is bound to pay it over or transfer it discharged

Cyc. 1044 *et seq.* And see, generally, VENDOR AND PURCHASER.

Illustration.— Where the purchaser retains part of the purchase-money and stipulates in the deed that the money retained shall be applied in payment of an encumbrance on the property, he thereby constitutes himself the vendor's trustee, and the statute of limitations does not run in his favor against the vendor's right to maintain a bill in equity to compel payment of the encumbrance. Moran *v.* Pellifant, 28 Ill. App. 278.

55. Soggins *v.* Heard, 31 Miss. 426; McDonald *v.* May, 1 Rich. Eq. (S. C.) 91. But *compare* Hughes *v.* Hughes, Cheves (S. C.) 33.

56. Hamer *v.* Sidway, 124 N. Y. 538, 550, 27 N. E. 256, 21 Am. St. Rep. 693, 12 L. R. A. 463 [*reversing* 57 Hun 229, 11 N. Y. Suppl. 182, and *quoting* 2 Story Eq. § 972]. See also Neilly *v.* Neilly, 23 Hun (N. Y.) 651 [*reversed* on other grounds in 89 N. Y. 352]. See, generally, TRUSTS.

57. Hamer *v.* Sidway, 124 N. Y. 538, 550, 27 N. E. 256, 21 Am. St. Rep. 693, 12 L. R. A. 463 [*reversing* 57 Hun 229, 11 N. Y. Suppl. 182, and *citing* Day *v.* Roth, 18 N. Y. 448]. And see Ray *v.* U. S., 50 Fed. 166. See, generally, TRUSTS.

58. *In re* Neilley, 95 N. Y. 382.

As to the disability of coverture see *infra*, VI, F, 3.

59. *In re* Neilley, 95 N. Y. 382.

60. When trust terminates in general see TRUSTS.

Presumption of termination from lapse of time see TRUSTS.

61. *Alabama.*— Johnson *v.* Johnson, 5 Ala. 90, a purchase by the trustee from the *cestui que trust.*

Arkansas.— McGaughey *v.* Brown, 46 Ark. 25.

California.— See Chapman *v.* California Bank, 97 Cal. 155, 31 Pac. 896.

New York.— Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554; Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854.

North Carolina.— Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212 [*following* Baker *v.* McAden, 118 N. C. 740, 24 S. E. 531] (death of life-tenant); Davis *v.* Cotten, 55 N. C. 430.

South Carolina.— State *v.* Norris, 15 S. C. 241; Beard *v.* Stanton, 15 S. C. 164; Starke *v.* Starke, 3 Rich. 438; Britton *v.* Lewis, 8 Rich. Eq. 271; Coleman *v.* Davis, 2 Strobh. Eq. 334; Barnwell *v.* Barnwell, 2 Hill Eq. 228; Moore *v.* Porcher, Bailey Eq. 195. See also Miller *v.* Morrison, 22 S. C. 590.

United States.— Clarke *v.* Johnston, 18 Wall. 493, 509, 21 L. ed. 904, where the court said: "It may be conceded that, so long as a trustee continues to exercise his powers as trustee in regard to property, that he can be called to an account in regard to that trust. But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose."

See 33 Cent. Dig. tit. "Limitation of Actions," § 505.

from the trust.[62] But the relation between the parties must be so completely severed as to indicate that the *cestui que trust* is no longer controlled by the trustee's influence which prevailed during the existence of the trust,[63] and the settlement must be free from fraud or circumstances indicating undue influence on the part of the trustee,[64] for in the case of fraud or undue influence the statute will not begin to run until the fraud is discovered or the undue influence ceases.[65] If the trust does not sooner expire by its own terms, or is not terminated by voluntary settlement or by repudiation, it will continue until the trustee's death, so that the statute will not begin to run before that time;[66] and this is true *a fortiori* where the terms of the trust are such that the *cestui que trust's* right to recover the trust funds does not mature until the trustee's death.[67] Where land is conveyed under a contract that it shall be sold by the grantee who shall pay out of the proceeds certain debts of the grantor and repay the balance, the trust thereby created is not terminated and the relation of debtor and creditor substituted by the grantee's sale of land, receipt of the proceeds, and payment of the grantor's debts; but the trust attaches to such proceeds and the grantee's duty to account becomes continuous.[68]

(II) *REPUDIATION OF TRUST AND ASSERTION OF ADVERSE CLAIM*—(A) *In General.* If the trustee openly repudiates the trust and asserts an adverse claim to the trust property, these facts being known to the *cestui que trust*, the statute then begins to run in the trustee's favor,[69] except where the *cestui que trust* is not

Where a note for one year with the privilege of renewal is given by a husband to a third person, in trust for the wife, the relations of the parties make a formal renewal for the additional year unnecessary in order to prevent the running of the statute from the expiration of the first year. Bechtel Case, 3 Fed. Cas. No. 1,204.

Payment to a person unauthorized to receive payment does not terminate the trust so as to set the statute in motion against the *cestui.* Barnwell *v.* Barnwell, 2 Hill Eq. (S. C.) 228, payment to father of *cestui.*

62. Gilmore *v.* Ham, 142 N. Y. 1, 36 N. E. 826, 40 Am. St. Rep. 554; Dunn *v.* Dunn, 137 N. C. 533, 50 S. E. 212. See TRUSTS.

63. Wellborn *v.* Rogers, 24 Ga. 558; Keaton *v.* McGwier, 24 Ga. 217; Hayden *v.* Stone, 1 Duv. (Ky.) 396; Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427. And see the cases in the following notes.

Thus "if the actual trust be terminated, but the trustee continues to exercise the same control of the property and influence over the person, that he had during its existence, so as to retain power or sway over the will of his former *cestui que trust*, and stifle inquiry into his conduct, that will prevent the running of the statute." Wellborn *v.* Rogers, 24 Ga. 558, 581.

The settlement and accounting must be complete — such as would entitle the trustee to his discharge — in order to set the statute in motion. McCarthy *v.* McCarthy, 74 Ala. 546.

64. Wellborn *v.* Rogers, 24 Ga. 558. And see the cases in the following note.

65. Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; Wellborn *v.* Rogers, 24 Ga. 558; Keaton *v.* McGwier, 24 Ga. 217. And see Starke *v.* Starke, 3 Rich. (S. C.) 438. *Compare* Johnson *v.* Johnson, 5 Ala. 90. See also *infra*, VI, B, 21, 22.

66. Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580 [*explained* in Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059]; Mabie *v.* Bailey, 95 N. Y. 206; Miller *v.* Parkhurst, 9 N. Y. St. 759.

Where a trustee becomes administrator with the will annexed of the deceased beneficiary, the trust ceases; and, being liable only as administrator, he can avail himself of the statute of limitations. Matter of Underhill, 9 N. Y. Suppl. 455, 1 Connolly Surr. 541.

67. Pinson *v.* Gilbert, 57 Ala. 35 (where the trustee had a life-interest in the property); Williams *v.* Clements, 19 N. Y. Suppl. 613; Kershaw *v.* Snowden, 36 Ohio St. 181.

68. Irwin *v.* Holbrook, 26 Wash. 89, 66 Pac. 116. And see Talbott *v.* Barber, 11 Ind. App. 1, 38 N. E. 487, 54 Am. St. Rep. 491; Wyman *v.* Babcock, 30 Fed. Cas. No. 18,113, 2 Curt. 386 [*affirmed* in 19 How. 289, 15 L. ed. 644].

69. *Arkansas.*— McGaughey *v.* Brown, 46 Ark. 25.

California.— Spencer *v.* Duncan, 107 Cal. 423, 40 Pac. 549. And see Wright *v.* Ross, 36 Cal. 414.

Georgia.— Keaton *v.* McGwier, 24 Ga. 217; Scott *v.* Haddock, 11 Ga. 258; Keaton *v.* Greenwood, 8 Ga. 97.

Illinois.— Hancock *v.* Harper, 86 Ill. 445. And see Benson *v.* Dempster, 183 Ill. 297, 55 N. E. 651.

Indiana.— Ward *v.* Harvey, 111 Ind. 471, 12 N. E. 399. And see Cunningham *v.* McKindley, 22 Ind. 149.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582; Wickliffe *v.* Lexington, 11 B. Mon. 155. And see Blades *v.* Grant County Deposit Bank, 101 Ky. 163, 40 S. W. 246, 41 S. W. 305, 19 Ky. L. Rep. 340.

Massachusetts.— See Currier *v.* Studley, 159 Mass. 17, 33 N. E. 709.

Mississippi.— Murdock *v.* Hughes, 7 Sm. & M. 219.

sui juris,[70] or is under undue influence proceeding from the trustee, in which latter event the statute will begin to run only when such influence ceases.[71] As the statute of limitations is an affirmative defense to be alleged and proved,[72] it is incumbent upon the trustee to show that there was a direct repudiation of the trust, and that the *cestui que trust* had knowledge thereof.[73]

(B) *Necessity For Notice.* But a trustee's repudiation of an express trust, and his assertion of an adverse interest, will not be sufficient to start the statute of limitations in motion, unless knowledge or notice of such repudiation and claim is brought home to the *cestui que trust*,[74] and the statute begins to run only

Missouri.— Poe *v.* Domie, 54 Mo. 119; Keeton *v.* Keeton, 20 Mo. 530; Hill *v.* Bailey, 8 Mo. App. 85.

Montana.— Mantle *v.* Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

New Jersey.— Dean *v.* Dean, 9 N. J. Eq. 425.

New York.— Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854; Hill *v.* McDonald, 58 Hun 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431; Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360].

North Carolina.— Egerton *v.* Logan, 81 N. C. 172. But *compare* Blount *v.* Robeson, 56 N. C. 73; Falls *v.* Torrance, 11 N. C. 412.

Ohio.— Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478; Larwill *v.* Burke, 19 Ohio Cir. Ct. 449, 10 Ohio Cir. Dec. 605.

South Carolina.— Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963; Fricks *v.* Lewis, 26 S. C. 237, 1 S. E. 884; Sollee *v.* Croft, 7 Rich. Eq. 34.

Tennessee.— Moffatt *v.* Buchanan, 11 Humphr. 369, 54 Am. Dec. 41.

Texas.— Hunter *v.* Hubbard, 26 Tex. 537; Robertson *v.* Wood, 15 Tex. 1, 65 Am. Dec. 140.

Utah.— Felkner *v.* Dooly, 28 Utah 236, 78 Pac. 365, 27 Utah 350, 75 Pac. 854; Wood *v.* Fox, 8 Utah 380, 32 Pac. 48.

West Virginia.—Jones *v.* Lemon, 26 W. Va. 629.

Wisconsin.— Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5. See also Sheldon *v.* Sheldon, 3 Wis. 699.

United States.— Speidel *v.* Henrici, 120 U. S. 377, 7 S. Ct. 610, 30 L. ed. 718 [*affirming* 15 Fed. 753]; Philippi *v.* Philippe, 115 U. S. 151, 5 S. Ct. 1181, 29 L. ed. 336; Robinson *v.* Hook, 20 Fed. Cas. No. 11,956, 4 Mason 139; Russell *v.* U. S., 37 Ct. Cl. 113.

See 33 Cent. Dig. tit. "Limitation of Actions," § 506. And see ADVERSE POSSESSION, 1 Cyc. 1064.

Where a trustee has repudiated part of the trust, the statute will run against the beneficiary as to that part but not as to the part not repudiated. Felkner *v.* Dooly, 28 Utah 236, 78 Pac. 365, 27 Utah 350, 75 Pac. 854.

The full period of limitation must elapse after the repudiation, etc., before the remedy of the *cestui que trust* becomes barred. Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321; Taylor *v.* Hill, 86 Wis. 99, 56 N. W. 738.

70. If plaintiff is under a disability the statute begins to run only when the disability is removed.

Georgia.— Scott *v.* Haddock, 11 Ga. 258.

Kentucky.— Hendrick *v.* Robinson, 7 Dana 165; Bigstaff *v.* Lumpkins, 16 S. W. 449, 13 Ky. L. Rep. 248, where the beneficiaries were slaves).

Pennsylvania.— Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24.

Vermont.— See Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427.

West Virginia.—Jones *v.* Lemon, 26 W. Va. 629.

As to disabilities generally see *infra*, VI, F.

71. Keaton *v.* McGwier, 24 Ga. 217. And see Drake *v.* Wild, 65 Vt. 611, 27 Atl. 427. *Compare* Egerton *v.* Logan, 81 N. C. 172.

72. See *infra*, VIII, C, 1; IX, B, 1.

73. Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523.

74. *Alabama.*— Kennedy *v.* Winn, 80 Ala. 165; McCarthy *v.* McCarthy, 74 Ala. 546; Hastie *v.* Aiken, 67 Ala. 313.

California.— Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555; Hovey *v.* Bradbury, 112 Cal. 620, 44 Pac. 1077; Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082. See also Miles *v.* Thorne, 38 Cal. 335, 99 Am. Dec. 384.

Georgia.— Robson *v.* Jones, 27 Ga. 266.

Minnesota.— Wilson *v.* Welles, 79 Minn. 53, 81 N. W. 549.

New Hampshire.— Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190.

New York.— Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523. And see Thacher *v.* Hope Cemetery Assoc., 46 Hun 594, construing Code Civ. Proc. § 410.

Pennsylvania.— Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24; Rush *v.* Barr, 1 Watts 110.

Tennessee.— Yarbrough *v.* Newell, 10 Yerg. 376.

Texas.—Rice *v.* Ward, 92 Tex. 704, 51 S. W. 844; Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485 [rehearing *denied* in 67 S. W. 343]; Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974. And see Andrews *v.* Smithwick, 34 Tex. 544.

Utah.— Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652.

West Virginia.— Nease *v.* Capehart, 8 W. Va. 95.

United States.— Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

See 33 Cent. Dig. tit. "Limitation of Actions," § 510; and ADVERSE POSSESSION,

from the time when the *cestui que trust* acquires the knowledge or receives the notice.[75]

(c) *Character and Circumstances of Repudiation and Notice.* To set the statute in motion the trustee's repudiation and adverse claim, whether by acts or words, must be clear, open, and unequivocal, and must be so clearly and fully made known to the *cestui que trust* as to make it incumbent upon him to assert his equitable rights.[76] To constitute a repudiation there must be something said or done by the trustee in open contravention of the terms of the trust,[77] and of such a character that the relations of the parties will become and continue hostile.[78] The declarations of repudiation must be continuous and consistent,[79] and the circumstances attending the adverse claim or user must be such that the trustee is liable to be sued.[80] Merely withdrawing trust funds from a bank for the purpose of investing them in some manner not inconsistent with the terms of the trust is not sufficient to constitute a repudiation which will set the statute in motion;[81] and in such a case it has been held that, although the trustee mingled the trust funds with his own in the purchase of property, taking title in his own

1 Cyc. 1063, 1064. And see *supra*, VI, B, 20, a.

75. *Alabama.*— Hastie *v.* Aiken, 67 Ala. 313.

California.— Odell *v.* Moss, 130 Cal. 352, 62 Pac. 555.

Minnesota.— Wilson *v.* Welles, 79 Minn. 53, 81 N. W. 549.

New Hampshire.— Crowley *v.* Crowley, 72 N. H. 241, 56 Atl. 190.

New York.— Terry *v.* Bale, 1 Dem. Surr. 452. And see Thacher *v.* Hope Cemetery Assoc., 46 Hun 594, construing Code Civ. Proc. § 410.

Texas.— Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485 [rehearing *denied* in 67 S. W. 343]; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974. And see Andrews *v.* Smithwick, 34 Tex. 544.

Utah.— Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652. And see Felkner *v.* Dooly, 28 Utah 236, 78 Pac. 365, 27 Utah 350, 75 Pac. 854.

United States.— Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

See 33 Cent. Dig. tit. "Limitation of Actions," § 510; and ADVERSE POSSESSION, 1 Cyc. 1063, 1064. And see *supra*, VI, B, 20, a.

76. *Alabama.*— Kennedy *v.* Winn, 80 Ala. 165; McCarthy *v.* McCarthy, 74 Ala. 546.

California.— Luco *v.* De Toro, 91 Cal. 405, 27 Pac. 1082; McClure *v.* Colyear, 80 Cal. 378, 22 Pac. 175; Janes *v.* Throckmorton, 57 Cal. 368. And see Spencer *v.* Duncan, 107 Cal. 423, 40 Pac. 549.

Georgia.— Keaton *v.* Greenwood, 8 Ga. 97, holding that the evidence of adverse claim on the part of the trustee and notice ought to be "clear and satisfactory" to authorize the running of the statute.

Indiana.— Stanley *v.* Pence, 160 Ind. 636, 66 N. E. 51, 67 N. E. 441; Thomas *v.* Merry, 113 Ind. 83, 15 N. E. 244.

New Hampshire.— See New Market *v.* Smart, 45 N. H. 87.

New York.—Matter of McCormick, 27 Misc. 416, 59 N. Y. Suppl. 374.

Pennsylvania.— Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974. And see Scott *v.* Farmers', etc., Nat. Bank, (Civ. App. 1902) 66 S. W. 485 [rehearing *denied.* in 67 S. W. 343].

United States.— New Orleans *v.* Warner, 175 U. S. 120, 130, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508]; Oliver *v.* Piatt, 3 How. 333, 411, 11 L. ed. 622 [*affirming* 19 Fed. Cas. No. 11,115, 2 McLean 267].

See 33 Cent. Dig. tit. "Limitation of Actions," § 508 *et seq.*; and ADVERSE POSSESSION, 1 Cyc. 1063, 1064.

77. Mabie *v.* Bailey, 95 N. Y. 206; Marshall's Estate, 138 Pa. St. 285, 22 Atl. 24; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974.

78. Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321; *In re* Marshall, 138 Pa. St. 285, 22 Atl. 24; New Orleans *v.* Warner, 175 U. S. 120, 130, 20 S. Ct. 44, 44 L. ed. 96 [*modifying* 81 Fed. 645, 26 C. C. A. 508]. And see Mixon *v.* Miles, (Tex. Civ. App. 1898) 46 S. W. 105, holding that a wrongful sale of the trust property by the trustee will not set the statute in motion if the trustee afterward recognizes the continuance of the trust.

Illustration.— Where a trust is created by a purchase of land by two parties, each advancing one half of the purchase-money and the title being taken in the name of one for their joint benefit, a sale of one half the land by the holder of the legal title does not amount to a repudiation of the trust if the other assents to or approves the transaction. Brotherton *v.* Weathersby, 73 Tex. 471, 11 S. W. 505.

79. Grumbles *v.* Grumbles, 17 Tex. 472, not now denying the trust and again admitting it.

80. Boxford Second Religious Soc. *v.* Harriman, 125 Mass. 321.

81. Mabie *v.* Bailey, 95 N. Y. 206; Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523.

name, it does not justify a presumption that he intended to repudiate the trust.[82] On the other hand there need be no formal renunciation of the trust if the acts of the trustee are equivalent to a repudiation and the *cestui* has knowledge thereof;[83] and "a use of a trust fund by the trustee for his own benefit, or in any way clearly inconsistent with the trust, and conclusively evincing a repudiation," is sufficient.[84] Mere failure or delay of the trustee to perform his duties is not sufficient to set the statute in motion in his favor.[85] Nor by the weight of authority will a mere breach of trust give currency to the statute unless the *cestui que trust* elect to consider the trust at an end and to treat the trustee as a wrongdoer,[86] although it has been held that the rule exempting an express, subsisting trust from the operation of the statute ceases to apply where the trust has been openly violated and a suit is brought to obtain redress for the injury resulting from the breach.[87] It has been held that actual notice to the *cestui que*

82. Hutton *v.* Smith, 74 N. Y. App. Div. 284, 77 N. Y. Suppl. 523.

83. Williams *v.* Cincinnati First Presb. Soc., 1 Ohio St. 478 ("acts that necessarily imply a disclaimer"); Laguerenne *v.* Farrar, 25 Tex. Civ. App. 404, 61 S. W. 953.

84. Buttles *v.* De Baun, 116 Wis. 323, 93 N. W. 5.

85. Kennedy *v.* Winn, 80 Ala. 165; McCarthy *v.* McCarthy, 74 Ala. 546; Cooper *v.* Cooper, 61 Miss. 676; Hovenden *v.* Annesley, 2 Sch. & Lef. 633, 9 Rev. Rep. 119. And see the cases in the following note.

So long as the duties of the trustee remain undischarged, and there is no repudiation of the trust by him, he cannot avail himself of the statute. Albretch *v.* Wolf, 58 Ill. 186. And see Gapen *v.* Gapen, 41 W. Va. 422, 23 S. E. 579.

86. *Alabama.*— Kennedy *v.* Winn, 80 Ala. 165, 171 (in which the court said: "But, generally, the statute of limitations can not be pleaded against a mere breach of trust. . . . And, when the *cestui que trust's* right of action is wholly founded on a breach of trust, the subject-matter having been lost or misapplied by the negligence or wrongful act of the trustee, his mere denial of a previously accepted trust, or refusal to act further, unaccompanied by the assertion of an adverse title, does not bring the case within the exceptions to the general rule. Otherwise, no field remains for its operation, and it would be virtually abrogated"); McCarthy *v.* McCarthy, 74 Ala. 546. *Compare* Maury *v.* Mason, 8 Port. 211.

Arkansas.— Brinkley *v.* Willis, 22 Ark. 1.

California.— Spencer *v.* Duncan, 107 Cal. 423, 40 Pac. 549; Baker *v.* Joseph, 16 Cal. 173.

Georgia.— Martin *v.* Greer, Ga. Dec. 109.

Missouri.— Ruff *v.* Milner, 92 Mo. App. 620.

North Carolina.— Peacock *v.* Harris, 85 N. C. 146; Blount *v.* Robeson, 56 N. C. 73; Falls *v.* Torrance, 11 N. C. 412.

Texas.— Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726; Canadian, etc., Trust Co. *v.* Edinburgh-American Sand Mortg. Co., 16 Tex. Civ. App. 520, 41 S. W. 140, 42 S. W. 864, where the trustee took title to trust property in his own name.

United States.— Bunnell *v.* Stoddard, 4 Fed. Cas. No. 2135.

England.— North American Land, etc., Co. *v.* Watkins, [1904] 1 Ch. 242; *In re* Cross, 20 Ch. D. 109, 51 L. J. Ch. 645, 45 L. T. Rep. N. S. 777, 30 Wkly. Rep. 376. And see *supra*, VI, B, 20, a.

But laches and acquiescence may bar the rights of the *cestui que trust*, independent of the statute. Ettling *v.* Marx, 4 Fed. 673, 4 Hughes 312. See TRUSTS.

87. Wickliffe *v.* Lexington, 11 B. Mon. (Ky.) 155, 162, where the trustees had conveyed away the trust property and the court said: "But when they had conveyed away the legal title wrongfully, what trust existed between them and the rightful owner of the lots? The trust had ceased by the execution of the conveyance. The act by which it was terminated had imposed a new liability upon the trustees; but that liability was not in the nature of a trust either expressed or implied. The trust had been openly renounced, it no longer subsisted, but in its stead a liability had arisen of a different character, and one that had to be enforced, if at all, within the time allowed by law for redressing similar injuries, by a resort to a proper tribunal for that purpose." And see Cooper *v.* Cooper, 61 Miss. 676; Murdock *v.* Hughes, 7 Sm. & M. (Miss.) 219; Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169, 46 C. C. A. 222.

In Iowa it has been held that while the statute will not run against an express trust during its continuance, yet whenever there is a breach of the terms and conditions of the trust, and the beneficiary has knowledge thereof a right of action accrues, either for an accounting in equity or for a recovery against the trustee personally at law, and the statute then begins to run. Wilson *v.* Green, 49 Iowa 251, where a trustee holding money for investment mingled it with other funds, in violation of the trust, and it was further held that since the beneficiary knew of the misapplication of the money no demand was necessary to mature the right of action and set the statute in motion.

A statute providing that bills for relief in cases of trust not cognizable in courts of law shall be filed within ten years after the cause of action accrues applies to a violation of trust by executors growing out of a mistaken construction of a will and unaccom-

trust is necessary; that constructive notice cannot be sufficient, since on account of the relations of the parties the *cestui que trust* cannot be supposed to be on his guard;[88] but there is authority to the contrary.[89] If the interest of the *cestui que trust* is contingent, or its enjoyment is postponed until a future date, and the trustee is under a continuous duty to keep the trust fund safely until the contingency happens or the date arrives, the fact that the *cestui*, with knowledge of a breach of trust by the trustee, remains passive before his interest becomes vested or comes into possession, does not set the statute in motion against him.[90]

(D) *Demand and Refusal.*[91] In the case of an express trust, a demand by the beneficiary that the trustee account or turn over the trust property, and the trustee's unqualified refusal to do so, will of course set the statute in motion;[92] but if no definite time is fixed for the termination of the trust and if there has been no previous repudiation of disavowal by the trustee, the statute will not run until such demand and refusal.[93]

21. FRAUD — a. Introductory Statement.[94] The question when the statute of limitations begins to run in cases of fraud is one which has given rise to much confusion and conflict of authority. Such rules as were formulated before the coalition of courts of law and courts of equity under the "code system" have in many states been considerably affected by legislation attending the adoption of that system, and in many jurisdictions the subject has been expressly regulated by statute.[95]

b. The Equitable and Statutory Rule — (I) *IN GENERAL.* It has long been a well settled rule in equity that where relief is sought on the ground of fraud

panied by any fraudulent intent. Clarke *v.* Johnston, 18 Wall. (U. S.) 493, 21 L. ed. 904.

88. *In re* Marshall, 138 Pa. St. 285, 22 Atl. 24.

The record of a wrongful conveyance by the trustee has been held not to be sufficient notice to the *cestui que trust.* Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726. And see Andrews *v.* Smithwick, 34 Tex. 544.

Knowledge of ancestor not imputed to heir. — Where the heirs, devisees, or legatees of the creator of the trust are ignorant of its existence, the knowledge of the ancestor that the trust existed will not be imputed to them; and a repudiation by the trustee after the death of the ancestor will not set the statute in motion against them as long as they remain in ignorance of the trust. Rice *v.* Ward, 92 Tex. 704, 51 S. W. 844 [*following* Bennett *v.* Colley, Coop. t. Brough. 248, 47 Eng. Reprint 88, 2 Myl. & K. 225, 7 Eng. Ch. 225, 39 Eng. Reprint 930]; Chalmer *v.* Bradley, 1 Jac. & W. 51, 20 Rev. Rep. 216, 37 Eng. Reprint 294.

89. Boyd *v.* Munro, 32 S. C. 249, 10 S. E. 963, where it was held that the filing of an inventory by a deceased trustee's administrator, the inventory including the trust property, was sufficient repudiation and notice to set the statute in motion. And see Fricks *v.* Lewis, 26 S. C. 237, 1 S. E. 884.

The record of a wrongful conveyance by the trustee has been held to constitute sufficient notice to the *cestui que trust,* although the latter was a non-resident. Clark *v.* Van Loon, 108 Iowa 250, 79 N. W. 88, 75 Am. St. Rep. 219. And see Irwin *v.* Hollbrook, 32 Wash. 349, 73 Pac. 360.

90. Bigstaff *v.* Lumkins, 16 S. W. 449, 13 Ky. L. Rep. 248 (where a will devising land in trust to the executor provided that certain slaves should be emancipated and should each receive twenty-five acres of land when they were thirty years of age); Hitchcock *v.* Peaslee, 87 Hun (N. Y.) 506, 35 N. Y. Suppl. 423. And see Anderson *v.* Dunn, 19 Ark. 650.

91. In case of implied or constructive trust see *supra,* VI, B, 20, b, (II), (A).

92. Purdy *v.* Sistare, 2 Hun (N. Y.) 126; Egerton *v.* Logan, 81 N. C. 172; Sollee *v.* Croft, 9 Rich. Eq. (S. C.) 474 (denial of liability to account); Phillippi *v.* Phillippe, 115 U. S. 151, 5 S. Ct. 1181, 29 L. ed. 336. And see Hill *v.* McDonald, 58 Hun (N. Y.) 322, 11 N. Y. Suppl. 813, 19 N. Y. Civ. Proc. 431.

93. Petersen *v.* Taylor, (Cal. 1893) 33 Pac. 436; Wright *v.* Cain, 93 N. C. 296; Henderson *v.* Rilly, 1 Tex. App. Civ. Cas. 483; U. S. *v.* Taylor, 104 U. S. 216, 26 L. ed. 721; Taylor *v.* Benham, 56 How. (U. S.) 233, 12 L. ed. 130. See also Schroeder *v.* Johns, 27 Cal. 274; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580.

94. Torts in general see *supra,* VI, B, 18.

Trusts imposed on the ground of fraud see *supra,* VI, B, 20, b, (II).

Application of the doctrine of laches in equity see EQUITY, 16 Cyc. 169–173.

As to conveyances in fraud of creditors see FRAUDULENT CONVEYANCES, 20 Cyc. 722 *et seq.*

For fraud in connection with wills see WILLS.

95. See comments of the court in Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140; Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Wear *v.* Skinner, 46 Md. 257, 24 Am. St. Rep. 517; Bailey *v.* Glover, 21 Wall. (U. S.) 342, 22 L. ed. 636.

which is concealed from plaintiff or without his fault or neglect is not presently discovered by him, the statute of limitations begins to run when and only when the frand is discovered, notwithstanding the statutory period may have elapsed since the perpetration of the fraud; and in many states this rule has been embodied in the statutes most of which do not expressly confine the rule to equity cases. In brief, the statute runs from the time when the fraud is discovered unless in the exercise of reasonable diligence it might have been sooner discovered.[96] It has been held, however, that it is not strictly true that in equity the

As to fraudulent concealment of the cause of action see, generally, *infra*, VI, D, 2.

96. *Alabama.*—Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505. See, however, the Alabama cases cited *infra*, notes 97, 98.

Arkansas.— McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953, holding that this is true independently of whether the statute of limitations contains any exception of cases of fraudulent concealment.

California.— Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70; Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. Rep. 219; People *v.* Blankenship, 52 Cal. 619; Currey *v.* Allen, 34 Cal. 254; Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146. And see People *v.* Perris Irr. Dist., 142 Cal. 601, 76 Pac. 381.

Colorado.— See Arnett *v.* Berg, 18 Colo. App. 341, 71 Pac. 636.

Delaware.— Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Georgia.— Short *v.* Mathis, 107 Ga. 807, 33 S. E. 694; Wellborn *v.* Rogers, 24 Ga. 558; Stocks *v.* Van Leonard, 8 Ga. 511; Pendergrast *v.* Foley, 8 Ga. 1.

Indiana.— In this state the decisions are not harmonious. There is a statute specially providing that actions for relief against frauds must be commenced within six years after the cause of action has accrued. It has been held that this statute applies to suits in equity as well as to actions at law (Pilcher *v.* Flinn, 30 Ind. 202); and that its operation is not postponed unless the fraud be concealed or "unless the defendant shall conceal his liability" (Pilcher *v.* Flinn, *supra*. And see Fisher *v.* Tuller, 122 Ind. 31, 23 N. E. 523 [*citing* Ware *v.* State, 74 Ind. 181; Jackson *v.* Buchanan, 59 Ind. 390; Wynne *v.* Cornelison, 52 Ind. 312]). On the other hand it is held that while the concealment must be something more than mere silence it need not result from any further act than the fraudulent misrepresentations constituting the cause of action; that it need not "be concocted after the accruing of the cause of action, provided it operates afterwards as a means of concealment, and was so intended." In other words, the fraud on which an action is based may of itself amount to a concealment so as to postpone the running of the statute until the discovery of the fraud. Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Boyd *v.* Boyd, 27 Ind. 429 [*citing* Jones *v.* State, 14 Ind. 120]; Day *v.* Dages, 17 Ind. App. 228, 46 N. E. 589. This rule has been held applicable to cases where a relation of trust and confidence exists between the parties. Fisher *v.* Tuller, 122 Ind. 31, 23 N. E. 523. It has also been asserted that in suits in equity "the decided weight of authority is in favor of the proposition that where a party has been injured by the fraud of another, and such fraud is concealed, or is of such character as to conceal itself, whereby the injured party remains in ignorance of it without any fault or want of diligence on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstance or efforts on the part of the person committing the fraud to conceal it from the knowledge of the other party." Dorsey Mach. Co. *v.* McCaffrey, *supra*. And see Matlock *v.* Todd, 25 Ind. 128; Raymond *v.* Simonson, 4 Blackf. 77, which was decided before the enactment of the statute above mentioned. The statute which provides that actions for relief against frauds shall be brought within six years applies to actions the immediate and primary object of which is to obtain relief from fraud, and not to actions which fall within some other class, even though questions of fraud may arise incidentally. Wilson *v.* Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792 [citing Eve *v.* Louis, 91 Ind. 457; Caress *v.* Foster, 62 Ind. 145; Vanduyn *v.* Hepner, 45 Ind. 589; Potter *v.* Smith, 36 Ind. 231]. Thus where the trustee of a corporation who was chosen to collect subscriptions to the stock, the money to be applied in discharging liens upon the property, paid to a lien-holder the amount of his judgment and took an assignment thereof, an action by the receiver of the corporation to set aside an execution sale under the judgment and to cancel the sheriff's deed was held not to be an action for relief against fraud within the meaning of the statute. Wilson *v.* Brookshire, *supra*.

Iowa.— The rule applies to cases formerly solely cognizable in a court of chancery. See Witt *v.* Day, 112 Iowa 110, 83 N. W. 797; Jacobs *v.* Snyder, 76 Iowa 522, 41 N. W. 207, 14 Am. St. Rep. 235; Clews *v.* Traer, 57 Iowa 459, 10 N. W. 838; Hanlenbeck *v.* Riley, 35 Iowa 105; Shank *v.* Teeple, 33 Iowa 189; Cowin *v.* Toole, 31 Iowa 513; Ryan *v.* Doyle, 31 Iowa 53; Relf *v.* Eberly, 23 Iowa 467; Baldwin *v.* Tuttle, 23 Iowa 66; McLenan *v.* Sullivan, 13 Iowa 521. And see Muir *v.* Bozarth, 44 Iowa 499.

Kansas.— Kahm *v.* Klaus, 64 Kan. 24, 67 Pac. 542; Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599; Doyle *v.* Doyle, 33 Kan. 721, 7

statutory period is computed from the discovery of the fraud, but that if the defrauded party discovers the fraud within a reasonable time before the period

Pac. 615; Duffitt *v.* Tuham, 28 Kan. 292. See also McCormick Harvesting Mach. Co. *v.* Hayes, (App. 1897) 49 Pac. 632.

Kentucky.— Hieronymous *v.* Mayhall, 1 Bush 508; Donnelly *v.* Donnelly, 8 B. Mon. 113; Frankfort Bank *v.* Markley, 1 Dana 373; Pugh *v.* Bell, 1 J. J. Marsh. 398. See also Howard *v.* Howard, 96 Ky. 445, 29 S. W. 285; Ellis *v.* Kelso, 18 B. Mon. 296; Pyle *v.* Beckwith, 1 J. J. Marsh. 445; Porter *v.* Benge, 67 S. W. 1005, 24 Ky. L. Rep. 24. But there is a modification of the rule under the present Kentucky statutes. See cases cited *infra*, note 99.

Louisiana.— See Murphy *v.* Gutierez, 20 La. Ann. 407; Weimprender *v.* Weimprender, 2 Mart. N. S. 591.

Maine.— Kelley *v.* Nealley, 76 Me. 71.

Maryland.— Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517; Jackson *v.* Hodges, 24 Md. 468.

Michigan.— Stebbins *v.* Patterson, 108 Mich. 537, 66 N. W. 484 [*following* Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651].

Minnesota.— Lewis *v.* Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665.

Mississippi.— North American Trust Co. *v.* Lanier, 78 Miss. 418, 28 So. 804, 84 Am. St. Rep. 635; Matthews *v.* Southeimer, 39 Miss. 174.

Missouri.— By statute the cause of action is "to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." Hunter *v.* Hunter, 50 Mo. 445; Ruff *v.* Milner, 92 Mo. App. 620. And see Edwards *v.* Noel, 88 Mo. App. 434.

Nebraska.— Weckerly *v.* Taylor, (1905) 103 N. W. 1065; Forsyth *v.* Easterday, 63 Nebr. 887, 89 N. W. 407; Blake *v.* Chambers, 4 Nebr. 90.

Nevada.— Lang Syne Gold Min. Co. *v.* Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337.

New Jersey.— Lincoln *v.* Judd, 49 N. J. Eq. 387, 24 Atl. 318; Todd *v.* Rafferty, 39 N. J. Eq. 254 [*affirmed* in 34 N. J. Eq. 552]; Williams *v.* Carle, 10 N. J. Eq. 543.

New York.— In an action to procure a judgment other than a sum of money, on the ground of fraud, in a case which was formerly cognizable in the court of chancery, the cause of action is not deemed to have accrued until the discovery of the facts constituting the fraud. Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990; Slayback *v.* Raymond, 93 N. Y. App. Div. 326, 87 N. Y. Suppl. 931 [*affirming* 40 Misc. 601, 83 N. Y. Suppl. 15]; Kelly *v.* Pratt, 41 Misc. 31, 83 N. Y. Suppl. 636 (holding that descendants of non-resident aliens, entitled to inherit lands under a will, have six years from the time of the discovery of fraud on the part of the administrator, whereby the lands were sold for taxes, and a lease taken by said administrator, to sue the widow of the devisee of the administrator in possession of the lands and claiming absolute ownership by virtue of the tax lease and adverse possession); Gallup *v.* Bernd, 1 N. Y. Suppl. 478; Selpho *v.* Brooklyn, 9 N. Y. St. 700 (where a municipal corporation made a fraudulent increase in an assessment and the suit was brought to have the assessment declared invalid as to the increase and to recover back the excess paid by plaintiff); Code Civ. Proc. § 382, subd. 5.

North Carolina.— Day *v.* Day, 84 N. C. 408; Sweat *v.* Arrington, 3 N. C. 129.

Ohio.— Carpenter *v.* Cincinnati, etc., Canal Co., 35 Ohio St. 307.

Rhode Island.— Peck *v.* Bank of America,, 16 R. I. 710, 19 Atl. 369, 7 L. R. A. 826.

South Carolina.— Toole *v.* Johnson, 61 S. C. 34, 39 S. E. 254; Beattie *v.* Pool, 13 S. C. 379; Prescott *v.* Hubbell, 1 Hill Eq. 210; Van Rhyn *v.* Vincent, 1 McCord Eq. 310; Croft *v.* Arthur, 3 Desauss. Eq. 223.

Tennessee.— Townsend *v.* Townsend, 4 Coldw. 70, 94 Am. Dec. 185; Haywood *v.* Marsh, 6 Yerg. 69; Herndon *v.* Lewis, (Ch. App. 1896) 36 S. W. 953. And see Smart *v.* Waterhouse, 10 Yerg. 94.

Texas.— Calhoun *v.* Burton, 64 Tex. 510; Brown *v.* Brown, 61 Tex. 56; Pitman *v.* Holmes, 34 Tex. Civ. App. 485, 78 S. W. 961; Cetti *v.* Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787. And see State *v.* Wichita Land, etc., Co., 73 Tex. 450, 11 S. W. 488 [*following* State *v.* Stone, Cattle, etc., Co., 66 Tex. 363, 17 S. W. 735].

Utah.— Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

Vermont.— See Payne *v.* Hathaway, 3 Vt. 212.

Virginia.— Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657; Shields *v.* Anderson, 3 Leigh 729.

Washington.— Irwin *v.* Holbrook, 26 Wash. 89, 66 Pac. 116.

Wisconsin.— The rule, embodied in a statute, applies to cases formerly solely cognizable in equity. Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571; Odell *v.* Burnham, 61 Wis. 562, 21 N. W. 635; McMahon *v.* McGraw, 26 Wis. 614.

United States.— Jones *v.* Van Doren, 130 U. S. 684, 9 S. Ct. 685, 32 L. ed. 1077; Kirby *v.* Lake Shore Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569; Bailey *v.* Glover, 21 Wall. 342, 22 L. ed. 636; Bartles *v.* Gibson, 17 Fed. 293; Taylor *v.* South., etc., R. Co., 13 Fed. 152, 4 Woods 575; Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135; Carr *v.* Hilton, 5 Fed. Cas. No. 2,437, 1 Curt. 390; Mitchell *v.* Thompson, 17 Fed. Cas. No. 9,669, 1 McLean 96; Piatt *v.* Vattier, 19 Fed. Cas. No. 11,117, 1 McLean 146 [*affirmed* in 9 Pet. 405, 9 L. ed. 173]. And see Moore *v.* Greene, 19 How. 69, 15 L. ed. 533.

England.— Blennerhassett *v.* Day, 2 Ball

expires he must sue within that time or be barred.[97] Under some statutes providing that the cause of action shall not be deemed to have accrued until the discovery of the fraud, the action must nevertheless be brought within a certain time after the discovery,[98] or even after the perpetration of the fraud or the making of the contract induced thereby.[99] Except in those cases where the party against whom the statute is invoked is not seeking affirmative relief on the ground of fraud,[1] in no case will the running of the statute be postponed after the time when the facts constituting the alleged fraud are brought to the knowledge of the defrauded party, but the right of action becomes barred at the expiration of the statutory period after such knowledge is acquired,[2] and this is true irrespective of

& B. 129; Booth *v.* Warrington, 4 Bro. P. C. 163, 2 Eng. Reprint 111; Blair *v* Bromley, 5 Hare 541, 11 Jur. 115, 16 L. J. Ch. 105, 26 Eng. Ch. 542, 67 Eng. Reprint 1026 [*affirmed* in 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354]; Charter *v.* Trevelyan, 4 L. J. Ch. 209 [*affirmed* in 11 Cl. & F. 714, 8 Jur. 1015, 8 Eng. Reprint 1273]; Hovenden *v.* Annesley, 2 Sch. & Lef. 630, 9 Rev. Rep. 119. And see Gibbs *v.* Guild, 9 Q. B. D. 59, 51 L. J. B. 313, 46 L. T. Rep. N. S. 248, 30 Wkly. Rep. 591 [*affirming* 8 Q. B. D. 296]. See, however, the English case cited *infra*, note 97.

Canada.— Irwin *v.* Freeman, 13 Grant Ch. (U. C.) 465.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 182, 183, 186, 480.

The reason of the rule is that were the guilty party allowed to plead the statute he would be taking advantage of his own wrong, and thus the law which is designed to prevent fraud would be the means of making it successful and secure. McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953; Way *v.* Cutting, 20 N. H. 187; Bailey *v.* Glover, 21 Wall. (U. S.) 342, 22 L. ed. 636. And see Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143; Hovenden *v.* Annesley, 2 Sch. & Lef. 630, 9 Rev. Rep. 119.

In Pennsylvania where there never has been any separate court of equity the rule of the text is well settled and applies whether the cause of action be legal or equitable in its nature. Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887; Sample *v.* Callery, 184 Pa. St. 95, 39 Atl. 6; Bricker *v.* Lightner, 40 Pa. St. 199; Ferris *v.* Henderson, 12 Pa. St. 49, 51 Am. Dec. 580; Pennock *v.* Freeman, 1 Watts 401; Jones *v.* Conoway, 4 Yeates 109; Philadelphia *v.* Brown, 3 Pa. Co. Ct. 327; U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. 31; Mussi *v.* Lorain, 2 Browne 56. But the later decisions have limited the rule to cases where there has been some active concealment of the fraud, the result being that the statute begins to run when the right of action becomes complete by the consummation of the fraud unless the wrong-doer subsequently says or does something to prevent inquiry or discovery. Mere silence is not sufficient to postpone the running of the statute, unless there is such a relation of trust and confidence between the parties that the wrong-doer is under the duty to make disclosure. Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849 [*explaining* decision on former appeal in 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887]. And see Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484; Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575. And see *infra*, VI, B, 21, e, (I).

97. Johnson *v.* Johnson, 5 Ala. 90; Byrne *v.* Frere, 2 Molloy 157. And see the cases cited *infra*, notes 98, 99.

98. Porter *v.* Smith, 65 Ala. 169.

99. The effect of such a statute is that the fraud must be discovered and the action brought within a definite period after the commission of the fraud or the making of the contract, notwithstanding that a shorter period of limitation prescribed would otherwise begin to run at the date of the discovery. See Nave *v.* Price, 108 Ky. 105, 55 S. W. 882, 21 Ky. L. Rep. 1538; Brown *v.* Brown, 91 Ky. 639, 11 S. W. [illegible]; Treadway *v.* Pharis, 90 Ky. 663, 14 S. W. 909, 12 Ky. L. Rep. 639; Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732; Dorsey *v.* Phillips, 84 Ky. 420, 1 S. W. 667, 8 Ky. L. Rep. 405; Salve *v.* Ewing, 1 Duv. (Ky.) 271; Abner *v.* Gabbard, 31 S. W. 285, 17 Ky. L. Rep. 410; Duff *v.* Duff, 14 S. W. 369, 12 Ky. L. Rep. 408; Ruff *v.* Milner, 92 Mo. App. 620; Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85, construing the Missouri statute. See also Combs, Noble, 58 S. W. 707, 22 Ky. L. Rep. 736. *Compare* Row *v.* Johnson, 78 S. W. 906, 25 Ky. L. Rep. 1799.

1. See *infra*, VI, B, 21, g.

2. *Arkansas.*— McGaughey *v.* Brown, 46 Ark. 25.

California.— Nicholson *v.* Tarpey, 124 Cal. 442, 57 Pac. 457. And see Marks *v.* Evans, (1900) 62 Pac. 76.

Colorado.— Walker *v.* Pogue, 2 Colo. App. 149, 29 Pac. 1017.

Georgia.— Knox *v.* Yow, 91 Ga. 367, 17 S. E. 654; Alford *v.* Hays, 87 Ga. 155, 13 S. E. 315.

Iowa.— Evans *v.* Montgomery, 50 Iowa 325 (suit to rescind a contract); Hanlenbech *v.* Riley, 35 Iowa 105. And see Murray *v.* Quigley, 119 Iowa 6, 92 N. W. 869, 97 Am. St. Rep. 276.

Kansas.— Houghton *v.* Axelsson, 64 Kan. 274, 67 Pac. 825; Rizer *v.* Geary County, 58 Kan. 114, 48 Pac. 568; Losch *v.* Pickett, 36 Kan. 216, 12 Pac. 822; Eaton *v.* Elliott, 9 Kan. App. 882, 57 Pac. 243. And see Fuller

whether the relief asked is sought by plaintiff or defendant,[3] or whether the cause of action is legal or equitable in its nature.[4] Nor is the rule just stated altered by plaintiff's ignorance of his legal rights,[5] or by the circumstance that he is a person of a low order of intelligence and mental capacity and of small will power, provided that he has the legal capacity to act and to contract; or by the further circumstance that after he has discovered the facts constituting the fraud he is subjected to undue influence inducing him to refrain from judicial proceedings to enforce his rights.[6] But the statute runs from the time when the fraud is discovered only where a right of action then exists,[7] for the statute never begins to run before a cause of action has accrued.[8]

(II) *WHETHER RESTRICTED TO CASES WITHIN EXCLUSIVE JURISDICTION OF EQUITY.*[9] In the absence of some statutory provision to the contrary the rule that the statute runs from the discovery of the fraud applies notwithstanding that the case is one in which there is a concurrent remedy in a court of common law.[10]

v. Homer, 69 Kan. 467, 77 Pac. 88; Nelson *v.* Stul, 65 Kan. 585, 68 Pac. 617, 70 Pac. 590 [*following* Young *v.* Wittenhall, 15 Kan. 579].

Maryland.— McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Mississippi.—Jones *v.* Rogers, 85 Miss. 802, 38 So. 742.

Nebraska.—Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308; Kohout *v.* Thomas, 4 Nebr. (Unoff.) 80, 93 N. W. 421, holding that under Code Civ. Proc. § 12, which provides that in actions for relief on the ground of fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud, such an action is barred in four years after the discovery whether the action involves the title to real or personal property.

New York.— Piper *v.* Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785 [*affirming* 65 How. Pr. 228].

Ohio.— Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743.

South Carolina.— Turnbull *v.* Gadsden, 2 Strobh. Eq. 14; Farr *v.* Farr, 1 Hill Eq. 387; Beck *v.* Searson, 8 Rich. Eq. 130.

Texas.— Smith *v.* Talbot, 18 Tex. 774.

Wisconsin.— O'Dell *v.* Rogers, 67 Wis. 168, 30 N. W. 229.

United States.—Kirby *v.* Lake Shore, etc., R. C., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569; Coddington *v.* Pensacola, etc., R. Co., 103 U. S. 409, 26 L. ed. 400; Putnam *v.* New Albany, etc., R. Co., 16 Wall. 390, 21 L. ed. 361; South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628.

Proving time when knowledge acquired — misrepresentation in deed.— In a suit based on fraudulent misrepresentations where plaintiff seeks to avoid the statutory bar by showing that he did not discover the fraud until long after it was committed, defendant may, for the purpose of fixing a time when the statute began to run, prove that plaintiff knew the real facts at an earlier date than he asserts, and this notwithstanding that defendant's misrepresentations are contained in a deed, and thus he is estopped to deny that he made them. Code *v.* Burton, 45 Ga. 456.

In early times it was considered that no delay or lapse of time would bar relief in equity on the ground of fraud. Alden *v.* Gregory, 2 Eden 280, 28 Eng. Reprint 905.

3. Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743. And see McCormick Harvesting Mach. Co. *v.* Hayes, (Kan. App. 1897) 49 Pac. 632.

4. McCormick Harvesting Mach. Co. *v.* Hayes, (Kan. App. 1897) 49 Pac. 632. And see Turnbull *v.* Gadsden, 2 Strobh. Eq. (S. C.) 14.

5. Alford *v.* Hays, 87 Ga. 155, 13 S. E. 315.

6. Piper *v.* Hoard, 107 N. Y. 67, 71, 13 N. E. 632, 1 Am. St. Rep. 785 [*affirming* 65 How. Pr. 228], where plaintiff was induced to discontinue a suit to set aside a conveyance on the ground of fraud, and it was held that this did not interrupt the running of the statute. It was said in the above case by Finch, J.: "I do not understand that the question whether such a discovery has taken place depends upon the mental condition of the party injured, where he has legal capacity to act and to contract, nor upon his freedom from undue influence or ability to resist it. If he has ascertained the facts which constitute the fraud and so has discovered its existence, the statute begins to run irrespective of the degree of intelligence possessed by the injured party, and whether he has enough of courage and independence to resist hostile influence, and asset his rights or not. In either event there has been a discovery of the fraud; the right of action has fully accrued; and the statute begins to run." To the same effect see Manby *v.* Bewicke, 3 Kay & J. 342, 69 Eng. Reprint 1140.

7. Suber *v.* Chandler, 18 S. C. 526 [*followed* in McGee *v.* Jones, 34 S. C. 146, 13 S. E. 326].

8. See *supra*, VI, A, 1.

9. See also *infra*, VI, B, 21, c.

10. Talbott *v.* Todd, 5 Dana (Ky.) 199; Mayne *v.* Griswold, 3 Sandf. (N. Y.) 463; Blair *v.* Bromley, 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354, 22 Eng. Ch. 354, 41 Eng. Reprint 979 [*affirming* 5 Hare 542, 11 Jur. 115, 16 L. J. Ch. 105, 26 Eng. Ch. 542, 67 Eng. Reprint 1026]. And see U. S. Bank *v.* Biddle, 2 Pars. Eq. Cas. (Pa.) 31.

Under the Judicature Acts in England the same rule applies. Gibbs *v.* Guild, 9 Q. B. D. 59, 51 L. J. Q. B. 313, 46 L. T. Rep. N. S.

But under special statutes in a number of jurisdictions where the "code system" prevails, the cases in which the statute runs from the time of the discovery of the fraud are those which were formerly solely cognizable in a court of chancery; and in these jurisdictions the running of the statute is not thus postponed in ordinary common-law actions or actions on the case, or in cases over which there was a concurrent jurisdiction in the common-law courts,[11] although in cases which were exclusively within the jurisdiction of equity the statute runs from the date of the discovery.[12] In some statutes there is an additional restriction that the action must be to recover a judgment other than for a sum of money; and so where the action, although based on fraud, is brought to recover money only or a judgment for damages, the statute runs from the commission of the fraud,[13] although where purely equitable relief is sought aside from or in addition to a mere money judgment, the statute runs only from the date of the discovery.[14]

(III) *INSTANCES OF APPLICATION OF RULE.* Subject to the restriction that fraud of some character must be the actual ground on which relief is asked,[15] the equitable or statutory rule that limitations run from the discovery of the fraud is one of wide application. As instances of its application may be mentioned suits to reform written instruments on the ground of fraud;[16] to rescind and can-

248, 30 Wkly. Rep. 591 [*affirming* 8 Q. B. D. 296]. And see North American Land, etc., Co. *v.* Watkins, [1904] 2 Ch. 233, 73 L. J. Ch. 626, 91 L. T. Rep. N. S. 425, 20 T. L. R. 642 [*affirming* [1904] 1 Ch. 242, 73 L. J. Ch. 117].

11. Daugherty *v.* Daugherty, 116 Iowa 245, 90 N. W. 65; Higgins *v.* Mendenhall, 51 Iowa 135, 50 N. W. 539; McGinnis *v.* Hunt, 47 Iowa 668; Phœnix Ins. Co. *v.* Dankwardt, 47 Iowa 432; Brown *v.* Brown, 44 Iowa 349; Gebhard *v.* Sattler, 40 Iowa 152; Williams *v.* Allison, 33 Iowa 278; Relf *v.* Eberly, 23 Iowa 467; Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761; Jacobs *v.* Frederick, 81 Wis. 254, 51 N. W. 320. But see Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58, holding that an action by a principal against his agent to recover a sum of money was an action "heretofore solely cognizable in a court of equity" within the meaning of the statute.

"The true test as to what is a case solely cognizable in a court of chancery is this: Did chancery, before the enactment of the statute, have exclusive jurisdiction to grant the relief prayed for in the action"? Higgins *v.* Mendenhall, 51 Iowa 135, 141, 50 N. W. 539.

In New York under the early provisions of the code the only cases of fraud in which the running of the statute was postponed were those solely cognizable in the court of chancery (Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Foot *v.* Farrington, 41 N. Y. 164); but under the later provisions of the code the running of the statute is postponed until the discovery of the fraud in all cases formerly cognizable by a court of chancery, whether the jurisdiction of that court was exclusive or concurrent with that of courts of law (Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990. And see Gallup *v.* Bernd, 49 Hun 605, 1 N. Y. Suppl. 478).

In North Carolina such a statutory restriction once obtained (Jaffray *v.* Bear, 103 N. C. 165, 9 S. E. 382; Blount *v.* Parker, 78 N. C. 128; Barham *v.* Lomax, 73 N. C. 76); but has been abrogated (Rev. (1905) § 395, subd. 9; Jaffray *v.* Bear, *supra*).

12. See Jacobs *v.* Snyder, 76 Iowa 522, 41 N. W. 207, 14 Am. St. Rep. 235; O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635. And see *supra*, VI, B, 21, b, (I).

13. Miller *v.* Wood, 116 N. Y. 351, 22 N. E. 553 [*affirming* 41 Hun 600]; Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298 [*reversing* 36 Hun 247]; Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559; Wood *v.* Monroe County, 50 Hun (N. Y.) 1, 2 N. Y. Suppl. 369; East River Sav. Ins. *v.* Barrett, 23 Misc. (N. Y.) 423, 52 N. Y. Suppl. 81.

State statute in the federal courts.— The requirement of N. Y. Code Civ. Proc. § 382, subd. 5, that the action must be to procure a judgment other than for a sum of money, on the ground of fraud, is not binding on the federal courts in so far as it conflicts with the general rule of equity applied by those courts that the statute runs only from the discovery of the fraud; otherwise the code restriction would impair the equity jurisdiction of the federal courts. Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569 [*affirming* 14 Fed. 261].

14. Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990; Carr *v.* Thompson, 87 N. Y. 160 (where it is said that the clause in N. Y. Code Civ. Proc. § 382, subd. 5, relating to an action to procure "a judgment other than for a sum of money," should be construed to mean "a judgment other than for a sum of money merely"); Gallup *v.* Bernd, 49 Hun (N. Y.) 605, 1 N. Y. Suppl. 478 (an action for the balance of the purchase-price of land, in which defendant alleged fraud and asked equitable relief). And see Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569 [*affirming* 14 Fed. 261] (construing N. Y. Code Civ. Proc. § 382, subd. 5).

15. See *infra*, VI, B, 21, d.

16. Day *v.* Day, 84 N. C. 408. See also

cel contracts, set aside sales, deeds, and other transfers of property;[17] to obtain an

Hanlenbeck *v.* Riley, 35 Iowa 105. *Compare* Abner *v.* Gabbard, 31 S. W. 285, 17 Ky. L. Rep. 410, decided under the peculiar provisions of the Kentucky statutes.

17. *California.*— Page *v.* Garver, 146 Cal. 577, 80 Pac. 860 (action by heir to cancel deed of ancestor obtained by fraud); People *v.* Blankenship, 52 Cal. 619 (an action by the state to cancel a patent for land).

Iowa.— Jacobs *v.* Snyder, 76 Iowa 522, 41 N. W. 267, 14 Am. St. Rep. 235, suit to set aside a foreclosure and other transactions.

Kansas.— Brown *v.* Brown, 62 Kan. 666, 64 Pac. 599; Doyle *v.* Doyle, 33 Kan. 721, 7 Pac. 615, suit to set aside a tax deed for fraud.

Louisiana.— See Weimprender *v.* Weimprender, 2 Mart. N. S. 591.

Nebraska.— Kohout *v.* Thomas, 4 Nebr. (Unoff.) 80, 93 N. W. 421, holding that Code Civ. Proc. § 12, imposing a four-year limitation to actions for relief on the ground of fraud and providing that in such cases the cause of action shall not be deemed to have accrued until the discovery of the fraud, applies to actions involving the title to real estate — an action to set aside a deed on the ground of fraud.

Nevada.—Lang Syne Gold Min. Co. *v.* Ross, 20 Nev. 127, 18 Pac. 358, 19 Am. St. Rep. 337, suit to set aside sheriff's deed for fraud.

New York.— Bosley *v.* National Mach. Co., 123 N. Y. 550, 25 N. E. 990.

Ohio.— Loffland *v.* Bush, 26 Ohio St. 559, suit to cancel promissory note.

Tennessee.— Herndon *v.* Lewis, (Ch. App. 1896) 36 S. W. 953, vendor's misrepresentation as to title to land.

Wisconsin.— O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635.

United States.— Jones *v.* Slauson, 33 Fed. 632.

England.— Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 304, 44 Eng. Reprint 1285.

Canada.— Charron *v.* Tourangeau, 16 Quebec Super. Ct. 489.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 479, 489. And see CANCELLATION OF INSTRUMENTS, 6 Cyc. 304, 306.

Removal of cloud on title see QUIETING TITLE.

Duress and undue influence as fraud see *infra*, VI, B, 22, note 12.

Application of statutes limiting actions for the recovery of real property.— In some cases the question has been raised whether an action to set aside a conveyance for fraud does not fall within the statutes of limitation applicable to actions for the recovery of real property rather than statutes providing that in actions for relief on the ground of fraud limitations run from the time the fraud is discovered. In some cases it has been held that such actions are properly "for relief upon the ground of fraud" notwithstanding plaintiff also asks for a partition of the land (Morgan *v.* Morgan, 10 Wash. 99, 38 Pac. 1054); or that it be adjudged that the title is in him and that he recover possession (McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404. And see Kohout *v.* Thomas, 4 Nebr. (Unoff.) 80, 93 N. W. 421). On the other hand it has been held that an equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore possession to the defrauded party, does not fall within the statute relating to actions for relief on the ground of fraud but is governed by the statute relating to actions for the recovery of real property. Oakland *v.* Carpentier, 13 Cal. 540. But *compare* Moore *v.* Moore, 56 Cal. 89. In Iowa where the statute applicable to actions for relief on the ground of fraud is confined to cases solely cognizable in a court of equity, it has been held that a suit in equity to cancel and set aside a contract and deed on the ground of fraud is a case solely cognizable in a court of equity within the meaning of the statute, notwithstanding that an action for damages on account of the fraud could be maintained at law (Relf *v.* Eberly, 23 Iowa 467); and that where an administrator fraudulently obtained orders of the court to sell land of the estate and fraudulently sold the same, an action brought by heirs to set aside the proceedings and the sales and to obtain an accounting does not fall within the statute limiting actions to recover real estate sold by an executor or administrator, but within the statute applicable to actions for relief on the ground of fraud (Cowin *v.* Toole, 31 Iowa 513); but the contrary has been held in a case of a sale that was absolutely void, since a deed under such a sale would be no defense to a recovery at law Gebhard *v.* Sattler, 40 Iowa 152); while a proceeding to set aside a sheriff's sale of land sold in gross, actual fraud being alleged, where the ultimate object is to recover the property (Williams *v.* Allison, 33 Iowa 278); and an action in equity to compel the conveyance of land purchased with plaintiff's money and for him, are actions for the recovery of real property and not "for relief on the ground of fraud" in cases "heretofore solely cognizable in a court of equity" (Stanley *v.* Morse, 26 Iowa 454. *Compare* McLenan *v.* Sullivan, 13 Iowa 521). Where an owner of land sold and conveyed it by or without warranty but represented it to be his own and afterward conveyed the same land to a *bona fide* purchaser and the first purchaser brought suit in equity, praying that the land be decreed to belong to him or that if the second purchaser was protected by the prior record of his deed that the vendor should be decreed to pay plaintiff the value of the land with rent, it was held that the period of limitation applicable was the same as that which would apply to an action for the land, namely, seven years from the discovery of the fraud. Cade *v.* Burton, 35 Ga. 280.

accounting;[18] to open or set aside fraudulent accounts or settlements;[19] for partition and to quiet title, where plaintiffs to establish their title are under the necessity of invalidating for fraud, a certificate of final payment for school lands and a patent issued thereon;[20] and to an action against officers of a manufacturing corporation under a statute requiring them to make an annual report of their paid-up capital stock and debts, and providing that the failure to make such reports, or the making of false reports, shall render them personally liable for all damages resulting from such failure while they are stock-holders of the corporation.[21]

c. Rule at Law — (I) *In General.* In some jurisdictions where the statutes do not otherwise provide, the strict rule obtaining in courts of law or applied to legal, as distinguished from equitable, causes of action is that in actions based on fraud the statute of limitations begins to run when the fraud is perpetrated, not when it is discovered.[22] This rule has been most frequently applied to actions of deceit.[23] But in many jurisdictions the equitable rule[24] that the statute begins to run upon the discovery of the fraud has been adopted by the courts,[25] or statutes embodying that rule are applied to actions at law as well as to suits in equity.[26]

18. Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626; Betjemann *v.* Betjemann, [1895] 2 Ch. 474, 64 L. J. Ch. 641, 73 L. T. Rep. N. S. 2, 12 Reports 455, 44 Wkly. Rep. 182.

Under the New York code.— The provisions of Code Civ. Proc. § 382, subd. 5, postponing the running of the statute until discovery of the fraud in an action to procure a judgment other than for a sum of money on the ground of fraud, applies to a case in which a judgment for an accounting is sought in addition to and as a means of reaching a judgment for money (Carr *v.* Thompson, 87 N. Y. 160; Slayback *v.* Raymond, 93 N. Y. App. Div. 326, 87 N. Y. Suppl. 931 [*affirming* 40 Misc. 601, 83 N. Y. Suppl. 15]; but as in other cases the action must be brought on the ground of fraud (Carr *v.* Thompson, *supra*; Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170. And see *infra*, VI, B, 21, d, (I)).

19. Jackson *v.* Hodges, 24 Md. 468; Lincoln *v.* Judd, 49 N. J. Eq. 387, 24 Atl. 318; Ludington *v.* Patton, 111 Wis. 208, 86 N. W. 571 (suit to rescind contract of settlement with trustees); Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569 [*affirming* 14 Fed. 261]. And see Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743, holding that the rule that the statute runs from the time the fraud is discovered applies as well where the cause of action is set up by answer in an action brought for a balance found due on settlement.

20. Murray *v.* Quigley, 119 Iowa 6, 92 N. W. 869, 97 Am. St. Rep. 276, in this case fraud is the gravamen of the action.

21. Brown *v.* Clow, 158 Ind. 403, 62 N. E. 1006. And see American Credit-Indemnity Co. *v.* Ellis, 156 Ind. 212, 59 N. E. 679.

22. Ellis *v.* Kelso, 18 B. Mon. (Ky.) 296; Pyle *v.* Beckwith, 1 J. J. Marsh. (Ky.) 445; Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Foot *v.* Farrington, 41 N. Y. 164; Hamilton *v.* Shepperd, 7 N. C. 115. And see *supra*, VI, B, 21, b, (II).

23. See *infra*, VI, B, 21, c, (II).

24. See *supra*, VI, B, 21, b, (I).

25. *Alabama.*— See Snodgrass *v.* Decatur Branch Bank, 25 Ala. 161, 60 Am. Dec. 505.

Georgia.— Kirkley *v.* Sharp, 98 Ga. 484, 25 S. E. 562 (an action by a purchaser of land to recover damages for deficiency in acreage); Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476. And see Walker *v.* Walker, 25 Ga. 76, an action of trover.

Indiana.— Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Bescher *v.* Paulus, 58 Ind. 271; Boyd *v.* Boyd, 27 Ind. 429; Day *v.* Dages, 16 Ind. App. 228, 46 N. E. 589. *Compare* Pilcher *v.* Flinn, 30 Ind. 202.

New Hampshire.—Way *v.* Cutting, 20 N. H. 187.

South Carolina.— Harrell *v.* Kelly, 2 McCord 426, action to recover money fraudulently obtained. *Compare* Motley *v.* Montgomery, 2 Bailey 544. But the law has since been changed by statute. See Lenhardt *v.* French, 57 S. C. 493, 35 S. E. 761.

Texas.— See Anding *v.* Perkins, 29 Tex. 348; Ripley *v.* Withee, 27 Tex. 14.

United States.— Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143, applying the law of New Hampshire in a case involving concealment of the fraud. And see Bailey *v.* Glover, 21 Wall. 342, 22 L. ed. 636.

See 33 Cent. Dig. tit. "Limitation of Actions," § 480.

Rule in Pennsylvania see *supra*, VI, B, 21, b, (I), note 96.

26. *Alabama.*—Code, § 2813, providing that "in actions seeking relief on the ground of fraud, where the statute has created a bar, the cause of action must not be considered as having accrued, until the discovery by the aggrieved party of the facts constituting the fraud, after which he must have one year within which to prosecute his suit," applies to actions at law as well as to suits in equity. Henry *v.* Allen, 93 Ala. 197, 9 So. 579; Tillison *v.* Ewing, 87 Ala. 350, 6 So. 276; Porter *v.* Smith, 65 Ala. 169.

California.— Christensen *v.* Jessen, (1895) 40 Pac. 747.

Indiana.— This result has been reached in some cases partly by applying the statute

(II) *IN ACTIONS OF DECEIT*—(A) *In General.* As a general rule, where the statutes do not otherwise provide, a right of action at law to recover damages for a fraud accrues and the statute begins to run when the fraud is successfully consummated, not when it is discovered. So in cases where a purchase of property is induced by fraud, the statute begins to run against the purchaser's right of action from the time when the sale is completed.[27] Similarly where the practice of fraud induces plaintiff to enter into a contract of marriage, the cause of action accrues and the statute begins to run when the fraud is consummated by the making of the contract, not when it is discovered,[28] unless the deception is continued after the marriage.[29] But the equitable rule that the statute runs from the discovery of the fraud applies to actions of deceit in those jurisdictions where that rule has been adopted by the common-law courts[30] or has been embodied in statutes applicable to actions at law.[31]

relating to concealment of the cause of action. See Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140; Boyd *v.* Boyd, 27 Ind. 429.

Kansas.— McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924; Marbourg *v.* McCormick, 23 Kan. 38; Young *v.* Whittenhall, 15 Kan. 579.

Maine.— Penobscot R. Co. *v.* Mayo, 67 Me. 470, 24 Am. Rep. 45, where the maker of a note fraudulently procured its surrender without payment, and an action was brought against him for money had and received.

Maryland.—Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517 [*followed* in New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 60 Atl. 469]. For former rule see Franklin *v.* Waters, 8 Gill 322.

Minnesota.— Mower County *v.* Smith, 22 Minn. 97; Coek *v.* Van Etten, 12 Minn. 522.

Missouri.— See Edwards *v.* Noel, 88 Mo. App. 434.

Nebraska.—Raymond *v.* Sehriever, 63 Nebr. 719, 89 N. W. 308.

Utah.— Larsen *v.* Utah Loan, etc., Co., 23 Utah 449, 65 Pac. 208.

Washington.— Stearns *v.* Hoehhrunn, 24 Wash. 206, 64 Pac. 165.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 182, 183, 480.

27. *Kentucky.* — Graves *v.* Leathers, 17 B. Mon. 665; Pyle *v.* Beckwith, 1 J. J. Marsh. 445.

Louisiana.— See Mitchel *v.* Jewell, 1 Mart. N. S. 87.

Mississippi.—Wilson *v.* Ivy, 32 Miss. 233.

New York.— Miller *v.* Wood, 116 N. Y. 351, 22 N. E. 553 [*affirming* 41 Hun 600] (holding that Code Civ. Proc. § 382, subd. 5, which postpones the running of the statute until the discovery of the facts constituting the fraud did not affect the case, since the provision applies only to "an action to procure a judgment, other than for a sum of money"); Northrop *v.* Hill, 57 N. Y. 351, 15 Am. Rep. 501 [*affirming* 61 Barb. 136]; Mitchell *v.* Strough, 35 Hun 83; Converse *v.* Miner, 21 Hun 367.

North Carolina. — Austin *v.* Dawson, 75 N. C. 523; Hamilton *v.* Shepperd, 7 N. C. 115.

Virginia.— Fant *v.* Fant, 17 Gratt. 11 (transfer of an obligation void for usury); Rice *v.* White, 4 Leigh 474; Callis *v.* Waddy, 2 Munf. 511.

England.— Clarke *v.* Hougham, 2 B. & C. 149, 3 D. & R. 325, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73.

Canada.— Dickson *v.* Jarvis, 5 U. C. Q. B. O. S. 694.

See 33 Cent. Dig. tit. "Limitation of Actions," § 484. See also, generally, FRAUD, 20 Cyc. 90 *et seq.*

The fraud must be fully consummated before the statute will begin to run. Phelps County *v.* Bishop, 68 Mo. 250.

28. Reilly *v.* Sabater, 43 N. Y. Suppl. 383, 26 N. Y. Civ. Proc. 34.

29. See *infra*, VI, B, 21, e, (v).

30. Persons *v.* Jones, 12 Ga. 371, 58 Am. Dec. 476 (action founded on the transfer of a usurious note); Way *v.* Cutting, 20 N. H. 187; Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143 (applying the law of New Hampshire to a case of concealment of the fraud). See *supra*, VI, B, 21, c, (I).

31. *Alabama.*— Henry *v.* Allen, 93 Ala. 197, 9 So. 579.

Florida.— Watson *v.* Jones, 41 Fla. 241, 25 So. 678, holding that Rev. St. (1894) § 1294, prescribing a limitation of three years in actions for relief on the ground of fraud, the cause of action not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud, applies to an action of deceit, wherein defendant "ought to have known" the falsity of his representations, as well as in a case where he actually knew their falsity.

Kansas.— Marbourg *v.* McCormick, 23 Kan. 38; Young *v.* Whittenhall, 15 Kan. 579.

Maryland.— Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517 [*followed* in New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 60 Atl. 469].

Missouri.— See Edwards *v.* Noel, 88 Mo. App. 434.

United States.—South Covington, etc., R. Co. *v.* Gest, 34 Fed. 628, applying the law of Ohio.

See 33 Cent. Dig. tit. "Limitation of Actions," § 484.

(B) *Date of Accrual or of Ascertainment of Consequential Damages.* The principle that the statute runs from the consummation of the fraud has been held not to be varied by the fact that plaintiff suffers consequential damages only at a time subsequent to the making of the contract induced by defendant's fraud, it being considered that fraudulently inducing a man to enter into a contract works such a legal injury as will support an action.[32] Thus in the case of a purchase induced by fraud the statute is held to run from the date of the sale and not from the date when the purchaser is evicted.[33] Even under a statute providing that the cause of action shall not be deemed to have accrued until the discovery of the fraud, the running of the statute is not postponed until the amount of plaintiff's damage has been judicially ascertained.[34]

d. Action Must Be Based on Fraud — (I) *In General.* Aside from cases where fraudulent concealment of the cause of action operates to postpone the running of the statute,[35] it is generally held that in order for the running of the statute to be postponed until the fraud is discovered, fraud must be the gravamen of the action; that is, the action must be based on fraud. This is especially true under the statutes which embody the equitable rule, as the greater number of them expressly apply to "actions for relief on the ground of fraud."[36] Thus the running of the statute is not postponed where the purpose of the action is merely to enforce a contract or recover damages for its breach,[37] unless the case is one where

32. Pyle *v.* Beckwith, 1 J. J. Marsh. (Ky.) 445; Wilson *v.* Ivy, 32 Miss. 233; Northrop *v.* Hill, 57 N. Y. 351, 15 Am. Rep. 501 [*affirming* 61 Barb. 136]. See also, generally, FRAUD, 20 Cyc. pp. 42, 90, 91, 142. *Compare* Phelps County *v.* Bishop, 68 Mo. 250.

Sale of unsound negro.— In an action of deceit for selling an unsound negro as sound it was held that the cause of action accrued and the statute began to run at the date of the sale, not on the death of the negro. Singleton *v.* Lewis, Hard. (Ky.) 258.

33. Pyle *v.* Beckwith, 1 J. J. Marsh. (Ky.) 445; Northrop *v.* Hill, 57 N. Y. 351, 15 Am. Rep. 501.

34. Thayer *v.* Kansas L. & T. Co., 100 Fed. 901, 41 C. C. A. 106, an action by a purchaser of notes and mortgages to recover for fraudulent misrepresentations as to the value of the security and the solvency of the mortgagors, it being held that the running of the statute was not postponed until foreclosure of the mortgages.

35. See *infra*, VI, D, 2, b.

36. *California.*— Kenney *v.* Parks, 137 Cal. 527, 70 Pac. 556; Doyle *v.* Callaghan, 67 Cal. 154, 7 Pac. 418.

Colorado.— Murto *v.* Lemon, 19 Colo. App. 314, 75 Pac. 160.

Kansas.—Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051, (1902) 70 Pac. 933.

Maine.—Penobscot R. Co. *v.* Mayo, 65 Me. 566.

New York.— Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298 [*reversing* 36 Hun 247]; Carr *v.* Thompson, 87 N. Y. 160; Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170.

North Carolina.— Rouss *v.* Ditmore, 122 N. C. 775, 30 S. E. 335.

Ohio.— Mosher *v.* Butler, 31 Ohio St. 188 (a suit for specific performance against the vendor's heirs and his grantee with notice); Howk *v.* Minnick, 19 Ohio St. 462, 2 Am. Rep. 413 (an action based on the wrongful taking of personal property by force; it being noticed, however, that the rule has been somewhat changed by a statute passed after the foregoing action was brought); Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212 (an action to enforce payment of a debt, it being held that plaintiff's ignorance of who was the real principal in the transaction did not postpone the running of the statute).

South Carolina.— Miles *v.* Berry, 1 Hill 296.

United States.— Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169, 46 C. C. A. 222.

Where only a mistake is alleged, a statute embodying the equitable rule can of course have no application unless it is in terms applicable to cases of mistake. Exkorn *v.* Exkorn, 1 N. Y. App. Div. 124, 37 N. Y. Suppl. 68; Sprague *v.* Cochran, 70 Hun (N. Y.) 512, 24 N. Y. Suppl. 369 [*reversed* on other grounds in 144 N. Y. 104, 38 N. E. 1000]; Hoyt *v.* Putnam, 39 Hun (N. Y.) 402; Oakes *v.* Howell, 27 How. Pr. (N. Y.) 145; Mask *v.* Tiller, 89 N. C. 423. And see Higgins *v.* Mendenhall, 51 Iowa 135, 50 N. W. 539 [*overruling* Higgins *v.* Mendenhall, 42 Iowa 675].

For facts held to constitute a cause of action for relief on the ground of fraud and not for the recovery of real property see Murphy *v.* Crowley, (Cal. 1902) 70 Pac. 1024.

As to relief on the ground of mistake see *infra*, VI, B, 23.

37. Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051 (holding that Civ. Code, § 18, subd. 3, providing that a cause of action for relief on the ground of fraud shall not be deemed to have accrued until the discovery of the fraud, does not apply to an action to recover damages for a breach of contract); Cole *v.* McGlathry, 9 Me. 131 (assumpsit for goods sold); Camp-

the violation of the contract is such as can properly be termed fraudulent,[38] or in an action based on a violation of duty imposed by contractual relations,[39] or to recover money on the theory of an implied or quasi-contract where no fraud is chargeable to defendant personally,[40] or in cases where the fraud is merely collateral to the cause of action,[41] or where the cause of action is complete without fraud, notwithstanding unnecessary averments of fraud in the complaint.[42] Fraud must be the principal ground on which relief is asked.[43]

(II) *Character of the Fraud*[44]—(A) *In General.* The rule that the statute runs only from the discovery of the fraud cannot of course apply either in law or in equity unless there has been a fraud of some description.[45] In some jurisdic-

bell *v.* Culver, 56 N. Y. App. Div. 591, 67 N. Y. Suppl. 469; Rouss *v.* Ditmore, 122 N. C. 775, 30 S. E. 335 (an action for the balance due on an account for goods sold).

The retention of money collected upon collateral security in excess of the debt secured is only a breach of contract, and not a fraud; and the failure to discover it will not postpone the running of the statute of limitations, under section 2530 of the Iowa code, against an action to recover the money. Brunson *v.* Ballou, 70 Iowa 34, 29 N. W. 794.

38. Gregory *v.* Spieker, 110 Cal. 150, 42 Pac. 576, 52 Am. St. Rep. 70 (a suit to enjoin a fraudulent violation of a contract; it being said that the "fraud was so ingrained with the breach of contract by defendant that the action, as regards the bar of the statute, at least, must be treated as one for relief on the ground of fraud"); Ripley *v.* Withee, 27 Tex. 14 [*followed* in Anding *v.* Perkins, 29 Tex. 348] (applying the equitable rule to an action to recover damages sustained by the purchase from defendant of forged land certificates).

39. Carr *v.* Thompson, 87 N. Y. 160 [*followed* in Seitz *v.* Seitz, 59 N. Y. App. Div. 150, 69 N. Y. Suppl. 170].

When the gravamen of the bill is a breach of duty and the action is thereby brought within the statute, the addition of "bare averments which call the same acts fraudulent" do not convert it into a bill both for the fraud and a breach of duty or for fraud alone. If the alleged acts constitute negligence it is useless to escape from the legal consequences of an action to recover damages for such acts by affixing to them the adjective "fraudulent." Frishmuth *v.* Farmers' L. & T. Co., 107 Fed. 169, 46 C. C. A. 222, a breach of duty by a trustee.

Allegation of fraudulent conspiracy.— Where one who is entitled to an accounting against another, and who has the express promise of such other to account, fails to institute his action within the statutory period, he cannot take his case out of the statute by alleging a fraudulent conspiracy between such adversary and a third person to refuse such accounting. Rizer *v.* Geary County, 58 Kan. 114, 48 Pac. 568. And see Conspiracy, 8 Cyc. 658.

40. Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298 [*reversing* 36 Hun 247].

41. Doyle *v.* Callaghan, 67 Cal. 154, 7 Pac. 418; Miles *v.* Berry, 1 Hill (S. C.) 296.

Where the maker of a note fraudulently obtained possession of it and kept it secret from the payee until the statutory period had expired, and the payee on discovering the circumstances brought an action of assumpsit to recover the amount of the note, alleging that the note had been lost, it was held that the maker's fraud did not affect the operation of the statute. Miles *v.* Berry, 1 Hill (S. C.) 296. See also Penobscot R. Co. *v.* Mayo, 65 Me. 566; Myers *v.* Cronk, 10 N. Y. St. 125. But *compare* Bricker *v.* Lightner, 40 Pa. St. 199, a case almost identical in its facts with Miles *v.* Berry, *supra*, but holding that the statute did not run against a right of action to recover the value of the notes until the fraud had been discovered.

42. Kenney *v.* Parks, 137 Cal. 527, 70 Pac. 536.

43. **Incidental equitable relief on the ground of fraud.**— A statute applying the equitable rule to actions for relief on the ground of fraud does not apply to an action to recover money where equitable relief (such as subrogation) on the ground of fraud is asked as a mere incident to the principal cause of action. Campbell *v.* Campbell, 133 Cal. 33, 65 Pac. 134; Clausen *v.* Meister, 93 Cal. 555, 29 Pac. 232.

44. See also *infra*, VI, B, 21, a, (I).

Duress and undue influence as fraud see *infra*, VI, B, 22, note 12.

45. In the following cases it was held that there was no showing of fraud sufficient to bring the equitable or statutory rule into operation.

Arkansas.— Leach *v.* Moore, 57 Ark. 583, 22 S. W. 173.

Kentucky.— Schwearman *v.* Com., 99 Ky. 296, 38 S. W. 146, 18 Ky. L. Rep. 585; Hahn *v.* Bellevue, (1887) 3 S. W. 132, holding that acts done by trustees of a town to enforce an *ultra vires* contract did not amount to fraud.

Montana.— Chowan *v.* Phelps, 26 Mont. 524, 60 Pac. 54.

Pennsylvania.— Davis *v.* Hawkins, 163 Pa. St. 228, 29 Atl. 746.

England.— Bree *v.* Holbech, Dougl. (3d ed.) 655.

What constitutes fraud see, generally, Fraud, 20 Cyc. 1; and cross-references there given.

If the false statements are not believed and do not deceive the statute runs from the time they are made. Stevens *v.* Reed, 60 N. Y. Suppl. 726.

tions it is only in cases of actual fraud that the running of the statute is postponed until the fraud is discovered; in cases of constructive fraud the statute runs from the time of the fraudulent act complained of.[46] But in other jurisdictions the equitable or statutory rule applies to constructive or "legal," unintentional, fraud as well as to "fraud in fact" or actual fraud.[47] The equitable or statutory rule has been applied to a wrongful entry of satisfaction of a judgment or mortgage whereby a subsequent assignee or purchaser suffers injury,[48] and to a case where a tract of land was included in a deed by the active fraud of the grantee and without the knowledge of the grantor who continued in possession of the tract.[49] The breach of a promise to do something in the future is not such a fraud as will postpone the running of the statute; ordinarily there must be some concealment or misrepresentation relating to existing facts and preventing plaintiff from sooner instituting his suit.[50] But where the promise was made with intent not to perform, it has been held that the statute did not run until the discovery of the fraud.[51] In order for plaintiff's ignorance of the fraud to postpone the running of the statute he must be in some way injured by the fraud. If the fraud does not affect any of his legal rights so as to entitle him to rely on it as a cause of action, the operation of the statute is not affected.[52]

Illegal issue of municipal bonds.— A suit to obtain the cancellation and surrender of municipal bonds issued without complying with the requirements of a statute is not an action for relief on the ground of fraud within the meaning of the New York code postponing the running of the statute of limitations until the discovery of the fraud. Venice *v.* Breed, 65 Barb. (N. Y.) 597.

A mere wilful trespass not committed by stealth is not legally a fraud which will postpone the running of the statute. Nudd *v.* Hamblin, 8 Allen (Mass.) 130. And see Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484.

Sale under trust deed without notice.— That property was sold under a deed of trust without the required notice does not constitute fraud, and the running of the statute will not be postponed. Gebhard *v.* Sattler, 40 Iowa 152.

46. Wilmerding *v.* Russ, 33 Conn. 67; Maxwell *v.* Walsh, 117 Ga. 467, 43 S. E. 704; Downs *v.* Harris, 75 Ga. 834; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 152, 31 Atl. 484; Davis *v.* Hawkins, 163 Pa. St. 228, 29 Atl. 746 (an action of assumpsit to recover money alleged to have been obtained by fraud); Hollinshead's Appeal, 103 Pa. St. 158; Otterson's Estate, 7 Pa. Dist. 379; Morrell *v.* Trotter, 15 Phila. (Pa.) 201 [*citing* Waterman *v.* Brown, 31 Pa. St. 161; Musselman *v.* Eshleman, 10 Pa. St. 394, 51 Am. Dec. 493]. *Contra*, Brown *v.* Binney, 1 Pa. Co. Ct. 432, 17 Wkly. Notes Cas. 401.

In Georgia the fraud which will postpone the running of the statute must involve moral turpitude (Maxwell *v.* Walsh, 117 Ga. 467, 43 S. E. 704; Anderson *v.* Foster, 112 Ga. 270, 37 S. E. 426; Downs *v.* Harris, 75 Ga. 834, applying the rule to a devastavit by a trustee is not complying with the law; Austin *v.* Raiford, 68 Ga. 201); and must have the effect of debarring or deterring plaintiff from his action (Anderson *v.* Foster, *supra* [*citing* Printup *v.* Alexander, 69 Ga. 553]). Mere errors or inaccuracies in accounts will not suffice. Austin *v.* Raiford, *supra* [*followed* in Maxwell *v.* Walsh, *supra*].

47. Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146 (construing the California statute embodying the equitable rule); Lewis *v.* Welch, 47 Minn. 193, 48 N. W. 608, 49 N. W. 665; Cock *v.* Van Etten, 12 Minn. 522; Ripley *v.* Withee, 27 Tex. 14 [*followed* in Anding *v.* Perkins, 29 Tex. 348]; Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208 (fraud of a bank in loaning money of a depositor in a different manner than he directed).

48. Brown *v.* Binney, 1 Pa. Co. Ct. 132, 17 Wkly. Notes Cas. 401; Mitchell *v.* Buffington, 10 Wkly. Notes Cas. (Pa.) 361. And see Day *v.* Dages, 17 Ind. App. 228, 46 N. E. 589.

49. Davis *v.* Monroe, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. Rep. 581.

50. Townsend *v.* Vanderwerker, 20 D. C. 197.

51. West *v.* Clark, 28 Tex. Civ. App. 1, 66 S. W. 215, where it appeared from the evidence that plaintiff was induced to render services by promises falsely and fraudulently made by defendant and which defendant did not intend to perform.

52. Brown *v.* Brown, 44 Iowa 349.

Illustration.— Where B conveyed land to his son who had an illegitimate child (plaintiff) whom he had recognized, and after the grantee's death, the child surviving him, B conveyed the same land to another person, plaintiff having for twenty years no knowledge that his father had owned the land or that the second conveyance had been made by B, it was held that since the second conveyance was inoperative to pass title to the land or to affect the rights of plaintiff, there was no fraud of which the latter could complain and that his ignorance of his rights did not affect the running of the statute. Brown *v.* Brown, 44 Iowa 349.

(B) *Fraudulent Conversion — Defalcations by Officers and Agents*[53] — (1) In General. In many decisions the equitable or statutory rule is held applicable to cases of fraudulent conversion of money or other property where the conversion has been concealed and the guilty party occupies a fiduciary relation toward the party defrauded;[54] although it has been held otherwise where the gravamen of the action was not fraud but merely a wrongful conversion or a breach of contract,[55] or where plaintiff was guilty of negligence in failing to discover the fact of the conversion.[56] Thus it has been held that where a public officer or an agent or officer of a corporation converts or misappropriates money intrusted to him

53. See also *supra*, VI, B, 3, d; VI, B, 3, e; and Trover and Conversion.

54. *California.*— Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219; Moyle *v.* Landers, (1889) 21 Pac. 1133.

Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241].

Iowa.— Wilder *v.* Secor, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236 [*following* Boomer Dist. Tp. *v.* French, 40 Iowa 601].

Minnesota.— Mower County *v.* Smith, 22 Minn. 97; Cock *v.* Van Etten, 12 Minn. 522.

Missouri.— Bent *v.* Priest, 86 Mo. 475; Ruff *v.* Milner, 92 Mo. App. 620; Aultman *v.* Loring, 76 Mo. App. 66; Bent *v.* Lewis, 15 Mo. App. 40 [*reversed* on other grounds in 88 Mo. 462].

Pennsylvania.— Semple *v.* Callery, 184 Pa. St. 95, 39 Atl. 6 (where a seller of bonds, the time of delivery having been extended, was permitted to keep the bonds in his possession, and afterward fraudulently converted them to his own use); *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921; Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417.

Washington.— Stearns *v.* Hochbrunn, 24 Wash. 206, 64 Pac. 165, an action by a principal against his agent to recover money which the agent had obtained in violation of his trust, where the agent had concealed the fact from his principal, had refused to pay the money over on demand and had converted it to his own use, it being held that the gravamen of the action being fraud the action was one "for relief on the ground of fraud" within the meaning of the statute.

United States.— Dunlevy *v.* Mowry, 8 Fed. Cas. No. 4,165, 2 Bond 214, where an agent or broker sold bonds for his principal at fifty cents on the dollar but reported that the sale was at a lower rate and settled with his principal on that basis. See also Birckhead *v.* De Forest, 120 Fed. 645, 57 C. C. A. 107 (construing N. Y. Code Civ. Proc. § 410; Bracken *v.* Milner, 104 Fed. 522 (applying Mo. Rev. St. (1889) § 4290).

England.— See North American Land, etc., Co. *v.* Watkins, [1904] 2 Ch. 233, 73 L. J. Ch. 626, 91 L. T. Rep. N. S. 425, 20 T. L. R. 642 [*affirming* [1904] 1 Ch. 242, 73 L. J. Ch. 117].

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 486, 487.

Illustration.— Where a client sends his attorney a claim against an estate for collection, but the attorney files it against the estate in his own name, and avails himself of it in the settlement of his own accounts with the administrator, he converts the claim to his own use and a cause of action at once arises; but where he conceals these facts from his client the statute does not begin to run until he discovers the cause of action or might discover it by the use of reasonable diligence. The obligation of the attorney in such a case to inform his client of the facts precludes him from making the claim that the client might sooner have discovered the facts by an examination of the records. Wilder *v.* Secor, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236.

Intent.— Plaintiff intrusted defendant with money to be loaned for her and in her name, and, in violation of his instructions, he mixed it with money of his own, and loaned it as his own, paying her interest for several years. It was held that such appropriation without plaintiff's consent, whether defendant intended to perpetrate a fraud or not, was a fraud in law, and an action to recover the money was "an action for relief on the ground of fraud," within the Minnesota statute providing that such action may be commenced within six years after the discovery of the fraud. Cock *v.* Van Etten, 12 Minn. 522.

55. Doyle *v.* Callaghan, 67 Cal. 154, 7 Pac. 418. And see Schwearman *v.* Com., 99 Ky. 296, 38 S. W. 146, 18 Ky. L. Rep. 585; Carr *v.* Thompson, 87 N. Y. 160; Howk *v.* Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Cook *v.* Darby, 4 Munf. (Va.) 449, 6 Am. Dec. 529, conversion of a common carrier. *Compare* Cock *v.* Van Etten, 12 Minn. 522, holding that the fact that the evidence shows also a breach of contract which is barred does not affect plaintiff's right to recover on the ground of fraud.

56. Simpson *v.* Dalziel, 135 Cal. 599, 67 Pac. 1080; Marler *v.* Simmons, 81 Ga. 611, 8 S. E. 190; Sutton *v.* Dye, 60 Ga. 449, where a factor sold cotton for his principal and received the proceeds, and on payment being demanded falsely and fraudulently answered that he had paid the money over to a third person, but was not asked to show a receipt or exhibit his books or other evidences of payment. And see *infra*, VI, B, 21, f, text and note 7.

Principal and factor.— "A principal ought to run down his accounts with his factor once in four years," the statutory period, else he may be chargeable with negligence in not discovering the factor's fraud. Sutton *v.* Dye, 60 Ga. 449.

and fraudulently conceals the defalcation, the equitable or statutory rule applies and the statute runs only from the discovery of the defalcation or of the breach of condition of his bond.[57]

(2) LIABILITY OF SURETIES ON BOND. The rule just stated has been applied to actions against principal and sureties on the bond of a defaulting agent or officer,[58] and to suits in equity by the sureties to enjoin the defrauded party from proceeding to collect from them the amount of the defalcation.[59] In such cases the sureties cannot invoke the protection of the statute on the ground that they were innocent of the fraud; and if the statute is suspended as to the principal it is suspended as to the sureties also.[60]

e. What Amounts to Discovery of Fraud — Necessity For Diligence or Concealment — (I) *IN GENERAL.*[61] There is, however, a well established qualification to the equitable rule that the statute runs only from the discovery of the fraud. Knowledge by the defrauded party of facts which in the exercise of proper prudence and diligence would enable him to learn of the fraud, is usually deemed equivalent to discovery; and therefore not only in equity but generally in those jurisdictions where the equitable rule has been made applicable to actions at law, the statute runs from the time when by the use of reasonable diligence the fraud could have been discovered. In other words "constructive notice of the fraud may constitute a discovery."[62] In applying this qualification, however, the decisions are not

57. *Alabama.*— Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373, 17 So. 620.

California.— San Pedro Lumber Co. *v.* Reynolds, 121 Cal. 74, 53 Pac. 410.

Delaware.—Lieberman *v.* Wilmington First Nat. Bank, (1898) 40 Atl. 382.

Minnesota.— Mower County *v.* Smith, 22 Minn. 97.

Nebraska.—Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974, overcharges and other irregularities by secretary of building association.

See 33 Cent. Dig. tit. "Limitation of Actions," § 486. And see the cases cited *infra*, VI, B, 21, d, (II), (B), (2).

For particular applications of the rule see such titles as CORPORATIONS, 10 Cyc. 1; OFFICERS; SHERIFFS AND CONSTABLES.

Opportunity to discover defalcation.— The fact that the books kept by the agent or officer or under his supervision were open to the inspection of the party defrauded does not affect the rule unless such party had some notice of the former's dishonesty; for the fiduciary relations of the parties dispenses to some extent with the necessity for active diligence to discover the fraud. Lieberman *v.* Wilmington First Nat. Bank, (Del. 1898) 40 Atl. 382; McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924; Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308; Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974, where a committee had been appointed each year to examine the books but had failed to discover the irregularities. See also *infra*, VI, B, 21, e, (VII).

58. *Connecticut.*— Eising *v.* Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75, bond given for the faithful performance of duty as collector and salesman, the case being decided under the provisions of a statute relating to fraudulent concealment.

Iowa.— Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93, bond of justice of the peace.

Kansas.— McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924.

Kentucky.— Schwerman *v.* Com., (1895) 33 S. W. 78, holding that under the statute relating to actions for relief for fraud the action may be brought at any time after the discovery of the fraud, provided that ten years have not elapsed since the fraud was perpetrated, and this notwithstanding a statute of limitation specially applicable to sureties.

Texas.— Moore *v.* Waco Bldg. Assoc., 19 Tex. Civ. App. 68, 45 S. W. 974, bonds given by secretary of building association.

See 33 Cent. Dig. tit. "Limitation of Actions," § 486.

59. Lieberman *v.* Wilmington First Nat. Bank, (Del. 1898) 40 Atl. 382 [*distinguishing* Grimshaw *v.* Wilmington, 5 Del. Ch. 183] (so holding notwithstanding a statute expressly provided that no action should be brought on the bond of such officers after a certain period from the accruing of the cause of action); Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

60. See the cases cited in the two preceding notes; and, generally, PRINCIPAL AND SURETY.

61. See also, generally, EQUITY, 16 Cyc. 171 *et seq.*

62. *Alabama.*— Johnson *v.* Johnson, 5 Ala. 90.

California.— Simpson *v.* Dalziel, 135 Cal. 599, 67 Pac. 1080; Smith *v.* Martin, 135 Cal. 247, 67 Pac. 779; Marks *v.* Evans, (1900) 62 Pac. 76; Archer *v.* Freeman, 124 Cal. 528, 57 Pac. 474; Burling *v.* Newlands, (1895) 39

harmonious. Many decisions qualify the general equitable or statutory rule that the statute runs only from the discovery of the fraud, by confining it substantially to cases of fraudulent concealment of the cause of action, it being held that defendant's fraud and plaintiff's ignorance thereof are not sufficient to postpone the running of the statute, but that the fraud must have been so concealed from plain-

Pac. 49; Bills *v.* Silver King Min. Co., 106 Cal. 9, 39 Pac. 43; Cohn *v.* Parcels, 72 Cal. 367, 14 Pac. 26; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88.

Georgia.— Maxwell *v.* Walsh, 117 Ga. 467, 43 S. E. 704; Little *v.* Reynolds, 101 Ga. 594, 28 S. E. 919; Marler *v.* Simmons, 81 Ga. 611, 8 S. E. 190; Sutton *v.* Dye, 60 Ga. 449; Freeman *v.* Craver, 56 Ga. 161; Edmonds *v.* Goodwyn, 28 Ga. 38; Pledger *v.* Coulter, 26 Ga. 443, an action of deceit for false representations as to the solvency of the maker of certain notes, the notes falling due more than the statutory period before the action, and it being held that it was to be presumed that plaintiff must have discovered the maker's insolvency (and therefore the fraud of defendant) when the notes fell due and were unpaid, or within a reasonable time thereafter.

Indiana.— Matlock *v.* Todd, 25 Ind. 128.

Iowa.— McDonald *v.* Bayard Sav. Bank, 123 Iowa 413, 98 N. W. 1025; Nash *v.* Stevens, 96 Iowa 616, 65 N. W. 825.

Kansas.— Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846; Black *v.* Black, 64 Kan. 689, 68 Pac. 662; Manley *v.* Robertson, 6 Kan. App. 921, 51 Pac. 795.

Kentucky.— Clark *v.* Seay, 51 S. W. 589, 21 Ky. L. Rep. 394.

Louisiana.— See Bory *v.* Knox, 38 La. Ann. 379.

Maine.— Cole *v.* McGlathry, 9 Me. 131.

Massachusetts.— Farnam *v.* Brooks, 9 Pick. 212.

Minnesota.— Shakopee First Nat. Bank *v.* Strait, 71 Minn. 69, 73 N. W. 645; Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838. But *compare* Berkey *v.* Judd, 22 Minn. 287.

Mississippi.— Buckner *v.* Calcote, 28 Miss. 432. And see Murphy *v.* Reedy, (1887) 2 So. 167.

Missouri.— Callan *v.* Callan, 175 Mo. 346, 74 S. W. 965; Loomis *v.* Missouri Pac. R. Co., 165 Mo. 469, 65 S. W. 962; Hunter *v.* Hunter, 50 Mo. 445.

Nebraska.— Cole *v.* Boyd, 68 Nebr. 146, 93 N. W. 1003; Wright *v.* Davis, 28 Nebr. 479, 44 N. W. 490, 26 Am. St. Rep. 347; Parker *v.* Kuhn, 21 Nebr. 413, 32 N. W. 74, 59 Am. Rep. 838; Welton *v.* Merrick County, 16 Nebr. 83, 20 N. W. 111, an action to recover back taxes alleged to have been unlawfully demanded and received.

New York.—Higgins *v.* Crouse, 147 N. Y. 411, 416, 42 N. E. 6 [*reversing* 71 Hun 615, 24 N. Y. Suppl. 1080] (where it was said by Finch, J.: "I think the true rule is that, where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him. He will be held, for the purposes of the Statute of Limitations, to have actually known what he might have known and ought to have known"); Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854; East River Sav. Inst. *v.* Barrett, 23 Misc. 423, 52 N. Y. Suppl. 81. And see Piper *v.* Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785.

Ohio.— Bohm *v.* Cunningham, 7 Ohio Dec. (Reprint) 382, 2 Cinc. L. Bul. 274. See also Jaeger *v.* Herancourt, 7 Ohio Dec. (Reprint) 1, 1 Cinc. L. Bul. 10.

Pennsylvania.— Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849; Braddock Trust Co. *v.* Guarantee, etc., Co., 180 Pa. St. 529, 37 Atl. 101; Franklin *v.* Franklin, 22 Pa. Super. Ct. 463; Goggins *v.* Risley, 13 Pa. Super. Ct. 316; Morrell *v.* Trotter, 15 Phila. 201.

South Carolina.— See Owens *v.* Watts, 24 S. C. 76.

Tennessee.— Peck *v.* Bullard, 2 Humphr. 41, a suit to rescind a contract for the sale of land upon the ground of fraudulent misrepresentations by the purchaser as to the quantity and quality of land embraced within the boundaries specified by the contract.

Texas.— Bass *v.* James, 83 Tex. 110, 18 S. W. 336 (an action of deceit for false representations as to the quantity of land in a tract sold by defendant to plaintiff); Kennedy *v.* Baker, 59 Tex. 150; Alston *v.* Richardson, 51 Tex. 1; Kuhlman *v.* Baker, 50 Tex. 630; Hudson *v.* Wheeler, 34 Tex. 356; Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109; Smith *v.* Talbot, 18 Tex. 774; Missouri, etc., R. Co. *v.* Smith, 28 Tex. Civ. App. 565, 68 S. W. 543; Cleveland *v.* Carr, (Civ. App. 1897) 40 S. W. 406; Woodhouse *v.* Cocke, (Civ. App. 1897) 39 S. W. 948; Beissner *v.* Texas Express Co., 1 Tex. App. Civ. Cas. § 806.

Washington.— Irwin *v.* Holbrook, 32 Wash. 349, 73 Pac. 360; Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561; Wickham *v.* Sprague, 18 Wash. 466, 51 Pac. 1055. See also Morgan *v.* Morgan, 10 Wash. 99, 38 Pac. 1054.

United States.— Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807; Thayer *v.* Kansas, L. & T. Co., 100 Fed. 901, 41 C. C. A. 106 (construing the Kansas statutes); Sedalia School Dist. *v.* De Weese, 100 Fed 705 (construing the Missouri statutes); Swift *v.* Smith, 79 Fed. 709, 25 C. C. A. 154 (construing the Colorado statute); Rhino *v.* Emery, 65 Fed. 826; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing*

tiff that it could not have been discovered by the exercise of reasonable diligence.[63] The principle enunciated by these decisions is that unless there is some relation of trust or confidence between the parties which imposes upon defendant the duty of making a full disclosure of the facts, there must be some active affirmative con-

44 Fed. 817 (*affirming* 32 Fed. 821)] (construing the Minnesota statute); Teall *v.* Slaven, 40 Fed. 774 (construing the California statute); Norris *v.* Haggin, 28 Fed. 275 [*affirmed* in 136 U. S. 386, 10 S. Ct. 942, 34 L. ed. 424] (construing the California statute); Taylor *v.* South, etc., R. Co., 13 Fed. 152, 4 Woods 575 (construing the Alabama statute); Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85 (construing the Missouri statute).

England.— The rule of the text is substantially affirmed in the qualifying clause of a statute (3 & 4 Wm. IV, c. 27, § 26), which provides that "in every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered." For construction see Lawrance *v.* Norreys, 15 App. Cas. 210, 213, 54 J. P. 708, 59 L. J. Ch. 681, 62 L. T. Rep. N. S. 706, 38 Wkly. Rep. 753; Vane *v.* Vane, L. R. 8 Ch. 383, 42 L. J. Ch. 299, 28 L. T. Rep. N. S. 320, 21 Wkly. Rep. 252; Willis *v.* Howe, [1893] 2 Ch. 545, 62 L. J. Ch. 690, 69 L. T. Rep. N. S. 358, 2 Reports 427, 41 Wkly. Rep. 433; Chetham *v.* Hoare, L. R. 9 Eq. 571, 39 L. J. Ch. 376, 22 L. T. Rep. N. S. 57; Lewis *v.* Thomas, 3 Hare 26, 25 Eng. Ch. 26, 67 Eng. Reprint 283; Manby *v.* Bewicke, 3 Kay & J. 342, 69 Eng. Reprint 1140; *In re* Jennens, 50 L. J. Ch. 4, 43 L. T. Rep. N. S. 375, 29 Wkly. Rep. 70.

See 33 Cent. Dig. tit. "Limitation of Actions," § 490, 491.

"The presumption is, that if the party affected by the fraudulent transaction might with ordinary care have seasonably detected it, he seasonably had actual knowledge of it." Bass *v.* James, 83 Tex. 110, 18 S. W. 336. And see Buckner *v.* Calcote, 28 Miss. 432; Angell Lim. § 187.

Statements of rule.— The rule has been sometimes stated to be that in cases of fraud the statute begins to run from the discovery of the facts constituting the fraud or of facts sufficient to put a person of ordinary or reasonable intelligence and prudence on an inquiry which if pursued would lead to discovery of the fraud. Nash *v.* Stevens, 96 Iowa 616, 65 N. W. 825; Cole *v.* Boyd, 68 Nebr. 146, 93 N. W. 1003; Wright *v.* Davis, 28 Nebr. 479, 44 N. W. 490, 26 Am. St. Rep. 347; Parker *v.* Kuhn, 21 Nebr. 413, 32 N. W. 74, 59 Am. Rep. 838; Swift *v.* Smith, 79 Fed. 709, 25 C. C. A. 154.

Meaning of "discovery."— In construing a statute embodying the equitable rule that the statute runs only from the discovery of the fraud, it was said: "Fraud in a past and consummated transaction cannot be the subject of direct ocular or auricular discovery or knowledge. The discovery, then, of which the statute speaks, is of evidence or of evidential facts leading to a belief in the fraud and by which its existence or perpetration may be established, and not of the fraud itself as an existing entity." Parker *v.* Kuhn, 21 Nebr. 413, 426, 32 N. W. 74, 59 Am. Rep. 838.

Actual notice required.— In Wisconsin actual notice of the "facts constituting the fraud" is required to set the statute in motion; constructive notice of such facts does not amount to discovery. Fox *v.* Zimmerman, 77 Wis. 414, 46 N. W. 533 [*following* McMahon *v.* McGraw, 26 Wis. 614]; O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635, holding also that "the discovery by the aggrieved party of the facts constituting the fraud" is an actual, not a mere constructive, discovery.

Notice, generally, see NOTICE.

63. Connoly *v.* Hammond, 58 Tex. 11; Hudson *v.* Wheeler, 34 Tex. 356; Thayer *v.* Kansas L. & T. Co., 100 Fed. 901, 41 C. C. A. 106, construing the Kansas statute. And see McGaughey *v.* Brown, 46 Ark. 25; Patterson *v.* Hewitt, 11 N. M. 1, 66 Pac. 552, 55 L. R. A. 658, and the cases in the following notes.

Concealment as the basis of rule.— In Gibbs *v.* Guild, 9 Q. B. D. 59, 69, 51 L. J. Q. B. 313, 46 L. T. Rep. N. S. 248, 30 Wkly. Rep. 591 [*affirming* 8 Q. B. D. 296] it was said by Brett, L. J.: "It seems to me that there is some little confusion in the expressions used in some cases as to the origin of the cause of action being a fraud. That is not the fraud which raised the equity; but if there was a cause of action, and if its existence was fraudulently concealed from the plaintiff by the defendant who had given that cause of action, it was then that the plaintiff's equity arose notwithstanding that his cause of action had arisen more than six years before." In Smith *v.* Blachley, 198 Pa. St. 173, 179, 47 Atl. 985, 53 L. R. A. 849, it was said by Mitchell, J.: "The cases which hold that where fraud is concealed or as sometimes added, conceals itself, the statute runs only from discovery, practically repeal the statute *pro tanto*. Fraud is always concealed. If it was not no fraud would ever succeed. But when it is accomplished and ended, the rights of the parties are fixed. The right of action is complete. If plaintiff bestirs himself to inquire, he has ample time to investigate and bring his action."

As to fraudulent concealment generally see *infra*, VI, D, 2, b.

cealment of the fraud, something said or done to continue the deception or to prevent inquiry and lull plaintiff into a sense of security, in order to postpone the running of the statute, and that the mere silence or passiveness of defendant after the completion of the fraud is not sufficient;[64] and thus in the absence of such circumstances the statute runs from the time the fraud is committed.[65] In cases involving deficiency in the represented area of land sold,[66] the rule requiring diligence to discover the fraud has been carried to the extent of imposing upon the purchaser the duty to make a survey within a reasonable time after the sale.[67] On the other hand it has been expressly held in some cases that the equitable rule applies, although there are no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the party defrauded, and that if the latter is actually kept in ignorance of the fraud this "concealment" need not be accomplished by any other fraud than that which constitutes the cause of action.[68] Thus it has been held that a secret fraud is the same thing as a concealed fraud and that either one is the equivalent of a concealment of the cause of action.[69] But it is clear that the fraud must either have been concealed from plaintiff or must have been "of such a character as necessarily implied concealment."[70] It seems that mental weakness or incapacity not amounting to absolute insanity is no excuse for failure to discover the fraud where the party is cognizant of all the material facts,[71] and even conceding that imbe-

64. *Massachusetts.*— Farnam *v.* Brooks, 9 Pick. 212.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; State *v.* Furlong, 60 Miss. 839; Buckner *v.* Calcote, 28 Miss. 432 [*followed* in Wilson *v.* Ivy, 32 Miss. 233].

Missouri.— Callan *v.* Callan, 175 Mo. 346, 74 S. W. 965 [*citing* Shelby County *v.* Bragg, 135 Mo. 291, 36 S. W. 600].

Pennsylvania.— Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849 [*explaining* decision on prior appeal in 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887]; Franklin *v.* Franklin, 22 Pa. Super. Ct. 463. And see Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484; Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575.

Texas.— Bass *v.* James, 83 Tex. 110, 18 S. W. 336.

65. Buckner *v.* Calcote, 28 Miss. 432; Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849.

66. **Mistake as to area — recovery back of part of purchase-money** see VENDOR AND PURCHASER.

67. Bass *v.* James, 83 Tex. 110, 18 S. W. 336. And see Nave *v.* Price, 108 Ky. 105, 55 S. W. 882, 21 Ky. L. Rep. 1538; Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109. *Compare* Kirkley *v.* Sharp, 98 Ga. 484, 25 S. E. 562.

68. Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Boyd *v.* Boyd, 27 Ind. 429; Day *v.* Dages, 17 Ind. App. 228, 46 N. E. 589; Way *v.* Cutting, 20 N. H. 187 [*followed* in Quimby *v.* Blackey, 63 N. H. 77]; Herndon *v.* Lewis, (Tenn. Ch. App. 1896) 36 S. W. 953; Bailey *v.* Glover, 21 Wall. (U. S.) 342, 22 L. ed. 636; Bartles *v.* Gibson, 17 Fed. 293.

Under a statute providing that "where a party has a cause of action of which he has been kept in ignorance by the fraud of the adverse party, the right to bring the suit shall be deemed to have first accrued at the time at which such fraud shall or with usual and ordinary diligence might have been known or discovered," it is not necessary that the party chargeable commit a fraud distinct and independent from the original fraud for the purpose of keeping the injured party in ignorance of his cause of action, but the mere concealment of the original fraud is sufficient, for the concealment is in itself a fraud. Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517 [*followed* in New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 69 Atl. 469].

69. Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85 [*following* Carr *v.* Hilton, 5 Fed. Cas. No. 2,436, 1 Curt. 230]. To the same effect see the cases cited *supra*, note 68.

70. Norris *v.* Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. ed. 424 [*affirming* 28 Fed. 275]. The following cases are to the same effect:

Kansas.— Black *v.* Black, 64 Kan. 689, 68 Pac. 662.

Mississippi.— State *v.* Furlong, 60 Miss. 839.

New York.— Venice *v.* Breed, 65 Barb. 597.

United States.— Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85.

England.— Manby *v.* Bewicke, 3 Kay & J. 342, 69 Eng. Reprint 1140.

See 33 Cent. Dig. tit. "Limitation of Actions," § 491. See also *supra*, VI, B, 21, d, (II).

"Fraud implies secrecy which cannot be discovered; treachery which cannot be guarded against; but, the moment the secret or treacherous intent discloses itself in the performance of the act, knowledge exists, and the statute commences to run." Rizer *v.* Geary County, 58 Kan. 114, 48 Pac. 568.

71. Manby *v.* Bewicke, 3 Kay & J. 342, 69 Eng. Reprint 1140, holding that in such a

cility resulting from an injury may be a sufficient excuse for not discovering the fraud, it can operate as such an excuse only during the time of its continuance and plaintiff must act as soon as the imbecility ceases.[72] In some jurisdictions where very strict requirements of diligence are imposed upon the defrauded party, his non-residence and continued absence from the state does not excuse him from the exercise of diligence to discover the fraud;[73] nor does the fact that he put confidence in defendant and relied on his veracity and integrity dispense with the necessity of exercising reasonable diligence if after the consummation of the fraud defendant did or said nothing to mislead him.[74] Plaintiff's inability to discover the whereabouts of defendant and of property which the latter has fraudulently taken does not amount to an inability to discover the fraud so as to postpone the running of the statute, although defendant has absconded from the state.[75] The substance of a number of well reasoned decisions is that the questions whether it is incumbent upon the defrauded party to use diligence to discover the fraud, and whether he has used due diligence to that end, are to be determined by the relative circumstances and conditions of the parties and the peculiar facts of each case rather than by any arbitrary rules;[76] and it has been said that it is impossible to lay down any general rule as to the amount of evidence or number or nature of evidential facts which must be discovered before the statute will begin to run.[77]

(II) *WHERE FACTS APPEAR OF RECORD.*[78] In conformity with the rule requiring the defrauded party to exercise diligence in discovering the fraud,[79] it is generally held that where the facts constituting or showing the fraud appear from the public records required by law to be kept and open to his inspection, his ignorance of the fraud will not postpone the operation of the statute, and that limitations will run from the time the record was made.[80] As to a non-resi-

case the fraud cannot be said to be concealed within the meaning of 3 and 4 Wm. IV, c. 27, § 26.

72. Norris *v.* Haggin, 28 Fed. 275 [*affirmed* in 136 U. S. 386, 10 S. Ct. 942, 34 L. ed. 424].

73. Teall *v.* Slaven, 40 Fed. 774, construing the California statute.

Absence and non-residence as postponing the running of the statute see *infra*, VI, F, 2.

74. Simpson *v.* Dalziel, 135 Cal. 599, 67 Pac. 1080; Callan *v.* Callan, 175 Mo. 346, 74 S. W. 965; Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849 [*explaining* decision on former appeal in 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887].

Purchaser's reliance on vendor.— That the purchaser of land had confidence in the veracity and integrity of his vendor does not excuse him for failure to use reasonable diligence to discover the quantity of land in the tract sold, where the vendor after the sale neither says or does anything to keep alive the effect produced by his previous misrepresentations or to induce the purchaser not to investigate the matter. Bass *v.* James, 83 Tex. 110, 18 S. W. 336. But see Herndon *v.* Lewis, (Tenn. Ch. App. 1896) 36 S. W. 953.

75. Myers *v.* Center, 47 Kan. 324, 27 Pac. 978.

Absence and non-residence generally see *infra*, VI, F, 2.

Fraudulent concealment of person or property generally see *infra*, VI, E, 2.

76. See the following cases:

Georgia.— Kirkley *v.* Sharp, 98 Ga. 484, 25 S. E. 562.

Iowa.— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Kentucky.— Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465.

Mississippi.— Matthews *v.* Sontheimer, 39 Miss. 174 [*distinguishing* Buckner *v.* Calcote, 28 Miss. 432].

New York.— Higgins *v.* Crouse, 147 N. Y. 411, 42 N. E. 6 [*reversing* 24 N. Y. Suppl. 1080].

Pennsylvania.—Ferris *v.* Henderson, 12 Pa. St. 49, 51 Am. Dec. 580; Mitchell *v.* Buffington, 10 Wkly. Notes Cas. 361.

Tennessee.— Herndon *v.* Lewis, (Ch. App. 1896) 36 S. W. 953.

Texas.— Andrews *v.* Smithwick, 34 Tex. 544; Cetti *v.* Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787.

Wisconsin.— O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635.

See 33 Cent. Dig. tit. "Limitation of Actions," § 490.

77. Parker *v.* Kuhn, 21 Nebr. 413, 32 N. W. 74, 59 Am. Rep. 838.

78. In cases of conveyances in fraud of creditors see FRAUDULENT CONVEYANCES, 20 Cyc. 723.

79. See *supra*, VI, B, 21, b, (I).

80. *California.*— Burling *v.* Newlands, (1895) 39 Pac. 49; Hecht *v.* Slaney, 72 Cal. 363, 14 Pac. 88.

Iowa.— McDonald *v.* Bayard Sav. Bank, 123 Iowa 413, 98 N. W. 1025 (the recording of a deed); Fuller *v.* McMahon, (1903) 94

dent plaintiff it has been held on the one hand that the record of a deed which would show the fraud is not such notice as to amount to a "constructive discovery" which will set the statute in motion;[81] while on the other hand it has been held that the deed does constitute such notice, the theory being that it is "notice to the world."[82] But the rule making the record a "constructive discovery" has been limited in a number of decisions to cases where in addition to the public record there are facts and circumstances sufficient to put the defrauded party on inquiry which if pursued would lead to the discovery of the fraud; the existence of the record alone being held insufficient.[83] This limitation of the rule is especially applicable where there is a relation of trust and confidence between the parties, as where the party committing the fraud is the tenant, agent, or trustee of the party defrauded.[84]

N. W. 205 (the recording of a deed); Allen *v.* Wisconsin, 90 Iowa 473, 57 N W. 1121; Francis *v.* Wallace, 77 Iowa 373, 42 N. W. 323 (holding that in an action to set aside a guardian's deed on the ground of fraud the fraud must be deemed to have been discovered when the deed was recorded); Bishop *v.* Knowles, 53 Iowa 268, 5 N. W. 139; Gebhard *v.* Sattler, 40 Iowa 152.

Kansas.— Black *v.* Black, 64 Kan. 689, 704, 68 Pac. 662, in which the court said: "The general, and as we think the correct, rule is that the language employed in the statute, 'until discovery of the fraud,' does not mean until the party complaining had actual knowledge of the fraud alleged to have been committed, but that constructive notice of the fraud is sufficient to set the statute in motion, even though there is no actual notice; that where the means of discovery lie in public records required by law to be kept, involving the very transaction in hand, and the interests of the parties to the litigation, the public records themselves are sufficient notice of the fraud to set the statute in motion."

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

Maryland.— McDowell *v.* Goldsmith, 2 Md. Ch. 370, recording of fraudulent deed.

Mississippi.— State *v.* Furlong, 60 Miss. 839.

New York.— See Talmage *v.* Russell, 74 N. Y. App. Div. 7, 76 N. Y. Suppl. 854.

Texas.— Hudson *v.* Wheeler, 34 Tex. 356, record of fraudulent deed. And see Kauhlman *v.* Baker, 50 Tex. 630 (where plaintiff purchased land relying on his vendor's assurances that the title was good, whereas the defect in the title was apparent on the county records); Smith *v.* Talbot, 18 Tex. 774.

Washington.— Irwin *v.* Holbrook, 32 Wash. 349, 73 Pac. 360.

United States.— Teall *v.* Schroder, 158 U. S. 172, 15 S. Ct. 768, 39 L. ed. 938 (construing the California statute); Norris *v.* Haggin, 136 U. S. 386, 10 S. Ct. 942, 34 L. ed. 424 [*affirming* 28 Fed. 275] (construing the California statute); Teall *v.* Slaven, 40 Fed. 774 (construing the California statute); Simmons *v.* Baynard, 30 Fed. 532. And see Rhino *v.* Emery, 65 Fed. 826 [*reversed* in 72 Fed. 382, 18 C. C. A. 600]; St. Paul, etc., R. Co. *v.* Sage, 49 Fed. 315, 1 C. C. A. 256 [*reversing* 44 Fed. 817 (*affirming* 32 Fed. 821)], construing the Minnesota statute.

See 33 Cent. Dig. tit. "Limitation of Actions," § 492.

But *compare* Berkey *v.* Judd, 22 Minn. 287.

Not notice to grantor.— It has been held, however, that where a tract of land is included in a deed by the active fraud of the grantee and without the knowledge of the grantor who continues in possession of the tract, the record of the deed is not such notice to the grantor as will charge him with knowledge of the fraud and set the statute in motion against him, the principle being that the record of a deed is notice only to those who are bound to search for it, not to the grantor. Davis *v.* Monroe, 187 Pa. St. 212, 41 Atl. 44, 67 Am. St. Rep. 581.

81. Coulson *v.* Galtsman, (Nebr. 1901) 96 N. W. 349.

82. Clark *v.* Van Loon, 108 Iowa 250, 79 N. W. 88, 75 Am. St. Rep. 219 [*citing* Bishop *v.* Knowles, 53 Iowa 268, 5 N. W. 139]; Teall *v.* Schroder, 158 U. S. 172, 15 S. Ct. 768, 39 L. ed. 938, construing the California statute and involving the record of a power of attorney to sell lands and of sales and transfers covered by the power. To the same effect see Teall *v.* Slaven, 40 Fed. 774, construing the California statute.

83. *Kentucky.*— Chinn *v.* Curtis, 71 S. W. 923, 24 Ky. L. Rep. 1563 [*following* Ward *v.* Thomas, 81 Ky. 542; McGehee *v.* Cox, 58 S. W. 532, 22 Ky. L. Rep. 619].

Nebraska.— Jones *v.* Danforth, (1904) 99 N. W. 495 [*disapproving* Gillespie *v.* Cooper, 36 Nebr. 775, 55 N. W. 302]; Forsyth *v.* Easterday, 63 Nebr. 887, 89 N. W. 407.

Pennsylvania.— Mitchell *v.* Buffington, 10 Wkly Notes Cas. 361.

Tennessee.— Herndon *v.* Lewis, (Ch. App. 1896) 36 S. W. 953.

Texas.—See Andrews *v.* Smithwick, 34 Tex. 544.

See 33 Cent. Dig. tit. "Limitation of Actions," § 492.

84. Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58; Jacobs *v.* Snyder, 76 Iowa 522, 41 N. W. 207, 14 Am. St. Rep. 235; Wilder *v.* Secor, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236; Duffitt *v.* Tuhan, 28 Kan. 292;

(III) *IMPUTED OR VICARIOUS NOTICE OF FRAUD.*[85] The general rule that notice to an attorney is notice to his client[86] has been applied to charge the client with notice of the fraud so as to fix a point from which the statute shall run.[87] But service of process in a suit to set aside a fraudulent transaction, upon an attorney who is not authorized to accept service, has been held not to constitute notice to the client.[88] The knowledge of an agent of a fraud committed by himself against his principal cannot be imputed to the latter as a "discovery" which will set the statute in motion in favor of the agent or his guilty associates.[89]

(IV) *NECESSITY FOR KNOWLEDGE OF FACTS TO EXCITE INQUIRY.* In a number of carefully considered cases it is held that the mere fact that the defrauded party has the opportunity or power to investigate and discover the fraud is not sufficient to charge him with notice or knowledge, but that he must be cognizant of such facts as would cause an ordinarily intelligent and prudent man to make an investigation which if pursued would disclose the fraud;[90] and that a mere suspicion of fraud is not sufficient to constitute a "discovery" which will set the statute in motion.[91] Thus even in a jurisdiction where concealment

McMahon *v.* McGraw, 26 Wis. 614. See Donaldson *v.* Jacobitz, 67 Kan. 244, 72 Pac. 846 [*explaining* Duffitt *v.* Tuhan, *supra*; McMahon *v.* McGraw, *supra*]. and see *infra*, VI, B, 21, e, (VII).

As between trustee and cestui que trust.— "The records of public offices are not constructive notice in favor of a fraudulent trustee and against his *cestui que trust*, to protect the fraudulent application of trust property, until such time as the law would presume, from the notorious act, the *cestui que trust* had received actual notice." Andrews *v.* Smithwick, 34 Tex. 544, 550.

85. See also, generally, EQUITY, 16 Cyc. 172; NOTICE.

86. See ATTORNEY AND CLIENT, 4 Cyc. 933.

87. Taft *v.* Wright, 2 Thomps. & C. (N. Y.) 614 [*affirmed* in 59 N. Y. 656]; Deering *v.* Holcomb, 26 Wash. 588, 67 Pac. 240, 561.

88. North American Trust Co. *v.* Lanier, 78 Miss. 418, 28 So. 804, 84 Am. St. Rep. 635, where a notice of a suit by a wife to set aside a foreclosure sale of the land of her husband under a mortgage to which he had forged her signature, was served on an attorney who was employed by the foreclosure purchaser to examine titles but who was not authorized to accept service of process, and neither the purchaser nor the mortgagee had notice of the husband's fraud; and it was held that the service of such notice did not give to the purchaser constructive notice of the husband's fraud so as to cause the statute to commence to run against an action for the possession of the land, as against the wife who was in possession.

89. As where an agent or officer of a municipal corporation is guilty of a fraud against the corporation. Oakland *v.* Carpentier, 13 Cal. 540; O'Brien County *v.* Brown, 18 Fed. Cas. No. 10,399, 1 Dill. 588.

90. *Indiana.*— Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290.

Kentucky.— See Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465.

Nebraska.— Forsyth *v.* Easterday, 63 Nebr. 887, 89 N. W. 407; Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308. And see Jones *v.* Danforth, (1904) 99 N. W. 495.

New Hampshire.— Way *v.* Cutting, 20 N. H. 187.

New York.— Slayback *v.* Raymond, 93 N. Y. App. Div. 326, 87 N. Y. Suppl. 931 [*affirming* 40 Misc. 601, 83 N. Y. Suppl. 15]. And see Higgins *v.* Crouse, 147 N. Y. 411, 415, 42 N. E. 6, per Finch, J.

Wisconsin.— O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 491, 492.

"The test is not whether the defrauded party has the opportunity or power to discover the fraud, but whether he was in possession of such facts as were sufficient to demand an investigation, which, if pursued, would have disclosed the fraud." Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308. Thus under a statute providing that the cause of action "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud," it has been held that the "facts constituting the fraud" mean facts unknown to the defrauded party and concealed or kept secret by the guilty party and that the "discovery," or the information which upon diligent inquiry would lead to the discovery, of the facts constituting the fraud, must be of such facts as would impress a reasonable person with the belief that a fraud has been committed. O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635. To the same effect see Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85, construing the Missouri statute.

91. Marbourg *v.* McCormick, 23 Kan. 38, 43 (in which Brewer, J., said: "'Discovery of the fraud' is the language of the statute. That knowledge implies knowledge, and is not satisfied by mere suspicion of wrong. The suspicion may be such as to call for further investigation, but is not of itself a discovery. A party, even though his suspicions have been aroused, may well be lulled into confidence, and take no action by such representations as were made. And it would be strange if a party who had disarmed

of the fraud is held necessary to postpone the running of the statute,[92] it is held that that doctrine does not apply where the fraud principally consists of secret acts not open to observation, and there is nothing to awaken the suspicion of the defrauded party or excite inquiry by him;[93] as where the fraud consists in selling a forged instrument as genuine and there is nothing to put the purchaser on inquiry until the instrument is declared by the proper officer to be a forgery.[94]

(v) *CONTINUATION OF DECEPTION.* There may be a repetition or continuation of the false representations so that plaintiff is continually deceived and kept in ignorance of the fraud. In such a case there is what may be termed a "continuing fraud," and the statute does not begin to run until the representations cease or their falsity is discovered.[95] It has been so held where defendant by false representations that he was unmarried persuaded plaintiff to contract a void marriage with him, and by repeated false representations induced her to live with him as his wife for many years.[96] In cases of active concealment of the fraud, as where defendant has continued his deception of plaintiff and kept him under a delusion, it has been held that defendant is estopped to set up that plaintiff had the means of ascertaining the truth.[97]

(vi) *FAILURE TO DISCOVER AFTER INQUIRY.* If plaintiff exhausts his sources of information without discovering the fraud, he stands in the same position as if he had never had knowledge of any facts to put him on inquiry, and the statute does not run against him until he actually discovers the fraud.[98]

(vii) *EXISTENCE OF CONFIDENTIAL RELATIONS.*[99] A number of decisions have laid down the rule that failure to employ the necessary means to discover the fraud may be excused when plaintiff was lulled into a sense of security by reason of a relation of trust and confidence between himself and defendant, rendering it the duty of the latter to disclose the truth, and when it also appears that because of this confidence plaintiff was actually deterred from sooner discovering the fraud, or even suspecting that any fraud had been perpetrated upon him. In

suspicions by his representations could thereafter plead those suspicions as ground for immediate inquiry and action. This is not a case where a party is chargeable with notice of existing equities, or the rights of third parties, but involves simply the question of liability between the immediate parties"); O'Dell *v.* Burnham, 61 Wis. 562, 21 N. W. 635.

92. See *supra*, VI, B, 21, e, (I).

93. Matthews *v.* Sontheimer, 39 Miss. 174 [*distinguishing* Buckner *v.* Calcote, 28 Miss. 432]; Edwards *v.* Gibbs, 39 Miss. 166.

94. Ripley *v.* Withee, 27 Tex. 14 [*followed* in Anding *v.* Perkins, 29 Tex. 348], sale of forged land certificate.

95. *California.*— Evans *v.* Duke, (1902) 69 Pac. 688.

Massachusetts.— Dean *v.* Ross, 178 Mass. 397, 60 N. E. 119, where plaintiff was induced to give certain bonds to defendant by the latter's falsely pretending that she was a spiritualistic medium and that the spirit of plaintiff's deceased husband directed plaintiff to transfer the bonds to defendant, these false pretenses being repeated and continued.

Pennsylvania.— *In re* Claghorn, 181 Pa. St. 608, 37 Atl. 921. And see Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887.

Vermont.— Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

United States.— See Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85.

England.— Vane *v.* Vane, L. R. 8 Ch. 383, 43 L. J. Ch. 299, 28 L. T. Rep. N. S. 320, 21 Wkly. Rep. 252 (construing 3 & 4 Wm. IV, c. 27, § 6); Clarke *v.* Hougham, 2 B. & C. 149, 3 D. & R. 325, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73 (per Best, J.).

96. Hodges *v.* Hodges, 27 Tex. Civ. App. 537, 66 S. W. 239; Morrill *v.* Palmer, 68 Vt. 1, 33 Atl. 829, 33 L. R. A. 411.

97. So held in a jurisdiction where a statute applicable alike to actions at law and suits in equity provides that in cases of fraudulent concealment of the cause of action the statute of limitations shall run only from the time of discovery. Dean *v.* Ross, 178 Mass. 397, 60 N. E. 119, delusion created and continued by a person posing as a spiritualistic medium. And see Evans *v.* Duke, (Cal. 1902) 69 Pac. 688.

Wrongful conduct working estoppel to plead statute see *supra*, IV, F, 2.

98. Brown *v.* Brown, 61 Tex. 45.

Inquiry held sufficient.— Where B, on inquiring of his father concerning his alleged deed to B's mother, was answered that such deed had been made, but "was not worth a baubee, and was destroyed," and after the father's death the deed was found, it was held that B had exercised reasonable diligence, and the statute was suspended until discovery of the fraud. Brown *v.* Brown, 61 Tex. 45.

99. See also *supra*, VI, B, 21, d, (II), (B); VI, B, 21, e, (II).

such a case, it is held, plaintiff is under no duty to make inquiry until something occurs to excite his suspicions.[1] So it has been held that where an agent commits a fraud upon his principal his mere silence in failing to disclose the facts amounts to a continuation of the original fraud and a concealment of the cause of action, so that the running of the statute is postponed according to the general equitable or statutory rule.[2] But other decisions require the exercise of diligence notwithstanding the existence of confidential relations.[3]

f. Parties Affected by Equitable or Statutory Rule. While the equitable or statutory rule applies to postpone the running of the statute as to all participants in the fraud,[4] it does not so apply to others than the parties to the fraud or their privies.[5] A relator suing in the name of the state to cancel a patent of lands for fraud committed by the purchaser is not an "aggrieved party," within the meaning of a statute postponing the running of limitations until the discovery by the "aggrieved party" of the facts constituting the fraud.[6] Where the defrauded party in his lifetime received sufficient notice of the fraud to set the statute in motion against him, his heirs cannot claim exemption from the operation of the statute on the ground that the fraud has been recently discovered.[7]

g. Fraud as a Defense. Statutes providing that in an action for relief on the ground of fraud limitation shall run from the time the fraud is discovered apply only as against a party who seeks affirmative relief on the ground of fraud committed by his opponent; they do not apply so as to raise a bar against a party who is seeking merely to defend his rights on the ground that a contract or transaction sought to be enforced by his opponent is fraudulent.[8] Likewise a statute

1. *Colorado.*— Arkins *v.* Arkins, 20 Colo. App. 123, 77 Pac. 256.
Georgia.— Kirkley *v.* Sharp, 98 Ga. 484, 25 S. E. 562. *Compare* Sutton *v.* Dye, 60 Ga. 449.
Illinois.— Vigus *v.* O'Bannon, 118 Ill. 334, 8 N. E. 778 [*reversing* 19 Ill. App. 241].
Iowa.— Jacobs *v.* Snyder, 76 Iowa 522, 41 N. W. 207, 14 Am. St. Rep. 235; Wilder *v.* Secor, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236.
Michigan.— Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651.
Mississippi.— Wilson *v.* Ivy, 32 Miss. 233.
Pennsylvania.— See Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417.
England.—Betjemann *v.* Betjemann, [1895] 2 Ch. 474, 64 L. J. Ch. 641, 73 L. T. Rep. N. S. 2, 12 Reports 455, 44 Wkly. Rep. 182; Rawlins *v.* Wickham, 3 De G. & J. 304, 5 Jur. N. S. 278, 28 L. J. Ch. 188, 7 Wkly. Rep. 145, 60 Eng. Ch. 304, 44 Eng. Reprint 1285.

2. Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

3. See cases cited *infra*, this note.
Relation of attorney and client.—The same confidence that justifies the client when making a trade with his attorney in relying upon the latter's assurances will entitle him to some reasonable time to ascertain such facts as usually come to the knowledge of owners about their own property, and until such a reasonable time has elapsed the statute will not begin to run against the client's cause of action. On the other hand the relationship does not excuse the client's neglect for more than two years to make any inquiries as to the condition of the title to land purchased from the attorney or its location and value, the client having the deed in his possession; and the client's action to rescind the contract for the attorney's fraud is barred where the use of these precautions would have resulted in a discovery of the fraud more than the statutory period before the commencement of the action. Cooper *v.* Lee, 75 Tex. 114, 12 S. W. 483. See also Simpson *v.* Dalziel, 135 Cal. 599, 67 Pac. 1080.

4. Walker *v.* Walker, 25 Ga. 76; Worst *v.* Sgitcovich, (Tex. Civ. App. 1898) 46 S. W. 72 (a purchaser who takes with knowledge of his vendor's fraud in acquiring the property); Bunnel *v.* Stoddard, 4 Fed. Cas. No. 2,135.

5. Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; Thorne *v.* Heard, [1895] A. C. 495, 64 L. J. Ch. 652, 73 L. T. Rep. N. S. 291, 4 Reports 254, 44 Wkly. Rep. 155 [*affirming* [1894] 1 Ch. 599 *affirming* [1893] 3 Ch. 530)], holding that the fraud must be that of the person who invokes the aid of the statute, or if committed by another it must be in some way legally imputable to the former. And see White *v.* Moss, 67 Ga. 89.

6. People *v.* Noyo Lumber Co., 99 Cal. 456, 34 Pac. 96.

7. Clarke *v.* Johnston, 18 Wall. (U. S.) 493, 21 L. ed. 904.

8. Evans *v.* Duke, (Cal. 1902) 69 Pac. 688 (applying the rule of the text to a case where one who had fraudulently induced another to enter into a contract sought affirmatively to enforce its provisions and the defrauded party attacked the validity of the contract on the ground of fraud); Thomas *v.* Rauer, 62 Kan. 568, 64 Pac. 80; Brown *v.* Cloud County Bank, 2 Kan. App. 352, 42 Pac. 593;

providing that actions for relief against frauds must be commenced within a certain time after the cause of action accrues does not apply where the fraud is set up merely by way of defense and not as a ground for affirmative relief.[9] Where a vendor of land misrepresents the area of the land included in the purchase, the rule in equity is that he cannot enforce the payment of the whole purchase-money and leave the purchaser to pursue a personal action at law for the damages, but that the purchaser has the right of withholding so much of the purchase-money as will reimburse him, because to that extent the consideration has failed;[10] and in such a case as long as the contract remains unexecuted the statute does not run against the purchaser's claim, and this irrespective of the time he acquired knowledge of the fraud.[11]

22. Duress and Undue Influence. In suits for relief on the ground of duress or undue influence, such as to set aside deeds, etc., the statute does not begin to run until the duress or undue influence ceases,[12] notwithstanding it does not cease until the death of the party on whom it has been practised.[13] But the continuance of the duress or undue influence must be alleged;[14] and it seems that duress or undue influence must be the ground on which the relief is sought — that it prevented plaintiff from proceeding with a suit brought on another cause of action will not interrupt the running of the statute as to that cause of action.[15]

23. Mistake.[16] The principle which governs the running of the statute of limitations in cases where equitable relief is sought on the ground of mistake is substantially the same as that applicable in cases of fraud.[17] The general rule, often substantially embodied in the local statutes, is that if plaintiff without any fault or neglect on his part is ignorant of the mistake, the statute begins to run

Louisville Banking Co. *v.* Buchanan, 117 Ky. 975, 80 S. W. 193, 25 Ky. L. Rep. 2167.

Affirmative relief asked in answer.— But where an answer sets up fraud and asks affirmative relief based thereon, the equitable or statutory rule applies and limitations run from the discovery of the fraud. Railroad Co. *v.* Smith, 48 Ohio St. 219, 31 N. E. 743.

9. Robinson *v.* Glass, 94 Ind. 211 (holding that a person who is sued on a contract may show that it was procured by fraud, although more than six years elapsed before the action on the contract was instituted and the defense interposed); Wilhite *v.* Hamrick, 92 Ind. 594.

10. See Vendor and Purchaser; and the cases cited *infra*, note 11.

11. Knight *v.* Houghtalling, 85 N. C. 17 (suit to foreclose a purchase-money mortgage); Ransom *v.* Shuler, 43 N. C. 304.

12. *Kansas.*— Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61.

Mississippi.—Allen *v.* Leflore County, 78 Miss. 671, 29 So. 161, duress.

Nebraska.— Aldrich *v.* Steen, (1904) 98 N. W. 445.

North Carolina.— Oldham *v.* Oldham, 58 N. C. 89.

Ohio.— Edwards *v.* Daller, 10 Ohio S. & C. Pl. Dec. 508, 8 Ohio N. P. 62.

Texas.— See Hodges *v.* Hodges, 27 Tex. Civ. App. 537, 66 S. W. 239.

England.— Sharp *v.* Leach, 31 Beav. 491, 8 Jur. N. S. 1026, 7 L. T. Rep. N. S. 146, 10 Wkly. Rep. 878, 54 Eng. Reprint 1229.

Compare Munholland *v.* Takes, 111 La. 931, 35 So. 983; McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404.

Duress and undue influence as fraud.— It has been held that suits to set aside deeds of real estate on the ground of duress and undue influence fall within the statutes providing that in actions for relief on the ground of fraud limitation shall run from the time the fraud is discovered. Moore *v.* Moore, 56 Cal. 89 (where plaintiff, whose husband had been killed a few days before, was induced by certain relatives of his relatives to execute deeds without reading them or knowing their contents and without consideration, it being held that so long as she was ignorant of the contents of the instrument she was ignorant of the facts constituting the fraud); McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404.

13. Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61; Allen *v.* Leflore County, 78 Miss. 671, 29 So. 161; Aldrich *v.* Steen, (Nebr. 1904) 98 N. W. 445; Edwards *v.* Daller, 10 Ohio S. & C. Pl. Dec. 508, 8 Ohio N. P. 62.

14. Beck *v.* Searson, 8 Rich. Eq. (S. C.) 130.

15. Piper *v.* Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785 [*affirming* 65 How. Pr. 228], where plaintiff was induced to discontinue a suit.

16. **For laches in equity** see Equity, 16 Cyc. 170 *et seq.*

Recovery of payments made under mistake see *supra*, VI, B, 14, b, (v).

Payment of taxes under mistake see Taxation.

17. Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657. And see the cases cited *infra*, note 18.

For relief on the ground of fraud see *supra*, VI, B, 21.

when and only when the mistake is discovered,[18] provided that the cause of action is one for relief on the ground of mistake and not one as to which the mistake is merely collateral or incidental.[19] This rule is most frequently applied in suits to correct or reform deeds and other written instruments,[20] but it is equally applicable

18. *Iowa.*— Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784. And see Cole *v.* Charles City Nat. Bank, 114 Iowa 632, 87 N. W. 671.

Kentucky.— The equitable rule stated in the text formerly obtained (Frankfort Bank *v.* Markley, 1 Dana 373); but the statutes now provide that the cause of action shall not be deemed to have accrued until the discovery of the mistake, but that the action cannot be brought ten years after the making of the contract (Abner *v.* Gabbard, 31 S. W. 285, 17 Ky. L. Rep. 410).

Maryland.— McDowell *v.* Goldsmith, 2 Md. Ch. 370.

Massachusetts.— Gould *v.* Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501.

New York.—Chaflin *v.* Gantz, 17 Misc. 425, 39 N. Y. Suppl. 712.

Pennsylvania.— See Olinger *v.* Shultz, 183 Pa. St. 469, 38 Atl. 1024.

Texas.— Oldham *v.* Medearis, 90 Tex. 586, 39 S. W. 919, mistake in locating boundary in making partition.

Virginia.— Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657 [*citing* Massie *v.* Heiskell, 80 Va. 789, 805; Rowe *v.* Bentley, 29 Gratt. 756]; Fore *v.* Foster, 86 Va. 104, 9 S. E. 497.

England.— Brooksbank *v.* Smith, 6 L. J. Exch. 34, 2 Y. & C. Exch. 58.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 475, 476. And the cases cited *infra*, note 19 *et seq.*

Contra, under some statutes. See Oakes *v.* Howell, 27 How. Pr. (N. Y.) 145; Bryant *v.* Swetland, 48 Ohio St. 194, 27 N. E. 100. And see the New York and Ohio cases cited *infra*, note 20.

19. Lonsdale *v.* Carroll County, 105 Iowa 452, 75 N. W. 332; Beecher *v.* Clay County, 52 Iowa 140, 2 N. W. 1037.

20. *California.*— Breen *v.* Donnelly, 74 Cal. 301, 15 Pac. 845.

Illinois.— McIntosh *v.* Saunders, 68 Ill. 128.

Iowa.— Bottorff *v.* Lewis, (1903) 95 N. W. 262; Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784.

Kansas.— Duvall *v.* Simpson, 53 Kan. 291, 36 Pac. 330.

Nebraska.— Carter *v.* Leonard, 65 Nebr. 670, 91 N. W. 574; Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837; Ainsfield *v.* More, 30 Nebr. 385, 46 N. W. 828.

New Jersey.— Stines *v.* Hays, 36 N. J. Eq. 364.

New York.—Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Chaflin *v.* Gantz, 17 Misc. 425, 39 N. Y. Suppl. 712.

North Carolina.— Day *v.* Day, 84 N. C. 408.

Texas.— Harris *v.* Flowers, 21 Tex. Civ. App. 669, 52 S. W. 1046.

See 33 Cent. Dig. tit. "Limitation of Actions," § 476.

Reformation of defective acknowledgment see ACKNOWLEDGMENTS, 1 Cyc. 608 note 38.

Laches in equity see REFORMATION OF INSTRUMENTS.

Reformation as a removal of cloud on title. — The rule that the statute of limitations has no application to a suit to remove a cloud on title to land has been applied to a suit by a purchaser in possession, whose title has not been disputed, to have the description in his deed corrected so as to make it conform to the original intention of the parties. Payne *v.* Ross, 10 Tex. Civ. App. 419, 30 S. W. 670. See also QUIETING TITLE.

Under N. Y. Code, where a suit is brought to reform a deed, contract, or other written instrument on the ground of mistake, the ten-year statute runs from the time the cause of action accrued — the time when the mistake was made or the instrument executed — not from the time when the mistake is discovered. Such a suit does not fall within the statute providing that in cases of fraud the cause of action shall not be deemed to have accrued until the discovery of the fraud. Exkorn *v.* Exkorn, 1 N. Y. App. Div. 124, 37 N. Y. Suppl. 68; Sprague *v.* Cochran, 70 Hun 512, 24 N. Y. Suppl. 369 [*reversed* on other grounds in 144 N. Y. 104, 38 N. E. 1000]; Hoyt *v.* Putnam, 39 Hun 402; Oakes *v.* Howell, 27 How. Pr. 145. *Compare* Mastin *v.* Mastin, 1 N. Y. Suppl. 746. On the other hand where a grantee of land is in possession claiming title by virtue of his deed and is sued in an action of ejectment in which he seeks a reformation of the deed to make his title effective, the statute does not run against him until he knows of the flaw in his deed or of an adverse claim. De Forest *v.* Walters, 153 N. Y. 229, 47 N. E. 294 [*affirming* 78 Hun 611]; Bartlett *v.* Judd, 21 N. Y. 200, 78 Am. Dec. 131; Perrior *v.* Peck, 39 N. Y. App. Div. 390, 57 N. Y. Suppl. 377 [*affirmed* in 167 N. Y. 582, 60 N. E. 1118]; Chaflin *v.* Gantz, 17 Misc. 425, 39 N. Y. Suppl. 712. But it has been held to the contrary where the grantor was in possession and was the party defendant who sought reformation of the deed. Cramer *v.* Benton, 4 Lans. 291, holding that the statute ran from the time the cause of action accrued.

In Ohio an action to reform a written instrument on the ground of mistake falls within Rev. St. § 4985, which limits the time for commencing the action to ten years after the cause of action accrues; and the cause of action accrues upon the execution of the instrument, so that the running of the statute is not postponed until the mistake is discovered. The rule is the same where reformation is asked in an answer to an action

to suits for rescission and cancellation[21] on the ground of mistake. The rule does not, however, dispense with the necessity of diligence on the part of the complainant where the means of discovery are at hand, and in such cases the statute runs from the time when he acquires such knowledge as would put an ordinarily intelligent person on inquiry which if pursued would lead to the discovery of the mistake,[22] or briefly, from the time when by the exercise of reasonable diligence the mistake might have been discovered.[23] But in order for the rule just stated to apply there must be circumstances to excite plaintiff's suspicion or charge him with notice of the mistake;[24] and no duty to make inquiry arises where defendant has so conducted himself to plaintiff's knowledge as to lull him into a sense of security and justify him in believing that no mistake has been made.[25]

C. Performance of Condition, Demand, and Notice — 1. Present Right to Remedy. Until the party can resort to a remedy for the enforcement of his claim or right, the statute of limitations does not begin to run.[26] And where there is no present right to pursue a particular remedy against a party, but such right arises only upon the doing of an act by him which puts him in default, the statute runs only from the default.[27] Where the right depends or the debt is demandable upon a future contingency, it must happen before the statute will commence to run.[28] On the other hand, failure on the part of one to do an act, which failure

brought to enforce the instrument. Bryant *v.* Swetland, 48 Ohio St. 194, 27 N. E. 100. An action by a purchaser of land who is in possession to correct a mistake in the conveyance under which he took possession and claims title falls within Rev. St. § 4974, which provides that the chapter of the statutes prescribing the time in which actions shall be commenced shall not apply "to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it"; and is not barred by limitations. Poag *v.* Shaw, 10 Ohio Cir. Ct. 448, 6 Ohio Cir. Dec. 523. It was previously held that in a case purely equitable and not cognizable in a court of law where it is sought upon a proper state of facts to reform on the ground of mistake an agreement for the conveyance of real estate and to enforce the same, and the correction of the mistake involves no change of possession, no disturbance of investments made by the party against whom the correction is sought, and leaves the enjoyment of the property to go on in harmony with the prior acts of the parties in interest, the lapse of time applied by courts of equity in analogy to the statute of limitations will be reckoned only from the time of the discovery of the mistake. Ormsby *v.* Longworth, 11 Ohio St. 653, in which, however, the court strictly confined its decision as a precedent within the limits of the qualifications stated.

21. Bottorff *v.* Lewis, (Iowa 1903) 95 N. W. 262; Clapp *v.* Greenlee, 100 Iowa 586, 69 N. W. 1049; Gould *v.* Emerson, 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501; Hall *v.* Otterson, 52 N. J. Eq. 522, 28 Atl. 907.

22. Pinkham *v.* Pinkham, 60 Nebr. 600, 83 N. W. 837; Ainsfield *v.* More, 30 Nebr. 385, 46 N. W. 828. See also Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 566, 46 Am. Dec. 528.

23. Dodge *v.* Essex Ins. Co., 12 Gray (Mass.) 65; Steele *v.* Steele, 25 Pa. St. 154; Rowe *v.* Horton, 65 Tex. 89; Lewis *v.* Houston, 11 Tex. 642. And see German Security Bank *v.* Columbia Finance, etc., Co., 85 S. W. 761, 27 Ky. L. Rep. 581.

Ignorance of boundaries.—Since every landowner is presumed to know the boundaries of his land, the fact that plaintiff's lands were situated in the woods, and partly in a river bottom and remote from his residence, is not sufficient to excuse his lack of knowledge of errors in the boundaries, so as to postpone the running of the statute against an action to correct them. Rowe *v.* Horton, 65 Tex. 89.

24. Breen *v.* Donnelly, 74 Cal. 301, 15 Pac. 845 (a case involving the acreage of a very large tract of land); Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465 (where plaintiffs resided at a distant place and there were relations of trust and confidence); Harris *v.* Flowers, 21 Tex. Civ. App. 669, 52 S. W. 1046.

25. Manatt *v.* Starr, 72 Iowa 677, 34 N. W. 784.

26. Fernandez *v.* New Orleans, 46 La. Ann. 1130, 15 So. 378, holding that limitations do not run against a claim against a city payable out of a particular fund until that fund is available.

27. Rice *v.* Pacific R. Co., 55 Mo. 146, holding that where an agent of a corporation died without transmitting to his principal call payments by a stock subscriber, and the corporation declared the stock forfeited as for non-payment, the statute of limitations did not commence to run in favor of the company and against the right of the subscriber to compel the issue of stock certificates by mandamus until the declaration of the forfeiture.

28. Clinton, etc., R. Co. *v.* Eason, 14 La. Ann. 816; Morgan *v.* Brown, 12 La. Ann. 159; Baird *v.* Livingston, 1 Rob. (La.) 182; Le Changeur *v.* Gravier, 2 Mart. N. S. (La.)

itself constitutes a default in the performance of his contract, perfects the cause of action against him and the statute of limitations runs from that time.[29]

2. Preliminary Steps to Render Remedy Available — a. Preliminary Steps Required of Parties in General — (i) *Rule Stated.* Where plaintiff's right of action depends upon some act to be performed by him preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by delaying the performance of the preliminary act; if the time for such performance is not definitely fixed, a reasonable time, but that only, will be allowed therefor.[30] The rule that where the right of action depends upon a preliminary step to be taken by plaintiff he cannot indefinitely delay the taking thereof rests upon the principle that plaintiff has it in his power at all times to do the act which fixes his right of action. The reason of the rule ceases, however, when the right of action is not under his control but depends upon some act to be performed by another, and in this event the cause of action does not accrue and the statute does not begin to run until the performance of the act.[31]

545. See also Jones *v.* Lightfoot, 10 Ala. 17, where it is said that in cases of contingent liability, where it is uncertain whether the relation of debtor and creditor will ever arise between the parties, the happening of the contingency fixes the status of the parties and the statute cannot run until that time.

See 33 Cent. Dig. tit. "Limitation of Actions," § 345. And for contingent claims against estates of decedents see "Executors and Administrators."

Where the claim or right is enforceable upon the death of one of the parties, the statute does not commence to run until that event occurs. Mills *v.* Mills, 43 Kan. 699, 23 Pac. 944; Matter of Neil, 35 Misc. (N. Y.) 254, 71 N. Y. Suppl. 840. So where a testator devised land to a tenant for life, directing that at his death his children should have the proceeds of the sale of the land or the land itself at their option, the children took an equitable right to have the land or the proceeds at the death of the life-tenant, and not a remainder, and although the life-estate was determined during the life of the life-tenant by a judgment in a will contest proceeding to which the children were not parties, the statute of limitations did not run against them until the death of the life-tenant. Holt *v.* Lamb, 17 Ohio St. 374.

Where a condition does not absolutely limit liability but fixes the time of payment at an uncertain date, "or as soon as otherwise convenient," the intention of the parties is that the payment shall be made within a reasonable time, and a payment thereafter of a part will be taken as equivalent to a demand within a reasonable time according to the understanding of the parties, and the statute will run from the date of such payment. Jones *v.* Eisler, 3 Kan. 134. But see Le Changeur *v.* Gravier, 2 Mart. N. S. (La.) 545.

29. Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899; Donovan *v.* Judson, 81 Cal. 334, 22 Pac. 682, 6 L. R. A. 591.

30. *California.*— Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877.

Georgia.— Bryant *v.* Atlantic Coast Line R. Co., 119 Ga. 607, 46 S. E. 829.

Illinois.— Shelburne *v.* Robinson, 8 Ill. 597.

Iowa.— Reizenstein *v.* Marquardt, 75 Iowa 294, 39 N. W. 506, 9 Am. St. Rep. 477, 1 L. R. A. 318; Ball *v.* Keokuk, etc., R. Co., 62 Iowa 751, 16 N. W. 592; Baker *v.* Johnson County, 33 Iowa 151.

Kansas.— Atchison First Nat. Bank *v.* King, 60 Kan. 733, 57 Pac. 952; Harrison *v.* Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893; Kulp *v.* Kulp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. 1051; Rork *v.* Douglas County, 46 Kan. 175, 26 Pac. 391; Atchison, etc., R. Co. *v.* Burlingame Tp., 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578.

Michigan.— Palmer *v.* Palmer, 36 Mich. 487, 494, 24 Am. Rep. 605, where the court said: "It is no stretch of language to hold that a cause of action accrues for the purpose of setting the statute in motion as soon as the creditor by his own act, and in spite of the debtor, can make the demand payable."

Pennsylvania.— Morrison *v.* Mullin, 34 Pa. St. 12; Pittsburgh, etc., Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770; Steele *v.* Steele, 25 Pa. St. 154.

United States.— Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316; Amy *v.* Watertown, 130 U. S. 320, 325, 9 S. Ct. 537, 32 L. ed. 953. But *compare* U. S. *v.* Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. ed. 69.

But *compare* Connolly *v.* Leahy, [1899] 2 Ir. 344.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 346 *et seq.*

31. Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877; Thompson *v.* Orena, 134 Cal. 26, 66 Pac. 24, holding that where plaintiff performed services for deceased under an agreement that he should be paid when she sold certain land, limitations do not run on his claim until such land is sold.

Where until disaffirmance by a party he cannot be sued for money received under the

(II) *Time Limited by Statute of Limitations*—(A) *In General.* What is a reasonable time will depend upon the particular and peculiar circumstances of each case as it arises,[32] although it is held that the period will not be extended in any event, unless there may be some solid ground of excuse or justification,[33] beyond the statutory period of limitation prescribed for bringing the particular kind of action;[34] and if money is payable at a particular time upon condition of the performance of certain acts by the creditor, or when and as such acts are performed, the statute will run from the time when the condition might have been performed.[35]

(B) *Preliminary Step Referring to Remedy.* Where, although the cause of action itself has accrued, some preliminary step is required before a resort can be had to the remedy, the condition referring merely to the remedy and not to the right, the cause will be barred if not brought within the statutory period; therefore the preliminary step must be taken within that period.[36]

(III) *Ascertainment of Facts Fixing Right to Sue*—(A) *In General.* Where the right to sue, to resort to the particular remedy, or to proceed against particular persons depends upon the prior ascertainment of facts,[37] or the estab-

contract which he subsequently avoids, the statute does not run until that time. Cowper *v.* Godmond, 9 Bing. 748, 2 L. J. C. P. 162, 3 Moore & S. 219, 23 E. C. L. 788.

A defendant cannot avail himself of a prescription until he has performed the conditions of the sale under which he entered. Arpine *v.* Harrison, 6 Mart. N. S. (La.) 326.

Official act.— If the act upon which the right to maintain an action depends is an official act to be performed by a public officer in the line of an official duty, there is no presumption that any delay in its performance was unreasonable. Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877. See also Brookline *v.* Norfolk County Com'rs, 114 Mass. 548; U. S. *v.* Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. ed. 69.

Surety on bond.— In Governor, etc. *v.* Gordon, 15 Ala. 72, it is held that where a notary public fails to give to an indorser of negotiable paper the notice necessary to charge him, the statute runs in favor of the sureties on the notary's bond from the date of the default and not from the time of the ascertainment of the damage by the injured party; that the contention that the action does not accrue until the indorser has availed himself of the want of notice, as he might waive it, and in such event no injury would accrue, is not tenable.

Statute runs from performance of condition.— In Mann *v.* Curtis, 6 Rob. (N. Y.) 128, it was held that where a corporation which was indebted to a state on certificates of indebtedness agreed with a third person, who was indebted to it, to receive such certificates in payment of his debt, and the state transferred the certificates to him, and he tendered the same to the corporation in payment of his debt, limitations ran against the right of the state to recover from such third person the amount of the certificates from the time of his tendering them to the corporation.

32. Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877.

33. See *infra*, VI, C, 2, b, (V), (D).

34. *Indiana.*— Kraft *v.* Thomas, 123 Ind. 513, 24 N. E. 346, 18 Am. St. Rep. 345.

Kansas.— Harrison *v.* Masonic Mut. Ben. Soc., 59 Kan. 29, 51 Pac. 893; Atchison, etc., R. Co. *v.* Burlingame, 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578.

Massachusetts.— Codman *v.* Rogers, 10 Pick. 112, which turned upon the question of laches.

Michigan.—See Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605.

New York.— Mills *v.* Hicks, 44 N. Y. Super. Ct. 527; Lyle *v.* Murray, 4 Sandf. 590.

Pennsylvania.— Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770.

Cause of action never accrues.— In State *v.* Norton, 59 Minn. 424, 61 N. W. 458, where the condition was not merely a step in the remedy but was a part of the right itself, it was held that by delaying in the performance of a condition beyond the statutory period of limitations the performance is barred and the cause of action never accrues.

Unreasonable delay may be waived by the acts and conduct of the other party. Moore *v.* Green County, 87 N. C. 209.

35. Barnes *v.* Pickett Hardware Co., 203 Pa. St. 570, 53 Atl. 378, holding that where a purchase-money note was payable in six months, provided certain liens were removed, and if not the note was to be paid when and as such liens were removed, the note was barred in six years after the expiration of the six months.

36. Garrettsville First Nat. Bank *v.* Greene, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754; Hintrager *v.* Hennessy, 46 Iowa 600; Prescott *v.* Gonser, 34 Iowa 175; Baker *v.* Johnson County, 33 Iowa 151; Ripon College *v.* Brown, 66 Minn. 179, 68 N. W. 837; Easton *v.* Sorenson, 53 Minn. 309, 55 N. W. 128; Lasnier *v.* Dozios, 15 Quebec Super. Ct. 604. See also *infra*, VI, C, 2, b, (V).

37. **Sale of stock to fix amount due on subscription.**—The statute of limitations commences to run, in a cause of action against a stock-holder to recover a balance due on

lishment of particular conditions upon which the peculiar liabilities may be enforced, the running of the statute begins from the ascertainment of such facts or the establishment of such conditions.[38]

(B) *Judgment Fixing Rights* — (1) IN GENERAL. And where such facts or conditions as those last above mentioned must be ascertained by a judgment in judicial proceedings, the statute does not run until the right of action has been ascertained by such proceeding and judgment.[39] Thus, limitations begin to run against a cause of action on an appeal-bond from the time of the entry of the

his subscription, from the time of the sale of the stock and not from the last assessment, where the remedy by sale and action for the balance and the remedy by action for the amount of the subscription are cumulative. Cape Fear, etc., Nav. Co. *v.* Costen, 63 N. C. 264; Cape Fear, etc., Nav. Co. *v.* Wilcox, 52 N. C. 481, 78 Am. Dec. 260. But if the remedy by sale is not resorted to an action for the amount due on the subscription must be brought within the statutory period, after calls made for payment of the subscription. Western R. Co. *v.* Avery, 64 N. C. 491.

Proceeds of sale by trustee.— An action on an agreement under which a trustee is to sell the interest of a defaulting party at public auction, and providing for the application of the proceeds to the amount due to plaintiff, and giving him an action against such defaulting party for the balance remaining due after such application, accrues when the trustee has sold the property. Goodell *v.* Sanford, 31 Mont. 163, 77 Pac. 522.

38. Harriman *v.* Wilkins, 20 Me. 93 (holding that the statute commences running against an action against a sheriff for taking insufficient sureties in replevin, from the time when plaintiff has failed to return the property replevied on a demand after judgment therefor); U. S. *v.* Louisiana, 123 U. S. 32, 8 S. Ct. 17, 31 L. ed. 69 (holding that as to an action of a state in the court of claims to recover the proceeds of sales of swamp lands granted to the state, the statute of limitations does not run until the ascertainment of the amount from proofs of the sales before the commissioner of the general land-office).

Remedies against legatee.— The statute does not run in favor of a legatee as against creditors of the estate, until they have exhausted their remedy against the executor. McMullin *v.* Brown, 2 Hill Eq. (S. C.) 457.

Claim of vendee in void deed.— The statute does not begin to run against the claim of a vendee at a sheriff's sale, which is void for irregularity, to be indemnified by the sheriff, until the vendee is evicted. Friedlander *v.* Bell, 17 La. Ann. 42.

39. *California.*— Lawrence *v.* Doolan, 68 Cal. 309, 5 Pac. 454, 9 Pac. 159.

Louisiana.— Hernandez *v.* Montgomery, 2 Mart. N. S. 422.

Michigan.— Grant Tp. *v.* Reno Tp., 107 Mich. 409, 65 N. W. 376, holding that limitations do not commence to run against the liability of a new township carved out of an old one, to pay its portion of bonds issued by the old township, until the liability of the old township has been established by judgment, the bonds being valid only in the hands of *bona fide* purchasers.

Missouri.— Soulard *v.* St. Louis, 40 Mo. 144, holding that where a clause of a charter, as to the payment of damages for land taken by the city, provided that, if the title to the property should be in controversy, nothing should be paid therefor until the right to the money ascertained by the verdict of the jury is determined by the judgment of a court of competent jurisdiction, in a suit between the parties claiming it, the statute does not commence to run against the claimant of the damages until the rendition of the judgment settling the question of title.

Virginia.— Scates *v.* Wilson, 9 Leigh 473.

United States.— Merchants' Nat. Bank *v.* Baltimore First Nat. Bank, 6 Fed. 66, 4 Hughes 9.

See 33 Cent. Dig. tit. "Limitation of Actions," § 346.

Recovery of purchase-money after setting aside of sale.— Where a judgment creditor has the judgment, execution, and sale set aside, the statute of limitations does not run against the execution purchaser's cause of action for the price paid until rendition of the decree setting aside the sale. Elling *v.* Harrington, 17 Mont. 322, 42 Pac. 851. So under a statute providing that on failure of title to land granted by the state the purchase-money shall be repaid on the award of the controller, the statute of limitations does not begin to run against such claim until the decision of the controller setting aside the sale. Matter of Harris, 12 Misc. (N. Y.) 223, 33 N. Y. Suppl. 1102 [*affirmed* in 90 Hun 525, 36 N. Y. Suppl. 29].

Recovery of taxes illegally assessed.— A tax deed need not be adjudged illegal before the cause of action accrues for the recovery of taxes illegally assessed. Callanan *v.* Madison County, 45 Iowa 561.

Liability of reinsurer.— Instead of suing immediately upon the occurrence of the loss, the reinsured may lawfully wait until suit brought and judgment obtained by the insured before seeking indemnity from the reinsurer. Pennsylvania Ins. Co. *v.* Telfair, 27 Misc. (N. Y.) 247, 57 N. Y. Suppl. 780.

Creditors' suits — judgment and execution see CREDITORS' SUITS, 12 Cyc. 9 *et seq.*

Malicious prosecution — termination of proceedings see MALICIOUS PROSECUTION.

judgment on the bond;[40] and where money is deposited in lieu of bail as a condition precedent to bring proceedings for review the right to recover it back arises and the statute of limitations begins to run upon a favorable judgment in the appellate court.[41]

(2) IN PROCEEDINGS AGAINST STOCK-HOLDERS. And so the statutory liability of stock-holders for debts of the corporation is generally dependent upon a prior exhausting of the legal remedies against the corporation itself, and until then the statute does not run in favor of the stock-holder.[42]

b. Demand — (1) *GENERAL RULES.* Where a demand is necessary to make the statute operative, the cause of action does not accrue until such demand has been made.[43] So where a demand is necessary as a prerequisite to a cause of action, the statute runs from the demand,[44] and not until then.[45]

40. Clark *v.* Smith, 66 Cal. 645, 4 Pac. 689, 6 Pac. 732; Crane *v.* Weymouth, 54 Cal. 476; Taylor *v.* Smith, 22 Ind. App. 418, 53 N. E. 1048.

41. Savannah *v.* Kassell, 115 Ga. 310, 41 S. E. 572, in which case, however, it was intimated that if the original judgment had been void the action would have accrued at once.

On certiorari in eminent domain proceedings.— Where the condemnor in eminent domain proceedings excepts to the award and procures a petition in error upon which the award is reversed, the limitations will not run against an action for the excess of the former verdict over the second verdict until the rendition of such second verdict, because the payment of the first verdict was necessary in order to take possession and the action could not have been begun until the difference was ascertained by the proceedings adopted. Cincinnati Southern R. Co. *v.* Banning, 10 Ohio Dec. (Reprint) 385, 21 Cinc. L. Bul. 9.

42. *Louisiana.*—Shropshire's Succession, 12 La. Ann. 527.

Maine.— Cummings *v.* Maxwell, 45 Me. 190.

Mississippi.— Payne *v.* Bullard, 23 Miss. 88, 55 Am. Dec. 74.

New York.— Handy *v.* Draper, 89 N. Y. 334; Christensen *v.* Colby, 43 Hun 362 [*affirmed* in 110 N. Y. 660]; Christensen *v.* Quintard, 36 Hun 334; Mills *v.* Hicks, 44 N. Y. Super. Ct. 527 (holding, however, that, where the execution is not returned within the time required by law, limitations will commence to run after the expiration of a reasonable time from the issuance of the execution); Merritt *v.* Reid, 10 Daly 311.

United States.— Bank of North America *v.* Rindge, 57 Fed. 279; Powell *v.* Oregonian R. Co., 38 Fed. 187, 13 Sawy. 543, 3 L. R. A. 270.

Going corporation.— It is also held that while the right to enforce the statutory liability of stock-holders does not accrue until an execution issued upon a judgment against the corporation has been returned unsatisfied, where the corporation continues to transact its business, if it has become insolvent and made an assignment for the benefit of its creditors the right of the creditors or any of them then accrues to commence suit against the stock-holder on the liability under the statute, without any prior proceeding against the corporation, and the statute of limitations begins to run from that time against the right of action. Younglove *v.* Kelly Island Lime Co., 49 Ohio St. 663, 33 N. E. 234; Bronson *v.* Schneider, 49 Ohio St. 438, 33 N. E. 233; Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798. In Iowa it is held, under the statutory provisions, that stock-holders are not to be exempt from personal liability to the amount of unpaid instalments, etc., that no judgment and execution are necessary to perfect the right of the creditor to sue the stock-holder; that the two facts existing, to wit, unpaid subscriptions and inability to collect the debt from the corporation, a cause of action arises and the statute runs. Tama Water-Power Co. *v.* Hopkins, 79 Iowa 653, 44 N. W. 797; Garretsville First Nat. Bank *v.* Greene, 64 Iowa 445, 17 N. W. 86, 20 N. W. 754. And in Kansas the statute begins to run after the suspension of business by the corporation for a year. Atchison First Nat. Bank *v.* King, 60 Kan. 733, 57 Pac. 952.

Dissolved corporation.— In Garesche *v.* Lewis, 15 Mo. App. 565, it was held that by the terms of the statute a claim of a creditor of a corporation against a stock-holder to recover unpaid subscriptions matures on the dissolution of the corporation, and the statute begins to run at that time.

43. High *v.* Shelby County, 92 Ind. 580; Cole *v.* Wright, 70 Ind. 179; Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807.

44. Rhind *v.* Hyndman, 54 Md. 527, 39 Am. Rep. 402; Miller *v.* Hinds County, 68 Miss. 88, 8 So. 269; Fuller *v.* O'Neal, 82 Tex. 417, 18 S. W. 479, 481.

Conversion.— Where a demand and refusal are evidence of a conversion the statute begins to run against the cause of action from such demand and refusal. Collis *v.* Bowen, 8 Blackf. (Ind.) 262; Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807; Roberts *v.* Berdell, 52 N. Y. 644; Bryant *v.* Peebles, 92 N. C. 176.

45. *Arkansas.*— Parker *v.* Gaines, (1889) 11 S. W. 693.

Georgia.— Stringer *v.* Stringer, 93 Ga. 320, 20 S. E. 242, holding that the statute does not begin to run against a contract to fur-

(II) *Necessity For Demand*—(A) *In General.* Where under the law governing the status of the parties or under the express provisions of the contract between them, a definite liability arises on a day certain, a default at that time creates a cause of action and the statute of limitations begins to run without demand.[46] But where the status of the parties is such that the attitude of one of them cannot be wrongful with reference to the other until the latter's rights are in some way denied or opposed, or where the nature of the contract and the situation of the parties require that it be adjudged that the trust or obligation is a continuing one which is not violated or broken until there is a refusal to honor a demand, then the demand creates the present liability and the statute runs from such demand.[47] So, where one's possession, as against another claiming an interest,

nish support "when called on for help," until a demand for support has been made.

Illinois.— Selleck *v.* Selleck, 107 Ill. 389.

Indiana.— Raymond *v.* Simonson, 4 Blackf. 77.

Iowa.— Owen *v.* Higgins, 113 Iowa 735, 84 N. W. 713; Deming *v.* Haney, 23 Iowa 77.

Massachusetts.— Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696.

New York.— Northrop *v.* Smith, 8 N. Y. St. 161.

North Carolina.— Carroway *v.* Cox, 44 N. C. 173.

Oklahoma.—Guthrie *v.* T. W. Harvey Lumber Co., 9 Okla. 464, 60 Pac. 247.

South Carolina.— Wright *v.* Hamilton, 2 Bailey 51, 21 Am. Dec. 513.

Vermont.— Smith *v.* Franklin, 61 Vt. 385, 17 Atl. 838; Page *v.* Thrall, 11 Vt. 230; Collard *v.* Tuttle, 4 Vt. 491, 24 Am. Dec. 627; Staniford *v.* Tuttle, 4 Vt. 82; Keith *v.* Ware, 2 Vt. 174.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

England.— Thorpe *v.* Coombe, 8 D. & R. 347, 16 E. C. L. 344, R. & M. 388, 21 E. C. L. 776, 29 Rev. Rep. 485; Shutford *v.* Borough, Godb. 437, holding that where the promise is to perform at the promisee's request, the statute will not begin to run until such request.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 353 *et seq.*

For paper payable on demand or at a fixed time after demand see COMMERCIAL PAPER, 7 Cyc. 845 *et seq.*

Conversion.— The liability of a pledgee for the conversion of a pledge remaining in his hands after the payment of the debt for which the property was pledged does not arise until a demand on him, and his refusal to deliver, and the statute does not begin to run until the time of such demand and refusal. Auld *v.* Butcher, 22 Kan. 400; Roberts *v.* Berdell, 61 Barb. (N. Y.) 37 [*affirmed* in 52 N. Y. 644]. See also Buffington *v.* Ulen, 7 Bush (Ky.) 231; Fishwick *v.* Sewell, 4 Harr. & J. (Md.) 393, in which cases it is held that the statute does not run against a cause of action for conversion until demand and refusal. But where there has been a conversion a demand is rendered unnecessary and the statute runs without demand. McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313; Bollman Bros. Co. *v.* Peake, 96 Mo. App. 253, 69 S. W. 1058, where there was a sale of property held as a bailment.

When the statutory period has run after a demand the action is barred. El Dorado Tp. *v.* Gordon, 50 Kan. 307, 32 Pac. 32; Battle *v.* Crawford, 68 Mo. 280; Kelsey *v.* Griswold, 6 Barb. (N. Y.) 436; Mills *v.* Whitmore, 22 Ohio Cir. Ct. 467, 12 Ohio Cir. Dec. 338; Shaw *v.* Upshur County Ct., 30 W. Va. 488, 4 S. E. 439; Pelton *v.* Crawford County Sup'rs, 10 Wis. 69.

46. *California.*— Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899.

Indiana.— Jones *v.* Jones, 91 Ind. 378.

Kentucky.— Kentucky Cent. R. Co. *v.* Pendleton County, 2 S. W. 176, 8 Ky. L. Rep. 517.

New Hampshire.— Hillsborough County *v.* Manchester, 49 N. H. 57.

New York.— Brown *v.* Brown, 83 Hun 160, 31 N. Y. Suppl. 650 [*affirmed* in 146 N. Y. 385, 42 N. E. 543]; Ryder *v.* Bushwick R. Co., 57 Hun 591, 10 N. Y. Suppl. 748 [*affirmed* in 134 N. Y. 83, 31 N. E. 251]; McCotter *v.* Lawrence, 4 Hun 107, 6 Thomps. & C. 392; House *v.* Agate, 3 Redf. Surr. 307.

Vermont.— Beeman *v.* Cook, 48 Vt. 201, 21 Am. Rep. 123.

See 33 Cent. Dig. tit. "Limitation of Actions," § 354.

Obligation continuing during life.— The statute of limitations will not commence to run against an obligation for a life-support merely because of neglect for any length of time to call for such support. Coleman *v.* Whitney, 62 Vt. 123, 20 Atl. 322, 9 L. R. A. 517.

47. *Connecticut.*— Ward's Appeal, 35 Conn. 161, holding that where land was conveyed on condition that the grantee should in case of the grantor's death support the latter's daughter and to reconvey to the grantor in case she should recover her health, the statute of limitations will not begin to run against the grantor's claim for a reconveyance until a request and refusal to reconvey.

Indiana.— Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Daugherty *v.* Wheeler, 125 Ind. 421, 25 N. E. 542.

Louisiana.— Brown *v.* Pike, 34 La. Ann. 576.

Massachusetts.— Hall *v.* Felton, 105 Mass. 516.

Nebraska.— Wilson *v.* Richards, 1 Nebr. 342.

is rightful,[48] or is in contemplation of law the possession of another who is the real owner,[49] or where one, although not yet having performed his part of the executory agreement which he may still perform, or where no fixed time for such performance is designated in the contract, or the other party is under the necessity of tendering performance,[50] the statute will begin to run from the time of demand.[51]

(B) *Application of Money.* If one receives money for the use of another under circumstances which make it his duty to pay it over at once, no demand is necessary and the statute begins to run immediately against the person for whose use the money was received.[52] But on the other hand, it is held that where

North Carolina.— See also Brooks *v.* Walters, 53 N. C. 428.

Ohio.— Iron R. Co. *v.* Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

Tennessee.— Goodwin *v.* Ray, 108 Tenn. 614, 69 S. W. 730, 91 Am. St. Rep. 761.

Vermont.— Keith *v.* Ware, 2 Vt. 174; Hutchinson *v.* Parkhurst, 1 Aik. 258; Poultney *v.* Wells, 1 Aik. 180.

United States.— Birckhead *v.* De Forest, 120 Fed. 645, 57 C. C. A. 107; Wyman *v.* Babcock, 30 Fed. Cas. No. 18,113, 2 Curt. 386 [*affirmed* in 19 How. 289, 15 L. ed. 644].

England.— Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610.

Relation of bank and depositor see *supra*, VI, B, 10.

Certificate of deposit.— See BANKS AND BANKING, 5 Cyc. 521.

Accounting.— The rule of the text is applied where the relation of the parties is such that the liability of one to the other depends upon an accounting. Hill *v.* Haskin, 42 Cal. 159; Rucker *v.* Maddox, 114 Ga. 899, 41 S. E. 68; Patterson *v.* Blanchard, 98 Ga. 518, 25 S. E. 572; Richards *v.* Grinnell, 63 Iowa 44, 18 N. W. 668, 50 Am. Rep. 727; Matthews *v.* Adams, 84 Md. 143, 35 Atl. 60; Holloway *v.* Turner, 61 Md. 217; Shepherd *v.* Shepherd, 108 Mich. 82, 65 N. W. 580; Kimball *v.* Kimball, 16 Mich. 211; Ela *v.* Ela, 70 N. H. 163, 47 Atl. 414; Halden *v.* Crafts, 4 E. D. Smith (N. Y.) 490; Bryant *v.* Peebles, 92 N. C. 176; Paschall *v.* Hall, 58 N. C. 108; Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610; Wilson *v.* Howe, 5 Ont. L. Rep. 323.

48. Martin *v.* Walker, 68 Cal. 317, 9 Pac. 185 (holding that as between the cotenants a statute begins to run from the time of demand by one to be let into possession with the other); Mertens *v.* Kielmann, 79 Mo. 412; Fry *v.* Clow, 50 Hun (N. Y.) 574, 3 N. Y. Suppl. 593 (holding that under the statute requiring that when a demand is necessary the action must be commenced within the statutory period, computing it from the time when the right to make demand is complete, except, among other cases, where personal property is to be returned, but the time for such return is not fixed, in which case the cause of action does not arise until demand made, a cause of action for the conversion of property held under a conditional sale contract in which no time is fixed for a return of the property, will not arise until demand and the statute will run only from that time.

49. Duryea *v.* Andrews, 58 Hun (N. Y.) 607, 12 N. Y. Suppl. 42, which was an action for conversion of property which had been stolen from plaintiff and subsequently found in the defendant's possession.

50. See *infra*, VI, C, 2, c.

51. Cole *v.* Wright, 70 Ind. 179; Rice *v.* Sims, 8 Rich. (S. C.) 416.

Breach of contract to convey.— The statute does not run against a cause of action for the breach of contract to convey "on demand," until there has been a demand for a conveyance. Thomas *v.* Pacific Beach Co., (Cal. 1896) 44 Pac. 475. But where the time for conveyance is fixed in a contract for the conveyance of land, the statute of limitations will run from such fixed time. McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps. & C. 392.

Specific performance of oral agreement to convey.— The statute does not commence to run against a suit for the specific performance of an oral agreement to convey land, where the vendee is put in possession under the contract, until the demand for a deed or the repudiation of the contract. Horner *v.* Clark, 27 Ind. App. 6, 60 N. E. 732.

A demand for title under the conditions of a title bond is necessary in order to start the running of limitations against an action to compel performance. Yeary *v.* Cummins, 28 Tex. 91; Tenzler *v.* Tyrrell, 32 Tex. Civ. App. 443, 75 S. W. 57.

Recovery back of consideration.— Where money is paid upon an agreement that the person receiving it will do certain things in the performance of which he fails, the statute will not commence to run against the claim of the person who paid the money until there is a demand and refusal to perform the contract. Link *v.* Jarvis, (Cal. 1893) 33 Pac. 206. And where money is paid on a parol contract for a conveyance of land, and no time is fixed for the conveyance, the action for the recovery back of the money so paid does not accrue until a demand for a deed or until the death of the other party. Eames *v.* Savage, 14 Mass. 425. See also Deming *v.* Haney, 23 Iowa 77.

52. Mills *v.* Mills, 115 N. Y. 80, 21 N. E. 714 [*affirming* 48 Hun 97]; Compton *v.* Elliott, 48 N. Y. Super. Ct. 211 (in which cases it appears that the rule of the text applies even though an accounting is necessary where such accounting can be had in the action); *In re* Cole, 34 Hun (N. Y.) 320; Brooks *v.* Brooks, 4 Redf. Surr. (N. Y.) 313 (in which cases the rule was applied in favor of a hus-

the transaction is such that the relation of debtor and creditor is not created,[53] or where one pays money to another to be paid to a third or to be applied in a particular manner, the recovery back of the money before such application depends upon a prior demand and the statute does not run until such demand has been made.[54] And a receipt of money for the use of another is without any duty to immediately pay it over, or where its retention is not in violation of the conditions under which it was received, the statute will run only from a demand.[55]

(c) *Claim Against County or Other Municipal Body.* Where a claim against a county or other municipal body must be presented for allowance before suit, it may be stated as a general proposition that the statute of limitations will not run against such claim until it is presented and rejected by such body or the particular board to which it is necessary to present the claim.[56] And where fees of a particular county officer are to be allowed by a particular board the statute

band who had received money of his wife). See also on the last point Muus *v.* Muus, 29 Minn. 115, 12 N. W. 343, where from the time of the receipt of the money by the husband he treated it as his own, and the statute was held to have run from the receipt of the money. But in Chew *v.* Baker, 5 Fed. Cas. No. 2,663, 4 Cranch C. C. 696, it was held that where a subcontractor was to receive his pay at the time of payment to the original contractor, and in like proportion, the subcontractor's cause of action arises when he has notice of the receipt of payments by the contractor, and the statute of limitations does not run against him until that time or until demand.

53. Jones *v.* Woods, 70 N. C. 447; Carroway *v.* Cox, 44 N. C. 173, holding that in a settlement between two persons in which a credit is allowed to one of them of an amount due from the other to a third person, the latter's cause of action against the party in the settlement charged with the sum does not accrue until demand by such third party, because until such demand the new debtor has not been accepted.

54. Sawyer *v.* Tappan, 14 N. H. 352.

55. Rucker *v.* Maddox, 114 Ga. 899, 41 S. E. 68; Bartlett *v.* Wright, 29 Ill. App. 339; Boughton *v.* Flint, 74 N. Y. 476; Wiltsie *v.* Wiltsie, 12 N. Y. St. 144, 6 Dem. Surr. 255, in which cases the rule was applied where a husband had received moneys for the use of his wife. But see Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448, where it was held that the husband was a creditor and the statute began to run in his favor without a demand, the court *distinguishing* Boughton *v.* Flint, 74 N. Y. 476, in that in this case the husband was requested to keep the funds until he should be required to account; and further in that the said case arose prior to the provision of the code of civil procedure which explains and limits the cases where a demand was made necessary.

56. Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607; Shaw *v.* Upshur County Ct., 30 W. Va. 488, 4 S. E. 439.

Money in United States treasury.— It has been held that where one is entitled, upon making application therefor, to a payment of money in the United States treasury, the statute runs from the time of the presentation of the claim to the secretary of the treasury. Harrison *v.* U. S., 20 Ct. Cl. 175; Lawton *v.* U. S., 18 Ct. Cl. 595; Taylor *v.* U. S., 14 Ct. Cl. 339.

Warrant.— The rule stated in the text has been applied under various provisions so as to save the running of the statute of limitations against causes of action on warrants of counties and the like, until they have been presented and rejected. Schloss *v.* Pitkin County, 1 Colo. App. 145, 28 Pac. 18; Carpenter *v.* Union Dist. Tp., 58 Iowa 335, 12 N. W. 280; Leach *v.* Wilson County, 62 Tex. 331; Blaisdell *v.* Westmore School Dist. No. 2, 72 Vt. 63, 47 Atl. 173; Pelton *v.* Crawford County Sup'rs, 10 Wis. 69; King Iron Bridge, etc., Co. *v.* Otoe County, 27 Fed. 800 [*reversed* on other grounds in 120 U. S. 225]. In Walnut Tp. *v.* Jordan, 38 Kan. 562, 16 Pac. 812, it was held that the statutory period prescribed for bringing an action on a written instrument applied to a township warrant and that an action brought within that period was in time. And in King *v.* Frankfort, 2 Kan. App. 530, 43 Pac. 983, it is held that a city warrant issued in payment for a sidewalk built by the city in front of a private lot constitutes an absolute liability for which an action could be maintained at once after the time named for payment and the statute ran from that time.

Money paid on redemption from tax-sale.— Where the cause of action is assumpsit for money paid into the county treasury upon a redemption from a tax-sale, it does not arise on demand only, although a demand may be necessary to inform the county of the person who claims title to the money, and the statute of limitations runs from the time the money is paid into the treasury. Robinson *v.* Cameron County, 1 Walk. (Pa.) 305.

Claim against state on contract.— But a claim against the state may be barred by the lapse of the statutory period of limitations without presenting such claim to the legislature for allowance, the requirement not being a part of the cause of action. Baxter *v.* State, 17 Wis. 588.

of limitations will not run against his claim for such fees until they have been rejected by such board.[57]

(D) *Money in Hands of Public Officer.* So if money is rightfully in the hands of a public officer, which he fails to pay over,[58] or which upon the happening of a contingency may be demanded back by an individual,[59] the statute runs from demand, unless there has been a prior conversion, in which case a demand is not necessary.[60]

(E) *Payment or Performance on Demand.* As a general rule, where money is payable on demand, it is due at once, and limitations run without demand from the date of the contract or of the instrument evidencing the debt.[61] But where the obligation is to pay on demand in something other than money, or is a collateral undertaking to deliver chattels on demand, such demand is a condition precedent and the statute runs from the making thereof.[62]

(F) *Call For Payment of Corporate Stock.* Where stock subscriptions are

Money left with county to be called for.— In an action against a town for a bounty, if it appears that by agreement between plaintiff and the town authorities the former left his money to remain for the use of the town until he returned and called for it, the debt would not be due before a demand and the statute would not begin to run until that time. Smith *v.* Franklin, 61 Vt. 385, 17 Atl. 838.

57. Miller *v.* Hinds County, 68 Miss. 88, 8 So. 269.

58. *Alabama.*— McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313.

Louisiana.—McCloskey's Succession, 32 La. Ann. 146; Soule *v.* Norwood, 30 La. Ann. 486; Fuqua *v.* Young, 14 La. Ann. 216.

Massachusetts.—Weston *v.* Ames, 10 Metc. 244. *A fortiori,* where the money is under attachment on mesne process, in behalf of a creditor of the person entitled, no cause of action accrues until demand.

Missouri.— Kirk *v.* Sportsman, 48 Mo. 383.

South Carolina.— McCauley *v.* Heriot, Riley Eq. 19.

Vermont.— Hutchinson *v.* Parkhurst, 1 Aik. 258.

59. Savannah *v.* Kassell, 115 Ga. 310, 41 S. E. 572.

60. McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313. See also County Bd. of Education *v.* State Bd. of Education, 107 N. C. 366, 12 S. E. 452.

Where a sheriff is ordered to pay over money collected on an attachment, no demand is necessary and the statute runs from the date of such order. King *v.* Nichols, 2 Ohio Dec. (Reprint) 564, 4 West. L. Month. 25.

Where the law requires payments at stated times, the statute runs from the time set for payment. Moore *v.* State, 55 Ind. 360.

61. High *v.* Shelby County, 92 Ind. 580; Sanford *v.* Lancaster, 81 Me. 434, 17 Atl. 402; Ware *v.* Hewey, 57 Me. 391, 99 Am. Dec. 780; Eborn *v.* Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

See COMMERCIAL PAPER, 7 Cyc. 847 *et seq.*

A mortgage payable on demand is payable at once and the statute runs from the date of the instrument. Martin *v.* Stoddard, 127 N. Y. 61, 27 N. E. 285.

Bank-bills.— See *supra,* VI, B, 11, a, (II), (B).

Obligation payable fixed time after demand see COMMERCIAL PAPER, 7 Cyc. 851.

Where no time is designated or fixed for payment the obligation is due and payable on demand and the rule of the text applies. Dorland *v.* Dorland, 66 Cal. 189, 5 Pac. 77.

Payable in work.— So in Douglass *v.* Sargent, 32 Kan. 413, 4 Pac. 861, it is held that a due-bill reciting that the amount is due "in brickwork" at a fixed rate, no time being fixed for payment, is due at once and the statute runs from its date. But under a promise to pay a certain amount "in sawing at my mill" it is held that either party may request performance within a reasonable time, and the statute will run only from the expiration of a reasonable time for performance after such demand. Weymouth *v.* Gill, 83 Me. 437, 22 Atl. 375.

62. High *v.* Shelby County, 92 Ind. 580; Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783; Laforge *v.* Jayne, 9 Pa. St. 410; Lincoln *v.* Purcell, 2 Head (Tenn.) 143, 73 Am. Dec. 196; Stanton *v.* Stanton, 37 Vt. 411.

Promise to pay collateral sum.— The law as to the necessity of a demand to set the statute in motion has been laid down substantially as follows: Where there is a present debt and a promise or covenant to pay on demand, a demand is not a condition precedent to the accrual of the cause of action, and the statute begins to run immediately. But where there is a promise or covenant to pay a collateral sum on demand, the demand is a condition precedent, and the statute runs only from demand (*In re* Brown, [1893] 2 Ch. 300, 304, 62 L. J. Ch. 695, 69 L. T. Rep. N. S. 12, 3 Reports 463, 41 Wkly. Rep. 440 [*following* Hartland *v.* Jukes, 3 F. & F. 149, 1 H. & C. 667, 9 Jur. N. S. 180, 32 L. J. Exch. 162, 7 L. T. Rep. N. S. 792, 11 Wkly. Rep. 519; Birks *v.* Trippet, 1 Saund. 32]); and whether in a given case a demand is a condition precedent within the foregoing rule depends upon

to be paid upon calls, the right to resort to an action for the recovery of the subscription arises when such calls are made, and the statute of limitations commences to run at that time [63] But where the proper officers have failed to make the call and the corporation becomes insolvent and its assets are assigned for the benefit of creditors, a court of chancery may make a call and order the payment of the subscriptions for stock; the statute of limitations will not run until the call is thus made, but is set in motion at once upon the entry of such an order.[64]

a construction of the particular contract involved (*In re* Brown, *supra*, per Chitty, J.).

Return of borrowed property.— Where a borrower of personal property promises to return it on demand, the statute of limitations does not run in his favor until demand. Parker *v.* Gaines, (Ark. 1889) 11 S. W. 693.

Demand in reasonable time.— The rule of the text is subject to the qualification, in some jurisdictions, that the demand must be made in a reasonable time. See *infra*, VI, C, 2, b, (v).

63. *Alabama.*—Curry *v.* Woodward, 53 Ala. 371.

California.— Glenn *v.* Saxton, 68 Cal. 353, 9 Pac. 420; Harmon *v.* Page, 62 Cal. 448.

Georgia.— Macon, etc., R. Co. *v.* Vason, 52 Ga. 326.

Louisiana.— Planters' Consol. Assoc. *v.* Lord, 35 La. Ann. 425; Clinton, etc., R. Co. *v.* Eason, 14 La. Ann. 816.

Maryland.— Taggart *v.* Western Maryland R. Co., 24 Md. 563, 89 Am. Dec. 760; Baltimore, etc., Turnpike Co. *v.* Barnes, 6 Harr. & J. 57.

North Carolina.— Western R. Co. *v.* Avery, 64 N. C. 491.

Ohio.— Kilbreath *v.* Gaylord, 7 Ohio Dec. (Reprint) 487, 3 Cinc. L. Bul. 525, holding that demand notes given for stock of an insurance company are to be construed as payable on call.

Pennsylvania.— Sinkler *v.* Indiana, etc., Turnpike Co., 3 Penr. & W. 149.

Tennessee.—Narr *v.* West Tennessee Bank, 4 Lea 578; Moses *v.* Ocoee Bank, 1 Lea 398.

United States.— See McDonald *v.* Thompson, 184 U. S. 71, 22 S. Ct. 297, 46 L. ed. 437, holding that a demand is sufficiently shown on the part of a receiver of a national bank to enforce a statutory liability of its shareholders, by the allegation of a bill filed by the receiver to enforce the liability, that on a certain date the controller of the currency made an assessment on the shareholders of such bank, and "did thereby make demand upon each and every share of the capital stock of the association" who directed the receiver to take proceedings to enforce by suit liability of the individual shareholders.

Canada.— *In re* Haggert Bros. Mfg. Co., 19 Ont. App. 582.

Indefinite postponement of calls.— But it is also held that as the right of action exists in a corporation whenever it may call for payment, it will not be permitted to avail itself of its failure, for the statutory period, to make such calls. Great Western Tel. Co. *v.* Purdy, 83 Iowa 430, 50 N. W. 45; Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770; Shackamaxon Bank *v.* Disston, 4 Pa. Co. Ct. 201, 20 Wkly. Notes Cas. 297.

64. *Alabama.*— Semple *v.* Glenn, 91 Ala. 245, 6 So. 46, 9 So. 265, 24 Am. St. Rep. 894; Lehman *v.* Glenn, 87 Ala. 618, 6 So. 44; Glenn *v.* Semple, 80 Ala. 159, 60 Am. Rep. 92.

California.— Glenn *v.* Saxton, 68 Cal. 353, 9 Pac. 420.

Georgia.— Glenn *v.* Howard, 81 Ga. 383, 8 S. E. 636, 12 Am. St. Rep. 318.

Maryland.— Glenn *v.* Williams, 60 Md. 93.

Virginia.— Vanderwerken *v.* Glenn, 85 Va. 9, 6 S. E. 806; Lewis *v.* Glenn, 84 Va. 947, 6 S. E. 866.

United States.— Glenn *v.* Marbury, 145 U. S. 499, 12 S. Ct. 914, 36 L. ed. 790; Glenn *v.* Liggett, 135 U. S. 533, 10 S. Ct. 867, 34 L. ed. 262; Hawkins *v.* Glenn, 131 U. S. 319, 9 S. Ct. 739, 33 L. ed. 184; Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968; Glenn *v.* McAllister, 46 Fed. 883; Glenn *v.* Foote, 36 Fed. 824; Glenn *v.* Spring, 26 Fed. 494; Glenn *v.* Soule, 22 Fed. 417. But see Glenn *v.* Dorsheimer, 23 Fed. 695.

Insolvency of corporation and appointment of receiver.— On the other hand, it is held that the statute begins to run, when the corporation becomes insolvent, from the date of its assignment for the benefit of creditors (Franklin Sav. Bank *v.* Bridges, 5 Pa. Cas. 238, 8 Atl. 611); or from the insolvency of the corporation established either by a general assignment or by a judgment and return of *nulla bona* (Jones *v.* Whitworth, 94 Tenn. 602, 30 S. W. 736).

Receiver in dissolution proceedings.— In Webber *v.* Hovey, 108 Mich. 49, 65 N. W. 619, it is held that the statute begins to run when a receiver is appointed in proceedings for voluntary dissolution of the corporation, the decision being based on the construction of the statute in Michigan. The court distinguished, upon the statute, the rule in Scovill *v.* Thayer, 105 U. S. 143, 26 L. ed. 968, in that in the latter case the only duty of the assignee, under the statute involved, was to collect in upon the unpaid stock a sum which, with the other assets of the company, would be sufficient to satisfy its creditors, while the Michigan statute contemplated that when an order of dissolution was made, and a receiver appointed to wind up the corporate affairs, he must immediately call in the unpaid subscriptions.

(III) *WAIVER OF DEMAND.* A refusal to perform or denial of liability dispenses with the necessity of a further demand and sets the statute in motion.[65]

(IV) *SUFFICIENCY OF DEMAND.* No particular form of demand is necessary.[66] If it is not in express terms, the conduct of the parties may be equivalent to a demand,[67] and a mere inquiry, upon which liability is denied, may raise a condition of hostility between the parties, dispensing with any further demand or refusal.[68] Where promisors are subject to a joint and common responsibility, a demand on one is a demand on all.[69] And a demand on a principal may be a sufficient demand on a deputy.[70]

(V) *TIME TO MAKE DEMAND* — (A) *Rules Stated.* From many of the cases which, under the various circumstances presented, require a demand as a condition precedent to bringing an action, and hold that the statute of limitations runs only from such demand, it appears to be held or assumed that the demand can be delayed indefinitely. But this would practically set aside the statute, and so it has been held that when no time is fixed for the making of a demand, it will be presumed to have been made in a reasonable time;[71] that the demand must be made in a reasonable time, and that what is a reasonable time must depend upon the particular circumstances of each case as it arises.[72] Again, it is held that

65. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422; Mifflin County Nat. Bank *v.* Fourth St. Nat. Bank, 8 Pa. Dist. 477, 22 Pa. Co. Ct. 495; Pruitt *v.* Durant, 84 Tex. 8, 19 S. W. 281.

But the closing of a bank, which precludes a demand in the usual way, while dispensing with the necessity of a demand, does not avail the bank to start the running of the statute against its liability to pay its bank-notes. Thurston *v.* Wolfborough Bank, 18 N. H. 391, 45 Am. Dec. 382; Memphis Fire, etc., Bank *v.* White, 2 Sneed (Tenn.) 482, 64 Am. Dec. 772.

And where the debtor holds money under a mistake, his negligence or refusal of payment, in order to amount to a waiver of a former demand, must occur after his attention has been called to the circumstance of the alleged mistake. Goodell *v.* Brandon Nat. Bank, 63 Vt. 303, 27 Atl. 596, 25 Am. St. Rep. 766.

66. Bills *v.* Silver King Min. Co., 106 Cal. 39 Pac. 43.

Calls for subscriptions see *supra,* VI, C, 2, b, (II), (F).

67. Daniel *v.* Whitfield, 44 N. C. 294.

68. Bills *v.* Silver King Min. Co., 106 Cal. 9, 39 Pac. 43; Mifflin County Nat. Bank *v.* Fourth St. Nat. Bank, 199 Pa. St. 459, 49 Atl. 213 But see Davenport *v.* Prince, 56 Fed. 186

69. Rhind *v.* Hyndman, 54 Md. 527, 39 Am. Rep. 402.

70. King *v.* Rice, 12 Cush. (Mass.) 161, holding that where a deputy sheriff who held money under mesne process had ceased to hold office and left the state before demand, the demand on the sheriff was sufficient.

71. Voss *v.* Bachop, 5 Kan. 59; Waterman *v.* Brown, 31 Pa. St. 161; Topham *v.* Braddick, 1 Taunt. 572, 10 Rev. Rep. 610, holding that after a reasonable time the jury might presume a demand and accounting, and that fourteen years would be a sufficient time for such a presumption.

Presumption of demand from a prior payment.— The conclusion of a demand was drawn from a prior payment of interest. *In re* Rutherford, 14 Ch. D. 687, 49 L. J. Ch. 654, 43 L. T. Rep. N. S. 105, 28 Wkly. Rep. 802. So where the time for payment was not definitely fixed and the amount was held to be payable within a reasonable time, a payment on the debt was said to be equivalent to a demand and the statute was held to run from that time. Jones *v.* Eisler, 3 Kan. 134.

The presumption may be overthrown by fraudulent conduct on the part of the person setting up the statute which will estop him from availing himself of the statute. Voss *v.* Bachop, 5 Kan. 59.

72. *Alabama.*— Massie *v.* Byrd, 87 Ala. 672, 6 So. 145; Wright *v.* Payne, 62 Ala. 340, 34 Am. Rep. 24; McDonnell *v.* Montgomery Branch Bank, 20 Ala. 313.

Indiana.— High *v.* Shelby County, 92 Ind. 580.

Massachusetts.— Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070, holding that if the contract requires a demand without language referring to the time when the demand is to be made, it is as if the words "within a reasonable time" were found in it; that what is a reasonable time is a question of law, to be determined with reference to the nature of the contract and the probable intention of the parties as indicated by it.

Michigan.— Smith *v.* Smith, 91 Mich. 7, 51 N. W. 694, where the period was computed from the expiration of a reasonable time for demand.

Pennsylvania.— Mosgrove *v.* Golden, 101 Pa. St. 605.

Texas.— Schraum *v.* Nolte, 1 Tex. App. Civ. Cas. § 1156.

Vermont.— Thrall *v.* Mead, 40 Vt. 540.

Loss under insurance policy.— A cause of action to enforce the payment of a policy of life insurance accrues after the death of

where there is nothing to indicate an expectation that a demand is to be made quickly,[73] the time limited for bringing the action should be treated as the time within which the demand should be made,[74] at the expiration of which the statute will begin to run, the demand being presumed to have been made at that time.[75] In other cases, however, after the expiration of such period without demand the action is barred,[76] the latter being the extreme doctrine, based upon the theory that the cause of action should be taken to accrue for the purpose of setting the

the assured within a reasonable time for preparing and presenting the requisite proof of the death and demanding payment, and not when the demand is actually made. Spratley *v.* Mutual Ben. L. Ins. Co., 11 Bush (Ky.) 443.

Payment in something other than money.— Although there is a distinction between a promise to pay money and a collateral promise to deliver chattels or to perform any other service on demand, yet it is held in some cases involving promises of the latter kinds that the demand must be made in a reasonable time. High *v.* Shelby County, 92 Ind. 580; Shaw *v.* Silloway, 145 Mass. 503, 14 N. E. 783; Laforge *v.* Jayne, 9 Pa. St. 410, 411, where the reason of the rule is stated: "Otherwise such a promise might be kept on foot indefinitely at the will of the promisor; and even the legal presumption of payment in twenty years, with which the law, for the sake of quietude and repose in old transactions, obliterates even bonds, judgments, and mortgages, would not extinguish a parol contract); Stanton *v.* Stanton, 37 Vt. 411.

73. Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

74. *California.*— Meherin *v.* San Francisco Produce Exch., 117 Cal. 215, 48 Pac. 1074; Thomas *v.* Pacific Beach Co., 115 Cal. 136, 46 Pac. 899.

Indiana.— Sheaf *v.* Dodge, 161 Ind. 270, 68 N. E. 292; Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703; Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163; High *v.* Shelby County, 92 Ind. 580; Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807.

Iowa.— Great Western Tel. Co. *v.* Purdy, 83 Iowa 430, 50 N. W. 45.

Kansas.— Atchison, etc., R. Co. *v.* Burlingame Tp., 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578.

Massachusetts.— Campbell *v.* Whoriskey, 170 Mass. 63, 48 N. E. 1070.

New York.— People *v.* Preston, 62 Hun 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866]; Lyle *v.* Murray, 4 Sandf. 595; Stafford *v.* Richardson, 15 Wend. 302.

Ohio.— Keithler *v.* Foster, 22 Ohio St. 27.

Pennsylvania.— Morrison *v.* Mullin, 34 Pa. St. 12.

Texas.— Clements *v.* Lee, 8 Tex. 374.

West Virginia.— Thompson *v.* Whitaker Iron Co., 41 W. Va. 574, 23 S. E. 795.

So in equity, a demand must be made within a reasonable time; otherwise the claim is considered stale, and no relief will be granted in a court of equity. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule. It must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action. Codman *v.* Rogers, 10 Pick. (Mass.) 112. See also Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163; Jefferson School Tp. *v.* Worthington School Town, 5 Ind. App. 586, 32 N. E. 807.

75. Keithler *v.* Foster, 22 Ohio St. 27. See also Massie *v.* Byrd, 87 Ala. 672, 6 So. 145; Stanton *v.* Stanton, 37 Vt. 411.

76. *Indiana.*— Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163; High *v.* Shelby County, 92 Ind. 580.

Iowa.— Ball *v.* Keokuk, etc., R. Co., 62 Iowa 751, 16 N. W. 592.

Kansas.— Travelers' Ins. Co. *v.* Stucki, 4 Kan. App. 424, 46 Pac. 42.

Louisiana.— Ball's Succession, 43 La. Ann. 342, 9 So. 45.

Michigan.— Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605.

Pennsylvania.— Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364; Shackamaxon Bank *v.* Disston, 4 Pa. Co. Ct. 201, 20 Wkly. Notes Cas. 297; Conyngham School Dist. *v.* Columbia County, 6 Leg. Gaz. 26.

Texas.— Mitchell *v.* McLemore, 9 Tex. 151.

Credit in settlement of officer.— Where a town clerk has duly paid a town order, and is entitled to recover credit therefor at his next annual settlement, the statute of limitations, on his claim for failure of the trustees to allow the same, runs from the time of the settlement at which it should have been allowed, although such failure may come from his not presenting the same for order and allowance. Dewey *v.* Lins, 57 Iowa 235, 10 N. W. 660.

Offer to perform and demand.— If by the terms of a contract one of the parties is entitled to offer performance on his part and thereupon require performance on the part of the other party, the statute will run from the date when the offer of performance might have been made. Short *v.* Van Dyke, 50 Minn. 286, 52 N. W. 643, holding further that the necessity of taking an account in order to ascertain how much the vendee must pay for a conveyance under a contract to convey land will not prevent the running of the statute of limitations against an action by the vendee for specific performance, because the account could be taken in such action.

statute in motion as soon as the creditor, by his own act, in spite of the debtor, can make the demand payable.[77]

(B) *Demand as Step Referring Only to Remedy.* Where the demand is a preliminary step referring only to the remedy and not to the right, the action will be barred if the demand is not made within the statutory period. This rule is applied to a cause of action against a county, state, or other municipal or similar body, where the presentment of a claim or a demand and refusal of payment are necessary to make the remedy by action presently available,[78] to the necessity for a demand and refusal to perform an official duty before the institution of mandamus proceedings,[79] and to the necessity of obtaining leave to sue in those cases where such leave must precede the bringing of an action.[80]

(C) *Intention of Parties to Delay Demand.* Notwithstanding the general rules requiring a demand to be made within a reasonable time or within the period of limitations, the parties may make a demand a condition precedent, and if it appears that the money or claim which is the subject of the contract is to be paid on demand in fact, the statute will not begin to run until an actual demand has been made.[81] And where the instrument itself indicates that the calls for pay-

77. Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605; Morrison *v.* Mullin, 34 Pa. St. 12; Pittsburgh, etc., R. Co. *v.* Byers, 32 Pa. St. 22, 72 Am. Dec. 770.

When the right to make the demand is complete the statute begins to run by express statutory provision in some jurisdictions, and if the demand is not made within the period of limitations applicable to the particular action it is barred. Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367; Bogardus *v.* Young, 64 Hun (N. Y.) 398, 19 N. Y. Suppl. 885; People *v.* Preston, 62 Hun (N. Y.) 185, 16 N. Y. Suppl. 488 [*affirmed* in 131 N. Y. 644, 30 N. E. 866]; Dickinson *v.* New York City, 28 Hun (N. Y.) 254, 3 N. Y. Civ. Proc. 93; Dolan *v.* Davidson, 16 Misc. (N. Y.) 316, 39 N. Y. Suppl. 394; Duer *v.* Twelfth St. Reformed Church, 10 N. Y. Suppl. 526; Robinson *v.* Brooklyn, 9 N. Y. St. 716; Van Dyke's Estate, 7 N. Y. St. 710; Goodwin *v.* Ray, 108 Tenn. 614, 69 S. W. 730. But see Oaks *v.* Taylor, 30 N. Y. App. Div. 177, 51 N. Y. Suppl. 775, holding that the statute will not begin to run against the right of one who has bought property under a contract with the vendor to repurchase at any time the vendee should desire him to do so, on the date of the contract, but the vendee will be given a reasonable time in which to exercise his option after he desires the vendor to repurchase the property, upon the ground that the promise to buy back and pay was not absolute. The statutory rule is not without exception, however. In New York there are express exceptions in the statute, and in the instances excepted the statute runs from actual demand. Thus, for example where there is a delivery of personal property, not to be returned at a fixed time or on a fixed contingency, the time within which an action for such property may be brought must be computed from the demand. Fry *v.* Clow, 50 Hun (N. Y.) 574, 3 N. Y. Suppl. 593. So also it is provided "that where a right grows out of the receipt or the detention of money or property by an agent, trustee or attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having a right to make the demand has actual knowledge of the facts upon which that right depends." Robinson *v.* Brooklyn, 9 N. Y. St. 716, 718. And in Tennessee it is held that the statute does not apply where money is left with a gratuitous bailee, and that in such a case limitations do not begin to run until demand made. Goodwin *v.* Ray, 108 Tenn. 614, 69 S. W. 730.

78. *Indiana.*— Nelson *v.* Posey County, 105 Ind. 287, 4 N. E. 703; Newsom *v.* Bartholomew County, 103 Ind. 526, 3 N. E. 163.

Iowa.— Spencer Dist. Tp. *v.* Riverton Dist. Tp., 62 Iowa 30, 17 N. W. 105; Baker *v.* Johnson County, 33 Iowa 151.

Minnesota.— Easton *v.* Sorenson, 53 Minn. 309, 55 N. W. 128.

New York.— Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367.

Texas.— Caldwell County *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

Wisconsin.— Schriber *v.* Richmond, 73 Wis. 5, 40 N. W. 644.

Statute does not run after presentment of claim.—When the claim in such cases is once duly presented then until it is rejected the statute cannot run. Caldwell *v.* Harbert, 68 Tex. 321, 4 S. W. 607.

79. Hintrager *v.* Traut, 69 Iowa 746, 27 N. W. 807; Beecher *v.* Clay, 52 Iowa 140, 2 N. W. 1037; Prescott *v.* Gonser, 34 Iowa 175.

80. Litchfield *v.* McDonald, 35 Minn. 167, 28 N. W. 191, applying the rule under a provision requiring leave to sue on an official bond. But see Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494, both holding otherwise in the case of suits on bonds of executors or administrators, but in the first case cited these cases are confined to the precise subject involved therein.

81. Parks *v.* Satterthwaite, 132 Ind. 411, 32 N. E. 82; Daugherty *v.* Wheeler, 125 Ind. 421, 25 N. E. 542; Horton *v.* Seymour, 82 Minn. 535, 85 N. W. 551; Branch *v.* Dawson,

ment are to be indefinitely prospective, and are to be made as might suit the wants or convenience of the payee,[82] or where a speedier demand would obviously violate the intention of the parties as indicated by the terms of their contract,[83] there is no ground furnished upon which the law can assume any fixed point as the limit to the reasonable time for making demand.

(D) *Delay Excused or Explained.* A delay in making a demand may be explained and excused.[84]

c. Tender and Offer of Performance. Where a party may call for performance of the agreement on the part of another only upon a tender or offer to perform his own agreement, there can be no breach of the contract by the one until such offer or tender by the other and the statute will not begin to run until that time.[85] But where the mutual agreements are not to be concurrently performed, or the performance of one does not depend upon the performance of the other, the statute may run against the cause of action on the breach of the agreement

33 Minn. 399, 23 N. W. 552; Brown *v.* Brown, 28 Minn. 501, 11 N. W. 64 (where the promise was to pay whenever the party making the loan should thereafter demand the same but not before and the statute was held to run only from demand); Sweet *v.* Irish, 36 Barb. (N. Y.) 467. See also Short *v.* Van Dyke, 50 Minn. 286, 52 N. W. 643.

Where money is deposited on interest, although without any provision as to repayment (Patterson *v.* Blanchard, 98 Ga. 518, 25 S. E. 572; Payne *v.* Slate, 39 Barb. (N. Y.) 634), or where the obligation is to repay on demand (Sullivan *v.* Fosdick, 10 Hun (N. Y.) 173), the statute will not run until demand. So where a bond for maintenance binds the obligor to pay and give on demand a certain sum with interest from a future date specified, limitations do not begin to run until demand. Portner *v.* Wilfahrt, 85 Minn. 73, 88 N. W. 418. See also in this connection title COMMERCIAL PAPER, 7 Cyc. 847 *et seq.*

82. Stanton *v.* Stanton, 37 Vt. 411, involving a note in which the purchaser promises to pay the payee "four hundred dollars in produce or wood from the farm on demand as he may want to use the same."

83. Daugherty *v.* Wheeler, 125 Ind. 421, 25 N. E. 542; Jameson *v.* Jameson, 72 Mo. 640, where the obligation to pay was conditioned upon payment made at any time during the life of the payee and if demand was not made within that time the amount was not to be paid at all, and it was held that the lifetime of the payee was the only limit to the period of making the demand.

84. Massie *v.* Byrd, 87 Ala. 672, 6 So. 145.

If induced by the opposite party the delay may be excused. Lydig *v.* Braman, 177 Mass. 212, 58 N. E. 696; Emmons *v.* Hayward, 6 Cush. (Mass.) 501. See also Roberts *v.* Berdell, 52 N. Y. 644.

85. Brennan *v.* Ford, 46 Cal. 7 (as to mutual agreements to convey lands which are to be performed concurrently); Deming *v.* Haney, 23 Iowa 77 (where the statute was held to run against an action for the breach of a contract to convey, from the time of the tender of the balance of the purchase-money and demand for a deed); Hall *v.* Felton, 105 Mass. 516; Iron R. Co. *v.* Fink, 41 Ohio St. 321, 52 Am. Rep. 84.

See 33 Cent. Dig. tit. "Limitation of Actions," § 379.

Redemption from lien.—The statute of limitations runs against the right to redeem from a mortgage which is in form an absolute conveyance, from the tender of the money secured by the mortgage, and from a refusal to reconvey. Wilson *v.* Richards, 1 Nebr. 342.

Pledge.— The statute will not run against a pledgor until tender of the debt and refusal by the pledgee to deliver, at least where the right of the pledgee to recover his debt has not become barred by limitations. Whelan *v.* Kinsley, 26 Ohio St. 131.

Enforcement of lien.— In Cole *v.* Wright, 70 Ind. 179, it was held that the statute did not run against the enforcement of the lien of a conveyance which was absolute in form until demand for payment and tender of a deed.

Pledge.— Where no request is made to redeem a pledge securing a debt payable on demand, the cause of action to foreclose the lien was held not to accrue until the complaint was filed. Bowman *v.* Hoffman, 20 N. Y. Suppl. 415, 22 N. Y. Civ. Proc. 371.

Redemption from execution sale.—Although the statutory period of limitations against an action of unlawful detainer was three years, it was held that quiet possession for three years did not conclusively bar an action against an execution creditor who had a right by statute to redeem from an execution sale but that the period of limitations in such case would be computed from the offer to redeem. Posey *v.* Pressley, 60 Ala. 243.

Sale reserving title.—Where by the terms of a contract by which certain machinery was placed in the hands of defendant, for sale, and title to such machinery remained in plaintiff, the statute of limitations began to run from the time at which defendant asserted a claim to the machinery and a desire to retain it which he could do only upon payment of the contract price. De Kruif *v.* Flieman, 130 Mich. 12, 89 N. W. 558.

on the one side whether the agreement on the other side has been performed or not.[86]

D. Notice, Knowledge, and Ignorance of Cause of Action — 1. Notice — a. In General. Where one has notice of an adverse claim or possession,[87] of an actionable wrong,[88] of the rejection of a claim presented for allowance and payment,[89] or of a fact which by reason of the relation of the parties at once subjects the one to liability to the other, the cause of action accrues when the notice is given and the statute runs from that time.[90] And if one is in possession of property for and in the right of another, the right of action arises and the statute of limitations begins to run from the time of notice of an adverse holding or antagonistic claim.[91] So, under particular statutory provisions creating liability upon notice of the peculiar conditions, the statute of limitations runs from the time of the giving of the prescribed notice.[92] Where a contract expressly provides for notice before

86. Donovan *v.* Judson, 81 Cal. 334, 22 Pac. 682, 6 L. R. A. 591, holding that where one of the parties to a contract agreed to pay money at a particular time and the other agreed to convey land without fixing the time of the conveyance, the statute of limitations would run against the agreement to pay the money from the date when it was due under the contract, without reference to whether the agreement to convey had been performed or not.

87. Fisk *v.* Stewart, 26 Minn. 365, 4 N. W. 611.

88. Flack *v.* Haynie, 18 Tex. 468.

89. Railway Pass., etc., Assoc. *v.* Loomis, 142 Ill. 560, 32 N. E. 424, holding that the statute begins to run in favor of an insurance company from the time of notice by it to a claimant that his claim is rejected, where the company does nothing further to induce delay in bringing suit.

90. McCoon *v.* Galbraith, 29 Pa. St. 293, where an attorney gave notice of a partial collection and it was held that the statute ran against the cause of action on so much of the claim as was collected from the time of such notice.

Notice of inability and refusal to perform. —And where a party to a contract to be performed within a reasonable time becomes unable to perform and gives notice of such inability and thus declines to perform, the statute runs against an action to recover back the consideration as on an implied promise to return it from the date of such notice. Rose *v.* Foord, (Cal. 1891) 28 Pac. 229.

Notice of issue of stock certificate.— The statute of limitations did not begin to run against a transferee of a certificate of stock, for the refusal by the corporation to transfer the stock, until the transfer was refused, or until the transferee had notice that a new certificate had been issued in place of the one transferred to him. Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483.

91. *Alabama.*— Bryan *v.* Weems, 29 Ala. 423, 65 Am. Dec. 407, holding that where the sole property of a wife is allowed by the trustee to remain in the possession of her husband, and the husband at his death disposes of the property by will, the fact that the trustee knew of the making of the will and its general character before it was admitted to probate is equivalent to notice; and the statute commences running against the trustee from and after the probate of the will and possession of the property under it by the husband's executor.

Arkansas.— Coleman *v.* Hill, 44 Ark. 452.

California.— Thompson *v.* Felton, 54 Cal. 547.

Hawaii.— Nakuaimanu *v.* Halstead, 4 Hawaii 42.

Illinois.— Cooper *v.* Cooper, 132 Ill. 80, 23 N. E. 246, holding that where horses belonging to a married woman are kept on her husband's farm in charge of her stepson, the statute will not begin to run against her right to sue her stepson for the horses until she has notice that he claims to own them.

Kentucky.— Turner *v.* Davis, 1 B. Mon. 151.

Wisconsin.— Neilson *v.* Grignon, 85 Wis. 550, 55 N. W. 890.

Compare Hall *v.* Dickey, 32 Miss. 208.

See also Adverse Possession, 1 Cyc. 968. For repudiation of trust see *supra*, VI, B, 20, e, (II).

92. Cutler *v.* Maker, 41 Me. 594; Augusta *v.* Vienna, 21 Me. 298; Camden *v.* Lincolnville, 16 Me. 384; Reading *v.* Malden, 141 Mass. 580, 7 N. E. 21, in which cases it is held that a cause of action in favor of a town for expenses incurred in supporting a pauper arises and limitations begin to run against it, from the time of giving notice to the town legally liable for the expenses incurred and not from the time of furnishing the support. But in the first of the above jurisdictions, while the action cannot be commenced until two months after the notice given, under the statute, if the answer of defendant town is received within the two months the statute starts when the answer is received. Robbinston *v.* Lisbon, 40 Me. 287. And in Massachusetts it has been held that the expenses incurred, although within three months prior to the notice required, cannot be recovered if they arose more than two years before the commencement of the action. Harwich *v.* Hallowell, 14 Mass. 184.

Notice of claim to property levied on.— Reinbeck Bank *v.* Brown, 76 Iowa 696, 39 N. W. 524, where the statute was held to run against a cause of action for a wrongful sale under an execution only from the time of

liability accrues, the statute will not run until such notice is given according to the requirement of the contract.[93]

b. Notice of Facts Dispensing With Demand. Where the creditor has notice of facts dispensing with a demand which might have been otherwise necessary, the statute of limitations will run from the time of such notice.[94]

2. Ignorance and Concealment of Cause of Action — a. Ignorance in General. Omitting at this place any consideration of the effect of a mistake,[95] trust relations in general, or laches,[96] and except where there has been secret fraud or fraudulent concealment on the part of defendant,[97] the rule is uniformly established that mere ignorance of the facts which constitute the cause of action will not postpone the operation of the statute of limitations, but the statute will run from the time the cause of action first accrues notwithstanding such ignorance.[98] The reason of the rule seems to be that in such cases ignorance is the result of want of diligence

notice of claim served after levy of the execution, the cause of action arising out of the sale and not out of the levy of the execution. *Conversely,* it is held in Kendall *v.* Westbrook, 54 Ga. 587, that where notice of the levy of an execution is required, the statute of limitations will run in favor of a claimant's possession of land, as a *bona fide* purchaser, against the judgment lien, until notice of the levy has been given by the sheriff.

Notice to hold officer for surplus held under mesne process.— The cause of action in favor of a judgment debtor for surplus in the hands of an officer who had sold an equity of redemption on execution and held such surplus on a second attachment, which had since failed, did not accrue until the officer had received notice of the dissolution of the second attachment, and the statute of limitations did not begin to run until that time. King *v.* Rice, 12 Cush. (Mass.) 161.

93. Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

Notice of call.— Where a charter (Cherry *v.* Lamar, 58 Ga. 541) or the contract of subscription (Kent County R. Co. *v.* Wilson, 5 Houst. (Del.) 49) makes the subscription payable within a fixed time after notice calling for the payment, the statute will not begin to run until that time.

94. Farmers', etc., Bank *v.* Planters' Bank, 10 Gill & J. (Md.) 422, where the statute ran from notice by the bank to a depositor that his claim would not be paid on demand. And so it is held that from the time of knowledge of depositor of the fact that the bank has suspended specie payments and discontinued business the statute will begin to run. Union Bank *v.* Planters' Bank, 9 Gill & J. (Md.) 439, 31 Am. Dec. 113; Planters' Bank *v.* Farmers', etc., Bank, 8 Gill & J. (Md.) 449.

Notice by a withdrawing partner in a banking firm to a depositor of the withdrawal starts the running of the statute of limitations in favor of such withdrawing partner against the recovery of deposits due the depositor at the time of such withdrawal. Robinson *v.* Floyd, 159 Pa. St. 165, 28 Atl. 258.

Notice of one's disavowal of a trust starts the running of the statute of limitations. Leach *v.* Moore, 57 Ark. 583, 22 S. W. 173; Granville County Bd. of Education *v.* State Bd. of Education, 107 N. C. 366, 12 S. E. 452. But the act of repudiation must be brought to the notice of the *cestui que trust.* Leach *v.* Wilson County, 68 Tex. 353, 4 S. W. 613, applying this principle where a county commissioners' court passed an order that all warrants not registered under a certain act should not be paid, in an action on a warrant issued prior to said order and of which order the plaintiff had no knowledge.

95. See *supra,* VI, B, 20, 23.

96. See Equity, 16 Cyc. 170 *et seq.*

97. **Relief on the ground of fraud** see *supra,* VI, B, 21. For fraudulent concealment of cause of action see *infra,* VI, D, 2.

98. *Alabama.*— Underhill *v.* Mobile Fire Department Ins. Co., 67 Ala. 45; Martin *v.* Decatur Branch Bank, 31 Ala. 115. See also Governor *v.* Gordon, 15 Ala. 72.

Arkansas.— Leach *v.* Moore, 57 Ark. 583, 22 S. W. 173.

Connecticut.— Hartford County Bank *v.* Waterman, 26 Conn. 324.

Georgia.— Davis *v.* Boyett, 120 Ga. 649, 48 S. E. 185, 102 Am. St. Rep. 118, 66 L. R. A. 258.

Illinois.— Parmelee *v.* Price, 105 Ill. App. 271.

Indiana.— Schultz *v.* Cass County, 95 Ind. 323; Ware *v.* State, 74 Ind. 181; State *v.* Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244.

Iowa.— Brunson *v.* Ballow, 70 Iowa 34, 29 N. W. 794; Shreves *v.* Leonard, 56 Iowa 74, 8 N. W. 749; Washington County *v.* Mahaska County, 47 Iowa 57; Brown *v.* Brown, 44 Iowa 349; Boomer Dist. Tp. *v.* French, 40 Iowa 601; Campbell *v.* Long, 20 Iowa 382.

Kentucky.—Covington *v.* Voskatter, 80 Ky. 219; Perry *v.* Elgin, 26 S. W. 4, 15 Ky. L. Rep. 855.

Maine.— Bishop *v.* Little, 3 Me. 405.

Maryland.— Biays *v.* Roberts, 68 Md. 510, 13 Atl. 366; Abell *v.* Harris, 11 Gill & J. 367.

Minnesota.— Everett *v.* O'Leary, 90 Minn. 154, 95 N. W. 901; Mast *v.* Easton, 33 Minn. 161, 22 N. W. 253.

Missouri.— Shelby County *v.* Bragg, 135 Mo. 291, 298, 36 S. W. 600; Wells *v.* Halpin,

and the party cannot thus take advantage of his own fault.[99] It is otherwise where the cause of action does not arise except upon ascertainment or knowledge of a particular fact.[1]

b. Fraudulent Concealment of Cause of Action — (i) *GENERAL STATEMENT OF RULE.* The general statement of the rule as to the effect of a fraudulent concealment of a cause of action, where such rule is applicable, is that when a party against whom a cause of action exists in favor of another, by fraud or concealment prevents such other from obtaining knowledge thereof, the statute of limitations will commence to run only from the time the cause of action is discovered or might have been discovered by the exercise of diligence.[2]

59 Mo. 92; Foley *v.* Jones, 52 Mo. 64; Smith *v.* Newby, 13 Mo. 159; Garrett *v.* Conklin, 52 Mo. App. 654; Hoffman *v.* Parry, 23 Mo. App. 20.

Montana.— Yore *v.* Murphy, 18 Mont. 342, 45 Pac. 217.

Nebraska.— Webster *v.* Bates Mach. Co., 64 Nebr. 306, 89 N. W. 789; Welton *v.* Merrick County, 16 Nebr. 83, 20 N. W. 111.

New York.— Baker *v.* Moore, 4 N. Y. App. Div. 234, 38 N. Y. Suppl. 559; Oakes *v.* Howell, 27 How. Pr. 145; Troup *v.* Smith, 20 Johns. 33; Argall *v.* Bryant, 1 Sandf. Ch. 98. *Compare* Davies *v.* Cram, 4 Sandf. 355.

North Carolina.— Blount *v.* Parker, 78 N. C. 128; Davis *v.* Cotten, 55 N. C. 430.

Ohio.— Townsend *v.* Eichelberger, 51 Ohio St. 213, 38 N. E. 207; State *v.* Standard Oil Co., 49 Ohio St. 137, 30 N. E. 279, 34 Am. St. Rep. 541, 15 L. R. A. 145; Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583; Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212.

Pennsylvania.— Guarantee Trust, etc., Co. *v.* Farmers', etc., Nat. Bank, 202 Pa. St. 94, 51 Atl. 765; Taylor *v.* Hammell, 201 Pa. St. 546, 51 Atl. 316 (as to ignorance of the negligence of an agent in investing his principal's money in a forged security, the agent being guilty of no fraud or concealment); New Holland Turnpike Co. *v.* Farmers' Ins. Co., 144 Pa. St. 541, 22 Atl. 923; Owen *v.* Western Sav. Fund, 97 Pa. St. 47, 39 Am. Rep. 794; Link *v.* McLeod, 8 Pa. Dist. 175, 22 Pa. Co. Ct. 273.

South Carolina.— Sams *v.* Rhett, 2 McMull. 171; Thomas *v.* Ervin, Cheves 22, 34 Am. Dec. 586; Bossard *v.* White, 9 Rich. Eq. 483.

Texas.— Houston Water-Works *v.* Kennedy, 70 Tex. 233, 8 S. W. 36; Meyer Bros. Drug Co. *v.* Fry, (Civ. App. 1898) 48 S. W. 752.

Utah.— Dee *v.* Hyland, 3 Utah 308, 3 Pac. 388.

Virginia.— Foster *v.* Rison, 17 Gratt. 321.

United States.— Sedalia School Dist. *v.* De Wees, 100 Fed. 705; Goodridge *v.* Union Pac. R. Co., 35 Fed. 35; Gaines *v.* Hammond, 6 Fed. 449, 2 McCrary 432 [*affirmed* in 111 U. S. 395, 28 L. ed. 466]; Wilcox *v.* Plummer, 4 Pet. 172, 7 L. ed. 821; Green *v.* U. S., 17 Ct. Cl. 174.

England.— Short *v.* McCarthy, 3 B. & Ald. 626, 22 Rev. Rep. 503, 5 E. C. L. 360; Granger *v.* George, 5 B. & C. 149, 7 D. & R. 729, 29 Rev. Rep. 196, 11 E. C. L. 406; Bree *v.* Holbech, Dougl. (3d ed.) 655.

Canada.— Bogardus *v.* Wellington, 27 Ont. App. 530. But in McDonnell *v.* McIsaac, 23 Nova Scotia 407, it was held that where a particular proceeding was not taken within the time fixed by the statute, because of a misapprehension caused by a certain will being a forgery, limitation is considered as beginning to run from the date of the discovery of the forgery.

See 33 Cent. Dig. tit. "Limitation of Actions," § 473 *et seq.*

The rule is the same at law and in equity. — Lewey *v.* H. C. Fricke Coke Co., 166 Pa. St. 536, 31 Atl. 261, 45 Am. St. Rep. 684, 28 L. R. A. 283.

Ignorance of law is no excuse for delay in bringing suit and will not postpone the running of the statute. Cox *v.* Von Ahlefeldt, 105 La. 543, 34 So. 175; Lisle *v.* U. S., 23 Ct. Cl. 270.

But as to a third person an independent agreement between the creditor and debtor cannot affect the rights of such third person so as to be a basis for prescription, although it was not intended to conceal the agreement. Boagni *v.* Wartelle, 50 La. Ann. 128, 23 So. 206.

99. See Welton *v.* Merrick County, 16 Nebr. 83, 20 N. W. 111; Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484; Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364. See also cases cited in last preceding note.

Concealment and ignorance distinguished. — The mere failure to discover a cause of action is not the same as a concealment of it because the former may accrue without a fault of the person liable while the latter cannot. Ware *v.* State, 74 Ind. 181.

1. Hutchinson *v.* Sheboygan County, 26 Wis. 402, holding that under a statutory provision that "if, after the conveyance of any lands sold for taxes, it shall be discovered that the sale was invalid, the county board of supervisors shall cause the money paid therefor on the sale . . . to be refunded," etc., the statute of limitations does not begin to run against the claim to have the purchase-money refunded until the grantee has clear and positive knowledge of the proof of the invalidity of the sale, and information from a stranger, or in the nature of a mere rumor, will not be sufficient. See also *supra*, VI, C, 2, a, (III).

2. *Iowa.*— Cook *v.* Chicago, etc., R. Co., 81

(II) *IN EQUITY.* In courts of equity it is the settled doctrine that a fraudulent concealment of a cause of action will postpone the operation of the statute of limitations until the discovery of the fraud.[3]

(III) *AT LAW.* But in actions at law, where the question whether a fraudulent concealment of the fact upon the existence of which the cause of action accrues would avoid the statute of limitations has also frequently arisen, there has been considerable conflict of opinion. In the absence of a statutory exception it is held in some jurisdictions that such concealment does not postpone the operation of the statute of limitations.[4] The weight of authority, however, supports

Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Carrier *v.* Chicago, etc., R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799; Wilder *v.* Secor, 72 Iowa 161, 33 N. W. 448, 2 Am. St. Rep. 236; Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93; Findley *v.* Stewart, 46 Iowa 655; Boomer Dist. Tp. *v.* French, 40 Iowa 601.

Massachusetts.—Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81.

Michigan.— Wolkins *v.* Knight, 134 Mich. 347, 96 N. W. 445.

Pennsylvania.— Smith *v.* Blachley, 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887; Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575; Ferris *v.* Henderson, 12 Pa. St. 49, 51 Am. Dec. 580; Glenn *v.* Cuttle, 2 Grant 273; Stewart *v.* McBurney, 1 Pa. Cas. 234, 1 Atl. 639.

Tennessee.— Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427.

Texas.— Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52; Alston *v.* Richardson, 51 Tex. 1; Ward *v.* Marion County, 26 Tex. Civ. App. 361, 62 S. W. 557, 63 S. W. 155.

Utah.— Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

See 33 Cent. Dig. tit. "Limitation of Actions," § 511 *et seq.*

The concealment of a will is held to come within the rule, so that if one fraudulently conceals a will, being interested in its nonproduction, the statutory bar will not begin to run until the discovery of the will if there has been no lack of reasonable diligence. Deake's Appeal, 80 Me. 50, 12 Atl. 790.

3. See *supra*, VI, B, 21. See also the following cases:

Delaware.— Lieberman *v.* Wilmington First Nat Bank, 2 Pennew. 416, 45 Atl. 901, 82 Am. St. Rep. 414, 48 L. R. A. 514.

Massachusetts.— Livermore *v.* Aldrich, 5 Cush. 431.

Michigan.— Allen *v.* Conklin, 112 Mich. 74, 76 N. W. 339; Stebbins *v.* Patterson, 108 Mich. 537, 66 N. W. 484, in which state this rule is statutory also.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

Tennessee.— Moses *v.* Ocoee Bank, 1 Lea 398; Peak *v.* Buck, 3 Baxt. 71; McLain *v.* Ferrell, 1 Swan 48; Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427; Herndon *v.* Lewis, (Ch. App. 1896) 36 S. W. 953.

Vermont.— Payne *v.* Hathaway, 3 Vt. 212.

United States.— Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85.

England.— Blair *v.* Bromley, 5 Hare 542, 11 Jur. 115, 16 L. J. Ch. 105, 26 Eng. Ch. 542, 67 Eng. Reprint 1026 [*affirmed* in 11 Jur. 617, 16 L. J. Ch. 495, 2 Phil. 354, 22 Eng. Ch. 354, 41 Eng. Reprint 979].

Compare Arrington *v.* McLemore, 33 Ark. 759.

The reason is that the statute ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time. Moses *v.* St. Paul, 67 Ala. 168 [*citing* Hovenden *v.* Annesley, 2 Sch. & Lef. 630, 9 Rev. Rep. 119].

4. *Kansas.*—Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051 [*distinguishing* McMullen *v.* Winfield Bldg., etc., Assoc., 64 Kan. 298, 67 Pac. 892, 91 Am. St. Rep. 236, 56 L. R. A. 924, in that there was a violation of a trust relation in the latter case], holding that Civ. Code, § 18, postponing the running of the statute until discovery of the fraud, does not apply to an action to recover damages for a breach of contract, but applies only to "actions for relief on the ground of fraud."

Maryland.— Franklin *v.* Waters, 8 Gill 322.

Mississippi.— Cook *v.* Rives, 13 Sm. & M. 328, 53 Am. Dec. 88.

New Jersey.— Somerset County *v.* Veghte, 44 N. J. L. 509.

New York.— Allen *v.* Mille, 17 Wend. 202; Leonard *v.* Pitney, 5 Wend. 30; Troup *v.* Smith, 20 Johns. 33. See also Engle *v.* Fischer, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818.

North Carolina.— Blount *v.* Parker, 78 N. C. 128; Hamilton *v.* Shepperd, 7 N. C. 115, holding that fraud not discovered does not prevent the running of the statute, but as was pointed out in another case (Mason *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582) the element of concealment was wanting.

Ohio.— Howk *v.* Minnick, 19 Ohio St. 462, 2 Am. Rep. 413 [*following* Fee *v.* Fee, 10 Ohio 469, 36 Am. Dec. 103]. But see Kilbreath *v.* Fosdick, 6 Ohio Dec. (Reprint) 629, 7 Am. L. Rec. 153.

Tennessee.— Million *v.* Medaris, 6 Baxt. 132; Peak *v.* Buck, 3 Baxt. 71; Cocke *v.* McGinnis, Mart. & Y. 361, 17 Am. Dec. 809.

Virginia.— Callis *v.* Waddy, 2 Munf. 511. *Compare* Rice *v.* White, 4 Leigh 474.

England.— Brown *v.* Howard, 2 B. & B. 74, 4 Moore C. P. 508, 6 E. C. L. 43; Imperial Gas Light, etc., Co. *v.* London Gas Light Co., 2 C. L. R. 1230, 10 Exch. 39, 18

the contrary view and follows the rule which obtains in equity, under which such a concealment is a good reply to a plea of the statute of limitations.[5]

(IV) *By Statute.* In many jurisdictions the exception is incorporated in the statute itself, whereby in various although similar terms the operation of the statute is postponed, where the cause of action is fraudulently concealed by defendant, until the discovery of the cause of action, or for a time fixed after such discovery.[6]

Jur. 497, 23 L. J. Exch. 303, 2 Wkly. Rep. 527. But see Bree *v.* Holbech, Dougl. (3d ed.) 655, where the court in a *dictum* indicates that there may be cases of fraudulent concealment to preclude the operation of the statute.

5. *Alabama.*— Tillison *v.* Ewing, 87 Ala. 350, 6 So. 276. In this state the statutory exception was as to causes of action based on fraud, and this provision applies to actions at law based on fraud whereby the cause of action is concealed. Porter *v.* Smith, 65 Ala. 169.

California.— Kane *v.* Cook, 8 Cal. 449.

District of Columbia.— Lewis *v.* Denison, 2 App. Cas. 387; Moses *v.* Taylor, 6 Mackey 255.

Illinois.— Campbell *v.* Vining, 23 Ill. 525; Grant *v.* Odiorne, 43 Ill. App. 402.

Iowa.— Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Carrier *v.* Chicago, etc., R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799; Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93; Boomer Dist. Tp. *v.* French, 40 Iowa 601. But see Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62, where a different view was taken of the law in Iowa under the statute in that state the court refusing to follow the cases above cited.

Massachusetts.—First Massachusetts Turnpike Corp. *v.* Field, 3 Mass. 201, 3 Am. Dec. 124.

Missouri.— Shelby County *v.* Bragg, 135 Mo. 291, 36 S. W. 600 (where it was said to be doubtful whether the provisions of the statutes in that state excepting cases where defendant by "improper act" prevents the bringing of a suit does not refer entirely to acts by which service of process or some other step necessary to a commencement of a suit and obtaining jurisdiction of the person is prevented, the court, however, holding that fraudulent concealment prevented the running of the statute of limitations independently of the provision mentioned and considered in Kirk *v.* Sportsman, 48 Mo. 383, and State *v.* Minor, 44 Mo. 373, as authority for the position, inasmuch as the decision in those cases was not based upon any statutory exception, the ruling in those cases being that the cause of action against an officer for money collected on process would not be within the operation of the statute of limitations until the return of the process, which point was also decided in Schaeffer *v.* Bernero, 11 Mo. App. 562); State *v.* Hawkins, 103 Mo. App. 251, 77 S. W. 98 (where the rule excepting cases of fraudulent concealment was applied, although the statute of limitations was a special statute containing no exceptions and the general statute of limitations excepted cases of improper conduct preventing the bringing of an action); Hickam *v.* Hickam, 46 Mo. App. 496.

New Hampshire.— Quimby *v.* Blackey, 63 N. H. 77; Way *v.* Cutting, 20 N. H. 187; Bowman *v.* Sanborn, 18 N. H. 205.

Pennsylvania.— Hughes *v.* Waynesburg First Nat. Bank, 110 Pa. St. 428, 1 Atl. 417; Morgan *v.* Tener, 83 Pa. St. 305; Campbell *v.* Boggs, 48 Pa. St. 524, 2 Grant 273; McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503; Harrisburg Bank *v.* Forster, 8 Watts 12.

Rhode Island.— Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639.

South Carolina.— Harrell *v.* Kelly, 2 McCord 426. *Contra,* Clarke *v.* Reeder, 1 Speers 398 [*distinguishing* Harrell *v.* Kelly, *supra*], in that the conclusion in that case might be rested on the fact that no cause of action arose until a demand. An examination of the latter case, however, will not justify the distinction, and the reference to it in the subsequent decision in Miles *v.* Berry, 1 Hill 296, also shows that the rule stated in the text was recognized and applied and that it was not applied in Miles *v.* Berry, *supra,* because that was not a proper case for its application.

Texas.— Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52, 88 Tex. 111, 30 S. W. 543; Anding *v.* Perkins, 29 Tex. 348; Ripley *v.* Withee, 27 Tex. 14; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

Utah.— See also Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

United States.— Sherwood *v.* Sutton, 21 Fed. Cas. No. 12,782, 5 Mason 143, applying the law of New Hampshire.

England.— Granger *v.* George, 5 B. & C. 149, 7 D. & R. 729, 29 Rev. Rep. 196, 11 E. C. L. 406; Clarke *v.* Hougham, 2 B. & C. 149, 3 D. & R. 322, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73; Bree *v.* Holbech, Dougl. (3d ed.) 655. And see Bailey *v.* Glover, 21 Wall. 342, 22 L. ed. 636.

6. See the statutes in the various states. And see also the following cases:

Alabama.— Tillison *v.* Ewing, 87 Ala. 350, 6 So. 276. But the statute (Code, § 2813) limits the time for bringing suit to one year after the discovery of the facts constituting the fraud. Porter *v.* Smith, 65 Ala. 169.

Connecticut.—Eising *v.* Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75.

Georgia.— Printup *v.* Alexander, 69 Ga. 553; Hoyle *v.* Jones, 35 Ga. 40, 89 Am. Dec. 273.

(v) *Limitation on Rule — Diligence.* For the purposes of the statute of limitations, if the means of knowledge exist and the circumstances are such as to put a man of ordinary prudence on inquiry, it will be held that there was knowledge of what could have been readily ascertained by such inquiry, and the limitation on the general rule is that plaintiff cannot set up successfully a fraudulent concealment of his cause of action if his failure to discover it is attributable to his own negligence.[7] But on the other hand there is no want of diligence where the

Illinois.— Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79.

Indiana.— Brake *v.* Payne, 137 Ind. 479, 37 N. E. 140; Earnhart *v.* Robertson, 10 Ind. 8. And see Pate *v.* Tait, 72 Ind. 450.

Maine.— Kelley *v.* Nealley, 76 Me. 71; McKown *v.* Whitmore, 31 Me. 448.

Maryland.— Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517.

Massachusetts.— Dean *v.* Ross, 178 Mass. 397, 60 N. E. 119; Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864; Nudd *v.* Hamblin, 8 Allen 130.

Michigan.— Purdon *v.* Seligman, 78 Mich. 132, 43 N. W. 1045; Stevenson *v.* Robinson, 39 Mich. 160.

Mississippi.— Hudson *v.* Kimbrough, 74 Miss. 341, 20 So. 885; Clarke *v.* Goodrum, 61 Miss. 731; State *v.* Furlong, 60 Miss. 839.

Virginia.— See Ragland *v.* Owen, 84 Va. 227, 5 S. E. 91, where the evidence was held not to constitute a fraudulent concealment. In this state the statutory provision is like that in West Virginia.

West Virginia.— Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364; Vanbibber *v.* Beirne, 6 W. Va. 168, in which cases the statutory provision appears to be that where a party shall by any "indirect ways or means obstruct the prosecution," of a right, the time of such obstruction shall not be computed.

Under the Judicature Acts in England, the equitable rule applies to actions to recover by way of damages money lost by a plaintiff in relying on defendant's false representations (Gibbs *v.* Guild, 9 Q. B. D. 59, 51 L. J. Q. B. 313, 46 L. T. Rep. N. S. 248, 30 Wkly. Rep. 591 [*affirming* 8 Q. B. D. 296]); and to an action by a principal against his agent for moneys remitted to the latter for a particular purpose and retained by him where the agent is guilty of fraudulent concealment in his accounts. North American Land, etc., Co. *v.* Watkins, [1904] 2 Ch. 233, 73 L. J. Ch. 626, 91 L. T. Rep. N. S. 425, 20 T. L. R. 642 [*affirming* [1904] 1 Ch. 242, 73 L. J. Ch. 117]. See also *In re* Astley, etc., Coal, etc., Co., 68 L. J. Q. B. 252, 80 L. T. Rep. N. S. 116.

7. *California.*—Moore *v.* Boyd, 74 Cal. 167, 15 Pac. 670.

Georgia.— Lane *v.* Lane, 87 Ga. 268, 13 S. E. 335; Sutton *v.* Dye, 60 Ga. 449. See also Conyers *v.* Kenan, 4 Ga. 308, 48 Am. Dec. 226.

Idaho.— Ryan *v.* Woodin, 9 Ida. 525, 75 Pac. 261.

Illinois.— Conner *v.* Goodman, 104 Ill. 365; Means *v.* Jenkins, 18 Ill. App. 41.

Indiana.— Jackson *v.* Buchanan, 59 Ind. 390; Dearborn County *v.* Kyle, 9 Ind. App. 694, 37 N. E. 279; Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772.

Iowa.— Humphreys *v.* Mattoon, 43 Iowa 556.

Kansas.— Lewis *v.* Duncan, 66 Kan. 306, 71 Pac. 577.

Louisiana.— Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175.

Maine.— Deake's Appeal, 80 Me. 50, 12 Atl. 790; Rouse *v.* Southard, 39 Me. 404; McKown *v.* Whitmore, 31 Me. 448; Cole *v.* McGlathry, 9 Me. 131.

Massachusetts.— Nudd *v.* Hamblin, 8 Allen 130; Farnam *v.* Brooks, 9 Pick. 212.

Michigan.— Wolkins *v.* Knight, 134 Mich. 347, 96 N. W. 445; Purdon *v.* Seligman, 78 Mich. 132, 43 N. W. 1045; Mecosta County *v.* Vincent, 65 Mich. 503, 33 N. W. 44.

Mississippi.— Young *v.* Cook, 30 Miss. 320.

Missouri.— Shelby County *v.* Bragg, 135 Mo. 291, 36 S. W. 600; Mathias *v.* O'Neill, 94 Mo. 520, 6 S. W. 253; Hoffman *v.* Parry, 23 Mo. App. 20.

Nebraska.— Welton *v.* Merrick County, 16 Nebr. 83, 20 N. W. 111.

New Hampshire.— In Way *v.* Cutting, 20 N. H. 187, it is held that the means of knowledge must be the same possessed by the other party and place them on the same footing.

Pennsylvania.— Rhines *v.* Evans, 66 Pa. St. 192, 5 Am. Rep. 364.

Tennessee.— Woodfolk *v.* Marley, 98 Tenn. 467, 40 S. W. 479.

Texas.— Cobb *v.* Decatur First Nat. Bank, 91 Tex. 226, 42 S. W. 770; Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 608, 26 S. W. 599, 25 L. R. A. 52; Calhoun *v.* Burton, 64 Tex. 510; Ney *v.* Rothe, 61 Tex. 374; Brown *v.* Brown, 61 Tex. 56; Connoly *v.* Hammond, 58 Tex. 11; Alston *v.* Richardson, 51 Tex. 1; Ransome *v.* Bearden, 50 Tex. 119 (under statute as to relief against fraud); Anding *v.* Perkins, 29 Tex. 348; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582; Gerfers *v.* Mecke, 28 Tex. Civ. App. 269, 67 S. W. 144; Beissner *v.* Texas Express Co., 1 Tex. Civ. App. Cas. § 806.

Utah.— Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

United States.— Sedalia School Dist. *v.* De Weese, 100 Fed. 705; Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62; Martin *v.* Smith, 16 Fed. Cas. No. 9,164, 1 Dill. 85.

Laches.— See Equity, 16 Cyc. 170 *et seq.*

position of the parties with respect to each other in the particular case justifies one in relying upon the other.[8]

(VI) *APPLICATION OF RULE — WHAT CONSTITUTES FRAUDULENT CONCEALMENT* — (A) *Rule Inapplicable to Known Cause of Action* — (1) IN GENERAL. The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action.[9] If there is a known cause of action there can be no fraudulent concealment which will interfere with the operation of the statute.[10]

(2) IGNORANCE OF DETAILS OR EVIDENCE — (a) IN GENERAL. It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.[11]

(b) DENIAL OF FACT AND FALSEHOOD. The mere denial of a fact or a falsehood is not of itself a fraudulent concealment of a cause of action which will operate to postpone the running of the statute of limitations, the fact being capable of proof irrespective of any admission by the party,[12] although there may be no other evi-

At law and in equity the same rule is applied. Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567, 25 L. ed. 815; Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807 (which cases, the first at law and the second in equity, involved the statute in Indiana providing that "if any person liable to an action shall conceal the fact from the person entitled thereto, the action may be commenced at any time within the period of limitation after the discovery of the cause of action"); New Albany *v.* Burke, 11 Wall. (U. S.) 96, 20 L. ed. 155.

Matters of record must be taken notice of by plaintiff. Walker *v.* Soule, 138 Mass. 570; Robert *v.* Morrin, 27 Mich. 306; State *v.* Furlong, 60 Miss. 839; Fleming *v.* Grafton, 54 Miss. 79; Young *v.* Cook, 20 Miss. 320; Simmons *v.* Baynard, 20 Fed. 532. See also Dunn *v.* Beaman, 126 N. C. 766, 36 S. E. 172.

8. Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93; Atlantic Nat. Bank *v.* Harris, 118 Mass. 147. See also Clarke *v.* Goodrum, 61 Miss. 731.

9. Humphreys *v.* Mattoon, 43 Iowa 556; Douglas *v.* Elkins, 28 N. H. 26; Stewart *v.* McBurney, 1 Pa. Cas. 234, 1 Atl. 639.

Concealment of property from which a judgment might be satisfied will not suspend the operation of the statute. Humphreys *v.* Mattoon, 43 Iowa 556.

Concealment of property involved or liable see *infra*, VI, E.

Undisclosed principal.— When a cause of action against the agent of an undisclosed principal is barred by the statute of limitations, no action can be brought against the principal when discovered, there being no fraud, and concealment of the agency is not such fraud. Ware *v.* Galveston City Co., 111 U. S. 170, 4 S. Ct. 337, 28 L. ed. 393.

10. *Georgia.*— Callaway *v.* West, 56 Ga. 684.

Indiana.— Kennedy *v.* Warnica, 136 Ind. 161, 36 N. E. 22.

Maine.— Penobscot R. Co. *v.* Mayo, 65 Me. 566.

Maryland.— See Cummings *v.* Bannon, (1887) 8 Atl. 357.

Massachusetts.— Graham *v.* Stanton, 177 Mass. 321, 58 N. E. 1023.

New York.— Myers *v.* Cronk, 10 N. Y. St. 125, holding that the wrongful procuring of possession of a note by the maker will not postpone the running of the statute against a suit on it.

Texas.— Gerfers *v.* Mecke, 28 Tex. Civ. App. 269, 67 S. W. 144.

11. *Arkansas.*— Leach *v.* Moore, 57 Ark. 583, 22 S. W. 173.

Massachusetts.— Rice *v.* Burt, 4 Cush. 208, holding that the concealment of property by an insolvent debtor from his assignee, and of fraudulent acts which if known would enable the creditor to avoid the debtor's discharge, does not constitute a fraudulent concealment of the creditor's cause of action as contemplated by the statute.

New Hampshire.— Coolidge *v.* Alcock, 30 N. H. 329.

New York.— Reid *v.* Albany County, 128 N. Y. 364, 28 N. E. 367.

United States.— Amy *v.* Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 L. ed. 946.

12. Mereness *v.* Charles City First Nat. Bank, 112 Iowa 11, 83 N. W. 711, 84 Am. St. Rep. 318, 5 L. R. A. 410; Rouse *v.* Southard, 39 Me. 404 (where, however, the rule requiring diligence was applied); Cole *v.* McGlathry, 9 Me. 131.

After demand.— Where one having deposited money with another demands payment, his cause of action accrues and the false and fraudulent representation that the money had been stolen did not prevent suit and consequently, made after the refusal of the demand, will not prevent the running of the statute. Battle *v.* Crawford, 68 Mo. 280. To the same principle, Ragland *v.* Owen, 84 Va. 227, 5 S. E. 91.

dence at hand than the knowledge of plaintiff himself.[13] It is otherwise, however, where there is no other means of discovering the particular cause of action.[14]

(B) *Effect of Mere Silence — Necessity of Active Artifice* — (1) IN GENERAL. Unless there is some relation of trust and confidence between the parties which would impose upon defendant the duty of making a full disclosure of the facts,[15] or, as sometimes stated, some act or negligence so gross as to be equivalent to intentional fraud,[16] where a fraudulent concealment of a cause of action is relied on to suspend the operation of the statute of limitations, some actual artifice to prevent knowledge of the fact, some affirmative act of concealment, or some misrepresentation to exclude suspicion and prevent inquiry must be shown. Mere failure to disclose is not sufficient.[17]

13. Sanborn *v.* Gale, 162 Mass. 412, 38 N. E. 710, 26 L. R. A. 864, holding that an agreement between a wife and a person guilty of adultery with her to deny the adultery, which is known to the husband, is not a fraudulent concealment of the husband's cause of action, although the husband has no means of establishing his case other than his own testimony. See also Jackson *v.* Buchanan, 59 Ind. 390, holding that the fact that defendant in an action for criminal conversation concealed the same by persuading plaintiff's wife to deny the commission of the wrong is not sufficient to avoid the statute of limitations. And see *infra*, VI, D, 2, b, (v).

14. Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81, holding that where a bank overpaid someone by mistake, not knowing to whom such payment was made, and the person who received it denied the fact upon inquiry, such denial was a fraudulent concealment of the cause of action.

15. For actions founded on fraud see *supra*, VI, B, 21.

The relation of debtor and creditor is not one of trust or confidence so as to make it the duty of the debtor to disclose to the creditor the fact or amount of the indebtedness. Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575.

16. Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79.

17. *Illinois.*— Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79; Conner *v.* Goodman, 104 Ill. 365; Gunton *v.* Hughes, 79 Ill. App. 661 [*affirmed* in 181 Ill. 132, 54 N. E. 895]; Means *v.* Jenkins, 18 Ill. App. 41; International Bank *v.* Bartalott, 11 Ill. App. 620.

Indiana.— Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Miller *v.* Powers, 119 Ind. 79, 21 N. E. 455, 4 L. R. A. 483; Churchman *v.* Indianapolis, 110 Ind. 259, 11 N. E. 301; Ware *v.* State, 74 Ind. 181; State *v.* Giles, 52 Ind. 356; Wynne *v.* Cornelison, 52 Ind. 312; Stanley *v.* Stanton, 36 Ind. 445; Boyd *v.* Boyd, 27 Ind. 429; State *v.* Walters, 31 Ind. App. 77, 66 N. E. 182, 99 Am. St. Rep. 244; Bower *v.* Thomas, 22 Ind. App. 505, 54 N. E. 142; Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772.

Iowa.— Brunson *v.* Ballou, 70 Iowa 34, 29 N. W. 794; Shreves *v.* Leonard, 56 Iowa 74, 8 N. W. 749.

Massachusetts.— Nudd *v.* Hamblin, 8 Allen 130.

Missouri.— Hoffman *v.* Parry, 23 Mo. App. 20, under the statutory provision excepting cases in which the party absconds or conceals himself or does some other improper act to prevent the bringing of the action, holding that such provision contemplates the doing of some act calculated to throw plaintiff off his guard, some act of concealment or suppression where the party ought to speak.

Nebraska.— Webster *v.* Bates Mach. Co., 64 Nebr. 306, 89 N. W. 789; Campbell *v.* Roe, 32 Nebr. 345, 49 N. W. 452.

Pennsylvania.— Smith *v.* Blachley, 198 Pa. St. 173, 47 Atl. 985, 53 L. R. A. 849 [*explaining* decision on former appeal in 188 Pa. St. 550, 41 Atl. 619, 68 Am. St. Rep. 887]; Scranton Gas, etc., Co. *v.* Lackawanna Iron, etc., Co., 167 Pa. St. 136, 31 Atl. 484; Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575; Stewart *v.* McBurney, 1 Pa. Cas. 234, 1 Atl. 639.

South Carolina.— Bossard *v.* White, 9 Rich. Eq. 483.

Tennessee.— Haynie *v.* Hall, 5 Humphr. 290, 42 Am. Dec. 427.

Texas.— Cobb *v.* Decatur First Nat. Bank, 91 Tex. 226, 42 S. W. 770; Kennedy *v.* Baker, 59 Tex. 150.

United States.— Bates *v.* Preble, 151 U. S. 149, 14 S. Ct. 277, 38 L. ed. 106; Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807 (construing the Indiana statute); Despeaux *v.* Pennsylvania R. Co., 87 Fed. 794.

England.— Armstrong *v.* Milburn, 54 L. T. Rep. N. S. 723.

A mere error in making credits in the settlement of an account between the parties is not such fraud as will suspend the operation of the statute. Brown *v.* Edes, 37 Me. 318.

In equity, as at law, where there is no relation of trust but merely that of a debtor and creditor, the rule of the text applies. Wilson *v.* Sibley, 54 Miss. 656; Cook *v.* Lindsey, 34 Miss. 451.

Breach of moral duty alone is not sufficient. McKown *v.* Whitmore, 31 Me. 448.

Under the Georgia code, providing that if

(2) ACTS PART OF OR SUBSEQUENT TO CAUSE OF ACTION. Fraudulent concealment may consist in fraud connected with or constituting a cause of action, or it may consist of subsequent acts designed to conceal the cause of action originating without fraud.[18] The concealment of a cause of action as contemplated by the rule suspending for that reason the operation of the statute of limitations is considered as distinct from the fraud in the cause of action itself, fraud as the ground of relief, from the discovery of which the statute begins to run.[19] So it has been held that inasmuch as a cause of action cannot be concealed before it has accrued,[20] it is essential that the acts of concealment, to be available, must have taken place after the cause of action accrued,[21] from which it would appear that, although a fraud may give the right to an action it will not for that reason, in the absence of a trust relation, or some subsequent active concealment, constitute a fraudulent concealment of that cause of action;[22] but the fraudulent concealment may refer to a subsequent concealment of the original cause of action itself founded on fraud.[23] And on the other hand it is held that both the cause of action and the concealment of it may take place at the same time,[24] if the effect of the fraud which constitutes the actionable wrong or on account of which relief is sought at the same time operates to conceal the fact of the existence of the wrong or cause of action and to prevent its discovery, because in that event the concealment is continuing and therefore operates as such after the cause of action accrues.[25]

defendant has been guilty of fraud by which plaintiff has been debarred or deterred from his action the statute of limitations shall only run from the time of the discovery of the fraud, a mere indefinite understanding between plaintiff and defendant, without consideration that the debt might be admitted as a set-off on a certain judgment if recovered, is not included. Printup *v.* Alexander, 69 Ga. 553.

18. Campbell *v.* Vining, 23 Ill. 525.

19. Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

Under statutes relieving against fraud.— The fraudulent concealment of a cause of action generally, not founded upon fraud, is often held not to come within the provision of the statute saving from its operation causes of action for relief on the ground of fraud up to the time of the discovery of the fraud. Carrier *v.* Chicago, etc., R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799; Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93; Boomer Dist. Tp. *v.* French, 40 Iowa 601; Atchison, etc., R. Co. *v.* Atchison Grain Co., 68 Kan. 585, 75 Pac. 1051; Stinson *v.* Aultman, 54 Kan. 537, 38 Pac. 788; Perry *v.* Wade, 31 Kan. 428, 2 Pac. 787; Penobscot R. Co. *v.* Mayo, 65 Me. 566; Dunn *v.* Beaman, 126 N. C. 766, 36 S. E. 172 (holding that the provisions of the code in that state prior to the enactment of Laws (1889), c. 269, allowing three years from the discovery of a fraud, applied only to "cases heretofore solely cognizable in courts of equity," by the terms of said provisions); Howk *v.* Minnick, 19 Ohio St. 462, 2 Am. Rep. 413; Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62 (referring to the Iowa statute). See also Shelby County *v.* Bragg, 135 Mo. 291, 36 S. W. 600; Price *v.* Mulford, 107 N. Y. 303, 14 N. E. 298. But see Tillison *v.* Ewing, 87 Ala. 350, 6 So. 276; Porter *v.* Smith, 65 Ala. 169, where such a statute is applied to cases of fraudulent concealment of a cause of action.

20. Stanley *v.* Stanton, 36 Ind. 445.

21. Wynne *v.* Cornelison, 52 Ind. 312; Dearborn County *v.* Lods, 9 Ind. App. 369, 36 N. E. 772. See also Humphreys *v.* Mattoon, 43 Iowa 556.

22. Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Miller *v.* Powers, 119 Ind. 79, 21 N. E. 455, 4 L. R. A. 483; State *v.* Furlong, 60 Miss. 839 (which case involved also the circumstance that the means of knowledge was at hand); Reynolds *v.* Hennessy, 17 R. I. 169, 20 Atl. 307, 23 Atl. 639 (where it is said that while the rule at law cannot be maintained to the full extent of the rule in equity, that in cases of fraud the statute begins to run from the discovery of the fraud, "there is no reason why equity and law should be so far apart as to forbid a court of law from taking the same starting-point when active additional fraud has prevented such discovery").

23. Smith *v.* Blair, 133 Ind. 367, 32 N. E. 1123; Kansas City Cent. Bank *v.* Thayer, 184 Mo. 61, 82 S. W. 142. See also Conner *v.* Goodman, 104 Ill. 265.

24. Gerry *v.* Dunham, 57 Me. 334, where there was a relation of trust between the parties which did not, however, appear to influence the decision.

25. *Illinois.*—Athey *v.* Hunter, 65 Ill. App. 453; Bartalott *v.* International Bank, 14 Ill. App. 158.

Indiana.— Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Boyd *v.* Boyd, 27 Ind. 429.

Maine.— Kelley *v.* Nealley, 76 Me. 71.

Maryland.— Wear *v.* Skinner, 46 Md. 257, 24 Am. Rep. 517.

Massachusetts.—First Massachusetts Turn-

(c) *Concealment by Others Than Defendant*—(1) In General. Broadly it may be stated that concealment by any other than defendant is not such a concealment as is contemplated by the rule, statutory or otherwise, that limita-

pike Corp. *v.* Field, 3 Mass. 201, 3 Am. Dec. 124.

New Hampshire.— Quimby *v.* Blackey, 63 N. H. 77 (where defendant found money belonging to plaintiff, knowing that it was plaintiff's, but gave him no information of it and converted it); Way *v.* Cutting, 20 N. H. 187; Bowman *v.* Sanborn, 18 N. H. 205.

Texas.— Anding *v.* Perkins, 29 Tex. 348. See also Ripley *v.* Withee, 27 Tex. 14.

Utah.— Larsen *v.* Utah L. & T. Co., 23 Utah 449, 65 Pac. 208.

Comparison of several cases.— In Brown *v.* Howard, 2 B. & B. 74, 4 Moore C. P. 508, 6 E. C. L. 43, it is held that the fraudulent conduct being the basis of the cause of action was not a fraudulent concealment of the cause of action and the fraud cannot be replied to the plea of the statute, although the court said that the rule would be different if the cause of action were independent of the fraud. *Compare* Howell *v.* Young, 5 B. & C. 259, 11 E. C. L. 454, 2 C. & P. 238, 12 E. C. L. 548, 8 D. & R. 14, 4 L. J. K. B. O. S. 160, 29 Rev. Rep. 237. In First Massachusetts Turnpike Corp. *v.* Field, 3 Mass. 201, 3 Am. Dec. 124, where the action was based on fraud and deceit, it was held that the rule is the same whether the action is assumpsit or a special action on the case for the fraud. See also Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81. In Miles *v.* Berry, 1 Hill (S. C.) 296, which was an action of assumpsit to recover the amount of a note the possession of which had been fraudulently obtained by a mistake and retained until the statute of limitations had run out, it was held that plaintiff's action was barred notwithstanding the fraud, although it would have been different if the action had been predicated on the fraud itself, as an action on the case for fraudulently obtaining possession of the note or an action of trover for its recovery. It is apprehended that the real reason for the inapplicability or the rule of fraudulent concealment might be better stated to be that the cause of action itself was not concealed. The court *distinguishes* Harrell *v.* Kelly, 2 McCord (S. C.) 426, in that the application of the rule in that case could be justified upon the ground that the cause of action was the discovery of the fraud, and further lays it down that unless the discovery of the fraud can be regarded as the cause of action it cannot have the effect of preventing the running of the statute of limitations. In Bricker *v.* Lightner, 40 Pa. St. 199, 204, as to evidence that a debtor had surreptitiously taken a note made by him after the death of the holder in an action by the executor in assumpsit for the value of the note, it was said: "Against a man who snatches the evidence of his indebtedness from a deceased creditor, we would not hesitate to presume a new promise to pay, or an intention to administer assets, or anything else to arrest the statute. *In odium spoliatoris omnia præsumuntur.* What better excuse could be required of an executor for delaying suit upon the notes than that he had been deprived of the possession of them through the fraud of the debtor"? In Vanbibber *v.* Beirne, 6 W. Va. 168, which was a suit in equity, it was held that a replication that plaintiff brought and prosecuted a suit within five years from the time of defendant's liability to be sued and notice to plaintiff of the matter complained of in the bill (fraud being relied on for a recovery), was bad, although the fraudulent concealment of an action was considered to be a good reply. The court referred to Callis *v.* Waddy, 2 Munf. (Va.) 511, often cited in the books as an authority against the rule permitting the reply of fraud to the plea of the statute of limitations in actions at law, as being based upon the ground that the replication was that the fraud came to plaintiff's knowledge within the statutory period, and referred to Massachusetts, among other jurisdictions, in which fraudulent concealment is a good reply to the plea of limitations in actions at law and indicated that the ground of these decisions is that the replications set up that the cause of action had been fraudulently concealed. But in First Massachusetts Turnpike Corp. *v.* Field, 3 Mass. 201, 3 Am. Dec. 124, although often cited in the books as authority for the rule that fraud may be replied to the plea of limitations, the replication does not appear to be materially different from that in Callis *v.* Waddy, *supra.*

In equity a secret or concealed fraud is a fraudulent concealment. Traer *v.* Clews, 115 U. S. 528, 6 S. Ct. 155, 29 L. ed. 467 [*affirming* 57 Iowa 459, 10 N. W. 838]; Rosenthal *v.* Walker, 111 U. S. 185, 4 S. Ct. 382, 28 L. ed. 395 [*distinguishing* Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807] (which was an action at law); Mercantile Nat. Bank *v.* Carpenter, 101 U. S. 567, 25 L. ed. 815 (which was a suit in equity, in that the court was passing upon the statutes of Indiana); Bailey *v.* Glover, 21 Wall. (U. S.) 342, 22 L. ed. 636. While Wood *v.* Carpenter, 101 U. S. 135, 25 L. ed. 807, was decided under the statutes of Indiana and held that mere silence was not fraudulent concealment, as already shown, the supreme court of that state has held that the fraud on account of which relief is sought may itself be of such a character as to continue and operate as a concealment after the cause of action arises. See Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963. But on the other hand it is held that as a fraud-

tions will not run against a cause of action, the commencement of which is prevented by fraud, concealment, or other improper act.[26]

(2) AGENT OR SERVANT. A fraudulent concealment by a servant or agent of a cause of action against his principal, without the knowledge or connivance of the principal, will not postpone the operation of the statute of limitations.[27] But where the concealment is at the actual instigation of the principal the exception operates and the statute will not protect the principal before discovery of the fraudulent concealment.[28] And in the case of a corporation which must act through agents, a different rule is applied; the fraud of the agent will prevent the operation of the statute in favor of the principal until a discovery of the fraud.[29]

(3) PRINCIPAL AND SURETY. Upon the theory that if the principal is liable so is his surety, the statute will not run in favor of a surety until the discovery by the obligee of his right of action which had been fraudulently concealed by the principal.[30]

ulent concealment may be replied to the statute at law, and as fraud is not a sufficient ground to uphold a suit in equity in the absence of a showing for special equitable relief, a bill based on such concealed fraud will be dismissed for want of equity. Tillison *v.* Ewing, 87 Ala. 350, 6 So. 276.

26. Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79; Wells *v.* Halpin, 59 Mo. 92; Foley *v.* Jones, 52 Mo. 64; Smith *v.* Newby, 13 Mo. 159; Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582; Sedalia School Dist. *v.* De Weese, 100 Fed. 705; Hayden *v.* Thompson, 71 Fed. 60, 17 C. C. A. 592; Chamberlain *v.* Chicago, etc., R. Co., 27 Fed. 181 (holding that where one who has been injured by the negligence of another is placed by the latter in the care of a physician, misrepresentations by the physicians as to the extent of the injury will not prevent the running of the statute of limitations against the cause of action for the injury); *In re* McCallum, 49 Wkly. Rep. 129 (holding that "concealed fraud," to bring into operation the provision of the Real Property Limitation Act, must be fraud of the person setting up the statute or his predecessor in title); Thorne *v.* Heard, [1895] A. C. 495, 64 L. J. Ch. 652, 73 L. T. Rep. N. S. 291, 11 Reports 254, 44 Wkly. Rep. 155.

As against innocent third persons, a bankrupt's concealment of facts will not take the case out of the statute. Moses *v.* St. Paul, 67 Ala. 168.

Recovery of money wrongfully paid by wife.— In Metropolitan L. Ins. Co. *v.* Trende, 53 S. W. 412, 21 Ky. L. Rep. 909, it was held that where a wife has, without her husband's knowledge, obtained insurance on his life, and paid the premiums thereon with his money, the statute of limitations did not begin to run against the husband's right to recover such payments until he might with reasonable diligence have discovered that the payments had been made.

Defect covered by warranty.—Where the concealment of a defect to which a warranty extends is a necessary incident of the transaction, such concealment must be regarded as the act of the vendor. Anding *v.* Perkins, 29 Tex. 348; Ripley *v.* Witbee, 27 Tex. 14.

27. Wilson *v.* Williams, (Ill. 1893) 33 N. E. 884; Wood *v.* Williams, 142 Ill. 269, 31 N. E. 681, 34 Am. St. Rep. 79 (holding further that if the principal could be charged with negligence in failing to supervise the agent's conduct or in not discovering his fraud, it will not prevail if the ground set up is merely the fraudulent concealment); Stevenson *v.* Robinson, 39 Mich. 160.

28. Manufacturers' Nat. Bank *v.* Perry, 144 Mass. 313, 11 N. E. 81.

29. New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 60 Atl. 469.

30. *Connecticut.*— Eising *v.* Andrews, 66 Conn. 58, 33 Atl. 585, 50 Am. St. Rep. 75.

Delaware.— Lieberman *v.* Wilmington First Nat. Bank, 2 Pennew. 416, 45 Atl. 901, 82 Am. St. Rep. 414, 48 L. R. A. 514; Sparks *v.* Farmers' Bank, 3 Del. Ch. 274.

Iowa.— Bradford *v.* McCormick, 71 Iowa 129, 32 N. W. 93.

Missouri.— State *v.* Hawkins, 103 Mo. App. 251, 77 S. W. 98. In State *v.* Schaeffer, 12 Mo. App. 276, it was held that under the provision that a suit on a constable's bond may be brought within two years of the expiration of the term of his office, the omission of the officer to make a return which keeps one in ignorance of his cause of action for breach of the bond cannot extend the period of limitations beyond that time. The rule is based upon the ground that the special statute limiting the time for bringing the action contains no exception. See also Governor *v.* Gordon, 15 Ala. 72. But according to the cases already cited in this note, if the principal is liable so is the surety, and in Shelby County *v.* Bragg, 135 Mo. 291, 36 S. W. 600, it appears that independently of any statutory exception fraudulent concealment of a cause of action postpones the operation of the statute until the discovery of the fraud.

Texas.— Ward *v.* Marion County, 26 Tex. Civ. App. 361, 62 S. W. 557, 63 S. W. 155.

(D) *Application of Rule in Particular Cases.* There is no uniformity of decision as to what particular conduct, representation, or silent omissions to speak out will make such a case of fraudulent concealment of the cause of action as the court will accept as an excuse for a delay in bringing the suit, and each case must be determined upon its own facts.[31] Generally, however, it may be stated that if a fact exists from which a cause of action arises which is not peculiarly within the knowledge of the party from whom the right is to be received, a fact which may be ascertained by inquiry or diligence,[32] there is no duty on the debtor to give notice of the fact and mere ignorance thereof on the part of the creditor will not prevent the running of the statute.[33] But where the fraud is in the very transaction out of which the cause of action arises,[34] or the person from whom the right is to be received has exclusive or peculiar knowledge of the facts which constitute the cause of action in favor of the adverse party,[35] and there is a relation of

See also Beissner *v.* Texas Express Co., 1 Tex. App. Civ. Cas. § 806, where the case turned upon a want of diligence on the part of plaintiff.

31. Herndon *v.* Lewis, (Tenn. Ch. App. 1896) 36 S. W. 953 (where, referring to suits in equity, it is said that the concealment that will repel the plea of limitations cannot be compressed into a categorical definition; that, like "fraud," "negligence," "care," and other general terms used in the generalization of jurisprudence, its operative effect in deceiving and lulling the party affected by it must be determined by the particular facts and circumstances appearing in each case); Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

Question of law.—Where the excuse is set up in the declaration the sufficiency of the fraudulent concealment alleged will be decided on demurrer. Gunton *v.* Hughes, 79 Ill. App. 661 [*affirmed* in 181 Ill. 132, 54 N. E. 895].

For instances of sufficient grounds for applying the rule as to fraudulent concealment see Smith *v.* Blair, 133 Ind. 367, 32 N. E. 1123; Fisher *v.* Tuller, 122 Ind. 31, 23 N. E. 523; Earnhart *v.* Robertson, 10 Ind. 8; Wolkins *v.* Knight, 134 Mich. 347, 96 N. W. 445; Kansas City Cent. Bank *v.* Thaper, 184 Mo. 61, 82 S. W. 142; Ferris *v.* Henderson, 12 Pa. St. 49, 51 Am. Dec. 580; Moses *v.* Ocoee Bank, 1 Lea (Tenn.) 398; Ward *v.* Marion County, 26 Tex. Civ. App. 361, 62 S. W. 557, 63 S. W. 155.

Fraudulent appointment of receiver.—In a case involving an action to recover damages for negligently causing the death of a railroad employee for which action could not have been brought against a receiver duly appointed or against the acting receiver as agent of the railroad, it was held that the fraudulent appointment of a receiver and the concealment of the fraud was such a concealment of the cause of action as to take the case out of the operation of the statute. Texas, etc., R. Co. *v.* Gay, 86 Tex. 571, 26 S. W. 599, 25 L. R. A. 52.

Keeping from record a fraudulent deed is a fraudulent concealment. Reynolds *v.* Gawthrop, 37 W. Va. 3, 16 S. E. 364; McAlpine *v.* Hedges, 21 Fed. 689.

Discrimination in freight rate.—In Iowa it is held that where the carrier makes an unjust discrimination in freight charges and fraudulently conceals the fact of such discrimination, the statute of limitations will not run until a discovery of the fact. Cook *v.* Chicago, etc., R. Co., 81 Iowa 551, 46 N. W. 1080, 25 Am. St. Rep. 512, 9 L. R. A. 764; Carrier *v.* Chicago, etc., R. Co., 79 Iowa 80, 44 N. W. 203, 6 L. R. A. 799. But in Murray *v.* Chicago, etc., R. Co., 92 Fed. 868, 35 C. C. A. 62, a case from Iowa, the federal court refused to follow the Iowa decisions. See also Mentzer *v.* Railroad Co., 2 Blair Co. Rep. (Pa.) 106, holding that the statute of limitation will bar an action for freight discriminations unless the fact that such discrimination was made was actively concealed by defendant.

For instances of insufficient ground for applying the rule as to fraudulent concealment see Soule *v.* Atkinson, 18 Cal. 225, 79 Am. Dec. 174 (holding that the concealment of a partnership will not prevent the bar of the statute as to a claim against secret partners); Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Mereness *v.* Charles City First Nat. Bank, 112 Iowa 11, 83 N. W. 711, 84 Am. St. Rep. 318, 51 L. R. A. 410; Stewart *v.* Indian Territory Bank, 68 Kan. 755, 75 Pac. 1055; Dunn *v.* Beaman, 126 N. C. 766, 36 S. E. 172; Sankey *v.* McElevey, 104 Pa. St. 265, 49 Am. Rep. 575 (holding that voluntary disclosure by a debtor to his creditor of partial information concerning a debt, unaccompanied by positive misrepresentation, does not impose the duty of a full disclosure and will not toll the statute); Haynie *v.* Hall, 5 Humphr. (Tenn.) 290, 42 Am. Dec. 427.

32. Kavenagh *v.* Weedon, 1 Ala. 231, holding that for the rule to apply the event must be peculiarly within the knowledge of the person to whom the right is accrued, and that the death of a man's wife is not an event peculiarly within his knowledge, although the party to be affected by notice is a non-resident. See also *supra*, VI, D, 2, b, (V).

33. See also *supra*, VI, D, 2, a.

34. See *supra*, VI, D, 2, b, (VI), (B), (2).

35. McCarthy *v.* McCarthy, 74 Ala. 546; Vanbibber *v.* Beirne, 6 W. Va. 168 (which was a suit in equity, where, under the statu-

trust[36] or confidence between the parties, by reason of which it is the duty of the one to disclose to the other the fact or facts upon which his cause of action or the immediate right to pursue a particular remedy matures or arises, the omission to disclose what it is the special duty of defendant to disclose is a fraudulent concealment.[37]

E. Evasion or Obstruction of Process — 1. In the Absence of Statute. In the absence of such an exception in the statute, mere inability to find, or

tory provision saving cases in which defendant obstructs the bringing of suit, it was held that if it appears that the facts on which the cause of action is founded were exclusively within the knowledge of defendant and that he concealed these facts fraudulently, the statute of limitations is answered); Neilson *v.* Grignon, 85 Wis. 550, 55 N. W. 890; Amory *v.* Lawrence, 1 Fed. Cas. No. 336, 3 Cliff. 523 (holding that the statute commences to run against a claim for a balance of rents, against one who holds an absolute conveyance of property to secure a debt, from the time the grantor has knowledge of repayment of the debt by rents received).

Subterranean trespass.— The rule that ignorance of the cause of action is no answer to the statute of limitations in an action at law is applied to a trespass under ground. Williams *v.* Pomeroy Coal Co., 37 Ohio St. 583, in which state the fraudulent concealment of the cause of action was not proper matter in avoidance of the statute of limitations in an action at law. The same rule was applied in England. Imperial Gas Light, etc., Co. *v.* London Gas Light Co., 2 C. L. R. 1230, 10 Exch. 39, 18 Jur. 497, 23 L. J. Exch. 303, 2 Wkly. Rep. 527. But in equity a different rule has been applied in the case of a concealed fraudulent trespass in the working of a mine so long as the party defrauded remains in ignorance and is without fault or laches. Bulli Coal Min. Co. *v.* Osborne, [1899] A. C. 351, 68 L. J. P. C. 49, 80 L. T. Rep. N. S. 430, 47 Wkly. Rep. 545; *In re* Astley, etc., Coal, etc., Co., 68 L. J. Q. B. 252, 80 L. T. Rep. N. S. 116 (which cases recognize a distinction between mere negligence and a wilful trespass and in this respect disapprove Ecclesiastical Com'rs *v.* North Eastern R. Co., 4 Ch. D. 845, 47 L. J. Ch. 20, 36 L. T. Rep. N. S. 174, in which case the accounting was carried back beyond the statutory period without reference to whether the trespass was wilful and fraudulent or merely negligent); Dawes *v.* Bagnall, 23 Wkly. Rep. 690. In Pennsylvania the court has gone as far in an action at law as Ecclesiastical Com'rs *v.* North Eastern R. Co., *supra*, inasmuch as in that state equity was administered in the common-law forms of action, the court holding that, whether the invasion of one on the mineral estate of another is by mistake or otherwise, good faith requires a disclosure of the fact and a failure to disclose is a fraudulent concealment of the cause of action. Lewey *v.* H. C. Fricke Coke Co., 166 Pa. St. 536, 31 Atl. 261, 45 Am. St. Rep. 684, 23 L. R. A. 283.

36. **Ignorance of trust.**— Time will not begin to run against a *cestui que trust* for an accounting who has no knowledge of the existence of the trust and until he has knowledge or might fairly be presumed to have acquired knowledge of his rights. McCarthy *v.* McCarthy, 74 Ala. 546. See also Carlisle *v.* Foster, 10 Ohio St. 198, holding that an executor without notice of a trust in favor of his testator is not affected by the statute of limitations except from the time he has notice of the trust.

37. *California.*— Lataillade *v.* Orena, 91 Cal. 565, 27 Pac. 924, 25 Am. St. Rep. 219.

Georgia.— Hoyle *v.* Jones, 35 Ga. 40, 89 Am. Dec. 273.

Kansas.— Perry *v.* Wade, 31 Kan. 428, 2 Pac. 787; Perry *v.* Smith, 31 Kan. 423, 2 Pac. 784.

Maine.— Kelley *v.* Nealley, 76 Me. 71.

Massachusetts.— Atlantic Nat. Bank *v.* Harris, 118 Mass. 147.

Michigan.— Allen *v.* Conklin, 112 Mich. 74, 70 N. W. 339; Tompkins *v.* Hollister, 60 Mich. 470, 27 N. W. 651.

Texas.—Cobb *v.* Decatur *v.* First Nat. Bank, 91 Tex. 226, 42 S. W. 770.

Virginia.— Lightfoot *v.* Green, 91 Va. 509, 22 S. E. 242.

United States.— See also Chew *v.* Baker, 5 Fed. Cas. No. 2,663, 4 Cranch C. C. 696, holding that where one is to receive money for another, the cause of action will not accrue until notice of the receipt of the money.

Concealment by agent.— Limitations will not bar an action by a principal against his agent in respect of moneys remitted to the latter for an express purpose and retained by him, the agent being either in the position of an express trustee or guilty of fraudulent concealment in his accounts. North American Land, etc., Co. *v.* Watkins, [1904] 2 Ch. 233, 73 L. J. Ch. 626, 91 L. T. Rep. N. S. 425, 20 T. L. R. 642. As to collection by attorney or agent see *supra*, VI, B, 3, d, e.

Concealment by officer of corporation.— A corporation will not be barred in its right to an accounting from its president, who had refused to allow an examination of the books of the company, which together with his deception and misrepresentation as to the condition of the corporate affairs had caused the delay in suing. Coxe *v.* Huntsville Gas Light Co., 106 Ala. 373, 17 So. 626. The same principle is applied in Atlantic Nat. Bank *v.* Harris, 118 Mass. 147. So where an officer of a bank conceals the defalcation of another officer, his knowledge of the transaction is not chargeable to the bank, so as to set running the statute of limitations, as

ignorance of the debtor's whereabouts,[38] even though he conceals himself, as by assuming another name,[39] and intentionally evades the service of process, will not arrest the running of the statute.[40]

2. Statutory Exceptions — a. Concealment of Person — Obstruction by Removal. Various provisions have been incorporated in the statutes of some of the United States affording relief where the bringing of the action is obstructed or prevented by the debtor's absconding, removing,[41] or concealing him-

against a claim against the defaulting officer for the amount of the loss. Vance *v.* Mottley, 92 Tenn. 310, 21 S. W. 593. See also Harrisburg Bank *v.* Forster, 8 Watts (Pa.) 12.

38. See Cadmus *v.* Polhamus, 4 Fed. Cas. No. 2,282*a*.

39. Engel *v.* Fischer, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818, where the debtor moved into New York after a cause of action had accrued against him elsewhere and resided in New York under an assumed name for the whole of the period prescribed by the statute of that state, and the rule of the text was applied. But subsequently a clause was added by way of amendment of the statute of that state so as to include within the exception theretofore existing in cases of absence from the state a residence within the state under a false name, etc. (N. Y. Code Civ. Proc. § 401, amendment of 1896). See also *infra*, VI, F, 2, d, (II), (F), (9), for nature of return.

40. Amy *v.* Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 L. ed. 953, holding that a conspiracy on the part of city officials to prevent the service of process in an action against the city furnishes no excuse for not commencing the action within the time limited by statute; that the statutory exception relating to inability to serve process on account of the absence of the debtor did not embrace a mere concealment, and that the courts could not supply such an exception not contained in the statute. *Contra*, in Louisiana, where a removal obstructs the bringing of a suit, the courts adopted the maxim *contra non valentem agere non currit prescriptio*, from the Spanish law, as a part of the jurisprudence of the state, although not enacted into statute. Martin *v.* Jennings, 10 La. Ann. 553. See also Murphy *v.* Guiterez, 17 La. Ann. 269; Blossman *v.* Mather, 5 La. Ann. 335; Morgan *v.* Robinson, 12 Mart. O. S. 76, 13 Am. Dec. 366. Thus, all acts or hindrances coming from the debtor, which deprive the creditor of the remedy and forum contemplated at the time of the contract, suspend prescription; hence, where a debtor removed to a foreign country, intending not to pay the debts he left behind him, prescription was suspended. Boyle *v.* Mann, 4 La. Ann. 170. But where it does not appear that the foreign debtor had changed his domicile, and that the same was unknown to the creditor, or that the creditor could not, on account of some other obstacle, have instituted an action at the domicile of the debtor, the maxim will not apply. Norton *v.* Sterling, 15 La. Ann. 399; Kers *v.* Erwin, 4 La. 215. And a change of residence, openly and publicly made, from one part or state of our common country to that of another, cannot be considered an act on the part of the debtor which suspends prescription and creates a proper case for the application of the maxim. New Orleans Canal, etc., Co. *v.* Beard, 16 La. Ann. 345, 79 Am. Dec. 582. So if prescription is acquired by the debtor before absconding, the creditor cannot invoke the maxim. Gamble *v.* McClintock, 9 La. Ann. 160.

Where filing of a complaint is the commencement of the suit, evasion of service of process cannot stop the running of the statute. Nash *v.* El Dorado Co., 24 Fed. 252, where county supervisors resigned in order to evade service of process in a suit against the county.

41. See the various statutes. And see Keith *v.* Hiner, 63 Ark. 244, 38 S. W. 13; Davidson *v.* Simmons, 11 Bush (Ky.) 330; Southern Contract Co. *v.* Newhouse, 66 S. W. 730, 23 Ky. L. Rep. 214; Fink *v.* Zepp, 76 Md. 182, 24 Atl. 538; Maurice *v.* Worden, 52 Md. 283; Nelson *v.* Beveridge, 21 Mo. 22.

Removal alone, unless it actually obstructs or defeats plaintiff in bringing his action, is held not enough. Sneed *v.* Hall, 2 A. K. Marsh. (Ky.) 21; Cartmill *v.* Hopkins, 2 Mo. 220; Bobb *v.* Shipley, 1 Mo. 229; Hancock *v.* Heugh, 1 Mo. 678; Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33; Brown *v.* Butler, 87 Va. 621, 13 S. E. 71 (where the debtor had not left the state with the purpose of changing his residence); Wilson *v.* Koontz, 7 Cranch (U. S.) 202, 3 L. ed. 315 (construing a statute of Virginia substantially similar to that involved in Brown *v.* Butler, *supra*); Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172 (confining the obstruction clause to those who are residents when the action accrues). Ficklin *v.* Carrington, 31 Gratt. (Va.) 219, and Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400, following it in the construction of the same statutory provision, are not in conflict with the foregoing cases, for there it was admitted that defendants, after the causes of action accrued, left the state, and became residents of another state. The courts, however, in deciding the cases, laid down the broad doctrine that such a removal operates *proprio vigore* an objection, within the meaning of the statute to the prosecution of plaintiff's right, during the period of the debtor's absence, without noticing. Wilson *v.* Koontz, *supra*. So in Cheatham *v.* Aistrop, 97 Va. 457, 34 S. E. 57, and Fisher *v.* Hartley, 48 W. Va.

self,[42] and these are given such constructions as will effect their purpose without extending the exception beyond that to any other cases.[43] Such statutes cover cases in which the cause of action arises in another state and the debtor absconds to the state of the forum, especially when the statute broadly embraces any improper act which obstructs the bringing of the suit,[44] and sometimes by express terms the absconding into the state of the forum is provided for;[45] but where the provision is merely an exception in the case of absconding or concealment, without extending the exception to any acts which otherwise obstruct the bringing of an action, the commission must be in the state of the forum and absconding from another state and living openly in the state of the forum will not do.[46]

b. Concealment of Property. A concealment of the existence of property which might be subjected to satisfy a judgment, in the absence of a concealment of the cause of action, will not suspend the operation of the statute.[47] Where process to enforce a judgment does not operate directly upon the specific property, its presence in the jurisdiction is not necessary to the bringing of the suit and its absence will not suspend the operation of the statute.[48]

339, 37 S. E. 578, permanent removals were held to be obstructions under the statute.

Effect of absence see *infra*, VI, F, 2.

Requests for extensions of time, and promise to pay, upon which time is given, cannot be said in any sense to be an obstruction in the prosecution of plaintiff's right, there being no removal or concealment. Liskey *v.* Paul, 100 Va. 764, 42 S. E. 875.

42. Harper *v.* Pope, 9 Mo. 402, holding that concealment, to operate as an obstruction, need not be with a fraudulent intent.

Non-user of corporate powers is not a concealment of the corporation, such as to suspend the running of the statute of limitations, if it can be said that a corporation can in any way abscond or conceal itself. Ft. Scott *v.* Schulenberg, 22 Kan. 648.

43. Absconding.—An open removal into Arkansas was held not to be an absconding. Keith *v.* Hiner, 63 Ark. 244, 38 S. W. 13. But in Missouri a removal to that state or to another remote district within the state, if without the knowledge of the creditor, and diligent inquiry does not reveal the location to him, although the debtor may live openly in his new abode, comes within the statute and arrests it until discovery of the debtor by the creditor. Harman *v.* Looker, 73 Mo. 622; Butler *v.* Lawson, 72 Mo. 227; Harper *v.* Pope, 9 Mo. 402.

Removal from the debtor's residence is contemplated under the provision relieving against the statute where the creditors' right is obstructed by the debtor's removal from the county. Burr *v.* Williams, 20 Ark. 171. And where the debtor was a non-resident at the time the action accrues, and his domicile was outside the state when the debt was contracted, it was held that his removal from the state of the forum before the cause of action accrued did not come within the statute. Smith *v.* Bogliolo, 5 Mo. 344.

Temporary absence with the intention of returning is not contemplated by a provision of the statute of limitations that if a person, after a cause of action accrues against him, absconds or conceals himself, the time of such absence or concealment shall not be computed as any part of the time within which the action must be brought. Thomas *v.* Brewer, 55 Iowa 227, 7 N. W. 571; Blodgett *v.* Utley, 4 Nebr. 25.

Absence in military service was held not to obstruct the bringing of an action in Buckley *v.* Jenkins, 10 Bush (Ky.) 21. See also *infra*, VI, F, 2, d, (II), (F), (6).

Time of commission of act.—In Arkansas under the statutory exception where the debtor leaves the county and conceals himself and prevents the bringing of suit, the concealment refers to the time of the accrual of the cause of action, upon the theory that if the statute once starts nothing will stop it unless an express statutory exception. Keith *v.* Hiner, 63 Ark. 244, 38 S. W. 13; Richardson *v.* Cogswell, 47 Ark. 170, 1 S. W. 51, absconding from county after the cause of action accrued. But under the statutory exception in Missouri which suspended the operation of limitations if the debtor removed, absconded, or concealed himself so as to obstruct the bringing of suit, and a similar exception in Kentucky, the statute was suspended if the act was done at any time within the period limited for bringing an action, and defendant lost the time which had run. Nelson *v.* Beveridge, 21 Mo. 22; Ormsby *v.* Letcher, 3 Bibb (Ky.) 269.

44. Harman *v.* Looker, 73 Mo. 622; Butler *v.* Lawson, 72 Mo. 227; Harper *v.* Pope, 9 Mo. 402. *Compare* Thompson *v.* Berry, 26 Tex. 263.

45. Keith *v.* Hiner, 63 Ark. 244, 38 S. W. 13.

46. Myers *v.* Center, 47 Kan. 324, 27 Pac. 978; Frey *v.* Aultman, 30 Kan. 181, 2 Pac. 168; Hoggett *v.* Emerson, 8 Kan. 262; Talcott *v.* Bennett, 49 Nebr. 569, 68 N. W. 931; Rhoton *v.* Mendenhall, 17 Oreg. 199, 20 Pac. 49, the last two cases following the construction in Kansas.

47. See *supra*, VI, D, 2, b, (VI), (A), (V).

48. Chapman *v.* Hudson, 46 Ark. 489 (holding that a removal or concealment of property, to avoid its recovery by an action of replevin, will not postpone the running of the statute of limitations against an action

F. Disabilities — 1. In General. The saving of the operation of limitations by reason of disabilities depends on the statute; in the absence of such a saving clause, the statute runs against all persons, whether under disability or not;[49] and when exceptions in favor of persons under disability are made they should be strictly construed and never extended beyond their plain import or to disabilities not enumerated in the saving clause.[50] Mere doubt as to a right, or difficulty in the way of its assertion, will not operate as an exception. Apart from the disabilities expressed in the statute itself, in order to prevent the operation of limitations there must be some insuperable barrier, or some certain and well defined

of trover for its conversion); Crozier *v.* Bryant, 4 Bibb (Ky.) 174 (as to the necessity of the presence of the property in an action of detinue).

What is concealment — *Generally.*— In Arnold *v.* Scott, 2 Mo. 13, 22 Am. Dec. 433, which was an action of trover for bank-notes, etc., the court in commenting upon the meaning of the statute, excepting from the limitation period the time when a person "by absconding or concealing himself, or by any other improper acts" prevents the bringing of a suit, puts this illustration: "Had the defendant, for example, taken a wagon of the plaintiff, and used it on his farm or on the road, it can hardly be imagined that a jury would find it to be such a concealment as to deprive him of the benefit of the estate; but had he taken it to his house in the night time, and after taking it to pieces, packed it away in a private room, and there kept it locked up for five years, there could be little doubt that it would be such an act as would defeat" plaintiff in bringing the action so as to deprive defendant of the benefit of the act. Wells *v.* Halpin, 59 Mo. 92.

A deed to defraud creditors, which is recorded, may be regarded as an improper act, but there is no concealment. Reisse *v.* Clarenbach, 61 Mo. 310.

Acts must be by defendant.—A statute excepting from the period of limitation time when a person, "by absconding or concealing himself, or by any other improper act, prevents," etc., does not apply to concealment or improper acts by other persons than the debtor. Wells *v.* Halpin, 59 Mo. 92. See also Munson *v.* Hallowell, 26 Tex. 475, 84 Am. Dec. 582.

In Texas it was held that under a statutory provision that "no demand against any person who shall hereafter remove to this state, incurred prior to his removal, shall be barred by the statute of limitations of this state, until he shall have resided in this state for the space of twelve months," if a party who removes to this state is subject to be sued within twelve months after his removal *a fortiori* one who seeks to escape another jurisdiction by the fraudulent removal of property to this state during the pendency of a suit for that property in another state shall be in no better condition. Thompson *v.* Berry, 26 Tex. 263.

49. Joyce *v.* Means, 41 Kan. 234, 20 Pac. 853; Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480; Beaubien *v.* Beaubien, 23 How. (U. S.) 190, 16 L. ed. 484.

The test of the applicability of the statute is the incapacity to sue, and not the existence or non-existence of the right of disposal. Funkhouser *v.* Langkopf, 26 Mo. 453, distinguishing the rule of the civil law.

Particular statutes complete in themselves, or statutes governing particular remedies and rights fixing the time within which the remedy must be pursued or the right enforced, without exception, are not subject to general limitation acts and the exceptions of disabilities therein. Reid *v.* Hamilton, 92 Ky. 619, 18 S. W. 770, 13 Ky. L. Rep. 849 (saving not intended to apply to distinct and subsequent provisions); Meyer *v.* Moss, 110 La. 132, 34 So. 332; Ashley *v.* Ashley, 41 La. Ann. 102, 5 So. 539; Mull *v.* Walker, 100 N. C. 46, 6 S. E. 685; Headen *v.* Womack, 88 N. C. 468; Hunt *v.* Wall, 75 Pa. St. 413 (under a statute expressly providing that persons under disability must bring their actions for the recovery of lands within a fixed time after the right of entry accrues); Warfield *v.* Fox, 53 Pa. St. 382.

Repeal of saving clause.— The legislature may remove altogether the exception in favor of persons under disability giving persons then under disability a reasonable time in which to sue. Ragsdale *v.* Barnes, 68 Tex. 504, 5 S. W. 68. Limitations will run from the date of the repeal. Brown *v.* Baraboo, 98 Wis. 273, 74 N. W. 223.

50. *Indiana.*— Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. 336.

Maryland.— Weaver *v.* Leiman, 52 Md. 708.

Ohio.— Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480.

Pennsylvania.— Warfield *v.* Fox, 53 Pa. St. 382; Mobley *v.* Oeker, 3 Yeates 200.

United States.— Kendall *v.* U. S., 14 Ct. Cl. 374.

Additional time allowed after disability removed does not mean that the statute does not run pending the disability; it runs from the time the cause accrues, although the party under the disability is allowed additional time after the disability is removed in which to sue. Bunce *v.* Wolcott, 2 Conn. 27; Stevens *v.* Bomar, 9 Humphr. (Tenn.) 546; McDonald *v.* Johns, 4 Yerg. (Tenn.) 258.

For effect of bar against trustee see *supra*, IV, E, 5.

exception clearly established by judicial authority.[51] But on the other hand, if a party without any fault of his own has been deprived of his remedy by some superior power, the statute will not run while the disability continues, although it is not an exception in the statute;[52] one who cannot sue is not within the operation of prescription;[53] and so, there being no limitation except by statute, if there is no limitation as to a particular suit, it has been held that the presumption which arises from length of time is not regarded when the party against whom it is to operate is *non sui juris*.[54]

2. Absence and Non-Residence — a. Nature of Exception in General. The operation of the statute of limitations is not suspended or postponed by the absence or non-residence of either creditor or debtor unless such an exception is a rule of the statute. Courts cannot engraft the exception upon the statute.[55] And where the statute which gives the right contains its own limitations the court can

Slavery as imprisonment see *infra*, VI, F, 5.

Adoption of proviso in equity.— Hertle *v.* Schwartze, 3 Md. 366; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; Belch *v.* Harvey, 3 P. Wms. 288 note, 24 Eng. Reprint 1069 per Lord Talbot.

51. Weaver *v.* Leiman, 52 Md. 708; McIver *v.* Ragan, 2 Wheat. (U. S.) 25, 4 L. ed. 175, as to difficulties which affect merely the trial and not the institution of the suit.

52. Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610; U. S. *v.* Wiley, 11 Wall. (U. S.) 508, 20 L. ed. 211; Braun *v.* Sauerwein, 10 Wall. (U. S.) 218, 19 L. ed. 895; Hanger *v.* Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939; Devereaux *v.* Brownsville, 29 Fed. 742, as to effect of repealing a charter, for the purpose of obstructing a creditor, whereby there is no organization to be sued. See also *infra*, VI, H, 6.

Suit against government.— Where proceedings to enforce the claim of a citizen against the United States cannot be taken, limitations will not run against one to whom the courts are thus closed. San Francisco Sav. Union *v.* Irwin, 28 Fed. 708. But where congress gives the right to sue and suit might have been brought in the name of another, as the assignor of a lease, on the same cause of action, the statute of limitations runs from the time the claim first accrues. Cross *v.* U. S., 4 Ct. Cl. 712.

53. Landry *v.* L'Eglise, 3 La. 219; Ayraud *v.* Babin, 7 Mart. N. S. (La.) 471; Hernandez *v.* Montgomery, 2 Mart. N. S. (La.) 422; Greenwald *v.* Apell, 17 Fed. 140, 5 McCrary 339. See also *supra*, VI, C, 2, a, (III), (B); *infra*, VI, H, 2, 6.

For slavery as an insuperable hindrance to bringing suit see Berry *v.* Berry, 22 S. W. 654, 15 Ky. L. Rep. 865 (holding that the statute had run after the freedom of the party); Price *v.* Slaughter, 1 Cinc. Super. Ct. (Ohio) 429; Matilda *v.* Crenshaw, 4 Yerg. (Tenn.) 299 (the last two cases holding that slavery was equivalent to imprisonment under the statute and that the statute ran only from emancipation, as to which point see also Wood *v.* Ward, 30 Fed. Cas. No. 17,965).

While immunity from suit exists, as in the case of an ambassador, it is held that limitations will not run during such period. Musurus Bay *v.* Gadban, [1894] 2 Q. B. 352, 63 L. J. Q. B. 621, 71 L. T. Rep. N. S. 51, 9 Reports 519, 42 Wkly. Rep. 545.

54. Ponder *v.* Cox, 26 Ga. 485, holding that a suit for freedom was not within any statute of limitations, and that from the state and condition of a negro entitled to freedom, but held in slavery, no presumption could be raised against him.

55. *Arkansas.*— Machin *v.* Thompson, 17 Ark. 199; Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248, as to plaintiffs.

Georgia.— Wynn *v.* Lee, 5 Ga. 217, as to plaintiff.

Illinois.— Stevenson *v.* Westfall, 18 Ill. 209 (limitation as to writs of error); King *v.* Hamilton, 16 Ill. 190 (as to plaintiff).

Indiana.— Royse *v.* Turnbaugh, 117 Ind. 539, 20 N. E. 485 [*overruling* Smith *v.* Wiley, 21 Ind. 224, as having been based upon a misapprehension of the statute relating to the absence of defendants], as to plaintiff.

Iowa.— Bruce *v.* Luck, 4 Greene 143, as to plaintiff.

Kentucky.— Selden *v.* Preston, 11 Bush 191, as to defendant.

Louisiana.— Tate *v.* Garland, 12 La. Ann. 525; McMasters *v.* Mather, 4 La. Ann. 418. But see *supra*, VI, E, 1, note 40.

Maryland.— Bannon *v.* Lloyd, 64 Md. 48, 20 Atl. 1023; Maurice *v.* Worden, 52 Md. 283, as to defendant.

Michigan.— Home L. Ins. Co. *v.* Elwell, 111 Mich. 689, 70 N. W. 334, as to plaintiff.

Missouri.— State *v.* Willi, 46 Mo. 236; Smith *v.* Newby, 13 Mo. 159, as to plaintiffs.

New Jersey.— Beardsley *v.* Southmayd, 15 N. J. L. 171, as to plaintiff.

New York.— See Landriggan *v.* New York etc., R. Co., 5 N. Y. Civ. Proc. 76, 12 Abb. N. Cas. 273.

South Carolina.— Maccaw *v.* Crawley, 59 S. C. 342, 37 S. E. 934; Southgate *v.* Goldthwaite, 1 Bailey 367; Blake *v.* Hayward, Bailey Eq. 208; Buchan *v.* James, Speers Eq. 375, as to plaintiffs.

Tennessee.— Christian *v.* John, 111 Tenn.

make no other exceptions.[56] By the statute of James an exception was made where the creditor was beyond the sea.[57] But this statute made no exception to its own operation where defendant departed out of the realm and could not be served with process, hence the courts held that his absence from the realm did not prevent the running of the statute.[58] This difficulty was remedied by the act of 4 and 5 Anne, in England, which declares that if any person against whom there shall be any cause of action be, at the time such action accrued, beyond the seas, the action may be brought against him on his return within the time limited for bringing such action.[59]

b. Absence Beyond Seas. Beyond seas as used in the English statute has been given a meaning as if it were synonymous with "out of the realm."[60] This construction has been adopted in many of the American authorities, so that perhaps the weight of authority in this country on the subject is in favor of the construction which extends the exception to persons out of the state,[61] or out of the par-

92, 76 S. W. 906, holding that a limitation act as to a particular form of action excepting its operation in the case of persons under disability had no reference to the disability of absence.

Texas.— Maverick *v.* Salinas, 15 Tex. 57, as to plaintiff.

United States.— Amy *v.* Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 L. ed. 953; Beaubien *v.* Beaubien, 23 How. 190, 16 L. ed. 484; Maryland *v.* Todd, 16 Fed. Cas. No. 9,220, 1 Biss. 69, as to defendants.

Canada.— Johnston *v.* Johnston, 10 Nova Scotia 128.

See 33 Cent. Dig. tit. "Limitation of Actions, § 439 *et seq.*

By agreement between debtor and creditor that a suit shall not be brought on an account until the debtor's return from a voyage to Europe limitations during such absence will be suspended. Holladay *v.* Littlepage, 2 Munf. (Va.) 316.

56. Southgate *v.* Goldthwaite, 1 Bailey (S. C.) 367. See also Fisher *v.* Tuller, 122 Ind. 31, 23 N. E. 523.

57. Langkopff *v.* West, 3 Harr. & M. (Md.) 197; Ewer *v.* Jones, 6 Mod. 26; Jolliffe *v.* Pitt, 2 Vern. Ch. 694, 23 Eng. Reprint 1050; Strithorst *v.* Græme, 2 W. Bl. 723, 3 Wils. C. P. 145, 21 James I, c. 16.

St. 25 Vict. c. 20, abolishes all exceptions and distinctions in favor of absentees. Hartley *v.* Maycock, 28 Ont. 508; Low *v.* Morrison, 14 Grant Ch. (U. C.) 192.

58. Amy *v.* Watertown, 130 U. S. 320, 9 S. Ct. 537, 32 L. ed. 953; Hall *v.* Wybank, 3 Mod. 311, 1 Show. 100. See also Fladong *v.* Winter, 19 Ves. Jr. 196, 34 Eng. Reprint 491.

59. Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401; Jolliffe *v.* Pitt, 2 Vern. Ch. 694, 23 Eng. Reprint 1050; 4 and 5 Anne, c. 16, § 19.

The principle on which such exception is founded is that no presumption can arise against a party for not suing in a foreign country, nor until there is somebody within the jurisdiction whom he can sue. Maurice *v.* Worden, 52 Md. 283 [*citing* 2 Greenleaf Ev. § 437]; French *v.* Davis, 38 Miss. 218.

60. Pancoast *v.* Addison, 1 Harr. & J. (Md.) 350, 2 Am. Dec. 520, where it is said that Scotland was beyond the seas before the union because it was out of the realm); Ruckmaboye *v.* Mottichund, 5 Moore Indian App. 234, 18 Eng. Reprint 884, 8 Moore P. C. 4, 14 Eng. Reprint 2, 32 Eng. L. & Eq. 84; Wilmot, J., in Rex *v.* Walker, 1 W. Bl. 286; Anonymous, 1 Show. 91, 1 Eng. Reprint 62 (holding that Ireland is beyond sea).

In Canada "beyond the seas" in the statute of Anne is not to be construed literally, but means out of the province of Ontario. Boulton *v.* Langmuir, 24 Ont. App. 618; Forsyth *v.* Hall, Draper (U. C.) 291.

61. *Alabama.*— Thomason *v.* Odum, 23 Ala. 480, as to the provision in Florida "beyond the seas as out of the country."

Arkansas.— Wakefield *v.* Smart, 8 Ark. 488; Field *v.* Dickinson, 3 Ark. 409, 36 Am. Dec. 458.

Florida.— Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91.

Georgia.— Denham *v.* Holeman, 26 Ga. 182, 71 Am. Dec. 198.

Indiana.— Stephenson *v.* Doe, 8 Blackf. 508, 46 Am. Dec. 489.

Maryland.— Pancoast *v.* Addison, 1 Harr. & J. 350, 2 Am. Dec. 520; Brent *v.* Tasker, 1 Harr. & M. 89.

Michigan.— See also Hulburt *v.* Merriam, 3 Mich. 144.

New Hampshire.— Galusha *v.* Cobleigh, 13 N. H. 79.

Ohio.— West *v.* Pickesimer, 7 Ohio 235, Pt. II; Richardson *v.* Richardson, 6 Ohio 125, 25 Am. Dec. 745.

South Carolina.— Alexander *v.* Burnet, 5 Rich. 189; Forbes *v.* Foot, 2 McCord 331, 13 Am. Dec. 732.

United States.— Alexandria Bank *v.* Dyer, 14 Pet. 141, 10 L. ed. 391; Shelby *v.* Guy, 11 Wheat. 361, 6 L. ed. 495; Murray *v.* Baker, 3 Wheat. 541, 4 L. ed. 454. But the federal court will adopt the construction of the state court that the exception means out of the United States. Davie *v.* Briggs, 97 U. S. 628, 24 L. ed. 1086; Green *v.* Neal, 6 Pet. 291, 8 L. ed. 402.

ticular jurisdiction so as not to be subject to its process.[62] But other states have given the phrase a more literal construction, or at least have extended the exemption to such persons only as were beyond the bounds of the United States,[63] and this construction has been said to be more in accordance with the signification of the words, and sanctioned by the ruling of the English courts, which held that the term was synonymous with beyond or out of the realm.[64] In some of the states other expressions have been added in the saving clause of the statute to obviate the necessity of construction and make the exception more explicit in its signification of out of the realm or United States, as "out of the limits of the United States,"[65] "without any of the United States";[66] or to make the saving clause more certainly mean without the state, although not without the United States.[67] In other states expressions have been substituted for "beyond the sea" so as to cover an absence out of the particular state merely, without the reach of the courts of the forum, as, "out of the state,"[68] "from the country."[69]

c. Absence of Plaintiff or Creditor — (i) *In General.* As already shown, the absence of plaintiff or creditor was made an exception to the operation of limitations in the statute of James,[70] and this or kindred provisions, especially in the earlier statutes, were adopted in this country,[71] or provisions which except the operation of the statute of limitations altogether in particular instances where

62. Maurice *v.* Worden, 52 Md. 283 (where it is said of the cases in which the terms "beyond the sea" and "out of the state" have been construed, that there is in reality no conflict among them, and they all tend to ascertain whether or not in the particular case the party could be reached by the process of the court); Mason *v.* Union Mills Paper Mfg. Co., 81 Md. 446, 32 Atl. 311, 48 Am. St. Rep. 524, 29 L. R. A. 273.

District of Columbia and Delaware.— Delaware is beyond seas in regard to the District of Columbia, within the meaning of the Maryland statute. Ferris *v.* Williams, 8 Fed. Cas. No. 4,750, 1 Cranch C. C. 475.

Counties in the District of Columbia are not beyond seas with respect to each other. Suckley *v.* Slade, 23 Fed. Cas. No. 13,588, 5 Cranch C. C. 617.

63. *Illinois.*— Mason *v.* Johnson, 24 Ill. 159, 76 Am. Dec. 740.

Iowa.— Darling *v.* Meachum, 2 Greene 602, referring to the territorial statute of Michigan.

Missouri.— Keeton *v.* Keeton, 20 Mo. 530; Fackler *v.* Fackler, 14 Mo. 432; Marvin *v.* Bates, 13 Mo. 217 [which cases *overrule* the earlier contrary decisions in Bedford *v.* Bradford, 8 Mo. 233; Shreve *v.* Whittlesey, 7 Mo. 473; King *v.* Lane, 7 Mo. 241, 37 Am. Dec. 187].

North Carolina.— State *v.* Harris, 71 N. C. 174; Earle *v.* McDowell, 12 N. C. 16; Whitlocke *v.* Walton, 6 N. C. 23.

Pennsylvania.— Gonder *v.* Estabrook, 33 Pa. St. 374; Kline *v.* Kline, 20 Pa. St. 503; Thurston *v.* Fisher, 9 Serg. & R. 288; Ward *v.* Hallam, 2 Dall. 217, 1 L. ed. 355.

Tennessee.— Pike *v.* Greene, 1 Yerg. 465.

64. Darling *v.* Meachum, 2 Greene (Iowa) 602.

A strictly literal construction was adopted in Connecticut in Gustin *v.* Brattle, Kirby (Conn.) 299, where it was held that absence at Halifax, although without the jurisdiction of the United States, is not beyond sea, being on the mainland.

65. Varney *v.* Grows, 37 Me. 306; McMillan *v.* Wood, 29 Me. 217 (holding, under such provision, that limitations did not commence to run against a citizen of New Brunswick until he should come within the limits of the United States); Tush-ho-yo-tubby *v.* Barr, 45 Miss. 189 (holding that the Indian Territory west of Arkansas was not without the limits of the United States under such a statutory exception, and that a resident in such territory was not absent from the United States).

66. Whitney *v.* Goddard, 20 Pick. (Mass.) 304, 32 Am. Dec. 216 (holding that "beyond sea, without any of the United States," did not include a citizen of another state who had never been in Massachusetts); Hulburt *v.* Merriam, 3 Mich. 144 (holding as in the last case under a similar statute).

67. Shelby *v.* Guy, 11 Wheat. (U. S.) 361, 6 L. ed. 495, where it is said that the statute of Virginia adds the words, "without the limits of the commonwealth," to the words "beyond sea," to make it more explicit in its meaning as embracing persons out of the state, although in the United States.

68. Maurice *v.* Worden, 52 Md. 283 (holding that process from the circuit court of Anne Arundel county could reach defendant while residing there, and that he could not be "considered out of the state," within the meaning of the act of limitations); Sleght *v.* Kane, 1 Johns. Cas. (N. Y.) 76 (holding that the debtor being within the British line during the war was to be deemed as out of the state during that time).

69. Mansell *v.* Israel, 3 Bibb (Ky.) 510; Graves *v.* Graves, 2 Bibb (Ky.) 207, 4 Am. Dec. 697, construing the statute as in substance the same as the statute of James.

70. See *supra*, VI, F, 2, a.

71. See *supra*, VI, F, 2, b. And see also

the parties are non-residents,[72] or which fix a special period of limitations for demands of non-residents.[73] But a saving statute excepting the time of absence of one against whom a cause accrues cannot be extended to embrace the absence of a party in whose favor the cause accrues,[74] although the mere position of the party as plaintiff or defendant in the action is not material.[75]

(II) *APPLICATION TO FOREIGNERS AND NON-RESIDENTS.* The exception in favor of creditors beyond seas, or without the limits of the United States, not being confined in terms to citizens, and similar saving clauses as to absent or non-

Wakefield *v.* Smart, 8 Ark. 488; Gustin *v.* Brattle, Kirby (Conn.) 299; Yoast *v.* Willis, 9 Ind. 548 (limitation peculiar to claim against heirs); Pate *v.* Barrett, 2 Dana (Ky.) 426; Varney *v.* Grows, 37 Me. 306; Von Hermert *v.* Porter, 11 Metc. (Mass.) 210; Wolf *v.* District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23, 60 N. W. 445; Lockwood *v.* Wildman, 13 Ohio 430; Reid *v.* Geoghehan, 1 Miles (Pa.) 204; Smith *v.* Mitchell, 1 Rice (S. C.) 316, 33 Am. Dec. 119; Ransdale *v.* Grove, 20 Fed. Cas. No. 11,570, 4 McLean 282; Savage *v.* U. S., 23 Ct. Cl. 255 (under U. S. Rev. St. § 1069, providing that limitations shall not run against a claim against the United States in favor of a person "beyond the seas" at the time it accrues).

Where the saving clause is repealed limitations run from that time (Brian *v.* Tims, 10 Ark. 597; Carneal *v.* Thompson, 9 Ark. 55; Watson *v.* Higgins, 7 Ark. 475; Pate *v.* Barrett, 2 Dana (Ky.) 426; Boyle *v.* Arledge, 3 Fed. Cas. No. 1,758, Hempst. 620); except where the repealing act defers the operation of the repeal on causes already accrued, to a day certain, in which case the exception is limited to the date fixed (Pruseux *v.* Welch, 20 Fed. Cas. No. 11,456).

In Louisiana it was held that prescription will not be suspended on account of the absence of the creditor from the domicile of the debtor, when it appears that it was in the power of the creditor to reach the domicile, and there bring suit in time to avoid the prescription of his debt. Duncan *v.* Duncan, 29 La. Ann. 829.

Actions within the equity of the provisions, although not expressly mentioned, are construed to be embraced in it. Reid *v.* Geoghehan, 1 Miles (Pa.) 204 (holding that the statute of James embraces actions on the case in assumpsit, although not expressly mentioned); U. S. Bank *v.* McKenzie, 2 Fed. Cas. No. 927, 2 Brock. 393; Rochtschilt *v.* Leibman, 2 Str. 836.

Foreign corporation.—The disability of being beyond the limits of the state is held to be one which can never be removed and therefore it is held the clause cannot apply to a foreign corporation because it would mean that the statute of limitations would not run against such a plaintiff, and such a construction would put a foreign corporation on a different and more advantageous footing than citizens of the state. Such corporations, however, come within the provision which limits the time within which non-residents may bring their actions. Tennessee Bank *v.* Armstrong, 12 Ark. 602; Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248. *Compare* U. S. Bank *v.* McKenzie, 2 Fed. Cas. No. 927, 2 Brock. 393, where it was held that an action by a bank of the United States brought in Virginia did not come within the saving clause of "beyond the sea, or out of the country," the corporation having an office in Virginia for the purpose of conducting its business, as authorized by its charter.

72. Bond *v.* Jay, 7 Cranch (U. S.) 350, 3 L. ed. 367, under an early Maryland statute.

73. Timmons *v.* White, 14 La. Ann. 151 (as to law prior to the act of 1848 putting residents and non-residents on the same footing); Shackleford *v.* Robinson, 10 La. Ann. 583; Thompson *v.* Scales, 11 La. 560; New Orleans *v.* Ripley, 11 La. 144; Goddard *v.* Urquhart, 6 La. 659; Southgate *v.* Goldthwaite, 1 Bailey (S. C.) 367; Yancey *v.* Stone, 9 Rich. Eq. (S. C.) 429. See also Deal *v.* Patterson, 12 La. Ann. 728, after the act of 1848, where the statute of limitations barred the remedy of the non-resident in that state.

Alienage.—To sustain a claim of the benefit of the exception in favor of aliens under the laws of the republic of Texas giving them a certain time to bring an action, it must appear that such aliens, if of foreign birth, did not reside in Texas on the day of the Declaration of Independence. Hughes *v.* Lane, 25 Tex. 356.

74. Royse *v.* Turnbaugh, 117 Ind. 539, 20 N. E. 485; Hulbert *v.* Hopkins, 33 Iowa 122, holding that a provision that limitations "shall cease to run in favor of any such soldier, and his sureties, during the time their property is exempt from attachment," etc., did not apply to plaintiffs in the military service, but only to defendants.

Statutes are independent.—Hatch *v.* Spofford, 24 Conn. 432, 441, as to the absence of plaintiff, where the court said: "The statute of James and Anne have no necessary connection with each other and scarce any relation to each other, but are independent and distinct and in Connecticut we have only the statute of Anne, at least so far as absence is involved."

75. Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206 (where defendant's set-off against a non-resident plaintiff was held to come within the exception as to absent debtors); Ruggles *v.* Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482; Hewlett *v.* Hewlett, 4 Edw. (N. Y.) 7. See also Howell *v.* Burnett, 11 Ga. 303; Case *v.* Frazier, 31 Kan. 689, 3 Pac. 497.

resident creditors, are not to be confined to such subjects or residents who may leave and return, but they are general and extend as well to foreigners who are constantly resident abroad or non-residents who have never been in the state.[76] The word "return," used in the statute to indicate the starting point of the running of the time cannot restrict the operation of the exception to those only who have been in the state.[77] Sometimes, however, the statutory exception is confined to citizens of the United States.[78]

(III) *PRESENCE OF AGENT.* The presence of an agent of a non-resident creditor does not except such creditor from the saving clause of the statute of limitations suspending its operation against such persons.[79]

(IV) *COMING OR RETURNING INTO JURISDICTION.* The moment plaintiff comes or returns into the jurisdiction, the operation of the saving clause ceases and that of limitation begins and continues irrespective of subsequent absences,[80] if the debtor also is present at the time,[81] and if the statutory disability is absence from the United States, a return to any part of the United States removes the disability and puts the limitation in operation.[82] It does not lie in plaintiff's

76. *Arkansas.*— Wilson *v.* Keller, 8 Ark. 507; Wakefield *v.* Smart, 8 Ark. 488; Field *v.* Dickinson, 3 Ark. 409, 36 Am. Dec. 458.

Florida.— Keech *v.* Enriquez, 28 Fla. 597, 10 So. 91.

Illinois.— White *v.* Hight, 2 Ill. 204.

Massachusetts.— Goetz *v.* Voelinger, 99 Mass. 504; Von Hemert *v.* Porter, 11 Metc. 210; Wilson *v.* Appleton, 17 Mass. 180; Hall *v.* Little, 14 Mass. 203.

Michigan.— Wolf *v.* District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23, 60 N. W. 445 (where the exception was "if any person be absent," etc.); Erskine *v.* Messicar, 27 Mich. 84.

United States.— Irving *v.* Sutton, 13 Fed. Cas. No. 7,077, 1 Cranch C. C. 567.

England.— Strithorst *v.* Græme, 2 W. Bl. 723, 3 Wils. C. P. 145.

Effect of retaining domicile.— In Louisiana it was held that where one leaving the state to act as a United States senator becomes, on resigning, a member of the cabinet and a foreign minister, he does not lose his domicile in the state and prescription runs against him as if actually within the state. Walden *v.* Canfield, 2 Rob. (La.) 466.

77. Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359; Wilson *v.* Appleton, 17 Mass. 180; Dwight *v.* Clark, 7 Mass. 515; Ruggles *v.* Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482 [*citing* Dupleix *v.* De Roven, 2 Vern. Ch. 540, 23 Eng. Reprint 950]; Strithorst *v.* Græme, 2 W. Bl. 723, 3 Wils. C. P. 145 (per Kent, C. J.); Chomqua *v.* Mason, 5 Fed. Cas. No. 2,693, 1 Gall. 342.

And the phrase "after the disability shall be removed," as indicating the time when the statute would begin to run, removes any ambiguity created by the use of the word "return" in the saving clause of the English statute as indicating when the statute is started. McMillan *v.* Wood, 29 Me. 217.

78. Fleming *v.* Culbert, 46 Pa. St. 498, where it appears that after the decision of Johnston *v.* Humphreys, 14 Serg. & R. (Pa.) 394, the statutory provision under which a foreign creditor was within the exception as beyond sea was repealed as to all creditors beyond sea except citizens of the United States.

79. Wilson *v.* Keller, 8 Ark. 507 (where the note sued on was executed and delivered to plaintiff within the state, and had ever since remained within the state, in the hands of his agent); Wilson *v.* Appleton, 17 Mass. 180; Hall *v.* Little, 14 Mass. 203; Lockwood *v.* Wildman, 13 Ohio 430; Lane *v.* Stennett, 4 U. C. Q. B. 440. But see George *v.* Gardner, 49 Ga. 441.

80. May *v.* Slaughter, 3 A. K. Marsh. (Ky.) 505; Smith *v.* Harrow, 3 Bibb (Ky.) 446; Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480; Faw *v.* Roberdeau, 3 Cranch (U. S.) 174, 2 L. ed. 402; Sturt *v.* Mellish, 2 Atk. 610, 26 Eng. Reprint 765; Torrance *v.* Privat, 9 U. C. Q. B. 570. See also Ralls *v.* Hughes, 1 Dana (Ky.) 407; Savage *v.* U. S., 23 Ct. Cl. 255.

Where the creditor dies abroad, being a foreigner when the cause accrued, the statute runs from the appointment of the administrator in the state and not from the accrual of the action. Johnston *v.* Humphreys, 14 Serg. & R. (Pa.) 394.

81. Faw *v.* Roberdeau, 3 Cranch (U. S.) 174, 2 L. ed. 402, so holding under the Virginia statute, where the coming into the jurisdiction is for temporary purposes. But it has been held otherwise where both parties were absent when the cause accrued; that plaintiff's return starts the statute without regard to defendant's presence. Lavasseur *v.* Ligniez, 1 Strobh. (S. C.) 326. So in Vans *v.* Higginson, 10 Mass. 29, the same rule seems to be announced, the court holding that the statute is started by plaintiff's return, although plaintiff and defendant had not been present at the same time. The reporter of the opinion says the ruling is without authority, and but for the South Carolina case *supra*, his view is probably correct, else where the provisions of James and Anne are followed in the statutes if a plaintiff is absent and returns he loses the privilege of the defendant's absence.

82. Varney *v.* Grows, 37 Me. 306.

mouth to say that he did not remain in the jurisdiction long enough to sue, for that was his own choice.[83]

(v) *Subsequent Departure.* Where the disability is the absence at the time of the accrual of the action, a subsequent departure cannot interrupt the running of the statute.[84]

(vi) *Absence of One of Co-Plaintiffs.* Under the exception as to creditors beyond sea if one plaintiff be abroad and the other in England when the action accrues, the action must be brought within the statutory period after the cause of action arises.[85] But on the other hand if all are absent when the action accrues so as to come within the exception, then the return of one is held not to start the statute.[86]

d. Absence of Debtor or Defendant — (i) *In General.* The statute of Anne[87] was adopted in the early legislation of this country,[88] and various kindred provisions have been enacted from time to time looking to the suspension of the operation of limitations either when the debtor is absent at the accrual of the action or departs thereafter or in both such contingencies, until he returns into the jurisdiction.[89] But a saving clause embracing only the absence of plaintiff or

83. Torrance *v.* Privat, 9 U. C. Q. B. 570.

Commencing suit as a coming in.— Where a statute provides for the liability of heirs, etc., to the amount of the decedent's estate received, to any creditor whose claim remains unpaid, and who, six months prior to such final settlement, was out of the state, but that such suit must be brought within one year after the disability is removed, the commencing and continuing a suit for the claim down to within six months of the action against the heirs was held to be a coming into the state. Yoast *v.* Willis, 9 Ind. 548.

84. Gustin *v.* Brattle, Kirby (Conn.) 299; Phillips *v.* Sinclair, 20 Me. 269; Cobham *v.* Neill, 3 N. C. 5; Hill *v.* Smith, 1 Wils. Ch. 134, 37 Eng. Reprint 60. But see Finnell *v.* Southern Kansas R. Co., 33 Fed. 427.

But where a non-resident is excepted entirely in particular forms of action, as in case of account between merchants, etc., under an early Maryland statute, plaintiff's coming into the province was held not to bring him within the operation of limitations in analogy to the effect of coming in under the saving clause suspending the operation of limitations while the debtor is beyond the sea; that in order to start the statute of limitations the plaintiff must become a resident. Bond *v.* Jay, 7 Cranch (U. S.) 350, 3 L. ed. 367.

85. Dickey *v.* Armstrong, 1 A. K. Marsh. (Ky.) 39 (distinguishing between joint and several causes of action); Perry *v.* Jackson, 4 T. R. 516 (which cases construe the terms of the statute "any person or persons" in the saving clause, the further reason being assigned in the last case that one plaintiff can act for the others). But see Wolf *v.* District Grand Lodge No. 6, I. O. B. B., 102 Mich. 23, 60 N. W. 445, where under a saving clause that if any person entitled to bring a personal action is absent from the United States and from the British provinces of North America at the time the cause of action accrues, the statute of limitations shall not run until the disability is removed, it was held that limitations did not run against the liability of an endowment association on its policy where one of the beneficiaries lived in Germany, and died there, leaving as heirs residents of the United States, until after such beneficiary's death.

86. Jones *v.* Henry, 3 Litt. (Ky.) 46. See also Hopkirk *v.* Bell, 4 Cranch (U. S.) 164, 2 L. ed. 583; Greig *v.* Baird, 1 U. C. Q. B. 472.

87. See *supra*, VI, F, 2, a; b.

After death beyond seas.— In Story *v.* Fry, 6 Jur. 1029, 11 L. J. Ch. 373, 1 Y. & Coll. 603, 62 Eng. Reprint 1035, 20 Eng. Ch. 603, the debtor was a resident of India, when the action accrued, where he died. As soon as circumstances would permit after his death in India, his will was proved by his executors in England; and, within six years after his death, a creditors' bill was filed against the executors; and it was held that plaintiff was not barred by the statute of limitations.

88. See *supra*, VI, F, 2, a, b. See also Hatch *v.* Spofford, 24 Conn. 432; Alexander *v.* Burnet, 5 Rich. (S. C.) 189; Lavasseur *v.* Ligniez, 1 Strobh. (S. C.) 326.

89. See the statutes generally, and the cases cited in this section. See also the following cases:

Alabama.— Steen *v.* Swadley, 126 Ala. 616, 28 So. 620.

Alaska.— Van Schuyver *v.* Hartman, 1 Alaska 431.

California.— Rogers *v.* Hatch, 44 Cal. 280; Palmer *v.* Shaw, 16 Cal. 93.

Delaware.— Wells *v.* Jones, 2 Houst. 329; Geylin *v.* De Villeroi, 2 Houst. 311.

Georgia.— Simpson *v.* Wicker, 120 Ga. 418, 47 S. E. 965; Payne *v.* Bowdrie, 110 Ga. 549, 36 S. E. 89.

Illinois.— Janeway *v.* Burton, 201 Ill. 78, 66 N. E. 337; Wooley *v.* Yarnell, 142 Ill. 442, 32 N. E. 891; Ambler *v.* Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Locke *v.* Caldwell, 91 Ill. 417; Parks *v.* Cadwallader, 53 Ill. App. 236.

Indiana.— Wood *v.* Bissell, 108 Ind. 229, 9 N. E. 425; Lagow *v.* Neilson, 10 Ind. 183.

creditor will not suspend the operation of limitations because of the debtor's absence.[90]

(II) *APPLICATION OF STATUTORY EXCEPTION*—(A) *In General.* Where the statutory exception of absence of a defendant or debtor is general in terms it will not be confined to particular forms or classes of actions.[91] It is applied to actions

Iowa.— Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021; Pratt *v.* Hubbard, 1 Greene 9.

Kansas.— Williams *v.* Metropolitan St. R. Co., 68 Kan. 17, 74 Pac. 600, 104 Am. St. Rep. 377, 64 L. R. A. 794; Ament *v.* Lowenthall, 52 Kan. 706, 35 Pac. 804; Conlon *v.* Lamphear, 37 Kan. 431, 15 Pac. 600; Bonifant *v.* Doniphan, 3 Kan. 26.

Kentucky.— Craig *v.* Anderson, 96 Ky. 425, 29 S. W. 311, 16 Ky. L. Rep. 603; Seldon *v.* Preston, 11 Bush 191; Hampton *v.* France, 32 S. W. 950, 33 S. W. 826, 17 Ky. L. Rep. 980.

Louisiana.— Rist *v.* Hagan, 8 Rob. 106; Ogden *v.* Nichel, 4 Rob. 155, as to action of rehibition. See *supra*, VI, E, 2.

Maine.— Palmer *v.* Morse, (1887) 11 Atl. 601; Peyret *v.* Coffee, 48 Me. 319.

Maryland.— Hysinger *v.* Baltzell, 3 Gill & J. 158, as to the act of 1763. But the code provision that debtors absenting themselves from the state, or wandering from county to county, so that creditors may be uncertain of finding them, shall not have the benefit of any limitation prescribed by law, is held not to apply to a case in which there is no element of fraud nor any concealment of residence on the part of the debtor. Fink *v.* Zepp, 76 Md. 182, 24 Atl. 538; Maurice *v.* Worden, 52 Md. 283. See also *supra*, VI, E.

Massachusetts.— Lawrence *v.* Bassett, 5 Allen 140.

Michigan.— Hoffman *v.* Churchill, 74 Mich. 235, 41 N. W. 907.

Minnesota.— Drake *v.* Bigelow, 93 Minn. 112, 100 N. W. 664; Duke *v.* Balme, 16 Minn. 306; Hoyt *v.* McNeil, 13 Minn. 390.

Mississippi.— Sledge *v.* Jacobs, 58 Miss. 194; Withers *v.* Bullock, 53 Miss. 539; Fisher *v.* Fisher, 43 Miss. 212.

Missouri.— Sauter *v.* Leveridge, 103 Mo. 615, 15 S. W. 981; Garth *v.* Robards, 20 Mo. 523, 64 Am. Dec. 203. See also *supra*, VI, E, 2.

Nebraska.— Hartley *v.* Crawford, 12 Nebr. 471, 11 N. W. 729.

New Hampshire.— Dudley *v.* Kimball, 17 N. H. 498.

New Jersey.—Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206.

New Mexico.— Lindauer Mercantile Co. *v.* Boyd, (1902) 70 Pac. 568.

New York.— Hart *v.* Kip, 148 N. Y. 306, 42 N. E. 712; Cole *v.* Jessup, 10 N. Y. 96; Didier *v.* Davison, 2 Barb. Ch. 477; Hewlett *v.* Hewlett, 4 Edw. 7.

North Carolina.— Blue *v.* Gilchrist, 84 N. C. 239.

North Dakota.— Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (1905) 103 N. W. 915.

Ohio.— McBride *v.* Moore, Wright 524.

Oklahoma.— Keagy *v.* Welmington Nat. Bank, 12 Okla. 33, 69 Pac. 811.

Oregon.— Rhotan *v.* Mendenhall, 17 Oreg. 199, 20 Pac. 49.

Rhode Island.— Cottrell *v.* Kenney, 25 R. I. 99, 54 Atl. 1010; Crocker *v.* Arey, 3 R. I. 178.

South Carolina.— Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

Tennessee.— Kempe *v.* Bader, 86 Tenn. 189, 6 S. W. 126; Carlin *v.* Wallace, 13 Lea 571.

Texas.— Huff *v.* Crawford, 88 Tex. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763; Liner *v.* J. B. Watkins Land Mortg. Co., 29 Tex. Civ. App. 187, 68 S. W. 311; O'Neal *v.* Clymer, (Civ. App. 1900) 61 S. W. 545; Murphy *v.* Wallace, 3 Tex. App. Civ. Cas. § 430.

Utah.— Burnes *v.* Crane, 1 Utah 179.

Vermont.— Davis *v.* Marshall, 37 Vt. 69.

Virginia.— Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33. See also *supra*, VI, E, 2.

Washington.— Meek *v.* White, 26 Wash. 491, 67 Pac. 256; Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

West Virginia.— Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

Wisconsin.— Oshkosh Nat. Bank *v.* Davis, 100 Wis. 240, 75 N. W. 1005; Brown *v.* Bicknell, 1 Pinn. 226, 39 Am. Dec. 299.

United States.— Dorr *v.* Swartwout, 7 Fed. Cas. No. 4,010, 1 Blatchf. 179; Richardson *v.* Curtis, 20 Fed. Cas. No. 11,781, 3 Blatchf. 385 (which cases are as to an early New York statute); Wood *v.* Ward, 30 Fed. Cas. No. 17,965 (as to the statute of Ohio).

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 440, 450 *et seq.*

Actions which are already barred when such a statute is enacted do not come within its provisions. Lowry *v.* Keyes, 14 Vt. 66.

90. Nathans *v.* Bingham, 1 Miles (Pa.) 164, under an early statute copied from the statute of James.

91. Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271. See also Peyret *v.* Coffee, 48 Me. 319.

Application to other particular actions.— *A married woman* may have the benefit of the provision which contains no exception in favor of any person or class of persons. Hodges *v.* Darden, 51 Miss. 199.

The time limited for suing for a penalty after payment of usury in North Carolina is to be read with the section of the code providing that, when defendant departs from or resides out of the state, the time of his absence shall not be deemed part of the time limited for commencement of the action. Williams *v.* Iron Belt Building, etc., Assoc., 131 N. C. 267, 42 S. E. 607.

Right to execution.— In determining whether the right to an execution on a judgment is barred by the fifteen-year statute of limitations, the time of defendant's absence from the state since the last execution was

relating to realty,[92] as well as to actions founded on the right to the possession of personalty.[93] But distinct statutes governing particular rights have been considered to be complete in themselves and where such statutes fix absolutely the time for bringing the action or proceeding, the saving clause as to absentees contained in the general statute is held not to operate;[94] and so where the saving clause is confined to the forms of action to which only the limitation act is applicable.[95]

issued is to be deducted, as is done in determining whether an action to enforce the judgment is barred. Brittain *v.* Lankford, 110 Ky. 484, 61 S. W. 1000, 22 Ky. L. Rep. 1899.

Absence of judgment debtor comes within the exception, in considering the limitation applicable to a proceeding for the enforcement of a judgment. Newlove *v.* Pennock, 123 Mich. 260, 82 N. W. 54; Shelden *v.* Barlow, 108 Mich. 375, 66 N. W. 338; Wallace *v.* Field, 56 Mich. 3, 22 N. W. 91.

A suit to declare a resulting trust by the heirs of a widow against her son who, soon after he purchased property with funds belonging to her husband's estate, and wrongfully took title in his own name, left the state, and never lived therein thereafter, is within the protection of the saving clause as to absence. McMurray *v.* McMurray, 180 Mo. 526, 79 S. W. 701.

Revival.— The saving clause is held to apply to one who was a party to a suit, and was absent from the state over one year prior to a proceeding to revive the decree therein. Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

Absence preventing tender.— Where a vendor leaves the state before execution of the deed and payment of the purchase-money, the vendee's failure to tender the purchase-money during such absence does not affect his right to specific performance under the statute which provides that when the cause of action accrues against a person who is out of the state, the action may be commenced within the time limited after his return. Gill *v.* Bradley, 21 Minn. 15.

In Louisiana the maxim *contra non valentem agere, non currit prescriptio*, from the Spanish law, is applied, in an action of rehibition. Murphy *v.* Gutierez, 20 La. Ann. 407; Morgan *v.* Robinson, 12 Mart. O. S. 76, 13 Am. Dec. 366. Under an early statute prescription against an action of rehibition ran in favor of a vendor not domiciled in the state only while within its limits. Rist *v.* Hagan, 8 Rob. 106; Ogden *v.* Michel, 4 Rob. 155.

Presumption of payment distinguished.— In North Carolina it is held that the proviso declaring that plaintiff may have his action on the return of a defendant who was non-resident at the accrual of the action, within the time limited for such actions, had exclusive reference to the statute of limitations, and not to cases of presumed payment arising from lapse of time under another statute. Campbell *v.* Brown, 86 N. C. 376, 41 Am. Rep. 464.

92. Lagow *v.* Neilson, 10 Ind. 183 (holding that the concluding clause of the statute, however, providing that when an action is barred by the laws of the place where defendant resided such bar shall be a defense in Indiana, does not apply in regard to actions for realty in Indiana); Chicago, etc., R. Co. *v.* Cook, 43 Kan. 83, 22 Pac. 988; Morrell *v.* Ingle, 23 Kan. 32; Ard *v.* Wilson, 8 Kan. App. 471, 54 Pac. 511; Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44; Huff *v.* Crawford, 88 Tex. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763 [*overruling* in effect Hunton *v.* Nichols, 55 Tex. 217]; Wilson *v.* Daggett, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766]. But see otherwise in St. Paul, etc., R. Co. *v.* Minneapolis, 45 Minn. 400, 48 N. W. 22; St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17; Omaha, etc., Trust Co. *v.* Parker, 33 Nebr. 775, 51 N. W. 139, 29 Am. St. Rep. 506, in which state the ruling is upon the express terms of the statute that the saving clause shall not extend the period in which actions *in rem* may be commenced and is applied to a suit to quiet title.

93. Bohannan *v.* Chapman, 13 Ala. 641.

Foreign statute creating title see *supra*, IV, A.

94. Beebe *v.* Doster, 36 Kan. 666, 14 Pac. 150 (construing the limitation in the statute governing a proceeding to set aside or defeat a tax deed as excluding the operation of the saving clause in the general statute, although such special statute was differently construed in Case *v.* Frazier, 31 Kan. 689, 3 Pac. 497; Morrell *v.* Ingle, 23 Kan. 32, and Watkins *v.* Reed, 30 Fed. 908); Wetyen *v.* Fick, 178 N. Y. 223, 70 N. E. 497.

95. Clark *v.* Maning, 4 Ill. App. 649; Gass *v.* Bean, 5 Gray (Mass.) 397, where the saving clause in the limitation act applicable to particular forms of actions was held inapplicable to scire facias against bail. See also Clements *v.* Brown, 31 Miss. 93; Maitland *v.* Keith, 30 Miss. 499, in which cases the conclusion that the statute of limitations was not suspended by the reason of the non-residence of defendants was reached by the construction of the act in which the particular limitation provided for did not save its operation in the particular instance because such saving clause referred to limitations previously provided for in the act, whereas the limitation as to the particular action in hand was contained in a subsequent section of the act, and these cases were therefore *distinguished* in the subsequent case of Kennard *v.* Alston, 62 Miss. 763, involving the limitation applicable to the same kind of action, in that in the later statute the saving clause referred to all cases mentioned in the chapter which included that under consideration.

(B) *Property in Jurisdiction* — (1) IN THE ABSENCE OF STATUTORY QUALIFICATION. Where the statutory exception relates merely to personal presence, the presence or absence of property is not material and the fact that the absent debtor has property in the jurisdiction will not take the case out of the saving clause.[96]

(2) STATUTORY EXCEPTION IN SAVING CLAUSE — (a) IN GENERAL. In some of the states, in the earlier statutes especially, the absence provided for in the saving clause was made to suspend the operation of limitations only in case the debtor left no property in the jurisdiction out of which the debt could be satisfied.[97] Under such statutes the property must have been unencumbered and subject to be levied on for the debtor's debt,[98] and sufficient to satisfy the debt,[99] and the fact of the presence of such property and the debtor's ownership must have been so notorious as to enable the creditor by the use of common diligence to find and attach it.[1]

(b) PROCEEDINGS IN REM EXPRESSLY EXCLUDED. Sometimes it is expressly provided by the statute that the saving clause shall not extend the period within which actions *in rem* may be commenced.[2]

(c) *As Affecting Enforcement of Liens* — (1) IN GENERAL. Personal absence being contemplated by the saving clauses exceepting the operation of limitations pending defendant's absence, the statutory exception has been applied in proceedings for enforcement of liens where the rights of the lienor are governed by the rules applicable to the debt, as in the case of a vendee's absence, in proceedings to enforce the vendor's lien,[3] or of the owner's absence, in proceedings to enforce a

96. *Alabama.*— Wright *v.* Strauss, 73 Ala. 227; Wright *v.* Preston, 55 Ala. 570.

Connecticut.— Waterman *v.* Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240.

Kansas.— Conlon *v.* Lanphear, 37 Kan. 451, 15 Pac. 600.

Kentucky.— Craig *v.* Anderson, 96 Ky. 425, 29 S. W. 311, 16 Ky. L. Rep. 603.

Massachusetts.— Milton *v.* Babson, 6 Allen 322; Seymour *v.* Deming, 9 Cush. 527.

Mississippi.— Fisher *v.* Fisher, 43 Miss. 212.

Missouri.— Hancock *v.* Heugh, 1 Mo. 678 (under early statutes, excepting absconding or removal, and holding that the statute does not run, although the creditor does not commence an action by attachment); Lackland *v.* Smith, 5 Mo. App. 153.

North Carolina.— Grist *v.* Williams, 111 N. C. 53, 15 S. E. 889, 32 Am. St. Rep. 782.

Texas.—Ayres *v.* Henderson, 9 Tex. 539.

Washington.—Denny *v.* Sayward, 10 Wash. 422, 39 Pac. 119.

In Louisiana the maxim *contra non valentem agere non currit prescriptio* was held not to apply where, on leaving the state, defendant left real property, and an agent to represent him, and returned before the period of prescription had fully run. Zacharie *v.* Sproule, 22 La. Ann. 325. See also *supra*, VI, E.

Appearance in attachment suit.— In Wells *v.* Jones, 2 Houst. (Del.) 329, it was held that, although a suit commenced by foreign attachment on a cause of action which accrued when defendants were non-residents, and before they had come into the state, did not fall within the literal terms of the saving clause as to persons out of the state when the action accrues, the suit must be considered within the exception, and to be saved thereby, and to be taken out of the limitation, if defendant afterward appeared in court within the time limited, and gave bail for dissolution of the attachment.

97. Crosby *v.* Wyatt, 23 Me. 156; Dwight *v.* Clark, 7 Mass. 515; Dow *v.* Sayward, 14 N. H. 9; Sissons *v.* Bicknell, 6 N. H. 557; Batchelder *v.* Barber, 67 Vt. 254, 31 Atl. 293; Russ *v.* Fay, 29 Vt. 381; Tucker *v.* Wells, 12 Vt. 240.

98. Dow *v.* Sayward, 14 N. H. 9 (holding that a legal title in the debtor as trustee is not sufficient); Watts *v.* Kavanagh, 35 Vt. 34 (holding that money in the hands of a third person is not sufficient when the debt is of such an amount as that it cannot be reached by trustee process); Hill *v.* Bellows, 15 Vt. 727.

The property must remain during the period of the absence. Dow *v.* Sayward, 12 N. H. 271, 14 N. H. 9; Sissons *v.* Bicknell, 6 N. H. 557; Royce *v.* Hurd, 24 Vt. 620.

99. Munroe *v.* Potter, 65 Vt. 234, 26 Atl. 901; Royce *v.* Hurd, 24 Vt. 620; Hill *v.* Bellows, 15 Vt. 727.

1. Thompson *v.* Reed, 75 Me. 404 (which case, however, did not involve the point, being after the statute in that state was changed); Crosby *v.* Wyatt, 23 Me. 156; Little *v.* Blunt, 16 Pick. (Mass.) 359; Dow *v.* Sayward, 12 N. H. 271; Royce *v.* Hurd, 24 Vt. 620; Wheeler *v.* Brewer, 20 Vt. 113.

Actual knowledge is not necessary if by diligence the creditor might have acquired it. Tucker *v.* Wells, 12 Vt. 240. See also Stoughton *v.* Dimick, 23 Fed. Cas. No. 13,500, 3 Blatchf. 356, holding the facts sufficient to charge plaintiff with knowledge if he had exercised diligence.

2. Lantry *v.* Parker, 37 Nebr. 353, 55 N. W. 962.

3. Trotter *v.* Erwin, 27 Miss. 772 (upon the ground that the vendor is entitled to all

mechanic's lien.[4] On the other hand where the statute creating a judgment lien fixes and declares the period for which it may continue, it is held that the lien ceases at the expiration of this period, no matter where the residence of the parties in interest or the owners of the land may be, and the general limitation act, with the saving clause as to absent parties, has no application.[5]

(2) MORTGAGES — (a) ABSENCE OF MORTGAGOR. Upon the principle that so long as a mortgage indebtedness exists as a binding obligation the mortgage security may be enforced, the absence of a mortgagor falls within the exception of the statutory provision saving the operation of limitations on account of the absence of the person against whom the cause of action accrues.[6] This is true also because the proceeding to foreclose is not an action *in rem*,[7] but where there is no personal

the benefits of the exceptions touching the collection of the debt, although the mode of collection may be by the enforcement of an equitable lien); Falwell *v.* Hening, 78 Tex. 278, 14 S. W. 613.

4. Leeds Lumber Co. *v.* Haworth, 98 Iowa 463, 67 N. W. 383, 60 Am. St. Rep. 199. But see otherwise in Clark *v.* Manning, 4 Ill. App. 649, upon a construction of the saving clause in the statute of that state as applicable only to limitations provided in the particular chapter of the statute embracing the saving clause.

5. Albee *v.* Curtis, 77 Iowa 644, 42 N. W. 508.

As execution may issue at regular intervals and thus keep alive the judgment, it is held that the statute of limitations will run against a judgment notwithstanding absence of the judgment creditor during the whole period. Smalley *v.* Bowling, 64 Kan. 818, 68 Pac. 630. And the absence of a grantee of a judgment debtor is not within the exception of the saving clause as to absent parties where the judgment has not been kept alive and such absence is effectual to bar the lien of the judgment for purchase-money. Miller *v.* Anders, 21 Tex. Civ. App. 72, 51 S. W. 897.

6. *California.*— Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91; Wood *v.* Goodfellow, 43 Cal. 185.

Illinois.— Emory *v.* Keighan, 94 Ill. 543 (as to the exercise of a power of sale under a mortgage); Locke *v.* Caldwell, 91 Ill. 417.

Iowa.— Robertson *v.* Stuhlmilier, 93 Iowa 326, 61 N. W. 986; Brown *v.* Rockhold, 49 Iowa 282; Clinton County *v.* Cox, 37 Iowa 570, which cases are based upon the theory that the mortgage is a mere incident of the debt.

Kansas.— Smith *v.* Perkins, (App. 1901) 63 Pac. 297.

Minnesota.— Foster *v.* Johnson, 44 Minn. 290, 46 N. W. 350; Whalley *v.* Eldridge, 24 Minn. 358. In Hill *v.* Townley, 45 Minn. 167, 47 N. W. 653, it appears that the rule was changed by statute fixing the period of limitation for such actions and providing that it should not be enlarged or extended by reason of any non-residence.

Mississippi.— Hunt *v.* Belknap, 78 Miss. 76, 28 So. 751.

New York.— Simonson *v.* Vafis, 36 N. Y. App. Div. 473, 55 N. Y. Suppl. 449, where the rule was applied notwithstanding the statutory provision permitting service of process by publication.

North Dakota.— Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (1905) 103 N. W. 915.

The mortgagor cannot take advantage of his own absence to extend the period of redemption upon the ground that such absence extended the time within which the mortgage might be foreclosed. Parsons *v.* Noggle, 23 Minn. 328.

Absence of mortgagee.— Where the mortgagee in a first mortgage purchases the land at foreclosure sale, the absence of the mortgagee in a second mortgage will suspend the operation of the statute of limitations against an action by such purchaser to foreclose the second mortgage. Foster *v.* Johnson, 44 Minn. 290, 46 N. W. 350.

Against assignor of mortgage note.— If a mortgagee assigned a mortgage note and guarantees its payment, he cannot take any greater advantage from the expiration of time than the maker, and the latter's absence will suspend the operation of the statute as against the assignor in favor of his assignee. Spink *v.* Newby, 64 Kan. 883, 67 Pac. 437.

Duration of suspension.— The removal, absence, and death of a debtor do not amount to an indefinite suspension of the operation of limitations. Where the maker of a note secured by mortgage removes from the state and dies without returning and the creditor could have procured administration after the lapse of fifty days from the debtor's death and the statute had been running for some time before the debtor left the state and ten years elapsed after his death before the action was begun to foreclose the mortgage, it was held that the five-year statute barred the action. Kulp *v.* Kulp, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550. See *supra*, VI, C, 2, a, (II), (A), (B).

Deficiency judgment.— The absence of a judgment debtor in a judgment for a deficiency will be taken out of the time limiting proceedings for the enforcement of a judgment. Sheldon *v.* Barlow, 108 Mich. 375, 66 N. W. 338; Wallace *v.* Field, 56 Mich. 3, 22 N. W. 91.

7. Whalley *v.* Eldridge, 24 Minn. 358; Osborne *v.* Randall, 7 N. Y. Civ. Proc. 323; Colonial, etc., Mortg. Co. *v.* Flemington, (N. D. 1905) 103 N. W. 929.

liability for the debt on the part of the mortgagor or owner, it is held that absence of the owner of the property will not suspend the operation of the statute.[8] Where the proceeding to foreclose is *in rem*, however, the saving clause of the statute is held to be inapplicable and non-residence or absence, as the case may be, will not interfere with the running of limitation.[9] The application to an absent mortgagor of the rule that the saving clause excepting the absence or departure of a defendant or debtor prevents the operation of limitations has been extended so as to suspend the operation of the statute even as against a grantee of the absent mortgagor upon the theory that the remedy on the mortgage cannot be barred as long as that upon the debt is saved.[10] This doctrine is denied, however, in a number of well considered cases, and upon the theory that interests in mortgaged premises acquired subsequently to the mortgage constitute property and that the owners thereof stand in the same relation to the mortgage by the original owner as if their property was bound as collateral security,[11] the statute is not suspended as to such owners, although it is suspended as to the remedy against the original mortgagor.[12] The absence of a subsequent owner who is not personally liable for the mortgage debt will not stop the running of the statute.[13]

(b) Absence of Obligor in Bond Secured by Collateral Mortgage. So where property is bound as collateral security for the payment of a mortgage debt of another, evidenced by a bond in which the obligor is not personally liable for the original debt, the absence of the obligor will not suspend the operation of limitation against the foreclosure of a mortgage.[14]

(d) *Application to Residents and Others*—(1) Provisions Expressly Confined to Residents. Where the statutory exception is expressly directed to the absence of residents at the time of the accrual of the cause of action mere absence of a debtor who is not a resident will not suspend or prevent the running of limitations.[15]

(2) Provisions Necessarily Confined to Residents. Other provisions, although not in express terms, by necessary implication confine the exception

8. See Hogaboom *v.* Flower, 67 Kan. 41, 72 Pac. 547, where this seems to be recognized, although the owner is the grantee of the mortgagee in the particular case. But see Osborne *v.* Randall, 7 N. Y. Civ. Proc. 323.

9. Hurley *v.* Cox, 9 Nebr. 230, 2 N. W. 705 (where the statute provides that proceedings *in rem* shall not come within the operation of such saving clause); Anderson *v.* Baxter, 4 Oreg. 105; Eubanks *v.* Leveridge, 8 Fed. Cas. No. 4,544, 4 Sawy. 274 (under the Oregon statute). But see otherwise where the case arose before the statute taking proceedings *in rem* out of the operation of the saving clause attached to it. Seymour *v.* Street, 5 Nebr. 85.

10. Richey *v.* Sinclair, 167 Ill. 184, 47 N. E. 364; Robertson *v.* Stuhlmiller, 63 Iowa 326, 61 N. W. 986; Smith *v.* Perkins, (Kan. App. 1901) 63 Pac. 297 (where plaintiff was in possession as grantee of the mortgagor); Whalley *v.* Eldridge, 24 Minn. 358.

But where there is no personal liability upon the mortgagor or his remote grantees or assignees who required their interest in the equity of redemption after the cause of action had accrued, the saving clause has no application. Von Campe *v.* Chicago, 140 Ill. 361, 29 N. E. 892.

11. Filipini *v.* Trobock, 134 Cal. 441, 66 Pac. 587; Watt *v.* Wright, 66 Cal. 202, 5 Pac. 91; Wood *v.* Goodfellow, 43 Cal. 185.

12. Bush *v.* White, 85 Mo. 339; Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (N. D. 1905) 103 N. W. 915; Arthur *v.* Screven, 39 S. C. 77, 17 S. E. 640; George *v.* Butler, 26 Wash. 456, 67 Pac. 263, 90 Am. St. Rep. 756, 57 L. R. A. 396.

Where the deed to the subsequent grantee is unrecorded, and the mortgagee has no actual notice of the conveyance, it is held that the case should be an exception to the rule stated in the text and the statute will not run in the absence of the mortgagor. Denny *v.* Palmer, 26 Wash. 469, 67 Pac. 268, 90 Am. St. Rep. 766.

13. Hogaboom *v.* Flower, 67 Kan. 41, 72 Pac. 547.

14. Fowler *v.* Wood, 78 Hun (N. Y.) 304, 28 N. Y. Suppl. 976 [*affirmed* in 150 N. Y. 584, 44 N. E. 1124].

15. Bybee *v.* Poynter, 117 Ky. 109, 77 S. W. 698, 25 Ky. L. Rep. 1251; O'Bannon *v.* O'Bannon, 13 Bush (Ky.) 583; Selden *v.* Preston, 11 Bush (Ky.) 191; Clarke *v.* Seay, 51 S. W. 589, 21 Ky. L. Rep. 394; Carter *v.* Carter, 16 S. W. 589, 13 Ky. L. Rep. 215; Orr *v.* Wilmarth, 95 Mo. 212, 8 S. W. 258; Zoll *v.* Carnahan, 83 Mo. 35; Fike *v.* Clark, 55 Mo. 105; Scroggs *v.* Daugherty, 53 Mo. 497; Thomas *v.* Black, 22 Mo. 330 [*overruling* Tagart *v.* State, 15 Mo. 209]; Mathews *v.* Appleberry, 57 Mo. App. 615; Mastin *v.* Tilleston, 33 Mo. App. 622.

to residents, as an exception of absence of one who lives out of the jurisdictional limits of the state. The absence of a non-resident at the accrual of the action does not fall within the exception;[16] and so under a provision saving the period of absence of, or after departure by, the person who had resided in the state, a non-resident who had never resided in the state is not affected.[17]

(3) PROVISIONS EXPRESSLY EXCEPTING NON-RESIDENTS. In several states the saving clause itself excepts the operation of the statute only when the cause accrues against a non-resident.[18]

(4) GENERAL PROVISIONS AS TO ABSENCE — (a) CONFINED TO RESIDENTS BY CONSTRUCTION. In some jurisdictions the provision which in substance saves the operation of the statute of limitations until the return of a defendant or debtor who is absent when the cause of action accrues, or who shall thereafter depart, is confined in its application to such persons only who are residents of the state when the cause accrues.[19]

(b) EXTENDED TO NON-RESIDENTS — aa. *In General.* The construction last stated is opposed to the weight of authority. The rule most generally adopted is that under the usual saving clauses excluding the time of absence where the cause of action accrues against one while he is absent or who thereafter departs, limitations cannot be pleaded until the party sued, or his property, where the statute makes

16. Edwards *v.* Ross, 58 Ga. 147; Moore *v.* Carroll, 54 Ga. 126; Pare *v.* Mahone, 32 Ga. 253.

17. Kesterson *v.* Hill, 101 Va. 739, 45 S. E. 288 (as to one who at no time before the cause arose had been a resident); Griffin *v.* Woolford, 100 Va. 473, 41 S. E. 949 (holding that defendant must have departed after the cause accrued and been a resident before that time); Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33; Fisher *v.* Hartley, 48 W. Va. 339, 37 S. E. 578, 86 Am. St. Rep. 39, 54 L. R. A. 215 (holding that the exception as to departure or concealment after the cause of action has accrued applied only to cases in which the cause accrued before the departure); Walsh *v.* Schilling, 33 W. Va. 108, 10 S. E. 54 (holding that the provision as to absence when persons who had before resided in the state should by departing obstruct the prosecution of a right, etc., did not apply to a defendant who, although once a resident of the state removed before the transaction occurred out of which the cause of action arose and before any right accrued against him); Hefflebower *v.* Detrick, 27 W. Va. 16 (holding that if one is a resident of the state when he incurs the liability and leaves thereafter, whether before or after the action accrues, he is within the exception); Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400 (holding that where the contract is to be performed in the state the merely temporary presence of defendant in the state when the contract was made is to be regarded as bringing him within the terms of the statute as a person who has before resided in the state); Embrey *v.* Jemison, 131 U. S. 336, 9 S. Ct. 776, 33 L. ed. 172 (under the Virginia statute). See *supra*, VI, E.

18. Wood *v.* Bissell, 108 Ind. 229, 9 N. E. 425; Mechanics' Bldg. Assoc. *v.* Whitacre, 92 Ind. 547; Balph *v.* Magaw, 33 Ind. App. 399, 70 N. W. 188; Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524; Wetmore *v.* Marsh, 81 Iowa 677, 47 N. W. 1021; Ross *v.* Rees, 55 Iowa 296, 7 N. W. 611; Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206; Davenport *v.* Allen, 120 Fed. 172, under Iowa statute.

19. *Illinois.*— Wheeler *v.* Wheeler, 134 Ill. 522, 25 N. E. 588, 10 L. R. A. 613 (refusing to follow White *v.* Hight, 2 Ill. 204, decided under an earlier statute); Hyman *v.* Bayne, 83 Ill. 256.

Minnesota.— Drake *v.* Bigelow, 93 Minn. 112, 100 N. W. 664. But the statutes in this state are construed together, and in connection with the right to set up a foreign bar. See *infra*, VI, F, 2, d, (II), (D), (4), (b), bb, (bb).

New Mexico.— Lindauer Mercantile Co. *v.* Boyd, 11 N. M. 464, 70 Pac. 568 [*overruling* Stern *v.* Bates, 9 N. M. 286, 50 Pac. 325].

Oregon.— Van Santvoord *v.* Roethler, 35 Oreg. 250, 57 Pac. 628, 76 Am. St. Rep. 472 [*following* Crane *v.* Jones, 24 Oreg. 419, 33 Pac. 869; McCormick *v.* Blanchard, 7 Oreg. 232]; Rhoton *v.* Mendenhall, 17 Oreg. 199, 20 Pac. 49, holding that defendant was a resident at the time the action accrued elsewhere and therefore was not out of the state within the exception.

Texas.— Wilson *v.* Daggett, 88 Tex. 375, 31 S. W. 618, 53 Am. St. Rep. 766; Huff *v.* Crawford, 88 Tex. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763 [*overruling* Hunton *v.* Nichols, 55 Tex. 217]; Lynch *v.* Ortheib, 87 Tex. 590, 30 S. W. 545; Moore *v.* Hendrick, 8 Tex. 253; Snoddy *v.* Cage, 5 Tex. 106; Habermann *v.* Heidrick, (Tex. Civ. App. 1902) 66 S. W. 106, 795; Greer *v.* Gill, 13 Tex. Civ. App. 380, 35 S. W. 328; Montgomery *v.* Brown, (Tex. Civ. App. 1895) 31 S. W. 1084; Cotton *v.* Rand, (Tex. Civ. App. 1895) 29 S. W. 682. The rule is somewhat qualified by a provision requiring a residence

that material,[20] has been brought within the reach of the process of the court,[21] at which time the statute of the forum begins to run in his favor,[22] and the exception applies to non-residents and to those who have never resided in the state, and is not confined to persons who have before resided within the jurisdiction.[23]

of twelve months before one who moves into the state can plead the bar of limitations incurred prior to such removal, if the suit is not barred by the laws of the state of his residence under which it was held that where the citizen of another state was sued there for property and moved it to Texas pending the suit, he can be sued for the same property at any time until he had resided in Texas twelve months if the suit was not barred by the laws of the state of his residence. Thompson *v.* Berry, 26 Tex. 263. But this statute was held not to apply to one who had never removed to Texas at any time after the creditor was entitled to sue. Allen *v.* Hill, 78 Ky. 119, which construed the statute in passing on the question whether a resident of Kentucky might plead the statute of limitations of Texas under the provisions of the Kentucky statute permitting foreign limitations to be set up in certain cases. See also as construing the statute in Texas Bull *v.* Chenault, 3 Tex. App. Civ. Cas. § 383; McDowell *v.* Collier, 2 Tex. Civ. App. Cas. § 266.

20. See *supra*, VI, F, 2, d, (II), (B).

21. *Alabama.*— Towns *v.* Bardwell, 1 Stew. & P. 36.

Alaska.— Van Schuyver *v.* Hartman, 1 Alaska 431.

California.— Palmer *v.* Shaw, 16 Cal. 93.

New Hampshire.— Dow *v.* Sayward, 12 N. H. 271, 14 N. H. 9; Dudley *v.* Kimball, 17 N. H. 498 [*citing* Dupleix *v.* De Roven, 2 Vern. Ch. 540, 23 Eng. Reprint 950; Bulger *v.* Roche, 11 Pick. (Mass.) 36, 22 Am. Dec. 359].

Pennsylvania.— Mullen *v.* Ridgeway, Add. 278.

Canada.— Bugbee *v.* Clergue, 27 Ont. App. 96.

22. McDaniel *v.* Milam, 16 Fed. Cas. No. 8,744*a*, Hempst. 274.

Nature of return.— In connection with the text see *infra*, VI, F, 2, d, (II), (F).

23. *Alabama.*— Holley *v.* Coffee, 123 Ala. 406, 26 So. 239.

Alaska.— Van Schuyver *v.* Hartman, 1 Alaska 431.

Connecticut.— Waterman *v.* A., etc., Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240; Hatch *v.* Spofford, 24 Conn. 432.

Delaware.— Jones *v.* Wells, 2 Houst. 209.

Maine.— Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583.

Massachusetts.— McCann *v.* Randall, 147 Mass. 81, 17 N. E. 75, 9 Am. St. Rep. 666; Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925; Goetz *v.* Voelinger, 99 Mass. 504; Putnam *v.* Dike, 13 Gray 535; Dwight *v.* Clark, 7 Mass. 515.

Michigan.— Belden *v.* Blackman, 118 Mich. 448, 76 N. W. 979.

Mississippi.— Bower *v.* Henshaw, 56 Miss. 619; Fisher *v.* Fisher, 43 Miss. 212; Trotter *v.* Erwin, 27 Miss. 772; Estis *v.* Rawlins, 5 How. 258, which cases were under an earlier statutory provision than that referred to in Robinson *v.* Moore, 76 Miss. 89, 23 So. 631. See also *infra*, II, F, 2, d, (II), (D), (4), (b), bb.

Nebraska.— Minneapolis Harvester Works *v.* Smith, 36 Nebr. 616, 54 N. W. 973; Harrison *v.* Union Nat. Bank, 12 Nebr. 499, 11 N. W. 752; Hartley *v.* Crawford, 12 Nebr. 471, 11 N. W. 729.

New Hampshire.— Howard *v.* Fletcher, 59 N. H. 151; Paine *v.* Drew, 44 N. H. 306; Dudley *v.* Kimball, 17 N. H. 498; Sissons *v.* Bicknell, 6 N. H. 557, where it was said that the provision as to leaving property gave some countenance to the supposition that the legislators contemplated a leaving of the state by inhabitants thereof, but that this circumstance was too slight to authorize a construction so narrow as that the statute did not cover persons who had never resided in the state.

New York.— Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393; Power *v.* Hathaway, 43 Barb. 214; Carpenter *v.* Wells, 21 Barb. 593; Ford *v.* Babcock, 2 Sandf. 518; Moloney *v.* Tilton, 22 Misc. 682, 51 N. Y. Suppl. 19; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482.

North Carolina.— Williams *v.* Iron Belt Bldg., etc., Assoc., 131 N. C. 267, 42 S. E. 607.

Ohio.— Gibbons *v.* Ewell, 1 Handy 561, 12 Ohio Dec. (Reprint) 290, construing a Maryland statute.

South Carolina.— Alexander *v.* Burnet, 5 Rich. 189, as to statute of Anne. *Contra*, Cumming *v.* Berry, 1 Rich. Eq. 114, recognizing the rule under provisions of the statute of Anne, in applying the statute to a suit in equity.

South Dakota.— McConnell *v.* Spicker, 15 S. D. 98, 87 N. W. 574.

Tennessee.— Kempe *v.* Bader, 86 Tenn. 189, 6 S. W. 126 [*following* Carlin *v.* Wallace, 13 Lea 571; Ridge *v.* Cowley, 6 Lea 166, and *overruling* Barbour *v.* Erwin, 14 Lea 716].

Vermont.— Davis *v.* Marshall, 37 Vt. 69; Graves *v.* Weeks, 19 Vt. 178; Dunning *v.* Chamberlin, 6 Vt. 127.

Washington.— Weber *v.* Yancy, 7 Wash. 84, 34 Pac. 473; Lake *v.* Steinbach, 5 Wash. 659, 32 Pac. 767.

Wisconsin.— Adkins *v.* Loucks, 107 Wis. 587, 83 N. W. 934; Oshkosh Nat. Bank *v.* Davis, 100 Wis. 240, 75 N. W. 1005; Brown *v.* Bicknell, 1 Pinn. 226, 39 Am. Dec. 299.

England.— Lafond *v.* Ruddock, 13 C. B. 813, 1 C. L. R. 339, 17 Jur. 624, 22 L. J.

bb. *Place of Accrual of Action in Connection With Non-Residence* — (aa) *In General.* Where the cause accrues in another state and defendant is a resident of the state of the forum, the statute of the latter state runs,[24] and the statute rule that absence suspends the operation of limitations applies, although both parties reside out of the state,[25] and in the state where the cause accrued and where suit might have been brought, the statute of the state of the forum running only from the time defendant comes into that jurisdiction,[26] even though the saving clause

C. P. 217, 1 Wkly. Rep. 371, 76 E. C. L. 813, 24 Eng. L. & Eq. 239.

Canada.— Kasson *v.* Holley, 1 Manitoba 1; Bugbee *v.* Clergue, 27 Ont. App. 96.

See 33 Cent. Dig. tit. "Limitations of Actions," § 440 *et seq.*

The word "return" as used in the statute to indicate the point at which the limitation starts to run does not confine the exception to residents. Palmer *v.* Shaw, 16 Cal. 93; Milton *v.* Babson, 6 Allen (Mass.) 322; Little *v.* Blunt, 16 Pick. (Mass.) 359; Estis *v.* Rawlins, 5 How. (Miss.) 258; Paine *v.* Drew, 44 N. H. 306; Fowler *v.* Hunt, 10 Johns. (N. Y.) 464; Ruggles *v.* Keeler, 3 Johns. (N. Y.) 263, 3 Am. Dec. 482; Crocker *v.* Arey, 3 R. I. 178; Burrows *v.* French, 34 S. C. 165, 13 S. E. 355, 27 Am. St. Rep. 811 (under the code); Alexander *v.* Burnet, 5 Rich. (S. C.) 189 (under statute of Anne); Burnes *v.* Crane, 1 Utah 179; Weber *v.* Yancy, 7 Wash. 84, 34 Pac. 473.

24. Rhotan *v.* Mendenhall, 17 Oreg. 199, 20 Pac. 49.

Absence means from state of forum.— The act of Vermont suspending limitations against a person out of the state was held to refer to that state only, and did not suspend the statute in a cause which accrued in New York where plaintiff at the time of the accrual and ever since resided and defendant had not at any time since its accrual resided there. Sisson *v.* Niles, 64 Vt. 449, 24 Atl. 992.

25. Paine *v.* Drew, 44 N. H. 306, where both parties resided out of the state and not in the same state.

In Minnesota the statute is construed to embrace cases only the subject-matter of which arises in the state, unless the cause arising in another state, has been owned by a citizen of Minnesota ever since its accrual. Drake *v.* Bigelow, 93 Minn. 112, 100 N. W. 664; Powers Mercantile Co. *v.* Blethen, 91 Minn. 339, 97 N. W. 1056; Luce *v.* Clarke, 49 Minn. 356, 51 N. W. 1162. *Compare* Way *v.* Colyer, 54 Minn. 14, 55 N. W. 744.

26. *Alabama.*— Steen *v.* Swadley, 126 Ala. 616, 28 So. 620; Jones *v.* Jones, 18 Ala. 248.

Connecticut.— Hatch *v.* Spofford, 24 Conn. 432.

Delaware.— Jones *v.* Wells, 2 Houst. 209.

Maine.— Frye *v.* Parker, 84 Me. 251, 24 Atl. 844; Thompson *v.* Reed, 75 Me. 404; Brown *v.* Nourse, 55 Me. 230, 92 Am. Dec. 583.

Maryland.— Mason *v.* Union Mills Paper Mfg. Co., 81 Md. 446, 32 Atl. 311, 48 Am. St. Rep. 524, 29 L. R. A. 273.

Massachusetts.— Putnam *v.* Dike, 13 Gray 535; Bulger *v.* Roche, 11 Pick. 36, 22 Am. Dec. 359; Byrne *v.* Crowninshield, 1 Pick. 263; Dwight *v.* Clark, 7 Mass. 515; White *v.* Bailey, 3 Mass. 271.

Michigan.— Blackburn *v.* Blackburn, 124 Mich. 190, 82 N. W. 835, 83 Am. St. Rep. 325; Belden *v.* Blackman, 118 Mich. 448, 76 N. W. 979.

Mississippi.— Perkins *v.* Guy, 55 Miss. 153, 30 Am. Rep. 510, where the parties had resided in Tennessee and the cause of action was barred there when they went to Mississippi, and the court threw out the suggestion of the wisdom of meeting such a case by legislation, which suggestion is said in Robinson *v.* Moore, 76 Miss. 89, 23 So. 631, to have led to the insertion in the later statute of the words "in the state" after the words "if any cause of action shall have accrued." Under this statute where a cause arises out of the state, and defendant moves into Mississippi before the bar of the statute of his former residence is complete, the Mississippi limitations run notwithstanding the absence, that is, from the accrual of the action. Wright *v.* Mordaunt, 77 Miss. 537, 27 So. 640, 78 Am. St. Rep. 536.

Nebraska.— Hartley *v.* Crawford, 12 Nebr. 471, 11 N. W. 729.

Nevada.— Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

New York.— Miller *v.* Brenham, 68 N. Y. 83; Power *v.* Hathaway, 43 Barb. 214; Gans *v.* Frank, 36 Barb. 320; Carpenter *v.* Wells, 21 Barb. 593; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482.

Tennessee.— Kempe *v.* Bader, 86 Tenn. 189, 6 S. W. 126.

Utah.— Burnes *v.* Crane, 1 Utah 179.

Vermont.— Graves *v.* Weeks, 19 Vt. 178.

Wisconsin.— Brown *v.* Bicknell, 1 Pinn. 226, 39 Am. Dec. 299.

United States.—An act providing that actions on contracts made beyond the limits of the state shall be commenced within two years after the cause shall have accrued is held to be prospective in operation, and if defendant resided in the state when the act took effect, the creditor has two years within which to bring suit; but if he was not such resident the statute did not begin to run in his favor until he should come into the state. Sohn *v.* Waterson, 17 Wall. (U. S.) 596, 21 L. ed. 737.

England.— Lafond *v.* Ruddock, 13 C. B. 813, 1 C. L. R. 339, 17 Jur. 624, 22 L. J. C. P. 217, 1 Wkly. Rep. 371, 76 E. C. L.

makes no exception in favor of absent plaintiffs; it is the absence of defendant which operates to save the limitation.[27]

(bb) *Effect of Bar of Foreign Statute.* The rule of the statute suspending the operation of limitations pending absence or non-residence of the debtor applies without reference to limitation statutes of other jurisdictions, and if the parties come within the saving statute of the state of the forum it does not matter that they may have come within the reach of the process of another jurisdiction or that its limitation bar may have attached.[28] This rule is practically destroyed, however, by the statutory provisions in many states under which the bar of limitations of a sister state or foreign jurisdiction is recognized in the state of the forum.[29] The foreign limitation, under these provisions, is entirely ineffectual if it does not appear that the bar was complete before defendant came within the jurisdiction of the state of the forum.[30] But the provisions themselves are not necessarily inconsistent with the saving clauses as to absence,[31] although the two must be con-

813, 24 Eng. L. & Eq. 239; Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401; Ruckmoboye *v.* Mottichund, 5 Moore Indian App. 234, 18 Eng. Reprint 884, 8 Moore P. C. 4, 14 Eng. Reprint 2, 32 Eng. L. & Eq. 84.

Canada.— Hart *v.* Wilson, 6 U. C. Q. B. O. S. 19.

New promise made out of state.— If a new promise be made by the debtor, when out of the commonwealth, not having left therein attachable property, the statute will begin to run on such promise when he returns into the commonwealth. Little *v.* Blunt, 9 Pick. (Mass.) 488.

27. Wells *v.* Jones, 2 Houst. (Del.) 329. See also the cases cited heretofore in this section. *Contra*, Beardsley *v.* Southmayd, 15 N. J. L. 171, holding that the exception covering absence of a non-resident at the time of the accrual of the action is ineffectual to save limitations in favor of a non-resident plaintiff upon a contract made out of the state, and not to be performed within the state, upon the theory that the statute made no allowance for the absence of the creditor. To the same effect see Hale *v.* Lawrence, 21 N. J. L. 714, 47 Am. Dec. 190; Taberrer *v.* Brentnall, 18 N. J. L. 262. This construction of the statute has been referred to as fanciful if not forced. Paine *v.* Drew, 44 N. H. 306. And in a later case in that state the authority of the former decisions above stated was considerably shaken. Nolin *v.* Blackwell, 31 N. J. L. 170, 86 Am. Dec. 206, where one claiming a set-off, to which the statute of limitations was pleaded, had become a resident within six years after his claim accrued and continued such residence until the commencement of the action, and plaintiff was a non-resident, and it was held that such claim was not barred.

Foreign corporation.—A foreign corporation having the right to sue may to the same extent as other plaintiffs take advantage of the saving clause as to the absence of defendant from the state. Weyburn, etc., Co. *v.* Bemis, 122 Wis. 321, 99 N. W. 1050.

28. *Maine.*— Thompson *v.* Reed, 75 Me. 404, as to rule before passage of act, as to availability of a bar completed in another state where both parties resided.

Massachusetts.— Putnam *v.* Dike, 13 Gray 535; Bulger *v.* Roche, 11 Pick. 36, 22 Am. Dec. 359.

Michigan.— See Belden *v.* Blackman, 118 Mich. 448, 76 N. W. 979.

New York.— Miller *v.* Brenham, 68 N. Y. 83; Power *v.* Hathaway, 43 Barb. 214; Ruggles *v.* Keeler, 3 Johns. 263, 3 Am. Dec. 482.

Ohio.— Worth *v.* Wilson, Wright 162, applying the rule of the text in a case tried after, although arising before, the adoption of a statute allowing the defense of the bar of limitations of another state.

Rhode Island.— Crocker *v.* Arey, 3 R. I. 178.

Vermont.— Graves *v.* Weeks, 19 Vt. 178.

Canada.— Kasson *v.* Holley, 1 Manitoba 1.

29. See *infra*, VI, F, 2, d, (II), (D), (4), (b), bb, (bb).

30. *Alaska.*— Van Schuyver *v.* Hartman, 1 Alaska 431.

Iowa.— Ross *v.* Rees, 55 Iowa 296, 7 N. W. 611.

Kentucky.— See Cobb *v.* Thompson, 1 A. K. Marsh 507.

Minnesota.— Hoyt *v.* McNeil, 13 Minn. 390. See also Way *v.* Colyer, 54 Minn. 14, 55 N. W. 744.

Mississippi.— Wright *v.* Mordaunt, 77 Miss. 537, 27 So. 640, 78 Am. St. Rep. 536.

Nebraska.—Minneapolis Harvester Works *v.* Smith, 36 Nebr. 616, 54 N. W. 973; Nicholas *v.* Farwell, 24 Nebr. 180, 38 N. W. 820; Harrison *v.* Union Nat. Bank, 12 Nebr. 499, 11 N. W. 752.

New York.— Taylor *v.* Syme, 17 N. Y. App. Div. 517, 45 N. Y. Suppl. 707.

Oklahoma.— Keagy *v.* Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811.

Texas.— Thompson *v.* Berry, 26 Tex. 263; Hays *v.* Cage, 2 Tex. 501.

31. Kempe *v.* Bader, 86 Tenn. 189, 6 S. W. 126 [*overruling* Barbour *v.* Erwin, 14 Lea (Tenn.) 716], holding that the provision that the bar of the limitation of another state or government to an action upon a cause accruing therein shall be effectual in the state of the forum is not inconsistent with the general provision excepting absence of a defendant at the time of the accrual of the action, or absence from or residence out of the state after the accrual of the action, so

strued together in many cases in determining whether the particular conditions as to the place of accrual of the action or the residence of the parties bring the one or the other into operation.[32]

(5) CORPORATIONS. A corporation created by the laws of the state of the forum must be treated as a citizen of that state, and the absence of its officers will not

as to exclude the operation of the saving clause upon a cause accruing in another state between citizens thereof; that if the bar has accrued in the foreign state, it would be a bar in the state of the forum, otherwise defendant can only rely upon the local prescription, the effectiveness of which will depend upon his residence in that state. To the same effect see Keagy *v.* Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811.

Contra.— In Oregon a different view prevails, where it is held that by reason of the provision that when a cause of action between non-residents is barred by the statute of another state the defense is available in Oregon, the general saving clause should be confined to the absence of non-residents. Crane *v.* Jones, 24 Oreg. 419, 33 Pac. 869; McCormick *v.* Blanchard, 7 Oreg. 232, where the period of limitations prescribed by the Oregon statute is held to run from the accrual of the cause in the foreign state, where the action does not appear to have been barred in that state, and not from the time defendant comes into Oregon.

32. **Foreign bar not applicable to residents.** —A statute making the plea of foreign limitations available where the cause of action arises in another state or country between residents of such state or country, or between them and another state or country, has no reference to residents of the state of the forum. Labatt *v.* Smith, 83 Ky. 599; Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499.

The parties must have resided in the same state the bar of whose limitations is pleaded (Frye *v.* Parker, 84 Me. 251, 24 Atl. 844); and must be resident of the state where the cause accrues in order to take the case out of the exception of the saving clause (Troll *v.* Hanauer, 57 Vt. 139).

In Montana the provision "when the cause of action shall have arisen in another state," etc., justifies the setting up of the limitations of the place where the cause arose and not that of another state to which defendant moved before coming into Montana. Chevrier *v.* Robert, 6 Mont. 319, 12 Pac. 702.

Under the New York statute providing that where a cause of action accrues against a non-resident, an action cannot be brought in New York after the expiration of the time limited by the laws of his residence, except *inter alia*, "where, before the expiration of the time so limited, the person, in whose favor it originally accrued, was, or became, a resident of the State," a non-resident of the state who sends his family to reside in New York before but who does not himself come into the state until after the statute of the foreign state runs out does not thereby become a resident of New York so as to prevent the operation of the foreign limitation. Penfield *v.* Chesapeake, etc., R. Co., 134 U. S. 351, 10 S. Ct. 566, 33 L. ed. 940.

Causes arising out of state of forum.— The statute permitting the plea of the bar of foreign limitations has reference to the contracts made or acts to be performed in another state and cannot be extended to contracts made in the state of the forum, although the party to be charged had his domicile in another state. Wright *v.* Strauss, 73 Ala. 227; Minniece *v.* Jeter, 65 Ala. 222; Perry *v.* Lewis, 6 Fla. 555; Woolley *v.* Yarnell, 142 Ill. 442, 32 N. E. 89; Berry *v.* Krone, 46 Ill. App. 82; Wood *v.* Bissell, 108 Ind. 229, 9 N. E. 425; Mechanics' Bldg. Assoc. *v.* Whitacre, 92 Ind. 547. See also Blackburn *v.* Blackburn, 124 Mich. 190, 82 N. W. 835, 83 Am. St. Rep. 325.

In Minnesota the statute creating the exception where a cause arises against one who is out of the state or who after the accrual departs, etc., is considered in connection with the provision recognizing the bar of the limitation of another state where the cause of action accrues unless plaintiff is a citizen of Minnesota, and has owned the cause of action ever since its accrual, and it is held that the first provision refers to actions the subject-matter of which arises or originates in the state, the debtor being out of the state when the cause of action accrues or afterward departing therefrom; that the second provision applies to causes of actions not covered by the first, that is, actions the subject-matter of which arises out of the state. Powers Mercantile Co. *v.* Blethen, 91 Minn. 339, 97 N. W. 1056. A note payable in Minnesota is not for that reason merely within the statute where the maker is a resident of New York, and if he removes to a foreign state and lives there until its laws bar a suit on the note, an action cannot be maintained in Minnesota. Drake *v.* Bigelow, 93 Minn. 112, 100 N. W. 664. In Fletcher *v.* Spaulding, 9 Minn. 64, it is held that the effect of the statute of Minnesota was merely to allow a citizen of that state to plead the statute of limitations of a foreign state when it is more favorable than that of Minnesota, and to allow the same citizen when he is plaintiff in a foreign cause of action, which he has had from the time of its accrual the benefit of the statute of Minnesota; in other words confers a privilege on a defendant when sued by a foreigner which it denies to him when sued upon the same demand by a domestic plaintiff. See also as to the statute in this state Way *v.* Colyer, 54 Minn. 14, 55 N. W. 744; Smith *v.* Glover, 44 Minn. 260, 46 N. W. 406; Hoyt *v.* McNeil, 13 Minn. 390.

In Mississippi the saving clause is confined

necessarily carry such ideal person beyond the limits of the state.[33] But there is a conflict of authority upon the question whether a foreign corporation is within the saving clause relating to absence or non-residence from the state, at least in so far as the question of its right to plead the statute of limitations is concerned. Certainly the corporation is absent or non-resident in the sense that it cannot plead the statute when it has never been subject to the process of the courts.[34] But the predominating judicial opinion is that a corporation, although created by the laws of another state, should be deemed to be present in the state of the forum if it is there for the purpose of its business in compliance with the laws of the state in that behalf, so that it is subject to the process of the state; that such a presence will avail the foreign corporation under a plea of limitations and a want of such presence will deprive it of this advantage under the saving clause as to absence or non-residence.[35] In several jurisdictions, however, upon the theory

to causes arising in the state and applies whether plaintiff is non-resident or not, and the bar of foreign limitations is available only when the cause arises out of the state where the debtor resides and when he thereafter comes to reside in Mississippi, and if the case falls within neither provision, the limitations of Mississippi run. See Wright *v.* Mordaunt, 77 Miss. 537, 27 So. 640, 78 Am. St. Rep. 536; Robinson *v.* Moore, 76 Miss. 89, 23 So. 631; Louisville, etc., R. Co. *v.* Pool, 72 Miss. 487, 16 So. 753; Kennard *v.* Alston, 62 Miss. 763.

But in Nebraska the statute recognizes the bar of foreign limitations where the debtor has resided in the foreign jurisdiction for the requisite time, notwithstanding the cause of action arose in Nebraska where defendant resided at that time. Webster *v.* Davies, 44 Nebr. 301, 62 N. W. 484.

33. Sherman *v.* Buffalo, etc., R. Co., 21 Tex. 349, holding that while the office of the corporation is kept as required by law and plaintiff has an opportunity to procure service of process, it cannot be said that the corporation is beyond the limits of the state.

34. Waterman *v.* A. & W. Sprague Mfg. Co., 55 Conn. 554, 12 Atl. 240, in which the general rule was applied that the statute was suspended notwithstanding defendant had property in the state. So in Hall *v.* Vermont, etc., R. Co., 28 Vt. 401, it was held that the exception that limitations shall not begin to run against a person out of the state applied to a foreign corporation which had no attachable property within the state, although stockholders and directors lived there, the reason of the decision being that there was no mode of service of process provided in such case.

35. *Alabama.*— Huss *v.* Central R., etc., Co., 66 Ala. 472.

California.— Lawrence *v.* Ballou, 50 Cal. 258.

Illinois.— Hubbard *v.* U. S. Mortg. Co., 14 Ill. App. 40 (holding, however, that it must appear affirmatively that the corporation comes within the saving); Pennsylvania Co. *v.* Sloan, 1 Ill. App. 364.

Iowa.— Wall *v.* Chicago, etc., R. Co., 69 Iowa 498, 29 N. W. 427.

Minnesota.— St. Paul *v.* Chicago, etc., R. Co., 45 Minn. 387, 48 N. W. 17.

Mississippi.— See Louisville, etc., R. Co. *v.* Pool, 72 Miss. 487, 16 So. 753, where it was held that defendant could not avail itself of the statute of limitations of another state by simply pleading that it was a resident of the other state without pleading non-residence during the period set up as a bar, because it may have been a resident of both states.

Missouri.— Sidway *v.* Missouri Land, etc., Co., 187 Mo. 649, 86 S. W. 150.

Montana.— King *v.* National Min., etc., Co., 4 Mont. 1, 1 Pac. 727.

North Dakota.— Colonial, etc., Mortg. Co. *v.* Northwest Thresher Co., (1905) 103 N. W. 915.

Tennessee.— Turcott *v.* Yazoo, etc., R. Co., 101 Tenn. 102, 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768.

Texas.— Thompson *v.* Texas Land, etc., Co., (Civ. App. 1893) 24 S. W. 856.

Virginia.— Connecticut Mut. L. Ins. Co. *v.* Duerson, 28 Gratt. 630.

United States.— U. S. Express Co. *v.* Ware, 87 U. S. 543, 22 L. ed. 422 (under Nebraska statute); Taylor *v.* Union Pac. R. Co., 123 Fed. 155 (under the Iowa statute, holding, however, that it must appear affirmatively that the corporation comes within the statute); Southern R. Co. *v.* Mayes, 113 Fed. 84, 51 C. C. A. 70 (under the North Carolina statute); McCabe *v.* Illinois Cent. R. Co., 13 Fed. 827, 4 McCrary 492 (under the Iowa statute).

When the agency ceases, the saving clause as to the "time during which a defendant is a non-resident" (Winney *v.* Sandwich Mfg. Co., (Iowa 1891) 50 N. W. 565), or as to departure from the state (Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400) comes into operation. See also Norris *v.* Atlas Steamship Co, 37 Fed. 426, to the same effect, under the clause of the section of the New York code of civil procedure relating to absence, which provides that the section shall not apply while a regulation made as prescribed in another section remains in force, the other section referred to relating to a designation by a foreign corporation of an agent for the service of process.

Knowledge of agency, by plaintiff, is not necessary; the fact of the location of the agency in the state is the controlling one. Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524.

that a foreign corporation is incapable of being present in a state other than that under whose laws it exists and hence under all circumstances the foreign corporation is absent from all other states than that of its domicile, it is held that such corporation cannot come within the provision of the saving clause so as by its presence in any other state than that of its domicile to start the statute of limitations there in its favor.[36]

(E) *Absence of One of Joint and Several Debtors.* There is a conflict of authority upon the point of the effect of the absence of part of joint debtors. Sometimes it has been considered that such absence does not suspend the operation of the statute as to either; that it is immaterial by which of defendants the statute is pleaded, and unless all the joint debtors are absent the exception is not operative.[37] This is based upon a construction of the phrase "person or persons" in the saving clause excepting absence. But on the other hand where the phrase is if "any person" shall be absent, etc., it is held that absence of one suspends the statute against all,[38] although the better view seems to be that under such a statute the absence of one suspends the statute as to him and leaves it to run in

Failure to comply with the statute regulating the right of foreign corporations to do business in the state will not deprive a corporation of the right to plead the statute of limitations if it is subject to suit, although the failure subjects it to a penalty. King *v.* National Min., etc., Co., 4 Mont. 1, 1 Pac. 727; Turcott *v.* Yazoo, etc., R. Co., 101 Tenn. 102, 45 S. W. 1067, 70 Am. St. Rep. 661, 40 L. R. A. 768. But it is otherwise where by reason of the failure of the corporation to comply with such laws plaintiff is precluded from serving process. Johnson, etc., Dry Goods Co. *v.* Cornell, 4 Okla. 412, 46 Pac. 860.

36. *Kansas.*— Williams *v.* Metropolitan St. R. Co., 68 Kan. 17, 74 Pac. 600, 104 Am. St. Rep. 377, 64 L. R. A. 794; North Missouri R. Co. *v.* Akers, 4 Kan. 453, 96 Am. Dec. 183.

Nevada.— State *v.* Central Pac. R. Co., 10 Nev. 47; Barstow *v.* Union Consol. Silver Min. Co., 10 Nev. 386; Robinson *v.* Imperial Silver Min. Co., 5 Nev. 44. In an action between foreign corporations, it is held that the provision as to absence from the state applies to causes arising under another provision as to actions upon contracts, obligations, etc., occurring out of the state and to foreign corporations as well as individuals absent from the state. Sutro Tunnel Co. *v.* Segregated Belcher Min. Co., 19 Nev. 121, 7 Pac. 271.

New York.— Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Rathbun *v.* Northern Cent. R. Co., 50 N. Y. 656; Olcott *v.* Tioga R. Co., 20 N. Y. 210, 75 Am. Dec. 393 [*overruling* Faulkner *v.* Delaware, etc., Canal Co., 1 Den. 441]; Mallory *v.* Tioga R. Co., 3 Abb. Dec. 139, 3 Keyes 354, 1 Transcr. App. 203, 5 Abb. Pr. N. S. 420, 36 How. Pr. 202; Robeson *v.* New Jersey Cent. R. Co., 76 Hun 444, 28 N. Y. Suppl. 104. See also Dart *v.* Farmers' Bank, 27 Barb. 337; Londriggan *v.* New York, etc., R. Co., 5 N. Y. Civ. Proc. 76, 12 Abb. N. Cas. 273. But it appears that a later provision was added to the saving clause in this state to the effect that the section should not apply while a designation made as prescribed in another section should remain in force, the designation referred to being that of a person upon whom service of process might be had. Norris *v.* Atlas Steamship Co., 37 Fed. 426.

Wisconsin.— State *v.* National Accident Soc., 103 Wis. 208, 79 N. W. 220 [*construing* Hartford Travelers' Ins. Co. *v.* Fricke, 99 Wis. 367, 74 N. W. 372, 78 N. W. 407, 41 L. R. A. 557, as an authority for the proposition that a foreign corporation cannot plead the statute of limitations, although the language of the court on denying a rehearing seems to indicate otherwise]; Larson *v.* Aultman, etc., Co., 86 Wis. 281, 56 N. W. 915, 39 Am. St. Rep. 893.

United States.— Tioga R. Co. *v.* Blossburg, etc., R. Co., 20 Wall. 137, 22 L. ed. 331; Hanchett *v.* Blair, 100 Fed. 817, 41 C. C. A. 76 (under the Nevada statute); Kirby *v.* Lake Shore, etc., R. Co., 14 Fed. 261 [*affirmed* in 120 U. S. 130, 7 S. Ct. 430, 30 L. ed. 569] (which cases are under the new York statute).

37. Bruce *v.* Flagg, 25 N. J. L. 219, construing the phrase "person or persons," in the first clause of the section as used in the same sense as in the second clause of the section in reference to those having the cause of action and holding that its obvious import is that if the person against whom there is any specified cause of action shall be nonresident, etc., or if the persons against whom jointly there is any specified cause of action shall be non-resident, the statute shall not operate. See also Lovett *v.* Perry, 98 Va. 604, 37 S. E. 33, as to the absence of a partner, in which case the question is not discussed, however.

38. Reyhold *v.* Parker, 7 Houst. (Del.) 526, 32 Atl. 981; Casey *v.* Kimball, 7 Ohio Dec. (Reprint) 584, 4 Cinc. L. Bul. 78 (under a statute like that in Delaware, and distinguishing the rule in New Jersey, stated *supra*, last preceding note, upon the difference between the statutes); Fannin *v.* Anderson, 7 Q. B. 811, 9 Jur. 969, 14 L. J. Q. B. 282, 53 E. C. L. 811 (construing the phrase "or any of them" in the statute of Anne to refer to the actions enumerated and not to the

favor of the party who is present.[39] So where a promise or obligation is joint and several, one of the promisors cannot avoid the exception of the statute based on his absence from the state because his co-promisor had been in the jurisdiction during the whole of the statutory period,[40] and the absence of one will not suspend the statute in favor of the other who was present.[41]

(F) *Nature and Sufficiency of Absence and Return* — (1) IN GENERAL. The nature of the absence under a saving clause suspending the operation of limitations pending absence must be, to define it broadly, such absence as prevents the bringing of suit.[42] In some jurisdictions a provision excepting absences merely, without reference to residence or domicile, is held to contemplate the personal presence of the debtor, irrespective of his domicile or residence,[43] or of the fact that process might be served notwithstanding such absence;[44] and any absence from the jurisdiction, temporary or otherwise, is deducted from the period of limitation.[45] In other jurisdictions, however, the absence provided for is held

persons, and further *distinguishing* Perry *v.* Jackson, 4 T. R. 516, in that it was a case of joint plaintiffs and in such cases one plaintiff can act for all and use their names, whereas a plaintiff cannot by any act of his bring in an absent defendant, and therefore if he were compelled to see those who are within seas without joining those who are absent, he may have to take judgment against insolvent persons and lose his remedy against solvent persons who are absent); Towns *v.* Mead, 16 C. B. 123, 3 C. L. R. 381, 1 Jur. N. S. 355, 24 L. J. C. P. 89, 7 Scott 123, 81 E. C. L. 123.

39. Robertson *v.* Stuhlmiller, 93 Iowa 326, 61 N. W. 986; Town *v.* Washburn, 14 Minn. 268, 100 Am. Dec. 219; Cutler *v.* Wright, 22 N. Y. 472; Denny *v.* Smith, 18 N. Y. 567 [*overruling* Brown *v.* Delafield, 1 Den. (N. Y.) 445, and basing the decision upon the authority of Fannin *v.* Anderson, 7 Q. B. 811, 9 Jur. 969, 14 L. J. Q. B. 282, 53 E. C. L. 811, cited *supra*, last preceding note]; Brewster *v.* Bates, 81 Hun (N. Y.) 294, 30 N. Y. Suppl. 780 (holding that section 457 of the New York code did not change the practice so as to reinstate the rule of Brown *v.* Delafield, *supra*); Davis *v.* Kinney, 1 Abb. Pr. (N. Y.) 440; Didier *v.* Davison, 2 Barb. Ch. (N. Y.) 477, 487; Spaulding *v.* Ludlow Woolen Mill, 36 Vt. 150 (holding that a debt may be barred by the statute of limitations as to a partner residing in the state, notwithstanding it continues in force against his absent copartners); Caswell *v.* Engelmann, 31 Wis. 93. See also Arthur *v.* Screven, 39 S. C. 77, 85, 17 S. E. 640.

40. Emory *v.* Keighan, 94 Ill. 543; Bogert *v.* Vermilya, 10 N. Y. 447, Seld. 66.

41. Principal and surety.— The absence from the state of a principal debtor does not suspend the running of the statute against his surety. Mozingo *v.* Ross, 150 Ind. 688, 50 N. E. 867, 65 Am. St. Rep. 387, 41 L. R. A. 612 [*citing* Bottles *v.* Miller, 112 Ind. 584, 14 N. E. 728]; Davis *v.* Clark, 58 Kan. 454, 49 Pac. 665.

Where the surety pays the debt (sealed note), during the debtor's absence, the statute of limitations does not run against the surety who is subrogated to the rights of the holder of the note. Smith *v.* Swain, 7 Rich. Eq. (S. C.) 112.

42. Johnson *v.* Smith, 43 Mo. 499; Bensley *v.* Haeberle, 20 Mo. App. 648; Omaha, etc., Land, etc., Co. *v.* Parker, 33 Nebr. 775, 51 N. W. 139, 29 Am. St. Rep. 506.

Obstruction of prosecution.— Under a statute providing that when a cause accrues against a resident of a state and by his absence he obstructs its prosecution, the time of such absence shall not be computed, the character of the absence must be such as obstructs the bringing of the action and the mere temporary absence will not necessarily amount to this. Nunez *v.* Taylor, 91 Ky. 461, 16 S. W. 128, 13 Ky. L. Rep. 22; Buckley *v.* Jenkins, 10 Bush (Ky.) 21; Poston *v.* Smith, 8 Bush (Ky.) 589 (holding that absence for such a length of time as to obstruct the prosecution of an action should not be computed as a part of the period of limitations); Ormsby *v.* Letcher, 3 Bibb. (Ky.) 269 (holding that a temporary absence did not take the cause out of the statute); Brown *v.* Butler, 87 Va. 621, 13 S. E. 71. See also *supra*, VI, E.

43. Huss *v.* Central R., etc., Co., 66 Ala. 472.

44. Chicago, etc., R. Co. *v.* Cook, 43 Kan. 83, 22 Pac. 988; Beebe *v.* Doster, 36 Kan. 666, 14 Pac. 150 (where suit might have been brought by publication); Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316 (under the Kansas statute); Parker *v.* Kelly, 61 Wis. 552, 21 N. W. 539 (under the provision as to the accrual of a cause of action against a party who at the time is out of the state).

Non-residence is insufficient if there is not a personal absence. Coale *v.* Campbell, 58 Kan. 480, 49 Pac. 604.

45. Vanlandingham *v.* Huston, 9 Ill. 125 (under an early statute, since which the statute in that state has been altered so as to require absence and residence abroad, although the theory of this case is that the absence contemplated is one which prevents service of process to bind the debtor personally); Investment Securities Co. *v.* Bergthold, 60 Kan. 813, 58 Pac. 469; Conlon *v.* Lanphear, 37 Kan. 431, 15 Pac. 600; Hoggett *v.*

such an absence as will prevent the service of process, and a similar construction is adopted as under provisions requiring absence from and residence out of the state. Under this construction a temporary absence which does not destroy the domicile or interfere with the service of process by the statutory methods prevailing under which a personal judgment might be obtained does not come within the exception of the saving clause.[46]

(2) Absence and Residence Out of State. Where the provision excluding the time of absence expressly prescribes absence or departure from and residence out of the state, such absence and residence must concur in order to prevent the running of the statute, and in this sense mere temporary absence on business or for other purposes does not come within the exception.[47] The absence must amount to a change of domicile.[48] And as often held under such provision, the absence must be such as to prevent service of process, and if a constructive service is available where the debtor has a domicile or usual place of abode in the state a temporary absence which does not break up or destroy such domicile does

Emerson, 8 Kan. 262; Watkins *v.* Junker, (Tex. 1892) 19 S. W. 390.

Absence of a United States senator while in the performance of his official duties will not be reckoned in computing the period of limitation. Lane *v.* Metropolis Nat. Bank, 6 Kan. 74.

Conversely, an act which suspends the running of the statute in favor of debtors who leave the state, during their absence embraces those who leave to remain permanently. Ayres *v.* Henderson, 9 Tex. 539.

46. Sage *v.* Hawley, 16 Conn. 106, 41 Am. Dec. 128 (under an exception where defendant is "out of the state"); Penley *v.* Waterhouse, 1 Iowa 498 (under an exception where defendant is "out of the state"); Blodgett *v.* Utley, 4 Nebr. 25 (holding that under the provision excluding the time of absence where the debtor departs from the state after the cause of action accrues, the mere temporary absence is not contemplated where the debtor leaves a usual place of residence where service of process can be had upon him). But in Seymour *v.* Street, 5 Nebr. 85, it is held that if the right to sue is suspended by the absence or concealment of the debtor, the time of such absence or concealment is not computed, although he may leave a wife and family within the jurisdiction.

47. *Illinois.*— Hibernian Banking Assoc. *v.* Commercial Nat. Bank, 157 Ill. 576, 41 N. E. 918 (holding that the exception applies even though the debtor has executed a warrant of attorney under which personal judgment could be rendered against him without service of process, where he departs and resides in another state); Pells *v.* Snell, 130 Ill. 379, 23 N. E. 117 (where it appears that the earlier cases of Vanlandingham *v.* Huston, 9 Ill. 125, and Chenot *v.* Lefevre, 8 Ill. 637, are distinguished upon the difference in the terms of the statutes).

Maine.— Bucknam *v.* Thompson, 38 Me. 171, 61 Am. Dec. 237; Drew *v.* Drew, 37 Me. 389.

Massachusetts.— Perkins *v.* Davis, 109 Mass. 239.

Michigan.— Campbell *v.* White, 22 Mich. 178.

Missouri.— Johnson *v.* Smith, 43 Mo. 499; Cook *v.* Holmes, 29 Mo. 61, 77 Am. Dec. 548, distinguishing the case of absconding or concealment under another statutory provision, as to which see *supra*, VI, E.

New Hampshire.— Bell *v.* Lamprey, 52 N. H. 41.

New York.—Hickok *v.* Bliss, 34 Barb. 321; Belknap *v.* Sickles, 7 Daly 249; Wheeler *v.* Webster, 1 E. D. Smith 1. But see Harden *v.* Palmer, 2 E. D. Smith 172.

Vermont.— Hall *v.* Nasmith, 28 Vt. 791.

Wisconsin.— Farr *v.* Durant, 90 Wis. 341, 63 N. W. 274, where the provision required departure from and residence out of the state after the cause has accrued.

United States.— Barney *v.* Oelrichs, 138 U. S. 529, 11 S. Ct. 414, 34 L. ed. 1037, under the New York statute.

Resident temporarily absent at accrual of action.— Where defendant is a resident of the state and is temporarily absent when the cause of action accrues, the statute runs from his return. Whitton *v.* Wass, 109 Mass. 40; Davis *v.* Marshall, 37 Vt. 69 (the first clause, as to absence at the accrual of the action, providing merely for absence, and the second clause as to absence after the accrual of the action being "shall be absent from and reside out of the state"); Barney *v.* Oelrichs, 138 U. S. 529, 11 S. Ct. 414, 34 L. ed. 1037 (under New York statute). *Contra*, Crehore *v.* Mason, 23 Me. 413, holding that in such a case the saving clause does not apply, which practically confines the clause of the exception relating to absence of a party at the time a cause of action accrues against him to non-residents.

48. Ware *v.* Gowen, 111 Mass. 526; Blodgett *v.* Prince, 109 Mass. 44; Langdon *v.* Doud, 6 Allen (Mass.) 423, 83 Am. Dec. 641; Sleeper *v.* Paige, 15 Gray (Mass.) 349; Collestor *v.* Hailey, 6 Gray (Mass.) 517; McKenzie *v.* Boylan, 40 Mich. 329; Conrad *v.* Nall, 24 Mich. 275; Campbell *v.* White, 22 Mich. 178; Kerwin *v.* Sabin, 50 Minn. 320, 52 N. W. 642, 36 Am. St. Rep. 645, 17 L. R. A. 225; Venable *v.* Paulding, 19 Minn. 488; Lindsay *v.* Maxwell, 7 Ohio Dec. (Reprint) 273, 4 Ohio N. P. 354.

not come within the exception.[49] What is and what is not such an absence as will or will not interrupt the running of the statute under these constructions has been considered under varied circumstances;[50] but in any event whether the absence is permanent or merely temporary, if the residence or domicile in the state of the forum is abandoned and another taken up outside of that state, the statute does not operate in the absentee's favor.[51]

(3) UNDER EXCEPTION PRESCRIBING PERIOD OF ABSENCE. Sometimes the statutory exception expressly prescribes the period during which the debtor must reside out of the state before the time of such absence shall be excluded in computing limitation, under which the continuous absence and residence out of the state for the time prescribed is excluded from the computation;[52] but any one absence and residence out of the state must be for the time prescribed, and mere

Removal.—Although a provision excluding time of absence where the debtor removes from the state contemplates a permanent removal, if the party, after leaving with the intention of removing, permanently changes his purpose and returns the period of his absence will nevertheless be excluded. Sedgwick *v.* Gerding, 55 Ga. 264.

49. *Indiana.*— Niblack *v.* Goodman, 67 Ind. 174.

Mississippi.— State *v.* Furlong, 60 Miss. 839; Dent *v.* Jones, 50 Miss. 265; French *v.* Davis, 38 Miss. 218.

Missouri.— Miller *v.* Tyler, 61 Mo. 401; Venuci *v.* Cademartori, 59 Mo. 352; Garth *v.* Robards, 20 Mo. 523, 64 Am. Dec. 203; Bensley *v.* Haeberle, 20 Mo. App. 648; Rhodes *v.* Farish, 16 Mo. App. 430.

New Hampshire.— Quarles *v.* Bickford, 64 N. H. 425, 13 Atl. 642; Gray *v.* Fifield, 59 N. H. 131; Bell *v.* Lamprey, 52 N. H. 41; Brown *v.* Rollins, 44 N. H. 446; Ward *v.* Howe, 38 N. H. 35; Ward *v.* Cole, 32 N. H. 452, 64 Am. Dec. 378; Gilman *v.* Cutts, 27 N. H. 348.

Vermont.— Rutland Marble Co. *v.* Bliss, 57 Vt. 23; Hackett *v.* Kendall, 23 Vt. 275.

50. Mere length of time during which the absence continues, if the absence is not of such a character as to change the domicile, will not bring the absence within the statutory exception where the statute requires absence from and residence out of the state. Langdon *v.* Doud, 6 Allen (Mass.) 423, 83 Am. Dec. 641. And so where the absence and change of domicile must be such as to prevent service of process at the domicile in the state of the forum, it does not matter how long the absences continued so long as the domicile in the state of the forum is continued. State *v.* Furlong, 60 Miss. 839. Absences for business and pleasure varying from one to fifty days and averaging two months in each year do not come within the operation of such an exception. Barney *v.* Oelrichs, 138 U. S. 529, 11 S. Ct. 414, 34 L. ed. 1037.

Leaving family and intention to return.— The debtor must have some place of abode in the state which his family or his effects exclusively maintain in his absence and to which he may be expected soon or at some convenient time to return so that a copy may be left there and notice in fact proved. Hackett *v.* Kendall, 23 Vt. 275. See also Miller *v.* Tyler, 61 Mo. 401; Garth *v.* Robards, 20 Mo. 523, 64 Am. Dec. 203. So the fact that the debtor leaves his family in the state will not make it his place of usual abode where it does not appear that at any time during his absence he had any intention of returning. Forbes *v.* Thomas, 22 Nebr. 541, 35 N. W. 411, where it further appears that the debtor returned temporarily to the state but did not make it his residence. So in Brown *v.* Rollins, 44 N. H. 446, it was held that where the absence was continued for many years without interruption, the time was to be excluded, although the debtor left his wife and child in the state who resided on his homestead farm during the whole time. But in Gray *v.* Fifield, 59 N. H. 131, the debtor broke up housekeeping and went into another state to work, but periodically visited his family who lived in the state at the house of his father-in-law, occupying separate rooms and living apart from his family, and it was held that this was sufficient to warrant a finding that the domicile was in the state so as to warrant the service of process upon him. A finding of residence out of the state is supported by the fact that the maker went with his family, his wife and one child, to Russia to perform a contract there, storing his furniture and leaving his other children in the state, remaining from 1857 until 1865 except for a temporary return in 1862, and afterward laying out railroads in Russia and traveling throughout the United States. Ware *v.* Gowen, 111 Mass. 526.

Absence of a United States senator in attendance on official duties, but not abandoning his home and returning to his house between the sessions of congress, does not come within the exception. Kerwin *v.* Sabin, 50 Minn. 320, 52 N. W. 642, 36 Am. St. Rep. 645, 17 L. R. A. 225.

51. State *v.* Furlong, 60 Miss. 839; Johnson *v.* Smith, 43 Mo. 499; Ward *v.* Cole, 32 N. H. 452, 64 Am. Dec. 378 (notwithstanding the debtor left property in the state); Gilman *v.* Cutts, 23 N. H. 376; Brady *v.* Potts, (N. J. 1887) 11 Atl. 345. See also Harden *v.* Palmer, 2 E. D. Smith (N. Y.) 172.

52. Miller *v.* Warren, 94 N. Y. App. Div. 192, 87 N. Y. Suppl. 1011; Simonson *v.* Nafis, 36 N. Y. App. Div. 473, 55 N. Y. Suppl.

temporary absences for less periods will not come within the exception.[53] On the other hand if the debtor has a residence and domicile in the state and departs therefrom as a traveler for business or pleasure without acquiring a residence elsewhere, although he may be out of the state for the full period prescribed, yet the absence is not accompanied by residence out of the state and will not toll the statute.[54]

(4) Under Exception as to Non-Residents. Under a statutory exception excluding from computation the time during which defendant is a non-resident, absences from the state by the resident, with no intention of remaining away, will not stop the running of limitations.[55]

(5) Involuntary Absence. The statute does not run in favor of defendant who has been banished from the state pending the period of his absence.[56]

(6) Absence in Military Service. Under a statute excepting from computation such time as a resident debtor may be absent and obstructing the prosecution of a suit, temporary absence does not fall within the exception, and absence in the military service does not operate to obstruct the bringing of suit within the meaning of the provision.[57] And so where a change of domicile is necessary, a temporary absence in the military service will not interrupt the statute.[58]

(7) Return Considered in Connection With Nature of Absence. A return within the meaning of the saving clauses under consideration means a return within the particular jurisdiction whose process is invoked.[59] Under such pro-

449; Armfield *v.* Moore, 97 N. C. 34, 2 S. E. 347; Satterthwaite *v.* Abercrombie, 24 Fed. 543, 23 Blatchf. 308, under the New York statute. See also Bignold *v.* Carr, 24 Wash. 413, 64 Pac. 519.

53. Thomas *v.* Barney, 35 Fed. 112.

54. Hart *v.* Kip, 148 N. Y. 306, 42 N. E. 712, where it appears that under a code provision in that state service of process could have been affected in the case of such absence. But see Bennett *v.* Watson, 21 N. Y. App. Div. 409, 47 N. Y. Suppl. 569 (where the debtor was held not a mere traveler, having given up his house and gone to another state for the recovery of his son's health, where he remained less than a year, and then returned and stopped at a hotel for about a month, and then went to Europe for the same purpose where he remained for a time in excess of the period prescribed by the statute, the court *distinguishing* Hart *v.* Kip, *supra*, on the facts); Hennequim *v.* Barney, 24 Fed. 580 (under the New York statute).

Where residence out of the state is acquired, it is held that limitation ceases to run and that the provision that only an absence of a year or more shall toll the statute refers to absence of one who has not established a residence out of the state. Paine *v.* Dodds, (N. D. 1905) 103 N. W. 931. So in New York it is held that occasional and temporary visits of one who has removed to another state will not break the continuity of his absence; that a non-residence is absence, and that an amendment of the statute requiring defendant to reside out of the state or to continue absent for a specified time, which originally required residence and continued absence from the state for the specified time, did not change the rule. Connecticut Trust, etc., Co. *v.* Wead, 172 N. Y. 497, 65 N. E. 261, 93 Am. St. Rep. 756; Lawrence *v.* Hogue, 105 N. Y. App. Div. 247, 93 N. Y. Suppl. 998; Costello *v.* Downer, 19 N. Y. App. Div. 434, 46 N. Y. Suppl. 713; Martin *v.* Platt, 51 Hun (N. Y.) 429, 4 N. Y. Suppl. 359.

55. Drake *v.* Stuart, 87 Iowa 341, 54 N. W. 223; Savage *v.* Scott, 45 Iowa 130.

Intention to return at definite time.— But in this case as under the statutes requiring absence from and residence out of the state, it is held that, although the debtor may intend to return, if he does not intend to return at a definite time and has left no family or established business behind, his absence suspends the operation of limitations. Hedges *v.* Jones, 63 Iowa 573, 19 N. W. 675.

The appointment of a receiver for a railroad company which was a resident of the state when the cause accrued does not make the company a non-resident. Fowler *v.* Des Moines, etc., R. Co., 91 Iowa 533, 60 N. W. 116.

56. Johnston *v.* White, T. U. P. Charlt. (Ga.) 140, under the Confiscation Act of May 4, 1782.

57. Buckley *v.* Jenkins, 10 Bush (Ky.) 21.

58. Whitton *v.* Wass, 109 Mass. 40. See also Durbin *v.* Spiller, 20 La. Ann. 219; Hutchinson *v.* Richardson, 19 La. Ann. 187, where prescription was held not to have been interrupted during the service of defendants in the Confederate army.

By express statutory provision, however, such absence has sometimes been made to suspend the operation of limitations. Gregg *v.* Matlock, 13 Ind. 373 (under a provision excluding the time during which a defendant is "absent on public business"); Gray *v.* Spanton, 35 Iowa 508.

59. Smith *v* Bond, 8 Ala. 386, holding that a removal to the Indian nation where the

visions as those in the early statutes which merely postpone the operation of limitations until the debtor, who was absent at the accrual of the cause of action should return, as soon as the debtor came into the state or jurisdiction, it was held that limitations began to run, subject to the restriction hereafter mentioned,[60] and the action must have been brought within the statutory period beginning from the date of such return,[61] and if the only absence provided for was that when the cause accrued, if defendant was not absent at that time a subsequent absence or departure did not interrupt limitations.[62] This provision has been practically universally altered by the addition of a further provision, in terms more or less similar in the various jurisdictions, excepting subsequent absences, as by providing not only for absence when the cause of action accrues, but also for absences occasioned by departures after the accrual of the cause, and these statutes have overthrown the rule which obtained under the first provision mentioned.[63] However, under some of the earlier decisions, these two provisions standing together covered distinct classes; the return of a debtor absent at the accrual of the cause of action started the statute of limitations, and his subsequent departure could not be referred to the second provision, as that referred only to persons who were within the jurisdiction when the cause accrued.[64] But this doctrine has been repudiated

process of the courts of Alabama did not run is not a return within the state, although within its territorial limits.

Return of plaintiff and defendant see *supra*, VI, F, 2, c, (IV).

60. See *infra*, VI, F, 2, d, (II), (F), (9).

61. *California.*— Palmer *v.* Shaw, 16 Cal. 93.

Georgia.— Howell *v.* Burnett, 11 Ga. 303.

Maryland.— Hysinger *v.* Baltzell, 3 Gill & J. 158.

Mississippi.— Ingraham *v.* Bowie, 33 Miss. 17, under a statute providing an exception where defendant was out of the state when the cause of action accrued or where he was absent at any time during which the action could have been maintained. But see Withers *v.* Bullock, 53 Miss. 539, under subsequent provisions as to absence from and residence out of the state.

New York.— Randall *v.* Wilkins, 4 Den. 577; Fowler *v.* Hunt, 10 Johns. 464; Didier *v.* Davison, 2 Sandf. Ch. 61.

Vermont.— Mazzon *v.* Foot, 1 Ark. 282, 15 Am. Dec. 679.

United States.— McDaniel *v.* Milam, 16 Fed. Cas. No. 8,744*a*, Hempst. 274; Washington Patriotic Bank *v.* Webster, 18 Fed. Cas. No. 10,811*a*, 2 Hayw. & H. 47. See also Kers *v.* Erwin, 4 La. 215; Gregory *v.* Hurrill, 5 B. & C. 341, 11 E. C. L. 489.

62. *Massachusetts.*— Brigham *v.* Bigelow, 12 Metc. 268.

New Hampshire.— Adams *v.* Johnson, 6 N. H. 119.

New Jersey.— Halsey *v.* Beach, 2 N. J. L. 114.

North Carolina.— Blue *v.* Gilchrist, 84 N. C. 239.

Ohio.— Coventry *v.* Atherton, 9 Ohio 34.

Vermont.— Wires *v.* Farr, 25 Vt. 41.

Application of new provision to accrued causes.— In Massachusetts, where a defendant left after the cause accrued, at which time the only statutory exception related to absence at the accrual of the action, and before the bar of limitations had been complete and prior to defendant's departure a new statute was enacted containing the additional saving of the time of absence when defendant shall be "absent from and reside out of the State" after the cause accrues, it was held that the new provision applied and that the time of defendant's absence could not be computed, the whole of such absence having occurred after the passage of the new act under the terms of which, for the computing of time, the whole period of the absence should be excluded. Brigham *v.* Bigelow, 12 Metc. (Mass.) 268. So where defendant was absent when the statute was passed, at which time there was no limitation as to the particular form of action, it was held that the new statute applied, and if the action was not barred before the new act was passed and the time of absence thereafter saved it, the action was not barred. Seymour *v.* Deming, 9 Cush. (Mass.) 527. But in Vermont, where the new provision as to absence after the cause of action accrued covered a "departure" by defendant and the act provided that it should apply to all cases which came within its terms, that is, leaving the state after the passage of the act, the new provision did not apply to a defendant who was not absent when the cause accrued, but departed thereafter and before the passage of the new saving clause, so as to deprive him of the time of his absence before the passage of the new act. Wires *v.* Farr, 25 Vt. 41. Where the new statute providing for departure after the cause of action accrues confines its operation to causes which had not accrued, limitations will run in favor of a defendant who was present when the cause accrued, although absent thereafter and when the new statute was passed. Blue *v.* Gilchrist, 84 N. C. 239.

63. Todman *v.* Purdy, 5 Nev. 238. See also *infra*, VI, F, 2, d, (II), (10).

64. Ingraham *v.* Bowie, 33 Miss. 17; Randall *v.* Wilkins, 4 Den. (N. Y.) 577.

and the provision covering absences or departure after the accrual of the cause of action is held to cover absences after a return of a debtor who was not in the state when the cause of action accrued.[65]

(8) TEMPORARY RETURN. Where the operation of the statute is suspended by the departure of a resident who moves into another state he cannot thereafter take advantage of limitations by reason of mere temporary returns into the state after his removal.[66] If a non-resident defendant comes into the state temporarily, under the statute excepting absences by departure, the most that such an absence will avail him is the actual time of such presence.[67] Where the operation of limitations is suspended against a non-resident because of the fact of his non-residence or of his being out of the state at the time of the accrual of the action, his occasional coming into the state will not set the statute running in his favor.[68] In some of the cases the character of the return as affording an opportunity to sue is material;[69] and in some, temporary returns are considered insufficient only where

65. Milton *v.* Babson, 6 Allen (Mass.) 322; Todman *v.* Purdy, 5 Nev. 238; Bennett *v.* Cook, 43 N. Y. 547, 3 Am. Rep. 727; Cole *v.* Jessup, 10 N. Y. 96; Ford *v.* Babcock, 2 Sandf. (N. Y.) 518; Fisner *v.* Philps, 21 Tex. 551; Davis *v.* Marshall, 37 Vt. 69; Whitcomb *v.* Keator, 59 Wis. 609, 18 N. W. 469.

66. Rockwood *v.* Whiting, 118 Mass. 337; Lockport First Nat. Bank *v.* Bissell, 7 N. Y. Suppl. 753; Murray *v.* Fisher, 5 Lans. (N. Y.) 98; Gans *v.* Frank, 36 Barb. (N. Y.) 320; Burroughs *v.* Bloomer, 5 Den. (N. Y.) 532; Lee *v.* McKoy, 118 N. C. 518, 24 S. E. 210.

67. Bennett *v.* Cook, 43 N. Y. 537, 3 Am. Rep. 727 (where a defendant, residing in New Jersey, was in New York city in attendance on his business daily during business hours with certain exceptions, returning to his home every evening and the time of his actual absence deducted from the time which had elapsed since the cause accrued did not make up the statutory bar, and it was held that the statute had not become a bar); Bassett *v.* Bassett, 55 Barb. (N. Y.) 505 (where defendant after removal from New York continued to do business there and come daily to his business office). The same principle is applied in Bell *v.* Lamprey, 57 N. H. 168, where it was held that in order to entitle defendant in such a case to set up the bar, he must have resided within the state the whole of the statutory period of three hundred and sixty-five days in each year, Sundays included. See also Edgerton *v.* Wachter, 9 Nebr. 500, 4 N. W. 85, which is in accord with Bennett *v.* Cook, *supra*. *Contra*, Webster *v.* Citizens' Bank, (Nebr. 1902) 96 N. W. 118, in which under facts very like those in Bennett *v.* Cook, *supra*, it was held that in computing the period of absence it is not proper to reckon the aggregate number of hours during which defendant is out of the state.

68. *Georgia.*— Brooks *v.* Fowler, 82 Ga. 329, 9 S. E. 1089, holding, under the statute governing removal from the state, that the return must be for the purpose of residing in the state.

Maine.— Hacker *v.* Everett, 57 Me. 548.

Massachusetts.— Converse *v.* Johnson, 146 Mass. 20, 14 N. E. 925; Whitton *v.* Wass, 109 Mass. 40; Milton *v.* Babson, 6 Allen 322.

New York.— Gans *v.* Frank, 36 Barb. 320; McCord *v.* Woodhull, 27 How. Pr. 54, where the debtor came from his residence into New York where he did business every day except Sunday, returning to his residence every evening.

North Carolina.— Armfield *v.* Moore, 97 N. C. 34, 2 S. E. 347.

Ohio.— Stanley *v.* Stanley, 47 Ohio St. 225, 24 N. E. 493, 21 Am. St. Rep. 806, 8 L. R. A. 333, notwithstanding plaintiff might at such times have commenced an action by the exercise of ordinary diligence.

See also *supra*, VI, F, 2, d, (II), (F), (3).

69. Ridgeley *v.* Price, 55 Ky. 409, under a statute directed against a removal or concealment by a resident, obstructing the bringing of a cause of action, where it was held that defendant's removal and his occasional passing through the state thereafter without plaintiff's knowledge was a good answer to the plea of limitations. See also Bennett *v.* Devlin, 17 B. Mon. (Ky.) 353. In this state the statutory exception of absence at the time of the accrual of the cause of action was confined to residents of the state, and a provision adopted after the decision of Ridgley *v.* Price, *supra*, that limitations began to run in favor of persons coming temporarily into the state was held to apply only to debtors who resided in the state when the liability was incurred. O'Bannon *v.* O'Bannon, 13 Bush. (Ky.) 583. So in Mississippi under a statute excepting the time during which a defendant was absent from and resided out of the state, the court adopted the test whether defendant was openly in the state so as to afford an opportunity for service of process and held in one case where the presence was of this character that the period of the defendant's sojourns in the state would be considered as a part of the limitation (Pindell *v.* Harris, 57 Miss. 739); and in another that where the presence was not of the character mentioned the period of the sojourns would not be considered as a part

the various sojourns, of the character last mentioned, do not aggregate the statutory period.[70] Where the exception excluding the period of defendant's absence contemplates personal presence in the state, without regard to residence or domicile, mere presence for the period of limitation will perfect the bar in his favor.[71]

(9) RETURN SUFFICIENT TO NOTIFY PLAINTIFF. In order that a return into the jurisdiction after an absence which has interfered with the running of the statute of limitations may set the statute in motion, defendant cannot come secretly or privately into the jurisdiction for the mere purpose of starting the statute to run.[72] But he must be able to show that plaintiff either knew of the return so as to have had an opportunity to avail himself of the presence by bringing suit, or that the return or stay was so public or of such length as to amount to constructive notice or knowledge or to raise the presumption that if plaintiff had used ordinary diligence he might have brought his action.[73] The distinction in some of the cases seems to be that if the debtor, residing out of the state when the cause of action accrues, comes into it temporarily and with no intention of remaining, he must show knowledge on the part of the creditor;[74] but when the coming is to dwell and reside permanently, it is not necessary in order to set the statute in operation that the creditor should have knowledge thereof; it is enough if he can acquire such knowledge by the exercise of reasonable diligence.[75]

of the statutory period, as where defendant was a traveling salesman (Weille *v.* Levy, 74 Miss. 34, 20 So. 3, 60 Am. St. Rep. 500).

70. Story *v.* Thompson, 36 Ill. App. 370 (where the period of defendant's temporary visits into the state on business did not aggregate the statutory period); Campbell *v.* White, 22 Mich. 178; Whitcomb *v.* Keator, 59 Wis. 609, 18 N. W. 469 (under a provision which contemplated personal presence as distinguished from residence, where it was held that the temporary visits into the state could not defeat the operation of the statute where such visits did not aggregate the statutory period). So in Texas where the statutory exception as to absence refers only to residents of the state it is held that periodical visits made openly so as to afford reasonable opportunity for the service of personal process may be taken advantage of by defendant to the extent of the time actually spent in the state on such visits. Montgomery *v.* Brown, 9 Tex. Civ. App. 127, 28 S. W. 834.

71. Huss *v.* Central R., etc., Co., 66 Ala. 472.

72. Hysinger *v.* Baltzell, 3 Gill & J. (Md.) 158; White *v.* Bailey, 3 Mass. 271; Fowler *v.* Hunt, 10 Johns. (N. Y.) 464.

73. *Delaware.*— Morrow *v.* Turner, 2 Marv. 332, 43 Atl. 166 (holding that the return must be open and notorious under the specific provision of the statute that it shall be in such manner that defendant by the use of reasonable diligence can be served with process); Dukes *v.* Collins, 7 Houst. 3, 30 Atl. 639; Wells *v.* Jones, 2 Houst. 329.

Kentucky.— Bennett *v.* Devlin, 17 B. Mon. 353.

Maryland.— Hysinger *v.* Baltzell, 3 Gill & J. 158.

Massachusetts.— Little *v.* Blunt, 16 Pick. 359 (as to opportunity to arrest the body of defendant); Byrne *v.* Crowninshield, 1 Pick. 263.

Michigan.— Campbell *v.* White, 22 Mich. 178.

New York.— Ford *v.* Babcock, 2 Sandf. 518; Fowler *v.* Hunt, 10 Johns. 464; Didier *v.* Davison, 2 Barb. Ch. 477.

Ohio.—Gibbons *v.* Ewell, 1 Handy 561, 12 Ohio Dec. (Reprint) 290.

Rhode Island.— Cottrell *v.* Kenney, 25 R. I. 99, 54 Atl. 1010, requiring the return to be in such a manner that an action may with diligence be commenced against him.

South Carolina.— Alexander *v.* Burnet, 5 Rich. 189.

Texas.—Montgomery *v.* Brown, 9 Tex. Civ. App. 127, 28 S. W. 834.

Vermont.— Davis *v.* Field, 56 Vt. 426; Hill *v.* Bellows, 15 Vt. 727.

United States.—Dorr *v.* Swartwout, 7 Fed. Cas. No. 4,010, 1 Blatchf. 179; Wood *v.* Ward, 30 Fed. Cas. No. 17,965.

England.— See Gregory *v.* Hurrill, 1 Bing. 324, 1 L. J. C. P. O. S. 115, 4 L. J. K. B. O. S. 262, 8 Moore C. P. 189, 8 E. C. L. 529.

Canada.— Boulton *v.* Langmuir, 24 Ont. App. 618; Torrance *v.* Privat, 9 U. C. Q. B. 570.

74. Crosby *v.* Wyatt, 23 Me. 156; Gibbons *v.* Ewell, 1 Handy (Ohio) 561, 12 Ohio Dec. (Reprint) 290; Davis *v.* Field, 56 Vt. 426; Hill *v.* Bellows, 15 Vt. 727; Mazozon *v.* Foot, 1 Aik. 282, 15 Am. Dec. 679. But see State Bank *v.* Seawell, 18 Ala. 616, where it was held that in any event the open presence of the debtor in any part of the state is sufficient without regard to knowledge or want of knowledge by plaintiff of such presence.

75. Home L. Ins. Co. *v.* Elwell, 111 Mich. 689, 70 N. W. 334 (where the suit was on a cause of action arising in another state defendant having removed from that state into Michigan); Didier *v.* Davison, 2 Barb.

(10) Aggregating Successive Absences. Where the temporary presence of a non-resident or of one who had previously left the state is held to avail him to the extent of the time spent in the state, reciprocally temporary absences may be aggregated.[76] Under earlier statutes excepting time of absence until the return of a debtor who was absent at the accrual of the action, the holding that only one return was contemplated and that thereupon the statute began to run and no subsequent departure interrupted it necessarily excludes the right to aggregate subsequent departures of a debtor coming under such provision.[77] And so where the provisions as to absence at the time of the accrual of the cause of action and as to departure after the cause has accrued are considered to refer to distinct classes so that the departure after the accrual of the cause by a defendant who was absent when the cause accrued will not suspend the running of the statute which was started by his coming into the jurisdiction, such subsequent absences cannot be aggregated.[78] But the doctrine that the two clauses last mentioned do not refer to distinct classes having been repudiated, it followed and was decided that notwithstanding the return of a debtor who was absent at the time the cause accrued, his subsequent absences operating to suspend limitations under statutes which required presence in the state during the whole statutory period, such successive absences after the accrual of the cause of action should be aggregated.[79] And so the general rule is that where a departure from the state after the accrual of the cause of action is within the exception of the statutes, which in effect provide that such absence shall not be computed, every absence which is sufficient to suspend the running of limitations will be counted and successive absences will be aggregated.[80] On the other hand the statute may not contemplate the deduction of

Ch. (N. Y.) 477; Davis *v.* Field, 56 Vt. 426; Hall *v.* Nasmith, 28 Vt. 791; Mazozon *v.* Foot, 1 Aik. 282, 15 Am. Dec. 679. See also Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524.

Living under an assumed name by a debtor who moves into the state before the accrual of a cause of action against him without the state and thus residing within the state for the full statutory period entitles him to take advantage of the bar of limitation. Miller *v.* Lesser, 71 Iowa 147, 32 N. W. 250; Engel *v.* Fischer, 102 N. Y. 400, 7 N. E. 300, 55 Am. Rep. 818.

Keeping name out of directory.—A returning debtor is not shown to have concealed his return because he did not put his name in the city directory. Campbell *v.* Post, 20 Misc. (N. Y.) 339, 45 N. Y. Suppl. 919.

Where the return is by one domiciled in the state, although absent at the time of the accrual of the cause of action, if he returns openly this is all that is necessary. Whitton *v.* Wass, 109 Mass. 40 [*distinguishing* Little *v.* Blunt, 16 Pick. (Mass.) 359, in that it arose under an earlier statute and with reference to a defendant who had no domicile in the state when the cause of action accrued].

76. Campbell *v.* White, 22 Mich. 178; Whitcomb *v.* Keator, 59 Wis. 609, 18 N. W. 469.

77. Palmer *v.* Shaw, 16 Cal. 93 [which was afterward *distinguished* in Rogers *v.* Hatch, 44 Cal. 280, in that the latter cause arose under another provision of the statute which referred to departure of a resident after the accrual of the action]. See also *supra*, VI, F, 2, d, (II), (F), (7).

78. Wells *v.* Jones, 2 Houst. (Del.) 329; Mandeville *v.* Huston, 15 La. Ann. 281, where the statutory exception was in favor of the first absence of the debtor at the time of the accruing or after the accruing of the action. In Mississippi under a statute providing for the exclusion of time where defendant was out of the state when the cause accrued or was absent at any time during which the action could be maintained, it was held that one return only was contemplated in either case. Ingraham *v.* Bowie, 33 Miss. 17. On the other hand a different construction of statutes similar to the last was adopted in Bohannon *v.* Chapman, 13 Ala. 641; Fisher *v.* Phelps, 21 Tex. 551; Watkins *v.* Junker, (Tex. 1892) 19 S. W. 390.

79. Cole *v.* Jessup, 10 N. Y. 96 [*disapproving* Dorr *v.* Swartwout, 7 Fed. Cas. No. 4,010, 1 Blatchf. 179, and *following* Ford *v.* Babcock, 2 Sandf. (N. Y.) 518; Burroughs *v.* Bloomer, 5 Den. (N. Y.) 532; Didier *v.* Davison, 2 Barb. Ch. (N. Y.) 477]. In Withers *v.* Bullock, 53 Miss. 539 [*distinguishing* Ingraham *v.* Bowie, 33 Miss. 17, upon the difference of the terms of the statute], it was held that successive absences should be aggregated under a provision referring to absence from and residence out of the state.

80. *Alabama.*— Bohannan *v.* Chapman, 13 Ala. 641; Smith *v.* Bond, 8 Ala. 386.

California.— Rogers *v.* Hatch, 44 Cal. 280, which, however, refers only to the second clause of the statute relating to departure after accrual of the action.

Illinois.— Chenot *v.* Lefevre, 8 Ill. 637.

Nevada.— Todman *v.* Purdy, 5 Nev. 238.

absences but may fix a new time at which the statute begins to run, and where this construction is adopted absences after a return cannot be aggregated.[81] Where temporary absences are such as that they do not suspend the operation of the statute on any one occasion they cannot be aggregated.[82]

3. Coverture — a. In General. If the statute makes no exception in favor of married women, the courts will make none.[83] But it is almost universally provided in statutes of limitation that married women shall not be barred by the operation thereof. Therefore, under such provisions, limitations do not begin to run against a married woman, on a cause of action accruing during her coverture, until after the removal of her disability, or she cannot be barred until a designated period after disability removed.[84] Whenever a married woman has a right

New Hampshire.— Bell *v.* Lamprey, 52 N. H. 41; Gilman *v.* Cutts, 23 N. H. 376.

New Jersey.— Brady *v.* Potts, (1887) 11 Atl. 345.

New York.— Cutler *v.* Wright, 22 N. Y. 472; Cole *v.* Jessup, 10 N. Y. 96; Martin *v.* Platt, 51 Hun 429, 4 N. Y. Suppl. 359; Berrien *v.* Wright, 26 Barb. 208; Ford *v.* Babcock, 2 Sandf. 518; Burroughs *v.* Bloomer, 5 Den. 532.

Texas.— Fisher *v.* Phelps, 21 Tex. 551; Watkins *v.* Junker, (1892) 19 S. W. 390.

81. Cottrell *v.* Kenney, 25 R. I. 99, 54 Atl. 1010, under a statute providing that a person entitled to an action may commence the same within the time limited after defendant shall return into the state where (1) he was without the limits of the state at the time the cause accrued; or (2) where being within the state at that time he leaves afterward before the cause is barred, both clauses of which were held to fix a new time for the beginning of the running of the statute and not to add an increment to so much of the period of limitation as had already passed.

82. Hedges *v.* Roach, 16 Nebr. 673, 21 N. W. 404.

83. McGaughey *v.* Brown, 46 Ark. 25 (holding that married women are not excepted from the operation of the statute of limitations as to judicial sales); Machin *v.* Thompson, 17 Ark. 199 (holding that married women are not excepted from the operation of the statute of limitations in actions for the recovery of slaves); Pryor *v.* Ryburn, 16 Ark. 671; Masterson *v.* Marshall, 5 Dana (Ky.) 412 (holding that where a title accrues to a *feme covert* by contract, there is no saving in her favor as against adverse possession for twenty years). See also Beaubien *v.* Beaubien, 23 How. (U. S.) 190, 16 L. ed. 484, as to the Michigan act of Nov. 15, 1829, limiting actions for the recovery of land.

84. *Alabama.*— Sledge *v.* Clopton, 6 Ala. 589.

Arkansas.— Vaughan *v.* Parr, 20 Ark. 600.

California.—Wilson *v.* Wilson, 36 Cal. 447, 95 Am. Dec. 194.

Delaware.— State *v.* Layton, 3 Harr. 469.

Georgia.— Scott *v.* Haddock, 11 Ga. 258.

Kentucky.— Grundy *v.* Grundy, 12 B. Mon. 269; Gore *v.* Marshall, 3 A. K. Marsh. 317.

Mississippi.— Fatheree *v.* Fletcher, 31 Miss. 265.

Missouri.— Franklin *v.* Cunningham, 187 Mo. 184, 86 S. W. 79.

New Hampshire.— Little *v.* Downing, 37 N. H. 355; Pierce *v.* Dustin, 24 N. H. 417.

New York.— *In re* Neilley, 95 N. Y. 382; Dunham *v.* Sage, 52 N. Y. 229 [*reversing* 5 Lans. 451].

North Carolina.— Briggs *v.* Smith, 83 N. C. 306; Uzzle *v.* Wood, 54 N. C. 226.

Pennsylvania.— Etter *v.* Greenawalt, 98 Pa. St. 422; Beal *v.* Stehley, 21 Pa. St. 376; Hill *v.* Goodman, 1 Woodw. 207.

Rhode Island.— Taylor *v.* Slater, 21 R. I. 104, 41 Atl. 1001.

South Carolina.— Payne *v.* Harris, 3 Strobh. Eq. 39.

Tennessee.— Fitzsimmons *v.* Johnson, 90 Tenn. 416, 17 S. W. 100; Brown *v.* Crawford, 9 Humph. 164.

Texas.— Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258; Snow *v.* Hawpe, 22 Tex. 168; Roemilie *v.* Leeper, 2 Tex. Unrep. Cas. 535; Estes *v.* Turner, 30 Tex. Civ. App. 365, 70 S. W. 1007; Crouch *v.* Crouch, 30 Tex. Civ. App. 288, 70 S. W. 595; Harrison *v.* Sulphur Springs, (Civ. App. 1899) 50 S. W. 1064.

See 33 Cent. Dig. tit. "Limitation of Actions," § 399. See also *infra*, VI, F, 7, a, (I), (II); VI, F, 8.

Limitations can only be established against a married woman by proof either that the statute commenced to run against her before her marriage or that limitations have run since the passage of the statute abolishing the disability of coverture. Broom *v.* Pearson, 98 Tex. 469, 85 S. W. 790, 86 S. W. 733.

Where the legal title to a note is in a married woman who has been appointed administratrix, but the equitable title is in her decedent's estate, the statute of limitations runs against the note during her coverture. Taylor *v.* Bland, 60 Tex. 29.

Trespass on land held in entirety.—A wife's right of action for a trespass on land held by herself and her husband in entirety is not barred until the statutory period after her husband's death. Spruill *v.* Branning Mfg. Co., 130 N. C. 42, 40 S. E. 824.

Right to redeem from mortgage.— Where a wife joins in a purchase-money mortgage on land purchased in her husband's name, her right to redeem is not suspended until the death of the husband, but accrues immediately on the sale, and is barred in

of action during coverture she is within the operation of the statute.[85] Coverture as a disability has been modified in some states,[86] and abolished in others.[87]

b. Effect of Separate Property Acts. In many of the states acts have been passed removing the disabilities of married women, but upon the question whether these acts operate to repeal by implication the exception as to coverture contained in the general statute of limitation, the cases are not in accord. One line of authorities holds that they have this effect;[88] another line takes the contrary view.[89]

twenty years thereafter. McMichael *v.* Russell, 68 App. Div. (N. Y.) 104, 74 N. Y. Suppl. 212.

A person not under disability cannot delay his action because the party against whom his right of action exists is under the disability of coverture. Rennick *v.* Chandler, 59 Ind. 354.

85. Dyer *v.* Wittler, 89 Mo. 81, 14 S. W. 518, 58 Am. Rep. 85; Thompson *v.* Carmichael, 122 Pa. St. 478, 15 Atl. 867.

86. **In California** since 1863 the statute of limitations runs against a married woman in all actions to which her husband is not a necessary party plaintiff with her. Wilson *v.* Wilson, 36 Cal. 447, 95 Am. Dec. 194.

In Kentucky a statute permitting a married woman to sue alone in actions concerning her general property, where her husband refuses to unite with her, does not deprive her of the benefit of the saving exception in the statute of limitations. Onions *v.* Covington, etc., Elevated R., etc., Co., 107 Ky. 154, 53 S. W. 8, 21 Ky. L. Rep. 820.

In Indiana coverture is no longer a legal disability except in special cases. Rosa *v.* Prather, 103 Ind. 191, 2 N. E. 575.

87. **New York.**— Laws (1870), c. 41, § 5, removed the disability of married women and took away the extension of the time of limitation that theretofore had existed in their favor. Acker *v.* Acker, 81 N. Y. 143 [*reversing* 16 Hun 173].

North Carolina.— Under Laws (1899), c. 76, repealing coverture as a bar to the running of the statute, but providing that the time elapsing before its passage cannot be counted against a married woman in actions on administrator's bonds, etc., the statute of limitations does not apply to a plaintiff in such an action who was a minor at her marriage, and has remained under coverture to the time of commencing the action. Lafferty *v.* Young, 125 N. C. 296, 34 S. E. 444.

Texas.— The effect of the act of 1895 putting in operation the statute of limitations as to married women, as to causes of action that had prior to that time accrued, placed them in the same position as if they were never excepted from the operation of the statute, with the exception that they would have a reasonable time after the passage of the law in which to bring their suit. Williams *v.* Bradley, (Civ. App. 1902) 67 S. W. 170.

88. *California.*— Cameron *v.* Smith, 50 Cal. 303; Kapp *v.* Griffith, 42 Cal. 408.

Georgia.— Perkins *v.* Compton, 69 Ga. 736; Sparks *v.* Roberts, 65 Ga. 571.

Illinois.— Safford *v.* Stubbs, 117 Ill. 389, 7 N. E. 653; Geisen *v.* Heiderich, 104 Ill. 537; Enos *v.* Buckley, 94 Ill. 458; Castner *v.* Walrod, 82 Ill. 171, 25 Am. Rep. 369; Hayward *v.* Gunn, 82 Ill. 385. But see Harrer *v.* Wallner, 80 Ill. 197; Noble *v.* McFarland, 51 Ill. 226; Morrison *v.* Norman, 47 Ill. 477.

Indiana.— Irey *v.* Markey, 132 Ind. 546, 32 N. E. 309; Indianapolis *v.* Patterson, 112 Ind. 344, 14 N. E. 551.

Maine.— Brown *v.* Cousens, 51 Me. 301.

Michigan.— Douglass *v.* Douglass, 72 Mich. 86, 40 N. W. 177; King *v.* Merritt, 67 Mich. 194, 34 N. W. 689.

Nebraska.— Murphy *v.* J. H. Evans City Steam Laundry Co., 52 Nebr. 593, 72 N. W. 960.

New York.— Clarke *v.* Gibbons, 83 N. Y. 107; Acker *v.* Acker, 81 N. Y. 143 [*reversing* 16 Hun 173]; Ball *v.* Bullard, 52 Barb. 141.

Pennsylvania.— Hicks' Estate, 7 Pa. Super. Ct. 274, 42 Wkly. Notes Cas. 117 [*affirming* 6 Pa. Dist. 682, 20 Pa. Co. Ct. 386].

See 33 Cent. Dig. tit. "Limitation of Actions," § 400.

Rule applies to non-resident married women.— Linton *v.* Heye, 69 Nebr. 450, 95 N. W. 1040, 111 Am. St. Rep. 556.

89. *Arkansas.*— Memphis, etc., R. Co. *v.* Organ, 67 Ark. 84, 55 S. W. 952; Rowland *v.* McGuire, 64 Ark. 412, 42 S. W. 1068; Fox *v.* Drewry, 62 Ark. 316, 35 S. W. 533; McKneely *v.* Terry, 61 Ark. 527, 33 S. W. 953; Hershy *v.* Latham, 42 Ark. 305. But see Garland County *v.* Gaines, 47 Ark. 558, 562, 2 S. W. 460 (in which it is said: "Hershy *v.* Latham, 42 Ark. 305, stands on the peculiar language of the Act of 1851 . . . limiting actions for the recovery of lands. That act gives a married woman three years in which to sue, after she becomes discovert; not after removal of her disability"); Percy *v.* Cockrill's Ex'r, 53 Fed. 872, 4 C. C. A. 73 (construing Arkansas statute).

Kentucky.— Higgins *v.* Stokes, 116 Ky. 664, 76 S. W. 834, 25 Ky. L. Rep. 919; Sturgill *v.* Chesapeake, etc., R. Co., 116 Ky. 659, 76 S. W. 826, 25 Ky. L. Rep. 912.

Mississippi.— North *v.* James, 61 Miss. 761.

Missouri.— Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368; Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843.

New Jersey.— Carey *v.* Paterson, 47 N. J. L. 365, 1 Atl. 473.

North Carolina.— Campbell *v.* Crater, 95 N. C. 156; Briggs *v.* Smith, 83 N. C. 306; Lippard *v.* Troutman, 72 N. C. 551.

Ohio.— Hurlhut *v.* Wade, 40 Ohio St. 603.

c. Claim by Wife Against Husband. The statute of limitations will not run against the claim of a wife for money belonging to her, received and used by the husband, during his lifetime.[90] She has a specified time after the discoverture within which she may sue his executors.[91] Under a statute permitting a married woman to enforce her rights as if she were a *feme sole*, the statute of limitations will apply to a claim by a wife against her husband to recover a loan from him in the same way as if she were not his wife.[92]

Oregon.— Lattie-Morrison *v.* Holladay, 27 Oreg. 175, 39 Pac. 1100; Wythe *v.* Smith, 30 Fed. Cas. No. 18,122, construing Oregon statute, in which it is said that the exemption proceeds upon the theory that while a woman is under the disabilty of coverture she is not at liberty to sue without his assent, even if the law will permit it.

Canada.— Carroll *v.* Fitzgerald, 5 Ont. App. 322. *Compare Re* Laws, 28 Grant Ch. (U. C.) 382.

See 33 Cent. Dig. tit. "Limitation of Actions," § 400.

Theories of the cases.— The authorities which deny that the enabling acts relieving a married woman of the disabilty of coverture do not operate to repeal by implication the exception as to coverture contained in the general statute of limitations proceed upon the theory: (1) Mere ability to sue does not impose an obligation to do so (North *v.* James, 61 Miss. 761; Lindell Real Estate Co. *v.* Lindell, 142 Mo. 61, 43 S. W. 368; Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843), and (2) where a married woman can sue, either with or without her husband, failure to do so will not subject her to a plea of the statute of limitations (Lippard *v.* Troutman, 72 N. C. 551). The authorities maintaining the opposite view meet this argument in this wise, that when the disability is removed the cause for exemption disappears with it, and the exemption itself ceases to exist. See cases cited *supra*, this note.

Statute not retrospective.— Yocum *v.* Allen, 58 Ohio St. 280, 50 N. E. 909; Ham *v.* Kunzi, 56 Ohio St. 531, 47 N. E. 536.

"Free trader."— A married woman is not excluded from the benefit of the exception in the statute of limitations providing that the statute shall not run against the married woman during coverture by reason of the fact that she registers herself as a free trader during coverture as authorized by the code, section 1,827. Wilkes *v.* Allen, 131 N. C. 279, 42 S. E. 616.

90. *Connecticut.*— Comstock's Appeal, 55 Conn. 214, 10 Atl. 559.

Illinois.— See Bromwell *v.* Bromwell's Estate, 139 Ill. 424, 28 N. E. 1057.

Indiana.— Dice *v.* Irvin, 110 Ind. 561, 11 N. E. 488; Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718; Parrett *v.* Palmer, 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479.

Iowa.— Lower *v.* Lower, 46 Iowa 525.

Louisiana.— Sewell *v.* McVay, 30 La. Ann. 673.

New Jersey.— Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631; Gray *v.* Gray, 39 N. J. Eq. 511.

Ohio.— Simmerson *v.* Tennery, 37 Ohio St. 390.

Pennsylvania.— Kutz's Appeal, 40 Pa. St. 90; Towers *v.* Hagner, 3 Whart. 48.

Wisconsin.— Gudden *v.* Gudden's Estate, 113 Wis. 297, 89 N. W. 111.

See 33 Cent. Dig. tit. "Limitation of Actions," § 402. And for actions between husband and wife in general see HUSBAND AND WIFE, 21 Cyc. 1517 *et seq.* See also *supra*, VI, B, 20, c, (III).

West Virginia.—A claim of a wife against her husband is not barred during coverture, if at all, until twenty years from its inception or written renewal. Righter *v.* Riley, 42 W. Va. 633, 26 S. E. 357.

Note made by husband to wife.— Limitation does not run during coverture on the note of a husband to his wife. Fourthman *v.* Fourthman, 15 Ind. App. 199, 43 N. E. 965; Biggerstaff *v.* Biggerstaff, 40 S. W. 671, 19 Ky. L. Rep. 371 (holding that this is true, although the money for which the note is given is the wife's separate estate); Alpaugh *v.* Wilson, 52 N. J. Eq. 424, 28 Atl. 722; Kennedy *v.* Knight, 174 Pa. St. 408, 34 Atl. 585; Burnham *v.* McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887; Beloit Second Nat. Bank *v.* Merrill Iron Works, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877.

Although the enabling acts have removed the principal portion of a married woman's disabilities, yet the law still recognizes that a husband and wife are for some purpose one, and that it is not in harmony with the spirit of our institutions to require the unity of the family to be disturbed and its concord to be marred, by compelling the spouse to assert her rights against her consort in a court of law, or else be barred by lapse of time from recovering her own. Fourthman *v.* Fourthman, 15 Ind. App. 199, 49 N. E. 965; Alpaugh *v.* Wilson, 52 N. J. Eq. 424, 28 Atl. 722; Yeomans *v.* Petty, 40 N. J. Eq. 495, 4 Atl. 631; Towers *v.* Hagner, 3 Whart. (Pa.) 48; Burnham *v.* McMichael, 6 Tex. Civ. App. 496, 26 S. W. 887; Beloit Second Nat. Bank *v.* Merrill Iron Works, 81 Wis. 151, 50 N. W. 505, 29 Am. St. Rep. 877.

91. Sable *v.* Slingluff, 52 Md. 132; Dougherty *v.* Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520.

When the disability is removed by the death of the wife, her personal representative may bring an action against the husband within six years. Morrison *v.* Brown, 84 Me. 82, 24 Atl. 672.

92. Wilson *v.* Wilson, 36 Cal. 447, 95 Am.

d. Claim by Husband Against Wife. Since a husband cannot maintain an action against his wife, limitations do not begin to run against a claim by him against her until after her death.[93]

e. Claim For Personal Injuries to Wife. When the cause of action for the recovery of damages for injuries to the person of the wife is considered community property, the coverture of the wife does not prevent the running of the statute of limitations as against such an action, since the husband is the person authorized to sue therefor.[94] Where, however, such an action is held to be that of the wife, the husband being a mere formal party, necessary only on account of her common-law disability to sue alone, the bar of the statute is suspended during coverture,[95] although on the recovery of judgment the husband may reduce it to possession subject to the wife's equity.[96]

f. Claim to Real Property — (i) *In General.* The statute of limitations for the recovery of lands does not run against a married woman during coverture,[97] and she is given a specified time after the removal of the disability in which to commence her action therefor.[98]

Dec. 194; Wyatt *v.* Wyatt, 81 Miss. 219, 32 So. 317; *In re* Starr, 2 Ont. L. Rep. 762.

93. Gracie's Estate, 158 Pa. St. 521, 27 Atl. 1083 [*affirming* 24 Pittsb. Leg. J. 9].

94. Rice *v.* Mexican Nat. R. Co., 8 Tex. Civ. App. 130, 27 S. W. 921. *Compare* Texas, etc., R. Co. *v.* Gwaltney, 2 Tex. App. Civ. Cas. § 684.

95. Bailey *v.* Reed, 14 Phila. (Pa.) 167; Thompson *v.* Cincinnati, etc., R. Co., 109 Tenn. 268, 70 S. W. 612.

96. Thompson *v.* Cincinnati, etc., R. Co., 109 Tenn. 268, 70 S. W. 612.

97. *Arkansas.*— McFarlane *v.* Grober, 70 Ark. 371, 69 S. W. 56, 91 Am. St. Rep. 84.

Indiana.— Caress *v.* Foster, 62 Ind. 145; Bauman *v.* Grubbs, 26 Ind. 419.

Kentucky.— Sharp *v.* Head, 11 B. Mon. 277.

Maine.— Mellus *v.* Snowman, 21 Me. 201.

Missouri.— Vanata *v.* Johnson, 170 Mo. 269, 70 S. W. 687.

New York.— Jackson *v.* Sellick, 8 Johns. 262.

Texas.— Tevis *v.* Collier, 84 Tex. 638, 19 S. W. 801; Byne *v.* Wise, (Civ. App. 1895) 31 S. W. 1069; Corley *v.* Renz, (Civ. App. 1894) 24 S. W. 935; Storer *v.* Lane, 1 Tex. Civ. App. 250, 20 S. W. 852.

United States.— Meegan *v.* Boyle, 19 How. 130, 15 L. ed. 577; Wolf *v.* Hess, 107 Fed. 194; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251 (holding that Ohio Rev. St. (1890) §§ 4977, 4978, making the period of limitation in respect to real estate twenty-one years, except as to married women, in regard to whom it is ten years after the removal of the disability of coverture, does not apply to a case in which the disability of a married woman is removed more than ten years before the expiration of the twenty-one years).

See 33 Cent. Dig. tit. "Limitation of Actions," § 403.

Land taken under condemnation proceedings.— The coverture of the owner of land taken under void condemnation proceedings prevents the running of the statute of limitations as against her title. Norwood *v.* Gonzales County, 79 Tex. 218, 14 S. W. 1057.

Texas.— Rev. St. (1895) art. 3352, provides that limitation in suits for the recovery of real property shall not begin to run against married women until they arrive at the age of twenty-one years, and that their disability shall continue one year from and after the passage of the act, which went into effect Aug. 1, 1895. Broom *v.* Pearson, (Civ. App. 1904) 81 S. W. 753.

98. *Indiana.*— Two years are allowed. Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16.

Kentucky.— Three years are allowed. Bankston *v.* Crabtree Coal Min. Co., 95 Ky. 455, 25 S. W. 1105, 16 Ky. L. Rep. 15; Riggs *v.* Dooley, 7 B. Mon. 236.

Massachusetts.— Ten years are allowed. Atherton *v.* Hitchings, 12 Gray 117.

Missouri.— Reaume *v.* Chambers, 22 Mo. 36.

New York.— Ten years are allowed. Willson *v.* Betts, 4 Den. 201.

North Carolina.— When there is an adverse possession of land belonging to a *feme covert*, and the period of seven years from the time of the ouster expires in the lifetime of the husband, she has three years only after the death of the husband within which to commence her suit; but when the seven years do not expire within the lifetime of her husband she has the remainder of the full period of seven years from the time of the ouster, or three years from the time of her husband's death, whichsoever shall be the longer period, within which to commence her suit. Crump *v.* Thompson, 31 N. C. 491.

Tennessee.— Three years are allowed. King *v.* Nutall, 7 Baxt. 221.

Texas.— Seven years are allowed. Trammell *v.* Neal, 1 Tex. Unrep. Cas. 51.

West Virginia.— Five years are allowed. Waldron *v.* Harvey, 54 W. Va. 608, 46 S. E. 603, 102 Am. St. Rep. 959.

See 33 Cent. Dig. tit. "Limitation of Actions," § 403.

Beyond thirty years, however, the period within which an action may be brought cannot in any case be extended in some juris-

(II) *EFFECT OF ADVERSE POSSESSION.* When adverse possession commences during coverture limitations do not begin to run against a married woman until the removal of the disability.[99]

g. Recovery of Property Disposed of by, or as That of, the Husband — (I) *SALE OR OTHER DISPOSITION BY HUSBAND.* If the husband sell or otherwise dispose of property belonging to the wife without her consent, express or implied, her right of action is suspended during coverture, and the statute will not commence to run against her,[1] or her vendee,[2] until her husband's death; and a purchaser from a husband will not be protected by the statute of limitations, as against the wife, until the statutory period has run out after the husband's death.[3] If she survive her husband, she may sue his personal representative for the conversion; if he survive her, her personal representative may sue him.[4]

dictions. Louisville, etc., R. Co. *v.* Thompson, 105 Ky. 190, 48 S. W. 990, 20 Ky. L. Rep. 1110; Bradley *v.* Burgess, 87 Ky. 648, 10 S. W. 5, 10 Ky. L. Rep. 701; Mantle *v.* Beal, 82 Ky. 122; Medlock *v.* Suter, 80 Ky. 101; Conner *v.* Downer, 4 Bush (Ky.) 631; Melvin *v.* Merrimack River Locks, etc., Proprietors, 5 Metc. (Mass.) 15, 38 Am. Dec. 384, 16 Pick. 161; Reagle *v.* Reagle, 179 Pa. St. 89, 36 Atl. 191; Hogg *v.* Ashman, 83 Pa. St. 80.

99. Rowland *v.* McGuire, 67 Ark. 320, 55 S. W. 16; Hanford *v.* Fitch, 41 Conn. 486; Watson *v.* Watson, 10 Conn. 77; McLane *v.* Moore, 51 N. C. 520; Wren *v.* Howland, 33 Tex. Civ. App. 87, 75 S. W. 894; Halbert *v.* Brown, 9 Tex. Civ. App. 335, 31 S. W. 535; Hardy *v.* Dunlap, 7 Tex. Civ. App. 339, 26 S. W. 852; Oury *v.* Saunders, 5 Tex. Civ. App. 310, 24 S. W. 341, holding that a married woman will not lose title to land through a possession first asserted to be adverse during her coverture by the widow of the original occupant, who during his lifetime, and at the time of the owner's marriage, held in subordination to her title.

Possession is not adverse until discoverture. — Marshall *v.* McQueen, 3 Litt. (Ky.) 468.

A married woman who executes a mortgage of her land with her husband is not saved by her coverture from the running of the statute of limitation against her title in favor of the mortgage. Hanford *v.* Fitch, 41 Conn. 486.

Adverse possession for five years of the separate property of a married woman creates a bar under the statute of limitations, and is a good defense to an action for ejectment by her or her grantee. Kapp *v.* Griffith, 42 Cal. 408.

As between husband and wife. — While marital relations are uninterrupted, the husband's possession of land is not adverse to the wife, and the statute of limitations does not run in his favor prior to her death. Berkowitz *v.* Brown, 3 Misc. (N. Y.) 1, 23 N. Y. Suppl. 792.

1. Jenkins *v.* McConico, 26 Ala. 213; Meraman *v.* Caldwell, 8 B. Mon. (Ky.) 32, 46 Am. Dec. 537; Bradley *v.* Missouri Pac. R. Co., 91 Mo. 493, 4 S. W. 427; Culler *v.* Motzer, 13 Serg. & R. (Pa.) 356, 15 Am. Dec. 604.

Alienation by the husband merely suspends the right to enter during coverture; at his death it is revived in the wife and not barred until twenty years thereafter. Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575.

Possession not adverse during husband's life. — Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575; Fagan *v.* Walker, 27 N. C. 634.

Wife must plead disability. — Where the husband lawfully sells the separate property of the wife, a cause of action accrues to her at the time of the sale and delivery of the property; and in a suit by her for the property, after the death of the husband, the statute of limitations will commence to run against her from the same time, unless she sets up the disability in reply. Gray *v.* Adams, 19 Ark. 289.

Judicial sales. — The statute in Texas enlarging the time of limitation in case of the illegal sale of lands of the wife only applies to sales by the husband, and does not apply to a judicial sale for partition of property to a portion of which a wife is entitled as heir. Hunton *v.* Nichols, 55 Tex. 217.

Right to recover community homestead. — The statute of limitations runs against a married woman's right to recover a community homestead conveyed by her husband in direct hostility to her homestead rights, since the wife may sue alone should her husband refuse to join her. Hussey *v.* Moser, 70 Tex. 42, 7 S. W. 606; Cuellar *v.* Dewitt, 5 Tex. Civ. App. 568, 24 S. W. 671.

Louisiana. — Prescription does not run against the wife in favor of purchasers of her property from her husband, although she be separated in property. Prudhomme *v.* Dawson, 3 Mart. N. S. 161.

2. Jones *v.* Freed, 42 Ark. 357.

3. Stephens *v.* McCormick, 5 Bush (Ky.) 181; Taylor *v.* Shemwell, 4 B. Mon. (Ky.) 575; Miller *v.* Shackleford, 3 Dana (Ky.) 289; Leggett *v.* Coffield, 58 N. C. 382; Fagan *v.* Walker, 27 N. C. 634; Jones *v.* Reeves, 6 Rich. (S. C.) 132; McCorry *v.* King, 3 Humphr. (Tenn.) 267, 39 Am. Dec. 165; Miller *v.* Miller, Meigs (Tenn.) 484, 33 Am. Dec. 157. See also King *v.* Nutall, 7 Baxt. (Tenn.) 221; Weisinger *v.* Murphy, 2 Head (Tenn.) 674, holding that the husband, by his deed, estops himself from suing, and the wife cannot sue alone nor can she or her heirs sue the husband's vendee until after the husband's death.

4. Jenkins *v.* McConico, 26 Ala. 213.

(II) *SALE UNDER EXECUTION AGAINST HUSBAND.* The statute of limitations does not bar a married woman from recovering her separate property, sold under execution against her husband, when her title accrued during coverture.[5] This rule is not affected by the right of a married woman to maintain actions for the protection of exempt property, when necessary to protect her against the acts of her husband or others in the disposition of property.[6]

h. Recovery of Property Purporting to Have Been Conveyed by Wife. Where a husband and wife execute a deed of land belonging to the wife under such circumstances that the title of the wife does not pass, but merely the husband's estate by curtesy, the statute of limitations does not run against the estate in fee remaining in the wife during the existence of the husband's life-estate,[7] and she has the statutory period after she becomes discovert within which to bring her action.[8] Where, however, a wife makes a deed purporting to convey her land, which deed is void and conveys no title, it has been held that her coverture does not prevent the running of limitations against her from the time the grantee takes possession of the land, claiming the title adversely.[9]

i. Effect of Divorce, Separation, or Abandonment. Since a decree of divorce removes the disability of a married woman and leaves her free to assert her rights, she is no longer within the saving clause of the statute of limitations.[10] Abandonment of the wife by the husband does not *ipso facto* remove her disability, since mere ability to sue does not impose an obligation to do so.[11] Mere change in the husband's residence will not affect the rights of the wife in matters relating to her separate property.[12]

j. Effect on Husband of Wife's Disability. When the husband, either in his own right or the right of his wife, may bring suit for property accruing to the wife during coverture, the statute of limitations runs against him, and he cannot avail himself of her disability.[13]

5. Michigan *v.* Wyatt, 21 Ala. 813; Brenner *v.* Quick, 88 Ind. 546; Summerlin *v.* Cowles, 101 N. C. 473, 7 S. E. 881.

6. Alsup *v.* Jordan, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

7. *Illinois.*— Higgins *v.* Crosby, 40 Ill. 260.

Kentucky.— Gill *v.* Fauntleroy, 8 B. Mon. 177.

Louisiana.— Brownson *v.* Weeks, 47 La. Ann. 1042, 17 So. 489.

North Carolina.— Kincaid *v.* Perkins, 63 N. C. 282.

West Virginia.— Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56; Central Land Co. *v.* Laidley, 32 W. Va. 134, 9 S. E. 61, 25 Am. St. Rep. 797, 3 L. R. A. 826.

England.— Jumpsen *v.* Pitchers, 13 Sim. 327, 36 Eng. Ch. 327, 60 Eng. Reprint 127.

See 33 Cent. Dig. tit. "Limitation of Actions," § 405.

Deed by wife void as not properly acknowledged.—A statute in Texas deferring the running of the limitations "if during coverture a sale of the lands or slaves of the wife be illegally effected" is held not to apply to a case where a deed is void as not having been properly acknowledged by the wife. Harris *v.* Wells, 85 Tex. 312, 20 S. W. 68.

8. Stephens *v.* McCormick, 5 Bush (Ky.) 181; Brown *v.* Spand, 2 Mill (S. C.) 12; King *v.* Nutall, 7 Baxt. (Tenn.) 221.

9. Bradley *v.* Burgess, 87 Ky. 648, 10 S. W. 5, 10 Ky. L. Rep. 701; Mantle *v.* Beal, 82 Ky. 122; Medlock *v.* Suter, 80 Ky. 101; Brown *v.* Swango, 28 S. W. 156, 16 Ky. L. Rep. 381; Shields *v.* Riverside Imp. Co., 90 Tenn. 633, 18 S. W. 258; Merritt *v.* Hughes, 36 W. Va. 356, 15 S. E. 56.

10. Hopson *v.* Fowlkes, 92 Tenn. 697, 23 S. W. 55, 36 Am. St. Rep. 120, 23 L. R. A. 805.

11. McDanell *v.* Landrum, 87 Ky. 404, 9 S. W. 223, 12 Am. St. Rep. 500 (holding that under the statute in Kentucky a wife abandoned by her husband can sue only after being empowered by the judgment of a court of equity, limitation commences to run from the date of such judgment, and not from the date of the abandonment); Throckmorton *v.* Pence, 121 Mo. 50, 25 S. W. 843.

12. McCain *v.* Gibbons, 7 Wash. 314, 35 Pac. 64.

As between husband and wife.— The indebtedness of a husband to his wife remains absolutely imprescriptible in so far as the husband is concerned so long as the marriage exists, although she be judicially separated from him. *In re* Leeds, 49 La. Ann. 501, 21 So. 617.

13. *Arkansas.*— Carter *v.* Cantrell, 16 Ark. 154.

Georgia.— Shipp *v.* Wingfield, 46 Ga. 593.

Kentucky.— Hargis *v.* Sewell, 87 Ky. 63, 7 S. W. 557, 9 Ky. L. Rep. 920; Neal *v.* Robertson, 2 Dana 86.

Missouri.— Arnold *v.* Willis, 128 Mo. 145, 30 S. W. 517.

k. Effect on Wife of Limitation Against Husband. The exception in favor of a married woman, usually contained in statutes of limitation, prevents the statute from operating as a bar against the wife, even though it has run against the husband,[14] except in cases where realty belonging to the wife on her intermarriage vests by some provision of the statute in her husband.[15] And the fact that a wife who has sustained personal injuries during the disability of coverture elects to sue before the disability is removed, and to that end necessarily joins her husband as nominal plaintiff, does not operate as a waiver of the exception in her favor.[16]

l. Effect of Disability on Joint Action of Husband and Wife. When the husband must sue alone, or may, at his election, join the wife, the statute of limitations runs during coverture, for it is his cause of action, and does not survive to the wife.[17] Where the wife must be joined, the statute does not run, for it is her cause of action and survives to her.[18] But where the right of action for possession of the wife's lands is in the husband, the statute of limitations does not com-

United States.— Gregg *v.* Tesson, 1 Black 150, 17 L. ed. 74, holding that where a husband has a life-estate in land belonging to his wife, he is competent to sue for the recovery of it, consequently the statute runs against him. If he and his wife convey their title to another, their grantee must bring suit within the statutory period after limitations first began to run against the husband.

See 33 Cent. Dig. tit. "Limitation of Actions," § 408.

Choses in action of the wife, accruing during coverture, vest immediately in the husband the right to sue for them, and therefore the statute then begins to run notwithstanding her coverture. Cook *v.* Lindsey, 34 Miss. 451.

Right to sue for minor wife's land.— The husband may sue for his minor wife's land any time within three years after her becoming of age. Bush *v.* Lindsey, 14 Ga. 687.

14. Black *v.* Whitehall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Collins *v.* Riley, 104 U. S. 322, 26 L. ed. 752; Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325.

15. Cain *v.* Furlow, 47 Ga. 674.

16. Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325. See also *infra*, VI, F, 9.

17. *Arkansas.*— Carter *v.* Cantrell, 16 Ark. 154.

Kentucky.— Neal *v.* Robertson, 2 Dana 86. But see Gore *v.* Marshall, 3 Litt. 469; Marshall *v.* McQueen, 3 Litt. 468.

North Carolina.— Williams *v.* Lanier, 44 N. C. 30.

Texas.— Wells *v.* Cockrum, 13 Tex. 127.

Canada.— Ingalls *v.* Reid, 15 U. C. C. P. 490, holding that the husband by joining his wife cannot do that which he could not have done without joining her.

See 33 Cent. Dig. tit. "Limitation of Actions," § 407.

18. Knight *v.* Brawner, 14 Md. 1; Johnson *v.* Edwards, 109 N. C. 466, 14 S. E. 91, 26 Am. St. Rep. 580 (holding that where a husband and wife are seized of land by entireties, the statute of limitations is no bar to one unless it is a bar to both); Williams *v.* Lanier, 44 N. C. 30; Caldwell *v.* Black, 27 N. C. 463; Allen *v.* Gentry, 4 N. C. 411; Bailey *v.* Reed, 14 Phila. (Pa.) 167; Thompson *v.* Cincinnati, etc., R. Co., 109 Tenn. 268, 70 S. W. 612. See also *infra*, VI, F, 8.

But as to the joint right of the husband and wife where a wife is disseized, with her husband, during coverture, they can enter at once, and hence limitation runs against them both from that time. Mellus *v.* Snowman, 21 Me. 201; Moore *v.* Walker, 3 Lea (Tenn.) 656; McClung *v.* Sneed, 3 Head (Tenn.) 218; Guion *v.* Anderson, 8 Humphr. (Tenn.) 298; Cantrell *v.* Davidson County, 3 Tenn. Ch. 426. By marriage the husband becomes seized jointly with his wife in the wife's inheritance, and if there be a disseizin during coverture the husband and wife must sue jointly, and it is held that if the husband's interest becomes barred or extinguished both are barred during coverture, and if she survives him she has by the statute only three years next after coverture shall cease; that if there is no joint right in the husband and wife, as where the husband makes a conveyance of the wife's land and she does not join therein, as he is estopped from suing and the wife cannot sue alone, the case becomes one of particular estate and the wife or her heirs may sue within seven years after the husband's death. Weisinger *v.* Murphy, 2 Head (Tenn.) 674.

Remedy in equity.— Tenn. Code, c. 36, § 2481, whether the marriage was before or after the act, saves to the wife her remedy in equity to recover land conveyed by her husband without her consent by deed, according to the statute for the conveyance of a married woman's land, notwithstanding a joint disseizin of the husband and wife, and notwithstanding the bar of their joint action, until three years after her discoverture, except where the bar had given the disseizor a title perfected by the lapse of time before the passage of the act, or where there was an outstanding trustee capable of suing. Moore *v.* Walker, 3 Lea (Tenn.) 656; McCallum *v.* Petigrew, 10 Heisk. (Tenn.) 394; Dodd *v.* Benthal, 4 Heisk. (Tenn.) 601; Cantrell *v.* Davidson County, 3 Tenn. Ch. 426; Partee *v.* Thomas, 11 Fed. 769, construing the Tennessee statute.

mence to run against her in case of his disseizin until the termination by the death of the husband of his curtesy initiate.[19]

m. Effect on Wife's Heirs of Surviving Husband's Interest. As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by curtesy, the statute of limitations runs from the expiration of his estate, and not from her death.[20]

4. INFANCY — a. In General. In many jurisdictions, by express statutory enactment, or by judicial construction, where the statute excepts persons laboring under disabilities from its operation, without mentioning infants specifically, infants are within the saving clause of the statute, and the statute does not run against them during such disability,[21] even where such infant has a guardian who might maintain the action in his or her name, provided the title or right of action

19. Dawson *v.* Edwards, 189 Ill. 60, 50 N. E. 590; Dyer *v.* Wittler, 89 Mo. 81, 14 S. W. 518, 58 Am. Rep. 85 [*overruling* Valle *v.* Obenhause, 62 Mo. 81].

20. *Alabama.*— McLeod *v.* Bishop, 110 Ala. 640, 20 So. 130.

Arkansas.— Banks *v.* Green, 35 Ark. 84.

Connecticut.— Clark *v.* Vaughan, 3 Conn. 191.

Kentucky.— Butler *v.* McMillan, 88 Ky. 414, 11 S. W. 362, 11 Ky. L. Rep. 23; Meraman *v.* Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537.

Missouri.— Smith *v.* Patterson, 95 Mo. 525, 8 S. W. 567; Dyer *v.* Wittler, 89 Mo. 81, 14 S. W. 518, 58 Am. Rep. 85 [*overruling* Valle *v.* Obenhause, 62 Mo. 81]; Dyer *v.* Brannock, 66 Mo. 391, 27 Am. Rep. 359.

New York.— Moore *v.* Jackson, 4 Wend. 58.

North Carolina.— Kincaid *v.* Perkins, 63 N. C. 282.

Ohio.— Koltenbrock *v.* Cracraft, 36 Ohio St. 584; Cracraft *v.* Roach, 5 Ohio Dec. (Reprint) 467, 6 Am. L. Rec. 83.

Pennsylvania.— Marsteller *v.* Marsteller, 93 Pa. St. 350; Lahr's Appeal, 90 Pa. St. 507; Ege *v.* Medlar, 82 Pa. St. 86; Shallenberger *v.* Ashworth, 25 Pa. St. 152; Marple *v.* Myers, 12 Pa. St. 122.

Tennessee.— Royston *v.* Wear, 3 Head. 8.

United States.— Seawell *v.* Berry, 55 Fed. 731 [*reversed* on other grounds in 65 Fed. 742, 13 C. C. A. 101]; Beattie *v.* Wilkinson, 36 Fed. 646.

Canada.— Wigle *v.* Merrick, 8 U. C. C. P. 307. *Compare* Farquharson *v.* Morrow, 12 U. C. C. P. 311.

See 33 Cent. Dig. tit. "Limitation of Actions," § 412.

Where land conveyed to a husband in trust for his wife for life, with remainder to her children, is conveyed in fee by the husband and wife to defendants' grantors, the latter take but a life-estate, and, having entered under the deed, the statute does not begin to run against the children until the death of the wife. Gudgell *v.* Tydings, 10 S. W. 466, 10 Ky. L. Rep. 737.

21. *Arkansas.*— Phipps *v.* Martin, 33 Ark. 207.

California.— Morrell *v.* Morgan, 65 Cal. 575, 4 Pac. 580.

Delaware.— Traverse *v.* Cain, 2 Harr. 97.

Georgia.— Jordan *v.* Thornton, 7 Ga. 517; Irwin *v.* Morell, Dudley 72.

Indiana.— Hawkins *v.* Hawkins, 28 Ind. 66.

Kentucky.— Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563 (holding, however, that the statutory provision in behalf of infants, etc., is operative only where there is no person *in esse* as a widow or administrator, who has a right to sue); Merrill *v.* Tevis, 2 Dana 162; Pugh *v.* Bell, 1 J. J. Marsh. 398; Gibson *v.* Gibson, 77 S. W. 928, 25 Ky. L. Rep. 1332; Jones *v.* Comer, 76 S. W. 392, 25 Ky. L. Rep. 773 [rehearing *denied* in 77 S. W. 184, 25 Ky. L. Rep. 1104]; Myers *v.* Korh, 58 S. W. 1108, 21 Ky. L. Rep. 163.

Louisiana.— George *v.* Delaney, 111 La. 760, 35 So. 894; Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Messick *v.* Mayer, 52 La. Ann. 1161, 27 So. 815; Beckham *v.* Henderson, 23 La. Ann. 446; Terrio *v.* Guidry, 5 La. Ann. 589; Calvit *v.* Mulhollan, 12 Rob. 258; Lea *v.* Myers, 4 Rob. 8; Miers *v.* Bethany, 9 La. 374; Calvit *v.* Innis, 10 Mart. 287. See Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539 (holding that the lapse of time within which a revocatory action must be brought is a forfeiture of action by delay, and not affected by the rule of law which provides that prescription does not run against minors); Oriol *v.* Moss, 38 La. Ann. 770 (holding that where an administrator has waived notice of the seizure and sale of the property of minor heirs, want of notice is an irregularity cured by the prescription of five years, under Civ. Code, art. 3543).

Maryland.— Welch *v.* State, 5 Harr. & J. 369; Lamar *v.* Jones, 3 Harr. & M. 328.

Michigan.— Watson *v.* Watson, 53 Mich. 168, 18 N. W. 605, 51 Am. Rep. 111.

Mississippi.— Pittman *v.* McClellan, 55 Miss. 299; Pearson *v.* McMillan, 37 Miss. 588 (holding that the rule applies equally to matters at law and in equity); Adams *v.* Torry, 26 Miss. 499. See also Murdock *v.* Hughes, 7 Sm. & M. 219.

New Mexico.— Ortiz *v.* Salazar, 1 N. M. 355.

New York.— Miller *v.* Parkhurst, 9 N. Y. St. 759.

North Carolina.— Carroll *v.* Montgomery, 128 N. C. 278, 38 S. E. 874; Threadgill *v.*

is in the infant.[22] In the majority of jurisdictions, where the title or right of action vests in a personal representative, guardian, or trustee, who is under no legal disability, the statute of limitations begins to run notwithstanding the minority of the beneficiary, and where the former is barred by the statute, the latter is likewise barred.[23] In a few jurisdictions, however, a contrary doctrine prevails, and a minor may sue within the statutory period after attaining his majority, even where the representative or trustee is barred by the statute.[24] In some jurisdictions the rule is laid down that the statute of limitations begins to run against an infant when the cause of action accrues, the only effect of this disability being to give him, if the full limitation has run before he reaches his majority, a designated period thereafter within which he may sue.[25] However, the rule suspending the statute of limitations during minority is exclusively for the benefit of

West, 35 N. C. 310. See also Burkhead *v.* Colson, 22 N. C. 77.

Ohio.— Slater *v.* Cave, 3 Ohio St. 80; Bormuth *v.* Beyer, 10 Ohio Cir. Ct. 291, 6 Ohio Cir. Dec. 548; Jaeger *v.* Herancourt, 7 Ohio Dec. (Reprint) 1, 1 Cinc. L. Bul. 10.

Pennsylvania.— Pugh *v.* Powell, 8 Pa. Cas. 515, 11 Atl. 570; Hasson *v.* Pennsylvania R. Co., 1 Pa. Co. Ct. 531.

South Carolina.— Clark *v.* Smith, 13 S. C. 585; Lanier *v.* Griffin, 11 S. C. 565; Fewell *v.* Collins, 1 Treadw. 202.

Tennessee.— Aiken *v.* Smith, 1 Sneed 304.

Texas.— McCulloch *v.* Renn, 28 Tex. 793; Ferguson *v.* Morrison, (Civ. App. 1904) 81 S. W. 1240; Missouri, etc., R. Co. *v.* Scarborough, 29 Tex. Civ. App. 194, 68 S. W. 196; Grant *v.* Anderson, 1 Tex. App. Civ. Cas. § 190. See also Duncan *v.* Rawls, 16 Tex. 478; Behan *v.* Long, (Civ. App. 1895) 30 S. W. 380; Hampton *v.* Hampton, 9 Tex. Civ. App. 497, 29 S. W. 423; Roemilie *v.* Leeper, 2 Tex. Unrep. Cas. 535.

Virginia.— Lynch *v.* Thomas, 3 Leigh 682; Hudson *v.* Hudson, 6 Munf. 352. See also Butler *v.* Howe, 13 Me. 397; Thompson *v.* Myrick, 20 Minn. 205.

Canada.— Taylor *v.* Parnell, 43 U. C. Q. B. 239, holding that a statutory provision that if a minor, over a certain age and under certain conditions, enters into an engagement in writing, he shall be liable on and shall have the benefit of such engagement, only renders him liable under the conditions prescribed and does not deprive him of the right to take advantage of his disability under the statute of limitations.

See 33 Cent. Dig. tit. "Limitation of Actions," § 309.

The purchaser of an infant's lands succeeds to all the infant's rights in relation to it, although his rights grow out of his infancy, and if the infant is not barred of his claim to the lands by the statute of limitations at the time of the sale, the purchaser will not be. Thomson *v.* Gaillard, 3 Rich. (S. C.) 418, 45 Am. Dec. 778.

Notes payable to the order of minors, not being transferable by indorsement or delivery so long as the minority lasts, are not subject to the prescription of five years. Bird *v.* Pate, 4 La. Ann. 225.

22. *Georgia.*— Grimsby *v.* Hudnell, 76 Ga. 378, 2 Am. St. Rep. 46; Pendergrast *v.* Gullatt, 10 Ga. 218.

Mississippi.— Learned *v.* Ogden, 80 Miss. 769, 32 So. 278, 92 Am. St. Rep. 621.

New York.— Torrey *v.* Black, 3 N. Y. Wkly. Dig. 131.

North Carolina.— Cross *v.* Craven, 120 N. C. 331, 26 S. E. 940.

Tennessee.— Hale *v.* Ellison, (Ch. App. 1990) 59 S. W. 673.

23. See *supra*, IV, E, 5, b.

24. Moore *v.* Wallis, 18 Ala. 458; Eckford *v.* Evans, 56 Miss. 18; Pittman *v.* McClellan, 55 Miss. 299; Fearn *v.* Shirley, 31 Miss. 301, 64 Am. Dec. 575; Bacon *v.* Gray, 23 Miss. 140; Lacy *v.* Williams, 8 Tex. 182.

25. *Illinois.*— Davis *v.* Hall, 92 Ill. 85; Kilgour *v.* Gockley, 83 Ill. 109, holding that the provisions of the Limitation Act of 1839, that it shall not extend to persons under twenty-one years of age, provided they commence an action to recover within three years after the disabilities enumerated shall cease to exist, have reference to a disability of minority, without regard to the age to which such minority extends; and when, by a subsequent statute, minority of females ceased at eighteen, defendant's action must be brought, under the act of 1839, within three years after such persons attain that age.

Indiana.— King *v.* Carmichael, 136 Ind. 20, 35 N. E. 509, 43 Am. St. Rep. 303; Peelle *v.* State, 118 Ind. 512, 21 N. E. 288; Indianapolis *v.* Patterson, 112 Ind. 344, 14 N. E. 551; Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; Barnett *v.* Harshbarger, 105 Ind. 410, 5 N. E. 718; Wright *v.* Kleyla, 104 Ind. 223, 4 N. E. 16; Bryson *v.* Collmer, 33 Ind. App. 494, 71 N. E. 229.

Iowa.— Rice *v.* Bolton, 126 Iowa 654, 100 N. W 634, 102 N. W. 509.

Kansas.— Missouri Pac. R. Co. *v.* Cooper, 57 Kan. 185, 45 Pac. 587; Tinsley *v.* Pitts, 10 Kan. App. 321, 62 Pac. 536.

Michigan.— Thurstin *v.* Luce, 61 Mich. 292, 28 N. W. 103.

New Hampshire.— Frost *v.* Eastern R. Co., 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; Forest *v.* Jackson, 56 N. H. 357.

New York.— Cahill *v.* Seitz, 93 N. Y. App. Div. 105, 86 N. Y. Suppl. 1009; Hyland *v.* New York, etc., R. Co., 24 N. Y. App. Div.

minors, and does not prevent them from pleading such statute against persons resting under no disability.[26]

b. Where Right of Action Is Given by Statute. No exception can be claimed in favor of minors in a statutory provision limiting the time for commencing actions given by such statute, unless they are expressly mentioned by the statute as excepted.[27] Thus a statute which contains a saving clause in favor of infants "in any of the personal actions before mentioned" applies only to actions mentioned in such statutes.[28]

c. Actions For Recovery of Real Property. The general rule is that the various statutes of limitation do not operate as a bar to an action by a minor for the recovery of realty; some of the statutes holding that his cause of action only

417, 48 N. Y. Suppl. 416; Matter of Pond, 40 Misc. 66, 81 N. Y. Suppl. 249; Jagau *v.* Goetz, 11 Misc. 380, 32 N. Y. Suppl. 144. See also *In re* Becker, 28 Hun 207.

South Carolina.— Anderson *v.* Simms, 29 S. C. 247, 7 S. E. 289, 13 Am. St. Rep. 711; Fricks *v.* Lewis, 26 S. C. 237, 1 S. E. 884.

Tennessee.— Jackson *v.* Crutchfield, 11 Tenn. 394, 77 S. W. 776.

West Virginia.— McClintic *v.* Ocheltree, 4 W. Va. 249.

Wisconsin.— Gibson *v.* Gibson, 108 Wis. 102, 84 N. W. 22.

United States.— Bent *v.* Thompson, 138 U. S. 114, 11 S. Ct. 238, 34 L. ed. 902 [*affirming* 5 N. M. 408, 23 Pac. 234].

26. Petetin *v.* His Creditors, 51 La. Ann. 1660, 26 So. 471; Linton *v.* Harman, 5 La. Ann. 603.

27. *Alabama.*— Mewburn *v.* Bass, 82 Ala. 622, 2 So. 520, holding that the exception to the statute of limitations in favor of persons under the disability of infancy does not extend to the statutory right of redemption from mortgage sales, and infants must redeem from such sales within the statutory two years.

Arkansas.— See Clarke *v.* Mississippi Bank, 10 Ark. 516, 52 Am. Dec. 248.

Georgia.— Hines *v.* Weaver, 84 Ga. 265, 10 S. E. 741, holding that under Code, § 2922, providing that actions against executors must be brought within ten years after the right accrues, an action by the heirs of the legatee to recover a legacy brought more than ten years after the collection of all assets, although within five years after they attain their majority, is barred; section 2607 giving an heir, distributee, or legatee who is a minor at the time of the discharge of the executor five years after attaining his majority in which to sue, not applying to the heirs of a legatee.

Indiana.—De Moss *v.* Newton, 31 Ind. 219. See also State *v.* Pavey, 82 Ind. 543, holding that a prosecution for bastardy must be begun within two years from the time of the birth of the child, although the mother is an infant; one of the grounds given being that the state and not the relatrix is plaintiff in such form of action. See, however, Indiana Cent. R. Co. *v.* Oakes, 20 Ind. 9.

Louisiana.— Goodwin *v.* Bodcaw Lumber Co., 109 La. Ann. 1050, 34 So. 74; Copse *v.* Eddins, 15 La. Ann. 528, holding that the prescription of three years on a claim for services as overseer runs against minors, reserving, however, to them their recourse against their tutors or curators.

New York.— Norton *v.* New York, 16 Misc. 303, 38 N. Y. Suppl. 90, holding that the provision of Code Civ. Proc. § 396, extending the limitation of actions in the case of infants to one year after disability ceases, do not apply to the limitation in Laws (1886), c. 572, requiring notice of intention to begin an action against a city for personal injuries to be filed within six months after the cause of action accrued; holding likewise that this statute is special in its character, and contains no exception.

North Carolina.— Rayner *v.* Watford, 13 N. C. 338, holding that the act of 1715 is a bar to the claim of an infant creditor of the decedent preferred more than seven years after his death.

Ohio.— Favorite *v.* Booher, 17 Ohio St. 548.

Pennsylvania.—Peterson *v.* Delaware River Ferry Co., 190 Pa. St. 364, 42 Atl. 955; Way *v.* Hooton, 156 Pa. St. 8, 26 Atl. 784, 32 Wkly. Notes Cas. 398, holding that the infancy of a beneficiary does not prolong the time within which an action to enforce a resulting trust in land may be brought under the act of 1856, section 6.

Wisconsin.— Woodbury *v.* Shackleford, 19 Wis. 55.

United States.— Schauble *v.* Schulz, 137 Fed. 389, 69 C. C. A. 581, holding that the exemptions from the operation of statutes of limitation usually accorded to infants do not rest upon any fundamental doctrine of the law but only upon express provisions therefor in such statutes, and that it is competent for the legislature to put infants and adults upon the same footing in this respect, and that this is the effect of a statute containing no saving clause exempting infants.

Canada.— Miller *v.* Ryerson, 22 Ont. 369.

28. Sims *v.* Cumby, 53 Ark. 418, 14 S. W. 623; Foster *v.* Yazoo, etc., R. Co., 72 Miss. 886, 18 So. 380 (holding that an action by an infant for the death of its father, given by Miss. Code, c. 21, § 66, must be brought within one year after the death of the decedent as required, although the infant at the time is not represented by any guardian, etc.); Lanning *v.* Penn Electric Light Co., 31 Wkly. Notes Cas. (Pa.) 251.

accrues upon his attaining his majority;[29] while in other jurisdictions it is held that the operation of the statute is not suspended during infancy, but the minor is merely given a designated period after attaining his majority to bring suit, if the period of limitations has expired.[30]

d. Actions Against Former Guardian or Trustee. The general rule is that the right of action by a ward against a former guardian or trustee accrues upon the ward's arriving at age, and the action is barred if not brought within the designated statutory period reckoned from that date.[31]

29. *Alabama.*—Riggs *v.* Fuller, 54 Ala. 141.
Arkansas.— Thomas *v.* Sypert, 61 Ark. 575, 33 S. W. 1059; Falls *v.* Wright, 55 Ark. 562, 18 S. W. 1044, 29 Am. St. Rep. 74; Kessinger *v.* Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220.
Indiana.— Caress *v.* Foster, 62 Ind. 145; Breeding *v.* Shinn, 8 Ind. 125.
Louisiana.— Sewall *v.* Hebert, 37 La. Ann. 155; Fraser *v.* Zylicz, 29 La. Ann. 534; Gayoso de Lemos *v.* Garcia, 1 Mart. N. S. 324, holding, however, that the prescription of four years against the recovery of land by minors after majority runs only against them where the forms of law have been pursued in the alienation of their property.
Mississippi.— Wolf *v.* Brown, (1892) 11 So. 879; Tippin *v.* Coleman, 59 Miss. 641.
Nebraska.— Albers *v.* Kozeluh, 68 Nebr. 522, 94 N. W. 521, 97 N. W. 646 [*affirming* on rehearing 94 N. W. 521].
New York.— Meiggs *v.* Hoagland, 68 N. Y. App. Div. 182, 74 N. Y. Suppl. 234.
South Carolina.— Rice *v.* Bamberg, 59 S. C. 498, 38 S. E. 209; Maccaw *v.* Crawley, 59 S. C. 342, 37 S. E. 934; Goforth *v.* Goforth, 47 S. C. 126, 25 S. E. 40; Johnson *v.* Cobb, 29 S. C. 372, 7 S. E. 601; Massey *v.* Adams, 3 S. C. 254; Rose *v.* Daniel, 2 Treadw. 549; McQueen *v.* Fletcher, 4 Rich. Eq. 152.
Tennessee.— Hale *v.* Ellison, (1900) 59 S. W. 673.
Texas.— Martin *v.* Wayman, 38 Tex. 649; McMasters *v.* Mills, 30 Tex. 591; Taylor *v.* Brymer, 17 Tex. Civ. App. 517, 42 S. W. 999.
Vermont.— See Soule *v.* Barlow, 49 Vt. 329, holding that the statute of limitations runs against an infant having only color of title to the land.
Washington.— Mabie *v.* Whittaker, 10 Wash. 656, 39 Pac. 172.
United States.— Leroy *v.* Reeves, 15 Fed. Cas. No. 8,272, 5 Sawy. 102.
See 33 Cent. Dig. tit. "Limitation of Actions," § 392.

30. *California.*—Ganahl *v.* Soher, (1884) 5 Pac. 80, holding likewise that the time of one's minority is calculated from the first minute of the day on which he is born to the first minute of the day corresponding which completes the period of minority.
Connecticut.— Sheldon *v.* Bird, 2 Root 509.
Illinois.— Mason *v.* Odum, 210 Ill. 471, 71 N. E. 386, 102 Am. St. Rep. 180; Orthwein *v.* Thomas, 127 Ill. 554, 21 N. E. 430, 11 Am. St. Rep. 159, 4 L. R. A. 434; Safford *v.* Stubbs, 117 Ill. 389, 7 N. E. 653; Hodgen *v.* Henrichsen, 85 Ill. 259.
Iowa.— Lloyd *v.* Bunce, 41 Iowa 660; Mathews *v.* Stephens, 39 Iowa 279; Campbell *v.* Long, 20 Iowa 382.
Kansas.— Thompson *v.* Burge, 60 Kan. 549, 57 Pac. 110, 72 Am. St. Rep. 369; Howbert *v.* Heyle, 47 Kan. 58, 27 Pac. 116; Delashmutt *v.* Parrent, 39 Kan. 548, 18 Pac. 712; Scantlin *v.* Allison, 32 Kan. 376, 4 Pac. 618.
Kentucky.— Hoffert *v.* Miller, 86 Ky. 572, 6 S. W. 447, 9 Ky. L. Rep. 732; Gates *v.* Jacob, 1 B. Mon. 306; Sharp *v.* Stephens, 52 S. W. 977, 21 Ky. L. Rep. 687, holding that under Rev. St. § 2506, providing that one who was an infant when his right of action to recover real property accrued may, although the period of fifteen years has expired, bring his action within three years after his disability is removed, the right to sue is limited to fifteen years, where the disability is removed as much as three years before the expiration of that time.
Missouri.— Ogle *v.* Hignet, 161 Mo. 47, 61 S. W. 596.
New York.— Howell *v.* Leavitt, 95 N. Y. 617 [*followed* and *approved* in Darrow *v.* Calkins, 154 N. Y. 503, 49 N. E. 61, 61 Am. St. Rep. 637, 48 L. R. A. 299 (*affirming* 6 N. Y. App. Div. 28, 39 N. Y. Suppl. 527)] (holding likewise that any unexpended part of the period of time fixed by the general rule of limitations belongs to the party entitled to sue after the disability has ended, and so much added time as will not extend the original limit beyond ten years more after the end of the disability); Hœpfner *v.* Sevestre, 10 N. Y. Suppl. 51; Jackson *v.* Cairns, 20 Johns. 301; Jackson *v.* Lewis, 13 Johns. 504 [*affirmed* in 17 Johns. 475].
North Carolina.— Cross *v.* Craven, 120 N. C. 331, 26 S. E. 940; Clayton *v.* Rose, 87 N. C. 106.
Ohio.— Walker *v.* Knight, 12 Ohio St. 209.
Pennsylvania.— Henry *v.* Carson, 59 Pa. St. 297; Weddle *v.* Robertson, 6 Watts 486.
Tennessee.— Winters *v.* Hainer, 107 Tenn. 337, 64 S. W. 44.
Canada.— Shea *v.* Burchell, 27 Nova Scotia 235. See also McKinnon *v.* Brody, 3 Nova Scotia Dec. 410.

31. *Arkansas.*— Wallace *v.* Swepston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94.
Georgia.— Lane *v.* Lane, 87 Ga. 268, 13

e. Effect of Marriage. The general rule is that the marriage of a *feme* infant will not merge the disability of infancy in that of coverture, but the suspension of the statute continues until such infant attains her majority.[32] In other jurisdictions, however, the statute is held to begin to run against a female minor from the date of her marriage.[33]

f. Effect of Absence or Non-Residence. The absence or non-residence of the infant during the period of minority does not affect the rule as to the suspension of the statute of limitations during such minority.[34]

g. Effect of Action During Disability. The institution of an action on behalf of an infant by his guardian or next friend will not operate to set the statute running, or prevent such infant from prosecuting the action in his own name upon attaining his majority.[35]

5. IMPRISONMENT. Imprisonment, if not an exception in the statute, cannot affect the running of limitations.[36] But under the statutes in various jurisdictions this exception has been made.[37]

S. E. 335; Hobbs *v.* Cody, 45 Ga. 478. See Byne *v.* Anderson, 67 Ga. 466.

Indiana.— Lambert *v.* Billheimer, 125 Ind. 519, 25 N. E. 451.

Louisiana.— Richmond's Succession, 35 La. Ann. 858; Sewell *v.* McVay, 30 La. Ann. 673.

Maryland.— State *v.* Henderson, 54 Md. 332.

Mississippi.— Fearn *v.* Shirley, 31 Miss. 301, 64 Am. Dec. 575.

Missouri.— State *v.* Willi, 46 Mo. 236.

Pennsylvania.— Bones' Appeal, 27 Pa. St. 492; Wyant *v.* Dieffendafer, 2 Grant 334.

Virginia.— Magruder *v.* Goodwyn, 2 Patt. & H. 561.

United States.— Hubbird *v.* Goin, 137 Fed. 822, 70 C. C. A. 320.

England.—Thomas *v.* Thomas, 1 Jur. N. S. 1160, 2 Kay & J. 79, 25 L. J. Ch. 159, 4 Wkly. Rep. 135, 69 Eng. Reprint 701.

See 33 Cent. Dig. tit. "Limitation of Actions," § 395.

32. Layton *v.* State, 4 Harr. (Del.) 8; Barrow *v.* Wilson, 39 La. Ann. 403, 2 So. 809; Cross *v.* Craven, 120 N. C. 331, 26 S. E. 940; Robertson *v.* Wurdeman, 2 Hill (S. C.) 324.

Emancipation.—Where a minor has been emancipated by the judgment of a court, under statute, prescription against his right of action against his tutor for a settlement begins from the time of his emancipation, and not from his majority. Proctor *v.* Hebert, 36 La. Ann. 250.

33. Finnell *v.* O'Neal, 13 Bush (Ky.) 176; Parish *v.* Alston, 65 Tex. 194; Thompson *v.* Cragg, 24 Tex. 582; White *v.* Latimer, 12 Tex. 61; Taylor *v.* Brymer, 17 Tex. Civ. App. 517, 42 S. W. 999; Smith *v.* Powell, 5 Tex. Civ. App. 373, 23 S. W. 1109.

34. *Iowa.*— Killmer *v.* Wuchner, 74 Iowa 359, 37 N. W. 778.

Louisiana.— Smith *v.* McWaters, 7 La. Ann. 145. See Leonard *v.* Fluker, 4 Rob. 148, holding that under the provision of Code (1808), bk. 3, tit. 1, art. 74, which declares "that until the acceptance or renunciation, the inheritance is considered as a fictitious being, representing in every respect, the deceased, who was the owner of the estate," prescription runs against a vacant succession, although minors are interested.

Ohio.— Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480.

South Carolina.— Papot *v.* Trowell, 8 Rich. 234; Edson *v.* Davis, 1 McCord 555.

United States.— Brush *v.* Ware, 15 Pet. 93, 10 L. ed. 672 [*affirming* 29 Fed. Cas. No. 17,171, 1 McLean 533].

35. *Kentucky.*—Hopkins *v.* Virgin, 11 Bush 677.

Michigan.— Keating *v.* Michigan Cent. R. Co., 94 Mich. 219, 53 N. W. 1053.

Mississippi.— Tucker *v.* Wilson, 68 Miss. 693, 9 So. 898.

New York.— Geibel *v.* Elwell, 91 Hun 550, 36 N. Y. Suppl. 238.

Tennessee.— Whirley *v.* Whiteman, 1 Head 610.

Texas.— Galveston, etc., R. Co. *v.* Washington, 25 Tex. Civ. App. 600, 63 S. W. 538.

36. Bledsoe *v.* Stokes, 1 Baxt. (Tenn.) 312; Tallman *v.* Mutual F. Ins. Co., 27 U. C. Q. B. 100.

Imprisonment of a debtor will not prevent the running of the statute in his favor, the saving clause covering only imprisonment of the creditor. Turner *v.* Shearer, 6 Gray (Mass.) 427.

37. Price *v.* Slaughter, 1 Cinc. Super. Ct. (Ohio) 429; Matilda *v.* Crenshaw, 4 Yerg. (Tenn.) 299 (which cases hold that slavery of one entitled to freedom is imprisonment); Lasater *v.* Waites, (Tex. Civ. App. 1902) 67 S. W. 518 [*reversed* on other grounds in 95 Tex. 553, 68 S. W. 500] (holding that one is "a person in prison," when the sheriff after arresting him wrongfully moves him before his broken leg is in proper condition, and while he is confined in jail awaiting trial, and while he is absent from the jail, as an attached witness, in the custody of the sheriff); Wood *v.* Ward, 30 Fed. Cas. No. 17,965, 6 Am. L. Rec. 675 (as to Ohio law). But a slave who has been transferred by her owner

6. Insanity — a. As to Insane Claimant or Plaintiff. Limitations run against everyone without regard to the personal disability of insanity, unless there is a saving of such cases in the statute.[38] This disability is now generally the subject of exception in the various limitation statutes, either suspending the beginning of the operation of limitations until the disability is removed or granting an additional period after that time,[39] although the exception is sometimes directed to such disability in general or generic terms, as by extending the period in favor of

to another, in trust to emancipate her as soon as the laws shall permit it, and meanwhile to allow her to control herself, and who, although not emancipated, is allowed personal liberty, is not "imprisoned," within the meaning of an exception to the statute of limitations. Downs *v.* Allen, 10 Lea (Tenn.) 652.

"Under legal disability" is construed by statute in Kansas as including a person imprisoned. State *v.* Calhoun, 50 Kan. 523, 32 Pac. 38, 34 Am. St. Rep. 141, 18 L. R. A. 838. But without the aid of such statute it would seem that the legal disability must have been by imprisonment for felony, as no plea in abatement or bar could have been pleaded if the action had been brought while plaintiff was imprisoned for misdemeanor only. Tallman *v.* Mutual F. Ins. Co., 27 U. C. Q. B. 100.

38. Shorick *v.* Bruce, 21 Iowa 305. See also Humpfrey *v.* Gery, 7 C. B. 567, 62 E. C. L. 567.

A limitation is fixed for such cases sometimes, by express statute, as in Pennsylvania, where the statute provides that no exception in any act of assembly respecting the limitation of actions in favor of persons *non compos mentis* shall stand, so as to permit any person to maintain any action for the recovery of land after "thirty years shall have elapsed since the right of entry thereto accrued to any person within the exceptions aforesaid." Boyd *v.* Weber, 193 Pa. St. 651, 44 Atl. 1078. See also Trusts, etc., Co. *v.* Ontario Trusts Corp., 31 Ont. 504 [*affirmed* in 2 Ont. L. Rep. 97], where it appears the statute of limitations prescribed twenty years for bringing actions on behalf of persons under disability of insanity.

39. See the various statutes. And see the following cases:

Georgia.—Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133.

Iowa.—McNeil *v.* Sigler, 95 Iowa 587, 64 N. W. 604, holding that the limitation runs and the statute merely allows an additional year after the disability is removed or after death, and that if the death occurs within a year of the expiration of the general limitation period the additional year runs from the death.

Kentucky.—Lackey *v.* Lackey, 8 B. Mon. 107, as to the right of an insane person to prosecute a writ of error.

Maine.—McCutcheon *v.* Currier, 94 Me. 362, 47 Atl. 923.

Massachusetts.—Edson *v.* Munsell, 10 Allen 557, holding that an easement in the land of an insane person cannot be acquired by prescription until the expiration of such time after his death or the removal of his disability as would bar an action by him or his legal representatives for the land.

Mississippi.—Ward *v.* Dulaney, 23 Miss. 410.

New Hampshire.—Little *v.* Downing, 37 N. H. 355.

New Jersey.—Kidder *v.* Houston, (Ch. 1900) 47 Atl. 336.

North Carolina.—Outland *v.* Outland, 118 N. C. 138, 33 S. E. 972.

Pennsylvania.—Bensell *v.* Chancellor, 5 Whart. 371, 34 Am. Dec. 561.

Rhode Island.—Bourne *v.* Hall, 10 R. I. 139, holding that a person of unsound mind is not within the operation of the statute of possession or of that of limitations, although he may have a guardian who might have brought suit for him.

South Carolina.—Cleveland *v.* Jones, 3 Strobh. 479 note.

Tennessee.—Alston *v.* Boyd, 6 Humphr. 504.

Texas.—Moore *v.* Waco, 85 Tex. 206, 20 S. W. 61; Sasser *v.* Davis, 27 Tex. 656; Roemilie *v.* Leeper, 2 Tex. Unrep. Cas. 535.

Vermont.—Chamberlain *v.* Estey, 55 Vt. 378.

United States.—De Arnaud *v.* U. S., 151 U. S. 483, 14 S. Ct. 374, 38 L. ed. 244, as to U. S. Rev. St. § 1069.

Canada.—Trusts, etc., Co. *v.* Ontario Trusts Corp., 31 Ont. 504 [*affirmed* in 2 Ont. L. Rep. 97].

See 33 Cent. Dig. tit. "Limitation of Actions," § 413 *et seq.*

Where insanity was caused by an injury, it was held in an action for the injury that the statutory provision that "no limitations . . . shall run against . . persons of unsound mind, during the existence of their respective disabilities," saved plaintiff's action out of the operation of the one-year limitation act applicable to actions for personal injuries, plaintiff having been rendered insane from the day of the injury. Sasser *v.* Davis, 27 Tex. 656. But in Roelefsen *v.* Pella, 121 Iowa 153, 96 N. W. 738, the statute extending the time to sue by insane persons for a fixed time after disability removed did not save the action of one who became insane a few hours after an injury and as a result of the injury, as the disability did not exist when the cause accrued. And in Calumet Electric R. Co. *v.* Mabie, 66 Ill. App. 235, 239, it was said: "We do not decide that the insanity must have existed prior to the injury, so as to give literal effect to the present tense of the words of the statute, 'is at the time the cause of action accrued . . insane,' nor that the insanity must have re-

persons "under legal disability."[40] The party who invokes the protection of such saving clause, or those claiming under him, must show the condition of mind contemplated by the statute which will not be extended to embrace other conditions,[41] and as soon as the disability is removed or the party dies the statute operates or the extension of time begins to run.[42]

b. As to Insane Defendant. Although the statute deducts from the time prescribed for the commencement of actions the period during which plaintiff or claimant is under disability (insanity), this provision makes no allowance for like disabilities of the adverse party, the debtor, and as liabilities may be enforced against insane persons by action, the insanity of a defendant will not take a claim against him out of the operation of the statute of limitations, whether such insanity has been judicially determined or not.[43]

sulted instantly from the injury," but the court held that six months having elapsed between the injury and the insanity, the statute began to run from the date of the injury. See also *infra*, VI, F, 7, a.

Deed of insane person.— Limitations will not run in favor of one claiming under a deed of an insane person until the disability of the grantor is removed or until his death. Downham *v.* Holloway, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 330 (as to the right of heirs to disaffirm, on the ground that the deed of the ancestor was voidable only); Howard *v.* Carter, 71 Kan. 85, 80 Pac. 61; Spicer *v.* Holbrook, 66 S. W. 180, 23 Ky. L. Rep. 1812 (holding that the deed of an insane person is void, and that the ten-year statute of limitations applicable to actions for relief from fraud does not apply to an action to set aside such a deed). But on the other hand, it is held that a deed is voidable for insanity of the grantor and the right of action to avoid it accrues to such grantor immediately, which right, and that of the persons claiming under the grantor are barred, after thirty years from such date, under the act declaring that no exception in any act of assembly respecting the limitation of actions in favor of persons *non compos mentis* shall stand, so as to permit any person to maintain any action for the recovery of land after thirty years shall have elapsed since the right of entry thereto accrued to any person within the exception aforesaid. Boyd *v.* Weber, 193 Pa. St. 651, 44 Atl. 1078.

The negligence of others for a long period of time to have a guardian appointed, and take steps to avoid the conveyance by an insane person will not prejudice his rights. Alston *v.* Boyd, 6 Humphr. (Tenn.) 504. See also Kidder *v.* Houston, (N. J. Ch. 1900) 47 Atl. 336.

40. Lantis *v.* Davidson, 60 Kan. 389, 56 Pac. 745, holding that an insane person is under disability, within the meaning of the statute, although the question of his insanity has never been adjudicated. See also Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. 336. In these states by statute persons of unsound mind are embraced in the expression under "legal disability." See also Downham *v.* Holloway, 158 Ind. 626, 64 N. E. 82, 92 Am. St. Rep. 330.

41. Calumet Electric St. R. Co. *v.* Mabie, 66 Ill. App. 235 (as to peevishness and peculiarity not being insanity); Rugan *v.* Sabin, 53 Fed. 415, 3 C. C. A. 578 (holding that credulity and feebleness of mind and body did not come within a saving as to insanity under the Nebraska statute).

An habitual drunkard is not a person of unsound mind so as to come within the definition of persons "under legal disabilities" within the meaning of the statute. Makepeace *v.* Bronnenberg, 146 Ind. 243, 45 N. E. 336.

A deaf mute is not an idiot, or *non compos mentis*, within the intent of the statute of limitations, if he has his intellectual faculties. Christmas *v.* Mitchell, 38 N. C. 535. But on the other hand, under the old rule that a deaf mute is presumed *prima facie* to be *non compos mentis*, such a person shown to have been deaf and dumb from birth must be shown to have sufficient intelligence to know and comprehend his legal rights and liabilities in order to fall without the exception. Oliver *v.* Berry, 53 Me. 206, 87 Am. Dec. 547.

Non compos mentis.— The word "insane," as used in a statute of limitations, applies to every person who is *non compos*, or in the words of the statute of wills, "of unsound or deranged mind," and is not confined to persons wholly without understanding. Burnham *v.* Mitchell, 34 Wis. 117. In Warlick *v.* Plonk, 103 N. C. 81, 9 S. E. 190, the court held an instruction without error which charged "that if the alleged insane person was so mentally diseased that he was unable to understand and assert his rights, that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in possession thereof asserting title thereto, and that such possession would destroy his rights, then he labored under such disability as would prevent the operation of the statute."

Monomania.— In Clarke *v.* Irwin, 63 Nebr. 539, 88 N. W. 783, it is held that there is no valid reason why the rule regarding monomania or partial insanity should not be applied in the determination of questions involving the statute of limitations.

42. Dicken *v.* Johnson, 7 Ga. 484; Arnold *v.* Arnold, 35 N. C. 174, 55 Am. Dec. 434. See also *infra*, V, F, 7, a, (III).

43. Sanford *v.* Sanford, 62 N. Y. 553; Ald-

7. Concurrent and Intervening Disabilities — a. Intervening Disabilities — (i) *General Rule.* When the statute once begins to run it will continue unless there is a saving qualification in the statute,[44] and as a general rule it is the settled construction of the statutes of limitation both in England and the United States that when a right of action has accrued, and there are parties competent to sue and be sued at that time, the period of limitations begins to run, and the time will continue to run notwithstanding any subsequent disability, and the provisions suspending the operation of limitations, in favor of infants, idiots, insane persons, married women, etc., or extending the period in favor of such persons, are confined to such disabilities existing at the time the cause of action accrues to such person.[45] The rule is not entirely without exception, however, and it has been held that if subsequent to the accrual of a cause of action plaintiff, without any fault on his part, is deprived of his remedy by some superior power, the stat-

rich *v.* Williams, 12 Vt. 413. See also Edwards *v.* Ross, 58 Ga. 147; State Hospital *v.* Fountain, 129 N. C. 90, 39 S. E. 734 (holding that under the statute, an insane defendant is entitled to the benefit of the statute, whether specifically pleaded or not); Grady *v.* Wilson, 115 N. C. 344, 20 S. E. 518, 44 Am. St. Rep. 461.

In England a different rule has been applied in suits in equity brought to enforce demands against the estates of deceased lunatics, so found, it being held in such cases that the lapse of six years during the lunatic's lifetime will not bar the claim, since the court will take judicial knowledge of the fact that a suit against the lunatic in his lifetime for the recovery of the claim would have been restrained on a petition in lunacy. Stedman *v.* Hart, 18 Jur. 744, Kay 607, 23 L. J. Ch. 908, 2 Wkly. Rep. 462, 69 Eng. Reprint 258. But where under the bill to sustain such action an order was made by consent staying the action and suit with liberty for plaintiff to prove his claim in lunacy, and he attempted to support his claim before the master in lunacy who disallowed it and reported without including the holder of the claim as a creditor, and nearly thirteen years thereafter the lunatic died, it was held that a creditor's suit thereafter was barred. Rock *v.* Cooke, 1 De G. & Sm. 675, 12 Jur. 5, 17 L. J. Ch. 93, 63 Eng. Reprint 1246.

Non-joinder of ward in action.—Where the statute required the joinder of the guardian as a party with his insane ward in actions to enforce claims against the latter, suit having been brought against the guardian alone and the ward afterward joining by leave of court, it was held that the bringing of action against the guardian alone did not stop the running of the statute in favor of the insane defendant. Potts *v.* Hines, 57 Miss. 735.

Reimbursement of committee of lunatic.—It has been held that a petition in lunacy brought by the committee of a lunatic after the death of the latter, to be reimbursed moneys expended by the committee for the lunatic's benefit, was not such a proceeding as would take the claim of the committee out of the statute, as against an heir at law who had not been made a party respondent to the petition (Wilkinson *v.* Wilkinson, 9 Hare, 204, 41 Eng. Ch. 204, 68 Eng. Reprint 476); and generally the claim for past maintenance being simply a debt of the lunatic, the court will not pay out of his estate more than six years' arrears of such maintenance. *In re* Weaver, 21 Ch. D. 615, 47 J. P. 68, 48 L. T. Rep. N. S. 93, 31 Wkly. Rep. 224; *In re* Harris, 49 L. J. Ch. 327.

44. Beattie *v.* Whipple, 154 Ill. 273, 40 N. E. 340; Peoria County *v.* Gordon, 82 Ill. 435; People *v.* White, 11 Ill. 341. As where a certain time is allowed after removal of an intervening disability. See Holtzapple *v.* Phillibaum, 12 Fed. Cas. No. 6,648, 4 Wash. 356, under a Pennsylvania statute.

45. *Alabama.*— Lee *v.* Wood, 85 Ala. 169, 4 So. 693; Underhill *v.* Mobile Fire Department Ins. Co., 67 Ala. 45; Reed *v.* Minell, 30 Ala. 61; Doe *v.* Thorp, 8 Ala. 253.

Arkansas.— McFarlane *v.* Grober, 70 Ark. 371, 69 S. W. 56, 91 Am. St. Rep. 84; Denton *v.* Brownlee, 24 Ark. 556; Carter *v.* Cantrell, 16 Ark. 154.

California.— McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814.

Connecticut.— Rogers *v.* Hillhouse, 3 Conn. 398; Griswold *v.* Butler, 3 Conn. 227.

District of Columbia.— Gibson *v.* Ruff, 8 App. Cas. 262.

Florida.— Wade *v.* Doyle, 17 Fla. 522.

Georgia.— Wellborn *v.* Weaver, 17 Ga. 267, 63 Am. Dec. 235, although marriage occurs on same day the statute starts to run.

Illinois.— Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590; Calumet Electric St. R. Co. *v.* Mabie, 66 Ill. App. 235, subsequent insanity.

Indiana.— Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; Kistler *v.* Hereth, 75 Ind. 177, 39 Am. Rep. 131, subsequent imprisonment.

Iowa.— Roelefsen *v.* Pella, 121 Iowa 153, 96 N. W. 738; Black *v.* Ross, 110 Iowa 112, 81 N. W. 229, subsequent insanity.

Kentucky.— Loyd *v.* Loyd, 46 S. W. 485, 20 Ky. L. Rep. 347. See also Young *v.* Ashland Coal, etc., R. Co., 41 S. W. 313, 19 Ky. L. Rep. 491.

Maine.— McCutcheon *v.* Currier, 94 Me. 362, 47 Atl. 923, subsequent insanity.

Maryland.— Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306; Ruff *v.* Bull, 7 Harr. & J. 14, 16 Am. Dec. 290.

ute ceases to run during the continuance of the supervening disability;[46] and so also that the general rule must yield to a positive statutory inhibition against plaintiff's right to sue,[47] or against the running of limitations to bar persons under specified disabilities, although they arise after the statute of limitations has begun to run.[48]

(II) *WHERE STATUTE HAS BEGUN TO RUN AGAINST ANCESTOR OR PREDECESSOR.* The foregoing general rule against the interruption of the statute of limitations after it has started to run is not confined to causes which accrue originally to the person whose disability intervenes. If there are successive owners of a cause, or of equitable relief,[49] and the right to prosecute arises in the time of the first, the period of limitation commences at that time and continues attached

Massachusetts.— Currier *v.* Gale, 3 Allen 328; Allis *v.* Moore, 2 Allen 306; Dow *v.* Warren, 6 Mass. 328.

Minnesota.— Kelley *v.* Gallup, 67 Minn. 169, 69 N. W. 812.

Mississippi.— Tippin *v.* Coleman, 61 Miss. 516; Parmele *v.* McGinty, 52 Miss. 475; Stevenson *v.* McReary, 12 Sm. & M. 9, 51 Am. Dec. 102; McCoy *v.* Nichols, 4 How. 31.

Missouri.— Meyer *v.* Christopher, 176 Mo. 580, 75 S. W. 750; Pim *v.* St. Louis, 122 Mo. 654, 27 S. W. 525; Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177; Gordon *v.* Lewis, 88 Mo. 378; Cunningham *v.* Snow, 82 Mo. 587; Rogers *v.* Brown, 61 Mo. 187; Smith *v.* Newby, 13 Mo. 159; Landes *v.* Perkins, 12 Mo. 238; State *v.* Macy, 72 Mo. App. 427.

New Hampshire.— Munroe *v.* Wilson, 68 N. H. 580, 41 Atl. 240.

New Jersey.—Clark *v.* Richards, 15 N. J. L. 347.

New York.— Bucklin *v.* Bucklin, 1 Abb. Dec. 242, 1 Keyes 141; Fleming *v.* Griswold, 3 Hill 85; Bradstreet *v.* Clarke, 12 Wend. 602; Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433; Peck *v.* Randall, 1 Johns. 165.

North Carolina.— Causey *v.* Snow, 122 N. C. 326, 29 S. E. 359; Asbury *v.* Fair, 111 N. C. 251, 16 S. E. 467; Kennedy *v.* Cromwell, 108 N. C. 1, 13 S. E. 135; Chancy *v.* Powell, 103 N. C. 159, 9 S. E. 298; Killian *v.* Watt, 7 N. C. 167; Jones *v.* Clayton, 6 N. C. 62; Pearce *v.* House, 4 N. C. 722.

Pennsylvania.— Amole's Appeal, 115 Pa. St. 356, 8 Atl. 614 (as to the marriage of the heir of the holder of a note with the maker); Bensell *v.* Chancellor, 5 Whart. 371, 34 Am. Dec. 561 (subsequent insanity); Neilly *v.* McCormick, 2 Yeates 447.

South Carolina.— Duren *v.* Kee, 26 S. C. 219, 2 S. E. 4; Shubrick *v.* Adams, 20 S. C. 49; Dillard *v.* Philson, 5 Strobh. 213; Barino *v.* McGee, 3 McCord 452 (as to personalty); Faysoux *v.* Prather, 1 Nott & M. 296, 9 Am. Dec. 691; Adamson *v.* Smith, 2 Mill 269, 12 Am. Dec. 665; Fewell *v.* Collins, 3 Brev. 286.

Tennessee.— Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299; Alvis *v.* Oglesby, 87 Tenn. 172, 10 S. W. 313; Chaney *v.* Moore, 1 Coldw. 48; Jones *v.* Preston, 3 Head 161.

Texas.— Becton *v.* Alexander, 27 Tex. 659; White *v.* Latimore, 12 Tex. 61; McDonald *v.* McGuire, 8 Tex. 361; Cole *v.* Runnells, 6 Tex. 272; Tyson *v.* Britton, 6 Tex. 222; Bowles *v.* Smith, (Civ. App. 1896) 34 S. W. 381; Mexia *v.* Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016.

Virginia.— Parsons *v.* McCracken, 9 Leigh 495; Hudson *v.* Hudson, 6 Munf. 352; Fitzhugh *v.* Anderson, 2 Hen. & M. 289, 3 Am. Dec. 625.

West Virginia.—Mynes *v.* Mynes, 47 W. Va. 681, 35 S. E. 935.

Wisconsin.— Charmley *v.* Charmley, 125 Wis. 297, 103 N. W. 1106, 110 Am. St. Rep. 827; Swearingen *v.* Robertson, 39 Wis. 462.

Wyoming.— Bliler *v.* Boswell, 9 Wyo. 57, 59 Pac. 798, 61 Pac. 867.

United States.— De Arnaud *v.* U. S., 151 U. S. 483, 14 S. Ct. 374, 38 L. ed. 244 (subsequent insanity); McDonald *v.* Honey, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269 (applying the construction of the statutes to the provision limiting the time for bringing error or appeal); Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317; Oliver *v.* Pullam, 24 Fed. 127; Roberts *v.* Moore, 20 Fed. Cas. No. 11,905, 3 Wall. Jr. 292.

England.— Piggott *v.* Rush, 4 A. & E. 912, 2 Harr. & W. 29, 6 L. J. K. B. 272, 6 N. & M. 376, 31 E. C. L. 398 (subsequent insanity); Doe *v.* Shane, 4 T. R. 306 note (b); Doe *v.* Jones, 4 T. R. 300.

Canada.—Bradbury *v.* Baillie, 6 N. Brunsw. 690; Doe *v.* Bennett, 21 U. C. Q. B. 405; Doe *v.* Grant, 3 U. C. Q. B. O. S. 511.

See 33 Cent. Dig. tit. "Limitation of Actions," § 417 *et seq.*

Injury causing insanity see *supra*, VI, F, 6.

46. Broadfoot *v.* Fayetteville, 124 N. C. 478, 32 S. E. 804, 70 Am. St. Rep. 610 [*citing* U. S. *v.* Wiley, 11 Wall. (U. S.) 508, 20 L. ed. 211; Braun *v.* Sauerwein, 10 Wall. (U. S.) 218, 19 L. ed. 895; Hanger *v.* Abbott, 6 Wall. (U. S.) 532, 18 L. ed. 939]. See also *infra*, VI, H.

47. Jordan *v.* Jordan, Dudley (Ga.) 182 (as to postponement of right to sue administrator); Dowell *v.* Webber, 2 Sm. & M. (Miss.) 452.

See also EXECUTORS AND ADMINISTRATORS.

An unconstitutional and void statute interdicting the service or execution of process creates no legal disability, although the act stood unimpeached for several years. Shubrick *v.* Adams, 20 S. C. 49.

48. Bush *v.* Lindsey, 14 Ga. 687.

49. Bucklin *v.* Bucklin, 1 Abb. Dec. (N. Y.)

to the demand during the successive changes without regard to the disability of any of the successors.[50] If the right or cause accrues to the ancestor and the statute commences to run against him, the disabilities of those to whom his right passes at his death will not interrupt the running of the statute,[51] subject to the particular provisions of some of the statutes fixing a limit of time after the death of the ancestor, after which the heir or successor will be barred.[52] It will be seen that in most of the states the clauses of exception or provisos were drawn from and implied equivalent terms to those used in the English statute, expressly limiting the exception to cases of disability existing when the cause of action accrues. While this is not always the case, variation in the language has not been allowed

242, 1 Keyes 141, holding that a statutory provision that "no person shall avail himself of any disability . . . unless such disability existed at the time his right of action or of entry accrued," does not mean that one succeeding to a cause or right against which the statute had started to run in the hands of the predecessor, can take advantage of his own disability existing when he succeeded to the cause or right.

Effect of bar against trustee on cestui que trust see *supra*, IV, E, 5.

50. McFarlane *v.* Grober, 70 Ark. 371, 69 S. W. 56, 91 Am. St. Rep. 84; Meyer *v.* Christopher, 176 Mo. 580, 75 S. W. 750; Clark *v.* Richards, 15 N. J. L. 347; Bucklin *v.* Bucklin, 1 Abb. Dec. (N. Y.) 242, 1 Keyes 141.

51. *Alabama.*— Oates *v.* Beckworth, 112 Ala. 356, 20 So. 399; Smith *v.* Roberts, 62 Ala. 83; Doe *v.* Thorp, 8 Ala. 253.

Arkansas.— Bender *v.* Bean, 52 Ark. 132, 12 S. W. 180, 241; Bozeman *v.* Browning, 31 Ark. 364; Tyler *v.* Tyler, (1886) 2 S. W. 466.

California.— Castro *v.* Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; McLeran *v.* Benton, 73 Cal. 329, 14 Pac. 879, 2 Am. St. Rep. 814.

Connecticut.— Griswold *v.* Butler, 3 Conn. 227.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Illinois.— Dawson *v.* Edwards, 189 Ill. 60, 59 N. E. 590.

Indian Territory.— Murray *v.* Houghton, 2 Indian Terr. 504, 52 S. W. 48.

Iowa.— Grether *v.* Clark, 75 Iowa 383, 39 N. W. 655, 9 Am. St. Rep. 491.

Kentucky.— Ray *v.* Thurman, 15 S. W. 1116, 13 Ky. L. Rep. 3; Shuffitt *v.* Shuffitt, 4 S. W. 348, 9 Ky. L. Rep. 207.

Michigan.— De Mill *v.* Moffat, 49 Mich. 125, 13 N. W. 387.

Missouri.— Shumate *v.* Snyder, 140 Mo. 77, 41 S. W. 781; Pim *v.* St. Louis, 122 Mo. 654, 27 S. W. 525; Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Cunningham *v.* Snow, 82 Mo. 587; Rogers *v.* Brown, 61 Mo. 187.

Nebraska.— Ballou *v.* Sherwood, 32 Nebr. 666, 49 N. W. 790, 50 N. W. 1131; Hardy *v.* Riddle, 24 Nebr. 670, 39 N. W. 841.

New Hampshire.— Munroe *v.* Wilson, 68 N. H. 580, 41 Atl. 240; Wallace *v.* Fletcher, 30 N. H. 434.

New York.—Greagan *v.* Buchanan, 15 Misc. 580, 37 N. Y. Suppl. 83; Fleming *v.* Griswold, 3 Hill 85; Jackson *v.* Rohins, 15 Johns. 169; Jackson *v.* Moore, 13 Johns. 513, 7 Am. Dec. 398.

North Carolina.— Frederick *v.* Williams, 103 N. C. 189, 9 S. E. 298; Chancy *v.* Powell, 103 N. C. 159, 9 S. E. 298; Bennett *v.* Williamson, 30 N. C. 121; Rowland *v.* Dowe, 4 N. C. 722; Pearse *v.* House, 3 N. C. 386.

Ohio.— Bartlow *v.* Kinnard, 38 Ohio St. 373.

Pennsylvania.— Douglas *v.* Irvine, 126 Pa. St. 643, 17 Atl. 802; Lynch *v.* Cox, 23 Pa. St. 265.

South Carolina.— Satcher *v.* Grice, 53 S. C. 126, 31 S. E. 3.

Tennessee.— Jones *v.* Preston, 3 Head 161; Hale *v.* Ellison, (Ch. App. 1900) 59 S. W. 673.

Texas.—Campbell *v.* McFadden, 9 Tex. Civ. App. 379, 31 S. W. 436; Shortridge *v.* Allen, 2 Tex. Civ. App. 193, 21 S. W. 419.

West Virginia.— Talbott *v.* Woodford, 48 W. Va. 449, 37 S. E. 580.

Wisconsin.— Swearingen *v.* Robertson, 39 Wis. 462.

United States.— Harris *v.* McGovern, 99 U. S. 161, 25 L. ed. 317.

England.— Stowel *v.* Zouch, 1 Plowd. 353; Doe *v.* Jesson, 6 East 80, 2 Smith K. B. 236, 8 Rev. Rep. 408. *Compare* Talson *v.* Koye, 3 B. & B. 217, 7 E. C. L. 694; Cotterell *v.* Dutton, 4 Taunt. 826, 14 Rev. Rep. 675.

Canada.— Doe *v.* Marks, 5 N. Brunsw. 659.

52. Doe *v.* Jesson, 6 East 80, 2 Smith K. B. 236, 8 Rev. Rep. 408, where Lord Ellenborough, in making an application of the ten years, or time after the removal of the disability to the death, expressly annexes it to the death of the person dying under that disability, which existed in him at the time the right accrued. In Kentucky the act of 1813 did not give the same period of three years to a *feme covert* unless she were a covert at the time the right accrued. Kendal *v.* Slaughter, 1 A. K. Marsh. (Ky.) 375.

Death.— See *infra*, VI, G.

Against executors, etc.—Where the statute begins to run against a testator, it continues against his executors in whom the title remains for the purpose of executing a will, notwithstanding minorship of the devisee, until the title passes from the executor. Sparks *v.* Roberts, 65 Ga. 571. Referring to the rule that when the legal title to property is vested in a trustee who can sue for

to change the construction of the statute as a general rule.[53] In some jurisdictions, however, by express provision, the statute has been suspended pending disability of an heir, or the language of the exception somewhat different from the English statute, has been construed to have that effect.[54]

(III) *TACKING SUCCESSIVE DISABILITIES* — (A) *Several Disabilities of Same Person* — (1) IN GENERAL. Disabilities, to bring a party within the exceptions

it, if his right of action is barred the right of his *cestui que trust* is also barred, although the latter be under disability, it was held under the code provision that where the legal title to property or a right of action is in the administrator or guardian the time during which the statute of limitations runs against him shall be computed against the persons beneficially interested, although under disability, that if before the right of the administrator *de bonis non* to sue has been barred, it becomes no longer necessary to recover assets to pay debts, which condition alone gives the administrator the right to sue and makes the statute run against him and the persons beneficially interested, the right of the distributees to sue immediately arises and the limitation which was running against the administrator ceases to run against him or as against them by virtue of his right to sue. Weir *v.* Monahan, 67 Miss. 434, 7 So. 291, where the court held that this was not a case for the application of the rule that where the statute of limitations once commences to run subsequent disabilities will not interrupt it. In May *v.* Slaughter, 3 A. K. Marsh. (Ky.) 505, where under the statutory provisions which prevailed the statute does not run against infant heirs, although it had begun to run against the ancestor, it was held that where the testator against whom the statute had begun to run devised his estate in trust to executors, the estate descended to the heirs until the executors qualified, and that if the heirs were under disability the statute ceased to run against them so long as they held the estate until removal of the disability, but that on the qualifying of the executor the bar revived and ran from the time of the adverse entry.

For the effect of the bar of the statute of limitations against a trustee of the beneficiaries see *supra*, IV, E, 5.

Where a particular estate exists when the disseizin takes place and the reversion has also vested before the disseizin the statute will not begin to run against the reversioner or remainder-man until the termination of the particular estate. Randall *v.* Raab, 2 Abb. Pr. (N. Y.) 307; Jackson *v.* Schoonmaker, 4 Johns. (N. Y.) 390. So where parents having a life-estate in slaves with remainder to their children are deprived of the property in their lifetime and die leaving the children under age, limitations will not run against the children until they become of age. Baird *v.* Bland, 3 Munf. (Va.) 570. And where the estate of minors is postponed to the life-estate of a surviving husband as tenant by curtesy, limitations having begun to run against the ancestor, who was a married woman, will run against her heirs who are minors. Beattie *v.* Whipple, 154 Ill. 273, 40 N. E. 340.

53. See the cases heretofore cited in this section. See also supporting the text and discussing the statutes mentioned: Doe *v.* Thorp, 8 Ala. 253; Griswold *v.* Butler, 3 Conn. 227; Wade *v.* Doyle, 17 Fla. 522; Bradstreet *v.* Clarke, 12 Wend. (N. Y.) 602; McDonald *v.* Johns, 4 Yerg. (Tenn.) 258; McDonald *v.* Hovey, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269; Thorp *v.* Raywood, 16 How. (U. S.) 247, 14 L. ed. 923; Walden *v.* Gratz, 1 Wheat. (U. S.) 292, 4 L. ed. 94; Doe *v.* Jones, 6 East 80, 2 Smith K. B. 236, 8 Rev. Rep. 408.

54. Ladd *v.* Jackson, 43 Ga. 288, under an express provision that the statute shall not run against a minor heir. See also Everett *v.* Whitfield, 27 Ga. 133, which does not appear to have been decided under such a statutory provision, holding that, although the limitation may be running against an equitable title, if that title comes to an infant it ceases to run during the infancy.

In Kentucky under the early statute there prevailing the court considered that there was a difference in the language of the English statute in that it saved the right of infants who were at the time when the right or title "first descended accrued," etc., while the Kentucky statute, as to land, saved the right of those who at the time "when the right or title accrued to them." It was considered that the English provision obviously related to the time when the right first accrued (which is in accord with the general rule of the cases already cited in this section), but that the language of the Kentucky statute required a different construction. South *v.* Thomas, 7 T. B. Mon. 59; McIntire *v.* Funk, 5 Litt. 33; May *v.* Slaughter, 3 A. K. Marsh. 505; Sentney *v.* Overton, 4 Bibb 445; Machir *v.* May, 4 Bibb 43. However, this construction was held not to apply where the ancestor's right of entry had been preserved only by his absence from the state. Clay *v.* Miller, 3 T. B. Mon. 146. Nor did it apply to those who took otherwise than by descent. Patterson *v.* Hansel, 4 Bush 654; South *v.* Thomas, 7 T. B. Mon. 59. In Walden *v.* Gratz, 1 Wheat. (U. S.) 292, 4 L. ed. 94, the supreme court of the United States refused to adopt the construction of the Kentucky statute which the court of that state had given it, and held that the language did not vary essentially from that of the statute of James. And under a later statute it was provided that time for suing to recover real property should not be extended by reason of any disability of the heirs of the person to whom

of the statute, cannot be piled one upon another, but a party claiming the benefit of the exception can only avail himself of the disability existing when the right of action first accrued.[55]

(2) Second Disability Intervening Before First Is Removed. When a disability existing at the time the right of action accrued has been removed, the time cannot be enlarged and extended by adding to it a subsequent intervening disability.[56]

the right first accrued. Ray *v.* Thurman, 15 S. W. 1116, 13 Ky. L. Rep. 3; Henderson *v.* Bonar, 11 S. W. 809, 11 Ky. L. Rep. 219; Shuffitt *v.* Shuffitt, 4 S. W. 348, 9 Ky. L. Rep. 207.

In Louisiana it was held under the maxim *contra non valentem agere non currit præscriptio* that prescription which had begun against an ancestor was suspended at his death until the majority of his minor heir at law. Orso *v.* Orso, 11 La. 61. But the prescription is merely suspended and not interrupted and the time which had run against the ancestor must be added to that which has run since the heir became of age. Smith *v.* Escouhas, 43 La. Ann. 932, 9 So. 907.

In South Carolina, in Duren *v.* Kee, 26 S. C. 219, 2 S. E. 4, the court refers to the difference of opinion which existed between the judges under an early act [*citing* as illustrative Hill *v.* Connelly, 4 Rich. 615; Gibson *v.* Taylor, 3 McCord 451; Cook *v.* Wood, 1 McCord 139; Faysoux *v.* Prather, 1 Nott & M. 296, 9 Am. Dec. 691; Rose *v.* Daniel, 3 Brev. 438], and indicates that the act of 1824 was passed to settle the question, which act provided that the statute of limitations should not thereafter be construed to defeat the rights of minors, when it had not barred the right in the lifetime of the ancestor before the accrual of the right of the minor. But the court further holds that the act applies only to an infant heir and not to one who conveys after his majority so as to protect the alienee in an action against the disseizor of the ancestor by deducting the period of the heir's infancy from the adverse possession of such disseizor. So an infant is entitled to ten years, as all other persons under the act of 1824, from the accrual of his right but only to five years after attaining full age. Hill *v.* Connelly, *supra*. But see Satcher *v.* Grice, 53 S. C. 126, 31 S. E. 3, where it appears that under the code of civil procedure, it was provided that in order to prevent or arrest the running of limitations, the person entitled to commence an action for lands must show a disability "at the time such title shall first descend or accrue," under which it was held that the fact that plaintiff was a minor when his action was commenced did not arrest the statute which had already begun to run against the person under whom the minor claimed.

In personal actions the early rule in Kentucky and South Carolina as to actions for recovery of land did not apply. Baker *v.* Grundy, 1 Duv. (Ky.) 281; Rosson *v.* Anderson, 9 B. Mon. (Ky.) 423; Haddix *v.* Davison, 3 T. B. Mon. (Ky.) 39; Beauchamp *v.* Mudd, 2 Bibb (Ky.) 537 (because the saving or provisos in such cases was expressed in language different from that used in the case of suits for realty); McCullough *v.* Speed, 3 McCord (S. C.) 455 (the act of 1824 being confined to actions concerning lands).

55. *Arkansas.*— Carter *v.* Cantrell, 16 Ark. 154.

Georgia.— Scott *v.* Haddock, 11 Ga. 258.

Illinois.— Fritz *v.* Joiner, 54 Ill. 101.

Indiana.— Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387.

Maine.— Butler *v.* Howe, 13 Me. 397.

Missouri.— Franklin *v.* Cunningham, 187 Mo. 184, 86 S. W. 79.

New York.— Jackson *v.* Wheat, 18 Johns. 40.

Ohio.— Cozzens *v.* Farnan, 30 Ohio St. 491, 27 Am. Rep. 470.

Pennsylvania.— Thompson *v.* Smith, 7 Serg. & R. 209, 10 Am. Dec. 453.

Tennessee.— Alvis *v.* Oglesby, 87 Tenn. 172, 10 S. W. 313; Weisinger *v.* Murphy, 2 Head 674.

United States.— Hogan *v.* Kurtz, 94 U. S. 773, 24 L. ed. 317; Mercer *v.* Selden, 1 How. 37, 17 Pet. 61, 11 L. ed. 38; Healy *v.* Mothershed, 11 Fed. Cas. No. 6,296.

See 33 Cent. Dig. tit. "Limitation of Actions," § 422.

56. *Arkansas.*— Millington *v.* Hill, 47 Ark. 301, 1 S. W. 547; Carter *v.* Cantrell, 16 Ark. 154. See also Brinkley *v.* Willis, 22 Ark. 1.

Connecticut.—Bush *v.* Bradley, 4 Day 298. *Contra*, Eaton *v.* Sanford, 2 Day 523.

Indiana.— Royce *v.* Turnbaugh, 117 Ind. 539, 20 N. E. 485; Walker *v.* Hill, 111 Ind. 223, 12 N. E. 387; Sims *v.* Gay, 109 Ind. 501, 9 N. E. 120; White *v.* Clawson, 79 Ind. 188.

Kentucky.— Manion *v.* Titsworth, 18 B. Mon. 582; Martin *v.* Letty, 18 B. Mon. 573; Clark *v.* Jones, 16 B. Mon. 121; Duckett *v.* Crider, 11 B. Mon. 188; Findley *v.* Patterson, 2 B. Mon. 76; Sharp *v.* Stephens, 52 S. W. 977, 21 Ky. L. Rep. 687.

Maryland.— Dugan *v.* Gittings, 3 Gill 138, 43 Am. Dec. 306; Hertle *v.* McDonald, 2 Md. Ch. 128.

Massachusetts.— Eager *v.* Com., 4 Mass. 182.

Mississippi.— Watts *v.* Gunn, 53 Miss. 502; Parmele *v.* McGinty, 52 Miss. 475; Dease *v.* Jones, 23 Miss. 133.

Missouri.— Farish *v.* Cook, 78 Mo. 212, 47 Am. Rep. 107; Billon *v.* Larimore, 37 Mo. 375; Keeton *v.* Keeton, 20 Mo. 530.

New Hampshire.— Nutter *v.* De Rochemont, 46 N. H. 80.

(3) Second Disability Intervening After First Is Removed. Applying the well settled rule that when the statute of limitations has once begun to run, it will continue to run, notwithstanding any subsequent disability, where a disability, existing at the time of the accrual of the cause of action, is removed, the statute will then run, and will not be suspended by any subsequent intervening disability.[57] Thus, where the statute once begins to run by a removal of the disability of insanity, it continues to run, notwithstanding the insanity of the person whose rights are to be affected by the bar again supervenes.[58]

(B) *Disabilities of Several Persons.* Where the cause of action arises during the life of the devisor or ancestor, resting under a disability, such disability ceases and the statute begins to run upon his death, and is not suspended by any statutory disability in the devisee, or in the heir at the time of the descent cast.[59]

New York.— Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 8 Am. Dec. 467.

Pennsylvania.— Carlisle *v.* Stitler, 1 Penr. & W. 6.

South Carolina.—Starke *v.* Starke, 3 Rich. 438; Fewell *v.* Collins, 3 Brev. 286.

Tennessee.— McDonald *v.* Johns, 4 Yerg. 258; Buttery *v.* Brown, (Ch. App. 1899) 52 S. W. 713.

Texas.— Parish *v.* Alston, 65 Tex. 194; Parker *v.* Spencer, 61 Tex. 155; Ortiz *v.* De Benavides, 61 Tex. 60; Hunton *v.* Nichols, 55 Tex. 217; McMasters *v.* Mills, 30 Tex. 591; Ford *v.* Clements, 13 Tex. 592; White *v.* Latimer, 12 Tex. 61.

Virginia.—Blackwell *v.* Bragg, 78 Va. 529; Parsons *v.* McCracken, 9 Leigh 495.

United States.— Mercer *v.* Selden, 1 How. 37, 17 Pet. 61, 11 L. ed. 38; Lewis *v.* Barksdale, 15 Fed. Cas. No. 8,317, 2 Brock. 436.

Contra.— Jones *v.* Coffey, 109 N. C. 515, 14 S. E. 84; Davis *v.* Cooke, 10 N. C. 608.

57. *Alabama.*— Doe *v.* Thorp, 8 Ala. 253.

Arkansas.— Gherson *v.* Brooks, (1887) 5 S. W. 329.

Georgia.— Sparks *v.* Roberts, 65 Ga. 571.

Illinois.— Keil *v.* Healey, 84 Ill. 104, 25 Am. Rep. 434.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; Clark *v.* Trail, 1 Metc. 35; Floyd *v.* Johnson, 2 Litt. 109, 13 Am. Dec. 255; Crozier *v.* Gano, 1 Bibb 257.

Maryland.— Wickes *v.* Wickes, 98 Md. 307, 56 Atl. 1017.

Massachusetts.— Allis *v.* Moore, 2 Allen 306.

New York.— Bradstreet *v.* Clarke, 12 Wend. 602, 675.

North Carolina.— Miller *v.* Bumgardner, 109 N. C. 412, 13 S. E. 935.

Pennsylvania.— Rider *v.* Maul, 46 Pa. St. 376; Rankin *v.* Tenbrook, 6 Watts 388.

Rhode Island.— Union Sav. Bank *v.* Taber, 13 R. I. 683.

Tennessee.— State *v.* Parker, 8 Baxt. 495; Stevens *v.* Bomar, 9 Humphr. 546; Hale *v.* Ellison, (Ch. App. 1900) 59 S. W. 673.

Texas.— Ragsdale *v.* Barnes, 68 Tex. 504, 5 S. W. 68; Grigsby *v* Peak, 57 Tex. 142; French *v.* Strumberg, 52 Tex. 92; White *v.* Latimer, 12 Tex. 61; McDonald *v.* McGuire, 8 Tex. 361; Franks *v.* Habcock, 1 Tex. Unrep. Cas. 554.

Vermont.— McFarland *v.* Stone, 17 Vt. 165, 44 Am. Dec. 325.

United States.— Gaines *v.* Hammond, 6 Fed. 449, 2 McCreary 432 [*affirmed* in 111 U. S. 395, 28 L. ed. 466].

England.— Murray *v.* East India Co., 5 B. & Ald. 204, 24 Rev. Rep. 325, 7 E. C. L. 118; Doe *v.* Jesson, 6 East 80, 2 Smith K. B. 236, 8 Rev. Rep. 408; Stowel *v.* Zouch, Plowd. 353; Doe *v.* Jones, 4 T. R. 300.

58. Verdery *v.* Savannah, etc., R. Co., 82 Ga. 675, 9 S. E. 1133; Clark *v.* Trail, 1 Metc. (Ky.) 35; Cotterell *v.* Dutton, 4 Taunt. 826, 14 Rev. Rep. 675; Doe *v.* Shane, 4 T. R. 306 note (b).

59. *Arkansas.*— Dowell *v.* Tucker, 46 Ark 438.

Connecticut.— Griswold *v.* Butler, 3 Conn. 227. *Contra*, Eaton *v.* Sanford, 2 Day 523.

Florida.— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

Kentucky.— Mitchell *v.* Berry, 1 Metc. 602; Ashbrook *v.* Quarles, 15 B. Mon. 20; Downing *v.* Ford, 9 Dana 391; South *v.* Thomas, 7 T. B. Mon. 59; Floyd *v.* Johnson, 2 Litt. 109, 13 Am. Dec. 255; Call *v.* Phelps, 45 S. W. 1051, 20 Ky. L. Rep. 507; Hall *v.* Ditto, 12 S. W. 941, 11 Ky. L. Rep. 667.

Missouri.— Pim *v.* St. Louis, 122 Mo. 654, 27 S. W. 525; Wilkinson *v.* St. Louis Sectional Dock Co., 102 Mo. 130, 14 S. W. 177; Burdett *v.* May, 100 Mo. 13, 12 S. W. 1056; Gordon *v.* Lewis, 88 Mo. 37; Dessaunier *v.* Murphy, 33 Mo. 184.

New York.— Fleming *v.* Griswold, 3 Hill 85; Carpenter *v.* Schermerhorn, 2 Barb. Ch. 314.

North Carolina.— Chancey *v.* Powell, 103 N. C. 159, 9 S. E. 298. *Contra*, Gilliam *v.* Jacocks, 11 N. C. 310.

Ohio.— Ridley *v.* Hettman, 10 Ohio 524.

Pennsylvania.— Henry *v.* Carson, 59 Pa. St. 297; Bensell *v.* Chancellor, 5 Whart. 371, 34 Am. Dec. 561.

Rhode Island.— Clarke *v.* Cross, 2 R. I. 440.

South Carolina.— Dillard *v.* Philson, 5 Strobh. 213.

Tennessee.— Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299; Weisinger *v.* Murphy, 2 Head 674; Guion *v.* Anderson, 8 Humphr. 298; Guion *v.* Bradley Academy, 4 Yerg. 232. See McCorry *v* King, 3 Humphr. 267,

b. Disabilities Coexisting When Cause Accrues. If concurrent disabilities exist in the same party when the cause of action accrues to him, the statutory exception applies to all of such disabilities and until all of them are removed the bar of limitation cannot become complete.[60]

8. Disability of One of Several Parties. The authorities are not in harmony upon the question of the effect of the disability of one or more of several parties where one or more are *sui juris*. Thus it has been held that if one cotenant is a minor the disability will save the interests of his cotenant from the operation of limitations in actions for land,[61] and this rule is extended to tenants in common as well as joint tenants,[62] although in personal actions it is held otherwise, and one plaintiff may be barred while another is saved.[63] On the other hand it is held that where the right is joint so that all must sue, all must have the right to sue when the suit is brought, and if one is barred at that time all are barred, although some may have labored under disability.[64] Perhaps the rule which is best supported by the authorities is that if the right is joint and several the disability of one will save him but will not avail another who is not under disability, and that if the right is joint so that the suit cannot be brought except by the parties jointly

39 Am. Dec. 165, where a husband sold and conveyed in fee land devised to the wife, without the wife joining in the deed of conveyance, and it was held that the statute of limitations did not begin to run against her heirs until after the expiration of the husband's life-estate. See, however, Matherson *v.* Davis, 2 Coldw. 443.

Texas.— Jackson *v.* Houston, 84 Tex. 622, 19 S. W. 799; Best *v.* Nix, 6 Tex. Civ. App. 349, 25 S. W. 130.

United States.— Davis *v.* Coblens, 174 U. S. 719, 19 S. Ct. 832, 43 L. ed. 1147; Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 10 S. Ct. 206, 33 L. ed. 487; McDonald *v.* Holby, 110 U. S. 619, 4 S. Ct. 142, 28 L. ed. 269; Thorp *v.* Raymond, 16 How. 247, 14 L. ed. 923; Lewis *v.* Marshall, 5 Pet. 470, 8 L. ed. 195; East Tennessee, etc., R. Co. *v.* Wiggin, 68 Fed. 446, 15 C. C. A. 510.

England.— Doe *v.* Jesson, 6 East 80, 2 Smith K. B. 236, 8 Rev. Rep. 408.

Canada.— Doe *v.* Teal, 7 U. C. Q. B. 370.

Contra.— Rawls *v.* Rawls, 6 La. Ann. 665, which decision was based on the wording of the Louisiana statute.

See 33 Cent. Dig. tit. "Limitation of Actions," § 423.

60. *Arkansas.*— Fox *v.* Drewry, 62 Ark. 316, 35 S. W. 533; Stull *v.* Harris, 51 Ark. 294, 11 S. W. 104, 2 L. R. A. 741.

Georgia.— Scott *v.* Haddock, 11 Ga. 258.

Indiana.— See Richardson *v.* Pate, 93 Ind. 423, 47 Am. Rep. 374; Sims *v.* Bardoner, 86 Ind. 87, 44 Am. Rep. 263; Stringer *v.* Northwestern Mut. L. Ins. Co., 82 Ind. 100.

Maine.— Butler *v.* Howe, 13 Me. 397.

Mississippi.— North *v.* James, 61 Miss. 761.

Missouri.— Keeton *v.* Keeton, 20 Mo. 530.

New York.— Jackson *v.* Johnson, 5 Cow. 74, 15 Am. Dec. 433.

North Carolina.— Lippard *v.* Troutman, 72 N. C. 551.

Tennessee.— Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299.

See 33 Cent. Dig. tit. "Limitation of Actions," § 421.

For effect of right of married women to sue alone see *supra*, VI, F, 3.

61. McGee *v.* Hall, 26 S. C. 179, 1 S. E. 711; Lahiffe *v.* Smart, 1 Bailey (S. C.) 192 (where the court said that it did not know that the rule had ever been extended to any disability other than that of infancy); Gourdine *v.* Theus, 1 Brev. (S. C.) 326 (as to a joint right). See also Garrett *v.* Weinberg, 48 S. C. 28, 26 S. E. 3.

Reason of rule.— In Henry *v.* Stewart, 2 Hill (S. C.) 328, 333, the court said in speaking of the ruling in trespass to try title: "The reason of this decision may have been, that notwithstanding any one of several tenants in common or distributees might sue in trespass to try titles, and recover his or her share of the land, that yet his or her recovery would entitle him or her to the writ of habere facias possessionem for, and an execution of it by delivery of the possession of the whole land. When any one of the cotenants obtains possession, his possession is that of all, and hence if any one was entitled to recover possession, all would be of necessity also entitled."

62. Boozer *v.* Teague, 27 S. C. 348, 3 S. E. 551 [*citing* Hill *v.* Sanders, 4 Rich. (S. C.) 521, 55 Am. Dec. 696].

63. Woodward *v.* Clarke, 4 Strobh. (S. C.) Eq. 167; Henry *v.* Stewardt, 2 Hill (S. C.) 328. But the rule that the right is saved as to all is sometimes stated in terms broad enough to cover any interest and liability as that "a joint right cannot be barred by the limitation act, if any of the persons connected in the right, are entitled to the benefit of any of the exceptions in the saving clause." Gourdine *v.* Theus, 1 Brev. (S. C.) 326. See also Archer *v.* Munday, 17 S. C. 84.

64. Marsteller *v.* McClean, 7 Cranch (U. S.) 156, 3 L. ed. 300, upon the authority of Perry *v.* Jackson, 4 T. R. 516.

Writ of error.— All plaintiffs in error must

then the rights of all are saved if any is under disability;[65] and one of coheirs or tenants in common is saved by his own disability notwithstanding his cotenant is *sui juris* and barred, and the saving as to the former will not save the latter,[66] upon

have labored under disabilities at the rendition of the judgment or decree in order that the rights of any may be saved. Shannon *v.* Dunn, 8 Blackf. (Ind.) 182 (on the authority of Perry *v.* Jackson, 4 T. R. 516); Riney *v.* Riney, 1 B. Mon. (Ky.) 69 (as to a writ of error by heirs for the setting aside of an allotment of dower to the widow, upon the theory that the interest of the heirs in the land was joint); Madison *v.* Wallace, 2 J. J. Marsh. (Ky.) 581; Holliday *v.* Hickman, 6 T. B. Mon. (Ky.) 376; May *v.* Marshall, 2 Litt. (Ky.) 147 [*distinguishing* Kennedy *v.* Duncan, Hard. (Ky.) 365, in that it was decided under an earlier statute]; Garrett *v.* Cocke, 8 Baxt. (Tenn.) 274 (holding that where there is a joint decree against husband and wife, the statute giving the wife two years after coverture does not enable her to bring error pending coverture because the right until discoverture is joint and that joint right is barred if the husband is barred [*distinguishing* Winchester *v.* Winchester, 1 Head (Tenn.) 460, where it was held that a wife might file a bill of review by next friend where her husband is barred, making him a defendant, and that such bill was not analogous to that of a suit for land where the joint estate is barred. The joint right to prosecute error in the first case is said to be analogous to suits for land where the joint estate is barred and where neither can sue]). So in Trimble *v.* Longworth, 13 Ohio St. 431, it is held that a *feme covert* may file a bill to review a decree at any time during coverture and if she joins with others who are barred the bill may be dismissed as to them and retained as to her.

65. *Georgia.*—Williams *v.* Merritt, 109 Ga. 213, 34 S. E. 312, holding that where a judgment obtained by several persons, some of whom are minors, is not divided into separate parts in favor of the respective plaintiffs therein, but is for one entire sum in favor of all of them, if it becomes dormant, the time prescribed by law within which suit may be brought upon a dormant judgment does not begin to run against any of them until the disability of each of such minors has ceased to exist.

Michigan.— Probate Judge *v.* Stevenson, 55 Mich. 320, 21 N. W. 348, as to several rights.

Mississippi.— Leflore County *v.* Allen, 80 Miss. 208, 31 So. 815; Saunders *v.* Saunders, 49 Miss. 327.

Ohio.— Riddle *v.* Roll, 24 Ohio St. 572; Trimble *v.* Longworth, 13 Ohio St. 431; Sturges *v.* Longworth, 1 Ohio St. 544; Kay *v.* Watson, 17 Ohio 27; Massey *v.* Matthews, 12 Ohio 351; Meese *v.* Keefe, 10 Ohio 362; Bronson *v.* Adams, 10 Ohio 135; Moore *v.* Armstrong, 10 Ohio 11, 36 Am. Dec. 63; Wilkins *v.* Philips, 3 Ohio 49, 17 Am. Dec. 579.

Virginia.— Redford *v.* Clarke, 100 Va. 115, 40 S. E. 630, holding that since the statutory modification of the common-law rule no longer requires that all joint tenants shall unite in suits affecting the joint property, the infancy of some of several joint tenants does not prevent the running of limitations against the others.

Conflict in application of rule.— The authorities are also conflicting sometimes in the application of the general rules. Thus in Massey *v.* Matthews, 12 Ohio 351, which was a bill of review filed by the heirs of Massey to reverse a decree requiring them to execute an agreement of their ancestor, it was held that the disability of one heir inured to the benefit of his coheirs because the covenant of the ancestor to convey was as to them entire and not several. In Kay *v.* Watson, 17 Ohio 27, which was also a bill of review by heirs to reverse a decree for the conveyance of lands descended, one of the heirs being under the disability of coverture, it was held in opposition to Massey *v.* Mathews, *supra*, that the interests of the heirs were severable and that the heir under disability of coverture should have filed her separate bill.

Action for death.— In an action for death by wrongful act under the statute in Texas, it is held that the fact that at the time of the death one of the parties entitled to sue was under no disability does not set the statute of limitations in motion against another, in this case a posthumous child, who was under disability. This was upon the rule in that state that the statute governing these actions does not restrict the number of recoveries but merely prevents double recoveries by the same party. Nelson *v.* Galveston, etc., R. Co., 78 Tex. 621, 14 S. W. 1021, 22 Am. St. Rep. 81, 11 L. R. A. 391. A contrary construction was given to a similar statute in Kentucky where it was held that the statute covered but one recovery and that as there was but one cause of action and the right to sue upon it was given to either of several persons if there is one *in esse* who can sue and fails to do so within the year prescribed, all the parties are barred, although the others may be under disability of minority. Louisville, etc., R. Co. *v.* Sanders, 86 Ky. 259, 5 S. W. 563, 9 Ky. L. Rep. 690.

66. Bryan *v.* Hinman, 5 Day (Conn.) 181, 5 Am. Dec. 136; Doolittle *v.* Blakesley, 4 Day (Conn.) 465; Pendergrast *v.* Gullatt, 10 Ga. 218; Jordan *v.* Thornton, 7 Ga. 517 (trover); Mayfield *v.* Seawell, Cooke (Tenn.) 437, where a minor was saved, although cotenants were adults and had sold their interest before the statute attached.

the principle that each may sue for his own share severally.[67] This general rule is subject to qualifications, however, and while it is held that if the cause accrues to two jointly who are under disability, the statute will not run until the disability is removed as to both,[68] the application of the rule is confined to cases where all the parties are under disability when the cause accrues and if one is not under disability the statute will run against all;[69] and this latter branch of the

67. *Arkansas.*— Wheeler *v.* Ladd, 40 Ark. 108; Gray *v.* Trapnall, 23 Ark. 510; Wilder *v.* Mayo, 23 Ark. 325; Lyth *v.* State, 17 Ark. 608.

Iowa.— Peters *v.* Jones, 35 Iowa 512.

Kentucky.— Thomas *v.* Machir, 4 Bibb 412 [*distinguishing* Wooley *v.* Bruce, 2 Bibb 105; Kennedy *v.* Duncan, Hard. 365, in that in both the right was entire and the right of the person *sui juris* would have been lost if it could not have been prosecuted jointly, and therefore the bar was saved as to both], holding that the tenants must bring several actions; hence the right of one may be saved while that of the other is barred.

Mississippi.— Root *v.* McFerrin, 37 Miss. 17, 75 Am. Dec. 49.

North Carolina.— Caldwell *v.* Black, 27 N. C. 463; McRee *v.* Alexander, 12 N. C. 321, where it was held that the statute bars an entry but does not require a joint entry; each may enter according to his estate; that upon strictly technical grounds in the strict action of ejectment where the action is brought by the lessee deriving his title from several, it is held that they are not plaintiffs, and if the title of either of them is good for the whole the lessee will recover the whole, and if good for a part, and that of the others bad for the whole, the lessee would recover that part.

Tennessee.— It has been the uniform practice for tenants in common to join in ejectment and declare on a joint demise, and recover a part or the whole of the premises declared for, according to the evidence of title adduced, and a bar of the statute of limitations as to one or more will not operate to bar the others. Belote *v.* White, 2 Head 703; Wade *v.* Johnson, 5 Humphr. 117, 42 Am. Dec. 422; Roberts *v.* Pharis, 8 Yerg. 447; Barrow *v.* Navee, 2 Yerg. 227.

Texas.—Stovall *v.* Carmichael, 52 Tex. 383, trespass to try title. When a *feme covert* and another own land in common, and plaintiff's coverture prevents the statute from running against her, yet, if the character of defendant's possession of the land is such as to set the statute of limitations in operation against her cotenant, plaintiff is protected to the extent of her own interest only, and cannot recover the interest of such cotenant not suing and the subsequent acquisition of such tenant's interest by plaintiff will not interrupt the running of the statute notwithstanding plaintiff's coverture. Johnson *v.* Schumacher, 72 Tex. 334, 12 S. W. 207.

United States.— See Lewis *v.* Barksdale, 15 Fed. Cas. No. 8,317, 2 Brock. 436.

England.— So in Roe *v.* Rowlston, 2 Taunt. 441, 11 Rev. Rep. 640, which was ejectment by heirs, it was held that the disability of one of them operated in her favor, although it did not prevent the running of the statute as to the other, and inasmuch as there was a separate demise from the one so protected plaintiff obtained judgment for her part of the land.

Where the estates of parceners is of the same character the same rule is held to apply. Bryan *v.* Hinman, 5 Day (Conn.) 211 (where Trumbull, J., in a concurring opinion says that the English rule was grounded upon these reasons only: "That coparceners are but one heir, that the parol shall demur, during the minority of either, and that they cannot sue severally"; that "the first reason is merely the result of feudal principles; and the other we have not adopted, for we have allowed coheirs to maintain separate actions to recover their several shares in land"); Moore *v.* Armstrong, 10 Ohio 11, 36 Am. Dec. 63 (holding that the interest of each coparcener or cotenant may be recovered in ejectment but it must be on a separate demise).

But if the tenants join in an action, it has been held that the disability of one will not avail the other and that both will be barred. Walker *v.* Bacon, 32 Mo. 144; Keeton *v.* Keeton, 20 Mo. 530.

68. Kessinger *v.* Wilson, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; Anding *v.* Davis, 38 Miss. 574, 77 Am. Dec. 658; Masters *v.* Dunn, 30 Miss. 264.

69. Moore *v.* Calvert, 6 Bush (Ky.) 356; Patterson *v.* Hansel, 4 Bush (Ky.) 654; Baker *v.* Grundy, 1 Duv. (Ky.) 281; Riggs *v.* Dooley, 7 B. Mon. (Ky.) 236; Clay *v.* Miller, 3 T. B. Mon. (Ky.) 146; Allen *v.* Beal, 3 A. K. Marsh (Ky.) 554, 13 Am. Dec. 203; Simpson *v.* Shannon, 3 A. K. Marsh (Ky.) 462; Sharp *v.* Stephens, 52 S. W. 977, 21 Ky. L. Rep. 687; Stauffer *v.* British, etc., Mortg. Co., 77 Miss. 127, 25 So. 299; Tippin *v.* Coleman, 61 Miss. 516; Traweek *v.* Kelly, 60 Miss. 652; Masters *v.* Dunn, 30 Miss. 264; Jordan *v.* McKenzie, 30 Miss. 32; Riden *v.* Frion, 7 N. C. 577; Shute *v.* Wade, 5 Yerg. (Tenn.) 1 [*distinguishing* Marsteller *v.* McClean, 7 Cranch (U. S.) 156, 3 L. ed. 300, in that the distinction was not thought of in that case between causes in which one of the parties was not under disability at the time the action accrued and those in which all the parties are under disability when the cause accrued], holding that the rule that if one is barred all are barred is the true rule in personal actions because the bar is general without exception of infants, etc., in the enacting clause of the statute; that it lies upon plaintiffs to bring themselves within the exceptions and that one of them cannot

rule is confined in some cases to actions other than for the recovery of land in which the rule is applied that as each may sue for his own share, even though all may join, the bar as to one will not operate against the other who is under disability.[70]

9. Nature of Disability as Personal Privilege Only. A personal disability which saves from the operation of the statute of limitations can be set up only by the party himself or those claiming under him,[71] and notwithstanding such disability the party may sue by next friend, or through those who may legally act, at any time while the disability exists.[72] The disability of an absent creditor is in the nature of a privilege and does not prevent him from suing pending his absence. It does not suspend the right,[73] and the fact that suit might have been brought in the meantime at the place where the creditor resided does not affect his right under the saving clause of the statute of the forum.[74]

do so. There is a difference in Kentucky between the general limitation law and the seven-year limitation as to adverse possession. The latter saved the right which descended to heirs, if any one of them was under disability, differing from the general law that all must be under disability to save the right of any. Harlan *v.* Seaton, 18 B. Mon. (Ky.) 312; Ashbrook *v.* Quarles, 15 B. Mon. (Ky.) 20; Whiting *v.* Taylor, 8 Dana (Ky.) 403; South *v.* Thomas, 7 T. B. Mon. (Ky.) 59; McIntire *v.* Funk, 5 Litt. (Ky.) 33; May *v.* Bennett, 4 Litt. (Ky.) 311; Hoskins *v.* Helm, 4 Litt. (Ky.) 309, 14 Am. Dec. 133; Floyd *v.* Johnson, 2 Litt. (Ky.) 109, 13 Am. Dec. 255.

Effect of estoppel of party sui juris.— If the party who is *sui juris* has estopped himself to sue, then his failure to sue will not operate to bar infants who will have their time until after disability removed. Morgan *v.* Reed, 2 Head (Tenn.) 276.

Devisees or distributees.— Under a statutory provision as to the limitation of actions against sureties on administration and guardian bonds heirs and devisees having a certain time after the youngest has attained full age, actions against such sureties are not barred until the time has elapsed without suit after the youngest distributee or devisee or other person interested shall attain full age. Jones *v.* Letcher, 13 B. Mon. (Ky.) 363.

70. Belote *v.* White, 2 Head (Tenn.) 703; Hobbs *v.* Ballard, 5 Sneed (Tenn.) 395; Seay *v.* Bacon, 4 Sneed (Tenn.) 99, 67 Am. Dec. 601; Wells *v.* Ragland, 1 Swan (Tenn.) 501; Guion *v.* Anderson, 8 Humphr. (Tenn.) 298; Wade *v.* Johnson, 5 Humphr. (Tenn.) 117, 42 Am. Dec. 422; Shute *v.* Wade, 5 Yerg. (Tenn.) 1; Barrow *v.* Navee, 2 Yerg. (Tenn.) 227.

71. Watson *v.* Kelty, 16 N. J. L. 517.

72. *Illinois.*— Milliken *v.* Marlin, 66 Ill. 13.

Kentucky.— Hopkins *v.* Virgin, 11 Bush 677.

Mississippi.— Finney *v.* Speed, 71 Miss. 32, 14 So. 465, as to the right to appeal.

New Hampshire.— Pierce *v.* Dustin, 24 N. H. 417.

New Jersey.— Smith *v.* Felter, 61 N. J. L. **102**, 38 Atl. 746.

North Carolina.— McLean *v.* Jackson, 34 N. C. 149.

Ohio.— Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480.

Pennsylvania.—Hill *v.* Goodman, 1 Woodw. 207.

Rhode Island.— Bliven *v.* Wheeler, 23 R. I. 379, 50 Atl. 644.

Tennessee.— Cargle *v.* Nashville, etc., R. Co., 7 Lea 717; Green *v.* Perkins, 3 Lea 491; Whirley *v.* Whiteman, 1 Head 610.

Virginia.— Hansford *v.* Elliott, 9 Leigh 79, holding that the rule applies in equity as well as at law.

United States.— Fink *v.* Campbell, 70 Fed. 664, 17 C. C. A. 325, as to rule in Tennessee.

England.— Belch *v.* Harvey, 3 P. Wms. 288 note, 24 Eng. Reprint 1069; Chandler *v.* Vilett, 2 Saund. 120; Strithorst *v.* Græme, 2 W. Bl. 723, 3 Wils. C. P. 145.

But where there is a joint decree against husband and wife and the right of the husband to prosecute a writ of error is barred, the statute allowing the wife two years after disability removed to prosecute error does not permit her to prosecute error pending coverture, where the joint right is barred and the wife's separate right depends upon her becoming discovert; she cannot prosecute the writ until after that condition arises. Garrett *v.* Cocke, 8 Baxt. (Tenn.) 274. So where by the marriage the husband becomes jointly seized with the wife in her inheritance, it is held that the husband and wife must sue jointly if the disseizin occur during coverture and that if the husband's interest becomes barred both are barred during coverture, and if she survive him she has only three years after the coverture. Weisinger *v.* Murphy, 2 Head (Tenn.) 674.

73. Belch *v.* Harvey, 3 P. Wms. 288, 24 Eng. Reprint 1069 [*quoted* to the proposition of the text in Powell *v.* Koehler, 52 Ohio St. 103, 39 N. E. 195, 49 Am. St. Rep. 705, 26 L. R. A. 480]; Strithorst *v.* Græme, 2 W. Bl. 723, 3 Wils. C. P. 145; Doe *v.* Maxwell, 11 N. Brunsw. 233; Crosby *v.* Collins, 5 U. C. Q. B. 545.

74. Lane *v.* Small, 4 U. C. Q. B. 448 [*citing* Williams *v.* Jones, 13 East 439, 12 Rev. Rep. 401, as an illustration as strong as can be given of the obligation the courts of

G. Death[75] — **1. Death of Person Entitled to Sue**[76] — **a. In General.** Where a right of action accrues after the death of the person entitled to sue, limitation will not begin to run until administration is taken out upon his estate or until probate of the will and the qualification of an executor.[77] As respects causes of action arising in the lifetime of the person entitled to sue, it is well settled that his death does not interrupt the running of the statute of limitations in the absence of some statutory provision to the contrary.[78] This rule is applicable in actions by the personal representative of the decedent[79] or by the heirs, devisees, etc.[80]

b. Death of Person Acting in Representative Capacity.[81] The death of a trustee in whom alone is the right to sue, after the statute of limitations has commenced to run against him, and before the purposes of the trust are accomplished, can have no effect in preventing the bar of the statute against the *cestui que trust*.[82] In the same way it has been intimated that if the statute has begun to run against a trustee in favor of the *cestui que trust* during the life of the trustee, it will not be suspended by the trustee's death.[83]

c. Death as Removing Disabilities.[84] Under a saving clause in favor of minors, married women, and lunatics, granting a specified time within which suits may be brought after the removal of the disability, it has been held that the death of the person under disability is a removal of the disability within the meaning of the statute and hence that his heirs must bring suit within the period

England have felt themselves under to allow a plaintiff literally and to the full extent the benefit of the exception]; Simpson *v.* Privat, 2 U. C. Q. B. 265.

75. Evidence of death see Death, 13 Cyc. 295.

76. Time within which suit brought by decedent may be continued or revived see Abatement and Revival, 1 Cyc. 103 note 2 *et seq.*

Death of ward as fixing time from which limitation begins to run on guardian's bond see Guardian and Ward, 21 Cyc. 249 note 45.

77. See Executors and Administrators, 18 Cyc. 916 note 26 *et seq.*

78. Mereness *v.* Charles City First Nat. Bank, 112 Iowa 11, 83 N. W. 711, 84 Am. St. Rep. 318, 51 L. R. A. 410; Ackerman *v.* Hilpert, 108 Iowa 247, 79 N. W. 90; Baker *v.* Baker, 13 B. Mon. (Ky.) 406; Tobias *v.* Richardson, 26 Ohio Cir. Ct. 81; Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

79. See Executors and Administrators, 18 Cyc. 915 note 23 *et seq.*

80. Bozeman *v.* Browning, 31 Ark. 364; Loyd *v.* Loyd, 46 S. W. 485, 20 Ky. L. Rep. 347 (action by heir to recover claim due to estate); Baumeister *v.* Silver, 98 Md. 418, 56 Atl. 825; Patton *v.* Dixon, 105 Tenn. 97, 58 S. W. 299.

In Texas it is held that, although no administration is necessary, and those entitled to decedent's estate have taken possession, the running of the statute is interrupted, under the provision of Rev. St. (1895) art. 3368, that, in case of death of a person having a cause of action, the statute shall cease to run against it for twelve months, unless an administrator or executor shall sooner qualify on the estate. Carter *v.* Hussey, (Civ. App. 1898) 46 S. W. 270. See also Hasseldenz *v.* Dofflemyre, (Civ. App. 1898) 45 S. W. 830. But it has been held that the statute proceeds upon the assumption that there is no one *in esse* capable of bringing suit and will not apply where there is some one *in esse* who can bring suit. Davis *v.* Dixon, 61 Tex. 446, holding that the statute does not apply where the decedent transferred a note in blank, and the transferee has authority to sue, although the decedent had an interest in it.

Action by donee causa mortis. — Under Mass. Rev. St. c. 126, § 10, providing that if any "person, entitled to bring any of the actions" mentioned in preceding sections shall die before the expiration of the time therein limited therefor, an action may be commenced by his executor or administrator at any time within two years after the grant of letters testamentary or of administration, the donee *causa mortis* of a negotiable note, not indorsed, may bring an action thereon in the name of the administrator of the donor, at any time within two years after the grant of letters of administration. Bates *v.* Kempton, 7 Gray (Mass.) 382.

Effect of death of former owner on adverse possession see Adverse Possession, 1 Cyc. 1021 note 12 *et seq.*

Limitation of actions by heirs or distributees generally see 14 Cyc. 140 *et seq.*

81. Death of executor or administrator as suspending statute see Executors and Administrators, 18 Cyc. 917 note 32.

82. Molton *v.* Henderson, 62 Ala. 426; Wooldridge *v.* Planters' Bank, 1 Sneed (Tenn.) 297.

83. Clark *v.* Clark, 21 Nebr. 402, 32 N. W. 157.

84. Intervening disabilities after death see *supra*, VI, F, 7, a.

limited after the ancestor's death.[85] And a similar saving clause in favor of a non-resident entitled to sue on a cause of action has received the same construction.[86] The saving of the statute up to the time of the death of the ancestor is, however, operative in favor of his heirs, or representatives, and the statute does not begin to run against them prior to that time.[87] The period within which suit must be brought by one succeeding to the right of action of a person under disability upon the death of the latter is sometimes expressly prescribed by statute.[88]

2. DEATH OF PERSON LIABLE TO SUIT.[89] Where a cause of action accrues against a person in his lifetime his death does not, in the absence of legislation to the contrary, suspend the running of the statute until administration is taken out;[90] but apart from express statutory provision to the contrary, if the cause of action had not accrued against a person at the time of his death, the general statute of limitations does not commence to run until there is administration upon decedent's estate.[91] Special statutory provisions exist in many jurisdictions either suspending the operation of the statute of limitations for a prescribed time, or requiring that suits shall be brought within a specified period, in the case of the death of a person against whom there may be a cause of action; and statutes of this character have been held applicable to actions against heirs, devisees, etc.,[92] as well as personal representatives.[93]

H. Pendency of Legal Proceedings, Arbitration, Stay, or War — 1. PENDENCY OF LEGAL PROCEEDINGS[94] — a. In General. Where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right.[95] Thus, during the pendency of

85. Gibbs *v.* Sawyer, 48 Iowa 443. See also Sansom *v.* Harrell, 55 Ark. 572, 18 S. W. 1047; Doe *v.* Teal, 7 U. C. Q. B. 370.

86. Carey *v.* Robinson, 13 Ohio 181.

87. Carey *v.* Robinson, 13 Ohio 181 [*disapproving* Whitney *v.* Webb, 10 Ohio 513].

88. Reed *v.* Painter, 145 Mo. 341, 46 S. W. 1089; Rosenberger *v.* Mallerson, 92 Mo. App. 27.

89. Death of testator or intestate during absence from state see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 935 note 99.

Death of personal representative see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 936 note 4.

Limitations of actions against representative and coöbligor of decedent see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 944 note 73 *et seq.*

Effect of death of adverse holder of property see ADVERSE POSSESSION, 1 Cyc. 1004 note 77 *et seq.*

90. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 930 note 54 *et seq.*

91. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 930 note 53.

92. Sigler *v.* Vaughan, 16 Lea (Tenn.) 346; Woolridge *v.* Page, 1 Lea (Tenn.) 135; Stidham *v.* McCarver, (Tenn. Ch. App. 1900) 57 S. W. 212; Groesbeck *v.* Crow, 91 Tex. 74, 40 S. W. 1028 [*reversing* (Tex. Civ. App. 1897) 39 S. W. 1003]; Morgan *v.* Baker, (Tex. Civ. App. 1897) 40 S. W. 27, holding that Sayles Civ. St. art. 8218, providing that in the case of the death of any person "against whom there may be cause of action, the law of limitation shall cease to run . . . twelve months," etc., applies to real as well as personal actions. See also Southern Contract Co. *v.* Newhouse, 66 S. W. 730, 23 Ky. L. Rep. 2141. *Compare* Scofield *v.* Douglass, (Tex. Civ. App. 1895) 30 S. W. 817.

Running of the statute in favor of heirs or distributees against creditors of decedent see DESCENT AND DISTRIBUTION, 14 Cyc. 215.

93. See EXECUTORS AND ADMINISTRATORS, 18 Cyc. 921 note 68 *et seq.*

94. Effect of lis pendens to suspend running of statute as to purchaser pending action see LIS PENDENS.

Suspension of limitations or right to sue as class legislation see CONSTITUTIONAL LAW, 8 Cyc. 695.

Pendency of action as excuse for laches see EQUITY.

95. *Arkansas.*— Daniel *v.* Roper, 24 Ark. 131.

Connecticut.— Allen *v.* Rogers, 1 Root 471, holding, however, that the pendency of an action on a book debt does not prevent defendant from suing plaintiff on a book debt, so as to toll the statute of limitations in regard to defendant's cause of action against plaintiff.

Georgia.— Fulcher *v.* Mandell, 83 Ga. 715, 10 S. E. 582.

Kansas.— McDonald *v.* Symns Grocer Co., 64 Kan. 529, 67 Pac. 1111, holding that an order discharging an attachment obtained by a creditor of a chattel mortgagor, and to reverse which proceeding in error was brought, does not prevent the mortgagee from suing the creditor for conversion, so as to suspend the running of limitations against such action.

Michigan.— Bray *v.* Fletcher, 132 Mich.

litigation provoked by defendant's own acts, limitations do not run against plaintiff.[96]

b. Public Prosecution. The private action of trover being suspended until the public prosecution for the offense has been duly conducted and ended, the statute of limitations does not run until the termination of the prosecution.[97]

c. Appeal and Proceedings to Review.[98] Where time runs from a judgment, it seems that a final judgment, to the enforcement of which there is no impediment, is contemplated.[99] Pending an appeal the statute will not run against matters which are still properly cognizable in the proceeding and against which

272, 93 N. W. 624; O'Toole *v.* Hurley, 115 Mich. 517, 73 N. W. 805.

Minnesota.— St. Paul, etc., R. Co. *v.* Olson, 87 Minn. 117, 91 N. W. 294, 94 Am. St. Rep. 693.

New York.— Yates *v.* Wing, 42 N. Y. App. Div. 356, 59 N. Y. Suppl. 78, holding that where residuary devisees execute a power of attorney, authorizing the attorney to sell and convey all their interests in the real estate of the decedent, and the land is thereafter sold under such power, proceedings in the surrogate's court for the settlement of the personal estate of the testator, in which the devisees were defendants, does not prevent them from asserting any remedies they may have for the moneys collected under the power of attorney, so as to prevent the running of the statute.

Pennsylvania.— Sattler *v.* Opperman, 30 Pittsb. Leg. J. N. S. 205.

Texas.— Bowen *v.* Kirkland, 17 Tex. Civ. App. 346, 44 S. W. 189.

United States.— See Whitman *v.* Atkinson, 130 Fed. 759, 65 C. C. A. 185.

Canada.— See Laing *v.* Avery, 14 Grant Ch. (U. C.) 33 (where the proceeding was held to be one which did not interfere with the running of the statute); Wright *v.* Crain, 7 Quebec Q. B. 524 (holding that prescription of interest is interrupted pending suit in which the capital is claimed).

But see Gibson *v.* Ruff, 8 App. Cas. (D. C.) 262.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 514, 515.

Contest in land department.— Where a court refuses to entertain jurisdiction of a suit to recover lands because a controversy concerning them is pending between the parties in the land department of the United States, limitations do not begin to run against the right to recover the lands until after the termination of such controversy. Frink *v.* Hoke, 35 Oreg. 17, 56 Pac. 1093.

Inability to obtain necessary process.— Where the commencement of a suit is prevented by inability of plaintiff to obtain the necessary process, the running of the statute of limitations is stopped. Smith *v.* Taylor, 10 Rob. (La.) 133.

Election of remedies.—A statutory proceeding to confirm a tax title does not stop the running of the statute of limitations in favor of defendant in adverse possession of the land, since the holder of a tax deed, after the expiration of the period of redemption, is at liberty at once to bring his action of ejectment to recover possession, or if he prefers he may file his bill for confirmation of his title under the statute. If he does the latter he is liable to be defeated by an adverse holding sufficiently prolonged when he sues to recover possession. Bell *v.* Coats, 56 Miss. 776.

Failure to ask leave of court to sue.— When one has the option at any time to obtain leave of court to bring his action, and does not ask for such leave, he cannot enlarge the statute of limitations by his own delinquency. Baker *v.* Johnson County, 33 Iowa 151; Litchfield *v.* McDonald, 35 Minn. 167, 28 N. W. 191; Palmer *v.* Palmer, 36 Mich. 487, 24 Am. Rep. 605; Spokane County *v.* Prescott, 19 Wash. 418, 53 Pac. 661, 67 Am. St. Rep. 733. But see Lanier *v.* Irvine, 24 Minn. 116; Wood *v.* Myrick, 16 Minn. 494.

96. Baker *v.* Boozer, 58 Ga. 195 (holding that the owner of property cannot change the period of limitations by interposing a claim, litigating the right of property in that case, and treating his damages as not sustained until the claim case has terminated in his favor); Smith *v.* Jones, 3 Dana (Ky.) 89 (holding, however, that the rule does not apply where defendant interferes with a suit against another party, although such suit is for the same cause of action); Harvey *v.* Pflug, 37 La. Ann. 904 (holding that a party cannot provoke and protract litigation based on his refusal to deliver leased premises, and then avail himself of the lapse of time to avoid damages for his wrongful refusal); Baylee *v.* Browne, 10 Ir. Eq. 180.

97. Hutchinson *v.* Merchant's, etc., Bank, 41 Pa. St. 42, 80 Am. Dec. 596.

98. Suspension of limitations against lien of judgment by appeal see JUDGMENTS, 23 Cyc. 1401.

99. Chouteau *v.* Rowse, 90 Mo. 191, 2 S. W. 209, holding that where, under the statute, a plaintiff is given a designated time to bring another suit after suffering a nonsuit, the time will run from the entry of a judgment of nonsuit to the enforcement of which there is no legal impediment and that if the nonsuit is involuntary and an appeal is perfected and bond given as required by law, the time runs only from affirmance in the appellate court.

Judgment fixing right by contract.—Where by the terms of the contract between the

the bar was not complete before action brought,[1] and a right or cause of action depending or founded upon a judgment is not subject to limitations from the entry of the judgment, where an appeal from the judgment is perfected which suspends the rights of the parties.[2] And while a plaintiff's right of action is thus suspended by an appeal from the judgment which fixes such right, thus depriving him of the means of enforcing his claim, pending such appeal, limitations will not run until the final disposition of the appeal.[3] And so in an action of debt or scire facias on a judgment a new promise or any other fact that clearly rebuts the presumption of payment during the existence of such fact suspends the operation of limitations which will commence to run anew from the time of the cessation of the operation of such fact.[4] But if the judgment is final and enforceable notwithstanding an appeal except upon the execution of supersedeas or stay bond, a mere appeal will not prevent the running of limitations against an action founded upon such judgment, unless such judgment was stayed or superseded.[5]

parties the breach which perfects the right of action in favor of one is the adverse determination of a suit in which the other is plaintiff, an appeal in such suit by plaintiff from an adverse judgment therein is a continuation of the original suit and the statute will not run until a final judgment in the appellate court which fixes the breach. Nix *v.* Draughon, 54 Ark. 340, 15 S. W. 893.

Time for renewal in ejectment.—Where one of several plaintiffs in ejectment appeals from an adverse judgment and the action is dismissed after the completion of the statutory period, the appeal suspends the running of the statutory time within which plaintiffs are privileged to renew the suit as to all plaintiffs. Hesters *v.* Coats, 32 Ga. 448.

1. **Deficiency judgment in foreclosure.**— An appeal from a decree of foreclosure or confirmation of sale suspends the running of limitations against an application for a deficiency judgment during the pendency of the appeal. Patrick *v.* National Bank of Commerce, 63 Nebr. 200, 88 N. W. 183; Brand *v.* Garneau, 3 Nebr. (Unoff.) 879, 93 N. W. 219.

2. **Where an appeal is not perfected until the court has adjourned for the term,** the statute of limitations begins to run from the last day of the term, and the fact that the appeal is afterward perfected will not stop its running. Peoria County *v.* Gordon, 82 Ill. 435.

3. Ephraim *v.* Pacific Bank, 129 Cal. 589, 62 Pac. 177 (holding that the statute of limitations against the action of a receiver to recover his compensation does not begin to run until his account is settled and allowed by the court; and for the time during which an appeal from the order of allowance was pending the running of the statute is suspended); Martel *v.* Somers, 26 Tex. 551; Reynolds *v.* Lansford, 16 Tex. 286, in which cases it is held that in a suit to subject to the satisfaction of a judgment which had been appealed, certain property which had been sold by the judgment debtor in fraud of his creditors, the cause of action did not accrue until the final disposition of the appeal; and until then the statute of limitations did not begin to run against plaintiff. See also Cavanaugh *v.* Britt, 90 Ky. 273, 13 S. W. 922, 12 Ky. L. Rep. 204, where the judgment was superseded. And see *supra*, VI, C, 2, a, (III).

Right to rents dependent upon judgment for land.—Where an appeal suspends the right of a party to recover possession of land until the judgment is reversed in the appellate court, limitations against an action for rents for the use and occupation of the land will not begin to run until the rendition of the judgment in the appellate court which justifies such recovery. Fields *v.* Anstin, (Tex. Civ. App. 1895) 30 S. W. 386.

Adverse possession pending appeal.—Where one is in possession pending proceedings in which a judgment adverse to his right and title is rendered, an appeal suspends all rights under the judgment and the appellant cannot by retaining such possession pending the appeal acquire a title by adverse possession against the opposite party. Kirsch *v.* Kirsch, 113 Cal. 56, 45 Pac. 164.

In Louisiana a devolutive or suspensive appeal does not suspend prescription against the judgment pending the appeal. Samory *v.* Montgomery, 27 La. Ann. 50 [*citing* Byrne *v.* Garrett, 23 La. Ann. 567; Walker *v.* Hays, 23 La. Ann. 176]; Arrowsmith *v.* Durell, 21 La. Ann. 295. See also, as to the effect of appeal on judgment liens, JUDGMENTS, 23 Cyc. 1401.

4. **After vacating levy on audita querela.**— The statute runs against an action on a judgment only from the judgment in a suit of audita querela vacating an execution and levy under the judgment sued on. Fairbanks *v.* Devereaux, 58 Vt. 359, 365, 3 Atl. 500, where it is said: "The case might be made to stand on the ground that the plaintiff, by the suit in audita querela, recognized the balance due on the judgment for which the levy was made, as a subsisting obligation against him; in that, he asked to have the levy vacated, not on the ground that he had paid the debt, but on the ground that the execution was irregularly issued, and irregularly satisfied, out of his property."

5. Delay *v.* Yost, 59 Kan. 496, 53 Pac. 482

d. Proceedings in Insolvency or Bankruptcy — (i) *Insolvency Proceedings.* After the property of an insolvent debtor has been assigned under the insolvent laws, and thus sequestered and placed in the custody of the law in trust for his creditors, the statute of limitations does not run against their claims upon his estate in the hands of his assignee.[6] A claim against the estate of the debtor in the hands of his assignee stands upon a different ground in this respect from the right of action against the debtor personally. That right is not taken away or suspended by the proceedings in insolvency, and is therefore barred by the lapse of the usual period of limitation.[7] In some states the running of the statute of limitations is suspended by statute by reason of insolvency.[8]

(ii) *Bankruptcy Proceedings.* The same principle applies to bankruptcy proceedings. Where the creditor does not prove his debt against the bankrupt estate, the federal bankrupt law does not prohibit him from bringing his action against the bankrupt, and the statute of limitations is not suspended.[9] Where, however, the bankrupt proves his debt, he is no longer allowed to bring an action against the bankrupt, and therefore the interval of time between the proof of the debt and the termination of the bankruptcy proceeding is excluded in computing

(action on replevin bond, where no supersedeas bond was given on proceedings in error in the replevin suit); Stockham Bank *v.* Weins, 12 Okla. 502, 71 Pac. 1073; Howard Ins. Co. *v.* Silverberg, 94 Fed. 921, 36 C. C. A. 549.

6. *Maryland.*— Hignutt *v.* Garey, 62 Md. 190; *In re* Leiman, 32 Md. 225, 3 Am. Rep. 132.

Massachusetts.— Parker *v.* Sanborn, 7 Gray 191; Willard *v.* Clarke, 7 Metc. 435; Minot *v.* Thacher, 7 Metc. 348, 41 Am. Dec. 444.

Mississippi.— Hendricks *v.* Pugh, 57 Miss. 157.

New York.— Ludington *v.* Thompson, 153 N. Y. 499, 47 N. E. 903 [*affirming* 4 N. Y. App. Div. 117, 38 N. Y. Suppl. 768]; Von Sachs *v.* Kretz, 72 N. Y. 548 [*affirming* 10 Hun 95].

Pennsylvania.— Floyd's Estate, 30 Pittsb. Leg. J. N. S. 411.

England.— *Ex p.* Ross, 2 Glyn & J. 330.

See 33 Cent. Dig. tit. "Limitation of Actions," § 520.

Assignee is trustee for creditors.— By force and effect of insolvency proceedings the property of the insolvent debtor is sequestered for the benefit of all the then existing creditors. The trust thus created is an express trust for the benefit of the creditors and their claims, unless then barred by the statute of limitations, are not afterward, during the execution of the trust, affected by lapse of time. *In re* Leiman, 32 Md. 225, 3 Am. Rep. 132; Minot *v.* Thacher, 7 Metc. (Mass.) 348, 41 Am. Dec. 444; Von Sachs *v.* Kretz, 72 N. Y. 548; *Ex p.* Ross, 2 Glyn & J. 330.

In Louisiana prescription is interrupted by a *cessio bonorum* made by the debtor. Akin *v.* Giraud, 22 La. Ann. 577; Flower's Succession, 12 La. Ann. 216; West *v.* His Creditors, 1 La. Ann. 365; Wilcox *v.* His Creditors, 11 Rob. 346; Weimprender *v.* Weimprender, 2 Mart. N. S. 591.

In Pennsylvania it is provided by statute that the statute of limitations shall not extend to any suit against a corporation which has in any manner ceased from or suspended the ordinary business for which it was created. Shamokin Valley, etc., R. Co. *v.* Malone, 85 Pa. St. 25. This statute applies to a suit brought against a national bank in the hands of a receiver. Riddle *v.* Butler First Nat. Bank, 27 Fed. 503, construing Pennsylvania statute.

7. *Massachusetts.*—Doe *v.* Erwin, 134 Mass. 90; Richardson *v.* Thomas, 13 Gray 381, 74 Am. Dec. 636; Parker *v.* Sanborn, 7 Gray 191; Stoddard *v.* Doane, 7 Gray 387; Collester *v.* Hailey, 6 Gray 517.

Michigan.— Parsons *v.* Clark, 59 Mich. 414, 26 N. W. 656.

Pennsylvania.— Sletor *v.* Oram, 1 Whart. 106; Shoenberger *v.* Adams, 4 Watts 430; Feather's Appeal, 1 Penr. & W. 322 [*overruled* in Gest *v.* Heiskill, 5 Rawle 134].

Tennessee.— Todd *v.* Wright, 12 Heisk. 442; Miller *v.* Taylor, 6 Heisk. 465.

Texas.— Meusebach *v.* Half, 77 Tex. 185, 13 S. W. 979.

See 33 Cent. Dig. tit. "Limitation of Actions," § 520.

A representation of insolvency and the appointment of commissioners, although it changes the proceedings by which the creditor must enforce the demand against the administrator, does not suspend or defeat the operation of the statute of limitations. Doe *v.* Erwin, 134 Mass. 90; Blanchard *v.* Allen, 116 Mass. 447; Tarbell *v.* Parker, 106 Mass. 347.

8. Union Collection Co. *v.* Soule, 141 Cal. 99, 74 Pac. 549; Trafton *v.* Hill, 80 Me. 503, 15 Atl. 64; Hagood *v.* Robinson, 7 Rich. (S. C.) 43; Sinclair *v.* Lynah, 1 Speers (S. C.) 244; King *v.* Westendorf, Dudley (S. C.) 244.

9. Hawes *v.* Fette, 42 Ark. 374; Doe *v.* Erwin, 134 Mass. 90; Rosenthal *v.* Plumb, 25 Hun (N. Y.) 336; Cleveland *v.* Johnson, 5 Misc. (N. Y.) 484, 26 N. Y. Suppl. 734. See also Trafton *v.* Hill, 80 Me. 503, 15 Atl. 64.

the time limited for bringing suit.[10] It has been held, however, that this section of the Bankrupt Act should be so construed as to prohibit only such actions or proceedings as are inconsistent with the election by the creditor to obtain satisfaction of his debt under the bankruptcy proceedings;[11] and that an action commenced by summons may be brought and prosecuted to any stage short of final judgment unless stayed by order of the court sitting in bankruptcy.[12]

(III) *APPOINTMENT OF RECEIVER.* As a general rule the mere appointment of a receiver does not in any way affect the running of the statute of limitations.[13] But where the receiver is appointed to take charge of an estate for the purpose of administering it, as for instance the settlement of the affairs of a partnership and the payment of firm debts, the statute being substantially for the benefit of all the creditors, in analogy to an ordinary creditor's bill, the running of the statute of limitations is suspended in equity against claims by firm creditors for the payment of partnership debts out of the assets in the receiver's hands.[14]

2. STAY OF PROCEEDINGS[15] — a. By Order of Court or Judge. When the commencement of an action is stayed by an order of a court or judge,[16] the time of the continuance of the stay is not a part of the time limited for the commencement of the action.

b. By Statutory Prohibition. When by a legislative enactment parties are prevented from prosecuting their claims, the interval during which such prevention lasts is not to be counted as part of the time allowed by the statute of limitations.[17]

c. By Injunction — (I) *AT COMMON LAW.* In the absence of some statutory provision to the contrary an injunction staying the commencement of an action or proceedings on a judgment does not operate to suspend the running of the

10. Hawes *v.* Fette, 42 Ark. 374; Hoff *v.* Funkenstein, 54 Cal. 233; Rosenthal *v.* Plumb, 25 Hun (N. Y.) 336; Wofford *v.* Unger, 53 Tex. 634. *Compare* Milne's Appeal, 99 Pa. St. 483.

Some early cases hold that even if the bankruptcy proceedings do prevent suit against the bankrupt, the statute of limitations is not suspended, since the courts cannot extend the exceptions thereto. Harwell *v.* Steel, 17 Ala. 372; Sacia *v.* De Graaf, 1 Cow. (N. Y.) 356.

11. Hill *v.* Phillips, 14 R. I. 93.

12. Hill *v.* Phillips, 14 R. I. 93, holding that the statute of limitations is a good defense to the suit of a creditor, who has proved his claim in bankruptcy, but has neglected to bring his suit until a discharge in bankruptcy has been refused.

The right of action is not destroyed but only suspended by the act of the creditor in proving his debt. Smith *v.* Soldiers' Business Messenger, etc., Co., 35 N. J. L. 60.

13. *Georgia.*— Johnston *v.* Talley, 60 Ga. 540.

Illinois.— White *v.* Meadowcroft, 91 Ill. App. 293.

Maryland.— Williams *v.* Taylor, 99 Md. 306, 57 Atl. 641.

New Jersey.— Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539, 7 Atl. 647.

England.— Anonymous, 2 Atk. 15, 26 Eng. Reprint 406; Wrixon *v.* Vize, 2 C. & L. 138, 3 Dr. & War. 104, 5 Ir. Eq. 173 (holding that, although the appointment of a receiver does not prevent the bar of the statute from operating against a stranger, yet it will serve to prevent it from running in favor of a stranger to the suit); Harrison *v.* Dignan, 1 C. & L. 376, 2 Dr. & War. 298, 4 Ir. Eq. 562.

14. Kirkpatrick *v.* McElroy, 41 N. J. Eq. 539, 7 Atl. 647. See also Ludington *v.* Thompson, 153 N. Y. 499, 47 N. E. 903 [*affirming* 4 N. Y. App. Div. 117, 38 N. Y. Suppl. 768].

15. **Stay of action on administration bond** see EXECUTORS AND ADMINISTRATORS.

16. Best *v.* Davis Sewing Mach. Co., 65 Hun (N. Y.) 72, 19 N. Y. Suppl. 731, 22 N. Y. Civ. Proc. 362 (holding that judgment in an action of replevin is not an order staying the commencement of an action); Wilder *v.* Ballou, 63 Hun (N. Y.) 118, 17 N. Y. Suppl. 625 (holding that a stipulation to stay proceedings on a claim against an estate, given in pursuance of an order requiring it, is in effect an order for a stay); Williams *v.* Roberts, 1 C. M. & R. 676, 3 Dowl. P. C. 513, 1 Gale 56, 4 L. J. Exch. 78, 5 Tyrw. 421 (holding that an order made upon a summons to refer an attorney's bill for taxation is not a stay of proceedings, so as to prevent suit upon the bill).

17. Bates *v.* Gregory, 89 Cal. 387, 26 Pac. 891; Planters' Bank *v.* Alexandria Bank, 10 Gill & J. (Md.) 346; Brehm *v.* New York, 104 N. Y. 186, 10 N. E. 158; Worster *v.* Forty-second, etc., R. Co., 6 Daly (N. Y.) 528. But see Sacia *v.* De Graaf, 1 Cow. (N. Y.) 356.

A stay law which merely suspends the right to issue execution, without interfering with the creditor's right of action, does not suspend the running of the statute of limitations, since the judgment may be kept alive by scire facias during the stay of execution. Kirkland *v.* Krebs, 34 Md. 93.

statute of limitations, or relieve a party from its operation.[18] Plaintiff may, however, apply to a court of equity for an order restraining defendant in an action at law from pleading the statute of limitations during the period such defendant has previously caused such plaintiff to be restrained from bringing or prosecuting such action at law,[19] and where a defendant has procured the issuance of an injunction restraining the prosecution or the bringing of a suit on a claim, he will not, after the dissolution of the injunction, be permitted to avail himself, in a court of equity, on the plea of limitation, of the period of time during which the injunction was in force, provided plaintiff has not been guilty of laches.[20] Defendant will not be restrained, however, from relying upon the statute during such period, if plaintiff has been guilty of laches in filing suit on his claim after the dissolution of the injunction.[21] No matter in what form the aid of the court of equity is invoked the relief is granted, not upon the ground that equity can disregard or create exceptions to the statute of limitation, but upon the ground that the party sought to be enjoined has, by an abuse of the process of the court, obtained an unconscionable advantage which he ought not to be permitted to enjoy.[22] Where the injunction granted does not prevent the party from suing, there is no equitable ground on which the operation of the statute can be suspended.[23]

18. *Kentucky.*—Rice *v.* Lowan, 2 Bibb 249.
Louisiana.— Yale *v.* Randle, 23 La. Ann. 579.
Massachusetts.—Paul *v.* New York Fidelity, etc., Co., 186 Mass. 413, 71 N. E. 801, 104 Am. St. Rep. 594.
Mississippi.— Robertson *v.* Alford, 13 Sm. & M. 509. But see Tishiningo Sav. Inst. *v.* Buchanan, 60 Miss. 496.
New York.— Wilkinson *v.* First Nat. F. Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166; Barker *v.* Millard, 16 Wend. 572.
North Carolina.—Vance *v.* Granger, 1 N. C. 203, 204, in which the court says: "We cannot add to these, others, which the Legislature has omitted; nor construe cases to be within the saving which is plain were not meant to be included.
See 33 Cent. Dig. tit. "Limitation of Actions," § 521.

Necessity of legislative provision to suspend statute.— The operation of the statute of limitations will not be suspended except by legislative provision to that effect. An injunction staying proceedings at law is not a legislative prohibition of suit. It is always subject to qualification by the chancellor, and if, after having been granted, the statute of limitations is about to become a bar, the party enjoined may at any time apply to the court for a modification of the order, so as to permit the commencement of suit. Consequently no such disability is created by an injunctior as to stop the operation of the statute. Robertson *v.* Alford, 13 Sm. & M. (Miss.) 509.

19. Sugg *v.* Thrasher, 30 Miss. 135; Lamb *v.* Ryan, 40 N. J. Eq. 67; Doughty *v.* Doughty, 10 N. J. Eq. 347; Barker *v.* Millard, 16 Wend. (N. Y.) 572.

Mistake as to issuance of injunction.— An innocent mistake of the complainant, not superinduced by any act or word of defendant, as to the existence of an injunction, is not sufficient to enable a court of chancery to interfere with defendant's legal right to rely on the statute. Chilton *v.* Scruggs, 5 Lea (Tenn.) 308.

20. *Illinois.*— Kelly *v.* Donlin, 70 Ill. 378.
Louisiana.— Stanbrough *v.* McCall, 4 La. Ann. 322.
Maryland.— Little *v.* Price, 1 Md. Ch. 182.
Mississippi.— Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78; Sugg *v.* Thrasher, 30 Miss. 135.
Ohio.— Brown County *v.* Martin, 50 Ohio St. 197, 33 N. E. 1112.
Texas.— Converse *v.* Davis, 90 Tex. 462, 39 S. W. 277 [*reversing* (Civ. App. 1896) 37 S. W. 247].
United States.— Union Mut. L. Ins. Co. *v.* Dice, 14 Fed. 523, 11 Biss. 373.
England.—Anonymous, 1 Vern. Ch. 73, 23 Eng. Reprint 320.
See 33 Cent. Dig. tit. "Limitation of Actions," § 521.

Jurisdiction of equity to grant complete relief.—While the usual course is to sue at law and apply to a court of equity to restrain defendant from relying upon limitation during such period, there are cases where a court of equity will take original jurisdiction and grant complete relief, upon the ground that defendant has, by unconscientious litigation in equity, caused plaintiff to be debarred from his right to proceed at law. Davis *v.* Hoopes, 33 Miss. 173; Bond *v.* Hopkins, 1 Sch. & Lef. 413.

21. Sugg *v.* Thrasher, 30 Miss. 135; Doughty *v.* Doughty, 10 N. J. Eq. 347; Chilton *v.* Scruggs, 5 Lea (Tenn.) 308.

22. See cases cited *supra*, note 20.

23. *Arkansas.*— State Bank *v.* Byrd, 14 Ark. 496.
Kentucky.— Biggs *v.* Lexington, etc., R. Co., 79 Ky. 470.
New York.— Van Wagonen *v.* Terpenning, 122 N. Y. 222, 25 N. E. 254; McQueen *v.* Babcock, 41 Barb. 337.

(II) *Under Statute.* It is now provided by statute in several states that when the commencement of an action is stayed by injunction, the time of the continuance of the stay is not a part of the time limited for the commencement of the action.[24] Such statutes apply only between parties to the writ, and not where the injunction is granted in a suit to which the debtor is not a party;[25] nor do such statutes apply to limitations prescribed by the contract of the parties.[26]

3. Arbitration or Reference — a. In General. Reference of a suit to arbitration under order of court takes the subject-matter referred out of the statute of limitations.[27] The mere submission to arbitration of matters on which the arbitrators never acted will not prevent the running of the statute of limitations during the continuance of the submission,[28] and this rule is not affected by the fact that, pending the submission, the right of action is suspended.[29] The mere fact that there are negotiations with a view of referring a disputed matter to arbitrators does not suspend the running of the statute, there being no express agreement to suspend legal remedies to await the issue of the negotiations.[30]

b. Reference to Court of Claims. Congress has in special cases invested the court of claims with jurisdiction to determine a claim, relieved of the bar of limitation.[31] Unless congress otherwise directs, however, every claim cognizable by the court of claims must be determined with reference to the limitation prescribed for claims of the class to which it belongs.[32]

4. Property in Custody of the Law. When property is in the custody of the law, it is not liable to be sued for, and the statute of limitations does not run.[33]

Texas.— Davis *v.* Andrews, 88 Tex. 524, 30 S. W. 432, 32 S. W. 513.

United States.— Wells, etc., Co. *v.* Vansickle, 112 Fed. 398.

See 33 Cent. Dig. tit. "Limitation of Actions," § 521.

An order enjoining creditors from prosecuting actions at law against an estate, and fixing a time for proving their claims in the action in which the injunction was granted, will not suspend the running of the statute of limitations against a creditor who brings suit on a simple contract claim more than six years after the time so fixed. McLure *v.* Melton, 34 S. C. 377, 13 S. E. 615, 27 Am. St. Rep. 820, 13 L. R. A. 723.

24. Wild *v.* People, 92 Ill. App. 66; Sands *v.* Campbell, 31 N. Y. 345; Fincke *v.* Funke, 25 Hun (N. Y.) 616; Berrien *v.* Wright, 26 Barb. (N. Y.) 208. See also Hinchman *v.* Anderson, 32 Wash. 198, 72 Pac. 1018.

Mere irregularity in the granting of an injunction will not render it a nullity so as to prevent the suspension of the statute of limitations during the pendency of the injunction. Walton *v.* Pearson, 85 N. C. 34.

25. Van Wagonen *v.* Terpenning, 122 N. Y. 222, 25 N. E. 254 [*affirming* 46 Hun 423]; Terrell *v.* Ingersoll, 10 Lea (Tenn.) 77.

26. Paul *v.* New York Fidelity, etc., Co., 186 Mass. 413, 71 N. E. 801, 104 Am. St. Rep. 594; Wilkinson *v.* First Nat. F. Ins. Co., 72 N. Y. 499, 28 Am. Rep. 166. *Compare* Hamilton *v.* Royal Ins. Co., 156 N. Y. 327, 50 N. E. 863, 42 L. R. A. 485.

27. Colkings *v.* Thackston, 1 N. C. 225; Fowler *v.* Lewis, 36 W. Va. 112, 14 S. E. 447.

In England it has been held that submission to arbitration does not suspend the statute unless an express agreement to that effect is put in the agreement of submission. *In re* Astley, etc., Coal, etc., Co., 68 L. J. Q. B. 252, 80 L. T. Rep. N. S. 116.

28. Cowart *v.* Perrine, 21 N. J. Eq. 101; Cowart *v.* Perrine, 18 N. J. Eq. 454.

29. Cowart *v.* Perrine, 21 N. J. Eq. 101.

30. Gooden *v.* Amoskeag F. Ins. Co., 20 N. H. 73; Snell *v.* Dale, 17 N. Y. Suppl. 575.

31. Erwin *v.* U. S., 97 U. S. 392, 24 L. ed. 1065.

32. Ford *v.* U. S., 116 U. S. 213, 6 S. Ct. 360, 29 L. ed. 608.

33. *Louisiana.*— Gas Light, etc., Co. *v.* Haynes, 7 La. Ann. 114, holding that where an insolvent corporation is in process of liquidation in the hands of a liquidator appointed under the law, prescription does not run in favor of the corporation during the term of liquidation.

Maryland.— Hebb *v.* Moore, 66 Md. 167, 7 Atl. 255.

North Carolina.—Causey *v.* Snow, 122 N. C. 326, 29 S. E. 359, holding, however, that where commissioners in insolvency, under order of the court, loan money of the estate, a note taken as security therefor is not a fund in the hands of the court, and hence is subject to limitations.

Tennessee.— Tyner *v.* Fenner, 4 Lea 469; Moore *v.* Crockett, 10 Humphr. 365.

United States.— Mattingly *v.* Boyd, 20 How. 128, 15 L. ed. 845.

See 33 Cent. Dig. tit. "Limitation of Actions," § 519.

Pending administration the statute of limitations will not run as to funds in the hands of the administrator in favor of the heir at law, and against creditors who have reduced their claims to judgment, such funds being held in trust for the creditors, until the estate is settled. Morris *v.* Cain, 39 La.

5. Stay Laws.[34] State legislatures have the constitutional right of suspending the operation of the statute of limitations, which right is frequently exercised.[35] The suspending act, however, operates only to interrupt and stay the course of the statute for the time mentioned by it.[36]

6. War[37] **— a. Foreign or International War.** A foreign or international war suspends the operation of the statute of limitations between the citizens of the countries at war so long as the war lasts.[38] On the restoration of peace all those rights recommence which had lain dormant, or had been suspended during the war.[39]

b. Civil War — (I) *Independent of Statute* — (A) *As Between Citizens of Belligerent Powers.* In the early English cases, the closing of the courts in time of civil war not being a case excepted from the operation of the statute of limitations, the running thereof was not interrupted.[40] It is well established, however, in this country, both in the federal and state courts, that the doctrine applicable to international war applies in the case of civil war, and the statute of limitations was suspended as between citizens of the Confederate states and citizens of those states which adhered to the national government during the whole period of the war.[41] The doctrine applies not only to cases of claims between citizens of belligerent powers, but also to claims of the government against its own citi-

Ann. 712, 1 So. 797, 2 So. 418; Phifer *v.* Berry, 110 N. C. 463, 15 S. E. 1.

Where one is administrator of an estate which has a claim against him individually, prescription is suspended during the continuance of the administration. McKnight *v.* Calhoun, 36 La. Ann. 408.

34. Stay laws suspending statute of limitations during war see *supra*, VI, H, 6, b, (I), (II).

35. Pegues *v.* Warley, 14 S. C. 180; Wardlaw *v.* Buzzard, 15 Rich. (S. C.) 158, 94 Am. Dec. 148 (holding that the stay law of 1861 applied to actions on contracts then existing, and suspended the statute of limitations in such actions during its continuance and successive renewals); State *v.* Gibson, 27 Tex. Civ. App. 355, 65 S. W. 690.

Presumption of payment arising from lapse of time is not affected by the suspension of the statute of limitations by act of legislature. Shubrick *v.* Adams, 20 S. C. 49.

36. Hicks *v.* Pouncey, 1 Brev. (S. C.) 115. But see East Tennessee Iron Mfg. Co. *v.* Gaskell, 2 Lea (Tenn.) 742.

37. Absence during war see *supra*, VI, F, 2, d, (II), (F), (6).

38. Robson *v.* Wall, 2 Nott & M. (S. C.) 498, 10 Am. Dec. 623; Hopkirk *v.* Bell, 3 Cranch (U. S.) 454, 2 L. ed. 497; Dunlop *v.* Alexander, 8 Fed. Cas. No. 4,166, 1 Cranch C. C. 498; Jackson Ins. Co. *v.* Stewart, 13 Fed. Cas. No. 7,152, 1 Hughes 310; —— *v.* Lewis, 15 Fed. Cas. No. 8,315, Brunn. Col. Cas. 27, 3 N. C. 346. See also Nicks *v.* Martindale, Harp. (S. C.) 136, 18 Am. Dec. 647; Cross *v.* Sabin, 13 Fed. 308.

The reason for the rule is that in time of war no action can be maintained by an alien enemy, and if the statute were not suspended during the period of the war every debtor in a country lately restored to peace, where there had been commercial dealings before the war, could cheat and defraud his just and *bona fide* creditors, since every nation in its political capacity disdains and disclaims every idea of confiscating commercial debts to its own use. Robson *v.* Wall, 2 Nott & M. (S. C.) 498, 10 Am. Dec. 623.

39. Robson *v.* Wall, 2 Nott & M. (S. C.) 498, 10 Am. Dec. 623.

40. Weller *v.* Prideux, 1 Keb. 157; Lee *v.* Rogers, 1 Lev. 111; Prideaux *v.* Webber, 1 Lev. 31; Aubry *v.* Fortescue, 10 Mod. 206; Hall *v.* Wybourn, 2 Salk. 420; Beckford *v.* Wade, 17 Ves. Jr. 87, 11 Rev. Rep. 20, 34 Eng. Reprint 34.

41. *Arkansas.*— Hodges *v.* Taylor, (1890) 13 S. W. 129; Williamson *v.* McCrary, 33 Ark. 470; Mayo *v.* Cartwright, 30 Ark. 407; Metropolitan Nat. Bank *v.* Gordon, 28 Ark. 115 [*overruling* Bennett *v.* Worthington, 24 Ark. 487]; Randolph *v.* Ward, 29 Ark. 238; Eddins *v.* Graddy, 28 Ark. 500.

Illinois.— Mixer *v.* Sibley, 53 Ill. 61.

Indiana.— Perkins *v.* Rogers, 35 Ind. 124, 9 Am. Rep. 639.

Kentucky.— Selden *v.* Preston, 11 Bush 191; Sharp *v.* Morris, 4 Ky. L. Rep. 732.

Missouri.— McMerty *v.* Morrison, 62 Mo. 140.

Wisconsin.— Ahnert *v.* Zaun, 40 Wis. 622.

United States.— Bird *v.* Louisiana State Bank, 93 U. S. 96, 23 L. ed. 818; Batesville Inst. *v.* Kauffman, 18 Wall. 151, 21 L. ed. 775; Hiatt *v.* Brown, 15 Wall. 177, 21 L. ed. 128; Freeborn *v.* The Protector, 12 Wall. 700, 20 L. ed. 463; Levy *v.* Stewart, 11 Wall. 244, 20 L. ed. 86; Hanger *v.* Abbott, 6 Wall. 532, 18 L. ed. 939; Opie *v.* Castleman, 32 Fed. 511 [*reversed* on another point in 145 U. S. 214, 12 Sup. Ct. 822, 31 L. ed. 680]; Chappelle *v.* Olney, 5 Fed. Cas. No. 2,613, 1 Sawy. 401; Gooding *v.* Varn, 10 Fed. Cas. No. 5,539, Chase 286; Green *v.* U. S., 17 Ct. Cl. 174; Sierra *v.* U. S., 9 Ct. Cl. 224.

See 33 Cent. Dig. tit. "Limitations of Actions," § 523.

Since the Civil war practically interrupted all intercourse and all commerce between the

zens resident in the rebellious states;[42] and claims against the United States in favor of inhabitants of an insurrectionary state, whether they were in fact rebels, or were loyal to the government, but constrained by circumstances to abide in the rebellious territory.[43] Since the fact of inaccessibility or inability to sue is the reason why statutes of limitation are suspended during a time of war, the rule does not apply where parties who, although citizens of a seceded state at the opening of the war, resided in the loyal states or in neutral territory while it was in progress and maintained their allegiance, since the courts were not closed to such persons.[44] Nor was the statute of limitations suspended where the disability to sue was a voluntary wrongful creation of the party himself.[45]

(B) *As Between Citizens of Same Power.* It would seem on general principles that the existence of war would not suspend the statute of limitations as between citizens of the same power, since they are not disabled from enforcing their claims in the courts, and there are decisions to this effect.[46] It has been

different sections, there is no ground upon which any distinction can be made between this and international wars, so long as there existed an actual non-intercourse and a practical impossibility of enforcing claims. Jackson Ins. Co. *v.* Stewart, 13 Fed. Cas. No. 7,152, 1 Hughes 310.

The Civil war was accompanied by the general incidents of war between independent nations; the inhabitants of the Confederate states on the one hand, and the loyal states on the other, became thereby reciprocally enemies of each other, and were liable to be so treated without reference to their individual dispositions or opinions; during its continuance all commerce, intercourse, and correspondence between them were interdicted by principles of public law as well as by express enactments of congress; all contracts previously made between them were suspended, and the courts of each belligerent were closed to the citizens of the other. Brown *v.* Hiatt, 15 Wall. (U. S.) 177, 21 L. ed. 128.

The suspension of the federal court in Mississippi, by reason of the rebellion, suspended the running of limitations as to persons having a right to pursue their remedies in that court. Whitfield *v.* Allison, 26 Fed. Cas. No. 17,571.

Limitation of judgment lien.— The suspension applies as well to the three-year limitation on judgment liens, as any other. Randolph *v.* Ward, 29 Ark. 238; Batesville Inst. *v.* Kauffman, 18 Wall. (U. S.) 151, 21 L. ed. 775.

The doctrine is not applied to the case of a mere personal trust which could have been executed by the trustee without the aid of a court. Mayo *v.* Cartwright, 30 Ark. 407.

Contract limitation.— A limitation imposed by statute is suspended during war, since the law imposes the limitation and the law imposes the disability. It is nothing therefore but necessary legal logic that one period should be taken from the other. Where, however, the limitation is imposed by the contract of the parties, the rule does not apply, since the courts have no right to expand the time so limited. Semmes *v.* Hartford F. Ins. Co., 13 Wall. (U. S.) 158, 20 L. ed. 490 [*reversing* 21 Fed. Cas. No. 12,651, 6 Blatchf. 445, 36 Conn. 543].

An application to open a decree and be allowed to defend, being a defensive proceeding, is not affected by the rule which prohibits an alien enemy from suing in the courts of that state; and therefore the accident of war affords no ground for suspending the limitation of three years in which such application must be made. Seymour *v.* Bailey, 66 Ill. 288; Seymour *v.* Davis, 66 Ill. 308 note.

In Louisiana the rule seems to be well established that the mere existence of the Civil war did not of itself operate to suspend prescription. Winn's Succession, 33 La. Ann. 1392 [*overruling* Aby *v.* Brigham, 28 La. Ann. 840, and *declining to follow* Stewart *v.* Bloom, 11 Wall. (U. S.) 493, 20 L. ed. 176]; Perrett *v.* Lee, 23 La. Ann. 553; Sampson *v.* Gillis, 22 La. Ann. 591; Bartley *v.* Bosworth's Succession, 21 La. Ann. 126; Smith *v.* Stewart, 21 La. Ann. 67, 99 Am. Dec. 709. Where the evidence shows that suit might have been brought before prescription obtained, notwithstanding the war, the maxim *contra non valentem agere non currit præscriptio* cannot be invoked to defeat a plea of the statute of limitations. Mechanics, etc., Bank *v.* Saunders, 21 La. Ann. 106; Lemon *v.* West, 20 La. Ann. 427; Norwood *v.* Mills, 20 La. Ann. 422; Marcy *v.* Steele, 20 La. Ann. 413; Barriere *v.* Stein, 20 La. Ann. 397; Payne *v.* Douglass, 20 La. Ann. 280; Rabel *v.* Pourciau, 20 La. Ann. 131; Munson *v.* Robertson, 19 La. Ann. 170.

42. U. S. *v.* Wiley, 11 Wall. (U. S.) 508, 20 L. ed. 211.

43. Sierra *v.* U. S., 9 Ct. Cl. 224.

44. Seymour *v.* Davis, 66 Ill. 308 note; Seymour *v.* Bailey, 66 Ill. 288; Zacharie *v.* Godfrey, 50 Ill. 186, 99 Am. Dec. 506.

45. Hall *v.* Connecticut Mut. L. Ins. Co., 68 Ill. 357 (holding that the three-year limitation for defending against a decree of foreclosure will not be extended on the ground that the mortgagor was absent by voluntary enlistment in the Confederate army); Kendall *v.* U. S., 14 Ct. Cl. 374; Sierra *v.* U. S., 9 Ct. Cl. 224.

46. Smith *v.* Charter Oak L. Ins. Co., 64 Mo. 330; Cross *v.* Sabin, 13 Fed. 308; Lock-

held, however, that the principle that state statutes of limitation did not run during the Civil war applied to suits between persons in different states of the so-called Confederate states as much as to suits between citizens of loyal states and citizens of Confederate states.[47]

(c) *Time of Commencement and Close of War.* The war did not begin or close at the same time in all the states. Its commencement in certain states was referred to the first proclamation of blockade embracing them and made April 19, 1861, and, as to the other states, to the second proclamation embracing them, and made on April 27, 1861.[48] The first proclamation embraced the states of Alabama, Florida, Georgia, Louisiana,[49] Mississippi, South Carolina,[50] and Texas; the second embraced the states of Virginia[51] and North Carolina.[52] There were also two proclamations declaring that the war had closed; one issued on the 2d of April, 1866, embracing the states of Arkansas,[53] Alabama, Florida,[54] Georgia, Louisiana,[55] Mississippi, North Carolina, South Carolina,[56] Tennessee and Virginia;[57] the other issued on the 20th of August, 1866, and embraced the state of Texas.[58]

(d) *Statute Revived After Close of War.* The statute commenced to run again after the close of the war and the power of suing was restored.[59]

(ii) *Statutory Suspension of Limitations* — (a) *During Revolutionary War.* During the Revolutionary war, several statutes, both federal and state, were passed, suspending the statute of limitations as to claims between citizens of the belligerent powers.[60]

(b) *During Civil War* — (1) Federal Statutes. On June 11, 1864, congress passed an act suspending the limitation of actions between citizens of the adhering states and those of the Confederate states during the war. This act allowed the time both before and after its passage during which plaintiff was prevented by the war from suing to be deducted.[61] It applied to cases in the courts of the states as well as to those in the federal courts,[62] but not to cases where the creditor and debtor both resided within the limits of the insurrectionary states.[63]

hart *v.* Horn, 15 Fed. Cas. No. 8,445, 1 Woods 628 [*affirmed* in 17 Wall. 570, 21 L. ed. 657].

47. Ross *v.* Jones, 22 Wall. (U. S.) 576, 22 L. ed. 730. See also Batesville Inst. *v.* Kauffman, 18 Wall. (U. S.) 151, 21 L. ed. 775; Adger *v.* Alston, 15 Wall. (U. S.) 555, 21 L. ed. 234.

48. Freeborn *v.* The Protector, 12 Wall. (U. S.) 700, 20 L. ed. 463.

49. Aby *v.* Brigham, 28 La. Ann. 840; Adger *v.* Alston, 15 Wall. (U. S.) 555, 21 L. ed. 234.

50. Gooding *v.* Varn, 10 Fed. Cas. No. 5,539, Chase 286.

51. Hiatt *v.* Brown, 15 Wall. (U. S.) 177, 21 L. ed. 128.

52. Arkansas and Tennessee were not included within either proclamation. In Arkansas the war commenced, and the statute of limitations ceased to run, on May 6, 1861 (Hall *v.* Denckla, 28 Ark. 506); in Tennessee the war commenced on Aug. 16, 1861 (Hammond *v.* Johnston, 93 Mo. 198, 6 S. W. 83).

53. Worthington *v.* De Bardlekin, 33 Ark. 651; Hall *v.* Denckla, 28 Ark. 506.

54. Sierra *v.* U. S., 9 Ct. Cl. 224.

55. Aby *v.* Brigham, 28 La. Ann. 840; Adger *v.* Alston, 15 Wall. (U. S.) 555, 21 L. ed. 234.

56. Gooding *v.* Varn, 10 Fed. Cas. No. 5,539, Chase 286.

57. Hiatt *v.* Brown, 15 Wall. (U. S.) 177, 21 L. ed. 128; Green *v.* U. S., 17 Ct. Cl. 174.

58. Freeborn *v.* The Protector, 12 Wall. (U. S.) 700, 20 L. ed. 463.

59. Perkins *v.* Rogers, 35 Ind. 124, 9 Am. Rep. 639; Ahnert *v.* Zaun, 40 Wis. 622.

60. Johns *v.* Lane, 3 Harr. & M. (Md.) 398; Ringgold *v.* Cannell, 2 Harr. & M. (Md.) 408; Penrose *v.* King, 1 Yeates (Pa.) 344.

The act of 1781, relative to the adjustment of claims for property impressed for public service during the Revolutionary war, and the subsequent continuing laws, were acts of limitation, and barred claims not asserted before September, 1787. Com. *v.* Banks, 4 Call (Va.) 338.

61. U. S. *v.* Wiley, 11 Wall. (U. S.) 508, 20 L. ed. 211; Stewart *v.* Bloom, 11 Wall. (U. S.) 493, 20 L. ed. 176. But see Harrison *v.* Adger, 24 La. Ann. 565.

62. Stewart *v.* Bloom, 11 Wall. (U. S.) 493, 20 L. ed. 176. But see Winn's Succession, 33 La. Ann. 1392, which declines to acknowledge Stewart *v.* Bloom, *supra*, as authority, and *overrules* Aby *v.* Brigham, 28 La. Ann. 840, expressly, and Auchincloss *v.* Frois, 24 La. Ann. 31, without mention.

63. Miltenberger *v.* Witherow, 24 La. Ann. 183; Lockhart *v.* Horn, 15 Fed. Cas. No. 8,445, 1 Woods 628 [*affirmed* in 17 Wall. 570, 21 L. ed. 657].

Such act was not itself a statute of limitation, and was not within the provisions of a state constitution declaring statutes of limitation suspended.[64]

(2) STATE STATUTES. Most of the states likewise passed stay laws during the Civil war suspending the statute of limitations for a greater or less period.[65]

I. Commencement of Action or Other Proceeding[66] — **1. EFFECT OF COMMENCEMENT OF ACTION**[67] — **a. Upon Same Cause of Action** — (I) *IN GENERAL.* Where legal proceedings are commenced to enforce a right before the statute has run against it, no lapse of time after the commencement of such proceeding will

64. Graydon *v.* Sweet, 10 Fed. Cas. No. 5,733, 1 Woods 418.

65. *Alabama.*— The statute of limitations was suspended from Jan. 11, 1861, to Sept. 21, 1865. Black *v.* Pratt Coal, etc., Co., 85 Ala. 504, 5 So. 89; Morgan *v.* Casey, 73 Ala. 222; Steele *v.* Steele, 64 Ala. 438, 38 Am. Rep. 15; Anderson *v.* Melear, 56 Ala. 621; Harrison *v.* Heflin, 54 Ala. 552; Carter *v.* Carter, 53 Ala. 365; Jones *v.* Nelson, 51 Ala. 471; Fox *v.* Lawson, 44 Ala. 319; Coleman *v.* Holmes, 44 Ala. 124, 4 Am. Rep. 121.

Florida.—McDonald *v.* Bogue, 14 Fla. 363; Hart *v.* Bostwick, 14 Fla. 162.

Georgia.— Ellis *v.* Atlantic, etc., R. Co., 61 Ga. 362; Renew *v.* Darley, 49 Ga. 332 (the statute of limitations applicable to bills of review was suspended from Nov. 30, 1860, until July 21, 1868); Shorter *v.* Marshall, 49 Ga. 31; Satterfield *v.* Shwab, 46 Ga. 119; Baker *v.* Roath, 44 Ga. 33; Calhoun *v.* Kellogg, 41 Ga. 231; Ragland *v.* Barringer, 41 Ga. 114; Walker *v.* Mercer, 41 Ga. 44.

Mississippi.— The statute of limitations was suspended from Dec. 31, 1862, to April 2, 1867. Wiggle *v.* Owen, 45 Miss. 691; McCutchen *v.* Dougherty, 44 Miss. 419; Griffing *v.* Mills, 40 Miss. 611.

North Carolina.— Thompson *v.* Nations, 112 N. C. 508, 17 S. E. 432 (from May 20, 1861, to Jan. 1, 1870); Chancy *v.* Powell, 103 N. C. 159, 9 S. E. 298; Davis *v.* Perry, 89 N. C. 420; Hawkins *v.* Savage, 75 N. C. 133; Edwards *v.* Jarvis, 74 N. C. 315 (from May 20, 1861, to Jan. 31, 1870); Harrison *v.* Styres, 74 N. C. 290 (holding that the act of May 11, 1861, known as the "first stay law of the war," does not apply to a mortgage executed prior to the act, but registered afterward); Taylor *v.* Galbraith, 65 N. C. 409 (from May 20, 1861, to Jan. 1, 1870); Plott *v.* Western North Carolina R. Co., 65 N. C. 74 (from May 11, 1861, to Jan. 1, 1870); Howell *v.* Buie, 64 N. C. 446 (from May 20, 1861, to the end of the war); Johnson *v.* Winslow, 63 N. C. 552 (holding that in actions on notes the statute of limitations was suspended from Sept. 1, 1861, to Jan. 1, 1870); Morris *v.* Avery, 61 N. C. 238.

Tennessee.—The statute of limitations was suspended from May 6, 1861, until Jan. 1, 1867. Jones *v.* Reynolds, 5 Baxt. 644; Peak *v.* Buck, 3 Baxt. 71; Marks *v.* Borum, 1 Baxt. 87, 25 Am. Rep. 764; Kilpatrick *v.* Brashear, 10 Heisk. 372; Neely *v.* Luster, 7 Heisk. 354; Yancy *v.* Yancy, 5 Heisk. 353, 13 Am. Rep. 5; Gwyn *v.* Porter, 5 Heisk. 253; Vaughn *v.* Smith, 2 Heisk. 649.

Texas.— The statute of limitations was suspended from Jan. 28, 1861, to March 30, 1870. Sickels *v.* Epps, (1888) 8 S. W. 124; Ragsdale *v.* Barnes, 68 Tex. 504, 5 S. W. 68; Porterfield *v.* Taylor, 60 Tex. 264; Grigsby *v.* Peak, 57 Tex. 142; Lewis *v.* Davidson, 51 Tex. 251; Moseley *v.* Lee, 37 Tex. 479; Waters *v.* Waters, 33 Tex. 50; Harvey *v.* Carroll, 5 Tex. Civ. App. 324, 23 S. W. 713.

Virginia.— Tunstall *v.* Withers, 86 Va. 892, 11 S. E. 565 (from April 17, 1861, to Jan. 1, 1869); Davis *v.* Tebbs, 81 Va. 600 (from April 17, 1861, to Jan. 1, 1869); Morrison *v.* Householder, 79 Va. 627; Brewis *v.* Lawson, 76 Va. 36; Danville Bank *v.* Waddil, 27 Gratt. 448 (from March 2, 1866, to Jan. 1, 1869); Johnston *v.* Gill, 27 Gratt. 587.

West Virginia.—The statute of limitations was suspended from April 17, 1861, to March 1, 1865. Hale *v.* Pack, 10 W. Va. 145; Huffman *v.* Alderson, 9 W. Va. 616; Pitzer *v.* Burns, 7 W. Va. 63; Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180. This act applies as well to suits pending as to suits brought after its passage.

See 33 Cent. Dig. tit. "Limitation of Actions," § 524.

Effect of military orders.— The military orders issued during the war, staying proceedings in certain causes of action, and extending the time for a stay of execution on judgments, did not operate to suspend the running of the statute of limitations. Shand *v.* Gage, 9 S. C. 187.

The Dormant Judgment Act is not a statute of limitations, and was not suspended during the war. Battle *v.* Shivers, 39 Ga. 405; Chapman *v.* Akin, 39 Ga. 347; Dooly *v.* Isbell, 39 Ga. 342; Johnston *v.* Wilson, 29 Gratt. (Va.) 379.

Texas.— The stay laws passed during the war were abrogated by provincial Governor Hamilton's proclamation of Sept. 8, 1865. Clepper *v.* Hutchinson, 33 Tex. 120.

The mere occasional invasion of a county by hostile bands of Indians, making it unsafe to live therein, but not preventing the holding of courts, is not such forcible occupation of the county by a public enemy as would interrupt the running of the statute of limitations. League *v.* Rogan, 59 Tex. 427.

66. Creditors' bill as stopping the running of the statute of limitations see *infra*, VI, I, 7, a.

67. Pleading commencement of action see *infra*, VIII, D.

In criminal prosecution see CRIMINAL LAW.

operate as a bar to the enforcement of that right.[68] The fact that judgment in

Commencement of actions on insurance policies containing special limitations see FIRE INSURANCE, 19 Cyc. 903 *et seq.*; LIFE INSURANCE.

68. *Alabama.*— Beard *v.* Ryan, 78 Ala. 37. *Georgia.*— Gordon *v.* Trimmier, 91 Ga. 472, 18 S. E. 404. *Illinois.*— Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588. *Iowa.*— Citizens' State Bank *v.* Jess, 127 Iowa 450, 103 N. W. 471; Freeburg *v.* Eksell, 123 Iowa 464, 99 N. W. 118. *Kansas.*— Chicago, etc., Bridge Co. *v.* Fowler, 55 Kan. 17, 39 Pac. 727. *Louisiana.*— Woodcock *v.* Baldwin, 110 La. 270, 34 So. 440; Destrehan *v.* Fazende, 13 La. Ann. 307; Riviere *v.* Spencer, 2 Mart. 79. *Maryland.*—McKaig *v.* Piatt, 34 Md. 249. *Minnesota.*— Backus *v.* Burke, 63 Minn. 272, 65 N. W. 459. *New York.*— Matter of Sargent, 42 N. Y. App. Div. 301, 59 N. Y. Suppl. 105 [*affirming* 25 Misc. 261, 54 N. Y. Suppl. 555]. *North Carolina.*— Long *v.* Orrell, 35 N. C. 123. *Pennsylvania.*— Schmidt *v.* Heimberger, 21 Pa. Co. Ct. 564. *Texas.*— Hope *v.* Alley, 11 Tex. 259; Hanrick *v.* Gurley, (Civ. App. 1899) 48 S. W. 994. *Virginia.*— Covington *v.* Griffin, 98 Va. 124, 34 S. E. 974; Bell *v.* Wood, 94 Va. 677, 27 S. E. 504. *West Virginia.*— McEndree *v.* Morgan, 31 W. Va. 521, 8 S. E. 285. *United States.*— Curtner *v.* U. S., 149 U. S. 662, 13 S. Ct. 985, 1041, 37 L. ed. 890; St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 8 S. Ct. 1335, 32 L. ed. 289. *England.*— Alsop *v.* Bell, 24 Beav. 451, 53 Eng. Reprint 431; Gregory *v.* Hurrell, 3 B. & B. 212, 7 E. C. L. 691.

See 33 Cent. Dig. tit. "Limitation of Actions," § 514.

Suit in equity prevents statute running at law.— Wrixon *v.* Vize, 2 C. & L. 138, 3 Dr. & War. 104, 5 Ir. Eq. 173 [*affirming* 1 C. & L. 298, 2 Dr. & War. 192, 4 Ir. Eq. 463]. See also Sirdefield *v.* Price, 2 Y. & J. 73.

The institution of a suit to foreclose a mortgage before the note is barred by the statute tolls the statute on the note from the commencement of the foreclosure proceedings. Patrick *v.* National Bank of Commerce, 63 Nebr. 200, 88 N. W. 183; Carstens *v.* Eller, 5 Nebr. (Unoff.) 149, 97 N. W. 631; Harris *v.* Nye, etc., Co., 3 Nebr. (Unoff.) 169, 91 N. W. 250. *Contra*, Hinchman *v.* Anderson, 32 Wash. 198, 72 Pac. 1018; Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

The institution of a suit against an executor within the time prescribed by law will save the bar of the statute (Scott *v.* Ware, 64 Ala. 174), as to the entire assets of the estate, both real and personal (Henry *v.* Mills, 1 Lea (Tenn.) 144; Wooldridge *v.* Page, 9 Baxt. (Tenn.) 325).

If plaintiff fails in his action, or, having succeeded, the judgment expires or ceases for any reason to have operative force, conditions will remain the same as if the action had never been commenced. Snell *v.* Harrison, 131 Mo. 495, 32 S. W. 37, 52 Am. St. Rep. 642.

The fact that judgment is taken in violation of an injunction will not affect the statute of limitations. The suit will still be pending. Latta *v.* Sumerow, 4 Lea (Tenn.) 486; Bibb *v.* Tarkington, 2 Lea (Tenn.) 21.

Second action in aid of former.— Where a second action is brought in aid of, and not as a substitute for, a former action, the statute of limitations ceases to run from the commencement of the former action. Hughes *v.* Whitaker, 84 N. C. 640.

Termination of suit as pending case.— The fact that a chancery case is no longer carried on the docket, or that, when the papers are destroyed by fire, no order is made to supply them, will not operate as a determination of the case so as to set the statute of limitations in motion. Weaver *v.* Ruhm, (Tenn. Ch. App. 1897) 47 S. W. 171.

A reply when filed relates back to the commencement of the action, and may be filed after the expiration of the limitation period, where the action is commenced within that period. State *v.* Coughran, (S. D. 1905) 103 N. W. 31.

Where a suit is docketed by consent, in November, "as of April term" preceding, so far as limitation is concerned, the suit will be taken as brought on the first day of the April term. Reed *v.* Carusi, 20 Fed. Cas. No. 11,642, Taney 72.

"Though an action is not placed on calendar for several terms, it may nevertheless be "pending." Lawrence *v.* Belger, 31 Ohio St. 175.

Filing of petition under act for quieting titles is not such a proceeding as will save the rights of a party contestant otherwise barred by the statute of limitations. Laing *v.* Avery, 14 Grant Ch. (U. C.) 33.

The pendency of a former action of ejectment, between the same parties and for the same premises, in which plaintiff recovered only a part of them, will not prevent the operation of the statute as to that part for which verdict was given for defendant. Morrison *v.* Connelly, 13 N. C. 233.

If a suit be instituted upon a note before it is due, and pending the suit the note matures and is protested for non-payment, prescription of that note is interrupted so long as the suit lasts, after maturity, even if the suit be ultimately dismissed upon an exception of prematurity. Barrow *v.* Shields, 13 La. Ann. 57.

Where a personal judgment is obtained on a note secured by mortgage, the note is merged in the judgment, which also carries with it the mortgage lien. Slaughter *v.* Owens, 60 Tex. 668. And an action on the original indebtedness will not stop the run-

the action is not entered until the period of limitation has expired will not alter the rule.[69]

(II) *Necessity That Action Be One in Which Defense Pleaded.* The defense of the bar of the statute of limitations applies strictly to the particular action to which it is pleaded, and hence if that suit be not brought within the statutory period, the bar of the statute cannot be avoided by showing that another action had been brought by plaintiff against defendant on the same cause of action within the period limited by the statute.[70]

(III) *Necessity of Diligence in Prosecution.* While it has been held that the actual commencement of a suit is sufficient to stop the running of the statute of limitations, without any regard to, or dependence on, any after diligence of plaintiff in its prosecution,[71] it seems to be well established that if a suit is voluntarily abandoned,[72] or dismissed,[73] or is not proceeded with for a considerable period of time,[74] the operation of the statute will not be suspended.

b. Upon Different Cause of Action. The commencement of an action will not stop the running of limitations against a suit founded on a different cause of action.[75]

ning of the statute of limitations against the judgment. McKeen *v.* James (Tex. Civ. App. 1893) 23 S. W. 460, 87 Tex. 193, 25 S. W. 408, 27 S. W. 59.

Louisiana — Prescription interrupted by judicial demand. — By Civ. Code, art. 3484, a legal interruption of prescription takes place when the possessor has been cited to appear before a court of justice, on account either of ownership or possession, and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not. Creswell *v.* Tabary, 10 La. Ann. 396. An order for seizure and sale, served on the debtor, is a judicial demand, the same as an ordinary suit. D'Ile Roupe *v.* Carradine, 20 La. Ann. 244; Walker *v.* Lee, 20 La. Ann. 192; Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. ed. 383.

69. Dougherty *v.* Henarie, 47 Cal. 9; Randolph *v.* Bayue, 44 Cal. 366; Sandwich Mfg. Co. *v.* Earl, 56 Minn. 390, 57 N. W. 938; Moore *v.* Lobbin, 26 Miss. 304; Hook *v.* McCune, 6 Pa. Dist. 611.

70. *Arkansas.* — Wallace *v.* Swepston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94; Hill *v.* Pipkins, 72 Ark. 549, 81 S. W. 1216.

Mississippi. — Crane *v.* French, 38 Miss. 503.

New York. — Stafford *v.* Bryan, 1 Paige 239 [*affirmed* in 3 Wend. 532].

Texas. — Duke *v.* Reed, 64 Tex. 705.

Virginia. — Gunnell *v.* Dixon, 101 Va. 174, 43 S. E. 340; Callis *v.* Waddy, 2 Munf. 511.

United States. — Moore *v.* Greene, 19 How. 69, 15 L. ed. 533; Elder *v.* McClaskey, 70 Fed. 529, 17 C. C. A. 251; Delaplaine *v.* Crowninshield, 7 Fed. Cas. No. 3,756, 3 Mason 329.

See 33 Cent. Dig. tit. "Limitation of Actions," § 515.

71. King *v.* State Bank, 13 Ark. 269; Louisville *v.* Meglemry, 107 Ky. 122, 52 S. W. 1052, 21 Ky. L. Rep. 751; Louisville *v.* Hornsby, 64 S. W. 996, 23 Ky. L. Rep. 1238.

The suit must, however, be prosecuted in good faith, and if the time constituting the bar is permitted to elapse between the suing out of one process and another, the mere bringing of the suit will not prevent the statute from running. Clark *v.* Kellar, 3 Bush (Ky.) 223.

72. Dixon *v.* Gayfere, 17 Beav. 421, 23 L. J. Ch. 60, 51 Eng. Reprint 1097.

New action after abandonment see *infra*, VI, I, 9, d, (II).

73. Hanks *v.* Williams, Cheves Eq. (S. C.) 203; Herr *v.* Rodriguez, (Tex. Civ. App. 1899) 50 S. W. 487.

New action after dismissal or nonsuit see *infra*, VI, I, 9, e.

74. Rutherford *v.* Fen, 20 N. J. L. 299 (nineteen years); Lacon *v.* Lacon, 2 Atk. 395, 26 Eng. Reprint 639 (six years); Anonymous, 2 Atk. 1, 26 Eng. Reprint 398 (six years); Lake v. Hayes, 1 Atk. 281, 26 Eng. Reprint 180; Hurdret *v.* Calladon, 1 Ch. Rep. 214, 21 Eng. Reprint 553; Craddock *v.* Marsh, 1 Ch. Rep. 205, 21 Eng. Reprint 551. But see Dickenson *v.* Holland, 2 Beav. 310, 17 Eng. Ch. 310, 48 Eng. Reprint 1200; Anonymous, 1 Vern. Ch. 73, 23 Eng. Reprint 320.

The issuance and service of a writ of mandamus, no other steps being taken for more than six years, will not prevent the running of the statute of limitations, since it cannot be said that the mandamus proceeding was pending during that time. Dempsey *v.* Oswego Tp., 51 Fed. 97, 2 C. C. A. 110.

75. *Iowa.* — Garrett *v.* Pierson, 29 Iowa 304.

Louisiana. — Wilcox *v.* Henderson, 11 La. Ann. 190.

Michigan. — Bresnahan *v.* Nugent, 92 Mich. 76, 52 S. W. 735.

Montana. — Mantle *v.* Speculator Min. Co., 27 Mont. 473, 71 Pac. 665.

New York. — Bissell *v.* State, 70 N. Y. App. Div. 238, 73 N. Y. Suppl. 1105 [*affirmed* in 177 N. Y. 540, 69 N. E. 1120].

Tennessee. — Hopkins *v.* Calloway, 7 Coldw. 37.

Texas. — Browning *v.* Pumphrey, 81 Tex. 163, 16 S. W. 870; Lynch *v.* Ortlieb, (Civ.

2. Mode of Computation of Time Limited[76] **— a. In General.** The limitation of an action is computed from the time the cause of action accrues up to the commencement of the suit. Therefore if the suit is brought within the statutory period next after the cause of action accrues, the action is not barred, although more than such period elapses before the trial of the cause.[77]

b. Days Included or Excluded.[78] In the ordinary computation of time there are no fractions of a day, and the day on which the act is done must be entirely excluded or included.[79] This rule as to the indivisibility of a day has never been departed from except in those cases where questions as to the priority of claims arise depending upon the order of events occurring on the same day. But even in those cases where the general rule applies, as when statutes of limitation fix the periods which date from the time of the accrual of the causes of action, there is great diversity in the decisions of the courts, whether the day of the accrual of the cause of action is to be excluded or included. The rule laid down in some decisions is that when the computation is to be made from an act done, the day in which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day in which it was done. But when the computation is to be made from the day itself, and not from the act done, then the day in which the act was done must be excluded.[80] This distinction, however, does not rest upon a sound principle, and in most jurisdictions it is no longer recognized. The tendency of recent decisions is very strongly toward the adoption of a general rule which excludes the day as the *terminus a quo* in such cases.[81]

App. 1894) 28 S. W. 1017; Windom *v.* Howard, (Civ. App. 1894) 26 S. W. 175.

Virginia.— Spotswood *v.* Dandridge, 4 Hen. & M. 139.

See 33 Cent. Dig. tit. "Limitation of Actions," § 515.

76. Effect of change or repeal of limitation see *supra*, III, B, 2.

Computation of period of limitation against maritime liens see Maritime Liens.

Computation of time in general see Time.

In action on insurance policy providing special limitation see Fire Insurance; Life Insurance.

In election contests see Elections, 15 Cyc. 401.

77. Withers *v.* Richardson, 5 T. B. Mon. (Ky.) 94, 17 Am. Dec. 44; Stewart *v.* Durrett, 2 T. B. Mon. (Ky.) 122, 3 T. B. Mon. 113.

The limitation of motions against sheriffs is computed to the time of service of the notice. Gore *v.* Hedges, 7 T. B. Mon. (Ky.) 520.

Months of limitation are lunar months.— In North Carolina the months of limitation, in a statute limiting the time for bringing an action to six months after the cause of action accrues, are held to be taken as lunar and not as calendar months. Rives *v.* Guthrie, 46 N. C. 84.

78. See, generally, Time.

For cases involving bills and notes see Commercial Paper, 7 Cyc. 842, 843.

79. Haden *v.* Buddensick, 49 How. Pr. (N. Y.) 241; Phelan *v.* Douglass, 11 How. Pr. (N. Y.) 193; Cornell *v.* Moulton, 3 Den. (N. Y.) 12; Perkins *v.* Jennings, 27 Wash. 145, 67 Pac. 590; Lester *v.* Garland, 15 Ves. Jr. 248, 10 Rev. Rep. 68, 33 Eng. Reprint 748.

80. *Arkansas.*— Shinn *v.* Tucker, 33 Ark. 421.

Illinois.— Krug *v.* Outhouse, 8 Ill. App. 304.

Indiana.— Jacobs *v.* Graham, 1 Blackf. 392.

Kentucky.— Chiles *v.* Smith, 13 B. Mon. 460 [*overruling* Smith *v.* Cassity, 9 B. Mon. 192, 48 Am. Dec. 420]; Lebus *v.* Wayne Ratterman Co., 21 S. W. 652, 14 Ky. L. Rep. 794.

Massachusetts.— Presbrey *v.* Williams, 15 Mass. 193 [*overruled* in Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470].

New Jersey.—McCulloch *v.* Hopper, 7 N. J. L. J. 336.

United States.— Pearpoint *v.* Graham, 19 Fed. Cas. No. 10,877, 4 Wash. 232.

England.— Rex *v.* Adderley, Dougl. (3d. ed.) 463; Glassington *v.* Rawlins, 3 East 407; Norris *v.* Gantris, Hob. 196; Cartle *v.* Burditt, 3 T. R. 623.

See 33 Cent. Dig. tit. "Limitation of Actions," § 526.

Whenever the whole day and every moment of it can be counted, then it should be done; whenever, if it were counted, the party would in fact have but a fractional part of it, then it should not be counted. Phelan *v.* Douglass, 11 How. Pr. (N. Y.) 193.

In estimating a period of limitation running against a person from the date of his majority, the day on which he attains it must be computed. And in ascertaining the date of his majority, his age is computed by including the day of his birth. Ganahl *v.* Soher (Cal. 1884) 5 Pac. 80; Phelan *v.* Douglass, 11 How. Pr. (N. Y.) 193; Ross *v.* Morrow, 85 Tex. 172, 19 S. W. 1090, 16 L. R. A. 542.

81. *California.*— Hathaway *v.* Patterson, 45 Cal. 294.

3. PROCEEDINGS CONSTITUTING COMMENCEMENT OF ACTION[82] — a. Actions at Law — (I) *IN GENERAL.* When a claim is submitted to the jurisdiction of a court for determination, the common statute of limitations and the analogous bars and presumptions in equity and at law are regarded, for all purposes of the pending litigation, as having ceased to operate against the claim, so that, if it be not then barred, the subsequent lapse of time will not defeat it.[83] If the law furnishes a party with a simple method of proceeding against a debtor, he cannot prevent the statute of limitations from running against him by attempting to collect his debt by a circuitous legal proceeding.[84]

(II) *ISSUANCE OF PROCESS*[85] — (A) *In General.* The general rule, except where it has been otherwise provided by statute, is that an action is commenced, so as to stop the running of the statute of limitations, from the time the summons or other process is issued.[86]

Connecticut.— Blackman *v.* Nearing, 43 Conn. 56, 21 Am. Rep. 634.

District of Columbia.— Baker *v.* Ramsburg, 4 Mackey 1.

Kansas.— Hook *v.* Bixby, 13 Kan. 164.

Louisiana.— Chestnut *v.* Hughes, 22 La. Ann. 615; Wartelle *v.* King, 10 La. Ann. 655.

Massachusetts.— Seward *v.* Hayden, 150 Mass. 158, 22 N. E. 629, 15 Am. St. Rep. 183, 5 L. R. A. 844; Bemis *v.* Leonard, 118 Mass. 502, 19 Am. Rep. 470.

New York.— McGraw *v.* Walker, 2 Hilt. 404; Haden *v.* Buddensick, 49 How. Pr. 241; Cornell *v.* Moulton, 3 Den. 12; Fairbanks *v.* Wood, 17 Wend. 329. Under Code, §§ 380, 383, providing that an action for injuries from negligence may be commenced within three years after the cause of action accrued, the day on which such a cause accrued must be included in reckoning the period of limitation, notwithstanding Laws (1894), p. 910, c. 447, § 27, providing that the day from which any specified number of "days, weeks or months of time is reckoned" shall be excluded in making the reckoning. Benoit *v.* New York Central, etc., R. Co., 94 N. Y. App. Div. 24, 87 N. Y. Suppl. 951. See also Aultman *v.* Syme, 163 N. Y. 54, 57 N. E. 168, 79 Am. St. Rep. 565.

North Carolina.—Cook *v.* Moore, 95 N. C. 1.

Ohio.— Harris *v.* Harris, 13 Ohio Cir. Ct. 170, 7 Ohio Cir. Dec. 189.

Pennsylvania.— Menges *v.* Frick, 73 Pa. St. 137, 13 Am. Rep. 731.

Tennessee.— Rogers *v.* Etter, 8 Baxt. 13; Elder *v.* Bradley, 2 Sneed 247.

Texas.— Hunter *v.* Lanius, 82 Tex. 677, 18 S. W. 201; Smith *v.* Dickey, 74 Tex. 61, 11 S. W. 1049; Texas, etc., R. Co. *v.* Moore, (Civ. App. 1897) 43 S. W. 67; Geistweidt *v.* Mann, (Civ. App. 1896) 37 S. W. 372; Texas, etc., R. Co. *v.* Goodson, 2 Tex. App. Civ. Cas. § 27; Dowell *v.* Vinton, 1 Tex. App. Civ. Cas. § 327.

Vermont.— Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401.

Washington.— Perkins *v.* Jennings, 27 Wash. 145, 67 Pac. 590.

England.— See Webb *v.* Fairmaner, 6 Dowl. P. C. 549, 7 L. J. Exch. 140, 3 M. & W. 473; Lester *v.* Garland, 15 Ves. Jr. 248, 10 Rev. Rep. 68, 33 Eng. Reprint 748.

See 33 Cent. Dig. tit. "Limitation of Actions," § 526.

82. New action after failure of former action see *infra*, VI, I, 9.

Bill of review in equity see EQUITY, 16 Cyc. 517 *et seq.*

Nature and requisites of process in general see PROCESS.

Service of process in general see PROCESS.

83. Forman *v.* Brewer, 62 N. J. Eq. 748, 48 Atl. 1012, 90 Am. St. Rep. 475.

84. Glenn *v.* Dorsheimer, 23 Fed. 695.

85. Suing out writ and issuance of summons as constituting commencement of action see ACTIONS, 1 Cyc. 747.

86. *Alabama.*— Flournoy *v.* Lyon, 70 Ala. 308.

Arkansas.— St. Louis, etc., R. Co. *v.* Shelton, 57 Ark. 459, 21 S. W. 876; Hallum *v.* Dickinson, 47 Ark. 120, 14 S. W. 477; State Bank *v.* Brown, 12 Ark. 94; State Bank *v.* Cason, 10 Ark. 479; State Bank *v.* Bates, 10 Ark. 120; McLarren *v.* Thurman, 8 Ark. 313.

Illinois.— Fairbanks *v.* Farwell, 141 Ill. 354, 30 N. E. 1056; Schroeder *v.* Merchants', etc., Ins. Co., 104 Ill. 71; Rich *v.* Scalio, 115 Ill. App. 166; McKee *v.* Allen, 94 Ill. App. 147.

Indiana.— Belck *v.* Belck, 97 Ind. 73.

Kentucky.— Cecil *v.* Sowards, 10 Bush 96; Butts *v.* Turner, 5 Bush 435; Pindell *v.* Maydwell, 7 B. Mon. 314; Blackburn *v.* Louisville, 55 S. W. 1075, 21 Ky. L. Rep. 1716.

Massachusetts.— Bunker *v.* Shed, 8 Metc. 150; Gardner *v.* Webber, 17 Pick. 407; Ford *v.* Phillips, 1 Pick. 202.

Nebraska.— Reliance Trust Co. *v.* Atherton, 67 Nebr. 305, 93 N. W. 150, 96 N. W. 218 (holding that an action is not commenced within the meaning of the statute of limitations at the date of the issuance of the summons, unless such summons is served on defendant); Ballard *v.* Thompson, 40 Nebr. 529, 58 N. W. 1133; Burlingim *v.* Cooper, 36 Nebr. 73, 53 N. W. 1025.

New Jersey.— Updike *v.* Ten Broeck, 32 N. J. L. 105.

Pennsylvania.— McClure *v.* McClure, 1 Grant 222.

Rhode Island.— Hail *v.* Spencer, 1 R. I.

(B) *Necessity of Delivery to Officer.*[87] A writ is not considered as legally sued out, however, until it is delivered, or put in course of delivery, to a proper officer, with a *bona fide* intent to have the same served.[88]

17; Fearing *v.* Glenn, 73 Fed. 116, 19 C. C. A. 388, construing Rhode Island statute.

Vermont.— Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104; Chapman *v.* Goodrich, 55 Vt. 354; Allen *v.* Mann, 1 D. Chipm. 94.

Virginia.— Jones *v.* Jincey, 9 Gratt. 708.

West Virginia.— Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925; U. S. Blowpipe Co. *v.* Spencer, 46 W. Va. 590, 33 S. E. 342; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

Canada.— See Dupuis *v.* Canadian Pac. R. Co., Q. R. 12 Quebec Super. Ct. 193, holding that under the provisions of the statute prescribing one year for bringing actions for bodily injuries, such an action must be actually assigned within one year from the injury, and the issue of the writ within that time is not sufficient.

See 33 Cent. Dig. tit. "Limitation of Actions," § 529.

Date of writ prima facie evidence of commencement of action.— Ware *v.* Swann, 79 Ala. 330; Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203; Bunker *v.* Shed, 8 Metc. (Mass.) 150; Chapman *v.* Goodrich, 55 Vt. 354; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431.

First summons in wrong name.—Where the summons is issued by mistake in the name of the wrong person, and thereafter quashed, and another issued in the right name, the plea of limitations will not avail defendant, although the second summons was issued after the expiration of the time within which the action might be brought. Louisville, etc., R. Co. *v.* Bowen, 39 S. W. 31, 18 Ky. L. Rep. 1099.

Issue of summons in good faith.— Under the Kentucky statute, section 2524, providing that "an action shall be deemed to have been commenced at the date of the first summons or process issued in good faith from a court or tribunal having jurisdiction of the cause of action," filing a petition and issuing summons stops the running of the statute, although defendant is a nonresident, if plaintiff is ignorant of that fact. Walston *v.* Louisville, 66 S. W. 385, 23 Ky. L. Rep. 1852.

A summons issued before a petition is filed in the proper office is void, and will not suspend the statute. U. S. *v.* Eddy, 28 Fed. 226.

An action against the crown for forfeitures is deemed commenced by the issuing of process, and not by the actual filing of the information. Atty.-Gen. *v.* Hall, 11 Price 760.

87. Delivery of writ or notice to officer as commencement of action in general see ACTION, 1 Cyc. 748.

88. *Alabama.*— West *v.* Engel, 101 Ala. 509, 14 So. 333 (delivery in person or by mail); Ware *v.* Swann, 79 Ala. 330.

Arkansas.— Wilkins *v.* Worthen, 62 Ark. 401, 36 S. W. 21.

Illinois.— Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472.

Indiana.— Evans *v.* Galloway, 20 Ind. 479; Hancock *v.* Ritchie, 11 Ind. 48.

Iowa.— Hawley *v.* Griffin, 121 Iowa 667, 92 N. W. 113, 97 N. W. 86 (holding that Code, § 2532, providing that delivery of notice to the sheriff, to be immediately served, is a commencement of an action, applies only to a cause of action for which no special limitation is provided); Bracken *v.* McAlvey, 83 Iowa 421, 49 N. W. 1022; Hampe *v.* Schaffer, 76 Iowa 563, 41 N. W. 315; Wolfenden *v.* Barry, 65 Iowa 653, 22 N. W. 915 (holding that where the petition in a case is filed, and notice put into the hands of the sheriff for service, but returned without service to plaintiff's attorney, and lost, and nearly two years later another notice was drawn and duly served, the action was not begun until the last notice was put into the officer's hands).

Maine.— Jewett *v.* Greene, 8 Me. 447 (holding that plaintiff is not bound to send the writ to the nearest officer, but is at liberty to send it to any one within the county or precinct); Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203.

Mississippi.— Lamkin *v.* Nye, 43 Miss. 241.

Missouri.— Heman *v.* Larkin, (App. 1902) 70 S. W. 907; Kansas City Hydraulic Press Brick Co. *v.* Barker, 50 Mo. App. 60.

New Hampshire.— Mason *v.* Cheney, 47 N. H. 24; Society for Propagating, etc., *v.* Whitcomb, 2 N. H. 227.

New Jersey.— McCracken *v.* Richardson, 46 N. J. L. 50.

New York.— Davis *v.* Duffie, 18 Abb. Pr. 360 [*reversed* on other grounds in 8 Bosw. 617]; Jackson *v.* Brooks, 14 Wend. 649; Paskins *v.* Wilson, 6 Cow. 471; Burdick *v.* Green, 18 Johns. 14.

North Carolina.— Webster *v.* Sharpe, 116 N. C. 466, 21 S. E. 912.

Ohio.— Pollock *v.* Pollock, 2 Ohio Cir. Ct. 140, 10 Ohio Cir. Dec. 408.

South Carolina.— Morgan *v.* Morgan, 45 S. C. 323, 23 S. E. 64.

Tennessee.— East Tennessee Coal Co. *v.* Daniel, 100 Tenn. 65, 42 S. W. 1062.

Vermont.— Day *v.* Lamb, 7 Vt. 426.

United States.— See Bell *v.* Ohio Life, etc., Co., 3 Fed. Cas. No. 1,260, 1 Biss. 260; Fadden *v.* Satterlee, 43 Fed. 568 (construing Iowa statute); Ewell *v.* Chicago, etc., R. Co., 29 Fed. 57 (construing Iowa statute).

See 33 Cent. Dig. tit. "Limitation of Actions," § 530.

Delivery to proper officer necessary.—An action is not commenced, within the meaning

(III) *FILING OF DECLARATION, PETITION, OR COMPLAINT.*[89] The statutes of some states provide that an action shall be deemed "commenced," in such sense as to stop the running of the statute of limitations, when the declaration, petition, or complaint is filed,[90] provided plaintiff has a *bona fide* intention to prosecute the

of the statute of limitations, by delivering the writ for service to one incapable of making a valid service. Lesure Lumber Co. *v.* Mutual F. Ins. Co., 101 Iowa 514, 70 N. W. 761. Under a statute providing that "the delivery of the original notice to the sheriff of the proper county, with intent that it be served immediately . . . is a commencement of the action," the "sheriff of the proper county" is the sheriff of the county where the action is brought, although defendant is in fact in another county. Hampe *v.* Schaffer, 76 Iowa 563, 564, 41 N. W. 315.

Necessity of continuing intent.— The intent in regard to immediate service of the process must be a continuing intent. Where the intent is abandoned it has no legal effect, and a subsequent delivery of the notice to the sheriff does not constitute the commencement of the action. Richardson *v.* Turner, 110 Iowa 318, 81 N. W. 593; Wolfenden *v.* Barry, 65 Iowa 653, 22 N. W. 915.

The mere signing and sealing of a summons by the clerk without delivery to the sheriff is not sufficient. Wilkins *v.* Worthen, 62 Ark. 401, 36 S. W. 21; Hekla Ins. Co. *v.* Schroeder, 9 Ill. App. 472; Webster *v.* Sharpe, 116 N. C. 466, 21 S. E. 912.

Actual delivery unnecessary.—Actual delivery of the writ to the sheriff is not necessary, but it is sufficient if it appears that the writ was made out and sent to the sheriff or his deputy by mail or otherwise, with a *bona fide*, absolute, and unequivocal intention of having it served. Jackson *v.* Brooks, 14 Wend. (N. Y.) 649; Burdick *v.* Green, 18 Johns. (N. Y.) 14.

Presumption of delivery to sheriff.—Where process is not served until a month after the petition was filed, the court will presume that the writ was delivered to the sheriff at the time of filing the petition with the intent that it be served immediately. Snyder *v.* Ives, 42 Iowa 157.

A capias ad respondendum, to save the statute of limitations, delivered to the sheriff with directions not to execute it, but to return it *non est*, is a good commencement of the suit for the purpose of defeating the operation of the statute. Beekman *v.* Satterlee, 5 Cow. (N. Y.) 519.

Special statutory provisions.— Iowa Code (1873), § 2532, providing that the delivery of the notice to the sheriff, with intent that it shall be served immediately, is the commencement of an action, is applicable only to the classes of actions named in that chapter. Hintrager *v.* Nightingale, 36 Fed. 847.

Death of defendant.—Under N. Y. Code Civ. Proc. § 399, relating to the commencement of actions and the suspension of the statute of limitations, which provides that an attempt to commence an action shall be equivalent to its commencement when summons is delivered to the proper officer with intent that it shall actually be served, but that delivery of summons to the officer must be followed by service within a specified time, it is held that, where defendant's death after delivery of summons to the officer rendered service impossible, such delivery saves the claim from the bar of the statute up to the date of defendant's death. Riley *v.* Riley, 141 N. Y. 409, 36 N. E. 398 [*reversing* 64 Hun 496, 19 N. Y. Suppl. 522].

89. Filing pleadings and papers as commencement of action in general see ACTIONS, 1 Cyc. 749.

90. *California.*— The filing of a complaint is the commencement of a suit within the General Limitation Act. Adams *v.* Hopkins, 144 Cal. 19, 77 Pac. 712; Allen *v.* Marshall, 34 Cal. 165; Pimental *v.* San Francisco, 21 Cal. 351; Sharp *v.* Maguire, 19 Cal. 577; Flandreau *v.* White, 18 Cal. 639; Nash *v.* El Dorado County, 24 Fed. 252, construing California statute. Under the Mechanic's Lien Law, however, a complaint must be filed and a summons issued. Flandreau *v.* White, 18 Cal. 639; Green *v.* Jackson Water Co., 10 Cal. 374. See also Van Winkle *v.* Stow, 23 Cal. 457.

Georgia.— Nicholas *v.* British America Assur. Co., 109 Ga. 621, 34 S. E. 1004 (holding that the commencement of an action dates from the filing of a petition only when process is served); Graves *v.* Strozier, 37 Ga. 32.

Minnesota.— London, etc., Mortg. Co. *v.* St. Paul Park Imp. Co., 84 Minn. 144, 86 N. W. 872.

Missouri.— McGrath *v.* St. Louis, etc., R. Co., 128 Mo. 1, 30 S. W. 329; South Missouri Lumber Co. *v.* Wright, 114 Mo. 326, 21 S. W. 811. But see Watkins *v.* St. Louis, etc., R. Co., 53 Mo. App. 659, holding that a suit is not begun until the writ is actually issued.

Nevada.— Rose *v.* Richmond Min. Co., 17 Nev. 25, 27 Pac. 1105.

Texas.— McManus *v.* Wallis, 52 Tex. 534; Kinney *v.* Lee, 10 Tex. 155; Smith *v.* Farmers' L. & T. Co., 21 Tex. Civ. App. 170, 51 S. W. 515.

Utah.— Keyser *v.* Pollock, 20 Utah 371, 59 Pac. 87; Needham *v.* Salt Lake City, 7 Utah 319, 26 Pac. 920.

Washington.— Cresswell *v.* Spokane County, 30 Wash. 620, 71 Pac. 195.

See 33 Cent. Dig. tit. "Limitation of Actions," § 528.

The filing must be with the clerk of the court.— It is not enough that the petition is presented to the judge out of court, and

suit and uses reasonable diligence to have process issued and served at once.[91] Filing a petition with instructions not to issue process on it until further orders is not sufficient to interrupt limitation.[92] So if, after the filing of a petition, process fails to issue through the laches of plaintiff, the suit is not commenced within the purview of the statute.[93] If, however, process fails to issue without fault of plaintiff, the action is not barred.[94]

(IV) *SERVICE OF PROCESS*— (A) *In General.* Some statutes provide that the interruption of limitation dates only from the service of process.[95]

a citation asked for, nor can it be filed *nunc pro tunc*. *In re* Sbarboro, 63 Cal. 5; Graves *v.* Strozier, 37 Ga. 32.

In admiralty.— The filing of a libel, without any attempt to arrest the vessel, is the commencement of the action. A state statute providing that an action shall be deemed commenced, as to each defendant, when the complaint is filed and the summons served on him, does not apply to admiralty suits in the federal courts. Laidlaw *v.* Oregon Ry., etc., Co., 81 Fed. 876 [*reversing* 73 Fed. 846].

In a suit for the benefit of creditors generally, or where creditors are called in by authority to receive distribution of a fund under the control of the court, the day of filing the petition to be admitted, or the day of filing the voucher or evidence of the claim, is considered as the commencement of the suit as to such creditor; and from that day the statute of limitations ceases to run against the claim. Abrahams *v.* Myers, 40 Md. 499.

Texas — In justices' courts, the summons being the leading process, the action is not commenced until it is issued. August Kern Barber Supply Co. *v.* Freeze, 96 Tex. 513, 74 S. W. 303; Price *v.* Luter, 14 Tex. 6; Keedle *v.* Bailey, 3 Tex. 492; Brown *v.* Been, (Civ. App. 1899) 54 S. W. 779; Moore *v.* Gulf, etc., R. Co., (Civ. App. 1898) 46 S. W. 388.

Docketing action.— The running of the act of limitations is arrested by the docketing of an action, with direction to the clerk to issue the necessary process, whether such process is issued or not. U. S. Bank *v.* Lyles, 10 Gill & J. (Md.) 326.

91. Huysman *v.* Evening Star Newspaper Co., 12 App. Cas. (D. C.) 586; Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24; Gulf, etc., R. Co. *v.* Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.

92. White *v.* Reed, 60 Mo. App. 380; Bates *v.* Smith, 80 Tex. 242, 16 S. W. 47; Maddox *v.* Humphries, 30 Tex. 494; Wood *v.* Mistretta, 20 Tex. Civ. App. 236, 49 S. W. 236, 50 S. W. 135; Wood *v.* Gulf, etc., R. Co., 15 Tex. Civ. App. 322, 40 S. W. 24; Walker *v.* Towner, 29 Fed. Cas. No. 17,089, 4 Dill. 165, construing Missouri statute.

93. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Ricker *v.* Shoemaker, 81 Tex. 22, 16 S. W. 645; Goldstein *v.* Gans, (Tex. Civ. App. 1895) 32 S. W. 185.

94. Tribby *v.* Wokee, 74 Tex. 142, 11 S. W. 1089; Belton *v.* Sterling, (Tex. Civ. App. 1899) 50 S. W. 1027; Gulf, etc., R. Co. *v.* Flatt, (Tex. Civ. App. 1896) 36 S. W. 1029; Gulf, etc., R. Co. *v.* Knott, 14 Tex. Civ. App. 158, 36 S. W. 491; Davidson *v.* Southern Pac. Co., 44 Fed. 476, construing Texas statute.

Delay attributable to defendant.— Where delay in serving is attributable to the fact that defendant requested no further steps to be taken until he could hear from plaintiff, the bar of the statute will not attach. Wigg *v.* Dooley, 28 Tex. Civ. App. 61, 66 S. W. 306.

95. *Connecticut.*— Sanford *v.* Dick, 17 Conn. 213.

Kansas.— Searle *v.* Adams, 3 Kan. 515, 89 Am. Dec. 598.

Louisiana.— The interruption of the statute dates only from the service of the citation, or defendant's appearance and answer, and not from the filing of the petition. Boyd *v.* Heine, 41 La. Ann. 393, 6 So. 714; Levi *v.* Weil, 24 La. Ann. 223; *In re* Mason, 9 Rob. 105; Hill *v.* Barlow, 6 Rob. 142; Bonnet *v.* Ramsay, 6 Mart. N. S. 129.

Michigan.— Detroit Free Press Co. *v.* Bagg, 78 Mich. 650, 44 N. W. 149, holding that under a statute providing for commencement of actions by filing a declaration and entering a rule to plead within twenty days after service of a copy thereof personally on defendant, an action is not "duly commenced" without personal service.

Washington.— Hayton *v.* Beason, 31 Wash. 317, 71 Pac. 1018, holding that an action is commenced by service of summons, or by filing the complaint and causing the summons to be served within ninety days.

Canada.— See Gooderham *v.* Moore, 31 Ont. 86. But in Bugbee *v.* Clergue, 27 Ont. App. 96, it was held that where by indorsement on his writ plaintiff claimed upon a foreign judgment only, and in his statement of claim set up an alternative demand upon the original consideration, it was too late to object at the trial, and that as the period of limitation upon the original consideration had not expired when the writ issued, plaintiff was entitled to recover, although the period had expired before the filing of the statement of claim.

See 33 Cent. Dig. tit. "Limitation of Actions," § 531.

The service of notice of an intended motion is the commencement of a suit, and if the time required to perfect the bar of the statute of limitations is not complete before service, it arrests its operation. Young *v.* Hare, 11 Humphr. (Tenn.) 303.

(B) *On Part of Several Defendants.*[96] By statute in some states service of process on one of two or more joint debtors or joint contractors stops the running of the statute of limitations as to all.[97] It has been held, however, in one jurisdiction that the statute is interrupted as to a person not served, only when he was made a party with the intention of serving him.[98] So under the statutes of one state service of process against one of several obligors *in solido* interrupts the running of the statute of limitations as to all the obligors.[99] In the absence of

Service of an order of seizure and sale in executory process interrupts prescription. Rhea *v.* Taylor, 8 La. Ann. 23.

Action of ejectment.—The service of notice is the commencement of an action of ejectment within the statute of limitation. Taylor *v.* Taylor, 3 A. K. Marsh. (Ky.) 18.

Special proceedings.—Under N. Y. Code Civ. Proc. § 2517, providing that the presentation of a petition is deemed the commencement of a special proceeding within the statute of limitations, if a citation issued on the presentation of the petition is served within sixty days thereafter, the citation is required to be served within sixty days after it is issued, and not within sixty days after the petition is presented. Matter of Bradley, 70 Hun (N. Y.) 104, 23 N. Y. Suppl. 1127.

Claim for relief.—The service of summons is a claim for relief within the meaning of N. Y. Code Civ. Proc. § 415, providing that the period of limitation must be computed from the time of the accruing of the right of action to the time when the claim for relief is actually interposed. Logeling *v.* New York El. R. Co., 5 N. Y. App. Div. 198, 38 N. Y. Suppl. 1112.

Effect of voluntary appearance.—Under a statute providing that an action is commenced at the date of the summons which is served on defendant, if a summons is issued but not served, and defendant enters a voluntary appearance, the commencement of the action within the statute of limitations dates from the entry of the appearance. Reliance Trust Co. *v.* Atherton, 67 Nebr. 305, 93 N. W. 150, 96 N. W. 218; Hotchkiss *v.* Aukerman, 65 Nebr. 177, 90 N. W. 949. See also Hawkins *v.* Donnerberg, 40 Oreg. 97, 66 Pac. 691, 908; Jones *v.* Boxer, 7 C. B. 58, 6 D. & L. 574, 13 Jur. 960, 18 L. J. C. P. 185, 62 E. C. L. 58. So also if the process issued is invalid, but defendant waives the defect and enters his appearance. Humphrey *v.* Jones, 3 T. B. Mon. (Ky.) 261.

96. See also *infra*, VI, I, 7, a.

97. Maples *v.* Mackey, 89 N. Y. 146 [*affirming* 22 Hun 228]; Davison *v.* Budlong, 40 Hun (N. Y.) 245; White's Bank *v.* Ward, 35 Barb. (N. Y.) 637; Gibson *v.* Van Derzee, 14 Abb. Pr. N. S. (N. Y.) 111; Broadway Bank *v.* Luff, 51 How. Pr. (N. Y.) 479. The rule was otherwise under the laws of 1813, which contained no provision, in case of joint debtors, for making a service on one defendant a good commencement of the action against the other, to save the running of the statute. Vandenburgh *v.* Briggs, 3 How. Pr. (N. Y.) 316; Bruen *v.* Bokee, 4 Den. (N. Y.) 56, 47 Am. Dec. 239; Taylor *v.* Bonte, 5 Ohio Dec. (Reprint) 137, 3 Am. L. Rec. 220.

Partners are "joint contractors," and therefore service of summons on one of them stops the running of the statute as to the other. Howell *v.* Dimock, 15 N. Y. App. Div. 102, 44 N. Y. Suppl. 271.

98. Demple *v.* Hofman, (Kan. App. 1899) 57 Pac. 234, 55 Pac. 558.

99. Turner *v.* McMain, 29 La. Ann. 298; Rogers *v.* Gibbs, 24 La. Ann. 467; Maurin *v.* Martinez, 5 Mart. (La.) 432; Ellery *v.* Brown, 8 Fed. Cas. No. 4,383, 2 Woods 156, holding that prescription in favor of the one not served is not merely interrupted by the service of process, but is suspended during the entire pendency of the action against defendant served. So in Quebec by statute the institution of proceedings against one of a number of joint and several debtors interrupted prescription as against co-debtors, and after judgment against such debtor the interrupted prescription recommenced to run against the others, by the same time as before, although the judgment debtor could only be prescribed as against the creditor, by the period of thirty days. Thus the holder of a note having obtained judgment against the maker, and permitted more than five years to elapse after judgment before taking proceedings against the indorser, is barred as against the indorser. Campbell *v.* Baxter, 7 Quebec Q. B. 134.

A suit brought against one partner interrupts prescription as to all the partners. Speake *v.* Barrett, 13 La. Ann. 479.

Co-trespassers are liable *in solido*, and citation as to one will interrupt prescription as to all. Frazier *v.* Hardee, 21 La. Ann. 541.

Principal and surety.—An action brought against the principal debtor interrupts the prescription on the part of the surety (Cohen *v.* Golding, 27 La. Ann. 77; Ferguson *v.* Glaze, 12 La. Ann. 667; Neda *v.* Simon, 10 La. Ann. 700; Mullen *v.* Scott, 9 La. Ann. 173; Dwight *v.* Brashear, 5 La. Ann. 551), and *vice versa* (Cohen *v.* Golding, 27 La. Ann. 77; Richard *v.* Butman, 14 La. Ann. 144). The statute will commence to run again, however, from the date of the interruption. Richard *v.* Butman, *supra;* Dwight *v.* Brashear, *supra*; Hite *v.* Vaught 2 La. Ann. 970; Millaudon *v.* Beazley, 2 La. Ann. 916.

There being no privity or reciprocity between the different obligors in a commercial instrument, and their respective obligations arising from different and successive contracts, the parties are not debtors *in solido*, and a suit against one party does not inter-

statutory provisions of this character service of process on one defendant would not suspend the running of the statute as to one not served with process.[1]

(c) *Substituted Service.* Although a statute requires "personal service" or "service by publication," within sixty days after the running of the statute of limitations, of a summons issued before that time, in order to prevent the bar of the statute, yet substituted service, being of equal force with the other methods in the support given to proceedings based thereon, is equivalent thereto, and will likewise prevent the bar of the statute.[2]

(d) *Service by Publication.* Where service is by publication, an action is not to be deemed commenced until the date of the first publication, although there may have been an unsuccessful attempt to serve a summons on defendant, a non-resident, prior thereto.[3]

(e) *Subsequent, Alias, and Pluries Process.*[4] A suit commenced by a writ which is returned *non est inventus* may be continued by the issuance of a second writ so as to save the bar of the statute of limitations. Plaintiff must show, however, that the first process was issued and returned, and connect it by continuances with the process served on defendant.[5] This must be a continuance of the same writ or process which was originally sued out, and must appear on the record to be so.[6] But where the continuance is in fact regular it is held that it may

rupt prescription as to the rest. Jacobs *v.* Williams, 12 Rob. (La.) 183 [*overruling* Alain *v.* Longer, 4 La. 151]. Thus a suit against the accepter of a bill of exchange does not interrupt prescription as to the drawer and indorser. Corning *v.* Wood, 15 La. Ann. 168. And suit against one indorser does not interrupt prescription with regard to other parties to the note. Christine *v.* Chaney, 5 La. Ann. 219.

1. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661; Piche *v.* Morse, 15 Quebec Super. 306. And see *infra*, VI, I, 5, d, (II); VI, I, 7, b.

2. Clare *v.* Lockard, 122 N. Y. 263, 25 N. E. 391, 9 L. R. A. 547 [*affirming* 21 Abb. N. Cas. 173].

Acceptance of citation by a curator ad hoc of an absent defendant will not interrupt prescription as to the latter. Waiver can only be made by defendant personally, or by an attorney whom he has employed. Hill *v.* Barlow, 6 Rob. (La.) 142.

3. Wood *v.* Bissell, 108 Ind. 229, 9 N. E. 425.

4. **Alias and plurias writs as commencement of action** see ACTIONS, 11 Cyc. 748.

5. *Kentucky.*— Hume *v.* Dickinson, 4 Bibb 276.

Maryland.— Bennington *v.* Dinsmore, 2 Gill 348.

New York.— Cornell *v.* Moulton, 3 Den. 12; Orange County Bank *v.* Haight, 14 Wend. 83; Davis *v.* West, 5 Wend. 63; Soulden *v.* Van Rensselaer, 3 Wend. 472; Baskins *v.* Wilson, 6 Cow. 471; Beekman *v.* Satterlee, 5 Cow. 519.

Pennsylvania.— McClurg *v.* Fryer, 15 Pa. St. 293; Fuller *v.* Dempster, 8 Pa. Cas. 546, 11 Atl. 670; Hanks *v.* Railroad Co., 13 Luz. Leg. Reg. 143, 10 North. Co. Rep. 268.

South Carolina.— Chapman *v.* Mayrant, 2 Speers. 481; Chapman *v.* Hardy, 2 Brev. 426.

England.— Weston *v.* Fournier, 14 East 491; Budd *v.* Berkenhead, 2 Salk. 420.

Canada.— Ford *v.* McGoey, 12 U. C. Q. B. 505; Notman *v.* Crooks, 10 U. C. Q. B. 105; McLean *v.* Knox, 4 U. C. Q. B. 52; Curry *v.* Brotman, 4 Terr. L. Rep. 369.

See 33 Cent. Dig. tit. "Limitation of Actions," § 535.

The suing out of an original or latitat, if it be continued down by *vice-comes non misit breve*, will save the bar of the statute of limitations. Birtte *v.* Wood, 2 Keb. 46; Dacy *v.* Clinch, Sid. 52.

A return is necessary to complete the connection between the original and the alias. The return must purport something capable of being understood without evidence *aliunde*. The letters N E I have no meaning. Parker *v.* Grayson, 1 Nott. & M. (S. C.) 171.

If the summons is lost and hence not returned, the statute does not cease to run until an alias summons is issued. Jones *v.* Mackey, 3 Lack. Leg. N. (Pa.) 375.

6. Bennington *v.* Dinsmore, 2 Gill (Md.) 348 (holding that a writ issued in the name of one administrator is not a continuance of one sued out in the name of another administrator); Chapman *v.* Mayrant, 2 Speers (S. C.) 481 (holding that a several writ is not a continuance of a joint writ); Blair *v.* Cary, 9 Wis. 543 (holding that the issuing and serving of a summons is not a continuance of an action commenced by capias, and returned *non est*, but is the beginning of a new suit); Hodsden *v.* Harridge, 2 Saund. 61*h*; Smith *v.* Bower, 3 T. R. 662.

If the first summons is served, but dismissed for an irregularity, a second summons is an original and not an alias writ. Finan *v.* O'Dowd, 6 N. Y. App. Div. 268, 40 N. Y. Suppl. 969.

Although the first process is erroneous, yet, if it is only voidable, and not void, and be returned by the sheriff, it is well enough to save the statute of limitations, and will support the continuance. Hodsden *v.* Harridge, 2 Saund. 61*h*; Leadbeter *v.* Markland, 2 W. Bl. 1131; Karver *v.* James, Willes 255.

be entered at any time.[7] As to the time in which the alias must issue there is a conflict in the decisions.[8]

(v) *ATTEMPT TO COMMENCE ACTION.* It is provided by statute in some states that an attempt to commence an action shall be equivalent to its commencement when a summons is delivered to the proper officer with an intent that it shall actually be served, providing such attempt is followed by service within a specified time.[9] An attempt requires the delivery of legal process[10] to a person capable of making service.[11]

If the first writ is void, and a new writ is issued and served, the commencement of the action, so far as relates to the statute of limitations, dates from the issuance of the new writ. Quick *v.* Leigh, 12 N. Y. Suppl. 616, 20 N. Y. Civ. Proc. 147; Noell *v.* Noell, 93 Va. 433, 25 S. E. 242.

7. Sherman *v.* Barnes, 8 Conn. 138; Orange County Bank *v.* Haight, 14 Wend. (N. Y.) 83; Davis *v.* West, 5 Wend. (N. Y.) 63; Baskins *v.* Wilson, 6 Cow. (N. Y.) 471; Beardmore *v.* Rattenbury, 5 B. & Ald. 452, 7 E. C. L. 249; Dacy *v.* Linch, 1 Keb. 140, Sid. 52; Harris *v.* Woolford, 6 T. R. 617; McLean *v.* Knox, 4 U. C. Q. B. 52.

Under the English Uniformity of Process Act, in order to save the statute, a second or a subsequent writ of summons must, at the time a copy is served, contain the indorsement required by 2 Wm. IV, c. 39, § 10, and such indorsement must be made by plaintiff or his attorney, and the roll is not evidence of these facts. Walker *v.* Collick, 7 D. & L. 225, 4 Exch. 171, 18 L. J. Exch. 387. See also Morris *v.* Richards, 46 J. P. 37, 45 L. T. Rep. N. S. 210.

8. See cases cited *infra*, this note.

Alias must issue at term to which original writ returnable.— Johnson *v.* Mead, 58 Mich. 67, 24 N. W. 665; Etheridge *v.* Woodley, 83 N. C. 11; Hanna *v.* Ingram, 53 N. C. 55; Fulbright *v.* Tritt, 19 N. C. 491. This rule is not varied by the fact that an order was made by the court for the issuance of an alias, which was neglected or disregarded by the clerk. Etheridge *v.* Woodley, 83 N. C. 11.

Alias may issue with the intervention of even more than one term, if it be within six years from the time the original writ was issued. Rees *v.* Clark, 213 Pa. St. 617, 63 Atl. 364. *In re* Curcier, 28 Pa. St. 261; McClurg *v.* Fryer, 15 Pa. St. 293; Jones *v.* Orum, 5 Rawle (Pa.) 249; Pennock *v.* Hart, 8 Serg. & R. (Pa.) 369; O'Neill's Estate, 29 Pa. Super. Ct. 415. See also Bovaird, etc., Mfg. Co. *v.* Ferguson, 215 Pa. St. 235, 64 Atl. 513.

An alias must issue within a year and a day after the former writ. State Bank *v.* Baker, 3 McCord, (S. C.) 281; Parker *v.* Grayson, 1 Nott & M. (S. C.) 171.

After the bar had attached the court refused to renew the writ after the expiration of a year. Mair *v.* Cameron, 18 Ont. Pr. 484 [*citing* Hewett *v.* Barr, [1891] 1 Q. B. 98, 60 L. J. Q. B. 268, 39 Wkly. Rep. 394; Doyle *v.* Kaufman, 3 Q. B. D. 7, 47 L. J. Q. B. 26, 26 Wkly. Rep. 98 (*affirmed* in 3 Q. B. D. 340)]. See also Holman *v.* Weller, 8 U. C. Q. B. 202. And Butler *v.* McMicken, 32 Ont. 422, it was held that the renewal of a summons after its expiration is a matter of judicial discretion and that when the county court judge had renewed such writ so as to defeat the operation of the statute of limitations and defendant made no attempt to appeal from his order, but appeared to the writ without objection, the objection would not be entertained on appeal from the judgment in the action.

No length of time between the first and the last process will affect the proceeding, it seems. Ontario Bank *v.* Rathbun, 19 Wend. (N. Y.) 291.

9. German Ins. Co. *v.* Wright, 6 Kan. App. 611, 49 Pac. 704 (holding that where a petition is filed and summons issued thereon, although service is not obtained but an alias summons is issued and properly served within sixty days, the action will be deemed to have been commenced when the petition was filed); Riley *v.* Riley, 141 N. Y. 409, 36 N. E. 398 [*reversing* 64 Hun 496, 19 N. Y. Suppl. 522, 22 N. Y. Civ. Proc. 318] (holding that where defendant's death after delivery of summons to the officer rendered service impossible, such delivery saves the claim from the bar of the statute up to the date of defendant's death); Burgett *v.* Strickland, 32 Hun (N. Y.) 264; Davis *v.* Duffie, 8 Bosw. (N. Y.) 617 (holding that such a statute applies, although the cause of action on which the action is brought accrued before the enactment of the statute); Goldenberg *v.* Murphy, 108 U. S. 162, 2 S. Ct. 388, 27 L. ed. 686.

Statute applicable only to limitations provided for by statute.— An action on an insurance policy which provides that no action shall be brought on it, unless commenced within twelve months after the loss, cannot be maintained where the summons was served after the twelve months had elapsed, although it was given to the sheriff for service within that time. Quinn *v.* Royal Ins. Co., 81 Hun (N. Y.) 207, 30 N. Y. Suppl. 714.

The time limited for service is computed from the attempt to make the service, and not from the time when the court determines that the original service is defective. Baltimore, etc., R. Co. *v.* Collins, 11 Ohio Cir. Dec. 334.

10. Johnson *v.* Turnell, 113 Wis. 468, 89 N. W. 515.

11. Moulton *v.* Williams, 101 Wis. 236, 77 N. W. 918.

b. Suits in Equity — (I) *ENGLISH RULE.* Previous to the statute of 4 Anne,[12] it was not necessary to file the complainant's bill before issuing and service of a subpœna to appear and answer, but it was sufficient if the bill was filed afterward; and the suit, as against defendant himself, was then considered as commenced from the teste of the subpœna, as in the case of actions at law commenced by original writs.[13] Since the passage of this statute, however, requiring the filing of the bill before the issuance of the subpœna, the commencement of a suit is reckoned, for the purpose of preventing the operation of the statute of limitations, from the filing of the bill and not from the service of the subpœna.[14]

(II) *AMERICAN RULE.* In this country, in the absence of statutory regulation, the rule seems to be that the filing of a bill, and taking out a subpœna and making a *bona fide* attempt to serve it, is the commencement of a suit in equity as against defendant, so as to prevent the operation of the statute. The mere filing of the bill of itself without the issuing of the service of process is not sufficient for this purpose.[15] Some state legislatures have expressly provided by statute that a suit in equity shall be deemed commenced, within the statute of limitations, by the filing of the bill.[16]

4. DEFECTS AND IRREGULARITIES IN PROCEEDINGS — a. Want of Jurisdiction.[17] The fact that the court in which an action is brought has no jurisdiction does not defeat the effect of bringing suit as an interruption of prescription.[18]

b. Defects in Parties. The running of the statute of limitations is not interrupted by the commencement of an action against the servant of the real party in interest,[19] against a person no longer a party in interest,[20] or by an action against a person in the wrong capacity.[21] So a suit against one administrator, where several are appointed and qualified to administer on the estate, is a nullity,

Delivery to outgoing sheriff.— Under N. Y. Code Civ. Proc. §§ 182, 183, providing that a sheriff elect, who has qualified, shall receive from the clerk a certificate, and on the commencement of his term and service of the certificate on the outgoing sheriff, the powers of the latter shall cease, mailing a summons on December 30 to an outgoing sheriff who received it on January 1, after his successor was entitled to the office, but before he had taken possession or served the certificate, is an attempt to commence an action within the meaning of the statute. Littlejohn *v.* Leffingwell, 34 N. Y. App. Div. 185, 54 N. Y. Suppl. 536.

Residence of defendant in same county with sheriff.—Proof that summons was lodged with the sheriff for service upon defendant without further proof that defendant was at the time a resident of the same county did not operate to prevent the effect of the statute. Riker *v.* Curtis, 10 Misc. (N. Y.) 125, 30 N. Y. Suppl. 940 [*reversing* 7 Misc. 444, 27 N. Y. Suppl. 1012].

12. St. 4 Anne, c. 16, § 22.

13. Pigott *v.* Nower, 3 Swanst. 534 note, 36 Eng. Reprint 970.

14. Forster *v.* Thompson, 2 C. & L. 568, 4 Dr. & War. 303, 6 Ir. Eq. 168; Boyd *v.* Higginson, Fl. & K. 603, 5 Ir. Eq. 97; Purcell *v.* Blennerhasset, 9 Ir. Eq. 108, 3 J. & L. 24; Morris *v.* Ellis, 7 Jur. 413; Coppin *v.* Gray, 6 Jur. 512, 11 L. J. Ch. 105, 1 Y. & Coll. 205, 20 Eng. Ch. 205, 62 Eng. Reprint 856.

15. Fairbanks *v.* Farwell, 141 Ill. 354, 30 N. E. 1056; Pindell *v.* Maydwell, 7 B. Mon. (Ky.) 314; Lyle *v.* Bradford, 7 T. B. Mon. (Ky.) 111; Fitch *v.* Smith, 10 Paige (N. Y.) 9; Hayden *v.* Bucklin, 9 Paige (N. Y.) 512; Webb *v.* Pell, 1 Paige (N. Y.) 564; U. S. *v.* American Lumber Co., 80 Fed. 309 [*affirmed* in 85 Fed. 827, 29 C. C. A. 431]; Bisbee *v.* Evans, 17 Fed. 474. *Contra*, Dilworth *v.* Mayfield, 36 Miss. 40; Bacon *v.* Gardner, 23 Miss. 60; Wright *v.* Pratt, 17 Mo. 43; Clark *v.* Slayton, 63 N. H. 402, 1 Atl. 113; Aston *v.* Galloway, 38 N. C. 126; McLin *v.* McNamara, 22 N. C. 82, all of which decisions hold that the filing of the bill is the commencement of the suit.

16. Miller *v.* Rich, 204 Ill. 444, 68 N. E. 488; Johnson *v.* Davidson, 162 Ill. 232, 44 N. E. 499; Maddux *v.* Jones, 51 Miss. 531; Cowan *v.* Donaldson, 95 Tenn. 322, 327, 32 S. W. 457.

17. New action after failure of former action for want of jurisdiction see *infra*, VI, I, 9.

18. Atlanta, etc., R. Co. *v.* Wilson, 119 Ga. 781, 47 S. E. 366; Blume *v.* New Orleans, 104 La. 345, 29 So. 106; Ealer *v.* Lodge, 36 La. Ann. 115; Levy *v.* Calhoun, 34 La. Ann. 413; Sorrell *v.* Laurent, 27 La. Ann. 70; Hill *v.* Barlow, 6 Rob. (La.) 142; Flower *v.* O'Connor, 17 La. 213; White *v.* McQuillan, 12 La. 530; Baker *v.* Thomas, 4 La. 414; Prall *v.* Peet, 3 La. 274. *Contra*, Street *v.* Chattanooga Electric Light Co., 97 Tenn. 252, 36 S. W. 1090.

19. Lattie-Morrison *v.* Holladay, 27 Oreg. 175, 39 Pac. 1100.

20. Kennedy *v.* Rust, 25 La. Ann. 554, suit against discharged bankrupt.

21. Virgin's Succession, 18 La. Ann. 42, suit against person as administratrix before her appointment.

and will not prevent limitations from running against the debt.[22] The fact that someone is improperly joined as a defendant, however, will not cause the statute to keep on running.[23]

c. Defects in Process or Service.[24] The fact that a summons is defective will not prevent the action thus commenced from interrupting the running of the statute of limitations.[25] If, however, the process is not only defective, but lacks an essential requirement of the statute, it is equivalent to no process at all, and the running of the statute is not stopped.[26] An alteration in a summons, made after its delivery to the sheriff, makes a new summons of it, and the action is not commenced until its redelivery to the sheriff after the alteration.[27] If service of process is made on a person not authorized to receive it, there is no interruption of the statute.[28] In Louisiana a citation for the purpose of interrupting prescription need not be technically perfect either in form or service.[29] If, however, citation is entirely wanting,[30] or a citation issued is absolutely null,[31] prescription in favor of defendant is not interrupted. Service of citation on a representative of an absentee is sufficient to interrupt the running of the statute of limitations.[32] A written acknowledgment by a curator *ad hoc* of service of petition and citation addressed to him as such brings defendant into court and interrupts prescription.[33] But the mere acceptance by a person appointed as curator *ad hoc* in a suit brought against an absentee, in the absence of citation served on him or any appearance by him, will not interrupt prescription.[34]

d. Defects in Pleadings or Other Proceedings. If it appears by the original petition that defendant is sued on a valid cause of action, however defectively it may be presented, limitation in his favor is interrupted.[35] So the fact that there is a

22. Hopkins *v.* McPherson, 2 Bay (S. C.) 194.

23. International, etc., R. Co. *v.* McCulloch, (Tex. Civ. App. 1894) 24 S. W. 1101.

24. New action after failure of former for want of or defects in process or service thereof see *infra*, VI, I, 9.

25. Louisville, etc., R. Co. *v.* Smith, 87 Ky. 501, 9 S. W. 493, 10 Ky. L. Rep. 514; Weir *v.* Slocum, 3 How. Pr. (N. Y.) 397, holding that a summons issued in the name of an agent not an attorney, and requiring service of answer on him, may be amended, where the statute of limitations would defeat the claim if the amendment were denied. But where plaintiff altered the return-day of a writ from the first to the last day of the term, in consequence of which a verdict in his favor was set aside, the court refused to permit the amendment of the writ by striking out the alteration and restoring it to its original form, although plaintiff would be barred by the statute of limitations from bringing a fresh action. Barlow *v.* O'Donnell, 6 N. Brunsw. 561.

26. Fernekes *v.* Case, 75 Iowa 152, 39 N. W. 238; Phinney *v.* Donahue, 67 Iowa 192, 25 N. W. 126.

27. Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526.

28. Tanner *v.* King, 10 La. Ann. 485; Knowlton *v.* Watertown, 130 U. S. 327, 334, 9 S. Ct. 539, 542, 32 L. ed. 956.

29. Satterley *v.* Morgan, 33 La. Ann. 846; Martinez *v.* Vives, 30 La. Ann. 818 (citation not containing the number of days for answer); New Orleans Canal, etc., Co. *v.* Tanner, 26 La. Ann. 273 (citation issued by a *de facto* clerk, not lawfully in office); Elmore *v.* Ventress, 24 La. Ann. 382 (citation addressed to a person sued as administrator, and naming him individually without specifying his capacity); De Marigny's Succession, 22 La. Ann. 171 (citation not specifying the residence of defendant, where the petition accompanying it specified such residence); Leon *v.* Bouillet, 21 La. Ann. 651 (service of petition and citation in English only on one whose native language is French); Smith *v.* Taylor, 10 Rob. (La.) 133 (deposit of the petition in the clerk's office, although, owing to absence of clerk and deputy, plaintiff was unable to obtain issuance of citation in time); Driggs *v.* Morgan, 10 Rob. (La.) 119 (filing of reconventional demand, although without citation or service; White *v.* McQuillan, 12 La. 530 (service of citation, although not certified by the clerk).

30. Dwight *v.* Brashear, 5 La. Ann. 551.

31. Bertrand *v.* Knox, 39 La. Ann. 431, 2 So. 63.

32. Williams *v.* Douglas, 23 La. Ann. 685.

33. Bartlett *v.* Wheeler, 31 La. Ann. 540.

34. Roubieu *v.* Champlin, 23 La. Ann. 214.

35. Amendment of pleadings as to cause of action see *infra*, VI, I, 6.

New action after failure of former for defects in pleadings see *infra*, VI, I, 9; Dayton *v.* Hirth, 87 S. W. 1136, 27 Ky. L. Rep. 1209; Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483; Tarkinton *v.* Broussard, 51 Tex. 550; Killebrew *v.* Stockdale, 51 Tex. 529; Scoby *v.* Sweatt, 28 Tex. 713; Cox *v.* Patten, (Tex. Civ. App. 1902) 66 S. W. 64; Grand Lodge A. O. U. W. *v.* Bollman, 22 Tex. Civ. App. 106, 53 S. W. 829; Texas, etc., R. Co. *v.*

mistake as to the form of the remedy which prevents the maintenance of the action will not prevent the statute from being interrupted.[36] Nor will variance between the writ and declaration have this effect.[37]

5. Amendment as to Parties[38] — **a. Correcting Name of or Character in Which Parties Sued.** Where an action is brought against a party in the wrong name or capacity, an amendment correcting such mistake does not introduce a new cause of action, and the statute of limitations runs only to the commencement of the suit, and not to the allowance of the amendment.[39]

b. Dropping Party. A change in a declaration or petition by withdrawing one of the parties does not introduce a new cause of action, so as to admit a plea of the statute of limitations, the action having been begun in time.[40]

c. Intervention[41] — (I) *As Party Plaintiff.* A suit brought before the bar of limitation is complete will inure to the benefit of one intervening after the time when but for the commencement of the suit the claim would be barred.[42] According to some decisions, however, intervention will not have this effect, when no privity of estate or community of interest exists between the parties.[43] And where a defendant makes no affirmative assertion of title to the property in suit until he has himself made a party plaintiff, the statute of limitations continues to run against him until he is made plaintiff.[44]

(II) *As Party Defendant.* Where a person is made a defendant on his own application, the action will be considered as having been commenced against

Johnson, (Tex. Civ. App. 1896) 34 S. W. 186; Galveston, etc., R. Co. *v.* Cook, (Tex. Civ. App. 1894) 25 S. W. 455; Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609.

Misnomer of defendant does not render the action ineffectual to stop the running of the statute of limitations. Hoffman *v.* Keeton, 132 Cal. 195, 64 Pac. 264; Southern Contract Co. *v.* Newhouse, 66 S. W. 730, 23 Ky. L. Rep. 2141; American F. Ins. Co. *v.* Bland, 40 S. W. 670, 19 Ky. L. Rep. 287; Prichard *v.* McCord-Collins Co., 30 Tex. Civ. App. 582, 71 S. W. 303; Southern Pac. Co. *v.* Graham, 12 Tex. Civ. App. 565, 34 S. W. 135.

36. Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

37. State Bank *v.* Steen, 13 Ark. 36.

38. Amendment as to cause of action see *infra*, VI, I, 6.

39. *Alabama.*— Doe *v.* Richardson, 76 Ala. 329.

California.—Fox *v.* Hale, etc., Silver Min. Co., (1898) 53 Pac. 32.

Georgia.—Gordon *v.* McCauley, 73 Ga. 667; Rutherford *v.* Hobbs, 63 Ga. 243; Tift *v.* Towns, 63 Ga. 237.

Illinois.— Penusylvania Co. *v.* Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337 [*affirming* 24 Ill. App. 48].

Indiana.— Monticello *v.* Grant, 104 Ind. 168, 1 N. E. 302.

Maryland.— Western Union Tel. Co. *v.* State, 82 Md. 293, 33 Atl. 763, 51 Am. St. Rep. 464, 31 L. R. A. 572.

Pennsylvania.— Wright *v.* Eureka Tempered Copper Co., 206 Pa. St. 274, 55 Atl. 978.

Texas.— McIlhenny *v.* Lee, 43 Tex. 205.

Canada.— See Brossard *v.* Banque du Peuple, 13 Quebec K. B. 148.

See 33 Cent. Dig. tit. "Limitation of Actions," § 540.

40. U. S. *v.* O'Leary, 19 D. C. 118; Wade *v.* Clark, 52 Iowa 158, 2 N. W. 1039, 35 Am. Rep. 262; McIlhenny *v.* Lee, 43 Tex. 205.

Action by husband and wife.— Where an action for personal injury to a married woman is begun in proper time by her husband and herself jointly, and, by amendment made after the period of limitation has expired, the wife's name is dropped from the suit, which is thereafter prosecuted by the husband for the benefit of the community estate, the statute of limitations does not bar the suit. Missouri Pac. R. Co. *v.* Watson, 72 Tex. 631, 10 S. W. 731; Dallas Rapid Transit R. Co. *v.* Campbell, (Tex. Civ. App. 1894) 26 S. W. 884.

41. Time for intervening or bringing in new parties see Parties.

Effect of intervention as to time of commencing action in general see Actions, 1 Cyc. 750.

42. Becnel *v.* Waguespack, 40 La. Ann. 109, 3 So. 536; Foote *v.* O'Roork, 59 Tex. 215; Field *v.* Gantier, 8 Tex. 74.

Where a suit is brought by plaintiff on behalf of himself and all others standing in the same situation and some of them become parties on their own petition, the statute runs from the time of the commencement of the action, not from the time of filing their petitions. For the purpose of the statute of limitations the action must be treated as if all were originally plaintiffs. Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 1 N. E. 663 [*reversing* 34 Hun 352, and *distinguishing* Cunningham *v.* Pell, 5 Paige (N. Y.) 607].

43. Burleson *v.* Burleson, 28 Tex. 383; Bean *v.* Dove, 33 Tex. Civ. App. 377, 77 S. W. 242.

44. Buck *v.* Davis, 64 Ark. 345, 42 S. W. 534.

him at the time it was commenced against the other defendants, in computing the period of limitation.[45]

d. Bringing in New Parties — (I) *Parties Plaintiff.* The addition of a new plaintiff or plaintiffs by amendment does not constitute a new cause of action so far as the original plaintiff is concerned, and as to him the statute is suspended by the commencement of the action.[46] As respects plaintiffs brought in by amendment, some decisions hold that the running of the statute is not arrested by the commencement of the action but continues until they are brought in by amendment.[47] Others hold that the running of the statute is suspended as to them by the commencement of the action.[48]

(II) *Parties Defendant* — (A) *Effect as to New Defendants.* The general rule is well settled that where new parties defendant are brought in by amendment, the statute of limitations continues to run in their favor until thus made parties.[49] The suit cannot be considered as having been commenced against them until they are made parties. As was said by Justice McLean of the United States supreme court it would be a novel and unjust principle to make defendants

45. Turner *v.* White, 97 Ala. 545, 12 So. 601. See also Stockham Bank *v.* Alter, 61 Nebr. 359, 85 N. W. 300.

46. East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567; Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847. And see Roberson *v.* McIlhenny, 59 Tex. 615; McIlhenny *v.* State, 43 Tex. 205.

47. Barker *v.* Anniston, etc., R. Co., 92 Ala. 314, 8 So. 466; King *v.* Avery, 37 Ala. 169; McDowell *v.* Goldsmith, 2 Md. Ch. 370; Kane *v.* Lawrence, 73 Pa. St. 410; East Line, etc., R. Co. *v.* Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L. R. A. 567; Telfener *v.* Dillard, 70 Tex. 139, 7 S. W. 847.

48. *Iowa.*— Dixon *v.* Dixon, 19 Iowa 512.

Kansas.—Hucklebridge *v.* Atchison, etc., R. Co., 66 Kan. 443, 71 Pac. 814.

New Jersey.— Vunk *v.* Raritan River R. Co., 56 N. J. L. 395, 28 Atl. 593.

Ohio.— Bradford *v.* Andrews, 20 Ohio St. 208, 5 Am. Rep. 645.

South Carolina.— Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426.

England.— Larkin *v.* Watson, 2 C. & M. 685; Baker *v.* Neaver, 1 C. & M. 112; Corne *v.* Maline, 6 Exch. 803, 20 L. J. Exch. 434, 2 L. M. & P. 498, 6 Eng. L. & Eq. 568; Brown *v.* Fullerton, 13 M. & W. 556.

See 33 Cent. Dig. tit. "Limitation of Actions," § 541.

Application of rule.— Where plaintiff as assignee of the original plaintiff and while a party in interest is added by an amendment, the statute as to him is arrested on the commencement of the action. Suber *v.* Chandler, 36 S. C. 344, 15 S. E. 426; Suber *v.* Chandler, 28 S. C. 382, 6 S. E. 155. When an action is brought upon a cause of action belonging to a copartnership in the name of one of the partners only, the court may at any time permit an amendment and set up the name of the firm as plaintiff, although the bar of the statute is complete before the amendment. Dixon *v.* Dixon, 19 Iowa 512.

In North Carolina it is held that where in an action by one partner, a judgment of nonsuit is rendered for non-joinder of the other partner, he may bring another action within a year, although the action would have been barred if it had been the beginning of the litigation, and that since to achieve the same end by different means can prejudice no one, the same result may be attained by an amendment converting the individual action into one in the name of the partnership if the amendment be made within the time within which a new action might have been brought. Martin *v.* Young, 85 N. C. 156 [*distinguishing* Cogdell *v.* Exum, 69 N. C. 464, 12 Am. Rep. 657], in which an assignee in bankruptcy was made a party plaintiff to an action brought by the bankrupt in his own name, more than two years from the date of his appointment as such, and it was held that defendant might plead the limitation prescribed in the act of congress as to him. There the new party not only sued upon a title distinct from that of the original plaintiff, but the bar of the statute applied to him personally, and not to the cause of action sued upon, and besides, as it was said, the courts could not permit a plain act of congress to be contravened in any such way.

49. *Alabama.*— Wilson *v.* Holt, 91 Ala. 204, 8 So. 794.

California.— Harrison *v.* McCormick, 122 Cal. 651, 55 Pac. 592; Jeffers *v.* Cook, 58 Cal. 147.

Georgia.— Knox *v.* Laird, 92 Ga. 123, 17 S. E. 988; Bower *v.* Thomas, 69 Ga. 47.

Illinois.— Haines *v.* Chandler, 26 Ill. App. 400.

Indiana.— Floyd *v.* Floyd, 90 Ind. 130; Hawthorn *v.* State, 57 Ind. 286; Jones *v.* Porter, 23 Ind. 66; Lagow *v.* Neilson, 10 Ind. 183.

Kansas.— Anderson *v.* Atchison, etc., R. Co., 71 Kan. 453, 80 Pac. 946.

Maine.— Woodward *v.* Ware, 37 Me. 563.

Mississippi.— Potts *v.* Hines, 57 Miss. 735; Brown *v.* Goolsby, 34 Miss. 437.

Missouri.— Jaicks *v.* Sullivan, 128 Mo. 177, 30 S. W. 890; Thompson *v.* School Dist. No. 4, 71 Mo. 495; Forrey *v.* Holmes, 65 Mo. App.

responsible for a proceeding of which they had no notice.[50] When an action is commenced as to any defendant there must be an existing cause of action against him and the right to a remedy upon it.[51] Some decisions, however, have recognized exceptions to this rule. Thus it has been held that the statute runs from the commencement of the suit as to a defendant brought in by amendment who acquired his interest in the subject-matter of the suit *pendente lite*, through any of the original defendants.[52] So it has been held that the general rule does not apply where the addition of a new defendant merely corrects a defect in the original proceedings,[53] nor to a case where no judgment at all can be rendered until all the parties beneficially interested are before the court. In such case the action must be deemed commenced as to all from the time it was originally instituted.[54]

(B) *Effect As to Original Defendants.* Bringing in new parties defendant by amendment does not extend the running of the statute of limitations in favor of the original defendants to the time of the amendment. As to them the commencement of the suit is the period at which the running of the statute is arrested.[55]

e. Substitution of Parties — (I) *PARTIES PLAINTIFF* — (A) *When Cause of Action Not Changed.* Where the substitution of plaintiffs by amendment does

114; Bombeck *v.* Devorss, 19 Mo. App. 38; Fury *v.* Boeckler, 6 Mo. App. 24.

New York.— Shaw *v.* Cock, 78 N. Y. 194 [*affirming* 12 Hun 173]; Newman *v.* Marvin, 12 Hun 236; Merritt *v.* Sawyer, 6 Thomps. & C. 160; Campbell *v.* Bowne, 5 Paige 34.

Ohio.— Stoltz *v.* Baltimore, etc., R. Co., 7 Ohio S. & C. Pl. Dec. 514, 7 Ohio N. P. 128.

Pennsylvania.— Wright *v.* Eureka Tempered Copper Co., 206 Pa. St. 274, 55 Atl. 978; Bell's Appeal, 115 Pa. St. 88, 8 Atl. 177, 2 Am. St. Rep. 532.

Texas.— Rucker *v.* Dailey, 66 Tex. 284, 1 S. W. 316; Uhl *v.* Musquez, 1 Tex. Unrep. Cas. 650; Cable *v.* Jackson, 16 Tex. Civ. App. 579, 42 S. W. 136; Dillingham *v.* Anello, (Civ. App. 1895) 29 S. W. 1103.

Virginia.— Dorr *v.* Rohr, 82 Va. 359, 3 Am. St. Rep. 106.

Wisconsin.— Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938; Levy *v.* Wilcox, 96 Wis. 127, 70 N. W. 1109.

United States.— Miller *v.* McIntyre, 6 Pet. 61, 8 L. ed. 320 [*affirming* 17 Fed. Cas. No. 9,582, 1 McLean 85]; Memphis, etc., R. Co. *v.* Hoechner, 67 Fed. 456, 14 C. C. A. 469.

England.— Byron *v.* Cooper, 11 Cl. & F. 556, 8 Eng. Reprint 1212; Plowden *v.* Thorpe, 7 Cl. & F. 137, 7 Eng. Reprint 1019, 1 West 42, 9 Eng. Reprint 415 [*doubting* Thorpe *v.* Mattingley, 8 L. J. Exch. 253, 2 Y. & C. Exch. 421].

See 33 Cent. Dig. tit. "Limitation of Actions," § 541.

Mechanics' liens.— This principle has frequently arisen in mechanic's lien cases, and it has been uniformly held that where, after an action to enforce a mechanic's lien has been commenced, a new defendant is brought in after the expiration of the time limited by statute for bringing the action, as to such defendant the suit is barred. Seibs *v.* Engelhardt, 78 Ala. 508; Watson *v.* Gardner, 119 Ill. 312, 10 N. E. 192 [*affirming* 18 Ill. App. 386]; McGraw *v.* Bayard, 96 Ill. 146; Clark *v.* Manning, 95 Ill. 580; Crowl *v.* Nagle, 86 Ill. 437; Dunphy *v.* Riddle, 86 Ill. 22; Mosier *v.* Flanner-Miller Lumber Co., 66 Ill. App. 630; Austin *v.* Wohler, 5 Ill. App. 300; Clark *v.* Manning, 4 Ill. App. 649; Bayard *v.* McGraw, 1 Ill. App. 134; Race *v.* Sullivan, 1 Ill. App. 94; Bombeck *v.* Devorss, 19 Mo. App. 38; Fury *v.* Boeckler, 6 Mo. App. 24; Ballard *v.* Thompson, 40 Nebr. 529, 58 N. W. 1133; Green *v.* Sanford, 34 Nebr. 363, 51 N. W. 967 [*overruling* Manly *v.* Downing, 15 Nebr. 637, 19 N. W. 601]; Brandt *v.* Schmeckenbecher, 89 Hun (N. Y.) 406, 35 N. Y. Suppl. 331.

Where a plaintiff commences his action against the wrong party, when no such party is in existence, and, after the statute of limitations has fully run, amends his petition by bringing in new parties as defendants, the parties so brought in may successfully rely on the statute of limitations as a defense. Leatherman *v.* Times Co., 88 Ky. 291, 11 S. W. 12, 10 Ky. L. Rep. 896, 21 Am. St. Rep. 342, 3 L. R. A. 324.

50. Miller *v.* McIntyre, 6 Pet. (U. S.) 61, 8 L. ed. 320.

51. Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

52. Willingham *v.* Long, 47 Ga. 540 (holding that when, in an action of ejectment, a third person goes into possession after the commencement of the suit, and is made a party defendant, the date of the commencement of the original suit is to be taken as the date of the commencement of the suit against such party); State *v.* Woodruff, 81 Miss. 456, 33 So. 78; Bexar Bldg., etc., Assoc. *v.* Newman, (Tex. Civ. App. 1893) 25 S. W. 461.

53. Burgie *v.* Parks, 11 Lea (Tenn.) 84.

54. Floyd *v.* Floyd, 90 Ind. 130.

55. Harrison *v.* McCormick, 122 Cal. 651, 55 Pac. 592; Lewis *v.* Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423; Easton *v.* O'Reilly, 63 Cal. 305; Bower *v.* Thomas, 69 Ga. 47; Smith *v.* Boese, 39 Mo. App. 15.

not in fact change the claim or cause of action, such amendment relates back to the commencement thereof, and stops the running of the statute of limitations at that point.[56] But when an action is instituted by a nominal plaintiff incapable of bringing suit, the action is not saved from the operation of the statute of limitations by an amendment, afterward made, introducing a natural person as a party suing for the use of the original plaintiff, the statutory bar having attached before the amendment was made.[57]

(B) *When New Cause of Action Introduced.* If the substituted plaintiff introduces a new claim and cause of action by the amendment against which the statute of limitations has run, that defense is available.[58]

(II) *PARTIES DEFENDANT.* Where the substitution of parties defendant by amendment does not change the cause of action, the statute of limitations stops running as to the substituted defendant at the commencement of the action.[59] If a new cause of action is set up by the amendment, the running of the statute is not suspended until the amendment.[60]

56. *Illinois.*— Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588.

Kansas.— Service *v.* Farmington Sav. Bank, 62 Kan. 857, 62 Pac. 670; Weaver *v.* Young, 37 Kan. 70, 14 Pac. 458.

Missouri.— McFaul *v.* Haley, 166 Mo. 56, 65 S. W. 995; Lilly *v.* Tobbein, 103 Mo. 477, 15 S. W. 618, 23 Am. St Rep. 887, (1890) 13 S. W. 1060.

Montana.— Territory *v.* Cox, 3 Mont. 197.

Nebraska.— Tecumseh Nat. Bank *v.* McGee, 61 Nebr. 709, 85 N. W. 949.

Pennsylvania.— Clement *v.* Com., 95 Pa. St. 107.

See 33 Cent. Dig. tit. "Limitation of Actions," § 542.

Substitution after death.— The substitution of the administrator as plaintiff on the death of the original plaintiff, and the filing of an amended complaint, are but steps in continuation of the original action and not the commencement of a new one. Evans *v.* Nealis, 69 Ind. 148; Evans *v.* Cleveland, 72 N. Y. 486.

When an action is commenced in the name of the wrong person, the court may allow another person to be substituted as plaintiff, and such substitution is not a commencement of a new action, but may be made after expiration of the time for commencing the action. Bowen *v.* National Life Assoc., 63 Conn. 460, 27 Atl. 1059; Green *v.* U. S., 7 Ct. Cl. 496; Payan *v.* U. S., 7 Ct. Cl. 400. Substituting the party having the legal right to sue instead of one improperly named as plaintiff, is in no sense the commencing of a new suit, but so far as defendant is concerned the suit will be regarded as commenced at the time of the original issuing and service of the summons. The rule is different where a new defendant is brought into the case by amendment and summons against him. U. S. Insurance Co. *v.* Ludwig, 108 Ill. 514; Gally *v.* Tabein, 103 Mo. 477. But see Brown *v.* Mann, 71 Cal. 192, 12 Pac. 51; Hawthorn *v.* State, 57 Ind. 286.

57. Beaty *v.* Atlanta, etc., R. Co., 100 Ga. 123, 28 S. E. 32.

58. *Arizona.*— Motes *v.* Gila Valley, etc., R. Co., (1902) 68 Pac. 532.

Georgia.— Jones *v.* Johnson, 81 Ga. 293, 6 S. E. 181.

Missouri.— Sweet *v.* Jeffries, 67 Mo. 420.

Pennsylvania.— Comrey *v.* East Union Tp., 202 Pa. St. 442, 51 Atl. 1025; Kille *v.* Ege, 82 Pa. St. 102.

Tennessee.— Flatley *v.* Memphis, etc., R. Co., 9 Heisk. 230.

Texas.— Koschwitz *v.* Healy, 36 Tex. 666.

United States.— Mount *v.* U. S., 11 Ct. Cl. 509.

See 33 Cent. Dig. tit. "Limitation of Actions," § 542.

59. Heckman *v.* Louisville, etc., R. Co., 85 Ky. 631, 4 S. W. 342, 9 Ky. L. Rep. 297; McLaughlin *v.* West End St. R. Co., 186 Mass. 150, 71 N. E. 317; Knapp *v.* New York El. R. Co., 4 Misc. (N. Y.) 408, 24 N. Y. Suppl. 324.

The institution of an action against a receiver of a railroad company for personal injuries within the statutory period prevents a plea of the statute by the railroad company, substituted as defendant after the period of limitations has expired. Texas, etc., R. Co. *v.* Comstock, 83 Tex. 537, 18 S. W. 946; Texas, etc., R. Co. *v.* Huffman, 83 Tex. 286, 18 S. W. 741; Texas, etc., R. Co. *v.* Watson, (Tex. Civ. App. 1894) 24 S. W. 952. See also Missouri, etc., R. Co. *v.* Graham, 12 Tex. Civ. App. 54, 33 S. W. 576. The same rule applies where the receiver is substituted by amendment in a suit against the railroad company. Lehigh Coal, etc., Co. *v.* Central R. Co., 42 N. J. Eq. 951, 8 Atl. 648. This principle cannot, however, be extended to the vendee of the original corporation. Missouri, etc., R. Co. *v.* Graham, *supra.*

Substitution after death.— Where a defendant dies pending suit, the filing of an amended complaint, substituting the heirs and representatives, is not the commencement of a new action, as regards the statute of limitations. Hibernia Sav., etc., Soc. *v.* Wackenreuder, 99 Cal. 503, 34 Pac. 219; Philadelphia, etc., Coal, etc., Co. *v.* Butler, 181 Mass. 468, 63 N. E. 949.

60. Tucker *v.* Bryan, 1 Tex. App. Civ. Cas. § 1157. Where the company is substituted

6. Amendment as to Pleadings — a. In General. An amendment of a declaration, petition, or complaint which sets up no new cause of action or claim and makes no new demand relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point.[61]

b. Making Allegations More Specific. Where plaintiff by amendment sets up

as defendant, and plaintiff seeks to charge it on the ground of a fraudulent and void receivership, the action is not a continuation of the original one against the receiver, but is in so far a new suit in which limitations will be a bar if the prescribed period has elapsed between the accrual of the action and the substitution. Texas, etc., R. Co. *v.* Watson, 13 Tex. Civ. App. 555, 36 S. W. 290.

61. *Alabama.*— Louisville, etc., R. Co. *v.* Woods, 105 Ala. 561, 17 So. 41; Taylor *v.* Smith, 104 Ala. 537, 16 So. 629; Winston *v.* Mitchell, 93 Ala. 554, 9 So. 551; Louisville, etc., R. Co. *v.* Hall, 91 Ala. 112, 8 So. 371, 24 Am. St. Rep. 863; American Union Tel. Co. *v.* Daugherty, 89 Ala. 191, 7 So. 660; Adams *v.* Phillips, 75 Ala. 461; Dowling *v.* Blackman, 70 Ala. 303; Stringer *v.* Waters, 63 Ala. 361; Bradford *v.* Edwards, 32 Ala. 628.

Arkansas.— Wright *v.* Walker, 30 Ark. 44.

California.— Frost *v.* Witter, 132 Cal. 421, 64 Pac. 705, 84 Am. St. Rep. 53; Stockton Combined Harvester, etc., Works *v.* American F. Ins. Co., 121 Cal. 182, 53 Pac. 573; Link *v.* Jarvis, (1893) 33 Pac. 206; Vanderslice *v.* Matthews, 79 Cal. 273, 21 Pac. 748; Lorenzana *v.* Camarillo, 45 Cal. 125.

Georgia.— Roberts *v.* Leak, 108 Ga. 806, 33 S. E. 995; Holton *v.* Western Union Tel. Co., 94 Ga. 435, 19 S. E. 843; South Carolina R. Co. *v.* Nix, 68 Ga. 572; Allen *v.* Woodson, 50 Ga. 53.

Illinois.— Cicero *v.* Bartelme, 212 Ill. 256, 72 N. E. 437 [*affirming* 114 Ill. App. 9]; Connell *v.* Crosby, 210 Ill. 380, 71 N. E. 350; Chicago City R. Co. *v.* McMeen, 206 Ill. 108, 68 N. E. 1093 [*affirming* 102 Ill. App. 318]; Wolf *v.* Collins, 196 Ill. 281, 63 N. E. 638 [*affirming* 94 Ill. App. 518]; Louisville, etc., R. Co. *v.* Wurl, 62 Ill. App. 381.

Indiana.— Cleveland, etc., R. Co. *v.* Bergschicker, 162 Ind. 108, 69 N. E. 1000; Peerless Stone Co. *v.* Wray, 152 Ind. 27, 51 N. E. 326; Ross *v.* State, 131 Ind. 548, 30 N. E. 702; Chicago, etc., R. Co. *v.* Bills, 118 Ind. 221, 20 N. E. 775; Springfield Engine, etc., Co. *v.* Michener, 23 Ind. App. 130, 55 N. E. 32.

Iowa.— Padden *v.* Clark, 124 Iowa 94, 99 N. W. 152.

Kansas.— Taylor *v.* Atchison, etc., R. Co., 64 Kan. 888, 68 Pac. 691; Emporia Nat. Bank *v.* Layfeth, 63 Kan. 17, 64 Pac. 973; Culp *v.* Steere, 47 Kan. 746, 28 Pac. 987.

Kentucky.— Louisville, etc., R. Co. *v.* Pointer, 113 Ky. 952, 69 S. W. 1108, 24 Ky. L. Rep. 772; Louisville *v.* Selvage, (1902) 56 S. W. 376.

Louisiana.— McCubbin *v.* Hastings, 27 La. Ann. 713.

Maryland.— State *v.* Chesapeake Beach R. Co., 98 Md. 35, 56 Atl. 385; Wolf *v.* Baereis, 72 Md. 481, 19 Atl. 1045, 8 L. R. A. 680; Hamburger *v.* Paul, 51 Md. 219.

Massachusetts.— Cogswell *v.* Hall, 185 Mass. 455, 70 N. E. 461.

Michigan.— Detroit *v.* Hosmer, 125 Mich. 634, 85 N. W. 1; Belden *v.* Blackman, 124 Mich. 667, 83 N. W. 616; Randall *v.* Gartner, 96 Mich. 284, 55 N. W. 843; Abbott *v.* Wayne Cir. Judge, 55 Mich. 410, 21 N. W. 911; Wilcox *v.* Kassick, 2 Mich. 165.

Minnesota.— Bruns *v.* Schreiber, 48 Minn. 366, 51 N. W. 120.

Missouri.— Courtney *v.* Blackwell, 150 Mo. 245, 51 S. W. 668; Long *v.* Long, 141 Mo. 352, 44 S. W. 341.

New Hampshire.— Seely *v.* Manhattan L. Ins. Co., 72 N. H. 49, 55 Atl. 425; Gagnon *v.* Connor, 64 N. H. 276, 9 Atl. 631.

New Jersey.— Guild *v.* Parker, 43 N. J. L. 430.

North Carolina.— Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Southerland *v.* Fremont, 107 N. C. 565, 12 S. E. 237; Ely *v.* Early, 94 N. C. 1.

Ohio.— Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250; Baltimore, etc., R. Co. *v.* Gibson, 41 Ohio St. 145.

Pennsylvania.— Wilhelm's Appeal, 79 Pa. St. 120.

Tennessee.— Love *v.* Southern R. Co., 108 Tenn. 104, 65 S. W. 475, 55 L. R. A. 471.

Texas.— Cotter *v.* Parks, 80 Tex. 539, 16 S. W. 307; Kauffman *v.* Wooters, 79 Tex. 205, 13 S. W. 549; Anderson *v.* Boyd, 64 Tex. 108; Usher *v.* Skidmore, 28 Tex. 616; Turner *v.* Brown, 7 Tex. 489; Rippetoe *v.* Dwyer, 1 Tex. Unrep. Cas. 498; Lee *v.* Wilkins, 1 Tex. Unrep. Cas. 287; McLaury *v.* Watelsky, (Civ. App. 1905) 87 S. W. 1045; Ferguson *v.* Morrison, (Civ. App. 1904) 81 S. W. 1240; Burton-Lingo Co. *v.* Beyer, (Civ. App. 1904) 78 S. W. 248; Orange Mill-Supply Co. *v.* Goodman, (Civ. App. 1900) 56 S. W. 700; Fidelity, etc., Co. *v.* Allibone, 15 Tex. Civ. App. 178, 39 S. W. 632; Campbell *v.* Nicolini, (Civ. App. 1896) 35 S. W. 74; Missouri, etc., R. Co. *v.* McFadden, (Civ. App. 1895) 32 S. W. 18; Fields *v.* Ft. Worth, etc., R. Co., (Civ. App. 1895) 30 S. W. 255; Texas, etc., R. Co. *v.* Grimes, (Civ. App. 1895) 29 S. W. 1104; White *v.* Holley, 3 Tex. Civ. App. 590, 24 S. W. 831.

Utah.— Billings *v.* Parsons, 17 Utah 22, 53 Pac. 730.

Vermont.— Dana *v.* McClure, 39 Vt. 197.

West Virginia.— Kuhn *v.* Brownfield, 34 W. Va. 252, 12 S. E. 519, 11 L. R. A. 700; Hart *v.* Baltimore, etc., R. Co., 6 W. Va. 336.

United States.— Johnson *v.* Waters, 111 U. S. 640, 4 S. Ct. 619, 28 L. ed. 547; Cincinnati, etc., R. Co. *v.* Gray, 101 Fed. 623,

no new matter or claim, but merely restates in a different form,[62] more correctly

41 C. C. A. 535, 50 L. R. A. 47; Whalen *v.* Gordon, 95 Fed. 305, 37 C. C. A. 70; Carnegie *v.* Hulbert, 70 Fed. 209, 16 C. C. A. 498; McGlinchy *v.* U. S., 16 Fed. Cas. No. 8,803, 4 Cliff. 312.

England.— Smith *v.* Walsh, 1 Ir. Eq. 167.

See 33 Cent. Dig. tit. "Limitation of Actions," § 543.

Amendment allowed to save bar.—The court will allow a writ of summons to be amended where the statute would otherwise operate as a bar. Green *v.* Kettelby, 8 Dowl. P. C. 783, 4 Jur. 725, 9 L. J. Exch. 228, 6 M. & W. 731.

Where an amended petition is abandoned by plaintiff, and the petition which it superseded, and which states the same cause of action, is readopted, and trial had thereon, the date of filing the readopted petition, and not of its readoption, determines whether the action is barred by the statute of limitations. Mayer *v.* Walker, 82 Tex. 222, 17 S. W. 505.

The discontinuance of a suit as to one defendant, and the filing of additional counts against the remaining defendant, is not the presentation of a new cause of action, within the purview of the statute of limitations. Liebold *v.* Green, 69 Ill. App. 527.

Formal defects.— An amendment correcting merely formal defects in the complaint relates to the bringing of the action so that limitation runs against an amended complaint only to that time. Williams *v.* McKissack, 125 Ala. 544, 29 So. 922; Taylor *v.* Taylor, 110 Iowa 207, 81 N. W. 472; Anthony Inv. Co. *v.* Arnett, (Kan. 1901) 64 Pac. 1024; Lamb *v.* Cecil, 28 W. Va. 653.

A bill filed after limitation has expired is not an amendment of a suit for the same cause of action, filed before the period of limitation, and subsequently dismissed. Clark *v.* Hackett, 5 Fed. Cas. No. 2,823, 1 Cliff. 269.

Ejectment — Laying entirely new demise.— In ejectment, an additional count on the same title, although under a new demise, will relate back to the commencement of the action to avoid the bar of the statute of limitations. Bentley *v.* Crummey, 119 Ga. 911, 47 S. E. 209; Burbage *v.* Fitzgerald, 98 Ga. 582, 25 S. E. 554; Roe *v.* Pierce, 30 Ga. 873; Augusta Mfg. Co. *v.* Vertrees, 4 Lea (Tenn.) 75; Corder *v.* Dolin, 4 Baxt. (Tenn.) 238; Nance *v.* Thompson, 1 Sneed (Tenn.) 321. But where the action had been stayed owing to an order for security for costs, and the demise had expired, the court refused an amendment by enlarging the term which would have deprived defendant of a title acquired under the statute of limitations, upon the ground that it is one thing to allow an amendment in order to prevent the lapse of time running on so as to defeat plaintiff, and another thing to amend in order to divest a title which has become vested. Doe *v.* Bennett, 21 U. C. Q. B. 405.

[VI, I, 6, b]

New assignment.— When the statute of limitations is pleaded to a wrong which is actionable without proof of special damage, the subsequent consequences being alleged as matter in aggravation, plaintiff may recover by newly assigning the consequential damages as a cause of action, and showing that they were sustained within the time of limitation. McConnel *v.* Kibbe, 33 Ill. 175, 85 Am. Dec. 265.

62. *Alabama.*— Illinois Car, etc., Co. *v.* Walch, 132 Ala. 490, 31 So. 470.

Illinois.— Metropolitan L. Ins. Co. *v.* People, 209 Ill. 42, 70 N. E. 643 [*affirming* 106 Ill. App. 516]; Earnshaw *v.* Western Stone Co., 200 Ill. 220 65 N. E. 661 [*affirming* 98 Ill. App. 538]; New York L. Ins. Co. *v.* People, 195 Ill. 430, 63 N. E. 264 [*affirming* 95 Ill. App. 136]; Chicago North Shore St. R. Co. *v.* Payne, 192 Ill. 239, 61 N. E. 467 [*affirming* 94 Ill. App. 466]; Chicago Gen. R. Co. *v.* Carroll, 189 Ill. 473, 59 N. E. 551; Chicago City R. Co. *v.* Hackendahl, 188 Ill. 300, 58 N. E. 930 [*affirming* 88 Ill. App. 37]; Chicago City R. Co. *v.* Leach, 182 Ill. 359, 55 N. E. 334 [*reversing* 80 Ill. App. 354]; Griffin Wheel Co. *v.* Markus, 180 Ill. 391, 54 N. E. 206 [*affirming* 79 Ill. App. 82]; Illinois Cent. R. Co. *v.* Weiland, 179 Ill. 609, 54 N. E. 300 [*affirming* 67 Ill. App. 332]; Illinois Cent. R. Co. *v.* Souders, 178 Ill. 585, 53 N. E. 408; Chicago, etc., R. Co. *v.* Henneberry, 153 Ill. 354, 38 N. E. 1043 [*affirming* 42 Ill. App. 126]; Blanchard *v.* Lake Shore, etc., R. Co., 126 Ill. 416, 18 N. E. 799, 9 Am. St. Rep. 630 [*affirming* 27 Ill. App. 22]; North Chicago Rolling Mill Co. *v.* Monka, 107 Ill. 340; Mitchell *v.* Milholland, 106 Ill. 175; Winheim *v.* Field, 107 Ill. App. 145; Pardridge *v.* Gilbride, 98 Ill. App. 134; Elgin *v.* Anderson, 89 Ill. App. 527; Cicero, etc., St. R. Co. *v.* Brown, 89 Ill. App. 318; Kingma *v.* Chicago, etc., R. Co., 85 Ill. App. 138; Illinois Steel Co. *v.* Richter, 82 Ill. App. 45; Griffin Wheel Co. *v.* Markus, 79 Ill. App. 82; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41; Illinois Cent. R. Co. *v.* Swisher, 74 Ill. App. 164; Illinois Cent. R. Co. *v.* Weiland, 67 Ill. App. 332; Illinois Cent. R. Co. *v.* Camphell, 58 Ill. App. 275.

Indiana.— Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475; Shirk *v.* Coyle, 2 Ind. App. 354, 27 N. E. 608.

Iowa.— Mather *v.* Butler County, 16 Iowa 59.

Missouri.— Crockett *v.* St. Louis Transfer Co., 52 Mo. 457; Buel *v.* St. Louis Transfer Co., 45 Mo. 562; Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98.

Texas.— Henry *v.* Whitaker, 82 Tex. 5, 17 S. W. 509.

See 33 Cent. Dig. tit. "Limitation of Actions," § 544.

Where proof of the facts alleged in an additional count would have been competent under the original declaration, the additional count cannot be said to state a new cause

and specifically,[63] the same cause of action set out in the original declaration, it is not a new suit, and the statute will not avail for the period between the original and amended pleadings. Where the original declaration states a cause of action, but does it imperfectly, and afterward an amended declaration is filed, correcting the defect, the plea of the statute of limitations will relate to the time of filing the original declaration.[64]

of action within the statute of limitations. Chicago Gen. R. Co. *v.* Carroll, 189 Ill. 273, 59 N. E. 551; Wolf *v.* Collins, 94 Ill. App. 518.

Amendment as to place where injury took place.— In an action for personal injuries, an amended count which states a different place at which the injury took place is not amenable to a plea of the statute of limitations, and it is not a statement of another cause of action. Chicago City R. Co. *v.* McMeen, 102 Ill. App. 318.

63. *Alabama.*— South, etc., Alabama R. Co. *v.* Bees, 82 Ala. 340, 2 So. 752.

District of Columbia.— Moses *v.* Taylor, 6 Mackey 255.

Georgia.— Verdery *v.* Barrett, 89 Ga. 349, 15 S. E. 476.

Illinois.— Chicago City R. Co. *v.* Hackendahl, 188 Ill. 300, 58 N. E. 930 [*affirming* 88 Ill. App. 37].

Iowa.— Myers *v.* Kirt, 68 Iowa 124, 26 N. W. 22.

Nebraska.— Chicago, etc., R. Co. *v.* Young, 67 Nebr. 568, 93 N. W. 922; Norfolk Beet-Sugar Co. *v.* Hight, 59 Nebr. 100, 80 N. W. 276.

New York.— Logeling *v.* New York El. R. Co., 5 N. Y. App. Div. 198, 38 N. Y. Suppl. 1112.

South Carolina.— Bell *v.* Floyd, 64 S. C. 246, 42 S. E. 104.

Texas.— Texas Elevator, etc., Co. *v.* Mitchell, 78 Tex. 64, 14 S. W. 275; Texas Pac. R. Co. *v.* Davidson, 68 Tex. 370, 4 S. W. 636; Foster *v.* Smith, 66 Tex. 680, 2 S. W. 745; Rowland *v.* Murphy, 66 Tex. 534, 1 S. W. 658; Zeliff *v.* Jennings, 61 Tex. 458; Jones *v.* George, 56 Tex. 149, 42 Am. Rep. 689; Hill *v.* Clay, 26 Tex. 650; St. Louis Type Foundry *v.* Taylor, 27 Tex. Civ. App. 349, 65 S. W. 677; Galveston, etc., R. Co. *v.* English, (Civ. App. 1900) 59 S. W. 626 [rehearing *denied* in 59 S. W. 912]; Worsham *v.* Vignal, 14 Tex. Civ. App. 324, 37 S. W. 17; Dunlap *v.* Brooks, 3 Tex. App. Civ. Cas. § 357; Millington *v.* Texas, etc., R. Co., 2 Tex. App. Civ. Cas. § 171; Hines *v.* Dean, 1 Tex. App. Civ. Cas. § 690.

United States.— Marshalltown Stone Co. *v.* Louis Drach Constr. Co., 123 Fed. 746; Buck *v.* U. S., 25 Ct. Cl. 120.

See 33 Cent. Dig. tit. "Limitation of Actions," § 544.

Enlargement of allegations of negligence.— An amendment to a declaration, amplifying and enlarging upon the manner in which an accident occurred, and stating more clearly the negligence complained of, is not barred by limitations, if the action was brought within the time prescribed by statute. Alabama Great Southern R. Co. *v.* Arnold, 80 Ala. 600, 2 So. 337; Esrey *v.* Southern Pac. Co., 103 Cal. 541, 37 Pac. 500; Colley *v.* Gate City Coffin Co., 92 Ga. 664, 18 S. E. 817; Cicero *v.* Bartelme, 212 Ill. 256, 72 N. E. 437 [*affirming* 114 Ill. App. 9]; Chicago Gen. R. Co. *v.* Carroll, 189 Ill. 273, 59 N. E. 551; Swift *v.* Foster, 163 Ill. 50, 44 N. E. 837 [*affirming* 55 Ill. App. 280]; Illinois Cent. R. Co. *v.* Souders, 79 Ill. App. 41; Lake Shore, etc., R. Co. *v.* Ryan, 70 Ill. App. 45; Missouri Pac. R. Co. *v.* Moffatt, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343; Caswell *v.* Hopson, (Tex. Civ. App. 1898) 47 S. W. 54; Texas, etc., R. Co. *v.* Eberhart, (Tex. Civ. App. 1897) 40 S. W. 1060.

Enlargement of allegations as to injuries.— Where a substantial cause of action for personal injuries has been pleaded, the enlargement of the allegations as to specific injuries by amendment is not affected by the statute of limitations. Illinois Steel Co. *v.* Szutenbach, 64 Ill. App. 642; The Oriental *v.* Barclay, 16 Tex. Civ. App. 193, 41 S. W. 117.

Distinct act of negligence.— Where an act of negligence, set up in an amended count, filed after the time allowed by the statute of limitations within which to bring suit has run, is distinct and separate from the act charged in the original declaration, it is barred by the statute. Chicago, etc., R. Co. *v.* Reilly, 75 Ill. App. 125.

Question for court.— The question whether plaintiff intended when he brought his action to include the substance of the amended count as a part of his demand is within the discretion of the trial court. Cogswell *v.* Hall, 185 Mass. 455, 70 N. E. 461.

64. *Alabama.*— Chambers *v.* Talladega Real Estate, etc., Assoc., 126 Ala. 296, 28 So. 636; Alabama Great Southern R. Co. *v.* Thomas, 89 Ala. 294, 7 So. 762, 18 Am. St. Rep. 119; Sublett *v.* Hodges, 88 Ala. 491, 7 So. 296; Agee *v.* Williams, 30 Ala. 636.

District of Columbia.— Lewis *v.* Washington, etc., R. Co., 6 Mackey 556.

Illinois.— Mott *v.* Chicago, etc., R. Co., 102 Ill. App. 412.

Kentucky.— Turner *v.* Mitchell, 61 S. W. 468, 22 Ky. L. Rep. 1784.

Nebraska.— Gourley *v.* Prokop, (1904) 99 N. W. 243 [rehearing *denied* in 100 N. W. 949]; Merrill *v.* Wright, 54 Nebr. 517, 74 N. W. 955.

North Carolina.—Ely *v.* Early, 94 N. C. 1.

Texas.— Missouri, etc., R. Co. *v.* McFadden, 89 Tex. 138, 33 S. W. 853; Becker *v.* Gulf City St. R., etc., Co., 80 Tex. 475, 15 S. W. 1094; Scoby *v.* Sweatt, 28 Tex. 713.

c. Introducing New Cause of Action — (I) *In General.* An amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed;[65] and this rule applies, although the two causes of action arise out of the same

United States.— Marshalltown Stone Co. *v.* Louis Drach Constr. Co., 123 Fed. 746.

See 33 Cent. Dig. tit. "Limitation of Actions," § 544.

Where all the pleadings anterior to the amended petition are withdrawn and stricken from the file, the original petition ceases to be a part of the record, and the rule that where an amended petition is filed, perfecting the cause of action set out in the original petition, the running of limitations stops at the filing of the original petition, cannot be applied. Norman *v.* Central Kentucky Asylum, 80 S. W. 781, 26 Ky. L. Rep. 71.

Where a complaint is amended to obviate a variance, and the cause of action is the same as that set out in the original complaint, the amended complaint relates to the commencement of the action. Smullen *v.* Phillips, 92 Cal. 408, 28 Pac. 442.

65. *Alabama.*— Alabama Great Southern R. Co. *v.* Smith, 81 Ala. 229, 1 So. 723; Doe *v.* Richardson, 76 Ala. 329; Mohr *v.* Lemle, 69 Ala. 180; King *v.* Avery, 37 Ala. 169.

California.— Lambert *v.* McKenzie, 135 Cal. 100, 67 Pac. 6; Campbell *v.* Campbell, 133 Cal. 33, 65 Pac. 134; Bogart *v.* Crosby, 91 Cal. 278, 27 Pac. 603; Meeks *v.* Southern Pac. R. Co., 61 Cal. 149; Atkinson *v.* Amador, etc., Canal Co., 53 Cal. 102.

Illinois.— Wabash R. Co. *v.* Bhymer, 214 Ill. 579, 73 N. E. 879 [*reversing* 112 Ill. App. 225]; Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029 [*affirming* 95 Ill. App. 471]; Chicago City R. Co. *v.* Leach, 182 Ill. 359, 55 N. E. 334; Walker *v.* Warner, 179 Ill. 16, 53 N. E. 594, 70 Am. St. Rep. 85; Eylenfeldt *v.* Illinois Steel Co., 165 Ill. 185, 46 N. E. 266 [*affirming* 62 Ill. App. 552]; Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367 [*affirming* 54 Ill. App. 457]; Hawley *v.* Simons, 157 Ill. 218, 41 N. E. 616 [*affirming* 63 Ill. App. 287]; Chicago, etc., R. Co. *v.* Jones, 149 Ill. 361, 37 N. E. 247, 41 Am. St. Rep. 278, 24 L. R. A. 141; Chicago, etc., R. Co. *v.* Jenkins, 103 Ill. 588; Phelps *v.* Illinois Cent. R. Co., 94 Ill. 548; Mott *v.* Chicago, etc., El. R. Co., 102 Ill. App. 412; Dalton *v.* Chicago City R. Co., 93 Ill. App. 7; Harper *v.* Illinois Cent. R. Co., 74 Ill. App. 74; Pullman *v.* Secord-Hopkins Co., 73 Ill. App. 30 [*affirmed* in 173 Ill. 357]; Richter *v.* Michigan Mut. L. Ins. Co., 66 Ill. App. 606; Baumgartner *v.* Hoeft, 64 Ill. App. 449; Peoria, etc., R. Co. *v.* U. S. Rolling Stock Co., 28 Ill. App. 79; Illinois Cent. R. Co. *v.* Phelps, 4 Ill. App. 238 [*affirmed* in 94 Ill. 548].

Indiana.— Blake *v.* Minkner, 136 Ind. 418, 36 N. E. 246; Niblack *v.* Goodman, 67 Ind. 174; Shroyer *v.* Pittenger, 31 Ind. App. 158, 67 N. E. 475.

Iowa.— Van Patten *v.* Waugh, 122 Iowa 302, 98 N. W. 119; O'Banion *v.* De Garmo, 121 Iowa 139, 96 N. W. 739; Brooks *v.* Seevers, 112 Iowa 480, 84 N. W. 517.

Kansas.— Thompson *v.* Beeler, 69 Kan. 462, 77 Pac. 100; Atchison, etc., R. Co. *v.* Schroeder, 56 Kan. 731, 44 Pac. 1093; Parsons Water Co. *v.* Hill, 46 Kan. 145, 26 Pac. 412; Walker *v.* Hester, 9 Kan. App. 201, 59 Pac. 662.

Kentucky.— Dudley *v.* Price, 10 B. Mon. 84; Roush *v.* Vanceburg, etc., Turnpike Co., 85 S. W. 735, 27 Ky. L. Rep. 542; Norman *v.* Central Kentucky Asylum, 79 S. W. 189, 25 Ky. L. Rep. 1846 [rehearing *denied* in 80 S. W. 781, 26 Ky. L. Rep. 71]; Fisher *v.* Musick, 72 S. W. 787, 24 Ky. L. Rep. 1913.

Maryland.— Hamilton *v.* Thirston, 94 Md. 253, 51 Atl. 42.

Michigan.— Pratt *v.* Montcalm Cir. Judge, 105 Mich. 499, 63 N. W. 560; Nugent *v.* Adsit, 93 Mich. 462, 53 N. W. 620; People *v.* Judge Newaygo Cir. Ct., 27 Mich. 138.

Missouri.— Bricken *v.* Cross, 163 Mo. 449, 64 S. W. 99.

Nebraska.— Buerstetta *v.* Tecumseh Nat. Bank, 57 Nebr. 504, 77 N. W. 1094; Wigton *v.* Smith, 57 Nebr. 299, 77 N. W. 772.

Nevada.— Schwartz *v.* Stock, 26 Nev. 128, 65 Pac. 351.

New York.— Serrell *v.* Forbes, 106 N. Y. App. Div. 482, 94 N. Y. Suppl. 805; Quimby *v.* Claflin, 27 Hun 611. See also Davis *v.* New York, etc., R. Co., 110 N. Y. 646, 17 N. E. 733. *Contra,* Ward *v.* Kalbfleish, 21 How. Pr. 283.

North Carolina.— Christmas *v.* Mitchell, 38 N. C. 535.

Oklahoma.— Butt *v.* Carson, 5 Okla. 160, 48 Pac. 182.

Oregon.— Montgomery *v.* Shaver, 40 Oreg. 244, 66 Pac. 923.

Pennsylvania.— Philadelphia *v.* Hestonville, etc., Pass. R. Co., 203 Pa. St. 38, 52 Atl. 184; Miller *v.* Bealer, 100 Pa. St. 583; Smith *v.* Bellows, 77 Pa. St. 441; Wright *v.* Hart, 44 Pa. St. 454; Moles *v.* Crozier, 31 Pittsb. Leg. J. N. S. 216.

South Carolina.— Mayo *v.* Spartenburg, etc., R. Co., 43 S. C. 225, 21 S. E. 10.

Tennessee.— East Tennessee Iron, etc., Co. *v.* Broyles, 95 Tenn. 612, 32 S. W. 761; Burgie *v.* Parks, 11 Lea 84; Allen *v.* Link, 5 Lea 454.

Texas.— Phœnix Lumber Co. *v.* Houston Water Co., 94 Tex. 456, 61 S. W. 707 [*affirming* (Civ. App. 1900) 59 S. W. 552]; Cotton *v.* Rand, 93 Tex. 7, 51 S. W. 838, 53 S. W. 343 [*reversing* (Civ. App. 1898) 51 S. W. 55]; Howard *v.* Windom, 86 Tex.

transaction, and, by the practice of the state, a plaintiff is only required in his pleading to state the facts which constitute his cause of action.[66]

(II) *WHEN ORIGINAL DECLARATION FAILS TO STATE CAUSE OF ACTION.* Where the declaration states no cause of action whatever, it will not arrest the running of limitations; and an amendment made after the bar of the statute is complete will be regarded as the beginning of the action, in reckoning the statutory period of limitations.[67]

560, 26 S. W. 483; Morales *v.* Fisk, 66 Tex. 189, 18 S. W. 495; Ayers *v.* Cayce, 10 Tex. 99; Stewart *v.* Robbins, 27 Tex. Civ. App. 188, 65 S. W. 899; Missouri, etc., R. Co. *v.* Levy, 23 Tex. Civ. App. 686, 57 S. W. 866; Nelson *v.* Brenham Compress Oil, etc., Co., (Civ. App. 1899) 51 S. W. 514; Estey *v.* Fisher, (Civ. App. 1897) 44 S. W. 555; Santleben *v.* Froboese, 17 Tex. Civ. App. 626, 43 S. W. 571; Worsham *v.* Vignal, 14 Tex. Civ. App. 324, 37 S. W. 17; Jones *v.* Bull, (Civ. App. 1896) 36 S. W. 501; Bowles *v.* Smith, (Civ. App. 1896) 34 S. W. 381; Taylor *v.* Brown, 8 Tex. Civ. App. 261, 27 S. W. 911; Gulf, etc., R. Co. *v.* Thompson, (App. 1890) 16 S. W. 174; Williams *v.* Chamberlain, 1 Tex. App. Civ. Cas. § 342.

United States.— Union Pac. R. Co. *v.* Wyler, 158 U. S. 258, 15 S. Ct. 877, 39 L. ed. 983; Boston, etc., R. Co. *v.* Hurd, 108 Fed. 116, 47 C. C. A. 615, 56 L. R. A. 193; Whalen *v.* Gordon, 95 Fed. 305, 37 C. C. A. 70; Smith *v.* Missouri Pac. R. Co., 50 Fed. 760 [*reversed* in 56 Fed. 458, 5 C. C. A. 557]; Buntin *v.* Chicago, etc., R. Co., 41 Fed. 744; Hintrager *v.* Nightingale, 36 Fed. 847; The Harmony, 11 Fed. Cas. No. 6,081, 1 Gall. 123.

England.— See Campbell *v.* Smart, 5 C. B. 196, 5 D. & L. 335, 17 L. J. C. P. 63, 57 E. C. L. 196; Allison *v.* Herring, 8 L. J. Ch. 223.

Canada.— Hogaboom *v.* MacCulloch, 17 Ont. Pr. 377.

See 33 Cent. Dig. tit. "Limitation of Actions," § 545.

Similar rule in equity.— If, during the pendency of a suit in chancery, any new matter or claim is set up by complainant, defendant may insist on the benefit of the statute of limitations until the time the new claim is presented. Dudley *v.* Price, 10 B. Mon. (Ky.) 84; Holmes *v.* Trout, 12 Fed. Cas. No. 6,645, 1 McLean 1.

A declaration containing merely common counts cannot, after the expiration of the statute of limitations, be amended so as to authorize recovery for breach of a special contract, which could not have been proven under the common counts. Flint, etc., R. Co. *v.* Donovan, 108 Mich. 80, 65 N. W. 583.

Averment that causes of action same.— Allegations in an amendment to the original declaration that the causes of action set up therein are the claims for which plaintiff intended to bring suit do not avoid the statute of limitations as to such causes of action, if they are in fact different from the cause set out in the original declaration. Nelson *v.* Montgomery First Nat. Bank, 139 Ala. 578, 36 So. 707, 101 Am. St. Rep. 52; Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367 [*affirming* 54 Ill. App. 457].

In an action for wrongful death, under a statute by which a right of action is given to the personal representative of the deceased for the benefit of his widow or next of kin, a suit in behalf of one beneficiary is a different suit from one in behalf of another, and an amendment of a declaration changing the beneficiary is in effect the beginning of a new suit, and is subject to a plea of limitation as such. Atlanta, etc., R. Co. *v.* Hooper, 92 Fed. 820, 35 C. C. A. 24.

Where the original petition is based on a statute, and the amended petition on a license, if the statute of limitations has run before the filing of the amended petition, it constitutes a bar. Sims *v.* Field, 24 Mo. App. 557.

A declaration charging a railroad company as common carrier, for loss of goods, cannot be amended after the cause of action is barred by limitations, so as to charge it as warehouseman. Anniston, etc., R. Co. *v.* Ledbetter, 92 Ala. 326, 9 So. 73; People *v.* Kalamazoo Cir. Judge, 35 Mich. 227.

Amendment for claim of damages.— Where a petition claims only damages sustained from a breach of contract, an amended petition claiming the liquidated damages provided for by the contract sets up a new cause of action, against which the statute of limitations is only arrested at the date of the amendment. Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98.

Amendment bringing suit within jurisdiction of justice.— Where a justice did not have jurisdiction of a claim, the filing of an amendment bringing the claim within his jurisdiction is the institution of a new suit. Ball *v.* Hagy, (Tex. Civ. App. 1899) 54 S. W. 915.

If the original suit is a personal action, plaintiff may amend so as to obtain the benefit of the mechanic's lien law, but such amendment will be the beginning of a suit to enforce the lien, and the statute of limitations will commence to run from the time the amendment is made. Dinkins *v.* Bowers, 49 Miss. 219.

Unnecessary amendment.— An amendment of a declaration on a guardian's bond by setting forth the proceedings in the orphan's court being unnecessary is not such an introduction of a new cause of action as will admit the plea of the statute of limitations, the action having been commenced in good time. U. S. *v.* O'Leary, 19 D. C. 118.

66. Whalen *v.* Gordon, 95 Fed. 305, 37 C. C. A. 70.

67. Johnston *v.* District of Columbia, 1

d. As to Relief Sought. An amendment, enlarging the prayer of the petition to enable the court to award the relief to which plaintiff is entitled upon his cause of action, does not introduce a new cause of action so as to be subject to a plea of limitations.[68] This rule is particularly applicable when an amendment is filed claiming increased damages.[69]

e. Change in Form of Action. An amendment changing the form of an action will not open the case to the bar of the statute of limitations, if the cause of action is not changed. So long as the identity of the cause of action is preserved the form of the action is not material.[70] If, however, the change in the form of the action introduces a new and distinct cause of action, limitations do not cease to run until the amendment is made.[71]

7. Effect as to Persons Not Made Parties — a. Plaintiffs. The commencement of an action by one person will not interrupt the running of the statute as against one who was neither a party nor privy.[72] But an action brought by one creditor in behalf of himself and other creditors stops the running of the statute

Mackey (D. C.) 427; Mackey *v.* Northern Milling Co., 210 Ill. 115, 71 N. E. 448 [*affirming* 99 Ill. App. 57]; Doyle *v.* Sycamore, 193 Ill. 501, 61 N. E. 1117 [*affirming* 81 Ill. App. 589]; Foster *v.* St. Luke's Hospital, 191 Ill. 94, 60 N. E. 803 [*affirming* 86 Ill. App. 282]; Illinois Cent. R. Co. *v.* Campbell, 170 Ill. App. 163, 49 N. E. 314 [*reversing* 58 Ill. App. 275]; Eylenfeldt *v.* Illinois Steel Co., 165 Ill. 185, 46 N. E. 266 [*affirming* 62 Ill. App. 552]; Foley *v.* Suburban R. Co., 98 Ill. App. 108; Field *v.* French, 80 Ill. App. 78; Missouri, etc., R. Co. *v.* Bagley, 65 Kan. 188, 69 Pac. 188, 3 L. R. A. N. S. 259.

68. *California.*— Kent *v.* San Francisco Sav. Union, 130 Cal. 401, 62 Pac. 620.

Iowa.— Case *v.* Blood, 71 Iowa 632, 33 N. W. 144.

Kentucky.— Bland *v.* Kittinger, 9 S. W. 301, 10 Ky. L. Rep. 417.

Mississippi.— Easter *v.* Riley, 79 Miss. 625, 31 So. 210; Cooper *v.* Allen, 57 Miss. 694.

Missouri.— See Baker *v.* Missouri Pac. R. Co., 34 Mo. App. 98.

Texas.— McIlhenny *v.* Lee, 43 Tex. 205.

See 33 Cent. Dig. tit. "Limitation of Actions," § 546.

The remedy sought is not the cause of action, and is no part of it. The cause of action, if valid, entitles plaintiff to a remedy. In a proper case he may change his claim for the remedy, without in any manner presenting a new cause of action. The action after the amendment is merely a continuance of the original action, with a claim for a different remedy. Case *v.* Blood, 71 Iowa 632, 33 N. W. 144.

69. Chicago North Shore St. R. Co. *v.* Payne, 192 Ill. 239, 61 N. E. 467 [*affirming* 94 Ill. App. 466]; Cooper *v.* Mills County, 69 Iowa 350, 28 N. W. 633; Scanlon *v.* Galveston, etc., R. Co., (Tex. Civ. App. 1905) 86 S. W. 930; Gulf, etc., R. Co. *v.* O'Neill, 32 Tex. Civ. App. 411, 74 S. W. 960; International, etc., R. Co. *v.* Dalwigh, (Tex. Civ. App. 1900) 56 S. W. 136; Bentley *v.* Standard F. Ins. Co., 40 W. Va. 729, 23 S. E. 584.

70. *District of Columbia.*— Howard *v.* Chesapeake, etc., R. Co., 11 App. Cas. 300, contract to tort.

Kansas.— Hillyer *v.* Douglass, 56 Kan. 97, 42 Pac. 329, action to quiet title to ejectment.

Nebraska.— McKeighan *v.* Hopkins, 19 Nebr. 33, 26 N. W. 614, action at law to suit in equity.

New York.— Truman *v.* Lester, 71 N. Y. App. Div. 612, 75 N. Y. Suppl. 528, 10 N. Y. Annot. Cas. 478 (action at law to suit in equity); Eighmie *v.* Taylor, 39 Hun 366 (contract to tort).

Pennsylvania.— Smith *v.* Bellows, 77 Pa. St. 441, contract to tort.

Texas.— Bailey *v.* Laws, 3 Tex. Civ. App. 529, 23 S. W. 20, partition to trespass to try title and partition.

See 33 Cent. Dig. tit. "Limitation of Actions," § 547.

71. Lansford *v.* Scott, 51 Ala. 557; Palmer *v.* Southern Express Co., 52 Ga. 240; American Salt Co. *v.* Heidenheimer, 80 Tex. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

72. Tiffin *v.* Leabo, 52 Mo. 49 (holding that where the statute of limitations is pleaded as a defense against a note, evidence that a suit was instituted thereon within the statutory period by a stranger to the note is inadmissible); Updegrove *v.* Blum, 117 Pa. St. 259, 10 Atl. 785 (holding that a suit brought by a husband which involved only his own right in land of which his wife had made an illegal conveyance does not suspend the running of the statute against her heirs, the title under which they claim being different from that of the husband). But see Flower *v.* O'Connor, 17 La. 213, holding that where suit is brought by the surviving partner of a firm for the whole debt due the firm and he is nonsuited, the suit suspends the statute against the firm. The reason stated is as follows: "If it be established that the defendant has been judicially notified of the titles which are the foundation of the demand for the whole of the property or of the debt, so as to acquire a sufficient knowledge of the rights which are sought to be enforced against him by a suit, there results from said suit a legal interruption in favor of those to whom such rights may belong. This seems also

of limitations from the time of the beginning of the action, as against any creditor who comes in and proves his debt under the decree.[73] The suspension only exists, however, as to that particular suit, and not as to the cause of action involved therein.[74] Nor has the rule application to a creditor who was not a party to the suit and did not come in under the decree.[75]

b. Defendants. As a general rule the commencement of an action[76] or a

to be the true spirit of our law on this subject, as from the expressions of the art. 3484 of the La. Code, to wit, 'a legal interruption takes place, when the possessor has been cited to appear before a court of justice, on account either of the property or of the possession'; the law appears to contemplate that the object and cause of the action, ought to be the principal criterions which should be resorted to for the purpose of ascertaining the fact and the extent of the interruption resulting from a judicial demand." Flower *v.* O'Connor, 17 La. 213, 219.

73. *Alabama.*— Taber *v.* Royal Ins. Co., 124 Ala. 681, 26 So. 252.

North Carolina.— Dobson *v.* Simonton, 93 N. C. 268.

Ohio.— Barrick *v.* Gifford, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798.

Virginia.— Gunnell *v.* Dixon, 101 Va. 174, 43 S. E. 340; Repass *v.* Moore, 96 Va. 147, 30 S. E. 458; Craufurd *v.* Smith, 93 Va. 623, 23 S. E. 235, 25 S. E. 657; Ewing *v.* Ferguson, 33 Gratt. 548; Harvey *v.* Steptoe, 17 Gratt. 289; Stephenson *v.* Paverners, 9 Gratt. 398.

United States.— Richmond *v.* Irons, 121 U. S. 27, 7 S. Ct. 788, 30 L. ed. 864 [*affirming* 27 Fed. 591]; Newgass *v.* Atlantic, etc., R. Co., 72 Fed. 712.

England.— Farran *v.* Beresford, 10 Cl. & F. 319, 8 Eng. Reprint 764; Brown *v.* Lynch, 4 Ir. Eq. 316; Congreve *v.* Power, 1 Molloy 121; Sterndale *v.* Hankinson, 1 Sim. 393, 27 Rev. Rep. 210, 2 Eng. Ch. 393, 57 Eng. Reprint 625. See also *In re* Greaves, 18 Ch. D. 551, 50 L. J. Ch. 817, 45 L. T. Rep. N. S. 464, 30 Wkly. Rep. 55; Bennett *v.* Barnard, 12 Ir. Eq. 229; Watson *v.* Birch, 11 Jur. 198, 16 L. J. Ch. 188, 15 Sim. 523, 38 Eng. Ch. 523, 60 Eng. Reprint 721.

Canada.— Archer *v.* Severn, 12 Ont. 615, holding further that the rule does not prevent the statute from running against debtors to the estate.

Contra.— Welch *v.* Stewart, 2 Bland (Md.) 37, holding that as to all creditors coming in after the commencement of the suit, or under the decree, the day of filing the petition to be admitted as a creditor, or the day of filing the voucher or evidence of the claim, is considered as the commencement of the suit.

A bill to carry out the directions of a will for the sale of real estate, with prayer for general relief is not a creditor's bill, and the filing of such a bill does not prevent the running of the statute of limitations as against a debt due to the complainant, and recoverable under a creditor's bill. Sabel *v.* Slingluff, 52 Md. 132.

An action to have a certain conveyance decreed to be an equitable mortgage, and to provide for the payment of certain debts, for which the grantee was bound, out of the sale of the property conveyed, and to determine liens thereon, is not a general creditor's bill, within the rule that proof of debts in a general creditor's suit suspends the running of limitations. Gunnel *v.* Dixon, 101 Va. 174, 43 S. E. 340.

A creditor cannot set up the statute against plaintiff whose decree he comes in under. Fuller *v.* Redman, 26 Beav. 614, 53 Eng. Reprint 1035; Briggs *v.* Wilson, 17 Beav. 330, 51 Eng. Reprint 1061, 5 De G. M. & G. 12, 54 Eng. Ch. 12, 43 Eng. Reprint 772; Adams *v.* Waller, 35 L. J. Ch. 727, 14 Wkly. Rep. 789; Shewen *v.* Vanderhorst, 1 Russ. & M. 347, 39 Eng. Reprint 134; *Ex p.* Dewdney, 2 Rose 59 note, 15 Ves. Jr. 479; 33 Eng. Reprint 836.

74. Gunnell *v.* Dixon, 101 Va. 174, 43 S. E. 340, holding that the rule as to suspension had no application to the case at bar.

75. Callaway *v.* Saunders, 99 Va. 350, 38 S. E. 182; Tatam *v.* Williams, 3 Hare 347, 25 Eng. Ch. 347, 67 Eng. Reprint 415; O'Kelly *v.* Bodkin, 3 Ir. Eq. 390.

76. *Arkansas.*— Wallace *v.* Swepston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94.

Kansas.—Wood *v.* Dill, 3 Kan. App. 484, 43 Pac. 822.

Minnesota.— Falconer *v.* Cochran, 68 Minn. 405, 71 N. W. 386; Smith *v.* Hurd, 50 Minn. 503, 52 N. W. 922, 36 Am. St. Rep. 661.

Texas.— Robinson *v.* Thompson, (1899) 52 S. W. 117.

United States.— Laughlin *v.* Calumet, etc., Co., 65 Fed. 441, 13 C. C. A. 1.

Applications of rule.— **A** suit against the guardian and one of his sureties to surcharge and falsify his accounts does not suspend the operation of the statute against the estate of a deceased surety on the bond. Wallace *v.* Swepston, 74 Ark. 520, 86 S. W. 398, 109 Am. St. Rep. 94. Pendency of suit affecting title to land against one who is a stranger to the title of one in possession thereof who is not made a party does not suspend the running of the statute in the latter's favor. Laughlin *v.* Calumet, etc., Co., 65 Fed. 441, 13 C. C. A. 1. The bringing of an action of trespass to try title does not stop the running of limitations against the right of plaintiffs, the heirs of a subvendee, to pay the balance of the purchase-price owing by the vendee, and thus obtain title to the land, although the original vendor had foreclosed his vendor's lien, he not having made the heirs parties thereto. Robinson *v.* Thompson, (Tex. Civ. App. 1899) 52 S. W. 117. The institution of a suit of trespass to try title by one tenant in common

judgment or decree rendered therein[77] does not suspend the running of the statute as to persons who were neither parties to the action nor privies. The rule, however, is otherwise where commencement of an action against one of two or more joint debtors by express statutory provision stops the running of the statute as to the others,[78] or where it is provided by statute that service of process on one of several obligors *in solido* interrupts the running of the statute as to all the obligors.[79] So under the statute of one state a suit brought against the husband on notes due by the community interrupts the statute as to the heirs of the deceased wife.[80] And in another it is held that a suit against a husband alone will under a statute giving him the management of the wife's separate property be sufficient to stop the running of the statute in the wife's favor.[81]

8. Set-Offs and Counter-Claims.[82] There is a conflict of opinion as to when a claim interposed as a set-off or counter-claim becomes barred by the statute of limitations. The better rule seems to be that where defendant's claim in set-off was an existing debt not barred by the statute of limitations at the time plaintiff's action was begun, it will be a valid set-off, although the statutory period may have elapsed before the filing of the answer setting it up.[83] In some states, however, the institution of an action in which a claim of set-off is afterward pleaded does not stop the running of the statute of limitations as against the set-off as of the

against a third person, without anything to indicate that the suit is brought on behalf of the other tenants, does not operate to stop the running of the statute of limitations against the other tenants. Stovall *v.* Carmichael, 52 Tex. 383. But see Iberg *v.* Webb, 96 Ill. 415, holding that a suit by one tenant in common for the partition of land and to remove cloud from title will arrest the running of the statute of limitations as to all the tenants in common; that all acts done by one tenant in common are held to be done for all the cotenants.

77. *Iowa.*— Great Western Tel. Co. *v.* Purdy, 83 Iowa 430, 50 N. W. 45; Wadsworth *v.* Gerhard, 55 Iowa 367.

Louisiana.— McDaniel *v.* Lalanne, 28 La. Ann. 661.

Maryland.— Harwood *v.* Rawlings, 4 Harr. & J. 126.

New York.— Vanderburgh *v.* Biggs, 3 How. Pr. 316; Bruen *v.* Bokee, 4 Den. 56, 47 Am. Dec. 239.

North Carolina.— Rufty *v.* Claywell, 93 N. C. 306.

South Carolina.— Ariail *v.* Ariail, 29 S. C. 84, 7 S. E. 35.

Applications of rule.— An order of court requiring payment of unpaid subscriptions by the subscribers in a proceeding for the appointment of a receiver does not prevent the running of the statute of limitations in favor of a subscriber not a party to such proceeding. Great Western Tel. Co. *v.* Purdy, 83 Iowa 430, 50 N. W. 45. A suit against a personal representative does not arrest the running of the statute against decedent's devisees. While lands in the possession of the devisees are liable for his simple contract debts, the cause of action must be established against the devisees who are not bound by a judgment against the representative to which they are neither parties nor privies. Ariail *v.* Ariail, 29 S. C. 84, 7 S. E. 35. A notice by a creditor of a firm, within three years after obtaining a judgment against two of the partners, but more than three years after the accrual of the cause of action, issued to a third partner, who was not served in the original action, to show cause why he should not be bound by the judgment, is the beginning of a new suit, and barred by the statute of limitations. Rufty *v.* Claywell, 93 N. C. 306.

Where a wrong person is sued the right party cannot be deprived of the benefit of the statute by making a suit against him relate back to the former suit to which he was not a party. Peterson *v.* Delaware River Ferry Co., 190 Pa. St. 364, 42 Atl. 955.

78. See *supra*, VI, I, 3, a, (IV), (B).

79. See *supra*, VI, I, 3, a, (IV), (B).

80. Regan's Succession, 12 La. Ann. 116.

81. Allen *v.* Read, 66 Tex. 13, 17 S. W. 115; Burleson *v.* Burleson, 28 Tex. 383.

82. **New action on set-off or counter-claim after failure on former action** see *infra*, VI, I, 9, i.

Period of limitation on set-off or counter-claim see *supra*, V, O, 2.

83. *Arkansas.*— Camp *v.* Gullett, 7 Ark. 524.

California.— McDougal *v.* Hulet, 132 Cal. 154, 64 Pac. 278; Perkins *v.* West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118.

Indiana.— Eve *v.* Louis, 91 Ind. 457.

Massachusetts.— Parker *v.* Sanborn, 7 Gray 191.

New York.— Herbert *v.* Day, 33 Hun 461, 15 Abb. N. Cas. 172.

North Carolina.— Brumble *v.* Brown, 71 N. C. 513.

Ohio.— McEwing *v.* James, 36 Ohio St. 152; Markley *v.* Michael, 8 Ohio Dec. (Reprint) 269, 6 Cinc. L. Bul. 832.

Tennessee.—Paducah, etc., R. Co. *v.* Parks, 86 Tenn. 554, 8 S. W. 842; Williams *v.* Lenoir, 8 Baxt. 395.

Texas.— Crook *v.* McGreal, 3 Tex. 487; Walker *v.* Fearhake, 22 Tex. Civ. App. 61,

time when the action was commenced, but only as of the time when the set-off was claimed.[84] The right to make a claim available by set-off will not relieve it from prescription in a direct action.[85] Where a counter-claim is pleaded in an amended answer, and not in the original, the statute runs against it until the filing of the amended answer.[86]

9. New Action After Dismissal, Nonsuit, or Failure of Former Action — a. In General[87] — (I) *At Common Law.* At common law suits frequently abated for matter of form. In such cases plaintiff was allowed a reasonable time within which to sue out a new writ. This time was theoretically computed with reference to the number of days which the parties must spend in journeying to the court. Hence the name "journey's account." Such renewed suit was but a continuance of that which had abated, and of necessity was in the same court, against the same parties, and for the same cause of action.[88]

(II) *By Statute* — (A) *In General.* This ancient remedy is not now recognized in this country, but in lieu thereof nearly every state has provided by statute for the renewal of actions which have failed for some matter not involving the merits.[89] Such a statute does not contemplate a revival or a continuance of a former suit as at common law under "journey's account," but that a new and distinct suit may be brought.[90] The statutes on this subject vary greatly in their scope. Some limit the right to bring a second action to cases in which there has been an involuntary nonsuit; others to dismissal by the court for some matter of form not involving the merits; others to dismissals as the result of a reversal; others to cases where the judgment in favor of plaintiff has been arrested or set aside; still others include various combinations of the above provisions.[91]

52 S. W. 629. But see Fowler *v.* Stoneum, 11 Tex. 478, 62 Am. Dec. 490.

England.— Walker *v.* Clements, 15 Q. B. 1046, 69 E. C. L. 1046; Ord *v.* Ruspini, 2 Esp. 570.

See 33 Cent. Dig. tit. "Limitation of Actions," § 552.

In a suit on a memorandum of a sum to be accounted for on settlement, defendant may set off balances due him at its date by plaintiff, although they are more than six years old at the time of suit brought. Shattuck *v.* Shattuck, 16 N. H. 242.

On appeal.— Where a claim interposed as a set-off is not barred when the cause is tried in the lower court, it is error to exclude evidence of the set-off on appeal, although the statute of limitations has then run. Engel *v.* Samuels, 9 Colo. App. 338, 48 Pac. 276.

To what actions rule applicable.— The principle that limitations are held in abeyance as to set-offs and counter-claims by the commencement of the action is not limited to causes of action arising on contract set up as counter-claims, but applies also to a claim for damages caused by the negligence of plaintiff. Perkins *v.* West Coast Lumber Co., 120 Cal. 27, 52 Pac. 118.

84. *District of Columbia.*— Durant *v.* Murdock, 3 App. Cas. 114.

Kansas.— See Toby *v.* Allen, 3 Kan. 399.

Pennsylvania.— Gilmore *v.* Reed, 76 Pa. St. 462; McClure *v.* McClure, 1 Grant 222.

South Carolina.— Holley *v.* Rabb, 12 Rich. 185.

Virginia.— Trimyer *v.* Pollard, 5 Gratt. 460.

West Virginia.— Rowan *v.* Chenoweth, 49 W. Va. 287, 38 S. E. 544, 87 Am. St. Rep. 796.

See 33 Cent. Dig. tit. "Limitation of Actions," § 552.

In order to deprive plaintiff of the benefit of the statute, defendant must give notice of his intention to use the set-off before the period of limitations has expired; otherwise the statute runs until the time the set-off is given in evidence. Wisecarver *v.* Kincaid, 83 Pa. St. 100.

85. Broussard *v.* Broussard, 18 La. Ann. 593.

86. Perkins *v.* West Coast Lumber Co., (Cal. 1897) 48 Pac. 982.

87. New action on insurance policy providing special limitation see Fire Insurance, 19 Cyc. 910; Life Insurance *ante*, 687.

88. See Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

89. See cases cited in the following notes.

Statute not applicable to contract limitations.— Wilhelmi *v.* Des Moines Ins. Co., 103 Iowa 532, 72 N. W. 685 (as to a limitation clause in an insurance policy); Haskins *v.* Harding, 11 Fed. Cas. No. 6,196.

Where more than one action for the same cause has been duly commenced, and their benefit lost by any mode within the meaning of the statute, a new suit may be brought within one year after the determination of the last of such actions. Robinson *v.* Merchants', etc., Trans. Co., 16 R. I. 637, 19 Atl. 113.

90. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

91. See the statutes of the various states.

(B) *Purpose of Statute.* This exception or proviso of the general statute of limitations is intended to reach all those cases where a suit is brought, and the merits of the action fail to be tried without the fault of plaintiff, and the period of limitations becomes complete during the pendency of the suit.[92]

(C) *Construction of Statute.* Such a statute is remedial, and should be liberally construed in furtherance of its purpose.[93]

b. Actions Within Exception of Statute — (I) *ACTIONS AT LAW* — (A) *In General.* Statutes providing for the bringing of a new action in certain cases after the failure of a former action have reference only to actions regularly instituted in the regular course of civil procedure, and do not embrace motions and merely incidental proceedings.[94] The term "action," however, is held to include special[95] and statutory[96] proceedings. The statutes have been held not to apply to actions arising *ex delicto*,[97] penal actions,[98] actions for ante-bellum debts,[99] and actions maintainable solely by authority of special laws which make it a condition precedent to the right of recovery that action be brought within a period prescribed.[1]

(B) *Necessity of Actually Pending Suit.* It is only where a suit is pending,

92. Cumming *v.* Jacobs, 130 Mass. 419; Coffin *v.* Cottle, 16 Pick. (Mass.) 383; Spear *v.* Curtis, 40 Vt. 59; Phelps *v.* Wood, 9 Vt. 399.

93. *Georgia.*— Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Atlanta, etc., R. Co. *v.* Wilson, 119 Ga. 781, 47 S. E. 366; Gordon *v.* McCauley, 73 Ga. 667; Rountree *v.* Key, 71 Ga. 214.

Massachusetts.— Coffin *v.* Cottle, 16 Pick. 383.

New York.— Barker *v.* Millard, 16 Wend. 572.

Ohio.— Pittsburgh, etc., R. Co. *v.* Bemis, 64 Ohio St. 26, 59 N. E. 745.

Rhode Island.—Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637, 19 Atl. 113.

Tennessee.— Thomas *v.* Pointer, 14 Lea 343.

Vermont.— Spear *v.* Curtis, 40 Vt. 59.

Virginia.—Dawes *v.* New York, etc., R. Co., 96 Va. 733, 32 S. E. 778.

See 33 Cent. Dig. tit. "Limitation of Actions," § 553.

94. McIlhenny *v.* Wilmington Sav., etc., Co., 108 N. C. 311, 12 S. E. 1001. *Compare* Lansdale *v.* Cox, 7 J. J. Marsh. (Ky.) 391.

Action duly commenced.— An action commenced within the time allowed by the statute of limitations, by writ returnable according to law, containing a declaration adapted to the cause of action, is an "action duly commenced," within the meaning of a statute providing that if an action duly commenced is defeated for any matter of form, plaintiff may commence a new action in one year after the determination of the first. Woods *v.* Houghton, 1 Gray (Mass.) 580.

95. Matter of Schlesinger, 24 Misc. (N. Y.) 456, 53 N. Y. Suppl. 710.

96. Wintermute *v.* Montgomery, 11 Ohio St. 442 (holding that the saving of the right to commence a new action within one year after nonsuit is applicable to cases arising under the act of March 22, 1849, section 2, "to give additional security to land titles in this State"); Thomas *v.* Pointer, 14 Lea (Tenn.) 343 (holding that a statutory proceeding for the issue of an execution is a suit within the exception of the statute).

97. Cook *v.* Darling, 2 Pick. (Mass.) 605, 606, in which the court said: "It is clear, we think, that the legislature intended to draw the line of distinction between actions arising *ex contractu* and those arising *ex delicto*. The former are frequently more favored by the law than the latter."

98. Rockwell *v.* Hankins, 28 N. C. 428; Clarke *v.* Rutherford, 7 N. C. 237.

99. Reese *v.* Tollerson, 70 Ga. 443; Goss *v.* Roberts, 54 Ga. 494; Macon, etc., R. Co. *v.* Bass, 52 Ga. 13; Adams *v.* Davis, 47 Ga. 339.

1. Parmelee *v.* Savannah, etc., R. Co., 78 Ga. 239, 2 S. E. 686 (holding that the saving of the statute does not apply to an action for the recovery of an excess of freight paid in violation of law); Gerren *v.* Hannibal, etc., R. Co., 60 Mo. 405 (holding that an action to recover for the killing of stock not brought within one year after the cause of action accrued is barred, although an action to which plaintiff took a nonsuit was brought within a year); Hill *v.* Rensselaer County, 119 N. Y. 344, 23 N. E. 921 [*affirming* 53 Hun 194, 6 N. Y. Suppl. 716] (holding that an action for damages, in consequence of a mob or riot, is not within a statute provided for the bringing of a second action after the failure of a former one); Cavanagh *v.* Ocean Steam Nav. Co., 13 N. Y. Suppl. 540, 19 N. Y. Civ. Proc. 391. But see Meekins *v.* Norfolk, etc., R. Co., 131 N. C. 1, 42 S. E. 333, holding that even if Code, § 1498, prescribing a year from the death as the time within which action may be brought for death by wrongful act or negligence is not strictly a statute of limitations, such an action is within section 166, providing if any action be commenced within the time prescribed therefor, and plaintiff be nonsuited, he may commence a new action within one year after such nonsuit.

and the cause of action is barred during the pendency, that plaintiff is entitled to bring a new suit after the failure of a former suit.[2] A void suit is not a suit within the meaning of the statute, and a suit brought after its failure is not a continuation of the former suit, but a first and independent suit.[3]

(c) *In Different Forum.* There is a conflict of opinion as to whether a statute, providing for a new action after the failure of a former action, applies to actions brought in the federal courts. In some states such a statute is held to confer merely a privilege upon suitors who bring their actions in the state courts to renew them in the same or other courts of the state having jurisdiction thereof, and not to permit the renewal of a case in a state court after a dismissal in a federal court.[5] In others it is held that after a nonsuit in a federal court, plaintiff may renew in a state court[6] or *vice versa*.[7]

(ii) *SUITS IN EQUITY.* In some jurisdictions the word "actions" is not limited to actions at law, but includes suits in equity, and hence where plaintiff fails in a chancery suit he is entitled to commence an action at law within a year after such failure,[8] or *vice versa*.[9] In others it is held that by fair construction the words of the statute cannot be extended to equitable proceedings.[10]

e. Nature or Form of Action. In order that the second action may be deemed a continuation of the first, the cause of action must be the same in both cases.[11]

2. McGhee *v.* Gainesville, 78 Ga. 790, 3 S. E. 670.

3. Edwards *v.* Ross, 58 Ga. 147, holding that a suit commenced by an attachment which is adjudged void does not entitle the suitor to the benefit of a provision of the statute of limitations allowing a time after the failure of a first suit for the bringing of a second. But see *infra*, VI, I, 9, f, (I).

4. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

5. Constitution Pub. Co. *v.* De Laughter, 95 Ga. 17, 21 S. E. 1000; Cox *v.* East Tennessee, etc., R. Co., 68 Ga. 446; Solomon *v.* Bennett, 62 N. Y. App. Div. 56, 70 N. Y. Suppl. 856.

6. Fleming *v.* Southern R. Co., 128 N. C. 80, 38 S. E. 253.

7. Shaw *v.* Pershing, 57 Mo. 416.

8. McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470; Lamson *v.* Hutchings, 118 Fed. 321, 55 C. C. A. 245; Alexander *v.* Gordon, 101 Fed. 91, 41 C. C. A. 228.

9. Jordan *v.* Faircloth, 27 Ga. 372; Spear *v.* Newell, 13 Vt. 288.

Equity follows the law, and must give to the filing of a bill within the year for the same cause of action, the like effect that the new action at law would have had. Hall *v.* Davis, 56 N. C. 413.

Suit in equity after action in ejectment.— The filing of a bill of equity within a year after the dismissal of an action in ejectment, when the relief asked is in effect the same, is the commencement of a new action, within the statute of limitations. East Tennessee Iron, etc., Co. *v.* Ferguson, (Tenn. Ch. App. 1895) 35 S. W. 900; East Tennessee Iron, etc., Co. *v.* Lawson, (Tenn. Ch. App. 1895) 35 S. W. 456.

10. Morrison *v.* Stevenson, 69 Ala. 448; Roland *v.* Logan, 18 Ala. 307; Stafford *v.* Bryan, 1 Paige (N. Y.) 239 [*affirmed* in 3 Wend. 532]; Dawes *v.* New York, etc., R. Co., 96 Va. 733, 32 S. E. 778.

11. *Arkansas.*— Biscoe *v.* Madden, 17 Ark. 533.

Georgia.— Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

Indiana.— Sidener *v.* Galbraith, 63 Ind. 89.

Iowa.— McDonald *v.* Jackson, 55 Iowa 27, 7 N. W. 408.

Kansas.— McGlinchy *v.* Bowles, 68 Kan. 190, 75 Pac. 123; Dobson *v.* Noyes, 39 Kan. 471, 18 Pac. 697.

Louisiana.— Saunders' Succession, 37 La. Ann. 769; Seavers *v.* Journee, 11 La. Ann. 143.

Maine.— Marble *v.* Hinds, 67 Me. 203.

Missouri.— Meddis *v.* Wilson, 175 Mo. 126, 74 S. W. 984.

New York.—Titus *v.* Poole, 145 N. Y. 414, 40 N. E. 228, holding that an action founded on defendant's fraudulent representations that a stock certificate sold by him to plaintiff was of par value, and an action on those representations treated as a warranty, are for the same cause.

North Carolina.— Whetstine *v.* Wilson, 104 N. C. 385, 10 S. E. 471; Isler *v.* Dewey, 84 N. C. 345; Whitfield *v.* Hill, 58 N. C. 316; Williams *v.* Council, 49 N. C. 206; Crump *v.* Thompson, 35 N. C. 150, holding that an attempt to procession land is not equivalent to an action of ejectment.

Ohio.— Larwill *v.* Burke, 19 Ohio Cir. Ct. 449, 10 Ohio Cir. Dec. 605.

Oklahoma.— Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

South Carolina.— Gourdine *v.* Graham, 1 Brev. 329, holding that an action for trover for the conversion of a slave, and an action on the case, for harboring the same slave, are not for the same cause of action.

United States.— H. B. Claflin Co. *v.* Middlesex Banking Co., 113 Fed. 958; Whalen *v.* Gordon, 95 Fed. 305, 37 C. C. A. 70.

See 33 Cent. Dig. tit. "Limitation of Actions," § 555, 564.

This does not mean that the second suit must be a literal copy of the first,[12] or that the same form of action should be adopted.[13] A new action of any kind is permitted, having for result the same relief as was sought in the original action.[14] The court will not presume that the first suit was for the same cause of action as the second;[15] but plaintiff must establish the identity of the causes of action in the two suits,[16] by the record, and it cannot be shown by evidence *aliunde*.[17]

d. Abatement or Abandonment of Former Action — (i) *ABATEMENT.* It has been generally held, both in England and in this country, that where a suit has been commenced within the time limited by the statute of limitations, and abated by the death of one of the parties, the operation of the statute will be prevented, if a new suit is commenced within a reasonable time; but in no case has more than one year, the period usually fixed by statute for commencing a new action, been allowed for this purpose.[18] This rule is founded upon the principle that the case of an abatement is within the equity of the proviso of the statute which gives

12. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

13. Young *v.* Davis, 30 Ala. 213; Crow *v.* State, 23 Ark. 684; Myers *v.* Perry First Presb. Church, 11 Okla. 544, 69 Pac. 874.

Such a construction of the statute would exclude from its beneficial operation the class of cases where plaintiff's action failed on account of a mistake in the form of action, while there is no other class of cases to which it can be more appropriately applied. Young *v.* Davis, 30 Ala. 213; Crow *v.* State, 23 Ark. 684.

14. Kenney *v.* Parks, 137 Cal. 527, 70 Pac. 556.

15. Gibbs *v.* Crane Elevator Co., 180 Ill. 191, 54 N. E. 200 [*affirming* 79 Ill. App. 22]; Smith *v.* Herd, 110 Ky. 56, 60 S. W. 841, 1121, 22 Ky. L. Rep. 1596.

16. Gibbs *v.* Chicago Title, etc., Co., 79 Ill. App. 22.

17. Atlanta, etc., R. Co. *v.* Wilson, 119 Ga. 781, 47 S. E. 366 (holding that where, to prevent a bar of limitations, plaintiff relies on the privilege of renewal within six months, a copy of the record of the first suit should be attached, so that the court may determine as a matter of law whether it was for the same cause of action and between the same parties); Gibbs *v.* Crane Elevator Co., 180 Ill. 191, 54 N. E. 200 [*affirming* 79 Ill. App. 22]. See also Alexander *v.* Gordon, 101 Fed. 91, 41 C. C. A. 228.

18. *Kentucky.*— Hull *v.* Deatly, 7 Bush 687; Baker *v.* Baker, 13 B. Mon. 406. See also Montgomery *v.* Caldwell, 4 Bibb 305.

Michigan.— McKenzie *v.* A. P. Cook Co., 113 Mich. 452, 71 N. W. 868.

New York.— Schermerhorn *v.* Schermerhorn, 5 Wend. 513; Jackson *v.* Horton, 3 Cai. 197.

North Carolina.— Morrison *v.* Connelly, 13 N. C. 233.

Pennsylvania.— Downing *v.* Lindsay, 2 Pa. St. 382.

South Carolina.— Chapman *v.* Mayrant, 2 Speers 481; Patton *v.* Magrath, 1 McMull. 212 (holding, however, that a recovery is barred by limitations if the second suit cannot be connected with the preceding one); Martin *v.* Archer, 3 Hill 211 (holding that the commencement of a second suit one year and eleven months after the abatement of the first is not within a reasonable time); Hunter *v.* Glenn, 1 Bailey 542.

Tennessee.— Anderson *v.* Bedford, 4 Coldw. 464; Norment *v.* Smith, 1 Humphr. 46.

Virginia.— Brown *v.* Putney, 1 Wash. 302.

England.—Swindell *v.* Bulkeley, 18 Q. B. D. 250, 56 L. J. Q. B. 613, 56 L. T. Rep. N. S. 38, 35 Wkly. Rep. 189 (holding that the law is not changed by the Judicature Acts); Curlewis *v.* Mornington, 7 E. & B. 283, 3 Jur. N. S. 660, 26 L. J. Q. B. 181, 5 Wkly. Rep. 266, 90 E. C. L. 283; Sturgis *v.* Darell, 4 H. & N. 622, 28 L. J. Exch. 366; Kinsey *v.* Heyward, 1 Ld. Raym. 432; Wilcocks *v.* Huggins, 2 Str. 907. See also Matthews *v.* Phillips, 2 Salk. 424.

Canada.— See Ross *v.* Pomeroy, 28 Grant Ch. (U. C.) 435.

See 33 Cent. Dig. tit. "Limitation of Actions," § 556.

The allowance of an exception in such a case has been called judicial legislation. Schermerhorn *v.* Schermerhorn, 5 Wend. (N. Y.) 513.

In a joint action the fact that the abatement of the suit against the survivor is prevented by statute will not prevent plaintiff from bringing a new suit within a year. Chapman *v.* Mayrant, 2 Speers (S. C.) 481.

Abatement by marriage of feme sole.— The rule applies to a case where suit is brought by husband and wife, after abatement of a former suit instituted by the *feme* while *sole*, and which abated in consequence of her subsequent marriage. Matthews *v.* Phillips, 2 Salk. 424; Hodsden *v.* Harridge, 2 Saund. 61*b*; Wilcocks *v.* Huggins, 2 Str. 907; Middleton *v.* Forbes, Willes 259 note.

Abatement by dissolution of corporation.— Whether the principle applies when an action abates by the dissolution of a corporation *quære*. Life Assoc. of America *v.* Goode, 71 Tex. 90, 8 S. W. 639.

Where a writ is not actually abated, it is not necessary that a second action should be prosecuted within one year after the period of limitation has expired. Schlosser *v.* Lesher, 1 Dall. (Pa.) 411, 1 L. ed. 200.

plaintiff a year to commence a new action when the judgment is arrested or reversed.[19] In some courts, however, it is wholly rejected, and the doctrine is adhered to that no equitable exceptions are to be engrafted upon the statute, and that where there is not an express exception, the courts cannot create one.[20]

(II) *ABANDONMENT.* The general doctrine is well established that a properly instituted claim voluntarily abandoned cannot be made available in a subsequent action to save it from the operation of the statute of limitations.[21] The abandonment, however, must be express or positively implied, as where plaintiff declares that he voluntarily abandons his action, or by some other voluntary act shows a clear intention to do so.[22]

e. Dismissal or Nonsuit — (I) *WHEN WITHIN EXPRESS EXCEPTION OF STATUTE* — (A) *In General.* In some states it is expressly provided by the various statutory enactments that if a person be nonsuited,[23] or shall discontinue or dis-

19. See cases cited in preceding note.

In Michigan it is provided by statute that in case of the abatement of an action duly commenced within the statutory period plaintiff may bring a new suit within one year after. Foote *v.* Pfeiffer, 70 Mich. 581, 38 N. W. 586.

20. Crane *v.* French, 38 Miss. 503, holding further that the common-law writ of journey's accounts, under which, when an abatement of a suit happened without any fault of plaintiff, he was permitted to sue out a fresh writ, which was a quasi-continuance of the first writ, has no application to the system of jurisprudence in Mississippi.

21. *Indiana.*— Null *v.* White Water Valley Canal Co., 4 Ind. 431.

Louisiana.— Harrison *v.* Meyer, 22 La. Ann. 580; Prall *v.* Peet's Curator, 3 La. 274.

New Jersey.— Ivins *v.* Schooley, 18 N. J. L. 269.

Ohio.— Siegfried *v.* New York, etc., R. Co., 50 Ohio St. 294, 34 N. E. 331 [*affirming* 7 Ohio Cir. Ct. 33, 3 Ohio Cir. Dec. 649].

Rhode Island.— Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637, 19 Atl. 113.

Texas.— Shirley *v.* Waco Tap R. Co., 78 Tex. 131, 10 S. W. 543; Hughes *v.* Lane, 25 Tex. 356; Shields *v.* Boone, 22 Tex. 193; Beissner *v.* Texas Express Co., 1 Tex. App. Civ. Cas. § 806.

United States.— Richards *v.* Maryland Ins. Co., 8 Cranch 84, 3 L. ed. 496.

See 33 Cent. Dig. tit. "Limitation of Actions," § 556.

22. Raymond *v.* Conery, 50 La. Ann. 155, 23 So. 208 (holding that failing to exercise the rights of the action, and permitting the papers constituting the record to become lost, will be regarded as a practical abandonment of the action); Locke *v.* Barrow, 25 La. Ann. 118; Norwood *v.* Devall, 7 La. Ann. 523.

The dismissal of a suit does not constitute such a voluntary abandonment as will prevent the suit from interrupting prescription. Belden *v.* Butcher's Union Slaughterhouse Co., 38 La. Ann. 391; Dunn *v.* Kenney, 11 Rob. (La.) 249; Flower *v.* O'Connor, 17 La. 213; Prall *v.* Peet's Curator, 3 La. 274.

A judgment of nonsuit based on the merc failure of a plaintiff to appear cannot be regarded as a voluntary abandonment of the claim. Locke *v.* Barrow, 25 La. Ann. 118; Price *v.* Emerson, 16 La. Ann. 95; Sheldon *v.* Reynolds, 14 La. Ann. 692; Devalcourt *v.* Dillon, 12 La. Ann. 672; Norwood *v.* Devall, 7 La. Ann. 523. But see Bell *v.* Elliott, 8 La. Ann. 453.

A voluntary nonsuit does not interrupt prescription, although it appears of record that the discontinuance was taken with the intention, not of abandoning the claim, but of reviving it under more favorable auspices. Dennistoun *v.* Rist, 9 La. Ann. 464; Smith *v.* Gibbon, 6 La. Ann. 684.

23. *Arkansas.*— Smith *v.* State Bank, 11 Ark. 28; James *v.* Biscoe, 10 Ark. 184.

Illinois.— Peacock *v.* Churchill, 38 Ill. App. 634 (holding that the statute is not applicable to the dismissal of a bill in equity to contest the validity of a will); Herring *v.* Poritz, 6 Ill. App. 208 (holding that where plaintiff fails to appear in person or by attorney, to answer when called, and defendant has judgment for costs, this is a nonsuit).

Indian Territory.— Turner *v.* Gonzales, 3 Indian Terr. 649, 64 S. W. 565.

Missouri.— Shepard *v.* St. Louis, etc., R. Co., 3 Mo. App. 550.

Ohio.— Haymaker *v.* Haymaker, 4 Ohio St. 272, holding that a statute allowing a new suit after nonsuit is applicable to cases under the administration law where the claimant must commence suit within six months, and does so, and is afterward nonsuited.

South Carolina.— Edson *v.* Davis, 1 McCord 555.

See 33 Cent. Dig. tit. "Limitation of Actions," § 557.

Connection between suits must be shown.— Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624.

A nonsuit on the merits is not within the meaning of the statute. Swan *v.* Littlefield, 6 Cush. (Mass.) 417.

Dismissal for failure to furnish additional security for costs is a nonsuit within the meaning of the statute. Wetmore *v.* Crouch, (Mo. 1905) 87 S. W. 954.

Principle applicable to dismissal on demurrer to petition.— Hughes *v.* Lane, 25 Tex. 356.

Privilege of renewal given to plaintiff only. — Crane *v.* Barry, 60 Ga. 362. One who

miss his case,[24] and the time limited for bringing the action has expired during the pendency of the suit,[25] he may bring a new action within a certain time after such nonsuit or dismissal.

(B) *Voluntary Nonsuit.* Some cases hold that such a statute providing for a new action after nonsuit applies only to involuntary nonsuits as known to the common law, and not to voluntary nonsuits as permitted by statute.[26] Other cases hold that both voluntary and involuntary suits are within its application.[27]

(C) *When Nonsuit "Suffered."* Under a statute providing that a new action may be brought within one year after nonsuit is suffered, the question arises as to when a nonsuit is "suffered." In the case of a voluntary nonsuit it is when the judgment of nonsuit is entered. In the case of an involuntary nonsuit with leave to move to set it aside which is appealed from, it is when the judgment is affirmed in the appellate court.[28] When an appeal from an order of nonsuit is dismissed, the order of nonsuit and not the dismissal of the appeal is to be regarded as the legal termination of the action.[29]

(D) *Effect of Reinstatement After Dismissal.* Where a case is reinstated it stands as at the institution of the suit so far as the statute of limitations is concerned.[30] The time given for reinstatement does not, however, extend the statutory time for bringing a new action.[31]

(II) *When Not Within Express Exception of Statute*—(A) *In General.* Under a statute containing no saving in case of dismissal or nonsuit, there is a diversity of opinion as to whether or not a new action may be commenced after termination of a former action in such a manner. Some cases hold that judgment of nonsuit is within the equity of the saving in the statute, although not within its express exceptions;[32] others, however, have refused to adopt this

appears in a proceeding by an executor to settle his account, and secures leave to file objections, is not a "plaintiff," and, on discontinuance of that proceeding, is not entitled to bring a new proceeding for accounting after the time limited. Matter of Schlesinger, 36 N. Y. App. Div. 77, 55 N. Y. Suppl. 514 [*reversing* 24 Misc. 456, 53 N. Y. Suppl. 710].

Where the second action is commenced before the nonsuit in the first, the last action is not protected by the statute. Missouri, etc., Land Co. *v.* Quinn, 172 Mo. 563, 73 S. W. 184.

Statute operative as saving clause.—A statute saving the case of nonsuit is not intended to shorten the time given by the general provisions of the general limitation act, but is a saving clause to prevent the bar which would otherwise be applicable. Karnes *v.* American F. Ins. Co., 144 Mo. 413, 46 S. W. 166; Tate *v.* Jacobs, 47 Mo. App. 218.

24. Savannah, etc., R. Co. *v.* Smith, 93 Ga. 742, 21 S. E. 157; Bagley *v.* Stephens, 80 Ga. 736, 6 S. E. 695; Wynn *v.* Booker, 22 Ga. 359. But see Mahon *v.* Talbot County, Ga. Dec. Pt. II, 201.

Dismissal for want of prosecution is a discontinuance within the meaning of such a statute. Rountree *v.* Key, 71 Ga. 214.

25. Wiggins Ferry Co. *v.* Gardner, 91 Ill. App. 20, holding that if, at the time of the nonsuit, there remains any portion of the time limited for bringing the action, the provisions of the statute do not apply.

26. Boyce *v.* Snow, 187 Ill. 181, 58 N. E. 403 [*affirming* 88 Ill. App. 402]; Gibbs *v.* Crane Elevator Co., 180 Ill. 191, 54 N. E. 200 [*affirming* 79 Ill. App. 22]; Holmes *v.* Chicago, etc., R. Co., 94 Ill. 439.

27. State *v.* O'Gorman, 75 Mo. 370; Briant *v.* Fudge, 63 Mo. 489; Shaw *v.* Pershing, 57 Mo. 416.

In Arkansas in order that plaintiff may have the benefit of this saving in the statute it is not necessary that there should be a formal or technical judgment of nonsuit. Plaintiff may go out of court voluntarily or submit to the order of court requiring him to do so. Walker *v.* Peay, 22 Ark. 103; Biscoe *v.* Madden, 17 Ark. 533; State Bank *v.* Fowler, 14 Ark. 159; State Bank *v.* Magness, 11 Ark. 343.

28. Estes *v.* Fry, 166 Mo. 70, 65 S. W. 741; Hewitt *v.* Steele, 136 Mo. 327, 38 S. W. 82; Chouteau *v.* Rowse, 90 Mo. 191, 2 S. W. 209.

29. Richardson *v.* Riley, 67 S. C. 53, 45 S. E. 104; Trimmier *v.* Trail, 2 Bailey (S. C.) 480.

30. Cotton *v.* Lyter, 81 Tex. 10, 16 S. W. 553; Childs *v.* Mays, 73 Tex. 76, 11 S. W. 154; Sharpe *v.* Rockwood, 78 Va. 24. See also McIver *v.* Moore, 16 Fed. Cas. No. 8,831, 1 Cranch C. C. 90, holding that on reinstatement of a cause after nonsuit, defendant will not be permitted to plead the statute of limitations, unless on affidavit showing it to be necessary for the justice of the case.

31. Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468.

32. Wharton *v.* Currituck County Com'rs, 82 N. C. 11; Freshwater *v.* Baker, 52 N. C. 255; Skillington *v.* Allison, 9 N. C. 347; Anonymous, 3 N. C. 63.

construction and hold that the reason of the exception does not apply in the case of a nonsuit.[33]

(B) *Voluntary Nonsuit or Discontinuance.* Where the first suit is voluntarily discontinued by plaintiff, or abandoned by him, a second suit is not saved from the bar of the statute, as would be the case were the dismissal the act of the court.[34]

f. Failure of Former Action — (I) *For Want of Jurisdiction.* In many jurisdictions if an action fails for want of jurisdiction of the court in which it is brought, plaintiff may commence a new suit within a year thereafter.[35] This equitable construction given the statute allowing a new action after failure of a former action cannot, however, be invoked by one who knowingly practises a

A dismissal of a case without a trial on the merits is within the equity of a statute allowing a new action within a limited time after the failure of a former "otherwise than upon the merits." Hobbs *v.* Spencer, 49 Kan. 769, 31 Pac. 702; Smith *v.* Bourbon County, 42 Kan. 264, 21 Pac. 1109 (holding, however, that the second action will be barred if not commenced within one year of the termination of the first); Hall *v.* Hurd, 40 Kan. 374, 19 Pac. 802; Seaton *v.* Hixon, 35 Kan. 663, 12 Pac. 22; Bates *v.* Sandusky, etc., R. Co., 12 Ohio St. 620; Schock *v.* Frazer, 6 Ohio Dec. (Reprint) 1078, 10 Am. L. Rec. 305; Phelps *v.* Wood, 9 Vt. 399.

33. Sherman *v.* Barnes, 8 Conn. 138; Harris *v.* Dennis, 1 Serg. & R. (Pa.) 236; Cheeny *v.* Archer, Riley (S. C.) 195.

34. *Florida.*— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

South Carolina.— Barino *v.* McGee, 3 McCord 452.

Texas.— Shields *v.* Boone, 22 Tex. 193.

Virginia.— Manuel *v.* Norfolk, etc., R. Co., 99 Va. 188, 37 S. E. 957.

West Virginia.— Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925.

United States.— Richards *v.* Maryland Ins. Co., 8 Cranch 84, 3 L. ed. 496.

See 33 Cent. Dig. tit. "Limitation of Actions," § 557.

Contra.— Under a statute providing that plaintiff may commence a new action within a year after judgment is rendered against him on any ground not concluding his right of action. Hooper *v.* Atlanta, etc., R. Co., 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931; East Tennessee Iron, etc., Co. *v.* Broyles, 95 Tenn. 612, 32 S. W. 761; Memphis, etc., R. Co. *v.* Pillow, 9 Heisk. (Tenn.) 248. See also Cole *v.* Nashville, 5 Coldw. (Tenn.) 639. But see Nicholson *v.* Lauderdale, 3 Humphr. (Tenn.) 200.

To do so would be to allow a man to take advantage of neglect, intentional or inexcusable, and still hold his adversary liable after the limit of time made by the law his ample defense. Lawrence *v.* Winifrede Coal Co., 48 W. Va. 139, 35 S. E. 925.

Dismissal on motion of plaintiff is not a "failure otherwise than upon the merits." Siegfried *v.* New York, etc., R. Co., 50 Ohio St. 294, 34 N. E. 331 [*affirming* 7 Ohio Cir. Ct. 33, 3 Ohio Cir. Dec. 649]; Irwin *v.* Lloyd, 20 Ohio Cir. Ct. 339, 11 Ohio Cir. Dec. 212.

35. *Arkansas.*— Little Rock, etc., R. Co. *v.* Manees, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45.

Georgia.— Atlanta, etc., R. Co. *v.* Wilson, 119 Ga. 781, 47 S. E. 366, holding that where plaintiff sues in a court having jurisdiction of the subject-matter, and after the bar of the statute has attached the same is dismissed, because the court has no jurisdiction of the person of defendant, the action may be renewed within six months in another court of the state having jurisdiction of the person and the subject-matter.

Kansas.— Ball *v.* Biggam, 6 Kan. App. 42, 49 Pac. 678.

Massachusetts.— Woods *v.* Houghton, 1 Gray 580 (holding that a dismissal for want of jurisdiction is a dismissal for "matter of form" within the meaning of the statute); Coffin *v.* Cottle, 16 Pick. 383.

Mississippi.— Weathersly *v.* Weathersly, 31 Miss. 662.

North Carolina.—Harris *v.* Davenport, 132 N. C. 697, 44 S. E. 406; Dalton *v.* Webster, 82 N. C. 279; Strauss *v.* Beardsley, 79 N. C. 59.

Ohio.— Pittsburgh, etc., R. Co. *v.* Bemis, 64 Ohio St. 26, 59 N. E. 745 [*affirming* 9 Ohio S. & C. Pl. Dec. 662, 7 Ohio N. P. 515].

United States.— Smith *v.* McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. ed. 986; McCormick *v.* Eliot, 43 Fed. 469; Caldwell *v.* Harding, 4 Fed. Cas. No. 2,302, 1 Lowell 326.

See 33 Cent. Dig. tit. "Limitation of Actions," § 559. And see *supra*, note 3.

Contra. — Sweet *v.* Chattanooga Electric Light Co., 97 Tenn. 252, 36 S. W. 1090. And *compare* Donnell *v.* Gatchell, 38 Me. 217, holding that the dismissal of a suit because it was brought in the wrong county is not a failure for "matter of form."

Dismissal for want of jurisdiction is similar to a nonsuit, and a new action may be brought within the time limited. Harris *v.* Davenport, 132 N. C. 697, 44 S. E. 406.

Dismissal of chancery suit on ground of existence of adequate remedy at law.— A suit in chancery which is dismissed because plaintiff's claim is exclusively cognizable at law cannot be pleaded to prevent the operation of the statute of limitations against his claim. Gray *v.* Berryman, 4 Munf. (Va.) 181; Smith *v.* Cincinnati, etc., R. Co., 11 Fed. 289. But see Burgoyne *v.* Moore, 12 Ohio Cir. Ct. 31, 5 Ohio Cir. Dec. 522.

No distinction can be drawn between a failure in a former suit because of the lack

fraud on the jurisdiction of the court.[36] So where a plaintiff has no right or cause of action against a defendant, and no claim, title, or interest in the subject-matter stated in his petition, and brings his action in a court that has no jurisdiction of defendant, the pendency of such an action will not entitle him to the saving provision of the statute.[37]

(II) *FOR DEFECT OF PARTIES.* The failure of a former suit, because prosecuted in the name of the wrong person as plaintiff, brought to recover the same claim sought to be recovered in a later suit by the proper person as plaintiff, is a failure within a statute allowing a new action to be brought within a limited time after the failure of a former action.[38] If, however, the former action fails because the legal title to the contract on which plaintiff sues is in another person, such failure is not within the saving clause of the statute.[39]

(III) *FOR WANT OF, OR DEFECTS IN, PROCESS OR SERVICE*—(A) *When Within Express Saving of Statute.* In some states it is expressly provided by statute that if, in an action commenced within the time limited, the writ fails of sufficient service by unavoidable accident, plaintiff may have a certain time from the determination of the original suit to commence a new action.[40] The term "unavoidable accident" must have a reasonable construction, and does not mean to limit the case to a cause which no possible diligence could guard against; but an unforeseen cause preventing the service of the writ where due diligence has been used by the creditor to commence his action seasonably, by the due and ordinary course of law.[41] An utter failure of service is as much within the contemplation of the statute as a case in which something is done toward service, but not enough to amount to a legal service.[42]

(B) *When Not Within Express Saving of Statute*—(1) DEFECTIVE PROCESS OR SERVICE. Where the case is not within the express exception of the statute, it has been held that failure of an action for defects in process or the service thereof, as by a dismissal for want of jurisdiction of parties, is equivalent to a nonsuit,[43]

of jurisdiction of the parties, or because a jurisdictional fact, although existent, had not been stated, and a failure because the court in which the attempt had been made was without jurisdiction of the facts as they actually existed. Pittsburgh, etc., R. Co. *v.* Bemis, 64 Ohio St. 26, 59 N. E. 745.

36. Hardin *v.* Cass County, 46 Fed. 652.

37. Smith *v.* Bourbon County, 43 Kan. 619, 23 Pac. 642.

38. Wolf *v.* New Orleans Tailor-Made Pants Co., 110 La. 427, 34 So. 590; Martin *v.* Young, 85 N. C. 156; Premo *v.* Lee, 56 Vt. 60; Spear *v.* Braintree, 47 Vt. 729.

39. Bynum *v.* Memphis, etc., R. Co., 100 Ala. 311, 13 So. 910; Meath *v.* Mississippi Levee Com'rs, 109 U. S. 268, 3 S. Ct. 284, 27 L. ed. 930.

40. Marble *v.* Hinds, 67 Me. 203; Brown *v.* Houdlette, 10 Me. 399 (holding that such a statute does not apply to actions on bond or specialty); Bullock *v.* Dean, 12 Metc. (Mass.) 15; Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487; Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

To what actions applicable.—Such a statute applies only to actions duly commenced within the time limited, and any action not so commenced cannot be renewed, even though it fails for want of service. Johnson *v.* Mead, 73 Mich. 326, 41 N. W. 487. Me. St. (1821) c. 63, § 11, permitting a new suit where the writ has casually failed of service, applies only to the actions mentioned in that chapter, which are limited to six years. If therefore a suit against a sheriff for default of his deputy, which is limited to four years, is not commenced within the time mentioned in the statute, although the writ fail of service by inevitable accident, the remedy is gone forever. Jewett *v.* Greene, 8 Me. 447.

41. Marble *v.* Hinds, 67 Me. 203 (holding that where plaintiff retains the writ until the day preceding the last day of service, and sends it by mail to a sheriff in another town, where, in the ordinary course of mail, it would arrive on the day of its transmission, but it does not reach the deputy in season for service, the failure of service is not by reason of unavoidable accident); Bullock *v.* Dean, 12 Metc. (Mass.) 15 (holding that where plaintiff describes the residence of his debtor as he had known it, and as it was a short time before, when he had changed it to another town and county, of which plaintiff had no knowledge, and which the officer charged with service did not seasonably discover, the failure of the action is due to unavoidable accident); Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

42. Marble *v.* Hinds, 67 Me. 203; Bullock *v.* Dean, 12 Metc. (Mass.) 15; Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

43. Harris *v.* Davenport, 132 N. C. 697, 44 S. E. 406.

or a failure otherwise than on the merits,[44] so as to confer the right to bring a new action within the time limited.

(2) FAILURE OF SERVICE. In those states in which service of process upon defendant is necessary to constitute the commencement of an action, merely filing the petition, without any service whatever, does not constitute such an action as can be renewed so as to prevent the bar of the statute.[45] Where, however, service of the writ is not essential to the commencement of an action, failure thereof for want of service is within the saving of a statute permitting a new action.[46]

(IV) *FOR DEFECTS IN PLEADINGS.* A statute, saving from the bar of the statute of limitations a second action brought within a year from the termination of the first, applies, although the complaint in the first action failed to state a cause of action.[47]

(V) *FOR MISTAKE IN FORM OF ACTION.* The failure of an action because of a mistake in the form of the remedy is held to be within a statute providing for the bringing of a new action in certain cases after the failure of a former action.[48]

(VI) *FOR NEGLIGENCE IN PROSECUTION.* The statutes of some states provide that if plaintiff fails in a suit for any cause except negligence in its prosecution, a new suit brought within a limited time thereafter shall be deemed a continuance of the first.[49] Under such a statute failure to file the petition on account of the inadvertence and forgetfulness of the attorney in the case,[50] or postponing the mailing of the same so that a slight interruption in the mail service prevents its receipt in time for filing on the date specified in the original notice,[51] is negligence. So also where plaintiff voluntarily dismisses his case not under compulsion,[52] or brings a suit prematurely, and prosecutes it to judgment, when he might at any time have dismissed without prejudice, and commenced a new action,[53] his failure in the action is because of negligence in its prosecution. Even if the statute contains no express exception in case of negligence in prosecution, in no case when the failure of an action is due to the default, wrong, or laches of plaintiff, has it

44. Meisse *v.* McCoy, 17 Ohio St. 225; Clarke *v.* Farnum, 7 R. I. 519; Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683; Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347.

No matter how bad the writ, no matter whether it is void or voidable, it is sufficient to save the second action. It is within the very reason of the statute. It is just the kind of a trouble for which the statute intended to save the second action. Ketterman *v.* Dry Fork R. Co., 48 W. Va. 606, 37 S. E. 683.

Action for wrongful death.—The limitation of two years within which an action for wrongful death must be brought is a part of the cause of action itself, and therefore such an action is not saved by a statute providing that if, in an action commenced in due time, plaintiff fail otherwise than upon the merits, a new action may be commenced within one year. Baltimore, etc., R. Co. *v.* Collins, 11 Ohio Cir. Dec. 334.

45. McClendon *v.* Hernando Phosphate Co., 100 Ga. 219, 28 S. E. 152; McGhee *v.* Gainesville, 78 Ga. 790, 3 S. E. 670; Hugh *v.* Hernandez, 25 La. Ann. 360. See also Isaacs *v.* Price, 13 Fed. Cas. No. 7,097, 2 Dill. 347.

46. Eaton *v.* Chapin, 7 R. I. 408; Taft *v.* Daggett, 6 R. I. 266.

47. Woodcock *v.* Bostic, 128 N. C. 243, 38 S. E. 881; Webb *v.* Hicks, 125 N. C. 201, 34 S. E. 395 [rehearing *denied* in 123 N. C. 244, 31 S. E. 479]; Smith *v.* McNeal, 109 U. S. 426, 3 S. Ct. 319, 27 L. ed. 986. See also James *v.* Hicks, 110 U. S. 272, 4 S. Ct. 6, 28 L. ed. 144.

48. *Alabama.*— Young *v.* Davis, 30 Ala. 213.

Arkansas.— Crow *v.* State, 23 Ark. 684.

Indiana.— Flournoy *v.* Jeffersonville, 17 Ind. 169, 79 Am. Dec. 468.

Louisiana.— Prall *v.* Peet, 3 La. 274.

Michigan.— McMillan *v.* Reaume, 137 Mich. 1, 100 N. W. 166, 109 Am. St. Rep. 666.

49. See cases cited in the following notes.

Burden of proof.— Under such a statute, before a suit can be held a continuation plaintiff must show that the failure was from such other cause. Pardey *v.* Mechanicsville, 101 Iowa 266, 70 N. W. 189.

50. Clark *v.* Stevens, 55 Iowa 361, 7 N. W. 591.

51. Conley *v.* Dugan, 105 Iowa 205, 74 N. W. 774.

52. Pardey *v.* Mechanicsville, 101 Iowa 266, 70 N. W. 189; Archer *v.* Chicago, etc., R. Co., 65 Iowa 611, 22 N. W. 894.

Submission to nonsuit on denial of motion to amend is not a dismissal for neglect to prosecute. Marx *v.* Manhattan R. Co., 10 N. Y. Suppl. 222, 24 Abb. N. Cas. 62.

53. Wilhelmi *v.* Des Moines Ins. Co., (Iowa 1896) 68 N. W. 782; Heusinkveld *v.* Capital Ins. Co., 95 Iowa 504, 64 N. W. 594.

been held sufficient to authorize the bringing of another suit after the termination of the first.[54]

(VII) *For Matter of Form.* In some states it is provided that when an action commenced in time fails "for any matter of form," a new action may be commenced within a certain time thereafter. This expression relates to technical defects in the form of action, pleadings, or proof, or to variances between the one and the other.[55] The significance of "form," when considered in reference to the prosecution of suits in courts of law, is not limited merely to the manner in which parties are to state their particular claims or grounds of defense, but extends to what has been, by legislative enactment or other legitimate authority, made the stated method or particular mode in which they shall be conducted.[56]

g. Identity of, or Change in, Parties — (I) *Parties Plaintiff.* In order to save the second action from the bar of the statute, the cause of action must be the same,[57] and plaintiff must be the same in both actions.[58] It is not essential, however, in all cases that plaintiffs in both cases should be the same *eo nomine*, but they must be substantially the same, suing in the same right, as where the first suit was by the original trustee, and the second by his successor in the trust;[59] where the first suit was by the original administrator, and the second by his successor;[60] or where the first suit was by a holder of a promissory note, and the second by the assignee pending the first suit.[61] If, however, there is no identity of right or privity of interest between plaintiffs in the first suit and plaintiffs in the second suit, the latter action is not within the spirit or the letter of the statute permitting a new action.[62]

54. Cumming *v.* Jacobs, 130 Mass. 419; Robinson *v.* Merchants' etc., Transp. Co., 16 R. I. 637, 19 Atl. 113; Anderson *v.* Bedford, 4 Coldw. (Tenn.) 464 (suit dismissed for the champerty of the complainant); Chambers *v.* Shaw, 23 Tex. 165; Shields *v.* Boone, 22 Tex. 193.

55. Memphis, etc., R. Co. *v.* Orr, 52 Miss. 541; Kerr *v.* Squires, 22 N. Brunsw. 448, holding that the failure of an action brought by the title of "the estate of the late Robert Kerr," against defendant, because the name of the executor is not stated, is a failure for matter of form.

A suit dismissed for want of security for costs is not defeated for any matter of form. Memphis, etc., R. Co. *v.* Orr, 52 Miss. 541; Hayes *v.* Stewart, 23 Vt. 622.

56. Allen *v.* Sawtelle, 7 Gray (Mass.) 165, holding that the dismissal of an action because of an accidental omission of the clerk to enter it seasonably on the docket is a defeat of the action for matter of form.

A dismissal for failure to prosecute is not a failure for matter of form. Cumming *v.* Jacobs, 130 Mass. 419.

57. See *supra*, VI, I, 9, c.

58. *Florida.*— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334, first suit by administrator and second by heirs.

Georgia.— Moss *v.* Keesler, 60 Ga. 44.

Louisiana.— Knoop *v.* Blaffer, 39 La. Ann. 23, 6 So. 9, first suit by commissioners of bank, second suit by creditors.

Mississippi.— Ross *v.* Sims, 27 Miss. 359; Ingraham *v.* Regan, 23 Miss. 213.

Missouri.— Meddis *v.* Wilson, 175 Mo. 126, 74 S. W. 984; Tiffin *v.* Leabo, 52 Mo. 49.

North Carolina.— Whetstine *v.* Wilson, 104 N. C. 385, 10 S. E. 471; Williams *v.* Council, 49 N. C. 206.

Tennessee.— Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480; East Tennessee Iron, etc., Co. *v.* Lawson, (Ch. App. 1895) 35 S. W. 6.

United States.— H. B. Claflin Co. *v.* Middlesex Banking Co., 113 Fed. 958.

See 33 Cent. Dig. tit. "Limitation of Actions," § 564.

The fact that the number of plaintiffs is larger in the first than in the second action does not prevent the operation of the proviso in favor of plaintiffs in the second action, if they were all plaintiffs in the first action. Biscoe *v.* Madden, 17 Ark 533; Whetstine *v.* Wilson, 104 N. C. 385, 10 S. E. 471. *Compare* White *v.* Moss, 92 Ga. 244, 18 S. E. 13, holding that a second action by only one of the former joint plaintiffs is not a recommencement of the former so as to save the running of the statute.

Additional plaintiffs in second action.— It has been held that the second suit may be brought by a new party, either alone or in conjunction with plaintiff in the original action, if based upon the same cause of action and title (Martin *v.* Young, 85 N. C. 156), although this has also been denied (Crow *v.* State, 23 Ark. 684).

59. James *v.* Biscoe, 10 Ark. 184; Moody *v.* Threlkeld, 13 Ga. 55.

60. Moody *v.* Threlkeld, 13 Ga. 55.

61. Anthony Inv. Co. *v.* Law, 62 Kan. 193, 61 Pac. 745 [*reversing* (App. 1899) 58 Pac. 1116]; Thornburgh *v.* Cole, 27 Kan. 490; Shively *v.* Beeson, 24 Kan. 352; Wintermute *v.* Montgomery, 11 Ohio St. 442.

62. *Florida.*— Doyle *v.* Wade, 23 Fla. 90, 1 So. 516, 11 Am. St. Rep. 334.

(II) *Parties Defendant.* Defendant in the new action need not be the same as defendant in the former action.[63] Nor is it necessary that all defendants in the first action should be sued in the second,[64] unless they were parties to a joint contract, or entitled to rights, one against another, by way of contribution, in case plaintiff recovered.[65] Where the first suit is against one of two persons jointly liable, and the second suit is against both of them, the first action is of no avail to prevent the running of the statute in favor of the person not made a defendant in the first suit.[66] It is not necessary that defendant in the two suits be sued in the same capacity.[67]

h. Reversal on Appeal or Writ of Error — (I) *In General.* It is quite generally provided by statute that if an action is commenced within due time, and after judgment for plaintiff, the same be reversed on appeal or writ of error, he may commence a new action within a limited time after such reversal.[68] Such a statute does not abridge the time of limitation, but enlarges plaintiff's privilege in case the bar has become complete pending litigation. Therefore it does not prevent the second suit after reversal, although such suit was not begun within one year, if the general statute of limitations had not run against it.[69]

(II) *Time Limited For Bringing Second Action After Reversal.* The time allowed for beginning a new action after the reversal of a judgment commences at the date of reversal, and not of the dismissal of the first action in the lower court.[70] Where, however, an appeal is taken and dismissed, limitation runs from the date of judgment in the lower court, and suit must be brought within

Georgia.— Moss *v.* Keesler, 60 Ga. 44.

Louisiana.— Knoop *v.* Blaffer, 39 La. Ann. 23, 6 So. 9, holding a former action by the commissioners of a bank against the directors, in which it was held that the liability of the directors did not accrue in favor of the bank or its liquidators, but in favor of the creditors, did not interrupt the prescription against an action by the creditors.

Mississippi.— Ross *v.* Sims, 27 Miss. 359; Ingraham *v.* Regan, 23 Miss. 213.

Missouri.— Meddis *v.* Wilson, 17 Mo. 126, 74 S. W. 984.

North Carolina.— Halsey *v.* Buckley, 3 N. C. 234, holding that there is no privity in law between the vendor and the vendee of a chose in action so as to make a suit brought by the latter available to prevent the operation of the statute against a suit afterward brought by the former.

United States.— H. B. Claflin Co. *v.* Middlesex Banking Co., 113 Fed. 958.

See 33 Cent. Dig. tit. "Limitation of Actions," § 564.

63. Williams *v.* Council, 49 N. C. 206.

64. State Bank *v.* Davis, 12 Ark. 768; State Bank *v.* Roddy, 12 Ark. 766; State Bank *v.* Gray, 12 Ark. 760; State Bank *v.* Sherrill, 12 Ark. 183; Anthony Inv. Co. *v.* Law, 62 Kan. 193, 61 Pac. 745; East Tennessee Iron, etc., Co. *v.* Lawson, (Tenn. Ch. App. 1895) 35 S. W. 456. See also Crow *v.* State, 23 Ark. 684.

65. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912; Ford *v.* Clark, 75 Ga. 612.

Where the liability of defendants is joint and several, with no right of contribution, as in libel, a second action against all of the defendants to the first suit, served upon some of those jointly suable but severally liable, is within the saving provision of a statute granting the right to bring a new action within six months after discontinuance, dismissal, or nonsuit. Cox *v.* Strickland, 120 Ga. 104, 47 S. E. 912.

66. Gray *v.* Trapnall, 23 Ark. 510; Hughes *v.* Brown, 88 Tenn. 578, 13 S. W. 286, 8 L. R. A. 480; East Tennessee Iron, etc., Co. *v.* Walton, (Tenn. Ch. App. 1895) 35 S. W. 459, holding that a bill against heirs and a widow to cancel and remove, as a cloud on title, their alleged claims to the land accruing through the laws of descent is not a continuation of an action of ejectment against the widow alone, so as to stop the running of the statute. See also Crow *v.* State, 23 Ark. 684.

67. Saunders' Succession, 37 La. Ann. 769, holding that a former suit against the same defendant personally will interrupt prescription as to a subsequent suit against him as executor.

68. Drane *v.* Hodges, 1 Harr. & M. (Md.) 518; Weathersly *v.* Weathersly, 31 Miss. 662; A. M. Stevens Lumber Co. *v.* Kansas City Lumber Co., 72 Mo. App. 248.

Statute applicable to reversal on writ of certiorari.— McOmber *v.* Chapman, 42 Mich. 117, 3 N. W. 288.

Statute not applicable to reversal of judgment for defendant.— Robinson *v.* Robinson, 3 Harr. (Del.) 8.

Discontinuance as to two defendants, thus causing a reversal of the judgment as to a third, although not within the letter of the statute, is within its spirit, and another action may be brought under the statute. Givens *v.* Robbins, 11 Ala. 156.

69. Lang *v.* Fatheree, 7 Sm. & M. (Miss.) 404.

70. Arnett *v.* Coffey, 5 Colo. App. 560, 39 Pac. 894.

the time limited thereafter, otherwise the judgment becomes conclusive and binding upon the parties.[71]

i. Action on Set-Off or Counter-Claim. Where by statute the filing of a set-off is placed on the same ground as the commencement of an action by defendant, if plaintiff discontinues his action, defendant in such action will be considered a plaintiff within a statute permitting a new action in certain cases, after termination of a former action.[72] Where, however, the pleading is not considered as the bringing of a cross action, but the mere setting up of defensive matter, the rule is otherwise.[73]

10. Civil Proceedings Other Than Actions[74] — a. In General. In order that a proceeding other than an action may have the effect of stopping the running of the statute of limitations, it must be equivalent to an action at law or a suit in equity.[75]

b. Presentation of Claim Against Estate of Insolvent or Bankrupt. The filing of a claim with an assignee for creditors is tantamount to the commencement of an action so as to stop the running of the statute of limitations.[76]

11. Proceedings in Another State. The commencement of suit in one state does not suspend the statute of limitations of another state against an action for the same demand brought in such state.[77] And the commencement of an action in one state to enforce a lien within the statutory period will not suspend the running of the statute against an action to enforce such lien brought in another state to which the property involved in the first action had been removed.[78] So a judgment or decree against heirs in a suit in one state, authorizing the sale of a

71. Martin *v.* Wayman, 38 Tex. 649.

72. Hunt *v.* Spaulding, 18 Pick. (Mass.) 521. See also Parsons *v.* Crabb, 34 U. C. Q. B. 136.

73. Cummins *v.* Colgin, 3 Port. (Ala.) 393; Liebke *v.* Thomas, 24 Mo. App. 24.

In Louisiana where a reconventional demand is set up, and by a consent judgment plaintiff's suit is dismissed, there is a voluntary abandonment of the reconventional demand, and prescription is not interrupted. Elliot *v.* Brown, 13 La. Ann. 579.

74. Presentation of claim against estate of decedent as stopping the running of the statute of limitations see 18 Cyc. 930 *et seq.*

75. The presentation of a claim against a state or county to a board appointed by the legislature to examine into its merits is equivalent to an action between citizens, so as to stop the running of limitations against the claim. Coxe *v.* State, 144 N. Y. 396, 39 N. E. 400; Corkings *v.* State, 99 N. Y. 491, 2 N. E. 454, 3 N. E. 660; Marsh *v.* St. Croix County Sup'rs, 42 Wis. 355.

Merely posting notices of a sale under a trust deed will not suspend the running of the statute of limitations. Blackwell *v.* Barnett, 52 Tex. 326.

A citation to require a guardian to account is not an action, either at law or in equity, within the meaning of the statute of limitations. People *v.* Stewart, 29 Ill. App. 441.

Presenting a claim to the sixth auditor of the United States treasury does not take the case out of the statute of limitations. Mississippi Cent. R. Co. *v.* U. S., 23 Ct. Cl. 27.

Presentation to the treasury department does not take a claim against the United States, twenty years old when sued on in the court of claims, out of the statute of limitations. Ihrie *v.* U. S., 21 Ct. Cl. 216.

The institution of executory proceedings on a mortgage note will interrupt prescription of the note, unless the proceedings are dismissed on motion of plaintiff. Tertrou *v.* Durand, 30 La. Ann. 1108.

76. *Alabama.*— Woodruff *v.* Winston, 68 Ala. 412.

Iowa.— Lacey *v.* Newcomb, 95 Iowa 287, 63 N. W. 704.

Massachusetts.— Guild *v.* Hale, 15 Mass. 455.

Minnesota.—Potts *v.* St. Paul Athletic Park Assoc., 84 Minn. 217, 87 N. W. 604, holding that the commencement of an action to sequestrate the property of a corporation by a creditor, and his exhibiting his claim against it, tolls the statute of limitations both as to the corporation and its stockholders.

New York.— Peck *v.* Randall, 1 Johns. 165, holding that the exhibition of the claim of a creditor against an absent or absconding debtor to his trustee is equivalent to the commencement of a suit against the debtor so as to prevent the statute from attaching.

See 33 Cent. Dig. tit. "Limitation of Actions," § 569.

77. Delaplaine *v.* Crowninshield, 7 Fed. Cas. No. 3,756, 3 Mason 329. But see Jackson *v.* Tiernan, 15 La. 485, holding that prescription is interrupted by a suit in a United States circuit court sitting in another state.

78. North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780. *Compare* Rhinehart *v.* Doswell, 6 La. Ann. 766, holding that the institution of a suit in Texas for property subsequently removed to Louisiana and sold is an interruption of

decedent's land situated there to pay his debts, will not prevent the running of the statute of limitations against a suit in another state to subject his land situated therein to the payment of the same debts.[79]

12. Failure to Commence Action in Time — a. Effect in General. Where a plaintiff fails to commence his action within the period of limitation, and the delay is not justified, the claim will be held to have become stale, and the statute will be a bar.[80]

b. Excuse For Delay. A plaintiff may meet the defense of the statute of limitations by showing that before the time fixed by statute for the bar, defendant, by his course of conduct, led plaintiff to believe that a suit to enforce his rights would be unnecessary, and thereby lulled him into a feeling of security.[81] So also concealment, fraud, or interference by defendant, by which plaintiff is prevented from bringing suit within the period of limitation, is a sufficient excuse for such failure.[82] Poverty and inability to bear the expense of litigation,[83] or the fact that the creditor is involved in litigation with third parties on which his right to sue depends,[84] is not an excuse for failure to bring suit within the statutory period.

VII. New Promise, Acknowledgment, and Part Payment.

A. New Promise and Acknowledgment — 1. General Rules. The earlier decisions with regard to the English statute of limitations[85] held that a mere acknowledgment of the debt, without a promise to pay, would not affect its operation.[86] It was next determined that an acknowledgment of a debt was evidence from which a jury might infer a promise to pay, but would not, if specially found, warrant the court to give judgment for plaintiff.[87] And then the decisions going further held that the slightest acknowledgment, whether by word or in writing, would take a case out of the statute.[88] Under the modern doctrine, however, that statutes of limitations are statutes of repose,[89] the general rule in the United States and England is that a particular case may be removed from the bar of the statute by, and for such purpose there must be, either: (1) An unconditional promise to pay the debt;[90] (2) an acknowledgment of the debt from which a promise to pay is to be implied;[91] or (3) a conditional promise to pay the debt, which is accom-

prescription in Louisiana if the suit in Texas has never been abandoned.

79. Hull *v.* Hull, 35 W. Va. 155, 13 S. E. 49, 39 Am. St. Rep. 800.

80. The Jessie Russell, 13 Fed. Cas. No. 7,298, 9 Ben. 181. See also cases cited *infra*, notes 81 *et seq.*

81. In an action for personal injuries complainant may meet a defense of limitation by showing that defendant, by promising a settlement, led him to believe that a suit to enforce his claim was unnecessary. Renackowsky *v.* Detroit Bd. of Water Com'rs, 122 Mich. 613, 81 N. W. 581; Armstrong *v.* Levan, 109 Pa. St. 177, 1 Atl. 204. See also *supra*, IV, F.

Agreement to abide by decision in another case.— A defendant will not be permitted to plead the statute of limitations when it appears that plaintiff delayed bringing his action, under an agreement with defendant that such action should abide the decision of another already instituted and involving the same merits. Daniel *v.* Edgecombe County, 74 N. C. 494.

82. See *supra*, VI, B, 21; VI, D, 2, b.

83. Voight *v.* Raby, 90 Va. 799, 20 S. E. 824.

84. Gaines *v.* Hammond, 6 Fed. 449, 2 McCrary 432.

85. St. 21 Jac. 1, c. 16.

86. Dickson *v.* Thomson, 2 Show. 126; Bland *v.* Haselrigg, 2 Vent. 151.

87. Heylin *v.* Hastings, Carth. 470, Comyns 54, 1 Ld. Raym. 421, 5 Mod. 425, 1 Salk. 29.

88. Quantock *v.* England, 5 Burr. 2628, 2 W. Bl. 702; Rucker *v.* Hannay, 4 East 604 note; Bryan *v.* Horseman, 4 East 599; Clarke *v.* Bradshaw, 3 Esp. 155.

89. See *supra*, I, D.

90. See *infra*, VII, A, 6. And see cases cited in the following note.

91. *Alabama.*— Bradford *v.* Spyker, 32 Ala. 134.

Arkansas.— Grant *v.* Ashley, 12 Ark. 762; Brown *v.* State Bank, 10 Ark. 134.

California.— Rounthwaite *v.* Rounthwaite, 136 Cal. 20, 68 Pac. 304; Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Colorado.— Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

Connecticut.—Ensign *v.* Batterson, 68 Conn. 298, 36 Atl. 51.

Delaware.— Whitaker *v.* Parker, 2 Harr. 413; Lieberman *v.* Wilmington First Nat. Bank, (1898) 40 Atl. 382; Grimshaw *v.* Mayor, 5 Del. Ch. 183; Sparks *v.* Farmers' Bank, 3 Del. Ch. 275.

District of Columbia.— Bean *v.* Wheatley,

panied by a sufficient showing that the condition upon which the promise is made to

13 App. Cas. 473; Otterbach *v.* Brown, 2 MacArthur 541.

Georgia.— Lambert *v.* Doyle, 117 Ga. 81, 43 S. E. 416; Kelly *v.* Strouse, 116 Ga. 872, 43 S. E. 280; Rudolph *v.* Sellers, 106 Ga. 485, 32 S. E. 599; Norrington *v.* Philip, 66 Ga. 255; Dickinson *v.* McCamy, 5 Ga. 486, 48 Am. Dec. 298.

Illinois.—Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 [*affirming* 60 Ill. App. 398]; Carroll *v.* Forsyth, 69 Ill. 127; Dickerson *v.* Sutton, 40 Ill. 403; Ayers *v.* Richards, 12 Ill. 146; Kimmel *v.* Schwartz, 1 Ill. 278; Hahn *v.* Gates, 102 Ill. App. 385; Boyter *v.* Atkinson, 96 Ill. App. 580; Lash *v.* Bozarth, 78 Ill. App. 196; Treadway *v.* Treadway, 5 Ill. App. 478; Teessen *v.* Camblin, 1 Ill. App. 424.

Indiana.—Goldsby *v.* Gentle, 5 Blackf. 436; Park *v.* Park, 32 Ind. App. 642, 70 N. E. 493.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418; Chambers *v.* Garland, 3 Greene 322.

Kentucky.— Chism *v.* Barnes, 104 Ky. 310, 47 S. W. 232, 875, 20 Ky. L. Rep. 569; Fischer *v.* Hess, 9 B. Mon. 614; French *v.* Frazier, 7 J. J. Marsh. 425; Ormsby *v.* Letcher, 3 Bibb 269; Schonbachler *v.* Schonbachler, 57 S. W. 232, 22 Ky. L. Rep. 314.

Louisiana.— Union Nat. Bank *v.* Evans, 43 La. Ann. 372, 9 So. 44; Ross *v.* Adams, 23 La. Ann. 621; Marqueze *v.* Bloom, 22 La. Ann. 328; Elliott *v.* Brown, 13 La. Ann. 579.

Maine.— Johnston *v.* Hussey, 89 Me. 488, 36 Atl. 993; Boothby *v.* Bennett, 73 Me. 117; Brown *v.* Edes, 37 Me. 318; Deshon *v.* Eaton, 4 Me. 413; Miller *v.* Lancaster, 4 Me. 159; Perley *v.* Little, 3 Me. 97.

Maryland.— Dawson *v.* King, 20 Md. 442; Stockett *v.* Sasscer, 8 Md. 374; Mitchell *v.* Sellman, 5 Md. 376; Frey *v.* Kirk, 4 Gill & J. 509, 23 Am. Dec. 581; Oliver *v.* Gray, 1 Harr. & G. 204.

Massachusetts.—Wald *v.* Arnold, 168 Mass. 134, 46 N. E. 419; Rhoades *v.* Allen, 10 Gray 35; Bailey *v.* Crane, 21 Pick. 323; Gold *v.* Whitcomb, 14 Pick. 188; Cambridge *v.* Hobart, 10 Pick. 232; Bangs *v.* Hall, 2 Pick. 368, 13 Am. Dec. 437.

Michigan.— Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145.

Minnesota.— Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766; Drake *v.* Sigafoos, 39 Minn. 367, 40 N. W. 257; Denny *v.* Marrett, 29 Minn. 361, 13 N. W. 148.

Mississippi.— Fletcher *v.* Gillan, 62 Miss. 8; Eckford *v.* Evans, 56 Miss. 18.

Missouri.—Wells *v.* Hargrave, 117 Mo. 563, 23 S. W. 885; McLean *v.* Thorp, 4 Mo. 256; Monroe *v.* Herrington, 110 Mo. App. 509, 85 S. W. 1002.

Montana.— Howes *v.* Lynde, 7 Mont. 545, 19 Pac. 249.

Nebraska.— Ashby *v.* Washburn, 23 Nebr. 571, 37 N. W. 267; Johnson *v.* Ghost, 11 Nebr. 414, 8 N. W. 391; Cook *v.* Farley, 1 Nebr. (Unoff.) 540, 95 N. W. 683.

New Hampshire.— Rossiter *v.* Colby, 71 N. H. 386, 52 Atl. 927; Strafford Sav. Bank *v.* Church, 69 N. H. 582, 44 Atl. 105; Douglas *v.* Elkins, 28 N. H. 26; Kelley *v.* Sanborn, 9 N. H. 46; Russell *v.* Copp, 5 N. H. 154; Rice *v.* Wilder, 4 N. H. 336.

New York.— Connecticut Trust, etc., Deposit Co. *v.* Wead, 172 N. Y. 497, 65 N. E. 261 [*modifying* 58 N. Y. App. Div. 493, 69 N. Y. Suppl. 518]; Wakeman *v.* Sherman, 9 N. Y. 85; Bloodgood *v.* Bruen, 8 N. Y. 362; Watkins *v.* Jones, 63 Hun 106, 17 N. Y. Suppl. 619; Davis *v.* Noyes, 61 Hun 87, 15 N. Y. Suppl. 431; Turner *v.* Martin, 4 Rob. 661; Cocks *v.* Weeks, 7 Hill 45; Purdy *v.* Austin, 3 Wend. 187.

North Carolina.— Hussey *v.* Kirkman, 95 N. C. 63; Kirby *v.* Mills, 78 N. C. 124, 24 Am. Rep. 460; Gilmer *v.* McMurray, 52 N. C. 479; Rainey *v.* Link, 25 N. C. 376, 40 Am. Dec. 411; Smallwood *v.* Smallwood, 19 N. C. 330; Peebles *v.* Mason, 13 N. C. 367; Ferguson *v.* Taylor, 2 N. C. 20.

Ohio.— Goodrich *v.* Case, 68 Ohio St. 187, 67 N. E. 295.

Oklahoma.— Andrew *v.* Kennedy, 4 Okla. 625, 46 Pac. 485.

Pennsylvania.—Hughes' Estate, 176 Pa. St. 387, 35 Atl. 244; Keener *v.* Zartman, 144 Pa. St. 179, 22 Atl. 889; Shaeffer *v.* Hoffman, 113 Pa. St. 1, 4 Atl. 39; Wambold *v.* Hoover, 110 Pa. St. 9, 20 Atl. 404; Montgomery *v.* Cunningham, 104 Pa. St. 349; McClelland *v.* West, 59 Pa. St. 487; Beck *v.* Beck, 25 Pa. St. 124; Farley *v.* Kustenbader, 3 Pa. St. 418; Brown *v.* Campbell, 1 Serg. & R. 176; Gerhard *v.* Gerhard, 2 Pa. Cas. 449, 4 Atl. 55; Franklin *v.* Franklin, 22 Pa. Super. Ct. 463; Foringer *v.* Sisson, 14 Pa. Super. Ct. 266; Beal *v.* Adams Express Co., 13 Pa. Super. Ct. 143; McCahan *v.* Smith, 9 Pa. Super. Ct. 318; Kline *v.* Seidel, 1 Pa. Super. Ct. 22, 37 Wkly. Notes Cas. 310; Mewes' Estate, 24 Pa. Co. Ct. 429; Dick *v.* Mahoney, 21 Pa. Co. Ct. 241; Boss *v.* Hershman, 33 Leg. Int. 306.

South Carolina.— Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298; Patton *v.* Magrath, 1 McMull. 212; Young *v.* Monpoey, 2 Bailey 278.

Tennessee.— Thompson *v.* French, 10 Yerg. 452; Crowder *v.* Nichol, 9 Yerg. 453.

Texas.— Krueger *v.* Krueger, 76 Tex. 178, 12 S. W. 1004, 7 L. R. A. 72; Gathright *v.* Wheat, 70 Tex. 740, 9 S. W. 76; Aldrete *v.* Demitt, 32 Tex. 575; Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661; Crawford County Bank *v.* Henry, (Civ. App. 1897) 41 S. W. 201; Windom *v.* Howard, (Civ. App. 1894) 26 S. W. 175; Thompson *v.* Texas Land, etc., Co., (Civ. App. 1893) 24 S. W. 856.

Utah.— Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652.

Vermont.— Smith *v.* Purmort, 63 Vt. 378, 20 Atl. 928; Brayton *v.* Rockwell, 41 Vt. 621; White *v.* Dow, 23 Vt. 300; Carruth *v.* Paige, 22 Vt. 179.

Virginia.— Liskey *v.* Paul, 100 Va. 764, 42 S. E. 875.

depend has been performed.[92] In some jurisdictions by statute, however, it is provided that a mere acknowledgment of the debt is sufficient to remove the bar, and under such statutes it is unnecessary that the acknowledgment be such as to raise an implied promise to pay.[93] A cause of action may be revived by a new promise or acknowledgment, although the statute contains no provision therefor;[94] and a statute providing for the revival of causes of action founded upon contract by an admission that the debt is unpaid, as well as by a new promise to pay the same, amounts simply to a declaration of the common-law rule.[95] An acknowledgment or promise which will remove the bar of the statute at law will have the same effect in equity.[96] It is not necessary that the attention of the debtor be called to the fact that the debt is barred in order that a new promise may revive it.[97]

2. ACTIONS TO WHICH RULES ARE APPLICABLE. Only actions of assumpsit can be taken out of the statute of limitations by a new promise or acknowledgment.[98] An action of debt is not taken out of the operation of the statute by an acknowl-

Washington.— Liberman *v.* Gurensky, 27 Wash. 410, 67 Pac. 998.

United States.—Shepherd *v.* Thompson, 122 U. S. 231, 7 S. Ct. 1229, 30 L. ed. 1156; Walsh *v.* Mayer, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338; Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Wetzell *v.* Bussard, 11 Wheat. 309, 6 L. ed. 481; Bullion, etc., Bank *v.* Hegler, 93 Fed. 890; McAleer *v.* Clay County, 38 Fed. 707; Archer *v.* Poor, 1 Fed. Cas. No. 509, 5 Cranch C. C. 542; Barlow *v.* Barner, 2 Fed. Cas. No. 998, 1 Dill. 418; Cadmus *v.* Polhamus, 5 Fed. Cas. No. 2,282*a*.

England.— *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130; Richardson *v.* Barry, 29 Beav. 22, 54 Eng. Reprint 533; Fearn *v.* Lewis, 6 Bing. 349, 8 L. J. C. P. O. S. 95, 4 M. & P. 1, 31 Rev. Rep. 434, 19 E. C. L. 162; Fearn *v.* Lewis, 4 C. & P. 173, 19 E. C. L. 462; Brigstocke *v.* Smith, 1 Cromp. & M. 483, 2 L. J. Exch. 187, 3 Tyrw. 445; *In re* Hindmarsh, 1 Dr. & Sm. 129, 1 L. T. Rep. N. S. 475, 8 Wkly. Rep. 203, 62 Eng. Reprint 327; Williams *v.* Griffith, 3 Exch. 335, 18 L. J. Exch. 210; Cockrill *v.* Sparkes, 1 H. & C. 699, 9 Jur. N. S. 307, 32 L. J. Exch. 118, 7 L. T. Rep. N. S. 752, 11 Wkly. Rep. 428; Cripps *v.* Davis, 13 L. J. Exch. 217, 12 M. & W. 159; Martin *v.* Knowles, 2 L. J. K. B. 100, 1 N. & M. 421, 28 E. C. L. 544.

Canada.— King *v.* Rogers, 1 Ont. L. Rep. 69; Young *v.* Moore, 23 U. C. Q. B. 151; Smith *v.* Thorne, 18 U. C. Q. B. 143; Carpenter *v.* Vanderlip, (East T. 3 Vict.) R. & J. Dig. 169.

See 33 Cent. Dig. tit. "Limitation of Actions," § 605.

Sufficiency of acknowledgment see *infra*, VII, A, 7.

92. See *infra*, VII, A, 8.

93. See *infra*, VII, A, 7, a.

94. Penley *v.* Waterhouse, 3 Iowa 418; Kuhn *v.* McKay, 7 Wyo. 42, 49 Pac. 473, 51 Pac. 205.

The original general statute of limitations, 21 Jac. 1, c. 16, made no provision for the revival of a cause of action barred by its terms, but in recognition of the moral obligation to pay debts without regard to the efflux of time the courts declared that notwithstanding the statute if a debtor acknowledged his debt as an existing liability or promised to pay it it was revived and continued as a binding and enforceable obligation. Mountstephen *v.* Brooke, 3 B. & Ald. 141, 5 E. C. L. 90; Swann *v.* Sowell, 2 B. & Ald. 759; Tanner *v.* Smart, 6 B. & C. 603, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274; Frost *v.* Bengough, 1 Bing. 266, 1 L. J. C. P. O. S. 96, 25 Rev. Rep. 621, 8 E. C. L. 501; Yea *v.* Fouraker, 2 Burr. 1099; Heylin *v.* Hastings, Carth. 470, Comyns 54, 1 Ld. Raym. 421, 5 Mod. 425, 1 Salk. 29; Whitcomb *v.* Whiting, Dougl. (3d ed.) 652; Leaper *v.* Tatton, 16 East 420; Bryan *v.* Horseman, 4 East 599; Dowthwaite *v.* Tibbut, 5 M. & S. 75; Rowcroft *v.* Lomas, 4 M. & S. 457; Lloyd *v.* Maund, 2 T. R. 760.

95. Penley *v.* Waterhouse, 3 Iowa 418.

96. Harris *v.* Mills, 28 Ill. 44, 81 Am. Dec. 259; Ogden *v.* Wentworth, 68 Ill. App. 94.

97. O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081.

But where there is no moral obligation as in the case of a surety a promise made in ignorance of a discharge from legal liability will not be legally binding unless based on a sufficient consideration. Chapman *v.* Stockwell, 18 B. Mon. (Ky.) 650.

98. Moses *v.* Taylor, 6 Mackey (D. C.) 255; Goodwyn *v.* Goodwyn, 16 Ga. 114; Exeter Bank *v.* Sullivan, 6 N. H. 124; Rice *v.* Wilder, 4 N. H. 336; A'Court *v.* Cross, 3 Bing. 329, 4 L. J. C. P. O. S. 79, 11 Moore C. P. 198, 11 E. C. L. 165. By a new promise a cause of action to which the statute of limitation of twenty years is applicable may be revived. Von Hemert *v.* Porter, 11 Metc. (Mass.) 210; 3 & 4 Wm. IV, c. 42, § 5.

"The doctrine relating to acknowledgments applies only to cases founded upon assumpsit, and has no application where the action does not rest upon a promise." Wood Lim. § 66.

Book debt.— The principle of acknowledgment is applicable to an action of book debt. Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

A debt secured by bond or bill single does not come within the principle which allows a direct admission of a previous subsisting

edgment of the debt,[99] but even where the statute of limitations provides that no specialty shall be good after a certain period of years an express promise to pay the debt constitutes a new cause of action and the specialty may be used as evidence to establish a consideration therefor.[1] An action on a judgment is not an action on a contract, and therefore the bar of the statute of limitations is not removed by a promise or acknowledgment of liability.[2] If the right of action in a case of tort be once barred, no subsequent acknowledgment will take it out of the express language of the statute of limitations;[3] but a new promise will revive an implied promise arising from the receipt of the proceeds of sale of converted chattels.[4]

3. Time When Promise or Acknowledgment May Be Made — a. May Be Made Before or After Bar. The general rule is that a new promise, whether made before or after the bar is complete, will avoid the operation of the statute of limitations.[5]

debt which the party is liable and willing to pay to remove the bar of the statute of limitations. Crawford *v.* Childress, 1 Ala. 482.

A suit of foreclosure or for the sale of mortgaged premises is for the recovery of money due upon land within Const. St. (U. C.) c. 88, § 24, permitting a part payment or acknowledgment to toll the statute of limitations with regard to such actions. Barwick *v.* Barwick, 21 Grant Ch. (U. C.) 39.

99. Downer *v.* Shaw, 28 N. H. 151.

1. St. Mark's Evangelical Lutheran Church *v.* Miller, 99 Md. 23, 57 Atl. 644; Wright *v.* Gilbert, 51 Md. 146; Leonard *v.* Hughlett, 41 Md. 380; Young *v.* Mackall, 4 Md. 362; Lamar *v.* Manro, 10 Gill & J. (Md.) 50.

2. *Indiana.*— Niblack *v.* Goodman, 67 Ind. 174.

Louisiana.— Chapman *v.* Citizens' Bank, 31 La. Ann. 395; Favrot *v.* Bates, McGloin 130. But see Patrick's Succession, 30 La. Ann. 1071.

Mississippi.— Berkson *v.* Cox, 73 Miss. 339, 18 So. 934, 55 Am. St. Rep. 539.

North Carolina.—Taylor *v.* Spivey, 33 N. C. 427.

United States.— McAleer *v.* Clay Co., 38 Fed. 707.

See 33 Cent. Dig. tit. "Limitation of Actions," § 574.

Contra.—Carshore *v.* Huyck, 6 Barb. (N. Y.) 583; Olcott *v.* Scales, 3 Vt. 173, 21 Am. Dec. 585.

An action to recover a sum of money secured by judgment may be kept alive by an acknowledgment in writing within twenty years under Nova Scotia Rev. St. c. 112, § 21. Naugler *v.* Jenkins, 32 Nova Scotia 333.

3. *Georgia.*— Goodwyn *v.* Goodwyn, 16 Ga. 114.

Iowa.— Peterson *v.* Breitag, 88 Iowa 418, 55 N. W. 86.

Maryland.— Galligher *v.* Hollingsworth, 3 Harr. & M. 122.

Michigan.— Vickers *v.* Stoneman, 73 Mich. 419, 41 N. W. 495, slander.

New York. — Oothout *v.* Thompson, 20 Johns. 277, action on the case for deceit.

Pennsylvania.— See Armstrong *v.* Levan, 109 Pa. St. 177, 1 Atl. 204, holding a particular promise to operate as an estoppel.

South Carolina.— Avant *v.* Sweet, 1 Brev. 228.

Tennessee.— Ott *v.* Whitworth, 8 Humphr. 494.

England.— Short *v.* McCarthy, 3 B. & Ald. 626, 22 Rev. Rep. 503, 5 E. C. L. 360; Hurst *v.* Parker, 1 B. & Ald. 92 (action for trespass); Whitehead *v.* Howard, 2 B. & B. 372, 5 Moore C. P. 105, 23 Rev. Rep. 471, 6 E. C. L. 187.

See 33 Cent. Dig. tit. "Limitation of Actions," § 574.

4. Moses *v.* Taylor, 6 Mackey (D. C.) 255.

5. *California.*— If the acknowledgment is made before the bar the original contract continues, and if made after the bar it creates a new contract and cause of action: Newhall *v.* Hatch, 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673; Southern Pac. Co. *v.* Prosser, 122 Cal. 413, 55 Pac. 145; London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179; Curtis *v.* Sacramento, 70 Cal. 412, 11 Pac. 748; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Connecticut.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160. But see Gustin *v.* Brattle, Kirby 299, decided under an earlier statute.

Delaware.— State *v.* Whitaker, 4 Harr. 527 note; Newlin *v.* Duncan, 1 Harr. 204, 25 Am. Dec. 66; Duncan *v.* Newlin, 1 Harr. 109.

Florida.— Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276.

Illinois.— Keener *v.* Crull, 19 Ill. 189; Kimmel *v.* Schwartz, 1 Ill. 278. See also Ziegler *v.* Tennery, 23 Ill. App. 133.

Iowa.— McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101; Lindsey *v.* Lyman, 37 Iowa 206; Penley *v.* Waterhouse, 3 Iowa 418.

Kentucky.— In Kentucky the old cause is continued by a new promise made before the bar, but after the bar only the new promise is a basis of action. Gilmore *v.* Green, 14 Bush 772; Ogden *v.* Redd, 13 Bush 581; Carr *v.* Robinson, 8 Bush 269; Hopkins *v.* Stout, 6 Bush 375.

Maryland.— In this state the rule is that in case of a simple contract the remedy is revived on the original cause of action, and it

b. Acknowledgment Made After Suit Brought. There is a conflict as to an acknowledgment made after suit brought, some courts holding that it is sufficient to revive a barred debt,[6] while others maintain that it is ineffectual.[7]

c. Promise Made on Sunday. There is also a conflict as to the availability of a promise made on Sunday. In some jurisdictions it is held ineffectual;[8] while in others it is held to be of no avail.[9]

4. CONSIDERATION. The moral obligation to pay a debt is a sufficient legal consideration for a subsequent new promise to pay it, made either before or after the bar of the statute is complete;[10] and the new promise, based upon such moral

must be declared on (Felty *v.* Young, 18 Md. 163; Johnson *v.* Evans, 8 Gill 155, 50 Am. Dec. 669; Guy *v.* Tams, 6 Gill 82; Oliver *v.* Gray, 1 Harr. & G. 204; Barney *v.* Smith, 4 Harr. & J. 485, 7 Am. Dec. 679); and in case of specialty the remedy is on the new promise, the specialty being useful only as evidence of consideration (Felty *v.* Young, *supra*). But it was held that a mortgage was revived by a new promise. Brown *v.* Hardcastle, 63 Md. 484.

Massachusetts.— Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171; Little *v.* Blunt, 9 Pick. 488; Fiske *v.* Needham, 11 Mass. 452; Baxter *v.* Penniman, 8 Mass. 133.

Missouri.— Chidsey *v.* Powell, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267; Mastin *v.* Branham, 86 Mo. 643; Boyd *v.* Hurlbut, 41 Mo. 264; Harper *v.* Eubank, 32 Mo. App. 258.

New Hampshire.— Pickering *v.* Frink, 62 N. H. 342; Trumball *v.* Tilton, 21 N. H. 128; Betton *v.* Cutts, 11 N. H. 170.

New York.— Winchell *v.* Hicks, 18 N. Y. 558 [*affirming* 21 Barb. 448]; Esselstyn *v.* Weeks, 12 N. Y. 635; Philips *v.* Peters, 21 Barb. 351; Turner *v.* Martin, 4 Rob. 661; Allen *v.* Trisdorfer, 15 Daly 1, 4 N. Y. Suppl. 896; Wright *v.* Parmenter, 23 Misc. 629, 52 N. Y. Suppl. 99; Pinkerton *v.* Bailey, 8 Wend. 600.

North Carolina.— McCurry *v.* McKesson, 49 N. C. 510; Brannock *v.* Bushinell, 49 N. C. 33; Thompson *v.* Gilreath, 48 N. C. 493; Morrison *v.* Morrison, 14 N. C. 402.

Ohio.— Coffin *v.* Secor, 40 Ohio St. 637; Stephenson *v.* Line, 7 Ohio Cir. Ct. 147, 7 Ohio Cir. Dec. 35 [*affirmed* in 54 Ohio St. 645, 47 N. E. 1118]. The earlier rule was to the contrary. Kelly *v.* Wiseman, 2 Disn. 418; Brooks *v.* Otis, 2 Ohio Dec. (Reprint) 355, 2 West. L. Month. 490; Wood *v.* Ward, 1 Ohio Dec. (Reprint) 589, 10 West. L. J. 505; Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West. L. J. 385.

Pennsylvania.— Yaw *v.* Kerr, 47 Pa. St. 333; Hazlebacker *v.* Reeves, 9 Pa. St. 258; Levy *v.* Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650.

Texas.— See Montague County *v.* Meadows, 21 Tex. Civ. App. 256, 51 S. W. 556.

Vermont.— Carlton *v.* Coffin, 27 Vt. 496; Gailer *v.* Grinnel, 2 Aik. 349.

Virginia.—Beall *v.* Edmondson, 3 Call 514.

See 33 Cent. Dig. tit. "Limitation of Actions," § 616.

Sufficiency of new promise or acknowledgment made before or after bar: By mortgagor see *infra*, VII, A, 10, g. By vendee see *infra*, VII, A, 10, g. By partner see *infra*, VII, A, 10, e.

6. *Georgia.*— Love *v.* Hackett, 6 Ga. 486.

Maryland.— Oliver *v.* Gray, 1 Harr. & G. 204.

New York.— Danforth *v.* Culver, 11 Johns. 146, 6 Am. Dec. 361.

Vermont.— Stevens *v.* Hewitt, 30 Vt. 262.

England.— Yea *v.* Fouraker, 2 Burr. 1099.

See 33 Cent. Dig. tit. "Limitation of Actions," § 616.

7. Bradford *v.* Spyker, 32 Ala. 134; McMillan *v.* Leeds, 58 Kan. 815, 49 Pac. 159; Martin *v.* Jennings, 52 S. C. 371, 29 S. E. 807; Winyaw Indigo Soc. *v.* Kidd, Dudley (S. C.) 115; Bateman *v.* Pinder, 2 Q. B. 574, 2 G. & D. 790, 11 L. J. Q. B. 281, 43 E. C. L. 873. *Compare* Gilkyson *v.* Larue, 6 Watts & S. (Pa.) 213.

8. Ayres *v.* Bane, 39 Iowa 518; Thomas *v.* Hunter, 29 Md. 406.

9. Bumgardner *v.* Taylor, 28 Ala. 687; Haydock *v.* Tracy, 3 Watts & S. (Pa.) 507; Matter of Linn, 2 Pearson (Pa.) 487.

10. *California.*— Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40.

Georgia.— Pittman *v.* Elder, 76 Ga. 371; Comer *v.* Allen, 72 Ga. 1; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306; Brewster *v.* Hardeman, Dudley 138.

Illinois.— Keener *v.* Crull, 19 Ill. 189.

Kentucky.— Tolle *v.* Smith, 98 Ky. 464, 33 S. W. 410, 17 Ky. L. Rep. 1063; Hopkins *v.* Stout, 6 Bush 375; Emmons *v.* Overton, 18 B. Mon. 643; Ditto *v.* Ditto, 4 Dana 502; Head *v.* Manners, 5 J. J. Marsh 255.

Louisiana.—Jamison *v.* Ludlow, 3 La. Ann. 492.

Maine.— Peavey *v.* Brown, 22 Me. 100.

Maryland.— Stockett *v.* Sasscer, 8 Md. 374.

Massachusetts.— Little *v.* Blunt, 9 Pick. 488.

Michigan.—Koons *v.* Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438.

Mississippi.— Proctor *v.* Hart, 72 Miss. 288, 16 So. 595.

New York.— Danforth *v.* Culver, 11 Johns. 146, 6 Am. Dec. 361.

Ohio.— Hill *v.* Henry, 17 Ohio 9.

Pennsylvania.— Bolton *v.* King, 105 Pa. St. 78; Shreiner *v.* Cummins, 63 Pa. St. 374; Hazlebacker *v.* Reeves, 9 Pa. St. 258 [*overruling* so far as in conflict Morgan *v.* Walton, 4 Pa. St. 321; Case *v.* Cushman, 1 Pa. St. 241]; Forney *v.* Benedict, 5 Pa. St. 225 [*limiting* Case *v.* Cushman, 1 Pa. St.

obligation, is binding upon the debtor and may be shown in avoidance of the bar of the statute of limitations.[11]

5. Identification of the Debt — a. General Rule Requiring Certainty. The general rule is that an acknowledgment or promise to pay, in order to take the debt out of the statute, must satisfactorily and certainly appear to refer to the very debt in question.[12]

241]; Gest *v.* Heiskell, 5 Rawle 134; Levy *v.* Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650.

South Carolina.— Hayes *v.* Clinkscales, 9 S. C. 441; Goudy *v.* Gillam, 6 Rich. 28; McKelvey *v.* Tate, 3 Rich. 339; Sims *v.* Radcliffe, 3 Rich. 287; Lomax *v.* Spierin, Dudley 365; Reigne *v.* Desportes, Dudley 118; Allcock *v.* Ewen, 2 Hill 326.

Tennessee.— Jordan *v.* Jordan, 85 Tenn. 561, 3 S. W. 896.

Texas.— Interstate Bldg., etc., Assoc. *v.* Goforth, 94 Tex. 259, 59 S. W. 871; Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483; Womack *v.* Womack, 8 Tex. 397, 58 Am. Dec. 119; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

Utah.— Ireland *v.* Mackintosh, 22 Utah 296, 61 Pac. 901.

Vermont.— Giddings *v.* Giddings, 51 Vt. 227, 31 Am. Rep. 682.

Virginia.— Beall *v.* Edmondson, 3 Call 514.

West Virginia.— Walker *v.* Henry, 36 W. Va. 100, 14 S. E. 440.

Wisconsin.— Pritchard *v.* Howell, 1 Wis. 131, 60 Am. Dec. 363.

United States.— Shepherd *v.* Thompson, 122 U. S. 231, 7 S. Ct. 1229, 30 L. ed. 1156; Kampshall *v.* Goodman, 14 Fed. Cas. No. 7,605, 6 McLean 189; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,493, 4 Wash. 86.

Canada.— See Sparham *v.* Carley, 8 Manitoba 246.

See 33 Cent. Dig. tit. "Limitation of Actions," § 592.

Promise by heirs to pay barred debt.— A debt of an ancestor which is a charge on his land, although barred by the statute of limitations, will support a subsequent promise by his heir to pay it. Grimball *v.* Mastin, 77 Ala. 553; Blakemore *v.* Blakemore, 44 S. W. 96, 19 Ky. L. Rep. 1619.

11. Keener *v.* Crull, 19 Ill. 189. And see cases cited in preceding note.

12. *Alabama.*— Pollak *v.* Billing, 131 Ala. 519, 32 So. 639; Chapman *v.* Barnes, 93 Ala. 433, 9 So. 589.

Arkansas.— Ringo *v.* Brooks, 26 Ark. 540.

California.— Pierce *v.* Merrill, 128 Cal. 473, 61 Pac. 67, 79 Am. St. Rep. 63.

Colorado.— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344; Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137.

Connecticut.— Buckingham *v.* Smith, 23 Conn. 453.

Georgia.— Walker *v.* Griggs, 32 Ga. 119; Bulloch *v.* Smith, 15 Ga. 395; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306.

Illinois.— Carroll *v.* Forsyth, 69 Ill. 127; Norton *v.* Colby, 52 Ill. 198; Keener *v.* Crull, 19 Ill. 189.

Iowa.— Where a note is barred the execution of a note for interest which contains no reference to the principal note and no admission of the principal debt, does not take the latter out of the statute. Kleis *v.* McGrath, 127 Iowa 459, 103 N. W. 371, 109 Am. St. Rep. 396, 69 L. R. A. 260.

Louisiana.— Lehman *v.* Mahier, 34 La. Ann. 319; Alter *v.* McDougal, 26 La. Ann. 245; Buard *v.* Lemée, 12 Rob. 243; Courtebray *v.* Rils, 9 Rob. 511; Conway *v.* Williams, 10 La. 568, 29 Am. Dec. 466. See also Slaughter's Succession, 108 La. 492, 32 So. 379, 58 L. L. A. 408.

Maine.— Pray *v.* Garcelon, 17 Me. 145.

Massachusetts.— Bailey *v.* Crane, 21 Pick. 323; Gibson *v.* Grosvenor, 4 Gray 606.

Minnesota.— Smith *v.* Moulton, 12 Minn. 352; Whitney *v.* Reese, 11 Minn. 138.

Mississippi.— Allen *v.* Hillman, 69 Miss. 225, 13 So. 871; Canton Female Academy *v.* Gilman, 55 Miss. 148.

Montana.— Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

New York.— Stafford *v.* Bryan, 3 Wend. 532; Clarke *v.* Dutcher, 9 Cow. 674.

North Carolina.— Hussey *v.* Kirkman, 95 N. C. 63; Faison *v.* Bowden, 76 N. C. 425; Faison *v.* Bowden, 72 N. C. 405; Loftin *v.* Aldridge, 48 N. C. 328; Long *v.* Jameson, 46 N. C. 476; McRae *v.* Leary, 46 N. C. 91; McBride *v.* Gray, 44 N. C. 420; Shaw *v.* Allen, 44 N. C. 58; Moore *v.* Hyman, 35 N. C. 272; Sherrod *v.* Bennett, 30 N. C. 309.

Pennsylvania.— Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360; Ward *v.* Jack, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. Rep. 744; Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748; Landis *v.* Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747 (where, in a suit on a note, proof that defendant said "I will pay you $600 in thirty days on the note. . . . I will pay you the rest as quick as I can," was held insufficient as there was nothing said as to the date of the note, or to its amount, or the balance due thereon, and the note was not produced); Palmer *v.* Gillespie, 95 Pa. St. 340, 40 Am. Rep. 657; Miller *v.* Baschore, 83 Pa. St. 356, 24 Am. Rep. 187; Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487; Clark *v.* Maguire, 35 Pa. St. 259; Burr *v.* Burr, 26 Pa. St. 284; Shitler *v.* Bremer, 23 Pa. St. 413; Suter *v.* Sheeler, 22 Pa. St. 308; Huff *v.* Richardson, 19 Pa. St. 388; Painter's Appeal, 3 Pa. Cas. 480, 6 Atl. 477; Marshall *v.* Brick, 16 Pa. Super. Ct. 530; McGlinchey's Estate, 11 Pa. Dist. 257; Brock's Estate, 10

b. Application of Rule — Sufficiency of Acknowledgment or Promise. In the application of the general rule, however, the cases are not always in harmony. Thus it is held that the promise or acknowledgment must itself specify or plainly refer to the particular demand or cause of action,[13] and it matters not where the uncertainty lies, whether in the acknowledgment or in the identification, its existence is equally fatal to plaintiff's recovery;[14] or that the acknowledgment should furnish the means by which the character or amount of the debt can be certainly ascertained, or refer to something from which this can be certainly determined.[15] So it is held that the new promise must arise out of facts which identify the debt with such certainty as will clearly determine its character and fix the amount

Pa. Dist. 55; Dick *v.* Mahoney, 21 Pa. Co. Ct. 241; Gordon's Estate, 3 Pa. Co. Ct. 160; 20 Wkly. Notes Cas. 31; Franklin *v.* Franklin, 10 Kulp 476.

South Carolina.—Columbia Bank *v.* Gadsden, 56 S. C. 313, 33 S. E. 575 (holding that an indorsement by the principal debtor on a summons in an action to foreclose a mortgage of an agreement to indemnify the surety against loss on the mortgage, and the execution and delivery to the surety of a mortgage of other property reciting the making of the mortgage and conditioned that it shall be void if the principa. shall pay the mortgage bond and save the surety harmless thereon, will not prevent the running of limitations as to a payment made by the surety on the mortgage indebtedness, no reference being made to such payment, and the agreement to indemnify will be construed to apply to loss or damage accruing after the execution of the agreement); Lockhart *v.* Eaves, Dudley 321. After a claim is barred the acknowledgment or promise must specify or plainly refer to some particular demand or cause of action. Brailsford *v.* James, 3 Strobh. 171; Robbins *v.* Farley, 2 Strobh. 348; Williamson *v.* King, 2 McMull. 505 (where it is said that the promise should be so explicit that the liability could be made apparent by stating the terms of the undertaking in the declaration, reference being had to the old demand for a consideration; that is, the extent of the liability must appear in the terms of the assumption); Cook *v.* Ashe, Riley 246.

West Virgina.— Holley *v.* Curry, 58 W. Va. 70, 51 S. E. 135; Quarrier *v.* Quarrier *v.* 36 W. Va. 310, 15 S. E. 154.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Young *v.* Wetzell, 30 Fed. Cas. No. 18,176, 3 Cranch C. C. 359.

Canada.— See Faulkner *v.* Archibald, 21 Nova Scotia 294.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 612, 613.

13. Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035; Slack *v.* Sexton, 113 Ga. 617, 38 S. E. 946; Kirven *v.* Thornton, 110 Ga. 276, 34 S. E. 848; Paille *v.* Plant, 109 Ga. 247, 34 S. E. 247; Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629; Gartrell *v.* Linn, 79 Ga. 700, 4 S. E. 918; Sedgwick *v.* Gerding, 55 Ga. 264 (holding that a letter in this language: "You will please to withdraw your draft of $314.37 upon me, as I cannot pay for the present. As soon as I have the money, I shall remit," is not sufficient, the draft referred to not purporting to be given in liquidation of the account sued on, and the letter not stating for what consideration the draft was drawn); Gragg *v.* Barnes, 32 Kan. 301, 4 Pac. 276 (as to a note which did not refer to a former note). The identification is to be made by the debtor at the time of the promise and the identification by mere inference of the jury from other collateral matters is not sufficient. Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360; Burr *v.* Burr, 26 Pa. St. 284. But the phase of the rule stated in the last text statement above should be considered in connection with the rules as to the admissibility of parol evidence under statutes requiring the acknowledgment or promise to be in writing. See *infra*, IX, B, C.

Letters and detached writings which do not describe the debt so that it may be identified with reasonable certainty are not enough to connect a new promise which they express or imply with the particular debt sued on. Dobson *v.* Dickson, 62 Ga. 639.

14. Ward *v.* Jack, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. Rep. 744; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748; Landis *v.* Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747; Burr *v.* Burr, 26 Pa. St. 284.

The certainty must remove all hesitation as to the debtor's meaning. Palmer *v.* Gillespie, 95 Pa. St. 340, 40 Am. Rep. 657; Wolfensberger *v.* Young, 47 Pa. St. 516; Harbold *v.* Kuntz, 16 Pa. St. 210; Morgan *v.* Walton, 4 Pa. St. 321; Gilkyson *v.* Larue, 6 Watts & S. (Pa.) 213; Magee *v.* Magee, 10 Watts (Pa.) 172.

15. *Alabama.*— Pollak *v.* Billing, 131 Ala. 519, 32 So. 639 (holding that an agreement whereby, after stating that defendant was justly indebted upon certain bills of exchange and promissory notes, he acknowledged his obligation on "all of said notes and bills as shown by the same and in the manner shown by the same" is sufficient); Chapman *v.* Barnes, 93 Ala. 433, 9 So. 589.

Illinois.— Neustacher *v.* Schmidt, 25 Ill. App. 626, as by referring to something like a promissory note wherein the amount is definitely fixed. But see Wetz *v.* Greffe, 71 Ill. App. 313.

Mississippi.— Hart *v.* Boyt, 54 Miss. 547. A statute of 1844 provided that the bar of the statute of limitations would be removed

due[16] and a general admission of unsettled matters of account between the parties,[17] or a general admission of indebtedness not referring to any particular claim, is not sufficient to support a promise to pay any particular demand.[18] But on the

by the debtor's acknowledgment that the debt was due on the original claim being presented to him. Under this it was held that the original claim must be actually presented to the debtor and acknowledged by him to be due and unpaid (Lamkin *v.* Nye, 43 Miss. 241; Shackleford *v.* Douglass, 31 Miss. 95; Lawrence *v.* Mangum, 30 Miss. 171; Adams *v.* Torrey, 26 Miss. 499; Fonte *v.* Bacon, 24 Miss. 156; Thornton *v.* Crisp, 14 Sm. & M. 52), and that the statute was complied with where the creditor was ready to present the account without actually producing it provided the creditor understood that it was present and could be produced (Brody *v.* Doherty, 30 Miss. 40).

North Carolina.— Hussey *v.* Kirkman, 95 N. C. 63; Faison *v.* Bowden, 72 N. C. 405. A writing referring to a book-account amounting to a certain sum or more, which is acknowledged and which the debtor promises to pay, is sufficient. Long *v.* Oxford, 104 N. C. 408, 10 S. E. 525. There must be a promise express or implied to pay a certain definite sum, or an amount capable of being reduced to a certainty by reference to some paper or by computation or in some other infallible mode not dependent on the agreement of the parties or on the finding of arbitrators or of a jury. Long *v.* Jameson, 46 N. C. 476; McRae *v.* Leary, 46 N. C. 91; McBride *v.* Gray, 44 N. C. 420 (where in assumpsit on a contract and on a *quantum meruit* for services rendered, testimony that defendant had said "that the plaintiff had not been paid for his services, but he intended to pay him," was held too vague); Moore *v.* Hyman, 35 N. C. 272; Arey *v.* Stephenson, 33 N. C. 86.

Pennsylvania.— Ward *v.* Jack, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. Rep. 744; Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748; Linderman *v.* Pomeroy, 142 Pa. St. 168, 215 Atl. 820, 24 Am. St. Rep. 494; Miller *v.* Baschore, 83 Pa. St. 356, 24 Am. Rep. 187; Suter *v.* Sheeler, 22 Pa. St. 308; Huff *v.* Richardson, 19 Pa. St. 388 (where it is said that if a debtor distinctly recognizes his note of hand, his bill, or a book-account, barred by the statute of limitations, and promises to pay it, he revives the debt; that in such instances the extent of the liability is readily measured by the instrument acknowledged; but that where there are mutual dealings and unsettled accounts, he who would enforce a claim against a plea of the statute must prove the acknowledgment of a fixed sum, or of a balance which admits of certain ascertainment); Harbold *v.* Kuntz, 16 Pa. St. 210; Davis *v.* Steiner, 14 Pa. St. 275, 53 Am. Dec. 547; Hazlebaker *v.* Reeves, 12 Pa. St. 264; Painter's Appeal, 3 Pa. Cas. 480, 6 Atl. 477. But see Peters' Estate, 20 Pa. Super. Ct. 223.

South Carolina.— Lockhart *v.* Eaves, Dudley 321. A letter referring to a debt on which a certain payment had been made, with an unqualified promise to pay the balance of the debt, is sufficient. Guber *v.* Richards, 61 S. C. 393, 39 S. E. 540.

West Virginia.— Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986 (holding that an acknowledgment in writing must be a clear and definite acknowledgment of a precise sum); Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 612, 613.

Identification by reference.— The identification may be as well by satisfactory reference as by explicit terms. Neustacher *v.* Schmidt, 25 Ill. App. 626 (as to account); Lockhart *v.* Eaves, Dudley (S. C.) 321.

16. Ringo *v.* Brooks, 26 Ark. 540 (an agreement to pay all the debts of a partnership without specifying plaintiff's debt); Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41; Keener *v.* Crull, 19 Ill. 189; Albers Commission Co. *v.* Sessel, 87 Ill. App. 378 [*affirmed* in 193 Ill. 153, 61 N. E. 1075].

17. Boxley *v.* Gayle, 19 Ala. 151; Faison *v.* Bowden, 72 N. C. 405. See also Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101; and *infra*, VII, A, 7, e, (II).

A clause in an equitable mortgage "to secure . . . the payment of whatever amount said . . . may owe," etc., is not sufficient to revive barred items of an unsettled account. Holley *v.* Curry, 58 W. Va. 70, 51 S. E. 135.

18. *Georgia.*— Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306, holding that where an account consisted of a variety of items covering a period of years a mere promise to settle is not sufficient.

Louisiana.— Buard *v.* Lemée, 12 Rob. 243.

Maine.— Pray *v.* Garcelon, 17 Me. 145.

Mississippi.— Canton Female Academy *v.* Gilman, 55 Miss. 148, where in an action for balances of rent for several years, a letter in effect admitting some balance due for rent, without mentioning what the balance is, or when, from what, or to whom the rent accrued, is not sufficient.

New York.— Stafford *v.* Bryan, 3 Wend. 532.

Pennsylvania.— Walfensberger *v.* Young, 47 Pa. St. 516; Shitler *v.* Bremer, 23 Pa. St. 413; McGlinchey's Estate, 11 Pa. Dist. 257.

South Carolina.— Williamson *v.* King, 2 McMull. 505, after a claim is barred.

So where more debts than one are owing from defendant to plaintiff, it must appear to which the acknowledgment or promise applies. Opp *v.* Wack, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743; Buckingham *v.* Smith, 23 Conn. 453; Walker *v.* Griggs, 32 Ga. 119; Smallwood *v.* Smallwood, 19 N. C. 330.

other hand, either where the identity of the debt is otherwise certainly apparent,[19] or where extrinsic evidence may be admitted to identify the debt,[20] the amount of the debt need not be stated.[21] In many cases the broad rule is adopted that it is enough if an indebtedness is admitted in reference to a particular subject-matter, found to apply to the demand in suit, and that an admission of indebtedness in a specific sum is not essential,[22] or even that a general admission of indebtedness is

Where there are several notes, a general acknowledgment of indebtedness will not be referred to any of the notes, none of them being identified by the acknowledgment itself. Stout *v.* Marshall, 75 Iowa 498, 39 N. W. 808; Smith *v.* Moulton, 12 Minn. 352; Whitney *v.* Reese, 11 Minn. 138.

Where various items of account are involved such a general admission is not sufficient, some of the items being barred. Allen *v.* Hillman, 69 Miss. 225, 13 So. 871; Morgan *v.* Walton, 4 Pa. St. 321. See also Cole *v.* Martin, 99 Va. 223, 37 S. E. 907.

But the items of an account need not be specified in an admission of indebtedness for merchandise in a certain amount. Yarborough *v.* Gilland, 77 Miss. 139, 24 So. 170.

19. Conway *v.* Reyburn, 22 Ark. 290; Brown *v.* State Bank, 10 Ark. 134; Kahn *v.* Crawford, 28 Misc. (N. Y.) 572, 59 N. Y. Suppl. 853. See Wetz *v.* Greppe, 71 Ill. App. 313.

Balance admitting of ascertainment.— The acknowledgment must be of a balance which admits of ready and certain ascertainment. Huff *v.* Richardson, 19 Pa. St. 388; Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174. But see the cases cited *supra*, note 13.

A promise by the debtor to pay plaintiff "every cent he owed him" identifies the debt with sufficient certainty in the absence of proof that there was any debt or account between the parties, other than the one sued on, and will not be construed as referring only to such portion of the debt as is not barred. O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081. But equivalent expressions are held insufficient in Ward *v.* Jack, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. Rep. 744; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748; Miller *v.* Bosehore, 83 Pa. St. 356, 24 Am. Rep. 187; Magee *v.* Magee, 10 Watts (Pa.) 172. And see *infra*, VII, A, 7, b.

Letters in which the debtor says he will pay every cent, and a later letter in which he states that he would like to adjust the matter by giving a note, and inquiring what sum the creditor would take in cash in settlement, are sufficient. Rumsey *v.* Settle, 120 Mich. 372, 79 N. W. 579.

20. *Iowa.*— Campbell *v.* Campbell, 118 Iowa 131, 91 N. W. 894 (where the debtor wrote inclosing a draft "which I think pays the interest on my note," the evidence tending to show that the writing on which suit was brought was the only note or written obligation held against defendant); McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101 [*citing* Sigourney First Nat. Bank *v.* Woodman, 93 Iowa 668, 62 N. W. 28, 57 Am. St. Rep. 287; Stout *v.* Marshall, 75 Iowa 498, 39 N. W. 808].

Louisiana.—Where a letter signed by a deceased debtor acknowledges an indebtedness, parol testimony may be received to show that there was no other debt between the parties than that sued on and hence that the acknowledgment must have referred to it. Tilden *v.* Morrison, 33 La. Ann. 1067; Kugler's Succession, 23 La. Ann. 455.

Massachusetts.— Barnard *v.* Bartholomew, 22 Pick. 291.

New York.— Manchester *v.* Bredner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829; Kincaid *v.* Archibald, 73 N. Y. 189; Hodnett *v.* Hodnett, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831; Fletcher *v.* Daniels, 52 N. Y. App. Div. 67, 64 N. Y. Suppl. 861. But see Stafford *v.* Bryan, 3 Wend. 532; Clarke *v.* Dutcher, 9 Cow. 674.

West Virginia.— Where the acknowledgment or promise is contained in a letter of defendant to plaintiff, it is not necessary that the amount of the debt or its date should be specified in the letter. Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.

Extrinsic evidence to identify debt see *infra*, IX, C.

21. Eastman *v.* Walker, 6 N. H. 367 (where upon the presentation of a note for payment the maker admitted that something was due on it without specifying the amount); Wright *v.* Parmenter, 23 Misc. (N. Y.) 629, 52 N. Y. Suppl. 99 (holding that, where the acknowledgment refers to a particular account which was rendered and which showed the amount, it is good); Kennett *v.* Milbank, 8 Bing. 38, 1 L. J. C. P. 8, 1 Moore & S. 102, 21 E. C. L. 435 (where the acknowledgment was held insufficient); Lechmere *v.* Fletcher, 1 Cromp. & M. 623, 2 L. J. Exch. 219, 3 Tyrw. 450. But see Dickenson *v.* Hatfield, 5 C. & P. 46, 1 M. & R. 141, 24 E. C. L. 446 (where the recovery is confined to nominal damages); Cheslyn *v.* Dalby, 10 L. J. Exch. 21, 4 Y. & C. Exch. 238 (under an admission that same balance is due "such balance to be ascertained and paid in manner hereinafter mentioned," and then providing for submitting the accounts to arbitration).

Where the amount is not fixed by the contract under which the indebtedness is claimed, and acknowledgment of indebtedness without specifying the amount, is sufficient. Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522 (when the acknowledgment was "we owe you for three years' salary"); Thompson *v.* French, 10 Yerg. (Tenn.) 452.

22. *Connecticut.*— Cook *v.* Martin, 29 Conn. 63; Lord *v.* Harvey, 3 Conn. 370.

Maine.— Dinsmore *v.* Dinsmore, 21 Me. 433.

Maryland.— Hardy *v.* Hardy, 79 Md. 9, 28

sufficient, it not appearing that there was more than one debt due from defendant to plaintiff;[23] and that such a general promise or acknowledgment of indebtedness will be taken to relate to the demand in suit, and when once proven the burden shifts to defendant to show that it relates to some other debt than the one with reference to which the promise presumably relates.[24]

6. Express Promises. An express promise to pay the debt is sufficient to remove a case from the operation of the statute,[25] in case such promise is deter-

Atl. 887; Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355; Quynn *v.* Carroll, 10 Md. 197; Peterson *v.* Ellicott, 9 Md. 52.

Massachusetts.— Where an account is founded on a mutual account between the parties, consisting of numerous charges and credits, extending through a series of years, and no rests having been made, nor any balances struck, an acknowledgment will be construed to apply to the entire account barred and unbarred. Barnard *v.* Bartholomew, 22 Pick. 291.

New York.— Levy *v.* Popper, 106 N. Y. App. Div. 394, 94 N. Y. Suppl. 905; Chase *v.* Higgins, 1 Thomps. & C. 229.

Tennessee.— Broddie *v.* Johnson, 1 Sneed 464 (where it is said that the last case goes as far as can be justified on principle); Hale *v.* Hale, 4 Humphr. 183, 185 (where it is said: "We do not mean to say that a general admission of indebtedness will authorize a plaintiff to prove any accounts he may produce, however variant in their origin and remote from the meaning of the party making the admission. The admission must refer to a particular subject-matter of indebtedness," etc.); Thompson *v.* French, 10 Yerg. 452.

Vermont.— Prentiss *v.* Stevens, 38 Vt. 159.

See also the cases cited *supra*, notes 19, 21. In the application of this rule the cases would seem not to be in harmony with many of the cases which apply the rule first stated herein to invalidate such acknowledgments as would be considered good according to the cases in this note. See for example the Pennsylvania cases cited *supra*, note 12.

23. Guy *v.* Tams, 6 Gill (Md.) 82; Woodbridge *v.* Allen, 12 Metc. (Mass.) 470; Bailey *v.* Crane, 21 Pick. (Mass.) 323; Whitney *v.* Bigelow, 4 Pick. (Mass.) 110; Gruenberg *v.* Buhring, 5 Utah 414, 16 Pac. 486; Cornforth *v.* Smithard, 5 H. & N. 13, 29 L. J. Exch. 228, 8 Wkly. Rep. 8, which was a letter "in reply to your statement of account."

Application to two claims.— Where a party held two claims against a debtor, an account and a note, and a statement of both was presented to the debtor, who afterward made a general acknowledgment of indebtedness to the creditor and promised to pay him "what he owed him" the question of the application of the acknowledgment is for the jury. Cook *v.* Martin, 29 Conn. 63.

24. *Colorado.*— Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94; Blackmore *v.* Neale, 15 Colo. App. 49, 60 Pac. 952. But see Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418, holding that in the absence of proof of the existence of other debts as to which an acknowledgment in writing refers, the question may be left to the jury as to whether the debtor intended to acknowledge the particular debt sued upon.

Rhode Island.— Wilcox *v.* Clarke, 18 R. I. 324, 27 Atl. 219.

Texas.— Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483; Mitchell *v.* Clay, 8 Tex. 443; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

England.— Frost *v.* Bengaugh, 1 Bing. 266, 1 L. J. C. P. O. S. 96, 25 Rev. Rep. 621, 8 E. C. L. 501 (holding that the question is for the jury); Baillie *v.* Inchiquin, 1 Esp. 435; Spickernell *v.* Hotham, Kay 669, 2 Wkly Rep. 638, 69 Eng. Reprint 285. See also Beale *v.* Nind, 4 B. & Ald. 568, 6 E. C. L. 604.

25. *Arkansas.*— Kelley *v.* Telle, 66 Ark. 464, 51 S. W. 633; Ringo *v.* Brooks, 26 Ark. 540.

Colorado.— Blackmore *v.* Neale, 15 Colo. App. 49, 60 Pac. 952.

Delaware.— Levy *v.* Gillis, 1 Pennew. 119, 39 Atl. 785.

Georgia.— Harrell *v.* Davis, 108 Ga. 789, 33 S. E. 852.

Idaho.— Moulton *v.* Williams, 6 Ida. 424, 55 Pac. 1019.

Illinois.— Mandel *v.* Gundershimer, 61 Ill. App. 332. An express promise to pay a certain part of a debt, which is recognized as due, at a specified time, will prevent the bar of the statute. Ditch *v.* Vollhardt, 82 Ill. 134.

Iowa.— Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384; McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101, holding that were the question one of first impression a portion of the court would be inclined to hold that no promise made before the bar became complete could have that effect unless it was part of a definite agreement to extend the time of payment.

Kentucky.— Trousdale *v.* Anderson, 9 Bush 276.

Louisiana.— Gauche *v.* Gondran, 20 La. Ann. 156.

New York.— Levy *v.* Popper, 106 N. Y. App. Div. 394, 94 N. Y. Suppl. 905; Fair *v.* Mevey, 56 N. Y. Suppl. 414, 28 N. Y. Civ. Proc. 245.

Pennsylvania.— Peter's Estate, 10 Pa. Dist. 669; Rosenthal's Estate, 5 Pa. Dist. 225; Bond's Estate, 3 Pa. Co. Ct. 263, holding that where a bill was presented for payment and the debtor replied that he could not pay it then but would come down in a few days and pay it, it was sufficient.

South Carolina.— Grist *v.* Newman, 2 Bailey 92.

minate and unequivocal.[26] But it is not necessary that there be an express promise where a promise may be implied,[27] except in a few jurisdictions where it is held that to revive a debt barred by statute there must not only be an acknowledgment of the debt but an unqualified promise to pay it.[28] And the rule applies to debts owing by the state as well as to those of private individuals.[29] A promise to pay is not necessary under a statute requiring a written acknowledgment or promise.[30]

7. Acknowledgments — a. Effect of Admission of Debt in General. A promise preventing or repelling the bar of the statute of limitations may be implied from a clear, unconditional admission of the existence of the debt at the time of such admission,[31] if it is unaccompanied by any circumstances which rebut such

Tennessee.—Hollandsworth *v.* Squires, (Ch. App. 1900) 56 S. W. 1044.

United States.—Alexandria Bank *v.* Clarke, 2 Fed. Cas. No. 844, 2 Cranch C. C. 464; Penaro *v.* Flournoy, 19 Fed. Cas. No. 10,916.

England.— Chasemore *v.* Turner, L. R. 10 Q. B. 500, 45 L. J. Q. B. 66, 33 L. T. Rep. N. S. 323, 24 Wkly Rep. 70; Lee *v.* Wilmot, L. R. 1 Exch. 364. 4 H. & C. 469, 12 Jur. N. S. 762, 35 L. J. Exch. 175, 14 L. T. Rep. N. S. 627, 14 Wkly Rep. 993.

26. Blackmore *v.* Neale, 15 Colo. App. 49, 60 Pac. 952; Kelly *v.* Eby, 141 Pa. St. 176, 21 Atl. 512; Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692; Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174.

A promise to see that the creditor will be at no loss is sufficient. Brintnall *v.* Rice, 63 N. Y. App. Div. 54, 71 N. Y. Suppl. 441 [*affirmed* in 173 N. Y. 618, 66 N. E. 1105].

27. *Delaware.*— Burton *v.* Wharton, 4 Harr. 296; Black *v.* Reybold, 3 Harr. 528.

Georgia.— Bulloch *v.* Smith, 15 Ga. 395; Brewer *v.* Brewer, 6 Ga. 587.

Illinois.— Whiteman *v.* McFarland, 68 Ill. App. 295; Honn *v.* Pinnell, 61 Ill. App. 137 [*citing* Wooters *v.* King, 54 Ill. 343].

Mississippi.— Shackleford *v.* Douglass, 31 Miss. 95.

New York.— Benedict *v.* Slocum, 95 N. Y. App. Div. 602, 88 N. Y. Suppl. 1052; Fiske *v.* Hibbard, 45 N. Y. Super. Ct. 331.

Pennsylvania.— Palmer *v.* Gillespie, 95 Pa. St. 340, 40 Am. Rep. 657 [*followed* in Landis *v.* Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747]; Johns *v.* Lantz, 63 Pa. St. 324.

South Carolina.— Jamison *v.* Lindsay, 4 McCord 93 (where defendant said: "I have paid the money, but if I cannot show that I have paid it, I will not plead the statute"); Lee *v.* Perry, 3 McCord 552, 15 Am. Dec. 650 (where the debtor stated that the note had not been paid and that he would not pay it unless compelled by law as it was out of date and he had received no consideration for it); Burden *v.* McElhenny, 2 Nott & M. 60, 10 Am. Dec. 570; Rodrigue *v.* Fronty, 2 Brev. 31.

Tennessee.—Harwell *v.* McCullock, 2 Overt. 275.

England.— Lee *v.* Wilmot, L. R. 1 Exch. 364, 4 H. & C. 469, 12 Jur. N. S. 762, 35 L. J. Exch. 175, 14 L. T. Rep. N. S. 627, 14 Wkly Rep. 993.

Implied promises see *infra*, VII, A, 7.

28. Phelan *v.* Fitzpatrick, 84 Wis. 240, 54 N. W. 614; Pierce *v.* Seymour, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737; Carpenter *v.* State, 41 Wis. 36; Pritchard *v.* Howell, 1 Wis. 131, 60 Am. Dec. 363; Les Révérendes Dames Religieuses Ursulines *v.* Lampson, 22 Quebec Super. Ct. 7. See Frellsen *v.* Gantt, 25 La. Ann. 476, holding that a simple acknowledgment of a debt when prescription is acquired is not a renunciation of the prescription.

In Alabama under the code there must be an unconditional promise in writing signed by the party to be charged. Pollak *v.* Billing, 131 Ala. 519, 32 So. 639; Chapman *v.* Barnes, 93 Ala. 433, 9 So. 589; Grimball *v.* Mastin, 77 Ala. 553; Scott *v.* Ware, 64 Ala. 174. See also Minniece *v.* Jeter, 65 Ala. 222. The earlier Alabama cases held that an implied promise to pay was sufficient. Ross *v.* Ross, 20 Ala. 105; Deshler *v.* Cahiness, 10 Ala. 959.

In North Carolina since the adoption of the code prescribing a statute of limitations and doing away with the former statute of presumptions (Code, §§ 138, 172) the acknowledgment must contain an unconditional promise to pay the debt. George W. Helm Co. *v.* Griffin, 112 N. C. 356, 16 S. E. 1023; Greenleaf *v.* Norfolk Southern R. Co., 91 N. C. 33. Prior to the code an explicit acknowledgment of a subsisting debt from which the law might imply a promise was sufficient. Mastin *v.* Waugh, 19 N. C. 517; Smallwood *v.* Smallwood, 19 N. C. 330.

29. Carpenter *v.* State, 41 Wis. 36.

30. Fletcher *v.* Daniels, 52 N. Y. App. Div. 67, 64 N. Y. Suppl. 861; Crandall *v.* Moston, 42 N. Y. App. Div. 629, 59 N. Y. Suppl. 146. See *infra*, VII, A, 9, c.

31. *Arkansas.*— Ringo *v.* Brooks, 26 Ark. 540.

Connecticut.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42 [*citing* De Forest *v.* Hunt, 8 Conn. 179; Marshall *v.* Dalliber, 5 Conn. 480; Bound *v.* Lathrop, 4 Conn. 336, 10 Am. Dec. 147]; Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

District of Columbia.— Ruppert *v.* Beavans, 2 App. Cas. 298.

Georgia.— Bulloch *v.* Smith, 15 Ga. 395; Brewer *v.* Brewer, 6 Ga. 587; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306.

Illinois.— Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*citing* Parsons *v.* Northern Illinois Coal, etc., Co., 38 Ill. 430; Ayres *v.* Richards, 12 Ill. 146; Mellick *v.* De Seel-

implication,[32] such as a refusal to pay [33] or circumstances indicating an intention not to pay,[34] a denial of liability,[35] a denial of the justness of the debt,[36] or declarations indicative of an intent to insist upon the statute of limitations as a bar,[37] although the rule is sometimes limited by confining the qualifications which will rebut the implication to those which, if true, would exempt the party from a moral obli-

horst, 1 Ill. 221, 12 Am. Dec. 172]; Whiteman *v.* McFarland, 68 Ill. App. 295; Freeman *v.* Walker, 67 Ill. App. 309; Honn *v.* Pinnell, 61 Ill. App. 137 [*citing* Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522; Carroll *v.* Forsyth, 69 Ill. 127; Wooters *v.* King, 54 Ill. 343; Keener *v.* Crull, 19 Ill. 189].

Iowa.— McConaughy *v.* Wilsey, 115 Iowa 589, 88 N. W. 1101; Penley *v.* Waterhouse, 3 Iowa 418.

Kentucky.—Trousdale *v.* Anderson, 9 Bush 276; Ditto *v.* Ditto, 4 Dana 502.

Maryland.— Beeler *v.* Clarke, 90 Md. 221, 44 Atl. 1038, 78 Am. St. Rep. 439; Stewart *v.* Garrett, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333; Hall *v.* Bryan, 50 Md. 194; Buffington *v.* Davis, 33 Md. 511; Knight *v.* House, 29 Md. 194, 96 Am. Dec. 515; Ellcott *v.* Nichols, 7 Gill 85, 48 Am. Dec. 546; Carter *v.* Cross, 7 Gill 43; Hall *v.* Creswell, 12 Gill & J. 36; Mitchell *v.* Mitchell, 11 Gill & J. 388; Poe *v.* Conway, 2 Harr. & J. 307.

Massachusetts.— Custy *v.* Donlan, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419; Sigourney *v.* Drury, 14 Pick. 387.

New York.—McCahill *v.* Mehrbach, 37 Hun 504; Sherman *v.* Wakeman, 11 Barb. 254 [*reversed* on other grounds in 9 N. Y. 85]; Loomis *v.* Decker, 1 Daly 186.

Pennsylvania.— Yost *v.* Grim, 116 Pa. St. 527, 8 Atl. 925; Palmer *v.* Gillespie, 95 Pa. St. 340, 40 Am. Rep. 657; Johns *v.* Lantz, 63 Pa. St. 324.

Texas.— Vogelsang *v.* Taylor, (Civ. App. 1904) 80 S. W. 637; Burnett *v.* Munger, 23 Tex. Civ. App. 278, 56 S. W. 103; Acers *v.* Acers, 22 Tex. Civ. App. 584, 56 S. W. 196; Martin *v.* Somervell County, 21 Tex. Civ. App. 308, 52 S. W. 556; Montague County *v.* Meadows, 21 Tex. Civ. App. 256, 51 S. W. 556; Wheatley *v.* Nipper, (Civ. App. 1897) 42 S. W. 777.

Vermont.— Robinson *v.* Larabee, 58 Vt. 652, 5 Atl. 512; Phelps *v.* Williamson, 26 Vt. 230; Barlow *v.* Bellamy, 7 Vt. 54.

West Virginia.— Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Kirk *v.* Williams, 24 Fed. 437 (stating rule in Tennessee); Green *v.* Coos Bay Wagon Road Co., 23 Fed. 67, 10 Sawy. 625; Cowan *v.* Magauran, 6 Fed. Cas. No. 3,292, Wall. Sr. 66.

England.— *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130; Chasemore *v.* Turner, L. R. 10 Q. B. 500, 45 L. J. Q. B. 66, 33 L. T. Rep. N. S. 323, 24 Wkly. Rep. 70; Green *v.* Humphreys, 23 Ch. D. 207, 53 L. J. Ch. 625, 51 L. T. Rep. N. S. 42; Skeet *v.* Lindsay, 2 Ex. D. 314, 46 L. J. Exch. 249, 36 L. T. Rep. N. S. 98, 25 Wkly. Rep. 322; Quincey *v.* Sharpe, 1 Ex. D. 72, 45 L. J. Exch. 347, 34 L. T. Rep. N. S. 495, 24 Wkly. Rep. 373; Philips *v.* Philips, 3 Hare 281, 13 L. J. Ch. 445, 25 Eng. Ch. 281, 67 Eng. Reprint 388; Buccleuch *v.* Eden, 61 L. T. Rep. N. S. 360; Firth *v.* Slingsby, 58 L. T. Rep. N. S. 481.

32. *Massachusetts.*— Wald *v.* Arnold, 168 Mass. 134, 46 N. E. 419 (holding a letter in which defendant stated a present inability to pay, and stated that he did not know when he could pay insufficient); Bailey *v.* Crane, 21 Pick. 323.

New York.— Loomis *v.* Decker, 1 Daly 186.

North Carolina.—Smith *v.* Leeper, 32 N. C. 86.

Pennsylvania.— Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243; Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; Kensington Bank *v.* Patton, 14 Pa. St. 479, 53 Am. Dec. 564; Hudson *v.* Carey, 11 Serg. & R. 10; Fries *v.* Boisselet, 9 Serg. & R. 128, 11 Am. Dec. 683; *In re* McCullough, 18 Phila. 40.

South Carolina.— Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309; Horlbeck *v.* Hunt, 1 McMull. 197.

United States.— *In re* Lorillard, 107 Fed. 677, 46 C. C. A. 553, following New York rule.

33. See *infra*, VII, A, 7, d, (I).

34. *Alabama.*— Bradford *v.* Spyker, 32 Ala. 134; Pool *v.* Relfe, 23 Ala. 701.

Arkansas.— Ringo *v.* Brooks, 26 Ark. 540.

Illinois.— Wachter *v.* Albee, 80 Ill. 47; Keener *v.* Crull, 19 Ill. 189.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418.

Massachusetts.— Sigourney *v.* Drury, 14 Pick. 387.

Michigan.— Rumsey *v.* Settle, 120 Mich. 372, 79 N. W. 579.

Mississippi.—Westbrook *v.* Beverly, 11 Sm. & M. 419.

New York.—Turner *v.* Martin, 4 Rob. 661; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103.

North Carolina.— Kirby *v.* Mills, 78 N. C. 124, 24 Am. Rep. 460.

Pennsylvania.— Senseman *v.* Hershman, 82 Pa. St. 83.

South Carolina.— Young *v.* Monpoey, 2 Bailey 278.

Vermont.— Brayton *v.* Rockwell, 41 Vt. 621.

Canada.— Grantham *v.* Powell, 6 U. C. Q. B. 494.

35. Smith *v.* Talbot, 11 Ark. 666; Perley *v.* Little, 3 Me. 97; Phelps *v.* Williamson, 26 Vt. 230.

36. Goodwin *v.* Buzzell, 35 Vt. 9; Phelps *v.* Williamson, 26 Vt. 230.

37. *Connecticut.*— Sanford *v.* Clark, 29 Conn. 457.

Delaware.— Burton *v.* Robinson, 1 Houst. 260.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418.

gation to discharge the debt.[38] While it is often stated that there must be an acknowledgment of willingness and liability to pay[39] or to remain liable,[40] it is not necessary, save in those jurisdictions where an express promise is necessary to revive a barred debt,[41] that such acknowledgment be express.[42] And indeed under the statutes of some jurisdictions an acknowledgment alone may be sufficient, although insufficient to raise an implication of a promise.[43] An acknowledgment, however, can operate only to remove the bar of the statute and cannot of course validate a void promise or obligation unless it in itself amounts to a promise upon which an action may be based.[44] An acknowledgment tainted by a fraud will not sustain an inference of a new promise.[45]

b. Form of Acknowledgment. The acknowledgment from which a promise may be implied need not be in any particular form or contain any particular substance;[46] it is sufficient if the debt be acknowledged as an existing one, and a liability or willingness to pay it is inferable therefrom.[47] The acknowledgment

Massachusetts.— Bailey *v.* Crane, 21 Pick. 323; Sigourney *v.* Drury, 14 Pick. 387; Bangs *v.* Hall, 2 Pick. 368, 13 Am. Dec. 437.

New Hampshire.— Stanton *v.* Stanton, 2 N. H. 425.

New York.— Danforth *v.* Culver, 11 Johns. 146, 6 Am. Dec. 361; Stafford *v.* Bryan, 2 Paige 45.

North Carolina.— McGlensey *v.* Fleming, 20 N. C. 263.

Pennsylvania.— Hay *v.* Kramer, 2 Watts & S. 137; Guier *v.* Pearce, 2 Browne 35.

Contra.— Oliver *v.* Gray, 1 Harr. & G. (Md.) 204; Cadmus *v.* Dumon, 1 N. J. L. 176.

38. Felty *v.* Young, 18 Md. 163; Stockett *v.* Sasscer, 8 Md. 374; Keplinger *v.* Griffith, 2 Gill & J. (Md.) 296; Oliver *v.* Gray, 1 Harr. & G. (Md.) 204.

39. *New Hampshire.*— Holt *v.* Gage, 60 N. H. 536; Ventris *v.* Shaw, 14 N. H. 422. *Compare* Atwood *v.* Coburn, 4 N. H. 315.

New York.— Sherman *v.* Wakeman, 11 Barb. 254 [*reversed* on other grounds in 9 N. Y. 85]; Loomis *v.* Decker, 1 Daly 186.

Texas.— Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

Vermont.— Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

West Virginia.— Abrahams *v.* Swann, 18 W. Va. 274, 41 Am. Rep. 692.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174.

40. Robinson *v.* Larabee, 58 Vt. 652, 5 Atl. 512.

41. See *supra*, VII, A, 6.

42. *District of Columbia.*— Thompson *v.* Shepherd, 1 Mackey 385.

Georgia.— Bulloch *v.* Smith, 15 Ga. 395.

Missouri.— Chidsey *v.* Powell, 91 Mo. 622, 4 S. W. 446, 60 Am. Rep. 267.

New York.— Henry *v.* Root, 33 N. Y. 526; Cudd *v.* Jones, 63 Hun 142, 17 N. Y. Suppl. 582; Fiske *v.* Hibbard, 45 N. Y. Super. Ct. 331; Kahn *v.* Crawford, 28 Misc. 572, 59 N. Y. Suppl. 853.

Vermont.— Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

See also cases cited *supra*, note 31.

43. Clark *v.* King, 54 Kan. 222, 38 Pac. 281 [*following* Elder *v.* Dyer, 26 Kan. 604, 40 Am. Rep. 320, and *distinguishing* Hansom *v.* Towle, 19 Kan. 273]; Devereaux *v.* Henry, 16 Nebr. 55, 19 N. W. 697.

44. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Kelly *v.* Eby, 141 Pa. St. 176, 21 Atl. 512.

45. Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546.

46. Bean *v.* Wheatley, 13 App. Cas. (D. C.) 473; Brewer *v.* Brewer, 6 Ga. 587; Harms *v.* Freytag, 59 Nebr. 359, 80 N. W. 1039.

Under the Nebraska statute requiring an acknowledgment or promise it is not necessary that either the word "acknowledge" or "promise" should be used by the party. Rolfe *v.* Pilloud, 16 Nebr. 21, 19 N. W. 615, 970.

47. *Alabama.*— Evans *v.* Carey, 29 Ala. 99; Townes *v.* Ferguson, 20 Ala. 147; St. John *v.* Garrow, 4 Port. 223, 29 Am. Dec. 280.

Arkansas.— Ringo *v.* Brooks, 26 Ark. 540.

California.— Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371. A resolution adopted by a board of arbitration of a mutual benefit society invested with the power to determine the validity of claims against the society may constitute a sufficient acknowledgment to interrupt the statute as to a claim against such organization; and it is not necessary that the record of the proceedings of such board shall be delivered to the claimant. Dearborn *v.* Grand Lodge A. O. U. W., 138 Cal. 658, 72 Pac. 154.

Connecticut.— Blakeman *v.* Fonda, 41 Conn. 561; Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

Delaware.— Waples *v.* Layton, 3 Harr. 508; Parkins *v.* Bennington, 1 Harr. 209.

Florida.— Patterson *v.* Cobb, 4 Fla. 481.

Illinois.— Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*affirming* 110 Ill. App. 404]; Schmidt *v.* Pfau, 114 Ill. 494, 2 N. E. 522; Carroll *v.* Forsyth, 69 Ill. 127; Wooters *v.* King, 54 Ill. 343; Keener *v.* Crull, 19 Ill. 189; Walker *v.* Freeman, 94 Ill. App. 357; Ogden *v.* Wentworth, 68 Ill. App. 94; Honn *v.* Pinnell, 61 Ill. App. 137.

Indiana.— McNear *v.* Roberson, 12 Ind. App. 87, 39 N. E. 896.

Iowa.— Oakson *v.* Beach, 36 Iowa 171; Chambers *v.* Garland, 3 Greene 322.

of the debt may be in whole or in part,[48] and need not be express, but may be inferred from facts or acts.[49] It must, however, be distinct, unqualified, and unconditional,[50] and mere vague and uncertain expressions or conversations will not

Louisiana.— Warren *v.* Childress, 23 La. Ann. 184; Lackey *v.* Macmurdo, 9 La. Ann. 15; Harrell's Succession, 3 La. Ann. 323; Hays *v.* Marsh, 9 Rob. 26. In Louisiana an acknowledgment of a debt will suspend the running of a statute, but an acknowledgment of the existence of a debt will not revive it after prescription. Slaughter's Succession, 108 La. 492, 32 So. 379, 58 L. R. A. 408.

Maine.— Dinsmore *v.* Dinsmore, 21 Me. 433; Deshon *v.* Eaton, 4 Me. 413; Porter *v.* Hill, 4 Me. 41.

Maryland.— Stockett *v.* Sasscer, 8 Md. 374; Mitchell *v.* Sellman, 5 Md. 376.

Massachusetts.— Whitney *v.* Bigelow, 4 Pick. 110; Williams *v.* Root, 14 Mass. 273.

Michigan.— Jewell *v.* Jewell, 139 Mich. 578, 102 N. W. 1059.

Minnesota.— Sanborn *v.* Sturtevant, 17 Minn. 200.

New Hampshire.— Pickering *v.* Frink, 62 N. H. 342; Holt *v.* Gage, 60 N. H. 536.

New Jersey.— Conover *v.* Conover, 1 N. J. Eq. 403.

New Mexico.— Reymon *v.* Newcomb, 10 N. M. 151, 61 Pac. 205.

New York.— Manchester *v.* Braedner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829; Kincaid *v.* Archibald, 73 N. Y. 189 [*affirming* 10 Hun 9]; Wakeman *v.* Sherman, 9 N. Y. 85; Scrrell *v.* Forbes, 106 N. Y. App. Div. 482, 94 N. Y. Suppl. 805; Brintnall *v.* Rice, 63 N. Y. App. Div. 54, 71 N. Y. Suppl. 441; Cudd *v.* Jones, 63 Hun 142, 17 N. Y. Suppl. 582; McNamee *v.* Tenny, 41 Barb. 495; Sherman *v.* Wakeman, 11 Barb. 254 [*reversed* on other grounds in 9 N. Y. 85]; Watkins *v.* Stevens, 4 Barb. 168; Wright *v.* Parmenter, 23 Misc. 629, 52 N. Y. Suppl. 99; Rowe *v.* Thompson, 15 Abb. Pr. 377; Gaylord *v.* Van Loan, 15 Wend. 308; Stafford *v.* Richardson, 15 Wend. 302; Allen *v.* Webster, 15 Wend. 284; Laurence *v.* Hopkins, 13 Johns. 288; Smith *v.* Ludlow, 6 Johns. 267.

North Carolina.— Taylor *v.* Miller, 113 N. S. 340, 18 S. E. 504; Richmond *v.* Fugua, 33 N. C. 445; Falls *v.* Sherrill, 19 N. C. 371.

Pennsylvania.— Ritter's Estate, 161 Pa. St. 79, 28 Atl. 1011.

South Carolina.— Deloach *v.* Turner, 6 Rich. 117; Williamson *v.* King, 2 McMull. 505; Horlbeck *v.* Hunt, 1 McMull. 197; Cohen *v.* Aubin, 2 Bailey 283; Young *v.* Monpoey, 2 Bailey 278; Avant *v.* Sweet, 1 Brev. 228.

Tennessee.— Butler *v.* Winters, 2 Swan 91; Harwell *v.* McCullock, 2 Overt. 275.

Texas.— Russ *v.* Cunningham, (1891) 16 S. W. 446; Webber *v.* Cochrane, 4 Tex. 31; Oppenheimer *v.* Fritter, 1 Tex. App. Civ. Cas. § 372.

Utah.— Kuhn *v.* Mount, 13 Utah 108, 44 Pac. 1036; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652.

Vermont.— Stevens *v.* Hewitt, 30 Vt. 262; Phelps *v.* Williamson, 26 Vt. 230; Brainard *v.* Buck, 25 Vt. 573, 60 Am. Dec. 291.

Virginia.— Rowe *v.* Marchant, 86 Va. 177, 9 S. E. 995.

United States.— Moore *v.* Columbia Bank, 6 Pet. 86, 8 L. ed. 329; Arnold *v.* Dexter, 1 Fed. Cas. No. 557, 4 Mason 122.

Canada.—Grant *v.* Cameron, 18 Can. Sup. Ct. 716; Russell *v.* Crysler, 5 U. C. & B. 484.

See 33 Cent. Dig. tit. "Limitation of Actions," § 597.

Implication from admission of existing debt in general see *supra*, VII, A, 7, a.

Necessity of writing see *infra*, VII, A, 9.

48. Oliver *v.* Gray, 1 Harr. & G. (Md.) 204; Wetzell *v.* Bussard, 11 Wheat. (U. S.) 309, 6 L. ed. 481.

49. Bean *v.* Wheatley, 13 App. Cas. (D. C.) 473; Woodbury *v.* Woodbury, 47 N. H. 11, 90 Am. Dec. 555, holding that an admission fairly deducible from the conduct of the debtor that there is a sum due which he is liable and willing to pay is sufficient.

50. *Alabama.*— Pearson *v.* Darrington, 32 Ala. 227.

Arkansas.— Brown *v.* State Bank, 10 Ark. 134.

California.— Pierce *v.* Merrill, 128 Cal. 473, 61 Pac. 67, 79 Am. St. Rep. 63; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Iowa.— Nelson *v.* Hanson, 92 Iowa 356, 60 N. W. 655, 54 Am. St. Rep. 568.

Kansas.— Wood *v.* Merrietta, 66 Kan. 748, 71 Pac. 579; Durban *v.* Knowles, 66 Kan. 397, 71 Pac. 829; Haythorn *v.* Cooper, 65 Kan. 338, 69 Pac. 333, 70 Pac. 581; O'Riley *v.* Finegan, 9 Kan. App. 889, 58 Pac. 281; Richards *v.* Hayden, 8 Kan. App. 816, 57 Pac. 978. But see Pracht *v.* McNee, 40 Kan. 1, 18 Pac. 925, holding that an offer to turn over certain notes for the note held against the debtor is sufficient.

Kentucky.— Trousdale *v.* Anderson, 9 Bush 276.

Louisiana.— Union Nat. Bank *v.* Evans, 43 La. Ann. 372, 9 So. 44.

Maryland.— Higdon *v.* Stewart, 17 Md. 105.

Massachusetts.— Krebs *v.* Olmstead, 137 Mass. 504.

New York.— Bloodgood *v.* Bruen, 8 N. Y. 362 [*reversing* 4 Sandf. 427].

North Carolina.— Smallwood *v.* Smallwood, 19 N. C. 330.

Pennsylvania.— Ward *v.* Jack, 172 Pa. St. 416, 33 Atl. 577, 51 Am. St. Rep. 744; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748; Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741.

West Virginia.— Holley *v.* Curry, 58 W. Va. 70, 51 S. E. 135; Quarrier *v.* Quarrier, 36 W. Va. 310, 15 S. E. 154.

suffice.[51] Several insufficient acknowledgments cannot be taken together to constitute a sufficient one.[52]

c. Necessity That Present Existence of Debt Be Acknowledged. There must be an acknowledgment of a present existing debt;[53] it is not sufficient that the claim be acknowledged as originally just,[54] nor is it sufficient that an account be admitted to be correct unless the debt is admitted to be still due.[55] Hence the statute is not repelled by a mere failure on the part of the debtor to object to an account which is presented,[56] or a promise to examine the accounts and pay what is owing.[57] So a mere acknowledgment of the correctness of the items of an account is not sufficient where qualified by being made subject to a mutual settlement between the parties.[58]

United States.— Wetzell *v.* Bussard, 11 Wheat. 309, 6 L. ed. 481.

England.— Fearn *v.* Lewis, 6 Bing. 349, 8 L. J. C. P. O. S. 95, 4 M. & P. 1, 31 Rev. Rep. 434, 19 E. C. L. 162; Fearn *v.* Lewis, 4 C. & P. 173, 19 E. C. L. 462.

Canada.— Dougall *v.* Cline, 6 U. C. Q. B. 546.

But see Honn *v.* Pinnell, '' Ill. App. 137, holding that an acknowledgment may be qualified as to the time or manner in which the debtor intends to pay, if it is unconditional as to his intention.

An offer to pay in depreciated currency, such as Confederate notes, has been held qualified and conditional. McCranie *v.* Murrell, 22 La. Ann. 477; Parker *v.* Shufford, 76 N. C. 219; Simonton *v.* Clark, 65 N. C. 525, 6 Am. Rep. 752. But *compare* Wansley *v.* Willis, 23 La. Ann. 703.

51. Cane *v.* Reynolds, 7 La. Ann. 537; Perry *v.* Chesley, 77 Me. 393; Long *v.* Jameson, 46 N. C. 476; Sherrod *v.* Bennett, 30 N. C. 309.

In Pennsylvania the rule is that the acknowledgment must be so distinct in its extent and form as to leave no room for doubt or hesitation as to the meaning of the debtor. Linderman *v.* Pomeroy, 142 Pa. St. 168, 21 Atl. 820, 24 Am. St. Rep. 494; Shaeffer *v.* Hoffman, 113 Pa. St. 1, 4 Atl. 39; Palmer *v.* Gillespie, 95 Pa. St. 340, 40 Am. Rep. 657; Wolfensberger *v.* Young, 47 Pa. St. 516; Gillingham *v.* Gillingham, 17 Pa. St. 302; Harbold *v.* Kuntz, 16 Pa. St. 210; Hazlebaker *v.* Reeves, 12 Pa. St. 264; Hazlebacker *v.* Reeves, 9 Pa. St. 258; Morgan *v.* Walton, 4 Pa. St. 321; Farley *v.* Kustenbader, 3 Pa. St. 418; Gilkyson *v.* Larue, 6 Watts & S. 213; Magee *v.* Magee, 10 Watts 172; Berghaus *v.* Calhoun, 6 Watts 219; Brock's Estate, 10 Pa. Dist. 55.

Expression of regret that the debt has been so long due do not amount to a promise to pay. Collinson *v.* Margesson, 27 L. J. Exch. 305.

52. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Patterson *v.* Neuer, 165 Pa. St. 66, 30 Atl. 748.

53. *Alabama.*— Pool *v.* Relfe, 23 Ala. 701.

Arkansas.— Brown *v.* State Bank, 10 Ark. 134.

Delaware.— Burton *v.* Robinson, 1 Houst. 260; Burton *v.* Wharton, 4 Harr. 296; Black *v.* Reybold, 3 Harr. 528.

Georgia.— Brewer *v.* Brewer, 6 Ga. 587.

Illinois.— Bassett *v.* Noble, 15 Ill. App. 360.

Kentucky.— Ditto *v.* Ditto, 4 Dana 502; Harrison *v.* Handley, 1 Bibb 443; Bell *v.* Rowland, Hard. 301, 3 Am. Dec. 729.

Louisiana.— Levistones *v.* Marigny, 13 La. Ann. 353.

Maryland.— Dawson *v.* King, 20 Md. 442.

Massachusetts.— Custy *v.* Donlan, 159 Mass. 245, 34 N. E. 360, 38 Am. St. Rep. 419; Bangs *v.* Hall, 2 Pick. 368, 13 Am. Dec. 437.

Minnesota.— Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766; Drake *v.* Sigafoos, 39 Minn. 367, 40 N. W. 257.

Mississippi.— Hart *v.* Boyt, 54 Miss. 547.

Missouri.— Elliott *v.* Leake, 5 Mo. 208, 32 Am. Dec. 314; McLean *v.* Thorp, 4 Mo. 256.

Tennessee.—Russel *v.* Gass, Mart. & Y. 270.

Virginia.— Switzer *v.* Noffsinger, 82 Va. 518.

England.— Howcutt *v.* Bonser, 3 Exch. 491, 18 L. J. Exch. 262.

An admission that the sum claimed has not been paid is not sufficient without some further admission or other proof that the debt once existed. Oliver *v.* Gray, 1 Harr. & G. (Md.) 204.

54. *Connecticut.*— Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418.

New York.—Purdy *v.* Austin, 3 Wend. 187. And see Connecticut Trust, etc., Co. *v.* Wead, 58 N. Y. App. Div. 493, 69 N. Y. Suppl. 518.

Tennessee.— Fuqua *v.* Dinwiddie, 6 Lea 645; Russel *v.* Gass, Mart. & Y. 270.

United States.— Clementson *v.* Williams, 8 Cranch 72, 3 L. ed. 491.

55. Quayle *v.* Guild, 91 Ill. 378.

56. Verrier *v.* Gullon, 97 Pa. St. 63; Allison *v.* James, 9 Watts (Pa.) 380; Robinson *v.* Monroe, (Tex. Civ. App. 1894) 25 S. W. 53; *Re* McHenry, 71 L. T. Rep. N. S. 146, 8 Reports 337.

57. Hayward *v.* Gunn, 4 Ill. App. 161; Shultz *v.* Houghton, 36 La. Ann. 407.

58. Harlan *v.* Bernie, 22 Ark. 217, 76 Am. Dec. 428. And see Nixon *v.* Brownfield, 14 Pa. St. 319, holding that where on settling accounts an item is admitted, but no balance is struck and the account is not adjusted, the admission will not be sufficient to suspend the statute as to the particular item.

d. Matters Rebutting Presumption of Promise — (I) *Refusal to Pay.* According to the weight of authority the acknowledgment of the original cause of action, accompanied by a refusal to pay, will not take the case out of the statute of limitations,[59] especially where the debtor alleges facts which, if true, would destroy all moral obligation to pay.[60] However, there are some decisions which hold that a refusal to pay, having no justification in law, will not prevent an acknowledgment from reviving a debt barred by the statute.[61]

(II) *Declaration of Inability to Pay.* A mere declaration of inability to pay a demand is not in itself sufficient to remove or toll the bar of the statute of limitations,[62] such a declaration being in some cases construed to indicate a refusal rebutting the implication of a promise.[63] Where, however, the statement is coupled with expressions denoting a willingness or intention to pay, it has been held a sufficient acknowledgment.[64] And conversely when an acknowledgment is otherwise sufficient it is not vitiated by a declaration of present inability to pay.[65]

(III) *Claim of Payment.* An acknowledgment that a debt was once due accompanied by a declaration that it had been paid has no effect on the operation of the statute of limitations.[66] This rule is in no way affected by the fact that

59. *Kentucky.*— Gray *v.* McDowell, 6 Bush 475.

Louisiana.— Stewart *v.* Watts, 15 La. Ann. 135.

Maine.— Porter *v.* Hill, 4 Me. 41.

Massachusetts.— Bailey *v.* Crane, 21 Pick. 323; Sigourney *v.* Drury, 14 Pick. 387.

Missouri.— Buckner *v.* Johnson, 4 Mo. 100.

New Hampshire.— Stanton *v.* Stanton, 2 N. H. 425.

New Jersey.— Belles *v.* Belles, 12 N. J. L. 339.

New York.—Laurence *v.* Hopkins, 13 Johns. 288.

South Carolina.— Lee *v.* Polk, 4 McCord 215.

Texas.— Vogelsang *v.* Taylor, (Civ. App. 1904) 80 S. W. 637; Burnett *v.* Munger, 23 Tex Civ. App. 278, 56 S. W. 103.

United States.— Jenkins *v.* Boyle, 13 Fed. Cas. No. 7,262, 2 Cranch C. C. 120.

See 33 Cent. Dig. tit. "Limitation of Actions," § 606.

Contra.— Sheftall *v.* Clay, R. M. Charlt. (Ga.) 7; Linsell *v.* Bonsor, 2 Bing. N. Cas. 241, 1 Hodges 305, 5 L. J. C. P. 40, 2 Scott 399, 29 E. C. L. 519; Leaper *v.* Tatton, 16 East 420.

60. Higdon *v.* Stewart, 17 Md. 105; Mitchell *v.* Sellman, 5 Md. 376.

61. Mitchell *v.* Sellman, 5 Md. 376; Oliver *v.* Gray, 1 Harr. & G. (Md.) 204; Cobham *v.* Mosely, 3 N. C. 6, 2 Am. Dec. 612; Glenn *v.* McCullough, Harp. (S. C.) 484, 18 Am. Dec. 661; Newcomb *v.* Neil, Harp. (S. C.) 355; Lee *v.* Perry, 3 McCord (S. C.) 552, 15 Am. Dec. 650; Aiken *v.* Benton, 2 Brev. (S. C.) 330.

62. *District of Columbia.*— Otterback *v.* Brown, 2 MacArthur 541.

Maine.— Thayer *v.* Mills, 14 Me. 300.

Massachusetts.— Bailey *v.* Crane, 21 Pick. 323.

New Hampshire.— Manning *v.* Wheeler, 13 N. H. 486.

Vermont.— Galpin *v.* Barney, 37 Vt. 627.

England.— Knott *v.* Farren, 4 D. & R. 179, 2 L. J. K. B. O. S. 122, 16 E. C. L. 91; Rackham *v.* Marriott, 2 H. & N. 196, 3 Jur. N. S. 495, 26 L. J. Exch. 315, 5 Wkly. Rep. 572.

Canada.— Charlotte County Bank *v.* Ross, 10 N. Brunsw. 627.

63. Kirkbride *v.* Gash, 34 Mo. App. 256; Atwood *v.* Coburn, 4 N. H. 315; Hancock *v.* Bliss, 7 Wend. (N. Y.) 267; Airy *v.* Smith, 1 Phila. (Pa.) 337. *Contra,* Penley *v.* Waterhouse, 3 Iowa 418.

64. De Forest *v.* Hunt, 8 Conn. 179; Bayliss *v.* Street, 51 Iowa 627, 2 N. W. 437; Beeler *v.* Clarke, 90 Md. 221, 44 Atl. 1038, 78 Am. St. Rep. 439; Bond's Estate, 3 Pa. Co. Ct. 263.

65. *Illinois.*—Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*affirming* 110 Ill. App. 404].

Iowa.— Jenckes *v.* Rice, 119 Iowa 451, 93 N. W. 384.

Louisiana.— Bloom *v.* Kern, 30 La. Ann. 1263; Robinson *v.* Day, 7 La. Ann. 201.

Mississippi.— Beasley *v.* Evans, 35 Misc. 192.

New York.— Cudd *v.* Jones, 63 Hun 142, 17 N. Y. Suppl. 582.

Texas.— Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483.

Vermont.— Olcott *v.* Scales, 3 Vt. 173, 21 Am. Dec. 585.

England.— Lee *v.* Wilmot, L. R. 1 Exch. 364, 4 H. & C. 469, 12 Jur. N. S. 762, 35 L. J. Exch. 175, 14 L. T. Rep. N. S. 627, 14 Wkly. Rep. 993.

Canada.— See Carsley *v.* McFarlane, 26 Nova Scotia 48.

Compare Brown *v.* Keach, 24 Conn. 73.

66. *Connecticut.*— Marshall *v.* Dalliber, 5 Conn. 480.

Indiana.— Conwell *v.* Buchanan, 7 Blackf. 537.

Louisiana.— New Orleans, etc., R. Co. *v.* Harper, 11 La. Ann. 212.

Maine.— Lombard *v.* Pease, 14 Me. 349; Brackett *v.* Mountfort, 12 Me. 72.

Maryland.—Higdon *v.* Stewart, 17 Md. 105.

New Jersey.—Tichenor *v.* Colfax, 4 N. J. L. 153.

payment was claimed to be made in a particular way and no evidence is offered in support of such claim,[67] or by the fact that such claim is disproved.[68]

(IV) *CLAIM OF SET-OFF.* A claim of set-off will counteract the effect of a promise or acknowledgment to interrupt the statute.[69] But where the set-off is not claimed at the time of making the promise or acknowledgment, the revival is not affected by any subsequent claim of set-off.[70] An acknowledgment identifying the debt accompanied with the statement that it is subject to credits is sufficient to suspend the statute.[71]

(V) *OFFER OF COMPROMISE, ARBITRATION, OR REFERENCE.* An offer of a compromise is not sufficient to take a case out of the statute of limitations,[72] nor

Pennsylvania.— Bailey *v.* Bailey, 14 Serg. & R. 195; Smith *v.* Freel, Add. 291.

South Carolina.—Gray *v.* Kernahan, 2 Mill 65.

Vermont.— George *v.* Vermont Farm Mach. Co., 65 Vt. 287, 26 Atl. 722.

United States.— Reynolds *v.* Calvert, 20 Fed. Cas. No. 11,728, 3 Cranch C. C. 211.

England.— Poynder *v.* Bluck, 5 Dowl. P. C. 570, W. W. & D. 19; Brydges *v.* Plumptre, 9 D. & R. 746, 22 E. C. L. 599; Birk *v.* Guy, 4 Esp. 184; McCormick *v.* Berzcy, 1 U. C. Q. B. 388.

See 33 Cent. Dig. tit. "Limitation of Actions," § 602.

67. Brackett *v.* Mountfort, 12 Me. 72.

68. Marshall *v.* Dalliber, 5 Conn. 480 [*disapproving* Kellings *v.* Shaw, 7 Taunt. 608]. See also Goate *v.* Goate, 1 H. & N. 29. *Contra*, Partington *v.* Butcher, 6 Esp. 66.

69. *Illinois.*— Teessen *v.* Camblin, 1 Ill. App. 424.

Kentucky.— Tillet *v.* Linsey, 6 J. J. Marsh. 337.

Maine.— Deshon *v.* Eaton, 4 Me. 413.

Mississippi.— Davidson *v.* Morris, 5 Sm. & M. 564.

New York.— Bradley *v.* Field, 3 Wend. 272.

Ohio.— Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West. L. J. 385.

Pennsylvania.— Eckert *v.* Wilson, 12 Serg. & R. 393; Gordon's Estate, 3 Pa. Co. Ct. 160, 20 Wkly. Notes Cas. 31.

South Carolina.— Lee *v.* Polk, 4 McCord 215. But see Johnson *v.* Bounethea, 3 Hill 15, 30 Am. Dec. 347.

Virginia.— Sutton *v.* Burruss, 9 Leigh 381, 33 Am. Dec. 246.

West Virginia.— Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986.

United States.— Nicholls *v.* Warfield, 18 Fed. Cas. No. 10,234, 2 Cranch C. C. 429.

England.— *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130.

See 33 Cent. Dig. tit. "Limitation of Actions," § 606.

But see Deshler *v.* Cabiness, 10 Ala. 959; White *v.* Potter, 1 N. J. L. 183. *Compare* Jones *v.* Brown, 9 U. C. C. P. 201.

70. Mitchell *v.* Mitchell, 11 Gill & J. (Md.) 388.

71. Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*affirming* 110 Ill. App. 404].

72. *Georgia.*— Hicks *v.* Thomas, Dudley 218.

Iowa.— Brenneman *v.* Edwards, 55 Iowa 374, 7 N. W. 621; Morehead *v.* Gallinger, 9 Iowa 519; Chambers *v.* Garland, 3 Greene 322.

Kansas.—Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285.

Louisiana.— Lackey *v.* Macmurdo, 9 La. Ann. 15.

Massachusetts.— Weston *v.* Hodgkins, 136 Mass. 326; Smith *v.* Eastman, 3 Cush. 355.

Missouri.— Chambers *v.* Rubey, 47 Mo. 99, 4 Am. Rep. 318.

New Hampshire.—Weare *v.* Chase, 58 N. H. 225; Atwood *v.* Coburn, 4 N. H. 315.

New York.— Heaton *v.* Leonard, 69 Hun 423, 23 N. Y. Suppl. 469; Creuse *v.* Defiganiere, 10 Bosw. 122; Sands *v.* Gelston, 15 Johns. 511; Laurence *v.* Hopkins, 13 Johns. 288.

North Carolina.— Wolfe *v.* Fleming, 23 N. C. 290.

Pennsylvania.— Gest *v.* Heiskill, 5 Rawle 134.

South Carolina.— Cohen *v.* Aubin, 2 Bailey 283.

Texas.— Goldstein *v.* Gans, (Civ. App. 1895) 32 S. W. 185; Reynolds Iron Works *v.* Mitchell, (Civ. App. 1894) 27 S. W. 508.

Vermont.— Slack *v.* Norwich, 32 Vt. 818; Bowker *v.* Harris, 30 Vt. 424; Aldrich *v.* Morse, 28 Vt. 642; Cross *v.* Conner, 14 Vt. 394.

United States.— Edwards *v.* Bates County, 55 Fed. 436 [*reversed* in 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155]; Ash *v.* Hayman, 2 Fed. Cas. No. 572, 2 Cranch C. C. 452; Neil *v.* Abbott, 17 Fed. Cas. No. 10,088, 2 Cranch C. C. 193.

England.— Gibson *v.* Baghott, 5 C. & P. 211, 24 E. C. L. 531; Everett *v.* Robertson, 1 E. & E. 16, 4 Jur. N. S. 1083, 28 L. J. Q. B. 23, 7 Wkly. Rep. 9, 102 E. C. L. 16.

See 33 Cent. Dig. tit. "Limitation of Actions," § 607.

Contra.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42. The facts in this case were identical with those of Lackey *v.* Macmurdo, 9 La. Ann. 15.

Applications of rule.— A debt is not revived by the tendering of a note (Smith *v.* Eastman, 3 Cush. (Mass.) 355. *Contra*, Mooar *v.* Mooar, 69 N. H. 643, 46 Atl. 1052), or a check for a less sum than the whole debt (Heaton *v.* Leonard, 69 Hun (N. Y.) 423, 23 N. Y. Suppl. 469; Rhodes *v.* Hadfield, 20 Fed. Cas. No. 11,748, 2

is an offer to refer to arbitration;[73] but an offer to arbitrate will not destroy an unqualified admission or acknowledgment,[74] or stipulation for a reference.[75]

(VI) *OFFER TO BUY PEACE.* An offer of settlement made merely with the view of avoiding trouble and litigation will not revive a barred debt.[76]

e. Sufficiency of Particular Acknowledgments — (I) *PROMISE NOT TO PLEAD STATUTE.* The interruption of the statute or a revival of the claim is effectuated by a written[77] or a verbal promise not to plead the statute,[78] unless coupled with a denial of the debt,[79] or made after suit brought.[80] A promise not to plead the statute against the original demand does not operate to estop the promisor from pleading it as to the new promise itself.[81]

(II) *PROMISE TO SETTLE OR ACCOUNT.* Where a debtor promises his creditor to "settle," using the word as equivalent to "pay," such promise is sufficient to repel the bar of the statute of limitations.[82] But where a promise to "settle" looks merely to a future adjustment of accounts as between the parties it is insufficient for such purpose,[83] unless there are other circumstances or expressions

Cranch C. C. 566); or an offer to pay a certain part thereof without interest (Greenleaf *v.* Norfolk Southern R. Co., 91 N. C. 33; Columbia Bank *v.* Sweeny, 2 Fed. Cas. No. 882, 3 Cranch C. C. 293).

Limitations of rule.—Where an offer of compromise is coupled with a promise to pay, the promise will revive the barred claim notwithstanding such offer (Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483. And see Kohn *v.* Davidson, 23 La. Ann. 467); and a written acknowledgment of a debt included in a contract of compromise and settlement has been held sufficient to revive the debt (Olvey *v.* Jackson, 106 Ind. 286, 4 N. E. 149).

73. Curtis *v.* Sacramento, 70 Cal. 412, 11 Pac. 748; Broddie *v.* Johnson, 1 Sneed (Tenn.) 464; Read *v.* Wilkinson, 20 Fed. Cas. No. 11,611, 2 Wash. 514; *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130.

74. Cheslyn *v.* Dalby, 10 L. J. Exch. 21, 4 Y. & C. Exch. 238.

75. Ten Eyck *v.* Wing, 1 Mich. 40.

76. *Iowa.*— Chambers *v.* Garland, 3 Greene 322.

Massachusetts.— Gardner *v.* Tudor, 8 Pick. 206.

Minnesota.— McNab *v.* Stewart, 12 Minn. 407.

Nebraska.— Nelson *v.* Becker, 32 Nebr. 99, 48 N. W. 962.

New York.— Stafford *v.* Bryan, 3 Wend. 532 [*affirmed* in 2 Paige 45].

Canada.— Spalding *v.* Parker, 3 U. C. Q. B. 66.

77. Lowry *v.* Dubose, 2 Bailey (S. C.) 425; Burton *v.* Stevens, 24 Vt. 131, 58 Am. Dec. 153; Gardner *v.* McMahon, 3 Q. B. 561, 2 G. & D. 593, 6 Jur. 712, 11 L. J. Q. B. 297, 43 E. C. L. 867. See also Jordan *v.* Jordan, 85 Tenn. 561, 3 S. W. 896.

78. Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Gardenhire *v.* Rogers, (Tenn. Ch. App. 1900) 60 S. W. 616; Stearns *v.* Stearns, 32 Vt. 678. *Contra*, Joyner *v.* Massey, 97 N. C. 148, 1 S. E. 702.

79. Hazzard *v.* Wright, 2 Houst. (Del.) 42.

80. Gilkyson *v.* Larue, 6 Watts & S. (Pa.) 213.

81. Trask *v.* Weeks, 81 Me. 325, 17 Atl. 162; Randon *v.* Toby, 11 How. (U. S.) 493, 13 L. ed. 784. *Contra*, Sutton *v.* Burruss, 9 Leigh (Va.) 381, 33 Am. Dec. 246.

82. *California.*— Tuggle *v.* Minor, 76 Cal. 96, 18 Pac. 131. *Compare* Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371.

Delaware.— Greenman *v.* Wilson, 4 Houst. 14.

Massachusetts.— Barnard *v.* Bartholomew, 22 Pick. 291.

Mississippi.— Brody *v.* Doherty, 30 Miss. 40.

New York.— Pinkerton *v.* Bailey, 8 Wend. 600; Sluby *v.* Champlin, 4 Johns. 461.

North Carolina.— McCurry *v.* McKesson, 49 N. C. 510; Smith *v.* Leeper, 32 N. C. 86; Toomer *v.* Long, 3 N. C. 18.

Pennsylvania.— Jones *v.* Moore, 5 Binn. 573, 6 Am. Dec. 428.

South Carolina.— Johnson *v.* Bounettreau, Riley 9, 3 Hill 15, 30 Am. Dec. 347.

England.— Sidwell *v.* Mason, 2 H. & N. 306, 3 Jur. N. S. 649, 26 L. J. Exch. 407, 5 Wkly. Rep. 72.

83. *Illinois.*— Ayers *v.* Richards, 12 Ill. 146; Bloomfield *v.* Bloomfield, 7 Ill. App. 261.

North Carolina.— Mills *v.* Taber, 50 N. C. 412.

Pennsylvania.— Weaver *v.* Weaver, 54 Pa. St. 152; Emerson *v.* Miller, 27 Pa. St. 278; Gleim *v.* Rise, 6 Watts 44; Drawbaugh *v.* Drawbaugh, 7 Pa. Super. Ct. 349; Storm *v.* White, 6 Phila. 531. See also Berghaus *v.* Calhoun, 6 Watts 219.

South Carolina.— Hughes *v.* Hughes, Cheves 33.

Tennessee.— Russel *v.* Gass, Mart. & Y. 270.

Virginia.— Liskey *v.* Paul, 100 Va. 764, 42 S. E. 875; Gover *v.* Chamberlain, 83 Va. 286, 5 S. E. 174; Bell *v.* Crawford, 8 Gratt. 110; Sutton *v.* Burruss, 9 Leigh 381, 33 Am. Dec. 246; Aylett *v.* Robinson, 9 Leigh 45.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174.

which indicate an intent to pay the amount which shall be found due.[84] In such case the expression of an opinion that nothing will be found due will not rob the acknowledgment of its efficacy.[85] It follows of course from the preceding rules that the effect of a statement of a desire to settle will be overcome by contemporaneous statements evincing a refusal to pay.[86] To be effectual the agreement to settle must recognize a specific debt.[87]

(III) *Giving of Pledge or Security.* The running of the statute is interrupted by the giving of a pledge as security for the debt,[88] provided the pledge is legally made,[89] and the interruption continues while the pledge is held.[90] The giving of security constitutes a sufficient acknowledgment of a debt to take it out of the operation of the statute,[91] but the security must be given for the identical debt or is not effectual to interrupt the statute;[92] and it must be given to the creditor.[93] But a mere offer to give security is insufficient,[94] especially where the offer is rejected.[95] The possession by the creditor of property of the debtor for the purpose of paying himself out of its hire is an acknowledgment of the debt which interrupts prescription.[96]

(IV) *Giving or Renewal of Note.* The giving of a note for a debt may operate as an acknowledgment,[97] as may a promise to renew a note.[98] And so a

But *compare* Barney *v.* Smith, 4 Harr. & J. (Md.) 485, 7 Am. Dec. 679; Hunter *v.* Kittredge, 41 Vt. 359.

84. Phelps *v.* Sleeper, 17 N. H. 332; McLin *v.* McNamara, 22 N. C. 82; Bliss *v.* Allard, 49 Vt. 350; Prentiss *v.* Stevens, 38 Vt. 159; Cooper *v.* Parker, 25 Vt. 502; Williams *v.* Finney, 16 Vt. 297; Chapin *v.* Warden, 15 Vt. 560; Blake *v.* Parleman, 13 Vt. 574. See also Stancell *v.* Burgwyn, 124 N. C. 69, 32 S. E. 378; Lance *v.* Parker, 1 Mill (S. C.) 168; Prance *v.* Sympson, 18 Jur. 929, Kay 678, 69 Eng. Reprint 289.

85. Bliss *v.* Allard, 49 Vt. 350; Noyes *v.* Hall, 28 Vt. 645; Paddock *v.* Colby, 18 Vt. 485; Read *v.* Wilkinson, 20 Fed. Cas. No. 11,611, 2 Wash. 514. See also Skeet *v.* Lindsay, 2 Ex. D. 314, 46 L. J. Exch. 249, 36 L. T. Rep. N. S. 98, 25 Wkly. Rep. 322.

86. Currier *v.* Lockwood, 40 Conn. 349, 16 Am. Rep. 40.

87. Loftin *v.* Aldridge, 48 N. C. 328. See *supra*, VII, A, 5.

88. Souder's Estate, 169 Pa. St. 239, 32 Atl. 417 [*affirming* 3 Pa. Dist. 495, 15 Pa. Co. Ct. 285], in which it was said that this amounted to a distinct acknowledgment of the debt from which a promise to pay was reasonably deducible. But see Shepherd *v.* Thompson, 122 U. S. 231, 7 S. Ct. 1229, 30 L. ed. 1156.

89. Scott *v.* Shreveport, 20 Fed. 714.

90. Conger *v.* New Orleans, 32 La. Ann. 1250; Blanc *v.* Hertzog, 23 La. Ann. 199; Citizens' Bank *v.* Knapp, 22 La. Ann. 117; West Baton Rouge Police Jury *v.* Duraldc, 22 La. Ann. 107; Citizens' Bank *v.* Johnson, 21 La. Ann. 128; La Banque Du Peuple *v.* Huot, 12 Quebec Super. Ct. 370.

But if the thing pledged comes into the hands of the pledgor and is sold by him and the proceeds converted, the statute begins to run again. Conger *v.* New Orleans, 32 La. Ann. 1250.

91. Russell *v.* La Roque, 11 Ala. 352; Maddox *v.* Walker, 74 S. W. 741, 25 Ky. L. Rep. 124; Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464. And see cases cited *infra*, this note.

Mortgage.— The giving of a mortgage to secure a preëxisting debt will stop the running of the statute or revive a debt where barred (Merrills *v.* Swift, 18 Conn. 257, 46 Am. Dec. 315; Van Staden *v.* Kline, 64 Iowa 180, 20 N. W. 3; Hampton *v.* France, 32 S. W. 950, 33 S. W. 826, 17 Ky. L. Rep. 980; Balch *v.* Onion, 4 Cush. (Mass.) 559; Stanford *v.* Andrews, 12 Heisk. (Tenn.) 664; Grayson *v.* Taylor, 14 Tex. 672); but an undelivered mortgage will not revive the debt (Merriam *v.* Leonard, 6 Cush. (Mass.) 151).

Insurance policy.— The running of the statute is interrupted by the assignment of a life insurance policy and delivery to the creditor of the receipts or renewal certificates for annual premiums (Miller *v.* Magee, 2 N. Y. Suppl. 156); or the annual renewal of a fire insurance policy payable to the creditor as his interest may appear (Begue *v.* St. Marc, 47 La. Ann. 1151, 17 So. 700).

92. Gragg *v.* Barnes, 32 Kan. 301, 4 Pac. 276.

93. Holt *v.* Gage, 60 N. H. 536.

94. Wells *v.* Hill, 118 N. C. 900, 24 S. E. 771.

95. Exeter Bank *v.* Sullivan, 6 N. H. 124.

96. Scovel *v.* Gill, 30 La. Ann. 1207; Montgomery *v.* Levistones, 8 Rob. (La.) 145.

97. London, etc., Bank *v.* Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64. But see Parmiter *v.* Parmiter, 3 De G. F. & J. 461, 30 L. J. Ch. 508, 3 L. T. Rep. N. S. 799, 8 Wkly. Rep. 578, 64 Eng. Ch. 361, 45 Eng. Reprint 957.

98. Peavey *v.* Brown, 22 Me. 100; Hart *v.* Boyt, 54 Miss. 547; Bowman *v.* Rector, (Tenn. Ch. App. 1900) 59 S. W. 389. *Contra*, Ritter's Estate, 161 Pa. St. 79, 28 Atl. 1011; Hartranft's Estate, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717.

renewal of a note indorsed upon it will be sufficient as an acknowledgment to take the case out of the operation of the statute.[99]

(v) *Statement of Account.* An admission of the debt by the debtor in a statement of account furnished to the creditor is sufficient.[1]

(vi) *Agreement to Pay Interest.* An agreement to pay interest upon a debt may amount to an acknowledgment of the debt from which a promise may be implied.[2]

(vii) *Offer to Pay Principal Exclusive of Interest.* There is an irreconcilable conflict in the decisions as to the effect of an offer or promise to pay the principal or debt exclusive of the interest. By some courts it is held to revive no part of the debt,[3] by others it is held to revive the debt as to the principal only,[4] while by others the whole debt is held to be revived.[5]

(viii) *Deeds of Assignments or Schedules.* An assignment for the benefit of creditors made to a third person does not constitute such acknowledgment of debts of the assignor as to remove them from the operation of the statute;[6] nor will the listing of the claim in the schedule of liabilities have such effect;[7] nor is the statute interrupted by the debtor's acknowledgment made after the assignment that the debt was one of those on which payment was to be made.[8] But an assignment of a particular asset to be applied to the payment of a particular debt constitutes such acknowledgment of the debt as to take it without the statute.[9] So too will the debtor's referring the creditor to his trustee under an assignment for the benefit of his creditors.[10] One who has made an assignment for the benefit of creditors may revive thereafter by promise a claim against his estate.[11]

(ix) *Schedules in Insolvency or Bankruptcy.* A statement of a debt in

99. Warren Academy *v.* Starrett, 15 Me. 443; McKay *v.* Overton, 65 Tex. 82; Bourdin *v.* Greenwood, L. R. 13 Eq. 281, 41 L. J. Ch. 73, 28 L. T. Rep. N. S 782, 20 Wkly. Rep. 166. But *compare* Foster *v.* Dawber, 6 Exch. 839, 20 L. J. Exch. 385.

1. Smith *v.* Ludlow, 6 Johns. (N. Y.) 267; Holmes *v.* Mackrell, 3 C. B. N. S. 789, 91 E. C. L. 789; Waller *v.* Lacy, 8 Dowl. P. C. 563, 4 Jur. 435, 9 L. J. C. P. 217, 1 M. & G. 54, 1 Scott N. R. 186, 39 E. C. L. 641; House *v.* House, 24 U. C. C. P. 526.

Where two receipts for money are written on the same paper, the first barred and the latter within the statute of limitations, the latter amounts to a restatement of the account between the parties and revives the debt. Finkbone's Appeal, 86 Pa. St. 368.

2. Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44, 3 Ida. 672, 34 Pac. 813; Campbell *v.* Campbell, 118 Iowa 131, 91 N. W. 894; Miller *v.* Beardsley, 81 Iowa 720, 45 N. W. 756 (holding farther that the evidence of an existing indebtedness is even more satisfactory when the payment is of interest due and not due); Kincaid *v.* Archibald, 10 Hun (N. Y.) 9 [*affirmed* in 73 N. Y. 189]; Taylor *v.* Steele, 11 Jur. 806, 16 L. J. Exch. 177, 16 M. & W. 665.

Part payment by payment of interest see *infra*, VII, B, 2, b.

3. Pearson *v.* Darrington, 32 Ala. 227; Pool *v.* Relfe, 23 Ala. 701. See also Duffie *v.* Phillips, 31 Ala. 571, where the question is discussed, but not decided.

4. McDonald *v.* Underhill, 10 Bush (Ky.) 584; Graham *v.* Keys, 29 Pa. St. 189; McDonald *v.* Grey, 29 Tex. 80.

5. Foster *v.* Smith, 52 Conn. 449; Walker *v.* Cruikshank, 23 La. Ann. 252; Brookes *v.* Chesley, 4 Gill (Md.) 205; Murray *v.* Coster, 20 Johns. (N. Y.) 576, 11 Am. Dec. 333 [*affirming* 5 Johns. Ch. 522]. *Compare* Hartley *v.* Requa, 17 Misc. (N. Y.) 74, 39 N. Y. Suppl. 846.

6. Niblack *v.* Goodman, 67 Ind. 174; Reed *v.* Johnson, 1 R. I. 81; Kennett *v.* Milbank, 8 Bing. 38, 1 Moore & S. 102, 1 L. J. C. P. 8, 21 E. C. L. 435. See also Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907.

7. Georgia Ins., etc., Co. *v.* Ellicott, 10 Fed. Cas. No. 5,354, Taney 130; *Ex p.* Topping, 4 De G. J. & S. 551, 34 L. J. Bankr. 44, 12 L. T. Rep. N. S. 787, 13 Wkly. Rep. 1025, 69 Eng. Ch. 423, 46 Eng. Reprint 1033; Davies *v.* Edwards, 7 Exch. 22, 15 Jur. 1014, 21 L. J. Exch. 4; Courtenay *v.* Williams, 3 Hare 539, 13 L. J. Ch. 461, 15 L. J. Ch. 204, 25 Eng. Ch. 461, 67 Eng. Reprint 494. But see Barrett *v.* Bermingham, Fl. & K. 566, 4 Ir. Eq. 537, holding that a return made by an insolvent in his schedule is a sufficient acknowledgment. To the same effect see Eicke *v.* Nokes, 1 Bing. N. Cas. 69, 27 E. C. L. 548, 3 L. J. C. P. 256, 4 Moore & S. 585, 30 E. C. L. 567, 1 M. & R. 359; Pott *v.* Cleg, 11 Jur. 289, 16 L. J. Exch. 210, 16 M. & W. 321.

8. Pickett *v.* King, 34 Barb. (N. Y.) 193 [*affirmed* in 34 N. Y. 175].

9. Thompson *v.* Shepherd, 1 Mackey (D. C.) 385.

10. Baillie *v.* Inchiquin, 1 Esp. 435, upon the theory that a general acknowledgment is good.

11. Hellman *v.* Kiene, 73 Iowa 448, 35 N. W. 516, 5 Am. St. Rep. 693.

the schedule of an insolvent is not such an acknowledgment as will take the case out of the statute.[12]

(x) *PLEADINGS, AFFIDAVITS, EVIDENCE, ETC.* The statute is tolled by an unqualified acknowledgment of an existing indebtedness made in a pleading filed in a former[13] or pending action,[14] especially where a liability and willingness to pay are inferable therefrom.[15] But in order to revive a debt by an admission in pleading, there must be implied from it a recognition of a subsisting obligation and a willingness to pay, otherwise it is insufficient.[16] An admission in an affidavit for continuance which implies a determination to rely on the statute,[17] or an answer of a garnishee which does not admit a subsisting debt, will not revive a barred debt.[18] But an admission of indebtedness contained in an affidavit of the debtor filed in opposition to the appointment of a receiver is sufficient.[19] Where the admission of a witness acknowledges a debt as a subsisting one, and clearly implies a willingness to pay, the operation of the statute will be suspended or a barred debt revived.[20] But if there is no admission of fact from which a liability and willingness to pay can be inferred, the acknowledgment is insufficient.[21] A mere brief of evidence, not signed by the party, cannot have effect as an acknowledgment removing the bar of a debt against him.[22] A judgment or decree entered by consent or confession is sufficient to toll the statute;[23] but merely suffering a judgment by default will not have such effect;[24] nor will a confession of judgment before an officer unauthorized to enter it.[25] But a statement of indebtedness made as a basis for a judgment confessed will create a new cause of action against which the statute may run independently of the original debt.[26]

(xi) *PROVISIONS IN WILL AND CHARGES ON ESTATES.* Barred debts of a testator are not revived by a direction in his will for the payment of all of his just debts, whether such direction be express[27] or merely inferable from such

12. *Massachusetts.*—Richardson *v.* Thomas, 13 Gray 381, 74 Am. Dec. 636; Stoddard *v.* Doane, 7 Gray 387; Roscoe *v.* Hale, 7 Gray 274. See also Woodbridge *v.* Allen, 12 Metc. 470.

New York.— Stuart *v.* Foster, 18 Abb. Pr. 305; Kohnstamm *v.* Foster, 28 How. Pr. 273. *Contra,* Bryar *v.* Willcocks, 3 Cow. 159.

Pennsylvania.— Christy *v.* Flemington, 10 Pa. St. 129, 49 Am. Dec. 590; Brown *v.* Bridges, 2 Miles 424.

Rhode Island.— Hidden *v.* Cozzens, 2 R. I. 401, 60 Am. Dec. 93.

South Carolina.— Lauderdale *v.* Mahon, 41 S. C. 97, 19 S. E. 294; Sartor *v.* Beaty, 25 S. C. 293.

United States.— Georgia Ins., etc., Co. *v.* Ellicott, 10 Fed. Cas. No. 5,354, Taney 130.

See 33 Cent. Dig. tit. "Limitation of Actions," § 589.

13. Commercial Mut. Ins. Co. *v.* Brett, 44 Barb. (N. Y.) 489 Brigham *v.* Hutchins, 27 Vt. 569; Bradley *v.* Briggs, 22 Vt. 95; Ferris *v.* Burton, 1 Vt. 439; Moodie *v.* Bannister, 4 Drew. 432, 5 Jur. N. S. 402, 28 L. J. Ch. 881, 7 Wkly. Rep. 278, 62 Eng. Reprint 166; Blair *v.* Nugent, 9 Ir. Eq. 404, 3 J. & L. 673. But see Bloodgood *v.* Bruen, 8 N. Y. 362 [*reversing* 4 Sandf. 427].

14. Roberts *v.* Leak, 108 Ga. 806, 33 S. E. 995; McMillan *v.* Toombs, 74 Ga. 535; Sumter *v.* Morse, 2 Hill Eq. (S. C.) 87; Galway *v.* Barrymore, Dick. 163, 21 Eng. Reprint 231.

15. Sumter *v.* Morse, 2 Hill Eq. (S. C.) 87.

16. *Alabama.*—Bradford *v.* Spyker, 32 Ala. 134.

Georgia.— Thornton *v.* Nichols, 119 Ga. 50, 45 S. E. 785; Dickinson *v.* McCamy, 5 Ga. 486, 48 Am. Dec. 298.

Kansas.— McMillan *v.* Leeds, (1897) 49 Pac. 159.

Louisiana.— Southern Mut. Ins. Co. *v.* Pike, 34 La. Ann. 825.

Mississippi.— Holberg *v.* Jaffray, 65 Miss. 526, 5 So. 94.

New York.— Commercial Mut. Ins. Co. *v.* Brett, 44 Barb. 489.

North Carolina.— Newbern Bank *v.* Sneed, 10 N. C. 500.

See 33 Cent. Dig. tit. "Limitation of Actions," § 588.

17. Newbern Bank *v.* Sneed, 10 N. C. 500.

18. Hinkle *v.* Currin, 2 Humphr. (Tenn.) 137. See also Goodwin *v.* Buzzell, 35 Vt. 9.

19. Tristram *v.* Harte, 3 Ir. Eq. 386, Longf. & T. 186.

20. Dinguid *v.* Schoolfield, 32 Gratt. (Va.) 803; Roblin *v.* McMahon, 18 Ont. 219. *Contra,* Bloodgood *v.* Bruen, 8 N. Y. 362 [*reversing* 4 Sandf. 427].

21. Sanford *v.* Clark, 29 Conn. 457.

22. Bryan *v.* Edward, 96 Ga. 813, 22 S. E. 915.

23. Bissell *v.* Jaudon, 16 Ohio St. 498.

24. Boone *v.* Colehour, 165 Ill. 305, 46 N. E. 253; Lane *v.* Richardson, 79 N. C. 159.

25. Miflin *v.* Stalker, 4 Kan. 283.

26. Trenery *v.* Swan, 93 Iowa 619, 61 N. W. 947.

27. *Connecticut.*—Peck *v.* Botsford, 7 Conn. 172, 18 Am. Dec. 92.

expressions as "after paying my debts";[28] nor by a provision for payment out of assets which prove valueless.[29] A written acknowledgment of a debt, even though in form of an unexecuted will, will not suspend the running of the statute;[30] but a schedule of debts prepared and acknowledged by a testator at the time of making his will will start the statute to running anew.[31] So too will the recognition of a debt in the will itself, and a direction to pay it.[32] A direction in a will to disregard the statute of limitations authorizes the executor to pay all just debts, although they may be barred,[33] exclusive, however, of those due the executor himself,[34] unless he is empowered to make settlement of the accounts between himself and the testator without regard to limitations.[35] A trust in personal estate created by a will for the payment of debts will not affect the bar of the statute.[36] In the absence of a specific charge or an express trust, debts are not taken out of the statute as against lands devised.[37] Where, however, there is an express trust, the running of the statute will be interrupted as to claimants not barred at the testator's death,[38] but debts which are barred at his death are not revived by such trust.[39] A direction in a will for the executors to pay the debt of a third person will not confer upon them the right to pay such debt when barred by the statute of limitations and where the debtor insists upon the statute.[40] The running of the statute is interrupted where an employer acknowledges himself indebted to an employee and promises to pay such indebtedness by provision in his will,[41] or at

Pennsylvania.— Agnew *v.* Fetterman, 4 Pa. St. 56, 45 Am. Dec. 671; Smith *v.* Porter, 1 Binn. 209.

Texas.— Parker *v.* Cater, 8 Tex. 318; Suhre *v.* Benton, (Civ. App. 1894) 25 S. W. 822.

Virginia.— Tazewell *v.* Whittle, 13 Gratt. 329; Braxton *v.* Wood, 4 Gratt. 25; Brown *v.* Griffiths, 6 Munf. 450.

England.— Freake *v.* Cranefeldt, 4 Jur. 1080, 8 L. J. Ch. 61, 3 Myl. & C. 499, 14 Eng. Ch. 499, 40 Eng. Reprint 1019.

See 33 Cent. Dig. tit. "Limitation of Actions," § 585.

28. Starke *v.* Wilson, 65 Ala. 576; Walker *v.* Campbell, 8 N. C. 304.

29. *In re* Gannon, 27 Pittsb. Leg. J. (Pa.) 398.

30. Allen *v.* Collier, 70 Mo. 138, 35 Am. Rep. 416; Smith *v.* Camp, 58 Hun (N. Y.) 434, 12 N. Y. Suppl. 363.

31. Rogers *v.* Southern, 4 Baxt. (Tenn.) 67.

32. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197 [*affirming* 61 Ill. App. 252]; Miller *v.* Simons, 71 Ill. App. 369; Pillion's Estate, 15 Pa. Co. Ct. 8, 35 Wkly. Notes Cas. 68; Clinton *v.* Brophy, 10 Ir. Eq. 139. But see Stewart *v.* McFarland, 84 Iowa 55, 50 N. W. 221; Stansbury *v.* Stansbury, 20 W. Va. 23.

Revocation of will.—An oral promise to provide by will for the payment of a debt executed by the making of a will in which such provision is made, and which is subsequently revoked by the testator, will not suspend the running of the statute. Petrie *v.* Mott, 38 Hun (N. Y.) 279.

33. Campbell *v.* Shotwell, 51 Tex. 27. However, such direction will not prevent the executor from pleading the statute of nonclaim in favor of the estate. Bosworth *v.* Smith, 9 R. I. 67.

34. Williams *v.* Williams, 15 Lea (Tenn.) 438.

35. Hamner *v.* Hamner, 3 Head (Tenn.) 398.

36. Campbell *v.* Sullivan, Hard. (Ky.) 17; Scott *v.* Jones, 4 Cl. & F. 382, 7 L. J. Ch. 242, 7 Eng. Reprint 147.

37. Starke *v.* Wilson, 65 Ala. 576 [*overruling* Darrington *v.* Borland, 3 Port. (Ala.) 9]; Steele *v.* Steele, 64 Ala. 438, 38 Am. Dec. 15; Carrington *v.* Manning, 13 Ala. 611.

38. Agnew *v.* Fetterman, 4 Pa. St. 56, 45 Am. Dec. 671; Woonsocket Sav. Institute *v.* Ballou, 16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555.

39. Murray *v.* Mechanics' Bank, 4 Edw. (N. Y.) 567; Agnew *v.* Fetterman, 4 Pa. St. 56, 45 Am. Dec. 671; Burke *v.* Jones, 2 Ves. & B. 275, 13 Rev. Rep. 83, 35 Eng. Reprint 323.

In Virginia, by statute, it is provided that not even an express trust will revive barred debts, unless it is made to appear that the testator intended to waive the statute. Johnston *v.* Wilson, 29 Gratt. 379.

40. Dunn *v.* Renick, 33 W. Va. 476, 10 S. E. 810.

41. *Louisiana.*— Copse *v.* Eddins, 15 La. Ann. 528; Nimmo *v.* Walker, 14 La. Ann. 581; Alexander *v.* Alexander, 12 La. Ann. 588. See also Gaines *v.* Del Campo, 30 La. Ann. 245.

Maryland.— Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117.

Tennessee.— Cross *v.* Dunlacy, (Ch. App. 1898) 46 S. W. 473.

Vermont.— Minkler *v.* Minkler, 16 Vt. 193.

West Virginia.— Cann *v.* Cann, 45 W. Va. 563, 31 S. E. 923.

Bequests to attorney.— In Boucher *v.* Morrison, 2 Quebec Rev. Jud. 151, it was held that, although a bequest to an attorney in recognition of services rendered by him is invalid after the donor's death as a gift *causa mortis*, the prescription of his account against the donor is interrupted by her recog-

death,[42] although the amount of the debt is not stated or fixed by him at the time of the promise.[43] In the case of such promise the statute does not begin to run until the death of the promisor.[44] The statute is not interrupted, however, by a mere expression of an intent to compensate by testamentary provision which falls short of a binding promise or contract,[45] especially where made to a stranger.[46]

8. CONDITIONAL PROMISES — a. In General. A promise which revives a barred debt, being a voluntary one, conditions binding upon the creditor may be imposed by the debtor.[47] And when such conditions are imposed the promise is insufficient to remove the case from the statute,[48] unless the creditor shall have accepted the conditions[49] and there is proof of their fulfilment.[50] Within these rules are offers to pay in property other than money,[51] or in instalments;[52] or a promise to pay when the debtor sells certain property,[53] or if time enough is given him;[54] or to

nition of and promise to pay it implied from the bequest. *Compare* Cole *v.* Martin, 99 Va. 223, 37 S. E. 907.

42. Neish *v.* Gannon, 198 Ill. 219, 64 N. E. 1000 [*affirming* 98 Ill. App. 248]. And see Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531, holding that the promise of a debtor to pay at his death, and to compensate the creditor for deferring the payment, constituted a new contract based on a valuable consideration, against which the statute did not run until the debtor's death.

43. Neish *v.* Gannon, 198 Ill. 219, 64 N. E. 1000 [*affirming* 98 Ill. App. 248].

44. Copse *v.* Eddins, 15 La. Ann. 528; Nimmo *v.* Walker, 14 La. Ann. 581; Davis *v.* Teachout, 126 Mich. 135, 85 N. W. 475, 86 Am. St. Rep. 531; Cann *v.* Cann, 45 W. Va. 563, 31 S. E. 923.

45. Watson *v.* Barber, 105 La. 799, 30 So. 127; McNamara's Succession, 48 La. Ann. 45, 18 So. 908; Gill *v.* Staylor, 97 Md. 665, 55 Atl. 398.

46. Collar *v.* Patterson, 137 Ill. 403, 27 N. E. 604.

47. *Colorado.*— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Massachusetts.— Gardner *v.* Tudor, 8 Pick. 206.

New Hampshire.— Mooar *v.* Mooar, 69 N. H. 643, 46 Atl. 1052.

Pennsylvania.— Sbreiner *v.* Cummins, 63 Pa. St. 374.

South Carolina.—Allcock *v.* Ewen, 2 Hill 326.

Texas.— Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72.

United States.— Tridell *v.* Munhall, 124 Fed. 802.

48. *Georgia.*— Bulloch *v.* Smith, 15 Ga. 395.

Illinois.— Teessen *v.* Camblin, 1 Ill. App. 424.

Louisiana.— Jewell's Succession, 11 La. Ann. 83.

New York.— Wakeman *v.* Sherman, 9 N. Y. 85.

Pennsylvania.— Hartranft's Estate, 153 Pa. St. 530, 26 Atl. 104, 34 Am. St. Rep. 717.

Tennessee.— Broddie *v.* Johnson, 1 Sneed 464; Butler *v.* Winters, 2 Swan 91.

Canada.— Young *v.* Moore, 23 U. C. Q. B. 151; Lampmann *v.* Davis, 1 U. C. Q. B. 179.

A promise to pay as soon as the debtor "gets better" will not be construed as being conditional upon the restoration of the debtor's health. Morgan *v.* Kirkpatrick, 2 Pa. Co. Ct. 262.

49. *Illinois.*— Drury *v.* Henderson, 36 Ill. App. 521.

Louisiana.— Gardner *v.* McDaniel, 26 La. Ann. 472; Pearson *v.* Harper, 11 La. Ann. 184.

Maine.— McLellan *v.* Allbee, 17 Me. 184.

Massachusetts.— Mumford *v.* Freeman, 8 Metc. 432, 41 Am. Dec. 532.

New Hampshire.— Batchelder *v.* Batchelder, 48 N. H. 43, 97 Am. Dec. 569; Atwood *v.* Coburn, 4 N. H. 315.

New York.— Smith *v.* Meakim, 2 Dem. Surr. 129.

Pennsylvania.— Kensington Bank *v.* Patton, 14 Pa. St. 479, 53 Am. Dec. 564.

South Carolina.—Allcock *v.* Ewen, 2 Hill 326.

United States.— Craig *v.* Brown, 6 Fed. Cas. No. 3,330, 3 Wash. 503; Read *v.* Wilkinson, 20 Fed. Cas. No. 11,611, 2 Wash. 514.

Canada.— Barnes *v.* Metcalf, 17 U. C. Q. B. 388.

50. See *infra*, VII, A, 8, c.

51. *Alabama.*— Bates *v.* Bates, 33 Ala. 102 [*overruling* Newhouse *v.* Redwood, 7 Ala. 598].

Arkansas.— Opp *v.* Wack, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743.

Connecticut.— Currier *v.* Lockwood, 40 Conn. 349, 16 Am. Rep. 40.

New York.— Bush *v.* Barnard, 8 Johns. 407.

North Carolina.— Riggs *v.* Roberts, 85 N. C. 151, 39 Am. Rep. 692; Taylor *v.* Stedman, 33 N. C. 447.

Pennsylvania.— Huff *v.* Richardson, 19 Pa. St. 388.

Texas.— Mitchell *v.* Clay, 8 Tex. 443.

United States.— Kampshall *v.* Goodman, 14 Fed. Cas. No. 7,605, 6 McLean 189.

England.— Cawley *v.* Furnell, 12 C. B. 291, 15 Jur. 908, 20 L. J. C. P. 197, 74 E. C. L. 291.

52. Buckmaster *v.* Russell, 10 C. B. N. S. 745, 8 Jur. N. S. 155, 4 L. T. Rep. N. S. 552, 9 Wkly. Rep. 749, 100 E. C. L. 74.

53. Bates *v.* Herren, 95 N. C. 388.

54. Tyson *v.* McGill, 15 La. 145.

pay whatever a third party may find to be due.[55] It follows that where the offer is accepted the promise operates to take the debt out of the statute;[56] as where it is to pay if the debtor cannot prove payment,[57] if the debt is established,[58] if another has not paid,[59] or if another does not pay.[60] In some jurisdictions, however, a conditional promise to pay if the debtor owes has been held insufficient.[61]

b. Necessity That Acknowledgment Be Taken as a Whole. It would appear to be the better rule that the entire acknowledgment, whether verbal or written, must be considered, and that the creditor will not be permitted to accept an acknowledgment and reject a condition or qualification;[62] and he cannot sustain an action on the debt unless it is brought in accordance with the qualification.[63] There are cases, however, in which it has been held that where an acknowledgment and a promise are contained in the same writing, and are distinct, the acknowledgment will support a present action, although the promise is conditional.[64] So where the bar of the statute has not yet attached an unqualified admission of an existing debt is sufficient, although the debtor suggests a new mode of payment.[65]

c. Necessity of Fulfilment of Condition. An acknowledgment of a debt, accompanied by a promise to pay conditionally, is of no avail unless the condition be complied with or the event happens upon which the promise depends.[66] But where plaintiff shows that the condition has been fulfilled or a readiness on his

55. Linderman *v.* Pomeroy, 142 Pa. St. 168, 21 Atl. 820, 24 Am. St. Rep. 494.

56. Randon *v.* Toby, 11 How. (U. S.) 493, 13 L. ed. 784. *Contra,* Taylor *v.* Stedman, 35 N. C. 97.

57. Sothoron *v.* Hardy, 8 Gill & J. (Md.) 133; Mosher *v.* Hubbard, 13 Johns. (N. Y.) 510; Richmond *v.* Fugua, 33 N. C. 445; Davis *v.* Verdier, 1 McCord (S. C.) 320.

58. Stanton *v.* Stanton, 2 N. H. 425; Shaw *v.* Lambert, 14 N. Y. App. Div. 265, 43 N. Y. Suppl. 470; Loomis *v.* Decker, 1 Daly (N. Y.) 186; Read *v.* Wilkinson, 20 Fed. Cas. No. 11,611, 2 Wash. 514; Heylin *v.* Hastings, 12 Mod. 223.

59. Smith *v.* Ludlow, 6 Johns. (N. Y.) 267; Richmond *v.* Fugua, 33 N. C. 445; Sweet *v.* Hubbard, 36 Vt. 294.

60. Croman *v.* Stull, 119 Pa. St. 91, 12 Atl. 812.

61. Linderman *v.* Pomeroy, 142 Pa. St. 168, 21 Atl. 820, 24 Am. St. Rep. 494; Meyer *v.* Andrews, 70 Tex. 327, 7 S. W. 814.

62. Higdon *v.* Stewart, 17 Md. 105; Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72.

63. Wiley *v.* Brown, 18 R. I. 615, 30 Atl. 464; Shaw *v.* Newell, 1 R. I. 488.

64. Beasley *v.* Evans, 35 Miss. 192; Allen *v.* Trisdorfer, 15 Daly (N. Y.) 1, 4 N. Y. Suppl. 896 [*reversing* on other grounds 11 N. Y. St. 674]. See also Kahn *v.* Crawford, 28 Misc. (N. Y.) 572, 59 N. Y. Suppl. 853.

65. Southern Pac. Co. *v.* Prosser, (Cal. 1898) 52 Pac. 836.

66. *Arkansas.*— Opp *v.* Wack, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743.

California.— McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Colorado.— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Georgia.— Bulloch *v.* Smith, 15 Ga. 395.

Illinois.— Parsons *v.* Northern Illinois Coal, etc., Co., 38 Ill. 430; Mullett *v.* Shrumph, 27 Ill. 107; Boone *v.* A'Hern, 98 Ill. App. 610; Bloomfield *v.* Bloomfield, 7 Ill. App. 261.

Iowa.— Penley *v.* Waterhouse, 3 Iowa 418.

Kentucky.— Chism *v.* Barnes, 104 Ky. 310, 47 S. W. 232, 875, 20 Ky. L. Rep. 569.

Maine.— Mattocks *v.* Chadwick, 71 Me. 313.

Maryland.—Guy *v.* Tams, 6 Gill 82; Oliver *v.* Gray, 1 Harr. & G. 204.

Massachusetts.— Bidwell *v.* Rogers, 10 Allen 438; Robbins *v.* Otis, 3 Pick. 4; Robbins *v.* Otis, 1 Pick. 368.

Michigan.— Halladay *v.* Weeks, 127 Mich. 363, 86 N. W. 799.

Minnesota.— McNab *v.* Stewart, 12 Minn. 407.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

New Hampshire.— Stowell *v.* Fowler, 59 N. H. 585.

New Jersey.— Parker *v.* Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407; Paul *v.* Smith, 32 N. J. L. 13, 90 Am. Dec. 647.

New York.— Tebo *v.* Robinson, 29 Hun 243 [*reversed* on other grounds in 100 N. Y. 27, 2 N. E. 383]; Allen *v.* Trisdorfer, 11 N. Y. St. 674 [*reversed* on other grounds in 15 Daly 1, 4 N. Y. Suppl. 896]; Tompkins *v.* Brown, 1 Den. 247; Cocks *v.* Weeks, 7 Hill 45.

North Carolina.— Bates *v.* Herren, 95 N. C. 388.

Rhode Island.— Keenan *v.* Keenan, 20 R. I. 105, 37 Atl. 632; Wiley *v.* Brown, 18 R. I. 615, 30 Atl. 464; Sweet *v.* Franklin, 7 R. I. 355; Shaw *v.* Newell, 1 R. I. 488.

South Carolina.—Bonethea *v.* Joyner, 1 Rich. 210; Johnson *v.* Bounethea, 3 Hill 15, 30 Am. Dec. 347.

Tennessee.— Scott *v.* Thornton, 104 Tenn. 547, 58 S. W. 236; Shown *v.* Hawkins, 85 Tenn. 214, 2 S. W. 34; Luna *v.* Edmiston, 5 Sneed 159.

Texas.— Leigh *v.* Linthecum, 30 Tex. 100; Mitchell *v.* Clay, 8 Tex. 443.

part to perform it, the promise becomes effectual.[67] It is sufficient if the condition be performed after suit is brought.[68] If the condition is nugatory and compliance therewith not essential to action by the debtor, performanee thereof need not be shown to make the acknowledgment or promise effectual.[69] Where the debtor promises to pay if able and makes no reference to the future, the presumption will be that he refers to a present ability only and such ability must be shown in order to make the promise effeetual,[70] but where the ability is once shown it is not incumbent upon the creditor to show that it continues.[71] Where the promise is to pay on the happening of a certain contingency, of which the debtor is to notify the creditor, the statute does not begin to run as to the promise until the creditor has notice of the happening of the event.[72]

Virginia.— Farmers' Bank *v.* Clarke, 4 Leigh 603.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Tridell *v.* Munhall, 124 Fed. 802; *In re* Cornwall, 6 Fed. Cas. No. 3,250, 9 Blatchf. 114; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,492, 3 Wash. 404; Read *v.* Wilkinson, 20 Fed. Cas. No. 11,611, 2 Wash. 514.

England.— Meyerhoff *v.* Froehlich, 4 C. P. D. 63, 48 L. J. C. P. 43, 39 L. T. Rep. N. S. 621, 27 Wkly. Rep. 258; Lee *v.* Wilmot, 1 Exch. 364, 4 H. & C. 469, 12 Jur. N. S. 762, 35 L. J. Exch. 175, 14 L. T. Rep. N. S. 627, 14 Wkly. Rep. 993; Scales *v.* Jacob, 3 Bing. 638, 4 L. J. C. P. O. S. 209, 11 E. C. L. 311; Gould *v.* Shirley, 7 L. J. C. P. O. S. 117, 2 M. & P. 581, 17 E. C. L. 638; Woodham *v.* Hollis, 3 L. J. K. B. 70; Nichols *v.* Regent's Canal Co., 63 L. J. Q. B. 641, 71 L. T. Rep. N. S. 249; Barrett *v.* Davies, 21 T. L. R. 21 [*reversing* 90 L. T. Rep. N. S. 460, 20 T. L. R. 318, 52 Wkly. Rep. 607].

Canada.— Murdock *v.* Pitts, 2 Nova Scotia 258; Perrier *v.* Perrier, 25 Quebec Super. Ct. 183.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 604, 609.

67. *California.*— McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.

Colorado.— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Delaware.— Burton *v.* Robinson, 1 Houst. 260.

Georgia.— Love *v.* Hackett, 6 Ga. 486.

Illinois.— Dickerson *v.* Sutton, 40 Ill. 403; Mullett *v.* Shrumph, 27 Ill. 107; Mellick *v.* De Seelhorst, 1 Ill. 221, 12 Am. Dec. 172.

Kansas.— Hanson *v.* Towle, 19 Kan. 273.

Louisiana.— Lafourcade *v.* Barran, 8 La. 283.

Maine.— Morton *v.* Chandler, 8 Me. 9; Seaward *v.* Lord, 1 Me. 163, 10 Am. Dec. 50.

Maryland.—Guy *v.* Tams, 6 Gill 82; Oliver *v.* Gray, 1 Harr. & G. 204.

Minnesota.— McNab *v.* Stewart, 12 Minn. 407.

Montana.— Braithwaite *v.* Harvey, 14 Mont. 208, 36 Pac. 38, 43 Am. St. Rep. 625, 27 L. R. A. 101.

New Hampshire.— Stowell *v.* Fowler, 59 N. H. 585; Betton *v.* Cutts, 11 N. H. 170.

New Jersey.— Parker *v.* Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407; New York F. Ins. Co. *v.* Tooker, 35 N. J. Eq. 408.

New York.— Wakeman *v.* Sherman, 9 N. Y. 85 [*reversing* 11 Barb. 254, and *overruling* Philips *v.* Peters, 21 Barb. 351; Watkins *v.* Stevens, 4 Barb. 168].

North Carolina.— Falls *v.* Sherrill, 19 N. C. 371.

Pennsylvania.— Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; Drawbaugh *v.* Drawbaugh, 7 Pa. Super. Ct. 349.

South Carolina.— Hayes *v.* Clinkscales, 9 S. C. 441; Brown *v.* Joyner, 1 Rich. 210.

Texas.— Lange *v.* Caruthers, 70 Tex. 718, 8 S. W. 604; Leigh *v.* Linthecum, 30 Tex. 100; McDonald *v.* Grey, 29 Tex. 80; Salinas *v.* Wright, 11 Tex. 572.

Vermont.— Steele *v.* Towne, 28 Vt. 771; Hayden *v.* Johnson, 26 Vt. 768; Hill *v.* Keudall, 25 Vt. 528; Paddock *v.* Colby, 18 Vt. 485. But see Moore *v.* Stevens, 33 Vt. 308 [*criticizing* Steele *v.* Town, *supra;* Hill *v.* Kendall, *supra*].

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174; Wetzell *v.* Bussard, 11 Wheat. 309, 6 L. ed. 481; Bullion, etc., Bank *v.* Hegler, 93 Fed. 890; Kampshall *v.* Goodman, 14 Fed. Cas. No. 7,605, 6 McLean 189.

England.— *In re* River Steamer Co., L. R. 6 Ch. 822, 25 L. T. Rep. N. S. 319, 19 Wkly. Rep. 1130; Buccleuch *v.* Eden, 61 L. T. Rep. N. S. 360. See Clarke *v.* Hougham, 2 B. & C. 149, 3 D. & R. 322, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73; Leland *v.* Murphy, 16 Ir. Ch. 500; Nichols *v.* Regent's Canal, 63 L. J. Q. B. 641, 71 L. T. Rep. N. S. 249 [*reversed* on other grounds in 71 L. T. Rep. N. S. 836].

Canada.— Roblin *v.* McMahon, 18 Ont. 219; Young *v.* Moore, 23 U. C. Q. B. 151; Smith *v.* Thorne, 18 U. C. Q. B. 143; Carpenter *v.* Vanderlip, (East T. 3 Vict.) R. & J. Dig. 169.

68. Love *v.* Hackett, 6 Ga. 486.

69. Mitchell *v.* Sellman, 5 Md. 376; Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483.

70. Boynton *v.* Moulton, 159 Mass. 248, 34 N. E. 361; Manning *v.* Wheeler, 13 N. H. 486; Sherman *v.* Wakeman, 11 Barb. (N. Y.) 254 [*reversed* on other grounds in 9 N. Y. 85]. But see Cummings *v.* Gassett, 19 Vt. 308; Davis *v.* Van Zandt, 6 Fed. Cas. No. 3,356, 2 Cranch, C. C. 208, both holding that a promise to pay, as soon as a debtor can, is sufficient to revive a barred debt.

71. Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487; Lange *v.* Caruthers, 70 Tex. 718, 8 S. W. 604.

72. Hall *v.* Roberts, 58 Hun (N. Y.) 539,

d. Promises to Pay When Able. A promise by a debtor to pay as soon as he can,[73] if he can,[74] when he is able,[75] when he gets the money from a particular source,[76] when his condition is better,[77] or when it is convenient[78] is usually regarded as conditional and as not operating to prevent the bar of the statute of limitations unless there is proof of the fulfilment of the condition.[79] It has been held, however, that a promise to pay as soon as possible is not conditional, since the words "as soon as possible" are too uncertain and indefinite to amount to a condition;[80] and likewise that a promise to pay when the debtor makes a raise is not conditional.[81] Promises to pay when able have also been held insufficient upon the ground that the promise must not be coupled with expressions indicating a present inability to pay,[82] and also upon the ground of indefiniteness.[83] The statute begins to run, upon a promise to pay when able, as soon as the debtor becomes able to pay[84] and not until then.[85]

9. Requirement of Writing — a. In General. In the absence of legislation, such as has been commonly adopted in many jurisdictions requiring the promise to be in writing, a verbal promise will interrupt the statute of limitations,[86] or

12 N. Y. Suppl. 480. *Compare* McDowell *v.* Goodwyn, 2 Mill 441, 12 Am. Dec. 685.

73. *Massachusetts.*— Boynton *v.* Moulton, 159 Mass. 248, 34 N. E. 361; Bidwell *v.* Rogers, 10 Allen 438.

Michigan.— Halladay *v.* Weeks, 127 Mich. 363, 86 N. W. 799, 89 Am. St. Rep. 478.

New York.— Cocks *v.* Weeks, 7 Hill 45.

North Carolina.— Cooper *v.* Jones, 128 N. C. 40, 38 S. E. 28.

England.— Tanner *v.* Smart, 6 B. & C. 603, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274.

Canada.— Gemmell *v.* Colton, 6 U. C. C. P. 57.

Contra.— Lyme First Cong. Soc. *v.* Miller, 15 N. H. 520; Butterfield *v.* Jacobs, 15 N. H. 140 (both holding the promise to pay absolute); Cummings *v.* Gassett, 19 Vt. 308.

74. Ayton *v.* Bolt, 4 Bing. 105, 5 L. J. C. P. O. S. 109, 12 Moore C. P. 305, 13 E. C. L. 422; Gould *v.* Shirley, 7 L. J. C. P. O. S. 117, 2 M. & P. 581, 17 E. C. L. 638.

75. *Colorado.*— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Georgia.— Sedgwick *v.* Gerding, 55 Ga. 264.

Illinois.— Boone *v.* A'Hern, 98 Ill. App. 610. But *compare* Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*affirming* 110 Ill. App. 404].

Kansas.— Dezell *v.* Thayer, 2 Kan. App. 587, 44 Pac. 686.

Kentucky.— Chism *v.* Barnes, 104 Ky. 310, 47 S. W. 232, 20 Ky. L. Rep. 569.

Maine.— Mattocks *v.* Chadwick, 71 Me. 313.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

New Jersey.— Parker *v.* Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407.

New York.— Tebo *v.* Robinson, 29 Hun 243 [*reversed* on other grounds in 100 N. Y. 27, 2 N. E. 383]; Allen *v.* Trisdorfer, 11 N. Y. St. 674 [*reversed* on other grounds in 15 Daly 1, 4 N. Y. Suppl. 896]; Stevens *v.* Seibold, 5 N. Y. St. 258; Tompkins *v.* Brown, 1 Den. 247.

Pennsylvania.— Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Laforge *v.* Jayne, 9 Pa. St. 410.

Tennessee.— Scott *v.* Thornton, 104 Tenn. 547, 58 S. W. 236; Shown *v.* Hawkins, 85 Tenn. 214, 2 S. W. 34.

United States.— Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148.

England.— Haydon *v.* Williams, 7 Bing. 163, 9 L. J. C. P. O. S. 16, 4 M. & P. 811, 20 E. C. L. 80; Woodham *v.* Hollis, 3 L. J. K. B. 70; Lusher *v.* Hassard, 20 T. L. R. 563.

But *compare* Flannery *v.* Maine Red Granite Co., 3 App. Cas. (D. C.) 395.

76. Drawbaugh *v.* Drawbaugh, 7 Pa. Super. Ct. 349; Tridell *v.* Munhall, 124 Fed. 802.

77. Meyerhoff *v.* Froehlich, 4 C. P. D. 63, 48 L. J. C. P. 43, 39 L. T. Rep. N. S. 621, 27 Wkly. Rep. 258.

78. Cocks *v.* Weeks, 7 Hill (N. Y.) 45; Edmunds *v.* Downes, 2 C. & M. 459, 3 L. J. Exch. 98, 4 Tyrw. 173.

79. See *supra*, VII, A, 8, c.

80. Norton *v.* Shepard, 48 Conn. 141, 40 Am. Rep. 157. *Contra*, Murdoch *v.* Pitts, 2 Nova Scotia 258.

81. Sennott *v.* Horner, 30 Ill. 429; Horner *v.* Starkey, 27 Ill. 13. These cases are, however, criticized in Boone *v.* A'Hern, 98 Ill. App. 610.

82. Love *v.* Hough, 2 Phila. (Pa.) 350.

83. Sedgwick *v.* Gerding, 55 Ga. 264.

84. Tebo *v.* Robinson, 100 N. Y. 27, 2 N. E. 383 [*reversing* on other grounds 29 Hun 243].

85. Scott *v.* Thornton, 104 Tenn. 547, 58 S. W. 236; Hammond *v.* Smith, 33 Beav. 452, 10 Jur. N. S. 117, 9 L. T. Rep. N. S. 746, 12 Wkly. Rep. 328, 55 Eng. Reprint 443.

86. Sennott *v.* Horner, 30 Ill. 429; Honn *v.* Pinnell, 61 Ill. App. 137; Utz *v.* Utz, 34 La. Ann. 752; Harrell's Succession, 3 La. Ann. 323; Reeks *v.* Postlethwaite, Coop. 161, 35 Eng. Reprint 515; Whiting *v.* White, Coop. 1, 35 Eng. Reprint 455, 2 Cox Ch. 290, 30 Eng. Reprint 135; Edwards *v.* Janes, 1 Kay & J. 534, 3 Wkly. Rep. 566, 69 Eng. Reprint 571.

revive a debt barred thereby.[87] But, as above stated, by statute it is now provided, both in England and in many of the states, that in order to revive a debt barred by the statute of limitations, or to suspend the statute by promise or acknowledgment, such promise or acknowledgment must be in writing and signed by the party to be charged,[88] and must be delivered.[89] A written promise or acknowledgment is binding, although the person signing it failed to read it.[90] And if the promise is signed by another at the instance of the person to be charged it is good;[91]

87. *Delaware.*— Morrow *v.* Turner, 2 Marv. 332, 43 Atl. 166.

Florida.— Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276.

Illinois.— Robinson *v.* Briscoe, 55 Ill. App. 131.

Louisiana.— Harrell's Succession, 3 La. Ann. 323.

Michigan.— Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

England.— Gibbons *v.* McCasland, 1 B. & Ald. 690.

See 33 Cent. Dig. tit. "Limitation of Actions," § 593.

88. See the statutes of the several states. And see the following cases:

Alabama.— Crawford *v.* Childress, 1 Ala. 482.

Arkansas.— Sloan *v.* Sloan, 11 Ark. 29.

California.—Morehouse *v.* Morehouse, (1902) 60 Pac. 625; Rose *v.* Foord, (1891) 28 Pac. 229; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170; Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344.

Georgia.— Abercrombie *v.* Butts, 72 Ga. 74, 53 Am. Rep. 832; Moseley *v.* Jenkins, 65 Ga. 49; Green *v.* Hall, 36 Ga. 538; Burns *v.* Harvell, 32 Ga. 602; Holland *v.* Chaffin, 22 Ga. 343; Caldwell *v.* Ferrill, 20 Ga. 94; Van Buren *v.* Webster, 12 Ga. 615.

Idaho.— Reed *v.* Smith, 1 Ida. 533.

Illinois.— Horn *v.* Pinnell, 61 Ill. App. 137; Robinson *v.* Briscoe, 55 Ill. App. 131; Davis *v.* Mann, 43 Ill. App. 301; Baldwin *v.* Baldwin, 26 Ill. App. 176; Ziegler *v.* Tennery, 23 Ill. App. 133.

Indiana.— Ketcham *v.* Hill, 42 Ind. 64; Kisler *v.* Sanders, 40 Ind. 78; McBride *v.* Ulmer, 30 Ind. App. 154, 65 N. E. 610.

Iowa.— Price *v.* Price, 34 Iowa 404; Collins *v.* Bane, 34 Iowa 385.

Kansas.— Green *v.* Goble, 7 Kan. 297.

Louisiana.— Adams *v.* Mills, 49 La. Ann. 775, 22 So. 257; Gaines' Succession, 45 La. Ann. 1424, 14 So. 251; Patrick's Succession, 30 La. Ann. 1071; Megibben *v.* Willson, 21 La. Ann. 748; Chevalier *v.* Hyams, 9 La. Ann. 484; Ditch *v.* Wilkinson, 10 La. 201.

Maine.— Johnston *v.* Hussey, 92 Me. 92, 42 Atl. 312; Wellman *v.* Southard, 30 Me. 425.

Massachusetts.— Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171.

Michigan.—Sperry *v.* Moore, 42 Mich. 353, 4 N. W. 13; Hillebrands *v.* Nibbelink, 40 Mich. 646; Joy *v.* Thompson, 1 Dougl. 373.

Minnesota.— Erpelding *v.* Ludwig, 39 Minn. 518, 40 N. W. 829.

Mississippi.— Perry *v.* Ellis, 62 Miss. 711.

Missouri.— Allen *v.* Collier, 70 Mo. 138, 35 Am. Rep. 416; Blackburn *v.* Jackson, 26 Mo. 398; Monroe *v.* Herrington, 110 Mo. App. 509, 85 S. W. 1002.

Nebraska.— Arnett *v.* Zinn, 20 Nebr. 591, 31 N. W. 240.

New Jersey.— Ludlow *v.* Van Camp, 7 N. J. L. 113, 11 Am. Dec. 529.

New Mexico.— Bullard *v.* Lopez, 7 N. M. 561, 37 Pac. 1103.

New York.— McLaren *v.* Martin, 36 N. Y. 88, 1 Transcr. App. 226, 3 Abb. Pr. N. S. 345, 33 How. Pr. 449; Esselstyn *v.* Weeks, 12 N. Y. 635; Van Alen *v.* Feltz, 4 Abb. Dec. 439, 1 Keyes 332 [*reversing* 32 Barb. 139, 9 Abb. Pr. 277]; Smith *v.* Camp, 58 Hun 434, 12 N. Y. Suppl. 363; McCotter *v.* Lawrence, 4 Hun 107, 6 Thomps. & C. 392; Hope *v.* Bogart, 1 Hilt. 544.

North Carolina.— Bates *v.* Herren, 95 N. C. 388; Hussey *v.* Kirkman, 95 N. C. 63; Greenleaf *v.* Norfolk, etc., R. Co., 91 N. C. 33; Riggs *v.* Roberts, 85 N. C. 151, 39 Am. Rep. 692; Pool *v.* Bledsoe, 85 N. C. 1; Fleming *v.* Staton, 74 N. C. 203.

Ohio.— Stephenson *v.* Line, 7 Ohio Cir. Ct. 147, 7 Ohio Cir. Dec. 45; Brooks *v.* Otis, 2 Ohio Dec. (Reprint) 355, 2 West. L. Month. 490; Cleveland *v.* Duryea, 1 Cinc. Super. Ct. 324.

Texas.— San Antonio Real Estate, etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. 386, 86 Am. St. Rep. 864; Oppenheimer *v.* De Lopez, (Civ. App. 1895) 31 S. W. 826; Calloway *v.* Baldwin, 1 Tex. App. Civ. Cas. § 591.

Utah.— Whitehill *v.* Lowe, 10 Utah 419, 37 Pac. 589.

Wisconsin.— Moore *v.* Blackman, 109 Wis. 528, 85 N. W. 429; Pierce *v.* Seymour, 52 Wis. 272, 9 N. W. 71, 38 Am. Rep. 737.

England.— Ingram *v.* Little, 1 Cab. & E. 186; Emery *v.* Day, 1 C. M. & R. 245, 3 L. J. Exch. 307, 4 Tyrw. 695; Pott *v.* Cleg, 11 Jur. 289, 16 L. J. Exch. 210, 16 M. & W. 321; Clark *v.* Alexander, 8 Jur. 496, 13 L. J. C. P. 133, 8 Scott N. R. 147.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 593, 594.

89. Abercrombie *v.* Butts, 72 Ga. 74, 53 Am. Rep. 832; Heaton *v.* Leonard, 69 Hun (N. Y.) 423, 23 N. Y. Suppl. 469; Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986; Cann *v.* Cann, 45 W. Va. 563, 31 S. E. 923; Cann *v.* Cann, 40 W. Va. 138, 20 S. E. 910.

90. Bannister *v.* McIntire, 112 Iowa 600, 84 N. W. 707.

91. Deep River Nat. Bank's Appeal, 73 Conn. 341, 47 Atl. 675; Martin *v.* Somervell County, 21 Tex. Civ. App. 308, 52 S. W.

but the promisee cannot act as such agent.[92] On the other hand an estoppel *in pais* cannot be urged as against the requirements of the statute,[93] not even where consideration is given.[94]

b. Promises and Acknowledgments to Which Requirement Applies. Statutes requiring a writing apply whether the new promise or acknowledgment is made before or after the debt is barred.[95] Such statutes, however, are not retroactive in effect so as to render a parol acknowledgment or promise made previous to their enactment inoperative.[96] An oral promise made after the statute will not revive a barred debt, however, although the debt was created before the enactment of the statute.[97] Where the statute excepts cases in which the cause of action has already accrued, a verbal promise made after the statute but before the debt is barred is sufficient,[98] as is a verbal promise made before the statute becomes operative,[99] or, where the right of action is subsisting at the time of the enactment of the statute, an oral promise after the debt is barred;[1] but where the bar of the statute has attached before the enactment of the statute the contract cannot be reinstated without a promise or acknowledgment in writing.[2] The statutes requiring the acknowledgment or new promise to be in writing relate only to causes of action originally arising upon contracts or promises;[3] nor do they apply to specific actions for which distinct statutory provisions have been made,[4] or to promises not to plead the statute of limitations.[5] But among other causes of action a written acknowledgment or new promise has been required with relation to promises by sureties as well as by principals,[6] to an acknowledgment of an open account converting it into an account stated,[7] to a promise to deliver stocks,[8] and to a promise to extend the time of performance of a contract for the sale of land.[9]

c. Sufficiency of Writings. A statute requiring a new promise or acknowledgment to be in writing does not change the preëxisting law as to what acknowledgments will continue a debt, or what promises will create a new contract.[10] And as a general rule an acknowledgment which, prior to the enactment of such a statute, would have been sufficient, is sufficient thereafter when reduced to

556; Liberman *v.* Gurensky, 27 Wash. 410, 67 Pac. 998.

92. Wright *v.* Bessman, 55 Ga. 187.

93. Rounthwaite *v.* Rounthwaite, (Cal. 1902) 68 Pac. 304; Shapley *v.* Abbott, 42 N. Y. 443, 1 Am. Rep. 548; Hill *v.* Perrin, 21 S. C. 356.

94. Hodgdon *v.* Chase, 29 Me. 47; Perry *v.* Ellis, 62 Miss. 711. But *compare* Graham *v.* Stanton, 177 Mass. 321, 58 N. E. 1023.

95. Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344; Reed *v.* Smith, 1 Ida. 533; Bullard *v.* Lopez, 7 N. M. 561, 37 Pac. 1103.

96. Jordan *v.* Hubbard, 26 Ala. 433; Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276.

Conditional promises.— An oral conditional promise made before the passage of such a statute is not affected, although the condition is not performed until thereafter, and although the promise is made after the claim is barred. Hayes *v.* Clinkscales, 9 S. C. 441.

97. Baldwin *v.* Baldwin, 26 Ill. App. 176; Ziegler *v.* Tennery, 23 Ill. App. 133; Pool *v.* Bledsoe, 85 N. C. 1; Fleming *v.* Staton, 74 N. C. 203; Brooks *v.* Otis, 2 Ohio Dec. (Reprint) 355, 2 West. L. Month. 490.

98. Horseley *v.* Billingsley, 19 Ohio St. 413.

99. Winchell *v.* Hicks, 18 N. Y. 558; Van Alen *v.* Feltz, 4 Abb. Dec. (N. Y.) 439, 1 Keyes 332 [*reversing* 32 Barb. 139, 9 Abb. Pr. 277]; Wadsworth *v.* Thomas, 7 Barb. (N. Y.) 445, 3 Code Rep. 227.

1. Lansing *v.* Blair, 43 N. Y. 48; Coe *v.* Mason, 41 Barb. (N. Y.) 612.

2. McLaren *v.* McMartin, 36 N. Y. 88; Esselstyn *v.* Weeks, 12 N. Y. 635; Wadsworth *v.* Thomas, 7 Barb. (N. Y.) 445.

3. Cunningham *v.* McKindley, 22 Ind. 149, holding that continuing trusts, especially those arising by operation of law, were not within the rule.

4. Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

5. See *supra*, IV, F, 1, b, (II).

6. Davis *v.* Mann, 43 Ill. App. 301.

7. Rounthwaite *v.* Rounthwaite, (Cal. 1902) 68 Pac. 304; Chace *v.* Trafford, 116 Mass. 529, 17 Am. Rep. 171; Floyd *v.* Pearce, 57 Miss. 140; Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986. And see Weatherwax *v.* Cosumnes Valley Mill Co., 17 Cal. 344; Jones *v.* Ryder, 1 H. & H. 256, 7 L. J. Exch. 216, 4 M. & W. 32; Tarbuck *v.* Bispham, 6 L. J. Exch. 49, 2 M. & W. 2. But *compare* Smith *v.* Cormier, 28 N. Brunsw. 432.

8. Rose *v.* Foord, (Cal. 1891) 28 Pac. 229.

9. McCotter *v.* Lawrence, 4 Hun (N. Y.) 107, 6 Thomps. & C. 392.

10. Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309 [*citing* Estes *v.* Woods, 21 S. C. 600]; Webber *v.* Cochrane, 4 Tex. 31.

writing and signed by the party to be charged.[11] It is not necessary that the acknowledgment or promise should be formal.[12] And in each particular case the question to be determined is the intention of the writer of the instrument,[13] which must be either to acknowledge the debt or promise to pay it,[14] and all that is in general required is that by fair construction the writing shall constitute an admission that the claim is a subsisting debt, unaccompanied by any circumstances repelling the presumption of the party's willingness or intention to pay.[15] The date of the acknowledgment or promise need not appear in writing or be evidenced in writing.[16] In the absence of statutory requirement as to form, the question of the sufficiency of a written acknowledgment is one of law.[17] Where a statute requiring that the acknowledgment or new promise shall be contained in a writing signed by the party to be charged does not require the writing to be subscribed it is sufficient if it be evident from any part of the acknowledgment that the debtor named in it has given to it his assent.[18] When the promise is evidenced by letters, all of the letters relating to the debt, although they are separated by a considerable period of time, may be taken into consideration in determining whether a new promise was made and whether that promise was unconditional.[19] Separate insufficient acknowledgments made on separate dates cannot be taken together to make a good acknowledgment.[20]

10. Persons Who May Make Acknowledgment or Promise — a. In General.[21] As a general rule the promise or acknowledgment must be made by the party to

11. Honn *v.* Pinnell, 61 Ill. App. 137; Kincaid *v.* Archibald, 73 N. Y. 189 [*affirming* 10 Hun 9]; McCahill *v.* Mehrbach, 37 Hun (N. Y.) 504; Wright *v.* Parmenter, 23 Misc. (N. Y.) 629, 58 N. Y. Suppl. 99.

12. Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40 (so holding, under a statute requiring that the acknowledgment or promise shall be contained in some writing signed by the party to be charged thereby); Woodbridge *v.* Allen, 12 Metc. (Mass.) 470.

13. Brintnall *v.* Rice, 63 N. Y. App. Div. 54, 71 N. Y. Suppl. 441 [*affirmed* in 173 N. Y. 618, 66 N. E. 1105]; Shaw *v.* Lambert, 14 N. Y. App. Div. 265, 43 N. Y. Suppl. 470.

14. Stewart *v.* McFarland, 84 Iowa 55, 50 N. W. 221; Shaw *v.* Lambert, 14 N. Y. App. Div. 265, 43 N. Y. Suppl. 470.

15. *Arkansas.*— Brown *v.* State Bank, 10 Ark. 134; Alston *v.* State Bank, 9 Ark. 455.

California.— Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40.

Georgia.— Webb *v.* Carter, 62 Ga. 415.

Michigan.— Crane *v.* Abel, 67 Mich. 242, 34 N. W. 658.

New York.— Brintnall *v.* Rice, 63 N. Y. App. Div. 54, 71 N. Y. Suppl. 441 [*affirmed* in 173 N. Y. 618, 66 N. E. 1105]; Fletcher *v.* Daniels, 52 N. Y. App. Div. 67, 64 N. Y. Suppl. 861; Cudd *v.* Jones, 63 Hun 142, 17 N. Y. Suppl. 582; Kahn *v.* Crawford, 28 Misc. 572, 59 N. Y. Suppl. 853; Wright *v.* Parmenter, 23 Misc. 629, 52 N. Y. Suppl. 99.

Texas.— Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806; Webber *v.* Cochrane, 4 Tex. 31.

An acknowledgment of the correctness of the balance of an account indorsed by the debtor on an open account is sufficient. King *v.* Davis, 168 Mass. 133, 46 N. E. 418; Tennessee Brewing Co. *v.* Hendricks, 77 Miss. 491, 27 So. 526.

The mere books entries of a debtor are not a sufficient promise or acknowledgment. Harman *v.* Claiborne, 1 La. Ann. 342; Dewar *v.* Beirne, McGloin (La.) 75; Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986; Jackson *v.* Ogg, 1 Johns. 397, 5 Jur. N. S. 976, 7 Wkly. Rep. 730, 70 Eng. Reprint 476. *Contra*, Coulson *v.* Hartz, 47 Ill. App. 20.

Including a dishonored certified check in a statement of a bank's account published as required by statute does not constitute such acknowledgment as suspends the statute as to such check. Blades *v.* Grant County Deposit Bank, 56 S. W. 415, 21 Ky. L. Rep. 1761. But see Adams *v.* Orange County Bank, 17 Wend. (N. Y.) 514, holding the publication of unclaimed deposits remaining in a bank made in pursuance of a statute sufficient.

A bill of exchange given for the debt is sufficient. *Ex p.* Wilson, 1 Mont. D. & De G. 586.

A letter seeking an extension of a note is sufficient. Clayton *v.* Watkins, 19 Tex. Civ. App. 133, 47 S. W. 810.

16. Kincaid *v.* Archibald, 73 N. Y. 189 [*affirming* 10 Hun 9].

17. Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40.

18. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. 371; Rowe *v.* Thompson, 15 Abb. Pr. (N. Y.) 377.

19. Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595. But *compare* Walker *v.* Freeman, 94 Ill. App. 357.

20. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548. But *compare* Woodbridge *v.* Allen, 12 Metc. (Mass.) 470.

21. Acknowledgment, promise, or part payment by executor or administrator see Executors and Administrators, 18 Cyc. 424 *et seq.*, 934 *et seq.*

be charged or someone duly authorized by him;[22] but in some jurisdictions the debtor alone can make a promise and a writing signed by his agent is ineffectual.[23] In a case of mutual accounts, after the last item is barred by limitations, an entry of subsequent items by one of the parties on his own account will not suspend the statute.[24] An agent may have authority, either express or necessarily inferable from the nature of his duties, to bind his principal by his promise, and revive a debt against the latter;[25] but his admission as to a matter without the scope of his general authority will not bind his principal.[26] A promise by a life-tenant to pay taxes may be relied upon as against the remainder-man to remove the bar of the statute as to such taxes.[27] An acknowledgment by a trustee empowered to sell the trust property and pay debts is sufficient to interrupt the statute,[28] and the acknowledgment may be made through his attorney.[29] But an offer by an attorney made on his own behalf to pay the debt of his client will not interrupt the running of the statute in favor of the latter.[30] A habitual drunkard[31] or spendthrift cannot by a promise or acknowledgment take his debt out of the statute.[32] A guardian has no power to revive a barred debt against his ward,[33] not even where

22. *Mississippi.*— Bowers *v.* Johnson, 10 Sm. & M. 169.

Missouri.— Burk *v.* Howard, 13 Mo. 241.

New York.— Payne *v.* Slate, 39 Barb. 634 [*affirmed* in 29 N. Y. 146].

Ohio.— Kerper *v.* Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656.

Virginia.— Switzer *v.* Noffsinger, 82 Va. 518.

Wyoming.— Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608.

England.— Whippy *v.* Hillary, 3 B. & Ad. 399, 23 E. C. L. 181, 5 C. & P. 209, 24 E. C. L. 530, 1 L. J. K. B. 178; Ingram *v.* Little, 1 Cab. & E. 186; Leland *v.* Murphy, 16 Ir. Ch. 500; Knox *v.* Gye, 16 L. T. Rep. N. S. 76, 15 Wkly. Rep. 628. Prior to 9 Geo. IV, c. 14, § 1, the rule was different and an acknowledgment of an agent was then sufficient. Hyde *v.* Johnson, 2 Bing. N. Cas. 776, 2 Hodges 94, 5 L. J. C. P. 291, 3 Scott 289, 29 E. C. L. 757; Archer *v.* Leonard, 15 Ir. Ch. 267.

Canada.— Shanly *v.* Grand Junction R. Co., 4 Ont. 156.

See 33 Cent. Dig. tit. "Limitation of Actions," § 579.

Compare Johnson *v.* Johnson, 80 Ga. 260, 5 S. E. 629.

The debt admitted must be that of the party making the admission. Rogers *v.* Waters, 2 Gill & J. (Md.) 64.

A person can bind himself to pay the barred debt of another in the absence of fraud. Flack *v.* Neill, 22 Tex. 253.

Mere physical weakness, however great, without proof of mental incapacity, is not sufficient to render invalid an acknowledgment of debt. Emes *v.* Emes, 11 Grant Ch. (U. C.) 325.

23. De Raismes *v.* De Raismes, 71 N. J. L. 680, 60 Atl. 1133 [*affirming* 70 N. J. L. 15, 56 Atl. 170]; Prior to 9 Geo. IV, c. 14, § 1, this was the rule in England. Hyde *v.* Johnson, 2 Bing. N. Cas. 776, 2 Hodges 94, 5 L. J. C. P. 291, 3 Scott 289, 29 E. C. L. 757; Clark *v.* Alexander, 8 Jur. 496, 13 L. J. C. P. 133, 8 Scott N. R. 147.

In Louisiana, by virtue of statute, an agent's acknowledgment of a debt stops prescription. Greig *v.* Muggah, 5 Rob. 473.

24. Ross *v.* Fickling, 11 App. Cas. (D. C.) 442.

25. Watts *v.* Devor, 1 Grant (Pa.) 267. And see Beal *v.* Adams Express Co., 13 Pa. Super. Ct. 143.

Where the acknowledgment or promise is made by the agent charged with the management of the business out of which the debt arises, it is sufficient. Burt *v.* Palmer, 5 Esp. 145; Paletborp *v.* Furnish, 2 Esp. 511 note.

Authority will not be implied from the bare fact that the agent was authorized to create the debt as to which the promise was made. Watts *v.* Devor, 1 Grant (Pa.) 267.

An agent only authorized to compromise his principal's debt upon specific terms cannot make any promise, nor can a promise be inferred from any act of his by which the principal's debt is revived. Creuse *v.* Defiganiere, 10 Bosw. (N. Y.) 122.

26. Whitehouse *v.* Abberley, 1 C. & K. 642, 47 E. C. L. 642.

Limitation of rules.— A promise by an agent without authority will be sufficient if the debtor receives and holds the benefit of the promise. Bowers *v.* Johnson, 10 Sm. & M. (Miss.) 169; Burk *v.* Howard, 13 Mo. 241.

27. Duvall *v.* Perkins, 77 Md. 582, 26 Atl. 1085.

28. St. John *v.* Boughton, 2 Jur. 413, 7 L. J. Ch. 208, 9 Sim. 219, 16 Eng. Ch. 219, 59 Eng. Reprint 342.

29. Toft *v.* Stephenson, 1 De G. M. & G. 28, 15 Jur. 1187, 21 L. J. Ch. 129, 50 Eng. Ch. 28, 42 Eng. Reprint 461 [*reversing* 7 Hare 1, 27 Eng. Ch. 1, 68 Eng. Reprint 1]. And see Toft *v.* Stevenson, 5 De G. M. & G. 735, 54 Eng. Ch. 735, 43 Eng. Reprint 1055.

30. Morris *v.* Hazlehurst, 30 Md. 362.

31. Hannum's Appeal, 9 Pa. St. 471.

32. Manson *v.* Felton, 13 Pick. (Mass.) 206.

33. Clement *v.* Sigur, 29 La. Ann. 798; Stone *v.* McGregor, (Tex. 1905) 87 S. W.

he acts for an adult under a power of attorney, conferring only such power as he would have as guardian.[34] An account filed in court by a guardian admitting the receipt of money belonging to his ward is sufficient to revive an action to recover such money.[35] An acknowledgment given by an infant of a deed due for necessaries is effective to take the deed without the statute.[36] The individual members of an eleemosynary or educational corporation have no authority by their promise to remove the bar of the statute from the obligations of the corporation.[37] While a promise or acknowledgment made by a debtor will remove his debt out of the statute as to him, it cannot affect the rights of others acquired by reason of the bar.[38]

b. Principal or Surety. A promise by a principal debtor will not revive the claim as to his surety or guarantor.[39] Where a claim is barred against the principal a recognition thereof by the surety will remove the bar as to him, although it does not revive the obligation as against the principal.[40] Nor will the promise of one surety revive the claim against another.[41] Letters of a surety to his principal, written at the instance of the payee, urging him to pay the debt, do not constitute such acknowledgment as suspends the statute as to the surety;[42] but where the surety refers the creditor to the principal for payment it is such acknowledgment of liability as interrupts the statute.[43] Merely allowing a debt as a valid claim against an estate by an administrator who is guarantor of the debt will not constitute such acknowledgment on his part as to remove the bar of the statute.[44]

c. Maker or Indorser. The running of the statute in favor of the indorser of a promissory note is not interrupted by the promise of the maker,[45] by the

334 [*reversing* (Civ. App. 1904) 84 S. W. 399]. But see Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775, holding that, although a surviving husband, personally bound for the debts of the community, may, after the dissolution thereof, waive prescription which has since accrued thereon, still, when he is the tutor of his minor children, born from his marriage with his deceased wife, he cannot do so to the prejudice of her succession or to their injury, so as to burden them therewith, and to prevent their legal mortgage, duly recorded against him, from ranking the mortgage securing such debts; but such acknowledgment may be made before prescription has extinguished such debts, if made *bona fide*, and it will then keep such debts alive as well as the mortgage securing them, and bind the succession and the minors.

34. Stone *v.* McGregor, (Tex. 1905) 87 S. W. 334 [*reversing* (Civ. App. 1904) 84 S. W. 399].

35. Blakeney *v.* Wyland, 115 Iowa 607, 89 N. W. 16.

36. Willins *v.* Smith, 3 C. L. R. 16, 4 E. & B. 180, 1 Jur. N. S. 163, 24 L. J. Q. B. 62, 3 Wkly. Rep. 22, 82 E. C. L. 180.

37. Lyman *v.* Norwich University, 28 Vt. 560.

38. Larthet *v.* Hogan, 1 La. Ann. 330.

39. *Alabama.*— Lowther *v.* Chappell, 8 Ala. 353, 42 Am. Dec. 364.

Illinois.— Lash *v.* Bozarth, 78 Ill. App. 196; Robinson *v.* Briscoe, 55 Ill. App. 131.

Iowa.— Drake *v.* Stuart, 87 Iowa 341, 54 N. W 223.

Pennsylvania.— Meade *v.* McDowell, 5 Binn. 195.

Rhode Island.— Browning *v.* Tucker, 9 R. I. 500.

See 33 Cent. Dig. tit. "Limitation of Actions," § 579.

Contra.— Bloom *v.* Kern, 30 La. Ann. 1263.

40. Langston *v.* Aderhold, 60 Ga. 376; Collins *v.* Bane, 34 Iowa 385; City Nat. Bank *v.* Phelps, 86 N. Y. 484; Daniel *v.* Harvin, 10 Tex. Civ. App. 439, 31 S. W. 421.

In Kentucky it has been held that as the surety's obligation is legal merely and not moral, a promise by him to pay the debt barred by the statute of limitations is not binding unless supported by a new consideration (Emmons *v.* Overton, 18 B. Mon. 643), or unless he acted with the knowledge of his legal condition and rights with respect to the obligation and with the intention to revive it he knowingly and intentionally induced some act on the other side which it would be a fraud in him to defeat (Tillett *v.* Com., 9 B. Mon. 438).

In Michigan a different rule prevails; the obligation of the surety is regarded as a moral as well as a legal one and affords a sufficient consideration for a new promise. Perkins *v.* Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495; Parsons *v.* Frost, 55 Mich. 230, 21 N. W. 303.

41. Ottawa County Probate Judge *v.* Stevenson, 55 Mich. 320, 21 N. W. 348.

42. Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145.

43. Humphreys *v.* Jones, 9 Jur. 333, 14 L. J. Exch. 254, 14 M. & W. 1; Fisk *v.* Mitchell, 24 L. T. Rep. N. S. 272, 19 Wkly. Rep. 798.

44. Gardiner *v.* Nutting, 5 Me. 140, 17 Am. Dec. 211.

45. Dean *v.* Munroe, 32 Ga. 28; Citizens'

indorser's request to the indorsee made prior to the bar to compel payment by the maker,[46] or by repayment to the indorsee of the amount of a credit on the note, existing at the time of the indorsement, and which was overlooked.[47]

d. Joint Obligor. The earliest reported English case on the subject of the effect of a promise of one joint obligor to bind another[48] held that the promise could not have such effect; but in a later case[49] a contrary rule was adopted; and although the latter was promptly recognized as bad law[50] it was generally followed by the English and American courts,[51] but was later abandoned either by voluntary act of the courts or through the compulsion of legislation;[52] and now the almost universal rule is that an acknowledgment or new promise by one of several joint debtors or contractors will not interrupt the statute of limitations as to the others.[53] However, in some jurisdictions the old rule still prevails and the promise of the one joint debtor is sufficient to take the debt out of the statute of limitations as against the other,[54] but if made for the purpose of securing some advantage to the promisor it is absolutely ineffectual.[55] But an admission by one of several persons

Bank *v.* Murdock, 22 La. Ann. 130; Hickman *v.* Stafford, 2 La. Ann. 792; McCalop *v.* Newcomb, 2 La. Ann. 332; Jacobs *v.* Williams, 12 Rob. (La.) 183.

46. Vass *v.* Conrad, 52 N. C. 87.

47. Gilmer *v.* McMurray, 52 N. C. 479.

48. Bland *v.* Haselrig, 2 Vent. 151.

49. Whitcomb *v.* Whiting, Dougl. (3d ed.) 652.

50. Brandram *v.* Wharton, 1 B. & Ald. 463, 19 Rev. Rep. 354, 357; Pease *v.* Hirst, 10 B. & C. 122, 8 L. J. K. B. O. S. 94, 5 M. & R. 88, 21 E. C. L. 61; Burleigh *v.* Stott, 8 B. & C. 36, 6 L. J. K. B. O. S. 232, 2 M. & R. 93, 15 E. C. L. 27; Perham *v.* Raynal, 2 Bing. 306, 3 L. J. C. P. O. S. 271, 9 Moore C. P. 566, 9 E. C. L. 591; Clarke *v.* Bradshaw, 3 Esp. 155.

51. *Georgia.*— Cox *v.* Bailey, 9 Ga. 467, 54 Am. Dec. 358.

Maine.— Sbepley *v.* Waterhouse, 22 Me. 497; Dinsmore *v.* Dinsmore, 21 Me. 433; Pike *v.* Warren, 15 Me. 390; Getchell *v.* Heald, 7 Me. 26.

Massachusetts.— Frye *v.* Barker, 4 Pick. 382; White *v.* Hale, 3 Pick. 291, 15 Am. Dec. 209.

South Carolina.— Bowdre *v.* Hampton, 6 Rich. 208; Beitz *v.* Fuller, 1 McCord 541, 10 Am. Dec. 693.

England.— See cases cited in preceding note.

Canada.— Sifton *v.* McCabe, 6 U. C. Q. B. 394; Thompson *v.* Cummings, (Mich. T. 4 Vict.) R. & J. Dig. 1629.

52. See the statutes of the several jurisdictions.

53. *Arkansas.*— Wooddy *v.* State Bank, 12 Ark. 780; Grant *v.* Ashley, 12 Ark. 762.

California.— State L. & T. Co. *v.* Cochran, 130 Cal. 245, 62 Pac. 466, 600; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

Illinois.—Boynton *v.* Spafford, 162 Ill. 113, 44 N. E. 379, 53 Am. St. Rep. 274 [*affirming* 61 Ill. App. 384]; Kallenbach *v.* Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Robinson *v.* Briscoe, 55 Ill. App. 131.

Kansas.— Root *v.* Bradley, 1 Kan. 437.

Louisiana.— Grant *v.* Maier, 32 La. Ann. 51; Stowers *v.* Blackburn, 21 La. Ann. 127; Reynolds *v.* Rowley, 2 La. Ann. 890; Buard *v.* Lemée, 12 Rob. 243. If the debtors are bound *in solido*, the interruption of the statute is effected by the acknowledgment or promise of any one of them. Morgan *v.* Métayer, 14 La. Ann. 612; Milandon *v.* Beazley, 2 La. Ann. 916; Davis *v.* Houren, 6 Rob. 255.

Maryland.— Lingan *v.* Henderson, 1 Bland 236.

Massachusetts.— Peirce *v.* Tobey, 5 Metc. 168.

Michigan.— Koons *v.* Vauconsant, 129 Mich. 260, 88 N. W. 630, 95 Am. St. Rep. 438; Curtiss *v.* Perry, 126 Mich. 600, 85 N. W. 1131; Rogers *v.* Anderson, 40 Mich. 290; Holcomb *v.* Sloan, 39 Mich. 173.

Mississippi.— Briscoe *v.* Anketell, 28 Miss. 361, 61 Am. Dec. 553; Foute *v.* Bacon, 24 Miss. 156.

New York.— Connecticut Trust, etc., Co. *v.* Wead, 58 N. Y. App. Div. 493, 69 N. Y. Suppl. 518 [*modifying* 33 Misc. 374, 65 N. Y. Suppl. 466]; Barger *v.* Durvin, 22 Barb. 68; Bogert *v.* Vermilya, 10 Barb. 32.

North Carolina.— Campbell *v.* Brown, 86 N. C. 376, 41 Am. Rep. 464.

Pennsylvania.— Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Watts *v.* Devor, 1 Grant 267; Farnum *v.* Eastwick, 2 Am. L. Reg. 572; Smith *v.* Wesner, 1 Woodw. 182.

Vermont.— Carlton *v.* Coffin, 27 Vt. 496. *Compare* Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

Washington.— Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

England.— Fordham *v.* Wallis, 10 Hare 217, 17 Jur. 228, 22 L. J. Ch. 548, 1 Wkly. Rep. 118, 44 Eng. Ch. 210, 68 Eng. Reprint 905. See also Pittam *v.* Foster, 1 B. & C. 248, 2 D. & R. 363, 1 L. J. K. B. O. S. 81, 25 Rev. Rep. 385, 8 E. C. L. 106.

See 33 Cent. Dig. tit. "Limitation of Actions," § 579.

54. Caldwell *v.* Sigourney, 19 Conn. 37; Clark *v.* Sigourney, 17 Conn. 511; Bound *v.* Lathrop, 4 Conn. 336, 10 Am. Dec. 147. And see cases cited *supra*, note 51. *Compare* Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

55. Coit *v.* Tracy, 8 Conn. 268, 20 Am. Dec.

who are bound by contract merely several will not bind the other parties thereto.[56]

e. Partners. There is a conflict of authorities as to the power of one partner to interrupt the running of the statute as against his copartners by his promise to pay or acknowledgment of the existence of or part payment on a partnership debt. The rule in some jurisdictions invests him with such authority,[57] although the partnership has been dissolved at the time the promise, acknowledgment, or payment is made,[58] and the partner making it was insolvent at the time.[59] In other jurisdictions it is held that after dissolution one partner cannot by his promise or acknowledgment continue an existing debt against his copartners,[60] or revive as against them a barred firm debt,[61] unless the partner making the acknowledgment takes over the assets of the firm and becomes liquidating

110; Woonsocket Sav. Inst. *v.* Ballou, 16 R. I. 351, 16 Atl. 144, 1 L. R. A. 555; Perkins *v.* Barstow, 6 R. I. 505.

56. Bowdre *v.* Hampton, 6 Rich. (S. C.) 208.

57. Beardsley *v.* Hall, 36 Conn. 270, 4 Am. Rep. 74; Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Flannery *v.* Maine Red Granite Co., 3 App. Cas. (D. C.) 395; Walton *v.* Robinson, 27 N. C. 341; Willis *v.* Hill, 19 N. C. 231, 31 Am. Dec. 412; McIntire *v.* Oliver, 9 N. C. 209, 11 Am. Dec. 760.

Part payment by partner see *infra*, VII, B, 5, h.

58. *Connecticut.*— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

District of Columbia.— Flannery *v.* Maine Red Granite Co., 3 App. Cas. 395.

North Carolina.— Walton *v.* Robinson, 27 N. C. 341; McIntire *v.* Oliver, 9 N. C. 209, 11 Am. Dec. 760.

England.— Holme *v.* Green, 1 Stark 488, 2 E. C. L. 187; Wood *v.* Braddick, 1 Taunt. 104, 9 Rev. Rep. 711.

Canada.—Nova Scotia Bank *v.* Haliburton, 2 Nova Scotia 350.

See 33 Cent. Dig. tit. "Limitation of Actions," § 580.

59. Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Wood *v.* Braddick, 1 Taunt. 104, 9 Rev. Rep. 711. *Compare* Martin *v.* Bridges, 3 C. & P. 83, 14 E. C. L. 462.

60. *Alabama.*— Espy *v.* Comer, 76 Ala. 501.

Arkansas.— Burr *v.* Williams, 20 Ark. 171.

Florida.— Tate *v.* Clements, 16 Fla. 339, 26 Am. Rep. 709.

Georgia.— Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035; Ford *v.* Clark, 72 Ga. 760; Macon First Nat. Bank *v.* Ells, 68 Ga. 192; Brewster *v.* Hardeman, Dudley 138; Fellows *v.* Guimarin, Dudley 100.

Illinois.— Green *v.* Baird, 61 Ill. App. 72; Green *v.* Baird, 53 Ill. App. 211.

Indiana.— Kirk *v.* Hiatt, 2 Ind. 322; Yandes *v.* Lefavour, 2 Blackf. 371.

Ohio.— Kerper *v.* Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656.

Pennsylvania.— Wilson *v.* Waugh, 101 Pa. St. 233; Reppert *v.* Colvin, 48 Pa. St. 248; Wolfensberger *v.* Young, 47 Pa. St. 516.

South Carolina.— Steele *v.* Jennings, 1 McMull. 297; Veale *v.* Hassan, 3 McCord 278; Fisher *v.* Tucker, 1 McCord Eq. 169 [*questioning* Higginson *v.* Air, 1 Desauss. Eq. 427].

Tennessee.— Muse *v.* Donelson, 2 Humphr. 166, 36 Am. Dec. 309.

United States.— Bell *v.* Morrison, 1 Pet. 351, 7 L. ed. 174.

See 33 Cent. Dig. tit. "Limitation of Actions," § 580.

61. *Alabama.*—Espy *v.* Comer, 76 Ala. 501.

Delaware.— Rice *v.* Pennypacker, 5 Houst. 279.

Georgia.— Hughes *v.* Treadaway, 116 Ga. 663, 42 S. E. 1035; Macon First Nat. Bank *v.* Ells, 68 Ga. 192.

Illinois.— Helm *v.* Cantrell, 59 Ill. 524.

Iowa.— Harford *v.* Street, 46 Iowa 594.

Louisiana.— Walsh *v.* Cane, 4 La. Ann. 533; Buard *v.* Lemee, 12 Rob. 243; Davis *v.* Houren, 6 Rob. 255.

Maine.— True *v.* Andrews, 35 Me. 183. Before the enactment of Rev. St. c. 146, § 20, the contrary doctrine prevailed. Greenleaf *v.* Quincy, 12 Me. 11, 28 Am. Dec. 145.

Maryland.— Newman *v.* McComas, 43 Md. 70; Ellicott *v.* Nichols, 7 Gill 85, 48 Am. Dec. 546 [*overruling* Ward *v.* Howell, 5 Harr. & J. 60].

Minnesota.— Whitney *v.* Reese, 11 Minn. 138.

Nebraska.— Mayberry *v.* Willoughby, 5 Nebr. 368, 25 Am. Rep. 491.

New York.— Van Keuren *v.* Parmelee, 2 N. Y. 523, 51 Am. Dec. 322 [*overruling* Patterson *v.* Choate, 7 Wend. 441; Johnson *v.* Beardslee, 15 Johns. 3; and *dicta* in other cases]; Payne *v.* Slate, 39 Barb. 634 [*affirmed* in 29 N. Y. 146].

Pennsylvania.— Searight *v.* Craighead, 1 Penr. & W. 135; Levy *v.* Cadet, 17 Serg. & R. 126, 17 Am. Dec. 650; McCahan *v.* Smith, 9 Pa. Super. Ct. 318; Farnum *v.* Eastwick, 2 Am. L. Reg. 572; Darling's Estate, 7 Kulp 323.

Tennessee.— Belote *v.* Wynne, 7 Yerg. 534.

See 33 Cent. Dig. tit. "Limitation of Actions," § 580.

In Vermont one partner may by his promise or acknowledgment remove the bar of the statute as to debts of his firm and as to all the partners, whether such promise or acknowledgment be made before or after dissolution, and whether before or after the bar. Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163.

partner,[62] or the creditor has no notice of the dissolution.[63] In some jurisdictions even a liquidating partner cannot bind his copartners by his acknowledgment after notice of the dissolution has been given.[64] An acknowledgment by a firm will revive the individual joint debt of the members thereof,[65] and the effect of such acknowledgment is not removed by virtue of the fact that one member of the firm is a married woman.[66] A surviving partner cannot revive a debt as to a deceased partner.[67] But this fact cannot affect the liability of the surviving partner who makes acknowledgment of the debt.[68] Where plaintiff relies on the acknowledgment of one member of an alleged partnership to bind all the partners, and the partnership is denied, the burden is on him to prove its existence.[69]

f. Husband or Wife. The promise of a wife without her husband's assent to pay a debt contracted by her before marriage and barred by the statute of limitations does not revive the debt,[70] but it has been held that she may, by her acknowledgment, interrupt the running thereof.[71] Where she acts as agent of her husband in borrowing money on his account she may by her acknowledgment revive the debt against him;[72] but where she binds him by the purchase of goods for the household, she cannot by her promise or acknowledgment revive the debt after the bar.[73] Where the wife's separate property is liable for debts contracted in support of the household, promises or acknowledgments by the husband will not stop the running of the statute or revive a barred debt as to her.[74] The joint promise of the husband and wife to pay her debt contracted and barred before marriage will not remove the bar as to her and sustain a suit against her after his death;[75] nor will his promise revive such a debt against her;[76] nor can he revive by his promises, as against his wife, his individual debt, to secure which she has given a mortgage on her separate property. She is as to his debt merely his surety, and his promises and acknowledgments cannot bind her.[77] In jurisdictions where a debt contracted by a married woman is void, it will not support a promise made by her after dissolution of the marriage relation by death[78] or divorce.[79] Nor will a debt of her deceased husband so far support a promise made by her as to make it effectual to revive such debt.[80] A husband cannot by his act alone extend the time for the payment of a mortgage debt which encumbers the homestead.[81]

62. Van Staden *v.* Kline, 64 Iowa 180, 20 N. W. 3; Wilson *v.* Waugh, 101 Pa. St. 233; Darling's Estate, 7 Kulp (Pa.) 323.

63. Burr *v.* Williams, 20 Ark. 171; Talbot *v.* Rechlin, 2 N. Y. City Ct. 420; Clement *v.* Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760. *Contra*, Green *v.* Baird, 53 Ill. App. 211; Tate *v.* Clements, 16 Fla. 339, 26 Am. Rep. 709, holding that the statute is not interrupted whether the creditor has notice of the dissolution or not.

64. Kerper *v.* Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656; Folk *v.* Russell, 7 Baxt. (Tenn.) 591.

65. Walsh *v.* Mayer, 111 U. S. 31, 4 S. Ct. 260, 28 L. ed. 338.

66. Day *v.* Merritt, 38 N. J. L. 32, 20 Am. Rep. 362.

67. Espy *v.* Comer, 76 Ala. 501.

68. Espy *v.* Comer, 76 Ala. 501.

69. Hayden Saddlery Hardware Co. *v.* Ramsay, 14 Tex. Civ. App. 185, 36 S. W. 595.

70. Stewart *v.* McCalop, 10 La. Ann. 332; McComas *v.* Green, 6 La. Ann. 121; Axson *v.* Blakely, 2 McCord (S. C.) 6, 13 Am. Dec. 697.

In Pennsylvania, a married woman may by express promise, but not by acknowledgment, remove the bar of the statute. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548. See also Kelly *v.* Eby, 141 Pa. St. 176, 21 Atl. 512.

71. Booth's Appeal, 35 Conn. 165; Orcutt *v.* Berrett, 12 La. Ann. 178.

72. Burk *v.* Howard, 13 Mo. 241.

73. Hamilton *v.* Peck, (Tex. Civ. App. 1896) 38 S. W. 403. See also Palethorp *v.* Furnish, 2 Esp. 511 note. *Contra*, Gregory *v.* Parker, 1 Campb. 394, 3 Rev. Rep. 712.

74. Lee *v.* Campbell, 61 Ala. 12; Lewis *v.* Lynch, 61 Ill. App. 476. *Contra*, Lawrence *v.* Sinnamon, 24 Iowa 80.

75. Kline *v.* Guthart, 2 Penr. & W. (Pa.) 490.

76. Powers *v.* Southgate, 15 Vt. 471, 40 Am. Dec. 691.

77. Stevenson *v.* Craig, 12 Nebr. 464, 12 N. W. 1. *Contra*, Gay *v.* Hassom, 64 Vt. 495, 24 Atl. 715.

78. Hubbard *v.* Bugbee, 58 Vt. 172, 2 Atl. 594.

79. Haywood *v.* Barker, 52 Vt. 429, 36 Am. Rep. 762.

80. Sullivan *v.* Sullivan, 99 Cal. 187, 33 Pac. 862.

81. Barber *v.* Babel, 36 Cal. 11.

g. Mortgagor or Mortgagee, Vendor or Vendee. Acknowledgment of a debt secured by a mortgage and a promise to pay it made by a mortgagor in possession, and before the bar, interrupts the statute as to the mortgage and starts it to running anew,[82] unless the debtor expressly denies that it is his intention to revive the mortgage;[83] and in some jurisdictions a new promise or acknowledgment made after the bar, which operates to revive the debt, will also revive the security.[84] The statute is interrupted by the recognition in a subsequent mortgage of a debt secured by a prior mortgage,[85] and such interruption will operate against a subsequent grantee who has notice of the mortgage,[86] although he may not have any notice of the interruption;[87] and the rule applies to a grantee who assumes the first mortgage debt and acknowledges its existence in a second mortgage;[88] or who accepts a deed reciting payment of interest up to the date thereof and who assumes the payment of the mortgage debt.[89] After the mortgagor has parted with or encumbered his equity of redemption, he cannot, by any promise, acknowledgment, or other act, extend the time for payment of the mortgage debt as against his grantee,[90] or junior mortgagee,[91] especially where their rights were acquired after the bar.[92] However, such promise made after the bar will revive the debt as to a junior mortgagee, whose mortgage was given before the bar was

82. *California.*— Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; Southern Pac. Co. *v.* Prosser, 122 Cal. 413, 55 Pac. 145; London, etc., Bank *v.* Bandmann, 120 Cal. 220, 52 Pac. 583, 65 Am. St. Rep. 179; Wood *v.* Goodfellow, 43 Cal. 185; Lent *v.* Morrill, 25 Cal. 492; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

Connecticut.— Hough *v.* Bailey, 32 Conn. 288.

District of Columbia.— Thompson *v.* Shepherd, 1 Mackey 385.

Illinois.— Schifferstein *v.* Allison, 123 Ill. 622, 15 N. E. 275; Houston *v.* Workman, 28 Ill. App. 626; Kreitz *v.* Hamilton, 28 Ill. App. 566.

Iowa.— Sigourney First Nat. Bank *v.* Woodman, 93 Iowa 668, 22 N. W. 23, 57 Am. St. Rep. 287.

United States.— Groves *v.* Sentell, 153 U. S. 465, 14 S. Ct. 898, 38 L. ed. 785; Hughes *v.* Edwards, 9 Wheat. 489, 6 L. ed. 142.

England.— St. 37 & 38 Vict. c. 57, § 8. *Compare* Howcutt *v.* Bonser, 3 Exch. 491, 18 L. J. Exch. 262.

See 33 Cent. Dig. tit. "Limitation of Actions," § 583.

But see Leonard *v.* Smith, 28 La. Ann. 810; Union, etc., Bank *v.* Smith, 107 Tenn. 476, 64 S. W. 756.

Filing bill to set aside mortgage sale.— Where a mortgagor files a bill to set aside a mortgage sale and offers therein to pay anything found due upon an accounting of the mortgage deed he sufficiently acknowledges liability to suspend the state of limitations. Kelley *v.* Graham, 70 Ark. 490, 69 S. W. 551.

The assignor of a mortgage note who guarantees its payment and who pays the interest on the debt and institutes a suit in the name of the assignee to foreclose such mortgage sufficiently acknowledges the debt to suspend the statute of limitations. Spink *v.* Newby, 64 Kan. 883, 67 Pac. 437.

83. Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72.

84. Ogden *v.* Wentworth, 68 Ill. App. 94; Harding *v.* Durand, 36 Ill. App. 238; Brown *v.* Hardcastle, 63 Md. 484; Felty *v.* Young, 18 Md. 163; Wolford *v.* Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; Cason *v.* Chambers, 62 Tex. 305; Perkins *v.* Sterne, 23 Tex. 561, 76 Am. Dec. 72. See also Gustin *v.* Brattle, Kirby (Conn.) 299. *Contra*, Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; Southern Pac. Co. *v.* Prosser, 122 Cal. 413, 55 Pac. 145; Wells *v.* Harter, 56 Cal. 342; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

85. Palmer *v.* Butler, 36 Iowa 576; Hahl *v.* Ellwood, 34 Tex. Civ. App. 642, 79 S. W. 829.

86. Palmer *v.* Butler, 36 Iowa 576; Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130.

Purchaser of land.— The admission of a debtor will take his debt out of the statute as against a purchaser of land out of which the creditor has a right of satisfaction by an agreement with the debtor. Biddle *v.* Moore, 3 Pa. St. 161.

87. Lent *v.* Morrill, 25 Cal. 492; Murray *v.* Emery, 187 Ill. 408, 58 N. E. 327; Bowmar *v.* Peine, 64 Miss. 99, 8 So. 166; Plant *v.* Shryock, 62 Miss. 821; Eastham *v.* Patty, 29 Tex. Civ. App. 473, 69 S. W. 224.

88. Ferguson's Succession, 17 La. Ann. 255.

89. Forsyth *v.* Bristowe, 8 Exch. 716, 17 Jur. 675, 22 L. J. Exch. 255, 1 Wkly. Rep. 356. *Compare* Colquhoun *v.* Murray, 26 Ont. App. 204.

90. Wood *v.* Goodfellow, 43 Cal. 185; McCarthy *v.* White, 21 Cal. 495, 82 Am. Dec. 754.

91. Lord *v.* Morris, 18 Cal. 482; Bolding *v.* Lane, 1 De G. J. & S. 122, 9 Jur. N. S. 506, 32 L. J. Ch. 219, 7 L. T. Rep. N. S. 812, 1 New Rep. 248, 1 Wkly. Rep. 386, 66 Eng. Ch. 122, 46 Eng. Reprint 47.

92. Cook *v.* Prindle, 97 Iowa 464, 66 N. W.

complete.[93] And if, after the promise or acknowledgment was made, the mortgagor again acquires the title to the mortgaged property, the revival of the mortgage is effected.[94] An acknowledgment made by a purchaser at execution sale against a mortgagor will toll the statute as to his grantee.[95] A grantee who, prior to the bar of a mortgage debt, accepts title subject to the mortgage, thereby makes such acknowledgment as will suspend the statute;[96] and so will his assumption of the mortgage debt interrupt the statute as to him,[97] but not as to the mortgagor;[98] but if the mortgagor subsequently sues the vendee to compel payment of the debt, the statute will be suspended as to him.[99] The running of the statute against the foreclosure of a mortgage is suspended by an express promise to pay made by the grantee of the mortgaged premises,[1] or by his acknowledgment of the mortgage debt as a subsisting one.[2] The running of the statute is not interrupted by an acknowledgment made by a mortgagor to a mortgagee after assignment of the mortgage by the latter;[3] or by the mortgagor certifying that at a certain date a certain amount was due on the mortgage;[4] by his giving a note reciting that it shall stand as secured by the same mortgage that was given for the security of another note executed prior thereto;[5] by his accepting a release of a part of the mortgage premises, which recites that the mortgagee holds the residue of the mortgaged property as security for money remaining unpaid;[6] by the entry of judgment on the mortgage notes;[7] or by the assignee recording an assignment of the mortgage to him.[8] An acknowledgment by the mortgagee that the mortgage is still a subsisting, unsatisfied mortgage will suspend the statute as to an action for redemption therefrom.[9] An acknowledgment by a tenant in tail of the mortgaged

781, 59 Am. St. Rep. 424, (1895) 63 N. W. 187; Hubbard *v.* Missouri Valley L. Ins. Co., 25 Kan. 172; Schumacker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Cason *v.* Chambers, 62 Tex. 305.

93. Kerndt *v.* Porterfield, 56 Iowa 412, 9 N. W. 322.

94. Lent *v.* Morrill, 25 Cal. 492.

95. Heyer *v.* Pruyn, 7 Paige (N. Y.) 465, 34 Am. Dec. 355.

96. Moore *v.* Clark, 40 N. J. Eq. 152; Shaw *v.* Western Land, etc., Co., (Tex. Civ. App. 1901) 62 S. W. 941.

97. Daniels *v.* Johnson, 129 Cal. 415, 61 Pac. 1107, 79 Am. St. Rep. 123.

98. Biddel *v.* Brizzolara, 56 Cal. 374.

99. Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322.

1. Murray *v.* Emery, 187 Ill. 408, 58 N. E. 327 [*affirming* 85 Ill. App. 348]; Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865 [*affirming* 84 Ill. App. 317]; Neosho Valley Inv. Co. *v.* Huston, (Kan. 1900) 59 Pac. 643.

2. Foster *v.* Bowles, 138 Cal. 346, 71 Pac. 494; Clayton *v.* Watkins, 19 Tex. Civ. App. 133, 47 S. W. 810.

3. Investment Securities Co. *v.* Bergthold, 60 Kan. 813, 58 Pac. 469. But if defendant by reliance upon his mortgage indebtedness secures immunity from his other liabilities, the acknowledgment of such mortgage indebtedness may be shown by competent evidence on the question of the suspension of the statute. Union Nat. Bank *v.* Evans, 43 La. Ann. 372, 9 So. 44.

4. Fighstone *v.* Franks, 93 Mich. 52, 52 N. W. 1015. This was not a promise by the mortgagor which renewed the mortgage.

5. Randolph *v.* Thomas, 107 Tenn. 132, 64 S. W. 5.

6. Wellman *v.* Miner, 179 Ill. 326, 53 N. E. 609 [*reversing* 73 Ill. App. 448].

7. Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

8. Curtis *v.* Renneker, 34 S. C. 468, 13 S. E. 664.

9. Shepperd *v.* Murdock, 7 N. C. 218; Anonymous, 2 Atk. 333, 26 Eng. Reprint 603; Ball *v.* Riversdale, Beatty 551; Conway *v.* Shrimpton, 5 Bro. P. C. 187, 15 Vin. Abr. 468, pl. 6, 2 Eng. Reprint 617; Stansfield *v.* Hobson, 3 De G. M. & G. 620, 22 L. J. Ch. 657, 1 Wkly. Rep. 216, 52 Eng. Ch. 620, 43 Eng. Reprint 244; Pendleton *v.* Rooth, 1 Giffard 35, 5 Jur. N. S. 840, 29 L. J. Ch. 265, 65 Eng. Reprint 814; Price *v.* Copner, 1 L. J. Ch. O. S. 178, 1 Sim. & St. 347, 1 Eng. Ch. 347, 57 Eng. Reprint 139; Cutler *v.* Cremer, 1 L. J. Ch. O. S. 108, 6 Madd. 253, 56 Eng. Reprint 1087; Rayner *v.* Oastler, 6 Madd. 274, 58 Eng. Reprint 1095; Hodle *v.* Healey, 6 Madd. 181, 56 Eng. Reprint 1061, 1 Ves. & B. 536, 35 Eng. Reprint, 209, 22 Rev. Rep. 270; Trulock *v.* Robey, 12 Sim. 402, 35 Eng. Ch. 340, 59 Eng. Reprint 1186. *Compare* Thompson *v.* Bowyer, 9 Jur. N. S. 863, 9 L. T. Rep. N. S. 12, 11 Wkly. Rep. 975. But see Markwick *v.* Hardingham, 15 Ch. D. 339, 43 L. T. Rep. N. S. 647, 29 Wkly. Rep. 361.

In England the early rule provided that an acknowledgment made in an assignment of the mortgage was sufficient to interrupt the running of the statute as against the right of redemption (Hansard *v.* Hardy, 18 Ves. Jr. 455, 34 Eng. Reprint 389); but this rule was changed by statute requiring the acknowledgment to be made directly to the mortgagor or someone claiming his estate or to his agent (Lucas *v.* Dennison, 7

property revives title in the mortgagors.[10] A vendor's lien is saved from the statute by an admission of the non-payment of the purchase-money made before the bar,[11] or by the renewal of a purchase-money note after the bar;[12] but a secret lien will not be revived against a grantee by the promise of the lienor.[13]

h. City. The statute may be suspended as to debts of a municipality by acknowledgment, which may be made by ordinance duly passed by the legislative body,[14] or by procuring legislation providing for the payment of such debts and the levy of taxes therefor.[15] But it is not suspended by a promise or acknowledgment made by an officer, not expressly authorized to bind the city;[16] by levying and collecting taxes to pay interest on debts generally;[17] by reference of a claim to experts;[18] or to a committee;[19] by including it in a statement of indebtedness prepared in obedience to a statute,[20] by an acknowledgment of it in the annual report of an officer;[21] by the adoption of such report;[22] by a reference to it in a report of a committee;[23] or by the adoption of such report.[24]

i. County. A county may, by acknowledgment, prevent the running of the statute of limitations as to a debt owing by it,[25] which acknowledgment may be made by a resolution by the commissioners of the county recognizing the obligation.[26] In the absence of authority to make it, a county officer cannot, by his acknowledgment, suspend the statute as to county debts;[27] but where a county treasurer is authorized to indorse upon warrants a refusal to pay for want of funds, such indorsement will suspend the running of the statute as to such warrants.[28]

j. School-District. A school-district, acting in special or regular meeting, may make a promise or acknowledgment which will remove the bar of the statute;[29]

Jur. 1122, 13 Sim. 584, 36 Eng. Ch. 584, 60 Eng. Reprint 227; 3 & 4 Wm. IV, c. 27, § 28); but an acknowledgment by one of two joint mortgagees will not be sufficient (Richardson *v.* Younge, L. R. 6 Ch. 478, 40 L. J. Ch. 338, 25 L. T. Rep. N. S. 230, 19 Wkly. Rep. 612).

10. Pendleton *v.* Rooth, 1 De G. F. & J. 81, 6 Jur. N. S. 182, 29 L. J. Ch. 265, 8 Wkly. Rep. 101, 62 Eng. Ch. 101, 45 Eng. Reprint 289.

11. Moreton *v.* Harrison, 1 Bland (Md.) 491; Toft *v.* Stephenson, 1 De G. M. & G. 28, 15 Jur. 1187, 21 L. J. Ch. 129, 50 Eng. Ch. 22, 42 Eng. Reprint 461 [*reversing* 7 Hare 1, 27 Eng. Ch. 1, 68 Eng. Reprint 1]. See Toft *v.* Stevenson, 5 De G. M. & G. 735, 54 Eng. Ch. 577, 43 Eng. Reprint 1055.

12. Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483; Moran *v.* Wheeler, (Tex. Civ. App. 1894) 26 S. W. 297. *Contra*, Proctor *v.* Hart, 72 Miss. 288, 16 So. 595.

13. Montgomery *v.* Tabb, 40 S. W. 906, 19 Ky. L. Rep. 468.

But property in the hands of a voluntary grantee may be reached by a creditor whose debt has been revived by a new promise made before the conveyance. Davis *v.* Davis, 20 Oreg. 78, 25 Pac. 140.

14. McConnell *v.* New Orleans, 35 La. Ann. 273; Quaker City Nat. Bank *v.* Tacoma, 27 Wash. 259, 67 Pac. 710. But it has been held that the statute is not suspended by an ordinance levying an assessment for the improvement, on account of which the liability accrued. King *v.* Frankfort, 2 Kan. App. 530, 43 Pac. 983.

15. Underhill *v.* Sonora, 17 Cal. 172.

16. Nashville *v.* Toney, 10 Lea (Tenn.) 643; Houston *v.* Jankowskie, 76 Tex. 368, 13 S. W. 269, 18 Am. St. Rep. 57.

17. Houston *v.* Jankowskie, 76 Tex. 368, 13 S. W. 269, 18 Am. St. Rep. 57.

18. Taylor *v.* New Orleans, 41 La. Ann. 891, 6 So. 723.

19. Fiske *v.* Needham, 11 Mass. 452.

20. State *v.* Board of Liquidation, 35 La. Ann. 753; Conger *v.* New Orleans, 32 La. Ann. 1250.

21. Houston *v.* Jankowskie, 76 Tex. 368, 13 S. W. 269, 18 Am. St. Rep. 57.

22. Prescott *v.* Vershire, 63 Vt. 517, 22 Atl. 655.

23. Ft. Scott *v.* Hickman, 112 U. S. 150, 28 L. ed. 636.

24. Bush *v.* Martin, 2 H. & C. 311, 10 Jur. N. S. 347, 33 L. J. Exch. 17, 8 L. T. Rep. N. S. 509, 9 L. T. Rep. N. S. 510, 11 Wkly. Rep. 1078, 12 Wkly. Rep. 205.

25. Leavenworth County Com'rs *v.* Higginbotham, 17 Kan. 62.

26. Coffin *v.* Kearney County, 114 Fed. 518.

27. Harrison County Com'rs *v.* Cole, 8 Ind. App. 485, 36 N. E. 47; Cole *v.* Harrison County Com'rs, 3 Ind. App. 13, 28 N. E. 1031.

28. Morton *v.* Knox County, 65 Fed. 369 [*affirmed* in 68 Fed. 788, 15 C. C. A. 671]. See also Flagg *v.* St. Charles Parish, 48 La. Ann. 765, 19 So. 944, where it was held that warrants or orders on the parish treasurer by the police jury, without power to issue notes or other similar instruments, are sufficient acknowledgments to interrupt prescription.

29. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

but in the absence of express authority a promise or acknowledgment by the trustees of the district will not have that effect.[30]

k. United States. A new promise or its equivalent made by congress will remove the bar of the statute as to a claim against the United States.[31] But acknowledgments and promises made by executive officers of the government without express or clearly implied authority from congress will not operate to suspend the statute or revive a claim against the government.[32]

11. Persons to Whom Made. In some jurisdictions a promise or acknowledgment of a debt, although made to a stranger, is sufficient to take the debt out of the operation of the statute of limitations.[33] The weight of authority, however, is to the contrary, being to the effect that to take the debt out of the statute, the acknowledgment or promise must be made, not to a stranger but to the creditor himself or to someone acting for him.[34] Within this rule a promise to an agent

30. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

31. Cross' Case, 4 Ct. Cl. 271.

32. Leonard *v.* U. S., 18 Ct. Cl. 382.

33. *Alabama.*— St. John *v.* Garrow, 4 Port. 223, 29 Am. Dec. 280.

Delaware.— Smith *v.* Campbell, 5 Harr. 380.

Louisiana.— Utz *v.* Utz, 34 La. Ann. 752; Harrell's Succession, 3 La. Ann. 323.

Maine.— Peavey *v.* Brown, 22 Me. 100.

Maryland.— Stewart *v.* Garrett, 65 Md. 392, 5 Atl. 324, 57 Am. Rep. 333; Oliver *v.* Gray, 1 Harr. & G. 204.

Massachusetts.— Whitney *v.* Bigelow, 4 Pick. 110.

New Hampshire.— Titus *v.* Asb, 24 N. H. 319.

Vermont.—Minkler *v.* Minkler, 16 Vt. 193; Blake *v.* Parleman, 13 Vt. 574.

See 33 Cent. Dig. tit. "Limitation of Actions," § 575.

34. *Arkansas.*— Ringo *v.* Brooks, 26 Ark. 540.

California.— Rounthwaite *v.* Rounthwaite, (1902) 68 Pac. 304; Biddel *v.* Brizzolara, 64 Cal. 354, 30 Pac. 609.

District of Columbia.— Cunkle *v.* Heald, 6 Mackey 485.

Illinois.— Collar *v.* Patterson, 137 Ill. 430, 27 N. E. 604; McGrew *v.* Forsyth, 80 Ill. 596; Wachter *v.* Albee, 80 Ill. 47; Carroll *v.* Forsyth, 69 Ill. 127; Keener *v.* Crull, 19 Ill. 189; Albers Commission Co. *v.* Sessel, 87 Ill. App. 378 [*affirmed* in 193 Ill. 153, 61 N. E. 1075]; Bassett *v.* Noble, 15 Ill. App. 360; Katz *v.* Moessinger, 7 Ill. App. 536; Bloomfield *v.* Bloomfield, 7 Ill. App. 261; Teessen *v.* Camblin, 1 Ill. App. 424.

Indiana.— Niblack *v.* Goodman, 67 Ind. 174.

Kansas.— Sibert *v.* Wilder, 16 Kan. 176, 22 Am. Rep. 280.

Kentucky.— Proctor *v.* Bell, 97 Ky. 98, 30 S. W. 15, 16 Ky. L. Rep. 823; Hargis *v.* Sewell, 87 Ky. 63, 7 S. W. 557, 9 Ky. L. Rep. 920; Trousdale *v.* Anderson, 9 Bush 276.

Missouri.— Cape Girardeau County *v.* Harbison, 58 Mo. 90; Williamson *v.* Williamson, 50 Mo. App. 194. In Allen *v.* Collier, 70 Mo. 138, 35 Am. Rep. 416, a written acknowledgment of debt found among the papers of a deceased debtor was held insufficient to toll the statute, not being made to the creditor.

New York.— Wakeman *v.* Sherman, 9 N. Y. 85 [*reversing* 11 Barb. 254]; Bloodgood *v.* Bruen, 8 N. Y. 362 [*reversing* 4 Sandf. 427]; Fletcher *v.* Updike, 3 Hun 350, 5 Thomps. & C. 513; Stafford *v.* Bacon, 1 Hill 532, 37 Am. Dec. 366; Moore *v.* Viele, 4 Wend. 420. *Contra,* Watkins *v.* Stevens, 4 Barb. 168; McCrea *v.* Purmort, 16 Wend. 460, 30 Am. Dec. 103.

North Carolina.— Hussey *v.* Kirkman, 95 N. C. 63; Kirby *v.* Mills, 78 N. C. 124, 24 Am. Rep. 460; Faison *v.* Bowden, 76 N. C. 425; Parker *v.* Shuford, 76 N. C. 219; Thompson *v.* Gilreath, 48 N. C. 493. But see Collett *v.* Frazier, 56 N. C. 80.

Pennsylvania.—Spangler *v.* Spangler, 122 Pa. St. 358, 15 Atl. 436, 9 Am. St. Rep. 114; Hostetter *v.* Hollinger, 117 Pa. St. 606, 12 Atl. 741; McKinney *v.* Snyder, 78 Pa. St. 497; Zacharias *v.* Zacharias, 23 Pa. St. 452; Gillingham *v.* Gillingham, 17 Pa. St. 302; Kyle *v.* Wells, 17 Pa. St. 286, 56 Am. Dec. 555; Naglee's Estate, 4 Pa. Dist. 122, 16 Pa. Co. Ct. 204, 36 Wkly. Notes Cas. 104; Anderson *v.* Allison, 1 Am. L. Reg. 250; Danner's Estate, 2 Lehigh Val. L. Rep. 422. But see Wells *v.* Pyle, 1 Phila. 21.

Rhode Island.— Parker *v.* Remington, 15 R. I. 300, 3 Atl. 590, 2 Am. St. Rep. 897.

South Carolina.— Robbins *v.* Farley, 2 Strobh. 348; Trammel *v.* Salmon, 2 Bailey 308.

Tennessee.— Maxwell *v.* Reilly, 11 Lea 307; Roller *v.* Bachman, 5 Lea 153 (a limitation of the rule is recognized to the extent that a promise made by a debtor to a stranger which the former intends shall be communicated to the creditor is sufficient); Bachman *v.* Roller, 9 Baxt. 409, 40 Am. Rep. 97; Fuqua *v.* Dinwiddie, 6 Lea 645. *Compare* Thompson *v.* French, 10 Yerg. 452.

United States.— Ft. Scott *v.* Hickman, 112 U. S. 150, 5 S. Ct. 56, 28 L. ed. 636; Moore *v.* Columbia Bank, 6 Pet. 86, 8 L. ed. 329 [*reversing* 2 Fed. Cas. No. 876, 3 Cranch C. C. 663]; Craig *v.* Brown, 6 Fed. Cas. No. 3,330, 3 Wash. 503. But see Cadmus *v.* Polhamus, 4 Fed. Cas. No. 2,282*a*.

England.— Stamford Banking Co. *v.* Smith, [1892] 1 Q. B. 765, 56 J. P. 229, 61 L. J. Q. B. 405, 66 L. T. Rep. N. S. 306, 40 Wkly.

or attorney is sufficient,[35] although he is only authorized to collect the demand.[36] An acknowledgment made to a surviving partner,[37] to a managing partner,[38] to a bankrupt creditor acting in behalf of his assignees,[39] to the widow of the creditor,[40] to an heir who inherits the claim, even when the promise is made prior to his appointment as administrator,[41] to an executor of a devisee of the claim,[42] to an administrator while acting as such,[43] or to one of several administrators, although made to him individually and not in his representative capacity, is sufficient to toll the statute or revive a barred debt.[44] The indorsee of a promissory note may avail himself of a promise made by the maker to a prior holder,[45] or to him, although the maker had no notice of the indorsement.[46] But the assignee of an unnegotiable due-bill barred by the statute of limitations cannot recover on a new promise made before the assignment.[47]

12. Operation and Effect — a. Continuance of Original Demand — (I) *In General.* An acknowledgment or new promise fixes a point of time from which

Rep. 355; Rogers *v.* Quinn, L. R. 26 Ir. 136; Tanner *v.* Smart, 6 B. & C. 603, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274; Smith *v.* Forty, 4 C. & P. 126, 19 E. C. L. 438; Nash *v.* Hill, 1 F. & F. 198; Godwin *v.* Culley, 4 H. & N. 373; Greenfell *v.* Girdlestone, 1 Jur. 940, 7 L. J. Exch. 42, 2 Y. & C. Exch. 662; Easterly *v.* Pullen, 3 Stark. 186, 3 E. C. L. 647. See also Ward *v.* Hunter, 6 Taunt. 210, 1 E. C. L. 581. But see Mountstephen *v.* Brooke, 3 B. & Ald. 141, 5 E. C. L. 90; Clarke *v.* Hougham, 2 B. & C. 149, 3 D. & R. 325, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73; Halliday *v.* Ward, 3 Campb. 32; Peters *v.* Brown, 4 Esp. 47.

Canada.— The John Watson Mfg. Co. *v.* Sample, 12 Manitoba 373; Colquhoun *v.* Murray, 26 Ont. App. 204; Goodman *v.* Boyes, 17 Ont. App. 528; King *v.* Rogers, 1 Ont. L. Rep. 69 [*affirming* 31 Ont. 573]; Lyon *v.* Tiffany, 16 U. C. C. P. 197.

See 33 Cent. Dig. tit. "Limitation of Actions," § 575.

Promise to one of a class made with respect to a matter that affects all is sufficient to take the demands of all out of the statute. Clark *v.* Hougham, 2 B. & C. 149, 3 D. & R. 322, 1 L. J. K. B. O. S. 249, 9 E. C. L. 73.

Rebutting presumption of payment.—While an acknowledgment to a stranger is insufficient to toll the statute, it is competent to rebut the presumption of payment arising from the lapse of time. Cape Girardeau County *v.* Harbison, 58 Mo. 90.

Identity of promisee with creditor.— The identity of the person to whom a letter containing the promise is addressed with the creditor may be shown by parol. Collins *v.* Bane, 34 Iowa 385.

Or if the debtor constitutes another his agent to convey the promise to the creditor, the promise is good and stops the running of the statute. O'Hare *v.* Murphy, 196 Ill. 599, 63 N. E. 1081 [*affirming* 96 Ill. App. 577]. An acknowledgment of a liability made to a third person, with the understanding that such acknowledgment should be conveyed to the creditor, is sufficient. Miller *v.* Teeter, 53 N. J. Eq. 262, 31 Atl. 394. See also Tennessee cases cited *supra.*

35. *Illinois.*—Wetz *v.* Greffe, 71 Ill. App. 313; Mandel *v.* Gundershimer, 61 Ill. App. 332.

Maryland.— Emerson *v.* Aultman, 69 Md. 125, 14 Atl. 671.

New York.— Watkins *v.* Stevens, 4 Barb. 168.

North Carolina.— Hussey *v.* Kirkman, 95 N. C. 63; Kirby *v.* Mills, 78 N. C. 124, 24 Am. Rep. 460.

Pennsylvania.—Criswell *v.* Criswell, 56 Pa. St. 130; Wells *v.* Pyle, 1 Phila. 21.

Vermont.— Hill *v.* Kendall, 25 Vt. 528.

See 33 Cent. Dig. tit. "Limitation of Actions," § 575.

Limitations of rule.— A promise to an agent to pay in a manner and upon terms which he lacks authority to accept is not sufficient (Hamilton *v.* Carnes, 11 Fed. Cas. No. 5,977, 4 Cranch C. C. 531); and the statute is not interrupted by a promise made to one not known by the debtor to be the agent of the creditor (Williamson *v.* Williamson, 50 Mo. App. 194; McKinney *v.* Snyder, 78 Pa. St. 497).

36. Emerson *v.* Miller, 27 Pa. St. 278.

37. Barney *v.* Smith, 4 Harr. & J. (Md.) 485, 7 Am. Dec. 679.

38. Yarbrough *v.* Gilland, 77 Miss. 139, 24 So. 170.

39. Leach *v.* Coyle, 15 Fed. Cas. No. 8,156.

40. Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831.

41. Drawbaugh *v.* Drawbaugh, 7 Pa. Super. 349; Keely *v.* Wright, 5 Wkly. Notes Cas. (Pa.) 241. And see Robertson *v.* Burrill, 22 Ont. App. 356.

42. Croman *v.* Stull, 119 Pa. St. 91, 12 Atl. 812.

43. Farrell *v.* Palmer, 36 Cal. 187.

44. Hill *v.* Hill, 51 S. C. 134, 28 S. E. 309.

45. Lamar *v.* Manro, 10 Gill & J. (Md.) 50; Little *v.* Blunt, 9 Pick. (Mass.) 488; Clark *v.* Atkinson, 2 E. D. Smith (N. Y.) 112; Soulden *v.* Van Rensselaer, 9 Wend. (N. Y.) 293; Dean *v.* Hewit, 5 Wend. (N. Y.) 257. *Contra,* Thompson *v.* Gilreath, 48 N. C. 493.

46. Pinkerton *v.* Bailey, 8 Wend. (N. Y.) 600.

47. Reigne *v.* Desportes, Dudley (S. C.) 118.

limitations begin to run anew.[48] If such acknowledgment or promise be made before the bar of the statute has become complete it starts the statute anew from the date of the promise or acknowledgment and against the original claim.[49] If the acknowledgment or promise made after a cause is barred creates a new cause of action, the period of limitation will be determined by the character of the new promise,[50] and so it is sometimes held that a new promise creates a new cause of action whether made before or after the bar and the statute applicable to the new promise governs.[51] But where the acknowledgment revives the original claim and does not create a new substantive cause of action the time in which the claim is barred after the acknowledgment depends upon the nature of the cause of action revived — the original claim;[52] and so it has been held that the period applicable to the original claim governs whether the bar is complete or not when the

48. Harrell *v.* Davis, 108 Ga. 789, 33 S. E. 852; Rich *v.* Dupree, 14 Ga. 661; Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907; Ridgeley *v.* Price, 16 B. Mon. (Ky.) 409; Ireland *v.* Mackintosh, 22 Utah 296, 61 Pac. 901.

Revival of lien see *supra*, VII, A, 10, g.

The expiration of the statutory period after the promise bars the action. Hoadley *v.* Bliss, 9 Ga. 303; Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907; Phelps *v.* Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Brink *v.* Nice, 2 Leg. Rec. (Pa.) 373; Munson *v.* Rice, 18 Vt. 53.

As to principal, interest, and damages.— Where at the expiration of six years from the making of certain notes which bear interest on their face, the maker wrote to the payee and to the payee's solicitor, stating that he acknowledged his indebtedness on the notes so as to prevent the operation of the statute of limitations, the claim was taken out of the operation of the statute both as to the principal money and interest due at the maturity thereof as well as with reference to the interest by way of damages payable since the maturity of the note. *Re* Williams, 7 Ont. L. Rep. 156.

The statute in force at the date of the new promise controls, rather than that in force when the debt was contracted. Drury *v.* Henderson, 36 Ill. App. 521; Ziegler *v.* Tennery, 23 Ill. App. 133; Carr *v.* Robinson, 8 Bush (Ky.) 269.

49. *Alabama.*—Deshler *v.* Cabiness, 10 Ala. 959.

California.— Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40.

Connecticut.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

Georgia.— Rich *v.* Dupree, 14 Ga. 661 [*distinguishing* Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306, in that the promise was made after the bar was complete].

Illinois.— Sennott *v.* Horner, 30 Ill. 429.

Iowa.— Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907.

Kansas.— Pracht *v.* McNee, 40 Kan. 1, 18 Pac. 925.

Kentucky.— Gilmore *v.* Green, 14 Bush 772; Carr *v.* Robinson, 8 Bush 269; Hopkins *v.* Stout, 6 Bush 375.

Louisiana.— Brown *v.* McFarland, 19 La. Ann. 255. See also Millaudon *v.* Beazley, 2 La. Ann. 916; Dubreuil's Succession, 12 Rob. 511; Carraby *v.* Navarre, 3 La. 262. In this state it was held that a written acknowledgment of an account placed it on the footing of an ordinary personal debt and subjected it to the prescription applicable to such debt. Byrne *v.* Prather, 14 La. Ann. 653; Davis *v.* Houren, 10 Rob. 402.

Massachusetts.— Gilbert *v.* Collins, 124 Mass. 174; Phelps *v.* Brewer, 9 Cush. 390, 57 Am. Dec. 56.

Missouri.— Mastin *v.* Branham, 86 Mo. 643; Harper *v.* Eubank, 32 Mo. App. 258.

New Hampshire.— Pickering *v.* Frink, 62 N. H. 342.

Pennsylvania.— Patton *v.* Hassinger, 69 Pa. St. 311.

Texas.— Browne *v.* French, 3 Tex. Civ. App. 445, 22 S. W. 581.

Vermont.— Munson *v.* Rice, 18 Vt. 53.

Canada.— Charette *v.* Lacombe, 17 Quebec Super. Ct. 539.

50. McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170; Gilmore *v.* Green, 14 Bush (Ky.) 772; Carr *v.* Robinson, 8 Bush (Ky.) 269; Kuhn *v.* Mount, 13 Utah 108, 44 Pac. 1036; Gruenberg *v.* Buhring, 5 Utah 414, 16 Pac. 486. See also Ditto *v.* Ditto, 4 Dana (Ky.) 502, where it does not appear whether the new promise was before or after the bar, and from which it seems that, although a merchant's account for "store goods" was barred in twelve months, the action could be maintained upon any new promise, coupled with the original consideration, at any time within five years after the last promise. *Compare* Dawson *v.* Godkins, 28 Ga. 310; Hoadley *v.* Bliss, 9 Ga. 303.

51. Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298.

52. *Alabama.*— St. John *v.* Garrow, 4 Port. 223, 29 Am. Dec. 280.

Connecticut.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42.

Delaware.— Duncan *v.* Newlin, 1 Harr. 109.

Iowa.— Bayliss *v.* Street, 51 Iowa 627, 2 N. W. 437.

Louisiana.— Butler *v.* Ford, 9 Rob. 112; Montgomery *v.* Levistones, 8 Rob. 145; Shiff *v.* Hertzogg, 12 La. 455, in all of which cases debts evidenced by notes were acknowledged in writing.

See *infra*, VII, A, 12, a, (II).

promise is made,[53] and also when the action may be on the original claim or the new promise.[54]

(II) *SUIT ON ORIGINAL DEMAND OR NEW PROMISE.*[55] The question whether a new promise to pay a debt already barred by the statute of limitations creates a new cause of action so that suit should be brought upon it and not upon the original cause has given rise to some diversity of opinion. On the one hand it has been held in a number of cases that such new promise constitutes a new cause of action and that a suit should be brought upon it and not upon the original promise.[56] In the main these cases proceed upon the theory that the obligation is extinguished, but that inasmuch as it has been extinguished by operation of the law instead of by the act of the parties, a moral obligation to pay remains, and this moral obligation is sufficient consideration for the new promise.[57] On the other hand numerous cases maintain that the statute does not extinguish the debt but only bars the remedy and the new promise and removes the bar of the statute thereby enabling plaintiff to recover on the original contract, and does not create a new substantive cause of action.[58] And in some of the cases in which it does not appear whether the new promise was made before or after the bar or whether such consideration influenced the decisions, it is held that if the promise was made within the statutory period before the action is brought the original promise

53. Pickering *v.* Frink, 62 N. H. 342.

54. Little *v.* Blunt, 9 Pick. (Mass.) 488. See also Young *v.* Weston, 39 Me. 492; Warren Academy *v.* Starrett, 15 Me. 443.

55. By executor or administrator see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1006 note 77.

56. *California.*— Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; Rodgers *v.* Byers, 127 Cal. 528, 60 Pac. 42; Southern Pac. Co. *v.* Prosser, 122 Cal. 413, 55 Pac. 145; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170; Smith *v.* Richmond, 19 Cal. 476.

Colorado.— Richardson *v.* Bricker, 7 Colo. 58, 1 Pac. 433, 49 Am. Rep. 344.

Georgia.— Van Buren *v.* Webster, 12 Ga. 615; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306. But see Hart *v.* Holly, 18 Ga. 378.

Kentucky.— Gilmore *v.* Green, 14 Bush 772; Carr *v.* Robinson, 8 Bush 269; Hopkins *v.* Stout, 6 Bush 675; Ridgeley *v.* Price, 16 B. Mon. 409; Rankin *v.* Anderson, 69 S. W. 705, 24 Ky. L. Rep. 647.

Maine.— See Howe *v.* Saunders, 38 Me. 350.

Texas.— Bangs *v.* Crebbin, 29 Tex. Civ. App. 385, 69 S. W. 441; Stoker *v.* Patton, (Civ. App. 1896) 35 S. W. 64.

Utah.— Ireland *v.* Mackintosh, 22 Utah 296, 61 Pac. 901; Kuhn *v.* Mount, 13 Utah 108, 44 Pac. 1036; Gruenberg *v.* Buhring, 5 Utah 414, 16 Pac. 486; Anthony *v.* Savage, 2 Utah 466.

United States.— Kampshall *v.* Goodman, 14 Fed. Cas. No. 7,605, 6 McLean 189.

England.— A'Court *v.* Cross, 3 Bing. 329, 14 L. J. C. P. O. S. 79, 11 Moore C. P. 198, 11 E. C. L. 165.

See 33 Cent. Dig. tit. "Limitation of Actions," § 666.

57. See *supra*, VII, A, 4.

58. *Alabama.*— St. John *v.* Garrow, 4 Port. 223, 29 Am. Dec. 280; Bullock *v.* Perry, 2 Stew. & P. 319. But in Bradford *v.* Spyker, 32 Ala. 134 [*citing* Upton *v.* Else, 5 L. J. C. P. O. S. 108, 12 Moore C. P. 643, 22 E. C. L. 451], it is held that the cause of action is on the new promise, although the practice is to declare on the old.

Arkansas.— Harlan *v.* Bernie, 22 Ark. 217, 76 Am. Dec. 428; Biscoe *v.* Stone, 11 Ark. 39; Biscoe *v.* Jenkins, 10 Ark. 108.

Connecticut.— Austin *v.* Bostwick, 9 Conn. 496, 25 Am. Dec. 42; Lord *v.* Shaler, 3 Conn. 131, 8 Am. Dec. 160.

Idaho.— See Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44.

Illinois.— Keener *v.* Crull, 19 Ill. 189; Kimmel *v.* Schwartz, 1 Ill. 278.

Iowa.— Bayliss *v.* Street, 51 Iowa 627, 2 N. W. 437. See also Frisbee *v.* Seaman, 49 Iowa 95.

Maryland.— Guy *v.* Tams, 6 Gill 82; Oliver *v.* Gray, 1 Harr. & G. 204.

Massachusetts.— See Ilsley *v.* Jewett, 3 Metc. 439, 2 Metc. 168.

Missouri.— Boyd *v.* Hurlhut, 41 Mo. 264.

New Hampshire.— Betton *v.* Cutts, 11 N. H. 170.

New York.— Waltermire *v.* Westover, 14 N. Y. 16, 18; Esseltyn *v.* Weeks, 12 N. Y. 635; Sands *v.* St. John, 36 Barb. 628; Clark *v.* Atkinson, 2 E. D. Smith 112.

North Carolina.— Falls *v.* Sherrill, 19 N. C. 371.

Pennsylvania.— Yaw *v.* Kerr, 47 Pa. St. 333.

England.— Leaper *v.* Tatton, 16 East 420.

In the case of an instrument under seal upon which an action is barred, but for a new promise, the new promise must be declared on. Crawford *v.* Childress, 1 Ala. 482; Wright *v.* Gilbert, 51 Md. 146; Felty *v.* Young, 18 Md. 163.

As against other creditors.— Where a debt, the remedy for which is barred by the statute of limitations, is acknowledged by the debtor, and judgment is recovered there-

is the substantive cause of action.[59] In other cases it is considered that a suit may be maintained upon the original debt or upon the new promise.[60] But whatever difference of opinion may exist with reference to the effect of a new promise to revive a debt already barred, it is settled by the great weight of authority that such a promise made before the bar is complete does not create a new cause of action but merely suspends the bar of the statute for another period of limitation dating from the new promise, and that the action should be brought upon the original claim,[61] although in some jurisdictions if the action is brought after the statutory bar has run against the original cause, it is held that the recovery must

for, a voluntary settlement made before such acknowledgment, and before the remedy was barred, is void as against a fieri facias issued on the judgment. Irwin *v.* Freeman, 13 Grant Ch. (U. C.) 465.

59. Barrett *v.* Barrett, 8 Me. 353; Baxter *v.* Penniman, 8 Mass. 133; Doerge *v.* Heimenz, 8 Mo. App. 255; McCrea *v.* Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 130; Martin *v.* Williams, 17 Johns. (N. Y.) 330, as to a set-off. But in Howe *v.* Saunders, 38 Me. 350, it is said that the more satisfactory rule may be when the new promise is made or arises after the bar is complete, or when the new promise varies from the original, there should be a count upon the new promise and the original cause of action used as proof of a valuable consideration for it; and that in other cases the declaration may be upon the original promise only.

Where the new promise is conditional or qualified it is held that the action may be on the original promise. Wright *v.* Bartlett, 43 N. H. 548; Betton *v.* Cutts, 11 N. H. 170; Tanner *v.* Smart, 6 B. & C. 603, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274, holding that the proof must show the condition performed. *Contra*, Rodgers *v.* Byers, 127 Cal. 528, 60 Pac. 42 (holding that the action must be on the new promise, although made before the bar, the action being brought after the bar); Brown *v.* Joyner, 1 Rich. (S. C.) 210; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148 [*affirming* 15 Fed. Cas. No. 8,492, 3 Wash. 404]; Haydon *v.* Williams, 7 Bing. 163, 9 L. J. C. P. O. S. 16, 4 M. & P. 811, 20 E. C. L. 80. See also Howe *v.* Saunders, 38 Me. 350.

The fact of payment being made the test for determining the time the statute commences to run, the theory of requiring a new promise or of founding an action on an assumed new promise is abandoned and a new promise is not necessary but the action is founded on the original cause of action. Sutherlin *v.* Roberts, 4 Oreg. 378.

Where the promise is made by or to a person not a party to the original contract, it must be declared on specially as the cause of action. Pool *v.* Bledsoe, 85 N. C. 1; Fleming *v.* Staton, 74 N. C. 203; Reigne *v.* Desportes, Dudley (S. C.) 118.

But in debt on a simple contract a new promise cannot be shown as in assumpsit. Butcher *v.* Hixton, 4 Leigh (Va.) 519, which seems to consider the new promise the substantive cause of action even in assumpsit. See also Hurst *v.* Parker, 1 B. & Ald. 92; Tanner *v.* Smart, 6 B. & C. 603, 9 D. & R. 549, 5 L. J. K. B. O. S. 218, 30 Rev. Rep. 461, 13 E. C. L. 274; Pittam *v.* Foster, 1 B. & C. 248, 2 D. & R. 363, 1 L. J. K. B. O. S. 81, 25 Rev. Rep. 385, 8 E. C. L. 106.

60. Polk *v.* Butterfield, 9 Colo. 325, 12 Pac. 216 [*distinguishing* Buckingham *v.* Orr, 6 Colo. 587, in that the effect of the decision there is to give the preference to the practice of declaring on the new promise]; Little *v.* Blunt, 9 Pick. (Mass.) 488 (where it is held that the new promise constitutes a new cause of action, but that plaintiff may nevertheless declare on the old promise and reply the new promise if the bar of limitation is pleaded); Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148. See also Leaper *v.* Tatton, 16 East 420.

61. *Arkansas.*— Real Estate Bank *v.* Hartfield, 5 Ark. 551.

California.— Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40.

Florida.— Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276.

Iowa.— Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907; Frisbee *v.* Seaman, 49 Iowa 95.

Kentucky.— Rankin *v.* Anderson, 69 S. W. 705, 24 Ky. L. Rep. 647; Jones *v.* McCrocklin, 16 Ky. L. Rep. 285.

Maine.— See Howe *v.* Saunders, 38 Me. 350.

Maryland.— Guy *v.* Tams, 6 Gill 82.

Massachusetts.— Gilbert *v.* Collins, 124 Mass. 174.

Mississippi.— Shackleford *v.* Douglass, 31 Miss. 95.

Missouri.— Harper *v.* Eubank, 32 Mo. App. 258.

North Carolina.— Falls *v.* Sherrill, 19 N. C. 371; Kizer *v.* Bowles, 9 N. C. 539. *Compare* Kull *v.* Farmer, 78 N. C. 339.

Rhode Island.— Taylor *v.* Slater, 16 R. I. 86, 12 Atl. 727.

Tennessee.— Shields *v.* Dyer, 86 Tenn. 41, 5 S. W. 439; Bedford County *v.* Nashville, etc., R. Co., 14 Lea 525.

United States.— Union Pac. R. Co. *v.* Ruef, 120 Fed. 102.

England.— Irving *v.* Veitch, 7 L. J. Exch. 25, 3 M. & H. 313, 3 M. & W. 90.

Compare Van Alen *v.* Feltz, 32 Barb. (N. Y.) 139.

be based upon the new promise whether that was made before or after the original cause was barred.[62]

b. Effectual Promise Not Affected by Debtor's Acts. An acknowledgment from which a promise may be implied is not affected by accompanying objections to the amount of the demand,[63] or by a request for a reduction.[64] A promise which is effectual to toll the statute is not affected by subsequent ineffectual promises;[65] or attempted rescission of the action by which the promise is evidenced.[66]

c. Creditor May Render Inoperative. Where the creditor surrenders to the debtor the right evidencing the new promise, with intent to place the parties *in statu quo*, the revival is avoided.[67]

d. New Promise Not Extended by Implication — (I) *IN GENERAL.* A new promise will not be extended by implication or presumption beyond its express words.[68]

(II) *AMOUNT ADMITTED LIMITS AMOUNT OF REVIVAL.* An admission that a certain amount is owing will operate to revive the debt to the extent of the amount admitted;[69] but it will not be extended to include any portion of the debt not comprehended thereby.[70] A mere admission that a small amount is due will not cover such sum as the creditor may be able to prove to be due and unpaid;[71] nor

62. Milwee *v.* Jay, 47 S. C. 430, 25 S. E. 298; Walters *v.* Craft, 23 S. C. 578, 55 Am. Rep. 44; Smith *v.* Caldwell, 15 Rich. (S. C.) 365, where it is pointed out, however, that this proposition under the general form of pleading which is allowed is unimportant in practice where the declaration is in assumpsit upon an executed consideration, although it is material in the declaration of the rights of the parties whenever the new promise, and that alone, stands unaffected by the statute. But in Sepaugh *v.* Smith, 35 S. C. 613, 14 S. E. 939, and Fleming *v.* Fleming, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694, it is held that where the original cause was a note, upon which the action is barred, action must be brought and plaintiff must declare on the new promise. For earlier cases in this state see Pyles *v.* Bell, 20 S. C. 365; Bowdre *v.* Hampton, 6 Rich. (S. C.) 208; Rucker *v.* Frazier, 4 Strobh. (S. C.) 93; Lomax *v.* Spierin, Dudley (S. C.) 365. See also Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608; Ames *v.* Le Rue, 1 Fed. Cas. No. 327, 2 McLean 216.

In Texas the rule of the text was announced in an early case. Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661, which was subsequently recognized as stating the law of that state in Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483. The rule that the new promise constitutes the substantive cause of action was applied in Erskine *v.* Wilson, 20 Tex. 77 (holding that when the new promise is pleaded by way of amendment, the statute runs until the filing of the amendment); Henry *v.* Roe, 83 Tex. 446, 18 S. W. 806; Brown *v.* French, 3 Tex. Civ. App. 445, 22 S. W. 581 (which last two cases do not seem to go as far as the others on the question of pleading).

63. Ditto *v.* Ditto, 4 Dana (Ky.) 502; Carroll *v.* Ridgaway, 8 Md. 328.

64. McNear *v.* Roberson, 12 Ind. App. 87, 39 N. E. 896.

65. Rich *v.* Dupree, 14 Ga. 661.

66. Sanborn *v.* Rice County School Dist. No. 10, 12 Minn. 17.

67. Sumner *v.* Sumner, 1 Metc. (Mass.) 394.

68. Kimmel *v.* Schwartz, 1 Ill. 278; Oliver *v.* Gray, 1 Harr. & G. (Md.) 204; Smallwood *v.* Smallwood, 19 N. C. 330; Lowndes *v.* Garnett, etc., Gold Min. Co., 33 L. J. Ch. 418, 10 L. T. Rep. N. S. 229, 12 Wkly. Rep. 572. See also *supra*, VII, A, 8, b.

69. Oliver *v.* Gray, 1 Harr. & G. (Md.) 204; Mooar *v.* Mooar, 69 N. H. 643, 46 Atl. 1052; Weare *v.* Chase, 58 N. H. 225; Kittredge *v.* Brown, 9 N. H. 377; Exeter Bank *v.* Sullivan, 6 N. H. 124; McDonald *v.* Grey, 29 Tex. 80. But see Greenleaf *v.* Norfolk Southern R. Co., 91 N. C. 33, holding that a promise which does not extend to the whole amount is ineffectual.

The giving of one's own note in part payment of a simple contract debt takes the latter out of the operation of the statute, for being not merely an acknowledgment or promise, but a payment, no writing was necessary, and the objection that it ought not to operate as a promise in writing to pay more than it promises to pay is untenable. Ilsley *v.* Jewett, 2 Metc. (Mass.) 168.

70. *Alabama.*— Lucas *v.* Thorington, 5 Ala. 504.

Illinois.— See Whittaker *v.* Crow, 132 Ill. 627, 24 N. E. 57 [*affirming* 32 Ill. App. 29].

Maryland.— Higdon *v.* Stewart, 17 Md. 105.

New Hampshire.— Mooar *v.* Mooar, 69 N. H. 643, 46 Atl. 1052; Dodge *v.* Leavitt, 59 N. H. 245; Kittredge *v.* Brown, 9 N. H. 377.

North Carolina.— Pope *v.* Andrews, 90 N. C. 401.

Tennessee.— Hannah *v.* Hawkins, 5 Lea 240.

71. Mask *v.* Philler, 32 Miss. 237.

will an offer of one of several joint makers of a note to pay his share of the liability take the whole indebtedness without the statute.[72]

B. Part Payment — 1. The General Rules. A partial payment is by the English law regarded as a fact from which an acknowledgment or new promise may be inferred,[73] and while the doctrine does not depend upon express statutory sanction,[74] this is the general rule under the statutes in the United States which contain some qualifying clause identical with that in the English statute[75] or of sufficient force to require the same construction.[76] The principle is that by the part payment the party paying intended by it to acknowledge and admit the

72. Weare *v.* Chase, 58 N. H. 225; Phelps *v.* Stewart, 12 Vt. 256.

A promise by a surety to pay the balance, after the principal debtor's estate has paid its *pro rata* share, was held insufficient to toll the statute, although it was shown that there was no dividend declared on the estate. Senseman *v.* Hershman, 82 Pa. St. 83.

73. Before the statute of 9 Geo. IV, c. 14, according to the construction of the 21 James I, c. 16, three modes were in practice to take a case out of the operation of that statute: (1) An acknowledgment by words only; (2) a promise by words only; and (3) by payment of principal or interest. The statute of 9 Geo. IV, c. 14, did not confine itself to the first two, leaving the third precisely as it was before. It provided "that in actions of debt, &c., no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract," to take the case out of the statute, "unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby." The statute contained the additional proviso that "nothing herein contained shall alter, or take away, or lessen the effect of any payment of principal or interest," etc. This last clause leaves the effect and proof of payment exactly as it was before the statute. Cleave *v.* Jones, 6 Exch. 573, 15 Jur. 515, 20 L. J. Exch. 238 [*overruling* Willis *v.* Newham, 3 Y. & J. 518]. See also Wyatt *v.* Hudson, 8 Bing. 309, 1 L. J. C. P. 93, 1 Moore & S. 442, 21 E. C. L. 555.

74. Harper *v.* Fairley, 53 N. Y. 442.

75. St. 9 Geo. IV.

76. Pond *v.* French, 97 Me. 403, 54 Atl. 920; Sinnett *v.* Sinnett, 82 Me. 278, 19 Atl. 458; Sibley *v.* Lumbert, 30 Me. 253; Gillingham *v.* Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320; Williams *v.* Gridley, 9 Metc. (Mass.) 492; McClurg *v.* Howard, 45 Mo. 365, 100 Am. Dec. 378. See also Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155; McDonald *v.* Dickson, 87 N. C. 404. And see the cases cited generally in this section.

Rule applied to notes.— McGehee *v.* Greer, 7 Port. (Ala.) 537; Less *v.* Arndt, 68 Ark. 399, 59 S. W. 763; Topeka Capital Co. *v.* Merriam, 60 Kan. 397, 56 Pac. 757; Abner *v.* York, 41 S. W. 309, 19 Ky. L. Rep. 643; Howe *v.* Thompson, 11 Me. 152; Gilbert *v.* Collins, 124 Mass. 174; Lang *v.* Gage, 66 N. H. 624, 32 Atl. 155; Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155; Carshore *v.* Huyck, 6 Barb. (N. Y.) 583; Lawrence *v.* Harrington, 1 N. Y. Suppl. 577; Durant *v.* Abendroth, 15 N. Y. St. 339; Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315; Green *v.* Greensboro Female College, 83 N. C. 449, 35 Am. Rep. 579; Walton *v.* Robinson, 27 N. C. 341; Barnes *v.* Pickett Hardware Co., 203 Pa. St. 570, 53 Atl. 378; Rehm *v.* Frank, 16 Pa. Super. Ct. 175; Park *v.* Brooks, 38 S. C. 300, 17 S. E. 22; Eaton *v.* Gillet, 17 Wis. 435; Whitcomb *v.* Whitney, Dougl. (3d ed.) 652. See 33 Cent. Dig. tit. "Limitation of Actions," §§ 644, 647.

But the creditor must prove the date of the payment, because to permit the fact to be established by the credit entered on the note would be to allow the party relying on it to make evidence for himself. McGehee *v.* Greer, 7 Port. (Ala.) 537. In England it was provided by statute that such indorsement should not be sufficient proof of payment, to correct the anomaly presented of a party making evidence for himself. See Steel *v.* Matthews, 7 Yerg. (Tenn.) 313. See also *infra*, III, B, 4, e.

Rule applied to judgments.— Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997. But after the bar is complete it is held that no act short of an express or clearly implied promise to satisfy the balance of the judgment, founded on moral obligation to do so, can operate to revive it or entitle plaintiff to an execution on it. White *v.* Moore, 100 Ky. 358, 38 S. W. 505, 18 Ky. L. Rep. 790. And under a provision that "no acknowledgement or promise shall be received as evidence of a new or continuing contract . . . unless the same be contained in some writing," etc., and that "this section shall not alter the effect of any payment," etc., it is held that a judgment is not a contract, and that a payment on it cannot be received to take the case out of the operation of limitations. Hughes *v.* Boone, 114 N. C. 54, 19 S. E. 63; McDonald *v.* Dickson, 87 N. C. 404. But see Latouche *v.* O'Brien, 10 Ir. Eq. 113.

Rule applied to bonds.— Bailey *v.* Butler, 138 Ala. 153, 35 So. 111. But on the other hand it has been held that sealed instruments are not within the rule under which actions of assumpsit are saved from the operation of limitations, as in debt on a specialty the recovery must be had upon the obligation contained in the instrument itself and cannot be had upon any subsequent promise of less solemnity. Toothaker *v.* Boulder, 13 Colo. 219, 22 Pac. 468.

Payment of a negotiable coupon severed

greater debt to be due,[77] and upon which the inference may be drawn of a promise to pay the balance,[78] or that the payment, by its own vigor, revives the debt.[79] But the efficiency of a payment to avert the effect of the statute resides in the conscious and voluntary act of the debtor, and may be qualified and limited as a new promise may be;[80] language accompanying the act of payment is admissible to show the intent with which the payment was made,[81] and according to many of the authorities the inference of a new promise to pay the balance is only *prima facie* and may be rebutted,[82] although it has been held that if the payment is unattended by any facts or circumstances showing a different intent the court is bound to presume an acknowledgment of the continued existence of the demand.[83] The part payment marks the time from which the statute of limita-

from a negotiable bond will not suspend the running of the statute as to the bond. Conger *v.* New Orleans, 32 La. Ann. 1250.

Claims arising out of tort are not taken out of the operation of limitations by part payment. The part payment must be on a claim arising or founded on contract. Mitchell *v.* Cincinnati, 7 Ohio Dec. (Reprint) 310, 2 Cinc. L. Bul. 96. So payment on a note given for goods obtained by false pretenses keeps alive the note but not the fraud. Fritts *v.* Slade, 9 Hun (N. Y.) 145.

77. McGehee *v.* Greer, 7 Port. (Ala.) 537; Watson *v.* Dale, 1 Port. (Ala.) 247; Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997; Miner *v.* Lorman, 58 Mich. 212, 22 N. W. 265; Lang *v.* Gage, 65 N. H. 173, 18 Atl. 795; U. S. *v.* Wilder, 13 Wall. (U. S.) 254, 20 L. ed. 681. See also the cases, generally, cited in this section.

78. Sibley *v.* Lumbert, 30 Me. 253; Gillingham *v.* Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320; Harper *v.* Fairley, 53 N. Y. 442; McDonald *v.* Dickson, 87 N. C. 404; Walton *v.* Robinson, 27 N. C. 341. The part payment must be made under such circumstances that a promise to pay the remainder may be reasonably inferred from it. Morgan *v.* Rowlands, L. R. 7 Q. B. 493, 41 L. J. Q. B. 187, 26 L. T. Rep. N. S. 855, 20 Wkly. Rep. 726.

79. Biscoe *v.* Stone, 11 Ark. 39; Ebersole *v.* Omaha Nat. Bank, (Nebr. 1904) 99 N. W. 664. See also *supra*, note 57.

80. *Connecticut.*— Hale *v.* Morse, 49 Conn. 481, as to statements at the time of payment showing that there was no acknowledgment as to the balance.

Illinois.— Carroll *v.* Forsyth, 69 Ill. 127.

Missouri.— Shannon *v.* Austin, 67 Mo. 485.

New Hampshire.— Lang *v.* Gage, 65 N. H. 173, 18 Atl. 795.

New York.— Blair *v.* Lynch, 105 N. Y. 636, 11 N. E. 947; Berrian *v.* New York, 4 Rob. 538, holding that a payment "in full of all demands" cannot operate to take any balance out of the statute.

England.— Waters *v.* Tompkins, 2 C. M. & R. 723, 5 L. J. Exch. 61, 1 Tyrw. & G. 137; Wainman *v.* Kynman, 1 Exch. 118, 16 L. J. Exch. 232; Waugh *v.* Cope, 10 L. J. Exch. 145, 6 M. & W. 824.

81. Pond *v.* French, 97 Me. 403, 54 Atl. 920, as to evidence of a verbal promise to pay the balance.

Agreement to pay in instalments.— If the operation of a part payment is qualified by an agreement to pay the debt in instalments the creditor can only recover the instalments due at the time of the suit. Gillingham *v.* Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320.

82. *Arkansas.*— Burr *v.* Williams, 20 Ark. 171; State Bank *v.* Wooddy, 10 Ark 638.

Georgia.— Smith *v.* Simms, 9 Ga. 418.

Indiana.— Willey *v.* State, 105 Ind. 453, 5 N. E. 884; Ketcham *v.* Hill, 42 Ind. 64; Carlisle *v.* Morris, 8 Ind. 421; Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825.

Kentucky.— English *v.* Wathen, 9 Bush 387; Hopkins *v.* Stout, 6 Bush 375.

Louisiana.— Butler *v.* Ford, 9 Rob. 112; Parker *v.* Bernard, 9 Rob. 18; Montgomery *v.* Levistones, 8 Rob. 145; Lejeune *v.* Hebert, 6 Rob. 419; Wilson *v.* Bannen, 1 Rob. 556; Shiff *v.* Hertzogg, 12 La. 455; Lafourcade *v.* Barran, 8 La. 283; Carraby *v.* Navarre, 3 La. 262.

Maine.— Sinnett *v.* Sinnett, 82 Me. 278, 19 Atl. 458; Egery *v.* Decrew, 53 Me. 392.

Missouri.— Henry *v.* Diviney, 101 Mo. 378, 13 S. W. 1057.

New Hampshire.— Whipple *v.* Stevens, 22 N. H. 219.

New York.— Steven *v.* Lord, 146 N. Y. 398, 42 N. E. 543 [*affirming* 84 Hun 353, 32 N. Y. Suppl. 309].

Pennsylvania.— Wesner *v.* Stein, 97 Pa. St. 332.

Vermont.— Corliss *v.* Grow, 25 Vt. 702, 2 Atl. 388; Ayer *v.* Hawkins, 19 Vt. 26.

See 33 Cent. Dig. tit. "Limitation of Actions," § 644 *et seq.*

Question of fact for jury.— The court cannot infer from payment a promise to pay a balance. The question is for the jury (Carlisle *v.* Morris, 8 Ind. 421; White *v.* Jordan, 27 Me. 370; Blair *v.* Lynch, 105 N. Y. 636, 11 N. E. 947; Wainman *v.* Kynman, 1 Exch. 118, 16 L. J. Exch. 232); and they may infer it where actual payment is shown (Mellick *v.* Deseelhorst, 1 Ill. 221, 12 Am. Dec. 172.

83. Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997. The payment may be made under such circumstances as to repel the presumption that the debtor thereby recognized his obligation to pay the entire debt. Burr *v.* Williams, 20 Ark. 171; Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893; Parsons *v.* Clark, 59 Mich. 414, 26 N. W. 656; Jewett *v.* Petit, 4 Mich. 508.

tions begins to run anew.[84] While part payment does not stop the running of the statute as to debts arising out of different transactions from that on which it was made,[85] yet if the debtor consents to the entry of independent items on his running account any payment on the latter saving it from the bar also saves such items.[86] On the other hand statutes which contain no express provision whereby an inference of acknowledgment or promise can be raised by conduct are held to require an express promise or acknowledgment, and a part payment is not available,[87] and so also of statutes which require a written promise or acknowledgment.[88]

84. *Alabama.*— McGehee *v.* Greer, 7 Port. 537.

Louisiana.— Cockfield *v.* Farley, 21 La. Ann. 521.

Maine.—Lincoln Academy *v.* Newhall, 38 Me. 179; Estes *v.* Blake, 30 Me. 164.

Massachusetts.— Kellogg *v.* Dickinson, 147 Mass. 432, 18 N. E. 223, 1 L. R. A. 346; Gilbert *v.* Collins, 124 Mass. 174.

Missouri.— Bender *v.* Markle, 37 Mo. App. 234.

North Carolina.— Riggs *v.* Roberts, 85 N. C. 151, 39 Am. Rep. 692.

South Carolina.— Smith *v.* Caldwell, 15 Rich. 365.

Wisconsin.— Marshall *v.* Holmes, 68 Wis. 555, 32 N. W. 685.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 [*affirming* 28 Fed. 346].

See 33 Cent. Dig. tit. "Limitation of Actions," § 647.

85. Compton *v* Johnson, 19 Mo App. 88; Foggette *v.* Gaffney, 33 S. C. 303, 12 S. E. 260.

Payment by an agent or attorney of one of several claims held by him for collection cannot be construed into an admission of the existence of a liability on another claim suspending the statute as to the latter. Maury *v.* Mason, 8 Port. (Ala.) 211. But see Douglass *v.* Murray, 7 N. Y. St. 837; Torrence *v.* Strong, 4 Oreg. 39, both holding that the sums collected and remaining in an attorney's hands become one entire amount and any payments made thereon within six years would defeat the bar of the statute.

86. Gordon *v.* Ven, 55 Minn. 105, 56 N. W. 581. See also Bartel *v.* Mathias, 19 Oreg. 482, 24 Pac. 918.

Saving by payment applied to accounts.— Less *v.* Arndt, 68 Ark. 399, 59 S. W. 763; Thorn *v.* Moore, 21 Iowa 285; Pond *v.* French, 97 Me. 403, 54 Atl. 920; Benjamin *v.* Webster, 65 Me. 170 (account of single item); Dyer *v.* Walker, 54 Me. 18; Day *v.* Mayo, 154 Mass. 472, 28 N. E. 898; Buffinton *v.* Chase, 152 Mass. 534, 25 N. E. 977, 10 L. R. A. 123; Blackler *v.* Boott, 114 Mass. 24; Whipple *v.* Blackington, 97 Mass. 476; Penniman *v.* Rotch, 3 Metc. (Mass.) 216; Findlay Brewing Co. *v.* Brown, 19 Ohio Cir. Ct. 612, 10 Ohio Cir. Dec. 100; Blaskower *v.* Steel, 23 Oreg. 106, 31 Pac. 253; Yost *v.* Grim, 116 Pa. St. 527, 8 Atl. 925; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253. But see Livermore *v.* Rand, 26 N. H. 85; Romaine *v.* Corlies, 47 N. J. L. 108, holding that under a statutory provision like that of 9 Geo. IV, requiring an acknowledgment or promise to be in writing but that "nothing therein contained shall alter, or take away or lessen the effect of any payment," etc., the mere payment on a book-account without some act or declaration to show that the debtor recognizes the whole claim and intends to appropriate payment on the whole account will not take the unpaid part out of the statute, but that a payment with an express promise to pay the obligation within six years takes the case out of the statute of limitations. But on the other hand it is held that the fact of a payment of not more than sufficient to cover items of recent origin without proof of knowledge as to other items of older date long barred is not sufficient to remove the latter from the statute of limitations. Crum *v.* Higold, 32 Ill. App. 282; Beltzhoover *v.* Yewell, 11 Gill & J. (Md.) 212; Vaughn *v.* Hankinson, 35 N. J. L. 79; Crow *v.* Gleason, 141 N. Y. 489, 26 N. E. 497 [*reversing* 20 N. Y. Suppl. 590]; Mills *v.* Fowkes, 2 Arn. 62, 5 Bing. N. Cas. 455, 3 Jur. 406, 8 L. J. C. P. 276, 7 Scott 444, 35 E. C. L. 246. See 33 Cent. Dig. tit. "Limitation of Actions," § 643.

87. Anderson *v.* Robertson, 24 Miss. 389; McCullough *v.* Henderson, 24 Miss. 92; Smith *v.* Westmoreland, 12 Sm. & M. (Miss.) 663; Folk *v.* Russell, 7 Baxt. (Tenn.) 591; Locke *v.* Wilson, 10 Heisk. (Tenn.) 441; Lock *v.* Wilson, 9 Heisk. (Tenn.) 784; Steel *v.* Matthews, 7 Yerg. (Tenn.) 313 (where the action is already barred); Tilliard *v.* Hall, 11 Tex. Civ. App. 381, 32 S. W. 863.

88. Pena *v.* Vance, 21 Cal. 142; Barron *v.* Kennedy, 17 Cal. 574 (where, however, as the payments were evidenced by writing the rule was held not to be applicable); Fairbanks *v.* Dawson, 9 Cal. 89; Parsons *v.* Carey, 28 Iowa 431 (as to actions on written contracts); Perry *v.* Ellis, 62 Miss. 711 (distinguishing the statute of 9 Geo. IV in the words that "no acknowledgment or promise by words only shall be deemed sufficient," etc., whereas the Mississippi act provides that "no acknowledgment or promise" shall be deemed evidence, etc., unless in writing, and that therefore in that state "whether the acknowledgment or promise be by words only or in any other manner it is invalid unless in writing"); Taylor *v.* Hendrie, 8 Nev. 243; Wilcox *v.* Williams, 5 Nev. 206. But see Palmer *v.* Andrews, 18 Fed. Cas. No. 10,683, McAllister 491, contrary to the California case above cited, as to the rule in that state.

2. What Constitutes — a. In General. A part payment to be effectual to interrupt the statute must be voluntary[89] and free from any uncertainty as to the identification of the debt on which it is made.[90] It must also be made as part payment of a larger debt,[91] and be so accepted by the creditor,[92] and made under

89. *Colorado.*— Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137.

Louisiana.— Jacobs *v.* Calderwood, 4 La. Ann. 509.

Minnesota.— Wolford *v.* Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315.

Nebraska.— Moffitt *v.* Carr, 48 Nebr. 403, 67 N. W. 150, 58 Am. St. Rep. 696; Kyger *v.* Ryley, 2 Nebr. 20.

New York.— Arnold *v.* Downing, 11 Barb. 554.

Ohio.— Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West. L. Month. 385.

Oregon.— Anderson *v.* Baxter, 4 Oreg. 105.

Pennsylvania.— Barnes *v.* Pickett Hardware Co., 203 Pa. St. 570, 53 Atl. 378.

Vermont.— Fletcher *v.* Brainerd, 75 Vt. 300, 55 Atl. 608; Austin *v.* McClure, 60 Vt. 453, 15 Atl. 161; Benton *v.* Holland, 58 Vt. 533, 3 Atl. 322.

England.— Morgan *v.* Rowlands, L. R. 7 Q. B. 493, 41 L. J. Q. B. 187, 26 L. T. Rep. N. S. 855, 20 Wkly. Rep. 726.

See 33 Cent. Dig. tit. "Limitation of Actions," § 631.

Voluntary and involuntary payments illustrated.— A public officer who makes a payment on his debt because of a municipal rule or ordinance requiring officers to pay their debts cannot claim that it is involuntary and will not interrupt the statute. Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997. The payment by a city of an award in condemnation proceedings to the assignee of a mortgage on the property condemned, after a contest for the award between the assignee and the mortgagor, is not such a payment of the mortgage as will prevent the running of the statute. Knapp *v.* Crane, 14 N. Y. App. Div. 120, 43 N. Y. Suppl. 513. The crediting of the proceeds of an execution sale of the debtor's property will not toll the statute. Moffitt *v.* Carr, 48 Nebr. 403, 67 N. W. 150, 58 Am. St. Rep. 696; Lefurgey *v.* Harrington, 36 Nova Scotia 88.

90. *Colorado.*— Toothaker *v.* Boulder, 13 Colo. 219, 22 Pac. 468.

District of Columbia.— Linn *v.* Hoover, 6 Mackey 298.

Georgia.— Reed *v.* Thomas, 66 Ga. 595.

Illinois.— Lowery *v.* Gear, 32 Ill. 382; Rothschild *v.* Sessell, 103 Ill. App. 274.

Indiana.—Ketcham *v.* Hill, 42 Ind. 64; Prenatt *v.* Runyon, 12 Ind. 174; Carlisle *v.* Morris, 8 Ind. 421; McBride *v.* Ulmer, 30 Ind. App. 154, 65 N. E. 610.

Kansas.— Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. 545.

Maine.— Pond *v.* French, 97 Me. 403, 54 Atl. 920.

Massachusetts.— Day *v.* Mayo, 154 Mass. 472, 28 N. E. 898.

New York.— Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497; Dolan *v.* Mitchell, 39 N. Y. App. Div. 361, 57 N. Y. Suppl. 157; Milwaukee First Nat. Bank *v.* Smith, 26 Hun 221; Arnold *v.* Downing, 11 Barb. 554.

Pennsylvania.— Barnes *v.* Pickett Hardware Co., 203 Pa. St. 570, 53 Atl. 378; Rosencrance *v.* Johnson, 191 Pa. St. 520, 43 Atl. 360; Shaffer *v.* Shaffer, 41 Pa. St. 51; Burr *v.* Burr, 26 Pa. St. 284 [*doubting* Hazlebaker *v.* Reeves, 12 Pa. St. 264]; Davis *v.* Steiner, 14 Pa. St. 275, 53 Am. Dec. 547.

Virginia.— Bell *v.* Crawford, 8 Gratt. 110.

England.— Tippets *v.* Heane, 1 C. M. & R. 252, 3 L. J. Exch. 281, 4 Tyrw. 772; Davies *v.* Edwards, 7 Exch. 22, 15 Jur. 1014, 21 L. J. Exch. 4, 6 Eng. L. & Eq. 520; Waugh *v.* Cope, 10 L. J. Exch. 145, 6 M. & W. 824.

See 33 Cent. Dig. tit. "Limitation of Actions," § 631.

Applications of rule.— Where a debt is released on agreement to pay a creditor and an annuity for life, the payments of the annuity will not take the case out of the statute of limitations. Price *v.* Price, 111 Ky. 771, 64 S. W. 746, 66 S. W. 529, 23 Ky. L. Rep. 1911, 1947, 1086. Where an account is resettled after being barred, and the payments are made on the new balance found due, they will revive the old claim so as to constitute it a sufficient consideration and foundation for the new settlement. Miner *v.* Lorman, 59 Mich. 480, 26 N. W. 678. Where a mortgage provides for payment of insurance premiums by the mortgagee in case of default by the mortgagor which are to become a charge upon the premises repayment of such premiums to the mortgagee will keep alive the whole mortgage debt. Cogswell *v.* Grant, 34 Nova Scotia 340.

91. *Illinois.*— Rothschild *v.* Sessell, 103 Ill. App. 274; Crum *v.* Higold, 32 Ill. App. 282.

Indiana.— Prenatt *v.* Runyon, 12 Ind. 174.

Kansas.— Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. 545.

New Hampshire.— Brown *v.* Latham, 58 N. H. 30, 42 Am. Rep. 568.

New York.— Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497; Burdick *v.* Hicks, 29 N. Y. App. Div. 205, 51 N. Y. Suppl. 789; Arnold *v.* Downing, 11 Barb. 554; Compton *v.* Bowns, 5 Misc. 213, 25 N. Y. Suppl. 465 [*reversing* on other grounds 3 Misc. 140, 22 N. Y. Suppl. 920].

United States.— U. S. *v.* Wilder, 13 Wall. 254, 20 L. ed. 681.

England.— Waters *v.* Tompkins, 2 C. M. & R. 723, 5 L. J. Exch. 61, 1 Tyrw. & G. 137; Tippets *v.* Heane, 1 C. M. & R. 252, 3 L. J. Exch. 281, 4 Tyrw. 772.

Canada.— Boultbee *v.* Burke, 9 Ont. 80; Notman *v.* Crooks, 10 U. C. Q. B. 105.

See 33 Cent. Dig. tit. "Limitation of Actions," § 631.

92. Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497.

such circumstances as are consistent with an intent to pay the balance,[93] which intent must be determined by the jury.[94] The burden of proof is on the creditor to show such intent;[95] and the language used at the time of the payment is admissible to show the intent with which it is made.[96] Mere payment of a part without anything being said about the balance will not take a case without the statute.[97] Nor will payment of the costs included in a judgment keep the judgment alive.[98] Payment on a void judgment on a note will not suspend the statute as to the note.[99] The fact that the creditor becomes indebted to the debtor will not operate as a payment *pro tanto* interrupting the statute without an agreement between the parties that it should be so applied.[1] Where there is such agreement the application must be presently made, and the proper credit given.[2] The running of the statute is interrupted by the application by a bank of a deposit on a matured debt of a depositor,[3] or when a receipt is given for interest, although no money is actually paid.[4] Payment of a note in worthless money will not interrupt the statute.[5] Payments by the drawer of a draft to the drawee on his liability to the latter do not constitute payments on the draft in the hands of an indorsee so as to toll the statute.[6] The early English cases maintain the doctrine that a written promise to pay the balance in addition to part payment was necessary in order to suspend the statute,[7] but this rule was eventually abandoned in England,[8] and it was never approved in the United States.[9]

93. *Arkansas.*— Chase *v.* Carney, 60 Ark. 491, 31 S. W. 43.

Colorado.— Toothaker *v.* Boulder, 13 Colo. 219, 22 Pac. 468.

Kentucky.— Richardson *v.* Chanslor, 103 Ky. 425, 45 S. W. 774, 20 Ky. L. Rep. 121.

Minnesota.— Brisbin *v.* Farmer, 16 Minn. 215.

New Hampshire.— Brown *v.* Latham, 58 N. H. 30, 42 Am. Rep. 568; Livermore *v.* Rand, 26 N. H. 85.

New York.— Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497; Milwaukee First Nat. Bank *v.* Smith, 26 Hun 221; Arnold *v.* Downing, 11 Barb. 554. See also Adams *v.* Olin, 140 N. Y. 150, 35 N. E. 448.

England.— Linsell *v.* Bonsor, 2 Bing. N. Cas. 241, 1 Hodges 305, 5 L. J. C. P. 40, 2 Scott 399, 29 E. C. L. 519; Morgan *v.* Rowlands, L. R. 7 Q. B. 493, 41 L. J. Q. B. 187, 26 L. T. Rep. N. S. 855, 20 Wkly. Rep. 726; Davies *v.* Edwards, 7 Exch. 22, 15 Jur. 1014, 21 L. J. Exch. 4, 6 Eng. L. & Eq. 520; Wainman *v.* Kynman, 1 Exch. 118, 16 L. J. Exch. 232.

Canada.— Ball *v.* Parker, 1 Ont. App. 593 [*affirming* 39 U. C. Q. B. 488].

See 33 Cent. Dig. tit. "Limitation of Actions," § 632.

94. Strong *v.* State, 57 Ind. 428; Ketcham *v.* Hill, 42 Ind. 64; Carlisle *v.* Morris, 8 Ind. 421; White *v.* Jordan, 27 Me. 370; Linsell *v.* Bonsor, 2 Bing. N. Cas. 241, 1 Hodges 305, 5 L. J. C. P. 40, 29 E. C. L. 519; Wainman *v.* Kynman, 1 Exch. 117, 16 L. J. Exch. 232.

95. Burdick *v.* Hicks, 29 N. Y. App. Div. 205, 51 N. Y. Suppl. 789.

96. Gillingham *v.* Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320.

97. *Minnesota.*— Chadwick *v.* Cornish, 26 Minn. 28, 1 N. W. 55; Brisbin *v.* Farmer, 16 Minn. 215.

Mississippi.— Anderson *v.* Robertson, 24 Miss. 389; McCollough *v.* Henderson, 24 Miss. 92; Smith *v.* Westmoreland, 12 Sm. & M. 663.

New York.— Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497; Burdick *v.* Hicks, 29 N. Y. App. Div. 205, 51 N. Y. Suppl. 789.

Tennessee.— Steel *v.* Matthews, 7 Yerg. 313.

Canada.— McKeen *v.* McDougall, 3 Nova Scotia 403.

Contra.— Buckingham *v.* Orr, 6 Colo. 587; Corliss *v.* Grow, 58 Vt. 702, 2 Atl. 388.

98. Strong *v.* State, 57 Ind. 428; Strawn *v.* Hook, 25 Pa. St. 391.

99. Reed *v.* Thomas, 66 Ga. 595.

1. Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137; Anderson *v.* Baxter, 4 Oreg. 105; Nash *v.* Woodward, 62 S. C. 418, 40 S. E. 895. But the crediting of a charge by the debtor for the board of the creditor upon the former's debt when done in execution of an agreement between the parties constitutes such payment as will interrupt the statute. Blair *v.* Ormond, 17 Q. B. 423, 20 L. J. Q. B. 444, 15 Jur. 1054, 79 E. C. L. 423.

2. Winchester *v.* Sibley, 132 Mass. 273. But see Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831; Baird *v.* Ratcliff, 10 Tex. 81.

3. Park Bank *v.* Schneidermeyer, 62 Mo. App. 179.

4. Amos *v.* Smith, 1 H. & C. 236, 31 L. J. Exch. 423, 7 L. T. Rep. N. S. 66, 10 Wkly. Rep. 759.

5. New York Belting, etc., Co. *v.* Jones, 22 La. Ann. 530.

6. Milwaukee First Nat. Bank *v.* Smith, 26 Hun (N. Y.) 221.

7. Willis *v.* Newham, 3 Y. & J. 518.

8. Cleave *v.* Jones, 6 Exch. 573, 15 Jur. 515, 20 L. J. Exch. 238.

9. Williams *v.* Gridley, 9 Metc. (Mass.)

b. Payment of Interest. Payment of interest on a debt will take the debt out of the operation of the statute,[10] or revive a debt where the bar is complete.[11] It keeps alive the right to foreclose as well as the right to redeem from a mortgage.[12] Where the payment of interest standing alone is insufficient, it becomes effectual if accompanied by acts or declarations evidencing an intention that the statute shall be interrupted.[13] If interest is paid in advance the statute is suspended until the date at which it is paid.[14] The statute is tolled by the giving of a note,[15] or mortgage for accrued interest, which is accepted as payment,[16] even where conditioned on the payment of the latter.[17] The evidence of the payment of interest need not be in writing.[18]

c. Part Payment in Full Settlement. A payment of part in full satisfaction of the whole,[19] or accompanied by acts or declarations showing that the debtor does not intend to pay the balance, will not suspend the statute,[20] or revive the balance of a barred debt.[21] A payment made without anything being said as to a

482; Miner *v.* Lorman, 59 Mich. 480, 26 N. W. 678.

10. *Alabama.*— Taylor *v.* Perry, 48 Ala. 240.

California.— Barron *v.* Kennedy, 17 Cal. 574.

Connecticut.— Sanford *v.* Hays, 19 Conn. 591. See also Middlebrook's Appeal, 46 Conn. 436.

Indiana.— Conwell *v.* Buchanan, 7 Blackf. 537; MacMillan *v.* Clements, 33 Ind. App. 120, 70 N. E. 997.

Kansas.— Topeka Capital Co. *v.* Merriam, 60 Kan. 397, 56 Pac. 757.

Louisiana.— Marcelin *v.* His Creditors, 21 La. Ann. 423.

Maryland.— Under an early statute, the payment of interest on a bond would not interrupt the statute of limitations (Leonard *v.* Hughlett, 41 Md. 380; Carroll *v.* Waring, 3 Gill & J. 491); but now the statute provides that payment of interest shall suspend the running of the statute of limitations for the space of three years from its date (Pub. Gen. Laws, art. 57, § 3, p. 1459).

Minnesota.— Fisk *v.* Stewart, 24 Minn. 97.

Missouri.— Bridgeton *v.* Jones, 34 Mo. 471; Cocker *v.* Cocker, 2 Mo. App. 451.

New York.— Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155. See Matter of Baldwin, 11 N. Y. App. Div. 551, 42 N. Y. Suppl. 642.

Pennsylvania.— *In re* Clad, 214 Pa. St. 141, 63 Atl. 542.

Washington.— Koslowski *v.* Yesler, 2 Wash. Terr. 407, 8 Pac. 493.

United States.— Lyman *v.* Warner, 113 Fed. 87, 51 C. C. A. 73; Kirk *v.* Williams, 24 Fed. 437.

England.— Evans *v.* Davies, 4 A. & E. 840, 2 Harr. & W. 15, 6 L. J. K. B. 268, 31 E. C. L. 369; Wyatt *v.* Hodson, 8 Bing. 309, 1 L. J. C. P. 93, 1 Moore & S. 442, 21 E. C. L. 555; Griffin *v.* Ashby, 2 C. & K. 139, 61 E. C. L. 139; Chippendale *v.* Thurston, 4 C. & P. 98, M. & M. 411, 19 E. C. L. 425; Bamfield *v.* Tupper, 7 Exch. 27, 21 L. J. Exch. 6, 7 Eng. L. & Eq. 541.

Canada.— Doe *v.* Wright, 11 N. Brunsw. 241. See also Watson *v.* Harrington, 21 Nova Scotia 218.

See 33 Cent. Dig. tit. "Limitation of Actions," § 634.

Payments of interest made and indorsed on a usurious note given for a loan which originally was not usurious will be regarded as payments on the original loan and will operate to take the case out of the statute. *In re* Consalus, 95 N. Y. 340.

11. Fryeburg Parsonage Fund *v.* Osgood, 21 Me. 176.

12. Fisk *v.* Stewart, 24 Minn. 97.

13. Kirk *v.* Williams, 24 Fed. 437.

14. Lyme First Cong. Soc. *v.* Miller, 15 N. H. 520.

15. Bennett *v.* Baird, 67 Ill. App. 422; Wenman *v.* Mohawk Ins. Co., 13 Wend. (N. Y.) 267, 28 Am. Dec. 464.

16. Blair *v.* Carpenter, 75 Mich. 167, 42 N. W. 790.

17. Taylor *v.* Slater, 16 R. I. 86, 12 Atl. 727.

18. Bridgeton *v.* Jones, 34 Mo. 471.

19. *Colorado.*—Jones *v.* Langhorne, 19 Colo. 206, 34 Pac. 997.

Minnesota.— Brisbin *v.* Farmer, 16 Minn. 215.

New York.— Berrian *v.* New York, 4 Rob. 538; Compton *v.* Bowns, 5 Misc. 213, 26 N. Y. Suppl. 465 [*reversing* 3 Misc. 140, 22 N. Y. Suppl. 920].

Vermont.— Bowker *v.* Harris, 30 Vt. 424.

United States.— U. S. *v.* Wilder, 13 Wall. 254, 20 L. ed. 681.

See 33 Cent. Dig. tit. "Limitation of Actions," § 634.

20. *Connecticut.*— Hale *v.* Morse, 49 Conn. 481.

Missouri.— State *v.* Finn, 102 Mo. 222, 14 S. W. 984.

New York.— Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497 [*reversing* 20 N. Y. Suppl. 590]; Berrian *v.* New York, 4 Rob. 538; Peck *v.* New York, etc., U. S. Mail Steamship Co., 5 Bosw. 226.

North Carolina.— Hewlett *v.* Schenck, 82 N. C. 234.

Vermont.— Aldrich *v.* Morse, 28 Vt. 642.

See 33 Cent. Dig. tit. "Limitation of Actions," § 632.

21. Hale *v.* Morse, 49 Conn. 481; Jewett *v.*

balance is insufficient to interrupt the statute.[22] Payments made by one who assumes a debt and is accepted by the creditor as his debtor will not interrupt the statute as to the original debtor.[23]

d. Entry of Credit on Account. The mere indorsement of a partial payment on an open account is not sufficient to interrupt the statute of limitations,[24] or revive a barred debt.[25] It must further appear that the credit was authorized by defendant or someone legally competent to act for him,[26] or that the payment was actually made.[27] Entry of the credit of a payment made prior to the date thereof will not suspend the statute as of the date on which the entry is made. The creditor must show the date of the payment and that it was within the time limited.[28] Where a debtor assents to the indorsement it is effectual to stop the running of the statute.[29] A payment in chattels made to a partner in his individual capacity and credited on a debt due the partnership with the knowledge and in the presence of the debtor will operate to take the debt without the statute.[30] A payment properly credited on an account does not lose its influence on the statute of limitations by a subsequent agreement between the parties that it is to be canceled or diverted to another account.[31]

e. Indorsement on Evidence of Debt. It is the payment and not the indorse-

Petit, 4 Mich. 508; Croushore *v.* Knox, 7 Pa. Cas. 26, 10 Atl. 25.

22. Livermore *v.* Rand, 26 N. H. 85; Hussey *v.* Burgwyn, 51 N. C. 385; Locke *v.* Wilson, 10 Heisk. (Tenn.) 441. But see Bender *v.* Markle, 37 Mo. App. 234; Corliss *v.* Grow, 58 Vt. 702, 2 Atl. 388; Ayer *v.* Hawkins, 19 Vt. 26.

23. Hammond *v.* Hale, 61 Iowa 38, 15 N. W. 585.

24. *Alabama.*— Acklen *v.* Hickman, 60 Ala. 568.

Georgia.— Liseur *v.* Hitson, 95 Ga. 527, 20 S. E. 498.

Indiana.— Elliott *v.* Mills, 10 Ind. 368.

Maine.— Libby *v.* Brown, 78 Me. 492, 7 Atl. 114.

Massachusetts.— Hancock *v.* Cook, 18 Pick. 30.

Michigan.— Bay City Iron Co. *v.* Emery, 128 Mich. 506, 87 N. W. 652.

New Jersey.— Oberg *v.* Breen, 50 N. J. L. 145, 12 Atl. 203, 7 Am. St. Rep. 779.

New York.— Cuck *v.* Quackenbush, 13 Hun 107.

Ohio.— Bogart *v.* Cox, 4 Ohio Cir. Ct. 289, 2 Ohio Cir. Dec. 551.

Pennsylvania.— Haines' Estate, 10 Pa. Dist. 677; Butterweck's Estate, 4 Pa. Dist. 563, 11 Montg. Co. Rep. 122; Hull *v.* Mooney, 5 Wkly. Notes Cas. 511; Guillou *v.* Perry, 1 Wkly. Notes Cas. 39. The mere furnishing by the creditor to the debtor statements of his account containing undated credits will not remove the bar of the statute. McFarland's Estate, 5 Pa. Dist. 761, 18 Pa. Co. Ct. 596.

Rhode Island.— Campbell *v.* Collingwood, 15 R. I. 472, 8 Atl. 695.

See 33 Cent. Dig. tit. "Limitation of Actions," § 637.

25. *Illinois.*— Carroll *v.* Forsyth, 69 Ill. 127.

Indiana.— Elliott *v.* Mills, 10 Ind. 368; McBride *v.* Ulmer, 30 Ind. App. 154, 65 N. E. 610.

Kansas.— Hamilton *v.* Coffin, 45 Kan. 556, 26 Pac. 42.

New Jersey.— Hibler *v.* Johnston, 18 N. J. L. 266.

Ohio.— Kaufman *v.* Broughton, 31 Ohio St. 424.

Pennsylvania.— Chambers *v.* Marks, 25 Pa. St. 296.

South Carolina.— Taylor *v.* McDonald, 2 Mill 178.

See 33 Cent. Dig. tit. "Limitation of Actions," § 637.

26. Sawyer *v.* Lufkin, 58 Me. 429; Kaufman *v.* Broughton, 31 Ohio St. 424; Bogart *v.* Cox, 4 Ohio Cir. Ct. 289, 2 Ohio Cir. Dec. 551; Chambers *v.* Marks, 25 Pa. St. 296.

Persons who may make payment in general see *infra*, VII, B, 5.

27. Matter of Gladke, 45 N. Y. App. Div. 625, 60 N. Y. Suppl. 869.

28. Erpelding *v.* Ludwig, 39 Minn. 518, 40 N. W. 829.

29. McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853; Peabody *v.* North, 161 Mass. 525, 37 N. E. 744; Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. 406; Creighton *v.* Vincent, 10 Oreg. 56.

Indorsement of the credit on an account of a payment by a third party, who is liable to the debtor for certain items on the account for which the payment is made, and made with the debtor's knowledge and assent, is sufficient to take the account out of the statute. Sanderson *v.* Milton Stage Co., 18 Vt. 107.

Entry by the debtor on his own books of a payment to the creditor, coupled with a receipt given by the latter for a subsequent payment made by the former's executrix, is sufficient to prove the payments and interrupt the statute. Quynn *v.* Carroll, 10 Md. 197.

30. Cuthbertson *v.* Hill, 65 Vt. 573, 27 Atl. 71.

31. Palmer *v.* Woodward, 61 Vt. 571, 18 Atl. 189.

ment on the evidence of debt that operates to toll the statute,[32] and the date of the payment and not the date of the entry marks the time of the interruption.[33] Indorsements by the creditor of payments on a bond, note, or other evidence of debt, without more, do not operate to interrupt the running of the statute,[34]

32. *Arkansas.*— Alston *v.* State Bank, 9 Ark. 455, 460, in which it was said: "It being but evidence to be considered by the jury among the circumstances showing an actual part payment. 2 Greenl. Ev. § 444."

Kansas.— Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. 268; Topeka Capital Co. *v.* Merriam, 60 Kan. 397, 56 Pac. 757; Root *v.* Bradley, 1 Kan. 437.

Maine.— Curtis *v.* Nash, 88 Me. 476, 34 Atl. 273; Evans *v.* Smith, 34 Me. 33; Clapp *v.* Ingersol, 11 Me. 83.

Missouri.—Henry *v.* Diviney, 101 Mo. 378, 13 S. W. 1057; Regan *v.* Williams, 88 Mo. App. 577; Elsea *v.* Pryor, 87 Mo. App. 157.

North Carolina.— Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; State Nat. Bank *v.* Harris, 96 N. C. 118, 1 S. E. 459.

Pennsylvania.— Shaffer *v.* Shaffer, 41 Pa. St. 51.

But see McCrillis *v.* Millard, 17 R. I. 724, 24 Atl. 576.

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

An unsigned indorsement by the payer in the absence of any actual payment will not toll the statute. Blanchard *v.* Blanchard, 122 Mass. 558, 23 Am. Rep. 397.

33. *Colorado.*— Jones *v.* Langhorne, 19 Colo. 206, 34 Pac. 997.

Kansas.— Benton *v.* Yurann, 8 Kan. App. 305, 55 Pac. 676.

Maine.— Manson *v.* Lancey, 84 Me. 380, 24 Atl. 880.

Massachusetts.— Ramsay *v.* Warner, 97 Mass. 8.

Michigan.— Sweet *v.* Ellis, 109 Mich. 460, 67 N. W. 535.

New York.— Smith *v.* Ryan, 66 N. Y. 352, 23 Am. Rep. 60 [*affirming* 39 N. Y. Super. Ct. 489].

North Carolina.— Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

Vermont.— Lincoln *v.* Johnson, 43 Vt. 74; Hayes *v.* Morse, 8 Vt. 316.

The rule is not affected by the fact that the creditor is not informed until several years after of the payment which was made to a bank under agreement between the debtor and creditor. Gibbs *v.* Gibbs, 6 Colo. App. 368, 40 Pac. 781.

If the debtor agrees that it shall be entered as of a future date such agreement will control. Dings *v.* Guthrie, 45 Hun (N. Y.) 436 [*affirmed* in 120 N. Y. 620, 23 N. E. 1152].

34. *Alabama.*— Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693.

Arkansas.—Alston *v.* State Bank, 9 Ark. 455.

Connecticut.— Fuller *v.* Hancock, 1 Root 238.

District of Columbia.— Cropley *v.* Eyster, 9 App. Cas. 373.

Illinois.— Wellman *v.* Miner, 179 Ill. 326, 53 N. E. 609 [*reversing* 73 Ill. App. 448]; Lowery *v.* Gear, 32 Ill. 382; Connelly *v* Pierson, 9 Ill. 108; Drury *v.* Henderson, 36 Ill. App. 521.

Kansas.— Atchison, etc., R. Co. *v.* Atchison Grain Co., (1902) 70 Pac. 933.

Louisiana.— Munson *v.* Robertson, 19 La. Ann. 170; Maskell *v.* Pooley, 12 La. Ann. 661; Beatty *v.* Clement, 12 La. Ann. 82; Union Bank *v.* Dosson, 7 La. Ann. 548; McMasters *v.* Mather, 4 La. Ann. 418; Splane *v.* Daniel, 11 Rob. 449.

Maine.— Clapp *v.* Ingersol, 11 Me. 83.

Massachusetts.— Waterman *v.* Burbank, 8 Metc. 352; Whitney *v.* Bigelow, 4 Pick. 110.

Michigan.— Fowles *v.* Joslyn, 130 Mich. 272, 89 N. W. 946; Rogers *v.* Anderson, 40 Mich. 290; Michigan Ins. Co. *v.* Brown, 11 Mich. 265.

Minnesota.— Reeves *v.* Sawyer, 88 Minn. 218, 92 N. W. 962.

Missouri.—Phillips *v.* Mahan, 52 Mo. 197; Regan *v.* Williams, 88 Mo. App. 577; Freeze *v.* Lockhard, 87 Mo. App. 102; Briscoe *v.* Huff, 75 Mo. App. 288.

New Hampshire.— Smith *v.* Wells, 70 N. H. 49, 46 Atl. 51; Clough *v.* McDaniel, 58 N. H. 201; Wheeler *v.* Robinson, 50 N. H. 303; Marshal *v.* Daniel, 18 N. H. 364.

New Jersey.— Cristopher *v.* Wilkins, 63 N. J. Eq. 354, 51 Atl. 728.

New York.— U. S. Trust Co. *v.* Stanton, 145 N. Y. 620, 40 N. E. 165 [*affirming* 76 Hun 32, 27 N. Y. Suppl. 614]; McLaren *v.* McMartin, 36 N. Y. 88, 3 Abb. Pr. N. S. 345, 33 How. Pr. 449, 1 Transcr. App. 226; Purdy *v.* Purdy, 47 N. Y. App. Div. 94, 62 N. Y. Suppl. 153; Decker *v.* Zeluff, 23 N. Y. App. Div. 107, 48 N. Y. Suppl. 385; Hulbert *v.* Nichol, 20 Hun 454; Clapsaddle's Estate, 4 Misc. 355, 24 N. Y. Suppl. 313; U. S. Trust Co. *v.* Stanton, 8 N. Y. Suppl. 756; Read *v.* Hurd, 7 Wend. 408; Partridge *v.* Mitchell, 3 Edw. 180. Credits of interest on notes by the maker in a ledger account against the husband of the payee and indorsee not shown to have been authorized or acquiesced in by her are insufficient to suspend the statute as against the notes. Kirkpatrick *v.* Goldsmith, 81 N. Y. App. Div. 265, 80 N. Y. Suppl. 835.

Pennsylvania.— Shaffer *v.* Shaffer, 41 Pa. St. 51; Kinsloe *v.* Baugh, 1 Wkly. Notes Cas. 147.

South Carolina.— Guignard *v.* Parr, 4 Rich. 184.

Vermont.— Bailey *v.* Danforth, 53 Vt. 504. The indorsement on a note of a payment made in order to secure the dismissal

especially where the payer denies the payment credited,[35] or the bar is complete at the time of the indorsement.[36] There must be other proof of payment,[37] or it must appear that the maker or payer intended to make a payment on the debt,[38] that he had knowledge of or consented to the indorsement,[39] or that it was made before the statute attached and at a time when it was against the interest of the creditor.[40] Indorsements of payments antedating the bar of the statute are admissible as evidence to prove the payments and interrupt the statute, but standing alone they are not conclusive of the fact.[41] It must be shown by independent

of a suit thereon will not toll the statute. Terrill *v.* Deavitt, 73 Vt. 188, 50 Atl. 801.

Wisconsin.—Lyle *v.* Esser, 98 Wis. 234, 73 N. W. 1008.

United States.— Becker *v.* Oliver, 111 Fed. 672, 49 C. C. A. 533.

England.— Rose *v.* Bryant, 2 Campb. 321. *Compare* Barrington *v.* Searle, 3 Bro. P. C. 593, 2 Str. 826, 1 Eng. Reprint 1518; Gleadow *v.* Atkin, 1 Cromp. & M. 410, 2 L. J. Exch. 153, 3 Tyrw. 289.

Canada.— Bachand *v.* Lalumière, 21 Quebec Super. Ct. 449.

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

35. Frazer *v.* Frazer, 13 Bush (Ky.) 397.

36. Coon's Appeal, 52 Conn. 186; Soper *v.* Baum, 6 Mackey (D. C.) 29; West *v.* Johnson, Ga. Dec. 72; Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590.

Under the Louisiana statute of 1858, requiring a written promise in order to revive a barred debt, it was held that a part payment indorsed by the creditor would not suspend the statute. Areaux *v.* Mayeux, 23 La. Ann. 172.

37. West *v.* Johnson, Ga. Dec. 72; Maskell *v.* Pooley, 12 La. Ann. 661; Clapp *v.* Ingersol, 11 Me. 83; Whitney *v.* Bigelow, 4 Pick. (Mass.) 110.

38. Cropley *v.* Eyster, 9 App. Cas. (D. C.) 373; Pease *v.* Catlin, 1 Ill. App. 88; Carlisle *v.* Morris, 8 Ind. 421; Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590.

39. *Georgia.*— Smith *v.* Simms, 9 Ga. 418.

Kansas.— Atchison, etc., R. Co. *v.* Atchison Grain Co., (1902) 70 Pac. 933.

Massachusetts.— Davidson *v.* Delano, 11 Allen 523.

Missouri.— Regan *v.* Williams, 88 Mo. App. 577; McElvain *v.* Garrett, 84 Mo. App. 300; Gardner *v.* Early, 78 Mo. App. 346.

Vermont.— Terrill *v.* Deavitt, 73 Vt. 188, 50 Atl. 801.

Washington.— Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590.

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

40. *Arkansas.*— Alston *v.* State Bank, 9 Ark. 455. Proof that the indorsement was made before the bar is *prima facie* evidence of the payment. Wilson *v.* Pryor, 44 Ark. 532.

Georgia.— Smith *v.* Simms, 9 Ga. 418.

Missouri.— McElvain *v.* Garrett, 84 Mo. App. 300.

New York.— Mills *v.* Davis, 113 N. Y. 243, 21 N. E. 68, 3 L. R. A. 394 [*reversing* 41 Hun 415]; Hulbert *v.* Nichol, 20 Hun 454; Roseboom *v.* Billington, 17 Johns. 182.

Pennsylvania.— Shaffer *v.* Shaffer, 41 Pa. St. 51.

United States.— Kirkpatrick *v.* Langphier, 14 Fed. Cas. No. 7,849, 1 Cranch C. C. 85.

England.— Searle *v.* Barrington, 3 Bro. P. C. 593, 2 Str. 826, 1 Eng. Reprint 1518; Rose *v.* Bryant, 2 Campb. 321; Turner *v.* Crisp, 2 Str. 827; Glynn *v.* Bank of England, 2 Ves. 39, 28 Eng. Reprint 26.

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

41. *Arkansas.*— Ruddell *v.* Folsom, 14 Ark. 213; Brown *v.* Hutchings, 14 Ark. 83. An entry made by a bank clerk in a book kept for the purpose of entering payments made on notes held by the bank is not competent evidence to establish such payment. State Bank *v.* Barber, 12 Ark. 775.

District of Columbia.— See Linn *v.* Hoover, 6 Mackey 298.

Iowa.— Miller *v.* Dawson, 26 Iowa 186.

Kentucky.—Hopkins *v.* Stout, 6 Bush 375.

Louisiana.— Union Bank *v.* Bradford, 14 La. Ann. 159; Beatty *v.* Clement, 12 La. Ann. 82; Stocking's Succession, 6 La. Ann. 229.

Maine.— Small *v.* Rose, 97 Me. 286, 54 Atl. 726; Howe *v.* Saunders, 38 Me. 350.

Michigan.— Chandler *v.* Lawrence, 3 Mich. 261.

New Hampshire.— Wheeler *v.* Robinson, 50 N. H. 303.

New York.— *In re* Kellogg, 104 N. Y. 648, 10 N. E. 152; Ward *v.* Hoag, 78 N. Y. App. Div. 510, 79 N. Y. Suppl. 706; Risley *v.* Wightman, 13 Hun 163; Roseboom *v.* Billington, 17 Johns. 182.

North Carolina.— Woodhouse *v.* Simmons, 73 N. C. 30; Williams *v.* Alexander, 51 N. C. 137.

Pennsylvania.— Shaffer *v.* Shaffer, 41 Pa. St. 51; *In re* Cremer, 5 Watts & S. 331; Addams *v.* Seitzinger, 1 Watts & S. 243; Chapman's Estate, 3 Pa. Co. Ct. 534.

South Carolina.— Gibson *v.* Peebles, 2 McCord 418.

Vermont.— Fletcher *v.* Brainerd, 75 Vt. 300, 55 Atl. 608; Lawrence *v.* Graves, 60 Vt. 657, 13 Atl. 342; Bailey *v.* Danforth, 53 Vt. 504. Such indorsements are admissible whether made before or after the bar but are not conclusive. McDowell *v.* McDowell, 75 Vt. 401, 56 Atl. 98, 98 Am. St. Rep. 831; Bailey *v.* Danforth, *supra.*

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

evidence that the indorsement was made on the day of the date thereof.[42] Indorsements of payments admitted by the debtor,[43] or assented to by him,[44] even impliedly,[45] will toll the statute. If made after the bar and without the direction or knowledge of the debtor such indorsements are not admissible as evidence of the fact of payment, which must be proved by evidence *aliunde*,[46] or

Entries on the payee's books made before the bar are admissible to show payment (Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790); but entries made after the bar is complete are not (Small *v.* Rose, 97 Me. 286, 54 Atl. 726). But in Coulter *v.* Clear Creek County Bank, 18 Colo. App. 444, 72 Pac. 602, it was held that where the indorsements on the note were sufficient to avoid the bar original entries in a bank's book of credits made by its cashier were admissible.

Entries on the books of the assignor of a note of payments made to him are not admissible in favor of his assignee. Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. 590.

As to admissibility of entries on creditor's books see EVIDENCE, 17 Cyc. 365 *et seq.*

Under the Georgia statute (Code (1882), §§ 2934, 2935) an indorsement of a credit on a note must be in the handwriting of the maker (Moore *v.* Moore, 103 Ga. 547, 30 S. E. 535; Black *v.* Holland, 102 Ga. 523, 27 S. E. 671; Ryal *v.* Morris, 68 Ga. 834; George *v.* Gardner, 49 Ga. 441; Shumate *v.* Williams, 34 Ga. 245), or signed by him or someone duly authorized thereto (Moore *v.* Moore, *supra*; Black *v.* Holland, *supra*; Watkins *v.* Harris, 83 Ga. 680, 10 S. E. 447 [*disapproving* Green *v.* Juhan, 66 Ga. 531]; Ryal *v.* Morris, *supra*; George *v.* Gardner, *supra*; Green *v.* Hall, 36 Ga. 538. See also Holland *v.* Chaffin, 22 Ga. 343). A credit indorsed and signed by an agent is sufficient and if the agent is another than the payee his authority need not be in writing. Foster *v.* Cochran, 89 Ga. 466, 15 S. E. 551. Prior to the adoption of the statute named, the general rule that the indorsement must appear to have been made with the privity of the debtor or at a time when it was against the interests of the creditor prevailed in Georgia. Smith *v.* Simms, 9 Ga. 418. If made by the holder he must show authority in writing from the maker. Stone *v.* Parmalee, 18 Fed. 280; Dobson *v.* Dickson, 62 Ga. 639; Wright *v.* Bessman, 55 Ga. 187. Some of the earlier cases hold that the payee could not be the payer's agent for the purpose of entering credits. Wright *v.* Bessman, *supra*; Shumate *v.* Williams, *supra*. If the authority is sufficiently definite it is immaterial whether the credit is entered or not. Dobson *v.* Dickson, *supra*.

In Missouri the decisions are not in harmony as to the rule in cases covered by the text. Some of them hold that an indorsement of payment on a note is presumed to have been made at the time of its date (Smith *v.* Ferry, 69 Mo. 142; Horton *v.* Bayne, 52 Mo. 531; Carter *v.* Carter, 44 Mo. 195. And see McElvain *v.* Garrett, 84 Mo. App. 300); and it is further presumed that payment was made at that time and the indorsement is sufficient evidence to repel the statute of limitation (Smith *v.* Zimmerman, 51 Mo. App. 519; Haver *v.* Schwyhart, 48 Mo. App. 50, 39 Mo. App. 303). Other cases hold that indorsement alone is not sufficient. (McElvain *v.* Garrett, *supra*; Phillips *v.* Mahan, 52 Mo. 197); and it should not be read in evidence in the absence of proof as to when it was made and that it was made at a time when it was against the interest of the payee or that the payer assented to it (Goddard *v.* Williamson, 72 Mo. 131; Phillips *v.* Mahan, *supra*; McElvain *v.* Garrett, *supra*; Gardner *v.* Early, 78 Mo. App. 346; Briscoe *v.* Huff, 75 Mo. App. 288; Haver *v.* Schwyhart, 39 Mo. App. 303; Loewer *v.* Haug, 20 Mo. App. 163).

42. *Alabama.*— Walker *v.* Wykoff, 14 Ala. 560; McGehee *v.* Greer, 7 Port. 537; Watson *v.* Dale, 1 Port. 247.

Arkansas.— Ruddell *v.* Folson, 14 Ark. 213; Wood *v.* Wylds, 11 Ark. 754; State Bank *v.* Wooddy, 10 Ark. 638.

Colorado.— Meyer *v.* Binkleman, 5 Colo. 262.

Kentucky.— Hopkins *v.* Stout, 6 Bush 375.

Louisiana.— Beatty *v.* Clement, 12 La. Ann. 82; Stocking's Succession, 6 La. Ann. 229. See also Maskell *v.* Pooley, 12 La. Ann. 661.

New York.— Roseboom *v.* Billington, 17 Johns. 182. But see *In re* Kellogg, 104 N. Y. 648, 10 N. E. 152.

North Carolina.— Bond *v.* Wilson, 129 N. C. 387, 40 S. E. 182; Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; White *v.* Beaman, 85 N. C. 3; Grant *v.* Burgwyn, 84 N. C. 560; Woodhouse *v.* Simmons, 73 N. C. 30.

Pennsylvania.— Shaffer *v.* Shaffer, 41 Pa. St. 51; Addams *v.* Seitzinger, 1 Watts & S. 243; Peters *v.* Rothermel, 30 Pa. Super. Ct. 281; Kelley *v.* Hacket, 12 Pa. Dist. 84.

Vermont.— Lawrence *v.* Graves, 60 Vt. 657, 15 Atl. 342.

See 33 Cent. Dig. tit. "Limitation of Actions," § 639 *et seq.*

What evidence sufficient.— Proof that on the day of the date of the indorsement the creditor received from the debtor by mail a draft for the amount of the credit, coupled with the indorsement, will support a finding of payment. Wellman *v.* Miner, 179 Ill. 326, 53 N. E. 609 [*reversing* 73 Ill. App. 448].

43. Willett *v.* Maxwell, 169 Ill. 540, 48 N. E. 473 [*affirming* 68 Ill. App. 119].

44. Hawley *v.* Griswold, 42 Barb. (N. Y.) 18.

45. Fletcher *v.* Brainard, 75 Vt. 300, 55 Atl. 608.

46. *Arkansas.*— Wilson *v.* Pryor, 44 Ark. 532.

it must appear by independent evidence that the indorsements were authorized by the payer.[47] In some jurisdictions the latter proof must be made first in order to render the indorsements admissible.[48] Such proof is *prima facie* sufficient to establish the fact of payment.[49] Where the payee dies after making the indorsement and before suit, the indorsement is admissible and may constitute sufficient proof of the payment and the date thereof.[50] If, however, the credit is small compared with the amount of the debt and is entered just before the bar, although proven to be made at its date, still the jury would be justified in finding against it.[51] Where the statute provides that it may be interrupted only by a promise or acknowledgment in writing signed by the debtor, and there is no exception as to part payment, an indorsement by the creditor is unavailing to affect the running of the statute,[52] although made with the consent of the payer.[53] Under such a statute an indorsement made and signed by the debtor is not effectual.[54] Indorsements made in the handwriting of the debtor,[55] or in that of his authorized agent, are admissible,[56] and operate to take the case out of the statute.[57] An indorsement made by the holder with the express assent and request of the payer is sufficient proof to take the note out of the statute,[58] even where no payment is actually made;[59] and an indorsement by the maker without any payment will have the like effect.[60]

f. Security and Realization Thereof. The statute is not interrupted as to a debt secured by trust deed or mortgage by applying thereon proceeds arising from foreclosure either by sale under the power contained therein,[61] or by legal proceedings.[62] There is a conflict of authority on the question of the effect of applying the proceeds of collaterals left with the creditor by the debtor as part

District of Columbia.— Soper *v.* Baum, 6 Mackey 29.

Kansas.— Easter *v.* Easter, 44 Kan. 151, 24 Pac. 57.

New Hampshire.— Wheeler *v.* Robinson, 50 N. H. 303.

North Carolina.— Bond *v.* Wilson, 129 N. C. 387, 40 S. E. 182.

South Carolina.— Concklin *v.* Pearson, 1 Rich. 391.

See 33 Cent. Dig. tit. "Limitation of Actions," § 638 *et seq.*

But see Bailey *v.* Danforth, 53 Vt. 504.

47. Haver *v.* Schwyhart, 39 Mo. App. 303.

48. *Arkansas.*— Alston *v.* State Bank, 9 Ark. 455.

Georgia.— Smith *v.* Simms, 9 Ga. 418.

Minnesota.— Young *v.* Perkins, 29 Minn. 173, 12 N. W. 515. See also Turrell *v.* Morgan, 7 Minn. 368, 82 Am. Dec. 101.

New York.— Wilson *v.* Pope, 37 Barb. 321; Roseboom *v.* Billington, 17 Johns. 182.

Pennsylvania.— *In re* Cremer, 5 Watts & S. 331.

England.— Rose *v.* Bryant, 2 Campb. 321.

See 33 Cent. Dig. tit. "Limitation of Actions," § 640.

49. Wilson *v.* Pryor, 44 Ark. 532; Brown *v.* Hutchings, 14 Ark. 83; Wood *v.* Wylds, 11 Ark. 754; State Bank *v.* Wooddy, 10 Ark. 638. See also *In re* Hearman, 19 N. Y. Suppl. 639, Pow. Surr. 37.

50. Coffin *v.* Buckman, 12 Me. 471; Williams *v.* Alexander, 51 N. C. 137 [*overruling* Williams *v.* Alexander, 50 N. C. 162].

51. Smith *v.* Simms, 9 Ga. 418; Miller *v.* Dawson, 26 Iowa 186

52. Heinlin *v.* Castro, 22 Cal. 100; Pena *v.* Vance, 21 Cal. 142.

53. Areaux *v.* Mayeux, 23 La. Ann. 172.

54. Hale *v.* Wilson, 70 Iowa 311, 30 N. W. 739; Davidson *v.* Harrison, 33 Miss. 41; Smith *v.* Westmoreland, 12 Sm. & M. (Miss.) 663.

55. Chandler *v.* Lawrence, 3 Mich. 261; Wheeler *v.* Robinson, 50 N. H. 303; Boltz *v.* Bullman, 1 Yeates (Pa.) 584.

56. Foster *v.* Cochran, 89 Ga. 466, 15 S. E. 551.

57. Foster *v.* Cochran, 89 Ga. 466, 15 S. E. 551; Crockett *v.* Mitchell, 88 Ga. 166, 14 S. E. 118; Vines *v.* Tift, 79 Ga. 301, 7 S. E. 227; Noble *v.* Edes, 51 Me. 34; Chandler *v.* Lawrence, 3 Mich. 261; Cook *v.* Jennings, 40 S. C. 204, 18 S. E. 640.

58. Sibley *v.* Phelps, 6 Cush. (Mass.) 172.

59. McCrillis *v.* Millard, 17 R. I. 724, 24 Atl. 576.

60. Gay *v.* Hassom, 64 Vt. 495, 24 Atl. 715. *Compare* Blanchard *v.* Blanchard, 122 Mass. 558, 23 Am. Rep. 397.

61. Buffinton *v.* Chase, 152 Mass. 534, 25 N. E. 977, 10 L. R. A. 123; Campbell *v.* Baldwin, 130 Mass. 199. Westinghouse Co. *v.* Boyle, 126 Mich. 677, 86 N. W. 136, 86 Am. St. Rep. 570; Regan *v.* Williams, 88 Mo. App. 577; Leach *v.* Asher, 20 Mo. App. 656; Moffitt *v.* Carr, 48 Nebr. 403, 67 N. W. 150, 58 Am. St. Rep. 696. *Contra*, Bender *v.* Markle, 37 Mo. App. 234.

62. Thomas *v.* Brewer, 55 Iowa 227, 7 N. W. 571.

Effect on surety.— The application of the proceeds arising from the foreclosure of a mortgage given by a principal will not inter-

payment of the debt. In some jurisdictions it is regarded as sufficient to interrupt the statute,[63] provided the collaterals are realized on within a reasonable time.[64] In others it is ineffectual for such purpose in the absence of notice to or assent by the debtor.[65] If the collaterals were delivered after the delivery of the note then there will be a suspension of the statute from the date of delivery.[66] If the debtor constitutes a third person his agent to hold and, in case of default, to realize on collaterals and apply the proceeds to his debt, payment of such proceeds by such agent will interrupt the statute.[67] Where a creditor applies the proceeds of collaterals placed with him by the debtor as a credit on the latter's account, such payment will not revive the debt if the time intervening between the delivery of the collateral and the collecting and crediting of the proceeds exceeds the time limited by the statute,[68] especially where there is no present agreement by the debtor that the proceeds shall be so applied.[69]

3. Medium of Payment. It is not necessary that a payment in order to toll the statute should be made in money. Anything of value may be given by the debtor and accepted in payment by the creditor and will be sufficient,[70] provided, however, it is accepted as part payment only and not full payment.[71] The rule has been applied with respect to a receipt,[72] a chattel,[73] the note of the debtor,[74] or a bill of

rupt the statute running in favor of his surety. Peru Plow, etc., Co. *v.* Ward, 6 Kan. App. 289, 51 Pac. 805.

63. *Maine.*— Haven *v.* Hathaway, 20 Me. 345.

Massachusetts.— Taylor *v.* Foster, 132 Mass. 30; Whipple *v.* Blackington, 97 Mass. 476; Porter *v.* Blood, 5 Pick. 54.

Nebraska.— Sornberger *v.* Lee, 14 Nebr. 193, 15 N. W. 345, 45 Am. Rep. 106.

New Jersey.— New York F. Ins. Co. *v.* Tooker, 4 N. J. L. J. 334.

Vermont.— Fletcher *v.* Brainard, 75 Vt. 300, 55 Atl. 608.

See 33 Cent. Dig. tit. "Limitation of Actions," § 636.

Application of the proceeds of a life insurance policy assigned to the creditor is sufficient. *In re* Conlan, L. R. 29 Ir. 199.

Payment out of property assigned to trustees.— Where property is assigned to trustees with direction to pay premiums on life insurance policies out of which creditors are to be paid, the payment of the premiums by the trustees will constitute such payment on the debt as to stop the statute from running. Scott *v.* Synge, L. R. 27 I. R. 560.

64. Haven *v.* Hathaway, 20 Me. 345; Porter *v.* Blood, 5 Pick. (Mass.) 54.

65. Lyon *v.* State Bank, 12 Ala. 508; Eaton *v.* Lehan, 63 N. H. 619; Brown *v.* Latham, 58 N. H. 30, 42 Am. Rep. 568.

In Minnesota not even notice to and failure of the debtor to object will make the payment available to suspend the statute if the collaterals are delivered at the time of the delivery of the note; if delivered subsequently they operate as payment at the time of delivery. Wolford *v.* Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315.

66. Wolford *v.* Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; Acker *v.* Acker, 81 N. Y. 143; Smith *v.* Ryan, 66 N. Y. 352, 23 Am. Rep. 60; Harper *v.* Fairley, 53 N. Y. 442.

67. Boulder Nat. State Bank *v.* Rowland, 1 Colo. App. 468, 29 Pac. 465.

68. Jones *v.* Langhorne, 19 Colo. 206, 34 Pac. 997; Harper *v.* Fairley, 53 N. Y. 442.

69. Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. 545; Crow *v.* Gleason, 141 N. Y. 489, 36 N. E. 497 [*reversing* 20 N. Y. Suppl. 590].

70. Pracht *v.* McNee, 40 Kan. 1, 18 Pac. 925; Lawrence *v.* Baker, 44 Hun (N. Y.) 582; Fox's Appeal, 8 Pa. Cas. 393, 11 Atl. 228.

If a parent indebted to a child makes an investment for the benefit of the latter it will be held a payment on the debt interrupting the running of the statute. Glover *v.* Patten, 165 U. S. 394, 17 S. Ct. 411, 41 L. ed. 760.

71. Scott *v.* Ware, 64 Ala. 174; Kirk *v.* Hiatt, 2 Ind. 322; New York Belting, etc., Co. *v.* Jones, 22 La. Ann. 530; Young *v.* Alford, 113 N. C. 130, 18 S. E. 84; Locke *v.* Andres, 29 N. C. 159.

A bill of exchange given for the entire amount of the debt cannot operate as a partial payment, nor prevent or remove the bar. Scott *v.* Ware, 64 Ala. 174.

72. Maber *v.* Maber, L. R. 2 Exch. 153, 36 L. J. Exch. 70, 16 L. T. Rep. N. S. 26; Amos *v.* Smith, 1 H. & C. 238, 31 L. J. Exch. 423, 7 L. T. Rep. N. S. 66, 10 Wkly. Rep. 759.

73. Sibley *v.* Lumbert, 30 Me. 253; Rowell *v.* Lewis, 72 Vt. 163, 47 Atl. 783; Curthbertson *v.* Hill, 65 Vt. 573, 27 Atl. 71.

74. Pracht *v.* McNee, 40 Kan. 1, 18 Pac. 925; Sigourney *v.* Wetherell, 6 Metc. (Mass.) 553; Ilsley *v.* Jewett, 2 Metc. (Mass.) 168; Block *v.* Dorman, 51 Mo. 31. But see Lawrence *v.* Baker, 44 Hun (N. Y.) 582, holding that the giving of a note for part of a debt and its subsequent payment to an indorsee would not constitute payment of the original debt suspending the statute.

The giving of a note in part payment of a barred debt will revive it. Adams *v.* Tucker, 6 Colo. App. 393, 40 Pac. 783.

exchange;[75] and so where the debtor transfers a mortgage,[76] or delivers a note[77] or account of a third person to be applied on his debt, there is such a payment as will toll the statute;[78] and payments made thereon are payments on the principal debt suspending the statute as to it, provided they are collected with reasonable diligence;[79] for if the demand is payable presently the statute is interrupted at the time of the delivery of the mortgage, note, or bill, and not at the time of payment thereof.[80] If such collateral evidence of debt is payable in future, it suspends the statute until its maturity only.[81] So it has been held that payment in worthless money is good to interrupt the statute, as it operates as a new promise.[82] An agreement to apply as a credit a debt owing by the creditor to the debtor,[83] or to a firm of which the latter is a member,[84] or a debt owing by a third person to the debtor, will constitute payment interrupting the statute, although the credit be not actually entered.[85]

4. APPLICATION OF PAYMENT. Where a debtor makes a payment to his creditor, to whom he is indebted on several unbarred notes without directing its application, the creditor may apply a portion of it to each note and thus suspend the statute of limitations as to all,[86] or he may apply it to any one of the notes suspending the statute as to that alone;[87] and the application may be made at any time before suit, although the interruption of the statute will date from the time of payment.[88] The foregoing rules apply also to debts by open account which are not wholly distinct.[89] Where the debts are distinct, if the payment exceeds one, the surplus may be applied to another.[90] Or if one is evidenced by a note and the other by account current, overpayments on the latter may be regarded as payments on the former and interrupt the statute as to it and a mortgage securing it;[91] or, if the debtor agrees that all of his debts shall be treated as one, payments

75. Turney *v.* Dodwell, 2 C. L. R. 666, 3 E. & B. 136, 18 Jur. 187, 23 L. J. Q. B. 137, 77 E. C. L. 136. See also Irving *v.* Veitch, 7 L. J. Exch. 25, 3 M. & W. 90.

76. Hitchcock *v.* Wiltsie, 12 N. Y. St. 144, 6 Dem. Surr. 255.

77. Smith *v.* Ryan, 66 N. Y. 352, 23 Am. Rep. 60 [*affirming* 39 N. Y. Super. Ct. 489]; Lawrence *v.* Baker, 44 Hun (N. Y.) 582.

78. Butts *v.* Perkins, 41 Barb. (N. Y.) 509.

79. Haven *v.* Hathaway, 20 Me. 345; Sornberger *v.* Lee, 14 Nebr. 193, 15 N. W. 345, 45 Am. Rep. 106.

80. Butts *v.* Perkins, 41 Barb. (N. Y.) 509; Swift *v.* Lanier, 1 Hill (S. C.) 31; Gowan *v.* Foster, 3 B. & A. 507, 23 E. C. L. 227; Irving *v.* Veitch, 7 L. J. Exch. 25, 3 M. & W. 90. But see Smith *v.* Ryan, 66 N. Y. 352, 23 Am. Rep. 60 [*affirming* 39 N. Y. Super. Ct. 489].

81. Griffith *v.* Grogan, 12 Cal. 317. See also Harper *v.* Fairley, 53 N. Y. 442. But see Whipple *v.* Blackington, 97 Mass. 476, holding that the statute was suspended until the payment on the note was made.

82. Dupré *v.* Lumpkin, 28 La. Ann. 584. But see New York Belting, etc., Co. *v.* Jones, 22 La. Ann. 530.

83. McKeon *v.* Byington, 70 Conn. 429, 39 Atl. 853; State Nat. Bank *v.* Harris, 96 N. C. 118, 1 S. E. 459; Worthington *v.* Grimsditch, 7 Q. B. 479, 10 Jur. 26, 15 L. J. Q. B. 52, 53 E. C. L. 479; Ashby *v.* James, 12 L. J. Exch. 295, 11 M. & W. 542.

84. Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276.

85. Root *v.* Bradley, 1 Kan. 437.

86. Clapp *v.* Ingersol, 11 Me. 83; Taylor *v.* Foster, 132 Mass. 30; Rowell *v.* Lewis, 72 Vt. 163, 47 Atl. 783; Jackson *v.* Burke, 13 Fed. Cas. No. 7,133, 1 Dill. 311; Wilson *v.* Rykert, 14 Ont. 188. See also Cooper *v.* Olcott, 1 App. Cas. (D. C.) 123.

Where all the notes are written on a single sheet and the payments are indorsed on the back thereof, the court will apply them so as to save all the notes from the bar. Brafford *v.* Reed, 125 N. C. 311, 34 S. E. 443.

87. Ramsay *v.* Warner, 97 Mass. 8.

88. Ramsay *v.* Warner, 97 Mass. 8.

89. Bowe *v.* Gano, 9 Hun (N. Y.) 6 (as to payment in excess of any one item); Walker *v.* Butler, 6 E. & B. 506, 2 Jur. N. S. 687, 25 L. J. Q. B. 377, 88 E. C. L. 506.

In Alabama it was held that the application might be made to any one of the debts but it would not operate to interrupt the statute, the application being the sole act of the creditor. Royston *v.* May, 71 Ala. 398.

Where partial payments are made of wages due for several weekly or daily periods they are not imputable by the parties to the indebtedness for any particular period and they will be applied to the extinguishment of the oldest claim. Dewar *v.* Beirne, McGloin (La.) 75.

90. Corliss *v.* Grow, 58 Vt. 702, 2 Atl. 388.

91. Everton *v.* Day, 66 Ark. 73, 48 S. W. 900; Lyle *v.* Esser, 98 Wis. 234, 73 N. W. 1008; Staley *v.* Barrett, 26 L. J. Ch. 321, 5 Wkly. Rep. 188.

made will interrupt the statute as to all of them.[92] Where neither party makes application of the payment, the law will apply it to the debt which, although not barred when payment was made, has become barred at the time of the suit.[93] An undirected payment on an instalment debt, every part of which is due but unbarred at the time, will interrupt the statute as to all the instalments.[94] If some of the debts are barred and others are not, an application of an undirected payment to the subsisting debts will start the statute to running anew as to them.[95] But if the payment is not appropriated by either party to any particular one or all of the debts, the barred debts are not revived.[96] A creditor may apply an undirected payment to a barred debt,[97] at any time before action;[98] but this will not remove the bar with respect to the balance of the debt.[99] Where there are two existing debts, one clearly ascertained and the other not, and payments are made without being specifically applied on account of either, the jury may infer that the payments are made on the clearly ascertained debt so as to take the case out of the statute.[1] Where a payment or several payments made do not correspond in amount with any item or items of the account, the debtor cannot claim application to any particular item or items so as to avoid the interruption of the statute as to the whole account.[2] The undirected payments made out of his individual fund by a debtor who is also a member of a firm owing the same creditor cannot be applied to the firm debt so as to toll the statute as to the latter;[3] but where the payments exceed the individual account, the surplus will be applied to the partnership debt so as to interrupt the statute.[4] A creditor who has indirectly received money belonging to his debtor cannot apply it to his debt so as to toll the statute.[5] An undisclosed intention of the debtor will govern the application of a payment made by him.[6] Where the debtor directs the application, the statute is not interrupted as to the unpaid items.[7] An undirected partial payment once applied by the creditor cannot be altered after the debtor's death and applied on another debt so as to revive it.[8]

5. By Whom Made — a. In General. Part payment must be made by the debtor or someone duly authorized thereto.[9] It may be made by any one who

92. Gum *v.* Richert, 9 Kan. App. 57, 58 Pac. 236.

93. Robinson *v.* Allison, 36 Ala. 525. And see Wilson *v.* Rykert, 14 Ont. 188; Cathcart *v.* Haggard, 37 U. C. Q. B. 47.

94. Nesom *v.* D'Armond, 13 La. Ann. 294.

95. Blake *v.* Sawyer, 83 Me. 129, 21 Atl. 834, 23 Am. St. Rep. 762, 12 L. R. A. 712. *Compare* Mahoney *v.* McSweeny, 31 N. Brunsw. 672.

96. Shafer *v.* Pratt, 79 N. Y. App. Div. 447, 80 N. Y. Suppl. 109.

97. Blake *v.* Sawyer, 83 Me. 129, 21 Atl. 834, 23 Am. St. Rep. 762, 12 L. R. A. 712; Mills *v.* Fowkes, 2 Arn. 62, 5 Bing. N. Cas. 455, 3 Jur. 406, 8 L. J. C. P. 276, 7 Scott 444, 35 E. C. L. 246.

98. Mills *v.* Fowkes, 2 Arn. 62, 5 Bing. N. Cas. 455, 3 Jur. 406, 8 L. J. C. P. 276, 7 Scott 444, 35 E. C. L. 246.

99. *Illinois.*— Lowery *v.* Gear, 32 Ill. 382.

Maine.— Blake *v.* Sawyer, 83 Me. 129, 21 Atl. 834, 23 Am. St. Rep. 762, 12 L. R. A. 712.

Massachusetts.— Ramsay *v.* Warner, 97 Mass. 8; Pond *v.* Williams, 1 Gray 630.

Michigan.— Krone *v.* Krone, 38 Mich. 661.

Missouri.— Wilden *v.* McAllister, 91 Mo. App. 446.

England.— Mills *v.* Fowkes, 2 Arn. 62, 5 Bing. N. Cas. 455, 3 Jur. 406, 8 L. J. C. P. 276, 7 Scott 444, 35 E. C. L. 246.

See 33 Cent. Dig. tit. "Limitation of Actions," § 634.

Compare Ayer *v.* Hawkins, 19 Vt. 26, holding that if the debtor, owing several barred debts, makes an undirected payment to the creditor, the latter cannot distribute it to the several debts so as to revive them all, but he may apply it to any of them, even the largest, thereby reviving the debt to which it is applied.

1. Burn *v.* Boulton, 2 C. B. 476, 15 L. J. C. P. 97, 52 E. C. L. 474.

2. Howe *v.* Hammond, (Vt. 1904) 58 Atl. 724.

3. Camp *v.* Smith, 136 N. Y. 187, 32 N. E. 640 [*affirming* 18 N. Y. Suppl. 523]; Camp *v.* Smith, 1 N. Y. Suppl. 375.

4. Robie *v.* Briggs, 59 Vt. 443, 9 Atl. 593, 59 Am. Rep. 737.

5. Drouilliard *v.* Wilson, 1 Ohio Dec. (Reprint) 555, 10 West. L. J. 385.

6. Austin *v.* McClure, 60 Vt. 453, 15 Atl. 161. *Contra*, Pardee *v.* Markle, 111 Pa. St. 548, 5 Atl. 36, 56 Am. Rep. 299.

7. Peck *v.* New York, etc., Mail Steamship Co., 5 Bosw. (N. Y.) 226; Hicks *v.* Blanchard, 60 Vt. 673, 15 Atl. 401; Harris *v.* Howard, 56 Vt. 695; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253.

8. Coon's Appeal, 52 Conn. 186.

9. *Kansas.*— Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. 545.

could be compelled to pay,[10] by one who has agreed in writing with the debtor to pay the debt,[11] by one who has assumed the debt,[12] or by a stranger who makes it at the request and in the presence and with the consent of the debtor.[13]

b. Assignee, Trustee, or Under Order of Court. The payment of a dividend by the assignee of an insolvent debtor is not such part payment of a debt as will take the residue out of the statute of limitations against such debtor.[14] Nor will

Louisiana.— Smith *v.* Conn, 22 La. Ann. 445.

Minnesota.— Wolford *v.* Cook, 71 Minn. 77, 73 N. W. 706, 70 Am. St. Rep. 315; Pfenninger *v.* Kokesch, 68 Minn. 81, 70 N. W. 867.

Nebraska.— Mizer *v.* Emigh, 63 Nebr. 245, 88 N. W. 479.

New Hampshire.— Lang *v.* Gage, 65 N. H. 173, 18 Atl. 795.

New York.— Murdock *v.* Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418; Harper *v.* Fairley, 53 N. Y. 442; Bender *v.* Blessing, 82 Hun 320, 31 N. Y. Suppl. 481; *Ex p.* Petrie, 82 Hun 62, 31 N. Y. Suppl. 65; Kelly *v.* Weber, 27 Hun 8; Payne *v.* Slate, 39 Barb. 634.

North Carolina.— Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. 678; Woodhouse *v.* Simmons, 73 N. C. 30.

Oregon.— Dundee Mortg., etc., Inv. Co. *v.* Horner, 30 Oreg. 558, 48 Pac. 175.

Pennsylvania.— Wesner *v.* Stein, 97 Pa. St. 322.

Vermont.— Galpin *v.* Barney, 37 Vt. 627.

Canada.— Montreal Bank *v.* Lingham, 7 Ont. L. Rep. 164. Where on the settlement of accounts, one party took as part payment an order drawn by the other upon a third party, which was not accepted by such third party but by his son who made payments on it, it was held an insufficient payment by the drawer to take the case out of the statute. Smyth *v.* McDonald, 4 Nova Scotia 86.

See 33 Cent. Dig. tit. "Limitation of Actions." § 623.

In case of a mortgage debt if made by one other than the mortgagor or his authorized agent it will not interrupt the statute. George *v.* Gardner, 49 Ga. 441; Harlock *v.* Ashberry, 19 Ch. D. 539, 51 L. J. Ch. 394, 16 L. T. Rep. N. S. 356, 30 Wkly. Rep. 327; Chinnery *v.* Evans, 11 H. L. Cas. 115, 10 Jur. N. S. 855, 11 L. T. Rep. N. S. 68, 4 New Rep. 520, 13 Wkly. Rep. 20, 11 Eng. Reprint 1274. Application of rents and profits of land, by a grantee in possession under deeds operating as mortgages, to the payment of the debt secured, will not operate to check a suit by the grantor to recover the lands from the bar of the statute of limitations, no voluntary payment by him having been made. Adams *v.* Holden, 111 Iowa 54, 82 N. W. 468.

Voluntary payments by the maker's widow will not stop the running of the statute on notes as against his heirs. Gallagher *v.* Whalen, 9 S. W. 390, 701, 10 Ky. L. Rep. 458.

Payment by a corporation on its debt will not suspend the statute as to the liability of a stock-holder who retired prior to such payment. Robinson *v.* Floyd, 22 Pittsb. Leg. J. N. S. (Pa.) 265.

Payment of rent by a subtenant to be applied on the rent of a tenant in chief will not arrest the statute as to past-due rent owing by the latter. Boughton *v.* Boughton, 77 Conn. 7, 58 Atl. 226.

Payments made by one who receives the benefit of a loan negotiated for his accommodation will not toll the statute as to him on whose credit the loan was made (Patterson *v.* Collier, 113 Mich. 12, 71 N. W. 327, 67 Am. St. Rep. 440); or one who, without the knowledge of the party receiving the loan, guaranteed its payment (Blair *v.* Lynch, 105 N. Y. 636, 11 N. E. 947).

Payment by one as guardian of the person, for an estate he is administering as guardian of the person and estate, will interrupt the statute. Ducker's Succession, 10 La. Ann. 758.

Payment by a tenant for life of interest on a specialty chargeable upon the estate is sufficient to keep the right of action alive against all parties interested in the remainder. *In re* Hollingshead, 37 Ch. D. 651, 57 L. J. Ch. 400, 58 L. T. Rep. N. S. 758, 36 Wkly. Rep. 660; Roddam *v.* Morley, 1 De G. & J. 1, 3 Jur. N. S. 449, 26 L. J. Ch. 438, 5 Wkly. Rep. 510, 58 Eng. Ch. 1, 44 Eng. Reprint 622; *In re* Fitzmaurice, 15 Ir. Ch. 445. But see Becher *v.* Delacour, 11 L. R. Ir. 187; Gregson *v.* Hindley, 10 Jur. 383. Where the life-tenant at the time of making the payments also owns the reversionary estate subject to be divested on the happening of a future uncertain contingency, his payments will interrupt the statute as to those entitled on the occurrence of the contingency. Pinkney *v.* Weaver, 216 Ill. 185, 74 N. E. 714 [*affirming* 115 Ill. App. 582].

10. Sutherlin *v.* Roberts, 4 Oreg. 378; Lewin *v.* Wilson, 11 App. Cas. 639, 55 L. J. P. C. 75, 55 L. T. Rep. N. S. 410; *In re* Frisby, 43 Ch. D. 106, 59 L. J. Ch. 94, 61 L. T. Rep. N. S. 632, 38 Wkly. Rep. 65. See also Slater *v.* Musgrove, 29 Grant Ch. (U. C.) 392.

11. Huntington *v.* Chesmore, 60 Vt. 566, 15 Atl. 173.

12. Cockfield *v.* Farley, 21 La. Ann. 521.

13. Chapman *v.* Boyce, 16 N. H. 237.

In Louisiana a natural tutrix, who remarries without convoking a family meeting to advise as to continuing as tutrix, is without power to bind the minor by payment of interest on a debt for which the latter is bound. Grant *v.* Maier, 32 La. Ann. 51.

14. *Massachusetts.*—Richardson *v.* Thomas, 13 Gray 381, 74 Am. Dec. 636; Stoddard *v.*

a payment by an assignee operate to suspend the statute as against the insolvent's joint debtor,[15] or indorser, even where the assignee is himself the indorser.[16] But if the joint debtor induces a creditor to file his claim against the insolvent's estate and await the collection of the dividend before proceeding against him, the payment of a dividend marks a point from which the statute will begin to run anew as to him.[17] The running of the statute is not interrupted by a payment by a trustee made out of the proceeds of the trust property,[18] by applying to the debt the proceeds of a sale under foreclosure decree,[19] or by a payment made by a receiver.[20] A debt against a lunatic is not revived by a payment made by the committee under order of the court for distribution.[21]

c. Executors or Administrators, Heirs and Devisees. Payments on a mortgage debt against a testator which are made without the knowledge or consent of his devisees and the person subsequently appointed executor of his will will not suspend the statute of limitations as to the debt.[22] A mere allowance of a claim against the estate of a deceased joint debtor after the bar of the statute has become complete will not take the claim out of the operation of the statute in favor of the coöbligor;[23] but if the administrator makes a payment on the claim after allowance and before the bar the statute is suspended as to such coöbligor.[24]

Doane, 7 Gray 387; Roscoe *v.* Hale, 7 Gray 274.

Michigan.— Parsons *v.* Clark, 59 Mich. 414, 26 N. W. 656.

Nebraska.—Whitney *v.* Chambers, 17 Nebr. 90, 22 N. W. 229, 52 Am. Rep. 398.

New Hampshire.— Pine River Bank *v.* Swazey, 47 N. H. 154.

New York.— Pickett *v.* Leonard, 34 N. Y. 175 [*affirming* 34 Barb. 193, and *overruling* Barger *v.* Durvin, 22 Barb. 68]; Roosevelt *v.* Mark, 6 Johns. Ch. 266. *Compare* Miller *v.* Talcott, 54 N. Y. 114 [*affirming* 46 Barb. 167].

North Carolina.— Battle *v.* Battle, 116 N. C. 161, 21 S. E. 177.

Ohio.— Marienthal *v.* Mosler, 16 Ohio St. 566.

Pennsylvania.— Sheppard's Estate, 180 Pa. St. 57, 36 Atl. 422; Light's Estate, 136 Pa. St. 211, 20 Atl. 536, 537; Bunn *v.* Drovin, 2 Phila. 306.

Rhode Island.— Reed *v.* Johnson, 1 R. I. 81.

Vermont.— Benton *v.* Holland, 58 Vt. 533, 3 Atl. 322.

England.— *Ex p.* Topping, 4 De G. J. & S. 551, 34 L. J. Bankr. 44, 12 L. T. Rep. N. S. 787, 13 Wkly. Rep. 1025, 69 Eng. Ch. 551, 46 Eng. Reprint 1033; Davies *v.* Edwards, 7 Exch. 22, 15 Jur. 1014, 21 L. J. Exch. 4, 6 Eng. L. & Eq. 520.

Canada.— Fisken *v.* Stewart, 33 Can. L. J. 41; McKenzie *v.* Fletcher, 11 Manitoba 540. *Contra,* Boulet *v.* Metayer, 23 Quebec Super. Ct. 289; Carter *v.* McLean, 20 Quebec Super. Ct. 395; Desmarteau *v.* Darling, 12 Quebec Super. Ct. 212.

See 33 Cent. Dig. tit. "Limitation of Actions," § 629

Contra.— Letson *v.* Kenyon, 31 Kan. 301, 1 Pac. 562. But in White *v.* Smith-Frazier Boot, etc., Co., 51 Kan. 34, 32 Pac. 632, it was held that a payment on an unscheduled claim made by the clerk under order of the court after the discharge of the assignee would not interrupt the statute.

15. Brandram *v.* Wharton, 1 B. & Ald. 463, 19 Rev. Rep. 354, 357. *Contra,* Jackson *v.* Fairbank, 2 H. Bl. 340.

16. Merchants', etc., Bank *v.* Watson, 46 Pa. St. 310, 84 Am. Dec. 549.

17. Pine River Bank *v.* Swazey, 47 N. H. 154. But where a debtor corporation without making an assignment places its business in the hands of a committee of creditors which makes payments on its debts, such payments will be regarded as being voluntarily made by the corporation, since payments need not be made from choice, and operate to interrupt the statute. Peabody *v.* Tenney, 18 R. I. 498, 30 Atl. 456.

18. Leach *v.* Asher, 20 Mo. App. 656. But see Francis *v.* Grover, 5 Hare 39, 10 Jur. 280, 15 L. J. Ch. 99, 26 Eng. Ch. 39, 67 Eng. Reprint 818, holding that payments of an annuity by a trustee under a will are sufficient to keep alive the claim for the annuity.

19. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727.

20. White *v.* Meadowcroft, 91 Ill. App. 293; Whitley *v.* Lowe, 2 De G. & J. 704, 4 Jur. N. S. 815, 6 Wkly. Rep. 819, 59 Eng. Ch. 552, 44 Eng. Reprint 1163 [*affirming* 25 Beav. 421, 53 Eng. Reprint 697]. *Contra,* Chinnery *v.* Evans, 11 H. L. Cas. 115, 10 Jur. N. S. 855, 11 L. T. Rep. N. S. 68, 4 New Rep. 520, 13 Wkly. Rep. 20, 11 Eng. Reprint 1274.

21. Raeder's Appeal, 167 Pa. St. 597, 31 Atl. 929.

22. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727. And *compare* Cook *v.* Dodds, 39 Can. L. J. 755.

23. Smith *v.* Irwin, 37 Mo. 169, 90 Am. Dec. 375.

A payment by the administrator of a surety on a barred claim will not revive the debt. McBride *v.* Hunter, 64 Ga. 655; Matter of Dunn, 5 Dem. Surr. (N. Y.) 124.

24. Vernon County *v.* Stewart, 64 Mo. 408, 27 Am. Rep. 250; Zervis *v.* Unnerstall, 29

But payment by a surviving joint maker of a note will not prevent the statute from running in favor of the heirs of a deceased joint maker,[25] nor will a payment by them affect the survivor.[26] The statute is not tolled by a payment made by the heirs or devisee of a debtor;[27] nor will payment by one devisee interrupt it as to another.[28] Payment by one heir will not revive the debt against other heirs.[29] Payment by the heirs of a mortgagor will not interrupt the statute as to a grantee of the latter of a portion of the mortgaged lands who did not assume any part of the mortgage debt.[30] A payment made by a widow holding dower and homestead in the mortgaged lands of her husband and in effect a life-tenant *pro tanto* will not interrupt the running of the statute in favor of the heirs of the mortgagor who own the fee.[31]

d. Agent. Payment is effectual to suspend the statute when made by an agent specially authorized to make it;[32] or by a general agent and manager of the debtor's business,[33] even where the payment is made on a debt owing by the principal to him.[34] If made by an agent having authority to compromise only it is unavailable;[35] but an unauthorized payment may become effectual by subsequent ratification.[36] A payment by an agent who holds the money of the principal for an unreasonable time before making it will not start the statute anew.[37] Payment made by one acting as agent of an estate will not revive the debt of the ancestor against the heirs.[38]

e. Husband and Wife. Where a wife joins her husband in a note and mortgages her land to secure it,[39] or mortgages her land to secure his individual note,[40] or joins him in a mortgage of the homestead to secure a note executed by him alone,[41] or their joint note,[42] or joins in a mortgage of the husband's land securing his individual debt for the purpose of relinquishing dower and homestead

Mo. App. 474. *Contra*, Holcomb *v.* Sloan, 39 Mich. 173.

25. Smith *v.* Townsend, 9 Rich. (S. C.) 44. And the same is held true of a payment by the administrator of a joint and several promisor. Hathaway *v.* Haskell, 9 Pick. (Mass.) 42. See also Paxton *v.* Smith, 18 Ont. 178.

25. Smith *v.* Townsend, 9 Rich. (S. C.) 44.

27. Gibson *v.* Lowndes, 28 S. C. 285, 5 S. E. 727.

28. Dickenson *v.* Teasdale, 1 De G. J. & S. 52, 9 Jur. N. S. 237, 32 L. J. Ch. 37, 7 L. T. Rep. N. S. 655, 1 New Rep. 141, 66 Eng. Ch. 52, 46 Eng. Reprint 21.

29. Haines *v.* Haines, 69 N. J. L. 39, 54 Atl. 401.

30. Murdock *v.* Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418 [*reversing* 71 Hun 320, 25 N. Y. Suppl. 120].

31. Ætna L. Ins. Co. *v.* McNeely, 166 Ill. 540, 46 N. E. 1130 [*affirming* 65 Ill. App. 222]. See also Gallagher *v.* Whalen, 9 S. W. 390. 701 10 Ky. L. Rep. 458. *Contra*, Ames *v.* Mannering, 26 Beav. 583, 53 Eng. Reprint 1023.

32. Boulder Nat. State Bank *v.* Rowland, 1 Colo. App. 468, 29 Pac. 465; Barger *v.* Durvin, 22 Barb. (N. Y.) 68.

Indorsements of payments on a township warrant by the township treasurer do not suspend the statute as to the township. Carpenter *v.* Union Dist. Tp., 58 Iowa 335, 12 N. W. 280.

A county is not bound by a payment made by one not its agent.— Harrison County *v.* Cole, 8 Ind. App. 485, 36 N. E. 47.

33. McDonald *v.* McDonald, 5 Silv. Sup. (N. Y.) 28, 7 N. Y. Suppl. 935.

34. Blanchard *v.* Jefferson, 162 N. Y. 630, 57 N. E. 1104 [*affirming* 13 N. Y. App. Div. 314, 43 N. Y. Suppl. 152].

35. Linsell *v.* Bonsor, 2 Bing. N. Cas. 241, 1 Hodges 305, 3 L. J. C. P. 40, 2 Scott 399, 29 E. C. L. 519.

36. Clarkin *v.* Brown, 80 Minn. 361, 83 N. W. 351.

37. Sweet *v.* Ellis, 109 Mich. 460, 67 N. W. 535. See also Harper *v.* Fairley, 53 N. Y. 442.

38. Matteson *v.* Palser, 56 N. Y. App. Div. 91, 67 N. Y. Suppl. 612, 31 N. Y. Civ. Proc. 198.

39. Jackson *v.* Longwell, 63 Kan. 93, 64 Pac. 991; Gano *v.* Martin, 10 Kan. App. 384, 61 Pac. 460; Gay *v.* Hassom, 64 Vt. 495, 24 Atl. 715. See also Cooper *v.* Haythorn, 66 Kan. 91, 71 Pac. 277.

40. Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 [*affirming* 28 Fed. 346]. *Contra*, Curtiss *v.* Perry, 126 Mich. 600, 85 N. W. 1131.

In New York it was held where a wife mortgaged her land to secure a bond given for her husband's debt by a third person, that payments by the husband on the bond did not suspend the statute as to the mortgage. Fowler *v.* Wood, 78 Hun 304, 28 N. Y. Suppl. 976.

41. Skinner *v.* Moore, 64 Kan. 360, 67 Pac. 827, 91 Am. St. Rep. 244; Roberts *v.* Roberts, 10 N. D. 531, 88 N. W. 289.

42. Fuller *v.* McMahan, 64 Kan. 441, 67 Pac. 828.

rights,[43] payments made by him will suspend the statute as to her. But where the mortgage is on community property payments by the husband will not toll the statute as to the wife.[44] A part payment by the husband on joint notes of himself and wife will not suspend the statute as to her.[45] Nor will payments by a wife on her husband's debt made without express authority toll the statute as to him.[46]

f. Joint Obligor. The courts are not in harmony as to the effect of a partial payment made by one of several joint debtors. The weight of authority, however, supports the rule that such payment made without the acquiescence, consent, or ratification of the other joint debtor will not operate to suspend the running of the statute of limitations, as to him,[47] and the same rule applies where the contract of indebtedness is joint and several,[48] especially where he did not sign the

43. Clift *v.* Williams, 51 S. W. 821, 21 Ky. L. Rep. 551. See also Brown *v.* Puller, (Ark. 1905) 88 S. W. 838.

44. Stubblefield *v.* McAuliff, 20 Wash. 442, 55 Pac. 637.

45. Wilner *v.* Gaither, 68 Md. 342, 12 Atl. 8, 253.

46. Butler *v.* Price, 115 Mass. 578; Butler *v.* Price, 110 Mass. 97. Robertson *v.* McKeigan, 29 Nova Scotia 315.

In Michigan it has been held that payments made by the wife on a note executed by her and her husband jointly and secured by a mortgage on her land will not operate to suspend the statute of limitations as to the husband. Littlefield *v.* Dingwall, 1 Mich. 223, 39 N. W. 38.

47. *Alabama.*— Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693; Myatts *v.* Bell, 41 Ala. 222; Lowther *v.* Chappell, 8 Ala. 353, 42 Am. Dec. 364.

Colorado.— Coulter *v.* Clear Creek County Bank, 18 Colo. App. 444, 72 Pac. 602. See also Torbit *v.* Heath, 11 Colo. App. 492, 53 Pac. 615.

Illinois.— Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. 197; Boynton *v.* Spafford, 162 Ill. 113, 44 N. E. 379, 53 Am. St. Rep. 274 [*affirming* 61 Ill. App. 384]; Kallenbach *v.* Dickinson, 100 Ill. 427, 39 Am. Rep. 47; McDonald *v.* Weidmer, 103 Ill. App. 390; Granville *v.* Young, 85 Ill. App. 167; Robinson *v.* Briscoe, 55 Ill. App. 131.

Kansas.— Steele *v.* Souder, 20 Kan. 39; Root *v.* Bradley, 1 Kan. 437; Wellington Nat. Bank *v.* Thomson, 9 Kan. App. 667, 59 Pac. 178.

Maine.— McKenney *v.* Bowie, 94 Me. 397, 47 Atl. 918.

Massachusetts.— Balcom *v.* Richards, 6 Cush. 360; Peirce *v.* Tobey, 5 Metc. 168.

Michigan.— Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145; Mainzinger *v.* Mohr, 41 Mich. 685, 3 N. W. 183; Rogers *v.* Anderson, 40 Mich. 290.

Montana.— Oleson *v.* Wilson, 20 Mont. 544, 52 Pac. 372, 63 Am. St. Rep. 639; Miles City First Nat. Bank *v.* Bullard, 20 Mont. 118, 49 Pac. 658.

New Hampshire.— Whipple *v.* Stevens, 22 N. H. 219; Exeter Bank *v.* Sullivan, 6 N. H. 124.

New York.— Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; McMullen *v.* Rafferty, 89 N. Y. 456; Winchell *v.* Hicks, 18 N. Y. 558; Martin *v.* Hyde, 19 N. Y. App. Div. 490, 46 N. Y. Suppl. 613; Bender *v.* Blessing, 82 Hun 320, 31 N. Y. Suppl. 481; Hulbert *v.* Nichol, 20 Hun 454.

Ohio.— Keel *v.* Rudisell, 13 Ohio Cir. Ct. 199, 7 Ohio Cir. Dec. 464.

Pennsylvania.— Lazarus *v.* Fuller, 89 Pa. St. 331; Clark *v.* Burn, 86 Pa. St. 502; Bush *v.* Stowell, 71 Pa. St. 208, 10 Am. Rep. 694; Coleman *v.* Fobes, 22 Pa. St. 156, 60 Am. Dec. 75 [*overruling* Zent *v.* Heart, 8 Pa. St. 337]; Bixler *v.* Billet, 14 York Leg. Rec. 20.

Vermont.— Bailey *v.* Corliss, 51 Vt. 366 (prior to Gen. St. c. 63, § 23, the rule was otherwise); Wilson *v.* Green, 25 Vt. 450, 60 Am. Dec. 279; Wheelock *v.* Doolittle, 18 Vt. 440, 46 Am. Dec. 163; Joslyn *v.* Smith, 13 Vt. 353.

Washington.— Old Dominion Mining, etc., & C. Co. *v.* P. A. Daggett Co., 38 Wash. 675, 80 Pac. 839; Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

Canada.— Cowing *v.* Vincent, 29 U. C. Q. B. 427.

See 33 Cent. Dig. tit. "Limitation of Actions," § 624.

48. *Indiana.*— Bottles *v.* Miller, 112 Ind. 584, 14 N. E. 728; Koontz *v.* Hammond, 21 Ind. App. 76, 51 N. E. 506.

Minnesota.— Willoughby *v.* Irish, 35 Minn. 63, 27 N. W. 379, 59 Am. Rep. 297.

New York.— Shoemaker *v.* Benedict, 11 N. Y. 176, 62 Am. Dec. 95 note; Dunham *v.* Dodge, 10 Barb. 566; Bogart *v.* Vermilya, 10 Barb. 32, 3 Code Rep. 142.

Ohio.— Hance *v.* Hair, 25 Ohio St. 349.

South Carolina.—See Hall *v.* Woodward, 26 S. C. 557, 2 S. E. 401.

Wyoming.—Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 66 Am. St. Rep. 17, 25 L. R. A. 608.

United States.— Bergman *v.* Bly, 66 Fed. 40, 13 C. C. A. 319.

Canada.—Price *v.* Whiting, 19 N. Brunsw. 620.

See 33 Cent. Dig. tit. "Limitation of Actions," § 624.

Contra.— Burgoon *v.* Bixler, 55 Md. 384, 39 Am. Rep. 417; Schindel *v.* Gates, 46 Md. 604, 24 Am. Rep. 526; Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546, as to payment before the bar has attached.

evidence of debt but his promise was collateral.[49] Nor will it revive a barred debt as to the joint debtor,[50] even where the payment is made through him, the creditor being informed of the source of payment.[51] But where the payment is made by the one to whom the creditor has been referred for payment by the other,[52] or upon request of,[53] by direction of,[54] or under an express agreement with the other,[55] or with the knowledge and consent or subsequent ratification of the other,[56] it will toll the statute as to the other. But the mere presence of the co-debtor at the time of payment will not create a presumption of ratification and consent, and cause the payment to become effectual as to him,[57] unless he actively participates in making the payment and having it properly credited.[58] Nor will his subsequent verbal promise to pay the balance have such effect.[59] Payment after severance of the joint liability by the death of one of the joint debtors will not prevent the statute from running in favor of the representative of the decedent.[60] In some jurisdictions views contrary to those heretofore set forth in this section prevail, and a payment made by one before the bar is complete is regarded as the act of and suspends the running of the statute as to all,[61] provided the payment is made in good faith.[62] But in some of those jurisdictions a payment made after the bar is ineffectual to revive the debt, except as to the one making it;[63] and a payment made after the severance of the joint liability by the death of one of the

49. Underwood *v.* Patrick, 94 Fed. 468, 36 C. C. A. 330.

50. Kallenbach *v.* Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Bogert *v.* Vermilya, 10 Barb. (N. Y.) 32, 3 Code Rep. 142; Smith *v.* Caldwell, 15 Rich. (S. C.) 365.

51. Gray *v.* Pierson, 7 Ida. 540, 64 Pac. 233; Bailey *v.* Corliss, 51 Vt. 366.

52. Winchell *v.* Hicks, 18 N. Y. 558 [*affirming* 21 Barb. 448]; Coleman *v.* Ward, 85 Wis. 328, 55 N. W. 695. But see Smith *v.* Carpenter, 48 N. Y. App. Div. 350, 63 N. Y. Suppl. 47, h lding that payment by the widow of a deceased co-debtor to whom the payee was referred by the surviving debtor will not affect the statute as to the latter.

53. Pitts *v.* Hunt, 6 Lans. (N. Y.) 146; Munro *v.* Potter, 34 Barb. (N. Y.) 358.

54. Haight *v.* Avery, 16 Hun (N. Y.) 252.

55. Lawton *v.* Adams, 13 Ohio Cir. Ct. 233, 7 Ohio Cir. Dec. 129; Delavan Nat. Bank *v.* Cotton, 53 Wis. 31, 9 N. W. 926.

56. McDonald *v.* Weidmer, 103 Ill. App. 390; Granville *v.* Young, 85 Ill. App. 167.

57. Quimby *v.* Putnam, 28 Me. 419.

58. Mainzinger *v.* Mohr, 41 Mich. 685, 3 N. W. 183.

59. Pfenninger *v.* Kokesch, 68 Minn. 81, 70 N. W. 867.

60. Lane *v.* Doty, 4 Barb. (N. Y.) 530.

61. *Arkansas.*— Hicks *v.* Lusk, 19 Ark. 692.

Georgia.— Tillinghast *v.* Nourse, 14 Ga. 641.

Missouri.— Block *v.* Dorman, 51 Mo. 31; Craig *v.* Callaway County Court, 12 Mo. 94; Regan *v.* Williams, 88 Mo. App. 577; Kemble *v.* Logan, 79 Mo. App. 253.

New Jersey.—Corlies *v.* Fleming, 30 N. J. L. 349.

North Carolina.— Moore *v.* Beaman, 111 N. C. 328, 16 S. E. 177; Davis *v.* Coleman, 29 N. C. 424.

Oregon.— Partlow *v.* Singer, 2 Oreg. 307.

Rhode Island.— Woonsocket Sav. Inst. *v.* Ballou, 16 R. I. 35, 16 Atl. 144, 1 L. R. A. 555.

South Carolina.— Smith *v.* Caldwell, 15 Rich. 365.

England.— Brandram *v.* Wharton, 1 B. & Ald. 463, 19 Rev. Rep. 354, 357 (where Lord Ellenborough adheres to but severely criticizes the rule); Pease *v.* Hirst, 10 B. & C. 122, 8 L. J. K. B. O. S. 94, 5 M. & R. 88, 21 E. C. L. 61; Burleigh *v.* Stott, 8 B. & C. 36, 6 L. J. K. B. O. S. 232, 2 M. & R. 93, 15 E. C. L. 27; Wyatt *v.* Hodson, 8 Bing. 309, 1 L. J. C. P. 93, 1 Moore & S. 442, 21 E. C. L. 555; Perham *v.* Raynal, 2 Bing. 306, 3 L. J. C. P. O. S. 271, 9 Moore C. P. 566, 9 E. C. L. 591; Chippendale *v.* Thurston, 4 C. & P. 98, M. & M. 411, 19 E. C. L. 425; Whitcomb *v.* Whiting, 1 Dougl. (3d ed.) 652; Dowling *v.* Ford, 12 L. J. Exch. 342, 11 M. & W. 329. But the rule at common law did not apply where the co-debtor was dead at the time of payment or where the bar was complete. Atkins *v.* Tredgold, 2 B. & C. 23, 3 D. & R. 200, 1 L. J. K. B. O. S. 228, 26 Rev. Rep. 254, 9 E. C. L. 20. *Contra*, Channell *v.* Ditchburn, 3 Jur. 1107, 9 L. J. Exch. 1, 5 M. & W. 494.

See 33 Cent. Dig. tit. "Limitation of Actions," § 624.

62. Tillinghast *v.* Nourse, 14 Ga. 641.

63. Borden *v.* Peay, 20 Ark. 293; Mason *v.* Howell, 14 Ark. 199; Biscoe *v.* James, 10 Ark. 163; Biscoe *v.* Jenkins, 10 Ark. 108; Miller *v.* Miller, MacArthur & M. (D. C.) 109, 48 Am. Rep. 738; Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Parker *v.* Butterworth, 46 N. J. L. 244, 50 Am. Rep. 407. In Wood *v.* Barber, 90 N. C. 76, it was held that a payment on a barred draft by one of the makers revived it against all of the makers, but not the accepters who had transferred it. This decision is based upon a statute providing that a payment of a

co-debtors will not revive the debt against the deceased debtor's representatives or heirs.[64] However, if there survive more than one coöbligor, the liability of such survivors remains joint, and payment by either suspends the statute as to all of them.[65]

g. Mortgagor or Those Claiming Under Him. A payment by a mortgagor on his mortgage debt will interrupt the statute as to his subsequent vendee of the mortgaged land;[66] and where the mortgagee enters into possession of the mortgaged property his application of the rents to the debt will constitute such payment as will interrupt the statute.[67] While in some jurisdictions it is held that purchasers with notice, actual or constructive, of mortgaged lands, are subject to the operation of payments made by the mortgagor after conveyance and before the bar is complete,[68] which rule includes subsequent mortgagees under like circumstances;[69] in others it is the rule that after conveyance the mortgagor is divested of all power to do any act which will suspend the statute as to his grantee,[70] or revive the debt against him when the bar is complete,[71] especially where the grantee has not assumed the mortgage debt.[72] After sale of the mortgaged premises under execution against the mortgagor, a payment by him on the debt will not suspend the statute as to the purchaser at the execution sale, although the right of redemption from the sale has not expired.[73] But a payment by the purchaser at the sale will suspend the statute as to him and the mortgagor.[74] The application to the mortgage debt of the proceeds of a foreclosure sale made after a conveyance of the lands will not operate to interrupt the statute running in favor of the mortgagor;[75] and where the foreclosure is had after the mortgagor's death, such application of the proceeds will not revive the balance of the debt against his estate or his devisees.[76] Payments on a mortgaged debt made by one of the joint makers,[77] although the person making it is the surviving wife who joined her husband in the note and mortgage which covered the homestead,[78] or payment by the administrator of a deceased co-maker will keep the mortgage alive as to the other joint maker.[79] Where the mortgage is made by one joint debtor to secure a joint note payments by the other will keep the mortgage alive, although the debt may be barred as to the mortgagor.[80] There is a conflict in the authorities as to the effect of payments made by a grantee, immediate or

joint debtor revives the debt as to all debtors of his class.

64. Root *v.* Bradley, 1 Kan. 437; Disborough *v.* Biddleman, 21 N. J. L. 677 [*affirming* 20 N. J. L. 275].

65. Corlies *v.* Fleming, 30 N. J. L. 349.

66. Clift *v.* Williams, 105 Ky. 559, 49 S. W. 328, 20 Ky. L. Rep. 1261, 51 S. W. 821, 21 Ky. L. Rep. 551; Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130; Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501.

67. Brocklehurst *v.* Jessop, 7 Sim. 438, 8 Eng. Ch. 438, 58 Eng. Reprint 902.

68. Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. 268; Murdock *v.* Waterman, 145 N. Y. 55, 39 N. E. 829, 27 L. R. A. 418 [*reversing* 71 Hun 320, 25 N. Y. Suppl. 120]; New York L. Ins., etc., Co. *v.* Covert, 3 Abb. Dec. (N. Y.) 350, 3 Transcr. App. 24, 6 Abb. Pr. N. S. 154; Heyer *v.* Pruyn, 8 Paige (N. Y.) 465, 34 Am. Dec. 355; Kendall *v.* Tracy, 64 Vt. 522, 24 Atl. 1118; Barrett *v.* Prentiss, 57 Vt. 297; Hughes *v.* Edwards, 9 Wheat. (U. S.) 489, 6 L. ed. 142.

69. Buchanan *v.* Lloyd, 88 Md. 642, 41 Atl. 1075.

70. *California.*— Lord *v.* Morris, 18 Cal. 482.

Illinois.— Emory *v.* Krigham, 88 Ill. 482.

Kentucky.— Clift *v.* Williams, 105 Ky. 559, 49 S. W. 328, 20 Ky. L. Rep. 1261, 51 S. W. 821, 21 Ky. L. Rep. 551.

Washington.— Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

England.— Newbould *v.* Smith, 14 App. Cas. 423, 61 L. T. Rep. N. S. 814 [*affirming* 33 Ch. D. 127, 55 L. J. Ch. 788, 34 Wkly. Rep. 690].

71. Hubbard *v.* Missouri L. Ins. Co., 25 Kan. 172; Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765.

72. Damon *v.* Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927.

73. Raymond *v.* Bales, 26 Wash. 493, 67 Pac. 269.

74. Collier *v.* His Creditors, 12 Rob. (La.) 398.

75. Campbell *v.* Baldwin, 130 Mass. 199.

76. Gibson *v.* Lowndes, 28 S. C. 285, 6 S. E. 727.

77. Bailie *v.* Irwin, [1897] 2 Ir. 614.

78. Perry *v.* Horack, 63 Kan. 88, 64 Pac. 990, 88 Am. St. Rep. 225.

79. Sutherlin *v.* Roberts, 4 Oreg. 378.

80. Cleveland *v.* Harrison, 15 Wis. 670.

remote, of mortgaged lands. In some courts the rule prevails that payments made by a grantee who has assumed the debt, or who takes with actual or constructive notice of the mortgage, will suspend the running of the statute as to the mortgagor,[81] or any other grantees who have likewise assumed the debt,[82] or those taking with notice of the mortgage;[83] and payments of interest made by them or their grantees will operate to keep the mortgage alive.[84] Payments by a grantee who has assumed the mortgaged debt interrupt the statute as to him,[85] and those claiming under him;[86] although the mortgage is apparently barred.[87] In other jurisdictions the rule is that payments made by a grantee who takes subject to the mortgage will not suspend the statute as to the mortgagor,[88] or his grantee of other parcels of the mortgaged land.[89] A payment by a grantee made in order to redeem the land from an execution sale will not operate to interrupt the statute as to the mortgagor.[90] A grantee who does not assume the mortgage debt and who conveys the property by warranty deed has no such interest thereafter in the property as to make payments by him on the mortgage debt operate to interrupt the statute as to the mortgagor or the owners of the land, notwithstanding his liability on his warranty.[91] A payment by a vendee of land on a purchase-money note which constitutes a lien on the land made after conveyance by him will not interrupt the running of the statute in favor of his vendee;[92] but those made before conveyance will have that effect.[93] A payment made by any grantee of land subject to a vendor's lien for purchase-money which he assumes to discharge interrupts the statute as to the original vendee and other grantees who likewise assume the debt.[94]

h. Partners. The conflict of the authorities upon the effect in general of a partial payment made by one of several joint debtors characterizes the decisions involving the relation of partners.[95] Thus in the absence of statute it is held that a payment made by one partner, after dissolution of the partnership, will start the running of the statute anew as to all of them;[96] and it seems that the old

81. *Kansas.*— Woodruff *v.* Albright, 10 Kan. App. 113, 62 Pac. 250. See also McLane *v.* Allison, 60 Kan. 441, 56 Pac. 747 [*affirming* 7 Kan. App. 263, 53 Pac. 781].

Louisiana.— Levy *v.* Pointe Coupee, Police Jury, 24 La. Ann. 292; Cockfield *v.* Farley, 21 La. Ann. 521.

New Jersey.— Biddle *v.* Pugh, 59 N. J. Eq. 480, 45 Atl. 626.

North Carolina.— Harper *v.* Edwards, 115 N. C. 246, 20 S. E. 392.

Vermont.— Hollister *v.* York, 59 Vt. 1, 9 Atl. 2.

England.— Forsyth *v.* Bristowe, 8 Exch. 716, 17 Jur. 675, 22 L. J. Exch. 255, 1 Wkly. Rep. 356.

See 33 Cent. Dig. tit. "Limitation of Actions," § 630.

82. Levy *v.* Pointe Coupee Police Jury, 24 La. Ann. 292; Biddle *v.* Pugh, 59 N. J. Eq. 480, 45 Atl. 626; Hollister *v.* York, 59 Vt. 1, 9 Atl. 2.

83. Colton *v.* Depew, 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650.

84. McLane *v.* Allison, 60 Kan. 441, 56 Pac. 747.

85. Harts *v.* Emery, 184 Ill. 560, 56 N. E. 865.

86. McGehee *v.* Blackwell, 28 Ark. 27.

87. Murray *v.* Emery, 187 Ill. 408, 58 N. E. 327 [*affirming* 85 Ill. App. 348].

88. *Connecticut.*— Old Alms-House Farm *v.* Smith, 52 Conn. 434.

Michigan.— Home L. Ins. Co. *v.* Elwell, 111 Mich. 689, 70 N. W. 334.

Missouri.— Regan *v.* Williams, 88 Mo. App. 577.

New York.— Boughton *v.* Harder, 46 N. Y. App. Div. 352, 61 N. Y. Suppl. 574.

Wisconsin.— Cottrell *v.* Shepherd, 86 Wis. 649, 57 N. W. 983, 39 Am. St. Rep. 919.

See 33 Cent. Dig. tit. "Limitation of Actions," § 630.

89. Pike *v.* Goodnow, 12 Allen (Mass.) 472; Mack *v.* Anderson, 165 N. Y. 529, 59 N. E. 289 [*reversing* 12 N. Y. App. Div. 624, 42 N. Y. Suppl. 1127].

90. Hanna *v.* Kasson, 26 Wash. 568, 67 Pac. 271.

91. Dundee Mortg., etc., Inv. Co. *v.* Homer, 30 Oreg. 558, 48 Pac. 175.

92. Kendall *v.* Clarke, 90 Ky. 178, 13 S. W. 583, 11 Ky. L. Rep. 980; Tate *v.* Hawkins, 81 Ky. 577, 50 Am. Rep. 181.

93. Cook *v.* Union Trust Co., 106 Ky. 803, 51 S. W. 600, 21 Ky. L. Rep. 454, 45 L. R. A. 212.

94. Blackburn University *v.* Weer, 21 Ill. App. 29.

95. Gates *v.* Fisk, 45 Mich. 522, 526, 8 N. W. 558, which sufficiently illustrates the impracticability of doing more than to arrange the cases in useful order, where Graves, J., says that it would be a bootless task to attempt their classification.

96. Walker *v.* Wait, 50 Vt. 668; Mix *v.*

English rule as to payment by one of joint contractors[97] is recognized even to the extent of reviving a debt against all of the partners by a payment by one[98] out of the partnership funds after the dissolution of the partnership.[99] But a statutory provision that payment by one joint contractor shall not stop the running of limitations in favor of another applies to partners, and under it the payment by one partner will not deprive another of the benefit of limitations,[1] after the dissolution of the partnership,[2] or, as sometimes qualified, will not stop the running of the statute if the partnership has been dissolved to the knowledge of the payee,[3] and will not revive the debt against a non-participating or non-consenting partner whether the payment is made before or after the dissolution of the partnership.[4] On the other hand, and not necessarily in conflict with the foregoing rulings, as to matters pertaining to the partnership business the act of one of the members of a firm is the act of all and the part payment of a partnership debt by one of the partners will have the same effect against the others as against the one who makes the payment;[5] and the same rule is applied to a payment thus made after dissolution of the partnership where the creditor has no notice of the dissolution, not only where the statutory provision prevails that a payment by one joint debtor shall not affect the running of limitations in favor of another;[6] but also independently of such provision and as a part of the law governing partnership relations in general,[7] although in the last class of cases a distinction is taken between the instance in which the bar is complete and that in which the statute has not run out when the payment is made. In the first case the payment after dissolution does not revive the debt as to other partners who are not parties to the payment; in the latter case the statute is tolled as to all the partners and the payment forms a new point from which limitations run anew;[8] and in this last case other authorities apply the rule that the statute is tolled as to all the partners, although it does not appear that the fact that the bar was not complete was controlling.[9] Other cases holding partners after a dissolu-

Shattuck, 50 Vt. 421, 28 Am. Rep. 511; Carlton *v.* Coffin, 28 Vt. 504. See also Fortune *v.* Hayes, 5 Rich. Eq. (S. C.) 112; Goddard *v.* Ingram, 3 Q. B. 839, 3 G. & D. 46, 6 Jur. 1060, 12 L. J. Q. B. 9, 43 E. C. L. 999.

97. Whitcomb *v.* Whiting, Dougl. (3d ed.) 652.

98. True *v.* Andrews, 35 Me. 183.

Note executed in individual capacities.— But where a note was executed by members of a firm in their individual capacities, and they are so sued, a partial payment by one cannot have the effect it might have had if the debt had been that of the firm. Wellman *v.* Southard, 30 Me. 425.

99. Mix *v.* Shattuck, 50 Vt. 421, 28 Am. Rep. 511.

1. True *v.* Andrews, 35 Me. 183; Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558.

Application with reference to time of enactment.— The statute applies to a note executed before the passage of the statute (Wellman *v.* Southard, 30 Me. 425), and to a payment made before the passage of the act (Peirce *v.* Tobey, 15 Metc. (Mass.) 168). *Compare* Jackson *v.* Woolley, 8 E. & B. 778, 4 Jur. N. S. 656, 27 L. J. Q. B. 448, 6 Wkly. Rep. 686, 92 E. C. L. 778.

2. Peirce *v.* Tobey, 5 Metc. (Mass.) 168; Watson *v.* Woodman, L. R. 20 Eq. 721, 45 L. J. Ch. 57, 24 Wkly. Rep. 47; Thompson *v.* Waithman, 3 Drew. 628 2 Jur. N. S. 1080, 26 L. J. Ch. 134, 5 Wkly. Rep. 30, 61 Eng. Reprint 1043. See also Brown *v.* Gordon, 16 Beav. 302, 22 L. J. Ch. 65, 1 Wkly. Rep. 2, 51 Eng. Reprint 795.

3. Harding *v.* Butler, 156 Mass. 34, 30 N. E. 168; Buxton *v.* Edwards, 134 Mass. 567; Sage *v.* Ensign, 2 Allen (Mass.) 245; Gates *v.* Fisk, 45 Mich. 522, 8 N. W. 558; *In re* Tucker, [1894] 3 Ch. 429, 63 L. J. Ch. 737, 71 L. T. Rep. N. S. 453, 12 Reports 141.

4. Blethen *v.* Murch, 80 Me. 313, 14 Atl. 208, no such distinction being made in the statute.

5. Harding *v.* Butler, 156 Mass. 34, 30 N. E. 168 (holding that the statute as to joint debtors does not apply to such case); Goodwin *v.* Parton, 41 L. T. Rep. N. S. 91. See also Walker *v.* Wait, 50 Vt. 668, independently of such statute.

6. See *supra*, notes 2, 3.

7. Davison *v.* Sherbourne, 57 Minn. 355, 59 N. W. 316, 47 Am. St. Rep. 618; Tappan *v.* Kimball, 30 N. H. 136; Forbes *v.* Garfield, 32 Hun (N. Y.) 389; Clement *v.* Clement, 69 Wis. 599, 35 N. W. 17, 2 Am. St. Rep. 760.

8. Burr *v.* Williams, 20 Ark. 171; Hicks *v.* Lusk, 19 Ark. 692; Biscoe *v.* Jenkins, 10 Ark. 108; Bissell *v.* Adams, 25 Conn. 299; McClurg *v.* Howard, 45 Mo. 365, 100 Am. Dec. 378; Harris *v.* Odeal, 39 Mo. App. 270. See also Newman *v.* McComas, 43 Md. 70; Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546.

9. McKee *v.* Covalt, 71 Kan. 772, 81 Pac. 475; Casebolt *v.* Ackerman, 46 N. J. L. 169;

tion to the same rule which is applied to other joint debtors maintain that one partner without authority from his former copartners cannot, by a payment made on a partnership liability before the statute has perfected a bar, affect the running of limitations in favor of the other partners,[10] unless the payment is made by a liquidating partner,[11] and the same effect is given to such payment whether it be made before or after the bar of the statute is complete;[12] and the rule would seem to apply *a fortiori* where the statute had already become a complete bar when the payment was made.[13] If a payment is made by one partner as the result of a composition of his liability to his creditors it is not available to suspend the statute as to the other partner.[14]

i. Surety, Indorser, and Guarantor. The statute is not interrupted as to the surety or indorser by any payment made by a principal.[15] A payment by a surety

Day *v.* Merritt, 38 N. J. L. 32, 20 Am. Rep. 362; Walton *v.* Robinson, 27 N. C. 341.

10. Myatts *v.* Bell, 41 Ala. 222; Graham *v.* Selover, 59 Barb. (N. Y.) 313; Payne *v.* Slate, 39 Barb. (N. Y.) 634 [*affirmed* in 29 N. Y. 146]; Dick *v.* Williams, 130 Pa. St. 41, 18 Atl. 615. See also Sigler *v.* Platt, 16 Mich. 206.

Payment by authority.— But where the payments are made with the consent and by the authority of the other partner he is bound thereby. Burnett *v.* Snyder, 45 N. Y. Super. Ct. 577.

11. Campbell *v.* Floyd, 153 Pa. St. 84, 25 Atl. 1033; Kauffman *v.* Fisher, 3 Grant (Pa.) 302; Houser *v.* Irvine, 3 Watts & S. (Pa.) 345, 38 Am. Dec. 768. But only a liquidating partner can bind his copartners by partial payment. Robinson *v.* Floyd, 159 Pa. St. 165, 28 Atl. 258; Dick *v.* Williams, 130 Pa. St. 41, 18 Atl. 615.

In Ohio not even payments by a liquidating partner will revive a debt against his copartner where there is no express authority to bind him, although the debt was created and the partnership was carried on in a state where the liquidating partner had authority to bind the copartner. Kerper *v.* Wood, 48 Ohio St. 613, 29 N. E. 501, 15 L. R. A. 656.

In Louisiana payments by surviving partners will not operate to suspend the statute as to the widow of a deceased partner who accepts her husband's succession without inventory and thereby becomes bound for one half of his debts. Henderson *v.* Wadsworth, 115 U. S. 264, 6 S. Ct. 40, 29 L. ed. 377.

12. Graham *v.* Selover, 59 Barb. (N. Y.) 313; Payne *v.* Slate, 39 Barb. (N. Y.) 634 [*affirmed* in 29 N. Y. 146].

13. Terry *v.* Platt, 1 Pennew. (Del.) 185, 40 Atl. 243; Mayberry *v.* Willoughby, 5 Nebr. 368, 26 Am. Rep. 491; Hixon *v.* Rodbourn, 67 N. Y. App. Div. 424, 73 N. Y. Suppl. 779. A payment by the executors of one of two partners of a debt barred by limitation is voluntary and no part of it can be recovered back from the other party. Grimes *v.* Osterhoudt, 2 N. Y. Suppl. 436. *Compare* Thompson *v.* Waithman, 3 Drew. 628, 2 Jur. N. S. 1080, 26 L. J. Ch. 134, 5 Wkly. Rep. 30, 61 Eng. Reprint 1043.

14. Turner *v.* Ross, 1 R. I. 88, under a statute authorizing individual members of a dissolved partnership to make separate compositions for themselves. See also Sigler *v.* Platt, 16 Mich. 206.

15. *Georgia.*— McBride *v.* Hunter, 64 Ga. 655; Dean *v.* Munroe, 32 Ga. 28; Hunter *v.* Robertson, 30 Ga. 479.

Illinois.— Kallenbach *v.* Dickinson, 100 Ill. 427, 39 Am. Rep. 47; Deaton *v.* Deaton, 109 Ill. App. 7; Davis *v.* Mann, 43 Ill. App. 301.

Indiana.— Mozingo *v.* Ross, 150 Ind. 688, 50 N. E. 867, 65 Am. St. Rep. 387, 41 L. R. A. 612; Koontz *v.* Hammond, 21 Ind. App. 76, 51 N. E. 506; Dougherty *v.* Hoffstetter, 12 Ind. App. 699, 40 N. E. 278; Meitzler *v.* Todd, 12 Ind. App. 381, 39 N. E. 1046, 54 Am. St. Rep. 531; Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825.

Kansas.— McMillan *v.* Leeds, (1897) 49 Pac. 159; Steele *v.* Souder, 20 Kan. 39.

Maine.— Prior to the statute the promise of one bound all. Lincoln Academy *v.* Newhall, 38 Me. 179; Colburn *v.* Averill, 30 Me. 310, 50 Am. Rep. 630; Patch *v.* King, 29 Me. 448; Dinsmore *v.* Dinsmore, 21 Me. 433.

Massachusetts.— Faulkner *v.* Bailey, 123 Mass. 588. Prior to the statute, the rule was contrary. Sigourney *v.* Drury, 14 Pick. 387; Frye *v.* Barker, 4 Pick. 382; Hunt *v.* Bridgman, 2 Pick. 581, 13 Am. Dec. 458.

New Hampshire.— Buckminster *v.* Wright, 59 N. H. 153.

New York.— Shutts *v.* Fingar, 100 N. Y. 539, 3 N. E. 588, 53 Am. Rep. 231; Gould *v.* Cayuga County Nat. Bank, 86 N. Y. 75; *Ex p.* Petrie, 82 Hun 62, 31 N. Y. Suppl. 65 [*affirming* 4 Misc. 343, 24 N. Y. Suppl. 317].

Pennsylvania.— Klock *v.* Bressler, 2 Leg. Rec. 191.

South Carolina.—Walters *v.* Kraft, 23 S. C. 578, 55 Am. Rep. 44; Goudy *v.* Gillam, 6 Rich. 28. But see Dickson *v.* Gourdin, 26 S. C. 391, 2 S. E. 303, holding that in case of a bond a different rule prevails and payment by the principal suspends the statute as to the surety.

Vermont.— Arbuckle *v.* Templeton, 65 Vt. 205, 35 Atl. 1095.

England.— Cockrill *v.* Sparkes, 1 H. & C. 699, 9 Jur. N. S. 307, 32 L. J. Exch. 118, 7 L. T. Rep. N. S. 752, 11 Wkly. Rep. 428. But see *In re* Frisby, 43 Ch. D. 106, 59 L. J. Ch. 94, 61 L. T. Rep. N. S. 632, 38 Wkly.

or indorser will not prevent the running of the statute as to the principal[16] or another surety,[17] not even where the surety as administrator of the principal makes the payment,[18] or the payment was made as agent of the principal, which fact was undisclosed,[19] or the money was the proceeds of collateral left with the surety by the principal as indemnity;[20] and it is immaterial that the creditor was uninformed of the source of the payment,[21] particularly where the bar is complete at the time of the payment.[22] A payment by an indorser of a note, who before maturity waives protest and notice, tolls the statute as to him, although the note may be barred as to his principal.[23] Payment by a surety will toll the statute as to him,[24] although the bar is complete as to the principal.[25] Payments

Rep. 65; *In re* Powers, 30 Ch. D. 291, 53 L. T. Rep. N. S. 647.

See 33 Cent. Dig. tit. "Limitation of Actions," § 625.

Contra.— Schindel *v.* Gates, 46 Md. 604, 24 Am. Rep. 526; Ellicott *v.* Nichols, 7 Gill (Md.) 85, 48 Am. Dec. 546; Whitaker *v.* Rice, 9 Minn. 13, 86 Am. Rep. 78. *Compare* Perkins *v.* Barstow, 6 R. I. 505.

In Missouri a payment by the principal interrupts the running of the statute as to sureties (Lawrence County *v.* Dunkle, 35 Mo. 395; Craig *v.* Callaway County Ct., 12 Mo. 94), but not as to indorsers (Maddox *v.* Duncan, 143 Mo. 613, 55 S. W. 688, 65 Am. St. Rep. 678, 41 L. R. A. 581 [*reversing* 62 Mo. App. 474]; Monroe *v.* Herrington, 110 Mo. App. 509, 85 S. W. 1002). "The position of indorser is so at variance with that of surety and co-obligor that the adjudications to the effect that payment made on a note by one joint maker or co-obligor within the statutory period takes it out of the statute of limitations as to the other makers or co-obligors, have no bearing upon this case. Nor does the fact that under the statute the maker and indorser may be sued jointly change the relation of the parties." Maddox *v.* Duncan, 143 Mo. 613, 622, 45 S. W. 688, 65 Am. St. Rep. 678, 41 L. R. A. 581.

In North Carolina, by reason of a statute, a payment by one debtor interrupts the running of the statute of limitations as to all other debtors in the same transaction who are of the same class with the one making payment. Garrett *v.* Reeves, 125 N. C. 529, 34 S. E. 636; Moore *v.* Carr, 123 N. C. 425, 31 S. E. 832; Copeland *v.* Collins, 122 N. C. 619, 30 S. E. 315; Moore *v.* Goodwin, 109 N. C. 218, 13 S. E. 772; Green *v.* Greensboro Female College, 83 N. C. 449, 35 Am. Rep. 579. But a barred debt is not revived against a surety or indorser by a payment made by the principal. Garrett *v.* Reeves, *supra*. Nor will a payment by one surety revive it against other sureties. Long *v.* Miller, 93 N. C. 227. Nor will payment by the maker of a note interrupt the statute as to the payee who has indorsed it, they being debtors of a different class. Le Duc *v.* Butler, 112 N. C. 458, 17 S. E. 428.

Where the surety adopts the payment as his own and approves a receipt showing that he furnished the money he is bound. Utica First Nat. Bank *v.* Ballou, 49 N. Y. 155 [*affirming* 2 Lans. 120]; *In re* Petrie, 82 Hun (N. Y.) 62, 31 N. Y. Suppl. 65 [*affirming* 4 Misc. 343, 24 N. Y. Suppl. 317]. See also Munro *v.* Potter, 34 Barb. (N. Y.) 358.

Where the sureties refer the creditor to the principal debtor who makes the payment it will suspend the statute as to all those making the reference. Winchell *v.* Hicks, 18 N. Y. 558 [*affirming* 21 Barb. 448]. But see Littlefield *v.* Littlefield, 91 N. Y. 203, 43 Am. Rep. 663. Payment by the widow of the principal to whom the surety referred the creditor will not suspend the statute as to the surety. Smith *v.* Carpenter, 48 N. Y. App. Div. 350, 63 N. Y. Suppl. 47.

Where payment is made after the death of a surety it will not suspend the statute running in favor of his representative. Lane *v.* Doty, 4 Barb. (N. Y.) 530.

16. *Louisiana.*— Voorhies' Succession, 21 La. Ann. 659.

Mississippi.— Bibb *v.* Peyton, 11 Sm. & M. 275.

New York.— Eltinge *v.* Hull, 2 Dem. Surr. 562.

Pennsylvania.— Coleman *v.* Fobes, 22 Pa. St. 156, 60 Am. Dec. 75 [*overruling* Zent *v.* Heart, 8 Pa. St. 337].

England.— McFatridge *v.* Hunter, 12 Nova Scotia 289. See also *In re* Seager, 3 Jur. N. S. 481, 26 L. J. Ch. 809, 5 Wkly. Rep. 548.

See 33 Cent. Dig. tit. "Limitation of Actions," § 625.

In North Carolina a payment by a surety suspends the statute as to principal and other sureties (State Nat. Bank *v.* Harris, 96 N. C. 118, 1 S. E. 459), and in Missouri the same rule prevails (State *v.* Finn, 98 Mo. 532, 11 S. W. 994, 14 Am. St. Rep. 654).

17. Probate Judge *v.* Stevenson, 55 Mich. 320, 21 N. W. 348; Exeter Bank *v.* Sullivan, 6 N. H. 124. Payment by a surety after the statute of limitations would have run but for the fact of a judgment in a suit begun before may be availed of against the co-surety. Glasscock *v.* Hamilton, 62 Tex. 143.

18. Root *v.* Bradley, 1 Kan. 437.

19. Holmes *v.* Durell, 51 Me. 201.

20. Holmes *v.* Durell, 51 Me. 201; Lang *v.* Gage, 65 N. H. 173, 18 Atl. 795.

21. Lang *v.* Gage, 65 N. H. 173, 18 Atl. 795.

22. Dougherty *v.* Hoffstetter, 12 Ind. App. 699, 40 N. E. 278.

23. Union Nat. Bank *v.* Lee, 33 La. Ann. 301.

24. Long *v.* Miller, 93 N. C. 233.

25. Union Nat. Bank *v.* Lee, 33 La. Ann. 301.

by a principal debtor on a debt, the payment of which another has guaranteed for a valuable consideration, will not suspend the statute as to the liability on the guaranty,[26] and payment by an indorser of a note will not suspend the statute as to a guarantor thereof.[27] Participation in a payment made by the principal will not be implied from letters of the surety to him urging payment;[28] but where the surety is present and participates in making the payment which is actually made by the principal and with the latter's money, the statute is suspended as to him in the absence of notice to the creditor that it is not a joint payment,[29] and he will be bound where he procures payment to be made out of the funds of the principal.[30] However, under such circumstances, the effect of the payment on the surety's rights is dependent on his intent.[31]

6. To Whom Made. The general rule is that a part payment in order to effect an interruption of the statute or a revival of the debt must be made to the creditor or someone authorized to act on his behalf.[32] It is tolled by a payment to one holding the debt for collection;[33] to the known assignee of a note;[34] to a third person with the understanding that it shall be paid to the creditor on the debtor's debt;[35] to the next of kin of a deceased creditor[36] or to his widow,[37] especially where she is subsequently appointed administratrix[38] or where her act is ratified by the administrator thereafter appointed;[39] or to one who subsequently becomes executrix of the will of the creditor.[40] Payment to the payee of a note tolls the statute in favor of his subsequent indorsee.[41] And payments to a mortgagee are available in favor of a mortgagor who made the mortgage as security for a loan which went to the party making the payments.[42] If the debtor by arrangement with his creditor makes payments to a creditor of the latter, they will operate to keep his debt alive.[43] Payment by a vendee of mortgaged land, made on a mortgage assumed by him as part of the consideration, operates to toll the statute in favor of the mortgagee and the vendor,[44] and the latter may recover on the purchase-money demand, although the mortgage may be void.[45] Payment to the original mortgagee who has parted with his title to the mortgage is not effectual to toll the statute.[46]

7. Operation and Effect — a. When Made After Bar. There is a conflict of authorities as to the effect of part payment after the bar is complete, some courts

26. Furst *v.* Clinton County Mut. Sav., etc., Assoc., 128 Pa. St. 183, 18 Atl. 341. *Contra*, Hooper *v.* Hooper, 81 Md. 155, 31 Atl. 508, 48 Am. St. Rep. 496.

27. Corbyn *v.* Brokmeyer, 84 Mo. App. 649.

28. Borden *v.* Fletcher, 131 Mich. 220, 91 N. W. 145.

29. Mainzinger *v.* Mohr, 41 Mich. 685, 3 N. W. 183; Whipple *v.* Stevens, 22 N. H. 219; Glick *v.* Crist, 37 Ohio St. 388.

30. Green *v.* Morris, 58 Vt. 35, 4 Atl. 561; McConnell *v.* Merrill, 53 Vt. 149, 38 Am. Rep. 663.

31. Green *v.* Morris, 58 Vt. 35, 4 Atl. 561.

32. Kisler *v.* Sanders, 40 Ind. 78; Wesner *v.* Stein, 97 Pa. St. 322.

A payment by way of compromise to one of several claimants to a charge on real estate will operate to take the claims of all without the statute of limitations. Young *v.* Waterpark, 8 L. J. Ch. 214. But see Ashlin *v.* Lee, 44 L. J. Ch. 174, 31 L. T. Rep. N. S. 721, 23 Wkly. Rep. 287 [*affirmed* in 44 L. J. Ch. 376, 32 L. T. Rep. N. S. 348, 23 Wkly. Rep. 458], holding that when two separate sums are secured by one bond a payment in respect of one sum does not prevent the statute running in respect of the other.

33. Warnock *v.* Itawis, 38 Wash. 144, 80 Pac. 297.

34. McBrayer *v.* Mills, 62 S. C. 36, 39 S. E. 788.

35. Carroll *v.* Forsyth, 69 Ill. 127. *Contra*, Taylor *v.* Hendrie, 8 Nev. 243.

36. Hubbard *v.* Clark, (N. J. Ch. 1886) 7 Atl. 26.

37. Hubbard *v.* Clark, (N. J. Ch. 1886) 7 Atl. 26; Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831.

38. Townsend *v.* Ingersoll, 12 Abb. Pr. N. S. (N. Y.) 354, 43 How. Pr. 276. But see Kisler *v.* Sanders, 40 Ind. 78.

39. Haines *v.* Watts, 53 N. J. L. 455, 21 Atl. 1032.

40. Conrad *v.* Archer, 7 N. Y. St. 646.

41. Howe *v.* Thompson, 11 Me. 152.

42. Matter of Strickland, 5 N. Y. Suppl. 854, 2 Connoly Surr. 10.

43. Loftus *v.* Swift, 2 Sch. & Lef. 642; Jones *v.* Rhind, 17 Wkly. Rep. 1091.

44. Cucullu *v.* Hernandez, 103 U. S. 105, 26 L. ed. 322.

45. Tuttle *v.* Armstead, 55 Conn. 175, 22 Atl. 677.

46. Investment Securities Co. *v.* Bergthold, 60 Kan. 813, 58 Pac. 469, under rule as to payment to unauthorized stranger.

holding that it revives the balance of the debt,[47] while others hold that the acknowledgment extends only to the amount paid and there is no revival of the balance,[48] unless there is something more,[49] as a promise to pay the balance.[50]

b. Inoperative When Made on Sunday. A part payment made on Sunday will not take a debt out of the operation of the statute.[51]

c. When Made on Board or Wages. Where there is no express agreement as to the time of employment or measure of compensation, and the services extend over a number of years, the engagement will be taken as a general hiring, and the law will not imply an agreement that compensation shall be postponed until the termination of the employment so as to prevent the running of limitations until that time, but will rather consider the employment as yearly or from year to year, in the absence of any proof of usage, and a recovery will be limited to wages accruing within the statutory period prior to the determination of the employment unless there has been a payment within that period, and in this event a recovery is justified for the statutory period prior to the payment.[52] A similar rule applies to an account for board furnished through a number of years in the absence of a definite contract.[53] But where the claim of plaintiff, at any and all times for previous services, is an entire account for which he could maintain but a single action, and not a separate action for each year of services, a payment takes the entire balance out of the statute.[54] And where wages are payable periodically payment for one period will not interrupt the statute running against wages due at another,[55] or as to a claim for compensation for other and special services.[56]

d. As to Bringing Claim Within New Statute of Limitations. The part payment of a debt made after its maturity and after a new statute of limitations has become operative will bring the debt within the influence of the new statute.[57]

47. *Illinois.*— Carroll *v.* Forsyth, 69 Ill. 127.

Maine.— Pond *v.* French, 97 Me. 403, 54 Atl. 920 (where the payment was attended with a promise to pay the balance of an account); Sinnett *v.* Sinnett, 82 Me. 278, 19 Atl. 458.

Missouri.— Shannon *v.* Austin, 67 Mo. 485.

Nebraska.— Ebersole *v.* Omaha Nat. Bank, (1904) 99 N. W. 664.

New York.— Anthony *v.* Herzberg, 2 N. Y. City Ct. 165.

Vermont.— Mix *v.* Shattuck, 50 Vt. 421, 28 Am. Rep. 511; Hodge *v.* Manley, 25 Vt. 210, 60 Am. Dec. 253.

Wisconsin.— Marshall *v.* Holmes, 68 Wis. 555, 32 N. W. 685 (where there was also a promise to pay the balance); Engmann *v.* Immel, 59 Wis. 249, 18 N. W. 182.

48. Gover *v.* Chamberlain, 83 Va. 286, 5 S. E. 174. An expression of ability to pay a barred debt followed by partial payment does not operate to revive the debt. Slaughter's Succession, 108 La. 492, 32 So. 379, 58 L. R. A. 408.

If the several instalments of one debt are barred, payment on one will not revive the others. Brown *v.* Johnson, 20 La. Ann. 486.

Part payment by a surety after he is discharged by the operation of limitations is held not to revive his liability. Emmons *v.* Overton, 18 B. Mon. (Ky.) 643, distinguishing an implied promise by a debtor to pay his debt after it is barred, which will revive liability because based on a moral obligation to pay as a good consideration.

49. Kaufman *v.* Broughton, 31 Ohio St. 424, requiring it to be shown that a credit on an account was intended by the parties to be a payment on the account.

50. White *v.* Moore, 100 Ky. 358, 38 S. W. 505, 18 Ky. L. Rep. 790 (as to payment on a judgment); Romaine *v.* Corlies, 47 N. J. L. 108 (as to part payment on a running account).

51. Dennis *v.* Sharman, 31 Ga. 607; Clapp *v.* Hale, 112 Mass. 368, 17 Am. Rep. 111; Whitcher *v.* McConnell, 59 N. H. 470.

See 33 Cent. Dig. tit. "Limitation of Actions," § 646.

52. *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768.

53. Gilbert *v.* Comstock, 93 N. Y. 484.

54. Smith *v.* Velie, 60 N. Y. 106 [which is *distinguished* in *In re* Gardner, 103 N. Y. 533, 9 N. E. 306, 57 Am. Rep. 768, in that in the first case there were open mutual accounts between the parties and while that condition existed the statute was no bar where the last item was within six years]; Pursell *v.* Fry, 19 Hun (N. Y.) 595, 58 How. Pr. 317. Where a deceased person made payments in his lifetime and at the same time promised to pay the balance at a subsequent date, such facts relieve the claim from the operation of the statute. Neish *v.* Gannon, 198 Ill. 219, 64 N. E. 1000 [*affirming* 98 Ill. App. 248].

55. Dewar *v.* Beirne, McGloin (La.) 75.

56. Welsh *v.* New York, 33 Misc. (N. Y.) 377, 67 N. Y. Suppl. 465.

57. Drury *v.* Henderson, 143 Ill. 315, 32 N. E. 186 (upon the ground that the time

e. Debts Secured by Mortgage or Lien. Part payment of a note secured by mortgage,[58] or equitable mortgage,[59] or vendor's lien,[60] or mechanic's lien,[61] or statutory lien,[62] revives the security as well as the debt.

VIII. PLEADING.[63]

A. Anticipating Defense — 1. General Rules. At common law the complaint was not required to allege facts, in addition to the facts constituting the cause of action, to show that the action was commenced within the statutory period, notwithstanding the cause of action as alleged appeared to be barred by limitations.[64] This rule still prevails as to common-law actions in some of the states;[65] and it is held not only that such allegations are unnecessary, but also that they are improper,[66] and that plaintiff cannot avail himself of matter in avoidance of the statute of limitations, by pleading such matter in his complaint before the statute has been set up as a bar by plea.[67] A different rule prevailed in courts of

within which a suit shall be brought relates solely to the remedy and may be lengthened or shortened at the legislative will); Ziegler *v.* Tennery, 23 Ill. App. 133. It was held otherwise in several early cases in Arkansas. Mason *v.* Howell, 14 Ark. 199; State *v.* Terry, 12 Ark. 133; Durritt *v.* Trammell, 11 Ark. 183; Biscoe *v.* Stone, 11 Ark. 39.

58. *Illinois.*— Schifferstein *v.* Allison, 123 Ill. 662, 15 N. E. 275 [*affirming* 24 Ill. App. 294]; Murray *v.* Emery, 107 Ill. 408, 58 N. E. 327 [*affirming* 85 Ill. App. 348]; Kreitz *v.* Hamilton, 28 Ill. App. 566; Houston *v.* Workman, 28 Ill. App. 626. See also Drury *v.* Henderson, 143 Ill. 315, 32 N. E. 186 [*affirming* 36 Ill. App. 521].

Indiana.— Bottles *v.* Miller, 112 Ind. 584, 14 N. E. 728; McCallam *v.* Pleasants, 67 Ind. 542; MacMillan *v.* Clements, 33 Ind. App. 120, 70 N. E. 997.

Kansas.— McLane *v.* Allison, 60 Kan. 441, 56 Pac. 747 [*affirming* 7 Kan. App. 263, 53 Pac. 781]; Schmucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765.

Michigan.— Butler *v.* Hogadone, 45 Mich. 390, 8 N. W. 93.

Minnesota.— Kenaston *v.* Lorig, 81 Minn. 454, 84 N. W. 323; Carson *v.* Cochran, 52 Minn. 67, 53 N. W. 1130; Fisk *v.* Stewart, 24 Minn. 97.

Missouri.— Johnson *v.* Johnson, 81 Mo. 331.

North Carolina.— Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501.

Oregon.— Sutherlin *v.* Roberts, 4 Oreg. 378.

United States.— Cross *v.* Allen, 141 U. S. 528, 12 S. Ct. 67, 35 L. ed. 843 [*affirming* 28 Fed. 346].

See 33 Cent. Dig. tit. "Limitation of Actions," § 648.

59. Ewbank *v.* Ewbank, 64 S. C. 434, 42 S. E. 194.

60. Hill *v.* Downs, 6 S. W. 650, 9 Ky. L. Rep. 767; Spear *v.* Evans, 51 Wis. 42, 8 N. W. 20.

61. Myers *v.* Humphries, (Tex. Civ. App. 1898) 47 S. W. 812.

62. Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825.

63. Adverse possession see Adverse Possession, 1 Cyc. 1140 *et seq.*

Actions by or against executors or administrators see Executors and Administrators, 18 Cyc. 1003–1006.

In criminal prosecutions see Indictments and Informations, 22 Cyc. 157.

64. *Kansas.*— Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Kentucky.— Chiles *v.* Drake, 2 Metc. 146, 74 Am. Dec. 406, holding that the rule applies, although the statute under which the action is brought contains the limitation.

Maine.— Ware *v.* Webb, 32 Me. 41.

Minnesota.— Humphrey *v.* Carpenter, 39 Minn. 115, 39 N. W. 67.

New Hampshire.— Fowler *v.* Tuttle, 24 N. H. 9.

Vermont.— Carpenter *v.* McClure, 40 Vt. 108.

See 33 Cent. Dig. tit. "Limitation of Actions," § 663.

65. See *infra*, notes 66, 67. But see Weyma *v.* Bogert, 10 Kulp (Pa.) 205.

66. See cases cited *infra*, this note.

Demurrer.— Where matter in avoidance of the statute of limitations is set up in the complaint in an action at law, such matter is subject to a special demurrer, although not reached by a general demurrer. Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* 101 Ill. App. 431].

67. Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* 101 Ill. App. 431]; Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895 [*affirming* 79 Ill. App. 661]. See also Corrigan *v.* Reilly, 64 Ill. App. 124.

Debt barred by foreign statute.— In Shattuck *v.* Tyler, 16 Quebec Super. Ct. 401, 2 Quebec Pr. 143, it is held that in an action for the recovery of a debt, which would on its face have been prescribed under the local law, but which is not prescribed according to the laws of the country where the cause of action arose, the foreign law must be alleged in the declaration, and an answer alleging it, after a plea of prescription has been put in, will be rejected on motion.

equity, where it was held that if the bill showed on its face that the cause of action set forth was barred, it was necessary to allege facts showing an excuse, disability, or some exception to the statute.[68] This equity rule was generally adopted in the code states as the code rule,[69] except in states where it was provided by statute in effect that the defense of limitations could not be urged by demurrer;[70] and in a few states where it was held that no demurrer would lie unless the complaint showed on its face not only that the necessary time had elapsed, but also that the case was not within any exception in the statute.[71] For instance, except in the last two classes of states mentioned, where the cause of action as alleged is apparently barred by limitation, but in fact the statute has not run because of failure to discover the fraud or mistake complained of, as where fraud has been concealed by defendant, it is necessary to allege that the fraud or mistake was discovered within the statutory time allowed for the commencement of the action after such discovery.[72]

68. Love *v.* Butler, 129 Ala. 531, 30 So. 735; Humphrey *v.* Carpenter, 39 Minn. 115, 39 N. W. 67. See also Beadle *v.* Seat, 102 Ala. 532, 15 So. 243. Foster *v.* Hodgson, 19 Ves. Jr. 180, 34 Eng. Reprint 485.

Discovery of fraud.— A bill filed July 16, 1898, alleging discovery of a fraud "about August, 1888," shows a discovery within the ten-year limitation. The words quoted, fairly interpreted, mean in August or within a few days before or after that month. Irvine *v.* Burton (Miss. 1899), 24 So. 962.

69. *Arkansas.*— Lawson *v.* Badgett, 20 Ark. 195.

California.— Jerome *v.* Stebbins, 14 Cal. 457.

Georgia.— Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399. *Compare* Rich *v.* Dupree, 14 Ga. 661.

Iowa.— Phares *v.* Walters, 6 Iowa 106.

Louisiana.— Griffin *v.* New Orleans Drainage Commission, 110 La. 840, 34 So. 799.

Minnesota.— Humphrey *v.* Carpenter, 39 Minn. 115, 39 N. W. 67. See also Hoyt *v.* McNeil, 13 Minn. 390.

Wisconsin.— Howell *v.* Howell, 15 Wis. 55.

United States.— Edwards *v.* Bates County, 55 Fed. 436 [*reversed* on other grounds in 163 U. S. 269, 16 S. Ct. 967, 41 L. ed. 155].

See 33 Cent. Dig. tit. "Limitation of Actions," § 664.

Where the petition is in proper form and does not show that the statute of limitations has run, plaintiff is not bound to bring himself within any of the exceptions contained in such statute. Forrest *v.* Jelke, 7 Ohio Cir. Ct. 23, 3 Ohio Cir. Dec. 644. See also Backus *v.* Clark, 1 Kan. 303, 83 Am. Dec. 437.

Allegation of non-residence.— In an action against a resident on a contract executed outside the state, when defendant was a non-resident, plaintiff is not required to plead or prove facts showing that the obligation is not barred by the laws of the state where defendant formerly resided. Keagy *v.* Wellington Nat. Bank, 12 Okla. 33, 69 Pac. 811. See also Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546.

Former residence within state.— A petition alleged that, after the cause of action stated accrued, and within the statutory period of limitation, defendant "departed from and has ever since resided out of the state . . . and still so resides." It was held that this stated inferentially that defendant was a resident of the state prior to his departure therefrom, within the exception in the statute of limitations (Rev. St. § 3236). Sheehan, etc., Co. *v.* Sims, 36 Mo. App. 224.

Sufficiency of plea see *infra*, VIII, C, 4.

70. Lynch *v.* Lynch, 89 Hun (N. Y.) 112, 34 N. Y. Suppl. 1083; Sands *v.* St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; Reilly *v.* Sabater, 43 N. Y. Suppl. 383; Butler *v.* Mason, 5 Abb. Pr. (N. Y.) 40, 16 How. Pr. 546.

71. State *v.* Parsons, 147 Ind. 244, 47 N. E. 17, 62 Am. St. Rep. 430; Kent *v.* Parks, 67 Ind. 53; Hieronymous *v.* Mayhall, 1 Bush (Ky.) 508; Coldiron *v.* Combs, 60 S. W. 386, 22 Ky. L. Rep. 1187. See also *infra*, VIII, B.

72. *California.*— Castro *v.* Geil, 110 Cal. 292, 42 Pac. 804, 52 Am. St. Rep. 84; Smith *v.* Irving, (1889) 22 Pac. 170.

Kansas.— Young *v.* Whittenhall, 15 Kan. 579; McCalla *v.* Daugherty, 4 Kan. App. 410, 46 Pac. 30.

Kentucky.— Carneals *v.* Parker, 7 J. J. Marsh. 455.

Minnesota.— Morrill *v.* Little Falls Mfg. Co., 53 Minn. 371, 55 N. W. 547, 21 L. R. A. 174.

Nebraska.— Newman Grove State Bank *v.* Linderholm, 68 Nebr. 364, 94 N. W. 616; State Bank *v.* Frey, 3 Nebr. (Unoff.) 83, 91 N. W. 239; Westervelt *v.* Filter, 2 Nebr. (Unoff.) 731, 89 N. W. 994.

Ohio.— Combs *v.* Watson, 32 Ohio St. 228.

South Carolina.— Lott *v.* De Graffenreid, 10 Rich. Eq. 346; White *v.* Poussin, Bailey Eq. 458.

United States.— Brown *v.* Farwell, 74 Fed. 764; Danmeyer *v.* Coleman, 11 Fed. 97, 8 Sawy. 51.

See 33 Cent. Dig. tit. "Limitation of Actions," § 665.

Contra.— Stubbs *v.* Motz, 113 N. C. 458, 18 S. E. 387.

Where it appears from the bill itself that the fraud charged was not discovered until within six years before the institution of the

2. Basing Action on New Promise. Whether in case of a new promise the action should be based thereon depends of course on the question whether the old debt or new promise constitutes the cause of action, as to which there is considerable conflict of authority. This question is considered at length in a previous chapter.[73]

B. Demurrer Raising Defense[74] — **1. At Common Law.** The rule at common law was that in actions at law the defense of the statute of limitations could not be raised by demurrer but could only be taken advantage of by plea.[75] This rule still prevails in a few states where the common-law system of pleading remains.[76]

2. In Equity, And Under the Codes.[77] In equity the defense of laches, where apparent on the face of the bill, can generally be taken advantage of by demurrer.[78] The same rule applies to the statute of limitations.[79] So in many jurisdictions

suit, a distinct averment to that effect is not required to avoid the statute of limitations. Livermore *v.* Johnson, 27 Miss. 284. See also Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. 571, 86 Am. St. Rep. 286.

73. See *supra*, VII, A, 2.

74. General rules as to demurrers see Pleading.

When defense of adverse possession available by demurrer see Adverse Possession, 1 Cyc. 1142.

Statute of limitations as ground of demurrer to indictment see Indictments and Informations, 22 Cyc. 429.

75. *Indiana.*— Matlock *v.* Todd, 25 Ind. 128.

Iowa.— Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370; Sleeth *v.* Murphy, Morr. 321, 41 Am. Dec. 232.

Mississippi.— Hines *v.* Potts, 56 Miss. 346.

Missouri.— Smith *v.* Dean, 19 Mo. 63.

United States.— Wilkinson *v.* Pomeroy, 29 Fed. Cas. No. 17,675, 10 Blatchf. 524.

See 33 Cent. Dig. tit. "Limitation of Actions," § 670.

Reason for rule.— The statute must be pleaded so that plaintiff may if he can avoid the bar by replying facts which prevent it. Hines *v.* Potts, 56 Miss. 346.

76. Norton *v.* Kumpe, 121 Ala. 446, 25 So. 841; Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984; Huss *v.* Central R., etc., Co., 66 Ala. 472; Ovid First Nat. Bank *v.* Steel, 136 Mich. 588, 99 N. W. 786; Renackowsky *v.* Detroit, 122 Mich. 613, 81 N. W. 581; Fatum *v.* McLellan, 56 Miss. 352; Barclay *v.* Barclay, 206 Pa. St. 307, 55 Atl. 985; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431. *Contra*, Crawford *v.* Schaeffer, 8 Pa. Dist. 32, 22 Pa. Co. Ct. 79, 43 Wkly. Notes Cas. 359.

In Illinois the cases are conflicting to some extent, but it is generally held that where the action is a common-law one, the defense of limitations cannot be raised by demurrer. Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* 101 Ill. App. 431]; Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895; Emory *v.* Keighan, 88 Ill. 482; Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702; Rich *v.* Scalio, 115 Ill. App. 166; Corrigan *v.* Reilly, 64 Ill. App. 124. See also Sedgwick *v.* Concord Apartment House Co., 104 Ill. App. 5. But see People *v.* Boyd, 132 Ill. 60, 23 N. E. 342, where the contrary rule was held in a quo warranto proceeding. But it has been held by the appellate court that a demurrer is proper where the declaration shows that the statute has run and that the case is not within any of the statutory exceptions. People *v.* Strauss, 97 Ill. App. 47; Thomas *v.* Morgan, 96 Ill. App. 629.

In Tennessee, apparently in the absence of any statutory authority, it is held that if the declaration in an action at law shows on its face that it is barred a demurrer will lie. Thompson *v.* Cincinnati, etc., R. Co., 109 Tenn. 268, 70 S. W. 612 (in which the court said that there was no reason for a difference between the practice in equity and at law); Whaley *v.* Catlett, 103 Tenn. 347, 53 S. W. 131.

77. For effect of statutes requiring bar to be set up by answer see *infra*, VIII, C, 1.

78. See Equity, 16 Cyc. 267.

79. *Alabama.*— Love *v.* Butler, 129 Ala. 531, 30 So. 735; Huntville *v.* Ewing, 116 Ala. 576, 22 So. 984; Lovelace *v.* Hutchinson, 106 Ala. 417, 17 So. 623; Espy *v.* Comer, 76 Ala. 501; Thompson *v.* Parker, 68 Ala. 387; Underhill *v.* Mobile Fire Dept. Ins. Co., 67 Ala. 45; Bercy *v.* Lavretta, 63 Ala. 374; Nimmo *v.* Stewart, 21 Ala. 682. But see McCreary *v.* Jones, 96 Ala. 592, 11 So. 600.

Georgia.— Worthy *v.* Johnson, 8 Ga. 236, 52 Am. Dec. 399; Caldwell *v.* Montgomery, 8 Ga. 106. See also Plumb *v.* Tucker, 64 Ga. 497.

Illinois.— Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* 101 Ill. App. 431]; Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895; Fulton *v.* Northern Illinois College, 158 Ill. 333, 42 N. E. 138; Bell *v.* Johnson, 111 Ill. 374; Wieczorek *v.* Adamski, 114 Ill. App. 161.

Iowa.— Phares *v.* Walters, 6 Iowa 106.

Maine.— Baxter *v.* Moses, 77 Me. 465, 1 Atl. 350, 52 Am. Rep. 783; Mooers *v.* Kennebec, etc., R. Co., 58 Me. 279.

Maryland.— Meyer *v.* Saul, 82 Md. 459, 33 Atl. 539; Biays *v.* Roberts, 68 Md. 510, 13 Atl. 366.

Massachusetts.— Fogg *v.* Price, 145 Mass. 513, 14 N. E. 741.

where the code system of pleading has been adopted, if the pleading shows on its face that the cause of action is barred a demurrer will lie.[80] In some of them, however, a demurrer is proper only where the pleading shows that the cause of

Michigan.— See McLean *v.* Barton, Harr. 279.

Mississippi.— McNair *v.* Stanton, 57 Miss. 298; Ingraham *v.* Regan, 23 Miss. 213; Dickson *v.* Miller, 11 Sm. & M. 594, 49 Am. Dec. 71.

New York.— Muir *v.* Leake, etc., Orphan House Trustees, 3 Barb. Ch. 477. *Compare* Dias *v.* Bouchaud, 10 Paige 445.

Tennessee.— Wyatt *v.* Luton, 10 Heisk. 458; McClung *v.* Sneed, 3 Head 218; Dunlap *v.* Gibbs, 4 Yerg. 94.

West Virginia.— Bragg *v.* Wiseman, 55 W. Va. 330, 47 S. E. 90.

United States.— Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225; Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470; Wisner *v.* Ogden, 30 Fed. Cas. No. 17,914, 4 Wash. 631.

England.— Dawkins *v.* Penrhyn, 4 App. Cas. 51, 48 L. J. Ch. 304, 39 L. T. Rep. N. S. 583, 27 Wkly. Rep. 173; Noyes *v.* Crawley, 10 Ch. 31, 48 L. J. Ch. 112, 39 L. T. Rep. N. S. 267, 27 Wkly. Rep. 109 [*overruling* Wakelee *v.* Davis, 25 Wkly. Rep. 60]; Prance *v.* Sympson, 18 Jur. 929, 1 Kay 678, 69 Eng. Reprint 289; Hoare *v.* Peck, 2 L. J. Ch. 123, 6 Sim. 51, 9 Eng. Ch. 57, 58 Eng. Reprint 514; Foster *v.* Hodgson, 19 Ves. Jr. 180, 34 Eng. Reprint 485.

See 33 Cent. Dig. tit. "Limitation of Actions," § 670.

Compare Scoville *v.* Brock, 76 Vt. 385, 57 Atl. 967. *Contra,* Hubble *v.* Poff, 98 Va. 646, 37 S. E. 277.

In North Carolina, by statute, a demurrer does not lie even where an equitable claim appears on the face of the bill to be barred. Guthrie *v.* Bacon, 107 N. C. 337, 12 S. E. 204.

80. *California.*— Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877; Palmtag *v.* Roadhouse, (1893) 34 Pac. 111 (pleading must show, not that the cause of action may be barred, but that it is barred); Cameron *v.* San Francisco, 68 Cal. 390, 9 Pac. 430; Brennan *v.* Ford, 46 Cal. 7; Mason *v.* Cronise, 20 Cal. 211; Smith *v.* Richmond, 19 Cal. 476; Barringer *v.* Warden, 12 Cal. 311.

Colorado.— Arkins *v.* Arkins, 20 Colo. App. 123, 77 Pac. 256.

Idaho.— Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226.

Iowa.—Carroll Dist. Tp. *v.* Pleasant Valley Dist. Tp., 79 Iowa 100, 144 N. W. 237; Carroll Dist. Tp. *v.* Arcadia Dist. Tp., 79 Iowa 96, 44 N. W. 236; Springer *v.* Clay County, 35 Iowa 241; Miller *v.* Dawson, 26 Iowa 186; Lawrence *v.* Sinnamon, 24 Iowa 80; Shorick *v.* Bruce, 21 Iowa 305.

Kansas.— Chellis *v.* Coble, 37 Kan. 558, 15 Pac. 505; Hunt *v.* Jetmore, 9 Kan. App. 333, 61 Pac. 325; Hamilton County School Dist. No. 1 *v.* Herr, 6 Kan. App. 861, 50 Pac. 101; Phillipsburg *v.* Kincaid, 6 Kan. App. 377, 50 Pac. 1093; Morgan *v.* Van Wyck, 5 Kan. App. 520, 48 Pac. 206.

Minnesota.— Humphrey *v.* Carpenter, 39 Minn. 115, 39 N. W. 67; Kennedy *v.* Williams, 11 Minn. 314.

Nebraska.— Hurley *v.* Cox, 9 Nebr. 230, 2 N. W. 705.

Ohio.— Osborn *v.* Portsmouth Nat. Bank, 61 Ohio St. 427, 56 N. E. 197; Douglas *v.* Corry, 46 Ohio St. 349, 21 N. E. 440, 15 Am. St. Rep. 604; Vore *v.* Woodford, 29 Ohio St. 245; McKinney *v.* McKinney, 8 Ohio St. 423; Sturgis *v.* Burton, 8 Ohio St. 215, 72 Am. Dec. 582; Blue *v.* Hoke, 2 Ohio Dec. (Reprint) 440, 3 West. L. Month. 100; Whetstone *v.* Thorp, 1 Ohio Dec. (Reprint) 414, 9 West L. J. 303; Irwin *v.* Garretson, 1 Cinc. Super. Ct. 533.

Utah.— Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

Wisconsin.— Tucker *v.* Lovejoy, 73 Wis. 66, 40 N. W. 627; George *v.* Chicago, etc., R. Co., 51 Wis. 603, 8 N. W. 374; Howell *v.* Howell, 15 Wis. 55.

Wyoming.— Cowhick *v.* Shingle, 5 Wyo. 87, 37 Pac. 689, 63 Am. St. Rep. 17, 25 L. R. A. 608; Upton *v.* Mason, 2 Wyo. 55; Upton *v.* Steele, 2 Wyo. 54.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 670, 671.

In Connecticut where the pleading shows on its face that the cause of action is barred and the action is of such character that there is no possible question of avoiding the bar by a new promise, so that plaintiff need not be given an opportunity to reply to such defense, the objection may be taken by demurrer. Hartford, etc., R. Co. *v.* Montague, 72 Conn. 687, 45 Atl. 961; Davis *v.* Mills, 121 Fed. 703, 58 C. C. A. 123, district of *Connecticut*. *Compare* O'Connor *v.* Waterbury, 69 Conn. 206, 37 Atl. 499.

In Missouri advantage cannot be taken of the statute of limitations by demurrer, where the necessary facts appear on the face of the pleading, except in those cases where the statute creates an absolute bar by lapse of time without any exception. State *v.* Spencer, 79 Mo. 314; Henoch *v.* Chaney, 61 Mo. 129; Condrey *v.* Gilliam, 60 Mo. 86; State *v.* Bird, 22 Mo. 470; Maddox *v.* Duncan, 62 Mo. App. 474; U. S. *v.* Brown, 41 Fed. 481; Belleville Sav. Bank *v.* Winslow, 30 Fed. 488.

In Texas the earlier decisions adopted the chancery practice as rules of pleading **in** preference to that of the common-law courts, and held that a demurrer would lie where the pleading showed the cause of action was barred by the statute of limitations. McClenney *v.* McClenney, 3 Tex. 192, 49 Am. Dec. 738; Swenson *v.* Walker, 3 Tex. 93; Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661. This rule has been uniformly followed in the later decisions (Dwight *v.* Matthews,

action accrued more than the statutory time prior to the commencement of the action and in addition negatives the existence of any facts to avoid the bar of the statute where the statute contains exceptions applicable to the cause of action alleged.[81]

3. UNDER STATUTES REQUIRING OBJECTION TO BE TAKEN BY ANSWER. In some states it is held that no demurrer lies because of statutory provisions that the objection can only be taken by answer;[82] but in several states it is held that such a statute does not deny the right to interpose limitations by a demurrer,[83] or by a special exception.[84]

4. WHERE CAUSE OF ACTION CREATED BY STATUTE. Where the cause of action did not exist at common law, but has been created by a statute which fixes a time within which the action must be brought as an essential element of the right to sue, the question of limitations may be raised by demurrer, where the facts appear on the face of the complaint or declaration, notwithstanding the statute of limitations cannot be urged by demurrer.[85]

(Tex. Civ. App. 1901) 60 S. W. 805; Campbell *v.* Houchin, (Tex. Civ. App. 1896) 35 S. W. 753; McKinney *v.* Rodgers, (Tex. Civ. App. 1895) 29 S. W. 407; Smith *v.* Powell, 5 Tex. App. 373, 23 S. W. 1109), and it has been held that a statute requiring the defence to be set up by answer does not alter the rule. See *infra*, notes 83, 84.

The complaint must conclusively show on its face that the cause of action is barred, in order for a demurrer to lie. Trebby *v.* Simmons, 38 Minn. 508, 38 N. W. 693; McArdle *v.* McArdle, 12 Minn. 98.

81. St. Louis, etc., R. Co. *v.* Brown, 49 Ark. 253, 4 S. W. 781; Hutchinson *v.* Hutchinson, 34 Ark. 164; Collins *v.* Mack, 31 Ark. 684. See also McGehee *v.* Blackwell, 28 Ark. (optional to demur or answer); Faulkner *v.* Thompson, 14 Ark. 478; Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Dorsey Mach. Co. *v.* McCaffrey, 139 Ind. 545, 38 N. E. 208, 47 Am. St. Rep. 290; Shewalter *v.* Bergman, 123 Ind. 155, 23 N. E. 686; Hogan *v.* Robinson, 94 Ind. 138; Newson *v.* Bartholomew County Com'rs, 92 Ind. 229; State *v.* Younts, 89 Ind. 313; Lucas *v.* Labertue, 88 Ind. 277; Devor *v.* Rerick, 87 Ind. 337; Dunn *v.* Tousey, 80 Ind. 288; Cass County *v.* Adams, 76 Ind. 504; Harper *v.* Terry, 70 Ind. 264; Kent *v.* Taggart, 68 Ind. 163; McCallam *v.* Pleasants, 67 Ind. 542; Baugh *v.* Boles, 66 Ind. 376; Harlen *v.* Watson, 63 Ind. 143; Cravens *v.* Duncan, 55 Ind. 347; Koontz *v.* Hammond, 21 Ind. App. 74, 51 N. E. 506; McNear *v.* Roberson, 12 Ind. App. 87, 39 N. E. 896; Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825; Medsker *v.* Pogue, 1 Ind. App. 197, 27 N. E. 432. See also Roberts *v.* Smith, 165 Ind. 414, 74 N. E. 894, holding that a complaint stating a good cause of action is not demurrable, although the averments therein as to the concealment of the cause of action by defendant are insufficient; Stillwell *v.* Leavy, 84 Ky. 379, 1 S. W. 590, 8 Ky. L. Rep. 321; Chiles *v.* Drake, 2 Metc. (Ky.) 146, 74 Am. Dec. 406; French *v.* Bowling, 85 S. W. 1182, 27 Ky. L. Rep. 639; Green *v.* Irvine, 66 S. W. 278, 23 Ky. L. Rep. 1762; Brandenburg *v.* McGuire, 44 S. W. 96, 19 Ky. L. Rep. 1598; Com. *v.* Gardner, 30 S. W. 413, 17 Ky. L. Rep. 75. See also Call *v.* Shewmaker, 69 S. W. 749, 24 Ky. L. Rep. 686 [rehearing *denied* 70 S. W. 834, 24 Ky. L. Rep. 1167]; Johnson *v.* Robertson, 45 S. W. 523, 20 Ky. L. Rep. 135; Bradford *v.* Bradford, 43 S. W. 244, 19 Ky. L. Rep. 1245; Hutchings v. Lamson, 96 Fed. 720, 37 C. C. A. 564.

See 33 Cent. Dig. tit. "Limitation of Actions," § 673.

82. Grogan *v.* Valley Trading Co., 30 Mont. 229, 76 Pac. 211; Sands *v.* St. John, 36 Barb. (N. Y.) 628, 23 How. Pr. 140; Farrington *v.* Muchmore, 30 Misc. (N. Y.) 218, 62 N. Y. Suppl. 165; Hedges *v.* Conger, 10 N. Y. St. 42 [*overruling* Genet *v.* Tallmadge, 1 Code Rep. N. S. (N. Y.) 346, 2 Edm. Sel. Cas. 318]; Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518; State *v.* Patterson, 18 S. D. 251, 100 N. W. 162. See also the statutes of the several states.

In North Carolina the code requires the statute of limitations to be specially pleaded by answer whether the cause of action is legal or equitable. King *v.* Powell, 127 N. C. 10, 37 S. E. 62; Guthrie *v.* Bacon, 107 N. C. 337, 12 S. E. 204; Bacon *v.* Berry, 85 N. C. 124; Kahnweiler *v.* Anderson, 78 N. C. 133; Green *v.* North Carolina R. Co., 73 N. C. 524.

83. Motes *v.* Gila Valley, etc., R. Co., (Ariz. 1902) 68 Pac. 532; Howell *v.* Howell, 15 Wis. 55 (in which the court said that the word "answer" in the statute was used in a general sense so as to signify any pleading by which an issue of law or of fact is made or tendered on the part of defendant); Rivers *v.* Washington, 34 Tex. 267; Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109; Hopkins *v.* Wright, 17 Tex. 30 (in which it was said that the whole of the defensive pleadings constitute the answer); Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470.

84. Smith *v.* Fly, 24 Tex. 345, 76 Am. Dec. 109; Davidson *v.* Missouri Pac. R. Co., 3 Tex. App. Civ. Cas. § 173.

85. People *v.* Herr, 81 Ill. 125; Richmond Sav. Bank *v.* Powhatan Clay Mfg. Co., 102

5. Necessity For Bar Appearing From Pleadings. Where the pleading does not show on its face that the claim sued on is barred, the defense of limitations can be raised only by answer.[86] The pleading does not show on its face that the cause of action is barred, when it does not appear therefrom when the cause of action arose,[87] nor when the action was commenced.[88] For instance, where an amended complaint does not show on its face when the original complaint was filed, a demurrer does not lie.[89] The pleading does not show that limitations have run where it alleges a continuous non-residence after the accrual of the cause of action,[90] nor where partial payments are alleged.[91] It would seem, however, that

Va. 274, 46 S. E. 294; Lambert *v.* Ensign Mfg. Co., 42 W. Va. 813, 26 S. E. 431. See also Williams *v.* Starkweather, 24 R. I. 512, 53 Atl. 870. But see Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* 101 Ill. App. 431].

86. *California.*— Pleasant *v.* Samuels, 114 Cal. 34, 45 Pac. 998; Wise *v.* Hogan, 77 Cal. 184, 19 Pac. 278; Smith *v.* Richmond, 19 Cal. 476; Smith *v.* Hall, 19 Cal. 85; Ord *v.* De la Guerra, 18 Cal. 67; Barringer *v.* Warden, 12 Cal. 311.

Georgia.— Stringer *v.* Stringer, 93 Ga. 320, 20 S. E. 242; Rich *v.* Dupree, 14 Ga. 661; Battle *v.* Durham, 11 Ga. 17.

Iowa.— Goring *v.* Fitzgerald, 105 Iowa 507, 75 N. W. 358; Clay Dist. Tp. *v.* Buchanan Independent Dist., 69 Iowa 88, 28 N. W. 449 (petition for mandamus); Moulton *v.* Walsh, 30 Iowa 361.

Kansas.— Walker *v.* Fleming, 37 Kan. 171, 14 Pac. 470; Parker *v.* Barry, 12 Kan. 351; Garfield Tp. *v.* Dodsworth, 9 Kan. App. 752, 58 Pac. 565.

Minnesota.—Eastman *v.* St. Anthony Falls Water-Power Co., 12 Minn. 137.

Mississippi.— State *v.* Woodruff, 81 Miss. 456, 33 So. 78; Matthews *v.* Sontheimer, 39 Miss. 174.

Oregon.— Hawkins *v.* Donnerberg, 40 Oreg. 97, 66 Pac. 691, 908 statute.

Tennessee.— Nelson *v.* Trigg, 3 Tenn. Cas. 733.

Texas.— Grounds *v.* Sloan, 73 Tex. 662, 11 S. W. 898; Lewis *v.* Alexander, 51 Tex. 578; Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511; Stapper *v.* Wolter, (Civ. App. 1905) 85 S. W. 850; Killfoil *v.* Moore, (Civ. App. 1898) 45 S. W. 1024.

Wisconsin.— Howell *v.* Howell, 15 Wis. 55. See 33 Cent. Dig. tit. "Limitation of Actions," § 671.

Illustrations.—Where the declaration shows that some of the items in plaintiff's account are for services rendered within six years of the date of the suit, the action is not "on the face of the papers" barred by the general statute of limitations. Gould *v.* Whitmore, 79 Me. 383, 10 Atl. 60. Where a petition fails to show that the contract sued on was not in writing, a statute of limitations applicable to parol contracts only must be interposed by plea, and not by exception. Tinsley *v.* Penniman, 8 Tex. Civ. App. 495, 29 S. W. 175.

Amended pleadings.—Where it appears from the recitals of an amended petition demurred to that the original petition was filed and the suit was begun before the bar of the statute was interposed, a demurrer is improper. Rucker *v.* Dailey, 66 Tex. 284, 1 S. W. 316.

87. McCreary *v.* Jones, 96 Ala. 592, 11 So. 600; Kraner *v.* Halsey, 82 Cal. 209, 22 Pac. 1137; Harmon *v.* Page, 62 Cal. 448; Sinclair *v.* Auxiliary Realty Co., 99 Md. 223, 57 Atl. 664; Phelps County *v.* Bishop, 68 Mo. 250.

Discovery of fraud.—The defense that plaintiff discovered the fraud which is the foundation of the suit more than six years before bringing suit cannot be raised by demurrer, where under the allegations of the bill the question must be raised as one of fact. Johnson *v.* Powers, 13 Fed. 315. But see Gowdy *v.* Johnson, 104 Ky. 648, 47 S. W. 624, 20 Ky. L. Rep. 997, 44 L. R. A. 400.

An allegation of injury "on or about" a certain day, in an action for a personal injury, does not show when the cause of action arose, and hence the defense of limitations cannot be raised by demurrer. Conroy *v.* Oregon Constr. Co., 23 Fed. 71, 10 Sawy. 630. But it has been held that an averment that a libelous letter was written "in or about 1882" is demurrable where the statute commences to run on May 30, 1883. Jean *v.* Hennessy, 69 Iowa 373, 28 N. W. 645.

88. Thompson *v.* Campbell, 121 Ind. 398, 23 N. E. 267; Funk *v.* Davis, 103 Ind. 281, 2 N. E. 739; Osborn *v.* Portsmouth Nat. Bank, 61 Ohio St. 427, 56 N. E. 197, holding the rule applicable where the complaint is silent as to time as to any separable part of the cause of action.

Presumptions.— Where the original complaint in an action sets forth a fact as having occurred on a specified day, the presumption is that the action was not commenced before that day, and hence the complaint is demurrable where limitations had become a bar before that day. Clarke *v.* Lincoln County, 54 Wis. 580, 12 N. W. 20.

Date of verification of complaint.— The mere fact that the complaint appears to have been verified after the statute had fully run does not make the complaint show on its face that the action is barred by limitations, so as to be demurrable. Zaegel *v.* Kuster, 51 Wis. 31, 7 N. W. 781.

89. Lloyd *v.* Davis, 123 Cal. 348, 55 Pac. 1003; Redington *v.* Cornwell, 90 Cal. 49, 27 Pac. 40; Kaltcyer *v.* Wipff, (Tex. Civ. App. 1899) 49 S. W. 1055.

90. Reed *v.* Humphrey, 69 Kan. 155, 76 Pac. 390.

91. Cameron *v.* Cameron, 82 Ala. 392, 3 So. 148; Davenport *v.* Short, 17 Minn. 24;

where matters in avoidance of the bar are properly alleged in the complaint, their sufficiency may be tested by demurrer.[92] The bar of the statute of limitations appears on the face of the complaint where it appears from the reading of the complaint and summons together.[93]

6. Form and Sufficiency of Demurrer. A demurrer, in order to raise the defense of the statute of limitations, must point out the objection specially, a general demurrer being insufficient.[94] And where the defense is raised by an exception it must be a special rather than a general exception.[95] It is not sufficient to demur on the ground that the complaint does not state facts sufficient to constitute a cause of action,[96] or that plaintiff has not legal capacity to sue.[97] Furthermore in some states it is necessary to specify the section or subsection of the statute relied on.[98] A demurrer to the entire cause of action is insufficient where only a part of the cause of action is barred by limitations.[99]

7. Waiver. Where a statute of limitations may be urged by demurrer, it is waived if not made the subject of demurrer,[1] and under the general rules of

Kennedy *v.* Williams, 11 Minn. 314; Warren *v.* Providence Tool Co., 19 R. I. 360, 33 Atl. 876.

92. Radezky *v.* Sargent, 77 Conn. 110, 58 Atl. 709; O'Connor *v.* Waterbury, 69 Conn. 206, 37 Atl. 499; Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895 [*affirming* 79 Ill. App. 661]; Trustees *v.* Grubb, 5 Phila. (Pa.) 41.

93. Patterson *v.* Thompson, 90 Fed. 647.

Matters considered on hearing.— Where a complaint was demurred to on the ground that the action was barred by limitations, it was proper to consider the return of the officer on the summons in connection with the complaint to ascertain when the action was properly commenced. Smith *v.* Day, 39 Oreg. 531, 64 Pac. 812, 65 Pac. 1055.

94. McFarland *v.* Holcomb, 123 Cal. 84, 55 Pac. 761; Farwell *v.* Jackson, 28 Cal. 105; Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226; Archer *v.* Jones, 26 Miss. 583; Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652. See also Sargeant *v.* Johnson, 1 McCord (S. C.) 336. *Contra*, American F. Ins. Co. *v.* Buford, etc., Implement Co., 8 Kan. App. 36, 54 Pac. 6; Morgan *v.* Van Wyck, 5 Kan. App. 520, 48 Pac. 206.

What demurrers sufficiently specific.—A demurrer which alleges "that it appears by the complaint that the cause of action is barred by the Statute of Limitations" is sufficient. Brennan *v.* Ford, 46 Cal. 7. A demurrer alleging that "the alleged new promise in writing attached to the petition is not an admission made by the defendant in writing . . according to the law of evidence" is not sufficiently specific. Jones *v.* Brunskill, 18 Iowa 129.

95. Gathright *v.* Wheat, 70 Tex. 740, 9 S. W. 76; Rivers *v.* Washington, 34 Tex. 267; Sasser *v.* Davis, 27 Tex. 656.

Where some of the items of an account sued on are barred, and an exception setting up limitations is to the whole account, it should be sustained as to the barred items and overruled as to those not barred. International, etc., R. Co. *v.* Donalson, 2 Tex. App. Civ. Cas. § 238.

96. *California.*— Brown *v.* Martin, 25 Cal. 82.

Colorado.— Hunt *v.* Hayt, 10 Colo. 278, 15 Pac. 410; Arkins *v.* Arkins, 20 Colo. App. 123, 77 Pac. 256.

Idaho.— Chemung Min. Co. *v.* Hanley, 9 Ida. 786, 77 Pac. 226.

Missouri.— State *v.* Spencer, 79 Mo. 314.

Utah.— Fullerton *v.* Bailey, 17 Utah 85, 53 Pac. 1020.

Washington.— Joergenson *v.* Joergenson, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888.

United States.— Barnes *v.* Union Pac. R. Co., 54 Fed. 87, 4 C. C. A. 199, construing Colorado code.

See 33 Cent. Dig. tit. "Limitation of Actions," § 674.

Contra.— McArdle *v.* McArdle, 12 Minn. 98; Eayrs *v.* Nason, 54 Nebr. 143, 74 N. W. 408; Merriam *v.* Miller, 22 Nebr. 218, 34 N. W. 625; Aultman *v.* Cole, 16 Nebr. 4, 19 N. W. 783; Seymour *v.* Pittsburgh, etc., R. Co., 44 Ohio St. 12, 4 N. E. 236; Valley R. Co. *v.* Franz, 43 Ohio St. 623, 4 N. E. 88.

97. Spangenberg *v.* Schwartz, 9 Ohio Dec. (Reprint) 244, 11 Cinc. L. Bul. 283.

98. Nelden-Judson Drug Co. *v.* Commercial Nat. Bank, 27 Utah 59, 74 Pac. 195; Whereatt *v.* Worth, 108 Wis. 291, 84 N. W. 441; Crowley *v.* Hicks, 98 Wis. 566, 74 N. W. 348. See also Trubody *v.* Trubody, 137 Cal. 172, 69 Pac. 968.

Waiver.— Where the demurrer specifies a particular section of the statute as relied upon, that section only is pleaded. San Luis Obispo Bank *v.* Wickersham, 99 Cal. 655, 34 Pac. 444.

Statement of facts.— A demurrer is sufficient where it merely specifies the statute as a ground of demurrer without stating therein facts showing the defense. Williams *v.* Bergin, 116 Cal. 56, 47 Pac. 877.

99. Gulf Red Cedar Co. *v.* Crenshaw, 138 Ala. 134, 35 So. 50; Etchas *v.* Orena, 127 Cal. 588, 60 Pac. 45; Spalding *v.* St. Joseph's Industrial School for Boys, 107 Ky. 382, 54 S. W. 200, 21 Ky. L. Rep. 1107; Mounts *v.* Goranson, 29 Wash. 261, 69 Pac. 740.

1. Spaur *v.* McBee, 19 Oreg. 76, 23 Pac. 818. See also Dickinson *v.* Lott, 29 Tex. 172.

pleading as to the effect of pleading over in the face of demurrable defects the defense is waived by a subsequent answer to the merits.[2]

C. Pleading Statute as Defense[3] — 1. Necessity — a. General Rule.[4] The general rule is that the statute of limitations must be invoked as a defense in some way and if it has not been urged by demurrer, and the defense is not pleaded in the answer, the statute cannot be relied on but is deemed to have been waived;[5]

Where the defect does not clearly appear on the face of the complaint the defense of limitations need not be raised by demurrer but may be raised by answer. Damon *v.* Leque, 17 Wash. 573, 50 Pac. 485, 61 Am. St. Rep. 927.

2. Murphy *v.* Phelps, 12 Mont. 531, 31 Pac. 64; Vore *v.* Woodford, 29 Ohio St. 245. *Contra*, Brenneman *v.* Edwards, 55 Iowa 374, 7 N. W. 621; Zieverink *v.* Kemper, 10 Ohio Dec. (Reprint) 229, 19 Cinc. L. Bul. 270. Roche *v.* Spokane County, 22 Wash. 121, 60 Pac. 59, holding that it was not an abuse of discretion, on sustaining a motion, to strike from an answer a plea of limitations filed after a general demurrer to the complaint had been overruled, to permit defendant to interpose a special demurrer pleading the statute.

3. Election between defenses see Pleading.

Inconsistent defenses see Pleading.

Joint or separate pleading of co-defendants see Pleading.

Motions raising objections to pleading in general see Pleading.

Criminal prosecutions.— Joinder of plea of limitations with other pleas see Criminal Law, 12 Cyc. 349 note 5. Mode and time of objecting to indictment on account of time of offense see Indictments and Informations, 23 Cyc. 429.

4. Necessity of answer in support of plea in equity see Equity, 16 Cyc. 293 note 87.

5. *Alabama.*— Garrison *v.* Hawkins Lumber Co., 111 Ala. 308, 20 So. 427; Espy *v.* Comer, 76 Ala. 501; Hayes *v.* Woods, 72 Ala. 92; Ferguson *v.* Carter, 40 Ala. 607; Brown *v.* Hemphill, 9 Port. 206. But see Sims *v.* Canfield, 2 Ala. 555.

Arkansas.— Shirey *v.* Clark, 72 Ark. 539, 81 S. W. 1057. But see Riley *v.* Norman, 39 Ark. 158.

California.— Walter *v.* Merced Academy Assoc., 126 Cal. 582, 59 Pac. 136; San Joaquin Valley Bank *v.* Dodge, 125 Cal. 77, 57 Pac. 687; Bixby *v.* Crafts, (1898) 53 Pac. 404; Osment *v.* McElrath, 68 Cal. 466, 9 Pac. 731, 58 Am. Rep. 17; Kelley *v.* Kriess, 68 Cal. 210, 9 Pac. 129; People *v.* Broadway Wharf Co., 31 Cal. 33; Grattan *v.* Wiggins, 23 Cal. 16; Meeks *v.* Hahn, 20 Cal. 620.

Colorado.— Adams *v.* Tucker, 6 Colo. App. 393, 40 Pac. 783.

Georgia.— Milner *v.* Neel, 114 Ga. 118, 39 S. E. 890; Peel *v.* Bryson, 72 Ga. 331; Parker *v.* Irvin, 47 Ga. 405. But see Small *v.* Cohen, 102 Ga. 248, 29 S. E. 430.

Idaho.— Frantz *v.* Idaho Artesian Well, etc., Co., 5 Ida. 71, 46 Pac. 1026.

Illinois.— Wall *v.* Chesapeake, etc., R. Co., 200 Ill. 66, 65 N. E. 632 [*reversing* on other grounds 101 Ill. App. 431]; Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029 [*affirming* 95 Ill. App. 471]; Quincy Whig Co. *v.* Tillson, 67 Ill. 351; Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702; Hotaling *v.* Huntington, 64 Ill. App. 655; Jockisch *v.* Hardtke, 50 Ill. App. 202.

Indiana.— Wood *v.* Hughes, 138 Ind. 179, 37 N. E. 588; McCallam *v.* Pleasants, 67 Ind. 542; Earl *v.* Van Natta, 29 Ind. App. 532, 64 N. E. 901; Lebanon *v.* Twilford, 13 Ind. App. 384, 41 N. E. 844.

Iowa.— Belken *v.* Iowa Falls, 122 Iowa 430, 98 S. W. 296; McDonald *v.* Bice, 113 Iowa 44, 84 N. W. 985; Welch *v.* McGrath, 59 Iowa 519, 10 N. W. 810, 13 N. W. 638; Brush *v.* Peterson, 54 Iowa 243, 6 N. W. 287; Robinson *v.* Allen, 37 Iowa 27; Sleeth *v.* Murphy, Morr. 321, 41 Am. Dec. 232.

Kansas.— Baker *v.* Sears, 2 Kan. App. 617, 42 Pac. 501.

Kentucky.— Rankin *v.* Turney, 2 Bush 555; Hayden *v.* Stone, 1 Duv. 396; Jones *v.* Chiles, 4 J. J. Marsh. 610; Mullins *v.* Mullins, 87 S. W. 764, 27 Ky. L. Rep. 1048; Farmers' Nat. Bank *v.* Stone, 58 S. W. 983, 22 Ky. L. Rep. 831.

Louisiana.— Huber *v.* Jennings-Heywood Oil Syndicate, 111 La. 747, 35 So. 889; State *v.* Baten, 48 La. Ann. 1538, 21 So. 119; Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539; Williamson *v.* Richardson, 30 La. Ann. 1163; Daniel *v.* Harrison, 23 La. Ann. 473; Watts *v.* Bradley, 20 La. Ann. 523; Perroux *v.* Lacoste, 19 La. Ann. 266; Beard *v.* Pritchard, 9 Rob. 464; Lejeune *v.* Hébert, 6 Rob. 419; Broadway *v.* Pool, 19 La. 258; Semple *v.* Buhler, 6 Mart, N. S. 469; Brown *v.* Duplantier, 1 Mart. N. S. 312; Dunbar *v.* Nichols, 10 Mart. 184.

Maine.— Ware *v.* Webb, 32 Me. 41.

Maryland.— Duckett *v.* National Mechanics' Bank, 86 Md. 400, 38 Atl. 983, 63 Am. St. Rep. 513, 39 L. R. A. 84; Brendel *v.* Strobel, 25 Md. 395; Chambers *v.* Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572; Oliver *v.* Gray, 1 Harr. & G. 204; Maddox *v.* State, 4 Harr. & J. 539; Smith *v.* Williamson, 1 Harr. & J. 147; Hepburn's Case, 3 Bland 95.

Michigan.— Bellows *v.* Butler, 127 Mich. 100, 86 N. W. 533; Shank *v.* Woodworth, 111 Mich. 642, 70 N. W. 140.

Minnesota.— Gilbert *v.* Hewetson, 79 Minn. 326, 82 N. W. 655, 79 Am. St. Rep. 486; Davenport *v.* Short, 17 Minn. 24.

Mississippi.— Anderson *v.* McNeal, 82 Miss. 542, 34 So. 1.

Missouri.— Boyce *v.* Christy, 47 Mo. 70; Tramell *v.* Adam, 2 Mo. 155; Whiteside *v.* Magruder, 75 Mo. App. 364.

Nebraska.— Dufrene *v.* Anderson, 67 Nebr. 136, 93 N. W. 139; McCormick Harvesting Mach. Co. *v.* Cummins, 59 Nebr. 330, 80

and this is so even though the claim relied on is clearly barred by limita-

N. W. 1049; Hobson *v.* Cummins, 57 Nebr. 611, 78 N. W. 295; Alexander *v.* Meyers, 33 Nebr. 775, 51 N. W. 140; Atchison, etc., R. Co. *v.* Miller, 16 Nebr. 661 21 N. W. 451.

New Jersey.— West Hoboken *v.* Syms, 49 N. J. L. 546, 9 Atl. 780; Brand *v.* Longstreet, 4 N. J. L. 325.

New York.— Ainslie *v.* New York, 1 Barh. 168; Fogal *v.* Pirro, 17 Abb. Pr. 113; Waggoner *v.* Jermaine, 3 Den. 306, 45 Am. Dec. 474; Fairchild *v.* Case, 24 Wend. 381; Dey *v.* Dunham, 2 Johns. Ch. 182; Van Hook *v.* Whitlock, 2 Edw. 304 [*affirmed* in 7 Paige 373 (*affirmed* in 26 Wend. 43, 37 Am. Dec. 246)].

North Carolina.— Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. 678; Battery Park Bank *v.* Loughran, 122 N. C. 668, 30 S. E. 17; Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713; Randolph *v.* Randolph, 107 N. C. 506, 12 S. E. 374; Pegram *v.* Staltz, 67 N. C. 144. See also Heyer *v.* Rivenbark, 128 N. C. 270, 38 S. E. 875.

Ohio.— Towsley *v.* Moore, 30 Ohio St. 184, 27 Am. Rep. 434; McKinney *v.* McKinney, 8 Ohio St. 423; Lockwood *v.* Wildman, 13 Ohio 430; Blue *v.* Hoke, 2 Ohio Dec. (Reprint) 440, 3 West. L. Month. 100; Irwin *v.* Garretson, 1 Cinc. Super. Ct. 533.

Oregon.— Scott *v.* Christenson, 46 Oreg. 417, 80 Pac. 731; Davis *v.* Davis, 20 Oreg. 78, 25 Pac. 140.

Pennsylvania.— Heath *v.* Page, 48 Pa. St. 130; *In re* Smull, 9 Pa. Dist. 532, 24 Pa. Co. Ct. 124; Ziegler's Case, 12 York Leg. Rec. 158, holding that the statute of limitations does not run against a judgment confirming a report of viewers to assess damages for opening a street, since the statute can only be pleaded before judgment.

Rhode Island.— White *v.* Eddy, 19 R. I. 108, 31 Atl. 823.

South Carolina.— Jones *v.* Massey, 9 S. C. 376.

Tennessee.— German Bank *v.* Haller, 103 Tenn. 73, 52 S. W. 288; Merriman *v.* Cannovan, 9 Baxt. 93; Maury *v.* Lewis, 10 Yerg. 115.

Texas.— McClenney *v.* McClenney, 3 Tex. 192, 49 Am. Dec. 738; Petty *v.* Cleveland, 2 Tex. 404; Lang *v.* Henke, 22 Tex. Civ. App. 490, 55 S. W. 374; Kalteyer *v.* Wipff, (Civ. App. 1899) 49 S. W. 1055; International, etc., R. Co. *v.* Cook, 16 Tex. Civ. App. 386, 41 S. W. 665. *Compare* Galloway *v.* Kerr, (Civ. App. 1901) 63 S. W. 180 [*reversed* on other grounds in (1901) 64 S. W. 858], holding that where limitations barring a mortgage debt were alleged in a petition in an action to recover possession of land from a mortgagee wrongfully in possession, an additional plea of limitations was not necessary to raise the defense to a claim of defendant for the reformation of the mortgage.

Virginia.— Hickman *v.* Stout, 2 Leigh 6.

West Virginia.— Smith *v.* Brown, 44 W. Va. 342, 30 S. E. 160; Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410.

Wisconsin.— Malloy *v.* Chicago, etc., R. Co., 109 Wis. 29, 85 N. W. 130; Ward *v.* Walters, 63 Wis. 39, 22 N. W. 844; Lockhart *v.* Fessenich, 58 Wis. 588, 17 N. W. 302; Peek *v.* Cheney, 4 Wis. 249; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

United States.— Gormley *v.* Bunyan, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086; Shields *v.* Shiff, 124 U. S., 351, 8 S. Ct. 510, 31 L. ed. 445; Hallett *v.* New England Roller Grate Co., 119 Fed. 873, 56 C. C. A. 403 [*reversing* on other grounds 105 Fed. 217]; Rich *v.* Bray, 37 Fed. 273, 2 L. R. A. 225; Brown *v.* Jones, 4 Fed. Cas. No. 2,017, 2 Gall. 477; Norton *v.* Meader, 18 Fed. Cas. No. 10,351, 4 Sawy. 603.

Canada.— Miller *v.* Wolfe, 30 Nova Scotia 277, holding, however, that where the statute of limitations does not merely bar the action but divests the title to the land or vests it in another person, that person need not plead the statute as a defense. See also Cattanach *v.* Urquhart, 6 Ont. Pr. 28. But see Wright *v.* Morgan, 1 Ont. App. 613, as to allowance of interest within the period of limitation, on an account before the master.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 678, 680.

But see Pierce *v.* Pickens, 16 Mass. 470.

In the early English cases, it was held that it was not necessary for defendant to plead the statute of limitations (Brown *v.* Hancock, Cro. Car. 115; Freeman *v.* Stacy, Hutt. 109; Hodsden *v.* Harridge, 2 Saund. 61*k*. The later English authorities, however, changed the rule and held that the statute must be pleaded to be available. Prince *v.* Heylin, 1 Atk. 493, 26 Eng. Reprint 312; Roch *v.* Callen, 6 Hare 531, 12 Jur. 112, 17 L. J. Ch. 144, 31 Eng. Ch. 531, 67 Eng. Reprint 1274; *Re* Burge, 52 J. P. 20, 57 L. T. Rep. N. S. 364; Gould *v.* Johnson, 2 Ld. Raym. 838; Lee *v.* Rogers, Lev. 110; Kirkman *v.* Siboni, 8 L. J. Exch. 304, 4 M. & W. 339; Puckle *v.* Moor, 1 Vent. 191.

Where a new promise is set up by an amended complaint, after a plea of limitations, a further plea of limitations is necessary to raise the question whether the new promise is itself barred by limitations. Erskine *v.* Wilson, 20 Tex. 17; Stoker *v.* Patton, (Tex. Civ. App. 1896) 35 S. W. 64.

Where the defense was urged by a part only of the parties entitled to plead the statute, it inures only to the benefit of the parties who plead it. Bannon *v.* Lloyd, 64 Md. 48, 20 Atl. 1023.

Defect as cured by trial.— Failure to plead limitation is not a defect in matter of form which is cured by the trial. Dezengremel *v.* Dezengremel, 24 Hun (N. Y.) 457.

Necessity of pleading adverse possession see ADVERSE POSSESSION, 1 Cyc. 1140, 1141.

Executors and administrators.— Necessity of pleading statutes of limitation in actions

tions.[6] Likewise the statute of limitations of a foreign state cannot be taken advantage of where it is not pleaded.[7]

b. Exceptions to Rule — (I) *In General.* Failure to plead the statute is not a waiver where there has been no opportunity to plead it,[8] as where the plea is not allowable,[9] where there are no formal pleadings,[10] or where the answer interposes a set-off merely as a defense and the practice does not permit a reply thereto.[11] So the defense of limitations may be relied on, although not pleaded, where the failure to plead the statute is not the fault of defendant, as where the real cause of action does not appear from plaintiff's pleadings but is developed only by his testimony.[12] Furthermore the rule has no application to suits in the court of claims against the United States.[13] And where the statute of limitations is not matter in avoidance of the action, but is merely matter in mitigation of damages, the statute need not be pleaded.[14]

(II) *Where Right as Well as Remedy Is Extinguished.* Where the statute operates, not merely on the remedy, but also extinguishes the right of action, it need not be pleaded.[15] For instance, where the action is based on a statute which makes the time of bringing the action an express condition of the right given, plaintiff must plead the performance of such condition, and defendant is not required to plead the limitation in the statute to entitle him to insist on the objection that the action was not brought within the time limited.[16]

c. Defense to Set-Off or Counter-Claim. The statute of limitations is not available as a bar to a counter-claim, unless it is pleaded by reply.[17] But where a

against executors of administrators see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1003.

Waiver of defense and objections in general see PLEADING.

6. Morton *v.* Bartning, 68 Cal. 306, 9 Pac. 146; Clinton *v.* Eddy, 37 How. Pr. (N. Y.) 23. See also Schmitt *v.* Hager, 88 Minn. 413, 93 N. W. 110; Hardwick *v.* Ickler, 71 Minn. 25, 73 N. W. 519.

7. Chenot *v.* Lefevre, 8 Ill. 637; Hoyt *v.* McNeil, 13 Minn. 390; Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546. See, generally, STATUTES.

Sufficiency of plea see *infra*, VIII, C, 4.

8. Tazewell *v.* Whittle, 13 Gratt. (Va.) 329; Purcell *v.* Wilson, 4 Gratt. (Va.) 16 (as to mesne profits); Dreutzer *v.* Baker, 60 Wis. 179, 18 N. W. 776; Nelson *v.* Cooper, 108 Fed. 919, 48 C. C. A. 140.

Absence.— In Nova Scotia the court has refused to enter judgment against an absent debtor on a barred debt. Smith *v.* Cuff, 3 Nova Scotia 12; McRae *v.* Woodward, 3 Murd. Epit. 141.

9. Dean *v.* Tucker, 58 Miss. 487; Talmash *v.* Mugleston, 4 L. J. Ch. O. S. 200.

10. Bromwell *v.* Bromwell, 139 Ill. 424, 28 N. E. 1057 [*affirming* 40 Ill. App. 330]; Reynolds *v.* Lansford, 16 Tex. 286.

11. Bell *v.* Crawford, 8 Gratt. (Va.) 110; Trimyer *v.* Pollard, 5 Gratt. (Va.) 460. See also *infra*, VIII, C, 1, c.

12. Gottschall *v.* Melsing, 2 Nev. 185.

13. Finn *v.* U. S., 123 U. S. 227, 8 S. Ct. 82, 31 L. ed. 128. See also Kendall *v.* U. S., 14 Ct. Cl. 122.

14. Slocum *v.* Riley, 145 Mass. 370, 14 N. E. 174.

15. Way *v.* Hooton, 156 Pa. St. 8, 26 Atl. 784; Caldwell *v.* McFarland, 11 Lea (Tenn.) 463; De Beauvoir *v.* Owen, 5 Exch. 166, 19 L. J. Exch. 177; Montreal *v.* McGee, 30 Can. Sup. Ct. 582; Newburn *v.* Street, 21 U. C. Q. B. 498.

Construction of statute.— A statute which provides that all actions which accrued prior to a certain date shall be barred before another date or both the right and right of action be barred is not a peremptory discharge of the debt, but a mere statute of limitations which must be pleaded to be available. Sanger *v.* Nightingale, 122 U. S. 176, 7 S. Ct. 1109, 30 L. ed. 1105. Where the statute, instead of providing that no action shall be brought on certain instruments after a specific time, provides that after a certain period the written instruments shall be void, the statute is not such a statute of limitations as must be specially pleaded. People *v.* Herr, 81 Ill. 125.

16. Newcomb *v.* The Clermont No. 2, 3 Greene (Iowa) 295; Hallowell *v.* Harwich, 14 Mass. 186; Stern *v.* La Compagnie Generale Transatlantique, 110 Fed. 996; Montreal *v.* McGee, 30 Can. Sup. Ct. 582; Canadian Pac. R. Co. *v.* Robinson, 19 Can. Sup. Ct. 292 [*reversed* on other grounds in [1892] A. C. 481].

When statute merely a statute of limitations.— It does not necessarily follow that because a statute giving a right of action prescribes the time within which the action must be brought, such statute is to be considered one other than a mere statute of limitations. See Kaiser *v.* Kaiser, 16 Hun (N. Y.) 602; Upton *v.* McLaughlin, 105 U. S. 640, 26 L. ed. 1197; Bartles *v.* Gibson, 17 Fed. 293.

17. Bliss *v.* Sneath, 119 Cal. 526, 51 Pac. 848; Clinton *v.* Eddy, 54 Barb. (N. Y.) 54,

claim is interposed by defendant in his answer as a set-off, and not as a counter-claim, the objection that it is barred by the statute of limitations need not be taken by a reply.[18]

2. TIME TO PLEAD.[19] Ordinarily the statute of limitations should be pleaded at the first opportunity.[20] Under the earlier decisions it was generally held that the court, in the exercise of its discretion, would not grant leave to file a plea of limitations out of time, especially where there had been negligence and there was no pretense of merits;[21] but the rule which now generally prevails is that it is within the sound discretion of the trial court to permit the plea of the statute of limitations to be filed out of time.[22] After a default which

37 How. Pr. 23; Williams *v.* Willis, 15 Abb. Pr. N. S. (N. Y.) 11; Iowa L. & T. Co. *v.* Schnose, (S. D. 1905) 103 N. W. 22. *Contra,* Curtiss *v.* Sprague, 49 Cal. 301.

18. *New York.*— Mann *v.* Palmer, 3 Abb. Dec. 162, 2 Keyes 177; Thompson *v.* Sickles, 46 Barb. 49.

Pennsylvania.— Coulter *v.* Repplier, 15 Pa. St. 208; Levering *v.* Rittenhouse, 4 Whart. 130. But see Jacks *v.* Moore, 1 Yeates 391, holding that a reply is neeessary where the set-off is pleaded specially.

South Carolina.— Columbia Bank *v.* Gadsden, 56 S. C. 313, 33 S. E. 575; Rice *v.* Sims, 8 Rich. 416; Williams *v.* Perry, 2 Strobh. 170.

Tennessee.—Alsbrook *v.* Hathaway, 3 Sneed 454, holding that a reply is not neeessary where an abbreviated plea is used, giving the name only, as the words "set-off."

Virginia.— Sexton *v.* Aultman, 92 Va. 20, 22 S. E. 838 (holding that a reply is not neeessary where the defense is set up by notice, and not by plea); Trimyer *v.* Pollard, 5 Gratt. 460.

West Virginia.— Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986.

See 33 Cent. Dig. tit. "Limitation of Actions," § 695.

Compare Willis *v.* Sutton, 116 Ga. 283, 42 S. E. 526.

Contra.— Slade *v.* Green, 1 N. C. 66; Chapple *v.* Durston, 1 Cromp. & J. 1.

19. Amendment to plead statute see *infra,* VII, C, 7.

20. Clopton *v.* Clark, 7 Leigh (Va.) 325. See also Cake *v.* Bird, (Pa. 1888) 15 Atl. 774.

After the overruling of a demurrer, based on the ground of limitations, and leave to plead over, it seems that the statute of limitations may be raised in the answer. Knoedler *v.* Meloy, 2 MacArthur (D. C.) 239, holding that it is irregular to strike out such a plea upon affidavits that plaintiff has a good cause of action.

After hearing.— Leave to file a plea of limitations will sometimes be granted, even after the hearing, where a refusal would result in gross injustiee. Heath *v.* Doyle, 18 R. I. 252, 27 Atl. 333, holding that where plaintiff puts in evidence causes of action barred by limitations, and to a plea of set-off by defendant pleads limitations in his replication, defendant is properly allowed to file a plea of limitations after the hearing.

New trial.—The defense of limitations cannot be first urged on a new trial. Bay View Brewing Co. *v.* Grubb, 31 Wash. 34, 71 Pac. 553. But see Tomlin *v.* How, Gilm. (Va.) 1, holding that the statute may be pleaded after the granting of a new trial, where the jury have found against the presumption of payment from the staleness of the demand, which presumption prevented its being pleaded on the former trial.

The plea cannot be first presented after the action has been pending several years, and the evidence has been heard by a referee whose report has been filed. Foster *v.* Foster, 71 S. W. 524, 24 Ky. L. Rep. 1396.

In Indiana a plea of the statute of limitations, filed on the first calling of the cause after the complaint to which it was pleaded was filed, should not be rejected as having been filed too late. Kimball *v.* Whitney, 15 Ind. 280.

In Louisiana the plea of the statute of limitations does not go to the merits, and, when overruled, judgment cannot go against defendant, but he must be permitted to answer. Lejeune *v.* Hebert, 6 Rob. 419; Lang *v.* Kimhall, 15 La. 200. But see Boyers *v.* Vinson, 9 Rob. 518; Macarty *v.* Bureau, 7 Rob. 467.

In Maryland, under rules of court providing that, if defendant negleets to plead by the rule day, he cannot plead limitations unless the declaration is afterward amended, it has been held that a general continuance of the cause does not enlarge the time to file the plea. Nelson *v.* Bond, 1 Gill 218.

Setting up in subsequent action.—A plea erroneously held to be good and resulting in the dismissal of the aetion will not estop defendant from setting up the statute of limitations in a subsequent action, although the bar of the statute became complete after the dismissal. Turner *v.* Edwards, 24 Fed. Cas. No. 14,254, 2 Woods 435.

21. Reed *v.* Clark, 20 Fed. Cas. No. 11,643, 3 MeLean 480.

22. Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421. See also *infra,* VIII, C, 7.

After the time to plead has expired limitations may be pleaded where leave of court so to do has been granted. Peyton *v.* Minor, 11 Sm. & M. (Miss.) 148; Beatty *v.* Van Ness, 2 Fed. Cas. No. 1,198, 2 Craneh C. C. 67 (on affidavit showing limitations to be a fair defense under the circumstances of the case);

has been entered has been opened, it has been held that the statute of limitations is not an "issuable" plea which can be then first pleaded,[23] but the weight of authority is to the contrary.[24] Any irregularity as to the time of filing the plea is waived, however, where plaintiff files a replication and defendant joins issue thereon.[25]

3. Raising Defense by Motion, Objection, or Exception — a. General Rules. Generally, the defense of the statute of limitations cannot be first urged by a motion,[26] such as a motion in arrest of judgment,[27] a motion to vacate an order of arrest,[28] a motion to dismiss,[29] a motion for judgment on the pleadings,[30] or on a motion for judgment after an answer not pleading the statute, which has not been withdrawn.[31] Nor can the statute be first urged by objections to the admission of evidence,[32] nor by a demurrer to plaintiff's evidence.[33] The statute of limitations cannot ordinarily be raised by an exception,[34] as by an exception to the order of the court allowing an amendment to be filed.[35]

b. Proceedings Before Referee. In a few cases relating to the settlement of the estate of a deceased person, or of an insolvent person, partnership, or corporation, where the rights of creditors have been involved, it has been held that the statute of limitations may be first urged on a hearing before a referee, auditor, or commissioner, as the case may be, or by an exception to his report.[36] The general rule, however, is that the failure to set up the statute of limitations by demurrer or answer precludes the right to raise the objection on such hearing,

Marsteller *v.* McClean, 16 Fed. Cas. No. 9,138, 1 Cranch C. C. 550 (holding that payment of all antecedent costs and a continuance of the cause should be required); Thompson *v.* Affick, 23 Fed. Cas. No. 13,939, 2 Cranch C. C. 46 (on affidavit showing defense to be necessary for the justice of the case). *Compare* Columbia Bank *v.* Hyatt, 2 Fed. Cas. No. 869, 4 Cranch C. C. 38.

Necessity for leave of court.— If the statute of limitations is pleaded after the plea day, without leave of court, the plea will, on motion, be ordered to be stricken out. Scott *v.* Lewis, 21 Fed. Cas. No. 12,539, 2 Cranch C. C. 203.

23. State *v.* Jennings, 10 Ark. 428; Smith *v.* Stoops, 22 Fed. Cas. No. 13,110, 1 Cranch C. C. 238.

Opening or setting aside judgment to permit plea of limitations see Judgments, 23 Cyc. 889.

24. Newsom *v.* Ran, 18 Ohio 240; Wood *v.* Ward, 1 Ohio Dec. (Reprint) 589, 10 West. L. J. 505; Hane *v.* Goodwyn, 1 Brev. (S. C.) 461; Alexandria Mechanics' Bank *v.* Lynn, 16 Fed. Cas. No. 9,384, 2 Cranch C. C. 246; Morgan *v.* Evans, 17 Fed. Cas. No. 9,800, 2 Cranch C. C. 70; Rurker *v.* Hanny, 3 East 124. *Compare* Sheets *v.* Baldwin, 12 Ohio 120.

25. Stockett *v.* Sasscer, 8 Md. 374.

26. Baldwin *v.* Ohio Tp., (Kan. 1901) 65 Pac. 700; Taylor *v.* Richards, 3 Munf. (Va.) 8. *Contra*, Davis *v.* Boyett, 120 Ga. 649, 48 S. E. 185, 102 Am. St. Rep. 118; Cleveland *v.* Walden, 62 Ga. 163; Whitfield *v.* Hill, 58 N. C. 316.

27. Rich *v.* Scalio, 115 Ill. App. 166; Cooksey *v.* Kansas City, etc., R. Co., 17 Mo. App. 132.

28. Arthurton *v.* Dalley, 20 How. Pr. (N. Y.) 311.

29. See Dismissal and Nonsuit, 14 Cyc. 432.

30. See Pleading.

31. Theroux *v.* Northern Pac. R. Co., 64 Fed. 84, 12 C. C. A. 52.

32. Meeks *v.* Hahn, 20 Cal. 620; Finney *v.* Cochran, 1 Watts & S. (Pa.) 112, 37 Am. Dec. 450; White *v.* Leavitt, 20 Tex. 703.

33. Davis *v.* Millikan, (Kan. App. 1898) 54 Pac. 512.

34. Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029 [*affirming* 95 Ill. App. 471].

35. Chicago City R. Co. *v.* Cooney, 196 Ill. 466, 63 N. E. 1029 [*affirming* 95 Ill. App. 471]. But see Mullen *v.* McKim, 22 Colo. 468, 45 Pac. 416.

36. Leith *v.* Carter, 83 Va. 889, 5 S. E. 584; Conrad *v.* Buck, 21 W. Va. 396 (holding that, in suits brought for the liquidation and settlement of an insolvent partnership, when the fund is insufficient to pay all the debts, and the contest is wholly between the creditors of such partnership, and the partners do not appear in the cause in any manner, one creditor should be permitted to avail himself of the bar of the statute of limitations against the claims of other creditors in such suit in a court of equity in any manner allowed by the practice in such courts, whether it be by plea, answer, demurrer, or exceptions to a commissioner's report made in the cause); Woodyard *v.* Polsley, 14 W. Va. 211 (holding that in a suit against the estate of a deceased person the statute may be relied on before a commissioner, even where it has not been pleaded before the court prior to order of reference). See also Hall *v.* Ridgely, 33 Md. 308; McDowell *v.* Goldsmith, 24 Md. 214; Young *v.* Mackall, 3 Md. Ch. 398; Stiles *v.* Laurel Fork Oil, etc., Co., 47 W. Va. 838, 35 S. E. 986.

or by an exception to the report;[37] but where there has been no opportunity to plead the statute, it may be presented by objections before the referee or to his report.[38]

4. Sufficiency of Plea — a. General Rules.[39] The statute of limitations must be pleaded either by stating the facts showing the defense,[40] or by specifying the particular section or subdivision of the statute under which it is claimed the action is barred.[41] It is not sufficient to merely aver a conclusion of law such as that the action is barred by the statute of limitations.[42] No particular form of plea is

37. Brendel *v.* Strobel, 25 Md. 395; Riley *v.* Corwin, 17 Hun (N. Y.) 597. *Contra*, Carter *v.* Howard, 39 Vt. 106.

In an action of account the statute of limitations must be pleaded before the interlocutory judgment that defendant account, and cannot be pleaded before the auditor. Black *v.* Nichols, 68 Me. 227.

In an action on a book-account, the statute of limitations is not pleadable in bar, but must be taken advantage of before the auditor. Smith *v.* Bradley, 39 Vt. 366.

The objection cannot be made against the master's report where not taken before the master. Brigham *v.* Smith, 18 Grant Ch. (U. C.) 224.

38. Matter of Lafayette Place, 7 N. Y. Suppl. 476; Tazewell *v.* Whittle, 13 Gratt. (Va.) 329, holding that if plaintiff alleges in his bill that his claim is due by specialty, and it appears after answer that it is founded on parol contract, defendant may set up the statute of limitations by an exception to the report of the commissioner.

39. **In action against executor or administrator** see Executors and Administrators, 18 Cyc. 1004.

Sufficiency of plea of adverse possession see Adverse Possession, 1 Cyc. 1141.

In actions against a foreign corporation, to entitle it to the benefit of the statute of limitations it must affirmatively appear that it maintained an agent in the state where suit was brought upon whom service could have been made during the time necessary for the suit to have become barred. Taylor *v.* Union Pac. R. Co., 123 Fed. 155. See also Hubbard *v.* U. S. Mortg. Co., 14 Ill. App. 40.

40. *Alabama.*— Garner *v.* Hall, 114 Ala. 166, 21 So. 835; Maury *v.* Mason, 8 Port. 211.

Indiana.— Springfield Engine, etc., Co. *v.* Michener, 23 Ind. App. 130, 55 N. E. 32.

Iowa.— Jenks *v.* Lansing Lumber Co., 97 Iowa 342, 66 N. W. 231.

Kentucky.— See Rosson *v.* Metcalfe, 44 S. W. 423, 19 Ky. L. Rep. 1800.

North Carolina.— Humble *v.* Mebane, 89 N. C. 410.

Tennessee.— Graham *v.* McReynolds, 88 Tenn. 240, 12 S. W. 547.

Wisconsin.— Murray *v.* Scribner, 74 Wis. 602, 43 N. W. 549; Smith *v.* Dragert, 60 Wis. 139, 18 N. W. 732.

England.— Anonymous, 3 Atk. 71, 26 Eng. Reprint 843.

See 33 Cent. Dig. tit. "Limitation of Actions," § 684.

Where the complaint does not state facts to show the application of the limitation on which the plea is based, the plea must state such facts. Alexander *v.* Bryan, 110 U. S. 414, 4 S. Ct. 107, 28 L. ed. 195.

A plea in a chancery cause must aver all the facts necessary to make the bar complete and applicable to the cause of action. Andrews *v.* Huckabee, 30 Ala. 143. But it is not necessary to plead the statute in as formal and technical a manner as in a court of law. Ditto *v.* Young, 3 J. J. Marsh. (Ky.) 187; Wilkinson *v.* Flowers, 37 Miss. 579, 75 Am. Dec. 78; Mitchell *v.* Woodson, 37 Miss. 567. See also Weatherford *v.* Tate, 2 Strobh. Eq. (S. C.) 27.

Answer as distinguished from plea.— Under the equity practice the same strictness and particularity are not required in an answer as in a plea, although enough ought to be stated to put the facts in issue upon which the benefit of the statute of limitations is claimed. Maury *v.* Mason, 8 Port. (Ala.) 211; Van Hook *v.* Whitlock, 2 Edw. (N. Y.) 304 [*affirmed* in 7 Paige 373 (*affirmed* in 26 Wend. 43, 37 Am. Dec. 246)].

Pleading residence.—Where, in certain actions, a shorter period of limitations is prescribed in case defendant is a resident, and defendant pleads such statute, he must also plead his residence where he relies on the shorter period of limitations. Marx *v.* Logue, 71 Miss. 905, 15 So. 890.

41. Manning *v.* Dallas, 73 Cal. 420, 15 Pac. 34; Dodge *v.* Smith, 1 Ont. L. Rep. 46. See also *infra*, VIII, C, 4, b.

42. *California.* — Table Mountain Tunnel Co. *v.* Stranahan, 31 Cal. 387; Caulfield *v.* Sanders, 17 Cal. 569.

Louisiana.— See Gaines *v.* Del Campo, 30 La. Ann. 245.

Nebraska.— Dufrene *v.* Anderson, 67 Nebr. 136, 93 N. W. 139 (holding that it is not sufficient to allege that the complaint does not state facts sufficient to constitute a cause of action); Pinkham *v.* Pinkham, 61 Nebr. 336, 85 N. W. 285, 60 Nebr. 600, 83 N. W. 837.

New York.— Budd *v.* Walker, 29 Hun 344, 3 N. Y. Civ. Proc. 422, holding that an allegation that defendant claims "the benefit of all statutes, or rules of law or equity which may be invoked for the purpose of resisting the same, and which the evidence produced on the trial may show to be applicable," is insufficient.

North Carolina.— Murray *v.* Barden, 132 N. C. 136, 43 S. E. 600; Heyer *v.* Rivenbark,

required,[43] but it should be in ordinary and concise language as provided for by the codes.[44] It is not necessary, after pleading the facts constituting the bar, to add the conclusion of law that defendant therefore pleads the statute in bar of the action.[45]

b. Reference to Particular Statute — (i) *Necessity.* Where the facts showing that the time limited for bringing the action has expired are stated in the answer, it is not necessary to allege that any particular statute is relied on.[46]

128 N. C. 270, 38 S. E. 875; Lassiter *v.* Roper, 114 N. C. 17, 18 S. E. 946; Turner *v.* Shuffler, 108 N. C. 642, 13 S. E. 243 (holding insufficient a plea of the "statute of limitation of ten, seven, six and three years, as prescribed in The Code, to all said claims, and aver that they are unable to plead the same more definitely to each and all of said claims"); Pope *v.* Andrews, 90 N. C. 401. But see Pemberton *v.* Simmons, 100 N. C. 316, 6 S. E. 122.

North Dakota.— Satterlund *v.* Beal, 12 N. D. 122, 95 N. W. 518.

South Carolina.— Walker *v.* Laney, 27 S. C. 150, 3 S. E. 63.

Utah.— Spanish Fork City *v.* Hopper, 7 Utah 235, 26 Pac. 293.

Wisconsin.— Paine *v.* Comstock, 57 Wis. 159, 14 N. W. 910.

See 33 Cent. Dig. tit. "Limitation of Actions," § 684.

But see Lilly *v.* Farmers' Nat. Bank, 56 S. W. 722, 22 Ky. L. Rep. 148 (holding that a general allegation is sufficient where the bar appears on the face of the complaint); Bayles *v.* Crossman, 5 Ohio Dec. (Reprint) 354, 5 Am. L. Rec. 13 (holding that a chancery form of answer that the cause of action was barred by "lapse of time" is sufficient for the equity form of a petition, which only sets forth a case at law).

The addition of an allegation that the action is "outlawed" does not help the plea, where it is otherwise insufficient. Budd *v.* Walker, 29 Hun (N. Y.) 484; Schrieber *v.* Goldsmith, 39 Misc. (N. Y.) 381, 79 N. Y. Suppl. 846.

In Maine, where the statute allows defendant to file a brief statement of special matter of defense, it has been held that a mere allegation that he pleads the statute of limitations is sufficient. Solon Ministerial, etc., Fund *v.* Rowell, 49 Me. 330.

43. Ruggles *v.* Fond du Lac County, 63 Wis. 205, 23 N. W. 416.

Anything in an answer which will apprise plaintiff that defendant relies on the statute will be sufficient, if such facts are averred as are necessary to show that the statute is applicable. Tazewell *v.* Whittle, 13 Gratt. (Va.) 329; Humphrey *v.* Spencer, 36 W. Va. 11, 14 S. E. 410. See also McDowell *v.* Goldsmith, 24 Md. 214.

The plea should be so explicit as to put the opposite party on his guard, and enable him to show the interruption of the prescription. Ashbey *v.* Ashbey, 41 La. Ann. 102, 5 So. 539 (holding that an averment that in the same matter, between the same parties, but in a different suit and in another court, defendant had pleaded prescription, is not sufficient as a plea in the latter case); Blake *v.* Bredall, 15 La. 550.

In general an averment in an answer to a complaint based on a simple contract that the cause of action set forth in the complaint did not accrue within six years before the commencement of the action sufficiently pleads the statute of limitations. Douglass *v.* McCarer, 80 Ind. 91; Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285; Jex *v.* New York, 111 N. Y. 339, 19 N. E. 52 [*affirming* 13 N. Y. St. 545]; Bell *v.* Yates, 33 Barb. (N. Y.) 627; McConnell *v.* Spicker, 15 S. D. 98, 87 N. W. 574; Searls *v.* Knapp, 5 S. D. 325, 58 N. W. 807, 49 Am. St. Rep. 873. See also Wagner *v.* Boyce, 6 Ariz. 71, 52 Pac. 1122; Wallace *v.* Metzker, 41 Ind. 346; McKinney *v.* Springer, 3 Ind. 59, 54 Am. Dec. 470. But see Gray Lith. Co. *v.* American Watchman's Time Detector Co., 44 Misc. (N. Y.) 206, 88 N. Y. Suppl. 857.

Sufficiency of affidavits of defense see Hutton *v.* Marx, 69 Md. 252, 14 Atl. 684 (holding that an affidavit to the plea of limitations on an action on an open account is insufficient where it does not state as to what items of plaintiff's demand it is a defense, and as to what it is not); Bowers *v.* Bowers, 18 Wkly. Notes Cas. (Pa.) 80 (allegation that instrument sued on had become payable more than six years before suit held sufficient); Schaecterlein *v.* Knabe, 14 Wkly. Notes Cas. (Pa.) 404 (averment that defendant never paid the sums indorsed on the note held unnecessary); Newton *v.* Smith, 6 Wkly. Notes Cas. (Pa.) 56; Ball *v.* Monagan, 1 Wkly. Notes Cas. (Pa.) 188 (where allegation is based on belief grounds of belief must be stated).

In the federal courts the statute of limitations may be pleaded specially, either with or without the general issue, regardless of the state practice. Kulp *v.* Snyder, 94 Fed. 613.

A stipulation that the recovery shall be limited to damages arising within five years is not equivalent to a plea of the statute of limitations. Chicago, etc., R. Co. *v.* Glenney, 28 Ill. App. 364.

44. Bell *v.* Yates, 33 Barb. (N. Y.) 627.

45. Tudor *v.* Ebner, 104 N. Y. App. Div. 562, 93 N. Y. Suppl. 1067; Pipes *v.* North Carolina Mica Mineral, etc., Co., 132 N. C. 612, 44 S. E. 114.

46. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373 [*affirmed* in 26 Wend. 43, 37 Am. Dec. 246]; Meade *v.* Gilfoyle, 64 Wis. 18, 24 N. W. 413. See also Whitney *v.* Marshall, 17 Wis. 174.

(II) *PROPRIETY.* But while it is not necessary to refer to the statute, yet in many states it is optional with the pleader to refer to the particular statute relied on instead of setting out the facts.[47] But where the statute requires a reference to the section and subsection, a mere reference to the section is insufficient, where the code section contains subdivisions.[48]

(III) *REFERENCE TO WRONG STATUTE.* Where a party pleads a statute of limitations not applicable to the cause of action claimed to be barred, he cannot invoke the protection of another statute not pleaded.[49] For instance a party who pleads a shorter period of limitation than the one applicable to the case waives the benefit of the longer and correct limitation which might have been pleaded.[50] The majority of the cases hold, however, on the theory that the greater includes the lesser, that an answer setting up that the cause of action did not accrue within a specified number of years is a good plea of the statute of limitations for any period not over that number of years.[51]

c. Allegations as to Accrual of Cause of Action. The plea of the statute must refer to the time when the cause of action accrued,[52] except where the allegation

A repealed statute of limitations, under which the cause of action sued on had been barred, must be specially pleaded. Forsyth *v.* Ripley, 2 Greene (Iowa) 181.

47. See the statutes of the several states. See also Dorsey *v.* Dorsey, 6 Gill & J. (Md.) 12; Pullen *v.* Snelus, 48 L. J. C. P. 394, 40 L. T. Rep. N. S. 363, 27 Wkly. Rep. 534; Dodge *v.* Smith, 1 Ont. L. Rep. 46.

In California this rule is a statutory one. Alhambra Addition Water Co. *v.* Richardson, 72 Cal. 598, 14 Pac. 379; Packard *v.* Johnson, (1884) 4 Pac. 632.

48. Wolters *v.* Thomas, (Cal. 1893) 32 Pac. 565; Stewart *v.* Budd, 7 Mont. 573, 19 Pac. 221.

49. Onderdonk *v.* San Francisco, 75 Cal. 534, 17 Pac. 678; Blakely *v.* Ft. Lyon Canal Co., 31 Colo. 224, 73 Pac. 249; Bridgforth *v.* Payne, 62 Miss. 777; Irvin *v.* Smith, 60 Wis. 175, 18 N. W. 724.

Exception to rule.— Claiming the benefit of a statute not applicable does not make the plea insufficient, where all the facts necessary to bring the case within the statute of limitations are alleged and defendant insists upon the benefit of the statutes of limitations in force. Van Hook *v.* Whitlock, 7 Paige (N. Y.) 373 [*affirmed* in 26 Wend. 43, 37 Am. Dec. 246].

50. *Arkansas.*— Ryburn *v.* Pryor, 14 Ark. 505; Badgett *v.* Martin, 12 Ark. 730.

Florida.— Stewart *v.* Pennett, 1 Fla. 437.

Kansas.— Downey *v.* Atchison, etc., R. Co., 60 Kan. 499, 57 Pac. 101.

Mississippi.— Bridgforth *v.* Payne, 62 Miss. 777.

Missouri.— Hunter *v.* Hunter, 50 Mo. 445.

Tennessee.— Bruce *v.* Baxter, 7 Lea 417.

See 33 Cent. Dig. tit. "Limitation of Actions," § 685.

51. *California.*— Boyd *v.* Blankman, 29 Cal. 19, 87 Am. Dec. 146.

Indiana.—McCray *v.* Humes, 116 Ind. 103, 18 N. E. 500; Right *v.* Martin, 11 Ind. 123. *Compare* Axton *v.* Carter, 141 Ind. 672, 39 N. E. 546.

Missouri.— Davis *v.* Hascall, 4 Mo. 58. *Contra,* see Murphy *v.* De France, 105 Mo. 53, 15 S. W. 949, 16 S. W. 861.

New York.— Camp *v.* Smith, 136 N. Y. 187, 32 N. E. 640; Reilly *v.* Sabater, 43 N. Y. Suppl. 383, 26 N. Y. Civ. Proc. 34; Van Hook *v.* Whitlock, 7 Paige 373 [*affirmed* in 26 Wend. 43, 37 Am. Dec. 246].

Ohio.— State *v.* Newman, 2 Ohio St. 567.

South Carolina.— Sargeant *v.* Johnson, 1 McCord 336.

Wisconsin.— See Morgan *v.* Bishop, 61 Wis. 407, 21 N. W. 263.

United States.— Phelps *v.* Elliott, 35 Fed. 455.

See 33 Cent. Dig. tit. "Limitation of Actions," § 685.

Contra.—Smith *v.* Joyce, 10 Ark. 460; Boyd *v.* Barrlinger, 23 Miss. 269; Riggs *v.* Quick, 16 N. J. L. 160.

Construction of pleading.— A plea of limitations alleging possession for a period "more" than ten years next before the commencement of the action indicates the intention of the pleader not to limit the time of possession to the ten years immediately preceding the suit. Hennessy *v.* Savings, etc., Co., 22 Tex. Civ. App. 591, 55 S. W. 124.

52. *Arizona.*—Wagner *v.* Boyce, 6 Ariz. 71, 52 Pac. 1122.

Indiana.—Musselman *v.* Kent, 33 Ind. 452.

Kentucky.— See Johnson *v.* Owensboro, etc., R. Co., 36 S. W. 8, 18 Ky. L. Rep. 276. But see Lilly *v.* Farmers' Nat. Bank, 56 S. W. 722, 22 Ky. L. Rep. 148, holding that a plea of limitations need not state the time at which the cause of action accrued, where that fact appears from the petition.

Maryland.— Perkins *v.* Turner, 1 Harr. & M. 400. See also Smith *v.* Heldman, 93 Md. 343, 48 Atl. 946.

New Jersey.— Richman *v.* Richman, 8 N. J. L. 55.

New York.— Bacon *v.* Chapman, 85 N. Y. App. Div. 309, 82 N. Y. Suppl. 309 (holding that in an action to recover for medical service, an allegation that the "services" were rendered more than six years prior to the commencement of the action was suffi-

clearly shows that the date from which the limitation is calculated is also the date of the accrual of the cause of action.[53] Whether it is sufficient to allege that defendant did not promise within the time prescribed, instead of alleging that the cause of action did not accrue within the specified time, depends on whether the accrual of the cause of action and the making of the promise are identical in point of time. If identical, the allegation is sufficient; but if not, the allegation must state that the cause of action did not accrue within the prescribed time.[54]

d. Allegations as to Commencement of Action. Inasmuch as a general plea that the cause of action did not accrue within a specified number of years refers to the time of the plea, and not to the commencement of the action, such plea is insufficient.[55] The plea must refer to the commencement of the action,[56] although it may be sufficient if it does not expressly refer to the commencement of the action, where it alleges equivalent facts showing that the action must have accrued

cient inasmuch as it would be presumed that compensation for the services was due immediately upon their performance); Mallory *v.* Lamphear, 8 How. Pr. 491 (holding that an allegation that six years elapsed between the making of the note sued on and the commencement of the action was insufficient on the ground that the note became effective from its delivery, and not from its date).

Ohio.— Barker *v.* Glascow, Tapp. 198. *Compare* Haines *v.* Tharp, 15 Ohio 130.

See 33 Cent. Dig. tit. "Limitation of Actions," § 685.

Certainty.— An averment that the cause of action accrued "on or about" a day named beyond the period is insufficient to show that the claim is barred. Hoag *v.* Mendenhall, 19 Minn. 335; McArdle *v.* McArdle, 12 Minn. 98.

53. Nickell *v.* Tracy, 100 N. Y. App. Div. 80, 91 N. Y. Suppl. 287, holding that, in an action to foreclose a mortgage, where the bond was due three years from its date, an allegation that no payment had been made thereon since a certain day after the bond became due, and that more than twenty years had elapsed since the last payment was made, is sufficient.

It is not necessary to use the phrase "cause of action" where equivalent language is employed. For allegations held equivalent see Goldberg *v.* Lippmann, 6 Misc. (N. Y.) 35, 25 N. Y. Suppl. 1003 (allegation that "the note fell due"); Davis *v.* McCullen, 86 Va. 256, 9 S. E. 1095 (plea that defendant did not break his covenant within twenty years next before the bringing of the suit, the action being on a sealed agreement). For allegations held not equivalent see Hartson *v.* Hardin, 40 Cal. 264 (allegation as to time services were rendered); Indianapolis, etc., R. Co. *v.* Center Tp., 130 Ind. 89, 28 N. E. 439 (averment that "items" named in complaint accrued more than six years before the commencement of the suit).

54. *Indiana.*— McCollister *v.* Willey, 52 Ind. 382.

Iowa.— Walker *v.* Lathrop, 6 Iowa 516.

Kentucky.—Payne *v.* Smith, 7 J. J. Marsh. 500; Caldwell *v.* Irvine, 4 J. J. Marsh. 107; Stewart *v.* Durrett, 2 T. B. Mon. 122; Banks *v.* Coyle, 2 A. K. Marsh. 564; Harrison *v.* Handley, 1 Bibb 443.

Maryland.— Gemmell *v.* Davis, 71 Md. 458, 18 Atl. 955.

Mississippi.— Slocumb *v.* Holmes, 1 How. 139.

Missouri.— Johnson *v.* Buckner, 4 Mo. 624.

New Jersey.— Cunningham *v.* Stanford, 68 N. J. L. 7, 52 Atl. 374.

New York.— Stilwell *v.* Hasbrouck, 1 Hill 561; Hale *v.* Andrus, 6 Cow. 225.

Vermont.— Cook *v.* Kibbee, 16 Vt. 434.

West Virginia.— Atkinson *v.* Winters, 47 W. Va. 226, 34 S. E. 834.

Wisconsin.— Peck *v.* Cheney, 4 Wis. 249; Parker *v.* Kane, 4 Wis. 1, 65 Am. Dec. 283.

United States.— Columbia Bank *v.* Ott, 2 Fed. Cas. No. 879, 2 Cranch C. C. 575; Ferris *v.* Williams, 8 Fed. Cas. No. 4,750, 1 Cranch C. C. 475; Gardner *v.* Peyton, 9 Fed. Cas. No. 5,234, 5 Cranch C. C. 561; Georgetown Union Bank *v.* Eliason, 24 Fed. Cas. No. 14,355, 2 Cranch C. C. 667.

See 33 Cent. Dig. tit. "Limitation of Actions," § 685.

Compare Ware *v.* Dudley, 16 Ala. 742.

In assumpsit a plea that defendant did not promise within six years is sufficient. Pearson *v.* Eames, 3 N. H. 523.

55. Eno *v.* Diefendorf, 102 N. Y. 700, 7 N. E. 798; Schreiber *v.* Goldsmith, 39 Misc. (N. Y.) 381, 78 N. Y. Suppl. 846; Smith *v.* Walker, 1 Wash. (Va.) 135.

56. Lincoln *v.* Thompson, 75 Mo. 613; Eno *v.* Diefendorf, 102 N. Y. 720, 7 N. E. 798 (holding insufficient a plea "that more than six years have elapsed since the matters and things mentioned in plaintiff's complaint, or any of them, have become due"); Swift *v.* Vaughn, 6 Hill (N. Y.) 488 (holding that a plea that defendant did not promise within six years "before the exhibiting of the bill" was insufficient); Smith *v.* Walker, 1 Wash. (Va.) 135.

Objection that allegation is conclusion of law.— It is not necessary to use the phrase "preceding the filing of the complaint," instead of the term "preceding the commencement of the action," on the ground that the latter is a conclusion of law. Adams *v.* Patterson, 35 Cal. 122.

more than the statutory time before the suit was brought, as it is not necessary that the plea should be set out in the words of the statute.[57]

e. Allegations as to Nature of Action. Where the nature of the action does not clearly appear from the complaint, a plea of limitations applicable to particular actions must show that the cause of action sued on is one to which the statute applies.[58]

f. Matters Avoiding Bar of Statute. Where the cause of action, as pleaded, does not anticipate the defense of limitations, the plea of limitations need not negative matters which might be set up in avoidance of the plea,[59] such as exceptions contained in the statute of limitations;[60] unless such exceptions are contained in the enacting clause of the statute.[61] On the other hand, if the pleading setting up the cause of action alleges matter taking the case out of the operation of the statute, the plea of limitations must deny such allegations.[62] For instance,

57. Wallace *v.* Schaub, 81 Md. 594, 32 Atl. 324.

58. Shepard *v.* Hoit, 7 Hill (N. Y.) 198 (holding that, where an action of assumpsit is brought against a sheriff, without naming him as sheriff, for breach of official duty, the plea must be special, averring that defendant was sheriff, and that the action was brought to charge him for the alleged omission of an official duty); Lyon *v.* Bertram, 20 How. (U. S.) 149, 15 L. ed. 847 [*affirming* 3 Fed. Cas. No. 1,362, McAllister 53] (holding that where the statute of limitations pleaded applied only to a cause of action founded on a contract not in writing, and the complaint was framed so as to admit evidence of a contract in writing, as well as an oral contract, the plea should contain an averment that the cause of action was not in writing). See also Clark *v.* Schwing, 1 Dana (Ky.) 333.

In Alabama a plea in an action on an account setting up the statutory limitation of three years, and not containing an averment that the claim sued on was an open account, is insufficient (Lassiter *v.* Thompson, 85 Ala. 223, 6 So. 33; Clark *v.* Guard, 73 Ala. 456; Wright *v.* Preston, 55 Ala. 570; Brooks *v.* McFarland, 20 Ala. 483; Lowrie *v.* Stewart, 8 Ala. 163; Winston *v.* State University, 1 Ala. 124), unless the plea shows on its face that such was the nature of the demand (Battle *v.* Reid, 68 Ala. 149).

59. Anderson *v.* Fisk, 36 Cal. 625; Carroll *v.* Waring, 3 Gill & J. (Md.) 491. *Compare* Payne *v.* Hathaway, 3 Vt. 212.

60. *Kentucky.*— Packard *v.* Beaver Valley Land, etc., Co., 96 Ky. 249, 28 S. W. 779, 16 Ky. L. Rep. 451. *Compare* Hayden *v.* Hayden, 3 Metc. 189.

Massachusetts.— Codman *v.* Rogers, 10 Pick. 112.

Minnesota.— McMillan *v.* Cheeney, 30 Minn. 519, 16 N. W. 404.

Mississippi.— Lang *v.* Fatheree, 7 Sm. & M. 404.

New York.— Piper *v.* Hoard, 107 N. Y. 67, 13 N. E. 632, 1 Am. St. Rep. 785; Davidson *v.* Schermerhorn, 1 Barb. 480 (holding that a denial of a new promise within six years, where no new promise was alleged in the complaint, was mere surplusage); Ford *v.* Babcock, 2 Sandf. 518.

See 33 Cent. Dig. tit. "Limitation of Actions," § 687.

In Indiana it must be shown that the case is not within any exception, unless the complaint on its face shows that the action is barred, notwithstanding the exceptions. Lehanon *v.* Twiford, 13 Ind. App. 384, 41 N. E. 844.

61. Newborg *v.* Freehling, 43 Ill. App. 463.

62. *Iowa.*— Wright *v.* Le Claire, 4 Greene 420.

Maryland.— Moreton *v.* Harrison, 1 Bland 491.

Mississippi.— Shoults *v.* Kemp, 57 Miss. 218.

New York.—Kane *v.* Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417 [*affirmed* in 8 Cow. 360]; Goodrich *v.* Pendleton, 3 Johns. Ch. 384. *Contra,* Sands *v.* St. John, 36 Barb. 628, 23 How. Pr. 140.

Tennessee.— Southern R. Co. *v.* Harris, 101 Tenn. 527, 47 S. W. 1096.

Washington.— Lake *v.* Steinbach, 5 Wash. 659, 32 Pac. 767.

United States.— McCloskey *v.* Barr, 38 Fed. 165.

See 33 Cent. Dig. tit. "Limitations of Actions," § 687.

Contra.—Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869.

Denial of discovery of fraud.—Where the complaint alleges that the fraud in controversy was not discovered until within a space of time before the commencement of the action less than the statutory period of limitations, the answer must not only allege that the cause of action did not accrue within the statutory limitation, but also that the fraud was not discovered within such time. Maple *v.* Cincinnati, etc., R. Co., 40 Ohio St. 313, 48 Am. Rep. 685. *Contra,* Erickson *v.* Quinn, 3 Lans. (N. Y.) 299. *Compare* Nave *v.* Price, 108 Ky. 105, 55 S. W. 882, 21 Ky. L. Rep. 1538, holding that defendant need not aver that plaintiff might have sooner discovered the mistake by exercise of ordinary diligence, when the facts alleged by plaintiffs in the petition affirmatively show that fact.

Return to state after absence.—Where six years have elapsed since defendant's return into the state, it is not necessary to allege that such return was public and notorious,

if the complaint shows the infancy of plaintiff, under circumstances which apparently except the demand in suit from the running of the statute, an answer which merely sets up the statute, without showing facts to relieve against the exception, is insufficient.[63]

g. Foreign Statutes. In pleading a foreign statute of limitations,[64] it is necessary to allege the terms and provisions of such statute,[65] by setting forth the statute,[66] or the substance thereof;[67] and by alleging facts showing that the action is barred in the foreign state,[68] and that the foreign statute of limitations is applicable.[69] The plea must also show that the cause of action falls within the domestic statute which allows the bar of a foreign statute of limitations.[70] It is not sufficient to aver that the action is barred by the statute of limitations of a certain state, without stating what length of time has elapsed, or any other facts which show whether or not the action is barred.[71] Where the complaint states facts to show that the case is governed by a foreign statute of limitations, and that the action is not barred in the foreign state, an answer merely averring that the note sued on shows on its face that it is barred is insufficient.[72] If it is claimed that the foreign statute relied on bars the remedy as well as the right, it must be alleged that both parties continued to reside in the foreign state where the cause of action arose, during the full period of limitations.[73]

h. Plea of Payment. Where the presumption of payment from the lapse of twenty years is relied on, it has been held that the proper plea is one of payment instead of an allegation that the right of action accrued more than twenty years before the commencement of the suit.[74]

but it is sufficient to plead the return in the words of the statute. Cole *v.* Jessup, 10 N. Y. 96; Ford *v.* Babcock, 2 Sandf. (N. Y.) 518.

Negative pregnant.— Where, to take the case out of the statute of limitations, a partial payment was alleged to have been made on a certain day, an answer denying that any payment was made on said day is not a sufficient plea, since it impliedly admits that a payment was made on some other day within the statutory time. Argard *v.* Parker, 81 Wis. 581, 51 N. W. 1012.

Where the plea of part payment is indefinite and uncertain, it is not admitted by a failure to deny the allegations. Brown *v.* Wakefield, 1 Gray (Mass.) 450.

Sufficiency of denial.—Where the complaint alleges that payment or other new promise takes the case out of the statute of limitations, a denial of such payment or promise is a sufficient plea of the statute of limitations. Weinberger *v.* Weidman, 134 Cal. 599, 66 Pac. 869; Pumphrey *v.* Bogan, 8 App. Cas. (D. C.) 449; Lemon *v.* Dryden, 43 Kan. 477, 23 Pac. 641.

63. Lehman *v.* Scott, 113 Ind. 76, 14 N. E. 914; Johnson *v.* Pinegar, 41 Ind. 168.

64. See, generally, STATUTES.

65. Carter *v.* Adamson, 21 Ark. 287; Valz *v.* Birmingham First Nat. Bank, 96 Ky. 543, 29 S. W. 329, 16 Ky. L. Rep. 624, 49 Am. St. Rep. 306; Otter View Land Co. *v.* Bowling, 70 S. W. 834, 24 Ky. L. Rep. 1157.

Exceptions in the foreign state need not be pleaded. Hyman *v.* Bayne, 83 Ill. 256.

In California, where the statute provides that it is sufficient to refer to the section and subsection, if any, of the code, which is applicable, it is sufficient, in pleading a foreign statute, to merely refer to the code section which provides that when a cause of action has arisen in another state, and by the laws thereof an action thereon cannot be maintained against a person by reason of the lapse of time, an action thereon cannot be maintained against him in this state. Allen *v.* Allen, 95 Cal. 184, 30 Pac. 213, 16 L. R. A. 646.

66. Missouri River, etc., R. Co. *v.* King, 4 Ohio Dec. (Reprint) 325, 1 Clev. L. Rep. 313.

67. Minneapolis Harvester Works *v.* Smith, 36 Nebr. 616, 54 N. W. 973; Robeson *v.* New Jersey Cent. R. Co., 76 Hun (N. Y.) 444, 28 N. Y. Suppl. 104.

68. Gillett *v.* Hill, 32 Iowa 220.

69. Grammer *v.* Grammer, 52 Ill. App. 273.

70. Minniece *v.* Jeter, 65 Ala. 222; Crawford *v.* Roberts, 8 Oreg. 324, holding that, where the statute of the forum provides that no action can be maintained on a cause of action barred in another state, where the cause of action arose in such state, between non-residents of the forum, it is not sufficient to merely allege that one of the parties was a non-resident.

71. Templeton *v.* Sharp, 9 S. W. 507, 696, 10 Ky. L. Rep. 499, holding, however, that such a defective allegation is cured by a reply admitting the law of the state to be as stated, but averring the action to be within an exception in the statute.

72. Walker *v.* Russell, 73 Iowa 340, 35 N. W. 443.

73. Williams *v.* St. Louis, etc., R. Co., 123 Mo. 573, 27 S. W. 387. But see also *supra*, VI, F. 2, d, (II), (D), (4), (b), bb, (bb).

74. New York L. Ins., etc., Co. *v.* Covert, 29 Barb. (N. Y.) 435; Henderson *v.* Hender-

i. Hypothetical Allegations. Allegations that, if a cause of action existed in favor of plaintiff against defendant, it has been barred by limitation, are generally held sufficient.[75]

5. Verification.[76] The rule that a plea in equity must be supported by an oath[77] applies to a plea of limitations in equity.[78] So a plea must be verified under a statute which requires special pleas to be verified.[79]

6. Plea to Whole Where Part Not Barred. Where the statute of limitations is a good defense to only a part of a demand it is bad if pleaded to the whole.[80] So where several causes of action are joined in different counts, a plea of limitations to the entire complaint is insufficient where only a part of the causes of action are barred.[81] In order to raise the question whether any particular part of the cause of action, or whether one or more but not all of the causes of action alleged in the complaint are barred, the statute should be pleaded separately to the particular cause of action or part thereof deemed to be barred by limitation.[82] It would seem, however, that limitations need not be pleaded to each distinct count where the bar is applicable to all the causes of action stated.[83]

7. Amendment to Plead Statute. Because the statute of limitations was formerly considered an unconscionable defense, the early cases held that the statute could not be interposed by an amendment of the pleadings.[84] At present, however, the defense is considered as favorably as other defenses, in so far as amendments are concerned.[85] Laches in moving to amend may preclude the

son, 3 Den. (N. Y.) 314. See also Butts *v.* Patton, 33 N. C. 262.

In New York this rule has been changed by statute. Code Civ. Proc. § 378.

75. Fish *v.* Farwell, 160 Ill. 236, 43 N. E. 367; Judah *v* Stephenson, 10 Iowa 493; Anderson *v.* Canter, 10 Kan. App. 167, 63 Pac. 285; Zeidler *v.* Johnson, 38 Wis. 335. See also Bauer *v.* Wagner, 39 Mo. 385. *Contra,* Marchant *v.* Valley Falls Baptist Church, 6 R. I. 24; Margetts *v.* Bays, 4 A. & E. 489, 5 L. J. K. B. 105, 6 N. & M. 228, 31 E. C. L. 223.

76. See, generally, Pleading.

77. See Equity, 16 Cyc. 368.

78. Graham *v.* Nelson, 5 Humphr. (Tenn.) 605. See also Carroll *v.* Waring, 3 Gill & J. (Md.) 491, holding, however, that a verification is not necessary where it fully appears on the face of plaintiff's bill that the action is barred.

79. Dorsey *v.* Hardesty, 9 Mo. 157.

80. Davison *v.* Schermerhorn, 1 Barb. (N. Y.) 480; Wood *v.* Riker, 1 Paige (N. Y.) 616; Glover *v.* Wilson, 6 Pa. St. 290. See also Hutton *v.* Marx, 69 Md. 252, 14 Atl. 684. *Contra,* Chew *v.* Baker, 5 Fed. Cas. No. 2,663, 4 Cranch C. C. 696.

81. *Alabama.*— Galbreath *v.* Cole, 61 Ala. 139.

Illinois.— Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337.

Kentucky.— Clark *v.* Schwing, 1 Dana 333.

Maryland.— Crain *v.* Yates, 2 Harr. & G. 332.

New York.— Stilwell *v.* Hasbrouck, 1 Hill 561.

Vermont.— Smith *v.* Purmort, 63 Vt. 378, 20 Atl. 928.

See 33 Cent. Dig. tit. "Limitation of Actions," § 689.

82. Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337. See also Gilpin *v.* Adams, 14 Colo. 512, 24 Pac. 566; North Chicago St. R. Co. *v.* Burnham, 102 Fed. 669, 42 C. C. A. 584.

Definiteness.— A denial of the part of the claim sued on as barred must be specific. Hart *v.* Miller, 29 Ind. App. 222, 64 N. E. 239.

83. See Bullen *v.* Ridgely, 1 Harr. & J. (Md.) 104.

Uncertainty.—Where the declaration contains several causes of action, an answer stating that the alleged cause of action is barred by limitations is not defective for uncertainty as to which of the several causes of action it refers, since it will be considered as referring to the entire declaration. Wiley *v.* Heaps, 89 Md. 44, 42 Atl. 906.

84. Wolcott *v.* McFarlan, 6 Hill (N. Y.) 227; Jackson *v.* Varick, 2 Wend. (N. Y.) 294; Coit *v.* Skinner, 7 Cow. (N. Y.) 401. See Burton *v.* Waples, 3 Harr. (Del.) 75.

After issue joined.— It has been held by some courts that a plea of the statute of limitations cannot be allowed to be added by way of amendment. Curtis *v.* Pueblo, 11 Colo. App. 446, 54 Pac. 649; Golden *v.* Hallagan, 1 Wend. (N. Y.) 302. *Contra,* State *v.* Jennings, 10 Ark. 428. Other courts have held that the amendment is improper, unless peculiar circumstances are shown (Sheets *v.* Baldwin, 12 Ohio 120), or a good reason assigned why it was not sooner pleaded (Johnston *v.* Williams, 1 N. C. 565; Martin *v.* Anderson, 6 Rand (Va.) 19; Jackson *v.* Cutright, 5 Munf. (Va.) 308). In some states the statute can be pleaded after issue joined only on payment of all costs up to the time of the application. Hamilton *v.* Shepard, 4 N. C. 357.

85. Thomas *v.* Price, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; Whereatt *v.*

granting of the favor,[86] and the amendment will not in many states be allowed on or after the trial.[87] Where amendments "of course" are allowable, the plea of the statute may be set up by such an amendment the same as any other plea.[88]

8. Waiver and Abandonment of Plea. The plea of limitations may be waived at the option of the party entitled to rely thereon.[89] The plea is deemed to have been abandoned where the party interposing it, upon testifying, states explicitly that he does not plead the statute.[90] Where the plea of limitations has been abandoned, it cannot be relied on at any subsequent trial, without the consent of the opposing party or an order of court.[91]

9. Demurrer to Plea. A plea of the statute of limitations may be demurred to where clearly insufficient, the same as any other plea;[92] but inasmuch as a

Worth, 108 Wis. 291, 84 N. W. 441, 81 Am. St. Rep. 899. Patterson *v.* Central Canada Sav. etc., Co., 17 Ont. Pr. 470; Seaton *v.* Fenwick, 7 Ont. Pr. 146; Meehan v. Berry, 38 Can. L. J. N. S. 554. See also Cattanach *v.* Urquhart, 6 Ont. Pr. 28.

Discretion of court.— It is within the discretion of the trial court to permit an amendment of the answer by setting up the statute of limitations as a defense. Yocum *v.* Foreman, 14 Bush (Ky.) 494; Meade *v.* Lawe, 32 Wis. 261. See also Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. Rep. 2487.

Unless the amendment is in furtherance of justice, it will not be allowed, where the statute requires amendments to be in furtherance of justice. Cooke *v.* Spears, 2 Cal. 409, 56 Am. Dec. 348; Clinton *v.* Eddy, 54 Barb. (N. Y.) 54, 37 How. Pr. 23.

Under leave to file additional pleas, a plea of the statute of limitations may be filed, if done within the time that the rules of the court would allow if the party had filed the pleas before, but had been put under rule plea to the first plea day after appearance. Mitchell *v.* Sellman, 5 Md. 376.

In Louisiana a plea of prescription may be introduced by way of amendment, and is one to which great indulgence is given. Bainbridge *v.* Clay, 3 Mart. N. S. 262.

86. Curtis *v.* Pueblo, 11 Colo. App. 446, 54 Pac. 649; Owers *v.* Olathe Silver Min. Co., 6 Colo. App. 1, 39 Pac. 980 (one and a half years after issues made up); Dulle *v.* Lally, 167 Ill. 485, 47 N. E. 753 [*affirming* 64 Ill. App. 292]; Metropolitan L. Ins. Co. *v.* Blesch, 58 S. W. 436, 22 Ky. L. Rep. 530; Roberts *v.* Ward, 26 Nova Scotia 463. See Gerdau *v.* Faber, 26 N. Y. App. Div. 606, 50 N. Y. Suppl. 183.

After the filing of an auditor's or master's report, an amendment of the answer will not ordinarily be allowed. Brendel *v.* Strobel, 25 Md. 395; Everhart's Appeal, 106 Pa. St. 349.

87. Morton *v.* Bartning, 68 Cal. 306, 9 Pac. 146; Griffin *v.* Moore, 43 Md. 246; Robeson *v.* New Jersey Cent. R. Co., 76 Hun (N. Y.) 444, 28 N. Y. Suppl. 104. See also Brancker *v.* Crozier, 16 L. T. Rep. N. S. 391. But see Cunliff *v.* Delaware, etc., Canal Co., 4 N. Y. St. 775, holding that an amendment after judgment was proper, where the defense was omitted by inadvertence, and the case had proceeded as if the defense was pleaded. *Contra*, Nunnelly *v.* Southern Iron Co., 94 Tenn. 397, 29 S. W. 361, 28 L. R. A. 421; Thomas *v.* Price, 33 Wash. 459, 74 Pac. 563, 99 Am. St. Rep. 961; Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027.

Discretion of court.—A refusal of the court to allow an amendment of an answer setting up the statute of limitations, after close of testimony in the case, is not an abuse of discretion. Baxter *v.* Hamilton, 20 Mont. 327, 51 Pac. 265.

But where the cause of action proved is not the one alleged, an amendment should be allowed on the trial to set up limitations as a defense to the cause of action proved. Nichols *v.* Randall, 136 Cal. 426, 69 Pac. 26.

Terms.— Allowing an amendment on the trial on the ground of mistake, without imposing terms, after a substitution of attorneys, has been held not reversible error. Illinois Steel Co. *v.* Budzisz, (Wis. 1900) 81 N. W. 1027.

In Louisiana prescription may be pleaded at any time before final judgment, even on appeal. Beard *v.* Pritchard, 9 Rob. 464; Arbonneaux *v.* Letorey, 6 Rob. 456; Lejeune *v.* Herbert, 6 Rob. 419; Broadway *v.* Pool, 19 La. 258; Semple *v.* Buhler, 6 Mart. N. S. 469; Brown *v.* Duplantier, 1 Mart. N. S. 312; Dunbar *v.* Nichols, 10 Mart. 184.

88. Bradley *v.* Phœnix Ins. Co., 28 Mo. App. 7; McQueen *v.* Babcock, 3 Abb. Dec. (N. Y.) 129, 3 Keyes 428; Wyman *v.* Remond, 18 How. Pr. (N. Y.) 272. See also Louisville, etc., R. Co. *v.* Hall, 115 Ky. 567, 74 S. W. 280, 24 Ky. L. Rep. 2487.

89. Farmers' Bank *v.* Sprigg, 11 Md. 389.

Failure to request instructions.— A plea of the statute of limitations is not waived by failure to ask the withdrawal of the case from the jury, or an instruction in regard thereto. Jones *v.* Goldtree Bros. Co., 142 Cal. 383, 77 Pac. 939.

90. Lewis *v.* Buckley, 73 Miss. 58, 19 So. 197.

91. Sexton *v.* Brock, 15 Ark. 345.

92. Badgett *v.* Martin, 12 Ark. 730; Masterson *v.* Townshend, 123 N. Y. 458, 25 N. E. 928, 10 L. R. A. 816; Farrar *v.* Lee, 10 N. Y. App. Div. 130, 41 N. Y. Suppl. 672; Gray Lithograph Co. *v.* American Watchman's Time Detector Co., 44 Misc. (N. Y.) 206, 88 N. Y. Suppl. 857; Ausplund *v.* Ætna Indem-

demurrer admits the truth of the facts alleged in the plea, a demurrer does not lie on the ground that the cause of action did not accrue within the period mentioned in the plea.[93] By leave of court, plaintiff may be permitted to withdraw his reply and substitute a demurrer.[94]

10. Replication or Reply — a. Necessity.[95] At common law a replication is generally necessary to prevent the plea of limitations constituting a bar to a recovery;[96] but the want of it could be waived.[97] Under the codes, however, a reply is usually unnecessary,[98] especially where the answer does not consist of new matter.[99] In states where no reply is necessary to new matter, except where the court orders a reply, it is discretionary with the court whether to order a reply,[1] and a reply will not be required where the facts on which plaintiff relies to defeat the plea of the statute appear by affirmative allegations.[2]

b. Sufficiency.[3] A reply to an answer of the statute of limitations must apprise defendant of the issue to be made on the answer, whether of denial or voidance, by showing that the action was brought within the statutory time, or some disability suspending the operation of the statute.[4] It must be responsive to the plea,[5] and where the replication is only to a part of the plea directed to

nity Co., 47 Oreg. 10, 81 Pac. 577, 82 Pac. 12. See also Yetter *v.* Westfield, 19 Misc. (N. Y.) 328, 44 N. Y. Suppl. 268. *Compare* Sonoma County *v.* Hall, 129 Cal. 659, 62 Pac. 213.

The objection that there is no statute of limitations barring the cause of action sued on should be raised by demurrer. Norton *v.* Colby, 52 Ill. 198.

Amended declaration.— A demurrer to a plea of limitations interposed to an amended declaration, instead of a replication, is proper, although the plea is perfect in form, where the amended count is merely a restatement of the matter set up in the original count. Chicago, etc., R. Co. *v.* Gillison, 173 Ill. 264, 50 N. E. 657, 64 Am. St. Rep. 117.

Effect of demurrer to short plea.— A demurrer to a plea of the statute of limitations pleaded by name merely, by consent, raises no question whether the statute can be pleaded in an action of assumpsit. Goodwin *v.* Harrison, 6 Ala. 438.

Necessity.— The objection to a plea of the statute of limitations that it fails to state under which subdivision of the code the action is barred need not be taken by special demurrer. Wolters *v.* Thomas, (Cal. 1893) 32 Pac. 565.

93. De Armond *v.* Ballou, 122 Ind. 398, 23 N. E. 766 (holding that plaintiff cannot rely on the averments of his complaint to show when the cause of action accrued); Putnam *v.* Ward, 61 Vt. 42, 17 Atl. 740.

94. Lucas *v.* Tunstall, 6 Ark. 443.

95. To urge matters in avoidance of statute see *infra*, VIII, D, 2.

96. Almy *v.* Daniels, 15 R. I. 312, 10 Atl. 654, 4 Atl. 753; Curry *v.* Mannington, 23 W. Va. 14 (not necessary where plea of limitations is immaterial); Garrison *v.* Owens, 1 Pinn. (Wis.) 471; Barlow *v.* Arnold, 6 Fed. 351.

A similiter is no response to a plea of the statute of limitations. Morris *v.* Barkley, 1 Litt. (Ky.) 64.

97. Almy *v.* Daniels, 15 R. I. 312, 10 Atl. 654, 4 Atl. 753.

98. Alspaugh *v.* Reid, 6 Ida. 223, 55 Pac. 300, where the statute provides that new matter pleaded in the answer is deemed denied by plaintiff.

99. West *v.* Hennessey, 58 Minn. 133, 59 N. W. 984 (where plea mere denial of allegations in the complaint); Lake *v.* Steinbach, 5 Wash. 659, 32 Pac. 767 (where complaint alleged defendant's absence from the state when the cause of action accrued, and that he did not return within six years before the commencement of the action, and defendant merely pleaded the six-year statute of limitations).

1. Perls *v.* Metropolitan L. Ins. Co., 15 Daly (N. Y.) 517, 8 N. Y. Suppl. 532; Hubbell *v.* Fowler, 1 Abb. Pr. N. S. (N. Y.) 1.

2. Avery *v.* New York Cent., etc., R. Co., 6 N. Y. Suppl. 547. In Post *v.* Leys, 7 Ont. Pr. 387, which was an action on a note upon which it appeared defendant had signed a written agreement, five years after the note was made, that it "should continue a good security notwithstanding the statute of limitations," defendant pleaded the statute of limitation, and the court refused to strike out the plea but permitted plaintiff to file a special replication so that the question could come up on demurrer.

3. Allegations in avoidance of statute see *infra*, VIII, D, 3.

4. Jarvis *v.* Pike, 11 Abb. Pr. N. S. (N. Y.) 398. See also Field *v.* Sims, 96 Ala. 540, 11 So. 763, sufficiency of replication of *res judicata*.

5. Eames *v.* Savage, 14 Mass. 425, where plaintiff should have joined issue.

A general denial is sufficient to join issue. Whelan *v.* Kinsley, 26 Ohio St. 131; Smith *v.* Bartram, 11 Ohio St. 690.

Denial of suretyship.— To a plea relying upon the statute limiting actions against sureties, it is a good reply to deny the suretyship averred in the plea. Lewis *v.* Harbin, 5 B. Mon. (Ky.) 564.

several causes of action set out in the declaration, the part referred to must be pointed out with certainty.[6]

c. Effect. Where no evidence is introduced, a general replication is a complete answer to the plea of the statute of limitations.[7]

D. Pleading in Avoidance of Limitations[8] — 1. PROPRIETY.[9] A reply may set up any exception to the statute which is relied upon to take the case out of the statute of limitations;[10] but it must be responsive to the plea,[11] and not allege a cause of action not relied on in the complaint.[12] It is proper to deny a plea of limitations generally, and also to set up matters in avoidance,[13] although, except where allowed by statute or code practice,[14] a reply stating more than one exception to the statute, or more than one defense to the plea, is bad on account of duplicity.[15]

2. NECESSITY. Whether it is necessary to anticipate the defense of limitations has already been considered.[16] Where the defense has not been anticipated in the complaint, and is set up in the answer, the facts relied on in avoidance of the statute must be pleaded in a reply;[17] or they must be pleaded by an amend-

6. Hotchkiss *v.* Ladd, 36 Vt. 593, 86 Am. Dec. 679.

7. Lewis *v.* Mason, 84 Va. 731, 10 S. E. 529.

8. **Denials in reply and joinder of issue** see *supra*, VIII, C, 10.

Replication to plea of statute of limitations in actions by or against executors or administrators see EXECUTORS AND ADMINISTRATORS, 18 Cyc. 1005.

9. **Anticipating defense in bill or complaint** see *supra*, VIII, A, 1.

10. Minniece *v.* Jeter, 65 Ala. 222 (holding that any exception in a foreign statute is available in answer to a plea of a foreign statute of limitations); Gunton *v.* Hughes, 79 Ill. App. 661 [*affirmed* in 181 Ill. 132, 54 N. E. 895]; Wamburzee *v.* Kennedy, 4 Desauss. Eq. (S. C.) 474.

A part payment or other new promise in avoidance of a plea of limitation may be set up in the reply. Vinson *v.* Palmer, 45 Fla. 630, 34 So. 276. *Compare* Morrison *v.* Morrison, 14 N. C. 402.

11. Bottles *v.* Miller, 112 Ind. 584, 14 N. E. 728; Russell *v.* Stevens, 20 Vt. 53, holding that a replication that defendant promised within "six" years to pay the judgment is bad where the plea was that the cause of action did not accrue within "eight" years.

In assumpsit, a replication to a plea of the statute is sufficient where it alleges that defendant did "undertake and promise" within the time of the statute. Chenot *v.* Lefevre, 8 Ill. 637. See also Livingston *v.* Ostrander, 9 Wend. (N. Y.) 306.

In an action of debt, the replication should allege that "the cause of action did accrue to the said plaintiff within sixteen years next before the commencement" of the suit, it not being sufficient to allege that defendant did "undertake and promise" within the time of the statute. Chenot *v.* Lefevre, 8 Ill. 637.

12. McConnel *v.* Kibbe, 29 Ill. 483; Carpenter *v.* McClure, 38 Vt. 375, holding that, where the declaration counted specially on a note, but did not allege that it was witnessed, and defendant pleaded the statute of limitations, the replication alleging that the note was witnessed was no departure from the declaration.

A reply of a part payment is no departure. — Real Estate Bank *v.* Hartfield, 5 Ark. 551.

Where the new promise constitutes a new and independent cause of action, it cannot be first set up in the reply. Fletcher *v.* Munroe, 61 Vt. 406, 17 Atl. 793. But see *supra*, VII, A, 12.

Where the action is on a specialty, a reply setting up a new promise is bad because of a departure. Hittson *v.* Davenport, 3 Colo. 597; Masston *v.* Seabury, 3 N. J. L. 702.

In Texas, where a new promise made either before or after the original cause of action is barred must be declared on in the complaint as the cause of action, a reply setting up a subsequent promise constitutes a departure and is therefore improper. Coles *v.* Kelsey, 2 Tex. 541, 47 Am. Dec. 661.

13. Varner *v.* Varner, 69 Ill. 445.

14. Thomason *v.* Odum, 23 Ala. 480, holding that the statute applies to a plea setting up the statute of limitations of another state.

Effect.—Where two or more distinct and separate replications are interposed, the defense set up in the plea is overthrown if plaintiff is successful upon either of his replications. Cole *v.* Jessup, 10 N. Y. 96.

15. Andreae *v.* Redfield, 1 Fed. Cas. No. 368; Craig *v.* Brown, 6 Fed. Cas. No. 3,329, Pet. C. C. 443.

16. See *supra*, VIII, A.

17. *Arkansas.*—Walker *v.* Mississippi Bank, 7 Ark. 503. But see Meyer *v.* Quartermous, 28 Ark. 45.

Indiana.— Strong *v.* State, 57 Ind. 428.

Iowa.— Willits *v.* Chicago, etc., R. Co., 80 Iowa 531, 45 N. W. 916.

Kentucky.— Newdegate *v.* Early, 49 S. W. 338, 20 Ky. L. Rep. 1452. *Compare* Harris *v.* Moberly, 5 Bush 556.

Maryland.— Georgetown Union Bank *v.* Planters' Bank, 9 Gill & J. 439, 31 Am. Dec. 113.

Missouri.— Zoll *v.* Carnahan, 83 Mo. 35.

Pennsylvania.— Guldin *v.* Lorah, 8 Pa. Co. Ct. 503.

ment of the complaint, especially in equity where the countervailing matter cannot be set up by special replication.[18]

3. Sufficiency of Allegations — a. General Rules. Where a party against whom limitations has been pleaded attempts to bring himself within a particular saving or exception, he is required to state with distinctness and particularity all such facts as are essential to bring him within such exception.[19] Where a disability is relied on to save the bar of the statute there must be an allegation, not only of the existence of the disability and as to when the cause of action accrued, but also that it continued to a time when it would be an answer to the bar.[20] It

Rhode Island.—See Robinson *v.* Merchants', etc., Transp. Co., 16 R. I. 637, 19 Atl. 113.

Texas.— Meineke *v.* Edmundson, 33 Tex. Civ. App. 505, 77 S. W. 238; Morrow *v.* Terrell, 21 Tex. Civ. App. 28, 50 S. W. 734; Dublin *v.* Taylor, etc., R. Co., (Civ. App. 1898) 49 S. W. 667; Dodge *v.* Signor, 18 Tex. Civ. App. 45, 44 S. W. 926. See also Harris *v.* Linberg, (Civ. App. 1897) 39 S. W. 651.

Virginia.— Lewis *v.* Bacon, 3 Hen. & M. 89.

West Virginia.— Laidley *v.* Smith, 32 W. Va. 387, 9 S. E. 209, 25 Am. St. Rep. 825.

England.— Kempe *v.* Gibbon, 9 Q. B. 609, 11 Jur. 299, 16 L. J. Q. B. 120, 58 E. C. L. 609.

Canada.— Smith *v.* Stewart, 3 Nova Scotia 417.

See 33 Cent. Dig. tit. "Limitation of Actions," § 696.

Contra.— See Fox *v.* Tay, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897, 23 Am. St. Rep. 474.

An agreement by defendant not to plead the statute cannot be relied on as a defense to the plea of limitations, unless the agreement is set up in the reply. Bevan *v.* Cullen, 7 Pa. St. 281; McCulloch *v.* Norris, 5 Pa. St. 285. But see Segond *v.* Landry, 1 Rob. (La.) 335.

Replication or amendment.—In some of the cases it is stated that plaintiff, in order to bring himself within the exceptions of the statute, must set forth the facts relied on in his replication "or" by amending his declaration. Maury *v.* Mason, 8 Port. (Ala.) 211; Switzer *v.* Noffsinger, 82 Va. 518.

In North Carolina a reply is necessary only where matter in avoidance is relied on. Stubbs *v.* Motz, 113 N. C. 458, 18 S. E. 387.

In Virginia, where the code provides that a new promise may be shown in avoidance by a plaintiff, without pleading it, to repel the bar of the statute of limitations, pleaded by defendant, where reasonable notice of his intention to rely on the new promise is given to defendant before trial, it is not error to reject such evidence where no notice has been given. Noell *v.* Noell, 93 Va. 433, 25 S. E. 242.

The want of a replication is not cured by verdict.— Baltimore, etc., R. Co. *v.* Faulkner, 4 W. Va. 180.

18. Gentry *v.* Barron, 109 Ga. 172, 34 S. E. 349; Beard *v.* Simmons, 9 Ga. 4; Henry *v.* Peters, 5 Ga. 311; Harding *v.* Durand, 138 Ill. 515, 28 N. E. 948 [*reversing* 36 Ill. App. 238]; Lottman *v.* Barnett, 62 Mo. 159.

In Illinois special replications are not permissible in equity pleadings, and matters which might be specially pleaded in reply to the answer must be availed of by amendments to the bill. Gunton *v.* Hughes, 181 Ill. 132, 54 N. E. 895 [*affirming* 79 Ill. App. 661].

Laches in moving to amend.— The application to amend must be made with due diligence as soon as the facts are discovered. Hiatt *v.* Auld, 11 Kan. 176.

19. *Alabama.*— Love *v.* Butler, 129 Ala. 531, 30 So. 735; Thomason *v.* Odum, 23 Ala. 480; Watson *v.* Brazeal, 7 Ala. 451.

Arkansas.— Denton *v.* Brownlee, 24 Ark. 556; Pettus *v.* Harris, 11 Ark. 294.

Michigan.— Ten Eyck *v.* Wing, 1 Mich. 40.

New Hampshire.— Cook *v.* Rice, 3 N. H. 60.

New York.— Worden *v.* Worthington, 2 Barb. 368.

Texas.— See Grounds *v.* Sloan, 73 Tex. 662, 11 S. W. 898; Harrison *v.* Sulphur Springs, (Civ. App. 1896) 35 S. W. 744.

See 33 Cent. Dig. tit. "Limitation of Actions," § 698.

Facts, and not mere general allegations of absence, fraud, concealment, minority, and coverture, must be stated. Walton *v.* Talbot, 1 Tex. Unrep. Cas. 511.

It has been held, however, that an allegation that the cause of action justly subsisted at the commencement of the suit, as plaintiff can and will make it appear by defendant's testimony, is sufficient. Newfield *v.* Blawn, 16 Iowa 297. But see Sully *v.* Childress, 100 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875, where a general allegation was held insufficient.

Running accounts.— In an action on account for money loaned, where the six-year statute of limitations is pleaded, a reply that such money is part of a mutual running account, remaining unsettled, and extending up to the time of bringing the action, is sufficient on demurrer. Harper *v.* Harper, 57 Ind. 547. See also Brackenridge *v.* Baltzell, Smith (Ind.) 217.

Where one plea of limitations relates to several counts, a reply that one of the promises is within an exception in the statute is sufficient. Perkins *v.* Burbank, 2 Mass. 81.

20. Gross *v.* Disney, 95 Tenn. 592, 32 S. W. 632; Hale *v.* Ellison, (Tenn. Ch. App. 1900) 59 S. W. 673 (holding that where a married woman relies on the disability of coverture,

is sufficient to allege that the action could not be brought because the courts were closed by reason of civil war, where the facts as to time are alleged;[21] or that defendant promised not to plead the statute of limitations;[22] or facts showing defendant to be estopped to plead limitations.[23]

b. Personal Disabilities. Where a personal disability is relied on, the time when the disability commenced and the extent of its duration must be alleged.[24] For instance, a replication alleging insanity must show that plaintiff was insane at the time the cause of action accrued.[25] Where infancy is relied on to take the case out of the statute, the allegations must be definite and certain;[26] but where the action is brought by a next friend before the infant becomes of age, the reply need not aver that the next friend is a minor.[27]

c. Absence or Non-Residence. In pleading non-residence or absence from the state,[28] it is necessary to clearly bring the case within the exception in the statute by appropriate allegations of fact.[29] The pleading must state positively the duration of the absence from the state,[30] and that defendant has not returned to the state within the statutory time next preceding the commencement of the action.[31]

she must allege in her bill that the disability existed at the time her cause of action accrued and continued to the time of commencing the suit); Darrow *v.* Summerhill, 24 Tex. Civ. App. 208, 58 S. W. 158.

21. Peak *v.* Buck, 3 Baxt. (Tenn.) 71; Huffman *v.* Callison, 6 W. Va. 301.

22. Green *v.* Seymour, 59 Vt. 459, 12 Atl. 206, holding that the replication need not allege that the promise was in writing, although it would be unavailable if not in writing.

23. Chesapeake, etc., R. Co. *v.* Speakman, 114 Ky. 628, 71 S. W. 633, 24 Ky. L. Rep. 1449, 63 L. R. A. 193.

24. Crozier *v.* Bryant, 4 Bibb (Ky.) 174 (holding that an allegation that plaintiff was a *feme covert* when the cause of action accrued against defendant was not equivalent to an allegation of disability when the cause of action accrued to her); Roemillie *v.* Leeper, 2 Tex. Unrep. Cas. 535.

25. Lincoln *v.* Norton, 36 Vt. 679.

26. Midkiff *v.* Stephens, 9 Tex. Civ. App. 411, 29 S. W. 54, holding that an allegation that "most of the plaintiffs are married women and minors" was too indefinite.

Responsiveness.—Where a plea of limitations sets up the one and two year statutes, plaintiff's counter plea of minority, which states facts meeting both statutes, is sufficient, although it does not specifically mention the one-year statute. Galveston, etc., R. Co. *v.* Washington, 25 Tex. Civ. App. 600, 63 S. W. 538.

27. Bliven *v.* Wheeler, 23 R. I. 379, 50 Atl. 644.

28. See *supra*, VI, F, 2.

29. *Alabama.*— Stevenson *v.* Anderson, 87 Ala. 228, 6 So. 285, holding, however, that an allegation of non-residence, and domicile in another state, was equivalent to an allegation of absence from the state.

Arkansas.—Burr *v.* Williams, 20 Ark. 171; Smith *v.* Joyce, 10 Ark. 460, holding that the absconding must be alleged to have been since the statute was passed in regard to fraudulently absconding from the state.

Iowa.— Winney *v.* Sandwich Mfg. Co., 86 Iowa 608, 53 N. W. 421, 18 L. R. A. 524.

Tennessee.— Sully *v.* Childress, 106 Tenn. 109, 60 S. W. 499, 82 Am. St. Rep. 875, holding that an averment that the cause of action "while apparently barred by the statute of limitations, is not in fact barred, but in full force," is insufficient.

Vermont.— Wires *v.* Farr, 25 Vt. 41.

See 33 Cent. Dig. tit. "Limitation of Actions," § 700.

Following language of statute.— A reply which follows the language of the statute is sufficient without setting out how the removal from the state operated to produce the obstruction to bringing suit. Prather *v.* Ross, 10 B. Mon. (Ky.) 15.

Non-residence of assignors.— Where an assignee of a bond sues thereon and replies his non-residence to a plea of limitations, the replication is insufficient where it does not also allege non-residence of the assignors. Aikin *v.* Bailey, 10 Ark. 580.

In Vermont, where the statute was tolled by absence of defendant only where he had no known attachable property within the state, the reply of such absence must have alleged that defendant had no such attachable property within the state. Stevens *v.* Fisher, 30 Vt. 200.

Replications held sufficient see Sullenberger *v.* Gest, 14 Ohio 204; Cook *v.* Kibbee, 16 Vt. 434.

30. Hedges *v.* Roach, 16 Nebr. 673, 21 N. W. 404 (holding that an allegation of absence of "about" two years was insufficient); Bauserman *v.* Blunt, 147 U. S. 647, 13 S. Ct. 466, 37 L. ed. 316 (holding that an allegation of absence "for more than five years" was insufficient to describe a longer period than five years and one day).

31. Wells *v.* Jones, 2 Houst. (Del.) 329; Shapley *v.* Felt, 3 N. H. 121; Thurston *v.* Fisher, 9 Serg. & R. (Pa.) 288.

A continuing absence should be averred, since mere absence from one date to another will be held to mean for a single day. Hall *v.* Nasmith, 28 Vt. 791.

Where the exception in the statute relates to defendant's absconding from the state, so as to prevent the institution of a suit, it must be alleged that defendant was within the state when the cause of action accrued, or at some time between that time and the expiration of the limitation.[32] On the other hand, where the exception includes only those persons not resident in the state when the cause of action accrued, it is necessary to allege a residence outside of the state at the time the cause of action accrued, it not being sufficient to merely allege absence from the state at such time;[33] and the averment must show such absence at the time of the accrual of the cause of action rather than at the time that the cause of action accrued to plaintiff.[34] The reply must also show, in addition to an allegation of defendant's residence out of the state for a specified time, that the statutory period has not elapsed exclusive of the time of its absence.[35] It need not be alleged that defendant's removal from the state was with the intent to obstruct plaintiff in the prosecution of his action.[36]

d. Mistake, Fraud, or Concealment. In pleading mistake, fraud, or concealment to show that the cause of action did not accrue until the discovery thereof it is necessary to allege facts and not mere conclusions of law.[37] The time and manner of discovering the fraud must be stated,[38] and also the facts to show that

Continued absence, and not continued non-residence, must be alleged. Wells *v.* Jones, 2 Houst. (Del.) 329.

32. Pettus *v.* Harris, 11 Ark. 294; Smith *v.* Bogliolo, 5 Mo. 344.

33. Paterson Bank *v.* Ludlow, 11 N. J. L. 354.

34. Bennett *v.* Herring, 1 Fla. 387.

35. Andreae *v.* Redfield, 1 Fed. Cas. No. 368.

36. Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

37. Morgan *v.* Morgan, 68 Ala. 80; Beatty *v.* Nickerson, 73 Ill. 605; Jones *v.* Rogers, 85 Miss. 802, 38 So. 742; Lawrence *v.* Norreys, 15 App. Cas. 210, 54 J. P. 708, 59 L. J. Ch. 681, 62 L. T. Rep. N. S. 706, 38 Wkly. Rep. 753. But see Godbold *v.* Lambert, 8 Rich. Eq. (S. C.) 155, 70 Am. Dec. 192.

A mere allegation of want of knowledge without further allegation of fraud is insufficient. Parmelee *v.* Price, 208 Ill. 544, 70 N. E. 725 [*affirming* 105 Ill. App. 271]; Conner *v.* Goodman, 104 Ill. 365; Phelps *v.* Elliott, 29 Fed. 53.

Concealment.—Where it is alleged that the cause of action was fraudulently concealed it is generally necessary to state the facts constituting such concealment (Stone *v.* Brown, 116 Ind. 78, 18 N. E. 392; Holman *v.* Mayhew, 15 Ind. 263; Beissner *v.* Texas Express Co., 1 Tex. App. Civ. Cas. § 806; Beaubien *v.* Beaubien, 23 How. (U. S.) 190, 16 L. ed. 484; Cottrell *v.* Tenney, 48 Fed. 716), except where the concealment relied on consists of secret acts of the other party which are unknown to plaintiff (Matthews *v.* Sontheimer, 39 Miss. 174).

Obstruction of action.—A replication to a plea of the statute of limitations that defendant obstructed the action by assurances of settlement and adjustment and renewal of the policy, made with intent to deceive, mislead and defeat plaintiff's right of action, is good, although the particulars are not stated. Abell *v.* Penn Mut. L. Ins. Co., 18 W. Va. 400.

Allegations of concealment of fraud held sufficient see Irvine *v.* Burton, (Miss. 1899) 24 So. 962; Smith *v.* McElyea, 68 Tex. 70, 3 S. W. 258.

Allegations of concealment of fraud held insufficient see Jackson *v.* Jackson, 149 Ind. 238, 47 N. E. 963; Brunson *v.* Ballou, 70 Iowa 34, 29 N. W. 794.

38. *Alabama.*—Duncan *v.* Williams, 89 Ala. 341, 7 So. 416.

California.—Lady Washington Consol. Co. *v.* Wood, 113 Cal. 482, 45 Pac. 809.

Idaho.—See Ryan *v.* Woodin, 9 Ida. 525, 75 Pac. 261.

Kentucky.—German Security Bank *v.* Columbia Finance, etc., Co., 85 S. W. 761, 27 Ky. L. Rep. 581; Cotton *v.* Brown, 4 S. W. 294, 9 Ky. L. Rep. 115. See also Brown *v.* Brown, 91 Ky. 639, 11 S. W. 4, 12 Ky. L. Rep. 280.

Louisiana.—Dauphin's Succession, 112 La. 103, 36 So. 287. See also Cox *v.* Lea, 110 La. 1030, 35 So. 275.

Minnesota.—Duxbury *v.* Boice, 70 Minn. 113, 72 N. W. 838; Humphrey *v.* Carpenter, 39 Minn. 115, 39 N. W. 67.

Mississippi.—Edwards *v.* Gibbs, 39 Miss. 166; Buckner *v.* Calcote, 28 Miss. 432.

New York.—Erickson *v.* Quinn, 3 Lans. 299; Mayne *v.* Griswold, 3 Sandf. 463.

Texas.—Cohen *v.* Shwarts, (Civ. App. 1895) 32 S. W. 820.

United States.—Moore *v.* Greene, 19 How. 69, 15 L. ed. 533; Stearns *v.* Page, 7 How. 819, 12 L. ed. 928; Sedalia School Dist. *v.* Deweese, 93 Fed. 602; Carr *v.* Hilton, 5 Fed. Cas. No. 2,437, 1 Curt. 390.

See 33 Cent. Dig. tit. "Limitation of Actions," §§ 668, 701.

Contra.—Welles *v.* Fish, 3 Pick. (Mass.) 74; Homer *v.* Fish, 1 Pick. (Mass.) 435, 11 Am. Dec. 218.

Reliance on false statements.—Under a statute extending the time to sue, when the action was prevented by some improper act of defendant, an allegation in the complaint that plaintiff did not learn of the falsity of

the fraud could not have been discovered sooner by the exercise of reasonable diligence.[39] In some states, however, while it is necessary to state the time when the fraud was discovered,[40] it is not necessary to state the manner of discovery or plaintiff's diligence therein.[41] The mere plea of concealment is insufficient without an allegation that it was discovered within the statutory time before filing suit.[42] It is not necessary to allege that the acts constituting the fraudulent concealment were subsequent to the time when the cause of action accrued.[43]

e. Prior Action. Where the dismissal of a former action, or the reversal or arrest of a judgment therein, is relied on to show that the second action is within the exception of the statute which extends the time for suing in such cases,[44] the allegations in regard thereto, in the complaint or reply, must show all that is necessary to bring the case within the statutory exception.[45] For instance, it must be shown that the parties in the two actions are the same,[46] the result of the former action,[47] and that the second action was prosecuted within the statutory time allowed therefor after the dismissal or reversal of the first.[48]

f. Acknowledgment and New Promise. In pleading a new promise or an

a statement by defendant, until shortly before the action was commenced, is insufficient where there is no allegation that plaintiff believed and relied on defendant's statement, or that he exercised diligence to ascertain the fact. Ratican *v.* St. Louis Terminal R. Assoc., 114 Fed. 666.

Allegations as to time of discovery of fraud held sufficient see Raymond *v.* Schriever, 63 Nebr. 719, 89 N. W. 308; Cooper *v.* Lee, 1 Tex. Civ. App. 9, 21 S. W. 998; Forbes *v.* Overby, 9 Fed. Cas. No. 4,928*a*, 4 Hughes 441, averment that the facts only came to plaintiff's knowledge "within the past year."

Allegations as to time of discovery of fraud held insufficient see Fritschler *v.* Koehler, 83 Ky. 78.

39. Edwards *v.* Smith, 102 Ga. 19, 29 S. E. 129; Cox *v.* Von Ahlefeldt, 105 La. 543, 30 So. 175; Bremond *v.* McLean, 45 Tex. 10; Vodrie *v.* Tynan, (Tex. Civ. App. 1900) 57 S. W. 680. See also McNeil *v.* Sigler, 95 Iowa 587, 64 N. W. 604. *Compare* State *v.* Wichita Land, etc., Co., 73 Tex. 450, 11 S. W. 488, holding that where there is nothing on the face of a transaction, so far as the petition discloses, which should have put plaintiff on inquiry, an allegation that plaintiff did not learn and could not have learned of the fraud by the use of due diligence until a certain time, is not too general.

Denial.—Where a reply alleges that defendants discovered, or could by the exercise of ordinary care have discovered, the contents of the deed relied on by them more than five years before the action was brought, and a five-year statute of limitations is pleaded, it was not necessary for defendants by a rejoinder to affirmatively allege that they could not have discovered the mistake until within five years. Mayes *v.* Payne, 60 S. W. 710, 22 Ky. L. Rep. 1465.

40. Doyle *v.* Doyle, 33 Kan. 721, 7 Pac. 615; Kansas Pac. R. Co. *v.* McCormick, 20 Kan. 107; Young *v.* Whittenhall, 15 Kan. 579.

41. Kansas Pac. R. Co. *v.* McCormick, 20 Kan. 107; Zieverink *v.* Kemper, 50 Ohio St. 208, 34 N. E. 250; Stephenson *v.* Reeder, 7 Ohio Dec. (Reprint) 411, 2 Cinc. L. Bul. 335; Stearns *v.* Hochbrunn, 24 Wash. 206, 64 Pac. 165 [*followed* in Irwin *v.* Holbrook, 26 Wash. 89, 66 Pac. 116].

42. Whaley *v.* Catlett, 103 Tenn. 347, 53 S. W. 131.

43. Bartalott *v.* International Bank, 14 Ill. App. 158.

44. See *supra*, VI, I, 9.

45. *Alabama.*— Hill *v.* Huckabee, 70 Ala. 183.

Arkansas.— Mason *v.* Howell, 14 Ark. 199.

Kentucky.— Montgomery *v.* Caldwell, 4 Bibb 305.

Maryland.— Schnertzell *v.* Chapline, 3 Harr. & M. 439.

Vermont.— Scott *v.* Williamstown School Dist. No. 9, 67 Vt. 150, 31 Atl. 145, 27 L. R. A. 588.

See 33 Cent. Dig. tit. "Limitation of Actions," § 702.

Diligence in prosecution of first action.— Where a second action is claimed to be a continuation of the first, under a statute providing that if, after the commencement of an action, plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated (statute of limitation), be held a "continuation of the first," plaintiff must allege in his petition the facts to show that his failure to recover in the first action was not due to negligence in its prosecution. Ceprley *v.* Paton, 120 Iowa 559, 95 N. W. 179.

46. State Bank *v.* McClelland, 14 Ark. 176; State Bank *v.* Sherrill, 12 Ark. 183.

The beneficiary in either suit need not be named, where it is alleged that the former suit was between the same parties and for the same cause of action. Hooper *v.* Atlanta, etc., R. Co., 106 Tenn. 28, 60 S. W. 607, 53 L. R. A. 931. *Contra*, Crow *v.* State, 23 Ark. 684.

47. Bampton *v.* Birchall, 5 Beav. 67, 6 Jur. 815, 49 Eng. Reprint 502.

48. Jewitt *v.* Bradford, 2 A. K. Marsh. (Ky.) 248.

acknowledgment or agreement from which such promise will be implied, it need not be alleged that the same was made in writing, since that fact will be presumed until the contrary is shown.[49] Furthermore a new promise need not be set out *in hæc verba*, but it is sufficient to state it according to its legal effect.[50] The facts relating to the new promise must be alleged with sufficient certainty to enable defendant to meet the allegations by plea as well as by proof.[51] The time when the new promise was made must be definitely stated.[52] Alleging that the debt had been repeatedly acknowledged without averring a new promise is insufficient.[53] Where the action is based on the new promise, the complaint must show that defendant was in the first instance liable to pay the original debt;[54] and it is proper to describe the notes which constituted the original cause of action.[55]

g. Part Payment. The allegations as to part payments must be specific.[56] It must be shown that the payment was made by or on behalf of the debtor,[57] that it was made within the statutory time before the commencement of the suit,[58] and that it was made on account of the debt sued on and as a part thereof.[59] But it is not necessary to allege its effect as a new promise;[60] nor to state the words or acts indicating that the debtor acknowledged that more was due and would be paid.[61]

4. Rejoinder or Demurrer. Where the answer sets up the statute of limitations, and the reply alleges matters in avoidance of the statute, a rejoinder setting up facts to show that the matter alleged in avoidance is not applicable to the case or is not within the exception in the statute must clearly and definitely state the facts in regard thereto.[62] It is also necessary that the matter alleged in the

49. Higgins *v.* Graham, 143 Cal. 131, 76 Pac. 898; Carothers *v.* Hurley, 41 Miss. 71; Green *v.* Coos Bay Wagon Road Co., 23 Fed. 67, 10 Sawy. 625. *Compare* Cohen *v.* Shwarts, (Tex. Civ. App. 1895) 32 S. W. 820; Morris *v.* Lyon, (Va. 1887) 2 S. E. 515. *Contra*, Ringgold *v.* Dunn, 8 Ark. 497.

Signature to writing.— It is sufficient to plead a new promise in writing without further alleging that the writing was signed by the party. Porter *v.* Elam, 25 Cal. 291, 85 Am. Dec. 132.

50. Concannon *v.* Smith, 134 Cal. 14, 66 Pac. 40; Thornton *v.* Nichols, 119 Ga. 50, 45 S. E. 785; Smith *v.* Simms, 9 Ga. 418.

51. Jesup *v.* Epping, 66 Ga. 334, holding that a general averment that the case is taken out of the statute by a new promise made by the mortgagor in letters, and by payments and releases indorsed on the mortgage, was insufficient. *Compare* Kepe *v.* Gibbon, 12 Q. B. 662, 12 Jur. 697, 17 L. J. Q. B. 298, 64 E. C. L. 662.

The consideration for the new promise need not be expressly stated. Park *v.* Brooks, 38 S. C. 300, 17 S. E. 22.

52. Bloodgood *v.* Bruen, 8 N. Y. 362. See also Wurth *v.* Paducah, 76 S. W. 143, 25 Ky. L. Rep. 586.

53. Bloodgood *v.* Bruen, 8 N. Y. 362.

54. Meyer *v.* Zotel, 96 Ky. 362, 29 S. W. 28, 16 Ky. L. Rep. 506.

55. Heisch *v.* Adams, 81 Tex. 94, 16 S. W. 790.

56. Yesler *v.* Oglesbee, 1 Wash. Terr. 604.

57. Palmer *v.* White, 65 N. J. L. 69, 46 Atl. 706; Fleming *v.* Fleming, 33 S. C. 505, 12 S. E. 257, 26 Am. St. Rep. 694; Perkins *v.* Jennings, 27 Wash. 145, 67 Pac. 590.

Indorsements.— An allegation that there was indorsed on the note a certain sum within the time necessary to prevent the bar of the statute is insufficient in the absence of a direct averment that the maker of the note had paid the amount so indorsed. Murphy *v.* Phelps, 12 Mont. 531, 31 Pac. 64.

58. State Bank *v.* Gray, 13 Ark. 39. But see Harrison County *v.* Cole, 8 Ind. App. 485, 36 N. E. 47, holding that a reply alleging part payment within the statutory period is sufficient, without alleging as to how or when the payments were made.

Alleging day but not year.— An allegation of a part payment on a specified day without naming the year is insufficient. Jones *v.* Eisler, 3 Kan. 134.

59. Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825.

60. McBrayer *v.* Mills, 62 S. C. 36, 39 S. E. 788.

61. Oevermann *v.* Loebertmann, 68 Minn. 162, 70 N. W. 1084.

62. See cases cited *infra*, this note.

Return to state.—Where a return into the state is alleged to defeat a reply alleging absence from the state, it must allege a continuing residence within the state (Hall *v.* Nasmith, 28 Vt. 791); but it need not be alleged that such return was made openly, or that plaintiff had notice of it (Shapley *v.* Felt, 3 N. H. 121). Where the absence of plaintiff beyond seas is relied on to defeat the plea of limitations, a rejoinder is sufficient which alleges that after the accruing of the cause of action, plaintiff came into the United States and did not begin the suit within six years thereafter, where the allegation of absence is formally traversed (Bowman *v.* Harper, 17 N. H. 571. See also Bond *v.* Jay, 7 Cranch (U. S.) 350, 3 L. ed. 367).

rejoinder shall not constitute a departure from the plea of the statute of limitations.[63] The reply may be demurred to,[64] but if the demurrer is overruled with leave to withdraw it, and it is not withdrawn, the facts set up in the reply are deemed to be admitted.[65]

E. Issues, Proof, and Variance — **1. General Issues in Plea.**[66] Except where it is expressly provided by statute that in certain actions every defense may be availed of under a general denial,[67] or where the action is based on a penal statute,[68] the general rule is that evidence is not admissible to show that the action is barred by the statute of limitations, under a plea of the general issue.[69] But where the statute which gives the right of action provides that there

Denial of new promise.—A rejoinder by one of several defendants, to a replication averring a new promise by defendants within six years, that he, defendant, did not make a new promise, without denying that the other defendants did so, is bad on special demurrer. Tracy *v.* Rathbun, 3 Barb. (N. Y.) 543.

Denial of running account. — Where the replication alleges a running account, a rejoinder is sufficient which avers that the account sued on has not been an open and running account for five years, but that more than five years have elapsed before it became a stated account. Brackenridge *v.* Baltzell, Smith (Ind.) 217.

Rejoinder to part of reply.—Where a rejoinder attempts to answer one of the two grounds of avoidance set up in the replication, but does not answer the other, and the one not answered constitutes sufficient matter of avoidance, the rejoinder is insufficient on demurrer. Mansell *v.* Israel, 3 Bibb (Ky.) 510.

Verification.—The rejoinder should not conclude with a verification. Blossburg, etc., R. Co. *v.* Tioga R. Co., 3 Fed. Cas. No. 1,563, 5 Blatchf. 387.

63. Harper *v.* Hampton, 1 Harr. & J. (Md.) 453 (holding that a rejoinder of the act of limitations of another state not relied on in the plea was a departure); Blossburg, etc., R. Co. *v.* Tioga R. Co., 3 Fed. Cas. No. 1,563, 5 Blatchf. 387.

64. See Pleading.

65. Cutler *v.* Wright, 22 N. Y. 472.

66. Admissibility of evidence as to adverse possession under general issue, see Adverse Possession, 1 Cyc. 1141.

67. See Persons *v.* Parker, 3 Barb. (N. Y.) 249. See also Ejectment, 15 Cyc. 121.

68. *Colorado.*— Atchison, etc., R. Co. *v.* Tanner, 19 Colo. 559, 36 Pac. 541, holding that it is immaterial that the limitation is in a separate statute from the one imposing the penalty.

Kentucky.— Estill *v.* Fox, 7 T. B. Mon. 552, 18 Am. Dec. 213; Watson *v.* Anderson, 3 Hard. 458.

Maine.— Frohock *v.* Pattee, 38 Me. 103; Moore *v.* Smith, 5 Me. 490.

New Hampshire.— Pike *v.* Jenkins, 12 N. H. 255.

United States.— Gardner *v.* Lindo, 9 Fed. Cas. No. 5,231, 1 Cranch C. C. 78 [*reversed* on other grounds in 1 Cranch 343, 2 L. ed. 130]; McIver *v.* Moore, 15 Fed. Cas. No. 8,831, 1 Cranch C. C. 90; U. S. *v.* Six Fermenting Tubs, 27 Fed. Cas. No. 16,296, 1 Abb. 268.

Canada.— Mason *v.* Mossop, 29 U. C. Q. B. 500.

See 33 Cent. Dig. tit. "Limitation of Actions," § 705.

The reason for the rule that defendant is entitled, in an action for a penalty, to the benefit of the statute of limitations under a plea of the general issue, is that plaintiff has no cause of action independent of the penal statute, and while the penal statute gives him the right to recover the penalty by suing for it, the limitation statute makes his cause of action dependent upon his bringing suit within a certain period, so that if he fails to bring his suit within such period he has no cause of action remaining. Atchison, etc., R. Co. *v.* Tanner, 19 Colo. 559, 36 Pac. 541.

69. *Illinois.*— Wilson *v.* King, 83 Ill. 232; Chenot *v.* Lefevre, 8 Ill. 637 (statute of limitations of foreign country); Benson *v.* Arnold, 75 Ill. App. 610. But see Gebhart *v.* Adams, 23 Ill. 397, 76 Am. Dec. 702.

Indiana.—Bowman *v.* Mallory, 14 Ind. 424.

Kansas.— Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. 545; Mitchell *v.* Ripley, 5 Kan. App. 818, 49 Pac. 153. See also Parker *v.* Berry, 12 Kan. 531.

Kentucky.— Stewart *v.* Durrett, 3 T. B. Mon. 113.

Louisiana.— Mansfield *v.* Doherty, 21 La. Ann. 395.

Michigan.— Whitworth *v.* Pelton, 81 Mich. 98, 45 N. W. 500.

Missouri.— Orr *v.* Rode, 101 Mo. 387, 13 S. W. 1066; Bell *v.* Clark, 30 Mo. App. 224.

North Carolina.— See also Stancill *v.* Spain, 133 N. C. 76, 45 S. E. 466.

Ohio.— Kelly *v.* Wiseman, 2 Disn. 418.

Pennsylvania.— Witherup *v.* Hill, 9 Serg. & R. 11. But see Prather *v.* Connelly, 9 Serg. & R. 14, holding that the statute limiting suits against justices of the peace to six months may be taken advantage of by the justice, although not specially pleaded.

Virginia.— Hudson *v.* Hudson, 6 Munf. 352.

United States.— Walker *v.* Flint, 11 Fed. 31, 2 McCrary 507; Neale *v.* Walker, 17 Fed. Cas. No. 10,072, 1 Cranch C. C. 57.

See 33 Cent. Dig. tit. "Limitation of Actions," § 705. And see *supra*, VIII, C, 1.

Notice given under the general issue that the statute of limitation will be relied on is equivalent, in some states, to a special

shall be no recovery for any acts committed more than a certain number of years before the commencement of the action, and plaintiff alleges that the action was commenced within such time, limitations may be urged under a plea of the general issue.[70]

2. General Reply or Replication — a. General Rule. Where facts are relied on to avoid the statute of limitations, it is not sufficient to merely join issue by a general reply, but the matter of avoidance must be specially pleaded.[71]

b. Acknowledgment, New Promise, or Part Payment. The authorities are conflicting as to whether evidence of a new promise or a part payment is admissible under a general replication, without express allegations in the pleadings in regard thereto.[72]

3. Evidence Admissible Under Pleadings. Under an issue of *nul tiel record* on a reply setting up a previous action, no evidence is admissible but the record, or a transcript of it.[73] Where the only plea is the statute of limitations, evidence is

plea of the statute. Benoist *v.* Darby, 12 Mo. 196; Edgerton *v.* Coates, Wright (Ohio) 84.

In cases of account with mutual credits, it is not necessary that the statute of five-year limitation should be specially pleaded, although relied upon as a defense. Thompson *v.* Reed, 48 Ill. 118.

In particular actions see Assumpsit, Action of, 4 Cyc. 355 note 5; Detinue, 14 Cyc. 269 note 21; Ejectment, 15 Cyc. 121; Trespass to Try Title; Trover and Conversion.

70. Peters *v.* Hanger, 127 Fed. 820, 62 C. C. A. 498.

71. *Arkansas.*— Shirey *v.* Clark, 72 Ark. 539, 81 S. W. 1057; Stillwell *v.* Badgett, 22 Ark. 164; State Bank *v.* Conway, 13 Ark. 344.

Kentucky.— Jones *v.* Chiles, 4 J. J. Marsh. 610.

Maryland.— Planters' Bank *v.* Alexandria Bank, 10 Gill & J. 346.

Missouri.— Moore *v.* Granby Min., etc., Co., 80 Mo. 86.

New York.— Hyde *v.* Stone, 7 Wend. 354, 22 Am. Dec. 582. *Contra,* Graham *v.* Schmidt, 1 Sandf. 74.

Tennessee.— Sully *v.* Childress, 106 Tenn. 109, 68 S. W. 499, 82 Am. St. Rep. 875 [*overruling* Criner *v.* Sherry, 3 Tenn. Cas. 496]; Gross *v.* Disney, 95 Tenn. 592, 32 S. W. 632.

Texas.— Heflin *v.* Burns, 70 Tex. 347, 8 S. W. 48; Childress *v.* Grim, 57 Tex. 56; Glenn *v.* Ashcroft, 2 Tex. Unrep. Cas. 447; Phillips *v.* Sherman, (Civ. App. 1897) 39 S. W. 187; Byers *v.* Carll, 7 Tex. Civ. App. 423, 27 S. W. 190; Lewis *v.* Terrell, 7 Tex. Civ. App. 314, 26 S. W. 754; June *v.* Brubaker, 5 Tex. Civ. App. 79, 24 S. W. 79; Crow *v.* Fiddler, 3 Tex. Civ. App. 576, 23 S. W. 17.

Wisconsin.— Garrison *v.* Owens, 1 Pinn. 471.

United States.— Clarke *v.* Mayfield, 5 Fed. Cas. No. 2,858, 3 Cranch C. C. 353.

See 33 Cent. Dig. tit. "Limitation of Actions," § 707.

Where a former suit in which there was a nonsuit is relied on in avoidance of the plea of limitations, it cannot be proved under a general replication. McClellan *v.* State Bank, 12 Ark. 141; Rockwell *v.* Hankins, 28 N. C. 428.

An agreement not to plead the statute of limitations cannot be taken advantage of by a general replication. Cowan *v.* Perrine, 21 N. J. Eq. 101. *Contra,* Stearns *v.* Stearns, 32 Vt. 678; Bunton *v.* Stevens, 24 Vt. 131, 58 Am. Dec. 153.

72. See cases cited *infra,* this note.

That evidence of a new promise is admissible under the general issue see St. John *v.* Garrow, 4 Port. (Ala.) 223, 29 Am. Dec. 280; Chandler *v.* Duncan, 1 Pennew. (Del.) 170, 39 Atl. 1012; Levy *v.* Gillis, 1 Pennew. (Del.) 119, 39 Atl. 785; Pumphrey *v.* Bogan, 8 App. Cas. (D. C.) 449; Johnson *v.* Gregg, 7 D. C. 142; Shackleford *v.* Douglass, 31 Miss. 95; Esselstyn *v.* Weeks, 12 N. Y. 635 [*affirming* 2 E. D. Smith 116]; Carshore *v.* Huyck, 6 Barb. (N. Y.) 583; Watkins *v.* Stevens, 4 Barb. (N. Y.) 168; Martin *v.* Williams, 17 Johns. (N. Y.) 330; McCurry *v.* McKesson, 49 N. C. 510; Hunter *v.* Starkes, 8 Humphr. (Tenn.) 656; Upton *v.* Else, 5 L. J. C. P. O. S. 108, 12 Moore C. P. 303, 22 E. C. L. 643.

That evidence of a new promise is not admissible where not specially pleaded see Ringgold *v.* Dunn, 8 Ark. 497; Howard *v.* Windom, 86 Tex. 560, 26 S. W. 483; Kesterson *v.* Hill, 101 Va. 739, 45 S. E. 288; Kempe *v.* Gibbon, 9 Q. B. 609, 11 Jur. 299, 16 L. J. Q. B. 120, 58 E. C. L. 609. *Compare* McDermott *v.* McCormick, 4 Harr. (Del.) 543; Peabody *v.* Chapman, 20 N. H. 418; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,492, 3 Wash. 404.

Evidence of a particular payment is not admissible under a general replication. Watson *v.* Dale, 1 Port. (Ala.) 247; State Bank *v.* Conway, 13 Ark. 344; Conkey *v.* Barbour, 22 Ind. 196; Van Dike *v.* Van Dike, 15 N. J. L. 289. *Contra,* see Ramsay *v.* Barnes, 16 Daly (N. Y.) 478, 12 N. Y. Suppl. 726, 20 N. Y. Civ. Proc. 84, holding that plaintiff may prove a partial payment, not alleged in his complaint, to meet a plea of the statute of limitations, since he is not bound to anticipate the defense.

73. State Bank *v.* Sherrill, 12 Ark. 183.

inadmissible to show a want of consideration for the note sued on as a sufficient consideration will be taken to be admitted.[74]

4. Matters to Be Proved.[75] It is necessary, in order to show that a cause of action apparently barred by limitations is not barred because of extraneous facts, to prove all the facts necessary to take the case out of the operation of the statute.[76] For instance, where there is a part payment[77] or other acknowledgment,[78] it is necessary to show its relation to the particular demand in question. So where the date of an indorsement of a part payment,[79] or of an order sued on,[80] is material, it must be proved. Where the new promise is conditional on payment not having already been made, plaintiff must prove the debt before he can avail himself of the promise.[81] It is not necessary to prove the signature to the new promise, where the rejoinder in answer to the reply of a new promise is sworn to.[82] Likewise it is not necessary to prove partial payments alleged in the complaint in anticipation of the defense of limitations, where no such defense is interposed.[83]

5. Variance Between Allegations and Proof. The allegations and proof must correspond,[84] but an immaterial variance will be disregarded.[85] If an absolute promise is alleged, evidence of a conditional promise constitutes a fatal variance;[86] and where a conditional promise is alleged, it is necessary to show the performance of the condition.[87] Proof of a new promise by one plaintiff not binding on all does not support an allegation of a new promise by them all;[88] and an allegation of a promise to a woman before marriage is not supported by evidence of promises to her after marriage.[89] Where the infancy of all the plaintiffs is alleged, it is not sufficient to prove the infancy of a part of them.[90] Plaintiff cannot introduce evidence of a new cause of action in order to avoid the applicability of the statute of limitations pleaded in the answer, and to bring the case within a longer statute of limitations.[91]

IX. Evidence.[92]

A. Presumptions — 1. In General.[93] There is no presumption of law from the mere fact that the time has elapsed which is fixed by the statute for the commencement of the action, that the cause of action is barred by the statute of

74. Davidson *v.* Delano, 11 Allen (Mass.) 523.

75. Burden of proof see *infra*, IX, B.

76. Thurston *v.* Lowder, 40 Me. 197; Hall *v.* Timmons, 2 Rich. Eq. (S. C.) 120.

77. Armistead *v.* Brooke, 18 Ark. 521.

78. Buckingham *v.* Smith, 23 Conn. 453.

79. Gay *v.* Hebert, 44 La. Ann. 301, 10 So. 775.

80. Yongue *v.* Ruff, 3 Strobh. (S. C.) 311.

81. Kent *v.* Wilkinson, 5 Gill & J. (Md.) 497.

82. Atkinson *v.* Atkinson, 2 Colo. 381.

83. Davenport *v.* Short, 17 Minn. 24.

84. See, generally, Pleading.

New promise to partners.— There is no variance in an action by a surviving partner upon a promise alleged to have been made to both partners, where the evidence shows that the promise was made to plaintiff alone after the death of his partner. Barney *v.* Smith, 4 Harr. & J. (Md.) 485, 7 Am. Dec. 679.

85. State Bank *v.* Arnold, 11 Ark. 347; State Bank *v.* Magness, 11 Ark. 343.

Where a former suit is pleaded, if the record is set out imperfectly or impartially, it is sufficient if enough appears to prove the matter in dispute, as where the allegation is a former suit against defendant, and the record shows a suit against defendant and two other joint makers of the note sued on. State Bank *v.* Sherrill, 12 Ark. 183.

86. Rodgers *v.* Byers, 127 Cal. 528, 60 Pac. 42; Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,494, 4 Wash. 148, 15 Fed. Cas. No. 8,492, 3 Wash. 404.

87. Murphy *v.* Holway, 25 Ill. App. 554.

88. Moore *v.* Leseur, 18 Ala. 606; Grant *v.* Ashley, 12 Ark. 762.

Acknowledgment or promise by joint obligor see *supra*, VII, A, 10, d, e.

Part payment by joint obligor, etc., see *supra* VII, B, 5, f, h, i.

89. Ridgeway *v.* English, 22 N. J. L. 409.

90. Danley *v.* Edwards, 1 Ark. 437.

91. McCall *v.* Nave, 52 Miss. 494.

92. Evidence of adverse possession see Adverse Possession, 1 Cyc. 1143 *et seq.*

93. See, generally, Evidence, 16 Cyc. 1050.

Presumption that new promise is in writing see *supra*, VIII, D, 3, f.

Presumptions as to adverse possession see Adverse Possession, 1 Cyc. 1144.

limitations.[94] The court will not presume facts as to which there is no evidence to relieve a party from the bar of the statute.[95] It will be presumed that the indorsement on a complaint of a certificate showing the date of filing, where made by the clerk of the court, is correct.[96] Where, in an action on a note, it does not appear when the note became due, no presumption will ordinarily be indulged as to the time of its maturity.[97]

2. Demand. The necessity for a demand to start the statute of limitations running may be presumed from the fiduciary relationship existing between the parties.[98] So the making of a demand for such purpose may be presumed from lapse of time and such dealings between the parties as render it improbable that it had been neglected.[99] If the necessary demand is not shown to have been made within the period of the statute of limitations, it will, in the absence of special circumstances, be presumed to have been made at the expiration thereof.[1]

3. Law of Foreign State. It has been held that the statute of limitations of another state will be presumed, in the absence of evidence to the contrary, to be the same as that of the forum,[2] although there are authorities to the contrary.[3]

4. Matters in Avoidance — a. General Rule. The existence of such a disability that the party laboring under it is excepted from the statute of limitations will not be presumed, but must be proved by the persons claiming the benefit of it.[4] But where the party shows himself within an exception, he will be presumed to remain within the exception until such time as will take the case out of the statute, unless the contrary appears.[5]

b. Discovery of Fraud. It will not be presumed that the cause of action arose when the fraud was committed, in the absence of evidence showing when it was discovered, where the cause of action accrues on its discovery rather than at the time of its commission.[6] It will be presumed, however, that if fraud could have been detected with the use of due diligence, it was detected in the particular case.[7]

c. Absence or Non-Residence. Absence or non-residence will not be presumed, in the absence of any showing of facts to authorize such a presumption.[8] But where residence outside the state is shown, when the contract sued on was executed,[9] or when the cause of action accrued,[10] such residence, in the absence of any proof to the contrary, is presumed to be continued. And it has been held

94. Thomas *v.* Waterman, 7 Metc. (Mass.) 227.

95. Roberts *v.* Sykes, 30 Barb. (N. Y.) 173, 8 Abb. Pr. 345.

96. Lewis *v.* Seattle, 28 Wash. 639, 69 Pac. 393.

97. Gautreau *v.* Verret, 11 La. Ann. 78; Andrews *v.* Rhodes, 10 Rob. (La.) 52; Lang's Estate, 33 Pittsb. Leg. J. (Pa.) 9; Greer *v.* Perkins, 5 Humphr. (Tenn.) 588. But see De Espinosa *v.* Gregory, 40 Cal. 58, holding that where a deed, absolute on its face, is executed and delivered for the purpose of securing a subsisting debt, and it does not appear when the debt so secured became due, the presumption arises that it was due immediately, or upon demand.

98. Brooks *v.* Brooks, 4 Redf. Surr. (N. Y.) 313.

99. Staniford *v.* Tuttle, 4 Vt. 82; Collard *v.* Tuttle, 4 Vt. 491, 24 Am. Dec. 627. See also Massie *v.* Byrd, 87 Ala. 672, 6 So. 145.

1. Keitbler *v.* Foster, 22 Ohio St. 27. See also *supra*, VI, C, 2, b, (v).

2. Hadley *v.* Gregory, 57 Iowa 157, 10 N. W. 319.

3. Richardson *v.* Mackay, 4 Okla. 328, 46 Pac. 546. See, generally, Evidence, 16 Cyc. 1084.

4. Hunt *v.* Gray, 76 Iowa 268, 41 N. W. 14. And see Watson *v.* Lyle, 4 Leigh (Va.) 236.

5. Davis *v.* Sullivan, 7 Ark. 449.

Presumption of continuance in general see Evidence, 16 Cyc. 1015.

6. Gatlin *v.* Kendig, 18 La. Ann. 118; Lincoln *v.* Judd, 49 N. J. Eq. 387, 24 Atl. 318; Sheldon *v.* Keokuk Northern Line Packet Co., 8 Fed. 769, 10 Biss. 470. *Contra*, Brown *v.* Brown, 91 Ky. 639, 11 S. W. 4, 12 Ky. L. Rep. 280; Barlow *v.* Arnold, 6 Fed. 351.

7. McDonald *v.* McGuire, 8 Tex. 361. And see Exchange Bank *v.* Trimble, 108 Ky. 230, 56 S. W. 156, 21 Ky. L. Rep. 1681.

8. Van Patten *v.* Bedow, 75 Iowa 589, 39 N. W. 907; Tremaine *v.* Weatherby, 58 Iowa 615, 12 N. W. 609, holding that evidence that defendant went "east" and remained for a number of years does not authorize a presumption that he actually left the state.

9. Alden *v.* Goddard, 73 Me. 345.

10. Rixford *v.* Miller, 49 Vt. 319.

that proof of absence, with other circumstances, is sufficient to authorize a presumption of prior absence.[11]

d. New Promise or Part Payment. The presumption arising from a distinct admission of an indebtedness for a specific sum stands until overthrown by circumstantial or other evidence.[12] In the absence of evidence to the contrary, it has been presumed that a part payment indorsed on a note was made on the day specified therein.[13] And where the indorsements are not denied, it will be presumed that they were made by the maker of the note.[14] So it will be presumed that the payments were made with the intention of continuing the debt in force, or reviving it;[15] and where there is nothing to show the contrary, it will be presumed that the payments were unaccompanied by any fact or circumstance which would tend to qualify their presumed effect.[16] In the absence of proof that other demands existed to which the acknowledgment or part payment might apply, the presumption is that it is to be applied to the demand proven;[17] but where there are several demands existing between the parties, it will not be presumed that certain payments made generally were applied to any particular debt,[18] although, where payments are made on an account, it will be presumed that the payments made during the six years preceding the action were applied on the earlier items of the account.[19] Where the debt shows on its face that it is barred, and there is no evidence that a promise or acknowledgment was made within the proper time, the presumption of payment is conclusive.[20]

B. Burden of Proof — 1. General Rule.[21] It is held in some states that when the statute of limitations is pleaded, the burden is on the opposing party to show that the cause of action accrued within the time limited before the commencement of the action,[22] while in other states it is held that the burden is on the party pleading the statute.[23] In any event, the burden is on the party who claims

11. Swift *v.* Swift, 9 La. Ann. 117.

12. Watson *v.* Stem, 76 Pa. St. 121.

Prima facie presumption.— The presumption that a part payment is an admission of continued indebtedness is only a *prima facie* one. Strong *v.* State, 57 Ind. 428. See also *supra*, VII, A, B.

13. Curtis *v.* Daughdrill, 71 Ala. 590 (as to payment before bar was complete); Smith *v.* Ferry, 69 Mo. 142 (holding that the presumption ceases if there is anything in the indorsement indicative of alteration). See also *supra*, VII, B, 2, e.

14. Pears *v.* Wilson, 23 Kan. 343.

15. Young *v.* Alford, 118 N. C. 215, 23 S. E. 973.

16. Neilands *v.* Wright, 134 Mich. 77, 95 N. W. 997.

17. McNamee *v.* Tenny, 41 Barb. (N. Y.) 495; Trainer *v.* Seymour, 10 Tex. Civ. App. 674, 32 S. W. 154.

18. Camp *v.* Smith, 63 Hun (N. Y.) 634, 18 N. Y. Suppl. 523 [*affirmed* in 136 N. Y. 187, 32 N. E. 640].

19. Nostrand *v.* Ditmis, 127 N. Y. 355, 28 N. E. 27.

20. McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497.

21. Burden of proving adverse possession see Adverse Possession, 1 Cyc. 1143.

22. *Arkansas.*—Watkins *v.* Martin, 69 Ark. 311, 65 S. W. 103; Leigh *v.* Evans, 64 Ark. 26, 41 S. W. 427; Brown *v.* Hanauer, 48 Ark. 277, 3 S. W. 27; Carnall *v.* Clark, 27 Ark. 500; Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Michigan.— Ayres *v.* Hubbard, 71 Mich. 594, 40 N. W. 10.

North Carolina.— Hooker *v.* Worthington, 134 N. C. 283, 46 S. E. 726; Gupton *v.* Hawkins, 126 N. C. 81, 35 S. E. 229; House *v.* Arnold, 122 N. C. 220, 29 S. E. 334; Parker *v.* Harden, 121 N. C. 57, 28 S. E. 20; Graham *v.* O'Bryan, 120 N. C. 463, 27 S. E. 122; Koonce *v.* Pelletier, 115 N. C. 233, 20 S. E. 391; Nunnery *v.* Averitt, 111 N. C. 394, 16 S. E. 683; Moore *v.* Garner, 101 N. C. 374, 7 S. E. 732; Hussey *v.* Kirkman, 95 N. C. 63.

Pennsylvania.— McCahan *v.* Smith, 9 Pa. Super. Ct. 318.

Tennessee.— Prigmore *v.* East Tennessee, etc., R. Co., 1 Lea 204; Lawrence *v.* Bridleman, 3 Yerg. 496. But see Pickett *v.* Gore, (Ch. App. 1900) 58 S. W. 402.

See 33 Cent. Dig. tit. "Limitation of Actions," § 713.

The burden of showing an open, mutual account is on plaintiff. Dunn *v.* Fleming, 73 Wis. 545, 41 N. W. 707.

23. *California.*—Wise *v.* Williams, 72 Cal. 544, 14 Pac. 204; Wright *v.* Ward, 65 Cal. 525, 4 Pac. 534.

Illinois.— Haines *v.* Amerine, 48 Ill. App. 570.

Kansas.— Pracht *v.* McNee, 40 Kan. 1, 18 Pac. 925, holding that defendant must show when the action was commenced.

Louisiana.— Montamat's Succession, 15 La. Ann. 332. See also Pitkin *v.* Rousseau, 14 La. Ann. 511.

South Carolina.— Hunter *v.* Hunter, 63

that the action is not barred, where his pleading, or the written instrument which is the cause of action, shows on its face that the cause of action is barred.[24] Of course the burden of proof may be shifted from one party to the other, where a *prima facie* case is made.[25]

2. Identity of Debt. Where there is an acknowledgment of indebtedness it will be taken to relate to the demand in suit, and the burden is on defendant to show that it related to another debt either wholly or in part,[26] and the rule applies with peculiar force in a case where but one item of indebtedness is in suit.[27]

3. Matters in Avoidance — a. General Rule. The party who relies on facts in avoidance of the statute has the burden of proving such facts.[28] But where

S. C. 78, 41 S. E. 33; Moore *v.* Smith, 29 S. C. 254, 7 S. E. 485. See also Yancey *v.* Stone, 9 Rich. Eq. 429.

Texas.— Cunningham *v.* Frandtzen, 26 Tex. 34; Smith *v.* Power, 23 Tex. 29; Frosh *v.* Swett, 2 Tex. 485 (holding that where a petition sets forth a cause of action without showing the time of its accrual, defendant must show that it accrued before the period fixed by the statute); Duggan *v.* Cole, 2 Tex. 381. See also Tyler *v.* Jester, (Civ. App. 1903) 74 S. W. 359; Barnet *v.* Houston, 18 Tex. Civ. App. 134, 44 S. W. 689.

Utah.— Thomas *v.* Glendinning, 13 Utah 47, 44 Pac. 652.

Virginia.— Vashon *v.* Barrett, 99 Va. 344, 38 S. E. 200; Noell *v.* Noell, 93 Va. 433, 25 S. E. 242; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. 504; Cox *v.* Thomas, 9 Gratt. 323.

West Virginia.— Buck *v.* Newberry, 55 W. Va. 681, 47 S. E. 889.

United States.— Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

See 33 Cent. Dig. tit. "Limitation of Actions," § 713.

A foreign statute of limitations, where relied upon by defendant, must be proved by him the same as any other fact. Trigg *v.* Moore, 10 Tex. 197; Wojtylak *v.* Kansas, etc., Coal Co., 188 Mo. 260, 87 S. W. 506.

Where the execution of the note sued on is not denied, the burden is on defendant to show limitations. Bradford *v.* Brennan, 12 Okla. 333, 71 Pac. 655.

Where both parties are non-residents, the statute of limitations of the forum applies, and the burden of proof is on the party relying on the statute providing that where a cause of action arises in another state between residents of such state, and by the laws of such state an action cannot be maintained thereon, no action can be maintained in the forum to show that the cause of action accrued in another state between citizens of that state, and that the statute there was no obstacle to recovery. Cincinnati First Nat. Bank *v.* Thomas, 3 S. W. 12, 8 Ky. L. Rep. 690.

24. *Arkansas.*— Simpson *v.* Brown-Desnoyers Shoe Co., 70 Ark. 598, 70 S. W. 305.

Louisiana.— McStea *v.* Boyd, 21 La. Ann. 501; Kentucky Bank *v.* East, 21 La. Ann. 276; Boyle *v.* Kittredge, 21 La. Ann. 273; Peet *v.* Jackson, 21 La. Ann. 267; Funke *v.* McVay, 21 La. Ann. 192; Durand *v.* Hienn, 20 La. Ann. 345.

New York.— Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Reilly *v.* Sabater, 43 N. Y. Suppl. 383, 26 N. Y. Civ. Proc. 34.

North Dakota.— Paine *v.* Dodds, (1905) 103 N. W. 931.

Oklahoma.—Bradford *v.* Brennan, 12 Okla. 333, 71 Pac. 655.

South Dakota.—Dielmann *v.* Citizens' Nat. Bank, 8 S. D. 263, 66 N. W. 311.

Tennessee.— Apperson *v.* Pattison, 11 Lea 484.

Vermont.— Capen *v.* Woodrow, 51 Vt. 106, holding that where the cause of action is *prima facie* barred by limitations, the burden is not on defendant, even though he pleads the facts on which the bar is sought to be established.

See 33 Cent. Dig. tit. "Limitation of Actions," § 713.

25. McIntosh *v.* Condron, 20 Pa. Super. Ct. 118.

26. *Colorado.*— Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94.

Connecticut.— Cook *v.* Martin, 29 Conn. 63. But see Buckingham *v.* Smith, 23 Conn. 453.

Maryland.— Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355; Peterson *v.* Ellicott, 9 Md. 52; Guy *v.* Tams, 6 Gill 82.

Massachusetts.— Woodbridge *v.* Allen, 12 Metc. 470; Bailey *v.* Crane, 21 Pick. 323; Whitney *v.* Bigelow, 4 Pick. 110.

Missouri.— Boyd *v.* Hurlbut, 41 Mo. 264.

Nevada.— Wilcox *v.* Williams, 5 Nev. 206.

England.— Frost *v.* Bengough, 6 Bing. 266, 1 L. J. C. P. O. S. 96, 25 Rev. Rep. 621, 8 E. C. L. 501.

See *supra*, VII, A, 5.

Contra.—Penley *v.* Waterhouse, 3 Iowa 418, holding that the burden of proof is on plaintiff to show that the acknowledgment proved had reference to the claim sued on.

27. Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94.

28. *Arkansas.*— Taylor *v.* Spears, 6 Ark. 381, 44 Am. Dec. 519.

Indiana.— Vail *v.* Halton, 14 Ind. 344.

Iowa.— Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567.

New York.— Burdick *v.* Hicks, 29 N. Y. App. Div. 205, 51 N. Y. Suppl. 789.

North Carolina.— Edwards *v.* University Trustees, 21 N. C. 325, 30 Am. Dec. 170.

Texas.— Sidbury *v.* Ware, 65 Tex. 252. But see Mexican Nat. R. Co. *v.* Jackson, (Civ. App. 1895) 32 S. W. 230.

See 33 Cent. Dig. tit. "Limitation of Actions," § 714.

defendant, in his rejoinder, makes an affirmative allegation to avoid the exception in the statute set up in the reply, the burden is on him to prove such allegation.[29]

b. Fraud or Concealment. The party relying on the fraudulent concealment of the cause of action, to avoid the statute of limitations, has the burden of proving such concealment.[30] It has been held that the burden is on plaintiff to show that his discovery of the fraud was within the statutory time allowed in which to commence an action after such discovery,[31] and also to show that due diligence would have been ineffectual to discover such fraud sooner.[32] In other cases it is held, however, that the burden is on defendant to prove earlier knowledge.[33]

c. Absence or Non-Residence. The party relying on his absence or non-residence,[34] or on the absence or non-residence of the opposing party,[35] at the time of the accrual of the cause of action or thereafter, in avoidance of the bar of limitations, has the burden of proof; but where defendant affirmatively alleges facts as to his residence within the state, the burden is on him to prove such facts.[36] Where the absence or non-residence of defendant is shown, the burden is shifted to defendant to show his return to the state a sufficient length of time to create a bar under the statute.[37]

29. McLellan *v.* Crofton, 6 Me. 307; Little *v.* Blunt, 16 Pick. (Mass.) 359.

30. Bartelott *v.* International Bank, 119 Ill. 259, 9 N. Y. 898; Lemster *v.* Warner, 137 Ind. 79, 36 N. E. 900; Blethen *v.* Lovering, 58 Me. 437; Reeves *v.* Dougherty, 7 Yerg. (Tenn.) 222, 27 Am. Dec. 496. *Contra*, Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Shifting burden.— On a showing by plaintiff of a fraudulent concealment by defendant the burden of proof of limitation is shifted to defendant. Spuryer *v.* Hardy, 4 Mo. App. 573.

Action by agent against principal.—Where more than six years have elapsed from the date of a collection by an attorney in fact for his principal, and an action is brought for money had and received, the burden is on the principal to show fraudulent concealment on the part of the attorney. Campbell *v.* Boggs, 48 Pa. St. 524 [*distinguishing* McDowell *v.* Potter, 8 Pa. St. 189, 49 Am. Dec. 503].

31. Prewett *v.* Dyer, 107 Cal. 154, 40 Pac. 105; Mason *v.* Henry, 152 N. Y. 529, 46 N. E. 837; Baldwin *v.* Martin, 35 N. Y. Super. Ct. 85.

32. Stephenson *v.* Reeder, 7 Ohio Dec. (Reprint) 411, 2 Cinc. L. Bul. 335.

Extent of burden.—Where, to rebut the defense of the statute of limitations, plaintiffs claim that they were prevented from suing at an earlier date by the fraud of defendants, they must show by evidence how they came to be so long ignorant of their rights and the means used by defendants to keep them in ignorance, and how and when they first came to a knowledge of their cause of action. Salinger *v.* Black, 68 Ark. 449, 60 S. W. 229.

33. Harlin *v.* Stevenson, 30 Iowa 371; Baldwin *v.* Tuttle, 23 Iowa 66; Godbold *v.* Lambert, 8 Rich. Eq. (S. C.) 155, 70 Am. Dec. 192; McLure *v.* Ashby, 7 Rich. Eq. (S. C.) 430; Shannon *v.* White, 6 Rich. Eq. (S. C.) 96, 60 Am. Dec. 115.

As dependent on allegations in pleadings.— The mere fact that plaintiff in his complaint unnecessarily negatives his knowledge of the fraud until within the statutory time allowed to commence the action after the discovery of the fraud does not place the burden of proof as to the fact of knowledge upon plaintiff. Harlin *v.* Stevenson, 30 Iowa 371.

34. Hubnall *v.* Watt, 11 La. Ann. 57.

35. Condon *v.* Enger, 113 Ala. 233, 21 So. 227; Phillips *v.* Holman, 26 Tex. 276; Crissey *v.* Morrill, 125 Fed. 878, 60 C. C. A. 460.

Where absence for a part of a statutory time is relied on by plaintiff, the burden is on him to show that the remaining time is less than the statutory time allowed within which to commence an action. Pierce *v.* McClellan, 93 Ill. 245.

36. Smith-Frazer Boot, etc., Co. *v.* White, 7 Kan. App. 11, 51 Pac. 790; Mayer *v.* Friedman, 7 Hun (N. Y.) 218 [*affirmed* in 69 N. Y. 608], holding that where the complaint alleges that the contract sued on was made out of the state defendant must show, in order to avail himself of the statute of limitations, that he has resided within the state for six years before the commencement of the action.

37. State Bank *v.* Seawell, 18 Ala. 616; Palmer *v.* Bennett, 83 Hun (N. Y.) 220, 31 N. Y. Suppl. 567, 1 N. Y. Annot. Cas. 208 [*affirmed* in 152 N. Y. 621, 46 N. E. 1150] (holding that defendant must show that his return was public or notorious, so that plaintiff either knew of it, or by due diligence could have ascertained it); Helmer *v.* Minot, 75 Hun (N. Y.) 309, 27 N. Y. Suppl. 79. See also Phillips *v.* Holman, 26 Tex. 276.

Sufficiency of evidence to shift burden.— It does not require more than a *prima facie* case to shift the burden of proof on defendant where his actual residence is a fact peculiarly within his own knowledge. The place of business of a party is not necessarily his place of residence, but long continued business at a particular place is, in the absence of anything to the contrary, presumptive evidence, and shifts the burden on the party against whom the presumption

d. New Promise or Part Payment. Where plaintiff relies on a part payment to remove the bar of the statute, and such payment is denied,[38] the burden of proving it is on him.[39] The burden is on plaintiff, not only to prove the payments but also to prove that they were made by, or by authority of, the debtor sought to be charged,[40] and that the payment or acknowledgment was intended to relate to the identical cause of action in controversy.[41] So where a new promise is relied on to avoid the bar of limitations, the burden of proof is on the party relying on such new promise,[42] and he must show that the promise or acknowledgment was made within the proper time.[43] On the other hand, where defendant claims that the acknowledgment or part payment relates to an indebtedness other than the one sued on, the burden is on him to show such fact.[44] So where the new promise is conditional, the burden of showing performance of such conditions is on the debtor.[45]

e. Former Action or Obstruction to Service of Process. Where a former action,[46] or inevitable accident delaying the service of process,[47] is relied upon to take the case out of the statute, the burden of proof is on the party relying thereon to show such facts as will bring the case within the exception in the statute.

f. Coverture. The burden is on the party pleading coverture to show such fact,[48] and to show that the action was commenced within the time allowed by the statute after the removing of the disability.[49]

g. Infancy. The burden of proving infancy to avoid the bar of limitations is on the party pleading it,[50] and he must show that the action was commenced within the statutory time after reaching majority.[51]

C. Admissibility — 1. General Considerations.[52] The rules relating to the admissibility of evidence in civil actions in general apply to evidence to show whether the statute of limitations has barred the action.[53]

arises. Dederich *v.* McAllister, 49 How. Pr. (N. Y.) 351.

In Vermont, where plaintiff shows that defendant was a resident of another state when the cause of action accrued, the burden is on defendant to show either a removal within the state, or that he had no attachable property within the state. Rixford *v.* Miller, 49 Vt. 319. See also Burnham *v.* Courser, 69 Vt. 183, 37 Atl. 288.

38. Kendall *v.* Clarke, 90 Ky. 178, 13 S. W. 583, 11 Ky. L. Rep. 980; Redfield *v.* Stitt, 10 N. Y. St. 366; Keel *v.* Rudisell, 13 Ohio Cir. Ct. 199, 7 Ohio Cir. Dec. 464.

39. *Alabama.*—Knight *v.* Clements, 45 Ala. 89, 6 Am. Rep. 693.

Colorado.— Gregory *v.* Filbeck, 20 Colo. App. 131, 77 Pac. 369.

Kentucky.— Frazer *v.* Frazer, 13 Bush 397.

Louisiana.— Gordon *v.* Schmidt, 20 La. Ann. 427.

New York.— U. S. Trust Co. *v.* Stanton, 76 Hun 32, 27 N. Y. Suppl. 614.

Oregon.— Scott *v.* Christenson, 46 Oreg. 417, 80 Pac. 731.

Canada.— Charlotte County Bank *v.* Berry, 10 N. Brunsw. 520.

See 33 Cent. Dig. tit. "Limitation of Actions," § 716.

40. Bender *v.* Blessing, 91 Hun (N. Y.) 73, 36 N. Y. Suppl. 162; Wood *v.* Barber, 90 N. C. 76.

Indorsement of payment see *supra*, IX, B, 3, d; VII, B, 2, e.

41. Easter *v.* Easter, 44 Kan. 151, 24 Pac. 57; Hopper *v.* Beck, 83 Md. 647, 34 Atl. 474.

42. Wellman *v.* Miner, 73 Ill. App. 448.

43. McKinlay *v.* Gaddy, 26 S. C. 573, 2 S. E. 497.

44. Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355; Guy *v.* Tams, 6 Gill (Md.) 82; Whitney *v.* Bigelow, 4 Pick. (Mass.) 110; Boyd *v.* Hurlbut, 41 Mo. 264.

45. Richmond *v.* Fugua, 33 N. C. 445. See also *supra*, VII, A, 8.

46. Memphis, etc., R. Co. *v.* Shoecraft, 53 Ark. 96, 13 S. W. 422; McDowell *v.* Goodwyn, 2 Mill (S. C.) 441, 12 Am. Dec. 685.

47. Jewett *v.* Greene, 8 Me. 447.

48. McConnico *v.* Thompson, 19 Tex. Civ. App. 539, 47 S. W. 537.

49. Downing *v.* Ford, 9 Dana (Ky.) 391; Corley *v.* Anderson, 5 Tex. Civ. App. 213, 23 S. W. 839.

50. French *v.* Watson, 52 Ark. 168, 12 S. W. 328.

51. Vell *v.* Lane, 41 Ark. 53.

52. Admissibility of evidence as to adverse possession see Adverse Possession, 1 Cyc. 1147.

53. See, generally, Evidence.

Non-residence.—Admissions of defendant to third persons may be admissible to show his residence outside of the state (Burnham *v.* Courser, 69 Vt. 183, 37 Atl. 288), but evidence that during a portion of the time of defendant's absence from the state he was a paymaster in the United States army, and as such was designated in the army register

2. Acknowledgment or New Promise.[54] Any legal evidence which in any manner tends to prove that an acknowledgment or new promise was made in reference to a particular debt is admissible.[55] For instance, a written instrument, although invalid as an attempted assignment of a claim,[56] or void as a contract,[57] is nevertheless admissible in evidence to show an acknowledgment. But evidence of acknowledgments or new promises to one other than the creditor is inadmissible

as appointed from said state, is irrelevant on the question of a change of his domicile (Venable *v.* Paulding, 19 Minn. 488).

To prove when plaintiff discovered the fraud, where he testified that his first knowledge came from a certain person, the evidence of the latter as to the details of his interview with plaintiff is not subject to a motion to strike out, since it is at least admissible in part. New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 60 Atl. 469.

Evidence of custom of plaintiffs to sell goods upon a system of credits was inadmissible for the purpose of proving that the price was not to be paid when the goods were sold, but on a certain date thereafter, so as to avoid the bar of the statute by showing that the bill was not due until within the six years. Hursh *v.* North, 40 Pa. St. 241.

Self-serving declarations of the creditor, although embodied in writings, are not admissible in his behalf to take the case out of the operation of the statute of limitations. Seacord *v.* Matteson, 56 Ill. App. 439; Penniman *v.* Rotch, 3 Metc. (Mass.) 216.

Coverture may be shown, where relied on to avoid the bar of the statute of limitations, by proof of cohabitation as husband and wife. Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94.

The original claim may be proved by an admission made at the same time with an alleged new promise. Barwell *v.* Wirth, 61 Pa. St. 133.

Evidence as to a demand for payment is inadmissible where no demand was necessary to start running the statute of limitations. Kingsbury *v.* Butler, 4 Vt. 458. Where a demand within the statutory time before commencement of the action is proved, defendant may show that there had been a previous demand and refusal more than the statutory time before the commencement of the action. Young *v.* Epperson, 14 Tex. 618.

Former action.— Evidence of railroad foreclosure proceedings, subsequent leases, etc., is admissible to show that defendant company was the real party defendant in a former suit. Pennsylvania Co. *v.* Sloan, 125 Ill. 72, 17 N. E. 37, 8 Am. St. Rep. 337 [*affirming* 24 Ill. App. 48].

54. See also *infra*, IX, C, 4, a.

55. Cook *v.* Martin, 29 Conn. 63.

Letters.—The letters of defendant acknowledging the debt, although not written within the statutory period before suit, are admissible to prove that he subsequently acknowledged the debt within such period. Lang *v.* Gage, 66 N. H. 624, 32 Atl. 155. *Contra*, see Keener *v.* Zartman, 144 Pa. St. 179, 22 Atl. 889. So a letter in reply to a demand for payment, stating that the matter will receive the debtor's earliest and best attention, is admissible, in connection with other evidence, on the question whether there was a sufficient new promise. Cole *v.* Putnam, 62 N. H. 616. And letters written by the debtor to the creditor, containing general admissions of indebtedness, and excuses for delay in making payment, are admissible on the question of indebtedness, although the admissions may not be sufficient as an acknowledgment or new promise to avoid the statute. Minniece *v.* Jeter, 65 Ala. 222.

A note given for interest due on a note, after it would otherwise have been barred by limitations, is admissible as showing a recognition by the maker of the validity of an indorsement on the note acknowledging the debt and promising its payment. Martin *v.* Somervell County, 21 Tex. Civ. App. 308, 52 S. W. 556.

A deposition made by the debtor in another suit is admissible to show that the notes were a subsisting obligation when the deposition was made. Babylon *v.* Duttera, 89 Md. 444, 43 Atl. 938.

Evidence of an unaccepted offer to compromise claims barred by limitation is inadmissible to show a new promise. Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

Evidence of ownership of real estate at the end of a year is not admissible to prove that the business of the debtor for the year was successful, where the debtor had promised to pay the debt if he had another year's successful business, especially where he had property at the time of making the promise. Wakeman *v.* Sherman, 9 N. Y. 85.

Evidence of mistake.— Every acknowledgment must be taken all together, and no evidence can be received to turn a denial of the existence of a debt into an acknowledgment of a subsisting liability by proving that the party making the admission was mistaken in supposing the debt to have been paid. Oliver *v.* Gray, 1 Harr. & G. (Md.) 204.

Whole of evidence constituting new promise must be received.— All of the writing (Rogers *v.* Waters, 2 Gill & J. (Md.) 64) or conversation (Eckert *v.* Wilson, 12 Serg. & R. (Pa.) 393) claimed to constitute a new promise or acknowledgment should be received in evidence; plaintiff should not be allowed to select such portions as suit his purpose and reject the residue.

56. Thompson *v.* Shepherd, 1 Mackay (D. C.) 385.

57. Thompson *v.* Shepherd, 1 Mackay (D. C.) 385; Utica Ins. Co. *v.* Kip, 3 Wend. (N. Y.) 369, promissory note. But see McKay *v.* Grinley, 30 U. C. Q. B. 54, holding an unstamped note inadmissible.

in the absence of evidence of his authority to act for the creditor.[58] The writing sued on is admissible on the question of the identity of the instrument referred to in the new promise,[59] and to show the inducement to, or as explanatory and furnishing the legal basis of, the express promise to pay the amount remaining due.[60]

3. Part Payment[61] — a. General Considerations. The rules relating to the admissibility of evidence to prove or disprove payment in general ordinarily govern the admissibility of evidence as to part payments to avoid the bar of limitations.[62]

b. Intention in Making Payment. Inasmuch as part payment is only *prima facie* evidence of an admission of continued indebtedness after the period of limitations, it may be shown by evidence of the circumstances under which such payment was made that it was not intended as an acknowledgment of a subsisting debt or a new promise to pay the balance.[63]

c. Authority to Make or Receive Payments or Indorse Credits. Where the part payment is made by one other than the debtor, evidence is admissible to show that he acted as the servant or agent of the debtor in the making of the payment, and that he used his master's or principal's money.[64] So letters written by the debtor to the agent of the creditor are admissible to show that credits entered on the note by the agent were entered by the authority of the debtor.[65] And evidence is admissible to show that the creditor was authorized to apply on the debt a fund in his hands belonging to the debtor.[66]

d. Opinion Evidence. A question whether anything has been paid on account of the debt sued for does not necessarily call for a conclusion or opinion;[67] nor does a question asked the creditor as to what was the claim referred to in a receipt, where he answered that it was the balance due on the note sued on.[68]

4. Parol Evidence — a. General Rules.[69] So the time of commencement of

58. Bott *v.* Stoner, 2 Pennyp. (Pa.) 154, 12 Wkly. Notes Cas. 106.

59. Hancock *v.* Melloy, 189 Pa. St. 569, 42 Atl. 292.

60. St. Mark's Evangelical Lutheran Church *v.* Miller, 99 Md. 23, 57 Atl. 644; Leonard *v.* Hughlett, 41 Md. 380.

61. Proof of part payment by parol see *infra*, note 78.

Indorsement on note or other instrument as evidence see *supra* VII, B, 2, e.

Admissions made on Sunday see SUNDAY.

62. See, generally, PAYMENT.

On an issue as to whether any part payment was made, evidence of a promise to pay the balance of an account is admissible (Romaine *v.* Corlies, 47 N. J. L. 108), as are subsequent letters written by the debtor to the creditor and recognizing the part payment (Floersheim *v.* Vosburgh, 99 Mich. 11, 57 N. W. 1039), or the evidence of the various transactions out of which grew the debt evidenced by the note sued on (De Camp *v.* McIntyre, 8 N. Y. St. 468).

To show the purpose and character of the part payments, evidence is admissible as to continuous transactions, although part of them antedate the period of limitations. Haines *v.* Watts, 53 N. J. L. 455, 21 Atl. 1032.

Time.— On the issue as to the time when an indorsement was made, admissions of an obligor, after the bar has attached, are inadmissible against a coöbligor. Ruddell *v.* Folsom, 14 Ark. 213. On an issue as to whether a payment was made at a certain time by delivering a load of hay, the waybill is admissible. Winship *v.* Waterman, 56 Vt. 181.

Entries by the maker of a note in a private account-book, showing a payment on the note, may be introduced in evidence by the payee, without putting in evidence the remainder of the book. Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790.

63. Ketcham *v.* Hill, 42 Ind. 64; Schock *v.* Bieler, 5 Ohio Cir. Ct. 49, 3 Ohio Cir. Dec. 26; Davis *v.* Amy, 2 Grant (Pa.) 412.

64. Lime Rock Bank *v.* Mallett, 42 Me. 349.

65. Bond *v.* Wilson, 131 N. C. 505, 42 S. E. 956.

66. Brown *v.* Warner, 116 Wis. 358, 93 N. W. 17.

67. Ramsay *v.* Barnes, 16 Daly (N. Y.) 478, 12 N. Y. Suppl. 726, 20 N. Y. Civ. Proc. 84.

68. De Camp *v.* McIntire, 115 N. Y. 258, 22 N. E. 215.

69. See, generally, EVIDENCE, 17 Cyc. 567 *et seq.*

In Louisiana parol evidence is admissible to prove interruption of prescription (People's Bank *v.* Girod, 31 La. Ann. 592; Crone *v.* Citizens' Bank, 28 La. Ann. 449; Wansley *v.* Willis, 23 La. Ann. 703; Ludeling *v.* Boozman, 23 La. Ann. 673; Flanner *v.* Lecomte, 23 La. Ann. 193; Ross *v.* Johnstone, 23 La. Ann. 109; Harrell *v.* White, 21 La. Ann. 195; Bernstein *v.* Ricks, 21 La. Ann. 179; Gillis *v.* Nelson, 16 La. Ann. 275); but not where the acknowledgment or promise

judicial proceedings to avoid the bar of limitations may be shown by parol,[70] as may an inevitable accident as the reason for failure to serve the writ in the former action within the prescribed time.[71] The date of an acknowledgment or a new promise may be shown by parol;[72] so parol evidence is admissible to remove any existing uncertainty or doubt as to the demand to which the acknowledgment or new promise of the debtor applied,[73] and to identify an indebtedness referred to in an instrument whereby creditors agree not to sue a debtor for a certain time, as including the claim in suit.[74] But parol evidence is not admissible to vary or contradict the writing sued on,[75] nor to explain unambiguous language in an acknowledgment of a subsisting indebtedness.[76] So parol evidence is not admissible to make more clear the meaning of letters which do not refer to the note in suit in such definite terms as to make it certain that it is referred to at all.[77] Partial payments may generally be shown by parol,[78] although the rule is otherwise as to acknowledgments or new promises which are required to be in writing.[79]

b. After Death of Debtor. In the absence of a statute to the contrary, the general rule is that declarations of the debtor who has since died are admissible to remove the bar of the statute of limitations.[80] But in some states it is provided by statute that after the death of the debtor no part payment, acknowledgment, or new promise by him can be proved, except by written evidence signed by the deceased or his authorized agent.[81]

was made after the debt had become prescribed (Cormier *v.* De Valcourt, 33 La. Ann. 1168; Duncan *v.* Duncan, 29 La. Ann. 829; Flanner *v.* Lecompte, 23 La. Ann. 193).

70. Woodville *v.* Harrison, 73 Wis. 360, 41 N. W. 526; Witters *v.* Sowles, 32 Fed. 765.

71. Tracy *v.* Grand Trunk R. Co., 76 Vt. 313, 57 Atl. 104.

72. Crone *v.* Citizens' Bank, 28 La. Ann. 449; Kincaid *v.* Archibald, 10 Hun (N. Y.) 9 [*affirmed* in 73 N. Y. 189]; Hartley *v.* Wharton, 11 A. & E. 934, 4 Jur. 576, 9 L. J. Q. B. 209, 3 P. & D. 529, 39 E. C. L. 491; Edmunds *v.* Downes, 2 Cromp. & M. 459, 3 L. J. Exch. 98, 4 Tyr. 173.

73. *Arkansas.*— Opp *v.* Wack, 52 Ark. 288, 12 S. W. 565, 5 L. R. A. 743.

Colorado.— Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94; Blackmore *v.* Neale, 15 Colo. App. 49, 60 Pac. 952.

Idaho.— Kelly *v.* Leachman, 3 Ida. 629, 33 Pac. 44.

Iowa.— Sigourney First Nat. Bank *v.* Woodman, 93 Iowa 668, 62 N. W. 28, 57 Am. St. Rep. 287; Miller *v.* Beardsley, 81 Iowa 720, 41 N. W. 756.

Louisiana.— *In re* Kugler, 23 La. Ann. 455.

Minnesota.— Russell *v.* Davis, 51 Minn. 482, 53 N. W. 766.

New York.— Manchester *v.* Braedner, 107 N. Y. 346, 14 N. E. 405, 1 Am. St. Rep. 829; Kincaid *v.* Archibald, 73 N. Y. 189; Hodnett *v.* Gault, 64 N. Y. App. Div. 163, 71 N. Y. Suppl. 831; Fletcher *v.* Daniels, 52 N. Y. App. Div. 67, 64 N. Y. Suppl. 861; McNamee *v.* Tenny, 41 Barb. 495.

Texas.— Trainer *v.* Seymour, 10 Tex. Civ. App. 674, 32 S. W. 154.

England.— Lechmere *v.* Fletcher, 1 Cromp. & M. 623, 2 L. J. Exch. 219, 3 Tyrw. 450.

Compare Nicholas *v.* Krebs, 11 Ala. 230.

See *supra* VII, A, 5.

74. Rowe *v.* Thompson, 15 Abb. Pr. (N. Y.) 377.

75. Nicholas *v.* Krebs, 11 Ala. 230; Borden *v.* Peay, 20 Ark. 293.

76. Millard *v.* Smith, 25 La. Ann. 491.

77. Lehman *v.* Mahier, 34 La. Ann. 319.

78. *Illinois.*— Bowles *v.* Keator, 47 Ill. App. 98.

Indiana.— Ketcham *v.* Hill, 42 Ind. 64. See Brudi *v.* Trentman, 16 Ind. App. 512, 44 N. E. 932, holding that if part payment is made before the bar of the statute intervenes such payment may be proved by parol evidence.

Maine.—Dyer *v.* Walker, 54 Me. 18; Egery *v.* Decrew, 53 Me. 392; Sibley *v.* Lumbert, 30 Me. 253.

Massachusetts.—Gillingham *v.* Brown, 178 Mass. 417, 60 N. E. 122, 55 L. R. A. 320; Williams *v.* Gridley, 9 Metc. 482.

Michigan.— Fowles *v.* Joslyn, 135 Mich. 333, 97 N. W. 790.

Canada.— Boulet *v.* Metayer, 23 Quebec Super. Ct. 289. See also *supra*, VII, B, 2, e.

79. See *supra*, VII, A, 9.

The acknowledgment must be in the writing itself, and cannot be read into it by means of oral testimony. Johnston *v.* Hussey, 92 Me. 92, 42 Atl. 312.

Waiver.— If a party permits a new promise to be shown by parol evidence, he waives the statutory objection, and the promise is effective to prevent the operation of the statute. Ray *v.* Rood, 62 Vt. 293, 19 Atl. 226.

80. Cirwithin *v.* Mills, 2 Marv. (Del.) 232, 43 Atl. 151; Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117, which cases involve declarations made to third persons.

81. Weil *v.* Jacobs, 111 La. 357, 35 So. 599; McGinty *v.* Henderson, 41 La. Ann. 382, 6 So. 658 (holding that checks signed and issued by a debtor, and received by a creditor

D. Weight and Sufficiency[82] — **1. General Considerations.** The rules as to the weight and sufficiency of evidence in civil actions in general apply to the question as to the weight and sufficiency of the evidence relating to the bar of limitations.[83] The date of a summons or writ is not conclusive evidence of the time of the commencement of the action.[84] Where a new cause of action is set up in an amended complaint, there is no evidence as to when the action was commenced where the original complaint is not introduced in evidence, and there is no evidence as to the date of the filing of the amended complaint.[85] Evidence of non-residence is not sufficient evidence of itself of absence from the state.[86]

2. Discovery of Fraud or Concealment of Cause of Action. The fraudulent concealment of the cause of action, where relied on to avoid the bar, must be strictly and clearly proved;[87] but it need not be proved beyond a reasonable

as payments on account of a debt, are competent evidence to prove interruption of prescription, after the decease of the debtor, and that the stubs of the check-book, from which the checks were taken, are admissible to connect them with the particular debt to which they were to be applied); Coyle *v.* Creevy, 34 La. Ann. 539; Edwards' Succession, 34 La. Ann. 216 (holding that the statute does not require that the proof of the special authority of the agent should also be in writing); Petetin *v.* Boagni, 26 La. Ann. 607 (holding that the statute does not prohibit parol testimony for the purpose of proving that prescription had been interrupted as to the decedent by the acknowledgment of his coöbligor); Millard *v.* Smith, 25 La. Ann. 491; Guillory *v.* Dejean, 25 La. Ann. 481; Boswell *v.* Roby, 24 La. Ann. 496; Broussard *v.* Breaux, 23 La. Ann. 549; Pavy *v.* Escoubas, 23 La. Ann. 531; Ross *v.* Johnstone, 23 La. Ann. 109; Hillebrandt's Succession, 21 La. Ann. 350.

82. **Weight and sufficiency of evidence to show adverse possession** see Adverse Possession, 1 Cyc. 1151.

Sufficiency of proof of limitations against criminal prosecutions see Criminal Law.

83. See, generally, Evidence, 17 Cyc. 753 *et seq.*

Evidence of a cosurety to rebut the bar of the statute does not necessarily inure to the benefit of the other surety, where the debt is paid by cosureties, so that they have distinct causes of action against the principal. Hall *v.* Creswell, 12 Gill & J. (Md.) 36.

A decree of foreclosure against an original mortgagor is evidence that the debt is not paid, so as to prevent the operation of the statute. Lyman *v.* Little, 15 Vt. 576.

Evidence of attorney. — Where notes are prescribed in the hands of an attorney employed to collect them, his testimony is insufficient of itself to establish an interruption or renunciation of prescription. Madden *v.* Farmer, 7 La. Ann. 580.

Sufficiency of evidence to show renunciation of trust see Williams *v.* Williams, 76 S. W. 413, 25 Ky. L. Rep. 836, 77 S. W. 184, 25 Ky. L. Rep. 1085.

Snfficiency of evidence to show infancy see Hillebrant *v.* Brewer, 6 Tex. 45, 55 Am. Dec. 757; Halliday *v.* Lambright, 29 Tex. Civ. App. 226, 68 S. W. 712.

Insanity. — Such mental unsoundness as would toll limitations was properly not found on evenly balanced evidence, consisting of depositions and stipulations, where the issue was negatived by disinterested witnesses, and was not raised till property rights were endangered by adverse possession. Carter *v.* Stewart, (Tenn. Ch. App. 1897) 43 S. W. 366.

Statements in writing as to when compensation became due are conclusive in the absence of evidence to the contrary. Bulkley's Case, 8 Ct. Cl. 517.

Evidence that a debt has been due for the lapse of time necessary to bar it is sufficient, where there is no evidence of other facts which avoid the bar so established. Munson *v.* Robertson, 19 La. Ann. 170; White *v.* Blanchard, 19 La. Ann. 59; Peyroux *v.* Lacoste, 18 La. Ann. 626; Blossman *v.* Mather, 5 La. Ann. 335.

Evidence that some portion of the demand is barred, without showing the amount, is insufficient to establish the bar as to any part of the demand. Borland *v.* Haven, 37 Fed. 394, 13 Sawy. 551.

84. Alabama, etc., R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403; Huss *v.* Central R., etc., Co., 66 Ala. 472; Johnson *v.* Farwell, 7 Me. 370, 22 Am. Dec. 203; Day *v.* Lamb, 7 Vt. 426.

The record is conclusive as to when the action was commenced, however, where there is no evidence to the contrary. Grant *v.* Monticello, 71 Ind. 58.

Altered writ. — A replication to a plea of the statute of limitations, stating the suing out of a writ on a certain day within six years, is not proved by a writ originally sued out on that day, but afterward altered and made returnable on a different day — the day of the alteration being considered the issuing of the writ. Barlow *v.* O'Donnell, 6 N. Brunsw. 433.

85. Galveston, etc., R. Co. *v.* English, (Tex. Civ. App. 1900) 59 S. W. 626.

86. Miller *v.* Baier, 67 Kan. 292, 72 Pac. 772.

Sufficiency of evidence of absence see Kennedy *v.* Shea, 110 Mass. 147; Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111; Cruger *v.* Dockstader, 31 Misc. (N. Y.) 24, 62 N. Y. Suppl. 1036.

87. McDonald *v.* McGuire, 8 Tex. 361.

doubt.[88] Circumstantial evidence may be sufficient to prove that plaintiff discovered the fraud more than the statutory time allowed in which to thereafter commence the action.[89]

3. Acknowledgment or New Promise. Evidence of an acknowledgment or a new promise, to take the case out of the operation of the statute of limitations, must be clear and definite.[90] And proof of a new promise alone is not sufficient to sustain a recovery. There must be some evidence of the existence of the original demand.[91] The evidence as to the time when the new promise was made must also be clear and positive,[92] as must the evidence to show that the acknowledgment or new promise related to the debt sued on.[93] Circumstantial evidence of the fulfilment of the condition is sufficient, where the new promise is conditional.[94]

4. Part Payment. Evidence of part payment to take a case out of the statute of limitations must be clear and positive.[95] So it must be proven unequivocally

Evidence held insufficient to establish concealment see Tillison *v.* Ewing, 91 Ala. 467, 8 So. 404; Blackledge *v.* Blackledge, (Iowa 1902) 91 N. W. 818; McDonald *v.* McGuire, 8 Tex. 361.

Participation by defendant. — Where concealment is relied on the evidence must clearly show that defendants participated therein. Jones *v.* Rogers, 85 Miss. 802, 38 So. 742.

88. Ossipee *v.* Grant, 59 N. H. 70.

89. McLure *v.* Ashby, 7 Rich. Eq. (S. C.) 430.

90. *Illinois.*— McClintic *v.* Layman, 12 Ill. App. 356.

Louisiana.— Penn *v.* Crawford, 16 La. Ann. 255.

Minnesota.— McNab *v.* Stewart, 12 Minn. 407.

Pennsylvania.— Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487; Ulrich *v.* Getz, 9 Pa. Super. Ct. 289; Gerhard *v.* Gerhard, 2 Lanc. L. Rev. 9. But see Budd *v.* Conrad, 2 Phila. 175, holding that slight evidence of acknowledgment will rebut the presumption of payment after twenty years, and long continued absence and insolvency may corroborate, although insufficient to warrant a verdict.

England.— Barron *v.* Martin, 19 Ves. Jr. 327, 34 Eng. Reprint 539.

But see Strickland *v.* Walker, 37 Ala. 385, holding that evidence in proof of the revival, by a new promise or acknowledgment, of a debt barred by limitations, need not be clear and explicit, although the promise itself must be so.

A witness testifying to an acknowledgment need not state the exact words of the debtor. The statement of the substance is sufficient. Bulloch *v.* Smith, 15 Ga. 395.

Consideration for acknowledgment.—Where there was evidence that the debtor was told that he could have an extension of from one to five years, if he acknowledged the indebtedness, but the fact of extension was omitted from the indorsement by mistake or oversight, and the judge who took the acknowledgment testified as a witness that he understood that the extension was for one year, the evidence was held sufficient to support a finding that the extension was for one year. Martin *v.* Somervell County, 21 Tex. Civ. App. 308, 52 S. W. 556.

Evidence held sufficient to show new promise or acknowledgment see Lee *v.* Russell, 38 S. W. 874, 18 Ky L. Rep. 951; St. Mark's Evangelical Lutheran Church *v.* Miller, 99 Md. 23, 57 Atl. 644; Farnam *v.* Brooks, 9 Pick. (Mass.) 212; Heflin *v.* Kinard, 67 Miss. 522, 7 So. 493; Lathrop *v.* Woodward, 21 N. Y. Suppl. 804; Henry *v.* Zurflieh, 203 Pa. St. 440, 53 Atl. 243 (holding that the law makes no change in the measure of proof between the promise made before the statute has run and one made afterward); Lazarus' Estate, 142 Pa. St. 104, 21 Atl. 792; Wells *v.* Wilson, 140 Pa. St. 645, 21 Atl. 445; Gilbert *v.* Clark, (Tenn. Ch. App. 1901) 62 S. W. 41.

Evidence held insufficient to show acknowledgment or new promise see Ferguson's Appeal, 167 Pa. St. 467, 31 Atl. 733; Heany *v.* Schwartz, 155 Pa. St. 154, 25 Atl. 1078; Bryan *v.* Bouton, 10 Tex. 62.

91. Kimmel *v.* Schwartz, 1 Ill. 278; Dickenson *v.* Hatfield, 5 C. & P. 46, 1 M. & Rob. 141, 24 E. C. L. 446.

92. McGrew *v.* Forsyth, 80 Ill. 596; Dunlevy's Estate, 10 Pa. Co. Ct. 454, holding that testimony that defendant promised to pay the claim "two or three years" after the cause of action accrued was too indefinite.

93. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548; Landis *v.* Roth, 109 Pa. St. 621, 1 Atl. 49, 58 Am. Rep. 747; Yaw *v.* Kerr, 47 Pa. St. 333 (holding, under particular circumstances, that it was a reasonable and necessary inference that the acknowledgment related to the note in controversy); Mayfarth's Appeal, 1 Pa. Cas. 14, 2 Atl. 28.

Proving particular facts by different witnesses.— The testimony of a witness that a promise was made, and that of another witness that the debt was identified, cannot be combined to make out a definite promise to pay an identified debt, so as to take it out of the statute of limitations. Simrell *v.* Miller, 169 Pa. St. 326, 32 Atl. 548.

94. Lonsdale *v.* Brown, 15 Fed. Cas. No. 8,493, 4 Wash. 86.

95. Wallace *v.* Sanville, 2 Del. Co. (Pa.)

that the payment was made on the claim in suit,[96] and that the intention was to make a part payment.[97] And where a payment was made by a third person, the evidence as to his authority to make the payment so as to bind the debtor must be clear.[98] While the mere indorsement on a note of a part payment is not sufficient evidence thereof,[99] it may be sufficient in connection with other evidence in corroboration thereof.[1]

X. TRIAL.

A. Questions of Law and Fact — 1. General Rules.[2] Where the facts are not disputed, it is a question of law whether the case is within the bar of the statute;[3] but where the facts are doubtful, the question is a mixed one of law and fact.[4] The following *inter alia* have been held questions of fact for the jury: Whether there are mutual accounts or dealings between the parties so as to relieve the bar of the statute;[5] whether a certain statement made by defendant to plaintiff was a "request for delay" which would toll limitations;[6] what is a reasonable time;[7] whether a note was signed in the presence of an attesting witness,[8] and whether the attestation of the note was made with the knowledge of

513. See also Gregory *v.* Filbeck, 20 Colo. App. 131, 77 Pac. 369; Davenport *v.* Comstock, 31 N. Y. App. Div. 505, 52 N. Y. Suppl. 177; Chambers *v.* Walker, 4 Rich. (S. C.) 548; Gibbon *v.* Kerry, 19 Wash. 159, 52 Pac. 1023.

If a credit is small compared with the amount of the debt, and entered just before the bar of the statute would attach, although proven to have been made at its date, the jury will be justified in finding against it. Smith *v.* Simms, 9 Ga. 418.

Testimony of plaintiff and another witness, both parties to the transaction alleged to result in the payment, is not sufficient to establish the part payment as against the positive denial of the payer and of a disinterested third person, through whom, if at all, the payment was made, when their testimony is supported by circumstances, and by other evidence. Kendall *v.* Clarke, 90 Ky. 178, 13 S. W. 583, 11 Ky. L. Rep. 980.

96. Matter of Gladke, 45 N. Y. App. Div. 625, 60 N. Y. Suppl. 869; Ryan *v.* McElroy, 15 N. Y. App. Div. 216, 44 N. Y. Suppl. 196 (holding that payment of wages to a housekeeper is not shown merely by evidence that on several occasions her employer handed her money, since such money might well have been for household expenses); Ramsay *v.* Barnes, 16 Daly (N. Y.) 478, 12 N. Y. Suppl. 726, 20 N. Y. Civ. Proc. 84; Wright *v.* Jordan, 181 Pa. St. 100, 37 Atl. 196; Shaffer *v.* Shaffer, 41 Pa. St. 51; Drawbaugh *v.* Drawbaugh, 7 Pa. Super. Ct. 349.

97. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* on other grounds 61 Ill. App. 429]. See also Taylor *v.* Wilson, 38 S. W. 877, 18 Ky. L. Rep. 904.

98. Hulbert *v.* Nichol, 20 Hun (N. Y.) 454 (holding that payments of interest on a joint and several note are not sufficient to revive the liability of a maker, where the evidence does not show that the payments were not made by a co-maker); Miller *v.* Magee, 2 N. Y. Suppl. 156.

99. See *supra*, VII, B, 2, e.

1. See cases cited *infra*, this note.

Evidence held sufficient see Oughterson *v.* Clark, 20 N. Y. Suppl. 381, holding that where the maker acknowledged that the indorsement on the note was all right, the evidence was sufficient to show a part payment.

Evidence held insufficient see Walker *v.* Wykoff, 14 Ala. 560; Waterman *v.* Burbank, 8 Metc. (Mass.) 352; Snyder *v.* Winsor, 44 Mich. 140, 6 N. W. 197 (evidence that no "other" payments were made on the note); Chapman's Appeal, 122 Pa. St. 331, 15 Atl. 460 (letter of debtor showing payment where no evidence to connect the letter with the indorsement on the note).

2. See, generally, Trial.

Province of court and jury to determine question of adverse possession see Adverse Possession, 1 Cyc. 1153.

3. Reed *v.* Swift, 45 Cal. 255; Clarke *v.* Dutcher, 9 Cow. (N. Y.) 674; Chapin *v.* Warden, 15 Vt. 560.

Where the facts raising the questions of limitations are not alleged in the complaint, the question whether plaintiff's claim is barred by limitations cannot be a question exclusively for the court. See Wright *v.* Cain, 93 N. C. 296.

4. Chapin *v.* Warden, 15 Vt. 560.

5. Kirven *v.* Thornton, 110 Ga. 276, 34 S. E. 848; Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893.

Whether there is any evidence of a mutual account is a question of law; but if there is any evidence, its sufficiency is a question for the jury. Stokes *v.* Taylor, 104 N. C. 394, 10 S. E. 566.

6. Apperson *v.* Pattison, 11 Lea (Tenn.) 484.

7. Schraum *v.* Nolte, 1 Tex. App. Civ. Cas. § 1156. But see Gwin *v.* Brown, 21 App. Cas. (D. C.) 295, holding that it was a question of law whether an action was brought within a reasonable time after the repeal of the saving clause of a former statute.

What is a reasonable time after an insane person becomes sane, to enable him to examine his affairs and to commence an action to recover a debt, is for the jury. Clark *v.* Trail, 1 Metc. (Ky.) 35.

8. Swazey *v.* Allen, 115 Mass. 594.

the promisor and as part of the execution.[9] The justice of the claim is not to be considered by the jury where the only issue is the bar of limitations.[10]

2. Time of Accrual and Commencement of Action. The time of the accrual of a cause of action is a question of law,[11] as is the question whether a suit was commenced at the time summons issued or at the time the amendment to the declaration was made.[12] The question of whether the summons introduced in evidence was an original or an alias summons is a question for the court;[13] but the question as to whether the summons was actually deposited or delivered within the statutory period is a question for the jury.[14] The time when an injury occurred, so as to start the running of the statute of limitations, is a question of fact.[15]

3. Fraud and Concealment of Cause of Action. The rule that the existence of fraud is a question of fact, where the evidence is conflicting, applies where fraud and concealment are relied on to take the case out of the operation of the statute of limitations.[16] So the question as to when plaintiff first learned of the fraud is one of fact,[17] as is the question whether he used due diligence and whether he could have discovered the fraud sooner than he did by the exercise of such diligence.[18]

4. Acknowledgment or New Promise. Where the promise is in writing,[19] or the facts as to the acknowledgment of a debt or the making of a new promise are not disputed, the question as to their sufficiency to take the case out of the statute of limitations is one for the court, and not for the jury;[20] but it is a question

9. Drury *v.* Vannevar, 1 Cush. (Mass.) 276.

10. Shaw *v.* Yarbrough, 3 Ala. 588.

11. See Coffing *v.* Dodge, 167 Mass. 231, 45 N. E. 928.

When the services of an attorney terminated is a question for the jury in an action by an attorney against his client. Lowe *v.* Ring, 106 Wis. 647, 82 N. W. 571.

12. Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101.

13. Alabama Great Southern R. Co. *v.* Hawk, 72 Ala. 112, 47 Am. Rep. 403.

14. Michigan Ins. Bank *v.* Eldred, 130 U. S. 693, 9 S. Ct. 690, 32 L. ed. 1080.

15. Merchants L. & T. Co. *v.* Boucher, 115 Ill. App. 101.

16. Hickson *v.* Bryan, 75 Ga. 392.

17. Alpha Mills *v.* Watertown Steam Engine Co., 116 N. C. 797, 21 S. E. 917.

18. *Iowa.*— Faust *v.* Hosford, 119 Iowa 97, 93 N. W. 58.

Maryland.— New England Mut. L. Ins. Co. *v.* Swain, 100 Md. 558, 60 Atl. 469.

Mississippi.— Jones *v.* Rogers, 85 Miss. 802, 38 So. 742.

Missouri.— State *v.* Hawkins, 103 Mo. App. 251, 77 S. W. 98.

New Hampshire.—Buswell *v.* Roby, 3 N. H. 467.

Texas.— Andrews *v.* Smithwick, 34 Tex. 544.

See 33 Cent. Dig. tit. "Limitation of Actions," § 728.

The jury can take into consideration all the attendant circumstances tending to excuse plaintiff from any lack of diligence in the discovery of fraud. Cooper *v.* Lee, 1 Tex. Civ. App. 9, 21 S. W. 998.

19. Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94; Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595 [*affirming* 110 Ill. App. 404]; Serrell *v.* Forbes, 106 N. Y. App. Div. 482, 92 N. Y. Suppl. 805; Sidwell *v.* Mason, 2 H. & N. 306, 3 Jur. N. S. 649, 26 L. J. Exch. 407, 5 Wkly. Rep. 72. See also Chapman *v.* Barnes, 93 Ala. 433, 9 So. 589; Bell *v.* Rowland, Hard. (Ky.) 301, 3 Am. Dec. 729. *Contra*, Watkins *v.* Stevens, 4 Barb. (N. Y.) 168.

Explanation by extrinsic facts.— The construction of a doubtful document given in evidence to defeat the statute is, as in other cases involving the construction of written instruments, for the court and not for the jury; if it is explained by extrinsic facts it is for the jury. Morrell *v.* Frith, 8 C. & P. 246, 1 H. & H. 100, 2 Jur. 619, 7 L. J. Exch. 172, 3 M. & W. 402, 34 E. C. L. 715.

20. *Alabama.*—Evans *v.* Carey, 29 Ala. 99; Townes *v.* Ferguson, 20 Ala. 147.

Colorado.— Thomas *v.* Carey, 26 Colo. 485, 58 Pac. 1093.

Connecticut.—Clark *v.* Sigourney, 17 Conn. 511.

District of Columbia.—Otterback *v.* Brown, 2 MacArthur 541.

Georgia.— Love *v.* Hackett, 6 Ga. 486; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306; Sheftall *v.* Clay, R. M. Charlt. 7.

Illinois.— Walker *v.* Freeman, 209 Ill. 17, 70 N. E. 595.

Maine.— Johnston *v.* Hussey, 89 Me. 488, 36 Atl. 993; Miller *v.* Lancaster, 4 Me. 159.

Maryland.— Oliver *v.* Gray, 1 Harr. & G. 204.

Massachusetts.— Bangs *v.* Hall, 2 Pick. 368, 13 Am. Dec. 437.

Mississippi.— Beasley *v.* Evans, 35 Miss. 192.

Missouri.— Warlick *v.* Peterson, 58 Mo. 408.

New Hampshire.— Ventris *v.* Shaw, 14 N. H. 422.

for the jury as to whether a promise was made,[21] what promise was in fact made,[22] and whether the acknowledgment or new promise refers to the cause of action sued on.[23] When the evidence as to a new promise is susceptible of more than one interpretation,[24] or there is a dispute as to the facts, the question is one for the jury, subject to the instructions of the court as to what, in law, is sufficient to constitute an acknowledgment or new promise such as will take the case out of the statute.[25] So it is a question for the jury whether an acknowledgment or new promise may be implied from certain writings where the statements therein are doubtful,[26] or from other facts.[27] So the question, where a new promise is conditional, as to whether the condition has happened, is one for the jury.[28] Whether the substitution of collateral after the maturity of the notes was such an acknowledgment of the debt as to remove the bar of limitation is a question for the jury.[29]

5. PART PAYMENT. Whether a part payment was in fact made is a question for the jury under the evidence adduced upon that issue and the instructions of the court,[30]

New York.— Clarke *v.* Dutcher, 9 Cow. 674.

Pennsylvania.— Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487; Farley *v.* Kustenboder, 3 Pa. St. 418; Allison *v.* Pennington, 7 Watts & S. 180; Allison *v.* James, 9 Watts 380; Boyd *v.* Grant, 13 Serg. & R. 124; Ulrich *v.* Getz, 9 Pa. Super. Ct. 289; Gerhard *v.* Gerhard, 2 Lanc. L. Rev. 9.

South Carolina.— Horlbeck *v.* Hunt, 1 McMull. 197.

Virginia.— Fisher *v.* Duncan, 1 Hen. & M. 563, 3 Am. Dec. 605.

United States.— Penaro *v.* Flournoy, 19 Fed. Cas. No. 10,916.

See 33 Cent. Dig. tit. "Limitation of Actions," § 729.

Time when statute attaches.—Whether a promise to pay a note was made "before the Statute of Limitations had attached to the note" is a question of law. Newman *v.* McComas, 43 Md. 70.

21. Clark *v.* Sigourney, 17 Conn. 511; Delbridge *v.* Young, 56 Ill. App. 224. See also Higgins *v.* Butler, 10 Okla. 345, 62 Pac. 810.

22. Love *v.* Hackett, 6 Ga. 486.

23. *Colorado.*— Morrell *v.* Ferrier, 7 Colo. 22, 1 Pac. 94.

Connecticut.— Cook *v.* Martin, 29 Conn. 63; Buckingham *v.* Smith, 23 Conn. 453.

Delaware.— Robinson *v.* Burton, 1 Houst. 540.

Iowa.— Collins *v.* Bane, 34 Iowa 385; Penley *v.* Waterhouse, 3 Iowa 418.

Maryland.— Shipley *v.* Shilling, 66 Md. 558, 8 Atl. 355; Quynn *v.* Carroll, 10 Md. 197; Guy *v.* Tams, 6 Gill 82.

Missouri.— Mastin *v.* Branham, 86 Mo. 643; Warlick *v.* Peterson, 58 Mo. 408; Boyd *v.* Hurlbut, 41 Mo. 264.

North Carolina.— McRae *v.* Leary, 46 N. C. 91.

Pennsylvania.— Hancock *v.* Melloy, 189 Pa. St. 569, 42 Atl. 292.

Rhode Island.— Shaw *v.* Newell, 2 R. I. 264.

South Carolina.— Suber *v.* Richards, 61 S. C. 393, 39 S. E. 540.

Texas.— Dickinson *v.* Lott, 29 Tex. 172.

Vermont.— Kimball *v.* Baxter, 27 Vt. 628.

United States.— Dorr *v.* Swartwout, 2 Fed. Cas. No. 1,010, 1 Blatchf. 179; Penaro *v.* Flournoy, 19 Fed. Cas. No. 10,916, 5 Pa. L. J. 555.

England.— Frost *v.* Bengough, 1 Bing. 266, 1 L. J. C. P. O. S. 96, 25 Rev. Rep. 621, 8 E. C. L. 501.

See 33 Cent. Dig. tit. "Limitation of Actions," § 729.

Exception to rule.— The question of the application of an acknowledgment is for the jury unless defendant fails to show that there was another debt due from him to plaintiff. Mitchell *v.* Clay, 8 Tex. 443.

24. *Alabama.*— Newhouse *v.* Redwood, 7 Ala. 598.

Connecticut.—Clark *v.* Sigourney, 17 Conn. 511.

Delaware.— Robinson *v.* Burton, 1 Houst. 540.

Georgia.— Love *v.* Hackett, 6 Ga. 486; Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306.

Illinois.— Mellick *v.* De Seelhorst, 1 Ill. 221, 12 Am. Dec. 172.

Missouri.— Warlick *v.* Peterson, 58 Mo. 408.

New York.— Watkins *v.* Stevens, 4 Barb. 168; Stevens *v.* Seibold, 5 N. Y. St. 258.

England.— Linsell *v.* Bonsor, 2 Bing. N. Cas. 241, 1 Hodges 105, 5 L. J. C. P. 40, 2 Scott 399, 29 E. C. L. 519; Lloyd *v.* Maund, 2 T. R. 760.

Where the expressions are equivocal, vague, and indefinite, leading to no certain conclusion but at best only probable inferences, the question should not be left to the jury. Bell *v.* Morrison, 1 Pet. (U. S.) 351, 7 L. ed. 174. But see Lloyd *v.* Maund, 2 T. R. 760.

25. Martin *v.* Broach, 6 Ga. 21, 50 Am. Dec. 306; O'Hara *v.* Murphy, 196 Ill. 599, 63 N. E. 1081; Lawson *v.* McCartney, 104 Pa. St. 356.

26. Turnbull *v.* Witherspoon, Walk. (Miss.) 351; Stevens *v.* Seibold, 5 N. Y. St. 258.

27. Warren *v.* Perry, 5 Bush (Ky.) 447; Loomis *v.* Decker, 1 Daly (N. Y.) 186.

28. Stevens *v.* Seibold, 5 N. Y. St. 258.

29. Becker *v.* Oliver, 111 Fed. 672, 49 C. C. A. 533.

30. Hollywood *v.* Reed, 55 Mich. 308, 21 N. W. 313; Risley *v.* Wightman, 13 Hun (N. Y.) 163.

as is the question whether it was intended as a part payment,[31] and on account of what indebtedness the payment was made.[32] So the question whether a part payment was authorized by the debtor is a question of fact,[33] as is the question whether the maker of a note was acting as agent for the surety in making the payment,[34] and also whether an indorsement on the note by the payee was authorized by the maker.[35] And it has been held that whether payments were such as to remove the bar of the statute from the entire debt is a question for the jury.[36]

6. EXISTENCE OF MUTUAL ACCOUNTS.[37] The question whether a mutual account exists in a given case is one which must be submitted to the jury under suitable instructions from the court.[38] Whether there was an "implied understanding" between the parties that certain items should constitute a part of their mutual dealings and enter into the account so as to become the subject of future adjustment in ascertaining the balance due is ordinarily a mixed question of law and fact.[39]

B. Taking Case From Jury.[40] Where plaintiff's evidence shows that his action is barred by limitations a nonsuit is properly granted,[41] provided defendant has pleaded limitations.[42] So, where plaintiff fails to sustain the burden on him to show that limitations had not run against his cause of action, it is proper to direct a verdict for defendant,[43] or grant a nonsuit.[44] A verdict should not be directed for plaintiff where there is evidence to support defendant's plea of limitations.[45]

C. Instructions.[46] The court must fully and distinctly charge, if requested,[47] as to the statute of limitations as a bar to the action,[48] provided the question of

31. Minniece *v.* Jeter, 65 Ala. 222; Engel *v.* Brown, 69 N. H. 183, 45 Atl. 402; Gibson *v.* Peebles, 2 McCord (S. C.) 418. See also Blair *v.* Lynch, 105 N. Y. 636, 11 N. E. 947.

But where the intention is clear, and the facts are undisputed, the question should not be submitted to the jury. Lester *v.* Thompson, 91 Mich. 245, 51 N. W. 893; Miller *v.* Talcott, 46 Barb. (N. Y.) 167 [*affirmed* in 54 N. Y. 114].

32. Beltzhoover *v.* Yewell, 11 Gill & J. (Md.) 212; Litchfield *v.* Merritt, 102 Mass. 520; Read *v.* Hurd, 7 Wend. (N. Y.) 408.

33. Wesner *v.* Stein, 97 Pa. St. 322.

34. Matter of Petrie, 82 Hun (N. Y.) 62, 31 N. Y. Suppl. 65.

35. Blockett *v.* Sagendorph, 116 Mich. 643, 74 N. W. 999.

36. Christian *v.* State, 7 Ind. App. 417, 34 N. E. 825.

37. See also *supra*, VI, B, 17.

38. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45 [*reversing* 61 Ill. App. 429]; Becker *v.* Jones, 37 Hun (N. Y.) 35. See also Stoner *v.* Riggs, 128 Mich. 129, 87 N. W. 109. *Compare* Thompson *v.* Reed, 48 Ill. 118.

39. Plimpton *v.* Gleason, 57 Vt. 604.

40. See, generally, TRIAL.

41. Wallingford *v.* Hall, 64 Conn. 426, 30 Atl. 47; Croft *v.* Haight, 51 N. Y. App. Div. 265, 64 N. Y. Suppl. 882. But see Fitch *v.* Bill, 71 Conn. 24, 40 Atl. 910.

Where the instrument sued on is on its face barred by limitations, a nonsuit may be ordered. Echols *v.* Phillips, 112 Ga. 700, 37 S. E. 977.

A nonsuit should not be granted where there is evidence tending to show that the action is not barred. Mulvane *v.* Sedgley, (Kan. App. 1900) 61 Pac. 971; Wilcox *v.* Wilcox, 139 Mich. 365, 102 N. W. 954; Eldredge *v.* Mathews, 93 N. Y. App. Div. 356, 87 N. Y. Suppl. 652; Latimer *v.* Trowbridge, 52 S. C. 193, 29 S. E. 634, 68 Am. St. Rep. 893.

42. Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127, holding that where the cause of action is set up in three counts, and the statute is only pleaded to two, a nonsuit will not be granted on the ground that the proof shows that the claim is barred.

43. House *v.* Arnold, 122 N. C. 220, 29 S. E. 334.

44. Coolidge *v.* Alcock, 30 N. H. 329; Larason *v.* Lambert, 12 N. J. L. 247.

Before the court can grant a nonsuit on the ground that the evidence offered by plaintiff does not remove the bar of limitations, it must assume the truth of every fact in support of plaintiff's claim which the jury, under the testimony, could find. Guy *v.* Tams, 6 Gill (Md.) 82.

45. Worth *v.* Norton, 60 S. C. 293, 38 S. E. 605.

46. See, generally, TRIAL.

47. Ennis *v.* Pullman Palace-Car Co., 165 Ill. 161, 46 N. E. 439 (holding that the request to charge must be complete in itself); Needham *v.* Bythewood, (Tex. Civ. App. 1901) 61 S. W. 426; Parrish *v.* Williams, (Tex. Civ. App. 1899) 53 S. W. 79; Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. 726 (holding that a request for a charge as to the time limitations commenced running did not amount to a request for a charge defining "repudiation").

48. *Illinois.*— Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45.

limitations is raised by the pleadings.[49] Such instructions must be warranted by the pleadings[50] and the evidence,[51] and applicable thereto; and must not be misleading[52] or argumentative;[53] nor must they unduly invade the province of the jury.[54] A party cannot complain of an instruction more favorable to him than he is entitled to.[55]

D. Verdict and Findings — 1. Verdict. The verdict must be responsive to the issues made by the pleadings.[56] Where special questions are submitted to the jury to be answered, the findings must be consistent with each other.[57] It will be

Maryland.— Carroll *v.* Ridgaway, 8 Md. 328.

Mississippi. — Roberts *v.* Singleton, 24 Miss. 438.

New York.— Northrup *v.* Smith, 118 N. Y. 682, 23 N. E. 571.

North Carolina.— Bond *v.* Wilson, 129 N. C. 387, 40 S. E. 182.

Texas.— Underwood *v.* Coolgrove, 59 Tex. 164.

See 33 Cent. Dig. tit. "Limitation of Actions," § 731.

Burden of proof.— It is error in a proper case to refuse an instruction as to the burden of proof of facts necessary to remove the bar of the statute. Apperson *v.* Pattison, 11 Lea (Tenn.) 484.

Definition of terms.— The court need not define terms used in instructions where such terms are unimportant. Schroeder *v.* Michel, 98 Mo. 43, 11 S. W. 314.

A charge that there is no evidence to rebut the plea of limitations should be given where, as a matter of fact, there is no such evidence. Barnes *v.* Farmer, 31 N. C. 202.

A charge to disregard evidence of coverture is proper where there is no plea of coverture, although the marriage of plaintiff was proved without objection. Harvey *v.* Cummings, 68 Tex. 599, 5 S. W. 513.

Failure to refer to the effect of payments upon the running of the statute is not error when it is not shown that the payments were meant to be applied to the claim sued on. Murtaugh *v.* Murphy, 30 Ill. App. 59.

Agency and demand.— It was proper to charge that the evidence, if proved, would establish agency, and that the statute of limitations could not run until after demand. Lamb *v.* Ward, 114 N. C. 255, 19 S. E. 230.

49. Miller *v.* Cinnamon, 168 Ill. 447, 48 N. E. 45; Albertson *v.* Terry, 109 N. C. 8, 13 S. E. 713. But see Sexton *v.* Aultman, 92 Va. 20, 22 S. E. 838, holding that where plaintiff has a right to the defense of limitations without pleading it, an instruction that the same, if believed, would be a defense, is not error as operating as a surprise to defendant.

Where the reply of part payment is eliminated by demurrer, and plaintiff relies on a direct new promise to pay, it is not error to charge that the only question for the jury is whether defendant, within six years, promised to pay the note. Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137.

50. Sears *v.* Hicklin, 3 Colo. App. 331, 33 Pac. 137.

A charge correct as an abstract rule of law, but which, for want of a qualification which would have made the case in controversy an exception, was incorrect in its application, is erroneous. Pond *v.* Williams, 1 Gray (Mass.) 630.

51. *Illinois.* — Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41; Steude *v.* Fischer, 50 Ill. App. 374.

Kentucky.— Newton *v.* Carson, 5 S. W. 475, 9 Ky. L. Rep. 476.

Maryland.— Gill *v.* Donovan, 96 Md. 518, 54 Atl. 117.

North Carolina.— Justice *v.* Gallert, 131 N. C. 393, 42 S. E. 850; Baird *v.* Reynolds, 99 N. C. 469, 6 S. E. 377.

Texas.— Ayres *v.* Henderson, 9 Tex. 539.

See 33 Cent. Dig. tit. "Limitation of Actions," § 731.

52. *Alabama.*— Ross *v.* Ross, 20 Ala. 105.

Illinois.— Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41.

Kentucky.— Newton *v.* Carson, 5 S. W. 475, 9 Ky. L. Rep. 476.

Michigan.— Bay City Iron Co. *v.* Emery, 128 Mich. 506, 87 N. W. 652, holding that a charge as to payment could not mislead the jury into thinking it referred solely to payment in money.

Texas.— Gerfers *v.* Mecke, 28 Tex. Civ. App. 269, 67 S. W. 144.

Virginia.— Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593.

See 33 Cent. Dig. tit. "Limitation of Actions," § 731.

Other instructions may be curative. Gill *v.* Staylor, 97 Md. 665, 55 Atl. 398.

53. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41.

54. Waldron *v.* Alexander, 136 Ill. 550, 27 N. E. 41; Fawcett *v.* Fawcett, 95 Pa. St. 376, holding that it was error to instruct in effect that there was a positive new promise to pay where the evidence in regard thereto was not clear.

55. Buckingham *v.* Smith, 23 Conn. 453.

56. Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. 593 (holding that where the pleas are *non assumpsit*, and the statute of limitations, a general verdict for plaintiff fixing the amount of his damages is responsive to both issues); Calvert *v.* Bowdoin, 4 Call (Va.) 217 (holding that a finding that defendant assumed within the five years next before the suit was commenced, and not that defendant promised in manner and form, etc., was insufficient).

57. Murray *v.* Scribner, 74 Wis. 602, 43 N. W. 549.

presumed that the jury, in answering such questions, were governed by the instructions applicable thereto.[58]

2. FINDINGS. Inasmuch as the findings must be responsive to the pleadings and evidence, a finding that the action is barred by limitations is improper where the defense of limitations has not been raised.[59] While the findings as to limitations must be clear and explicit,[60] yet where the facts found clearly show that the action is or is not barred, it is not necessary that the court expressly find as to the statute of limitations.[61] Failure of the court to find as to the existence of facts alleged in avoidance of limitations has been held equivalent to a finding that there were no such facts.[62]

XI. REVIEW.

A. Saving Questions For Review. Generally, the defense of limitations cannot be first urged on appeal,[63] even where the bar appears from the record.[64] So objections to a plea of limitations, or a plea in avoidance thereof, cannot be first urged on appeal.[65] A request for an instruction as to limitations,[66] or specific objections to an instruction,[67] may be necessary to preserve the question for review.

B. Review as Dependent on Record. Questions as to limitations not raised by the record will not be considered in an appellate court.[68]

C. Presumptions. Where the evidence is not in the record, and the cause of action is barred unless facts in avoidance of the bar were shown, it will be presumed on appeal, in support of the judgment, that such facts were shown in evidence.[69]

D. Discretion of Court. The rule that discretionary rulings will ordinarily not be reviewed on appeal[70] has been applied to rulings as to limitations.[71]

E. Questions of Fact. A verdict,[72] or findings of fact by the court,[73] on the

58. Murray *v.* Scribner, 74 Wis. 602, 43 N. W. 549.

59. Retzer *v.* Wood, 109 U. S. 185, 3 S. Ct. 164, 27 L. ed. 900.

60. Weeks *v.* Boynton, 37 Vt. 297, holding that an auditor's report that an account "accrued more than six years ago" was insufficient.

61. Filippini *v.* Trohock, (Cal. 1900) 62 Pac. 1066; Woodham *v.* Cline, 130 Cal. 497, 62 Pac. 822; Ready *v.* McDonald, 128 Cal. 663, 61 Pac. 272, 79 Am. St. Rep. 76; Wolfskill *v.* Douglas, (Cal. 1900) 59 Pac. 987, holding that where the complaint alleged that the cause of action arose on or about a certain day, within the statutory time for commencing the action, a finding that all the allegations therein are true is an adverse finding on defendant's plea of limitations. *Contra*, Duff *v.* Duff, 71 Cal. 513, 12 Pac. 570, holding that findings must not only include the facts, but also state whether the action is barred by the statute.

There is a sufficient finding of part payment to avoid the operation of the statute, where there is a finding of a payment on the note in suit by the debtor at a particular time within six years before the action was commenced. Downer *v.* Read, 17 Minn. 493; Wenke *v.* Hall, 17 S. D. 305, 96 N. W. 103.

62. Lemster *v.* Warner, 137 Ind. 79, 36 N. E. 900.

63. See APPEAL AND ERROR, 2 Cyc. 668 note 79.

64. See APPEAL AND ERROR, 2 Cyc. 669.

65. Wright *v.* Preston, 55 Ala. 570; Harrison *v.* Harrison, 39 Ala. 489; Roemilie *v.* Leeper, 2 Tex. Unrep. Cas. 535.

66. Castagnino *v.* Balletta, 82 Cal. 250, 23 Pac. 127. See also APPEAL AND ERROR, 2 Cyc. 669, note 80.

67. Mahony *v.* Clark, 1 N. Y. App. Div. 196, 37 N. Y. Suppl. 138.

68. Smith *v.* Hudspeth, 63 Ga. 212; Webster *v.* Newbold, 41 Pa. St. 482, 82 Am. Dec. 487. See also Dumonchel *v.* Lemerick, 21 La. Ann. 30; Watts *v.* Bradley, 20 La. Ann. 523.

69. See APPEAL AND ERROR, 3 Cyc. 287 note 49.

70. See APPEAL AND ERROR, 3 Cyc. 325 *et seq.*

71. Turner *v.* Shuffler, 108 N. C. 642, 13 S. E. 243 (holding that a refusal to allow an amendment of the plea of limitations will not be reviewed); Privett *v.* Calloway, 75 N. C. 233 (holding that the discretion of the trial court in allowing the defense of limitations to be relied on, although not pleaded, is not reviewable on appeal).

72. Wallace *v.* Sanville, 2 Del. Co. (Pa.) 513. See also Charlotte County Bank *v.* Berry, 10 N. Brunsw. 520, as to a finding against plaintiff upon doubtful evidence of part payment. See, generally, APPEAL AND ERROR, 3 Cyc. 348 *et seq.*

73. Munroe *v.* Potter, 65 Vt. 234, 26 Atl. 901, holding that a finding as to whether a non-resident defendant had attachable prop-

issue of the bar of limitations, where based on conflicting evidence, will not be disturbed. So the report of a referee finding a new promise as a question of fact, where the existence of the promise depends on the intentions of the parties, is conclusive on appeal.[74]

F. Harmless and Trivial Errors. Error in admitting evidence,[75] in ruling on a demurrer,[76] or in giving or refusing instructions as to limitations,[77] where not prejudicial to the party complaining, is not ground for reversal.[78] So, where the evidence shows that the claim sued on is barred, the judgment will not be reversed because the lower court mistook the nature of the action and applied a wrong limitation,[79] or because the plea of limitations did not refer to the entire demand, where it was treated by all the parties as applicable to all the claims sued on.[80] But where the cause has been submitted to the jury on two distinct theories in avoidance of the statute of limitations, one of which is erroneous, and it is impossible to determine upon which one of the theories the jury acted, the judgment must be reversed.[81]

LIMITED. Narrow, restricted;[1] circumscribed;[2] construed;[3] controlled and governed;[4] not absolute.[5] (Limited: Damages, see DAMAGES. Divorce, see DIVORCE. Fee, see ESTATES. Jurisdiction, see COURTS. Liability Company, see CORPORATIONS; JOINT STOCK COMPANIES. Partnership, see PARTNERSHIP. Predestination, see LIMITED PREDESTINATION. Publication, see LIMITED PUBLICATION. Ticket, see LIMITED TICKET.)

LIMITED DAMAGES. See DAMAGES.

LIMITED DIVORCE. See DIVORCE.

LIMITED FEE. See ESTATES.

LIMITED JURISDICTION. See COURTS; JUSTICE OF THE PEACE.

LIMITED LIABILITY COMPANIES. See CORPORATIONS; JOINT STOCK COMPANIES.

LIMITED PARTNERSHIP. See PARTNERSHIP.

LIMITED PREDESTINATION. A term which means that God predestinated all things whatsoever which come to pass with reference to the salvation of souls only, and it repudiates the idea that God predestinated the happening of things in this material world.[6] (See, generally, RELIGIOUS SOCIETIES.)

LIMITED PUBLICATION. As applied to a literary composition, the act of communicating the knowledge of the contents to a select few, upon conditions

erty was on a question of fact which would not be disturbed on appeal. See, generally, APPEAL AND ERROR, 3 Cyc. 357 *et seq.*

74. Engel *v.* Brown, 69 N. H. 183, 45 Atl. 402.

75. Wheeler *v.* Robinson, 50 N. H. 303.

76. Leavitt *v.* Gooch, 12 Tex. 95, holding that error in sustaining a general demurrer to a petition disclosing that the cause of action is barred by limitations should be affirmed, because the judgment was substantially correct, notwithstanding a general demurrer was improper.

77. Simmons *v.* Nelson, 48 Ill. App. 520; Lytle *v.* Newell, 74 S. W. 693, 25 Ky. L. Rep. 120; Fairbanks *v.* Long, 91 Mo. 628, 4 S. W. 499; Marx *v.* Kilpatrick, 25 Nebr. 107, 41 N. W. 111.

78. See, generally, APPEAL AND ERROR, 3 Cyc. 383 *et seq.*

79. Miller *v.* Parkhurst, 9 N. Y. St. 759.

80. Liskey *v.* Paul, 100 Va. 764, 42 S. E. 875.

81. King *v.* Post, 12 Colo. 355, 21 Pac. 38.

1. Cheyney *v.* Smith, 3 Ariz. 143, 155, 23 Pac. 680.

2. Cheyney *v.* Smith, 3 Ariz. 143, 155, 23 Pac. 680.

3. See Douglass *v.* Lewis, 3 N. M. 345, 347, 9 Pac. 377.

4. Gallagher *v.* Basey, 1 Mont. 457, 462; Brinckerhoff *v.* Bostwick, 99 N. Y. 185, 192, 1 N. E. 663.

"Limited by law" see U. S. *v.* Ensign, 2 Mont. 396, 401; People *v.* Douglass, 5 Utah 283, 289, 14 Pac. 801.

5. Griffith *v.* Charlotte, etc., R. Co., 23 S. C. 25, 38, 55 Am. Rep. 1.

"Limited or partial interest" see Washington F. Ins. Co. *v.* Kelly, 32 Md. 421, 453, 3 Am. Rep. 149.

6. Bennett *v.* Morgan, 112 Ky. 512, 520, 66 S. W. 287, 23 Ky. L. Rep. 1824.

Absolute predestination means that "God foreknew and predestined all things whatsoever that may come to pass, whether with reference to the material universe or the salvation of souls." Bennett *v.* Morgan, 112

expressly or impliedly limiting its rightful ulterior communication except in restricted private intercourse.[7] (See, generally, COPYRIGHT.)

LIMITED TICKET. As applied to a railroad ticket, a ticket the use of which is limited, as by requiring a continuous journey to be made by the holder of the ticket.[8] (See COMMUTATION TICKET; EXCURSION TICKET. See also, generally, CARRIERS.)

LIMITS. See BOUNDARIES.

LINCOLN'S INN. See INNS OF COURT.

LINE. A term, the signification of which depends upon the subject to which it is applied and the connection in which it is used.[9] As used in connection with other words the following phrases among others[10] have received judicial interpretation: "Line of buildings;"[11] "line of the canal;"[12] "line of credit;"[13] "line of descent;"[14] "line of duty;"[15] "line of a fence, a road, or a farm;"[16] "line of goods;"[17] "line of a highway;"[18] "line of navigation;"[19] "line of railroad or railway;"[20] "line of the road;"[21] "line of a state, a county, a coast, or a seashore;"[22] "line of steamers;"[23] "line of the street;"[24] "line with said street;"[25]

Ky. 512, 519, 66 S. W. 287, 23 Ky. L. Rep. 1824.

7. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644 [*citing* Bartlette *v.* Crittenden, 17 Fed. Cas. No. 1,082, 4 McLean 300].

8. U. S. *v.* Egan, 47 Fed. 112, 116, opinion of Thayer, J.

9. State *v.* Canadian Pac. R. Co., 100 Me. 202, 205, 60 Atl. 901; Oxton *v.* Groves, 68 Me. 371, 372, 28 Am. Rep. 75; McIntyre *v.* Ramsey, 23 Pa. St. 317, 320.

According to the context it may mean a wall, a ditch, a crooked fence, or a hedge. Baker *v.* Talbott, 6 T. B. Mon. (Ky.) 179, 182. It means a straight line, unless controlled by the context. Brown *v.* Brown, 6 Watts (Pa.) 54, 55.

10. See Card *v.* McCaleb, 69 Ill. 314, 317 ("upon the line"); Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 64, 8 Atl. 754 ("by the line of"); Cubberly *v.* Cubberly, 12 N. J. L. 308, 314 ("thence as the line runs"); McIntyre *v.* Ramsey, 23 Pa. St. 317, 320 ("on that line").

11. Simpson *v.* Smith, L. R. 6 C. P. 87, 95, 40 L. J. M. C. 89, 24 L. T. Rep. N. S. 100, 19 Wkly. Rep. 355; Wadsworth Dist. Bd. of Works *v.* Hall, L. R. 4 C. P. 85, 88, 19 L. T. Rep. N. S. 641, 17 Wkly. Rep. 256; Tear *v.* Freebody, 4 C. B. N. S. 228, 257, 6 Wkly. Rep. 520, 93 E. C. L. 228.

12. Card *v.* McCaleb, 69 Ill. 314, 317.

13. Isadore Bush Wine, etc., Co. *v.* Wolff, 48 La. Ann. 918, 920, 19 So. 765; Schneider-Davis Co. *v.* Hart, 23 Tex. Civ. App. 529, 530, 57 S. W. 903 (a term which signifies "a margin of credit enabling one to continue buying so long as he keeps his account within the limit by payments"); American Button-Hole, etc., Mach. Co. *v.* Gurnee, 44 Wis. 49, 62.

14. Den *v.* Robinson, 5 N. J. L. 689, 708; McIntyre *v.* Ramsey, 23 Pa. St. 317, 320. See also DESCENT AND DISTRIBUTION.

Line of descent is the order or series of persons who have descended one from the other or all from a common ancestor, considered as placed in a line of succession in the order of their birth, the line showing the connection of all the blood relatives. Black L. Dict.

15. Allen *v.* Burlington, etc., R. Co., 57 Iowa 623, 627, 11 N. W. 614 (synonymous with the phrase "in the discharge of duty"); Hutchens *v.* Covert, (Ind. App. 1906) 78 N. E. 1061, 1063; Rhodes *v.* U. S., 79 Fed. 740, 743, 25 C. C. A. 186. See MASTER AND SERVANT; PRINCIPAL AND AGENT.

16. Cubberly *v.* Cubberly, 12 N. J. L. 308, 314.

17. A. B. Dick Co. *v.* Sherwood Letter File Co., 51 Ill. App. 343, 348 [*affirmed* in 157 Ill. 325, 42 N. E. 440].

18. Baltimore, etc., R. Co. *v.* Gould, 67 Md. 60, 64, 8 Atl. 754. See STREETS AND HIGHWAYS.

19. Green River, etc., Nav. Co. *v.* Chesapeake, etc., R. Co., 88 Ky. 1, 10, 10 S. W. 6, 10 Ky. L. Rep. 625, 2 L. R. A. 540, Holt, J., delivering the opinion of the court.

20. Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 8 Am. Rep. 690; Chicago, etc., R. Co. *v.* Eisert, 127 Ind. 156, 26 N. E. 759; Burnam *v.* Banks, 45 Mo. 349, 350; Western New York, etc., R. Co. *v.* Buffalo, etc., R. Co., 193 Pa. St. 127, 44 Atl. 242; London, etc., R. Co. *v.* Llandudno Imp. Com'rs, [1897] 1 Q. B. 287, 297, 61 J. P. 55, 66 L. J. Q. B. 232, 75 L. T. Rep. N. S. 659, 45 Wkly. Rep. 350. See RAILROADS.

21. Helmer *v.* Castle, 109 Ill. 664, 672; Chicago, etc., R. Co. *v.* People, 56 Ill. 365, 372, 8 Am. Rep. 690; Smith *v.* Slocomb, 9 Gray (Mass.) 36, 38, 69 Am. Dec. 274; Sibley *v.* Holden, 10 Pick. (Mass.) 249, 20 Am. Dec. 521; Coyle *v.* Chicago, etc., R. Co., 27 Mo. App. 584, 593; Mead *v.* Riley, 50 N. Y. Super. Ct. 20, 25; Williams *v.* Sparks, 24 Ohio St. 141, 142; Liverpool, etc., Ins. Co. *v.* McNeill, 89 Fed. 131, 137, 32 C. C. A. 173. See also Fitchburg R. Co. *v.* Charlestown Mut. F. Ins. Co., 7 Gray (Mass.) 64, 66.

22. Cubberly *v.* Cubberly, 12 N. J. L. 308, 314.

23. Elwell *v.* Fabre, 13 N. Y. Suppl. 829, 830.

24. Hughes *v.* Providence, etc., R. Co., 2 R. I. 493, 515; Kneeland *v.* Van Valkenburgh, 46 Wis. 434, 438, 1 N. W. 63, 32 Am. Rep. 719.

25. Hamlin *v.* Pairpoint Mfg. Co., 141 Mass. 51, 56, 6 N. E. 531.

"line of the tunnel;"[26] "line trees;"[27] "direct line;"[28] "division line;"[29] "harbor line;"[30] "section line;"[31] "telegraph line;"[32] and "telephone line."[33] In printing, the term means a row of words, letters or figures printed across a page or column, without regard to the size of the type.[34] As a term of surveying, it means something which has length,[35] without breadth.[36] (Line: Boundary, see BOUNDARIES. Harbor, see NAVIGABLE WATERS. Of Descent, see DESCENT AND DISTRIBUTION. Of Highway, see STREETS AND HIGHWAYS. Of Railroad, see RAILROADS. Telegraph or Telephone, see TELEGRAPHS AND TELEPHONES.)

LINEAGE. HEIRS,[37] *q. v.*; race, progeny, descendants in a common line from a common progenitor.[38] (See, generally, DESCENT AND DISTRIBUTION.)

LINEAL. That which comes in a direct line.[39] (See COLLATERAL.)

LINEAL CONSANGUINITY. That relation which exists among persons where one is descended from the other, as between the son and the father or the grandfather, and so upward in a direct ascending line; and between the father and son or the grandson, and so downward in a direct or descending line;[40] the relation which subsists between persons of whom one is descended in a direct line from the other.[41]

LINEAL DESCENDANTS. Direct descendants,[42] but not brothers and sisters;[43] a term which is said to be synonymous with ISSUE,[44] *q. v.* (See COLLATERAL CONSANGUINITY; CONSANGUINITY; DESCENDANT. See also, generally, DESCENT AND DISTRIBUTION.)

LINEAL DESCENT. A term used to designate a descent from father to son, or grandfather to grandson.[45] (See COLLATERAL DESCENT. See also, generally, DESCENT AND DISTRIBUTION.)

26. Corning Tunnel Co. *v.* Pell, 4 Colo. 507, 511; Hope Min. Co. *v.* Brown, 11 Mont. 370, 379, 380, 28 Pac. 732; Hope Min. Co. *v.* Brown, 7 Mont. 550, 19 Pac. 218.

27. Harndon *v.* Shultz, 124 Iowa 440, 100 N. W. 329, 330 (trees standing directly on the boundary between lands of adjoining owners); Dubois *v.* Beaver, 25 N. Y. 123, 126, 82 Am. Dec. 326.

28. Thomas *v.* Godfrey, 3 Gill & J. (Md.) 142, 152.

29. Brown *v.* Watts, 6 Watts (Pa.) 54, 55.

30. Engs *v.* Peckham, 11 R. I. 210, 224. See NAVIGABLE WATERS.

31. Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334, 337.

32. Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 37, 21 So. 570.

33. Southern Bell Tel., etc., Co. *v.* D'Alemberte, 39 Fla. 25, 37, 21 So. 570.

34. Sheehey *v.* Hoboken, 62 N. J. L. 184, 185, 40 Atl. 626. See EM; FOLIO.

35. Corning Tunnel Co. *v.* Pell, 4 Colo. 507, 511.

36. Corning Tunnel Co. *v.* Pell, 4 Colo. 507, 511; Baker *v.* Talbott, 6 T. B. Mon. (Ky.) 179, 182; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505, 517.

Yet this theoretic idea of a line may be explained, by the facts referred to and connected with the division, to mean a wall, a ditch, a crooked fence, or a hedge, that which has breadth.

37. Lockett *v.* Lockett, 94 Ky. 289, 291, 22 S. W. 224, 15 Ky. L. Rep. 79, a word of limitation.

38. Webster Dict. [*quoted* in Lockett *v.* Lockett, 94 Ky. 289, 291, 22 S. W. 224, 15 Ky. L. Rep. 79].

39. As from father to son. Black L. Dict.

40. Willis Coal, etc., Co. *v.* Grizzell, 198 Ill. 313, 317, 65 N. E. 74 [*citing* Bouvier L. Dict.]; The Tyler Tap R. Co. *v.* Overton, 1 Tex. App. Civ. Cas. § 533. See also McDowell *v.* Addams, 45 Pa. St. 430, 432.

Statutory definitions see Cal. Civ. Code (1903), § 1390; Mont. Civ. Code (1895), § 1856.

41. McDowell *v.* Addams, 45 Pa. St. 430, 432; Brown *v.* Baraboo, 90 Wis. 151, 154, 62 N. W. 921, 30 L. R. A. 320. See also Sweezey *v.* Willis, 1 Bradf. Surr. (N. Y.) 495, 498.

42. *In re* Miller, 45 Hun (N. Y.) 244, 246; Matter of Jones, 19 Abb. N. Cas. (N. Y.) 221, 224. See also Mason *v.* Ammon, 117 Pa. St. 127, 133, 138, 11 Atl. 449. *Compare* Matter of Smith, 5 Dem. Surr. (N. Y.) 90, 91.

Includes a legally adopted child.— Warren *v.* Prescott, 84 Me. 483, 485, 24 Atl. 948, 30 Am. St. Rep. 370, 17 L. R. A. 435 [*quoting* Morse *v.* Hayden, 82 Me. 227, 230, 19 Atl. 443].

43. *In re* Miller, 45 Hun (N. Y.) 244, 246. See also *In re* Tuttle's Estate, (Conn. 1904) 59 Atl. 44, 45.

44. Morse *v.* Hayden, 82 Me. 227, 230, 19 Atl. 443 [*citing* 3 Pomeroy Eq. 1145 notes; 2 Redfield Wills 73; 2 Williams Ex. 1000].

Defined by statute see Mont. Code (1895), § 1856.

45. As distinguished from "collateral descents," as from brother to brother, cousin to cousin, etc. Levy *v.* McCartee, 6 Pet. (U. S.) 102, 112, 8 L. ed. 334.

Considered in connection with "relations" see Craik *v.* Lambe, 1 Coll. 489, 493, 9 Jur. 6, 14 L. J. Ch. 84, 63 Eng. Reprint 512.

LINEAL HEIRS. Legal representatives.[46] (See HEIR; LEGAL REPRESENTATIVE.)

LINEAL WARRANTY. A term applied where the heir derived, or might by possibility have derived, his title to the land warranted, either from or through the ancestor, who made the warranty.[47]

LINEA RECTA EST INDEX SUI ET OBLIQUI LEX EST LINEA RECTI. A maxim meaning "A right line is a test of itself, and of an obliqne."[48]

LINEA RECTA SEMPER PRÆFERTUR TRANSVERSALI. A maxim meaning "The right line is always preferred to the collateral."[49]

LINEN. A thread or cloth made of flax or hemp.[50] (See LACE; and, generally, CUSTOMS DUTIES.)

LINE OF CREDIT. See LINE.

LINE OF DUTY. See LINE.

LINE TREES. See LINE.

LINK. A unit in a connected series; anything which serves to connect or bind together the things which precede and follow it.[51] As a verb, to couple, or join together.[52] (See, generally, CRIMINAL LAW; EVIDENCE.)

LINOLEUM. An article used for covering floors, like a carpet or oilcloth;[53] a preparation of linseed oil and ground cork, intimately mixed and spread in a uniform layer over a sheet of rough jute canvas, and is often used for floor cloth;[54] solidified oil, and appropriately described as an article made of such a composition and used as a floor covering, as oilcloth.[55]

LINSEED OIL. A product of the flax berry, used in the arts.[56]

LIQUEUR. A CORDIAL,[57] *q. v.*; a liquor composed of alcohol, water, sugar, and different aromatic substances.[58] (See CORDIAL; and, generally, CUSTOMS DUTIES.)

LIQUID. FLUID,[59] *q. v.*

LIQUIDATE. To adjust; to settle;[60] to ascertain or reduce to precision in

46. *In re* Tuttle, (Conn. 1904) 59 Atl. 44, 45.

47. Flynn *v.* Williams, 23 N. C. 509, 512 [*citing* 2 Blackstone Conm. 301; Littleton, §§ 703, 711; 1 Sheppard Touchst. (Preston ed.) 336].

48. Black L. Dict. [*citing* Coke Litt. 158].

49. Bouvier L. Dict. [*citing* Broom Leg. Max. 529; Coke Litt. 10; Fleta, lib. 6, c. 1; 1 Stephen Comm. (4th ed.) 406].

50. Sidenberg *v.* Robertson, 41 Fed. 763, 766; Claflin *v.* Robertson, 38 Fed. 92, 93.

"Household linen" see Watchorn *v.* Langford, 3 Campb. 422, 423.

Linen as wearing apparel and baggage see 6 Cyc. 666 note 31.

"Linens or a manufacture of flax" see Richardson *v.* Lawrence, 20 Fed. Cas. No. 11,785, 1 Blatchf. 501, 503.

"My linen and cloaths of all kinds" see Hunt *v.* Hort, 3 Bro. Ch. 311, 29 Eng. Reprint 554.

"Some of my best linnen" see Peck *v.* Halsey, 2 P. Wms. 387, 388, 24 Eng. Reprint 780.

51. Black L. Dict.

Illustrations.—A "link in the chain of evidence," a "link in the chain of title," a "link in the record," are common figurative expressions. Anderson L. Dict.

Links in a chain of circumstances see CRIMINAL LAW, 12 Cyc. 634.

52. Taws *v.* Laughlins Co., 70 Fed. 102, 109.

53. Wake *v.* Thoms, 78 Conn. 273, 275, 61 Atl. 949.

54. Raub *v.* Guinzburg, 95 Fed. 151, 152.

55. Linoleum Mfg. Co. *v.* Navin, 7 Ch. D. 834, 836, 47 L. J. Ch. 430, 38 L. T. Rep. N. S. 44, 20 Wkly. Rep. 463.

56. State *v.* Williams, 93 Minn. 155, 159, 100 N. W. 641.

According to the context, it may include both raw and boiled oil. State *v.* Williams, 93 Minn. 155, 159, 100 N. W. 641.

"Calcutta linseed" see Wieler *v.* Schilizzi, 17 C. B. 619, 624, 25 L. J. C. P. 89, 4 Wkly. Rep. 209, 84 E. C. L. 617.

57. U. S. *v.* Three Hundred Casks of Juniper Cordial, 28 Fed. Cas. No. 16,511.

58. U. S. *v.* Three Hundred Casks of Juniper Cordial, 28 Fed. Cas. No. 16,511.

Includes: Absinthe. U. S. *v.* Luyties, 124 Fed. 977 [*affirmed* in 130 Fed. 333, 64 C. C. A. 579]. Chartreuse. Nicholas *v.* U. S., 122 Fed. 892, 893.

59. Sickles *v.* Evans, 22 Fed. Cas. No. 12,839, 2 Cliff. 203, 206.

60. Walker Dict. [*quoted* in Midgett *v.* Watson, 29 N. C. 143, 145]; Webster Dict. [*quoted* in Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531].

"'Liquidate' is said to be a term of jurisprudence, of finance, and of commerce; the action by which one determines, or fixes, that which has been indeterminate in every species of accounts; liquidation of expenses, of interest, of accounts; liquidation of profits; liquidation and partition of a succession. He labors for a liquidation of his debts, of his effects, of his accounts." Dictionary of the French Academy [*quoted* in Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531].

amount;[61] to ascertain the balance due, to whom due and to whom payable;[62] to clear away, to lessen a debt;[63] to clear up;[64] to clear from obscurity;[65] to pay;[66] to satisfy.[67] (See LIQUIDATED; LIQUIDATION.)

LIQUIDATED.[68] Adjusted, certain, settled in respect to amount;[69] that which is made certain and manifest.[70] (Liquidated: Account, see ACCOUNTS AND ACCOUNTING. Damages, see DAMAGES. Debt or Demand, see ACCORD AND SATISFACTION; ATTACHMENT; GARNISHMENT; INTEREST; RECOUPMENT, SET-OFF, AND COUNTER-CLAIM.)

LIQUIDATING PARTNER. See PARTNERSHIP.

61. Walker Dict. [*quoted* in Midgett *v.* Watson, 29 N. C. 143, 145].

62. Midgett *v.* Watson, 29 N. C. 143, 145.

63. Fleckner *v.* U. S. Bank, 8 Wheat. (U. S.) 338, 362, 5 L. ed. 631 [*quoted* in Austin *v.* Tecumseh Nat. Bank, 49 Nebr. 412, 418, 68 N. W. 628, 59 Am. St. Rep. 543, 35 L. R. A. 444; Richmond *v.* Irons, 121 U. S. 27, 61, 7 S. Ct. 788, 30 L. ed. 864].

64. Worcester Dict. [*quoted* in Laidlaw *v.* Abraham, 43 Fed. 297, 298].

65. Parris *v.* Hightower, 76 Ga. 631, 634.

66. Wilson *v.* Stilwell, 9 Ohio St. 467, 469, 75 Am. Dec. 477; Webster Dict. [*quoted* in Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531].

67. Webster Dict. [*quoted* in Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531].

68. "Liquidate" is used in different senses. —Chicago, etc., R. Co. *v.* Clark, 178 U. S. 353, 372, 20 S. Ct. 924, 44 L. ed. 1099, as used in a referee's finding.

69. Abbott L. Dict. [*quoted* in Jones *v.* Hunt, 74 Tex. 657, 659, 12 S. W. 832].

"Liquidated," when stamped by a collector of customs on the entry of goods at a custom house, meant that the entry had been passed regularly through the various divisions of the collector's office, and the duties thereon had been finally ascertained and fixed by the customs officials. Merritt *v.* Cameron, 137 U. S. 542, 544, 11 S. Ct. 174, 34 L. ed. 772.

70. Bouvier L. Dict. [*quoted* in Roberts *v.* Prior, 20 Ga. 561, 562; Robison *v.* Hibbs, 48 Ill. 408, 409]. See also Clark *v.* Dutton, 69 Ill. 521, 523; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 261, 62 N. Y. Suppl. 276.

An account, claim, debt, or demand is liquidated: When it appears that something is due, and how much is due. Ditman *v.* Hotz, 9 Mart. (La.) 200, 203; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 261, 62 N. Y. Suppl. 276. When it is certain what is due, and how much is due. Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 62 N. Y. Suppl. 276; Bouvier L. Dict. [*quoted* in Clark *v.* Dutton, 69 Ill. 521, 523; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 261, 62 N. Y. Suppl. 276]. *Compare* Henderson Cotton Mfg. Co. *v.* Lowell Mach. Shops, 86 Ky. 668, 676, 7 S. W. 142, 9 Ky. L. Rep. 831; Chicago, etc., R. Co. *v.* Clark, 92 Fed. 968, 985, 35 C. C. A. 120; Charnley *v.* Sibley, 73 Fed. 980, 982, 20 C. C. A. 157. When the amount due is fixed by law, or has been ascertained and agreed upon by the parties. Chicago, etc., R. Co. *v.* Mills, 18 Colo. App. 8, 69 Pac. 317, 318; State *v.* Staub, 61 Conn. 553, 568, 23 Atl. 924; Mitchell *v.* Addison, 20 Ga. 50, 53; Hargroves *v.* Cooke, 15 Ga. 321, 332; Anderson *v.* State, 2 Ga. 370, 374; Nisbet *v.* Lawson, 1 Ga. 275, 287; Greenlee *v.* Mosnat, 116 Iowa 535, 538, 90 N. W. 338; McLellan *v.* Crofton, 6 Me. 307, 349; Treat *v.* Price, 47 Nebr. 875, 883, 66 N. W. 834; Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 261, 62 N. Y. Suppl. 276; Jones *v.* Hunt, 74 Tex. 657, 659, 12 S. W. 832; Continental Ins. Co. *v.* Chase, (Tex. Civ. App. 1895) 33 S. W. 602, 603; Commercial Union Assur. Co. *v.* Meyer, 9 Tex. Civ. App. 7, 17, 29 S. W. 93; Dando *v.* Boden, [1893] 1 Q. B. 318, 320, 62 L. J. Q. B. 339, 68 L. T. Rep. N. S. 90, 5 Reports 183, 41 Wkly. Rep. 285; Wilks *v.* Wood, [1892] 1 Q. B. 684, 688, 61 L. J. Q. B. 516, 66 L. T. Rep. N. S. 520, 40 Wkly. Rep. 418; Ryley *v.* Master, [1892] 1 Q. B. 674, 683, 60 L. J. Q. B. 219, 66 L. T. Rep. N. S. 228, 40 Wkly. Rep. 381; Grant *v.* Elstan, 13 Q. B. D. 302, 303, 53 L. J. Q. B. 68, 49 L. T. Rep. N. S. 645, 32 Wkly. Rep. 239; Hodsoll *v.* Baxter, E. B. & E. 884, 886, 4 Jur. N. S. 556, 28 L. J. Q. B. 61, 6 Wkly. Rep. 686, 96 E. C. L. 882. See also McNulty *v.* Pruden, 62 Ga. 135, 136; Crowther *v.* Sawyer, 2 Speers (S. C.) 573, 578.

"A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated." Nassoly *v.* Tomlinson, 148 N. Y. 326, 330, 42 N. E. 715, 51 Am. St. Rep. 695 [*quoted* in Greenlee *v.* Mosnat, 116 Iowa 535, 538, 90 N. W. 338]; Komp *v.* Raymond, 42 N. Y. App. Div. 32, 34, 58 N. Y. Suppl. 909; Lestienne *v.* Ernst, 5 N. Y. App. Div. 373, 376, 39 N. Y. Suppl. 199. *Compare* Ostrander *v.* Scott, 161 Ill. 339, 345, 43 N. E. 1089, 1091; Treat *v.* Price, 47 Nebr. 875, 883, 66 N. W. 834, 836.

"The commonest example of a liquidated demand is an action of debt, where there is an express contract to pay a sum certain at a fixed time." 1 Sedgwick Dam. (8th ed.) § 299 [*quoted* in Kennedy *v.* Queens County, 47 N. Y. App. Div. 250, 261, 62 N. Y. Suppl. 276].

A claim for damages founded on a tort or breach of covenant is not a "liquidated claim." Worley *v.* Smith, 26 Tex. Civ. App. 270, 272, 63 S. W. 903.

LIQUIDATION.[71] The act of settling, adjusting debts, or ascertaining their amounts or balance due;[72] settlement or adjustment of an unsettled account.[73] Applied to a bill, bond, or note, or bill of exchange, payment and satisfaction thereof.[74] Applied to a partnership or company, the act or operation of winding up the affairs of a firm or company by getting in the assets, settling with its debtors and creditors, and appropriating the amount of profit or loss.[75] (Liquidation: Of Bank, see BANKS AND BANKING. Of Corporation, see CORPORATIONS. Of Duty, see CUSTOMS DUTIES. Of Partnership, see PARTNERSHIP. See also ASSIGNMENTS FOR BENEFIT OF CREDITORS; BANKRUPTCY; INSOLVENCY.)

LIQUOR. A liquid or fluid substance.[76] In a more limited sense, and in its more common application, spirituous fluids, whether fermented or distilled, such as brandy, whisky, rum, gin, beer and wine, and also decoctions, solutions, tinctures, and the like fluids in great variety.[77] (See, generally, INTOXICATING LIQUORS.)

LIQUOR DEALER. See INTOXICATING LIQUORS.

LIQUOR LICENSE. See INTOXICATING LIQUORS.

LIQUOR SELLING. See INTOXICATING LIQUORS.

LIQUOR SHOP. A house where spirituous liquors are kept and sold.[78] (See, generally, INTOXICATING LIQUORS.)

LIS. A suit, action, CONTROVERSY, *q. v.*, or DISPUTE,[79] *q. v.* (Lis: Mota, see LIS MOTA. Pendens, see LIS PENDENS.)

LIS MOTA. In the Roman law, as used in rules of evidence, a term which was applied strictly to the commencement of the action and was not referred to an

The term may be used as equivalent to settlement, arrangement, acknowledgment, or agreement. Parris *v.* Hightower, 76 Ga. 631, 634.

"Liquidated by litigation" see *In re* Thompson, 123 Fed. 174, 175.

71. **"It appears to be a word of French origin, and is in the Dictionary of the French Academy."** Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531.

72. Midgett *v.* Watson, 29 N. C. 143, 145, where it is said: "There must then be someone, to whom that balance is due, as well as someone from whom it is due." Laidlaw *v.* Abraham, 43 Fed. 297, 298; U. S. *v.* Cousinery, 25 Fed. Cas. No. 14,878, 7 Ben. 251.

"In liquidation" see Burr *v.* Williams, 20 Ark. 171, 188.

73. Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 533.

74. Martin *v.* Kirk, 2 Humphr. (Tenn.) 529, 531.

75. Century Dict. [*quoted* in Garrett *v.* Morton, 35 Misc. (N. Y.) 10, 13, 71 N. Y. Suppl. 17]. See also Horsey *v.* Steiger, [1898] 2 Q. B. 259, 265, 67 L. J. Q. B. 747, 79 L. T. Rep. N. S. 116; General Share, etc., Co. *v.* Wetley Brick, etc., Co., 20 Ch. D. 260, 267, 30 Wkly. Rep. 445; Watney *v.* Ewart, 18 T. L. R. 426, 427; CORPORATIONS, 10 Cyc. 550, 965, 997, 1312.

76. Webster Dict. [*quoted* in Houser *v.* State, 18 Ind. 106, 107; State *v.* Quinlan, 40 Minn. 55, 58, 41 N. W. 299; Dolan *v.* McLaughlin, 46 Nebr. 449, 456, 64 N. W. 1076].

In its most comprehensive signification, the word implies fluid substances generally, such as water, milk, blood, sap, juice, etc. State *v.* Townley, 18 N. J. L. 311, 321; State *v.* Giersch, 98 N. C. 720, 723, 4 S. E. 193; Webster Dict. [*quoted* in Houser *v.* State, 18 Ind. 106, 107].

77. State *v.* Martin, 34 Ark. 340, 341 (not alcohol); Mandeville *v.* Baudot, 49 La. Ann. 236, 237, 21 So. 258 (all fermented liquors); Tompkins County Excise Com'rs *v.* Taylor, 21 N. Y. 173, 177; People *v.* Crilley, 20 Barb. (N. Y.) 246, 248 (malt); Nevin *v.* Ladue, 3 Den. (N. Y.) 43, 44; State *v.* Giersch, 98 N. C. 720, 723, 4 S. E. 193; State *v.* Brittain, 89 N. C. 574, 576; Kizer *v.* Randleman, 50 N. C. 428, 429 (champagne); Clifford *v.* State, 29 Wis. 327, 329; Harris *v.* Jenns, 9 C. B. N. S. 152, 30 L. J. M. C. 183, 3 L. T. Rep. N. S. 408, 9 Wkly. Rep. 36, 99 E. C. L. 152 (British wine); Century Dict. [*quoted* in Hollender *v.* Magone, 149 U. S. 586, 589, 13 S. Ct. 932, 37 L. ed. 860]; Stormouth Dict. [*quoted* in Hollender *v.* Magone, 38 Fed. 912, 915]; Webster Dict. [*quoted* in Brass *v.* State, 45 Fla. 1, 5, 34 So. 307; Houser *v.* State, 18 Ind. 106, 107]; Dolan *v.* McLaughlin, 46 Nebr. 449, 456, 64 N. W. 1076; Hollender *v.* Magone, *supra*.

As defined by statute, the word means distilled or rectified spirits, wine, fermented, or malt liquors. Matter of Hunter, 34 Misc. (N. Y.) 389, 69 N. Y. Suppl. 908 [*citing* N. Y. Liquor Tax Law, § 2].

78. Wooster *v.* State, 6 Baxt. (Tenn.) 533, 534.

79. Wharton L. Lex. [*quoted* in State *v.* Guinotte, 156 Mo. 513, 519, 57 S. W. 281, 50 L. R. A. 787].

"There is lis when conflicting statements are made in the family, when it becomes, in short, a matter of discussion and controversy." Butler *v.* Mountgarret, 7 H. L. Cas. 641, 648, 11 Eng. Reprint 252.

early period of a controversy.[80] But in our law the term is taken in the classical and larger sense of CONTROVERSY, *q. v.*, and is understood to mean the commencement of the controversy, and not the commencement of a suit.[81]

80. 1 Greenleaf Ev. § 132 [*quoted* in Westfelt *v.* Adams, 131 N. C. 379, 385, 42 S. E. 823].

81. 1 Greenleaf Ev. § 132 [*quoted* in Westfelt *v.* Adams, 131 N. C. 379, 385, 42 S. E. 823].

Post litem motam, literally, "after the suit was commenced or the controversy had arisen" (Berkeley Peerage Case, 4 Campb. 401, 406) or "after a dispute has arisen" (Berkeley Peerage Case, 4 Campb. 401, 416).

Ante litam motam declarations see EVIDENCE, 16 Cyc. 1240 note 49.

LIS PENDENS

By Edward Baker Evans
Dean of Drake University College of Law

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I. GENERAL CONSIDERATIONS.

A. Definitions and Scope of Title. *Lis* means a suit, action, controversy, or dispute,[1] and *lis pendens* means a pending suit.[2] The doctrine denotes those principles and rules of law which define and limit the operation of the common-law maxim, *pendente lite nihil innovetur*, that is, pending the suit nothing should be changed.[3] While the term is sometimes incorrectly applied to another action pending as a defense to a subsequent action,[4] the rule strictly speaking and as considered in this title is confined to the effect of an action or other proceeding in court on rights acquired during its pendency.

B. Origin of Doctrine. While the rule of *lis pendens* seems to have been recognized at an earlier day, it is often referred to as having been first formulated by Lord Bacon.[5] The equity doctrine of *lis pendens* was introduced in analogy

1. State *v.* Gumotte, 156 Mo. 513, 519, 57 S. W. 281, 50 L. R. A. 787 [*quoting* Wharton L. Lex.]. See also *ante*, p. 1445 text and note 79.

2. Rothschild *v.* Kohn, 93 Ky. 107, 115, 19 S. W. 180, 14 Ky. L. Rep. 36, 40 Am. St. Rep. 184.

3. Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536. And see *infra*, I, C, text and note 12.

4. See ABATEMENT AND REVIVAL, 1 Cyc. 21 *et seq.*

5. Hayes *v.* Nourse, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep. 700.

Lord Bacon's 12th rule declares that no decree bindeth any that cometh in *bona fide*, by conveyance from the defendant, before the bill is exhibited, and is made no party by bill or order. But when he comes in *pendente lite*, and while the suit is in full prosecution,

to the rule at common law in a real action "where, if defendant aliens after pendency of the writ, the judgment in the action will overreach such alienation."[6]

C. Statement of Doctrine. The general rule is that one not a party to a suit is not affected by the judgment.[7] The exception is that one who acquires an interest in property[8] which is at that time[9] involved in litigation in a court having jurisdiction of the subject-matter and of the person of the one from whom the interests are acquired,[10] from a party to the proceeding,[11] takes subject to the judgment or decree,[12] and is as conclusively bound by the result of the litigation

and without any color of allowance or privity of the court, there regularly the decree bindeth. But if there were any intermissions of suit, or the court made acquainted with the conveyance, the court is to give order upon the special matter, according to justice. Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537.

In this country Chancellor Kent's opinion in Murray *v.* Ballou, 1 Johns. Ch. (N. Y.) 566, which was decided in 1815, is the foundation of the doctrine of *lis pendens.*

6. Houston *v.* Timmerman, 17 Oreg. 499, 21 Pac. 1037, 11 Am. St. Rep. 848, 4 L. R. A. 716; Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429; Sorrell *v.* Carpenter, 2 P. Wms. 482, 24 Eng. Reprint 825.

7. See JUDGMENTS, 23 Cyc. 623.

8. Kind of property see *infra,* II.

9. Necessity that interest be acquired pending the litigation see *infra,* X, C.

10. See *infra,* IV.

11. Necessity that interest be acquired from party see *infra,* X, H, 1.

12. *Alabama.*— Moon *v.* Crowder, 72 Ala. 79.

California.— Di Nola *v.* Allison, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419; Haynes *v.* Calderwood, 23 Cal. 409; Richardson *v.* White, 18 Cal. 102; Gregory *v.* Haynes, 13 Cal. 591.

Florida.— Hayden *v.* Thrasher, 28 Fla. 162, 9 So. 855.

Georgia.— Johnson *v.* McKay, 121 Ga. 763, 49 S. E. 757; Tinsley *v.* Rice, 105 Ga. 285, 31 S. E. 174; Jinks *v.* Lewis, 94 Ga. 677, 20 S. E. 6; Smith *v.* Coker, 65 Ga. 461.

Illinois.— See Steger *v.* Traveling Men's Bldg., etc., Assoc., 208 Ill. 236, 70 N. E. 236, 100 Am. St. Rep. 225.

Kansas.— Garver *v.* Graham, 6 Kan. App. 344, 51 Pac. 812.

Kentucky.— Parks *v.* Smott, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043; Wickliffe *v.* Bascom, 7 B. Mon. 681; Clarkson *v.* Morgan, 6 B. Mon. 441.

Maine.— Snowman *v.* Harford, 62 Me. 434.

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Michigan.— Hesselbacher *v.* Sprague, 104 Mich. 197, 62 N. W. 296; Sawyer *v.* McAdie, 70 Mich. 386, 38 N. W. 292.

Mississippi.— Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

Missouri.— Burnham *v.* Smith, 82 Mo. App. 35.

Nevada.— Powell *v.* Campbell, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350, 2 L. R. A. 615.

New Mexico.—Lockhart *v.* Leeds, 12 N. M. 156, 76 Pac. 312.

New York.— Zoeller *v.* Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157; Craig *v.* Ward, 1 Abb. Dec. 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235; Salisbury *v.* Morss, 7 Lans. 359; Voorhees *v.* Seymour, 26 Barb. 569; Harrington *v.* Slade, 22 Barb. 161; Jackson *v.* Andrews, 7 Wend. 152, 22 Am. Dec. 574; Murray *v.* Ballou, 1 Johns. Ch. 566.

North Carolina.— Coble *v.* Clapp, 54 N. C. 173.

Ohio.— Wolf *v.* Coddington, 12 Ohio Cir. Ct. 261, 5 Ohio Cir. Dec. 671.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Pennsylvania.— Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429; Hersey *v.* Turbett, 27 Pa. St. 418.

Rhode Island.— Brightman *v.* Brightman, 1 R. I. 112.

Tennessee.— American Exch. Bank *v.* Andrews, 12 Heisk. 306; Garretson *v.* Brien, 3 Heisk. 534; Buckner *v.* Geodeker, (Ch. App. 1897) 45 S. W. 448.

Virginia.— Sharitz *v.* Moyers, 99 Va. 519, 39 S. E. 166.

Washington.— Washington Dredging, etc., Co. *v.* Kinnear, 24 Wash. 405, 64 Pac. 522.

West Virginia.— White *v.* Perry, 14 W. Va. 66.

United States.— Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858.

See 33 Cent. Dig. tit. "Lis Pendens," § 1 *et seq.* And see JUDGMENTS, 23 Cyc. 1257.

The reason of the rule is, that if a transfer of interest pending a suit were to be allowed to affect the proceedings, there would be no end to litigation, since as soon as a new party was brought in, he might transfer to another and render it necessary to bring that other before the court, so that a settlement might be interminable. Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667.

Orders.—A purchaser *pendente lite* is bound by an order permitting an inspection of the real property, where made after his purchase. Heinze *v.* Butte, etc., Consol. Min. Co., 129 Fed. 274, 63 C. C. A. 388.

Admissibility of evidence against purchaser. — On alienation of lands *pendente lite* depositions taken after the alienation and before the alienee became a party to the cause may be used against him as they might have been used against the party under whom he claims. Morris *v.* Linton, (Nebr. 1905) 104 N. W. 927.

as if he had been a party thereto from the outset.[13] This is so irrespective of whether he has been made a party to the proceeding,[14] or had actual notice of the pendency of the proceeding,[15] and even where there was no possibility of his having had notice of the pendency of the litigation.[16] It is immaterial that a purchaser was a *bona fide* purchaser and for a valuable consideration.[17] While there is no doubt whether *lis pendens* has the effect of constructive notice, it is almost universally held that strictly speaking the doctrine of *lis pendens* is not founded upon notice but upon reasons of public policy founded upon necessity.[18] For practical purposes, however, it is immaterial whether the doctrine of *lis pendens* be considered as based on constructive notice or on public policy.[19] It has been said[20] that it is essential to the existence of a valid and effective *lis pendens* that three elements be present: (1) The property must be of a character to be subject to the rule;[21] (2) the court must have jurisdiction both of the person and the *res*;[22] and (3) the property or *res* involved must be sufficiently described in the pleadings.[23] It may be added that the litigation must be about some specific thing that must be necessarily affected by the termination of the suit.[24]

13. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

14. Harding *v.* American Glucose Co., 182 Ill. 551, 55 N. E. 577, 74 Am. St. Rep. 189, 64 L. R. A. 738.

15. Johnson *v.* McKay, 121 Ga. 763, 49 S. E. 757; Tice *v.* Hamilton, 188 Mo. 298, 87 S. W. 497; Wille *v.* Ellis, 22 Tex. Civ. App. 462, 54 S. W. 922; Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843. Effect of actual notice of litigation see *infra*, I, E.

16. Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766.

17. Brightman *v.* Brightman, 1 R. I. 112.

18. *Alabama.*— Greenwood *v.* Warren, 120 Ala. 71, 23 So. 686.

Illinois.— Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Durand *v.* Lord, 115 Ill. 610, 4 N. E. 483.

Kansas.— Smith *v.* Kimball, 36 Kan. 474, 13 Pac. 801.

Kentucky.— Watson *v.* Wilson, 2 Dana 406, 26 Am. Dec. 459.

Missouri.— Turner *v.* Babb, 60 Mo. 342; O'Reilly *v.* Nicholson, 45 Mo. 160; Dodd *v.* Lee, 57 Mo. App. 167; Carr *v.* Lewis Coal Co., 15 Mo. App. 551.

New Jersey.— Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200; Haughwout *v.* Murphy, 22 N. J. Eq. 531.

New York.— Lamont *v.* Cheshire, 65 N. Y. 30.

North Carolina.— Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

Oregon.— Houston *v.* Timmerman, 17 Oreg. 499, 21 Pac. 1037, 11 Am. St. Rep. 848, 4 L. R. A. 716.

Pennsylvania.— Dovey's Appeal, 97 Pa. St. 153.

Texas.— Bowen *v.* Kirkland, 17 Tex. Civ. App. 346, 44 S. W. 189.

Virginia.— Newman *v.* Chapman, 2 Rand. 93, 14 Am. Dec. 766.

Wisconsin.— Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96.

England.— Bellamy *v.* Sabine, 1 De G. & J. 566, 3 Jur. N. S. 943, 26 L. J. Ch. 797, 6 Wkly. Rep. 1, 58 Eng. Ch. 564, 44 Eng. Reprint 842.

Canada.— Peck *v.* Sun L. Assur. Co., 11 Brit. Col. 215.

See 33 Cent. Dig. tit. "Lis Pendens," § 1.

Every man is supposed to be attentive to what passes in the superior courts of the sovereignty where he resides, and some courts have based the doctrine upon the theory of notice. But it would seem that the doctrine really rests upon the public policy which does not allow litigating parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party. Carr *v.* Lewis Coal Co., 15 Mo. App. 551; Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Bellamy *v.* Sabine, 1 De G. & J. 566, 3 Jur. N. S. 943, 26 L. J. Ch. 797, 6 Wkly. Rep. 1, 58 Eng. Ch. 564, 44 Eng. Reprint 842.

Lis pendens as notice.— It is frequently said that *lis pendens* is notice, but that is a loose mode of expression, not warranted by the reason or spirit of the rule. If *lis pendens* were notice then it should bind the purchaser like actual notice in any subsequent suit prosecuted for the same cause, but it does not. A *pendente lite* purchaser should rather be regarded in the attitude of a party, or at least of a privy, to the suit, since his rights are as absolutely concluded by the final determination of the suit as though he were a party or privy. Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459.

19. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

20. Boyd *v.* Emmons, 103 Ky. 393, 45 S. W. 364, 20 Ky. L. Rep. 107; Leavell *v.* Poore, 91 Ky. 321, 15 S. W. 858, 13 Ky. L. Rep. 51. And see Bennett Lis Pend. 151.

21. See *infra*, II.

22. See *infra*, IV.

23. See *infra*, V.

24. Houston *v.* Timmerman, 17 Oreg. 499, 21 Pac. 1037, 11 Am. St. Rep. 848, 4 L. R. A. 716. And see *infra*, III.

The doctrine will not be extended beyond the property which is the immediate object of the suit. St. John *v.* Strauss, 60 Kan. 136,

D. Strict Construction of Rule. The rule of *lis pendens* is in many instances very harsh in its operation; and one who relies upon it to defeat a *bona fide* purchaser must understand that his case is *strictissimi juris*.[25]

E. Actual Notice. Where a purchase is made or a right acquired with actual notice of the pendency of a suit relating thereto, there is no question but what the person acquiring the rights in the property takes subject to the decree.[26] Furthermore, actual notice is more extensive than the doctrine of *lis pendens*. For example, a purchaser of a bond or other negotiable paper pending litigation, where he has actual knowledge of the litigation affecting it, takes subject thereto,[27] although under the doctrine of *lis pendens*, in the absence of actual notice, he would not take subject to the final determination of the suit.[28] Actual notice is also more extensive in that it will bind as to collateral issues.[29] So a purchase after actual notice may be fraudulent;[30] but it would not be so where the purchaser is only charged with constructive notice under the rule of *lis pendens*.[31]

F. Effect of Statutes.[32] It has been stated that the rule of *lis pendens* in many of the states has been abrogated by statute.[33] What is meant is, that in so far as the statute covers the proceedings and property to which the common-law and equity rule of *lis pendens* is applicable, the proceeding is not *lis pendens* until a notice of the pendency of the action is filed, as provided for in the *lis pendens* statute.[34] Where the *lis pendens* statute has no negative words or repeal-

55 Pac. 845; Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375; Green *v.* Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48 (holding that the purchaser of mortgaged premises pending a suit involving merely title to the mortgage does not take as a *lis pendens* purchaser); Emonds *v.* Crenshaw, 1 McCord Eq. (S. C.) 252. And see Mealy *v.* Lipp, 91 Tex. 182, 42 S. W. 544.

25. Clarkson *v.* Morgan, 6 B. Mon. (Ky.) 441; Leitch *v.* Wells, 48 N. Y. 585; Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351; Sorrell *v.* Carpenter, 2 P. Wms. 482, 24 Eng. Reprint 825. See also Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756.

26. *Arizona.*— Daggs *v.* Wilson, 6 Ariz. 388, 59 Pac. 150.

California.— Hibernia Sav., etc., Soc. *v.* Lewis, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; Wise *v.* Griffith, 78 Cal. 152, 20 Pac. 675.

Colorado.— Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536.

Illinois.— Richards *v.* Cline, 176 Ill. 431, 52 N. E. 907; McCauley *v.* Rogers, 104 Ill. 578.

Indiana.— Rowell *v.* Klein, 44 Ind. 290, 15 Am. Rep. 235.

Iowa.— See Shumaker *v.* Davidson, 116 Iowa 569, 87 N. W. 441.

Michigan.— Baker *v.* Pierson, 5 Mich. 456.

Minnesota.— Dorr *v.* Steichen, 18 Minn. 26.

Nebraska.— Parrotte *v.* Dryden, (1905) 102 N. W. 610.

New York.— Varnum *v.* Bolton Shoe Co., 171 N. Y. 658, 63 N. E. 1123 [*affirming* 63 N. Y. App. Div. 570, 71 N. Y. Suppl. 903].

Oklahoma.— Uhl *v.* Irwin, 3 Okla. 388, 41 Pac. 376.

Washington.— Pacific Mfg. Co. *v.* Brown, 8 Wash. 347, 36 Pac. 273.

United States.— King *v.* Davis, 137 Fed. 222; Phelps *v.* Elliott, 35 Fed. 455.

Compare Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

While actual notice will not be presumed (Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811), but must be proved by the party claiming the existence thereof (Buxton *v.* Sargent, *supra*); yet the fact of notice may be inferred from circumstances as well as proved by direct evidence (Wick *v.* Dawson, 48 W. Va. 469, 37 S. E. 639), and where the facts and circumstances are such as to raise the presumption of notice the burden of proving the want of notice is shifted to the alleged innocent purchaser (Wick *v.* Dawson, *supra*).

Extent of notice.—A purchaser with knowledge of a suit is charged only with knowledge of the facts on the record at the time of his purchase. Davis *v.* Christian, 15 Gratt. (Va.) 11.

Writ of assistance.— A grantee of defendant in a foreclosure suit, purchasing during pendency, and with notice thereof, occupies, with reference to the purchaser's right to a writ of assistance, under a decree of foreclosure rendered in the suit, the same position as his grantor. Montgomery *v.* Byers, 21 Cal. 107. Writ of assistance, generally see 4 Cyc. 289 *et seq.*

What constitutes notice see Bailey *v.* McGregor, 46 Iowa 667; Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345. And see NOTICE.

27. Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Phelps *v.* Elliott, 35 Fed. 455.

28. See *infra*, II.

29. Griffith *v.* Griffith, Hoffm. (N. Y.) 153 [*reversed* on other grounds in 9 Paige 315].

30. Griswold *v.* Miller, 15 Barb. (N. Y.) 520.

31. Griswold *v.* Miller, 15 Barb. (N. Y.) 520; Mead *v.* Orrery, 3 Atk. 235, 26 Eng. Reprint 937.

32. See also *infra*, VI, B.

33. See *infra*, VI, B, 1.

34. Richardson *v.* White, 18 Cal. 102.

ing clause, it is regarded as supplemental to the common law and not as repealing it, so that the common law will govern in all cases not covered by the statute.[35] Where a statute does not require a notice to be filed the common-law rule of notice arising from the commencement of the action itself prevails.[36]

G. Estoppel to Rely on Rule. The doctrine of estoppel may be invoked by the person acquiring his rights *pendente lite*, as against the successful party, in bar of the enforcement of the rule of *lis pendens*.[37]

II. PERSONAL PROPERTY AS WITHIN RULE.

A. In General. Although there are some authorities which deny or question the applicability of the rule of *lis pendens* to personal property,[38] the rule has been applied to personal property without question in many cases,[39] and it has been expressly held that personal as well as real property is within the rule,[40] except negotiable paper,[41] and articles of ordinary commerce sold in the usual way.[42]

B. Negotiable Paper, Bonds, and Stocks. To apply the doctrine of *lis pendens* to negotiable paper would destroy one of its essential characteristics,[43] and hence it is well settled that negotiable paper is a species of personal property to which the doctrine of *lis pendens* does not apply where it is transferred before maturity.[44] It follows that the doctrine is not applicable to corporate

35. Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279; Brown *v.* Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83.

36. Rothschild *v.* Leonhard, 33 Ind. App. 452, 71 N. E. 673.

37. Miles *v.* Lefi, 60 Iowa 168, 14 N. W. 233; Dodd *v.* Lee, 57 Mo. App. 167; Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

38. See Miles *v.* Lefi, 60 Iowa 168, 14 N. W. 233; McLaurine *v.* Monroe, 30 Mo. 462; Chase *v.* Searles, 45 N. H. 511 (sales of personalty pending a creditors' bill to reach assets of a judgment debtor); Wigram *v.* Buckley, [1894] 3 Ch. 483, 63 L. J. Ch. 689, 71 L. T. Rep. N. S. 287, 7 Reports 469, 43 Wkly. Rep. 147; Hood *v.* Aston, 1 Russ. 412, 25 Rev. Rep. 93, 46 Eng. Ch. 366, 38 Eng. Reprint 160; Jervis *v.* White, 7 Ves. Jr. 413, 32 Eng. Reprint 167.

39. *Alabama.*— Bolling *v.* Carter, 9 Ala. 921.

Arkansas.— Swantz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98.

Illinois.— McCauley *v.* Rogers, 104 Ill. 578.

Kansas.— Sherburne *v.* Strawn, 52 Kan. 39, 34 Pac. 405.

Kentucky.— Thoms *v.* Southard, 2 Dana 475, 26 Am. Dec. 467.

Maine.— Hines *v.* Allen, 55 Me. 114, 92 Am. Dec. 574.

Mississippi.— Smith, etc., Co. *v.* Burns, 72 Miss. 966, 18 So. 483.

Nebraska.— Nagle *v.* Omaha First Nat. Bank, 57 Nebr. 552, 77 N. W. 1074.

New York.— Murray *v.* Lylburn, 2 Johns. Ch. 441; Scudder *v.* Van Amburgh, 4 Edw. 29.

Pennsylvania.— Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

South Carolina.— Watlington *v.* Howley, 1 Desauss Eq. 167.

Texas.— Hosack *v.* Darman, 44 Tex. 154.

United States.— Broom *v.* Armstrong, 137 U. S. 266, 11 S. Ct. 73, 34 L. ed. 648; Tyler *v.* Hyde, 24 Fed. Cas. No. 14,309, 2 Blatchf. 308.

See 33 Cent. Dig. tit. "Lis Pendens," § 9.

Set-off of judgments.— An assignee of a judgment who takes pending proceedings by the judgment debtor to set it off against a judgment which he holds against the assignor takes subject to the final allowance of the set-off. Brooks *v.* Harris, 41 Ind. 390.

40. Davis *v.* Miller Signal Co., 105 Ill. App. 657; Reid *v.* Sheffy, 75 Ill. App. 136; McCutchen *v.* Miller, 31 Miss. 65; Carr *v.* Lewis Coal Co., 15 Mo. App. 551 [*affirmed* in 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328]; Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

41. See *infra*, II, B.

42. See Carr *v.* Lewis Coal Co., 15 Mo. App. 551 [*affirmed* in 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328]; Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977.

In commercial transactions no benefit can be derived from the doctrine of *lis pendens*, and only its hardship is apparent. Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

43. Kieffer *v.* Ehler, 18 Pa. St. 388.

44. *Alabama.*—Mayberry *v.* Morris, 62 Ala. 113; Winston *v.* Westfeldt, 22 Ala. 760, 58 Am. Dec. 278.

Georgia.— Mims *v.* West, 38 Ga. 18, 95 Am. Dec. 379.

Kentucky.— Bryan *v.* Saltenstall, 3 J. J. Marsh. 672; Carstairs *v.* Chas. A. Kelly Co., 16 Ky. L. Rep. 64.

Mississippi.— Madison County *v.* Paxton, 56 Miss. 679.

New York.— American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435, 78 N. Y. Suppl. 305.

Ohio.— Pittsburgh, etc., R. Co. *v.* Lynde, 55 Ohio St. 23, 44 N. E. 596; Howe *v.* Hart-

bonds[45] or to stocks.[46] It is immaterial whether the securities were created during the suit or before its commencement, or whether the controversy relates to their origin or their transfer.[47] The doctrine does apply, however, to past-due negotiable paper,[48] and to negotiable paper in the custody of the law.[49]

III. PROCEEDINGS TO WHICH RULE APPLIES.[50]

A. Actions Relating to Property in General.[51] The rule of *lis pendens* applies to actions at law as well as to equity suits.[52] It does not apply to an action merely seeking to recover a money judgment,[53] nor to any other action which does not directly affect property.[54] It applies at common law to all suits or actions

ness, 11 Ohio St. 449, 78 Am. Dec. 312; Stone *v.* Elliott, 11 Ohio St. 252.

Pennsylvania.— Day *v.* Zimmerman, 68 Pa. St. 72, 8 Am. Rep. 157; Kieffer *v.* Ehler, 18 Pa. St. 388.

Tennessee.— Kimbrough *v.* Hornsby, 113 Tenn. 605, 84 S. W. 613; Matheny *v.* Hughes, 10 Heisk. 401.

Texas.— Gannon *v.* Northwestern Nat. Bank, 83 Tex. 274, 18 S. W. 573; Adoue *v.* Tankersley, (Civ. App. 1894) 28 S. W. 346.

Vermont.— Sawyer *v.* Phaley, 33 Vt. 69.

Wisconsin.— Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96.

United States.— Enfield *v.* Jordan, 119 U. S. 680, 7 S. Ct. 358, 30 L. ed. 523; Cass County *v.* Gillett, 100 U. S. 585, 25 L. ed. 585; Myers *v.* Hazzard, 50 Fed. 155; Marshal *v.* Elgin, 8 Fed. 783, 3 McCrary 35; *In re* Great Western Tel. Co., 10 Fed. Cas. No. 5,740, 5 Biss. 363.

See 33 Cent. Dig. tit. "Lis Pendens," § 10.

Extension of rule to mortgages.— The rule that there can be no *lis pendens* as to unmatured negotiable instruments does not extend, however, to the mortgage which is the security therefor. Dodd *v.* Lee, 57 Mo. App. 167.

45. State *v.* Wichita County, 59 Kan. 512, 53 Pac. 526; Lindsley *v.* Diefendorf, 43 How. Pr. (N. Y.) 357; Farmers', etc., Nat. Bank *v.* Waco Electric R., etc., Co., (Tex. Civ. App. 1896) 36 S. W. 131; Carroll County *v.* Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. ed. 517; Orleans *v.* Platt, 99 U. S. 676, 25 L. ed. 404; Farmers' L. & T. Co. *v.* Toledo, etc., R. Co., 54 Fed. 759, 4 C. C. A. 561; Hill *v.* Scotland County, 34 Fed. 208.

In Pennsylvania municipal bonds are not negotiable instruments, and hence it is held that the doctrine of *lis pendens* applies thereto. Diamond *v.* Lords County, 37 Pa. St. 353, 78 Am. Dec. 429.

46. Davis *v.* Miller Signal Co., 105 Ill. App. 657; Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Leitch *v.* Wells, 48 N. Y. 585; American Press Assoc. *v.* Brantingham, 75 N. Y. App. Div. 435, 78 N. Y. Suppl. 305; Krebs *v.* Firbriger, 10 Ohio Dec. (Reprint) 506, 21 Cinc. L. Bul. 313. *Contra*, see Buford *v.* Keokuk Northern Line Packet Co., 3 Mo. App. 159, holding that the purchaser of corporate stock pending an action to cancel it as having been improperly issued will be bound by the decree for cancellation.

47. Warren County *v.* Marcy, 97 U. S. 96, 24 L. ed. 977.

48. Fields *v.* Carney, 4 Baxt. (Tenn.) 137; Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96.

49. Madison County *v.* Paxton, 56 Miss. 679.

50. Proceedings in which statutory notice may or must be filed see *infra*, VI, B.

51. Transfer of property or rights pending garnishment see GARNISHMENT, 20 Cyc. 1064.

52. *Connecticut.*—Norton *v.* Birge, 35 Conn. 250 [*overruling* in effect King *v.* Bill, 28 Conn. 593].

Missouri.— McIlwrath *v.* Hollander, 73 Mo. 105, 39 Am. Rep. 484.

New York.— Lamont *v.* Cheshire, 65 N. Y. 30; Murray *v.* Ballou, 1 Johns. Ch. 566.

North Carolina.— Rollins *v.* Henry, 78 N. C. 342.

Ohio.— Bennet *v.* Williams, 5 Ohio 461.

West Virginia.— White *v.* Perry, 14 W. Va. 66.

See 33 Cent. Dig. tit. "Lis Pendens," § 1.

53. *Georgia.*— Carson *v.* Fears, 91 Ga. 482, 17 S. E. 342.

Illinois.— St. Joseph Mfg. Co. *v.* Daggett, 84 Ill. 556.

Louisiana.— Gales *v.* Christy, 4 La. Ann. 293.

Ohio.— Fulton Bldg. Assoc. *v.* Hooker, 6 Ohio Dec. (Reprint) 1123, 10 Am. L. Rec. 559.

South Carolina.— Armstrong *v.* Carwile, 56 S. C. 463, 35 S. E. 196.

Texas.— Shearon *v.* Henderson, 38 Tex. 245; Briscoe *v.* Bronaugh, 1 Tex. 326, 46 Am. Dec. 108, holding that where the holder of a vendor's lien sues the vendee to recover the amount of the lien, but does not attempt to enforce the lien itself, such suit is not constructive notice to a purchaser from defendant while the suit is pending.

West Virginia.— White *v.* Perry, 14 W. Va. 66.

See 33 Cent. Dig. tit. "Lis Pendens," § 3.

If money is secured upon an estate, and an action is brought involving the right to the money, but there is no question relating to the estate upon which it is secured, the action is not *lis pendens*. Worsley *v.* Scarborough, 3 Atk. 392, 26 Eng. Reprint 1025.

54. *Alabama.*— Greenwood *v.* Warren, 120 Ala. 71, 23 So. 686.

Illinois.— Paine *v.* Root, 121 Ill. 77, 13 N. E. 541 (action to compel corporation to account); Loudon *v.* Mullins, 52 Ill. App. 410 (trespass and conversion).

which directly affect real property,[55] such as an action to enforce a trust in land,[56] or to set aside a deed[57] or mortgage,[58] or to redeem from a foreclosure sale,[59] or for specific performance,[60] or to charge the separate estate of a married woman

Indiana.— Ray *v.* Roe, 2 Blackf. 258, 18 Am. Dec. 159, slander.

New York.— Zoeller *v.* Riley, 100 N. Y. 102, 2 N. E. 388, 53 Am. Rep. 157, action for conspiracy.

Pennsylvania.— Green *v.* Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48.

Rhode Island.— Campbell *v.* Metcalf, 20 R. I. 352, 39 Atl. 190, suit for accounting.

South Carolina.— Emonds *v.* Crenshaw, 1 McCord Eq. 252.

Texas.— Mansur, etc., Implement Co. *v.* Beer, 19 Tex. Civ. App. 311, 45 S. W. 972.

See 33 Cent. Dig. tit. "Lis Pendens," § 3.

Ultimate effect.— The doctrine of *lis pendens* does not apply to an action of debt brought to ultimately charge land with its payment. White *v.* Perry, 14 W. Va. 66.

Bill by heir for distribution.— The pendency of a bill in chancery, filed by an heir at law for the removal of the administration of the estate into chancery, for distribution among the heirs, and not seeking to fix any lien, charge, or encumbrance on the land, and on which an ordinary money decree is rendered, is not *lis pendens*, so as to affect the title to land sold under an execution issued on the decree rendered. Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52.

55. *California.*— Di Nola *v.* Allison, 143 Cal. 106, 76 Pac. 976, 101 Am. St. Rep. 84, 65 L. R. A. 419.

Georgia.— Johnson *v.* McKay, 121 Ga. 763, 49 S. E. 757.

Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375, holding that the doctrine applies only to a proceeding directly relating to the thing or property in question.

Mississippi.— Alliance Trust Co. *v.* Nettleton Hardwood Co., 74 Miss. 584, 21 So. 396, 60 Am. St. Rep. 531, 36 L. R. A. 155.

Pennsylvania.— Dovey's Appeal, 97 Pa. St. 153, holding that the rule has no application except in those cases where the *lis* in question is of such a character as to enable a definite decree to be entered therein, deciding the right of property between the parties.

Rhode Island.— Gardner *v.* Peckham, 13 R. I. 102; Brightman *v.* Brightman, 1 R. I. 112, limiting the rule to suits involving the title to property.

England.— Garth *v.* Ward, 2 Atk. 174, 26 Eng. Reprint 509; Gaskell *v.* Durdin, 2 Ball & B. 170; Yeavely *v.* Yeavely, 3 Ch. Rep. 44, 21 Eng. Reprint 724; O'Connor *v.* Spaight, 1 Sch. & Lef. 305; Metcalfe *v.* Pulvertoft, 2 Ves. & B. 200, 13 Rev. Rep. 63, 35 Eng. Reprint 295.

See 33 Cent. Dig. tit. "Lis Pendens," § 3.

Compare Whiting *v.* Beebe, 12 Ark. 421; Smadbeck *v.* Law, 106 N. Y. App. Div. 552, 94 N. Y. Suppl. 797.

Quo warranto proceedings involving the right to property have been held *lis pendens*. Com. *v.* Dieffenbach, 3 Grant (Pa.) 368.

A claim case of a third person to the property levied on under execution is *lis pendens*. Jinks *v.* Lewis, 94 Ga. 677, 20 S. E. 6; Ralston *v.* Field, 32 Ga. 453.

An action to recover from an administrator on a claim against the intestate is *lis pendens*, so that a purchaser of land from an heir takes subject to any judgment recovered against the administrator. Ely *v.* Jones, 1 N. J. L. 131.

56. Walker *v.* Elledge, 65 Ala. 51.

57. *California.*— Hurlbutt *v.* Butenop, 27 Cal. 50. And see Drinkhouse *v.* Spring Valley Water-Works, 87 Cal. 253, 25 Pac. 420.

Florida.— Leuders *v.* Thomas, 35 Fla. 518, 17 So. 633, 48 Am. St. Rep. 255.

Georgia.— Faulkner *v.* Vickers, 94 Ga. 531, 21 S. E. 233; Carmichael *v.* Foster, 69 Ga. 372.

Illinois.— Dugger *v.* Oglesby, 99 Ill. 405.

Indiana.— See Wild *v.* Noblesville Bldg., etc., Inst., 153 Ind. 5, 53 N. E. 944.

Maryland.— Inloes *v.* Harvey, 11 Md. 519.

Mississippi.— Shotwell *v.* Lawson, 30 Miss. 27, 64 Am. Dec. 145.

New York.— Craig *v.* Ward, 36 Barb. 377 [*affirmed* in 1 Abb. Dec. 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235]; Greenwick Bank *v.* Loomis, 2 Sandf. Ch. 70.

Texas.— Hair *v.* Wood, 58 Tex. 77.

Washington.— See Bigelow *v.* Brewer, 29 Wash. 670, 70 Pac. 129.

See 33 Cent. Dig. tit. "Lis Pendens," §§ 5, 40.

But see Laramée *v.* Collin, 16 Quebec Super. Ct. 346.

Fraudulent concealment of pendency of suit. — The rule that one purchasing real estate, pending an action against his grantor to set aside the tax deed under which he held, will be charged with constructive notice of plaintiff's rights is not changed by the grantor's fraudulent concealment of such fact. Blanchard *v.* Ware, 37 Iowa 305, 43 Iowa 530.

58. Ellis *v.* Sisson, 96 Ill. 105.

59. Roberts *v.* Fleming, 53 Ill. 196; Stevenson *v.* Edwards, 98 Mo. 622, 12 S. W. 255.

Decree of dismissal.— A purchaser of land from a mortgagor pending a bill to redeem, brought by him, is bound by a decree entered by the mortgagor dismissing his suit. Borrowscale *v.* Tuttle, 5 Allen (Mass.) 377.

60. *Alabama.*— Moon *v.* Crowder, 72 Ala. 79.

California.— Brock *v.* Pearson, 87 Cal. 581, 25 Pac. 963.

Georgia.— Faulkner *v.* Vickers, 94 Ga. 531, 21 S. E. 233.

Illinois.— Sumner *v.* Waugh, 56 Ill. 531.

Iowa.— Ferrier *v.* Buzick, 6 Iowa 258.

Kentucky.— Henderson *v.* Pickett, 4 T. B. Mon. 54, 16 Am. Dec. 130; Morton *v.* Long, 3 A. K. Marsh. 414; Hart *v.* Hawkins, 3 Bibb 502, 6 Am. Dec. 666; Owings *v.* Myers, 3 Bibb 278.

Louisiana.— Long *v.* French, 13 La. 257.

with the payment of a debt,[61] or relating to the sale of real estate of decedents,[62] or an action by heirs to set aside the probate of a will devising land,[63] or an action to declare a deed absolute in form a mortgage.[64] So unlawful detainer suits are *lis pendens*,[65] as are replevin suits.[66]

B. Actions to Recover Real Property.[67] A person entering or otherwise acquiring rights from a party to a pending action to recover the possession of the real property takes or holds subject to the judgment entered therein.[68] If he holds under defendant he may be ousted by a writ of possession,[69] and is liable

Maine.— Snowman *v.* Harford, 57 Me. 397.
Minnesota.— Steele *v.* Taylor, 1 Minn. 274.
North Carolina.— Rollins *v.* Henry, 78 N. C. 342.
Tennessee.— Woodfolk *v.* Blount, 3 Hayw. 147, 9 Am. Dec. 736.
Texas.— Edwards *v.* Norton, 55 Tex. 405.
West Virginia.— Parrill *v.* McKinley, 6 W. Va. 67.

See 33 Cent. Dig. tit. "Lis Pendens," § 46.

Reversal of decree.— A purchaser from plaintiff, pending a suit to compel specific performance of a contract to convey land, is bound by the final decree in favor of defendant therein, although such decree was first in favor of plaintiff, and, after performance by defendant, was reversed on writ of error. Clark *v.* Farrow, 10 B. Mon. (Ky.) 446, 52 Am. Dec. 552.

61. Boss *v.* Jordan, 118 Iowa 204, 89 N. W. 1070, 92 N. W. 111; Rosenheim *v.* Hartsock, 90 Mo. 357, 2 S. W. 473; Hughes *v.* Hamilton, 19 W. Va. 366. *Compare* Chaffe *v.* Patterson, 61 Miss. 28, holding that the suit does not constitute a *lis pendens* as to the married woman's estate in general. *Contra*, Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

62. Parks *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043; Harris *v.* Davenport, 132 N. C. 697, 44 S. E. 406; Draper *v.* Barnes, 12 R. I. 156; Mowry *v.* Robinson, 12 R. I. 152. But see Clarkson *v.* Barnett, 14 B. Mon. (Ky.) 164, holding that a petition by heirs to sell their real estate is not *lis pendens*.

63. McIlwrath *v.* Hollander, 73 Mo. 105, 39 Am. Rep. 484.

64. Zane *v.* Fink, 18 W. Va. 693.

65. Jackson *v.* Warren, 32 Ill. 331; Newman *v.* Mackin, 13 Sm. & M. (Miss.) 383. But see Hoffman *v.* Blume, 64 Tex. 334.

66. *Arkansas.*— Swantz *v.* Pillow, 50 Ark. 300, 7 S. W. 167, 7 Am. St. Rep. 98.
Kansas.— Sherburne *v.* Strawn, 52 Kan. 39, 34 Pac. 405.
Maine.— Hines *v.* Allen, 55 Me. 114, 92 Am. Dec. 574.
Michigan.— Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.
Texas.— Southern Rock Island Plow Co. *v.* Pitluk, 26 Tex. Civ. App. 327, 63 S. W. 354.

See 33 Cent. Dig. tit. "Lis Pendens," § 43.

67. **Conveyance by plaintiff pendente lite** as defeating ejectment see EJECTMENT, 15 Cyc. 69.

68. *Alabama.*— Kirkland *v.* Trott, 75 Ala. 321.
California.— Huerstal *v.* Muir, 64 Cal. 450, 2 Pac. 33; Mayne *v.* Jones, 34 Cal. 483; Watson *v.* Dowling, 26 Cal. 124; Calderwood *v.* Tevis, 23 Cal. 335.
Florida.— Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. 255.
Georgia.— Equitable Securities Co. *v.* Green, 113 Ga. 1013, 39 S. E. 434; Weems *v.* Harrold, 75 Ga. 866.
Iowa.— Woodin *v.* Clemons, 32 Iowa 280.
Kentucky.— Long *v.* Morton, 2 A. K. Marsh. 39.
Louisiana.— Barelli *v.* Delassus, 16 La. Ann. 280; Masson *v.* Saloy, 12 La. Ann. 776; Citizens' Bank *v.* Armor, 11 La. Ann. 468.
New York.— Jackson *v.* Stone, 13 Johns. 447.
Pennsylvania.— Bolin *v.* Connelly, 73 Pa. St. 336; Snively *v.* Hitechew, 59 Pa. St. 49.
Texas.— Lee *v.* Salinas, 15 Tex. 495; Hicks *v.* Porter, (Civ. App. 1905) 85 S. W. 437.
United States.— Hargrove *v.* Cherokee Nation, 129 Fed. 186, 63 C. C. A. 276; Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

See 33 Cent. Dig. tit. "Lis Pendens," § 43. And see *infra*, X, H, 1.

Holder of independent title.— Where the holder of an independent title to land sued for in ejectment, not a party to the suit, acquired possession through purchase from defendants in the action *pendente lite*, although without actual notice, he is subject to the execution of a writ of possession in favor of plaintiff in such action, notwithstanding his independent title has not been adjudicated. King *v.* Davis, 137 Fed. 222. And see *infra*, X, H, 1.

Validity of judgment.— A judgment in ejectment against defendant who died after his answer was filed and before trial is not void as to those who purchase his interest in the premises sued for *pendente lite*. Tyrrell *v.* Baldwin, 67 Cal. 1, 6 Pac. 867.

Burden to show entry under one other than party.— One not a party to an ejectment suit, but who went into possession of the premises after the suit was brought, is subject to removal under the writ of possession issued under the judgment for plaintiff, he not having clearly shown that he did not obtain possession from one of defendants, the tenant of the other defendant, or enter under the title of other defendant, although by deed he had obtained, not only that title, but another, that of one not a party to the suit, which on its face was an inferior record title. Baum *v.* Roper, 1 Cal. App. 435, 82 Pac. 390.

69. See EJECTMENT, 15 Cyc. 186, 187.

for mesne profits the same as if he had been the original disseizor receiving the rents and profits.[70]

C. Creditors' Suits and Like Actions. A lien is acquired by the filing of a strict creditor's bill to subject property not reachable by execution at law,[71] or by the filing of a bill by a creditor to set aside a fraudulent conveyance by his debtor.[72] Independent of the lien acquired by the commencement of such a suit, the rule of *lis pendens* applies to a creditor's suit or a suit in the nature of a creditor's suit to reach interests in real property, or to set aside conveyances as fraudulent as against creditors, so that a purchaser or other person acquiring interests *pendente lite* takes title subject to the decree in the suit.[73] However, if the complainant's judgment expires pending suit there is no *lis pendens*,[74] although a reversal of the complainant's judgment on which the suit is based is not necessarily fatal where a second judgment is recovered without any interruption of the proceedings.[75]

70. See EJECTMENT, 15 Cyc. 204, 205.

71. See CREDITORS' SUITS, 12 Cyc. 61.

72. See FRAUDULENT CONVEYANCES, 20 Cyc. 826.

73. *Alabama.*— Evans *v.* Welch, 63 Ala. 250.

Connecticut.— Gould *v.* Stanton, 16 Conn. 12.

Illinois.— Gould *v.* Hendrickson, 96 Ill. 599; Alwood *v.* Mansfield, 59 Ill. 496.

Kentucky.— Salter *v.* Salter's Creditors, 6 Bush 624; Child *v.* Burton, 6 Bush 617; Copenheaver *v.* Huffaker, 6 B. Mon. 18; Watson *v.* Wilson, 2 Dana 406, 26 Am. Dec. 459; Cromwell *v.* Clay, 1 Dana 578, 25 Am. Dec. 165; Deatly *v.* Murphy, 3 A. K. Marsh. 472; Caldwell *v.* Eminence Deposit Bank, 58 S. W. 589, 22 Ky. L. Rep. 684.

Louisiana.— Cantereau *v.* Lacaze, 9 La. Ann. 257.

Maryland.— Schaferman *v.* O'Brien, 28 Md. 565, 92 Am. Dec. 708; Applegarth *v.* Russell, 25 Md. 317; Inloes *v.* Harvey, 11 Md. 519; Campbell's Case, 2 Bland 209, 20 Am. Dec. 360.

Mississippi.— Willis *v.* Gattman, 53 Miss. 721.

Nebraska.— Nelson *v.* Bevins, 19 Nebr. 715, 28 N. W. 331.

New Jersey.— Taylor *v.* Woodward, 10 N. J. L. 1; Beeckman *v.* Montgomery, 14 N. J. Eq. 106, 80 Am. Dec. 229.

New York.— Varnum *v.* Behn, 63 N. Y. App. Div. 570, 71 N. Y. Suppl. 903 [*affirmed* in 175 N. Y. 522, 67 N. E. 1090]; Myrick *v.* Selden, 36 Barb. 15; Jackson *v.* Andrews, 7 Wend. 152, 22 Am. Dec. 574; Scudder *v.* Van Amburgh, 4 Edw. 29. *Compare* Brox *v.* Riker, 56 N. Y. App. Div. 388, 67 N. Y. Suppl. 772.

North Carolina.— McRary *v.* Fries, 57 N. C. 233.

Ohio.— Bennet *v.* Williams, 5 Ohio 461.

Tennessee.— Dillard, etc., Co. *v.* Smith, 105 Tenn. 372, 59 S. W. 1010.

Virginia.— Price *v.* Thrash, 30 Gratt. 515.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843; Wilfong *v.* Johnson, 41 W. Va. 283, 23 S. E. 730; Harmon *v.* Byram, 11 W. Va. 511.

United States.— Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352, 9 S. Ct. 781, 33 L. ed. 178; Atlas R. Supply Co. *v.* Lake, etc., R. Co., 134 Fed. 503.

England.— Price *v.* Price, 35 Wkly. Rep. 386.

See 33 Cent. Dig. tit. "Lis Pendens," §§ 5, 40.

When not lis pendens.— A creditor's action seeking to obtain payment out of assets as a preferred claim, where certain conveyances are alleged to have been made to defraud creditors, is not *lis pendens* where no judgment or order with reference to such lands is asked; nor will the subsequent bringing in of the fraudulent grantee as defendant, prior to obtaining any judgment against the debtor, constitute a *lis pendens* until plaintiff is in a position to, and does, attack the fraudulent transfer by an action in the nature of a creditor's bill. Harrison *v.* Shaffer, 60 Kan. 176, 55 Pac. 881.

Liability as concurrent with that of fraudulent vendee.— The liability of one buying pending a suit to avoid a fraudulent conveyance exists at the same time and concurrently with that of the fraudulent vendee, although there can be but one satisfaction. Dillard, etc., Co. *v.* Smith, 105 Tenn. 372, 59 S. W. 1010.

Especially where an attachment has been levied, a creditors' suit is *lis pendens*. Peevey *v.* Cabaniss, 70 Ala. 253; Tuttle *v.* Turner, 28 Tex. 759.

A mere bill for discovery has been held not *lis pendens*. Low *v.* Pratt, 53 Ill. 438.

In Texas it has been held that the pendency of an action to set aside a conveyance of land as fraudulent, by a contract creditor, having no judgment or other lien thereon, will not prevent the passing of a good title by a sale made on a judgment against the grantor in favor of another creditor. Anderson *v.* Cassaday, 36 Tex. 652.

Grantee's knowledge or notice of pendency of suit against grantor as rendering conveyance fraudulent see FRAUDULENT CONVEYANCES, 20 Cyc. 465 *et seq.*

74. McCutchen *v.* Miller, 31 Miss. 65.

75. Gibbon *v.* Dougherty, 10 Ohio St. 365; Stoddard *v.* Myers, 8 Ohio 203.

D. Actions to Enforce or Foreclose Liens. An action to enforce a lien on real property is *lis pendens* as to a purchaser from a party pending suit, or a person taking an encumbrance on the property while the action is pending, or any other person acquiring rights during the litigation.[76] For instance an action to enforce a vendor's lien is *lis pendens*,[77] as is a suit to foreclose a mortgage,[78] a suit to foreclose the lien of a street assessment,[79] or a suit to enforce a drainage assessment.[80]

76. *Georgia.*— George *v.* McAllister, 106 Ga. 40, 31 S. E. 790; Swift *v.* Dederick, 106 Ga. 35, 31 S. E. 788; Wilson *v.* Wright, 72 Ga. 848, action by attorney to enforce lien for fees.

Kentucky.— Friedman *v.* Janssen, 66 S. W. 752, 23 Ky. L. Rep. 2151.

Missouri.— Dodd *v.* Lee, 57 Mo. App. 167.

Oregon.—Bergman *v.* Inman, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771.

Virginia.— Philips *v.* Williams, 5 Gratt. 259.

United States.— Stevens *v.* The Railroads, 4 Fed. 97.

See 33 Cent. Dig. tit. "Lis Pendens," §§ 6, 39.

Unlawful sale of intoxicating liquors.— In an action for injuries caused by the unlawful sale of intoxicating liquors to plaintiff's husband, where the owner of the building occupied by the seller is made a party, and a lien asked on the building, the petition is one "affecting real estate" so as to be *lis pendens*. O'Brien *v.* Putney, 55 Iowa 292, 7 N. W. 615. See also Myers *v.* Kirt, 68 Iowa 124, 26 N. W. 22.

Action to enforce mechanic's lien.— Purchasers of land from defendant in a suit to enforce a mechanic's lien thereon, pending the suit, are, with their grantees, bound by the decree therein. Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567; Jones *v.* Standiferd, 69 Kan. 513, 77 Pac. 271. Necessity for service of notice to preserve mechanic's lien see MECHANICS' LIENS.

77. *Alabama.*— Owen *v.* Kilpatrick, 96 Ala. 421, 11 So. 476; Smith *v.* Conner, 65 Ala. 371.

Arkansas.— Burleson *v.* McDermott, 57 Ark. 229, 21 S. W. 222; Montgomery *v.* Birge, 31 Ark. 491; Holman *v.* Patterson, 29 Ark. 357.

Indiana.— Truitt *v.* Truitt, 38 Ind. 16; Kern *v.* Hazlerigg, 11 Ind. 443, 71 Am. Dec. 360.

Kentucky.— Taylor *v.* U. S. Building, etc., Assoc., 60 S. W. 927, 22 Ky. L. Rep. 1560.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Tennessee.— Wagner *v.* Smith, 13 Lea 560.

Texas.— Attaway *v.* Carter, 1 Tex. Unrep. Cas. 73; Hermes *v.* Vaughn, 3 Tex. Civ. App. 607, 22 S. W. 189, 817. See Brackenridge *v.* San Antonio, 39 Tex. 64.

See 33 Cent. Dig. tit. "Lis Pendens," § 39.

78. *Alabama.*—Malone *v.* Marriott, 64 Ala. 486; Center *v.* Planters', etc., Bank, 22 Ala. 743; Powell *v.* Williams, 14 Ala. 476, 48 Am. Dec. 105.

Arkansas.— Meux *v.* Anthony, 11 Ark. 411, 52 Am. Dec. 274.

California.— Daniels *v.* Henderson, 49 Cal. 242.

Georgia.— Stokes *v.* Maxwell, 59 Ga. 78; Spence *v.* Shell, 54 Ga. 498; Williams *v.* Terrell, 54 Ga. 462; Guerin *v.* Danforth, 45 Ga. 493; Barden *v.* Grady, 37 Ga. 660; Knowles *v.* Lawton, 18 Ga. 476, 63 Am. Dec. 290.

Illinois.— Asher *v.* Mitchell, 9 Ill. App. 335.

Indiana.— Randall *v.* Lower, 98 Ind. 255; Green *v.* White, 7 Blackf. 242.

Iowa.— Cooney *v.* Coppock, 119 Iowa 486, 93 N. W. 495; Jackson *v.* Centerville, etc., R. Co., 64 Iowa 292, 20 N. W. 442; Walsh *v.* Griffith, 61 Iowa 754, 16 N. W. 588; Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921; Smith *v.* Kerns, 24 Iowa 589; Knowles *v.* Rablin, 20 Iowa 101.

Kentucky.— Edmunds *v.* Leavell, (1887) 3 S. W. 134; Deskins *v.* Big Sandy Co., 89 S. W. 695, 28 Ky. L. Rep. 565.

Michigan.— Hoppin *v.* Avery, 87 Mich. 551, 49 N. W. 887.

Minnesota.— Rogers *v.* Holyoke, 14 Minn. 220.

Mississippi.— Alabama, etc., R. Co. *v.* Thomas, 86 Miss. 27, 38 So. 770.

Nebraska.— Buchanan *v.* Griggs, 18 Nebr. 121, 24 N. W. 452.

New York.— Harrington *v.* Slade, 22 Barb. 161; Greenwich Bank *v.* Loomis, 2 Sandf. Ch. 70.

Ohio.— Caldwell Bldg. Loan Assoc. *v.* Bigley, 25 Ohio Cir. Ct. 431.

Oregon.— Kaston *v.* Storey, (1905) 80 Pac. 217.

South Carolina.— Tittle *v.* Kennedy, 71 S. C. 1, 50 S. E. 544.

Texas.— Burford *v.* Rosenfield, 37 Tex. 42; Rippetoe *v.* Dwyer, 1 Tex. Unrep. Cas. 498; Morrison *v.* Lazarus, (Civ. App. 1896) 35 S. W. 498. See New England Loan, etc., Co. *v.* Miller, (Civ. App. 1897) 40 S. W. 646.

See 33 Cent. Dig. tit. "Lis Pendens," §§ 6, 39.

But see Taylor *v.* Pipes, 24 La. Ann. 551.

Effect of failure to make purchaser a party. — One who purchases mortgaged land after a bill to foreclose has been filed, and summons served on the mortgagor, is bound by a decree of foreclosure afterward rendered, although the mortgagee knew of the purchase, and did not make the purchaser a party. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

Necessity of filing notice before decree to sustain decree see MORTGAGES.

79. Page *v.* W. W. Chase Co., 145 Cal. 578, 79 Pac. 278. See also Dow *v.* Ballard, 28 Wash. 87, 68 Pac. 176.

80. Chaney *v.* State, 118 Ind. 494, 21 N. E. 45.

E. Partition Suits. One who purchases, or otherwise acquires interests in, property from a party to a partition suit in which it is involved, pending the suit, is bound by the decree, although not a party to the suit.[81] So it has been held that a petition for certiorari to quash a partition is *lis pendens*.[82]

F. Actions to Quiet Title and Similar Actions. An action to quiet title,[83] or a like action such as trespass to try title,[84] or an action to determine conflicting claims to real property,[85] is *lis pendens* as to persons acquiring interests *pendente lite*.

G. Actions For Divorce or to Compel Support. Ordinarily a suit for divorce or to compel support, being of a personal nature, is not *lis pendens*;[86] but a suit for divorce and alimony is *lis pendens* where the complaint describes specific property which is sought to be set apart to the complaining party or charged with the payment of the sum claimed, and where such relief may be granted in a proper case.[87]

81. *Alabama.*— Stein *v.* McGrath, 128 Ala. 175, 30 So. 792.
Illinois.— Harms *v.* Jacobs, 160 Ill. 589, 43 N. E. 745; Loomis *v.* Riley, 24 Ill. 307.
Indiana.— Edwards *v.* Dykeman, 95 Ind. 509.
Kentucky.— Hawes *v.* Orr, 10 Bush 431.
Missouri.— Becker *v.* Stroeher, 167 Mo. 306, 66 S. W. 1083; Hart *v.* Steedman, 98 Mo. 452, 11 S. W. 993.
Nebraska.— Clark *v.* Charles, 55 Nebr. 202, 75 N. W. 563.
New York.— Shannon *v.* Pentz, 1 N. Y. App. Div. 331, 37 N. Y. Suppl. 304; Connor *v.* Connor, 13 N. Y. Suppl. 402, 20 N. Y. Civ. Proc. 308.
North Carolina.— Baird *v.* Baird, 62 N. C. 317.
Pennsylvania.— Baird *v.* Corwin, 17 Pa. St. 462.
See 33 Cent. Dig. tit. "Lis Pendens," § 45.
Notice of subsequent proceedings in action. — After a plaintiff in partition has conveyed his interest to a stranger pending suit, the other parties are not obliged to give to the purchaser notice of the subsequent proceedings in the action, in order that the purchaser be bound by the decree as against the purchaser at the partition sale. Baird *v.* Corwin, 17 Pa. St. 462.
82. Dyer *v.* Lowell, 33 Me. 260.
83. *Arkansas.*— Pindall *v.* Trevor, 30 Ark. 249.
California.— Welton *v.* Cook, 61 Cal. 481; Haynes *v.* Calderwood, 23 Cal. 409; Gregory *v.* Haynes, 13 Cal. 591.
Illinois.—Roby *v.* Calumet, etc., Canal, etc., Co., 165 Ill. 277, 46 N. E. 214.
Iowa.— Bacon *v.* Early, 116 Iowa 532, 90 N. W. 353.
Kentucky.— Currie *v.* Fowler, 5 J. J. Marsh. 145.
Missouri.— Turner *v.* Babb, 60 Mo. 342.
Nebraska.—Lincoln Rapid Transit Co. *v.* Rundle, 34 Nebr. 559, 52 N. W. 563.
See 33 Cent. Dig. tit. "Lis Pendens," § 44.
84. Hicks *v.* Porter, (Tex. Civ. App. 1905) 85 S. W. 437.
85. Curtis *v.* Sutter, 15 Cal. 259.
86. *Colorado.*— McClelland *v.* Phillips, 6 Colo. App. 47, 39 Pac. 893.
District of Columbia.— Ulrich *v.* Ulrich, 3 Mackey 290.
Indiana.— Frakes *v.* Brown, 2 Blackf. 295.
Iowa.— Scott *v.* Rogers, 77 Iowa 483, 42 N. W. 377.
Maryland.— Feigley *v.* Feigley, 7 Md. 537, 61 Am. Dec. 375.
North Carolina.— Daniel *v.* Hodges, 87 N. C. 95; Gilmore *v.* Gilmore, 58 N. C. 284.
Rhode Island.— Brightman *v.* Brightman, 1 R. I. 112.
Virginia.— Almond *v.* Almond, 4 Rand. 662, 15 Am. Dec. 781.
Canada.— White *v.* White, 6 Ont. Pr. 208.
See 33 Cent. Dig. tit. "Lis Pendens," § 4.
In **California** a cross bill by a wife in an action by her husband for a divorce has been held not to have the effect of a *lis pendens*, so as to make a mortgage taken prior to any order of court, by one with knowledge thereof, on separate property of the husband, subject to the lien of the alimony afterward decreed her, although the cross bill asked for alimony and the assignment to her of the community property, and described the property afterward mortgaged, where it did not seek to have the lands described, or any part thereof set apart as security for her maintenance, and it is not shown that such lands are the only ones constituting the community property. Sun Ins. Co. *v.* White, 123 Cal. 196, 55 Pac. 902. And see Mayberry *v.* Whittier, 144 Cal. 322, 78 Pac. 16.
87. *District of Columbia.*— Ulrich *v.* Ulrich, 3 Mackey 290.
Illinois.— Vanzant *v.* Vanzant, 23 Ill. 536.
Kansas.— Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; Garver *v.* Graham, 6 Kan. App. 344, 51 Pac. 812.
Nevada.— Powell *v.* Campbell, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350, 2 L. R. A. 615.
North Carolina.— Daniel *v.* Hodges, 87 N. C. 95.
Ohio.— Tolerton *v.* Williard, 30 Ohio St. 579.
Rhode Island.— Spencer *v.* Spencer, 9 R. I. 150.
See 33 Cent. Dig. tit. "Lis Pendens," § 4.
But see Houston *v.* Timmerman, 17 Oreg. 499, 21 Pac. 1037, 11 Am. St. Rep. 848, 4

H. Attachment Suits. The rule has been laid down that purchasers of land from a defendant in a suit in which the lands have been attached take the lands subject to all the contingencies of the suit and are bound by the judgment therein ;[88] and this rule has often been applied so as to give priority to the attachment as against interests acquired *pendente lite* after the lien has attached,[89] although it would seem that it is the levy of the attachment itself, and the creation of the lien thereby, that subordinates the rights of one thereafter acquiring interest in the attached property,[90] rather than the doctrine of *lis pendens*.

I. Injunction Suits. A suit wherein an injunction is sought, where the suit directly affects property interests, is usually *lis pendens*.[91] On the other hand, a suit to enjoin a corporation from carrying on a certain kind of business is not *lis pendens*.[92] So an action to enjoin the negotiation of a note and mortgage on real estate, and asking an attachment against the mortgaged property, has been held, before the service of the injunction, not a suit "affecting real estate" within a *lis pendens* statute.[93]

J. Actions on Unrecorded Instruments. It has been held that a *lis*

L. R. A. 716, holding that in a divorce suit the real property which comes to the wife as a result of the divorce is not the subject-matter of the litigation, nor has the court any jurisdiction to affect or divest the title of the husband to lands owned by him or to decree one third of them to the wife independent of a decree for divorce, nor has plaintiff any title upon which to base the suit to recover any portion of the same, except as it comes by force of the statute upon a decree for a divorce.

88. Tilton *v.* Cofield, 93 U. S. 163, 23 L. ed. 858.

89. *Connecticut.*— Rathbone *v.* Riley, 3 Day 503.

Georgia.— Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826.

Indiana.— Daggett *v.* Flanagan, 78 Ind. 253; Fee *v.* Moore, 74 Ind. 319.

Kentucky.— Lewis *v.* Quinker, 2 Metc. 284.

Nebraska.— Nagle *v.* Omaha First Nat. Bank, 57 Nebr. 552, 77 N. W. 1074.

New Jersey.— King *v.* Wilson, 54 N. J. Eq. 247, 34 Atl. 394.

New Mexico.—Bell *v.* Gaylord, 6 N. M. 227, 27 Pac. 494, holding that after real property is attached the action "affects" the title to real estate.

New York.— See Shand *v.* Hanley, 71 N. Y. 319.

Tennessee.— American Exch. Bank *v.* Andrews, 12 Heisk. 306.

Texas.— Paxton *v.* Meyer, 67 Tex. 96, 2 S. W. 817.

United States.— Thompson *v.* Baker, 141 U. S. 648, 12 S. Ct. 89, 35 L. ed. 889.

See 33 Cent. Dig. tit. "Lis Pendens," § 41. See also ATTACHMENT, 4 Cyc. 627.

90. See Wright *v.* Smith, 11 Nebr. 341, 7 N. W. 537.

Attachment lien distinguished.—It is probably the law, that although the contention is merely in regard to a moneyed demand, and auxiliary proceeding *in rem* is resorted to in the same action — as an attachment in aid of the suit at law — there is a lien that is equivalent to a *lis pendens*, and which may ripen into title by virtue of the result of the litigation. Probably the better view to be taken of such auxiliary proceedings is that the provisional remedy pursued creates the lien by virtue of a statutory provision, and hence the constructive notice of *lis pendens* does not apply. Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991.

91. *Georgia.*—Woodburn *v.* Smith, 108 Ga. 815, 34 S. E. 167.

New York.— Murray *v.* Lylburn, 2 Johns. Ch. 441.

Pennsylvania. — Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

South Carolina.— South Carolina Bank *v.* Rose, 1 Strobh. Eq. 257; Watlington *v.* Howley, 1 Desauss. Eq. 167.

Tennessee.— White *v.* Nashville, etc., R. Co., 7 Heisk. 518.

United States.— Union Trust Co. *v.* Southern Inland Nav., etc., Co., 130 U. S. 565, 9 S. Ct. 606, 32 L. ed. 1043.

See 33 Cent. Dig. tit. "Lis Pendens," § 42.

Under a statute authorizing the filing of a notice of pendency in an action brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, it has been held that a *lis pendens* notice cannot be filed in a damage suit where it is sought to enjoin encroachment upon a street, so as to affect land of an abutting owner who is a party (Ackerman *v.* True, 44 N. Y. App. Div. 106, 60 N. Y. Suppl. 608); and also that a notice cannot be filed where a judgment is demanded in the nature of a mandatory injunction requiring defendants to remove a brick wall on their premises which encroached on plaintiff's property (McManus *v.* Weinstein, 108 N. Y. App. Div. 301, 95 N. Y. Suppl. 724). On the other hand, in the same state, it has been held that such notice may be filed in an action to restrain the building on and adding to the height of a party-wall, and thereby causing it to settle. Moeller *v.* Wolkenberg, 67 N. Y. App. Div. 487, 73 N. Y. Suppl. 890.

92. State *v.* New Orleans Warehouse Co., 109 La. 64, 33 So. 81.

93. Newcomb *v.* Nelson, 54 Iowa 324, 6 N. W. 526.

pendens will not supply the failure to record the written instrument sued on so as to make a purchaser *pendente lite* take subject to the decree,[94] although there is authority to the contrary.[95]

K. Special Proceedings and Motions.[96] The rule of *lis pendens* has been applied not only to suits and actions but also to special proceedings affecting property,[97] although there are decisions in which the courts have refused to extend the doctrine to special proceedings.[98] The doctrine has also been applied to motions.[99]

IV. JURISDICTION OF THE PERSON AND SUBJECT-MATTER.

In order that an action may be *lis pendens* the court must have jurisdiction of the subject-matter[1] as well as of the person of defendant.[2] It is sufficient if the jurisdiction of the person is acquired by reason of the jurisdiction of the property, but the court must have the property in its grasp in order to create a *lis pendens*.[3] In the absence of statutes allowing the filing of a notice of *lis pendens* in counties other than the one where the action is brought,[4] the action, in order to affect lands purchased or encumbered during its pendency, must be brought in the county where the land is situated.[5]

94. Page *v.* Street, Speers Eq. (S. C.) 159; Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; Wyatt *v.* Barwell, 19 Ves. Jr. 435, 13 Rev. Rep. 236, 34 Eng. Reprint 578.

95. Bolling *v.* Carter, 9 Ala. 921; National Bank of Metropolis *v.* Sprague, 21 N. J. Eq. 530. And see Mayne *v.* Jones, 34 Cal. 483; Dickson *v.* Todd, 43 Ill. 504.

96. Supplementary proceedings as lis pendens see EXECUTIONS, 17 Cyc. 1432 *et seq.*

97. Rubel *v.* Title Guarantee, etc., Co., 101 Ill. App. 439 [*affirmed* in 199 Ill. 110, 64 N. E. 1033] (condemnation proceedings); Shirk *v.* Whitten, 131 Ind. 455, 31 N. E. 87 (proceeds to establish ditch); Wight *v.* Packer, 114 Mass. 473.

Probate proceedings not directly involving real property are not *lis pendens*. Moragne *v.* Doe, 143 Ala. 459, 39 So. 161, 111 Am. St. Rep. 52; Niderer *v.* Ayers, 83 Cal. 39, 23 Pac. 192; Stockton Bldg., etc., Assoc. *v.* Chalmers, 65 Cal. 93, 3 Pac. 101; Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756, holding that the pendency of administration proceedings is not notice to one dealing with the administratrix in regard to land to which she holds the legal title, that the estate has an interest in the land.

Lunacy proceedings have been held *lis pendens*, so as to give notice to persons thereafter dealing with the alleged lunatic. Griswold *v.* Miller, 15 Barb. (N. Y.) 520; L'Amoureux *v.* Crosby, 2 Paige (N. Y.) 422, 22 Am. Dec. 655. But see Moore *v.* Hershey, 90 Pa. St. 196.

To whom money payable in condemnation proceedings where land conveyed *pendente lite* see EMINENT DOMAIN, 15 Cyc. 797.

98. Curran *v.* Shattuck, 24 Cal. 427 (holding that the purchaser of land pending proceedings to open a highway through it is not chargeable with notice thereof); Clarkson *v.* Barnett, 14 B. Mon. (Ky.) 164; Gray *v.* Case, 51 N. J. Eq. 426, 26 Atl. 805.

99. Burgett *v.* Paxton, 99 Ill. 288; Isler *v.* Brown, 66 N. C. 556. And see *supra*, I, C, text and note 12, order to allow inspection.

1. Thomas *v.* Smith, 8 Kan. App. 855, 54 Pac. 695; Jones *v.* Lusk, 2 Metc. (Ky.) 356; Pearson *v.* Keedy, 6 B. Mon. (Ky.) 128, 43 Am. Dec. 160; Carrington *v.* Brents, 5 Fed. Cas. No. 2,446, 1 McLean 167 [*affirmed* in 9 Pet. 86, 9 L. ed. 60].

2. Reid *v.* Sheffy, 75 Ill. App. 136; Thomas *v.* Smith, 8 Kan. App. 855, 54 Pac. 695.

When jurisdiction obtained.—Where a necessary party has not been joined as defendant the unwarranted issuing of process to him and service of the same does not operate to bring him within the jurisdiction of the court. Reid *v.* Sheffy, 75 Ill. App. 136. But where one not made a party, although necessary to a complete determination of the case, voluntarily submits himself to the jurisdiction of the court by entering an appearance before the purchase by the third person, the action is *lis pendens*. Reid *v.* Sheffy, *supra*.

Where a petition of intervention is unauthorized it cannot be the basis of a *lis pendens*. Des Moines Ins. Co. *v.* Lent, 75 Iowa 522, 39 N. W. 826.

Service of process as commencement of *lis pendens* see *infra*, VI, A, 1.

3. Leavell *v.* Poore, 91 Ky. 321, 15 S. W. 858, 13 Ky. L. Rep. 51.

4. See the statutes of the several states.

5. Evans *v.* Miller, 5 Ky. L. Rep. 609; Benton *v.* Shafer, 47 Ohio St. 117, 24 N. E. 197, 7 L. R. A. 812. But see Wickliffe *v.* Breckinridge, 1 Bush (Ky.) 427, holding that where one purchases land while a suit is pending in a court having jurisdiction, even though it lies in another county, he is chargeable with notice of the suit and takes title subject to the lien.

Change of venue by agreement, however, where the action is brought in the county in which the land is situated, does not destroy the force of the suit as *lis pendens* in such

V. DESCRIPTION OF PROPERTY IN PLEADING.[6]

A purchaser or mortgagee or other person who would otherwise be affected by the rule of *lis pendens* is not affected by the pendency of an action unless the pleadings therein at the date of the purchase or the acquisition of rights[7] describe the property as to which the rule is sought to be applied so as to enable the purchaser or other third person to ascertain its identity.[8] The property is sufficiently described, it would seem, although not described by metes and bounds, if described with reasonable certainty,[9] that is, if enough is alleged to enable a per-

county. Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

6. Description in notice of lis pendens see *infra*, VI, B, 5.

7. Gardner *v.* Watson, 18 Ill. App. 386 [*affirmed* in 119 Ill. 312, 10 N. E. 192]; Baldwin *v.* Love, 2 J. J. Marsh. (Ky.) 489; Allen *v.* Poole, 54 Miss. 323; Lewis *v.* Mew, 1 Strobh. Eq. (S. C.) 180.

8. *California.*— Mitchell *v.* Amador Canal, etc., Co., 75 Cal. 464, 17 Pac. 246.

Georgia.—Mashburn *v.* Dannenberg Co., 117 Ga. 567, 44 S. E. 97; Coulter *v.* Lumpkin, 94 Ga. 225, 21 S. E. 461.

Illinois.— Paine *v.* Root, 121 Ill. 77, 13 N. E. 541; Davis *v.* Miller Signal Co., 105 Ill. App. 657; Gardner *v.* Watson, 18 Ill. App. 386 [*affirmed* in 119 Ill. 312, 10 N. E. 192].

Kansas.— Garver *v.* Graham, 6 Kan. App. 344, 51 Pac. 812.

Kentucky.— Baldwin *v.* Love, 2 J. J. Marsh. 489; Evans *v.* Miller, 5 Ky. L. Rep. 609.

Mississippi.— Allan *v.* Poole, 54 Miss. 323.

Nebraska.— Hillebrand *v.* Nelson, 1 Nebr. (Unoff.) 783, 95 N. W. 1068.

New York.— Oliphant *v.* Burns, 146 N. Y. 218, 40 N. E. 980; Griffith *v.* Griffith, Hoffm. 153 [*reversed* on other grounds in 9 Paige 315].

North Carolina.— Badger *v.* Daniel, 77 N. C. 251.

South Carolina.— Lewis *v.* Mew, 1 Strobh. Eq. 180.

Tennessee.— Boshear *v.* Lay, 6 Heisk. 163; Ewin *v.* Lindsay, (Ch. App. 1900) 58 S. W. 388.

Texas.— Russell *v.* Kirkbride, 62 Tex. 455.

United States.— Miller *v.* Sherry, 2 Wall. 237, 17 L. ed. 827.

England.— Price *v.* Price, 35 Wkly. Rep. 386.

See 33 Cent. Dig. tit. "Lis Pendens," § 20.

It is the original pleading filed, and not the record made by the clerk of the court, that constitutes the notice. Armstrong *v.* Ashley, 22 App. Cas. (D. C.) 368.

9. Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

The legal maxim that that is certain which can be made certain applies to the question whether property is sufficiently described to create *lis pendens*. The description of the property may be such that, by reference and upon inquiry, it may be ascertained. It must be so pointed out in the proceedings as to warn the public that they intermeddle at their peril; and any one reading the bill must be able to learn thereby what property is intended to be made the subject of litigation. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

Other statements as to sufficiency.— It has been held that the land must be described with such reasonable certainty as would inform a prudent person of its location. Evans *v.* Miller, 5 Ky. L. Rep. 609. The land must be so definitely described as to clearly show the specific property involved. Boshear *v.* Lay, 6 Heisk. (Tenn.) 163. It must be described or identified in the pleadings with sufficient particularity to have put one upon his inquiry if brought to his attention. Seibel *v.* Bath, 5 Wyo. 409, 40 Pac. 756. The description must be so definite that any one reading it can learn thereby what property is the subject of the litigation. Miller *v.* Sherry, 2 Wall. (U. S.) 237, 17 L. ed. 827.

Much greater particularity is required where one of several parcels, or a part of a single parcel, of land is the subject of the litigation. In such cases there should be a sufficient description to identify in some manner the specific land to be affected; but where the entire real estate of a decedent is, in the absence of sufficient personal assets, liable to be charged by the law with the payment of his indebtedness, and where it can be clearly seen that the object of the action is to subject the same, it cannot be insisted that a purchaser should not be affected with constructive notice as to any land situated in the county in which the action is pending. Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

Applications of rule.—Where the petition gave the outside boundaries of the tract of land in dispute, it was sufficient to identify the whole tract so as to operate as *lis pendens* as to a subsequent mortgagee of a portion of the tract. Johnson *v.* McKay, 121 Ga. 763, 49 S. E. 757. Where the description in the levy of an attachment as returned by the officer is otherwise definite, the omission to set out the number of feet in the frontage of the premises on a certain street is immaterial. Clark *v.* Empire Lumber Co., 87 Ga. 742, 13 S. E. 826. A description of certain lands as "divers lands in Cosby's manor" was a sufficient description to affect a purchaser of the trust lands in that manor with notice. Green *v.* Slayter, 4 Johns. Ch. (N. Y.) 38. The prayer of a petition "that a receiver [be appointed] of the property, books, papers, debts, choses in action, and

son upon reasonable inquiry to identify the property and ascertain the object of the suit.[10] In determining whether the pleading sufficiently describes the property, exhibits which are made a part of the pleadings may be considered in connection therewith.[11]

VI. COMMENCEMENT.

A. By Suit — 1. Service of Summons and Filing of Complaint. In determining when an action or suit or other proceeding becomes *lis pendens* reliance cannot always be placed on the general rules as to when an action is commenced,[12] nor on the rules as to when an action is commenced so as to stop the running of the statute of limitations.[13] The earlier decisions held that an action was *lis pendens* from the day of the teste of the writ,[14] and a suit from the exhibition of the bill or the teste of a subpœna.[15] It is now well settled, however, except where it is otherwise provided by statute,[16] that no suit or action is *lis pendens* before the service of process or a voluntary appearance in lieu thereof.[17] The mere filing

estate of every kind" of certain partners, "both as copartners as aforesaid and individually," is a sufficient description of the individual property of one of the partners to charge a purchaser with notice of the pending proceeding. Fogg *v.* Providence Lumber Co., 15 R. I. 15, 23 Atl. 31. Where the evident purpose, as shown by the pleadings, is to reach all the estate of defendant, a misdescription of land sought to be charged is immaterial. Burbridge *v.* Rogers, 7 Ky. L. Rep. 48.

Insufficient descriptions.—Where the declaration transmitted an error in the record in the registry of deeds of a levy, which was intended to take a part of lot No. 32, but 29 was substituted for 32, the description by metes and bounds perfectly fitting one parcel as well as the other, neither the declaration nor the record was sufficient notice to a subsequent purchaser from the execution debtor. Jones *v.* McNarrin, 68 Me. 334, 28 Am. Rep. 66. As against an innocent purchaser of real estate for value and his grantees a general attachment of the original vendor's interest in real estate is not *lis pendens*. Ashland Sav. Bank *v.* Mead, 63 N. H. 435.

10. Boyd *v.* Emmons, 103 Ky. 393, 45 S. W. 364, 20 Ky. L. Rep. 107.

11. Boyd *v.* Emmons, 103 Ky. 393, 45 S. W. 364, 20 Ky. L. Rep. 107.

12. See Actions, 1 Cyc. 747 *et seq.*

13. See Limitations of Actions, *antc*, 1288 *et seq.*

14. See Newman *v.* Chapman, 2 Rand. (Va.) 93, 14 Am. Dec. 766; White v. Perry, 14 W. Va. 66.

15. See Pigott *v.* Nower, 3 Swanst. 534 note, 36 Eng. Reprint 970.

16. See the statutes of the several states.

Filing of complaint and "issuance" of summons.— By statute in some states the action is *lis pendens* when the complaint is filed and a summons is "issued" thereon. Burleson *v.* McDermott, 57 Ark. 229, 21 S. W. 222; Hale *v.* Warner, 36 Ark. 217 (holding that a suit is commenced so as to render it a pending one when the bill is filed, and a writ is issued, or publication made, or defendant's appearance entered); Rothschild *v.* Kohn, 93 Ky. 107, 19 S. W. 180, 14 Ky. L. Rep. 36, 40 Am. St. Rep. 184. See also Hart *v.* Hayden, 79 Ky. 346, 2 Ky. L. Rep. 219, 359.

Filing of petition.— In other states the filing of the petition of itself constitutes the commencement of the action so as to make it *lis pendens*. Weems *v.* Harrold, 75 Ga. 860; Olson *v.* Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327; Harrison *v.* Shaffer, 69 Kan. 176, 55 Pac. 881; Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158; McClung *v.* Hohl, 10 Kan. App. 93, 61 Pac. 507; Fisher *v.* Shropshire, 147 U. S. 133, 13 S. Ct. 201, 37 L. ed. 109, construing Iowa statutes. It is the filing, and not the indexing, which initiates the *lis pendens*, where a statute provides that the action is pending when a petition has been filed affecting real estate. Haverly *v.* Alcott, 57 Iowa 171, 10 N. W. 326. A petition is not filed where, although indorsed by the clerk, it is immediately taken from the office and no summons is issued thereon. Wilkinson *v.* Elliott, *supra*. The statute applies to cases depending upon petition in error and it is not necessary that a supersedeas bond be given by plaintiff in the case in order to give force to the statute. McClung *v.* Hohl, *supra*.

17. *Alabama.*— Rooney *v.* Michael, 84 Ala. 585, 4 So. 421; Watford *v.* Oates, 57 Ala. 290.

Kentucky.— Lytle *v.* Pope, 11 B. Mon. 297; Read *v.* Cassidy, 7 Ky. L. Rep. 305.

Maryland.— Sanders *v.* McDonald, 63 Md. 503.

Missouri.— Bailey *v.* McGinniss, 57 Mo. 362.

New Jersey.— O'Neill *v.* Clark, 33 N. J. Eq. 444.

New York.— Jackson *v.* Roberts, 1 Wend. 478; Hayden *v.* Bucklin, 9 Paige 512.

Tennessee.— Staples *v.* White, 88 Tenn. 30, 12 S. W. 339.

United States.— Wheeler *v.* Walton, etc., Co., 65 Fed. 720; McClaskey *v.* Barr, 48 Fed. 130.

See 33 Cent. Dig. tit. "Lis Pendens," § 15.

A voluntary appearance is equivalent to service of process. Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536.

of a bill or complaint, or the issuance of process without its service or a voluntary appearance, does not make the action a pending one as to strangers.[18] On the other hand the mere service of process does not make the action *lis pendens* before the bill or complaint is filed.[19] Where the service of summons initiates

See Hanrick *v.* Gurley, (Tex. Civ. App. 1899) 48 S. W. 994.

Service on part of defendants.— The summons need not it seems in all cases be served upon all of defendants. Fuller *v.* Scribner, 76 N. Y. 190 [*affirming* 16 Hun 130]. But in a creditors' suit, the service of process on the fraudulent grantee without serving process on the judgment debtor is not a sufficient commencement of the action against the debtor to make it *lis pendens* as against one who has acquired rights from the debtor. Myrick *v.* Selden, 36 Barb. (N. Y.) 15. However, service of summons on a copartner in an action against a partnership is sufficient to make the action *lis pendens* so that no third person can purchase any interest in the subject-matter of the action so as to defeat or affect any right of plaintiff in the action. Dresser *v.* Wood, 15 Kan. 344. Where *lis pendens* is once created by the service of a summons on one of the members of a copartnership firm, a subsequent failure to commence making service on the other members of the firm for sixty-three days from the time of filing the petition will not destroy the force or affect of such *lis pendens* as to the purchaser. Dresser *v.* Wood, 15 Kan. 344.

Reading a copy of the bill to defendant by a co-defendant is not equivalent to the service of process. Williamson *v.* Williams, 11 Lea (Tenn.) 355.

Amendment of subpœna.—Where service of a subpœna was defective and by agreement of the parties it was set aside and amended and dated from the day when the agreement was made, the suit was *lis pendens* only from the time of the amendment. Allen *v.* Case, 13 Wis. 621.

18. *Alabama.* — Banks *v.* Thompson, 75 Ala. 531; Goodwin *v.* McGehee, 15 Ala. 232.

California.— Majors *v.* Cowell, 51 Cal. 478.

Illinois.— Hallorn *v.* Trum, 125 Ill. 247, 17 N. E. 823; Figge *v.* Rowlen, 84 Ill. App. 238.

Mississippi.— Allen *v.* Poole, 54 Miss. 323; Allen *v.* Mandaville, 26 Miss. 397.

Missouri.— Shaw *v.* Padley, 64 Mo. 519; Hirshiser *v.* Tinsley, 9 Mo. App. 489; Hirshiser *v.* Tinsley, 9 Mo. App. 339.

New Jersey.— Haughwout *v.* Murphy, 21 N. J. Eq. 118.

New York.— Jackson *v.* Dickenson, 15 Johns. 309, 8 Am. Dec. 236.

Pennsylvania.— Duff *v.* McDonough, 155 Pa. St. 10, 25 Atl. 608; News *v.* Shackamaxon Bank, 16 Wkly. Notes Cas. 207. But see Hillside Coal, etc., Co. *v.* Pitt, 4 Lack. Leg. N. 335, holding that where a pending action of ejectment was duly entered in the ejectment docket, it is notice to the world of the controversy involved, as purchasers of the land affected take subject thereto.

Texas.— Hanrick *v.* Gurley, 93 Tex. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330. See also Sparks *v.* Taylor, (1906) 90 S. W. 485 [*reversing* on other grounds (Civ. App. 1905) 87 S. W. 740].

United States.— Wheeler *v.* Walton, etc., Co., 65 Fed. 720.

See 33 Cent. Dig. tit. "Lis Pendens," § 15.

Rule applied to writ of error.—Where there has been a decree for defendant in a creditors' bill to set aside a deed to a wife as in fraud of her husband's creditors, and a writ of error is sued out, but, before any appearance of defendant in error and before service of process or publication in error, the land is sold to a purchaser for value, the purchaser is not chargeable with notice of such litigation. Pierce *v.* Stinde, 11 Mo. App. 364. And see *infra*, VII, C, 2.

Filing of bill as creation of lien.— The filing of the bill of itself creates a lien in some suits, such as creditors' suits (see CREDITORS' SUITS, 12 Cyc. 61 *et seq.*), but the lien thus created is entirely different from the doctrine of *lis pendens*.

19. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743.

Illinois.— Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397; Grant *v.* Bennett, 96 Ill. 513; Hansen *v.* Klicka, 78 Ill. App. 177.

Kansas.— Campbell *v.* Reese, 8 Kan. App. 518, 56 Pac. 543, where a statute making suit *lis pendens* from the time the petition is filed seems to have been overlooked.

Mississippi.— Bacon *v.* Gardner, 23 Miss. 60.

Missouri.— Samuels *v.* Shelton, 48 Mo. 444; Metcalf *v.* Larned, 40 Mo. 572; Herrington *v.* Herrington, 27 Mo. 560.

New Hampshire.— Hunt *v.* Haven, 52 N. H. 162.

New York.— Leitch *v.* Wells, 48 N. Y. 585; Jackson *v.* Dickenson, 15 Johns. 309, 8 Am. Dec. 236; Murray *v.* Ballou, 1 Johns. Ch. 566.

North Carolina.— Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Pennsylvania.— Diamond *v.* Lawrence County, 37 Pa. St. 353, 78 Am. Dec. 429.

South Carolina.—Miller *v.* Kershaw, Bailey Eq. 479, 23 Am. Dec. 183.

Tennessee.— Tharte *v.* Dunlap, 4 Heisk. 674.

See 33 Cent. Dig. tit. "Lis Pendens," § 15.

Contra.— O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276; Harmon *v.* Byram, 11 W. Va. 511.

An agreement by defendant to accept service as of the day of filing the bill will not affect the purchaser. Miller *v.* Kershaw, Bailey Eq. (S. C.) 479, 23 Am. Dec. 183.

the notice of the pendency of the action it is insufficient therefor unless it is a valid service.[20]

2. Service by Publication. When service is by publication the suit is *lis pendens* when the publication is complete,[21] but not before,[22] except where it is otherwise provided by statute.[23]

3. Cross Actions. A cross action is not *lis pendens* until the cross petition is filed and process is issued.[24]

B. By Notice — 1. Nature and Effect of Statutes.[25] The common-law doctrine of *lis pendens* has been abrogated by statute in most if not all of the states,[26] except as to personal property,[27] by provisions for the filing of a notice of the pendency of the action.[28] The statutory "notice of *lis pendens*," as distinguished from the common law "*lis pendens*," resulted from the hardship of the common-law rule in cases of certain equitable liens and trust estates.[29] The statutes are not retroactive,[30] and have no application to suits in the federal courts.[31] The filing of the notice of *lis pendens*, in a proper case, binds a purchaser *pendente lite*, although he is not made a party to the action;[32] but where a notice of *lis pendens* is filed in an action not affecting real property nor within the statute relating thereto it is a mere nullity.[33]

Before the statute of Anne, providing that no subpœna should issue out of a court of equity until after the bill was filed, it was held that there was no *lis pendens* until the service of the subpœna and the filing of the bill; but when the bill was filed the *lis pendens* existed from the service of the subpœna, although the bill was not filed until long afterward, so that a purchaser, after a service of the subpœna, but before the filing of the bill, would, after the filing of the bill, be deemed to be a *pendente lite* purchaser. Pigott *v.* Nower, 3 Swanst. 534 note, 36 Eng. Reprint 970.

Under the codes the mere service of a summons and complaint in an action will not make it *lis pendens* until the filing thereof, and when the papers are filed a *lis pendens* does not relate back to the service. Leitch *v.* Wells, 48 N. Y. 585; Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96. *Compare* Board *v.* Texas, etc., R. Co., 46 Tex. 316. *Contra*, Stone *v.* Tyree, 30 W. Va. 687, 5 S. E. 878 (holding that when a bill in chancery is filed the *lis pendens* relates back to the service of the subpœna and not to the day the subpœna was issued); Harmon *v.* Byram, 11 W. Va. 511.

20. Wellsford *v.* Durst, 8 Kan. App. 231, 55 Pac. 493; Barry *v.* Hovey, 30 Ohio St. 344; Sherry *v.* Gilmore, 58 Wis. 324, 17 N. W. 252.

21. *Alabama.*— Doe *v.* Magee, 8 Ala. 570.

Kansas.— Bayer *v.* Cocherill, 3 Kan. 282.

Missouri.— Carter *v.* Mills, 30 Mo. 432.

Ohio.— Bennet *v.* Williams, 5 Ohio 461.

Texas.— Cassidy *v.* Kluge, 73 Tex. 155, 12 S. W. 13.

See 33 Cent. Dig. tit. "Lis Pendens," § 16.

Compare Hayden *v.* Bucklin, 9 Paige (N. Y.) 512.

22. Clevinger *v.* Hill, 4 Bibb (Ky.) 498; Carter *v.* Mills, 30 Mo. 432.

Time when service is complete see Process.

23. See the statutes of the several states.

24. Hart *v.* Hayden, 79 Ky. 346, 2 Ky. L. Rep. 219, 359. See Garver *v.* Graham, 6 Kan. App. 344, 51 Pac. 812; Mansur, etc., Implement Co. *v.* Beer, 19 Tex. Civ. App. 311, 45 S. W. 972. But see S. C. Hall Lumber Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616; Markley *v.* Michael, 8 Ohio Dec. (Reprint) 269, 6 Cinc. L. Bul. 832, holding that a cross bill created a *lis pendens* which related back to the commencement of the suit.

25. See also *supra*, I, F.

Notice of lis pendens as objection to title of vendor see Vendor and Purchaser.

26. Snow *v.* Russell, 94 Me. 322, 47 Atl. 536; Jorgenson *v.* Minneapolis, etc., R. Co., 25 Minn. 206; Clergue *v.* McKay, 6 Ont. L. Rep. 51. And see the statutes of the several states.

27. See *infra*, VI, B, 3, a.

28. See the statutes of the several states.

29. Empire Land, etc., Co. *v.* Engley, 18 Colo. 388, 33 Pac. 153.

30. Hines *v.* Dresher, 93 Ind. 551; Wilson *v.* Hefflin, 81 Ind. 35; Taylor *v.* U. S. Building, etc., Assoc., 60 S. W. 927, 22 Ky. L. Rep. 1560; Jennings *v.* Bond, 8 Ir. Eq. 755, 2 J. & L. 720.

31. Majors *v.* Cowell, 51 Cal. 478; Wilson *v.* Hefflin, 81 Ind. 35; Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438; King *v.* Davis, 137 Fed. 222; McClaskey *v.* Barr, 48 Fed. 130; Rutherglen *v.* Wolf, 21 Fed. Cas. No. 12,175, 1 Hughes 78.

32. Matteson *v.* Wagoner, 147 Cal. 739, 82 Pac. 436.

A statutory notice is designed merely to preclude any change in the subject-matter, to the prejudice of plaintiff during the pendency of the action, and not to give constructive notice of plaintiff's claim as does the recording of a deed or mortgage. McVay *v.* Tousley, (S. D. 1905) 105 N. W. 913. See also Pipe *v.* Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138.

33. Bayley *v.* Bayley, 66 N. J. Eq. 84, 57

2. Proceedings in Which Notice Authorized. While a notice of the pendency of an action cannot, under the statutes of most of the states, be filed in an action relating to personal property,[34] and while the statutes of the several states differ somewhat in their enumeration of the class of real actions in which a notice may be filed, a notice may be filed in most of the states in any action affecting real property.[35] For instance a notice may generally be filed in such actions as those to cancel a conveyance of land,[36] to declare or enforce a lien on land,[37] to charge the separate estate of a married woman,[38] or for specific performance.[39] On the other hand the filing of a notice is of no effect in a purely personal action,[40] as where it is based on a mere money demand,[41] such as an action of trespass,[42] or a suit for an accounting,[43] or to appoint a receiver and dissolve a partnership.[44] Even where the action affects specific real property *lis pendens* cannot be filed as to other property in no way related to the property in controversy.[45] It has been held that the notice may be filed, in a proper case, in special proceedings.[46]

3. Necessity[47] — a. To Give Notice of Plaintiff's Claims. Filing a notice of pendency of the action is not required in so far as the parties to the action are concerned, and an omission to file is not a defense to the action.[48] And in most if not all of the states no notice need be filed in actions relating to personal property.[49] The statutes which have been passed in most of the states requiring the filing of a notice of the pendency of the action in specified actions to make them *lis pendens*, in so far as the class of actions is concerned, generally include merely the real actions which would be *lis pendens* under the common-law or equity rule,[50] although some of the statutes restrict the class of actions in which the notice is required to be filed.[51] Failure to file a notice of the pendency of the

Atl. 271; Mills *v.* Bliss, 55 N. Y. 139; Olyphant *v.* Phyfe, 48 N. Y. App. Div. 1, 62 N. Y. Suppl. 688 [*affirmed* in 166 N. Y. 630, 60 N. E. 1117].

34. See *infra*, VI, B, 3, a.

35. Kunz *v.* Bachman, 61 How. Pr. (N. Y.) 519. And see the statutes of the several states.

The action contemplated by the statute is one whose object and purpose is to determine the title or the rights of the parties in, to, or over some particular real estate, which is the subject-matter of the action. It probably includes all actions which involve and determine, as between the parties, the title to a specific tract of land, or which are brought to establish any estate, interest, or right of the parties in, to, or over the real estate described in the complaint, or to enforce any lien, charge, or encumbrance upon said real estate. Longstaff *v.* Hurd, 66 Conn. 350, 34 Atl. 91.

Attachment.— A notice may be filed in an action where real property has been attached. Bell *v.* Gaylord, 6 N. M. 227, 27 Pac. 494.

36. Wilmont *v.* Mescrole, 41 N. Y. Super. Ct. 274. See Smadbeck *v.* Law, 106 N. Y. App. Div. 552, 94 N. Y. Suppl. 797.

37. Bachmann *v.* Wagner, 16 N. Y. Suppl. 67.

38. Brainerd *v.* White, 48 N. Y. Super. Ct. 399, 12 Abb. N. Cas. 407; Little *v.* Rawson, 8 Abb. N. Cas. (N. Y.) 259 note.

39. Ruck *v.* Lange, 10 Hun (N. Y.) 303.

40. Bayley *v.* Bayley, 66 N. J. Eq. 84, 57 Atl. 271.

41. Burkhardt *v.* Sanford, 7 How. Pr. (N. Y.) 329 (holding that a notice cannot be filed in an action commenced by attachment of land against a non-resident defendant to recover money only); Armstrong *v.* Carwile, 56 S. C. 463, 35 S. E. 196; White *v.* Perry, 14 W. Va. 66.

42. Hailey *v.* Ano, 136 N. Y. 569, 32 N. E. 1068, 32 Am. St. Rep. 764.

43. Campbell *v.* Metcalf, 20 R. I. 352, 39 Atl. 190.

44. Longstaff *v.* Hurd, 66 Conn. 350, 34 Atl. 91.

45. Brox *v.* Riker, 56 N. Y. App. Div. 388, 67 N. Y. Suppl. 772.

46. *In re* Bingham, 127 N. Y. 296, 27 N. E. 1055. But see Olyphant *v.* Phyfe, 48 N. Y. App. Div. 1, 62 N. Y. Suppl. 688 [*affirmed* in 166 N. Y. 630, 60 N. E. 1117].

47. In particular suits, as affecting the judgment sought see Mechanics' Liens; Mortgages; Partition.

48. Stuyvesant *v.* Weil, 26 Misc. (N. Y.) 445, 57 N. Y. Suppl. 592. And see Dunning *v.* Crane, 61 N. J. Eq. 634, 47 Atl. 420.

49. Powell *v.* National Bank of Commerce, 19 Colo. App. 57, 74 Pac. 536; Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919; Osborn *v.* Glasscock, 39 W. Va. 749, 20 S. E. 702; Kellogg *v.* Fancher, 23 Wis. 21, 99 Am. Dec. 96. And see the statutes of the several states.

50. See the statutes of the several states.

51. See the statutes of the several states.

West Virginia.— A suit to set aside a deed as fraudulent and void is not "a proceeding to subject real estate to the payment of a debt or liability," within Code, c. 139, § 13, so as to require the notice of the pendency of the suit to be recorded in order to be effectual against a purchaser *pendente lite*.

action, where a statute provides therefor as a condition precedent to the action being *lis pendens*, precludes the right to claim that the person acquiring interests *pendente lite* takes subject to the judgment,[52] except where he has actual notice of the pendency of the suit,[53] or where the purchaser is chargeable with notice by reason of the filing of a lien or payment of the amount of the lien into court.[54] Where the statute requires a notice only as against a purchaser or mortgagee, no notice need be given in order to bind subsequent attaching creditors.[55]

b. To Give Notice of Cross Action or Counter-Claim. Under most of the statutes defendant is required to file a notice where he interposes a cross bill or counter-claim seeking some affirmative relief, in order to make his claim *lis pendens*.[56] It is not sufficient that plaintiff file a *lis pendens*.[57] In the absence of a statute providing therefor, however, it would seem that the notice given of the original suit is constructive notice to persons acquiring interests *pendente lite* so as to bind them by the decree, although it involves the assertion of the claim held by defendants.[58]

4. Time For Filing and When Notice Takes Effect. While the filing of the

O'Connor *v.* O'Connor, 45 W. Va. 354, 32 S. E. 276.

Ejectment.— It has been held not necessary to file a notice of the pendency of the action in ejectment suits. Long *v.* Neville, 29 Cal. 131; Wattson *v.* Dowling, 26 Cal. 124; Sheridan *v.* Andrews, 49 N. Y. 478.

In an action to enforce a tax levied on land, no notice need be filed. Reeve *v.* Kennedy, 43 Cal. 643.

A statute requiring a notice of lis pendens to be filed in ejectment does not apply to adverse proceedings under the acts of congress. People *v.* El Paso County Dist. Ct., 19 Colo. 343, 35 Pac. 731.

52. *Arkansas.* — Steele *v.* Robertson, 75 Ark. 228, 87 S. W. 117.

California.— Ault *v.* Gassaway, 18 Cal. 205; Richardson *v.* White, 18 Cal. 102; Head *v.* Fordyce, 17 Cal. 149; Bensley *v.* Mountain Lake Water Co., 13 Cal. 306, 73 Am. Dec. 575.

Indiana.— Pennington *v.* Martin, 146 Ind. 635, 45 N. E. 1111.

Kentucky.— White *v.* Manning, 82 S. W. 607, 26 Ky. L. Rep. 887.

Michigan.— Detroit Citizens' St. R. Co. *v.* Detroit, 124 Mich. 449, 83 N. W. 104; Jackson, etc., R. Co. *v.* Davison, 65 Mich. 416, 32 N. W. 726.

New York.— Wiswall *v.* McGowan, Hoffm. 125 [*affirmed* in 2 Barb. 270].

Virginia.— Easley *v.* Barksdale, 75 Va. 274.

West Virginia.— De Camp *v.* Carnahan, 26 W. Va. 839.

United States.— Smith *v.* Gale, 144 U. S. 509, 12 S. Ct. 674, 36 L. ed. 521.

See 33 Cent. Dig. tit. "Lis Pendens," § 23.

In North Carolina no notice of *lis pendens* need be filed where the statute involves the title to lands situated in the county where the action is brought. It is otherwise as to suits in other counties. Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351; Collingwood *v.* Brown, 106 N. C. 362, 10 S. E. 868; Spencer *v.* Credle, 102 N. C. 68, 8 S. E. 901; Todd *v.* Outlaw, 79 N. C. 235.

In proceedings strictly in rem no notice of *lis pendens* is ordinarily necessary, since the court by seizing the property renders it impossible for any one to buy *pendente lite* and yet claim to be a good faith purchaser. Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811.

53. *California.*— Sharp *v.* Lumley, 34 Cal. 611; Sampson *v.* Ohleyer, 22 Cal. 200.

North Dakota.— Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811.

Utah.— Whittaker *v.* Greenwood, 17 Utah 33, 53 Pac. 736.

Virginia.— Easley *v.* Barksdale, 75 Va. 274.

West Virginia.— Wick *v.* Dawson, 48 W. Va. 469, 37 S. E. 639; Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919. But see Bruff *v.* Thompson, 31 W. Va. 16, 6 S. E. 352.

Wisconsin.— Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279; Brown *v.* Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83.

See 33 Cent. Dig. tit. "Lis Pendens," § 23. And see *supra*, I, E.

Knowledge of facts and circumstances sufficient to put a reasonable person on his inquiry is equivalent to the filing of a notice of the pendency of the action. Wick *v.* Dawson, 48 W. Va. 469, 37 S. E. 639.

54. Empire Land, etc., Co. *v.* Engley, 18 Colo. 388, 33 Pac. 153; Bates *v.* Masonic Hall, etc., Fund, 7 Misc. (N. Y.) 609, 27 N. Y. Suppl. 951 [*affirmed* in 88 Hun 236, 34 N. Y. Suppl. 598]; Shumate *v.* Crockett, 43 W. Va. 491, 27 S. E. 240; Harmon *v.* Byram, 11 W. Va. 511. See Easley *v.* Barksdale, 75 Va. 274.

55. Dunning *v.* Crane, 61 N. J. Eq. 634, 47 Atl. 420. And see Vance *v.* Wesley, 85 Fed. 157, 29 C. C. A. 63.

56. See the statutes of the several states. See also Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555; Niebuhr *v.* Schreyer, 13 Daly (N. Y.) 546, 10 N. Y. Civ. Proc. 72.

57. Corwin *v.* Bensley, 43 Cal. 253. And see Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

58. S. C. Hall Lumber Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616.

notice of the pendency of the action may precede the filing of the complaint, the notice does not become operative until the complaint is filed.[59] The notice of the pendency of the action may be filed before the summons is served,[60] but it does not become operative, except where the statute otherwise provides,[61] until service of the summons.[62] A notice of the pendency cannot be filed after the matters in dispute have been finally determined,[63] and no notice need be filed after the rendition of judgment in the lower court.[64]

5. Form and Contents of Notice. The notice is usually required, by statute, to state the name of the court in which the action is pending,[65] the names of the parties to the action,[66] the object of the action,[67] and contain a description of the property sought to be affected by the action.[68] A notice of the pendency of an action will be considered as a whole, and inaccuracies or mistakes in one part are immaterial, if, from the writing as a whole, no doubt remains of its significance.[69] Defects in the notice have no effect on the parties to the action as between themselves.[70] A notice may be signed by plaintiff's attorneys instead of by plaintiff.[71]

6. New Notice and Amendments. When the complaint is amended by adding

59. Albro *v.* Blume, 5 N. Y. App. Div. 309, 39 N. Y. Suppl. 215; Weeks *v.* Tomes, 16 Hun (N. Y.) 349 [*affirmed* in 76 N. Y. 601]; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472; Benson *v.* Sayre, 7 Abb. Pr. (N. Y.) 472 note; Morgan *v.* Bostic, 132 N. C. 743, 44 S. E. 639; Sherman *v.* Bemis, 58 Wis. 343, 17 N. W. 8; Olson *v.* Paul, 56 Wis. 30, 13 N. W. 868; Flood *v.* Isaac, 34 Wis. 423; Houghton *v.* Mariner, 7 Wis. 244. *Contra*, Walker *v.* Hill, 22 N. J. Eq. 513.

Directing filing nunc pro tunc.— Notice in *lis pendens* is not effective until the complaint is filed, and is not remedied so as to bind an intervening creditor, by an order directing the complaint to be filed *nunc pro tunc*. Weeks *v.* Tomes, 16 Hun (N. Y.) 349 [*affirmed* in 76 N. Y. 601].

60. Stern *v.* O'Connell, 35 N. Y. 104; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472; Tate *v.* Jordan, 3 Abb. Pr. (N. Y.) 392. *Contra*, Burroughs *v.* Reiger, 3 Abb. Pr. (N. Y.) 393 note, 12 How. Pr. 171.

61. See the statutes of the several states.

In New York the statute now provides that when the notice is filed with the complaint before the service of process, personal service of summons must be made within sixty days thereafter or a publication of the summons must be commenced within that time. It is held thereunder that failure to serve the summons within sixty days after the filing of the complaint and notice terminates the notice, but it has no effect on the jurisdiction of the court. Brandow *v.* Vroman, 22 Misc. 370, 50 N. Y. Suppl. 323. A substituted service of summons within the specified time is the equivalent of a personal service or service by publication. Ferris *v.* Plummer, 46 Hun 515, 13 N. Y. Civ. Proc. 389.

62. H. L. Spencer Co. *v.* Koell, (Minn. 1904) 97 N. W. 974; Hokanson *v.* Gunderson, 54 Minn. 499, 56 N. W. 172, 40 Am. St. Rep. 354; Fernwood Lumber Co. *v.* Meehan-Rounds Lumber Co., 85 Miss. 54, 37 So. 502; Butler *v.* Tomlinson, 38 Barb. (N. Y.) 641, 15 Abb. Pr. 88; Farmers' Loan, etc., Co. *v.* Dickson, 9 Abb. Pr. (N. Y.) 61, 17 How. Pr. 477; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472. *Compare* Lockwood *v.* Noble, 113 Mich. 418, 71 N. W. 856, where the notice was held to take effect from the date of its filing as against the contention that it took effect from the date of completion of the service of process upon all of defendants.

63. Washington Dredging, etc., Co. *v.* Kinnear, 24 Wash. 405, 64 Pac. 522.

64. Sheridan *v.* Andrews, 49 N. Y. 478.

65. See the statutes of the several states.

66. Weber *v.* Fowler, 11 How. Pr. (N. Y.) 458, holding that the notice was sufficient, although an initial as if of a middle name was wrongly inserted in defendant's name.

67. Alterauge *v.* Christiansen, 48 Mich. 60, 11 N. W. 806.

68. Potter *v.* Rowland, 8 N. Y. 448; *In re* Thompson, 25 U. C. Q. B. 237.

Sufficiency of description.— A notice of the pendency of an action in which an attachment has been issued, which describes the attached property as all the real property of a certain defendant, situated in a specified county, is insufficient. Jaffray *v.* Brown, 17 Hun (N. Y.) 575. It would seem that the description is sufficient if it would be sufficient in a deed, and where a notice correctly described the land by boundaries, and then incorrectly stated that it was located in the northwest corner of a certain larger tract, the mistake as to the location in the larger tract was not fatal. McLean *v.* Baldwin, 136 Cal. 565, 69 Pac. 259. Where there is a correct independent description of the land in the notice, an erroneous and unnecessary conclusion which is merely surplusage will not vitiate the notice. Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63.

Sufficiency of notice in foreclosure suit under the act of 1840 in New York see Curtis *v.* Hitchcock, 10 Paige (N. Y.) 399.

69. Watson *v.* Wilcox, 39 Wis. 643, 20 Am. Rep. 63.

70. Totten *v.* Stuyvesant, 3 Edw. (N. Y.) 500.

71. Eldridge *v.* Etenger, 19 Wash. 697, 54 Pac. 541, as to signature of notices in actions in general see NOTICE.

new parties, after the filing of the notice of *lis pendens*, a new notice is necessary in so far as the rights of persons who subsequently acquire interests from such new parties are concerned.[72] But a new notice is not necessary in so far as the rights of persons affected by the original notice are concerned.[73] The notice may be amended by order of court in a proper case,[74] as by inserting a specific description of a lot omitted by mistake.[75] Where the notice covers certain land which cannot be affected by the action the court may order it amended by striking out the portions thereof relating to such lands.[76]

7. Filing and Recording. It is the filing of the notice that creates the *lis pendens*, and hence the action is none the less *lis pendens* because the clerk does not properly enter or index the notice,[77] nor because the notice is subsequently temporarily removed[78] or lost[79] from the files.

VII. DURATION.

A. General Rule. The effect of an action as *lis pendens* continues at least until the final termination of the action in the trial court,[80] unless there has been an abandonment of the action, or want of due diligence in prosecuting, or a dismissal other than on the merits.[81] It has been held that an action is pending after default until final judgment is entered.[82] The action is *lis pendens* after the rendition of judgment, but before the execution of conveyances in pursuance of the judgment,[83] or after a decree of sale but before the sale.[84] So a *lis pendens* has been held not to be terminated by a decree and sale and the execution of a conveyance, where there has been no delivery of possession.[85] Where a default judgment, including one based on a publication of the summons without an appearance, is subject to be opened within a specified number of years, there is no *lis pendens* after the rendition of the judgment and before a motion to open,[86]

72. Curtis *v.* Hitchcock, 10 Paige (N. Y.) 399.

73. Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472.

74. Vanderheyden *v.* Gray, 38 How. Pr. (N. Y.) 367.

75. Vanderheyden *v.* Gray, 38 How. Pr. (N. Y.) 367.

76. Fitzgerald *v.* Blake, 42 Barb. (N. Y.) 513.

77. Heim *v.* Ellis, 49 Mich. 241, 13 N. W. 582; Hartwell *v.* Riley, 47 N. Y. App. Div. 154, 62 N. Y. Suppl. 317; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472; Bigelow *v.* Brewer, 29 Wash. 670, 70 Pac. 129. See Curtis *v.* Hitchcock, 10 Paige (N. Y.) 399.

78. Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472.

79. Heim *v.* Ellis, 49 Mich. 241, 13 N. W. 582.

80. See Center *v.* Planters', etc., Bank, 22 Ala. 743; Allen *v.* Poole, 54 Miss. 323.

After termination of the suit, a purchaser from one of the parties does not take subject thereto. Whitfield *v.* Riddle, 78 Ala. 99; Wood Sash, Door, etc., Co. *v.* Burrows, 25 Ohio Cir. Ct. 781. A decree in partition, entered after everything has been done in the cause except the settling of costs, ascertaining and apportioning the costs, is a final decree; and subsequent proceedings by which a part of the land is sold to pay the costs assessed against it are not binding on a purchaser *pendente lite* who has no notice of such proceedings. Virginia Iron, etc., Co., *v.* Roberts, 103 Va. 661, 49 S. E. 984.

Duration as coextensive with term of court. — A case is in court, *lis pendens*, during the whole of the term at which judgment is rendered, and not simply to the time when the judgment is rendered. Green *v.* Green, 23 Ohio Cir. Ct. 323. And see Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138. A suit for divorce and alimony, restraining the transfer of property by injunction, which was dismissed, but at a later term, on motion for rehearing filed at the same term, reheard, and judgment prayed for granted, was *lis pendens* from time of dismissal to filing of motion for rehearing. Green *v.* Green, 23 Ohio Cir. Ct. 323.

An action is pending so long as there remains anything to be done to work out the judgment as pronounced in the action. Peck *v.* Sun L. Assur. Co., 11 Brit. Col. 215.

81. See *infra*, VII, B.

82. Abadie *v.* Lobero, 36 Cal. 390.

83. Osenton *v.* Nichols, 12 S. W. 278, 11 Ky. L. Rep. 431; Norton *v.* McGonagill, 5 Ky. L. Rep. 245.

84. Senft *v.* Vanek, 209 Ill. 361, 70 N. E. 720; Davis *v.* John V. Farwell Co., (Tex. Civ. App. 1899) 49 S. W. 656.

85. Jackson *v.* Warren, 32 Ill. 331.

86. Kellar *v.* Stanley, 86 Ky. 240, 5 S. W. 477, 9 Ky. L. Rep. 388; Aldrich *v.* Chase, 69 Minn. 243, 73 N. W. 161, holding that the rights of the purchaser after judgment cannot be affected by a subsequent setting aside or modification of the judgment, at least after time for appeal has expired, unless he is made a party to or given notice of the

nor, it has been held, even where the purchase is after the institution of proceedings to reopen the judgment.[87]

B. Dismissal of Action or Neglect to Prosecute — 1. General Rules. An action must be prosecuted to final judgment in good faith to have the effect of *lis pendens*,[88] so that if it is abandoned,[89] or dismissed either voluntarily or involuntarily,[90] the *lis pendens* is terminated, and the person acquiring interests before the abandonment or dismissal does not acquire his rights *pendente lite*, so as to be affected thereby. If plaintiff does not diligently prosecute the action, the consequences are the same as though no action had been begun, and a person acquiring rights pending the litigation is not affected thereby.[91] The question as to what is

application, at least when the party making the application has notice, actual or constructive, of the transfer of the interest. *Compare* Gay *v.* Parpart, 106 U. S. 679, 1 S. Ct. 456, 27 L. ed. 256. *Contra*, Glaze *v.* Johnson, 27 Tex. Civ. App. 116, 65 S. W. 662.

87. Scudder *v.* Sargent, 15 Nebr. 102, 17 N. W. 369.

88. Reid *v.* Sheffy, 75 Ill. App. 136; Wortham *v.* Boyd, 66 Tex. 401, 1 S. W. 109; Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624.

Collusive prosecution of action.—An action to enforce a vendor's lien collusively prosecuted to judgment after payment of the debt by defendant does not operate as *lis pendens*. Rippetoe *v.* Dwyer, 65 Tex. 703.

89. Wells *v.* Goss, 110 La. 347, 34 So. 470 (holding that a formal entry of abandonment is not necessary); Alexander *v.* Pendleton, 8 Cranch (U. S.) 462, 3 L. ed. 624.

Abandonment after reversal.— Where the mandate of the supreme court has not been filed in the trial court for more than four years, and during that time the suit had no place on the docket of either court, the doctrine of *lis pendens*, as to property involved in the suit, does not apply as against a purchaser for value, taking during such period without actual notice. Durand *v.* Lord, 115 Ill. 610, 4 N. E. 483.

Reliance on record.— A purchaser who relies upon an entry on the records showing a settlement of a suit, but who overlooks a subsequent entry showing a continuance of the suit by agreement of the parties, is a *pendente lite* purchaser, where his purchase was in fact after the reinstatement of the cause. Furry *v.* Ferguson, 105 Iowa 231, 74 N. W. 903.

What constitutes abandonment of action in general see Actions, 1 Cyc. 756.

90. *Illinois.*— Allison *v.* Drake, 145 Ill. 500, 52 N. E. 537; Reid *v.* Sheffy, 75 Ill. App. 136.

Kansas.— Karr *v.* Burns, 1 Kan. App. 232, 40 Pac. 1087.

Kentucky.— Hord *v.* Marshall, 5 Dana 495, judgment of dismissal by mistake.

Missouri.— Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472; Herrington *v.* Herrington, 27 Mo. 560.

South Dakota.— McVay *v.* Tousley, (1905) 105 N. W. 932.

United States.— Alexander *v.* Pendleton, 8 Cranch 462, 3 L. ed. 624.

See 33 Cent. Dig. tit. "Lis Pendens," § 29.

Dismissal of part of cause of action.— Where, pending the suit, plaintiff dismissed the count of his petition under which he claims a lien on land, and the action does not constitute a *lis pendens* in the absence of such count, such dismissal terminated the *lis pendens* and vested in a prior purchaser a title to the property unaffected thereby. Bristow *v.* Thackston, 187 Mo. 332, 86 S. W. 94, 106 Am. St. Rep. 472.

91. *Georgia.*—Tinsley *v.* Rice, 105 Ga. 285, 31 S. E. 174.

Iowa.— Davis *v.* Bonar, 15 Iowa 171.

Kentucky.— Kelley *v.* Culver, 116 Ky. 241, 75 S. W. 272, 25 Ky. L. Rep. 443; Erhman *v.* Kendrick, 1 Metc. 146; Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723; Clarkson *v.* Morgan, 6 B. Mon. 441; Watson *v.* Wilson, 2 Dana 406, 26 Am. Dec. 459; Woodward *v.* Johnson, 90 S. W. 1076, 28 Ky. L. Rep. 1091.

Maryland.— Taylor *v.* Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479.

Michigan.— Hammond *v.* Paxton, 58 Mich. 393, 25 N. W. 321.

New Jersey.— Boice *v.* Conover, (Ch. 1905) 61 Atl. 159.

Oregon.— Bybee *v.* Summers, 4 Oreg. 354.

United States.— Johnston *v.* Standard Min. Co., 148 U. S. 360, 13 S. Ct. 585, 37 L. ed. 480.

See 33 Cent. Dig. tit. "Lis Pendens," § 29.

But see Dwyer *v.* Rippetoe, 72 Tex. 520, 10 S. W. 668; Brackenbridge *v.* San Antonio, 39 Tex. 64.

Failure to prosecute an appeal with diligence may preclude the suit being *lis pendens* after the judgment. Davis *v.* Bonar, 15 Iowa 171; Boice *v.* Conover, (N. J. Ch. 1905) 61 Atl. 159. See also Ferrier *v.* Busick, 6 Iowa 258.

The burden of showing diligence in the prosecution of the suit is on the one claiming the benefit of a *lis pendens* against a *bona fide* purchaser. Hawes *v.* Orr, 10 Bush (Ky.) 431.

Collusion.— It has been held that the rule requiring the prosecution of the suit with reasonable diligence necessitates the further rule that the prosecution must not be collusive in its nature. Rippetoe *v.* Dwyer, 65 Tex. 703.

Property of speculative nature.— Especially is plaintiff bound to prosecute the action with diligence where the property is of a speculative nature. Clergue *v.* McKay, 6 Ont.

a full or continuous prosecution of a cause, either in the trial court or in the court to which an appeal is taken, is one which of necessity must be determined from the facts appearing in the particular case under consideration.[92] The neglect to prosecute must be such as to induce the belief that the proceeding has been abandoned.[93] Where there is an apparent neglect to prosecute, a reasonable excuse for the delay complained of is always available to keep the *lis pendens* alive.[94]

2. New Action After Dismissal or Discontinuance. If an action is dismissed, either voluntarily or involuntarily, under such circumstances as not to preclude another action, but without any reservation of the right to bring a new action, a person acquiring interests in the subject-matter of the litigation, before the commencement of the second action, is not bound thereby.[95] On the other hand, if the judgment or decree of dismissal expressly reserves the right to another action, it would seem that the bringing a new action continues the operation of the *lis pendens* created by the first action so that purchasers during its pendency may be deemed in the second action to have purchased with notice thereof.[96] At any

L. Rep. 51; Smith *v.* Hughes, 5 Ont. L. Rep. 238.

92. Olson *v.* Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327.

Mere lapse of time does not show negligence in failure to prosecute. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

If the suit finally proceeds to a final decree, it will be presumed, in the absence of a showing to the contrary, that there has been no negligent intermission of the prosecution. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

In Kentucky, it has been held that it is not necessary, in order to retain the character of a *lis pendens*, that a suit should be prosecuted with even ordinary diligence; but, as a *lis pendens* is created by an institution of the suit, it can only be lost by unusual and unreasonable negligence in its prosecution. Gossom *v.* Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723.

Laches held fatal to lis pendens.—Wallace *v.* Marquett, 88 Ky. 130, 10 S. W. 374, 10 Ky. L. Rep. 750 (twenty-three years); Petree *v.* Bell, 2 Bush (Ky.) 58 (two years); Erhman *v.* Kendrick, 1 Metc. (Ky.) 146 (four years); Woodward *v.* Johnson, 90 S. W. 1076, 28 Ky. L. Rep. 1091 (thirty years); Taylor *v.* Carroll, 89 Md. 32, 42 Atl. 920, 44 L. R. A. 479 (twenty years); Hayes *v.* Noursc, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep. 700 (forty years); Myrick *v.* Selden, 36 Barb. (N. Y.) 15 (eight years); Fox *v.* Reeder, 28 Ohio St. 181, 22 Am. Rep. 370 (twenty-six years); Trimble *v.* Boothby, 14 Ohio 109, 45 Am. Dec. 526 (twelve years); Bybee *v.* Summers, 4 Oreg. 354 (five years); Mann *v.* Roberts, 11 Lea (Tenn.) 57 (three and one-half years). It has been held, however, that where the delay was short of the period of limitations, and no nonsuit had been granted for failure to prosecute, the *lis pendens* was notice to one purchasing fourteen years after the commencement of the action. Hillside Coal, etc., Co. *v.* Heermans, 191 Pa. St. 116, 43 Atl. 76. And see Olson *v.* Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327.

93. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233. And see Durand *v.* Lord, 115 Ill. 610, 4 N. E. 483; Davis *v.* Bonar, 15 Iowa 171; Farmers' Loan, etc., Co. *v.* Meridian Waterworks Co., 139 Fed. 661.

94. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; Wickliffe *v.* Breckinridge, 1 Bush (Ky.) 427; Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395; Morgan *v.* Hammett, 34 Wis. 512.

Neglect during Civil war.—The failure to press a suit between the years 1866 and 1870 was, in view of the disturbed condition then existing, not such negligence as to destroy its force as a pending suit. Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

Incorrect advice of counsel that, if a party to a suit to recover land purchased the land at a judicial sale, he might lose all of it that was in possession of squatters by operation of the statute against champerty, constituted no excuse for his delay of nearly thirty years in the prosecution of such suit. Woodward *v.* Johnson, 90 S. W. 1076, 28 Ky. L. Rep. 1091.

95. Pipe *v.* Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138; Herrington *v.* McCollum, 73 Ill. 476. And see Hammond *v.* Paxton, 58 Mich. 393, 25 N. W. 321; Herrington *v.* Herrington, 27 Mo. 560. *Compare* Moody *v.* Millen, 103 Ga. 452, 30 S. E. 258, holding that, where an execution levy is dismissed for defects in the returns, and a new levy made, one who purchases the property pending the trial of the first levy is not charged with constructive notice thereof.

Motion to reinstate.—A voluntary dismissal terminates the effect of the action as *lis pendens*, even though a motion to reinstate the action has been filed, where the conveyance is made before the notice of the motion is served on defendant. Davis *v.* Hall, 90 Mo. 659, 3 S. W. 382.

96. Ferrier *v.* Buzick, 6 Iowa 258; Winchester *v.* Paine, 11 Ves. Jr. 194, 8 Rev. Rep.

event, if there is unreasonable delay in bringing a new action the benefit of the *lis pendens* will be lost.[97]

3. Death of Party. The death of a party to the suit does not terminate the *lis pendens*.[98] But delay in reviving a suit after the death of a party may terminate the *lis pendens*.[99]

C. Pending Proceedings to Review Judgment — 1. General Rules. Whether a *lis pendens* continues after a final judgment in the trial court, while it is subject to review or to be opened for further proceedings thereunder, is the subject of conflicting decisions, and while there are authorities seemingly holding that inasmuch as a decree is not notice there is no *lis pendens* after such final judgment,[1] the weight of authority is to the contrary so that the purchaser after judgment or decree, but while it is subject to review or further proceedings thereunder, takes subject thereto.[2] A purchaser who relies on a judgment in favor of his vendor takes subject to the risks of appeal.[3] A purchaser or other person acquiring rights pending an appeal takes subject to the final disposition of the case.[4] A purchaser or encumbrancer, after the reversal of the judgment in

131, 32 Eng. Reprint 1062. See also Herrington *v.* McCollum, 73 Ill. 476; Clarkson *v.* Morgan, 6 B. Mon. (Ky.) 441.

Identity of renewed action.— An action of ejectment is not a reinstatement or renewal of an action in equity brought by plaintiff to declare a deed executed by her ancestor a mortgage, which had been dismissed three years before without prejudice, so as to continue in effect the notice of *lis pendens* filed in such equitable action as against a *bona fide* purchaser subsequent to the dismissal. Pipe *v.* Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138.

97. Pipe *v.* Jordan, 22 Colo. 392, 45 Pac. 371, 55 Am. St. Rep. 138; Herrington *v.* McCollum, 73 Ill. 476.

98. See Ashley *v.* Cunningham, 16 Ark. 168.

99. Shiveley *v.* Jones, 6 B. Mon. (Ky.) 274; Watson *v.* Wilson, 2 Dana (Ky.) 406, 26 Am. Dec. 459; Hayes *v.* Nourse, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep. 700.

1. Page *v.* Waring, 76 N. Y. 463; Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616; Ludlow *v.* Kidd, 3 Ohio 541; Turner *v.* Crebill, 1 Ohio 372; Price *v.* White, Bailey Eq. (S. C.) 240; Blake *v.* Heyward, Bailey Eq. (S. C.) 208; Worsley *v.* Scarborough, 3 Atk. 392, 26 Eng. Reprint 1025; Kinsman *v.* Kinsman, 9 L. J. Ch. O. S. 276, 1 Russ. & M. 617, Taml. 399, 5 Eng. Ch. 618, 39 Eng. Reprint 236; Harvey *v.* Montague, 1 Vern. Ch. 122, 23 Eng. Reprint 359. See Peck *v.* Sun L. Assur. Co., 11 Brit. Col. 215. *Contra*, Sorrell *v.* Carpenter, 2 P. Wms. 482, 24 Eng. Reprint 825.

2. *Illinois.*— McCauley *v.* Rogers, 104 Ill. 578; Jackson *v.* Warren, 32 Ill. 331; Brachtendorf *v.* Kehm, 72 Ill. App. 228.

Indiana.— Farmers' Bank *v.* Frankfort First Nat. Bank, 30 Ind. App. 520, 66 N. E. 503.

Kansas.— Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138.

Kentucky.— Pittman *v.* Wakefield, 90 Ky. 171, 13 S. W. 525, 11 Ky. L. Rep. 972.

Maryland.— Brown *v.* Wallace, 2 Bland 585.

Mississippi.— Smith, etc., Co. *v.* Burns, 72 Miss. 966, 18 So. 483.

New Jersey.— McPherson *v.* Housel, 13 N. J. Eq. 299.

Pennsylvania.— Biddle *v.* Tomlinson, 115 Pa. St. 299, 8 Atl. 774; Sanderson *v.* Phinney, 2 Walk. 526.

South Carolina.— Watlington *v.* Howley, 1 Desauss. Eq. 167.

See 33 Cent. Dig. tit. "Lis Pendens," § 30.

Purchaser from purchaser at judicial sale. — The rule of *lis pendens* has been applied to a purchaser from a purchaser at a judicial sale. Lynch *v.* Andrews, 25 W. Va. 751.

3. Dunnington *v.* Elston, 101 Ind. 373.

4. *Alabama.*— Kirkland *v.* Trott, 75 Ala. 321.

Arkansas.— See Ashley *v.* Cunningham, 16 Ark. 168.

Indiana.— Krug *v.* Davis, 101 Ind. 75, holding that one entering on land as a tenant under a party to a partition suit, pending an appeal, is bound by the judgment on such appeal, although the defeated party dismiss the suit after its remand to the lower court.

Iowa.— Olson *v.* Leibpke, 110 Iowa 594, 81 N. W. 801, 80 Am. St. Rep. 327; Ferrier *v.* Buzick, 6 Iowa 258.

Kentucky.—Martin *v.* Kennedy, 83 Ky. 335. But see Harper *v.* Lee, 6 Ky. L. Rep. 743.

Minnesota.— Washburn *v.* Van Steenwyk, 32 Minn. 336, 20 N. W. 324.

Missouri.— Carr *v.* Cates, 96 Mo. 271, 9 S. W. 659.

Nebraska.— Martin *v.* Abbott, (1904) 100 N. W. 142 [*modifying* Parker *v.* Courtnay, 28 Nebr. 605, 44 N. W. 863, 26 Am. St. Rep. 360, in so far as it conflicts therewith].

New York.— Salisbury *v.* Morss, 7 Lans. 359 [*affirmed* in 55 N. Y. 675].

North Carolina.— Isler *v.* Brown, 66 N. C. 556.

United States.— Allen *v.* Halliday, 28 Fed. 261.

See 33 Cent. Dig. tit. "Lis Pendens," § 30.

The absence of an appeal-bond or supersedeas does not prevent a *pendente lite* pur-

the appellate court, but before subsequent proceedings in the trial court, acquires his rights *lis pendens*.[5]

2. Writ of Error. Contrary to the rules just stated is the effect given to interests acquired before the bringing of a writ of error. Where a writ of error is commenced by the service of process and is considered an independent suit or proceeding, *lis pendens* does not begin until the service of process therein.[6]

3. Bill of Review. Although there is authority to the contrary,[7] the general rule is that one acquiring an interest in the subject-matter of the litigation after the original decree is entered, and before a bill of review is filed, does not take subject to the result of the bill of review.[8]

D. Effect of Amended or Supplemental Pleadings. An amendment to the bill or complaint, after a purchase or the acquisition of other rights *pendente lite*, which does not alter the cause of action, does not affect the *lis pendens*, since it relates back to the filing of the original bill.[9] On the other hand if the cause of action is changed by the amendment, or a new cause added, the *lis pendens* does not relate back but dates from the filing of the amended complaint.[10] Where the

chaser from being bound by a judgment of reversal afterward entered. Carr *v.* Cates, 96 Mo. 271, 9 S. W. 659. It is immaterial that no supersedeas bond has been given, especially where none is provided for by statute. Martin *v.* Abbott, (Nebr. 1904) 100 N. W. 142.

Before rehearing on appeal.— Where one purchases land after a judgment of the appellate court affecting it, and before expiration of the time for application for rehearing, he takes subject to the further review by the rehearing. Bird *v.* Gilliam, 125 N. C. 76, 34 S. E. 196.

5. Castleman *v.* Combs, 7 T. B. Mon. (Ky.) 273; Real Estate Sav. Inst. *v.* Collonious, 63 Mo. 290. But see Olyphant *v.* Phyfe, 27 Misc. (N. Y.) 64, 58 N. Y. Suppl. 217.

6. Eldridge *v.* Walker, 80 Ill. 270; Wadhams *v.* Gay, 73 Ill. 415; Macklin *v.* Schmidt, 104 Mo. 361, 16 S. W. 241; Pierce *v.* Stinde, 11 Mo. App. 364; Wooldridge *v.* Boyd, 13 Lea (Tenn.) 151. And see McClung *v.* Hohl, 10 Kan. App. 93, 61 Pac. 507. *Contra*, Madeira *v.* Hopkins, 12 B. Mon. (Ky.) 595; Harle *v.* Langdon, 60 Tex. 555.

Discharge of attachment.—Where a trial of an attachment action results in favor of defendant, the lien of the attachment is discharged, and in the absence of an order staying the full effect of such judgment pending proceedings in error, a subsequent reversal thereof will not revive such lien to the prejudice of a purchaser of the attached property, intermediate the rendition of the judgment, and its reversal. Miller *v.* Dixon, 2 Kan. App. 445, 42 Pac. 1014.

7. Earle *v.* Couch, 3 Metc. (Ky.) 450; Debell *v.* Foxworthy, 9 B. Mon. (Ky.) 228; Clarey *v.* Marshall, 4 Dana (Ky.) 95; Cook *v.* French, 96 Mich. 525, 56 N. W. 101.

8. Ludlow *v.* Kidd, 3 Ohio 541; Lee County *v.* Rogers, 7 Wall. (U. S.) 181, 19 L. ed. 160; Rector *v.* Fitzgerald, 59 Fed. 808, 8 C. C. A. 277.

9. *Illinois.*— Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233.

Kansas.— Myers *v.* Jones, 61 Kan. 191, 59 Pac. 275.

Kentucky.— Arnold *v.* Arnold, (1891) 17 S. W. 203.

New Jersey.— Turner *v.* Houpt, 53 N. J. Eq. 526, 33 Atl. 28, adding other specifications of frand of the same character in an action to rescind an exchange of lands for fraud.

Ohio.— Pendery *v.* Allen, 53 Ohio St. 251, 41 N. E. 255; Caldwell Bldg. Loan Assoc. *v.* Bigley, 25 Ohio Cir. Ct. 431.

Texas.— See Portis *v.* Hill, 30 Tex. 529, 98 Am. Dec. 481.

United States.— Cotton *v.* Dacey, 61 Fed. 481.

See 33 Cent. Dig. tit. "Lis Pendens," § 32.

Application of rule.—Where a bill to foreclose a mortgage makes claim for the amount due under a subsequent agreement modifying the mortgage, and alleges that the mortgage is security therefor, a *lis pendens* is constructive notice to the extent of the claim, although the modifying agreement is only set up by amendment at the hearing. Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261.

Title put in issue by answer.— The fact that a deed, given but not recorded before the commencement of a suit against the grantor for the possession of the land, was thereafter recorded before the complaint was amended, so as to put the title in issue, will not relieve the grantee from being bound by the decree, where an answer putting the title in issue was filed before the deed was recorded. Collingwood *v.* Brown, 106 N. C. 362, 10 S. E. 868.

10. Wheeler, etc., Mfg. Co. *v.* Hasbrouck, 68 Iowa 554, 27 N. W. 738; Cornell University *v.* Parkinson, 59 Kan. 365, 53 Pac. 138; Davis *v.* Willson, 115 Ky. 639, 74 S. W. 696, 25 Ky. L. Rep. 21; Stone *v.* Connelly, 1 Metc. (Ky.) 652, 71 Am. Dec. 499; Wortham *v.* Boyd, 66 Tex. 401, 1 S. W. 109; Letcher *v.* Reese, 24 Tex. Civ. App. 537, 60 S. W. 256. But see McClaskey *v.* Barr, 48 Fed. 130.

Substitution of new plaintiffs.—An amendment of a bill by substituting new parties plaintiff will have the effect to relieve intermediate purchasers from the application of

original bill is so defective that it could not operate as a *lis pendens*, the amended bill will not relate back so as to defeat the rights acquired since the commencement of the action.[11] So the filing of an amended complaint in an action wherein the original complaint did not authorize the filing of a notice will not create a *lis pendens* from the time of filing the original complaint but only from the filing of the amended complaint.[12] A supplemental bill filed by complainant after he conveyed the land in controversy is not *lis pendens* as against the title of his grantee.[13]

E. Loss, Destruction, or Withdrawal of Papers. The *lis pendens* is not terminated by the accidental loss or destruction of the papers on file, such as the pleadings or the notice of pendency.[14] But if the party filing the papers withdraws them from the files, leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, the purchaser will be protected.[15] So where the venue is changed to another county by consent, the original papers being transferred instead of a transcript, the notice which such papers had supplied in the former county fails.[16]

F. Cancellation of Notice — 1. Grounds. The right to file a notice of the pendency of the action being absolute, it can be canceled by order of court only for the reasons specified in the statute.[17] Ordinarily the notice cannot be canceled while the action is pending and undetermined,[18] unless the filing of the order was unauthorized because of the nature of the action or otherwise,[19] or there has been a neglect to prosecute the action with reasonable diligence.[20] Usually the rendition of final judgment in the action,[21] after the time to appeal therefrom

the doctrine of *lis pendens*. Clarkson *v.* Morgan, 6 B. Mon. (Ky.) 441.

11. Jones *v.* Lusk, 2 Metc. (Ky.) 356.

12. Brox *v.* Riker, 56 N. Y. App. Div. 388, 67 N. Y. Suppl. 772.

13. Gage *v.* Parker, 178 Ill. 455, 53 N. E. 317.

14. Heim *v.* Ellis, 49 Mich. 241, 13 N. W. 582; Waring *v.* Waring, 7 Abb. Pr. (N. Y.) 472. *Compare* Wilkinson *v.* Elliott, 43 Kan. 590, 23 Pac. 614, 19 Am. St. Rep. 158.

15. Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

16. Arrington *v.* Arrington, 114 N. C. 151, 19 S. E. 351.

17. Beman *v.* Todd, 124 N. Y. 114, 26 N. E. 326; Mills *v.* Bliss, 55 N. Y. 139; Fitzsimons *v.* Drought, 15 N. Y. App. Div. 413, 44 N. Y. Suppl. 453; Willis *v.* Bellamy, 53 N. Y. Super. Ct. 94; Shandley *v.* Levine, 44 Misc. (N. Y.) 23, 89 N. Y. Suppl. 717; Murray *v.* Barth, 24 N. Y. Suppl. 921, 30 Abb. N. Cas. 303; Niebuhr *v.* Schreyer, 10 N. Y. Civ. Proc. 72. See Peck *v.* Sun L. Assur. Co., 11 Brit. Col. 215; Merrick *v.* Morrison, 7 Brit. Col. 442; Towne *v.* Brighouse, 6 Brit. Col. 225.

A notice which is a mere nullity will not be ordered canceled. Jaffray *v.* Brown, 17 Hun (N. Y.) 575.

Mechanic's lien suits.— The court has no general power to cancel notice of *lis pendens*, filed in a mechanic's lien action, merely because the procedure in such cases is regulated by the special provisions of the mechanic's lien law, but the matter is governed by N. Y. Code Civ. Proc. § 1674. Breen *v.* Lennon, 10 N. Y. App. Div. 36, 41 N. Y. Suppl. 705.

18. Joslyn *v.* Schwend, 89 Minn. 71, 93 N. W. 705; Mills *v.* Bliss, 55 N. Y. 139.

19. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 62 N. Y. App. Div. 538, 71 N. Y. Suppl. 82; Campbell *v.* Metcalf, 20 R. I. 352, 39 Atl. 190; Washington Dredging, etc., Co. *v.* Kinnear, 24 Wash. 405, 64 Pac. 522.

Action ceasing to affect real property.— An action to enforce a mechanic's lien ceases, on the giving of the statutory bond to discharge the lien, to be an action affecting the real property, within N. Y. Code Civ. Proc. § 1670, authorizing the filing of notice of *lis pendens*, and such notice may then be canceled. Breen *v.* Lennon, 10 N. Y. App. Div. 36, 41 N. Y. Suppl. 705.

20. Townsend *v.* Work, 79 Hun (N. Y.) 381, 29 N. Y. Suppl. 791; Wagner *v.* Perry, 51 Hun (N. Y.) 199, 3 N. Y. Suppl. 880; Cohen *v.* Levy, 27 Misc. (N. Y.) 330, 58 N. Y. Suppl. 721, holding that neglect to serve any defendant within sixty days after filing the *lis pendens* is an unreasonable neglect to proceed with the action within the code provision. *Compare* Graham *v.* Chalmers, 2 Ch. Chamb. (U. C.) 53.

In West Virginia, it seems, a motion to set aside will not be granted because of laches in prosecuting the action where no order of dismissal has been granted or a voluntary discontinuance entered. Herring *v.* Bender, 48 W. Va. 498, 37 S. E. 568.

21. Jarvis *v.* American Forcite Powder Mfg. Co., 93 N. Y. App. Div. 234, 87 N. Y. Suppl. 742 (holding that the court has no discretion to refuse the cancellation of the notice where final judgment has been rendered); Pooley *v.* Bosanquet, 7 Ch. D. 541,

has expired,[22] is ground for cancellation, but a mere dismissal of the complaint is not ground,[23] especially where an appeal from the judgment of dismissal is pending.[24] But an order of cancellation is proper where a judgment of dismissal voluntarily entered by plaintiff has been affirmed and the continuance of the notice uncanceled is prejudicial to defendant.[25] The insufficiency of the complaint in stating a cause of action is not ground where it would support a default judgment affecting real estate,[26] nor can the court compel plaintiff to release property covered by the notice so as to enable defendant to mortgage it.[27] Independent of statutory provisions a *lis pendens* will not be canceled merely because an injunction has been granted and the injunction has been dissolved on the deposit in court of a specific sum of money, notwithstanding its continuance may defeat a contract for the sale of the property which defendant could make after the dissolution of the injunction.[28]

2. WHO MAY MOVE. Generally the motion must be made by some person aggrieved by the continuance of the notice on the records.[29] Of course the party who has filed the notice of *lis pendens* may at any time obtain an order canceling it.[30]

3. PROCEDURE. The application to cancel the notice may be by motion instead of a separate suit.[31]

4. HEARING. On a motion to cancel the notice of *lis pendens* the court cannot consider whether the action can be maintained;[32] and if there is any doubt as to the right to file the notice the merits should not be looked into.[33] The court need not have a copy of the notice before it to determine whether the action affects real estate, since the notice is a matter of public record,[34] and because the nature of the action is determinable from an examination of the complaint and not of the notice of pendency.[35] Where the granting of the order is discretionary, it seems that terms may be imposed on granting the motion.[36]

5. SUBSTITUTION OF UNDERTAKING. Under some statutes the court may direct the cancellation of the notice and the substitution therefor of an undertaking or a deposit of money in court.[37]

6. EFFECT. The cancellation of the notice terminates its effect as against those subsequently dealing with the title.[38] When a notice has been canceled, another like notice cannot be filed in the same action so long as the canceling

26 Wkly. Rep. 587; Clutton *v.* Lee, 45 L. J. Ch. 684, 24 Wkly. Rep. 607.

New trial in ejectment.— The statute authorizing a new trial in ejectment on payment of all costs within three years after the rendition of judgment does not preclude the necessity on motion of canceling the *lis pendens* after final judgment has been rendered in such an action. Jarvis *v.* American Forcite Powder Mfg. Co., 93 N. Y. App. Div. 234, 87 N. Y. Suppl. 742.

22. Parks *v.* Murray, 2 N. Y. St. 135.

23. Wilmont *v.* Meserole, 41 N. Y. Super. Ct. 274.

Necessity.— After a dismissal of the action it is not necessary to obtain a cancellation of the *lis pendens*. Dexter *v.* Cosford, 1 Ch. Chamb. (U. C.) 22.

24. St. Regis Paper Co. *v.* Santa Clara Lumber Co., 62 N. Y. App. Div. 538, 71 N. Y. Suppl. 82 [*affirming* 34 Misc. 428, 69 N. Y. Suppl. 904].

25. Lennon *v.* Stiles, 9 N. Y. Suppl. 358.

26. Brainerd *v.* White, 48 N. Y. Super. Ct. 399, 12 Abb. N. Cas. 407.

27. Platt *v.* Matthews, 19 Fed. Cas. No. 11,218*a*.

28. Pratt *v.* Hoag, 5 Duer (N. Y.) 631.

29. Walters *v.* Kraemer, 17 N. Y. Suppl. 659, holding that a person not a party to an action in which a *lis pendens* was filed, who owned the property covered thereby, but conveyed away the same pending the action, has no standing in court to move to discharge the *lis pendens* from record, and consequently no right to an appeal from an order denying such motion.

30. McGillivray *v.* Williams, 4 Ont. L. Rep. 454.

31. Campbell *v.* Metcalf, 20 R. I. 352, 39 Atl. 190.

32. Snandley *v.* Levine, 44 Misc. (N. Y.) 23, 89 N. Y. Suppl. 717.

33. Smadbeck *v.* Law, 106 N. Y. App. Div. 552, 94 N. Y. Suppl. 797.

34. Brox *v.* Riker, 56 N. Y. App. Div. 388, 67 N. Y. Suppl. 772.

35. Brox *v.* Riker, 56 N. Y. App. Div. 388, 67 N. Y. Suppl. 772.

36. Merrick *v.* Morrison, 7 Brit. Col. 442.

37. Bresel *v.* Browning, 109 N. Y. App. Div. 588, 96 N. Y. Suppl. 402.

38. Valentine *v.* Austin, 58 Hun (N. Y.) 398, 12 N. Y. Suppl. 196; McVay *v.* Tousley, (S. D. 1905) 105 N. W. 932.

order remains in force and unreversed.[39] The cancellation of the *lis pendens* by order of court does not protect a *pendente lite* purchaser who thereupon pays over the subject-matter in litigation, where the decree of cancellation is appealed from and reversed.[40]

VIII. NATURE AND FORM OF DECREE AS AFFECTING RULE.

One acquiring interests *pendente lite* in a proceeding which is *lis pendens* is bound by the decree without regard to its form,[41] or whether it is erroneous.[42] It is immaterial that the relief granted in the suit is the result of agreement or compromise,[43] or other than that prayed for in the pleadings,[44] except where the result of collusion between the parties.[45] But where there is an agreed judgment not based on the grounds for relief relied on in the suit, a *pendente lite* purchaser is not bound thereby.[46]

IX. EXTENT OF NOTICE.

A. General Considerations. The pendency of the action, or the filing of a notice of pendency, is notice of every fact contained in the pleadings which is pertinent to the issue,[47] and the contents of exhibits filed and made a part of the pleadings;[48] and also such other facts as those facts necessarily put him upon inquiry for, and as such inquiry, pursued with ordinary diligence and prudence, would bring to his knowledge.[49] On the other hand, a person acquiring interests *pendente lite* is not affected with notice of facts not alleged in the pleadings or of facts not in issue.[50] The extent of the notice is limited to the facts apparent from the pleadings, it would seem, irrespective of the contents of the notice of

39. Cohen *v.* Ratkowsky, 43 N. Y. App. Div. 196, 59 N. Y. Suppl. 344.

40. Wick *v.* Dawson, 48 W. Va. 469, 37 S. E. 639.

41. Nelson *v.* Bevins, 19 Nebr. 715, 28 N. W. 331; Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395, holding that it is immaterial that the judgment was in favor of one who became a party after the *lis pendens* purchase as a successor to the rights of an original party.

42. Norris *v.* Ile, 152 Ill. 190, 38 N. E. 762, 43 Am. St. Rep. 233; McIlwrath *v.* Hollander, 73 Mo. 105, 39 Am. Rep. 484.

43. Partridge *v.* Shepard, 71 Cal. 470, 12 Pac. 480; McIlwrath *v.* Hollander, 73 Mo. 105, 39 Am. Rep. 484; Turner *v.* Babb, 60 Mo. 342. But *compare* Jackson *v.* Tuttle, 9 Cow. (N. Y.) 233 [*reversed* in 6 Wend. 213].

Effect of stipulation by parties to suit as against purchaser *pendente lite* see STIPULATIONS.

44. Turner *v.* Babb, 60 Mo. 342.

45. Wolf *v.* Butler, 81 Tex. 86, 16 S. W. 794. See also Jones *v.* Robb, 35 Tex. Civ. App. 263, 80 S. W. 395.

46. Davis *v.* Willson, 115 Ky. 639, 74 S. W. 696, 25 Ky. L. Rep. 21.

47. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743. See also Fash *v.* Ravesies, 32 Ala. 451.

Illinois.— Davis *v.* Miller Signal Co., 105 Ill. App. 657.

Indiana.— Ray *v.* Roe, 2 Blackf. 258, 18 Am. Dec. 159.

Kansas.— Smith *v.* Kimball, 36 Kan. 474, 13 Pac. 801.

Mississippi.— Allen *v.* Poole, 54 Miss. 323.

Virginia.—Davis *v.* Christian, 15 Gratt. 11.

West Virginia.— Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

See 33 Cent. Dig. tit. "Lis Pendens," § 35.

Illustrations of rule.— Lockwood *v.* Bates, 1 Del. Ch. 435, 12 Am. Dec. 121; Burt *v.* Gamble, 98 Mich. 402, 57 N. W. 261. An allegation that complainant made certain advances to defendant, who used them to pay a note to a third person, which was a lien on the land in controversy, is notice to a purchaser *pendente lite* that complainant claims substitution to the rights of such third person, even without a prayer for such relief. Chaffe *v.* Patterson, 61 Miss. 28. One taking a trust deed of land pending a suit against the grantor is charged with notice of the title asserted, and the particular relief demanded, in such suit. New England L. & T. Co. *v.* Miller, (Tex. Civ. App. 1897) 40 S. W. 646. A purchaser of lands from a plaintiff in ejectment, pending the suit, is chargeable with notice of an outstanding unrecorded deed from the vendor to another, which defendant would be entitled to introduce as a defense under the pleadings. Henderson *v.* Wanamaker, 79 Fed. 736, 25 C. C. A. 181.

Cross bill.—The notice extends, it has been held, to the contents of a cross bill, although it asks affirmative relief, where inseparable from the original bill. S. C. Hall Lumber Co. *v.* Gustin, 54 Mich. 624, 20 N. W. 616. But see *supra*, VI, B, 3, b.

48. Center *v.* Planters', etc., Bank, 22 Ala. 743; Davis *v.* Miller Signal Co., 105 Ill. App. 657; Allen *v.* Poole, 54 Miss. 323.

49. Jones *v.* McNarrin, 68 Me. 334, 28 Am. Rep. 66.

50. *Connecticut.*—Sanford *v.* Hill, 46 Conn. 42.

pendency.[51] The proceeding is not notice of the interests of one not a party where not disclosed by the pleadings,[52] such as the interests of creditors not joined as parties to a creditors' suit and not necessary parties thereto, they having distinct and separate claims of their own;[53] nor of any proceeding other than the pending suit.[54] And a creditors' suit is not *lis pendens* as against purchasers *pendente lite* in favor of creditors thereafter joined as plaintiffs.[55] One not a party and who would not be bound by the result of the litigation cannot avail himself of the benefit of the rule of *lis pendens* as against persons acquiring interests *pendente lite*.[56]

B. Extraterritorial Operation. The *lis pendens* is sometimes said to be notice to all the world.[57] This statement is too broad inasmuch as the general rule is that the notice is confined to the territorial jurisdiction of the court in

Indiana.— Ray *v.* Roe, 2 Blackf. 258, 18 Am. Dec. 159.

Kansas.— St. John *v.* Strauss, 60 Kan. 136, 55 Pac. 845.

Kentucky.— See Leavell *v.* Poore, 91 Ky. 321, 15 S. W. 858, 13 Ky. L. Rep. 51.

New York.— Griffith *v.* Griffith, Hoffm. 153 [*reversed* on other grounds in 9 Paige 315]. See also Green *v.* Slayter, 4 Johns. Ch. 38.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Texas.— New England L. & T. Co. *v.* Miller, (Civ. App. 1897) 40 S. W. 646.

Virginia.— Davis *v.* Christian, 15 Gratt. 11.

United States.— Alexander *v.* Pendleton, 8 Cranch 462, 3 L. ed. 624; Weller *v.* Dreyfus, 26 Fed. 824.

See 33 Cent. Dig. tit. "Lis Pendens," § 35.

Illustrations of rule.— An action to enforce a lien for the purchase-money of land does not settle the title or boundary of the land, and those questions are therefore not *lis pendens*. Beal *v.* Arnold, 1 Ky. L. Rep. 403. The mention, in a bill by a creditor to reach the interests of his debtor as devisee of an estate, of an existing mortgage on that interest, and the making of the mortgagee a party defendant, without putting in issue the validity of the mortgage, or asking any relief in regard to it, does not create such *lis pendens* as to affect the validity of a sale under the mortgage. Cockrill *v.* Maney, 2 Tenn. Ch. 49.

A lis pendens is not notice of every equity which arises in the course of a suit. Shalcross *v.* Dixon, 7 L. J. Ch. 180. A *lis pendens* purchaser is not affected with equities as between the parties to the action unless such equities are material to the pending suit. See Bellamy *v.* Sabine, 1 De G. & J. 566, 3 Jur. N. S. 943, 26 L. J. Ch. 797, 6 Wkly. Rep. 1, 58 Eng. Ch. 564, 44 Eng. Reprint 842.

Rights between co-defendants.—The *lis pendens* does not extend to matters appearing only incidentally, such as rights between co-defendants not affecting the litigation. Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661, 49 S. E. 984. Where a person without notice of a suit purchases from one of defendants property which is the subject of it, he is not in consequence of the pendency of the suit affected by the equitable title of another defendant which appears on the face of the proceedings, but of which he has no notice, and to which it is not necessary for any purposes of the suit to give effect. Virginia Iron, etc., Co. *v.* Roberts, *supra*; Bellamy *v.* Sabine, 1 De G. & J. 566, 3 Jur. N. S. 943, 26 L. J. Ch. 797, 6 Wkly. Rep. 1, 58 Eng. Ch. 564, 44 Eng. Reprint 842.

Subsequent facts or issues.— A purchaser having actual or constructive notice of a pending suit can only be held chargeable with knowledge of the facts of which the record in the suit, as it existed at the time of his purchase, would have informed him. He cannot be charged with knowledge of facts afterward brought into the case. Virginia Iron, etc., Co. *v.* Roberts, 103 Va. 661, 49 S. E. 984; Davis *v.* Christian, 15 Gratt. (Va.) 11; Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843. And see *supra*, VII, D.

51. Griffith *v.* Griffith, Hoffm. (N. Y.) 153 [*reversed* on other grounds in 9 Paige 315]; Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537. And see Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200.

52. Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

53. Jacobs *v.* Smith, 89 Mo. 673, 2 S. W. 13; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

54. Gordon *v.* Ritenour, 87 Mo. 54; Kickbusch *v.* Corwith, 108 Wis. 634, 85 N. W. 148.

55. Jacobs *v.* Smith, 89 Mo. 673, 2 S. W. 13.

But in partition the fact that new parties come in and establish their right to a part of the interest claimed by the original complainants in partition has been held no ground of complaint to persons who purchased part of the premises involved after the service of the subpœna and before the new parties intervened. McClaskey *v.* Barr, 48 Fed. 130.

56. St. John *v.* Strauss, 60 Kan. 136, 55 Pac. 845; Geishaker *v.* Pancoast, 57 N. J. Eq. 60, 40 Atl. 200; Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

57. Faulkner *v.* Vickers, 94 Ga. 531, 21 S. E. 233; Edwards *v.* Banksmith, 35 Ga. 213.

which the proceeding is pending. A suit brought in a federal court operates as notice throughout the district.[58] The pendency of an action in a state court is not constructive notice so as to affect the sale of the subject-matter in another state,[59] especially where the subject of the suit is removed from the state where the action is pending and sold to a *bona fide* purchaser in another state.[60]

X. PERSONS AFFECTED.

A. General Rules. While the doctrine of *lis pendens* is most usually applied to purchasers *pendente lite*,[61] it is not confined to purchasers,[62] but includes encumbrancers.[63] It applies to mortgagees,[64] lienors,[65] lessees,[66] and attachment[67] and

58. Atlas R. Supply Co. *v.* Lake, etc., R. Co., 134 Fed. 503; Stewart *v.* Wheeling, etc., R. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

59. *Louisiana.*— Rhinehart *v.* Doswell, 6 La. Ann. 766.

Mississippi.— Hibernian Bank *v.* Everman, 52 Miss. 500.

Missouri.— Carr *v.* Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328 [*affirming* 15 Mo. App. 551].

New York.— Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616.

United States.— Foulke *v.* Zimmerman, 14 Wall. 113, 20 L. ed. 785.

Compare Chickering *v.* Failes, 26 Ill. 507.

The clause in the federal constitution that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state, does not interfere with the rule that a pending cause in one state is not *lis pendens* in another state. Carr *v.* Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328; Shelton *v.* Johnson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265. *Contra,* Fletcher *v.* Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143.

60. Fletcher *v.* Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143; Shelton *v.* Johnson, 4 Sneed (Tenn.) 672, 70 Am. Dec. 265.

61. Sherburne *v.* Strawn, 52 Kan. 39, 34 Pac. 405 (purchaser of property in the custody of the law); Hosack *v.* Darman, 44 Tex. 154 (purchaser at auction sale); Lyne *v.* Wilson, 1 Rand. (Va.) 114 (patentee of land).

Homestead.— The term "purchaser" includes one who acquires a homestead interest in the property. Roach *v.* Riverside Water Co., 74 Cal. 263, 15 Pac. 776.

Purchaser of timber on land in controversy.— Pending a creditors' suit to subject a tract of land to the satisfaction of a judgment lien a purchaser of the timber standing on the land takes subject to the judgment. Goff *v.* McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64. But see Gardner *v.* Peckham, 13 R. I. 102.

62. Carmichael *v.* Foster, 69 Ga. 372, holding that a bill by beneficiaries to set aside a deed to the executors of land belonging to the estate is notice to persons giving credit to one of the executors of the right of the beneficiaries in the land.

An assignee of a mortgage (Case *v.* Bartholow, 21 Kan. 300; Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 3 Keyes 387, 2 Transcr. App. 281, 3 Abb. Pr. N. S. 235; Zeiter *v.* Bowman, 6 Barb. (N. Y.) 133), or a tax certificate (Hixon *v.* Oneida County, 82 Wis. 515, 52 N. W. 445), pending an action to foreclose, set aside, or enjoin the enforcement thereof, takes subject to the decree entered in the suit. The rule also extends to an assignee of a lease. Cole *v.* Winnipisseogee Lake Cotton, etc., Co., 54 N. H. 242.

63. Masson *v.* Saloy, 12 La. Ann. 776; Steele *v.* Taylor, 1 Minn. 274, holding that one who becomes an encumbrancer during the pendency of an action for specific performance stands in no better position than a voluntary purchaser, and is bound by the decree, although not made a party to the suit.

The assignee of a mortgage is an "encumbrancer." Hovey *v.* Hill, 3 Lans. (N. Y.) 167. See also *supra,* X, A.

64. *Alabama.*—Owen *v.* Kilpatrick, 96 Ala. 421, 11 So. 476.

Arkansas.—Burleson *v.* McDermott, 57 Ark. 229, 21 S. W. 222.

Indiana.— Fee *v.* Moore, 74 Ind. 319.

Louisiana.— Masson *v.* Saloy, 12 La. Ann. 776.

Missouri.— Becker *v.* Stroeher, 167 Mo. 306, 66 S. W. 1083.

Pennsylvania.— Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278.

65. Bell *v.* Gaylord, 6 N. M. 227, 27 Pac. 494 (mechanic's lien); Pacific Mfg. Co. *v.* Brown, 8 Wash. 347, 36 Pac. 273 (mechanic's lien).

66. *Alabama.*— Chapman *v.* Gibbs, 51 Ala. 502.

Illinois.— Yates *v.* Smith, 11 Ill. App. 459.

Indiana.— Krug *v.* Davis, 101 Ind. 75; Bibbler *v.* Walker, 69 Ind. 362.

Massachusetts.— Haven *v.* Adams, 8 Allen 363.

Pennsylvania.— Com. *v.* Dieffenbach, 3 Grant 368.

Texas.— Shultz *v.* Spreain, 1 Tex. App. Civ. Cas. § 916.

See 33 Cent. Dig. tit. "Lis Pendens," §§ 47, 49.

67. Jefferson County Sav. Bank *v.* McDermott, 99 Ala. 79, 10 So. 154; Keith *v.* Losier, 88 Iowa 649, 55 N. W. 952; Puckett *v.* Benjamin, 21 Oreg. 370, 28 Pac. 65; Cotton *v.* Dacey, 61 Fed. 481.

judgment[68] creditors *pendente lite*. So "purchasers" *pendente lite* are not confined to those taking voluntary conveyances,[69] but include purchasers at an execution[70] or judicial[71] sale, provided the action in which the execution was issued or the judicial sale made was commenced before the suit claimed to be *lis pendens*.[72]

B. Parties to Action. Strictly speaking, the doctrine of *lis pendens* has no application as between the parties to the action,[73] although some of the cases treat transfers by one party to another *pendente lite* as within the doctrine of *lis pendens*.[74]

68. Cooney *v.* Coppock, 119 Iowa 486, 93 N. W. 495.

Judgment creditor as encumbrancer.— A creditor who obtains a judgment after the commencement of the action which is claimed to be *lis pendens* is an encumbrancer. Fuller *v.* Scribner, 76 N. Y. 190. See also Hull *v.* Spratt, 1 Hun (N. Y.) 298, 3 Thomps. & C. 718.

69. See cases cited *infra*, this note.

Acquisition of rights by marriage.— The marital rights of a husband who marries a defendant pending the suit are subject to the decree therein, although he is not joined as a party nor his marriage suggested. Koehler *v.* Bernicker, 63 Mo. 368; Lionberger *v.* Baker, 14 Mo. App. 353 [*affirmed* in 88 Mo. 447].

Assignee in bankruptcy or insolvency.— The rule that one who purchases *pendente lite* is bound by the subsequent proceedings is applicable to an assignee in bankruptcy and to the transfer made by a bankruptcy proceeding. Kimberling *v.* Hartly, 1 Fed. 571, 1 McCrary 136. And see Fogg *v.* Providence Lumber Co., 15 R. I. 15, 23 Atl. 31. *Contra*, Williams *v.* Winans, 20 N. J. Eq. 392; Zane *v.* Fink, 18 W. Va. 693.

70. *Alabama.*— Evans *v.* Welch, 63 Ala. 250; Fash *v.* Ravesies, 32 Ala. 451; Harris *v.* Carter, 3 Stew. 233.

California.— Horn *v.* Jones, 28 Cal. 194. But see Purser *v.* Cady, 120 Cal. 214, 52 Pac. 489.

Georgia.— Brinkley *v.* Sanford, 99 Ga. 130, 25 S. E. 32; McLin *v.* Williams, 28 Ga. 482.

Illinois.— Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Ellis *v.* Sisson, 96 Ill. 105; Dickson *v.* Todd, 43 Ill. 504.

Iowa.— Sowden *v.* Craig, 26 Iowa 156, 96 Am. Dec. 125; Bell *v.* Hall, 4 Greene 68.

Kansas.— Smith *v.* Kimball, 36 Kan. 474, 13 Pac. 801.

Kentucky.— Gibbs *v.* Davis, 93 Ky. 466, 20 S. W. 385, 14 Ky. L. Rep. 500; Scott *v.* Coleman, 5 T. B. Mon. 73. But see Martin *v.* Shelton, 2 B. Mon. 63.

Maine.— Crooker *v.* Crooker, 57 Me. 395.

Minnesota.—Hart *v.* Marshall, 4 Minn. 294.

New Jersey.— Ettenborough *v.* Bishop, 26 N. J. Eq. 262.

New York.— Spring *v.* Sandford, 7 Paige 550.

Pennsylvania.— Hersey *v.* Turbett, 27 Pa. St. 418.

Tennessee.— Wagner *v.* Smith, 13 Lea 560; Tharpe *v.* Dunlap, 4 Heisk. 674.

Texas.— Yoe *v.* Milam County Cotton, etc., Alliance, (Civ. App. 1895) 32 S. W. 111.

See 33 Cent. Dig. tit. "Lis Pendens," § 51.

A purchaser at an execution sale is affected by the doctrine of *lis pendens* in the same manner as one purchasing directly from defendant, where the action in which the execution issued was begun subsequent to that in which the title to the property is litigated. Allen *v.* Halliday, 28 Fed. 261.

Right of purchaser under judgment junior to mortgage foreclosed to share in proceeds of foreclosure suit by claiming under senior judgment see Baum *v.* Trantham, 45 S. C. 291, 23 S. E. 54.

Relation back of title of execution purchaser to the date of the levy which was prior to the commencement of foreclosure proceedings see *Ex p.* Mobley, 19 S. C. 337.

71. Randall *v.* Lower, 98 Ind. 255; Rider *v.* Kelso, 53 Iowa 367, 5 N. W. 509; Cooley *v.* Brayton, 16 Iowa 10.

Relation back to date of encumbrance.— It has been held that a purchaser at a mortgage foreclosure sale, pending a suit relating to the mortgaged property, is bound by the judgment, although the mortgage was executed prior to the commencement of the suit (Lacassagne *v.* Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. ed. 368. *Compare* Randall *v.* Duff, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756, 101 Cal. 82, 35 Pac. 440); although there are authorities holding the contrary on the ground that the title of the foreclosure purchaser relates back to the date of the mortgage (Lacassagne *v.* Abraham, 48 La. Ann. 1160, 20 So. 672; Leverich *v.* Toby, 6 La. Ann. 462, 7 La. Ann. 445; Roosevelt *v.* Land, etc., Imp. Co., 108 Wis. 653, 84 N. W. 157; Allen *v.* Case, 13 Wis. 621; Murphy *v.* Farwell, 9 Wis. 102; National Foundry, etc., Works *v.* Oconto City Water Supply Co., 113 Fed. 793, 51 C. C. A. 465. And see Bradley *v.* Luce, 99 Ill. 234; Sprague *v.* White, 73 Iowa 670, 35 N. W. 751; Fenwick *v.* Macey, 2 B. Mon. (Ky.) 469), especially where the purchase is by the mortgagee himself (Coles *v.* Allen, 64 Ala. 98; Andrews *v.* National Foundry, etc., Works, 77 Fed. 774, 23 C. C. A. 454, 36 L. R. A. 153).

72. Shanklin *v.* Franklin L. Ins. Co., 77 Ind. 268; Allen *v.* Halliday, 28 Fed. 261.

73. Murray *v.* Blatchford, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537. See Jewett *v.* Iowa Land Co., 64 Minn. 531, 67 N. W. 639, 58 Am. St. Rep. 555.

74. Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110; McGregor *v.* McGregor, 21 Iowa 441; Craig *v.* Ward, 1 Abb. Dec. (N. Y.) 454, 3 Keyes 387, 2 Transcr.

C. Purchasers Before Action Pending — 1. In General. If a third person acquires rights before the action is pending so as to be *lis pendens*, or before the filing of the notice by plaintiff, where the filing thereof initiates the *lis pendens*, he is not bound by the judgment or decree entered in such suit unless made a party to the action.[75]

2. Conveyance Unrecorded Before Commencement of Lis Pendens. Generally, under the recording acts, where a conveyance is delivered before, but not recorded until after, the commencement of the action, the person taking it is a *pendente lite* purchaser or encumbrancer.[76] By the *lis pendens* statute, the holder of a conveyance unrecorded at the time the notice of the pendency of the action is filed is in some states a purchaser *pendente lite*;[77] but where the statute

App. 281, 3 Abb. Pr. N. S. 235; Goff *v.* McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64; Beckwith *v.* Thompson, 18 W. Va. 103. *Compare* Etzler *v.* Evans, 61 Ind. 56.

The doctrine of lis pendens applies with much greater force where the purchaser is an actual party to the suit, since equity will not permit a defendant in a suit by collusion with his co-defendant to purchase any portion of the subject of litigation and thereby defeat the object of the suit. Goff *v.* McLain, 48 W. Va. 445, 37 S. E. 566, 86 Am. St. Rep. 64.

75. *Iowa.*— Noyes *v.* Crawford, 118 Iowa 15, 91 N. W. 799, 96 Am. St. Rep. 363; Farmers' Nat. Bank *v.* Fletcher, 44 Iowa 252.

Kansas.— Thomas *v.* Smith, 8 Kan. App. 855, 54 Pac. 695.

Kentucky.— Park *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043.

Louisiana.— Lacassagne *v.* Abraham, 48 La. Ann. 1160, 20 So. 672.

Minnesota.—Bennett *v.* Hotchkiss, 20 Minn. 165.

Nebraska.— Snowden *v.* Tyler, 21 Nebr. 199, 31 N. W. 661.

New Hampshire.— Hunt *v.* Haven, 52 N. H. 162.

New Jersey.— Haughwout *v.* Murphy, 22 N. J. Eq. 531.

New York.— People *v.* Connolly, 8 Abb. Pr. 128; Murray *v.* Lyburn, 2 Johns. Ch. 445.

North Dakota.—Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811.

Ohio.— Trimble *v.* Boothby, 14 Ohio 109, 45 Am. Dec. 526; Appleby *v.* Mullaney, 9 Ohio S. & C. Pl. Dec. 765, 7 Ohio N. P. 120.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Tennessee.— Rodgers *v.* Dibrell, 6 Lea 69.

Virginia.— Curtis *v.* Lunn, 6 Munf. 42.

United States.— Farmers' Loan, etc., Co. *v.* Meridian Waterworks Co., 139 Fed. 661.

Canada.— Peck *v.* Sun L. Assur. Co., 11 Brit. Col. 215; Manson *v.* Howison, 4 Brit. Col. 404.

Conditional assignment of mortgage. — Where a mortgagee assigned the mortgage conditionally and the assignment became void by breach of the condition so as to revest it in the mortgagee after the commencement of the suit by the mortgagor against the assignee to have the mortgage canceled as paid, the mortgagee is not a purchaser *pendente lite* so as to be bound by the previous proceedings against his assignee. Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667.

76. *Connecticut.*— Norton *v.* Birge, 35 Conn. 250.

Indiana.— Ferris *v.* Udell, 139 Ind. 579, 38 N. E. 180.

Kansas.—Atchison County *v.* Lips, 69 Kan. 252, 76 Pac. 851.

Maine.— Smith *v.* Hodsdon, 78 Me. 180, 3 Atl. 276.

Ohio.— Irvin *v.* Smith, 17 Ohio 226.

See 33 Cent. Dig. tit. "Lis Pendens," § 31.

Contra.— See Hammond *v.* Paxton, 58 Mich. 393, 25 N. W. 321; Johnson *v.* Robinson, 20 Minn. 170.

Construction of statutes.— A statute providing that every conveyance of real estate which shall not be recorded as provided by statute shall be deemed void as against any subsequent "purchaser" of the same real estate, where his own "conveyance" shall be first duly recorded, does not apply to a person filing a *lis pendens*, he not being a "purchaser" nor the *lis pendens* a "conveyance." Baker *v.* Bartlett, 18 Mont. 446, 45 Pac. 1084, 56 Am. St. Rep. 594. A statute making an unrecorded conveyance void as against a judgment subsequently obtained against the person in whose name the title to such land appears of record does not give such judgment retroactive power in favor of the notice of *lis pendens* filed in the action, the notice not affecting the rights of the holder of the prior unrecorded conveyance until the judgment in the suit. West Missabe Land Co. *v.* Berg, 92 Minn. 2, 99 N. W. 209. An attaching creditor is not a purchaser or encumbrancer, within the statute declaring that every conveyance of real property is void as against a subsequent purchaser or encumbrancer whose conveyance is first duly recorded. Kohn *v.* Lapham, 13 S. D. 78, 82 N. W. 408.

77. Ayrault *v.* Murphy, 54 N. Y. 203; Slattery *v.* Schwannecke, 44 Hun (N. Y.) 75 [*affirmed* in 118 N. Y. 543, 23 N. E. 922]; Kindberg *v.* Freeman, 39 Hun (N. Y.) 466 [*affirmed* in 109 N. Y. 653, 16 N. E. 683]; Kipp *v.* Brandt, 49 How. Pr. (N. Y.) 358; Williams *v.* Kerr, 113 N. C. 306, 18 S. E. 501; Collingwood *v.* Brown, 106 N. C. 362, 10 S. E. 868.

In Wisconsin the statute, in so far as it relates to unrecorded conveyances, has been

provides that a person taking under such conveyance shall be bound "to the same extent as if he were made a party," the claim under the unrecorded instrument is paramount to the claim of plaintiff where he had notice of such unrecorded claim before filing the notice of pendency.[78]

D. Purchasers From Plaintiff. It has been held that the doctrine of *lis pendens* does not apply to a purchaser from plaintiff in the action,[79] and the statement of the rule of *lis pendens* usually refers simply to persons acquiring interests from defendant, although the doctrine has been applied in many instances to persons purchasing or acquiring interests from or through plaintiff without taking notice as to whether the rule refers to persons acquiring interests through plaintiff.[80]

E. Purchasers From Purchasers Pendente Lite. The doctrine of *lis pendens* applies not only to interests acquired during the pendency of the suit from a party thereto, but also to persons purchasing from or acquiring interests under those claiming under parties to the suit pending the litigation.[81]

F. Persons Going Into Possession Under Party. A person going into possession of land pending a suit affecting it,[82] provided he enters under some person who is a party to the suit,[83] such as a person who enters as the tenant of a party to the suit,[84] or a landlord who receives or resumes possession pending eject-

held not to apply in ejectment actions. Webster *v.* Pierce, 108 Wis. 407, 83 N. W. 938.

78. Lamont *v.* Cheshire, 65 N. Y. 30 [*affirming* 6 Lans. 234, and *followed* in Bateman *v.* Backus, 4 Dak. 433, 34 N. W. 66; Bell *v.* Gittere, 14 N. Y. St. 61; Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72; Eldridge *v.* Stenger, 19 Wash. 697, 54 Pac. 541]. *Contra*, Collingwood *v.* Brown, 106 N. C. 362, 10 S. E. 868.

Where the unrecorded claim is subordinate to plaintiff's claim, the fact that he has knowledge thereof before filing the notice of pendency does not affect the statute nor prevent the claimant being a *pendente lite* purchaser or encumbrancer. Payson *v.* Jacobs, 38 Wash. 203, 80 Pac. 429.

79. Taylor *v.* Kelly, 56 N. C. 240.

80. See the following cases:

Kentucky.— Clark *v.* Farrow, 49 Ky. 446, 52 Am. Dec. 552.

Massachusetts.— Borrowscale *v.* Tuttle, 87 Mass. 377.

Minnesota.— Rogers *v.* Holyoke, 14 Minn. 220.

Pennsylvania.— Baird *v.* Corwin, 17 Pa. St. 462.

Texas.— Lee *v.* Salinas, 15 Tex. 495.

England.— Bellamy *v.* Sabine, 1 De G. & J. 566, 3 Jur. N. S. 943, 26 L. J. Ch. 797, 6 Wkly. Rep. 1, 58 Eng. Ch. 564, 44 Eng. Reprint 842.

81. *Alabama.*— Center *v.* Planters', etc., Bank, 22 Ala. 743.

Connecticut.— Norton *v.* Birge, 35 Conn. 250.

Georgia.— Beardsley *v.* Hilson, 94 Ga. 50, 20 S. E. 272.

Indiana.— Bibbler *v.* Walker, 69 Ind. 362.

Iowa.— Tredway *v.* McDonald, 51 Iowa 663, 2 N. W. 567.

Nebraska.— Wright *v.* Smith, 11 Nebr. 341, 7 N. W. 537.

New York.— Zeiter *v.* Bowman, 6 Barb. 133.

United States.— Union Trust Co. *v.* Southern Inland Nav., etc., Co., 130 U. S. 565, 9 S. Ct. 606, 32 L. ed. 1043.

England.— Robertson *v.* Cox, 2 L. J. Ch. 41.

82. Kemerer *v.* Bournes, 53 Iowa 172, 4 N. W. 921 (holding that a person who takes possession of land pending foreclosure of a mortgage thereon cannot subsequently acquire a homestead right in such land as against the purchaser at the foreclosure sale); Scott *v.* McMillen, 1 Litt. (Ky.) 302, 311, 13 Am. Dec. 239.

83. Mayo *v.* Sprout, 45 Cal. 99 (holding that one not entering under a party cannot be removed by a writ of restitution); Graham *v.* Kitchen, 118 Ky. 18, 80 S. W. 464, 25 Ky. L. Rep. 2224; Thompson *v.* Clark, 4 Hun (N. Y.) 164, 6 Thomps. & C. 510; Van Hook *v.* Throckmorton, 8 Paige (N. Y.) 33.

Exception to rule.— It has been held that a person let into possession by the landlord of a defendant in ejectment (Long *v.* Neville, 29 Cal. 131), or a purchaser from the landlord where the action is against the tenant but not against the landlord (Henly *v.* Gore, 4 Dana (Ky.) 133; Jones *v.* Chiles, 2 Dana (Ky.) 25), takes subject to the decree on the theory that while the landlord is not a party he is a privy to the suit because of his relation to the tenant. But in a recent case it was held, where ejectment was brought against a tenant, and the landlord was not joined, and had no notice of the action until after judgment had been rendered in favor of plaintiff, that the landlord was entitled to convey her rights in the land, including the right to have such judgment opened and be permitttcd to defend, to a purchaser, innocent or otherwise. King *v.* Davis, 137 Fed. 222.

84. Chapman *v.* Gibbs, 51 Ala. 502; Yates *v.* Smith, 11 Ill. App. 459; Krug *v.* Davis, 101 Ind. 75; Haven *v.* Adams, 8 Allen (Mass.) 363.

ment against the tenant,[85] is bound by the decree and may be removed by a writ at the instance of the purchaser at the judicial sale.[86]

G. Holders of Antecedently Acquired Equity — 1. GENERAL RULES. A holder of an antecedently acquired equity may, it seems, purchase the legal title *pendente lite* without being bound by the decree.[87]

2. CONVEYANCE AFTER ACTION PENDING. The general rule is that where there is an executory contract of purchase before the action is pending, a purchaser is not a *pendente lite* purchaser so as to be bound by the decree, although he does not receive the deed,[88] or complete the payment of the purchase-price,[89] until the action is pending. At any event, where the antecedently acquired equity is of such a nature or character, or has been acquired in such a manner that plaintiff is charged with notice or knowledge of it, his failure to make the holder thereof a party is at his peril.[90] And this rule applies to a purchaser at a sheriff's sale who purchases before the action is commenced but does not receive his deed until thereafter.[91]

H. Persons Not Claiming Under Party — 1. GENERAL RULES. The pendency of an action has no effect as to third persons asserting rights independent of and adverse to the parties, but is confined to purchasers or others acquiring interests from a party to the action.[92] Where the vendor was not a party at the

85. Smith *v.* Gayle, 58 Ala. 600; Rodgers *v.* Bell, 53 Ga. 94.

86. Chapman *v.* Gibbs, 51 Ala. 502. *Contra*, Oetgen *v.* Ross, 47 Ill. 142, 95 Am. Dec. 468, holding that where a landlord had received no notice as required by statute of the pendency of a suit in ejectment against his tenant, and was chargeable with no fault or laches, and, pending the suit, possession had been surrendered to him, he could not be evicted by a writ of possession issued on the judgment against the tenant.

87. Austin *v.* Lauderdale, (Tex. Civ. App. 1904) 83 S. W. 413, holding that where a vendor's lien notes were received for the price of land sold, a purchaser of one of such notes first maturing was entitled as a holder of an antecedently acquired equity to purchase the legal title from the grantee after the commencement of an action to foreclose the lien of an alleged judgment against the grantee, as against the holders of such lien. And see *supra*, X, A.

88. *Illinois.*— Franklin Sav. Bank *v.* Taylor, 131 Ill. 376, 23 N. E. 397.

Kentucky.— Parks *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043. See also Cox *v.* Story, 80 Ky. 64, 3 Ky. L. Rep. 551.

New York.— Parks *v.* Jackson, 11 Wend. 442, 25 Am. Dec. 656.

Ohio.— Gibler *v.* Trimble, 14 Ohio 323; Trimble *v.* Boothby, 14 Ohio 109, 45 Am. Dec. 526.

Oregon.— Walker *v.* Goldsmith, 14 Oreg. 125, 12 Pac. 537.

Virginia.— Bowyer *v.* Hughart, 9 Gratt. 336.

See 33 Cent. Dig. tit. "Lis Pendens," § 52.

Restatement of rule.—It seems that a deed executed and delivered during the pendency of an action concerning the subject-matter involved in the transfer, in pursuance of a valid contract by which a substantial equity had been antecedently acquired which remains undisclosed to plaintiff, and of which he is not chargeable with notice, either actual or constructive, does not constitute an alienation or a transfer *pendente lite* wherein the judgment or decree finally obtained, if adverse to the title attempted to be conveyed, will bind the grantee. See Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

Public lands.— Where a decree was rendered, at the suit of the United States, canceling a patent to lands, in which suit there was not joined as a party one who, under a prior contract for a deed, took a conveyance of the land pending, but without notice of, the suit, such decree is not binding on him, unless the government had no knowledge of his interest, or had some other valid excuse for not making him a party. Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

89. Parks *v.* Smoot, 105 Ky. 63, 48 S. W. 146, 20 Ky. L. Rep. 1043; Parks *v.* Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656; Clergue *v.* McKay, 6 Ont. L. Rep. 51.

Possession and making of improvements.— A vendee in possession of land under an executory contract of sale, who has made improvements, and pays the purchase-money, pending a suit begun subsequent to his entry on the lands, to avoid the title of his vendor, is not bound by the result of the action against his vendor. Parks *v.* Jackson, 11 Wend. (N. Y.) 442, 25 Am. Dec. 656.

90. Jennings *v.* Kiernan, 35 Oreg. 349, 55 Pac. 443, 56 Pac. 72.

91. *In re* Smith, 4 Nev. 254, 97 Am. Dec. 531; Jackson *v.* Dickenson, 15 Johns. (N. Y.) 309, 8 Am. Dec. 236.

Relation back of sheriff's deed in general see EXECUTION, 17 Cyc. 1350.

92. *Florida.*— Knox *v.* Spratt, 19 Fla. 817.

Illinois.— Scarlett *v.* Gorham, 28 Ill. 319; Douglas *v.* Davies, 23 Ill. App. 618.

Iowa.— Noyes *v.* Crawford, 118 Iowa 15, 91 N. W. 799, 96 Am. St. Rep. 363; Semple *v.* McCrary, 46 Iowa 37; Parsons *v.* Hoyt, 24

time of the purchase during the litigation it is immaterial that he was thereafter made a party.[93]

2. PURCHASERS AT TAX-SALE. A sale for taxes is not subject to the rule that one who purchases during the pendency of a suit is bound by the decree that may be made.[94]

Iowa 154, holding that the rule is not changed by the *lis pendens* statute.

Kentucky.— Graham *v.* Kitchen, 118 Ky. 18, 80 S. W. 464, 25 Ky. L. Rep. 2224; Sutor *v.* Miles, 2 B. Mon. 489; Fenwick *v.* Macey, 2 B. Mon. 469; Macey *v.* Fenwick, 9 Dana 198.

Nebraska.— Merrill *v.* Wright, 65 Nebr. 794, 91 N. W. 697, 101 Am. St. Rep. 645.

New Jersey.— Allen *v.* Morris, 34 N. J. L. 159.

New York.—Jaycox *v.* Smith, 17 N. Y. App. Div. 146, 45 N. Y. Suppl. 299; Becker *v.* Howard, 4 Hun 359, 6 Thomps. & C. 603 [*affirmed* in 66 N. Y. 5]; Stuyvesant *v.* Hone, 1 Sandf. Ch. 419 [*affirmed* in 2 Barb. Ch. 151].

Ohio.— See Porter *v.* Barclay, 18 Ohio St. 546.

Pennsylvania.— Green *v.* Rick, 121 Pa. St. 130, 15 Atl. 497, 6 Am. St. Rep. 760, 2 L. R. A. 48; Raw *v.* Stevenson, 24 Pittsb. Leg. J. 145.

South Carolina.— Shaw *v.* Barksdale, 25 S. C. 204.

Tennessee.— Fitzgerald *v.* Cummings, 1 Lea 232.

Virginia.— French *v.* Loyal Co., 5 Leigh 627.

Washington.— Johnson *v.* Irwin, 16 Wash. 652, 48 Pac. 345.

Wisconsin.— Smith *v.* Pretty, 22 Wis. 655.

See 33 Cent. Dig. tit. "Lis Pendens," § 54.

Compare Hooper *v.* Payne, 94 Ala. 223, 10 So. 431; Williams *v.* Drew, 47 La. Ann. 1622, 18 So. 623.

Statutes.— A *lis pendens* statute providing that "no interest can be acquired by third persons in the subject-matter thereof, as against the plaintiff's title," does not prevent third persons from acquiring rights or interests in no way dependent on or derived through those of persons made parties to the suit. Merrill *v.* Wright, 65 Nebr. 794, 91 N. W. 697, 101 Am. St. Rep. 645.

Legal title in a person not party.— In an action for the recovery of money, in which an attachment is issued, and levied upon an equitable interest of the debtor in real estate, the legal title to which is in a person who is not a party to the action, there is no *lis pendens* against a subsequent purchaser for value, and without knowledge, from the holder of the legal title. Travis *v.* Topeka Supply Co., 42 Kan. 625, 22 Pac. 991.

Lis pendens is not an equivalent of registration under the recording statutes, inasmuch as the registration of an instrument admissible to record is notice thereof to the entire world, while a *lis pendens* is notice only to those who attempt to acquire some interest in the subject-matter of litigation after suit is begun, and from a party thereto. Noyes *v.* Crawford, 118 Iowa 15, 91 N. W. 799, 96 Am. St. Rep. 363.

Vendor as party to suit.—A purchaser who intervenes in attachment suits subsequently brought against his vendor, but who, by consent of all parties, withdraws his intervention before the hearing, is not bound by the judgment, so as to enable plaintiffs to seize and sell the property in the hands of one who buys from the purchaser pending the suits. Rogers *v.* Winds Lumber Co., 72 Ark. 657, 80 S. W. 584.

Action against principal and surety.— Where a creditor's suit is brought against both a principal and his surety, the judgment debtors, solely to enforce the lien against the real estate of the surety, a purchaser of the land of the principal *pendente lite* was not a *lis pendens* purchaser. Woods *v.* Douglass, 52 W. Va. 517, 44 S. E. 234.

Foreclosure suit.— The pendency of a suit in a federal court to foreclose a second mortgage on railroad property, to which neither the trustee under the first mortgage nor the bondholders were parties, although the property was in the custody of the court through its receivers, did not operate by way of *lis pendens* to prevent the acquiring of a lien on the property under the first mortgage by a *bona fide* purchaser of bonds secured thereby; nor will a sale in such suit divest the lien of the bond purchaser, where the decree is expressly without prejudice to the rights of prior lien-holders. Pittsburgh, etc., R. Co. *v.* Long Island L. & T. Co., 172 U. S. 493, 19 S. Ct. 238, 43 L. ed. 528.

Person not named as party in lis pendens notice.— The filing of a notice of the pendency of an action does not affect one who purchases from a person not named as a party in the notice of pendency. Buxton *v.* Sargent, 7 N. D. 503, 75 N. W. 811.

93. Marchbanks *v.* Banks, 44 Ark. 48; Arnold *v.* Smith, 80 Ind. 417; Carr *v.* Callaghan, 3 Litt. (Ky.) 365.

Order allowing amendment as making person party.— Where a person applies to be made a party to a suit in equity, and an order is made that the cause stand over, with liberty to the complainant to amend his bill by adding proper parties, if he should be so advised, such order does not make the applicant a party to the bill, nor make a purchaser from him subsequently to such order, but prior to his being made a party, a purchaser *pendente lite*. Bigelow *v.* Stringfellow, 25 Fla. 366, 5 So. 816.

94. *Arkansas.*— Boykin *v.* Jones, 67 Ark. 571, 57 S. W. 17; Wright *v.* Walker, 30 Ark. 44.

California.— Wilson *v.* California Bank, 121 Cal. 630, 54 Pac. 119.

New York.— Becker *v.* Howard, 4 Hun 359, 6 Thomps. & C. 603 [*reversing* 47 How. Pr. 423].

XI. RIGHTS, LIABILITIES, AND REMEDIES.

A. General Considerations.[95] The statement of the doctrine of *lis pendens*, as generally made, is that a person acquiring rights *pendente lite* in proceedings in which the rule applies is bound by the judgment or decree entered therein. It follows that a person acquiring rights *pendente lite* is not affected by the pendency of a suit relating thereto until the judgment or decree is entered.[96] Furthermore the rule of *lis pendens* does not operate to annul the rights acquired *pendente lite* but merely to render them subservient to the rights of the parties to the action as determined by the judgment or decree.[97] After *lis pendens* is filed in a foreclosure suit a subsequent renter of the mortgaged property is not entitled to a way-going crop.[98]

B. Statute of Limitations. A purchaser *pendente lite* may be said to stand in the shoes of his vendor before judgment and while the action is pending, so that limitations do not run in his favor nor can he acquire title by adverse possession prior to the judgment or decree.[99] But where one does not hold under a party, but is a trespasser *pendente lite*, adverse possession runs in his favor notwithstanding the pendency of the action.[1]

C. Right of Purchaser to Improvements. A purchaser *pendente lite* from a party of property in litigation is not entitled to improvements made by him upon the property as against the successful adverse party,[2] especially where the

Ohio.— Security Trust Co. *v.* Root, 72 Ohio St. 535, 74 N. E. 1077 [*affirming* 25 Ohio Cir. Ct. 614].

Wisconsin.— Bell *v.* Peterson, 105 Wis. 607, 81 N. W. 279; Brown *v.* Cohn, 95 Wis. 90, 69 N. W. 71, 60 Am. St. Rep. 83. *Compare* Coe *v.* Manseau, 62 Wis. 81, 22 N. W. 155.

See 33 Cent. Dig. tit. "Lis Pendens," § 57.

Contra.— See Crum *v.* Cotting, 22 Iowa 411; Walter *v.* Curry, 7 Ky. L. Rep. 219; Hawes *v.* Howland, 136 Mass. 267.

95. Necessity of joining or substituting purchasers pendente lite see ABATEMENT AND REVIVAL, 1 Cyc. 116 *et seq.*; EQUITY, 16 Cyc. 200; PARTIES.

Right of purchaser pendente lite to intervene see, generally, PARTIES. And see EJECTMENT, 15 Cyc. 88; MECHANICS' LIENS; MORTGAGES; SPECIFIC PERFORMANCE; VENDOR AND PURCHASER.

Right of purchaser pendente lite to appeal see APPEAL AND ERROR, 2 Cyc. 637.

Transfer of plaintiff's title as abating action see ABATEMENT AND REVIVAL, 1 Cyc. 116 *et seq.*

Right of pendente lite purchaser to oppose motion to dismiss appeal see APPEAL AND ERROR, 3 Cyc. 192 note 99.

96. Davis *v.* Christian, 15 Gratt. (Va.) 11.

97. St. John *v.* Strauss, 60 Kan. 136, 55 Pac. 845; Stone *v.* Connelly, 1 Metc. (Ky.) 652, 71 Am. Dec. 499.

Right to surplus.— If the purchaser's title be destroyed by the result of the creditors' bill, he may yet claim the surplus, if any, realized on the sale over what is necessary to discharge the vendor's debts. Cromwell *v.* Clay, 1 Dana (Ky.) 578, 25 Am. Dec. 165.

Costs.— If one purchases after decree of foreclosure he takes title subject to the burden of all costs incurred by the mortgagee in maintaining or enforcing his decree. McPherson *v.* Housel, 13 N. J. Eq. 299. And see COSTS, 11 Cyc. 90 *et seq.*

98. Tittle *v.* Kennedy, 71 S. C. 1, 50 S. E. 544. See also LANDLORD AND TENANT, 24 Cyc. 1068 *et seq.*

99. Harrington *v.* Slade, 22 Barb. (N. Y.) 161; Sidbury *v.* Ware, 65 Tex. 252; Lynch *v.* Andrews, 25 W. Va. 751; Walden *v.* Bodley, 9 How. (U. S.) 34, 13 L. ed. 36. See Blake *v.* Heyward, Bailey Eq. (S. C.) 208. *Compare* Vigo *v.* Carlon, 48 La. Ann. 665, 19 So. 682.

Adverse possession.— A purchaser pending a suit to enforce a judgment lien does not hold adversely to plaintiff in such suit. Parker *v.* Clarkson, 39 W. Va. 184, 19 S. E. 431; Lynch *v.* Andrews, 25 W. Va. 751.

The commencement of a suit in one state for property subsequently removed to another state and sold is an interruption of the running of limitations in the latter state if the action has not been abandoned. Rhinehart *v.* Doswell, 6 La. Ann. 766.

Conveyance to co-party.— No title can be acquired by prescription by a deed by a defendant to a co-defendant pending a suit for partition, since the bringing of the suit suspends the running of the statute of limitations. Christy *v.* Spring Valley Water Works, 97 Cal. 21, 31 Pac. 1110.

1. Sutor *v.* Miles, 2 B. Mon. (Ky.) 489.

2. Henderson *v.* Pickett, 4 T. B. Mon. (Ky.) 54, 16 Am. Dec. 130; Shand *v.* Hanley, 71 N. Y. 319; Patterson *v.* Brown, 32 N. Y. 81; McDonald *v.* Miller, 90 Tex. 309, 39 S. W. 89; Harle *v.* Langdon, 60 Tex. 555; Davis *v.* John V. Farwell Co., (Tex. Civ. App. 1899) 49 S. W. 656. *Compare* North Hudson County R. Co. *v.* Booraem, 28 N. J. Eq. 450 [*reversing* 27 N. J. Eq. 371]. See also EJECTMENT, 15 Cyc. 221; IMPROVEMENTS, 22 Cyc. 1.

purchase was without actual knowledge of the purchaser that the property was at that time the subject of a suit affecting it.[3]

D. Relief Awarded Against Purchaser.[4] Unless relief against a purchaser *pendente lite* has been waived,[5] it seems that the judgment may grant relief against the person acquiring rights *pendente lite*,[6] especially where the interests were acquired with actual notice of the litigation.[7] A purchaser *pendente lite* or a person going into possession *pendente lite* under a party to the suit has been held liable to the successful plaintiff in ejectment for mesne profits,[8] and for rents and profits in a creditors' suit.[9] So, in a foreclosure suit, a purchaser of the mortgaged premises *pendente lite* has been held liable to the purchaser at a foreclosure sale for any waste committed while in possession,[10] as well as for the mesne profits.[11] In at least one state, however, it is held that no personal judgment can be rendered against the person acquiring his interest *pendente lite* without actual notice, nor is he personally bound by the decree.[12] A purchaser *pendente lite* may be punished for contempt in disobeying the final decree,[13] but not upon the application of the representatives of a deceased party where the action has not been revived.[14]

XII. LIS PENDENS AS LIEN.

While the bringing of a suit *in rem*,[15] such as a creditors' suit[16] or a suit in which an attachment is levied,[17] or a foreclosure suit,[18] may create a lien upon the property involved, pending the suit, the doctrine of *lis pendens* does not *per se* create a lien upon the property in litigation.[19]

3. Cable *v.* Ellis, 120 Ill. 136, 11 N. E. 188; Hurn *v.* Keller, 79 Va. 415.

4. **Writ of assistance** against purchaser pending suit see ASSISTANCE, WRIT OF, 4 Cyc. 292, 293.

Liability for costs see COSTS, 11 Cyc. 93.

5. Smith *v.* Browne, 9 Leigh (Va.) 293, holding that where plaintiff in an action for the recovery of slaves and their profits asked and received a decree against defendant for the value of a slave sold to a third person *pendente lite*, plaintiff thereby waived his claim for the slave against the purchaser *pendente lite*.

6. Wilson *v.* Tobin, 5 J. J. Marsh. (Ky.) 218 (holding that where, pending a creditor's bill, a note due the debtor was paid by the maker, the creditor was entitled to judgment against the maker for the amount of the note); Moffatt *v.* Shepard, 2 Pinn. (Wis.) 66, 52 Am. Dec. 141.

Requiring conveyance.—Equity will, at the instance of the party to whom land is decreed, set aside a deed taken *pendente lite*, and require the legal title to be conveyed to her. Powell *v.* Campbell, 20 Nev. 232, 20 Pac. 156, 19 Am. St. Rep. 350, 2 L. R. A. 615.

Election between remedies.— Plaintiff, in a suit against both a trustee who had sold the trust estate, pending a suit for breach of his trust, and assigned the securities taken for the purchase-money, and the purchaser of the security, was ordered to signify his election whether to proceed for the land or the securities, and to discontinue as to the other party. Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441.

Writ of assistance against person acquiring rights *pendente lite* see ASSISTANCE, WRIT OF, 4 Cyc. 293.

7. Heatley *v.* Finster, 2 Johns. Ch. (N. Y.) 158; Murray *v.* Finster, 2 Johns. Ch. (N. Y.) 155.

8. See EJECTMENT, 15 Cyc. 204.

9. Simpson *v.* Dugger, 88 Va. 963, 14 S. E. 760, holding that plaintiff could not be required to proceed against an insolvent vendee of the *pendente lite* purchaser, the insolvent not being a party to the suit. *Contra*, Carr *v.* Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328; Jacobs *v.* Smith, 89 Mo. 673, 2 S. W. 13.

As dependent on fraud.— *Pendente lite* purchasers occupying the estate in suit are chargeable with rents and profits when the record of the suit charges their grantor with fraud in fact in the acquisition of the property. Stout *v.* Philippi Mfg., etc., Co., 41 W. Va. 339, 23 S. E. 571, 56 Am. St. Rep. 843.

10. Mitchell *v.* Amador Canal, etc., Co., 75 Cal. 464, 17 Pac. 246.

11. Mitchell *v.* Amador Canal, etc., Co., 75 Cal. 464, 17 Pac. 246.

12. Carr *v.* Lewis Coal Co., 96 Mo. 149, 8 S. W. 907, 9 Am. St. Rep. 328; Jacobs *v.* Smith, 89 Mo. 673, 2 S. W. 13; McLaurine *v.* Monroe, 30 Mo. 462.

13. Justice *v.* McBroom, 1 Lea (Tenn.) 555.

14. Justice *v.* McBroom, 1 Lea (Tenn.) 555.

15. Gibbons *v.* Germantown, etc., Turnpike Road Co., 14 Bush (Ky.) 389; Parsons *v.* Meyburg, 1 Duv. (Ky.) 206.

16. See CREDITORS' SUITS, 12 Cyc. 61.

17. See Bowlby *v.* De Witt, 47 W. Va. 323, 34 S. E. 919.

18. McCauley *v.* Rogers, 10 Ill. App. 559.

19. Hayes *v.* Nourse, 114 N. Y. 595, 22 N. E. 40, 11 Am. St. Rep. 700; Bull *v.*

XIII. PLEADING.[20]

Where one relies on the filing of a notice of the pendency of the action he must specifically set it forth in his pleading.[21] If the purchaser *pendente lite* is, after the commencement of an action for specific performance, joined as a party defendant, the amended complaint need not allege a demand upon the purchaser for the conveyance.[22]

XIV. EVIDENCE.

No presumption will be indulged in favor of the doctrine of *lis pendens*,[23] and hence a person claiming the benefit of the rule has the burden of clearly bringing his case within it.[24] The presumption arising from the recitals in the decree that the petition in an equity suit described the land embraced in the decree, so as to be *lis pendens*, is not overcome by extrinsic evidence not based upon independent recollection of the subject.[25] The rules relating to the admissibility of documentary evidence in general,[26] and the admissibility of secondary evidence,[27] govern the admissibility of evidence to prove the filing of the notice of *lis pendens*.[28] Where service of summons is by publication, the newspaper in which the publication is printed, when aided by the production of the order and extrinsic proof that the paper was regularly issued as contemplated by it, is competent evidence to show the pendency of the suit.[29]

LIST. As a noun, a roll or catalogue;[1] a simple series of names, etc., in brief form.[2] As a verb,[3] applied to taxation, to make a list of the property assessed, with the description and valuation of the same.[4] (List: Of Jurors, see JURIES. Of Property For Taxation, see TAXATION. Of Voters, see ELECTIONS. Subscription, see CORPORATIONS; SUBSCRIPTIONS. See also INVENTORY.)

LISTERS. Persons whose duty it is to arrange a list of taxpayers in a given district.[5] (See LIST; and, generally, TAXATION.)

LITERÆ PATENTES REGIS NON ERUNT VACUÆ. A maxim meaning "Letters-patent of the king shall not be void."[6]

Hutchens, 32 Beav. 615, 9 Jur. N. S. 954, 8 L. T. Rep. N. S. 716, 11 Wkly. Rep. 866, 55 Eng. Reprint 242; Manson *v.* Howison, 4 Brit. Col. 404. See also Hodges *v.* Holeman, 1 Dana (Ky.) 50; Burnham *v.* Smith, 82 Mo. App. 35; Simon *v.* Vanderveer, 155 N. Y. 377, 49 N. E. 1043, 63 Am. St. Rep. 683. But see Hines *v.* Duncan, 79 Ala. 112, 58 Am. Rep. 580 (holding that a *lis pendens* creates a specific lien if successfully prosecuted to a final decree, the decree taking effect by relation from the day of the service of the summons to answer); Graham *v.* Chalmers, 2 Ch. Chamb. (U. C.) 53.

20. Pleading pendency of another action as defense see PLEADING.

21. Todd *v.* Outlaw, 79 N. C. 235.

Filing plea of lis pendens as appearance see APPEARANCES, 3 Cyc. 506 note 29.

22. Kirkham *v.* Moore, 30 Ind. App. 549, 65 N. E. 1042.

23. See *supra*, I, D.

24. Leitch *v.* Wells, 48 N. Y. 585. See also Clarkson *v.* Morgan, 6 B. Mon. (Ky.) 441.

25. Citizens' Sav. Bank *v.* Stewart, 90 Iowa 467, 57 N. W. 957.

26. See EVIDENCE, 17 Cyc. 296 *et seq.*

27. See EVIDENCE, 17 Cyc. 479 *et seq.*

28. See Carberry *v.* Benson, 18 Wis. 489, where it is said that the best evidence of filing the notice of *lis pendens* is a copy of the notice certified by the register of deeds.

Seal.— A copy of the notice of *lis pendens*, with the register's certificate attached in the usual form, except that it is without seal, and states that he has no official seal, was held to constitute sufficient proof of filing the notice. Farmers', etc., Bank *v.* Eldred, 20 Wis. 196.

29. Doe *v.* Magee, 8 Ala. 570. See also NOTICE.

1. Homer *v.* Cilley, 14 N. H. 85, 100.

2. Webster Dict. [*cited* in Chiles *v.* State, 45 Ark. 143, 147].

"Inventory and list" see Steinlein *v.* Halstead, 52 Wis. 289, 291, 8 N. W. 881.

"List of creditors" see Gage *v.* Bell, 124 Fed. 371, 372.

3. Compared with and distinguished from "assess" see Beresheim *v.* Arnd, 117 Iowa 83, 90, 90 N. W. 506.

4. Thompson *v.* Davidson, 15 Minn. 412.

5. Taylor *v.* Moore, 63 Vt. 60, 70, 21 Atl. 919.

6. Bouvier L. Dict.

Applied in Shrewsbury *v.* Rutland, 1 Bulstr. 4, 6.

LITERAL INTERPRETATION. A term applied where we collect the intention from the words used only.[7] (See CONSTRUCTION; INTERPRETATION.)

LITERARY. Pertaining to polite learning; connected with the study or use of books and writings.[8] (See COPYRIGHT; LITERARY PROPERTY.)

7. Rutherford 2 Inst. [*cited* in Tallman *v.* Tallman, 3 Misc. (N. Y.) 465, 478, 23 N. Y. Suppl. 734].

As applied to a statute, it means the finding out of its true sense by making the statute its own expositor. Sutherland St. Constr. §§ 236, 237 [*citing* Leiber, and *quoted* in State *v.* Manson, 105 Tenn. 232, 238, 58 S. W. 319].

8. Black L. Dict.

"The word 'literary' having no legal signification, is to be taken in its ordinary and usual meaning. We speak of literary persons as learned, erudite; of literary property, as the productions of ripe scholars, or, at least, of professional writers; of literary institutions, as those where the positive sciences are taught, or persons eminent for learning associate, for purposes connected with their professions. This we think the popular meaning of the word; and that it would not be properly used as descriptive of a school for the instruction of youth." Indianapolis *v.* McLean, 8 Ind. 328, 332.

"'Literary' corporation" see Milwaukee Protestant Home *v.* Becher, 87 Wis. 409, 413, 58 N. W. 774; Reg. *v.* Jones, 8 Q. B. 719, 725, 728, 55 E. C. L. 719.

"Literary institution" see Indianapolis *v.* McLean, 8 Ind. 328, 332; New England Theosophical Corp. *v.* Board of Assessors, 172 Mass. 60, 62, 63, 51 N. E. 456, 42 L. R. A. 281.

"Literary or scientific institution" see Manchester *v.* McAdam, [1896] A. C. 500, 501, 65 L. J. Q. B. 672, 75 L. T. Rep. N. S. 229. See also Musgrave *v.* Dundee, [1898] W. N. 127.

"Literary purposes" see Kendrick *v.* Farquhar, 8 Ohio 189, 197.

"Literary society" see People *v.* Gunn, 96 N. Y. 317, 321; Carpenter *v.* Historical Soc., 2 Dem. Surr. (N. Y.) 574, 576. See also Reg. *v.* Jones, 8 Q. B. 719, 727, 55 E. C. L. 719.

LITERARY PROPERTY

By Edmund A. Whitman

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I. DEFINITION.

Literary property or common-law copyright is the exclusive right of the owner to possess, use, and dispose of intellectual productions.[1]

II. NATURE AND ESSENTIALS.

A. In General. Literary property differs in no respect from any other form of personal property in the protection the common law throws about it.[2] By the common law authors were protected in the exclusive use of their literary or intellectual productions and in the enjoyment of the pecuniary benefits thereof. The right still exists, independent of all statutes concerning copyrights.[3]

B. Originality — 1. In General. It is generally laid down that literary matter in order to be the subject of property must be original with the author,[4] but by this is meant nothing more than that it must represent independent mental labor on the part of the author,[5] who will be protected in the exclusive control of the fruits of such labors, even though it may not be of sufficient merit to come within the purview of the copyright statutes.[6]

2. Dramatic Compositions. A dramatic composition need be original only in its arrangement or construction in order to be private property.[7]

1. Drone Copyr. 97. "Literary property may be described as the right which entitles an author and his assigns to all the use and profit of his composition to which no independent right is, through any act or omission on his or their part, vested in another person." Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644. And see Palmer *v.* De Witt, 2 Sweeny (N. Y.) 530. "The property in an author or composer of any work, whether of literature, art, or science, such work being unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed." Prince Albert *v.* Strange, 1 Hall & T. 1, 21, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 19, 41 Eng. Reprint 1171.

2. Property in a manuscript is not distinguishable from any other personal property, but is governed by the same rules of transfer and succession and has the benefits of all remedies of other property as far as applicable. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480.

3. Ockenholdt *v.* Frohman, 60 Ill. App. 300; Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 423; Potter *v.* McPherson, 21 Hun (N. Y.) 559; Palmer *v.* De Witt, 2 Sweeny (N. Y.) 530, 40 How. Pr. 293 [*affirmed* in 47 N. Y. 532, 7 Am. Rep. 480]; French *v.* Maguire, 55 How. Pr. (N. Y.) 471; Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10; Hoyt *v.* Mackenzie, 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178; Isaacs *v.* Daly, 6 Leg. Gaz. (N. Y.) 175; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408; Little *v.* Hall, 18 How. (U. S.) 165, 15 L. ed. 328; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; Werckmeister *v.* Springer Lith. Co., 63 Fed. 808; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,082, 4 McLean 300; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537; Pulte *v.* Derby, 20 Fed. Cas. No. 11,465, 5 McLean 328; Stowe *v.* Thomas, 23 Fed. Cas. No. 13,514, 2 Wall. Jr. 547; Southey *v.* Sherwood, 2 Meriv. 435, 35 Eng. Reprint 1006; Tonson *v.* Collins, 1 W. Bl. 301.

4. Trade Auxiliary Co. *v.* Middlesborough, etc., Protection Assoc., 40 Ch. D. 425, 58 L. J. Ch. 293, 60 L. T. Rep. N. S. 681, 37 Wkly. Rep. 337; Bell *v.* Whitehead, 3 Jur. 68, 8 L. J. Ch. 141; Wilkins *v.* Aikin, 17 Ves. Jr. 422, 11 Rev. Rep. 118, 34 Eng. Reprint 163. "The matter must be original and possess some possible utility. The originality, however, may be of the lowest order, and the utility barely perceptible." Brightley *v.* Littleton, 37 Fed. 103, 104.

5. "It is not necessary that a work of this kind [comic opera] should be entirely original, or original in anything except its arrangement or construction, to be private property." Aronson *v.* Baker, 43 N. J. Eq. 365, 370, 12 Atl. 177. Thus a translation of a work in a foreign language is private property. Wyatt *v.* Barnard, 3 Ves. & B. 77, 13 Rev. Rep. 141, 35 Eng. Reprint 408. "The compilation of a street directory, the reports of proceedings in courts of law, and the tables of the times of running of certain railway trains have been held to bring the producers within the word 'author'; and yet in one sense no original matter can be found in such publications." Walter *v.* Lane, [1900] A. C. 539, 554, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95.

6. Grigsby *v.* Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509; Woolsey *v.* Judd, 4 Duer (N. Y.) 386, 11 How. Pr. 49; Prince Albert *v.* Strange, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293.

7. Aronson *v.* Baker, 43 N. J. Eq. 365, 12 Atl. 177; Aronson *v.* Fleckenstein, 28 Fed.

C. Innocence. It is also said that literary matter must be innocent in order to be the subject of property,[8] but the decision upon which this doctrine is based has been severely criticized.[9]

D. Exclusive Control. The most important element of literary or intellectual property is the right of exclusive control and the right to prevent its publication by others. The owner has the right of private circulation among such persons as he may designate and may impose such restrictions as he pleases upon their use of it.[10] He is entitled to all profit from the use of it, so long as that use does not amount to a general publication.[11]

III. SUBJECT-MATTER.

A. In General. Literary property in the narrow sense is not limited to the exact form in which the author has expressed his ideas in his manuscript. The property is in the intellectual conception, and the author may claim it as his own in whatever form of words it can be identified as his production.[12] Strictly speaking the term should be "intellectual property," inasmuch as it is used to include products of the intellect not literary in form, such as the creations of the

75; Shook *v.* Rankin, 21 Fed. Cas. No. 12,804, 6 Biss. 477; Chatterton *v.* Cave, 3 App. Cas. 483, 47 L. J. C. P. 545, 38 L. T. Rep. N. S. 397, 26 Wkly. Rep. 498; Toole *v.* Young, L. R. 9 Q. B. 523, 43 L. J. Q. B. 170, 30 L. T. Rep. N. S. 599, 22 Wkly. Rep. 694; Tree *v.* Bowkett, 74 L. T. Rep. N. S. 77. In Hatton *v.* Kean, 7 C. B. N. S. 268, 6 Jur. N. S. 226, 29 L. J. C. P. 20, 1 L. T. Rep. N. S. 10, 8 Wkly. Rep. 7, 97 E. C. L. 268, plaintiff adapted a play from Shakespeare and was protected in his adaptation.

Two independent dramatizations from the same novel may be made, although they are necessarily very similar in form and construction. Tompkins *v.* Duff, 13 N. Y. Daily Reg. 421, 493.

8. Shook *v.* Daly, 49 How. Pr. (N. Y.) 366 (drama); Broder *v.* Zeno Mauvais Music Co., 88 Fed. 74; Martinetti *v.* Maguire, 16 Fed. Cas. No. 9,173, 1 Abb. 356, Deady 216; Du Bost *v.* Beresford, 2 Campb. 511; Hime *v.* Dale, 2 Campb. 27 note; Southey *v.* Sherwood, 2 Meriv. 435, 35 Eng. Reprint 1006; Walcot *v.* Walker, 7 Ves. Jr. 1, 32 Eng. Reprint 1.

9. See Curtis Copyr. 157 *et seq.*; Drone Copyr. 113; 10 Lives Lord Chancellors 257 (per Lord Campbell); Shortt Law Lit. & Art (2d ed.) 4–6; 2 Story Eq. Jur. (12th ed.) § 938. It is submitted that all that the judges in the cases cited in the preceding note really mean is that the interposition of equity cannot be asked to protect property which is harmful to the public.

10. In communicating the contents of his manuscript, the author may prescribe limitations and impose such restrictions as he pleases upon the extent of its use, thereby making a limited publication, which will not abridge his rights further than necessarily results from the nature and extent of such limited use. Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537.

11. Where one engaged in furnishing "foreign financial news" furnished news quotations by stock tickers to special subscribers for their private use, there was no publication or dedication thereof to the public. Kiernan *v.* Manhattan Quotation Tel. Co., 50 How. Pr. (N. Y.) 194. The issuance to subscribers, without count as to number, of a book of credit ratings and the financial standing of persons and firms who are engaged in a particular line of business, upon a stipulation that the same is merely loaned to the subscriber, and not sold to him, and that, if it is found in any other hands than those of persons who are entitled to use it by permission of the publishers, the latter may take possession of it and annul all rights of the subscriber, is a publication. Ladd *v.* Oxnard, 75 Fed. 703.

12. "As the owner of material possessions may assert his rights wherever or in whatever disguise his property is found, so the author of a literary composition may claim it as his own in whatever language or form of words it can be identified as his production. The true test of piracy, then, is not whether a composition is copied in the same language or the exact words of the original, but whether in substance it is reproduced; not whether the whole but a material part, is taken. . . . The controlling question is whether the substance of the work is taken without authority." Maxwell *v.* Goodwin, 93 Fed. 665, 666. "It is the intellectual production of the author which the copyright protects and not the particular form which such production ultimately takes." Holmes *v.* Hurst, 174 U. S. 82, 89, 19 S. Ct. 606, 43 L. ed. 904 [*affirming* 80 Fed. 514, 25 C. C. A. 610 (*affirming* 76 Fed. 757)]. See also Drone Copyr. c. 1.

Literary composition.— An original result of mental production, developed in a series of written or printed words, arranged for an intelligible purpose is an orderly succession of expressive combinations. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157, where it is said: "The person by whom the composition is primarily thus developed is its author. An author and his assigns are included in the meaning of the general phrase 'literary proprietor.'"

artist, sculptor, and architect.[13] Such property is not in ideas in the abstract,[18] but only in the concrete form in which they may be embodied, as in language, paintings, and sculpture.[14] It is independent of the paper upon which it is written,[15] and indeed need not be reduced to writing at all so long as it can be readily identified.[16] Its basis is the mental effort necessary to its production and the right of everyone to the fruits of his own labor.[17] There is then a common-law property in facts and information collected and utilized by skill, labor, and expense.[18]

B. Letters. The right of the writer of a letter to restrain its publication rests on his right of property in the ideas expressed.[19] It is not necessary that

13. "Whether the product of such [mental] labor consists in literary, dramatic or musical compositions, or designs for works of ornament or utility, planned by the mind of an artist, they are equally inviolable while they remain unpublished, and their owner may exercise the same supreme dominion over them that the owner of any other species of property may exercise over it." Aronson *v.* Baker, 43 N. J. Eq. 365, 367, 12 Atl. 177. There is no property in an idea in the abstract; thus where the complainant conceived and put in operation a scheme for collecting, classifying, and putting in convenient form information in respect to the financial standing of business men in towns or counties, with a key thereto; the same being intended for the use of business men in the same locality or district, and defendants, by means of the same method of collecting, classifying, etc., obtained by their own original efforts like information in respect to the standing of parties in a different county, it was held that this was not an infringement of complainant's common-law right of property in his own compilation, in case the mere private and limited circulation thereof should be considered as not amounting to a publication. Burnell *v.* Chown, 69 Fed. 993.

14. Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10; Werckmeister *v.* Springer Lith. Co., 63 Fed. 808; Stowe *v.* Thomas, 23 Fed. Cas. No. 13,514, 2 Wall. Jr. 547; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81, 10 Eng. Reprint 681.

15. Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544. "The property of the author in the copy is equally an incorporeal right to print a set of intellectual ideas of modes of thinking, communicated in a set of words or sentences, and modes of expression. It is equally detached from the manuscript, or any other physical existence whatsoever." Millar *v.* Taylor, 4 Burr. 2303, 2396.

16. Literary composition as it lies in the author's mind before it is substantiated by reducing it into writing has the essential requisites to make it the subject of property, and while it thus lies dormant in the author's mind it is absolutely in the power of the proprietor. He alone is entitled to the profits communicating or making it public. Tonson *v.* Collins, 1 W. Bl. 301. But see Abernathy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313.

A speech, address, or lecture not committed to writing is the property of the author. Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95. And see Abernethy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313.

17. Walter *v.* Lane, [1900] A. C. 539, 69 L. J. Ch. 699, 83 L. T. Rep. N. S. 289, 49 Wkly. Rep. 95. "Every new and innocent product of mental labor, which has been embodied in writing, or some other material form, while it remains unpublished, is the exclusive property of its author, entitled to the same protection which the law throws around the possession and enjoyment of other kinds of property." Aronson *v.* Baker, 43 N. J. Eq. 365, 367, 12 Atl. 177.

18. Emerson *v.* Davies, 8 Fed. Cas. No. 4,436, 3 Story 768. A mercantile company, inventing and preparing a secret code or system of letters, figures, and characters showing the cost and selling price of its wares and merchandise for use between itself and its traveling salesmen has a property therein which equity will protect. Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

Market quotations.— Matter gathered and transmitted by a telegraph company, and printed on a tape in the offices of its customers, consisting of a notation of current events, such as market quotations, and having only a transient value due solely to prompt transmission and distribution is not literary property but essentially a commercial product and will be protected by the law as the latter rather than as the former. National Tel. News Co. *v.* Western Union Tel. Co., 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805. And see Chicago Bd. of Trade *v.* Cella Commission Co., 145 Fed. 28; Illinois Commission Co. *v.* Cleveland Tel. Co., 119 Fed. 301, 56 C. C. A. 205.

19. Denis *v.* Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712; Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617; Gee *v.* Pritchard, 2 Swanst. 402, 19 Rev. Rep. 87, 36 Eng. Reprint 670. "The author's right to publication or non-publication being deemed his property, and only property, the protection of that property is the only adjudged ground of injunction against publication without his consent. Courts of equity have not yet assumed jurisdiction to enforce duties merely moral, or to prevent a breach of epistolary confidence or exposure of an epistolary secret in no way affecting any interest in property — however inconsistent such publication may be with honor or pure ethics.

letters should have any literary quality or any originality of ideas.[20] Familiar and business letters are as much property as more finished compositions intended for the press.[21]

C. Musical Compositions. The owner of an unpublished musical composition has the exclusive right to grant rights of performance, public or private. This may be of material value with songs, orchestral music and operas.[22]

D. Works of Art. The artist, whether sculptor, painter, designer, draftsman, or photographer, has the exclusive control of his work until publication.[23]

IV. PERSONS ENTITLED TO PROPERTY.

A. Authorship and Ownership. Authorship is not necessary to ownership of literary property. The manuscript of a person employed to compose it belongs to the employer.[24] The owner of an unpublished manuscript may restrain an

But the sole ground yet recognized for injunction is the protection of property." Grigsby *v.* Breckinridge, 2 Bush (Ky.) 480, 486, 92 Am. Dec. 509.

The injunction should run against publication, and not "from informing any person or persons of their or any of their contents." Labouchere *v.* Hess, 77 L. T. Rep. N. S. 559. But see Denis *v.* Leclerc, 1 Mart. (La.) 297, 5 Am. Dec. 712.

20. The author of any letter or letters, and his representatives, whether they are literary compositions, or familiar letters, or letters of business, possess the sole and exclusive copyright therein. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100. "I think that it will be extremely difficult to say where the distinction is to be found between private letters of one nature, and private letters of another nature." Gee *v.* Pritchard, 2 Swanst. 402, 426, 19 Rev. Rep. 87, 36 Eng. Reprint 670, per Lord Eldon.

The contrary doctrine which was laid down in the early cases in New York of Wetmore *v.* Scovell, 3 Edw. (N. Y.) 515, and Hoyt *v.* Mackenzie, 3 Barb. Ch. (N. Y.) 320, 49 Am. Dec. 178, may be considered as overruled by Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 386, 11 How. Pr. 49, where the court says: "We can perceive no reason for doubting that the exclusive property of an author rests exactly upon the same ground as that of a manufacturer or artist — a painting may be a wretched daub—a statue, a lamentable abortion; yet, should either be purloined by an enemy with the view to secure profits to himself, or to disgrace the artist by its public exhibition, a court of equity would renounce its principles should it refuse to protect the owner, the unfortunate artist, by a peremptory injunction." See also U. S. Rev. St. (1878) § 4967, amended by Act Mar. 3, 1891, § 9, 26 U. S. St. at L. 1109 [U. S. Comp. St. (1901) p. 3416], forbidding the unauthorized publication of "any manuscript whatever."

21. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100.

22. Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81, 10 Eng. Reprint 681.

23. Prince Albert *v.* Strange, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293, 1 Hall & T. 1, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 25, 41 Eng. Reprint 1171; Turner *v.* Robinson, 10 Ir. Ch. 121 [*affirmed* in 10 Ir. Ch. 510]. An artist has the exclusive right to reproduce copies of a painting of his own creation. Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10. And see Oertel *v.* Jacoby, 44 How. Pr. (N. Y.) 179; Werckmeister *v.* Springer Lith. Co., 63 Fed. 808.

24. Colliery Engineer Co. *v.* United Correspondence Schools Co., 94 Fed. 152; Mallory *v.* Mackaye, 86 Fed. 122 [*reversed* on other grounds in 92 Fed. 749, 34 C. C. A. 653]; Mutual Advertising Co. *v.* Refo, 76 Fed. 961; Schumacher *v.* Schwencke, 25 Fed. 466, 23 Blatchf. 373; De Witt *v.* Brooks, 7 Fed. Cas. No. 3,851; Heine *v.* Appleton, 11 Fed. Cas. No. 6,324, 4 Blatchf. 125; Lawrence *v.* Dana, 14 Fed. Cas. No. 8,136, 4 Cliff. 1; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; Pierpont *v.* Fowle, 19 Fed. Cas. No. 11,152, 2 Woodb. & M. 23; Siebert's Case, 7 Op. Atty. Gen. 656; Grace *v.* Newman, L. R. 19 Eq. 623, 44 L. J. Ch. 298, 23 Wkly. Rep. 517; Shepherd *v.* Conquest, 17 C. B. 427, 2 Jur. N. S. 236, 25 L. J. C. P. 127, 4 Wkly. Rep. 283, 84 E. C. L. 427; Sweet *v.* Benning, 16 C. B. 459, 1 Jur. N. S. 543, 24 L. J. C. P. 175, 3 Wkly. Rep. 519, 81 E. C. L. 459; Hatton *v.* Kean, 7 C. B. N. S. 268, 6 Jur. N. S. 226, 29 L. J. C. P. 20, 1 L. T. Rep. N. S. 10, 8 Wkly. Rep. 7, 97 E. C. L. 268 (drama); Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118, 1 Wkly. Rep. 345, 45 Eng. Ch. 118, 68 Eng. Reprint 1211; Brown *v.* Cooke, 11 Jur. 77, 16 L. J. Ch. 140; Barfield *v.* Nicholson, 2 L. J. Ch. O. S. 90, 2 Sim. & St. 1, 25 Rev. Rep. 144, 1 Eng. Ch. 1, 57 Eng. Reprint 245; Stannard *v.* Harrison, 24 L. T. Rep. N. S. 570, 19 Wkly. Rep. 811; Hazlitt *v.* Templeman, 13 L. T. Rep. N. S. 593. But see Atwill *v.* Ferrett, 2 Fed. Cas. No. 640, 2 Blatchf. 39; Walter *v.* Howe, 17 Ch. D. 708, 50 L. J. Ch. 621, 44 L. T. Rep. N. S. 727, 29 Wkly. Rep. 776; Trade Auxiliary Co. *v.* Jackson, 4 T. L. R. 130.

Where a draftsman, while in the service of the commonwealth, collected materials from which he published a map, the results of his labor thereon belonged to the commonwealth. Com. *v.* Desilver, 3 Phila. (Pa.) 31.

One who agrees to write a play to be acted

unlicensed publication, and his right is not affected by the fact that he is not the author of it.[25]

B. Letters. The recipient has a qualified property in the paper on which the letter is written. He may keep it or destroy it, and he can recover possession of it when lost, even from the writer,[26] but he cannot publish it or communicate it to others without the consent of the writer.[27] A newspaper, however, is entitled to publish letters sent to it impliedly for publication,[28] and the property in business letters written by an employee to his employer belongs to the latter[29] as well as letters by a public officer to his government.[30] It has been held that the recipient of a letter may publish it against the will of the writer where it is necessary to protect his rights or to defend his character against the writer,[31] but

at the theater of another person, receiving a share of the profits as compensation, does not thereby confer on any one the legal or equitable title to the play. Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

Additions to a play made by an actor while in the employ of the owner, in adapting the play to the performance by him, belong to the owner. Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644, 4 Phila. (Pa.) 157.

A college, in the absence of a special agreement, has no right to manuscript prepared for publication by a professor, as the result of his literary labors, although he is aided in his work by the facilities afforded him by his position as professor. Peters *v.* Borst, 9 N. Y. Suppl. 789, 24 Abb. N. Cas. 1.

25. Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Webb *v.* Forrester [*cited* in Macklin *v.* Richardson, Ambl. 695, 696, 27 Eng. Reprint 451]. In 1723 the Earl of Clarendon delivered to one Gwynne the original manuscript of a history written by his father. In 1758 the administrator of Gwynne sold it to defendant for publication, but the representatives of the Earl restrained such publication. Queensberry *v.* Shebbeare, 2 Eden 329, 28 Eng. Reprint 924 [*cited* in Millar *v.* Taylor, 4 Burr. 2303, 2330].

26. Grigsby *v.* Breckinridge, 2 Bush (Ky.) 480, 92 Am. Dec. 509; Dock *v.* Dock, 180 Pa. St. 14, 36 Atl. 411, 57 Am. St. Rep. 617; Werckmeister *v.* American Lith. Co., 142 Fed. 827; Pope *v.* Curl, 2 Atk. 342, 26 Eng. Reprint 608. See Labouchere *v.* Hess, 77 L. T. Rep. N. S. 559.

It is necessary to distinguish between the property in the paper and the copyright. The former is in the receiver, the latter is in the writer. Oliver *v.* Oliver, 11 C. B. N. S. 139, 8 Jur. N. S. 512, 31 L. J. C. P. 4, 5 L. T. Rep. N. S. 287, 10 Wkly. Rep. 18, 103 E. C. L. 139.

Letters are personal property, and possession of them is *prima facie* evidence of title and ownership. Tefft *v.* Marsh, 1 W. Va. 38. A letter written by Gen. Washington to the authorities of the city of New York in response to a municipal address remains the property of the city, in the absence of evidence showing how it came into the possession of a third person, whose executor sold it at public auction, the city claiming title thereto as against the purchaser. New York *v.* Lent, 51 Barb. (N. Y.) 19.

27. Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. 49; Werckmeister *v.* American Lith. Co., 142 Fed. 827; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100; Pope *v.* Curl, 2 Atk. 342, 26 Eng. Reprint 608.

The receiver of private letters has not such an interest therein that he can sell them without the writer's consent. Rice *v.* Williams, 32 Fed. 437. Where the writer declined to receive his letters, telling the receiver to keep them, the latter was thereby given no right to publish them. Thompson *v.* Stanhope, Ambl. 737, 27 Eng. Reprint 476.

28. Hogg *v.* Kirby, 8 Ves. Jr. 215, 7 Rev. Rep. 30, 32 Eng. Reprint 336; Sweetman *v.* Bentley, [1871] W. N. 162.

The writer may revoke this permission before publication. Davis *v.* Miller, 17 Dec. Ct. Sess. (2d s.) 1166.

29. Howard *v.* Gunn, 32 Beav. 462, 55 Eng. Reprint 181.

30. "But this is an exception in favor of the government, and stands upon principles allied to, or nearly similar to, the rights of private individuals, to whom letters are addressed by their agents, to use them, and publish them, upon fit and justifiable occasions. But assuming the right of the government to publish such official letters and papers, under its own sanction, and for public progress, I am not prepared to admit, that any private persons have a right to publish the same letters and papers, without the sanction of the government, for their own private profit and advantage." Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100, 113.

31. Perceval *v.* Phipps, 2 Ves. & B. 19, 13 Rev. Rep. 1, 35 Eng. Reprint 225, per Plumer, V. C. See Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. 49; Widdemer *v.* Hubbard, 19 Phila. (Pa.) 263. And see *dictum* by Story, J., in Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100. But see Gee *v.* Pritchard, 2 Swanst. 402, 19 Rev. Rep. 87, 36 Eng. Reprint 670, where letters written by plaintiff to defendant had been returned by him with a declaration that he did not consider himself entitled to retain them, and the publication of copies taken before the return, without the knowledge of plaintiff, was restrained by injunction, although represented by defendant as necessary for the vindication of his character.

the doctrine has been severely criticized in this country and it is doubtful if it would now be followed;[32] but these considerations do not apply to, or prevent, the production of letters in court as evidence.[33] The property in letters passes to the personal representative of the receiver, but they are not assets in his hands.[34] The personal representative of the writer may prevent publication.[35]

C. Lectures. The property in unpublished lectures or addresses is in the author and he may prevent unauthorized publication.[36]

D. Photographs. Where a photographer takes a portrait for a sitter, it is the implied agreement that the property in the portrait is in the sitter, and neither the photographer nor a stranger has the right to publish or make copies without permission from the sitter.[37]

E. Architects. Plans and architectural drawings belong to the architect and he has the exclusive right to license construction from them.[38]

F. Rights of Joint Owners. Literary property may be held in joint ownership, and each owner will be protected in his property.[39]

G. Alien Owners. Literary property will be protected in the hands of an alien.[40]

32. Palin *v.* Gathercole, 1 Coll. 565, 28 Eng. Ch. 565, 63 Eng. Reprint 545. And see Drone Copyr. 138, citing Judge Story's view as expressed in his work on equity jurisprudence.

33. Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. 49; Barrett *v.* Fish, 72 Vt. 18, 47 Atl. 174, 82 Am. St. Rep. 914, 51 L. R. A. 754; Hopkinson *v.* Burghley, L. R. 2 Ch. 447, 36 L. J. Ch. 504, 15 Wkly. Rep. 543; Palin *v.* Gathercole, 1 Coll. 565, 28 Eng. Ch. 565, 63 Eng. Reprint 545. See 2 Story Eq. Jur. (12th ed.) § 948 *et seq.*

34. Eyre *v.* Higbee, 35 Barb. (N. Y.) 502, 22 How. Pr. 198.

35. Lytton *v.* Devey, 54 L. J. Ch. 293, 52 L. T. Rep. N. S. 121. The children of the poet Burns prevented the publication of his manuscript letters. Cadell *v.* Stewart [*cited* in 1 Bell Comm. 116 note]. See Granard *v.* Dunkin, 1 Ball & B. 207, 12 Rev. Rep. 18, where the executors of the recipient of letters secured an injunction against persons who had gotten possession of them from publishing them.

36. Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 426; New Jersey State Dental Soc. *v.* Dentacura Co., 57 N. J. Eq. 593, 41 Atl. 672 [*affirmed* in 58 N. J. Eq. 582, 43 Atl. 1098]; Abernethy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313, where Lord Eldon bases his decision on the doctrine of implied contract; but see the criticism of this view in 18 Ir. L. T. Rep. 412, 19 L. J. 450. In Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,082, 4 McLean 300, 304, the court says: "Popular lectures may be taken down verbatim, and the person taking them down has a right to their use. He may in this way perpetuate the instruction he receives, but he may not print them. The lecturer designed to instruct his hearers, and not the public at large. Any use, therefore, of the lectures, which would operate injuriously to the lecturer, would be a fraud upon him for which the law would give him redress."

37. Moore *v.* Rugg, 44 Minn. 28, 46 N. W. 141, 20 Am. St. Rep. 539, 9 L. R. A. 58; Pollard *v.* Photographic Co., 40 Ch. D. 345, 58 L. J. Ch. 251, 60 L. T. Rep. N. S. 418, 37 Wkly. Rep. 266.

Where, however, the photograph is taken at the instance of the photographer and for his benefit, the sitter loses control of the disposition of the pictures. Press Pub. Co. *v.* Falk, 59 Fed. 324; Nottage *v.* Jackson, 11 Q. B. D. 627, 52 L. J. Q. B. 760, 49 L. T. Rep. N. S. 339, 32 Wkly. Rep. 106.

38. Gendell *v.* Orr, 13 Phila. (Pa.) 191, holding that an architect has a common-law right of property in his design of a novel and artistic porch before its publication by application to a building which he has erected.

Where an architect prepares plans and specifications for a building for a client for a certain compensation, such plans, if valuable as property after their publication, belong to the client, and not to the architect. Wright *v.* Eisle, 86 N. Y. App. Div. 356, 83 N. Y. Suppl. 887. See also BUILDERS AND ARCHITECTS, 6 Cyc. 33.

39. Levy *v.* Rutley, L. R. 6 C. P. 523, 40 L. J. C. P. 244, 24 L. T. Rep. N. S. 621, 19 Wkly. Rep. 976. To protect a person in the possession of an unpublished manuscript, the law does not require that it shall be the exclusive work of one individual. It may be that of one or many, acting in coöperation, and, whichever may be the case, the right is substantially the same, and the person is equally entitled to the protection of courts of justice. The same reasons that will induce security to the individual will extend it to all whose joint action may contribute to the result finally attained. French *v.* Maguire, 55 How. Pr. (N. Y.) 471. Either may bring suit to protect the property right in the manuscript. Aronson *v.* Fleckenstein, 28 Fed. 75. Either may publish the work at his own expense without liability to account to the other. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273.

40. Crowe *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208; Keene *v.* Wheatley, 14 Fed. Cas.

V. DEDICATION AND PUBLICATION.

A. In General. The common law, however, protects literary property in the hands of the owner only so long as it remains unpublished.[41] Publication is regarded by the law as an abandonment or dedication to the public of all rights in such property,[42] and after publication the author or owner has no longer any exclusive right to the control of his production, except as may be conferred upon him by copyright statutes.[43] It matters not where publication takes place,[44] but publication in order to deprive its author of his rights must be with his consent

No. 7,644; Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 867, 1 Jur. N. S. 615, 24 L. J. Exch. 81, 10 Eng. Reprint 681, per Erle, J. "The courts of the State are open to an alien friend pursuing his property, and seeking to recover it from a wrongdoer; and there is nothing in any positive law, or in the policy of the government, which would close the door against the same alien friend seeking protection for the fruits of his mental labor, by restraining publication against his wishes." Palmer *v.* De Witt, 47 N. Y. 532, 539, 7 Am. Rep. 480. As far as manuscripts and rights therein are concerned, an author and his assignees, whether citizens or aliens, are equally protected by the law, and these rights cannot be impaired or infringed, either directly or indirectly, and, if necessary, will be protected by an injunction. Shook *v.* Daly, 49 How. Pr. (N. Y.) 366.

Property rights of aliens in general see ALIENS, 2 Cyc. 81.

41. Banker *v.* Caldwell, 3 Minn. 94. The author may keep it for his own exclusive use or enjoyment if he sees fit. The public has no greater right to it, however useful it may be, than it would have to any other part of his personal property. But if he once publishes it his property right to it is gone and every one may use it. Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 155 N. Y. 241, 49 N. E. 872, 63 Am. St. Rep. 666, 41 L. R. A. 846. The right of an owner of manuscript to publish it or not is an incorporeal property right, belonging to him personally. Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544.

The burden of showing that a manuscript has been dedicated to the public is on the party so asserting. Dentacure Co. *v.* New Jersey State Dental Soc., 58 N. J. Eq. 582, 43 Atl. 1098 [*affirming* 57 N. J. Eq. 593, 41 Atl. 672].

What is publication see COPYRIGHT, 9 Cyc. 920, 926.

42. Carter *v.* Bailey, 64 Me. 458, 18 Am. Rep. 273; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480 [*affirming* 2 Sweeny 530, 40 How. Pr. 293]; Palmer *v.* De Witt, 7 Rob. (N. Y.) 530, 5 Abb. Pr. N. S. 130, 36 How. Pr. 222; French *v.* Maguire, 55 How. Pr. (N. Y.) 471; Wheaton *v.* Peters, 8 Pet. (U. S.) 591, 8 L. ed. 1055; Mark Twain Case, 14 Fed. 728, 11 Biss. 459; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,082, 4 McLean 300; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537. And see Millar *v.* Taylor, 4 Burr. 2303.

Exhibiting a manuscript or composition to others is not deemed sufficient to constitute the publication which will deprive the author of his exclusive right. French *v.* Maguire, 55 How. Pr. (N. Y.) 471.

43. Kipling *v.* Fenno, 106 Fed. 692. "If such publication be made in print of a work of which no copyright has been obtained, it is a complete dedication thereof for all purposes to the public. If of a work of which a copyright has been obtained, it is so dedicated, subject to the protection afforded by the laws of copyright, the author accepting the statutory rights thereby given in place of his common-law rights." Tompkins *v.* Halleck, 133 Mass. 32, 36, 43 Am. Rep. 480. The author of a literary work has by common law the exclusive right to the first publication of it; but he has no exclusive right to multiply copies or to control the subsequent use of such rights by others, such right being a creation of statute. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480. Where the owners of a system of copybooks, containing instructions on penmanship, publish such system for use by the public, there is a dedication of the system, giving third persons liberty to publish and sell the book. Potter *v.* McPherson, 21 Hun (N. Y.) 559.

There is no coexisting common-law protection during the period of statutory protection. Reade *v.* Conquest, 9 C. B. N. S. 755, 7 Jur. N. S. 265, 30 L. J. C. P. 209, 3 L. T. Rep. N. S. 888, 9 Wkly. Rep. 434, 99 E. C. L. 755.

The use of a nom de plume by an author will not give him such property in his literary productions as will defeat the rule that a publication thereof is a dedication to the public. Mark Twain Case, 14 Fed. 728, 11 Biss. 459.

44. Larrowe-Loisette *v.* O'Loughlin, 88 Fed. 896; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34. See Goldmark *v.* Kreling, 35 Fed. 661, 13 Sawy. 310.

Publication abroad.— A German dramatic author sold the acting rights in a drama to an American manager and subsequently authorized the publication in print of the drama in German and it was held that the drama had thereby become common property in America. Daly *v.* Walrath, 40 N. Y. App. Div. 220, 57 N. Y. Suppl. 1125. The com-

or permission. An unauthorized publication has no effect upon such rights.[45] It is necessary therefore in all cases to determine whether literary property has been published in order to determine whether protection therefor should be sought under the common law, or under copyright statutes. It does not cease to be literary property because protection must be sought under the statute.[46]

B. Lectures. It is sometimes difficult to determine what constitutes publication in the case of lectures, but the test is whether the mode of delivery is such as to indicate that the author intends to retain the right of repetition for personal profit.[47] Where the lecturer earns his livelihood as a lecturer, either on the platform or in the class-room, the intent to reserve the use of his property is clear and he will be protected therein.[48] In England a lecture is protected from reproduction by statute, the lecturer being required at each delivery to give written notice to two justices of the peace in the vicinity of his intent to reserve his rights.[49]

C. Sermons and Public Addresses. Where a person preaches a sermon or delivers an address in a church or other building the doors of which are thrown open to the public, the mode and manner of delivery negative any limitation on the publication.[50]

D. Musical Compositions. The authorized sale of copies of a musical composition constitutes a dedication.[51] It has been the subject of much discussion as to what is dedicated to the public by a publication of a vocal or piano score of an orchestral work. It has been held that such dedication must be confined to the publication as it is and that the right to perform an orchestration of the music remains with the composer;[52] but the better opinion is that such a publication dedicates to the public all that can naturally be drawn from it by the public, and

poser Wagner sold the publication rights of Parsifal to A, reserving the acting rights to himself. A published the drama and music in book form in Germany without securing copyright in the United States and it was held that such publication prevented the author from enforcing his exclusive claim to the acting right. Wagner *v.* Conried, 125 Fed. 798.

45. Jewelers' Mercantile Agency *v.* Jewelers' Weekly Pub. Co., 155 N. Y. 241, 49 N. E. 872, 63 Am. St. Rep. 666, 41 L. R. A. 846, holding that if, while the books are thus stored away, a copy should be obtained surreptitiously and printed, or should the author loan one of the books to a friend to read and return, and in that manner a copy of the book should fall into the hands of someone who should attempt to print it, the author would be entitled to restrain publication, for the reason that he had not undertaken to put within the reach of the general public such thoughts or facts as he may have exposed or stated in the book. See Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Crowe *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208; Kenrick *v.* Danube Collieries, etc., Co., 39 Wkly. Rep. 473.

If a licensee violates his contract and publishes the work, there is a publication which destroys the common-law right. Daly *v.* Walrath, 40 N. Y. App. Div. 220, 57 N. Y. Suppl. 1125.

46. The fruits of the author's mental labor are still the subject of the protection. Newton *v.* Cowe, 4 Bing. 234, 5 L. J. C. P. O. S. 159, 12 Moore C. P. 457, 29 Rev. Rep. 541, 13 E. C. L. 482.

47. Where a lecture is delivered to an audience admitted only by ticket, whether the lecture has been committed to writing or not, the audience may take the fullest notes for its own benefit, but cannot publish them for profit, and it makes no difference that the publication is in shorthand characters which can be read only by stenographers. Nicols *v.* Pitman, 26 Ch. D. 374.

48. Where a student is admitted to a college lecture on the payment of a prescribed fee, the delivery of the lecture is not regarded as a communication to the public at large. Caird *v.* Sime, 12 App. Cas. 326, 57 L. J. P. C. 2, 57 L. T. Rep. N. S. 634, 36 Wkly. Rep. 199.

49. St. 5 & 6 Wm. IV, c. 65.

50. Caird *v.* Sime, 12 App. Cas. 326, 57 L. J. P. C. 2, 57 L. T. Rep. N. S. 634, 36 Wkly. Rep. 199. But see Pope *v.* Curl, 2 Atk. 342, 26 Eng. Reprint 608, where Lord Hardwicke speaks of objections to the publication of sermons after the death of the author "which the author may never intend should be published, but are collected from loose papers, and brought out after his death." See also the reference to sermons by Lord Eldon in Abernethy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313.

51. Wall *v.* Gordon, 12 Abb. Pr. N. S. (N. Y.) 349.

52. The composer Gounod published in print the words and vocal parts with pianoforte accompaniment, of his oratorio "The Redemption" and then sold to plaintiffs the rights in his oratorio for the United States.

after such publication any one may write an original orchestration based on the published score.[53]

E. Dramatic Compositions — 1. IN GENERAL. In the United States a public representation of a dramatic composition is not regarded as such a publication as dedicates the literary property therein to the public,[54] such dedication being made only by a general and authorized publication in print.[55] This was originally so in England but is now otherwise by statute.[56]

2. REPRODUCTION FROM MEMORY. It was at one time thought that a public representation of a play was such a publication as would entitle a hearer to reproduce it from memory,[57] but this doctrine has been repudiated in this country;[58] and it is now held that the owner's right to prevent repetition or publication in print by others is absolute and unqualified.[59]

F. Works of Art. Public exhibition of a work of art is a publication.[60]

Defendant advertised a performance "with New Orchestration from indications in the published Piano-forte Score." It was held that the orchestration and the right to perform it were not dedicated to the public by the publication of the pianoforte score. Thomas *v.* Lennon, 14 Fed. 849. See Goldmark *v.* Kreling, 35 Fed. 661, 13 Sawy. 310; Carte *v.* Evans, 27 Fed. 861; Boosey *v.* Fairlie, 7 Ch. D. 301 [*affirmed* in 4 App. Cas. 711, 48 L. J. Ch. 697, 41 L. T. Rep. N. S. 73, 28 Wkly. Rep. 4].

53. Mikado, etc., Case, 25 Fed. 183, 23 Blatchf. 347, holding that by the publication of the whole opera except the instrumental parts, the authors abandoned the entire dramatic property in their work to the public. The right to represent it as a dramatic composition thereby became public property, although they still retain the sole right of multiplying copies of their orchestral score. Where the non-resident alien authors of the comic opera "Iolanthe" sanctioned the publication in the United States of the libretto and vocal score, with a piano accompaniment, and kept the orchestration in manuscript, a person who had independently arranged a new orchestration, using for that purpose only the published vocal and pianoforte scores, could not be enjoined from publicly performing the opera with the new orchestration. Carte *v.* Ford, 15 Fed. 439. Publication of the songs and vocal score of an operetta, with the name of the operetta, does not make such name public property. Aronson *v.* Fleckenstein, 28 Fed. 75.

54. Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480; Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 426; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480 [*affirming* 2 Sweeny 530, 40 How. Pr. 293]; French *v.* Maguire, 55 How. Pr. (N. Y.) 471; Gilbert *v.* Bacher, 9 Wkly. Notes Cas. (Pa.) 14; Aronson *v.* Fleckenstein, 28 Fed. 75; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Carillo *v.* Shook, 5 Fed. Cas. No. 2,407; Crowe *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208; Roberts *v.* Myers, 20 Fed. Cas. No. 11,906; Shook *v.* Rankin, 20 Fed. Cas. No. 12,804, 6 Biss. 477. But see Keene *v.* Clarke, 5 Rob. (N. Y.) 38; Carte *v.* Ford, 15 Fed. 439; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644.

55. Shook *v.* Nervendorf, 11 N. Y. Daily Reg. 985; Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

56. Boucicault *v.* Chatterton, 5 Ch. D. 267, 46 L. J. Ch. 305, 35 L. T. Rep. N. S. 745, 25 Wkly. Rep. 287; Macklin *v.* Richardson, Ambl. 694, 27 Eng. Reprint 451; Boucicault *v.* Delafield, 1 Hem. & M. 597, 9 Jur. N. S. 1282, 33 L. J. Ch. 38, 9 L. T. Rep. N. S. 709, 15 Wkly. Rep. 101, 71 Eng. Reprint 261; Morris *v.* Kelly, 1 Jac. & W. 481, 21 Rev. Rep. 216, 37 Eng. Reprint 451; Coleman *v.* Wathen, 5 T. R. 245. And see St. 3 & 4 Wm. IV, c. 15; 5 & 6 Vict. c. 45, §§ 20–24.

The representation of a play on a stage in England, there by statute made a publication, cannot affect the rights of the author or his assignees at common law in the United States. Crowe *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208.

57. Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 426; Keene *v.* Clarke, 5 Rob. (N. Y.) 38; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644; Boosey *v.* Fairlie, 7 Ch. D. 301.

58. Tompkins *v.* Halleck, 133 Mass. 32, 43 Am. Rep. 480; Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480 [*affirming* 2 Sweeny 530, 40 How. Pr. 293]; Fleron *v.* Lackaye, 14 N. Y. Suppl. 292; French *v.* Maguire, 55 How. Pr. (N. Y.) 471; French *v.* Conelly, 1 N. Y. Wkly. Dig. 197; Crowne *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208; Shook *v.* Rankin, 21 Fed. Cas. No. 12,805.

59. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408.

After a publication, however, interpolations and additions to a play, technically called "gags," are not entitled to any greater degree of protection than the body of the play to which they belong. Keene *v.* Clarke, 5 Rob. (N. Y.) 38.

60. Werckmeister *v.* American Lith. Co., 117 Fed. 360 (holding that an exhibition of a painting at the Royal Academy of Arts where the public are admitted on payment of a fee is a publication); Pierce, etc., Mfg. Co. *v.* Werckmeister, 72 Fed. 54, 18 C. C. A. 431. But it has been doubted whether such an exhibition is a publication where the public

G. Architecture. Deposit of plans with an inspector of buildings or other similar public officer or construction of a building from such plans is regarded as a publication of them, and the exclusive control is thereafter gone.[61]

VI. TRANSFER OF RIGHTS.

A. Assignment and Devolution. Literary property passes by oral assignment,[62] and such assignment may be either absolute or qualified in any degree.[63] It passes to the personal representatives on the decease of the owner and may be devised by will.[64] A transfer of the manuscript does not convey the literary

are forbidden to take copies. Werckmeister *v.* Springer Lith. Co., 63 Fed. 808; Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445; Turner *v.* Robinson, 10 Ir. Ch. 121 [*affirmed* in 10 Ir. Ch. 510]. And this doubt seems to be well founded. See Drone Copyr. 286. See also Blank *v.* Footman, 39 Ch. D. 678, 57 L. J. Ch. 909, 59 L. T. Rep. N. S. 507, 36 Wkly. Rep. 921; Dalglish *v.* Jarvie, 2 Hall & T. 437, 47 Eng. Reprint 1754, 14 Jur. 945, 20 L. J. Ch. 475, 2 Macn. & G. 231, 48 Eng. Ch. 231, 42 Eng. Reprint 89; Mayall *v.* Higbey, 1 H. & C. 148, 8 Jur. N. S. 622, 31 L. J. Exch. 329, 6 L. T. Rep. N. S. 362, 10 Wkly. Rep. 631.

Sending miniature copies of engravings to dealers for the purpose of soliciting orders does not constitute a publication. Falk *v.* Gast Lith., etc., Co., 54 Fed. 890, 4 C. C. A. 648.

61. Wright *v.* Eisle, 86 N. Y. App. Div. 356, 83 N. Y. Suppl. 887. Where a draftsman made several copies of a manuscript map, one of which he placed in a public office, and others of which he sold to third persons, there was a dedication sufficient to terminate his common-law rights therein. Rees *v.* Peltzer, 75 Ill. 475.

Where an architect erected a porch of novel and artistic design in front of his house, facing the public highway, there was sufficient publication or dedication of the design to allow reproduction thereof by a third person. Gendell *v.* Orr, 36 Leg. Int. (Pa.) 412.

Right to plans as against client see BUILDERS AND ARCHITECTS, 6 Cyc. 33.

62. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Tams *v.* Witmark, 30 Misc. (N. Y.) 293, 63 N. Y. Suppl. 721; Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10 (painting); Callaghan *v.* Myers, 128 U. S. 617, 9 S. Ct. 177, 32 L. ed. 547; Black *v.* Henry G. Allen Co., 42 Fed. 618, 9 L. R. A. 433; Carte *v.* Evans, 27 Fed. 861; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Lawrence *v.* Dana, 15 Fed. Cas. No. 8,136, 4 Cliff. 1; Little *v.* Gould, 15 Fed. Cas. No. 8,394, 2 Blatchf. 165; Gocks *v.* Purday, 5 C. B. 860, 12 Jur. 677, 17 L. J. C. P. 273, 57 E. C. L. 860; Turner *v.* Robinson, 10 Ir. Ch. 121 [*affirmed* in 10 Ir. Ch. 510]. See Power *v.* Walker, 4 Campb. 8, 3 Moore & S. 7, 15 Rev. Rep. 378.

Analogy to other personal property.— Personal property is transferable by sale and delivery, and there is no distinction in that respect, independent of statute, between literary property and property of any other description. Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537.

Allegation of transfer.— Where plaintiffs alleged that they had acquired title to the unpublished drama for the purpose of producing and exhibiting it, and that in violation of their rights defendant was about to produce it in a theater controlled by him, setting forth the agreement or contract of sale, it was held that the fact that the sale relied upon in support of the action was made might properly be assumed from the agreement, which appeared to have been so authenticated as to establish the fact of its genuineness. French *v.* Maguire, 55 How. Pr. (N. Y.) 471.

63. Keene *v.* Kimball, 16 Gray (Mass.) 545, 77 Am. Dec. 426; Aronson *v.* Baker, 43 N. J. Eq. 365, 12 Atl. 177; Prince Albert *v.* Strange, 1 Hall & T. 1, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 41 Eng. Ch. 25, 41 Eng. Reprint 1171, in which celebrated case the husband of Queen Victoria prevented not only the publication of etchings made by himself and the queen for private circulation, but also of a catalogue descriptive of them.

The author has the undisputed right to his manuscript; he may withhold it, or he may communicate it, and communicating he may limit the number of persons to whom it is imparted and impose such restrictions as he pleases upon their use of it. The fulfilment of the annexed conditions he may proceed to enforce and for their breach he may claim compensation. Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81, 10 Eng. Reprint 681.

Works of art.— The artist may assign the right of reproduction by engraving to one person and of reproduction by other means to another. Lucas *v.* Cooke, 13 Ch. D. 872, 42 L. T. Rep. N. S. 180, 28 Wkly. Rep. 439.

64. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100 (in which the owner of Washington's papers who obtained his title from his devisee was granted an injunction against an infringing edition); Thompson *v.* Stanhope, Ambl. 737, 27 Eng. Reprint 476; Queensberry *v.* Shebbeare, 2 Eden 329, 28 Eng. Reprint 924 (in which a copy of Lord Clarendon's history was adjudged to be the property of his descendants nearly one hundred years after his death). See also Webb

property appearing therein or give any right over it to the transferee.[65] The sale of a work of art, as a picture or piece of sculpture, does not carry with it the right of reproduction or the right to license another to make copies or secure a copyright unless such was the evident intent of the parties. Such right the artist retains.[66]

B. Licenses. The owner of a dramatic composition may grant the performing rights for a definite territory or time,[67] and may license oral recitation;[68] but a license to produce upon the stage does not include a right to publish in print.[69]

VII. REMEDIES FOR INFRINGEMENT.

A. At Law. As the rights of intellectual or literary property are based on the common law, so the remedies for infringement thereof must be sought therein. Except in the case of manuscripts, the courts of the United States are not open for the protection of intellectual property except in the case of controversies between citizens of different states. Protection for intellectual prop-

v. Rose [*cited* in Millar *v.* Taylor, 4 Burr. 2303, 2330].

A bequest of "all my books" includes manuscript notes. Willis *v.* Curtois, 1 Beav. 189, 8 L. J. Ch. 105, 17 Eng. Ch. 189, 48 Eng. Reprint 911.

65. "To make a gift of a copy of the manuscript is no more a transfer of the right [to publish] or abandonment of it, than it would be a transfer or an abandonment of an exclusive right to republish, to give a copy of a printed work." Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32, 41. "Even the transfer of the manuscript of a book will not, at common law, carry with it a right to print and publish the work, without the express consent of the author, as the property in the manuscript, and the right to multiply the copies, are two separate and distinct interests." Stephens *v.* Cady, 14 How. (U. S.) 528, 530, 14 L. ed. 528; Queensberry *v.* Shebbeare, 2 Eden 329, 28 Eng. Reprint 924. See also Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544.

An author may privately circulate copies of his work among his friends without parting with his control over his intellectual production. Prince Albert *v.* Strange, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293, [*affirmed* in 1 Hall & T. 1, 47 Eng. Reprint 1302, 13 Jur. 109, 18 L. J. Ch. 120, 1 Macn. & G. 25, 47 Eng. Ch. 25, 41 Eng. Reprint 1171].

66. Werckmeister *v.* Pierce, etc., Mfg. Co., 63 Fed. 445. But see Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537, holding that the purchaser on an unconditional sale of an uncopyrighted painting has a right to reproduce the same by chromo, lithograph, etc., without obtaining the consent of the author.

Where an artist gave a third person the right to make copies of an oil painting, he did not thereby dedicate such painting to the public, so as to permit the reproduction of the picture in the form of a photograph. Oertel *v.* Wood, 40 How. Pr. (N. Y.) 10.

67. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Boucicault *v.* Fox, 3 Fed. Cas. No. 1,691, 5 Blatchf. 87.

What constitutes license.— The payment by defendant of the sum decreed to be paid to plaintiff, in an action to recover damages for the infringement of her play, in which the price of a license is made the measure of damages, does not confer a license on defendant to represent such play, merely because the value of such license was made the measure of such indemnity. Keene *v.* Clarke, 5 Rob. (N. Y.) 38.

Operation and effect.— The fact that plaintiff has licensed a third person to produce a play for a limited time does not disable him from maintaining an injunction against such person after such license expires, as he is the owner of the dramatization, and interested in its preservation from piracy. Fleron *v.* Lackaye, 14 N. Y. Suppl. 292. Only the licensee of the general owner can bring suit for the protection of property in a dramatic composition, where such licensee has an exclusive license for a definite period, and by the terms of his license is to bring all suits for the protection of his rights. Aronson *v.* Fleckenstein, 28 Fed. 75.

Right of licensee to license others.— Where a contract between the author of a play and a theatrical firm provided that the firm should have the exclusive right to produce the play for a certain period, during which it was not to be published in any manner, but was to remain in manuscript, and to be used only for production by the firm who should produce the play continuously during the prescribed period; the actors were to be subject to the author's approval, and the play was to be produced only in first-class theaters; and on termination for any cause, all rights in the play were to revert to the author, it was held that the firm had only the right to produce the play with companies organized by itself, and no right to license other theaters or companies to produce it, although such licensing was for the purpose of avoiding heavy losses. Harne *v.* Liebler, 73 N. Y. App. Div. 194, 76 N. Y. Suppl. 762.

68. Roberts *v.* Myers, 20 Fed. Cas. No. 11,906.

69. Macklin *v.* Richardson, Ambl. 694, 27 Eng. Reprint 451.

erty must be sought in the state courts.[70] An action on the case will lie and exemplary damages may be recovered for an infringement of an author's right of exclusive publication.[71] A manuscript may be the subject of replevin or trover.[72]

B. In Equity. An author may have his exclusive rights protected by injunction,[73] and he may have an account of profits in case of infringement of his rights.[74] Thus the author or proprietor of an unpublished dramatic composition may have a remedy by injunction to prevent an unlicensed representation of his work.[75] The courts, however, are not always clear in discerning the proper character of intellectual productions and frequently invoke doctrines other than those of property in order to justify interference for its protection. Thus, if the infringer bears, or has borne, any relation of trust or confidence to the owner of the property taken, he will be restrained from his infringement on the ground of breach of faith or breach of an implied contract.[76]

70. Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47.

71. Maxwell *v.* Goodwin, 93 Fed. 665. Defendant, whose newspaper was published in New York, after it had secured a copy of plaintiff's poem through its agent in Chicago, was informed that the poem was copyrighted. Defendant then made inquiries of its agent, and, on learning that the copy in his possession bore no copyrighted words, telegraphed its agent that it would take the chances on the publication. Defendant's managing editor testified that he knew the poem belonged to others; that he made no inquiry of the owners as to his right to buy it; that he believed he had the right, under some circumstances, to publish a literary work without the owner's consent; that his conduct in publishing the poem had never been blamed, and, so far as he knew, had been ratified, by defendant corporation, and it was held that a verdict for exemplary damages was justified. Press Pub. Co. *v.* Monroe, 73 Fed. 196, 19 C. C. A. 429, 51 L. R. A. 353.

72. Dart *v.* Woodhouse, 40 Mich. 399, 29 Am. Rep. 544; Aronson *v.* Baker, 43 N. J. Eq. 365, 12 Atl. 177; Stover *v.* Lathrop, 33 Fed. 348; Dodsley *v.* McFarquhar, 1775, Vols. 29, 30, Morleys Dict. 8308. If after composition the author chooses to keep his writings private, he has the remedies for wrongful abstraction of copies analogous to those of an owner of personalty in the like case. Jefferys *v.* Boosey, 3 C. L. R. 625, 4 H. L. Cas. 815, 1 Jur. N. S. 615, 24 L. J. Exch. 81, 10 Eng. Reprint 681. See, generally, REPLEVIN; TROVER AND CONVERSION.

73. Folsom *v.* Marsh, 9 Fed. Cas. No. 4,901, 2 Story 100. A court of chancery has jurisdiction to afford redress to one whose rights to uncopyrighted literary property have been infringed. Jones *v.* Thorne, 1 N. Y. Leg. Obs. 408.

An express remedy in equity was given in section 9 of the act of Feb. 3, 1831, 4 U. S. St. at L. 437, but this is now repealed. See Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34.

74. Macklin *v.* Richardson, 2 Ambl. 694, 27 Eng. Reprint 451. One who produces an opera without authority from the author must account to him for the profits, where such opera has never been circulated or published, although copies had been printed for the private convenience of performers in learning their parts. French *v.* Kreling, 63 Fed. 621.

75. Boucicault *v.* Wood, 3 Fed. Cas. No. 1,693, 2 Biss. 34; Keene *v.* Wheatley, 14 Fed. Cas. No. 7,644. The author of an unpublished play, or his assignee, has a right of property in the manuscript and its incorporeal contents, that is, in the words, ideas, sentiments, characters, dialogue, descriptions, and their connection, independent of statutes; and a court of equity can protect it. Crowe *v.* Aiken, 6 Fed. Cas. No. 3,441, 2 Biss. 208.

The owner of an opera that has not been copyrighted may obtain an injunction, on giving proper security, to prevent its presentation by an unauthorized party. Goldmark *v.* Kreling, 25 Fed. 349. And see Goldmark *v.* Kreling, 35 Fed. 661, 13 Sawy. 310.

76. Abernethy *v.* Hutchinson, 1 Hall & T. 28, 3 L. J. Ch. O. S. 209, 47 Eng. Reprint 1313.

Where an employee surreptitiously copies and publishes manuscripts of his employer, such publication will be restrained as obtained through a breach of trust. Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 63 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405; Merryweather *v.* Moore, [1892] 2 Ch. 518, 61 L. J. Ch. 505, 66 L. T. Rep. N. S. 719, 40 Wkly. Rep. 540; Prince Albert *v.* Strange, 2 De G. & Sm. 652, 13 Jur. 507, 64 Eng. Reprint 293; Yovatt *v.* Winyard, 1 Jac. & W. 394, 21 Rev. Rep. 194, 37 Eng. Reprint 425; Reuter's Telegram Co. *v.* Byron, 43 L. J. Ch. 661; Louis *v.* Smellie, 11 T. L. R. 515. The injunction will also extend to one who purchases from such employee with knowledge of the breach of trust. Exchange Tel. *v.* Gregory, [1896] 1 Q. B. 147, 60 J. P. 52, 65 L. J. Q. B. 262, 74 L. T. Rep. N. S. 83; Exchange Tel. Co. *v.* Central News, [1897] 2 Ch. 48, 66 L. J. Ch. 672, 76 L. T. Rep. N. S. 591, 45 Wkly. Rep. 595; Tipping *v.* Clarke, 2 Hare 383, 24 Eng. Ch. 383. See Morison *v.* Moat, 9 Hare 241, 41 Eng. Ch. 241, 68 Eng. Reprint 492.

C. Under Copyright Statutes. By express provision of the copyright statute, actions for infringement of the author's rights in his manuscript by printing or publishing it without his consent may be brought in the United States courts,[77] but this remedy has been held to be cumulative to that given by the common law.[78] In order to sue under this section of the statute it is not necessary that the whole of the manuscript be taken; it is enough that a substantial portion be.[79] A picture is not a manuscript within the meaning of the statute.[80]

VIII. RIGHTS OF AN AUTHOR TO HIS REPUTATION.

Apart from the ownership of literary property created by him, an author is entitled to protection of his literary reputation, and to prevent matter being published as his composition which is not in fact his.[81]

LITERARY WORK. Something intended to afford either information and instruction, or pleasure, in the form of literary enjoyment.[1]

LITHARGE. An oxide of lead.[2] (See CHEMICAL; EARTH.)

Where third persons have become possessed in a wrongful and fraudulent manner of a secret code showing the cost and selling price of the merchandise of a mercantile company for use between itself and its traveling salesmen, and such third persons copy the same into a catalogue of their own, a court of equity will take possession of such catalogue and retain it pending a temporary injunction and the appointment of a receiver. Simmons Hardware Co. *v.* Waibel, 1 S. D. 488, 47 N. W. 814, 36 Am. St. Rep. 755, 11 L. R. A. 267.

77. See U. S. Rev. Sts. (1878) § 4967, amended by Act March 3, 1891, § 9, 26 U. S. St. at L. 1109 [U. S. Comp. St. (1901) p. 3416]. In Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480, the court expressed a doubt whether this act applied to manuscripts not the subject of copyright under the statute.

78. Palmer *v.* De Witt, 47 N. Y. 532, 7 Am. Rep. 480; Woolsey *v.* Judd, 4 Duer (N. Y.) 379, 11 How. Pr. 49; Widmer *v.* Greene, 56 How. Pr. (N. Y.) 91; Bartlett *v.* Crittenden, 2 Fed. Cas. No. 1,076, 5 McLean 32; Boucicault *v.* Hart, 3 Fed. Cas. No. 1,692, 13 Blatchf. 47. As the right of an author and his assigns to the exclusive use of his literary productions is a common-law one, the state courts have jurisdiction to protect literary property. The act of congress affords an additional remedy merely, and does not affect the preëxisting jurisdiction. Isaacs *v.* Daly, 6 Leg. Gaz. (N. Y.) 175.

But there is no such concurrent jurisdiction when the protection of the manuscript is merely incidental to the main question in the case. Haworth *v.* Nystrom, 11 Fed. Cas. No. 6,251.

79. Bartlette *v.* Crittenden, 2 Fed. Cas. No. 1,082, 4 McLean 300.

80. Parton *v.* Prang, 18 Fed. Cas. No. 10,784, 3 Cliff. 537.

81. An author may prevent the publication of a book under his name of which he is not the author or which has been mutilated or altered without his authority. Clemens *v.* Belford, 14 Fed. 728, 11 Biss. 459. So an author can prevent the publication of a work as his which is only a fragmentary report of some of his addresses. Drummond *v.* Altemus, 60 Fed. 338. See Pott *v.* Altemus, 69 Fed. 339; Harte *v.* De Witt, 1 Cent. L. J. 360.

There is a right of action for damages on the ground of injury to reputation alone and the court may interfere by injunction. Archbold *v.* Sweet, 5 C. & P. 219, 1 M. & Rob. 62, 24 E. C. L. 535; Byron *v.* Johnston, 2 Meriv. 29, 16 Rev. Rep. 135, 35 Eng. Reprint 851. But see Lee *v.* Gibbings, 67 L. T. Rep. N. S. 263, 8 T. L. R. 773.

Alterations which do not affect the author's reputation will not be restrained. Cox *v.* Cox, 1 Eq. Rep. 94, 11 Hare 118, 1 Wkly. Rep. 345, 45 Eng. Ch. 118, 68 Eng. Reprint 1211; Crookes *v.* Petter, 6 Jur. N. S. 1131, 3 L. T. Rep. N. S. 225. But see Planchi *v.* Colburn, 8 Bing. 14, 21 E. C. L. 424, 5 C. & P. 58, 24 E. C. L. 452, 1 L. J. C. P. 7, 1 Moore & S. 51.

Work published under pseudonym.— That an uncopyrighted work is republished without the author's consent, and in such form as to wound her susceptibilities, does not entitle her to restrain such publication, where the work was originally printed under a pseudonym, and it does not appear that any portion of the public knew who the real author was. Angers *v.* Leprohon, 22 Quebec Super. Ct. 170.

1. Hollinbrake *v.* Truswell, [1894] 3 Ch. 420, 428, 63 L. J. Ch. 719, 71 L. T. Rep. N. S. 419, 7 Reports 568. *Compare* Chilton *v.* Progress Printing, etc., Co., [1895] 2 Ch. 29, 33, 35. See also Lamb *v.* Evans, [1893] 1 Ch. 218, 62 L. J. Ch. 404, 68 L. T. Rep. N. S. 131, 2 Reports 189, 41 Wkly. Rep. 405; Kelly *v.* Morris, L. R. 1 Eq. 697, 35 L. J. Ch. 423, 14 L. T. Rep. N. S. 222, 14 Wkly. Rep. 496.

2. Jenkins *v.* Johnson, 13 Fed. Cas. No. 7,271, 9 Blatchf. 516, 519, used as one of the ingredients of an elastic packing.

LITHOGRAPH. A print from a drawing on stone.[3] (See COPYRIGHT; CUSTOMS DUTIES.)

LITIGATE. To dispute or contend in form of law; to carry on a suit.[4] (See LITIGATION.)

LITIGATION.[5] A judicial controversy, a contest in a court of justice, for the purpose of enforcing a right;[6] a CAUSE,[7] *q. v.* (See LITIGATE.)

LITIGIOUS. That which is the subject of a suit or action.[8] In Spanish law, that which is in dispute in a suit.[9] (Litigious: Rights — Sale or Transfer of, see CHAMPERTY AND MAINTENANCE.)

LITIGOSA IGNORANTIA JURIS EST POTIUS QUAM SCIENTIA. A maxim meaning "Ignorance of the law, rather than familiarity with it, is the most frequent cause of law suits."[10]

LITIS NOMEN OMNEM ACTIONEM SIGNIFICAT, SIVE IN REM, SIVE IN PERSONAM SIT. A maxim meaning "A lawsuit signifies every action, whether it be *in rem* or *in personam*."[11]

LITTER. Straw, or other substance commonly used for bedding or otherwise for or about animals.[12]

LITTLE. Small in size or extent.[13]

3. Arthur *v.* Moller, 97 U. S. 365, 368, 24 L. ed. 1046. See also Oliver Ditson Co. *v.* Littleton, 67 Fed. 905, 906, 15 C. C. A. 61.

"**Lithographic process**" see U. S. *v.* Weiller, 65 Fed. 418, 419, 12 C. C. A. 668.

4. Burrill L. Dict.

"**Litigated cases**" see 11 Cyc. 135.

"**Litigated facts**" see Eastman *v.* Symonds, 108 Mass. 567, 569.

"**Litigated motions**" means motions which can be heard only on notice. Sturz *v.* Fischer, 15 Misc. (N. Y.) 410, 411, 36 N. Y. Suppl. 893.

5. **Distinguished from "judicial decision"** see *In re* Aribib, [1891] 1 Ch. 601, 613, 60 L. J. Ch. 263, 64 L. T. Rep. N. S. 217, 39 Wkly. Rep. 305.

6. Black L. Dict.

"**For litigation**" see Koger *v.* Hunter, 102 Ga. 76, 78, 29 S. E. 141.

"**Involved in litigation**" see Hall *v.* Niagara F. Ins. Co., 93 Mich. 184, 197, 53 N. W. 727, 32 Am. St. Rep. 497, 18 L. R. A. 135; Williams *v.* Buffalo German Ins. Co., 17 Fed. 63, 66.

"**Litigation or controversy**" see Reg. *v.* Norfolk County, 15 Q. B. 549, 564, 15 Jur. 121, 69 E. C. L. 549.

"**Litigation pending**" see Manuel *v.* Fabyanski, 44 Minn. 71, 75, 46 N. W. 208.

Litigation tax see 11 Cyc. 292 note 51.

"**Notwithstanding any previous . . . litigation**" see *In re* Aribib, [1891] 1 Ch. 601, 603, 60 L. J. Ch. 263, 64 L. T. Rep. N. S. 217, 39 Wkly. Rep. 305. See also Isaacs *v.* Towell, [1898] 2 Ch. 285, 67 L. J. Ch. 508, 78 L. T. Rep. N. S. 619.

7. See 6 Cyc. 704.

8. Black L. Dict.

9. White *v.* Gay, 1 Tex. 384, 389 [*citing* Diccionario de Legislacion, p. 382; 3 Partidas, tit. 7, l. 13, 14; 2 Sala tit. 10, § 14].

"**Litigious right**" is variously defined to be a right which cannot be exercised without undergoing a lawsuit (La. Civ. Code (1900), art. 3556, subs. 18 [*quoted* in Sanders *v.* Ditch, 110 La. 884, 899, 34 So. 860]); a right which exists whenever there is a suit and contestation on the same (La. Civ. Code (1900), art. 2653 [*quoted* in Sanders *v.* Ditch, 110 La. 884, 899, 34 So. 860; Cucullu *v.* Hernandez, 103 U. S. 105, 117, 26 L. ed. 322]); or a right about which a suit has not only commenced, but has advanced in its progress to the contestation, and its transfer is expressly authorized by law (White *v.* Gay, 1 Tex. 384, 388 [*citing* La. Code, arts. 2622, 2623, 2624; Simmins *v.* Parker, 4 Mart. N. S. (La.) 200; Prevost *v.* Johnson, 9 Mart. (La.) 123, 183]). "In France, a right was regarded as litigious, not only after the inception of the suit, but also before, when the same might be reasonably apprehended. But by the Code Napoleon, a right is not considered as litigious until it is put in contest in a suit." White *v.* Gay, 1 Tex. 384, 387 [*citing* Pothier Sales 353].

"**Litigious thing**" has been defined as a thing about whose property there is a dispute (White *v.* Gay, 1 Tex. 384, 387 [*citing* 1 Brown Civ. L. 256]); concerning which there exists a suit, and contestation (Prevost *v.* Johnson, 9 Mart. (La.) 123, 183 [*citing* La. Civ. Code 361, art. 131, and *cited* in White *v.* Gay, 1 Tex. 384, 387]).

10. Morgan Leg. Max.

11. Bouvier L. Dict. [*citing* Coke Litt. 292].

12. St. 57 & 58 Vict. c. 57, § 59.

13. Webster Int. Dict. See State *v.* Call, 48 N. H. 126, 132, where it is said: "The terms 'little' and 'large' are uncertain."

"**Here a little and there a little**" see *In re* Senate File 31, 25 Nebr. 864, 884, 41 N. W. 981.

"**Little double seamer**" see Stratton *v.* Mattingly, 89 S. W. 513, 28 Ky. L. Rep. 472.

"**Little more or less**" see U. S. *v.* Fossat, 20 How. (U. S.) 413, 415, 423, 15 L. ed. 944.

Little more than see Marsh *v.* U. S., 16 Fed. Cas. No. 9,120.

"**What little property I have**" see Payne *v.* Johnson, 95 Ky. 175, 184, 24 N. W. 238, 609, 15 Ky. L. Rep. 522.

LITTORAL.[14] A word used in describing the rights of the upland owners along the seashore and tide lands.[15] (See BOUNDARIES; NAVIGABLE WATERS; WATERS.)

LITTUS MARIS. Ordinary tides or neap-tides which happen between the full and change of the moon.[16]

LITUS EST QUOUSQUE MAXIMUS FLUCTUS A MARI PERVENIT. A maxim meaning "The shore is where the highest wave from the sea has reached."[17]

LIVE. As an adjective, being in life; LIVING, *q. v.*; animate; not dead.[18] As a verb, to continue in being; to remain or be kept alive;[19] to ABIDE (*q. v.*), to have a settled residence in any place;[20] to DWELL,[21] *q. v.*; to reside; to have one's home or domicil.[22] (See LIVING; and, generally, DOMICILE.)

LIVELIHOOD. Means by which life is maintained in accordance with the customary mode of living.[23]

LIVELY TROT. A term which may or may not imply negligence.[24] (See ENERGY; and, generally, NEGLIGENCE.)

LIVER. See EVIL LIVER.

LIVERY OF SEIZIN. Investiture or delivery of corporeal possession of land or a tenement;[25] delivery of possession.[26] (See, generally, DEEDS.)

14. **A word derived from "litus,"** the seashore. Sutter *v.* Heckman, 1 Alaska 188, 192.

15. Sutter *v.* Heckman, 1 Alaska 188, 192.

16. Hale De Jure Maris. p. 26 [*quoted* in Atty.-Gen. *v.* Chambers, 4 De G. M. & G. 206, 213, 2 Eq. Rep. 1195, 18 Jur. 779, 23 L. J. Ch. 662, 2 Wkly. Rep. 636, 53 Eng. Ch. 159, 43 Eng. Reprint 486 (*citing* Lowe *v.* Govett, 3 B. & Ad. 863, 1 L. J. K. B. 224, 23 E. C. L. 376)].

17. Black L. Dict. [*citing* Angell Tide-Waters 67; Dig. 50, 16, 96].

18. Century Dict.

"Live animals" see Reiche *v.* Smythe, 20 Fed. Cas. No. 11,666, 7 Blatchf. 235.

"Live and dead stock" see Rudge *v.* Winnall, 12 Beav. 357, 360, 13 Jur. 737, 18 L. J. Ch. 469, 50 Eng. Reprint 1098; Hutchinson *v.* Smith, 8 L. T. Rep. N. S. 602, 603, 1 New Rep. 513, 11 Wkly. Rep. 417; Blake *v.* Gibbs, 5 Russ. 13 note, 29 Rev. Rep. 1, 5 Eng. Ch. 13, 38 Eng. Reprint 932; Porter *v.* Towmay, 3 Ves. Jr. 310, 311, 30 Eng. Reprint 1027. See also Burbridge *v.* Burbridge, 37 L. J. Ch. 47, 17 L. T. Rep. N. S. 138, 16 Wkly. Rep. 76.

19. Century Dict. See also Keating *v.* Reynolds, 1 Bay (S. C.) 80, 87.

20. Webster Dict. [*quoted* in Hinds *v.* Hinds, 1 Iowa 36, 41].

21. Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722; Hinds *v.* Hinds, 1 Iowa 36, 41; Shaw *v.* Shaw, 98 Mass. 158, 159.

22. Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722; Shaw *v.* Shaw, 98 Mass. 158, 159. See also Hobne *v.* Harrison, 2 Whart. (Pa.) 283, 285; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 732, 7 C. C. A. 444, 22 L. R. A. 325; Doe *v.* Collins, 2 T. R. 498, 503.

"Live in my family" see Rutan *v.* Crawford, 45 N. J. Eq. 99, 104, 16 Atl. 180.

"The farm on which John Fox now lives" is not used in the sense of to "dwell" or to "reside," but was used by the testator in the more general sense of "subsisting," or "obtaining a livelihood," on the farm. Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 449.

"Lives" in an averment of citizenship see Gale *v.* Southern Bldg., etc., Assoc., 117 Fed. 732, 734.

23. English L. Dict. See also Torbert *v.* Twining, 1 Yeates (Pa.) 432, 439; Smith *v.* Hurrell, 10 B. & C. 542, 545, 21 E. C. L. 231; Bushnell *v.* Levi, 5 Bing. 315, 15 E. C. L. 599; Double *v.* Gibbs, 1 Dowl. P. C. 583, 586; Reeves *v.* Stroud, 1 Dowl. P. C. 399; Kemsett *v.* West, 5 Dowl. & R. 626, 16 E. C. L. 246; Stephens *v.* Derry, 11 East 147, 149; Miller *v.* Williams, 5 Esp. 19, 20.

24. See Crocker *v.* Knickerbocker Ice Co., 92 N. Y. 652, where it is held that a person driving a team on a "lively trot" is not, as a matter of law or fact, negligent.

25. 2 Blackstone Comm. 310 [*quoted* in Michean *v.* Crawford, 8 N. J. L. 90, 108].

26. *In re* Dodge, 40 Hun (N. Y.) 443, 453; Northern Pac. R. Co. *v.* Cannon, 46 Fed. 224, 232. See also Plummer *v.* Russell, 2 Bibb (Ky.) 174, 176; Thatcher *v.* Omans, 3 Pick. (Mass.) 521, 532.

LIVERY-STABLE KEEPERS

By Ernest G. Chilton

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I. DEFINITION.

One who keeps a livery stable[1] as a business is a livery-stable keeper.[2]

II POWER OF MUNICIPALITY[3] TO REGULATE LIVERY STABLES.

A. In General. The legislature of a state may invest a municipal corporation with power to regulate livery stables within its corporate limits.[4]

B. By Designating or Prohibiting Location. And when the power of regulating livery stables is given to a municipality, such power includes the right

1. A livery stable is "a place where horses are groomed, fed and hired, where vehicles are let." Williams *v.* Garignes, 30 La. Ann. 1094, 1095; Kittanning *v.* Montgomery, 5 Pa. Super. Ct. 196, 198. "A place where horses and vehicles are kept for hire." English L. Dict.

A stable in which store-room is leased to persons who care for and control their own horses and vehicles is not "a stable for taking . . . horses and carriages for hire," within Mass. Rev. Laws, c. 102, § 70, prohibiting the erection of such a stable within two hundred feet of a church. Beth Israel Congregation *v.* O'Connell, 187 Mass. 236, 72 N. E. 1011.

2. English L. Dict.

Other definitions are: "One whose business it is to keep horses for hire, or to let, or to keep, feed, or board, horses for others." Abbott L. Dict.; Anderson L. Dict.; Black L. Dict.

"One who takes horses to bait and board; and he usually keeps horses to let." Groves *v.* Kilgore, 72 Me. 489, 491.

3. Powers of municipality generally see MUNICIPAL CORPORATIONS.

4. Chicago *v.* Stratton, 162 Ill. 494, 44 N. E. 853, 53 Am. St. Rep. 325, 35 L. R. A. 84. See also St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721. See also *Re* Kiely, 13 Ont. 451.

to designate the place where they may be located and prohibit their erection at other places.[5]

C. By Prescribing Manner of Use. A municipality having the power to regulate livery stables may prescribe the manner of their keeping, in order that they may not become obnoxious or deleterious to the health of her citizens.[6]

D. Delegation of Power. The power of regulating livery stables, when conferred upon a municipality, must be exercised by it, and cannot be delegated to any other body or authority.[7]

III. IMPOSITION OF LICENSES AND TAXES.[8]

A. In General. A license-tax on keepers or owners of livery stables is a tax on occupation and not on property.[9]

B. By State — 1. In General. Some of the state constitutions confer on the legislatures express authority to impose a license-tax on the occupation of keeping a livery stable;[10] but where the constitution provides that the legislature shall have the right to tax privileges, the keeping of a livery stable cannot be taxed, until such occupation has been made a privilege by the legislature.[11]

2. Effect of Failure to Procure License. When the state requires a license for the privilege of conducting a livery stable, one who carries on such business without procuring the license required cannot maintain an action for damages for injuries to his business as a livery-stable keeper.[12]

C. By Municipality — 1. In General. Where a state constitution gives the

5. St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; State *v.* Beattie, 16 Mo. App. 131; *Re* Kiely, 13 Ont. 451.

Unjust discrimination.—An ordinance is invalid for unjust discrimination which by its provisions permits one citizen to erect a livery stable in a certain locality by obtaining the written consent of one-half the owners of the ground in the block, while another of like merit is not permitted to do so for want of such consent. St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

Unreasonable ordinance.—An ordinance prohibiting the erection of livery stables in certain blocks, which is indefinite and unsuitable to accomplish the desired object, is unreasonable and cannot be upheld. Phillips *v.* Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. Rep. 230.

Where the statute confers authority merely to prescribe regulations for cleaning and keeping in order livery stables, a municipality may not locate at pleasure or suppress the location of a livery stable. Crowley *v.* West, 52 La. Ann. 526, 27 So. 53, 78 Am. St. Rep. 355, 47 L. R. A. 652.

6. St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721; State *v.* Beattie, 16 Mo. App. 131.

Accumulation of manure.—A city ordinance which prohibits the accumulation in or near a livery stable of more than two cart loads of manure, during certain months, recognizes no right to deposit manure in the adjacent alleys. People *v.* Bennett, 83 Mich. 457, 47 N. W. 250.

7. Chicago *v.* Stratton, 162 Ill. 494, 504, 44 N. E. 853, 53 Am. St. Rep. 325, 35 L. R. A. 84. Thus a city cannot by an ordinance delegate to the owners of one-half the ground in any block in which a livery stable is proposed to be erected the right to say whether it shall be done or not. St. Louis *v.* Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721 [*disapproving* State *v.* Beattie, 16 Mo. App. 131]. See also *Re* Kiely, 13 Ont. 451. In Chicago *v.* Stratton, *supra* [*distinguishing* St. Louis *v.* Russell, *supra*], the declaration that an ordinance requiring the consent of adjacent property owners was no delegation of legislative power apparently conflicts with the text. The court, however, draws the following distinction: "It will be noticed, that, in the Missouri case, the ordinance requiring the consent of adjacent property owners related to the entire city. Under the operation of such an ordinance livery stables might be totally suppressed and prohibited everywhere within the municipal limits. The ordinance, however, in the case at bar is not thus unreasonable, as it relates only to certain residence districts which are clearly defined. Within such specified residence districts, the city council undoubtedly has the power to prohibit or forbid the location of livery stables, and, having the power of total prohibition within those districts, it may impose such conditions and restrictions in relation to their limited area as it may see fit." See also 20 L. R. A. 721 note.

8. Licenses generally see LICENSES.

Taxation generally see TAXATION.

9. Municipality No. 2 *v.* Dubois, 10 La. Ann. 56; Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

10. Howland *v.* Chicago, 108 Ill. 496; Marmet *v.* State, 45 Ohio St. 63, 12 N. E. 463.

11. Columbus *v.* Guest, 3 Head (Tenn.) 413.

12. Sherman *v.* Fall River Iron Works Co., 5 Allen (Mass.) 213.

legislature the power to impose a license-tax on the occupation of keeping a livery stable, such power may be delegated by the state to a municipality.[13]

2. METHOD OF IMPOSING. The method of imposing the tax being a detail resting in the discretion of the city, it may require that a license for conducting a livery stable shall be paid for in proportion to the number of carriages kept for hire,[14] or it may require a tag on each licensed vehicle and the payment of a fee therefor.[15]

3. BUSINESS TAX IN ADDITION TO PROPERTY TAX. When authorized by its charter or the general corporation laws of the state to license and tax livery stables, a municipality may impose on a livery-stable keeper not only a license-tax on his occupation as such, but also an additional license-tax on the vehicles employed by him in his business.[16]

IV. RIGHT TO LIEN FOR COMPENSATION.

A. At Common Law — 1. IN GENERAL. At common law one who as a livery-stable keeper furnishes food for and takes care of a horse intrusted to his care, has no lien for its keeping without a special agreement to that effect.[17]

2. EXPRESS AGREEMENT. Even at common law, however, a livery-stable keeper's lien may be created by express agreement between the parties.[18]

3. HORSE TAKEN FOR SOME PURPOSE IN ADDITION TO KEEPING. The common law also recognizes a lien in favor of a livery-stable keeper who takes a horse for the purpose of performing some special service in addition to caring for and feeding it, such as training for the race-course,[19] or curing the animal of a disease.[20]

B. Statutory Lien — 1. IN GENERAL. Many of the states have by statutes

13. Howland *v.* Chicago, 108 Ill. 496. See also *Ex p.* Jackson, 143 Cal. 564, 77 Pac. 457; Wilson *v.* Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834, 20 Ky. L. Rep. 1593, 1980; Reg. *v.* Swalwell, 12 Ont. 391.

The city of Washington, D. C., has no right to require a license for the keeping of a livery-stable. Washington *v.* Barber, 29 Fed. Cas. No. 17,224, 5 Cranch C. C. 157.

14. Howland *v.* Chicago, 108 Ill. 496.

15. Wilson *v.* Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834, 20 Ky. L. Rep. 1593, 1980.

16. Wilson *v.* Lexington, 105 Ky. 765, 49 S. W. 806, 50 S. W. 834, 20 Ky. L. Rep. 1593, 1980; Covington *v.* Woods, 98 Ky. 344, 33 S. W. 84, 17 Ky. L. Rep. 927. But see Williams *v.* Garignes, 30 La. Ann. 1094, where the court declared that the state itself has no power to exact of a livery-stable keeper who has paid a license on his occupation as such, an additional tax on the vehicles used in his business.

17. *Colorado.*—Wall *v.* Garrison, 11 Colo. 515, 19 Pac. 469.

Georgia.— Jackson *v.* Holland, 31 Ga. 339.

Indiana.— Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101.

Iowa.— Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290; McDonald *v.* Bennett, 45 Iowa 456.

Maine.— Allen *v.* Ham, 63 Me. 532; Miller *v.* Marston, 35 Me. 153, 56 Am. Dec. 694.

Massachusetts.— Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288.

Minnesota.— Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203.

Missouri.— Pickett *v.* McCord, 62 Mo. App. 467; Stone *v.* Kelley, 59 Mo. App. 214.

New York.— Fox *v.* McGregor, 11 Barb. 41; Robinson *v.* Kaplan, 21 Misc. 686, 47 N. Y. Suppl. 1083; Grinnell *v.* Cook, 3 Hill 485, 38 Am. Dec. 663.

Pennsylvania.— Hartshorne *v.* Seeds, 1 Chest. Co. Rep. 460.

Tennessee.— Saint *v.* Smith, 1 Coldw. 51. See also McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

West Virginia.— Lambert *v.* Nicklass, 45 W. Va. 527, 31 S. E. 951, 72 Am. St. Rep. 828, 44 L. R. A. 561.

England.— Orchard *v.* Rackstraw, 9 C. B. 698, 14 Jur. 605, 19 L. J. C. P. 303, 67 E. C. L. 698; Judson *v.* Etheridge, C. & M. 743, 2 L. J. Exch. 300, 3 Tyrw. 954. See also Jackson *v.* Cummins, 3 Jur. 436, 8 L. J. Exch. 265, 5 M. & W. 342.

See 33 Cent. Dig. tit. "Livery Stable Keepers," § 7.

Compare Hickman *v.* Thomas, 16 Ala. 166.

18. Perkins *v.* Boardman, 14 Gray (Mass.) 481; Grinnell *v.* Cook, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; Wallace *v.* Woodgate, 1 C. & P. 575, 12 E. C. L. 328, R. & M. 193, 21 E. G. L. 731.

Both for the expense of its keeping and for money loaned to the owner a lien on the horse may be created by such express agreement. Donatty *v.* Crowder, 11 Moore C. P. 479, 4 L. J. C. P. O. S. 184.

19. Bevan *v.* Waters, 3 C. & P. 520, 14 E. C. L. 693, M. & M. 235, 22 E. C. L. 515.

20. Lord *v.* Jones, 24 Me. 439, 41 Am. Dec. 391.

No lien for doctoring exists, however, if the charge be for incidental services rendered in the usual course of keeping, and with no special contract therefor. Miller *v.* Marston, 35 Me. 153, 56 Am. Dec. 694.

quite similar in their provisions changed the common-law rule by giving a livery-stable keeper a lien for the keeping of a horse intrusted to his care.[21]

2. Construction of Statutes. Although a statute giving a lien to a livery-stable keeper is remedial and must be liberally construed,[22] it cannot be construed so as to extend the lien thereby given beyond its plain terms.[23]

3. Creation and Existence of Lien — a. In General. As a general rule the lien is created or attaches as soon as the horses enter the stable and feed and care are bestowed,[24] although the charges therefor are not due.[25]

b. Necessity of Possession. The statutory lien depends on possession for its creation and existence.[26]

c. By Whom Created. In order to create the statutory lien it is necessary that the contract be made or the horse be placed with the livery-stable keeper by its owner, or by someone having authority from him so to do.[27]

21. *California.*— Lowe *v.* Woods, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301.

Georgia.—Colquitt *v.* Kirkman, 47 Ga. 555; Gammell *v.* Schley, 41 Ga. 112.

Illinois.— Charles *v.* Neigelsen, 15 Ill. App. 317.

Indiana.— Glascock *v.* Lemp, 26 Ind. App. 175, 59 N. E. 342; Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101.

Iowa.— Bray *v.* Wise, 82 Iowa 581, 48 N. W. 994.

Kentucky.— Fitch *v.* Steagall, 14 Bush 230.

Louisiana.— Andrews *v.* Crandell, 16 La. Ann. 208.

Maine.— Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467.

Minnesota.— Flint *v.* Luhrs, 66 Minn. 57, 68 N. W. 514, 61 Am. St. Rep. 391; Skinner *v.* Canghey, 64 Minn. 375, 67 N. W. 203; Smith *v.* Stevens, 36 Minn. 303, 31 N. W. 55.

Missouri.— Varney *v.* Jackson, 66 Mo. App. 348; State *v.* Shevlin, 23 Mo. App. 598.

New York.— Robinson *v.* Young, 51 N. Y. App. Div. 603, 64 N. Y. Suppl. 50; Corning *v.* Ashley, 51 Hun 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100]; Jackson *v.* Kasseall, 30 Hun 231; Eckhard *v.* Donohue, 9 Daly 214; Robinson *v.* Kaplan, 21 Misc. 686, 47 N. Y. Suppl. 1083; Lessells *v.* Farnsworth, 3 How. Pr. N. S. 364; Ogle *v.* King, 2 N. Y. City Ct. 83.

Pennsylvania.— Young *v.* Kimball, 23 Pa. St. 193; Sides *v.* Cline, 19 Pa. Co. Ct. 481; Hartshorne *v.* Seeds, 1 Chest. Co. Rep. 460; McMangle *v.* Crouse, 34 Leg. Int. 384.

Tennessee.— McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654; Caldwell *v.* Tutt, 10 Lea 258, 43 Am. Rep. 307.

Texas.— Stott *v.* Scott, 68 Tex. 302, 4 S. W. 494; Blackford *v.* Ryan, (Civ. App. 1901) 61 S. W. 161; Domnau *v.* Green, (App. 1892) 19 S. W. 909.

West Virginia.— Lambert *v.* Nicklass, 45 W. Va. 527, 31 S. E. 951, 72 Am. St. Rep. 828, 44 L. R. A. 561.

See 33 Cent. Dig. tit. "Livery Stable Keepers," § 7.

Horses in keeping prior to the enactment of a statute giving a lien may be detained by the livery-stable keepers for their keeping subsequent to the date of the statute, unless it appears that he took them under a special contract inconsistent with the claim of a lien. Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290.

22. Eckhard *v.* Donohue, 9 Daly (N. Y.) 214; Lessells *v.* Farnsworth, 3 How. Pr. N. S. (N. Y.) 364; Ogle *v.* King, 2 N. Y. City Ct. 83.

23. Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083; Hartshorne *v.* Seeds, 1 Chest. Co. Rep. (Pa.) 460.

A lien given for keeping horses for hire does not include a lien to one receiving a horse under an agreement to take it to different races, the owner to share the expense and profit. Armitage *v.* Mace, 96 N. Y. 538.

24. Ogle *v.* King, 2 N. Y. City Ct. 83.

25. Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101.

26. Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101; Marseilles Mfg. Co. *v.* Morgan, 12 Nebr. 66, 10 N. W. 462; Estey *v.* Cooke, 12 Nev. 276; Bentley *v.* Colyer, 9 N. Y. St. 687; Seebaum *v.* Handy, 46 Ohio St. 560, 22 N. E. 869. *Contra*, Heaps *v.* Jones, 23 Mo. App. 617.

Actual, physical custody at every moment of time, however, is not necessary, since the horse may, with the livery-stable keeper's consent, be used by the owner from time to time for the purposes of his business. Welsh *v.* Barnes, 5 N. D. 277, 65 N. W. 675. See also State *v.* Shevlin, 23 Mo. App. 598.

For the purpose of giving the statutory notice of the amount of charges and an intention to claim the lien, possession is not necessary. Kline *v.* Green, 83 Hun (N. Y.) 190, 31 N. Y. Suppl. 599.

27. *California.*— Lowe *v.* Woods, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301.

Maine.— Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467.

Massachusetts.— Howes *v.* Newcomb, 146 Mass. 76, 15 N. E. 123.

New Hampshire.— Sargent *v.* Usher, 55 N. H. 287, 20 Am. Rep. 208.

New York.— Hassett *v.* Sanborn, 62 N. Y. App. Div. 588, 71 N. Y. Suppl. 81.

Texas.— Stott *v.* Scott, 68 Tex. 302, 4 S. W. 494; Downau *v.* Green, (App. 1892) 19 S. W. 909.

But see Boyle *v.* Lukens, 2 Del. Co. (Pa.) 383, holding that one merely having

d. Statutory Notice. Some of the statutes require a livery-stable keeper, in order to create his lien, to prepare and serve upon the owner of the property a notice of the amount of his charges and of his intention to detain.[28] Under such a statute, if the owner demands his horse without offering to pay what is due for the keeping, the livery-stable keeper may maintain possession for a reasonable time in which to prepare and serve the statutory notice.[29]

4. Persons Entitled to Lien. The statutory lien exists generally only in favor of the "keeper" of a livery stable, feeding and caring for horses intrusted to him for that purpose,[30] and therefore does not attach in favor of a mere servant employed in the care of the animals.[31]

5. What Service Covered. Although the statutes generally contemplate a lien only for the amount which may be due for keeping,[32] yet, when the statute places the lien upon the same footing as that of an innkeeper, such lien extends to any account in the line of a livery-stable keeper's business, such as horse hire and buggy hire.[33]

6. Property Subject to Lien — a. In General. Unless the statute expressly gives the livery-stable keeper a lien on both the horse or horses kept and any other property coming into possession therewith,[34] the lien is a claim *in rem* which must be restricted to the thing kept and cannot be extended to other property.[35] However, where the statute provides for a lien for the expense of their keeping on "any and every horse" delivered to be kept, one of several horses may be detained for a debt incurred on account of it and others belonging to the same person and taken charge of at the same time.[36]

b. Exempt Property.[37] Exempt property is not excepted from the operation of statutes giving a lien in favor of livery-stable keepers.[38]

7. Priority — a. Over Lien of Chattel Mortgage — (i) *In General.* By the weight of authority, the lien of a livery-stable keeper on a horse kept by him is, in the absence of legislative intent to the contrary, subordinate to the lien of a prior recorded mortgage,[39] unless the horse be delivered to the livery-stable

lawful possession of a horse, in that it had been hired to him, may create a livery-stable keeper's lien against the owner by contracting for the keeping of the animal.

One in possession under a conditional sale of a horse cannot create a lien in favor of a livery-stable keeper for the feeding of the horse. Lowe *v.* Woods, 100 Cal. 408, 34 Pac. 959, 38 Am. St. Rep. 301.

28. Kline *v.* Green, 83 Hun (N. Y.) 190, 31 N. Y. Suppl. 599; Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100]; Jackson *v.* Kasseall, 30 Hun (N. Y.) 231; Armitage *v.* Mace, 48 N. Y. Super. Ct. 107 [*affirmed* in 96 N. Y. 538]; Lessels *v.* Farnsworth, 13 Daly (N. Y.) 473; Eckhard *v.* Donohue, 9 Daly (N. Y.) 214; Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083; Bentley *v.* Colyer, 9 N. Y. St. 687; Ogle *v.* King, 2 N. Y. City Ct. 83.

29. Lessels *v.* Farnsworth, 13 Daly (N. Y.) 473; Eckhard *v.* Donohue, 9 Daly (N. Y.) 214.

30. Cox *v.* McGuire, 26 Ill. App. 315; Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203.

Assignability. The statutory lien, since it depends for its existence on the personal possession of the lienor, is not assignable. Glascock *v.* Lemp, 26 Ind. App. 175, 59 N. E. 342. But see Shellhammer *v.* Jones, 87 Iowa 520, 54 N. W. 363.

31. Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203; Hoover *v.* Epler, 52 Pa. St. 522.

32. Varney *v.* Jackson, 66 Mo. App. 348; Armitage *v.* Mace, 96 N. Y. 538; Young *v.* Kimball, 23 Pa. St. 193.

33. Gammell *v.* Schley, 41 Ga. 112.

34. Varney *v.* Jackson, 66 Mo. App. 348.

A lien on the "horse or horses kept, and on any vehicle or equipment" coming into his possession therewith, given by the terms of a statute, creates no lien on the carriage for the board of the horse, where the horse is boarded at a livery stable and subsequently the owner of the horse sends a carriage to the stable. Zartman-Thalman Carriage Co. *v.* Reid, 99 Mo. App. 415, 73 S. W. 942.

35. Varney *v.* Jackson, 66 Mo. App. 348; Jackson *v.* Kasseall, 30 Hun (N. Y.) 231; Cotta *v.* Carr, 27 Misc. (N. Y.) 545, 58 N. Y. Suppl. 317; Robinson *v.* Kaplan, 21 Misc. (N. Y.) 686, 47 N. Y. Suppl. 1083; Sides *v.* Cline, 19 Pa. Co. Ct. 481; Hartshorne *v.* Seeds, 1 Chest. Co. Rep. (Pa.) 460.

36. Young *v.* Kimball, 23 Pa. St. 193.

37. Exempt property generally see Exemptions.

38. Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290; Fitch *v.* Steagall, 14 Bush (Ky.) 230; Flint *v.* Luhrs, 66 Minn. 57, 68 N. W. 514, 61 Am. St. Rep. 391.

39. The lien of a subsequent mortgage is superior to that of the livery-stable keeper

keeper with the consent of the owner, express or implied;[40] but there are decisions to the contrary which proceed upon the idea that the mortgaged horse must be preserved for the benefit of the mortgagee as well as that of the mortgagor.[41]

(II) *When Statute Itself Creates Lien.* Where the statute and not the agreement of the mortgagor creates the lien, and is intended to give a lien to every livery-stable keeper, provided notice be given to the owner, the giving of the statutory notice to the mortgagee as well as to the mortgagor renders the lien of the mortgagee subordinate.[42]

b. Over Lien of Execution. The lien of a livery-stable keeper is superior to that of an execution levied upon the horse while temporarily in his owner's possession.[43]

8. Waiver or Loss — a. In General. If a statute providing for a lien in favor of a livery-stable keeper gives no intimation that it uses the word "lien" in any different sense than that which is known to the common law, whatever will divest a common-law lien will divest the statutory lien.[44]

b. When and How Lost. A livery-stable keeper waives or loses his lien for keeping a horse by voluntarily and without reservation parting with possession;[45] by refusing to deliver a horse, unless there be paid in addition to the claim for keeping an unwarranted claim;[46] by compromising his claim,[47] or taking security

who voluntarily parts with the possession of the horse or horses kept by him. Marseilles Mfg. Co. *v.* Morgan, 12 Nebr. 66, 10 N. W. 462.

40. *Alabama.* — Chapman *v.* Montgomery First Nat. Bank, 98 Ala. 528, 13 So. 764, 22 L. R. A. 728.

Illinois.— Charles *v.* Neigelson, 15 Ill. App. 17.

Kentucky.— Lee *v.* Vanmeter, 98 Ky. 1, 32 S. W. 137, 17 Ky. L. Rep. 548.

Maine.— Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467.

Massachusetts.— Howes *v.* Newcomb, 146 Mass. 76, 15 N. E. 123.

Missouri.— Miller *v.* Crabbe, 66 Mo. App. 660; Lazarus *v.* Moran, 64 Mo. App. 239; Baskins *v.* Wayne, 62 Mo. App. 515; Pickett *v.* McCord, 62 Mo. App. 467; Stone *v.* Kelley, 59 Mo. App. 214.

New Hampshire.— Sargent *v.* Usher, 55 N. H. 287, 20 Am. Rep. 208.

New Jersey.— Sullivan *v.* Clifton, 55 N. J. L. 324, 26 Atl. 964, 39 Am. St. Rep. 652, 20 L. R. A. 719.

Tennessee.— McGhee *v.* Edwards, 87 Tenn. 506, 11 S. W. 316, 3 L. R. A. 654.

Texas.— Blackford *v.* Ryan, (Civ. App. 1901) 61 S. W. 161.

Consent on the part of the mortgagee may be implied from the express contract under which the mortgagor delivers the horse to the livery-stable keeper and from the circumstances surrounding the transaction. Lynde *v.* Parker, 155 Mass. 481, 30 N. E. 74; Miller *v.* Crabbe, 66 Mo. App. 660.

The mortgagee need not tender the amount of a livery-stable keeper's lien, in order to entitle him to possession. Reynolds *v.* Case, 60 Mich. 76, 26 N. W. 838.

41. Colquitt *v.* Kirkman, 47 Ga. 555; Smith *v.* Stevens, 36 Minn. 303, 31 N. W. 55. See also Skinner *v.* Caughey, 64 Minn. 375, 67 N. W. 203.

42. Corning *v.* Ashley, 51 Hun (N. Y.) 483, 4 N. Y. Suppl. 255 [*affirmed* in 121 N. Y. 700, 24 N. E. 1100].

Service of the statutory notice on the mortgagee, however, does not give the livery-stable keeper a lien for past charges superior to that of a chattel mortgage. Jackson *v.* Kasseall, 30 Hun (N. Y.) 231.

43. Caldwell *v.* Tutt, 10 Lea (Tenn.) 258, 43 Am. Rep. 307.

44. Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288.

45. *Iowa.*— Shellhammer *v.* Jones, 87 Iowa 520, 54 N. W. 363; Bray *v.* Wise, 82 Iowa 581, 48 N. W. 994.

Massachusetts.— Papineau *v.* Wentworth, 136 Mass. 543.

Minnesota.— Ferriss *v.* Schreiner, 43 Minn. 148, 44 N. W. 1083.

Missouri.— State *v.* Shevlin, 23 Mo. App. 598.

Nebraska.— Marseilles Mfg. Co. *v.* Morgan, 12 Nebr. 66, 10 N. W. 462.

Nevada.— Estey *v.* Cooke, 12 Nev. 276; Cardinal *v.* Edwards, 5 Nev. 36.

New York.— Gorman *v.* Williams, 26 Misc. 776, 56 N. Y. Suppl. 1031.

Ohio.— Seebaum *v.* Handy, 46 Ohio St. 560, 22 N. E. 869.

See 33 Cent. Dig. tit. "Livery Stable Keepers," § 9.

46. Hamilton *v.* McLaughlin, 145 Mass. 20, 12 N. E. 424; Viley *v.* Lockwood, 102 Tenn. 426, 52 S. W. 138. See also Allen *v.* Corby, 59 N. Y. App. Div. 1, 69 N. Y. Suppl. 7. *Compare* Bowden *v.* Dugan, 91 Me. 141, 39 Atl. 467.

But the assertion of an unjust claim, in order to operate as a waiver of the lien, must be clear and distinct and interfere with a claimed right on the part of the owner. Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290.

47. Rosema *v.* Porter, 112 Mich. 13, 70 N. W. 316; Darling *v.* Hunt, 46 N. Y. App. Div. 631, 61 N. Y. Suppl. 278.

therefor;[48] by making an agreement fixing a future time of payment;[49] or by so using the horse left in his charge as to amount to a conversion thereof.[50] Again, a livery-stable keeper waives or loses his lien by selling his stable and allowing the purchaser to take possession of the horse, without any arrangement as to the horse being held for his benefit;[51] by failing to give a notice of intention to enforce his lien, where such notice is required by statute;[52] or by failing to enforce his lien within a reasonable time.[53]

c. When and How Not Lost. On the other hand, the lien of a livery-stable keeper is not waived or lost where possession of the horse is tortiously obtained from him by the owner or by any one else;[54] where he allows the owner to use the horse in his business and to have possession of it for that purpose;[55] or where the horse is sold before the statutory notice of lien is given.[56] Again, a livery-stable keeper's lien is not lost by a third person seizing the property by virtue of an execution,[57] or by selling it under such execution;[58] or by the livery-stable keeper levying an execution issued in a proceeding to enforce his lien,[59] levying an attachment on the property,[60] or buying the property at a sale under execution issued upon a judgment in favor of a third party.[61]

9. REVIVOR. If the owner of the horse obtains possession by fraud and a livery-stable keeper, without force, retakes the animal, the lien will be revived;[62] but not if the livery-stable keeper regains possession by trick or fraud.[63]

10. ENFORCEMENT — a. When Enforced. The lien must be enforced within a reasonable time after the livery-stable keeper is notified that the one in whose name the horse was left in his care is not the owner and will no longer be responsible for the keeping.[64]

b. How Enforced — (I) *IN GENERAL.* Where a horse is wrongfully taken

48. Darling *v.* Hunt, 46 N. Y. App. Div. 631, 61 N. Y. Suppl. 278; Gorman *v.* Williams, 26 Misc. (N. Y.) 776, 56 N. Y. Suppl. 1031.

49. Cardinal *v.* Edwards, 5 Nev. 36.

50. Munson *v.* Porter, 63 Iowa 453, 19 N. W. 290.

Question for jury.— The fact that a livery-stable keeper, while holding possession of horses under a claim of lien for their keeping, uses them on a hack from which he derives some profit, does not constitute a conversion, as a matter of law, which will debar him from the enforcement of his lien, there being evidence that the horses were benefited by the use and it not appearing that the keeper refused to account for the value of their use, but the question of conversion is for the jury. Brintnall *v.* Smith, 166 Mass. 253, 44 N. E. 223.

51. Fitchett *v.* Canary, 59 N. Y. Super. Ct. 383, 14 N. Y. Suppl. 479.

52. Bentley *v.* Colyer, 9 N. Y. St. 687; Ogle *v.* King, 2 N. Y. City Ct. 83.

53. Mason Stable Co. *v.* Lewis, 16 Misc. (N. Y.) 359, 38 N. Y. Suppl. 82.

54. Young *v.* Kimball, 23 Pa. St. 193; Wallace *v.* Woodgate, 1 C. & P. 575, 12 E. C. L. 328, 1 R. & M. 193, 21 E. C. L. 73.

Even as against third persons having no notice, the lien of a livery-stable keeper is not lost where his relinquishment of possession is involuntary. State *v.* Shevlin, 23 Mo. App. 598.

55. Walls *v.* Long, 2 Ind. App. 202, 28 N. E. 101; Heaps *v.* Jones, 23 Mo. App. 617; Young *v.* Kimball, 23 Pa. St. 193; Caldwell *v.* Tutt, 10 Lea (Tenn.) 258, 43 Am. Rep. 307. *Contra*, Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288; Estey *v.* Cooke, 12 Nev. 276; Cardinal *v.* Edwards, 5 Nev. 36.

Even as against third parties attaching, buying, or taking a mortgage on the horse while temporarily in the possession of the owner, while the horse is boarded in the stable, the lien subsists. State *v.* Shevlin, 23 Mo. App. 598; Welsh *v.* Barnes, 5 N. D. 277, 65 N. W. 675.

Evidence.—In an action involving a conflict between a livery-stable keeper's lien and that of a chattel mortgage, it is error, when the evidence is conflicting as to whether the horse was still boarding at the stable at the time it was mortgaged or had been permanently removed, to exclude evidence intended to show that the mortgagor had no notice of the livery-stable keeper's lien. State *v.* Shevlin, 23 Mo. App. 598.

56. Lessels *v.* Farnsworth, 13 Daly (N. Y.) 473.

57. Shue *v.* Ingle, 87 Ill. App. 522.

58. Young *v.* Kimball, 23 Pa. St. 193.

59. Neff *v.* Rhodes, 20 Mo. App. 347.

60. Lambert *v.* Nicklass, 45 W. Va. 527, 31 S. E. 951, 72 Am. St. Rep. 828, 44 L. R. A. 561.

61. Neff *v.* Rhodes, 20 Mo. App. 347.

62. Wallace *v.* Woodgate, 1 C. & P. 575, 12 E. C. L. 328, R. & M. 193, 21 E. C. L. 731.

63. Bray *v.* Wise, 82 Iowa 581, 48 N. W. 994; Vinal *v.* Spofford, 139 Mass. 126, 29 N. E. 288.

64. Mason Stable Co. *v.* Lewis, 16 Misc. (N. Y.) 359, 38 N. Y. Suppl. 82.

from a livery-stable keeper, the usual and proper remedy for the enforcement of his lien is by replevin.[65] And even if the statute provides a specific remedy for the enforcement of the lien, such remedy is not exclusive, so that a lienor from whom the horse has been wrongfully taken may replevy it;[66] but during the pendency of such replevin action the lienor may not maintain another action for the enforcement of his lien.[67]

(II) *Sale.* Under a statute providing for the sale of the property to satisfy the lien, a sale made by a livery-stable keeper to himself is in any event voidable,[68] and if made without giving the notice specified by statute is absolutely void.[69]

c. Under What Circumstances Enforced. The lien is not enforceable where the livery-stable keeper claims a gross sum, and there is no way to distinguish between the sum claimed for the keeping of the horse and that claimed for other services.[70]

V. DUTIES AND LIABILITIES OF LIVERY-STABLE KEEPERS.

A. As to Horses or Vehicles Left in His Custody — 1. In General. The delivery of a horse or vehicle to a livery-stable keeper to be kept does not make him an insurer of its safety and care,[71] but creates a bailment mutually benefiting the parties and binding the bailee to take ordinary care of the property.[72]

2. Negligence — a. In General. It follows therefore from what has been said that a livery-stable keeper can be held responsible for loss or injury to the horse or vehicle while in his exclusive custody only upon proof of his negligence,[73]

65. Young *v.* Kimball, 23 Pa. St. 193; Sides *v.* Cline, 19 Pa. Co. Ct. 481. See also, generally, Replevin.

66. Heaps *v.* Jones, 23 Mo. App. 617; State *v.* Shevlin, 23 Mo. App. 598.

67. Pickett *v.* McCord, 62 Mo. App. 467.

68. Witkowski *v.* Stubbs, 91 Ga. 440, 17 S. E. 609.

69. Witkowski *v.* Stubbs, 91 Ga. 440, 17 S. E. 609.

In Indiana the publishing of a notice of the time and place of the sale of the property by a liveryman to satisfy a lien thereon is sufficient, if given by publishing the same three weeks consecutively in a newspaper in the county. Shappendocia *v.* Spencer, 73 Ind. 128.

70. Varney *v.* Jackson, 66 Mo. App. 348.

71. Hunter *v.* Ricke, 127 Iowa 108, 102 N. W. 826; Dennis *v.* Huyck, 48 Mich. 620, 12 N. W. 878, 42 Am. Rep. 479; Searle *v.* Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. Rep. N. S. 89, 22 Wkly. Rep. 367.

72. *Connecticut.*— Bradley *v.* Cunningham, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679.

Iowa.— Hunter *v.* Ricke Bros., 127 Iowa 108, 102 N. W. 826.

Kentucky.— Weick *v.* Dougherty, 90 S. W. 996, 28 Ky. L. Rep. 930, 3 L. R. A. N. S. 348.

Maryland.— Adams *v.* Cost, 62 Md. 264, 50 Am. Rep. 211.

New York.— Byrnes *v.* Holscher, 96 N. Y. Suppl. 89, holding that where plaintiff leased his sleigh, and the servant of the lessee left it at a livery stable, and the keepers let out the sleigh to someone who destroyed it, the livery-stable keepers were liable for the loss.

North Carolina.—Swann *v.* Brown, 51 N. C. 150, 72 Am. Dec. 568.

England.— See Searle *v.* Laverick, L. R. 9 Q. B. 122, 43 L. J. Q. B. 43, 30 L. T. Rep. N. S. 89, 22 Wkly. Rep. 367.

See 33 Cent. Dig. tit. "Livery Stable Keepers," § 6. See also generally, Bailments.

When a horse in charge of a livery-stable keeper becomes sick, it is his duty to either see that proper treatment is furnished to the animal, that is to say, such treatment as reasonable care and skill would dictate, or to give immediate notice of the sickness to the owner. Hexamer *v.* Sonthal, 49 N. J. L. 682, 10 Atl. 281.

73. Dennis *v.* Huyck, 48 Mich. 620, 12 N. W. 878, 42 Am. Rep. 479; Swann *v.* Brown, 51 N. C. 150, 72 Am. Dec. 568.

Negligence generally see Negligence.

Proximate cause. — The negligence complained of, however, must be the proximate cause of the loss or injury. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469; Eaton *v.* Lancaster, 79 Me. 477, 10 Atl. 449.

When not liable.— A livery-stable keeper who rents stalls to another who finds his own employee and feed for his horses is not liable if the latter be lost or stolen. Berry *v.* Marix, 16 La. Ann. 248.

Evidence.— In an action against a livery-stable keeper to recover damages for the death of a horse intrusted to him which slipped his halter, it is error to exclude evidence that the horse was frightened, and was caused to slip and fall on the pavement, by the noise and hallooing made by persons on the street. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469. Where the issue is whether livery-stable keepers were negligent in respect to their care of plaintiff's horse, bailed with them, and lost in a fire at the barn in the night-time, evidence that plaintiff placed reliance on a statement made to him

or from the negligence of his servants acting within the scope of their employment.[74]

b. Contributory Negligence. Since the action against the livery-stable keeper for loss or injury to a horse while in his custody is founded on contract,[75] the doctrine of contributory negligence is not applicable.[76]

B. As to Horses, Vehicles, or Equipment Let to Customer — 1. In General. A livery-stable keeper is not a common carrier and bound to use the utmost care and skill in furnishing a horse, vehicle, harness, and driver to a customer,[77] but his duty in the premises is to use ordinary care and skill.[78]

2. Injuries Occasioned by Horse — a. In General. A livery-stable keeper who lets a horse for hire impliedly promises that the horse is suitable for the purpose for which it is let, and not vicious;[79] hence a livery-stable keeper who knows of the viciousness of a horse he lets for hire, or who by the exercise of reasonable care ought to know of its viciousness, is liable for injuries resulting therefrom to the hirer;[80] nor is the liability affected by the fact that such injury was in part occasioned by a defect in the highway,[81] or by the fact that the hirer to the knowledge of the liveryman took a horse not intended for him.[82]

b. Hidden Defects. The liveryman does not, however, warrant that the horse is free from defects which he does not know of, and could not have discovered by the exercise of due care.[83]

by one of defendants to the effect that such defendant was to remain in attendance upon the barn all night is irrelevant. Hunter *v.* Ricke, 127 Iowa 108, 102 N. W. 826.

74. Lockridge *v.* Fesler, 37 S. W. 65, 18 Ky. L. Rep. 469; Eaton *v.* Lancaster, 79 Me. 477, 10 Atl. 449.

Master's liability for servant's act generally see Master and Servant.

If the owner confers upon the servants authority to ride and exercise the horse, which service the livery stable has not assumed, and an accident occurs while the servant is acting under the authority so conferred, the livery-stable keeper is not responsible. Adams *v.* Cost, 62 Md. 264, 50 Am. Rep. 211.

75. McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242. Hunter *v.* Ricke, 127 Iowa 108, 102 N. W. 826; Legge *v.* Tucker, 1 H. & N. 500, 2 Jur. N. S. 1235, 26 L. J. Exch. 71, 5 Wkly. Rep. 78.

Damages recoverable.— Any damage which is not the natural consequence of a breach of the contract of keeping and avoidable by ordinary care on the part of the owner is not recoverable. Peyser *v.* Lund, 89 N. Y. App. Div. 195, 85 N. Y. Suppl. 881.

76. McPherrin *v.* Jennings, 66 Iowa 622, 24 N. W. 242.

Contributory negligence generally see Negligence.

77. Stanley *v.* Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561. Payne *v.* Halstead, 44 Ill. App. 97; Siegrist *v.* Arnot, 86 Mo. 200, 56 Am. Rep. 424; McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

Who are common carriers see Carriers, 6 Cyc. 352.

78. Stanley *v.* Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561; Payne *v.* Halstead, 44 Ill. App. 97; Erickson *v.* Barber, 83 Iowa 367, 49 N. W. 838; McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919. See also Ohlweiler *v.* Lehmann, 88 Wis. 75, 59 S. W. 678.

79. Windle *v.* Jordan, 75 Me. 149.

80. Lynch *v.* Richardson, 163 Mass. 160, 39 N. E. 801, 47 Am. St. Rep. 444; Copeland *v.* Draper, 157 Mass. 558, 32 N. E. 944, 34 Am. St. Rep. 314, 19 L. R. A. 283; Horne *v.* Meakin, 115 Mass. 326; Kissam *v.* Jones, 56 Hun (N. Y.) 432, 10 N. Y. Suppl. 94; Huntoon *v.* Trumbull, 12 Fed. 844, 2 McCrary 314; Fowler *v.* Lock, L. R. 10 C. P. 90, 31 L. T. Rep. N. S. 844, 23 Wkly. Rep. 415.

A livery-stable keeper gratuitously furnishing a carriage to take performers to a charitable entertainment and to bring them back is not liable for injuries to a person, not a performer, occasioned by the running away of the horse. Siegrist *v.* Arnot, 86 Mo. 200, 56 Am. Rep. 424.

Burden of proof as to defense.— In an action by one who hired a horse from a livery-stable keeper for injuries received by a kick from the horse, in which the defense is that at the time of letting defendant warned plaintiff that it would kick if struck, and that plaintiff agreed to take the risk, and that the injury was caused by plaintiff's striking the horse, the burden of proof to show the facts of defense rests with defendant. Windle *v.* Jordan, 75 Me. 149.

Evidence.— In an action against a liveryman for injury from a vicious horse let to plaintiff, evidence of others who had driven the horse a month before the accident that the horse had run away with them was held admissible to show the actual dangerous disposition of the animal. Nisbet *v.* Wells, 76 S. W. 120, 25 Ky. L. Rep. 511.

81. Horne *v.* Meakin, 115 Mass. 326.

82. Horne *v.* Meakin, 115 Mass. 326.

83. Copeland *v.* Draper, 157 Mass. 558, 32 N. E. 944, 34 Am. St. Rep. 314, 19 L. R. A. 283. See also Story Bailm. § 391.

c. Contributory Negligence.[84] The hirer of a vicious horse is not guilty of contributory negligence in failing to abandon the animal after it has shown the first symptoms of viciousness,[85] or in jumping from the vehicle when put in danger of injury by the running away of the horse.[86]

3. Injuries Due to Defects in Vehicle. Livery-stable keepers who let carriages for hire are answerable for injuries which happen by reason of defects which might have been discovered by the most careful and thorough examination,[87] but not for an injury which happens in consequence of a hidden defect which would not upon such examination have been discovered[88]

4. Injuries Due to Neglect or Incompetency of Driver. It is the duty of livery-stable keepers to select and furnish drivers having the skill, caution, and experience ordinarily possessed by persons exercising such calling,[89] and slight neglect or want of care in this regard creates a liability for injuries thereby occasioned.[90]

VI. Duties and Liabilities of Hirer of Horse and Vehicle.

A. In General. By his contract the hirer of a horse from a livery stable agrees to use ordinary care and skill in driving the animal,[91] which care means that which an ordinarily prudent person would take in the use of his own property.[92] When want of such care and skill results in injury to the horse, the hirer is liable, whether the neglect be his own,[93] or that of his servants.[94]

B. Deviating From Journey Specified in Contract. One who hires a horse for a specified journey becomes liable for any damage arising from his driving the animal on a further journey,[95] or on another and different trip,[96] but not for slight and immaterial departures from the general course outlined in the contract.[97]

C. Using Horse After Time Specified in Contract. So also does the hirer

84. Contributory negligence generally see Negligence.

85. Nisbet *v.* Wells, 76 S. W. 120, 25 Ky. L. Rep. 511.

86. Nisbet *v.* Wells, 76 S. W. 120, 25 Ky. L. Rep. 511.

It is a question for the jury whether one who without having hold of the reins attempted to get into a buggy driven by a horse said to be unsafe by the livery-stable keeper who let it was guilty of contributory negligence. Monroe *v.* Lattin, 25 Kan. 351.

87. Hadley *v.* Cross, 34 Vt. 586, 80 Am. Dec. 699.

88. Stanley *v.* Steele, 77 Conn. 688, 60 Atl. 640, 69 L. R. A. 561; Hadley *v.* Cross, 34 Vt. 586, 80 Am. Dec. 699; Hyman *v.* Nye, 6 Q. B. D. 685, 45 J. P. 554, 44 L. T. Rep. N. S. 919.

89. Payne *v.* Halstead, 44 Ill. App. 97; McGregor *v.* Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919.

90. Benner Livery, etc., Co. *v.* Busson, 58 Ill. App. 17; Perez *v.* New Orleans, etc., R. Co., 47 La. Ann. 1391, 17 So. 869.

91. Strong *v.* Connell, 115 Mass. 575; Mooers *v.* Larry, 15 Gray (Mass.) 451; Chase *v.* Boody, 55 N. H. 574.

92. Powers *v.* Brooks, 7 Ky. L. Rep. 204.

93. Chase *v.* Boody, 55 N. H. 574.

Burden of proof.— In an action by a liveryman for injuries received by his horse while in the custody of a hirer the burden of proof is on the liveryman to show negligence. Powers *v.* Brooks, 7 Ky. L. Rep. 204. This burden is not shifted by proof that the horse was uninjured when delivered to the hirer, and remained in his possession until returned in an injured condition to the liveryman. Hart *v.* Lockwood, 66 N. H. 541, 23 Atl. 367. But see Bischoff *v.* Schulz, 5 N. Y. Suppl. 757.

94. Pickens *v.* Diecker, 21 Ohio St. 212, 8 Am. Rep. 55.

Master's liability for servant's act generally see Master and Servant.

Negligence of the hirer's servants resulting in injuries to his carriage will not authorize a recovery by the livery-stable keeper, where the injuries would not have occurred had it not been for the breaking of the reins furnished by the liveryman. Oglesby *v.* Smith, 38 Mo. App. 67.

95. Hall *v.* Corcoran, 107 Mass. 251, 9 Am. Rep. 30; Gregg *v.* Wyman, 4 Cush. (Mass.) 322.

96. Strong *v.* Connell, 115 Mass. 575.

97. Young *v.* Muhling, 48 N. Y. App. Div. 617, 63 N. Y. Suppl. 181, holding further that an admission made by the hirer that he went to a place other than that agreed upon is insufficient to show a material departure from the terms of the contract, where the hirer and another positively denied the truth of the admission, and the hirer explained that it was made under excitement and there was proof on both sides that the hirer went to the place specified and spent the day there.

of a horse for a definite time, who continues to use him after the time expires, become liable for any injury that the animal may sustain.[98]

D. Measure of Damages.[99] The measure of damages for injuries due to overdriving a horse hired of a livery-stable keeper is the expense of curing the animal of its injuries, the value of the services while it is being cured, and the difference between its value before the injury and after the cure.[1]

VII. PENALTIES FOR VIOLATING REGULATIONS.[2]

One who keeps a livery stable without obtaining the license required by a city empowered to license and tax livery-stable keepers is guilty of a breach of the provisions of an ordinance requiring such tax and is subject to the penalty prescribed therein.[3]

VIII. OFFENSES BY LIVERY-STABLE KEEPERS.[4]

Where a municipal ordinance imposes a license-tax on every livery stable, a complaint charging the accused with conducting a livery stable without license does not entirely fail to state a public offense.[5]

LIVERY STOCK. A term sufficiently expressive to include all the property used in a livery business.[1]

LIVES IN BEING. See PERPETUITIES.

LIVE STOCK. Domestic animals kept for farm purposes, especially marketable animals, as cattle, horses, and sheep.[2] (Live Stock: In General, see ANIMALS. Carriage of, see CARRIERS; SHIPPING. Damage For Injury to or Destruction of, see DAMAGES; RAILROADS. Exemption From Seizure, see EXEMPTIONS. Fences to Restrain, see FENCES. Injury to — In General, see ANIMALS; By Fence, see FENCES; By Railroad, see RAILROADS; Jurisdiction of Justice of the Peace, see JUSTICES OF THE PEACE. Insurance, see LIVE-STOCK INSURANCE. On Range, Levy on, see EXECUTIONS. Registers, see EVIDENCE.)

98. Stewart *v.* Davis, 31 Ark. 518, 25 Am. Rep. 576, holding further that, although the contract for the hire of the horse is void, the continued use of the animal and the different use made of him from that agreed upon was in effect a warranty against injury.

99. Damages generally see DAMAGES.

1. Cunningham *v.* Dickerson, 104 Mo. App. 410, 79 S. W. 492.

Where the horse is let to one person, at the special request of another, the latter is not liable for the negligent driving of the former, but his liability is limited to the price for hiring. Wallace *v.* Laugeland, 66 Mich. 365, 33 N. W. 519.

2. Penalties generally see PENALTIES.

3. Howland *v.* Chicago, 108 Ill. 496.

4. Criminal law generally see CRIMINAL LAW.

Indictment or information generally see INDICTMENTS AND INFORMATIONS.

5. *Ex p.* Jackson, 143 Cal. 564, 77 Pac. 457.

An indictment does not lie under 15 S. C. St. at L. 195, against a livery-stable keeper for not paying a license according to the rental value of the stable since the act prescribed no rate by which the sum to be paid is fixed. State *v.* Graham, 4 S. C. 380.

Where an accused is convicted of keeping a livery stable without license under a complaint charging him with conducting a livery "or" feed stable without license, the defect in the complaint because of the disjunctive "or" is not available on habeas corpus. *Ex p.* Jackson, 143 Cal. 564, 77 Pac. 457.

1. Shuler *v.* Dutton, 75 Iowa 155, 157, 39 N. W. 239.

2. Standard Dict. See also Lee *v.* Minneapolis, etc., R. Co., 66 Iowa 131, 133, 23 N. W. 299 (hogs); Inman *v.* Chicago, etc., R. Co., 60 Iowa 459, 461, 15 N. W. 286 (horses); Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 192, 85 N. W. 454, 86 Am. St. Rep. 535 (horses); The Matilda A. Lewis, 16 Fed. Cas. No. 9,281, 5 Blatchf. 520, 522 (not fowls).

Defined by statute see Ida. Pol. Code (1901), § 660; Wyo. Rev. St. (1899) §§ 1987, 3216.

LIVE-STOCK INSURANCE

By John Lehman *

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CROSS-REFERENCES

For Matters Relating to:
Insurance Generally, see Insurance.
Other Insurance Titles, see Insurance, and Cross-References Thereunder.

I. Definition.

Live-stock insurance is a contract by which the insurer agrees to indemnify the insured against such loss or damage as he may sustain by reason of injury to or the death of live stock[1] by the happening of the perils specified, as fire and lightning;[2] or a contract to pay a certain sum of money on the death of an animal from disease or accident.[3]

II. The Contract and Rights Thereunder.

A. In General. The contract of insurance on live stock does not differ from contracts of indemnity against damage to other property from like perils, as where ordinary fire insurance policies cover live stock along with other property definitely located,[4] and also insure against damage by lightning,[5] or wind, cyclone, or

1. Olyphant Lumber Co. *v.* Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100, 104.

2. See Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159; American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107.

3. See Algase *v.* Horse Owners' Ins. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101.

4. Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748.

5. See Farmers' Mut. F. Ins. Assoc. *v.* Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284; Wilson *v.* Hawkeye Ins. Co., 70 Iowa 91, 30 N. W. 22; Mills *v.* Farmers' Ins. Co., 37 Iowa 400; Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535; De Graff *v.* Queen Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685; Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159.

Lightning insurance defined see Lightning Insurance, *ante*, p. 959.

* Author of "Abduction," 1 Cyc. 140; "Accounts and Accounting," 1 Cyc. 351.

tornadoes,[6] and in policies covering loss by the death of animals by accident or disease, now often written by companies organized for that particular class of business, the provisions are peculiar only in so far as required by the nature and use of the property insured.[7]

B. Payment of Premium. The insurer may waive the payment of the premiums when due,[8] and if under the provisions of the policy the only effect of the failure to pay a premium note is to give the company the right to cancel the policy, the validity of the policy does not necessarily depend upon payment of the note.[9]

C. Ownership of Property. While under a policy on the life of an animal insuring its owner against its loss by death, it appears from the terms of the policy and the nature of the contract that the ownership of the particular animal at the time of the loss, as well as at the time the policy is issued, is material,[10] and if the owner of such property sells it he must give notice of the sale, as required by the policy and the company's by-laws, if he retains any interest which he wishes to protect,[11] in the case of a policy for a gross amount against loss by fire on property, including "live stock on premises" for a designated amount, the fact that the ownership of an animal killed was acquired by the insured in exchange for other stock on the premises when the policy issued will not affect the right to recover for the loss.[12]

D. Location and Use of Property — Effect of Description. A policy of insurance covering live stock must have a reasonable construction, and the insured cannot be deprived, upon the peril of forfeiture of his policy, of the ordinary and beneficial use of the property insured,[13] unless there is an express restriction in the policy.[14] Upon this principle it has been held that the removal of live stock consistently with its ordinary use will not operate to avoid the policy,[15] and

6. Wilson *v.* Hawkeye Ins. Co., 70 Iowa 91, 30 N. W. 22.

Cyclone insurance defined see CYCLONE INSURANCE, 12 Cyc. 1191.

Hurricane insurance defined see HURRICANE INSURANCE.

7. See Tripp *v.* Northwestern Live Stock Ins. Co., 91 Iowa 278, 59 N. W. 1; Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620; Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101.

8. Schoneman *v.* Western Horse, etc., Ins. Co., 16 Nebr. 404, 20 N. W. 284.

Receipt after death.— Where a policy on the life of a horse was already forfeited at the time of its death, by failure to give notice of its sickness, and without knowledge of the death the company accepted payment of a premium note, but returned the money in a reasonable time after learning of the death, the forfeiture was not waived. Green *v.* Northwestern Live-Stock Ins. Co., 87 Iowa 358, 54 N. W. 349.

9. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

10. See Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620; Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101; Olyphant Lumber Co. *v.* Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100.

11. Olyphant Lumber Co. *v.* Peoples' Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100, where the owner of a horse sold him and transferred the possession and received the consideration but upon condition that the assignment of the policy would be approved by the company and no notice was given to the company, and thereafter the horse became sick, and on the day it died the assigned policy was sent to the company for approval.

12. Mills *v.* Farmers' Ins. Co., 37 Iowa 400, in analogy to the well settled rule that an insurance company is liable for goods purchased and put into the stock after the issuance of a policy upon a stock of goods on certain premises.

13. Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748 (under a fire-insurance policy covering live stock and other property); Boright *v.* Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796.

14. Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748; Eddy *v.* Farmers' Mut. Ins. Co., 20 N. Y. App. Div. 109, 46 N. Y. Suppl. 695.

15. Territorial restrictions on company's business.— Where there is no provision in the constitution, by-laws, or policy of a mutual live-stock insurance association which prohibits the removal, temporarily or for the purpose of sale, out of particular counties, of the live stock which may be insured by its policies, such a removal does not contravene a provision of the constitution that the business of the association shall be confined to those counties, and if they die when they are so removed the contract is not forfeited. Reck *v.* Hathoro Mut. Live-Stock, etc., Ins. Co., 163 Pa. St. 443, 30 Atl. 205; Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281.

language used to describe the location of the property will not limit its use to such place.[16]

E. Assignment of Policy. A policy of insurance or indemnity upon a horse, where the insurer agrees to pay a certain sum upon proof of death as provided, is assignable like other choses in action.[17] But on the other hand a sale

To the same effect see Eddy *v.* Farmers' Mut. Ins. Co., 20 N. Y. App. Div. 109, 46 N. Y. Suppl. 695.

16. Mills *v.* Farmers' Ins. Co., 37 Iowa 400; Peterson *v.* Mississippi Valley Ins. Co., 24 Iowa 494, 95 Am. Dec. 748 (where the policy contained the condition that "if the risk be increased by the erection of adjacent buildings, or by any other means without the assent of the company, the policy shall become void," and the assured, a farmer, while hauling his grain to market stopped for the night at a hotel, and put his team in the hotel barn in which the property was more exposed to fire than in its use on the farm of the assured); Holbrook *v.* St. Paul F. & M. Ins. Co., 25 Minn. 229 (under a fire policy on mules "all contained in the two-story frame barn, (36 x 100 ft.,) situate (detached) on section No. 19, town No. 140, range No. 43, in Becker county, Minnesota," holding that this description did not limit the risk to the property while actually in the barn).

Lightning clause in fire policy.— Where stock is described in a policy covering live stock and other property, as being in a certain barn, and there is a further provision "that the said company shall not be liable for more than the sum or sums insured, nor the interest of the insured, except as hereinafter provided, as specified upon the property described in the places herein set forth, and not elsewhere," it was held that the description did not amount to a promissory warranty that the stock would not be removed from the barn, and a recovery could be had for an animal covered by the policy which was killed by lightning while in another barn (De Graff *v.* Queen Ins. Co., 38 Minn. 501, 38 N. W. 696, 8 Am. St. Rep. 685), or while out of the barn (American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107). Under similar provisions the same ruling was made in Mills *v.* Farmers' Ins. Co., 37 Iowa 400; Haws *v.* Philadelphia Fire Assoc., 114 Pa. St. 431, 7 Atl. 159. So in Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535, it is held that under a provision that "live stock, carriages, harnesses, and farm implements, $200. Stock insured against lightning anywhere in Kent, Allegan, and Ottawa counties. Situated in Allegan county, Michigan, on section 5, in the township of Heath," the insurance was not confined to property while on the farm. And in Boright *v.* Springfield F. & M. Ins. Co., 34 Minn. 352, 25 N. W. 796, under a policy written on a form applicable to buildings, insuring against loss or damage by fire on horses and colts "while in barn, and by lightning only while in use, or running in pasture, or yard on his farm, in the town of Le Sueur," it was held that a loss by lightning was not confined to such loss while the horses were "in use" or "running in pasture," on the farm occupied by plaintiff at the date of the issue of the policy, but extended to any place in the town of Le Sueur. But in Haws *v.* St. Paul F. & M. Ins. Co., 130 Pa. St. 113, 15 Atl. 915, 18 Atl. 621, 2 L. R. A. 52, under a provision that "this policy does not cover or insure personal property of any kind while removed from the particular building herein described, or kept or used in any other place or location, unless otherwise specified in the policy," it was held that a recovery could not be had for the loss of an animal while not in the place specified. The court distinguishes Haws *v.* Philadelphia Fire Assoc., *supra*, and American Cent. Ins. Co. *v.* Haws, *supra*, in that in both the opinions proceeded upon the ground that as the insurance was upon horses alone and the contract was inserted into a printed form designed for the insurance of a different class of property, and it could not have been in contemplation of the parties that the animals were insured only when inside the barn, while in the case in hand the restrictive clause is not a mere matter of description. It may be noted, however, that in American Cent. Ins. Co. *v.* Haws, *supra*, it does not appear that only horses were insured or that the opinion proceeded on that ground, and while the policies were not written on forms especially adapted to insurance of live stock, the court seems to proceed in both these cases upon the ground that the ordinary use of the property was not interfered with — and in Haws *v.* Philadelphia Fire Assoc., *supra*, the court expressly distinguishes upon that ground insurance on other personal property. So in Farmers' Mut. F. Ins. Assoc. *v.* Kryder, 5 Ind. App. 430, 31 N. E. 851, 51 Am. St. Rep. 284, a still more radical ruling was made, where it was held that where no description was suggested or referred to in the policy except the barn and "contents therein," the contents of the barn were insured as such, and any item of property which was not included in that designation was not within the terms of the policy.

17. Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101, holding that where a mortgagee was assignee of the chose, at the time of the death of the animal which was caused by the negligence of a railroad company, he could recover, although after the loss the assignor made a settlement with the railroad company and executed a release to it, the assignee not appearing to have consented to discharge the mortgage or to have had any part in the settlement with the railroad company.

of property insured does not carry with it the policy of insurance, and in the absence of an assignment the grantee cannot recover on the policy because the insurer has no contract with him, and the grantor cannot recover because he has sustained no loss.[18]

F. Forfeiture and Avoidance — 1. FAILURE TO GIVE NOTICE OF SICKNESS OR ACCIDENT. Where the policy requires immediate notice of sickness, accident, etc., and provides that a failure to give it shall avoid the policy, no recovery can be had if there has been a violation of the condition.[19] The insurer does not waive the forfeiture by sending a surgeon to examine the animal upon the first notice it has of the sickness, or by thereafter receiving proofs of death,[20] although it may waive the written notice required by accepting and acting upon verbal notice.[21]

2. FALSE REPRESENTATIONS AND BREACH OF WARRANTY. A mere representation, as distinguished from a warranty, in an application for insurance on the life of an animal, although false, will not necessarily avoid the policy in the absence of bad faith, unless it is substantial and material to the risk, but if statements are warranted to be true and the policy is issued upon the agreement that such statements are warranted, the warranty must be strictly satisfied,[22] unless by statements to the agent when the application is written and knowledge then conveyed to him on the subject of the representations the company may be estopped to claim a warranty.[23]

3. CANCELLATION BY COMPANY. If the company wishes to avoid a policy on the ground of fraud, it should tender back the premium paid. It cannot retain the premium and at the same time refuse to pay a loss;[24] and if under the terms of the policy the company has the right, if it so elects, to terminate the contract of insurance, for failure of the insured to pay a premium note, in order to do so an affirmative act upon its part is necessary. So long as it insists upon the payment

18. Olyphant Lumber Co. *v.* People's Mut. Live Stock Ins. Co., 4 Pa. Super. Ct. 100.

19. Illinois Live Stock Ins. Co. *v.* Kirkpatrick, 61 Ill. App. 74; Green *v.* Northwestern Live-Stock Ins. Co., 87 Iowa 358, 54 N. W. 349; Alston *v.* Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784; Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641.

20. Illinois Live Stock Ins. Co. *v.* Kirkpatrick, 61 Ill. App. 74 (where the horse insured first showed sign of sickness on July 1, 1894, did not improve, but rather grew worse until the fifth, when a veterinary surgeon was called in, the indications becoming more unfavorable from day to day until the ninth, when one of the owners notified the company by mail, and on the tenth the company sent a surgeon to examine the horse); Alston *v.* Northwestern Live Stock Ins. Co., 7 Kan. App. 179, 53 Pac. 784.

21. Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567, where it was held that if the owner gives verbal notice within the time fixed in the policy, upon which the company acts, sending a surgeon to attend the animal, written notice required in the policy is waived; and where the company through its surgeon takes charge of the animal and they order it to be killed, it is more than mere evidence of waiver and is a waiver by such unequivocal acts as admit of no other construction.

22. Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641.

In an action for false representations brought by the company to recover money paid under a policy on the life of a horse, by reason of false and fraudulent representations as to the health and value of the animal, defendant must have known the falsity of the representations, or they must have been made without any knowledge or information or any grounds for expressing their belief, in order to justify a recovery. Hartford Live Stock Ins. Co. *v.* Matthews, 102 Mass. 221.

23. Johnston *v.* Northwestern Live Stock Ins. Co., 107 Wis. 337, 83 N. W. 641, holding that upon the question of the misrepresentation as to the amount for which the animal was mortgaged, if the insured said, "about $500," it would be a representation merely, if there was also a statement by the insured that he did not know the amount, and knowledge by the agent that he did not know it, and was not pretending to state it.

24. Schoneman *v.* Western Horse, etc., Ins. Co., 16 Nebr. 404, 20 N. W. 284, where the company issued a policy on certain live stock, including a stallion, but the owner not being ready to pay the premium, the agent extended the time, and subsequently the stallion died; thereupon the owner paid the premium and the policy was delivered to him; and in an action to recover on the policy for the death of the stallion, the evidence being in direct conflict as to whether plaintiff told the agent of the death when the premium was paid and the policy delivered, it was held that the company could not defend on the ground of fraud,

of the note and declines to cancel the policy, so long its obligations continue.[25] Where the provisions of a policy insuring against death by disease or accident gives the company the right to cancel the policy for misrepresentations in the application, it cannot, after discovering that the animal must be destroyed by reason of disease, resort to a pretended ground for canceling by a dishonest attempt to evade inevitable liability.[26]

G. The Loss — 1. Cause of the Loss. The loss must result from the particular peril against which the assured is indemnified.[27] Where a policy insuring against loss by the death of a horse excepts destruction by any society for the prevention of cruelty to animals, the insurer is not liable for death so produced, although the horse was killed on the ground that it was incurable,[28] and under a policy insuring against death by "disease or accident" an intentional destruction of the animal because it is incurably sick is not authorized.[29] If the death of an animal results from mistreatment by the policy-holder no recovery can be had for the loss.[30]

2. Notice and Proof of Loss. Forfeitures are not favored, and upon this principle if a policy on the life of live stock prescribes a certain notice of loss without providing that a non-compliance shall forfeit the contract, this effect will not be given to a failure to give the notice within the time prescribed or even within that time after the owner knew of the death.[31] And by analogy to cases involving the total destruction of a building by fire, where there is one article of personal property, specific and identical, insured for a certain round sum, no other proof will be required than notice to the company that there was an entire loss, that is, that the animal is dead.[32]

3. Adjustment of Loss. A clause providing for arbitration in the adjustment of a loss is waived by a denial of liability by the company.[33]

having retained the premium and not having sought to cancel the policy.

25. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620, where the note was paid to an attorney in whose hands it was placed for collection, without making known to him the fact of the death of the property.

26. Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567, where there was evidence that defendant company, before it was notified of the disease which caused the horse's death, was informed that the price paid for it was much less than stated in the application, and it appeared that the notification to the company of the disease was made on the thirteenth of the month, and that on the twenty-third defendant notified plaintiff of the cancellation of the policy because of the misrepresentation, while on the twenty-second defendant's surgeon, who attended the horse, had notified plaintiff that it must be killed the next day, and it was held that the evidence warranted the inference that notice of cancellation was not prompted by the misrepresentation as to the price assured paid for the horse, but by the fact of the disease which required the destruction of the animal.

27. Wilson *v.* Hawkeye Ins. Co., 70 Iowa 91, 30 N. W. 22, under a policy insuring against loss by wind and lightning.

Loss by lightning.— A policy insuring horses against loss by lightning has been held to include loss from lightning, whether the horses were killed by the lightning, or by a fire which was the immediate result of the lightning. Hapeman *v.* Citizens' Mut. F. Ins. Co., 126 Mich. 191, 85 N. W. 454, 86 Am. St. Rep. 535.

28. Hinsworth *v.* People's Mut. Live Stock Ins. Co., 2 Pa. Dist. 541.

29. Tripp *v.* Northwestern Live Stock Ins. Co., 91 Iowa 278, 59 N. W. 1, holding that an officer of the company could not authorize the destruction of the animal so as to bind the company to a liability not created by the policy; and that the business of the company was to insure against loss which resulted from the death of live stock, not to destroy it and then pay for its loss.

30. Western Horse, etc., Ins. Co. *v.* O'Neill, 21 Nebr. 548, 32 N. W. 581.

31. Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281, holding that in such a case it is proper to leave to the jury the reasonableness of the notice given; and that if defendant could show that it had sustained damage on account of the breach of the condition it might defend against the policy to that extent, but that would be the limit of its right.

32. Beech *v.* Live-Stock Ins. Assoc., 137 Pa. St. 617, 20 Atl. 943 (holding that notice to the company through the mail, of the death of a horse, under a policy insuring against its loss by death, and requesting a blank proof of loss in proper form, is sufficient proof of loss); American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107.

33. Western Horse, etc., Ins. Co. *v.* Putnam, 20 Nebr. 331, 30 N. W. 246.

III. ACTIONS.

A. Time to Sue. Under a provision of a policy requiring an action to be begun within a specified time, it does not matter that the original writ was not served within the period, as alias and pluries writs are a continuance of the original action.[34] A provision that a suit may be brought if payment is withheld beyond a certain time after due notice of loss is not like a provision that no suit shall be brought unless a prescribed notice is given, but is only a permission, and the right to sue is not taken away if the prescribed notice is not given.[35]

B. Venue. A provision in a policy requiring suit to be brought in a particular county cannot support an objection to the venue after the company appears and pleads to the merits.[36]

C. Parties. There is nothing peculiar to actions on policies insuring against loss of live stock which excludes the application of the general rules as to parties to actions,[37] or to actions on similar contracts of indemnity covering other kinds of property.[38] A mortgagor cannot sue on a policy payable to the mortgagee as his interest may appear, unless he has paid the debt or satisfied and discharged the mortgage.[39]

D. Pleading and Proof. The general rules of pleading and procedure govern in actions on live-stock insurance policies.[40] Plaintiff must allege and prove a cause of action in himself.[41] A complaint to which the policy is attached and of which it is made a part sufficiently shows plaintiff's interest without an allegation that he was the owner when the policy issued,[42] and is sufficient in other respects if the essential elements of the cause are alleged substantially, even though inartificially.[43] Affirmative matter in avoidance of the liability for a loss alleged within the terms of a policy must be pleaded;[44] but parol contemporane-

34. American Cent. Ins. Co. *v.* Haws, 7 Pa. Cas. 558, 11 Atl. 107.

35. Coventry Mut. Live Stock Ins. Assoc. *v.* Evans, 102 Pa. St. 281.

36. Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567.

37. See PARTIES.

38. See FIRE INSURANCE.

39. Graves *v.* American Live-Stock Ins. Co., 46 Minn. 130, 48 N. W. 684, where it is said that the mortgagor possibly might recover by alleging and showing that the mortgagee had consented to and authorized a recovery by him.

In an action by an assignee who has a mortgage on the property evidence that plaintiff held the mortgage and as to the extent to which it remained unsatisfied is admissible. Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101.

40. See, generally, EVIDENCE; FIRE INSURANCE; PLEADING; TRIAL.

41. Graves *v.* American Live-Stock Ins. Co., 46 Minn. 130, 48 N. W. 684.

For form of complaint in substance see Western Horse, etc., Ins. Co. *v.* Timm, 23 Nebr. 526, 37 N. W. 308; Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

Proof of ownership.— The issuance of the policy to him, the fact of the contract, is *prima facie* sufficient proof of plaintiff's ownership. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620, holding that if the contract was procured by fraud and plaintiff was not the owner this is matter of defense.

Corroborative evidence of proof of loss.— Statements in a letter written by an officer of the company may be admitted in corroboration of evidence tending to show that proof of loss was furnished. Algase *v.* Horse Owners' Mut. Indemnity Assoc., 77 Hun (N. Y.) 472, 29 N. Y. Suppl. 101.

42. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620, holding that such matter is matter of defense and need not be pleaded.

43. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620, holding that an allegation that the policy was issued in consideration of the covenants performed by plaintiff, the policy itself, which is embodied in the complaint, showing upon its face and acknowledging the payment of premium, is sufficient, and that an allegation of proof of loss "on blanks furnished by defendant's agent" and that defendant "would not pay the sum of . . . [the amount of the policy] nor any part thereof, is a sufficient allegation of demand if any such allegation were necessary."

44. **Fraud and want of interest.**— Fraud in procuring a policy or that the contract is merely a wagering contract because plaintiff was not the owner of the property or had no insurable interest therein must be pleaded. Western Horse, etc., Ins. Co. *v.* Scheidle, 18 Nebr. 495, 25 N. W. 620.

For form of answer setting up death by reason of abuse and want of proper and rea-

ous evidence will not be admitted to vary the terms of the policy, and is not admissible to contradict or vary the terms of a valid written instrument.[45] When the evidence is conflicting on the issues raised, they must be submitted to the jury.[46]

LIVING. Abiding;[1] having a domicile;[2] having one's home;[3] residing;[4] sojourning;[5] being;[6] subsisting;[7] permanent or continuous.[8] In the Anglican Church, a BENEFICE (*q. v.*), or the revenue derived from it; sometimes, the parish to which it is attached.[9] (Living: Apart, see HUSBAND AND WIFE. In Adultery, see LEWDNESS. Together, see ADULTERY; DIVORCE; HUSBAND AND WIFE; LEWDNESS; MARRIAGE. See also ADVOWSON; BENEFICE; LIVE.)

LIVING HEIR. Sometimes used as equivalent to ISSUE,[10] *q. v.* (See HEIR; and, generally, DESCENT AND DISTRIBUTION.)

sonable care see Western Horse, etc., Ins. Co. *v.* O'Neill, 21 Nebr. 548, 32 N. W. 581.

Death caused by plaintiff — necessity of reply. — Where the petition alleged that the death of insured mules did not result from any act, design, procurement, or fault on the part of plaintiff, and the answer alleged that plaintiff "suffered and permitted them (said mules) to be overworked in plowing, and by such overwork caused their death," and there was no reply or denial of such allegation, and the cause was submitted to the trial court on the pleading, a judgment for plaintiff was reversed, and the cause remanded with leave to plaintiff to reply, because, although it may be said that the allegation of the answer was in a sense negatived in advance, by the allegations of the petition, the words of the petition were probably necessary to prevent the petition being open to demurrer, and are too general to be held to answer in advance the special allegations of the answer. Western Horse, etc., Ins. Co. *v.* Timm, 23 Nebr. 526, 37 N. W. 308.

Evidence of value. — Where the defense was fraudulently false representations as to the value of the animal to induce the issuance of the policy, it was held that, conceding that the value of the animal was in issue, testimony of a witness who shows himself qualified to testify on the question of the value of animals, such as that involved, but who had never seen the particular one, in answer to hypothetical questions fairly reflecting the testimony offered by plaintiff as to the condition of the animal at the time of the insurance, is sufficient, in the absence of all other evidence on the subject, to support verdict for defendant. Western Horse, etc., Ins. Co. *v.* Putnam, 20 Nebr. 331, 30 N. W. 2466.

45. Mills *v.* Farmers' Ins. Co., 37 Iowa 400, holding that defendant cannot show by parol proof that at the time plaintiff took the policy he was informed that defendant would not be liable thereon unless the stock was injured on the premises.

46. Graves *v.* American Live-Stock Ins. Co., 46 Minn. 130, 48 N. W. 684 (holding that in an action by the mortgagor on a policy in which the loss is payable to the mortgagee, it is error to instruct the jury to find for plaintiff, when the evidence is conflicting as to whether the mortgage has been paid); Smith *v.* People's Mut. Live Stock Ins. Co., 173 Pa. St. 15, 33 Atl. 567 (upon the defense of misrepresentations).

1. Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 732, 7 C. C. A. 444, 22 L. R. A. 325.

2. Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722; Hanson *v.* Hanson, 111 Mass. 158, 159.

3. Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722.

4. Allgood *v.* Williams, 92 Ala. 551, 552, 8 So. 722; Hanson *v.* Hanson, 111 Mass. 158, 159; Shaw *v.* Shaw, 98 Mass. 158, 159; Mutual Ben. L. Ins. Co. *v.* Robison, 58 Fed. 723, 732, 7 C. C. A. 444, 22 L. R. A. 325. But *compare* Paltrovitch *v.* Phœnix Ins. Co., 68 Hun (N. Y.) 304, 307, 23 N. Y. Suppl. 38 (where the terms are not considered synonymous); Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 449.

5. Mutual Ben. L. Ins. Co. *v.* Robison, 78 Fed. 723, 732, 7 C. C. A. 444, 22 L. R. A. 325. But *compare* Ross *v.* Ross, 103 Mass. 575, 576.

6. See Pearce *v.* Atwood, 13 Mass. 324, 340.

Child in ventre sa mere as living see Hall *v.* Hancock, 15 Pick. (Mass.) 255, 258, 26 Am. Dec. 598; Clarke *v.* Blake, 2 Bro. Ch. 320, 29 Eng. Reprint 176; Beale *v.* Beale, 1 P. Wms. 244, 24 Eng. Reprint 373.

7. Kendall *v.* Miller, 47 How. Pr. (N. Y.) 446, 449.

8. Parke County *v.* Wagner, 138 Ind. 609, 616, 38 N. E. 171 [*citing* Carroll County *v.* Bailey, 122 Ind. 46, 23 N. E. 672; Rice *v.* Evansville, 108 Ind. 7, 9 N. E. 139, 58 Am. St. Rep. 22, and *quoted* in New York C., etc., R. Co. *v.* Speelman, 12 Ind. App. 372, 40 N. E. 541, 543], as a "living stream."

9. Standard Dict. See also Rowland *v.* Doughty, Cro. Jac. 649; Webb *v.* Byng, 2 Kay & J. 669, 674, 69 Eng. Reprint 951, 4 Wkly. Rep. 657; 4 Blackstone Comm. 107.

10. Taylor *v.* Smith, 116 N. C. 531, 534, 21 S. E. 202 [*citing* Howell *v.* Knight, 100 N. C. 254, 6 S. E. 721; Patrick *v.* Morehead, 85 N. C. 62, 39 Am. Rep. 684].

LLOYD'S INSURANCE

By Ernest G. Chilton *

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CROSS-REFERENCES

For Matters Relating to:
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* Author of "Livery-Stable Keepers," 25 Cyc. 1504.

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Other Kinds of Insurance, see ACCIDENT INSURANCE; FIRE INSURANCE; and the other particular Insurance Titles.

I. DEFINITIONS.

A. Lloyd's Insurance. Lloyd's insurance is a contract by which the members of an association not incorporated agree to indemnify each other, or some third party, against loss, damage, or liability arising from an unknown or contingent event, each member agreeing to bear a given amount of such loss, damage, or liability.[1]

B. Lloyd's Association — 1. IN GENERAL. A Lloyd's association is a combination of individuals acting concretely as insurers, binding themselves not jointly, but severally, until the entire amount of the insurance has been covered.[2]

2. NOT A JOINT STOCK COMPANY OR A CORPORATION. A Lloyd's association is neither a joint stock company[3] nor a corporation,[4] although it has been held that

1. See Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 21, 42 Atl. 1063, 55 L. R. A. 193 (where it is said: "What is familiarly known as a 'Lloyd's' contract or policy of insurance, [is] where the insurers are such as individuals and not as a corporate insurance company, and where the liability for loss, under the contract, of the individual underwriters is several and not joint"); English L. Dict.

Origin and history.— "In the times of William the Third and Queen Anne, when coffee-houses in London were the fashionable places of resort, Lloyd's coffee-house, at the corner of Abchurch Lane, Lombard Street, became the wonted resort of seafaring men, and those that did business with them. There, and subsequently in Pope's Head Alley, and ultimately on the west side of the old Royal Exchange, to which place the coffee-house was successively removed, the underwriters of London congregated, having formed at this centre an association among themselves, and with it a system of agency radiating everywhere. Lloyd's underwriters now meet and carry on their business in subscription rooms over the Royal Exchange, still called Lloyd's. The affairs of the subscribers to these rooms are managed by a committee, chosen from their own number, called Lloyd's committee, and presided over by a chairman. Agents (generally called Lloyd's agents) are appointed by the committee in all the principal ports of the world, whose business it is to forward accounts of all departures from and arrivals at their ports, as well as of losses and other casualties; and, in general, all such information as may be supposed to be of importance in guiding the judgment of the underwriters." Abbott L. Dict. 55.

The principal features of the system as enumerated by a leading lexicographer, are that each individual assumes a liability for a specified amount; that attorneys or managers are appointed by a power of attorney authorizing them to be sued; that suits are brought against such attorneys or managers; and that each underwriter is bound by the fundamental agreement to accept the result of such suit. Burrill L. Dict.

Difference between the English system and that adopted in the United States.— The Lloyd's system as it originated in England was an insurance based on a fund made up of deposits by each member of the association, from which, when a loss occurred, their agent took the means of payment, so that the fund deposited was in the strictest sense a trust fund for the benefit of the insured; but in this country, in adopting the Lloyd's system, each member of the association, in lieu of a deposit, contributes a given sum to make up a fund, and each contracts with an agent who represents the association to pay in from time to time so much as shall be needed to pay losses, and hence the trust in favor of the insured consists of the amount deposited by each member, and the covenant on his part to pay the money to answer the amount due from him upon such loss. Durbrow *v.* Eppens, 65 N. J. L. 10, 46 Atl. 582.

Lloyd's register is "a list of vessels of all nations classified according to their seaworthy condition, gotten up by an English association of shipowners, shippers and underwriters." English L. Dict.

Lloyd's bonds are "bonds given to the association by members of Lloyds that they will meet their obligations." English L. Dict.

2. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

Another definition is: "An association or company of individuals, organized to do an insurance business upon certain stipulations and conditions evidenced by their written agreement." Hoadley *v.* Purifoy, 107 Ala. 276, 289, 18 So. 220, 30 L. R. A. 351.

3. Fort *v.* State, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197; Com. *v.* Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247.

Joint-stock company generally see JOINT-STOCK COMPANIES.

4. Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

Corporation generally see CORPORATIONS.

in respect to its carrying on the business of insurance with a limited personal liability, it resembles the former[5] as well as the latter.[6]

II. CONTROL AND REGULATION BY STATE.

A. Requiring License. The state unquestionably has the power to require a license as a condition precedent to the right of a Lloyd's association,[7] or of an agent thereof,[8] to transact insurance business within its borders.

B. Absolute Prohibition. So too may a state absolutely prohibit such an association from acting as insurers therein.[9]

C. Ouster From State. Furthermore it has been held that, although an association disclaims the name of a corporation, yet, by carrying on the business of insurance with a limited personal liability, and that only as to the extent of the sums advanced or pledged as indemnity to the insured, it acts so far as a corporation that quo warranto,[10] or any writ intended as a substitute therefor,[11] will lie to oust the association from the unlawful exercise of power to transact insurance business in a given state.

III. POWERS AND DUTIES OF THE ATTORNEYS IN FACT.[12]

Under the modern method of Lloyd's associations by which the attorneys in fact determine what risks the underwriter shall assume, together with the premiums to be paid therefor, they are in effect the chief executive and managing agents of the enterprise, having almost unlimited power in that regard.[13]

5. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

6. People *v.* Loew, 23 Misc. (N. Y.) 574, 52 N. Y. Suppl. 799; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197; People *v.* Loew, 19 Misc. (N. Y.) 248, 44 N. Y. Suppl. 42; State *v.* Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

7. People *v.* Loew, 23 Misc. (N. Y.) 574, 52 N. Y. Suppl. 799, holding further that a Lloyd's association, organized not for the *bona fide* purpose of conducting insurance business, but for the purpose of sale to purchasers to be found, does not come within the clause of a regulative statute saving from its operation Lloyd's associations actually engaged in the insurance business on a given date. See also Union Ins. Co. *v.* Smart, 60 N. H. 458.

However, a Lloyd's association is not a company and is not entitled to be licensed as such to transact insurance business in a state other than the one in which it is organized. Fort *v.* State, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86; State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243.

Nor is it a corporation and entitled to be licensed as such. Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 224, 30 L. R. A. 351.

Nor in a state where it is unlawful for any person, partnership, or association to execute fire policies therein are individuals associated in the manner of the Lloyd's entitled to be licensed to transact business in the state. *In re* License, 3 Pa. Dist. 822.

Statutes making it a criminal offense to procure insurance for unlicensed companies.— An act making it an indictable misdemeanor for any person to transact business within the state as the agent of an insurance company of another state without a certificate of authority applies only to incorporated companies known as corporations, and does not apply to individuals associated together in the manner of the Lloyd's. Com. *v.* Reinoehl, 163 Pa. St. 287, 29 Atl. 896, 25 L. R. A. 247. In Georgia it has been held that under a statute making it a criminal offense for any person to procure within the state business for any insurance company, or agent thereof, without such company having first procured a license, one who assists a Lloyd's association in procuring business in a state is not guilty of the statutory offense, where there is no provision of law for granting a license to such association. Fort *v.* Smith, 92 Ga. 8, 18 S. E. 14, 23 L. R. A. 86.

8. State *v.* Stone, 118 Mo. 388, 24 S. W. 164, 40 Am. St. Rep. 388, 25 L. R. A. 243; New York Fire Dept. *v.* Stanton, 159 N. Y. 225, 54 N. E. 28.

9. Com. *v.* Vrooman, 164 Pa. St. 306, 30 Atl. 217, 44 Am. St. Rep. 603, 25 L. R. A. 250. See also Arrott *v.* Walker, 118 Pa. St. 249, 12 Atl. 280.

10. Greene *v.* People, (Ill. 1889) 25 L. R. A. 238 note; State *v.* Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L. R. A. 298.

11. People *v.* Loew, 23 Misc. (N. Y.) 574, 52 N. Y. Suppl. 799; People *v.* Loew, 19 Misc. (N. Y.) 248, 44 N. Y. Suppl. 42.

12. Attorney in fact generally see PRINCIPAL AND AGENT.

13. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

Clause of policy waived by conduct of attorney.— The clause of a Lloyd's policy that "in any matter relating to this insurance no person unless duly authorized in writing shall

IV. THE CONTRACT OF INSURANCE.

A. Manner of Execution.[14] A Lloyd's policy may be executed in pencil by one of the underwriters as well as in type or ink.[15]

B. Validity — 1. In General. Unless restricted by some statutory provision from acting as insurers,[16] the members of a Lloyd's association may enter into mutual covenants to insure each other,[17] or to insure third parties,[18] and such a contract of insurance is valid.

2. Undertaking Joint Liability. In England the contract has been held to be legal where the underwriters bind themselves severally for specified amounts, but void as contrary to the insurance laws of that country when the underwriters undertake a joint liability on joint capital.[19]

3. Provision For Suit Against Attorney — a. In General. When the policy provides that action thereon shall be primarily brought against the attorney in fact, the underwriters stipulating to abide by the result, there is a conflict of authority as to whether such provision is valid, it being held in some cases that the provision is void as against public policy,[20] while in other cases such provision has been held to be valid.[21]

be deemed the agent of the underwriters" was held to be waived where it appeared that the attorney delivered the policy to one in the habit of soliciting insurance and charged the amount against him in a running account between them, and did not, until two and one-half months had elapsed, insist upon payment of the premium from the solicitor who had received it from the insured upon the delivery of the policy. Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Suppl. 842.

Resisting suit on policy and appealing from judgment therein.— Under a policy authorizing the attorney in fact "to acknowledge or contest any claim . . . to defend, compromise or settle any suit" brought upon the policy, such attorney has the power to appeal from, as well as resist, a judgment in the first instance. Lowrey *v.* Bates, 26 Misc. (N. Y.) 407, 56 N. Y. Suppl. 197.

Verification of answer by attorney.— It has been held in New York that, where action is brought on a Lloyd's policy, one of the members of a firm acting as attorneys in fact cannot on information and belief deny the allegations of the complaint as to the issuance of the policy, where it appears that the firm has within its control means of information to form a belief in that regard. Compton *v.* Beecher, 17 N. Y. App. Div. 38, 44 N. Y. Suppl. 887.

Estoppel by holding out a person as attorney.— If a Lloyd's association holds out to the insured a person as its attorney to represent it in respect to losses and speak for it in negotiations for the settlement and appraisement of losses, it cannot afterward question his power to bind the association. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

14. **Execution of contract:** Generally see Contracts. Insurance contract see the Insurance Titles.

15. Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 41 N. Y. Suppl. 507.

16. Lees *v.* Smith, 7 T. R. 338.

17. Clark *v.* Spafford, 47 Ill. App. 160; Dowell *v.* Moon, 4 Camph. 166.

18. Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063, 55 L. R. A. 193; Imperial Shale Brick Co. *v.* Jewett, 42 N. Y. App. Div. 588, 60 N. Y. Suppl. 35; Harrison *v.* Millar, 2 Esp. 513, 7 T. R. 340 note. See also Hoadley *v.* Purifoy, 107 Ala. 276, 18 So. 220, 30 L. R. A. 351; Union Ins. Co. *v.* Smart, 60 N. H. 458.

19. Strong *v.* Harvey, 3 Bing. 304, 4 L. J. C. P. O. S. 57, 11 Moore C. P. 72, 11 E. C. L. 153; Harrison *v.* Millar, 2 Esp. 513, 7 T. R. 340 note; Lees *v.* Smith, 7 T. R. 338.

20. Toronto Bank *v.* Manufacturers', etc., Fire Assoc., 63 N. J. L. 5, 42 Atl. 761 (where the court further says, although incidentally, that if any circumstances were shown out of which a personal liability arises on the part of the attorney in fact or if it were averred that he held a fund in trust delivered to him by the underwriters for the payment of such claims as that of plaintiff, no doubt he would be suable in equity for the enforcement of the trust, or perhaps suable at law for so much money had and received to plaintiff's use); Biggert *v.* Hicks, 18 Misc. (N. Y.) 593, 42 N. Y. Suppl. 236; Farjeon *v.* Fogg, 16 Misc. (N. Y.) 219, 37 N. Y. Suppl. 980; Walker *v.* Beecher, 15 Misc. (N. Y.) 149, 36 N. Y. Suppl. 470; Ralli *v.* Hillyer, 15 Misc. (N. Y.) 692, 40 N. Y. Suppl. 1148; Knorr *v.* Bates, 14 Misc. (N. Y.) 501, 35 N. Y. Suppl. 1060 (the last two cases holding that such a provision against the enforcement of the contract by judicial process is void as against public policy, and that, the attorneys not being parties or privies to the contract, no action is maintainable against them).

21. Wheelock *v.* Chapman, 34 N. Y. App. Div. 464, 54 N. Y. Suppl. 327. See also Compton *v.* Beecher, 17 N. Y. App. Div. 38, 44 N. Y. Suppl. 887.

No attorneys at commencement of suit.— When, however, there are no attorneys in fact representing the underwriters at the

b. Attorney Being Also an Underwriter. When, however, the attorney in fact is also one of the underwriters, and liable as such on his contractual obligation, it is well settled that a provision that suit must, in the first instance, be brought against him, is valid.[22]

C. Construction. The rule of construction that the language of the policy, in case of doubt, is to be taken against the insurer, applies in construing a Lloyd's policy.[23] However, the stipulations of the contract as to the formal acts on the part of the insured necessary to the recovery of the loss must be reasonably and liberally construed.[24]

V. RIGHTS AND LIABILITIES OF THE INSURERS.

A. Right to Contribution From Each Other. When the insured has resorted to some of the insurers severally liable under the policy until full satisfaction has been obtained, one of the insurers paying more than his share of the actual loss may look to his associates for contribution, and this he is entitled to do without any express clause of subrogation being contained in the policy.[25]

B. Liabilities — 1. For Losses Sustained Under Policy — a. Nature. The liability of the underwriters, when a loss occurs which is covered by an ordinary Lloyd's policy, is several, not joint.[26]

b. Extent. In the absence of some stipulation in the policy to the contrary, each underwriter is liable for the whole amount of his stipulated liability until satisfaction has been obtained by the insured.[27]

c. Fixing Liability. Where the policy specifically provides that notice of the casualty and proofs of loss shall be served upon the attorneys of the underwriters, such provision by legal construction means the attorneys for the time being, and service on them is therefore sufficient.[28]

commencement of the action on the policy, the provision does not prevent bringing of suit directly against the underwriters. American Lucol Co. *v.* Lowe, 41 N. Y. App. Div. 500, 58 N. Y. Suppl. 687.

22. Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063, 55 L. R. A. 193; Ketchum *v.* Belding, 58 N. Y. App. Div. 295, 68 N. Y. Suppl. 1099; McCredy *v.* Thrush, 37 N. Y. App. Div. 465, 56 N. Y. Suppl. 68, (holding further that where the attorney in fact is also one of the underwriters, the recovery of a judgment against the former and the satisfaction thereof bar a subsequent action against the other underwriters, although judgment was demanded and obtained against the attorney in fact only to the extent of his individual liability); Gough *v.* Satterlee, 32 N. Y. App. Div. 33, 52 N. Y. Suppl. 492; Lawrence *v.* Schaefer, 20 N. Y. App. Div. 80, 46 N. Y. Suppl. 719; New Jersey, etc., Concentrating Works *v.* Ackermann, 6 N. Y. App. Div. 540, 30 N. Y. Suppl. 585; Leiter *v.* Beecher, 2 N. Y. App. Div. 577, 37 N. Y. Suppl. 1114; Stieglitz *v.* Belding, 20 Misc. (N. Y.) 297, 45 N. Y. Suppl. 670. See also Lowrey *v.* Bates, 26 Misc. (N. Y.) 407, 56 N. Y. Suppl. 197.

23. Sumner *v.* Piza, 91 Fed. 677.

Words "subject to average" construed.— If a Lloyd's policy contains no average clause, but does contain the words "subject to average," the loss on such policy must be calculated upon the principle laid down by the usual average clause contained in such policies. Acme Wood Flooring Co. *v.* Marten, 90 L. T. Rep. N. S. 313.

24. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

25. McAllister *v.* Hoadley, 76 Fed. 1000. See also Sumner *v.* Piza, 91 Fed. 677.

Contribution generally see CONTRIBUTION.

26. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197; Sumner *v.* Piza, 91 Fed. 677; McAllister *v.* Hoadley, 76 Fed. 1000.

The fact that the word "syndicate" occurs in a policy in other respects in the ordinary form of a Lloyd's policy does not make the policy a joint obligation. Tyser *v.* Shipowners Syndicate, [1896] 1 Q. B. 135, 8 Aspin. 81, 65 L. J. Q. B. 238, 23 L. T. Rep. N. S. 605, 44 Wkly Rep. 207.

27. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197; Sumner *v.* Piza, 91 Fed. 677; McAllister *v.* Hoadley, 76 Fed. 1000. See also New York Bd. of Fire Underwriters *v.* Whipple, 36 N. Y. App. Div. 49, 55 N. Y. Suppl. 188.

A provision in the policy for simultaneous contribution and making the liability several, not joint, does not, if all the underwriters are not served with process, prevent the collection of the full proportion up to the limit of his liability from each underwriter, even though that amount is greater than his proportion of the actual loss sustained. McAllister *v.* Hoadley, 76 Fed. 1000.

28. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197; Walker *v.* Beecher, 15 Misc. (N. Y.) 149, 36 N. Y. Suppl. 470.

d. Accrual of Liability. The rules of law applicable to insurers generally must determine when a liability arises under the policy.[29]

2. For Assessment Levied on Premiums Received. Where an assessment, pursuant to statute, is levied on the premiums received by the association, the members of the association are jointly and severally liable therefor.[30]

VI. ACTIONS.

A. By Insurers — 1. Parties. Notwithstanding the fact that by the policies which are the subject of reinsurance each underwriter is liable only in a fixed and stated proportion of the risk, a reinsurance contract made with the association itself and not with the individual members thereof can be enforced only in an action where all the members of the association join as plaintiffs.[31]

2. Pleading and Defenses. In an action by the members of a Lloyd's association on a contract of reinsurance, failure of the association to comply with the law, restricting its right to do business within the state, is a matter of defense, the fact of compliance not being a necessary part of the complaint.[32] Since the knowledge of their agent in another part of the world cannot be imputed to the individuals of a Lloyd's association, a defense of concealment of a fact material to the risk interposed in an action by them on a policy of reinsurance must fail, where it appears that they had no knowledge of the fact concealed by their agent.[33]

B. Against Insurers — 1. Parties. Where the express terms of the contract of insurance exclude all joint liability, no action thereon is maintainable against the insurers jointly.[34] And if there is a statutory provision for the maintenance of an action on the policy against the association by its recognized name, the attorney in fact cannot in such action be made a party defendant, even though the policy stipulates that action on the policy shall be in the first instance brought against him.[35]

2. Pleading.[36] In an action on a Lloyd's policy the limitations, conditions, and stipulations of the policy which are in the nature of conditions subsequent, and go to defeat the liability of the insurer, need not be alleged and negatived in the complaint.[37] The defense to an action on a Lloyd's policy that such action must primarily be brought against the attorneys for the underwriters is in the nature of a plea in abatement and, in order to be available, must be affirmatively pleaded.[38]

When proper service presumed.— Where the insured sends in a registered letter to the proper address proofs of loss and there is returned to him a registry receipt therefor, apparently executed by the proper party, and the attorney of record produces a copy of proofs upon the trial of the action on the policy, proper service of the proofs will be presumed. Compton *v.* Beecher, 17 N. Y. App. Div. 38, 44 N. Y. Suppl. 887.

29. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

The principles of estoppel, in determining when a liability under the policy arises, apply when necessary to prevent fraud and injustice. Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197.

30. New York Bd. of Fire Underwriters *v.* Whipple, 36 N. Y. App. Div. 49, 55 N. Y. Suppl. 188.

31. Thompson *v.* Colonial Assur. Co., 60 N. Y. App. Div. 325, 70 N. Y. Suppl. 85.

32. Thompson *v.* Colonial Assur. Co., 33 Misc. (N. Y.) 37, 68 N. Y. Suppl. 143 [*affirmed* in 60 N. Y. App. Div. 325, 70 N. Y. Suppl. 85].

33. Wilson *v.* Salamandra Assur. Co., 88 L. T. Rep. N. S. 98.

34. Sumner *v.* Piza, 91 Fed. 677.

Under N. Y. Code Civ. Proc. § 454, a complaint which joins as party defendants all the underwriters separately liable for a specific share of the loss is demurrable for misjoinder. Straus *v.* Hoadley, 23 N. Y. App. Div. 360, 48 N. Y. Suppl. 239. *Compare* Isear *v.* McMahon, 16 Misc. (N. Y.) 95, 37 N. Y. Suppl. 1101, an earlier case decided at special term, holding that the action may be maintained against two or more of the underwriters where an examination of the policies shows a community of interest on the part of all the underwriters.

35. Toronto Bank *v.* Manufacturers', etc., Fire Assoc., 63 N. J. L. 5, 42 Atl. 761.

36. **Form of declaration** in action on Lloyd's policy see Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063, 55 L. R. A. 193.

37. Enterprise Lumber Co. *v.* Mundy, 62 N. J. L. 16, 42 Atl. 1063, 55 L. R. A. 193.

38. Peabody *v.* Germain, 40 N. Y. App. Div. 146, 58 N. Y. Suppl. 86υ; Lowrey *v.*

3. Defenses — a. Concealment of Fact Material to Risk. The general rule is that it is a good defense to an action on a Lloyd's policy that, in effecting the insurance, the insured concealed from the insurers a fact material to the risk,[39] even though such concealment was not fraudulent.[40] To this rule, however, exceptions are recognized, as where the insurer might, by fair inquiry and due diligence, have learned the fact from the ordinary sources of information,[41] or where the underwriter learns of the concealment before the actual delivery of the policy and does not meet the burden of showing circumstances to explain such delivery.[42]

b. Breach of Warranty. Where a Lloyd's policy contains a clause warranting it to be on the same rate and interest insured as two other existing policies, such warranty is a condition precedent, and a breach thereof constitutes a defense to an action on the policy.[43]

4. Evidence. In an action on a Lloyd's policy the policy itself is competent evidence.[44] The rule in England is that in an action on a Lloyd's marine policy, Lloyd's lists,[45] stating the time of a vessel's sailing, are, in the absence of fraud on the part of the insured in effecting the insurance, admissible as evidence in an action on the policy.[46]

5. Judgment — a. Fixing Proportional Liability. When the policy provides that action thereon must in the first instance be brought against the attorney of the underwriters, they agreeing to abide by the result, the proportion of the liability of each of the underwriters should be ascertained and fixed in the judgment.[47]

b. Conclusiveness of. The judgment recovered against the attorney in fact in an action where the policy provides that the action shall be primarily brought against the attorney in fact, the underwriters agreeing to abide by the result, is conclusive against the underwriters, not only as to every matter litigated in the suit resulting in such judgment, but as to every fact which, if set up, would have constituted a defense.[48]

Bates, 26 Misc. (N. Y.) 407, 56 N. Y. Suppl. 197; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197. *Compare* Ketchum *v.* Belding, 58 N. Y. App. Div. 295, 68 N. Y. Suppl. 1099, holding that where the language employed in the policy must be regarded as an express prohibition against the maintenance of the action until suit has been brought against the attorneys in fact and execution returned unsatisfied, the defense need not be affirmatively pleaded.

39. Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 24 E. C. L. 466, 1 Moore & S. 323; Nicholson *v.* Power, 20 L. T. Rep. N. S. 580.

The fact concealed must be a material one. — In an action on a Lloyd's policy insuring the solvency of the surety for a debt, the defense of concealment of a fact material to the risk fails where nothing affecting the solvency of the insurer was concealed, that being the only fact material to the risk. Seaton *v.* Burnand, [1900] A. C. 135, 5 Com. Cas. 198, 69 L. J. Q. B. 409, 82 L. T. Rep. N. S. 205.

40. Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 24 E. C. L. 466, 1 Moore & S. 323.

41. Elton *v.* Larkins, 8 Bing. 198, 21 E. C. L. 504, 5 C. & P. 86, 24 E. C. L. 466, 1 Moore & S. 323; Friere *v.* Woodhouse, Holt N. P. 572, 17 Rev. Rep. 639, 679, 3 E. C. L. 225. But see Bates *v.* Hewitt, L. R. 2 Q. B. 595, 36 L. J. Q. B. 282, 15 Wkly. Rep. 1172.

42. Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 197, 1 Aspin. 503, 42 L. J. Exch. 115, 21 Wkly. Rep. 774.

43. Barnard *v.* Faber, [1893] 1 Q. B. 340, 62 L. J. Q. B. 159, 68 L. T. Rep. N. S. 179, 4 Reports 201, 41 Wkly. Rep. 193, holding further that the fact that the premium and the interest insured as stated in one of the existing policies differed from that of the policy in suit constitutes a defense.

44. Porter *v.* Valentine, 18 Misc. (N. Y.) 213, 41 N. Y. Suppl. 507. See also Rapp *v.* Allnutt, 15 East 601, holding that the policy is not admissible in evidence, unless stamped in accordance with the then existing Stamp Act.

45. Lloyd's lists are: "Statements of the arrival and departure of ships and the casualties and losses to them in all parts of the world" (English L. Dict.); "accounts of the arrivals, departures, casualties, and losses to ships" (Anderson L. Dict.).

46. Mackintosh *v.* Marshall, 12 L. J. Exch. 337, 11 M. & W. 116.

47. Leiter *v.* Beecher, 2 N. Y. App. Div. 577, 37 N. Y. Suppl. 1114; Ralli *v.* White, 21 Misc. (N. Y.) 285, 47 N. Y. Suppl. 197. See also Clark *v.* Spafford, 47 Ill. App. 160.

48. Conant *v.* Jones, 50 N. Y. App. Div. 336, 64 N. Y. Suppl. 189.

LOAD. As a noun, the carrying capacity of a conveyance;[1] the material placed upon a conveyance for carriage.[2] As a verb, to lay a burden on; charge with a load; furnish with lading or cargo.[3]

LOAF SUGAR. Sugar in loaves.[4]

LOAN.[5] As a noun, a lending; that which is lent; a permission to use;[6] a bailment of an article for a certain time used by the borrower without paying for

When satisfaction of judgment against attorney bars action against the underwriters. —A Lloyd's policy provided: "No action shall be brought to enforce the provisions of this policy except against the general manager, as attorney in fact, and representing all of the underwriters, and each of the underwriters hereby agrees to abide the result of any suit so brought as fixing his individual responsibility hereunder. Judgment entered in such an action shall be satisfied out of the premiums in the hands of the underwriters unexpended; if such premiums shall be insufficient, then out of the deposit made by the several underwriters; if both shall be insufficient, then out of the individual liability of the several underwriters, as hereinbefore expressed and limited, but in no case shall the judgment bind the property of the said general manager to a greater extent than his liability as an individual underwriter." Suit was brought on this policy against the attorney in fact for all the underwriters in which judgment for only the amount of the individual liability of the attorney in fact was asked for and recovered. It was held that a satisfaction of the judgment recovered against the attorney in fact barred any subsequent action on the policy by the insured to enforce the individual liability of the other insurers. McCredy *v.* Thrush, 37 N. Y. App. Div. 465, 56 N. Y. Suppl. 68.

1. Flanagan *v.* Demarest, 3 Rob. (N. Y.) 173, 181, as a "load of barley." See also Wills *v.* Ft. Smith, 70 Ark. 221, 223, 66 S. W. 922 (a "load of coal"); Huntley *v.* Woodward, 9 Gray (Mass.) 86, 88 ("per load").

2. Howe *v.* Castleton, 25 Vt. 162, 167. *Compare* Heitb *v.* Big Flats, 66 N. Y. App. Div. 88, 90, 73 N. Y. Suppl. 86, construing the words "vehicle and load."

3. Century Dict. See also Thwing *v.* Great Western Ins. Co., 103 Mass. 401, 406, 4 Am. Rep. 567; Midland Nav. Co. *v.* Dominion Elevator Co., 6 Ont. L. Rep. 432, 456, where it is said that the word "'load' must be taken to mean the completion of the loading, and not merely its commencement."

Loaded.— Distinguished from "empty" see 15 Cyc. 1043 note 22. "Loaded arms" see Reg. *v.* James, 1 C. & K. 530, 531, 1 Cox C. C. 78, 47 E. C. L. 530; Rex *v.* Mountford, 7 C. & P. 242, 244, 1 Moody C. C. 141, 32 E. C. L. 593; Rex *v.* Harris, 5 C. & P. 159, 160, 24 E. C. L. 503. "Loaded in regular turn" see Hudson *v.* Clementson, 18 C. B. 213, 225, 25 L. J. C. P. 234, 86 E. C. L. 213. "Loaded or discharged upon" see Kingston-upon-Hull Dock Co. *v.* La Marche, 8 B. & C. 42, 52, 6 L. J. K. B. O. S. 216, 2 M. & R. 107, 15 E. C. L. 30. "Loaded upon" see Kingston-upon-Hull Dock Co. *v.* La Marche, 8 B. & C. 42, 53, 6 L. J. K. B. O. S. 216, 2 M. & R. 107, 15 E. C. L. 30. "Loaded wagon" see Merrick *v.* Phelps, 5 Conn. 465, 467, 468.

Loading.—"Accident preventing the loading." Grant *v.* Coverdale, 9 App. Cas. 470, 475, 5 Aspin. 353, 53 L. J. Q. B. 462, 51 L. T. Rep. N. S. 472, 32 Wkly. Rep. 831; Stephens *v.* Harris, 57 L. J. Q. B. 203, 207. "Baker's Island loading" see Reed *v.* Merchants' Mut. Ins. Co., 95 U. S. 23, 31, 32, 24 L. ed. 348. "From the loading of the goods" see Clark *v.* Higgins, 132 Mass. 586, 590. "Loading excepted" see Lister *v.* Van Haansbergen, 1 Q. B. D. 269, 272, 3 Aspin. 145, 45 L. J. Q. B. 495, 34 L. T. Rep. N. S. 446, 24 Wkly. Rep. 395. "In regular turns of loading" see Leidemann *v.* Schultz, 14 C. B. 38, 50, 2 C. L. R. 87, 18 Jur. 42, 23 L. J. C. P. 17, 78 E. C. L. 38. "Loading in turn" see Taylor *v.* Clay, 9 Q. B. 713, 725, 11 Jur. 277, 16 L. J. Q. B. 44, 58 E. C. L. 713. "Loading and unloading" see Penn *v.* Buffalo, etc., R. Co., 49 N. Y. 204, 208, 10 Am. Rep. 355. "Loading or unloading" see Sisson *v.* Cleveland, etc., R. Co., 14 Mich. 489, 500, 90 Am. Dec. 252. See also Hawkins *v.* Great Western R. Co., 17 Mich. 57, 61, 97 Am. Dec. 179; Kempson *v.* Great Western R. Co., 4 R. & Can. Tr. Cas. 426, 433. "[Loading] whilst at anchor" see The Winston, 9 P. D. 85, 5 Aspin. 274, 53 L. J. Adm. 69, 51 L. T. Rep. N. S. 183.

4. U. S. *v.* Breed, 24 Fed. Cas. No. 14,638, 1 Sumn. 159, 167, where the court said: "The name doubtless carries, in some degree, an implication of quality, arising from the fact, that quality is usually associated with form; but the designation is primarily derived from and depends upon the form. . . . Crushed sugar is not known as, or even called, 'loaf sugar.' Whatever may be its quality, it is still not 'loaf sugar,' for it wants the form."

5. **Distinguished** from barter or sale see Coker *v.* State, 91 Ala. 92, 94, 8 So. 874; Robinson *v.* State, 59 Ark. 341, 343, 27 S. W. 233; Skinner *v.* State, 97 Ga. 690, 691, 25 S. E. 364; Richmond *v.* McGirr, 78 Ind. 192, 196. But *compare* Com. *v.* Abrams, 150 Mass. 393, 398, 23 N. E. 53; Keaton *v.* State, 36 Tex. Cr. 259, 260, 38 S. W. 522. See also SALES.

6. Webster Dict. [*quoted* in Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 360, 63 Pac. 665], where it is said that the term imports a change of possession.

"Loan for use" defined by statute see Cal. Civ. Code, § 1884; Ga. Code, § 2126; La. Civ. Code, art. 2893; Mont. Civ. Code, § 2550; N. D. Rev. Code, § 4041; Okla. Rev. St. § 2865; S. D. Civ. Code, § 1894.

the use;[7] a transaction whereby the owner places some specific thing in the hands of the borrower to be used by him without compensation;[8] anything[9] furnished for a temporary use to a person at his request, on condition that the specific thing shall be returned, or its equivalent in kind;[10] and the term ordinarily means money loaned;[11] but according to the context the term may mean DEBT,[12] *q. v.* deposit,[13] DISCOUNT,[14] *q. v.*, or gift.[15] As a verb, to lend;[16] to deliver to another for temporary use on condition that the thing be returned, or deliver for temporary use on condition that an equivalent in kind shall be returned with compensation for its use;[17] and according to the context the term may mean to ADVANCE,[18] *q. v.*, to borrow;[19] to GIVE,[20] *q. v.* (Loan: In General, see BAILMENTS. As Fraudulent Conveyance, see FRAUDULENT CONVEYANCES. By Administrator, see EXECUTORS AND ADMINISTRATORS. By Agent, see FACTORS AND BROKERS; PRINCIPAL AND AGENT. By or Between Husband and Wife, see HUSBAND AND WIFE. By Bank, see BANKS AND BANKING. By Building and Loan Association, see BUILDING AND LOAN SOCIETIES. By Corporation, see CORPORATIONS. By Executor, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Insolvent, see INSOLVENCY. By Pawnbroker, see PAWNBROKERS. By Trust Company, see BANKS AND BANKING. By Trustee, see TRUSTS. Enforcement Against Homestead, see HOMESTEADS. Execution Against, see EXECUTIONS. For

7. 2 Kent Comm. (4th ed.) 573 [*quoted* in Booth *v.* Terrell, 16 Ga. 20, 25].

8. Templeman *v.* Gibbs, 86 Tex. 358, 361, 24 S. W. 792.

9. **It may include** the lending of anything — a horse, a carriage, a book, or any kind of goods, as well as money. Lancey *v.* Brake, 10 Ont. 428, 433.

"Loan of . . . credit" see Gibson *v.* Mason, 5 Nev. 283, 300; Green *v.* Dyersburg, 10 Fed. Cas. No. 5,756, 2 Flipp. 477, 483; Jarrott *v.* Moberly, 13 Fed. Cas. No. 7,223, 5 Dill. 253, 257; Webster Dict. [*quoted* in Belfast, etc., R. Co. *v.* Brooks, 60 Me. 568, 574; Jerome *v.* Morgan, 13 Daly (N. Y.) 225, 226].

10. Jerome *v.* Morgan, 13 Daly (N. Y.) 225, 226.

"Except with respect to money, 'to loan' implies that a thing is delivered to another for use, without reward, and to be returned in specie." Coker *v.* State, 91 Ala. 92, 94, 8 So. 874.

"Loan for consumption" see Kinne *v.* Kinne, 45 How. Pr. (N. Y.) 61, 65 [*citing* Bouvier L. Dict.]; Story Bailm. § 228.

"Loan for exchange" defined by statute see Cal. Civ. Code, § 1902; Mont. Civ. Code, § 2570; N. D. Rev. Code, § 4053; Okla. Rev. St. § 2877; S. D. Civ. Code, § 1406.

11. Webster Dict. [*quoted* in Savings, etc., Soc. *v.* San Francisco, 131 Cal. 356, 360, 63 Pac. 665].

"By a loan of money, is meant the delivery by one party . . . and the receipt by the other party . . of a given sum of money, upon an agreement, express or implied, to repay the sum loaned, with or without interest." Payne *v.* Gardiner, 29 N. Y. 146, 167. A loan of money is a lending on one side and a borrowing on the other. Tyson *v.* Rickard, 3 Harr. & J. (Md.) 109, 114, 5 Am. Dec. 424. See also Kendig *v.* Linn, 47 Iowa 62, 63; Klages *v.* Philadelphia, etc., Terminal Co., 160 Pa. St. 386, 28 Atl. 862. It constitutes an advancement of money upon a contract or stipulation, express or implied, to repay at some future day. Brittin *v.* Freeman, 17 N. J. L. 191, 231. "Loan of money" defined by statute see Cal. Civ. Code, § 1912; Mont. Civ. Code, § 2580; N. D. Rev. Code, § 4058; S. D. Civ. Codes, § 1411.

12. De Portes *v.* Hurlbut, 44 N. J. Eq. 517, 519, 14 Atl. 891. But see Ketchum *v.* Buffalo, 21 Barb. (N. Y.) 294, 304.

13. Ricks *v.* Broyles, 78 Ga. 610, 613, 3 S. E. 772, 6 Am. St. Rep. 280; South Bend First Nat. Bank *v.* Lanier, 11 Wall. (U. S.) 369, 372, 20 L. ed. 172. See also DEPOSITARIES.

Distinguished from pledge see PLEDGES.

14. Youngblood *v.* Birmingham Trust, etc., Co., 95 Ala. 521, 523, 12 So. 579, 36 Am. St. Rep. 245, 20 L. R. A. 58; Brittin *v.* Freeman, 17 N. J. L. 191, 211. See also BANKS AND BANKING, 5 Cyc. 522.

15. See *infra*, note 20.

Distinguished from gift see Coker *v.* State, 91 Ala. 92, 94, 8 So. 874. See also GIFTS.

16. Holt *v.* Pickett, 111 Ala. 362, 367, 20 So. 432; State *v.* Brandt, 41 Iowa 593, 609, 610, where it is said: "In order to constitute a loan there must be a thing loaned, . . . a lender and a borrower, as well as a contract between the parties."

17. Webster Dict. [*quoted* in Ramsey *v.* Whitbeck, 81 Ill. App. 210, 217].

"Loan or use" see Eshelman *v.* Whitmar, 2 Watts (Pa.) 263, 264.

"Loaning out" see State *v.* Rubey, 77 Mo. 610, 620.

18. Wright's Appeal, 89 Pa. St. 67, 69, 70. *Compare* Fisher *v.* Parr, 92 Md. 245, 277, 48 Atl. 621; De Portes *v.* Hurlbut, 44 N. J. Eq. 517, 518, 14 Atl. 891; Cooley *v.* Driver, 5 Ch. D. 458, 486, 46 L. J. Ch. 466, 36 L. T. Rep. N. S. 79, 25 Wkly. Rep. 162.

19. Massey *v.* Citizens' Bldg., etc., Assoc., 22 Kan. 624, 632. *Compare* Henry *v.* Thompson, Minor (Ala.) 209, 223.

20. Britt *v.* Rawlings, 87 Ga. 146, 147, 13 S. E. 336; Jones *v.* Jones, 20 Ga. 699, 700; Chapman *v.* Chapman, 90 Va. 409, 410, 18 S. E. 913.

Gaming Purposes, see GAMING. Interest on, see INTEREST. Of Funds — Deposit in Court, see DEPOSITS IN COURT; Of County, see COUNTIES; Of Municipality, see MUNICIPAL CORPORATIONS; Of School, see SCHOOLS AND SCHOOL-DISTRICTS. To State, see STATES. Recovery of, see ACCOUNTS AND ACCOUNTING; MONEY LENT. Secured by — Insurance Policy, see FIRE INSURANCE; and the Insurance Titles; Mortgage, see MORTGAGES; Pledge, see PLEDGES. To Corporation, see CORPORATIONS. To Decedent and Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. To Guardian, see GUARDIAN AND WARD. To Infant, see INFANTS. To Insane Person, see INSANE PERSONS.)

LOAN ASSOCIATION, COMPANY, or SOCIETY. See BANKS AND BANKING; BUILDING AND LOAN SOCIETIES.[21]

LOBBY. As a verb, to address or solicit members of a legislative body in the reception hall or elsewhere with the purpose of influencing their votes.[22]

LOBSTER. See FISH AND GAME.

LOCAL.[23] Relating to place; belonging or confined to a particular place; distinguished from general, personal, or transitory;[24] pertaining to a place, or to a fixed or limited portion of space;[25] limited or confined to a spot, place, or definite

21. See also Topham *v.* Greenside Glazed Fire-brick Co., 37 Ch. D. 281, 291, 5 L. J. Ch. 583, 58 L. T. Rep. N. S. 274, 36 Wkly. Rep. 464.

22. Colusa County *v.* Welch, 122 Cal. 428, 431, 55 Pac. 243 [*citing* Black. L. Dict.; Webster Dict.]; Webster Dict. [*quoted* in Chippewa Valley, etc., R. Co. *v.* Chicago, etc., R. Co., 75 Wis. 224, 250, 44 N. W. 17, 6 L. R. A. 601].

Defined by statute see Ga. Code, § 4486.

"Lobby member" is a person who frequents the lobby of a house of legislation, for the purpose of influencing measures. Webster Dict. [*quoted* in Chippewa Valley, etc., R. Co. *v.* Chicago, etc., R. Co., 75 Wis. 224, 250, 44 N. W. 17, 6 L. R. A. 601], holding that the term does not include an attorney openly appearing in the legislative assembly as a representative of parties interested in certain legislation.

"Lobby services" are generally defined to mean the use of personal solicitation, the exercise of personal influence, and improper or corrupt methods, whereby legislative or official action is to be the product. Dunham *v.* Hastings Pavement Co., 56 N. Y. App. Div. 244, 248, 67 N. Y. Suppl. 632. See also Trist *v.* Child, 21 Wall. (U. S.) 441, 448, 22 L. ed. 623 [*cited* in Nutt *v.* Knut, 200 U. S. 12, 21, 26 S. Ct. 216, 50 L. ed. 348].

"Lobbying contract" defined see 9 Cyc. 486. See also 9 Cyc. 763 note 38, 568 note 38. Houlton *v.* Nichol, 93 Wis. 393, 399, 67 N. W. 715, 57 Am. St. Rep. 928, 33 L. R. A. 166.

Acting as lobbyist see 4 Cyc. 981 note 12.

23. Distinguished from "national" building and loan association see Maudlin *v.* American Sav., etc., Assoc., 63 Minn. 358, 359, 65 N. W. 645.

As used in connection with other words see the following phrases: "Local administrative" see Workman *v.* New York, 63 Fed. 298, 304. "Local and personal nature" see Reg. *v.* London, [1893] 2 Q. B. 454, 460, 58 J. P. 21, 63 L. J. Q. B. 4, 69 L. T. Rep. N. S. 580, 4 Reports 531; Carr *v.* Royal Exch. Assur. Co., 1 B. & S. 956, 957, 8 Jur. N. S. 384, 31 L. J. Q. B. 93, 6 L. T. Rep. N. S. 105, 10 Wkly. Rep. 352, 101 E. C. L. 956; Richards *v.* Easto, 3 D. & L. 515, 518, 10 Jur. 695, 15 L. J. Exch. 163, 15 M. & W. 244; Cock *v.* Gent, 1 D. & L. 413, 13 L. J. Exch. 24, 12 M. & W. 234. "Local authorities" see *In re* Rochester Electric R. Co., 123 N. Y. 351, 356, 25 N. E. 381; Wheatfield *v.* Tonawanda St. R. Co., 92 Hun (N. Y.) 460, 462, 36 N. Y. Suppl. 744; Matter of Niagara Highway Com'rs, 72 Hun (N. Y.) 575, 577, 25 N. Y. Suppl. 231. "Local Boards of Education" see People *v.* Oakland Bd. of Education, 55 Cal. 331, 335. "Local commercial broker" see Stratford *v.* Montgomery, 110 Ala. 619, 625, 20 So. 127. "Local common law" see 12 Cyc. 1030. "Local concern" see Little Rock *v.* North Little Rock, 72 Ark. 195, 79 S. W. 785, 788. "Local disease" see Scoles *v.* Universal L. Ins. Co., 42 Cal. 523, 528. "Local drainage" see Ford *v.* Toledo, 64 Ohio St. 92, 97, 59 N. E. 779. "Local influence" see Montgomery County *v.* Cochran, 116 Fed. 985, 993; Adelbert College *v.* Toledo, etc., R. Co., 47 Fed. 836, 844; Neale *v.* Foster, 31 Fed. 53, 55, 12 Sawy. 424. "Local injury" see Titus *v.* Frankfort, 15 Me. 89, 97 [*citing* Jefferies *v.* Duncombe, 2 Campb. 3, 11 East 226]. "Local legislation" see Healey *v.* Dudley, 5 Lans. (N. Y.) 115, 120. "'Local' office" see Matter of Brenner, 35 Misc. (N. Y.) 306, 310, 71 N. Y. Suppl. 44; State *v.* Yates, 66 Ohio St. 546, 550, 64 N. E. 570; State *v.* Milwaukee County, 21 Wis. 443, 450. "Local police" see State *v.* Hine, 59 Conn. 50, 60, 21 Atl. 1024, 10 L. R. A. 83. "Local traffic" see Midland R. Co. *v.* Manchester, etc., R. Co., [1870] W. N. 117. "Suit of a local nature" see East Tennessee, etc., R. Co. *v.* Atlanta, etc., R. Co., 49 Fed. 608, 614, 15 L. R. A. 109.

24. Burrill L. Dict. [*quoted* in Earle *v.* San Francisco Bd. of Education, 55 Cal. 489, 491; People *v.* Newburgh, etc., R. Co., 86 N. Y. 1, 7; People *v.* Hills, 35 N. Y. 449, 451; People *v.* Metropolitan Police Bd., 33 How. Pr. (N. Y.) 52, 58]. See also People *v.* Allen, 1 Lans. (N. Y.) 248, 256.

25. Webster Dict. [*quoted* in Lastro *v.* State, 3 Tex. App. 363, 365].

district;[26] fixedness in a place.[27] For some purposes the word is said to be nearly synonymous with "private";[28] or with "special."[29] (Local: Action, see VENUE. Assessment[30] For — Drain, see DRAINS; Highway, see STREETS AND HIGHWAYS; Levee, see LEVEES; Municipal Purposes, see MUNICIPAL CORPORATIONS; Street, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. Court, see COURTS. Custom, see CUSTOMS AND USAGES. Freight, see LOCAL FREIGHT. Government,[31] see COUNTIES; DISTRICT OF COLUMBIA; MUNICIPAL CORPORATIONS; TOWNS. Improvement,[32] see DRAINS; LEVEES; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. Law, see STATUTES. Legislation, see STATUTES. Matter, see LOCAL MATTERS. Minister, see LOCAL MINISTER. Option,[33] see CONSTITUTIONAL LAW; COUNTIES; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS. Posts, see LOCAL POSTS. Prejudice as Ground For — Change of Venue, see CRIMINAL LAW; VENUE; Continuance, see CONTINUANCES IN CIVIL CASES; CONTINUANCES IN CRIMINAL CASES; New Trial, see CRIMINAL LAW; NEW TRIAL; Removal of Cause, see REMOVAL OF CAUSES. Purpose, see LOCAL PURPOSE. Self-Government, see CONSTITUTIONAL LAW; COUNTIES; MUNICIPAL CORPORATIONS; STATUTES; TOWNS. Statute, see STATUTES. Superintendent, see LOCAL SUPERINTENDENT. Taxation,[34] see TAXATION. Ticket, see LOCAL RAILROAD TICKET. Usage, see CUSTOMS AND USAGES. See also COMMON; GENERAL.)

LOCAL ACTION.[35] See VENUE.

LOCAL AGENT. See CORPORATIONS; INSURANCE; PRINCIPAL AND AGENT; RAILROADS.

LOCAL ASSESSMENT. A species of taxes on supposed benefits.[36] (See, generally, DRAINS; LEVEES; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.)

LOCAL COURT. See COURTS.[37]

LOCAL CUSTOM. See CUSTOMS AND USAGES.

LOCAL FREIGHT. Freight shipped from either terminus to a way station, or *vice versa*, or from one station to another that is over a part of the road only;[38] articles transported in the prosecution of the internal trade of a state, as contrasted with those brought from abroad into the state or carried through by a continuous transit.[39] (See FREIGHT; and, generally, CARRIERS; RAILROADS; SHIPPING.)

LOCAL GOVERNMENT. That form of government where the local affairs are regulated by local authorities.[40] (See, generally, COUNTIES; DISTRICT OF COLUMBIA; MUNICIPAL CORPORATIONS; TOWNS.)

LOCAL IMPROVEMENT. A public improvement which, by reason of its being

26. Webster Dict. [*quoted* in Lastro *v.* State, 3 Tex. App. 363, 365, 366].

27. Bouvier L. Dict. [*quoted* in People *v.* Chautauqua County, 43 N. Y. 10, 16].

28. Kerrigan *v.* Force, 68 N. Y. 381, 383; People *v.* Allen, 1 Lans. (N. Y.) 248, 256. See also McRae *v.* Shaffer, 89 Mich. 463, 465, 50 N. W. 1091; People *v.* Marlborough Highway Com'rs, 54 N. Y. 276, 278, 13 Am. Rep. 581; Conner *v.* New York, 5 N. Y. 285, 292; Fall Brook Coal Co. *v.* Lynch, 47 How. Pr. (N. Y.) 520, 521; London, etc., R. Co. *v.* Runcorn Rural Dist. Council, [1898] 1 Ch. 561, 62 J. P. 643, 67 L. J. Ch. 324, 78 L. T. Rep. N. S. 343, 46 Wkly. Rep. 484.

29. Lastro *v.* State, 3 Tex. App. 363, 374.

30. See also LOCAL ASSESSMENT, *post*, this page, text and note 36.

31. See also LOCAL GOVERNMENT, *post*, this page, text and note 40.

32. See also LOCAL IMPROVEMENT, *post*, this page.

33. See also LOCAL OPTION, *post*, p. 1534.

34. See also LOCAL TAXATION, *post*, p. 1535.

35. See also 11 Cyc. 850.

36. Shreveport *v.* Prescott, 51 La. Ann. 1895, 1915, 26 So. 664, 46 L. R. A. 193. See also Vicksburg, etc., R. Co. *v.* Goodenough, 108 La. 442, 457, 32 So. 404, 66 L. R. A. 314; Gould *v.* Baltimore, 59 Md. 378, 380; State *v.* Ramsey County Dist. Ct., 33 Minn. 295, 310, 23 N. W. 222; Macon *v.* Patty, 57 Miss. 378, 386, 34 Am. Rep. 451; Buffalo City Cemetery *v.* Buffalo, 46 N. Y. 506, 509; Seanor *v.* Whatcom County, 13 Wash. 48, 58, 42 Pac. 552; Allen *v.* Drew, 44 Vt. 174, 186.

37. See 11 Cyc. 659.

38. Mobile, etc., R. Co. *v.* Steiner, 61 Ala. 559, 579. See also on this subject Rowland *v.* Pennsylvania R. Co., 52 Pa. St. 250, 252 [*citing* Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338, 344].

39. Shipper *v.* Pennsylvania R. Co., 47 Pa. St. 338, 344 [*quoted* in Rowland *v.* Pennsylvania R. Co., 52 Pa. St. 250, 252].

40. Black Const. L. 373, 374 [*quoted* in Rathbone *v.* Wirth, 6 N. Y. App. Div. 277, 290, 40 N. Y. Suppl. 535]. See also 8 Cyc. 779, 786 note 82.

confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it through the municipality;[41] an improvement made in a particular locality, by which the real property adjoining or near such locality is especially benefited.[42] (See, generally, DRAINS; LEVEES; MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS.)

LOCALITY. A particular district; confined to a limited region; opposed to GENERAL, *q. v.*; limited by boundaries, large or small.[43] (See LOCAL.)

LOCALIZED PROPERTY. As used in statutes relating to taxation of railroads, property which consists of depot buildings, and other property, real, personal, and mixed, having an actual *situs*.[44] (See, generally, RAILROADS; TAXATION.)

LOCAL LAWS. See STATUTES.

LOCAL LEGISLATION. See STATUTES.

LOCALLY.[45] See LOCAL.

LOCAL MATTERS. Matters which consist of such facts as carry with them the idea of some certain place comprising all matters relating to realty, and hardly any others.[46]

LOCAL MINISTER. In the Methodist Church, one who does not travel.[47] (See, generally, RELIGIOUS SOCIETIES.)

LOCAL OPTION. A term which implies the grant of the right to one locality to adopt, and another to decline to avail itself of a law.[48] (See, generally, CONSTITUTIONAL LAW; COUNTIES; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS; SCHOOLS AND SCHOOL-DISTRICTS; TOWNS.)

41. Illinois Cent. R. Co. *v.* Decatur, 154 Ill. 173, 176, 34 N. E. 626 [*citing* Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412]; Butte *v.* School Dist. No. 1, 29 Mont. 336, 339, 74 Pac. 869.

Local improvements have been held to include: An electric light system. Ewart *v.* Western Springs, 180 Ill. 318, 322, 54 N. E. 478. But *compare* Putnam *v.* Grand Rapids, 58 Mich. 416, 25 N. W. 330. Grading, curbing, and paving of streets. Sperry *v.* Flygare, 80 Minn. 325, 83 N. W. 177, 81 Am. St. Rep. 261, 49 L. R. A. 757; Rogers *v.* St. Paul, 22 Minn. 494, 507. Opening, grading, paving, and otherwise improving streets and alleys, making sidewalks, the construction of drains and sewers and other improvements of this character. Chicago *v.* Law, 144 Ill. 569, 577, 33 N. E. 855. Sewer. Ryder *v.* Alton, 175 Ill. 94, 99, 51 N. E. 821; Payne *v.* South Springfield, 161 Ill. 285, 291, 44 N. E. 105. Street improvement. New York L. Ins. Co. *v.* Prest, 71 Fed. 815, 816. Street sprinkling. State *v.* Reis, 38 Minn. 371, 372, 38 N. W. 97; Smith *v.* Seattle, 25 Wash. 390, 309, 62 Pac. 612. But *compare* Chicago *v.* Blair, 149 Ill. 310, 36 N. E. 829, 24 L. R. A. 412.

Local improvements have been held not to include: Filling up lots. Charleston *v.* Werner, 38 S. C. 488, 493, 17 S. E. 33, 37 Am. St. Rep. 776. Water-works system. Hewes *v.* Glos, 170 Ill. 436, 440, 48 N. E. 922. But *compare* Ewart *v.* Western Springs, 180 Ill. 318, 321, 54 N. E. 478; Hughes *v.* Momence, 164 Ill. 16, 18, 45 N. E. 302; Morgan Park *v.* Wiswall, 155 Ill. 262, 265, 40 N. E. 611. Widening a navigable river. Chicago *v.* Law, 144 Ill. 569, 576, 33 N. E. 855.

42. Rogers *v.* St. Paul, 22 Minn. 494, 507.

43. As a country, a state, a county, a town, or a portion thereof. Anderson L. Dict. [*quoted* in Pierce *v.* Dillingham, 96 Ill. App. 300, 313, where it is said: "In human laws neither the world, nor the greater portion of it, is spoken of as a locality"].

The context often governs the meaning of the term. State *v.* Fremont, etc., R. Co., 22 Nebr. 313, 329, 35 N. W. 118; People *v.* Shea, 73 N. Y. App. Div. 232, 235, 76 N. Y. Suppl. 679. See also 14 Cyc. 525 note 33.

44. Kansas City, etc., R. Co. *v.* King, 120 Fed. 614, 621, 57 C. C. A. 278.

45. **"Locally inapplicable"** see Hoffman *v.* Pawnee County, 3 Okla. 325, 349, 41 Pac. 566.

"Locally situate" see Australia Smelting Co. *v.* Inland Revenue Com'rs, [1897] 1 Q. B. 175, 182, 61 J. P. 116, 66 L. J. Q. B. 137, 75 L. T. Rep. N. S. 534, 45 Wkly. Rep. 203; Brooke *v.* Inland Revenue Com'rs, [1896] 2 Q. B. 356, 65 L. J. Q. B. 657, 44 Wkly. Rep. 670.

46. Stephen Pl. 288 [*quoted* in Mehrhof Bros. Brick Mfg. Co. *v.* Delaware, etc., R. Co., 51 N. J. L. 56, 58, 16 Atl. 12].

47. Guardians of Poor *v.* Greene, 5 Binn. (Pa.) 554, 560. See also *In re* Cunninggim, 60 N. C. 392, 393.

48. *Ex p.* Handler, 176 Mo. 383, 389, 75 S. W. 920.

"Local option elections."—*Ex p.* Mills, 46 Tex. Cr. 224, 226, 79 S. W. 555.

"Local option law" means a law to take or not to take effect in a given locality upon the consent or dissent of the voters of the locality, or upon other contingencies, while it may have effect in other localities. State *v.* Brown, 19 Fla. 563, 598. See also State *v.* Barber, (S. D. 1904) 101 N. W. 1078, 1081. "Such laws are known in common parlance as 'Local Option Laws.' They relate to subjects which like the reta[i]ling of intoxicating drinks, or the running at large of cattle in the highways, may be differently regarded in different localities." Cooley Const. Lim. 146 [*quoted* in *In re* O'Brien, 29 Mont. 530, 546, 75 Pac. 196]. "Local option law" is

LOCAL POSTS. Special arrangements for the carriage of letters and packets to and from subordinate stations within the limits of a mail station.[49] (See, generally, POST-OFFICE.)

LOCAL PREJUDICE. See CRIMINAL LAW; REMOVAL OF CAUSES; VENUE.

LOCAL PROPERTY OF RAILROAD. A term which is used to designate all the property of a railroad, except the roadbed, rolling-stock, and other movable property.[50] (See, generally RAILROADS; TAXATION.)

LOCAL PURPOSE. A purpose the benefit of which is confined to a particular locality or limited district.[51] (See, generally, MUNICIPAL CORPORATIONS; TAXATION.)

LOCAL RAILROAD TICKET. A mere token to the passenger and voucher to the conductor, adopted for convenience to show that the passenger has paid his fare from one place to another, and are much in the nature of baggage checks.[52] (See COMMUTATION TICKET; EXCURSION TICKET; and, generally, CARRIERS.)

LOCAL SUPERINTENDENT. As the term is used when applied to an officer of a railroad company, an officer whose duties are confined or limited to a particular county, city, town, place, district, or section.[53] (See, generally, RAILROADS.)

LOCAL TAXATION. A term used to distinguish this form of taxation from that form of taxation which is general and for the whole state.[54] (See LOCAL ASSESSMENT; and, generally, TAXATION.)

LOCAL USAGE. See CUSTOMS AND USAGES.

LOCAL VENUE. See VENUE.

LOCATE.[55] According to the context[56] the word may be employed as meaning: To ascertain and determine the place of;[57] to build;[58] to construct;[59] to designate the site or place of;[60] to determine the situation or limits.[61] So according to the context it may mean to direct, or to lead to;[62] to erect;[63] to fix in place;[64]

an apt term to designate a law prohibiting the sale of intoxicating liquors which is left to take effect or operate in school-districts at the option of a majority of the adult residents thereof. Boyd *v.* Bryant, 35 Ark. 69, 73, 37 Am. Rep. 6.

49. U. S. *v.* Kochersperger, 26 Fed. Cas. No. 15,541.

50. State *v.* Metropolitan St. R. Co., 161 Mo. 188, 198, 61 S. W. 603. But *compare* Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443, 448.

"Distributable property" of a railroad see 14 Cyc. 524 note 27.

51. People *v.* Allen, 1 Lans. (N. Y.) 248, 251 [*reversed* on another point in 42 N. Y. 378, 383].

"Local or corporate purposes" see Chicago *v.* Manhattan Cement Co., 178 Ill. 372, 382, 53 N. E. 68, 69 Am. St. Rep. 321, 45 L. R. A. 848.

"Local or private purposes" see People *v.* Marlborough Highway Com'rs, 54 N. Y. 276, 278, 13 Am. Rep. 581.

"Strictly local . . purpose" see Will County *v.* People, 110 Ill. 511, 519.

52. Louisville, etc., R. Co. *v.* Turner, 100 Tenn. 213, 224, 47 S. W. 223, 43 L. R. A. 140.

53. St. Louis, etc., R. Co. *v.* De Ford, 38 Kan. 299, 300, 16 Pac. 442.

54. People *v.* Brooklyn Bd. of Assessors, 141 N. Y. 476, 477, 36 N. E. 508. See also Davidson *v.* Ramsey County Com'rs, 18 Minn. 482, 494; Matter of Vanderbilt, 10 N. Y. Suppl. 239, 242, 2 Connoly Surr. 319.

55. "Derived from . . locatus — implying 'placed, situated, fixed in place.'" Westfield *v.* Tioga County, 150 Pa. St. 152, 155, 24 Atl. 700.

56. The significance of the term may depend upon the sense in which it is used by the parties. Hart *v.* Carnall-Hopkins Co., 103 Cal. 132, 137, 37 Pac. 196; Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37, 38. It "is not a technical term, and must therefore be interpreted according to its usual and ordinary significance." *In re* Providence, etc., R. Co., 17 R. I. 324, 335, 21 Atl. 965.

57. Foster *v.* Boston Bd. of Park Com'rs, 133 Mass. 321, 332.

58. Warner *v.* Callender, 20 Ohio St. 190, 197 ("locate a road"); Westfield *v.* Tioga County, 150 Pa. St. 152, 155, 24 Atl. 700. See also Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574, 588.

59. Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174, 182, 27 Atl. 564; Nashville, etc., R. Co. *v.* Jones, 2 Coldw. (Tenn.) 574, 588.

60. Webster Dict. [*quoted* in Providence, etc., R. Co.'s Petition, 17 R. I. 324, 335, 21 Atl. 965].

61. Century Dict. [*quoted* in U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 488, 41 Pac. 729].

62. Thus, in a contract whereby one party agreed to "locate" another on government land. Hart *v.* Carnall-Hopkins Co., 103 Cal. 132, 137, 37 Pac. 196.

63. Waldron *v.* Marcier, 82 Ill. 550, 552; Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37, 39, 40.

64. Webster Dict. [*quoted* in Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr.

to place;[65] to put in place;[66] to put up;[67] to select or define;[68] to select or determine the bounds or place of;[69] to set in a particular spot or position;[70] as applied to land, to select, survey, and settle the boundaries of a particular tract of land, or to designate a particular portion of land by limits; to designate and determine the place of.[71] (See Entry; Establish; Fix; Location; and, generally, Boundaries; Public Lands.)

LOCATE ANEW. A term practically synonymous with "relocate."[72] (See Locate.)

LOCATED. Situated.[73] (See Locate.)

LOCATING or LOCATION. Situation.[74] Applied to canals, highways, railroads and the like,[75] a term often used to denote the act of selecting and marking out the line upon which a railroad, canal or highway is to be constructed.[76] In American land law the designation of the boundaries of a particular piece of land, either upon record or on the land itself.[77] (Location: Of Boundary, see Boundaries. Of Bridge, see Bridges. Of Canal, see Canals. Of Cemetery,

(N. Y.) 37, 39; Godfrey *v.* Wright, 8 Okla. 151, 155, 56 Pac. 1051; Providence, etc., R. Co.'s Petition, 17 R. I. 324, 336, 21 Atl. 965].

65. Webster Dict. [*quoted* in Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37, 39; Godfrey *v.* Wright, 8 Okla. 151, 155, 56 Pac. 1051; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 488, 41 Pac. 729; *In re* Providence, etc., R. Co., 17 R. I. 324, 326, 21 Atl. 965; Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483, 501].

66. Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110, 141.

67. Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37, 39, 40.

68. Turner *v.* Thornton, etc., Gravel Road Co., 33 Ind. 317, 319.

69. Webster Dict. [*quoted* in Providence, etc., R. Co.'s Petition, 17 R. I. 324, 336, 21 Atl. 965].

70. Webster Dict. [*quoted* in Godfrey *v.* Wright, 8 Okla. 151, 155, 56 Pac. 1051; U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 488, 41 Pac. 729; Providence, etc., R. Co.'s Petitioner, 17 R. I. 324, 326, 21 Atl. 965; Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483, 501]; Stormonth Dict. [*quoted* in U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 488, 41 Pac. 729].

71. Webster Dict. [*quoted* in Murdock *v.* Memphis, 7 Coldw. (Tenn.) 483, 501]. Thus "to locate a tract of public land by surveying it and defining its boundaries." Century Dict. [*quoted* in U. S. *v.* Choctaw, etc., R. Co., 3 Okla. 404, 488, 41 Pac. 729].

Applied to the acquisition of government land, the word is sometimes used in the sense of to "purchase." Goodnow *v.* Wells, 67 Iowa 654, 660, 25 N. W. 864.

72. Hyde Park *v.* Norfolk County Com'rs, 117 Mass. 416, 422.

73. Webster Dict. [*quoted* in Moule *v.* Macedon, etc., Plank Road Co., 6 How. Pr. (N. Y.) 37, 39; Godfrey *v.* Wright, 8 Okla. 151, 155, 56 Pac. 1051; Providence, etc., R. Co., Petitioner, 17 R. I. 324, 336, 21 Atl. 965].

"Located and contained" see Hannon *v.* Hartford F. Ins. Co., 41 N. Y. App. Div. 226, 228, 58 N. Y. Suppl. 549, employed in a fire insurance policy.

"Located and maintained" see Toronto *v.* Quebec, etc., R. Co., 22 Ont. 344, 346, in which the expression quoted was employed in a contract relating to machine shops.

"Located in the state" see Davis *v.* Cook, 9 Nev. 134, 145.

"Located on those bridges" see Middlesex R. Co. *v.* Wakefield, 103 Mass. 261, 263.

74. See *In re* State Institutions, 9 Colo. 626, 627, 21 Pac. 472; Holbrook *v.* Faulkner, 55 N. H. 311, 315; Dorsey *v.* Phillips, etc., Constr. Co., 42 Wis. 583, 604. *Compare* Harvey *v.* Hamilton, 155 Ill. 377, 40 N. E. 592, 593.

"Location of the lot" see Jordan *v.* Cape Elizabeth School Dist., No. 8, 60 Me. 540, 544.

75. **Distinguished from "route."**—Theberath *v.* Newark, 57 N. J. L. 309, 311, 30 Atl. 528.

"The word . . . is sometimes used, in the statutes relating to ways, to mean the land included within the limits of the way as laid out, and sometimes as synonymous with 'laying out.'" Foster *v.* Boston Park Com'rs, 133 Mass. 321, 332.

76. Bouvier L. Dict. [*quoted* in Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172, 179]. See also *In re* Railroad Com'rs, 91 Me. 135, 138, 39 Atl. 478; Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295, 300; Abbott *v.* New York, etc., R. Co., 145 Mass. 450, 456, 15 N. E. 91; South Boston R. Co. *v.* Middlesex R. Co., 121 Mass. 485, 489.

77. Black L. Dict.

In connection with public lands the term denotes the act of selecting and designating lands which the person making the location is authorized by law to select. Richmond *v.* Henrico County, 83 Va. 204, 213, 2 S. E. 26 [*quoting* Bouvier L. Dict., and *citing* Foster *v.* Boston Park Com'rs, 133 Mass. 321, 332]. It is sometimes called an "application" (2 Pepper & L. Dig. Pa. Laws (1894), col. 3733, § 29); and sometimes it is used as synonymous with "description" (Cunningham *v.* Browning, 1 Bland (Md.) 299, 329); again, it is said to be generally applied to occupations of portions of the public domain (Lux *v.* Haggin, 69 Cal. 255, 363, 10 Pac. 674).

see CEMETERIES. Of College or University, see COLLEGES AND UNIVERSITIES. Of Domicile, see DOMICILE. Of Drain, see DRAINS. Of Easement, see EASEMENTS. Of Fence, see FENCES. Of Ferry, see FERRIES. Of Highway, see STREETS AND HIGHWAYS. Of Mining Claim, see MINES AND MINERALS. Of Property as Affecting — Insurance, see FIRE INSURANCE, and the Insurance Titles; Judgment or Its Lien, see JUDGMENTS. Of Public Land Claim, see PUBLIC LANDS. Of Railroad, see RAILROADS; STREET RAILROADS. Of Seat of Government, see CONSTITUTIONAL LAW. Of Street, see MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS. See also LOCATE.)

LOCATIO. Hiring for a reward.[78] (See, generally, BAILMENTS.)

LOCATOR. The name of the lender in a bailment in which the goods are left with the bailee to be used by him for hire.[79] (Locator: Of Land, see PUBLIC LANDS. See also, generally, BAILMENTS.)

LOCATUM. See BAILMENTS.

LOCKAGE. See ADMIRALTY.[80]

LOCKED HARBOR. A harbor where a vessel cannot go to sea being landlocked by shoals or reefs.[81]

LOCKOUT. The closing of a factory or workshop by an employer, usually to bring the workmen to satisfactory terms by a suspension of wages.[82]

LOCKUP. A place where bailiffs temporarily confine persons under arrest — a watch house;[83] a place for the temporary confinement of prisoners.[84] (See JAIL; and, generally, PRISONS.)

LOCMAN. A term used in the early maritime law to designate a local pilot whose business was to assist the pilot of the vessel in guiding the course of the vessel into the harbor, or through a river or channel, so as to avoid shoals, rocks,[85] etc.

LOCOMOTIVE. A steam engine, or an engine propelled by steam as its motive power.[86] (See ENGINE; and, generally, MASTER AND SERVANT; RAILROADS; STREET RAILROADS.)

78. 2 Kent Comm. 558 [*quoted* in Com. *v.* Cart, 2 Pittsb. (Pa.) 495, 497].

Locatio et conductio is the bailment which is created when goods are left with the bailee to be used by him for hire. Coggs *v.* Bernard, 2 Ld. Raym. 909, 913. See also McDougall *v.* Campbell, 41 U. C. Q. B. 332, 353.

Locatio custodiæ is a letting to keep; a bailment or deposit of goods for hire. Burrill L. Dict. [*citing* Story Bailm. § 442].

Locatio operis is a contract between parties for the performance of mechanical labor and the supply of necessary materials therefor in the repair of an article. Zell *v.* Dunkle, 156 Pa. St. 353, 356, 27 Atl. 38.

Locatio operis faciendi is a letting out of work to be done; a bailment of a thing for the purpose of having some work and labor or care and pains bestowed on it for a pecuniary recompense. Burrill L. Dict. [*citing* 2 Kent Comm. 586, 588; Story Bailm. §§ 370, 421, 422]. See also Wilmot *v.* Jarvis, 12 U. C. Q. B. 641, 644.

Locatio operis mercium vehendarum is a letting of work to be done in the carrying of goods; a contract of bailment by which goods are delivered to a person to carry for hire. Burrill L. Dict. [*citing* 2 Kent. Comm. 597; Story Bailm. §§ 370, 457].

Locatio rei is a letting of a thing to hire. Burrill L. Dict. [*citing* 2 Kent Comm. 586].

79. Coggs *v.* Bernard, 2 Ld. Raym. 909, 913.

80. See 1 Cyc. 830.

81. U. S. *v.* Morel, 26 Fed. Cas. No. 15,807.

82. Mathews *v.* People, 202 Ill. 389, 398, 67 N. E. 28, 31, 95 Am. St. Rep. 241, 63 L. R. A. 73. See also Atchison, etc., R. Co. *v.* Gee, 140 Fed. 153.

"**Strikes, lockouts,** accidents to railway" see *In re* Richardsons, 66 L. J. Q. B. 868, 872, 77 L. T. Rep. N. S. 479.

83. Webster Dict. [*quoted* in *In re* Burke, 27 Nova Scotia 286, 291].

84. Wharton L. Dict. [*quoted* in *In re* Burke, 27 Nova Scotia 286, 291].

"A lock up is not a jail or prison in which to confine prisoners for punishment." *In re* Burke, 27 Nova Scotia 286, 291.

85. Martin *v.* Farnsworth, 33 N. Y. Super. Ct. 246, 261 [*quoting* Laws Oleron, arts. 13, 14].

86. Gillette *v.* Chester, etc., R. Co., 2 Pa. Dist. 450, 451. *Compare* Jarvis *v.* Hitch, (Ind. App. 1902) 65 N. E. 608, 610, where it is said that a machine which moves backward and forward along the track of a railroad, by its own steam power, and which, while it has not the weight, size, speed, nor power of an ordinary locomotive, is capable of and does the same work to a certain extent, and is also used for the purpose of driving piles, is a locomotive.

Locomotive engine has been defined as "a locomotive . . . which moves cars by its own forward and backward motion" (Stranahan *v.* Sea View R. Co., 84 N. Y. 308, 314), or "a propelling engine on a railroad" (Mur-

LOCO PARENTIS. See In Loco Parentis.

LOCUM TENENS. Literally, "A place holder; one who holds the place of another." [87]

LOCUS CONTRACTUS REGIT ACTUM. A maxim meaning "The place of the contract governs the act." [88]

LOCUS IN QUO. Literally, "the place in which," or "the place where." [89] (Locus In Quo: In Action of — Ejectment, see Ejectment; Trespass, see Trespass; Trespass to Try Title, see Trespass to Try Title. In Writ of Entry, see Entry, Writ of.)

LOCUS PŒNITENTIÆ. A phrase meaning that the law affords an opportunity to withdraw from an illegal contract before it has been executed, that is, carried out.[90] Also used of a chance afforded to a person, by the circumstances, of relinquishing the intention which he has formed to commit a crime, before the perpetration thereof.[91] (See, generally, Contracts; Criminal Law.)

phy *v.* Wilson, 55 L. J. Q. B. 524, 525, 48 L. T. Rep. N. S. 788, holding that the term does not include a traction engine, with a crane used for lifting stone, but propelled by steam); or "an engine to draw a train of trucks or cars along a permanent or temporary set of rails" (Murphy *v.* Wilson, 52 L. J. Q. B. 524, 525, 48 L. T. Rep. N. S. 788, where it is said: "There is . . . a well-known class of engines, such as traction engines, which, though they are capable of being moved from place to place, are never spoken of as locomotive engines"). See also Thyng *v.* Fitchburg R. Co., 156 Mass. 13, 17, 30 N. E. 169, 32 Am. St. Rep. 425; Jones *v.* Festiniog R. Co., L. R. 3 Q. B. 733, 738, 9 B. & S. 835, 37 L. J. Q. B. 214, 18 L. T. Rep. N. S. 902, 17 Wkly. Rep. 28; Reg. *v.* Pease, 4 B. & Ad. 30, 32, 24 E. C. L. 24, 2 L. J. M. C. 26, 1 N. & M. 690.

"Locomotive engine or train upon a railroad" relates to those operated or originally intended to be operated to some extent by steam, and does not include electrically propelled cars on street railways. Fallon *v.* West End St. R. Co., 171 Mass. 249, 50 N. E. 536.

"Locomotive propelled by steam or by other than animal power" includes a tricycle capable of being propelled by the feet, or by steam as an auxiliary, or by steam alone. Parkyns *v.* Preist, 7 Q. B. D. 313, 315, 47 J. P. 751, 50 L. J. M. C. 148, 50 L. J. Q. B. 648, 30 Wkly. Rep. 13.

"Locomotive . . . used solely for agricultural purposes" see Ellis *v.* Hulse, 23 Q. B. D. 24, 26, 53 J. P. 598, 58 L. J. M. C. 91, 60 L. T. Rep. N. S. 836, 37 Wkly. Rep. 557.

"Any locomotive propelled by steam or by any other than animal power" see Parkyns *v.* Preist, 7 Q. B. D. 313, 315, 47 J. P. 751, 50 L. J. M. C. 148, 50 L. J. Q. B. 648, 30 Wkly. Rep. 13.

"Locomotive power" see Gillette *v.* Chester, etc., R. Co., 2 Pa. Dist. 450, 451, where it is said: "Electricity is certainly a locomotive power."

"Locomotive steam" is such as is used in a locomotive engine. Stranahan *v.* Sea View R. Co., 84 N. Y. 308, 314.

87. Burrill L. Dict. [*citing* Fleta, lib. 2, c. 64, § 2]. See also McAboy's Appeal, 107 Pa. St. 548, 557; McKinney *v.* Monongahela Nav. Co., 14 Pa. St. 65, 66, 53 Am. Dec. 517; Frederick *v.* Frederick, 1 P. Wms. 710, 712, 24 Eng. Reprint 582.

88. Burrill L. Dict.

Applied in Rogers *v.* March, 33 Me. 106, 113; Dacosta *v.* Davis, 24 N. J. L. 319, 331; Matter of Roberts, 8 Paige (N. Y.) 519, 524; Kohne's Estate, 1 Pars. Eq. Cas. (Pa.) 399, 412; Fant *v.* Miller, 17 Gratt. (Va.) 47, 59; Bremer *v.* Freeman, 10 Moore P. C. 306, 323, 325, 14 Eng. Reprint 508; Ross *v.* Ross, 25 Can. Sup. Ct. 307, 318 [*affirming* 2 Quebec Q. B. 413, 418]; Bremer *v.* Freeman, D. & Sw. 192, 233.

89. Burrill L. Dict. See also United Land Assoc. *v.* Knight, 85 Cal. 448, 467, 24 Pac. 818; Peck *v.* Lockwood, 5 Day (Conn.) 22, 27; Jeppson *v.* Almquist, 94 Minn. 403, 404, 103 N. W. 10; Baker *v.* Kansas City, etc., R. Co., 122 Mo. 533, 567, 26 S. W. 20; Moor *v.* Campbell, 15 N. H. 208, 211; Seabright *v.* New Jersey Cent. R. Co., (N. J. Sup. 1905) 60 Atl. 64, 65; Patchen *v.* Keeley, 19 Nev. 404, 411, 14 Pac. 347; Brill *v.* Brill, 108 N. Y. 511, 513, 15 N. E. 538; Masterson *v.* Short, 33 How. Pr. (N. Y.) 481, 486; Williams *v.* Buchanan, 23 N. C. 535, 539, 35 Am. Dec. 760; Paine *v.* Hutchins, 49 Vt. 314, 317; Garske *v.* Ridgeville, 123 Wis. 503, 506, 102 N. W. 22; Illinois Steel Co. *v.* Bilot, 109 Wis. 418, 447, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; State *v.* Logue, 73 Wis. 598, 602, 41 N. W. 1061; Hutchinson *v.* Chicago, etc., R. Co., 37 Wis. 582, 607; Martin *v.* Waddell, 16 Pet. (U. S.) 367, 434, 10 L. ed. 997; Atty.-Gen. *v.* Tomhue, 5 Ch. D. 750, 763, 46 L. J. Ch. 654, 36 L. T. Rep. N. S. 684, 25 Wkly. Rep. 802; Elmore *v.* Tucker, 6 Mod. 198.

90. Anderson L. Dict. [*quoted* in Hardt *v.* Deutsch, 22 Misc. (N. Y.) 66, 70, 48 N. Y. Suppl. 564]. See also Hutchins *v.* Sprague, 4 N. H. 469, 477, 17 Am. Dec. 439; State *v.* Williams, 47 N. C. 257, 259; Ault *v.* Dustin, 100 Tenn. 366, 375, 45 S. W. 981; Lee *v.* U. S. Bank, 9 Leigh (Va.) 200, 218; Coffin *v.* Jenkins, 5 Fed. Cas. 2,948, 3 Story 108, 119; Whitchurch *v.* Bevis, 2 Bro. Ch. 559, 560, 569, 29 Eng. Reprint 306. See also 10 Cyc. 456; 7 Cyc. 73 note 4; 4 Cyc. 1044.

91. Black L. Dict.

LOCUS PRO SOLUTIONE REDITUS AUT PECUNIÆ SECUNDUM CONDITIONEM DIMISSIONIS AUT OBLIGATIONIS EST STRICTE OBSERVANDUS. A maxim meaning "The place for the payment of rent or money, according to the condition of a lease or bond, is to be strictly observed."[92]

LOCUS SIGILLI. See L. S.

LOCUS STANDI. A place of standing; standing in court.[93]

LODE. See MINES AND MINERALS.

LODGE. As a noun, a secret association;[94] the meeting room of an association.[95] As a verb, to rest or dwell for a time;[96] to deliver;[97] to file.[98] (See, generally, ASSOCIATIONS; CLUBS; INNKEEPERS. See also FILE; LODGER; LODGING.)

LODGER.[99] One who for the time being has his home at his lodging place;[1] one who has the right to inhabit another man's house; one who lives in a hired room or rooms in the house of another;[2] one who inhabits a portion of a house, of which another has the general possession and custody;[3] one who lives at board, or in a hired room, or who has a bed in another's house;[4] one who occupies hired apartments in another's house; a tenant of part of another's house;[5] a person who lives and sleeps in a place;[6] a person whose occupation is of part of a

92. Black L. Dict.

93. Black L. Dict. See also Andrew *v.* New York Bible, etc., Soc., 4 Sandf. (N. Y.) 156, 185; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161, 167; *In re* Gold Co., 12 Ch. D. 77, 83, 48 L. J. Ch. 650, 40 L. T. Rep. N. S. 865, 27 Wkly. Rep. 757; James *v.* Reg., 5 Ch. D. 153, 160, 46 L. J. Ch. 516, 36 L. T. Rep. N. S. 903, 25 Wkly. Rep. 615.

94. "As of the Freemasons, Odd Fellows, and the like." Webster Dict. [*quoted* in State *v.* Farmers', etc., Mut. Aid Assoc., 35 Kan. 51, 9 Pac. 956].

95. Laycock *v.* State, 136 Ind. 217, 228, 36 N. E. 137.

96. Webster Dict. [*quoted* in Darden *v.* Wyatt, 15 Ga. 414, 415, where the phrase "shall generally lodge" is construed].

97. Archer *v.* Williams, 2 C. & K. 26, 27, 61 E. C. L. 26.

98. Dickerson *v.* Bowers, 42 N. J. Eq. 295, 296, 11 Atl. 142.

"Lodged," in respect to the filing of papers, is sometimes used in the sense of "received." Wilson *v.* Hines, 99 Ky. 227, 229, 35 S. W. 627, 37 S. W. 148, 18 Ky. L. Rep. 233.

99. Distinguished from "Guest" see Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 247, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809. See also INNKEEPERS, 22 Cyc. 1075. "Tenant" see Shearman *v.* Iroquois Hotel, etc., Co., 42 Misc. (N. Y.) 217, 219, 85 N. Y. Suppl. 365; Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 200, 58 N. E. 576 [*quoting* Century Dict., and *citing* 1 McAdam Landl. & Ten. 619, 621]; Allen *v.* Liverpool, L. R. 9 Q. B. 180, 191, 43 L. J. M. C. 69, 30 L. T. Rep. N. S. 93, 22 Wkly. Rep. 330; Wansey *v.* Perkins, 9 Jur. 116, 117, 14 L. J. C. P. 75, 1 Lutw. Reg. Cas. 252, 7 M. & G. 151, 8 Scott N. R. 979, 49 E. C. L. 151. See also LANDLORD AND TENANT, 24 Cyc. 879.

The term is said to indicate a personal relation of some one lodging somewhere with somebody. Ness *v.* Stephenson, 9 Q. B. D. 245, 252, 47 J. P. 134.

According to the purpose for which it is used the meaning of the term may vary. Phillips *v.* Henson, 3 C. P. D. 26, 31, 47 L. J. C. P. 273, 37 L. T. Rep. N. S. 432, 26 Wkly. Rep. 214. It must be taken to mean an occupier according to the understanding of that word by the majority of persons conversant with the modes of letting and occupying houses in this country to lodgers and undertenants. Ness *v.* Stephenson, 9 Q. B. D. 245, 252, 47 J. P. 134; Morton *v.* Palmer, 51 L. J. Q. B. 7, 9, 45 L. T. Rep. N. S. 426, 30 Wkly. Rep. 115.

1. Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809.

2. Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 200, 58 N. E. 576 [*quoting* Century Dict., and *citing* 1 McAdam Landl. & Ten. 619, 621].

3. Bouvier L. Dict. [*quoted* in Pullman Palace Car Co. *v.* Lowe, 28 Nebr. 239, 247, 44 N. W. 226, 26 Am. St. Rep. 325, 6 L. R. A. 809]. See also McDowell *v.* Hyman, 117 Cal. 67, 71, 48 Pac. 984; Metzger *v.* Schnabel, 23 Misc. (N. Y.) 698, 699, 52 N. Y. Suppl. 105.

"Where the owner of a house takes in a person to reside in a part of it, though such person has the exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet, if the owner retains his character of master of the house, the individual so occupying part of it occupies as a lodger only." Toms *v.* Luckett, 5 C. B. 23, 38, 11 Jur. 993, 17 L. J. C. P. 27, 2 Lutw. Reg. Cas. 19, 57 E. C. L. 23 [*quoted* in Morton *v.* Palmer, 51 L. J. Q. B. 7, 9, 45 L. T. Rep. N. S. 426, 30 Wkly. Rep. 115].

4. Webster Dict. [*quoted* in Pollock *v.* Landis, 36 Iowa 651, 652].

5. Burrill L. Dict. [*quoted* in Ullman *v.* State, 1 Tex. App. 220, 222, 28 Am. Rep. 405].

6. Heawood *v.* Bone, 13 Q. B. D. 179, 184, 48 J. P. 710, 51 L. T. Rep. N. S. 125, 32 Wkly. Rep. 752.

house, and subordinate to and in some degree under the control of a landlord or his representative.[7] (See LODGE; LODGING-HOUSE; and, generally, INNKEEPERS.)

LODGING. A place of rest for a night, or a residence for a time; temporary habitation.[8] (See LODGE; LODGER.)

LODGING-HOUSE.[9] A term applied to houses containing furnished apartments which are let out by the week or by the month, without meals, or with breakfast simply;[10] a house where lodgings are let.[11] (See COMMON LODGING-HOUSE; and, generally, INNKEEPERS.)

LOESS. As applied to soil, a clayey substance without fissures or seams.[12]

LOG. See LOGGING.

LOG-BOOK. See EVIDENCE.

7. Thompson *v.* Ward, L. R. 6 C. P. 327, 360, 1 Hopw. & C. 530, 40 L. J. C. P. 169, 24 L. T. Rep. N. S. 679.

8. Webster Dict. [*quoted* in Comer *v.* State, 26 Tex. App. 509, 513, 10 S. W. 106].

9. The term "lodging-house" has been distinguished from "boarding house," "inn," and "hotel" see Bailey *v.* People, 190 Ill. 28, 37, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L. R. A. 838; Thompson *v.* Lacy, 3 B. & Ald. 283, 287, 5 E. C. L. 169.

10. Cromwell *v.* Stephens, 2 Daly (N. Y.) 15, 25, 3 Abb. Pr. N. S. 26.

11. Century Dict. [*quoted* in Linwood Park Co. *v.* Van Dusen, 63 Ohio St. 183, 200, 58 N. E. 576].

12. Braasch *v.* Cemetery Assoc., 69 Nebr. 300, 306, 95 N. W. 646.

LOGGING

By Lycurgus James Rusk

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I. DEFINITIONS.

A. Logs. A log is the trunk of a tree cut down and stripped of its branches.[1]

B. Timber. The word "timber" has an enlarged or restricted sense, according to the connection in which it is employed.[2] It may refer to standing trees[3] or to stems or trunks of trees cut and shaped for use in the erection of buildings or other structures, and not manufactured into lumber within the ordinary mean-

1. State *v.* Addington, 121 N. C. 538, 540, 27 S. E. 988.

Another definition is: "A bulky piece or stick of wood or timber." Burkholder *v.* Union Trust Co., 82 Mo. 572, 576 [*quoting* Webster Dict.; Worcester Dict.].

A sawlog means a heavy piece or stick of wood, or body of a tree, cut a convenient length for the purpose of being sawed into lumber. Burkholder *v.* Union Trust Co., 82 Mo. 572, 576; State *v.* Addington, 121 N. C. 538, 540, 27 S. E. 988.

The word "logs" does not include manufactured lumber of any kind, or timber which is squared or otherwise shaped for use without further change in form. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67. Nor does it include masts or spars. Haynes *v.* Hayward, 40 Me. 145.

2. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28, 37. See also Great Western R. Co. *v.* Caswell, [1904] 2 K. B. 508, 512, 73 L. J. K. B. 834. It may mean "wood suitable for building houses or ships, or for use in carpentry, joinery, etc., trees cut down and squared or capable of being squared and cut into beams, rafters, planks, boards, etc.," or "growing trees, yielding wood suitable for constructive uses; trees generally; woods." Donworth *v.* Sawyer, 94 Me. 243, 253, 47 Atl. 521.

As a generic term "timber" properly signifies only such trees as are used in building, but its signification is not limited to trees, inasmuch as it applies to the wood or the particular form which the trees assume when no longer growing or standing in the ground. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28, 37.

3. Kaul *v.* Weed, 203 Pa. St. 586, 53 Atl. 489.

In this country the term "timber," when applied to standing trees, generally means such as are suitable for use in the erection of buildings or in the manufacture of tools, utensils, furniture, carriages, fences, ships, and the like. Alcutt *v.* Lakin, 33 N. H. 507, 509, 66 Am. Dec. 739.

In England the term "timber" does not include all kinds of trees. What kind of wood is deemed to be timber depends upon the custom of the country. Wood which in some counties is called timber is not so in others. Dashwood *v.* Magniac, [1891] 3 Ch.

ing of the word "lumber."[4] It does not ordinarily refer to the articles manufactured therefrom, such as shingles,[5] lath,[6] fence rails,[7] or railroad ties.[8]

C. Lumber. Lumber is timber sawed or split for use in building,[9] that is, the manufactured product of logs.[10] In some states the term is defined by statute.[11]

306, 351, 60 L. J. Ch. 809, 65 L. T. Rep. N. S. 811; Bullen *v.* Denning, 5 B. & C. 842, 847, 5 D. & R. 657, 4 L. J. K. B. O. S. 314, 29 Rev. Rep. 431, 11 E. C. L. 705 (apple trees held not timber trees); Aubrey *v.* Fisher, 10 East 446, 455; Cumberland's Case, Moore K. B. 812; Chandos *v.* Talbot, 2 P. Wms. 601, 606, 24 Eng. Reprint 877; Wyndham *v.* Way, 4 Taunt. 316, 318, 13 Rev. Rep. 607.

In Canada "the term 'timber' . . . would be properly applicable to whatever trees are used in building or the mechanic arts." Corbett *v.* Harper, 5 Ont. 93, 97.

The algebara is not a timber tree. Liu Kong *v.* Keahialoa, 8 Hawaii 511.

The mesquite, a small tree indigenous to deserts, used only for firewood, is not timber. Bustemente *v.* U. S., 4 Ariz. 344, 42 Pac. 111.

Young trees which may become timber are not so while they are yet saplings. Corbett *v.* Harper, 5 Ont. 93, 97. See Campbell *v.* Shields, 44 U. C. Q. B. 449, 450.

4. Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67; U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean (U. S.) 28. See also Keeton *v.* Audsley, 19 Mo. 362, 61 Am. Dec. 560; Bryant *v.* U. S., 105 Fed. 941, 45 C. C. A. 145.

Other definitions are: "That sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like." Lord *v.* Meader, 73 N. H. 185, 187, 60 Atl. 434; Alcutt *v.* Lakin, 33 N. H. 507, 509, 66 Am. Dec. 739; Webster Dict. [*quoted* in Nash *v.* Drisco, 51 Me. 417, 418; U. S. *v.* Stores, 14 Fed. 824, 825, 4 Woods 641; Corbett *v.* Harper, 5 Ont. 93, 97].

"That sort of wood which is squared, or capable of being squared and fit for being employed in house or ship building or in carpentry, joinery, etc." Imperial Dict. [*quoted* in Corbett *v.* Harper, 5 Ont. 93, 97].

"The body, stem or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the planks, boards, shingles or lath which may be used to complete the structure." Babka *v.* Eldred, 47 Wis. 189, 192, 2 N. W. 102, 599.

"Wood fit for building." Latham Eng. Dict. [*quoted* in Corbett *v.* Harper, 5 Ont. 93, 97].

Firewood is not timber where not suitable for any other purpose. Nash *v.* Drisco, 51 Me. 417.

Pulp wood is included within the terms of a statute providing for the driving of "timber" so intermixed with logs in a stream that it cannot be conveniently separated. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260. But it has been held that trees suitable only for chemical and pulp purposes, but not for building purposes, are not "timber" within the terms of a contract conveying "timber down and standing, save and except hemlock timber," especially where the parties to the contract themselves place a construction on it by first cutting all the trees above a certain diameter, and thereafter, on the establishment of chemical factories in the county, cutting the remaining trees not suitable for lumber. Kaul *v.* Weed, 203 Pa. St. 586, 53 Atl. 489.

Slabs are not included within a statute giving a lien on the "lumber and timber" for services in cutting logs. Engi *v.* Hardell, 123 Wis. 407, 100 N. W. 1046.

Saw timber does not include timber for telegraph poles. Elliott *v.* Bloyd, 40 Oreg. 326, 67 Pac. 202.

The word "growth" includes all the wood on land, and may be a broader term than timber. Lord *v.* Meader, 73 N. H. 185, 60 Atl. 434.

5. U. S. *v.* Schuler, 27 Fed. Cas. No. 16,234, 6 McLean 28.

6. Babka *v.* Eldred, 47 Wis. 189, 2 N. W. 102, 559.

7. McCauley *v.* State, 43 Tex. 374. See also Wilson *v.* State, 17 Tex. App. 393.

8. Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135 (holding that where an instrument conveyed all the timber and logs suitable for cross ties on described land, and provided that the contract should expire after twelve months, and that after that time all the timber left on the land should revert to the seller, the word "timber" will not be construed to include manufactured cross ties); Hubbard *v.* Burton, 75 Mo. 65. *Contra*, Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

9. Ward *v.* Kadel, 38 Ark. 174, 180; Williams *v.* Stevens Point Lumber Co., 72 Wis. 487, 489, 40 N. W. 154.

Shingles are lumber. Gross *v.* Eiden, 53 Wis. 543, 11 N. W. 9. But see Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070, holding that a lien given for labor in "manufacturing sawlogs into lumber" means the grosser operation of converting logs into timbers, planks, and boards and does not extend to manufacturing into shingles.

Cedar shingle rift, cut four feet long for hauling, is embraced in the statute which gives laborers a lien for cutting and hauling "logs and lumber." Sands *v.* Sands, 74 Me. 239.

10. Dutch *v.* Anderson, 75 Ind. 35.

11. Ryan *v.* Guilfoil, 13 Wash. 373, 43 Pac. 351; Hadlock *v.* Shumway, 11 Wash. 690, 40 Pac. 346; Baxter *v.* Kennedy, 35 N. Brunsw. 179.

Fence posts are manufactured articles within the statutory definition of lumber, although they are not sawed but are split, and whether split by a maul and wedge or through the medium of machinery in a mill. Ryan *v.* Guilford, 13 Wash. 373, 43 Pac. 351.

D. Stumpage. While the term "stumpage" has different meanings according to the connection in which it is used, it generally refers to the sum agreed on, to be paid to an owner for trees standing or lying upon his land.[12]

E. Boom. A boom is a line of connected floating timbers stretched across a river, or inclosing an area of water, to keep sawlogs from floating away.[13] It consists not only of the timbers by which the commodity boomed is inclosed, but also of the piers, piles, or other thing by which it is held in place.[14]

F. Raftage and Boomage. "Raftage" and "boomage" are charges incident and necessary to the delivery of logs.[15]

G. Sawmill. A sawmill is an establishment for sawing logs into lumber by power, often including other wood-working machines, such as lath and planing machines.[16]

H. Log Measure. Log measure is the measurement of logs before sawing them, then by calculation ascertaining what quantity of lumber they would produce when sawed into pieces of the required size.[17]

I. Logging Railroad.[18] A logging railroad is a private road constructed for the convenience and accommodation of lumbermen.[19]

II. CONTRACTS AND CONVEYANCES.[20]

A. Transfer of Timber Lands[21] — **1. False Representations.** A sale of timber lands induced by false representations as to the amount or quality of timber thereon may be rescinded,[22] whether the representations were made innocently or

A shingle bolt is a manufactured article within the statute defining lumber as "every article of whatsoever nature or description manufactured from sawlogs or other timber." Hadlock *v.* Shumway, 11 Wash. 690, 40 Pac. 346.

12. Blood *v.* Drummond, 67 Me. 476, 478.
Other definitions are: The compensation paid by the purchaser for standing timber to be cut and removed by him. Baker *v.* Whiting, 2 Fed. Cas. No. 787, 3 Sumn. 475, 484.

The value of the standing timber. Gordon *v.* Grand Rapids, etc., R. Co., 103 Mich. 379, 61 N. W. 549.

"The value of timber . . . standing in the tree." Nitz *v.* Bolton, 71 Mich. 388, 389, 39 N. W. 15.

"[The value of] the timber in a standing tree." Skeels *v.* Starrett, 57 Mich. 350, 355, 24 N. W. 98; U. S. *v.* Mills, 9 Fed. 684, 687.

13. Webster Dict.
It is an inclosure or artificial harbor for logs and lumber, of which one side is furnished ordinarily by the natural bank of the stream and the other is provided by the piers and the timbers or other obstruction to the passage of logs which connect them together. Powers' Appeal, 125 Pa. St. 175, 187, 17 Atl. 254, 11 Am. St. Rep. 882.

To boom, in the phrase "boom and deliver," means to completely inclose logs floating in a boom chained, and fastened together at the ends ready to be delivered in a raft. Gasper *v.* Heimbach, 59 Minn. 102, 60 N. W. 1080; Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559.

14. John Spry Lumber Co. *v.* The C. H. Green, 76 Mich. 320, 43 N. W. 576. See also Farrand *v.* Clarke, 63 Minn. 181, 183, 65 N. W. 361.

Piles to which the boom-stick is secured are a part of the boom, as well as the piles in the dock to which the other extremity of the boom-stick is fastened. John Spry Lumber Co. *v.* The C. H. Green, 76 Mich. 320, 43 N. W. 576.

15. Moss Point Lumber Co. *v.* Thompson, 83 Miss. 499, 35 So. 828, "raftage" being the expense of floating and "running" the logs, and "boomage" being a fixed charge payable at the place of delivery. See also Bangor Boom Corp. *v.* Whiting, 29 Me. 123. *Compare* Farrand *v.* Clarke, 63 Minn. 181, 183, 65 N. W. 361, where it is said: "The word 'boomage' is a term of rather indefinite meaning."

16. *In re* Gosch, 121 Fed. 604, 605 [*citing* Standard Dict.], in which it was decided that a sash and door factory is not a sawmill. See also Farrar *v.* Stackpole, 6 Me. 154, 19 Am. Dec. 261; Newhall *v.* Kinney, 56 Vt. 591.

17. Smith *v.* Aikin, 75 Ala. 209, 210.

18. Logging road see PRIVATE ROADS.

19. Tompkins *v.* Gardner, etc., Co., 69 Mich. 58, 60, 37 N. W. 43.

20. See, generally, CONTRACTS; DEEDS; SALES; VENDOR AND PURCHASER.
Entire or severable contract see CONTRACTS, 9 Cyc. 648.
Liquidated damages or penalty for breach of contract generally see DAMAGES, 13 Cyc. 89 *et seq.*
Contracts for driving logs see *infra*, V, D.
Scaling or other measurements see *infra*, III.

21. Reservation of timber in deeds to lands see DEEDS, 13 Cyc. 679.

22. Jones *v.* Wing, Harr. (Mich.) 301; Miner *v.* Medbury, 6 Wis. 295; Daniel *v.* Mitchell, 6 Fed. Cas. No. 3,562, 1 Story 172.

with fraudulent intent.[23] So, in an action on purchase-price notes not in the hands of *bona fide* purchasers, a partial failure of consideration arising out of misrepresentations as to the quantity of trees on the land is a defense.[24] The right to set up the misrepresentation as a defense may, however, be precluded by subsequent dealings between the parties with knowledge thereof.[25]

2. WARRANTY AS TO AMOUNT. To constitute a warranty as to the amount of timber on the land, there must be a clear and explicit representation in regard thereto.[26] The warranty of a certain amount of timber means timber which it is possible to remove.[27]

3. CONSTRUCTION. Contracts for the sale of timber land are to be construed by the same rules applicable to other land contracts.[28]

4. RESERVATION OF TITLE UNTIL PAYMENT. Title may be reserved in the vendor

If the purchaser does not rely on the representations, but instead relies on his own judgment and information obtained from third persons, he cannot obtain an abatement of the price on account of a deficit in the estimated amount of timber. Garrett *v.* Burleson, 25 Tex. Suppl. 41.

Effect of examination of land by vendee.— A sale induced by fraudulent representations as to the amount of timber on a tract of land may be rescinded, although the vendee himself examined the land, where the tract consisted of one thousand acres, and the examination was in charge of the vendor's agent, who had instructions to show vendee only the best part of the timber. Brotherton *v.* Reynolds, 164 Pa. St. 134, 30 Atl. 234.

Procedure.— Where the purchaser is liable under the decree to account for the sale of timber cut by him, he may be required to file a bond to pay the amount as soon as collected. Doggett *v.* Emerson, 7 Fed. Cas. No. 3,962, 1 Woodb. & M. 195.

23. Jones *v.* Wing, Harr. (Mich.) 301; Miner *v.* Medbury, 6 Wis. 295.

24. Hammatt *v.* Emerson, 27 Me. 308, 46 Am. Dec. 598.

25. Wylie *v.* Gamble, 95 Mich. 564, 55 N. W. 377.

26. Mahaffey *v.* Ferguson, 156 Pa. St. 156, 27 Atl. 21.

Construction of guaranty.— A person gave an authority in writing, to sell land on certain terms, containing the following clause: "I will guarantee, that there is 45,000,000 feet, (board measure) of pine timber on the township; and the purchaser may elect within thirty days of the purchase, to take it at a survey of all the standing pine timber at one dollar per thousand, or pay the said forty-five thousand dollars." It was held that this did not amount to a representation that there were in fact forty-five million feet of timber on the land. Hammatt *v.* Emerson, 27 Me. 308, 333, 46 Am. Dec. 598.

27. Anderson *v.* Northern Nat. Bank, 98 Mich. 543, 57 N. W. 808.

28. See, generally, VENDOR AND PURCHASER.

Time as essence of contract.— Time is the essence of a contract to buy timber land whose chief value is the timber, where the contract is payable in three annual instalments, and requires the cutting of sufficient timber each year to pay the instalments, and the making of monthly payments in proportion to the quantity of timber cut. Jennison *v.* Leonard, 21 Wall. (U. S.) 302, 22 L. ed. 539.

Stumpage.— Where a contract for the sale of timber land promised a conveyance on receiving advances, and certain costs and expenses, "from the stumpage cut on the land," such "stumpage cut on the land" meant money received or to be received from the sale of licenses to cut and remove timber therefrom; and hence the vendor would be liable to account for cuttings made by himself or jointly with others. And where one who has contracted to convey an interest in certain timber lands, on receiving his costs and expenses "from the stumpage cut on the land," his liability to the prospective vendee for timber cut since the date of the contract would be its value on the land. Blood *v.* Drummond, 67 Me. 476.

Amount of purchase-price.— In a contract of sale of timber land for a stipulated price, there was a provision that the vendee shall pay certain prices per thousand feet of designated classes of timber cut on the land, "said amount to apply as payment on this contract," and the title to the timber to remain in the vendor until paid for. It was held that the vendor was entitled to the stipulated sum for timber in addition to the agreed price for the land. Hersey *v.* Fisher, 90 N. Y. 647.

Right to pile timber on bank of stream.— An owner of timber land on the head waters of a creek also owned certain lands and mills at the mouth of the creek, which he sold to plaintiff, reserving in the deed the right of occupying the pond and shore above the Hall & Lacy Mills and the mouth of Big Raccoon creek, for the purpose of securing and holding lumber and timber taken from the property of the grantor. The grantor piled his lumber on the shore of the pond above the mouth of the creek preparatory to rafting, and plaintiff sued for use and occupation, contending that the reservation in the deed only gave the grantor the right to moor his lumber in the stream and fasten it to the shore. It was held that the grantor had the right to pile his lumber on the bank of the stream, and raft it in the ponds above the mills. Lacy *v.* Green, 84 Pa. St. 514.

until full payment of the successive instalments of the purchase-money;[29] and where the vendor, on default in a payment, takes possession of logs cut on the land by the vendee and expends money in sending the timber to market, the vendor is entitled to repayment of such advance on the vendee's performing his contract.[30] Where the contract of sale provides that no timber shall be cut until full payment is made, the fact that timber has been cut does not prevent the vesting of the legal title in the purchaser where he thereafter makes or tenders full performance.[31] Where a condition as to prepayment of instalments before the cutting and removal of timber is waived by the seller, even by parol, the buyer has a good title to timber cut and removed by him.[32]

B. Transfers of Standing Timber[33] — **1. Formal Requisites.** The general rule is that sales of standing timber must be in writing,[34] since standing timber is a part of the realty.[35] The conveyance must be under seal in states where seals are necessary on transfers of realty.[36]

2. Existence, Validity, and Construction of Contract in General — a. General Rules. The rules relating to contracts in general govern the creation, validity, and construction of contracts for the sale of standing timber.[37] Misrepresentations of material facts may be ground for rescission or a defense to an action for

29. Tyler *v.* Strang, 21 Barb. (N. Y.) 198.

Rights of purchasers of timber from vendee. — Where the contract gave the vendee power to sell the timber, but it was agreed that title to it should remain in the original vendor until full payment was made, a sale of timber by the vendee passed title thereto. Ortman *v.* Shaw, 37 Mich. 448.

30. Burgett *v.* Bissell, 14 Barb. (N. Y.) 638.

31. Haven *v.* Beidler Mfg. Co., 40 Mich. 286. See also Burgett *v.* Bissell, 14 Barb. (N. Y.) 638.

32. Marsh *v.* Bellew, 45 Wis. 36.

33. See, generally, Vendor and Purchaser.

Rights of purchasers of land after sale of timber see Vendor and Purchaser.

Leases of standing timber see Landlord and Tenant.

Restraining cutting or removal of timber see Injunctions.

34. See Frauds, Statute of, 20 Cyc. 212.

35. See Property.

36. White *v.* King, 87 Mich. 107, 49 N. W. 518; Potter *v.* Everett, 40 Mo. App. 152; Andrews *v.* Costican, 30 Mo. App. 29; McIntyre *v.* Barnard, 1 Sandf. Ch. (N. Y.) 52. *Contra*, see Warren *v.* Leland, 2 Barb. (N. Y.) 613.

37. See Contracts; Sales; Vendor and Purchaser.

What constitutes a complete contract for the sale of standing timber see Tacoma Mill Co. *v.* Perry, 40 Wash. 44, 82 Pac. 140.

Grounds for avoiding contract see Mills *v.* Stillwell, 89 S. W. 112, 28 Ky. L. Rep. 204.

Time when title passes. — It has been held that the title to standing timber passes immediately on the execution of the instrument of conveyance. Haskell *v.* Ayres, 35 Mich. 89. *Compare* Yockey *v.* Norn, 101 Mich. 193, 60 N. W. 685, 26 L. R. A. 145, holding that, where a person "sells to" another certain standing timber, to be paid for when cut, hauled, and loaded on the cars by the vendor, no title passes until delivery on the car. A sale of "all the merchantable timber" on specified lands operates to transfer the title to such timber at once, although the merchantable timber is not immediately determinable. Haskell *v.* Ayres, 35 Mich. 89. See also Hays *v.* McLin, 115 Ky. 39, 72 S. W. 339, 24 Ky. L. Rep. 1827. By the sale of standing timber, the trees to be chosen by the vendee, an interest passes which may be binding before election made. McCoy *v.* Herbert, 9 Leigh (Va.) 548, 33 Am. Dec. 256. It has also been held that title does not pass until the trees are cut. Fletcher *v.* Livingston, 153 Mass. 388, 26 N. E. 1001; Nash *v.* Rockford Veneer Co., 109 Mich. 269, 67 N. W. 111; New York, etc., Iron Co. *v.* Greene County Iron Co., 11 Heisk. (Tenn.) 434. See also Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135. A contract for the sale of timber "now standing" on a certain lot contained provisions as to the quantity to be cut each year, as to measurements by the vendor, and as to the price per cord for the bark, and per thousand for the timber. It was held that the contract was executory, and that no property passed to the vendee in the bark and timber until they were cut. Shakers United Soc. *v.* Brooks, 145 Mass. 410, 14 N. E. 622. Under a contract of sale of timber on land to be cut and removed by the vendee within a specified time, and measured and paid for each month, and before removal, as the work progresses, title vests in the purchaser as the timber is cut. Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432. A sale of wood growing on the seller's land, with the right to cut it within a specified time, but without any agreement that the purchaser may assign his rights, gives him a title to the wood cut within that time, which title he may sell to a third person. Nelson *v.* Belson, 6 Gray (Mass.) 385. Another line of cases holds that title does not pass where something remains to be done to identify the timber sold, until such act is performed. Moss *v.* Meshew, 8 Bush (Ky.) 187; Byassee *v.* Reese, 4 Metc. (Ky.) 372, 83 Am. Dec. 481; Ayer, etc., Tie Co. *v.* Davenport, 82 S. W. 177, 26 Ky. L. Rep. 115; Bar-

the purchase-price,[38] provided the representations were relied on.[39] There is no implied warranty of title in a contract for the sale of standing timber,[40] and there can be no warranty of title by parol.[41] So there is no implied warranty of quality.[42] Where standing trees are sold by the owner of the land under a written contract, fixing no definite time for their removal, the covenant of title to the trees runs with the land.[43]

b. Subject-Matter. A provision in the contract as to the size or suitability of the timber which may be cut,[44] in the absence of anything to show a contrary intent, refers to the timber of that dimension,[45] or available for the specified purpose,[46] when the conveyance was executed. Where the contract provides no rule for measurement, and no local usage is shown to the contrary, the diameter

nard *v.* Poor, 21 Pick. (Mass.) 378. If the contract provides that title shall remain in the seller until the purchase-price is paid, the title does not pass until such payment (Comstock *v.* Smith, 23 Me. 202; Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467. See also Emerson *v.* Fisk, 6 Me. 200, 19 Am. Dec. 206; Wilkie *v.* Day, 141 Mass. 68, 6 N. E. 542; Briggs Iron Co. *v.* Richardson, 4 Allen (Mass.) 371; Warren *v.* Leland, 2 Barb. (N. Y.) 613), unless such condition is waived (Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432; Marsh *v.* Bellew, 45 Wis. 36). A landowner made an executory contract for the sale of standing timber, licensing the purchasers to cut the timber, but retaining the title thereto until the purchase-money should be fully paid. Subsequently, the contract having been assigned, the owner agreed to execute a bill of sale without other security than the notes of the assignee. It was held that, on the execution of an absolute bill of sale, acknowledging the receipt of the purchase-money, the title to the timber vested in the assignee, although the warranty clause contained an exception subjecting the bill of sale to the "provisions and conditions" of the executory contract. *In re* Ortmann, 80 Mich. 67, 45 N. W. 63.

38. See, generally, VENDOR AND PURCHASER. See also Chess, etc., Co. *v.* Simpson, 82 S. W. 601, 26 Ky. L. Rep. 893, false representations of buyer.

Statutes.— Ga. Civ. Code, § 3542, declaring that, where there is a sale of land by tract, a deficiency in the quantity cannot be apportioned, does not apply to a sale of timber growing on the land, where there is no deficiency in the quantity of the land, but only misrepresentations as to the quantity and character of the timber itself. Harwell *v.* Martin, 115 Ga. 156, 41 S. E. 686.

39. Warner *v.* Munsheimer, 2 Tex. App. Civ. Cas. § 393; Shoemaker *v.* Cake, 83 Va. 1, 1 S. E. 387. But see Harwell *v.* Martin, 115 Ga. 156, 41 S. E. 686, holding that misrepresentations as to the quantity of growing timber on lands affords no ground for defeating an action, on the sale thereof, for the agreed price of the timber, where the purchaser had sufficient opportunity to inspect the same, and was not prevented by the seller from so doing, and voluntarily chose to rely on the statement.

40. Slocum *v.* Seymour, 36 N. J. L. 138, 13 Am. Rep. 432; Zimmerman *v.* Lynch, 130 N. C. 61, 40 S. E. 841; Van Doren *v.* Fenton, 125 Wis. 147, 103 N. W. 228.

Absence of title in seller.— Where one who had purchased timber discovered that the seller had no title, it was not necessary as a condition precedent to an action for damages to tender the contract price. Barnes *v.* F. Weikel Chair Co., 89 S. W. 222, 28 Ky. L. Rep. 315, which also considers the amount of damages recoverable.

41. Van Doren *v.* Fenton, 125 Wis. 147, 103 N. W. 228.

42. Hege *v.* Newsom, 96 Ind. 426.

43. Hogg *v.* Frazier, 70 S. W. 291, 24 Ky. L. Rep. 930.

44. See Leonard *v.* Holland, 79 S. W. 227, 25 Ky. L. Rep. 2009, holding that, under a contract for the sale of "all timber that can be made into railroad cross-ties, consisting of white oak, post oak and chestnut oak, no limit in size of post oak and chestnut oak, that will measure in diameter not over 12 inches," the words "no limit in size of post oak" were parenthetical, the limitation as to size referring to the white oak alone.

45. Warren *v.* Short, 119 N. C. 39, 25 S. E. 704; Whitted *v.* Smith, 47 N. C. 36. *Compare* Dexter *v.* Lathrop, 136 Pa. St. 565, 20 Atl. 545. *Contra*, see Bryant *v.* Bates, 39 S. W. 428, 19 Ky. L. Rep. 191.

Dimension "when cut."— Under a contract for the sale of all the pine timber on plaintiff's land of and above the size of twelve inches in diameter "when cut," with the term of fifteen years in which to cut and remove the same, the purchaser is entitled to cut trees that attain that size within the term. Hardison *v.* Dennis Simmons Lumber Co., 136 N. C. 173, 48 S. E. 588. Where plaintiff owned all the trees on a certain tract over fourteen inches in diameter at the time of severance, and had eight years within which to remove such trees, he cannot enjoin the construction of a tramway on such land by a lessee of the owner, who has the right to cut timber not belonging to plaintiff, on the ground that he is removing trees which will be fourteen inches in diameter before plaintiff's contract expires, as he has no property interest in the trees till they reach such size. Goldsboro Lumber Co. *v.* Hines Bros. Lumber Co., 126 N. C. 254, 35 S. E. 458.

46. Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831, in which it was decided that a convey-

of a given tree is its circumference at the point where it would be cut in the ordinary course of such work, divided by 3.1416;[47] and the diameter is to be measured from outside to outside, bark included.[48] The lands on which the timber is located must be clearly designated in the contract or conveyance,[49] as well as the kind and amount of timber sold.[50] A conveyance of timber for a particular purpose includes only that suitable for such purpose.[51] The buyer has no interest in trees on the land of another, although such land was described in the instrument.[52] Where the number of trees sold is designated, it may prevail over a designation of certain kinds of trees.[53] A sale of a certain lot of timber on a certain tract, the kinds and dimensions being certified, and the prices per thousand feet being given is not limited to the number of feet the seller agrees to deliver.[54]

3. Time For Removal of Timber — a. Where Contract Fixes Time. It is customary, where standing timber is sold without the land, to provide in the contract that the timber shall be removed within a specified time. Where such a clause is inserted, the time usually begins to run from the execution of the conveyance, although sometimes a different time is agreed on, such as the time of commencement of the cutting.[55] The general rule is that where the contract requires the timber to be removed within a given time, the sale is only of so much timber as

ance of pine trees growing on certain land for "sawmill and turpentine purposes" includes only those then suitable for such purposes, and not those which by growth subsequently came within the description of the original grant.

47. Bryant *v.* Bates, 39 S. W. 428, 19 Ky. L. Rep. 191. See also Leonard *v.* Holland, 79 S. W. 227, 25 Ky. L. Rep. 2009.

48. Hardison *v.* Dennis Simmons Lumber Co., 136 N. C. 173, 48 S. E. 588.

49. Strubbe *v.* Lewis, 76 S. W. 150, 25 Ky. L. Rep. 605 (holding that where a contract authorized plaintiff to cut and remove timber from lands belonging to S "on Sinking Creek and Big and Little South Fork Rivers in Wayne County, Ky.," the lands were described with sufficient definiteness to designate the subject of the contract); New York, etc., Iron Co. *v.* Greene County Iron Co., 11 Heisk. (Tenn.) 434 (holding that a reference to all the timber on the land of the vendor was sufficient).

50. Kennedy Stave, etc., Co. *v.* Sloss Sheffield Steel, etc., Co., 137 Ala. 401, 34 So. 372 (a deed purporting to convey all the minerals in certain lands, and all the timber thereon necessary for mining and marketing, is inoperative as a present transfer of title to timber because of uncertainty as to amount, but is a grant of a right to use timber while mining operations are going on, and to the extent necessary therefor, but does not prevent the owner of the timber from removing it before then); Bradford *v.* Huffman, 88 S. W. 1057, 28 Ky. L. Rep. 18; Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104 ("portions of the timber now standing on said premises" is too uncertain); Mizell *v.* Ruffin, 113 N. C. 21, 18 S. E. 72 (holding that a deed conveying "a portion of his cypress timber on Ahoskie and Loosing swamps," and providing that the grantor "may retain from the timber enough for his farm and building purposes," is void for indefiniteness). See also Hays *v.* McLin, 115 Ky. 39, 72 S. W. 339, 24 Ky. L. Rep. 1827.

51. Pennington *v.* Avera, 124 Ga. 147, 52 S. E. 324; Martin *v.* Peddy, 120 Ga. 1079, 48 S. E. 420; Herring *v.* Hardison, 126 N. C. 75, 35 S. E. 184, holding, however, that when cut the buyer might use it as he saw fit.

Cypress as suitable for sawmill purposes.— A lease of timber suitable for sawmill purposes includes cypress timber when there is nothing to show that by the custom of the trade only pine timber is embraced in such description. Gray Lumber Co. *v.* Gaskin, 122 Ga. 342, 50 S. E. 164.

Timber for turpentine "and" sawmill purposes.— A conveyance of timber suitable for turpentine and sawmill purposes gave to the grantor the use of such timber only as was suitable for both turpentine and sawmill purposes, and consequently did not include cypress timber. Gray Lumber Co. *v.* Gaskin, 122 Ga. 342, 50 S. E. 164.

52. Caughie *v.* Brown, 88 Minn. 469, 93 N. W. 656.

Lands held jointly and severally.— Where three persons owned jointly a tract of land, and one of them owned individually an adjoining tract, and the three sold the timber on the tract that they owned jointly, describing such tract by its generally known name, but describing it by boundaries, which included the tract owned by one of them individually, the latter tract was not included in the contract. Jackson *v.* Hardin, 87 S. W. 1119, 27 Ky. L. Rep. 1110.

53. Paalzow *v.* North Carolina Estate Co., 104 N. C. 437, 10 S. E. 527.

54. Bradford *v.* Huffman, 88 S. W. 1057, 28 Ky. L. Rep. 18.

55. Perkins *v.* Peterson, 110 Ga. 24, 35 S. E. 319.

Several tracts of land.— Where a right to use timber on several tracts of land was granted, to continue for a specified number of years from the time the cutting was

is removed within that time;[56] and confers no authority to remove the same after the expiration of the time specified.[57] The majority of the cases hold that the title to the timber not removed reverts to the owner,[58] but some of the cases merely hold that the buyer has no right of entry.[59] Each case depends on the terms of the particular contract, which may be so worded as to constitute the agreement to remove a mere covenant, so that the timber will remain the property of the purchaser.[60] It has been held that the mere cutting of timber within the time specified for its "removal" is not a compliance with the contract so as to entitle the buyer thereto,[61] but the weight of authority is to the con-

started, the period commenced to run as to all the tracts from the time the cutting commenced on any one of them. Perkins *v.* Peterson, 110 Ga. 24, 35 S. E. 319; Baxter *v.* Mattox, 106 Ga. 344, 32 S. E. 94.

Time when cutting must be commenced.— If the contract certifies the time within which the timber must be cut after the time of commencing the cutting, it must be commenced within a reasonable time. Hawkins *v.* Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852, 139 N. C. 167, 51 S. E. 855.

56. *Kentucky.*—Jackson *v.* Hardin, 87 S. W. 1119, 27 Ky. L. Rep. 1110.

Maine.—Webber *v.* Proctor, 89 Me. 404, 36 Atl. 631; Howard *v.* Lincoln, 13 Me. 122; Pease *v.* Gibson, 6 Me. 81.

Minnesota.— King *v.* Merriman, 38 Minn. 47, 35 N. W. 570.

New York.— Boisaubin *v.* Reed, 1 Abb. Dec. 161, 2 Keyes 323; Kellam *v.* McKenstry, 6 Hun 381 [*affirmed* in 69 N. Y. 264].

Wisconsin.— Hicks *v.* Smith, 77 Wis. 146, 46 N. W. 133; Golden *v.* Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32.

See 33 Cent. Dig. tit. "Logs and Logging," § 9.

57. *Georgia.*— See Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831.

Kentucky.— Chestnut *v.* Green, 86 S. W. 1122, 27 Ky. L. Rep. 838.

Michigan.— Haskell *v.* Ayres, 32 Mich. 93.

New York.— McIntyre *v.* Barnard, 1 Sandf. Ch. 52.

Tennessee.— Mengal Box Co. *v.* Moore, 114 Tenn. 596, 87 S. W. 415.

West Virginia.— Null *v.* Elliott, 52 W. Va. 229, 43 S. E. 173.

See 33 Cent. Dig. tit. "Logs and Logging," § 9.

Failure of seller to comply with contract.— The seller cannot insist on a forfeiture where he has not complied with his contract to remove certain timber not sold. Small *v.* Roharge, 132 Mich. 356, 93 N. W. 874.

Where the seller prevents removal.— Where a contract for the sale of timber limited the time within which it might be removed, and the purchaser was prevented by the seller from removing a portion of it, the purchaser should be allowed a reasonable time after the expiration of the contract, to get off the timber in question. Jackson *v.* Hardin, 87 S. W. 1119, 27 Ky. L. Rep. 1110.

"During logging season only."—A contract gave plaintiffs permission, "during the ensuing logging season only," to cut timber. It was shown that there was no "logging season" in the parish, but that those engaged in the industry, logged continuously, and that completion of the contract could not ordinarily be expected within the time of the logging season as known to other localities. It was held that the provision "during logging season only" would not be given effect. Prentiss *v.* Lyons, 105 La. 382, 29 So. 944.

58. *Massachusetts.*— Reed *v.* Merrifield, 10 Metc. 155; Kemble *v.* Dresser, 1 Metc. 271, 35 Am. Dec. 364.

Michigan.— Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102; Gamble *v.* Gates, 97 Mich. 465, 56 N. W. 855; Green *v.* Bennett, 23 Mich. 464.

North Carolina.— Hawkins *v.* Goldsboro Lumber Co., 139 N. C. 160, 51 S. E. 852, 139 N. C. 167, 51 S. E. 855.

Pennsylvania.— Bennett *v.* Vinton Lumber Co., 28 Pa. Super. Ct. 495.

Wisconsin.— Strasson *v.* Montgomery, 32 Wis. 52.

See 33 Cent. Dig. tit. "Logs and Logging," § 9.

59. Hoit *v.* Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119; Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193.

60. Peterson *v.* Gibbs, 147 Cal. 1, 81 Pac. 121, 109 Am. St. Rep. 107; Walker *v.* Johnson, 116 Ill. App. 145.

As dependent on nature of sale.— Where the contract is construed as a sale of goods and chattels, and not an interest in land, timber cut but not removed in the time specified in the contract may be removed after the expiration of such time (McGregor *v.* McNeil, 32 U. C. C. P. 538); but where the contract is construed as a deed of the timber subject to the condition that it be cut and removed on or before a specified date, the contrary rule applies (Johnston *v.* Shortbreed, 12 Ont. 633 [*followed* in Steinhoff *v.* McRae, 13 Ont. 546]).

61. Boisaubin *v.* Reed, 1 Abb. Dec. (N. Y.) 161, 2 Keyes 323; McNeil *v.* Hall, 107 N. Y. App. Div. 36, 94 N. Y. Suppl. 920; McIntyre *v.* Barnard, 1 Sandf. Ch. (N. Y.) 52.

Express provision as to reversion.— Where the contract covered all the timber standing, lying, or being on the land, and provided that whatever of "said" timber should remain on said lands, after the time limit, should revert back and become the property of the seller, timber cut but not removed within the time limit, became the property of the seller. Gamble *v.* Gates, 92 Mich. 510, 52 N. W. 941.

trary.[62] In any event, the manufacture of the trees into different kinds of timber is a sufficient removal from the premises, although such timber is still on the premises.[63] The cutting need not be continuous to comply with a contract to cut and remove within a specified term of years.[64]

b. Where Contract Is Silent. Except where the deed clearly manifests an intention on the part of the grantor to convey to the grantee a perpetual right to enter upon the land and cut trees,[65] the purchaser will be allowed only a reasonable time to remove the timber, where the conveyance contains no provision as to the time for exercising the right of removal;[66] but it has been held that the failure to remove the timber within a reasonable time does not forfeit the title of the purchaser, although he may have no right of entry.[67] The question of what is a reasonable time is one of fact dependent on the circumstances of each case; there are no fixed rules for its ascertainment.[68] The owner of the land

62. *Maine.*— Erskine *v.* Savage, 96 Me. 57, 51 Atl. 242.

Michigan.— Hodges *v.* Buell, 134 Mich. 162, 95 N. W. 1078; Macomber *v.* Detroit, etc., R. Co., 108 Mich. 491, 66 N. W. 376, 62 Am. St. Rep. 713, 32 L. R. A. 102.

Minnesota.— Alexander *v.* Bauer, 94 Minn. 174, 102 N. W. 387.

New Jersey.— Irons *v.* Webb, 41 N. J. L. 203, 32 Am. Rep. 193.

Wisconsin.— Hicks *v.* Smith, 77 Wis. 146, 46 N. W. 133.

See 33 Cent. Dig. tit. "Logs and Logging," § 9.

Compare Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104.

Remedy of purchaser.— While, under a contract whereby defendant was to have until a certain time to cut and remove timber from the land, he cut the same, but failed to remove it, the remedy in favor of the landowner was such damage as he might receive by trespass against defendant if he should enter after the limitation and remove the timber, or damages for the occupation of the land after the time fixed in the contract. Alexander *v.* Bauer, 94 Minn. 174, 102 N. W. 387.

Removal of timber to another part of the farm owned by the vendor, with his consent, has been held a sufficient removal. Watson *v.* Gross, 112 Mo. App. 615, 87 S. W. 104.

63. Hubbard *v.* Burton, 75 Mo. 65; Golden *v.* Glock, 57 Wis. 118, 15 N. W. 12, 46 Am. Rep. 32. See also Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135.

64. Hardison *v.* Dennis Simmons Lumber Co., 136 N. C. 173, 48 S. E. 588.

65. Baxter *v.* Mattox, 106 Ga. 344, 32 S. E. 94.

66. *Alabama.*— Heflin *v.* Bingham, 56 Ala. 566, 28 Am. Rep. 776.

Arkansas.— Liston *v.* Chapman, etc., Lumber Co., (1905) 91 S. W. 27.

Georgia.— Johnson *v.* Truitt, 122 Ga. 327, 50 S. E. 135. See also McRae *v.* Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513.

New Hampshire.— Kidder *v.* Flanders, 73 N. H. 345, 61 Atl. 675; Hoit *v.* Stratton Mills, 54 N. H. 452.

North Carolina.— See Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24.

Tennessee.— Carson *v.* Three States Lumber Co., 108 Tenn. 681, 69 S. W. 320, (1902) 91 S. W. 53.

Canada.— Dolan *v.* Baker, 10 Ont. L. Rep. 259.

See 33 Cent. Dig. tit. "Logs and Logging," § 9.

Illustrations.— Where the purchaser of growing trees for the purpose of manufacturing enters on the lands within a reasonable time, and cuts all the timber apparently worth taking, and thereupon removes his mill, and abandons the premises for eleven years, his right to enter and cut timber is gone. Patterson *v.* Graham, 164 Pa. St. 234, 30 Atl. 247.

67. Magnetic Ore Co. *v.* Marbury Lumber Co., 104 Ala. 465, 16 So. 632, 53 Am. St. Rep. 73, 27 L. R. A. 434; Hoit *v.* Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.

68. Liston *v.* Chapman, etc., Lumber Co., (Ark. 1905) 91 S. W. 27; McRae *v.* Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Hoit *v.* Stratton Mills, 54 N. H. 452; Boults *v.* Mitchell, 15 Pa. St. 364. See also Carson *v.* Three States Lumber Co., 108 Tenn. 681, 69 S. W. 320.

Matters to be considered.— Where no time is specified for the removal by vendees of standing timber sold them, the condition of the land whereon the trees stand, its accessibility, whether overflowed land or not, and, if overflowed, the effect of an overflow in hindering or aiding the grantees in removing the timber when cut, the number of trees standing at the time of the contract, and the facilities under the contract of the grantees for cutting and removing the timber, are to be considered in determining what is a reasonable time for such removal. Carson *v.* Three States Lumber Co., (Tenn. 1902) 91 S. W. 53.

Effect of transfer of land after timber deed. — Where one, after giving a deed of standing timber, specifying no time for removing it, gives to others a deed of the land, "subject to the timber deed," thus expressly recognizing the rights in the timber of the grantees thereof, only the time subsequent to giving of the second deed is to be considered in determining as between the grantees in the two deeds the question of what constitutes a reasonable time for removal of the timber.

may, by giving proper notice to the purchaser of the timber, hasten the time for its removal.[69]

4. Right of Purchaser to Enter on Land. A purchaser of standing timber has the right to enter on the land for the purpose of cutting and removing the timber.[70]

5. Payment. Provisions as to payment from the proceeds of the timber cut are often inserted in the contract.[71] So the seller is sometimes given the right to declare a forfeiture of the contract on a failure to pay instalments, but such right may be waived by acquiescence in subsequent work and expenditures by the buyer after such a failure constituting a ground for forfeiture.[72]

6. Vendor's Lien. In the absence of agreement therefor, it has been held that the vendor has no lien on the timber cut for the purchase-price thereof.[73] But the vendor has a lien for the purchase-price where the removal of the logs from the land prior to payment is prohibited.[74] And where the vendor expressly retains a lien on the trees, the lien is not lost by the vendee's cutting them and converting them into mill logs in the manner provided for by the contract.[75]

7. Recording Conveyance. While a conveyance of standing timber may be recorded,[76] yet in states where a sale of standing timber is considered a sale of an interest in lands, statutes requiring the recordation of sales of personal property do not apply.[77]

C. Cutting and Hauling[78] **— 1. Nature of Contract.** Whether a contract is

Liston *v.* Chapman, etc., Lumber Co., (Ark. 1905) 91 S. W. 27.

The facts as they existed at the time the deed was executed are the only ones to be considered in determining what is a reasonable time. Allison *v.* Wall, 121 Ga. 822, 49 S. E. 831.

Thirteen years is, as a matter of law, an unreasonable time for cutting and removing timber under a contract conveying such timber, and giving the grantee five years from the time he should begin to manufacture the same in which to cut it. Bunch *v.* Elizabeth City Lumber Co., 134 N. C. 116, 46 S. E. 24; Gay Mfg. Co. *v.* Hobbs, 128 N. C. 46, 38 S. E. 26, 83 Am. St. Rep. 661.

69. Boults *v.* Mitchell, 15 Pa. St. 371. See also Davidson *v.* Moore, 37 S. W. 260, 18 Ky. L. Rep. 563.

70. Brodack *v.* Morsbach, 38 Wash. 72, 80 Pac. 275.

Mode of entry.—In a contract of sale of standing timber to a person with the right for "his train," tramroad, wagons, and employees to enter on said land and remove said timber, the word "train" must be deemed to refer to a railroad train. Waters *v.* Greenleaf-Johnson Lumber Co., 115 N. C. 648, 20 S. E. 718.

Removal of timber.—Where the sale of standing timber, with the right to enter and remove the trees in such a manner as the purchaser might think proper, but not interfering with the enjoyment of the seller, except in so far as it might be necessary, timber cut may be taken across cleared land, where the cost of taking timber from the center of the wooded belt through the woodland to the roads instead of passing over the cleared land is more than the timber is worth. Stephens *v.* Gordon, 19 Ont. App. 176.

71. McMurphy *v.* Garland, 47 N. H. 316.

72. Buskirk *v.* Peck, 57 W. Va. 360, 50 S. E. 432. See also Garrison *v.* Glass, 139 Ala. 512, 36 So. 725.

73. Douglas *v.* Shumway, 13 Gray (Mass.) 498; Williams *v.* Gillespie, 30 W. Va. 586, 5 S. E. 210.

Where the agreement is construed as one for the sale of an interest in land, the vendor is *prima facie* entitled to a lien for unpaid purchase-money. Summers *v.* Cook, 28 Grant Ch. (U. C.) 179.

74. Buskirk *v.* Peck, 57 W. Va. 360, 50 S. W. 432. See also Bunn *v.* Valley Lumber Co., 51 Wis. 376, 8 N. W. 232.

75. Bradeen *v.* Brooks, 22 Me. 463; Ford *v.* Hodgson, 3 Ont. L. Rep. 526.

76. See, generally, Records.

A statute requiring mortgages and other instruments "affecting the ownership of any mark of logs" to be recorded refers to mortgages and other instruments affecting title to logs already cut and marked when such instruments are executed, and not to sales or mortgages of standing timber. Bunn *v.* Valley Lumber Co., 51 Wis. 376, 8 N. W. 232 [*following* Cadle *v.* McLean, 48 Wis. 630, 4 N. W. 755].

In Michigan, the sale of growing timber may be recorded in a book provided for miscellaneous documents. Mee *v.* Benedict, 98 Mich. 260, 57 N. W. 175, 39 Am. St. Rep. 543, 22 L. R. A. 641.

77. Bent *v.* Hoxie, 90 Wis. 625, 64 N. W. 426; Lillie *v.* Dunbar, 62 Wis. 198, 22 N. W. 467 [*distinguishing* Bunn *v.* Valley Lumber Co., 51 Wis. 376, 8 N. W. 232; Cadle *v.* McLean, 48 Wis. 630, 4 N. W. 755].

78. **Logging roads** see Private Roads.

Measurement or scaling under contracts to cut and haul see *infra*, III.

Lien for cutting or hauling see *infra*, VI.

merely a simple hiring to cut and saw timber, or a contract for the purchase or sale of timber, depends on the terms of the particular contract.[79]

2. Ownership of Logs. Where the clearing of the land is to be paid for by the timber taken off the land, the timber severed from the soil becomes the property of the logger.[80] So the ownership of the logs cut is usually in the person cutting them, where the other party merely takes a lien on them for the amount of his advances.[81]

3. Construction and Operation. There is a substantial compliance with the contract to cut and deliver all the logs from a tract, where the land is cleared of timber as closely as it is the custom of prudent and economical lumbermen to clear the land.[82] Where the timber is required to be cut in a "workmanlike" manner, it means the customary way of cutting timber in the locality where the contract is to be performed.[83] Time may be of the essence of the contract.[84] The construction of agreements as to delivery,[85] the sharing of expenses,[86] and payment [87] is governed by the rules applicable to contracts in general.

79. See Lambden *v.* West, 7 Del. Ch. 266, 44 Atl. 797.

80. McAllister *v.* Walker, 69 Mo. App. 496.

81. Andrews *v.* Jenkins, 39 Wis. 476.

82. Pallman *v.* Smith, 135 Pa. St. 188, 19 Atl. 891.

Construction of particular contracts.— Where the agreement is to cut all marketable timber with the right of the owner of the land to dictate "from time to time what timber is marketable," the loggers cannot complain that plaintiffs prevented them from cutting all the marketable timber. Haines *v.* Gibson, 115 Mich. 131, 73 N. W. 126. Where the logger is not required to cut timber, the expense of which to him would be more than a certain per cent above the ordinary price for cutting, he is not bound to cut any timber that would exceed that price, and cannot be required to cut all the timber, if, upon taking it all together, he could cut it on an average at the price fixed by the contract. Wadleigh *v.* Shaw, 45 Iowa 535.

83. Shores Lumber Co. *v.* Stitt, 102 Wis. 450, 78 N. W. 562.

84. Utley *v.* S. N. Wilcox Lumber Co., 59 Mich. 263, 26 N. W. 488. See also Kentucky Lumber Co. *v.* Martin, 49 S. W. 191, 20 Ky. L. Rep. 1358.

Nature of logging.— Where the contract is to deliver and bank logs by a specified date, "provided the logging season permit," the measure of the contractor's duty is not that of ordinary care and diligence, but his obligation is absolute, except as affected by the nature of the season. Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410. Where the hauling is to be done during the winter if the weather is favorable and if not during the following winter, the lack of snow and frost with but a few days of sledding is a good excuse for not hauling all the logs during the first winter. Goodrich *v.* Hubbard, 51 Mich. 62, 16 N. W. 232. See Kerslake *v.* McInnis, 113 Wis. 659, 89 N. W. 895.

Waiver.— Where there is a breach of a contract to haul and deliver logs by a specified date at a specified place, but the contractor delivers them at a later date and at another place, where the other party accepts them and takes from the contractor the cost of running them to the agreed place of delivery, it is proper to submit to the jury the question whether this constitutes a recognition of the contract as in force and an acceptance of delivery. Godkin *v.* Monahan, 83 Fed. 116, 27 C. C. A. 410.

85. See cases cited *infra*, this note.

Construction of particular contracts.— Where logs are required to be drawn to a specified stream, it is sufficient to draw them to the stream at a point most convenient to the contractor. Palmer *v.* Fogg, 35 Me. 368, 58 Am. Dec. 708. Where logs are to be delivered upon the skids at a mill, "keeping logs of particular lengths by themselves," it has been held that logs of precisely the same length need not be placed together where it is not necessary for the convenience of the other party. Maltby *v.* Plummer, 71 Mich. 578, 40 N. W. 3. A contract to deliver logs on loaded cars at a station some distance from the place of loading requires the loggers to obtain the necessary cars. O'Brien Lumber Co. *v.* Wilkinson, 117 Wis. 468, 94 N. W. 337.

86. Hopkins Mfg. Co. *v.* Ruggles, 51 Mich. 474, 16 N. W. 862, holding that an agreement between the parties to the contract to share the expenses covers not only the cost of property purchased, but also the necessary payment of interest on such purchases.

Where the expenses of scaling are to be apportioned and the scaler boards with the jobber, the board is an item of expense to be divided. Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511.

87. Bishop *v.* White, 68 Me. 104.

Payment as release.— Where payment for the cutting and skidding is to be separate from that for the drawing, the payment for the former before the drawing was completed does not show a release from the completion of the drawing. Bean *v.* Bunker, 68 Vt. 72, 33 Atl. 1068.

Destruction by fire.— Where the logger, after part performance, is released from his contract under an agreement that he is to be paid a certain price for the logs already

4. EFFECT OF DEATH OF PARTY.[88] A contract for the cutting of timber does not involve personal skill or expert knowledge, and hence survives the death of either or both parties.[89]

5. LIABILITY OF LOGGER FOR INJURIES.[90] Where the logger runs a railroad train properly equipped and operated over a logging railroad,[91] he is not liable for injury to the owner of the land to the same extent as a regular railroad would be.

6. RIGHTS OF SUBSEQUENT PURCHASERS. A purchaser of the logs, with notice of the logging contract, either actual[92] or constructive,[93] takes subject thereto.

7. ACTIONS — PLEADING AND PRACTICE. The pleading,[94] evidence,[95] trial,[96] and damages[97] in actions involving contracts for cutting and hauling logs are governed by the rules applicable in civil actions in general.

D. Sawing and Manufacturing Logs. Contracts for the sawing and manufacturing of logs are governed by no particular rules other than those pertaining to contracts in general.[98] When logs are delivered at a custom sawmill to be

cut as soon as shipped to market, he is entitled to the sum specified notwithstanding the subsequent destruction of the logs by fire before shipment. Lupton *v.* Freeman, 82 Mich. 638, 40 N. W. 1042.

Where extra work is done by the logger, at the request of the other party, he is entitled to recover the reasonable value of his services in regard thereto. McCann *v.* Doherty, 98 Wis. 335, 73 N. W. 782.

Where logs not complying with the contract are accepted, the logger may recover their reasonable market value. Bresnahan *v.* Ross, 103 Mich. 483, 61 N. W. 793.

Advances.— Where a certain number of feet of logs are to be cut, with the option to cut a certain additional number, the owner to advance cash at a certain rate per thousand as called for, the loggers cannot call for advances beyond the number of feet stipulated in the contract, unless they were bound to furnish logs accordingly. Hopkins *v.* Sanford, 38 Mich. 611.

Agreements between loggers.— Where two persons contracting to cut and haul timber from the land of another are to have one third, and they subsequently agree that one of them should cut and haul the timber, the other paying him a certain sum for each thousand feet so hauled, the latter is liable for compensation for all the timber cut and hauled, including that set apart to the owner of the land. Richardson *v.* Single, 42 Wis. 40.

88. See, generally, ABATEMENT AND REVIVAL.

89. Billings' Appeal, 106 Pa. St. 558.

90. **Logging railroad** defined see *supra*, I, I.

91. Simpson *v.* Enfield Lumber Co., 131 N. C. 518, 42 S. E. 939, Clark and Douglas, JJ., dissenting.

92. Waterston *v.* Getchell, 5 Me. 435, 17 Am. Dec. 251.

93. Steele *v.* Schricker, 55 Wis. 134, 12 N. W. 396.

94. See, generally, PLEADING.

95. See, generally, EVIDENCE.

Evidence held admissible.— Where the contract provides for a minimum and maximum number of feet to be delivered during the year, and thereafter the minimum amount is required to be delivered during the first six months, by reason of which the loggers claim the right to terminate the contract, evidence is admissible to show that delivery of the minimum amount within the six months was impracticable. Wager Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. 949.

Evidence held inadmissible.— Where the contract is to cut all timber suitable for a certain purpose, testimony as to the condition of the land is immaterial. And, on an issue as to how much suitable timber the logger failed to cut, as required by his contract, evidence as to the rejection of some of the timber cut is immaterial. Thornton *v.* Savage, 120 Ala. 449, 25 So. 27.

96. See, generally, TRIAL.

Questions for the jury.—The following have been held to be questions of fact for the jury: Whether the logger has abandoned the contract. Greenwood *v.* Davis, 106 Mich. 230, 64 N. W. 26. Whether there was a substantial compliance with a contract to cut and deliver "all" the logs from a tract. Pallman *v.* Smith, 135 Pa. St. 188, 19 Atl. 891. Whether a lumbering season was an ordinarily good season in certain respects. Smith *v.* Scott, 31 Wis. 437. Whether an engine furnished, to be used in the logging business, was a necessary. Carstens *v.* Earles, 26 Wash. 676, 67 Pac. 404.

97. See DAMAGES, 13 Cyc. 162, 163. See also Stillwell *v.* Packcke-Leicht Lumber Co., 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42 (holding that the measure of damages for breach of a logging contract requiring the taking of all the lumber from certain land, at a specified price, is the difference between the market value of the timber left standing on the land and the contract price at the date of the breach); Heyser *v.* Gunter, 118 N. C. 964, 24 S. E. 712.

98. See, generally, CONTRACTS.

Construction and operation of particular contracts see Hale *v.* Trout, 35 Cal. 229; Tompkins *v.* Gardner, etc., Co., 69 Mich. 58, 37 N. W. 43 (expense of inspection of lumber when loaded on cars); Wilcox *v.* Allen, 36 Mich. 160; Phillips *v.* Raymond, 17 Mich. 287; Harris *v.* Rathbun, 2 Abb. Dec. (N. Y.)

manufactured into lumber at an agreed compensation, it is a bailment for mutual benefit, and the bailee is bound to exercise ordinary care in manufacturing the same, and must either account for the logs or show that they were lost or destroyed without his fault.[99] The sawyer is required to saw the lumber in a workmanlike manner.[1] The failure to furnish logs to be sawed, as provided for by the contract, may constitute a breach of contract,[2] as may, on the other hand, the failure to saw the logs within the time specified in the contract.[3] Although the contract provides that the amount sawed and to be paid for is to be determined by measurement at a certain time,[4] such measurement is not the basis of settlement where shown to be fraudulent.[5]

E. Sales of Logs or Lumber — 1. In General. Sales of logs and lumber are sales of personal property and governed in general by the rules relating to all sales of personal property.[6] A contract for the sale of logs "boomed and delivered

326, 2 Keyes 312 (holding that where a contract to saw lumber requires the taking and paying for all lumber spoiled in sawing, lumber merely sawed smaller than called for by the contract is not "spoiled"); Penfield *v.* Dunbar, 64 Barb. (N. Y.) 239 (agreement to divide profits of sawing after deduction of advances); Wilson *v.* Crowell, 48 Pa. St. 58; Hunter *v.* Felton, 61 Vt. 359, 17 Atl. 739 (implied promise to pay for gathering logs in addition to sawing them); Clark *v.* Clifford, 25 Wis. 597 (part payments held to be due on partial deliveries of lumber); Barker, etc., Lumber Co. *v.* Edward Hines Lumber Co., 137 Fed. 300 (breach of contract rendering performance impossible).

Title during various stages of sawing see Tompkins *v.* Gardner, etc., Co., 69 Mich. 58, 37 N. W. 43; Hurd *v.* Cook, 75 N. Y. 454; Dennis *v.* Montesano Nat. Bank, 38 Wash. 435, 80 Pac. 764.

99. Gleason *v.* Beer, 59 Vt. 581, 10 Atl. 86, 59 Am. Rep. 757.

1. Rhodes *v.* Holladay-Klotz Land, etc., Co., 105 Mo. App. 270, 79 S. W. 1145.

2. Whidden *v.* Belmore, 50 Me. 357; Stimpson *v.* Freeman, 38 Mich. 314; Fredenburg *v.* Turner, 37 Mich. 402. *Compare* Little *v.* Barry, 125 Mich. 211, 84 N. W. 67; Rhodes *v.* Holladay-Klotz Land, etc., Co., 105 Mo. App. 279, 79 S. W. 1145; Toomey *v.* Atyoe, 95 Tenn. 373, 32 S. W. 254.

Provision for liquidated damages.— Performance of a contract to saw a certain amount of lumber, with a stipulation for liquidated damages for every day the mill should remain idle because of neglect to furnish logs, is not excused by failure to supply logs until the amount stipulated for damages equals the contract price. Bassett *v.* Child, 11 Ill. 569.

Measure of damages.— Where defendant agreed to furnish plaintiff a specified quantity of logs for sawing, and to pay for such sawing at stated times, the measure of damages for failure to so furnish a portion of the logs is the difference between the contract price of the entire work and the reasonable cost of the work at the usual and ordinary prices. Dunn *v.* Johnson, 33 Ind. 54, 5 Am. Rep. 177; Snell *v.* Remington Paper Co., 102 N. Y. App. Div. 138, 32 N. Y. Suppl. 343. In an action for breach of a lumbering contract, whereby defendant was to furnish a certain quantity of logs to be sawed, in ascertaining plaintiff's prospective profits, depreciation and deterioration in the mill property from wear and tear, and the time which plaintiff was enabled to spend at other employment should be considered. Snell *v.* Remington Paper Co., 102 N. Y. App. Div. 138, 92 N. Y. Suppl. 343.

3. Fletcher *v.* Prestwood, 143 Ala. 174, 38 So. 847; Stephenson *v.* Collins, 57 W. Va. 351, 50 S. E. 439.

Due diligence.— Where a contract required defendant to run and saw plaintiff's logs with all due diligence, and as fast as water would permit, defendant had no right to postpone the running and sawing of plaintiff's logs while he ran and sawed his own. Such a stipulation referred to natural conditions, such as drouth, and the like, bearing upon the supply of water, and did not cover the fortuitous breaking of defendant's dam. Fletcher *v.* Prestwood, 143 Ala. 174, 38 So. 847.

4. See Youngs *v.* Johnson, 82 Wis. 102, 51 N. W. 1127, where defendant was to pay plaintiff straight measure for sawing logs, "the saw bill is to be determined by the number of thousand feet . . . [defendant] realizes from the lumber. If sold merchantable, or otherwise than straight measure . . . [defendant] shall pay . . . [plaintiff] said saw bill at straight measure." The lumber was measured at the mill by defendant's agents, and delivered on board his vessels. It was held that the amount of the saw bill was to be determined by the quantity of lumber made from the logs and delivered by plaintiff to defendant, and not by the amount of lumber sold.

5. Sigler *v.* Beebe, 44 W. Va. 587, 30 S. E. 76.

6. See, generally, Sales.

Warranty.— There is no implied warranty as to the soundness of the logs sold, where the seller was a general merchant and the purchaser inspected the logs before running them through his mills. Ketchum *v.* Stetson, etc., Mill Co., 33 Wash. 92, 73 Pac. 1127. An agreement for "good, smooth, sound" logs, to be paid for if approved by the buyer, is not a warranty which will survive the acceptance of the logs after approval. Max-

to tug" means that the seller is to inclose the logs in a boom, so that a tug could fasten to them and tow them away.[7]

2. Delivery and Acceptance. A symbolical delivery of large quantities of logs on a stream or the banks thereof preparatory to driving is sufficient.[8] What constitutes a sufficient delivery of a raft of logs depends largely upon the circumstances of each case.[9] Where the contract is silent as to the time when the logs are to be delivered, the delivery must be within a reasonable time.[10] Where the contract provides for delivery the second spring afterward, if it is found that delivery the first spring is not practicable, a delivery the second spring is authorized where the logs could not be floated to the mills the first spring.[11] A forfeiture of all the logs contracted to be sold because of failure to deliver them at a certain date, although provided for by the contract, will not be enforced.[12] Where lumber is delivered to the wrong place by a mistake of the seller or his agent and is destroyed by fire before acceptance by the buyer, the loss falls on the seller.[13]

well *v.* Lee, 34 Minn. 511, 27 N. W. 196. So a provision in a contract which may be construed as merely an opinion as to the probable quantity of logs in a certain place is not to be deemed a warranty of the existence of the quantity named. Switzer *v.* Pinconning Mfg. Co., 59 Mich. 488, 26 N. W. 762.

Masts or spars.— A contract for the sale of logs does not include masts or spars, especially where the distinction between masts and logs is found in the statute and in the scale bill adopted by the parties. Haynes *v.* Hayward, 40 Me. 145.

The word "sticks" as used in a contract for the sale of timber ordinarily refers to sawed timber rather than unsawed logs. Cincinnati, etc., R. Co. *v.* Dickey, 30 Ohio St. 16.

Defenses to action for price.— The purchaser may refuse to pay the price until liens on the lumber in excess of its value are released or he is given indemnity against such claims. Saxton *v.* Krein, 107 Mich. 62, 64 N. W. 868. Where the logs sold were cut on government land, but without the knowledge of either the buyer or seller, the seller is entitled to a reduction of the price to the amount paid by him to the government in settlement of the trespass. Parish *v.* McPhee, 102 Wis. 241, 78 N. W. 421.

Construction of contracts in general see Yellow Poplar Lumber Co. *v.* Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621; French *v.* Asher Lumber Co., 41 S. W. 261, 46 S. W. 701, 20 Ky. L. Rep. 380; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; McIlquham *v.* Barber, 83 Wis. 500, 53 N. W. 902 (construing contract to contemplate insurance and inspection fees, and authorize the buyer to incur such charges and deduct them from the purchase-price of the lumber); Aitcheson *v.* Cook, 37 U. C. Q. B. 490; Reid *v.* Robertson, 25 U. C. C. P. 568.

Measure of damages for breach of contract see Sales.

Survey by public surveyor as condition precedent to action to recover purchase-price see *infra*, III, C, 2.

Sales of timber lands see *supra*, II, A.

Sales of standing timber see *supra*, II, B.

7. Gasper *v.* Heimbach, 53 Minn. 414, 55 N. W. 559.

8. Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 572; Boynton *v.* Veazie, 24 Me. 286; Jewett *v.* Warren, 12 Mass. 300, 7 Am. Dec. 74; Brewster *v.* Leith, 1 Minn. 56.

9. See Williams *v.* Johnston, 26 N. C. 233.

It is not a sufficient delivery of a raft where it is tied up in the middle of a fleet of logs composed of rafts belonging to various persons. Hungerford *v.* Winnebago Tug, etc., Co., 33 Wis. 303.

Survey and marking.— A survey of logs by a person mutually agreed on by the parties to a sale thereof, and the marking of the logs, constitute a sufficient delivery, although the contract requires delivery at a place farther down the river. Bethel Steam Mill Co. *v.* Brown, 57 Me. 9, 99 Am. Dec. 572.

10. Yellow Poplar Lumber Co. *v.* Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621. See also Peterson *v.* South Shore Lumber Co., 105 Wis. 106, 81 N. W. 141.

Delivery during lumber running season.— Where the agreement was to receive at a certain price all lumber which should be manufactured for plaintiff at a certain mill during the remainder of the sawing season of that year, "so long as defendants could run the lumber" to market through the river, the contract required that plaintiff should have his lumber ready for delivery during the lumber running season, and it would not do to tender lumber after this time, even though it might be physically possible to run it down the river. Running the lumber out of season might be attended with increased expense, risk, and danger, and a fair, reasonable interpretation of the contract required that the lumber should be ready for delivery during the running lumber season, and not after that had practically closed. Chapman *v.* Ingram, 30 Wis. 290.

Damages are recoverable for injury to the logs from exposure by reason of delay in delivery. Yellow Poplar Lumber Co. *v.* Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621.

11. Irish *v.* Pauley, (Cal. 1897) 48 Pac. 321.

12. Daniel *v.* Day Bros. Lumber Co., 85 S. W. 1092, 27 Ky. L. Rep. 650.

13. Buie *v.* Browne, 28 N. C. 404. *Compare* Bigler *v.* Hall, 54 N. Y. 167, holding

The acceptance of a portion of the logs does not necessarily preclude the right to object thereto as not complying with the contract.[14]

3. When Title Passes. The general rules applicable to sales of personal property in general, as to when the title passes,[15] apply to sales of logs or lumber.[16]

4. Recordation of Bill of Sale. In some states bills of sale affecting the ownership of marked logs are, by statute, invalid unless recorded.[17]

5. Actions — Pleading and Practice. In actions involving sales of logs or lumber the procedure and trial,[18] including questions of law and fact,[19] the evidence,[20] its admissibility,[21] as well as its weight and sufficiency,[22] and the damages recoverable,[23] are governed by no particular rules other than those applicable to

that a loss before delivery, irrespective as to whether title has passed, is the loss of the seller.

14. See Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015, holding that the acceptance of logs cut, on the promise of the seller to have the balance sufficiently large to bring the average up to a certain number of cubic feet per stick as called for by the contract, does not prevent the buyer from raising the question of a breach of contract where the other logs furnished do not bring up the average.

15. See, generally, Sales.

16. See Grant *v.* Merchants', etc., Bank, 35 Mich. 515; F. E. Creelman Lumber Co. *v.* De Lisle, 107 Mo. App. 615, 82 S. W. 205.

Executory contracts.— Where the seller is required to drive the logs a considerable distance to the point of delivery and the scaling is to be done at the mutual expense of buyer and seller, the title does not pass until such acts are performed. State *v.* Meehan, 92 Minn. 283, 100 N. W. 6. Where some of the logs sold had not been cut, the sale is an executory contract and not a completed sale, passing present title. Martin *v.* Hurlbut, 9 Minn. 142. Where the last instalment of a purchase-price is not to be paid until the logs are put afloat by the seller the contract remains executory until the logs are put afloat, so that the purchaser is not entitled to take possession of the logs while they are upon the bank. Strong *v.* Dinniny, 175 Pa. St. 586, 34 Atl. 919.

Executed contracts.— Where nothing remains to be done, and the contract is unconditional, and no different intention appears, the title passes to the buyer when the contract is made, without regard as to whether the time of payment or the time of delivery, or both, are postponed. State *v.* Meehan, 92 Minn. 283, 100 N. W. 6. See also Hurd *v.* Cook, 75 N. Y. 454; Gatzmer *v.* Moyer, 9 Pa. Cas. 567, 13 Atl. 540.

17. Cook *v.* Van Horne, 76 Wis. 520, 44 N. W. 767, holding that the statute which provides for the recordation of all bills of sale which shall specify the marks placed upon the logs sold and when they are cut does not apply to a bill of sale of marked logs that does not specify the marks or when the logs were cut.

18. **Pleading** generally see Pleading.

Trial generally see Trial.

19. **Acceptance.**— It is a question for the jury whether logs had been accepted by the buyer as a performance of the contract so as to bind him to pay the purchase-price. St. Anthony Lumber Co. *v.* Bardwell-Robinson Co., 60 Minn. 199, 62 N. W. 274.

Scaling.— Where the evidence is conflicting as to whether it was agreed that the scaling should be final, the question as to the actual agreement is one for the jury. Nelson *v.* Mashek Lumber Co., 95 Minn. 217, 103 N. W. 1027.

What constitutes sale.— The court may properly instruct as to what will amount to a sale of a raft of lumber, and refer to a custom of the river making a measurement, certificate, and payment necessary to complete the contract. Erisman *v.* Walters, 26 Pa. St. 467.

Effect of complaint as evidence.— Where a complaint filed in another action is introduced in evidence as an admission of the opposing party, the court should charge on request as to the legal effect of the complaint. Tingley *v.* Fairhaven Land Co., 9 Wash. 34, 36 Pac. 1098.

20. See, generally, Evidence.

21. On an issue as to whether defendants consented to delivery at a later date, evidence is admissible, where the contract required plaintiff to deliver logs at a given time and place astern a vessel to be furnished by defendants, as to whether defendants had a vessel at the place at the time the contract called for. Duplanty *v.* Stokes, 103 Mich. 630, 61 N. W. 1015.

Custom.— On an issue as to whose duty it was to pay the boom charges evidence of the general custom of the business at the place of sale is admissible. Clarke *v.* Hall, etc., Lumber Co., 41 Minn. 105, 42 N. W. 785.

A letter written by defendant to plaintiff stating that defendant had favored plaintiff with his patronage is admissible in an action for lumber sold, where defendant denied the sale and it appeared that defendant had at another time bought lumber from plaintiff. Swindell *v.* Gilbert, 100 Md. 399, 60 Atl. 102.

Evidence held inadmissible see Tenny *v.* Mulvaney, 8 Oreg. 513, holding that the question, "Are these average logs on the ground where they were cut"? is inadmissible.

Want of, or mistake in, scale bill see *infra*, III, B.

22. Helfrich, etc., Planing Mill Co. *v.* Everly, 32 S. W. 750, 17 Ky. L. Rep. 795.

23. See, generally, Damages.

civil actions in general, and for this reason no extended discussion of pleading and practice in this class of actions is necessary.

III. SCALING OR OTHER MEASUREMENT.[24]

A. Where Contract Is Silent — 1. STATUTORY OR CUSTOMARY RULE. In some states, where there is no contract provision as to the mode of measurement, the statutory rule of measurement applies.[25] Where there is no such statute and no provision in the contract as to the mode of measurement, the timber should be measured according to the standard ordinarily prevailing.[26] Where the contract provides for the delivery of lumber at specified rates per thousand feet it will be construed as providing for board measure, and not for log measure.[27]

2. TIMBER FOR FOREIGN MARKET. Where parties agree to furnish logs or timber suitable for a market named, the measurement should be made according to the standard of such market, and not according to the mode prevailing at the home market.[28]

B. Agreements as to Measurement — 1. IN GENERAL. The contract often provides the mode of scaling,[29] and where made with reference to the method of scaling in general use, the parties will be bound by such scale, although in some respects erroneous.[30] Where the contract provides for scaling according to the standard rules in general use, the contract will be governed by the scale in use at the time of the scaling, and not at the time of the contract.[31] Of course an agreement for a rescale must be based on a consideration, but a waiver of the original scale and a mutual consent to accept the rescale as the basis for computing compensation is a sufficient consideration.[32] Where the parties disagree as to the mode of measurement, an agreement that the logs should be measured by the rule adopted by a lumber dealer in the neighborhood is based on a valid consideration.[33] If the party required to cause a scale to be made does not do so he cannot object to the failure to scale,[34] nor to evidence of a scale made on behalf of the other party;[35] and his failure to prove a survey may preclude a recovery of the purchase-price by him.[36] Where the amount is to be determined by the mill scale after

24. Liens for see *infra*, VI, C, 4, a.

25. Johnson *v.* Burns, 39 W. Va. 658, 20 S. E. 686, in which case it was decided that in ascertaining the cubical contents of the logs, Scribner's rule, designated "cubic measurement," reducing the logs to square measure, is the rule applicable, where the logs were purchased with the knowledge by the seller that they are to be manufactured into lumber.

26. Sanderson *v.* Hagan, 7 Fla. 318; Heald *v.* Cooper, 8 Me. 32. See McIntyre *v.* Rodgers, 92 Wis. 5, 65 N. W. 503, as to what constitutes a fair scale according to the usual method.

Fire-wood.— Where the agreement was to deliver "one hundred cords of logs," and there was nothing in the contract to indicate the mode in which they should be measured, the usual method adopted in measuring wood for fuel should be followed. Hale *v.* Handy, 26 N. H. 206.

Scale acquiesced in by both parties.—Where no log scale was agreed on in a contract between plaintiff and defendant for lumbering the timber on certain land, but it appeared that a scale adopted by the common carrier which transported the logs was known to and acquiesced in by both parties, such scale would be adopted in determining the number of feet for which defendant should be allowed for lumbering. Boyce *v.* Boyce, 124 Mich. 696, 83 N. W. 1013.

27. Dutch *v.* Anderson, 75 Ind. 35. But see Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39.

28. Merick *v.* McNally, 26 Mich. 374.

29. Construction of particular contracts see McIlquham *v.* Barber, 83 Wis. 500, 53 N. W. 902; Fornette *v.* Carmichael, 41 Wis. 200.

Right to elect.— Where one party is given the option of adopting the official scale or the bank scale, made at a different place, such election could be exercised each year with reference to the work actually accomplished. Boyle *v.* Musser-Sauntry Land, etc., Co., 86 Minn. 160, 90 N. W. 319.

30. Heald *v.* Cooper, 8 Me. 32. See also Bulkley *v.* Whited, 113 La. 396, 37 So. 5.

31. Hackley *v.* Headley, 45 Mich. 569, 8 N. W. 511.

32. Porteous *v.* Commonwealth Lumber Co., 80 Minn. 234, 83 N. W. 143. See also Yellow Poplar Lumber Co. *v.* Stephens, 69 S. W. 715, 24 Ky. L. Rep. 621.

33. Hunter *v.* Felton, 61 Vt. 359, 17 Atl. 739.

34. Gaslin *v.* Pinney, 24 Minn. 322.

35. Grice *v.* Noble, 59 Mich. 515, 26 N. W. 688.

36. See Patterson *v.* Larsen, 36 N. Brunsw. 4, holding that where a survey is to be made

sawing, and the logs are not sawed within a reasonable time, the seller may recover according to the number actually delivered to the mill owner.[37]

2. Conclusiveness of Scale by Person Agreed Upon. Except where the contract otherwise provides,[38] the scale of a person agreed on as a surveyor to scale logs is conclusive on the parties, in the absence of fraud or gross mistake.[39] The scale is not conclusive, however, as to matters expressly withdrawn by the contract from the judgment of the scaler,[40] nor unless made as provided for in the contract.[41] A stipulation that the scaling by a state surveyor should be final is valid notwithstanding the statute makes it only *prima facie* evidence.[42] If the surveyor scales only a part and estimates the balance, it has been held that the scale

by any surveyor the seller may have in his employ, which survey is to be final, the seller cannot recover the purchase-price without proof of the survey made by his surveyor, even though the surveyor is not shown to have been a duly sworn surveyor.

The scaling of the logs by the seller is not a condition precedent to the right to recover for logs delivered, where the measurement was to be decided by a scale on the mill deck of the buyer. Peterson *v.* South Shore Lumber Co., 105 Wis. 106, 81 N. W. 141.

37. Rowe *v.* Chicago Lumber, etc., Co., 50 La. Ann. 1258, 24 So. 235.

38. See Kennedy *v.* South Shore Lumber Co., 102 Wis. 284, 78 N. W. 567, holding that where a logging contract provided for scaling by a scaler mutually agreed on, or, in default of agreement, by one chosen by a referee, and, if the scale of any person selected under the contract should prove unsatisfactory to either party, he could insist on a change, this applied to a scaler chosen by the referee as well as to one chosen by the contracting parties.

39. *California.*— Bullock *v.* Consumers' Lumber Co., (1892) 31 Pac. 367.

Maine.— Nadeau *v.* Pingree, 92 Me. 196, 42 Atl. 353 (mathematical mistake); Ames *v.* Vose, 71 Me. 17; Bailey *v.* Blanchard, 62 Me. 168; Berry *v.* Reed, 53 Me. 487; Robinson Fiske, 25 Me. 401; Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379.

Michigan.— Robinson *v.* Ward, 141 Mich. 1, 104 N. W. 373; Sullivan *v.* Ross, 124 Mich. 287, 82 N. W. 1071; Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

Minnesota.—Boyle *v.* Musser-Sauntry Land, etc., Co., 77 Minn. 206, 79 N. W. 659. See Nelson *v.* Charles Betcher Lumber Co., 88 Minn. 517, 93 N. W. 661, holding that where the contract contains no provision that the scale shall be conclusive, it is subject to correction for mistake without a showing of fraud or inaccuracy amounting to bad faith.

Missouri.— See Strother *v.* McMullen Lumber Co., 110 Mo. App. 552, 85 S. W. 650.

New Hampshire.— See Hale *v.* Handy, 26 N. H. 206.

Wisconsin.— Peterson *v.* South Shore Lumber Co., 105 Wis. 106, 81 N. W. 141, fraud, mistake, prejudice, or neglect.

See 33 Cent. Dig. tit. "Logs and Logging," § 21.

Gross mistake means a mistake which is clearly shown to have left out some of the logs, or increased the scale by mistake in the tally or in the addition of the amounts on the tally-sheets, or something of that kind, and not an honest error of judgment in the scaler; for it is well understood and established that, in estimating the merchantable lumber in a given log, the judgment of scalers varies more or less, and that the scale cannot be made so accurate that all scalers will agree upon it. Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

Mistake of judgment.— Where a scaler is agreed on by the party to a sale of logs, they are not precluded from showing a mistake of fact in his computation, although in matters purely of judgment. Ortman *v.* Green, 26 Mich. 209. See also Robinson *v.* Fiske, 25 Me. 401.

Construction of contract for scale by buyer. — A contract for the sale of logs will not be construed as making conclusive the measurements taken by the buyer alone after delivery of the logs, unless the words relied upon as having that effect are clear and unequivocal. Southern Lumber Co. *v.* Asher, 64 S. W. 462, 23 Ky. L. Rep. 901.

40. Magee *v.* Smith, 101 Wis. 511, 78 N. W. 167.

41. Chase *v.* Bradley, 17 Me. 89; Eakright *v.* Torrent, 105 Mich. 294, 63 N. W. 293; Jesmer *v.* Rines, 37 Minn. 477, 35 N. W. 180.

A rescale not made by the person agreed on in the contract, and without the knowledge or consent of the seller, is not binding on him. McIntyre *v.* Rodgers, 92 Wis. 5, 65 N. W. 503.

In scaling by the Scribner rule, the scaler must exclude from the scale all visible defects in the logs which will prevent their making lumber, but a provision in the contract for the "making allowance for all defects" refers to visible defects in the logs, and does not include mill culls. Gordon *v.* Cleveland Sawmill, etc., Co., 123 Mich. 430, 82 N. W. 230.

Inspection by assistant.— Where an agreement provided that the boom master should inspect the logs before delivery, and both parties knew that it was the boom master's custom to employ assistants to help him inspect, the parties were bound by his assistant's inspection. Leonard *v.* Davis, 1 Black (U. S.) 476, 17 L. ed. 222.

Joint scale.— Where the seller and purchaser of logs agree in writing to scale them jointly, the joint scale binds them both. Busch *v.* Kilborne, 40 Mich. 297.

42. Leighton *v.* Grant, 20 Minn. 345.

is conclusive as to the part actually measured,[43] but it is not conclusive as to the part estimated.[44]

3. WARRANTY OF SCALE Where logs are sold according to a scale already made by one employed by the seller, there is an implied warranty that the scaler is competent and the scale honestly made, unless it clearly appears that the buyer assumed that risk.[45]

C. Public Inspectors or Surveyors — 1. CREATION OF OFFICE. The office of lumber surveyor or inspector has been established in several of the states.[46]

2. NECESSITY FOR INSPECTION OR SURVEY.[47] The statutes in some of the states require lumber to be surveyed by a public surveyor before it is sold,[48] but such statutes have no extraterritorial effect.[49] Failure to have the survey made precludes a recovery of the purchase-price,[50] but not unless the buyer shows that the

43. Vaughan *v.* Howe, 20 Wis. 497.

44. Douglas *v.* Leighton, 53 Minn. 176, 54 N. W. 1053, holding, however, that where the buyer received the logs and the "averaged" scale bill without objection, the seller, in an action for the price, must show that the quantity was actually equal to the amount set down in the scale bill.

45. Ortman *v.* Green, 26 Mich. 209.

46. See the statutes of the several states.

Presumption as to appointment.— In the absence of any showing to the contrary, it will be presumed that district lumber inspectors were duly appointed by the governor, as prescribed by statute. McCutchin *v.* Platt, 22 Wis. 561.

Liability on bond.— A lumber inspector, required by statute to discharge his duties of surveying and measuring lumber, "to the best of his knowledge, judgment, and ability," is not liable on his official bond, conditioned for the faithful performance of such duties, for inaccuracies of opinion or mistakes of judgment. Gates *v.* Young, 82 Wis. 272, 52 N. W. 178.

Termination of authority.—Under the statutes, a surveyor of lumber holds his office until another is chosen and qualified in his stead. Dow *v.* Bullock, 13 Gray (Mass.) 136.

Fees.— A surveyor-general, who surveys and scales logs turned out of a boom (Minn. Gen. St. (1878) c. 32, § 14), and receives his fees therefor, and then of his own motion places on the logs the scale mark of the person to whom they are delivered, and makes a record thereof, and delivers a copy to such person, is not entitled to recover from such person an additional fee for the same survey and scaling, although a usage existed under which such further scaling was made. Lovejoy *v.* Itasca Lumber Co., 46 Minn. 216, 48 N. W. 911.

Conflict of statutes.—A statute authorizing the appointment, by a corporation formed under the act, of persons to inspect produce, etc., and making the certificate of such person evidence between the buyer and seller, and binding upon the members of the corporation, a person so appointed may be authorized by the corporation to measure or scale logs afloat, and his certificate will then be evidence between the members of the corporation and others assenting thereto, in the manner prescribed in the act. This does not conflict with the provisions of the general statutes for the appointment of surveyors general to scale logs, and making their scale bills evidence. State *v.* Lumbermen's Bd. of Exch., 33 Minn. 471, 23 N. W. 838.

Inspector as broker.— The fact that a person is lumber inspector of one district does not preclude him from contracting to procure a purchaser for logs in another district, far distant. McKenzie *v.* Lego, 98 Wis. 364, 74 N. W. 249.

47. Survey as condition to cutting of timber see *infra*, VIII, E.

48. See the statutes of the several states.

In North Carolina the statute is held to be merely directory and for the benefit of the seller, so that if he makes no objection to an inspection and measurement not in accordance with the statute he is bound thereby. McNeill *v.* Chadbourn, 79 N. C. 149.

Purchase of standing timber.— A statute making it unlawful to sell or purchase mill logs without inspection and measurement by a sworn inspector does not apply to the purchase of standing timber. State *v.* Addington, 121 N. C. 538, 27 S. E. 988.

Successive inspections.—Under the local law of Baltimore, providing for the inspection and measurement of lumber previous to sale, all that is required is that lumber shall be once inspected by a licensed inspector in some part of the state before being sold in Baltimore. An inspection need not be made every time a sale is made. Blitz *v.* James, 31 Md. 264.

Offenses.— The measure of lumber by one not an authorized inspector, under the early New York law, was not an offense unless the lumber measured was intended for exportation. Shoemaker *v.* Lansing, 17 Wend. (N. Y.) 327.

49. Hardy *v.* Potter, 10 Gray (Mass.) 89.

50. Richmond *v.* Foss, 77 Me. 590, 1 Atl. 830.

Logs.— A statute relating to boards, lumber, and shingles does not apply to logs. Thomas *v.* Conant, (Me. 1886) 5 Atl. 533.

A survey by the seller of lumber, even though he is a duly qualified surveyor, is not a compliance with the statute requiring a survey by a sworn surveyor as a condition precedent to recover the price of lumber sold. Knight v. Burnham, 90 Me. 294, 38 Atl. 168.

sale is within the statute and not included in any statutory exception.[51] The right to collect tolls on logs may also, by statute, depend on a survey by a public inspector.[52]

D. Evidence[53] — **1. Presumptions.** Where a contract for the sale of logs makes no provision as to the scaling thereof, it has been held that the presumption is that the parties had some verbal or other arrangement respecting such scaling.[54] It has been held that where, at the time of the sale, there was a general usage as to the scale used in measurement, the parties will be presumed to have intended such scale to be used.[55] And where a public lumber inspector whose duty it was to scale logs was stationed at the place of sale, the parties will be presumed to have contracted with reference to the scaling required by statute.[56] Where a scaler mutually agreed on by the parties is dead, his measurements will be presumed to be honest and accurate, without any evidence to that effect.[57] Where the scale bill shows that part of the logs were "averaged" the presumption is that they were not actually surveyed but were estimated.[58]

2. Burden of Proof. The general rule that the burden of proof is on the party holding the affirmative[59] applies to the issue as to scaling.[60] The burden of impeaching the scale is on the party objecting thereto.[61]

3. Admissibility[62] — **a. In General.** An unprofessional log-scaler can testify to his own scale.[63] On a question as to whether one or the other of two log scales was in general use in a certain locality, it is not competent to ask a witness if it was the general understanding among the lumbermen of the state that one of the two was adopted.[64] Where a contract for the sale of logs provides that a certain person should scale the logs, and the parties by mutual consent selected another, evidence of the reputation of the former as a scaler was properly excluded in an action for the price of the logs.[65]

b. Documentary Evidence — (1) *In General.* The scale bill is admissible in evidence where properly identified,[66] without producing the testimony of the scaler

51. Whitman *v.* Freese, 23 Me. 185; Howe *v.* Norris, 12 Allen (Mass.) 82.

52. Penobscot Boom Corp. *v.* Lamson, 16 Me. 224, 33 Am. Dec. 656 (holding that inspection by one called a public "scaler" instead of a "surveyor" was within the terms of the act of incorporation of a boom company); Androscoggin River Side Booms *v.* Haskell, 7 Me. 474 (holding that it was the duty of the boom company, and not of the owner of the logs, to cause the survey to be made).

Statute not applicable to persons.— A statute relating to chartered dam companies, log-driving associations, and chartered log-driving companies, was held not to apply to one who, by his individual name and his heirs and assigns, is authorized to maintain dams and charge tolls. Tewksbury *v.* Schulenberg, 41 Wis. 584.

53. Evidence generally see Evidence.

54. McDowell *v.* Leav, 35 Wis. 171.

55. Heald *v.* Cooper, 8 Me. 32.

56. Morrow *v.* Delaney, 41 Wis. 149. See also Herdic *v.* Bilger, 47 Pa. St. 60, holding that contracts for the sale of lumber on the west branch of the Susquehanna are presumed to be made with reference to the statute, which authorizes the appointment of a scaler by the common pleas, to measure logs rafted out of the Susquehanna boom.

57. Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

58. Pratt *v.* Ducey, 38 Minn. 517, 38 N. W. 611.

59. See Evidence, 16 Cyc. 926.

60. Nutter *v.* Bailey, 32 Me. 504 (holding that where the defense in an action for the price of lumber sold and delivered is that it was not legally surveyed, the burden of proof is on defendant); Atkinson *v.* Morse, 57 Mich. 276, 23 N. W. 812 (holding that in an action on a contract by which plaintiff was to get out for defendant cedar posts and ties, where plaintiff hired an inexperienced person to do the scaling, the burden of proof was on him to show that the work of the scaler was accurate); Perkins *v.* Hoyt, 35 Mich. 506 (holding that where the seller and purchaser of logs agree that the quantity thereof shall be determined by the mill run at the place of sawing, it is incumbent on the seller, in an action for the purchase-price, to show what was the result of such scale).

61. Boyle *v.* Musser-Sauntry Land, etc., Co., 77 Minn. 206, 79 N. W. 659.

62. Evidence as to custom see Customs and Usages, 12 Cyc. 1084, 1085.

63. Thomas *v.* Conant, (Me. 1886) 5 Atl. 533; Busch *v.* Kilborne, 40 Mich. 297.

64. Headley *v.* Hackley, 50 Mich. 43, 14 N. W. 693.

65. Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

66. Haynes *v.* Hayward, 41 Me. 488; Peterson *v.* Anderson, 44 Mich. 441, 7 N. W. 56;

himself,[67] and although not certified as required by statute.[68] Where the parties agree to a scaling by a surveyor of a lumber district, other than the one in which the logs are located, his scale bill is admissible in evidence.[69] The scale is not admissible to show a conversion by the person first driving the logs, where made after the logs have been driven a long distance by another contractor.[70] Where the evidence is conflicting as to whether the parties agreed to be bound by the scaling of a certain person, evidence of other scales is admissible.[71] But where a joint scale made by a seller and buyer of a portion of logs is lost, a third person's scale of the whole drive is not admissible as to quantity or quality of that part which had been scaled jointly.[72] Where there is a question as to the accuracy of a scale on the mill deck, the woods scale of the logs is admissible as evidence to show the number of logs delivered.[73]

(II) *Evidence to Impeach.* A public surveyor cannot contradict his survey even as to the quality of the timber surveyed.[74] The official scale cannot be impeached by evidence of mere estimates of witnesses as to the number and size of the logs, made without count or measurement.[75] But evidence of measurements made elsewhere is admissible to show fraud, gross mistake, or bad faith in the measurement provided for by the contract.[76]

c. Secondary Evidence. Secondary evidence of the contents of a scale book, while proper where the book is in the possession of the opposing party and he refuses to produce it,[77] is not admissible unless it appears that a record of the scale was not made or is not accessible.[78]

d. Parol Evidence Relating to Contract. Where logs were scaled by a third person, the seller may show that at the time of the sale it was orally agreed between himself and the buyer that such third person should scale the logs.[79] So evidence is admissible to show that, by agreement of the parties to the contract, the inspection was made by one other than the person named in the contract.[80] Parol evidence is admissible to show that the term "mill tally" as used in a contract includes "mill culls."[81] Where the scaler is dead, the seller or a third per-

Clark *v.* C. N. Nelson Lumber Co., 34 Minn. 289, 25 N. W. 628; Smith *v.* Schulenberg, 34 Wis. 41. See Day *v.* Gumaer, 80 Wis. 362, 50 N. W. 182.

Where scale not completed.—Where a scaler mutually agreed upon by the parties to a contract for cutting and hauling logs ceased to scale before completion of the contract, his scale bill of that portion which he had measured was admissible. Bailey *v.* Blanchard, 62 Me. 168.

As to logs averaged, the scale bill is not admissible in evidence. Pratt *v.* Ducey, 38 Minn. 517, 38 N. W. 611.

67. Bailey *v.* Blanchard, 62 Me. 168.

68. Christie *v.* Keator, 49 Wis. 640, 6 N. W. 334.

69. Carver *v.* Crookston Lumber Co., 84 Minn. 79, 86 N. W. 871.

70. Itasca Lumber Co. *v.* Gale, 62 Minn. 356, 64 N. W. 916.

71. Sovereign *v.* Mosher, 86 Mich. 36, 48 N. W. 611.

72. Busch *v.* Kilborne, 40 Mich. 297.

73. Peterson *v.* South Shore Lumber Co., 105 Wis. 106, 91 N. W. 141.

74. Whitman *v.* Freese, 23 Me. 212.

75. Fornette *v.* Carmichael, 41 Wis. 200.

76. Ozan Lumber Co. *v.* Haynes, 68 Ark. 185, 56 S. W. 1068.

Where there is evidence of a mistake in a scale made by a scaler agreed on by the parties to a contract, the estimate of others as to the quantity may be received to the exclusion of the scale. Sullivan *v.* Ross, 124 Mich. 287, 82 N. W. 1071.

Estoppel to object to scale.—The fact that a party to a logging contract received the scaler's report and made it the basis of a charge for stumpage does not estop him from questioning the correctness of the scale, where he afterward stated to the other party that the scale was too low, and asked for a new scale. Sullivan *v.* Ross, 124 Mich. 287, 82 N. W. 1071.

77. Tewksbury *v.* Schulenburg, 48 Wis. 577, 4 N. W. 757.

78. Steele *v.* Schricker, 55 Wis. 134, 12 N. W. 396. See Antill *v.* Potter, 69 Minn. 192, 71 N. W. 935.

Entries in a mill book by the sawyer from the figures made by the scaler are admissible in evidence, although the original figures made by the scaler are not produced, where the other party to the contract indorsed the accuracy of the figures from the mill book by paying for sawing the amount of lumber which they indicated. Gardner *v.* Wilber, 75 Wis. 601, 44 N. W. 628.

79. Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837.

80. Savercool *v.* Farwell, 17 Mich. 308.

81. Corneil *v.* New Era Lumber Co., 71 Mich. 350, 39 N. W. 7.

son may testify as to the manner in which the scale was made and what the scaler said and did while scaling the logs.[82]

4. Weight and Sufficiency of Evidence. To show fraud or mistake in the scale made, the evidence should be clear and convincing.[83] The measurement by a sworn officer is *prima facie* correct.[84] Gross error in the measurement of the logs is not conclusive evidence of fraud.[85]

E. Questions For Jury. Among the questions which have been held questions of fact for the jury are whether the scale was authorized by the contract,[86] whether the parties agreed to be bound by the scaling of a certain person,[87] and whether there was negligence or mistake in the scale.[88] The meaning of the term "purchase scale"[89] and "dead culls"[90] have been held not ambiguous, and therefore a question of law for the court.

F. Instructions. The rules applicable to instructions in civil cases in general apply to instructions relating to the scaling or other measurement.[91]

IV. MARKS AND BRANDS.[92]

A. Statutes. Statutes providing for the marking of logs and the recordation of the marks and of transfers of the marked logs are in force in several states.[93] Statutes providing that unmarked logs, or logs the mark of which is not recorded, shall not be decreed to be the property of the person claiming to be the owner have been held not to apply to logs on the land and in the actual possession of the

82. Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

83. See cases cited *infra*, this note.

Evidence held sufficient see Gardner *v.* Wilber, 75 Wis. 601, 44 N. W. 628.

Evidence held insufficient see Gates *v.* Young, 82 Wis. 272, 52 N. W. 178; Day *v.* Gumaer, 80 Wis. 362, 50 N. W. 182.

Variance between agreed scale and official scale.— Evidence that the variance between a scale of logs and its official measurement is too great to be accounted for by any variance between competent scalers will justify a finding that there has been either mistake or incompetency in the original scaling. Ortman *v.* Green, 26 Mich. 209.

Scale of short logs only.—Where there were both short and long logs and a scaler's report refers to short logs only, there is a sufficient showing of mistake to authorize the submission of the question to the jury. Sullivan *v.* Ross, 124 Mich. 287, 82 N. W. 1071.

84. Boyle *v.* Musser-Sauntry Land, etc., Co., 86 Minn. 160, 90 N. W. 319; Heilbruner *v.* Wayte, 51 Pa. St. 259. See also Antill *v.* Potter, 69 Minn. 192, 71 N. W. 935.

85. Leighton *v.* Grant, 20 Minn. 345.

86. Bresnahan *v.* Ross, 103 Mich. 483, 61 N. W. 793; Daggett *v.* Hayward, 95 Mich. 217, 54 N. W. 764.

87. Sovereign *v.* Mosher, 86 Mich. 36, 48 N. W. 611.

88. Gates *v.* Young, 78 Wis. 98, 47 N. W. 275.

89. Hayes *v.* Cummings, 99 Mich. 206, 58 N. W. 46.

90. Brigham *v.* Martin, 103 Mich. 150, 61 N. W. 276.

91. See, generally, TRIAL.

Competency of scale.— In an action for the price of lumber, the court properly instructed the jury that it was for them to say whether the scaler was competent; not whether he was such a person as would commit no mistakes in rejecting or accepting logs, but whether he was as competent as men employed in that capacity ordinarily are. McIlquham *v.* Barber, 83 Wis. 500, 53 N. W. 902.

Scale made by party to contract.—Where the parties did not designate any person to scale the logs contracted to be delivered by plaintiff to defendants' mill, it was proper to charge that if plaintiff made a fair scale of the logs, according to the one in general use upon the stream where the logs were delivered, he would not be responsible to defendants for a small shortage, apparent after the logs had been converted into lumber. Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39.

Charge as curing error in admission of evidence.— Error in permitting plaintiff to testify that the scale was one agreed on by the scaler and himself was cured by a charge that it was not competent for them to agree on a scale that would bind defendant. Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638.

Instructions held sufficient see Malone *v.* Gates, 87 Mich. 332, 49 N. W. 638 (instruction held not open to the objection that it omitted the element of gross mistake or to state that the scale must have been according to the contract); Mason *v.* Phelps, 48 Mich. 126, 11 N. W. 413, 837 (instruction speaking of person "agreed upon" to do the scaling held not to assume a fact not proved); Horton *v.* Harbridge, 127 Pa. St. 11, 17 Atl. 675.

92. **Destruction or change of brand** on logs see *infra*, VIII, C.

93. See the statutes of the several states.

Construction of statute.—A statute providing that no sale or transfer of any log mark shall he legal and binding except between the

owner.[94] A statute requiring the recordation of all conveyances respecting the ownership of any mark of logs has been held to refer to conveyances of the logs and not of the marks themselves,[95] and not to apply to conveyances of standing timber.[96] The statute sometimes forbids the adoption of more than one mark on logs.[97]

B. Evidence. In the absence of evidence to the contrary, evidence as to the marks may be sufficient to show title,[98] especially where it is shown that no other logs are known to be so stamped, and no other person has ever claimed logs so stamped.[99] Evidence is admissible as to the log mark, although it is not recorded.[1] Parol evidence has been held inadmissible to explain the mark.[2]

V. DRIVING, FLOATING, OR RAFTING LOGS.[3]

A. Right to Use Streams — 1. In General.[4] While in some states the common-law rule that only those streams in which the tide ebbs and flows are considered strictly navigable still obtains,[5] yet in most of the states the common-law distinction between "navigable" rivers and those which are simply recognized as "highways" does not exist, and a floatable stream is considered a navigable stream.[6] The public has a right to float logs on streams which in their natural state are capable of being so used,[7] or on streams capable of floating logs at some

parties thereto, unless such sale, etc., is in writing and recorded, refers to a person who has acquired some right thereto from the person who appears on the record to be the owner, and not to a mere stranger or trespasser. Gaslin *v.* Bridgman, 26 Minn. 442, 4 N. W. 1111.

94. Stanchfield *v.* Sartell, 35 Minn. 429, 29 N. W. 145; Plummer *v.* Mold, 14 Minn. 532.

95. McCutchin *v.* Platt, 22 Wis. 561.

96. See *supra*, II, B, 10.

97. Smith *v.* Haines, 7 Phila. (Pa.) 188, holding that the registry of a "brace and bit" and "triangle" can be a designation of one mark, within the meaning of the statute.

98. Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691. See also Fox *v.* Ellison, 43 Minn. 41, 44 N. W. 671, statute makes recorded log mark *prima facie* evidence of ownership. *Compare* Long *v.* Davidson, 77 Wis. 509, 46 N. W. 805.

99. Weiler *v.* Coleman, 71 Pa. St. 346.

1. St. Paul Boom Co. *v.* Kemp, 125 Wis. 138, 103 N. W. 259.

2. Stuart *v.* Morrison, 67 Me. 549.

3. **Rights in navigable waters in general** see NAVIGABLE WATERS.

Rights in non-navigable streams in general see WATERS.

Dedication of right to float logs in stream see DEDICATION, 13 Cyc. 451 note 36.

Loss of raft by negligence of tow see TOWAGE.

Statutes as to floatage of logs as regulation of commerce see COMMERCE, 7 Cyc. 465.

Criminal prosecution for taking logs out of stream see *infra*, VIII, A.

Exercise of right of eminent domain in opening stream as highway for floating logs see EMINENT DOMAIN, 15 Cyc. 594.

4. **Floating loose logs as offense** see *infra*, VIII, B.

Forfeiture of logs floating loose see *infra*, V, F.

Liability of vessel for injury to raft see SHIPPING.

5. See NAVIGABLE WATERS.

6. Veazie *v.* Dwinel, 50 Me. 479; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621. But see Irwin *v.* Brown, (Tenn. 1889) 12 S. W. 540 (holding that the capacity to float a log is not the criterion of navigability); Stuart *v.* Clark, 2 Swan (Tenn.) 9, 58 Am. Dec. 49.

Streams which are floatable at certain seasons are navigable. Ford Lumber, etc., Co. *v.* McQueen, 14 Ky. L. Rep. 521; Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209; Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. Rep. 146; Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392; Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257; Olson *v.* Merrill, 42 Wis. 203. But see Lewis *v.* Coffee County, 77 Ala. 190, 54 Am. Rep. 55; Rhodes *v.* Otis, 33 Ala. 578, 73 Am. Dec. 439, holding that a creek is not a navigable stream for the purpose of floatage, where it had never been used before by any persons for transportation in any way, and there are no large forests contiguous to the stream, and the stream is floatable only for a very few miles, and then only in times of freshets.

7. *Maine.*— Gerrish *v.* Brown, 51 Me. 256, 81 Am. Dec. 569; Brown *v.* Black, 43 Me. 443; Brown *v.* Chadbourne, 31 Me. 9, 50 Am. Dec. 641; Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

New Hampshire.— Connecticut River Lumber Co. *v.* Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826; Collins *v.* Howard, 65 N. H. 190, 18 Atl. 794; Thompson *v.* Androscoggin River Imp. Co., 54 N. H. 545.

New York.— Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58.

Oregon.— Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. Rep. 146; Felger *v.* Robin-

seasons every year.[8] On the other hand a stream which can only be made floatable by artificial means is not a public highway for the floatage of logs, nor is a stream in which logs cannot be driven without propulsion by persons traveling on its

son, 3 Oreg. 455; Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

Tennessee.— Stuart *v.* Clark, 2 Swan 9, 58 Am. Dec. 49.

West Virginia.—Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

Wisconsin.— Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295; Olson *v.* Merrill, 42 Wis. 203; Sellers *v.* Union Lumbering Co., 39 Wis. 525; Whisler *v.* Wilkinson, 22 Wis. 572.

United States.— Heerman *v.* Beef Slough Mfg., etc., Co., 1 Fed. 145.

See 33 Cent. Dig. tit. "Logs and Logging," § 29.

Dependent upon capacity of stream.— The right of using a river as a highway for floating logs is measured by the capacity of the stream in its natural condition. Connecticut River Lumber Co. *v.* Olcott Falls Co., 65 N. H. 290, 21 Atl. 1090, 13 L. R. A. 826.

Same rights as steamboats.— The owners of rafts have the same rights to the navigable waters of the Mississippi river as those of steamboats. Castner *v.* The Dr. Franklin, 1 Minn. 73.

Mode of conveyance.— It is not essential to the right that the property to be transported should be carried in vessels or in some other mode whereby it can be guided by the agency of man, provided it can ordinarily be carried safely without such guidance. Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58.

Power of state.— The right of the individual to use a floatable stream for floating logs is not derived from the state, and the state cannot deny its use without just compensation, but has merely the power to regulate highways for the public good. Hutton *v.* Webb, 126 N. C. 897, 36 S. E. 341, 59 L. R. A. 33.

Questions of fact.— Whether a stream is capable of being used as a passageway for logs is a question of fact. Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298. So the question whether the use of a stream for floatage during the winter seasons makes it a public highway has been held one of fact for the jury. Olive *v.* State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33.

8. *Florida.*— Bucki *v.* Cone, 25 Fla. 1, 6 So. 160.

Kentucky.—Goodin *v.* Kentucky Lumber Co., 90 Ky. 625, 14 S. W. 775, 12 Ky. L. Rep. 573. See Murray *v.* Preston, 106 Ky. 561, 50 S. W. 1095, 90 Am. St. Rep. 232.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

New Hampshire.— Carter *v.* Thurston, 53 N. H. 104, 42 Am. Rep. 584.

New York.— Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58; De Camp *v.* Thomson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014. *Compare* Curtis *v.* Keesler, 14 Barb. 511; Munson *v.* Hungerford, 6 Barb. 265.

North Carolina.— Burke County *v.* Catawba Lumber Co., 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829, 115 N. C. 590, 20 S. E. 707, 847.

Oregon.— Hallock *v.* Suitor, 37 Oreg. 9, 60 Pac. 384; Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831, 3 L. R. A. 609; Shaw *v.* Oswego Iron Co., 10 Oreg. 371, 45 Am. Rep. 146; Felger *v.* Robinson, 3 Oreg. 455.

Washington.— Monroe Mill Co. *v.* Menzel, 35 Wash. 487, 77 Pac. 813, 102 Am. St. Rep. 905, 70 L. R. A. 272; Watkins *v.* Dorris, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199.

West Virginia.— Gaston *v.* Mace, 33 W. Va. 14, 10 S. E. 60, 25 Am. St. Rep. 848, 5 L. R. A. 392.

Wisconsin.— Falls Mfg. Co. *v.* Oconto River Imp. Co., 87 Wis. 134, 58 N. W. 257; Olson *v.* Merrill, 42 Wis. 203.

See 33 Cent. Dig. tit. "Logs and Logging," § 29.

Contra.— Hubbard *v.* Bell, 54 Ill. 110, 5 Am. Rep. 98.

If the stream is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement. Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58.

Stream as highway during low water.— A stream is not a public highway and subject to the public easement at those times when in its natural condition it cannot be used as such. Thunder Bay River Booming Co. *v.* Speechly, 31 Mich. 336, 18 Am. Rep. 184.

9. *Kentucky.*— Banks *v.* Frazier, 111 Ky. 909, 64 S. W. 983, 23 Ky. L. Rep. 1197.

Michigan.— Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

New York.— De Camp *v.* Thomson, 16 N. Y. App. Div. 528, 44 N. Y. Suppl. 1014.

Oregon.— Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831, 3 L. R. A. 609.

Washington.— East Hoquiam Boom, etc., Logging Co. *v.* Neeson, 20 Wash. 142, 54 Pac. 1001.

See 33 Cent. Dig. tit. "Logs and Logging," § 29.

Under Canadian statutes giving the public a right to float logs in certain streams, it has been held that the statute applies to all streams in which logs can be floated during freshets, including streams made floatable by the personal expenditure and improvements of others, as well as streams which in their natural state can be used for floatage. Caldwell *v.* McLaren, 9 App. Cas. 392, 53 L. J. P. C. 33, 51 L. T. Rep. N. S. 370 [*overruling* Boale *v.* Dickson, 13 U. C. C. P. 337]. See also Mackey *v.* Sherman, 8 Ont. 28; Whelan *v.* McLachlan, 16 U. C. C. P. 102.

banks[10] or in boats.[11] But the fact that it is sometimes necessary for persons driving logs to go on the banks will not destroy the right to float logs on a stream.[12] Accidental or intentional obstruction in a stream, not there in its natural state, will not take away its natural capability as a public highway for floating logs.[13] The fact that a floatable stream has not been used by the public, but has only been used by the persons following a particular occupation, does not deprive the stream of its public character.[14] A riparian owner cannot acquire by prescription a right which will impede or defeat the right of the public to float logs in a floatable stream.[15]

2. USE OF SHORES. Where a stream is capable of being used for floating rafts or logs, the public easement therein extends to the use of its banks, when necessary for such purpose.[16] But the riparian proprietor may recover for actual damages occasioned thereby.[17] Of course these rights may be limited or enlarged by contract.[18] Rafts may be moored to the bank for a reasonable time, in a case of necessity;[19] but not in such a manner as to deprive wharf owners of access to their wharves.[20]

3. RIGHT TO MAINTAIN BOOM.[21] Riparian owners on floatable streams have the right to construct a boom from their own premises on the bank of the river so long as they do not obstruct the floatage of logs or infringe on the rights of other riparian owners;[22] but the right to raft logs down a stream does not involve the right of booming them upon private property of another for safe-keeping and storage.[23] Where the right to maintain a boom on the land of another has been acquired, it passes to the grantee of the boom.[24]

4. RIGHT TO MAINTAIN DAM. While no right exists to obstruct the floating of logs by means of dams,[25] they may properly be constructed with sluices so as not

10. Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298; Wadsworth *v.* Smith, 11 Me. 278, 26 Am. Dec. 525. See also Haines *v.* Hall, 17 Oreg. 165, 20 Pac. 831, 3 L. R. A. 609.

11. Morgan *v.* King, 35 N. Y. 454, 91 Am. Dec. 58.

12. Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298.

13. Treat *v.* Lord, 42 Me. 552, 66 Am. Dec. 298.

14. Moore *v.* Sanborne, 2 Mich. 519, 59 Am. Dec. 209.

15. See NAVIGABLE WATERS.

16. Brown *v.* Chadbourne, 31 Me. 9, 59 Am. Dec. 641; Pursell *v.* Stover, 110 Pa. St. 43, 20 Atl. 403.

Use of land above high tide where covered by water.— The owner of logs has a right to use the channel of a navigable highway in all stages of the water, and such use, when the water is above the line of mean high tide, is not a use of the adjoining land of the riparian proprietor. Downsdale *v.* Grays Harbor Boom Co., 36 Wash. 198, 78 Pac. 904.

Stranded logs may be removed by entering on the land of the riparian proprietor. Carter *v.* Thurston, 58 N. H. 104, 42 Am. Rep. 584.

Questions for jury.—Whether a necessity existed, in floating logs down a floatable stream, to fasten a boom to plaintiff's land, and what was a reasonable time for the removal of such boom, are questions for the jury. Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

17. Hooper *v.* Hobson, 57 Me. 273, 99 Am. Dec. 769.

Necessity for substantial damage.—Where it becomes necessary, in order to exercise the right of floating logs on a floatable stream, to fasten the boom to the shore, no cause of action will lie for a mere intrusion which works no appreciable damage. Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621.

18. Bradley *v.* Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 24.

Construction of reservation in deed.— A reservation in a deed of timber lands upon a river of a right to occupy the shore for the purpose of securing lumber cut higher up stream by the grantor, and floated down, entitles the grantor, not only to moor his lumber in the stream by fastening it to the land at the water line, but also to pile or stack it upon the land, near the water. Lacy *v.* Green, 84 Pa. St. 514.

19. Weise *v.* Smith, 3 Oreg. 445, 8 Am. Rep. 621; Pursell *v.* Stover, 110 Pa. St. 43, 20 Atl. 403. See also Hayward *v.* Knapp, 23 Minn. 430 (to enable owner to sell the logs); Moore *v.* Jackson, 2 Abb. N. Cas. (N. Y.) 211.

20. Harrington *v.* Edwards, 17 Wis. 586, 86 Am. Dec. 768.

21. **Rights of boom companies** see *infra*, V, B, 2.

22. Stevens Point Boom Co. *v.* Reilly, 44 Wis. 295.

23. Lorman *v.* Benson, 8 Mich. 18, 77 Am. Dec. 435; Watkinson *v.* McCoy, 23 Wash. 372, 63 Pac. 245. But see Canfield *v.* Erie, 1 Mich. N. P. 105.

24. Hoskins *v.* Brawn, 76 Me. 68. See also Engel *v.* Ayer, 85 Me. 448, 27 Atl. 352.

25. See, generally, NAVIGABLE WATERS; WATERS.

to unreasonably injure the right of floatage.[26] Statutes in some states require licenses to be obtained to maintain sluice dams.[27]

5. Relative Right of Mill Owners and Log Owners. It has been held that the right to float logs on a stream, valuable for floatage, but not for navigation, is not paramount to the use of the water for machinery, etc.[28] The right is merely an easement which must be enjoyed with the exercise of such care, skill, and diligence as may be necessary to prevent injury to or interference with the concurrent rights of riparian proprietors.[29]

B. Boom and Driving Companies[30] — **1. Creation and Organization.** Statutes in the lumbering states usually expressly provide for the incorporation of driving, rafting, and booming companies,[31] which are generally considered as

26. See *infra*, V, A, 5, as to relative rights of mill owners and log drivers.

27. See on this subject the statutes of the several states.

Construction of statutes see Mille Lacs Imp. Co. *v.* Bassett, 32 Minn. 375, 20 N. W. 363; Anderson *v.* Munch, 29 Minn. 414, 13 N. W. 192; Lamprey *v.* Nelson, 24 Minn. 304.

28. Middleton *v.* Flat River Booming Co., 27 Mich. 533. But see Pearson *v.* Rolfe, 76 Me. 380, holding that the right of passage is the superior, but not a usurping, excessive, or exclusive right.

Duties of mill owner.— While, as between a mill owner and one desiring to float logs down a non-navigable river, the right of the latter is paramount, a mill owner is under no obligation to afford to one desiring to float logs down the river better facilities than the stream in its natural state would afford. Foster *v.* Searsport Spool, etc., Co., 79 Me. 508, 11 Atl. 273; Pearson *v.* Rolfe, 76 Me. 380. See also Stratton *v.* Currier, 81 Me. 497, 17 Atl. 579, 3 L. R. A. 809.

Rights of each modify other's rights.— The right to obtain water power from a stream for milling purposes, and the right of another to use the stream for the floating of logs, modify each other; and, although the exercise of each right may render the other less valuable, there is no ground of complaint if it is considerate and reasonable. Buchanan *v.* Grand River, etc., Log Running Co., 48 Mich. 364, 12 N. W. 490. While the mill proprietor may erect and maintain his dam, he must at the same time keep open for the use of the public a convenient and suitable passageway through or by his dam. The privileges of the mill owner must be so exercised as not to interfere with the substantial rights of the public in the stream as a highway, for the purpose of transporting such property as in its natural capacity it is capable of floating. The use of both parties must be a reasonable use, and the rights of both must be exercised in a reasonable manner. Veazie *v.* Dwinel, 50 Me. 479. See also Parks *v.* Morse, 52 Me. 260; Crookston Waterworks, etc., Co. *v.* Sprague, 91 Minn. 461, 98 N. W. 347, 99 N. W. 420, 103 Am. St. Rep. 525, 64 L. R. A. 977.

Break in dam.—Where without the fault of either the owner of the dam or the owner of logs there is a break in the dam, the dam owner has a reasonable right to repair the dam and to its reasonable protection, and where the detention of the logs is necessary to such repair and protection he has the right to a reasonable temporary detention for that purpose. Pratt *v.* Brown, 106 Mich. 628, 64 N. W. 583. Where a mill owner suffered a break to remain in his dam some two months without repair, causing a deficiency of water in the chute, so as to render it impracticable to pass logs through the chute, river-men above had a right to run their logs through the new channel break, if with proper care to prevent any unnecessary damage to the dam. Whisler *v.* Wilkinson, 22 Wis. 572.

29. Ward *v.* Grenville Tp., 32 Can. Sup. Ct. 510.

30. Navigation improvement companies in general see Navigable Waters.

Booms as obstruction to navigation in general see Navigable Waters.

Obstruction and detention of flow of non-navigable streams by booms see Waters.

Power to take lands on the banks of a river for boom purposes see Eminent Domain, 15 Cyc. 599 note 47.

Taxation of booms as real estate see Taxation.

31. See the statutes of the several states. See also Powers' Appeal, 23 Wkly. Notes Cas. (Pa.) 485; Gray's Harbor Boom Co. *v.* McAmmant, 21 Wash. 465, 58 Pac. 573.

Sufficiency of affidavit by directors.— Where a statute for the formation of companies for running logs required that an affidavit should be made by two directors of the company, setting forth that "all prior proceedings of said association have been in strict conformity with all the provisions of [the act]," no detailed statement of the facts to which the affidavit is made was necessary. Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266.

Rights both under general law and charter. — A boom company, in so far as its right to receive compensation and acquire a lien for service in running logs is concerned, may have the benefit of the general law and also of the act under which it is incorporated. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

Necessity for filing and sufficiency of bond see Genesee Fork Imp. Co. *v.* Ives, 144 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427.

A boom is "chartered by law," within

quasi-public corporations.[32] These statutes have generally been held constitutional,[33] although statutes unduly extending their powers over logs owned by persons not desiring the assistance of the company have been held unconstitutional.[34] These charters are often granted, with the right to collect toll, partly in consideration of an improvement of the stream for floating purposes.[35]

2. Duties and Liabilities[36] — a. As Fixed by Charter or Statute. The duties of a boom or driving company are generally fixed by its charter or by general statute,[37] including the logs which the company is required to drive,[38] and also the time of driving.[39] The duty imposed on a boom company to sort logs has been

Minn. St. (1894) § 2400, when it is owned by a corporation having authority to maintain a boom, whether it is incorporated under a general law or a special law. Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. ed. 400.

Associations in the nature of mutual benefit associations, incorporated in some states, have been held liable to be sued by members thereof for damages sustained through its negligence in booming and rafting logs, without a prior presentation of the claim for damages, when there was no special provision in the charter to that effect. Sibley *v.* Penobscot Lumbering Assoc., 93 Me. 399, 45 Atl. 293. As to the right of members to compel a distribution of a safety fund in such an association, there being existing claims for unliquidated damages, see *In re* Penobscot Lumbering Assoc., 93 Me. 391, 45 Atl. 290.

Power to obstruct navigation.— The legislature cannot, in incorporating a boom company, give it power to obstruct a tidal navigable river. Queddy River Driving Boom Co. *v.* Davidson, 10 Can. Sup. Ct. 222.

Incidental powers of improvement corporation see Corporations, 10 Cyc. 1145.

32. Osborne *v.* Knife Falls Boom Corp., 32 Minn. 412, 21 N. W. 704, 50 Am. Rep. 590; Nicomen Boom Co. *v.* North Shore Boom, etc., Co., 40 Wash. 315, 82 Pac. 412.

33. Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266; Sands *v.* Manistee River Imp. Co., 123 U. S. 288, 8 S. Ct. 113, 31 L. ed. 149.

Acting without request of log owners.— The legislature may authorize booming companies to sluice, sack, and drive logs which impede the progress of the logs, without the request of their owners, and to charge a toll therefor. East Hoquiam Boom, etc., Co. *v.* Neeson, 20 Wash. 142, 54 Pac. 1001; Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 17 Fed. 419, 5 McCrary 382.

Survey as condition precedent to collection of tolls.— A statute requiring a boom company named therein to survey all logs in their booms as a condition precedent to the collection of tolls thereon is constitutional. Androscoggin River *v.* Haskell, 7 Me. 474.

Establishment of tribunal to determine controversy.— The legislature, in a charter authorizing the erection of a dam subject to the duty of turning the logs over the dam and supplying water for the driving of them, may constitute the selectmen of the town the exclusive judges to decide whether a sufficiency of water has been furnished and whether the logs were seasonably turned over the dam. Bassett *v.* Carleton, 32 Me. 553, 54 Am. Dec. 605.

34. Ames *v.* Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 Am. Dec. 731, holding that a statute, in so far as it authorizes a company, without any necessity arising from the obstruction of their own business, to assume the control and management of logs of non-consenting parties which are being floated on public waters, and to enforce compensation against the logs for thus controlling and managing them, is unconstitutional.

35. See Northwestern Imp., etc., Co. *v.* O'Brien, 75 Minn. 335, 77 N. W. 989, holding, under a particular statute, that it was not necessary to improve the whole stream but only that the company take possession of a considerable portion thereof.

36. **Injuries incident to driving logs** see *infra*, V, G.

37. Mississippi, etc., Boom Co. *v.* Prince, 34 Minn. 79, 24 N. W. 361; West Branch Boom Co. *v.* Dodge, 31 Pa. St. 285.

Liability for stoppage of logs.— A boom company, although required by its charter to allow logs, driven by persons not desiring the services of the boom company, to pass the boom, is nevertheless not liable for the stoppage of such logs where intermingled with other logs, where the stoppage is for no longer time than reasonably necessary to examine the marks, separate, and pass them out. West Branch Boom Co. *v.* Pennsylvania Joint Lumber, etc., Co., 121 Pa. St. 143, 15 Atl. 509, 6 Am. St. Rep. 766.

38. Patterson *v.* Penobscot Log Driving Co., 71 Me. 44; St. Louis Dalles Imp. Co. *v.* C. N. Nelson Lumber Co., 43 Minn. 130, 44 N. W. 1080.

Duty to drive all logs in stream.—Although, where the charter for a log-driving company provides that the "company may drive all logs and other timber" in a certain stream, the word "may" is to be construed as permissive, and not imperative, when the company accepts the privilege thus conferred of driving "all the logs," etc., it assumes a duty commensurate with the privilege conferred, since by this acceptance it has the exclusive right to drive all the logs, and the duty to drive results. Weymouth *v.* Penobscot Log Driving Co., 71 Me. 29.

39. See Patterson *v.* Penobscot Log Driv-

held not to require it to sort them by marks as well as by ownership. Sorting, rafting, and delivering them according to ownership is sufficient.[40]

b. Liability as Common Carrier. A boom company engaged in the business of driving and booming logs for any persons having logs to be driven, and charging regular rates therefor, is not a common carrier or subject to the common-law liabilities of carriers.[41]

c. Liability For Loss of Logs. The proprietor of a boom is liable for the loss of logs by reason of failure to exercise reasonable diligence either in the construction and repairing[42] or in the management[43] of the boom, but loss occurring without its neglect or carelessness does not render the owners of the boom liable therefor;[44] and hence they are not liable for the loss of logs resulting from unavoidable dangers of the stream.[45] For a negligent loss of logs the proprietor of a boom is liable whether acting as owner or lessee of the boom.[46] Where the company is required to hold all logs not in charge of the owner, it is liable where it allows such logs floating down the river to escape into the sea.[47]

d. Liability For Obstruction of Stream. The owner of a boom in navigable waters must so construct it that it will not interfere with navigation,[48] including the driving of logs,[49] although generally a boom company is not liable to others using the banks and bed of a stream for milling or other purposes unless the boom is negligently, unlawfully, or improperly erected or managed.[50] A boom company cannot detain the logs of persons who have not requested the services of the company,[51] where sufficient provisions have been made for the running of such logs,[52] except where it is necessary to stop them for a reasonable length of time until they can be separated from logs which the company controls.[53] However, a log owner may waive his right to object that the booms constitute an unlawful obstruction of the stream by voluntarily making use thereof.[54]

e. Accrual of Liability. As a condition precedent to the accrual of liability

ing Co., 71 Me. 44, as to what constitutes a driving at as early a period as practicable.

40. Machias Boom *v.* Sullivan, 87 Me. 506, 33 Atl. 13.

41. Mann *v.* White River Log, etc., Co., 46 Mich. 38, 8 N. W. 550, 41 Am. St. Rep. 141; Chesley *v.* Mississippi, etc., Boom Co., 39 Minn. 83, 38 N. W. 769.

42. Holway *v.* Machias Boom, 90 Me. 125, 37 Atl. 882; Weld *v.* Androscoggin River Side Booms, 6 Me. 93.

Evidence.— On an issue as to the sufficiency of a boom to be furnished for a specified number of feet of logs, evidence is admissible to show that the logs were less than the average size. Hebard *v.* Shaw, 123 Mich. 514, 82 N. W. 250.

43. Palmer *v.* Penobscot Lumbering Assoc., 90 Me. 193, 38 Atl. 108; Holway *v.* Machias Boom, 90 Me. 125, 37 Atl. 882; Crane *v.* Fry, 126 Fed. 278, 61 C. C. A. 260.

The burden of proving the use of ordinary care, where the boom company is sued for the loss of logs, is on the company. Chesley *v.* Mississippi, etc., Boom Co., 39 Minn. 83, 38 N. W. 769. *Contra*, Melendy *v.* Ames, 62 Vt. 14, 20 Atl. 161.

44. Penobscot Boom Corp. *v.* Baker, 16 Me. 233.

45. Brown *v.* Susquehanna Boom Co., 109 Pa. St. 57, 1 Atl. 156, 58 Am. Rep. 708.

46. Crane *v.* Fry 126 Fed. 278, 61 C. C. A. 260.

47. Tingley *v.* Bellingham Bay Boom Co., 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055, holding, however, that the company is not liable for damages caused to the owner by reason of his being obliged, from want of logs, to close his logging camp, to the injury of his credit, where there is no contract between the log owner and the boom company in regard to anything except the marketing of logs.

48. See NAVIGABLE WATERS.

49. Watts *v.* Tittabawassee Boom Co., 52 Mich. 203, 17 N. W. 809.

Contributory negligence.— The fact that one engaged in sending logs down a navigable stream knows that such stream is obstructed by a boom does not establish contributory negligence, in case he is injured by such negligence. Sullivan *v.* Jernigan, 21 Fla. 264.

50. Pickens *v.* Coal River Boom, etc., Co., 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819.

51. West Branch Boom Co. *v.* Dodge, 31 Pa. St. 285; Mason *v.* Boom Co., 16 Fed. Cas. No. 9,232, 3 Wall. Jr. 252.

52. Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266.

53. Edwards *v.* Wausau Boom Co., 67 Wis. 463, 30 N. W. 716; Nester *v.* Diamond Match Co., 105 Fed. 567, 44 C. C. A. 606, 52 L. R. A. 950. See also Morgan *v.* King, 18 Barb. (N. Y.) 277.

54. Nester *v.* Diamond Match Co., 105 Fed. 567, 44 C. C. A. 606, 52 L. R. A. 950. See also Power's Appeal, 125 Pa. St. 175, 17 Atl. 254, 11 Am. St. Rep. 882.

for failure to deliver logs, a demand and offer to pay the proper charges is usually necessary.[55]

C. Tolls[56] — **1. Validity of Statutes.** While statutes authorizing the exaction of tolls have generally been held valid,[57] a statute purporting to grant a franchise to collect toll to any person or company making certain improvements in a river is void for want of a certain grantee.[58] Furthermore a statute authorizing a toll in the nature of a public tax to be used in the removal of obstructions has been held invalid.[59]

2. Right to Collect — a. In General. Generally no toll can be demanded by an improvement company before the improvements have been made facilitating the transportation,[60] or after the destruction of such improvements.[61] And it has been held that tolls are chargeable only where the improvements in the stream are made for the express purpose of facilitating the floating of sawlogs.[62] In the absence of a contract to pay tolls, it has been held that none can be collected where the state has not fixed any rates.[63] An ascertainment of the amount boomed is of course necessary, although actual measurement has been held unnecessary.[64] Loss of other logs through defects in the boom is no defense,[65] and the owner cannot set up as a set-off a claim for logs lost where they belonged to a different lot brought into the boom at another time.[66] Recovery of tolls for the use of a sluice dam may depend on the existence of a public license to maintain the dam.[67]

b. Liability as Dependent on Request. Under the terms of many charters, liability does not depend on the services having been requested,[68] although tolls cannot be charged for driving where the logs are being driven by the owners who notify the company not to act, and the logs do not impede the driving of other logs by the company.[69]

3. Persons Liable. One who for a fixed compensation agrees to drive logs to a certain point is himself liable for the tolls.[70] But the owner of the logs cannot escape liability because of a driving contract with a third person where the boom company had no knowledge of the contract for driving.[71]

55. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

56. Scaling or other measurements see *supra*, III.

Lien for see *infra*, VI, C, 3.

57. See *supra*, V, B, 1.

Power by statute to impose toll on logs floating in state destined for or coming from points outside the state see Commerce, 7 Cyc. 465 note 93.

58. Sellers *v.* Union Lumbering Co., 39 Wis. 525.

59. Hutton *v.* Webb, 126 N. C. 897, 36 N. E. 341.

60. Swift River, etc., Imp. Co. *v.* Brown, 77 Me. 40. But see Genesee Fork Imp. Co. *v.* Ives, 144 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427 (holding that the right of a company organized under the statute authorizing the incorporation of companies to improve streams and float logs to collect tolls for logs floated cannot be questioned by the owner of such logs on the ground that few or no improvements were made, and that he could float his logs without the aid of such improvements); Susquehanna Boom Co. *v.* Dubois, 58 Pa. St. 182.

61. St. Louis River Dalles Imp. Co. *v.* C. N. Nelson Lumber Co., 51 Minn. 10, 52 N. W. 976; Lehigh Coal, etc., Co. *v.* Brown, 100 Pa. St. 338.

62. Matter of Little Bob River, 23 Ont. App. 177.

63. Ocqueoc Imp. Co. *v.* Mosher, 101 Mich. 473, 59 N. W. 664.

64. Wausau Boom Co. *v.* Plumer, 49 Wis. 115, 5 N. W. 26.

65. Androscoggin River Side Booms *v.* Weld, 6 Me. 105.

66. Penobscot Boom Corp. *v.* Wadleigh, 16 Me. 235.

67. Lamprey *v.* Nelson, 24 Minn. 304.

68. Duluth Lumber Co. *v.* St. Louis Boom, etc., Co., 17 Fed. 419, 5 McCrary 382. But see Chase *v.* Dwinal, 7 Me. 134, 20 Am. Dec. 352, holding that toll cannot be collected for rafts intended to pass down the river, but accidentally stopped by the boom, where its use and security were not sought or desired.

Driving tolls may be collected even on lost logs not intended to be driven, where the driving company is required to receive all logs floated down a river to a given point, and drive them thence through certain limits in the river. St. Louis Dalles Imp. Co. *v.* C. N. Nelson Lumber Co., 43 Minn. 130, 44 N. W. 1080.

69. Washougal River Imp., etc., Co. *v.* Skamania Logging Co., 23 Wash. 89, 62 Pac. 450. See also Gary's Harbor Boom Co. *v.* McAmmant, 21 Wash. 465, 58 Pac. 573.

70. Johnson *v.* Cranage, 45 Mich. 14, 7 N. W. 188.

71. West Branch Logging Co. *v.* Strong, 196 Pa. St. 51, 46 Atl. 290.

4. Amount. The amount of the toll is usually fixed by the charter or statute,[72] as by naming a maximum toll, the reasonableness of which cannot be questioned.[73] Where the statute merely authorizes the collection of a uniform and reasonable toll, and no price is fixed by contract, the receipts and expenditures of the company may be taken into consideration in determining what is reasonable compensation.[74] Charging for storage according to the time the logs are held in the boom is not proper under all circumstances.[75]

5. Enforcing Payment. A statutory remedy for the collection of tolls by the stoppage of logs, where inadequate owing to the frequent impossibility of stopping logs, is not exclusive so as to preclude an action to recover such tolls.[76] If a boom company sells the logs to satisfy its claims, the statutory provisions as to the sale should be strictly followed or else the sale may be enjoined;[77] but mere irregularities do not prevent a valid title passing to the purchaser,[78] and the fact that the sale was at private instead of public auction cannot be set up by the purchaser as a defense to an action to recover the price.[79]

D. Contracts. To constitute a contract for running logs there must of course be a definite offer and an acceptance thereof.[80] In construing contracts relating to driving or booming of logs, the usual rules apply which govern the construction of other contracts.[81] Ordinarily failure to perform is not excused by a

72. Machias Boom *v.* Holway, 89 Me. 236, 36 Atl. 378.

Extra work.— Where the rent for the use of a boom and appurtenances was fixed at nine cents per one thousand feet of logs passing through the same, the rent is the equivalent by statute for the use of the boom and appurtenances, and should not be increased, even if a portion of the logs must be twice rafted before they pass through the boom. Penobscot Boom Corp. *v.* Penobscot Lumbering Assoc., 61 Me. 533.

73. Genesee Fork Imp. Co. *v.* Ives, 144 Pa. St. 114, 22 Atl. 887, 13 L. R. A. 427.

74. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

Value of boom and land.— It is proper to consider the property used in the business, including the land, taken at its fair market value, arrived at with such aids as the circumstances afford. Pere Marquette Boom Co. *v.* Adams, 44 Mich. 403, 6 N. W. 857.

Reasonableness of rule for ascertainment of amount of logs.— A rule that the amount of boomage charges should be ascertained by "counting the logs into the boom" is reasonable, and the company may maintain an action for the charges when so ascertained, although the number of feet may have been overestimated. Wausau Boom Co. *v.* Plumer, 49 Wis. 115, 5 N. W. 26.

Question for jury.— In an action by a boom company to recover for running and sorting logs, it is for the jury to decide whether any of the various items of the account properly enter into it, and whether the charges of the company are reasonable. Sturgeon River Boom Co. *v.* Nester, 55 Mich. 113, 20 N. W. 815.

75. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

76. Bear-Camp River Co. *v.* Woodman, 2 Me. 404; West Branch Logging Co. *v.* Strong, 196 Pa. St. 51, 46 Atl. 290.

77. Bennett's Branch Imp. Co.'s Appeal, 65 Pa. St. 242.

78. Hunter *v.* Perry, 33 Me. 159.

79. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314.

80. Seaton *v.* Pere Marquette Boom Co., 84 Mich. 178, 47 N. W. 560; Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266.

Power to contract.—A statute providing that a boom company shall be under no obligation to receive or store logs except where the log owner complies with certain conditions precedent does not preclude the company from contracting for the storage of logs in any way in which a lawful contract may be made. Wausau Boom Co. *v.* Plumer, 35 Wis. 274.

81. See cases cited *infra*, this note.

Time.— Where the contract is construed as containing no absolute limitation as to the time within which the work must be done (Gainor *v.* Cheboygan River Boom Co., 86 Mich. 112, 48 N. W. 787. See Darrah *v.* Gow, 77 Mich. 16, 43 N. W. 851, where contract construed to limit the time within which to drive the logs), it must be performed within a reasonable time (Whalon *v.* Aldrich, 8 Minn. 346). And where a person contracts to raft timber as fast as put into a creek, and to run it as fast as the water will permit, he is only required to perform his contract within a reasonable time. Bonifay *v.* Hassell, 100 Ala. 269, 14 So. 46. See also Francis *v.* Shearer, 16 S. W. 365, 17 S. W. 165, 13 Ky. L. Rep. 283.

Construction of particular contracts see Gainor *v.* Cheboygan River Boom Co., 86 Mich. 112, 48 N. W. 787; Hopkins *v.* Sanford, 41 Mich. 243, 2 N. W. 39 (holding that where a contract provided that when plaintiffs had delivered logs in a certain stream they were to be driven to defendants' mill by a log-driving company, whom plaintiffs were to pay, it was held proper to charge

change in circumstances,[82] although failure of water may excuse driving where there is nothing in the contract to the contrary.[83] A driver of logs cannot defend an action for loss thereof through his negligence, on the ground that the owner did not turn out to be driven all the logs he contracted to turn out.[84] The compensation fixed by contract[85] does not cover extra expense not within the terms of the original contract and for which the other party has agreed to pay an additional sum,[86] and is ordinarily recoverable only as to those logs actually delivered, where the contract is for driving.[87] The measure of damages, in an action for failure to drive logs according to the contract, in a proper manner, is the loss accruing to plaintiff from the negligence of defendant.[88]

E. Intermingling and Confusion — 1. Rights at Common Law. If logs are turned into a stream and left to themselves so that another drive is embarrassed or hindered by them, the owner of such logs is liable at common law for obstructing the common way.[89] And such common-law right of action is not taken away by the statutes.[90] But there is no liability at common law unless defendant's conduct was negligent or otherwise wrongful.[91] Where logs of different owners are voluntarily commingled in a stream at a point where they cannot be separated, any one or more of the owners, upon notice to the others, may, at the common expense of all, move the logs to some point where separation may be conveniently possible.[92]

that the parties contemplated that neither should be particularly responsible for the good faith and diligence of the log driving company); Garvin *v.* Gates, 73 Wis. 513, 41 N. W. 621 (holding, in a suit on a contract to deliver logs "into Hay creek in good driving water, and land them so they can be easily started through the dam in the spring," when it appears that the creek in its ordinary stage has no good driving water, but that at high water, by means of a flooding dam, logs can be run from that point, and there is evidence that the logs could have been run from the point at which they were delivered had not the dam below been choked with other logs, the court cannot say as a matter of law that the contract has not been performed); Cohn *v.* Stewart, 41 Wis. 527.

82. Mississippi River Logging Co. *v.* Robson, 69 Fed. 773, 16 C. C. A. 400.

Increase in boom charges.— Where the contractor has boomed and delivered logs with an agreement that the boom charges shall not exceed a certain sum, he is not excused from further performance of the contract or entitled to demand a higher compensation than that contracted for merely because the necessary boom charges were increased during the life of the contract by circumstances over which neither party to the contract had control. Robson *v.* Mississippi River Logging Co., 61 Fed. 893 [*affirmed* in 69 Fed. 773].

83. Clarksville Land Co. *v.* Harriman, 68 N. H. 374, 44 Atl. 527.

84. Boody *v.* Goddard, 57 Me. 602.

85. See Mississippi Rafting Co. *v.* Ankeny, 18 Minn. 17.

Payment of toll on tug.—Where a contract to pay toll on logs passing through plaintiff's canal contains no reference to payment of toll on the tug which tows them, a receipt of toll on the logs for two years without complaint precludes plaintiff from demanding toll on the tug. Destrehan *v.* Louisiana Cypress Lumber Co., 45 La. Ann. 920, 13 So. 230, 40 Am. St. Rep. 265.

Successive drives.— Where one has driven a certain quantity of logs down a river at a fixed price, and thereafter drives an additional number without any price having been fixed, he is entitled to recover at the same rate as for those first driven. Meserve *v.* Lewiston Steam-Mill Co., 64 Me. 438.

86. Davis *v.* Ladue, 58 Mich. 226, 24 N. W. 871.

87. Gill *v.* Johnstown Lumber Co., 151 Pa. St. 534, 25 Atl. 120.

88. Parks *v.* Libby, 92 Me. 133, 42 Atl. 318.

Market value.— Where logs are not driven until the season after they should have been driven, the measure of damages for such delay is the difference between the market value of the logs when they were in fact delivered and the time when they should have been delivered under the contract. Whalon *v.* Aldrich, 8 Minn. 346.

89. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

90. Bellant *v.* Brown, 78 Mich. 294, 44 N. W. 326; Miller *v.* Chatterton, 46 Minn. 338, 48 N. W. 1109.

91. Miller *v.* Chatterton, 46 Minn. 338, 48 N. W. 1109.

92. Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70.

Limitations of rule.— But where one, allowed by way of accommodation to bank logs on another's ground, is required to put afloat the logs of such landowner in order to get his own out, he is not entitled to compensation therefor without an agreement to that effect. Peters *v.* Gallagher, 37 Mich. 407. So where an owner of logs farther up a river moved defendant's logs, which were in the river below, to one side, so that plaintiff's logs could be driven through, such act

2. Contracts For Driving. The rights and duties as to driving intermingled logs may be fixed by contract.[93] So long as an agreement for a joint drive is being acted on and recognized by the parties as in force, its terms, and not the provisions of the statute, govern the rights and duties of the parties.[94]

3. Statutes — a. In General. Statutes in many states provide that any person compelled to drive the logs of another intermingled with his own or to break log jams formed by the logs of another where they obstruct his drive shall be entitled to a reasonable compensation therefor from the owner of such logs.[95] Such statutes are applicable when the logs of different owners have become intermingled by consent or by contract as well as where by reason of any wrongful conduct of a log owner.[96] It is immaterial, so far as liability under the statute is concerned, whether the driving is of benefit to the person whose logs are being driven by the person whose drive is obstructed,[97] or that the party claiming compensation had another drive later on when all of defendant's logs would have been turned in.[98] If the intermixture of logs arose from plaintiff's own misconduct, however, he cannot recover.[99] And compensation cannot be recovered for the driving of such logs as had not become intermixed.[1]

b. Joint Drives. To recover compensation for driving the logs of another the party driving need not assume entire charge of the drive, but it is sufficient that the person claiming compensation employed proportionately more men than the owner of the other logs.[2] Where the driving of intermingled logs is the joint work of two or more owners each may claim compensation of the other for an excess of service beyond his equitable share.[3]

c. Notice to Owners. Notice need not be given to the owner of the intermingled logs, by the person driving them, where not required by statute.[4]

d. Necessity For Services. It is the failure or refusal of an owner of logs to

did not confer a benefit on defendants, so as to entitle plaintiff to recover therefor in assumpsit. Doyle *v.* Pelton, 134 Mich. 398, 96 N. W. 483.

93. Dow *v.* Huckins, 34 Me. 110.

94. McDonald *v.* Boeing, 80 Mich. 415, 45 N. W. 362; Beard *v.* Clarke, 35 Minn. 324, 29 N. W. 142.

Abandonment of contract.— Where a contract between log owners for a joint drive of their intermingled logs is abandoned by one of them, the other may treat the contract as terminated and recover under the statute for further acts in driving the intermingled logs. Beard *v.* Clarke, 35 Minn. 324, 29 N. W. 142; Walker *v.* Beam, 34 Minn. 427, 26 N. W. 232. But no recovery is permissible under the statute for driving logs pursuant to a contract before the abandonment of such contract, the cause of action therefor being upon the contract. Beard *v.* Clarke, *supra*.

95. See the statutes of the several states.

Use of artificial means.— The right to compensation is not affected by the fact that at the time the stream had not in its natural state sufficient water to float logs, and that plaintiff has had to resort to artificial means. Beard *v.* Clarke, 35 Minn. 324, 29 N. W. 142; Merriman *v.* Bowen, 33 Minn. 455, 23 N. W. 843. *Contra*, Kroll *v.* Nester, 52 Mich. 70, 17 N. W. 700.

Kind of logs.— The statute applies whether the drive consists of sawlogs or of shiptimber, pulp-wood, or any other wood product suitable for commerce or manufacture that may be conveniently driven to market. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

Custom as defense.— It is no defense to an action that there exists a custom to treat as gratuitous the driving of intermingled logs. Osborne *v.* C. N. Nelson Lumber Co., 33 Minn. 285, 22 N. W. 540.

96. Walker *v.* Beam, 34 Minn. 427, 26 N. W. 232.

97. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

98. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

99. Megquier *v.* Gilpatrick, 88 Me. 422, 34 262.

1. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

2. E. W. Backus Lumber Co. *v.* Scanlon-Gipson Lumber Co., 78 Minn. 438, 81 N. W. 216.

A log owner first putting his logs in a stream has the right to manage his whole drive as most advantageous to himself, provided he does not unreasonably appropriate the stream, and if defendant interjects his logs in the midst of plaintiff's logs plaintiff may drive the mass at the expense of both owners, and defendant cannot prevent this course by attempting to drive his own logs only to increase the expense of driving the whole mass. Megquier *v.* Gilpatrick, 88 Me. 422, 34 Atl. 262.

3. Lord *v.* Woodward, 42 Me. 497; Peters *v.* Gallagher, 37 Mich. 407.

4. Osborne *v.* C. N. Nelson Lumber Co., 33 Minn. 285, 22 N. W. 540.

act after they have become intermixed with the logs of another that gives the latter the right to drive them at the expense of the former.[5] A claim to compensation cannot be defeated by the fact that the owner of the intermingled logs had made ample provision for driving his own logs, where the driver was ignorant thereof.[6] But no recovery can be had where defendant was using all reasonable efforts to drive his own logs.[7]

e. What Constitutes Obstruction. It is not necessary, to constitute a hindrance or obstruction within the meaning of the statute, that the logs of such other person come into actual contact with those of the person driving them and claiming compensation therefor.[8] And it is immaterial whether the intermingling took place before or after the commencement of the drive.[9]

f. Sufficiency of Drive. A person driving intermingled logs must use such care and skill as attach to the position of bailee and agent, both as to selecting the time for driving and in all the particulars in which the rights of such other person are involved.[10] When intermixed logs are once taken charge of to be driven at the expense of various owners, they must be driven clean,[11] and to their destination.[12] To be entitled to recover compensation a party must actually drive the logs of another, since it is not sufficient to simply get them out of his own way, making no further effort to keep them afloat in the stream.[13]

g. Persons Entitled to Compensation and Persons Liable. One having possession of logs of another is considered to be the owner thereof in so far as his right to recover compensation for driving other logs intermingled therewith is concerned.[14] Only the owner of the particular logs driven can be held liable for the driving thereof.[15]

h. Amount of Compensation Recoverable. Where the statute provides for reasonable compensation, the measure of damages is the *pro rata* expense of driving the mass.[16] Compensation is to be measured by the value of the labor

5. Hayward *v.* Campbell, 72 Wis. 321, 39 N. W. 540. See also Ames *v.* Port Huron Log Driving, etc., Co., 6 Mich. 266.

6. Foster *v.* Cushing, 35 Me. 60.

7. Butterfield *v.* Gilchrist, 63 Mich. 155, 29 N. W. 682, 53 Mich. 22, 18 N. W. 542.

8. Anderson *v.* Maloy, 32 Minn. 76, 19 N. W. 387.

9. Wisconsin River Log-Driving Assoc. *v.* D. F. Comstock Lumber Co., 72 Wis. 464, 40 N. W. 146, 1 L. R. A. 717.

10. Foster *v.* Cushing, 35 Me. 60; Beard *v.* Clarke, 35 Minn. 324, 29 N. W. 142.

11. Weymouth *v.* Beatham, 93 Me. 525, 45 Atl. 519; Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

Driving all of logs.— But while the party claiming compensation must make a clean drive of defendant's logs which he attempts to drive, it is not necessary that all of defendant's logs be driven but only such as became intermixed with plaintiff's so that they cannot be conveniently separated. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

Excuses.— Where plaintiff's logs and defendants' logs became intermingled, and certain of defendants' logs were driven down the stream the same season, it was not necessary for plaintiff to make as clean a drive of defendants' logs, in order to recover therefor, as he would have made if defendants' other logs, further up stream, were not to come down the same season. Boyle *v.* Musser, 77 Minn. 153, 79 N. W. 664.

12. Bearce *v.* Dudley, 88 Me. 410, 34 Atl. 260.

Driving past destination.— It is no defense that the intermingled logs belonging to defendant were driven past their destination where they could not be conveniently separated at such place. Chesley *v.* De Graff, 35 Minn. 415, 29 N. W. 167.

Logs are driven to some point where they can be conveniently separated, within the meaning of the statute, where they are driven within the limits of a boom company exercising exclusive control in driving all logs floating down the river. Boyle *v.* Musser, 77 Minn. 153, 79 N. W. 664; Osborne *v.* C. N. Nelson Lumber Co., 33 Minn. 285, 22 N. W. 540.

13. Doyle *v.* Pelton, 134 Mich. 398, 96 N. W. 483; Miller *v.* Chatterton, 46 Minn. 338, 48 N. W. 1109.

14. Tibbets *v.* Tibbets, 46 Me. 365; Wisconsin River Log-Driving Assoc. *v.* D. F. Comstock Lumber Co., 72 Wis. 464, 40 N. W. 146, 1 L. R. A. 717.

15. See Marsh *v.* Flint, 27 Me. 475, holding that logs of one owner cannot be held to secure a claim not only for driving his logs but also the logs of another third person.

It follows that where two persons are jointly interested in the lumbering business, one of them who attends to the driving of the logs cannot charge the other with any of the expense of driving intermingled logs. Edson *v.* Gates, 44 Mich. 253, 6 N. W. 645.

16. Bearce *v.* Dudley, 88 Me. 410, 34 Atl.

performed in driving the logs and not by the value of the benefit thereby conferred on the owner of such logs.[17]

i. Procedure to Recover Compensation. To recover compensation for driving intermingled logs, an action may be brought to recover a personal judgment against the owner,[18] or a lien may be enforced against the logs so driven.[19] If a merely personal action is brought, no statement of a claim for driving the logs need be filed as a condition precedent to bringing the action.[20]

4. Confusion of Goods. Where floating logs are so intermingled that the identical logs belonging to different persons cannot be separated, a confusion of goods results;[21] but it is otherwise where the logs are so distinctly marked that their identity is not lost.[22]

F. Stranded and Lost Logs — 1. Common-Law Rights. At the common law a riparian owner has no right to forfeit logs stranded upon his lands.[23] And a person finding and rescuing lumber from a broken raft has no lien thereon for his services.[24]

2. Contract Rights. The log owner may have a contractual right to go on the land and remove stranded logs, unaffected by custom,[25] or statute.[26]

3. Statutes. Statutes relating to compensation and forfeiture, where logs are lost or stranded, are in force in most of the lumber states.[27] Under such statutes, before there is any right to compensation or title by forfeiture, it may be neces-

260; E. W. Backus Lumber Co. *v.* Scanlon-Gipson Lumber Co., 78 Minn. 438, 81 N. W. 216.

Use of dams.— One removing obstructing logs can recover no compensation for the use of dams erected and used by him for his own purposes. Crane Lumber Co. *v.* Bellows, 117 Mich. 482, 76 N. W. 67.

17. Osborne *v.* C. N. Nelson Lumber Co., 33 Minn. 285, 22 N. W. 540.

18. See Cockburn *v.* Imperial Lumber Co., 30 Can. Sup. Ct. 80 [*reversing* 26 Ont. App. 19], holding that the statutory right to break jams formed by the logs of another person and recover compensation therefor does not exclude the right to an arbitration to determine the amount of his damages from such detention.

Evidence is admissible on behalf of plaintiff to show what part of defendants' logs he had to drive to bring his logs down (Bellows *v.* Crane Lumber Co., 131 Mich. 630, 92 N. W. 286), and to show the time of putting in hard-wood logs by defendant by reason of which the cost of driving was largely increased (Bellows *v.* Crane Lumber Co., *supra*). Where the statute gives a cause of action against any person in whose name the log mark was recorded, evidence that the mark was recorded in the name of defendant merely as security for the payment of money by another, who was in fact the owner, is inadmissible. O'Brien *v.* Glasow, 72 Minn. 135, 75 N. W. 7.

Matters admissible under general issue.— In a personal action based on the statute, defendant may show under the general issue that there was a contract between the parties that each should drive certain portions of the logs of the other. Bellows *v.* Crane Lumber Co., 126 Mich. 476, 85 N. W. 1103.

Questions for jury.— The question whether it was reasonable for defendant to place in the river and attempt to float hard-wood logs is for the jury. Bellows *v.* Crane Lumber Co., 126 Mich. 476, 85 N. W. 1103.

19. See *infra*, VI.

Where the owner cannot be ascertained the property may be seized and libeled, but in such case the libel must expressly allege that the owner cannot be ascertained, it not being sufficient to allege that the owners are unknown, and must also allege that an inventory and appraisement provided for by the statute was made after seizure of the property. Marsh *v.* Flint, 27 Me. 475.

20. O'Brien *v.* Glasow, 72 Minn. 135, 75 N. W. 7.

21. See Confusion of Goods. See also Norris *v.* U. S., 44 Fed. 735.

22. Goff *v.* Brainerd, 58 Vt. 468, 5 Atl. 393.

23. West Branch Lumbermen's Exch. *v.* McCormick's Estate, 1 Pa. Dist. 542. See also Eastman *v.* Harris, 4 La. Ann. 193. See, generally, Finding Lost Goods.

24. See, generally, Salvage.

25. Bradley *v.* Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 24.

26. Bradley *v.* Tittabawassee Boom Co., 82 Mich. 9, 46 N. W. 24.

27. See the statutes of the several states. See also Scott *v.* Willson, 3 N. H. 321.

Floating as distinguished from stranded logs.— Statutes relating to salvage for taking up floating logs do not authorize a recovery for taking up stranded logs. West Branch Lumbermen's Exch. *v.* Fisher, 150 Pa. St. 475, 24 Atl. 735 [*affirming* 11 Pa. Co. Ct. 328); Etter *v.* Edwards, 4 Watts (Pa.) 63; West Branch Lumbermen's Exch. *v.* McCormick, 1 Pa. Dist. 542; Craig *v.* Kline, 2 Leg. Gaz. (Pa.) 81.

Effect of forfeiture.— Where timber is forfeited under the act regulating the putting of pine timber into Connecticut river, when

sary that the damages be appraised,[28] that notice be given to the owner,[29] or that a description of the property be filed with a certain officer.[30] Generally title does not vest until proceedings have been taken to enforce the forfeiture.[31] Logs subject to forfeiture cannot be seized as forfeited after the owner has regained possession thereof.[32]

G. Injuries Incident to Driving or Rafting —1. **Liability in General.**[33] The liability of a log owner for damages arising from the use of a river for driving his logs down a stream depends on whether he has been negligent.[34] And where he

found lodged on an island in the river, the title of the former owner is wholly lost, and a contract with one who has taken up the timber to come and take it away, and pay him for his trouble does not revest title until executed. Scott *v.* Willson, 3 N. H. 321.

Constitutionality of statutes.— Statutes regulating the payment of a certain sum per log for logs stranded on the property of riparian owner, with a right to sell if such sum is not paid, are not invalid as taking private property without due process of law. Henry *v.* Roberts, 50 Fed. 902. But a statute authorizing rafting companies to take control of logs belonging to third persons without their consent, when found floating on public waters, and to sell the logs to pay their expenses, has been held to violate the constitutional provision against the taking of private property without due process of law. Ames *v.* Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 Am. Dec. 731. Statutes disposing of logs to which, from the loss of all distinguishing marks of property, no title can be established by any claimant, are constitutional. Kennebec Log Driving Co. *v.* Burrill, 18 Me. 314.

Construction of statutes in general see Wilson *v.* Wentworth, 25 N. H. 245 (time logs must have remained on land); West Branch Lumbermen's Exch. *v.* Lutz, 2 Pa. Super. Ct. 91, 38 Wkly. Notes Cas. 434; West Branch Lumbermen's Exch. *v.* McCormick, 1 Pa. Dist. 542.

28. Flanders *v.* Locke, 53 Cal. 21. *Contra*, Wilson *v.* Wentworth, 25 N. H. 245 [*overruling* Walker *v.* Sawyer, 13 N. H. 191].

29. Wendt *v.* Craig, 67 Pa. St. 424.

Sufficiency of notice.— Where the captor of loose logs retains the same during the time prescribed for paying the salvage, such retention is not notice sufficient to vest the property in him by way of forfeiture. Wendt *v.* Craig, 67 Pa. St. 424.

30. Seagrist *v.* Clement, 6 Pa. Co. Ct. 671.

In Pennsylvania the description is invalid if it is not subscribed by the salvor, and where defective in substance it cannot be amended after the owner has exercised his right of recaption. Hynicka *v.* Smith, 26 Pa. St. 499.

Sufficiency of description see Hynicka *v.* Smith, 26 Pa. St. 499.

31. Log Owners' Booming Co. *v.* Hubbell, 135 Mich. 65, 97 N. W. 157, 4 L. R. A. N. S. 573.

32. Barron *v.* Davis, 4 N. H. 338.

33. **Liability of owner of raft for injury to bridge** see Bridges, 5 Cyc. 1115–1117; Navigable Waters.

34. Coyne *v.* Mississippi, etc., Boom Co., 72 Minn. 533, 75 N. W. 748, 71 Am. St. Rep. 508, 41 L. R. A. 494; Outterson *v.* Gould, 77 Hun (N. Y.) 429, 28 N. Y. Suppl. 798; Hunter *v.* Grande Ronde Lumber Co., 39 Oreg. 448, 65 Pac. 598 [*overruling* Haines *v.* Welch, 14 Oreg. 319, 12 Pac. 502]; Field *v.* Apple River Log-Driving Co., 67 Wis. 569, 31 N. W. 17. See also Gulf Red Cedar Co. *v.* Walker, 132 Ala. 553, 31 So. 374; Ramgren *v.* McDermott, 73 Minn. 368, 76 N. W. 47; Cue *v.* Breeland, 78 Miss. 864, 29 So. 850; Ward *v.* Grenville Tp., 32 Can. Sup. Ct. 510.

If the stream is not floatable negligence need not be shown. Gwaltney *v.* Scottish Carolina Timber, etc., Co., 115 N. C. 579, 20 S. E. 465. See also Hoskins *v.* Archer, 6 Ky. L. Rep. 671; Munson *v.* Hungerford, 6 Barb. (N. Y.) 265.

Excessive flood.— No liability is incurred by one who logs on the banks and in a stream at a time when a prudent man would not anticipate that injury would result, although, by an extraordinary rise in the river, the bottom farms were overflowed, and much damage done by the logs as they were carried down by the stream. Goodwin *v.* Kentucky Lumber Co., 80 Ky. 625, 14 S. W. 775, 12 Ky. L. Rep. 573. But liability for injuries from logs floated during a flood cannot be avoided on the ground that the flood was the act of God where such a flood as might be expected from climates or geographical conditions, although infrequently occurring. Gulf Red Cedar Co. *v.* Walker, 132 Ala. 553, 31 So. 374.

Where the stream is unlawfully used for storing and holding logs in a boom, a person so obstructing the stream is responsible to a riparian owner for the damages accruing therefrom, irrespective of whether he was negligent. Watkinson *v.* McCoy, 23 Wash. 372, 63 Pac. 245.

A boom company is not liable to a riparian owner for injuries resulting from driving logs down a stream where no greater damage is caused than would result from the passage of such logs in a purely natural way. White River Log, etc., Co. *v.* Nelson, 45 Mich. 578, 8 N. W. 587, 909.

Defenses.— The right to float logs between certain points on a floatable stream is no defense for injury done thereby to a dam

has been negligent a recovery may be precluded by failure of the person injured to use ordinary care to avoid the injury,[35] or by other contributory negligence.[36]

2. Stranded Logs. One floating logs on a floatable river is not liable to a riparian proprietor for damages occasioned by the stranding of logs on his land, if he exercises due care in driving or floating such logs,[37] although he may be liable where he allows the logs to remain on the land an unreasonable length of time.[38]

3. Log Jams. Where logs are allowed to form jams, and cause flowage greater than would otherwise exist, the person or company driving the logs is liable for damages resulting from such excessive flowage,[39] where want of ordinary care is shown in not breaking up the jam.[40] But a boom company may be liable for continued overflows, although not negligent, where it has not acquired the right to overflow by purchase or condemnation.[41]

4. Actions — Pleading and Practice — a. Remedy. While damages are sometimes required by statute to be appraised by third persons,[42] such statutes have been held not to provide an exclusive remedy,[43] and to relate only to damages necessarily or naturally resulting from the floating and not to damages the result of negligence.[44] A statutory right to seize floating logs has been held not to preclude an action for damages.[45] An injunction will not issue where the remedy at law is adequate.[46]

b. Who May Sue. A riparian owner injured by overflows due to the negligent driving of logs may sue, where in possession, without showing a valid and perfect title.[47]

c. Pleading, Evidence, and Trial. Without going into details, it is enough to say that the rules governing pleadings,[48] the burden of proof,[49] the admission[50]

beyond such points. Felger *v.* Robinson, 3 Oreg. 455.

35. Lilley *v.* Fletcher, 81 Ala. 234, 1 So. 273.

36. Miller *v.* Sherry, 65 Wis. 129, 26 N. W. 612.

37. Ford Lumber, etc., Co. *v.* McQueen, 14 Ky. L. Rep. 521; Carter *v.* Thurston, 58 N. H. 104, 42 Am. Rep. 584; Sheldon *v.* Sherman, 42 Barb. (N. Y.) 368.

38. Ford Lumber, etc., Co. *v.* McQueen, 14 Ky. L. Rep. 521; Sheldon *v.* Sherman, 42 Barb. (N. Y.) 368. See also Campbell *v.* Dickie, 36 Nova Scotia 40.

39. Anderson *v.* Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518; White River Log, etc., Co. *v.* Nelson, 45 Mich. 578, 8 N. W. 578, 909.

The measure of damages for injuries to land caused by log jams is the difference in the value of the land before and after the injury complained of, and in determining such difference in value the jury may take into consideration the various elements tending to cause a diminution in the value of the land, the fact that crops were previously raised thereon, whether the overflowed land could be restored to its former condition, and the length of time it would take to effect such restoration. Osborn *v.* Mississippi, etc., River Boom Co., 95 Minn. 149, 103 N. W. 879.

40. *Michigan.*— Witheral *v.* Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325; Bauman *v.* Pere Marquette Boom Co., 66 Mich. 544, 33 N. W. 538.

Minnesota.— Coyne *v.* Mississippi, etc., Boom Co., 72 Minn. 533, 75 N. W. 748, 71 Am. St. Rep. 508, 41 L. R. A. 494.

Montana.— Hopkins *v.* Butte, etc., Co., 16 Mont. 356, 40 Pac. 865.

New Hampshire.— George *v.* Fisk, 32 N. H. 32.

Washington.— White *v.* Codd, 39 Wash. 14, 80 Pac. 836.

41. Hueston *v.* Mississippi, etc., Boom Co., 76 Minn. 251, 79 N. W. 92.

42. Bald Eagle Boom Co. *v.* Sanderson, 81* Pa. St. 402.

43. Brewster *v.* Rogers Co., 169 N. Y. 73, 62 N. E. 164, 58 L. R. A. 495.

44. Mandlebaum *v.* Russell, 4 Nev. 551.

45. Coe *v.* Hall, 41 Vt. 325.

46. Buchanan *v.* Grand River, etc., Log Running Co., 48 Mich. 364, 12 N. W. 490. See, generally, Injunctions, 22 Cyc. 769 *et seq.*

47. Field *v.* Apple River Log Driving Co., 67 Wis. 569, 31 N. W. 17.

48. See, generally, Pleading.

49. See Evidence, 16 Cyc. 926 *et seq.*

Burden of proof.— In an action against a boom company for negligence causing damage to plaintiff's land, it is for defendant to show the actual condition of the logs, and of the water, and to state what was done to move the logs and prevent the overflow. Anderson *v.* Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518.

50. See, generally, Evidence.

Evidence is admissible to show defendant's method of breaking jams (Hopkins *v.* Butte, etc., Commercial Co., 16 Mont. 356, 40 Pac.

and sufficiency[51] of evidence, and matters of trial[52] in civil actions generally apply to actions for injuries resulting from the driving of logs on streams.

VI. LIENS.[53]

A. Classification and Nature — 1. Common-Law Liens — a. Implied Liens. Persons engaged in cutting, hauling, and driving timber ordinarily have no common-law lien thereon,[54] except where the laborer's contract entitles him to retain possession until paid for his services.[55] But one to whom logs are deliv-

865), and to show that the flooding was the cause of the injuries complained of (Anderson *v.* Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518).

Evidence as to plaintiff's title.— In an action for negligence on the part of a boom company, causing damage to plaintiff's land, described in the declaration as lot 1, a quitclaim deed to a portion of said lot 1 is admissible in evidence. Anderson *v.* Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518.

Evidence of usage.— In an action for damage done to a bridge by putting a large quantity of logs in the river and carelessly running them against the bridge, evidence of usage of running logs in that state is inadmissible. Sewall's Falls Bridge *v.* Fisk, 23 N. H. 171.

Evidence admissible under general issue.— Evidence of due care in driving logs is admissible under the general issue in an action by a riparian owner for injuries to his land by the negligence of defendant when floating logs down the stream (Hunter *v.* Grande Ronde Lumber Co., 39 Oreg. 448, 65 Pac. 598), but evidence that the overflow was caused by a sudden and unusual rise of water is not admissible unless such defense is specially pleaded (Hunter *v.* Grande Ronde Lumber Co., *supra*).

Evidence held inadmissible see Coburn *v.* Muskegon Booming Co., 72 Mich. 134, 40 N. W. 198; Edwards *v.* Wausau Boom Co., 67 Wis. 463, 30 N. W. 716, expert evidence.

51. See generally Evidence.

Sufficiency of evidence see Witheral *v.* Muskegon Booming Co., 68 Mich. 48, 35 N. W. 758, 13 Am. St. Rep. 325 (to show negligence); Hopkins *v.* Butte, etc., Commercial Co., 16 Mont. 356, 40 Pac. 865 (to show overflow was caused by jam and that certain animals were lost in flood); Taylor *v.* Norfolk, etc., R. Co., 131 N. C. 50, 42 S. E. 464 (negligence of railroad company in breaking up raft which had lodged against its bridge); Gwaltney *v.* Scottish Carolina Timber, etc., Co., 111 N. C. 547, 16 S. E. 692; Shaw *v.* Susquehanna Boom Co., 125 Pa. St. 324, 17 Atl. 426.

52. See, generally, Trial.

Questions for jury.— The question as to whether there was unreasonable use of a stream in driving logs, whereby a riparian owner was injured, is one of fact for the jury (Outterson *v.* Gould, 77 Hun (N. Y.) 429, 28 N. Y. Suppl. 798), as is the question whether there were unnecessary jams causing an overflow (Anderson *v.* Thunder Bay River Boom Co., 61 Mich. 489, 28 N. W. 518).

53. See, generally, Liens.

Lien of bailee in general see Bailments, 5 Cyc. 193 *et seq.*

Laborer's liens in general see Master and Servant.

Mechanics' liens see Mechanics' Liens.

54. Haughton *v.* Busch, 101 Mich. 267, 59 N. W. 621. See also Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379. But see Farrington *v.* Meek, 30 Mo. 578, 77 Am. Dec. 627 (holding that Mississippi raftsmen have a lien on their rafts for the value of their services); Ottawa Bank *v.* Bingham, 8 Quebec Q. B. 359.

Independent and exclusive possession.— One with whom the owner of timber contracts for its cutting and delivery in his mill pond has no such independent and exclusive possession of the logs as will give him a common-law lien thereon. Fitzgerald *v.* Elliott, 162 Pa. St. 118, 29 Atl. 346, 42 Am. St. Rep. 812. To the same effect see O'Clair *v.* Hale, 35 N. Y. App. Div. 77, 54 N. Y. Suppl. 388.

One who cuts down trees which are part of the realty has no lien for such work at common law or under a statute providing that one who makes, alters, repairs, or in any way enhances the value of personal property, at the request of the owner, shall have a lien on such article, since the statute applies only to personal property, and to skilled labor rather than to common labor such as cutting logs. O'Clair *v.* Hale, 25 Misc. (N. Y.) 31, 54 N. Y. Suppl. 386 [*affirmed* in 35 N. Y. App. Div. 77, 54 N. Y. Suppl. 388].

Timber sold but not removed within specified time.— Under a contract for the purchase of standing timber providing that the buyer should cut and remove it within five years, and that all remaining after that time should revert to the seller, the buyer has no lien for labor performed on timber cut within the five years, but not carried away. Gamble *v.* Gates, 97 Mich. 465, 56 N. W. 855.

Lien of grantor.— Where the grantor of timber land takes possession of the logs cut on a breach of the contract of sale by failure to pay instalments of the purchase-price, and expends money and labor thereon, he is entitled to a lien on the lumber for such advances. Burgett *v.* Bissell, 14 Barb. (N. Y.) 638.

55. Haughton *v.* Busch, 101 Mich. 267, 59 N. W. 621.

ered to be sawed into lumber has a lien on them for his labor, independent of any special agreement.[56] The common-law lien is not abrogated by statutes giving a lien.[57] A logger is not entitled to a lien if he has not substantially complied with his contract,[58] nor where the contract calls for a delivery of logs before the stipulated time for payment.[59]

b. Liens Created by Contract. A lien may be created by contract,[60] and in such case the contract controls as to the time the lien accrues, its extent, etc.

2. Statutory Liens[61] **— a. Constitutionality of Statutes.**[62] Statutes giving a lien on logs, lumber, sawmills, etc., for services or supplies rendered in connection therewith[63] have generally been held to be constitutional,[64] except where the lien is given priority over prior liens such as judgments and mortgages.[65]

b. Construction of Statutes in General. Lien laws should be construed liberally in favor of the parties for whose benefit they were enacted;[66] but, while

56. *Maine.*— Palmer *v.* Tucker, 45 Me. 316.
Michigan.— Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661. See Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644.
Pennsylvania.— Pierce *v.* Sweet, 33 Pa. St. 151.
South Carolina.— Walker *v.* Cassels, 70 S. C. 271, 49 S. E. 862.
Wisconsin.— Arians *v.* Brickley, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611.
See 33 Cent. Dig. tit. "Logs and Logging," § 54 *et seq.*
The word "labor," as used in a statute providing for enforcement of a common-law lien for sawing lumber, has been held not restricted to manual labor. Crouch *v.* Buerman, 6 Pa. Dist. 357.
Where there is a breach of contract providing for a lien for sawing logs, a common-law lien attaches. Mount *v.* Williams, 11 Wend. (N. Y.) 77.
Possession obtained wrongfully.— Where lumber was forcibly and wrongfully taken by defendant from plaintiff's possession, defendant was not entitled to a possessory lien for expenses of logging and sawing the same. Dresser *v.* Lemma, 122 Wis. 387, 100 N. W. 844.

57. Phillips *v.* Freyer, 80 Mich. 254, 45 N. W. 81; Arians *v.* Brickley, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611.

58. Haughton *v.* Busch, 101 Mich. 267, 59 N. W. 621; Hodgdon *v.* Waldron, 9 N. H. 66. See Smith *v.* Scott, 31 Wis. 420.
Rights of third persons.— The failure to complete the performance of the contract is not available to a third person to defeat the claim for the lien, where the party with whom the contract was made has accepted what has been done thereof as full performance of the contract. Kangas *v.* Boulton, 127 Mich. 539, 86 N. W. 1043.

59. Stillings *v.* Gibson, 63 N. H. 1. See also Au Sable River Boom Co. *v.* Sanborn, 36 Mich. 358; Rhodes *v.* Hinds, 79 N. Y. App. Div. 379, 79 N. Y. Suppl. 437.

60. See Strong *v.* Krebs, 63 Miss. 338.
Contract not contemplating a lien.— A contract whereby a sawmill was leased without rent, but the lessees were to saw all logs furnished by the lessor, and ship and season lumber as ordered, at a certain rate per thousand, does not contemplate a lien on the lumber. McMaster *v.* Merrick, 41 Mich. 505, 2 N. W. 895.
Rights of lienor.— A person taking a lien on logs to secure advances, "until the same is finally marketed and payment received therefor," is not authorized to manufacture the lumber at the risk of the general owner, and to account only for the net proceeds, provided they do not amount to the market value of the lumber at the time possession was taken under the contract. Boody *v.* Goddard, 57 Me. 602.

61. Repeal of statute as divesting lien see Constitutional Law, 8 Cyc. 901 note 91.

62. See, generally, Constitutional Law.
Statutes giving a lien on logs cut in another state for surveying and scaling as burden on interstate commerce see Commerce, 7 Cyc. 465 note 92.

63. See the statutes of the several states.

64. Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621; Hoffa *v.* Person, 1 Pa. Super. Ct. 357; Winslow *v.* Urquhart, 39 Wis. 260 [*following* Munger *v.* Kenroot, 32 Wis. 541].
Privity of contract.— A statute giving the laborer a lien on the logs for his wages, even though there is no privity of contract between him and the owner of such logs, is constitutional. Reilly *v.* Stephenson, 62 Mich. 509, 29 N. W. 99. *Contra*, Jacobs *v.* Knapp, 50 N. H. 71; Quimby *v.* Hazen, 54 Vt. 132.
Remedy by attachment.— It is competent for the legislature to provide for security, by way of a lien, in behalf of a laborer working on logs, and also to provide a remedy for the enforcement of such lien by attachment in cases where the possession of the property upon which the labor is performed is not retained by the person performing such labor. Shaw *v.* Bradley, 59 Mich. 199, 26 N. W. 331.

65. Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390. See Bradley *v.* Cassels, 117 Ga. 517, 43 S. E. 857.

66. Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005; Carver *v.* Bagley, 79 Minn. 114, 81 N. W. 757; Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Kendall *v.* Hynes Lumber Co., 96 Wis. 659, 71 N. W. 1039; Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363; Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67;

this rule is of very general application, they do not confer the right of lien as against public property.[67]

c. Retroactive Effect of Statutes. The statutes have no retroactive effect so as to apply to contracts entered into before their passage,[68] although provisions as to enforcement of the lien will apply to a lien which accrued prior to the enactment.[69]

B. Assignment of Lien. In several states it is provided that a lien claim may be assigned.[70] And independent of statute, such lien claim has been held assignable,[71] although in at least one state it is held that the inchoate right of lien cannot be assigned but the lien may be assigned after the filing of notice of lien.[72]

C. Services and Supplies For Which Lien May Be Claimed — 1. In General.[73] The question as to what labor or services entitles a person rendering them to a statutory lien therefor depends upon the wording of the particular statute, the statutes differing to a considerable extent in the various states.[74] Statutes in

Winslow *v.* Urquhart, 39 Wis. 260. *Contra*, see Lord *v.* Woodward, 42 Me. 497; Clark *v.* Adams, 33 Mich. 159; Dallaire *v.* Gauthier, 24 Can. Sup. Ct. 495.

A general statute providing as to the mode of enforcing a lien of any mechanic or tradesman engaged in constructing or repairing any article of value does not give a lien for sawing timber, but merely provides the manner for enforcing a common-law lien. Bierly *v.* Royse, 25 Ind. App. 202, 57 N. E. 939.

Construction of statute as to territory embraced in lien district see Townsend Sav. Bank *v.* Epping, 24 Fed. Cas. No. 14,120, 3 Woods 390.

67. Rowley *v.* Conklin, 89 Minn. 172, 94 N. W. 548.

68. Shuffleton *v.* Hill, 62 Cal. 483; Bass *v.* Williams, 73 Mich. 208, 41 N. W. 229.

69. Palmer *v.* Tucker, 45 Me. 316; Paine *v.* Gill, 13 Wis. 561.

Time to sue to enforce.— Where, when a lien was perfected, the statute provided that suit must be brought within twelve months, but before suit was brought the statute was amended so as to require a suit to be brought within eight months, and when the amendment took effect the lienor had six of the eight months left to commence suit, the time within which he could sue was governed by the amendment. McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

70. See the statutes of the several states. See also Bernhardt *v.* Rice, 98 Wis. 578, 74 N. W. 370; Kline *v.* Comstock, 67 Wis. 473, 30 N. W. 920, holding that one who is entitled to the statutory lien upon logs for work in hauling may assign his claim to a colienor; and, where the contractor assents thereto, the assignment may be of a part of the claim only.

Filing assignment.— If an assignment of a lien on logs is not filed for record in the surveyor-general's office, as required by Minn. Gen. St. (1878) c. 32, § 75, the assignee cannot enforce the lien. Griffin *v.* Chadbourne, 32 Minn. 126, 19 N. W. 647.

What constitutes assignment.— One who merely pays lienable claims on orders, but does not take an assignment thereof, is not entitled to a lien under the statute giving assignees of lienable claims the right to a lien. Dirimple *v.* Dells Lumber Co., 101 Wis. 509, 78 N. W. 182. An instrument in terms assigning a right to file and foreclose a lien on certain lumber, the assignee to collect said claim, and out of the proceeds to deduct expenses, then take out the balance due him, and out of the residue pay to another a certain sum, the balance then remaining to be paid to assignor, is not an assignment of the lien, but is an instrument of trust. Bernhart *v.* Rice, 98 Wis. 578, 74 N. W. 370.

71. Phillips *v.* Vose, 81 Me. 134, 16 Atl. 463; Murphy *v.* Adams, 71 Me. 113, 36 Am. Rep. 299. *Contra*, Tewksbury *v.* Bronson, 48 Wis. 581, 4 N. W. 749.

72. Munholland *v.* Ault, (Wash. 1892) 32 Pac. 294; Casey *v.* Ault, 4 Wash. 167, 29 Pac. 1048; Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

73. **Common-law lien** see *supra*, VI, A, 1, a.

74. See the statutes of the several states.

Chopping, swamping, and loading are services for which a lien is given, where the statute gives a lien for "cutting, skidding, falling, hauling, scaling, banking, driving, running rafting, or booming any logs." Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

Hauling lumber.— A statute which provides that "any person or persons who perform any labor or services in manufacturing lumber" shall have a lien thereon does not give a lien for hauling lumber from the mills after it is manufactured. Villenuve *v.* Sines, 92 Mich. 556, 52 N. W. 1007.

Construction of mill.— Under a statute providing that a person performing labor in cutting logs or manufacturing them into lumber shall have a lien thereon, no lien is given for work in the construction of a mill and the appurtenances thereof. Kendall *v.* Hynes Lumber Co., 96 Wis. 659, 71 N. W. 1039.

Furnishing shingle bands.—Under a statute which provides that any person performing labor or services in manufacturing shingles shall have a lien thereon, one who furnishes bands for shingles is entitled to a lien for the amount of his claim. Bass *v.* Williams, 73 Mich. 208, 41 N. W. 229.

some of the states provide for two distinct classes of liens according to whether the labor is performed in obtaining or securing the sawlogs or whether in manufacturing the sawlogs.[75]

2. NECESSITY FOR PERFORMANCE OF LABOR. There may be a lien for the time a laborer is not actually working, where he is ready to work, under his contract, but is detained by the action of his employer;[76] but no lien is given for damages for the breach, by the employer, of a contract to employ the laborer.[77]

3. DRIVING LOGS. The lien given for services in driving logs covers all labor which is an essential part of the work on the drives,[78] including the gathering and taking care of the tools used, preparatory to ending the job.[79] When the driving is the joint work of two or more owners, while a right of compensation exists according to the amount of work done by each owner, there is no lien for such services.[80]

4. INCIDENTAL SERVICES — a. In General. Persons who do not personally and directly engage in the work of cutting the logs or in handling them, but who are engaged in the common enterprise and employed at or about the logging camp, are held to be entitled to a lien for their services the same as persons actually engaged in cutting, banking, or driving logs.[81] For instance, such necessary persons in a logging crew as the camp cook;[82] an assistant, if assistance be required;[83] and a blacksmith employed in shoeing the horses, in repairing the sleds, and in

Peeling and piling lumber.— One who at an agreed price per cord contracts to cut, peel, and pile poplar lumber to be manufactured into pulp, has a lien thereon for his pay, although, by the terms of the statute, "cutting" alone is mentioned as being the foundation of the lien. Bondur *v.* Le Bourne, 79 Me. 21, 7 Atl. 814.

In Georgia the statute gives a lien to "persons furnishing saw-mills with timber, logs, provisions, or any other thing necessary to carry on the work of saw-mills." This statute has been held not to extend to the furnishing of money therefor (Dart *v.* Mayhew, 60 Ga. 104), nor to the furnishing or putting up of machinery for a steam sawmill (Filer, etc., Co. *v.* Empire Lumber Co., 91 Ga. 657, 18 S. E. 359; Balkcom *v.* Empire Lumber Co., 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58); nor to cutting and delivering at the mill logs belonging to the mill owner, nor to sales of standing timber (Loud *v.* Pritchett, 104 Ga. 648, 30 S. E. 870; Giles *v.* Gano, 102 Ga. 593, 27 S. E. 730; Balkcom *v.* Empire Mill Co., *supra*); but it is applied to one who furnished grain with which to feed the mules of the mill only, which are used in carrying on the work of the mill (Empire Mill Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972).

Sash and door factory not a sawmill.— A lien given to persons furnishing "sawmills" with timber, logs, etc., necessary to carry on the work of the sawmill does not extend to lumber furnished a "sash and door factory." *In re* Gosch, 121 Fed. 604.

75. Winsor *v.* Johnson, 5 Wash. 429, 32 Pac. 215.

76. McCrillis *v.* Wilson, 34 Me. 286, 56 Am. Dec. 655.

77. Kennedy *v.* South Shore Lumber Co., 102 Wis. 284, 78 N. W. 567.

78. See Yellow River Imp. Co. *v.* Arnold, 46 Wis. 21, 49 N. W. 971, holding that a lien could be claimed for services in getting the logs into the river where the statute gave a lien for driving "or for any other services" to the logs.

"Sluicing, sacking and driving" logs which have been so intermingled with others that they must be driven together includes assorting, booming, and delivering such logs, for which services a lien attaches within Laws (1895), pp. 128, 131 (Act March 18, 1895, § 5). East Hoquiam Boom, etc., Co. *v.* Neeson, 20 Wash. 142, 54 Pac. 1001.

79. Minton *v.* Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857.

80. Lord *v.* Woodward, 42 Me. 497.

81. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

"The general rule of demarkation which fairly results from the cases thus far decided, and which will effectuate the legislative purpose, liberally construed, may be stated to be that services of almost any character which are performed as a part of, and as mere incidents in, the work for which a lien is expressly given, should be protected, although the same kind of services, performed independently of the lienable work, are not entitled to lien." Carpenter *v.* McCord Lumber Co., 107 Wis. 611, 617, 83 N. W. 764.

82. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Winslow *v.* Urquhart, 39 Wis. 260; Young *v.* French, 35 Wis. 111.

Entire contract for board.— Where an action to enforce a lien is based on a contract for furnishing board to the men at a stipulated price, there can be no apportionment separating the value of the food from the labor in preparing it, and giving plaintiff a lien for his services as cook. Bradford *v.* Underwood Lumber Co., 80 Wis. 50, 48 N. W. 1105.

83. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

mending and keeping in order tools actually used by the loggers,[84] are entitled to a lien. So services in repairing a mill during slight interruptions to the work at irregular intervals are a mere incident to the work of manufacturing the lumber, for which the lien is given, and are protected under the liberal interpretation of the statute.[85] But services rendered in preparation, improvement, or permanent repair of a plant with which the lienable work is to be done are not a part of that work so as to authorize a lien therefor.[86]

b. Building Road or Passageway. One who labors in constructing roads to be used in transporting logs from the camp to the water,[87] or in blasting rocks to make a passage for logs,[88] is entitled to a lien; but not where the work is on a road not used or intended to be used for hauling logs,[89] or where the work is done for a railroad company constructed for reaching and hauling all the timber tributary thereto.[90]

5. Services of Teams. Under a statute giving lumbermen a lien on lumber cut and hauled by them, for their personal services, there is no lien for labor performed by their teams;[91] but where the statute does not confine the lien to personal labor it is held that the lien extends to labor performed by his teams.[92] However, the owner of a team who hires them to another to be used in hauling logs, performing no service himself, is not entitled to a lien;[93] but it is sufficient that the teams are driven by servants of the owner claiming the lien.[94] It follows that the person laboring with a team is entitled to a lien for both himself and team, although his possession is merely under a hiring or a contract of purchase.[95]

6. Supplies. Where the statute gives a lien to persons furnishing supplies in getting out logs,[96] the word "supplies" includes board furnished the loggers at or near where they are working,[97] and also goods sold as supplies, although placed in the stores of the purchasers as part of their stock to be sold in the usual course of trade to their employees and others.[98]

84. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

85. Engi *v.* Hardell, 100 Wis. 407, 100 N. W. 1046.

86. Carpenter *v.* McCord Lumber Co., 107 Wis. 611, 83 N. W. 764 (holding that one who worked in building and keeping a logging railroad in repair, and who was employed by the railroad company, which was constructed for reaching and hauling all the timber tributary thereto, irrespective of ownership, was not entitled to a lien on lumber manufactured from logs hauled on the railroad); Kendall *v.* Hynes Lumber Co., 96 Wis. 659, 71 N. W. 1039 (holding that no lien is given for work in the construction of a mill and the appurtenances thereof).

87. Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067.

88. Duggan *v.* Washougal Land, etc., Co., 10 Wash. 84, 38 Pac. 856.

89. Duggan *v.* Washougal Land, etc., Co., 10 Wash. 84, 38 Pac. 856.

90. Carpenter *v.* McCord Lumber Co., 107 Wis. 611, 83 N. W. 764.

91. Coburn *v.* Kerswell, 35 Me. 126; McCrillis *v.* Wilson, 34 Me. 286, 56 Am. Dec. 655. See Hale *v.* Brown, 59 N. H. 551, 47 Am. Rep. 224, holding, it seems, that a lien is given where the team is actually used by the laborer and is essential to the service rendered.

92. Hogan *v.* Cushing, 49 Wis. 169, 5 N. W. 490. See also Klondike Lumber Co. *v.* Williams, 71 Ark. 334, 75 S. W. 854.

Team and man working separately.—Where a man and his team are employed at a gross price for both, to haul or bank logs, his lien on the logs extends to the use of the team, although the employer may afterward put them to work separately, on different parts of the work. Martin *v.* Wakefield, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362.

93. McMullin *v.* McMullin, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510; Richardson *v.* Hoxie, 90 Me. 227, 38 Atl. 142; Mabie *v.* Sines, 92 Mich. 545, 52 N. W. 1007; Edwards *v.* H. B. Waite Lumber Co., 108 Wis. 164, 84 N. W. 150, 81 Am. St. Rep. 884; Lohman *v.* Peterson, 87 Wis. 227, 58 N. W. 407; Rhéaume *v.* Batiscan River Lumber Co., 23 Quebec Super. Ct. 166.

94. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545.

95. Kelley *v.* Kelley, 77 Me. 135.

96. See the statutes of the several states. See also Patten *v.* Northwestern Lumber Co., 73 Wis. 233, 41 N. W. 82, where it was held that where the statute applied only to certain counties, a lien was given, although the goods were sold and delivered in another county, where used in a county designated in the statute.

Supplies furnished to sawmills see *supra*, VI, C, 1.

97. Bradford *v.* Underwood Lumber Co., 80 Wis. 50, 48 N. W. 1105; Kollock *v.* Parcher, 52 Wis. 393, 9 N. W. 67.

98. Stacy *v.* Bryant, 73 Wis. 14, 40 N. W. 632.

D. Persons Entitled — 1. In General.[99] In determining who is entitled to a lien, the terms of the particular statute governing the case must be consulted.[1] The lien does not inure to a wilful trespasser.[2] In some states a lien is given to one manufacturing, or performing labor in manufacturing, timber into lumber.[3]

2. Laborers. In most of the states it is held that the statute is designed solely for the protection of the laborers performing physical labor with their own hands and with their teams, under the direction of an employer, and for fixed wages.[4] It follows that the statutes, where so construed, do not give a lien to a foreman having charge of the logging operations,[5] nor to a person acting as scaler.[6] But in some states an employer is entitled to a lien for services performed by his servants under contract,[7] although not where the statute expressly limits the lien to personal services.[8]

3. Contractors. It is generally held that the statutes do not apply to a contractor who employs men to do work for which the lien is claimed,[9] or who hauls logs with his team for a certain price per thousand feet,[10] although he performs some physical labor, where he does not do so under the direction of an employer and for mere wages.[11]

4. Employees of Contractors. It is generally held that the lien given to laborers applies not only to laborers with whom the owner directly contracts, but also to the employees of a person contracting with such owner.[12]

99. Persons performing services incidental to logging see *supra*, VI, C, 4.

1. See the statutes of the several states.

The proprietor of a sawmill has a lien on the product of the mill for work done on the material furnished by others, where the statute gives such lien to planing-mills and other "similar establishments." Murphey *v.* McGough, 105 Ga. 816, 31 S. E. 757.

2. Oliver *v.* Woodman, 66 Me. 54; Dwinel *v.* Fiske, 9 Me. 21.

3. See Robins *v.* Paulson, 30 Wash. 459, 70 Pac. 1113, holding that a statute giving a lien to one performing labor in manufacturing timber into lumber, while under the control of the manufacturer, applies to one who has performed labor in getting out logs for one who has manufactured them into lumber, which is still under the manufacturer's control.

Who is manufacturer.— A purchaser of standing timber, who cuts and hauls it to the mill to be sawed, is not a manufacturer within the meaning of the statute. Burge *v.* Comerer, 5 Pa. Co. Ct. 5.

4. Littlefield *v.* Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513.

It is immaterial that the laborers are paid by the piece instead of by time. Littlefield *v.* Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513.

5. Meands *v.* Park, 95 Me. 527, 50 Atl. 706.

6. Meands *v.* Park, 95 Me. 527, 50 Atl. 706. But see Kline *v.* Comstock, 67 Wis. 473, 30 N. W. 920.

In Minnesota the surveyor-general is given a lien on logs for inspecting and scaling them by statute. Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. ed. 400.

7. Breault *v.* Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Hogan *v.* Cushing, 49 Wis. 169, 5 N. W. 490.

8. Hale *v.* Brown, 59 N. H. 551, 47 Am. Rep. 224.

9. *Arkansas.*—Klondike Lumber Co. *v.* Williams, 71 Ark. 334, 75 S. W. 854.

Maine.— Rogers *v.* Dexter, etc., R. Co., 85 Me. 372, 27 Atl. 257, 21 L. R. A. 528.

Minnesota.— See King *v.* Kelly, 25 Minn. 522, where statutes expressly excluded contractors. *Contra*, Carver *v.* Bagley, 79 Minn. 114, 81 N. W. 757.

Pennsylvania.— Burge *v.* Comerer, 5 Pa. Co. Ct. 5. But see Hoffa *v.* Person, 1 Pa. Super. Ct. 367.

Washington.— Campbell *v.* Sterling Mfg. Co., 11 Wash. 204, 39 Pac. 451. But see Blumauer *v.* Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966.

Canada.— Dallaire *v.* Gauthier, 24 Can. Sup. Ct. 495; Baxter *v.* Kennedy, 35 N. Brunsw. 179.

See 33 Cent. Dig. tit. "Logs and Logging," § 69.

Contra.— Phillips *v.* Freyer, 80 Mich. 254, 45 N. W. 81 [*following* Shaw *v.* Bradley, 59 Mich. 199, 26 N. W. 331, and *overruling* Kieldsen *v.* Wilson, 77 Mich. 45, 43 N. W. 1054].

Contract to board men.—One who contracts to board loggers is not entitled to a lien under a statute giving a lien to all persons performing services by cooking food for men performing labor on logs. Bradford *v.* Underwood Lumber Co., 80 Wis. 50, 48 N. W. 1105.

A boom company is entitled to a lien for driving logs, although the work is performed by one as its agent. Hall *v.* Tittabawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

10. Sparks *v.* Crescent Lumber Co., (Tex. Civ. App. 1905) 89 S. W. 423.

11. Littlefield *v.* Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513. *Contra*, Klondike Lumber Co. *v.* Williams, 71 Ark. 334, 75 S. W. 854.

12. Allen *v.* Roper, 75 Ark. 104, 86 S. W.

5. CREDITORS. One extending credit generally to the laborers of a logging company, under an agreement to which the company is a party, that such claims shall be deducted from the pay-roll, and paid the creditor, does not acquire a lien for such claims on the property of the company.[13]

E. Proceedings to Perfect Lien — 1. CONDITIONS PRECEDENT IN GENERAL. Before a lien is perfected certain acts are usually required by statute,[14] such as the filing of the lien claim and the giving of notice thereof to the person or persons enumerated in the statute[15] as entitled to notice.[16] The filing of a claim for a lien does not "create" the lien but is necessary merely in order to keep alive the lien which is created when the work is performed.[17]

2. TIME FOR FILING STATEMENT. The statutes usually provide that the lien statement must be filed within a specified time after the completion of the work.[18]

836; Klondike Lumber Co. *v.* Williams, 71 Ark. 334, 75 S. W. 854 [*distinguishing* Tucker *v.* St. Louis, etc., R. Co., 59 Ark. 81, 26 S. W. 375]; Doe *v.* Monson, 33 Me. 430; Bahka *v.* Eldred, 47 Wis. 189, 2 N. W. 102, 599; Munger *v.* Lenroot, 32 Wis. 541. *Contra*, see Wright *v.* Terry, 23 Fla. 160, 2 So. 6; Kendall *v.* Davis, 52 Ga. 9; Jacobs *v.* Knapp, 50 N. H. 71.

The fact that a contractor has not fully executed his contract with the general owner of the logs, and is not entitled to any part of the price, will not prevent his employee's lien from attaching. Munger *v.* Lenroot, 32 Wis. 541. But see Wilson *v.* Barnard, 67 Cal. 422, 7 Pac. 845.

In Wisconsin, under a statute giving a lien upon lumber to any person performing manual labor thereon "for or on account of the owner, agent or assignee thereof," there must be privity of contract between the laborer and the owner of the logs to entitle the former to a lien. Gross *v.* Eiden, 53 Wis. 543, 11 N. W. 9.

13. Hyde *v.* German Nat. Bank, 115 Wis. 170, 91 N. W. 230.

Assignment of lien claims see *supra*, VI, B.

14. See the statutes of the several states.

The record of scale bills in the books of the surveyor-general is not a necessary preliminary to his right to a lien for scaling, under the Minnesota statutes. Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. ed. 400.

Demand.— Under a statute providing that a demand for payment must be made on the owner, agent, or lessee of the property, a demand on one who owned the property when the debt was contracted, but had since sold it, is insufficient. Aiken *v.* Peck, 72 Ga. 434. Necessity for demand in general see Murchie *v.* Scott, 36 N. Brunsw. 161.

15. Hill *v.* Callahan, 58 N. H. 497.

Notice to assignee.— A statute required notice of the claim of lien to be given to the owner. The owner of logs sold them, reserving the title in himself until paid for. The notice of claim was served only on the assignee of this contract. It was held, in replevin by the assignee, where it appeared that the owner had been paid before the replevin suit was commenced, that the service was sufficient. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

16. Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894.

Notice in Quebec see Rhéaume *v.* Batiscan River Lumber Co., 23 Quebec Super. Ct. 71; Harvey *v.* Harvey, 19 Quebec Super. Ct. 153; Daviau *v.* Hawthorne, 14 Quebec Super. Ct. 500.

17. Viles *v.* Green, 91 Wis. 217, 64 N. W. 856.

18. See the statutes of the several states. See also Sparks *v.* Crescent Lumber Co., (Tex. Civ. App. 1905) 89 S. W. 423; Campbell *v.* Vincent, 8 Wash. 650, 36 Pac. 685.

Labor and services are not to be deemed continuous so as to authorize the filing of a claim within thirty days after the last day of performing such services where logs were rafted and boomed and a delivery was accepted as a complete performance of the contract, although four logs which were not delivered were delivered some two months afterward. Keystone Lumber Co. *v.* Ashland First Nat. Bank, 80 Wis. 634, 50 N. W. 586; Fish Creek Boom, etc., Co. *v.* Ashland First Nat. Bank, 80 Wis. 630, 50 N. W. 585.

Colorable return to work.— Where, some two months after laborers have voluntarily quit the job, they returned without being requested so to do and then worked only two days, the return to work was not a *bona fide* continuation of the work so as to lengthen the time to file their claims. Guimond *v.* Belanger, 33 N. Brunsw. 589.

Effect of part payments.— A claim of lien is filed within thirty days after the last day's labor was performed, where the work was continuous from December to June, although the employee was paid in full for the last three months where the claim for lien was filed within thirty days of the last work in June. Hammond *v.* Pullman, 129 Mich. 567, 89 N. W. 358.

Logs rafted into booms.— The thirty days in which notice of lien may be filed does not run from the time logs are rafted into booms, but from the time the services rendered in securing the logs ends. Overbeck *v.* Calligan, 6 Wash. 342, 33 Pac. 825.

Where notice must be given as soon as possible, notice given eleven days after the completion of the work has been held sufficient. Daviau *v.* Hawthorne, 14 Quebec Super. Ct. 500.

The time will not commence to run from the time of the rendition of statements showing the amount of work done and the amount due, where such statements were rendered at frequent intervals but all pertain to work done under one contract.[19] Where a logger releases his lien on the specific logs cut during the last period of a continuous employment, the time for filing his lien for logs cut during the first period begins to run from the end of such period.[20] A claim for a lien need not be filed during the lifetime of the debtor provided it is otherwise filed in due time.[21]

3. SUFFICENCY OF NOTICE OR CLAIM — a. In General. The notice or claim for a lien is sufficient if it is a reasonable and substantial compliance with the statute providing what the notice or claim shall contain.[22] The notice should be construed liberally to uphold the lien,[23] and it is not necessary that the notice should be as definite as if the lien was upon real property.[24]

b. Description of Property. Generally the property to be charged is required to be described sufficiently for identification with reasonable certainty.[25]

c. Description of Services. A notice stating that the claims are for labor performed upon and assistance rendered in preparing and securing the logs is sufficiently definite, without stating the character of the labor;[26] and where the statute does not limit the lien to the logs on which labor was performed by the claimant, it is not necessary that the lien notice state that the labor was performed on the particular logs upon which the lien is claimed.[27] The notice need not state the time when the work was commenced, if it appears therefrom that the work was done within the time required by statute preceding the filing of the notice.[28]

d. Statement of Amount. Where the notice is required to contain a statement of the demand and the amount thereof, after deducting, as near as possible, all just credits and offsets, it is necessary that it appear from the notice taken as a whole what was the full amount of the claim before any deductions were made, and also the amount thereof after the deduction of credits and offsets.[29] However, the fact that a larger amount is claimed in a lien statement than is found due does not vitiate the lien, where there is nothing to show a wilful attempt to claim a lien for more than was justly due.[30]

e. Effect of Mistakes. Innocent mistakes in the notice are usually declared by the statute not to be fatal to the validity of the lien, except as against third persons prejudiced thereby.[31]

Construction of Wisconsin statutes see De Morris *v.* Wilbur Lumber Co., 98 Wis. 465, 74 N. W. 105; Kendall *v.* Hynes Lumber Co., 96 Wis. 659, 71 N. W. 1039; McGinley *v.* Laycock, 94 Wis. 205, 68 N. W. 871, holding that the word "from" is used inclusively in a statute providing that if the doing of the work is continuous "from" November 1, or a date prior thereto, and to a date beyond May 1, the claim shall be filed within thirty days after the last date of doing such labor.

19. Craddock *v.* Dwight, 85 Mich. 587, 48 N. W. 644.

20. Beal *v.* Nichols, 12 Wash. 157, 40 Pac. 789.

21. Viles *v.* Green, 91 Wis. 217, 64 N. W. 856.

22. See Cameron *v.* Consolidated Lumber Co., 118 N. C. 266, 24 S. E. 7.

23. Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96.

24. Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

25. See the statutes of the several states.

For notices held sufficient see the following cases: Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96; Munholland *v.* Ault, 4 Wash. 170, 32 Pac. 294; Casey *v.* Ault, 4 Wash. 167, 29 Pac. 1048; Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070; Wheeler *v.* Port Blakely Mill Co., 2 Wash. Terr. 71, 3 Pac. 635; McLeod *v.* Port Blakely Mill Co., (Wash. Terr. 1881) 3 Pac. 898.

For notices held insufficient see the following cases: Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96; Dexter *v.* Wiley, 2 Wash. 171, 25 Pac. 1071.

26. Overbeck *v.* Calligan, 6 Wash. 342, 33 Pac. 825.

27. McPherson *v.* Smith, 14 Wash. 226, 44 Pac. 255.

28. Maris *v.* Clevenger, 29 Wash. 395, 69 Pac. 1089.

29. Wheeler *v.* Port Blakely Mill Co., 2 Wash. Terr. 71, 3 Pac. 635.

30. Duggan *v.* Washington Land, etc., Co., 10 Wash. 84, 38 Pac. 856; Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067.

31. Grays Harbor Boom Co. *v.* Lytle Logging, etc., Co., 36 Wash. 151, 78 Pac. 795; Marlette *v.* Crawford, 17 Wash. 603, 50 Pac.

4. JOINDER OF CLAIMANTS IN ONE NOTICE. Where the character of the claims is the same, and the proceeding is against the same party, a number of claimants may file one notice of lien wherein the claim of each is separately stated, where the statute authorizes such persons to join in the same foreclosure suit.[32]

5. VERIFICATION OF CLAIM. Where the statement is required to be under oath by the claimant, or someone in his behalf, and the verification is made by one other than the claimant, it must state that it is done by his authority.[33] It is not necessary to state the facts upon which the deponent bases his belief that the claim is true.[34]

6. RECORDING. Generally it is not necessary that the lien claimed be recorded,[35] the statute relating to the recording of mortgages of personal property not being applicable.[36]

7. WAIVER OF OBJECTIONS. The right to object to the sufficiency of the lien notice may be precluded by inconsistent acts of the person objecting.[37]

F Commencement and Duration of Lien —1. COMMENCEMENT. A statutory lien for labor arises at once upon the performance of the work and is not created by the filing of a claim for a lien.[38]

2. DURATION.[39] It is generally provided by statute that no lien shall exist after the expiration of a specified number of days after the completion of the services unless a statement of the lien is filed within such time;[40] and also that the lien shall terminate at the end of a specified time from the completion of the work or the filing of the lien statement unless in the meantime a suit to enforce the lien is commenced.[41]

G. Amount and Extent — 1. IN GENERAL. Where a lien is expressly confined to logs and timber it does not extend to lumber manufactured therefrom.[42] Where a statute gives a lien on lumber for labor in assisting in manufacturing sawlogs and other timber into lumber and shingles, the lien extends to shingles manufactured from the lumber and is not limited to shingle bolts.[43]

2. SERVICES ON LOGS OWNED BY DIFFERENT PERSONS. If labor is performed on the logs of two or more persons the laborer has no lien on the logs of one owner for that part of his labor expended on the logs of the other.[44]

3. INTERMINGLED LOGS OR LUMBER. Where the owner of timber lands employs

495. See also Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599.

32. Chevret *v.* Mechanics' Mill, etc., Co., 4 Wash. 721, 31 Pac. 24.

33. Griffin *v.* Chadbourne, 32 Minn. 126, 19 N. W. 647.

34. Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

35. Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972; Winslow *v.* Urquhart, 39 Wis. 260.

36. Sawyer *v.* Fisher, 32 Me. 28.

37. Winson *v.* Johnson, 5 Wash. 429, 32 Pac. 215.

38. Viles *v.* Green, 91 Wis. 217, 64 N. W. 856.

39. **Lien of boom company.**— Where the owner of logs fails to tender the proper amount of charges to a boom company at or below its sorting gaps, and the logs are carried forward with the rest of the drive, the company's lien will continue to the end of the drive. Hall *v.* Tittahawassee Boom Co., 51 Mich. 377, 16 N. W. 770.

40. See *supra*, VI, E.

41. See *infra*, VII, I.

Effect on extent of lien.— Where the statute provides that the lien shall continue sixty days after completion of the work, the lien is not limited to timber cut within the sixty days prior to the commencement of the action. Hale *v.* Brown, 59 N. H. 551, 47 Am. Rep. 224; Hill *v.* Callahan, 58 N. H. 497.

42. Ryan *v.* Guilfoil, 13 Wash. 373, 43 Pac. 351; Gross *v.* Eiden, 53 Wis. 543, 11 N. W. 9; Babka *v.* Eldred, 47 Wis. 189, 2 N. W. 102, 559. See also Engi *v.* Hardell, 123 Wis. 407, 100 N. W. 1046.

What constitutes lumber see *supra*, I.

43. Campbell *v.* Sterling Mfg. Co., 11 Wash. 204, 39 Pac. 451. See also Munroe *v.* Sedro Lumber, etc., Co., 16 Wash. 694, 48 Pac. 405.

44. Hamilton *v.* Buck, 36 Me. 536; Doe *v.* Monson, 33 Me. 430; McGuire *v.* McCallum, 110 Mich. 91, 67 N. W. 1092; Murphy *v.* Myre, 74 Mich. 365, 42 N. W. 50; Appleman *v.* Myre, 74 Mich. 359, 42 N. W. 48; Minton *v.* Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857.

Logs intermixed in drive.— Where logs of different owners have been intermixed in a drive, the lien for driving extends to each owner in such proportionate amount as the quantity of his logs bears to the whole mass driven. Oliver *v.* Woodman, 66 Me. 54; Doyle *v.* True, 36 Me. 542.

different gangs of men to cut different lots of timber, the lien of each laborer is on the lot on which he worked.[45] But where the owner of logs intentionally [46] or negligently [47] intermingles logs cut by different gangs of laborers so that the respective lots on which the several laborers worked cannot be distinguished, their lien extends to all the logs. Where shingles manufactured are mingled and sold without regard to the fact of their being the first or last manufactured, shingles manufactured prior to the time up to which the manufacturer had been paid are subject to a lien for work and labor thereafter performed in such manufacture.[48]

4. Lien on Part For Work Done on Whole. A lien for work done on logs, timber, or lumber may be enforced against any part of the property subject to such lien, where the labor was performed under one entire contract.[49] For instance, one who saws timber for another has a lien on any part of it for the entire bill for sawing.[50] But where the contract is not an entire one, as where payment for cutting was to be made separately for each thousand feet cut, a portion of the logs in possession of a purchaser from the original lien debtor is not liable for the entire claim for cutting but only *pro rata* for the amount of the lien.[51]

5. Lien on Whole For Work Done on Part. Where laborers are employed by the same employer and upon the same work, the lien of any particular laborer is not confined to the particular logs as to which his services were rendered.[52]

H. Priorities — 1. In General.[53] Independent of statutory provisions giving a logging lien a priority,[54] it has been decided that such a lien is ordinarily entitled

45. Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621.

46. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138; Creighton *v.* Cole, 10 Wash. 472, 38 Pac. 1007.

47. Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621.

48. Craddock *v.* Dwight, 85 Mich. 587, 48 N. W. 644.

49. Austill *v.* Hieronymus, 117 Ala. 620, 23 So. 660; Akeley *v.* Mississippi, etc., Boom Co., 64 Minn. 108, 67 N. W. 208; Proulx *v.* Stetson, etc., Mill Co., 6 Wash. 478, 33 Pac. 1067; Blonde *v.* Menominee Bay Shore Lumber Co., 106 Wis. 540, 82 N. W. 552; De Morris *v.* Wilbur Lumber Co., 98 Wis. 465, 74 N. W. 105.

Logs bearing different marks.— Where the whole of the services are performed under one contract of employment in getting out a single lot of logs, two different marks, however, being put on different portions of them, according to their grade or quality, the laborer may claim and enforce his lien for the entire services upon that part bearing one of these marks. Martin *v.* Wakefield, 42 Minn. 176, 43 N. W. 966, 6 L. R. A. 362.

50. *Indiana.*— Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811; Bierly *v.* Royse, 25 Ind. App. 202, 57 N. E. 939.

Maine.— Palmer *v.* Tucker, 45 Me. 316.

Michigan.— Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644, 120 Mich. 61, 78 N. W. 1007; Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661.

New Hampshire.— Partridge *v.* Dartmouth College, 5 N. H. 286.

New York.— Morgan *v.* Congdon, 4 N. Y. 552; McFarland *v.* Wheeler, 26 Wend. 467.

Washington.— Grays Harbor Boom Co. *v.* Lytle Logging, etc., Co., 36 Wash. 151, 78 Pac. 795.

See 33 Cent. Dig. tit. "Logs and Logging," § 77.

51. Doyle *v.* McLeod, 4 Wash. 732, 31 Pac. 96. But see Bean *v.* Brown, 54 N. H. 395, holding that one who contracts to haul lumber at a stipulated price per thousand feet has a lien on the whole quantity drawn and not a separate lien on each one thousand feet.

52. *Michigan.*— Huntoon *v.* O'Brien, 79 Mich. 227, 44 N. W. 601.

Mississippi.— Ouilette *v.* Davis, 69 Miss. 762, 12 So. 27.

New Hampshire.— Hopkins *v.* Rays, 68 N. H. 164, 44 Atl. 102, 73 Am. St. Rep. 554.

Washington.— Overbeck *v.* Calligan, 6 Wash. 342, 33 Pac. 825 [*followed* in Cross *v.* Dore, 20 Wash. 121, 54 Pac. 1003].

Wisconsin.— Johnson *v.* Iron Belt Min. Co., 78 Wis. 159, 47 N. W. 363; Jacubeck *v.* Hewitt, 61 Wis. 96, 20 N. W. 372.

See 33 Cent. Dig. tit. "Logs and Logging," § 78.

53. Priority of laborers' liens in general see Master and Servant.

54. Oliver *v.* Woodman, 66 Me. 54 (lien takes precedence of a prior mortgage); Fitch *v.* Applegate, 24 Wash. 25, 64 Pac. 147 (holding that statute giving lien priority over mortgages applies only to mortgages executed after the laborer has commenced his work); Smith *v.* Shell Lake Lumber Co., 68 Wis. 89, 31 N. W. 694. See Bradley *v.* Cassels, 117 Ga. 517, 43 S. E. 857, holding that the lien of a purchase-money mortgage on a sawmill is not one of the liens enumerated in Ga. Civ. Code, § 2809, as superior to a lien for articles

to priority against other liens,[55] as for instance a vendor's lien,[56] or a lien for advances.[57]

2. Bona Fide Purchasers.[58] Where no lien claim has been filed, and the person claiming the lien is not in possession of the property on which the lien is claimed, a *bona fide* purchaser,[59] in the absence of a statute to the contrary,[60] takes the property free from the lien.[61] But if the lien claimant is in possession of logs or lumber on which he has a lien at the time of their sale, his rights are superior to those of a *bona fide* purchaser.[62]

I. Injury to, or Destruction of, Subject-Matter of Lien. Statutes in some of the states give the lien-holder an action for damages for the removal or destruction of, or injury to, logs or lumber to which the lien has attached.[63] It has been held that such statutes, being penal in their nature, require a strict con-

furnished sawmills, unless the holder of the latter lien had actual notice of its existence before his debt was created.

Power of legislature to give lien of laborer preference to judgments and mortgages see *supra*, VI, A.

55. See Munholland *v.* Ault, (Wash. 1892) 32 Pac. 294 [*following* Casey *v.* Ault, 4 Wash. 167, 29 Pac. 1048].

56. Spofford *v.* True, 33 Me. 283, 54 Am. Dec. 621.

57. Shuffleton *v.* Hill, (Cal. 1885) 7 Pac. 7; Paine *v.* Woodworth, 15 Wis. 298. See also Hyde *v.* German Nat. Bank, 115 Wis. 170, 91 N. W. 230.

58. Purchasers pending suit to foreclose see Lis Pendens.

59. See Chadwick *v.* Broadwell, 27 Mich. 6, as to who can claim the rights of *bona fide* purchasers.

60. Ivall *v.* Willis, 17 Wash. 645, 50 Pac. 467 (holding under a statute providing that it shall be conclusively presumed that one purchasing the property liened upon within thirty days given to claimants in which to file their liens is not a *bona fide* owner of such property, unless he has paid full value for it, and has seen that the purchase-money was applied to the payment of such *bona fide* claims as were entitled to liens, that a purchaser is not entitled to an assignment of a lien claim as a condition precedent to its payment); De Morris *v.* Wilbur Lumber Co., 98 Wis. 465, 74 N. W. 105 (holding that under a statute providing that no purchase of property, against which there is a lien claim, within the time for filing said claim, shall prejudice the rights of the claimant, a person who, without notice of lienable claims on logs, timber, or lumber, buys such property in the regular course of trade, pays full value therefor, and transports the same at considerable expense, thereby enhancing its market value, is not by reason of these facts entitled to protection against the lien claim). See also Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599.

61. Haifley *v.* Haynes, 37 Mich. 535; Smith *v.* Shell Lake Lumber Co., 68 Wis. 89, 31 N. W. 694. In the latter case the statute gave a lien to any person sawing or manufacturing logs into lumber taking "precedence of all other claims or liens thereon."

62. Germain *v.* Central Lumber Co., 120 Mich. 61, 78 N. W. 1007; Akeley *v.* Mississippi, etc., Boom Co., 64 Minn. 108, 67 N. W. 208.

63. See the statutes of the several states.

Transporting logs out of state.— A statute providing that one who transports out of the state logs on which there is a lien shall be liable as for a conversion does not apply to the owner of logs who sells them to one who so transports them. Lohman *v.* Peterson, 87 Wis. 227, 58 N. W. 407.

In Washington the statute provides in substance that any person who shall injure, impair, or destroy or who shall render difficult, uncertain, or impossible of identification logs or timber upon which there is a lien, without the consent of the lien-holder, shall be liable to the latter for damages to the amount secured by his lien, which may be recovered by a civil action against such person. Under this statute it has been held that an action for damages may be maintained without a prior determination in equity of the validity of such lien; that all lien-holders may join in an action for the destruction of logs on which they claim liens; that a separate action for damages may be maintained for a balance due after an action to enforce the lien as to an undestroyed portion of such logs has been determined; and that the complaint need not allege the value of the logs if the amount of the lien is alleged and damages asked in that sum. Peterson *v.* Sayward, 9 Wash. 503, 37 Pac. 657. A joint action cannot be maintained against the persons who owned the logs and the person who sawed them, for a personal judgment against the former, a decree of foreclosure against the logs, and a decree that the latter person pay the sum due with attorney's fees, etc. Singer *v.* Wallace, 8 Wash. 576, 36 Pac. 466. A tort for conversion may be waived and recovery had on an implied contract. Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599. The lien-holder has the right to elect whether to sue to enforce his lien or to sue for the damages as provided for by the statute. Bergman *v.* Inman, 43 Oreg. 456, 72 Pac. 1086, 73 Pac. 341, 99 Am. St. Rep. 771, construing Washington statute. Sufficiency of allegations in complaint. See Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599.

The cause of action accrues against an assignee of the owner when he removed the

struction.[64] Irrespective of statute, it has been held that a lien-holder may recover damages from one destroying the property, or so managing or disposing of it, with knowledge of the lien, as to destroy the lien.[65]

J. Waiver, Loss, or Discharge — 1. In General. In determining whether a lien is lost or waived, it is sometimes important to consider the nature of the lien, since acts which will constitute a waiver of an implied common-law lien will not necessarily operate as a waiver of a lien created by contract,[66] or by statute. A statutory lien is not waived by expressly reserving in the statement of lien the common-law lien to which the lienor is entitled by virtue of his possession of the property.[67] A sawyer's lien is not lost by restating the account and deducting certain items after replevin is brought by the owner.[68] The statutory lien of a third person on logs in the possession of the purchaser is not defeated by a rescission of the contract of sale.[69]

2. Surrender of Possession. A common-law lien on logs or lumber is waived by relinquishing possession of the property,[70] but not where possession is lost by means of a tort.[71] The lien is lost as to third persons, although the contracting parties stipulate that the lien shall continue notwithstanding the change of possession.[72] Where a lien is created by contract, parting with the possession does not discharge the lien if it can be done consistently with the contract, the course of business, and the intention of the parties.[73]

3. Acceptance of Note. Except where a note is not accepted as payment,[74] the acceptance of a promissory note for the work waives the right to a lien.[75]

property from Washington, from which time limitations would begin to run, and not from the time he sawed the logs into lumber in another state where the action is brought. Bergman *v.* Inman, 43 Oreg. 456, 72 Pac. 1086 [rehearing *denied* in 73 Pac. 341, 99 Am. St. Rep. 771].

64. Lohman *v.* Peterson, 87 Wis. 227, 58 N. W. 407.

65. Goodrow *v.* Buckley, 70 Mich. 513, 38 N. W. 454.

66. Spaulding *v.* Adams, 32 Me. 211.

67. Phillips *v.* Freyer, 80 Mich. 254, 45 N. W. 81.

68. Comstock *v.* McCracken, 53 Mich. 123, 18 N. W. 583.

69. Calef *v.* Brinley, 58 N. H. 90.

70. *Indiana.*—Bierly *v.* Royse, 25 Ind. App. 202, 57 N. E. 939.

Maine.— Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379; Brackett *v.* Hayden, 15 Me. 347.

Michigan.— Smith *v.* Greenop, 60 Mich. 61, 26 N. W. 832.

Pennsylvania.— Burge *v.* Comerer, 5 Pa. Co. Ct. 5.

South Carolina.— Walker *v.* Cassels, 70 S. C. 271, 49 S. E. 862.

Vermont.— Bailey *v.* Quint, 22 Vt. 474.

Washington.— See Swartwood *v.* Red Star Shingle Co., 13 Wash. 349, 43 Pac. 21

Canada.— *In re* Hurtubise, 26 Quebec Super. Ct. 137.

See 33 Cent. Dig. tit. "Logs and Logging," § 88.

What constitutes loss of possession.— Possession is not lost by permitting the bailor to pile the lumber in the mill-yard of the bailee for its better preservation (Holderman *v.* Manier, 104 Ind. 118, 3 N. E. 811), nor by the fact that the lumber was marked as it was sawed and piled, where the sawyer had an additional duty yet to perform respecting it, and neither party regarded the marking as a delivery or transfer of possession (Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661).

Loss of possession of part of property see *supra*, VI, F, 4.

71. Haughton *v.* Busch, 101 Mich. 267, 59 N. W. 621.

72. McFarland *v.* Wheeler, 26 Wend. (N. Y.) 467.

73. Spaulding *v.* Adams, 32 Me. 211. See also Oakes *v.* Moore, 24 Me. 214, 41 Am. Dec. 379. See Smith *v.* Scott, 31 Wis. 420, holding that lien was not lost by the mere division of logs into two equal parts.

74. Prentiss *v.* Garland, 67 Me. 345 (holding that an agreement made with the maker of notes taken by one to whom stumpage is due, for the privilege of cutting logs, to compromise them for a less sum than the amount due on their face, upon a condition not afterward performed, does not operate to discharge the lien where there is such a stipulation); Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644; McEwan *v.* Carpenter, 111 Mich. 522, 69 N. W. 1117 (holding that evidence that the payee discounted the notes and protected them in the hands of the holder by collateral security is incompetent to show a waiver of the lien). See also Coburn *v.* Kerswell, 35 Me. 126.

Renewal of a note not accepted as payment does not release the lien. Germain *v.* Central Lumber Co., 120 Mich. 61, 78 N. W. 1007.

75. Germain *v.* Central Lumber Co., 120 Mich. 61, 78 N. W. 1007; Tyler *v.* Blodgett, etc., Lumber Co., 78 Mich. 81, 43 N. W. 1034; Hutchins *v.* Olcutt, 4 Vt. 549, 24 Am. Dec. 634. See also Akeley *v.* Mississippi, etc., Boom Co., 64 Minn. 108, 67 N. W. 208. But

4. AGREEMENTS INCONSISTENT WITH LIEN. The right to a statutory lien may be waived by a contract giving the employer the absolute possession and power of disposal of the logs.[76] A common-law lien is waived where possession is to be turned over before the time for payment.[77]

5. MINGLING LIENABLE WITH NON-LIENABLE CLAIMS. A common-law lien is waived if lienable and non-lienable claims are commingled in the same dealings, so that the lien is not kept ascertainable without restating and charging the accounts.[78]

6. LEGAL PROCEEDINGS. A common-law lien is not waived by bringing suit on the demand and attaching the lumber, if the lienor retains possession and insists on his lien, and no judgment has been rendered in the suit.[79] But a common-law lien will be defeated by procuring the property to be taken in execution at the suit of the lienor.[80]

7. PAYMENTS. The statutory lien on logs is not discharged by a sale by the owner and the receipt of the entire purchase-price by the lienor, where not sufficient to satisfy the lien.[81] So payment by the owner to the contractor, although in full of all demands by the contractor, does not discharge the lien possessed by the employees of the contractor, where they have not been paid by the contractor.[82] And a receipt in full for labor performed is not conclusive of payment in full, and is not a release of the right to a lien for any balance.[83]

8. EXTENDING TIME FOR PAYMENT. The lien of a boom company is lost, as against a vendor's lien, by extending the time for payment of the boom charges.[84]

9. ASSIGNMENT OF LIEN. The right to a lien, where destroyed by assignment of the lien claim, is not revived by a reassignment.[85]

10. ACQUIESCENCE IN ACTS OF THIRD PERSONS. Acquiescence in the acts of third persons may constitute an estoppel preventing the reliance on the lien as against such third persons.[86] For instance, the lienor's presence at a sale of the logs on which he has a lien, without asserting his lien, may estop him from thereafter claiming the lien as against the purchaser.[87]

K. Enforcement — 1. NATURE AND FORM OF PROCEEDINGS. In most of the states the statutes provide for the enforcement of logging liens by attachment proceedings,[88] and in some states it is held that such statutory remedy is exclusive.[89] In other states no provision is made for seizure but the statute fixes a method of

see Ottawa Bank *v.* Bingham, 8 Quebec Q. B. 359.

A renewal of a note accepted as payment does not reinvest the payee with a lien. Germain *v.* Central Lumber Co., 120 Mich. 61, 78 N. W. 1007.

76. Anderson *v.* Tingley, 24 Wash. 537, 64 Pac. 747, 85 Am. St. Rep. 959. But see Maris *v.* Clevenger, 29 Wash. 395, 69 Pac. 1089, holding that a provision in a contract for the sale of timber that the buyers were to run the logs down the river, sell them as soon as practicable, and leave with their purchaser the stumpage agreed on, did not negative the intention of the owner to claim a lien.

77. Farrington *v.* Meek, 30 Mo. 578, 77 Am. Dec. 627, holding, however, that, where a part of the price for rafting was to be paid within twenty-four hours after the delivery of the lumber, the lien was not waived as to such part of the price.

78. McMaster *v.* Merrick, 41 Mich. 505, 2 N. W. 895. See also Horton *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

79. Palmer *v.* Tucker, 45 Me. 316.

80. *In re* Coumbe, 24 Grant Ch. (U. C.) 519.

81. Kangas *v.* Boulton, 127 Mich. 539, 86 N. W. 1043.

82. Federspiel *v.* Johnstone, 87 Mich. 303, 309, 49 N. W. 581, 583.

83. Engi *v.* Hardell, 123 Wis. 407, 100 N. W. 1046.

84. Clough *v.* Mississippi, etc., Boom Co., 64 Minn. 87, 66 N. W. 200.

85. Tewkshury *v.* Bronson, 48 Wis. 581, 4 N. W. 749.

Lien claim as assignable see *supra*, VII, A.

86. Stone *v.* Fairbanks, 53 Vt. 145. *Compare* Austill *v.* Heironymus, 117 Ala. 620, 23 So. 660.

87. Spaulding *v.* Adams, 32 Me. 211. *Compare* Hughes *v.* Tanner, 96 Mich. 113, 55 N. W. 661.

88. See the statutes of the several states.

Assumpsit.— The statutory provision that in a lien action the forms and proceedings shall be the same as in ordinary actions of assumpsit is to be construed as permissive, and not mandatory; so that the word "shall" contained therein will be construed as meaning "may." Parks *v.* Crockett, 61 Me. 489.

89. Griffin *v.* Chadbourne, 32 Minn. 126, 19 N. W. 647. See also Robinson *v.* Bunker, 38 Me. 130.

foreclosure and obviates the necessity of an attachment.[90] The proceedings in the former class of states are *in personam* so far as the debtor is concerned, but are strictly *in rem* so far as regards the general owner of the property, where the only claim of the laborer is against the contractor, and not against the owner.[91] Actions to enforce liens by attachment proceedings have been held to be actions at law,[92] but a common-law lien may be enforced in equity.[93] The court has no jurisdiction to enforce a logging lien unless a statement of the lien has been filed.[94]

2. Time to Sue. Statutes in several states limit the time to sue to enforce the lien to a specified time after the filing of the lien claim.[95] In other states it is provided that the lien shall continue a certain number of days after the logs or lumber arrive at the place of destination for sale or manufacture,[96] which in effect limits the time to sue to enforce the claim to the specified number of days.

3. Place of Trial. Generally the action must be brought in the county where the logs are located;[97] but in so far as the action is not to enforce a lien but merely to obtain a personal judgment for the amount due, it may be brought in a county other than the one where the logs are located.[98]

4. Parties and Notice — a. Owner as Party. The general rule is that the action must be brought against the employer of the lienor and not against the owner of the property on which the lien is claimed, where the owner is not the employer.[99]

b. Notice to Owner. Whether the lien is enforced by a foreclosure suit,[1] or by

90. Overbeck *v.* Calligan, 6 Wash. 342, 33 Pac. 825.

91. Bicknell *v.* Trickey, 34 Me. 273; Pack *v.* Simpson, 70 Mich. 135, 38 N. W. 6.

92. De Morris *v.* Wilbur Lumber Co., 98 Wis. 465, 74 N. W. 105.

93. Arians *v.* Brickley, 65 Wis. 26, 26 N. W. 188, 56 Am. Rep. 611.

94. Eales *v.* Francis, 115 Mich. 636, 73 N. W. 894.

95. See the statutes of the several states.

When action is commenced.— An action is commenced within four months from the filing of the lien where the property is attached within that time, although the summons is not served until after the four months, where the statute provides that the court shall be deemed to have acquired jurisdiction from the time of service of summons or the issuance of a provisional remedy. Cox *v.* North Wisconsin Lumber Co., 82 Wis. 141, 51 N. W. 1130.

A suit brought in one state within the twelve months in which a lien may be enforced does not preserve the lien where the logs were removed to another state before a decree was entered and a suit was brought in such latter state after the expiration of the statutory period. North Pac. Lumber Co. *v.* Lang, 28 Oreg. 246, 42 Pac. 799, 52 Am. St. Rep. 780.

Retroactive effect of statutes see *supra*, VI, A, 2, c.

96. See the statutes of the several states. See also Dallaire *v.* Gauthier, 24 Quebec Super. Ct. 495.

When time begins to run.— Where the contract is to cut and haul two kinds of lumber from the same land, the time during which the lien continues runs from the last delivery of either kind, and not, as to each kind, from the last delivery made of it. Phillips *v.* Vose, 81 Me. 134, 16 Atl. 463. The time during which a driving lien continues does not commence to run, as to any of the logs upon which the lien exists, until all the logs subject to the same lien have arrived within the boom; provided the logs have been driven together and the driving has not been suspended after a portion of them has reached the boom, but has been continuously kept up until all the logs have been driven in. Sheridan *v.* Ireland, 66 Me. 65.

What constitutes place of destination.— Under a statute providing for the continuance of a lien for sixty days after spool timber or spool bars "arrive at the place of destination for the sale or manufacture," the place named in the statute is the place at which the spool bars are, in fact, intended to be sold or manufactured into spools. Chamberlain *v.* Wood, 100 Me. 73, 60 Atl. 706.

97. Harris *v.* Doyle, 130 Mich. 470, 90 N. W. 293; Pine Saw Logs *v.* Sias, 43 Mich. 356, 5 N. W. 414. *Contra*, Overbeck *v.* Calligan, 6 Wash. 342, 33 Pac. 825, where the statute provided that loggers' liens should be enforced by a civil action in "any" superior court.

Where standing trees are regarded as personalty, the court has jurisdiction to decree a sale of trees located in other counties, although it would not have such jurisdiction if the trees were considered as a part of the realty. Tilford *v.* Dotson, 106 Ky. 755, 51 S. W. 583, 21 Ky. L. Rep. 333.

98. Shafer *v.* Hogue, 70 Wis. 392, 35 N. W. 928.

99. Oliver *v.* Woodman, 66 Me. 54; Reilly *v.* Stephenson, 62 Mich. 509, 29 N. W. 99.

1. Duggan *v.* Smith, 27 Wash. 702, 68 Pac. 356.

attachment proceedings,[2] notice of the suit must be given to the owner of the logs or lumber, where he is not the employer, before a judgment *in rem* can be rendered against the property.

c. Notice to Debtor. While the debtor must be served in order to obtain a personal judgment against him, jurisdiction of the person of the debtor, as well as jurisdiction of the owner of the logs, is not necessary to sustain a judgment *in rem*.[3]

d. Personal and Constructive Service.[4] Service cannot be made on an agent of the owner of the logs unless the owner cannot be found,[5] and service by publication is not permissible except where service cannot be made in any other way.[6] Substituted service is permitted only in case defendant cannot be found.[7]

e. Intervention. Where a person entitled to intervene in an action to enforce a lien files an answer consisting of a general denial, he is entitled to a trial, irrespective of the disposition of the action in so far as the original defendants are concerned.[8]

5. Attachment[9] **— a. Affidavit.** An affidavit to procure an attachment is, under the statutes, necessary to confer jurisdiction.[10] It must be sworn to on the same day the writ issues.[11] The affidavit confers no authority on the officer executing the attachment, unless it contains all the material allegations acquired by the statute.[12] Generally the affidavit is required to state *inter alia* the amount

2. Parks *v.* Crockett, 61 Me. 489; Reilly *v.* Stephenson, 62 Mich. 509, 29 N. W. 99. See also Hinckley *v.* Gilmore, 49 Me. 59. *Contra*, Munger *v.* Lenroot, 32 Wis. 541 [*followed* in Winslow *v.* Urquhart, 39 Wis. 260].

In Maine a lien claim can be preserved in no form of proceeding without notice to the log owners (Parks *v.* Crockett, 61 Me. 489), and it is not sufficient that the log owners come in voluntarily, or that they are summoned individually, but a general notice such as would be good against the world must be given (Timony *v.* Timony, 63 Me. 564; Sheridan *v.* Ireland, 61 Me. 486). Notice to be given is such "as the Court shall order," and it may be by publication in a newspaper (Wilson *v.* Ladd, 49 Me. 73), although generally the notice to be ordered should be a public notice, by posting or publication, as well as a specific notice to the parties supposed to be the owners (Sheridan *v.* Ireland, *supra*).

In Michigan a notice provided for in ordinary attachment suits, where the writ is directed against defendant's property generally, and defendant cannot be found, is insufficient. Streeter *v.* McMillan, 74 Mich. 123, 41 N. W. 883. The notice given must be a reasonable one, so as to permit the owner to contest the claim (Newbauer *v.* Newbauer, 112 Mich. 562, 70 N. W. 1104), one day's notice is insufficient (Noyes *v.* Hillier, 65 Mich. 638, 32 N. W. 872).

Adjournments.— Where the log owner is not personally served, and none of defendants appear on the return-day of the attachment, the justice of the peace must adjourn the case not less than thirty, nor more than ninety, days, as provided for by Mich. Rev. St. (1897) pt. 7, c. 34, § 33. Brabant *v.* Lillie, 117 Mich. 167, 75 N. W. 440.

3. Plurede *v.* Levasseur, 89 Me. 172, 36 Atl. 110.

4. Service of writ of attachment see *infra*, VI, K, 5, c, (II).

5. Noyes *v.* Hillier, 65 Mich. 636, 32 N. W. 872.

6. Shearer *v.* Davis, etc., Lumber Co., 78 Wis. 278, 47 N. W. 360, holding that, where it appears that service cannot be made in any other way, service by publication is authorized, even though the logs were not the property of defendant but of a third person for whom he had worked as a contractor in cutting them and getting them out.

7. White *v.* Prior, 88 Mich. 647, 50 N. W. 655.

8. Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

9. Priority of attachment under log lien act over general attachment see ATTACHMENT, 4 Cyc. 641 note 98.

10. Woodruff *v.* Ives, 34 Mich. 320.

11. McPherson *v.* McGillis, 93 Mich. 525, 53 N. W. 794, holding that the statute relating to affidavits in attachments generally is not applicable to attachments to enforce logging liens in so far as it fixes a rule contrary to that laid down in the text.

12. Woodruff *v.* Ives, 34 Mich. 320. See also Single *v.* Barnard, 29 Wis. 463.

Action brought by one in behalf of many.— Objections to an affidavit in an action brought in affiant's name to enforce liens on lumber for work done by himself and others, that it fails to show that the claimants have united their claims, and designated affiant as their attorney for prosecuting them, and that it is not alleged that each claim is for an amount less than one hundred dollars, are merely technical, and cannot be made on a motion to dismiss, especially as, had any of the claims exceeded one hundred dollars in amount, they would on the trial, upon objection, have them rejected. Babcock *v.* Cook, 55 Mich. 1, 20 N. W. 689. Although

of the indebtedness,[13] the nature of the services,[14] by whom the labor was performed,[15] the filing of the statement of lien,[16] and a description of the logs or lumber;[17] but it need not state who is the owner of the logs,[18] or show that the indebtedness arose from a contract express or implied,[19] or how much work was done on each lot of logs, where the work was done for a contractor on several lots, all of which are attached.[20] The affidavit need not state the date of the last day of labor, where it appears from the statement filed and the evidence that the statement of lien was filed before the expiration of the statutory time allowed after the performance of the labor.[21]

b. Undertaking. An undertaking is usually not necessary as a prerequisite to obtaining the attachment.[22] The owner of the logs may obtain possession after the writ is served, by giving a forthcoming bond.[23]

c. Writ — (I) *CONTENTS.*[24] A writ of attachment must show the nature of the claim on which the right to the lien is based,[25] and must contain a description of the logs or lumber sought to be attached,[26] it not being sufficient that the writ contains a general direction to attach the property of defendant.[27] The description is sufficient if the officer can find the property by the exercise of reasonable diligence.[28] The writ need not allege the ownership of the logs,[29] nor is it neces-

it is better practice to show in the affidavit that the claims are each less than one hundred dollars, it is not necessary to give the court jurisdiction if such fact appears from the statements of liens which have been filed. Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005.

Forms of affidavits see Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005; Babcock *v.* Cook, 55 Mich. 1, 20 N. W. 689.

13. Woodruff *v.* Ives, 34 Mich. 320.

14. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

Where there are several lots of logs belonging to different owners, the affidavit is not defective because some of the labor alleged is not the subject of a lien, and it does not affirmatively appear that labor entitled to a lien was performed on one lot. Wright *v.* Iosco Cir. Judge, 70 Mich. 146, 38 N. W. 11; Pack *v.* Iosco Cir. Judge, 70 Mich. 135, 38 N. W. 6.

15. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

16. Wright *v.* Iosco Cir. Judge, 70 Mich. 146, 38 N. W. 11; Pack *v.* Iosco Cir. Judge, 70 Mich. 135, 38 N. W. 6 (holding sufficient the statement that "said plaintiff, and each of said claimants, have filed a lien for the amount due each"); Winslow *v.* Urquhart, 39 Wis. 260 (holding that it need not also state that the lien claim was recorded).

17. Wright *v.* Iosco Cir. Judge, 70 Mich. 146, 38 N. W. 11; Pack *v.* Iosco Cir. Judge, 70 Mich. 135, 38 N. W. 6.

18. Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005; Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006; Babcock *v.* Cook, 55 Mich. 1, 20 N. W. 689.

19. Winslow *v.* Urquhart, 39 Wis. 260.

20. Wright *v.* Iosco Cir. Judge, 70 Mich. 146, 38 N. W. 11; Pack *v.* Iosco Cir. Judge, 70 Mich. 135, 38 N. W. 6.

21. Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005.

22. De Morris *v.* Wilbur Lumber Co., 98 Wis. 465, 74 N. W. 105, holding that an undertaking is not required under the Wisconsin statutes, unless ordered by the circuit court or judge, on ten days' notice of the application therefor to plaintiff in attachment.

23. Wheeler *v.* McDill, 51 Wis. 356, 8 N. W. 169, holding that the general statutes relating to attachment and garnishment were applicable.

Effect as estoppel to deny validity of lien. — The owner of logs is not estopped from denying the validity of the lien by giving the sheriff an undertaking, in order to obtain possession of the logs. Shevlin *v.* Whelen, 41 Wis. 88; Baxter *v,* Kennedy, 35 N. Brunsw. 179. See, generally, ATTACHMENT, 4 Cyc. 687.

24. **Forms of writ** see Babcock *v.* Cook, 55 Mich. 1, 20 N. W. 689.

25. McNally *v.* Kerswell, 37 Me. 550.

26. Redington *v.* Frye, 43 Me. 578. *Contra,* see Carver *v.* Bagley, 79 Minn. 114, 81 N. W. 757.

27. Redington *v.* Frye, 43 Me. 578.

Where the writ merely requires the officer to attach the property of defendant, the officer cannot attach the property in the hands of a *bona fide* purchaser not a party to the action, although the property is subject to plaintiff's lien. Bryant *v.* Warren, 51 N. H. 213. The owner of logs, where not a party to the action, although served by publication, is not entitled to contest a lien claim where the writ merely directs the officer to attach logs belonging to defendant, located at a certain place. Campbell *v.* Smith, 47 Me. 143.

28. Hopkins *v.* Rays, 68 N. H. 164, 44 Atl. 102, 73 Am. St. Rep. 554.

Sufficiency of description. — A description of the property as "about 200,000 feet of pine and hemlock lumber, and also about 300 cords of slabs" is sufficient. Dillon *v.* Howe, 98 Mich. 168, 57 N. W. 102.

29. Parker *v.* Williams, 77 Me. 418, 1 Atl.

sary that it should affirmatively show that the lien has not been lost by lapse of time.[30]

(II) *Service and Levy.* A court acquires no jurisdiction unless the writ of attachment is served within the time prescribed by the statute.[31] Statutes in some states provide for the service of a writ of attachment while in transit from the place where banked or deposited for shipment or floatage, when the destination is in the state, by service on the person or company in charge of the logs.[32] Where logs are in the possession of a booming company, the service of a writ operates as a seizure of all the logs, although the return states that the officer seized a specific number.[33] In some states it is necessary to serve a certified copy of the inventory of the property seized.[34] It has been held that the sheriff of one county may serve the writ on the log owner in another county,[35] but that he cannot levy on logs not within his county.[36] Where logs on which a lien has accrued have been intermingled by the owner with other logs, so that the former cannot be distinguished from the latter, it is the duty of the officer to attach the whole.[37] The necessity for an inventory and appraisal[38] depends entirely on the statutes existing in each state. To preserve an attachment on logs in a river or on its banks, it is not necessary that there should be the same manual possession or supervision as would be requisite in case of many other kinds of property less cumbrous and more easily movable.[39] An excessive levy does not vitiate the proceedings,[40] nor does a levy on less than the amount directed in the writ.[41] Where the logs, after being levied on, are taken by the owner, and the sheriff thereupon brings replevin, the complaint must show that the logs were subject to seizure by attachment.[42]

(III) *Return.*[43] A return of an attachment should show everything necessary to constitute a valid levy;[44] but the fact that it contains additional statements may be disregarded.[45]

6. Pleadings[46] **— a. Complaint** — (I) *In Attachment Suits.* The complaint

138; Dillon *v.* Howe, 98 Mich. 168, 57 N. W. 102.

30. Getchell *v.* Gooden, 63 Me. 563.

31. White *v.* Prior, 88 Mich. 647, 50 N. W. 655.

32. Lake *v.* Père Marquette R. Co., 132 Mich. 190, 93 N. W. 257, holding that such a statute applies to a carriage by a railroad company for the purpose of making a delivery, and that it is not unconstitutional on the ground that no provision was made for the carrier's expense of retaining possession of the property after the service of the writ.

33. McGuire *v.* McKnight, 101 Mich. 275, 59 N. W. 610.

34. See the statutes of the several states. In Michigan the proceedings are void where a certified copy of the inventory is not served on either the principal defendant or the owner of the logs (Sheridan *v.* Colton, 113 Mich. 112, 71 N. W. 479; Davison *v.* Davison, 99 Mich. 625, 58 N. W. 637; White *v.* Prior, 88 Mich. 647, 50 N. W. 655), except where the logs are attached in transit, so that no inventory can be made (McGuire *v.* McKnight, 101 Mich. 275, 59 S. W. 610), or where the attachment is served on the owners of logs who are not made defendants in the action (Ruggles *v.* Muskegon Cir. Judge, 124 Mich. 472, 83 N. W. 149; Federspiel *v.* Johnstone, 87 Mich. 309, 49 N. W. 583, 87 Mich. 303, 49 N. W. 581).

35. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

36. Shafer *v.* Hogue, 70 Wis. 392, 35 N. W. 928. See also Foley *v.* Markham, 60 Minn. 216, 62 N. W. 125, holding that the levy may be made by the sheriff of the county where the logs are located.

37. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138.

38. Ruggles *v.* Muskegon Cir. Judge, 124 Mich. 472, 83 N. W. 149, holding that an appraisal was unnecessary. See also *supra*, note 34.

39. Bicknell *v.* Trickey, 34 Me. 273.

40. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138; Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379. See also Attachment, 4 Cyc. 599 note 83.

41. Bean *v.* Ayers, 70 Me. 421.

42. Tronson *v.* Union Lumbering Co., 38 Wis. 202.

43. **Effect of return.**— The officer's return on a writ does not establish the fact that the logs attached are identical with those upon which the services were rendered, although having marks in common. Thompson *v.* Gilmore, 50 Me. 428. See Bean *v.* Soper, 56 Me. 297.

44. Scott, etc., Lumber Co. *v.* Sharvy, 62 Minn. 528, 64 N. W. 1132, where return was held insufficient for failure to show that a copy of the writ was filed in the office of the surveyor-general. See also Lewiston Steam Mill Co. *v.* Easter, 78 Me. 107, 2 Atl. 882.

45. Brown *v.* Markham, 60 Minn. 233, 62 N. W. 123, 30 L. R. A. 84.

46. Pleading generally see Pleading.

in an action to enforce a logging lien should allege the filing of the claim for a lien and service of notice of the filing.[47] Where the action must be brought in the county where the logs are located, the complaint must show that all or a part of the logs are situated in the county where the action is brought.[48] The name of the log owner need not be stated,[49] and it is not necessary to affirmatively allege that the lien claim has not been lost by lapse of time.[50] Where the right to recover depends on the existence of a debt due from the owner of the logs to the contractor, at the time plaintiff's lien was filed, or that the owner had notice of plaintiff's claim before paying the contractor the full amount due, such facts must be set forth in the complaint.[51] The description of the logs and a direction to attach them for plaintiff's claim contained in the lien statement may obviate the necessity of any allegation in the complaint that plaintiff labored on the logs, or a reference to his lien.[52]

(II) *IN FORECLOSURE SUITS.* In states where the procedure is by a suit to foreclose, the complaint must show whether the action is one to foreclose a lien, or for an eloignment of logs on which a lien is claimed.[53] An allegation that defendant has an interest in the logs, without specifying the interest, is not demurrable;[54] and an allegation of indebtedness in a specified sum sufficiently alleges that such amount was due plaintiff.[55] Where the amount of the claim for a lien, as stated in the complaint, exceeds the claim in the lien statement as filed, the claim in excess of the lien claim may be disregarded on a motion for judgment.[56] An affidavit to foreclose a lien, as provided for in some states, must follow the provisions of the statute.[57]

(III) *JOINDER OF CLAIMS.* Where several are employed by the same contractor, but to work separately by the piece, they may maintain a joint action against the employer, and *in rem* against the logs or lumber for their services;[58] and in some states the statute provides for the joinder of labor claims against the same product, where the amount of each claim is less than the specified sum.[59] Where services are performed upon the same logs for different persons, the laborer may treat his liens as an entirety, and enforce them in a single proceeding to which each employer may be made a party.[60] On the other hand a claim *in personam* cannot be joined with a different claim *in rem*.[61]

(IV) *AMENDMENT.* The description of the property in the complaint is amendable,[62] as is the failure to allege that the logs were cut and removed within

47. Clark *v.* Adams, 33 Mich. 159.

48. Pine Saw Logs *v.* Sias, 43 Mich. 356, 5 N. W. 414.

49. Parker *v.* Williams, 77 Me. 418, 1 Atl. 138.

50. Getchell *v.* Gooden, 63 Me. 563.

51. Wilson *v.* Barnard, 67 Cal. 422, 7 Pac. 845.

52. Hill *v.* Callahan, 58 N. H. 497.

53. State *v.* Skagit County Super. Ct., 9 Wash. 673, 38 Pac 155.

54. McQuesten *v.* Morrill, 12 Wash. 335, 41 Pac. 56.

55. Mason *v.* McGee, 15 Wash. 272, 46 Pac. 237.

56. Dexter *v.* Sparkman, 2 Wash. 165, 25 Pac. 1070.

57. See the cases cited *infra*, this note.

In Georgia an affidavit to foreclose a lien on a steam sawmill for provisions and other things furnished must show a demand for payment after the debt became due (Milam *v.* Solomon, 66 Ga. 55), and that the provisions were furnished to the mill of the person named and not to the person himself (Bennett *v.* Gray, 82 Ga. 592, 9 S. E. 469); but need not allege that the provisions were necessary (Bennett *v.* Gray, *supra*), nor that the provisions were furnished under a contract (Bennett *v.* Gray, *supra*). Counter-affidavits must either admit or deny the indebtedness (Murphey *v.* McGough, 105 Ga. 816, 31 S. E. 757), and where the counter-affidavit has been dismissed the case passes out of the jurisdiction of the court (Murphey *v.* McGough, *supra*). For sufficiency of allegations in general see the following cases: Moody *v.* Travis, 76 Ga. 832; Wright *v.* Phillips, 46 Ga. 197; Porter *v.* Lively, 45 Ga. 159.

58. Ouelette *v.* Pluff, 93 Me. 168, 44 Atl. 616.

59. Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005 [*followed* in Villenuve *v.* Sines, 92 Mich. 556, 52 N. W. 1007].

Form of appointment of agent see Wiggins *v.* Houghton, 89 Mich. 468, 50 N. W. 1005.

60. Collins *v.* Cowan, 52 Wis. 634, 9 N. W. 787.

61. Parks *v.* Crockett, 61 Me. 489.

62. Stacy *v.* Bryant, 73 Wis. 14, 40 N. W. 632.

a specified time prior to the filing of the lien.[63] Other claimants may be made parties by amendment,[64] and a count for damages for the destruction of part of the logs may be added by amendment.[65]

b. Answer or Demurrer. The owner of the logs, where he comes in and defends the suit, may contest the existence and validity of the lien claim.[66] But separate pleas cannot be filed in behalf of the contractor and the owner which will require separate verdicts.[67] The general owner of the logs may also demur to the writ and declaration.[68] Failure to deny the giving of notice of the lien is not such an admission as to absolve plaintiff from proving that notice of the lien was given.[69]

7. Evidence.[70] Plaintiff must show that the logs were cut in the county where the lien was filed.[71] Where it appears that plaintiff was employed partly in capacities not entitling him to a lien, he must clearly show how much time and labor he spent in the work for which a lien may be claimed.[72] The rules as to the admissibility of evidence in civil actions in general apply to actions to enforce logging liens.[73] The burden of proof is on the purchaser of lumber in possession of a sawyer to show that his lien for sawing had been terminated.[74] The clerk's indorsement on a statement of lien has been held *prima facie* evidence that it was filed;[75] and testimony of the lienor that he had filed the lien notice in the proper office, admitted without objection, is sufficient proof of the recording thereof.[76] A *prima facie* case of non-payment is made out by a judgment-roll showing reduction of the claim to judgment and the establishment of the lien therefor on the logs.[77]

8. Questions For Jury. Whether a levy under a logging lien is excessive is a question of fact for the jury,[78] as is the question as to the amount for which plaintiff is entitled to a lien;[79] but issues not raised by the pleadings are not to be considered by the jury.[80]

9. Verdict and Findings. Where the owner of logs appears to contest a lien claim, one verdict, with special findings under the direction of the court, is sufficient to establish the rights of all parties.[81] Where the verdict is for plaintiff, but is silent as to the existence of a lien, it will be presumed that the jury found no lien.[82]

63. Maris *v.* Clevenger, 29 Wash. 395, 69 Pac. 1089.

64. Cross *v.* Dore, 20 Wash. 121, 54 Pac. 1003.

65. Cross *v.* Dore, 20 Wash. 121, 54 Pac. 1003.

66. Lumbert *v.* Lumbert, 44 Me. 85. But see McPheters *v.* Lumbert, 41 Me. 469.

67. Lumbert *v.* Lumbert, 44 Me. 85.

68. Parks *v.* Crockett, 61 Me. 489.

69. Clark *v.* Adams, 33 Mich. 159, statutory provision.

70. Evidence generally see Evidence.

71. Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

72. Glover *v.* Hynes Lumber Co., 94 Wis. 457, 69 N. W. 62.

73. See, generally, Evidence.

Scale bills accompanied by a certificate of the surveyor-general stating, as required by Minn. St. (1894) § 2402, the amount due him thereon, and that he scaled the logs, timber, or lumber, relying upon the lien, and that he claimed a lien thereon for the amount thereof and costs of collection, are competent evidence. Lindsay, etc., Co. *v.* Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 L. ed. 400.

Evidence of title.— Evidence is admissible on behalf of interveners to show title to the land from which the timber which is the subject of the lien has been taken (Cook *v.* Cook, 106 Mich. 164, 64 N. W. 12); but evidence that the title to the property, which is the product of the claimant's labor, is in another than the person with whom he contracted to do the work, is inadmissible (Moody *v.* Travis, 76 Ga. 832).

Due-bills delivered by the employer to each plaintiff are *prima facie* evidence of the amounts due them. Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

74. Germain *v.* Central Lumber Co., 116 Mich. 245, 74 N. W. 644.

75. Minton *v.* Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857, in which it was so held, although the clerk was absent from his office when the statement was delivered to him.

76. Mason *v.* McGee, 15 Wash. 272, 46 Pac. 237.

77. Livingstone *v.* Lovgren, 27 Wash. 102, 67 Pac. 599.

78. Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379.

79. Mencry *v.* Backus, 107 Mich. 329, 65 N. W. 235.

80. Hyde *v.* German Nat. Bank, 115 Wis. 170, 91 N. W. 230.

81. Lumbert *v.* Lumbert, 44 Me. 85.

82. Kieldsen *v.* Wilson, 77 Mich. 45, 43 N. W. 1054. *Contra*, see Hawkins *v.* Chambliss, 120 Ga. 614, 48 S. E. 169; Eubanks *v.* West, 119 Ga. 804, 47 S. E. 194.

10. Judgment[83] — a. In Attachment Suits. A valid judgment *in rem* must be obtained against the property in order to enforce a lien on logs not belonging to the persons for whom the services were rendered.[84] A personal judgment may be rendered, however, although no judgment *in rem* is proper because there is no lien.[85] On the other hand a judgment *in rem* may be proper, although no personal judgment can be rendered against the owner.[86] The record of a judgment *in rem* against logs not belonging to the persons for whom the services were rendered must show that the logs are the same which the writ commanded to be attached, and which were attached and returned by the officer.[87] It must also show that the labor was embraced within the class for which a lien may be asserted,[88] since a judgment *in rem* is invalid where it includes non-lien claims.[89] A single *in rem* judgment against both fire-wood and lumber is proper, although the laborer's lien on lumber and that on fire-wood were established at different times by different legislatures, where the two liens have accrued from the performance of labor in cutting fire-wood and lumber, and sawing and piling it.[90] A judgment may be in form against the personal defendant and against the logs.[91] A judgment *in rem* is not proper on default, in the absence of an answer, where the complaint does not pray therefor.[92] And the judgment cannot include an item of indebtedness not mentioned in the lien statement,[93] nor exceed the amount claimed in such lien claim.[94]

b. In Foreclosure Suits. Where the lien is enforced in a foreclosure suit, no decree of foreclosure can be entered where the logs have been cut into lumber, and otherwise disposed of, so as not to be capable of identification;[95] but the court may impress a lien on the purchase-money where the logs have been sold.[96] It seems that the decree may include an alternative personal decree against a defendant claimant who has made himself liable by interference with the logs.[97] A recovery of costs may be precluded by failure to demand payment before commencement of the suit.[98] A statute providing for the allowance of a reasonable attorney's fee for each person claiming a lien has been held constitutional.[99]

11. Execution[1] — a. Necessity and Sufficiency of Writ. To make the lien effectual it must be pursued to final judgment, and sale on execution.[2] The execution is usually required, in addition to the ordinary commands, to contain a command that the logs or lumber on which the lien exists be sold to satisfy the judgment.[3] Where the attachment merely authorizes a seizure of the goods of defendant who was not the owner of the logs or lumber on which the services

83. Judgment generally see JUDGMENTS.

84. Thompson *v.* Gilmore, 50 Me. 428. See also Annis *v.* Gilmore, 47 Me. 152.

85. Demars *v.* Conrad, 73 Mich. 151, 40 N. W. 799; Shaw *v.* Bradley, 59 Mich. 199, 26 N. W. 331; Dorothy *v.* Peck, 74 Wis. 210, 42 N. W. 247; McKenzie *v.* Peck, 74 Wis. 208, 42 N. W. 247. *Compare* Clark *v.* Adams, 33 Mich. 159.

86. See Ferguson Lumber Co. *v.* Low, (Ark. 1891) 17 S. W. 879.

87. Thompson *v.* Gilmore, 50 Me. 428.

88. Backus *v.* Barber, 107 Mich. 468, 65 N. W. 379.

89. Kelley *v.* Kelley, 77 Me. 135; Bicknell *v.* Trickey, 34 Me. 273.

90. Ouelette *v.* Pluff, 93 Me. 168, 44 Atl. 616.

91. Bean *v.* Ayers, 70 Me. 421.

92. Dorothy *v.* Peck, 74 Wis. 210, 42 N. W. 247; McKenzie *v.* Peck, 74 Wis. 208, 42 N. W. 247.

93. Carver *v.* Bagley, 79 Minn. 114, 81 N. W. 757.

94. Chesley *v.* De Graff, 35 Minn. 415, 29 N. W. 167.

95. Grays Harbor Boom Co. *v.* Lytle Logging, etc., Co., 36 Wash. 151, 78 Pac. 795.

96. Grays Harbor Boom Co. *v.* Lytle Logging, etc., Co., 36 Wash. 151, 78 Pac. 795.

97. See Garneau *v.* Port Blakely Mill Co., 8 Wash. 467, 36 Pac. 463.

98. Fraser *v.* Rutherford, 26 Wash. 658, 67 Pac. 366, holding that the fact that the claim was denied and litigated after the commencement of the suit did not obviate the necessity for such demand.

99. Ivall *v.* Willis, 17 Wash. 645, 50 Pac. 467.

1. Execution generally see EXECUTIONS.

2. Robinson *v.* Bunker, 38 Me. 130.

Sale under attachment.— The sheriff cannot sell the logs or lumber levied on pending the suit by the lienor to enforce his lien and before the owners have been given notice of the suit. Hinckley *v.* Gilmore, 49 Me. 59.

3. See Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006, where execution

have been performed, the execution issued will not authorize a sale of the logs or lumber to satisfy the lien claim.[4] The execution should describe the logs, but is not void where it merely describes them as the logs mentioned in the declaration.[5] It is not a fatal defect that the execution calls for a levy on more than the lien covers.[6] The sale of a sawmill may be ordered in mass, although it may be necessary to separate the proceeds of the land and of the mill.[7]

b. Sale and Rights of Purchaser. The lienor may, by statute, be prevented from becoming the purchaser.[8] If the sale is void because of irregularities in entering judgment, the purchaser cannot recover the property in replevin from a purchaser at a subsequent execution sale.[9] If the original owner of the logs is not made a party to the lien proceedings, he may avail himself of the remedy in equity, after he has tendered the purchaser at the execution sale the amount bid with interest.[10] Where the original owner cannot deliver the logs sold on execution, the purchaser is entitled to recover, in addition to damages for the taking, their full actual value, and not merely the amount of the lien judgment and costs.[11]

VII. CONVERSION OF FLOATING OR STRANDED LOGS.[12]

An action of trover lies for converting floating or stranded logs,[13] as well as other logs.[14] Plaintiff must, however, show either title or right of possession.[15] Where logs are converted while in a river some distance from a market, the measure of damages is their value at the nearest convenient market, less the cost of moving them.[16] The rules applicable to the admissibility of evidence in actions for conversion in general apply equally well to actions for conversion of floating or stranded logs.[17]

was held not invalid for failure to specifically comply with such statutory provision.

4. Cunningham *v.* Buck, 43 Me. 455.

5. Grand Rapids Chair Co. *v.* Runnels, 77 Mich. 104, 43 N. W. 1006.

6. Bennett *v.* Gray, 82 Ga. 592, 9 S. E. 469.

7. Empire Lumber Co. *v.* Kiser, 91 Ga. 643, 17 S. E. 972.

8. Ames *v.* Port Huron Log Driving, etc., Co., 11 Mich. 139, 83 Am. Dec. 731.

9. Upham *v.* Caldwell, 100 Mich. 264, 58 N. W. 1001.

10. Winslow *v.* Urquhart, 44 Wis. 197.

11. Winslow *v.* Urquhart, 44 Wis. 197.

12. **Recovery of double and treble damages** for wrongful cutting and removal of timber see TRESPASS.

13. Eastman *v.* Harris, 4 La. Ann. 193. See also Kimberly *v.* Guilford, 34 Mich. 259, effect of mistake in cutting logs on land of another.

What constitutes conversion see Bellows *v.* Crane Lumber Co., 129 Mich. 560, 89 N. W. 367.

14. See TROVER AND CONVERSION.

15. See, generally, TROVER AND CONVERSION. See also Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691, holding that defendant cannot avail himself of the fact that plaintiffs failed to cut the logs within the time limited by the bill of sale under which they acquired title.

A logging lien claimant not entitled to the possession of logs which have been seized under an attachment, in an action to foreclose a log lien, may nevertheless bring an action for damages against a person wrongfully taking the logs from the possession of the sheriff. Breault *v.* Merrill, etc., Lumber Co., 72 Minn. 143, 75 N. W. 122.

16. Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70.

Where logs converted are cut into firewood by the wrong-doer and then sold, the measure of damage is the value of the timber when cut for fire-wood, less the cost of cutting it up. Eastman *v.* Harris, 4 La. Ann. 193.

Cutting by mistake.— Where the cutting by a trespasser was by mistake and the logs so cut were marked and mingled with the logs owned by the trespasser, and thereafter the landowner peaceably took possession of a quantity of logs while afloat, amounting to the number cut on his land, the cutter was not entitled to recover the difference between the value of the logs when seized while afloat and the value of the stumpage. Arpin *v.* Burch, 68 Wis. 619, 32 N. W. 681.

Measure of damages for conversion of cut logs in general see TROVER AND CONVERSION.

17. See, generally, EVIDENCE; TROVER AND CONVERSION.

Evidence held admissible see Stillwell *v.* Paepcke-Leicht Lumber Co., 73 Ark. 432, 84 S. W. 483, 108 Am. St. Rep. 42 (evidence of difference between the value of the logs converted when floating in the river and when lodged in the pond, where they were converted); Seymour *v.* Bruske, 140 Mich. 244, 103 N. W. 613, 104 N. W. 691 (evidence of the number of logs put into the water by plaintiffs, the number accounted for, and the percentage to be deducted for the loss of sunken logs and the loss in towing and otherwise, in order to show approximately the

VIII. PENALTIES AND OFFENSES.[18]

In some of the states various acts relating to logs or timber are by special provisions of the legislature made punishable by penalty or by imprisoment.[19] Among other things such statutes have been directed against the unlawful taking of logs from a river,[20] the floating of loose logs,[21] the destruction or change of the brand on the logs of another person,[22] or the cutting of timber on the land of another;[23]

logs probably converted by defendant); Hodson *v.* Goodale, 22 Oreg. 68, 29 Pac. 70 (parol evidence of plaintiff's ownership and possession of the land from which the logs were taken, and evidence of the number of the logs of the brand put into the river); Walker *v.* Duncan, 68 Wis. 624, 32 N. W. 689 (testimony to show the quantity converted).

Evidence held inadmissible see Miles *v.* North Pac. Lumber Co., 38 Oreg. 556, 64 Pac. 303.

Weight and sufficiency of evidence see Snyder *v.* East Bay Lumber Co., 135 Mich. 31, 97 N. W. 49, evidence as to value; testimony of defendant as to the amount actually purchased not conclusive as against opinions of others.

Sufficiency of proof of wrongful taking.— Miles *v.* North Pac. Lumber Co., 38 Oreg. 556, 64 Pac. 303.

18. Criminal law generally see CRIMINAL LAW.

Indictment or information generally see INDICTMENTS AND INFORMATIONS.

Penalty generally see PENALTIES.

19. See the statutes of the several states.

In Iowa the offense of larceny of logs is defined by a statute which provides that in a prosecution for the larceny the finding of the logs in possession of defendant, whether with or without the marks cut out or destroyed, will be presumptive evidence of guilt. It was held thereunder that the finding of marked logs in the possession of defendant of itself raises a presumption of guilt against defendant, but the wrongful taking of the logs and their ownership must be established as in other prosecutions of larceny. State *v.* Loomis, 129 Iowa 141, 105 N. W. 397.

20. See the statutes of the several states.

When log is taken from river.—A log taken "from the bank of a river, twelve or fifteen feet from the water, where grass grew, which was annually mowed, but which was covered by water in freshets of an ordinary height," is not taken from the river, within the meaning of the log act, prescribing a punishment for such offense. State *v.* Adams, 16 Me. 67.

When log is taken "on or near bank."— A recovery of double damages authorized by statute, where logs are taken from a river or on or near the bank, is not permissible where the logs are situated a quarter of a mile from the bank of the river. Parkhurst *v.* Staples, 91 Wis. 196, 64 N. W. 882.

Persons liable.— A purchaser of the logs with knowledge of the unlawful taking is liable, as well as the original wrong-doer. Howes *v.* Shed, 3 Me. 202.

It is not necessary to aver that defendant knew plaintiff to be the owner (Frost *v.* Rowse, 2 Me. 130); but the want of the owner's consent must be alleged (Little *v.* Thompson, 2 Me. 228).

Verdict.— Under a statute making the wilful conversion of floating logs larceny, conviction may be had on a verdict omitting the word "feloniously" therefrom. State *v.* Fackler, 91 Wis. 418, 64 N. W. 1029.

Liability of corporation see CORPORATIONS, 10 Cyc. 1209 note 90.

21. Evans *v.* Com., 7 S. W. 925, 10 Ky. L. Rep. 29 (holding that the statute does not prohibit the setting adrift and collecting of logs cut and hauled to the river before the law went into effect, which have been swept away and scattered by high water); Harrigan *v.* Connecticut River Lumber Co., 129 Mass. 580, 37 Am. Rep. 387 (statute held constitutional).

22. See the statutes of the several states.

An indictment for such offense should allege the name of the owner, the existence and character of the brand, and that the brands were defaced by defendant, and the logs appropriated to his use (Johnson *v.* Com., 20 S. W. 200, 14 Ky. L. Rep. 257), without the consent of the owner (Com. *v.* Asher Lumber Co., 32 S. W. 136, 17 Ky. L. Rep. 542); but it is not necessary to allege the particular county in which the brand was recorded (Com. *v.* Puckett, 92 Ky. 206, 17 S. W. 353, 13 Ky. L. Rep. 547).

23. See the statutes of the several states.

Proof of a criminal intent is necessary to authorize a conviction of cutting timber on the land of another. State *v.* Kempf, 11 Mo. App. 88. See also Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189, holding that an instruction in the language of the statute was proper.

An indictment is sufficient to describe the land from which the timber was cut, where it alleges that the land was not the property of defendant, but was the property of a named person. State *v.* Warren, 13 Tex. 45.

Consent of owner.— Under a statute authorizing the recovery of a penalty for cutting trees on the land of another, wilfully, knowingly, and without the consent of the owner, the burden is on plaintiff to establish want of consent. Davis *v.* Arnold, 143 Ala. 228, 39 So. 141. Sufficiency of evidence of consent of owner see Davis *v.* Arnold, *supra*; Golonbieski *v.* State, 101 Wis. 333, 77 N. W. 189.

and they have also been directed against the cutting of timber without a survey of the land.[24]

LOGICAL RELEVANCY. See LEGAL RELEVANCY; and, generally, EVIDENCE.

LOGMAN. A term sometimes applied to a person employed in transporting or navigating logs.[1] (See, generally, LOGGING.)

LOG-ROLLING. A union of interest to secure legislation;[2] the practice of comprising in one bill subjects of a diverse and antagonistic nature, in order to combine in its support members who were in favor of particular measures, but neither of which measures could command the requisite majority on its own merits;[3] the practice of corrupt combinations of minorities with different interests to force the passage of bills with provisions which could never succeed if they stood on their separate merits.[4] (See, generally, STATUTES.)

LOITER. To be slow in moving; to DELAY, *q. v.*; to HINDER, *q. v.*; to be dilatory; to spend time idly; to saunter; to lag behind.[5]

LOMBARDS. In England, a term sometimes applied to a class of merchants who were said to be bankers and usurers.[6] (See, generally, BANKS AND BANKING; USURY.)

LONDON.[7] In its strict and proper meaning the city of that name.[8] (London: Custom of, see ATTACHMENT.)

Civil action for trespass see TRESPASS.

Cutting timber on public lands see PUBLIC LANDS.

Cutting timber on Indian lands see INDIANS.

Fence rails as *timber* see *supra*, I, B.

Title of owner against inadvertent trespasser where standing timber is converted into a different species of property by addition of labor or materials see ACCESSION, 1 Cyc. 223 note 8.

24. See the statutes of the several states.

What constitutes violation.— A statutory provision that any person desiring to cut timber for sawing into lumber must have the land surveyed by the county surveyor is not violated, although the survey made before the timber was cut was made by a professional surveyor other than the county surveyor, where less favorable to the owner of the land than the official survey made after the timber was cut, and where the timber was cut beyond the limits of the survey. Sawyer, etc., Lumber Co. *v.* State, 75 Ark. 309, 87 S. W. 431.

1. Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 419, 61 N. W. 536, where it is said: "The term 'log man' is a technical term, and may have a signification limiting the range of the duties of the person to whom applied."

2. People *v.* Briggs, 50 N. Y. 553, 558 [*quoted* in Atty.-Gen. *v.* Amos, 60 Mich. 372, 376, 27 N. W. 571].

3. St. Louis *v.* Tiefel, 42 Mo. 578, 590.

It is a well known process by which bills to promote individual interests and mere neighborhood projects often, at the expense of the people of the county at large, were combined together in order to aggregate a sufficient number of votes to carry them all through the legislature (Conner *v.* New York, 2 Sandf. (N. Y.) 355, 361 [*quoted* in O'Leary *v.* Cook County, 28 Ill. 534, 542]); a term used to designate the legislative practice of embracing in one bill several distinct matters, none of which perhaps would singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all (Walker *v.* Griffith, 60 Ala. 361, 369); a practice by which a number of different and disconnected subjects are united in one bill, and then carried through by a combination of interests (Johnson *v.* Harrison, 47 Minn. 575, 577, 50 N. W. 923, 28 Am. St. Rep. 382).

4. Com. *v.* Barnett, 199 Pa. St. 161, 172, 48 Atl. 976, 50 L. R. A. 882.

5. Stephens *v.* District of Columbia, 16 App. Cas. (D. C.) 279, 281.

6. 4 Coke Inst. 277 [*cited* in Sackett *v.* Andross, 3 N. Y. Leg. Obs. 11, 18].

7. "London Gazette" see Reg. *v.* Lowe, 15 Cox C. C. 286, 287, 47 J. P. 535, 52 L. J. M. C. 122, 48 L. T. Rep. N. S. 768.

"London right," as applied to a drama, a term which means the right to produce it in London. Taylor *v.* Neville, 47 L. J. Q. B. 254, 256, 38 L. T. Rep. N. S. 50, 26 Wkly. Rep. 255.

8. Hudson *v.* Tooth, 3 Q. B. D. 46, 51, 47 L. J. Q. B. 18, 37 L. T. Rep. N. S. 462, 26 Wkly. Rep. 95; Mallan *v.* May, 9 Jur. 19, 20, 14 L. J. Exch. 48, 13 M. & W. 511. See also Sergeant *v.* Dale, 2 Q. B. D. 558, 568, 46 L. J. Q. B. 781, 37 L. T. Rep. N. S. 153; Coventry *v.* London, etc., R. Co., L. R. 5 Eq. 104, 109, 37 L. J. Ch. 90, 17 L. T. Rep. N. S. 368, 16 Wkly. Rep. 267; Wallace *v.* Atty.-Gen., 33 Beav. 384, 389, 10 Jur. N. S. 249, 33 L. J. Ch. 314, 10 L. T. Rep. N. S. 51, 12 Wkly. Rep. 506, 55 Eng. Reprint 416. But *compare* Beckford *v.* Crutwell, 5 C. & P. 242, 243, 1 M. & Rob. 187, 24 E. C. L. 546,

LONE ENGINE. A locomotive not hauling any cars, except its own tender.[9] (See ENGINE; LOCOMOTIVE; and, generally, RAILROADS.)

LONG. Having duration or extent in time;[10] extended, drawn out in a line, or in the direction of length, opposed to "short," and contra-distinguished from "broad" or "wide."[11] (Long: Account — As Ground for Reference, see REFERENCES; Jurisdiction Respecting, see ACCOUNTS AND ACCOUNTING; EQUITY. And Short Haul, see CARRIERS. See also LONGS.)

LONGA PATIENTIA TRAHITUR AD CONSENSUM. A maxim meaning "Long sufferance is construed as consent."[12]

LONGA POSSESSIO EST PACIS JUS. A maxim meaning "Long possession is the law of peace."[13]

LONGA POSSESSIO PARIT JUS POSSIDENDI, ET TOLLIT ACTIONEM VERO DOMINO. A maxim meaning "Long possession produces the right of possession, and takes away from the true owner his action."[14]

LONGEVITY. Length of life.[15] (Longevity: Evidence Concerning, see EVIDENCE. Pay, see ARMY AND NAVY.)

LONGS. A term used in the language of boards of trade, stock exchanges, etc., to designate the buyers of commodities for future delivery, who, by reason of the fact that there is a much greater quantity of such commodities sold for such future delivery than can be purchased in the markets, are said to have procured a corner on the market, and by insisting on delivery of the commodity run up the prices to a fictitious point.[16] (See CORNER.)

LONGUM EST ITER PER PERCEPTA; BREVE ET EFFICAX PER STATUTA. A maxim meaning "The way is long that is marked out by precepts; short and certain when indicated by statutes."[17]

where it is said that the word "London" is a *nomen collectivum* and may include not the city merely but more.

9. Kielbeck *v.* Chicago, etc., R. Co., 70 Nebr. 571, 97 N. W. 750.

10. Century Dict. See also Modlin *v.* Kennedy, 53 Ind. 267, 268; Worden *v.* Humeston, etc., R. Co., 72 Iowa 201, 205, 33 N. W. 629; Ingraham *v.* Hough, 46 N. C. 39, 43.

"Long swings" is the term used in the postal service to designate intervals of time of considerable length between the time of the closing of one mail delivery and the commencing of the next subsequent delivery, such interval being the carrier's own time, for which he is entitled to receive no compensation. King *v.* U. S., 32 Ct. Cl. 234, 238.

"Long yearlings" is a term applied to cattle after they enter the second year and before completing it. Sparks *v.* Paris Deposit Bank, 115 Ky. 461, 465, 74 S. W. 185, 24 Ky. L. Rep. 2333, 78 S. W. 171, 25 Ky. L. Rep. 1481.

Longer: Period see Wegner *v.* Lubenow, 12 N. D. 95, 99, 95 N. W. 442. Time see Downing *v.* Funk, 5 Rawle (Pa.) 69, 73.

Longest liver see Bulkley *v.* Bulkley, 1 Root (Conn.) 78, 79; Devenish *v.* Smith, 1 Harr. & M. (Md.) 148.

"Longest period" see *In re* Foster, 9 Fed. Cas. No. 4,962, 3 Ben. 386, 389.

11. Webster Dict. [*quoted* in Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579, 585], where it is said: "Long is a relative term; for a thing may be long in respect to one thing, and short in respect to another."

Long: Account see Prentice *v.* Huff, 98 N. Y. App. Div. 111, 114, 90 N. Y. Suppl. 780; Doyle *v.* Metropolitan El. R. Co., 1 Misc. (N. Y.) 376, 381, 20 N. Y. Suppl. 865; Ross *v.* New York, 2 Abb. Pr. N. S. (N. Y.) 266; Dickinson *v.* Mitchell, 19 Abb. Pr. (N. Y.) 286, 287; Druse *v.* Horter, 57 Wis. 644, 648, 16 N. W. 14. Line see Stevenson *v.* Michigan Log Towing Co., 103 Mich. 412, 417, 61 N. W. 536. Price see Moore *v.* Des Arts, 1 N. Y. 359, 363, a term which includes the amount of duties paid, and carries to the purchaser the right to the drawback. Transactions see Baldwin *v.* Flagg, 36 N. J. Eq. 48, 56, those transactions where an order is given to a broker to buy, where the broker receives an order to credit the account with certain stocks. Wall work see Chicago, etc., Coal Co. *v.* Peterson, 39 Ill. App. 114, 115, a term used to designate a manner of operating a coal mine in which the coal is all taken out as the work progresses. Weight see Jones *v.* Giles, 10 Exch. 119, 127, a phrase perfectly well known to mean tons of twenty hundred weight of one hundred twenty pounds each.

12. Bouvier L. Dict. [*citing* Fleta, lib. 4, c. 26, § 4].

13. Burrill L. Dict. [*citing* Branch Princ.; Coke Litt. 6].

14. Black L. Dict. [*citing* Coke Litt. 110b].

15. Webster Int. Dict.

16. Kent *v.* Miltenberger, 13 Mo. App. 503, 506. See also Baldwin *v.* Flagg, 36 N. J. Eq. 48, 56.

17. Peloubet Leg. Max.

LONGUM TEMPUS ET LONGUS USUS QUI EXCEDIT MEMORIA HOMINUM SUFFICIT PRO JURE. A maxim meaning "Long time and long use, exceeding the memory of men, suffices for right."[18]

LOOK. To keep watch; to be careful; to take heed.[19]

LOOK AFTER. To watch after.[20] (See Look.)

LOOK AND LISTEN. See Railroads.

LOOKING-GLASS. A term which may include a barber's mirror.[21]

LOOKOUT. Some one in a favorable position to see, stationed near enough to the helmsman to communicate with him and receive communications from him, and exclusively employed in watching the movements of vessels which they are meeting or about to pass.[22] (Lookout: Affecting Liability For — Collision, see Collision; Injury by Train, see Railroads.)

LOOM. The word may, according to the connection, include not merely the framework, but all that is necessary for weaving.[23]

LOOSE. Free from all control;[24] not fixed, or its equivalents; not stationary, or susceptible of motion;[25] of unchaste character.[26] (See Chaste; Chastity; Fast; Free.)

LOP. To cut off.[27]

LOPPINGS. The fruit of trees, together with the usual trimmings.[28]

LOPWOOD. A right in the inhabitants of a parish within a manor, in England, to lop for fuel at certain periods of the year, the branches of trees growing upon the waste lands of the manor.[29]

LOQUENDUM UT VULGUS, SENTIENDUM UT DOCTI. A maxim meaning "We must speak as the common people, we must think as the learned."[30]

LORD PARAMOUNT. A term used in the feudal system to designate the king.[31]

LORD'S DAY. Sunday.[32]

LOSE.[33] Casually and involuntarily to part with the possession, so that the mind has no impress of, and can have no recourse to, the event.[34] (See Loss.)

18. Black L. Dict. [*citing* Coke Litt. 115*a*].

19. Century Dict.

20. Webster Dict. [*quoted* in Jeffries *v.* State, 61 Ark. 308, 311, 32 S. W. 1080].

21. Terry *v.* McDaniel, 103 Tenn. 415, 420, 53 S. W. 732, 46 L. R. A. 559.

"Looking-glass plates" see Herrman *v.* U. S., 62 Fed. 149, 150.

22. The Genesee Chief *v.* Fitzhugh, 12 How. (U. S.) 443, 462, 13 L. ed. 1058. See also Reed *v.* The New Haven, 20 Fed. Cas. No. 11,649, 18 How. Pr. (N. Y.) 482, 485; Gosling *v.* Green, [1893] 1 Q. B. 109, 111.

23. Cort *v.* Sagar, 3 H. & N. 370, 372, 27 L. J. Exch. 378.

24. Sherborn *v.* Wells, 3 B. & S. 784, 786, 9 Jur. N. S. 1104, 32 L. J. M. C. 179, 8 L. T. Rep. N. S. 274, 11 Wkly. Rep. 594, 113 E. C. L. 783.

25. Fry *v.* Shipley, 94 Tenn. 252, 259, 29 S. W. 6.

"Loose rock," and "solid rock" see Spaulding *v.* Cœur D'Alene, R., etc., Co., 5 Ida. 528, 531, 51 Pac. 408.

26. Foster *v.* Hanchett, 68 Vt. 319, 320, 35 Atl. 316, 54 Am. St. Rep. 886.

27. Unwin *v.* Hanson, [1891] 2 Q. B. 115, 118, 120, 55 J. P. 662, 60 L. J. Q. B. 53, 65 L. T. Rep. N. S. 511, 39 Wkly. Rep. 587, distinguishing "lopping" from "topping" of trees. Lemmon *v.* Webb, [1895] A. C. 1, 3, 59 J. P. 564, 64 L. J. Ch. 205, 71 L. T. Rep. N. S. 647, 11 Reports 116.

28. Elliot *v.* Smith, 2 N. H. 430, 431.

29. Sweet L. Dict. See also Willingale *v.* Maitland, L. R. 3 Eq. 103, 110, 36 L. J. Ch. 64, 15 Wkly. Rep. 83; Chilton *v.* London, 7 Ch. D. 735, 744, 745, 47 L. J. Ch. 433, 38 L. T. Rep. N. S. 498, 26 Wkly. Rep. 474.

30. Burrill L. Dict.

Applied in Calvin's Case, 7 Coke 1, 11*b*. See also Reg. *v.* Sauer, 3 Brit. Col. 308, 309.

31. Opinion of Justices, 66 N. H. 629, 636, 33 Atl. 1076. See also De Peyster *v.* Michael, 6 N. Y. 467, 495, 57 Am. Dec. 470.

32. See, generally, Sunday. See also Fox *v.* Abel, 2 Conn. 541, 549 (as not including Saturday and Sunday nights); Com. *v.* Newton, 8 Pick. (Mass.) 234 (where "Lord's day or evening" meant Sunday and the evening immediately following Sunday on that day, and not the evening immediately preceding Sunday).

33. Distinguished from "abandonment."—Ferguson *v.* Ray, 44 Oreg. 557, 564, 77 Pac. 600, 102 Am. St. Rep. 648, 1 L. R. A. N. S. 477.

34. Ferguson *v.* Ray, 44 Oreg. 557, 564, 77 Pac. 600, 102 Am. St. Rep. 648, 1 L. R. A. N. S. 477; Lawrence *v.* State, 1 Humphr. (Tenn.) 228, 232, 34 Am. Dec. 644 [*quoted* in Livermore *v.* White, 74 Me. 452, 457, 43 Am. Rep. 600; Sovern *v.* Yoran, 16 Oreg. 269, 274, 20 Pac. 100, 8 Am. St. Rep. 293].

It implies an inability to retain, or to recover, or an involuntary deprivation of, the thing which one is deprived of. Webster Unabr. Dict. [*cited* in Shafer *v.* Senseman, 125 Pa. St. 310, 316, 17 Atl. 350].

Lose: A hand see Sisson *v.* Supreme Ct. of

LOSS.[35] Deprivation,[36] detriment or forfeiture;[37] DAMAGE,[38] *q. v.*; damages.[39] Its meaning is often governed by the context.[40] (Loss: Of Services — Action For, see PARENT AND CHILD; SEDUCTION.)

LOSS OF CONSORTIUM. A deprivation of the full society, affection, and assistance to which a wife is entitled.[41] (See, generally, HUSBAND AND WIFE.)

LOST.[42] A thing is lost when it cannot be found, or when ordinary vigilance will not regain it.[43] (Lost: Animal, see ANIMALS. Goods — Appropriation of,

Honor, 104 Mo. App. 54, 60, 78 S. W. 297, 299. "The negro's lost time" see Barlow *v.* Lambert, 28 Ala. 704, 710, 65 Am. Dec. 374.

Losing: A limb see Bigham *v.* Clubb, (Tex. Civ. App. 1906) 95 S. W. 675, 677. Party see Bangor, etc., R. Co. *v.* Chamberlain, 60 Me. 285, 286.

35. **Distinguished from:** "Indemnity" see Rice *v.* National Credit Ins. Co., 164 Mass. 285, 286, 41 N. E. 276. "Injury" see Nelson *v.* Great Northern R. Co., 28 Mont. 297, 318, 72 Pac. 642. "Liability" see Stephenson *v.* London, etc., Ins. Co., 116 Wis. 277, 283, 93 N. W. 19. *Compare* State *v.* Pittsburg, etc., R. Co., 68 Ohio St. 9, 30, 67 N. E. 93, 96 Am. St. Rep. 635, 64 L. R. A. 405. "Personal injury" see Haigh *v.* Royal Mail Steam Packet Co., 52 L. J. Q. B. 640, 643, 49 L. T. Rep. N. S. 802; The Franconia, 2 P. D. 163, 175.

36. Meadowcroft *v.* People, 163 Ill. 56, 81, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Queenan *v.* Palmer, 117 Ill. 62, 619, 629, 7 N. E. 470, 613; State *v.* Beach, (Ind. 1896) 43 N. E. 949, 953.

37. Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 123, 44 N. W. 1055.

38. Daniel *v.* Hunt, 77 Ala. 567, 570; Chippewa Lumber Co. *v.* Phenix Ins. Co., 80 Mich. 116, 123, 44 N. W. 1055; Fay *v.* Parker, 53 N. H. 342, 16 Am. Rep. 270.

39. Stephenson *v.* Agricultural Ins. Co., 116 Wis. 277, 283, 93 N. W. 19.

40. In some instances it may mean that which can never be recovered, and in others that which is simply withheld or that of which a party is dispossessed. Meadowcroft *v.* People, 163 Ill. 56, 81, 45 N. E. 303, 54 Am. St. Rep. 447, 35 L. R. A. 176; Queenan *v.* Palmer, 117 Ill. 62, 619, 629, 7 N. E. 470, 613; State *v.* Beach, (Ind. 1896) 43 N. E. 949, 953.

When applied to the business of a partnership, it refers to the diminution or depreciation of capital. Eastwood *v.* McNulty, 44 How. Pr. (N. Y.) 392, 396.

Loss: "Accrues" see Steen *v.* Niagara F. Ins. Co., 61 How. Pr. (N. Y.) 144, 146. "Arising from petroleum" see Imperial F. Ins. Co. *v.* Fargo, 95 U. S. 227, 231, 24 L. ed. 428. "By bursting of boilers" see Roe *v.* Columbus Ins. Co., 17 Mo. 301, 303. "By . . . explosion" see St. John *v.* American Mut. F. & M. Ins. Co., 11 N. Y. 516, 518. "By fire" see New Orleans Mut. Ins. Co. *v.* New Orleans, etc., R. Co., 20 La. Ann. 302, 304; Davis *v.* Insurance Co. of North America, 115 Mich. 382, 385, 73 N. W. 393; Brady *v.* Northwestern Ins. Co., 11 Mich. 425, 445; Pentz *v.* Ætna F. Ins. Co., 9 Paige (N. Y.) 568, 572. "By fire or wetting" see The Roanoke, 53 Fed. 270, 271. "By theft" see Leiber *v.* Liverpool L., etc., Ins. Co., 6 Bush (Ky.) 639, 641, 99 Am. Dec. 695. "Of an arm" see Garcelon *v.* Commercial Travelers' Eastern Acc. Assoc., 184 Mass. 8, 11, 67 N. E. 868, 100 Am. St. Rep. 540. "Of earnings" see Slaughter *v.* Metropolitan St. R. Co., 116 Mo. 269, 275, 23 S. W. 760. "Of feet" see Sheanon *v.* Pacific Mut. L. Ins. Co., 77 Wis. 618, 621, 46 N. W. 799, 20 Am. St. Rep. 151, 9 L. R. A. 685. "Of goods by fire" see Merchants' Dispatch Transp. Co. *v.* Hoslins, 41 S. W. 31, 44 S. W. 362, 19 Ky. L. Rep. 799. "Of sight" see Humphreys *v.* National Ben. Assoc., 139 Pa. St. 264, 271, 20 Atl. 1047, 11 L. R. A. 564. "Of society" see McVeigh *v.* Gentry, 72 N. Y. App. Div. 598, 599, 76 N. Y. Suppl. 535. "Or damage by fire" see Scripture *v.* Lowell Mut. F. Ins. Co., 10 Cush. (Mass.) 356, 357, 57 Am. Dec. 111; Kentucky Bank *v.* Adams Express Co., 93 U. S. 174, 181, 23 L. ed. 872. "Or damage occasioned by causes beyond his control" see Compania de Navigacion La Flecha *v.* Braner, 168 U. S. 104, 123, 18 S. Ct. 12, 42 L. ed. 398. "Sustained by the insolvency of debtors" see People *v.* Mercantile Credit Guarantee Co., 166 N. Y. 416, 419.

41. Angell *v.* Reynolds, 26 R. I. 160, 58 Atl. 625, 105 Am. St. Rep. 707.

42. **Distinguished from "wrecked"** see Collard *v.* Eddy, 17 Mo. 354, 355.

43. State Sav. Bank *v.* Buhl, 129 Mich. 193, 195, 88 N. W. 471, 56 L. R. A. 944. See also Sovern *v.* Yoran, 16 Oreg. 269, 278, 20 Pac. 100, 8 Am. St. Rep. 293.

When applied to a ship, is understood to mean "lost at sea." It would be unusual, if not unheard of, to speak of a ship, under any circumstances, as lost at her wharf. Portland Flouring-Mills Co. *v.* Weir, 95 Fed. 997, 1000. To the same effect is Delaware Mut. Safety Ins. Co. *v.* Gossler, 7 Fed. Cas. No. 3,766, Holmes 475, 480 [*quoting* Broomfield *v.* Southern Ins. Co., L. R. 5 Exch. 192, 39 L. J. Exch. 186, 22 L. T. Rep. N. S. 371, 18 Wkly. Rep. 810]. *Compare* Bennett *v.* Garlock, 10 Hun (N. Y.) 328, 338.

Something accidentally left or forgotten is not properly speaking lost. State *v.* Cummings, 33 Conn. 260, 264, 89 Am. Dec. 208; Livermore *v.* White, 74 Me. 452, 456, 43 Am. Rep. 600; Kincaid *v.* Eaton, 98 Mass. 138, 141; Belote *v.* State, 36 Miss. 96, 120, 72 Am. Dec. 163; Hoagland *v.* Forest Park Highlands Amusement Co., 170 Mo. 335, 342, 70 S. W. 878, 94 Am. St. Rep. 740; State *v.* McCann, 19 Mo. 249, 252; Loucks *v.* Gallogly, 1 Misc. (N. Y.) 22, 24, 23 N. Y. Suppl. 126; Pritchett *v.* State, 2 Sneed (Tenn.) 285, 288, 62 Am. Dec. 468.

"Lost art" is a term which is applicable

see LARCENY; By Confusion, see CONFUSION OF GOODS; Finding, see FINDING LOST GOODS; Reward for Recovery of, see REWARDS; Sale of, see SALES. Instrument, see LOST INSTRUMENTS. Log, see LOGGING. Vessel, see SHIPPING.)

peculiarly to certain monuments of antiquity still remaining in the world, the process of whose accomplishment has been lost for centuries, has been irretrievably swept from the earth, with every vestige of the archives or records of the nations with whom those arts existed, and the origin or even the identity of which process none can certainly establish. Gayler *v.* Wilder, 10 How. (U. S.) 477, 507, 13 L. ed. 504.

"**Lost boundary**" is a boundary which has lost its distinctive character as such by removal, displacement, decay, or change, so that it no longer answers the purpose of a bound in defining the true line between the tracts. Perry *v.* Pratt, 31 Conn. 433, 442.

"**Lost or damaged**" see Garnett *v.* Willan, 5 B. & Ald. 5357, 24 Rev. Rep. 276, 7 E. C. L. 41.

"**Lost or not lost**" see Hooper *v.* Robinson, 98 U. S. 528, 529, 25 L. ed. 219; Mercantile Mut. Ins. Co. *v.* Folsom, 18 Wall. (U. S.) 237, 251, 21 L. ed. 827; Merchants Mut. Ins. Co. *v.* Lyman, 15 Wall. (U. S.) 664, 670, 21 L. ed. 246.

"**Lost grant**" see Boyce *v.* Missouri Pac. R. Co., 168 Mo. 583, 590, 68 S. W. 920, 58 L. R. A. 442. See also 14 Cyc. 1145.

LOST INSTRUMENTS

By Lucius W. Hoyt
Dean of the University of Denver School of Law

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CROSS-REFERENCES

For Matters Relating to:
Loss of Instrument:
As Excuse For Delay in Suing, see EQUITY.
By Conversion, see TROVER AND CONVERSION.
Lost Instrument:
Acknowledgment of, see ACKNOWLEDGMENTS.
Adverse Possession Under, see ADVERSE POSSESSION.
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Best and Secondary Evidence of, see EVIDENCE.
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Will, see WILLS.

I. EFFECT OF LOSS ON OBLIGATION OF PARTIES.

The loss or destruction of a written instrument in no way affects the liabilities of the parties to it,[1] or changes the nature of the demand. In case of the loss of

1. *California.*— Bagley *v.* Eaton, 10 Cal. 126.
Connecticut.— Hinsdale *v.* Miles, 5 Conn. 331.
Illinois.—Hoereth *v.* Franklin Mill Co., 30 Ill. 151.
Louisiana.— Wade *v.* New Orleans Canal, etc., Co., 8 Rob. 140, 41 Am. Dec. 296; Mayor *v.* Caldwell, 14 La. 499, holding that a purchaser of negotiable city bonds which have been lost cannot, because of the loss, claim new bonds or the rescission of the sale, in a suit on his notes given for the bonds, because the loss did not diminish the city's obligation.
Minnesota.— Homberg *v.* Kikhaffer, 43 Minn. 205, 45 N. W. 154, as to a note destroyed by a third person.

a check the holder may maintain action thereon against the drawer, proper steps having been taken to fix the drawer's liability, and after sufficient indemnity having been tendered.[2] But to fix the liability of the indorser of a lost negotiable instrument, presentment of a copy to the person primarily liable is sufficient,[3] and he is discharged from liability if presentment of a copy or a written description of the instrument and a tender of indemnity is not made.[4] The maker of a negotiable instrument should require the person who presents it to show that he is the *bona fide* purchaser before maturity;[5] and if the maker of a promissory note, payable to bearer, pays it after being notified that it has been stolen, without any inquiry as to the title of the holder, he is liable to the true owner.[6]

II. REMEDIES.

A. Equitable Jurisdiction — 1. In General. It has long been well settled that courts of equity have jurisdiction to establish lost instruments,[7] and those courts are not deprived of jurisdiction by reason of the fact that courts of law have assumed, or by statute have been given, the same jurisdiction;[8] and although a court of law would have afforded the same relief by admitting parol evidence of the contents of the lost instrument.[9] It has also been held that where secondary

Canada.— Litman *v.* Montreal City, etc., Sav. Bank, 13 Quebec Super. Ct. 262.

See 33 Cent. Dig. tit. "Lost Instruments," § 1.

2. Shipsey *v.* Bowery Nat. Bank, 36 N. Y. Super. Ct. 501; Jacks *v.* Darrin, 3 E. D. Smith (N. Y.) 548. See also BANKS AND BANKING, 5 Cyc. 550, text and note 51.

3. Hinsdale *v.* Miles, 5 Conn. 331.

4. Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419. See also BANKS AND BANKING, 7 Cyc. 1122.

Non-liability of indorser and accepter.— But it has been held that the holder of a lost negotiable instrument cannot maintain an action against the indorser because, if the indorser pays, he is entitled to take the instrument up and in turn sue his indorser or negotiate it again. Tuttle *v.* Standish, 4 Allen (Mass.) 481, 81 Am. Dec. 712. See also McGregory *v.* McGregory, 107 Mass. 543. And it has also been held that an accepter is not liable upon a lost instrument for the reason that he in case of payment is entitled to the instrument as a voucher; that the same reasons applied in Tuttle *v.* Standish, *supra*, which was at law, apply in equity, although if the drawer were a party to the suit the difficulty might be overcome. Savannah Nat. Bank *v.* Haskins, 101 Mass. 370, 3 Am. Rep. 373. See also McGregory *v.* McGregory, 107 Mass. 543. And see *infra*, II, D, 2.

5. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153.

6. Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297.

Where the maker of a negotiable bond has been notified of its loss and thereafter paid some interest coupons at maturity without inquiring as to the title of the party to whom the money was paid, the owner may recover the amount from the maker. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153. See also *infra*, II, E, 4. And see COMMERCIAL PAPER, 7 Cyc. 955 note 18.

7. Bohart *v.* Chamberlain, 99 Mo. 622, 13 S. W. 85; Allen *v.* State Bank, 21 N. C. 3.

Destroyed instrument. — The jurisdiction of equity in cases of lost bonds exists also in cases of bonds which have been destroyed. Crosse *v.* Bedingfield, 5 Jur. 836, 10 L. J. Ch. 219, 12 Sim. 35, 35 Eng. Ch. 31, 59 Eng Reprint 1043; Frontenac County *v.* Breden, 17 Grant Ch. (U. C.) 645.

Ancillary remedy.—Originally there was no relief at common law or in equity to decree the reëxecution of a deed, except as an ancillary remedy to some other relief, as ejectment or to enjoin a recovery and the like. Jones *v.* Ballou, 139 N. C. 526, 52 S. E. 254; McCormick *v.* Jernigan, 110 N. C. 406, 14 S. E. 971.

8. *Alabama.*—Crawford *v.* Childress, 1 Ala. 482; Tindall *v.* Childress, 2 Stew. & P. 250.

Georgia.— Fulgham *v.* Pate, 77 Ga. 454; Hardeman *v.* Battersby, 53 Ga. 36.

New Hampshire.— Hill *v.* Barney, 18 N. H. 607.

New Jersey.— Reeves *v.* Morgan, 48 N. J. Eq. 415, 21 Atl. 1040; Force *v.* Elizabeth, 27 N. J. Eq. 408.

Oregon.— Howe *v.* Taylor, 6 Oreg. 284.

Virginia.— Shields *v.* Com., 4 Rand. 541.

West Virginia. — Hall *v.* Wilkinson, 35 W. Va. 167, 12 S. E. 1118; Mitchell *v.* Chancellor, 14 W. Va. 22; Hickman *v.* Painter, 11 W. Va. 386.

See 33 Cent. Dig. tit. "Lost Instruments," § 8.

The statutory remedy before the clerk to establish a lost deed and the jurisdiction of the superior court are cumulative. Jones *v.* Ballou, 139 N. C. 526, 52 S. E. 254.

9. Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351. It has been held, however, that if the courts of law have been given power to establish lost instruments, courts of equity are thereby ousted from jurisdiction unless a special case is made out by the bill. Osborn *v.* Harris County, 17 Ga. 123, 63 Am. Dec. 230.

evidence of the contents of the instrument is admitted in a court of law a court of equity has no jurisdiction unless it is made to appear that the loss obstructs the right of plaintiff at law or exposes him to undue peril in the future.[10] The jurisdiction of equity arose from the inadequacy of the remedy at law, where the rule was that in an action on a bond profert was necessary, and if therefore the instrument was lost the obligee was without remedy. In those circumstances equity assumed jurisdiction,[11] and while the common law still prevailed, equity, in defending defendant's rights, adopted certain rules as to indemnity, etc., and, when profert was no longer required,[12] equity retained jurisdiction because its relief was more adequate by reason of the administration of the rules so established.[13] Another reason for the assumption of jurisdiction by the courts of equity was the inadequacy of the relief afforded by the courts of law in actions upon lost negotiable instruments. If the negotiable instrument was payable to bearer and was lost before maturity a person subsequently purchasing the note innocently before maturity and for value might recover thereon from the maker notwithstanding the fact that the note had been lost by or stolen from the true owner. It was therefore held that a court of law could not entertain jurisdiction in a suit by the original owner because it could not protect — by requiring indemnity or otherwise — the rights of the maker.[14] And it has been held that a court of equity has jurisdiction even when the negotiable instrument was not lost before it was due because it was said that in that case the person primarily liable could set up, as against the person subsequently bringing the action, any defense he might have.[15]

2. Instrument Found Pending Suit. After a suit in equity on a lost instrument has been commenced the court is not deprived of jurisdiction because, during the pendency of the action, the instrument is found.[16]

3. Extent of Relief — a. Establishment and Reëxecution. A court of equity may establish the possession of the person who claims title under a lost

10. Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557; Howe *v.* Taylor, 6 Oreg. 284. *Contra,* Anderson *v.* Akard, 15 Lea (Tenn.) 182. See also *infra,* II, E, 1.

11. **Establishment of instrument and recovery of amount.**— The obligee of a bond which had been lost, being without remedy in a court of law, sought a court of equity and there was permitted either to establish the instrument and upon the reëstablished instrument bring action at law, or to seek a recovery of the amount due on the instrument in the court of equity itself. Foster *v.* Williams, 5 B. Mon. (Ky.) 197; New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560.

12. See Totty *v.* Nesbitt, 3 T. R. 153 note; Read *v.* Brookman, 3 T. R. 151, in which cases it appears that the rule at common law requiring profert was changed and actions on lost bonds were permitted on allegation of loss in the declaration, and this allegation was held to dispense with profert.

13. *Illinois.*— Patton *v.* Campbell, 70 Ill. 72.

Mississippi.— Smith *v.* Walker, Sm. & M. Ch. 432.

North Carolina.—Deans *v.* Dortch, 40 N. C. 331; Allen *v.* State Bank, 21 N. C. 3.

Ohio.— Sook *v.* Friend, 9 Ohio 78.

South Carolina.— Chewning *v.* Singleton, 2 Hill Eq. 371.

Tennessee.— Irwin *v.* Planters' Bank, 1 Humphr. 145.

Compare Foster *v.* Williams, 5 B. Mon. (Ky.) 197, holding the equitable jurisdiction exclusive.

14. *Illinois.*— Patton *v.* Campbell, 70 Ill. 72.

Indiana.— Bloomington *v.* Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310.

Kentucky.— West *v.* Patton, Litt. Sel. Cas. 405.

Missouri.— Miller *v.* Wells, 5 Mo. 6.

New Jersey.— Force *v.* Elizabeth, 28 N. J. Eq. 403.

North Carolina.— Davis *v.* Davis, 41 N. C. 418; Deans *v.* Dortch, 40 N. C. 331; Carter *v.* Jones, 40 N. C. 196, 49 Am. Dec. 425.

Ohio.— Thayer *v.* King, 15 Ohio 242, 45 Am. Dec. 571.

South Carolina.—Davis *v.* Benbow, 2 Bailey 427.

Vermont.— Adams *v.* Edmunds, 55 Vt. 352.

For a history of the remedy see Reeves *v.* Morgan, 48 N. J. Eq. 415, 21 Atl. 1040; Allen *v.* State Bank, 21 N. C. 3; Snyder *v.* Wolfley, 8 Serg. & R. (Pa.) 328; Lyttle *v.* Cozad, 21 W. Va. 183.

15. Green *v.* Stone, Walk. (Mich.) 109.

16. *Kentucky.*— Crawford *v.* Summers, 3 J. J. Marsh. 300.

Missouri.— Miller *v.* Wells, 5 Mo. 6.

New Jersey.— Force *v.* Elizabeth, 28 N. J. Eq. 403.

North Carolina.— Hamlin *v.* Hamlin, 56 N. C. 191.

deed,[17] or it may enjoin an action at law on behalf of a defendant therein, and establish his lost deed,[18] or establish the instrument or decree a reëxecution of it,[19] or enter an order divesting the title of the grantor and his heirs and vesting it in the grantee and his heirs,[20] or the heirs of the grantor of a lost deed may be compelled to execute a new one.[21] The court may decree a reëxecution of the lost instrument, even though the instrument was lost by the gross negligence of the grantee;[22] and, having jurisdiction of the person, it may decree the reëxecution of a lost deed of lands lying in another state.[23]

b. Jurisdiction Exercised to Administer Complete Relief. Where a court of equity has assumed jurisdiction because the instrument was lost, it will retain jurisdiction and adjudicate all the issues in the case.[24] Where a person's chain of title is incomplete because of the loss of a deed he has a complete remedy in equity in the right to bring an action to establish the lost deed and remove cloud from title, and he is not obliged to resort to a court of law.[25] A court of equity also has jurisdiction of an action to recover for breaches of a lost bond,[26] or to enforce the payment of a destroyed note,[27] or upon a lost instrument where discovery is sought and also relief consequent upon the discovery.[28] Where a written contract to furnish articles of personal property is lost equity may enforce payment for the property actually delivered;[29] or where an instrument by which rent was provided for was lost equity will permit the recovery of the rent secured thereby;[30] and where the title to a portion of the property conveyed by a lost

South Carolina.— Drake *v.* Ramey, 3 Rich. 37.

West Virginia.—Lyttle *v.* Cozad, 21 W. Va. 183.

Canada.— Nickles *v.* McRoberts, 10 Grant Ch. (U. C.) 473, as to relief in suit to establish lost deed where the deed is found pending the suit.

See 33 Cent. Dig. tit. "Lost Instruments," § 30.

17. Hoddy *v.* Hoard, 2 Ind. 474, 54 Am. Dec. 456; Wynn *v.* Cory, 43 Mo. 301; Hord *v.* Baugh, 7 Humphr. (Tenn.) 576, 46 Am. Dec. 91; Patrick *v.* Badger, (Tex. Civ. App. 1897) 41 S. W. 538.

18. Butch *v.* Lash, 4 Iowa 215. There must be a prayer for reëstablishment of the deed. Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351.

19. Hudspeth *v.* Thomason, 46 Ala. 470; Chesapeake, etc., R. Co. *v.* Blair, 45 Md. 102; Bohart *v.* Chamberlain, 99 Mo. 622, 13 S. W. 85.

As an illustration of this power a slave who has been manumitted and lost her deed of manumission may have an order in equity that a new deed be executed and delivered to her (Negro Alice *v.* Morte, 1 Fed. Cas. No. 198, 2 Cranch C. C. 485); and an action by one cotenant against all parties in interest to set up a deed, claimed to have been executed by his cotenant to himself, was held proper (Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296).

Sheriff's deed.— A court of equity may decree the execution of a new deed in place of a sheriff's deed on execution sale, which has been lost before registration, the title not passing under the local law until registration. McMillan *v.* Edwards, 75 N. C. 81.

Execution by commissioner see *infra*, III, E, 2.

After demand.—Where a deed has been lost, a right to bring action to compel its reëxecution exists after demand for a second deed has been made or refused or neglected to be done in a reasonable time. Conlin *v.* Ryan, 47 Cal. 71.

20. Mason *v.* Black, 87 Mo. 329; Wynn *v.* Cory, 43 Mo. 301.

21. Bennett *v.* Waller, 23 Ill. 97.

22. Conlin *v.* Ryan, 47 Cal. 71.

23. King *v.* Pillow, 90 Tenn. 287, 16 S. W. 469.

24. Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351; Mitchell *v.* Chancellor, 14 W. Va. 22; Hickman *v.* Painter, 11 W. Va. 386.

Under a local statute which was not intended to authorize a proceeding to try title, where the complaint alleged that plaintiff purchased the lot from a certain person and took a deed, which was lost, and that defendant's grantor, having knowledge of the loss, obtained a deed from the heirs of the original grantor and then ejected plaintiff and sold to defendants, who bought knowing of plaintiff's claim, the court should adjudicate as to the execution and loss of the deed only. Anthony *v.* Beal, 111 Mo. 637, 20 S. W. 326.

25. Conlin *v.* Ryan, 47 Cal. 71; Cummings *v.* Coe, 10 Cal. 529; Low *v.* Staples, 2 Nev. 209.

26. Goldman *v.* Page, 59 Miss. 404; Howe *v.* Taylor, 6 Oreg. 284; Harrison *v.* Turbeville, 2 Humphr. (Tenn.) 242.

27. West *v.* Patton, Litt. Sel. Cas. (Ky.) 405; Fisher *v.* Mershon, 3 Bibb (Ky.) 527; Allen *v.* State Bank, 21 N. C. 3.

Indemnity see *infra*, II, D, 2.

28. Temple *v.* Gove, 8 Iowa 511, 74 Am. Dec. 320; Sook *v.* Friend, 9 Ohio 78.

29. Bolware *v.* Bolware, 1 Litt. (Ky.) 124.

30. Lawrence *v.* Hammett, 3 J. J. Marsh. (Ky.) 287.

deed fails the vendee may bring a suit in equity to recover the money to the extent of such failure.[31]

B. Kinds of Instruments Which May Be Established. A court of equity may compel the reëxecution of a lost bond,[32] and a deed of land lost before registration, the grantor being dead.[33] Where the loss of a mortgage exposes the grantee to undue perils in the future a court of equity will decree the execution of a new one.[34] Courts of equity may establish replevin and other statutory bonds having the force of a judgment;[35] and the owner of lost negotiable railroad coupons may recover upon them.[36] A court of equity has jurisdiction of an action filed to recover a quantity of cotton under a warehouse receipt which has been lost or destroyed,[37] and upon a contract of apprenticeship which has been lost.[38] Under a local statute, and it seems by virtue of the common law, a court may decree the reissue of county scrip which has been destroyed.[39] A court of equity will not establish a lost piece of written evidence upon which, with other proof, plaintiff seeks to charge defendant with a tort;[40] and a local statute particularly prescribing what instruments may be supplied by suit seems to exclude the exercise of the statutory jurisdiction to supply any other instrument.[41]

C. Necessity and Effect of Establishing — 1. In General. A party is not now obliged to establish a lost paper but may, by showing its loss, give secondary evidence of its contents and recover on it;[42] or if the instrument is a lost deed he may recover possession of the land conveyed,[43] or recovery may be had on a count founded on the original consideration.[44]

2. Actions at Law — a. In General. In England prior to the enactment of

31. Michael *v.* Mills, 17 Ohio 601.

32. New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560.

33. Hord *v.* Baugh, 7 Humphr. (Tenn.) 576, 46 Am. Dec. 91.

34. Lawrence *v.* Lawrence, 42 N. H. 109.

35. Webb *v.* Bowman, 3 J. J. Marsh. (Ky.) 70.

36. Fitchett *v.* North Pennsylvania R. Co., 5 Phila. (Pa.) 132.

37. Hardeman *v.* Battersby, 53 Ga. 36.

38. Linconfelter *v.* Kelly, 6 J. J. Marsh. (Ky.) 339.

39. Craig *v.* Chicot County, 40 Ark. 233.

40. Security Sav., etc., Assoc. *v.* Buchanan, 66 Fed. 799, 14 C. C. A. 97.

41. St. Louis, etc., R. Co. *v.* Harris, 73 Tex. 375, 11 S. W. 405, holding that under a statute authorizing the supplying in a court by parol evidence of their contents of "all deeds, bonds, bills of sale, mortgages, deeds of trust, powers of attorney, and conveyances of any and every description which are required or permitted by law to be acknowledged or recorded and which have been so acknowledged or recorded" does not cover a contract by a railroad company to permanently keep in operation its shops in a certain city.

"Papers, deeds or other writings."— Under a statute giving courts power to establish copies of lost "papers, deeds or other writings," a lost promissory note may be established. Bigelow *v.* Summers, 28 Fla. 759, 9 So. 690.

42. *Alabama.*—Koppersmith *v.* Nassano, 77 Ala. 385.

Georgia.—Lindsay *v.* Kendrick, 30 Ga. 545.

Iowa.—White *v.* Mallord, Morr. 494.

Kentucky.— Stephens *v.* Crostwait, 3 Bibb 222.

Louisiana.— Glasgow *v.* Stevenson, 6 Mart. N. S. 567.

Massachusetts.— Savannah Nat. Bank *v.* Haskins, 101 Mass. 370, 3 Am. Rep. 373.

Vermont.— Reynolds *v.* French, 8 Vt. 85, 30 Am. Dec. 456.

Ownership in dispute.— A note, however, cannot be considered to have been lost so as to permit action upon it as a lost note if the party in possession of it is known to plaintiff and the ownership is in dispute. Cobb *v.* Tirrell, 141 Mass. 459, 5 N. E. 828; Read *v.* Buffalo Mar. Bank, 136 N. Y. 454, 32 N. E. 1083, 32 Am. St. Rep. 758.

43. Donaldson *v.* Williams, 50 Mo. 407. It has been held, however, that where a plaintiff in ejectment might have obtained a reëstablishment of his lost deed or might have instituted proceedings to supply the defects in his title occasioned by the loss, parol evidence will not be admitted because it is not the best evidence. Hamilton *v.* Van Swearingen, Add. (Pa.) 48. A party whose deed with its record has been destroyed can depend upon the rules of the common law to establish its contents whenever an occasion may arise, as in the course of a trial. Hopper *v.* Justice, 111 N. C. 418, 16 S. E. 626; Cowles *v.* Hardin, 91 N. C. 231. And for admissibility of secondary evidence generally see Evidence, 17 Cyc. 465.

One who has never been in possession of the real property may establish his title thereto under lost deeds as links in his chain of title. Patrick *v.* Badger, (Tex. Civ. App. 1897) 41 S. W. 538.

44. McMillan *v.* Bethold, 35 Ill. 250; O'Connor *v.* East Baton Rouge Parish, 31 La. Ann. 221; Murray *v.* Carrot, 3 Call (Va.) 373.

statutory provisions it was held that a suit at law could not be maintained on a lost negotiable instrument.[45] It is now generally held, however, that where, because of the original character of the instrument it is non-negotiable and therefore the debtor is enabled to set up equitable defenses against subsequent *bona fide* holders claiming title from the finder, a suit at law is maintainable thereon;[46] and where by local statute a maker may set up equitable defenses against the innocent purchaser for value from the finder, a court of law also has jurisdiction;[47] and where the instrument is negotiable but is payable to order and has never been indorsed prior to its loss or destruction, or is indorsed specially, an action at law may be maintained;[48] or where the instrument was lost after maturity;[49] or upon an instrument which has been destroyed because it could not thereafter appear in the hands of an innocent holder;[50] or where the statute of limitations could be pleaded against a *bona fide* purchaser from the finder;[51] or from any other circumstances where the debtor could set up equitable defenses against the *bona fide* purchaser from the finder.[52] Where, however, a lost instrument is negotiable and is payable to bearer or is payable to order and indorsed before maturity in blank, an action at law may not be maintained.[53]

45. Hansard *v.* Robinson, 7 B. & C. 90, 9 D. & R. 860, 5 L. J. K. B. O. S. 242, R. & M. 404 note, 31 Rev. Rep. 166, 14 E. C. L. 50.

46. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603; Thayer *v.* King, 15 Ohio 242, 45 Am. Dec. 571; Clark *v.* Snow, 60 Vt. 205, 14 Atl. 87, 6 Am. St. Rep. 108; Hough *v.* Barton, 20 Vt. 455.

47. Clark *v.* Reed, 12 Sm. & M. (Miss.) 554.

48. *Alabama.* — Mobile Branch Bank *v.* Tillman, 12 Ala. 214.

Indiana. — Dean *v.* Speakman, 7 Blackf. 317; Depew *v.* Wheelan, 6 Blackf. 485.

Maine. — Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297.

New Hampshire. — Hill *v.* Barney, 18 N. H. 607.

Ohio. — Lamson *v.* Pfaff, 1 Handy 449, 12 Ohio Dec. (Reprint) 231; Baker *v.* Weaver, 1 Ohio Cir. Ct. 397, 1 Ohio Cir. Dec. 222.

Rhode Island. — Aborn *v.* Bosworth, 1 R. I. 401.

South Carolina. — Whitesides *v.* Wallace, 2 Speers 193.

Vermont. — Lazell *v.* Lazell, 12 Vt. 443, 36 Am. Dec. 352.

See 33 Cent. Dig. tit. "Lost Instruments," § 28.

Party acquiring after loss. — Under a statute which gave a remedy at law, where it appeared "on the trial that the note was lost while it belonged to the party claiming the amount due thereon," the remedy of a person acquiring the note after it is lost is in equity and not at law. Smith *v.* Young, 2 Barb. (N. Y.) 545.

49. Boteler *v.* Dexter, 20 D. C. 26; Mowery *v.* Mast, 14 Nebr. 510, 16 N. W. 839.

50. Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Dec. 609. But see Edwards *v.* McKee, 1 Mo. 123, 13 Am. Dec. 474, where it was held that an action could not be maintained on a note which was not in existence. But it has been held that no recovery can be had on a destroyed note unless it is shown to have been destroyed through ignorance or mistake. McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

51. Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297; Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609.

Mere lapse of time has been held to be enough. Templin *v.* Krahn, 3 Ind. 373; Allendorph *v.* Ogden, 28 Nebr. 201, 44 N. W. 220; Frémont *v.* U. S., 4 Ct. Cl. 252.

52. Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449.

Instrument lost pending action. — And a person is entitled to recover on an instrument which is lost between the commencement of the suit and its trial upon tender of an indemnity bond. Jacks *v.* Darrin, 3 E. D. Smith (N. Y.) 557.

Instrument found pending action. — Where the action was begun on a lost instrument which was found before a motion for a new trial was disposed of the court retained jurisdiction. Myers *v.* Sealy, 5 Rich. (S. C.) 473; Enston *v.* Friday, 2 Rich. (S. C.) 427. And where plaintiff was nonsuited in an action on a bond which had been filed as an exhibit at a previous trial because he was unable to produce it the nonsuit was set aside on a new trial granted on payment of costs the bond having been subsequently filed. Muirhead *v.* McDougall, (H. T. 2 Vict.) 1 Ont. Case L. Dig. 858.

53. Fells Point Sav. Inst. *v.* Weedon, 18 Md. 320, 81 Am. Dec. 603; Kirby *v.* Sisson, 2 Wend. (N. Y.) 550; Rowley *v.* Ball, 3 Cow. (N. Y.) 303; Pintard *v.* Tackington, 10 Johns. (N. Y.) 104; Adams *v.* Edmunds, 55 Vt. 352. See also Campbell *v.* McCrea, 11 U. C. Q. B. 93; Russell *v.* McDonald, 1 U. C. Q. B. 296. It has been held, however, that where the judge has law and equity jurisdiction together he may under such circumstances retain jurisdiction of an action at law (Bridgeford *v.* Masonville Mfg. Co., 34 Conn. 546, 91 Am. Dec. 744); and one court held that the reason assigned for not giving a court of law jurisdiction in such cases — that is, that it could not require indemnity — was rather ideal than solid, and permitted

b. Requirement of Profert. When profert of a deed was required an action at law would not lie,[54] but when profert was no longer required courts of law had jurisdiction.[55]

3. Effect of Establishing. The effect of establishing in equity a lost instrument is to restore it to its original vigor and power.[56] A lost instrument having been established, the copy may be sued upon and recovery had in the same manner as upon the original, and that without resorting to a court of equity or requiring indemnity,[57] and any defense which might have been made to the original instrument may be set up in an action on the established instrument.[58]

D. Conditions[59] **— 1. Notice of Loss or Proceeding.** Under a statute which requires notice of a proceeding to establish a lost or destroyed instrument to be served personally, a notice left at "his most notorious place of abode" is not sufficient,[60] and under a statute which provided that where a lost instrument is made the foundation of a suit or defense, it must appear that the loss was advertised within a reasonable time in a public paper, it was held that a failure to so advertise within a reasonable time will prevent a recovery.[61]

2. Indemnity — a. In General. Sometimes in order to recover on a lost instrument it is necessary to indemnify the other party to it against damages by reason of such loss.[62] Generally when defendant may be damaged by a subsequent claim of a purchaser from the finder a court of equity may and should decree that plaintiff furnish an indemnity bond with satisfactory sureties or other-

a recovery (Fales *v.* Russell, 16 Pick. (Mass.) 315).

Under a local statute permitting an action at law where the note was lost by the party claiming the amount due thereon it was held that but for the statute the remedy would be in equity. Smith *v.* Young, 2 Barb. (N. Y.) 545. So under a statute permitting an action on a lost negotiable note or bill of exchange, upon executing indemnity, recovery may be had upon a lost negotiable coupon executed by a person or corporation. Rolston *v.* Central Park, etc., R. Co., 21 Misc. (N. Y.) 439, 47 N. Y. Suppl. 650.

Indemnity see *infra*, II, D, 2.

54. Helm *v.* Eastland, 2 Bibb (Ky.) 193.

Lost release.—Where profert has not been abolished, a defendant cannot plead a lost release as a defense to a suit on a judgment. Warder *v.* Evans, 2 Mo. 205.

55. People *v.* Pace, 57 Ill. App. 674; Franceschi *v.* Marino, 3 Edw. (N. Y.) 586; Murlock *v.* Brown, 7 Humphr. (Tenn.) 61 [*overruling* Gwathney *v.* Stump, 2 Overt. (Tenn.) 308]. See also *supra*, II, A, 1.

56. Kerney *v.* Kerney, 6 Leigh (Va.) 478, 29 Am. Dec. 213.

57. Harris *v.* Williams, Dudley (Ga.) 199.

58. Prescott *v.* Johnson, 8 Fla. 391. See also *infra*, II, E.

59. Affidavit of loss see *infra*, III, C.

60. Bond *v.* Whitfield, 28 Ga. 537.

61. Vance *v.* Cooper, 22 La. Ann. 508; Lewis *v.* Splane, 2 La. Ann. 754. Where an action is brought on an indorser's written promise to pay after his discharge and the promise and the original note are both lost, the loss of both must be advertised. New Orleans, etc., R. Co. *v.* Armstrong, 2 La. Ann. 829. And where an administrator's bond was lost and its existence and genuineness were established in an action upon it and it appeared that the administrator was clerk of the court and as such legal custodian of the bond, it was held unnecessary to advertise the loss. Cox *v.* Bradley, 15 La. Ann. 529.

The advertisement may be after suit brought as well as before. Weaver *v.* Cox, 15 La. Ann. 463.

An inaccurate description in the advertisement being the result of information given by defendant to plaintiff who could neither read nor write, defendant was not allowed to take advantage of the error. Lebleu *v.* Rutherford, 9 Rob. (La.) 95.

Where the instrument is shown to have been destroyed, no advertisement is necessary. Weaver *v.* Cox, 15 La. Ann. 463; Beebe *v.* McNeill, 8 La. Ann. 130.

62. Shipsey *v.* Bowery Nat. Bank, 36 N. Y. Super. Ct. 501; Jacks *v.* Darrin, 3 E. D. Smith (N. Y.) 548. *Compare* McDonald *v.* Hime, 15 Grant Ch. (U. C.) 72, where it was held that where a mortgagor offered to pay overdue interest upon affidavit by the mortgagee that the latter had not parted with the mortgage which affidavit the mortgagee produced, but the mortgagor failed to pay the interest, the mortgagee lost his right to insist upon indemnity before paying the interest then due.

An indorser or accepter of a lost note or bill may be held upon giving sufficient indemnity. See Hinsdale *v.* Miles, 5 Conn. 331; Meeker *v.* Jackson, 3 Yeates (Pa.) 442; Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419; Litman *v.* Montreal City, etc., Sav. Bank, 13 Quebec Super. Ct. 262. But see *supra*, note 4. An indorser of a bill of exchange is not liable to an indorsee upon the refusal of the drawee to accept where the bill has been lost and no bill of indemnity is offered. Riggs *v.* Graeff, 20 Fed. Cas. No. 11,826, 2 Cranch C. C. 298.

Some local statutes permitting actions on lost instruments also provide for the giving

wise protect defendant.[63] The matter is in the discretion of a court of equity and sometimes does not afford adequate protection, as, for example, when municipal bonds, maturing many years hence and having attached to them thousands of coupons and payable to bearer, are stolen.[64] It has therefore been held that in suits on negotiable instruments lost before maturity and payable to bearer or indorsed in blank plaintiff should be compelled to give indemnity as a condition precedent to judgment;[65] and so also in an action to recover a prize drawn on a lost lottery ticket.[66] But a court will not order the giving of indemnity unless the person to whom the indemnity is given could be prejudiced by the subse-

of indemnity bonds. Armstrong *v.* Lewis, 14 Minn. 406; Sauter *v.* Leveridge, 103 Mo. 615, 15 S. W. 981. If the instrument is negotiable the indemnity is required; otherwise not. Wright *v.* Wright, 54 N. Y. 437; Rolston *v.* Central Park, etc., R. Co., 21 Misc. (N. Y.) 439, 47 N. Y. Suppl. 650. Under a statute which required indemnity in case an instrument was lost or destroyed it was held that the statute included one lost by theft. Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26.

If defendant does not, in a proper case, demand indemnity, plaintiff is not bound to furnish it. Weaver *v.* Cox, 15 La. Ann. 463; Murray *v.* Dallas Homestead, etc., Assoc., (Tex. Civ. App. 1898) 48 S. W. 604.

Where notice of loss is given to the maker of interest coupons payable to bearer, it need not be accompanied by an offer of indemnity. Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297.

Not a part of papers.— A rule of court requiring the filing of all papers necessary to enable the clerk to make up and enter judgment does not make it impossible to recover on a lost note, and has no application on the question of indemnity. Munroe *v.* Weir, 177 Mass. 301, 58 N. E. 1013.

63. *Maryland.* — Chesapeake, etc., Canal Co. *v.* Blair, 45 Md. 102.

Massachusetts.— McGregory *v.* McGregory, 107 Mass. 543; Almy *v.* Reed, 10 Cush. 421.

Michigan.—Walker *v.* Gillett, 98 Mich. 59, 56 N. W. 1052; Yerkes *v.* Blodgett, 48 Mich. 211, 12 N. W. 218.

Mississippi.— New Orleans, etc., R. Co. *v.* Mississippi College, 47 Miss. 560.

New Hampshire.— Heywood *v.* Hartshorn, 55 N. H. 476.

New York.— Manhattan Sav. Inst. *v.* East Chester, 44 Hun 537; Rogers *v.* Chicago, etc., R. Co., 6 Abb. N. Cas. 253.

Vermont.— Miller *v.* Rutland, etc., R. Co., 40 Vt. 399, 94 Am. Dec. 414.

See 33 Cent. Dig. tit. "Lost Instruments," § 41 *et seq.*

Jurisdictional.— It has been held that the tendering of indemnity gives equity jurisdiction in a suit to recover on a lost or destroyed note. Ross *v.* Wright, 12 Ga. 507; Truly *v.* Lane, 7 Sm. & M. (Miss.) 325, 45 Am. Dec. 305.

64. Bainbridge *v.* Louisville, 83 Ky. 285, 4 Am. St. Rep. 153; Munroe *v.* Weir, 177 Mass. 301, 58 N. E. 1013. In the first case the court suggested that the city be enjoined from paying any bonds or coupons until the persons presenting them for payment should appear before the court having jurisdiction of the proceeding and show that they were *bona fide* purchasers for value before maturity, the true owner of course being given an opportunity to be heard. In another case where it appeared that an instrument, payable to order of a certain person, was lost in New York City "where it was used as collateral security," it was held that an indemnity bond should be ordered. Nalle *v.* Conrad, 30 La. Ann. 503.

65. *California.*— Price *v.* Dunlap, 5 Cal. 483.

Georgia.—Robinson *v.* Darien Bank, 18 Ga. 65.

Indiana.— Elliott *v.* Woodward, 18 Ind. 183.

Kentucky.— Berry *v.* Berry, 6 Bush 594.

Louisiana.— Miller *v.* Webb, 8 La. 516; Glasgow *v.* Stevenson, 6 Mart. N. S. 567; Lewis *v.* Petayvin, 4 Mart. N. S. 4; Nagel *v.* Mignot, 8 Mart. 488.

Massachusetts.— Schmidt *v.* People's Nat. Bank, 153 Mass. 550, 27 N. E. 595; Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Tucker *v.* Tucker, 119 Mass. 79; Fales *v.* Russell, 16 Pick. 315.

Missouri.— Hendricks *v.* Whitecotton, 60 Mo. App. 671; Barrows *v.* Million, 43 Mo. App. 79.

Nebraska. — Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444; Kirkwood *v.* Hastings Exch. Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Means *v.* Kendall, 35 Nebr. 693, 53 N. W. 610.

New York.— Des Arts *v.* Leggett, 5 Duer 156 [*affirmed* in 16 N. Y. 582]; Desmond *v.* Rice, 1 Hilt. 530.

North Carolina.—Deans *v.* Dortch, 40 N. C. 331; Cotton *v.* Beasley, 6 N. C. 259.

Ohio.— Belmont Branch Bank *v.* Durbin, 2 Ohio Dec. (Reprint) 372, 2 West. L. Month. 543.

Pennsylvania.— Beaver Valley Lodge, No. 749, I. O. O. F. *v.* Beaver Falls First Nat. Bank, 7 Pa. Super. Ct. 552; Fitchett *v.* North Pennsylvania R. Co., 5 Phila. 132; Milne *v.* Marshall, 5 Phila. 131.

Texas. — Wiedenfeld *v.* Gallagher, (Civ. App. 1895) 32 S. W. 248; Wiedenfeld *v.* Gallagher, (Civ. App. 1893) 24 S. W. 333.

West Virginia.—Virginia Exch. Bank *v.* Morrall, 16 W. Va. 546.

See 33 Cent. Dig. tit. "Lost Instruments," § 42.

66. Snyder *v.* Wolfley, 8 Serg. & R. (Pa.) 328.

quent appearance of the lost instrument.[67] It has therefore been held that if the note has been absolutely destroyed no indemnity is necessary.[68] Nor will it be required when the instrument is not negotiable;[69] when it does not affirmatively appear that the note is negotiable;[70] when the instrument is payable to order and has not been indorsed;[71] where by local statute equitable defenses may be set up against *bona fide* purchasers for value before maturity;[72] where a negotiable instrument has been indorsed or lost after maturity;[73] where because of long delay in asserting an adverse title it is improbable that the debtor will ever be disturbed by the finder or any one else claiming under him;[74] where the rights of another claimant will be barred by the statute of limitations;[75] or where at the time of the rendition of the lost instrument has been found and filed with

67. Lynch *v.* De Viar, 3 Johns. Cas. (N. Y.) 303.

The loss of course must be proved or indemnity will not be ordered. Burgwin *v.* Richardson, 10 N. C. 203.

Where a note was in the hands of the adverse party and was not lost indemnity was ordered in one case. Berry *v.* Berry, 6 Bush (Ky.) 594.

A mutilated note is not a lost note Martin *v.* Blydenburgh, 1 Daly (N. Y.) 314.

68. Mobile Bank *v.* Meagher, 33 Ala. 622; Edler *v.* Uchtmann, 10 Ill. App. 488; Blandin *v.* Wade, 20 Kan. 251; Des Arts *v.* Leggett, 16 N. Y. 582 [*affirming* 5 Duer 156]; Scott *v.* Mecker, 20 Hun (N. Y.) 161; Terwilliger *v.* Terwilliger, 27 N. Y. Suppl. 284. *Contra*, Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Price *v.* Dunlap, 5 Cal. 483; Welton *v.* Adams, 4 Cal. 37, 60 Am. Dec. 579; Wade *v.* New Orleans Canal, etc., Co., 8 Rob. (La.) 140, 41 Am. Dec. 296; Dumas *v.* Powell, 22 N. C. 122. See also Pillow, etc., Co., *v.* L'Espérance, 22 Quebec Super. Ct. 213.

69. Lafayette Nat. State Bank *v.* Ringel, 51 Ind. 393; Coon *v.* Bouchard, 74 Mich. 486, 42 N. W. 72; Wright *v.* Wright, 54 N. Y. 437; Mills *v.* Albany Exch. Sav. Bank, 28 Misc. (N. Y.) 251, 59 N. Y. Suppl. 149; Rolston *v.* Central Park, etc., R. Co., 21 Misc. (N. Y.) 439, 47 N. Y. Suppl. 650; Hopkins *v.* Adams, 20 Vt. 407. But see Pillow, etc., Co. *v.* L'Espérance, 22 Quebec Super. Ct. 213.

Receipt for cotton.— Indemnity will not be required where the instrument is a receipt for cotton issued by the proprietor of a cotton yard, because the instrument is not negotiable. Clay *v.* Gage, 1 Tex. Civ. App. 661, 20 S. W. 948.

70. Depew *v.* Wheelan, 6 Blackf. (Ind.) 485; Allen *v.* Reilly, 15 Nev. 452; Wilder *v.* Seelye, 8 Barb. (N. Y.) 408; Terwilliger *v.* Terwilliger, 27 N. Y. Suppl. 284; Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; McNair *v.* Gilbert, 3 Wend. (N. Y.) 344; Rowley *v.* Ball, 3 Cow. (N. Y.) 303; Pintard *v.* Tackington, 10 Johns. (N. Y.) 104; Hough *v.* Barton, 20 Vt. 455; Lazell *v.* Lazell, 12 Vt. 443, 36 Am. Dec. 352.

71. *Indiana.*— Lafayette Nat. State Bank *v.* Ringel, 51 Ind. 393.

Iowa.— Dudman *v.* Earl, 49 Iowa 37.

Maine.— Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297.

Nebraska.— Palmer *v.* Carpenter, 53 Nebr. 394, 73 N. W. 690; Kirkwood *v.* Hastings Exch. Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444.

New York.— Bishop *v.* Sniffen, 1 Daly 155. But under a local statute the contrary has been held. Frank *v.* Wessels, 64 N. Y. 155.

Ohio.— Baker *v.* Weaver, 1 Ohio Cir. Ct. 397, 1 Ohio Cir. Dec. 222.

72. Wofford *v.* Holmes County Police Bd., 44 Miss. 579; Sharp *v.* Cutler, 25 N. J. Eq. 425; Massaker *v.* Mackerley, 9 N. J. Eq. 440.

Married woman.— It has been held, however, that a married woman, although entitled to set up the defense of coverture against an innocent holder, may insist upon indemnity because of liability for damages and costs. Gordon *v.* Manning, 44 Miss. 756.

73. *Colorado.*— Filby *v.* Turner, 9 Colo. App. 202, 47 Pac. 1037.

Indiana.— Swatts *v.* Bowen, 141 Ind. 322, 40 N. E. 1057; Bloomington *v.* Smith, 123 Ind. 41, 23 N. E. 972, 18 Am. St. Rep. 310; Elliott *v.* Woodward, 18 Ind. 183.

Louisiana.— Brent *v.* Ervin, 3 Mart. N. S. 303, 15 Am. Dec. 157.

Nebraska.— Kirkwood *v.* Hastings Exch. Nat. Bank, 40 Nebr. 497, 58 N. W. 1135; Kirkwood *v.* Hastings First Nat. Bank, 40 Nebr. 484, 58 N. W. 1016, 42 Am. St. Rep. 683, 24 L. R. A. 444; Means *v.* Kendall, 35 Nebr. 693, 53 N. W. 610.

Rhode Island.— Adams *v.* Baker, 16 R. I. 1, 11 Atl. 168, 27 Am. St. Rep. 721.

Canada.— Abell *v.* Morrison, 23 Grant Ch. (U. C.) 109, where defendant allowed the bill to be taken *pro confesso* and omitted to make demand for security.

74. State *v.* New Orleans, etc., R. Co., 51 La. Ann. 909, 25 So. 465, holding that where a certificate of corporate stock was lost sixteen years before and during the time the dividends had been paid to the owner and no claim had been made by any one else, no indemnity would be required. So where a mortgage was lost six years before a foreclosure proceeding was started and was seen in the mortgagee's possession shortly before that and no claim of principal or interest had ever been made by any one else. Stoddard *v.* Gailor, 90 N. Y. 575. See also Sohier *v.* Lamb, 134 Mass. 275.

75. Marsh *v.* Perry, 6 La. Ann. 669;

papers in the case.[76] No indemnity is necessary where the instrument is left with the court as an exhibit and pending an appeal is lost.[77] A court of law may not order the filing of an indemnity bond but may stay proceedings or execution until it is filed or until it appears that it is no longer necessary for the security of defendant;[78] or the court may continue proceedings until the claim is barred by the statute of limitations.[79]

b. Time to Tender. It is not necessary to tender indemnity as a condition precedent to the commencement of the suit.[80] Outside of the question of costs, it is sufficient that the indemnity be given at any time prior to the entry of a decree for the amount involved.[81] And it has been held that the fact that the bond was not given until after the verdict and judgment does not warrant a reversal of the case provided it was given before a motion for a new trial was disposed of.[82] The time of tender, however, becomes important in determining who should pay the costs; defendant might accept the tendered indemnity and pay the obligation and so ought not to pay the costs which accumulated prior to the tender.[83]

c. Character and Sufficiency. The bond of indemnity should be such as to save defendant harmless against all lawful claims of any other person on account of the lost instrument and against all costs and expenses by reason of defending such claims,[84] and it should cover the damages and the accumulated expenses of

Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297; Hopkins *v.* Adams, 20 Vt. 407.

76. Hunter *v.* Robinson, 5 W. Va. 272.

The maker and indorsers of a promissory note are liable, although it was lost at maturity and no indemnity was tendered to the maker or indorsers at the time of presentment and notice of dishonor, if the note is afterward found and produced at the trial. Smith *v.* Rockwell, 2 Hill (N. Y.) 482.

77. Winship *v.* May, 7 Colo. App. 355, 43 Pac. 904; German Sav. Bank *v.* Kerlin, 53 Mo. 382; Bisbing *v.* Graham, 14 Pa. St. 14, 53 Am. Dec. 510.

78. Fales *v.* Russell, 16 Pick. (Mass.) 315; Hill *v.* Barney, 18 N. H. 607; Reisinger *v.* Magee, 158 Pa. St. 280, 27 Atl. 962; Bisbing *v.* Graham, 14 Pa. St. 14, 53 Am. Dec. 510. See also *infra*, note 80.

79. Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297; Reisinger *v.* Magee, 158 Pa. St. 280, 27 Atl. 962; Bisbing *v.* Graham, 14 Pa. St. 14, 53 Am. Dec. 510.

80. *Mississippi.*— Smith *v.* Walker, Sm. & M. Ch. 432.

Missouri.— Hogan *v.* Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

New York.— Brookman *v.* Metcalf, 4 Rob. 568; Dupignac *v.* Quick, 27 Misc. 500, 58 N. Y. Suppl. 341 [*affirming* 26 Misc. 872, 56 N. Y. Suppl. 385].

North Carolina.— Under a local statute it was held that it was not necessary to tender an indemnity bond before bringing action where defendant denied plaintiff's right to a reëxecution of the lost instrument. Hendon *v.* North Carolina R. Co., 127 N. C. 110, 37 S. E. 155.

Vermont.— Hopkins *v.* Adams, 20 Vt. 407.

West Virginia.— Virginia Exch. Bank *v.* Morrall, 16 W. Va. 546.

See 33 Cent. Dig. tit. "Lost Instruments," § 42.

Contra.— Snyder *v.* Wolfley, 8 Serg. & R. (Pa.) 328. See also Meeker *v.* Jackson, 3 Yeates (Pa.) 442. Under a statutory provision requiring indemnity in an action on a note it was held in Quebec that the demand for security should be made by *exception dilatoire* (Brown *v.* Barden, 13 Quebec Super. Ct. 151); and plaintiff cannot proceed without proving loss and obtaining an order that the loss shall not be pleaded upon plaintiff's giving security, etc. (Tessier *v.* Caillé, 25 Quebec Super. Ct. 207); and while the statute relates to actions on the instrument, it has been applied where the action is brought upon the original consideration (J. H. *v.* G. B., 4 Can. L. J. 285; Tessier *v.* Caillé, 25 Quebec Super. Ct. 207).

To hold an indorser, it is said, upon the question of presentment and demand, if the note or bill be lost the demand should be accompanied by a tender of indemnity. Lane *v.* West Tennessee Bank, 9 Heisk. (Tenn.) 419. But if the holder fails to do so and the lost instrument is found before trial the indorser is liable. Smith *v.* Rockwell, 2 Hill (N. Y.) 482.

81. Burrows *v.* Goodhue, 1 Greene (Iowa) 48; Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Fales *v.* Russell, 16 Pick. (Mass.) 315; Snediker *v.* Griffin, 4 N. Y. Leg. Obs. 423.

82. Aylor *v.* McMunigal, 66 Mo. App. 657.

Staying execution.— And it has been held that indemnity will be required before execution will be issued on a judgment on a lost note. Polhamius *v.* New Orleans, 18 La. Ann. 234; Yerkes *v.* Mooney, 1 Wkly. Notes Cas. (Pa.) 433; Lowry *v.* Medlin, 6 Humphr. (Tenn.) 450.

83. Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139. See also Cartier *v.* Strachan, 5 Ont. Pr. 159; Cusack *v.* Southern Loan, etc., Co., 2 Ont. Wkly. Rep. 179.

84. Hinckley *v.* Union Pac. R. Co., 129 Mass. 52, 37 Am. Rep. 297; Pillow, etc., Co. *v.* L'Espérance, 22 Quebec Super. Ct. 213.

Security fixed by master.— Although the

another suit.[85] Where one of two partners is sued on a firm note it is sufficient that an indemnity bond is given to the one only.[86] After the bond is approved by the court an injunction will not be granted because of the insufficiency of the bond.[87]

E. Objections and Defenses[88] — **1. In General.** The mere fact that the lost deed was made in pursuance of a non-enforceable contract[89] or a plea that the instrument was not delivered, want of consideration, fraud, satisfaction, and the like are not available. Such defenses should be interposed in a suit on the reëstablished instrument.[90] It has been held, however, that a lost deed, void because of champerty or fraud, or because of some rule of law or public policy, will not be reëstablished by a court of equity;[91] and the court will not reëstablish an instrument where to do so would be to aid one in, or relieve him from, the consequences of his own fraud.[92] A court of equity will not compel the reëxecution of a quit-claim deed made by one who was under no obligation to execute it and who asserts no adverse title;[93] and it has also been held that where the lost instrument can be sued upon, the execution of a new one will not be decreed.[94] The mere fact that the lost instrument does not mature for many years and that in the meantime sureties on an indemnity bond may become insolvent or die is no reason for denying a court of equity power to decree a reëxecution.[95] It is not a valid objection to decreeing the reëxecution of a lost deed that since its execution a sheriff has levied on the land and sold it to defendant to whom a sheriff's deed has not yet been delivered.[96]

2. Limitation and Laches. And it has been held that the statute of limitations is no defense against one who is seeking to establish a lost instrument.[97] But a suit brought to establish a lost instrument will be subject to the plea of laches when brought an unreasonable time after its loss.[98]

words of the statute are that indemnity "to the satisfaction of the court or a judge" is to be given, the security may be left to the master to settle. Orton *v.* Brett, 12 Manitoba 448, requiring sureties.

85. Truly *v.* Lane, 7 Sm. & M. (Miss.) 325, 45 Am. Dec. 305.

86. Sauter *v.* Leveridge, 103 Mo. 615, 15 S. W. 981. But it was held under a local statute that the bond should run to all the defendants, although some of them were not served with process. Higgins *v.* Watson, 1 Mich. 428.

A decree requiring bond to two is not complied with by executing a bond to one of them. Moore *v.* Durnan, (N. J. Ch. 1905) 62 Atl. 327.

87. Mills *v.* Jones, 9 La. Ann. 11.

88. Defense to established instrument see *supra*, II, C, 3.

Affidavit of loss see *infra*, III, C.

89. Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180.

90. Suwannee County *v.* Columbia County Com'rs, 18 Fla. 78; Venable *v.* Born, 40 Ga. 74; Montgomery *v.* Kerr, 6 Coldw. (Tenn.) 199, 98 Am. Dec. 450.

91. Montgomery *v.* Kerr, 6 Coldw. (Tenn.) 199, 98 Am. Dec. 450.

Divorce and marriage as consideration.— A court of equity will not establish a lost deed given on an illegal consideration, as for example the divorce of the grantor and his marrying the grantee. King *v.* Pillow, 90 Tenn. 287, 16 S. W. 469.

92. Chapman *v.* Chapman, 4 Call (Va.) 430, holding that equity will not establish a destroyed deed given by one brother to another on parol promise of the mother, afterward broken, that she would deliver to the grantor one half of her land, because the destruction of the deed by the grantor was justifiable as preventing a fraud contemplated against himself.

Deed suppressed by party himself.— Nor will a court grant relief to one claiming under a lost instrument which has been destroyed or suppressed by that person himself. Davis *v.* Davis, 41 N. C. 418.

Destruction of note.— Neither will relief be granted where the note has been destroyed in pursuance of a fraudulent scheme of the person so destroying it. McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

93. Dull *v.* Rohr, 13 Misc. (N. Y.) 530, 35 N. Y. Suppl. 523. So it has been held that while a court of equity will establish the possession of a person who claims under a lost deed it will not, under such circumstances, decree the reëxecution of the instrument, and that while the grantee is in possession the grantor is under no obligation to preserve the evidences of the grantee's title. Hoddy *v.* Hoard, 2 Ind. 474, 54 Am. Dec. 456.

94. Mayor *v.* Caldwell, 14 La. 499; Franceschi *v.* Marino, 3 Edw. (N. Y.) 586.

95. Chesapeake, etc., Canal Co. *v.* Blair, 45 Md. 102.

96. Cummings *v.* Coe, 10 Cal. 529, holding that there was no consummation of the sale until the execution of the sheriff's deed and until then the purchaser had only a right to an estate.

97. See Limitation of Actions, *ante*, p. 1059.

98. Shepard *v.* Cummings, 44 Tex. 502.

3. Negligence. The defense of negligence in losing the instrument is not material except with reference to costs.[99]

4. Want of Notice of Loss. A notice of loss of county orders payable to bearer should, to save the rights of the owner, be brought home to the county treasurer, and an advertisement in a newspaper is not sufficient.[1]

III. PROCEDURE.

A. Parties.[2] Any person having a legal or equitable interest in land, even though small, may bring suit to establish an instrument of title under which he claims and he should make as parties all persons having an interest in the lands,[3] and all persons interested in the relief prayed for in the bill should be made parties to the suit.[4] Any person who has the legal title to a lost instrument may be made a party plaintiff in a suit to recover on the instrument or the amount thereof,[5] and when the suit is in equity the equity rule requiring the presence of all parties interested applies.[6] A person who has no interest in a non-negotiable

Laches generally see Equity.

99. Conlin *v.* Ryan, 47 Cal. 71. So where a bailee of a note is negligent in losing it and thereby the owner has an insufficient description, in an action against the executor of the bailee for the amount, the executor cannot defend on the ground of want of a better description. Sandefur *v.* Mattingley, 16 Ark. 237.

Liability of bank see Banks and Banking, 7 Cyc. 997 note 15.

1. Sweet *v.* Carver County Com'rs, 16 Minn. 106. See also *supra*, I.

2. Parties generally see Equity; Parties.

3. Anderson *v.* Akard, 15 Lea (Tenn.) 182.

A vendee of land who has resold it by warranty deed and delivered possession may bring an action in equity to compel a reconveyance when the first deed has been lost, without waiting until the grantor asserts his claim or until sued on his covenant of warranty. Owen *v.* Paul, 16 Ala. 130.

4. Turner *v.* Joiner, 18 Ga. 368. In a suit to establish a sheriff's deed defendant in the suit in which the execution was issued under which the sale was made is a necessary party. Turner *v.* Joiner, *supra*. And where the sheriff's deed was lost prior to registration, the sheriff himself is a proper party. McMillan *v.* Edwards, 75 N. C. 81.

Heirs who agreed with other heirs to release their claim against the estate in consideration of the others supporting the testator's widow for life, which agreement was lost by the other heirs, may bring an action in equity to establish the agreement. Wells *v.* Flitcraft, (N. J. Ch. 1899) 43 Atl. 659.

One who has parted with title.—A person who had made a deed which was not formally executed, and which was afterward lost, in a suit to establish that deed, should be made a party, even though he had subsequently made a binding deed to another and thereby, as far as possible, divested himself of his interest. Findlay *v.* Hinde, 1 Pet. (U. S.) 241, 7 L. ed. 128.

All persons in any way liable on the instrument should be made parties to a suit to establish a lost bill of exchange. Bond *v.* Whitfield, 28 Ga. 537.

Original holder of unassigned certificate.— In a suit to establish a government certificate by one who holds it without assignment from the original holder, the original holder should be made a party. Anditor *v.* Johnson, 1 Hen. & M. (Va.) 536.

Attachment creditor of grantor.— In a suit to establish a lost deed, a person who has attached the property of the grantor is not a proper party. Bogle *v.* Maddox, 27 Ga. 472.

5. Smith *v.* Walker, Sm. & M. Ch. (Miss.) 432; Long *v.* Constant, 19 Mo. 320, 61 Am. Dec. 559.

Beneficial owner.—Where, upon the death of the owner of a lost county bond, it was set apart as a portion of his residuary estate, a residuary legatee and the administrator of another legatee were permitted to maintain an action, as beneficial owners. Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26.

Assignee.— It has been held, however, that where a negotiable note was indorsed in blank and lost by the indorsee, who then assigned to another his right on the instrument, the assignee could not maintain an action in his own name (Willis *v.* Cresey, 17 Me. 9); but it has been held that such an assignment will not prevent action in the name of the payee (Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679; Tucker *v.* Tucker, 119 Mass. 79).

Striking out indorsement see Commercial Paper, 8 Cyc. 88 note 58.

6. Mitchell *v.* Chancellor, 14 W. Va. 22, holding that in a suit on a lost bond the administrators of the deceased maker are necessary parties.

Principal and surety.— In a suit by the indorsee against the indorser of a lost note, the maker, who was surety for the indorser, is a necessary party. West *v.* Patton, Litt. Sel. Cas. (Ky.) 405. So in a suit against a surety the principal should be made a party (Long *v.* Dupuy, 1 Dana (Ky.) 104); and where he is dead and the instrument binds his heirs they also must be made parties (Kerney *v.* Kerney, 6 Leigh (Va.) 478, 29 Am. Dec. 213).

note but is in wrongful possession of it and carries it beyond the jurisdiction of the court is not a necessary party.[7]

B. Pleading — 1. Bill or Complaint[8] — a. In General. Where the establishment of a lost instrument is sought or a recovery thereon is asked and no other equitable relief is demanded, the basis of the jurisdiction of a court of equity is the loss of the instrument.[9] And in a suit to recover land, where the sheriff's deed thereof has been lost, it is not a misjoinder to demand execution of another deed.[10] It has been held that no special count in the complaint is required in order to permit secondary evidence of the lost instrument;[11] but a complaint alleging the existence of a bond, and making profert, is not sustained by proof of a lost bond.[12] The names of the legal representatives of deceased parties should be distinctly stated in the complaint to establish lost instruments.[13] And where it is held that upon the loss of the instrument debt cannot be brought upon the note, but that assumpsit may be brought on the original cause of action, the consideration must be averred.[14] The objection that the complaint does not show equity must be taken by demurrer, and if the demurrer is not filed the objection is waived.[15]

b. Execution of Instrument. The bill must also have sufficient allegation that the lost instrument was originally executed and delivered.[16]

c. Description of Instrument. The bill or complaint must describe the lost instrument correctly,[17] or aver in substance the contents thereof.[18] If the lost instrument is a warranty deed, the bill should contain allegations that it contained the usual covenants of warranty, and if acknowledged that fact should be alleged.[19]

d. Loss of Instrument. An allegation averring the fact of the loss or destruction without showing the manner of the loss or the diligence used in finding it is sufficient for this purpose. Anything more would be pleading of evidence.[20] Where the law requires that an instrument sued on must be filed or copied with

7. Butler *v.* Anderson, 27 Ind. 117.

8. **Bill in equity** generally see EQUITY.
Complaint generally see PLEADING.
Oath to bill see *infra*, III, C.

9. McClusky *v.* Gerhauser, 2 Nev. 47, 90 Am. Dec. 512; Hopkins *v.* Adams, 20 Vt. 407.
But a prayer for establishment of the instrument is necessary. Griffin *v.* Fries, 23 Fla. 173, 2 So. 266, 11 Am. St. Rep. 351.

10. McMillan *v.* Edwards, 75 N. C. 81.
Previous demand for reëxecution.— A bill seeking to reëstablish a lost instrument should aver that previous to the commencement of the action plaintiff demanded the execution of a new deed and offered to pay the expenses thereof, which was refused by defendant. Conlin *v.* Ryan, 47 Cal. 71; Clarke *v.* Featherston, 32 Ind. 142.

11. Livingston County *v.* White, 30 Barb. (N. Y.) 72; Renner *v.* Columbia Bank, 9 Wheat. (U. S.) 581, 6 L. ed. 166.

12. Chamberlain *v.* Sawyer, 19 Ohio 360.

13. Cobb *v.* Cobb, 10 Ga. 445.

14. Stephens *v.* Crostwait, 3 Bibb (Ky.) 222. So where plaintiff declared against the drawer of a lost bill payable to plaintiff's order on a promise to pay it but did not state any new consideration for the promise nor allege that the bill was not indorsed at the time of the loss his pleading was held bad on demurrer. Russell *v.* McDonald, 1 U. C. Q. B. 296.

15. Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902.
Demurrers generally see EQUITY; PLEADING.

16. Laubach *v.* Meyers, 147 Pa. St. 447, 23 Atl. 765.

17. Torrent Fire Engine Co. No. 5 *v.* Mobile, 101 Ala. 559, 14 So. 557; Porter *v.* Nash, 1 Ala. 452; Smith *v.* Brown, 3 Blackf. (Ind.) 22.

18. Cleveland *v.* Roberts, 14 Ind. 511; Rand *v.* Rand, 4 N. H. 267.

19. Lane *v.* Lane, 113 Mo. 504, 21 S. W. 99.

20. Douthit *v.* Mohr, 116 Ind. 482, 18 N. E. 449; Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679; Townsend *v.* Caldwell, 1 Rob. (La.) 433; Thomas *v.* McCormick, 1 N. M. 369; Taliaferro *v.* Foote, 3 Leigh (Va.) 58. It has been held, however, under local statutes, that an allegation of loss is not necessary. McLain *v.* Duncan, 57 Ark. 49, 20 S. W. 597; Dupignac *v.* Quick, 56 N. Y. Suppl. 385.
Sufficient allegations.— In a case where an executor sold land under a power in the will and took a bond and trust deed to secure the purchase-price, and afterward left the state without collecting the bond, a bill was brought by the legatees, who were entitled to receive the purchase-money but who could not sue at law, in which they alleged that they did not know where the bond was or whether it had been lost or destroyed, that the trustee named in the trust deed had no means of knowing the amount due, and therefore had no right to sell under a trust deed, it was held that the bill was sufficient

the pleading, an averment of its loss excuses the failure to file it.[21] A bill for discovery[22] of a lost note, in aid of an action at law to recover on it, must allege the loss or destruction of the note and that the person, without the discovery, has not sufficient evidence to maintain his action at law.[23] If the instrument is lost after the commencement of the suit, plaintiff should amend his complaint setting up the loss.[24] Where, however, the action may be brought at law and no indemnity is necessary because defendant can set up his defenses against an innocent holder, an allegation of loss in the bill or complaint is not necessary.[25]

e. Non-Payment. The complaint should allege that the bill has not been paid.[26]

f. Indemnity. Even though indemnity is necessary it is not necessary to allege in the complaint that it has been given where it may be given any time prior to judgment.[27]

2. Plea or Answer[28] — a. Effect of Pleading to Merits. Where defendant pleads to the merits, he cannot afterward object that a court of law has no jurisdiction,[29] and he also waives objections for want of profert.[30]

b. As to Execution, Existence, and Loss of Instrument. A general denial under oath has been held to put in issue the execution of the note.[31] Under statute or code provisions which enact that if the contents of a written instrument are set out in a complaint its execution is admitted if not denied under oath, a complaint which alleges the execution of an instrument, states its contents, and alleges its loss, will be taken to be true unless an answer verified by affidavit is filed.[32] Where profert or allegation of the loss is necessary and a bill alleges that an

to give equity jurisdiction. Miller *v.* Trevilian, 2 Rob. (Va.) 1. A bill alleging a lost contract under which money of plaintiffs was to be invested in land and asking for a specific performance of the contract or that the money advanced be refunded, or asking discovery as to the contents of the lost instrument, is sufficient to give equity jurisdiction. Wiley *v.* Mullins, 22 Ark. 394.

Note taken beyond jurisdiction.— An averment in the bill that the note is in possession of a third person who holds it wrongfully and has taken it beyond the jurisdition of the court and beyond control of plaintiff is sufficient. Butler *v.* Anderson, 27 Ind. 117.

Allegation of destruction required.— In a suit on a lost note, an averment that the note had been lost or mislaid and cannot be found or produced is not sufficient where the law requires that plaintiff must allege that the note was destroyed. Rogers *v.* Miller, 5 Ill. 333.

Sufficient allegation of search.— An allegation that the grantee of a deed has caused search to be made in all such places as he supposed it might possibly he found is sufficient. Owen *v.* Paul, 16 Ala. 130.

21. Van Dorn *v.* Bodley, 38 Ind. 402; Blasingame *v.* Blasingame, 24 Ind. 86.

22. Discovery generally see DISCOVERY.

23. Temple *v.* Gove, 8 Iowa 511, 74 Am. Dec. 320.

24. Chamberlain *v.* Sawyer, 19 Ohio 360.

25. *Indiana.*— Butler *v.* Anderson, 27 Ind. 117.

Louisiana.—Adams *v.* McCauley, 4 Rob. 184.

New Jersey.— Vanauken *v.* Hornbeck, 14 N. J. L. 178, 25 Am. Dec. 509.

New York.— Snediker *v.* Griffin, 4 N. Y. Leg. Obs. 423.

Ohio.— Sargent *v.* Steubenville, etc., R. Co., 32 Ohio St. 449.

Rhode Island.— Adams *v.* Baker, 16 R. I. 1, 11 Atl. 168, 27 Am. St. Rep. 721.

Vermont.— Viles *v.* Moulton, 11 Vt. 470.

See 33 Cent. Dig. tit. "Lost Instruments," § 47.

Under the old rule requiring profert and oyer of course the loss, even in an action at law, must be averred. Church *v.* Flowers, 2 Root (Conn.) 144. And it has even been held in such a case that it is necessary to declare with a profert. Metcalf *v.* Standeford, 1 Bibb (Ky.) 618.

And under certain local statutes regulating actions on lost instruments the bill need not aver the loss of the instrument. Sauter *v.* Leveridge, 103 Mo. 615, 15 S. W. 981.

26. Mason *v.* Foster, 3 J. J. Marsh. (Ky.) 283.

27. Eans *v.* Jefferson City Exch. Bank, 79 Mo. 182. See also *supra*, II, D, 2.

28. Plea or answer: Generally see PLEADING. In equity see EQUITY.

29. Cherry *v.* Mann, Cooke (Tenn.) 268, 5 Am. Dec. 696.

30. Lowry *v.* Medlin, 6 Humphr. (Tenn.) 450.

Denial of liability and of offer of security. — Where in an action on a destroyed note plaintiff declared that he had offered and was still ready to give defendant security against liability, the latter may deny all allegations of the action and also set up facts tending to show that he is not liable. Rowan *v.* Ross, 3 Quebec Pr. 391.

31. Erskine *v.* Wilson, 20 Tex. 77.

32. Pattison *v.* Shaw, 82 Ind. 32; Jenkins

instrument is lost, a plea that it is not lost is a good answer.[33] But an answer in an action on a lost instrument averring payment and alleging that the instrument was not lost by accident but destroyed by the obligee for the purpose of releasing the obligor admits the existence and loss of the instrument,[34] and in an action on a destroyed note, an answer denying its execution and alleging that if it was made it was for an illegal consideration was held to admit the destruction of the note.[35]

c. As to Description of Instrument. In a suit in equity on a lost note, where the bill, which was sworn to, described the note and alleged its loss and defendant in his answer pleaded failure of consideration only, no further proof of the execution was necessary.[36] An answer admitting the execution of a note to plaintiff and stating that defendant did not recollect the amount, date, or time of the maturity of the note and therefore would not admit the correctness of plaintiff's allegations on these points is evasive and insufficient.[37]

C. Affidavit of Loss — 1. Necessity For. It was early held in England that if relief was demanded and not merely discovery, an affidavit of loss must be annexed to the bill, not as evidence of loss but as the foundation for action by a court of equity.[38] And in the United States the bill should be sworn to,[39] or the affidavit, as the basis of the jurisdiction of the court, should be filed with the bill,[40] or annexed to the bill.[41] The filing of an affidavit of loss, when necessary, is not excused by the fact that plaintiff took the stand as a witness and testified as to the

v. Parkhill, 25 Ind. 473; Mays *v.* Foster, 26 Kan. 518; Keithley *v.* Seydell, 60 Tex. 78. It has been held, however, that such statutes do not apply to lost instruments. Norris *v.* Kellogg, 7 Ark. 112.

Variance.— Under a code provision requiring an affidavit of "the loss, destruction and contents" of the lost instrument, to give equity jurisdiction, defendant may take advantage of a variance without a sworn plea of *non est factum*. Boylston *v.* Sherran, 31 Ala. 538.

General rules applied to test sufficiency in substance.— Where the complaint alleges the making and delivery of the instrument on a particular day, an answer denying the making and delivery of the note on the day mentioned was held insufficient as raising an immaterial issue. Castro *v.* Wetmore, 16 Cal. 379. And where the allegation was that the lost note was executed to plaintiff, "or to her or her order" an admission in the answer that the note was to or in the name of plaintiff as payee admits the execution as alleged. Peck *v.* Hendersbott, 14 Iowa 40.

33. Rand *v.* Rand, 4 N. H. 267.

Reply to plea of loss.— In an action by the payee against the maker of a note payable to order and indorsed in blank, a plea setting up the loss of the note before the commencement of the suit, and that plaintiff is unable to procure the same and give it up to defendant, is sufficiently answered by a replication that plaintiff did not lose the note in the manner and form, etc., because the material point in defense is that plaintiff cannot produce the note, and the ground on which the form of replication has been sustained probably is that when plaintiff denies the loss of the note he takes upon himself the burden of producing it. Campbell *v.* McCrea, 11 U. C. Q. B. 93.

A plea of set-off and nothing else admits the existence, indorsement, and loss of the note. Willson *v.* Light, 4 Ark. 158.

34. Colley *v.* Sheppard, 31 Gratt. (Va.) 312.

35. Nagel *v.* Mignot, 8 Mart. (La.) 488; Boston Lead Co. *v.* McGuirk, 15 Gray (Mass.) 87.

36. Scherer *v.* Upton, 31 Tex. 617.

37. Hill *v.* Lackey, 9 Dana (Ky.) 81.

38. Walmsley *v.* Child, 1 Ves. 341, 27 Eng. Reprint 1070; Stokoe *v.* Robson, 3 Ves. & B. 51, 35 Eng. Reprint 398; East India Co. *v.* Boddam, 9 Ves. Jr. 464, 7 Rev. Rep. 275, 32 Eng. Reprint 682.

39. Kennedy *v.* Conn, 3 B. Mon. (Ky.) 321.

40. *Alabama.*— Posey *v.* Decatur Bank, 12 Ala. 802; Hooe *v.* Harrison, 11 Ala. 499; Bell *v.* Moore, 9 Ala. 823.

Illinois.— Purviance *v.* Holt, 8 Ill. 394; Dormady *v.* State Bank, 3 Ill. 236.

Indiana.— Carlisle *v.* Ramsey, 4 Ind. 242; Hoddy *v.* Hoard, 2 Ind. 474, 54 Am. Dec. 456; Pennington *v.* Governor, 1 Blackf. 78.

Kentucky.— Kennedy *v.* Conn, 3 B. Mon. 321; Lineonfelter *v.* Kelly, 6 J. J. Marsh. 339; Webb *v.* Bowman, 3 J. J. Marsh. 70; Peart *v.* Taylor, 2 Bibb 556. But see Graham *v.* Haekwith, 1 A. K. Marsh. 423.

Mississippi.— Smith *v.* Walker, Sm. & M. Ch. 432.

New York.— Le Roy *v.* Veeder, 1 Johns. Cas. 417. Where discovery and relief are sought in an action on a lost instrument, the affidavit of loss should be made. Livingston *v.* Livingston, 4 Johns. Ch. 294.

Tennessee.— Parson *v.* Wilson, 2 Overt. 260.

Virginia.— Taliaferro *v.* Foote, 3 Leigh 58. But see Cabell *v.* Megginson, 6 Munf. 202.

See 33 Cent. Dig. tit. "Lost Instruments," § 37.

41. Hill *v.* Lackey, 9 Dana (Ky.) 81; Grant *v.* Reid, 46 N. C. 512; Fisher *v.* Carroll, 41 N. C. 485.

loss of the note.[42] Where the court would have jurisdiction of a suit on a lost instrument independent of the fact of the loss, an affidavit is not necessary.[43] If the bill is sworn to and alleges the loss of the instrument, an additional affidavit of loss is unnecessary.[44] The necessity for an affidavit for loss in an action on the lost instrument is sometimes controlled by express statute.[45] If the instrument is sued on, and is lost pending an appeal from a justice of the peace, an affidavit of loss is not required.[46]

2. By Whom Made. The affidavit may be made by plaintiff,[47] even though the law makes the party incompetent to testify in the main case,[48] or, as has been held, by any one who knows the facts, even though not a party to the suit.[49]

3. Before Whom Made. The affidavit should be made before an officer authorized to administer the oath.[50]

4. Sufficiency. The affidavit of loss must be clear, satisfactory,[51] and certain as to those things which should be shown therein,[52] and must make the showing

42. Bremond *v.* Johnson, 1 Tex. App. Civ. Cas. § 609. But see Graham *v.* Hackwith, 1 A. K. Marsh. (Ky.) 423.

43. *Alabama.*—O'Bannon *v.* Myers, 36 Ala. 551, 76 Am. Dec. 335.

Illinois.— Purviance *v.* Holt, 8 Ill. 394.

Indiana.— Clark *v.* Trueblood, 16 Ind. App. 98, 44 N. E. 679.

Kentucky.— Peart *v.* Taylor, 2 Bibb 556.

Massachusetts.— Campbell *v.* Sheldon, 13 Pick. 8.

West Virginia.— Lyttle *v.* Cozad, 21 W. Va. 183.

See 33 Cent. Dig. tit. "Lost Instruments," § 37.

Illustration of this may be found in a bill to foreclose a mortgage (O'Bannon *v.* Myer, 36 Ala. 551, 76 Am. Dec. 335; Allen *v.* Smith, 29 Ark. 74); or in an action for specific performance (Blasingame *v.* Blasingame, 24 Ind. 86).

44. Vimont *v.* Stitt, 6 B. Mon. (Ky.) 474; Kennedy *v.* Conn, 3 B. Mon. (Ky.) 321; Hunter *v.* Robinson, 5 W. Va. 272.

45. Glassell *v.* Mason, 32 Ala. 719, holding that the affidavit if made shifted the burden of proof, but that it need not be made in order to authorize the bringing of suit. In Mobile Branch Bank *v.* Tillman, 12 Ala. 214, and Posey *v.* Decatur Bank, 12 Ala. 802, it was decided that this statute was cumulative merely; that a plaintiff, notwithstanding this statute, might sue at common law, without making the affidavit, in all cases where he could have sued at common law, before the statute.

In Louisiana the oath of the party was required in support of the proof of loss. Vance *v.* Cooper, 22 La. Ann. 508.

Where negotiable paper has been destroyed no affidavit of loss is necessary. Mobile Bank *v.* Williams, 13 Ala. 544.

46. Hosea *v.* Cross, 60 Mo. 173.

47. *Arkansas.*— Worthington *v.* Curd, 15 Ark. 491; Kellogg *v.* Norris, 10 Ark. 18.

Illinois.— Taylor *v.* McIrvin, 94 Ill. 488.

Indiana.— Cleveland *v.* Worrell, 13 Ind. 545; Bean *v.* Keen, 7 Blackf. 152.

Louisiana.— Flower *v.* O'Conner, 7 La. 198. The oath required in this state, to be in support of the proof, must be made by plaintiff, unless there is direct testimony of loss. Vance *v.* Cooper, 22 La. Ann. 508. See also Lewis *v.* Splane, 2 La. Ann. 754.

Mississippi.— Davis *v.* Black, 5 Sm. & M. 226.

North Carolina.— Chancy *v.* Baldwin, 46 N. C. 78; McRae *v.* Morrison, 35 N. C. 46.

Pennsylvania.— Gray *v.* Coulter, 4 Pa. St. 188; Snyder *v.* Wolfley, 8 Serg. & R. 328.

Rhode Island.— Aborn *v.* Bosworth, 1 R. I. 401.

United States.— Tayloe *v.* Riggs, 1 Pet. 591, 7 L. ed. 275.

See 33 Cent. Dig. tit. "Lost Instruments," § 38.

48. Bagley *v.* Eaton, 10 Cal. 126; Hamit *v.* Lawrence, 2 A. K. Marsh. (Ky.) 366.

49. Banks *v.* Dixon, 24 Ga. 483; Smith *v.* Young, 2 Barb. (N. Y.) 545; Withee *v.* Fearing, 23 Tex. 503.

By young child.— It has been held that the affidavit could not be made by a young child because it was not shown that he was acquainted with the facts. Cheek *v.* James, 2 Heisk. (Tenn.) 170.

50. Allen *v.* State Bank, 21 N. C. 3, holding that the affidavit may be made before a master in chancery in another state.

Under a local statute it was held that an affidavit made before a justice of the peace is sufficient (Kearney *v.* Woodson, 4 Mo. 114); and under a statute in another state it was held that the affidavit must be made before the clerk of the court in which the suit is pending (Jones *v.* Blackburn, 2 Baxt. (Tenn.) 399; Baker *v.* Grigsby, 7 Heisk. (Tenn.) 627; Tyree *v.* Magness, 1 Sneed (Tenn.) 276; Carter *v.* Vaulx, 2 Swan (Tenn.) 639; Buckner *v.* Geodeker, (Tenn. Ch. App. 1897) 45 S. W. 448).

51. McCart *v.* Wakefield, 72 Ill. 101.

52. Palmer *v.* Logan, 4 Ill. 56, holding that an affidavit stating that the instrument was lost and destroyed and was not in the possession or power of plaintiff and that he has no knowledge of its acceptance except the statement of defendant, was insufficient because it did not show what diligence or search had been used and made by plaintiff.

Note sent out of state.— An affidavit stating that the note was sent to another state

required by the statute which governs;[53] but if it recites in detail the facts of the loss it is sufficient.[54]

5. Objections — Amendment. The failure to file an affidavit with the bill may be cured by admissions in defendant's answer.[55] So the omission of the affidavit of loss in a suit on a lost instrument should be taken advantage of by demurrer to the declaration or bill,[56] and the sufficiency of the affidavit may also be tested in the same way;[57] and if no demurrer is filed the affidavit is waived.[58] It is too late, after convincing proof of the loss, to object that no affidavit was filed with the bill;[59] and it is sufficient if, no demurrer having been filed, the affidavit is filed afterward during the progress of the cause.[60] If the affidavit is defective, plaintiff may file an amendment;[61] but where the affidavit is rejected as defective and no further evidence is offered or application for a continuance or leave to amend made, the judgment must be for defendant.[62]

D. Evidence[63] **— 1. In General.** In actions on lost instruments, the rules of evidence ordinarily applied by courts of law and equity are operative.[64]

2. Presumptions and Burden of Proof.[65] Courts of equity will only entertain jurisdiction on lost instruments where the execution and former existence of the instrument is clearly established.[66] The burden of proof is on the person claiming under a lost instrument to establish its execution and contents;[67] and where the loss of the instrument is not admitted, plaintiff must prove it.[68] In a suit to establish a lost deed, which relinquished the dower right of the grantor's wife,

and a judgment against one of the makers obtained is not a sufficient showing of loss in a suit against another maker, unless it is shown that neither the original nor a copy can be had under the laws of that state. Stout *v.* Ashton, 5 T. B. Mon. (Ky.) 251.

53. Buckner *v.* Geodeker, (Tenn. Ch. App. 1897) 45 S. W. 448, holding that an affidavit should state that the lost instrument is still the property of plaintiff, and that the instrument was unintentionally lost or mislaid.

Ownership.— Under a statute requiring that the affidavit state that the person bringing the suit is the owner, or the agent of the owner, a failure to so state is fatal. Rowland *v.* Daily, 45 Ga. 129.

Instrument not accessible.— Under a statute providing that plaintiff must make an affidavit that the instrument was not accessible, an affidavit stating that the note "has become lost or destroyed, and plaintiff does not know whether it is one or the other, but believes it to be one or the other" is sufficient. Hogan *v.* Kaiser, 113 Mo. App. 711, 88 S. W. 1128.

"Loss" implies "accident."— Under a statute permitting recoveries on instruments lost "by accident," an affidavit that the note was "lost" is sufficient, as the word "lost" implies accident. Harryman *v.* Robertson, 3 Mo. 449.

54. Hill *v.* Lackey, 9 Dana (Ky.) 81.

Sufficient affidavits.— An affidavit which states the death of the payee of a note, that all his papers were passed into the hands of his executor, that his executor died, and that the note could not be found among his papers, is sufficient. Bell *v.* Young, 1 Grant (Pa.) 175. So an affidavit setting forth that the lost instrument was filed in a prior suit before a justice who afterward died and that his successor and the counsel in the case were unable, after search, to find it was held to be sufficient. Stanley *v.* Anderson, 107 Mich. 384, 65 N. W. 247.

55. Webb *v.* Bowman, 3 J. J. Marsh. (Ky.) 70.

56. Bell *v.* Moore, 9 Ala. 823.

Demurrer: Generally see Pleading. In equity see Equity.

57. Carter *v.* Vaulx, 2 Swan (Tenn.) 639.

58. Findlay *v.* Hinde, 1 Pet. (U. S.) 241, 7 L. ed. 128.

59. Bennett *v.* Waller, 23 Ill. 97.

60. Thornton *v.* Stewart, 7 Leigh (Va.) 128.

61. Bateman *v.* Bateman, 21 Tex. 432; Lyttle *v.* Cozad, 21 W. Va. 183. *Compare* Bateman *v.* Bateman, 16 Tex. 541.

62. Buckner *v.* Geodeker, (Tenn. Ch. App. 1897) 45 S. W. 448.

63. **Evidence** generally see Evidence.

64. Scherer *v.* Upton, 31 Tex. 617.

65. **Burden of proof** generally see Evidence, 16 Cyc. 926 *et seq.*

66. Jackson *v.* Jackson, 6 Dana (Ky.) 257; Gray *v.* Coulter, 4 Pa. St. 188; Bell *v.* Young, 1 Grant (Pa.) 175.

67. *District of Columbia.*— Kelley *v.* Diver, 6 Mackey 440.

Louisiana.— Cooper *v.* White, 16 La. Ann. 317.

New Jersey.— Gallagher *v.* McBride, 63 N. J. L. 422, 44 Atl. 203; Swaine *v.* Maryott, 28 N. J. Eq. 589.

Texas.— Erskine *v.* Wilson, 20 Tex. 77.

United States.— U. S. *v.* Knight, 1 Black 227, 488, 17 L. ed. 76, 80.

See 33 Cent. Dig. tit. "Lost Instruments," § 52.

68. Hooe *v.* Harrison, 11 Ala. 499.

Instrument last in defendant's hands.— But where it appears that the lost instrument was non-negotiable and in the hands of defendant when last seen, the burden of proving the payment and of showing that the

proof of substantial compliance with the steps then provided by law to relinquish a dower right must be offered.[69] Where the instrument was executed by several parties, it is not enough to prove the signatures of some of them.[70] Nothing appearing to the contrary, a note is presumed to be non-negotiable.[71] But in an action at law upon a negotiable instrument lost before maturity, evidence must be introduced that the instrument was not indorsed, but if it was lost after maturity the indorsement need not be shown.[72] The assignee of a lost instrument must show the assignment in order to recover.[73] Where it appears that the lost instrument was executed, a legal consideration will be presumed.[74] A lost deed of land is presumed to be in conformity with the articles of agreement for the sale of the land.[75]

3. Admissibility and Competency. The general rules of evidence apply in suits on or to establish lost instruments.[76] There must be proof of the existence and loss of the instrument before secondary evidence of its contents can be admitted.[77] The evidence of the execution of the instrument[78] or of its loss[79] may be proved by oral or presumptive evidence; and so the same character of evidence is admissible to prove the terms and identity of the instrument in an action on a lost instrument.[80] Where the testimony is conflicting, the admissions of

instrument was not lost is on defendant. Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. 853.

69. Owen *v.* Paul, 16 Ala. 130.

70. Neely *v.* Carter, 96 Ga. 197, 23 S. E. 313.

71. *Maine.*— Moore *v.* Fall, 42 Me. 450, 66 Am. Dec. 297.

Maryland.— Yingling *v.* Kohlhass, 18 Md. 148.

Nevada.—Allen *v.* Reilly, 15 Nev. 452.

New Jersey.— Clark *v.* Hornbeck, 17 N. J. Eq. 430.

New York.— Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126; McNair *v.* Gilbert, 3 Wend. 344; Pintard *v.* Tackington, 10 Johns. 104.

Vermont.— Lazell *v.* Lazell, 12 Vt. 443, 36 Am. Dec. 352.

See 33 Cent. Dig. tit. "Lost Instruments," § 52.

Negotiability not shown by indorsement.— Proof that the payee's name was indorsed upon the note does not prove that the note was negotiable. Hough *v.* Barton, 20 Vt. 455.

72. Sloo *v.* Roberts, 7 Ind. 128.

73. Arnold *v.* Voorhies, 4 J. J. Marsh. (Ky.) 507.

Presumption of indorsement or assignment.— A non-negotiable instrument will not be presumed to have been indorsed or assigned. Clark *v.* Hornbeck, 17 N. J. Eq. 430. See also Bean *v.* Keen, 7 Blackf. (Ind.) 152. *Contra*, Bigler *v.* Keller, 8 Wkly. Notes Cas. (Pa.) 323.

74. McIlvoy *v.* Cochran, 3 Litt. (Ky.) 454.

75. Patterson *v.* Forry, 2 Pa. St. 456.

76. See Evidence.

In a suit to establish a lost deed, evidence on behalf of defendant of the statement of a person, under whom plaintiff did not claim, that he owned no interest in the property, is properly rejected. Jones *v.* Ballou, 139 N. C. 526, 52 S. E. 254.

77. *Alabama.*— Johnson *v.* Alabama Gas, etc., Co., 90 Ala. 505, 8 So. 101.

Maine.— Kimball *v.* Morrell, 4 Me. 368.

New York.— Blade *v.* Noland, 12 Wend. 173, 27 Am. Dec. 126.

Pennsylvania.— Slone *v.* Thomas, 12 Pa. St. 209. In an action to recover real estate, claimed under a lost deed, evidence of a witness that he saw a deed for the tract among the claimant's papers, but without any testimony from him as to who executed it or when, is inadmissible to show title. Burke *v.* Hammond, 76 Pa. St. 172.

Texas.— Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109.

See 33 Cent. Dig. tit. "Lost Instruments," § 51 *et seq.*

Admission of party.— A letter written by one of the parties to a lost instrument to a third person acknowledging the contract and stating its terms is admissible against the party who wrote the letter as to the loss and the contents of the instrument. Peart *v.* Taylor, 2 Bibb (Ky.) 556.

78. Kelley *v.* Riggs, 2 Root (Conn.) 126; Menendez *v.* Larionda, 3 Mart. (La.) 256; Irving *v.* Campbell, 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103; Rains *v.* McMills, 14 Tex. 614; Patrick *v.* Badger, (Tex. Civ. App. 1897) 41 S. W. 538. It has been held, however, that in an action of ejectment by the grantee of one tenant in common against those claiming under another, where a deed relied upon by one of the parties has been lost, parol evidence of the declaration of plaintiff's grantor was inadmissible. Harmon *v.* James, 7 Sm. & M. (Miss.) 111, 45 Am. Dec. 296.

79. Kelley *v.* Riggs, 2 Root (Conn.) 126; Clark *v.* Hornbeck, 17 N. J. Eq. 430.

80. Kelley *v.* Riggs, 2 Rott (Conn.) 126; Patrick *v.* Badger, (Tex. Civ. App. 1897) 41 S. W. 538.

Proof of handwriting.— It has been held that when the note is destroyed strict proof of handwriting is unnecessary. Bradley *v.* Long, 2 Strobh. (S. C.) 160. But where there has been no evidence of the form and

the holder as to the nature of his claim are admissible in evidence.[81] Plaintiff need not himself be sworn as to the loss in order to admit evidence of the contents of the lost instrument,[82] but he may be sworn to prove such loss.[83] On the other hand, while a party to the action may file an affidavit of loss, such affidavit is addressed to the court to lay a foundation for secondary evidence and plaintiff may at the same time be incompetent to testify at the trial itself.[84] Where recovery is sought on a lost deed, resort must first be had to the witnesses of such deed if they are known to prove the execution of the deed.[85] The execution of a bond may be proved by any person who knows the facts.[86] Under a general denial, in an action on a lost instrument, evidence that defendant never executed the instrument is admissible, not to show that the instrument was never executed but to show its non-existence.[87] In a state where the loss of the instrument must be advertised, the newspaper in which the publication is made need not be produced but the advertisement may be proved by oral evidence.[88] If an action is brought upon a lost instrument, which is supported by affidavit of loss, but the instrument is found before trial, the instrument itself may be read in evidence.[89]

4. Weight and Sufficiency. Proof of the existence and delivery of the lost instrument must be clear and convincing.[90] It has been held that the fact of the execution and its contents and the loss must be proved by more than the prepon-

description of the letters in a genuine signature to a lost instrument, evidence of the form and description of an alleged signature is inadmissible. Spottiswood *v.* Weir, 80 Cal. 448, 22 Pac. 289. And in an action on a lost instrument, plaintiff is not bound to accept as genuine or submit to his witnesses an instrument which is produced by defendant, purporting to be the lost instrument. Helzer *v.* Helzer, 187 Pa. St. 243, 41 Atl. 40; Hill *v.* Townsend, 24 Tex. 575.

81. Elliott *v.* Dycke, 78 Ala. 150; Leggett *v.* McLendon, 66 Ga. 725.

82. Weaver *v.* Cox, 15 La. Ann. 463; Smith *v.* Young, 2 Barb. (N. Y.) 545.

83. Bean *v.* Keen, 7 Blackf. (Ind.) 152, holding, however, that the contents of the note and the fact that it was indorsed must be shown by disinterested witnesses.

84. Davis *v.* Black, 5 Sm. & M. (Miss.) 226. An affidavit of loss annexed to the complaint is sufficient proof of the loss to let in secondary evidence of its contents unless there is some opposing testimony or the execution of the instrument is denied in the answer. Hill *v.* Lackey, 9 Dana (Ky.) 81; Fisher *v.* Carroll, 41 N. C. 485; Wardlaw *v.* Gray, Dudley Eq. (S. C.) 85.

Affidavit not evidence.— The affidavit itself is in no sense evidence. Mobile County *v.* Sands, 127 Ala. 493, 29 So. 26; Branch Bank *v.* Tillman, 12 Ala. 214; Hooe *v.* Harrison, 11 Ala. 499. See also Wardlaw *v.* Gray, Dudley Eq. (S. C.) 85. But see Cleveland *v.* Roberts, 14 Ind. 511. Under a local statute providing that the affidavit should be received as presumptive evidence of contents and loss unless defendant denies the execution by a verified plea, it was held that the burden of proving the loss was shifted upon the filing of an affidavit. Glassell *v.* Mason, 32 Ala. 719. And where defendant claimed a set-off under a lost certificate of deposit, it was held that he must prove its contents unless he filed an affidavit of loss. Parker *v.* Edwards, 85 Ala. 24€. 4 So. 612.

85. Felton *v.* Pitman, 14 Ga. 530; Jackson *v.* Vail, 7 Wend. (N. Y.) 125.

But the subscribing witnesses being unknown, the existence and execution of the deed may be shown by any witnesses who know the facts. Turner *v.* Cates, 90 Ga. 731, 16 S. E. 971; Felton *v.* Pitman, 14 Ga. 530; Jackson *v.* Vail, 7 Wend. (N. Y.) 125.

86. Rowland *v.* Day, 17 Ala. 681. Testimony of a witness that the lost deed was read by the grantor and the witness and that his brother, who was present, then said, "Now we know whose land it is," is competent. Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475.

Self-serving acts.— It has been held that evidence of the acts of a person or his agent indicating that they have openly claimed land is admissible, although self-serving, to establish a lost deed. Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121.

87. Millikan *v.* State, 70 Ind. 310.

88. Miller *v.* Webb, 8 La. 516.

89. Carlisle *v.* Davis, 7 Ala. 42.

90. Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475. See Evidence, 17 Cyc. 778 text and notes 48, 49.

Circumstantial evidence.— The signatures may be proved by circumstantial evidence. Clapp *v.* Engledow, 82 Tex. 290, 18 S. W. 146; Bounds *v.* Little, 75 Tex. 316, 12 S. W. 1109. Evidence that more than four years had elapsed from the time a lost note fell due and that there had been two previous trials of the same action without the note being produced was considered as strongly indicating the existence and loss of the note. Swift *v.* Stevens, 8 Conn. 431.

Evidence of transfer.— Evidence tending to show the transfer, although there was no actual delivery or assignment, is permissible to show the transfer but not to show the

derance of evidence,[91] and that the evidence of loss or destruction should be the same proof as that introduced as the fountain for secondary evidence.[92] The mere assertion that plaintiff had made diligent search and could not find the instrument is not sufficient proof of the loss.[93] In proving the contents of a lost instrument, it is sufficient to show who executed it and to whom it was executed, the time of execution, the consideration and the property conveyed, or the subject-matter of the contract;[94] but it is held that while the evidence as to the amount, terms, and identity must be clear, specific, and satisfactory in an action on the instrument, it is sufficient to prove the contents in substance.[95]

5. VARIANCE. Failure to prove the contents of a lost instrument, as alleged in

existence of the note or its original execution. Gregory *v.* Ross, 9 Baxt. (Tenn.) 599.

Under a plea of non est factum one witness is sufficient to prove the execution of the lost instrument. Albro *v.* Lawson, 17 B. Mon. (Ky.) 642.

A written acknowledgment by a grantor that he signed the lost instrument is sufficient evidence of its execution. Elliott *v.* Dycke, 78 Ala. 150; Fearn *v.* Taylor, 4 Bibb (Ky.) 363; Latapie *v.* Gravier, 8 Mart. (La.) 316.

Deed filed in another suit.— Where a sheriff's deed was filed as evidence in another suit and lost and the grantee and a sheriff testified as to its contents, execution, and acknowledgment in open court and the court record containing the entry of the acknowledgment was produced, it was held that the loss was sufficiently shown. Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3.

91. Cooley *v.* Cooley, (Ky. 1886) 1 S. W. 491; Gillis *v.* Wilmington, etc., R. Co., 108 N. C. 441, 13 S. E. 11, 1019.

Beyond a reasonable doubt.— It has been held that the destruction of a note must be proved beyond a reasonable doubt. Moses *v.* Trice, 21 Gratt. (Va.) 556, 8 Am. Rep. 609. See also EVIDENCE, 17 Cyc. 771 text and note 24.

92. Loewe *v.* Reismann, 8 Ill. App. 525; Allerkamp *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 372.

Circumstantial evidence.— It has been held that in an action on a lost bank-bill, not to be distinguished from others, circumstantial evidence of the loss is not sufficient. Tower *v.* Appleton Bank, 3 Allen (Mass.) 387, 81 Am. Dec. 665. See also Swift *v.* Stevens, 8 Conn. 431.

93. Laubach *v.* Meyers, 147 Pa. St. 447, 23 Atl. 765.

Sufficiency without evidence of search.— Testimony of two witnesses who were present when the instrument was executed as to its contents, by whom prepared, and how it was burned, is sufficient evidence of loss without any evidence as to search. Morrison *v.* Jackson, 35 S. C. 311, 14 S. E. 682.

For sufficient evidence of loss see Wiedenfeld *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 333; Rogers *v.* Durant, 106 U. S. 644, 1 S. Ct. 623, 27 L. ed. 303. A statement in an agreed statement of facts that it is "unknown whether said . . . [intestate] disposed of note in his lifetime, or whether it has been lost or destroyed," is not sufficient evidence of the loss. Hughes *v.* Moore, 17 Mo. App. 148.

94. Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63.

For sufficient proof of execution see Shorter *v.* Sheppard, 33 Ala. 648; McDonald *v.* Thompson, 16 Colo. 13, 26 Pac. 146; Hawley *v.* Hawley, 187 Ill. 351, 58 N. E. 332; Harrell *v.* Enterprise Sav. Bank, 183 Ill. 538, 56 N. E. 63; Templin *v.* Krahn, 3 Ind. 373; Otten *v.* Laffler, 17 Iowa 576; Segond *v.* Roach, 4 La. Ann. 54; Yingling *v.* Kohlhass, 18 Md. 148; Holmes *v.* Deppart, 122 Mich. 275, 80 N. W. 1094; Towle *v.* Sherer, 70 Minn. 312, 73 N. W. 180; Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3; Hill *v.* Bub, 34 Nebr. 524, 52 N. W. 375; Wells *v.* Flitcraft, (N. J. Ch. 1899) 43 Atl. 659; Irving *v.* Campbell, 56 N. Y. Super. Ct. 224, 4 N. Y. Suppl. 103; Teller *v.* Brower, 14 Oreg. 405, 14 Pac. 209; Anderson *v.* Robson, 1 Brev. (S. C.) 263; Belton *v.* Briggs, 4 Desauss Eq. (S. C.) 465; Grayson *v.* Lofland, 21 Tex. Civ. App. 503, 52 S. W. 121; Robbins *v.* Ginnochio, (Tex. Civ. App. 1898) 45 S. W. 34; Dulaney *v.* Walshe, 3 Tex. Civ. App. 174, 22 S. W. 131; Caston *v.* Dawson, 3 Tex. App. Civ. Cas. § 332; Colchester *v.* Culver, 29 Vt. 111; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329; Matteson *v.* Hartmann, 91 Wis. 465, 65 N. W. 58. See 33 Cent. Dig. tit. "Lost Instruments," §§ 17, 54, 57.

For insufficient proof of execution see Hooper *v.* Chism, 13 Ark. 496; Duncan *v.* Last Chance Ditch Co., 7 Colo. App. 34, 42 Pac. 171; Calvert *v.* Nichols, 8 B. Mon. (Ky.) 264; Arnold *v.* Voorhies, 4 J. J. Marsh. (Ky.) 507; Anderson *v.* Cox, 6 La. Ann. 9; Seymour *v.* Canfield, 122 Mich. 212, 80 N. W. 1096; Stovall *v.* Judah, 74 Miss. 747, 21 So. 614; Hendricks *v.* Whitecotton, 60 Mo. App. 671; Owen *v.* Crum, 20 Mo. App. 121; Reimer *v.* Muller, 47 N. Y. Super. Ct. 226; Townsend *v.* Moss, 58 N. C. 145; Burridge *v.* Geauga Bank, Wright (Ohio) 688; Nessley *v.* Ladd, 29 Oreg. 354, 45 Pac. 904; Burr *v.* Kase, 168 Pa. St. 81, 31 Atl. 954; Rousher *v.* Hamm, 3 Brewst. (Pa.) 233; Overand *v.* Menczer, 83 Tex. 122, 18 S. W. 301; Barley *v.* Byrd, 95 Va. 316, 28 S. E. 329. See 33 Cent. Dig. tit. "Lost Instruments," §§ 17, 54, 57.

95. *District of Columbia.*— Kelley *v.* Divver, 6 Mackey 440.

Florida.— Fries *v.* Griffin, 35 Fla. 212, 17 So. 66.

Illinois.— Bennett *v.* Waller, 23 Ill. 97; Osborne *v.* Rich, 53 Ill. App. 661.

the declaration, in material points, is a fatal variance.[96] But an allegation that the instrument sued on was destroyed is supported by offering in evidence the mutilated instrument,[97] and proof that the note was destroyed by fire will support an allegation that the note was lost.[98]

E. Trial[99] — **1. Questions For Court and Jury.** The question of the loss of the instrument, upon evidence offered to lay the foundation for secondary evidence, is for the court,[1] and its execution and existence, as a ground of action, in a suit at law, are for the jury.[2] And in an equity case the chancellor may direct an issue to be tried by a jury.[3]

2. Judgment[4] **and Decree.**[5] A court of equity may either establish a lost instrument by declaring its existence in its decree or order its reëxecution,[6] or may order the execution by a commissioner of a new deed to replace the lost one.[7] But where the answer alleges that an action of ejectment is pending between the parties, the court, instead of finding the paramount title in plaintiff, should merely establish the lost deed and leave questions like the statute of limitations, etc., to be litigated in the action of ejectment.[8] In an action to recover on a lost

Iowa.— McDonald *v.* Jackson, 56 Iowa 643, 10 N. W. 223.

Maine.— Perkins *v.* Cushman, 44 Me. 484.

Michigan.— Holmes *v.* Deppert, 122 Mich. 275, 80 N. W. 1094.

Minnesota.— Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. 902.

New York.— Metcalf *v.* Van Benthuysen, 3 N. Y. 424.

North Carolina.— Tuttle *v.* Rainey, 98 N. C. 513, 4 S. E. 475; Loftin *v.* Loftin, 96 N. C. 94, 1 S. E. 837; Deans *v.* Dortch, 40 N. C. 331.

Pennsylvania.— Emig *v.* Diehl, 76 Pa. St. 359; Slone *v.* Thomas, 12 Pa. St. 209.

Tennessee.— McCarty *v.* Kyle, 4 Coldw. 348; Johnson *v.* McKamey, (Ch. App. 1899) 53 S. W. 221.

Virginia.— Thomas *v.* Ribble, (1896) 24 S. E. 241.

West Virginia.— Board *v.* Callihan, 33 W. Va. 209, 10 S. E. 382.

United States.— Burdick *v.* Peterson, 72 Fed. 864.

Deed made by order of court.— Where the execution and loss of an instrument has been shown, its contents may be proved by the introduction of an amended deed made by order of court in another case. Dollarhide *v.* Parks, 92 Mo. 178, 5 S. W. 3.

Papers of attorney who drew instrument.— In an action where it is sought to prove the contents of instruments long since destroyed, entries relating thereto, in the account-book of the counsel who drafted the instruments, his drafts thereof, and other papers drawn by him at the same time relative to the subject, the counsel being deceased, are admissible in evidence. Moffat *v.* Moffat, 10 Bosw. (N. Y.) 468.

96. Stickney *v.* Stickney, 21 N. H. 61. Where the complaint described the instrument as being dated Nov. 1, 1826, and the proof showed that it was executed April 17, 1827, it was held to be a fatal variance. Smith *v.* Brown, 3 Blackf. (Ind.) 22.

Under unsworn plea.— It has been held that under an unsworn plea of *non est factum*, the defense of a variance may be relied upon. Osborne *v.* Rich, 53 Ill. App. 661.

Between petition and advertisement.— In a state where a lost instrument is required by law to be advertised, a variance between the description of the instrument in the petition and in the advertisement is fatal. Tuttle *v.* Burroughes, 9 La. Ann. 494.

97. Martin *v.* Blydenburgh, 1 Daly (N. Y.) 314; Myers *v.* Sealy, 5 Rich. (S. C.) 473.

98. McGregory *v.* McGregory, 107 Mass. 543.

99. Trial generally see Trial.

1. Hill *v.* Barney, 18 N. H. 607.

In a suit on a non-negotiable instrument, it was held that its destruction was a question for the jury. Des Arts *v.* Leggett, 5 Duer (N. Y.) 156 [*affirmed* in 16 N. Y. 582].

2. Brighton *v.* Lake Shore, etc., R. Co., 103 Mich. 420, 61 N. W. 550; Hill *v.* Barney, 18 N. H. 607; Baylor *v.* Tillebach, 20 Tex. Civ. App. 490, 49 S. W. 720.

3. Truly *v.* Lane, 7 Sm. & M. (Miss.) 325, 45 Am. Dec. 305.

4. Judgment generally see Judgments.

5. Decree generally see Equity.

6. See also *supra*, II, A, 3.

Under prayer for general relief.— A decree for the reëxecution of a lost instrument is proper under a prayer for general relief in the bill. Bohart *v.* Chamberlain, 99 Mo. 622, 13 S. W. 85.

7. McCauley *v.* Galloway, 43 S. W. 225, 19 Ky. L. Rep. 1291 (if because of the fault of plaintiff a deed is lost it would not be proper to order its reëxecution, the court may direct it to be done by a commissioner); Wade *v.* Greenwood, 2 Rob. (Va.) 474, 40 Am. Dec. 759.

8. Rockwell *v.* Servant, 54 Ill. 251.

Limited to establishment of instrument.— On the other hand, where in a suit on a lost note made by one defendant, plaintiff sought to garnish moneys due the maker of the note from another defendant, the court decided that the decree should be limited to the establishment of the lost note, leaving plaintiff to pursue his garnishment in an independent proceeding. Rich *v.* Catterson, 2 J. J. Marsh. (Ky.) 135.

instrument, the judgment should include interest to the extent of the liability for interest under the instrument established-[9]

3. Costs.[10] Plaintiff in an action on a lost instrument where indemnity should be given is liable for all costs accruing prior to the tender of indemnity;[11] but if indemnity is tendered, defendant is liable for costs, interest on the obligation after maturity and, in certain states, attorney's fees.[12] And where defendant denies the execution of the lost instrument but the proof shows its existence, the costs will go against him.[13]

F. Appeal.[14] Where the evidence tends to show the execution and delivery of a lost instrument and its loss, a finding to the effect that it was executed and delivered will not be disturbed on appeal.[15] Where the regularity of a judgment depends on whether or not the action was on a lost instrument, the indorsement on the writ cannot be looked to to show the nature of the action.[16] Where it appears that indemnity was tendered but the time of tender did not appear, the appellate court will not reverse the case because plaintiff was not awarded costs, it being impossible to determine how much of the costs accrued prior to the tender of indemnity.[17]

LOST MOTION. As applied to a locomotive, a jarring or swinging motion, caused by its worn-out condition.[1] (See, generally, Railroads.)

LOST OR NOT LOST. See Marine Insurance.

LOST PAPERS. See Lost Instruments.

LOST PROPERTY. See Lost.

LOST RECORD. See Records.

LOT. That which causes, falls, or happens; chance, fortune, hazard;[2] anything used in determining a question by chance, or without a man's choice or will;[3] a share.[4] Applied to real estate, it is a term of indefinite meaning,[5] and

9. Fisher *v.* Mershon, 3 Bibb (Ky.) 527; Allerkamp *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 372.

10. Costs generally see Costs.

11. Farmers' Exch. Bank *v.* Altura Gold Mill, etc., Co., 129 Cal. 263, 61 Pac. 1077; Randolph *v.* Harris, 28 Cal. 561, 87 Am. Dec. 139; Burrows *v.* Goodhue, 1 Greene (Iowa) 48; Milne *v.* Marshall, 5 Phila. (Pa.) 131.

12. McCauley *v.* Galloway, 43 S. W. 225, 19 Ky. L. Rep. 1291; Citizens' Bank *v.* Baltz, 27 La. Ann. 106; Wiedenfeld *v.* Gallagher, (Tex. Civ. App. 1893) 24 S. W. 333; Cartier *v.* Stracham, 5 Ont. Pr. 159; Orton *v.* Brett, 12 Manitoba 448, under a statute as to indemnity, holding that in an action on a lost note if the loss is pleaded plaintiff should offer a proper bond before applying to set aside the plea in order to avoid paying costs. But in Hopkins *v.* Adams, 20 Vt. 407, it was held that where no indemnity was offered and defendant resisted payment because no indemnity was offered but did not pay the money into court, the costs should be taxed for neither party. And in Cusack *v.* Southern Loan, etc., Co., 2 Ont. Wkly. Rep. 179, where defendant did not deny liability but both parties were to blame for the litigation, the court ordered an indemnity bond and that upon the payment of the money into court it should be paid out to plaintiff and the action discontinued without costs to either party.

Advertisement.— In a state where a statute requires the fact of the loss to be advertised, the expenses of advertising are not charged against defendant. Citizens' Bank *v.* Baltz, 27 La. Ann. 106.

13. McCauley *v.* Galloway, 43 S. W. 225, 19 Ky. L. Rep. 1291; Lawrence *v.* Lawrence, 42 N. H. 109.

14. Appeal generally see Appeal and Error.

15. Bingham *v.* Hyland, 1 Silv. Sup. (N. Y.) 551, 6 N. Y. Suppl. 75.

16. Stephenson *v.* Roper, 5 Ala. 182.

17. Farmers' Exch. Bank *v.* Altura Gold Mill, etc., Co., 129 Cal. 263, 61 Pac. 1077.

1. Southern Pacific Co. *v.* Johnson, 69 Fed. 559, 567, 16 C. C. A. 317.

2. Webster Dict. [*quoted* in Wilkinson *v.* Gill, 74 N. Y. 63, 66, 30 Am. Rep. 264; People *v.* Noelke, 1 N. Y. Cr. R. 252, 258]. See also Matter of Grening, 74 Hun (N. Y.) 62, 65, 26 N. Y. Suppl. 117.

3. Webster Unabr. Dict. [*quoted* in Chavannah *v.* State, 49 Ala. 396, 398]; Webster Int. Dict. [*quoted* in Lynch *v.* Rosenthal, 144 Ind. 86, 91, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835]. To the same effect see Johnson *v.* State, 137 Ala. 101, 105, 34 So. 1018; Loiseau *v.* State, 114 Ala. 34, 38, 22 So. 138, 62 Am. St. Rep. 84.

4. English L. Dict.

5. Webster *v.* Little Rock, 44 Ark. 536, 551; Potter *v.* Orange. 62 N. J. L. 192, 195, 40 Atl. 647; Pilz *v.* Killingsworth, 20 Oreg. 432, 436, 26 Pac. 305.

must be interpreted with due regard to the context and the subject-matter;[6] thus the word may be employed as referring to a division, parcel, piece, portion, or tract of land;[7] a portion of land that has been set off or allotted, whether great or small;[8] a single piece or parcel of land lying in a solid body, and separated from contiguous land by such subdivisions as are used to denote different tracts of land;[9] a parcel of land within the limits of the state or village as surveyed and platted;[10] a piece or parcel of land within a city, town, or village,[11] as distinguished from land located in a rural district.[12] (Lot: Of Land Described or Designated in — Deed, see DEEDS; Local Assessment Proceedings, see MUNICIPAL CORPORATIONS; Homestead Proceedings, see HOMESTEADS; Mechanic's Lien, see MECHANICS' LIENS; Mortgage, see MORTGAGES; Patent, see PUBLIC LANDS; Plat of City, see MUNICIPAL CORPORATIONS; Tax Proceedings, see TAXATION. See also CURTILAGE; FARM; FIELD.)

LOT AND COPE. Duties payable to the crown by persons working certain mines.[13] (See, generally, MINES AND MINERALS.)

LOTO. A game of chance.[14] (See, generally, GAMING.)

LOT OF LAND. See LOT.

6. Ontario Land, etc., Co. *v.* Bedford, 90 Cal. 181, 184, 27 Pac. 39; White *v.* Gay, 9 N. H. 126, 131, 31 Am. Dec. 224; Dunn *v.* Charleston, Harp. (S. C.) 189, 198.

In a statute relating to adverse possession, "lot" means the smallest legal subdivision of land. Wilson *v.* Henry, 40 Wis. 594, 609; Pepper *v.* O'Dowd, 39 Wis. 538, 546. See also Aldrich *v.* Thurston, 71 Ill. 324, 325.

In its most limited sense, the word might be confined to the area actually covered by a building. *Ex p.* Davis, 9 S. C. 204, 205. See also Hill *v.* La Crosse, etc., R. Co., 11 Wis. 214, 227 [*citing* Choteau *v.* Thompson, 2 Ohio St. 114].

It does not include: A division of land under tide water. Coddington *v.* Beebe, 31 N. J. L. 477, 484. Land in an open street. Schenectady *v.* Union College, 144 N. Y. 241, 249, 39 N. E. 67, 26 L. R. A. 614. A very narrow strip of land. Figg *v.* Louisville, etc., R. Co., 116 Ky. 135, 141, 75 S. W. 269, 25 Ky. L. Rep. 350; Coutt *v.* Craig, 2 Hen. & M. (Va.) 618, 622. Nor railroad property. Indianapolis, etc., R. Co. *v.* Capitol Paving, etc., Co., 24 Ind. App. 114, 54 N. E. 1076, 1077; Buncombe County *v.* Tommey, 115 U. S. 122, 136, 5 S. Ct. 626, 29 L. ed. 308.

7. Harvey *v.* Meyer, 117 Cal. 60, 64, 48 Pac. 1014; Diamond Match Co. *v.* Ontonagon, 72 Mich. 249, 261, 40 N. W. 448; State *v.* Robert P. Lewis Co., 72 Minn. 87, 92, 75 N. W. 108, 42 L. R. A. 639; Lax *v.* Peterson, 42 Minn. 214, 44 N. W. 3; North Star Iron Works Co. *v.* Strong, 33 Minn. 1, 4, 21 N. W. 740; Webster Dict. [*quoted* in Buell *v.* Ball, 20 Iowa 282, 290; Kansas City, etc., R. Co. *v.* Merrill, 25 Kan. 421, 423; Trotter *v.* St. Louis Public Schools, 9 Mo. 69, 94; Wheeler *v.* Port Blakely Mill Co., 2 Wash. Terr. 71, 74, 3 Pac. 635]. *Compare* Wilson *v.* Proctor, 28 Minn. 13, 17, 8 Pac. 830 [*distinguished* in Ford *v.* Clement, 68 Minn. 484, 488, 71 N. W. 672; Lax *v.* Peterson, 42 Minn. 214, 219, 44 N. W. 3].

8. Edwards *v.* Derrickson, 28 N. J. L. 39, 45; Pilz *v.* Killingsworth, 20 Oreg. 432, 436, 26 Pac. 305; *Ex p.* Davis, 9 S. C. 204, 205. See Phillipsburgh *v.* Bruch, 37 N. J. Eq. 482, 486, where it is said that it is more generally used to describe a small parcel of land than a large parcel. *Compare* Kaufman *v.* Stein, 138 Ind. 49, 56, 37 N. E. 333, 46 Am. St. Rep. 368.

9. North, etc., Lumber Co. *v.* Hegwer, 1 Kan. App. 623, 42 Pac. 388, 390.

10. Norfolk State Bank *v.* Schwenk, 51 Nebr. 146, 149, 70 N. W. 970.

11. Texarkana Water Co. *v.* State, 62 Ark. 188, 195, 35 S. W. 788; Ontario Land, etc., Co. *v.* Bedford, 90 Cal. 181, 184, 27 Pac. 39; Lake Erie, etc., R. Co. *v.* Alexandria, 153 Ind. 521, 525, 55 N. E. 435; Collins *v.* New Albany, 59 Ind. 396, 400; Evansville *v.* Page, 23 Ind. 525, 528; Diamond Match Co. *v.* Ontonagon, 72 Mich. 249, 261, 40 N. W. 448; Phelps *v.* Northern Trust Co., 70 Minn. 546, 550, 73 N. W. 842; Worley *v.* Naylor, 6 Minn. 192; State *v.* McMinn, 81 N. C. 585, 587; Fitzgerald *v.* Thomas, 61 Mo. 499, 500; Miller *v.* Hoffman, 26 Mo. App. 199, 204. See also Vasquez *v.* Ewing, 42 Mo. 247, 256.

12. Webster *v.* Little Rock 44 Ark. 536, 551; Glover *v.* Terre Haute, 129 Ind. 593, 594, 29 N. E. 412; Collins *v.* New Albany, 59 Ind. 396, 400; Evansville *v.* Page, 23 Ind. 525, 528; Phelps *v.* Northern Trust Co., 70 Minn. 546, 550, 73 N. W. 842; Coddington *v.* Hudson County Dry Dock, etc., Co., 31 N. J. L. 477, 488; Edwards *v.* Derrickson, 28 N. J. L. 39, 72.

13. Wake *v.* Hall, 50 L. J. Q. B. 545, 548.

14. Lowry *v.* State, 1 Mo. 722 [*cited* in State *v.* Foster, 2 Mo. 210].

LOTTERIES

By Monte M. Lemann
Professor of Law, Law Department, Tulane University of Louisiana

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CROSS-REFERENCES

For Matters Relating to:
Gambling Generally, see GAMING.
License to Sell Lottery Tickets, see LICENSES.
Lost Lottery Ticket, see LOST INSTRUMENTS.
Use of Mails by Lottery, see POST-OFFICE.
Wagers Generally, see GAMING.

I. DEFINITION.

A. In General. A lottery is a species of gaming,[1] which may be defined as a scheme for the distribution of prizes by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize.[2]

1. *Alabama.*— Paulk *v.* Jasper Land Co., 116 Ala. 178, 183, 22 So. 495.
Hawaii.— Rex *v.* Ah Lee, 5 Hawaii 545, 547.
Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 982, 27 So. 532.
Missouri.— Roselle *v.* Farmers' Bank, 141 Mo. 36, 42, 39 S. W. 274, 64 Am. St. Rep. 501.
New York.— Wilkinson *v.* Gill, 74 N. Y. 63, 66, 30 Am. Rep. 264.
Oregon.— Portland *v.* Yick, 44 Oreg. 439, 446, 75 Pac. 706, 102 Am. St. Rep. 633; *Ex p.* Kameta, 36 Oreg. 251, 254, 60 Pac. 394, 78 Am. St. Rep. 775.
Tennessee.— Eubanks *v.* State, 3 Heisk. 488, 490; Bell *v.* State, 5 Sneed 507, 509; State *v.* Smith, 2 Yerg. 272.
Whether gaming statutes apply to lotteries depends largely upon the form of the statutes and the separate treatment of the subjects in the statute books. See Henderson *v.* State, 95 Ga. 326, 22 S. E. 537; Rex *v.* Yeong Ting, 6 Hawaii 576; Bell *v.* State, 5 Sneed (Tenn.) 507; Temple *v.* Com., 75 Va. 892.

2. State *v.* U. S. Express Co., 95 Minn. 442, 445, 104 N. W. 556; State *v.* Moren, 48 Minn. 555, 560, 51 N. W. 618; People *v.* Lavin, 179 N. Y. 164, 168, 71 N. E. 753, 66 L. R. A. 601. See also New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; U. S. *v.* Olney, 27 Fed. Cas. No. 15,918, 1 Abb. 275.
Other definitions are: "A scheme for the distribution of prizes by chance." Dunn *v.* People, 40 Ill. 465, 467 [*cited* with approval in Buckalew *v.* State, 62 Ala. 334, 34 Am. Rep. 22; Hudelson *v.* State, 94 Ind. 426, 48 Am. Rep. 171; State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532; Fleming *v.* Bills, 3 Oreg. 286; Randle *v.* State, 42 Tex. 580; Bouvier L. Dict.].
"A scheme by which a result is reached by some action or means taken, and in which result man's choice or will has no part, nor can human reason, foresight, sagacity, or design enable him to know or determine such result until the same has been accomplished." People *v.* Elliott, 74 Mich. 264, 267, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. A. 403 [*cited* in Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586].
"Where a pecuniary consideration is paid, and it is determined by lot or chance, according to some scheme held out to the public what the party who pays the money is to have for it . . . it is a lottery." State *v.* Clarke, 33 N. H. 329, 335, 66 Am. Dec. 723 [*cited* with approval in State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430; Hull *v.* Ruggles, 56 N. Y. 424; Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586; MacDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339].
"[The word 'lottery'] embraces the elements of procuring through lot or chance, by the investment of a sum of money or something of value, some greater amount of money or thing of greater value." U. S. *v.* Wallis, 58 Fed. 942, 943.
"When small amounts are hazarded to gain large amounts, and the result of winning to be determined by the use of a contrivance of chance, in which neither choice nor skill can exert any effect, it is gambling by lot, or a prohibited lottery." Loiseau *v.* State, 114 Ala. 34, 38, 22 So. 138, 62 Am. St. Rep. 84.
"A lottery, within the meaning of the statute of this state forbidding lotteries, is a scheme, devise or game of hazard, whereby

B. Specific Requisites[3] — **1. Prizes.** There must of course be prizes;[4] but it is not essential that the prizes be paid in money,[5] that they have a fixed market value,[6] or that the value be previously fixed.[7] If prizes are offered, the fact that it is possible that no one may win a prize will not prevent the scheme from being a lottery.[8]

2. Distribution by Chance — a. In General. It is essential that the distribution be by chance,[9] but the exact mode adopted is immaterial. The scheme may provide for distributing all the prizes at one time, or at several times, absolutely to one set of persons, or conditionally to that set or class. It may allow one person to exhaust all his chances before other persons accept a chance.[10]

b. Presence of Element of Certainty Immaterial. It is sufficient if chance be the dominant factor in determining the result; the presence of an element of certainty does not necessarily destroy the existence or effect of the element of chance.[11]

c. Certainty of Return to Holders of Chances. Thus it matters not if the purchaser of a chance is to receive the full value of his money in any event, if there is a chance that some purchasers may receive more than others.[12] A scheme

for a smaller sum of money, or other thing of value, the person dealing therein by chance or hazard, or contingency, may or may not get money or other thing of value, of greater or less value, or in some cases no value at all, from the owners or managers of such lottery." State *v.* Lumsden, 89 N. C. 572, 573 [*citing* 2 Bishop Cr. L. 945, 946].

"Any scheme whereby one, on paying money or other valuable thing to another becomes entitled to receive from him such a return in value, or nothing, as some formula of chance may determine." Bishop St. Cr. § 952 [*cited* in Cross *v.* People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292; Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93 (per Lumpkin, J.); State *v.* Boneil, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. Rep. 413, 10 L. R. A. 60].

"A lottery is a game of hazard, in which small sums are ventured for the chance of obtaining greater." Bell *v.* State, 5 Sneed (Tenn.) 507, 509 [*cited* in France *v.* State, 6 Baxt. (Tenn.) 478].

The word "lottery" has not any technical or peculiar significance. U. S. *v.* Olney, 27 Fed. Cas. No. 15,918, 1 Abb. 275.

As defined by statute see Cal. Pen. Code, § 319; Hawaii Rev. Laws, § 3172; Kan. Gen. St. c. 31, art. 11, § 2402; Nev. Comp. Laws (1900), § 4937; N. D. Rev. Codes (1899), § 7217; Okla. Pen. Code, § 385; Porto Rico Pen. Code, § 291; S. D. Pen. Code, § 379.

Three elements enter into a lottery scheme: (1) A consideration; (2) chance; (3) a prize or some advantage or inequality in amount or value which is in the nature of a prize. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93, per Lumpkin, J.

For a statement of the distinction between "Class" and "Numerical" lotteries see Fleming *v.* Bills, 3 Oreg. 286, 291.

3. Under statute prohibiting mailing of matter concerning lotteries see Post-Office.

4. See People *v.* Payne, 3 Den. (N. Y.) 88, holding that a lottery which does not involve the determination of any right to property is not illegal.

5. State *v.* Nebraska Home Co., 66 Nebr. 349, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448; New York City Alms House *v.* American Art Union, 7 N. Y. 228; Fleming *v.* Bills, 3 Oreg. 286.

6. New York City Alms House *v.* American Art Union, 7 N. Y. 228.

7. New York City Alms House *v.* American Art Union, 7 N. Y. 228; Public Clearing House *v.* Coyne, 121 Fed. 927 [*affirmed* in 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092]. See also Com. *v.* Wright, 137 Mass. 250, 50 Am. Dec. 306, holding that the prizes need not be specific.

8. Fleming *v.* Bills, 3 Oreg. 286.

9. See cases cited *passim* this article, especially those cited *infra*, II, A, C.

10. Fleming *v.* Bills, 3 Oreg. 286.

11. People *v.* Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601; Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586; Horner *v.* U. S., 147 U. S. 449, 13 S. Ct. 409, 37 L. ed. 237. But *compare* People *v.* Elliott, 74 Mich. 264, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. A. 403; U. S. *v.* Rosenblum, 121 Fed. 180.

The managers of the lottery need not work the scheme whereby the lot is determined; a scheme worked by the ticket-holders or by third persons would seem equally to be a lottery. Fleming *v.* Bills, 3 Oreg. 286; Bishop St. Cr. 954.

12. *Illinois.*— Dunn *v.* People, 40 Ill. 465.

Kansas.— State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430.

New York.— People *v.* American Art Union, 13 Barb. 577.

Texas.— Randle *v.* State, 42 Tex. 580.

United States.— Horner *v.* U. S., 147 U. S. 449, 13 S. Ct. 409, 37 L. ed. 237.

England.— Reg. *v.* Harris, 10 Cox C. C. 352.

is none the less a lottery because it promises a prize to each ticket-holder, the prizes to be drawn being of different values.[13]

d. Influence of Skill in Determining Result. If the result of the distribution is to be determined solely by skill or judgment, the scheme is not a lottery;[14] but by the better rule if the influence of skill is apt to be thwarted by chance it will be immaterial that the conditions of distribution permit the exercise of judgment to some extent.[15]

3. Consideration For Chance to Secure Prize[16] — a. Necessity. It is necessary that some valuable consideration be furnished,[17] and that it be given in exchange for the chance to secure a prize.[18] Thus if persons already owning property choose to distribute by an appeal to lot what has thus come to them before they had any scheme of so distributing it, they are not within the definition of a lottery.[19]

b. What May Constitute. Although there are no reported cases expressly so holding, it does not seem necessary that the consideration be furnished in the form of money or property; it may take the form of any detriment to the chance holder, such as the rendering of services.[20]

13. State *v.* Willis, 78 Me. 70, 2 Atl. 848; State *v.* Overton, 16 Nev. 136; Randle *v.* State, 42 Tex. 580.

Apparently the rule should be the same where the promoters of a scheme offer to give to all contestants prizes which they claim are of equal value, although of different kinds, the article each is to receive being determined by the promoters. See Thomas Non-Mailable Matter 37–39.

14. See cases cited *passim* this article, and especially those cited *infra*, II, A, C.

15. Hudelson *v.* State, 94 Ind. 426, 48 Am. Rep. 171 (prize offered to person guessing number of beans in glass bowl); People *v.* Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601 (prize offered person guessing number of cigars taxed in given month); Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586 (guessing contest as to number of votes to be cast in approaching election). *Contra*, Stevens *v.* Cincinnati Enquirer Co., 28 Cinc. L. Bul. 235; U. S. *v.* Roseublum, 121 Fed. 180.

The English and Canadian cases are opposed to the rule stated in the text, adopting the view that to constitute a lottery the issue of the contest must depend entirely upon chance. See Hall *v.* Cox, [1899] 1 Q. B. 198, 68 L. J. Q. B. 167, 79 L. T. Rep. N. S. 653, 47 Wkly. Rep. 161 (prize offered person predicting number of births and deaths in London in given week); Stoddart *v.* Sagar, [1895] 2 Q. B. 474, 18 Cox C. C. 165, 59 J. P. 598, 64 L. J. M. C. 234, 73 L. T. Rep. N. S. 215, 15 Reports 579, 44 Wkly. Rep. 287 [*following* Caminada *v.* Hulton, 17 Cox C. C. 307, 55 J. P. 727, 60 L. J. M. C. 116, 64 L. T. Rep. N. S. 572, 39 Wkly. Rep. 540] (prize to person naming winner in horse-race); Reg. *v.* Jamieson, 7 Ont. 149 [*following* Reg. *v.* Dodds, 4 Ont. 390] (prize to person guessing number of buttons in glass bowl). *Compare* Dunham *v.* St. Croix Soap Mfg. Co., 34 N. Brunsw. 243.

Guessing number of beans in bowl. — "An expert mathematician . . . might more nearly fix the number of beans in the globe than persons of less judgment; yet the exact number would be a mere matter of guessing. That any one should guess the correct number would be a matter of the merest chance, because there are no means of attaining to a certainty." Hudelson *v.* State, 94 Ind. 426, 428, 48 Am. Rep. 171. But see Reg. *v.* Jamieson, 7 Ont. 149, 153, in which it is said that the number to be ascertained is a certain definite and ascertainable fact. Nothing can remove it to the region of uncertainty. The opening of the jar and counting of the buttons will ascertain the fact. . . . The jar being closed, the fact that the buttons were of unequal size and different shapes renders the estimates less accurate and more difficult; nevertheless, it is an estimate, a calculation, an endeavor to ascertain a fact by mental process, rendered more or less certain by a variety of circumstances."

16. **What constitutes chance.** — In People *v.* Lavin, 179 N. Y. 164, 169, 71 N. E. 753, 6 L. R. A. 601, the court said: "It may be said that an event presents the element of chance so far as after the exercise of research, investigation, skill and judgment we are unable to foresee its occurrence or nonoccurrence or the forms and conditions of its occurrence." See Gaming, 20 Cyc. 881, and cases there cited.

17. Loiseau *v.* State, 114 Ala. 34, 22 So. 138, 62 Am. St. Rep. 84; Yellow Stone Kit *v.* State, 88 Ala. 196, 7 So. 338, 16 Am. St. Rep. 38, 7 L. R. A. 599; Cross *v.* People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292. And see cases cited *passim* this article.

18. State *v.* Nebraska Home Co., 66 Nebr. 349, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448.

19. People *v.* American Art Union, 13 Barb. (N. Y.) 577, per Mitchell J. See also U. S. *v.* Olney, 27 Fed. Cas. No. 15,918, 1 Abb. 275.

20. See Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St.

c. Sufficiency. It does not affect the validity of the consideration that it was given, not simply for the chance of a prize, but also, and possibly chiefly, in return for merchandise or other advantage to the chance holder.[21]

II. SCHEMES HELD TO BE LOTTERIES.

A. Bond Investment Schemes. Bonds issued under a scheme by which the time of redemption and the distribution of certain premiums among bondholders are to be determined by a drawing or other chance method are lotteries, even though issued under the authority of a foreign government.[22] *A fortiori* so-called "bond investment schemes" under which fully paid-up bonds are issued to subscribers, who pay in instalments and whose bonds are subject to redemption before full payment of their face value, the order of redemption being determined by chance, are lotteries, such schemes being dependent for success on the chance of obtaining new business and of lapses by a large proportion of subscribers.[23]

Rep. 177, 62 L. R. A. 93; Thomas Non-Mailable Matter 21-35 [*citing* unreported decision of Grosscup, J.]. *Compare* Yellow Stone Kit *v.* State, 88 Ala. 196, 7 So. 338, 16 Am. St. Rep. 38, 7 L. R. A. 599; Cross *v.* People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292, holding no lottery where pianos distributed by chance among those registering at defendant's shoe store.

21. See cases cited *supra*, I, B, 2, c.

22. Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 25 Am. St. Rep. 559, 8 L. R. A. 671; Dorzbacher *v.* Steiman, N. Y. Daily Reg., March 30, 1886; Horner *v.* U. S., 147 U. S. 449, 13 S. Ct. 409, 37 L. ed. 237; U. S. *v.* Politzer, 59 Fed. 273; U. S. *v.* Zeisler, 30 Fed. 499. *Contra, Ex p.* Shobert, 70 Cal. 632, 11 Pac. 786, 59 Am. Rep. 432; Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. Rep. 628 [*reversing* 21 Hun 466].

If the time of redemption alone were to be determined by the drawings, there being no other element of chance in the scheme, and each bond being redeemed with interest to the date of redemption, this would not give bond issue the characteristics of a lottery. See McLanahan *v.* Mott, 73 Hun (N. Y.) 131, 25 N. Y. Suppl. 892; U. S. *v.* Zeisler, 30 Fed. 499.

Under a New York statute punishing the sale of tickets in any illegal lottery the sale of premium Austrian bonds was held not to be prohibited. Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. Rep. 628 [*reversing* 21 Hun 466].

An association which invests the subscriptions of the members and divides the capital funds and profits among them by means of certificates convertible by annual drawings by lot into preference dividend bonds bearing interest with a bonus is operating a lottery scheme. Sykes *v.* Beadon, 11 Ch. D. 170, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 243, 27 Wkly. Rep. 464, *semble*.

23. *District of Columbia.*— U. S. *v.* Sherwood (unreported) [*cited* in State *v.* Nebraska Home Co., 66 Nebr. 349, 373, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448].

Minnesota.— State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556.

Missouri.— Siver *v.* Guarantee Inv. Co., 183 Mo. 41, 81 S. W. 1098.

New York.— McLanahan *v.* Mott, 73 Hun 131, 25 N. Y. Suppl. 892.

Ohio.— State *v.* Interstate Sav. Inv. Co., 64 Ohio St. 283, 60 N. E. 220, 83 Am. St. Rep. 754, 52 L. R. A. 530.

United States.— U. S. *v.* Fulkerson, 74 Fed. 619; McDonald *v.* U. S., 63 Fed. 426, 12 C. C. A. 339 [*affirming* 59 Fed. 563]. See also State *v.* New Orleans Debenture Redemption Co., 51 La. Ann. 18, 27, 26 So. 586; McLaughlin *v.* National Mut. Bond, etc., Co., 64 Fed. 908; 23 Op. Atty.-Gen. 512; 21 Op. Atty.-Gen. 313.

Contra.—See McDonald *v.* Pacific Debenture Co., 146 Cal. 667, 80 Pac. 1090; Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 1725, 62 L. R. A. 93 (where five-hundred-dollar bonds were issued to purchasers who were to pay two hundred and ten dollars in instalments of four dollars, the bonds being subject to redemption at any time before the full price was received, on repayment by the company of the instalments already paid in, with eight per cent interest, the order of redemption being determined by the "numeral apart" system); Union Inves. Assoc. *v.* Lutz, 50 Ill. App. 176. *Compare* State Mut. L. Ins. Co. *v.* Newton, 89 Ill. App. 353; Atty.-Gen. *v.* Preferred Mercantile Co., 187 Mass. 516, 73 N. E. 669 (where a company undertook to redeem in diamonds worth two hundred dollars "diamond leases" which it issued for one hundred and ten dollars, payable in monthly instalments, the order of redemption of "leases" to be determined by numbering the applications in the order in which they were received); Rehberg *v.* Tontine Surety Co., 131 Mich. 135, 91 N. W. 132.

The element of chance in determining the order of redemption of bonds is sufficiently present when that order depends on their numbering and they are numbered in the order in which applications happen to come in. U. S. *v.* Sherwood (D. C. unreported) [*cited* in State *v.* Nebraska Home Co., 66 Nebr. 349, 373, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448].

B. Schemes For Distribution of Land by Chance. Within the meaning of statutes directed against lotteries are contracts for the sale of tracts of land of unequal value to be apportioned among the purchasers by lot,[24] schemes for the disposal of town lots by which a number of lots are sold and others are reserved to be distributed by lot among purchasers of the first portion,[25] and land club organizations providing for small weekly payments by members and weekly drawings for town lots;[26] and it is immaterial in any of these cases that every purchaser is to receive some return.[27]

C. Gift Enterprises and Prize Concerts.[28] Offers of prizes to purchasers of goods, the prizes to be distributed by chance among the purchases, constitute lotteries, whether the goods purchased or the chance to obtain a prize is the consideration that moves the purchasers to enter into the transaction.[29] And of

Life insurance distinguished from bond investment schemes. "The purpose and operation of a life insurance company is beneficent; the object and effect of this scheme is to enrich its promoters and defraud the public. A life insurance company invests its funds; this association does not. The ability of a life insurance company to meet its obligations does not depend upon either new business or lapses; that of this association depends on both. The solvency of a life insurance company is determined by commercial exigencies; that of this association is determined by chance. A life insurance company may remain solvent indefinitely; this association must become insolvent. The policies of a life insurance company are paid upon an event certain to happen, although at an uncertain time; the certificates of this association are paid according to priority in number, determined by chance, if at all." State *v.* U. S. Express Co., 95 Minn. 442, 449, 104 N. W. 556. See also U. S. *v.* McDonald, 59 Fed. 563; Thomas Non-Mailable Matter 63.

Statutes expressly prohibitory of schemes in the nature of these bond investment devices have been passed in some jurisdictions. See Atty.-Gen. *v.* Preferred Mercantile Co., 187 Mass. 516, 73 N. E. 669. See also S. D. Pen. Code, § 394.

A home company scheme by which certain subscribers are to receive an advance of money earlier than others, the order of priority to be determined by numbering applications in the order in which they are received, is a lottery. State *v.* Nebraska Home Co., 66 Nebr. 349, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448. See also 24 Op. Atty.-Gen. 563; 21 Op. Atty.-Gen. 4.

An organization to which each member pays an entrance fee and one dollar monthly and which at the end of five years is to distribute among those who have remained members for five years ninety per cent of the amount paid by them and by new and lapsed members, being dependent on chance for its partial or full success, is a lottery scheme. Public Clearing House *v.* Coyne, 194 U. S. 497, 24 S. Ct. 789, 48 L. ed. 1092 [*affirming* 121 Fed. 927].

24. *Alabama.*— Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 So. 495.

Illinois.— Elder *v.* Chapman, 176 Ill. 142, 52 N. E. 10.

Indiana.— Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; Emshwiler *v.* Tyner, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. Rep. 360.

Iowa.— Guenther *v.* Dewien, 11 Iowa 133.

New Jersey.— Den *v.* Shotwell, 23 N. J. L. 465 [*affirmed* in 24 N. J. L. 789].

Ohio.— Jackson Steel Nail Co. *v.* Marks, 4 Ohio Cir. Ct. 343, 2 Ohio Cir. Dec. 584.

Pennsylvania.— Seidenbender *v.* Charles, 4 Serg. & R. 151, 8 Am. Dec. 682.

United States.— Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129. See 34 Cent. Dig. tit. "Lotteries," § 13.

Where lots equal in value are to be divided by chance, there is no lottery, and a contract which provided for such division is not void as a lottery contract. Elder *v.* Chapman, 176 Ill. 142, 52 N. E. 10; Lauder *v.* Peoria Agricultural, etc., Soc., 71 Ill. App. 475.

25. Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; U. S. *v.* Olney, 27 Fed. Cas. No. 15,918, 1 Abb. 275.

Where it was no part of the original contract how the lots should be divided among the purchasers, but the latter agree among themselves, after the sale is consummated, to resort to chance, there is no lottery, and the original vendor may recover the purchase-price. McCleary *v.* Chipman, 32 Ind. App. 489, 68 N. E. 320; Washington Glass Co. *v.* Mosbaugh, 19 Ind. App. 105, 49 N. E. 178; Chancy Park Land Co. *v.* Hart, 104 Iowa 592, 73 N. W. 1059. But if the original vendor is a party to the agreement to resort to lot, the contract of sale becomes tainted with the vice of a lottery and is enforceable. Emshwiler *v.* Tyner, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. Rep. 360.

26. Branham *v.* Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213.

27. See cases cited *supra*, notes 24–26.

28. Gift enterprise defined.— "The transfer of rights of independent value in money or property, together with the right, in consideration of the payment of value, to a chance for a prize, may be called a gift enterprise." Thomas Non-Mailable Matter 85.

29. *District of Columbia.*— See Sheedy *v.* District of Columbia, 19 App. Cas. 280.

Illinois.— Dunn *v.* People, 40 Ill. 465.

Indiana.— Lohman *v.* State, 81 Ind. 15.

similar nature is the distribution of prizes by chance among purchasers of concert tickets.[30]

D. Guessing Contests. Guessing contests have been held lotteries, in which prizes were to be awarded to the person who, having paid a certain entrance fee or purchased a certain amount of merchandise, should guess with the nearest approach to accuracy the number of beans in a glass bowl,[31] the number of cigars on which taxes would be paid during a certain month,[32] the number of votes to be cast for governor at the next election,[33] or the missing word in a paragraph otherwise complete.[34] On the other hand guessing the weight of a mass of soap for a prize was considered in a Canadian case not to involve the element of chance sufficiently to constitute a lottery.[35] And where those naming the winners in a horse-race were to be awarded prizes, contestants being required to write their guesses on coupons cut from defendant's newspaper and to pay in addition a penny a guess, it was held in England that there was no lottery.[36]

E. Slot Machines and Wheels of Fortune. Owners and operators of slot machines and wheels of fortune have been held guilty of operating lotteries within penal statutes,[37] even though those who deposited coin in the machines

Kansas.— Davenport *v.* Ottawa, 54 Kan. 711, 39 Pac. 708, 45 Am. St. Rep. 303; State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430.

Louisiana.— State *v.* Boneil, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. Rep. 413, 10 L. R. A. 60.

Maine.— State *v.* Willis, 78 Me. 70, 2 Atl. 848.

Missouri.— State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532, distribution of prizes among subscribers to newspaper.

New Hampshire.— State *v.* Clarke, 33 N. H. 329, 66 Am. Dec. 723.

New York.— Hull *v.* Ruggles, 56 N. Y. 424.

North Carolina.— State *v.* Lumsden, 89 N. C. 572.

Pennsylvania.— Com. *v.* Sheriff, 10 Phila. 203.

Tennessee.— Eubanks *v.* State, 3 Heisk. 488; Bell *v.* State, 5 Sneed 507.

Texas.— Randle *v.* State, 42 Tex. 580; Holoman *v.* State, 2 Tex. App. 610, 28 Am. Rep. 439.

United States.— U. S. *v.* Jefferson, 134 Fed. 299; U. S. *v.* Wallis, 58 Fed. 942.

England.— Taylor *v.* Smetten, 11 Q. B. D. 207, 48 J. P. 36, 52 L. J. M. C. 101, distribution of prize tea packages.

Canada.— Reg. *v.* Parker, 9 Manitoba 203; Reg. *v.* Freeman, 18 Ont. 524.

Trading stamp devices are not lotteries. See cases cited *infra*, III, A.

30. *Illinois.*—Thomas *v.* People, 59 Ill. 160.

Massachusetts.— Com. *v.* Thatcher, 97 Mass. 583, 93 Am. Dec. 125.

Nevada.— State *v.* Overton, 16 Nev. 136.

New Jersey.— State *v.* Shorts, 32 N. J. L. 398, 90 Am. Dec. 668, where the exhibitor reserved the right to give no prizes at all or to refuse them to applicants whose appearance did not please him.

New York.— Negley *v.* Devlin, 12 Abb. Pr. N. S. 210.

England.— Morris *v.* Blackman, 2 H. & C. 912, 10 Jur. N. S. 520.

31. Hudelson *v.* State, 94 Ind. 426, 48 Am. Rep. 171. *Contra*, Reg. *v.* Jamieson, 7 Ont. 149; Reg. *v.* Dodds, 4 Ont. 390.

32. People *v.* Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601 [*reversing* 93 N. Y. App. Div. 292, 87 N. Y. Suppl. 776]. *Contra*, U. S. *v.* Rosenblum, 121 Fed. 180.

33. Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586.

34. Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74.

35. Dunham *v.* St. Croix Mfg. Co., 34 N. Brunsw. 243 [*criticized* in Thomas Non-Mailable Matter 158–162].

36. Stoddart *v.* Sagar, [1895] 2 Q. B. 474, 18 Cox C. C. 165, 59 J. P. 598, 64 L. J. M. C. 234, 73 L. T. Rep. N. S. 215, 15 Reports 579, 44 Wkly. Rep. 287; Caminada *v.* Hulton, 17 Cox C. C. 307, 55 J. P. 727, 60 L. J. M. C. 116, 64 L. T. Rep. N. S. 572, 39 Wkly. Rep. 540. *Compare* Reg. *v.* Stoddart, [1901] 1 K. B. 177, 19 Cox C. C. 587, 64 J. P. 774, 70 L. J. K. B. 489, 83 L. T. Rep. N. S. 538, 49 Wkly. Rep. 173.

37. *Alabama.*— Johnson *v.* State, 137 Ala. 101, 34 So. 1018; Loiseau *v.* State, 114 Ala. 34, 22 So. 138, 62 Am. St. Rep. 84; Reeves *v.* State, 105 Ala. 120, 17 So. 104. *Compare* Buckalew *v.* State, 62 Ala. 334, 34 Am. Rep. 22.

Florida.— State *v.* Vasquez, 49 Fla. 126, 38 So. 830.

Georgia.— Meyer *v.* State, 112 Ga. 20, 37 S. E. 96, 81 Am. St. Rep. 17, 51 L. R. A. 496, holding a slot machine within a statute prohibiting lotteries and "other scheme or device for the hazarding of any money or valuable thing."

Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532.

Texas.— Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850; Barry *v.* State, 39 Tex. Cr. 240, 45 S. W. 571.

England.— Santongeli *v.* Neilson, 3 F. (Just. Cas.) 10.

were assured of the ordinary return for their money, in addition to the chance of securing a prize.[38]

F. Playing Policy. The game of policy is a lottery.[39]

G. Pools and Pool Selling. The few decisions are in conflict as to whether pools on horse-races and pool-selling are lotteries.[40]

H. Suit Clubs. Suit clubs, the members of which pay weekly dues and have weekly drawings for suits, the unsuccessful members being entitled to receive a suit eventually, after the payment of a stipulated amount, or to withdraw and take out in trade the instalments which they have paid, are lottery schemes.[41]

I. Raffles. Although a raffle in its ordinary sense of a disposal by chance of a single prize among purchasers of separate chances[42] is within the usual definition of a lottery,[43] it has been held in a few states not to be a lottery within the local statutes.[44] The statutes of many states expressly provide that raffles shall be considered as lotteries.[45]

J. Miscellaneous Schemes. Other schemes which have been held to be lotteries are collected in the notes.[46]

38. See cases cited *supra*, note 37.

39. *Georgia.*— See Thomas *v.* State, 118 Ga. 774, 45 S. E. 622; Wilson *v.* State, 67 Ga. 658.

Massachusetts.— Com. *v.* Sullivan, 146 Mass. 142, 15 N. E. 491.

Michigan.— People *v.* Hess, 85 Mich. 128, 48 N. W. 181; People *v.* Elliott, 74 Mich. 264, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. A. 403.

Missouri.— State *v.* Harmon, 60 Mo. App. 48. See also State *v.* Williams, 44 Mo. App. 302.

New York.— Wilkinson *v.* Gill, 74 N. Y. 63, 30 Am. Rep. 264; Almy *v.* McKinney, 5 N. Y. St. 267, holding that playing policy in a Kentucky lottery is at least a "game, or device of chance in the nature of a lottery" within statutory prohibition.

For statutes directed especially against policy playing see *infra*, IV, B, 3, b, (VII).

40. That they are lotteries see State *v.* Lovell, 39 N. J. L. 458; Irving *v.* Britton, 8 Misc. (N. Y.) 201, 28 N. Y. Suppl. 529 [*followed* in Ludington *v.* Dudley, 9 Misc. (N. Y.) 700, 30 N. Y. Suppl. 221].

That they are not lotteries see People *v.* Reilly, 50 Mich. 384, 15 N. W. 520, 45 Am. Rep. 47; Reilly *v.* Gray, 77 Hun (N. Y.) 402, 28 N. Y. Suppl. 811, arguing that the separate provisions in the New York statutes as to betting prove that no form of betting was meant to be included in the statutory prohibition of lotteries.

Where defendant arranged for a sweepstakes on a horse-race and sixty-one persons, entered, each of whom paid sixpence to defendant, and prizes amounting to thirty shillings were paid by defendant to the persons who respectively drew the first six horses in the race, it was held that the sweepstakes was a lottery within 42 Geo. III, c. 119, § 2. Hardwick *v.* Lane, [1904] 1 K. B. 204, 60 J. P. 94, 73 L. J. K. B. 96, 89 L. T. Rep. N. S. 630, 20 T. L. R. 87, 52 Wkly. Rep. 591.

41. De Florin *v.* State, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177; People *v.* McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505; State *v.* Moren, 48 Minn. 555, 51 N. W. 618.

42. See Commissioners' Note to Cal. Pen. Code, § 319.

43. See Com. *v.* Brockway, 150 Mass. 322, 23 N. E. 101; State *v.* Kennon, 21 Mo. 262; Com. *v.* Manderfield, 8 Phila. (Pa.) 457.

44. State *v.* Pinchback, 2 Mill (S. C.) 128; Com. *v.* Garland, 5 Rand. (Va.) 652. See also Johnson *v.* State, 83 Ala. 65, 3 So. 790; Hawkins *v.* State, 33 Ala. 433; Kirk *v.* State, 69 Miss. 215, 10 So. 577, making distinction between sale of lottery tickets and sale of chances in a lottery.

In Texas lotteries are forbidden but raffles of property up to the value of five hundred dollars are permitted. Risein *v.* State, 44 Tex. Cr. 413, 71 S. W. 974. A lottery is defined as a game in which there is a keeper or exhibitor. This keeper or exhibitor has the real fund, and against this the better stakes the money, which may be evidenced by tickets. On the side of those who hold tickets it is a perfect game of chance. On the side of the keeper there are both chance and skill. A raffle, which is authorized by the code, is a game of perfect chance, in which every participant is equal with every other in the proportion of his risk and prospective gain. The prize is a common fund or that which is purchased by a common fund. The successful party takes the whole prize and all the rest lose. That element of one against the many, the keeper against the better, either directly or indirectly, is not to be found in it. Stearnes *v.* State, 21 Tex. 692 [*cited* with approval in Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850; Barry *v.* State, 39 Tex. Cr. 240, 45 S. W. 571].

45. See statutes cited *supra*, I, A.

46. Where the purchaser of a chance receives a prize if the number chosen by him corresponds with that in an envelope drawn by the operator of the game, that is a lottery. Com. *v.* Wright, 137 Mass. 250, 50 Am. Rep. 306. In this case the court said

III. SCHEMES HELD NOT TO BE LOTTERIES.

A. Trading Stamp Devices. The issue of trading stamps to purchasers of goods, entitling the latter to articles on exhibition at the store of a trading stamp company, is not a lottery, since it involves no element of chance.[47]

that the fact that more than one could select the same number with the same result did not prevent the game from being a lottery. See also State *v.* Bryant, 74 N. C. 207.

Where a box is divided into compartments, some containing prizes, others being empty, and purchasers of chances throw dice, receiving the contents of the compartment the number of which they throw, there is a lottery, although there is no certainty that any one will win a prize. Fleming *v.* Bills, 3 Oreg. 286.

A scheme for the distribution of pictures by lot among persons who subscribe five dollars to an art society is a lottery. New York City Alms House *v.* American Art Union, 7 N. Y. 228. *Compare* People *v.* American Art Union, 7 N. Y. 240 [*affirming* 13 Barb. 577].

A company which invests no funds, but distributes money collected from its patrons, less a percentage retained as a commission, in accordance with priority in the number of certificate given each so-called investor, is engaged in a lottery business, or in a business which is in the nature of a lottery, and is in result a legal fraud, when it appears that the priority of such number is determined by chance, and that the redemption of such certificate is also dependent upon the chance of solvency of the company, based upon writing of new and lapsation of old contracts. State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556. And see Jacobs *v.* People, 117 Ill. App. 195 [*affirmed* in 218 Ill. 500, 75 N. E. 1034], where evidence of a somewhat similar state of facts was held to establish a lottery.

Lottery within lottery.— One who sells to several persons the same interest in a foreign lottery, the seller taking the risk that no number sold by him will be drawn, is guilty of contriving a lottery. People *v.* Wolff, 14 N. Y. App. Div. 73, 43 N. Y. Suppl. 421 [*affirmed* in 152 N. Y. 640, 46 N. E. 1150].

Bolito.— Slips of paper stamped by the seller and sold at five cents apiece to purchasers, who number them with certain numbers selected from a blackboard in possession of the seller, which slips of paper are at a subsequent lottery drawing conducted by the seller, if the numbers thereon correspond with others drawn, redeemed by the seller paying to the purchaser four dollars and fifty cents, are lottery tickets. Bueno *v.* State, 40 Fla. 160, 23 So. 862.

Where defendant published in his newspaper from time to time spots of varying size and configuration, followed by an announcement showing the exact configuration of such spots as were declared to be winning and as would entitle to prizes all sending to his office portions of the newspaper containing the facsimile of them, he was rightly convicted of publishing a lottery scheme. Hall *v.* McWilliam, 85 L. T Rep. N. S. 239.

Selling envelopes, some of which contain money while others do not, and paying a sum of money when an empty envelope is purchased by chance, is a violation of the statutes against lotteries. Crews *v.* State, 38 Ind. 28.

For a collection of ingenious lottery schemes passed upon by the assistant attorney-general for the post-office department see Thomas Non-Mailable Matter, § 71 *et seq.*

47. *Alabama.*— Montgomery *v.* Kelly, 142 Ala. 552, 38 So. 67, 70 L. R. A. 209; State *v.* Shugart, 138 Ala. 86, 35 So. 28, 100 Am. St. Rep. 17.

California.— *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588; *Ex p.* McKenna, 126 Cal. 429, 58 Pac. 916.

Colorado.— People *v.* Beer, Colo. County Ct. [*cited* in *Ex p.* Drexel, *supra.*]

Massachusetts.— Com. *v.* Sisson, 178 Mass. 578, 60 N. E. 385.

New Hampshire.— State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

New York.— People *v.* Dycker, 76 N. Y. Suppl. 111 [*applying* People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465]. See also People *v.* Zimmerman, 102 N. Y. App. Div. 103, 92 N. Y. Suppl. 497.

North Carolina.— Winston *v.* Beeson, 135 N. C. 271, 47 S. E. 457, 65 L. R. A. 167.

Pennsylvania.— Com. *v.* Moorhead, 7 Pa. Co. Ct. 513.

Rhode Island.— State *v.* Dalton, 22 R. I. 77, 46 Atl. 234, 84 Am. St. Rep. 818, 48 L. R. A. 775.

Vermont.— State *v.* Dodge, 76 Vt. 197, 56 Atl. 983.

Virginia.— Young *v.* Com., 101 Va. 853, 45 S. E. 327.

Apparently contra see Lansburgh *v.* District of Columbia, 11 App. Cas. (D. C.) 512 [*followed* in State *v.* Hawkins, 95 Md. 133, 51 Atl. 850, 93 Am. St. Rep. 328; Humes *v.* Ft. Smith, 93 Fed. 857]. The first case was afterward construed by the criminal court of Baltimore to refer only to cases where the article to be obtained by the holder of the stamp was to be determined by some lot or chance. See also State *v.* Frankel, decided Sept. 12, 1902 [*cited* in *Ex p.* Drexel, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. N. S. 588]; and *compare* Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425 (holding unconstitutional an act prohibiting the giving away of anything to a purchaser of goods as an inducement to make the purchase. The reasoning in Lansburgh *v.* District of Columbia, *supra*, seems to be based upon facts showing that an element of

B. Horse-Races For Premiums. The offer of premiums in a horse-race does not make the officers of the racing association guilty of maintaining a lottery.[48]

C. Contests Involving Skill and Popularity. Contests in which prizes are offered to the individual suggesting the best name for a village, the choice to be made by a committee,[49] to the person throwing rings over knives stuck in an inclined table,[50] or to the person in whose name the most tickets are voted [51] are not lotteries, even though participants in the contest are required to pay an entrance fee. The game of keno has been held not to be a lottery,[52] and there are *dicta* to that effect in other decisions.[53]

IV. REGULATION AND PROHIBITION.[54]

A. Constitutionality of Laws Regulating and Prohibiting — 1. In General — a. State Laws. The power of the state to tax, regulate, or prohibit lotteries, and the various transactions connected with them, in the interest of public morals, is a recognized branch of the police power; and statutes directed to that end are universally recognized as constitutional.[55]

b. Municipal Ordinances. Where a municipal corporation is by its charter authorized to make and enforce police regulations for the protection of the health and morals of the citizens, it may enact ordinances to regulate and prohibit lotteries.[56]

chance was there involved which does not usually exist in trading stamp devices. See State *v.* Ramseyer, 73 N. H. 31, 58 Atl. 958.

The distribution of premiums to every purchaser of two pounds of coffee is not a lottery. People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465, holding unconstitutional the provision of the penal code prohibiting the sale or disposal of any article of food or any offer or attempt to do so upon any representation or inducement that anything else will be delivered as a gift or premium to the purchaser. A quite similar statute in Massachusetts has been interpreted not to forbid a sale of two things at once, even if one of them is the principal object of desire and the other an additional inducement which turns the scale. Com. *v.* Emerson, 165 Mass. 146, 42 N. E. 559, where photographs were distributed to purchasers of tobacco. See also Long *v.* State, 74 Md. 565, 22 Atl. 4, 28 Am. St. Rep. 268, 12 L. R. A. 425.

48. People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Matter of Dwyer, 14 Misc. (N. Y.) 204, 35 N. Y. Suppl. 884.

As to the legality of contests for purses, prizes, or premiums in general see GAMING, 20 Cyc. 924, and cases there cited.

49. Holt *v.* Wood, 14 Pa. Co. Ct. 499.

50. McRea *v.* State, (Tex. 1904) 81 S. W. 741.

51. Dion *v.* St. John Baptiste Soc., 82 Me. 319, 19 Atl. 825; Quatsoe *v.* Eggleston, 42 Oreg. 315, 71 Pac. 66.

52. Eslava *v.* State, 44 Ala. 406.

53. Portis *v.* State, 27 Ark. 360; U. S. *v.* Hornihrook, 26 Fed. Cas. No. 15,390, 2 Dill. 229.

54. Impairment of obligation of contract by legislative regulation of right to business see CONSTITUTIONAL LAW, 8 Cyc. 972.

Impairment of obligation of contract by repeal of charter see CONSTITUTIONAL LAW, 8 Cyc. 985.

Prohibition of interstate trade in lottery tickets by congress see COMMERCE, 7 Cyc. 436.

Power of state to prohibit chartered lotteries although person selling tickets holds federal license see COMMERCE, 7 Cyc. 436.

55. See CONSTITUTIONAL LAW, 8 Cyc. 670. See also the cases cited *passim* this article, especially People *v.* Gillson, 109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465; People *v.* Noelke, 94 N. Y. 137, 46 Am. Rep. 128; Humes *v.* Ft. Smith, 93 Fed. 857. See also License Tax Cases, 5 Wall. (U. S.) 463, 18 L. ed. 497.

The prohibition of the publication of lottery advertisements is not unconstitutional as infringing the liberty of the press. State *v.* Sykes, 28 Conn. 225 (*semble*); Hart *v.* People, 26 Hun (N. Y.) 396.

For cases involving the constitutionality of specific acts on grounds peculiar to themselves see Boyd *v.* State, 53 Ala. 601; Evans *v.* State, 68 Ga. 826; Louisiana State Lottery Co. *v.* New Orleans, 24 La. Ann. 86; State *v.* Allen, 2 McCord (S. C.) 55; France *v.* State, 6 Baxt. (Tenn.) 478.

56. *California.*— *Ex p.* McClain, 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243, 54 L. R. A. 779.

Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; State *v.* Populus, 49 La. Ann. 1606, 22 So. 844; State *v.* Oriol, 49 La. Ann. 442, 21 So. 634 (although the state itself has not acted in the matter); State *v.* Dobard, 45 La. Ann. 1412, 14 So. 253.

Missouri.— Kansas City *v.* Hallett, 59 Mo. App. 160.

Oregon.— Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706, 102 Am. St. Rep. 633; *Ex p.* Kameta, 36 Oreg. 251, 60 Pac. 394, 78 Am. St. Rep. 775, where city charter authorized suppression of gaming.

Such ordinances are not obnoxious to the rule against the delegation of legislative authority.[57]

2. Where Lottery Previously Authorized by State — a. Where No Consideration Paid For License. The authorities agree that permission to draw a lottery granted by the legislature to a corporation which has paid no bonus therefor is a mere license which may be withdrawn at any time before rights have vested under it. Subsequent statutes or provisions in state constitutions repealing the privilege do not impair the obligation of contracts and are not in conflict with the federal constitution.[58]

b. Where Consideration Paid. Where, however, the corporation to which the permission has been granted has paid a bonus therefor, or where rights have vested, or obligations been incurred, upon the faith of the permission, the cases are not in harmony. The earlier decisions are to the effect that in such a situation subsequent enactments forbidding all lotteries are unconstitutional.[59] These decisions have, however, been in effect overruled by more recent opinions of the United States supreme court, holding that a state cannot bargain away by contract its right to safeguard the morals and health of its citizens; and that the constitutional prohibition against the impairment of the obligation of contracts does not apply to cases falling within the legitimate application of the police power, such as the suppression or restraint of lotteries.[60] If a lottery company is recognized by the state constitution, it is beyond the power of the legislature to pass an act repealing the privilege.[61]

B. Nature of Laws Regulating and Prohibiting — 1. In General. Although lotteries were formerly permitted in practically every state, either by the general

Washington.— Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324.

Such ordinances will be valid, although they provide a different penalty or fine from the state statute upon the subject. Kansas City *v.* Hallett, 59 Mo. App. 160. *Compare Ex p.* Solomon, 91 Cal. 440, 27 Pac. 757, holding ordinance void as in conflict with the general laws of the state because penalties excessive as compared with those provided by statute.

Where the burden of proving innocence is put on defendant by the ordinance it is void. *In re* Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138; *Ex p.* Kameta, 36 Oreg. 251, 60 Pac. 394, 78 Am. St. Rep. 775. *Compare Ex p.* McClain, 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243, 54 L. R. A. 779; State *v.* Riley, 49 La. Ann. 1617, 22 So. 843; Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551.

57. State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

58. *Kentucky.*—Wandover *v.* Lexington, 15 B. Mon. 258.

Louisiana.— Davis *v.* Caldwell, 2 Rob. 271.

Mississippi.— Mississippi Art, etc., Soc. *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723.

Missouri.— State *v.* Sterling, 8 Mo. 697; Freleigh *v.* State, 8 Mo. 606.

Tennessee.— Bass *v.* Nashville, Meigs 421, 33 Am. Dec. 154.

Virginia.— See Justice *v.* Com., 81 Va. 209; Phalen *v.* Com., 1 Rob. 713.

United States.—Phalen *v.* Virginia, 8 How. 163, 12 L. ed. 1030.

See 34 Cent. Dig. tit. "Lotteries," § 2.

59. *Alabama.* — Broadbent *v.* Tuskaloosa Scientific, etc., Assoc., 45 Ala. 170, *semble.*

Indiana.— Kellum *v.* State, 66 Ind. 588 [*overruled* in State *v.* Woodward, 89 Ind. 110, 46 Am. Rep. 160].

Kentucky.— Gregory *v.* Shelby College, 2 Metc. 589 [*overruled* in Com. *v.* Douglass, 100 Ky. 116, 24 S. W. 233, 15 Ky. L. Rep. 581, 66 Am. St. Rep. 328].

Missouri.— State *v.* Miller, 66 Mo. 328; State *v.* Miller, 50 Mo. 129; State *v.* Morrow, 26 Mo. 131; Morrow *v.* State, 12 Mo. 279; State *v.* Hawthorn, 9 Mo. 389.

United States.— Louisiana State Lottery Co. *v.* Fitzpatrick, 15 Fed. Cas. No. 8,541, 3 Woods 222.

See 34 Cent. Dig. tit. "Lotteries," § 2.

60. *Indiana.*— State *v.* Woodward, 89 Ind. 110, 46 Am. Rep. 160 [*overruling* Kellum *v.* State, 66 Ind. 588].

Kentucky.— Com. *v.* Douglass, 100 Ky. 116, 24 S. W. 233, 15 Ky. L. Rep. 581, 66 Am. St. Rep. 328 [*overruling* Gregory *v.* Shelby College, 2 Metc. 589].

Mississippi.— Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367.

North Carolina.— State *v.* Morris, 77 N. C. 512, *semble.*

United States.— Douglas *v.* Kentucky, 168 U. S. 488, 18 S. Ct. 199, 42 L. ed. 553; Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079.

State constitution held not to be estopped by a previous adjudication in favor of the licensee from holding that an act giving a special license to conduct a lottery was unconstitutional see Boyd *v.* Alabama, 94 U. S. 645, 24 L. ed. 302.

61. New Orleans *v.* Houston, 119 U. S. 265, 7 S. Ct. 198, 30 L. ed. 411 [*distinguishing* Stone *v.* Mississippi, 101 U. S. 814, 25 L. ed. 1079].

law or by special legislative authorization,[62] they are to-day restrained or prohibited by the statutes or constitutions of almost every state.[63]

2. Constitutional Prohibitions. The constitutions of a number of states contain provisions forbidding lotteries and the sale of lottery tickets or the legislative authorization of lotteries.[64]

3. Criminal Responsibility[65] — a. In General. At common law there was no criminal liability for transactions connected with lotteries, as there was none for any form of gaming;[66] but by statute in England, Canada, and almost every state of the Union transactions connected with lotteries are made criminal, as either felonies or misdemeanors, and punishable by fine or imprisonment.[67]

b. Offenses Within Statutes — (i) *Establishing, Operating, and Promoting Lotteries.* Probably the commonest form of statute is that which in substance declares it criminal to maintain, establish, promote, draw, or operate a lottery, or to dispose of property by way of lottery or by any other scheme or device in the nature of a lottery.[68]

62. See, in addition to the cases cited *infra*, V, A, 1; VI, the following cases:

Alabama.— Boyd *v.* State, 61 Ala. 177; Tuscaloosa Scientific, etc., Assoc. *v.* State, 58 Ala. 54; Boyd *v.* State, 53 Ala. 601; Warren *v.* State, 46 Ala. 549; Eslava *v.* State, 44 Ala. 406.

Georgia.— Dugas *v.* Lawrence, 19 Ga. 557; McKenney *v.* Compton, 18 Ga. 170; Greene *v.* Barnwell, 11 Ga. 282.

Kentucky.— Com. *v.* Whipps, 80 Ky. 269; Com *v.* Bierman, 13 Bush 345; Bibb *v.* Miller, 11 Bush 306; McIlvain *v.* Holmes, Ky. Dec. 317.

Maine.— Opinion of Justices, 7 Me. 502; Thomas *v.* Mahan, 4 Me. 513.

Maryland.— Paine *v.* France, 25 Md. 163; Heckart *v.* McPhail, 12 Md. 96; Yates *v.* O'Neale, 3 Gill & J. 253; State *v.* Wolfe, 3 Harr. & J. 224.

Massachusetts.— Gilbert *v.* Williams, 8 Mass. 476.

New York.— See People *v.* Sturdevant, 23 Wend. 418.

Virginia.— Mayo *v.* Murchie, 3 Munf. 358.

63. See cases cited *infra*, IV, B, 2 3, 4.

64. *Alabama.*— Loiseau *v.* State, 114 Ala. 34, 22 So. 138, 62 Am. St. Rep. 84.

Florida.— State *v.* Vasquez, 49 Fla. 126, 38 So. 830.

Indiana.— Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; Swain *v.* Bussell, 10 Ind. 438.

Iowa.— Chancy Park Land Co. *v.* Hart, 104 Iowa 592, 73 N. W. 1059; Guenther *v.* Dewein, 11 Iowa 133.

Kansas.— State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430.

Louisiana.—New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532.

Mississippi.— Mississippi Arts, etc., Soc. *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723.

Missouri.— See Kitchen *v.* Greenabaum, 61 Mo. 110.

Nevada.— State *v.* Overton, 16 Nev. 136; *Ex p.* Blanchard, 9 Nev. 101.

New York.— New York City Alms House *v.* American Art Union, 7 N. Y. 228.

Oregon.— Fleming *v.* Bills, 3 Oreg. 286.

Tennessee.— France *v.* State, 6 Baxt. 478; Bass *v.* Nashville, Meigs 421, 33 Am. Dec. 154.

Texas.— Randle *v.* State, 42 Tex. 580; Barry *v.* State, 39 Tex. Cr. 240, 45 S. W. 571.

Virginia.— See Cardwell *v.* Kelly, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240.

See 34 Cent. Dig. tit. "Lotteries," § 2.

65. Lottery-keeper as vagrant see Vagrancy.

Violation of postal laws by mailing matter concerning lotteries see Post-Office.

66. See Gaming, 20 Cyc. 878, 879. But see *Ex p.* Blanchard, 9 Nev. 101.

67. See cases cited *infra*, IV, B, 3, b.

68. See the following cases:

Alabama.— Johnson *v.* State, 137 Ala. 101, 34 So. 1018; Loiseau *v.* State, 114 Ala. 34, 22 So. 138, 62 Am. St. Rep. 84; Reeves *v.* State, 105 Ala. 120, 17 So. 104; Yellow Stone Kit *v.* State, 88 Ala. 196, 7 So. 338, 16 Am. St. Rep. 38, 7 L. R. A. 599; Salomon *v.* State, 28 Ala. 83; Salomon *v.* State, 27 Ala. 26.

Colorado.— Branhan *v.* Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213; Cross *v.* People, 18 Colo. 321, 32 Pac. 821, 36 Am. St. Rep. 292.

Florida.— Smith *v.* State, 40 Fla. 203, 23 So. 854; Bueno *v.* State, 40 Fla. 160, 23 So. 862.

Georgia.— De Florin *v.* State, 121 Ga. 593, 49 S. E. 699, 104 Am. St. Rep. 177; Thomas *v.* State, 118 Ga. 774, 45 S. E. 622; Meyer *v.* State, 112 Ga. 20, 37 S. E. 96, 81 Am. St. Rep. 17, 51 L. R. A. 496.

Hawaii.— Reg. *v.* Ah Hum, 9 Hawaii 97; Reg. *v.* Alani, 8 Hawaii 533; Reg. *v.* Jim Kaka, 8 Hawaii 305.

Illinois.— Elder *v.* Chapman, 176 Ill. 142, 52 N. E. 10 [*reversing* 70 Ill. App. 288].

Indiana.— Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; Kellum *v.* State, 66 Ind. 588; Swain *v.* Bussell, 10 Ind. 438; Markle *v.* State, 3 Ind. 535.

Iowa.— Guenther *v.* Dewein, 11 Iowa 133.

Kentucky.— Morton *v.* Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366. See also Com. *v.* Douglass, 100 Ky. 116, 24 S. W. 233, 15 Ky. L. Rep. 581, 66 Am. St. Rep. 328.

(II) *Selling Lottery Tickets.*[69] The sale of lottery tickets or of chances in any scheme for the distribution of prizes by chance is forbidden almost universally.[70] These prohibitions apply either expressly or by construction to the

Louisiana.— New Orleans *v.* Collins, 52 La. Ann. 973, 27 So. 532; State *v.* Populus, 49 La. Ann. 1606, 22 So. 844.

Massachusetts.— Com. *v.* Mackey, 177 Mass. 345, 58 N. E. 1027; Com. *v.* Sheedy, 159 Mass. 55, 34 N. E. 84; Com. *v.* Brockway, 150 Mass. 322, 23 N. E. 101; Com. *v.* Sullivan, 146 Mass. 142, 15 N. E. 491; Com. *v.* Wright, 137 Mass. 250, 50 Am. Dec. 306; Com. *v.* Harris, 13 Allen 534.

Michigan.— People *v.* McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505; People *v.* Elliott, 74 Mich. 264, 41 N. W. 916, 16 Am. St. Rep. 640, 3 L. R. A. 403.

Minnesota.— See State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; State *v.* Moren, 48 Minn. 555, 51 N. W. 618.

Mississippi.— Kirk *v.* State, 69 Miss. 215, 10 So. 577; Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367; Mississippi Arts, etc., Soc. *v.* Musgrove, 44 Miss. 820, 7 Am. Rep. 723.

Missouri.— State *v.* Miller, 190 Mo. 449, 89 S. W. 377; State *v.* Pomeroy, 130 Mo. 489, 32 S. W. 1002 (holding it immaterial that drawings were to occur outside state); Freleigh *v.* State, 8 Mo. 606; Kansas City *v.* Hallett, 59 Mo. App. 160 (ordinance).

Nebraska.— State *v.* Nebraska Home Co., 66 Nebr. 349, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448; State *v.* Dennison, 60 Nebr. 192, 82 N. W. 628.

New Hampshire.— State *v.* Clarke, 33 N. H. 329, 66 Am. Dec. 723.

New Jersey.— State *v.* Lovell, 39 N. J. L. 458; State *v.* Shorts, 32 N. J. L. 398, 90 Am. Dec. 668; Watson *v.* Murray, 23 N. J. Eq. 257.

New York.— People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; New York City Alms House *v.* American Art Union, 7 N. Y. 228; People *v.* Sturdevant, 23 Wend. 418; Hunt *v.* Knickerbacker, 5 Johns. 327.

North Carolina.— State *v.* Lumsden, 89 N. C. 572; State *v.* Morris, 77 N. C. 512; State *v.* Krebs, 64 N. C. 604.

Ohio.— See Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586; State *v.* Interstate Sav. Inv. Co., 64 Ohio St. 283, 60 N. E. 220, 83 Am. St. Rep. 754, 52 L. R. A. 530; Hooker *v.* De Palos, 28 Ohio St. 251.

Oregon.— State *v.* Dougherty, 4 Oreg. 200; Fleming *v.* Bills, 3 Oreg. 286.

Pennsylvania.— Seidenbender *v.* Charles, 4 Serg. & R. 151, 8 Am. Dec. 682.

Tennessee.— Bass *v.* Nashville, Meigs 421, 33 Am. Dec. 154.

Texas.— Randle *v.* State, 42 Tex. 580; Barry *v.* State, 39 Tex. Cr. 240, 45 S. W. 571; Holoman *v.* State, 2 Tex. App. 610, 28 Am. Rep. 439. But Texas authorizes by statute the raffling of personal property up to the value of five hundred dollars. See Risein *v.* State, 44 Tex. Cr. 413, 71 S. W. 974.

Virginia.— Temple *v.* Com., 75 Va. 892.

Washington.— Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324, municipal ordinance.

United States.— See Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

England.— Macnee *v.* Persian Inv. Corp., 44 Ch. D. 306, 59 L. J. Ch. 695, 62 L. T. Rep. N. S. 894, 38 Wkly. Rep. 596; Sykes *v.* Beadon, 11 Ch. D. 170, 48 L. J. Ch. 522, 40 L. T. Rep. N. S. 245, 27 Wkly. Rep. 464.

See 34 Cent. Dig. tit. "Lotteries," § 22 *et seq.*

In Tennessee parties aiding or abetting in the operation of a lottery and vendors or purchasers of lottery tickets have been held punishable under an anti-gaming statute. See Eubanks *v.* State, 3 Heisk. 488; Bell *v.* State, 5 Sneed 507; State *v.* Smith, 2 Yerg. 272.

To induce persons to become patrons of a lottery is to promote it. Miller *v.* Com., 13 Bush (Ky.) 731.

69. What are lottery tickets.—A guaranty, or written assurance or promise whereby the warrantor binds himself that he will pay the prize which may be drawn to a certain number in a lottery, when sold by the proprietor of a lottery or his authorized agent, is strictly a lottery ticket within statutory prohibition of sale. Com. *v.* Chubb, 5 Rand. (Va.) 715.

70. *Alabama.*— See Loiseau *v.* State, 114 Ala. 34, 22 So. 138, 62 Am. St. Rep. 84; Gipson *v.* Knard, 96 Ala. 419, 11 So. 482; *Ex p.* Tompkins, 58 Ala. 71.

California.— *Ex p.* Shobert, 70 Cal. 632, 11 Pac. 786, 59 Am. Rep. 432.

Florida.— See Smith *v.* State, 40 Fla. 203, 23 So. 854; Bueno *v.* State, 40 Fla. 160, 23 So. 862.

Georgia.— See Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93.

Illinois.— Elder *v.* Chapman, 176 Ill. 142, 52 N. E. 10 [*reversing* 70 Ill. App. 288]; Thomas *v.* People, 59 Ill. 160; Dunn *v.* People, 40 Ill. 465.

Indiana.— Watson *v.* State, 111 Ind. 599, 12 N. E. 1008; Trout *v.* State, 111 Ind. 499, 12 N. E. 1005; State *v.* Woodward, 89 Ind. 110, 46 Am. Rep. 160; Crews *v.* State, 38 Ind. 28; Swain *v.* Bussell, 10 Ind. 438; Whitney *v.* State, 10 Ind. 404; Markle *v.* State, 3 Ind. 535.

Kentucky.—Com. *v.* Bierman, 13 Bush 345.

Louisiana.— State *v.* Boneil, 42 La. Ann. 1110, 8 So. 298, 21 Am. St. Rep. 413, 10 L. R. A. 60; State *v.* Judge First Dist. Ct., 32 La. Ann. 719; State *v.* Houston, 30 La. Ann. 1174.

Maine.— State *v.* Bishop, 15 Me. 122.

Maryland.— See Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551; Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 25 Am. St. Rep. 559, 8 L. R. A. 671; Boyland *v.* State, 69 Md. 511, 16 Atl. 132; Smith

sale of tickets in lotteries operated outside the state,[71] even though authorized by other states or by foreign governments.[72]

(III) *PURCHASING LOTTERY TICKETS.* In some jurisdictions it is a criminal offense to purchase chances in a lottery.[73] In other jurisdictions purchasers cannot be punished.[74]

(IV) *ADVERTISING LOTTERIES.* Statutes differing in details very frequently prohibit the advertising of lotteries or of lottery tickets;[75] they also have been

v. State, 68 Md. 168, 11 Atl. 758. See also State *v.* Scribner, 2 Gill & J. 246.

Massachusetts.— Com. *v.* Harris, 13 Allen 534; McIntyre *v.* Parks, 3 Metc. 207; Com. *v.* Lang, 14 Pick. 76; Com. *v.* Johnson, Thach. Cr. Cas. 284; Com. *v.* Braynard, Thach. Cr. Cas. 146.

Michigan.— People *v.* McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505.

Mississippi.— Kirk *v.* State, 69 Miss. 215, 10 So. 577; Moore *v.* State, 48 Miss. 147, 12 Am. Rep. 367.

Missouri.— State *v.* Kennon, 21 Mo. 262; Freleigh *v.* State, 8 Mo. 606; Kansas City *v.* Zahner, 73 Mo. App. 396; State *v.* Rothschild, 19 Mo. App. 137; State *v.* Ochsner, 9 Mo. App. 216; State *v.* Hindman, 4 Mo. App. 582, holding it not necessary that lottery be regular or that it be actually drawn.

Nevada.— State *v.* Overton, 16 Nev. 136; *Ex p.* Blanchard, 9 Nev. 101.

New Hampshire.— State *v.* Follet, 6 N. H. 53.

New Jersey.— Watson *v.* Murray, 23 N. J. Eq. 257.

New York.— People *v.* Fallon, 152 N. Y. 12, 46 N. E. 296, 57 Am. St. Rep. 492, 37 L. R. A. 227; Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. Rep. 628 [*reversing* 21 Hun 466]; Thatcher *v.* Morris, 11 N. Y. 437; New York City Alms House *v.* American Art Union, 7 N. Y. 228; People *v.* Payne, 3 Den. 88; Hunt *v.* Knickerbacker, 5 Johns. 327.

North Carolina.— State *v.* Bryant, 74 N. C. 207.

Oregon.— *Ex p.* Kameta, 36 Oreg. 251, 60 Pac. 394, 73 Am. St. Rep. 775; Fleming *v.* Bills, 3 Oreg. 286.

Pennsylvania.— See Eberman *v.* Reitzel, 1 Watts & S. 181; Com. *v.* Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475; Seidenbender *v.* Charles, 4 Serg. & R. 151, 8 Am. Dec. 682; Com. *v.* Manderfield, 8 Phila. 457.

Tennessee.— France *v.* State, 6 Baxt. 478.

Texas.— Randle *v.* State, 42 Tex. 580; Anderson *v.* State, (Cr. App. 1897) 39 S. W. 109.

Vermont.— See Case *v.* Riker, 10 Vt. 482, 33 Am. Dec. 211; Rogers *v.* Hough, 4 Vt. 172 (showing private lotteries forbidden); May *v.* Brownell, 3 Vt. 463.

Virginia.— See Cardwell *v.* Kelly, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240; Justice *v.* Com., 81 Va. 209; Com. *v.* Chubb, 5 Rand. 715.

Washington.— Seattle *v.* Chin Let, 19 Wash. 38, 52 Pac. 324.

Wisconsin.— Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

United States.— See Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

England.— Stoddart *v.* Sagar, [1895] 2 Q. B. 474, 18 Cox C. C. 165, 59 J. P. 598, 64 L. J. M. C. 234, 73 L. T. Rep. N. S. 215, 15 Reports 579, 44 Wkly. Rep. 287.

See 34 Cent. Dig. tit. "Lotteries," §§ 22, 30.

71. Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93; People *v.* Warner, 4 Barb. (N. Y.) 314. See also Van Doren *v.* Staats, 3 N. J. L. 887.

72. *Connecticut.*— Terry *v.* Olcott, 4 Conn. 442.

Maryland.— Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 25 Am. St. Rep. 559, 8 L. R. A. 671.

Missouri.— See Kitchen *v.* Greenabaum, 61 Mo. 110.

New Hampshire.— State *v.* Moore, 63 N. H. 9, 56 Am. Rep. 478.

New York.— People *v.* Noelke, 29 Hun 461; People *v.* Sturdevant, 23 Wend. 418. But *compare* Kohn *v.* Koehler, 96 N. Y. 362, 48 Am. Rep. 628; McLanahan *v.* Mott, 73 Hun 131, 25 N. Y. Suppl. 892.

United States.— Horner *v.* U. S., 147 U. S. 449, 13 S. Ct. 409, 37 L. ed. 237.

73. See *Ex p.* Doran, 2 Pars. Eq. Cas. (Pa.) 467; Justice *v.* Com., 81 Va. 209; Com. *v.* Chubb, 5 Rand. (Va.) 715. See also Randle *v.* State, 42 Tex. 580.

74. See White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; State *v.* Bryant, 74 N. C. 207.

If prizes are paid voluntarily it is no crime to receive them in some states at least. See White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; People *v.* Watson, 75 Mich. 582, 42 N. W. 1005.

75. *Connecticut.*— State *v.* Sykes, 28 Conn. 225, holding that the language used when given its natural and ordinary import did not amount to a proposal to sell or procure lottery tickets within the intent of the statute.

Florida.— See Smith *v.* State, 40 Fla. 203, 23 So. 854.

Georgia.— See Swan *v.* State, 29 Ga. 616.

Indiana.— Hudelson *v.* State, 94 Ind. 426, 48 Am. Rep. 171; Lohman *v.* State, 81 Ind. 15.

Iowa.— See Guenther *v.* Dewein, 11 Iowa 133.

Kansas.— Davenport *v.* Ottawa, 54 Kan. 711, 39 Pac. 708, 45 Am. St. Rep. 303, city ordinance.

Kentucky.— Louisville Courier-Journal Co. *v.* Com., 92 Ky. 22, 17 S. W. 163, 13 Ky. L. Rep. 341, holding that the statute then in force did not apply to one who advertised lotteries without indicating where they might be obtained in the state. The present statute reads differently. See Gen. St. § 1314.

held to apply to lotteries drawn outside the state,[76] even though authorized by the laws of the country in which they are drawn.[77]

(v) *Keeping or Permitting Use of House For Lottery Purposes.* At common law the keeping of a house or room for the illegal sale of lottery tickets is not indictable.[78] There are, however, statutes in some jurisdictions providing punishment for those keeping[79] or permitting the use of[80] houses for lotteries or for the sale of lottery tickets.[81]

(vi) *Having Lottery Tickets or Materials in One's Possession.* In some jurisdictions it is criminal to have in one's possession lottery tickets or materials for carrying on lotteries.[82] The requirement that the possession be knowingly or with intent to sell is common but not universal.[83]

Maine.— State *v.* Willis, 78 Me. 70, 2 Atl. 848.

Massachusetts.— Com. *v.* Hooper, 5 Pick. 42; Com. *v.* Braynard, Thach. Cr. Cas. 146.

Missouri.— State *v.* Kaub, 90 Mo. 196, 2 S. W. 276 (holding that simply publishing in a newspaper as an item of news that a lottery had a drawing on the first of last month or would have a drawing on the first of next month would not subject the publisher to the punishment prescribed by the statute); State *v.* Mumford, 73 Mo. 647, 39 Am. Rep. 532; State *v.* Kaub, 15 Mo. App. 433.

New Jersey.— See State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156.

New York.— People *v.* Lavin, 179 N. Y. 164, 71 N. E. 753, 66 L. R. A. 601; People *v.* England, 27 Hun 139; Hart *v.* People, 26 Hun 396 (holding that statute did not prevent the publication by any newspaper of any narrative or statement showing existence of an illegal lottery and where the same is carried on, for the purpose of denouncing and exposing the same); People *v.* Payne, 3 Den. 88.

England.— Stoddart *v.* Sagar, [1895] 2 Q. B. 474, 18 Cox C. C. 165, 59 J. P. 598, 64 L. J. M. C. 234, 73 L. T. Rep. N. S. 215, 15 Reports 579, 44 Wkly. Rep. 287; Hall *v.* McWilliam, 85 L. T. Rep. N. S. 239.

See 34 Cent. Dig. tit. "Lotteries," § 23.

Defendant must be connected with the circulation of the advertisement in the state where it is prohibited; thus it is probably not sufficient to allege merely that he caused it to be inserted in a newspaper published outside the state which did actually circulate within the state. See State *v.* Willis, 78 Me. 70, 2 Atl. 848, penal statute.

76. State *v.* Kaub, 90 Mo. 196, 2 S. W. 276.

77. *Connecticut.*—State *v.* Sykes, 28 Conn. 225, *semble.*

Kentucky.— See Louisville Courier-Journal Co. *v.* Com., 92 Ky. 22, 17 S. W. 163, 13 Ky. L. Rep. 341.

New Hampshire.— State *v.* Moore, 63 N. H. 9, 56 Am. Rep. 478.

New York.— Hart *v.* People, 26 Hun 396; People *v.* Charles, 3 Den. 212 [*affirmed* in 1 N. Y. 180].

England.— See Macnee *v.* Persian Inv. Corp., 44 Ch. D. 306, 59 L. J. Ch. 695, 62 L. T. Rep. N. S. 894, 38 Wkly. Rep. 596.

See 24 Cent. Dig. tit. "Lotteries," § 23.

The statutes do not apply to advertisements to be made outside the state, since they have no extraterritorial operation. Ormes *v.* Dauchy, 82 N. Y. 443, 37 Am. Rep. 583.

78. People *v.* Jackson, 3 Den. (N. Y.) 101, 194, 45 Am. Dec. 449.

79. See Miller *v.* Com., 13 Bush (Ky.) 731; Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551; Wallingford *v.* Mutual Soc., 5 App. Cas. 685, 50 L. J. Q. B. 49, 43 L. T. Rep. N. S. 258, 29 Wkly. Rep. 81; Hardwick *v.* Lane, [1904] 1 K. B. 204, 68 J. P. 94, 73 L. J. K. B. 96, 89 L. T. Rep. N. S. 630, 20 T. L. R. 87, 52 Wkly. Rep. 591; Stoddart *v.* Sagar, [1905] 2 Q. B. 474, 18 Cox C. C. 165, 59 J. P. 598, 64 L. J. M. C. 234, 73 L. T. Rep. N. S. 215, 15 Reports 579, 44 Wkly. Rep. 287; Taylor *v.* Smetten, 11 Q. B. D. 207, 48 J. P. 36, 52 L. J. M. C. 101.

80. See Com. *v.* Horton, 2 Gray (Mass.) 69.

81. See State *v.* Riley, 49 La. Ann. 1617, 22 So. 843; State *v.* Populus, 49 La. Ann. 1606, 22 So. 844; Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 25 Am. St. Rep. 559, 8 L. R. A. 671; Portland *v.* Yick, 44 Oreg. 439, 75 Pac. 706, 102 Am. St. Rep. 633.

82. *California.*— *Ex p.* McClain, 134 Cal. 110, 66 Pac. 69, 86 Am. St. Rep. 243, 54 L. R. A. 779; *In re* Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138 (ordinance); *Ex p.* Solomon, 91 Cal. 440, 27 Pac. 757; Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173 (ordinance).

Hawaii.— Rex *v.* Lum Hung, 7 Hawaii 344.

Kentucky.— See Miller *v.* Com., 13 Bush 731.

Maryland.— Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551, holding that statute does not apply to cases of possession for purpose of furnishing evidence of violation of law.

Massachusetts.— Com. *v.* Thacher, 97 Mass. 583, 93 Am. Dec. 125; Com. *v.* Dana, 2 Metc. 329, holding that statute extends to all lotteries not authorized by Massachusetts.

New Jersey.— State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156; State *v.* Collins, 63 N. J. L. 316, 43 Atl. 896.

Oregon.— *Ex p.* Kameta, 36 Oreg. 251, 60 Pac. 394, 73 Am. St. Rep. 775, holding particular ordinance unconstitutional because shifting burden of proof.

83. See the cases cited *supra*, especially

(VII) *PLAYING POLICY.* Statutes specifically directed against that form of lottery known as playing policy are becoming more common.[84]

(VIII) *INSURING LOTTERY TICKETS.* In some jurisdictions the insurance of lottery tickets is prohibited and made criminal.[85]

(IX) *BRINGING LOTTERY TICKETS WITHIN THE STATE.* It is infrequently provided that bringing lottery tickets within the state shall be a criminal offense.[86]

c. Who May Be Liable[87] — (I) *IN GENERAL.* The statutes of the various states usually provide what degree and manner of participation in the acts prohibited shall suffice to make the parties criminally responsible.[88] It is very commonly provided that all who are concerned, or who aid or assist, in the commission of the acts forbidden shall be deemed guilty of the offense, and in the absence of such a provision, where the offense created is of the grade of misdemeanor, all participants are held as principals.[89]

(II) *UNDER STATUTES PROHIBITING ADVERTISEMENTS.* Under statutes prohibiting the advertisement of lotteries it has been held that it is not necessary that defendant be the proprietor of the newspaper in which the advertisement appeared, in order to be held,[90] and that the printer[91] or managing editor[92] may be held; but one who inserts an advertisement in a paper published outside the state without being connected with its circulation within the state is not within a penal statute,[93] and a stock-holder in the corporation whose newspaper published the advertisement cannot be held unless it be shown that he actually and personally did the acts constituting the offense.[94]

d. Prosecution and Punishment — (I) *JURISDICTION.* The jurisdiction of the court in which the prosecution is instituted depends upon the provisions of the particular statute involved and the powers delegated to the court by the general law of the state.[95]

(II) *INDICTMENT AND INFORMATION* — (A) *General Requisites* — (1) CERTAINTY AND PARTICULARITY. The ordinary rule holds good for indictments in

Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551 (holding it no defense that defendant did not know what the articles were); State *v.* Collins, 63 N. J. L. 316, 43 Atl. 896 (holding fact of possession evidence of the knowledge necessary to constitute the offense).

84. See the following cases:

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497.

Delaware.— State *v.* Walls, 4 Pennew. 408, 56 Atl. 111.

Georgia.— See O'Dell *v.* State, 120 Ga. 152, 47 S. E. 577.

Massachusetts.— Com. *v.* Gorman, 164 Mass. 549, 42 N. E. 94.

Missouri.— State *v.* Cronin, 189 Mo. 663, 88 S. W. 604; State *v.* Wilkerson, 170 Mo. 184, 70 S. W. 478; State *v.* Williams, 44 Mo. App. 302; State *v.* Rothschild, 19 Mo. App. 137.

New Jersey.— State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156; State *v.* Collins, 63 N. J. L. 316, 43 Atl. 896.

85. See the statutes of the various states. And see Mount *v.* Waite, 7 Johns. (N. Y.) 434, holding that statute applies equally to insurance of foreign lottery tickets.

86. See Ford *v.* State, 85 Md. 465, 37 Atl. 172, 60 Am. St. Rep. 337, 41 L. R. A. 551.

87. **Persons liable as accessaries and accomplices** see CRIMINAL LAW, 12 Cyc. 448.

88. See the statutes of the various states and further the following cases: Marks *v.* State, 45 Ala. 38 (holding it unnecessary to show that defendant had sold any tickets himself); Com. *v.* Harris, 13 Allen (Mass.) 534.

89. State *v.* Willis, 78 Me. 70, 2 Atl. 848; Com. *v.* Brockway, 150 Mass. 322, 23 N. E. 101; Com. *v.* Braynard, Thach. Cr. Cas. (Mass.) 146; State *v.* U. S. Express Co., 95 Minn. 442, 104 N. W. 556; State *v.* Moore, 63 N. H. 9, 56 Am. Rep. 478. See Thomas *v.* State, 118 Ga. 774, 45 S. E. 622; Henderson *v.* State, 95 Ga. 326, 22 S. E. 537.

One who devotes his time to the business of selling tickets assists in establishing a lottery as an avocation or business. State *v.* Miller, 190 Mo. 449, 89 S. W. 377.

90. State *v.* Kaub, 15 Mo. App. 433.

91. Com. *v.* Clapp, 5 Pick. (Mass.) 41.

92. State *v.* Moore, 63 N. H. 9, 56 Am. Rep. 478.

93. State *v.* Willis, 78 Me. 70, 2 Atl. 848, *semble.*

94. People *v.* England, 27 Hun (N. Y.) 139, holding that defendant's connection with the corporation may be evidence that the corporation did the acts by his hand, act, direction, or commission.

95. See People *v.* Pickert, 96 N. Y. App. Div. 637, 89 N. Y. Suppl. 183; People *v.* Borges, 6 Abb. Pr. (N. Y.) 132.

lottery prosecutions that the charges must be preferred with reasonable particularity and certainty in order that it may be apparent what crime if any has been committed, and that the jury may know what issue is to be tried and defendant what he must answer to.[96]

(2) Language of Statute. The rule is often stated in general terms that the offenses connected with lotteries being created by statute, an indictment which follows the language of the statute is sufficient.[97] This, however, is not the case where the elements of the offense are not set out.[98]

(3) Joinder of Counts. An indictment may properly contain several counts charging different grades of an offense, but relating to the same transaction.[99]

(4) Duplicity. When a statute makes either of two or more acts connected with lotteries and subject to the same punishment indictable as distinct crimes, they may, when committed by the same person at the same time, be coupled in one count and constitute but one offense.[1]

96. *Indiana.*— Whitney *v.* State, 10 Ind. 404.

Kentucky.— Miller *v.* Com., 13 Bush 731.

Massachusetts.— Com. *v.* Sheedy, 159 Mass. 55, 34 N. E. 84.

New Hampshire.— State *v.* Follet, 6 N. H. 53.

New York.— See People *v.* Noelke, 29 Hun 461 [*affirmed* in 94 N. Y. 137, 46 Am. Rep. 128]; Pickett *v.* People, 8 Hun 83; People *v.* Taylor, 3 Den. 91.

Oregon.— State *v.* Dougherty, 4 Oreg. 200.

Pennsylvania.— Com. *v.* Gillespie, 7 Serg. & R. 469, 10 Am. Dec. 475.

Compare State *v.* Walls, 4 Pennew. (Del.) 408, 56 Atl. 111.

See 34 Cent. Dig. tit. "Lotteries," § 29 *et seq.*

Where the grand jury are ignorant of certain particulars in the description of the ticket or lottery it is sufficient to aver that fact. Pickett *v.* People, 8 Hun (N. Y.) 83; People *v.* Taylor, 3 Den. (N. Y.) 91; Com. *v.* Manderfield, 8 Phila. (Pa.) 457.

It is not necessary to specify the particular acts done; it is sufficient to aver that defendant induced others for a valuable consideration to take chances. Miller *v.* Com., 13 Bush (Ky.) 731.

97. *Alabama.*— Salomon *v.* State, 27 Ala. 26.

Connecticut.— State *v.* Carpenter, 60 Conn. 97, 22 Atl. 497, keeping place for policy playing.

Florida.— Bueno *v.* State, 40 Fla. 160, 23 So. 862.

Indiana.— Watson *v.* State, 111 Ind. 599, 12 N. E. 1008 (selling lottery tickets); Trout *v.* State, 111 Ind. 499, 12 N. E. 1005.

Kentucky.— Com. *v.* Bull, 13 Bush 656.

Massachusetts.— Com. *v.* Harris, 13 Allen 534 (promoting and setting up lottery); Com. *v.* Dana, 2 Metc. 329. See also Com. *v.* Sullivan, 146 Mass. 142, 15 N. E. 491.

Missouri.— State *v.* Miller, 190 Mo. 449, 89 S. W. 377 (holding averment that defendant "feloniously" aided in lottery sufficient, without use of "unlawfully"); State *v.* Cronin, 189 Mo. 663, 88 S. W. 604; State *v.* Wilkerson, 170 Mo. 184, 70 S. W. 478 (aiding and assisting in establishing policy); Kansas City *v.* Zahner, 73 Mo. App. 396.

New Hampshire.— State *v.* Martin, 68 N. H. 463, 44 Atl. 605.

New York.— See People *v.* Borges, 6 Abb. Pr. 132; People *v.* Taylor, 3 Den. 91.

See 34 Cent. Dig. tit. "Lotteries," § 29 *et seq.*

98. State *v.* McDowell, 1 Pennew. (Del.) 2, 39 Atl. 454.

99. People *v.* Emerson, 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157, holding that a general verdict of guilty on such an indictment is proper. See also Bueno *v.* State, 40 Fla. 160, 23 So. 862; Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850.

1. Smith *v.* State, 40 Fla. 203, 23 So. 854; Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850.

Hence an indictment is not bad for duplicity which charges defendant in one count: With setting up a lottery, disposing of property by way of lottery, conducting lottery drawings, and selling lottery tickets. Smith *v.* State, 40 Fla. 203, 23 So. 854. Or with being concerned in a lottery by printing, publishing, and circulating an advertisement of a lottery. State *v.* Willis, 78 Me. 70, 2 Atl. 848. And see Lohman *v.* State, 81 Ind. 15. Or with offering for sale and selling a lottery ticket. Com. *v.* Eaton, 15 Pick. (Mass.) 273. Or with setting up and promoting a lottery. Com. *v.* Harris, 13 Allen (Mass.) 534. Or with advertising, exposing for sale, and selling lottery tickets. State *v.* McWilliams, 7 Mo. App. 99; State *v.* Hindman, 4 Mo. App. 582. Or with establishing a lottery and disposing of property by lottery. State *v.* Randle, 41 Tex. 292; Prendergast *v.* State, 41 Tex. Cr. 538, 57 S. W. 850. Or with knowingly suffering money or other property to be raffled for in a house owned by defendant and to be won there by throwing or using dice. Com. *v.* Coleman, 184 Mass. 198, 62 N. E. 220. Or with depositing on a certain day a certain number of circulars concerning a lottery, at the post-office to be sent by mail. U. S. *v.* Patty, 2 Fed. 664, 9 Biss. 429.

Where the statute makes it criminal to carry on a lottery publicly or privately, a count which charges defendant with carrying on a lottery publicly and privately is bad for duplicity. State *v.* Dennison, 60 Nebr. 192, 82 N. W. 628.

(B) *Under Particular Statutes* — (1) ESTABLISHING AND PROMOTING LOTTERY — (a) DESCRIPTION OF LOTTERY. The necessity of describing the lottery as one set on foot for the purpose of disposing of money or other valuable property varies with the form of the statute.[2]

(b) DESCRIPTION OF PRIZES. It is not necessary to set forth the number or value of the prizes.[3]

(2) SELLING LOTTERY TICKETS — (a) DESCRIPTION OF TICKETS. It is not ordinarily necessary to set out a ticket by its tenor or purport, it being sufficient to describe it as "a certain lottery ticket" in the language of the statute.[4]

(b) DESCRIPTION OF LOTTERY. Whether the indictment must describe the lottery to which the ticket belongs as an unauthorized lottery, or as a lottery for the disposition of money or other valuable things, depends upon the form of the statute; the decisions cannot be grouped in support of any general rule.[5]

(c) NAME OF PURCHASER. The name of the purchaser need not be given.[6]

(3) DISPOSING OF PROPERTY BY LOTTERY. Under statutes punishing the disposition of property by way of lottery it has been held that the indictment must allege to whom the property was disposed,[7] and that it must specify the species of property.[8]

A charge that defendant is engaged in a lottery scheme or device of chance is not bad for duplicity since a lottery is a device of chance. State *v.* Willis, 78 Me. 70, 2 Atl. 848.

An information is bad for duplicity which charges in a single count that on a certain date and on divers days between that and a subsequent date, defendant did publicly and privately open, set on foot, and carry on a lottery, since the offense is not a continuing one. State *v.* Dennison, 60 Nebr. 192, 82 N. W. 628.

In Kentucky there is an express statutory provision that an indictment may charge in one count the commission of any number of the offenses connected with lotteries. See Com. *v.* Rose, 107 Ky. 567, 54 S. W. 862, 21 Ky. L. Rep. 1278.

2. See Com. *v.* Mackay, 177 Mass. 345, 58 N. E. 1027 (holding absence of such description merely formal defect); State *v.* Shorts, 32 N. J. L. 398, 90 Am. Dec. 668 (holding such description necessary); People *v.* Noelke, 94 N. Y. 137, 46 Am. Rep. 128 [*affirming* 29 Hun 461]; Dunn *v.* People, 90 N. Y. 104 [*reversing* 27 Hun 272]; People *v.* Warner, 4 Barb. (N. Y.) 314; People *v.* Taylor, 3 Den. (N. Y.) 91; People *v.* Payne, 3 Den. (N. Y.) 88; France *v.* State, 6 Baxt. (Tenn.) 478 (holding indictment sufficient, although it fails to set out ticket or aver where lottery is to be drawn or its name).

By statute in New Hampshire a lottery may be described as a pretended lottery, "which shall be sufficient, whatever the proof may be; and it shall not be necessary to allege or prove, upon trial, who is the owner of the property, nor who manages, conducts, or draws the lottery, or participates therein." See State *v.* Martin, 68 N. H. 463, 44 Atl. 605.

3. Com. *v.* Harris, 13 Allen (Mass.) 534; Com. *v.* Horton, 2 Gray (Mass.) 69.

The amount for which the lottery is set on foot need not be alleged. People *v.* Taylor, 3 Den. (N. Y.) 91.

An indictment charging defendant with establishing a lottery for the purpose of disposing of a horse and buggy to and among the persons who should distribute tickets is defective as alleging the distribution of a single prize not to the winner but to all the purchasers of tickets. Risein *v.* State, 44 Tex. Cr. 413, 71 S. W. 974.

4. Dunn *v.* People, 40 Ill. 465; Freleigh *v.* State, 8 Mo. 606. See also Bueno *v.* State, 40 Fla. 160, 23 So. 862, holding that the indictment need not designate the particular lottery ticket alleged to be sold.

The ticket may be set out in the indictment by copy, and if it does not appear on its face to be such, it may be so averred and proved. State *v.* Willis, 78 Me. 70, 2 Atl. 848. See also Com. *v.* Thacher, 97 Mass. 583, 93 Am. Dec. 125.

5. **Where no lottery is authorized,** it is not necessary that there should be a description of the ticket or of the lottery to which it belongs. See Com. *v.* Johnson, Thach. Cr. Cas. (Mass.) 284; State *v.* Follet, 6 N. H. 53.

Where some lotteries are authorized the indictment should show upon its face that the lottery in question was an illegal one. Com. *v.* Manderfield, 8 Phila. (Pa.) 457. And the indictment should set out the ticket that the court may see whether it was in an authorized lottery. State *v.* Kennon, 21 Mo. 262. See also Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475. *Compare* Com. *v.* Bierman, 13 Bush (Ky.) 345. See further cases cited *supra*, IV, B, 3, d, (II), (B), (1), (a).

6. State *v.* Yoke, 9 Mo. App. 582.

Giving defendant the addition of lottery vendor, when his proper addition was broker, furnishes good cause for abating the indictment. State *v.* Bishop, 15 Me. 122.

7. Com. *v.* Shedy, 159 Mass. 55, 34 N. E. 84, holding language of statute not sufficient. See Prendergast *v.* State, 41 Tex. Cr. 358, 57 S. W. 850.

8. Markle *v.* State, 3 Ind. 535.

(4) ADVERTISING LOTTERIES. Under statutes forbidding the advertisement of lotteries it has been held that it is not necessary to allege or prove the kind of tickets advertised,[9] or that they were advertised as being for sale within the commonwealth,[10] or that defendant's name was attached to the advertisement.[11] But there must be an averment that defendant was connected with the circulation of the advertisement within the state.[12]

(c) *Proof and Variance.* The proof must substantially correspond with the descriptive allegations of the indictment;[13] but an unsubstantial and non-prejudicial variance, as in the name of the lottery, will not be ground for acquittal.[14] Where the indictment charges the commission of each of a number of prohibited acts, proof that defendant is guilty of any one would be sufficient to warrant a conviction.[15]

(III) *EVIDENCE*— (A) *Burden of Proof.* In accordance with the general rule, the burden of proving guilt in lottery prosecutions is upon the state; and statutes attempting to change the rule are violative of provisions in state constitutions.[16]

(B) *Judicial Notice.*[17] Courts will take judicial notice of the peculiar nature of lotteries and the mode in which they are generally carried on.[18] It has been held that the court will take judicial notice of what is meant by a gift enterprise,[19] but not of the fact that policy is a species of lottery.[20]

(C) *Admissibility.* The ordinary rules as to the admissibility of evidence in criminal prosecutions apply.[21] Thus envelopes, tickets, and other papers and materials are admissible;[22] they may be admitted even though found on defendant's person or premises without infringing upon defendant's privilege against self-incrimination.[23] So similar sales may be shown in a prosecution for selling

9. Com. *v.* Hooper, 5 Pick. (Mass.) 42.

10. Com. *v.* Clapp, 5 Pick. (Mass.) 41.

11. Lohman *v.* State, 81 Ind. 15.

12. State *v.* Willis, 78 Me. 70, 2 Atl. 848, *semble*.

13. Whitney *v.* State, 10 Ind. 404.

If the indictment charges that defendant sold a lottery ticket "in the words and figures following," it must contain a literal recital of the ticket; and any variance therefrom will be fatal. Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

14. State *v.* Scully, 9 Mo. App. 582. See also Anderson *v.* State, (Tex. Cr. App. 1897) 39 S. W. 109.

15. Thomas *v.* State, 118 Ga. 774, 45 S. E. 622; State *v.* Hindman, 4 Mo. App. 582. *Compare* Dunn *v.* People, 27 Hun (N. Y.) 272.

16. *In re* Wong Hane, 108 Cal. 680, 41 Pac. 693, 49 Am. St. Rep. 138; *Ex p.* Kameta, 36 Oreg. 251, 60 Pac. 294, 78 Am. St. Rep. 775.

17. **For judicial notice in general** see EVIDENCE, II, B, 16, a, (VI).

18. Boullemet *v.* State, 28 Ala. 83.

19. Lohman *v.* State, 81 Ind. 15.

20. State *v.* Norman, 44 Mo. App. 306; State *v.* Bruner, 17 Mo. App. 274; State *v.* Sellner, 17 Mo. App. 39; State *v.* Russell, 17 Mo. App. 16. *Compare* State *v.* Williams, 44 Mo. App. 302; State *v.* Rothschild, 19 Mo. App. 137.

21. See CRIMINAL LAW, 12 Cyc. 390.

Admissible evidence.— Smith *v.* State, 68 Md. 168, 11 Atl. 758 (as to selling lottery tickets); Com *v.* Gorman, 164 Mass. 549, 42 N. E. 94 (as to having lottery policy in possession); State *v.* Miller, 190 (Mo.) 449, 89 S. W. 377 (as to establishing lottery); State *v.* Collins, 63 N. J. L. 316, 43 Atl. 896 (as to having lottery tickets in possession knowingly); People *v.* Emerson, 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157 (admitting evidence of gambling transactions extending over period of about ten months preceding date of offense charged in indictment, Code Crim. Proc. § 280, providing that precise time at which crime was committed need not be stated in indictment).

The best evidence must be adduced.— Thus in a prosecution for selling lottery tickets evidence of their contents is not admissible unless it be shown that the tickets themselves cannot be produced. Whitney *v.* State, 10 Ind. 404.

22. *Illinois.*— Thomas *v.* People, 59 Ill. 160 (admitting also bills and advertisements delivered to other parties); Dunn *v.* People, 40 Ill. 465.

Maryland.— Boyland *v.* State, 69 Md. 511, 16 Atl. 132.

Missouri.— State *v.* Miller, 190 Mo. 449, 89 S. W. 377.

New Jersey.— State *v.* Arthur, 70 N. J. L. 425, 57 Atl. 156; Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327, "dream-books" admitted.

New York.— People *v.* Emerson, 5 N. Y. Suppl. 374, 6 N. Y. Cr. 157.

See 34 Cent. Dig. tit. "Lotteries," § 34.

23. Com. *v.* Dana, 2 Metc. (Mass.) 329; State *v.* Pomeroy, 130 Mo. 489, 32 S. W. 1002. See also People *v.* Noelke, 29 Hun (N. Y.) 461 [*affirmed* in 94 N. Y. 137, 46 Am. Rep. 128], holding admission of search warrant and matters pertaining thereto did not infringe defendant's constitutional rights.

lottery tickets.[24] Evidence that defendant had operated a lottery openly and never been forbidden by the authorities is irrelevant and inadmissible.[25]

(D) *Weight and Sufficiency.* There are no peculiar doctrines as to the weight and sufficiency of evidence in prosecutions under anti-lottery statutes, but the commonly accepted rules of criminal evidence apply.[26] It is not necessary to prove an express promise to pay the successful chance holder some money or other valuable thing; such a promise may be inferred from the general character of the business or transaction.[27] A conviction may be had upon circumstantial evidence.[28]

(IV) *Instructions.* The ordinary rules apply in lottery prosecutions, as that instructions should be direct and certain;[29] that they should not contain any expressions calculated to influence the jury in determining questions of fact;[30] and that charges are properly refused which are confusing or which assume the existence of evidence that has not been presented.[31] But an instruction is not erroneous which assumes as true a fact which is admitted on trial.[32] Where the proof is all aimed at one count in the indictment, it is proper for the court to instruct the jury to find defendant guilty of the offense charged in that count if they believe him guilty at all.[33]

(V) *Verdict.* Where an indictment charged defendant with establishing a lottery as a business and avocation a verdict omitting the words "as a business and avocation" is sufficient, where it found defendant guilty as charged in the indictment.[34]

(VI) *Appeal and Error.*[35] The elementary principles have been recognized in cases arising under anti-lottery statutes that an exception will not be considered if the instruction to the jury renders the exception immaterial;[36] and that if the facts as found by the jury are sufficient to sustain the conviction an appellate tribunal will not interfere.[37]

(VII) *Punishment.* The punishment for the violation of lottery statutes is usually a fine or imprisonment or both, the offense being classed more frequently as a misdemeanor than as a felony.[38]

24. State *v.* Ochsner, 9 Mo. App. 216.

25. Johnson *v.* State, 137 Ala. 101, 34 So. 1018.

26. See Criminal Law, 12 Cyc. 390. And see the following cases:

Alabama.— *Ex p.* Hawkins, 89 Ala. 103, 8 So. 19; Salomon *v.* State, 28 Ala. 83.

Delaware.— State *v.* Walls, 4 Pennew. 408, 56 Atl. 111, holding that particular numbers on policy slip need not be proved.

Hawaii.— Reg. *v.* Kaka, 8 Hawaii 305, evidence that defendant received stakes from players and returned prize to the successful one held sufficient.

Massachusetts.— Com. *v.* Brockway, 150 Mass. 322, 23 N. E. 101 (holding it unnecessary to prove actual delivery of the prize to the successful chance-holder); Com. *v.* Lang, 14 Pick. 76.

Missouri.— State *v.* Cronin, 189 Mo. 663, 88 S. W. 604; Kansas City *v.* Zahner, 73 Mo. App. 396; State *v.* Rothschild, 19 Mo. App. 137, all cases of playing policy.

Texas.— Randle *v.* State, 42 Tex. 580; Anderson *v.* State, (Cr. App. 1897) 39 S. W. 109.

See 34 Cent. Dig. tit. "Lotteries," § 34.

27. State *v.* Walls, 4 Pennew. (Del.) 408, 56 Atl. 111; State *v.* Ochsner, 9 Mo. App. 216 (holding that paper need not on its face purport to be a lottery ticket or a writing purporting to give the holder a sum of money in the event of the happening of the contingency named in the ticket); Clark *v.* State, 47 N. J. L. 556, 4 Atl. 327.

28. State *v.* Williams, 44 Mo. App. 302; State *v.* Collins, 63 N. J. L. 316, 43 Atl. 896; Com. *v.* Gillespie, 7 Serg. & R. (Pa.) 469, 10 Am. Dec. 475.

29. Salomon *v.* State, 28 Ala. 83.

30. People *v.* Jones, 89 Hun (N. Y.) 12, 35 N. Y. Suppl. 61, holding it error to rule that paper in question was not lottery ticket.

31. Salomon *v.* State, 28 Ala. 83; Bueno *v.* State, 40 Fla. 180, 23 So. 862.

32. State *v.* Miller, 190 Mo. 449, 89 S. W. 377.

33. Wilson *v.* State, 67 Ga. 658.

34. State *v.* Miller, 190 Mo. 449, 89 S. W. 377.

35. See, generally, Appeal and Error.

36. Pickett *v.* People, 8 Hun (N. Y.) 83.

37. Com. *v.* Gorman, 164 Mass. 549, 42 N. E. 94.

38. See the statutes of the various states as stated in the cases cited in this article *passim*. In Missouri one who establishes or aids in establishing or who advertises a lottery as a business is guilty of a felony, while one who merely advertises or sells tickets or advertises the numbers drawn is guilty of a misdemeanor. State *v.* Kaub, 15 Mo. App.

4. Penalties and Forfeitures — a. In General. As in the case of other forms of gambling,[39] the legislatures of some states have passed statutes directed against lotteries which provide other forms of punishment either in addition to, or in substitution for, the ordinary fine or imprisonment following upon criminal proceedings. Such statutes provide for penalties to be recovered by the public prosecuting officer or some public institution,[40] for the recovery by purchasers of chances of double the amount paid by them for such chances,[41] and for forfeitures of prizes.[42] Proceedings in quo warranto will be maintained to forfeit the charter of a corporation engaged in the lottery business contrary to statute.[43]

b. Actions. The proper form of action varies with the different statutes. In some jurisdictions debt alone may be brought,[44] while in others indictment has been held to be the proper remedy.[45]

c. Evidence. In actions to recover double the purchase-price of tickets the tickets need not be produced,[46] and it is sufficient to show the aggregate amount paid during a specified period with reasonable certainty.[47]

d. Seizure of Lottery Tickets and Materials — (I) *In General.* In a few states there are special statutes which have been held to be constitutional, although authorizing the seizure under search warrants of lottery tickets and materials used in carrying on lotteries.[48]

(II) *Disposition of Property Seized.* Property seized under a search warrant is in the custody of the court,[49] and the officer in charge may refuse to return lottery tickets so seized on the ground that they should be retained to prevent the commission of the offense of selling them;[50] but tickets seized on a warrant illegally issued are not liable to be burned, since lottery tickets are not *mala in se* and

433. In Maine the statute declares every lottery and scheme of chance to be a nuisance. See State *v.* Willis, 78 Me. 70, 2 Atl. 848. See also People *v.* Borges, 6 Abb. Pr. (N. Y.) 132.

39. See Gaming, 20 Cyc. 917.

40. See the following cases:

Georgia.— Swan *v.* State, 29 Ga. 616.

Maine.— State *v.* Willis, 78 Me. 70, 2 Atl. 848.

Maryland.— Broadbent *v.* State, 7 Md. 416; Day *v.* State, 7 Gill 321.

Massachusetts.— Com. *v.* Eaton, 15 Pick. 273; Nichols *v.* Squire, 5 Pick. 168.

New Jersey.— See Wolcott *v.* Skahill, 56 N. J. L. 221, 27 Atl. 912, where statute provided for recovery of the penalty by any person who should sue for same.

New York.— New York City Almshouse *v.* American Art Union, 7 N. Y. 228.

South Carolina.— State *v.* Allen, 2 McCord 55, holding act unconstitutional in so far as it purports to authorize tax-collector to issue execution without conviction by jury, although the statute termed the penalty a tax.

41. See Wilkinson *v.* Gill, 74 N. Y. 63, 30 Am. Rep. 264; Almy *v.* McKinney, 5 N. Y. St. 267.

42. See People *v.* Kent, 6 Cal. 89; State Mut. L. Ins. Co. *v.* Newton, 89 Ill. App. 353; Com. *v.* Howes, 15 Pick. (Mass.) 231; People *v.* American Art Union, 7 N. Y. 240; Almy *v.* McKinney, 5 N. Y. St. 267.

A bill for an injunction to restrain the owner of the lottery from disposing of the prizes will lie, where suits have been begun before a magistrate for the forfeiture of prizes to the state. People *v.* Kent, 6 Cal. 89, holding prizes forfeited as soon as drawn, before delivery.

43. State *v.* Kansas Mercantile Assoc., 45 Kan. 351, 25 Pac. 984, 23 Am. St. Rep. 727, 11 L. R. A. 430; State *v.* Nebraska Home Co., 66 Nebr. 349, 92 N. W. 763, 103 Am. St. Rep. 706, 60 L. R. A. 448; State *v.* Interstate Sav. Inv. Co., 64 Ohio St. 283, 60 N. E. 220, 83 Am. St. Rep. 754, 52 L. R. A. 530.

44. See Swan *v.* State, 29 Ga. 616; Broadbent *v.* State, 7 Md. 416; Day *v.* State, 7 Gill (Md.) 321. See also Wolcott *v.* Skahill, 56 N. J. L. 221, 27 Atl. 912, where statute authorized the beginning of suit by attachment in certain cases.

45. See State *v.* Willis, 78 Me. 70, 2 Atl. 848.

An indictment is not bad for duplicity which alleges in one count that defendant was concerned in a lottery by printing, publishing, and advertising a lottery. State *v.* Willis, 78 Me. 70, 2 Atl. 848. Or that defendant did unlawfully offer for sale and did unlawfully sell. Com. *v.* Eaton, 15 Pick. (Mass.) 273; Com. *v.* Howes, 15 Pick. (Mass.) 231; Nichols *v.* Squire, 5 Pick. (Mass.) 168. And see *supra*, IV, B, 3, d, (II), (A), (4).

46. Wilkinson *v.* Gill, 74 N. Y. 63, 30 Am. Rep. 264; Grover *v.* Morris, 73 N. Y. 473.

47. Almy *v.* McKinney, 5 N. Y. St. 267.

48. See Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173; Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 369; Com. *v.* Dana, 2 Metc. (Mass.) 329.

49. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

50. Collins *v.* Lean, 68 Cal. 284, 9 Pac. 173.

courts have no power to regulate the disposition of them beyond that which is conferred by statute.[51]

5. STATUTES INVALIDATING CONVEYANCES MADE IN PURSUANCE OF LOTTERY SCHEMES. In a few states conveyances or grants of land or chattels made in pursuance of lottery schemes are expressly declared void.[52]

C. Rules of Construction. The rules of construction vary with the nature of the statutes. Where the question presented is one of enforcing criminal responsibility, or of refusing to aid in a transaction alleged to be within the statutory prohibition, the courts will ordinarily construe liberally the provisions relating to lotteries so as to include all schemes which appeal to the gambling propensities of men.[53] But where the enforcement of a penal statute is before the court, the ordinary rule of strict construction applies.[54]

V. TRANSACTIONS AND CONTRACTS CONNECTED WITH LOTTERIES.[55]

A. Validity — 1. IN ABSENCE OF STATUTORY PROHIBITION. In the absence of statutory provisions prohibiting lotteries, or in the presence of enactments expressly recognizing the lottery involved, contracts and transactions connected with the operation of lotteries are valid and may be enforced. Thus successful chance holders may sue to recover prizes,[56] an agent may recover for services rendered in connection with the operation of a lottery,[57] and contracts or notes made for the purchase of lottery tickets may be enforced.[58]

2. UNDER STATUTORY PROHIBITION — a. In General. Where lotteries are prohibited by the general or criminal law of a state, the courts universally hold that contracts and transactions connected with the operation of lotteries are illegal as against public policy, invalid, and unenforceable. Thus prize-winners cannot

51. Com. *v.* Lottery Tickets, 5 Cush. (Mass.) 369.

Description of property in search warrant. — The house or place where lottery tickets, etc., are believed to be concealed is sufficiently designated and described in a search warrant, according to the provision of Mass. Rev. St. c. 142, § 3, by denominating it the "office of E. W. Dana," and truly stating the number thereof and the street in which it is situate, although A occupies the office with D. Com. *v.* Dana, 2 Metc. (Mass.) 329.

52. See Wooden *v.* Shotwell, 23 N. J. L. 465; Watson *v.* Murray, 23 N. J. Eq. 257; Hull *v.* Ruggles, 56 N. Y. 424; Ridgeway *v.* Underwood, 20 Fed. Cas. No. 11,815, 4 Wash. 129.

53. See Equitable Loan, etc., Co. *v.* Waring, 117 Ga. 599, 44 S. E. 320, 97 Am. St. Rep. 177, 62 L. R. A. 93 (per Lumpkin, J.); Ballock *v.* State, 73 Md. 1, 20 Atl. 184, 25 Am. St. Rep. 559, 8 L. R. A. 671; Smith *v.* State, 68 Md. 168, 11 Atl. 758; People *v.* McPhee, 139 Mich. 687, 103 N. W. 174, 69 L. R. A. 505; State *v.* Clarke, 33 N. H. 329, 66 Am. Dec. 723.

54. See State *v.* Sykes, 28 Conn. 225; Nichols *v.* Squire, 5 Pick. (Mass.) 168.

55. Forfeiture of lease by improper use of premises see LANDLORD AND TENANT, 23 Cyc. 1353.

56. *Kentucky.*— Bibb *v.* Miller, 11 Bush 306.

Massachusetts.— Homer *v.* Whitman, 15 Mass. 132; Gilbert *v.* Williams, 8 Mass. 476, holding that a prize winner had relinquished his claim upon managers of lottery in the particular instance.

Missouri.— See Petit *v.* Bouju, 1 Mo. 64, holding that trover will not lie for the amount of a prize ticket unless the money has been set apart in kind.

New York.— See McLaughlin *v.* Waite, 5 Wend. 404, 21 Am. Dec. 232 (holding finder of lottery ticket not entitled to enforce it); Yates *v.* Tisdale, 3 Edw. 71 (holding that manager of lottery may file interpleader).

Pennsylvania.— McNight *v.* Biesecker, 13 Pa. St. 328; Yohe *v.* Robertson, 2 Whart. 155; Snyder *v.* Wolfley, 8 Serg. & R. 328; Biddis *v.* James, 6 Binn. 321, 6 Am. Dec. 456.

Tennessee.— McGimpsey *v.* Booker, 5 Yerg. 139, granting bill in equity.

Vermont.— Case *v.* Riker, 10 Vt. 482, 33 Am. Dec. 211; May *v.* Brownell, 3 Vt. 463.

United States.— Clark *v.* Washington, 12 Wheat. 40, 6 L. ed. 544; Brent *v.* Davis, 10 Wheat. 395, 6 L. ed. 350.

See 34 Cent. Dig. tit. "Lotteries," § 161.

57. Broadbent *v.* Tuskaloosa Scientific, etc., Assoc., 45 Ala. 170; Yates *v.* O'Neale, 3 Gill & J. (Md.) 253.

58. *Connecticut.*— See Barnum *v.* Barnum, 9 Conn. 242.

Delaware.—Gregory *v.* Bailey, 4 Harr. 256; Bailey *v.* McDowell, 1 Harr. 346.

Kentucky.— Jameson *v.* Gregory, 4 Metc. 363.

Louisiana.— See Antoine *v.* Smith, 40 La. Ann. 560, 4 So. 321.

Maryland.— City Bank *v.* Smith, 3 Gill & J. 265.

recover their prizes,[59] vendors of tickets cannot recover the purchase-price,[60] employees cannot recover remuneration for services rendered in connection with the operation of lotteries,[61] agreements by purchasers of tickets to pool their winnings cannot be enforced,[62] agents or partners cannot be compelled to account,[63] specific performance of an agreement to take such land as may be apportioned to defendant by a lottery scheme will not be granted,[64] and contracts for the purchase of land to be used for prizes in a lottery scheme,[65] or contracts to insure lottery tickets[66] cannot be enforced. Statutes expressly declaring void contracts, conveyances, and grants of land or chattels made in aid of lotteries have been passed in some jurisdictions.[67]

b. Obligations and Securities Given in Lottery Transactions. Obligations and securities given in contracts or transactions connected with lotteries are unenforceable as between the parties,[68] but in the absence of statute valid in the hands of *bona fide* purchasers for value before maturity.[69]

3. What Law Governs. The validity of a contract concerning lotteries is to be determined according to the usual principles of the conflict of laws by the law of the place of making.[70] If valid by that law, it may be enforced in the

Massachusetts.— McIntyre *v.* Parks, 3 Metc. 207.

Pennsylvania.—See Bows *v.* White, 2 Miles 140.

See 34 Cent. Dig. tit. "Lotteries," § 15.

59. Thatcher *v.* Morris, 11 N. Y. 437; Biddis *v.* James, 6 Binn. (Pa.) 321, 6 Am. Dec. 456; Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 68 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74. *Compare* Funk *v.* Gallivan, 49 Conn. 124, 44 Am. Rep. 210, where both plaintiff and defendant claimed prize.

60. Hunt *v.* Knickerbacker, 5 Johns. (N. Y.) 327; Eberman *v.* Reitzel, 1 Watts & S. (Pa.) 181; Seidenbender *v.* Charles, 4 Serg. & R. (Pa.) 151, 8 Am. Dec. 682; May *v.* Brownell, 3 Vt. 463.

61. Davis *v.* Caldwell, 2 Rob. (La.) 271. *Compare* Higgins *v.* Miner, 13 Ind. 346; Riggs *v.* Adams, 12 Ind. 199.

62. Roselle *v.* Farmers' Bank, 141 Mo. 36, 39 S. W. 274, 64 Am. St. Rep. 501. See also Van Doren *v.* Staats, 3 N. J. L. 887. *Compare* Hatch *v.* Hanson, 46 Mo. App. 323; Goodrich *v.* Houghton, 134 N. Y. 115, 31 N. E. 516; Crutchfield *v.* Rambo, (Tex. Civ. App. 1905) 86 S. W. 950.

63. *New Hampshire.*— Udall *v.* Metcalf, 5 N. H. 396; Roby *v.* West, 4 N. H. 285, 17 Am. Dec. 423.

New Jersey.— Watson *v.* Murray, 23 N. J. Eq. 237.

New York.— Rolfe *v.* Delmar, 7 Rob. 80; Negley *v.* Devlin, 12 Abb. Pr. N. S. 210.

Wisconsin.— Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58.

United States.— Lanahan *v.* Pattison, 14 Fed. Cas. No. 8,036, 1 Flipp. 410.

64. Lynch *v.* Rosenthal, 144 Ind. 86, 42 N. E. 1103, 55 Am. St. Rep. 168, 31 L. R. A. 835; Emshwiler *v.* Tyner, 21 Ind. App. 347, 52 N. E. 459, 69 Am. St. Rep. 360.

65. Hooker *v.* De Palos, 28 Ohio St. 251.

66. Mount *v.* Waite, 7 Johns. (N. Y.) 434.

67. See *supra*, IV, B, 5.

68. *Iowa.*— Guenther *v.* Dewein, 11 Iowa 133.

Kentucky.— Morton *v.* Fletcher, 2 A. K. Marsh. 137, 12 Am. Dec. 366; Clarke *v.* Havens, 1 A. K. Marsh. 198.

Massachusetts.— Williams *v.* Woodman, 8 Pick. 78, indenture to furnish money for vending of lottery tickets.

Missouri.— Siver *v.* Guarantee Inv. Co., 183 Mo. 41, 81 S. W. 1098.

New York.— Irving *v.* Britton, 8 Misc. 201, 28 N. Y. Suppl. 529.

United States.— Hawkins *v.* Cox, 11 Fed. Cas. No. 6,243, 2 Cranch C. C. 173; Lanahan *v.* Pattison, 14 Fed. Cas. No. 8,036, 1 Flipp. 410; Thompson *v.* Milligan, 23 Fed. Cas. No. 13,969, 2 Cranch C. C. 207.

See 34 Cent. Dig. tit. "Lotteries," §§ 12, 15.

69. See Terry *v.* Olcott, 4 Conn. 442. But *compare* Kittle *v.* De Lamater, 3 Nebr. 325.

By statute in Rhode Island notes, obligations, and promises given for lottery tickets are declared void. Gen. St. c. 283, § 3.

70. *Kentucky.*— Jameson *v.* Gregory, 4 Metc. 363.

Maryland.— Paine *v.* France, 26 Md. 46.

Massachusetts.— McIntyre *v.* Parks, 3 Metc. 207.

Missouri.— Roselle *v.* Farmers' Bank, 141 Mo. 36, 39 S. W. 274, 64 Am. St. Rep. 501. *Compare* Hatch *v.* Hanson, 46 Mo. App. 323.

Nebraska.— See Kittle *v.* De Lamater, 3 Nebr. 325, stating the rule to be that unless a contract is by its terms to be performed in another state, it must be governed by the law of the place where it is made.

New York.— Goodrich *v.* Houghton, 134 N. Y. 115, 31 N. E. 516; Thatcher *v.* Morris, 11 N. Y. 437.

Pennsylvania.— See McNight *v.* Biesecker, 13 Pa. St. 328 (holding that Pennsylvania law for the suppression of lotteries does not prohibit the making of an agreement for the purchase of tickets in Maryland); Bows *v.* White, 2 Miles 140.

Vermont.— Case *v.* Riker, 10 Vt. 482, 33 Am. Dec. 211.

courts of a state where it could not have been lawfully made,[71] although courts which consider the public policy against the transaction very strong may refuse to enforce it.[72]

B. Rights and Liabilities of Parties to Lottery Transactions[73] — **1. In General.** The general rule is well settled that in lottery transactions, as in illegal contracts generally, the courts will leave the parties where it finds them,[74] and will not lend its aid either to enforce[75] or to rescind[76] the contract. Thus a deed made in consideration of shares in a lottery will not be set aside at the suit of the grantor,[77] money advanced to forward the sale of tickets by an agent cannot be recovered back,[78] and the sale of a lottery ticket induced by fraud will not be rescinded at the instance of the vendor.[79] Subscribers are estopped as against creditors to set up the invalidity of their subscription to capital stock on the ground that the corporation was organized for the purpose of conducting a lottery, where the illegality did not appear on the face of the contract of subscription or the prospectus therein referred to.[80]

2. Exceptions to General Rule. There are well recognized exceptions to the general rule,[81] in cases where the parties are not *in pari delicto*,[82] where the party complaining can establish his case without relying on the illegal transaction,[83] and

See 34 Cent. Dig. tit. "Lotteries," § 12 *et seq.*

Not to be explained on this principle are Dieckhoff *v.* Fox, 56 Minn. 438, 57 N. W. 930; Com. *v.* Bassford, 6 Hill (N. Y.) 526, holding validity of bond to be determined by law of place of performance.

Extraterritorial operation. — The statutes forbidding lotteries have no extraterritorial operation. *Ex p.* Hawkins, 89 Ala. 103, 8 So. 19. Thus the New York statute forbidding advertisements of lotteries does not apply to advertisements outside the state; and contracts made in New York for advertisements elsewhere are valid by New York law. Ormes *v.* Dauchy, 82 N. Y. 443, 37 Am. Rep. 583. See also McNight *v.* Bicsecker, 13 Pa. St. 328; Cohens *v.* Virginia, 6 Wheat. (U. S.) 264, 5 L. ed. 257.

71. See Jameson *v.* Gregory, 4 Metc. (Ky.) 363; McIntyre *v.* Parks, 3 Metc. (Mass.) 207; Case *v.* Riker, 10 Vt. 482, 33 Am. Dec. 211. *Compare* Udall *v.* Metcalf, 5 N. H. 396.

Although the seller of tickets knows the law of a neighboring state to be violated by a resale there, he may recover the purchase-price in that state, the original contract of sale being valid where made. Jameson *v.* Gregory, 4 Metc. (Ky.) 363; McIntyre *v.* Parks, 3 Metc. (Mass.) 207.

72. See Watson *v.* Murray, 23 N. J. Eq. 257.

73. **Remedy by action on book-account or book-debt for lottery tickets** see Accounts, 1 Cyc. 497 note 94.

74. See Funk *v.* Gallivan, 49 Conn. 124, 44 Am. Rep. 210; Hooker *v.* De Palos, 28 Ohio St. 251, where contract to dispose of land in aid of lottery had been partly executed and court refused aid to either vendor or vendee.

75. See *supra*, V, A, 2, a.

76. See cases cited *infra*, note 77 *et seq.* *Contra*, Lewis *v.* Robards, 3 T. B. Mon. (Ky.) 406, where slave mortgaged to secure price of lottery tickets was ordered restored to mortgagor upon a rescission of the contract.

77. Swain *v.* Bussell, 10 Ind 438.

78. Rolfe *v.* Delmar, 7 Rob. (N. Y.) 80.

79. Kitchen *v.* Greenabaum, 61 Mo. 110.

80. Cardwell *v.* Kelly, 95 Va. 570, 28 S. E. 953, 40 L. R. A. 240.

81. See Contracts, 9 Cyc. 550.

82. Mount *v.* Waite, 7 Johns. (N. Y.) 434, where plaintiff was permitted to recover premium paid for illegal insurance of lottery ticket.

83. Thus one who converts to his own use money received by him from a lottery company for the holder of a ticket and afterward promises the holder to repay him cannot, when sued, maintain the defense of illegality between plaintiff and the lottery company. Brady *v.* Horvath, 167 Ill. 610, 47 N. E. 757 [*affirming* 64 Ill. App. 254]. See also Hamilton *v.* Canfield, 2 Hall (N. Y.) 564; Lemon *v.* Grosskopf, 22 Wis. 447, 99 Am. Dec. 58. In Roselle *v.* Beckemeir, 134 Mo. 380, 35 S. W. 1132, several parties in Missouri agreed to pool their tickets in the Louisiana lottery. The tickets drew several prizes and plaintiff, who was one of the parties, obtained a draft for the whole prize money which he indorsed to a bank, upon an agreement that it should collect the proceeds and pay part thereof to plaintiff and another part to Beckemeir who was also a party to the original agreement. It was held that the illegality of the original transaction was no bar to the recovery by Beckemeir of his part of the proceeds of the draft from the bank.

Where land is conveyed by a lottery scheme, the vendor may recover it in ejectment on his prior untainted legal title. Wooden *v.* Shotwell, 23 N. J. L. 465. But *compare* Allebach *v.* Hunsicker, 132 Pa. St. 349, 19 Atl. 139 (holding that the grantor of a deed valid on its face will not be allowed to impeach it by showing that it was given in pursuance of a lottery scheme in which he participated); Allebach *v.* Godshalk, 116 Pa. St. 329, 9 Atl. 444.

Where defendant fraudulently induced plaintiff to believe that a certain ticket

where defendant is insisting upon the retention of profits to which he is not entitled.[84]

3. Rights of Chance Holders — a. Right to Recover Prizes. The cases in support of the proposition that successful chance holders cannot invoke the aid of courts to recover their prizes in jurisdictions where lotteries are prohibited are cited in a previous section.[85]

b. Right to Recover Money Paid. In accordance with the general rule as to parties *in pari delicto*, purchasers of chances in a lottery have no action, in the absence of statute, to recover the price paid by them for tickets or chances.[86] But by statute in some jurisdictions payments made for chances in lotteries may be recovered back.[87]

VI. Management, Operation, and Expiration of Lottery Franchises.

Lotteries being commonly prohibited in the United States and Canada, cases dealing with their management and operation and with the life of lottery franchises are no longer of practical importance. For convenience of reference, however, the early decisions are collected and classified in the notes.[88]

had drawn a prize and to pay the amount of the prize to the one who held that ticket, the illegality of the lottery cannot be urged as a defense in an action for money had and received. Catts *v.* Phalen, 2 How. (U. S.) 376, 11 L. ed. 306. See also Phalen *v.* Clark, 19 Conn. 421, 50 Am. Dec. 253.

A sale by a prize winner of any portion of his rights, after the same have been determined, is valid and may be sued upon because independent of the illegal act. Rothrock *v.* Perkinson, 61 Ind. 39.

A broker who agrees merely to bring the parties together can recover the percentage promised him, although the contract entered into by the principals is illegal and void as a contract for advertising a lottery. Ormes *v.* Dauchy, 45 N. Y. Super. Ct. 85 [*affirmed* in 84 N. Y. 243]. *Compare* Ormes *v.* Dauchy, 82 N. Y. 443, 37 Am. Rep. 583.

84. Gipson *v.* Knard, 96 Ala. 419, 11 So. 482. See also Hatch *v.* Hanson, 46 Mo. App. 323.

85. See cases cited *supra*, V, A, 2, a.

If the prize drawn is voluntarily paid to the successful chance holder no law seems to prohibit him from receiving it. See White *v.* Prentiss, 3 T. B. Mon. (Ky.) 449; People *v.* Watson, 75 Mich. 582, 42 N. W. 1005.

86. Paulk *v.* Jasper Land Co., 116 Ala. 178, 22 So. 495 (where conditions of statute permitting recovery were not complied with); Branham *v.* Stallings, 21 Colo. 211, 40 Pac. 396, 52 Am. St. Rep. 213; State Mut. L. Ins. Co. *v.* Newton, 89 Ill. App. 353; Crutchfield *v.* Rambo, (Tex. Civ. App. 1905) 86 S. W. 950, *semble*. *Contra*, Gray *v.* Roberts, 2 A. K. Marsh. (Ky.) 208, 12 Am. Dec. 383; and *dicta* in Lewis *v.* Robards, 3 T. B. Mon. (Ky.) 406; Hutchinson *v.* Targee, 14 N. J. L. 386; Barclay *v.* Pearson, [1893] 2 Ch. 154, 62 L. J. Ch. 636, 60 L. T. Rep. N. S. 709, 3 Reports 388, 42 Wkly. Rep. 74.

87. Dion *v.* St. John Baptiste Soc., 82 Me. 319, 19 Atl. 825; R. I. Gen. St. c. 283, § 4.

Penal statutes exist in some jurisdictions permitting the recovery of double the amount paid by purchasers. See *supra*, IV, B, 4, a.

Statutes permitting recovery of money lost in gaming have been held not to apply to money lost in a lottery. See State Mut. L. Ins. Co. *v.* Newton, 89 Ill. App. 353.

For a chance holder to maintain a suit for an injunction and a receiver, for the benefit of himself and others, there must be community of interest as well as a right of recovery by reason of the same essential facts. Stevens *v.* Cincinnati Times-Star Co., 72 Ohio St. 112, 73 N. E. 1058, 106 Am. St. Rep. 586, where petitioner did not make it plain that other chance holders desired the relief which he sought.

88. **Giving of bonds by commissioners.**— Vannini *v.* Paine, 1 Harr. (Del.) 65; Potts *v.* Camp, 12 Rob. (La.) 646; Washington *v.* Young, 10 Wheat. (U. S.) 406, 6 L. ed. 352.

Liability of managers to chance holders.— McIlvain *v.* Holmes, Ky. Dec. 317; Bishop *v.* Williamson, 11 Me. 495; Homer *v.* Whitman, 15 Mass. 132; Yates *v.* Tisdale, 3 Edw. (N. Y.) 71; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639; Washington *v.* Young, 29 Fed. Cas. No. 17,241, 2 Cranch C. C. 632.

Liability of grantees of franchises.— Walton *v.* Catholic Cong., 12 La. 493; Shankland *v.* Washington, 5 Pet. (U. S.) 390, 8 L. ed. 166; Clark *v.* Washington, 12 Wheat. (U. S.) 40, 6 L. ed. 544 [*reversing* 5 Fed. Cas. No. 2,839, 2 Cranch C. C. 502]; McCue *v.* Washington, 16 Fed. Cas. No. 8,735, 3 Cranch C. C. 639.

Management.—Horst *v.* Moses, 48 Ala. 129; Gregory *v.* Shelby College, 2 Metc. (Ky.) 589; Collins *v.* Louisiana State Lottery Co., 43 La. Ann. 9, 9 So. 27; Waddle *v.* Pickensville Lottery Com'rs, 2 Nott. & M. (S. C.) 550; Rogers *v.* Hought, 4 Vt. 172; May *v.* Brownell, 3 Vt. 463.

Sale of franchise.— Gregory *v.* Shelby College, 2 Metc. (Ky.) 589; Lawrence *v.* Simmons, 9 S. W. 163, 10 Ky. L. Rep. 347, 1 L. R. A. 172; Walton *v.* Catholic Cong., 12 La. 493; McGuire *v.* Mead, 9 La. 311; Phalen *v.* State, 12 Gill & J. (Md.) 18.

Expiration of franchises.— Phalen *v.* State,

LOUVER. An opening in buildings crossed by a series of slanting slats to exclude rain and snow, and admit air[1]

LOVE. A term whose meaning is not synonymous with friendship.[2] (Love: And Affection as Consideration, see CONTRACTS.[3])

LOVELY CLAIM. A donation made by the general government of two quarter sections of the public lands, according to the legal subdivisions of the public surveys, to a particular class of people.[4] (See, generally, PUBLIC LANDS.)

LOW.[5] Not high in character or condition; not haughty or proud; meek, lowly; lacking in dignity, refinement, or principle; vulgar, groveling, abject, mean, base; in a mean condition.[6] (See HIGH.)

LOW DILIGENCE. That which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns.[7] (See DILIGENCE; NEGLIGENCE.)

LOWEST BIDDER. See Low.[8]

LOWEST RESPONSIBLE BIDDER. See Low.[9]

LOW WATER. A term only predicable of those parts of rivers within the ebb and flow of tides, to distinguish the water-line at spring or neap tides.[10] (See, generally, BOUNDARIES; NAVIGABLE WATERS.)

LOW-WATER MARK. Applied to fresh waters, the point to which the river recedes at its lowest stage.[11] Applied to tide waters, the margin of the sea when the tide is out.[12] (See, generally, BOUNDARIES; NAVIGABLE WATERS; WATERS.)

LOW WINE. The product of the first process of distillation of spirituous

12 Gill & J. (Md.) 18; Lucas *v.* McBlair, 12 Gill & J. (Md.) 1, 11 Gill & J. 490; May *v.* Brownell, 3 Vt. 463.

Evidence in actions under old statutes.— See Homer *v.* Whitman, 15 Mass. 132; Snyder *v.* Wolfley, 8 Serg. & R. (Pa.) 328; Biddis *v.* James, 6 Binn. (Pa.) 321, 6 Am. Dec. 456; Clark *v.* Washington, 12 Wheat. (U. S.) 40, 6 L. ed. 544.

Irregularities in drawing.— State *v.* Wolfe, 3 Harr. & J. (Md.) 224; Butler *v.* Kent, 19 Johns. (N. Y.) 223, 10 Am. Dec. 219; Neilson *v.* Mott, 2 Binn. (Pa.) 301; McGimpsey *v.* Booker, 5 Yerg. (Tenn.) 139; Madison *v.* Vaughan, 5 Call (Va.) 562; Brent *v.* Davis, 10 Wheat. (U. S.) 395, 6 L. ed. 350.

For other early cases see citations *supra*, IV, B, 1; V, A, 1.

1. Hayes *v.* Bickelhoupt, 21 Fed. 566.

2. Carney *v.* State, 79 Ala. 14, 19, where it is said: "Love between the sexes has different constituents from those found in mere friendship. It is itself very variable in its constitution. It may be refined, having elevated aims, or it may be gross, in which the baser desires predominate."

3. See also 7 Cyc. 728; 5 Cyc. 742 note 89.

4. Logan *v.* Moulder, 1 Ark. 313, 319, 33 Am. Dec. 338.

5. **Compared with and distinguished from "high"** see Louisville, etc., R. Co. *v.* Tucker, 65 S. W. 453, 454, 23 Ky. L. Rep. 1929.

6. Century Dict. [*quoted* in Arkansas *v.* Kansas, etc., Coal Co., 96 Fed. 353, 362].

"Lower rates" see Glasgow, etc., R. Co. *v.* Mackinnon, 11 App. Cas. 386.

"Lowest averaged price" see Cincinnati *v.* Gas Light, etc., Co., 53 Ohio St. 278, 290, 41 N. E. 239.

Lowest bidder: Letting contract to see CONTRACTS; COUNTIES; MUNICIPAL CORPORATIONS; STATES; TOWNS; UNITED STATES. Sale of land to see TAXATION. Sale of municipal securities to see MUNICIPAL CORPORATIONS. See also Clapton *v.* Taylor, 49 Mo. App. 117, 124; Reilly *v.* New York, 111 N. Y. 473, 474, 18 N. E. 623; Cleveland Fire Alarm Tel. Co. *v.* Metropolitan Fire Com'rs, 55 Barb. (N. Y.) 288, 292.

"Lowest responsible bidder" see Boseker *v.* Wabash County, 88 Ind. 267; Packard *v.* Hayes, 94 Md. 233, 242, 51 Atl. 32; Hoole *v.* Kinkead, 16 Nev. 217, 220; People *v.* Kings County, 42 Hun (N. Y.) 456, 458; People *v.* Dorsheimer, 55 How. Pr. (N. Y.) 118, 120; Vitrified Brick, etc., Co. *v.* Philadelphia, 164 Pa. St. 477, 479, 30 Atl. 383; Douglass *v.* Com., 108 Pa. St. 559, 563; Com. *v.* Mitchell, 82 Pa. St. 343, 349; Gutta Percha Co. *v.* Stokely, 11 Phila. (Pa.) 219, 211.

"Lowest price" see Harvey *v.* Facey, [1893] A. C. 552, 555, 62 L. J. P. C. 127, 69 L. T. Rep. N. S. 504, 1 Reports 428, 42 Wkly. Rep. 129.

"Lowest rate" see Barry R. Co. *v.* Taff Vale R. Co., [1895] 1 Ch. 128, 129, 64 L. J. Ch. 230, 71 L. T. Rep. N. S. 688, 12 Reports 76, 43 Wkly. Rep. 372.

"Lowest stage of water" see Cargill *v.* Thompson, 57 Minn. 534, 546, 59 N. W. 638.

"Lowermost portion thereof" see Krause *v.* Oregon Steel Co., 45 Oreg. 378, 384, 77 Pac. 833.

7. Union Pac. R. Co. *v.* Rollins, 5 Kan. 167, 180 [*citing* Bouvier L. Dict.].

8. See *ante*, note 6.

9. See *ante*, note 6.

10. Howard *v.* Ingersoll, 13 How. (U. S.) 381, 417, 14 L. ed. 189.

11. Paine Lumber Co. *v.* U. S., 55 Fed. 854, 864.

12. Storer *v.* Freeman, 6 Mass. 435, 439, 4 Am. Dec. 155.

liquors by the application of heat to a still containing the material.[13] (See DISTILLATION; and, generally, INTERNAL REVENUE.)

LOYALTY. Faithfulness to the existing government.[14] (Loyalty: Of Claimant Against Government, see UNITED STATES.)

L. S. Letters originally used as an abbreviation for *locus sigilli* — the place of the seal,[15] but now having acquired the popular force of an arbitrary sign for a seal,[16] and by long usage and the general understanding of legal writers regarded as the true representation of a seal, in all legal precepts.[17] (See, generally, SEALS.)

LT. An abbreviation sometimes used for the word LOT,[18] *q. v.*

LTD. An abbreviation often used for the word LIMITED,[19] *q. v.*

LUBRICUM GLOSSÆ NON FACILE TRAHENDUM EST IN PŒNAM. A maxim meaning "A slip of the tongue ought not lightly to be submitted to punishment."[20]

LUBRICUM LINGUÆ NON FACILE TRAHENDUM EST IN PŒNAM. A maxim meaning "A slip of the tongue ought not lightly to be subjected to punishment."[21]

LUCET IPSA PER SE ÆQUITAS. A maxim meaning "Equity shines by her own light."[22]

LUCID INTERVAL. As used in speaking of lucid intervals of insane persons, not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficiently to enable the party soundly to judge of the act.[23] (Lucid Interval: Affecting Criminal Responsibility, see CRIMINAL LAW; INSANE PERSONS. Affecting Testamentary Capacity, see WILLS. Of Insane Person, see INSANE PERSONS.)

LUCKY. Fortunate; successful.[24]

LUCRATIVE. Yielding lucre; gainful; profitable; making increase of money or goods.[25] (Lucrative: Office, see OFFICERS.)

LUCRI CAUSA. Literally, "for the sake of gain,"[26] "with a view to pecuniary profit."[27] (See LUCRUM; and, generally, LARCENY.)

13. U. S. *v.* Tenbroek, 2 Wheat. (U. S.) 248, 258, 4 L. ed. 231, where it is said to differ from "spirits" in that the latter passes through a second distillation.

14. Black L. Dict.

15. Lorah *v.* Nissley, 156 Pa. St. 329, 331, 27 Atl. 242; Bennet *v.* Allen, 20 Phila. (Pa.) 423, 424, where the court said: "They simply draw the attention of the signer to the place for making his seal."

16. Lorah *v.* Nissley, 156 Pa. St. 329, 331, 27 Atl. 242, just as "&" is held and used to mean "and."

The letters "L. S.," printed between brackets, and following the signatures of the makers of a promissory note, which also contained the words, "given under the hand and seal of each party," were sufficient to make it a sealed instrument. Barnes *v.* Walker, 115 Ga. 108, 41 S. E. 243.

17. Smith *v.* Butler, 25 N. H. 521, 524. See O'Cain *v.* O'Cain, 1 Strobh. (S. C.) 402, 405 [*quoted* in McLaughlin *v.* Braddy, 63 S. C. 433, 437, 48 S. E. 523, 90 Am. St. Rep. 681], where Wardlaw, J., said: "For a seal, the letters L. S., with a circumflex, are usually adopted; and where a party who signs does himself make these marks plainly after his name, or with his name before them plainly made on the paper, they furnish of themselves, even without the *apposui sigillum*, evidence of his intention to do what they usually denote — to seal." See also Relph *v.* Gist, 4 McCord (S. C.) 267.

18. Hunt *v.* Smith, 9 Kan. 137, 153.

19. Bernard, etc., Mfg. Co. *v.* Packard, 64 Fed. 309, 310, 12 C. C. A. 123; Howell Lith. Co. *v.* Brethour, 30 Ont. 204, 208.

20. Morgan Leg. Max.

21. Black L. Dict.

22. Peloubet Leg. Max.

23. Ricketts *v.* Jolliff, 62 Miss. 440, 448. To the same effect see Fraser *v.* Fraser, 2 Del. Ch. 260, 263; Godden *v.* Burke, 35 La. Ann. 160, 173; Ekin *v.* McCracken, 11 Phila. (Pa.) 534, 539.

24. Standard Dict. See also Guthing *v.* Lynn, 2 B. & Ad. 232, 234, 22 E. C. L. 104.

"Lucky man" see Leslie *v.* Haseltine, 155 Pa. St. 98, 100, 25 Atl. 886.

25. Webster Dict. [*quoted* in State *v.* Kirk, 44 Ind. 401, 405, 15 Am. Rep. 239].

Lucrative bailment see Prince *v.* Alabama State Fair, 106 Ala. 340, 345, 17 So. 449, 28 L. R. A. 716. See, generally, BAILMENTS.

Lucrative title under the Spanish and Mexican law see Scott *v.* Ward, 13 Cal. 458, 471.

26. Anderson L. Dict. [*quoted* in State *v.* Caddle, 35 W. Va. 73, 83, 12 S. E. 1098], where it is said to be a civil law expression corresponding to *animus furandi* in the common law. See also State *v.* Slingerland, 19 Nev. 135, 140, 7 Pac. 280.

27. State *v.* Ryan, 12 Nev. 401, 403, 28 Am. Rep. 802.

In the law of larceny the term is used to characterize the nature of a taking sufficient to bring the act within the definition of the crime of larceny. State *v.* Ryan, 12 Nev. 401, 403, 28 Am. Rep. 802. See also U. S. *v.* Lowenstein, 21 D. C. 515, 517; People *v.* Griffin, 2 Barb. (N. Y.) 427, 431.

LUCRUM. GAIN, *q. v.*, profit, ADVANTAGE, *q. v.*, BENEFIT,[28] *q. v.*

LUCRUM CESSANS. A civil law term meaning damage which one receives by loss of gain which he might have made.[29] (See DAMAGE; GAIN.)

LUCRUM FACERE EX PUPILLI TUTELA TUTOR NON DEBET. A maxim meaning "A guardian ought not to make money out of the guardianship of his ward."[30]

LUGGAGE. Baggage.[31] (See, generally, CARRIERS; SHIPPING.)

LUMBER. See LOGGING.

LUMBER DEALER. A person who habitually deals in lumber.[32]

LUMBER WAGON. A term generally applied to an ordinary double wagon used by farmers.[33]

LUMP. To throw into a mass.[34]

LUMP COAL. Coal which is not reduced to the ordinary commercial sizes for consumption.[35] (See COAL; and, generally, MINES AND MINERALS.)

LUMPERS. In shipping men who erect a staging around the exterior hull of a vessel placed in a dry dock for the purpose of repairs, grave the vessel, and put on the felting, if necessary, and run the metal.[36] (See, generally, SHIPPING.)

LUMP WORK. A phrase well understood in this country as meaning the same as job work.[37] (See JOB.)

LUNACY. See INSANE PERSONS.

LUNATIC. See INSANE PERSONS.

LUNATIC ASYLUM. See ASYLUMS.

LUNATICUS, QUI GAUDET IN LUCIDIS INTERVALLIS. A maxim meaning "He is a lunatic who enjoys lucid intervals."[38]

LUNGE. A sudden pass or movement toward a person.[39]

LYING. See LIE.

LYING IN WAIT. In criminal law, hiding in ambush or concealment;[40] being in ambush for the purpose of murdering another.[41] (See, generally, HOMICIDE.)

LYNCHING. Any act of violence on the body of any person by any collection of individuals assembled for any unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without authority of law.[42] (Lynching: Liability of County For, see COUNTIES.)

28. Anderson L. Dict. [*quoted* in State *v.* Caddle, 35 W. Va. 73, 83, 12 S. E. 1098].

29. Gaines *v.* New Orleans, 17 Fed. 16, 32, 4 Woods 213 [*citing* 3 Puffendorf L. of Nat. c. 1, § 3].

30. Black L. Dict.

Applied in Manning *v.* Manning, 1 Johns. Ch. (N. Y.) 527, 535.

31. Baggage being the American term and luggage the one employed in England. Pfister *v.* Central Pac. R. Co., 70 Cal. 169, 173, 11 Pac. 686, 59 Am. Rep. 404; Choctaw, etc., R. Co. *v.* Zwirtz, 13 Okla. 411, 414, 73 Pac. 941.

32. State *v.* Barnes, 126 N. C. 1063, 1064, 35 S. E. 605.

33. Rawlins *v.* Kennard, 26 Nebr. 181, 185, 41 N. W. 1004; Jordan *v.* Hamilton County Bank, 11 Nebr. 499, 503, 9 N. W. 654.

34. Webster Int. Dict.

"Lump sum freight" see Merchant Shipping Co. *v.* Armitage, L. R. 9 Q. B. 99, 107, 2 Aspin, 185, 43 L. J. Q. B. 24, 29 L. T. Rep. N. S. 809. See FREIGHT.

Lumping charges see 17 Cyc. 375; 1 Cyc. 484 note 99.

Lumping sale see Anniston Pipe Works *v.* Williams, 106 Ala. 324, 333, 18 So. 111, 54 Am. St. Rep. 51. See also EXECUTIONS, 17 Cyc. 1237.

35. Wright *v.* Warrior Run Coal Co., 182 Pa. St. 514, 521, 38 Atl. 491.

36. Butler *v.* Townsend, 126 N. Y. 105, 107, 26 N. E. 1017, where the term "caulkers" is also defined.

37. Dixon *v.* Cory, 3 N. J. L. 1043, 1044.

38. Black L. Dict. [*citing* 1 Story Const. § 73].

39. State *v.* Biggs, 93 Iowa 125, 126, 61 N. W. 417.

40. State *v.* Tyler, 122 Iowa 125, 131, 97 N. W. 983 [*citing* State *v.* Cross, 68 Iowa 180, 26 N. W. 62]. *Compare* People *v.* Miles, 55 Cal. 207, 209. See also Com. *v.* Jones, 1 Leigh (Va.) 598, 611; Burgess *v.* Com., 2 Va. Cas. 483, 488 [*quoted* in State *v.* Abbott, 8 W. Va. 741, 769].

41. Bouvier L. Dict. [*quoted* in State *v.* Olds, 19 Oreg. 397, 433, 24 Pac. 394; State *v.* Abbott, 8 W. Va. 741, 769].

"To constitute lying in wait, three things must concur, to-wit, waiting, watching, and secrecy." Riley *v.* State, 9 Humphr. (Tenn.) 646, 651 [*quoted* in State *v.* Abbott, 8 W. Va. 741, 769].

42. 92 Ohio L. p. 136 [*quoted* in Caldwell

LYNCH LAW. The action of private individuals, organized bodies of men, or disorderly mobs, who, without legal authority, punish by hanging or otherwise, real or suspected criminals without trial according to the forms of law.[43]

LYSOL. A liquid substance in which coal tar is the origin of the elements that give it its determining characteristic.[44]

M. A roman numeral standing for one thousand;[45] an abbreviation for Mary, Michaelmas, master, middle,[46] mill,[47] mills,[48] etc.[49] In old English law, a brand or stigma impressed upon the brawn of the thumb of a person convicted of manslaughter and admitted to the benefit of clergy.[50]

MACADAMIZE. To cover as a roadway or path, with small stones, so as to form a smooth laid surface.[51]

MACADAMIZING.[52] A mode of paving deriving its name from the man who invented it—Macadam.[53] (See MUNICIPAL CORPORATIONS; STREETS AND HIGHWAYS; TOLL ROADS.)

MACHETE. A heavy knife or cutlass, used among Spanish colonists and Spanish American countries both as a tool and a weapon;[54] a large heavy knife, resembling a broadsword, often two or three feet in length, used by inhabitants of Spanish America to cut their way through thickets and for various other purposes.[55] (See, generally, WEAPONS.)

MACHINE. A construction more or less complex, consisting of a combination of moving parts or simple mechanical elements, as wheels, levers, cams, etc., with their supports and connecting frame work, calculated to constitute a prime mover, or to receive force and motion from a prime mover or from another machine, and transmit, modify, and apply them to the production of some desired mechanical effect or work;[56] an instrument interposed between the moving power and the resistance, with a view to change the direction of the force or otherwise modify it.[57]

v. Cuyahoga County, 15 Ohio Cir. Ct. 167, 168, 8 Ohio Cir. Dec. 56].

43. Anderson L. Dict. [*quoted* in State *v.* Aler, 39 W. Va. 549, 558, 559, 20 S. E. 585]. See also definitions of Bouvier and Webster quoted in State *v.* Aler, *supra*.

The origin of the term is not certain. See State *v.* Aler, 39 W. Va. 549, 558, 20 S. E. 585; 6 Cent. L. J. 340; 5 American Lawyer 215; 5 Green Bag 116; 4 Green Bag 561; 18 Harper Mag. 794 *et seq.*; 1 Law Notes (Amer.) 168.

44. U. S. *v.* Lehn, 124 Fed. 87, 88.

45. Abbott L. Dict.

46. Black L. Dict.

47. U. S. *v.* Hardyman, 13 Pet. (U. S.) 176, 179, 10 L. ed. 113, "1 M per centum," on the face of a treasury note.

48. Jackson *v.* Cummings, 15 Ill. 449, 454; Hunt *v.* Smith, 9 Kan. 137, 153.

49. M. D. see Townshend *v.* Gray, 62 Vt. 373, 19 Atl. 635, 8 L. R. A. 112.

M. of the Gospel see Erwin *v.* English, 61 Conn. 502, 23 Atl. 753.

50. Rapalje & L. L. Dict.

51. Webster Dict. [*quoted* in Harrisburg *v.* Segelbaum, 551 Pa. St. 172, 180, 24 Atl. 1070, 20 L. R. A. 834].

52. Compared with or distinguished from curbing. City St. Imp. Co. *v.* Taylor, 138 Cal. 364, 366, 71 Pac. 446; Beaudry *v.* Valdez, 32 Cal. 269, 276. Guttering. Burk *v.* Altschul, 66 Cal. 533, 534, 6 Pac. 393; McNamara *v.* Estes, 22 Iowa 246, 255. Improving or improvement. Himmelmann *v.* Satterlee, 50 Cal. 68, 70; Beaudry *v.* Valdez, 32 Cal. 269, 276. Paving. Burnham *v.* Chicago, 24 Ill. 496, 499; State *v.* Ramsey County Dist. Ct., 33 Minn. 164, 170, 22 N. W. 295; Ross *v.* Gates, 183 Mo. 338, 350, 81 S. W. 1107; Harrisburg *v.* Segelbaum, 151 Pa. St. 172, 179, 24 Atl. 1070, 20 L. R. A. 834; Leake *v.* Philadelphia, 150 Pa. St. 643, 650, 24 Atl. 351; Huidekoper *v.* Meadville, 83 Pa. St. 156, 158.

The process is described in American Cyclopedia [*quoted* in State *v.* Curry, 1 Nev. 251, 252].

53. Burnham *v.* Chicago, 24 Ill. 496, 500. See also McNamara *v.* Estes, 22 Iowa 246, 255, 256.

54. Century Dict. [*quoted* in Wiborg *v.* U. S., 163 U. S. 632, 636, 16 S. Ct. 1127, 1197, 41 L. ed. 289].

55. Webster Dict. [*quoted* in Wiborg *v.* U. S., 163 U. S. 632, 636, 16 S. Ct. 1127, 1197, 41 L. ed. 239].

56. Webster Dict. [*quoted* in Fairbank *v.* Cincinnati, etc., R. Co., 66 Fed. 471, 475].

57. Chamber Encycl. [*quoted* in Fairbank *v.* Cincinnati, etc., R. Co., 66 Fed. 471, 475].

It includes every mechanical device or combination of mechanical powers and devices to perform some function to produce a certain effect or result (*In re* Weston, 17 App. Cas. (D. C.) 431, 436; Green *v.* American Car, etc., Co., 163 Ind. 135, 139, 71 N. E. 268; New England Car Spring Co. *v.* Baltimore, etc., R. Co., 11 Md. 81, 89, 69 Am. Dec. 181; Boyden Power-Brake Co. *v.* Westinghouse, 170 U. S. 537, 556, 18 S. Ct. 707, 42 L. ed. 1136; Risdon Iron, etc., Works *v.* Medart, 158 U. S.

MACHINERY. The working parts of a machine,[58] engine, or instrument, arranged and constructed so as to apply and regulate force, as the machinery of a watch; the means and appliances by which anything is kept in action;[59] an artificial work which serves to apply or regulate moving power or to produce motion;[60] parts of a machine considered collectively; any construction of mechanical means designed to work together so as to effect a given end;[61] parts of machinery considered collectively; the combination of mechanical means to a given end.[62] (Machinery: In General, see MANUFACTURES. Dangerous, see MASTER AND SERVANT; NEGLIGENCE; RAILROADS. Electrical, see ELECTRICITY. Exemption From Sale or Taxation, see EXEMPTIONS; TAXATION. Fixtures, see FIXTURES. Insurance on, see FIRE INSURANCE, and the particular Insurance Titles. Levy on, see ATTACHMENT; EXECUTIONS. Lien For Furnishing, see MECHANICS' LIENS. Mortgage of, see CHATTEL MORTGAGES. Patent of, see PATENTS. Sale of, see SALES.)

MACHINIST. A constructor of engines and machines;[63] a constructor of machines or one skilled in their construction;[64] a constructor of machines and engines, or one well versed in the principles of machines.[65] (Machinist: Lien of, see MECHANICS' LIENS.)

MACHINIST'S LIEN. See MECHANICS' LIENS.

MADE LAND. A term applied to land reclaimed from the waters of a lake by filling out into the lake.[66]

68, 15 S. Ct. 745, 39 L. ed. 899; Burr *v.* Duryee, 1 Wall. (U. S.) 531, 570, 17 L. ed. 650, 660, 661; Corning *v.* Burden, 15 How. (U. S.) 252, 267, 14 L. ed. 683; Stearns *v.* Russell, 85 Fed. 218, 225, 29 C. C. A. 121; Chicago Sugar Refining Co. *v.* Charles Pope Glucose Co., 84 Fed. 977, 981, 28 C. C. A. 594; Pratt *v.* Thompson, etc., Spice Co., 83 Fed. 516, 518; Carter Mach. Co. *v.* Hanes, 70 Fed. 859, 868; Card *v.* Colby, 64 Fed. 594, 598, 12 C. C. A. 319; Pittsburgh Reduction Co. *v.* Cowles Electric Smelting, etc., Co., 55 Fed. 301, 316; Central Trust Co. *v.* Sheffield, etc., Coal, etc., Co., 42 Fed. 106, 110, 9 L. R. A. 67; MacKay *v.* Jackman, 12 Fed. 615, 618, 20 Blatchf. 466) and embraces any mechanical contrivance, as the wooden horse with which the Greeks entered Troy; a coach, a bicycle (Lefler *v.* Forsberg, 1 App. Cas. (D. C.) 36, 41).

An emery belt, used in a factory to polish metal, is a machine," within Burns Annot. St. (1901) § 7087*i*, requiring machinery of every description in factories to be properly guarded. La Porte Carriage Co. *v.* Sullender, (Ind. App. 1904) 71 N. E. 922, 924.

58. It has been held not to be synonymous with "machine" (Seavey *v.* Central Mut. F. Ins. Co., 111 Mass. 540, 541), but more extensive in its signification (Benedict *v.* New Orleans, 44 La. Ann. 793, 11 So. 41; Seavey *v.* Central Mut. F. Ins. Co., 111 Mass. 540, 541).

59. Webster Dict. [*quoted* in Brewer *v.* Ford, 59 Hun (N. Y.) 17, 27, 12 N. Y. Suppl. 619].

60. Worcester Dict. [*quoted* in Brewer *v.* Ford, 59 Hun (N. Y.) 17, 27, 12 N. Y. Suppl. 619].

61. Century Dict.; Standard Dict. [*quoted* in Brower *v.* Locke, 31 Ind. App. 353, 67 N. E. 1015, 1017].

62. Benedict *v.* New Orleans, 44 La. Ann. 793, 794, 11 So. 41.

The term has been held to include: Elevators for carrying passengers. Lefler *v.* Forsberg, 1 App. Cas. (D. C.) 36, 41. Lead pipe machine. Lowber *v.* Le Roy, 2 Sandf. (N. Y.) 202, 217. Mains and pipes laid in streets and elsewhere for the distribution of gas. Com. *v.* Lowell Gas Light Co., 12 Allen (Mass.) 75, 76. Patterns. Brewer *v.* Ford, 59 Hun (N. Y.) 17, 27, 12 N. Y. Suppl. 619. Planing machine. James River Ins. Co. *v.* Merritt, 47 Ala. 387, 389. Saw. State *v.* Avery, 44 Vt. 629, 630. Smokestack. Wreggitt *v.* Barnett, 99 Mich. 477, 478, 58 N. W. 467.

It has been held not to include: Car axles. Fairbank *v.* Cincinnati, etc., R. Co., 81 Fed. 289, 299, 26 C. C. A. 402 [*reversing* 66 Fed. 471]. Carding machine. Graves *v.* Pierce, 53 Mo. 423, 424. Circular railroad locks. Whitney Arms Co. *v.* Barlow, 38 N. Y. Super. Ct. 554, 563. Hammer. Georgia Pac. R. Co. *v.* Brooks, 84 Ala. 138, 140, 4 So. 289; Georgia R., etc., Co. *v.* Nelms, 83 Ga. 70, 74, 9 S. E. 1049, 20 Am. St. Rep. 308. Joist being placed in a building. Griffiths *v.* New Jersey, etc., R. Co., 5 Misc. (N. Y.) 320, 321, 25 N. Y. Suppl. 812. Linotypes. Nicholson *v.* Board of Assessors, 48 La. Ann. 1570, 1572, 21 So. 167. Pipes, lamp posts and meters of a gas company. Covington *v.* Covington Gaslight Co., 2 S. W. 326, 328, 8 Ky. L. Rep. 515. Steel bar used to align a railroad track. Clements *v.* Alabama Great Southern R. Co., 127 Ala. 166, 171, 28 So. 643. Wrenches. Meek *v.* Parker, 63 Ark. 367, 369, 38 S. W. 900, 58 Am. St. Rep. 119.

63. Johnson Univ. Dict. [*quoted* in Parkerson *v.* Wightman, 4 Strobh. (S. C.) 363, 365].

64. Century Dict.; Worcester Dict. [*quoted* in Michel *v.* American Cent. Ins. Co., 17 N. Y. App. Div. 87, 92, 44 N. Y. Suppl. 832].

65. Webster Dict. [*quoted* in Loudon *v.* Coleman, 59 Ga. 653, 655].

66. Carli *v.* Stillwater St. R., etc., Co., 28 Minn. 373, 379, 10 N. W. 205, 41 Am. Rep. 290.

MADE UP. A term applied to a railroad train when the cars are coupled together, and the train is completed, ready to start out on a trip over the road.[67]

MADHOUSE. See Asylums.

MADMAN. One who reasoned correctly from false premises.[68] (See, generally, Insane Persons.)

MADNESS. Consists of a perversion of the intellect.[69] (See, generally, Insane Persons.)

MAD POINT. A term used to designate the idea or object upon which the derangement of the mental faculties of one suffering with monomania is confined.[70] (See, generally, Insane Persons.)

MAGAZINE. A receptacle in which anything is stored; a storehouse; a warehouse.[71]

MAGIS DE BONO QUAM DE MALO LEX INTENDIT. A maxim meaning "The law favors a good rather than a bad construction."[72]

MAGIS DIGNUM TRAHIT AD SE MINUS DIGNUM. A maxim meaning "The more worthy draws to itself the less worthy."[73]

MAGIS JUS NOSTRUM QUAM JUS ALIENUM SERVEMUS. A maxim meaning "We should follow our own rather than a foreign law."[74]

MAGISTERIAL PRECINCT. A local subdivision of a county having no corporate autonomy.[75] (See, generally, Justices of the Peace.)

MAGISTER RERUM USUS; MAGISTRA RERUM EXPERIENTIA. A maxim meaning "Use is the master of things; experience is the mistress of things."[76]

MAGISTRALIA BREVIA. Writs adapted to special cases, and so called because drawn by the masters in chancery.[77]

MAGISTRATE. A public civil officer,[78] invested with some part of the legislative, executive or judicial power given by constitution or the law;[79] a generic term importing a public officer exercising a public authority, used with reference to the acknowledgment of deeds before;[80] a judicial officer having summary jurisdiction in matters of a criminal or quasi criminal nature.[81] (See, generally, Justices of the Peace.)

MAGNA CHARTA. The name usually given to the charter originally granted by King John, and afterwards reënacted and confirmed by parliament (more than thirty times according to Coke), in the reigns of Henry III and Edward I.[82] (See, generally, Constitutional Law.)

67. Union Stock Yards Co. *v.* Conozer, 41 Nebr. 617, 630, 59 N. W. 950.

68. Locke Human Understanding [*quoted* in Francke *v.* His Wife, 29 La. Ann. 302, 303, where, however, it was said that this definition "would embrace a very large class who are commonly supposed to be sane"].

Distinguished from "idiot" in Com *v.* Haskell, 2 Brewst. (Pa.) 491, 497.

69. Chitty Med. Jur. [*quoted* in People *v.* Crosswill, 13 Mich. 427, 436, 87 Am. Dec. 774].

70. Owing's Case, 1 Bland (Md.) 370, 388, 17 Am. Dec. 311.

71. State *v.* Sprague, 149 Mo. 409, 419, 50 S. W. 901.

72. Black L. Dict. [*citing* Coke Litt. 78*b*].

73. Burrill L. Dict.

74. Varnum *v.* Camp, 13 N. J. L. 326, 333, 25 Am. Dec. 476; Turpin *v.* Povall, 8 Leigh (Va.) 93, 113.

75. Breckenridge County *v.* McCracken, 61 Fed. 191, 194, 9 C. C. A. 442.

76. Black L. Dict. [*citing* Coke Litt. 69, 229; Wingfield Max. 752].

77. Cyclopedic L. Dict. [*citing* Bracton 413*b*].

78. Strauss *v.* Imperial F. Ins. Co., 94 Mo. 182, 187, 6 S. W. 698, 4 Am. St. Rep. 368.

79. Martin *v.* State, 32 Ark. 124, 127, 128; Childers *v.* State, 30 Tex. App. 160, 195, 16 S. W. 903, 28 Am. St. Rep. 899.

80. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 528, 25 Am. Dec. 344.

81. Kurtz *v.* State, 22 Fla. 36, 44, 1 Am. St. Rep. 173.

The term may include: A consul. Scanlan *v.* Wright, 13 Pick. (Mass.) 523, 528, 25 Am. Dec. 344. A justice of the peace. Martin *v.* State, 32 Ark. 124, 127; *Ex p.* White, 15 Nev. 146, 147, 37 Am. Rep. 466; Childers *v.* State, 30 Tex. App. 160, 196, 16 S. W. 903, 28 Am. St. Rep. 899; Kerry *v.* State, 17 Tex. App. 178, 181, 50 Am. Rep. 122; People *v.* Spiers, 4 Utah 385, 391, 10 Pac. 609, 11 Pac. 509. A police magistrate. Kurtz *v.* State, 22 Fla. 36, 44, 1 Am. St. Rep. 173. But *compare* People *v.* State Reformatory, 38 Misc. (N. Y.) 243, 77 N. Y. Suppl. 153.

A notary public is not properly embraced within the meaning of the term. Cayon *v.* Dwelling-House Ins. Co., 68 Wis. 510, 514, 32 N. W. 540. But *compare* Schultz *v.* Merchants' Ins. Co., 57 Mo. 331, 336.

82. Black L. Dict.

MAGNA COMPONERE PARVIS. A maxim meaning "To compare great things with small things."[83]

MAGNA CULPA DOLUS EST. A maxim meaning "Great neglect is equivalent to fraud."[84]

MAGNA EST DELICTUM SEIPSUM INTERFICERE QUAM ALIUM. A maxim meaning "It is as great a crime to kill one's self as to kill another."[85]

MAGNA FUIT MAGNÆ QUONDAM REVERENTIA CHARTÆ. A maxim meaning "Great was the reverence formerly paid to the Great Charter."[86]

MAGNA NEGLIGENTIA CULPA EST, MAGNA CULPA DOLUS EST. A maxim meaning "Gross negligence is a fault, gross fault is a fraud."[87]

MAGNETIC HEALING. See HEALERS.[88]

MAGNETO TRANSMITTER. One in which only a feeble current is generated by induction.[89] (See, generally, TELEGRAPHS AND TELEPHONES.)

MAID or MAIDEN. An unmarried woman, a "virgin;"[90] a young unmarried woman, a girl;[91] a female child; a female who has preserved her chastity; a virgin; a female servant;[92] an unmarried woman.[93] (See FEMALE; GIRL.)

MAIDEN. In Scotch law, an instrument formerly used in beheading criminals.[94]

MAIHEM. See MAYHEM; MAIM.

MAIHEMIUM EST HOMICIDIUM INCHOATUM. A maxim meaning "Mayhem is incipient homicide."[95]

MAIHEMIUM EST INTER CRIMINA MAJORA MINIMUM, ET INTER MINORA MAXIMUM. A maxim meaning "Mayhem is the least of great crimes, and the greatest of small."[96]

MAIL. See POST-OFFICE.

MAIL CATCHER. See MAIL CRANE.

MAIL COACH. See COACH.

MAIL CONTRACTOR. See POST-OFFICE.

MAIL CRANE. An upright post planted close to the railroad track, with an arm, which, when not in use, hangs by the side of the post, but when in use is extended horizontally towards the track, and from which a suspended mail sack may be taken while the train is in motion by means of an iron hook or "mail catcher" attached to the door of the car, and operated by a mail clerk.[97]

MAIL MATTER. See POST-OFFICE.

MAIM. To inflict some permanent injury;[98] to cripple.[99] (See, generally, ANIMALS; MAYHEM.)

MAIMING. See MAYHEM.

MAIN. As an adjective, principal.[1] As a noun, a pipe through which a gas company distributes gas.[2]

MAIN CHANNEL. That bed of a river over which the principal volume of water flows;[3] the middle of the principal channel from bank to bank.[4] (See, generally, BOUNDARIES; NAVIGABLE WATERS; WATERS.)

83. Black L. Dict.
84. Cyclopedic L. Dict. [*citing* 1 Bouvier Inst. Note 646].
85. Morgan Leg. Max.
86. Burrill L. Dict.
87. Black L. Dict. [*citing* Dig. 50. 16. 226].
88. See also Parks *v.* State, 159 Ind. 211, 214, 64 N. E. 862, 59 L. R. A. 190.
89. American Bell Tel. Co. *v.* National Tel. Mrg. Co., 119 Fed. 893, 897, 56 C. C. A. 423.
90. Webster Dict.; Worcester Dict. [*quoted* in State *v.* Shedrick, 69 Vt. 428, 431, 38 Atl. 75].
91. Century Dict. [*quoted* in State *v.* Shedrick, 69 Vt. 428, 431, 38 Atl. 75].
92. Richardson Dict. [*quoted* in State *v.* Shedrick, 69 Vt. 428, 431, 38 Atl. 75].
93. State *v.* Shedrick, 69 Vt. 428, 431, 38 Atl. 75.
94. Black L. Dict.
95. Burrill L. Dict.
96. Black L. Dict. [*citing* Coke Litt. 127].
97. Chicago, etc., R. Co. *v.* Gregory, 58 Ill. 272; International, etc., R. Co. *v.* Stephenson, 22 Tex. Civ. App. 220, 54 S. W. 1086.
98. State *v.* Harris, 11 Iowa 414, 415; Reg. *v.* Jeans, 1 C. & K. 539, 540, 47 E. C. L. 539.
99. Turman *v.* State, 4 Tex. App. 586, 588.
1. Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 8 N. W. 443.
2. Moore *v.* Champlain Electric Co., 88 N. Y. App. Div. 289, 292, 85 N. Y. Suppl. 37, 39.
3. St. Louis, etc., Packet Co. *v.* Keokuk, etc., Bridge Co., 31 Fed. 755, 757.
4. Cessill *v.* State, 40 Ark. 501, 504; Dunlieth, etc., Bridge Co. *v.* Dubuque County, 55 Iowa 558, 564, 8 N. W. 443.

MAINPRISE. The taking or receiving of a person into friendly custody, who otherwise might be committed to prison upon security that he should be forthcoming.[5] (See, generally, BAIL.)

MAIN SEA. That part of the sea which lies not within the body of the country;[6] that part of the sea lying outside of the *terræ fauces* or points on the opposite shore sufficiently near to enable persons standing on one shore to distinctly see and discern with the naked eye what is doing on the opposite shore.[7] (See HIGH SEAS.)

MAINSWORN. Forsworn, by making false oath with hand (*main*) on book.[8]

MAINTAIN. To bear the expense of; to support; to keep up; to supply with what is needed;[9] to keep in repair;[10] to uphold; to sustain; to keep up;[11] to preserve something already in existence;[12] not to lose or surrender; to continue.[13] As respects actions, to commence, institute, begin;[14] bring.[15]

MAINTENANCE. Means of subsistence, supply of necessaries and conveniences;[16] aid, support, assistance; the support which one person, who bound by law to do so, gives to another for his living.[17] (Maintenance: Of Child, see BASTARDS; PARENT AND CHILD. Of Grantor as Consideration, see DEEDS; FRAUDULENT CONVEYANCES. Of Indian, see INDIANS. Of Insane Person, see INSANE PERSONS. Of Parent, see PARENT AND CHILD. Of Pauper, see PAUPERS. Of Ward, see GUARDIAN AND WARD. Of Wife and Family, see DIVORCE; HUSBAND AND WIFE. Separate, see HUSBAND AND WIFE. See also, generally, CHAMPERTY AND MAINTENANCE.)

MAJOR CONTINET IN SE MINUS. A maxim meaning "The greater includes the less."[18]

MAJORE POENA AFFECTUS QUAM LEGIBUS STATUTA EST, NON EST INFAMIS. A maxim meaning "One affected with a greater punishment than is provided by law is not infamous."[19]

MAJORI SUMMÆ MINOR IN EST. A maxim meaning "In the greater sum the less is included."[20]

The main channel of the Mississippi river means the principal navigable and navigated channel, the one customarily followed in steamboat navigation. Franzini *v.* Layland, 120 Wis. 72, 79, 97 N. W. 499.

5. Tomlin L. Dict. [*quoted* in Matter of Wolfe, 3 N. Y. Leg. Obs. 383, 385]. See also Matter of Nottingham, [1897] 2 Q. B. 502, 510, 61 J. P. 725, 66 L. J. Q. B. 883, 77 L. T. Rep. N. S. 210, where it is said: "Mainprise is when a man is arrested by capias, the judge may deliver his body to certain men to keep and bring before him at a certain day, and these are called mainpernors, and if the party appear not at the day assigned the mainpernors shall be amerced."

6. U. S. *v.* Rodgers, 150 U. S. 249, 254, 14 S. Ct. 109, 37 L. ed. 107; De Lovio *v.* Boit, 7 Fed. Cas. No. 3,776, 2 Gall. 398, 428.

7. People *v.* Richmond County, 73 N. Y. 393, 396 [*citing* U. S. *v.* Grush, 26 Fed. Cas. No. 15,268, 5 Mason 290; 2 East P. C. c. 17, § 10, p. 804]; Baker *v.* Hoag, 7 N. Y. 555, 560, 59 Am. Dec. 431.

8. Cyclopedic L. Dict. [*citing* Brownlow & G. 4; Hobart 125].

9. Boutiller *v.* The Milwaukee, 8 Minn. 97, 101; Merrill *v.* Spencer, 14 Utah 273, 277, 46 Pac. 1096; Anderson L. Dict. [*quoted* in Kadderly *v.* Multnomah County Ct., 32 Oreg. 560, 567, 52 Pac. 515]; Webster Dict. [*quoted* in Alexander *v.* Parker, 144 Ill. 355, 33 N. E. 183, 19 L. R. A. 187; Lucas *v.* St. Louis, etc., R. Co., 174 Mo. 270, 276, 73 S. W. 589, 61 L. R. A. 452; Barber Asphalt Paving Co. *v.* Hezel, 155 Mo. 391, 399, 56 S. W. 449, 48 L. R. A. 285; Benn *v.* Troy, 60 Barb. (N. Y.) 417, 421, 41 How. Pr. 475, 479].

10. Webster Dict. [*quoted* in McChesney *v.* Hyde Park, 151 Ill. 634, 646, 37 N. E. 858; Louisville, etc., R. Co. *v.* Godman, 104 Ind. 490, 492, 4 N. E. 163].

11. Benson *v.* New York, 10 Barb. (N. Y.) 223, 235; Anderson L. Dict. [*quoted* in Carson-Rand Co. *v.* Stern, 129 Mo. 381, 387, 31 S. W. 772, 32 L. R. A. 420].

12. Hoar *v.* Hennessy, 29 Mont. 253, 259, 74 Pac. 452. See also California Sav., etc., Soc. *v.* Harris, 111 Cal. 133, 138, 43 Pac. 525; Moon *v.* Durden, 2 Exch. 22, 30, 12 Jur. 138.

13. Benson *v.* New York, 10 Barb. (N. Y.) 223, 225.

14. Boutiller *v.* The Milwaukee, 8 Minn. 97; New Carlisle Bank *v.* Brown, 11 Ohio Cir. Ct. 77, 78, 5 Ohio Cir. Dec. 94.

15. Burbank *v.* Auburn, 31 Me. 590, 591.

16. Webster Dict. [*quoted* in Alexander *v.* Parker, 144 Ill. 355, 367, 33 N. E. 183, 19 L. R. A. 187; Warren *v.* Insane Hospital, 3 Pa. Dist. 223, 224, 15 Pa. Co. Ct. 83, 84].

17. Bouvier L. Dict. [*quoted* in State *v.* Beatty, 61 Iowa 307, 308, 16 N. W. 149].

18. Bouvier L. Dict. [*citing* 19 Viner Abr. 379].

19. Cyclopedic L. Dict. [*citing* 4 Inst. 66].

20. Black L. Dict. [*citing* 2 Kent Comm. 618].

MAJORITY. More than half;[21] the age at which, by law, a person is entitled to the management of his own affairs and to the enjoyment of civic rights.[22] (Majority: Attainment of, see INFANTS. In Voting, see CORPORATIONS; COUNTIES; ELECTIONS; MUNICIPAL CORPORATIONS; TOWNS.)

MAJOR NUMERUS IN SE CONTINET MINOREM. A maxim meaning "The greater number contains in itself the less."[23]

MAJUS DIGNUM TRAHIT AD SE MINUS DIGNUM. A maxim meaning "The more worthy draws to itself the less worthy."[24]

MAJUS EST DELICTUM SEIPSUM OCCIDERE QUAM ALIUM. A maxim meaning "It is a greater crime to kill one's self than to kill another."[25] (See, generally, SUICIDE.)

MAJUS JUS. Literally, "Greater right" or "more right." A plea in the old real actions.[26]

MAKE. To form of materials, to cause to exist in a certain form, to construct, to fabricate;[27] to produce, to create, to execute;[28] to execute with requisite formalities;[29] to form and publish a judgment on the facts;[30] to put;[31] to enact;[32] to form or compose.[33]

MAKER. See COMMERCIAL PAPER.

MAKING LAW. One of the ancient methods of trial, frequently, though inaccurately, termed "waging law," or "wager of law."[34]

MAL. A prefix meaning ill or evil; from the Latin "malus," bad or ill.[35]

MALADMINISTRATION. Wrong administration.[36]

MALA GRAMMATICA NON VITIAT CHARTAM. SED IN EXPOSITIONE INSTRUMENTORUM MALA GRAMMATICA QUOAD FIERI POSSIT EVITANDA EST. A maxim meaning "Bad grammar does not vitiate a deed. But in the exposition of instruments, bad grammar, as far as it can be done, is to be avoided."[37]

MALARIA. A morbid condition produced by exhalations from decaying vegetable matter in contact with moisture, giving rise to fever and ague and many other symptoms characterized by their tendency to recur at definite and usually uniform intervals.[38]

MALCONDUCT. Official misconduct.[39] (See MALFEASANCE; MISFEASANCE; and, generally, OFFICERS.)

MALEDICTA EXPOSITIO QUÆ CORRUMPIT TEXTUM. A maxim meaning "That is a bad exposition which corrupts the text."[40]

21. *In re* Denny, 156 Ind. 104, 108, 59 N. E. 359, 51 L. R. A. 722; Com. *v.* Wickersham, 66 Pa. St. 134, 136.

22. Bouvier L. Dict., where it is said to mean the opposite of minority.

23. Cyclopedic L. Dict. [*citing* Bracton fol. 16].

24. Bouvier L. Dict. [*citing* Broom Leg. Max. 176 note; Coke Litt. 43, 355; Finch L. 22; 2 Inst. 307; 5 Viner Abr. 584, 586].

25. Burrill L. Dict.

26. Abbott L. Dict. [*citing* 1 Reeve Hist. Eng. L. 476].

27. Webster Dict. [*quoted* in Morse *v.* West Port, 110 Mo. 502, 507, 19 S. W. 831].

28. Anderson L. Dict. [*quoted* in Sager *v.* Summers, 49 Nebr. 459, 461, 68 N. W. 614]. See also Hazelet *v.* Holt County, 51 Nebr. 716, 718, 71 N. W. 717; Means *v.* Evans, 4 Desauss. Eq. (S. C.) 242, 249.

29. Webster Int. Dict. [*quoted* in Hazelet *v.* Holt County, 51 Nebr. 716, 718, 71 N. W. 717].

30. Hoff *v.* Taylor, 5 N. J. L. 976, 980, as to make an award.

31. Gerzebeck *v.* Lord, 33 N. J. L. 240, 245.

32. Kepner *v.* Com., 40 Pa. St. 124, 129.

33. State *v.* Drew, 51 Vt. 56, 58; Hunt *v.* Viall, 20 Vt. 291, 292.

34. Black L. Dict. [*citing* 3 Blackstone Comm. 341].

35. Webster Dict. [*quoted* in Taliaferro *v.* Lee, 97 Ala. 92, 104, 13 So. 125].

36. Minkler *v.* State, 14 Nebr. 181, 183, 15 N. W. 330, used interchangeably in the law books with misadministration.

37. Black L. Dict. [*citing* 6 Coke 39].

Applied in Cutter *v.* Doughty, 7 Hill (N. Y.) 305, 316; *In re* Peterson, 212 Pa. St. 453, 457, 61 Atl. 1005; Freeman's Estate, 15 Phila. (Pa.) 549, 556; Ketchum *v.* Spurlock, 34 W. Va. 597, 601, 12 S. E. 832; May *v.* Standard F. Ins. Co., 5 Ont. App. 605, 617.

38. Webster Dict. [*quoted* in St. Louis *v.* Galt, 179 Mo. 8, 19, 77 S. W. 876, 63 L. R. A. 778].

39. Taliaferro *v.* Lee, 97 Ala. 92, 104, 13 So. 125; Johnson *v.* Galveston, 11 Tex. Civ. App. 469, 473, 33 S. W. 150.

40. Morgan Leg. Max.

Applied in Reimer Harrow Co. *v.* Rosenberger, 16 Phila. (Pa.) 191, 192; Sawyer *v.* Dodge County Mut. Ins. Co., 37 Wis. 503, 524.

MALEFACTOR. He who is guilty, or has been convicted, of some crime or offense.[41] (See, generally, CONVICTS.)

MALEFICIA NON DEBENT REMANERE IMPUNITA, ET IMPUNITATIS AFFECTUM CONTINUUM TRIBUIT DELINQUENTI. A maxim meaning "Evil deeds ought not to remain unpunished, and impunity affords continual incitement to the delinquent."[42]

MALEFICIA PROPOSITIS DISTINGUNTUR. A maxim meaning "Evil deeds are distinguished from evil purposes."[43]

MALEFICIUM. Waste; damage; tort; injury.[44] (See, generally, TORTS.)

MALE RES SE HABET CUM QUO VIRTUTE EFFICI DEBEAT A TENTATUR PECUNIA. A maxim meaning "That is a bad case wherein one attempts to accomplish with money that which ought to be prompted by virtue."[45]

MALFEASANCE. Evil doing, ill conduct, the doing of what one ought not to do;[46] the commission of some act which is positively unlawful;[47] the doing of an act which is wholly wrongful and unlawful,[48] the doing of an act which the person ought not to do at all;[49] the unjust performance of some act which the party had no right, or which he had contracted not to do.[50] (Malfeasance: By Executor or Administrator, see EXECUTORS AND ADMINISTRATORS. By Guardian, see GUARDIAN AND WARD. By Officer — Of Corporation, see CORPORATIONS; Public Officer, see OFFICERS. By Trustee, see TRUSTS. See also MALCONDUCT; MISFEASANCE.)

MALICE. In its common acceptation, a term involving some intent of the mind and heart,[51] including the will;[52] and has been said to mean a bad mind;[53] ill-will against a person;[54] a wicked or evil state of the mind toward another;[55] an evil intent or wish or design to vex or annoy another;[56] a wilful intent to do a wrongful act;[57] a wish to vex, annoy or injure another person, or an intent to do a wrongful act;[58] a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief;[59] a disposition to injure another without cause, from a spirit of revenge merely, or for personal gratification;[60] the state of a wicked and depraved mind fatally bent on mischief;[61] that state of mind when one wilfully does that which he knows will injure another person or property,[62] or which prompts a conscious violation of law to the prejudice of another;[63] the expression of a wicked and depraved heart and mind, and of a

41. Cyclopedic L. Dict.
42. Morgan Leg. Max.
43. Burrill L. Dict.
44. Black L. Dict. See also Patapsco Ins. Co. *v.* Coulter, 3 Pet. (U. S.) 222, 231, 7 L. ed. 659.
45. Morgan Leg. Max.
46. Worcester Dict. [*quoted* in State *v.* Lazarus, 39 La. Ann. 142, 161, 1 So. 361].
47. Abbott L. Dict. [*quoted* in State *v.* Lazarus, 39 La. Ann. 142, 161, 1 So. 361].
48. Coite *v.* Lynes, 33 Conn. 109, 115 [*quoted* in Minkler *v.* State, 14 Nebr. 181, 183, 15 N. W. 330].
49. Bell *v.* Josselyn, 3 Gray (Mass.) 309, 311, 63 Am. Dec. 741; Greenburg *v.* Witcomb Lumber Co., 90 Wis. 225, 231, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439.
50. Dudley *v.* Flemingsburg, 115 Ky. 5, 9, 72 S. W. 327, 24 Ky. L. Rep. 1804; Bouvier L. Dict. [*quoted* in State *v.* Lazarous, 39 La. Ann. 142, 161, 1 So. 361; People *v.* Auburn, 33 N. Y. Suppl. 165, 169].
51. Allen *v.* U. S., 164 U. S. 492, 495, 17 S. Ct. 154, 41 L. ed. 528.
52. State *v.* Robbins, 66 Me. 324, 328.
53. Bacon *v.* Towne, 4 Cush. (Mass.) 217, 233.
54. See cases cited *infra*, note 83.
55. Cotton *v.* State, 32 Tex. 614, 641; People *v.* Davis, 8 Utah 412, 415, 32 Pac. 670; Thiede *v.* Territory, 159 U. S. 510, 522, 16 S. Ct. 62, 40 L. ed. 237; Reg. *v.* Smith, 7 Nova Scotia 29, 31.
56. People *v.* Camp, 66 Hun (N. Y.) 531, 535, 21 N. Y. Suppl. 741; People *v.* Stark, 59 Hun (N. Y.) 51, 57, 12 N. Y. Suppl. 688.
57. Com. *v.* York, 9 Metc. (Mass.) 93, 97, 43 Am. Dec. 373; U. S. *v.* Reed, 86 Fed. 308, 309; U. S. *v.* Taylor, 28 Fed. Cas. No. 16,442, 2 Sumn. 584, 586; Bouvier L. Dict. [*quoted* in Tuttle *v.* Bishop, 30 Conn. 80, 85].
58. People *v.* Dice, 120 Cal. 189, 201, 52 Pac. 477.
59. Anderson *v.* Territory, 4 N. M. 108, 112, 13 Pac. 21; State *v.* Cheatwood, 2 Hill (S. C.) 459, 462; Harrell *v.* State, 39 Tex. Cr. 204, 229, 45 S. W. 581; Swift *v.* State, 8 Tex. App. 614, 616; Harris *v.* State, 8 Tex. App. 90, 108; Johnson *v.* State, 5 Tex. App. 423, 439.
60. King *v.* Root, 4 Wend. (N. Y.) 113, 155, 21 Am. Dec. 102.
61. Pickens *v.* State, 13 Tex. App. 353, 357.
62. Carr *v.* State, 23 Nebr. 749, 755, 37 N. W. 630 [*citing* Territory *v.* Egan, 3 Dak. 119, 13 N. W. 563]; *In re* Freche, 109 Fed. 620, 621.
63. Com. *v.* Chance, 174 Mass. 245, 252, 54 N. E. 551, 75 Am. St. Rep. 306; People *v.*

cruel disposition;[64] wickedness of purpose, or a spiteful or malevolent design against another, a purpose to injure another, a design of doing mischief, or any evil design or inclination to do a bad thing, or a reckless disregard of the rights of others, or an intent to do an injury to another or absence of legal excuse, or any other motive than that of bringing a party to justice;[65] enmity of heart, malevolence, ill-will, a spirit desiring harm or misfortune to another, a disposition to injure others, unprovoked malignity or spite;[66] any wicked or mischievous intention of the mind; a depraved inclination to mischief; intention to do an act which is wrongful, without just cause or excuse; a wanton disregard of the rights or safety of others; wilfulness;[67] any corrupt motive, any wrong motive, or any departure from duty;[68] a depraved inclination to disregard the rights of others;[69] a willingness to injure another;[70] a wicked intention to do an injury;[71] a propensity to inflict injury or suffering; active ill-will;[72] an intention to do bodily harm, a formed design to do mischief;[73] a formed design of doing mischief to another, a wicked intention to do an injury to another;[74] a mischievous design or intent to do an injury to an individual or the public;[75] enmity of heart, malevolence; ill-will; a spirit desiring harm to another; unprovoked malignity or spite;[76] extreme enmity of heart, or malevolence; a disposition to injure others without cause, or from personal gratification, or from a spirit of revenge; unprovoked malignity or spite;[77] wickedness of purpose, a spiteful or malevolent design against another, a settled purpose to injure or destroy another;[78] an intent to do an unlawful act without legal justification or excuse;[79] a wicked and mischievous purpose which characterizes the perpetration of an injurious act without lawful excuse;[80] that condition of the mind which prompts one to do a wrongful act intentionally without legal justification or excuse;[81] the intent from which flows any unlawful and injurious act committed without legal justification.[82] In its legal sense, however, the term has been said to denote a wrongful act done intentionally without just cause or excuse;[83] and this definition

Davis, 8 Utah 412, 422, 32 Pac. 670; Bouvier L. Dict. [*quoted* in Abbott *v.* Com., 68 S. W. 124, 125, 24 Ky. L. Rep. 148].

64. State *v.* Wallace, 2 Pennew. (Del.) 402, 404, 47 Atl. 621; State *v.* Cole, 2 Pennew. (Del.) 344, 351, 45 Atl. 391.

It comprehends every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty. McClain *v.* Com., 110 Pa. St. 263, 268, 1 Atl. 45.

65. Shannon *v.* Jones, 76 Tex. 141, 144, 13 S. W. 477.

66. Webster Dict. [*quoted* in Chandler *v.* State, 141 Ind. 106, 115, 39 N. E. 444].

67. Webster Dict. [*quoted* in Carr *v.* State, 23 Nebr. 749, 757, 37 N. W. 630].

68. Shaver *v.* Linton, 22 U. C. C. B. 177, 185.

69. *In re* Freche, 109 Fed. 620, 621.

70. Jewell *v.* Territory, 4 Okla. 53, 61, 43 Pac. 1075.

71. Baxter *v.* Campbell, 17 S. D. 475, 479, 97 N. W. 386; Bouvier L. Dict. [*quoted* in Williams *v.* State, 3 Tex. App. 316, 318].

72. Hatch *v.* Matthews, 85 Hun (N. Y.) 522, 524, 33 N. Y. Suppl. 332.

73. U. S. *v.* Boyd, 45 Fed. 851, 857; U. S. *v.* King, 34 Fed. 302, 310.

74. Flora First Nat. Bank *v.* Burkett, 101 Ill. 391, 394, 40 Am. Rep. 209; Davison *v.* People, 90 Ill. 221, 229.

75. Viele *v.* Gray, 18 How. Pr. (N. Y.) 550, 564; Shannon *v.* Jones, 76 Tex. 141, 144, 13 S. W. 477.

76. Chandler *v.* State, 141 Ind. 106, 115, 39 N. E. 444.

77. Webster Dict. [*quoted* in Williams *v.* State, 3 Tex. App. 316, 318].

78. Barrett Dict. [*quoted* in Patterson *v.* State, 85 Ga. 131, 133, 11 S. E. 620, 21 Am. St. Rep. 152].

79. People *v.* Taylor, 36 Cal. 255, 266; People *v.* Abbott, (Cal. 1884) 4 Pac. 769, 771; People *v.* Vanderpool, 1 Mich. N. P. 264, 267.

80. State *v.* Coella, 3 Wash. 99, 119, 28 Pac. 28.

81. State *v.* Privitt, 175 Mo. 207, 216, 72 S. W. 457; Ickenroth *v.* St. Louis Transit Co., 102 Mo. App. 597, 611, 77 S. W. 162; Housh *v.* State, 43 Nebr. 163, 167, 61 N. W. 571.

82. Lovett *v.* State, 30 Fla. 142, 155, 11 So. 550, 17 L. R. A. 705; Bouvier L. Dict. [*quoted* in People *v.* Kernaghan, 72 Cal. 609, 613, 14 Pac. 566].

83. Dunn *v.* Hall, 1 Ind. 344, 353, Smith 228; State *v.* Debolt, 104 Iowa 105, 108, 73 N. W. 499; Hathaway *v.* Com., 82 S. W. 400, 402, 26 Ky. L. Rep. 630; Ohio Valley Tel. Co. *v.* Meyer, 56 S. W. 673, 22 Ky. L. Rep. 36; Zimmerman *v.* Whiteley, 134 Mich. 39, 45, 95 N. W. 989 [*quoting* Long *v.* Tribune Printing Co., 107 Mich. 207, 215, 65 N. W. 108; Bell *v.* Fernald, 71 Mich. 267, 269, 38 N. W. 910]; Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 172, 33 N. W. 181; State *v.* Darling, (Mo. 1906) 97 S. W. 592, 595; Minter *v.* Bradstreet Co., 174 Mo. 444, 497, 73 S. W.

has been substantially adopted in a great many cases with immaterial alteration of phraseology, as follows: The intentional doing of a wrongful act toward another without legal justification or excuse;[84] the wilful doing of an injurious act with-

668; Callahan *v.* Ingram, 122 Mo. 355, 370, 26 S. W. 1020, 43 Am. St. Rep. 583; Fugate *v.* Millar, 109 Mo. 281, 288, 19 S. W. 71; Buckley *v.* Knapp, 48 Mo. 152, 160; State *v.* Jaeckel, 44 Mo. 234, 235; State *v.* Hays, 23 Mo. 287, 326; Trauernan *v.* Lippincott, 39 Mo. App. 478, 488; Jones *v.* Fruin, 26 Nebr. 76, 80, 42 N. W. 283; Darry *v.* People, 10 N. Y. 120, 139; State *v.* Spivey, 132 N. C. 989, 992, 43 S. E. 475; Page *v.* Miller, 13 Ohio Cir. Ct. 663, 669, 6 Ohio Cir. Dec. 676; Lander *v.* State, 12 Tex. 462, 481; Connell *v.* State, 46 Tex. Cr. 259, 261, 81 S. W. 746; Spangler *v.* State, 42 Tex. Cr. 233, 245, 61 S. W. 314; Vinal *v.* Core, 18 W. Va. 1, 27; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244, 247; U. S. *v.* Harriman, 26 Fed. Cas. No. 15,311, 1 Hughes 525, 528; Wiggin *v.* Coffin, 29 Fed. Cas. No. 17,624, 3 Story 1, 7; Bromage *v.* Prosser, 4 B. & C. 247, 255, 10 E. C. L. 563, 1 C. & P. 475, 12 E. C. L. 276, 6 D. & R. 296, 3 L. J. K. B. O. S. 203, 28 Rev. Rep. 241 [*quoted* in Maynard *v.* Firemen's Fund Ins. Co., 34 Cal. 48, 53, 91 Am. Dec. 672; Schaffner *v.* Ehrman, 139 Ill. 109, 113, 28 N. E. 917, 32 Am. St. Rep. 192, 15 L. R. A. 134; Haynes *v.* Haynes, 29 Me. 247, 253; Com. *v.* York, 9 Metc. (Mass.) 93, 104, 43 Am. Dec. 373; State *v.* Schoenwald, 31 Mo. 147, 157; State *v.* Hambleton, 22 Mo. 452, 456; Davis *v.* State, 51 Nebr. 301, 309, 70 N. W. 984; McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 516, 51 N. Y. Suppl. 275; Bush *v.* Prosser, 13 Barb. (N. Y.) 221, 228; Viele *v.* Gray, 10 Abb. Pr. (N. Y.) 1, 5, 18 How. Pr. 550; Gee *v.* Culver, 13 Oreg. 598, 599, 11 Pac. 302; State *v.* McDaniel, 68 S. C. 304, 312, 47 S. E. 384, 102 Am. St. Rep. 661; Tinker *v.* Colwell, 193 U. S. 473, 485, 24 S. Ct. 505, 48 L. ed. 754; Allen *v.* Flood, [1898] A. C. 1, 18, 62 J. P. 595, 67 L. J. Q. B. 119, 77 L. T. Rep. N. S. 717, 46 Wkly. Rep. 258; Sherwin *v.* Savindall, 13 L. J. Exch. 237, 238; Gallagher *v.* Westmoreland, 29 N. Brunsw. 217, 243]. See also 1 Cyc. 669.

This definition was criticized in Nichols *v.* Com., 11 Bush (Ky.) 575, 582, where Judge Cofer, who delivered the opinion of the court, said: "Malice cannot denote an act, but, on the contrary, an act may denote — i. e., furnish evidence of — malice." And so the court goes on to say that malice is implied by the law from any deliberate cruel act. But the first clause of the instruction, "Malice, in the legal sense, denotes a wrongful act done intentionally," although not accurate in itself, was not prejudicial to the prisoner.

Omitting the element of justification the word has been variously defined as: An act done in the spirit of mischief or of criminal indifference to civil obligation. Bozer *v.* Coxen, 92 Md. 366, 370, 48 Atl. 161; Seeman *v.* Feeney, 19 Minn. 79; Spellman *v.* Richmond, etc., R. Co., 35 S. C. 475, 489, 14 S. E. 947, 28 Am. St. Rep. 858; Brooke *v.* Clark, 57 Tex. 105, 107. An action flowing from a wicked and corrupt motive. McCoy *v.* People, 175 Ill. 224, 229, 51 N. E. 777; People *v.* Borgetto, 99 Mich. 336, 339, 58 N. W. 328. An improper act injurious to another proceeding from an improper motive. Sommer *v.* Wilt, 4 Serg. & R. (Pa.) 19, 24. The intentional doing of an unlawful act. State *v.* Harper, 149 Mo. 514, 521, 51 S. W. 89. The intentional doing of a wrongful act, knowing that it was wrongful at the time. Witaschiek *v.* Glass, 46 Mo. App. 209, 214. The perpetration of a wrong or injury on another with intent to do so. Jernberg *v.* Mix, 199 Ill. 254, 256, 65 N. E. 242; Mahler *v.* Sinsheimer, 20 Ill. App. 401, 403. The wilful doing of a wrongful act. Proctor *v.* Southern R. Co., 61 S. C. 170, 188, 39 S. E. 351. The wilful doing of an act which one knows is liable to injure another, regardless of the consequences. U. S. *v.* Reed, 86 Fed. 308, 312. The wrongful doing of an act with the intention to do harm. State *v.* Shaffner, 2 Pennew. (Del.) 171, 172, 44 Atl. 620. But see Davis *v.* Standard Nat. Bank, 50 N. Y. App. Div. 210, 213, 63 N. Y. Suppl. 764. A wanton disregard of the rights or safety of another. Lehrer *v.* Elmore, 100 Ky. 56, 59, 37 S. W. 292, 18 Ky. L. Rep. 551; Webster Dict. [*quoted* in Louisville Press Co. *v.* Tennelly, 105 Ky. 365, 372, 49 S. W. 15, 20 Ky. L. Rep. 1231]. Gross, reckless and wilful misconduct toward another, evincing a wicked intention to do him injury. Com. *v.* McClure, 1 Pa. Co. Ct. 207, 208. Recklessness of the lives and safety of others, which proceeds from a heart void of a just sense of social duty and bent on mischief. Morgan *v.* Durfee, 69 Mo. 469, 480, 33 Am. Rep. 508.

As applied to torts does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions injury to another. Brown *v.* Brown, 124 N. C. 19, 23, 32 S. E. 320, 70 Am. St. Rep. 574; Hogg *v.* Pinckney, 16 S. C. 387, 397. Or as otherwise expressed, it refers to that state of mind which is reckless of law and of the legal rights of the citizen in a person's conduct toward such citizen. Willis *v.* Miller, 29 Fed. 238, 244.

84. Ludwig *v.* Com., 60 S. W. 8, 9, 22 Ky. L. Rep. 1108; State *v.* Wieners, 66 Mo. 13, 20; McFadden *v.* Lane, 71 N. J. L. 624, 630, 60 Atl. 365; Etchberry *v.* Levielle, 2 Hilt. (N. Y.) 40, 44; State *v.* Levelle, 34 S. C. 120, 132, 13 S. E. 319, 27 Am. St. Rep. 799; Bean *v.* State, (Tex. Cr. App. 1899) 51 S. W. 946; Martinez *v.* State, 30 Tex. App. 129, 138, 16 S. W. 767, 28 Am. St. Rep. 895; Farrar *v.* State, 29 Tex. App. 250, 254, 15 S. W. 719; Gallaher *v.* State, 28 Tex. App. 247, 266, 12 S. W. 1087; McKinney *v.* State, 8 Tex. App. 626, 643; Evans *v.* State, 6 Tex. App. 513, 518; State *v.* Coella, 3 Wash. 99, 119, 28 Pac. 28.

out lawful excuse;[85] the doing a wrongful act intentionally without just cause or excuse;[86] a term of art importing wickedness, and excluding a just cause or excuse.[87] Malice has been classified as (1) actual malice, malice in fact, or express malice; and (2) constructive malice, malice in law, or implied malice.[88] (Malice: Aforethought, see HOMICIDE. An Element of Crime — In General, see CRIMINAL LAW; Particular Crime, see ABORTION; ARSON: ASSAULT AND BATTERY; HOMICIDE; LIBEL AND SLANDER; MALICIOUS MISCHIEF. As Affecting Liability For — Abuse of Process, see PROCESS; False Imprisonment, see FALSE IMPRISONMENT; Libel or Slander, see LIBEL AND SLANDER; Malicious Prosecution, see MALICIOUS PROSECUTION; Obstructing Easement, see ADJOINING LANDOWNERS; EASEMENTS; Obstruction of Water, see WATERS; Tort Generally, see TORTS; Trespass, see TRESPASS; Wrongful Attachment, see ATTACHMENT; MALICIOUS PROSECUTION; Wrongful Executions, see EXECUTIONS; MALICIOUS PROSECUTION; Wrongful Garnishment, see GARNISHMENT; MALICIOUS PROSECUTION. As Affecting Right to Exemplary Damages, see DAMAGES. See also MALICIOUS.)

MALICE AFORETHOUGHT. See HOMICIDE.

MALICIOUS.[89] Evincing malice; done with malice and an evil design; wilful;[90]

85. State *v.* Pike, 49 N. H. 399, 404, 6 Am. Rep. 533; Ruffner *v.* Hooks 2 Pa. Super. Ct. 278, 282, 38 Wkly. Notes Cas. 516; Com. *v.* Lister, 15 Phila. (Pa.) 405, 407.

86. Vollmer *v.* State, 24 Nebr. 838, 844, 40 N. W. 420; State *v.* Stout, 49 Ohio St. 270, 283, 30 N. E. 437; Bouvier L. Dict. [*quoted* in People *v.* Ah Toon, 68 Cal. 362, 363, 9 Pac. 311; Whitman *v.* State, 17 Nebr. 224, 226, 22 N. W. 459; Milton *v.* State, 6 Nebr. 136, 143; McFadden *v.* Morning Journal Assoc., 28 N. Y. App. Div. 508, 516, 51 N. Y. Suppl. 275].

87. Holland *v.* State, 12 Fla. 117, 125; State *v.* Doig, 2 Rich. (S. C.) 179, 182 [*quoted* in State *v.* Toney, 15 S. C. 409, 413; State *v.* Alexander, 14 Rich. (S. C.) 247, 253].

88. Taylor *v.* Hearst, 107 Cal. 262, 269, 40 Pac. 392; Osborne *v.* Troup, 60 Conn. 485, 492, 23 Atl. 157; Wynne *v.* Parsons, 57 Conn. 73, 76, 17 Atl. 362; Hotchkiss *v.* Porter, 30 Conn. 414, 421; Herbener *v.* Crossan, 4 Pennew. (Del.) 38, 45, 55 Atl. 223; State *v.* Talley, 9 Houst. (Del.) 417, 421, 33 Atl. 181; State *v.* Harrigan, 9 Houst. (Del.) 369, 370, 31 Atl. 1052; Lewis *v.* State, 90 Ga. 95, 97, 15 S. E. 697; Smith *v.* Rodecap, 5 Ind. App. 78, 31 N. E. 479; Pullen *v.* Glidden, 66 Me. 202, 204; Jellison *v.* Goodwin, 43 Me. 287, 288, 69 Am. Dec. 62; Gambrill *v.* Schooley, 95 Md. 260, 289, 52 Atl. 500, 63 L. R. A. 427; Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 172, 33 N. W. 181; Tucker *v.* Cannon, 32 Nebr. 444, 446, 49 N. W. 435; Colwell *v.* Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 98 Am. St. Rep. 587, 58 L. R. A. 765; State *v.* Mills, 116 N. C. 992, 993, 21 S. E. 106; State *v.* Town, Wright (Ohio) 75, 76; Gee *v.* Culver, 13 Oreg. 598, 599, 11 Pac. 302; McDonald *v.* Brown, 23 R. I. 546, 552, 51 Atl. 213, 91 Am. St. Rep. 659, 58 L. R. A. 768; State *v.* Murrell, 33 S. C. 83, 97, 11 S. E. 682; McCoy *v.* State, 25 Tex. 33, 39, 78 Am. Dec. 520; Jordan *v.* State, 10 Tex. 479, 493; Missouri Pac. R. Co. *v.* Behee, 2 Tex. Civ. App. 107, 109, 21 S. W. 384; McGrath *v.* State, 35 Tex. Cr. 413, 423, 34 S. W. 127, 941; Singleton *v.* State, 1 Tex. App. 501, 507; Holden *v.* State, 1 Tex. App. 225, 238; Duebbe *v.* State, 1 Tex. App. 159, 165; McWhirt's Case, 3 Gratt. (Va.) 566, 576, 46 Am. Dec. 196; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244, 247; Jones *v.* Gwynn, 10 Mod. 214, 215.

Malice in fact is a deliberate intention to do unlawfully any bodily harm to another (State *v.* Talley, 9 Houst. (Del.) 417, 420, 33 Atl. 181); and is established by legal presumption or proof of certain facts and is to be found by the jury from the evidence in the case (Pullen *v.* Glidden, 66 Me. 202, 204); an evil intent arising from spite or ill-will (McDonald *v.* Brown, 23 R. I. 546, 548, 51 Atl. 213, 91 Am. St. Rep. 659, 58 L. R. A. 768); or improper and unjustifiable motive (Hotchkiss *v.* Porter, 30 Conn. 414, 421); it relates to the actual state or condition of the mind of the person who did the act (Gee *v.* Culver, 13 Oreg. 598, 601, 11 Pac. 302), and implies a desire and an intention to injure (Jellison *v.* Goodwin, 43 Me. 287, 288, 69 Am. Dec. 62; Bacon *v.* Michigan Cent. R. Co., 66 Mich. 166, 172, 33 N. W. 181).

Malice in law means an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill-feeling or spite, or a desire to injure another (Tucker *v.* Cannon, 32 Nebr. 444, 446, 49 N. W. 435), or a depraved inclination on the part of a person to disregard the rights of others, which intent is manifested by his injurious acts (Colwell *v.* Tinker, 169 N. Y. 531, 536, 62 N. E. 668, 98 Am. St. Rep. 587, 58 L. R. A. 765). It is implied from wrongful and unjustifiable acts done on purpose or without just or legal excuse. McGrath *v.* State, 35 Tex. Cr. 413, 423, 34 S. W. 127, 941; McDonald *v.* Woodruff, 16 Fed. Cas. No. 8,770, 2 Dill. 244, 247.

89. The word may in some sort be considered as synonymous with "malice aforethought," although not a perfect synonym. In its larger sense it is common to many crimes. Cannon *v.* State, 60 Ark. 564, 567, 31 S. W. 150, 32 S. W. 128.

90. Black L. Dict. [*quoted* in Ohio Valley

indulging or exercising malice, harboring ill-will or enmity, malevolent, malignant in heart;[91] committed wantonly, wilfully, or without cause,[92] or done not only wilfully and intentionally, but out of cruelty, hostility or revenge;[93] done in wilful neglect of a known obligation, with reckless disregard of the consequences;[94] done with a fixed hate, or with intentions or motives not the result of sudden passion.[95] (Malicious: Abandonment, see HUSBAND AND WIFE. Abuse of Process, see PROCESS. Arrest, see MALICIOUS PROSECUTION Attachment, see MALICIOUS PROSECUTION. Execution, see MALICIOUS PROSECUTION. Garnishment, see MALICIOUS PROSECUTION. Imprisonment, see FALSE IMPRISONMENT; MALICIOUS PROSECUTION. Mischief, see MALICIOUS MISCHIEF. Prosecution, see MALICIOUS PROSECUTION. Shooting, see ASSAULT AND BATTERY. Threat, see THREATS. Trespass, see TRESPASS. See also MALICE.)

MALICIOUSLY. With deliberate intention to injure; wilfully;[96] with ill-will, malevolence, grudge, spite, or enmity.[97] (Maliciously: As Used in Indictment—For Arson, see ARSON; For Assault or Battery, see ASSAULT AND BATTERY; For Homicide, see HOMICIDE. Destroying Fence, see FENCES. Injuring Animal, see ANIMALS. See, generally, FALSE IMPRISONMENT; INDICTMENTS AND INFORMATIONS; MALICIOUS MISCHIEF; MALICIOUS PROSECUTION; TRESPASS. See also MALICE; MALICIOUS.)

Tel. Co. *v.* Meyer, 56 S. W. 673, 674, 22 Ky. L. Rep. 36].

In criminal statutes the word is ordinarily the equivalent of wrongful, intentional, and without just cause or excuse; but as used in many statutes directed against the unlawful destruction of property, it is held to have a restricted meaning peculiar to such statutes, implying that the act to which it relates must have resulted from actual ill-will or revenge. State *v.* Boies, 68 Kan. 167, 169, 74 Pac. 630.

91. Webster Dict. [*quoted* in Chandler *v.* State, 141 Ind. 106, 115, 39 N. E. 444].

92. Maclean *v.* Scripps, 52 Mich. 214, 221, 17 N. W. 815, 18 N. W. 209; Burrill L. Dict. [*quoted* in Rounds *v.* Delaware, etc., R. Co., 5 Thomps. & C. (N. Y.) 475, 481].

93. Wing *v.* Wing, 66 Me. 62, 64, 22 Am. Rep. 548 [*citing* State *v.* Hussey, 60 Me. 410, 11 Am. Rep. 206; Com. *v.* Williams, 110 Mass. 401; Com. *v.* Walden, 3 Cush. (Mass.) 558].

94. U. S. *v.* Reed, 86 Fed. 308, 312.

95. Martin *v.* State, 119 Ala. 1, 5, 25 So. 255; Hawes *v.* State, 88 Ala. 37, 44, 7 So. 302; Holley *v.* State, 75 Ala. 14, 20; Mitchell *v.* State, 60 Ala. 26, 28.

The term imports nothing more than the wicked and perverse disposition with which a party commits an act. Com. *v.* York, 9 Metc. (Mass.) 93, 106, 43 Am. Dec. 373.

96. Mills *v.* Larrance, 217 Ill. 446, 451, 74 N. E. 555; Anderson L. Dict. [*quoted* in May *v.* Anderson, 14 Ind. App. 251, 42 N. E. 946, 947]; Webster Dict. [*quoted* in Tuttle *v.* Bishop, 30 Conn. 80, 85]. And see Johnson *v.* State, 61 Ala. 9, 11.

The term imports an evil intent or wish, or design to vex or annoy another person, or injure another person. Anderson *v.* How, 116 N. Y. 336, 341, 22 N. E. 695.

Compared with "wilfully."—It has been said to be the equivalent of "wilfully" (Bouvier L. Dict. [*quoted* in Mills *v.* Glennon, 2 Ida. (Hasb.) 105, 109, 6 Pac. 116]); but it has a larger meaning which "wilfully" in an indictment would not supply (Shotwell *v.* State, 43 Ark. 345, 347; Funderburk *v.* State, 75 Miss. 20, 22, 21 So. 658). It was said in State *v.* Robbins, 66 Me. 324, 325, that the words were sufficiently synonymous so that where the word "wilfully" is used in a statute it will be sufficient if the word "maliciously" is employed in an indictment thereunder. In its ordinary sense when used in criminal or otherwise penal statute, the word implies the existence of a wicked or revengeful purpose, or an evil disposition or wanton disregard of the rights of others, and includes within its meaning "wilfully." U. S. *v.* Three Railroad Cars, 28 Fed. Cas. No. 16,513.

97. Johnson *v.* State, 61 Ala. 9, 11.

MALICIOUS MISCHIEF

By Donald J. Kiser*

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CROSS-REFERENCES

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Criminal Procedure Generally, see Criminal Law.

Destruction or Injury of Particular Kinds of Property:

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* Joint author of "Indictments and Informations," 22 Cyc. 157, and of "Joinder and Splitting of Actions," 23 Cyc. 376; also editor of "Landlord and Tenant," 24 Cyc. 845.

For Matters Relating to — (*continued*)
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I. NATURE AND ESSENTIALS OF OFFENSE.

A. Common Law. According to the weight of authority the offense of malicious mischief exists under the common law of the United States,[1] although in England, since malicious mischief was made punishable by statute at an early date, and severe penalties imposed, the statutes were resorted to and the common law lost sight of.[2] From the fact that malicious mischief has been so much legislated upon and at such an early day, its common-law limits are indistinct,[3] but it may be defined in general terms as including all malicious physical injuries to the rights of another, which impair utility or materially diminish value.[4] But although the essence of the crime of malicious mischief is the injury to property,[5] it must

1. *Arkansas.*— State *v.* Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216.
Delaware.— State *v.* Hamilton, Houst. Cr. Cas. 281, so holding under the laws of Delaware making malicious injury done by one person to another, either in his person or in his real or personal estate, by necessary implication a breach of the peace.
Idaho.— See People *v.* Maxon, 1 Ida. 330.
Missouri.— State *v.* McLain, 92 Mo. App. 456.
New York.— Loomis *v.* Edgerton, 19 Wend. 419; People *v.* Smith, 5 Cow. 258; People *v.* Moody, 5 Park. Cr. 568.
North Carolina.—State *v.* Helmes, 27 N. C. 364.
Pennsylvania.— Com. *v.* Eckert, 2 Browne 248.
South Carolina.— State *v.* Switzer, 59 S. C. 225, 37 S. E. 818.
Tennessee.— State *v.* Council, 1 Overt. 305. But see Shell *v.* State, 6 Humphr. 283, holding that the unlawful and malicious destruction of a pair of saddle bags was not indictable.
Vermont.— State *v.* Briggs, 1 Aik. 226.
Contra.— Brown's Case, 3 Me. 177; State *v.* Beekman, 27 N. J. L. 124, 72 Am. Dec. 352.
2. State *v.* Briggs, 1 Aik. (Vt.) 226 [*cited* in Loomis *v.* Edgerton, 19 Wend. (N. Y.) 419].
3. State *v.* Watts, 48 Ark. 56, 2 S. W. 342, 3 Am. St. Rep. 216; Duncan *v.* State, 49 Miss. 331; State *v.* Simpson, 9 N. C. 460.
4. State *v.* Watts, 48 Ark. 56, 59, 2 S. W. 342, 3 Am. St. Rep. 216.
Other definitions.— "Malicious mischief to be indictable, consists in the wilful destruction of some article of personal property, from actual ill-will or resentment towards its owner or possessor." State *v.* Robinson, 20 N. C. 129, 131, 32 Am. Dec. 661 [*citing* State *v.* Simpson, 9 N. C. 460; State *v.* Landreth, 4 N. C. 331].
"The description of malicious mischief usually given by the writers on Criminal Law, that is to say, 'such damage as is done to private property, not *animo furandi*, or with an intent of gaining by another's loss, but either out of spirit of wanton cruelty or black and diabolical revenge,' may answer as a general indication of those common law trespasses, which, by a multitude of statutes, have been raised into crimes, but it is too destitute of precision to constitute a legal definition." State *v.* Robinson, 20 N. C. 129, 131, 32 Am. Dec. 661.
"Malicious mischief at the common law is the wilful destruction of some article of personal property from actual ill will or resentment towards its owner." People *v.* Petheram, 64 Mich. 252, 264, 31 N. W. 188 [*quoting* 2 Bishop Cr. L. § 983].
"Malicious mischief may be defined to be any malicious or mischievous physical injury either to the rights of another or to those of the public in general." State *v.* Foote, 71 Conn. 737, 741, 43 Atl. 488 [*quoting* 2 Wharton Cr. L. § 1067].
5. An act which, however wanton and dangerous, is not and does not result in destruction or even the injury of property, is not an act of malicious mischief. Wait *v.* Green, 5 Park. Cr. (N. Y.) 185. See also *infra*, I, G.

be marked by some peculiar features to convert it from a trespass into a crime.[6] A trespass against the property of an individual is not in itself indictable as malicious mischief,[7] but the act must amount also to a violation of duties owing to the public.[8] Hence it must evince a degree of moral turpitude dangerous to society,[9] as where it consists of wanton cruelty to a domestic animal,[10] or where the act is done in secret or at night.[11] That an act is done through mere sport and wantonness will not alone render it malicious mischief at common law,[12] although it may become such when done after full notice of the consequences and notice to desist.[13]

B. Under Statutes — 1. IN GENERAL. In England malicious mischief was at an early date defined by numerous statutes;[14] but it is doubtful if such statutes were embodied in the common law of the United States, one of the most important of them, the so-called Black Act, having been specifically held contrary to the

6. Wait *v.* Green, 5 Park. Cr. (N. Y.) 185. See State *v.* Robinson, 20 N. C. 129, 32 Am. Dec. 661.

Malicious trespass as offense see TRESPASS.

7. Kilpatrick *v.* People, 5 Den. (N. Y.) 277, holding that a trespass is not indictable merely because done with malice, although there is no expectation or hope of benefit to the wrong-doer. See also State *v.* Robinson, 20 N. C. 129, 32 Am. Dec. 661.

8. Williams *v.* People, 24 How. Pr. (N. Y.) 350. See State *v.* Robinson, 20 N. C. 129, 32 Am. Dec. 661 (holding that the distinction between those injuries which are regarded simply as trespasses on the rights of individuals and those which amount to a violation also of the duties due to the community ought to be accurately drawn and carefully observed); Com. *v.* Casperson, 14 Wkly. Notes Cas. (Pa.) 106.

The destruction of a shade tree upon public grounds is indictable at common law. Com. *v.* Eckert, 2 Browne (Pa.) 249.

The unnecessary discharge of firearms may constitute malicious mischief. Com. *v.* Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347.

9. See People *v.* Smith, 5 Cow. (N. Y.) 258.

10. Com. *v.* Walden, 3 Cush. (Mass.) 558; Kilpatrick *v.* People, 5 Den. (N. Y.) 277; People *v.* Smith, 5 Cow. (N. Y.) 258; Republica *v.* Teischer, 1 Dall. (Pa.) 335, 1 L. ed. 163; State *v.* Briggs, 1 Aik. (Vt.) 226. See *contra*, State *v.* Beekman, 27 N. J. L. 124, 72 Am. Dec. 352; State *v.* Wheeler, 3 Vt. 344, 23 Am. Dec. 212; Ranger's Case, 2 East P. C. 1074. See, generally, ANIMALS, 2 Cyc. 427.

11. Kilpatrick *v.* People, 5 Den. (N. Y.) 277.

The act may be in the daytime if secret and clandestine. People *v.* Moody, 5 Park. Cr. (N. Y.) 568.

12. Wait *v.* Green, 5 Park. Cr. (N. Y.) 185; State *v.* Robinson, 20 N. C. 129, 32 Am. Dec. 661, so holding where the indictment alleged that defendants found a wagon standing in the street, and for the purpose of having sport ran it through the street and down a hill whereby it was injured as charged in the indictment, and where they left it.

13. Com. *v.* Wing, 9 Pick. (Mass.) 1, 19 Am. Dec. 347, so holding where a person discharged a gun at wild fowl, with knowledge and warning that the report would affect injuriously the health of a sick person in the neighborhood, and such effect was produced by the discharge.

14. See Wait *v.* Green, 5 Park. Cr. (N. Y.) 185.

Destruction or injury of machinery.— By 7 & 8 Geo. IV, c. 30, § 4, the malicious injury of any threshing-machine or other machine or engine, whether fixed or movable, employed in manufacture, is made a felony. Reg. *v.* Foster, 6 Cox C. C. 25. The displacement of a machine has been held within this statute, although the working of the machine was not prevented. Reg. *v.* Foster, *supra*. Plows have been held machines within this statute. Reg. *v.* Gray, 9 Cox C. C. 417, 10 Jur. N. S. 160, L. & C. 365, 33 L. J. M. C. 78, 9 L. T. Rep. N. S. 733, 12 Wkly. Rep. 350. It is immaterial that the machine may have been taken apart, if the separated parts are destroyed. Rex *v.* Mackerel, 4 C. & P. 448, 19 E. C. L. 596; Rex *v.* Chubb, Deac. Cr. L. 1518; Rex *v.* Hutchins, Deac. Cr. L. 1517; Rex *v.* Bartlett, Deac. Cr. L. 1517. But where the owner anticipating the destruction of the machine by a mob had taken it to pieces and had broken parts of it so that it could not be worked, he being in fear that the mob would set it on fire and destroy his premises, the destruction of the remaining parts of the machine by the mob is not within the meaning of the statute. Rex *v.* West, Deac. Cr. L. 1518. The silling beneath an engine is a part of a machine or engine. Reg. *v.* Foster, *supra*. The destruction of a water-wheel by which a threshing-machine is operated is within the statute, although the machine has been taken down, and although the machine was sometimes worked by horse power. Rex *v.* Fidler, 4 C. & P. 449, 19 E. C. L. 596.

Goods in stage, process, or progress of manufacture.— Under 7 & 8 Geo. IV, c. 30, § 3, making the destruction of goods in the process of manufacture a felony, goods remain in stage, process, or progress of manufacture, although the texture is complete, if they are not in a condition fit for sale. Rex *v.* Woodhead, 1 M. & Rob. 549. A warp not sized, but on its way to the sizers to be sized to fit it for being used in manufacturing

nature and genius of our institutions.[15] However, in the United States generally statutes punishing malicious mischief have been enacted,[16] some of which are elsewhere treated, such among others as those which relate to animals,[17] bridges,[18] crops,[19] fences,[20] landmarks,[21] public land,[22] railroad property,[23] toll roads,[24] and telegraphs and telephones.[25] In addition, the wilful and malicious destruction of property of another by fire is the well defined and recognized crime of arson.[26] In some jurisdictions provision is made for the punishment of criminal trespass, an offense which, under the statutes, is analogous to malicious mischief.[27] After enumeration of particular acts of malicious mischief the statutes quite commonly provide for the punishment of other acts not specifically defined,[28] although it has been held that the fact that a specific act is more directly covered by a particular section of the statute will not prevent the act from being punishable under a general statute, where the penalty is the same;[29] and a person may be punished for malicious mischief, although the mischievous acts might also constitute another offense.[30] Under some statutes a conspiracy with a fraudulent or malicious intent wrongfully to injure the property of another is made punishable.[31]

2. CONSTRUCTION OF STATUTES. Where a specific definition of the offense is attempted by statute, the usual rule of construction of criminal statutes, that the scope of the statute cannot be extended beyond its express terms, is applicable.[32]

goods, is not within this statute. Reg. *v.* Clegg, 3 Cox C. C. 295.

Destruction of tools employed in woolen trade.— Under 22 Geo. III, c. 40, § 1, making it a felony to break or destroy any tools used in the making of serges or woolen goods, the cutting or destroying of part of a loom is not included. Rex *v.* Hill, R. & R. 359.

Injury to stocking frame.— Under 28 Geo. III, c. 55, § 4, making it a felony to break, destroy, or damage any frame, etc., used in the manufacture of framework knitted pieces, the taking of a piece of iron called the half-jack from a framework used for the knitting of stockings, was a damaging of the frame, although the part taken was not injured. Rex *v.* Tacy, R. & R. 336.

Destroying tackle prepared for weaving.— Under 7 & 8 Geo. IV, c. 30, § 3, making it a felony to cut, break, or destroy, or damage with intent to destroy or render useless, any tackle prepared for weaving, the cords employed to raise the harness or the working tools of a loom in order to move the shuttle to and fro, are within the intent of the statute, and the malicious cutting of them is a complete offense without averment of intent to destroy or render useless. Reg. *v.* Smith, 6 Cox C. C. 198.

15. State *v.* Campbell, T. U. P. Charlt. (Ga.) 166.

16. See the statutes of the various states.

17. See ANIMALS, 2 Cyc. 427.

18. See BRIDGES, 5 Cyc. 1115.

19. See CROPS, 12 Cyc. 981.

20. See FENCES, 19 Cyc. 483.

21. See BOUNDARIES, 5 Cyc. 974.

22. See PUBLIC LANDS.

23. See RAILROADS.

24. See TOLL ROADS.

25. See TELEGRAPHS AND TELEPHONES.

26. See ARSON, 3 Cyc. 982.

Burnings not constituting arson see FIRES; 19 Cyc. 978.

27. See TRESPASS.

28. See the statutes of the several states. And see Stanton *v.* State, 45 Tex. Cr. 168, 74 S. W. 771, holding that a person could not be punished under a statute punishing the wilful or mischievous injury to any real or personal property of any description whatever, in such manner as that the injury does not come within the description of any of the offenses against property otherwise provided for, for the burning of certain song books, since by another section of the statute a punishment was denounced for the burning of personal property of another.

29. Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33.

30. State *v.* Leavitt, 32 Me. 183 (holding that an indictment for malicious mischief may be sustained, although the acts charged might also constitute larceny); Porter *v.* State, 83 Miss. 23, 35 So. 218 (holding that a person may be convicted of malicious mischief in recklessly and wilfully driving into a horse owned by another, under a statute punishing mischief, "for which no other penalty is prescribed," although he might also have been charged and convicted under a provision punishing not keeping to the right hand in a public road, and holding, also, that defendant could not be convicted under a statute punishing malicious injury to animals, since there was no specific spirit of revenge against the owner, or wanton cruelty to the horse, nor any specific purpose to maliciously or mischievously injure that particular horse). *Compare* Barkley *v.* State, (Miss. 1898) 23 So. 185.

31. See State *v.* Flynn, 28 Iowa 26, holding that an indictment under such a statute could not be sustained where it was shown that the injury was done in the exercise of an avowed legal right which the testimony tended to establish, and without malicious or fraudulent intent.

32. See State *v.* Green, 106 La. 440, 30 So. 898 (holding that a statute punishing the

So also when general words follow an enumeration of particular cases, they will be limited to cases of the same kind as those enumerated,[33] although a statute punishing the wilful injury of certain enumerated animals "or other personal property" has been held sufficient to cover the destruction of oil stored in tanks.[34] The fact that a statute provides that the injury of particular property in a certain manner shall be punishable does not prevent the punishment of the injury of other kinds of property in the same manner.[35]

C. Property Subject. It is held in some jurisdictions that only personal property is subject of the offense.[36] The destruction of a boat may be the subject

severance of fruit or crops from the soil will not cover the removal of seed cane which has been cut and windrowed for planting); State *v.* Avery, 109 N. C. 798, 13 S. E. 931 (holding that under a statute contemplating the punishment of the destruction of crops in the stack or otherwise secured out of doors, the burning of cotton loaded in a freight car is not punishable); Caine *v.* Kelly, 13 Pa. Dist. 570, 3 Just. L. Rep. 67 (holding that felling trees on realty by a tenant in possession, although a waste, is not within the act of June 8, 1881, providing a penalty for malicious mischief to orchards, gardens, etc.).

Destruction of advertising matter.— A statute making it an offense to destroy any show-bill, poster, or advertisement posted upon a bill-board, etc., does not include the tearing down of a constable's notice of sale. Com. *v.* Johnson, 13 Pa. Co. Ct. 543.

Destruction of transfer or assurance of money.— A statute punishing the destruction of any written transfer or assurance of money, stock, goods and chattels, or other property does not include the destruction of an instrument whereby one person acknowledged to have received from another certain seed for which he is to return a greater amount, the seed to be sown on shares upon the farm of the acknowledged owner, and who further binds himself not to convey or sell without the restriction that the acknowledgee is to have his pay from the acknowledgor's part. State *v.* Farrand, 8 N. J. L. 333.

Explosion of dynamite.— Under a statute providing that penal statutes are to be construed according to the fair import of their terms, it has been held that a statute punishing the malicious explosion of dynamite and other enumerated explosives in "any building . . . or other place where human beings usually inhabit, assemble, frequent, or pass and re-pass," the malicious depositing and exploding of dynamite in the levels, stopes, and chutes of a working mine is punishable. *In re* Mitchell, 1 Cal. App. 396, 82 Pac. 347.

The destruction of standing wheat cannot be punished under a statute providing against the malicious destruction of any barrack, cock, crib, rick, or stack. Parris *v.* People, 76 Ill. 274.

Throwing stones at a street-car is punishable under a statute punishing the throwing of stones at any car or locomotive. State *v.* Lang, 14 Mo. App. 247.

Injuries to building.— Under a statute punishing injury to public buildings a church is not included. Collum *v.* State, 109 Ga. 531, 35 S. E. 121. A statute providing for the punishment of the injury of any house or building is sufficient to embrace a jail. State *v.* Bryan, 89 N. C. 531.

Use of building for indecent purpose.— Entering a court-house and urinating against the door-facing therein is using the building for an indecent purpose within Ga. Pen. Code, § 725, and such act is a misdemeanor whether as a result thereof the building is injured or defaced or not. Smith *v.* State, 110 Ga. 292, 35 S. E. 166.

A statute relating to the injury or destruction of inanimate property will not include the injury or killing of animals. Patton *v.* State, 93 Ga. 111, 19 S. E. 734, 24 L. R. A. 732.

Papers and documents.— Under a statute punishing the malicious destruction or secretion of any goods, chattels, or valuable papers of another, the destruction of election tickets may be punished. State *v.* Click, 115 Tenn. 283, 90 S. W. 855.

33. See, generally, STATUTES.

Goods, wares, or merchandise.— Under a statute punishing the wilful destruction or injury of any goods, wares, or merchandise, or any other personal property of another, a prosecution may be had for injury to a threshing-machine. State *v.* McLain, 92 Mo. App. 456.

Agricultural products or property.— A statute punishing the destruction of growing fruit, corn, grain, or other agricultural products or property, real or personal, is not sufficiently broad to cover the destruction of a set of harness (Terry *v.* State, 25 Tex. App. 714, 8 S. W. 934), or malicious injury to a private storehouse (Beeson *v.* State, 23 Tex. App. 406, 5 S. W. 118), or the "killing" of a locomotive engine (Murray *v.* State, 21 Tex. App. 620, 2 S. W. 757, 57 Am. Rep. 623).

34. State *v.* Switzer, 59 S. C. 225, 37 S. E. 818.

35. Com. *v.* Falvey, 108 Mass. 304, holding that an indictment will lie for poisoning chickens, notwithstanding they are not included in a statute providing for the punishment of the poisoning of horses, cattle, and other beasts.

36. See State *v.* Helmes, 27 N. C. 364, holding that an indictment for the destruction of standing corn could not be maintained. But *compare* People *v.* Upton, 9 N. Y. Suppl.

of an indictment at common law.[37] A statute punishing an injury to real or personal property will not cover an injury to an incorporeal right.[38]

D. Malice. Malice is an essential ingredient of an offense of malicious mischief both at common law[39] and under almost all of the statutes defining the offense.[40] As distinguished from the meaning attributed to "maliciously" as ordinarily employed in criminal statutes, as equivalent to wrongfully, intentionally, and without just cause or excuse,[41] the word has been held in many statutes directed against the unlawful destruction of property to have a restricted meaning peculiar to such statutes, implying that the act to which it relates must have resulted from actual ill-will or revenge.[42] This distinction first arose under the English statutes, but the statutes of the United States have been regarded as sufficiently like those of England to have been given the same construction in many cases.[43] But where statutes have been enacted providing that the offense may be committed through malice against the owner of the property in respect to which it is committed or otherwise, it is not necessary that defendant should have been actuated by actual ill-will toward the owner or any other person.[44] And even in

684; Loomis *v.* Edgerton, 19 Wend. (N. Y.) 419, both holding that malicious mischief may be done to any kind of property.

Destruction of a growing crop has been held to be trespass and not a criminal offense. Parris *v.* People, 76 Ill. 274; State *v.* Helmes, 27 N. C. 364. See, generally, CROPS, 12 Cyc. 981.

37. Com. *v.* Bryant, 3 Kulp (Pa.) 290.

38. Laws *v.* Eltringham, 8 Q. B. D. 283, 15 Cox C. C. 22, 46 J. P. 230, 51 L. J. M. C. 13, 48 L. T. Rep. N. S. 64, 30 Wkly. Rep. 245, holding, where the soil of a town moor was vested in the corporation of the town in fee, but freemen and widows of deceased freemen of the town were under statute entitled to the "full right and benefit to the herbage" of the town moor for two milch cows, that this right to the herbage was not "any real and personal property whatsoever" within the meaning of 24 & 25 Vict. c. 97, § 52.

39. Malice toward the owner must be the inducement in the spoliation or destruction of property to constitute malicious mischief at common law. State *v.* Newby, 64 N. C. 23. See *supra*, I, A.

40. See the statutes of the several states. And see the following cases:

Connecticut.—State *v.* Foote, 71 Conn. 737, 43 Atl. 488, so holding on an indictment under a statute punishing the wilful injury to a public building.

Iowa.— State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41; State *v.* Flynn, 28 Iowa 26.

Tennessee.— Hampton *v.* State, 10 Lea 639, holding that under a statute making it a misdemeanor to maliciously destroy, injure, or secrete, any goods, chattels, or valuable papers of another, the act must be wanton and malicious and its primary motive be to do injury and gratify a malevolent disposition.

Texas.— Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204.

England.— Reg. *v.* Prestney, 3 Cox C. C. 505 (holding that damage done to a fence by a poacher's dog in pursuit of game was not a malicious injury within 7 & 8 Geo. IV, c. 30, § 23, since there must be the object of doing damage to the thing injured); Hall *v.* Richardson, 54 J. P. 345 (holding that where the servant of a milkman spilt some of his master's milk, and to prevent loss to his master filled in water to make up the quantity and sold the diluted milk to customers, he had not committed the offense of wilfully or maliciously damaging his master's property within 24 & 25 Vict. c. 97, § 52.

In prosecutions for injuries to animals see ANIMALS, 2 Cyc. 428 *et seq.*

41. See State *v.* Boies, 68 Kan. 167, 74 Pac. 630. See, generally, CRIMINAL LAW, 12 Cyc. 150.

42. State *v.* Boies, 68 Kan. 167, 170, 74 Pac. 630, in which it was said: "The special meaning noted had its origin in England in prosecutions under what is known as the 'black act' (9 Geo. I, ch. 22), enacted in 1722, so called because it was designed to repress the depredations of bands of marauders calling themselves 'blacks,' some of them being disguised by blacking their faces." In Brown *v.* State, 26 Ohio St. 176, it is suggested that the peculiar construction of the language of the Black Act was adopted because of the disproportionate severity of the punishment, the judges naturally inclining to an interpretation that would save the life of defendant.

A spirit of cruelty, hostility, or revenge must exist; it is not sufficient that the act be one which is prohibited by law, wilfully done and without lawful excuse. Com. *v.* Williams, 110 Mass. 401; Com. *v.* Walden, 3 Cush. (Mass.) 558; State *v.* Johnson, 7 Wyo. 512, 54 Pac. 502.

43. See State *v.* Boies, 68 Kan. 167, 74 Pac. 630. See also cases cited in the preceding note.

44. State *v.* Boies, 68 Kan. 167, 74 Pac. 630; Reg. *v.* Welch, 1 Q. B. D. 23, 13 Cox C. C. 121, 45 L. J. M. C. 17, 33 L. T. Rep. N. S. 753, 24 Wkly. Rep. 288; Reg. *v.* Pembliton, L. R. 2 C. C. 119, 12 Cox C. C. 607, 43 L. J. M. C. 91, 30 L. T. Rep. N. S. 405, 22 Wkly. Rep. 553; Reg. *v.* Tivey, 1 C. & K.

the absence of such an enactment a similar rule has been followed in some jurisdictions.[45]

E. Wilfulness, Wantonness, and Unlawfulness. Both unlawfulness and wilfulness are, under some statutes, essentials of the offense.[46] An act is wanton when it is needless for any rightful purpose, is without adequate legal provocation, and manifests an indifference to the rights of others.[47] Wilfully, as employed in a statute punishing malicious mischief, has been held to import more than voluntarily or knowingly, and to mean with evil intent or legal malice, or without reasonable grounds for believing the act to be lawful.[48] To constitute the crime of wrongfully destroying property without the consent of the owner, under certain statutes, it is not necessary that defendant shall have been wrongfully in the possession of the property.[49]

F. Acts in Defense of Right or Under Claim of Right. Since malice is an essential of malicious mischief,[50] an act will not constitute malicious mischief where it is done in good faith and under a reasonable claim of right.[51] But under

704, 1 Den. C. C. 63, 47 E. C. L. 704 (based on 7 & 8 Geo. IV, c. 30, § 25).

St. 32 & 33 Vict. c. 22, § 66, does not dispense with proof of malice, but means merely that the malice need not be conceived against the owner of the property injured. Reg. *v.* Bradshaw, 38 U. C. Q. B. 564.

45. *Georgia.*— Mosely *v.* State, 28 Ga. 190, holding that it is sufficient that the act be wanton and reckless, although there is no actual ill-will toward the owner of the property.

Iowa.— State *v.* Roscum, 128 Iowa 509, 104 N. W. 800, holding that proof of an intentional act without just cause was sufficient to support a conviction for maliciously severing and carrying away fruit trees.

Louisiana.— State *v.* Dowdell, 106 La. 645, 31 So. 151, holding that any formed design of doing mischief is called "malicious," whether the mischief be intended to fall upon a particular person, or upon any person who may be within its range.

Mississippi.— Funderhurk *v.* State, 75 Miss. 20, 21 So. 658, holding that on a prosecution for malicious mischief in injuring a house, it is no defense that defendant had no malice against the owner or intent to injure him, but his purpose was to commit a crime against another who had taken refuge in the house.

Rhode Island.— State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844, holding that upon a prosecution for injury to a building, express malice against the owner of the building need not be shown.

South Carolina.— State *v.* Doig, 2 Rich. 179, holding, under a statute punishing the malicious destruction of property, that defendant need not have acted wantonly or spitefully, but it is sufficient that he shall have acted wilfully, without just cause or excuse.

Canada.— Reg. *v.* Elston, 10 N. Brunsw. 2, holding that if a building is pulled down unlawfully, and without any *bona fide* belief by defendants that they had a right to do it, the jury may infer malice; that malice may be inferred from the commission of a wrongful act, forbidden by law, without any personal malice against the owner of the property.

46. People *v.* Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. Rep. 574 [*reversing* 15 N. Y. Suppl. 612]. See State *v.* Alexander, 14 Rich. (S. C.) 247.

The word "maliciously" in 24 & 25 Vict. c. 97, § 51, requires that an act to be criminal within that section should be done wilfully. Reg. *v.* Pembliton, L. R. 2 C. C. 119, 12 Cox C. C. 607, 43 L. J. M. C. 91, 30 L. T. Rep. N. S. 405, 22 Wkly. Rep. 553, holding that a conviction under that section, for unlawfully and maliciously committing damage above the value of £5 to a house, should be quashed where the person, after fighting in a crowd in the street near the window of the house, separated himself from the crowd, picked up a stone, threw it at one of the persons with whom he had been fighting, missed his aim, and hit a plate glass window above the value of £5 in the house, but did not intend to break the window.

47. State *v.* Brigman, 94 N. C. 888.

Attempt of prisoner to escape.— An injury to county property perpetrated by a person in an attempt to escape from jail, whether his purpose was to escape from prison or only to impair the jail house and cage, is malicious mischief. Allgood *v.* State, 95 Tenn. 471, 32 S. W. 308, under a statute making it a misdemeanor to wantonly deface or disfigure any building belonging to a county. See also People *v.* Boren, 139 Cal. 210, 72 Pac. 899.

48. Rose *v.* State, 19 Tex. App. 470, holding a person not guilty of wilful and malicious injury to a person's goods, where he was shown to have, while walking along a public sidewalk, knocked and kicked down the goods of a storekeeper displayed in front of his store and obstructing the sidewalk.

49. State *v.* Pike, 33 Me. 361, holding that where defendant was charged with having unlawfully destroyed certain promissory notes, it was immaterial whether the property had come into his possession rightfully or wrongfully.

50. See *supra*, I, D.

51. Com. *v.* Drass, 146 Pa. St. 55, 23 Atl.

some statutes it is held that there must be fair and reasonable grounds in fact for the belief of the right.[52] So acts done in the protection of a legal right,[53] in the protection of the possession of property,[54] or in the protection of the property itself[55] will not constitute malicious mischief. Nor under a statute punishing wilful injuries is a person liable where he acts under an honest although erroneous belief of authority in the performance of a supposed duty.[56] But one who uses authority maliciously or spitefully, to the destruction of the property of another, may be guilty of malicious mischief.[57] A person is not liable for malicious mischief in abating a public nuisance by which he is aggrieved, where he does so without a breach of the peace.[58] The fact that one is illegally confined in a public jail does not justify his injuring it.[59] An offer to pay, or a payment to the person injured, of the damages sustained is not a defense.[60]

G. Destruction or Injury of Property — 1. Necessity. In order that the offense of malicious mischief may be perpetrated, it is necessary that there be

233; Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204 (so holding where a member of one faction in a church forcibly broke into the building); Reg. *v.* Clemens, [1898] 1 Q. B. 556, 19 Cox C. C. 18, 67 L. J. Q. B. 482, 78 L. T. Rep. N. S. 204, 46 Wkly. Rep. 416 (holding that if upon the evidence the jury were reasonably convinced that defendants used greater violence than it could properly be supposed was necessary for the assertion of the right or its protection, the jury ought to find defendants guilty of malicious damage); Denny *v.* Thwaites, 2 Ex. D. 21, 46 L. J. M. C. 141, 35 L. T. Rep. N. S. 628; Leyson *v.* Williams, 54 J. P. 631; Crick *v.* Crick, 6 Wkly. Rep. 594; Reg. *v.* Bradshaw, 13 Can. L. J. N. S. 41.

The digging of a ditch for a reasonable purpose on the land of another, under the belief that it was the land of defendant, is not punishable under a statute punishing the wilful or malicious injury or destruction of real property. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963.

An honest mistake as to the legal rights of the perpetrator may prevent an act from constituting malicious mischief. State *v.* Zinn, 26 Mo. App. 17, holding that an information charging the unlawful, wilful, and wanton destruction of a hedge could not be sustained upon evidence that defendant trimmed a hedge which he believed to be upon his own land, in a manner in which a hedge of that size was properly trimmed.

52. See Reg. *v.* Davy, 27 Ont. App. 508. See also Hamilton *v.* Bone, 16 Cox C. C. 437, 52 J. P. 726; Rex *v.* Whately, 4 M. & R. 431.

53. Carstarphen *v.* State, 112 Ga. 230, 37 S. E. 423.

54. Sattler *v.* People, 59 Ill. 68 (so holding where defendant pulled down a fence which the complainants were attempting to erect across his land); People *v.* Kane, 142 N. Y. 366, 37 N. E. 104 [*reversing* 73 Hun 542, 26 N. Y. Suppl. 1121] (holding that a conviction for unlawful and wilful destruction of property is invalid where it appears that defendant openly, and on advice of counsel, destroyed a boat by order of the owner of a pond in an effort to protect his possession of the pond from the trespass of the owner of the boat, he having repeatedly taken the boat back to the owner); People *v.* Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574 [*reversing* 15 N. Y. Suppl. 612].

55. Brady *v.* State, (Tex. Cr. App. 1894) 26 S. W. 621 (holding that the owner of property was not guilty of malicious mischief in the destruction of hay stacked by a lessee of the premises upon a garden, the destruction being for the purpose of protecting the property from injury through the starting of seed); Heard *v.* Coles, 56 J. P. 119.

56. State *v.* Foote, 71 Conn. 737, 43 Atl. 488, so holding on an indictment under a statute punishing the wilful injury to a public building.

57. Harris *v.* State, 73 Ga. 41, so holding under a statute punishing all acts of wilful and malicious mischief in the injuring or destroying of any public or private property not otherwise specifically made punishable by statute.

Employees of a telegraph company who, with knowledge of the rights of an adjoining landowner in trees in the public highway, heedlessly, recklessly, and carelessly injure such trees as against his protest, are liable to a prosecution for wrongful injury to property. Daily *v.* State, 51 Ohio St. 348, 37 N. E. 710, 46 Am. St. Rep. 578, 24 L. R. A. 724, so holding, although the landowner had not objected at the time the telegraph line was built, and although the construction of the telegraph line upon the public highway had been authorized by the legislature.

58. People *v.* Severance, 125 Mich. 556, 84 N. W. 1089. And see State *v.* Bush, 29 Ind. 110, holding, on a prosecution for cutting the banks of a reservoir of a canal, that it was proper to show that the canal had ceased to be used and that the reservoir caused sickness in the neighborhood in which defendants resided. But see Smart *v.* Com., 27 Gratt. (Va.) 950, holding that persons breaking down a toll-gate are guilty, whether or not the order of the county court authorizing the erection of the gate was valid.

59. People *v.* Boren, 139 Cal. 210, 72 Pac. 899.

60. State *v.* Doig, 2 Rich. (S. C.) 179.

injury to property;[61] but since the statutes as a rule punish either the destruction or injury of property[62] it is not necessary that the property be entirely destroyed.[63] Under certain statutes damage to a stated amount must be shown.[64]

2. **Person Affected.** As a general rule under the statutes, while the person injured must have some right of property,[65] it is not necessary that the actual legal title be in him;[66] but it is sufficient that he has a right of possession, although only temporary.[67] It is of course necessary that the

61. Pollet *v.* State, 115 Ga. 234, 41 S. E. 606; Patterson *v.* State, 41 Tex. Cr. 412, 55 S. W. 338 (holding that evidence that defendant had brought rubbish from outside of a blacksmith shop and stacked it inside the shop to a height of six or seven feet, and that it took the owner half a day to remove the rubbish, was insufficient to sustain a conviction); Reg. *v.* Caswell, 20 U. C. C. P. 275.

An act which places the owner of property to an expense and annoyance, but which does not destroy or injure the property, is not within a statute punishing the injury or destruction of public or private property. Pollet *v.* State, 115 Ga. 234, 41 S. E. 606, holding that one maliciously throwing down cordwood was not guilty under such a statute.

Damage to realty.— Under a statute punishing the wilful or malicious injury, damage, or spoil to or upon any real property, there must be proof of actual damage to the realty itself, and the gathering of mushrooms which, while of value to the owner, grew spontaneously and were uncultivated, will not constitute an offense within such a statute. Gardner *v.* Mansbridge, 19 Q. B. D. 217, 16 Cox C. C. 281, 51 J. P. 512, 57 L. T. Rep. N. S. 265, 35 Wkly. Rep. 809.

62. See the statutes of the several states.

63. Com. *v.* Sullivan, 107 Mass. 218; Com. *v.* Soule, 2 Metc. (Mass.) 21. But see Reg. *v.* Boucher, 5 Jur. 709, holding that in order to support an indictment under 7 & 8 Geo. IV, c. 30, § 18, for destroying hop-binds it must be shown that the plant died in consequence of the injury received, and proof of the infliction of injury by cutting, bruising, etc., is insufficient.

Trees.— Under a statute punishing cutting or otherwise destroying trees grown for profit, it is sufficient to constitute the offense that they be cut down, although they are not totally destroyed. Rex *v.* Taylor, R. & R. 277, so holding where grafted trees were cut below the graft.

What constitutes injury.— Under a statute punishing the injury of a building, any injury is included which will render a building less agreeable, useful, or comfortable for the purpose for which it was intended. Mitchell *v.* State, (Tex. Cr. App. 1901) 62 S. W. 572.

What constitutes breaking or destroying.— The words "breaking or destroying," as employed in a statute relating to injuries to buildings, have been construed to mean to destroy the completeness of the portion of the building with regard to which the offense is charged. State *v.* McBeth, 49 Kan. 584, 31 Pac. 145, holding that no offense, under such a statute, was committed where under a claim of right to possession of a building the landlord had forced open a door, occasioning no damage to the doors or premises except the forcing of two small screws from the door casing.

Defacing.— A statute punishing the defacing of a public building includes the staining of a building with any article that will discolor it, although the stains may not be of a permanent and lasting character. Mitchell *v.* State, (Tex. Cr. App. 1901) 62 S. W. 572.

Removal or disarrangement of parts of a machine has been held to constitute an offense under a statute punishing the destruction or damage of a machine, although the parts themselves are not destroyed or injured. Reg. *v.* Fisher, L. R. 1 C. C. 7, 10 Cox C. C. 146, 11 Jur. N. S. 983, 35 L. J. M. C. 57, 13 L. T. Rep. N. S. 380, 14 Wkly. Rep. 58; Rex *v.* Tacey, R. & R. 336.

64. See Reg. *v.* Whiteman, 6 Cox C. C. 370, Dears. C. C. 353, 18 Jur. 434, 23 L. J. M. C. 120, holding under a statute punishing damage to trees to the amount of £5, that an indictment for injury to trees in a hedge could not be sustained where the actual injury done to the trees was for the amount of £1, although the expenses of repairing the hedge would bring the total amount of damage to more than £5.

Where the statutory amount of damage is not inflicted, it has been held that a prosecution may be had under another statute in which no limitation as to amount is imposed. Reg. *v.* Dodson, 9 A. & E. 704, 36 E. C. L. 371.

Successive acts of injury cannot be cumulated in order to make up the statutory amount. Reg. *v.* Williams, 9 Cox C. C. 338.

65. Dotson *v.* State, 6 Coldw. (Tenn.) 545.

A building erected by a trespasser may be removed by the owner. Malone *v.* State, 11 Lea (Tenn.) 701.

A holder of a tax lien is not to be regarded as the owner of property so that it may be the subject of malicious mischief as against him. Adkin *v.* Pillen, 136 Mich. 682, 100 N. W. 176.

66. Malone *v.* State, 11 Lea (Tenn.) 701.

67. Malone *v.* State, 11 Lea (Tenn.) 701; State *v.* Mathes, 3 Lea (Tenn.) 36. *Contra.* Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963 [*distinguishing* Carter *v.* State, 18 Tex. App. 573; Behrens *v.* State, 14 Tex. App. 121; Jenkins *v.* State, 7 Tex. App. 146, as cases based upon other statutes relative to pulling down fences].

injury be done or occasioned by one who is not the rightful owner or entitled to possession.[68]

II. PROSECUTION AND PUNISHMENT.

A. In General. Whether malicious mischief may be prosecuted upon indictment is a question governed by the statutes of the particular jurisdiction and the punishment imposed.[69] Where a malicious mischief is a misdemeanor only, those taking part are equally chargeable as principals, and the doctrine of principal and accessory does not apply.[70]

B. Indictment or Information — 1. General Rules. The general rules governing indictments and informations[71] are applicable to prosecutions for malicious mischief. Hence it is usually regarded as sufficient that the nature of the offense charged be so stated as easily to be understood by the jury,[72] if the averments charging the offense are certain and positive, and not by way of argument or inference.[73] An indictment under a statute cannot be sustained as a charge at common law, where it is vague and indefinite as to the precise nature of the offense.[74]

2. Following Language of Statute. It is generally sufficient to charge the offense in the language of the statute, if sufficiently definite to inform defendant of the nature of the offense with which he is charged.[75] But it is not always sufficient to follow the words of the statute. The charge must be as specific as the proof adduced in its support must be.[76]

3. Negative Averments. It is sometimes necessary that an indictment for malicious mischief should contain negative averments, as that the property destroyed or injured was the property of another than defendant, and that defendant had no interest therein or right to the possession thereof, and other like matters negativing defendant's right to do the act with which he is charged.[77] However, an

Under a statute punishing the malicious injury of buildings, it has been held unnecessary to show damage to the owner of the building. State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844, so holding where the building injured was in the possession of a tenant.

68. Malone *v.* State, 11 Lea (Tenn.) 701.

A statute punishing injury to houses and inclosures does not cover a case in which the destruction or damage is by the owner. State *v.* Mace, 65 N. C. 344 (holding that an indictment under such a statute could not be supported by proof that a dwelling-house was torn down by the owner or his lessee under his authority, although it was occupied at the time by a tenant at sufferance); State *v.* Mason, 35 N. C. 341. And an injury by a tenant in possession, although amounting to waste, does not constitute an offense under such a statute. State *v.* Whitener, 92 N. C. 798; State *v.* Mason, 35 N. C. 341.

69. See the statutes of the several states. And see People *v.* Maxon, 1 Ida. 330; State *v.* Brant, 14 Iowa 180; *Ex p.* Moffet, 10 Montreal Leg. N. 19.

Particular form of accusation applicable in general see Indictments and Informations, 22 Cyc. 173 *et seq.*

70. State *v.* McLain, 92 Mo. App. 456. See, generally, Criminal Law, 12 Cyc. 183 text and note 36.

71. See Indictments and Informations.

72. Com. *v.* Bryant, 3 Kulp (Pa.) 290.

Description of the offense as felony or misdemeanor is not necessary. People *v.* Boren, 139 Cal. 210, 72 Pac. 899, an indictment for injury to a jail.

Form of indictment: For wilfully injuring and defacing a public building see Mitchell *v.* State, (Tex. Cr. App. 1901) 62 S. W. 572. For disconnecting oil tank piping and wasting oil see State *v.* Switzer, 59 S. C. 225, 37 S. E. 818, holding the indictment good, both at common law and under the statute.

73. Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204. See, generally, Indictments and Informations, 22 Cyc. 293 *et seq.*

74. Com. *v.* Johnson, 13 Pa. Co. Ct. 543.

75. Harris *v.* State, 73 Ga. 41 (holding an indictment sufficient which stated that the property was destroyed, described it and named the owner); State *v.* Martin, 107 N. C. 904, 12 S. E. 194; State *v.* Doig, 2 Rich. (S. C.) 179 (indictment for maliciously breaking a waste-weir of a canal); Rex *v.* Ashton, 2 B. & Ad. 750, 22 E. C. L. 314; Reg. *v.* Elston, 10 N. Brunsw. 2 (holding that in an indictment under 1 Rev. St. cap. 147, for unlawfully and maliciously pulling down a building, it is not necessary to allege that it was done "riotously").

The crime of injuring a public jail, which is charged substantially in the language of the statute, and as committed at the county of S, and in and upon the county jail of said county, is sufficiently charged. People *v.* Sheldon, 68 Cal. 434, 9 Pac. 457.

76. State *v.* Hill, 79 N. C. 656. See, generally, Indictments and Informations, 22 Cyc. 335 *et seq.*

77. Brazleton *v.* State, 66 Ala. 96; State *v.*

exception [78] or proviso [79] in the statute defining the offense need not be negatived where it is separable from the description of the defense,[80] and matters of affirmative defense peculiarly within the knowledge of defendant need not be negatived by the prosecution.[81] An indictment under a statute need not allege that the defense does not come within the description of any offense otherwise provided for.[82]

4. TIME AND PLACE. The indictment should name the day on which the offense was committed [83] and state the place where the mischief was done.[84]

5. DESCRIPTION OF PROPERTY. It is essentially necessary that the indictment should contain a description of the property destroyed or injured, which must be as certain as the circumstances will permit.[85]

6. OWNERSHIP OF PROPERTY. Although it is held in some jurisdictions, under particular statutes, that the ownership of the property is immaterial,[86] as a general rule the ownership of the property destroyed or injured must be averred [87] and shown to be in some person other than defendant,[88] unless it is unknown, and

Stanley, 63 Mo. App. 654; State *v.* Crenshaw, 41 Mo. App. 24; *Ex p.* Eads, 17 Nebr. 145, 22 N. W. 352; State *v.* Smith, 21 Tex. 748; Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204.

78. State *v.* Batson, 31 Mo. 343.

79. Hewitt *v.* State, 121 Ind. 245, 23 N. E. 83.

80. See INDICTMENTS AND INFORMATIONS, 22 Cyc. 344.

81. Smith *v.* District of Columbia, 12 App. Cas. (D. C.) 33; State *v.* Whittier, 21 Me. 341, 38 Am. Dec. 272; State *v.* Batson, 31 Mo. 343.

Negativing defenses in general see INDICTMENTS AND INFORMATIONS, 22 Cyc. 304.

82. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963 (injury to real property); Todd *v.* State, 39 Tex. Cr. 232, 45 S. W. 596.

83. Bailey *v.* State, 65 Ga. 410. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 313.

84. State *v.* Slocum, 8 Blackf. (Ind.) 315. See, generally, INDICTMENTS AND INFORMATIONS, 22 Cyc. 307.

85. *Indiana.*— Birdg *v.* State, 31 Ind. 88.

Massachusetts.— Com. *v.* Bean, 11 Cush. 414. And see Com. *v.* Cox, 7 Allen 577, holding an indictment which alleges that a certain panel was a panel of an omnibus, and that the omnibus was injured by the breaking of the panel, sufficiently alleged that the panel was a part of the omnibus.

Nebraska.— State *v.* Priebnow, 14 Nebr. 484, 16 N. W. 907, holding that under a statute which makes it a crime to cut down or injure "any fruit, ornamental, shade, or other trees," the property of another, to a certain amount in value, an indictment which charges that the trees cut were "ornamental and shade trees" without specifying the particular kind is sufficient.

North Carolina.— State *v.* Hill, 79 N. C. 656.

Tennessee.— Taylor *v.* State, 6 Humphr. 285; State *v.* Pearce, Peck 66.

Texas.— Ritter *v.* State, 33 Tex. 608 (holding that in an indictment for malicious mischief to real estate by the removal of a house therefrom, a description of the real estate as "the lands and premises constituting and composing the homestead" of the person alleged to be the owner is sufficient); Pratt *v.* State, 19 Tex. App. 276; Brown *v.* State, 16 Tex. App. 245.

86. See Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204.

In case of cruelty to animals see ANIMALS, 2 Cyc. 347.

87. *Georgia.*— Smith *v.* State, 63 Ga. 168.

Illinois.— Staaden *v.* People, 82 Ill. 432, 25 Am. Rep. 333.

Indiana.— State *v.* Jackson, 7 Ind. 270; Read *v.* State, 1 Ind. 511.

Iowa.— State *v.* Brant, 14 Iowa 180.

Kansas.— State *v.* Haney, 32 Kan. 428, 4 Pac. 831.

Nebraska.— *Ex p.* Eads, 17 Nebr. 145, 22 N. W. 352.

North Carolina.— State *v.* Deal, 92 N. C. 802; State *v.* Hill, 79 N. C. 656; State *v.* Knox, 61 N. C. 312; State *v.* Sears, 61 N. C. 146; State *v.* Mason, 35 N. C. 341.

Pennsylvania.— Davis *v.* Com., 30 Pa. St. 421.

Tennessee.— Haworth *v.* State, Peck 89.

Texas.— State *v.* Smith, 21 Tex. 748; Cleavinger *v.* State, 43 Tex. Cr. 273, 65 S. W. 89 (holding that under Pen. Code, art. 499, prescribing a penalty for wilfully injuring or defacing a public building, evidence, on a trial for defacing such a building, that the building defaced was a school-house built about eight years before, and that during that period the public school had been taught there, and that it had also been used for church purposes, is insufficient, since it does not prove that the building was owned or controlled and held by the public authorities for a public use); Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204; Pratt *v.* State, 19 Tex. App. 276; Brown *v.* State, 16 Tex. App. 245.

Destruction of election ballots.— An indictment, under a statute punishing the destruction of the valuable papers of another for the destruction of election ballots should lay the property of the ballots in the election commissioners of the county. State *v.* Click, 115 Tenn. 283, 90 S. W. 855.

88. Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204.

then that fact should be averred.[89] An allegation of ownership, however, is sufficient. It is not necessary to deraign the title;[90] and as the gravamen of the offense is usually an intent to injure either the owner or possessor of the property destroyed or injured, it is sufficient to lay the ownership to the person in possession at the time of the offense.[91] On the other hand it is sufficient to aver the general ownership, although the property was in possession of a tenant at the time of the injury.[92]

7. Nature and Character of Injury. The indictment should aver specifically the nature and character of the injury done to the property.[93] But it is not necessary to describe minutely the manner of the destruction or injury.[94] It is immaterial whether the injury be alleged to be damage done to the property or the owner.[95]

8. Value of Property and Amount of Injury. Neither the value of the property destroyed or injured nor the amount of damage sustained need be alleged in the indictment,[96] unless the punishment is administered in proportion to the amount of injury done, in which case both the value of the property and the amount of injury done to it should be averred and proved.[97] In this latter

89. State *v.* Anderson, 34 Tex. 611. See, generally, Indictments and Informations, 22 Cyc. 348.

90. State *v.* Brant, 14 Iowa 180, holding that an indictment laying property in the elders of a church is sufficient. Where an indictment charges defendants with maliciously injuring a building known as the "National Hall" the property of a benevolent society, a "corporation duly organized under the laws of the state," and there is proof that defendants injured a building having such name; that the society was in possession of the building by one of its trustees, and was acting as a corporation, it is unnecessary to prove that the record title of the land is in the society, or that the society is incorporated, since McClain's Code, § 5687, provides that when an offense involves the commission of an injury to persons or property, and is described in other respects with sufficient certainty, an erroneous allegation as to the name of the person injured is immaterial. State *v.* Semotan, 85 Iowa 57, 51 N. W. 1161.

91. *California.*— People *v.* Coyne, 116 Cal. 295, 48 Pac. 218.
Indiana.— Read *v.* State, 1 Ind. 511.
Kansas.— State *v.* Gurnee, 14 Kan. 111.
Nevada.— State *v.* Rising, 10 Nev. 97.
Pennsylvania.— Davis *v.* Com., 30 Pa. St. 421.
Tennessee.— State *v.* Mathes, 3 Lea 36.
Texas.— Woodward *v.* State, 33 Tex. Cr. 554, 28 S. W. 204.
England.— Reg. *v.* Jones, 1 C. & K. 181, 2 Moody C. C. 293, 47 E. C. L. 181.

92. State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844. *Contra*, State *v.* Whitener, 92 N. C. 798; State *v.* Mason, 35 N. C. 341, both holding that where the injury is alleged to be to a dwelling-house it should be laid as the dwelling-house of a lessee who is actually in possession, and not of the reversioner.

93. *California.*— People *v.* Boren, 139 Cal. 210, 72 Pac. 899.
Connecticut.— State *v.* Costello, 62 Conn. 128, 25 Atl. 477.
Indiana.— State *v.* Aydelott, 7 Blackf. 157.
Missouri.— State *v.* Batson, 31 Mo. 343.
New Hampshire.— State *v.* Webster, 17 N. H. 543, holding that an indictment charging that defendant wilfully and maliciously cut off a rope having a banner attached to it, by means of which the rope and banner, which was the property of the persons named in the indictment, were injured, was sufficient under a statute providing that the wilful and malicious commission of an act whereby the real or personal property of another is injured, should be punishable.
Texas.— Todd *v.* State, 39 Tex. Cr. 232, 45 S. W. 596.
Canada.— Reg. *v.* Spain, 18 Ont. 385.

94. Hayworth *v.* State, 14 Ind. 590; Taylor *v.* State, 6 Humphr. (Tenn.) 285.

95. Kinsman *v.* State, 77 Ind. 132; State *v.* Pitzer, 62 Ind. 362; State *v.* Sparks, 60 Ind. 298.

96. *Alabama.*— Caldwell *v.* State, 49 Ala. 34.
Arkansas.— State *v.* Culbreath, 71 Ark. 80, 71 S. W. 254.
Georgia.— Harris *v.* State, 73 Ga. 41.
Indiana.— State *v.* Clevinger, 14 Ind. 366.
Massachusetts.— Com. *v.* Cox, 7 Allen 577.
Mississippi.— Funderburk *v.* State, 75 Miss. 20, 21 So. 658.
Texas.— Stanton *v.* State, 45 Tex. Cr. 168, 74 S. W. 771.

97. State *v.* Garner, 8 Port. (Ala.) 447; State *v.* McKee, 109 Ind. 497, 10 N. E. 405; Sample *v.* State, 104 Ind. 289, 4 N. E. 40 (holding that the value of the property injured need not be stated in an affidavit for a prosecution for a malicious trespass, where there is an averment that the property or its owner was damaged in a certain amount); Harness *v.* State, 27 Ind. 425; Com. *v.* Cox, 7 Allen (Mass.) 577; Thomas *v.* State, 42 Tex. 235; State *v.* Heath, 41 Tex. 426; Stanton *v.* State, 45 Tex. Cr. 168, 74 S. W. 771; Beaufier *v.* State, (Tex. Cr. App. 1897) 38 S. W. 608; Uecker *v.* State, 4 Tex. App. 234; Nicholson *v.* State, 3 Tex. App. 31.

event, however, the indictment may set out the collective value of the different items of property destroyed or injured.[98]

9. Malice. An indictment for malicious mischief should as a general rule directly charge malice toward the owner or possessor of the property,[99] or so describe the offense as necessarily to embrace it; and where the indictment concludes as at common law, and fails to charge in terms that the offense was committed out of malice toward the owner of the property, it must be charged that the offense was committed "mischievously," as that is the generic term in the description of the crime.[1] Unless it is charged that the act was done maliciously or mischievously, nothing more than the commission of a trespass is charged and the indictment is fatally defective.[2] So where the word "maliciously" is used in the statutory description of the offense, it must be charged in the indictment that the act was done maliciously,[3] and it is not sufficient to use the words wilfully and unlawfully.[4] A charge that an act was done unlawfully, wilfully, and maliciously is, however, sufficient without a more definite averment of guilty knowledge in defendant.[5]

10. Feloniousness, Unlawfulness, Wilfulness, Etc. Under statutes making malicious mischief a felony it must be alleged that the act was feloniously done unless the necessity has been removed by statute.[6] The term "unlawfully" which is frequently used in the description of the offense is unnecessary wherever the crime existed at common law, and is manifestly illegal; nor is it necessary to use it in a prosecution under a statute, unless it is made a part of the statutory description of the crime.[7] It is not the equivalent of the statutory word "wilfully," and cannot supply its place in the indictment.[8] The descriptive word "wilfully," as used in the statute, means not simply a voluntary and intentional act, which is in fact wrongful, but an act done for a wrongful purpose, with a design to injure another, or from mere wantonness or lawlessness.[9] Where the descriptive words appear in the statute disjunctively, or in the alternative, as "wilfully or maliciously," or "maliciously or wantonly," it is necessary to allege and prove one only.[10] But where the statute uses the words conjunctively, as

98. Com. *v.* Falvey, 108 Mass. 304 (so holding upon an indictment for poisoning chickens, where all of the chickens alleged were shown to have been killed); Reg. *v.* Thomas, 12 Cox C. C. 54, 24 L. T. Rep. N. S. 398.

99. U. S. *v.* Gideon, 1 Minn. 292; State *v.* Jackson, 34 N. C. 329; State *v.* Rector, 34 Tex. 565; Rex *v.* Lewis, 2 Russ. C. & M. 799. And see Powell *v.* Williamson, 1 U. C. Q. B. 154.

1. State *v.* Hill, 79 N. C. 656; State *v.* Jackson, 34 N. C. 329; State *v.* Scott, 19 N. C. 35; Com. *v.* Cunningham, 1 Pa. Dist. 573.

2. State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41; Thompson *v.* State, 51 Miss. 353; Boyd *v.* State, 2 Humphr. (Tenn.) 39; State *v.* Delue, 2 Pinn. (Wis.) 204, 1 Chandl. 166.

3. State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41; Com. *v.* Walden, 3 Cush. (Mass.) 558; State *v.* Click, 115 Tenn. 283, 90 S. W. 855.

4. State *v.* Lightfoot, 107 Iowa 344, 78 N. W. 41.

5. Com. *v.* Falvey, 108 Mass. 304, so holding upon an indictment for poisoning, under a statute punishing the wilful destruction and injury of personal property.

6. Reg. *v.* Gray, 9 Cox C. C. 417, 10 Jur. N. S. 160, L. & C. 365, 33 L. J. M. C. 78, 9 L. T. Rep. N. S. 733, 12 Wkly. Rep. 350; Reg. *v.* Gough, 3 Ont. 402. See, generally, Indictments and Informations, 22 Cyc. 331.

7. State *v.* Maddox, 85 Ind. 585. Where the statute denounces an act done wantonly and wilfully, it is sufficient to charge the offense in those words; it is not necessary to charge also that it was done unlawfully. State *v.* Martin, 107 N. C. 904, 12 S. E. 194. See Reg. *v.* Fife, 17 Ont. 710, holding the omission of the word "unlawfully" from a warrant of commitment fatal.

8. Com. *v.* Turner, 8 Bush (Ky.) 1; State *v.* Hussey, 60 Me. 410, 11 Am. Rep. 206.

9. State *v.* Foote, 71 Conn. 737, 43 Atl. 488; Wass *v.* Stephens, 128 N. Y. 123, 28 N. E. 21. It implies the doing of the act, purposely and deliberately, in violation of law. State *v.* Whitener, 93 N. C. 590.

10. *Alabama.*— Johnson *v.* State, 37 Ala. 457.

Iowa.— The clauses in Code, § 2686, providing a punishment for "maliciously injuring, defacing or destroying any building," being disjunctive, either one or all of them may be charged in a single count. State *v.* Hockenberry, 11 Iowa 269.

Maine.— State *v.* Burgess, 40 Me. 592.

Texas.— Rountree *v.* State, 10 Tex. App. 110.

Wisconsin.— Werner *v.* State, 93 Wis. 266, 67 N. W. 417.

"maliciously and wantonly," or "maliciously and mischievously," both must be charged in the language of the statute, and must be proved as alleged.[11] But if it is charged that the act was done "maliciously," it is not necessary, it seems, to charge also that it was done "wilfully," for malice includes in it the idea of wilfulness and means even more.[12] Where, however, "wilfully" is the statutory word descriptive of the mental attitude of the offender it must be used in the indictment.[13]

C. Issues, Proof, and Variance. As in the case of criminal prosecutions generally [14] the evidence in a prosecution for malicious mischief must conform to the allegations in the complaint, information, or indictment,[15] and any failure to establish a material allegation [16] or variance as to such an allegation [17] is fatal.

D. Evidence — 1. Presumptions and Burden of Proof. The usual rules of criminal proceedings as to presumptions and burden of proof are applicable.[18] For example the burden is on defendant to show that his act falls within an exception to the statute,[19] or where the state alleges and proves that the property injured is not that of defendant, the burden is on defendant to establish that the ownership was in another with whose consent the act was done.[20] As a general rule malice need not be expressly proved but may be implied or inferred from the act or the manner of committing the act.[21]

11. Com. *v.* Walden, 3 Cush. (Mass.) 558; State *v.* Alexander, 14 Rich. (S. C.) 247; Branch *v.* State, 41 Tex. 622; State *v.* Rector, 34 Tex. 565.

12. Funderburk *v.* State, 75 Miss. 20, 21 So. 658; Rembert *v.* State, 56 Miss. 280; Chapman *v.* Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

13. Woolsey *v.* State, 14 Tex. App. 57; Uecker *v.* State, 4 Tex. App. 234; State *v.* Delue, 2 Pinn. (Wis.) 204, 1 Chandl. 166.

14. See Indictments and Informations, 22 Cyc. 445 *et seq.*

15. See Arnold *v.* State, 70 Ga. 723, holding that under an averment of "killing" evidence of "shooting" was admissible.

16. *Indiana.*— Powell *v.* State, 2 Ind. 550, ownership.

North Carolina.— State *v.* Mason, 35 N. C. 341.

Rhode Island.— State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844.

South Carolina.— State *v.* Trapp, 14 Rich. 203, ownership.

Tennessee.— Goforth *v.* State, 8 Humphr. 37, malicious intent.

Texas.— Niblo *v.* State, (Cr. App. 1904) 79 S. W. 31 (holding that a charge of unlawfully, wilfully, and maliciously throwing a brickbat at a private residence is not supported by evidence that defendant and her children, after a heated colloquy with the prosecuting witness, threw some stones at the prosecuting witness, one of which by accident, so far as the record shows, struck the house and broke a window); Reid *v.* State, 8 Tex. App. 430 (fact of killing).

England.— Rex *v.* Patrick, 2 East P. C. 1059, 1 Leach C. C. 253, ownership. And see Rex *v.* Hitchcock, 2 East P. C. 588, 1 Leach C. C. 481.

A failure to prove venue is fatal. Sattler *v.* People, 59 Ill. 68. See, generally, Criminal Law, 12 Cyc. 382.

Upon an indictment for defacing a public building, the public character of the building must be established. Cleavinger *v.* State, 42 Tex. Cr. 273, 65 S. W. 89, holding the evidence insufficient. *Compare* Read *v.* State, 1 Ind. 511, holding that on a charge of injuring a building used as a county seminary it was not necessary to show title in the county.

17. See, generally, Indictments and Informations, 22 Cyc. 450 *et seq.*

What constitutes variance.— Evidence that the offense was discovered on a date different from that alleged as that of its commission is not a variance. People *v.* Sheldon, 68 Cal. 434, 9 Pac. 457. An allegation that the building was the property of the prosecutor is sustained by evidence that he paid the taxes and resided on the premises with his wife, although the legal title was in the wife. People *v.* Coyne, 116 Cal. 295, 48 Pac. 218. There is no fatal variance between the proof and information, where the information averred property to be the property of the first congregational church society, and the proof showed that the society bore the name of the first congregational church, since the addition of the word "society" did not render the indictment uncertain. People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334, so holding under a statute providing that no indictment shall be held insufficient because any person mentioned therein is designated by the name of office or other descriptive appellation instead of his proper name.

18. See Criminal Law, 12 Cyc. 379 *et seq.*

19. State *v.* Whittier, 21 Me. 341, 38 Am. Dec. 272, consent of owner. See, generally, Criminal Law, 12 Cyc. 382.

20. Ritter *v.* State, 33 Tex. 608.

21. People *v.* Burkhardt, 72 Mich. 172, 40 N. W. 240 (injury to building); People *v.* Petheram, 64 Mich. 252, 31 N. W. 188; Com. *v.* Burton, Susq. Leg. Chron. (Pa.) 66; Wallace *v.* State, 30 Tex. 758.

2. ADMISSIBILITY. The usual rules applicable to criminal evidence[22] govern prosecutions for malicious mischief.[23] It is proper to show ill-will upon the part of the accused toward the prosecuting witness.[24] In a case where the ownership of real property becomes material defendant is entitled to introduce evidence as to such ownership;[25] and evidence may be admissible as tending to explain the possession of defendant and the good faith of his acts, although it would not be sufficient evidence of title upon an issue directly involving title.[26] Defendant may give evidence showing a justification of his act, although it may have been unnecessary for the state to establish an intent.[27]

3. SUFFICIENCY. Defendants must be shown to have committed the crime.[28]

Presumption of intention and malice: In criminal prosecutions generally see CRIMINAL LAW, 12 Cyc. 152 *et seq.* In prosecutions for injuring animals see ANIMALS, 2 Cyc. 434.

Relations of persons other than defendant, such as the family in which he lived, toward the person injured cannot be considered as tending to prove a malicious intent. State *v.* McDermott, 36 Iowa 107.

22. See CRIMINAL LAW, 12 Cyc. 379 *et seq.*

23. See People *v.* Boren, 139 Cal. 210, 72 Pac. 899 (holding evidence that a person accused of injuring a public jail and that he was confined therein admissible as tending to show motive, and holding also that broken bars forming a part of the cell were admissible where they were properly identified); Rex *v.* Crutchley, 5 C. & P. 133, 24 E. C. L. 490, holding upon an indictment for breaking a threshing-machine that a witness was properly asked whether the mob by whom the machine was broken did not compel persons to go with them and then compel each person to give one blow to the machine; also, whether at the time the prisoner and himself were forced to join the mob they did not agree together to run away from the mob at the first opportunity.

Res gestæ.— On a prosecution for injuring real property the state may prove as a part of the *res gestæ* that defendant began digging the ditch complained of three or four days prior to the day alleged in the complaint. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963.

Interest of witness.— Where on a prosecution for injuring a public jail an inmate of the jail at the time of the injury testified that defendant had nothing to do with the injuring of the jail, and that the witness had no interest in shielding defendant, he is properly asked on cross-examination why he did not tell that a hole was being cut. People *v.* Boren, 139 Cal. 210, 72 Pac. 899.

24. State *v.* Wideman, 68 S. C. 119, 46 S. E. 769.

As tending to show ill-will, evidence of acts of violence by defendant toward the family of the prosecutor shortly before the offense is admissible. State *v.* Sheets, 89 N. C. 543. But evidence of threats made by one of defendants after the offense has been held inadmissible where it was not connected in any manner with the act charged. Com. *v.* Smith, 2 Allen (Mass.) 517, holding that on a trial of an indictment against several for malicious mischief, by injuring a sloop in taking her from her moorings, evidence was inadmissible to show that several hours after the taking of the sloop defendants were pursued in steamboats, and when overtaken one of them made threats of personal violence against anybody who should lay hands on him.

25. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963.

Evidence of title.— On a prosecution for injury to a fence, evidence that the land was actually occupied by the grantor at the time of the execution of a deed offered in evidence, and that the grantee who was the prosecuting witness had occupied it for more than twenty years, is sufficient to show title, although the deed misdescribes the land. People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334.

26. State *v.* Roseman, 66 N. C. 634, holding that on a charge of unlawfully and wilfully demolishing a public school-house, the record of a petition in equity of several persons who therein claimed title to the premises, setting forth their title thereto as tenants in common, the order for partition, the report of the commissioners, and final decree confirming that report, among the parties being one under whom defendants claimed, was admissible.

27. People *v.* Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574 [*reversing* 15 N. Y. Suppl. 612].

In a prosecution for wilfully destroying growing corn, evidence that the ownership of the land was in dispute, and that defendant had rented it to prosecutor to reimburse him for taking up a claim thereto, that after prosecutor claimed possession of the land as owner, defendant proposed in settlement that, if prosecutor would pay rent for a certain portion, he might work the corn, and on his refusal defendant plowed up the land as he believed he had a right to do, was inadmissible to show defendant's good faith, since such facts tended to show a disregard of the tenant's rights. Camp *v.* State, (Tex. Cr. App. 1900) 57 S. W. 96.

28. Kluthe *v.* People, 29 Ill. App. 448, holding that evidence connecting defendant with the crime by mere inference was insufficient.

Circumstantial evidence may be sufficient to support a conviction. State *v.* Wideman, 68 S. C. 119, 46 S. E. 769.

Evidence held sufficient.— For evidence held sufficient to establish a malicious severing

In this connection a charge that the jury must be fully satisfied of defendant's guilt has been held sufficient.[29]

E. Trial and Review — 1. QUESTIONS FOR JURY. Where defendant's evidence tends to show that the destruction of property was in defense of his ownership and possession, the question of whether there was excusable cause for the destruction is one of fact for the jury.[30]

2. INSTRUCTIONS. Instructions in prosecutions for malicious mischief are governed by the rules relating to criminal prosecutions generally.[31] The meaning of the words "wilfully"[32] and "wantonly,"[33] as employed in an indictment, should be defined by the court in the instructions.[34]

3. VERDICT. A verdict of guilty is not vitiated by matter which negatives a more aggravated offense.[35]

4. REVIEW. A conviction will not be reversed for error not prejudicial to defendant.[36]

F. Punishment. A statute fixing a greater punishment for injury to real property, where the value of the property is above a certain amount, does not apply where the whole property is not injured.[37]

and carrying away of fruit trees see State *v.* Roscum, 128 Iowa 509, 104 N. W. 800. To support a conviction of exploding dynamite under street-car tracks see State *v.* Northway, 164 Mo. 513, 65 S. W. 331.

29. State *v.* Sears, 61 N. C. 146, holding also that a charge that the jury should be "satisfied" as to the ownership of the property was sufficient.

30. People *v.* Kane, 131 N. Y. 111, 29 N. E. 1015, 27 Am. St. Rep. 574 [*reversing* 15 N. Y. Suppl. 612].

31. See CRIMINAL LAW, 12 Cyc. 611 *et seq.*

The instructions should conform to the evidence.— Raoul *v.* State, 110 Ga. 295, 35 S. E. 120, holding that where it was material whether the act was done with or without the consent of the owner, an instruction that if the jury believe that the owner consented under duress such consent would be no excuse, was erroneous in the absence of any evidence tending to show duress. See People *v.* Severance, 125 Mich. 556, 84 N. W. 1089.

Should be taken as a whole.— State *v.* Roscum, 128 Iowa 509, 104 N. W. 800 (holding the instructions in a prosecution for malicious severing and carrying away fruit trees sufficient); State *v.* Gilligan, 23 R. I. 400, 50 Atl. 844 (holding that an instruction in an action for malicious injury of a building that it makes no difference who owns the building, although the state must prove that the building belonged to the person to whom it was stated in the indictment that it did belong, is proper).

Malice.— An instruction in the prosecution of an action for the injury to church property that malice must be shown to have been against the church society, and that ill-will against the minister or certain members of the church could not be considered except so far as going to establish malice against the church as a society, sufficiently protects the rights of defendant. People *v.* Ferguson, 119 Mich. 373, 78 N. W. 334.

32. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197, holding that the failure to define the word "wilful," while not reversible error, since the offense was a misdemeanor, becomes reversible error when defendant by a special instruction sought to supply the omission and reserved an exception both to the omission of the charge and to the refusal of the special instruction.

33. Browder *v.* State, 30 Tex. App. 614, 18 S. W. 197.

34. **Necessity of defining nature and elements of crime** in general see CRIMINAL LAW, 12 Cyc. 614.

35. Com. *v.* Cox, 7 Allen (Mass.) 577, sustaining a verdict of guilty which specially found the damage to have been less than fifteen hundred dollars.

36. See, generally, CRIMINAL LAW, 12 Cyc. 910 *et seq.*

Failure to admit evidence in mitigation which, however, would not furnish a justification, is not fatal when the lowest punishment permitted by statute was imposed. Bennefield *v.* State, 62 Ark. 365, 35 S. W. 790.

37. Adams *v.* State, (Tex. Cr. App. 1904) 81 S. W. 963, where the injury complained of was the digging of a small ditch upon one corner of a large tract.